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TO
HABITUAL OFFENDERS

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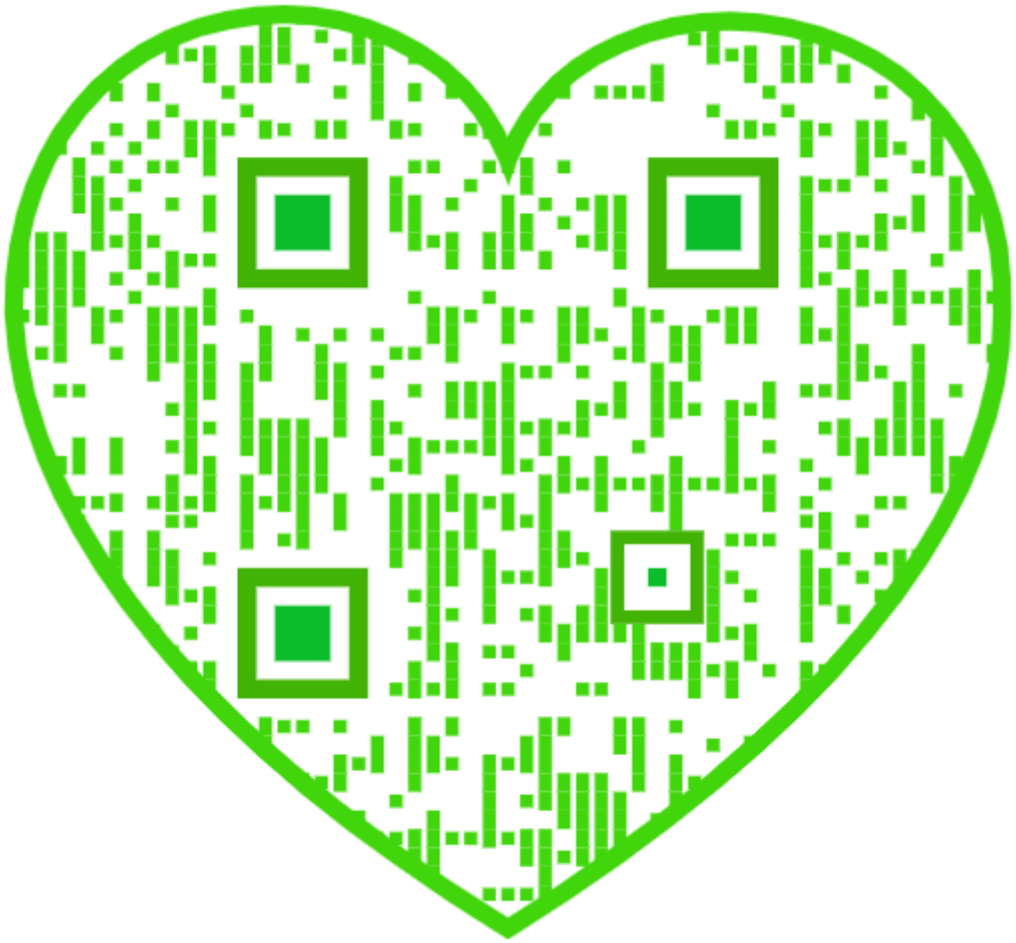

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CURRENT LAW

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VOLUME VII. SEPTEMBER, 1906. NUMBER 1.

ABANDONMENT, see latest topical index.

ABATEMENT AND REVIVAL.

§ 1. Causes of Abatement (1). Pendency of Another Action or Suit (1). Death of a Party (2). Failure to Acquire Jurisdiction (3). Misjoinder or Nonjoinder (3). Bankruptcy of Party (3). Insanity (3). Cessation of Authority of Officers or Representatives (3). Dissolution of Corporation Party (3).

§ 2. Raising of Objections; Waiver (4).

§ 3. Survivability of Causes of Action (5).

§ 4. Effect of Abatement, Revival, and Continuation of Suits (6).

The scope of this topic excludes criminal prosecutions,[1] bills of revivor,[2] revival of judgments,[3] or of statute-barred causes of action,[4] and the abatement of various writs for defects therein.[5]

§ 1. *Causes for abatement.*[6] *Pendency of another action or suit*[7] in the same jurisdiction between the same parties for the same cause of action and relief may be pleaded in abatement.[8] To sustain a plea on this ground, actual present pendency of such fomer suit at the time of plea must be shown[9] and it must be made to appear that the cause of action in the two suits is the same,[10] that the same relief is

1. See Indictment and Prosecution, 6 C. L. 1790.

2. See Equity, 5 C. L. 1144.

3. See Judgments, 6 C. L. 214.

4. See Limitation of Actions, 6 C. L. 465.

5. See Attachment, 5 C. L. 302, and like titles.

6. See 5 C. L. 1.

7. See 5 Ch. 1, and Fletcher Eq. Pl. & Pr. §§ 293 et seq. 1048.

8. Haas v. Righeimer [Ill.] 77 N. E. 69.

9. What is pendency: A proceeding is not "pending" until all parties named as defendants therein have been served with summons (or have voluntarily appeared). Monroe v. Millizen, 113 Ill. App. 157. Service of summons and complaint in an action to which a demurrer has been sustained and no further proceedings taken does not constitute a former action pending, sufficient to bar a subsequent action. Harris v. Fidalgo Mill Co., 38 Wash. 169, 80 P. 289. An attempted appeal which is in fact a nullity does not make the action a pending one. So held where an appeal was attempted from an order of dismissal, which was not appealable under Rev. Code Civ. Proc. § 462. Deere & Webber Co. v. Hinckley, [S. D.] 106 N. W. 138.

Case subsequently begun: Plea of former suit pending properly denied when it was admitted that suit was not pending when motion was made. Mundt v. Cooke-Rutledge Coal Co., 118 Ill. App. 124.

Earlier case terminated: Dismissal of first suit, when shown, defeats the plea. Lamb v. Chicago, 219 Ill. 229, 76 N. E. 343. Where proceedings to pave a street were pending and subsequent proceedings were instituted to have an intersecting street, dismissal of the first proceeding before hearing in the second, held to defeat the plea of former suit pending as to the intersecting portion of the streets. Id.

Matters of identity stricken from earlier suit: Suit by wife for separate maintenance and custody of children, wherein the husband's cross complaint for divorce has been stricken by the court, with leave to answer, is not a pending action such as to bar an independent action by the husband for divorce. Cupples v. Cupples, 33 Colo. 449, 80 P. 1039.

10. Prior garnishment of debtor in suit by third person against debtor is no ground for abatement of an action by the creditor against the debtor to enforce the claim. Barnsdall v. Waltemeyer [C. C. A.] 142 F. 415. The pendency of a suit for infringement of certain claims of a patent not a bar to another suit in the same court between the same parties for infringement of different claims of the same patent. Bates Mach. Co. v. Force & Co., 139 F. 746. A complaint alleging another action pending but not alleging that the same cause of action or subject-matter is involved does not show a former action pending. Mitchell v. Pear-

demanded in both,[11] and that the parties are at least substantially the same.[12] The pendency of a suit in a state court is not necessarily a bar to a suit in a Federal court between the same parties, involving the same issues,[13] where no conflict arises between the two courts over the custody or dominion of specific property.[14] Likewise, the pendency of an action between the same parties for the same cause in another state is not cause for abatement.[15]

Death of a party.[16]—In suits between natural private persons where the sole plaintiff in an action dies, the effect is to suspend further proceedings until the action has been revived in the name of the legal representatives,[17] and so as to a sole defendant.[18] By statute in most states a mere suspension of the action pending substitution. not an abatement results.[19] The death of a party non sui juris abates an action brought by his guardian,[20] but a judgment in an action brought on a guardian's bond given to the courts for the benefit of a ward under a statute is not void because he was dead when the judgment was renewed.[21] Proceedings in bankruptcy do not abate by the death of the bankrupt previous to adjudication.[22] An action authorized to be brought by or in the name of a public officer does not abate at his death but may be continued by his successor.[23] The effect of death of

son [Colo.] 82 P. 446. Pendency of proceedings to foreclose a mortgage whether upon realty or personalty is no hindrance to a regular action on the notes secured by the mortgage. The two actions are unlike, the causes of action are not the same, and the results are dissimilar. Montgomery v. Fouche [Ga.] 53 S. E. 767. Suit by a taxpayer to enjoin a city from paying balance due on contract for completed public improvements, held no bar to an action of assumpsit by the contractor. City of Chicago v. Duffy, 218 Ill. 242, 75 N. E. 912. Original mandamus proceedings pending in the supreme court to compel appraisement of school lands do not oust the district court of jurisdiction of a proceeding to enjoin the county treasurer from selling the same land under other proceedings. Schwab v. Wilson [Kan.] 84 P. 123.

11. Suit in state court no bar in Federal court, where parties were not the same and relief sought was different. New York Cotton Exch. v. Hunt, 144 F. 511. Allowing the same amendment in two actions, which alleges liability on four notes, is not allowing two actions to be pending in the same cause where the bill of particulars in one action is for three notes and in the other for the fourth note. Pratt v. Rhodes [Conn.] 61 A. 1009. Error to dismiss complaint absolutely where former action was for only two items of claim sued for in second action. Alcolm Co. v. Philip Hano & Co., 96 N. Y. S. 221.

12. Prior garnishment of a debtor in state court in action by third person against creditor is no ground for abatement in Federal court of suit by creditor against debtor to enforce claim. Barnsdall v. Waltemeyer [C. C. A.] 142 F. 415. Substantial identity of parties is sufficient where the actions are for the same relief. Suit by one child against others to establish a constructive trust in realty held a bar to another suit by one child for partition and an accounting, though additional parties who became interested after institution of the former suit, were made parties to the second. Haas v. Righeimer [Ill.] 77 N. E. 69.

13. Slaughter v. Mallet Land & Cattle Co. [C. C. A.] 141 F. 282; Barnsdall v. Waltemeyer [C. C. A.] 142 F. 415; New York Cotton Exch. v. Hunt, 144 F. 511; City of Mankato v. Barber Asphalt Pav. Co. [C. C. A.] 142 F. 329. Pendency of a suit in a state court does not deprive a court of bankruptcy of jurisdiction. In re W. C. Allen & Co., 134 F. 620. Pendency in a state court of action of trespass to try title to land and remove a cloud therefrom not sufficient to abate a suit in a Federal court to quiet title. Slaughter v. Mallet Land & Cattle Co. [C. C. A.] 141 F. 282.

See extensive note 3 C. L. 3, n. 21.

14. City of Mankato v. Barber Asphalt Pav. Co. [C. C. A.] 142 F. 329.

15. Schmidt v. Posner [Iowa] 106 N. W. 760.

16. See 5 C. L. 3.

17. Where there was no revival after plaintiff's death, subsequent proceedings were held null. Street v. Smith [Neb.] 106 N. W. 472. Where pending trial of a claim case it appears that plaintiff has died the hearing should be postponed until the representative of his estate can be made a party. An heir, without other authority, cannot be made a party. Neal v. Heard, [Ga.] 54 S. E. 99.

18. Under Laws 1877, c. 466, § 10, as amended by Laws 1878, c. 318, where an assignee for creditors dies pending a reference in proceedings to compel him to account, a report by the referee filed after the assignee's death but before substitution of his personal representative, is a nullity. In re Venable, 97 N. Y. S. 938.

19. Strauss v. Merchants' Loan & T. Co., 119 Ill. App. 588.

20. Where pending an appeal from a judgment removing the curator of an interdict, the interdict dies, the suit abates and the appeal must be dismissed. In re Lambert [La.] 39 So. 447.

21. Mass. Rev. Laws, c. 149, § 29. Donaher v. Flint, 188 Mass. 525, 74 N. E. 927.

22. In re Spalding [C. C. A.] 139 F. 244.

23. By express provisions of Code Civ.

a party pending appeal or error depends on a variety of considerations.[24] Under the Florida practice death of a party to an action after its submission in the appellate court does not render a revival of the cause necessary to give the court authority to render decisions.[25]

Failure to acquire jurisdiction,[26] as where defendant is a non-resident,[27] is ground of abatement. In a tort action against a master and his servant, the fact that process was served only on the latter as agent is not ground for abating the action.[28]

Misjoinder or nonjoinder.[29] *Alienation of matter in litigation,*[30] whether voluntary or by decree of court, does not, under modern statutes, abate the suit [31] and the original plaintiff may prosecute it.[32]

Bankruptcy of party. An action by or against a bankrupt in a state court does not abate upon the adjudication of bankruptcy or appointment of a trustee in the Federal court; in the absence of an application by the trustee for substitution, it may be prosecuted or defended by the bankrupt.[33] The right of a stockholder to maintain an action for an accounting for the benefit of the corporation is not affected by the bankruptcy of the corporation; but the accounting must be to the trustee and not to the corporation.[34]

Insanity.[35]—Where a cause has been tried and submitted and verdict returned insanity of a defendant will not prevent the signing of the findings and judgment.[36]

Cessation of authority of officers or representatives.[37]—An action by a sheriff for the conversion of goods on which he had levied may be continued by him after his term of office has expired.[38] An action by a guardian for the benefit of his minor wards does not abate when the wards become of age and the guardian is discharged.[39]

Dissolution of corporation party.[40]—An action pending against a corporation in another state is not abated by the dissolution of the corporation where by statute it is continued for a given time to prosecute and defend actions;[41] but a decree of injunction in favor of a body politic exercising quasi-public functions does not survive the dissolution of such body under a statute providing that actions do not abate by death, disability, or transfer of interest.[42]

Proc. § 766. Dickinson v. Oliver, 99 N. Y. S. 432.

24. See Appeal and Review, § 11 C. 5 C. L. 190; Id. § 11 G, 5 C. L. 201; 5 Enc. Pl. & Pr. title "Death."

25. Mugge v. Jackson [Fla.] 39 So. 157.

26. 5 C. L. 4. See, also, Jurisdiction, 6 C. L. 267; Appearance, 5 C. L. 248; Process, 6 C. L. 1078.

27. In order that an action may abate under Code 1899, c. 125, § 8, the return on the writ must show that the defendant is a nonresident. United States Oil & Gas Well Supply Co. v. Gartlan [W. Va.] 52 S. E. 524.

28. Both may be sued, and the irregularity is only ground for quashing service. Indiana Nitroglycerine & Torpedo Co. v. Lippencott Glass Co. [Ind.] 75 N. E. 649.

29. See 5 C. L. 4. As to what is such, see Parties, 6 C. L. 888, also topics treating of particular actions.

30. 1 C. L. 2, n. 22.

31. Civ. Code Prac. § 20, gives assignees right to continue. Woodward v. Johnson [Ky.] 90 S. W. 1076. By Code & 3476, a transfer of the premises by plaintiff in foreclosure proceedings does not cause the suit to abate. Citizens' State Bank v. Jess, 127 Iowa, 450, 103 N. W. 471.

32. Under Code Civ. Proc. § 756, providing that in case of a transfer of interest the action may be continued by the original party, unless the court directs the substitution or joinder of the transferee, it is error to dismiss a complaint in replevin on proof of the appointment of a receiver of plaintiff's property subsequent to the commencement of the action and in another cause. Stearns v. Early, 96 N. Y. S. 837.

33. Hahlo v. Cole, 98 N. Y. S. 1049.

34. Meyer v. Page, 98 N. Y. S. 739.

35. See 5 C. L. 4.

36. Eminent domain proceedings. San Luis Obispo County v. Simas [Cal. App.] 81 P. 972.

37. See 1 C. L. 2.

38. Dickinson v. Oliver, 99 N. Y. S. 432.

39. Shattuck v. Wolf [Kan.] 83 P. 1093.

40. See 5 C. L. 4.

41. Act March 10, '99 (21 Del. Laws, p. 456, c. 273) § 36. Scott v. Stockholders' Oil Co., 142 F. 287.

42. Utah Rev. St. 1898, § 2920. An irrigation district dissolved. Thompson v. McFarland [Utah] 82 P. 478.

§ 2. *Raising objections; waiver.*[43]—In general, matter in abatement must be expressly pleaded in abatement[44] either by plea or in the manner required by statute.[45] If not so pleaded or if not relied on, as where a plea to the merits is filed[46] and the trial proceeded with, the objection is waived. This rule has been applied to an objection to plaintiff's right[47] or capacity[48] to sue; to the objection that there is a misjoinder of parties[49] or causes,[50] or a defect of parties apparent on the face of the complaint;[51] that the court has no jurisdiction;[52] that the action is prematurely brought,[53] or is not brought in time,[54] and that there is a former action pending.[55] A motion to dismiss for want of prosecution will lie in equity suits abated in Federal courts by death of complainant.[56] The existence of a fact in abatement may be for the jury where tried with the issues.[57]

43. See 5 C. L. 5.

44. Town of Beloit v. Heineman [Wis.] 107 N. W. 334. The objection that the court never acquired jurisdiction because of a fraudulent use of its process is properly raised by a plea in abatement. Frohlich v. Independent Glass Co. [Mich.] 13 Det. Leg. N. 152, 107 N. W. 889.

45. Lack of jurisdiction of the subject-matter may be set up in an answer to the merits (Duke v. Duke [N. J. Eq.] 62 A. 466), but lack of jurisdiction of the person can be raised only by plea; the benefit of it is lost by general answer (Id.). In Indiana where it appears upon the face of the complaint that there is another action pending, a demurrer will lie; but where such pendency is not apparent upon the face of the complaint, such objection must be interposed by plea in abatement. Burns' Ann. St. 1901, § 342. City of LaPorte v. Scott [Ind.] 76 N. E. 878.

46. Objection made by plea in abatement is waived by a plea of the general issue when plea in abatement has been overruled. Frohlich v. Independent Glass Co. [Mich.] 13 Det. Leg. N. 152, 107 N. W. 889.

47. That action by town to recover for use of stone crusher was not formally authorized by town board could not be raised on trial, not having been pleaded in abatement. Town of Beloit v. Heineman [Wis.] 107 N. W. 334. Whether an action by a guardian should have been brought by the ward cannot be raised after plea in bar, being in abatement only. Randall v. Lonstorf [Wis.] 105 N. W. 663. The objection that a mortgage, sought to be foreclosed, was not legally assigned to plaintiff, goes to his right to maintain the action, and should be raised by plea in abatement. When joined with a plea to the merits, the objection is waived. Lassas v. McCarty [Or.] 84 P. 76.

48. The objection that the plaintiff has not legal capacity to sue is waived by a failure to plead it, either by demurrer or answer. Sullivan v. Franklin Bank, 6 Ohio C. C. (N. S.) 468. Objection that foreign corporation is without capacity to sue on account of noncompliance with regulatory statutes, held waived. Weaver Coal & Coke Co. v. Rhode Island Co-op. Coal Co. [R. I.] 61 A. 426.

49. Under Code Civ. Proc. §§ 498, 499, misjoinder of parties is waived if not raised by demurrer or answer. Jacobs v. New York, etc., R. Co., 107 App. Div. 134, 94 N. Y. S. 954. Misjoinder cannot be taken advantage of by answer but only by motion. Mitchell v. McLeod, 127 Iowa, 733, 104 N. W. 349.

50. Misjoinder of parties and causes cannot ordinarily be raised by demurrer; the remedy is by motion. Citizens' State Bank v. Jess, 127 Iowa, 450, 103 N. W. 471.

51. Such defect must be raised by plea, filed and tried before answers in bar are pleaded. Burns' Ann. St. 1901, § 368. Western Union Tel. Co. v. State [Ind.] 76 N. E. 100. Objection that a party did not sign a transfer of an insurance policy and was therefore not a party to the action waived by failure to raise by special demurrer. Gragg v. Home Ins. Co. [Ky.] 90 S. W. 1045.

52. Plea to jurisdiction waived where not insisted on before proceeding to the hearing of other matters involving the exercise of jurisdiction. Richardson v. Johnson [La.] 39 So. 449 [advance sheets only]. Plea to merits waives plea to jurisdiction. Daley v. Iselin, 212 Pa. 279, 61 A. 919. A plea to the merits, filed by defendant at the same time as a plea to jurisdiction over the person, waives the latter plea. Putnam Lumber Co. v. Ellis-Young Co. [Fla.] 39 So. 193.

53. McClung v. McPherson [Or.] 82 P. 13.

54. An objection that an appeal was not taken in time cannot be raised after bringing the case on for trial on the merits. Commonwealth v. Crum Lynne Iron & Steel Co., 27 Pa. Super. Ct. 508.

55. City of Chicago v. Duffy, 117 Ill. App. 261. A plea in abatement setting up a former action pending should be filed before any other pleadings, motions, or steps are taken in the proceedings. Lamb v. Chicago, 219 Ill. 229, 76 N. E. 343. A motion to quash, made during trial, setting up former action pending, if regarded as a plea in abatement, waived by filing general objections. Id. Defense of former pending action to foreclose mechanic's lien, not pleaded in subsequent action, held waived. Fish Co. v. Young [Wis.] 106 N. W. 795. An answer setting up another action pending after answer in bar, demurrable. Chicago & S. E. R. Co. v. Grantham [Ind.] 75 N. E. 265.

56. Brown v. Fletcher, 140 F. 639. Allowed where no revival was sought in 18 months. Id.

57. Where an answer was a general denial and alleged facts tending to show plaintiff's claim not due, constituting a plea in abatement, and there was evidence to sustain it, such issue was for the jury under instructions as to abatement. Steele v. Crabtree [Iowa] 106 N. W. 753.

§ 3. *Survivability of causes of action.*[58]—Whether a cause of action survives by law is a question, not of procedure, but of right;[59] and is determinable, when the action is one arising at common law, by the law of the state where the action is brought.[60] The rule being general that only those causes of action survive which are assignable, the cases cited in dealing with the law of assignability should be consulted.[61] By statute in North Carolina actions for penalties abate upon the death of defendant.[62]

At common law, tort actions did not survive the death of the sole plaintiff or defendant [63] and this is still the rule except as modified by statute.[64] But this rule does not apply when the cause of action has been merged in a judgment for the injured party.[65] An action for the death of a person could not at common law be maintained; such actions are wholly dependent upon statute.[66] There is a conflict as to the survivability of a cause of action for personal injuries where the injured person dies.[67] Where such cause of action is survivable, it is to be prosecuted by the legal representatives, and the damages recoverable are only those suffered by deceased prior to his death, and go to the general fund of the estate.[68] In New York an action for personal injuries does not abate by the death of a party after verdict, report, or decision,[69] though such verdict, report or decision, is reversed after the death of the party, if the reversal is upon questions of law alone;[70] but such action abates where the verdict of the jury is set aside or judgment entered thereon reversed when the party against whom the same was rendered dies before another trial is had.[71]

A cause of action upon contract, express or implied, survives the death of a

58. See 5 C. L. 6.

59. Martin v. Wabash R. Co. [C. C. A.] 142 F. 650.

60. Martin v. Wabash R. Co. [C. C. A.] 142 F. 650. Therefore an action brought in Kentucky by a citizen of Indiana for personal injuries received in Indiana survives to his administrator, although under the Indiana statute such actions do not survive. Austin's Adm'r v. Pittsburg, etc., R. Co. [Ky.] 91 S. W. 742.

61. See assignments, 5 C. L. 279.

62. Code N. C. § 188. Wallace v. McPherson, 139 N. C. 297, 51 S. E. 897.

63. Jones v. Barmm, 217 Ill. 381, 75 N. E. 505.

64. Tort action to recover for hindering, injuring and interfering with plaintiff's business, does not survive defendant's death, under Hurd's Rev. St. 1903, c. 3, § 122. Jones v. Barmm, 217 Ill. 381, 75 N. E. 505; Jones v. Barmm, 119 Ill. App. 475. Causes of action for slander or libel do not survive the death of either party Miller v. Nuckolls [Ark.] 89 S. W. 88.

65. After verdict and judgment for plaintiff in an action for slander the cause of action becomes merged in the judgment, and unless the same be set aside or reversed, there can be no abatement by death of defendant. Miller v. Nuckolls [Ark.] 89 S. W. 88.

66. Jacobs v. Glucose Sugar Refining Co., 140 F. 766. The right of action given by Ky. St. 1903, § 4, to the widow and minor children of a person killed by the wanton or malicious use of firearms, survives against the personal representative of the person causing the injury, since the action is not one for assault within § 10. Merrill v. Puckett's Curator [Ky.] 93 S. W. 912. See Death by Wrongful Act, 5 C. L. 945.

67. A cause of action for personal injuries survives the death of the injured person, in Wisconsin. Nemecek v. Filer & Stowell Co. [Wis.] 105 N. W. 225. Under Hurd's Rev. St. 1903, c. 3, § 123, a personal injury action commenced by the person injured, survives to his representatives. Martin v. Wabash R. Co. [C. C. A.] 142 F. 650. Action for personal injuries survives in Kentucky (Ky. St. 1903, § 10), but not in Indiana (Burns' Ann. St. Ind. 1901, § 283). Austin's Adm'r v. Pittsburg, etc., R. Co. [Ky.] 91 S. W. 742. The Iowa rule, that an action for pain and suffering of a deceased person, does not survive to his legal representatives, is the rule of construction in the Federal courts. Action for personal injuries started by executor after testator's death. Jacobs v. Glucose Sugar Refining Co., 140 F. 766. Where a plaintiff who has sued for damages on account of personal injuries dies before the action is determined, and the suit is revived in the name of the administrator, the filing becomes necessary of an amendment to the petition or a supplemental petition, setting out when the original plaintiff died and whether death was the result of the injuries alleged in the petition, since the cause of action does not survive if death resulted from the injuries alleged, but is merged in the action for death. See, also, 5 C. L. 6, notes 90, 91.

68. Nemecek v. Filer & Stowell Co. [Wis.] 105 N. W. 225.

69. Code Civ. Proc. § 764. Hughes v. Russell, 99 N. Y. S. 203.

70 71. Hughes v. Russell, 99 N. Y. S. 203.

party.[72] At common law, in case of a joint contract, if one of the joint contractors died, an action at law could not be brought against his executor or administrator, but against the surviving contractors only, and if the contract was several or joint and several, the executor or administrator of one could be sued separately but not jointly with the survivors.[73]

A cause of action for injuries to land caused before the owner's death [74] survives to the personal representative and not to heirs or devisees.[75] A cause of action against a director of a bank for moneys lost to the bank by his misconduct, or negligence, survives against his executors.[76] A right of action to have a fraudulent conveyance set aside is not abated by the death of the person defrauded.[77] The Montana statute providing that any person may sue the executor of a decedent who, in his lifetime, has wasted, destroyed or converted the goods of another, authorizes an action against an executor for damages for the act of the decedent in wrongfully procuring the appointment of a receiver for a going and solvent corporation.[78]

The rule that dissolution of a corporation absolutely abates an action by or against it applies only to actions at law,[79] and not to suits in equity.[80]

§ 4. *Effect of abatement,*[81] *revival, and continuation of suits.*[82]—An action, begun in the name of a dead man, cannot be revived; [83] and a defendant or the personal representative of a deceased defendant can compel the substitution of the executor of a deceased sole plaintiff; [84] and scire facias lies to compel their appearance.[85] But under the codes allowing surviving co-parties to continue the litigation, an executor cannot intervene in a suit affecting partnership matters unless the rights of the deceased partner's estate are threatened by hostility of the survivor's interests.[86] Executors of a joint promisor should not be substituted as joint parties.[87] The statutes allowing personal representatives to continue suits do not apply to causes of action which by descent are cast upon or pertain to heirs.[88] Where husband and wife are necessary and proper parties plaintiff and the husband dies pending the action, it is proper to substitute his legal representative.[89] On becoming of age, minor wards are entitled to be substituted as parties to an ac-

72. A statutory action by a widow against sureties on a liquor dealer's bond for injury resulting from the sale of liquor to her husband survives the death of the principal in the bond, the action being on contract and not in tort. Rev. Pol. Code S. D., §§ 2839, 2849 construed. Garrigan v. Huntimer [S. D.] 105 N. W. 278. The gist of the action allowed by Rev. Laws, c. 99, § 4, to recover payments on a sale of securities, where no actual delivery is intended, is for money had and received; and such cause of action survives. Anderson v. Metropolitan Stock Exch. [Mass.] 77 N. E. 706.

73. Richard J. Briggs & Co. v. E. Langhammer & Son [Md.] 63 A. 198.

74. As where house was crushed by bursting of reservoir, which resulted also in death of owner. Mast v. Lapp [N. C.] 53 S. E. 350.

75. Mast v. Lapp [N. C.] 53 S. E. 350.

76. Allen v. Luke, 141 F. 694.

77. Busiere v. Reilly [Mass.] 75 N. E. 958.

78. Code Civ. Proc. § 2733. Thornton-Thomas Mercantile Co. v. Bretherton, 32 Mont. 80, 80 P. 10.

79. Kelly v. Rochelle [Tex. Civ. App.] 93 S. W. 164.

80. Suit by corporation for rent and to foreclose landlord's lien held one in equity; hence action was not abated by dissolution of corporation but could be revived by its successor. Kelly v. Rochelle [Tex. Civ. App.] 93 S. W. 164.

81. Effect of abatement on cross bill, see Fletcher, Eq. Pl. & Pr. § 958 et seq.

82. See 5 C. L. 7. Bill of revivor in equity or in nature of revivor, see Fletcher Eq Pl. & Pr. §§ 848-886, 962-968.

83. Gallegos v. Navajos, 39 Ct. Cl. 86.

84, 85. Strauss v. Merchants Loan & T. Co., 119 Ill. App. 588.

86. Applying Code Civ. Proc., § 756. Callanan v. Keeseville, etc., R. Co., 95 N. Y. S. 513.

87. Death severs the liability of the promisors and changes that of deceased, and a single judgment could not be entered. Richard J. Biggs & Co. v. E. Langhammer & Son [Md.] 63 A. 198.

88. In an action upon a lease for rent which occurred after the death of deceased, his administrator cannot be joined as defendant with another person sued in his individual capacity, the death not having occurred since the commencement of the suit. Act March 22, 1861 (P. L. 186), providing for continuance of actions against representatives, does not apply. James v. Kurtz, 23 Pa. Super. Ct. 304.

89. Gomez v. Scanlan [Cal. App.] 84 P. 50.

tion commenced by the guardian for their benefit.[90] In the case of public officers sued or suing as such, their successors are the proper parties to continue.[91] Where a corporation was dissolved pending a suit in equity by it, and thereafter a judgment was rendered in its favor, a new corporation to which the trustees of the first had assigned the judgment and cause of action was entitled to revive the judgment and enforce it.[92]

When the action is not such as abates, the proper order is one of substitution of parties.[93] Defendant should be allowed opportunity to try the propriety of the proposed revival.[94] In New York an action may be continued in the name of the executor without supplemental summons and complaint upon the death of a sole defendant.[95] In South Carolina the proper practice to effect a continuation is by rule nisi to compel it.[96] The Federal statute, providing for the revival of actions abated by the death of a party has no application to suits in equity.[97] So a defendant cannot compel revival of a suit in equity after death of complainant.[98] If by assignment or devise the interest of a deceased complainant in a suit in equity has passed to another, an original bill is necessary.[99] A suggestion of death of one of several co-parties and the appropriate modification of judgment may be made in the appellate court where the surviving parties properly continued the action,[100] but where the necessity for substitution of parties occurs in the trial court and is properly refused for want of a proper showing, the appellate court will not make the substitution on sufficient facts adduced before it.[101]

Abbreviations, see latest topical index.

ABDUCTION.[1]

Under most statutes a taking for the specified purpose is all that is necessary, accomplishment of such purpose not being essential.[2] The words "unlawful sexual

90. Shattuck v. Wolf [Kan.] 83 P. 1093.

91. Successor of sheriff against whom replevin was brought was properly substituted. Mugge v. Jackson [Fla.] 39 So. 157. A rule nisi directed to magistrates constituting a court may be made absolute against their successors. Fiscal Court of Marion County v. Marion Circuit Court [Ky.] 89 S. W. 704.

92. Applying rule in equity and Rev. St. 1895, art. 1246, providing that a cause of action which survives does not abate by death of plaintiff. Kelly v. Rochelle [Tex. Civ. App.] 93 S. W. 164.

93. An order abating a replevin suit upon the suggestion of the death of the plaintiff upon the record held against the Illinois statute. Chap. 3, § 123, and Chap. 1, § 10, Rev. St. Ill. Strauss v. Merchants Loan & T. Co., 119 Ill. App. 588. After the suggestion of plaintiff's death it was competent to continue the action by his successor in interest under statute so providing. Rev. St. 1899, § 756. Overall v. St. Louis Traction Co. [Mo. App.] 90 S. W. 402.

94. An unconditional order substituting an alleged successor in interest of plaintiff, on suggestion of his death, without allowing defendant, who had not consented, an opportunity to show why the action should not be revived, is error, under Rev. St. 1899, § 758. Overall v. St. Louis Traction Co. [Mo. App.] 90 S. W. 402.

95. Under Code Civ. Proc. § 760, an order of continuance and that summons and pleadings be amended to make the executor a party is sufficient. Flannery v. Sahagian, 109 App. Div. 321, 95 N. Y. S. 643. In New York the executor of a deceased defendant may on plaintiff's application be substituted by order of the court. Citizens' Nat. Bank v. Bang, 99 N. Y. S. 76.

96. A proper practice in a case of substitution of parties is to make an ex parte application based upon a proper showing by affidavit for a rule to show cause why the action should not be continued by or against the party sought to be substituted. But any procedure having substantially the same effect, and filling the requirements of notice, proof of necessary facts, and opportunity to contest such facts, is sufficient. Marion v. City Council [S. C.] 52 S. E. 418.

97. Rev. St. U. S. 955. U. S. Comp. St. 1901, p. 697. Brown v. Fletcher, 140 F. 639.

98, 99. Brown v. Fletcher, 140 F. 639.

100. Comp. Laws Mich. §§ 10, 121, provides that on death of one of several parties plaintiff or defendant before final judgment the action may proceed for or against the survivor. Held, where a party plaintiff died before judgment below, proper to allow suggestion of death after judgment on appeal, as of the time of the death, and to modify judgment so as to give costs against the survivor only. Seymour v. Bruske [Mich.] 12 Det. Leg. N. 520, 104 N. W. 691.

101. To do so would reverse a correct decision. Marion v. City Council [S. C.] 52 S. E. 418.

1. See 5 C. L. 9. See, also, Clark & Marshall on Crimes [2d Ed.] 304.

2. State v. Tucker [Kan.] 84 P. 126.

intercourse," as used in a statute defining abduction, mean sexual intercourse out of wedlock;[3] and "concubinage" means living together as husband and wife.[4]

An information charging abduction substantially in the language of the statute is sufficient.[5] The offense consisting in the taking for the forbidden purpose, an information is not bad for duplicity because it names several houses to which the woman was taken,[6] nor is it too vague because it charges a taking to a designated house, and "to various other houses,"[7] and proof that the abducted woman was taken to other houses than the one named in the information for sexual intercourse, is admissible as characterizing the taking.[8]

In states making the detention of a woman against her consent, with intent to have sexual intercourse, an offense, it is not necessary to actually touch the woman in detaining her.[9]

ABETTING CRIME; ABIDE THE EVENT; ABODE, see latest topical index.

ABORTION.[10]

At the time of the alleged operation, the defendant must have known or believed the prosecutrix to be pregnant,[11] and it must have been performed with the intent and for the purpose of producing a miscarriage.[12]

An indictment charging that defendant administered certain drugs and medicines and used certain instruments "calculated to produce a miscarriage," is sufficient without naming the drugs or instruments,[13] and such indictment is not double because it charges in the same count that several different means of procuring a miscarriage were employed.[14] It must be alleged that an abortion was produced.[15]

Where certain drugs were administered, it is not error to submit to the jury the question whether they were given to produce an abortion, though there is no direct evidence upon that point.[16]

3. Act. No. 134, p. 175, of 1890. Not restricted to sexual intercourse made unlawful by statute, as rape, incest, etc. State v. Savant [La.] 38 So. 974.

4. The time during which the relation continues is immaterial. State v. Tucker [Kan.] 84 P. 126.

5. State v. Tucker [Kan.] 84 P. 126. An information which alleges that defendant, at a time and place specified, did unlawfully take prosecutrix, a female under the age of 18, from her father, without his consent for the purpose of concubinage, is sufficient under Rev. St. 1899, § 1842. State v. Jones, 19 Mo. 653, 90 S. W. 465.

6. State v. Savant [La.] 38 So. 974.

7. The latter may be disregarded as surplusage. State v. Savant [La.] 38 So. 974.

8. State v. Savant [La.] 38 So. 974.

9. Ky. St. 1903, § 1158. Evidence that defendant rode in front of the prosecuting witness, both being on horse-back, and crowded her off the road, is sufficient detention to warrant a conviction. Jones v. Commonwealth [Ky.] 89 S. W. 174.

10. See 5 C. L. 9. See, also, Clark & Marshall on Crimes [2d ed.] 413.

11. In the absence of proof of such knowledge or belief, a conviction is improper. Commonwealth v. Nailor, 29 Pa. Super. Ct. 271.

12. Commonwealth v. Nailor, 29 Pa. Super. Ct. 271.

13. Especially where the indictment subsequently recites that they were unknown to the grand jury. Reum v. State [Tex. Cr. App.] 90 S. W. 1109.

14. As by administering drugs and applying violence. Reum v. State [Tex. Cr. App.] 90 S. W. 1109.

15. An indictment charging the use of certain means calculated to produce a miscarriage, which did "then and there cause an abortion," is sufficient. Reum v. State [Tex. Cr. App.] 90 S. W. 1109.

16. Especially where they were given in connection with the application of an instrument known to have been employed for that purpose. Reum v. State [Tex. Cr. App.] 90 S. W. 1109.

NOTE. Corroboration of woman: It is generally held that the woman on whom the abortion is performed is, though voluntarily consenting thereto, the victim of the crime, and not an accomplice therein, and hence that her testimony need not be corroborated. Smith v. State, 99 Iowa, 26, 61 Am. St. Rep. 219; Peoples v. Commonwealth, 87 Ky. 487; Commonwealth v. Boynton, 116 Mass. 343; Commonwealth v. Follansbee, 155 Mass. 274; State v. Owens, 22 Minn. 238; State v. Hyer, 39 N. J. Law, 598; People v. Vedder, 98 N. Y. 630; Miller v. State, 37 Tex. Cr. App. 575; Hunter v. State, 38 Tex. Cr. App 61. To the contrary is People v. Josselyn, 39 Cal. 393, and see State v. McCoy, 52 Ohio St. 157.—From Stone v. State [Ga.] 98 Am. St. Rep. 179.

Absconding Debtors, see latest topical index.

ABSENTEES.[17]

As an attribute of government each state has power to provide for the administration of estates within its jurisdiction of persons presumed from continued absence to be dead;[18] but such presumption of death must be reasonable,[19] the administration must be upon due notice to the absentee,[20] and provision must be made for the protection of the property rights of such person should he return,[21] or there will not be due process of law as provided by the fourteenth amendment of the constitution of the United States. Where property is sold under an absentee's act, actions to recover such property for defects in the sale must in Indiana be brought within five years from the date of sale.[22]

ABSTRACTS OF TITLE.[23]

Abstracts of title are secondary evidence and are not admissible to show chain of title without the laying of a proper foundation, by proof of inability to produce original deeds.[24]

Abuse of Process; Abutting Owners; Acceptance, see latest topical index.

ACCESSION AND CONFUSION OF PROPERTY.[25]

The mere commingling of goods by an owner with those of another does not destroy the owner's property rights unless the identity of the goods be thereby lost or unless such commingling was done with a fraudulent intent and purpose,[26] but he who commingles his goods with those of another has the burden of identifying his own.[27]

Meteorites or aerolites are regarded as realty belonging to the owner of the land on which they are found, whether buried in the earth or not, in the absence of proof of severance.[28]

17. See 5 C. L. 10.

18. Cunnius v. Reading School Dist., 198 U. S. 458, 49 Law. Ed. 1125; Barton v. Kimmerley [Ind.] 76 N. E. 250.

19. A presumption based upon seven years of continued absence is reasonable. Cunnius v. Reading School District, 198 U. S. 458, 49 Law. Ed. 1125.

20. A published notice for four successive weeks of the intended administration, followed by a notice for two successive weeks allowing a period of twelve weeks within which to rebut the presumption of death, is sufficient. Cunnius v. Reading School Dist., 198 U. S. 458, 49 Law. Ed. 1125; Selden's Ex'r v. Kennedy [Va.] 52 S. E. 635.

21. A statute authorizing the revocation of the administration at any time upon proof that the absentee is in fact living, a return of the property by the distributees, and providing a bond for such return, is a sufficient safeguard of the property rights of the absentee. Cunnius v. Reading School Dist., 198 U. S. 458, 49 Law. Ed. 1125.

Note: This requirement would seem to be fatal to most of the statutes on this subject. Neither that upheld in Selden's Ex'r v. Kennedy [Va.] 52 S. E. 635, nor that sustained in Romy v. State, 32 Ind. 146, 67 N. E. 998 (see 3 ch. 13) contain such a provision. The statutes of many other states fail not only in this respect but in not providing for a special hearing and notice to the absentee.

22. Burns' Ann. St. 1901, § 294. Barton v. Kimmerley [Ind.] 76 N. E. 250.

23. See 5 C. L. 11. Duty of vendor to furnish abstract, see Vendors and Purchasers, 6 C. L. 1781. Registration under Torrens System, see Notice and Record of Title, 6 C. L. 814.

24. Glos v. Holberg [Ill.] 77 N. E. 80.

25. See 5 C. L. 12. See, also, Fixtures, 5 C. L. 1431; Riparian Owners, 6 C. L. 1313 (Accretion).

26. Instructions that plaintiff could not recover against a sheriff for attaching goods unless they were all his own, or if plaintiff knowingly intermingled goods of another with his own, properly refused. McClendon v. McKissack [Ala.] 38 So. 1020.

27. Kelly-Goodfellow Shoe Co. v. Sally, 114 Mo. App. 222, 89 S. W. 889. And see note Stone v. Marshall Oil Co. [Pa.] 101 Am. St. Rep. 913.

28. Mere tradition that the Indians reverenced an irregularly shaped mass of iron found upon the surface of the earth, washed their faces in it, and treated it as a magic or medicine rock, and that it contained pot-

Right to recover the value of improvements made on lands of another.[29]—Statutes authorizing a recovery for improvements are not retroactive,[30] and the burden is on the party claiming the compensation to show the dates when the several improvements were made.[31] A trespasser who, prior to the commencement of condemnation proceedings, makes permanent improvements upon land, is liable to the owner thereof, in subsequent proceedings, for the value of the land so improved.[32]

Accessories; Accident; Accommodation Paper; Accomplices, see latest topical index.

ACCORD AND SATISFACTION.

§ 1. **The Accord (10).**
A. In general (10).
B. The Consideration (14).
C. Fraud, Mistake, and Duress (15).
§ 2. **Satisfaction or Discharge (17).**
§ 3. **Pleadings, Issues, and Proof (17).**

This topic does not include cases of composition with creditors,[33] novation,[34] or of releases,[35] except in so far as such transactions are also accords,[36] nor the general law of payment and tender.[37]

§ 1. *The accord. A. In general.*[38]—An accord and satisfaction is an executed agreement [39] substituted between the parties in satisfaction of a former agreement,[40] or made in adjustment of a former difficulty or dispute.[41] It is binding on all the parties [42] and constitutes a valid affirmative defense [43] to an action on the original obligation. Like every contract, an accord depends on the meeting of the minds of the parties [44] and is no broader than their mutual intent,[45] but the policy of the

holes believed to be made by the Indians, was insufficient to show that they had severed the meteorite from the realty and thereafter abandoned it so as to entitle defendant to hold it as the next finder. Oregon Iron Co. v. Hughes [Or.] 81 P. 572, citing Goddard v. Winchell, 86 Iowa, 71, 17 L. R. A. 788.

29. See 5 C. L. 12. See, also, Ejectment, 5 C. L. 1064.

30. Laws 1903, p. 262, c. 137. Barton v. Wickizer [Wash.] 83 P. 312; Monk v. Duell [Wash.] 83 P. 313.

31. Monk v. Duell [Wash.] 83 P. 313.

32. A municipality having wrongfully erected waterworks upon the land of another before the commencement of condemnation proceedings, the owner of the land was entitled in subsequent proceedings to be awarded the value of the land as increased by the structures wrongfully erected but not the cost of the structures or their value to the municipality. Village of St. Johnsville v. Smith [N. Y.] 77 N. E. 617.

33. See Composition with Creditors, 5 C. L. 608.

34. See Novation, 6 C. L. 826.

35. See Releases, 6 C. L. 1286.

36. See 1 C. L. 8, n. 43.

37. See Payment and Tender, 6 C. L. 937.

38. See 5 C. L. 14.

39. Bankers' Union of the World v. Favalora [Neb.] 102 N. W. 1013; Kinney v. Brotherhood of American Yeomen [N. D.] 106 N. W. 44; Burr's Damascus Tool Works v. Peninsular Tool Mfg. Co. [Mich.] 12 Det. Leg. N. 754, 105 N. W. 858; Manley v. Vermont Mut. Fire Ins. Co. [Vt.] 62 A. 1020.

40. The surrender and cancellation of a note and mortgage in consideration of a new agreement, under which defendant agreed to pay a smaller amount of money and assumed an uncertain obligation of supporting his father until the latter's death, constitutes an accord and satisfaction. McGiverin v. Keefe [Iowa] 106 N. W. 369.

Distinguished from an account stated which is an agreement fixing amount due on former transactions between the parties thereto and promising payment. Banker's Union of the World v. Favalora [Neb.] 102 N. W. 1013.

41. Canton Union Coal Co. v. Parlin & Orendorff Co., 117 Ill. App. 622.

42. Where one defendant agreed to the settlement of a suit by which she was to have possession of the land for life paying taxes, insurance and making repairs, she cannot terminate this agreement by consenting to a partition. O'Shaughnessy v. O'Shaughnessy, 97 N. Y. S. 1126. Where by a tri-party agreement defendant indorsed notes given by a third party to plaintiff in compromise of their claim, under which compromise the plaintiff was entitled to collect of the third party the entire original claim in case of default on any of the notes, the defendant was nevertheless liable as an indorser. Gallice v. Crilly, 143 F. 178.

43. Johnson v. Berdo [Iowa] 106 N. W. 609.

44. Where defendant agreed with deceased to surrender one-third of a crop for two successive years in discharge of a note, being an accord, a later agreement between the defendant and a third person to apply one-third of the crop on the note, it being insisted by defendant that this contract should not supersede the former, would not constitute a merger of the two so as to give plaintiff a cause of action on the note for the balance not paid by the two one-third

law being to end disputes the accord will be given a liberal interpretation,[46] and if settlement is general, it will be presumed that all matters of difference between the parties are included.[47] A mere executory accord, unless it operates as a novation [48]

shares of the crop. Walsh v. Lunney [Neb.] 106 N. W. 447. An oral agreement whereby a seller agrees to receive a sum in gross on account and receive the remainder in installments superseding an original agreement as to time and manner of payment, does not extinguish the original book-account debt so as to prevent suit thereon, nor is it parallel to an accord and satisfaction. Weiss v. Marks, 23 Pa. Super. Ct. 602. A debtor sent a check to his creditor for the amount owing him, less the amount claimed as a set-off by debtor for breach of contract by creditor, without notifying the latter that such check was intended as a settlement in full, or that its acceptance would be considered a satisfaction of all demands—not an accord and satisfaction. West Point Cotton Mills v. Blythe, 29 Pa. Super. Ct. 642. Intention a question for jury. Mayo v. Leighton [Me.] 63 A. 298. Where a mining expert and a capitalist entered into a contract whereby whatever property was purchased should be owned jointly, the capitalist's share to be two-thirds, in consequence of which the capitalist purchased a 1-4 interest in a mine on the recommendation of the expert, and a short time thereafter the purchasers jointly gave the expert $1,000 in recognition of his services, and stated in a letter that although he admitted having no claim against the co-owners of the mine they nevertheless intended to reward him liberally in the future, if the mine warranted it, this was not a settlement in lieu of the expert's one-third interest in the capitalist's one-fourth ownership of the property under their contract. Rutan v. Huck [Utah] 83 P. 833. Where a son for many years both before and after majority gave large sums of money to his mother to hold for him in trust and on request she gives him $15,000 before his marriage without any agreement as to the balance of the fund in her hands, the exact amount of which the son had no means of knowing, this does not amount to an accord and satisfaction, preventing his recovery of the balance from his father on his mother's death. Jacobs v. Jacobs [Iowa] 104 N. W. 489. Question of settlement is for jury on conflicting evidence. Pagan v. Port Pitt Gas Co., 27 Pa. Super. Ct. 75.

45. The settlement of a suit brought on a contract for the balance due for fruit delivered is not a bar to suit subsequently brought on same contract for fruit subsequently offered and refused. Willson v. Gregory [Cal. App.] 84 P. 356. An agreement to trade certain deeds and notes for other notes and a mortgage is not an accord and satisfaction of damages for breach of a contract, unless so intended. Mayo v. Leighton [Me.] 63 A. 298. The compromise by an administrator of a suit brought by creditors of decedent against a certain defendant, for fraudulent transfers of land, does not bar a suit by heirs of decedent against the same defendant to set aside other fraudulent transactions had between decedent and defendant. Marsh v. Marsh [Vt.] 63 A. 159. The settlement of a suit for damages for wrongful detention of property stipulated that it did not cover damages plaintiff might have against defendant's grantee for the same cause, and was not a bar to an action against such grantee for damages for wrongful detention. Meriwether v. Howe [Kan.] 82 P. 723. Payment of a contractor and acceptance by city of his work is not an accord and satisfaction such as to prevent city from recovering against contractor and his surety for damages city was compelled to pay subsequently, through negligence of contractor in leaving an excavation in the street unguarded, unless such payment and acceptance was made in contemplation of the liability for damages or its purpose actually was to settle all their differences. City of Spokane v. Costello [Wash.] 84 P. 652.

46. Haydon v. St. Louis, etc., R. Co. [Mo. App.] 93 S. W. 833. A contract of settlement will be upheld whenever possible. Billau v. Kern [Iowa] 107 N. W. 307. An agreement voluntarily entered into in settlement and as a compromise of a dispute, will be enforced. Dickey v. Jackson [Or.] 84 P. 701.

47. Johnson v. Berdo [Iowa] 106 N. W. 609. Demand by plaintiff's attorney of her personal property and the turning over to him of a part of it did not constitute a settlement of all controversies between the parties so as to bar plaintiff's recovery for services or any property of her's retained because it could not be conveniently taken away. McMorrow v. Dowell [Mo. App.] 90 S. W. 728. A settlement, whereby plaintiff was to receive $180,000 net and 10 per cent of the proceeds of an estate at the time of distribution over $1,200,000, entitled her to her 10 per cent of the excess, regardless of whether it came from the principal or the income, since both must be accounted for. Chauvet v. Ives, 104 App. Div. 303, 93 N. Y. S. 744. Where settlement was made by a city with a wife for injuries to her from defective sidewalk, whereby items were paid which the plaintiff, her husband, was entitled to collect and he accepted the same and expressed himself as completely satisfied with the settlement, he cannot later bring action for loss of wife's services, although he was not present at the settlement and did not authorize signing of release. Savory v. North East Borough, 26 Pa. Super. Ct. 1.

48. However, in New York a specific and final agreement to pay a sum less than an immatured and contingent but specific obligation, though oral and unexecuted, is enforceable as a novation, although not as an accord. Defendant agreed to pay plaintiff $8,600 on completion of a certain roof. Before roof was completed the plaintiff agreed to receive presently $2,500; now he sues for $8,600; defendant sets up the agreement to accept $2,500, and defense is held valid. Bandman v. Finn [N. Y.] 78 N. E. 175. And see Manley v. Vermont Mut. Fire Ins. Co. [Vt.] 62 A. 1020.

or a liquidation of an unliquidated indebtedness,[49] is of no avail without performance by satisfaction[50] in full,[51] and acceptance is in complete settlement,[52] and

49. The rule that an executory agreement for accord, until performed, does not constitute a defense, which always obtains in the case of a conceded debt, does not apply to an agreement or compromise of a disputed claim. Bandman v. Finn [N. Y.] 78 N. E. 175.

50. Mayo v. Leighton [Me.] 63 A. 298; Kinney v. Brotherhood of American Yeomen [N. D.] 106 N. W. 44; Burr's Damascus Tool Works v. Peninsular Tool Mfg. Co. [Mich.] 12 Det. Leg. N. 754, 105 N. W. 858; Manley v. Vermont Mut. Fire Ins. Co. [Vt.] 62 A. 1020. An accord to be enforceable must be in full satisfaction and executed. Bankers' Union of the World v. Favalora [Neb.] 102 N. W. 1013. An agreement between insured and company adjuster as to amount of loss which company allows and promises to send check for, which check is never received is an accord unexecuted. Manley v. Vermont Mut. Fire Ins. Co. [Vt.] 62 A. 1020.

Note: Accord and satisfaction is an agreement whereby the right of action arising from breach of contract is discharged. Such an agreement, resting in paroi, must be supported by a sufficient consideration, and, moreover, the consideration must, as a rule, be executed in favor of the party entitled to sue; otherwise, it is an accord without satisfaction, and does not ordinarily discharge the right of action. Bayley v. Homan, 3 Bing. N. C. 915, 920; McManus v. Bark, L. R. 5 Exch. 65; Lynn v. Bruce, 2 H. Bl. 317; Langdell, Cas. Cont. 399; Case v. Barber, T. Raym. 450; Allen v. Harris, 1 Ld. Raym. 122; Hemmingway v. Stansdell, 106 U. S. 399, 27 Law Ed. 245; Simmons v. Hamilton, 56 Cal. 493; Troutman v. Lucas, 63 Ga. 466; Ogilvie v. Hallam, 58 Iowa, 714; Johnson's Adm'r v. Hunt, 81 Ky. 321; Browning v. Crouse, 43 Mich. 489; Lankton v. Stewart, 27 Minn. 346; Nassoiy v. Tomlinson, 148 N. Y. 326, 51 Am. St. Rep. 695; Kromer v. Heim, 75 N. Y. 574, 31 Am. Rep. 491, Huffcut & W. Am. Cas. Cont. 627; Mitchell v. Hawley, 4 [N. Y.] 414, 47 Am. Dec. 260; Frost v. Johnson, 8 Ohio, 393; Hosler v. Hursh, 151 Pa. 415; Pettis v. Ray, 12 R. I. 344; Schlitz v. Meyer, 61 Wis. 418. See Steeds v. Steeds, 22 Q. B. Div. 537; Foakes v. Beer, 9 App. Cas. 605; Blake's Case, 6 Coke, 43b; James v. Isaacs, 12 C. B. 791; Alden v. Thurber, 149 Mass. 271, Huffcut & W. Am. Cas. Cont. 630; Savage v. Blanchard, 148 Mass. 348. While this is the general rule, yet an agreement to accept an independent executory contract in satisfaction of a right of action is a sufficient discharge. In other words, an accord with mutual provisions to perform is good. This is not inconsistent with the principle that an accord, to bar an action, must be executed. The mutual promises are regarded as an execution of the accord. Whitsett v. Clayton, 5 Colo. 476; Schweider v. Lang, 29 Minn. 254, 43 Am. Rep. 202; Jones v. Perkins, 29 Miss. 139, 64 Am. Dec. 136; Heirn v. Carron, 11 Smedes & M. [Miss.] 361, 49 Am. Dec. 65; Nassoiy v. Tomlinson, 148 N. Y. 326, 51 Am. St. Rep. 695; Morehouse v. Second Nat. Bank of Oswego, 98 N. Y. 503; Davis v. Spencer, 24 N. Y. 386-391; Billings v. Vanderbeck, 23 Barb. [N. Y.] 546; Christie v. Craige, 20 Pa. 430; Bradshaw v. Davis, 12 Tex. 336; Babcock v. Hawkins, 23 Vt. 561. The satisfaction may consist in the acquisition of a new right against the debtor, as where the creditor accepts a negotable instrument from the debtor in payment of an open account. Varney v. Conery, 77 Me. 527; Guild v. Butler, 127 Mass. 386; Mason v. Campbell, 27 Minn. 54; Bennett v. Hill, 14 R. I. 322; Babcock v. Hawkins, 23 Vt. 561. If a check sent by a debtor purports to be in full payment of a liquidated demand, and the creditor accepts and collects it, he is precluded from afterwards asserting that a balance remains unpaid (Bidder v. Bridges, 37 Ch. Div. 406; Anderson v. Standard Granite Co., 92 Me. 429, 69 Am. St. Rep. 522; Nassoiy v. Tomlinson, 148 N. Y. 326, 51 Am. St. Rep. 695. Contra. Meyer v. Green, 21 Ind. App. 139, 69 Am. St. Rep. 344; Curran v. Rummell, 118 Mass. 482. And see Day v. McLea, 22 Q. B. Div. 610), or, of new rights against the debtor and third persons, as in the case of a composition with creditors (Goddard v. O'Brien, 9 Q. B. Div. 40; Good v. Cheesman, 2 Barn. & Ad. 328; Evans v. Powis, 1 Exch. 601. See, however, In re Hatton, 7 Ch. App. 723), or of something different in kind from that which the debtor was already bound by the original contract to perform (McCreery v. Day, 119 N. Y. 1, 16 Am. St. Rep. 793, Huffcut & W. Am. Cas. Cont. 524; Dreifus v. Columbian Exposition Salvage Co., 194 Pa. 475, 75 Am. St. Rep. 704. See Gordon v. Moore, 44 Ark. 349, 51 Am. Rep. 606). The injured party must not only have obtained what he bargained for in lieu of his right of action, but also have accepted it in satisfaction of his claim; otherwise, there is no discharge. Anson, Cont. [4th Ed.] 315; Preston v. Grant, 34 Vt. 201.—From Hammon on Contracts, p. 943.

51. On part payment of an accord, the plaintiff may retain the money as partial payment of original claim and sue for balance, disregarding the accord, or return the amount paid and sue for entire original claim. Kinney v. Brotherhood of American Yeomen [N. D.] 106 N. W. 44. Complete execution or performance necessary. Mayo v. Leighton [Me.] 63 A. 298. Where offers of settlement on insurance policies were merely tentative and part payment by one of three companies was returned, there was no legal accord and satisfaction. Lake Superior Produce & Cold Storage Co. v. Concordia Fire Ins. Co. [Minn.] 104 N. W. 560. Retention of drafts sent by two companies under a tentative settlement between plaintiff and three insurance companies, in the hope that the third would also pay, does not amount to a payment, where drafts were not cashed and were turned into court on beginning of suit. Id.

52. Byrnes v. Byrnes, 92 Minn. 73, 99 N. W. 426. In order to support a plea of accord and satisfaction, payment must be received as well as tendered. Mayo v. Leighton [Me.] 63 A. 298. The statement that appellant might pay what he pleased and they would scrap for the remainder, and the acceptance by appellee of a check for $194.46

until such performance is subject to revocation.[53] An accord and satisfaction ordinarily results from the retention of a sum tendered in full settlement.[54] Payment of a part of a liquidated debt is generally no satisfaction of the whole,[55] and certainly payment of a part of a debt never discharges the whole without an agreement to release the remainder, and an acceptance of the payment as an accord and satisfaction.[56] But where a sum is tendered as in full, payee cannot, by notice that he does not accept the condition, evade or modify it, so as to enable him to retain check without being bound by the condition,[57] and failure to return the payment is not

at the end of an angry dispute in which appellee claimed $2,600 was not an accord and satisfaction in the absence of any memorandum, receipt, or other evidence that the payment was in full. Lilly v. Lilly, Bogardus & Co., 39 Wash. 337, 81 P. 852. Where a purchaser of coal refused to accept any further shipments because not of the quality which the contract called for and on request sent a check "in full satisfaction of account to date," the items for shipments rejected being stricken out in the account, accord and satisfaction for entire contract was not established so as to preclude recovery of damages for breach of contract. Ginn v. Clark Coal Co. [Mich.] 12 Det. Leg. N. 1012, 106 N. W. 867. Neither offer to perform nor tender is sufficient. Mayo v. Leighton [Me.] 63 A. 298.

53. An accord, until executed by satisfaction, may be revoked at the will of either party without assigning any reason or cause. Kinney v. Brotherhood of American Yeomen [N. D.] 106 N. W. 44.

54. Payment and acceptance of a sum less than claimed, as in full of an unliquidated claim. Hand Lumber Co. v. Hall [Ala.] 41 So. 78. The acceptance of a statement and check in settlement of a disputed claim would in law be an accord and satisfaction. Beaver v. Porter [Iowa] 105 N. W. 346. An offer of certain sums to settle a disputed claim, on condition that it operate as a settlement in full, and its acceptance, is an accord and satisfaction. Canton Union Coal Co. v. Parlin & Orendorff Co., 117 Ill. App. 622. Acceptance and retention of a lump sum in settlement of an itemized account greater in amount than the sum received is an accord and satisfaction, as where an officer brought an itemized account for $152 to county, was allowed in gross $100, which he accepted and retained, but later brought action for allowance of bill by items. Hunt v. Franklin County Com'rs [Me.] 62 A. 213. Where amount due was in dispute, defendant might stipulate on his check that it was sent for "payment in full." St. Regis Paper Co. v. Tonawanda Board & Paper Co., 107 App. Div. 90, 94 N. Y. S. 946. Amount due being in dispute, the offer of an amount in settlement, its acceptance and the signing of a receipt in full therefor, is a valid compromise. Earle v. Berry [R. I.] 61 A. 671. Acceptance of check given for settlement of acountt in full, and retention of proceeds ordinarily amounts to an accord and satisfaction. George W. Linn Co. v. Harris, 118 Ill. App. 5. A check was sent an attorney for services "in full of all accounts" which he refused to accept, later a check was sent him, accompanied by a voucher which stated that check was in full of all services, and the check recited that it covered the accompanying voucher. The attorney accepted and cashed check, but refused to sign and return voucher and brought this action for the balance of his claim. Held that acceptance and retaining of check constituted accord and satisfaction, as his claim was unliquidated. Hand Lumber Co. v. Hall [Ala.] 41 So. 78. Where a check is marked as payment in full of rent, though less than contractual amount, the reductions being on consideration of certain repairs by lessee, and the lessor retains the checks but insists that payment is on account only and that the reduction was granted only temporarily during the summer months, it will be an accord and satisfaction. Snow v. Griesheimer [Ill.] 77 N. E. 110.

55. Byrnes v. Byrnes, 92 Minn. 73, 99 N. W. 426. A debtor held not relieved from paying one note by the payment of others. Siewing v. Tacke, 112 Mo. App. 414, 86 S. W. 1103. Where an administratrix because of a dispute as to date of birth of decedent which would vary liability of insurance company compromised claim on policy for $400 whereas $1,000 was actually due thereunder, the subsequent administrator d. b. n. could recover balance due under the policy. Prudential Ins. Co. v. Cottingham [Md.] 63 A. 359.

56. Byrnes v. Byrnes, 92 Minn. 73, 99 N. W. 426.

57. George W. Linn Co. v. Harris, 118 Ill. App. 5. Using a check and depleting the defendant's acount with the drawee for the amount, constitutes an acceptance of the check and the conditions on which it was given. St. Regis Paper Co. v. Tonawanda Board & Paper Co., 107 App. Div. 90, 94 N. Y. S. 946. Where debtor offers a check for payment in full, and payee accepts and retains it on account but refuses to accept condition, such condition is nevertheless binding and it is not the duty of the debtor to ask for a return of the check. Canton Union Coal Co. v. Parlin & Orendorff, 117 Ill. App. 622. An acceptance of a check offered as payment in full of a disputed claim amounts to a settlement though creditor protests that it is not payment in full and that he does not accept it as such. Snow v. Griesheimer [Ill.] 77 N. E. 110. If he wishes to refuse condition, he must return check or proceeds. George W. Linn Co. v. Harris, 118 Ill. App. 5. Check must be rejected or accepted with condition imposed. St. Regis Paper Co. v. Tonawanda Board & Paper Co., 107 App. Div. 90, 94 N. Y. S. 946. In a disputed account a check offered by the debtor for settlement in full must be accepted by creditor on conditions offered, or rejected, altogether. Snow v. Griesheimer [Ill.] 77 N. E. 110. Receipt of part payment of dis-

excused by inability of payee to read and thus to ascertain that check is "in full settlement of account," [58] for it is the duty of every person to ascertain whether or not a check is sent on account or in full settlement.[59] In the Federal courts [60] and in New York,[61] however, the rule is otherwise. The breach of one of the conditions [62] of a settlement is not ground for setting it aside, there being an adequate remedy at law,[63] and where a settlement provides that failure of strict compliance therewith will revive original causes of action, such strict compliance may be waived.[64] A husband must adopt a settlement made by a wife on behalf of herself and him, in toto; or promptly repudiate it so far as it was under his control; [65] he cannot accept the beneficial part and reject the remainder.[66] An offer of a certain sum in full satisfaction of claims of plaintiff in an answer which denies all liability of defendant may be withdrawn when plaintiff refuses to accept said sum either at time answer is set up or when case is decided against her.[67]

(§ 1) *B. The consideration.*[68]—A consideration is any benefit to the promisor, or any loss, trouble, or inconvenience to or charge upon the person to whom the

puted claim. Powers v. Harris [Tex. Civ. App.] 94 S. W. 136.

58, 59. George W. Linn Co. v. Harris, 118 Ill. App. 5.

60. Federal Printing Co. v. Garrick Press, 99 N. Y. S. 809. Cashing of check and use of money received under a release does not, as a matter of law, ratify it. Rockwell v. Capital Traction Co., 25 App. D. C. 98. In the Federal courts acceptance and retention of a check offered as payment in full, but accepted only on account is not an accord and satisfaction. Federal Printing Co. v. Garrick Press, 99 N. Y. S. 809.

61. The beneficiary under a $1,000 benefit certificate accepted a draft for $796.64 and signed a receipt therefor which recited, "in full under this certificate," to which she added "but I accept the above amount under protest,"—not an accord and satisfaction. Mitterwallner v. Supreme Lodge, Knights and Ladies of the Golden Star, 109 App. Div. 165, 95 N. Y. S. 1090.

62. Agreement to use switch track for movement of cars only and not for storing them. Haydon v. St. Louis, etc., R. Co. [Mo. App.] 93 S. W. 833.

63. Haydon v. St. Louis, etc., R. Co. [Mo. App.] 93 S. W. 833.

64. Browere v. Carpenter, 99 N. Y. S. 531. Plaintiff and defendant settled suits on notes, by execution of new notes and payment of costs by defendant, providing that default of defendant on said notes revived the actions. Defendant asked plaintiff whether he might obtain consent of indorsee of one of the notes to an extension and plaintiff raised no objections whereupon defendant did procure an extension of one of the notes from the indorsee. Plaintiff thereupon revived former actions and entered default judgments which was error. Browere v. Carpenter, 99 N. Y. S. 531.

65. He must tender back such money received by her as properly is meant as a compensation to him for loss of services, expenses incurred, etc. Savory v. North East Borough, 26 Pa. Super. Ct. 1.

66. Savory v. North East Borough, 26 Pa. Super. Ct. 1.

67. Plaintiff sued for services as teacher, and board of certain pupils. Defendant alleges having made his contract with her father and none with her. Coltrane v. Peacock [Tex. Civ. App.] 91 S. W. 841.

68. See 5 C. L. 18.

Note: "There must," says Sir William Anson (Anson, Cont. [8th Ed.] 87), "be something different to that which the recipient is entitled to demand, in the thing done or given, in order to support his promise. The difference must be real, but the fact that it is slight will not destroy its efficacy in constituting a consideration, for, if the courts were to say that the thing done in return for a promise was not sufficiently unlike that to which the promisor was already bound, they would in fact be determining the adequacy of the consideration," which, as we shall see, they do not do. Thus, the giving of a negotiable instrument for a money debt (Bidder v. Bridges, 37 Ch. Div. 406; Sibree v. Tripp, 15 Mees. & W. 23; Varney v. Conery, 77 Me. 527; Jaffray v. Davis, 124 N. Y. 164, Huffcut & W. Am. Cas. Cont. 187; Kidder v. Kidder, 33 Pa. 268, Huffcut & W. Am. Cas. Cont. 625; Reid v. Hibbard, 6 Wis. 175. The acceptance of a note for the amount of a debt is not a payment of it, however, unless the parties so agree. Johnston v. Barrills, 27 Or. 251, 50 Am. St. Rep. 717. See section 430, infra), or anything else to which the creditor is not already entitled, provided it is of some value, however slight, in the eye of the law (Goddard v. O'Brien, 9 Q. B. Div. 37; Hill v. Bull, 43 Conn. 455; Bender v. Been, 78 Iowa, 283, Huffcut & W. Am. Cas. Cont. 87; Dunham v. Peterson, 5 N. D. 414, 57 Am. St. Rep. 556; Collyer v. Moulton, 9 R. I. 90, Huffcut & W. Am. Cas. Cont. 522), or payment before maturity, or in a different manner or at a different place from that agreed upon (Brownlee v. Lowe, 117 Ind. 420; Arnold v. Park, 8 Bush. [Ky.] 3; Fenwick v. Phillips, 3 Metc. [Ky.] 87; Bowker v. Childs, 3 Allen [Mass.] 434; Brooks v. White, 2 Metc. [Mass.] 283; Schweider v. Lang, 29 Minn. 254; Jones v. Perkins, 29 Miss. 139; McKenzie v. Culbreth, 66 N. C. 534; Harper v. Graham, 20 Ohio, 106. However, an agreement that the creditor shall suspend a debt already due in money, and accept payment in future services of the debtor, is without consideration, and may be renounced at any time before complete performance.

promise is made.[69] The sufficiency of the consideration for a compromise is not to be determined by the soundness of the original claim of either party, the very object of compromise being to avoid the risk or trouble of that question,[70] and especially is this principle applicable to family arrangements and compromises.[71] Payment of a part of a debt not yet due,[72] the giving up of an apparently good claim to a fund,[73] a mutual agreement to pay and receive a certain sum in satisfaction of a doubtful claim,[74] forbearance to prosecute proceedings for the reversal of a judgment,[75] payment of settlement with money derived from sale of exempt property,[76] surrender of unprobated claims by heirs and devisees,[77] have all been held a sufficient consideration to support an accord and satisfaction. However, the mere fact of a dispute as to amount due is not sufficient to support a release,[78] nor is there any consideration if a claimant, knowing his claim is groundless, forces other party to compromise by threats of suit, and such a compromise will not be enforced.[79]

(§ 1) *C. Fraud, mistake, and duress.*[80]—The defense of fraud [81] in procuring an accord and satisfaction and release may be set up at law,[82] and is a good ground for setting it aside.[83] But a settlement will not be set aside as fraudulent because property received did not turn out to be a good investment even after opportunity

Bates v. Starr, 2 Vt. 536), is a valid discharge of the debt, if it is so agreed, since the courts will presume that what is thus accepted by the creditor might be more beneficial to him than the money, or whatever else the contract may call for (Pinnel's Case, 5 Coke, 117). So, if the debtor procures a third person to guaranty a part of the debt (Singleton v. Thomas, 73 Ala. 205; Whitsett v. Clayton, 5 Colo. 476; Little v. Hobbs, 34 Me. 357; Maddux v. Bevan, 39 Md. 485; Mason v. Campbell, 27 Minn. 54; Kellogg v. Richards, 14 Wend. [N. Y.] 116; Le Page v. McCrea, 1 Wend. [N. Y.] 164; Gunn v. McAden, 37 N. C. 79. Contra, semble, Parmelee v. Thompson, 45 N. Y. 58), or if he pays a part of it in a third person's notes, which are afterwards paid (Brassell v. Williams, 51 Ala. 349, 352; Brooks v. White, 2 Metc. [Mass.] 283; Frisbie v. Larned, 21 Wend. [N. Y.] 450), or in a third person's check (Guild v. Butler, 127 Mass. 386), an agreement that such payment shall satisfy the debt is based upon a sufficient consideration, and is binding.—From Hammon on Contracts, p. 668.

69. Ward, Murray & Co. v. Young [Tex. Civ. App.] 13 Tex. Ct. Rep. 797, 89 S. W. 456.

70, 71. Lewallen's Estate, 27 Pa. Super. Ct. 320.

72. Payment by surety of part of notes, all of which were not yet due was a sufficient consideration to support a release by payee to surety from the liability on balance. Baldwin v. Daly [Wash.] 83 P. 724.

73. Plaintiff's right to entire insurance money immaterial, surrender of claim being sufficient. Gaynor v. Quinn, 212 Pa. 362, 61 A. 944.

74. Gering v. School Dist. No. 28, Cass County [Neb.] 107 N. W. 250; Beaver v. Porter [Iowa] 105 N. W. 346. The real consideration for a release is the mutual agreement of the parties to the terms of the compromise. Byrnes v. Byrnes, 92 Minn. 73, 99 N. W. 426.

75. Unless the good faith of claimant in pressing his claim is put in issue, whether he intended to prosecute such proceeding, is immaterial. Gering v. School Dist. No. 28, Cass County [Neb.] 107 N. W. 250.

76. Payment with money derived from the sale of exempt property by an insolvent person, sufficient though the claim is liquidated. Ward, Murray & Co. v. Young [Tex. Civ. App.] 13 Tex. Ct. Rep. 797, 89 S. W. 456.

77. A promise to will all property to his children is sufficiently supported by their assignment to him of all their right, title and interest in their mother's property on her death, though their interest is doubtful and unascertained. Lewallen's Estate, 27 Pa. Super. Ct. 320.

78. Byrnes v. Byrnes, 92 Minn. 73, 99 N. W. 426.

79. Gering v. School Dist. No. 28, Cass County [Neb.] 107 N. W. 250.

80. See 5 C. L. 20.

81. A release signed by plaintiff unable to read or write English under representations that it was merely a receipt for a gratuity given to plaintiff, affected at the time with great grief for loss of his son through negligence of defendant, was fraudulent in legal effect. Erickson v. Northwest Paper Co. [Minn.] 104 N. W. 291.

82. Memphis St. R. Co. v. Giardino [Tenn.] 92 S. W. 855.

83. Gulf, etc., Ry. Co. v. Huyett [Tex. Civ. App.] 14 Tex. Ct. Rep. 124, 89 S. W. 1118. False statements as to his physical condition made to the plaintiff by a physician in the employ of the defendant railway company for the purpose of facilitating a settlement will vitiate it. Gulf, etc., R. Co. v. Huyett [Tex. Civ. App.] 14 Tex. Ct. Rep. 124, 89 S. W. 1118. Inducing real estate agents to accept a small amount in settlement of claims for finding a purchaser of a piece of real estate by fraudulent statements to the effect that they had determined to withdraw the land from the market, whereas their real intention as manifested by their acts was to close the deal with the purchaser found, for themselves, entitles the real estate agents to set aside the settlement as fraudulent. Bowe v. Gage [Wis.] 106 N. W. 1074. A settlement between a wife

for full investigation.[84] Nor is the fact that the plaintiff signed a release while in bed suffering pain, sufficient to sustain defense of fraud to a release.[85] Where, however, the party believed that the signature of her husband deprived her of her rights, and the defendant's agent did not correct the false impression created by the husband's statements to that effect, she may be relieved from the release.[86] A settlement of a claim on an insurance policy will not be set aside as fraudulent, merely because defendant falsely claimed that policy sued on was obtained by fraud and deceit and would resist suit thereon, but compromised by paying one-half of face of policy.[87] A settlement though fraudulent is valid and binding on those committing the fraud,[88] subject, however, to their equity to have the amount paid thereon credited to them in case of recovery on the original contract.[89] One entering into a release through fraud must, immediately upon the discovery of the fraud, take action to disaffirm the release.[90] Although the general rule is that a settlement cannot be rescinded while its benefits are being retained,[91] an exception thereto exists where money has been paid under a fraudulent settlement in which case the payee may retain amount paid and sue for the balance.[92] But the rule varies, some courts requiring a tender back at time of pleading[93] or setting up the fraud,[94] and retention of the consideration of the release for two years after discovery of fraud and refusal to pay it into court until compelled to in order to avoid dismissal would amount to a ratification of the release.[95] One offering to repay money received under an alleged fraudulent settlement need not tender any interest on the amount originally received for the time it was retained;[96] and it is not necessary that the identical money received, be tendered back.[97] Nor need one attempting to rescind an alleged fraudulent settlement offer to return such money as was paid for his hospital expenses, when the same were incurred without his request or even ability to resist and apparently, without expectation of reward, and were not mentioned in the written settlement.[98] In a suit in equity to set aside a contract of compromise, settlement for breach thereof, it is not necessary to offer to return the consideration.[99] The station agent being the person highest in authority in a certain county, is the proper person to whom to make tender back of money received under

and husband fraudulent through the false representations of the latter and his attorney does not bar the wife from enforcing a trust for the remainder of her property in his possession. Heinrich v. Heinrich [Cal. App.] 84 P. 326.

84. A settlement made deliberately, with fullest opportunity for investigation and assistance of distinguished counsel, will not be set aside for fraud except upon clearest proof. Judson v. Bowser [Ky.] 91 S. W. 727.

85, 86. Rockwell v. Capital Traction Co., 25 App. D. C. 98.

87. Myers v. Farmers' Life Ass'n [Iowa] 104 N. W. 1147.

88, 89. Bowe v. Gage [Wis.] 106 N. W. 1074.

90. Memphis St. R. Co. v. Giardino [Tenn.] 92 S. W. 855.

91. Caine v. Farmers' & Mechanics' Life Ass'n, 115 Ill. App. 307.

92. Caine v. Farmers' & Mechanics' Life Ass'n, 115 Ill. App. 307. The recipient is under no obligation to tender back the money received under such fraudulent settlement, its application to an actual existing debt satisfying all the requirements. Bowe v. Gage [Wis.] 106 N. W. 1074.

93. One seeking to disaffirm a release from liability for injuries received, on the ground of fraud, must pay or tender back the consideration received as a condition precedent at the time the pleading repudiating the settlement is set up. Memphis St. R. Co. v. Giardino [Tenn.] 92 S. W. 855.

94. Where a release is sought to be impeached for fraud, a tender back of the consideration need not be made until the release shall have been pleaded in bar. Rockwell v. Capital Traction Co., 25 App. D. C. 98.

95. Memphis St. R. Co. v. Giardino [Tenn.] 92 S. W. 855.

96. Louisville & N. R. Co. v. Helm [Ky.] 89 S. W. 709.

97. Spending $50.00 out of $400.00 before the discovery of the fraud would not amount to a ratification of a settlement. Louisville & N. R. Co. v. Helm [Ky.] 89 S. W. 709.

98. Louisvile & N. R. Co. v. Helm [Ky.] 89 S. W. 709.

99. Plaintiffs agreed that they would deed land to railroad company for switching purposes and dismiss suits in consideration of $600, costs of suits and agreement by the railroad company not to leave cars standing on the switch in front of plaintiff's premises. Last condition broken by company. Suit to rescind contract. Plaintiff was not

a settlement, from the railroad company, which is sought to be avoided on the ground of fraud.[1] Neither one who makes a settlement in order to avoid litigation, as threatened,[2] nor one entering into a compromise to avoid the threatened withholding of payment of a debt due,[3] is acting under duress.

§ 2. *Satisfaction or discharge.*[4]—A satisfaction in its legal significance is a performance of the terms of the accord.[5] Hence, the acceptance and use of a check sent in settlement of an account,[6] payment in full settlement of disputed accounts, made after negotiations, in the absence of fraud or mistake,[7] payment of a sum less than a specified but contingent and unmatured obligation,[8] constitute a satisfaction; whereas, failure to comply fully with the terms of the accord,[9] or payment under an accord not based on a sufficient consideration,[10] would not. Probably money accepted from a stranger in full settlement of a claim against the real offenders will estop the party accepting it from obtaining any further sum,[11] but not where the transaction between the parties contemplated a different result.[12] Release of one of two joint tort-feasors discharges the other,[13] unless intended otherwise, and this intention may be shown by parol;[14] but it has been held that if one of two joint tort-feasors purchases immunity from suit for himself by payment of a sum of money, the other tort-feasor is entitled to apply that amount pro tanto on a judgment recovered against him.[15] A reversion of a settlement, put upon the ground that payment was by a lump sum on a release made by several parties, some of whom are minors and incapable of making a binding contract, is not sufficient, as payees under the settlement may make their own division.[16] A debtor need not pay more than amount he admits due.[17]

§ 3. *Pleadings, issues, and proof.*[18]—Accord and satisfaction is a special contract and must be alleged and proven as such.[19] It cannot be set up under the general issue or plea of not guilty,[20] and failure to plead payment as a settlement excludes its consideration as a defense.[21] Likewise, mistake or fraud in a settlement

obliged to return $600 and costs to maintain suit. Haydon v. St. Louis & S. F. R. Co. [Mo. App.] 93 S. W. 833.

1. Louisville & N. R. Co. v. Helm [Ky.] 89 S. W. 709.

2. Dickey v. Jackson [Or.] 84 P. 701.

3. Earle v. Berry [R. I.] 61 A. 671.

4. See 5 C. L. 21.

5. Canton Union Coal Co. v. Parlin & Orendorff Co., 117 Ill. App. 622.

6. St. Regis Paper Co. v. Tonawanda Board & Paper Co., 107 App. Div. 90, 94 N. Y. S. 946.

7. Accuracy of such accounts not open to question later. Consolidated Fruit Jar Co. v. Wisner, 103 App. Div. 453, 93 N. Y. S. 128; Bandman v. Finn [N. Y.] 78 N. E. 175; Snow v. Griesheimer [Ill.] 77 N. E. 110.

8. Bandman v. Finn [N. Y.] 78 N. E. 175.

9. Insufficiency of amount paid. Kinney v. Brotherhood of American Yeomen [N. D.] 106 N. W. 44. The **retention** of an amount paid on an accord but not sufficient to satisfy it will not estop plaintiff from asserting that there is no executed accord. Id.

10. Amount dne certain, payment of a less sum. Snow v. Griesheimer [Ill.] 77 N. E. 110. Payment of a sum less than due not a satisfaction unless additional security given. Bandman v. Finn [N. Y.] 78 N. E. 175. Mere naked receipt for sum less than specific amount due not a discharge or satisfaction. Prudential Ins. Co. v. Cottingham [Md.] 63 A. 359.

11. The conversion of the proceeds of certain notes by agent did not subject him to action by the plaintiff, where the latter had been satisfied by settlement with the principal. Chicago Herald Co. v. Bryan [Mo.] 92 S. W. 902.

12. El Paso & S. R. Co. v. Darr [Tex. Civ. App.] 15 Tex. Ct. Rep. 145, 93 S. W. 166.

13. Chicago Herald Co. v. Bryan [Mo.] 92 S. W. 902; El Paso & S. R. Co. v. Darr [Tex. Civ. App.] 15 Tex. Ct. Rep. 145, 93 S. W. 166.

14. El Paso S. R. Co. v. Darr [Tex. Civ. App.] 15 Tex. Ct. Rep. 145, 93 S. W. 166.

15. Although oral testimony showed the payment to be a mere gratuity. El Paso & S. R. Co. v. Darr [Tex. Civ. App.] 15 Tex. Ct. Rep. 145, 93 S. W. 166.

16. Hoerger v. Citizen's St. R. Co. [Ind. App.] 76 N. E. 328.

17. Snow v. Griesheimer [Ill.] 77 N. E. 110.

18. See 5 C. L. 21.

19. City of Spokane v. Costello [Wash.] 84 P. 652. In a suit on a mortgage for the balance due after sale of land, a defense of conversion of the mill, because a $1,200 mill was sold for $700 is equivalent to a plea of accord and satisfaction. Aultman & Taylor Co. v. Meade [Ky.] 89 S. W. 137.

20. Gossett v. Southern R. Co. [Tenn.] 89 S. W. 737.

21. Rutan v. Huck [Utah] 83 P. 833.

must be alleged and cannot be shown under a general issue.[22] In an action for injuries where defense was a release, the reply, by failing to allege that either party to the settlement had rescinded it or to give any good ground for rescission, was bad on demurrer.[23] A departure from the plea of an account stated to a plea of accord and satisfaction is the substitution of a new ground of defense which will be struck in district court on appeal from county court for failure to plead below.[24] A settlement and stipulation for discontinuance should be introduced before case is moved for trial and jury impaneled.[25] If the validity and fairness of a settlement is challenged by attorneys for plaintiff at the proper time of its introduction, namely when case is called for trial, the court, by reference or otherwise, should ascertain the facts forthwith and then make such order as seems advisable.[26] General settlement is an affirmative defense with burden of proof on defendant.[27] Likewise, in impeaching a settlement, burden of proof rests on assailant.[28] Where the facts in evidence as to an alleged accord and satisfaction are undisputed and ascertained, their legal effect is purely a question of law and should not have been submitted to a jury.[29] The issue of fraud in procuring a settlement is a question for the jury merely as to whether the facts alleged as fraud were true and not whether fraud had actually been practiced,[30] but the question as to credibility of witness in establishing fraud as to a release is exclusively for jury.[31] To establish the defense of an accord and satisfaction,[32] or to show fraud in the procuring of a settlement, made deliberately,[33] the proof must be clear and unequivocal. Oral evidence is admissible to prove accord and satisfaction for a sum less than originally contracted for in a written lease,[34] or as to what was the intention of the parties to a release.[35] If on a motion to set aside a verdict, the plaintiff introduces affidavits to impeach fairness and honesty of a settlement, defendant should be allowed to introduce counter affidavits.[36] Where defense in an action upon a compromise settlement is that it was procured by threats and intimidation, evidence as to reputation of claimant in the vicinity, whether peaceable or otherwise, is admissible.[37]

22. Johnson v. Berdo [Iowa] 106 N. W. 609.

23. A pleading that an oral agreement for a release was incorrectly reduced to writing presents no ground for rescission, in the absence of any showing of mental incapacity to make release, or other disability, or incorrect reading of its contents, or a valid excuse for not reading it, or any showing that he could not, or was prevented from, understanding the contents of the release. Hoerger v. Citizens' St. R. Co. [Ind. App.] 76 N. E. 328.

24. Bankers' Union of the World v. Favalora [Neb.] 102 N. W. 1013.

25, 26. Kuehn v. Syracuse Rapid Transit R. Co. [N. Y.] 76 N. E. 589.

27. Johnson v. Berdo [Iowa] 106 N. W. 609; Mitterwallner v. Supreme Lodge, Knights and Ladies of the Golden Star, 109 App. Div. 165, 95 N. Y. S. 1090; Kinney v. Brotherhood of American Yeomen [N. D.] 106 N. W. 44. Burden on party alleging it. Bray v. Bray [Iowa] 103 N. W. 477.

28. For mistake or fraud. Johnson v. Berdo [Iowa] 106 N. W. 609; Russell v. Stewart [Ark.] 94 S. W. 47. For fraud and duress. Billau v. Kern [Iowa] 107 N. W. 307.

29. Canton Union Coal Co. v. Parlin & Orendorff Co., 117 Ill. App. 622.

30. Pace v. Paducah R. & Light Co. [Ky.] 89 S. W. 105. Where plaintiff testified that he had not signed a release and had never seen it before it was shown to him on the trial, a charge to the jury that if defendant had falsely and fraudulently represented to plaintiff that said lease was a different instrument, and that in reliance upon such false and fraudulent statements he had executed it, their verdict must be for plaintiff, was not warranted by the evidence. St. Louis S. W. R. Co. v. Demsey [Tex. Civ. App.] 13 Tex. Ct. Rep. 961, 89 S. W. 786.

31. Rockwell v. Capital Traction Co., 25 App. D. C. 98.

32. Observance of condition as to retention of check must have been insisted upon and proof must not admit of the inference that the debtor intended that his creditor might keep the money tendered, in case he did not assent to the condition upon which it was offered. Canton Union Coal Co. v. Parlin & Orendorff, 117 Ill. App. 622.

33. Judson v. Bowser [Ky.] 91 S. W. 727.

34. Snow v. Griesheimer [Ill.] 77 N. E. 110.

35. That the release of one wrongdoer was not to apply to others. El Paso & S. R. Co. v. Darr [Tex. Civ. App.] 15 Tex. Ct. Rep. 145, 93 S. W. 166.

36. Kuehn v. Syracuse Rapid Transit R. Co. [N. Y.] 76 N. E. 589.

37. Gering v. School Dist. No. 28, Cass County [Neb.] 107 N. W. 250.

Declarations of parties at a meeting of school electors where resolutions accepting a compromise were adopted, tending to show that they were intimidated are properly receivable in evidence as part of the res gestae.[38]

ACCOUNTING, ACTION FOR.

§ 1. Nature of Remedy and Jurisdiction of Courts (19).
§ 2. Persons Liable and Entitled to Accounting (20).
§ 3. Practice and Procedure (21). Parties (21). Pleading (21). Evidence (22). Decree for Accounting, Reference (22).
§ 4. Requisites, Substance, and Statement of the Account (22).

This topic includes only suits in equity to obtain an accounting and equivalent legal remedies. The liability of fiduciaries to account is treated in topics dealing with their rights and liabilities.[39]

§ 1. *Nature of remedy and jurisdiction of courts.*[40]—The right to an accounting and discovery being an equitable one is incidental to some principal ground upon which equity jurisdiction is based.[41] To entitle a complainant to this remedy, the existence of mutual [42] or complicated accounts,[43] a fiduciary [44] or joint contract relation imposing the duty to account,[45] fraud [46] or other condition rendering legal remedies inadequate,[47] must be shown. Equity will in many cases re-

38. Remarks of those leaving a meeting, that they left because they expected trouble over the resolution. Gering v. School Dist. No. 28, Cass County [Neb.] 107 N. W. 250. Evidence that a creditor sued out an attachment on his debtor on failure to pay a note, for which debtor claimed he could put him in jail, followed by a settlement wherein the creditor agreed to receive less than amount due and dismiss suit will justify a finding that it also included the matter of abuse of process which was subject of present suit. Wright v. Anderson [Mass.] 77 N. E. 704.

39. See Brokers, 5 C. L. 445; Guardianship, 5 C. L. 1603; Trusts, 6 C. L. 1736, and similar topics.

40. See 5 C. L. 22.

41. Brown v. Equitable Life Assur. Soc., 142 F. 835.

42. Plaintiff conveyed mortgaged land to defendant as security for a debt and took back a contract of reconveyance. Upon foreclosure of the mortgage it was agreed that plaintiff should not redeem but that defendant should purchase the certificate of sale, take a sheriff's deed thereon, sell the farm and account to plaintiff for the proceeds after deducting the amounts due him. Defendant sold the farm but refused to account. Held, there being mutual claims between the parties involving rents, insurance, etc., arising out of the transaction, plaintiff was entitled to an accounting. Chaffee v. Conway, 125 Wis. 77, 103 N. W. 269. The fact that the trial court held the issues cognizable in equity on the ground that the relation of the parties was that of mortgagor and mortgagee did not alter the subject of inquiry as to the accounting which included all the mutual claims. Id.

43. In suit by a county against its officer, held, accounts not mutual or complicated. Hulsey v. Walker County [Ala.] 40 So. 311. The mere fact that it was difficult to ascertain the amount due without an accounting held insufficient to justify accounting. Id. In determining whether equity should take jurisdiction of a case involving legal rights only on the ground of the intricacy or complexity of the questions involved, the test is, are the issues so numerous and so distinct, and the evidence to sustain them so variant, technical, and voluminous, that a jury is incompetent to intelligently deal with them, and come to a final conclusion. Daab v. New York, etc., R. Co. [N. J. Eq.] 62 A. 449.

44. Where an attorney in fact occupied a position of trust and confidence and an accounting between him and his principals involved a complicated statement of accounts and required a discovery, the proceeding was within the jurisdiction of equity. Wilson v. Miller [Va.] 51 S. E. 837.

45. Equity has jurisdiction to direct an accounting against one of two joint promoters of a corporation who refuses to share the profits with his associate as per contract. Boice v. Jones, 106 App. Div. 547, 94 N. Y. S. 896. A bill for an accounting will lie where under a contract there is a mutual duty on both parties to account and where the bill also prays for a discovery. Stitzer v. Fonder [Pa.] 63 A. 421. Defendant having agreed to furnish the money and plaintiff his services for the execution of contracts to be entered into by the parties for municipal and government work, plaintiff to have, in addition to a salary, a certain per cent of the profits, plaintiff was entitled to an accounting at the termination of the contract. Id.

46. A bill for an accounting does not show equity jurisdiction on the ground of fraud by allegations that defendant in making settlements with complainant endeavored to deceive him as to the amount of his earnings it appearing by the bill that complainant was not deceived by the representations but protested against them during the course of the settlements. Daab v. New York, etc., R. Co. [N. J. Eq.] 62 A. 449.

47. A complainant claiming an accounting because of the intricacy and complexity

fuse an accounting asked merely because of the complexity of the questions involved until it has been demonstrated by actual test that a court of law cannot do justice in the case.[48] That complainant has a right to a discovery [49] or that the bill prays for an accounting [50] is not controlling.

§ 2. *Persons liable and entitled to accounting.*[51]—Under conditions recited in the preceding section,[52] a party is liable to an accounting [53] or entitled thereto [54] in the absence of any statutory prohibition,[55] or laches,[56] or other inequitable conduct on the part of complainant.[57] The owner of a policy of life insurance issued on the mutual plan, by a company controlled by its stockholders, and entitling the holder thereof to share in the surplus of the company does not stand in such fiduciary relation to the company as will entitle him to maintain a suit in equity for an accounting and the appointment of a receiver based on the alleged mismanagement and misappropriation of the accumulated funds.[58] Equity looks with disfavor upon an application for an accounting on the ground of the intricacy of the case where

of the accounts must do more than show that the case might prove intricate and complex in a court of law. He must show that the remedy at law is in fact inadequate. Daab v. New York, etc., R. Co. [N. J. Eq.] 62 A. 449. In determining the adequacy of the machinery of courts of law to accomplish justice, the legal machinery of to-day must be considered and not that of the past. Id. Remedy cannot rest solely on mere breach of contract. Brown v. Equitable Life Assur. Soc., 142 F. 835. A mere tortious conversion of timber though under cover of government permits cannot be made the basis for an accounting. United States v. Bitter Root Development Co., 200 U. S. 318, 50 Law Ed. —. Failure to pay royalties for the manufacture of patented articles does not give the right to an accounting in absence of any trust or fiduciary relation. Moore v. Coyne & D. Mfg. Co., 98 N. Y. S. 892. That it may be necessary to take an account of all articles sold is not sufficient. Id.

48. Unless the delay will cause irremediable damage. Daab v. New York, etc., R. Co. [N. J. Eq.] 62 A. 449.

49. The jurisdiction of equity to decree an accounting cannot be sustained on the ground that the complainant has a right to a discovery where complainant waives an answer under oath as authorized by Laws 1867, p. 166, and Laws 1902, p. 517, § 19, and submits no interrogatories to be answered under oath electing to have the answer stand as a mere pleading. Daab v. New York, etc., R. Co. [N. J. Eq.] 62 A. 449. The mere fact that the bill asks for a discovery is not sufficient. Brown v. Corey [Mass.] 77 N. E. 838.

50. The primary rights of a complainant being strictly legal the jurisdiction of equity to compel an accounting cannot be sustained merely because the bill prays for an accounting. Daab v. New York, etc., R. Co. [N. J. Eq.] 62 A. 449.

51. See 5 C. L. 23.

52. See ante, § 1.

53. A mortgagee agreed to use the proceeds of the mortgage in payment of a claim secured by a mortgage held by a bank against a third person and it was agreed that upon such payment the mortgaged chattels should be returned to the third person. By reason of the failure of the mortgagee to apply the proceeds as agreed, the bank sold the mortgaged chattels to satisfy its claim. Held, the mortgagee was bound to account to the mortgagor for the amount of the mortgage with interest. Bullis v. Farmers' State Bank [Mich.] 13 Det. Leg. N. 85, 107 N. W. 700.

54. Where a mortgagee forcibly took possession and received the profits of a business in the possession of the holder of a prior unrecorded mortgage, the latter was entitled to an accounting. Martin v. Sexton, 112 Ill. App. 199.

55. Laws N. Y. 1892, p. 1958, c. 690, § 56, expressly prohibiting the direction of an accounting by an insurance company except upon application of, or approval by, the attorney general is a part of the contract of every policy holder of a New York company and he is bound thereby though he be a citizen of a foreign state. Brown v. Equitable Life Assur. Soc., 142 F. 835.

56. Complainant in accounting for fees realized by defendant in prosecuting government claims was not guilty of laches where suit was brought within two years from the making of the only government appropriation which exceeded defendant's expenses in the business. Waggaman v. Earle, 25 App. D. C. 582.

57. See Note, Accounting for proceeds of illegal business, 5 C. L. 23, n. 12. That one of two joint promoters of the pooling of certain mills being himself a mill owner concealed from the other mill owners that he had an interest in the promotion fees did not necessarily deprive him of the right to an accounting against his co-promoter for such profits. Boice v. Jones, 106 App. Div. 547, 94 N. Y. S. 896.

58. Brown v. Equitable Life Assur. Soc., 142 F. 835. The charter of a life insurance company provided that after the payment of certain dividends on the capital stock, expenses, etc., the receipts of the company should be accumulated and that each policy holder should be credited with an equitable share of the surplus according to principles and methods to be adopted by the company. Held, a policy holder did not have such interest in the surplus before apportionment nor did he sustain such trust relation with respect thereto as would enable him to compel an accounting, or to control the discretion of the company in making an equitable apportionment. Id.

complainant has himself been instrumental in bringing about the complexity on which he bases his prayer.[59]

§ 3. *Practice and procedure.*[60] *Parties.*[61]—The necessity for the joining of parties in accounting will usually depend upon their interest in the controversy.[62] In an action for an accounting brought by a mortgagor against the mortgagee after the discharge of the mortgage, and based on an agreement on the part of the mortgagee to apply the proceeds of the mortgage for a specified purpose, the wife of the mortgagor who joined in the mortgage and others who may have released their interest in the premises are not necessary parties, the mortgage not being attacked and no interests of these parties being litigated.[63]

Pleading.[64]—The bill must show equity.[65] Mere demand for an accounting cannot change the nature of the action.[66] A bill against a broker for an accounting for money intrusted to him for stock investments must show that there was a fiduciary relation between the parties,[67] or that the account is so complicated that it cannot be conveniently taken in an action at law.[68]

59. Where complainant allowed defendant to make inadequate weekly settlements with him for five years. Daab v. New York, etc., R. Co. [N. J. Eq.] 62 A. 449.

60. See 5 C. L. 23.

61. See 5 C. L. 24.

62. In an action by a corporation against its secretary and treasurer to recover realty which defendant had been employed to save from foreclosure proceedings but the title to which he had taken in his own name at sheriff's sale and for an accounting to determine rents, expenses, etc., neither plaintiff's stockholders nor the loan company from which defendant obtained the money with which to make the purchase, nor the loan brokers, were necessary parties. Fricker v. Americus Mfg. & Imp. Co. [Ga.] 52 S. E. 65. But where defendant claimed credit on account of an amount which he had agreed to pay to the loan brokers and plaintiff charged collusion between defendant and the brokers and that defendant had given the brokers a mortgage on the property which included unlawful charges and plaintiff prayed that the brokers be made parties, for full relief, and that the mortgage be canceled, the brokers should have been made parties defendant. Id. Where property of one corporation was transferred to another for consolidation purposes and the president of the first corporation received as a consideration therefor stock of the new corporation for the benefit of the stockholders of the old corporation, in a suit for an accounting against the president, held, both the old corporation and its stockholders were necessary parties. Knickerbocker v. Conger, 110 App. Div. 125, 97 N. Y. S. 127. In determining between the parties to an accounting whether defendant should be allowed credit for payments made by him, a corporation to whom the payments were made is not a necessary party. Complaint not demurrable. Fricker v. Americus Mfg. & Imp. Co. [Ga.] 52 S. E. 65. Where certain promoters of a corporation agreed with another person merely to keep an account of the profits resulting from the promotion and to pay him a certain per cent of all net profits they might personally receive thereunder after deducting and paying him a sum previously advanced by him, such person was not a necessary party to an action for an accounting between the promoters. Boice v. Jones, 106 App. Div. 547, 94 N. Y. S. 896. Where in an action for an accounting against a surviving partner it was necessary to set aside an agreement made with him whereby all the assets were assigned to him and he assumed all liabilities, all parties to such agreement were necessary parties. Smith v. Irvin, 108 App. Div. 218, 95 N. Y. S. 731.

63. Bullis v. Farmers State Bank [Mich.] 13 Det. Leg. N. 85, 107 N. W. 700.

64. See 5 C. L. 24.

65. A partner who has taken a conveyance of the entire interest of his co-partner and assumed the debts of the firm as well as part of an individual indebtedness of his co-partner is not entitled to an accounting in equity from the co-partner, no fraud or misrepresentation being shown. Durham v. Edwards [Fla.] 38 So. 926. It is not sufficient to aver that it is difficult to ascertain the amount due without an accounting. Hulsey v. Walker County [Ala.] 40 So. 311.

66. Complaint that plaintiff deposited with defendant stock as collateral, that defendant refused to sell the stock on plaintiff's request and inability to pay the debt but converted the same and which demands that the amounts of the debt and of the stock and dividends be ascertained and that plaintiff recover the difference, does not show necessity for an accounting. Brightson v. Claflin Co., 108 App. Div. 284, 95 N. Y. S. 751. That the bill asks a discovery is not alone sufficient. Brown v. Corey [Mass.] 77 N. E. 838.

67. Allegations that defendant agreed to purchase stocks on commission, that plaintiff relied on defendant's superior knowledge, that the number of sales and purchases was large, that plaintiff has never received a statement of his account and that it was impossible to state how much the defendant owed held to show merely the ordinary relation of debtor and creditor and not a fiduciary relation. Brown v. Corey [Mass.] 77 N. E. 838. That plaintiff relied on defendant's experience in regard to trading in stocks and employed defendant in order to avail himself of such experience did not show a sufficient fiduciary relation. Id.

68. Allegations that the number of pur-

While the prayer may be considered in determining the intent of the pleader it cannot control a cause of action clearly alleged,[69] but if insufficient may be amended so as to demand further relief consistent with the cause of action stated.[70] An amended complaint merely amplifying the allegations of the original one and praying certain steps within the equity powers of the court necessary to enable it to grant the same relief prayed for in the former pleading is not objectionable as stating a different cause of action.[71]

The fact that the complaint characterizes the relation of the parties as a partnership and there is proof of only a joint venture does not deprive the plaintiff of the right to an accounting where the complaint also refers to the transaction as a joint venture and there is no claim made of a general partnership.[72] That the complaint asks that an agreement be set aside, does not make it demurrable for improper joinder of causes where such relief is necessary in order to entitle plaintiff to an accounting.[73] An accounting on a complaint based on the existence of a contract between plaintiff and defendants jointly cannot be maintained by proof of a contract between one of the defendants and plaintiff and the other defendant jointly.[74]

Evidence.[75]—In a suit for an accounting, books used by the parties for keeping their joint accounts are admissible in evidence.[76]

Decree for accounting, reference.[77]—The auditor's report should be construed in the light of the pleadings in determining whether it will authorize the decree.[78]

§ 4. *Requisites, substance, and statement of the account.*[79]—An item allowed by an auditor not being on its face unreasonable, the burden is upon the party objecting thereto to show the impropriety of its allowance.[80]

ACCOUNTS STATED AND OPEN ACCOUNTS.

§ 1. Nature and Elements of the Several Kinds of Accounts (22).
§ 2. Binding Effect, Rights, and Liabilities (23).
§ 3. Remedies on Account Stated (24).
§ 4. Remedies on Open Accounts (24).

§ 1. *Nature and elements of the several kinds of accounts.*[81]—An account stated results from an agreement on a balance due from previous transactions or

chases and sales was very great and that for such reason it was impossible to state how much defendant owed, held not sufficient to show such complication. Brown v. Corey [Mass.] 77 N. E. 838.

69. North Side Loan & Bldg. Soc. v. Nakielski [Wis.] 106 N. W. 1097. The mere fact that the prayer asked only for a money judgment and did not demand all the activities of the court to which the cause of action stated by plaintiff entitled him did not oust equity jurisdiction. Id. In an action for an accounting where each party presents his respective items of credit and a balance is found for defendant, judgment is properly rendered in his favor though no affirmative judgment is demanded in his answer. Consolidated Fruit Jar Co. v. Wisner, 110 App. Div. 99, 97 N. Y. S. 52. See Note, Necessity for Cross-bill Equity, 5 C. L. 1166, n. 45.

70. Amended to demand reformation of a bond, discovery, and accounting. North Side Loan & Bldg. Soc. v. Nakielski [Wis.] 106 N. W. 1097.

71. North Side Loan & Bldg. Soc. v. Nakielski [Wis.] 106 N. W. 1097.

72. Boice v. Jones, 106 App. Div. 547, 94 N. Y. S. 896.

73. Smith v. Irvin, 108 App. Div. 218, 95 N. Y. S. 731.

74. Held failure of proof. Hartman v. Belden, 38 Wash. 655, 80 P. 806.

75. See 3 C. L. 26.

76. Stitzer v. Fonder [Pa.] 63 A. 421.

77. See 5 C. L. 24. So construed held to authorize the decree. Linder v. Whitehead [Ga.] 53 S. E. 588.

78. The prayer in a bill charging defendant with receiving rents asking that an account be taken and that defendant be required to pay over the sum found in his hands asks merely for the net income so that a decree "according to the prayer" will take account of proper expenditures made by defendant. Smith's Adm'r v. Smith [Vt.] 61 A. 558.

79. See 5 C. L. 25.

80. Waggaman v. Earle, 25 App. D. C. 582. It appearing from the report of a master that there was evidence tending strongly to support his conclusions, the court will not review the evidence filed by him with the clerk. Smith's Adm'r v. Smith [Vt.] 61 A. 558. Where there is no report of the evidence the master's findings of fact must stand unless upon the face of the report they are inconsistent with other findings and are plainly wrong. Crane v. Brooks [Mass.] 75 N. E. 710.

81. See 5 C. L. 25.

from an acknowledgment of an indebtedness shown by a statement of account.[82] It cannot of itself create a debt but must be founded on previous transactions of a monetary character creating the relation of debtor and creditor,[83] and must be based on a valid claim.[84] The test of an account stated is that the minds of the parties meet as to the amount due.[85] The giving of a note for the amount apparently due on an account is only prima facie evidence of an account stated.[86]

The retention of a statement of account and failure to object thereto may raise an implied promise to pay the amount claimed,[87] but objection to an account made to an authorized agent of the creditor is sufficient.[88]

§ 2. *Binding effect, rights, and liabilities.*[89]—While an account stated is binding upon the parties thereto,[90] it is not in general conclusive but merely establishes prima facie the correctness of the items included therein.[91] It does not conclude as to matters not contemplated thereby,[92] nor in the absence of a previous existing[93] valid debt.[94] Upon a complete settlement between the parties, any doubtful claim for interest falls with the principal debt.[95] Familiarity with the items of an account is not essential to a liability on an account stated.[96] An account may be restated,[97] where the facts imply fraud.

82. Oberndorfer v. Moyer [Utah] 84 P. 1102.

83. Chase v. Chase [Mass.] 78 N. E. 115.

84. Usurious charges and claims for liquor sold. Peebles v. Yates [Miss.] 40 So. 996.

85. New York Board of Fire Underwriters v. Boughan & Co., 97 N. Y. S. 402. Where defendants never agreed to the account as presented but approved the bills at a smaller sum to which plaintiff did not assent there was no account stated. Id. A recovery cannot be had as on an account stated on a mere promise to pay whatever is due. Bartholomew v. Shepperd [Tex. Civ. App.] 93 S. W. 218. A mere **statement by a broker** who carried stocks on margin for plaintiff's assignor that there was a balance in the latter's favor did not show the existence of a defined cash debt in the absence of authority to sell the stock and a sale thereof by the broker. Egner v. Strong, 98 N. Y. S. 753. Where plaintiff wrote letters to defendant containing an itemized account and claiming a certain sum and defendant acknowledged receipt thereof and promised to pay such sum, this was sufficient to constitute an account stated. Oberndorfer v. Moyer [[Utah,] 84 P. 1102.

86. Maker may show that it was not given in acknowledgment of the correctness of the account and in settlement thereof. Kneeland v. Pennell, 96 N. Y. S. 430.

87. Evidence of dealings between plaintiffs as partners and defendant, a submission of a statement of account, demand for payment, no reply from defendant, etc., held to show an account stated. McMullin v. Reid [Pa.] 62 A. 924. The mere fact that defendant retained bills made out to him long after the sale of the goods to a third person does not establish an account stated, especially where bills for the same claims had been rendered to the purchaser at the time of the transactions. Brush & Stephens Co. v. Ross, 99 N. Y. S. 796. Receipt by an attorney of a **claim for collection,** a letter written by the attorney to the debtor stating the amount of the claim, that it had been placed with him for collection and requesting an answer before bringing suit, and failure to answer, is not proof of an account stated. Frank v. Lynch, 90 N. Y. S. 408.

88. Facts held to show that plaintiffs had made certain third persons their agents to adjust the matters in controversy and it was error to exclude evidence of objections made by defendants to them. Allen v. Uplinger [Minn.] 107 N. W. 1131.

89. See 5 C. L. 27.

90. A trustee having charged himself in his statement of account with having received the equivalent of a specified amount in cash, it is proper in an accounting against him, to charge him with having received such amount in cash. Jarrett v. Johnson, 116 Ill. App. 592.

91. Peebles v. Yates [Miss.] 40 So. 996.

92. Did not preclude recovery on a note made after the accounting but for different services. Paul v. Dickinson [Mass.] 76 N. E. 954.

93. Only determines the amount of the debt but does not create one. Chase v. Chase [Mass.] 78 N. E. 115. Where plaintiff at the time he paid his account with defendant was ignorant of defendant's failure to credit him with certain payments previously made he was not concluded by the settlement in an action for the money not credited. Seiber v. Johnson Mercantile Co. [Tex. Civ. App.] 90 S. W. 516.

94. In a suit to enjoin a foreclosure, a bill which alleged that the account stated included illegal charges for usury, for liquor illegally sold and for goods sold at exhorbitant prices sufficiently showed that the account was not founded on a valid debt. Peebles v. Yates [Miss.] 40 So. 996.

95. A complete settlement having been made between the parties, and no charge of interest ever having been made any possible claim that might have been made for interest fell with the principal debt when it was satisfied. Crane v. Brooks [Mass.] 75 N. E. 710.

96. One who, on consideration, has agreed with another to pay the future balance of his open account to a third person is liable to pay the balance found due upon investigating its accuracy. Runkle & Fouse v. Kettering, 127 Iowa, 6, 102 N. W. 142.

97. That defendant had sold complain-

§ 3. *Remedies on account stated.*[98]—The complaint may contain one count on an open account and another on an account stated.[99] If an itemized account is stated it must be set out as itemized in a declaration thereon.[1] In an action on an account stated defendant cannot show under a general denial that plaintiff is indebted to him for matters altogether outside the items embraced in the account.[2] An instruction that if an account was rendered and defendant made no objection for a period of three months, the account became an account stated and its items could not be inquired into, is not a charge as to matters of fact.[3] In an action to recover money paid but not credited on plaintiff's account thereafter otherwise settled, it is no defense that defendant furnished plaintiff with statements of his account which showed that he never received the credits contended for.[4]

§ 4. *Remedies on open accounts.*[5]—Book debt will not lie for a claim never entered as a charge on any book of account.[6] A state of demand upon a book account in the small-cause court in New Jersey must show the nature of the demand and the parties to the account.[7] Where the complaint is a sworn account, the action will lie though the account is made out against a third person where it is plain from the verification that the account is asserted against the defendant.[8] A statement in the complaint as originally filed that the account was verified need not be repeated where the complaint is amended.[9]

Some jurisdictions allow commissions on the sale of real estate to be recovered in an action of book account;[10] others do not.[11] A demand is not sufficient unless made on the account in suit.[12] In some jurisdictions the introduction of a verified account is prima facie proof,[13] and such account is not too indefinite because of the use of trade terms familiar to the trade,[14] and an account is admissible in evidence though it is not within the statute making certain accounts prima facie,[15] nor does the fact that an account not within the statute is verified under it make it inadmissible.[16] Points on evidence[17] and questions for the jury [18] are given in the notes.

ant's cotton for 8 to 9 1-2 cents but given complainant credit for only 7 cents held to imply fraud sufficient to authorize a restatement. Peebles v. Yates [Miss.] 40 So. 996.

98. See 5 C. L. 28.

99. The complaint containing one count on an open account and one on an account stated for the same cause of action a motion to compel election was properly denied. Oberndorfer v. Moyer [Utah] 84 P. 1102.

1. A special exception to the petition that the account is not itemized is good in an action on an account stated as well as in an action on an open account. Bartholomew v. Shepperd [Tex. Civ. App.] 93 S. W. 218.

2. Uhlhorn v. Hovey, 97 N. Y. S. 1040.

3. Cusick v. Boyne [Cal. App.] 82 P. 985.

4. Seiber v. Johnson Mercantile Co. [Tex. Civ. App.] 90 S. W. 516. In a suit to recover money paid to defendant but through fraud or mistake not credited to plaintiff's account, evidence as to drinking habits of defendant's bookkeeper should have been admitted. Id.

5. See 5 C. L. 28.

6. Reiley v. Torkomian [Conn.] 63 A. 516. Items of indebtedness for personal services copied after the action was brought, from a piece of paper into a book which had never before been used as an account book were not book entries under Gen. St. 1902, § 981, allowing in evidence the entries of the parties in their respective books. Id.

7. Where account consisted merely of dates, figures and initials. Weill v. Jacoby [N. J. Err. & App.] 61 A. 389.

8. Held no variance. Pelican Lumber Co. v. Johnson Mercantile Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 917, 89 S. W. 439.

9. Fulton v. Sword Medicine Co. [Ala.] 40 So. 393.

10. Held a proper book charge. Reynolds-McGinness Co. v. Green [Vt] 61 A. 556.

11. Not properly a book charge under the statute. Sayers v. Walker [Del.] 61 A. 973.

12. Held error to admit evidence of a demand made by plaintiff of the defendant for money without proof as to the account on which the money requested was to be applied. Ehrman v. Whelan [Miss.] 40 So. 430.

13. The introduction of an account duly verified under Code 1896, § 1804, entitled plaintiff to judgment where defendant filed no affidavit denying its correctness and offered no evidence. Baker v. Haynes, Henson & Co. [Ala.] 40 So. 968.

14. A verified account offered in evidence under Revisal 1905, § 1625, was not too indefinite because of trade terms understood in the trade, showing the number and kind of articles, catalogue number, price, and discounts. Claus-Shear Co. v. Lee Hardware House [N. C.] 53 S. E. 433.

15, 16. Standifer v. Bond Hardware Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 770, 94 S. W. 144.

17. Evidence that defendant had admit-

ACCRETION; ACCUMULATIONS, see latest topical index.

ACKNOWLEDGMENTS.

§ 1. Nature, Office, and Necessity (25).
§ 2. Officers Who May Take (25).
§ 3. Taking and Making Acknowledgments (26).
§ 4. Certificate and acknowledgment (26).
§ 5. Authentication of Officers' Authority (26).
§ 6. Operation and Effect (26).
§ 7. Defects and Invalidities (27).

§ 1. *Nature, office, and necessity.*[19]—Unless required by statute,[20] acknowledgment is not needed except to cut off dower or homestead rights [21] to render the instrument self-proving [22] or to admit it to record or registry.[23] In Alabama acknowledgement is a judicial act and not collaterally assailable,[24] but the majority hold otherwise as to its nature.[25]

§ 2. *Officers who may take.*[26]—The officers are specified by the various statutes and others may not act.[27] Acknowledgment before a de facto officer is valid.[28] Interest is often regarded as a disqualification,[29] but a notary has been held not disqualified to take an acknowledgment because he is in the employ of a party to the instrument or because he is to be paid his notarial fee out of the proceeds of the deed acknowledged.[30]

ted the amount claimed and offered a less sum was admissible. Baker v. Haynes, Henson & Co. [Ala.] 40 So. 968. Where in an action on a written order for goods the account is verified, the order is admissible without further proof, there being no plea of non est factum. Fulton v. Sword Medicine Co. [Ala.] 40 So. 393. Plaintiff could use a bill of particulars in testifying to the amount due on an account after testifying that it had been copied from his books and that it was correct. Snyder v. Patton & Gibson Co. [Mich.] 12 Det. Leg. N. 1041, 106 N. W. 1106. In an action on account for services rendered it is proper to permit plaintiff to state his custom in keeping accounts. Mullenary v. Burton [Cal. App.] 84 P. 159.

18. Submission to jury of question whether a payment was accepted in full or on account held proper. Snyder v. Patton & Gibson Co. [Mich.] 12 Det. Leg. N. 1041, 106 N. W. 1106. Where in an action on account plaintiff made different claims by bills of particulars the statements were not conclusive but were properly submitted to the jury. Id. In an action on account instruction that there was no dispute about the amount of certain items but there was a dispute as to whether it had been paid was proper though a receipted statement on which payment was admitted included such items. Id.

19. See 5 C. L. 29.

20. No deed of conveyance effective unless duly acknowledged and certified under Rev. St. 1901, par. 725. Lewis v. Herrera [Ariz.] 85 P. 245.

21. See Dower, 5 C. L. 1045; Homestead, 5 C. L. 1696.

22. Objection that an acknowledgment before a justice was without statutory certificate is untenable where execution was proved by common-law method. Martin v. Martin [Neb.] 107 N. W. 580. Where the original deed was offered though lacking acknowledgment, the bill of exceptions must show a lack of proof of execution to present error in excluding it. Marsh v. Bennett [Fla.] 38 So. 237. See, also, Evidence, 5 C. L. 1342.

23. See Notice and Record of Title, 6 C. L. 819, N. 14 et seq.

24. Chattanooga Nat. Bldg. & L. Ass'n v. Vaught [Ala.] 39 So. 215.

25. 1 Am. & Eng. Enc. Law [2d Ed.] 487.

26. See 5 C. L. 30.

27. By Code 1896, § 993, notaries public may take acknowledgments of conveyances. Loyd v. Oates [Ala.] 38 So. 1022. Police magistrate is not a judge or other officer within laws 1896, p. 609, c. 547, § 248. Tully v. Lewitz, 98 N. Y. S. 829.

28. If at the expiration of his term, he continues to perform the duties of his office, holding himself out to the public as a notary he becomes an officer de facto, whose acts are legal and binding. An acknowledgment taken seven months after expiration of term with no official holding out in meantime is not valid. Sandlin v. Dowdell [Ala.] 39 So. 279. Does not come within hold-over clause of Code 1886, § 1102, providing that notaries shall hold office for three years and until their successors are qualified. Id.

29. 5 C. L. 30, N. 13.

30. Notary was clerk of trustee and in addition to his regular salary was to receive $1.50 out of proceeds of trust deed. Scott v. Thomas [Va.] 51 S. E. 829.

NOTE. Extra compensation for securing acknowledgment: Acknowledgments taken by the grantees in trust deeds are usually held to be insufficient (German Am. Bank v. Carondelet, 150 Mo. 570, 51 S. W. 691; Rothschild v. Daughter, 85 Tex. 332, 20 S. W. 142, 34 Am. St. Rep. 811, 16 L. R. A. 719), though the fact that the notary was related by affinity or consanguinity to the grantor or grantee would not affect his competency to take the acknowledgment (Remington Co. v. Dougherty, 81 N. Y. 474; McAllister v. Purcell, 124 N. C. 262). Where the notary is the agent of one of the parties, acknowledgments taken by him have been usually

§ 3. *Taking and making acknowledgments.*[31]—The acknowledgment must be in the officer's presence.[32] It is not necessary in North Dakota to examine a wife separately or to explain the nature of the instrument,[33] but in Alabama complete absence of any examination or acknowledgment renders the certificate of acknowledgment absolutely void.[34] If one signs and acknowledges a deed in his individual capacity it suffices though he acts as an individual and also as survivor of a community.[35]

Persons who may make.[36]

§ 4. *Certificate of acknowledgment.*[37]—It should show what was the office by virtue of which the acknowledgment was taken,[38] but abbreviations of which the court judicially takes cognizance will suffice.[39] In New York the officer must expressly certify that the acknowledger is known to him to be the person described in and who executed the conveyance as an individual.[40]

By the statute of Kentucky the seal of a foreign deputy clerk of court must be attached to his signature.[41] An acknowledgment, whenever reasonably susceptible of it should be so construed as to give a reasonable meaning to all its clauses and make it legally effective.[42] The certificate will be liberally construed in view of the fact that officers who take acknowledgments are not assumed to be learned in the law.[43] Thus a recital of "execution" will include signing, sealing, and delivering.[44] A certification that she was examined separate and apart from her husband imports that the wife was present in person.[45]

§ 5. *Authentication of officers' authority.*[46]

§ 6. *Operation and effect.*[47]—Where acknowledgement is essential to make a conveyance operative it takes effect only from the time when made and not from date of the deed.[48] In Alabama an acknowledgment is a sufficient recognition and adoption of a signature.[49] Where a mortgagor acknowledges above his signature on

upheld (Penn v. Garvin, 56 Ark. 511), though some courts hold to the contrary (Sampler v. Irwin, 45 Tex. 567). But where the amount of the agent's compensation depends on his securing the acknowledgment, as in the principal case, it has been intimated that the notary would be disqualified. Havenmeyer v. Dahn, 48 Neb. 536, 67 N. W. 489, 58 Am. St. 706, 33 L. R. A. 332. A Virginia statute (Acts of 1901-2, ch. 127) validates all prior acknowledgments taken by notaries who are trustees in the deeds acknowledged, but this statute is not referred to by the court.—From 4 Mich. L. R. 300.

31. See 5 C. L. 30.

32. Certificate that wife was separately examined held to show that she was present. Sandlin v. Dowdell [Ala.] 39 So. 279.

33. Wife is there regarded as feme sole. Patnode v. Deschenes [N. D.] 106 N. W. 573.

34. Wife joining with husband in conveyance of homestead. Chattanooga Nat. Bldg. & Loan Ass'n v. Vaught [Ala.] 39 So. 215.

35. Kane v. Sholars [Tex. Civ. App.] 90 S. W. 937.

36, 37. See 5 C. L. 30.

38. Where the official character of a notary and his county appears in a part of the certificate it is unnecessary to repeat it at the end. Kane v. Sholars [Tex. Civ. App.] 90 S. W. 937.

39. The letters "N. P." are judicially known to be in common use to signify "notary public," hence "N. S. Nells, Jr., N. P." is permissible. Leech v. Karthaus, 141 Ala. 509, 37 So. 696. The letters "U. Q." meaning unum quorum affixed to the acknowledging officer's signature suffice to show his office where the person was at the time clerk of the court and so judicially known and was ex officio a justice of the quorum with authority to take acknowledgments (5 St. at L. 479; 7 St. at L. 247). McCreary v. Coggeshall [S. C.] 53 S. E. 978.

40. A mere certificate that he knew the person is bad. Carolan v. Goran, 104 App. Div. 488, 93 N. Y. S. 935.

41. Ky. St. 1903, § 502. Burt & Brabb Lumber Co. v. Wilson [Ky.] 93 S. W. 906.

42. Recordation of mortgage not rendered void by interpolation of word "who" in certificate of acknowledgment, constituting mere surplusage and not destroying sense under liberal construction. Reed v. Bank of Ukiah [Cal.] 82 P. 845.

43. Elmslie v. Thurman [Miss.] 40 So. 67.

44. But recital of "signing" without one of "delivery" is bad. Elmslie v. Thurman [Miss.] 40 So. 67.

45. Sandlin v. Dowdell [Ala.] 39 So. 279.

46, 47. See 3 C. L. 34.

48. A conveyance by deed of gift from a creditor to his wife, while he was solvent but not acknowledged until after he became insolvent was void as to his creditors. Lewis v. Herrera [Ariz.] 85 P. 245.

49. Code, § 982, requiring signature at the foot of conveyances for the alienation of land, or in case the party cannot write, the writing of his name for him with the words "his mark" written against or over

the mortgage the receipt of a full, true, perfect, and complete copy of the same, it is prima facie evidence that a statute requiring this has been observed.[50] In Alabama, the act of taking an acknowledgment is in its nature a judicial act, akin to ordinary judgments in matters of jurisdiction and attack,[51] but it may be shown that the certificate was wholly false in reciting one.[52] The certificate of the acknowledgment of a deed imparts verity and can be overcome only by clear and satisfactory proof of falsity or fraud.[53] The date of a certificate is conclusive as to the day on which the instrument was acknowledged,[54] and when of same date as the instrument itself raises the presumption that wife was examined on that day,[55] and the deed is good in the absence of fraud though the notary failed to explain to a married woman as fully as the law intends.[56] To avoid the deed, such fraud, it has been held, must be attributed to the grantees, not alone to the notary's voluntary act.[57]

§ 7. *Defects and invalidities.*[58]—An acknowledgment failing to state that the person making it was known, to the officer taking it, to be the person who executed the instrument acknowledged, is fatally defective, though stating that the notary personally knew the affiant,[59] but a mere clerical variance in matter of description will not invalidate a certificate.[60] It must with certainty state that grantors all acknowledged.[61] Burden of proof is on the one assailing an acknowledgment.[62] Objections to acknowledgments as defective cannot be raised for first time on appeal.[63] Defects may be cured by adverse possession.[64]

the same and attested by two witnesses, sufficiently complied with by executing the acknowledgment provided by Code, § 984. Loyd v. Oates [Ala.] 38 So. 1022.

50. L. 1897, c. 95, p. 250, § 2, provides that every chattel mortgage shall be void unless it appears on the instrument above the mortgagor's signature that he has received a true copy of the same. Foss v. Van Wagenen [S. D.] 104 N. W. 605.

51. Certificate may be collaterally assailed where no acknowledgment was in fact made. Chattanooga Nat. Bldg. & Loan Ass'n v. Vaught [Ala.] 39 So. 215.

52. No examination of wife was had or acknowledgment made by her. Chattanooga Nat. Bldg. & Loan Ass'n v. Vaught [Ala.] 39 So. 215.

Note: This is not in conflict with the statement as ordinarily made that an acknowledgment is not collaterally assailable [see 5 C. L. 32, n. 40].

53. Swiger v. Swiger [W. Va.] 52 S. E. 23. Testimony of grantor and his witnesses denying genuineness of his signature not sufficient where evidence is conflicting with but slight preponderance either way. Id. Facts held not to show fraud on a wife from the fact that she did not know contents of instrument, she was told to sign the statute in force not requiring that its nature be made known or explained. Patnode v. Deschenes [N. D.] 106 N. W. 573.

54. Weisiger v. Mills [Ky.] 91 S. W. 689.

55. Sandlin v. Dowdell [Ala.] 39 So. 279.

56. Cannot be shown except as fraud that it was only partial. Cason v. Cason [Tenn.] 93 S. W. 89.

57. Deed given to make good a son's misappropriation of money, the grantees however not having procured it to be made. Cason v. Cason [Tenn.] 93 S. W. 89. The grantees' mere acceptance without knowledge held not a ratification. Id.

58. See 5 C. L. 32.

59. Carolan v. Yoran, 104 App. Div. 488, 93 N. Y. S. 935.

60. A person is described as S. W. Sholars in a deed and as S. W. Sholars, Sr., in the certificate. Kane v. Sholars [Tex. Civ. App.] 90 S. W. 937.

61. NOTE. Use of "he" instead of "they." A certificate of acknowledgment, stating that the grantors, naming them separately, appeared before the notary and acknowledged that "he" executed the instrument, etc., was held insufficient to entitle the instrument to be admitted in evidence as a recorded instrument. Kane v. Sholars [Tex. Civ. App.] 90 S. W. 937.

Where an instrument is defectively acknowledged it is not entitled to be introduced as evidence of title without proof of execution. But a mere clerical error will not vitiate a certificate of acknowledgment, and the court in the case of McCardia v. Billings, 10 N. D. 373, 87 N. W. 1008, 88 Am. St. Rep. 729, where a similar state of facts existed, said "that they would construe the language of certificates of acknowledgment liberally and hold them valid if that could be done by a fair and reasonable construction of the language used," and held that the use of "he" instead of "they" was a mere clerical error. In the case of Montgomery v. Hornberger, 16 Tex. Civ. App. 28, there was a similar holding in regard to the use of "the" for "they." While the courts have been very exacting in regard to certificates of acknowledgment of married women (Sarazin v. Railroad, 153 Mo. 479; 55 S. W. 92), there seems to be no very good reason for such stringency in the principal case.—From 4 Mich. L. R. 545.

62. Action of ejectment, defendant attacking deed in plaintiff's chain of title. Loyd v. Oates [Ala.] 38 So. 1022.

63. An instrument improperly acknowledged in that two persons are referred to as "he acknowledged that he executed," objections might have been taken to its admission as a recorded instrument. Kane v. Sholars [Tex. Civ. App.] 90 S. W. 937.

64. A certificate reciting separate exam-

ACTIONS.[1]

This topic includes only questions relating strictly to actions. Causes of action and defenses,[2] and forms of action, are treated elsewhere.[3]

The creation of a new right to contract includes an appropriate remedy for the violation of the contract obligation.[4] A cause of action must exist in favor of plaintiff at the time of the commencement of the suit or it will not lie.[5] The commencement of an action at law ordinarily dates from the issuance of the summons,[6] and a suit in equity from the issuance of the process to answer plaintiff's bill.[7]

Special proceedings may be deemed actions for certain purposes [8] though not ordinarily considered as such. Actions are either civil or criminal in their nature.[9] Civil actions are either legal or equitable according to whether they are cognizable at law or in equity,[10] and, again, are in personam [11] or in rem.

Act of God; Additional Allowances; Ademption of Legacies, see latest topical index.

ADJOINING OWNERS.[12]

Every owner of lands has absolute dominion over them and may put them to any legitimate use he sees fit, and any injury resulting to adjacent premises from

ination of a wife who declared the deed to be her "act and deed . . . signed and delivered . . . without dread or fear of any person and [she] does not wish to retract it" held invulnerable after limitations had run. Milby v. Hester [Tex. Civ. App.] 15 Tex. Ct. Rep. 495, 94 S. W. 178.

1. See 5 C. L. 32.

2. See Causes of Action and Defenses, 5 C. L. 555.

3. See Forms of Action, 5 C. L. 1517.

4. A statute creating a right in a married woman to contract with her husband gives her a right to sue. Mathewson v. Mathewson [Conn.] 63 A. 285.

5. An assignor cannot maintain an action on the contract assigned though it is reassigned subsequent to the commencement of the action. Walsh v. Woarms, 109 App. Div. 166, 95 N. Y. S. 824.

6. The issuance of the original summons fixes the date of commencement though it is returned unserved and an alias summons issued. United States Oil & Gas Well Supply Co. v. Gartlan [W. Va.] 52 S. E. 524. Issuance and service of summons in suit to foreclose mortgage after plaintiff had suffered a non-suit held equivalent to commencement of new suit within the statute of limitations. Livingston v. New England Mortg. Sec. Co. [Ark.] 91 S. W. 752.

7. An amended or supplemental bill when filed relates back to the time the process to answer was issued. Columbia Finance & Trust Co. v. Furbaugh [W. Va.] 53 S. E. 468.

8. An independent proceeding commenced by a writ of certiorari is an action within § 2595, Rev. St. 1898. State v. Chittenden [Wis.] 107 N. W. 500. An order in supplemental proceedings requiring a judgment debtor to attend for examination is an order in an "action" within Code Civ. Proc., § 338, subd. 4, authorizing service anywhere in the state. Deane v. Sire, 95 N. Y. S. 556. An application for a writ of review is an action within the meaning of Code 1881, § 512, subd. 4, authorizing costs. State v. Superior Ct. of Spokane County [Wash.] 82 P. 878.

9. The presentment of an accusation against a public officer under Pen. Code, § 758, is criminal in its nature. Coffey v. Superior Ct. of Sacramento County [Cal. App.] 83 P. 580.

See, also, Appeal and Review, 5 C. L. 121; Indictment and Prosecution, 5 C. L. 1790, and topics where it is necessary to make the distinction in order to determine the procedure, as for example Bastards, 5 C. L. 412; Contempt, 5 C. L. 650; Habeas Corpus, 5 C. L. 1615; Jury, 6 C. L. 316.

10. For general matters having to do with this distinction see Equity, 5 C. L. 1144, and Forms of Action, 5 C. L. 1517. For a discussion of the question as affecting the placing of the cause of the docket or calendar see Dockets, Calendars and Trial Lists, 5 C. L. 1039, as affecting the right to a jury trial see Jury, 6 C. L. 316, and as affecting the method of pleading, see Pleading, 6 C. L. 1008. See, also, the topic dealing with the particular form of action in regard to which the question arises.

A proceeding to recover dower is an action at law. Ex parte Wallace [S. C.] 52 S. E. 873. A complaint alleging that defendant is in possession of certain lands and praying for possession and that defendant remove its tracks and cease to operate its trains thereon, alleges an action at law, and not in equity. Remsen v. New York, etc., R. Co., 97 N. Y. S. 902. Where a petition filed in the district court states facts sufficient to justify either legal or equitable relief, and prays relief that can only be granted in full in equity, it will be presumed that the petition was addressed to the equity side of the court. Ames v. Ames [Neb.] 106 N. W. 584.

11. In North Dakota an action to foreclose a mortgage is in personam, and hence within Rev. Codes 1899, § 5210, authorizing a deduction for the time defendant is absent from the state from the period of limitations. Paine v. Dodds [N. D.] 103 N. W. 931; Colonial & U. S. Mortg. Co. v. Flemington [N. D.] 103 N. W. 929.

12. See 5 C. L. 33.

such use is damnum absque injuria,[13] and such use being legal, it is immaterial with what motive he acted.[14] The owner of land has no right in the light and air coming across his neighbor's adjoining property, hence no injunction will lie to restrain an interference therewith.[15] Adjoining owners may limit the use of their property by contract.[16]

Lateral support.[17]—One excavating on his own land in a careful and prudent manner is not liable for consequential damages accruing to his neighbor.[18] He has, however, no right to remove the earth so near to the land of an adjoining owner that the latter will crumble away and fall by its own weight,[19] and in case he does so is liable for the resulting damages regardless of the degree of care or skill used to prevent them.[20] The same is true where an excavation taps a subterranean stream in such a way as to interfere with lateral support.[21] The rule applies equally to cities and their licensees excavating in or beneath streets.[22] This right of lateral support, however, extends only to the soil in its natural condition,[23] and does not protect structures placed thereon which increase the lateral or downward pressure,[24] but one re-

13. Applied to the fencing off of one's own land thereby preventing an adjoining landowner's cattle from reaching the public lands beyond. Anthony Wilkinson Livestock Co. v. McIlquam [Wyo.] 83 P. 364.

14. Anthony Wilkinson Livestock Co. v. McIlquam [Wyo.] 83 P. 364. Where one had a legal right to construct a fence thereby depriving the adjacent property of the light and air naturally passing over his land, his motive in so doing is immaterial. Koblegard v. Hale [W. Va.] 53 S. E. 793.

As to **spite fences** see note, 3 C. L. 39, n. 92.

15. Cannot maintain bill for an injunction to restrain maintenance of fence of unusual height on adjoining land on sole ground that it deprives his building of light and air coming laterally from such land. Koblegard v. Hale [W. Va.] 53 S. E. 793.

16. A board fence diminishing the light and air held to be prohibited by contract. MacGregor v. Linney, 6 Ohio C. C. (N. S.) 524.

17. See 5 C. L. 34. See, also, Tiffany on Real Property, § 301, p. 669.

18. Farnandis v. Great Northern R. Co. [Wash.] 84 P. 18.

19. Farnandis v. Great Northern R. Co. [Wash.] 84 P. 18. One owning land in its natural state has a right to the lateral support of the adjoining lands. Adjoining owner has no right to make an excavation which will cause it to subside, if no structures have been placed thereon which increase the burden by increasing the pressure. Riley v. Continuous Rail Joint Co., 110 App. Div. 787, 97 N. Y. S. 283. Such result is not a consequential damage, but a direct injury. Farnandis v. Great Northern R. Co. [Wash.] 84 P. 18.

NOTE. Right to substitute artificial support: The right of support is not a right to have the adjoining soil remain in its natural state, but merely the right to have the benefit of support, and consequently the owner of the servient tenement may substitute artificial support, such as a retaining wall. Tiffany on Real Property, § 301, p. 669; Stimmel v. Brown, 7 Houst. [Del.] 219, 30 A. 996; Livingston v. Anoingona Coal Co., 49 Iowa, 369, 31 Am. Rep. 150; Wier's Appeal, 81 Pa. 203. Dicta in Block v. Hazeltine, 3 Ind. App. 491, 29 N. E. 937; Mickel v. Douglas, 75 Iowa, 78, 39 N. W. 198; Kistler v. Thompson, 158 Pa. 139, 27 A. 874; Gumbert v. Kilgore [Pa.] 6 Cent. Rep. 406, 6 A. 771.—From Tiffany on Real Property, § 301, p. 669, and note to Kansas City & N. W. R. Co. v. Schwake [Kan.] 68 L. R. A. 692.

20. Farnandis v. Great Northern R. Co. [Wash.] 84 P. 18. Railroad company removing lateral support by construction of tunnel on its own land is liable for resulting damages regardless of the degree of care or skill used, in view of constitutional provision that no private property shall be taken or damaged for public or private use without just compensation having first been paid. Id.

21 Farnandis v. Great Northern R. Co. [Wash.] 84 P. 18. Where there was evidence tending to show that cracks in, and settling of, the earth by the tapping of an underground stream of water by defendant's tunnel caused the soil to be carried away, instruction that defendant would not be liable in such case if the waters withdrawn were on defendant's own property, but would be if water was taken from under a public street or property not belonging to defendant, held proper. Id.

22. Farnandis v. Great Northern R. Co. [Wash.] 84 P. 18. In case injury results from tapping subterranean water course in public street by a railroad company building a tunnel, under a license from the city, there is a taking or damage within the meaning of the constitutional provision prohibiting such taking or damage until payment of compensation. Id.

23. Farnandis v. Great Northern R. Co. [Wash.] 84 P. 18. Ordinarily the natural support of his land by that of the adjoining proprietor is all that a landowner is entitled to. Hannicker v. Tepper [S. D.] 107 N. W. 202.

24. Fernandis v. Great Northern R. Co. [Wash.] 84 P. 18. Natural support of land by that of adjoining proprietor is all that he is entitled to under Rev. Civ. Code, § 291, providing that each coterminous owner is entitled to the lateral and subjacent support which his land has received from the adjoining land, subject to the right of the latter to make proper and usual excavations

moving the lateral support of adjacent property carrying buildings is bound to use ordinary care to prevent injury both to the land and to the structures thereon.[25] If the weight of the buildings does not in any way contribute to the damage, and the removal of the earth is the direct cause of the damage to both them and the land, the owner can recover for the damage to both.[26] The right to remove lateral support may be acquired by an implied license, as where one owning adjoining tracts sells one of them with knowledge of the fact that the purchaser intends to excavate thereon.[27] The question whether the removal of lateral support was the proximate cause of the injury is ordinarily for the jury.[28] Matters relating to subjacent support,[29] and the measure of damages are treated elsewhere.[30] Where plaintiff is entitled to recover for damages to both the land and the buildings, the use to which the land was adapted may be considered in determining its value and the damage sustained.[31]

ADJOURNMENTS; ADMINISTRATION; ADMINISTRATIVE LAW, see latest topical index.

ADMIRALTY.

§ 1. **Jurisdiction and Courts (30).**
§ 2. **Remedies and Remedial Rights (32).**
§ 3. **Practice and Procedure (33).**
A. Pleading, Process, Interlocutory Orders, etc. (33).
B. Evidence, Proof, Hearing, and Decree (34).
§ 4. **Appeals and Subsequent Proceedings (35).**

§ 1. *Jurisdiction and courts.*[32]—The admiralty jurisdiction of the Federal courts extends to all cases of a maritime nature, whether the right in question is one accorded by the general rules of admiralty law, or is created by legislation.[33] The maritime nature of the subject is always the test of jurisdiction.[34] State legislation may create rights of such a nature that they may properly be administered by the admiralty courts,[35] but cannot restrict or extend the admiralty jurisdiction of Fed-

on the same for purposes of construction, on using ordinary care and skill and taking reasonable precautions to sustain the land of the other, and giving previous reasonable notice to the other of his intention to make such excavations. Hannicker v. Tepper, [S. D.] 107 N. W. 202. "Land" as used in such section does not include buildings in view of Rev. Civ. Code, § 187, defining land as the solid material of the earth, whatever may be the ingredients of which it is composed, whether soil, rock, or other substance. Id. Owner of land so burdened has no right to have them supported by adjacent landowners. Riley v. Continuous Rail Joint Co., 110 App. Div. 787, 97 N. Y. S. 283. Evidence held not to show that buildings on lot tended to increase pressure at the line between the lands of plaintiff and defendant, but to tend to show that landslide was entirely independent of the pressure of such buildings. Id.

25. Hannicker v. Tepper [S. D.] 107 N. W. 202. Defendant held liable for injuries to plaintiff's building on adjoining land, where he left excavation exposed to inclement weather for an unreasonable length of time. Id. Instructions approved. Id.

26. Farnandis v. Great Northern R. Co. [Wash.] 84 P. 18. Sinking and cracking of earth held not due to increased downward or lateral pressure by buildings, where cracks appeared between buildings and defendant's tunnel, and extended through buildings. Id.

27. Where it is claimed that plaintiff knew the purpose for which lands purchased by defendant from her were to be used, evidence that at the time plaintiff's agent agreed to sell to defendant the lands purchased by it he spoke to defendant's manager about the bank sliding down if the grading was done and was told that defendant would secure the bank by putting in retaining walls, is properly considered in answer to suggestion that deed gave defendant a license to remove lateral support. Riley v. Continuous Rail Joint Co. 110 App. Div. 787, 97 N. Y. S. 283.

28. Question whether damage to land and buildings 120 feet away from defendant's tunnel was caused by removal of lateral support or by blasts. Farnandis v. Great Northern R. Co. [Wash.] 84 P. 18. Question whether falling of wall was due to undermining of wall, or to removal of lateral support by taking down an adjoining wall taken with the fact that wall which fell was out of plumb. Di Palma v. Weinman [N. M.] 82 P. 360.

29. See Mines and Minerals, 6 C. L. 644.

30. See Damages, 5 C. L. 904.

31. Instruction in action for damages by lessees held not objectionable as permitting the assessment of damages personal to plaintiffs. Farnandis v. Great Northern R. Co. [Wash.] 84 P. 15.

32. See 5 C. L. 35.

33, 34, 35. The Winnebago [C. C. A.] 141 F. 945.

eral courts.[36] A state court can judicially sell only the right of a shipowner subject to maritime liens.[37]

Courts of admiralty have no general equity jurisdiction, and cannot afford equitable relief in a direct proceeding for that purpose,[38] but they may apply equitable principles to subjects within their jurisdiction, and, in the distribution of proceeds in their possession or under their control, may give effect to equitable claims.[39] They have no jurisdiction of a suit brought solely for the purpose of obtaining an accounting,[40] but may decree an accounting when necessary as incidental to the main relief in a cause of which they have undoubted jurisdiction.[41]

The Federal courts have exclusive jurisdiction to enforce liens given by the general maritime law.[42] The true criterion of their jurisdiction to enforce contracts is the nature and subject-matter of the contract, as to whether it is a maritime contract, having reference to maritime service or maritime transactions.[43] The maritime nature of the contract depends upon its subject-matter, and not upon locality, nor upon the personal obligations of the parties.[44] A court of admiralty will not afford relief to a mortgagee seeking to recover possession of property mortgaged to secure the payment of a nonmaritime debt.[45] State statutes may create liens not maritime in character and confer on their own courts power to enforce them,[46] and

36. Liens given by state statutes not the test of admiralty jurisdiction. The San Rafael [C. C. A.] 141 F. 270. Cannot enlarge the powers of such courts by creating rights of which they cannot take cognizance consistently with their principles or with the object of their institution. The Winnebago [C. C. A.] 141 F. 945.

37. Where purchaser at receiver's sale paid, over and above his bid, a certain sum to lien claimants who had libeled vessel in court of admiralty, held that insolvent estate had no ownership or equity in such sum, and that lien claimants, who were also creditors of the insolvent, could not be compelled to account for the same in the receivership proceedings. In re Red River Line [La.] 40 So. 250.

38. United States v. Cornell Steamboat Co., 26 S. Ct. 648, afg. [C. C. A.] 137 F. 455. Courts of admiralty are not vested with the powers of a court of equity, though they observe equitable principles and recognize equities when the primary cause is within their primary jurisdiction. Equities for charging vessel equally in fault for collision with share of liability for cargo damage which arise out of the conduct and results of the litigation in reference to such claim of cargo damage, and not out of the collision, are not cognizable in admiralty apart from a primary cause to establish the rights and liabilities of the parties concerned. Erie & W. Transp. Co. v. Erie R. Co. [C. C. A.] 142 F. 9.

39. In allowance of salvage for saving property in possession of government customs officers on which duties have been paid. United States v. Cornell Steamboat Co., 202 U. S. 184, 50 Law. Ed. —, afg. [C. C. A.] 137 F. 455.

40. The Emma B., 140 F. 771.

41. In suit for partition of vessel, may order an accounting between libelant and respondent of earnings and expenses of vessel during period mentioned in libel. The Emma B., 140 F. 771.

42. The San Rafael [C. C. A.] 141 F. 270. Have exclusive jurisdiction as to the enforcement of all liens in respect to maritime contracts. Delaney Forge & Iron Co. v. Iroquois Transp. Co. [Mich.] 12 Det. Leg. N. 441, 105 N. W. 527.

43. North German Fire Ins. Co. v. Adams [C. C. A.] 142 F. 439. Maritime contracts give rise to maritime liens enforceable in admiralty against the vessel. In re Eastern Dredging Co., 138 F. 942.

44. Insurance policy on vessel engaged in navigation is maritime contract though it insures her against fire loss alone, and court of admiralty has jurisdiction of action in personam to enforce it. North German Fire Ins. Co. v. Adams [C. C. A.] 142 F. 439. Contracts for the building of ships or for the furnishing of materials for their construction are not maritime in character, nor are liens given on ships in the course of construction maritime liens. The Winnebago [C. C. A.] 141 F. 945. Delaney Forge & Iron Co. v. Iroquois Transp. Co. [Mich.] 12 Det. Leg. N. 441, 105 N. W. 527.

45. Contract mortgaging vessel to secure payment of purchase price is nonmaritime, and court will not entertain suit by mortgagee to recover possession. The Clifton [C. C. A.] 143 F. 460.

46. If contract is not maritime in character, it is of no concern to the Federal jurisdiction what remedies the state may provide, whether in rem, or otherwise. The Winnebago [C. C. A.] 141 F. 945. Proceedings in rem provided for by state statutes, arising under nonmaritime contracts are within the jurisdiction of state courts. Delaney Forge & Iron Co. v. Iroquois Transp. Co. [Mich.] 12 Det. Leg. N. 441, 105 N. W. 527. Comp. Laws 1897, § 10, 788, giving lien for materials furnished in the construction of vessels enforceable in state courts does not derogate from the jurisdiction of the Federal admiralty courts, at least when applied to ships not already engaged in commerce. The Winnebago [C. C. A.] 141 F. 945; Delaney Forge & Iron Co. v. Iroquois Transp. Co. [Mich.] 12 Det. Leg. N. 441, 105 N. W. 527. It makes no difference

such liens are enforceable in the state courts notwithstanding the fact that the vessel has been licensed and enrolled and is engaged in interstate commerce.[47]

Maritime torts give rise to maritime liens enforceable in admiralty against the vessel.[48] A court of admiralty has jurisdiction of a suit to recover possession of a vessel, duly licensed and enrolled under the Federal navigation laws, which has been seized by state officers for violation of a state fishery law, where the constitutionality of such law is questioned on the ground that it invades the admiralty jurisdiction of the Federal courts, and there is a show of substance to such contention.[49] Such a suit is not one against a state so as to deprive the court of jurisdiction, though there may be an appearance on its behalf.[50] Proceedings to limit liability supersede all other actions or suits for the same damages in the state or Federal courts upon all matters properly presented therein, the jurisdiction of the district court, when it has once attached, being exclusive.[51] Courts of admiralty have jurisdiction of an independent libel by one of two vessels in a collision to compel contribution by the other for damages which the former was compelled to pay cargo owners, upon the ground that both vessels were equally in fault.[52] The Federal district court has jurisdiction of a petition which is in effect a libel in personam against the United States for the salvage of duties collected on a cargo saved from destruction by fire while on board a vessel and in the possession and control of the customs officers.[53]

§ 2. *Remedies and remedial rights.*[54]—One who has a maritime lien may enforce the same by a suit in rem in admiralty regardless of the fact that he also has an equitable lien enforceable in a court of equity.[55] So, too, the fact that a libelant has already brought suit in a state court for the same claim is no bar to a subsequent proceeding in admiralty,[56] but one who participates in a proceeding in a state court to enforce a maritime lien, resulting in a sale at his instance, loses his lien, if not by estoppel, at least by laches.[57] The fact that the property saved is not within the physical possession of the court, but is of an intangible nature, such as freight or customs duties, does not prevent the maintenance of a libel in personam against the owner for salvage.[58]

The jurisdiction of a Federal court to enforce liens given by the general maritime law is not affected or restricted by state statutes of limitation,[59] though, when

in determining the maritime nature of the transaction whether the vessel is to be used wholly in Michigan waters, or elsewhere as well. The Winnebago [C. C. A.] 141 F. 945; Delaney Forge & Iron Co. v. Iroquois Transp. Co. [Mich.] 12 Det. Leg. N. 441, 105 N. W. 527.

47. Fact that she may become subject to maritime liens, does not prevent the enforcement against her in the state courts of nonmaritime liens to which she is subject under state statutes. The Winnebago [C. C. A.] 141 F. 945; Delaney Forge & Iron Co. v. Iroquois Transp. Co. [Mich.] 12 Det. Leg. N. 441, 105 N. W. 527.

48. In re Eastern Dredging Co., 138 F. 942.

49. If state statute is unconstitutional it affords no justification for parties acting under it, and court may inquire into its constitutionality. The W. J. Hingston, 144 F. 560. If law is invalid proceeding is proper one in which to obtain a return of the vessel, but if valid, libel will be dismissed. Id.

50. The W. J. Hingston, 144 F. 560.

51. Dowdell v. United States District Court [C. C. A.] 139 F. 444.

52. Right to such contribution is one given by admiralty law. Erie & W. Transp. Co. v. Erie R. Co. [C. C. A.] 142 F. 9.

53. Under Tucker Act, § 2, 24 St. at L. 505, c. 359. United States v. Cornell Steamboat Co., 202 U. S. 184, 50 Law. Ed. —, afg. [C. C. A.] 137 F. 455. Even if claim is not one arising on contract it is one for unliquidated damages in a case not sounding in tort in respect of which the party would be entitled to redress in a court of admiralty, if the United States were suable. Id. Is not a suit under the revenue laws. Id.

54. See 5 C. L. 37.

55. Bank of British North America v. Freights, etc., of The Hutton [C. C. A.] 137 F. 534. A pledge for loans made for purpose of directly aiding the prosecution of current voyages, and upon the faith of the freights to be earned, as a part of the contract, is maritime and enforceable by a suit in rem in admiralty. Id.

56, 57. Northwestern Commercial Co. v. Bartels [C. C. A.] 131 F. 25.

58. General admiralty rule no. 19. United States v. Cornell Steamboat Co., 26 S. Ct. 648, afg. [C. C. A.] 137 F. 455.

59. Limitation prescribed by Cal. Code Civ. Proc. § 813 for enforcement of liens

there is nothing exceptional in the case, courts of admiralty govern themselves by the analogies of common-law limitation.[60]

§ 3. *Practice and procedure. A. Pleading, process, interlocutory orders, etc.*[61] —Service of monition may be made under the provisions of a state statute regulating the mode of service in actions at law or in equity.[62] A monition and publication made according to the rules and practice in admiralty in a proceeding for limitation of liability is notice to all persons having claims whether they receive actual notice thereof or not.[63] The effect of a default to appear is ordinarily the same as in other actions.[64]

It is the facts pleaded which constitute an estoppel in any given case, and not the term by which the defense may be designated.[65] New facts alleged by defendant in his answer are to be deemed denied by libelant, and no replication is necessary or allowable.[66] The libelant may, however, within such time as may be fixed by the court, amend his libel so as to confess and avoid, or explain or add to such new matter, and defendant must answer such amendments, within such time as shall be fixed in like manner.[67] In the event the libelant does not elect to confess or avoid or explain or add to such new matter, the burden of proving it rests upon the party alleging it and it cannot be assumed to be true without proof.[68] On motion to dismiss before hearing, the libel and not the answer is to be looked to.[69] Damages arising out of an independent transaction cannot be pleaded as a set-off.[70] A cross-libel must be confined to matters auxiliary to the cause of action set forth in the original libel.[71] The rule as to the allowance of amendments is practically the same as in chancery.[72] An amendment is properly allowed to conform the libel to the theory on which the case was tried and the evidence.[73] As in other cases, the allegata and probata must correspond.[74] Where the essential facts by reason of which the injury occurred are correctly stated, a failure to give a proper interpretation of such facts, or to give the scientific reason for the result, or the scientific expression of the causal relation between the facts shown and the result following, is not a material variance.[75]

given thereby held not applicable to libel by passenger to enforce lien for damages for injuries and loss of goods in collision. The San Rafael [C. C. A.] 141 F. 270.

60. Libelant held not guilty of laches. The San Rafael [C. C. A.] 141 F. 270.

61. See 5 C. L. 38.

62. Service in action in personam upon agent of nonresident defendant in accordance with Pa. act July 9, 1901 (P. L. 615) § 2, cls. e, g. Insurance Co. of North America v. Frederick Leyland & Co., 139 F. 67.

63, 64. Dowdell v. United States District Court [C. C. A.] 139 F, 444.

65. Answer held to present defense of estoppel to enforce lien, particularly where no objection was interposed to evidence below. Northwestern Commercial Co. v. Bartels [C. C. A.] 131 F. 25.

66. Admiralty rule 51. The Celtic Monarch [C. C. A.] 138 F. 711; The W. J. Hingston, 144 F. 560.

67. Admiralty rule 51. The Celtic Monarch [C. C. A.] 138 F. 711.

68. The Celtic Monarch [C. C. A.] 138 F. 711. Truth of such new matter cannot be assumed for purpose of summary motion to vacate attachment of vessel for manifest want of equity, pursuant to admiralty rule 35 of District Court of District of Wash., northern division, and motion should not be sustained where libel states cause of action. Id.

69. The W. J. Hingston, 144 F. 560.

70. George D. Emery Co. v. Tweedie Trading Co., 143 F. 144.

71. Cross-libel is incidental to, and dependent upon the original suit, and new and distinct matters not included in the original libel cannot be considered. George D. Emery Co. v. Tweedie Trading Co., 143 F. 144.

72. Where exceptions to a libel are sustained on the ground that owner and vessel cannot be proceeded against jointly, it is proper to permit the libel to be so amended as to make the proceeding one against the vessel alone. The San Rafael [C. C. A.] 141 F. 270. Claims filed in proceedings for limitation of liability by administrators of decedents based on state statutes giving right of recovery to widow held sufficient where they disclosed fact that libelants were also widows of decedents, and amendments making claims in that capacity properly allowed, though of limitations had run against their claims. The Saginaw, 139 F. 906.

73. As to cause of collision. Kelley Island Lime & Transport Co. v. Cleveland 144 F. 207.

74. Allegation in libel to recovery for injuries to stevedore that master employed inexperienced and incompetent winchman held not to authorize recovery for isolated act of negligence on part of such winchman. The Elton [C. C. A.] 142 F. 367.

75. Held no material variance between

Answers to interrogatories must be responsive,[76] and must be verified.[77] One may object to the answering of such of them as would expose him to any prosecution or punishment for crime, or any penalty or forfeiture of his property for any penal offense.[78] It is not necessary that a party be personally before the court in order to avail himself of the privilege,[79] but the answers must expressly invoke it.[80]

The admiralty rules authorize any person having an interest in any proceeds in the registry of the court to intervene, by petition and summary proceeding, pro interesse suo for a delivery thereof to him, the court to proceed to hear and decide the matter upon due notice to the adverse parties.[81] Intervening parties are generally required to file a stipulation, with sureties, for the payment of costs and damages.[82] A vessel in commission will not be seized and kept in custody of the marshal under expense in a suit by a half-owner for its partition provided the respondent gives a sufficient bond for her delivery to the marshal on the entry of a decree to that effect.[83] The amount of the bond for the release of a libeled vessel does not fix the value of the vessel,[84] but on final hearing the respondent may show its actual value, which will limit the amount which the libelant may recover.[85] In case the value of the vessel exceeds the amount of the bond, the libelant must look to the personal responsibility and credit of the owners for the excess,[86] therefore when there is a dispute as to the value of the vessel, the bond will be required in the highest amount.[87]

Any real offer to pay by one then ready to pay the amount due before bringing suit, or, in case suit is brought, a renewal of the offer in such a way as to indicate readiness and willingness to pay the amount due, together with interest and costs to the time of tender, will be treated as a lawful tender, regardless of whether the money was produced or not,[88] and will relieve the party making it from further liability for interest or costs.[89]

(§ 3) *B. Evidence, proof, hearing, and decree.*[90]—Findings of a commissioner fixing the amount of damages will not ordinarily be disturbed unless clearly wrong,[91] but this rule has little application where he has no better opportunity to judge of the

allegations as to cause of collision and proof. Kelley Island Lime & Transport Co. v. Cleveland, 144 F. 207.

76. Answer to interrogatory calling for rules and regulations of company referring to rules of government held not responsive. In re Knickerbocker Steamboat Co., 139 F. 713. Answer to interrogatory calling for by-laws of company held sufficient. Id.

77. Verification of answers containing all the necessary averments held sufficient though not in strict conformity to form used in admiralty pleadings. In re Knickerbocker Steamboat Co., 139 F. 713.

78. Admiralty rules 31, 32. In re Knickerbocker Steamboat Co., 139 F. 713.

79. Proceeding to limit liability. In re Knickerbocker Steamboat Co., 139 F. 713.

80. Answers stating that interrogatories framed in support of allegations in the answer which if true would or might tend to expose the petitioner to a penalty or forfeiture held insufficient. In re Knickerbocker Steamboat Co., 139 F. 713.

81. Rule 43 of U. S. supreme court. The Chief [C. C. A.] 142 F. 349. This rule does not confer any right upon the claimant of a vessel sold in salvage proceedings to demand a summary hearing as to claims against the resulting fund before any proceedings for distribution by clerk or commissioner have been taken under admiralty rules 57 and 58 of district court of E. District of Pa., and to give bond for any sum awarded him by the court in such summary proceeding. Id.

82. Admiralty rule 34. The W. J. Hingston, 144 F. 560. In suit to recover vessel seized by state officers for violation of a state fishery law and held by respondents merely as bailiffs and custodians for the department of fisheries, a warden of the department of fisheries may appear and answer without filing such stipulation, particularly where such answer is supplemented by a similar answer by the commissioner of fisheries protesting against court taking jurisdiction because of state's interest and a special appearance by the attorney general of the state making the same objection. Id.

83. Bond should be in a sum twice the value of a half-interest. The Emma B., 140 F. 770.

84, 85, 86, 87. The Twilight, 138 F. 1005.

88. Donaldson v. Severn River Glass Sand Co., 138 F. 691.

89. Respondent held not relieved from such liability where amount was not paid into court and there was no offer to pay interest and costs. Donaldson v. Severn River Glass Sand Co., 138 F. 691.

90. See 5 C. L. 39.

91. Collision case. The Sovereign of the Seas, 139 F. 812.

weight of the evidence than the court.[92] The fact that the award was less than the amount claimed is no reason why it should be more favorably considered, where the demand of the libelants was clearly excessive and exhorbitant.[93]

After proceedings for limitation of liability have been closed up in so far as the parties before the court are concerned by the entry of a final decree, the court has no power to open them up for the purpose of allowing other claimants, who did not appear, to come into the case and prove their claims.[94] If the decree is not binding on them for any reason, their remedy is by an independent action.[95] A final decree in a collision suit, in which both vessels and all parties in interest are before the court, is conclusive of all questions relating to the rights and liabilities of such vessels arising out of the collision.[96]

§ 4. *Appeals and subsequent proceedings.*[97]—The circuit court of appeals has appellate jurisdiction to review by appeal or writ of error all final decrees in admiralty.[98] In order to be final the decree must dispose of the whole case on the merits.[99] The appeal must of course be perfected within the time prescribed by statute,[1] and the statutory notice of appeal must be given.[2] Such an appeal vacates altogether the decree of the lower court, and the case is tried de novo.[3] And this is true though some of the parties do not appeal.[4] A motion to dismiss an appeal calls in question the jurisdiction of the appellate court to deal with the subject-matter of the appeal, and the only questions to be considered are those relating to the issue whether the appeal was properly taken and perfected.[5] It is no ground for dismissal that the evidence on which the decree was rendered is not presented to the appellate court.[6]

ADMISSIONS, see latest topical index.

ADOPTION OF CHILDREN.

§ 1. Adoptive Acts and Proceedings (35). § 2. Consequences of Adoption (37).

§ 1. *Adoptive acts and proceedings.*[7]—Statutes authorizing the adoption of children are in derogation of the common law and should be strictly construed,[8] but

92. Not where he takes but little evidence of importanee. The Sovereign of the Seas, 139 F. 812.

93. The Sovereign of the Seas, 139 F. 812.

94, 95. Dowdell v. United States Dist. Ct. [C. C. A.] 139 F. 444.

96. A final decree in a collision suit in which both vessels and all parties in interest are before the court, in which the damages suffered by both vessels and the cargo are assessed, the aggregate damages to both vessels equally apportioned, and the damages to the cargo charged against one vessel alone because of insufficient pleadings to authorize their apportionment, is a bar to an independent libel subsequently brought to compel contribution for cargo damage. Erie & W. Transp. Co. v. Erie R. Co. [C. C. A.] 142 F. 9.

97. See 5 C. L. 40.

98. Act March 3, 1891, § 6, 26 St. 828, c. 517. The Chief [C. C. A.] 142 F. 349.

99. The Chief [C. C. A.] 142 F. 349. Order of district court refusing to allow claimant of vessel, libeled for salvage and sold under order of court, to intervene pro interesse suo, under admiralty rule 42, for summary determination of his right to the fund in court as a result of such sale, and for a delivery to him of such fund on substitution of bond, held not final. Id.

1. Decree granting prayer for limitation of liability, holding vessel in fault for collision, etc., and referring cause to commissioner to take testimony as to claims for alleged damages is reviewable on appeal from final decree on commissioner's report though the time for taking an appeal from the prior decree has expired, the prior decree being interlocutory. La Bourgoyne [C. C. A.] 139 F. 433. It is no ground for dismissing the appeal that an order substituting appellant for certain intervenors was not filed with the clerk until after the expiration of the time for appealing, where it was made and served before the expiration of such time. Brown v. Merchants' Marine Ins. Co. [C. C. A.] 144 F. 85.

2. It is no ground for dismissal that notice of appeal was not served on parties for whom appellant had been substituted by order of district court, where they agreed to sign document authorizing appellant to represent them, and do not claim that they are not represented or question the right of the court to proceed with the appeal. Brown v. Merchants' Marine Ins. Co. [C. C. A.] 144 F. 85.

3. The San Rafael [C. C. A.] 141 F. 270.

4. Whole case is opened by appeal in proceeding to limit liability though claimant does not appeal. The San Rafael [C. C. A.] 141 F. 270.

5, 6. Brown v. Merchants' Marine Ins. Co. [C. C. A.] 144 F. 85.

7. See 5 C. L. 41.

8. In re Huyck's Estate, 99 N. Y. S. 502.

a construction should not be adopted which would defeat their object.[9] In deciding whether leave to adopt should be granted, the welfare of the child is the primary if not the sole consideration.[10]

In Pennsylvania no action of any court is absolutely essential to a valid and lawful adoption,[11] the controlling fact being the intention of the adopting parent.[12] The statute provides for the approval of the court and gives him power to refuse to sanction an adoption unless satisfied that the welfare of the child will be promoted by it, but beyond that his action only confirms that of the parent.[13] Adoption being purely a statutory fiction, consent of the parents or others having the custody of the child, though generally required, is not of the essence of the adoption.[14] In Louisiana, the notarial act by which a child is adopted need not be signed by any one for him if the child has neither parent nor tutor,[15] and the parents of a foundling have no voice in its adoption.[16] In Washington, nonresidents cannot maintain a petition for adoption.[17] In New York a married man, not lawfully separated from his wife, may not adopt a child without her consent.[18] The presumption of regularity of judicial proceedings obtains in a special statutory proceeding to establish one as heir.[19] Under the statute of Wisconsin an order of the court establishing one as heir becomes final and effectual when the court signs the same and announces its determination, and its entry by the clerk upon the records of the court is not essential to its validity.[20] There is no presumption that children living with people whose names they have taken have been adopted,[21] and there being no evidence of a statutory adoption

9. The subject-matter and proceedings under Rev. St. 1858, c. 49, providing for the establishment of one as heir being kindred to those for the adoption of children, the statute should be liberally construed to accomplish its object. In re Marchant's Estate, 121 Wis. 526, 99 N. W. 320.

10. Knight v. Gallaway [Wash.] 85 P. 21.

11. In re Peterson's Estate, 212 Pa. 453, 61 A. 1005.

12. The question of adoption depends upon the intention of the adopting parent, and the literal decree of the court is not the only governing fact. In re Peterson's Estate, 212 Pa. 453, 61 A. 1005.

13. In re Peterson's Estate, 212 Pa. 453, 61 A. 1005. Where the petition for adoption was first filed by the husband but later joined in by the wife who afterwards treated the child as her own, and the petition and decree used both the word "petitioner" and the word "petitioners" the child was entitled to take as a distributee of the wife's estate. In re Peterson's Estate, 212 Pa. 453, 61 A. 1005.

14. Succession of Dupre [La.] 41 So. 324.

15. Construing Act No. 31 of 1872, p. 79. Succession of Dupre [La.] 41 So. 324. Act No. 31 of 1872, p. 79, if interpreted so as to dispense with the concurrence of a tutor ad hoc in the adoption of a child is not unconstitutional as depriving the minor of liberty and property without due process of law. Id. Upon a claim to heirship, proof of the death of the parents of a child at the time of its adoption was not objectionable on the ground that only the notarial act could show that fact. Id.

16. Under Civ. Code, art. 213, providing that the "foundling whom persons from charity have received and brought up cannot be claimed by its father or mother," the parents no longer have any authority over the foundling and for all purposes of its adoption, the situation is as if the parents were dead. Succession of Dupre [La.] 41 So. 324.

17. Under Ballinger's Ann. Codes & St. § 6480 providing that any inhabitant of the state not married or any husband and wife jointly may petition the court of their proper county for leave to adopt a child. Knight v. Gallaway [Wash.] 85 P. 21.

18. Laws 1873, p. 1244, c. 830, § 3; Laws 1896, p. 225, c. 272, § 60. Middleworth v. Ordway, 49 Misc. 74, 98 N. Y. S. 10. Though this provision has reference to an adoption as provided for by the domestic relation law, it operates to render such an adoption by contract malum prohibitum as to the wife, and without effect as to her interest in his estate under the statute of distribution. Id.

19. The court having acquired jurisdiction over the subject-matter, it was presumed in a collateral proceeding that proceedings under Rev. St. 1858, c. 49, were regular though there was no entry in the clerk's minutes of any proceedings had on the date fixed by the notice for hearing, where the records showed a hearing on a subsequent day of the same term. In re Marchant's Estate, 121 Wis. 526, 99 N. W. 320.

20. Under Rev. St. 1858, c. 49. In re Marchant's Estate, 121 Wis. 526, 99 N. W. 320.

21. In re Huyck's Estate, 99 N. Y. S. 502. That decedent was taken from an orphan asylum at the age of seven years, took the name of the people receiving him, lived with them until after his majority, and was always treated as a son held insufficient to raise a presumption of legal adoption in the absence of evidence of a statutory adoption. Id.

the court will not presume that adoption papers had been executed and were destroyed by a fire in a public building in which, under the law, they would have been filed.[22]

Contracts of adoption.[23]—Alleged contracts of adoption when relied on to secure an interest in the estates of deceased persons must be established by clear and satisfactory evidence.[24] In proceedings to enforce them, any evidence having a fairly ascertainable tendency to enlighten the court's understanding as to the situation and circumstances of the parties, should be admitted.[25] The usual rules of construction apply to written contracts of adoption.[26] Parol evidence is admissible to explain ambiguities, or the local or colloquial meaning of terms used.[27] The fact that the contract is unilateral does not render it invalid if performed by the party not bound by its terms.[28] A contract of adoption by a married man to which his wife is not a party must be enforced in subordination to her rights in his estate, particularly where the statute requires her consent.[29]

§ 2. *Consequences of adoption.*[30]—The effect of an adoption, must be determined by the law in force at time of the adoption.[31] An adopted child has only such rights as the statute clearly gives him.[32] While he may inherit, his rights in this regard are no greater than those of a natural child.[33] In Illinois the adopting parents and their heirs inherit from the adopted child, its descendants, husband, or wife, such property as the adopted child may have received from or through the adopting parents.[34] In some states the adoption does not give the adopting parent a right to the custody of the child.[35] One does not waive his rights as an established heir by filing a claim against the estate for services rendered deceased under the agreement pursuant to which the proceedings to establish him as an heir were had.[36]

22. In re Huyck's Estate, 99 N. Y. S. 502. Where papers are not found in an office where if in existence they ought to be, the presumption arises that no such documents ever existed. Id.

23. See 5 C. L. 42.

24. Middleworth v. Ordway, 49 Misc. 74, 98 N. Y. S. 10. Alleged oral contracts to adopt children of strangers and to make testamentary disposition in their behalf at the expense of children of the blood or to make them equal heirs with such children. In re Peterson [Neb.] 107 N. W. 993.

25. In re Peterson [Neb.] 107 N. W. 993.

26. Where a contract provides that upon a child arriving at a certain age it shall be entitled to the rights of a child of the foster parents in their property, the status as the child of such parents begins when the child arrives at such age, but not the time for the enjoyment of such rights. Child not precluded because there was nothing to take when she arrived at the age of eighteen. Middleworth v. Ordway, 49 Misc. 74, 98 N. Y. S. 10.

27. Middleworth v. Ordway, 49 Misc. 74, 98 N. Y. S. 10. A contract providing that the child should remain with the adopting parents and submit to their control until she arrived at the age of 18 years when she should be entitled to her "dower rights in the property" as if she were their own child vested in the child, upon the performance of the condition, the same interest in her foster father's property as his own lawful child would have had in case of intestacy. Id.

28, 29. Middleworth v. Ordway, 49 Misc. 74, 98 N. Y. S. 10.

30. See 5 C. L. 42.

31. Blodgett v. Stowell [Mass.] 75 N. E. 138. A child whose adoptive father died in 1903 and who had been adopted after the passage of St. 1876, p. 210, c. 213, providing that the adopted child shall stand in regard to the legal descendents, but to no other of the kindred of such parent, in such position as if born to him in lawful wedlock, could not take as the "issue" or "heir" of her adoptive father under the will of her adopted grandfather. Id.

32. Morgan v. Reel [Pa.] 62 A. 253.

33. Where a person adopts a child of a deceased child and dies intestate, the adopted child is entitled to inherit only as child and not as both child and grandchild. Morgan v. Reel [Pa.] 62 A. 253. See, also, Descent and Distribution, 5 C. L. 995.

34. Where an adopted illegitimate child dies leaving an illegitimate child surviving only a few months, the heirs of the adopting parents and not the natural mother of the adopted child will inherit property received by the adopted child from the adopting parent by devise, under 1 Starr & C. Ann. St. 1896, p. 353, § 6. Swick v. Coleman, 218 Ill. 33, 75 N. E. 807. The right of such inheritance under the statute is not restricted to the particular property received but includes the proceeds of a sale thereof. Id.

35. White v. Richeson [Tex. Civ. App.] 15 Tex. Ct. Rep. 846, 94 S. W. 202.

36. A claimant as heir under Rev. St. 1858, c. 49, by filing a claim in order to protect himself should it be determined that he had no interest as such heir. In re Marchant's Estate, 121 Wis. 526, 99 N. W. 320.

ADULTERATION.

§ 1. Legislation and Regulation (38).
§ 2. The Offense (38).
§ 3. Enforcement and Prosecution (38).

§ 1. *Legislation and regulation.*[37]—Statutes prohibiting the adulteration of food must, of course, comply with constitutional provisions requiring singleness of subject-matter and expression thereof in the title.[38] The sale of samples of drugs and articles of food to official inspectors may be required by law,[39] but such samples must be reasonable ones under all the circumstances.[40] In Pennsylvania the vitiation, impurity, or adulteration of liquors sold, is a defense to an action for the price of the same, provided their quality or value is thereby impaired.[41]

§ 2. *The offense.*[42]—The sale of oleomargarine, made to resemble butter in appearance, has been prohibited in some jurisdictions.[43] Artificial coloring is sufficiently established if it is shown that one of the ingredients is so treated as unnecessarily to impart to it a certain color, which it in turn imparts to the article sold.[44] The Pennsylvania statute prohibiting the adulteration of food does not apply to the adulteration of drinks.[45]

§ 3. *Enforcement and prosecution.*[46]—On trial of an indictment for the sale of oleomargarine resembling yellow butter persons who saw it at the time may testify as to its resemblance to butter though it is not produced in court.[47] Samples of butter and oleomargarine are admissible for purposes of comparison if sufficiently identified.[48] A witness should not be allowed to state that cotton-seed oil is recognized as a legitimate ingredient.[49] Where the defense is permitted to prove that cotton-seed

37. See 5 C. L. 43. See, also, Food, 5 C. L. 1436.

38. Act of June 26, 1895 (P. L. 317), entitled "An act to provide against the adulteration of food and providing for the enforcement thereof," will not sustain an indictment for adulteration of drinks, although the second section of the act so provides owing to the constitutional requirement that the title express the entire subject-matter, and "food" will not ordinarily include drink. Commonwealth v. Kebort, 212 Pa. 289, 61 A. 895. Act of May 29, 1901, P. L. 327, prohibiting the sale of oleomargarine resembling butter is not unconstitutional for including more than one subject. Commonwealth v. Caulfield, 27 Pa. Super. Ct. 279.

39. Act of Congress, Feb. 17, 1898 (30 St. at L. 246, c. 25), requiring sale of sample of drugs or articles of food for purpose of official analysis is constitutional. District of Columbia v. Garrison, 25 App. D. C. 563.

40. What is a reasonable sample is not for the determination exclusively of the official inspector or the dealer. District of Columbia v. Garrison, 25 App. D. C. 563. A milk dealer held justified in refusing to sell a half a pint of milk to an inspector for 2c when he offered to sell him a whole pint for 4c and the sale of half a pint would have destroyed the value of the remainder for his business. Id.

41. Proof of adulteration without proof that such adulterations are deleterious. Spellman v. Kelly, 27 Pa. Super. Ct. 39. The affidavit of defense should either aver that the impurity, vitiation or adulteration impairs their quality or value, or should state facts which would necessarily imply such impairment. Id.

42. See 5 C. L. 44. See, also, Food, 5 C. L. 1436.

43. The Act of May 29, 1901 (P. L. 327), was intended to prevent the sale of oleomargarine which by reason of the addition of coloring matter, or of the selection or treatment or combination of its component parts, is made to resemble and be in imitation of yellow butter. Commonwealth v. Mellet, 27 Pa. Super. Ct. 41. It was not intended to be entirely prohibitive of the sale of the article, nor to prevent only the sale of colored oleomargarine manufactured and sold entirely within the state. Id.

44. Treating cotton seed oil in the manufacture so as to render it yellow which imparted to the oleomargarine of which it is an ingredient the same color. Commonwealth v. Mellet, 27 Pa. Super. Ct. 41. Proof that oleomargarine was colored in imitation of butter by cotton seed oil, which was an essential ingredient, but whose yellow color was unnecessarily preserved in its manufacture, will sustain a conviction. Id.

45. Act June 26, 1895 (P. L. 317), though it defines the term "food" as including "all articles used for food or drink by man." Commonwealth v. Kebort, 212 Pa. 289, 61 A. 895.

46. See 5 C. L. 44. See, also, Food, 5 C. L. 1436; Indictment and Prosecution, 5 C. L. 1790.

47. On trial under an indictment for sale of colored oleomargarine, sold more than a year previous, the state did not need to show inability to produce the oleomargarine before introducing proof of color by eyewitnesses at time of sale. Comonwealth v. Caulfield, 27 Pa. Super. Ct. 279. Testimony to the effect that oleomargarine was yellow like butter is not opinion evidence but merely testimony on an actual fact. Id.

48. Samples are inadmissible with no proof of their identity except the representations of the sellers. Commonwealth v.

oil is a necessary ingredient of oleomargarine, the prosecution should be permitted in rebuttal to show that it does not necessarily impart the color of yellow butter, unless specially prepared.[50]

ADULTERY.

§ 1. The Offense (39).
§ 2. The Indictment or Information (39).
§ 3. Evidence (40).
§ 4. Practice and Trial (40).

Only the criminal offense is included in this topic.[51]

§ 1. *The offense.*[52]—The offense is variously defined by statute. In some states it is committed by sexual intercourse between persons, one or both of whom are married,[53] while in others "living together" [54] or notoriously immoral cohabitation [55] is required.

§ 2. *The indictment or information.*[56]—In Georgia a man charged with adultery and fornication on four different counts may be convicted on any of them and the state need not elect on which it will prosecute until all the evidence is in.[57] An information charging a continuing offense, such as living in a state of adultery it is proper to allege commission of crime between certain dates.[58] The female with whom accused is charged to have committed the crime of adultery need not be made a co-defendant.[59] If the information fully and plainly describes the offense, it is immaterial that it incorrectly designates the same [60] or that it fails to show on what statute the prosecution is based.[61] In some states only the offended spouse can, by complaint, commence the prosecution,[62] and it must be before their divorce.[63]

Mellet, 27 Pa. Super. Ct. 41. But chemical analysis is not always necessary, especially where an experienced officer of the state, completely identifies them. Id. A sample of oleomargarine may be introduced for purpose of showing that it does not necessarily resemble butter, without proof that it was commercial oleomargarine, when sample was identified by an experienced chemist in oleomargarine as such and there is no set formula according to which all oleomargarine is manufactured. Commonwealth v. Caulfield, 27 Pa. Super. Ct. 279.

49. Involves a construction of the statute. Commonwealth v. Mellet, 27 Pa. Super. Ct. 41.

50. Commonwealth v. Mellet, 27 Pa. Super. Ct. 41.

51. See Divorce, 5 C. L. 1026.

52. See 5 C. L. 45. See Clark & Marshall on Crimes [2d Ed.] 707.

53. In Georgia both parties to the offense must be married. In the absence of evidence of marriage of either party, court erred in not setting verdict of guilty aside. Tison v. State [Ga.] 53 S. E. 809. Where one is convicted of the offense of adultery and fornication, and the evidence does not disclose that either the accused or the other party participating in the criminal act is married, the verdict is without evidence to support it, and a new trial should be granted. Elliott v. State [Ga.] 53 S. E. 809.

54. It is not necessary in Texas that parties should "live together as man and wife" to constitute adultery under the statute, they need be only living together and having intercourse. Shaw v. State [Tex. Cr. App.] 91 S. W. 1087. Sexual intercourse between persons taking meals at the same place, but sleeping at different places is not "living together." Paul v. State [Tex. Cr. App.] 90 S. W. 171.

55. Under Stat. 1871-72, c. 276, punishing "open and notorious adultery" the notoriety must go not only to the cohabitation but to its meretricious character and a cohabitation reputed to be matrimonial is not within the statute. People v. Salmon [Cal.] 83 P. 42.

56. See 5 C. L. 45.

57. Sutton v. State [Ga.] 53 S. E. 381.

58, 59. State v. Nelson, 39 Wash. 221, 81 P. 721.

60. An information which plainly charges the crime of living in a state of adultery under Ballinger's Ann. Codes & St. § 7231, is sufficient, even though it incorrectly designate the crime. State v. Nelson, 39 Wash. 221, 81 P. 721.

61. If a person of common understanding can readily discern what is intended by an information and what crime is charged, it is not bad for uncertainty because not specifying whether found under §§ 7230, 7231, or 7238 of Ballinger's Ann. Codes & St. State v. Nelson, 39 Wash. 221, 81 P. 721. Nor is such an information bad for duplicity. Id.

62. Under Code, § 4932. State v. Loftus [Iowa] 104 N. W. 906. Whether husband demanded a prosecution so as to come within the Code, is a question for the jury on the evidence. Id. The fact that a husband testified before the grand jury in response to a subpoena, and his declaration that on request of county attorney he would have come without a subpoena, and that he wanted the guilty parties punished, is not such a complaint as was intended by Code, § 4932. Id.

63. State v. Loftus [Iowa] 104 N. W. 906.

§ 3. *Evidence.*[64]—It is admissible to prove the condition and circumstances of the parties,[65] their conduct before and after the alleged offense and pertinent thereto,[66] indications of familiarity in their general demeanor toward each other,[67] the repute of the woman and of the house where the parties met,[68] and birth of a child following the co-habitation.[69] Where conduct of a possibly incriminating nature is shown defendant should be permitted to explain it.[70] That defendant is married is to be proved as in other cases.[71] Under the Texas statute the jury need not find that the parties had sexual intercourse at any specified time, but only that they were living together and at some time during the period covered by the indictment had such intercourse.[72] The offense need not be proved by direct evidence.[73]

§ 4. *Practice and trial.*[74]—The husband of the defendant's paramour is a competent witness against him.[75] Lack of proper objection made in the court below to the evidence establishing a divorce renders the divorced wife a competent witness against her former husband charged with adultery,[76] except as to communications made by one to the other during marriage.[77] The evidence showing several and distinct occasions on which opportunity to commit the crime was presented, the state, on motion by defendant, must elect on which occasion it will rely,[78] but need not so elect until the evidence is all in.[79]

64. See 5 C. L. 45.

65. That defendant's paramour was married and that her husband was absent. State v. Nelson, 39 Wash. 221, 81 P. 721. Testimony of a witness that she understood that the woman with whom the offense was committed was a widow and that the accused had said she was. Coons v. State [Tex. Cr. App.] 91 S. W. 1085. A witness may testify that he supposed the accused to be a married man, that several years previous he lived with a woman reputed to be his wife and had a family; such evidence is not objectionable as opinion evidence, or as indefinite or too remote. Id. That witness understood accused to have been married but did not know whether or not he had a divorce. Id. The testimony of a witness that the man with whom the accused was alleged to have committed the offense, claims to be a married man, is merely hearsay, and such evidence has no probative value. Tison v. State [Ga.] 53 S. E. 809.

66. Evidence of the action of the parties immediately before or after the date of the alleged offense is germane and pertinent, and is admissible though happening in a county foreign to the place of trial. Coons v. State [Tex. Cr. App.] 91 S. W. 1085. Evidence showing that accused insisted that his paramour stopping at the same hotel with himself changed her room from downstairs to up stairs near his own. Id. Testimony as to the conduct of defendant and his paramour three months prior to date alleged in information is competent. State v. Nelson, 39 Wash. 221, 81 P. 721.

67. That accused called his paramour "Muggins" though her true name was Mrs. Shaw. Coons v. State [Tex. Cr. App.] 91 S. W. 1085. Evidence of familiarity between defendant and woman not identified held sufficiently connected with woman named in the indictment to be admissible. Counts v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 142, 94 S. W. 220.

68. Where a married man was seen at the house and in bed with a woman other than his wife's, it is competent to show that the house was reputed a bawdy-house, and the woman a prostitute. Sutton v. State [Ga.] 53 S. E. 381.

69. Evidence of the fact that defendant's paramour gave birth to a child more than twenty months after she had seen or cohabited with her husband, to prove adultery with some one. State v. Nelson, 39 Wash. 221, 81 P. 721.

70. In a prosecution based on circumstantial evidence, part of which was the fact that accused had left home and was living elsewhere, the accused should have been permitted to testify that the reason he left home was because his wife had drawn a revolver on him, took a knife to her bed and made life unendurable for him. State v. Koller [Iowa] 105 N. W. 391.

71. The provision in § 7232, Ballinger's Ann. Codes & St., that a recorded certificate of marriage or certified copy thereof shall constitute proof of marriage in adultery cases, is cumulative and does not exclude other proof. State v. Nelson, 39 Wash. 221, 81 P. 721. And see Marriage, 6 C. L. 515.

72. Counts v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 142, 94 S. W. 220.

73. Need be established only beyond a reasonable doubt. Sutton v. State [Ga.] 53 S. E. 381. Evidence that accused and his paramour were living continuously for two or three months at some boarding house, that they were seen upon the bed in the act of intercourse, although the latter is sharply contradicted, is sufficient to sustain a verdict of guilty. Coons v. State [Tex. Cr. App.] 91 S. W. 1085. Circumstantial evidence of intimate association of married man with woman living alone held sufficient. Counts v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 142, 94 S. W. 220.

74. See 5 C. L. 45.

75, 76, 77. State v. Nelson, 39 Wash. 221, 81 P. 721.

78. State v. Loftus [Iowa] 104 N. W. 906.

79. Sutton v. State [Ga.] 53 S. E. 381.

ADVANCEMENTS, see latest topical index.

ADVERSE POSSESSION.

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§ 13. Nature of Title Acquired (57).

§ 1. *Estates and property subject to adverse possession.*[80]—The statute of limitations will run against an equitable estate in favor of adverse user and, having so commenced to run, will continue to run against an estate in remainder which becomes vested by the grant upon which the whole estate depends.[81] Whether title to a railroad right of way may be acquired by adverse possession seems to depend upon the nature of the company's title and the manner in which it was obtained.[82]

§ 2. *Against whom available.*[83]—The public domain is not susceptible of adverse possession, and until a title thereto is vested at least equitably in a private owner limitations do not run.[84] Adverse possession runs against the state in some cases.[85] It has never been authoritatively determined by the courts of the United

80. See 5 C. L. 45.

81. McCullough v. Seitz, 28 Pa. Super. Ct. 458.

82. NOTE. Adverse possession of railroad right of way: The Federal supreme court has held "that the nature of the duties imposed by Congress upon the railroad company, and the character of the title conferred by Congress upon the railroad company, and the character of the title conferred by Congress in giving the right of way * * * are inconsistent with the power of the individual to acquire, for private purposes, by limitation, a portion of the right of way." Northern P. R. Co. v. Townsend, 190 U. S. 267, 47 Law Ed. 1044. See, also, Oregon S. L. R. R. v. Quigley, 10 Idaho, 770, 80 P. 401. Contra. Northern P. R. Co. v. Ely, 25 Wash. 384, 87 Am. St. Rep. 766, 54 L. R. A. 526. The same result has been reached by holding that cultivation of a portion of such a right of way is not adverse user. Railroad v. Donovan, 43 Kan. 134, or that the right of way is a public highway. Southern Pac. R. ,Co. v. Hyatt, 132 Cal. 240. But title by adverse user has been recognized where the right of way was given by state grant. Illinois C. R. R. v. Wakefield, 173 Ill. 564. Where the right of way is obtained from individuals, the courts generally permit title to be gained by adverse user. Matthews v. R. R. Co., 110 Mich. 170, 64 Am. St. Rep. 336; Wilmot v. R. R. Co., 76 Miss. 374; Pittsburgh, etc., R. Co. v. Stickey, 155 Ind. 312. Contra. Slocumb v. R. R. Co., 57 Iowa, 675; Railroad v. Donovan, 104 Tenn. 20.—From 6 Columbia L. R. 61.

83. See 5 C. L. 46.

84. One who makes improvements on such land, knowing it to be open to exploration and sale for its minerals, and makes no effort to secure the title thereto under the laws or the right of possession under the local rules and customs of miners, has no valid claim of possession or of compensation for his improvements as an adverse holder in good faith. Helstrom v. Rodes [Utah] 83 P. 730. Under Code, § 141, requiring the owner of lands in the adverse possession of another claiming under color of title to sue for possession within 7 years after accrual of right or title, he is not barred until the expiration of 7 years from the grant, although the person claiming adversely was in possession prior thereto. Lindsay v. Austin, 139 N. C. 463, 51 S. E. 990. Limitations do not run against a settler on public lands belonging to the United States, until the issue of a patent to him. Slaight v. Northern Pac. R. Co., 39 Wash. 576, 81 P. 1062. As against a railroad company entitled to a grant of public lands, the statute of limitations begins to run in favor of a claimant under the timber culture act from the time of his taking possession under the receiver's receipt. Blumer v. Iowa R. Land Co. [Iowa] 105 N. W. 342. Where lands granted to a railroad company had been earned and all contests pending in the land department disposed of, they were subject to the doctrine of adverse possession, although not certified to the company by the land department. Blumer v. Iowa R. Land Co. [Iowa] 105 N. W. 342.

See, also, Limitation of Actions, 6 C. L. 465; Public Lands, 6 C. L. 1126.

85. In North Carolina, under the express provisions of Revisal 1905, § 380, adverse possession against the state for 30 years is presumptive of a complete title out of the state, only where such possession has been ascertained and identified under known and visible lines or boundaries. Bullard v. Hollingsworth [N. C.] 53 S. E. 441. In Kentucky, under Ky. St. § 2523. Asher v. Howard [Ky.] 91 S. W. 270. The patentee of lands by the state cannot oust one who has acquired title thereto by right of possession and lapse of time. Id. Rev. St. 1899, § 4270, prohibiting the running of limitations against the state, as to public lands, is not retrospective, and did not prevent the operation of the ten-year limitation of actions

States whether a state can lose its territory by prescription and acquiescence;[86] but it was held that there had not been an acquiescence by Mississippi in the claims of the authorities of Arkansas to jurisdiction over an island in the Mississippi river for long enough time to deprive it of its sovereignty over the island.[87] A county cannot make any agreement as to a boundary line, whereby, by long acquiescence therein, it may be divested of the title to school lands.[88] Adverse possession may run against a municipality;[89] but not as to property held by it in its governmental capacity for public purposes.[90] Prescription does not run against a riparian owner in respect to batture while administered by a city for public use.[91] The prescription of three years, under the constitution of Louisiana, has no application to a defendant resisting by exception or answer, plaintiff's attack upon his title.[92] Where a right of entry and of action is lost by a trustee by adverse occupation, the cestui que trust is also concluded.[93] Title cannot be acquired as against a minor[94] or a married woman;[95] but disabilities cannot be tacked to prevent the running of the statute of limitations.[96] Where the legal title is in a trustee, adverse possession runs against the cestui.[97] The burden of proving a disability that will prevent the running of the statute of limitations is on the party asserting it;[98] and where the statute of limitations has commenced to run against an ancestor before descent cost it continues to run against the heir though under disability.[99] A disability, which will stop the running of the statute is only one existing at the time the right of action accrued, and no after-accruing disability will stop it.[1]

§ 3. *To whom available.*[2]—Under the statutes of Massachusetts, authorizing voluntary religious societies to acquire, use, and enjoy property in the same manner as if incorporated,[3] such a society can acquire title by adverse possession.[4]

to recover lands, when an adverse claimant of swamp lands patented by the state to a county took possession before that section became a law. Hunter v. Pinnell [Mo.] 91 S. W. 472. The statute of Indiana (Rev. St. 1852, § 224), making limitations of actions applicable to the state, remained in force only until 1881, since which time the common-law rule exempting the state therefrom has prevailed. McCaslin v. State [Ind. App.] 75 N. E. 844.

86, 87. Moore v. McGuire, 142 F. 787.

88. Atacosa County v. Alderman [Tex. Civ. App.] 91 S. W. 846.

89. Where a vendor conveyed a lot by metes and bounds, putting the vendee in possession and knowing and acquiescing therein, and the vendee and his grantee occupied the premises for over 30 years, they acquired title by lapse of time, as against a municipality claiming a strip of land for a street alleged to have been dedicated by the vendor. Town of Como v. Pointer [Miss.] 40 So. 260.

90. Rapp v. Stratton [Wash.] 83 P. 182, following West Seattle v. West Seattle Land, etc., Co., 38 Wash. 359, 80 P. 549.

91. Minor's Heirs v. New Orleans [La.] 38 So. 999.

92. Const. 1898, § 233. Ramos Lumber & Mfg. Co. v. Labarre [La.] 40 So. 898; St. Paul v. Louisiana Cypress Lumber Co. [La.] 40 So. 906.

93. Cameron v. Hicks [N. C.] 53 S. E. 728.

94. Limitations do not run against the infant heirs of a trustee of the legal title to land, nor against the cestui que trust, during the infancy. Cameron v. Hicks [N. C.] 53 S. E. 728.

95. Where a married woman acquired no title under a junior state grant which conflicted with a prior grant, she was not a person "entitled to commence an action for the recovery" of the land, and could not therefore use her disability to defeat a claim of adverse possession. Berry v. Ritter Lumber Co. [N. C.] 54 S. E. 278. The act of 1899 removing the disability of coverture was not retroactive, but by its terms (Revisal 1905, § 363) no adverse possession prior to Feb. 13, 1899, could be counted against a married woman. Norcum v. Savage [N. C.] 53 S. E. 289; Berry v. Ritter Lumber Co. [N. C.] 54 S. E. 278.

96. Yarborough v. Mayes [Tex. Civ. App.] 91 S. W. 624. The disability of the minority of the heirs cannot be tacked to the disability of the coverture of the ancestor to prevent the running of the statute of limitations. Elean v. Childress [Tex. Civ. App.] 89 S. W. 84; Lamberida v. Barnum [Tex. Civ. App.] 90 S. W. 698.

97. Kirkman v. Holland, 139 N. C. 185, 51 S. E. 856.

98. Elcan v. Childress [Tex. Civ. App.] 89 S. W. 84. In Kentucky, no disability prevents the running of the thirty-years limitation, if a right of action would have existed in the claimant but for the disability. Ky. St. 1903, § 2508. Watkns v. Pfeiffer [Ky.] 92 S. W. 562.

99. Shaffer v. Detie, 191 Mo. 377, 90 S. W. 131.

1. Lamberida v. Barnum [Tex. Civ. App.] 90 S. W. 698.

2. See 5 C. L. 47.

3. St. 1811, c. 6, § 3, re-enacted in St. 1834, c. 183, § 5, and in Rev. St. 1836, c. 20,

§ 4. *Definition and essential elements.*[5]—The entire doctrine of adverse possession is based upon the existence of defective titles, for where titles are good there is no occasion for invoking it;[6] and the acquisition of title thereby is predicated upon the statute of limitations.[7] The possession which will confer title[8] must be hostile,[9] actual, visible, notorious and exclusive,[10] continuous[11] and to a well de-

§ 25. First Baptist Church of Sharon v. Harper [Mass.] 77 N. E. 778.

4. First Baptist Church of Sharon v. Harper [Mass.] 77 N. E. 778.

5. See 5 C. L. 47.

6. Blumer v. Iowa R. Land Co. [Iowa] 105 N. W. 342.

7. May v. Dobbins [Ind.] 77 N. E. 353. Open, notorious, adverse possession of an unpatented mining claim for a period of more than five years brings it under the provisions of the statute of Idaho, and an action to recover possession thereof is barred. Rev. St. 1887, & 4036. Bradley v. Johnson [Idaho] 83 P. 927. The statutes of limitations of both 15 and 30 years barred recovery of the land, where for 70 years a purchaser and his grantees had held adverse possession, without receiving the deed stipulated for in the title bond, and for 50 years after promise to pay the balance of the purchase price, without any attempt on the part of the sole heirs to recover such balance. Doty v. Jameson [Ky.] 93 S. W. 38.

8. Requisites generally: In order to constitute adverse possession, five indispensable elements must appear: (1) It must be hostile, and under a claim of right; (2) it must be actual; (3) it must be open and notorious; (4) it must be exclusive; (5) it must be continuous. McCaslin v. State [Ind. App.] 75 N. E. 844. Must be (1) hostile (2) actual (3) visible notorious and exclusive (4) continuous (5) under claim of title. Clark v. Jackson [Ill.] 78 N. E. 6. It is an adverse actual possession; it must assert and exercise dominion and control over the premises in such manner as to exclude all who might wish to enjoy them under any other title. It must establish of itself a foothold upon the land, being a visible exercise of exclusive authority by virtue of a claim of right. It must be so open and notorious that the ousted claimant may have notice thereby of the fact that he is disseised. Interstate Inv. Co. v. Bailey [Ky.] 93 S. W. 578.

9. See § 5, Hostility.

10. Actual: One who enters land, on which there are other claimants, who continue thercon, acquires no right by adverse posesssion beyond his close. Phillips v. Beattyville Mineral & Timber Co. [Ky.] 88 S. W. 1058. Evidence of a prior possession and cultivation by defendant's predecessor, under a claim of right, of conveyance to defendant, is not sufficient, in the absence of proof of possession or cultivation of the particular tract in controversy. Cook v. Spencer [Tex. Civ. App.] 91 S. W. 813. Where defendants claimed to own up to plaintiff's true boundary which was disputed, and there was evidence of a former difference of opinion as to its location but not amounting to a controversy, and no actual possession of the land in controversy was had by defendants until two or three years before suit, it was error for the court to instruct as to defendant's claim of possession. Chambers v. Tharp [Ky.] 93 S. W. 627.

Visible possession of real estate with acts of dominating control, improvements, the continuous cultivation of the land, etc., are as potential in imparting notice of a claim of title as the record of a deed. Shaffer v. Detie, 191 Mo. 377, 90 S. W. 131.

Notorious: Possession through tenants, evidenced by cultivation and crops, the tenants being required to look after not only their own particular parcels but the whole general boundary, but doing nothing to direct anybody's attention to the fact that their landlord claimed possession. Held that such possession was not sufficient to constitute title by adverse possession by lapse of time. Interstate Inv. Co. v. Bailey [Ky.] 93 S. W. 578. Where one admitted that he did not own the land he had inclosed and promised to remove the fence, his possession thereof did not become adverse, until he did some act which operated as actual or constructive notice of a change in the character of his possession. Kane v. Sholars [Tex. Civ. App.] 90 S. W. 937. If a part of the land purporting to be conveyed by a deed is held in adverse possession at the time of the conveyance, and such possession is known to the vendee, he can have no relief against his vendor for deficiency of land conveyed; otherwise if he has no such knowledge. Rich v. Scales [Tenn.] 91 S. W. 50.

Exclusive: Where parent and child lived together on land, neither could claim title by adverse possession as against the other. Irvine v. Irvine [Ky.] 89 S. W. 193. A landlord could not gain title through the possession with the tenant of another person, and there was nothing to indicate the portion he actually occupied exclusively. Wiley v. Bargman [Tex. Civ. App.] 90 S. W. 1116. Where plaintiff in an ejectment suit showed a sufficient possession in defendant to constitute an adverse possession, but attempted to avoid the effect thereof by showing a certain agreement and also claimed that she was still entitled to recover, she was bound to point out the particular portion claimed by her. Dawson v. Falls City Boat Club [Mich.] 12 Det. Leg. N. 855, 106 N. W. 146. Where a strip of land had been subject to drippings from the eaves of defendant's barns for more than 20 years, plaintiff had no such exclusive possession, as could ripen into a title by adverse possession. Lins v. Seefeld [Wis.] 105 N. W. 917. Where a purchaser of real estate from testator's widow had been in exclusive possession, claiming title in good faith, for over 20 years, and for more than 5 years after the youngest child of testator became of age, it was too late for the children to assert any claim, if they had any, they being at all times advised as to the situation. Wenger v. Thompson [Iowa] 105 N. W. 333. Where a party entered into possession in 1889, received a grant in 1890 and remained in possession until 1902, but a co-tenant held possession of part of the land until 1902.

fined, marked boundary.[12] Good faith is not an essential element of adverse possession,[13] and proof of the continuity of good faith is not a condition precedent to acquiring a title by prescription.[14] In some states, additional elements have been made essential in order to give title under particular statutes, such as claim in good faith under color of title,[15] payment of taxes,[16] or the filing of a particular notice.[17] The doctrine of adverse possession is sometimes confused with estoppel.[18] The character of possession spoken of in the champerty statute [19] is the same kind of possession which, if maintained long enough under the limitation statute, confers title upon the possessor.[20]

§ 5. *Hostility.*[21]—Possession must be under claim of right,[22] inconsistent with

his possession had not been exclusive for 7 years so as to ripen into title by adverse possession. Lindsay v. Austin, 139 N. C. 463, 51 S. E. 990.

Claim of ownership of one in possession is an ingredient of adverse possession. Henry v. Brown [Ala.] 39 So. 325. An instrument describing land and containing a warranty of title, though containing no words of transfer is an assertion of claim of ownership in the grantee. Anniston City Land Co. v. Edmondson [Ala.] 40 So. 505.

11. See § 6, Continuity.

12. Hughes v. Owens [Ky.] 92 S. W. 595. But adverse possession of a portion of a lot will not authorize a recovery of such portion, where there is no showing of what portion was so occupied. Wiley v. Bargman [Tex. Civ. App.] 90 S. W. 1116. Boundaries as denoting area of possession, see post § 10.

13. An instruction that if defendant took posesssion without color of title and knew or had reason to believe who was the rightful owner, his occupancy was not such good-faith occupancy under claim of ownership as would confer title, however long continued, was erroneous. May v. Dobbins [Ind.] 77 N. E. 353. The question of the good or bad faith, or of the intention of the party taking possession, is not material, provided his intention is to take and hold adversely. Boyles v. Dougherty [Ark.] 91 S. W. 304.

14. Bennett v. Colmes [La.] 40 So. 911.

15. See § 8, Color of title. It cannot be said that possession of land under the timber culture act was not in good faith, as against another claimant to the land, where the application was granted and possession taken and the land cultivated, under legal advice, merely because a former application by the applicant for the same land had been denied. Blumer v. Iowa R. Land Co. [Iowa] 105 N. W. 342. The purchaser of property from the widow of testator was not charged with notice that he did not have title, simply because something was said at the time of the purchase to the effect that testator's children might have some interest in the property, so as to impugn the good faith of the purchaser's claim of title. Wenger v. Thompson [Iowa] 105 N. W. 333.

16. See § 9, Payment of taxes. Under Rev. St. 1898, § 2806, providing that adverse possession shall not be established, unless it shall be shown that the land was claimed and occupied for 7 years continuously, with payment of taxes, held that where a party had held the land in controversy, but admitted that the other party had paid the taxes, his adverse claim was unsustainable. Crane v. Judge [Utah] 83 P. 566.

17. Code 1896, § 1541, requires one who enters upon real estate without color of title or bona fide claim of possession to file a notice in the probate judge's office. §§ 1542, 1543 prescribe the form of notice and provide for its record, and § 1545 declares that, until the filing thereof, no possession of real estate shall be deemed adverse. Held, that where one went into possession without color of title or bona fide claim and had not been in possession 10 years before the enactment of these sections he could not acquire title by adverse title without giving such notice. Brasher v. Shelby Iron Co. [Ala.] 40 So. 80. But these sections are not applicable to one entering under a bona fide claim of purchase. Brannan v. Henry [Ala.] 39 So. 92. Where plaintiff, in an action to recover the penalty imposed by Code 1896, § 4137, for unlawful cutting of trees, attempted to show ownership by adverse possession only and had not acquired such title prior to the enactment of Code 1896, §§ 1541-46, requiring notice of adverse possession, the burden was upon him to show compliance with those sections. Brasher v. Shelby Iron Co. [Ala.] 40 So. 80.

18. Where one, with full knowledge of the facts, failed to assert, for nearly ten years, any interest in lands claimed by another in fee and improved at great expense, he was estopped from making any claim. Lewis v. Sherman Bros. [Iowa] 106 N. W. 183.

19. Ky. St. 1903, c. 210, declaring conveyances of lands in the adverse possession of another void. Interstate Inv. Co. v. Bailey [Ky.] 93 S. W. 578. See Champerty and Maintenance, 5 C. L. 565.

20. Interstate Inv. Co. v. Bailey [Ky.] 93 S. W. 578.

21. See 5 C. L. 48.

22. McCaslin v. State [Ind. App.] 75 N. E. 844. Where one takes possession of a disputed strip up to a line believed by him to be the true line of his land, intending to hold it adversely, the statute runs in his favor, regardless of any mistake as to the boundary. Bayles v. Daugherty [Ark.] 91 S. W. 304. Where plaintiff's devisor was mentally incapacitated to act or have a purpose to act or assert, for 8 years of the statutory period preceding his death, and neglected the boathouse and permitted it to fall into decay, held that plaintiff could not maintain the building on the public landing, as against the public under Rev. St. 1836, c. 24, § 61 (Gen. St. 1860, c. 46, § 1; Pub. St.

the rights of the true owner,[23] and hostile to any superior title.[24] The possession of one claiming the exclusive ownership of land is adverse to all the world,[25] and not merely adverse to those who know or claim that they have some title to the property.[26] Possession under one may be adverse to all others.[27] Where adverse pos-

c. 4, § 1; Rev. Laws, c. 53, § 1). Gifford v. Westport [Mass.] 76 N. E. 1042.

23. Adverse possession is a possession held by one "not the owner" adversely to the actual owner. Ramos Lumber & Mfg. Co. v. Labarre [La.] 40 So. 898. Adverse possession which will ripen a defective title must be of a character to subject the occupant to action. Smith v. Proctor, 139 N. C. 314, 51 S. E. 889. A possession cannot be adverse to one who has no title or right of entry or of action, or a mere stranger to the true title. Berry v. Rilte Lumber Co. [N. C.] 54 S. E. 278.

24. McCaslin v. State [Ind. App.] 75 N. E. 844. Claim of ownership openly asserted as hostile to the true owner is an indispensable ingredient of adverse possession and must be shown. Henry v. Brown [Ala.] 39 So. 325. Mere possession of land, where not in any way hostile to the legal title, does not create title however long continued. Crowl v. Crowl [Mo.] 92 S. W. 890. Where one held possession of land more than 20 years under claim of title, not in subservience to the title of another, either by direct acknowledgment or an open denial of right on his part, the possession was adverse. Cline v. Hays [Ind.. App.] 76 N. E. 257. Where the agent in possession of land surrendered it to the sheriff to be sold on execution, the possession of the owner, subsequent to the sale, was not hostile to the vendee, in the absence of an intention to appropriate the land in spite of the sheriff's conveyance, so evidenced as to constitute notice to such purchasers. Woodward v. Johnson [Ky.] 90 S. W. 1076. An entry upon land with the intention of asserting ownership and continuing in the open and exclusive possession thereof, exercising the usual acts of ownership, without asking permission and in disregard of all other claims, is sufficient to make the possession adverse. May v. Dobbins [Ind.] 77 N. E. 353. Where a widow held possession of an entire farm under a dede of two-thirds, denied the title of the purchaser of the other third under an execution against her son, permitted in joint possession, and afterward purchased the other third under another execution and afterward held possession for the period of limitations, held that she had acquired title to the other third by adverse possessions. Tarplee v. Sonn, 109 App. Div. 241, 96 N. Y. S. 6. An instruction that to constitute effectual adverse possession, it must have been hostile in its inception, to wit, from the time defendant claimed he purchased, was not prejudicial when the defendant did not claim that his possession was hostile from any other period. Fox v. Spears [Ark.] 93 S. W. 560. One obtained license for right of way in 1859, and servient estate was sold in 1876. Court found that licensee and his grantees used the way openly and continuously and exclusively until 1895 and had possession "under a claim of right" until that time. Held, that finding showed a hostile user sufficient to give title to the way, regardless of whether sale of servient estate rendered continued occupation of the way hostile. Toney v. Knapp [Mich.] 12 Det. Leg. N. 872, 106 N. W. 522.

NOTE. Mistake in locating boundary: The question has frequently arisen whether, when an owner of land, by mistake as to the boundary line of his land, takes possession of another's land, and holds it for the statutory period, he thereby acquires the title as against the real owner. In some states, in such a case, the possession is regarded as adverse, without reference to the fact that it is based on mistake, it being sufficient that actual and visible possession is taken under claim of right. French v. Pearce, 8 Conn. 439, 21 Am. Dec. 680, 3 Gray's Cas. 76; Yetzer v. Thoman, 17 Ohio St. 130, 91 Am. Dec. 122; Metcalfs v. McCutchen, 60 Miss. 145; Burnell v. Maloney, 39 Vt. 579, 94 Am. Dec. 358; Tex v. Pflug, 24 Neb. 666, 8 Am. St. Rep. 231; Levy v. Yerga, 25 Neb. 764, 13 Am. St. Rep. 525; Seymour, Sabin & Co. v. Carli, 31 Minn. 81; Ramsey v. Glenny, 45 Minn. 401, 22 Am. St. Rep. 736; Greene v. Anglemire, 77 Mich. 168; Crary v. Goodman, 22 N. Y. 170; Tolman v. Sparhawk, 5 Metc. [Mass.] 469; Grim v. Murphy, 110 Ill. 271 (semble); Dyer v. Eldridge, 136 Ind. 654. See Bishop v. Bleyer, 105 Wis. 330. In other states the fact that, in such case, the possession of the other's land is under mistake, is regarded as material, and a distinction is asserted to the effect that, if such possession up to the boundary as located is with the intention of claiming to such boundary even though the boundary be incorrect, the possession is adverse, while, if it is with the intention of claiming thereto only if the boundary is correct, the possession is not adverse. Wilson v. Hunter, 59 Ark. 626, 43 Am. St. Rep. 63; Watrous v. Morrison, 33 Fla. 261, 39 Am. St. Rep. 139; Taylor v. Fomby, 116 Ala. 621; Ayers v. Reidel, 84 Wis. 276, Finch's Cas. 1016; Grube v. Wells, 34 Iowa, 148, 3 Gray's Cas. 82; Mills v. Penny, 74 Iowa, 172, 7 Am. St. Rep. 474; Winn v. Abeles, 35 Kan. 85, 57 Am. Rep. 138; Preble v. Maine Cent. R. Co., 85 Me. 260, 35 Am. St. Rep. 366; McCabe v. Bruere, 153 Mo. 1; Finch v. Ullman, 105 Mo. 255, 24 Am. St. Rep. 383, note; Caufield v. Clark, 17 Or. 473, 11 Am. St. Rep. 845; King v. Brigham, 23 Or. 262; Chance v. Branch, 58 Tex. 490.—From Tiffany on Real Property, § 443, P. 1013.

25. Waterman Hall v. Waterman [Ill.] 77 N. E. 142.

26. Waterman Hall v. Waterman [Ill.] 77 N. E. 142; Steele v. Steele [Ill.] 77 N. E. 232. One who purchases land, pays the purchase price and enters into possession believing he has title, whether he receives a good deed, an imperfect one or no deed at all, nevertheless enters into a possession adverse to the vendor and all the rest of the world. Purchase of mortgaged property from the mortgagor, by the owner of the mortgage, and possession thereunder, held to be adverse, giving an absolute title after

session is founded upon a parol gift, the gift must be established by clear and convincing evidence, and the possession must be shown to have been hostile and not merely that of a licensee;[28] and the burden of proof, as to improvements made and other acts of ownership upon the faith of the gift is upon him who asserts title by virtue of the donation and possession.[29] Permissive possession,[30] possession under a license[31] pursuant to an agreement,[32] or in subordination to the title of the true owner,[33] is not adverse. The defendant in ejectment, after judgment against him, may acquire title by adverse possession beginning after such judgment, but his possession before judgment cannot be considered.[34] Adverse possession does not run as between co-tenants[35] unless there is actual ouster and notice or knowledge of hostile claim by one in possession, brought home to the other party,[36] nor as be-

5 years, although the writings amounted to only a mortgage instead of a transfer of title. Fountain v. Lewiston Nat. Bank [Idaho] 83 P. 505.

27. Entry under a belief that land belongs to the state and possession with intent to preempt it, is hostile to a private owner. Village Mills Co. v. Manley [Tex. Civ. App.] 15 Tex. Ct. Rep. 487, 94 S. W. 102.

28. A plural wife, who had lived 46 years on her husband's premises, did not acquire adverse possession through a parol gift, where her residence was merely as a plural wife, and her husband exercised ownership and dominion over the land, etc. Raleigh v. Wells [Utah] 81 P. 908.

29. Raleigh v. Wells [Utah] 81 P. 908.

30. Evidence held to show that the alley proposed to be opened through plaintiff's block existed and that his possession was only permissive. Incorporated Town of Hope v. Shiver [Ark.] 90 S. W. 1003. The grantee of a mortgagor is in permissive possession of the mortgaged premises and does not hold adversely to the mortgagee, but stands in the same position as the mortgagor. Thornely v. Andrews [Wash.] 82 P. 899.

31. A license by the owner of land to erect a shed over an alley, **reserving ingress and egress and right of revocation,** does not entitle the licensee to claim title by adverse possession after 21 years. Wilson v. Cather [Pa.] 63 A. 190. For discussion of question whether one entering upon the land of another under a license may set up a claim of title by adverse possession continued for the statutory period after a revocation of the licensor without also showing distinct notice of an adverse claim to the owner of the servient estate, see Toney v. Knapp [Mich.] 12 Det. Leg. N. 872, 106 N. W. 522.

32. Acquiescence for a long term of years in the **mutual use of a driveway,** established by consent of adjoining lot owners, did not create title in either party, such user being neither hostile nor adverse. Wilkinson v. Hutzel [Mich.] 12 Det. Leg. N. 870, 106 N. W. 207. Where 25 acres were deeded with a **reservation of one acre for a right of way,** with a privilege to the grantee to inclose such right of way, he being required to maintain a gate at each end of the right of way, the actual occupation of the 24 acres by one to whom they were assigned on partition, together with the right of way, was not adverse as to the one acre, though it was inclosed with the 24 acres. Pritchard v. Lewis, 125 Wis. 604, 104 N. W. 989. Where a father went into **possession with consent** of the son, to occupy and cultivate a farm for himself, but with the understanding that the title should remain in the son, and continued to occupy the farm until his death, with no indication of any change in the character of his possession, he did not gain title by adverse possession. Allen v. Ellis, 125 Wis. 565, 104 N. W. 739. Where title to property was taken in a member's name for an unincorporated religious society, his regular attendance on divine worship in the church built on the premises, did not constitute a joint user of the premises by him and the society, so as to show that the society's occupation was permissive rather than adverse. First Baptist Church of Sharon v. Harper [Mass.] 77 N. E. 778.

33. Bayles v. Daugherty [Ark.] 91 S. W. 304. Occupation of land for 35 years held not to have raised a presumption of title, where the occupant's original acquisition, as well as her continual possession, had been in subordination to another's fee. Kennedy v. Rainey [Ala.] 39 So. 813. Plaintiff's asking permission of the common council to close an alley, and promising to reopen it when directed, precluded his claiming an adverse possession thereof. Incorporated Town of Hope v. Shiver [Ark.] 90 S. W. 1003.

34. Wade v. McDougle [W. Va.] 52 S. E. 1026.

35. The possession of one joint tenant, parcener, or tenant in common, is the possession of the others. Chapman v. Kullman, 191, 89 S. W. 924; Dobbins v. Dobbins [N. C.] 53 S. E. 870; Steele v. Steele [Ill.] 77 N. E. 232.

36. One tenant in common may assert an adverse title against his co-tenant, if only it be adverse and to the exclusion of the co-tenant (Tarplee v. Sonn, 109 App. Div. 241, 96 N. Y. S. 6), as where it is of such a character as to give notice to the co-tenant that his title is not acknowledged and that the possession is adverse to him (Waterman Hall v. Waterman [Ill.] 77 N. E. 142); taking actual and exclusive possession of the entire estate, with such outward acts of exclusive ownership as give notice that an adverse possession is intended (Id.; Dobbins v. Dobbins [N. C.] 53 S. E. 870); or by open, notorious and uninterrupted possession for more than 21 years, claiming the whole land and taking all the profits exclusively (Rohrbach v. Sanders [Pa.] 62 A. 27). A sale and conveyance of the whole title by one co-tenant, followed by adverse possession, amounts to a disseisin of the other co-

tween landlord and tenant.[37] The possession of the life tenant is not adverse to the remainderman;[38] but where an estate was devised in trust for a daughter "and the heirs of her body," and providing that, if she died without "children," the estate should go to persons named, she and her trustee, under the statute converting estates tail into fees simple, had a fee-simple estate, and the statute of limitations began to run at the time the original purchaser of the estate took possession;[39] and where the possessor is a stranger to the title of both the life tenant and the remainderman, the possession is adverse to both.[40] A grantor who holds possession of land, after the execution and delivery of a deed thereof, is regarded as holding in subserviency to his grantee, and nothing short of an explicit disclaimer of such relation and a notorious assertion of right in himself will be sufficient to change the character of his possession and render it adverse to the grantee;[41] nor does a mortgagor's possession of the premises after foreclosure and sale become adverse, until notice to the purchaser, that the mortgagor is holding in hostility to him.[42] The possession of a vendee under an executory contract of sale is not adverse to the vendee, or one standing in a similar relation as the vendor by privity of contract,[43]

tenants and limitations will run against them. Steele v. Steele [Ill.] 77 N. E. 232. Where a tenant in common and those claiming under him held exclusive, quiet and peaceable possession for more than 40 years without any demand or claim for an accounting of rents and profits, it was presumed that there was an actual ouster at the beginning that the occupation was adverse and converted the estate in common into one in severalty. Dobbins v. Dobbins [N. C.] 53 S. E. 870. Disability of some of the parties claiming an interest in the land, during such period, did not rebut the presumption of ouster, where the parties under disability claimed under an ancestor who was not under disability at the time the adverse possession commenced. Id. Mere silent possession by one co-tenant, no matter how long continued, does not destroy the right of another. Logan's Heirs v. Ward [W. Va.] 52 S. E. 398. Where all the deeds gave defendant only an undivided five-sixths of the land and one was executed subsequent to his making most of the improvements on the land on which he relied to show exclusive possession, and there was no notice that he claimed more than five-sixths, he could not hold the other one-sixth by adverse possession. Chapman v. Kullman, 191 Mo. 237, 89 S. W. 924. Where a claim of adverse possession was asserted in a suit for partition at a time when such questions could not be tried in such action, the other co-tenant was not charged with notice that the claimant was an adverse occupant. Tarplee v. Sonn, 109 App. Div. 241, 96 N. Y. S. 6. The rule that a tenant in common cannot purchase an outstanding title and refuse to permit his co-tenant to share therein by sharing in the burden does not apply where the claimants are asserting hostile claims (Niday v. Cochran [Tex. Civ. App.] 93 S. W. 1027); but before the co-tenant's right to share in the burden and benefit of the purchase can be cut off, he must be given notice, either actual or constructive, of the purchase (Id.).

37. Dickinson v. Arkansas City Imp. Co. [Ark.] 92 S. W. 21. Where a lessee enters on premises under a contract with one of the tenants in common, his entry is not hostile to their title, whether the contract was binding or not. Lee v. Livingston [Mich.] 12 Det. Leg. N. 922, 106 N. W. 713. Where a tenant built a house on leased land, partially extending on to other land owned by his lessor, adverse possession could not begin to run in favor of the lessee until the date of lessor's deed of the land to another party. Ross v. Guentherodt [Mich.] 12 Det. Leg. N. 850, 105 N. W. 1120.

38. Adverse possession does not begin to run against remaindermen until the death of the life tenant. McCormack v. Coddington, 46 Misc. 510, 95 N. Y. S. 46; Elcan v. Childress [Tex. Civ. App.] 84 S. W. 84. Possession under a tax deed conveying only the life tenant's title is not adverse to the remaindermen until the death of the life tenant. Smith v. Proctor, 139 N. C. 314, 51 S. E. 889.

39. Watkins v. Pfeiffer [Ky.] 92 S. W. 562.

40. Each has the right of action for recovery, as soon as the adverse possession begins, and permitting the possession to continue for the statutory period will bar the right of both. Elcan v. Childress [Tex. Civ. App.] 89 S. W. 84.

41. Where one executed a deed covering certain land by mistake and the deed was recorded, mere payment of taxes and fencing the land, without exclusive possession, is not sufficient. Garst v. Brutsche [Iowa] 105 N. W. 452.

42. Tainter v. Abrams [Neb.] 107 N. W. 225.

43. Barrett v. McKinney [Tex. Civ. App.] 93 S. W. 240; Wilson v. Nugent [Tex. Civ. App.] 91 S. W. 241. Neither a purchaser taking possession under a verbal contract, nor his heirs, can dispute the title while the purchase price remains unpaid. Tillar v. Clayton [Ark.] 88 S. W. 972. Where one made a bond for conveyance of land to another and then deeded part of the land to a third party, the possession of the vendee under the bond was not adverse to the first party, but was adverse to the third party after deed to him. King v. Thompson [W. Va.] 52 S. E. 487.

until there has been a severance of the relation of vendor and vendee, by a distinct avowal by the latter that he holds adversely and not in subordination to the vendor's title, and notice of such disclaimer is brought home to the vendor;[44] but such possession is adverse to all others.[45] The general rule is that the husband or wife cannot, while living together and in the joint possession of real estate, acquire title one against the other by prescription,[46] but both are presumed to occupy the premises in subordination to the title under which possession was taken, and not in hostility thereto.[47] Where the owner of an unassigned dower interest assumed to demise the entire premises, an entry thereunder did not become hostile to the title of the owners by agreement or acquiescence of the owner of the dower interest.[48]

Where one already in possession under color of title, from another source, merely buys an outstanding title or claim to get peace, he is not afterward estopped to deny the validity of such title and to claim under his own previous title.[49]

§ 6. *Continuity.*[50]—The doctrine of continuity rests upon the principle that whenever a party quits the possession the seisin of the true owner is restored and a subsequent wrongful entry constitutes a new disseisin.[51] Continuity of the adverse possession is the very essence of the doctrine and policy of the statutes of limitation.[52] Hence possession must be continuous and uninterrupted [53] for the statutory

44. Possession of vendee under an incomplete contract of sale. Marbach v. Holmes [Va.] 52 S. E. 828.

45. Barrett v. McKinney [Tex. Civ. App.] 193 S. W. 240.

46. McPherson v. McPherson [Neb.] 106 N. W. 991.

47. Prior to the vesting of title in the wife by prescription, the husband bought the patent title and they continued in possession of the premises. Held that his purchase of title and possession of the premises with her did not arrest the running of the statute in favor of the wife. McPherson v. McPherson [Neb.] 106 N. W. 991.

48. Lee v. Livingston [Mich.] 12 Det. Leg. N. 922, 106 N. W. 713.

49. Fitch v. Gentry [Ky.] 92 S. W. 586.

50. See 5 C. L. 51.

51, 52. Henry v. Brown [Ala.] 39 So. 325.

53. McCaslin v. State [Ind. App.] 75 N. E. 844. Temporary absence from land, without any intention of abandonment, does not break the continuity of possession. Hunter v. Pinnell [Mo.] 91 S. W. 472. On the issue of the sufficiency of adverse possession, the question of whether a party who left land and remained away did so without intention of returning, was a question for the jury. Campbell v. Bates [Ala.] 39 So. 144. The mere fact that during the possession the fence inclosing the land was at times torn, knocked, or blown down, being always put up again immediately, did not interrupt the running of the limitation. Kane v. Sholars [Tex. Civ. App.] 90 S. W. 937. The purchase of one of two tracts of land, by one who has used a way over both, before he has acquired a prescriptive right of way, does not interrupt the running of the prescriptive time as to the other tract. Bullock v. Phelps [R. I.] 61 A. 589. The owner of lot A had used a way across lots B and C for 17 years, when he purchased lot B. The prescriptive time as to lot C was not interrupted and the prescriptive right of way would mature in 20 years. Id. Where the court charged that peaceable possession meant continuous possession not interrupted by adverse suit to recover, it was error not to instruct the jury that a judgment against defendant, which was in evidence and was void for lack of jurisdiction, did not interrupt the running of the statute. Barrett v. McKinney [Tex. Civ. App.] 93 S. W. 240. Adverse possession interrupted by removal of plaintiff's tenant from the land for two years, leaving the place vacant. Phillips v. Beattyville Mineral & Timber Co. [Ky.] 88 S. W. 1058. Statutory period interrupted by the mental incapacity of plaintiff's devisor to act or assert a claim for 8 years preceding his death. Gifford v. Westport [Mass.] 76 N. E. 1042. Where plaintiff's adverse possession had not ripened into a perfect title as against his grantee when the latter sold to a third person who never recognized plaintiff's possession and had no notice of plaintiff's repudiation of his own deed, plaintiff's adverse possession was interrupted by such sale. Garst v. Brutsche [Iowa] 105 N. W. 452. Where the claimant by adverse possession entered in Nov. 1893, but the land was not occupied by any one during 1896, the period of limitation was broken and the occupation prior to the break could not be counted as part of the term of limitation. Wilson v. Nugent [Tex. Civ. App.] 91 S. W. 241. The patenting by the claimant, as vacant land, of part of the land claimed to have been held in adverse possession for 30 years, was not an abandonment of the claim of adverse possession. Asher v. Howard [Ky.] 91 S. W. 270. Where plaintiff's ancestor was in actual possession during 1842-45, but abandoned the land in 1849, and there had been no asserted claim up to 1897, except the forbidding of trespassing on one occasion, to which no attention was paid, but from 1873 the heirs of the original owner claimed and conveyed the land, the possession of plaintiff's ancestor was not such as to confer title by adverse possession. Veatch v. Gray [Tex. Civ. App.] 91 S. W. 324. Where a purchaser located land, took possession, cleared, fenced

period.[54] To interrupt possession an action must be commenced by the claimant, by the true owner, or a re-entry on the premises must be made by him, and his intention must be sufficiently indicated by words or acts, by express declaration or by exercise of acts of ownership inconsistent with a subordinate character.[55]

Tacking.[56]—Those claiming by adverse possession can add to their possession that of those under whom they claim;[57] but a claimant cannot tack to the time of his possession that of a previous holder, when the land is not included in the boundaries in the deed from such holder.[58] The heir may tack the possession of his ancestor to make up the statutory period of adverse possession.[59]

§ 7. *Duration.*[60]—The possession must continue for the statutory period,[61]

and planted it to fruit trees, and so occupied it for about 9 years, and then had a survey made which showed that his location extended over adjacent owners' lands, whereupon he improved his lands only with reference to the survey and removed his improvements from the strip outside of his line; held that such action was an abandonment of the strip within the statutory period of 10 years. Noyes v. Douglas, 39 Wash. 314, 81 P. 724. An agreement for a good title to 200 out of 353 acres held adversely by the heirs of the purchaser, held not to have been a surrender of the rest of the land and 50 years' possession of the entire tract gave the grantees title by adverse possession. Doty v. Jameson [Ky.] 93 S. W. 638.

54. See § 7, Duration.

55. McPherson v. McPherson [Neb.] 106 N. W. 991.

56. See 5 C. L. 52.

57. Hughes v. Owens [Ky.] 92 S. W. 595; Moulierre v. Coco [La.] 41 So. 113. In ejectment, the defendant is not confined to his own adverse possession, as against the plaintiff's prima facie showing, but can tack to it the possession of those under whom he claims. Campbell v. Everhart, 139 N. C. 503, 52 S. E. 201. Where a husband took possession of real estate, under claim of title, and lived thereon with his wife and family and died before the ten-year limitation expired, the possession of his widow, who continued to live on the land, could be tacked to the husband's possession, so as to raise the bar of limitation. Larson v. Anderson [Neb.] 104 N. W. 925. In such case the widow's possession is a continuation of the husband's adverse possession and will not be deemed adverse to the claims of their children and heirs (Id.), unless by some means she brings to their attention the fact that she claims to own the property in her own right and adversely to any right derived through her husband (Id.). In Texas the requisite peaceable and adverse possession need not be continued in the same person, but when held by different persons successively there must be a privity of estate between them. Rev. St. 1895, art. 3350. Lamberdia v. Barnum [Tex. Civ. App.] 90 S. W. 698.

NOTE. Tacking of possession: The possession must be continuous, and when one seeks to unite to his possession that of prior occupants the several titles must be connected by purchase or descent without some privity between the successive occupants, the several possessions cannot be tacked together so as to make the required continuity. Smith v. Reich, 87 Hun [N. Y.] 287. Different entries, at different times, by different persons, between whom no privity exists, are but a succession of trespasses. Rose v. Goodwin, 88 Ala. 390. Privity must be shown to have existed between them. Wheeler v. Moody, 9 Tex. 372. And deed must be shown to tack possession of successive tenants. Johnson v. Nash, 15 Tex. 419. Each succeeding occupant must show title under his predecessor and his possession must be referable to the original entry. Witt v. St. Paul & N. R. Co., 38 Minn. 122. But evidence of omission by mistake in drafting deed embracing land in question is admissible to characterize the possession of grantor and grantee.—From 15 Yale F. Jr. 300.

58. Messer v. Hibernia Sav. & Loan Soc. [Cal.] 84 P. 835; Jennings v. White, 139 N. C. 23, 51 S. E. 799.

59. Brucke v. Hubbard [S. C.] 54 S. E. 249. Possession by mother held to inure to the benefit of the son. Henry v. Brown [Ala.] 139 So. 325. Children remaining in possession through the administrator of their mother's estate, their guardian and agent, for 14 years after the death of their parents, acquired title by adverse possession. Killebrew v. Mauldin [Ala.] 39 So. 575.

60. See 5 C. L. 53.

61. A landlord cannot claim title through the possession of his tenant, unless such tenant sustained that relation during the full statutory period. Wiley v. Bargman [Tex. Civ. App.] 90 S. W. 1116. Adverse possession of wild land for 20 years, before the passage of the Maine Pub. Laws 1895, c. 162, would not bar suit for recovery, if such adverse possession did not continue for the 5 years following its passage. Soper v. Lawrence Bros. Co., 26 S. Ct. 473. Evidence held not to show adverse, exclusive, continuous, open, and notorious occupation for 20 years or more. Whitmore v. Brown [Me.] 61 A. 985. Possession shown to have been open and uninterrupted for 20 years. Reitler v. Lindstrom [Wis.] 106 N. W. 388. Adverse possession continued uninterruptedly for 20 years or more will establish title to the extent that the possession is actual and exclusive. May v. Dobbins [Neb.] 77 N. E. 353. The doctrine of abandonment of lands will not aid to establish title by adverse possession, where such possession has not been held fos the period of the statute of limitations. Kreamer v. Voneida [Pa.] 62 A. 518. Where adjoining landowners establish a disputed boundary line by parol agreement and hold possession accordingly for over twenty years, any questioning of

which varies in the several states.[62] Two years' open, continuous, exclusive and adverse possession under a donation deed gives title in Arkansas.[63] Where a person has had uninterrupted possession of land for thirty years or more, the common law of the land creates the presumption that his entry was under a purchase and that his grantor had lawful right to convey;[64] and in case of an unincorporated religious society, it will be presumed under such circumstances that the title was duly conveyed to trustees for its benefit.[65]

§ 8. *Color of title.*[66]—Color of title is that which in appearance is title, but which in reality is no title,[67] and it exists wherever there is a reasonable doubt regarding the validity of an apparent title.[68] Color of title is anything in writing connected with the title,[69] however imperfect it may be as a conveyance,[70] which serves to define the extent of the claim,[71] such as a quitclaim deed,[72] a special com-

such agreement is barred by limitation. Kincaid v. Vickers, 217 Ill. 423, 75 N. E. 527. A party holding under a warranty deed, as color of title, for seventeen years, and occupying the premises and paying all taxes thereon for fifteen years had title to the land by limitations. Wilder v. Aurora, DeKalb & R. Elec. Traction Co., 216 Ill. 493, 75 N. E. 194.

62. Mills' Ann. St. §§ 2923, 2924, prescribing a five-year limitation in favor of those in possession of land under claim and color of title in good faith and who pay taxes thereon, or who claim unoccupied lands under color of title and pay taxes thereon, are expressly repealed by Laws 1893, p. 327, c. 118, which prescribes a seven-year limitation in such cases. Ballard v. Golob [Colo.] 83 P. 376. Good faith, just title, and 10 years' possession are the requisites. Bennett v. Calmes [La.] 40 So. 911. Where a tract was included by fencing and use in a plantation for more than 20 years, openly, notoriously, and uninterruptedly, and the plantation was sold by the sheriff by name and metes and bounds, the incorporated tract passed as a part of the plantation by a title whose defects, if any, were cured by the prescription of 10 years, where the adjudicatee continued in possession in good faith. Booksh v. New Iberia Sugar Co. [La.] 39 So. 545. Where the defendant acquired through mesne conveyances from the original purchaser and, by himself and through his ancestors, had been in actual, open, notorious, and uninterrupted possession, under titles translative of property, for more than 10 years, plaintiff could not recover the land. Penn. v. Prevost, 114 La. 1080, 38 So. 865. Under Rev. St. 1836, c. 24, § 61 (substantially retained in Gen. St. 1860, c. 46, § 1; Pub. St. c. 54, § 1; Rev. Laws, c. 53, § 1), no length of time less than 40 years justifies the continuance of a building on a public landing place, as against the public. Gifford v. Westport [Mass.] 76 N. E. 1042. Evidence of a deed to defendant made over 5 years prior to suit, payment of taxes by defendant for more than five consecutive years, and of clearing, fencing and cultivation of the land for the same time, entitles defendant to judgment under the five-year statute of limitations. Cook v. Spencer [Tex. Civ. App.] 91 S. E. 813. The claimant must have been in possession of the boundary for 15 years. Hughes v. Owens [Ky.] 92 S. W. 595.

63. Sibly v. Gomillion [Ark.] 91 S. W. 22.

64, 65. Penny v. Central Coal & Coke Co. [C. C. A.] 138 F. 769.

66. See 5 C. L. 53.

67. Henry v. Brown [Ala.] 39 So. 325; Smith v. Proctor, 139 N. C. 314, 51 S. E. 889.

68. Henry v. Brown [Ala.] 39 So. 325.

69. Color of title has its root in some instrument dealing with the title. Shaffer v. Detie, 191 Mo. 377, 90 S. W. 131. A deed, though antedated, is color of title from the time of its execution. Anniston City Land Co. v. Edmondson [Ala.] 40 So. 505. A recorded warranty deed purporting to convey the premises is color of title. Milby v. Hester [Tex. Civ. App.] 15 Tex. Ct. Rep. 495, 94 S. W. 178.

70. Shaffer v. Detie, 191 Mo. 377, 90 S. W. 131. Where the deed was signed by mark and bore an acknowledgment by one purporting to be an officer, which, though void as an acknowledgment, was good as an attestation, it gave color of title. Davis v. Arnold [Ala.] 39 So. 141. However insufficient may be a conveyance to pass title and however incomplete the power of the grantor to pass the true and real title, yet an entry thereunder, accompanied with continuous possession and claim of title, renders the possession adverse. Henry v. Brown [Ala.] 39 So. 325. In order that a deed or paper writing may give color of title, it is not necessary that the grantor have title, either to the whole or to any part of the land embraced in the instrument. Id. Where it appears that it was the intention of grantors to transfer lands described in the division of an estate, it is sufficient color of title in the grantees, although the instrument may lack apt words of conveyance. Id.

71. An instrument describing land and containing a warranty of title, though containing no words of transfer, is color. Anniston City Land Co. v. Edmondson [Ala.] 140 So. 505. Description in tax deed held to cover disputed strip with sufficient certainty to include it within the claim of title. A deed which locates a corner and gives courses and distances is sufficient under the five-year statute of limitations, to give title by possession and payment of taxes, although it refers to an unrecorded deed. Club Land & Cattle Co. v. Wall [Tex.] 91 S. W. 778. The description of a town lot by name, number, and division, also by metes and bounds, was sufficient to give color of title, it appearing that the town had been divided and allotted. Capen's

missioner's deed,[73] an administrator's deed,[74] a tax deed,[75] a sheriff's deed,[76] an unregistered deed,[77] or a will.[78] A deed which conveyed no greater interest to a person than a tenancy by curtesy operated as color of title.[79] But no color of title is conferred by a deed containing an insufficient description,[80] or by a certificate of purchase on a tax sale.[81] A tax deed which conveys only the interest of the life tenant is not color of title against the remaindermen;[82] nor does prescription run against an owner in possession, in favor of a tax title based upon an assessment radically defective.[83] A security deed, so long as the possession of the premises is not surrendered to the grantee but remains in the grantor, cannot be made the foundation of a prescription by seven years' possession under color of title.[84] A deed from an executor purporting to be executed pursuant to the requirements of a will, conveys no greater interest than would pass under the will, and cannot be used as color of title for the foundation of a prescriptive right against the claims of those whom the grantee was bound to recognize as owners under the will.[85] Where an estate created by color of title and possession is conveyed, the estate passes to the grantee and gives him color of title;[86] and one who has color of title acquired in good faith need not trace his title to the source to see whether it is apparently perfect and free from defects.[87] What constitutes color of title is a question of law for the court.[88]

Color of title is not necessary to constitute adverse possession[89] unless made so by statute.[90]

Adm'r v. Sheldon [Vt.] 61 A. 864. Where description in tax deed and certificate was inaccurate but not impossible, the deed was held to constitute color of title. Kampfer v. East Side Syndicate [Minn.] 104 N. W. 290; Reitler v. Lindstrom [Wis.] 106 N. W. 388.

72. A quitclaim deed which purports to convey the property is as good color of title as a warranty deed. Waterman Hall v. Waterman, 220 Ill. 569, 77 N. E. 142.

73. A deed from a special commissioner purporting to have been made under a decree is admissible as evidence of color of title for adverse possession. Wade v. McDougle [W. Va.] 52 S. E. 1026.

74. An administrator's deed on sale of land to pay debts constitutes color of title. Shaffer v. Detie, 191 Mo. 377, 90 S. W. 131.

75. A tax deed is a "deed" within the meaning of art. 3193, Rev. St. 1879 (art. 3342, Rev. St. 1895) and will support the plea of limitation of five years without proof of the prerequisites necessary to authorize the sale for taxes. Lamberida v. Barnum [Tex. Civ. App.] 90 S. W. 698. A tax deed containing a sufficient description of the land conveyed, although void as a muniment of title, is admissible as evidence of color of title. Brannan v. Henry [Ala.] 39 So. 92. Adverse possession for over 15 years, under color of title based on a tax deed, tolled the record owner's right of entry. Fitch v. Gentry [Ky.] 92 S. W. 586.

76. A sheriff's deed to land sold on execution, though actually conveying nothing, is sufficient to constitute color of title. Tarplee v. Sonn, 109 App. Div. 241, 96 N. Y. S. 6. The recording of such deed is not essential to the acquirement of title under it by holding adversely. Id.

77. Under Revisal 1905, § 980, an unregistered deed, as against one claiming from a different source, is admissible as color of title. Janney v. Robbins [N. C.] 53 S. E. 863. The title or possession of a claimant by adverse possession cannot be affected by the nonregistry of an anterior deed. Moulierre v. Coco [La.] 41 So. 113.

78. Where a will described land as 80 acres adjoining the farm of testatrix and deeded to her in her maiden name, and there was a recorded deed of such tract, and testatrix did not own the tract, but the devisee went into possession, devisee had color of title. Waterman Hall v. Waterman, 220 Ill. 569, 77 N. E. 142.

79. Norcum v. Savage [N. C.] 53 S. E. 289.

80. The two-year statute of limitations does not run under a tax deed that is void for failure to describe any land. Dickinson v. Arkansas City Imp. Co. [Ark.] 92 S. W. 21. Three years' peaceable and adverse possession under patents does not confer title, when the land so possessed is not included in the patents by a proper construction of their calls. Atascosa County v. Alderman [Tex. Civ. App.] 91 S. W. 846.

81. Jackson v. Bailey [S. D.] 104 N. W. 268.

82. Smith v. Proctor, 139 N. C. 314, 51 S. E. 889.

83. Posey v. Ducros [La.] 39 So. 26.

84. Phillips v. Collinsville Granite Co., 123 Ga. 830, 51 S. E. 666.

85. Sanders v. Thompson, 123 Ga. 4, 50 S. E. 976.

86. Capen's Adm'r v. Sheldon [Vt.] 61 A. 864. Where the original vendor was in possession and sold the property by title valid in form, that was a sufficient starting point for a prescription afterward acquired. Bennet v. Calmes [La.] 40 So. 911.

87. Waterman Hall v. Waterman, 220 Ill. 569, 77 N. E. 142.

88. Henry v. Brown [Ala.] 39 So. 325.

89. May v. Dobbins [Ind.] 77 N. E. 353. The running of the statute of limitations

§ 9. *Payment of taxes.*[91]—Payment of taxes is, in some states, equivalent to possession of wild and vacant land,[92] and in other states it is only an element of adverse possession under particular statutes.[93] While nonpayment of taxes on the land during its occupancy will not of itself defeat a claim thereto, yet it is entitled to weight as tending to show that the claimant did not intend to assert title as against the real owner.[94] Where land was assessed to the record owner regularly and he paid the taxes, another party could not gain title by virtue of the statute of limitations by causing the land to be assessed to himself and paying taxes thereon.[95] Payment of taxes by certain co-owners of a mining claim, who have acquired a patent therefor must be regarded as a payment for all the owners, for whom they hold the title in trust.[96]

§ 10. *Area of possession.*[97]—One holding without color holds only to the extent of his actual possession;[98] but one holding under color holds within the bound-

may be instituted without even color of title and without reference to the good or bad faith of the adverse claim asserted by the occupant. Id.

90. Mere naked possession in Washington is not sufficient, but there must be claim of right or color of title. Lohse v. Burch [Wash.] 84 P. 722. One who purchased land pending a suit by a minor to recover the land after he became of age, was not a purchaser in good faith and under color of title within the meaning of Ballinger's Ann. Codes & St. § 5503, and such minor was not bound to sue him within 3 years after attaining his majority, under § 5505. May v. Sutherlin [Wash.] 84 P. 585. Under Mills' Ann. St. § 2923, parties must be in possession under color of title, to receive the benefit of the limitation of five years' payment of taxes. Ballard v. Golob [Colo.] 83 P. 376. Rev. Code Civ. Proc. § 55, confers title on a person possessing color of title and paying taxes in good faith for 10 years. Jackson v. Bailey [S. D.] 104 N. W. 268. But the limitation is not effective unless 10 years intervene between the execution of the tax deed and the commencement of action. Id.

91. See 5 C. L. 55.

92. Under Act Mar. 18, 1899 (Acts 1899, p. 117, No. 66), payment of taxes under color of title constitutes possession for each successive year in which payment is made, provided such payment be continued for at least 7 years in succession and not less than 3 years after the passage of the statute (Price v. Greer [Ark.] 88 S. W. 985), and the adverse possession begins with the payment and not at the expiration of the 7 years (Cottonwood Lumber Co. v. Harding [Ark.] 92 S. W. 1118). Said act is constitutional. Id. The act of Arkansas which provides that unimproved and uninclosed lands shall be deemed to be in the possession of the person who pays the taxes thereon, but that no one can invoke the benefit of the act unless he and those under whom he claims shall have paid the taxes for at least seven successive years is a valid and constitutional act of limitation. Act Mar. 18, 1899 (Acts 1899, p. 117, Kirby's Dig. § 5057.) Arbuckle v. Kelley, 144 F. 276.

93. In South Dakota one possessing color of title and paying taxes in good faith for 10 successive years acquires title. Rev. Code Civ. Proc. § 55. Jackson v. Bailey [S. D.] 104 N. W. 268. Possession of premises for 16 years, under a deed, without proof of payment of taxes for at least seven consecutive years, does not establish title by limitation or otherwise, as against the world. Glos v. Holberg, 220 Ill. 167, 77 N. E. 80. Where defendants had been in possession for 5 years, up to December, 1903, but had not paid the taxes for that year, they did not acquire title by adverse possession, since there was a period when they might have paid the taxes of 1903, before commencement of trespass to try title, in April, 1904. Club Land & Cattle Co. v. Wall [Tex.] 91 S. W. 778; Id. [Tex.] 92 S. W. 984. Under Mills' Ann. St. § 2923, prescribing a five-year limitation in favor of persons in peaceful and undisputed possession under claim and color of title and who pay taxes, and in favor of claimants of unoccupied lands under color of title and who pay taxes, the limitations do not run where the taxes have not been paid for five years by persons having or claiming color of title. Ballard v. Golob [Colo.] 83 P. 376. Where an undivided half interest was conveyed to a defendant for his own use and the other half to him for the use of a firm to which he belonged, and he held and paid taxes for five years, he acquired title to a half-interest, although the taxes on the other half were not paid during the five years. Club Land & Cattle Co. v. Wall [Tex.] 91 S. W. 778.

94. Bush v. Griffin [Neb.] 107 N. W. 247.

95. Turner v. Ladd [Wash.] 84 P. 866.

96. Ballard v. Golob [Colo.] 83 P. 376.

97. See 5 C. L. 55.

98. There must be an actual occupation of lands outside of the descriptive terms of a deed to establish an adverse possession of them. Whitmore v. Brown [Me.] 61 A. 985. Where there is no color of title, possession is confined to the land in actual, open, notorious, exclusive occupation by inclosure by fence, residence, clearing, cultivation or other open and notorious act. Wade v. McDougle [W. Va.] 52 S. E. 1026. Entry made upon a specific lot of land and occupation of a part thereof, without any recorded claim of title, gives title only to the part actually occupied. Banton v. Herrick [Me.] 63 A. 671. The owner and actual possessor of a tract of land cannot extend his possession over a portion of an adjoining tract granted to another person, by securing a

aries called for in his color,[99] and no further.[1] And where two grants overlap, the grantee in the junior grant, in order to acquire title by possession against the elder grant, must take actual physical possession of the land within the interference and hold it adversely and continuously for the full statutory period.[2] Actual possession of part with title to the whole and intention to possess the whole is possession of the whole,[3] or of so much as it not in the actual adverse possession of others;[4] and such possession, thus commenced, is continued by mere civil possession, until ouster by a counter actual possession of one year.[5] A statute of Maine extends the effect of actual occupation of improved land over uncultivated land or woodland when used as part of a farm.[6]

§ 11. *Sufficiency of possession.*[7]—The sufficiency of acts to constitute adverse possession is governed by the facts of each particular case,[8] and present questions

junior patent thereto, he must take actual possession of some part of the land included in the junior patent and within the boundaries of the senior patent. Camden v. West Branch Lumber Co. [W. Va.] 53 S. E. 409.

99. Adverse possession under a deed extends to the entire tract described (Campbell v. Bates [Ala.] 39 So. 144) in the absence of any controlling circumstances to the contrary (Banton v. Herrick [Me.] 63 A. 671).

1. The entry of the purchaser of certain land is restricted, so far as the law construes it as a possession, to the boundary of the land to which he has some color of title. Woodward v. Johnson [Ky.] 90 S. W. 1076; Bates v. Collins [Ky.] 93 S. W. 615.

2. Bates v. Collins [Ky.] 93 S. W. 615. Possession under the junior patent, of land outside of where the two patents overlap, is not adverse possession of land within the lap. Id. Bates v. Collins [Ky.] 93 S. W. 615.

3. Jones v. Goss [La.] 40 So. 357. Actual possession of part of a tract under a donation deed describing the whole carries the constructive possession to the limits described in the deed, so as to sustain a plea of adverse possession of the whole. Rucker v. Dixon [Ark.] 93 S. W. 750. Where boundaries of land interfere, an entry upon any part of the boundary of the elder title, by the owner, is construed to extend to the whole boundary, unless some part of it be in the actual possession of another, when the owner's entry is restricted only by the hostile stranger's actual occupancy. Woodward v. Johnson [Ky.] 90 S. W. 1076.

4. Camden v. West Branch Lumber Co. [W. Va.] 53 S. E. 409.

5. Jones v. Goss [La.] 40 So. 357. In the case of open prairie land, such civil possession, continuing an actual possession, is not ousted by the plowing of one or more furrows around the land, where persons passing over the land did not see them. Id.

6. Rev. St. c. 106, § 38. Banton v. Herrick [Me.] 63 A. 671. The rule of constructive disseisin. In force prior to the enactment of Rev. St. c. 106, § 38, was not limited thereby. Id.

7. See 5 C. L. 56.

8. Evidence held insufficient to sustain the defense of title by adverse possession in a suit to quiet title. Davis v. Commonwealth Land & Lumber Co., 141 F. 711. Defendant held never to have had such possession as gave it a right to invoke and sustain the plea of prescription. St. Paul v. Louisiana Cypress Lumber Co. [La.] 40 So. 906.

Held insufficient: Evidence of **occasional cutting of trees** and the like, not continuously but at infrequent intervals, was insufficient to show any right as against those in actual occupancy, under recorded deeds, for about sixty years, claiming adversely and notoriously. Rogers v. Cuyler [Ky.] 89 S. W. 2. Where a purchaser of land at a tax sale **merely erected fences** thereon, without actual occupancy or open use, he did not take sufficient possession for adverse possession under the five-year statute of limitations. Niday v. Cochran [Tex. Civ. App.] 93 S. W. 1027. Possession **under a revocable license, reserving ingress and egress,** to erect a shed over an alley, held not to be continued, exclusive, open, notorious and adverse possession. Wilson v. Cather [Pa.] 63 A. 190. An **inclosure** of lands **by a fence** erected from a creek to a river, which fence was not on the land in dispute, and the pasturage of cattle within the inclosure, held not to constitue an adverse possession. Dowdle v. Wheeler [Ark.] 89 S. W. 1002. The **inclosure** of a tract of land with other lands, **by a small amount of fencing,** the rest of the inclosure being natural barriers, is not such an appropriation as constitutes adverse possession. Hyde v. McFaddin [C. C. A.] 140 F. 433. Where a fence erected by plaintiff's predecessor, inclosing a portion of the premises, had been destroyed long since and for nearly 20 years **the land had been open to commissions** and no more in possession of plaintiff or her predecessor than anyone else, plaintiff was not entitled to the property by the statutes of limitations. Turner v. Ladd [Wash.] 84 P. 866. Where the occupant entered without color of title or claim of right and his entry and occupation appear consistent with **a mere intention to trespass** until interfered with by the owner, his testimony that he intended to hold and occupy as owner, uncorroborated by acts, is not sufficient to require a finding in his favor. Bush v. Griffin [Neb.] 107 N. W. 247, following Knight v. Denman, 64 Neb. 814, 90 N. W. 863. Mere **occasional grazing of cattle** or cutting timber or sod on land does not constitute adverse possession under the statute of limitations. Wade v. McDougle [W. Va.] 52

for the jury.[9] Parties who claimed the record title for more than the statutory period did not acquire title where the land was in the possession of others who held it at their sufferance.[10] Actual inclosure by a fence is not indispensable to adverse possession under the statute of limitations;[11] and natural barriers may be utilized in constructing inclosures of land, provided they, with the artificial barriers, are sufficient to indicate an assertion of dominion over the premises and give notoriety to the claim of possession.[12] In countries where the lands are largely unsettled and actual possession the exception and not the rule, the doctrine that possession is indispensable to the presumption of a grant does not apply.[13] In some states acts which constitute a sufficient possession are enumerated by statute.[14]

In the absence of actual possession of land, the possession follows the legal title,[15] and, in case of conflicting claims, the best title.[16] Since constructive possession accompanies the legal title only, it cannot be extended beyond the bounds of the actual possession of an entrant upon lands, so as to include other territory.[17] There cannot be two hostile constructive possessions of the same land at the same time, any more than there can be two hostile actual possessions of the same land

S. E. 1026. A party who did **not have actual possession to any definite line,** but at all times regarded the line in dispute and attempted to buy the tract in controversy, could not claim the same by adverse possession. Liddle v. Blake [Iowa] 105 N. W. 649. Where the grantee of a farm and the right to the timber on part of an adjoining farm resided on his own land for 26 years and during that time **occasionally took wood** from the reservation, with knowledge of the owners of the land, it was not sufficient to vest in him title to either the land or the timber. Decker v. Hunt, 98 N. Y. S. 174.

Held sufficient: Possession under a void sale, **exercising acts of ownership** inconsistent with recognition of any rights in others, mortgaging the land repeatedly, warranting title and executing deed with full covenants purporting to convey title in fee for twenty years, held sufficient. Collins v. Paepke-Leicht Lumber Co. [Ark.] 84 S. W. 1044.

Getting wood off of land, **selling logs** and cross-ties, permitting a timberman to camp on the land, keeping trespassers off, **paying taxes** and **selling the land,** are sufficient possessory acts. Ladd v. Powell [Ala.] 39 So. 46. This is sufficient if the possession be marked or held by inclosure by **fence, cultivation, residence, clearing** or any plainly visible and notorious manifestation of sole, exclusive possession, according to the nature of the case. Wade v. McDougle [W. Va.] 52 S. E. 1026. Possession for 2 years under a tax deed, being open, continuous, and adverse, evidenced by **fencing with a substantial wire fence,** repairing the fence, using the land at times and leasing it at other times, gives title under Kirby's Dig. § 5061. Carpenter v. Smith [Ark.] 88 S. W. 976. Where grantees went into immediate possession by going over land and **prospecting for minerals,** doing something almost every year upon the land; held that they were in possession. Capen's Adm'r v. Sheldon [Vt.] 61 A. 864.

9. Occupancy and acts of ownership (Henry v. Brown [Ala.] 39 So. 325), and the character of the possession are for the jury (Barrett v. McKinney [Tex. Civ. App.] 93 S. W. 240). The question of whether sufficient possesssion under color of title has been proved is for the jury, and the affirmative charge is properly refused, although there is evidence tending to contradict the evidence of possession. Campbell v. Bates [Ala.] 39 So. 144.

10. Lohse v. Burch [Wash.] 84 P. 722.

11. Wade v. McDougle [W. Va.] 152 S. E. 1026.

12. Dowdle v. Wheeler [Ark.] 89 S. W. 1002.

13. E. and his heirs openly asserted title to lands entered by L., since prior to 1848. The heirs of L. never claimed or exercised ownership over the lands, nor paid taxes thereon, but the heirs of E. paid the taxes. No one had ever been in possession. After L.'s death his heirs quitclaimed to E.'s heirs. Held sufficient evidence to justify a finding of a presumed grant from L. to E. Arthur v. Ridge [Tex. Civ. App.] 13 Tex. Ct. Rep. 449, 89 S. W. 15.

14. The statute of Texas requires adverse possession, cultivation, use, or enjoyment, with payment of taxes and a registered deed. Niday v. Cochran [Tex. Civ. App.] 93 S. W. 1027. In California land is deemed to have been possessed (1) where it has been usually cultivated or improved; (2) where it has been protected by a substantial inclosure. Code Civ. Proc. § 323. Botsford v. Eyraud [Cal.] 83 P. 1008. Payment of taxes, inclosure with other property by a substantial fence, cultivation by a lessee, contruction of a dwelling house thereon, living there, holding it for sale as town lots and generally exercising acts of ownership from 1882 to 1901, held to bar action, under Code Civ. Proc. §§ 318, 319, 323. Id.

15. Lindsay v. Austin, 139 N. C. 463, 51 S. E. 990; Ladd v. Powell [Ala.] 39 So. 46. It is title which gives constructive possession. Interstate Inv. Co. v. Bailey [Ky.] 93 S. W. 578; Camden v. West Branch Lumber Co. [W. Va.] 53 S. E. 409.

16. Bates v. Collins [Ky.] 93 S. W. 615.

17. Woodward v. Johnson [Ky.] 90 S. W. 1076. Constructive possession is attached to "ownership" as an "accessory," and when there is no ownership, there is no such possession. Ramos Lumber & Mf'g Co. v. Labarre [La.] 40 So. 898.

contemporaneously.[18] If one has constructive possession, nothing short of actual possession will deprive him of it.[19] But no amount of constructive possession can give title.[20] Where a party has long been in peaceable possession and occupancy of lands, another cannot by forcible entry acquire such a possession as would deprive him of the right to maintain an action to quiet title and to enjoin further trespasses.[21]

In order to set in motion the limitation contained in the general tax law of Michigan,[22] an entry under the tax title, or something equivalent thereto, is necessary.[23]

§ 12. *Pleading, evidence, and instructions.*[24]—The facts constituting adverse possession must be pleaded,[25] but a defective pleading may be cured by verdict.[26] In an ejectment case, title by adverse possession may be proved under a general denial;[27] and in Kentucky the defendant is not required to allege title by adverse possession, in order to prove it at the trial.[28]

Evidence.[29]—Evidence of adverse possession must be clear and positive, and should be strictly construed.[30] An admission by defendant that he did not own a part of the property in controversy precludes his claiming adverse possession thereof, but does not affect his adverse possession of the rest.[31] But evidence of the possessor's efforts to buy outstanding claims, or declarations to the effect that he did not claim the land, made after the lapse of sufficient time to mature title under the statute of limitations, did not preclude recovery on the ground of adverse possession, but might be considered by the jury.[32] Where a deed is offered to show color of title, it is not necessary to prove its execution.[33] Where an applicant to register a deed establishes his right to registration, the establishment of an adverse title rests on the claimant thereof.[34]

18. Interstate Inv. Co. v. Bailey [Ky.] 93 S. W. 578.

19. Capen's Adm'r v. Sheldon [Vt.] 61 A. 864; Bates v. Collins [Ky.] 93 S. W. 615.

20. Interstate Inv. Co. v. Bailey [Ky.] 93 S. W. 578.

21. Slaughter v. Mallet Land & Cattle Co. [C. C. A.] 141 F. 282.

22. Gen. Tax Law, § 73, amd. by Laws 1899, p. 430, Act 262, providing that no sale for taxes shall be set aside after actual and undisputed possession by the purchaser for five years. Lee v. Livingston [Mich.] 12 Det. Leg. N. 922, 106 N. W. 713.

23. Especially where a party leased certain premises under an agreement to pay taxes thereon for certain years, and afterward bought in the premises at a sale for taxes which became a lien before his entry and which he was under no obligation to pay. Lee v. Livingston [Mich.] 12 Det. Leg. N. 922, 106 N. W. 713.

24. See 5 C. L. 58.

25. Plea of adverse possession held insufficient in not averring how respondent became the owner of the land, nor such possession as would be adverse to his co-tenants. Jordan v. Jordan [Ala.] 39 So. 992. Plea of adverse possession insufficient for failure to aver ouster or that respondent's possession was exclusive. Id. Where the pleadings in ejectment presented no issue of adverse possession, plaintiff could not, after the case was before the jury, rely on such possession as a source of title. White River Min. & Nav. Co. v. Langston [Ark.] 88 S. W. 971. A complaint which fails to state that the open, notorious, and exclusive possession of real estate for 20 years was continous during the time, Rev. St. 1852, § 224, making limitations applicable to the state, was in force, is insufficient to show a bar against the state. McCaslin v. State [Ind. App.] 75 N. E. 844.

26. A plea of the ten-year statute of limitations which failed to allege "peaceable possession," and of the five-year limitation, which failed to allege a "cultivation, use, or enjoyment," cured by judgment. Elcan v. Childress [Tex. Civ. App.] 89 S. W. 84.

27. Link v. Campbell [Neb.] 104 N. W. 939.

28. Under Civ. Code Proc. § 125, subd. 2. Asher v. Howard [Ky.] 91 S. W. 270.

29. See 5 C. L. 58.

30. Pritchard v. Lewis, 125 Wis. 604, 104 N. W. 989. Evidence held to justify the submission of the defense of adverse possession to the jury. Driver v. King [Ala.] 40 So. 315. Evidence that a decedent was once in possession of land, and claimed it, is not sufficient to give title as against the owner of the legal title, where it is not shown that deceased exercised any act of ownership for a number of years before his death. Henry v. Brown [Ala.] 39 So. 325.

31. Kane v. Sholars [Tex. Civ. App.] 90 S. W. 937.

32. Barrett v. McKinney [Tex. Civ. App.] 93 S. W. 240.

33. Brannan v. Henry [Ala.] 39 So. 92.

34. Glos v. Holberg, 220 Ill. 167, 77 N. E. 80.

What is admissible.[35]—Tax receipts showing payment of taxes,[36] leases of the land in question,[37] testimony that the party claiming adverse possession bought the land,[38] and declarations of the party while in possession,[39] are admissible to show claim of ownership. Evidence that it was well known in the vicinity that one claimed title to land was competent to show the notoriety of his claim, but not to show title;[40] and where proof of claim of ownership has been made, it is competent to prove notoriety of the claim, simply as one means of proving knowledge of the claim by the true owner.[41] On the question of adverse possession, it was competent for plaintiff to testify that prior to his purchase he rode over the lands and saw no one in possession, and that they were woodlands, uninclosed, uncultivated and without improvements.[42] Where the defense in ejectment was adverse possession, the record of a suit for specific performance by defendant against his alleged vendor under whom plaintiff claimed, in which the bill was dismissed, was admissible to show that defendant's possession was not adverse then.[43] Evidence that one paid a valuable consideration may be considered as bearing on the question whether the possession was adverse and under claim of right;[44] also that the possessor's predecessor sued a street railway company for trespass on the premises;[45] and also the testimony of said predecessor that he built a $1,200 cottage on the land.[46] The fact that one claiming land by adverse possession did not return it for taxation,[47] and the assessment sheets showing that the land was not assessed to the party claiming adverse possession, were admitted to rebut his claim.[48] In North Carolina no adverse possession against the state, short of the thirty years prescribed by Revisal of 1905, section 380, can be submitted to the jury as evidence upon which to find the fact of a grant.[49] Parol evidence was admissible to show that an instrument, which conveyed a life estate only, was understood by the grantor to convey the fee; that the grantee claimed the same and the grantor always acquiesced and never asserted any right to the land, but abandoned it and died recognizing the grantee's claim.[50] Where, in trespass to try title, the undisputed evidence showed that defendant had title by adverse possession, the admission of an imperfectly acknowledged deed to show plaintiff's knowledge of such possession was harmless.[51]

Instructions.[52]—In instructing the court should clearly define the elements.[53] Elements substantially charged need not be repeated,[54] an erroneous general instruc-

35. See 5 C. L. 59.

36. 37. Staley v. Stone [Tex. Civ. App.] 92 S. W. 1017.

38. Anniston City Land Co. v. Edmondson [Ala.] 40 So. 505.

39. Henry v. Brown [Ala.] 39 So. 325. Declarations of a former owner of the land, since deceased, were admissible to show adverse possession under Rev. Laws, c. 175, § 66, making such declarations admissible where the court finds them to have been made in good faith. Luce v. Parsons [Mass.] 77 N. E. 1032.

40. Anniston City Land Co. v. Edmondson [Ala.] 40 So. 505.

41. Henry v. Brown [Ala.] 39 So. 325.

42. Driver v. King [Ala.] 40 So. 315.

43. Marbach v. Helmes [Va.] 52 S. E. 828.

44, 45, 46. Luce v. Parsons [Mass.] 77 N. E. 1032.

47, 48. Driver v. King [Ala.] 40 So. 315.

49. Bullard v. Hollingsworth [N. C.] 53 S. E. 441.

50. Breland v. O'Neal [Miss.] 40 So. 865.

51. Yarborough v. Mayes [Tex. Civ. App.] 91 S. W. 924.

52. See 5 C. L. 59.

53. Instruction, in case of a shifting and not a distinct possession, held not sufficiently specific. Dawson v. Falls City Boat Club [Mich.] 12 Det. Leg. N. 855, 106 N. W. 146. An instruction that adverse possession is to be taken strictly and not to be made out by inferences, and that every presumption is in favor of possession subject to the true owner's title, was ambiguous. Fox v. Spears [Ark.] 93 S. W. 560. Such instruction was not obnoxious to a general objection, but the defect should have been pointed out specifically. Id. Where title by adverse possession is one of the defenses in an ejectment suit, defendant is entitled to have the jury instructed with reference to the same, if any competent evidence has been introduced to support the issue, even though such evidence may be contradicted or deemed insufficient by the jury. Link v. Campbell [Neb.] 104 N. W. 939.

54. Where the court properly instructed

tion as to constructive possession may be cured by a later instruction applicable to the facts;[55] and an error in instructing may sometimes be immaterial.[56]

§ 13. *Nature of title acquired.*[57]—Adverse possession for the statutory period operates as a grant,[58] and conveys to the possessor an indefeasible title,[59] in fee simple,[60] which is a defense to all claims.[61] And the statutes on which title by adverse possession is based are not a denial of due process of law.[62] Recognition of title in the former owner by one claiming adversely, after he has acquired a perfect title by adverse possession will not divest him of title.[63] In consequence of the disseisin the real owner has not in some few states anything susceptible of transfer or conveyance.[64]

on the question of adverse possession as affected by co-tenancy, it was not necessary to repeat the instructions in reference to the question when plaintiff's cause of action accrued. Yarborough v. Mayes [Tex. Civ. App.] 91 S. W. 624.

55. Yarborough v. Mayes [Tex. Civ. App.] 91 S. W. 624.

56. In ejectment where plaintiff must fail unless the third party under whom defendant claimed had been in possession under plaintiff's grantor, the error in an instruction, that, unless defendant had adverse and exclusive possession for 20 years, he could not recover, was immaterial. Campbell v. Everhart, 139 N. C. 503, 52 S. E. 201.

57. See 5 C. L. 59.

58. There is a salutary principle that from long possession the law sometimes presumes a grant, in order to quiet possession and make it consistent with rightful title (Logan's Heirs v. Ward [W. Va.] 52 S. E. 398), but such presumption never arises, where all the circumstances are consistent with the non-existence of such grant (Id.).

59. It is not error to charge that title becomes complete by actual, continued, notorious, and adverse possession of land, claiming title against all persons, for ten years. Stryker v. Meagher [Neb.] 107 N. W. 792. Where a person has been in the uninterrupted, honest and adverse possession of land, under color of title for over 25 years, defects in his original title are cured. Bryan v. Augusta Perpetual Bldg. & Loan Co. [Va.] 52 S. E. 357. Bona fide purchasers of land for a valuable consideration and their vendors, who have been in actual possession for more than 30 years, have a perfect title as against the holders of an alleged lost title bond. Slusher v. Howard [Ky.] 88 S. W. 1109. Where a parol partition of lands has been followed by adverse possession of the shares, by the respective parties, for 15 years, it is conclusive. Caudill v. Bayes [Ky.] 89 S. W. 114. In Texas whenever a cause of action for the recovery of real estate is barred by limitation, the person having peaceable and adverse possession is held to have full title, under the express provisions of Rev. St. 1895, art. 3347. Lamberida v. Barnum [Tex. Civ. App.] 90 S. W. 698. Where a vendee under a commissioner's sale took possession of inclosed land, which he continuously claimed and occupied for 18 years, and his descendants used and occupied it as their own for 30 years longer, the fencing around it remaining for the most of the time, such vendee and his descendants acquired perfect title, although the sale was never confirmed or deed issued. Hall v. Bowman [Ky.] 90 S. W. 1051. Adverse possession of a lot by plaintiffs and their grantors for 16 years, under color of title and claim of ownership, gave plaintiffs sufficient title to enable them to maintain an action against defendant as a wrong-doer. Retetsky v. Delmar Ave. & C. R. Co. [Mo. App.] 85 S. W. 665.

60. Where a husband conveyed land to his wife in 1877, and she conveyed to a third person in 1882, who occupied and paid taxes until his death in 1902, the heirs of the husband who died prior to the wife's conveyance, although of full age, having asserted no claim to the land; held that a fee-simple title by adverse possession had vested in the heirs of the wife's grantee. Beste v. McGaugh [Del.] 63 A. 28.

61. Where, in a suit against the city and county of San Francisco to quiet title, it appeared that plaintiff had acquired title by adverse possession under Civ. Code, § 1007, it was no defense that the lands were included in Act Mar. 14, 1870 (St. 1869-70, p. 353, c. 249), authorizing said city and county to convey certain lands to certain claimants, in the absence of any showing that some person existed for whom the property was held in trust. Orack v. Powleson [Cal. App.] 85 P. 129. And the fact that plaintiff himself might have acquired a title under the act of 1870 did not defeat his title acquired by adverse possession. Id. If the period of limitation has fully run while there is adverse possession of land, it gives title to the adverse possessor, which he may assert against the former owner, although he ceased, after the title was so acquired, to continue in possession. Lamberida v. Barnum [Tex. Civ. App.] 90 S. W. 698.

62. The statute of Maine (Pub. Laws 1895, c. 162, § 1), providing that the doing of such overt acts of ownership as are possible on wild land, under a recorded deed showing a claim of title, with payment of taxes, the owner meanwhile not paying taxes or exercising ownership, shall constitute a disseisin, which, if continued 20 years shall bar recovery, is not a denial of due process of law guaranteed by U. S. Const. Amdt. 14. Soper v. Lawrence Bros. Co., 201 U. S. 359, 50 Law. Ed. —. Nor does the statute deny due process of law, when construed as barring recovery unless suit is begun therefor within 5 years after the passage of the act, where the statutory possession has been held for such 5 years and for 15 years before. Id.

63. Payment of rent to the owner of the paper title did not impair such title. Martin v. Martin [Neb.] 107 N. W. 580.

64. See Champerty and Maintenance, 5 C. L. 565.

ADVICE OF COUNSEL, see latest topical index.

AFFIDAVITS.[65]

Who may make.[66]—An affidavit for a bill of particulars should be signed by the party and not by his attorney except under very especial circumstances.[67]

Who may take.[68]—Authority to take affidavits to be used in the court of chancery is given to a county judge in New Jersey.[69] Parties who acquiesce in the proceedings in which such affidavits are taken cannot contend that they were not taken in that court nor by the judge as one of its officers.[70]

Form and requisites.[71]—An affidavit is not void for mere absence of venue where nothing appears to show that it was taken without the jurisdiction of the notary.[72] Affidavits made by an attorney are generally required to recite that the facts sworn to are within his personal knowledge.[73] The certificate of the officer must ordinarily show that the affidavit was signed in his presence and sworn to before him.[74]

Admissibility of affidavit in evidence and effect thereof.[75]—Except when used as depositions in equity[76] and in admiralty,[77] or as the basis of motions,[78] or as admissions against interest,[79] or for purposes of impeachment,[80] affidavits are never

65. This topic includes only general rules. The necessity of affidavits in particular proceedings and their sufficiency in point of substance is treated in the titles dealing with such proceedings. See, also, Oaths, 6 C. L. 840.

66. See 5 C. L. 60. See, also, Fletcher, Eq. Pl. & Prac. § 442, and note in 5 C. L. 60, n. 58.

67. Fact that affiant is a corporation does not change the rule. St. Regis Paper Co. v. Santa Clara Lumber Co., 98 N. Y. S. 572. The fact that no officer of the affiant corporation is in the county at the date of verification of affidavit is not a sufficient reason. Id.

68. See 5 C. L. 60.

69. Seastream v. New Jersey Exhibition Co. [N. J. Eq.] 61 A. 1041.

70. Objection to the authority of a judge to take affidavits in contempt proceedings cannot be sustained, where all the parties interested acquiesced in the taking of the affidavits and some were in attendance while they were being taken, even though some of them at the time of attendance were not accused of improper conduct. Seastream v. New Jersey Exhibition Co. [N. J. Eq.] 61 A. 1041.

71. See 5 C. L. 61.

NOTE. Amendment of affidavits in courts of equity: In most jurisdictions an affidavit may be amended. Reese v. Walker, 89 Ga. 72, 14 S. E. 888; Stewart v. Cabanne, 16 Mo. App. 517; Ely v. Fen, 12 N. J. Law, 321; State v. Giles, 103 N. C. 391, 9 S. E. 433. It must, however, be resworn to in such case. Atlantic Bank v. Frankford, 61 N. C. 199. The omission of affiant's signature, when necessary may be cured by amendment. Watts v. Womack, 44 Ala. 605; Schumann v. Schumann, 6 Phila. [Pa.] 318; West Tenn. Agricultural & Mech. Ass'n v. Madison, 9 Lea [Tenn.] 407. So may the failure of the officer to add his attestation. Pierson v. Hendrist, 88 Ill. 34; Goldie v. McDonald, 78 Ill. 605.—From Fletcher, Eq. Pl. & Prac. § 445.

72. Albright v. United Clay Production Co. [Del.] 62 A. 726.

73. A recital in the affidavit that the facts are within the personal knowledge of the attorney making same is in exact conformity with the requirements of the statute, Wilson's Rev. & Ann. St. 1903, § 4318. Pallidy v. Beatty [Okl.] 83 P. 428. An affidavit by an attorney for a corporation praying for a bill of particulars, alleging that on consultation with officers of the corporation they did not know what the term "other machinery" means is insufficient, as the fact should be shown otherwise than by the unsworn statements of the officers to the attorney. St. Regis Paper Co. v. Santa Clara Lumber Co., 98 N. Y. S. 572.

74. The words "subscribed and sworn to before me" are a sufficient compliance with Wilson's Rev. & Ann. St. 1903, § 4317, requiring an affidavit to be certified by the officer taking it "that it was sworn to or affirmed before him and signed in his presence." Pallidy v. Beatty [Okl.] 83 P. 428.

75. See 5 C. L. 61.

76. See Equity, 5 C. L. 1144. An objection to an affidavit that no opportunity to cross-examine was given by the county judge will not lie where opportunity to cross-examine was given by the vice-Chancellor. Seastream v. New Jersey Exhibition Co. [N. J. Eq.] 61 A. 1041.

77. See Admiralty, 7 C. L. 30.

78. See, also, Motions and Orders, 6 C. L. 702. On a motion for alimony, affidavits tending to show the conduct of the parties to each other and their adherence to correct standards of conjugal behavior (Sanford v. Sanford, 94 N. Y. S. 1096), or such as reply to the affidavits of the opponent, accepting the issue whether cause of estrangement lay with the plaintiff or the defendant, should not be suppressed (Id.).

79. In so far as they contain admissions, they bind only those who make them. Graham v. Smart [Wash.] 84 P. 824. Where question was the ownership of certain rock or granite, an affidavit of the defendant's grantor wherein he admits that he is not the owner of the rock or granite is admissible although the affiant is dead and the

admissible as evidence of the facts therein recited.[81] An affidavit to be used as evidence must be positive and direct and if made only on information and belief may be disregarded.[82] The fact that it was evidently prepared to be sworn to by anyone who could make an affidavit to the facts rather than to conform to affiant's knowledge of them will be considered in determining its weight.[83]

AFFIDAVITS OF MERITS OF CLAIM OR DEFENSE.[84]

In New York in cases where the pleadings are unverified, an affidavit of merits must be served and filed or else an inquest may be taken.[85] It need not necessarily accompany the answer but may be served and filed at any time before actual inquest takes place.[86]

An affidavit of defense is necessary only when required by statute.[87] It may be made by attorney or other person not a party to the record in case the defendant is absent or incapacitated,[88] but in such case it must be alleged that it is filed by his authority or on his behalf,[89] and that the facts alleged are founded on affiant's own personal knowledge, or upon information derived from a proper source to enable the court to pass upon the sufficiency of the proof.[90] An application to extend the time for filing must be made within the time prescribed by the rules of court.[91]

It is not necessary to file an affidavit of defense to a statement that does not set forth a good cause of action,[92] and the filing of an affidavit to the merits is a waiver of formal defects,[93] even though filed under protest, and to prevent a default.[94] This rule does not, however, apply where the statement fails to state a cause of action.[95]

The purpose of the affidavit is to test the defendant's conscience.[96] The nature and character of the defense relied upon must appear,[97] and the averments must

present defendant was not a party to the suit in which the affidavit originally was used. Phillips v. Collinsville Granite Co., 123 Ga. 830, 51 S. E. 666.

80. Graham v. Smart [Wash.] 84 P. 824.

81. Affidavit made by a witness on a motion to dissolve a temporary restraining order is admissible only to impeach the witness. Graham v. Smart [Wash.] 84 P. 824.

82. Pelegrinelli v. McCloud River Lumber Co. [Cal. App.] 82 P. 695.

83. Fact that it was prepared before name of affiant was known and before it was executed, and that it is silent as to the circumstances under which it was made the care with which it was read and explained to affiant, etc. In re Town of Lafayette, 45 Misc. 141, 91 N. Y. S. 970.

84. See 5 C. L. 61.

85, 86. Beglin v. People's Trust Co., 95 N. Y. S. 910.

87. Actions of assumpsit for which judgment may be taken for want of an affidavit of defense are limited to such as are founded on contract alone, and do not include cases in which the cause of action is in delicto or of a mixed character of contract and tort. Kinney v. Mitchell [C. C. A.] 136 F. 773. Where the suit is in the form of assumpsit while the real cause of action is in tort to which no affidavit of defense is required, judgment will not be granted for want of it. Kinney v. Beaver, 140 F. 792.

88. If only they disclose a good defense. Safety Bank & Trust Co. v. Conwell, 28 Pa. Super. Ct. 237.

89. Safety Bank & Trust Co. v. Conwell, 28 Pa. Super. Ct. 237.

90. Affidavit held insufficient where it was not alleged that affiant believed facts alleged to be true, and sources of information were not given, thus raising inference that it was merely hearsay. Safety Bank & Trust Co. v. Conwell, 28 Pa. Super. Ct. 237.

91. By the first Friday of the term. Melvin v. Conner [Del. Super.] 62 A. 264.

92. Felty v. National Acc. Soc., 139 F. 57; Bill Posting Sign Co. v. Jermon, 27 Pa. Super. Ct. 171.

93. Proper course is to demur or to move for a more specific statement. Felty v. National Acc. Soc. 139 F. 57.

94. Even though affidavit recites that it is filed under protest, simply to prevent default and with reservation of right to move to quash writ or other preliminary motions. Felty v. National Acc. Soc., 139 F. 57.

95. Defendant meeting a defective declaration with an affidavit of defense instead of demurrer need not rest on the defense therein set forth. Bill Posting Sign Co. v. Jermon, 27 Pa. Super. Ct. 171.

96. Safety Bank & Trust Co. v. Conwell, 28 Pa. Super. Ct. 237.

97. An affidavit of defense to assumpsit stated that defendant, "verily believes that there is a legal defense to the whole of the cause of action in the above stated suit, the nature and character whereof is as follows: that there is nothing due and owing from the said defendant to the said plaintiffs,"—insufficient. Melvin v. Conner [Del. Super.]

form a complete answer to plaintiff's demands.[98] Every matter of defense presented must be set forth specifically and with such detail as to show clearly its relation to plaintiff's claim.[99] Nothing can be left to inference, but what is not stated will be presumed not to exist.[1] As in other pleadings, facts and not conclusions should be alleged.[2] Allegations of set-off must be as clear and specific as those required in a statement of claim.[3] Statements as to what defendant "is informed and verily believes" may be disregarded unless followed by allegations of expectancy of being able to prove them.[4] Affidavits are to be construed in the light of the statements to which they purport to be replies.[5] An original and supplemental affidavit are to be construed together and must not be self-contradictory when so construed.[6]

The plaintiff may offer the whole of an affidavit in evidence, take advantage of such portions of it as are in his favor, and introduce evidence to contradict the rest.[7]

The right of a plaintiff to judgment on a rule for it for want of a sufficient

62 A. 264. Where defense was an oral agreement at the time the note sued upon was signed, the affidavit of defense should aver that deponent was induced to sign the note by reason of the oral stipulation. Appleby v. Barrett, 28 Pa. Super. Ct. 349. An affidavit which merely asserts that an improper payee was put into a renewal note, and that against the true payee affiant has a good defense, without specifying what such defense is, insufficient, since the ground must be specified and set out. Hess v. Gerstlauer [Pa.] 63 A. 366.

98. Caven-Williamson Ammonia Co. v. Ice Mfg. Co., 27 Pa. Super. Ct. 381. Facts if proven should be a complete defense. Bill Posting Sign Co. v. Jermon, 27 Pa. Super. Ct. 171. Where statement of claim in action on city contractor's bond averred that bond had been approved as required, averment in affidavit of defense that defendant is informed that bond had not been so approved "and that it therefore denies the allegations to that effect," held insufficient to prevent judgment. City of Philadelphia v. Pierson, 211 Pa. 388, 60 A. 999. Averment that plaintiff had agreed to give bond to indemnify contractor against any defects in the work, and had not done so, held insufficient to prevent judgment, in the absence of an averment that defendant exacted it, or was prejudiced by failure to give it. Id. In a suit by assignee of seller, for goods sold, an affidavit of defense is insufficient which though it questions plaintiff's right to sue to his own use and the bona fides of the assignment avers that defendant had entered into an agreement of compromise with his creditors for 25 per cent. of their claims, and that the legal plaintiff had signed such agreement, but which does not aver the payment of the 25 per cent. nor defendant's readiness to pay it to legal plaintiff, and which does not deny that defendant received notice of the assignment of the claim prior to the attempted settlement with the legal plaintiff. Kamber v. Becker, 27 Pa. Super. Ct. 266.

99. Caven-Williamson Ammonia Co. v. Ice Mfg. Co., 27 Pa. Super. Ct. 381; Safety Bank & Trust Co. v. Conwell, 28 Pa. Super. Ct. 237. Vague and ambiguous averments are insufficient to prevent judgment. Fuhrman v. Stackman, 28 Pa. Super. Ct. 154.

Affidavits held sufficient: An affidavit distinctly and positively avering that prior to the giving of the note in suit a third person had paid plaintiff on behalf of defendant in full of any claim he had, which defendant did not learn until after giving the note, setting forth time and place of payment with particularity. Penrose v. Caldwell, 29 Pa. Super. Ct. 550.

Affidavits held insufficient: For failure to sufficiently allege that defendant entered into guaranty on faith of contract that he was to be held only on certain contingencies. McCambridge & Co. v. O'Callaghan, 27 Pa. Super. Ct. 199. For lack of particularity. Bill Posting Sign Co. v. Jermon, 27 Pa. Super. Ct. 171. Affidavit in action for goods sold for failure to allege in what respect they were defective, etc., and because it did not contain clear and concise statement of facts constituting basis for assessment of damages. Fuhrman v. Stackman, 28 Pa. Super. Ct. 154. Affidavit merely alleging fraud in a general way, by claiming that statements made to a mercantile agency were false, but not stating that such representations were intended to deceive, or that any artifice was practiced on the defendant, or in what particulars the statements to the mercantile agency were false. American Lumber & Mfg. Co. v. Taylor [C. C. A.] 137 F. 321.

1, 2. Caven-Williamson Ammonia Co. v. Ice Mfg. Co., 27 Pa. Super. Ct. 381.

3. Appleby v. Barrett, 28 Pa. Super. Ct. 349. Defendant has affirmative of the issue, and must aver it in terms incapable of being misunderstood. Caven-Williamson Ammonia Co. v. Ice Mfg. Co., 27 Pa. Super. Ct. 381.

4. Bill Posting Sign Co. v. Jermon, 27 Pa. Super. Ct. 171.

5. Union Surety & Guaranty Co. v. Stevenson, 27 Pa. Super. Ct. 324. Affidavit by a surety company sued on its bond, which admits the default alleged in the statement but claims that it occurred on an earlier date and that due notice was not given the surety, held sufficient. Id.

6. Penrose v. Caldwell, 29 Pa. Super. Ct. 550. When a supplementary affidavit is merely fuller and more specific than the original and not irreconcileable with the facts there averred or the necessary inferences from them it is not self-contradictory. Id.

7. Affidavit admitting plaintiff's claim but urging a set-off. McAvoy v. Commonwealth Title Ins. & Trust Co., 27 Pa. Super. Ct. 271.

affidavit of defense must be determined from it and the plaintiff's statement alone.[8] Judgment will not be granted if the statement of claim fails to state a cause of action,[9] or if there is a sufficient indication that there is a bona fide defense,[10] nor while a motion to dismiss for want of jurisdiction is pending.[11] It is not necessary that the court specify on which of two items urged in the statement he grants the judgment.[12] Where the statement is amended by striking out the names of defendants improperly joined, judgment may be rendered against the remaining defendant who has filed an insufficient affidavit without requiring the filing of a new statement and giving him an opportunity to file a new affidavit.[13]

AFFIRMATIONS, see latest topical index.

AFFRAY.[14]

AGENCY.

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Scope.—Agency resulting by operation of law from certain relations, as in the case of partnership[15] or marriage,[16] and other particular kinds of agencies,[17] are elsewhere treated, as well as analogous matters properly pertinent to the relation of master and servant.[18]

8. City of Philadelphia v. Pierson, 211 Pa. 388, 60 A. 999. An affidavit of defense in an action of assumpsit to recover money received by defendant, which shows that plaintiff and defendant had no direct dealings with each other, no contract or fiduciary relation existed between them, and that plaintiff did not part with his money on the faith of anything said or done by the defendant, and if plaintiff was over reached, it was without design or conniving of defendant. Robbins v. Jay, 27 Pa. Super. Ct. 652.

9. Statement must be self-sustaining in order to entitle plaintiff to judgment. Bill Posting Sign Co. v. Jermon, 27 Pa. Super. Ct. 171.

10. In an action on book account, affidavit alleged acceptance by plaintiff of a note from a third person, wiping out indebtedness of defendant, held sufficient. Scott Fertilizer Co. v. Maloney [Del.] 62 A. 223.

11. Kinney v. Mitchell [C. C. A.] 136 F. 773.

12. Where a plaintiff moves for judgment on a part of his claim for insufficiency of affidavit specifying part as to which he claims the affidavit insufficient, the court may grant judgment by the simple entry "rule absolute" without specifying the reasons therefor in an opinion. Smucker v. Grinberg, 27 Pa. Super. Ct. 531.

12. Where statement as amended states a good cause of action against him. Kidney v. Beemer, 27 Pa. Super. Ct. 558.

14. No cases have been found for this subject since the last article. See 5 C. L.

15. See Partnership, 6 C. L. 911. The implied authority of a partner to contract so as to bind the firm relates only to the business in which the firm is engaged. Slayden & Co. v. Palmo [Tex. Civ. App.] 90 S. W. 908.

16. See Husband and Wife, 5 C. L. 1731.

17. See Attorneys and Counselors, 5 C. L. 319; Brokers, 5 C. L. 445; Corporations, 5 C. L. 764; Factors, 5 C. L. 1411; Insurance, 6 C. L. 69.

On the general law of agency as well as the specific kinds of agency, see **Clark & S. Agency.**

18. See Master and Servant, 6 C. L. 521.

§ 1. *The relation between the parties.*[19] *In general.*[20] An agent is one who represents another called the "principal" in dealing with third persons.[21] The relation between principal and agent is a fiduciary one.[22]

(§ 1) *A. Competency to act as agent or to employ agents.*[23]—Agents in some particular lines of business are required to take out licenses.[24] A notary public, in the execution of a deed, acts as a public officer, and cannot, as a matter of law, be the agent of either party.[25] After a corporation has received the benefit of the services of an attorney employed by it, he having fully executed the contract on his part, it is estopped to deny its authority to employ him.[26]

(§ 1) *B. Creation and existence of the relation.*[27]—The actual relation of the parties to each other must be judged from a fair construction of the entire contract and all the circumstances, and the relation of principal and agent will not be assumed to exist merely because the parties so described themselves.[28] It is not

19. See 5 C. L. 64.

20. See 5 C. L. 64, n. 15; **Clark & S. Agency, 1.**

21. Civ. Code, § 2295. Nicholls v. Mapes [Cal. App.] 82 P. 265.

22. Forlaw v. Augusta Naval Stores Co. [Ga.] 52 S. E. 898; Morgan v. Aldrich [Mo. App.] 91 S. W. 1024.

23. See 5 C. L. 64; **Clark & S. Agency, 34-75.**

24. Agents of investment companies, under Ky. St. 1903, § 2223a, subsec. 11. Mutual Life Ins. Co. v. Chosen Friends Lodge, No. 2, I. O. O. F. [Ky.] 93 S. W. 1044.

An indictment for violation of that section, is defective under Cr. Code Prac. § 122, if it fails to allege what office the accused held in the company or whether he was an ordinary agent. Mutual Life Ins. Co. v. Chosen Friends Lodge, No. 2, I. O. O. F. [Ky.] 93 S. W. 1044.

25. Cason v. Cason [Tenn.] 93 S. W. 89.

26. Kelly v. Ning Yung Benev. Ass'n [Cal. App.] 84 P. 321.

27. See 5 C. L. 65. See, also, Clark & S. Agency, p. 100 et seq.

28. Nicholls v. Mapes [Cal. App.] 82 P. 265. A detective employed by a railroad company, upon whose information a warrant was sworn out, is to be regarded as the agent of the company in the institution of the prosecution. Evans v. Atlantic Coast Line R. Co. [Va.] 53 S. E. 3. A person who purchases a mortgage against an estate for the administrator is the mere agent for the latter and can get no better title to it than his principal could have done, and hence the estate is not deprived of the right to redeem by a foreclosure by such purchaser. Smith v. Goethe, 147 Cal. 725, 82 P. 384. Where, in the course of business, a bank took notes running to defendant bank and two of the former bank's officers indorsed the same and sent them to the defendant bank, which gave the other bank credit as a deposit, the officers and defendant bank dividing the interest, held that the officers were not in such transactions, agents of defendant bank. Sanborn v. First Nat. Bank, 115 Mo. App. 50, 90 S. W. 1033. Proposition from one engaged in the cotton business to a cotton buyer, accepted by the latter, held not to have created the relation of principal and agent. Daniel v. Maddox-Rucker Banking Co. [Ga.] 53 S. E. 573. Contract held to have constituted one corporation the purchasing arm or agent of the other. Forbes Co. v. Leonard, 119 Ill. App. 629.

Selling associations: Where cranberry producers formed a union to market their product, the union agreement was held to include an agency feature, involved in the transactions of shipping berries out of stocks belonging to members, in form as owner, and collecting and accounting for the proceeds to each member for the net amount received for berries sold for him. Briere v. Searls [Wis.] 105 N. W. 817. But the secretary of the union was not the agent of any member, but the mere employe of the union, which was itself the agent. Id.

Agency or sale: A contract, binding plaintiffs to sell certain lots to defendant within six months, and defendant to sell the lots within that time at not less than a certain sum per lot net to plaintiffs, all money less 5 per cent commission to be deposited to plaintiffs' credit and after 6 months plaintiffs to turn over to defendant all money over $145 per lot and defendant to assume all lots unsold and pay plaintiffs $145 apiece therefor, was a contract of sale to defendant and he was not the agent of plaintiffs with authority to bind them by installment contracts. Monk v. Duell [Wash.] 83 P. 313. The giving of an option to real estate agents for a fixed time, to find a purchaser at a net price to the seller, is an employment of them as agents and not a sale of real estate to them (Arnold v. National Bank of Waupaca [Wis.] 105 N. W. 828), and is a promise of exclusive agency during such time (Id.). Where purchasers at a tax sale agreed to lease the land for the owner and reimburse themselves from the rent collected for the amount paid for the tax title, render it for taxes and pay the same, such purchasers became the agents of the owner; the possession of the tenants was the owner's possession; payments of taxes were the owner's payments; and the statute of limitations would not begin to run against the owner, until he was notified of the repudiation of the agency. Hall v. Semple [Tex. Civ. App.] 91 S. W. 248. A contract whereby defendant was to select certain government lands for plaintiff, plaintiff agreeing to deposit money in a bank to be paid defendant at a fixed price per acre, when he delivered a deed for the land, was a contract of agency and not of sale. Farnum v. Clarke [Cal.] 84 P. 166.

necessary that there should be an express formal appointment to create the relation,[29] though the authority of an agent to sell real estate must be in writing under the statutes of several states,[30] and the statute of frauds requires it if the agent is to execute a power to convey or encumber,[31] but it is not necessary that the agent who gives a mere license to cut standing timber should have written authority.[32]

Agency is usually a mixed question of law and fact,[33] but if the facts legally establish agency the intention of parties otherwise is immaterial.[34]

Intermediaries and dual agencies.[35]—Dual agencies are void only when the fact of representation of both parties is not known to each.[36] But when a professional land agent acts as agent for both buyer and seller, the law exacts the most perfect good faith, honesty, and fairness on his part.[37] An interpreter selected by two persons speaking different languages, as the medium of their communication, is regarded as their joint agent.[38]

(§ 1) *C. Implied agency from relation of parties.*[39]—The husband is regarded as head and master of the community rather than as the wife's agent where he manages a community business as his own;[40] but where a sale of liquor on Sunday was made by the wife of the accused, the presumption is that she acted as her husband's agent in making the sale.[41]

(§ 1) *D. Evidence of agency.*[42]—Agency may be shown by either direct or indirect evidence.[43] It may be shown by facts and circumstances and by the ap-

Under a contract by which an engineering company agreed to do all of a steel company's work, held that the engineering company was an **independent contractor** and not the **agent** of the steel company. Kirby v. Lackawanna Steel Co., 109 App. Div. 334, 95 N. Y. S. 833. Where a steel company contracted with an engineering company to do all the former's work, it was held that the engineering company was an independent contractor and not an agent of the steel company, so as to make the steel company liable for personal injuries to an employe engaged in the work done. Id.

29. Siers v. Wiseman [W. Va.] 52 S. E. 460.

30. Frahm v. Metcalf [Neb.] 106 N. W. 227; Bloodgood v. Short, 98 N. Y. S. 775. Want of it is no defense to principal in suit for commissions earned. Smyth v. Sichel, 97 N. Y. S. 1008.

31. A contract for the purchase of land, obligating the principal to pay money and to execute a note and deed of trust, does not bind the principal, under the statute of frauds, if signed by an agent without written authority. Cowan v. Curran, 216 Ill. 598, 75 N. E. 322. Where the owner of real estate wrote letters commending his agent for the way he was handling his business, urged him to sell his property and authorized him to act as he thought best, having ratified and confirmed all the previous acts of such agent, it was held that the agent was more than a mere broker and was authorized in writing to make a valid contract of sale of real estate. Winch v. Edmunds [Colo.] 83 P. 632.

32. Antrim Iron Co. v. Anderson [Mich.] 12 Det. Leg. N. 314, 104 N. W. 319.

33. Mail & Express Co. v. Wood [Mich.] 12 Det. Leg. N. 244, 103 N. W. 864; Fifer v. Clearfield & Cambria Coal & Coke Co. [Md.] 62 A. 1122; Slayden & Co. v. Palm [Tex. Civ. App.] 90 S. W. 908. Whether a certain party signed a bill of lading as agent for the carrier was a question for the jury. Tishomingo Sav. Inst. v. Johnson, Nesbitt & Co. [Ala.] 40 So. 503. Whether a party who was present daily during the erection of a building for plaintiff, in company with plaintiff's secretary and frequently gave directions without any objection on the part of the secretary, was an agent of plaintiff authorized to give directions was a question for the jury. Novelty Mill Co. v. Heinzerling, 39 Wash. 244, 81 P. 742.

Evidence to establish agency see succeeding sub-sections "Implied Agency," "Evidence of Agency."

34. Noel Const. Co. v. Atlas Portland Cement Co. [Md.] 63 A. 384.

35. See 5 C. L. 66.

36. Where the consent of both is given or may be reasonably inferred a real estate broker may receive commissions from both. Keach v. Bunn, 116 Ill. App. 397. Where parties negotiated a sale between the buyer and a traveling salesman for the seller, agreeing for a commission to have the goods shipped to them and to be liable to the seller for the price, such persons became agents for both parties. Haines v. Neece [Mo. App.] 92 S. W. 919.

37. Cowan v. Curran, 216 Ill. 598, 75 N. E. 322.

38. Kelly v. Ning Yung Benev. Ass'n [Cal. App.] 84 P. 321.

39. See 5 C. L. 67, n. 46. See, also, **Clark & S. Agency, 181,** and Special Art. 3, C. L. 101.

40. Succession of Sangpiel, 114 La. 767, 38 So. 554.

41. Trometer v. District of Columbia, 24 App. D. C. 242.

42. See 5 C. L. 67. See, also, **Clark & S. Agency, 163.**

43. Ward v. Trustees of New England Southern Conference of M. E. Church [R. I.] 61 A. 651; Siers v. Wiseman [W. Va.] 52 S. E. 460.

parent relations and conduct of the parties,[44] and a continued course of business transactions,[45] and may be presumed from the conduct of the parties or their usual course of business.[46] The presumption of agency from the possession of a note by the person demanding payment is ordinarily sufficient in itself to justify the debtor in making the payment,[47] and the want of such possession is of itself sufficient to put the debtor upon his inquiry as to the agent's authority to receive payment.[47a] The fact of the agency cannot be proved by the acts, declarations, or admissions of the alleged agent,[48] but this rule relates only to admissions and declarations made

44. Siers v. Wiseman [W. Va.] 52 S. E. 460; Peyton v. Old Woolen Mills Co. [Ky.] 91 S. W. 719. Agency for the purpose of paying taxes on land is sufficiently shown by proof of the alleged agent's having done so for a long time, without any claim of right or title in himself, and other acts in connection with the payment of such taxes. Siers v. Wiseman [W. Va.] 52 S. E. 460. If it be shown that one person continues to act for another and his action is acquiesced in, the relationship or contract of agency is sufficiently sustained by evidence. Id. Where it was shown that the general manager of a railroad company was president of a hospital, its general attorney was a director, and that both corporations had the same treasurer, it tended to show that the physician in charge of the hospital was the agent of the railroad company in the negotiation of a release of damages by an employe. Gulf, etc., R. Co. v. Huyett [Tex. Civ. App.] 14 Tex. Ct. Rep. 124, 89 S. W. 1118. That one dictated terms of a contract which alleged principal sued on tends to show agency. Mail & Express Co. v. Wood [Mich.] 12 Det. Leg. N. 244, 103 N. W. 864.

45. Pullman Co. v. Willett, 7 Ohio C. C. [U. S.] 175.

46. Reynolds v. Chicago, etc., R. Co. 114 Mo. App. 670, 90 S. W. 100.

Held to show agency: Express company uniformly allowed persons wearing caps bearing its name to drive its wagons and receive goods for transportation. Reel v. Adams Express Co., 27 Pa. Super. Ct. 77. Where a debtor delivers money to a third person to pay a note not yet due and of which that person has not the possession, agency is for debtor not creditor. Goodyear v. Williams [Kan.] 85 P. 300.

47, 47a. Goodyear v. Williams [Kan.] 85 P. 300.

48. Peyton v. Old Woolen Mills Co. [Ky.] 91 S. W. 719; Pease v. Fink [Cal. App.] 85 P. 657; Jackson v. American Tel. & T. Co., 139 N. C. 347, 51 S. E. 1015; St. Louis, etc., R. Co. v. Daugherty [Kan.] 83 P. 821; Brounfield v. Denton [N. J. Err. & App.] 61 A. 378; Fifer v. Clearfield & Cambria Coal & Coke Co. [Md.] 62 A. 1122. Held inadmissible as evidence of agency: (1) Statements of alleged agent that mortgage interest coupons could be paid to him; (2) letters written by plaintiff to alleged agent relating to specific claims against other persons; (3) entries in the alleged agent's loan register—of all which the alleged principal had no knowledge at or prior to the payment to the alleged agent. Goodyear v. Williams [Kan.] 85 P. 300. Held that there was no evidence of agency except the declarations of the alleged agent. Wierman v. Bay City-Michigan Sugar Co. [Mich.] 12 Det. Leg. N. 833, 106 N. W. 75.

NOTE. Declarations and Admissions of Agent as to Agency. (a) Of alleged principal: The declarations and admissions of an alleged principal are competent evidence against him to prove the existence of the relation. Blood v. Goodrich, 12 Wend. [N. Y.] 525, 27 Am. Dec. 152; Wild v. New York & A. Silver Min. Co., 59 N. Y. 644; Wallace v. Nodine, 57 Hun [N. Y.] 239, 242; Haughton v. Maurer, 55 Mich. 323; Phleger v. Ivins, 5 Har. [Del.] 118; Irvine v. Buckaloe, 12 Serg. & R. [Pa.] 35; Arthur v. Gard, 3 Colo. App. 133; Leary v. Albany Brew. Co., 77 App. Div. [N. Y.] 6; Norton v. Richmond, 93 Ill. 367. And see Steel v. Solid Silver Gold & Silver Min. Co., 13 Nev. 486.

A party claiming lands by deed executed under an alleged power of attorney from the owner to the person executing the deed may, in proof of the power, give in evidence the declarations of the owner of the land and alleged grantor of the power made prior to the accrual of the interest of the person denying the power, and claiming under such former owner, that such power of attorney existed, that its contents were as alleged in the deed, and that it had been subsequently lost, canceled, or destroyed (Corbin v. Jackson, 14 Wend. [N. Y.] 619), and the alleged agent may testify as to such declaration and admissions (Wallace v. Nodine, 57 Hun [N. Y.] 239, 242; Lawall v. Groman, 180 Pa. 532, 57 Am. St. Rep. 662).

(b) Of alleged agent: The same rule does not apply to admissions and declarations of an alleged agent. As we shall hereafter see, when an agency is established by other evidence, direct or circumstantial, declarations and admissions of the agent touching the matter of the agency may be admissible as evidence against the principal. But the admissions, acts, and declarations of an alleged agent, not shown to have been known to and acquiesced in by the alleged principal, are not admissible in evidence, as against the alleged principal, to prove either the existence of the agency or its extent. **United States.** Union Guaranty & Trust Co. v. Robinson, 79 F. 420; James v. Stookey, 1 Wash. C. 330, Fed. Cas. No. 7,184. **Alabama.** Tanner & De Laney Engine Co. v. Hall, 86 Ala. 305; Foxworth v. Brown, 120 Ala. 59; Parker v. Bond, 121 Ala. 529; Huntsville Belt Line & M. S. R. Co. v. Corpening & Co., 97 Ala. 681. A telegram from defendant to a third party saying that a certain person named "will draw with certificates attached" is inadmissible to prove that defendant was acting as agent for the latter in contracting with plaintiff. Manly v. Sperry, 115 Ala. 524. **Arkansas.** Carter v. Burnham, 31 Ark. 212; Howcott v. Kilbourn, 44 Ark. 213. **California.** Van Dusen v. Star Quartz Min. Co., 36 Cal. 571, 95 Am. Dec. 209; Santa Cruz Butchers' Union v. I X L Lime Co [Cal.]

to third persons,[49] and in the absence of the principal,[50] and has no application to

46 P. 382; Petterson v. Stockton & T. R. Co., 134 Cal. 244. **Colorado.** Omaha & G. Smelting & Refining Co. v. Tabor, 13 Colo. 41, 16 Am. St. Rep. 185; Murphy v. Gumaer, 12 Colo. App. 472. **Connecticut.** Fitch v. Chapman, 10 Conn. 8. **Georgia.** Nelson v. Tumlin, 74 Ga. 171; Abel v. Jarratt, 100 Ga. 732; Wynne v. Stevens, 101 Ga. 808; Americus Oil Co. v. Gurr, 114 Ga. 624; Grand Rapids School Furniture Co. v. Morel, 110 Ga. 321; Armour & Co. v. Ross, 110 Ga. 403, 414. **Illinois.** Proctor v. Tows, 115 Ill. 138; Mullanphy Sav. Bank v. Schott, 135 Ill. 655, 25 Am. St. Rep. 401; McClure v. D. M. Osborne & Co., 86 Ill. App. 465; Currie v. Syndicate Des Cultivators Des Oignons a' Fleur, 104 Ill. App. 165. **Iowa.** Butler v. Chicago, B. & Q. R. Co., 87 Iowa, 206; Wood Mowing & Reaping Co. v. Crow, 70 Ia. 340; Joseph Schlitz Brew. Co. v. Barlow, 107 Iowa, 252; Mentzer v. Sargeant, 115 Iowa, 527. **Kansas.** Leu v. Mayer, 52 Kan. 419; Kane v. Barstow, 42 Kan. 465, 16 Am. St. Rep. 490; Howe Mach. Co. v. Clark, 15 Kan. 492. **Louisiana.** Dawson v. Landreaux, 29 La. Ann. 363; State v. Harris, 51 La. Ann. 1105; Lafourche Transp. Co. v. Pugh, 52 La. Ann. 1517. **Maine.** Eaton v. Granite State Provident Ass'n, 89 Me. 58. **Maryland.** Harker v. Dement, 9 Gill [Md.] 7, 52 Am. Dec. 670. **Massachusetts.** Stollenwerck v. Thacher, 115 Mass. 224; Nowell v. Chipman, 170 Mass. 340; Mussey v. Beecher, 3 Cush. [Mass.] 511. **Michigan.** Bond v. Pontiac, O. & P. A. R. Co., 62 Mich 643, 4 Am. St. Rep. 885; Three Rivers Nat. Bank v. Gilchrist, 83 Mich. 253; McPherson v. Pinch, 119 Mich. 36; Gore v. Canada Life Assur. Co., 119 Mich. 136. **Minnesota.** Sencerbox v. McGrade, 6 Minn. 484 (Gil. 334). **Mississippi.** Kinnare v. Gregory, 55 Miss. 612; Memphis & V. R. Co. v. Cocke, 64 Miss. 713. **Missouri.** Mitchum v. Dunlap, 98 Mo. 418; Peck v. Richey, 66 Mo. 114 (nor are declarations, tending to disprove the fact of agency, admissible in favor of the person alleged to be his principal); State v. Henderson, 86 Mo. App. 482. **Montana.** Nyhart v. Pennington, 20 Mont. 158. **Nebraska.** Anheuser-Busch Brew. Ass'n v. Murray, 47 Neb. 627. **New Hampshire.** Bohanan v. Boston & M. R. R., 70 N. H. 526. **New Jersey.** Gifford v. Landrine, 37 N. J. Eq. 127. **New York.** Stringham v. St. Nicholas Ins. Co., 4 Abb. Dec. 315; Roberge v. Monheimer, 21 Misc. 491; Reid v. Horn, 25 Misc. 523; Lyon v. Brown, 31 App. Div. 67; Booth v. Newton, 46 App. Div. 175. **North Carolina.** Taylor v. Hunt, 118 N. C. 168. **North Dakota.** Gordon v. Vermont Loan & Trust Co., 6 N. D. 454; O. W. Loverin-Browne Co. v. Bank of Buffalo, 7 N. D. 569. **Pennsylvania.** Baltimore & O. Employees' Relief Ass'n v. Post, 122 Pa. 579, 9 Am. St. Rep. 147; Pepper v. Cairns, 133 Pa. 114, 19 Am. St. Rep. 625; Lawall v. Groman, 180 Pa. 532, 57 Am. St. Rep. 662; Whiting v. Lake, 91 Pa. 349. **South Carolina.** Renneker v. Warren, 17 S. C. 139; Ehrhardt v. Breeland, 57 S. C. 142. **Texas.** Coleman v. Colgate, 69 Tex. 88; Ft. Worth Live-Stock Commission Co. v. Hitson [Tex. Civ. App.] 46 S. W. 915. **Vermont.** Dickerman v. Quincy M. F. Ins. Co., 67 Vt. 609. **Virginia.** Fisher v. White, 94 Va. 236; Hoge v. Turner, 96 Va. 624. **Washington.** Comegys v. American Lumber Co., 8 Wash. 661; Gregory v. Loose, 19 Wash. 599. **West Virginia.** Rosendorf v. Poling, 48 W. Va. 621; Garber v. Blatchley, 51 W. Va. 147. **Wisconsin.** Newell v. Clapp, 97 Wis. 104. Proof that a certain person had prepared a catalogue of the cattle belonging to the estate of a deceased person, and that he had answered plaintiff's letter addressed to such estate in relation to such cattle, and sent one of his catalogues, and that he afterwards received money for the purchase of the cattle selected by the plaintiff and bid them in for him at the administrator's sale, is not sufficient to establish that he was agent for the administrators. Newell v. Clapp, 97 Wis. 104.

But the acts of a person tending to show whom he represented on a particular occasion are competent evidence of the agency. Land Mortg. Co. v. Gillam, 49 S. C. 345. A newspaper publication, wherein one advertises himself to be the agent of another, is inadmissible to prove his agency, unless it appears that the alleged principal caused or knew of such publication. Joseph Schlitz Brew. Co. v. Barlow, 107 Iowa, 252. But acts of an alleged agent tending to show the exercise of control and authority over the business of the principal, and declarations and statements of agency made in the presence of other known agents, are admissible to establish the agency. Southern Exp. Co. v. Platten, 93 F. 936. And it is competent to prove the declaration of a person that he was an agent, not to show the agency, but to show that he held himself out as such. Parker v. Bond, 121 Ala. 529, 25 So. 898. Evidence is competent to show that, in what the agent said and did, he purported to act for the defendant, and not for another. Nowell v. Chipman, 170 Mass. 340. The declaration of agent made to a third person is inadmissible, in behalf of the principal, to prove that the third person was not also his agent, or to support the agent's testimony that such third person was not an agent. Short Mountain Coal Co. v. Hardy, 114 Mass. 197; Peck v. Richey, 66 Mo. 114.

The reason for this rule is that testimony as to such declarations is merely hearsay evidence, they being made at a time when the alleged agent was not under oath and there was no opportunity of cross-examination. But, as we have seen in a previous section, there is nothing in the law that renders the alleged agent himself an incompetent witness to testify on the trial of the case to any fact showing what the relation is between him and his alleged principal. —From Clark & S. Agency, 170.

49. Norden v. Duke, 106 App. Div. 514, 94 N. Y. S. 878.

NOTE. Competency to testify to agency: Either party to an alleged relation of principal and agent is a competent witness to testify as to whether the relation existed or not, and although the declarations and admissions of the alleged agent are inadmissible to prove the agency, yet the agent himself is competent to testify as to the alleged agency and its extent. Ilderton v. Atkinson, 7 Term R. 480; State v. Bristol Sav. Bank, 108 Ala. 3, 54 Am. St. Rep. 141; Parker v. Bond, 121 Ala. 529; Quertermous v. Taylor, 62 Ark. 598; McRae v. Argonaut Land & Development Co. [Cal.] 54 Pac. 743; Collins v. Lester, 16 Ga. 410; Armour & Co. v. Ross,

the agent's statements as a witness as to the existence of the agency.[51] For the existence of the agency may be shown by the testimony of the agent himself to the fact.[52] The assertions of the agent, taken in connection with the ratification of his acts by the principal, are competent to show agency;[53] and, although the statement of a secretary of a corporation that he held such office was insufficient of itself to prove the fact, so as to bind the corporation by his acts and representations, yet testimony that he made such statement was not incompetent, but could be considered in connection with other evidence of his authority.[54] Agency in favor of the principal and against the agent, however, may be established by proof of the agent's admissions, or of acts from which no inference other than that of the relationship of principal and agent can be reasonably deduced.[55] The contract between the alleged principal and agent is admissible against the third person to show whether

110 Ga. 403; Thayer v. Meeker, 86 Ill. 470; St. Louis S. W. R. Co. v. Elgin Condensed-Milk Co., 74 Ill. App. 619; Indianapolis Chair Mfg. Co. v. Swift, 132 Ind. 197; O'Neill v. Wilcox, 115 Iowa, 15; O'Leary v. German-American Ins. Co., 100 Iowa, 390; White v. Elgin Creamery Co., 108 Iowa, 522; Van Sickle v. Keith, 88 Iowa, 9; Howe Mach. Co. v. Clark, 15 Kan. 492; Cowles v. Burns, 28 Kan. 32; Dowell v. Williams, 33 Kan. 319; French v. Wade, 35 Kan. 391; Methuen Co. v. Hayes, 33 Me. 169; Rice v. Gove, 22 Pick. [Mass.] 158; 33 Am. Dec. 724; Gould v. Norfolk Lead Co., 9 Cush. [Mass.] 338, 57 Am. Dec. 50; Cleveland Co-operative Stove Co. v. Mallery, 111 Mich. 43; Nyhart v. Pennington, 20 Mont. 158; Smith v. Delaware & A. Tel. & Tel. Co., 64 N. J. Eq. 770; Commercial Bank v. Norton, 1 Hill [N. Y.] 501; Joseph v. Struller, 25 Misc. [N. Y.] 173; New Home Sew. Mach. Co. v. Seags, 128 N. C. 158; McDowell v. Simpson, 3 Watts [Pa.] 129, 27 Am. Dec. 338; Lawall v. Groman, 180 Pa. 532, 57 Am. St. Rep. 662; McGunnagle v. Thornton, 10 Serg. & R. [Pa.] 251; Miles v. Cook, 1 Grant's Cas. [Pa.] 58; Connor v. Johnson, 59 S. C. 115; Cunningham v. Mathews [Tex. Civ. App.] 57 S. W. 1114; American Tel. & Tel. Co. v. Kersh [Tex. Civ. App.] 66 S. W. 74; McCornick v. Queen of Sheba Gold Min. & Mill Co., 23 Utah, 71; Piercy v. Hedrick, 2 W. Va. 48, 98 Am. Dec. 774; Garber v. Blatchley, 51 W. Va. 147; O'Connor v. Hartford Fire Ins. Co., 31 Wis. 160; Roberts v. Northwestern Nat. Ins. Co., 90 Wis. 210. This right of the agent to testify as to his agency is not barred, after the death of his principal, by a statutory provision against any person interested in any proceeding being a witness in regard to any personal transaction between such witness and a deceased person [Code of Iowa, § 4606] (O'Neill v. Wilcox, 115 Iowa, 15), unless the authority is of such a nature that it cannot be proved by parol evidence. And the agent's testimony cannot be restricted to the mere words used by the principal, but is admissible generally on the whole subject (Lawall v. Groman, 180 Pa. 532, 57 Am. St. Rep. 662), or it may involve only a statement of the fact of agency without going into details as to how the relation was brought about, or as to particular facts upon which it rests (Parker v. Bond, 121 Ala. 529). But where the question of agency is directly involved, an agent, as a witness, cannot give his opinion or state his conclusion as to the alleged agency, or in other words the fact of the agency cannot be established upon his testimony alone. He may merely state the facts and circumstances concerning the various transactions between him and his alleged principal, leaving the court and jury to determine, under the facts disclosed, whether or not he was such agent. McCornick v. Queen of Sheba Gold Min. & Mill. Co., 23 Utah, 71; State v. Harris, 51 La. Ann. 1105; McCluskey v. Minek, 18 Misc. [N. Y.] 565. Where one assumes to act as subagent of another, he cannot establish his right to act for the principal by his own testimony. Lucas v. Roder, 29 Ind. App. 287. The reason for the rule that the declarations of an alleged agent cannot be admitted to establish his agency on the ground that they are hearsay evidence does not apply here, because his testimony is being given under oath, and subject to cross-examination. Nor does the rule, making an interested witness incompetent to testify on the side of his interest, apply. As has been said: "Nothing is better settled than that the cases of agents, carriers, factors, brokers and other servants of this description, in consideration of public convenience and necessity of trade and commerce, and to prevent a failure of justice, constitute a class of special exceptions to the general rule that a witness interested in the subject of the suit or in the record is not competent to testify on the side of his interest." By Starnes, J., in Collins v. Lester, 16 Ga. 410.—From Clark & S. Agency, 168.

50. Indiana Fruit Co. v. Sandlin [Ga.] 54 S. E. 65. Where there was no other evidence of the agency than the agent's declarations made to a third person in the absence of the alleged principal the complaint should have been dismissed. Sanford v. Fountain, 49 Misc. 301, 99 N. Y. S. 234.

51. Norden v. Duke, 106 App. Div. 514, 94 N. Y. S. 878.

52. Kean v. Landrum [S. C.] 52 S. E. 421; Peyton v. Old Woolen Mills Co. [Ky.] 91 S. W. 719. His testimony as a witness is not such an admission or declaration as is prohibited to prove the agency. Norden v. Duke, 106 App. Div. 514, 94 N. Y. S. 878.

53. Robert Buist Co. v. Lancaster Mercantile Co. [S. C.] 52 S. E. 789.

54. Kelly v. Ning Yung Benev. Ass'n [Col. App.] 84 P. 321.

55. Siers v. Wiseman [W. Va.] 50 S. E. 460.

their relation was agency or some other.[56] The burden of proving the agency lies upon the party alleging it.[57] Once the agency is shown, the relation is presumed to continue.[58] Cases deciding the admissibility [59] or sufficiency [60] of evidence as to the agency in particular instances are grouped in the notes.

(§ 1) *E. Estoppel to assert or deny agency.*[61]—Persons may be held liable as principals for the acts of their assumed agents because they have by their actions imparted to them an apparent authority to represent them, and are therefore estopped to deny the agency.[62] But this rule has no application where the third person had no knowledge at the time of the acts of the principal.[63] A principal who ratifies a contract is thereafter, in the absence of fraud, estopped to deny the authority of the agent.[64]

56. The contract gave the alleged agent only an option to purchase land. Quale v. Hazel [S. D.] 104 N. W. 215. See 15 Yale L. J. 40.

57. Ward v. Trustees of New England Southern Conference of M. E. Church [R. I.] 61 A. 651; Trau v. Sloan [Pa.] 62 A. 984. In an action against the railroad company by a physician, who had been employed by a conductor to attend a man run over by his train, the burden was upon plaintiff to show the conductor's authority to employ him. Wills v. International & G. N. R. Co. [Tex. Civ. App.] 92 S. W. 273. A subagent of a real estate agent, in an action against the principal for commissions on the rental of real estate, has the burden of proving the agent's authority to employ him. Southack v. Ireland, 109 App. Div. 45, 95 N. Y. S. 621. In an action against a building and loan association made by its solicitor that stock would mature in 72 months, the burden was on plaintiff to prove the agency. Ebersole v. Southern Bldg. & Loan Ass'n [Ala.] 41 So. 150 Where one seeks to have a tax deed set aside on the ground that the vendee therein was the agent of the former owner to pay the taxes, the burden is on him to prove the agency. Day v. Fay [W. Va.] 52 S. E. 1013.

58. All acts of a general agent within the scope of his authority, as respects third persons, are binding on the principal, even though done after revocation, unless notice of such revocation has been given to such as have had dealings and are apt to have other dealings with the agent upon the strength of his former authority. Burch v. American Grocery Co. [Ga.] 53 S. E. 1008.

59. Evidence that a certificate of title of land, which defendant was about to sell, was delivered to a third person, was inadmissible to show that such third person was defendant's agent. Pease v. Fink [Col. App.] 85 P. 657. Evidence of **other similar transactions** between the owner of property and an alleged agent is inadmissible to show the existence of agency, especially when the party dealing with the alleged agent had no knowledge of such transactions. Id.

60. Evidence of agency sufficient to justify jury's finding that defendants were plaintiff's agents. Kingsley v. Wheeler [Minn.] 104 N. W. 543. Where a heating company was to heat a building satisfactorily, in case proper piping and radiation were put in, proof held to be entirely lacking that a person employed to remedy defects therein was plaintiff's agent. Citizens' Elec. Light & Gas Co. v. Van Lent [Iowa] 103 N. W. 795. Statement of the secretary of a corporation that he held such office insufficient of itself to prove the fact, so as to bind the corporation by his acts and representations. Kelly v. Ning Yung Benev. Ass'n [Col. App.] 84 P. 321. Where the question was in issue whether a firm was bound by a contract signed by third parties in its name, and the evidence showed that plaintiff knew that such parties had no authority to sign the firm's name, it was error to refuse to submit the issue whether the firm was bound solely by reason of the execution of the contract in its name. Slayden & Co. v. Palmo [Tex. Civ. App.] 90 S. W. 908. Statements that one was to be agent though no proof that he became so may go to jury notwithstanding the repudiation of his act when followed by acts of agency which were adopted. Fifer v. Clearfield & Cambria Coal & Coke Co. [Md.] 62 A. 1122. Authority of persons who signed appeal bond for surety company held sufficiently shown, the company not having questioned it, and having received a premium for becoming such surety. Eichorn v. New Orleans & C. R. L. & P. Co., 114 La. 712, 38 So. 526.

61. See 5 C. L. 70. See, also, **Clark & S. Agency, 140.**

62. Buskirk v. Talcott, 96 N. Y. S. 714. Where a person whose name has been signed to a note without his authority remains silent when written to concerning the genuineness of the signature, he is thereby estopped to deny its genuineness. Harmon v. Loberman [Tex. Civ. App.] 87 S. W. 203. If the owner of property permits others to join with her in mortgaging her property, asserting part ownership, she is bound thereby as to third persons, either by recognizing their claim of ownership, or by clothing them with authority to deal so with her property. Pellerin v. Sanders [La.] 40 So. 917. Since the act of a bank in receiving and retaining moneys collected by an attorney did not mislead or injure the sureties on the note, but was an advantage to them, the bank was not estopped to deny the authority of the attorney to settle the claim. Bank of Batesville v. Maxey [Ark.] 88 S. W. 968.

63. Buskirk v. Talcott, 96 N. Y. S. 714. Alleged principal used signs and letter heads having his and the alleged agent's name thereon, but the party dealing with the agent did not know of it. Id.

64. Lutjeharms v. Smith [Neb.] 107 N. W. 256.

(§ 1) *F. Termination of relation.*[65]—An agency for an indefinite time is terminable at will [66] unless fair dealing requires a notice; but if the contract of agency be for a fixed period, the principal will be liable for damages for a wrongful revocation.[67] As a general rule, agency is terminated by the death of the principal,[68] when not coupled with an interest.[69] In order that a power of attorney

65. See 5 C. L. 71. See, also, **Clark & S. Agency, 381 et seq.**

66. In an action against a county, by an agent employed to survey and sell lands, for breach of the contract by termination, where no duration of the contract was expressed, it was incumbent on the agent to show that the county had acted unfairly in not allowing him a reasonable time to earn compensation for what he had done under the contract. Action held barred by limitation on a rehearing. Hollingsworth v. Young County [Tex. Civ. App.] 91 S. W. 1094.

67. Held that a contract of agency was created and that its revocation before the expiration of that time was illegal. Richmond v. Brandt, 118 Ill. App. 624.

68. The agent has no authority thereafter to receive and record a deed to his principal. Condon v. Barnum [Iowa] 106 N. W. 514. Payment to one having a power of attorney to deposit and draw money in his principal's name, made after the latter's death, held not to bind his estate, even though the payer did not know of his death at the time of payment. Hoffman v. Union Dime Sav. Inst., 109 App. Div. 24, 95 N. Y. S. 1045. Hoffman v. Union Dime Sav. Inst., 109 App. Div. 24, 95 N. Y. S. 1045. See 19 Harv. L. R. 296.

69. NOTE. Power coupled with an interest: An important exception or limitation to the general rule, as to the principal's right to revoke an agency at will, exists where the agent's authority is coupled with an interest. If an agent has an interest in the subject-matter of the agency, or as it is usually termed if he has a power coupled with an interest, his authority is deemed to be irrevocable, at least during the subsistence of such interest, whether it is expressly declared to be so or not, and the principal cannot revoke such authority, at least not until such interest has been satisfied. Watson v. King, 4 Camp. 274; Gaussen v. Morton, 10 Barn. & C. 731; Chambers v. Seay, 73 Ala. 372; Hynson v. Noland, 14 Ark. 710; Frink v. Roe, 70 Cal. 297; Barr v. Schroeder, 32 Cal. 609; Brown v. Pforr, 38 Cal. 550; Posten v. Rassette, 5 Cal. 467; Bonney v. Smith, 17 Ill. 531; Walker v. Denison, 86 Ill. 142; Smith v. Dare, 89 Md. 47; Attrill v. Patterson, 58 Md. 226; Chapman v. Bates, 61 N. J. Eq. 658, 88 Am. St. Rep. 459; Durbrow v. Eppens, 65 N. J. Law, 10; Hutchins v. Hebbard, 34 N. Y. 24; Marfield v. Goodhue, 3 N. Y. (3 Comst.) 62; Marfield v. Douglass, 1 Sandf. [N. Y.] 360; Knapp v. Alvord, 10 Paige [N. Y.] 205, 40 Am. Dec. 241; Wheeler v. Knaggs, 8 Ohio, 169; Hartley's Appeal, 53 Pa. 212, 91 Am. Dec. 207; Smyth v. Craig, 3 Watts & S. [Pa.] 14; Montague v. McCarroll, 15 Utah, 318. Thus, where A, being indebted to B, in order to discharge the debts, executed to B a power of attorney, authorizing him to sell certain lands belonging to him, A, it was a power coupled with an interest and could not be revoked. Gaussen v. Morton, 10 Barn. & C. 731. So where a note is indorsed on the faith of an equitable pledge by the maker of moneys earned by him under a contract with the state, but not yet due, a power of attorney authorizing the indorser to collect such moneys when they become payable is not subject to revocation, being a power coupled with an interest. Hutchins v. Hebbard, 34 N. Y. 24. Authority given by an officer, having charge of public moneys, to one of his securities, to act as agent in the receipt, control, and disbursement of the public moneys, for the protection of himself and securities, is in the nature of a power coupled with an interest and irrevocable so long as there remains any money of the office to be disbursed or accounted for, though the officer be removed from office. Hynson v. Noland, 14 Ark. 710. A power of attorney made by a stockholder to vote and deal with his stock, or sell and exchange it, conferring an interest, and by its terms irrevocable, cannot be revoked by the maker in the absence of a showing of illegal purpose in granting the power, or that it is in violation of a statute or against public policy. Chapman v. Bates, 61 N. J. Eq. 658, 88 Am. St. Rep. 459.

But an agency or authority, coupled with an interest in the subject-matter thereof, may be revoked by the principal in pursuance of a stipulation or reservation to that effect in the instrument constituting the agency or authority. Oregon & W. Mortg. Sav. Bank v. American Mortg. Co., 53 F. 22; Doyle v. Phoenix Ins. Co., 25 Nova Scotia, 436; Witherell v. Murphy, 147 Mass. 417; Adriance v. Rutherford, 57 Mich. 170; Chapman v. Bates, 61 N. J. Eq. 658, 88 Am. St. Rep. 459. Thus, where a contract appointing an agent, contained the following provision: "Each party hereto may terminate this agreement by giving the other written notice to that effect, and the agent shall not be entitled to any commission upon premiums collected or received after the expiration of such notice," etc.; either party could terminate the agency at a moment's notice, and the principal, having so done without previous notice, was not liable in damages to the agent. Doyle v. Phoenix Ins. Co., 25 Nova Scotia, 436.

What interest sufficient. It is not every interest, however, that will be sufficient to make the power irrevocable. To have this effect it seems now to be well settled that the power given to the agent must be connected with an interest in the subject-matter of the agency itself. In other words, "The power and estate must be united and coexistent," and possibly of such a nature that the power would survive the principal in the event of the latter's death, so as to be capable of execution in the name of the agent; and both the power and interest must be derived from the same source. Chambers v. Seay, 73 Ala. 378; Raleigh v. Atkinson, 6 Mees. & W. 670; Mansfield v. Mansfield, 6 Conn. 559; Nevitt v. Woodburn, 82

shall survive the death of the principal, it must be given on consideration and there must be vested in the donee some estate, right, or interest in its subject-matter.[70] A power is revocable so long as it remains unexecuted.[71] A power to release, con-

Ill. App. 649; Bonney v. Smith, 17 Ill. 531; Black v. Harsha, 7 Kan. App. 794; Hunt v. Rousmanier's Adm'rs, 8 Wheat. [U. S.] 174, 5 Law Ed. 589. Huffc. Cas. 146. And see cases cited supra, note 65. Or as defined by Chief Justice Marshall it must be a power "engrafted on an estate in the thing itself." Hunt v. Rousmanier's Adm'rs, 8 Wheat. [U. S.] 204, 5 Law. Ed. 597; Huffc. Cas. 146. Where the power is given to a person who derives, under the instrument creating the power, or otherwise, a present or future interest in the property, the subject on which the power is to act, it is then a power coupled with an interest. McGriff v. Porter, 5 Fla. 373.

Thus, where a power is given to an agent, to make a collection or sale, and out of the proceeds to pay himself for a debt due to him from the principal (Watson v. King, 4 Camp. 272; Gaussen v. Morton, 10 Barn. & C. 731; Barr v. Schroeder, 32 Cal. 609), or to reimburse himself for advances made to the principal (Posten v. Rassette, 5 Cal. 467; Marziou v. Pioche, 8 Cal. 522), or where it is given to indemnify a surety (Hynson v. Noland, 14 Ark. 710), it is a power coupled with an interest and cannot be revoked.

Wherever a consignment is made to a factor for sale, the consignor has a right, generally, to control the sale thereof, according to his own pleasure, from time to time, if no advances have been made or liabilities incurred on account thereof, and the factor is bound to obey his orders. This arises from the ordinary relation of principal and agent. If, however, the factor makes advances, or incurs liabilities on account of the consignment, by which he acquires a special property therein, the consignor has no authority by any subsequent orders to suspend or control this right of sale, except in respect to the surplus not necessary for the factor's reimbursement (Marfield v. Douglass, 1 Sandf. [N. Y.] 360; Marfield v. Goodhue, 3 N. Y. (3 Comst.) 62; Brown v. McGran, 14 Pet. [U. S.] 479, 10 Law. Ed. 550; Raleigh v. Atkinson, 6 Mees. & W. 670. See c. 21), unless there is some agreement between the factor and consignor which gives the consignor right to suspend or control the factor's actions after such advances (Brown v. McGran, 14 Pet. [U. S.] 479, 10 Law. Ed. 550; Marfield v. Goodhue, 3 N. Y. (3 Comst.) 62; Marfield v. Douglass, 1 Sandf. [N. Y.] 360. See c. 21).

What interest not sufficient: But where the agent, to whom the power is given, has an interest only in the proceeds of the transaction, and not in the subject-matter itself, as where he is to receive out of the proceeds a certain amount as compensation for services rendered in the transaction, it is not a power coupled with an interest, and hence is not irrevocable. Chambers v. Seay, 73 Ala. 372; Stier v. Imperial Life Ins. Co., 58 F. 843; Oregon & W. Mortg. Sav. Bank v. American Mortg. Co., 35 Fed. 22; Hall v. Gambrill, 92 F. 32; Ballard v. Travellers' Ins. Co., 119 N. C. 187; Wainwright v. Massenberg, 129 N. C. 46; Nevitt v. Woodburn, 82 Ill. App. 649; Andrews v. Travellers' Ins. Co., 24 Ky. L. R. 844, 70 S. W. 43. Thus, where it was stipulated that the agent should receive a certain per cent of the proceeds of sale by way of compensation for his services in making the sale, it was not an authority with an interest, and the agency could be revoked at any time before a sale was made under the power. Chambers v. Seay, 73 Ala. 372; Brown v. Pforr, 38 Cal. 550; Barr v. Schroeder, 32 Cal. 609; Frink v. Roe, 70 Cal. 296; Darrow v. St. George, 8 Colo. 592; Bonney v. Smith, 17 Ill. 531; Hamilton v. Frothingham, 59 Mich. 253; Simpson v. Carson, 11 Or. 361;; Hartley's Appeal, 53 Pa. 212. Huffc. Cas. 132; Blackstone v. Buttermore, 53 Pa. 266, Huffc. Cas. 133. So where A gave B a power of attorney to prosecute a suit for the redemption and recovery of lands, accompanied with an agreement to give the latter one-half of what he might recover, and secured the performance of the agreement on his part, by a mortgage on the land sought to be recovered, but there was nothing in any of the writings obligating the attorney to act, it was held that, by the mortgage, the power was not annexed to the estate, nor was the estate auxiliary to its exercise, that the power was not coupled with an interest in the lands and was revocable at any time before the attorney had recovered the lands or some portion thereof. Gilbert v. Holmes, 64 Ill. 548. And this is also true where a power is given to collect a debt, the agent to have a certain per cent of the proceeds for his services. Hartley's Appeal, 53 Pa. 212, Huffc. Cas. 132; Flanagan v. Brown, 70 Cal. 254; Oregon & W. Mortg. Sav. Bank v. American Mortg. Co., 35 F. 22.

A power is simply collateral and without interest, or a naked power, where, to a mere stranger, authority is given to dispose of an interest, in which he had not before, nor has by the instrument creating the power, any estate whatsoever. McGriff v. Porter, 5 Fla. 373.—From Clark & S. Agency, § 165, pp. 404-404.

70. The execution of the power of attorney to deposit and draw money in the principal's name and the delivery of her bankbook to the donee of the power held not to have been a pledge of the moneys on deposit as a security for payment for either services rendered or moneys advanced. Hoffman v. Union Dime Sav. Inst., 109 App. Div. 24, 95 N. Y. S. 1045. The employment of an agent by a county for the survey and sale of lands on a commission, but specifying no duration of the contract, does not give him an irrevocable power coupled with an interest, but entitles him to a reasonable time to sell and obtain compensation for labor and expenses. Hollingsworth v. Young County [Tex. Civ. App.] 91 S. W. 1094.

71. The commencement of suit on a claim for personal injuries is an implied revocation of a power to release contained in an assignment of the claim, which assignment had become inoperative for failure of consideration. Flynn v. Butler, 189 Mass. 377, 75 N. E. 730.

tained in an assignment of a claim for personal injuries, being a mere naked authority, became inoperative upon the failure of the consideration for the assignment.[72] To prove revocation the acts or declarations alleged to be such must evince an intention to revoke.[73]

Notice of revocation.—A statutory recordation of a power to convey lands and of the revocation thereof will not supply the want of actual notice of revocation to the agent.[74]

72. Flynn v. Butler, 189 Mass. 377, 75 N. E. 730.

73. Letters held not to have terminated contract of agency to purchase. Forbes Co. v. Leonard, 119 Ill. App. 629. A letter from the principal saying: "In regard to advance on that land, think it safer to wait a little and see what the crop will amount to," held not to operate as a revocation of the agency to sell the land. Kingsley v. Wheeler [Minn.] 104 N. W. 543.

74. Best v. Gunther, 125 Wis. 518, 104 N. W. 82. See 19 Harv. L. R. 373, 377.

NOTE. Notice to third persons. When necessary: Whenever a general agency has been established for any purpose, all persons who have dealt with such agent, or who have known of the agency and are apt to deal with him, have a right to presume that such authority will continue until it is shown to have been terminated in one way or another (McNeilly v. Continental L. Ins. Co., 66 N. Y. 23; Southern L. Ins. Co. v. McCain, 96 U. S. 84, 24 Law. Ed. 653; Andrews v. Clark, 72 Md. 396; Anthony v. Phillips, 17 R. I. 188); and they also have a right to anticipate that if the principal revokes such authority they will be given due notice thereof. It is a general rule of law, therefore, upon which there seems to be no conflict of authorities, that all acts of a general agent, within the scope of his authority, as respects third persons, will be binding on the principal even though done after revocation, unless notice of such revocation has been given to those persons who have had dealings with and who are apt to have other dealings with the agent, upon the strength of his former authority. England. Anon. v. Harrison, 12 Mod. 346, Wamb. Cas. 953; Salte v. Field, 5 Term R. 211. **United States.** Southern L. Ins. Co. v. McCain, 96 U. S. 84, 24 Law. Ed. 652; Hatch v. Coddington, 95 U. S. 48, 24 Law. Ed. 339; Lanusse v. Barker, 3 Wheat. 101, 142, 4 Law. Ed. 343; Johnson v. Christian, 128 U. S. 374, 32 Law. Ed. 412. **Alabama.** Gunter v. Stuart, 87 Ala. 196. **California.** Quinn v. Dresbach, 75 Cal. 159, 7 Am. St. Rep. 138; Van Dusen v. Star Quartz Min. Co., 36 Cal. 571, 95 Am. Dec. 209. **Connecticut.** Fellows v. Hartford & N. Y. Steamboat Co., 38 Conn. 197. **Illinois.** Meyer v. Hehner, 96 Ill. 400; Diversy v. Kellogg, 44 Ill. 114, 92 Am. Dec. 154. **Indiana.** Howe Machine Co. v. Simler, 59 Ind. 307; Foellinger v. Leh, 110 Ind. 238; Ulrich v. McCormick, 66 Ind. 243. **Iowa.** Baudouine v. Grimes, 64 Iowa, 370. **Kentucky.** Hancock v. Byrne, 5 Dana, 513. **Louisiana.** Harris v. Cuddy, 21 La. Ann. 388; Caldwell v. Neil Bros., 21 La. Ann. 342, 99 Am. Dec. 738; Girard v. Hirsch, 6 La. Ann. 651. **Maine.** Maxcy Mfg. Co. v. Burnham, 89 Me. 538, 56 Am. St. Rep. 436. **Maryland.** Baltimore v. Eschbach, 18 Md. 276; Bernard v. Torrance, 5 Gill. & J. 383; Andrews v. Clark, 72 Md. 396. **Massachusetts.** Wright v. Herrick, 128 Mass. 240; Packer Hinckley Locomotive Works, 122 Mass. 484; Rice v. Barnard, 127 Mass. 241. **Mississippi.** Planters' Bank v. Cameron, 3 Smedes & M. 609. **Missouri.** Lamothe v. St. Louis Marine R. & Dock Co., 17 Mo. 204. **New Hampshire.** Beard v. Kirk, 11 N. H. 397. **New Jersey.** Capen v. Pacific Mut. Ins. Co., 25 N. J. Law, 67, 64 Am. Dec. 412. **New York.** McNeilly v. Continental L. Ins. Co., 66 N. Y. 23; Claflin v. Lenheim, 66 N. Y. 301, 305; Barkley v. Rensselaer & S. R. Co., 71 N. Y. 205; Munn v. Commission Co., 15 Johns. 44, 8 Am. Dec. 219; Gelpcke v. Quintell, 74 N. Y. 599. **North Carolina.** Braswell v. American L. Ins. Co., 75 N. C. 8. **Pennsylvania.** Morgan v. Stell, 5 Bin. [Pa.] 305. **Rhode Island.** Anthony v. Phillips, 17 R. I. 188. **South Carolina.** Montgomery v. Eveleigh, 1 McCord [S. C.] 267. **Texas.** Aetna L. Ins. Co. v. Hanna, 81 Tex. 487, 492. **Vermont.** Tier v. Lampson, 35 Vt. 179, 82 Am. Dec. 634; Bradish v. Belknap, 41 Vt. 172. **Virginia.** Smith v. Watson, 82 Va. 712.

Thus, where an agency constituted by writing is revoked, but the written authority is left in the hands of the agent, and he subsequently exhibits it to a third person, who deals with him as agent, on the faith of it, without any notice of the revocation, the act of the agent, within the scope of the authority, will bind the principal. Beard. v. Kirk, 11 N. H. 397. So where a father has permitted a minor son to buy goods on his credit, a party knowing of that fact and without notice of any change in the relation or of circumstances sufficient to put him on inquiry may recover against the father for goods sold to the son, although the son has left the father. Murphy v. Ottenheimer, 84 Ill. 39, 25 Am. Rep. 424. And see ante, § 77.

The above rule also applies when the husband is acting as agent for his wife (Maxcy Mfg. Co. v. Burnham, 89 Me. 538, 56 Am. St. Rep. 436), and vice versa (Anthony v. Phillips, 17 R. I. 188; Debenham v. Mellon, 5 Q. B. Div. 394). Thus, where a tradesman who has previously furnished goods to a wife, and has been paid by the husband, has neither actual nor imputed knowledge of the wife's separation from the husband, and who after the separation furnishes goods to the wife, he may maintain an action therefor against the husband. In such a case, the wife's agency continues until a knowledge of the separation and notice by the husband not to sell to the wife on his credit is brought home to the tradesman. Anthony v. Phillips, 17 R. I. 188.

The doctrine, however, that a discharged agent may, under some circumstances, bind his former principal to the extent of the authority with which he had been apparently clothed, has no application beyond the claim of authority made by the agent. Accord-

§ 2. *Rights and liabilities of principal as to third persons.*[75] *A. Actual or implied authority to bind principal.*[76]—An agent may be authorized to do any act which his principal may do.[77] An agent has no implied authority to appoint subagents or delegate his powers [78] without his principal's consent; but there is a well recognized exception to this general rule, in cases where the appointment of a subagent is necessary to fully carry out the purposes for which the agent was appointed.[79] In California, the authority of factors in respect to the goods which are the subject-matter of a transaction cannot be delegated to any person in an independent employment.[80] The authority of the agent is always construed to include all the necessary and usual means of executing the duties of the agency properly; [81] but authority to make a particular contract does not carry with it the authority to waive the principal's rights after the contract has been agreed upon.[82]

The principal cannot repudiate acts within the agent's authority,[83] especially

ingly, where an agent of the plaintiff after his discharge, which was unknown to the defendant, represented that he had authority to draw upon his principal, but not that he had authority to procure an accommodation indorser, the principal was not bound to indemnify the defendant for indorsing the discharged agent's draft, which the principal refused to pay, notwithstanding the principal had honored several other drafts drawn by the agent before his discharge and indorsed by the defendant. Baudouine v. Grimes, 64 Iowa, 370; Groneweg v. Kusworm, 75 Iowa, 237.

The underlying principle that makes a principal liable to a third person for the acts of the agent done within the scope of his authority although after revocation, but before notice thereof has been brought home to third persons who had formerly dealt with him, is that, if one of two innocent purchasers must suffer, the loss must be borne by him whose acts contributed to bring about the state of things which caused the loss. Caldwell v. Neil Bros., 21 La. Ann. 342, 99 Am. Dec. 738; Story, Ag. § 856; Walker v. Cassaway, 4 La. Ann. 19, 50 Am. Dec. 551; Maple v. Cussart, 53 Pa. 349, 91 Am. Dec. 214; Stout v. Benoist, 39 Mo. 277, 90 Am. Dec. 466; Ruiz v. Norton, 4 Cal. 355, 60 Am. Dec. 618.

When not necessary: Where, however, the agent has been appointed for some special act only, or in other words, where he is a special agent, third persons have no right to presume that his authority will continue beyond the doing of that act. As soon as he has performed the particular act authorized, his authority thereby ceases, and parties knowing of his agency have knowledge of this fact. In case of special agencies, then it is the rule that notice of revocation of authority after the performance of the special act need not be given to third persons. Watts v. Kavanagh, 35 Vt. 34; Strachan v. Muxlow, 24 Wis. 21. But where the revocation is made before the special agency has been completed, notice thereof should be given to third persons who have had dealings with such agent, or who know of the agency, the same as in general agencies.—From Clark & S. Agency, § 173b.

75. See 5 C. L. 73. See, also, **Clark & S. Agency, 457 et seq.; 998 et seq.**

76. See 5 C. L. 73.

77. Civ. Code, § 2304. Nicholls v. Mapes [Cal. App.] 82 P. 265. The maker of a note may authorize another as agent to procure extensions of the time for the payment thereof, and such an extension made during the life of the note is not the service of an action within the meaning of Code, § 3456. Iowa Loan & Trust Co. v. McMurray [Iowa] 105 N. W. 361.

78. State v. Marley [Conn.] 62 A. 85. A broker or real estate agent, authorized to buy or lease premises, presumptively is not authorized to employ a subbroker or subagent. Southack v. Ireland, 109 App. Div. 45, 95 N. Y. S. 621; Arbesfeld v. Tanenbaum, 96 N. Y. S. 424. Where an agent employs another to assist him in making a sale, acting within the scope of his authority, and then accepts the services and acts upon them as his own, there is no attempted delegation of his authority as agent. Nichols & Shepard Co. v. Berning [Ind. App.] 76 N. E. 776.

79. Under Gen. St. 1902, §§ 2722, 2726, for the appointment in a no-license town of not more than 5,000, of an agent to sell intoxicating liquors for specified uses only, the appointment by him of suitable subagents is necessary to carry out the purposes of the statutes. State v. Marley [Conn.] 62 A. 85.

80. Civ. Code, § 2368 (3). Such person as the representative of factors might receive goods and place them in the warehouse for the owner, but could not by virtue of such representation, store them in his own name, either directly or indirectly. Akron Cereal Co. v. First Nat. Bank [Cal. App.] 84 P. 778.

81. State v. Marley [Conn.] 62 A. 85; Second Nat. Bank v. Adams [Ky.] 93 S. W. 671; Abrahams v. Revillon Freres [Wis.] 107 N. W. 656. Powers of an agent are prima facie coextensive with the business intrusted to his care. Mange-Wiener Co. v. Worsham Drug Co., 27 Pa. Super. Ct. 315.

82. The agent who made a contract for the drilling of a well for his principal could not, without further authority, authorize its abandonment. Caughey v. Parker, 26 Pa. Super. Ct. 289.

83. Wolff v. Wilson, 28 Pa. Super. Ct. 511; Peyton v. Old Woolen Mills Co. [Ky.] 91 S. W. 719; Braxmar v. Stanton, 110 App. Div. 167, 96 N. Y. S. 1096; Birkett v. Postal Telegraph-Cable Co., 107 App. Div. 515, 94 N. Y. S. 918; Colloty v. Schuman [N. J. Law] 62 A. 186. Where an oil and gas lease stipulated that deposits in a certain bank to the credit of the lessor should constitute pay-

where he accepts an order taken by the agent and profits by it.[84] The rule is even more important with the agent of a corporation than of an individual, that what he does, within the scope of the business intrusted to him, his principal does in the eye of the law.[85] So long as the agent acts merely as such, his acts, legally speaking, are the acts of his principal,[86] and if a contract so made is performed at the principal's place, it is governed by that law [87] and he is entitled to the benefit of a contract avowedly made by his agent in his behalf, as against any claimant through the agent.[88] A judgment in a suit, wherein an agent having authority is a party, is binding on the principal.[89] Where the authority of an agent is unwritten and express oral authority is not satisfactorily shown, such authority may be implied from acts and circumstances shown.[90] While such a new promise to pay a note as will arrest the running of the statute of limitations will be inferred from a payment made by an agent having express authority to do so,[91] yet such authority cannot be implied.[92]

Declarations or admissions of the agent, made without authority, or as to matters outside the scope of his authority, do not bind the principal,[93] nor do those made or done while acting for another not for the principal,[94] nor those made to some one else than him who seeks to rely on them,[95] but declarations and admissions within the agent's authority are binding [96] when made during the continuance of the

ment of rent, the acceptance of such a deposit by the bank after the expiration of the lease, without any notice from lessor not to do so, constituted a payment to the lessor. American Window Glass Co. v. Indiana Natural Gas & Oil Co. [Ind. App.] 76 N. E. 1006. Where a mortgagee of real estate assigned the mortgage, guarantying its payment, and afterward collected the principal and interest for which it failed to account, the evidence was held sufficient to show that the mortgagee was its assignee's agent and the payments made to it satisfied the mortgage. Pine v. Mangus [Neb.] 107 N. W. 222.

84. He is bound by his agent's representations. Rheinetrom v. Elk Brewing Co., 82 Pa. Super. Ct. 519. Payment to an authorized agent is binding on the principal, even though the agent fails to pay over the money. Fayetteville Wagon, Wood & Lumber Co. v. Kenefick Const. Co. [Ark.] 88 S. W. 1031.

85. Arnold v. National Bank of Waupaca [Wis.] 105 N. W. 828.

86. Where a lease was executed by the agent in the name and under the seal of the principal, it was the principal's act, and he could sue for rents thereon. Cochran v. MacRae, 98 N. Y. S. 852.

87. The fact that payment on an order for the purchase of stock might be paid to the agent in the state where the order was given, did not prevent the contract from being one of the state where the order was executed by the principal. Douglass v. Paine [Mich.] 12 Det. Leg. N. 527, 104 N. W. 781.

88. Where one is employed by another to procure an option on property, and such option is obtained in the agent's own name, but on the distinct understanding with the owner that it was procured for the employer, the latter is entitled to the benefit of the option as against the agent's assignee. Henry v. Black [Pa.] 63 A. 250.

89. Judgment in forcible entry and detainer proceedings, where defendant was shown to have acted as agent, held conclusive against the principal. Jacob v. Town of Oyster Bay, 109 App. Div. 630, 96 N. Y. S. 626.

90. Anglo-Californian Bank v. Cerf, 147 Cal. 384, 81 P. 1081. Where the owner of a suit case knew of the custom of an express company to limit its liability for loss of goods, and authorized his agent to deliver the suit case, pay charges and take a receipt, the agent had authority to assent to the usual limitation. Brunner v. Platt, 99 N. Y. S. 526.

91. Wanamaker v. Plank, 117 Ill. App. 327.

92. The mere holder of collateral security placed in his hands at the time of the execution of the note secured by it has no such authority unless expressly conferred. Wanamaker v. Plank, 117 Ill. App. 327.

93. Thompson v. Murphy [W. Va.] 53 S. E. 908; Shoemaker v. Commercial Union Assur. Co. [Neb.] 106 N. W. 316. An attorney holding a claim for collection cannot bind the owner of the claim by admissions either express or implied and a failure to answer a letter does not make it evidence of the admission of assertions contained therein. Irwin v. Buffalo Pitts Co., 39 Wash. 346, 81 P. 849. See, also, **Clark & S. Agency, 1023.**

94. A lineman of an electric light company, while acting at a fire under direction of city authorities and in compliance with an ordinance, cannot render the company liable by his acts and words, in the absence of special authority. New Omaha Thomson-Houston Elec. Light Co. v. Anderson [Neb.] 102 N. W. 89.

95. Agents' statements to one person do not bind the principals as to another a stranger. Trammell & Lane v. J. M. Guffey Petroleum Co. [Tex. Civ. App.] 94 S. W. 104.

96. Fitzgerald v. Kimball Bros. Co. [Neb.] 107 N. W. 227. In an action for false representations in the sale of goods, the exclusion of evidence as to the agent's represen-

agency and in regard to a transaction then in hand.[97] Statements made by an agent in soliciting persons to engage in his principal's employ, where a written contract is entered into, form no part of the contract.[98]

Evidence and proofs.[99]—Proof of the agency, whether express of implied must be clear to bind the principal,[1] as where agents' declarations or admissions are relied upon,[2] and should precede proof of the acts or statements of the agent.[3] The preliminary question of the existence of the agency, before a conversation with the alleged agent can be given in evidence, is one on which the finding of the trial judge is conclusive, unless the finding is not warranted by the facts as matter of law.[4] The authority of an agent may be shown by the letters of his principal.[5] The extent of an agent's authority cannot be shown by his declarations or admissions,[6] but his admissions or declarations during the transaction of business for his principal and

tations in inducing the sale was reversible error. Romano v. Brooks [Ala.] 29 So. 213.

97. Peyton v. Old Woolen Mills Co. [Ky.] 91 S. W. 719.

98. Nielson v. Northeastern Siberian Co. [Wash.] 82 P. 292.

99. See 5 C. L. 75.

1. McCune v. Badger [Wis.] 105 N. W. 667. The general rule is that when a contract made by an agent is relied on, the authority of the agent must be shown. Raleigh & G. R. Co. v. Pullman Co., 122 Ga. 700, 50 S. E. 1008. One cannot assume that another is the agent of the owner of a mortgage, pay the principal and interest on such mortgage and sustain a bill for its discharge. Ward v. Trustees of New England Southern Conference of M. E. Church [R. I.] 61 A. 651. In the absence of evidence to the contrary, checks representing advancements to plaintiff and signed by an individual were regarded involving individual transactions only, although the individual was secretary and treasurer of defendant corporation. Sheldon Canal Co. v. Miller [Tex. Civ. App.] 90 S. W. 206. A street railroad company could not be held liable for the compensation of a physician employed by its claim agent to attend an injured passenger, in the absence of any showing of his authority to employ a physician. Weldon v. Traction Co., 27 Pa. Super. Ct. 257. A teacher in a private school who was employed by an independent contractor, to whom the proprietor had let a department, had no claim against the proprietor of the school for her services. Coltrane v. Peacock [Tex. Civ. App.] 91 S. W. 841. One may show that alleged agent was not such by showing the contract with him. Quale v. Hazel [S. D.] 104 N. W. 215.

In an action against a building and loan association on a guaranty made by its solicitor that stock would mature in 72 months, the **burden** was on plaintiff to show that the guaranty was within the scope of his authority. Ebersole v. Southern Bldg. & Loan Ass'n [Ala.] 41 So. 150.

2. Fitzgerald v. Kimball Bros. Co. [Neb.] 107 N. W. 227. A conversation with an agent cannot be given in evidence as against his principal, until the agency is clearly established. Dexter v. Thayer, 189 Mass. 114, 75 N. E. 223. The agent's admission or representation as to the purpose for which he borrowed money is not evidence against his principal, in the absence of proof of the agent's authority. Thompson v. Murphy [W. Va.] 53 S. E. 908. An attorney's receipt to a debtor is not evidence against the creditor, unless the fact that he was the attorney of the creditor is shown. Payment to an attorney held not to have been payment to the bank. Bank of Batesville v. Maxey [Ark.] 88 S. W. 968. A vendee could not rescind a contract induced by fraudulent representations, upon a tender to an innocent party, without showing the agency of the party negotiating the sale. Bromfield v. Denton [N. J. Err. & App.] 61 A. 378. In an action on a contract alleged to have been made with defendant's agents in his behalf, neither the contract, nor the agents' letters, declarations or acts were admissible, until the agency had been proved. Fifer v. Clearfield & Cambria Coal & Coke Co. [Md.] 62 A. 1122.

3. While the better practice is to require proof of agency before admitting the declarations of the alleged agent, yet where there was, in the whole evidence, some testimony from which the agency might be inferred and the object was not so much to prove the agency as to show who effected the sale, a variance from the order of evidence was not reversible error. Indiana Fruit Co. v. Sandlin [Ga.] 54 S. E. 65.

4. Finding sustained. Dexter v. Thayer, 189 Mass. 114, 75 N. E. 223. The court must be satisfied that the agency has been shown, at least prima facie, before the acts or declarations of the agent can be shown. Jackson v. American Tel. & Tel. Co., 139 N. C. 347, 51 S. E. 1015. The fact that defendant in an action by an agent for commissions held out a certain party to be its sales manager, was sufficient to make his admissions of defendant's liability admissible in evidence, without further proof as to his duties as such. Garfield v. Peerless Motor Car Co., 189 Mass. 395, 75 N. E. 695.

5. Peycke v. Shinn [Neb.] 107 N. W. 386.

6. Weldon v. Traction Co., 27 Pa. Super. Ct. 257; Peyton v. Old Woolen Mills Co. [Ky.] 91 S. W. 719; Buskirk v. Talcott, 96 N. Y. S. 714; John Gund Brewing Co. v. Peterson [Iowa] 106 N. W. 741; McCune v. Badger [Wis.] 105 N. W. 667. Agent's declarations as to conversation with his principal by telephone not admissible to show authority. Fitzgerald v. Kimball Bros. Co. [Neb.] 107 N. W. 227. Under Civ. Code, § 2319, declaring an agent's authority to make representations not including the terms of his authority, the declaration of one claiming to be an agent is insufficient to show the extent of authority. Pease v. Fink [Cal. App.] 85 P. 657.

within the scope of the agency, when made in relation to such business, are admissible as part of the res gestæ.[7] Decisions on inferences to be drawn from particular facts are collected below.[8]

(§ 2) *B. Apparent authority and unauthorized or wrongful acts of agent; torts.*[9]—Acts of an agent within the apparent scope of his authority are binding on the principal,[10] and limitations of the agent's authority not brought to the knowledge of third persons do not affect them.[11] But if such limitations are known to the third party, the principal is not bound beyond the authority actually conferred;[12] and where the act is one which requires the agent's authority to be in writ-

7. Fitzgerald v. Kimball Bros. Co. [Neb.] 107 N. W. 227; Peyton v. Old Woolen Mills Co. [Ky.] 91 S. W. 719.

8. Evidence that defendant, through its agent, paid claims for harvesting sugar beets, was not admissible, to show the agent's authority in reference to plaintiff's claim for rent of the land where they grew. Wierman v. Bay City-Michigan Sugar Co. [Mich.] 12 Det. Leg. N. 833, 106 N. W. 75. Proof of a loan made to an agent on behalf of his principal is no evidence that the principal received the money. Thompson v. Murphy [W. Va.] 53 S. E. 908. Proof of authority to make a contract for putting down a well was no evidence of an agent's authority to consent to its abandonment. Caughey v. Parker, 26 Pa. Super. Ct. 289. Evidence relating to the employment, by a claim agent of a traction company, of a physician to attend a number of persons injured in an accident does not show, or tend to show, a general authority. Especially where the compensation of such surgeon was included in the settlements for damages as part of the consideration. Weldon v. Traction Co., 27 Pa. Super. Ct. 257. While proof of an agent's authority to receive rent does not show authority to renew a lease, such a fact is a circumstance to be considered, when the right to renew a lease is contested. Noble v. Burney [Ga.] 53 S. E. 463. Mere rumor or common belief that an agent has authority to do a particular act is not of itself evidence thereof. Thompson v. Murphy [W. Va.] 3 S. E. 908. The fact that a person has immediate charge of cattle at the time of their delivery for shipment is not conclusive evidence of his authority to sign the owner's name to a shipping contract. Atchison, etc., R. Co. v. Watson [Kan.] 81 P. 499. Nor is the carrier justified in assuming his authority, where an oral contract of shipment has already been made. Id. Evidence of alleged agent's authority to bind defendant held insufficient. Naughton Co. v. American Horse Exch., 97 N. Y. S. 387.

9. See 5 C. L. 75. As to torts of agents, see Clark & S. Agency, 1063. As to apparent authority, see Id., 1000.

10. Grand Rapids Elec. Co. v. Walsh Mfg. Co. [Mich.] 105 N. W. 1; Peyton v. Old Woolen Mills Co. [Ky.] 91 S. W. 719; California Development Co. v. Yuma Valley Union and Water Co. [Ariz.] 84 P. 88. Evidence of acts of defendant's general agent held admissible to prove his membership in a firm indebted to plaintiff. Peyton v. Old Woolen Mills Co. [Ky.] 91 S. W. 719. Letters sent to the attorney of the mortgagor, by the agent of the mortgagee having charge of the note and mortgage, must be deemed as sent to the mortgagor by the mortgagee. Mabb v. Stewart, 147 Cal. 413, 81 P. 1073.

11. Mabb v. Stewart, 147 Cal. 413, 81 P. 1073; Abrohams v. Revillon Freres [Wis.] 107 N. W. 656; Reynolds v. Chicago, B. & Q. R. Co., 114 Mo. App. 670, 90 S. W. 100; Robert Buist Co. v. Lancaster Mercantile Co. [S. C.] 52 S .E. 789. A letter written to an attorney must be regarded as giving him such authority as it purports to give on its face, so far as he acts upon it in his transactions with those who have no knowledge of his principal's secret intentions. Mabb v. Stewart, 147 Cal. 413, 81 P. 1073. Having ascertained the general character or scope of the agency, the party is authorized to rely upon the agent's having such powers as naturally belong to such character and, in the absence of circumstances putting him upon inquiry, is not bound to inquire for secret qualifications or limitations of his apparent powers. Grand Rapids Elec. Co. v. Walsh Mfg. Co. [Mich.] 105 N. W. 1. Where the principal delivered a piano to its agent to sell on commission, the purchaser acquired title, regardless of limitations of the agent's authority of which the purchaser had no notice. Chickering-Chase Bros. Co. v. Moulton [Iowa] 107 N. W. 434. And even if the third party took the piano as security for a loan of money to the agent, his right of possession would be good as against the principal, if he had no notice that the agent was not the owner with unlimited power of sale. Id. An instruction to an agent of a corporation not to lease a dredge, unless it was insured, was a limitation on his apparent power not binding on the lessor, unless it was disclosed to him. California Development Co. v. Yuma Valley Union Land & Water Co. [Ariz.] 84 P. 88. Where a principal turned over property to an agent to sell, under an unrecorded contract reserving title, and the agent turned it over to one of his creditors to sell and apply on his indebtedness to him and the others, they having no notice of the reservation of title, the principal could not recover the property by replevin. Parry Mfg. Co. v. Lowenberg & Co. [Miss.] 41 So. 65. It is within the scope of the apparent authority of a salesman to the retail trade to make a sale on condition that the goods need not be paid for until sold, and in the absence of any notice of limitation of the salesman's authority, such condition will bind the principal. Patton-Worsham Drug Co. v. Stark [Tex. Civ. App.] 13 Tex. Ct. Rep. 979, 89 S. W. 799.

12. Where the powers of an agent of a life insurance are defined and limited in express terms embodied in the application signed by the insured, the latter cannot hold

ing, the party dealing with him must take notice of that fact and is bound by any limitations in the written authority.[13] Persons dealing with agents of limited powers must generally inquire as to the extent of their authority,[14] and are chargeable with knowledge thereof.[15] Persons dealing with an agent are warranted in deducing the scope of his apparent authority from the business he is permitted to conduct [16] or the manner in which he is permitted to conduct it,[17] although the principal did not know of the agent's course and manner of doing business,[18] and a principal may so conduct his business through an agent as to become liable for the acts of the agent outside of his express or actual authority.[19] The scope of an agent's authority may be inferred from the nature of his agency.[20] If the principal

the company to any contract beyond the scope of the agent's express authority. Deming Inv. Co. v. Shawnee Fire Ins. Co. [Okl.] 83 P. 918. Where a purchaser signs a written order for goods, reciting that there is no oral agreement with the salesman aside from the order, he has notice that the salesman has no authority to make such agreements, and the principal is not bound by any oral agreement, unless informed thereof before shipment. Fulton v. Sword Medicine Co. [Ala.] 40 So. 393. The declaration of an agent empowered to lease a dredge that he would not accept it unless insured does not import want of authority to lease it unless it was insured. California Development Co. v. Yuma Valley Union Land & Water Co. [Ariz.] 84 P. 88. Where an agent, having wagons to sell for his principal, delivered one to a party having knowledge of the agency, in payment of an individual debt, the principal could recover the price thereof from the purchaser. Miller v. Springfield Wagon Co. [Ind. T.] 89 S. W. 1011.

13. Authority to sell real estate required to be in writing under statue of frauds. Frahm v. Metcalf [Neb.] 106 N. W. 227.

14. Grand Rapids Elec. Co. v. Walsh Mfg. Co. [Mich.] 105 N. W. 1; Reid v. Alaska Packing Co. [Or.] 83 P. 139; Moore v. Skyles [Mont.] 82 P. 799; Buskirk v. Talcott, 196 N. Y. S. 714. Third parties dealing with a commercial traveler are bound at their peril to acertain his real power. Moon Bros. Carriage Co. v. Devenish [Wash.] 85 P. 17.

15. Reid v. Alaska Packing Co. [Or.] 83 P. 139. One who had knowledge that certain horses, intrusted to an agent for sale, were boarded at a livery stable at the owner's expense, and knowledge of the agency, but made no inquiries as to the agent's authority, was held to have knowledge that the agent could not exchange them for other horses. Jones v. Richards, 98 N. Y. S. 698. A person is bound to know that a selling agent has no implied authority to sell his principal's goods for other goods or work to be furnished the agent on his personal account. Hook v. Crowe [Me.] 61 A. 1080.

16. Grand Rapids Elec. Co. v. Walsh Mfg. Co. [Mich.] 105 N. W. 1. Where a party placed funds in the hands of another to invest and also assigned and executed mortgages to raise more money to invest, which mortgages she placed in the agent's hands who sold and delivered them to defendant, defendant was entitled to assume the agent's authority to complete the transaction. James v. Lewis, 189 Mass. 134, 75 N. E. 217. Where a party had been manager of a hotel and was employed as assistant manager, without any apparent restrictions, and was actively engaged in managing the operations and business of the hotel, apparent authority on his part to make a contract for services was shown. Grand Pacific Hotel Co. v. Pinkerton, 217 Ill. 61, 75 N. E. 427.

17. Eggleston v. Advance Thresher Co [Minn.] 104 N. W. 891; Peyton v. Old Woolen Mills Co. [Ky.] 91 S. W. 719. Where one engaged in buying and selling cotton allowed an employe to transact his business through brokers, to draw checks for incidental expenses and to honor drafts, and to manage affairs in his absence generally, it was held to establish prima facie authority on the employe's part to deal with a broker in his employer's name and to render him liable for a loss. Norden v. Duke, 99 N. Y. S. 30. Where an agent having authority to sell only for cash or secured notes took personal property in part payment, and the contract was rescinded by mutual consent but the property was not returned, held that the manner of conducting the business as appeared from the evidence was such as to render the principal liable for the agent's act. Eggleston v. Advance Thresher Co. [Minn.] 104 N. W. 891.

18. Eggleston v. Advance Thresher Co. [Minn.] 104 N. W. 891.

19. Eggleston v. Advance Thresher Co. [Minn.] 104 N. W. 891, following Columbia Mill Co. v. Bank, 52 Minn. 224, 53 N. W. 1061. Evidence held not to bring the case within the rule laid down in Columbia Mill Co. v. Bank, 52 Minn. 224, 53 N. W. 1061; Barton-Parker Mfg. Co. v. Wilson [Minn.] 104 N. W. 968. While an agent to receive payments is usually authorized to take cash only, yet when there has been a long course of dealing and payments have been received accordingly, if the agent is alone known and is supposed to be the principal, his receipt of payment otherwise than in cash binds the principal. Payment of note and mortgage in grain held binding. Dusenberry v. McDole [Wash.] 85 P. 40. While a freight agent generally cannot bind his principal by an agreement to ship freight beyond its own line, yet if it is shown that the company has engaged in carrying freight beyond its own line, the local agent's power to make a contract therefor might be implied from the course of business. Gulf, etc., R. Co. v. Jackson [Tex.] 14 Tex. Ct. Rep. 100, 89 S. W. 968.

20. By conferring on one of its officers the title of "general manager," a railroad company holds him out to the world as having power to make a contract to repair

be a foreign corporation such power is apparent as will render practicable the transaction of business without submission of minor details to the principal.[21] The doctrine of the ostensible authority of an agent, being grounded on estoppel, can be invoked only by such as have dealt with the agent on the faith of such authority.[22]

Evidence and questions of fact.[23]—Apparent authority may be shown by proving a custom,[24] or ratifications by the principal of similar acts by the agent.[25] The question of the agent's apparent authority, under all the circumstances of the case is usually one of fact.[26]

Unauthorized and tortious acts.[27]—Acts of an agent without the scope of his authority will not bind his principal,[28] unless ratified by him;[29] and where the

a sleeping car used on its line. Raleigh & G. R. Co. v. Pullman Co., 122 Ga. 700, 50 S. E. 1008. A railroad company, by placing an agent in charge of its local business and empowering him to contract for the shipment of freight, holds him out to the public as having authority to contract with reference to all the necessary and usual details of the business, and within such range he becomes a general agent. Gulf, etc., R. Co. v. Jackson [Tex.] 14 Tex. Ct. Rep. 100, 89 S. W. 968. A manager who had sole charge of a branch factory and its business, employing hands and customarily making an annual contract with a traveling salesman, had apparent authority to renew such contract. Thomas v. International Silver Co., 48 Misc. 509, 96 N. Y. S. 218. Nothing appearing to the contrary, it is presumed that an agent who is intrusted with receiving messages for transmission has authority to bind his company by an agreement as to the time of sending a message, even to the extent of disregarding the regulations as to the hours of opening and closing the receiving office. Western Union Telegraph Co. v. Merrill [Ala.] 39 So. 121. Held that plaintiff was justified in believing that defendants' selling and purchasing agent and buyer had authority to contract for furs for future delivery. Abrohams v. Revillon Freres [Wis.] 107 N. W. 656.

21. California Development Co. v. Yuma Valley Union Land & Water Co. [Ariz.] 84 P. 88.

22. Fike v. Ott [Neb.] 107 N. W. 774.

23. See 5 C. L. 77.

24. In a suit upon a specialty, evidence of uniform custom of transacting business with the public with reference to the matter in dispute is admissible, when introduced for the purpose of showing an agent's authority to make the contract in question on behalf of his principal. Pullman Co. v. Willett, 7 Ohio C. C. (N. S.) 173.

25. Authority of a railroad ticket agent to reserve berths of a sleeping car company for passengers on a train may be proved by showing prior ratification of reservations made under similar circumstances by such agent. Pullman Co. v. Willett, 7 Ohio C. C. (N. S.) 173. A purchase by a principal and on his own credit of goods selected by his agent is no authority for subsequent sales to the agent alone on the principal's credit. Copen v. Mincoff, 96 N. Y. S. 411.

26. The legitimate powers of a general agent, in the absence of known limitations, must depend largely upon the circumstances of each particular case and usually present questions of fact for the jury. Grand Rapids Elec. Co. v. Walsh Mfg. Co. [Mich.] 105 N. W. 1. Whether an insurance agent was authorized to make an agreement for the surrender of three policies and the issue of a new policy for a greater amount, upon payment of an agreed premium, was held to be a question of fact under the circumstances of the case. Michigan Mut. Life Ins. Co. v. Vierra, 116 Ill. App. 476. Where a clerk in a broker's office conducted business for a customer, ostensibly on the broker's advice, and purchased stocks for her, which he appropriated, it was held to be a question for the jury, under all the circumstances, whether his employers had vested him with apparent authority. Merkel v. Lazard, 99 N. Y. S. 686. Where an agent conducted a branch office for the plaintiff, using letter heads and bill heads furnished by plaintiff with the agent's name thereon designated as "agent," where one of the letter heads was used in soliciting defendant's order and the bill which defendant paid was made up by plaintiff for presentation to defendant who paid it to the agent, the question of whether the agent had authority to collect money was a quesion of fact and not of law. Held v. Walker, 2 App. D. C. 486. On conflicting evidence as to the limitation of authority, it was error to charge that the agent was without authority. Robert Buist Co. v. Lancaster Mercantile Co. [S. C.] 52 S. E. 789.

Sufficiency of evidence: Held that, under the evidence, the agent was more than a mere traveling salesman, and had authority to allow a trade discount. Smith Table Co. v. Madsen [Utah] 84 P. 885. Evidence held to show that the purchase of poultry for shipment was within the apparent scope of the agent's employment. Brockman Commission & Cold Storage Co. v. Pound [Ark.] 91 S. W. 183. Evidence held insufficient to show that the physician in the employ of the master, in making misrepresentations as to an injured employe's condition, was the agent of the employer in the settlement of claim for damages. Gulf, etc., R. Co. v. Huyett [Tex.] 92 S. W. 454. The possession of a deed by a third person does not show that he is the grantor's agent for any other purpose than to deliver the deed and receive the purchase price. Pease v. Fink [Cal. App.] 85 P. 657.

27. See 5 C. L. 77.

28. Hook v. Crowe [Me.] 61 A. 1080; Thompson v. Laboringman's Mercantile & Mfg. Co. [W. Va.] 53 S. E. 908; Reid v. Alaska Packing Co. [Or.] 83 P. 139; Fitzgerald v. Kimball Bros. Co. [Neb.] 107 N. W. 227; Frahm v. Metcalf [Neb.] 106 N. W. 227.

principal repudiates the transaction as soon as it comes to his knowledge, he cannot be said to have ratified it.[30] But a principal may permit a person to hold himself out as his agent and act in such a way that authority to do a given act will be presumed,[31] and this rule applies more peculiarly to corporations, which act only through their officers and agents.[32] An admission after the termination of the agency does not bind.[33]

Fraud, misrepresentation or tortious acts by the agent may be imputed to the principal,[34] regardless of the agent's motive.[35] He must respond for all torts done

A power of attorney, given to manage and control business relating to personal estate, mentioning specifically certain things, conferred no further power, except such as might be necessary to execute the powers conferred, and did not include authority to hire a detective agency at great expense to investigate the affairs of a corporation in which the principal was a stockholder. Thiel Detective Service Co. v. McClure [C. C. A.] 142 F. 952. An agreement between the mortgagor, a creditor and the mortgagee's special agent, authorized only to receive and turn over the proceeds of the sale, that the sheriff should hold a certain amount of the proceeds until the creditor's right thereto was determined, does not affect the mortgagee's right. Seiberling & Co. v. Porter [Ind.] 74 N. E. 516. An agent of a company engaged in manufacturing folding chairs, revolving book-cases, hospital supplies and invalid goods, with power to sell goods in a store, cannot bind his principal by a purchase of household goods delivered to a third person. Cowan v. Sargent Mfg. Co. [Mich.] 12 Det. Leg. N. 362, 104 N. W. 377. Where the agent of defendant company informed plaintiff that he had no authority to make a lease of the privilege of selling cigars, but would lay the matter before the board of directors, held that the arrangements made between them did not contsitute a contract binding on the defendant. Berlin v. Belle Isle Scenic R. Co. [Mich.] 12 Det. Leg. N. 573, 105 N. W. 130. Where a bank held notes indorsed by the payee, who held a chattel hortgage as security, and sent them at maturity to the payee to be collected, to be protested and returned if not paid, the payee, in foreclosing the chattel mortgage to procure funds to reimburse the holders, was not acting as the holder's agent. Sanborn v. First Nat. Bank, 115 Mo. App. 50, 90 S. W. 1033. Where a bank authorized a live stock commission company to receive shipment of cattle mortgaged to secure notes held by the bank, to sell the cattle and receive the proceeds, and the company took a substituted note and mortgage which it sold but failed to pay over the proceeds, held that the company's unauthorized action did not discharge the lien of the first mortgage. Ridgeley Nat. Bank v. Barse Live Stock Commission Co., 113 Mo. App. 696, 88 S. W. 1124. Where goods were ordered by the alleged agent on his own behalf and defendant knew nothing about it and received no benefit from the transaction, defendant could not be held liable as principal, although the alleged agent used defendant's letter heads describing him as "Eastern Manager," and signed the principal's name together with his own as "Eastern Manager." Klumpp v. American Hardware Mfg. Co., 99 N. Y. S. 326. Where an assistant foreman of an extra section gang secured hands with permission of his "boss," who notified him that his services would have to be approved by the proper officer of the company, it was not error to add the words "if a contract was made by an authorized agent to pay for such services," to a requested charge that if the "boss" had authority to employ hands, he could not be required to consult any superior, but his agreement to pay for the services would bind the company. Crouch v. Illinois Cent. R. Co. [Miss.] 40 So. 1004.

29. See subd. D of this section, Ratification by principal. An agreement for the rent of defendant's apartment having been made with plaintiff, by defendant's employe, without authority, plaintiff paying him $20 to apply on rent, held that, in the absence of ratification, there was no contract and plaintiff could recover from defendant the $20 paid. McIntosh v. Kilparick, 94 N. Y. S. 1095.

30. Reid v. Alaska Packing Co. [Or.] 83 P. 139. Where a buyer knew, or was chargeable with knowledge, that the seller's agent had no authority to make a warranty, it was the buyer's duty to ascertain the agent's authority if he wished to rely upon the warranty; and in the absence of knowledge by the seller that the buyer was relying on the warranty, the seller was not bound to notify the buyer of his repudiation. Id. Where an attorney in fact exceeded his authority in taking a mortgage in part payment for land conveyed, and then fraudulently assigned such mortgage in payment of his own debt proceedings by the principal to procure a reassignment and an accounting for interest by the assignee ratified the taking of the mortgage but repudiated the fraudulent assignment. Union Trust Co. v. Cain, 29 Pa. Super. Ct. 189; Union Trust Co. v. Cain, 29 Pa. Super. Ct. 197.

31, 32. Raleigh & G. R. Co. v. Pullman Co., 122 Ga. 700, 50 S. E. 1008.

33. Burbank v. Hammond, 189 Mass. 189, 75 N. E. 102. See 15 Yale L. J. 147.

34. Jackson v. American Tel. & T. Co., 139 N. C. 347, 51 S. E. 1015. False statements made by a physician employed by a railroad company, as to the condition of an injured employe, held to have invalidated a release of damages. Gulf, etc., R. Co. v. Huyett [Tex. Civ. App.] 14 Tex. Ct. Rep. 124, 89 S. W. 1118. Misrepresentation of the acreage of a tract of land sold. Judd v. Walker, 114 Mo. App. 128, 89 S. W. 558. Where a mortgagee authorized its agent to negotiate a sale of the mortgaged property for the mortgagor, to satisfy its claim against the mortgagor, it was liable for fraudulent misrepresentations as to the title made by its agent in the transaction. John

at his direction.[36] He is liable for the misconduct of his agent committed in the line of his employment, even though the offense was in excess of his authority and unknown to the principal.[37] He who places it within the power of an agent to injure innocent third persons should be held to responsibility for abuse of that power, rather than the innocent stranger,[38] and must bear the loss, if any, rather than the other party.[39] But the doctrine of respondeat superior does not apply, where the owner contracts for the pasture of cattle with an agistor who wrongfully turns them upon his landlord's premises,[40] and the principal is not responsible for the negligence of the agent, while the latter is engaged in some act beyond the scope of his employment for his own or another's purposes,[41] although he may use the principal's instrumentalities.[42] The principal is liable for the mistakes of the agent while acting within the scope of his authority.[43] One who deals with another on his mere statement that he is the agent of a third person does so at his own risk and, if he is deceived, has no relief against the third person.[44] If a joint agent wrongs one principal the other is liable only when he was party to the wrong.[45]

Gund Brewing Co. v. Peterson [Iowa] 106 N. W. 741. Where a contractor to sink a well to ascertain the thickness of coal strata under land, so as to furnish a core representing the actual stratification, employs another to do the work, who fraudulently adds 14 inches to a core of 22 inches, so as to show a stratum of 3 feet, and deceive the land owner, such contractor could not recover for his work. Hoover v. Beech Creek Coal & Coke Co., 29 Pa. Super. Ct. 615. Where plaintiff's representative, sent to examine and estimate timber to be purchased, was referred by defendant to his agent, who made false representations and knowingly deceived plaintiff's representative, defendant was responsible for such false and fraudulent representations. Kell v. Trenchard [C. C. A.] 142 F. 16.

35. **Note:** According to modern authority the agent's motive is immaterial to the principal's liability for wrongs done in course of employment. Clark & S. Agency, 1085, citing cases from nearly every state.

36. Killing of a dog pursuant to direction either general or special. Harrington v. Hall [Del.] 63 A. 875.

37. The expression "in the course of his employment," in contemplation of law means only "while engaged in the service of the master" and is not synonymous with "during the period covered by his employment." Slater v. Advance Thresher Co. [Minn.] 107 N. W. 133. Where a telegraph company's agent rendered accounts to a customer showing excessive charges, which were paid, the company was liable, although the customer had a tariff book and the agent retained the express charges. Birkett v. Postal Telegraph-Cable Co., 107 App. Div. 115, 94 N. Y. S. 918. The act of an employe of a telephone company in causing the wrongful arrest of a land owner, to get him out of the way, so that the company's agents could erect poles on the land, was an act done in the course of his employment, for which the company was responsible. Jackson v. American Tel. & T. Co., 139 N. C. 347, 51 S. E. 1015. But misrepresentations made by a physician in the master's employ, as to an injured employe's condition, will not permit the latter to have a settlement set aside, when the physician had no authority in the premises, and the representations were not made in connection with the making of the settlement and were unknown to the master. Gulf, etc., R. Co. v. Huyett [Tex.] 92 S. W. 454.

38. Arnold v. National Bank of Waupaca [Wis.] 105 N. W. 828; Birkett v. Postal Telegraph-Cable Co., 107 App. Div. 115, 94 N. Y. S. 918.

39. A payer of money is not liable for the diversion of it by the receiving agent of the payee. Blair v. Baird [Tex. Civ. App.] 94 S. W. 116.

40. Mott v. Scott [Colo.] 83 P. 779.

41. Slater v. Advance Thresher Co. [Minn.] 107 N. W. 133.

42. The agent, while using for his own purposes an automobile furnished by defendant to assist in the transaction of its business, frightened a team by his alleged negligent management. Held that defendant was not liable for damages. Slater v. Advance Thresher Co. [Minn.] 107 N. W. 133.

43. Whatever a corporation can do at all, either rightfully or wrongfully, it can authorize its agent to do, for it can act only through an agent; hence it is bound by his acts and liable for his negligence, fraud or mistake, when acting within the scope of his authority. Arnold v. National Bank of Waupaca [Wis.] 10 N. W. 828. Bank held liable for its cashier's mistake in the identity of certain lands offered for sale through real estate agents. Id. See 4 Mich. L. Rev. 464. Where, in an office occupied by a railroad company, a telegraph company, and an express company, their joint agent is provided by them with a revolver for the protection of the property entrusted to his care, and while thus armed and acting in the line of duty shoots at and wounds one entering the building on unlawful business, his mistake of judgment must be charged against his employers, and an action for damages on account of the injury suffered will lie against the companies and agent jointly. Blakely v. Greer, 7 Ohio C. C. (N. S.) 169.

44. Pease v. Fink [Cal. App.] 85 P. 657.

45. Miscounting cattle by joint tally man of buyer and seller. Blair v Baird [Tex. Civ. App.] 94 S. W. 116.

(§ 2) *C. Particular kinds of agencies.*[46]—The power of an agent may be general or special.[47] It is general when he is empowered to do a particular thing, or many things, in any way necessary or proper to accomplish the end.[48] It is special when he is empowered to do a particular thing, or many things in a limited way.[49] The powers of a general agent are to be determined by the scope of his agency,[50] but are restricted to transactions within the scope of his principal's business.[51] A special agent has only such power as is expressly conferred [52] or necessarily implied from authority expressly given,[53] and his authority must be strictly pursued [54] in order to bind his principal.[55] The jury must determine the character of the agency from the testimony.[56] The general principles are further illustrated by the cases grouped in the notes.[57]

46. See 5 C. L. 79. See, also, **Clark & S. Agency, 531 et seq.**

47, 48, 49. Robert Buist Co. v. Lancaster Mercantile Co. [S. C.] 52 S. E. 789.

50. The general roadmaster of a railroad company has, prima facie, the authority to employ one to supervise a piece of work. King v. Seaboard Air Line R. Co. [N. C.] 53 S. E. 237. Held error to charge that a general agent could not enlarge the usual contract of bailment, so as to make his principal an insurer, if the thing hired was necessary for the principal's business and could be obtained in no other terms. Dunwoody v. Saunders [Fla.] 39 So. 965.

51. Cowan v. Sargent Mfg. Co. [Mich.] 12 Det. Leg. N. 362, 104 N. W. 377.

52. A person to whom a money order was given to see if it was all right and, if so, to have it cashed, was a special agent, within Civ. Code, § 3072. Moore v. Skyles [Mont.] 82 P. 799. Where the defendant stated to the plaintiff that he gave permission to his son to buy goods for $50 on the terms of 30 days in his name and the bill to be sent to him, the son's authority was special and limited to a single purchase. Cohen v. Mincoff, 96 N. Y. S. 411. An agent employed merely to solicit persons to engage in his principal's employment has no implied authority to make or modify contracts of employment. Nielsen v. Northeastern Siberian Co. [Wash.] 82 P. 292. An agent of architects in charge of the erection of a building, employed to see that a contractor for putting an elevator therein, to be paid for when accepted by the architects, properly performed his contract, had no authority to act for the architects in accepting the elevator. Louisville Foundry & Mach. Co. v. Patterson [Ky.] 93 S. W. 22.

53. An agent appointed by an administrator to assist in the settlement of an estate could pay an attorney a reasonable compensation for services rendered and accepted by the administrator, but could not make other disbursements except to the administrator or at his instance. He could not pay the appraisers more than $1 per day without the administrator's authority. Harms v. Wolf, 114 Mo. App. 387, 89 S. W. 1037.

54. Cohen v. Mincoff, 96 N. Y. S. 411.

55. Authority to do a specified act is limited thereto and does not empower the agent to bind his principal to an act involving essentially different rights and obligations. Moon Bros. Carriage Co. v. Devenish [Wash.] 85 P. 17.

56. Robert Buist Co. v. Lancaster Mercantile Co. [S. C.] 52 S. E. 789.

57. Power to sell or lease realty: It is within the scope of a real estate agent's authority to represent the acreage of a tract of land put in his hands for sale. Judd v. Walker, 114 Mo. App. 128, 89 S. W. 558. A power of attorney to sell lands did not authorize their sale in consideration of the individual debt of the donee, or a joint debt of the donor and donee. Hunter v. Eastham [Tex. Civ. App.] 81 S. W. 336. An agent appointed solely to rent land, or to do whatever he pleases with it, cannot bind his principal by a partnership agreement involving the use of the land. Providence Mach. Co. v. Browning [S. C.] 52 S. E. 117. An agent with authority to lease land and look after its management generally has no implied authority to construct a ditch thereon, to drain his own land, so as to bind his principal by the results of such drainage. Harvey v. Mason City & Ft. D. R. Co. [Iowa] 105 N. W. 958. A valid notice to quit may be given by an agent of the landlord, when he has authority to let the premises or special authority to give the notice. McClung v. McPherson [Or.] 81 P. 567. And where the tenant makes no objection to the admission of such notice in evidence, he concedes the agent's authority. Id. Real estate agents enjoy no exemption from the ordinary rules which govern the relationship of principal and agent. Kingsley v. Wheeler [Minn.] 104 N. W. 543.

Powers of attorney: Power of attorney held not to authorize the filling of blanks in an assignment of salary for a period other than the month specifically mentioned. Wabash R. Co. v. Papin, 119 Ill. App. 99. A power of attorney "to conduct mill operations for me," creates an agency with authority to operate the mill for the principal, but not on the agent's own account. Kean v. Landrum [S. C.] 52 S. E. 421. A power of attorney authorizing a party to sell and convey "all our land in the state of North Carolina," was sufficiently definite in its description of land to be admissible, with a deed executed thereunder, as evidence of title. Janney v. Robbins [N. C.] 53 S. E. 863. A deed with a special warranty, executed by an attorney in fact, conveys title, although his power of attorney authorizes him only to execute a quitclaim. Kane v. Sholars [Tex. Civ. App.] 90 S. W. 937. A power of attorney, signed as sole liquidator by the widow of the owner who was doing business under a firm name, authorizing a convey-

ance of the land owned by the deceased, was sufficient to authorize a conveyance of all the land as against both herself and the children. Clawson v. Wilkins [Tex. Civ. App.] 93 S. W. 1086.

Power to buy or sell personalty: An agent for the sale of property has no implied authority to exchange it for other property. Jones v. Richards, 98 N. Y. S. 698. An agent having authority to sell under a contract containing conditions for the benefit of the seller can bind his principal by a waiver of such conditions. Continuous efforts of agent to make a machine work, after expiration of the time for notifying the manufacturer of the failure to work, held to be a waiver of the condition. First Nat. Bank v. Dutcher [Iowa] 104 N. W. 497. Warranties made by an agent employed to sell a stacker, as to its durability or adaptability, or as to the material of which it was made, or as to the work it would do, were within the scope of his employment and binding on his principal (Second Nat. Bank v. Adams [Ky.] 93 S. W. 671), but representations that the purchaser's engine had sufficient power to run both the separator and stacker did not bind his principal (Id.). No implied authority to rescind a contract and accept a return of goods is to be inferred from the mere fact of an authority to sell. Mange-Wiener Co. v. Wersham Drug Co., 27 Pa. Super. Ct. 315.

General sales agents: The scope of a commercial traveler's authority as a general rule extends only to the soliciting of orders for goods. Moon Bros. Carriage Co. v. Devenish [Wash.] 85 P. 17. A selling agent for a firm that dealt only in Alaska salmon had no authority to sell sockeye salmon, or to warrant the salmon sold by him to be equal to the best Puget Sound fancy sockeye. Reid v. Alaska Packing Co. [Or.] 83 P. 139. A mere selling agent, without express power to warrant, cannot give a warranty which will bind his principal, unless the sale is of a class which is ordinarily accompanied by a warranty. Id. A contract for billboard advertising is not within the scope of the authority of a "selling agent" of a tailoring firm, unless it was necessary, and not merely appropriate, and reasonable in amount, and such as to justify a prudent business man in believing it to be within the agent's authority. St. Louis Gunning Advertising Co. v. Wanamaker, 115 Mo. App. 270, 90 S. W. 737. A selling agent has no implied authority to sell goods for anything but cash. Hook v. Crowe [Me.] 61 A. 1080. A party purchasing awnings and a sash curtain from such an agent, knowing him to be such, on an agreement that he might pay the agent for them with clothing and work out of his store, could not deduct any such items from the principal's bill. Id. An agent authorized to sell goods and collect money therefor has no implied authority to bind his principal by indorsement of a check received in payment for goods sold. Hamilton Nat. Bank v. Nye [Ind. App.] 77 N. E. 295. Such unauthorized indorsement did not divest the principal's title to the check and the bank could transfer no title thereto to an indorsee for value. Id.

Authority to receive payments or to collect money: An agent to receive payment ordinarily has no authority to commute his principal's debt for one due himself or to receive payment otherwise than in cash (Parker v. Leech [Neb.] 107 N. W. 217), but if a check received is actually paid by the drawee, that constitutes payment to the principal, even though the agent misappropriates the fund and converts it to his own use (Case v. Kramer [Mont.] 85 P. 878). An attorney in charge of the collection of an indebtedness has authority to accept a deed to his client in satisfaction thereof. Sawyer v. Vermont Loan & Trust Co. [Wash.] 84 R. 8. A mortgagee in a mortgage given by a husband and wife cannot, after the husband's death, question the authority of an attorney to receive a quitclaim deed from the wife in payment of her husband's debt to the attorney's client. Id. An agent sent to collect a bill has no implied authority to settle his principal's debt and give credit therefor on the bill. John Gund Brewing Co. v. Peterson [Iowa] 106 N. W. 741. The agent of a landlord who was authorized to collect rent, had authority to demand of a buyer of a subtenant's crop the value of such crop. Beck v. Minnesota & Western Grain Co. [Iowa] 107 N. W. 1032.

Railroad and railway officers and agents: Where a claim agent visited injured persons, employed doctors, etc., and the company paid for their services, the jury could find that the agent was acting within the scope of his authority in employing plaintiff to attend one of the injured. Reynolds v. Chicago, B. & Q. R. Co., 114 Mo. App. 670, 90 S. W. 100. A conductor had no authority to employ a physician to attend a trespasser who was run over and injured by a train, on account of his own negligence. Wills v. International & G. N. R. Co. [Tex. Civ. App.] 92 S. W. 273. A local freight agent ordinarily has no authority to bind the corporation by an agreement to carry freight beyond its line (Gulf, etc., R. Co. v. Jackson [Tex.] 14 Tex. Ct. Rep. 100, 89 S. W. 968), or by an agreement that cattle shall be shipped in a solid train, without the intermingling of any other freight, or that the train shall be drawn by a single engine (Id.) There is no presumption that the "claim agent" of a street railway company is invested with authority to employ surgeons at the expense of his principal. Weldon v. Traction Co., 27 Pa. Super. Ct. 257. Presumably his duty is to adjust claims against his employer and not to create new ones. Id. Where the condition of an injured passenger requires immediate medical attention and the company's surgeon is not obtainable, the representative of the traction company in authority at the time and place can employ a physician and bind the company to pay a reasonable sum for his services. Chicago Consolidated Traction Co. v. Mathews, 117 Ill. App. 174.

Miscellaneous special agencies: Where an agent is expressly authorized to deliver deeds absolute on their face as security for his own indebtedness, and no express limitation is placed upon him as to the particular indebtedness to be secured thereby, any arrangement as to amount, terms and character of his indebtedness to be so secured, which would not be unreasonable, would appear to be within the authority conferred. Anglo-Californian Bank v. Cerf, 147 Cal. 393, 81 P. 1081. An agent of a corporation who was authorized to dispose of stock issued to him as compensation for services

(§ 2) *D. Ratification by principal.*[58]—A principal may ratify the unauthorized act of his agent without having received the benefit of it,[59] and it is not necessary for the principal to be present at the performance of the agent's act in order to ratify it.[60] Ratification may be by mere acquiescence or failure to act,[61] or by positive acts, such as the adoption,[62] or the acceptance of benefits resulting from

through the company's agencies was not authorized to use such agencies to dispose of stock purchased by him for speculation. Gladiator Consol. Gold Mines & Mill. Co. v. Steele [Iowa] 106 N. W. 737. Authority to sign the principal's name to a guaranty to secure purchases made by another during his minority conferred no authority to execute a guaranty of such purposes good until canceled in writing by the principal. Lovett, Hart & Phipps Co. v. Sullivan, 189 Mass. 535, 75 N. E. 738. An agent of a seller of lard warranted to be pure leaf lard, when sent to the buyer to arrange and compromise a dispute as to the quality of the lard had power to authorize the buyer to sell it as compound lard. German-American Provision Co. v. Jones Bros. & Co. [Miss.] 39 So. 521.

58. See 5 C. L. 82. See, also, **Clark & S. Agency, 255 et seq.**

59. Thompson v. Laboringman's Mercantile & Mfg. Co. [W. Va.] 53 S. E. 908.

60. State v. Waldrop [S. C.] 52 S. E. 793.

61. Contract signed by agent for sale of land, which departed from the terms fixed by the owners, but ratified by one by telegram and by the other by acquiescence, held binding. Stuart v. Mattern [Mich.] 12 Det. Leg. N. 616, 105 N. W. 35. Failure of the principal to dissent or repudiate within a reasonable time under the circumstances is evidence of ratification. Thompson v. Laboringman's Mercantile & Mfg. Co. [W. Va.] 53 S. E. 908. Ratification by one of two owners, by recognition and acquiescence in a contract of sale of real estate which departed from the terms fixed by the owner. Stuart v. Mattern [Mich.] 12 Det. Leg. N. 616, 105 N. W. 35. Where a power of attorney was executed, authorizing the attorney to make a loan secured by mortgage on certain property, for the purpose of clearing the title thereto, and the attorney made a full report of all his proceedings and no objection was made until after the beginning of suit to foreclose, it was then too late to object that the power did not include authority to include in the mortgage money borrowed to pay certain existing debts and liens necessary to clear the title. Curtze v. Iron Dyke Copper Min. Co. [Or.] 81 P. 815. Where an agent contracted in his principal's name for bill-board advertising and after rent had accrued the lessor wrote to the principal as to payment, the latter's silence would not estop him from denying liability for accrued rent instalments, but would estop him from denying liability for rents accruing subsequently. St. Louis Gunning Advertising Co. v. Wanamaker, 115 Mo. App. 270, 90 S. W. 737. A principal, who failed to make objections for more than six months after being notified by his factor that he had turned the merchandise over to another for sale, thereby ratified the act of his factor. McIntosh v. Merchant [Wash.] 82 P. 753. Where an attorney's stenographer, without authority, accepted service of a statement in support of a motion for a new trial and entered into stipulations for an extension of time for filing objections thereto, it was not ratified by the attorney's reply to an inquiry, whether he repudiated the stipulation, that he would take time to consider. Nord v. Boston & M. Consol. Copper & Silver Min. Co. [Mont.] 84 P. 1116. Nor was the acceptance of service ratified by the attorney's securing an order granting time for filing amendments, but saving his right of all objections. Id. The unauthorized employment by a conductor of a physician to attend a man run over by his train was not ratified by the fact that it had paid for similar employment a short time before and the fact that it was notified that a physician was in charge of the case, but gave no directions in relation to it. Mills v. International & G. N. R. Co. [Tex. Civ. App.] 92 S. W. 273.

62. Ratification by telegram. Stuart v. Mattern [Mich.] 12 Det. Leg. N. 616, 105 N. W. 35. Letters written by defendant's wife, with his permission, held to tend to prove ratification of unauthorized signature to note. Harmon v. Leberman [Tex. Civ. App.] 87 S. W. 203. Unauthorized promise by defendant's agent to pay plaintiff a commission ratified by defendant's promise to pay. Nelson v. National Drill Mfg. Co. [S. D.] 105 N. W. 630. Employment of a subagent and promise to pay him a commission ratified by defendant's promise to pay, with full knowledge of the facts. Id. Where an agent employed another to assist him in making a sale, an attempt by the principal to perform the contract so made was a ratification, if there was any authorized delegation of authority by the agent. Nichols & Shepard Co. v. Berning [Ind. App.] 76 N. E. 776. Where the owner of land occupied it and claimed to an agreed division line fixed by her husband with the adjoining owner, her action operated as a ratification, and it was immaterial whether her husband had authority to make the agreement or not. Matthews v. French [Mo.] 92 S. W. 634. Although the written contract authorizing an agent to sell contemplated sales for cash only, the acceptance by the principal of anything else in payment made it equivalent to cash. Irwin v. Buffalo Pitts Co., 39 Wash. 346, 81 P. 849. Where a broker failed to procure a purchaser for a strip within the time limited, but procured one later, the strip having been meanwhile delivered to the purchaser on a contract between the owner and another representative of the purchaser, a compromise and payment of half the commission to the broker under protest did not operate as a ratification entitling him to the full commission. Ropes v. John Rosenfeld's Sons, 145 Cal. 671, 79 P. 354. Where a party consigned wool to a factor for sale on commission and secured an advance on the same, executing his note for that and other advances and expenses in caring for the wool and agreeing to the factor's accounts, he thereby waived the fac-

the unauthorized act [63] which may be by suing on the act done,[64] though suit on the agent's tortious fraud or deceit has no such effect.[65] But the principal's acceptance, in order to operate as a ratification must be consistent with any other reasonable hypothesis than that of approval of the acts of the party assuming to act as agent.[66] A conclusive presumption of acquiescence is raised from a principal's silence only when otherwise loss would fall on an innocent party.[67] The real ground on which

tor's previous failure to sell according to orders or negligence in caring for the wool, and ratified his departures from instructions. Allen v. McAllister, 39 Wash. 440, 81 P. 927. The acceptance by the owner of an offer for land actually made to a broker, and the consummation of a sale on the terms of such offer, is a ratification of the broker's act. Levy v. Wolf [Cal. App.] 84 P. 313. By entering upon lands granted as a right of way, constructing its road thereon, the company assumed all the burdens imposed by the contract between its agent and the owners of the land. Indianapolis Northern Traction Co. v. Harbaugh [Ind. App.] 78 N. E. 80. Where an agent who was authorized to sell cattle so as to pay the mortgage thereon and to net the mortgagor $2 per head, remortgaged them and with the proceeds paid the prior mortgage and the mortgagor's stipulated profit, acquiescence by the mortgagor after learning the facts rendered the new mortgage so executed valid. Schmidt v. Rankin [Mo.] 91 S. W. 78. Where a corporation promptly disaffirmed an unauthorized contract by its agent, a mere shipment of samples of its goods to the buyer was not a ratification. Reid v. Alaska Packing Co. [Or.] 83 P. 139. An agent's tortious act may be made the principal's own by adoption. Jackson v. American Tel. & Tel. Co., 139 N. C. 347, 51 S. E. 1015. Where the holder of a note by indorsement, which was secured by a chattel mortgage, sent it at maturity to the payee for collection, with instructions to protect and return if not paid, but the payee foreclosed to procure funds to reimburse the holder and wrongfully took property not covered by the mortgage, the retention of the money by the holder of the note did not operate as a ratification of the payee's acts, so as to make the holder liable for the property wrongfully taken. Sanborn v. First Nat. Bank, 115 Mo. App. 50, 90 S. W. 1033.

63. Use of goods ordered by the superintendent of a corporation, in the furtherance of its business operates as a ratification. Braxmar v. Stanton, 110 App. Div. 167, 96 N. Y. S. 1096. Where a brewing company's agent agreed in the sale of a saloon that complainant would not be called upon to pay a certain note and mortgage, so long as he purchased from the company the beer sold in his saloon, the company after acceptance of the benefits of the contract could not deny its agent's authority to make the collateral agreement. O'Brien v. Paterson Brewing & Malting Co. [N. J. Eq.] 61 A. 437. The acceptance of the benefit of an agent's misrepresentations as to the acreage of a tract of land sold ratifies the agent's fraud. Judd v. Walker, 114 Mo. App. 128, 89 S. W. 558. Receiving and retaining moneys collected by an attorney held, under the circumstances, not to have been a ratification of his acts by the bank. Bank of Batesville v. Maxey [Ark.] 88 S. W. 968.

64. Where an attorney in fact exceeded his authority by taking a mortgage in part payment for lands sold, the filing of a bill by the principal against the assignee of such mortgage for an assignment and the recovery of interest paid the assignee operates as a ratification of the taking of the mortgage. Union Trust Co. v. Cain, 29 Pa. Super. Ct. 189; Id., 29 Pa. Super. Ct. 197.

65. NOTE. Principal's recovery of secret profits from agent does not cure third person's fraud: An agent, colluding with a vendor in fraudulent representations to his principal, induced the latter to purchase certain land. For his assistance the vendor secretly paid him a commission which the principal recovered at law. Subsequently the principal sued the vendor for fraud and deceit with reference to the sale. **Held,** that the prior action against the agent does not so ratify the contract in all particulars as to bar the action against the vendor for deceit. Barnsdall v. O'Day [C. C. A.] 134 F. 828. Where an agent has acted in fraud of his principal the latter is not ordinarily chargeable with such knowledge as the agent possessed, and may sue a third party for fraudulent representations although the agent was aware of their falsity. See Bendict v. Arnoux, 154 N. Y. 715, 728. It was contended by the defendant in the present case that a different result should be reached, because, by suing for the wrongfully obtained bonus, the principal ratified the transaction and restored the agent to his position as agent for all purposes of the purchase. Such a result seems undesirable and unnecessary. Even if no fraudulent representations had been made to the principal he might recover any bonus secretly received by his agent from other parties to the contract. Warren v. Burt, 58 F. 101. That recovery cannot by retroaction restore the trustworthy character of the agent, nor can it condone the perpetration of a separate and distinct wrong. Hence he and the other defrauding party as well should still be liable for the further damage resulting from fraudulent representations. See Keator v. St. John, 42 F. 585; Glaspie v. Keator, 56 F. 203.—18 Harv. L. R. 617.

66. Bank of Batesville v. Maxey [Ark.] 88 S. W. 968.

67. St. Louis Gunning Advertising Co. v. Wanamaker, 115 Mo. App. 270, 90 S. W. 737. When an agent in contracting for his principal exceeds his authority, the principal, upon being fully informed of the facts, must, within a reasonable time, disavow or disaffirm his agent's act, especially where his silence might prejudice innocent parties, or he will be held to have ratified the act. Reid v. Alaska Packing Co. [Or.] 83 P. 139. Where an attorney in fact exceeded his authority by taking a mortgage in part payment for lands conveyed and fraudulently assigned such mortgage in payment of his own debt, the principal by instituting pro-

the principal is held liable under such circumstances is that of estoppel, though it is often said that the principal ratifies what was done by remaining silent.[68] In some cases but slight acts of ratification are sufficient.[69] In its genuine sense ratification depends on intention. It is the voluntary assumption, on full information, of an authorized act or agreement.[70] Hence the principal must have full knowledge of all material facts at the time of ratification.[71] As the principal is under no legal obligation to ratify the unauthorized act, he is not bound to make inquiries into the facts, and he will not be bound by a ratification made in ignorance thereof, unless his ignorance resulted from willfulness and not mere carelessness;[72] but when the circumstances are such as to call for the application of the law of estoppel, rather than the mere law of ratification, the situation may be such that it is the duty of the principal to know, the means of knowledge being at hand or within easy reach, and his relation to the third party such as to estop him from denying knowledge.[73] Ratification cannot be partial.[74] Ratification of an unauthorized contract may be made through an agent, who has authority to make such contracts in his principal's behalf;[75] but the secretary of a corporation, whose duties are prescribed

ceedings for a reassignment of the mortgage, without joining the terretenants or giving them any notice of repudiation of her agent's transactions for a number of years, was estopped to recover from them interest paid on such mortgage to her agent and the assignee. Union Trust Co. v. Cain, 29 Pa. Super. Ct. 189; Union Trust Co. v. Cain, 29 Pa. Super. Ct. 197.

68. St. Louis Gunning Advertising Co. v. Wanamaker, 115 Mo. App. 270, 90 S. W. 737.

69. Where, in case of emergency and the traction company's surgeon was not obtainable, the representative of the company in authority at the time and place employed a physician to attend an injured passenger, the superintendent's failure to make a direct reply to the physician's question as to the continuance of his service, was held to be a ratification. Chicago Consolidated Traction Co. v. Mathews, 117 Ill. App. 174.

70. St. Louis Gunning Advertising Co. v. Wanamaker, 115 Mo. App. 270, 90 S. W. 737.

71. Thompson v. Laboringman's Mercantile & Mfg. Co. [W. Va.] 53 S. E. 908; Bartleson v. Vanderhoof [Minn.] 104 N. W. 820; Munroe v. Fetter [Cal. App.] 82 P. 206; Fitzgerald v. Kimball Bros. Co. [Neb.] 107 N. W. 227, following O'Shea v. Rice, 49 Neb. 893, 69 N. W. 308. The reports of the motorman, conductor and road officer, as to an accident, do not amount to notice to a street railway company that a physician had been employed by its claim agent at its expense, where they merely allude to the fact of his employment. Weldon v. Traction Co., 27 Pa. Super. Ct. 257. The declared willingness of a principal to ratify a conditional contract will not operate as a ratification of an unconditional contract of which he is ignorant. Fitzgerald v. Kimball Bros. Co. [Neb.] 107 N. W. 227. Defendant held not to have ratified by his acts representations of an alleged agent, of which he had no knowledge. Pease v. Fink [Cal. App.] 85 P. 657. Bank held not to have ratified all the acts of an attorney of which it was unaware, by receiving and retaining money collected by him. Bank of Batesville v. Maxey [Ark.] 88 S. W. 968. Ratification of unauthorized purchases by an agent cannot be inferred from the payment of the bills, where it is not shown that any one had any knowledge of the nature of the transaction but the agent himself. Cowan v. Sargent Mfg. Co. [Mich.] 12 Det. Leg. N. 362, 104 N. W. 377. The mere acceptance of a deed by the grantees did not ratify fraudulent acts by a notary public in procuring the execution, of which acts the grantees were ignorant. Cason v. Cason [Tenn.] 93 S. W. 89.

72. Where plaintiff was not aware of the perishable nature of the goods pledged as security for a loan negotiated for her by a bank, her receipt of the interest on the note was not a ratification of the unauthorized action of the bank in so loaning her money. Valley Bank of Phoenix v. Brown [Ariz.] 83 P. 362.

73. Thompson v. Laboringman's Mercantile & Mfg. Co. [W. Va.] 53 S. E. 908.

74. Ratification of a sale ratifies the agent's warranty made therein, although made without authority. Holman v. Calhoun [Ala.] 40 So. 356; Phillips-Buttorff Mfg. Co. v. Wild Bros. [Ala.] 39 So. 359. Although made fraudulently, as in misrepresenting the acreage of a tract of land sold. Judd v. Walker, 114 Mo. App. 128, 89 S. W. 558. A principal who ratifies the unauthorized taking of a mortgage by her attorney in fact, in part payment for lands sold, must ratify all his acts in the transaction; she cannot profit by it and repudiate the frauds of her agent so far as innocent parties are concerned. Union Trust Co. v. Cain, 29 Pa. Super. Ct. 189; Id., 29 Pa. Super. Ct. 197.

75. Where the authorized agent of a railroad company receives cattle for shipment, without objection, under a parol agreement made by an unauthorized agent, he binds the company, notwithstanding the lack of authority on the part of the first agent. Gulf, etc., R. Co. v. Jackson [Tex.] 17 Tex. Ct. Rep. 100, 89 S. W. 968. The consignor of unclaimed freight stored in a warehouse delivered the bill of lading to an employe in the general freight agent's office and signed an indemnity agreement made out by the employe, making the carrier an agent for the return of the shipment and agreeing to save the carrier harmless. **Held** that the general freight agent's letter to the local agent was a ratification of the contract with

by the by-laws and do not include the making of contracts, cannot ratify an unauthorized contract made by an agent, unless authorized by the directors to do so.[76] An agent's assertion that his action had been ratified by his principal is not binding on the latter.[77] Where a contract for the purchase of land was void because executed by an agent without written authority, it could not be ratified by the principal alone, for it is not binding on the other party.[78] Ratification is equivalent to a precedent authority.[79] It confirms the contract as made; it neither changes the contract nor makes a new one with different terms.[80] A ratification by a creditor of her attorney's act in accepting in satisfaction of an indebtedness is binding on the mortgagee of the same premises.[81] Pleading ratification of an agent's act necessarily implies that he was originally wanting in authority, or exceeded his authority.[82] Where plaintiff relies upon a ratification of the contract by the principal, the burden is on him to prove it.[83] It is usually a question of fact for the jury.[84]

(§ 2) *E. Undisclosed agency.*[85]—An agent can make a valid contract with a third person in his own name, without disclosing his principal, and can sue on such contract unless the principal intervenes;[86] and the rule is the same, although the agent made the contract through a subagent employed by himself.[87] An undisclosed principal, however, may avail himself of a contract made by his agent;[88] but not where exclusive credit is given to the agent.[89] If a third person deals with an agent, believing him to be the principal, the undisclosed principal must take the contract, if he seeks to enforce it, as the agent and the other party made it.[90] The

the employe and the carrier was responsible for the value of the goods, for failure to get them out of the warehouse before they were sold. Murray v. New York, etc., R. Co., 99 N. Y. S. 477.

76. Reid v. Alaska Packing Co. [Or.] 83 P. 139.

77. Employment of a physician by the claim agent of a traction company to attend an injured passenger. Weldon v. Traction Co., 27 Pa. Super. Ct. 257.

78. The institution of suit for specific performance does not ratify such contract. Cowan v. Curran, 216 Ill. 598, 75 N. E. 322.

79. Reid v. Alaska Packing Co. [Or.] 83 P. 139.

80. Atlanta Buggy Co. v. Hess Spring & Axle Co. [Ga.] 52 S. E. 613. Questioned 4 Mich. L. R. 473. See, also, note to Attee v. Bartholomew [Wis.] 5 Am. St. Rep. 109.

81. Sawyer v. Vermont Loan & Trust Co. [Wash.] 84 P. 8.

82. Atlanta Buggy Co. v. Hess Spring & Axle Co. [Ga.] 52 S. E. 613.

83. Sanford v. Fountain, 49 Misc. 301, 99 N. Y. S. 234.

84. Letter of principal held to be sufficient evidence of ratification to go to the jury. Noble v. Burney [Ga.] 53 S. E. 463. Facts held to show, not a ratification of an employe's transactions with brokers, but a recognition by the principal of his liability therefor. Norden v. Duke, 99 N. Y. S. 30.

85. See 5 C. L. 84. See, also, **Clark & S. Agency, 1006, 1155.**

86. Kirby's Dig. § 6002, providing that an agent may sue on a contract made for the benefit of another does not change the law. Shelby v. Burrow [Ark.] 89 S. W. 464.

87. Shelby v. Burrow [Ark.] 89 S. W. 464.

88. Cowan v. Curran, 216 Ill. 598, 75 N. E. 322. A written contract for the sale of real estate, made and signed by an agent in his own name and without disclosing his agency or the name of his principal, satisfies the requirements of the statute of frauds, and is binding on, and may be enforced by, the principal. Egle v. Morrison, 6 Ohio C. C. (N. S.) 609. The principal can sue for breach of a contract made in its behalf, by its mere agents, although the other party did not know of the agency. Noel Const. Co. v. Atlas Portland Cement Co. [Md.] 63 A. 384. He may sue for damages, in his own name, for an error in the transmission of a telegram sent by his agent. Propeller Towboat Co. v. Western Union Tel. Co. [Ga.] 52 S. E. 766. He can maintain an action against a carrier for damages to goods in transportation, though shipped in the agent's name, under Code, § 540, permitting the enforcement of a contract in the name of the real party in interest. Griffin v. Wabash Co., 115 Mo. App. 549, 91 S. W. 1015. Cattle bought by an agent, under a written contract of agency, and with money advanced by the principal, are the property of the principal, although the agent holds possession and does not disclose his agency at the time of purchase. W. & P. Nicholls v. Mapes [Cal. App.] 82 P. 265. Where a selling agent was bound by his contract to deliver to his principal the notes of buyers as collateral security, and to hold all proceeds of goods sold, in trust for the payment of the notes, he was a mere trustee for his principal of the accounts of buyers and money collected thereon, and the assignee of the accounts from the agent acquired no title as against the principal, though he had no notice of his claim. Virginia-Carolina Chemical Co. v. McNair, 139 N. C. 326, 51 S. E. 949.

89. Cowan v. Curran, 216 Ill. 598, 75 N. E. 322. Evidence held not to substantiate plaintiff's claim that the bank, for which defendants were commssioners, was the undisclosed principal on a bond signed by a person individually. Drew v. Caffall [La.] 41 So. 233.

90. Hook v. Crowe [Me.] 61 A. 1080.

law imposes no duty on a person to inquire whether the party with whom he is dealing is acting as an agent, but it is the duty of such party, if he wishes to escape personal liability, to inform his customer of his agency.[91] The undisclosed principal, when discovered, may also be held liable on a contract made with his agent,[92] although goods were sold and charged to the agent;[93] but the rule that an undisclosed principal shall stand liable for the contract of his agent does not apply when the contract is under seal.[94] A third party who takes property as security for a loan to an agent who has the property in his possession to sell on commission, without notice of the agency, is entitled to possession as against the undisclosed principal.[95]

91. Armour Packing Co. of Louisiana v. Vietch-Young Produce Co. [Ala.] 39 So. 680.

92. Where the husband was manager of the wife's business, she was held liable as an undisclosed principal on her husband's promise to pay for work and materials. Keller v. Haug, 96 N. Y. S. 1058.

93. Where the wife was the agent, her written statement that she owned the goods, made after commencement of suit against the husband as the undisclosed principal in the transaction, did not preclude the vendor's showing the husband's ownership. McKee v. Cunningham [Cal. App.] 84 P. 260.

94. Van Dyke v. Van Dyke, 123 Ga. 686, 51 S. E. 582, afg. Lenney v. Finley, 118 Ga. 718, 45 S. E. 593.

Note: It is a settled rule of law that no one but a party to a sealed instrument can be sued thereon. Briggs v. Partridge, 64 N. Y. 347. But there is conflict as to whether the sealed instrument can be disregarded and suit be brought against the undisclosed principal on an implied contract, in cases where the seal is not necessary as above. It was held in Boerscherling v. Kotz, 37 N. J. Eq. 150, that it could not, but the best considered cases hold otherwise (Moore v. Granby Min. Co., 80 Mo. 86; Hitchcox v. Moore, 4 Wend. [N. Y.] 285); and there seems to be no reason why the mere fact that an instrument is under seal, though it is not necessary as in the above case, should change the liability of the principal. Kirshbor v. Bauzel, 67 Wis. 178.—From 15 Yale L. J. 41.

NOTE. Exceptions in case of contracts under seal: The doctrine allowing an action against an undisclosed principal does not apply to contracts under seal. It is well settled, at common law, that no person can sue or be sued upon a contract under seal except the parties who are named or described in the instrument; and under this rule where a person enters into a contract under seal in his own name, but as agent for an undisclosed principal, whether the existence of the principal is undisclosed, or his name merely, the other party cannot maintain an action against the principal. Pickering's Claim, 6 Ch. App. 525; Chesterfield Colliery Co. v. Hawkins, 3 Hurl. & C. 677; Clarke v. Courtney, 5 Pet. [U. S.] 350, 8 Law. Ed. 140; Badger Silver Min. Co. v. Drake [C. C. A.] 88 F. 48; Jones v. Morris, 61 Ala. 518; Sanders v. Partridge, 108 Mass. 556; Borcherling v. Katz, 37 N. J. Eq. 150; Briggs v. Partridge, 64 N. Y. 357; 21 Am. Rep. 617; Kiersted v. Orange & A. R. Co., 69 N. Y. 343, 25 Am. Rep. 199; Tuthill v. Wilson, 90 N. Y. 423; Sanger v. Warren, 91 Tex. 472, 66 Am. St. Rep. 913. And see ante, §§ 293-309. The rule does not apply, of course, where a seal is unnecessarily affixed to an instrument, so that it may be rejected as surplusage, and the instrument treated as a simple contract; or as the rule has been stated: "When a sealed contract has been executed in such form that it is, in law, the contract of the agent and not of the principal, but the principal's interest in the contract appears upon its face and he has received the benefit of performance by the other party and has ratified and confirmed it by acts in pais, and the contract is one which would have been valid without a seal, the principal may be made liable in assumpsit upon the promise contained in the instrument, which may be resorted to to ascertain the terms of the agrement." Briggs v. Partridge, 64 N. Y. 357, 21 Am. Rep. 617; Moore v. Granby Min. & Smelting Co., 80 Mo. 86; Randall v. Van Vechten, 19 Johns. [N. Y.] 60, 10 Am. Dec. 193; Worrall v. Munn, 5 N. Y. 229, 55 Am. Dec. 330; Dubois v. Delaware & Hudson Canal Co., 4 Wend. [N. Y.] 285; Lancaster v. Knickerbocker Ice Co., 153 Pa. 427; Stowell v. Eldred, 39 Wis. 614. But it is held that where the instrument is one that was required at common law to be under seal, as a deed, bond, etc., the fact that a statute renders it unnecessary to place a seal upon it does not affect this rule of holding the agent alone liable thereon, as the statute merely dispenses with a formality, and does not undertake to give a deed executed without a seal a different status from what it would have had before if executed with a seal. Sanger v. Warren, 91 Tex. 472, 66 Am. St. Rep. 913. "Though," under such a statute, "a seal may not now be necessary, to a conveyance of a legal estate in lands, yet the instrument, the deed of conveyance, which it must still be termed, though shorn of its dignity of a seal, retains all the operation and effect of a deed sealed at common law. Its covenants may be as comprehensive, and whatever they may be, are as obligatory, and its recitals are as incapable of being gainsaid as if it were sealed with the greatest formality. The estoppel which a sealed instrument, or its covenants, created at common law, is now claimed by the appellee, shall be attached to the conveyance by the agents of the appellant. And we cannot doubt that the estoppel which at common law grew out of the covenants, or the recitals of a sealed instrument, attaches now to an unsealed conveyance of the real estate in lands." Jones v. Morris, 61 Ala. 524.—From Clarke & S. Agency, § 463.

95. Chickering-Chase Bros. Co. v. Moulton [Iowa] 107 N. W. 434.

(§ 2) *F. Notice through agency.*[96]—Notice to an agent in the course of his employment is notice to the principal,[97] but the agency must be shown to exist.[98] The agent's knowledge or notice cannot be imputed to the principal, when it was not gained in the course of his employment,[99] or when it was not gained while acting within the scope of his authority,[1] or when it was gained while the agent was engaged in committing an independent, fraudulent act on his own account, and the facts to be imputed relate to such act.[2] Nor is notice to the agent, growing out of an agent's act, notice to his principal, when the issue is whether such act was within the agent's actual or apparent authority.[3] Besides being bound by his agent's knowledge or notice, the principal can avail himself of the knowledge of his agent gained in the course of his employment.[4]

96. See 5 C. L. 85. See, also, **Clark & S. Agency, 1039.**

97. Cowan v. Curran, 216 Ill. 598, 75 N. E. 322. Knowledge of the want of consideration for a note and mortgage imputed to principal. Condon v. Barnum [Iowa] 106 N. W. 514. Where plaintiff's agent surrendered a copy of a contract to defendant's agent who had knowledge of his want of authority to make the surrender, the agent's knowledge was imputed to defendant. Hayes v. Wagner, 220 Ill. 256, 77 N. E. 211. Defendant held chargeable with knowledge of its president who as superintending manager of a competing natural gas company had turned the latter's well over to defendant; and defendant company could not claim the benefit of adverse title. McCullough v. Ford Natural Gas Co. [Pa.] 62 A. 521. Where the agent of a creditor, taking mortgages to secure his principal's indebtedness within 4 months prior to the debtor's bankruptcy, had put him upon his inquiry, both agent and principal were bound by it. In re Nassau, 140 F. 912. Knowledge of the local agent of a loan company, whose business was to take applications personally, inspect security offered, and report the same, that a loan transaction reported by him was of a fictitious character, was knowledge of the company. Flynt v. Taylor [Tex. Civ. App.] 91 S. W. 864. The knowledge by a station agent that an intoxicated person was on the track ahead of a train and his failure to warn the trainmen, rendered the company responsible for the trespasser's death. Glenn's Adm'r v. Louisville & N. R. Co. [Ky.] 90 S. W. 975. An attorney employed to examine the title to land by one who wished to make a loan thereon and who paid him for the service, was not the agent of the party who loaned the money, and the latter was not bound by the knowledge gained by the attorney in his examinations. Flanders v. Rosoff, 97 N. Y. S. 514.

98. Relation of agency between the parties not shown. Garrett v. Slavens [Iowa] 105 N. W. 369. Knowledge of a citizen who procured an option on land as an inducement for the location of a factory, that the land did not belong to the party giving the option, could not be imputed to the manufacturing company, such citizen not being its agent. Barnes v. Welkel Chair Co. [Ky.] 89 S. W. 222. An agent for a borrower in procuring a loan does not become an agent for the lender, by the latter's consenting to rely upon the agent's representations as to the condition of the borrower's title, so as to render the lender chargeable with the agent's knowledge. Boyd v. Boyd [Iowa] 104 N. W. 798. Where the question of a certain person's agency for plaintiff was one for the jury, an instruction that any information gained by such person was not the knowledge of plaintiff, was properly refused. Novelty Mill Co. v. Heinzerling, 39 Wash. 244, 81 P. 742.

99. Moon Bros. Carriage Co. v. Devenish [Wash.] 85 P. 17.

1. The facts of which the agent had notice must be within the scope of the agency, so that it becomes the duty of the agent to act upon them or communicate them to his principal. Moon Bros. Carriage Co. v. Devenish [Wash.] 85 P. 17. The principal cannot be held to have notice of the acts of the agent outside of the scope of his authority and not shown to have been done with the principal's knowledge or consent. Harvey v. Mason City & Ft. D. R. Co. [Iowa] 105 N. W. 958. Where it did not appear that a traveling salesman was authorized to make collections, the principal is not charged with his knowwledge that on the dissolution of a partnership its liabilities were assumed by one of the partners. Moon Bros. Carriage Co. v. Devenish [Wash.] 85 P. 17. Where the owner of land sued a railroad company for negligently constructing a fill over a watercourse, so as to leave an alleged insufficient drain, evidence of his declarations to a surveyor of the premises and to persons at work on the fill were held inadmissible, as such persons were not shown to have an authority in the planning or constructing of the drain, etc. Price v. Oregon R. Co. [Or.] 83 P. 843.

2. Cowan v. Curran, 216 Ill. 598, 75 N. E. 322. Defendant could not be chargeable with notice of the fact that funds with which its treasurer was credited on its books were trust funds, held by him as guardian, as the facts to be imputed related to such treasurer's independent fraudulent acts. Brookhouse v. Union Pub. Co. [N. H.] 62 A. 219. The knowledge of a professional land agent who acts as the agent of both buyer and seller, cannot be imputed to one of the parties who has not actual knowledge and with whom the agent has not acted in the most perfect good faith. Cowan v. Curran, 216 Ill. 598 75 N. E. 322.

3. Thompson v. Laboringman's Mercantile & Mfg. Co. [W. Va.] 53 S. E. 908.

4. Smith & Cheney Co. v. Schmidt [Mich.] 12 Det. Leg. N. 604, 105 N. W. 39. An agent who contracted in behalf of his principal

(§ 2) *G. Mode of executing authority.*[5]—The act of the agent in executing his authority must purport to be representative.[6] It is immaterial in what form the signature appears, whether "principal by agent," or "agent for principal."[7]

(§ 2) *H. Remedies, pleading, procedure, and proof*[8] are discussed generally in the appropriate separate topics.[9] Where the vendee brings suit against the vendor on a warranty given by his agent in the sale of chattels, he must show the agent's authority to make the warranty, either by direct proof or by proof of a general custom; but when the vendor sues for the price of chattels sold by his agent, he is bound by his agent's representations as he cannot ratify the transaction in part.[10] One in possession of property merely as agent or caretaker cannot institute an action in his own name to enjoin a proceeding against him as tenant of another.[11] In an action against an administrator for specific performance of a contract made by an agent for the sale of real estate belonging to decedent's estate, a petition which did not show the agent's authority to sell the land, stated no cause of action.[12] The scope of the authority of a railroad claim agent not being defined by law, if put in issue must be proved as a matter of fact, even though the conduct of such an agent would be inexplicable on any other ground than that he had authority to make a settlement.[13] Where the only issue was whether a third party had authority to bind defendant as his agent, the decision of the trial justice that there was no privity of contract between the parties did not sufficiently answer the issue.[14]

§ 3. *Rights and liabilities of agent as to third persons.*[15]—As a general rule, a contract made by an agent as such and within the scope of his authority, is binding on the principal and not on the agent.[16] The personal liability is a question of intention,[17] and not of inference or conclusion drawn by law, except in the sense in which the law deduces intention from language and holds men to the legitimate results of their words and actions.[18] These rules govern in the case of contracts not under seal;[19] but in the case of contracts under seal, the contract must be in

with a third party, since deceased, is a competent witness for his principal to prove the contract. Brown v. Click [W. Va.] 53 S. E. 16.

5. See Clark & S. Agency, 669.

6. Where trustees of a religious society had authority only to convey the society's real estate, but in their recitals, covenant, execution and acknowledgment purport to grant only an individual interest, the fee does not pass but remains in the society. First Baptist Church of Sharon v. Harper [Mass.] 77 N. E. 778.

7. Cochran v. MacRae, 98 N. Y. S. 852.

Note: See generally **Clark & S. Agency,** 669, and particularly page 692 as to whether the instrument should show that it was done by the principal through agent or should omit mention of agency.

8. See 5 C. L. 86.

9. See the Topical Index and the heads there listed especially Contracts, 5 C. L. 664, and various topics descriptive of remedies on contracts; also particular tort titles.

10. Phillips-Buttorff Mfg. Co. v. Wild Bros. [Ala.] 39 So. 359.

11. Chatfield v. Clark, 123 Ga. 867, 51 S. E. 743.

12. Morrison v. Hazzard [Tex.] 92 S. W. 33.

13. St. Louis, etc., R. Co. v. Daugherty [Kan.] 83 P. 821.

14. Dunstan v. Ryley, 99 N. Y. S. 535.

15. See 5 C. L. 87. See, also, **Clark & S. Agency, 1216-1361.**

16. Colloty v. Schuman [N. J. Law] 62 A. 186; Hicks v. Kenan, 139 N. C. 337, 51 S. E. 941. Defendant as collection agent, without any personal fraud or guaranty of the validity of the claim, received from plaintiff payment of a claim against plaintiff's brother, and paid the same over to his principal. Held that the principal and not the agent was liable for the sum collected, on proof of the invalidity of the claim. Hauenstein v. Ruh [N. J. Law] 62 A. 184. An instruction that if defendants sold the goods as agents for the manufacturer and not as their own property, and disclosed their agency at the time, plaintiff could not recover against them for breach of warranty, was held objectionable as abstract, but not prejudicial and misleading for that reason. Haines v. Neece [Mo. App.] 92 S. W. 919. Where a contract for the alteration of a house was signed by defendants' daughters who had no interest in the house but lived with their parents, and defendants knew of the contract and that the work was being done, the daughters were only agents and not liable on the contract. Schindler v. Green [Cal. App.] 82 P. 341.

17. Hicks v. Kenan, 139 N. C. 337, 51 S. E. 941.

18. Wolff v. Wilson, 28 Pa. Super. Ct. 511.

19. If the contract is unsealed, it matters not how it is phrased, nor how it is signed, whether by the agent for the principal, or with the name of the principal by the agent or otherwise. The meaning of the contract-

the name of the principal and must purport to be his deed and not that of the agent.[20] The agent is not liable on a sealed instrument negotiated on behalf of a fictitious principal.[21] The agent is personally liable when he purports to act as principal,[22] or where he fails to bind his principal, because of want of authority,[23] and where a third party dealing with him does so on the faith that he possesses the authority he assumes, if the contract is one on which the principal could have been held, if the agent had in fact possessed the assumed authority.[24] Where an agent to sell lands employs another to find a purchaser, he is personally liable for the services.[25] An agent who performs gratuitous services and is not permitted to do so because of his holding himself out to be particularly skilled in the matter, is liable only for the fair exercise of such capacity as he possesses.[26]

Evidence, proof and procedure.[27]—An agent holding the legal title to land for his principal is a trustee of an express trust and may maintain an action in his own name to restrain a third person from cutting timber on the land and for the value of timber previously cut thereon.[28] An affidavit of defense that the contract of em-

ing parties is the agreement. Hicks v. Kenan, 139 N. C. 337, 51 S. E. 941.

20. Hicks v. Kenan, 139 N. C. 337, 51 S. E. 941.

21. Schenkberg v. Treadwell, 94 N. Y. S. 418.

Note: On strict theory this per curiam opinion seems difficult to support. By the weight of authority, when an unauthorized agent makes a contract for a principal actually existing, the agent is not liable on the contract. Lewis v. Nicholson, 18 Q. B. 503; Noe v. Gregory, 7 Daly [N. Y.] 283. When the principal is fictitious, however, the agent is often held liable on the contract, on the ground that otherwise it would be wholly inoperative. Kelner v. Baxter, L. R. 2 C. P. 174. Yet in the real essence of the situation, there is little difference between a principal who gives no authority and one who does not exist. See Bartlett v. Tucker, 104 Mass. 336. But here the instrument is under seal; and however loosely a simple contract may be treated, the law is strict that only those named as parties to a sealed instrument can sue or be sued upon it. Henricus v. Englert, 137 N. Y. 488. There seems to be no urgent necessity for relaxing the rule in the case at hand, as an adequate remedy lies for deceit, or for breach of an implied warranty of authority. Polhill v. Walter, 3 B. & Ad. 114; Collen v. Wright, 8 E. & B. 647.—19 Harv. L. R. 59.

22. Evidence held to support a finding that a party selling notes to another who had no notice of his agency was supposed by plaintiff to be acting in his individual capacity and was therefore personally liable for misrepresentations. Harris v. Cain [Tex. Civ. App.] 91 S. W. 866. The attorney of the plaintiff in a replevin suit, who "as principal" executed the replevin bond filed, was liable to indemnify the surety therein and could not defend on the ground that he was acting merely as attorney for his client, when he executed the bond. Hayes v. Bronson [Conn.] 61 A. 549. See 15 Yale L. J. 194. A contract signed by a person who adds "general manager" after his name, and purporting on its face to be made in behalf of another party, is not the individual undertaking of the signer. Raleigh & G. R. Co. v. Pullman Co., 122 Ga. 700, 50 S. E. 1008. A mere memorandum written by the manager of an insurance company, on one of its letter heads, addressed to plaintiff, that he was entitled to certain renewal premiums, held not to constitute a personal agreement to pay the commissions. Anderson v. English, 105 App. Div. 400, 94 N. Y. S. 200. Such agreement would be without consideration, unless the manager received some benefit from the insurance so placed with the agency. Id. Although a party engaged in purchasing stock for another may know that the latter is turning the stock over to a company of which he is general manager, as fast as he gets it, that knowledge does not prevent purchaser from looking to such general manager as the responsible party, if the purchaser had reason to believe that the general manager was acting for himself and not for the company. Martin v. Kennedy [Ky.] 90 S. W. 975.

23. The liability of an agent contracting without authority in the name of another, is divided into three classes: 1. Where the agent makes fraudulent representations of his authority, with intent to deceive. 2. Where he has no authority and knows it, but nevertheless makes a contract as if having such authority. 3. Where, not having authority in fact to make a contract as agent, yet does so under a bona fide belief that he has authority. Wolff v. Wilson, 28 Pa. Super. Ct. 511. Where the evidence that the agent had no authority to make a certain contract was undisputed, it was error to refuse to charge that he was personally liable if he made the contract without authority. Id.

24. Where a husband without authority employed a broker to procure a purchaser for his wife's land, but gave no written authority as required by Laws 1901, p. 312, c. 128, held that he was not liable as there could have been no recovery against the wife. Bloodgood v. Short, 98 N. Y. S. 775.

25. Triplett v. Jackson [Iowa] 106 N. W. 954.

26. Briere v. Searls [Wis.] 105 N. W. 817.

27. See 5 C. L. 89.

28. Under the express provisions of Civ. Code Proc. § 21. Goff v. Boland [Ky.] 92 S. W. 575.

ployment sued on was made by defendant as the agent of a corporation should allege that defendant make known his agency at the time the contract was made or that plaintiff had knowledge of the fact from some other source.[29]

§ 4. *Mutual rights, duties, and liabilities.*[30] *A. In general; contract of agency; diligence and good faith.*[31]—The agent must use reasonable care and diligence in the business of his principal,[32] act in good faith,[33] and keep his principal informed as to facts regarding the subject of his agency,[34] and is liable for damages resulting from default in either respect.[35] While the agent must serve alone the interest of his principal in the subject of his employment, the termination of the relation ends that duty and leaves the agent free to serve himself or others, provided he has done nothing during his agency to lay a foundation for profit to himself at his principal's expense.[36] An agent cannot make a profit for himself in the business of his principal,[37] without full knowledge and consent of his principal.[38] But the agency must be established.[39] The agent's fraud, however, may be waived by the principal.[40] Business dealings between a principal and his agent will be keenly scrutinized to prevent such relation being used as an instrument of extortion, speculation, or other unfair advantage;[41] and where a transaction between them is reasonably challenged, the onus is upon the agent to show that the bargain was just and equitable.[42] Cases have arisen where, even after the relation has been technically severed, dealings shortly thereafter, or which may have grown out of the old

29. Paine v. Berg, 23 Pa. Super. Ct. 577.

30. See 5 C. L. 89.

31. See 5 C. L. 89. See, also, **Clark & S. Agency, 866-934, 962 et seq.**

32. Kingsley v. Wheeler [Minn.] 104 N. W. 543. The duty of an agent who negotiates the sale of real estate is continuing throughout the transaction and he is bound to exert his skill for the benefit of his employer. Lease v. Christy, 28 Pa. Super. Ct. 507.

33. Morgan v. Aldrich [Mo. App.] 91 S. W. 1024; Morrison v. Hunter [Neb.] 105 N. W. 88; Kingsley v. Wheeler [Minn.] 104 N. W. 543. Where a professional land agent acts as agent for both buyer and seller, the utmost good faith is required. Cowan v. Curran, 216 Ill. 598, 75 N. E. 322. All departures from the exercise of good faith on the part of an agent are esteemed fraud. Lease v. Christy, 28 Pa. Super. Ct. 507. Where the receiver of a natural gas company placed its well in charge of its supervising manager, the latter as president of a competing company could not turn the well over to himself as such president, without notice, and then claim the benefit of an adverse title for the latter company. McCullough v. Ford Natural Gas Co. [Pa.] 62 A. 521. Where an agent who was employed to sell bicycles at a weekly salary made an arrangement for the appointment of a subagent through whom he sold them to himself at wholesale, and made the profit thereon for himself, it was a breach of duty to his principal. George N. Pierce Co. v. Beers [Mass.] 76 N. E. 603. Where a selling agent's contract required him to refer all inquiries from territory other than his own promptly to his principal, efforts by such agent to sell to a resident of other territory were in violation of his contract. Garfield v. Peerless Motor Car Co., 189 Mass. 395, 75 N. E. 695.

34. Kingsley v. Wheeler [Minn.] 104 N. W. 543. It is the agent's duty to communicate to his principal every fact affecting a transaction intrusted to his care, which comes to his knowledge in the course of its performance, and, in an action between the principal and the adverse party, the agent is conclusively presumed to have performed this duty, except in certain extreme cases. Pringle v. Modern Woodmen of America [Neb.] 107 N. W. 756.

35. Kingsley v. Wheeler [Minn.] 104 N. W. 543.

36. Morgan v. Aldrich [Mo. App.] 91 S. W. 1024.

37. Kingsley v. Wheeler [Minn.] 104 N. W. 543; Morgan v. Aldrich [Mo. App.] 91 S. W. 1024; Forlaw v. Augusta Naval Stores Co. [Ga.] 52 S. E. 898; Morrison v. Hunter [Neb.] 105 N. W. 88; Albright v. Phoenix Ins. Co. [Kan.] 84 P. 383.

38. Bartleson v. Vanderhoff [Minn.] 104 N. W. 820.

39. The fact that the alleged agent was to receive a commission is not conclusive of the agency. Bartleson v. Vanderhoff [Minn.] 104 N. W. 820.

40. Where the principal knows of a resale by the vendee at an advanced price and suspects the agent of connivance therein, but takes no steps to investigate while his contract is still executory, but executes the contract, he cannot recover damages for the agent's fraud. Bartleson v. Vanderhoff [Minn.] 104 N. W. 820.

41. Evans v. Evans [Mo.] 93 S. W. 969.

42. Evans v. Evans [Mo.] 93 S. W. 969. Contract for the support of a female person 84 years of age for the rest of her life in consideration of the transfer of bank deposits of about $4,000, held not unfair under the circumstances of the case and not affected by the fact that the principal lived only a few months afterward. Drefahl v. Security Sav. Bank [Iowa] 107 N. W. 179.

relation, come within the rule of keen scrutiny;[43] and where the agent claims that the relation of principal and agent had ceased to exist before the making of the contract, it is incumbent on him to establish that fact.[44] Under a contract granting an exclusive right of sales in a specific territory, the agent is entitled to such territory exclusive of his principal as well as of other agents.[45] An agent is never liable to his principal for a mere mistake in the performance of a duty within the general scope of his authority.[46]

(§ 4) *B. Accounting, settlement, and reimbursement.*[47]—All profits and benefits resulting from acts of an agent, whether in accordance with, or in violation of, his authority, belong to the principal.[48] The contract of an agent for his principal is the contract of the principal;[49] and the possession of the agent is the possession of the principal.[50] While the general rule is that an agent who receives money for his principal is estopped to deny the title and must return or account for the money received,[51] yet when sued by his principal he can show that he has been divested by a title paramount to that of his principal, or that he has paid over the money to one holding such a title.[52]

(§ 4) *C. Compensation and lien of agent.*[53]—The right to compensation and the amount thereof is usually determinable from the contract between the parties.[54]

43. Evans v. Evans [Mo.] 93 S. W. 969. A tax deed taken by the heirs of such agent vests no title in him as against the principal. Siers v. Wiseman [W. Va.] 52 S. E. 460.

44. Circumstances held to show the discontinuance of relations of trust or confidence before the execution of the contract. Evans v. Evans [Mo.] 93 S. W. 969.

45. If the principal sells therein he violates the rights of his agent. Garfield v. Peerless Motor Car Co. 189 Mass. 395, 75 N. E. 695.

46. Briere v. Searls [Wis.] 105 N. W. 817.

47. See 5 C. L. 90. See, also, **Clark & S. Agency, 853, 935.**

48. The agent will be held to be a trustee as to profits, advantages, rights or privileges under any contract made within the scope of the agent's employment and the agent will be compelled to transfer them to the principal, upon repayment to him of any sums expended by the agent in the business done. Forlaw v. Augusta Naval Stores Co. [Ga.] 52 S. E. 898. An attorney who was employed as an agent by a corporation to sell its treasury stock and received money for such stock sold, purporting to keep an account of the business, had the burden of accounting for such moneys or presenting a satisfactory excuse for not doing so (Gladiator Consol. Gold Mines & Milling Co. v. Steele [Iowa] 106 N. W. 737), and such agent, under an agreement for a mutual occupation of their adjoining offices, was not authorized to pay himself office rent out of the company's funds in his hands (Id.). Where the executor of a will was given a power of attorney by the beneficiaries to invest the sum in his hands belonging to the estate, and he reported that he had invested the sum in certain securities, paying them money as interest collected on the securities, he was chargeable with the amount of the securities, although the beneficiaries had recognized a third person as acting as an attorney in fact for the executor after his report to them. Hartman v. Schnugg, 99 N. Y. S. 33.

49. See 5 C. L. 90. In Indiana, under the statutes regulating the trial of claims against decedent's estates. Burns' Ann. St. 1901, § 2479. One who claims a note, made payable to himself and found among the effects of his deceased agent, has the burden of proving its execution. Indiana Trust Co. v. Byram [Ind. App.] 72 N. E. 670. Evidence held sufficient to show that decedent held the note as claimant's agent and claimant was entitled to recover amount due thereon. Id.

50. Chatfield v. Clark, 123 Ga. 867, 51 S. E. 743.

51. Moss Mercantile Co. v. First Nat. Bank [Or.] 82 P. 8. A subsequent agreement with agents for the sale of land, superseding a former agreement, held to have prevented the charging by the agents as a credit against its indebtedness, arising out of a sale under the second agreement, of any expenses or payments under the first. Clyne v. Easton, Eldridge & Co. [Cal.] 83 P. 36.

52. Moss Mercantile Co. v. First Nat. Bank [Or.] 82 P. 8.

53. See 5 C. L. 91. See, also, **Clark & S. Agency, 796.**

54. An exclusive agent for a particular territory held entitled under his contract to commissions on a sale, made outside of his territory, to a resident thereof temporarily residing elsewhere. Garfield v. Peerless Motor Car Co., 189 Mass. 395, 75 N. E. 695. A verbal promise made by the principal's district agent to pay a commission on a sale to a purchaser secured by a selling agent, in a case not covered by the latter's contract, is binding on the principal. Id. Where the agent's contract stipulates that he is to receive no commission on the sale of machinery taken back, he is not entitled to a commission on machinery sold but not paid for, and subsequently taken back by the principal, in a worn condition, on a foreclosure of a mortgage to secure its price. Reeves & Co. v. Watkins [Ky.] 89 S. W. 266.

Whether in case of revocation by the principal the agent may recover future salary or commissions that he might have earned depends on the rightfulness of the revocation.[55] Compensation already earned on sales is not lost by revocation before the price is collected.[56] Performance by the agent is a condition precedent to the right to compensation;[57] and where the time is limited, the performance must be within that time.[58] Authority given real estate agents to find a purchaser at a certain net price to the seller is understood to be an agreement to pay as commissions all sums which the buyer is able and willing to give above the nominated price.[59] Fraud or

55. Under a contract of employment as life insurance manager for a certain district, for at least one year, for a commission guaranteed to exceed a certain sum per month, but reserving the right to withdraw from the territory, the agent was not entitled to compensation for the rest of the year upon the company's withdrawing before the end of the year. National Life Ins. Co. v. Anderson [Ky.] 92 S. W. 976. The right to renewal commissions by an insurance solicitor held to have been terminated with the other provisions of his contract, by his exercise of the right to terminate the contract as provided therein. Scott v. Travelers' Ins. Co [Md.] 63 A. 377.

Notice required: A contract stipulating that the principal might terminate the agency and put other agents in the specified territory, depriving the agent of commissions on sales made by such other agents, in case the agent failed to canvass the territory or conduct the business satisfactorily, did not give the principal a right to do so without notice to the agent. Hilliker & Son v. Allen [Iowa] 105 N. W. 120.

56. Where the contract of employment was terminable at the pleasure of either party and stipulated that claims for compensation should cease upon termination of the contract, the agent was entitled to commissions on sales made during his service, although the collections of payments were made after his discharge. Singer Sewing Mach. Co. v. Brewer [Ark.] 93 S. W. 755. The custom that an agent lost his commission when a buyer removed out of his territory, and such account was transferred to the agent of the territory into which he moved, did not show that the parties intended that the agent, upon his discharge, should forfeit his commission on uncollected sales. Id.

57. A broker's commission is generally earned, when he finds a purchaser ready, able, and willing to buy and who actually offers to buy on the owner's terms. Indiana Fruit Co. v. Sandlin [Ga.] 54 S. E. 65. If he performs all the services required by the contract with his employer, he is entitled to the stipulated compensation, although the sale may be finally consummated by the employer. Id.

Agent entitled to compensation: Agent sent out to solicit orders and exploit a company's products, on a commission on all orders received through his efforts, who secured a promise from an intending purchaser to consider a proposition from the company and notified the company, entitled to a commission on an order taken by the company from such customer. Brodhead v. Pullman Ventilator Co., 29 Pa. Super. Ct. 19. Where commission is to be paid for finding a purchaser and after the latter's introduction to the principal by the agent, negotiations are carried on between the principal and purchaser which finally result in a sale. Bowman v. Hartman, 6 Ohio C. C. (U. S.) 264. A real estate agent employed to find a customer at a net price, upon finding such customer, whether the sale is consummated by the owner or not. Arnold v. National Bank of Waupaca [Wis.] 105 N. W. 828. Defendant having lands to sell employed plaintiff to find a purchaser for part of the lands, agreeing to pay him $150 therefor. Plaintiff found a purchaser, but the owner refused to sell without selling the whole, whereupon plaintiff, on an agreement by defendant to make it right with him, induced the purchaser to take the whole. Plaintiff entitled to $150 for the first services and a reasonable compensation for the second. Triplett v. Jackson [Iowa] 106 N. W. 954. Where the owner of land accepts an offer for land actually made to his broker and consummates a sale on the terms thereof, he ratifies the broker's act and the latter is entitled to his commission, although the sale was made through another broker. Levy v. Wolf [Cal. App.] 84 P. 313. Question whether a piano was sold through plaintiff's securing a prospective purchaser was one of fact for the jury and judgment for plaintiff affirmed. Jacobs v. Heppe, 29 Pa. Super. Ct. 406.

Not entitled to compensation: An agent engaged to procure a loan of not less than $220,000, who failed to secure more than $210,000, which was rejected by the principal, and who then abandoned the matter, not entitled to commission, upon his principal's afterward obtaining a loan of $200,000 from the same party. Stone v. Plaut, 96 N. Y. S. 1030. An agent employed to sell land or find a purchaser therefor not entitled to a commission, where the principal merely gives an option to the party procured. Keach v. Bunn, 116 Ill. App. 397. A showing by plaintiff that he procured a purchaser willing to take the property at defendant's price, if plaintiff would furnish or procure the funds and that plaintiff had a promise of loans for that purpose, not sufficient to recover commissions for procuring a purchaser. McCune v. Badger [Wis.] 105 N. W. 667.

58. Where an offer to a broker to sell a ship on commission was made on Sunday, with the understanding that the offer would expire the next day, Sunday was to be counted and Tuesday could not be included. Ropes v. John Rosenfeld's Sons, 145 Cal. 671, 79 P. 354.

59. Arnold v. National Bank of Waupaca [Wis.] 105 N. W. 828.

bad faith on the part of the agent destroys his right to commissions.[60] It is, however, no defense in case of an agency executed that the contract of agency required to be written was oral.[61]

Subagents.—If an agent employs a subagent to do the whole or any part of that which he is employed to do, without the knowledge or consent of his principal, inasmuch as there is no privity between the principal and the subagent, the latter will not be entitled to claim compensation from the principal.[62]

Lien.—An agent may have a common-law lien on the principal's property.[63]

60. Keach v. Bunn, 116 Ill. App. 397; Morgan v. Aldrich [Mo. App.] 91 S. W. 1024; Steele v. Crabtree [Iowa] 106 N. W. 753; Sidway v. American Mortgage Co., 119 Ill. App. 502.

Compensation forfeited: Where an agent deliberately concealed the fact that he was acting with another party to secure a larger price for the land sold and divide the difference between them. Fulton v. Walters, 28 Pa. Super. Ct. 269. Where an agent for the sale of real estate fails to exercise good faith and to exert his skill for the benefit of his employer throughout the entire transaction. Lease v. Christy, 28 Pa. Super. Ct. 507. Where an agent to sell becomes an agent to buy, and receives pay in a transaction from another source than his principal. Fulton v. Walters, 28 Pa. Super. Ct. 269. Where an agent, after the repudiation of his contract of sale of real estate, caused a written agreement signed by the purchaser and himself as agent to be placed on record, to create a cloud on the title and annoy his principal. Lease v. Christy, 28 Pa. Super. Ct. 507.

Compensation not forfeited: Where the agent's contract was to sell particular goods to a particular house, and not to sell defendant's goods generally, he is entitled to his commission for such sale, although in other independent transactions the agent may have been engaged in commercial hostility to his principal. Gibson v. Bailey Co., 114 Mo. App. 350, 89 S. W. 597. Where a member of an association furnished funds to a corporation that was conducting experiments for the association, and accepted the corporation's stock for such funds, in the absence of any showing of anything inconsistent with good faith, the member was not precluded from recovering his expenses in looking after operations under the contract with the corporation. Poole v. Poindexter [Kan.] 83 P. 126. An insurance company which continued to accept the services of an agent, knowing that he rebated premiums, could not forfeit his right to compensation for legitimate services rendered after the illegal acts were done. National Life Ins. Co. v. Anderson [Ky.] 92 S. W. 976. Where a person acts as agent for both vendor and vendee with their knowledge and positive consent, or where their consent may reasonably be inferred, he is not precluded from receiving a commission from each. Keach v. Bunn, 116 Ill. App. 397.

61. In New York, where a contract for the sale of real estate has been fully executed and the defendant has reaped the benefit of it, the principal cannot defend against an action for commissions under Pen. Code, § 640d (Laws 1901, p. 312, c. 128), making it a misdemeanor in certain cases to sell real estate without written authority. Smyth v. Sichel, 97 N. Y. S. 1008.

62. Principal held not liable for compensation of a sub-agent employed by a real estate agent authorized to lease premises Southack v. Ireland, 109 App. Div. 45, 95 N. Y. S. 621. Unauthorized employment of subagent and agreement to pay a commission ratified by subsequent promise of defendant. Nelson v. National Drill Mfg. Co. [S. D.] 105 N. W. 630.

63. NOTE. Essential elements of agent's lien: It is an essential element of an agent's common-law lien, whether general or special, that the agent, as such, should lawfully have possession, actual or constructive, of the property upon which the lien is claimed. Taylor v. Robinson, 2 Moore, 730; Ex parte Foster, 2 Story, 131, Fed. Cas. No. 4960; Donald v. Hewitt, 33 Ala. 534, 73 Am. Dec. 431; Sawyer v. Lorrilard, 48 Ala. 332; Tucker v. Taylor, 53 Ind. 93; Nevan v. Roup, 8 Iowa, 207; Oakes v. Moore, 24 Me. 214, 41 Am. Dec. 379; Robinson v. Larrabee, 63 Me. 116; Collins v. Buck, 63 Me. 459; Rice v. Austin, 17 Mass. 197; McFarland v. Wheeler, 26 Wend. [N. Y.] 467; Heard v. Brewer, 4 Daly [N. Y.] 136; Winter v. Coit, 7 N. Y. 288; Jenkins v. Eichelberger, 4 Watts [Pa.] 121, 28 Am. Dec. 691; McIntyre v. Carver, 2 Watts & S. [Pa.] 392, 37 Am. Dec. 519; Clemson v. Davidson, 5 Bin. [Pa.] 392; Elliott v. Bradley, 23 Vt. 217. It is not necessary that it should be in his actual possession, as constructive possession is sufficient, as where it is in the custody of his agent or servant (McCombie v. Davies, 7 East, 5; Bryans v. Nix, 4 Mees & W. 775; Heard v. Brewer, 4 Daly [N. Y.] 136; Elliott v. Bradley, 23 Vt. 217), or where in some cases he has the documents or muniments of title in his possession (Rice v. Austin, 17 Mass. 197), or where it is given into the possession of a third person for a temporary or particular purpose only (Dewing v. Hutton, 40 W. Va. 521). It is also essential that the property, upon which the lien is claimed, should have come into his possession in the course of his employment as agent in respect to that property, and must remain in his possession in that capacity. If he gets possession or holds it in any other capacity than as agent, this lien does not arise or continue. Scott v. Jester, 13 Ark. 438; Thacher v. Hannahs, 4 Rob. [N. Y.] 407; McIntyre v. Carver, 2 Watts & S. [Pa.] 392, 37 Am. Dec. 519. So the property must have been lawfully and in good faith obtained from one who had the right to give the possession. If he obtained it unlawfully or by means of fraud or misrepresentations, or if he obtained it from one who had no right to give the possession, he would have no lien thereon. Madden v. Kempster, 1 Camp. 12; Burn v. Brown, 2 Starkie, 272; Randel v. Brown, 2 How. [U. S.] 406, 11 Law. Ed. 318.—From Clark & S. Agency, § 375.

(§ 4) *D. Remedies, pleading, procedure, and proof.*[64]—Where the agent, suing for commissions, declared on a general contract to sell defendant's goods, but proved a contract for the sale of particular goods to a particular house, the variance was not fatal;[65] but where a broker sued for a commission under a special contract and all his evidence was directed to establishing such contract, on his failure to do so he could not recover on a second count for work and labor.[66] A receipt signed by an agent will not prevent his recovery of commissions in the absence of evidence that the sum sued for was due at the time when the receipt was dated;[67] but fraud, dishonesty, or unfaithfulness on the part of the agent is a defense to a claim for compensation, although not pleaded as a counterclaim.[68] And the principal, by accepting the benefits of an illegal transaction, may be estopped to set up the illegality as a defense to an action for commissions.[69] To bind the principal in any way for his agreed compensation, a subagent must show both the fact of his employer's agency and his authority to employ a subagent.[70]

Among the available remedies, as between principal and agent, illustrated in the notes, is an action for money had and received,[71] and for breach of the contract of agency.[72] The profits of an agent's transactions can be recovered by the principal,[73] unless action for such profits is barred by the statutes of limitations.[74] The

64. See 5 C. L. 92. See, also, **Clark & S. Agency, 858.**

65. Gibson v. Bailey Co., 114 Mo. App. 350, 89 S. W. 597.

66. Ropes v. John Rosenfeld's Sons, 145 Cal. 671, 79 P. 354.

67. Brodhead v. Pullman Ventilator Co., 29 Pa. Super. Ct. 19.

68. Steele v. Crabtree [Iowa] 106 N. W. 753.

69. Where a contract for the sale of real estate had been fully executed, and the defendant had reaped the benefit of it and acknowledged the plaintiff's agency in writing, he could not defend under Pen. Code, § 640d (Laws 1901, p. 312, c. 128) providing that the sale of real estate in certain cases, without written authority, shall be a misdemeanor. Smyth v. Sichel, 97 N. Y. S. 1008.

70. Held that neither was shown. Arbesfeld v. Tanenbaum, 96 N. Y. S. 424.

71. Green v. Macy [Ind. App.] 76 N. E. 264. Complaint in an action by the principal against the agent for money collected for stone sold and not accounted for, held not to state an action for conversion of goods delivered to the agent. Id.

72. Kingsley v. Wheeler [Minn.] 104 N. W. 543. Where an agent employed on a salary to sell bicycles made an arrangement for the appointment of a subagent, whereby he sold wheels to himself at wholesale, making a profit unknown to his principal, he was held liable in damages. George N. Pierce Co. v. Beers [Mass.] 76 N. E. 603. Where the principal discharged the agent as soon as his transactions became known to him, he could not be held to have waived the wrongful sales by keeping the agent in his employ. Id. The fact that the wheels so obtained were sold outside of working hours made no difference in the agent's liability to the principal. Id. The measure of damages was the difference between the price received for each wheel and the market price. Id. An agreement by defendants to act as agents for plaintiff's patterns and "to endeavor at all times to conserve the best interests of the agency," did not imply an agreement not to sell any other patterns. Butterick Pub. Co. v. Boynton [Mass.] 77 N. E. 705. Where there was no stipulation that such an agency should be sole and exclusive, an injunction would not lie to prevent the agents from selling other patterns; but where there was any violation of a contract the principal could terminate it and recover damages sustained. Id. In an action by the principal against the agent for breach of a written contract in making a sale, evidence held sufficient to sustain a verdict that the attempted sale was not made under the contract, but was negotiated before the contract was executed. Pneumatic Weigher Co. v. Burnquist [Iowa] 105 N. W. 326. Where a broker agreed to sell certain stocks within a certain time, and that plaintiff should receive a stipulated price therefor less fees, and failed to perform the agreement, plaintiff could not recover the agreed sum for the stocks but only damages for breach of contract. Gause v. Commonwealth Trust Co., 100 App. Div. 427, 91 N. Y. S. 847. Where an insurance company allowed its agent to rebate premiums contrary to Ky. St. 1903, § 656, making it a criminal offense, it could not recover from such agent the sums he ought to have collected from the insured. National Life Ins. Co. v. Anderson [Ky.] 92 S. W. 976. An officer or agent of a corporation may not defend against his liability by a plea that the corporate existence is impaired. Spreyne v. Garfield Lodge No. 1, 117 Ill. App. 253.

73. Albright v. Phoenix Ins. Co. [Kan.] 84 P. 383. Where the agents concealed the fact that they had contracted to sell the land of their principal at an advanced price and sold it to a man of straw and then through him sold it to the real vendee, they were responsible to the principal for the profits. Kingsley v. Wheeler [Minn.] 104 N. W. 543. Where an agent accepted employment from persons with whom his principals had con-

fact that one who gives an agent money to loan reposes a special trust and confidence in him does not create such a direct and continuing trust as to exempt the case from the running of the statute of limitations.[75] The measure of damages in an action to recover unlawful profits received by the agent is the full amount of commissions received, notwithstanding he may have paid others for assistance in the unlawful transactions.[76] An action for the purchase price of goods sold by an agent should be brought in the principal's name.[77]

Evidence.[78]—In an action against an agent for money collected, it is presumed, in the absence of evidence, that the agent in canceling a debtor's obligation did so for the face of the claim.[79] In actions arising out of the relations of principal and agent, the admissibility,[80] materiality,[81] competency,[82] and effect[83] of testimony, depend upon the usual rules of evidence.

AGISTMENT; AGREED CASE, see latest topical index.

AGRICULTURE.

§ 1. Regulation (94).
§ 2. Cropping Contracts, Products, and Crop Liens (95).
§ 3. Agricultural Societies (98).

§ 1. *Regulation.*[84]—At common law a landowner owes no active duty to his neighbors with respect to noxious plants accidentally or naturally growing upon his land except to refrain from actively conveying the seeds thereof to their premises.[85]

tract relations for the sale of proprety and so secured a commission, it was not necessary for the principals, in an action to recover such profits, to show a continuation of their employment up to the date of the sale. Morgan v. Aldrich [Mo. App.] 91 S. W. 1024.

74. Where the principal sued to recover profits and for a conveyance of certain reserved interests in land fraudulently conveyed by the agent to a third party, the action for profits was barred by the five-year limitation, but the action for reconveyance would not be barred, under Rev. St. 1899, § 4262, until 10 years from the filing of the deed for record. Hudson v. Cahoon [Mo.] 91 S. W. 72. Nor was the principal barred of his action for reconveyance on account of laches, by a delay of nearly 10 years, where defendant was not injured by the delay. Id.

75. Where the agent negligently loaned money to an insolvent, the principal could not recover it from the agent, after the statute of limitations had run. Hitchcock v. Cosper, 164 Ind. 633, 73 N. E. 264.

76. Morgan v. Aldrich [Mo. App.] 91 S. W. 1024.

77. Where by mistake such action was brought in the agent's name, a technical exception to the verdict will be overruled on condition that a proper amendment be made in the court below. Fay v. Walsh [Mass.] 77 N. E. 44.

78. See 5 C. L. 94.

79. Lexington Bank v. Phenix Ins. Co. [Neb.] 104 N. W. 1146.

80. In an action for commissions a letter purporting to be written to plaintiff by defendant is admissible on proof that it was signed by defendant's sales manager. Garfield v. Peerless Motor Car Co., 189 Mass. 395, 75 N. E. 695. Evidence of a trade usage that an exclusive agent is entitled to his commission on all sales in his territory by whomsoever made, in an action for commissions on a sale by the principal to a resident of the territory temporarily residing elsewhere, was held not to be objectionable as varying the terms of the contract, but admissible to cover a case not provided for. Id.

81. Where, in an action by an agent to recover his commissions, defendant endeavors to show that another agent had secured the order before plaintiff, evidence that such other agent had been paid for securing the order was immaterial. Brodhead v. Pullman Ventilator Co., 29 Pa. Super. Ct. 19.

82. Evidence of efforts of an agent to carry through a sale of land is competent in a suit for recovery of a commission on the sale, yet the refusal of the court to hear such evidence does not constitute reversible error where the only duty of the agent under his contract was to produce a purchaser. Bowman v. Hartman, 6 Ohio C. C. [N. S.] 264.

83. The agent's admission that plaintiff's bill of particulars showed the correct amount of stone shipped, was not necessarily an admission that it showed the correct amounts for which the sales were made. Green v. Macy [Ind. App.] 76 N. E. 264. While, upon a showing of the sale of stone and the receipt of the money therefor, it would be presumed that the agent received the market value therefor, yet where the evidence showed neither the market value nor the quantity sold, it was insufficient to sustain a verdict. Id.

84. See 5 C. L. 94.

85. Rule applies equally to railroad companies. San Antonio, etc., R. Co. v. Burns [Tex. Civ. App.] 89 S. W. 21. Although Johnson grass seed is carried upon a man's land by means of water flowing through railroad culvert, yet if the flow was no greater than it would have been naturally

Statutes in many states, however, provide for the suppression of noxious weeds and grasses and for the recovery of penalties and damages for permitting them to mature.[86]

By statute in some states no recovery can be had for fertilizer sold unless the sacks containing it are tagged according to law.[87]

§ 2. *Cropping contracts, products, and crop liens.*[88]—The relation existing between the parties[89] and the rights of each depend upon the terms of the contract.[90]

the railroad company incurs no liability at common law. Id. Failure to show negligence on part of railroad in permitting Johnson grass to mature and go to seed will prevent plaintiff from recovering common-law damages and restricts him to recovery of the statutory penalty only. Laws 27th Leg., p. 283, c. 117. Gulf, etc., R. Co. v. Stokes [Tex. Civ. App.] 91 S. W. 328.

86. Under Act April 18, 1901 (Acts 27th Leg. p. 283, c. 117) prohibiting railroad companies from permitting Johnson grass or Russian thistle to go to seed on their rights of way and providing that contiguous landowners may recover resulting damages and a penalty in case they do so, such owners may recover the penalty though they have not yet suffered any damage. San Antonio & A. P. R. Co. v. Burns [Tex. Civ. App.] 89 S. W. 21. Damages already suffered may be recovered without proof of negligence. Id. Since the act further provides that no landowner may recover if he permits any such grass or thistle to mature or go to seed on his own land, an owner cannot recover where he permits grass communicated to his land from company's right of way to mature. Id. Decision in accordance with judgment of supreme court on certified questions (Id. [Tex.] 13 Tex. Ct. Rep. 250, 87 S. W. 1144). So much of the act as provides for the recovery of damages is void because subject of damages is not expressed in the caption of the bill. Gulf, etc., R. Co. v. Stokes [Tex. Civ. App.] 91 S. W. 328. Damages were not intended to be a part of the penalty. Id.

87. For sale made Feb. 12, 1902. Zipperer v. Doyle [Ga.] 53 S. E. 505. Charge of court excluding from consideration of the jury any evidence tending to show that sacks were not property tagged is reversible error. Id.

88. See 5 C. L. 95.

89. An agreement whereby one party furnishes land, orchard, machinery, etc., and the other party performs the labor of raising the crop of fruit and covenants to deliver to the owner a portion of the crop, is not a lease but a cropping contract, even though called a lease. Adams v. Thornton [Cal. App.] 82 P. 215. Contract held to create relation of landlord and cropper between the parties. Lewis v. Owens [Ga.] 52 S. E. 333.

NOTE. Relation created: In any case where the owner of land agrees with another, either as occupant or mere cultivator, to pay the latter as compensation for working the land the value of a certain portion of the crops or a certain share thereof, the occupant or cultivator does not become a tenant of the landowner, and the agreement between them is not to be construed as a lease, but a mere cropping contract. In such case the agreement between the parties does not create the relation, nor the rights and liabilities of landlord and tenant, but simply those of landowner and cropper. Richards v. Wardwell, 82 Me. 343, 19 A. 863; State v. Jewell, 34 N. J. Law, 259; Bradish v. Schenck, 8 Johns. [N. Y.] 151; Caswell v. Distnich, 15 Wend. [N. Y.] 379; Wilbur v. Sisson, 53 Barb. [N. Y.] 258; Taylor v. Bradley, 4 Abb. App. Dec. 363, 39 N. Y. 129, 100 Am. Dec. 415; Booher v. Stewart, 75 Hun, 214, 27 N. Y. S. 114; Denton v. Strickland, 3 Jones [N. C.] 61; Medlin v. Steele, 75 N. C. 154; Maverick v. Lewis, 3 McCord [S. C.] 211; Warner v. Hoisington, 42 Vt. 94; Lowe v. Miller, 3 Grat. [Va.] 205, 46 Am. Dec. 188; Lanyon v. Woodward, 55 Wis. 652, 13 N. W. 863. Thus, one who raises a crop upon the land of another under a contract to raise such crop for a particular part of it is a mere cropper, and not a tenant; and has a lien upon the crop for whatever is due him. Burgie v. Davis, 34 Ark. 179. A contract with the owner of a farm to cultivate it for a certain period for a certain share of the crop as compensation is not a lease, and does not create the relation of landlord and tenant, although the cultivator occupies the farm buildings while thus employed. Such contract is a mere cropping agreement (Gray v. Reynolds, 67 N. J. Law, 169, 50 A. 670), and to the same effect is Ferris v. Hoglan, 121 Ala. 240, 25 So. 834. An agreement between a landowner and another that the latter shall plant and raise a crop on part of the former's land, of which the cultivator shall be entitled to one-third, not stipulating as to the duration of the contract, nor the relations of the parties to one another, constitutes the person tilling such land a mere cropper, with a naked right to enter and perform the labor necessary under the provisions of the contract. Moser v. Lower, 48 Mo. App. 85. If one agrees to attend to so much of another's land as he can cultivate with one horse during a year, and pay as "rent" two bales of cotton out of the first picking and no part of the crop to belong to him until the "rent" is paid, he is a mere cropper and not a tenant, as such contract is too indefinite to constitute a lease, or create the relation of landlord and tenant between the parties. Haywood v. Rogers, 73 N. C. 322. An agreement by which the owner of land agrees to furnish teams, utensils and supplies to make a crop on his land, the crop to be his, but in consideration of the labor of the other party the latter is to have what remains after deducting one-half of the crop for the use of the land, advances, etc., does not create a lease nor the relation of landlord and tenant, but is a mere cropping contract. Hammock v. Creekmore, 48 Ark. 264, 3 S. W. 180; Bryant v. Pugh, 86 Ga. 525, 12 S. E. 927.—From note to Kelly v. Rummerfield [Wis.] 98 Am. St. Rep. 951-955.

90. Under a contract between the owner of a farm and another whereby the latter

Under a cropping contract the landowner and the cropper are tenants in common of the crop prior to a division,[91] and hence the cropper may, before that time, mortgage his interest, subject, however, to all the rights of the landlord as fixed by the terms of the tenancy, or contract.[92] Each has an equal right with the others to the possession of the whole, and neither can maintain an action against the other to recover possesssion.[93] By statute in some states where the rent reserved in a lease is a share of the crops, the landlord and tenant are also tenants in common,[94] and hence in such a case a purchaser of the real estate from the landlord during the term of the lease, in the absence of an agreement to the contrary, is not entitled to the portion of the crop belonging to him which has been severed from the realty prior to the time the vendee acquires title.[95]

Liens.[96]—Statutes in many states give general or special liens to croppers,[97] farm laborers,[98] threshers,[99] and persons furnishing funds to aid in the raising of a crop.[1]

Such liens are purely statutory, and the statutory provisions relative to their foreclosure must be substantially complied with.[2] The lien must be claimed within the time prescribed.[3] Where a thresher lien when filed relates back to the time of doing the work, one purchasing the grain within the time given for filing is not an innocent purchaser even though no lien has actually been filed.[4] The lien notice or statement must contain everything required by the statute to be stated therein and nothing more.[5] A notice or statement for a cropper's or laborer's lien must describe the property to be charged with reasonable certainty.[6] In the case of

was to receive one-half of the proceeds for his labor and each was to furnish "one-half of the stock, teams" and so forth, the word stock did not mean work stock, but meant sheep, hogs, and cattle as well. Green v. Hart, 27 Ky. L. R. 970, 87 S. W. 315.

91. Adams v. Thornton [Cal. App.] 82 P. 215; Denison v. Sawyer [Minn.] 104 N. W. 305.

92. Denison v. Sawyer [Minn.] 104 N. W. 305.

93. Adams v. Thornton [Cal. App.] 82 P. 215.

94. Under Code, § 1073. Wendt v. Stewart [Neb.] 10 N. W. 550.

95. Wendt v. Stewart [Neb.] 105 N. W. 550. Landlord becomes owner of share of crops as soon as they are so far advanced that they may be said to be property, and hence he had a right to harvest and hold any portion of such share as were in proper condition for harvesting. Id. Rule not affected by provision in lease requiring tenant to harvest portion belonging to landlord. Id.

96. See 5 C. L. 96.

97. Lewis v. Owens [Ga.] 52 S. E. 333. One raising cotton under contract of hire whereby he furnishes labor and the other party the land and a team to cultivate it, the crop to be divided between them, has a lien thereon for the value of his portion under Code 1896, § 2712. Amos v. Garvin [Ala.] 39 So. 990. Such lien is superior to a mortgage by the landowner of all crops grown by or for him. Id. Evidence held insufficient to show contract whereby cropper bound himself to sell the cotton to the mortgagee so as to preclude him from enforcing his lien. Id. The cropper has a special lien upon the crop at the completion of the contract of labor. Lewis v. Owens [Ga.] 52 S. E. 333.

98. Under Sess. Laws 1899, c. 3, p. 153, § 1, anyone performing labor or rendering services in the production of a crop may have a lien on the entire crop produced. Beckstead v. Griffith [Idaho] 83 P. 764. Takes precedence over all other liens of whatsoever character. Id. A farm laborer who is hired to cultivate a growing crop and who performs in person the services required of him, may assert not only a special lien on the product of his labor [Civ. Code 1895, § 2793] (Faircloth v. Webb [Ga.] 53 S. E. 592), but also a general lien upon all other property belonging to his employer [Civ. Code 1895, § 2792] (Id.).

99. Mitchell v. Monarch Elevator Co. [N. D.] 107 N. W. 1085. Under Rev. Civ. Code 1899, § 4823, a thresher is entitled to a lien on all grain threshed for threshing any particular kind of grain, when done under the same contract and such lien is enforceable between the parties. Id.

1. Virginia Carolina Chemical Co. v. McNair, 139 N. C. 326, 51 S. E. 949.

2. Lien on crops for labor and services. Beckstead v. Griffith [Idaho] 83 P. 764.

3. Claim for farm laborer's lien may be made at any time within one year. Civ. Code 1895, § 2816. Faircloth v. Webb [Ga.] 53 S. E. 592.

4. Rev. Civ. Code 1899, c. 83, gives threshers an enforceable lien thereon upon filing a statement therefor within 30 days from the threshing and such lien exists from commencement of threshing, and hence one purchasing within that time is not an innocent purchaser. Mitchell v. Monarch Elevator Co. [N. D.] 107 N. W. 1085.

5. Statement for thresher's lien. Mitchell v. Monarch Elevator Co. [N. D.] 107 N. W. 1085.

6. A description in the lien that it is intended to cover the entire crop of hay produced for the year is not void for uncer-

thresher's liens it is generally required to show the amount of grain threshed,[7] and to describe the land on which it was grown.[8] In the absence of statute, a defective notice cannot be amended.[9] One seeking to establish a lien must show performance of the contract declared on[10] unless legally excused,[11] and a demand for payment when due.[12] Payments made from the proceeds of the sale of property subject to a lien, must be applied to the lien debt, even though the creditor has no knowledge as to how the funds were acquired.[13]

The complaint in a suit to foreclose must allege all facts necessary to entitle plaintiff to a lien under the statute.[14]

An execution issued upon an affidavit to enforce both a general and a special laborer's lien is not void merely because it cannot be immediately enforced by levy upon the growing crops, but it is to be construed as authorizing a levy as soon as one can legally be made.[15] So, too, the levy is not a nullity because it shows upon its face an unlawful attempt to make an immediate seizure of immature crops, which would render the levy thereon void, where it also shows a levy on other property subject to the laborer's general lien.[16] As in other cases the probata must correspond with the allegata.[17]

The issuance of a warrant of seizure by a magistrate will not exonerate the holder of a lien on crops from liability for the resulting damages where he knows at the time that the debt has actually been paid.[18]

A lien bond executed to secure future advances to aid in the cultivation of a crop for the current year is assignable and all the rights existing or thereafter ac-

tainty. Beckstead v. Griffith [Idaho] 83 P. 764. A lien notice stating that plaintiff "claims a lien upon a certain crop of wheat being about 450 acres in quantity being about 850 number of sacks of wheat" for services is insufficient to constitute a good notice under the statute. 2 Ballinger's Ann. Codes & St. § 5936. Dexter v. Olsen [Wash.] 82 P. 286.

7. A statement for a thresher's lien under Rev. Civ. Code 1899, c. 83, need not state the number of bushels of each kind of grain threshed, where it shows the aggregate number of bushels and definitely states the amount of the lien. Mitchell v. Monarch Elevator Co. [N. D.] 107 N. W. 1085.

8. Description held sufficient. Mitchell v. Monarch Elevator Co. [N. D.] 107 N. W. 1085.

9. Liens for services upon farm products are controlled by 2 Ballingers' Ann. Codes & St. §§ 5957 to 5959, inclusive, and by the provisions of the law as to loggers' liens so far as applicable, and as said provisions stood at the time of the enactment of said sections 5957-5959, and as §§ 5944 and 5945 were not at that time a part of the statute as to loggers' liens, they are not controlling as to liens upon farm products. Dexter v. Olsen [Wash.] 82 P. 286. 2 Ballinger's Ann. Codes & St., § 5904, giving the right to amend mechanics' liens does not apply to a lien for services upon farm products. Id.

10. Laborer's lien. Faircloth v. Webb [Ga.] 53 S. E. 592. Cannot successfully rely on proof of an award by arbitrators fixing amount due him when contract was abandoned. Id.

11. Where evidence showed that cropper was prevented from completing her contract by levy of a valid process against her landlord, it was error to dismiss her actions to foreclose a laborer's lien on ground that she had not completed her contract when she foreclosed her lien. Lewis v. Owens [Ga.] 52 S. E. 333.

12. One seeking to enforce laborer's lien must show demand for wages. Faircloth v. Webb [Ga.] 53 S. E. 592.

13. Barfield v. J. L. Coker & Co. [S. C.] 53 S. E. 170.

14. A complaint alleging that plaintiff performed labor in the production of seven stacks of hay, describing it, is not subject to a general demurrer that the complaint does not state facts sufficient to constitute a cause of action, even though the lien includes other hay raised on the same premises and harvested and stacked by others under a different contract. Beckstead v. Griffith [Idaho] 83 P. 764. A complaint alleging the amount due, that the services rendered were reasonably worth such a sum, and that by settlement it was agreed that this sum was due, and that the same has not been paid, is sufficient in an action on a laborer's crop lien. Id.

15. Faircloth v. Webb [Ga.] 53 S. E. 592. Since claim may be made at any time within one year after the laborer is entitled to payment (Civ. Code 1895, § 2816), execution issued on Aug. 31, upon affidavit to enforce both general and special liens is not open to attack because it commands a levy and sale of any of the employer's goods and chattels "and especially of the crops" upon which the special lien is claimed, which are at the time immature and hence not subject to lawful seizure. Id.

16. Faircloth v. Webb [Ga.] 53 S. E. 592.

17. One levying upon crop under a laborer's lien, cannot assert his lien upon proof of a cropper's contract. Faircloth v. Webb [Ga.] 53 S. E. 592.

18. Barfield v. J. L. Coker & Co. [S. C.] 53 S. E. 170.

cruing under it are carried with it, without specification, if such was the intention of the parties.[19]

§ 3. *Agricultural societies.*[20]—The rights and privileges of agricultural societies depend upon the terms of their charter.[21] As in the case of other corporations their charters may be revoked for a misuse of the powers intrusted to them.[22] Statutes in some states provide for county aid to such societies.[23]

An agricultural society holding a fair, for admission to which a fee is charged, is bound to use reasonable care to keep all parts of its grounds to which patrons are admitted, free from dangers to them.[24] Where a state agricultural society is a department of the state government, it and its officers and board of managers are exempt from liability for torts.[25] The constitutionality of the law organizing such a society is not open to attack in a private action for damages.[26]

AIDER BY VERDICT, ETC.; AID OF EXECUTION; ALIBI, see latest topical index.

ALIENS.

§ 1. **Who are Aliens (98).**
§ 2. **Disabilities and Privileges (98).**
§ 3. **Immigration, Exclusion, and Expulsion (101).** Admission and Exclusion of Immigrants (101). Registration and Certificate (102). Forgery of Certificates (103). Deportation and Procedure Incident Thereto (103). New Trial and Appeal (103).
§ 4. **Naturalization (103).**

§ 1. *Who are aliens.*[27]—A minor dwelling in this country with his mother and naturalized stepfather is not an alien.[28]

§ 2. *Disabilities and privileges.*[29]—The common law disabilities of aliens[30] have been largely mitigated by statutes.[31]

19. Assignment held to carry with it accounts for advances actually made though they were not mentioned. Virginia-Carolina Chemical Co. v. McNair, 139 N. C. 326, 51 S. E. 949.

20. See 5 C. L. 96. For matters relating to agricultural colleges, see Colleges and Academies, 5 C. L. 593.

21. Laws 1905, p. 648, c. 232, creating a corporation under the name of the New England Breeders' Club and authorizing it to hold races, etc., does not empower it to promote or permit betting or pool selling on its grounds. In re Opinion of the Justices [N. H.] 63 A. 505.

22. Where a corporation is formed to encourage agriculture, stock raising, racing, holding exhibitions, book-making, and so forth, and it engages only in racing and gambling, its franchise will be forfeited. State v. Delmar Jockey Club [Mo.] 92 S. W. 185. The court will not take judicial notice of the fact that a racing association is paying annually a certain sum for the purpose of making an agricultural exhibit at the state fair when no such exhibit is made. Gulf, etc., R. Co. v. Stokes [Tex. Civ. App.] 91 S. W. 328.

23. Under Art. 1, c. 2, § 12, Comp. St. 1903, providing that the county board may provide for payment of warrants, issued in favor of agricultural societies, out of the general fund and that such amounts must be included in the annual estimate, such estimate may be made after the paying of the warrant, and it is not necessary to show on appeal to the district court from an order of the county board allowing such aid that the annual estimates preceding the payment, included it, nor that there were funds in the treasury or taxes levied against which a warrant could be drawn. Sheldon v. Gage County Soc. of Agriculture [Neb.] 106 N. W. 474. Where as a condition precedent, the statute requires that such a society shall collect from its member by fee or voluntary subscription not less than $50 each year, and that the amount thus paid shall be certified by the president to the county clerk, a certificate which showed that for a certain year the amount exceeded $50 without stating exact amount and for subsequent years the exact amount was given, was a sufficient compliance with the statute. Id.

24. Higgins v. Franklin County Agricultural Soc. [Me.] 62 A. 708. One crossing the racing track of such a society, is not under the same obligation to be watchful as in crossing a public street, as it was the society's duty to exercise due and reasonable care to keep the track clear and free from danger to its patrons, at all such time as they are invited or permitted to cross it, and while they are thus crossing, and the mere fact that he was not watching is not contributory negligence on his part. Id. The duty of the society in such cases extends not only to its own servants, but it must prevent injury to patrons even from unauthorized drivers on the track. Id.

25. Not liable for damages for false imprisonment. Berman v. Cosgrove [Minn.] 104 N. W. 534, Laws 1903, p. 178, c. 126, X 27, makes state agricultural society a part of the state government. Id. Subject matter is sufficiently expressed in title and act does not pertain to more than one subject. Id.

26. Berman v. Cosgrove [Minn.] 104 N. W. 534.

27. See 5 C. L. 96.

28. United States v. Rodgers, 144 F. 711.

29, 30. See 5 C. L. 97.

An action between two nonresident aliens upon a foreign cause of action is entertained by our courts as a matter of comity and not as a matter of right,[32] and the same applies to auxiliary proceedings brought in aid of the main action;[33] hence a foreign creditor will not be aided by the courts to seize and carry away property upon which a citizen creditor also has a lien although subsequently acquired,[34] especially where the foreign creditor is suing nominally on his own behalf but in fact on behalf of an alien trustee in involuntary bankruptcy, who could not himself obtain any title to a citizen debtor's property,[35] and in an action on a creditor's bill, proof of amount of indebtedness having been received, preference should be given to the citizen's claim.[36] In Wisconsin a nonresident alien is not disqualified or prohibited from acting as executor but his nonresidence furnishes a ground for the exercise of the court's discretion in his appointment or removal.[37]

The location of a mining claim by an alien is not void but only voidable,[38] is free from attack by any one except the government[39] or one claiming in right of the government,[40] and may be cured by his grant to a citizen.[41] A nonresident alien, a subject of Great Britain, may, in New York, "transmit" property to his heirs by descent,[42] and the right to "devise" land includes the right to give it in trust.[43] And since an alien, who is a British citizen, is qualified in New York to hold land for his own use,[44] he may hold it in trust for another,[45] and the alienage of the beneficiary is immaterial.[46] In New York prior to 1893, a nonresident alien might take, but could not hold, inherited real property except by filing a declaration of intention to become a citizen,[47] and on the death of a nonresident alien heir, who had failed to file his declaration, such property escheated to the state ipso facto, no judicial determination being necessary.[48] In Kansas no distinction was made between

31. See post this section. Power to convey lands, see Tiffany, Real Prop, 1158. Alienage as affecting relation of agency, see Clark & S. Agency, 54.

32. A tort-feasor having fled from Germany to Wisconsin and there deposited funds, his German creditor sues him and recovers judgment, but in the meantime a citizen also sues and recovers judgment, the debtor prior thereto having returned to Germany. Disconto Gesellschaft v. Terlinden [Wis.] 106 N. W. 821. The treaties of 1799 and 1828 between the Kingdom of Prussia and the United States have no application to such a case. Id.

33. Garnishment. Disconto Gesellschaft v. Terlinden [Wis.] 106 N. W. 821.

34. Citizen commenced action and garnisheed bank deposit of an alien after an alien creditor had garnisheed the same and obtained judgment in his main action. Disconto Gesellschaft v. Terlinden [Wis.] 106 N. W. 821.

35. Foreign creditor under agreement to turn over to such trustee all funds obtained. Disconto Gesellschaft v. Terlinden [Wis.] 106 N. W. 821.

36. Disconto Gesellschaft v. Terlinden [Wis.] 106 N. W. 821.

37. Comp. Laws 1897, §§ 9310, 9317. Breen v. Kehoe [Mich] 12 Det. Leg. N. 620, 105 N. W. 28.

38, 39. Stewart v. Gold & Copper Co., 29 Utah, 443, 82 P. 475.

40. Matlock v. Stone [Ark.] 91 S. W. 553. Application by grantor of locators to have cloud removed from title raised by adverse claims of subsequent locators and applicants for a patent, the latter setting up alienage of plaintiff's grantors. Id.

41. Stewart v. Gold & Copper Co., 29 Utah, 443, 82 P. 475.

42. Under Real Property Law, §§ 5, 5a, 7, granting rights to foreigners to "take, acquire, hold, and convey" reciprocal to those granted by his country to citizens of the United States. Haley v. Sheridan, 107 App. Div. 17, 94 N. Y. S. 864, rvg. 46 Misc. 506, 95 N. Y. S. 42.

43. Hayden v. Sugden, 48 Misc. 108, 96 N. Y. S. 681.

44. Under Real Property Law, § 5a, granting same rights to foreigners in regard to real estate as their county grants citizens of the United States, the British Parliament (St. 33 Vict., p. 166, c. 14, § 2) having granted aliens the same rights to take, hold, and dispose of property as subjects. Hayden v. Sugden, 48 Misc. 108, 96 N. Y. S. 681.

45, 46. Hayden v. Sugden, 48 Misc. 108, 96 N. Y. S. 681.

47. McCormack v. Coddington [N. Y.] 77 N. E. 979. Laws 1893, c. 207, p. 365, relating to the ability of nonresident aliens to take, hold, convey, and devise land, is not retroactive. Id., rvg. 109 App. Div. 741, 96 N. Y. S. 571. Had it been retroactive it would have been unconstitutional because passed by less than two thirds vote and disposing of public property passed by escheat. Id.

48. McCormack v. Coddington [N. Y.] 77 N. E. 979, rvg. 109 App. Div. 741, 96 N. Y. S. 571. In such case he had no title to inherited land, which his heirs can take, though citizens of the United States. Id. A nonresident alien heir could not inherit land in 1888 from a nonresident alien heir who had inherited the premises in 1876 from a naturalized citizen and had never filed his dec-

aliens and citizens with reference to the purchase, enjoyment, or descent of property up to 1888,[49] and a title vested prior thereto was not affected by subsequent legislation,[50] nor did the constitutional amendment of that year providing for regulation by law of the rights of aliens in real property change the law of descent and distribution.[51] As governing questions of inheritability, it is a presumption of fact and not of law [52] that one was domiciled where he died especially if he was an alien and that was his original domicile,[53] but when the fact of domicile has been resolved by the omission of a finding thereon in a special verdict these presumptions no longer obtain.[54]

While aliens are not qualified for jury service,[55] yet a verdict is not invalid because an alien served on the jury, no objection having been seasonably raised.[56]

laration. Stewart v. Russell [N. Y] 77 N. E. 983. Laws 1877, c. 111, p. 117, that alienage shall not be a ground for questioning or impeaching an acquired title, applies only to cases in which title has been actually acquired. McCormack v. Coddington [N. Y.] 77 N. E. 979.

49. Const. Bill of Rights, § 17. Sparks v. Friedrich [Kan.] 82 P. 463. Deceased died in 1873, unmarried, and both parents dead, one having been a citizen and the other an alien; held that the alien heirs of the latter inherit equally with the heirs of the citizen parent. Id. Provision of treaty between United States and Hanseatic Republic of Bremen, negotiated in 1827, to the effect that three years shall be granted aliens to dispose of real estate which laws prevent them from inheriting, inapplicable, there being no disability. Id.

50. Title vested in aliens in 1873 not affected by constitutional amendment of 1888 permitting regulation of rights of aliens to hold and inherit real property, and laws passed thereafter. Sparks v. Friedrich [Kan] 82 P. 463.

51. State v. Ellis [Kan.] 83 P. 1045. Resident citizen half-sisters of a resident citizen who died intestate, leaving neither widow nor children, and whose parents died before him, nonresident aliens, inherit immediately and directly the lands of the deceased in this state. Id.

52, 53. Donaldson v. State [Ind.] 78 N. E. 182.

NOTE. Presumptions of fact as to domicile of alien: (1) A man is presumed to be domiciled where he is found unless he is shown to be there for some temporary purposes. (2) A stronger presumption exists that a man is domiciled where he dies. (3) On the return of an alien to his domicile of origin his original domicile instantly reverts. (4) In doubtful cases the original domicile is considered the true one." Citing Dicey on Conflict of Laws [Am. Ed.] pp. 132, 133; The Bernon, 1 C. Rob. Adm. 102, 104; Kennedy v. Ryall, 67 N. Y. 379, 386; Ryall v. Kennedy, 4 N. Y. Super. Ct. 347, 361; March v. Hutchinson, 2 Bosanquit & Puller, 23, note; Rogers v. The Amado, Newb. 400, Fed. Cas. No. 12,005; Butler v. Farnsworth, 4 Wash. C. C. 101, Fed. Cas. No. 2,240; Elbers v. United Ins. Co., 16 Johns. [N. Y.] 128, 133; Bradstreet v. Bradstreet, 18 D. C. (7 Mackey) 229; Clough v. Kyne, 40 Ill. App. 234, 236; Ennis v. Smith, 14 How. [U. S.] 400, 423, 14 Law Ed. 472; Anderson v. Watt, 138 U. S. 694, 706, 34 Law. Ed. 1078; United States v. Chong Sam, 47 F. 878, 886; Greenfield v. Camden, 74 Me. 56, 64; Liscomb v. N. J. R. Co., 6 Lans. [N. Y.] 75, 77; Horne v. Horne, 31 N. C. 99, 108; Kellar v. Baird, 5 Heisk. [Tenn.] 39, 46; Venable v. Paulding, 19 Minn. 488, 495 (Gil. 422); Mowry v. Latham, 17 R. I. 480, 481, 23 A. 13; Guier v. O'Daniel, 1 Bin. [Pa.] 349, 351, note, 1 Am. Leading Cases (Hare & Wallace) 732, 734, 753; Haskins v. Matthews, 8 Deg. M. & G. 13, 26, 35 Eng. L. & Eq. 532, 540; Haldane v. Eckford, L. R. 8 Eq. 631, 641; Johnston v. Beattie, 10 Clark & F. 42, 138; Wharton on Conflict of Laws [2d Ed.] § 55a; [3d Ed.] § 55 1-2 and cases cited; Atty. General v. Winans, 85 Law T. (N. S.) 508, 65 J. P. 819; Anderson v. Watt, 138 U. S. 694, 706, 34 Law. Ed. 1078; Tracy v. Tracy, 62 N. J. Eq. 807, 48 A. 533; Hairston v. Hairston, 27 Miss. 704, 61 Am. Dec. 530; Hindman's Appeal, 85 Pa. 466, 468; Anderson v. Laneville, 9 Moore P. C. 325, 334; President, etc. v. Drummond, 33 Beav. 449, 452, 33 Law J. Ch. (N. S.) 501, 503; King v. U. S., 27 Ct. Cl. 529, 533; Reed's Appeal, 71 Pa. 378; In re Bruce, 3 Tyr. 475, 486, 2 C. J. 436; King v. Foxwell, L. R. 3 Ch. Div. 518, 521; Capdevielle v. Capdevielle, 21 Law T. (N. S.) 660, 18 Wkly. Rep. 107; White v. Brown, 1 Wall. Jr. 217, 265, Fed. Cas. No. 17,538; Charles Green's Son v. Salas, 31 F. 106, 112; U. S. v. Chong Sam, 47 F. 878, 886; First Nat. Bank v. Balcom, 35 Conn. 351, 357; In re Wrigley, 8 Wend. [N. Y.] 134, 140; Sheldon v. Forsman, 17 Lanc. L. Rev. 85, 87, 14 York Leg. Reg. 102; Marks v. Marks, 75 F. 321, 329; La Virginie, 5 C. Rob. Adm. 98, 99; The Ann Green, 1 Gall. 274, 286, Fed. Cas. No. 414; Catlin v. Gladding, 4 Mason, 308, Fed. Cas. No. 2,520; Prentiss v. Barton, 1 Brock. 389, Fed. Cas. No. 11,384; Hallet v. Bassett, 100 Mass. 167, 170; Lord v. Calvin, 4 Drew, 366, 422; The Venus, 8 Cranch [U. S.] 253, 280, 3 Law. Ed. 553; In re Walker, 1 Low. 237, 238, Fed. Cas. No. 17,061; Barnham v. Rangeley, 1 Woodb. & M. 7, Fed. Cas. No. 2,176; State v. Hallet, 8 Ala. 159, 161; Miller's Estate, 3 Rawle [Pa.] 312, 319, 24 Am. Dec. 345; Udny v. Udny, 2 Ac. App. 1,677, 1,683; Munroe v. Munroe, 7 Clark & F. 842, 876; Colville v. Lander, Dictionary of Decisions, p. 14,964; The Indian Chief, 3 C. Rob. Adm. 17; Goods of West, 6 Jur. (N. S.) 831; Price v. Price, 156 Pa. 617, 27 A. 291.—From Donaldson v. State [Ind.] 78 N. E. 182.

54. An alien decedent had been for years domiciled in the United States but after returning to his native land shortly died there. Donaldson v. State [Ind.] 78 N. E. 182.

55. See Jury, 6 C. L. 320.

56. Schwantes v. State [Wis.] 106 N. W. 237.

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§ 3. *Immigration, exclusion, and expulsion.*[57] *Admission and exclusion of immigrants.*[58]—Under the law requiring every alien immigrant to pay a head tax[59] but exempting such as are merely in transit through the United States and providing that the commissioner general of immigration may establish proper rules and regulations, best calculated to enforce the law and prevent fraud,[60] a regulation requiring carriers of transient immigrants to deposit the head tax until proof of the alien's departure from United States territory is furnished to the appropriate immigration officer, is proper.[61] An alien having acquired a bona fide residence[62] may leave this country and re-enter it with the same freedom as a citizen,[63] and in contracting to return and labor is not within the Alien Contract Labor law.[64]

Under the Chinese Exclusion Acts the question whether minor sons, claiming the right of entry because their fathers are residents, should be admitted, is a question for the immigration officers,[65] and their decision refusing admission to alien immigrants is final, unless reversed on appeal.[66] The decision of the board of in-

57. See 5 C. L. 98.

58. See 5 C. L. 99.

59. Act March 3d, 1903, c. 1012, § 1, 32 Stat. 1213. Stratton v. Oceanic Steamship Co. [C. C. A.] 140 F. 829.

60. Act March 3, 1903, c. 1012, § 22. Stratton v. Oceanic Steamship Co. [C. C. A.] 140 F. 829.

61. Not an alteration or amendment of the provision exempting transient immigrants from the head tax. Stratton v. Oceanic Steamship Co. [C. C. A.] 140 F. 829. Requiring proof that alien immigrant "has passed by direct and continuous journey through the United States," is not an unreasonable provision. Id. Where under such regulation, the steamship company failed to show that the immigrants had even left the City of San Francisco, the collector might retain the head tax deposited. Id.

62. Living in the United States four years, taking out first papers and engaging in business, held evidence of bona fides. In re Buschbaum, 141 F. 221.

63. Although having contracted trachoma on a visit to his native land. In re Buschbaum, 141 F. 221.

64. Returning under a contract of labor. United States v. Aultman Co., 143 F. 922. A German immigrant coming to the United States when young, becoming domiciled here and remaining continuously so for twelve years, although never being naturalized, then going for two weeks into Canada and thence returning under a contract for labor, ostensibly to break a strike. Id. Cannot be excluded under Act March 3, 1903 (32 Stat. 1214, c. 1012, §§ 4, 5). Id.

65. Ex parte Wong Sang, 143 F. 147.

66. Where two Chinese minors seek admission on the ground that their fathers are residents and the decision of the immigrant officer is adverse to them, no abuse of discretion being shown, and the appeal from his decision having been abandoned, it is final and conclusive, not to be interfered with even by the proof of the relationship. Ex parte Wong Sang, 143 F. 147.

NOTE. Conclusiveness of decision adverse to a claim of citizenship: The administration by congress of matters within its exclusive control is not, under the Constitution, necessarily cognizable by the courts. Murray v. Hoboken Co., 18 How. [N. S.] 272, 284, 15 Law. Ed. 372. If Congress vests this function in administrative officers, their jurisdiction is limited only by the authority conferred and, within this jurisdiction, they may be made the final judges of the facts on which their decisions are based. Burfenning v. Chicago, etc., R. Co., 163 U. S. 321, 41 Law. Ed. 175; Gardner v. Bonestell, 180 U. S. 362, 45 Law. Ed. 574; Public Clearing House Co. v. Coyne, 194 U. S. 498, 48 Law. Ed. 1092; Bates, Guild & Co. v. Payne, 194 U. S. 106, 48 Law. Ed. 894; Buttfield v. Stranahan, 192 U. S. 470, 48 Law. Ed. 525; Benson v. McMahon, 127 U. S. 457, 32 Law. Ed. 234. The admission or expulsion of aliens is such a matter and comes wholly within the control of congress. And, therefore, the finding of facts on which the decision of their admissibility is based may be put exclusively in the hands of the administrative officers. Ekiu v. U. S., 142 U. S. 651, 35 Law. Ed. 1146; United States v. Williams, 194 U. S. 279, 48 Law. Ed. 979; Fong Yue Ting v. U. S. 149 U. S. 698, 37 Law. Ed. 905; Fok Yung Yo. v. U. S., 185 U. S. 296, 46 Law. Ed. 917; Lem Moon Sing v. U. S., 158 U. S. 538, 39 Law. Ed. 1082. Where citizenship is not claimed, the secretary's decision is final in all cases. See authorities cited and In re Lee Gee Ling, 85 F. 635. Except where favorable to the right of entry. In re Ki Sing, 30 C. C. A. 451; In re Li Foon, 80 F. 881. And the constitutionality of the power of the Secretary of Commerce to decide in cases where the applicant is admittedly an alien, seems to be settled. Ekiu v. U. S., 142 U. S. 651, 659, 35 Law. Ed. 1146. Congress may prescribe rules of evidence. United States v. Williams, 83 F. 997; Fong Yue Ting v. U. S., 149 U. S. 698, 37 Law. Ed. 905. It has also been held that an applicant claiming citizenship cannot resort to the Federal courts before he has prosecuted an appeal to the secretary. United States v. Sing Tuck, 194 U. S. 161, 48 Law. Ed. 917. But it is well established that where the facts in question go to the jurisdiction of the officers, the finding of facts may be reviewed by the courts irrespective of legislative sanction. Morton v. Nebraska, 21 Wall. [N. S.] 660, 22 Law. Ed. 639; Gonzales v. Williams, 192 U. S. 1, 48 Law. Ed. 317; In re Fassett, 142 U. S. 479, 35 Law. Ed. 1086; School of Magnetic Healing v. McAnnulty, 187 U. S. 94, 47 Law. Ed. 90. It is clear that the constitutional guaranties relating to the trial of criminals have

quiry unanimously in favor of admitting an alien is final as to the courts only,[67] and a second hearing may be ordered by the Secretary of Commerce and Labor at any time within three years, as a result of which they may be deported.[68] Carriers of immigrants are not insurers of their safe-keeping in case of detention or ejection, and if any escape without their fault or negligence, they cannot be held liable therefor.[69] The Chinese exclusion laws[70] were not abrogated by the expiration of our treaty with China in 1904,[71] but were continued in operation by force of special legislations.[72]

Registration and certificate.[73]—A duplicate certificate need not be an exact copy of the original as to signature.[74]

no application, as the inquiry is not a criminal proceeding (Fong Yue Ting v. U. S., 149 U. S. 698, 37 Law. Ed. 905), but the constitutional provisions against unreasonable seizures may apply (United States v. Wong Quong Wong, 94 F. 832). It is a serious question whether congress has not invested executive officials with power properly belonging to the judiciary and contravening the requirment of due process of law. It may be that the power to exclude or expel persons admittedly aliens is political in its nature, and the official's decision in regard to such persons is due process of law. Japanese Immigrant Case, 189 U. S. 86, 47 Law. Ed. 721. But if the applicant be in fact a citizen of the United States, he cannot be excluded as a punishment for crime. See In re Sing Tuck, 126 F. 386, 388; Lee Sing Far v. U. S., 94 F. 834, 836. It would seem, therefore, that the determination of his constitutional right of citizenship is a judicial and not an executive function. The statute making the decision of facts by the administrative officers final refers by its words to aliens. 28 U. S. St. at L. 390. In Gonzales v. Williams, 192 U. S. 1, 48 Law. Ed. 317, the court determined that, a citizen of Porto Rico not being an alien within the meaning of the act of 1891, the commissioner of immigration consequently had no jurisdiction to detain and deport her by deciding a mere question of law to the contrary. Gonzales v. Williams, 192 U. S. 1, 48 Law. Ed. 317. In the notable case of United States v. Ju Toy, 198 U. S. 253, 49 Law. Ed. 1040, 5 C. L. 99, n. 71, the decision of the Secretary of Commerce and Labor affirming the denial by immigration officers of the right of a person of Chinese descent to enter the United States was held conclusive on the Federal courts under the act of August 18, 1894. It was held squarely that the decision of the Commissioner of Immigration, affirmed by the Secretary of Commerce and Labor, that the petitioner was an alien, could not be reviewed by the courts on habeas corpus though the petitioner alleged citizenship by birth, and had exhausted his administrative remedy. This case, analogous to two earlier decisions must be considered good law. United States v. Wong Kim Ark, 169 U. S. 649, 42 Law. Ed. 890; Chin Bak Kan v. U. S., 186 U. S. 193 46 Law. Ed. 1121. But see dissenting opinion by Mr. Justice Brewer and also United States v. Gee Mun Sang, 93 F. 365; United States v. Sing Tuck, 194 U. S. 161, 48 Law. Ed. 917, does not decide the question indicated by the title of this annotation. To support the Ju Toy case on the ground of jurisdiction and take it out of the rule of the Gonzales decision, the statute would have to be construed in connection with the Exclusion Acts, as giving jurisdiction to the administrative officers over any person of Chinese race, whether an American citizen or not, coming into the United States. This would seem to be a radical departure from the decision (United States v. Wong Kim Ark, 169 U. S. 649, 42 Law. Ed. 890) which held that a person of Chinese race, born in the United States was a citizen under the Fourteenth Amendment, and that the Chinese Exclusion Acts did not apply to him. A tendency to limit that, it is true, was shown by the supreme court (United States v. Sing Tuck, 194 U. S. 161, 48 Law. Ed. 917) where the writ was denied on the ground that even a citizen must first exhaust his administrative remedy. The decision in the Ju Toy case would thus seem, by extending the jurisdiction of the administrative officers to all persons of Chinese race, to have subjected a certain class of citizens to the control of the administrative officers on the presumption that no person of Chinese race is a citizen, and to have put this class of citizens in jeopardy of being kept out of their country by the summary proceedings of the administrative authorities. It is suggested that this case goes farther towards emphasizing the development of the administrative arm of the government than any other decision that has appeared in recent years. See, also, notes in 15 Yale L. J. 97; 19 Harvard L. R. 60; 5 Columbia L. R. 537.

67. Act March 3, 1903, c. 1012, §§ 24, 25. Pearson v. Williams, 202 U. S. 281, 50 Law. Ed. ---.

68. Act March 3, 1903, c. 1012, § 21. Pearson v. Williams, 202 U. S. 281, 50 Law. Ed. ---.

69. Japanese immigrants before examination, removed from ship board, to Quarantine Island and put in custody of inspection officers, and escaped. Hackfeld & Co. v. United States [C. C. A.] 141 F. 9. Under penal statutes making it the duty of owners, masters, and agents of ships bringing alien immigrants to the United States to prevent their landing at any other time or place than designated by the proper officers or at all if rejected. Act March 3, 1891, c. 551, §§ 1, 10. Id.

70. Act Sept. 13, 1888, c. 1015 (25 Stat. 477, 479).

71. Treaty with China of Dec. 8, 1894, excluding Chinese for 10 years. Hong Wing v. U. S. [C. C. A.] 142 F. 128.

72. Act Apr. 29, 1902, c 641 (32 Stat. 176) as amended by Act Apr. 27, 1904, c. 1630, § 5 (33 Stat. 428).

73. See 5 C. L. 99.

74. Forging the name of a subsequent collector on duplicates when another had

Forgery of certificates.—Counts charging forgery of duplicate certificates may be properly joined with counts charging their utterance.[75] In order to charge the offense of forgery and uttering Chinese duplicate certificates, it is not necessary to charge that there had been in fact an original certificate issued to the person named in the fraudulent duplicate, nor to allege that such original had been proven to be lost.[76] It is sufficient to say that the actual delivery was to persons unknown to the grand jury coupled with the averment that it purported to have been issued to a certain Chinese person named therein.[77] A charge accusing defendant with knowingly issuing "false and fraudulent" certificates of residence, though not directly alleging forgery, is sufficient to admit proof that the signature to such certificate was forged.[78] In such a prosecution, it is proper to show frequent conferences between the accused and other implicated Chinamen.[79] Other forged and fraudulent certificates in the handwriting of the accused are admissible, even though not mentioned in the indictment, as showing intent;[80] and it is competent to show that the accused forged letters asserting the genuineness of the certificates and contrary to orders, failed to send the book of originals on demand to the inspector.[81]

Deportation and procedure incident thereto.[82]—A Chinaman who is a merchant under the Chinese exclusion acts, before, during, and for a long time after, the time in which Chinese laborers were required to register in order to be entitled to remain in the United States, is not liable to deportation on ceasing to remain a merchant and becoming a laborer.[83]

New trial and appeal.[84]—A commissioner exercises special authority in Chinese cases and after a hearing regularly had and decision in favor of the Chinaman, no fraud or abuse on part of commissioner being shown, no right of rearraignment exists in the Federal courts.[85] Where the record shows that proceedings for the exclusion of an alien were had against an American citizen merely returning from a visit to a foreign country, and that the question of citizenship was not passed upon by the commissioner of immigration, nor by the Secretary of Commerce and Labor, nor certified to the latter, no issue of finality of action on the part of the commissioner arises.[86]

§ 4. *Naturalization.*[87]—Acts organizing territories, or admitting territories to statehood, do not admit aliens to citizenship of themselves,[88] nor can a state, by extending to him whatsoever rights and privileges within its own borders, make an alien a citizen of the United States.[89] Although an alien for a long time exercised the rights of citizenship as to voting and holding office, citizenship will not be inferred where no declaration of intentions was ever filed by the alien himself or his stepfather while he was a minor.[90] An order admitting an alien to citizenship is a judgment of the same dignity as any other judgment of a court having jurisdiction,[91] hence an order made three years later vacating the original order cannot be sustained as a proceeding by motion,[92] nor as a suit in equity, no complaint having ever been filed,[93] nor could a written consent from the lien to the annulling order,

signed the originals, nevertheless within Act May 5, 1892, c. 60 (27 Stat. 25). Dillard v. U. S. [C. C. A.] 141 F. 303.

75, 76, 77, 78, 79, 80, 81. Dillard v. U. S. [C. C. A.] 141 F. 303.

82. See 5 C. L. 100.

83. United States v. Seid Bow, 139 F. 56.

84. See 5 C. L. 100.

85. United States v. Yueng Chu Keng, 140 F. 748.

86. United States v. Rodgers, 144 F. 711.

87. See 5 C. L. 101.

88. Mayer's Case, 38 Ct. Cl. 553. But see **note Naturalization by accession of territory,** 5 C. L. 587.

89, 90. Mayer's Case, 38 Ct. Cl. 553.

91. In re Tinn [Cal.] 84 P. 152.

92. Code Civ. Proc. § 473, authorizing a motion to set aside a judgment within 6 months after its rendition. In re Tinn [Cal.] 84 P. 152.

93. Under Code Civ. Proc. § 405, requiring a complaint in civil actions. In re Tinn [Cal.] 84 P. 152.

admitting fraud in the original transaction, be construed either as a complaint in a suit in equity [94] or as conferring authority on the court to make the vacating order after the lapse of the statutory period.[95] Conceding that a judgment of a court admitting an alien to citizenship is essential,[96] such judgment may be an oral order commanding that a certificate of naturalization be issued to an alien and recorded by the clerk in the minutes of the court,[97] and a rebuttable presumption arises in favor of a court with a judge, clerk and seal, that it is a court of record with common law jurisdiction, authorized to admit aliens to citizenship within the meaning of the United States statutes.[98] A state cannot intervene to set aside a judgment of one of its courts admitting an alien to citizenship although procured by fraud.[99] A nunc pro tunc order of naturalization cannot be entered after the term of original application has expired, and there is nothing in the record to show that such an order ever was made or pending.[1]

The forging of a certificate of naturalization or the uttering, selling, or disposing of a false or forged certificate of naturalization, is a crime no matter by whom or when committed.[2]

ALIMONY.

§ 1. Nature and Purpose of the Allowance (104).
§ 2. Jurisdiction and Power to Award (105).
§ 3. Stage or Condition of the Divorce Proceedings (105).
§ 4. Reasons for and Against (106). Permanent Allowances (106).
§ 5. Amount, Character, and Duration (107). Division of Property (108). Support of Child (108).
§ 6. Procedure and Practice (108).. Temporary Allowance (108). Permanent Award (110).
§ 7. The Decree; Its Enforcement and Discharge (110). Vacating or Modifying; Discharge (110). Attachment of the Person (112). Execution (113). Subjection of Property (113).
§ 8. Suits for Annulment and Actions for Separate Maintenance (114).

§ 1. *Nature and purpose of the allowance.*[3]—Alimony is that provision which the law makes for the support of the wife out of the estate of the husband after separation, in lieu of his common-law obligation to support her as wife if they should have continued living together,[4] or in enforcement of the duty to support. Being so founded, it cannot in most jurisdictions be recovered after the death of the husband.[5] Alimony proper does not include an order to pay for the support of children.[6]

94. In re Tinn [Cal.] 84 P. 152.
95. Code Civ. Proc. § 473. In re Tinn [Cal.] 84 P. 152.
96. State v. Webber [Minn.] 105 N. W. 490.
97. State v. Webber [Minn.] 105 N. W. 490. Affidavits examined and held to establish conclusively that relator's father was the person shown to have been naturalized. Id.
98. Applied to common pleas court of Meigs County, Ohio. State v. Webber [Minn.] 105 N. W. 490.
99. Peterson v. State [Tex. Civ. App.] 13 Tex. Ct. Rep. 674, 89 S. W. 81.
1. Original order alleged to have been made in 1863, in 1897 a nunc pro tunc order asked for on oral evidence only, the record failing to show any trace of the original order. Gagnon's Case, 38 Ct. Cl. 10.
2. Rev. St. § 5424. United States v. Raisch, 144 F. 486.
3. See 5 C. L. 101.
4. Muir v. Muir [Ky.] 92 S. W. 314.
5. Wilson v. Hinman, 182 N. Y. 408, 75 N. E. 236. A former holding that a mortgage to secure alimony may be enforced after the death of the husband has been reversed in New York. Wilson v. Hinman, 182 N. Y. 408, 75 N. E. 236, rvg. 99 App. Div. 41, 90 N. Y. S. 746.

Note: This accords with the better reason and follows the line of reasoning shown in 5 C. L. 102, n. 18. It had been the settled rule in New York that when there was some provision in the decree to perpetuate the payments, it could be enforced after the husband's death. See Wilson v. Hinman, 99 App. Div. 41, 90 N. Y. Supp. 746; Burr v. Burr, 10 Paige [N .Y.] 20; Id., 7 Hill [N. Y.] 207; Galusha v. Galusha, 43 Hun [N. Y.] 181; Johns v. Johns, 60 N. Y. S. 865; Id., 166 N. Y. 613, 59 N. E. 1124. It is the rule in some states that when there is a plain intent for the alimony to continue after their joint lives evidenced in the decree it will be enforced. Lennahan v. O'Keefe, 107 Ill. 620; O'Hagan v. O'Hagan, 4 Iowa, 509; Miller v. Miller, 64 Me. 489. **Contra.** Martin v. Martin, 33 W. Va. 695, 11 S. E. 12. If an agree-

§ 2. *Jurisdiction and power to award.*[7]—Jurisdiction relative to divorce and alimony is given by statute, and every power exercised by the court with reference thereto must find its source in the statute.[8] Jurisdiction of divorce proceedings[9] carries with it power to award alimony but though the jurisdiction is dependent on divorce proceedings, discontinuance thereof does not deprive the court of power to enforce orders already made.[10] In New Jersey jurisdiction for limited divorce and alimony may be obtained against a nonresident by constructive service,[11] and the decree for alimony enforced by sequestration of property within the jurisdiction,[12] but in Illinois it is otherwise held.[13] In Delaware the superior court and the court of general sessions have concurrent jurisdiction relative to the maintenance of children.[14] In divorce proceedings the court has jurisdiction to adjust the property rights of the parties[15] regardless of antenuptial agreements to the contrary,[16] and where a voluntary division has been made by deed the court may, though refusing a divorce, confirm the division thus made.[17] Asking relief on the merits waives questions as to jurisdiction of the person though the appearance is special.[18]

§ 3. *Stage or condition of the divorce proceeding.*[19]—The fact that a plaintiff moves to discontinue his action for divorce does not deprive the court of jurisdic-

ment for alimony to continue after the husband's death is incorporated into the decree, it will be binding. Stratton v. Stratton, 77 Me. 373, 52 Am. Rep. 779; Storey v. Storey, 125 Ill. 608, 18 N. E. 329, 8 Am. St. Rep. 417, 1 L. R. A. 320. It would seem that since alimony is in lieu of marital maintenance it should continue only during the joint lives of the parties, or until the remarriage of the wife, and this is the rule in nearly all the states in the absence of an agreement or a plain intent to the contrary in the decree. Knapp v. Knapp, 134 Mass. 353; Brown v. Brown, 38 Ark. 324.—From 4 Mich. L. R. 235.

6. Different remedies apply to it. Rush v. Flood, 105 Ill. App. 182.

7. See 5 C. L. 103.

8. Cizek v. Cizek [Neb.] 107 N. W. 1012.

9. See Divorce, 5 C. L. 1026.

10. Schulz v. Schulz [Wis.] 107 N. W. 302

11. Distinguishing actions for absolute divorce. Divorce act 1874, § 19 (2 Gen. St. p. 1269) P. L. 1902, p. 507, § 19. McGuinness v. McGuinness [N. J. Eq.] 62 A. 937.

12. McGuinness v. McGuinness [N. J. Eq.] 62 A. 937.

13. While a court may grant a divorce on service in another state it cannot on such service allow alimony or counsel fees or grant complainant an interest in real estate in an other state, defendant having no property within the state and not appearing in the suit. Proctor v. Proctor, 215 Ill. 275, 74 N. E. 145.

14. Where the superior court in granting a divorce awarded the custody of a child to the plaintiff wife but made no provision for its maintenance the court of general sessions had jurisdiction to compel the father to support the child under c. 230, 18 Laws Del. (Rev. Code 1852, amended in 1893, p. 971). State v. Redmile [Del.] 63 A. 575.

15. The court having jurisdiction of the parties its authority to grant a divorce carries with it the power to adjust the property rights of the parties with respect to personalty within its jurisdiction. Court could allow plaintiff the household furniture in her possession at the time of the decree. Hays v. Hays [Neb.] 106 N. W. 773. Under Comp. Laws, § 8640, authorizing a division of certain classes of property in a divorce suit, the court has power to determine what property belongs to the husband and to divide the same between the parties. Carnahan v. Carnahan [Mich.] 12 Det. Leg. N. 1023, 107 N. W. 73. Complainant could not contend that a decree requiring her to pay over to her husband a portion of a trust fund was void because the court could not enforce a trust in a divorce proceeding where she joined in the trial of both questions and neither party appealed. Id. Where an absolute divorce is granted the wife for the adultery of the husband the court may make her a just allowance out of his personalty under § 4807, Gen. St. 1894, in addition to the dower interest in his land which vests in her without a judgment by virtue of § 4808. Sodini v. Sodini [Minn.] 104 N. W. 976.

16. Watson v. Watson [Ind. App.] 77 N. E. 355. An ante nuptial contract providing that the husband shall pay the wife $200 in case of separation is contrary to public policy and void. Id.

17. Where, at the husband's suggestion, a division of the property was made between him and his wife, and the agreement carried out by written conveyance, and thereafter there was a dispute as to the ownership of the property it was held proper to award the wife the property conveyed to her though she was not entitled to a divorce. Healey v. Healey [Ark.] 90 S. W. 845.

18. In an action for divorce a mensa et thoro the court granted the divorce, awarded custody of the children to complainant, and fixed the amount of alimony all upon personal service on defendant in another state. Defendant prayed that the whole decree be set aside and complainant's bill dismissed for want of service within the state Held, he was not entitled to any relief upon his petition. McGuinness v. McGuinness [N. J. Eq.] 62 A. 937.

19. See 5 C. L. 103.

tion to allow defendant a balance of temporary alimony due under previous orders.[20] For the purpose of the allowance of alimony, a case is deemed pending until disposed of on final appeal.[21]

§ 4. *Reasons for and against. Provisional allowances.*[22]—Independent of statute the allowance rests in discretion,[23] and will not be disturbed unless the discretion has been abused.[24] It stands upon the ground of necessity,[25] hence it should not be allowed where the wife has resources of her own sufficient to enable her to maintain herself and conduct the suit,[26] and where the statute authorizes such allowance as may be necessary from time to time, the sum awarded should not materially exceed the present necessities of the wife.[27] A wife having obtained a judgment of separation awarding her alimony, the court cannot, while such judgment remains in force, award her alimony pendente lite in a subsequent action by her for absolute divorce,[28] but an allowance of temporary alimony to the wife pending an unsuccessful divorce suit by the husband is no bar to a similar allowance pending a second suit by him on another ground.[29] Where in a suit for divorce brought by the husband the wife denies on oath a charge of adultery, she will be allowed counsel fees for the purpose of defense though the husband submits affidavits in support of the charge unless it clearly appears beyond a reasonable doubt that his ultimate success is inevitable,[30] and where such a charge is denied and the wife sets up a counterclaim asking a divorce, counsel fees will be allowed to enable her to meet the charge though she has already obtained a judgment of separation and alimony in a previous action.[31] The fact that a wife has obtained a divorce in another state does not bar her right to counsel fees in an action for divorce brought by the husband in a state where the wife's decree is not binding.[32]

Permanent allowances.[33]—Permanent alimony should not be given in all cases, but only where from all the circumstances it is equitable to do so.[34] It ordinarily will not[35] but in some cases may be[36] granted to a wife for whose fault divorce is

20. Schulz v. Schulz [Wis.] 107 N. W. 302.

21. Where, after a judgment of separation in favor of the wife had been affirmed by the appellate division and the court of appeals, the case was appealed to the United States supreme court to review the judgment of the appellate division, and a supersedeas bond was given, the case was still pending so that alimony and counsel fees could properly be allowed under Code Civ. Proc., § 1769, authorizing alimony pendente lite. Haddock v. Haddock, 109 App. Div. 502, 96 N. Y. S. 522. The trial court has the power to require the husband to pay his wife a sum sufficient to enable her to prosecute an appeal in a divorce suit. Morgan v. Morgan, 25 App. D. C. 389.

22. See 5 C. L. 104.

23. Brady v. Brady [Ala.] 39 So. 237; Smith v. Smith [Ga.] 53 S. E. 958.

24. Smith v. Smith [Ga.] 53 S. E. 958. Refusal sustained where the evidence was conflicting as to whether plaintiff left her husband for his cruelty or voluntarily. Pearson v. Pearson [Ga.] 54 S. E. 194.

25. Stark v. Stark, 115 Mo. App. 436, 91 S. W. 413.

26. Stark v. Stark, 115 Mo. App. 436, 91 S. W. 413. Abundant resources. Lambert v. Lambert, 109 Mo. App. 19, 84 S. W. 203. Alimony pendente lite in an action for aliomny without divorce should be allowed only when the wife is without means. Brady v. Brady [Ala.] 39 So. 237.

27. Where wife had $800 an allowance of $225 should be reduced to $100 for the present. Stark v. Stark, 115 Mo. App. 436, 91 S. W. 413.

28. Schmalholz v. Schmalholz, 111 App. Div. 543, 98 N. Y. S. 510.

29. Plea of res adjudicata without merit. Bishop v. Bishop [Ga.] 52 S. E. 743.

30. Dean v. Dean, 48 Misc. 149, 96 N. Y. S. 472.

31. Schmalholz v. Schmalholz, 111 App. Div. 543, 98 N. Y. S. 510.

32. That defendant had obtained a divorce in another state not binding in New York did not bar her right to counsel fees in a subsequent action by the husband against her in New York. Dean v. Dean, 48 Misc. 149, 96 N. Y. S. 472. That the petition did not allege that she was plaintiff's wife was not material where such fact was shown by the pleadings. Id.

33. See 5 C. L. 105.

34. Neander v. Neander [Colo.] 84 P. 69.

35. The husband being found to be the innocent and injured party, and a divorce being granted him, no alimony is permissible to the wife. Cole v. Cole, 115 Mo. App. 466, 91 S. W. 457.

36. Under equitable circumstances, however, it is proper to award alimony though a divorce is granted for the fault of the wife. Where for six years the wife did all the housework but received from the husband no clothing or money. Stacker v. Stacker, 117 Ill. App. 549.

granted. A wife who has not returned or offered to return the consideration received by her under a void contract for the procurement of a divorce cannot secure indirectly, through an allowance for alimony in divorce proceedings, what would be denied her upon a direct application for cancellation or enforcement of the contract.[37] Under statutes allowing alimony out of the husband's estate it is not essential to an award that the husband should have a present fee simple estate.[38]

§ 5. *Amount, character, and duration.*[39]—The amount of alimony to be allowed is within the sound judicial discretion of the trial judge.[40] In determining upon a proper award on the rendition of a decree of divorce the size of the husband's estate, his probable earnings and accretions of wealth from other sources, the age, health, station, and ability of the parties and the cause of the divorce, may properly be considered.[41] In Kentucky it is held that since on a divorce being granted alimony becomes the portion of the wife in lieu of dower, she should be entitled, in any event, to such sum as her dower interest in her husband's estate would have amounted to.[42] The allowance of attorney's fees to the wife in divorce actions must be measured by the services performed, not by the number of attorneys employed.[43] The situation of the parties and the contingencies being such that the amount of alimony cannot be placed at a lump sum without danger that the allowance may prove unjust or inequitable to one or the other of the parties, the court may provide for the payment of a stated sum at fixed periods for a given length of time or until the further order of the court.[44] In Louisiana alimony can be allowed to the wife after she obtains a divorce, only from the property of the husband and to the extent of one-third of his income.[45] Where in that state, a wife in her petition for divorce

37. McAllen v. McAllen [Minn.] 106 N. W. 100.

38. Under Ky. St. 1903, § 2122, providing that if a wife who has obtained a divorce has not sufficient estate of her own she may have a just allowance from that of her husband, the fact that the husband held only an estate in possession did not bar alimony therefrom. Muir v. Muir [Ky.] 92 S. W. 314.

39. See 5 C. L. 105.

40. Muir v. Muir [Ky.] 92 S. W. 314; Watson v. Watson [Ind. App.] 77 N. E. 355. The allowance will not be interfered with unless discretion has been abused. Civ. Code, § 137. Youree v. Youree [Cal. App.] 81 P. 1023; Watson v. Watson [Ind. App.] 77 N. E. 355.

41. Muir v. Muir [Ky.] 92 S. W. 314. $3,000 to wife, $500 for child, and $500 for attorney's fees held fair where divorce was granted wife who had no estate and husband was worth $13,000. Hooe v. Hooe [Ky.] 92 S. W. 317. Where divorce and custody of eight year old child was awarded to the wife who was without property, and the husband had $4,500 and owed $1,600 the wife should have received $500 alimony and $500 for the education and maintenance of the child. Barlow v. Barlow [Ky.] 90 S. W. 216. Husband was unable to do manual labor and was dependent on his occupation as a teacher at $125 a year. The wife could take care of herself by washing and ironing. All the household effects were awarded her pendente lite and the custody of two children. Held, alimony of $400 should be reduced to $150. Newton v. Newton [Ky.] 88 S. W. 1050. Alimony held not excessive on the facts stated. Hays v. Hays [Neb.] 106 N. W. 773. Decree awarding plaintiff $240 per year for five years the payments then to cease upon defendant conveying a fee simple title to property previously conveyed to the children subject to a life estate held as liberal as the facts of the case and the circumstances of defendant would justify. Halley v. Halley [Iowa] 107 N. W. 807. Where the husband was 61 years old and received $30 a week wages and the wife was the life tenant of property paying her $41 per month and was allowed the use of the house and $10 a week, held, the weekly charge upon the husband's wages should be reduced to $7.50. Curtin v. Curtin, 97 N. Y. S. 771. No abuse of discretion in allowing $50 counsel fees and $10 per month temporary alimony. Bishop v. Bishop [Ga.] 52 S. E. 743. $600 held not excessive where wife's property amounted to only $550 and her husband's to $6,000-7,000. Watson v. Watson [Ind. App.] 77 N. E. 355.

42. Muir v. Muir [Ky.] 92 S. W. 314. Husband's estate at time of divorce decree was at least $15,000. Husband in good health except for a chronic disease and able to earn money. Wife without means and ill as result of disease communicated by husband, and was given custody of two children. Held $1,000 and $10 per month for support of children should be increased to $5,000. Id.

43. Allowance of $474.50 should be reduced to $250 where one-half of it was for services on motions respecting attorney's fees and the substitution of attorneys. Schulz v. Schulz [Wis.] 107 N. W. 302. $1,000 held excessive. Schmalholz v. Schmalholz, 111 App. Div 543, 98 N. Y. S. 510.

44. Where custody of the children was awarded to plaintiff. Hays v. Hays [Neb.] 106 N. W. 773.

45. The word "property" as used in Civ. Code, art. 160, does not mean earning capacity, nor does the word "income" mean

prays for alimony from judicial demand, she may in the final judgment be awarded a lump sum as the amount to which she was entitled for her maintenance during the litigation.[46] Fraudulent conveyances should be ignored in determining the amount of alimony.[47]

Division of property.—As with alimony proper, so with the division of the property between the parties, it is largely within the discretion of the trial court,[48] and must necessarily depend upon circumstances.[49] In certain cases a just and equitable distribution may mean that all the property be given to the wife.[50] Ordinarily, the value of the property on the date of the application for division should control.[51] An agreement by the wife pending divorce proceedings to accept certain property in lieu of alimony and to relinquish any claim to the husband's property, even though valid, could not affect the wife's interest in a life insurance policy held by the husband.[52]

Support of child.—The husband may be required to pay for the maintenance of children awarded the wife though the divorce was granted him entirely for the fault of the wife.[53] On suit by the wife the court may make a temporary allowance for the children only.[54] In Texas there is no such thing as permanent alimony,[55] and the court in that state cannot, by an order incidental to a decree of divorce, charge the husband with periodical payments, for the benefit of children, awarded the wife.[56]

§ 6. *Procedure and practice.*[57] *Temporary allowances.*—An order for temporary alimony made in vacation in a divorce suit, without notice, is void,[58] and

current earnings resulting from labor. Jackson v. Burns [La.] 41 So. 40.

46. $300 awarded on appeal. Jackson v. Burns [La.] 41 So. 40.

47. Under Ky. St. 1903, § 2126, declaring void conveyances in fraud of wife and children to maintenance, certain mortgages executed by husband to others with notice should not be considered in determining the amount of alimony. Muir v. Muir [Ky.] 92 S. W. 314.

48. Mitchell v. Mitchell, 39 Wash. 431, 81 P. 913.

49. The divorce was for the fault of the husband and the wife was given the custody of two young children. She was awarded a farm of 100 acres worth $2,000 subject to a debt of $300 and some taxes, but had assisted in accumulating most of the property. The husband was given the custody of a son 15 years old able to assist him as a miner, a house worth $80, and some other property of small value. On review the court could not say that the award to the wife was not just and reasonable. Galutia v. Galutia [Kan.] 82 P. 461. Where plaintiff conveyed to his wife all his property worth $10,000, but subject to his debts of more than $7,500, and advised her to abandon it because of his inability to pay interest, taxes, etc., but defendant alone by eight years of labor saved the property and reduced the debts to $4,200 it was proper, in decreeing her a divorce for abandonment and giving her the custody of three minor children, to award her all such property. Clemans v. Western, 39 Wash. 290, 81 P. 824. Where in a proceeding for a division of the husband's property it appeared that the net value of his property was $1,760.10, a judgment of $1,500 for the wife was excessive and should be reduced to $600. Martin v. Martin [Wis.] 105 N. W. 783. Allowance of personal property held reasonable. Sodini v. Sodini [Minn.] 104 N. W. 976.

50. Under Ballinger's Ann. Codes & St. § 5723, requiring a just and equitable distribution, the disposition is discretionary with the court and where there is but little property and the wife is innocent and not strong and is awarded the care of infant children and the husband is strong and wholly at fault, all the property may be given to the wife. Mitchell v. Mitchell, 39 Wash. 431, 81 P. 913.

51. On an application by a divorced wife for a division of the husband's property, the value of the property on the date of hearing the application, and not that on the date of the original judgment should be considered under Rev. St. 1898, § 2369, providing that when a final division of the property shall have been made no other provision shall thereafter be made for the wife. Martin v. Martin [Wis.] 105 N. W. 783.

52. Wallace v. Mutual Ben. Life Ins. Co. [Minn.] 106 N. W. 84.

53. Under express provisions of Rev. St. 1899, § 2926. Cole v. Cole, 115 Mo. App. 466, 91 S. W. 457.

54. Judgment allowing temporary alimony to be expended solely for the children not disturbed, the evidence being sufficient. Rochester v. Rochester [Ga.] 53 S. E. 399.

55. Bond v. Bond [Tex. Civ. App.] 90 S. W. 1128.

56. Court below ordered husband to pay $5 per month for maintenance and education of child until 18 years old. Bond v. Bond [Tex. Civ. App.] 90 S. W. 1128.

57. See 5 C. L. 106.

58. Order for temporary alimony can be made in vacation under Code 1899, c. 64, § 9, but adverse party has right to defend. Keller v. Keller [W. Va.] 52 S. E. 318.

failure to observe such order does not justify a stay of proceedings or a dismissal of the suit.[59] Where in an action by the wife for divorce the parties become reconciled before issue joined, the court may dismiss the suit at the instance of plaintiff,[60] and in such case the wife's attorney has no such interest in a pending application for temporary alimony as will enable him to revive and prosecute the same by means of intervention for his own benefit.[61] On a motion by the plaintiff in a divorce suit for a discontinuance, the court has power to require him to pay the reasonable expenses incurred by the wife in defense of the action as a condition of the granting of the motion.[62] On application by the wife for the care and custody of a child at a subsequent term, no provision therefor having been made in the original decree, the court may require the husband to pay a reasonable sum for the prosecution of the application,[63] and when such allowance is for attorney's fees the same may be taxed as part of the costs.[64] In determining the amount of counsel fees to be allowed the court is not bound to hear evidence as to the value of the services rendered or to be rendered,[65] but may, without such evidence, allow such sum as in his discretion appears proper under the facts and circumstances of the case.[66] Where the court has jurisdiction of the person of the defendant it may make an order for temporary alimony at any time after the filing of the petition.[67] Application for temporary allowances should ordinarily be made in the court below and not on appeal,[68] and though an appellate court may have the power to allow the wife appeal money, it cannot do so before the filing of the transcript.[69] On an application for temporary alimony evidence that the general character of the wife is bad is not admissible.[70] The court may change the findings of a commissioner as to the amount of temporary alimony due and the value of attorney's services though no exception is taken to the report.[71] Mere interlocutory orders are not appealable.[72]

59. Keller v. Keller [W. Va.] 52 S. E. 318.

60, 61. Peterson v. Peterson [Neb.] 107 N. W. 291.

62. Under Rev. St. 1898, § 2361, providing that during the pendency of a divorce action the court may require the husband to pay such sums as may be necessary for the wife's support and to enable her to defend the action. Schulz v. Schulz [Wis.] 107 N. W. 302. In such case the appellate court may allow the wife a reasonable sum for expenses in defending on appeal. Id.

63. Chambers v. Chambers [Neb.] 106 N. W. 993.

64. Chambers v. Chambers [Neb.] 106 N. W. 993. The fact that the court entered judgment therefor in favor of the attorneys by name was a mere error in form. Id. The decree was not erroneous because it awarded suit money out of the property acquired by defendant subsequent to the original decree. Id. The order of the court requiring the defendant to contribute to the support of the child while in the custody of plaintiff was not erroneous on the ground that it awarded the plaintiff the custody of the child for a portion of the time, or on the ground that defendant was ready and willing at all times to support and maintain the child. Id.

65. Civ. Code 1895, § 2457, only requires evidence of marriage and circumstances of the parties. Sweat v. Sweat, 123 Ga. 801, 51 S. E. 716.

66. Sweat v. Sweat, 123 Ga. 801, 51 S. E. 716.

67. Code § 3177, could be made before answer to the petition. Hamilton v. Hamilton [Iowa] 106 N. W. 5. Defendant having answered the application for temporary alimony could not thereafter contend that his appearance was special. Id.

68. Allowance to the wife's attorney cannot be made by the court of appeals. Can only be reviewed after being determined below. Muir v. Muir, 27 Ky. L. R. 1162, 87 S. W. 1070. Even if the court of appeals has power to require the husband to pay the costs of his wife's appeal in a divorce case, the better practice is to apply in the court below. Morgan v. Morgan, 25 App. D. C. 389.

69. Assuming that the court of appeals has power to order the husband to advance his wife money for the prosecution of her appeal in a divorce suit it cannot, before the filing of the transcript, order such payment though appellant has filed her appeal bond below. Morgan v. Morgan, 25 App. D. C. 389.

70. Bishop v. Bishop [Ga.] 52 S. E. 743. Husband who resisted wife's application for temporary alimony on ground of her immoral conduct held not competent to testify as to her adultery. Id. Answer of husband relative to adultery of wife properly stricken though elicited by wife's attorney. Id.

71. Schulz v. Schulz [Wis.] 107 N. W. 302.

72. Confirmation by the chancellor of the report of the register recommending $25 attorney's fees and $12.50 per month for complainant in a suit for alimony and an order to respondent to pay $100 to the register for

Permanent award.—To justify an allowance of alimony the complaint should allege her necessity therefor and the husband's ability to pay it.[73] In endeavoring to determine the proper amounts to be allowed for alimony and suit money, the court is not bound by the ordinary, technical rules of evidence.[74] On defendant's application for alimony in an action to annul a marriage all facts are relevant which show the conduct of the parties toward each other and toward others as well so far as the latter has a bearing on the wife's conception of and adherance to correct standard of conjugal conduct.[75] The permanent award may be increased on appeal in certain cases so as to include temporary allowances overdue.[76] Certain discretionary rulings relative to evidence[77] and affidavits[78] are given in the notes.

§ 7. *The decree; its enforcement and discharge.*[79]—The decree for alimony is favored by every reasonable intendment,[80] and it should be so construed as to effectuate its purpose.[81]

A judgment for alimony is as much enforceable as any other judgment,[82] and once obtained it is not affected by the subsequent death of the wife.[83] A wife, after a decree dissolving her marriage and awarding her alimony, may maintain an action to set aside a transfer of property made by her husband pending the divorce proceedings with intent to render ineffectual any recovery by her of any alimony which might be adjudged to her by the decree,[84] and it is not necessary in such case to prove that defendant had no other property or that execution has been returned

the attorney's fees and monthly payments pending suit and in default thereof ordering respondent to jail is not an appealable decree. Brady v. Brady [Ala.] 39 So. 237.

73. Ryan v. Ryan [Mont.] 84 P. 494.

74. Civ. Code § 137. Youree v. Youree [Cal. App.] 81 P. 1023.

75. Plaintiff's affidavits held proper. Sanford v. Sanford, 94 N. Y. S. 1096.

76. Where it was stipulated that defendant pay $20 per month during the pendency of the suit but no monthly payments were made after the decree below, the permanent alimony was increased so as to include $20 per month from the date of such decree to the date of the final decree on appeal. Pope v. Pope [Or.] 83 P. 786.

77. Where in a suit by a wife for divorce a decree was granted the husband, and the wife sought to reintroduce her evidence in support of an application for alimony, it was discretionary with the court to refuse such rehearing and deny the application. Neander v. Neander [Colo.] 84 P. 69.

78. Defendant having moved for alimony she was not entitled to have plaintiff's counter affidavits suppressed where the matter complained of was in reply to her own affidavit wherein she accepted the issues tendered by the complaint. Sanford v. Sanford, 94 N. Y. S. 1096. It was within the discretion of the court to permit the wife's attorney to file an affidavit at the hearing on an application for alimony, counsel fees, etc., in violation of the rule requiring copies of such affidavits to be served on the opposite party one day before the hearing. Youree v. Youree [Cal. App.] 81 P. 1023. Court held not to have abused its discretion in refusing to permit plaintiff to file an affidavit showing the bona fides of a transfer of nearly all his property made to his attorney two days before the hearing on his wife's application for alimony and suit money. Id.

79. See 5 C. L. 107.

80. Where the conclusions of law stated that plaintiff was entitled to $1,600 out of the realty, or, in lieu thereof, all the property described in the findings but the decree awarded plaintiff the whole interest in the realty without giving defendant an opportunity to comply with the alternative, the decree was sustained, there being nothing to show that defendant desired to pay the money to save the realty. Mitchell v. Mitchell, 39 Wash. 431, 81 P. 913.

81. A foreign divorce decree directing the payment of a certain sum per week to the attorney for libelant for the support of a child said payment to be in lieu of alimony should be construed as an order to pay the libelant the sum named to be used by her for the support of herself and child. Page v. Page, 189 Mass. 85, 75 N. E. 92. A decree directed the husband to convey to the wife a lot in fee and, among other things, to pay a sum not to exceed $100 for repairs thereon. It also ordered the conveyance of a life estate in other property and that the husband should pay taxes, etc., thereon, keep the same in repair, and guarantee the gross rentals from the two houses to be a certain sum named. Held that husband was not required to keep in repair the property conveyed in fee after expending the $100. Wickes v. Wickes' Ex'rs, 220 Ill. 32, 77 N. E. 101.

82. Gerrein's Adm'r v. Michie [Ky.] 91 S. W. 252.

83. Gerrein's Adm'r v. Michie [Ky.] 91 S. W. 252. Where a judgment for alimony is enforced after the death of the wife, the court **may modify** the judgment as to the amount to be paid on account of the children becoming self-supporting as it could have done had the wife attempted to enforce it in her lifetime. Id.

84. Cochran v. Cochran [Minn.] 105 N. W. 183. Evidence held sufficient to show fraud. Id.

unsatisfied.[85] In proceedings to enforce a foreign decree for alimony it must appear that it is final,[86] and the court cannot inquire as to the proper amount of the award nor can it enforce the decree in any of the ways set forth in the statute for the enforcement of domestic decrees.[87] A writ of ne exeat may be granted in some jurisdictions at the instance of a wife against her husband pending an application for alimony and prior to any decree therefor.[88] The district court in the territory of Oklahoma had power to punish a contempt of court in refusing to pay alimony by striking the defendant's answer or refusing to permit him to plead further in the case.[89]

Vacating or modifying; discharge.[90]—A decree for alimony may be revised or altered by the court where a change in the circumstances of the parties requires it,[91]

85. Cochran v. Cochran [Minn.] 105 N. W. 183. Where a petition for divorce alleged that property had been fraudulently transferred for the purpose of defeating the collection of alimony and defendant in the divorce proceedings was in default, the **defense of the grantee** extended only to the question of alimony and the validity of the conveyance. Bennett v. Bennett [Okl.] 81 P. 632. Where the property was conveyed to an infant son and the fraudulent purpose was apparent, the burden was upon the grantee to show a consideration or that alimony would not be defeated, and not upon the plaintiff to show insolvency of the grantor. Id.

86. **NOTE. Enforcement of foreign decree.** Plaintiff obtained a divorce and a decree of $6 per week alimony in Maine. Petition in equity in Massachusetts to recover the arrears due under the Maine decree and to compel security for future instalments. Held, that plaintiff could not recover since there was no averment that the Maine judgment was a "final" decree. Page v. Page, 189 Mass. 85, 75 N. E. 92. An allegation that the Maine decree "still stands unreversed and in full force" was held not sufficient allegation that it was final. In the case of Brisbane v. Dobson, 50 Mo. App. 170, an averment that there is no authority in the court to reverse or modify the decree was held sufficient. When the judgment is for a lump sum and is a final decree it is well settled that action can be brought on the judgment in another state under the provisions of the United States Const. (Art. 4, § 1), which provides that **full faith and credit** shall be given in each state to the records and proceedings in every other state. Dow v. Blake, 148 Ill. 76, 35 N. E. 761, 30 Am. St. Rep. 156; Howard v. Howard, 15 Mass. 196. See for similar principle, Nunn v. Nunn, 8 Law Rep. Ir. 298. The leading case on this point is Lynde v. Lynde, 162 N. Y. 405, 76 Am. St. Rep. 332, 48 L. R. A. 679; Id., 181 U. S. 183, 45 Law. Ed. 810, in which it was held that the New York court could enforce a New Jersey decree in so far as it gave judgment for alimony due at the time of the decree, but as to future payments, the New Jersey court might change its decree so that it was not "final." But see Brisbane v. Dobson, 50 Mo. App. 170. Courts of England refused to enforce the decrees of the ecclesiastical courts for alimony for more than one year's arrears. De Blaquiere v. De Blaquiere, 3 Hag. Ecc. 322. In the principal case it was intimated that the action should have been at law since there is a plain, adequate and complete remedy there, but this is not the rule of the Federal courts which hold that the action may be either at law or in equity. Barber v. Barber, 21 How. [U. S.] 582, 16 Law. Ed. 226. The usual form of action to enforce alimony decrees is in debt. The payment must be enforced in the foreign state by the methods and form of action in use there and it has no right to use the means provided by the court granting the decree, as the equitable remedies of sequestration, injunction, etc. Lynde v. Lynde, 162 N. Y. 405, 76 Am. St. Rep. 332, 48 L. R. A. 679; Id., 181 U. S. 183, 45 Law. Ed. 810."—4 Mich. L. R. 157.

87. Rev. Laws c. 152, §§ 25, 27-33, apply only to cases where the question of divorce or separation is heard in Massachusetts. Page v. Page, 189 Mass. 85, 75 N. E. 92.

88. In determining the amount of bond to be required in such case the court will exercise a sound discretion under the facts and circumstances having due regard to the rank of the parties and the property of the husband so as to prevent oppression. Lamar v. Lamar, 123 Ga. 827, 51 S. E. 763.

89. Where defendant had voluntarily absented himself from the territory for the purpose of avoiding contempt proceedings. Bennett v. Bennett [Okl.] 81 P. 632. Action of court in trying divorce case against defendant as upon default held proper where because of his willful noncompliance with an order for alimony pendente lite he was granted leave to answer only on condition that he comply with such order and he refused to so comply without excuse. Cases compared. Bennett v. Bennett [Okl.] 83 P 550.

90. See 3 C. L. 153.

91. Smith v. Smith [Mass.] 77 N. E. 522. Rev. Laws c. 152, § 33, authorizing the court to revise and alter a decree for alimony did not limit the power of the court to a revision pending full performance of the original decree but authorized the allowance of additional alimony after such performance where a change of circumstances required it. Smith v. Smith [Mass.] 77 N. E. 522. In view of the circumstances of the plaintiff shown by his uncontradicted affidavits it could not be said that the discretion of the court in discharging an order for alimony was not well exercised and its action was therefore not disturbed. Smith v. Smith, 142 Cal. 636, 76 P. 489. Discharge of husband from payment of alimony on grounds urged by the wife which her evidence does not support will not be disturbed. Id. Where

but the fact that the husband subsequently marries another woman is not such a change of circumstances as to warrant a reduction of the alimony.[92] The decree may be modified at a subsequent term when necessary,[93] but in such case the application must show facts or circumstances which have arisen subsequent to the decree, otherwise the matter will be deemed res adjudicata between the parties.[94] Orders may be made with respect to the maintenance and support of children either at the same or a subsequent term though the original decree made no provision for them.[95]

A decree requiring a defendant to make periodical payments for the support of a child is not discharged by the death of the defendant.[96] An order upon a father to support a child of tender years cannot be discharged by bankruptcy proceedings, but an order to reimburse a stranger for the child's past support may be so discharged.[97]

Attachment of the person.[98]—Failure to pay alimony or turn over property as directed by the court renders the delinquent party liable as for contempt [99] in the

the average annual income of the husband since the decree was $1,000 greater than the average income prior thereto and the wife received no substantial income from her property, the fact, among others, that the husband was compelled to borrow $2,640 to pay his debts held insufficient to warrant a reduction of the allowance. Goodsell v. Goodsell, 107 App. Div. 625, 95 N. Y. S. 242. After a decree of absolute divorce awarding the custody of a minor child to the wife but making no allowance for its maintenance, and when it appears that the wife is without financial means, the court has power to revise the decree so as to require the father to perform his legal and natural duty to care for his offspring. McAllen v. McAllen [Minn.] 106 N. W. 100. The changed circumstances arising from the removal of the child from the state held to justify a modification of a decree so as to relieve the husband from any further payment for its support. Myers v. Myers [Mich.] 12 Det. Leg. N. 885, 106 N. W. 402. That the court exceeded its jurisdiction in directing the husband to convey land to the wife thus rendering the decree for alimony void and that the husband successfully challenged the jurisdiction of the court in this respect held sufficient reasons why the decree should be modified. Cizek v. Cizek [Neb.] 107 N. W. 1012.

92. Where 12 days after a divorce was granted to defendant plaintiff married a woman with whom he had been keeping company for 2 years prior to the divorce and thereby alienated the affections of his daughter from him after which defendant discouraged the daughter's association with him, neither the remarriage nor the alienation of the daughter's affections justified a reduction of the permanent alimony of the wife not shown to be beyond her necessities. Smith v. Smith [Mich.] 102 N. W. 631.

93. Under § 27, c. 25, Comp. St. 1903 (Cobbey's Ann. St. 1903, § 5351), the district court has a continuing power after the granting of a decree for divorce to review and revise the provisions for alimony at subsequent terms on petition of either of the parties. Cizek v. Cizek [Neb.] 107 N. W. 1012. If the decree awarding alimony is void for **want of jurisdiction,** the court may at a subsequent term award suitable alimony upon application and a sufficient showing. Section 27, c. 25, Comp. St. 1903 (Cobbey's Ann. St. 1903, § 5351).

94. Where no alimony was awarded in the original decree, plaintiff was not entitled to alimony at a subsequent term though her petition showed that defendant, at the time of making the decree, agreed to pay her alimony from time to time where the agreement was not put forward as an excuse for not seeking alimony in the divorce proceedings. Chambers v. Chambers [Neb.] 106 N. W. 993.

95. At subsequent term. Comp. St. 1903, c. 25, §§ 15, 16. Chambers v. Chambers [Neb.] 106 N. W. 993. The court has authority to revise and alter a decree of divorce dividing the property and awarding the custody of the children to one of the parties so as to require the other party to pay a certain amount for the support and maintenance of the children even though the original decree made no provision for their support. Rev. St. 1898, §§ 2362, 2363, 2364, 2369. Renner v. Renner [Wis.] 106 N. W. 846.

96. Creyts v. Creyts [Mich.] 12 Det. Leg. N. 1039, 106 N. W. 1111.

97. Rush v. Flood, 105 Ill. App. 182.

98. See 3 C. L. 153.

99. A decree that the wife should pay over to the husband a portion of a trust fund held by her on deposit beyond the jurisdiction of the court not being a decree for the payment of money in the ordinary sense so as to be enforceable by execution, was enforceable by contempt proceedings under Comp. Laws § 10,891, subd. 3. Carnahan v. Carnahan [Mich.] 12 Det. Leg. N. 1023, 107 N. W. 73. The fact that a void execution had been issued and a levy made under which no benefit had been derived by the husband and no injury suffered by the wife did not affect the question. Id. The assignment of the decree to the husband's trustee in bankruptcy did not render the debt enforceable only by execution. Id. The trustee was properly made a party to the application to enforce the decree. Id. The proceeding for contempt held criminal and not civil within Comp. Laws § 10,342, prohibiting the imprisonment of any female on any process in any civil action, etc. Id. Defendant held properly committed under Comp. Laws § 10,913, "until further order of the court," and § 10,915 did not apply. Id. The fact that an allowance for the support

absence of sufficient excuse shown.[1] The authority of an attorney employed to prosecute a divorce suit terminates with the entry of a decree in plaintiff's favor,[2] and where such attorney or his agent makes a demand for the payment of alimony it must appear that he had authority to do so and that such fact was communicated to the party charged in order to justify a commitment for contempt.[3]

Execution.[4]—In Michigan execution cannot issue against a wife to enforce a decree for the division of a trust fund held by her in part for the benefit of her husband.[5]

Subjection of property.[6]—Judgments for alimony may generally be made a

of the children was made a lien upon defendant's real estate did not deprive the court of authority to punish him for contempt in failing to make the payments. Renner v. Renner [Wis.] 106 N. W. 846. In divorce proceedings defendant being in arrears in the payment of alimony and solicitor's fees, an order adjudging him guilty of contempt and denying him the privileges of the court was erroneous in so far as it required defendant to appear only in person at the bar of the court. Krieger v. Krieger [Ill.] 77 N. E. 909.

1. Though defendant testified that he was sixty-five years old had no property and could not work yet it appearing that prior to his marriage he conveyed all his property to his children on condition that they pay him such money as he might need, he was bound to pay a solicitor's fee to enable his wife to prosecute a suit for separate maintenance. McAtee v. McAtee, 116 Ill. App. 511.

2. Conklin v. Conklin, 99 N. Y. S. 310.

3. Kalmanowitz v. Kalmanowitz, 108 App. Div. 296, 95 N. Y. S. 627. Demand made by managing clerk in office of plaintiff's attorney did not render defendant liable in contempt where authority was not shown. Conklin v. Conklin, 99 N. Y. S. 310.

4. See 3 C. L. 154.

5. Under Comp. Laws, § 8640. Carnahan v. Carnahan [Mich.] 12 Det. Leg. N. 1023, 107 N. W. 73.

6. See 3 C. L. 154.

7. **NOTE. Power to charge property:** "Although alimony awarded in a divorce suit may, as a general rule be decreed a lien upon real estate, the courts refuse to declare it a lien upon the personal property of the party against whom the decree is entered. Johnson v. Johnson, 22 Colo. 20, 43 P. 130, 55 Am. St. Rep. 113, Griswold v. Griswold, 111 Ill. App. 269. In Yelton v. Handley, 28 Ill. App. 640, it was sought to sustain a lien on personalty for alimony under a code provision declaring that every decree for money shall be a lien "on the lands and tenements of the party against whom it is entered," but the court refused to allow the lien. And in Conklin v. Conklin, 93 Minn. 188, 101 N. W. 70, it was held that the court was not authorized under a statute allowing alimony to make a specific lien upon specified parcels of land, to decree the amount of alimony as a specific lien upon personal property. The decisions with respect to attempts to make temporary alimony a lien on the real estate of the party who is to pay the alimony do not seem to be numerous. In Barnes v. Barnes, 59 Iowa, 456, 13 N. W. 441, an order allowing a certain sum as temporary alimony for payment of attorneys' fees was permitted to stand, but the lien therefor upon the homestead was not allowed. And in Grove's Appeal, 68 Pa. St. 143, it was held that an order pendente lite for the wife's support and expenses was not a judgment upon which execution could issue, nor did it create a lien nor could it be regarded as "a decree in equity for the payment of money." It may be stated as supported by the weight of authority that courts have the the power to declare a lien upon the real estate of the person against whom the decree is directed in order to secure the payment of the alimony awarded. Gaston v. Gaston, 114 Cal. 546, 46 P. 609, 55 Am. St. Rep. 86; Hanscom v. Hanscom, 6 Colo. App. 97, 39 P. 885; Hall v. Harrington, 7 Colo. App. 474, 44 P. 365; Johnson v. Johnson, 22 Colo. 20, 43 P. 130, 55 Am. St. Rep. 113; O'Callaghan v. O'Callaghan, 69 Ill. 552; Frakes v. Brown, 2 Blackf. 295; Harshberger v. Harshberger, 26 Iowa, 503; Holmes v. Holmes, 29 N. J. Eq. 9; Lawton's Petition, 12 R. I. 210; Min Young v. Min Young, 47 Ohio St. 501, 25 N. E. 168; Gardenshire v. Gardenshire, 2 Okl. 484, 37 P. 813; Harding v. Harding, 16 S. D. 406, 92 N. W. 1080, 102 Am. St. Rep. 694. In Conrad v. Everich, 50 Ohio St. 476, 35 N. E. 58, 40 Am. St. Rep. 684; it was held that an alimony decree for a gross sum would per se operate as a lien like any other judgment for money. The court, after reviewing Lockwood v. Krum, 34 Ohio St. 1, Chase v. Chase, 105 Mass. 385, and Barber v. Barber, 21 How. [U. S.] 582, 16 Law, ed. 226, said: "And if the duty of the husband to provide proper maintenance and support for his wife, before and after a decree of divorce, is not technically a debt, it is, nevertheless, a paramount obligation springing out of a sacred relation, which, when it has passed into judgment, should, as such, carry with it the well-known binding force that attaches to judgments at law." It has quite frequently been held that such alimony decrees, where for a fixed sum of money, are liens on the real estate of the husband in the same manner as any other money judgment: Coulter v. Lumpkin, 94 Ga. 225, 21 S. E. 461; Sapp v. Wightman, 103 Ill. 150; Frakes v. Brown, 2 Blackf. [Ind.] 295; Tyler v. Tyler, 99 Ky. 31, 34 S. W. 898; Dufrene v. Johnson, 60 Neb. 18, 82 N. W. 107; Keyes v. Scanlan, 63 Wis. 345, 23 N. W. 570. In Russell v. Russell, 4 Greene [Iowa] 26, 61 Am. Dec. 112, an early case, the court said: "We find no authority in a case of this kind for transferring the real estate of the husband in fee simple to the wife, independent of the consent of the husband, by the act of the court. The most that will be done judicially is to give the wife a lien on the real estate of the husband for the amount of alimony decreed." In Questel v. Questel, Wright [Ohio] 492, a re-

lien on real property,[7] and orders for the support of children may be charged against the estate of a deceased husband.[8] Orders for alimony pendente lite are not incorporated into the final decree by mere mention,[9] and the only sum allowed by the decree being an unfounded one for separate maintenance leaves it without any basis for an order charging a trust on the husband's property and ordering sale.[10] The court may make such orders relative to the subjection of property as are reasonably necessary for the protection of the wife.[11]

§ 8. *Suits for annulment and actions for separate maintenance.*[12]—A wife is not entitled to separate maintenance when she is unjustifiably absent from the conjugal domicile,[13] and in that case a decree awarding separate maintenance is erroneous.[14] For the same reason a conveyance of his separate property by the husband

ceiver was appointed to receive the rents and profits from the property in order to secure the payment of the alimony awarded. In Burrows v. Purple, 107 Mass. 428, the decree for alimony was enforced by an order "that execution issue therefor." And in Sapp v. Wightman, 103 Ill. 159, it was said the fact that the alimony was decreed to be in satisfaction of dower makes no difference as to the lien of the decree. A few of the earlier cases refused to allow such liens in the absence of statutory authority. Thus, in Perkins v. Perkins, 16 Mich. 162, it was held that a court of equity had no original power to create liens on real estate and had no general power under the Compiled Laws to declare alimony to be a specific charge upon lands or to direct such lands to be sold in default of payment. So, also, in Casteel v. Casteel, 38 Ark. 477, it was held that alimony should not be declared a lien on the husband's lands because it embarrassed alienation, but in Kurtz v. Kurtz, 38 Ark. 119, the same court, in speaking of an alimony decree, observed that "as for all sums ordered to be paid at once, and for which execution may issue, they are already general liens without being so expressed." Decrees making alimony a lien on defendant's real estate were held erroneous in Swansen v. Swansen, 12 Neb. 210, 10 N. W. 713, and Brotherton v. Brotherton, 14 Neb. 186, 15 N. W. 347; though later on in Dufrene v. Johnson, 60 Neb. 18, 82 N. W. 107, it was held that such decrees, when for a definite sum, had the same force and effect as other money judgments.

In Stoy v. Stoy, 41 N. J. Eq. 370, 2 A. 638, 7 A. 625, it was held that alimony which accrues after the docketing of the decree allowing it becomes a lien on the lands of the defendant as fast as it becomes due. In Kurtz v. Kurtz, 38 Ark. 119, the court observed that the embarrassment and inconvenience incurred by making future payments of alimony a lien upon real estate were too obvious for discussion, but remarked that it was not necessary to declare a lien in the decree, because "as for all sums ordered to be paid at once, and for which execution may issue, they are already general liens without being so expressed." And in Olin v. Hunderford, 10 Ohio, 268, it was held that a decree for alimony to be paid in instalments is not a lien on defendant's land unless made a charge thereon by the decree itself, though it was intimated that if the alimony was payable in a gross sum it would be. In King v. Miller, 10 Wash. 274, 38 P. 1020, the periodical payments were made a lien on certain of the husband's lands; the court held that a subsequent judgment for a gross sum in lieu of such periodical payments would also become a lien. In Gaston v. Gaston, 114 Cal. 542, 46 P. 609, 55 Am. St. Rep. 86, the court made an allowance for the wife in the form of pecuniary payments at successive monthly intervals, and charged them as a lien on certain community property which was set apart to the husband. The court held that the right to execution for these payments did not accrue until they respectively fell due, and that the lien for any unpaid instalment accruing after the expiration of five years from the entry of the judgment, could be foreclosed notwithstanding a statute which prescribed a period of five years from the entry of judgments, in general, as the period within which execution could issue."—Harding v. Harding [S. D.] 102 Am. St. R. 703.

8. Under Comp. Laws, §§ 8640, 8641, authorizing the court to make a decree in divorce for the support of children a charge upon property and to change the decree from time to time, held that on the death of a defendant in divorce against whom such a decree had been renderd the court could modify the decree by fixing the period for which the provision for the child should continue, determining the present value of the same, providing for its immediate payment, and, except as against the right of dower, making it a first charge upon the estate. Creyts v. Creyts [Mich.] 12 Det. Leg. N. 1039, 106 N. W. 1111.

9. Kessler v. Kessler [Cal. App.] 83 P. 257.

10. Decree allowed maintenance, denied divorce, recited that alimony pendente lite had been awarded and then charging husband's grantee as trustee ordered sale for default in payment of any of such sums. Kessler v. Kessler, [Cal. App.] 83 P. 257.

11. Where the court pending a suit for alimony had enjoined defendant from receiving a certain fund an order modifying the injunction so as to allow defendant to receive half of the fund and to invest the balance in certain land, but enjoining him from transferring the same, held to prevent incumbrances thereof and to protect the wife. Thomason v. Thomason [S. C.] 52 S. E. 870.

12. See 5 C. L. 109.

13. Kessler v. Kessler [Cal. App.] 83 P. 257. The wife was not entitled to alimony where without just cause she separated from her husband and refused to return except on condition that he send away a girl adopted by them. Hlton v. Hilton [Miss.] 47 So 262.

14, 15. Kessler v. Kessler [Cal. App.] 83 P. 257.

could not be in fraud of the wife's right.[15] In Alabama, though a suit may be maintained for alimony unconnected with divorce proceedings[16] the allowance thereof is not a matter of right but is within the sound discretion of the court.[17] In suits for alimony the only duty which the court can enforce is that of maintenance,[18] and in so doing it can deal only with the income of the husband.[19] The mere conveyance of all his separate estate by a husband able to work is not a disablement to provide support tantamount to fraud in the conveyance[20] even if the marriage was made on the strength of his property.[21] In suits for separate maintenance, the court may award alimony pendente lite and counsel fees[22] without passing upon the merits of the case where the wife is without separate means and the husband is able to support her.[23] An order requiring the payment of stipulated sums until the further order of the court is proper.[24] The decree will not be disturbed unless it appears that manifest injustice was done.[25]

The court in annulling a voidable marriage at the suit of the husband may require him to pay a reasonable amount for the support and nurture of the issue of such marriage[26] and where the circumstances of the husband warrant it he may also be required to pay suit money for the wife, and to reimburse her for family expenditures made during the marriage.[27] Permanent alimony cannot be awarded in such case in the absence of statute,[28] but suit money may be allowed in the sound discretion of the court at any stage of the litigation and may be included in the final decree.[29]

ALTERATION OF INSTRUMENTS.

§ 1. Nature, Kinds and Materiality of Alterations (115). Particular Instruments (116).
§ 2. Effect of Alteration (117).
§ 3. Curing or Ratifying Alterations (118).
§ 4. Pleading, Practice, and Evidence (118).

§ 1. *Nature, kinds and materiality of alterations.*[30]—A material alteration is one which changes the legal effect of the instrument upon the rights of the parties whether such change be prejudicial or favorable to maker.[31] It is material though made by a party to a written instrument to conform it to the actual contract of the

16, 17, 18. Brady v. Brady [Ala.] 39 So. 237.

19. The court cannot compel the husband to labor and earn an income. Brady v. Brady [Ala.] 39 So. 237. In a suit for alimony the allowance should in no case exceed one-half the husband's income. Id.

20, 21. Kessler v. Kessler [Cal. App.] 83 P. 257.

22. In a suit for separate maintenance, a decree allowing solicitor's fees to the wife for the use of her solicitor named therein is proper. Berg v. Berg, 119 Ill. App. 422. Order granting wife alimony pendente lite at $25 per month and counsel fee of $50; and one allowing $75 for defending an appeal from the first order held no abuse of discretion. Sparks v. Sparks, 25 App. D. C. 356.

23. Sparks v. Sparks, 25 App. D. C. 356.

24. Kozacek v. Kozacek, 105 Ill. App. 180.

25. Especially where appeal record was incomplete. Berg v. Berg, 119 Ill. App. 422.

26. Where husband was under age of consent. Willits v. Willits [Neb.] 107 N. W. 379.

27. That husband proceeded by cross petition not material. Willits v. Willits [Neb.] 107 N. W. 379.

28, 29. Willits v. Willits [Neb.] 107 N. W. 379.

30. See 5 C. L. 110, 111.

31. Hecht v. Shenners [Wis.] 105 N. W. 309.

Illustrations: Striking out words "notice of such option [to declare default] being hereby waived" and "without any notice whatever." Hecht v. Shenners [Wis.] 105 N. W. 309. Erasing name of one of the makers of a note and inserting another in his place. Babcock v. Henkle, 117 Ill. App. 640. Adding the words "Value received with interest" to a note after execution and delivery. In re Pinkerton's Estate, 49 Misc. 363, 99 N. Y. S. 492. Changing payee in a note. First Nat. Bank v. Gridley, 98 N. Y. S. 445. Change of date in a bill of lading. Merchants' Nat. Bank v. Baltimore, C. & R. Steamboat Co. [Md.] 63 A. 108. Alteration and subsequent delivery of duplicate copy by erasing the letter "s" making two plurals singular. Webster Realty Co. v. Thomas, 107 App. Div. 612, 94 N. Y. S. 916. Changing the phrase "I agree to sell this carload" to "I agree to help sell this car load" is a material alteration; likewise changing "To be settled for Dec. 28, 1901, of what sold," to "to be settled for Dec. 28, 1901, as sold." Philip Carey Mfg. Co. v. Watson [W. Va.] 52 S. E. 515. Changing amounts to be paid for work from $52,000

parties,[32] but an alteration in no way affecting rights of parties [33] or additions that are mere surplusage[34] or which make more accurate an immaterial part of an instrument [35] is not material. The absence of assent by the party affected by the alteration is one of the invalidating elements of an alteration.[36] Hence interlineations made with mutual knowledge and consent [37] or filling in a blank under express or implied authority [38] are valid alterations. The same result does not follow where the party defending has merely been negligent in preventing opportunity for alteration.[39]

Particular instruments.[40]—It has been held a material alteration of a note to

to $54,700 and changing date of completion of work. Hayes v. Wagner, 220 Ill. 256, 77 N. E. 211.

32. Merritt v. Dewey, 218 Ill. 599, 75 N. E. 1066. "Interest at 7 per cent." accidentally omitted from a note and later inserted by payee. Id.

Note: In the states where the negotiable instrument law is in force a change in the sum payable, either interest or principal, is a material alteration of the contract, which will avoid the instrument except as against a party who has made or assented to the alteration. Hoffman v. Planters Bank, 99 Va. 480; Bank v. Chisholm, 169 Pa. 564. A holder in due course may enforce the instrument according to its original tenor. Colonial National Bank v. Duerr, 108 App. Div. 355, 95 N. Y. S. 810; Bank v. Snow, 187 Mass. 159; Schwartz & Sons v. Wilmer, 90 Md. 136. This latter rule is not generally in force where the negotiable instruments law has not been adopted. Eckert v. Pickel, 59 Iowa, 545; Schwartz & Sons v. Wilmer, 90 Md. 136; Morrison v. Garth, 78 Mo. 434; Bank v. Stowell, 123 Mass. 196, 25 Am. Rep. 67; Hurlbut v. Hall, 39 Neb. 889. The balance, however, is declaratory of the rule of the law merchant. Kelly v. Trumble, 74 Ill. 428; Walsh v. Hunt, 120 Cal. 46; Hewins v. Cargill, 67 Me. 554; Searles v. Seipp, 6 S. D. 472; Bank v. Novich, 89 Tex. 381; Batchelder v. White, 80 Va. 103. And this even though the alteration was to make the instrument conform to the terms of the contract. Kelly v. Trumble, 74 Ill. 428. Contra. Wallace v. Tice, 32 Or. 283.—From 4 Mich. L. R. 389.

At common law a material alteration, even after delivery, did not invalidate a sealed instrument, all parties consenting. Zouch v. Claye, 2 Lev. 35; Sheppard's Touchstone 68, and the same rule applied to other written instruments and to bills and notes. Master v. Miller, 4 Term R. 320. The more modern English cases, apparently inconsistent, Kershaw v. Cox, 3 Esp. 246; Hamelin v. Bruck, 9 Q. B. 306, recognized this common-law rule, Downes v. Richardson, 5 B. & Ald 674, but their holdings were demanded by a stamp act which required a new stamp after any alteration, irrespective of the consent of the parties. See Byles on Bills [15th Ed.] 334. While the principal case is sanctioned by some authority (Taylor v. Taylor, 12 Lea [Tenn.] 714), the sounder view permits a recovery on an instrument where the alteration is made merely to correct a mistake (Ames v. Culburn, 11 Gray [Mass.] 390) and with no fraudulent intent to avoid the note (Wallace v. Tice, 32 Or. 283). The case of Kelly v. Trumble, 74 Ill. 428, is clearly distinguishable, the alteration there being made after delivery.—From 6 Columbia L. R. 365.

33. Crowe v. Beem [Ind. App.] 75 N. E. 302.

34. Insertion of figure "90" in an instalment note before words "days after date" but not changing time or manner of payment elsewhere specified in the note. Crowe v. Beem [Ind. App.] 75 N. E. 302.

35. Nance v. Gray [Ala.] 38 So. 916. A note valid without description of land is not rendered void by interpolating the word "west" in the description of land in the note to make description more accurate. Id.

36. Babcock v. Henkle, 117 Ill. App. 640; Hershman v. Stafford [W. Va.] 52 S. E. 533.

37. Interlineations changing a fee simple to a life estate, made in a deed with the knowledge and consent of the parties after its execution and delivery but before recording, will not affect the validity of the deed as between the parties, nor discredit the genuineness of the conveyance. Hunt v. Nance [Ky.] 92 S. W. 6.

38. In the absence of evidence that the blank in a paper sued on is the result of mistake, the presumption is that the payee who is also the holder, has the right to fill up the blank with any amount agreed upon between him and the maker, unless its exercise has been unreasonably delayed. Chestnut v. Chistnut [Va.] 52 S. E. 348. One holding a paper executed by another with express or implied authority to fill up the blanks therein may do so, with the same effect as though it had been fully executed before delivery. Whether it be under seal or not, and they may thereafter be recorded without re-execution or acknowledgment. Friend v. Yahr [Wis.] 104 N. W. 997.

Note: The rule that blanks in a deed could not be filled by a third person unless expressly authorized to do so, by writing or by parol, was questioned as early as 1822 by Chief Justice Marshall in the case of United States v. Nelson, 2 Brock. 64. Marshall's prophecy that the strict rule of the common law would be some day set aside is fast coming true. The principal case is in line with this tendency and goes so far as to hold that one to whom a deed containing blanks is given, has implied authority to fill the blanks. This rule applies to deeds as well as to commercial paper. Nelson v. McDonald, 80 Wis. 605, 27 Am. St. Rep. 71, and cases there cited. This rule applies to blanks in surety bonds (Dolbeer v. Livingston, 100 Cal. 617); to an assignment of corporate stock (Bridgeport Bank v. New York, etc., R. Co., 30 Conn. 231); to consideration in deeds and mortgages (Quinn v. Brown, 71 Iowa, 376, 34 N. W. 13; Reed v. Morton, 24 Neb. 760).—From 4 Mich. L. R. 398.

39. Merchants' Nat. Bank v. Baltimore, C. & R. Steamboat Co. [Md.] 63 A. 108.

40. See 5 C. L. 110.

add interest,[41] to change the payees,[42] to make joint payees several,[43] to strike out a waiver of notice,[44] but not to make more accurate needless words of description.[45] It has also been held material in a contract to change the amount to be paid for work [46] or date of its completion,[47] or to diminish the work undertaken by changing plural to singular,[48] to reduce an undertaking to sell,[49] or the time of accounting for sales,[50] from an absolute one to a conditional one. A change of date in a bill of lading has been held material.[51]

§ 2. *Effect of alteration.*[52]—An immaterial alteration does not destroy the validity of a note,[53] and it is said that except in Missouri and New Jersey no alteration vitiates an instrument unless it is material.[54] Interlineations in a deed made with mutual knowledge and consent, do not affect its validity as between the parties.[55] An alteration consented to by some but not all co-parties may be a defense for the non-consenting ones, but any material alteration made in any instrument in writing by a party having an interest in its performance, or when made with his assent and without consent of the other party to the instrument, will avoid it and discharge the party not agreeing to the alteration from its performance.[56] Even where alteration was made possible by the negligence of the obligor, he may, in some cases, urge it as a defense.[57] If a material alteration appears to have been made fraudulently by the party producing and relying on the agreement, or with his privity, such party cannot recover on the original consideration,[58] but an alteration made innocently, while invalidating the instrument, still permits recovery on the original obligation,[59] for the intent with which alterations are made may be, and in such a case is, material.[60] A material alteration made after the instrument has

41. Inserting "Interest at 7 per cent." Merritt v. Dewey, 218 Ill. 599, 75 N. E. 1066. Adding "Value received with interest." In re Pinkerton's Estate, 49 Misc. 363, 99 N. Y. S. 492.

42. Babcock v. Henkle, 117 Ill. App. 640. One of several payees of a note made payable to them jointly, sent it to the maker after endorsing it, who without authority struck out the name of one of the payees and put his own in its place and struck out the word "jointly." First Nat. Bank v. Gridley, 98 N. Y. S. 445. Held not authorized by Neg. Instr. Law, § 33. Id.

43. See preceding note. First Nat. Bank v. Gridley, 98 N. Y. S. 445.

44. Hecht v. Shenners [Wis.] 105 N. W. 309.

45. Insertion of word "west" in a description in a note unnecessary to its validity. Nance v. Gray [Ala.] 38 So. 916.

46, 47. Hayes v. Wagner, 220 Ill. 256, 77 N. E. 211.

48. Webster Realty Co. v. Thomas, 107 App. Div. 612, 94 N. Y. S. 916.

49. Agree to sell changed to agree to "help" sell." Philip Carey Mfg. Co. v. Watson [W. Va.] 52 S. E. 515.

50. Changing "to be settled for Dec. 28, 1901, of what sold," to "to be settled for Dec. 28, 1901, as sold." Philip Carey Mfg. Co. v. Watson [W. Va.] 52 S. E. 515.

51. Merchants' Nat. Bank v. Baltimore, C. & R. Steamboat Co. [Md.] 63 A. 108.

52. See 5 C. L. 111. See, also, generally as to effect on deeds, Tiffany Real. Prop. 880.

53. Crowe v. Beem [Ind. App.] 75 N. E. 302.

54. Philip Carey Mfg. Co. v. Watson [Ky.] 52 S. E. 515.

55. Hunt v. Nance [Ky.] 92 S. W. 6.

56. A note executed by a number of signers in blank; afterwards name of one of signers was erased and his name written in as payee while another became a maker in his stead. Babcock v. Henkle, 117 Ill. App. 640. An agreement which is signed by all the parties but one, and in order to procure his signature a material change is made in the instrument, becomes ineffectual as to a party who had signed the agreement previously but did not know of or consent to the change. This is not strictly an alteration of an instrument which contemplates a completed contract, but rather constitutes a failure of minds to meet. Hershman v. Stafford [W. Va.] 52 S. E 533.

57. Although a railroad is negligent in not demanding surrender of bills of lading on delivery of goods, nevertheless where such bills were subsequently altered and then negotiated in due course, the railroad company was released from liability on the bills by the alteration. Merchants' Nat. Bank v. Baltimore, C. & R. Steamboat Co. [Md.] 63 A. 108. A statement in a bill of lading that "any alteration, addition, or erasure in the bill of lading, which shall be made without the special notation hereon of the agent of the carrier, shall be void," has no reference to fraudulent alterations after having been issued by carrier; but only to unauthorized alterations by persons on behalf of the carrier at the time of execution. Id.

58. Philip Carey Mfg. Co. v. Watson [W. Va.] 52 S. E. 515.

59. Hayes v. Wagner, 220 Ill. 256, 77 N. E. 211. Alterations made in good faith in expectation of a new and different contract and intended merely as notations or memoranda. Id.

60. Hayes v. Wagner, 220 Ill. 256, 77 N. E. 211.

left the indorser's hand releases him, though indorsement was unqualified.[61] Under the Negotiable Instruments Law where there are suspicious marks on a note and the jury finds that there have been alterations, the note will be avoided as to an indorser unless made anterior to or at the time of indorsement, or with defendant's consent if subsequent thereto or coming within statutory exceptions.[62]

Exclusion from jury.[63]—A material alteration apparent on the face of the note and made after execution by the parties to be held without their consent and with the knowledge and consent of the original payee excludes it from evidence,[64] and a statute making an exception to the general rule that a note materially altered after delivery is inadmissible in evidence except to prove the alteration, and is wholly void does not apply to a note altered and transferred before the act took effect;[65] but it is not error to admit a note in evidence and leave questions of alteration to jury, where it is not clearly apparent upon inspection,[66] nor to admit an instrument in evidence to show the facts in relation to its execution as part of the original transaction and the circumstances of its alteration, where such changes are claimed to have been innocently made,[67] nor an instrument whose alterations have been sufficiently explained,[68] nor to allow proof of the contents of an unaltered duplicate as a basis for recovery, where one duplicate was innocently altered.[69]

§ 3. *Curing or ratifying alterations*[70] restricts the issues when a note is sued upon to those presented by the altered tenor of it.[71]

§ 4. *Pleading, practice, and evidence.*[72]—In suing upon a note alleged to have been altered, burden of proof is first on plaintiff to show himself entitled to recover.[73] After the plaintiff has made a case and the note is in evidence and no alteration apparent from an inspection thereof, the burden of proving material alteration rests on defendant,[74] and material alteration having been established by the defense, the burden shifts back to the plaintiff to prove legal justification there-

61. First Nat. Bank v. Gridley, 98 N. Y. S. 445. Section 116 Neg. Inst. Law, whereby an indorser without qualification warrants to all subsequent holders in due course, does not apply to fraudulent changes made after instrument has left indorser's hands, especially when considered in connection with § 205. First Nat. Bank v. Gridley, 98 N. Y. S. 445.

62. Neg. Instr. Law, Act. 1901, § 124, providing that a holder in due course may enforce according to original tenor. Colonial Trust Co. of Reading v. Getz, 28 Pa. Super. Ct. 619.

63. See 3 C. L. 157.

64. Babcock v. Henkle, 117 Ill. App. 640.

65. Hecht v. Shenners [Wis.] 105 N. W. 309. Exception in favor of a holder in due course not connected with alteration, created by Negotiable Instrument Act (Laws 1899, c. 355, p. 681), becoming effective May 15th, 1899, cannot apply to a note transferred to plaintiff on April 12, 1899. Id.

66. Colonial Trust Co. of Reading v. Getz, 28 Pa. Super. Ct. 619. By an "apparent alteration" is not meant an alteration so apparent on ordinary inspection as to leave no room for doubt but merely such as would arouse the suspicions of a prudent man. Id. A note bearing some evidence on its face, of the date having been scraped and Jan. 19 being changed to Jan. 29, being merely marks of suspicion. Id.

67. Hayes v. Wagner, 220 Ill. 256, 77 N. E. 211.

68. Sufficient explanation: Showing that the alterations, erasures, and interlineations in a lease existed at the time it was executed and that the assignee received an exact copy of the original with its alterations under which he occupied leased premises and paid rent. Landt v. McCullough, 218 Ill. 607, 75 N. E. 1067. Proof that because of defects in a quitclaim deed another deed was executed on a warranty deed form and the erasures were such merely as made it conform to the orig-quitclaim deed sufficiently explained the erasures. Wilder v. Aurora, De Kalb & R. Elec. Traction Co., 216 Ill. 493, 75 N. E. 194. Evidence that a deed had been in possession of plaintiff 30 years and that certain erasures and interlineations were in it at the time he received it was a sufficient explanation of them. Bentley v. State [Ala.] 39 So. 649. Proof of custom of altering the dates of bills of lading at time of issuance to make them conform to the true date is not admissible in support of the contention that an alteration of a "spent" bill fraudulently made for fraudulent purposes, was authorized. Merchants' Nat. Bank v. Baltimore, C. & R. Steamboat Co. [Md.] 63 A. 108.

69. Hayes v. Wagner, 220 Ill. 256, 77 N. E. 211.

70. See 5 C. L. 112.

71. In a suit to recover upon a note as altered, evidence to show that proceeds of original note were applied for benefit of defendant was irrelevant. Colonial Trust Co. of Reading v. Getz, 28 Pa. Super. Ct. 619.

72. See 5 C. L. 112.

73, 74. Merritt v. Dewey, 218 Ill. 599, 75 N. E. 1066.

for or circumstances not precluding recovery.[75] In the absence of such explanation, the alteration will be presumed to have been made by the party producing the agreement or with his privity and fraudulently, so far as legal fraud attaches to a willful change of an agreement by a party thereto.[76] But a plaintiff is not bound to anticipate what evidence, as to an alteration in a note not apparent upon its face, the defendant may offer,[77] and having made a prima facie case and rested, he may introduce evidence in rebuttal as to alleged alterations.[78] The presumptions as to the reality of apparent alterations and as to whether an apparent alteration was contemporaneous with or subsequent to execution vary and conflict in different courts.[79] The presence or absence of circumstances or appearances of suspicion may make a prima facie case to be overcome by the other party.[80] An addition to a note, beneficial to the holder, written in a different style, may be a cause for suspicion, requiring explanation, before recovery is permitted,[81] but the substitution of a merely synonymous expression, no other word being appropriate, is not such evident mark of suspicion as to exclude the instrument from admission in evidence.[82] The materiality of an alteration is a question of law for the court upon the admissibility of the altered agreement in evidence,[83] but in doubtful cases it is held that the facts of suspicion or explanation should go to the jury.[84] The instrument should not go to the jury when there clearly are invalidating alterations.[85] A charge on the privity of a principal to an alteration by his agent and one on the absence of consent thereto by the other party should be put disjunctively.[86]

75. Merritt v. Dewey, 218 Ill. 599, 75 N. E. 1066. Where a material alteration is shown to have been made after the execution of the agreement, the burden is on the party producing and relying upon the agreement to explain the alteration by showing that it was under circumstanes rendering it lawful. Philip Carey Mfg. Co. v. Watson [W. Va.] 52 S. E. 515.

76. Philip Carey Mfg. Co. v. Watson [W. Va.] 52 S. E. 515.

77. Bunnell v. Kintner, 27 Pa. Super. Ct. 605. Where judge rules that alterations in a note are not so apparent on its face as to exclude it from evidence, the plaintiff may proceed on the theory that the note is unaltered. Id.

78. Bunnell v. Kintner, 27 Pa. Super. Ct. 605.

79. See 2 Am. & Eng. Enc. Law [2 ed.] 272.

80. Circumstances raising a presumption that an alteration in an instrument is made at the time of its execution may be rebutted by other suspicious circumstances raising opposite presumptions. Rogers v. Page [C. C. A.] 140 F. 596. The fact that ink used in an alteration is darker than that in the body of the instrument is a circumstance tending to rebut the presumption that the alteration was contemporaneous with the execution of the paper. Id. So too is the variance between a pleading setting up two distinct mortgages, one for $25,000 and another for $35,000, and the evidence establishing one mortgage only drawn originally to secure a $25,000 note, altered to $35,000 and of a different date than that alleged in the pleading, is a suspicious circumstance rebutting the presumption that the alteration was made at the time of execution. Id.

Sufficiency of proof: Where nine notes were all alike at time of execution and one (in suit) subsequently contains an erasure with a red ink line, not evident in the others and three witnesses testify uncontradicted that the erasure was made after delivery, the trial court's conclusion that the evidence was not sufficient to justify a finding that the note was altered after execution and delivery will be reversed. Hecht v. Shenners [Wis.] 105 N. W. 309. Evidence held not to establish an alleged erasure on back of a promissory note. Farmers' & Merchants' Bank v. Carlson [Neb.] 107 N. W. 1009.

81. In re Pinkerton's Estate, 49 Misc. 363, 99 N. Y. S. 492. Where body of note appears to be written with soft, blunt pencil and below the signature, the words "Value received with interest" seemed to have been written with a hard sharp-pointed pencil. Id.

82. Writing "fourth" above word "quarter" in description in deed. Campbell v. Bates [Ala.] 39 So. 144.

83. Philip Carey Mfg. Co. v. Watson [W. Va.] 52 S. E. 515. An alteration of dates in bills of lading. Merchants' Nat. Bank v. Baltimore, C. & R. Steamboat Co. [Md.] 63 A. 108.

84. The credibility of a witness, especially where he is an interested party, testifying that a note was not changed after coming into plaintiff's hands, should not be withdrawn from the jury, even though uncontradicted (Colonial Trust Co. of Reading v. Getz, 28 Pa. Super. Ct. 619); likewise although the testimony of the holder of a note that his bookkeeper made the alteration unauthorized, is uncontradicted, yet, as the alteration was in his favor, made while the note was in his possession, it was a question for the jury whether or not he made the alteration (McDonald v. Nalle [Tex. Civ. App.] 91 S. W. 632).

85. See ante, § 2.

86. An instruction that the verdict should be for the defendant if an alteration in a note was made with the knowledge or con-

AMBASSADORS AND CONSULS.[87]

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AMICUS CURIAE.[88]

AMOTION; AMOUNT IN CONTROVERSY; ANCIENT DOCUMENTS, see latest topical index.

ANIMALS.

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§ 9. Cruelty to Animals (126).
§ 10. Crimes Against Property in Animals (126).

§ 1. *Property in animals.*[89]—The modern rule is that a dog is a species of property recognized by law.[90] The ownership of animals ferae naturae is in the state in its sovereign capacity, as the representative and for the benefit of all its people in common.[91] No person can acquire an absolute property in them,[92] but persons lawfully killing them acquire a qualified property in the carcasses.[93]

§ 2. *Personal injuries inflicted by animals.*[94]—In actions to recover damages for injuries sustained in consequence of the kick or bite of a vicious animal, the principles governing the ordinary negligence action have no application.[95] The keeper, owner, or harborer[96] of a domestic animal, is liable for personal injuries

sent of the plaintiff, by his agent, and that his agent in making such change was acting within the scope of his authority and without the knowledge or consent of the defendants, while not positively erroneous, should nevertheless have been given disjunctively if requested by the defendants. McDonald v. Nalle [Tex. Civ. App.] 91 S. W. 632.

87. No cases have been found for this subject since the last article. See 5 C. L. 112.

88. No cases have been found for his subject since the last article. See 5 C. L. 113.

89. See 5 C. L. 113.

90. Dog registered under Acts Gen. Assem. Feb. 25, 1879 (16 Laws Del. p. 68, c. 48). Harrington v. Hall [Del.] 63 A. 875. Is property within the meaning of Rev. St. 1898, § 4427, punishing the willful, intentional and malicious poisoning of animals. State v. Coleman, 29 Utah, 417, 82 P. 465.

91. State v. Niles [Vt.] 62 A. 795.

92. The ownership of such animals is, at most, a qualified one. State v. Niles [Vt.] 62 A. 795.

93. See Fish and Game Law, 5 C. L. 1426. Nonresident who pays for and obtains a license from the state to kill deer, and kills one. Acts 1904, p. 167, No. 128. State v. Niles [Vt.] 62 A. 795. Acts 1896, p. 74, No. 94, as amended by Acts 1898, p. 84, No. 108, for the protection of deer, was repealed only so far as inconsistent by Acts 1904, p. 167, No. 128, providing for the granting of hunting licenses to nonresidents, and nonresidents must conform to its provisions and are subject to its penalties and presumptions. Id.

94. See 5 C. L. 113.

95. Hunter v. Metropolitan Exp. Co., 98 N. Y. S. 234. Negligence and contributory negligence in the ordinary sense of those terms are not elements. Malloy v. Starin, 99 N. Y. S. 603.

96. Gen. Laws 1896, c. 111, § 5, makes one harboring a dog liable for all damages done by it, as if he were the owner. Oldham v. Hussey [R. I.] 62 A. 377. One who permits his agent to keep a vicious dog on his premises, knowing it to be vicious, is liable for the damages caused by it. Defendant's porter kept a dog, which the evidence showed was known by defendant to be vicious. Barklow v. Avery [Tex. Civ. App.] 13 Tex. Ct. Rep. 893, 89 S. W. 417.

NOTE. What amounts to a keeping and harboring: Even at common law one who keeps or harbors a vicious dog knowing its vicious propensities seems to be responsible for its actions, although he is not the owner. M'Kone v. Wood, 5 C. & P. 1; Bundschuh v. Mayer, 81 Hun [N. Y.] 111. But now this liability is quite generally imposed or defined by statute. Yet precisely what constitutes "keeping or harboring" has been usually left to the courts to define. In a few cases the language used by the court would sustain the rule that merely to permit the dog to remain upon the premises constitutes a "harboring." Jacobsmeyer v. Poggemoeller, 47 Mo. App. 560. But the better and generally accepted rule seems to be that the question is one of fact for the jury, who are to decide it in the light of all the evidence. Whittemore v. Thomas, 153 Mass. 347. And the test usually given them is that the dog must have been in the possession or control of the defendant as a domestic animal. Cummings v. Riley, 52 N. H. 368. Or, if kept by servants or agents, the dog must be kept in some sense for the defendant's benefit. Baker v. Kinsey, 38 Cal. 631; Collingill v.

inflicted by it only when he has notice of its vicious traits,[97] or is negligent,[98] unless a different rule is prescribed by statute.[99] In Louisiana in order to render the owner liable some negligence on his part must be shown.[1] Hence he is not liable when it is shown that the animal has always been of kind temper, and has never attempted to bite any one, and has never given occasion to suspect that it would bite.[2] The burden of making such showing, however, is on the owner, and in the absence thereof he is presumed to have been negligent in not restraining the animal.[3] Where a servant is injured by a vicious animal belonging to his master, the usual rules as to assumption of risk apply.[4] The owner or keeper of a wild animal is chargeable with knowledge of its vicious tendency and disposition, and is liable for injuries inflicted by it without proof of actual negligence on his part.[5] One who, with knowledge of an animal's evil propensities, wantonly excites it, or voluntarily or unnecessarily puts himself in its way, cannot recover for the injuries resulting.[6]

One seeking to recover for an injury by a domestic animal must allege[7] and prove the scienter.[8] Knowledge of viciousness may be implied from circumstances,[9]

Haverhill, 128 Mass. 218.—From 19 Harv. L. R. 463.

97. If the owner has knowledge of the viciousness, he is prima facie liable for injuries done, without proof of negligence as to the manner of keeping the animal. Cooper v. Cushman [Mass.] 76 N. E. 461. One keeping or harboring a dangerous animal with knowledge of its propensities incurs a prima facie liability for any injuries caused by it. Hunter v. Metropolitan Exp. Co., 98 N. Y. S. 234. A vicious animal is a nuisance. Quigley v. Adams Exp. Co., 27 Pa. Super. Ct. 116. Where the owner of a vicious animal has notice of his character, the law imposes on him the duty of so keeping it as to avoid injuries therefrom and he is chargeable for damages resulting from his failure to do so. Quigley v. Adams Express Co., 27 Pa. Super. Ct. 116. The owner, keeper, or harborer of a vicious dog, known to be such, must restrain it, and if he permits it to run at large he is liable for damages done by it. Barklow v. Avery [Tex. Civ. App.] 13 Tex. Ct. Rep. 893, 89 S. W. 417.

98. Where the declaration avers that the owners, "well knownig the vicious and treacherons nature of the horse, were grossly careless and negligent in not informing the plaintiff," the gist of the action is the alleged negligence and it must be shown. Cooper v. Cashman [Mass.] 76 N. E. 461. Where the owners of a horse had no reason to suppose that the person in charge of it did not know that on a single occasion it had kicked a person, they could not be charged with negligence in not informing him. Id. The **keeping of bees** is recognized as proper and beneficial and liability for injury done by them rests on the doctrine of negligence. Petey Mfg. Co. v. Dryden [Del.] 62 A. 1056.

99. Gen. Laws 1896, c. 111, gives a remedy to a person who is bitten by a dog upon a highway, without reference to the defendant's knowledge of the dog's viciousness. Oldham v. Hussey [R. I.] 62 A. 377. While this statute extends the owner or keeper's liability for damage done in the highway, it does not impose any liability beyond that of the common law for acts of a dog committed within the owner or keeper's inclosure. Id.

1. Least act of negligence by owner of dog is sufficient; but some negligence must be shown. The owner of an animal is answerable for the damage it causes. Civ. Code, § 2321. Bentz v. Page [La.] 39 So. 599.

2. Bentz v. Page [La.] 39 So. 599.

3. Owner who assumes that a strange dog will not bite, and on that assumption permits the beast to run at large, is guilty of some degree of negligence. Bentz v. Page [La.] 39 So. 599.

4. Under issues made by the pleadings and the circumstances shown by the evidence held that servant's lack of knowledge of the viciousness of a horse was a material element of his cause of action, which he was bound to prove. St. Louis Nat. Stock Yards v. Morris, 116 Ill. App. 107.

5. If negligence is an element at all, it is not so in the ordinary sense of the term, but consists in the act of keeping the animal with knowledge of its disposition, which knowledge is imputable to him as a matter of law. Malloy v. Starin, 99 N. Y. S. 603. Knowledge of the vicious character of a bear, in the possession of one who was a common carrier, imputed to him. Id.

A common carrier holding a vicious animal which it had transported, until payment of the freight charges, had it in its keeping (Malloy v. Starin, 99 N. Y. S. 603), but it was not liable for injuries inflicted by it upon an infant, while it was kept caged in a freight house, where the cage was partially opened and left so by the owner. Id.

6. Malloy v. Starin, 99 N. Y. S. 603. Act of plaintiff in such case is deemed the proximate cause of the injury. Hunter v. Metropolitan Exp. Co., 98 N. Y. S. 234.

7. The plaintiff's statement averred that defendant knew that the horse "was accustomed to attack and bite mankind." Quigley v. Adams Exp. Co., 27 Pa. Super. Ct. 116.

8. Quigley v. Adams Exp. Co., 27 Pa. Super. Ct. 116. Declarations of one purporting to be the driver that the horse had bitten other persons are insufficient to go to the jury on the question of the owner's knowledge, where the declarant does not appear to have been present when the biting occurred and when he made the statement some time afterward. Id. Evidence that a dog had been seen to run out and attack persons, had

and the owner is chargeable with the knowledge of one to whom he has committed the care and custody of the animal.[10]

§ 3. *Injuries to property by animals trespassing or running at large.*[11]—At common law every man was bound to keep his cattle within his own inclosure, and failing thereof if they escaped and trespassed on another's lands, was liable for the resulting damage.[12] But this rule has been changed by statute in many states so that the owner is only liable in case the stock trespass on lands enclosed by a lawful fence, or embraced in a district in which stock is by law prohibited from running at large.[13] In many of the western states the owner of cattle may permit them to run at large and is not liable in trespass even though they wander upon and depasture uninclosed lands of another,[14] it being the duly of the landowner to enclose his land with a fence sufficient to exclude cattle of all sizes and kinds of ordinary disposition as to breaking fences.[15] Neither this rule[16] nor statutes requiring fencing, however, permit one to willfully and knowingly drive his cattle upon the uninclosed premises of another without his consent.[17] Nor can one unlawfully fenc-

snapped at witnesses and had torn a woman's dress, some of which things had been done in defendant's presence, held sufficient to apprise him that the dog was likely to bite persons on the highway. Fitzgerald v. Warholy, 109 App. Div. 606, 96 N. Y. S. 243. Evidence offered specifically to prove that the dog attacked the witness before plaintiff was bitten, and that the defendant had notice thereof was properly stricken out, where the witness was unable to fix the time when it was done, so as to charge defendant with notice. Deitrich v. Kettering, 212 Pa. 356, 61 A. 927. And where evidence so specifically offered was properly stricken out as not coming up to the offer under which it was admitted, it could not be maintained that such evidence was admissible to prove the dog's general behavior, it not having been offered for that purpose. Id.

9. Evidence that defendant frequently kept his horse muzzled implied knowledge of its viciousness. Poland v. Minshall, 96 N. Y. S. 200.

10. Owner of a dog held chargeable with the knowledge of his brother, to whose custody the dog was committed, as to its vicious character, although such knowledge was not communicated to the owner. Soronen v. Von Pustau, 98 N. Y. S. 431. And the statements of such brother, tending to show such knowledge, were admissible in evidence. Id.

11. See 5 C. L. 115.

12. Ryall v. Allen [Ala.] 38 So. 851.

13. The common-law rule does not prevail in Alabama, but he who seeks protection against animals running at large must inclose against them by a lawful fence. Ryall v. Allen [Ala.] 38 So. 851. And if stock trespasses on lands so inclosed, or embraced in a district where stock is prohibited from running at large, the owner is liable for the damages, and for double damages for each trespass after the first. Code 1896, § 2115. Id. In Kansas the general fence law of 1868 (Gen. St. 1901, c. 40) relieves owner from liability except for trespasses committed on lands inclosed with the legal fence therein described. Missouri Pac. R. Co. v. Olden [Kan.] 83 P. 25. But where the herd law of 1872 (Laws 1872, p. 384, c, 193) is adopted, it operates as a re-adoption of the common-law rule of liability and the general fence law has no application. Id.

14. Healy v. Smith [Wyo.] 83 P. 583; Musselshell Cattle Co. v. Woolfolk [Mont.] 85 P. 874. Under the laws of Idaho, live stock, with certain exceptions, may run at large and graze upon any uninclosed lands of the state, and it will not amount to an actionable trespass against their owner. Swanson v. Groat [Idaho] 85 P. 384. Lands not separanted by fences from government lands are regarded as uninclosed lands, as to the straying thereon of cattle from adjoining lands. Hardman v. King [Wyo.] 85 P. 382. Where cattle so stray upon uninclosed lands, it is not an actionable trespass for the owner to drive them therefrom. Id.

15. In Texas the owner of cattle, herding them just outside of another's pasture, was held not liable for their trespassing after breaking through the fence, unless they were breachy, there being very slight evidence, if any, that defendant "knew and intended" that the cattle would break down the fence and enter the pasture. Moore v. Pierson [Tex. Civ. App.] 93 S. W. 1007. Where plaintiff testified that he had a good fence in good repair, it was proper to exclude his further testimony that the fence was sufficient to turn and keep out all ordinary cattle of different kinds. Id.

16. Healy v. Smith [Wyo.] 83 P. 583. Is liable in trespass if he willfully, deliberately, and knowingly drives them on such land and holds, herds, and grazes them there over the owner's protests and objections. Swanson v. Groat [Idaho] 85 P. 384. One who knowingly and willfully permits sheep to be herded on lands of another, and to depasture the same. Musselshell Cattle Co. v. Woolfolk [Mont.] 85 P. 874. Where defendant willfully drove his cattle upon another's land, consuming the grass and water needful for plaintiff's cattle, and threatened to continue such acts, on account of the impossibility of accurately estimating the damages in money, and to prevent a multiplicity of suits, the enjoining of further trespasses was justified. Id.

17. Sess. Laws 1885, p. 229, authorizing a recovery for injuries by animals breaking through a lawful fence, does not preclude a

ing public land for the purpose of pasturing stock thereon recover damages for the depasturing of the land by another and the consequential injury wrought by his being compelled to pasture his stock upon the public range,[18] or obtain an injunction restraining the continuance of such depasturing.[19] One may rightfully drive cattle along the public highway,[20] and if, without fault on his part, and owing to a lack of intervening fences, they run therefrom into adjacent lands, or lands not abutting on such highway, is not liable for the resulting damage, provided he makes fresh pursuit and uses all proper endeavors to drive them back.[21] The liability of the owner of cattle for damage done by them may sometimes depend upon contract relations.[22] Liability for injury done by bees to property rests on the doctrine of negligence,[23] and trespass quare clausum fregit will not lie therefor.[24]

§ 4. *Liability for killing or injuring animals.*[25]—One unlawfully killing a dog duly registered according to law is liable to its owner for its value.[26] So, too, one negligently killing the animal of another is liable,[27] though it was running at large in violation of law.[28] One may not maliciously injure or kill a dog for a mere trespass on his premises,[29] though he has posted a notice against such trespassing,[30] but may do so where it is killing his fowls on his premises.[31] A bailee who negligently injures an animal in his possession is liable to the owner.[32] Railroad companies are liable for injuries to animals on their rights of way, where they are not fenced or guarded as required by statute.[33]

§ 5. *Contracts of agistment.*[34]—Where one agrees to pasture a certain number of cattle at a specified price per head, and not to put any other cattle in his pasture except certain of his own, there is an implied provision that he will not overstock such pasture and will keep the fences in a reasonably safe condition,[35] and the fact that no definite term for the duration of the contract is fixed does not preclude a recovery for damages sustained during its continuance.[36] In an action for damages for failure to furnish cattle received under a contract of pasturage with sufficient water, evidence of results obtained in another pasture under similar conditions, but where there was plenty of water, is admissible.[37] Statutes in some states give a lien

recovery for a willful trespass for driving sheep upon another's uninclosed land and contrary to his warning. Bell v. Gonzales [Colo.] 83 P. 639.

18. Title to land is in Federal government and it alone may sue for injuries to it. Clemmons v. Gillette [Mont.] 83 P. 879.

19. Cannot call on equity to prevent another from trespassing on him, by the pasturing of cattle. Clemmons v. Gillette [Mont.] 83 P. 879.

20, 21. Wood v. Snider, 95 N. Y. S. 508.

22. Defendant held liable for damage done to plaintiff's crops by cattle, under his agreement to protect the crop from such injury, while the plaintiff was cultivating defendant's land as tenant. Gloor & Co. v. West [Tex. Civ. App.] 89 S. W. 783. In an action for damages under such an agreement it was not necessary to charge that it was the tenant's duty to keep the fences in repair and protect himself against trespasses by stock. Id.

23. See note, 5 C. L. 114, n. 72. Petey Mfg. Co. v. Dryden [Del.] 62 A. 1056.

24. Petey Mfg. Co. v. Dryden [Del.] 62 A. 1056.

25. See 5 C. L. 116.

26. Harrington v. Hall [Del.] 63 A. 875. Act of defendant's son in shooting dog under general or special direction of defendant held the act of the latter. Id.

27. Evidence held to sustain a finding that defendant was not negligent in killing plaintiff's dog. Wallace v. North Ala. Traction Co. [Ala.] 40 So. 89.

28. One who unlawfully permits an animal to run at large in the streets of a city may recover for its death, caused by the negligence of another just prior to discovering the animal in the street, though there was no negligence after such discovery. The animal was run into by defendant's delivery wagon and killed. Ensley Mercantile Co. v. Otwell [Ala.] 38 So. 839.

29, 30. Harrington v. Hall [Del.] 63 A. 875.

31. For killing his turkeys. Harrington v. Hall [Del.] 63 A. 875.

32. Allegations of carelessness and negligence in a complaint for suffering a horse to run away and kill himself held too general to withstand a special demurrer, and evidence insufficient to support the verdict for plaintiff. Stewart v. Greene [Ga.] 53 S. E. 450.

33. See Railroads, 6 C. L. 1194.

34. See 5 C. L. 117.

35, 36. Wallis & Co. v. Wallace [Tex. Civ. App.] 92 S. W. 43.

37. Tuttle v. Moody [Tex. Civ. App.] 94 S. W. 134.

to persons feeding and pasturing horses.[38] An owner who makes a contract with a tenant in possession to pasture his cattle and intrusts them to his charge, is not liable for the tenant's wrongfully turning them upon the demised premises.[39]

§ 6. *Estrays and impounding.*[40] The legislature may pass general laws restraining animals from running at large,[41] and municipalities generally are authorized to restrain their running at large within the corporate limits.[42] In many states an estray can be taken up as such only when found in the vicinity of the residence of the person so taking it.[43] One who claims a lien upon an animal as an estray must show a full and strict compliance with all the requirements of the statute giving such lien;[44] and forfeits his lien if he refuses to surrender such animal to one furnishing the statutory proof of ownership.[45] The right to take into possession and keep trespassing animals until the damages and reasonable charges are paid is predicated upon their breaking through a good and lawful division fence, in good repair.[46] The statute of Kentucky, prohibiting cattle from running at large and giving a lien thereon for trespass, does not authorize one to hold them until the damages are paid,[47] but he must enforce such lien by action like any other lienholder;[48] and he cannot set up his damages as a counterclaim in an action by the owner to recover possession of the animals.[49]

38. In California a person feeding and pasturing horses is entitled to the statutory lien therefor, although he was not engaged in the general business of pasturing stock. Under Civ. Code, § 3051. Seale v. McCarty [Cal.] 82 P. 845.

39. Mott v. Scott [Colo.] 83 P. 779.

40. See 5 C. L. 118.

41. Rev. St. 1879, c. 159, for restraining swine from running at large, was repealed by act Mar. 27, 1883 (Laws 1883, p. 26), for the restraining of domestic animals, the later act being intended to cover the entire subject. Gumm v. Jones, 115 Mo. App. 597, 92 S. W. 169. Act May 23, 1901 (Kirby's Dig. § 5450), relative to the prevention of animals running at large in first and second class cities and incorporated towns, did not repeal Act Apr. 20, 1895 (Kirby's Dig. § 5451), prescribing the procedure in case animals are impounded, etc. Town of Benton v. Willis [Ark.] 88 S. W. 1000. Ky. St. 1903, c. 122, authorizing rural communities to adopt a stock law by vote did not directly or by implication alter, amend, or repeal the various city charters previously enacted. City of Paducah v. Ragsdale [Ky.] 92 S. W. 13.

42. Ordinance providing for the restraining upon the owner's premises of certain domestic animals, "within the limits of the town," and for the impounding of such as were found running at large therein, held not to apply to animals running at large on the common range outside of the city, but straying within the city limits. City of Red Lodge v. Maryott [Mont.] 83 P. 485. Ky. St. 1903, § 3058, subsec. 12, gives cities power to regulate or prohibit the running at large of cattle. City of Paducah v. Ragsdale [Ky.] 92 S. W. 13. The various sections of the Paducah city ordinance prohibiting the running at large of certain animals are all germane to the subject and not more than one subject is embraced therein. Id. It is no objection to the validity of an ordinance prohibiting the allowing of animals to run at large, that it requires the owner to prove his innocence or suffer a fine, the plea of not guilty putting the burden upon the prosecution to show guilt beyond a reasonable doubt. Id. An ordinance against allowing animals to run at large, which authorizes proceedings in rem, does not deprive the owner of property without due process of law, especially where the owner is given a day in court. Id. It is no objection to the validity of such ordinance that it provides for no appeal by the property owner. Id Acts 1905, p. 670, c. 316, amending the small stock law of 1903 (Acts 1903, p. 408, c. 177) so as to be in force only in counties adopting it by a majority vote, construed and held not unconstitutional as suspending the operation of the general act of 1903 in violation of Const. art. 11, § 8. Wright v. Cunningham [Tenn.] 91 S. W. 293. But the act of 1905 is unconstitutional, as the legislature cannot pass an act to become effective only on the contingency of a favorable vote of the people. Id.

43. Two miles out in the country is not "in the vicinity of" a person's residence in the town. Mills v. Fortune [N. D.] 105 N. W. 235.

44. Rev. Codes 1899, §§ 1571-1584. Mills v. Fortune [N. D.] 105 N. W. 235. Otherwise he is a mere trespasser and can claim no lien for compensation. Id. The demand for appraisement required by § 1578, Rev. Codes 1899, must be made within a reasonable time after the taking up of the estray. Id.

45. No other proofs of ownership can be demanded of the claimant than what the statute prescribes as sufficient (Rev. Codes 1899, § 1575) and an arbitrary refusal to deliver the estray without further proofs worked a forfeiture of the estray lien. Mills v. Fortune [N. D.] 105 N. W. 235.

46. Krahn v. Bickford, 118 Ill. App. 511. Where defendant locked up plaintiff's cow and refused to turn her out, until plaintiff paid damages, but afterwards made a settlement with plaintiff and turned the cow out, defendant was not liable for the value of the cow. Stout v. Fultz [Mo. App.] 93 S. W. 919.

47. Ky. St. 1903, § 4646. Linn v. Hagan's Adm'r [Ky.] 92 S. W. 11.

48, 49. Linn v. Hagan's Adm'r [Ky.] 92 S. W. 11.

§ 7. *Regulations as to care, keeping and protection, and health.*[50]—Statutes in many states provide for the inspection [51] and quarantine of live stock by state officers.[52] The legislature may confer power upon the proper state authorities to make necessary regulations.[53] The action of the state live stock inspector of Tennessee, in slaughtering any diseased animal when the public safety demands it, is unquestionable in any subsequent proceeding,[54] but the action of the commissioners appointed to determine the animal's value is judicial in its nature and may be reviewed by certiorari to the circuit court.[55] The statutes of Alabama provide for special elections for the purpose of adopting stock laws.[56] In a civil action for damages under the Idaho statute for permitting sheep infected with a contagious disease to run at large, scienter need not be alleged or proven where carelessness or negligence is averred.[57] In some states public officers are authorized to kill dogs not provided with collars as prescribed by law.[58] In such case the good faith of the owner in failing to comply with the statutes is immaterial;[59] and it is also immaterial that the person killing the dog did so for another reason than the statutory one.[60] In others dogs which habitually pursue deer may be killed by anyone.[61]

50. See 5 C. L. 118.

51. The act of 1905 (Sess. Laws 1905, p. 59), abolishes the offices of sheep inspector and deputies and creates in their place the offices of state veterinary surgeon, assistants and inspectors, repealing the act of 1901 (Sess. Laws 1901, p. 142). Noble v. Bragaw [Idaho] 65 P. 903.

52. Laws 1901, p. 662, c. 479, § 4, subsec. b, authorizes the commissioner of agriculture to co-operate with the United States department of agriculture in establishing cattle districts and quarantine lines, and the court of North Carolina will take judicial cognizance of the rules and regulations of the Federal department concerning cattle transportation. State v. Southern R. Co. [N. C.] 54 S. E. 294.

53. Laws 1901, p. 662, c. 479, § 4, subsec. b, authorizing the commissioner of agriculture, with the consent of the board of agriculture, to establish and maintain cattle districts and quarantine lines to prevent the infection of cattle, conferred power to make regulations for the transportation of cattle within the state. State v. Southern R. Co. [N. C.] 54 S. E. 294. That act was not unconstitutional as an unwarranted delegation of legislative power to the board of agriculture, which is a branch of the executive department. Id.

54. Acts 1901, p. 283, c. 156. Lewis v. Shelby County [Tenn.] 92 S. W. 1098.

55. Lewis v. Shelby County [Tenn.] 92 S. W. 1098.

56. General Stock Law (Acts 1903, p. 431) did not repeal Acts 1886-87, p. 739, authorizing the commissioners' court of Henry, Pickens and Dale counties to establish or abolish the districts in which live stock may be prevented from running at large. Mosely v. Hudson [Ala.] 40 So. 217. Loc. Acts 1900-01, p. 1800, provides for a stock law election in an entire county, whereupon such law may be established in any precinct where there is a majority therefor. Acts 1903, p. 431, provides for such election in any precinct and further provides that it shall not repeal any local law previously enacted. Held that both the local and the general law may be given operation in the same county. Phillips v. Bynum [Ala.] 39 So. 911. A precinct is the unit fixed for a stock law election (Commissioners' Ct. Blount County v. Johnson [Ala.] 39 So. 910), and such an election held for a subdivision of a precinct is void (Phillips v. Bynum [Ala.] 39 So. 911). Under Acts 1903, p. 431, a stock law election, held pursuant to a petition describing the territory to be covered by the election, by metes and bounds, and failing to show whether it included an entire precinct or not, and where the commissioners' court declared the result as in that part of the precinct described in the petition, was void. Commissioners' Ct. of Blount County v. Johnson [Ala.] 39 So. 910. The term "subdivision" in § 16 of the Stock Law Act (Acts 1903, p. 432), means a subdivision already existing and definitely fixed, so that the commissioners' court of a county could not order an election for the disestablishment of an existing stock law in a precinct where it affected only a portion thereof. Caudle v. Talladega County Court Com'rs [Ala.] 39 So. 307. A petition for a mandamus to compel county commissioners to order an election to repeal "existing stock law or stock laws," without showing what law, or that any stock law actually existed in the precinct, was bad. State v. Lovejoy [Ala.] 39 So. 126. It was also bad in showing that the stock district was only part of a precinct when an election in the entire precinct was prayed for. Id.

57. Under Sess. Laws 1901, p. 151, §§ 21, 23. North v. Woodland [Idaho] 85 P. 215. A complaint under that act that alleges that the injury was the result of the careless and negligent acts of the defendant is sufficient. Id.

58. Rev. Laws, c. 102, §§ 128, 143. Moore v. Mills [Mass.] 77 N. E. 638. When it can be done without the commission of a trespass. Id.

59. Rev. Laws, c. 102, § 143, authorizes such killing, unless the dog has a collar marked with the owner's name and registered number (§ 128). Held that the killing was justified, where the collar did not bear such number, although the owner had acted in good faith, understanding that the dog would have the same number as another that had died. Moore v. Mills [Mass.] 77 N. E. 638.

60. Moore v. Mills [Mass.] 77 N. E. 638.

Interstate transportation; quarantine; inspection.[62] Statutes in some states impose a penalty upon nonresidents driving stock into the state and permitting them to run at large.[63] The importation of Texas cattle into Kentucky is forbidden during certain months.[64]

§ 8. *Marks and brands.*[65]—Branded animals belong prima facie to the registered owner of the brand,[66] and certified copies of the brand record are admissible in evidence to show ownership.[67] The usual contract rules apply to contracts for the sale of brands.[68]

§ 9. *Cruelty to animals.*[69]

§ 10. *Crimes against property in animals.*[70]—It is generally made a crime to willfully kill the animals of another.[71] The presumption is that the killing of a dog by a public officer was legal rather than illegal.[72] Theft of animals is either covered by the general law of larceny or by statutory crimes of the same nature.[73]

ANNUITIES.[74]

An annuity is a grant of a stated sum of money payable at the expiration of fixed consecutive periods, for a definite term or for life.[75] The essential element is the certainty of the amount to be paid periodically at a certain rate per annum or in a certain aggregate annual amount, and it is immaterial that the periods for

61. Act June 27, 1883 (P. L. 163). Commonwealth v. Frederick, 27 Pa. Super. Ct. 228.

62. See 5 C. L. 119.

63. Under Code § 2319, one who owns in a county any estate in land for one year, or other higher estate, is exempted from certain forfeitures imposed upon nonresidents for stock driven within the state and suffered to range at large. Rose v. Davis [N. C.] 52 S. E. 780. Good faith, or a bona fide claim of a nonresident to title, does not bring him within the exception. Id.

64. Under St. 1903, § 1331, prohibiting the bringing of Texas cattle "into this state," during certain months, an indictment was insufficient in that it failed to charge that the cattle were brought "into this state" by defendant. Commonwealth v. Illinois Cent. R. Co. [Ky.] 90 S. W. 273.

65. See 5 C. L. 120.

66. Burden is on another claiming to own them under a contract to establish that fact by a preponderance of the evidence. Belknap v. Belknap [S. D.] 107 N. W. 692.

67. On a trial for the larceny of an animal, a certified copy of a brand taken from the county records showing the ownership of the brand found on the animal killed. Seaborn v. State [Tex. Cr. App.] 90 S. W. 649.

68. Where defendant sold his brand to plaintiff, with his horses on the range, and plaintiff was to be the judge, plaintiff could not act arbitarily in determining that an animal did not belong to defendant. Belknap v. Belknap [S. D.] 107 N. W. 692. Where defendant in an action in claim and delivery claimed that a certain mare was one owned and branded by him before the sale of his brand to plaintiff, it was competent for him to show that the animal was old enough to have been branded at such time. Id.

69, 70. See 5 C. L. 120.

71. The word "willfully" in the penal statute of Pennsylvania relative to the killing of domestic animals is synonymous with "intentionally." Act Apr. 24, 1903, P. L. 296. Commonwealth v. Frederick, 27 Pa. Super. Ct. 228. A person who wantonly, and without apparent necessity, kills the dog of another that goes into his pasture and frightens his stock, without making any effort to prevent the dog from running after the stock, is criminally liable therefor under Pen. Code, art. 786. Brookreson v. State [Tex. Cr. App.] 93 S. W. 725. A dog has rights, and cannot be wantonly, and without apparent necessity, killed for going into a pasture and frightening cattle, without any effort on the part of the owner to prevent its injuring the stock. Id. Evidence insufficient to sustain conviction for killing a mule with intent to injure the owner. Nicholson v. State [Tex. Cr. App.] 90 S. W. 1011. Rev. St. 1898, § 4427, provides for the punishment of persons willfully, unlawfully and maliciously administering poison to another's animal. State v. Coleman, 29 Utah, 417, 82 P. 465. Malice may be implied from the willful and intentional killing. Id. Although the owner of a dog poisoned was unknown to defendant, a finding that the act was malicious is not thereby precluded. Id. Evidence tending to show that a dog prior to its killing had bitten defendant's boy did not authorize a charge that the killing was not malicious but only for the purpose of preventing similar attacks. Id.

72. Where an officer in the employ of the commissioner of forestry was prosecuted for willfullly and maliciously killing a dog and the evidence showed that he had heard of the character of the animal as a deer dog and killed him 3 miles from the owner's residence and not in company with his master, it was error to place upon defendant the burden of disproving malice. Commonwealth v. Frederick, 27 Pa. Super. Ct. 228.

73. See Larceny, 6 C. L. 402.

74. See 5 C. L. 121. See 3 C. L. 165, 166. Where will be found notes on form of instrument required, and apportionment of annuities. See, also, Wills, § 5 D, 6 C. L. 1929.

75, 76. Peck v. Kinney [C. C. A.] 143 F. 76.

the payment may be distributed through the year.[76] It is not necessary that it be for the life of the individual beneficiary, but it may be fixed at a shorter period by words of limitation in the grant.[77] It differs from income in that the latter embraces only the net profits after deducting all necessary expenses and charges, while an annuity is a fixed amount to be paid absolutely and without contingency.[78] A gift of an annuity to a corporation without limitation or qualification as to its duration is, in the absence of anything to show a contrary intention, to be understood as a gift to it so long as it exists and fulfills the purposes designed by its charter.[79] An annuity chargeable upon a residuary estate independent of a trust is assignable and does not prevent the vesting of the fee in possession, while a beneficial interest in a trust estate is not assignable and does prevent such vesting.[80] Calling the interest of the annuitant an annuity does not make it assignable.[81] A trust to pay annuities is lawful in New York.[82] A contract whereby a husband agrees to pay his divorced wife an annuity for life in consideration of her releasing his other property from the lien of a judgment for alimony, the payments being secured by a trust deed on certain land, is valid and enforceable out of the security, notwithstanding the subsequent remarriage of the parties.[83] Whether an annuity is to be charged on the corpus of an estate or on the income only is a question of intention.[84] Whether a deficiency for one year in an annuity charged upon the net income of a trust fund can be made up from the income of subsequent years depends upon whether the annuity is charged upon the income generally or upon the income de anno in annum [85] which is a question of intention.[86] The fact that the annuity is given to testator's wife in lieu of dower does not change the rule.[87] The allowance of interest on arrears of annuities is discretionary, where there is no express direction or contract for interest.[88]

77. Peck v. Kinney [C. C. A.] 143 F. 76. Provision that trustees should pay "from time to time as often as once in six months," from the trust estate, including accumulations of income as well as the corpus of the estate, a specified sum per year to widow and children or their descendants per stirpes, with provision for payment to survivors in case of death of child without issue, held to create annuity. Id.

78. Peck v. Kinney [C. C. A.] 143 F. 76. Gift of interest on a specified sum to one for life, the principal to go to her children on her death, held to be a gift of interest and not an annuity. Bank of Niagara v. Talbot, 96 N. Y. S. 976.

79. Fact that it may continue perpetually is immaterial, where gift is for charitable purposes. Merrill v. American Baptist Missionary Union [N. H.] 62 A. 647.

80. People's Trust Co. v. Flynn, 106 App. Div. 78, 94 N. Y. S. 436. Will held to have created trust to pay annuity to widow for life, and not to have given her an assignable interest independent of the trust, and trust was void because limited as to duration by three lives. Id.

81. People's Trust Co. v. Flynn, 106 App. Div. 78, 94 N. Y. S. 436.

82. Under Laws 1896, p. 571, c. 547, § 76, subdv. 3. People's Trust Co. v. Flynn, 106 App. Div. 78, 94 N. Y. S. 436.

83. After divorce decree husband and wife entered into agreement whereby he, in consideration of her release of his other property from the lien of a judgment for alimony, agreed to pay her the amount of the alimony yearly for life, and executed a trust deed of certain property to secure its payment. Deed provided that on default in payment of an installment, trustee should sell property and either invest enough of the proceeds to produce the stipulated annuity, or pay wife the commuted value of the annuity at the date of the sale. Parties were subsequently remarried, and husband became bankrupt. State statute gave wife right to acquire and hold property as though unmarried. Held that contract and deed were valid, and were not rendered invalid by subsequent marriage of the parties, and that arrears of annuity could be collected out of the property after the husband's bankruptcy. Savage v. Savage [C. C. A.] 141 F. 346.

84. Annuities held charged on income only. Merrill v. American Baptist Missionary Union [N. H.] 62 A. 647.

85. If the former, it may be, but otherwise not. Comstock v. Comstock [Conn.] 63 A. 449.

86. Where testator gave wife annuity to be paid at least semiannually from the net annual income of a trust fund, and then appropriated to specified objects the whole of each year's excess income, held that annuity was not charged on net income of fund generally, and that deficiencies could not be made up. Comstock v. Comstock [Conn.] 63 A. 449.

87. Comstock v. Comstock [Conn.] 63 A. 449.

88. Not allowed on arrears of an annuity due from bankrupt to his wife under antenuptial contract secured by deed of trust, where contract did not provide for it, and

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husband had supported wife during time when arrears accrued, and its allowance would deplete residue of proceeds of property covered by the deed, which would go to creditors. Savage v. Savage [C. C. A.] 141 F. 346.

Scope of title.—All strictly revisory proceedings, as distinguished from supervisory remedies [1] or prerogative writs, are included herein, excepting certiorari [2] and proceedings in criminal cases [3] and before justices of the peace.[4] Bills of review [5] and other legal or equitable remedies for opening or correcting judgments [6] are not review in the sense here used. The effect of judicial error (Harmless or Prejudicial Error)[7] and the modes of saving the right to question such errors [8] are allotted to separate titles.

§ 1. *The right in general. A. Constitutional and statutory provisions; policy of the law.*[9]—Within the constitutional and organic law, the legislature has exclusive [10] power to withdraw [11] or regulate the right of review of judicial proceedings.

The right is favored in the law,[12] but being purely statutory,[13] cannot be extended or denied by the courts. An appeal [14] or the suing out of a writ of error is deemed the beginning of a new suit.[15]

(§ 1) *B. Waiver, election, transfer, or extinguishment.*[16]—A waiver [17] or election [18] to treat a proceeding as valid or to pursue another remedy for relief, or

1. See Mandamus, 6 C. L. 496; Prohibition, Writ of, 6 C. L. 1102, and the like.
2. See Certiorari, 5 C. L. 559.
3. See Indictment and Prosecution, 5 C. L. 1790.
4. See Justices of the Peace, 6 C. L. 331.
5. See Equity, 5 C. L. 1144.
6. See Judgments, 6 C. L. 214.
7. See 5 C. L. 1620.
8. See Saving Questions for Review, 6 C. L. 1385.
9. See 5 C. L. 122.
10. The legislature alone can regulate the matter of appeal and it is not within power of a city to regulate appeals by ordinance. City of Paducah v. Ragsdale [Ky.] 92 S. W. 13.
11. It is solely within the legislative discretion whether an appeal in any case shall be granted. An ordinance not unconstitutional for failure to provide for appeal. City of Paducah v. Ragsdale [Ky.] 92 S. W. 13. Where the constitution of a state does not define the specific limits of appellate jurisdiction, this may be abridged or extended by the legislature as public policy may require. Under the constitution of Tennessee, art. 6, §§ 1, 2, held, the charter provision of the city of Chattanooga denying an appeal in all civil cases where the fine imposed does not exceed $10 is constitutional. City of Chattanooga v. Keith [Tenn.] 94 S. W. 62. Even in the absence of legislative provision the establishment of an appellate tribunal by organic law is an implied declaration that some right of appeal exists which cannot be unreasonably restricted by statute law. Id. A provision in a constitution leaving the regulation of appeals to the legislature permits a limitation of appeal by it. Man v. Stoner [Wyo.] 83 P. 218. Legislature may declare judgments of district court in special proceedings final and it has done so in certain instances. Id.
12. Different statutes conferring the right of appeal must be construed so as to harmonize with each other, and so as to give effect to both if possible. Code Civ. Proc. § 1357, providing for appellants in special proceedings in courts of record held not in conflict with section 2260 providing for appeal in summary proceedings in Justices' courts. In re Soop [N. Y.] 76 N. E. 14.
13. The right to appeal is purely statutory. A constitutional grant of appellate jurisdiction alone is not sufficient. State v. Chittenden [Wis.] 107 N. W. 500. The right of appeal was unknown to the common law and exists only by statute or constitutional requirement. Man v. Stoner [Wyo.] 83 P. 218.
14. Is a new suit and not a continuation of the old. Wingfield v. Neal ;W. Va.] 54 S. E. 47.
15. Field v. Kenneweg, 218 Ill. 366, 75 N. E. 986.
16. See 5 C. L. 123.
17. The right of appeal may be waived after judgment (Keoughan & Co. v. Equitable Oil Co. [La.] 41 So. 88), and the waiver need not rest on a valuable consideration (Id.). The general authority of an attorney at law does not extend to a gratuitous waiver of his client's right of appeal. Id. Silence of counsel while counsel for his coparty announces acquiescence in the judgment does not waive the right of appeal. Wenar v. Schwartz [La.] 40 So. 599. A contestant of a will who consented to the appointment of certain administrators to conserve the estate after the allowance of the will did not thereby waive her right to appeal from the order allowing the will. In re Pederson's Estate [Minn.] 106 N. W. 958. A defendant who appealed from an order overruling her plea to the jurisdiction in a divorce suit and ordering her to answer or suffer a decree pro confesso, but providing that the answer should not be deemed a waiver of her right to appeal, will not, by answering, be considered to have waived her appeal. Duke v. Duke [N. J. Eq.] 62 A. 471. The right of appeal is not lost, where three suits are instituted involving the same controversy, only the first being brought to trial and the other two dismissed, by appealing from the first judgment alone and waiving the right as to the other two. Copper River Min. Co. v. M'Clellan [C. C. A.] 138 F. 333.
18. **Voluntary performance of a judgment or order** waives an appeal therefrom. Evans v. Noble [Iowa] 107 N. W. 1105. The court having decided that the county auditor should file a certain plat upon an abstract of title being attached thereto, plain-

an agreement to abide the event,[19] will deprive the party of his right of review. An existing matter of controversy is essential to any form of review, hence the transfer [20] or extinguishment of the aggrieved party's right is ground of dismissal,[21] but matters which frustrate merely the enforcement of the judgment do not have such effect.[22] After the right of appeal has been lost, the prevailing party has a vested right to his judgment free from review, and no further right of appeal can be then conferred.[23]

(§ 1) *C. Pendency of a former appeal.*[24]—There can be no review while a former proceeding for one identical in scope and operation is pending.[25]

§ 2. *The remedy for obtaining review.*[26] *A. Appeal and error* [27] are the common remedies, the former to review equitable causes,[28] the latter judgments at law.[29]

tiff could not appeal after voluntarily attaching the abstract pursuant to the order. Id. Where the defendants comply with an alternative writ of mandate, and the case is dismissed without the issuance of a peremptory writ and without final judgment, the defendants cannot appeal. McCormick v. State [Ind.] 76 N. E. 293. In a suit by county officials against the county for their salary resulting in judgment in favor of the officials which was satisfied of record and paid by a warrant by a ministerial officer, an appeal may nevertheless be taken by the county, there being nothing to show that such satisfaction and payment of the judgment by the county were voluntary. Ogden v. Chehalis County [Wash.] 82 P. 1095. A performance of a judgment not voluntary will not ordinarily destroy the right. Hindman v. Boyd [Wash.] 84 P. 609. On appeal from mandate performance of mandate was not a waiver of right of appeal, where it was shown that appellant had unsuccessfully applied to trial and appellate court to fix supersedeas bond. Id.

A litigant party accepting the benefits of a judgment cannot thereafter appeal, as where in a suit for a receiver for a corporation the tangible property of the corporation was sold, and a receiver was appointed for only the tangible property, and an attorney's fee was allowed to the plaintiff's attorney and paid out of the funds collected by the receiver, it was held that the plaintiff having received the benefit of a portion of the decree, could not appeal from that portion refusing to appoint a receiver for the tangible assets. See Burns' Ann. St. 1901, § 644. Thompson v. Midland Portland Cement Co. [Ind. App.] 77 N. E. 299. Where the only evidence that appellant accepted the portion of his claim allowed is that the account in the circuit court was credited with that amount, it is insufficient to estop him from appealing. Center's Adm'r v. Breathitt County [Ky.] 90 S. W. 1054. Where plaintiff is permitted to amend, complaint upon payment of all costs accrued, and acceptance of such costs by defendant, waives the right to appeal from the order. Serrell v. Forbes, 106 App. Div. 482, 94 N. Y. S. 805. Where a decree of the surrogate court settles the accounts of the committee of an incompetent person and allows compensation to the special guardian, an acceptance of the compensation does not waive the right of appeal from the settlement. In re Edwards, 110 App. Div. 623, 97 N. Y. S. 185.

Payment or tender into court: Under Civ. Code, art. 2634, defendant may appeal from a judgment of expropriation though it has paid the damages into court and taken possession of the land. Articles 2636, 2637, allowing suspensive appeals in expropriate cases, do not repeal article 263. New Orleans Terminal Co. v. Firemen's Charitable Ass'n [La.] 39 So. 437.

19. A waiver of the right to appeal in a lease does not apply to the question whether the tenant subsequently agreed to an increase of rental. Peters v. Dalton, 27 Pa. Super. Ct 285.

20. A father suing for his daughter loses capacity to act for her on appeal by her marriage and the joining of her husband. Pattison v. Gulf Bag Co. [La.] 41 So. 224. Where a party to an appeal transfers or otherwise loses his interest in the subject-matter in controversy, the appeal will be dismissed as to him, when the fact is brought to the attention of the appellate tribunal. Where it appeared that since the judgment below the interests of one of the appellants in real estate in controversy had ceased by virtue of a foreclosure of a deed of trust. Chicago & S. E. R. Co. v. Grantham [Ind.] 75 N. E. 265.

21. An appeal from a judgment of interdiction abates on the death of the interdict. In re Jones [La.] 41 So. 431. Death of interdict abates appeal from judgment homologating proceedings of family meeting to appoint curator. In re Interdiction of Lambert [La.] 38 So. 903. Death of an interdict pending appeal from the removal of the curator abates the appeal. In Re Lambert [La.] 39 So. 447.

22. Failure to present to executors a judgment appealed against decedent and continued against the executors though it makes the judgment unenforceable does not render it moot as of the time when it was entered; hence appeal will be retained. People's Home Sav. Bank v. Sadler [Cal. App.] 81 P. 1029.

23. Spremich v. Maurepas Land & Lumber Co., 114 La. 1053, 38 So. 827.

24. See 5 C. L. 124.

25. A bill of review for error of law cannot be maintained while an appeal is pending in the supreme court of appeals. Dunfee v. Childs [W. Va.] 53 S. E. 209. The pendency of an appeal ineffectual for failure to file the bond on appeal within the time required by law is no bar to a second appeal in the same cause. Tatum v. Geist [Wash.] 82 P. 902.

26, 27. See 5 C. L. 124.

28. The word "appeal" though having a strict technical meaning is frequently used

The character of the controversy and the relief sought, and not the mode of trial, determines whether the action is legal or equitable.[30] An act providing a particular method of appeal is generally exclusive, and must be strictly pursued.[31] Bankruptcy proceedings are specially reviewable under the act.[32]

(§ 2) *B. Certification or reservation*[33] of doubtful or disputed questions[34] is a mode of review in some states.

(§ 2) *C. The common remedies,*[35] appeal or error must, if adequate or applicable, be invoked rather than certiorari,[36] prohibition,[37] quo warranto,[38] manda-

as embracing all kinds of proceedings for the review of causes. City of Rockford v. Compton 115 Ill. App. 406. An appeal is not an appropriate method of review of errors committed in an action at law, in the federal courts. Roberts v. Great Northern R. Co. [C. C. A.] 138 F. 711. A motion to dismiss on ground that review should have been by writ of error instead of appeal denied, where appellee was plaintiff below and brought suit in equity by a bill praying for equitable relief though real controversy may have been a question at law. Madden v. McKenzie [C. C. A.] 144 F. 64.

29. Alleged error of trial court in compelling appellant to elect between two causes of action set forth in his petition cannot be considered on appeal for a trial de novo of the issues tried in the district court. Webber v. Ingersoll [Neb.] 104 N. W. 600. Could be reached only by error. Id. The fact that there is enough evidence in the record to make out the cause not tried does not avail Id.

30. Though an action at law is tried without a jury, error is the remedy for review. Guss v. Nelson, 200 U. S. 298, 50 Law Ed. —.

31. Where a special proceeding has been provided for the prosecution of error a reviewing court acquires no jurisdiction of proceedings brought under the general statute. Wilder v. Logan Natural Gas & Fuel Co., 6 Ohio C. C (N. S.) 206. A designated mode of prosecuting error to all judgments entered in pursuance of an act applies to a proceeding brought under an amended section thereof. Id.

32. Two remedies are available to procure a review of an adjudication within the election of the aggrieved party, namely review on petition in original court pursuant to section 24b, and review by appeal pursuant to section 25a. Taft Co. v. Century Sav. Bank [C. C. A.] 141 F 369.

33. See 5 C. L. 125 Under the statute relative to the certification of questions in criminal cases the supreme court has no jurisdiction of questions which arose in the midst of the trial. State v. Billings [Minn.] 104 N. W. 1150.

34. In Massachusetts the judge of the supreme court or a superior court may report the case for determination by the full court. Prior to St. 1878, p. 170, c. 231, the judges of the superior court had no power to report questions of law in civil cases tried without a jury and even under Revised Laws, c. 173, § 105, power to report is discretionary. Newburyport Inst. for Savings v. Coffin, 189 Mass. 74, 75 N. E. 81. The case cannot be reported, under such laws, by a judge who did not try the case. Id.

35. See 5 C. L. 126.

36. See, also, Certiorari, 5 C. L. 559.

Certiorari lies: Where a final judgment in garnishment was void for want of a valid conditional judgment. Ex parte Nat. Lumber Mfg. Co. [Ala.] 41 So. 10. To review a proceeding in a county court to eject an intruder, since there is no appeal. Rigell v. Sirmans, 123 Ga. 455, 51 S. E. 381. Whenever it is made to appear that the district court exceeded its jurisdiction in a certain proceeding and that no adequate plain and speedy remedy by appeal exists, and it does not matter whether the proceeding originated in the district court or was appealed to it. Oregon Short Line R. Co. v. District Ct. of Third Judicial Dist. [Utah] 85 P. 360. In West Virginia contested election cases are reviewable by certiorari and writ of error. By circuit court by certiorari and by the supreme court by writ of error where the value of the office exceeds $100. Williamson v. Musick [W. Va.] 53 S. E. 706. Where a decision by a quasi judicial tribunal affects injuriously and with substantial directions one not a party to the record having no other efficient legal remedy he may, in the discretion of the court, possessed of the jurisdiction, have the use of its writ of certiorari to remedy the wrong as to jurisdictional error. State v. Chittenden [Wis.] 107 N. W. 500. The only remedy for review from the judgment in the recorder's court is by **writ of review** in the absence of a valid ordinance giving an appeal. Wong Sing v. Independence [Or.] 83 P. 387.

Certiorari does not lie: The jurisdiction of the superior court over an appeal from a justice court being conceded, writ of certiorari to court of appeals will not lie to review its decision, merely because there is no appeal. Smith v. Superior Ct. of Napa County [Cal. App.] 84 P. 54. To review errors in construing facts and pleadings by the court of appeals. People v. Court of Appeals [Colo.] 82 P. 483. Error and not certiorari is the remedy to review in superior court errors of law and fact in a judgment at law in the county court. Cook v. Exom [Ga.] 54 S. E. 147. The sole remedy for reviewing orders of the county court sitting in probate in proceedings relating to the allowance of claims against the estate of an administrator is by appeal. Certiorari will not lie in such cases, notwithstanding 1 Starr and C. Ann. St. 1896, p. 300, c. 3, § 68, providing that appeals from allowance of rejection of claims by the county court may be taken in the same manner as appeals from justices of the peace, and p. 2436, c. 79, § 177; providing for the review of causes before justices of the peace by certiorari. Compare also laws 1849 p. 22, and the act of 1845, relating to appeals from probate justices of the peace. Schaeffer v. Burnett [Ill.] 77 N. E. 546. To review mere errors or mistakes of the district court, in matters within its jurisdiction. Oregon Short Line

mus,[39] injunction,[40] or motions [41] or suits to vacate the judgment below.[42] In Pennsylvania an appeal with the legal effect of a certiorari is allowed in certain cases.[43]

§ 3. *The parties. A. Persons entitled to review* [44] include only those who are parties [45] of record,[46] aggrieved [47] by the decree or judgment, or their successors in

R. Co. v. District Ct. of Third Judicial Dist. [Utah] 85 P. 360. To review an order incorporating a village in a special proceeding under Rev. St. 1898, §§ 854-866, appeal being adequate. In re Salter [Wis.] 106 N. W. 684. When it appears that the plaintiff had an appeal that is adequate from an order, a **writ of review** on motion will be quashed. Dahlstrom v. Portland Min. Co. [Idaho] 85 P. 916.

37. See, also, Prohibition, Writ of, 6 C. L. 1102.

Writ of prohibition will issue where appeal is not an adequate or speedy remedy as in the case of an order to continue an attachment. Primm v. Superior Ct. of Shasta County [Cal. App.] 84 P. 786. If appeal would involve great expense not recoverable as legal costs. Ophir Silver Min. Co. v. Superior Ct. of San Francisco, 147 Cal. 467, 82 P. 70. If appeal is not adequate. Wells v. Moncalm Circuit Judge [Mich.] 12 Det. Leg. N. 301, 104 N. W. 318.

Writ will be denied: After trial is had and merely a decree is to be entered which affords speedy adequate remedy by way of appeal, though it might have been granted to save expense of trial. Carr v. Superior Ct. of Monterey County, 147 Cal. 227, 81 P. 515. Cannot be made to serve purpose of a writ of error or certiorari to correct mistakes of the lower court in deciding question of law and fact within its jurisdiction. United States v. Scott, 2 App. Div. D. C. 88. On its appearing that there is an adequate remedy by appeal, the writ will be recalled. Barbier v. Nagel [La.] 39 So. 447.

38. See, also, Quo Warranto, 6 C. L. 1190. The action of a board of county commissioners, where it is voidable merely and not void, can be reviewed only on appeal and not by quo warranto. Johnston v. Savidge [Idaho] 81 P. 616.

39. See, also, Mandamus, 6 C. L. 496.

Mandamus will not lie where appeal lies. Hanson v. Police Jury of St. Mary Parish [La.] 41 So. 321. To compel the circuit judge to dismiss an appeal from the probate to the circuit court, since the refusal to dismiss may be reviewed by error after final judgment. Sharp v. Montcalm Circuit Judge [Mich.] 13 Det. Leg. N. 149, 107 N. W. 874. To compel the vacation of an order appointing a receiver of a railroad corporation there being an adequate remedy by appeal. Pontiac O. & N. R. Co. v. Oakland Circuit Judge [Mich.] 12 Det. Leg. N. 711, 105 N. W. 745. To correct errors of the county board in deciding upon the liability of property to taxation, the appeal provided for by § 124 of the revenue act (Laws 1903, p. 430, c. 73; Cobbey's An. St. 1903, § 10523), being an adequate remedy. State v. Drexel [Neb.] 107 N. W. 110.

40. See, also, Injunction, 6 C. L. 6. Injunction does not lie to restrain the collection of an invalid judgment so long as there is an adequate remedy by appeal or certiorari. Lasker v. Annunziata, 119 Ill. App. 653.

41. A judgment valid on its face, and rendered, as appears from the judgment roll itself, upon motion of plaintiff after hearing evidence on his behalf and after due deliberation, can be corrected only upon appeal, or through motion for a new trial and not by motion to vacate. Worth v. Emerson [Cal. App.] 85 P. 664. An order even though erroneous if within the court's jurisdiction, as striking from the files certain affidavits to support a motion for a new trial because they were contumelious, cannot be corrected by mandate to vacate the order, where an appeal would lie. Gay v. Torrance, 143 Cal. 169, 76 P. 973. Appeal rather than vacation is the remedy for an erroneous judgment. Snohomish Land Co. v. Blood [Wash.] 82 P. 933. If the lower court misapprehended the facts through the inadvertent error of counsel in presenting the case, the remedy is by application to that court and not by appeal to supreme court. City of Philadelphia v. Pennsylvania Inst. for the Instruction of the Blind [Pa.] 63 A. 420.

42. See, also, Judgments, 6 C. L. 214. Where relief sought is based on newly discovered evidence, the remedy is not by motion in appellate court, but by an original suit to vacate or annul decree. Livesley v. Johnston [Or.] 84 P. 1044.

43. Order awarding custody of children. Commonwealth v. Strickland, 27 Pa. Super. Ct. 309.

44. See 5 C. L. 127.

45. As a general rule a writ of error may be sued out by any person who was a party below. Mahon v. People, 218 Ill. 171, 75 N. E. 768. A wholly unauthorized judgment for costs against one not a party will not make him a party in the sense that he can appeal. Yockey v. Woodbury County [Iowa] 106 N. W. 950. Defendants who have been dismissed from an action cannot appeal from the decree subsequently rendered. Merritt v. Alabama Co. [Ala.] 39 So. 555. A ferryman who has the exclusive right to maintain a ferry within certain prescribed limits, cannot appeal from an order granting another license within the same district, if not a party to the proceedings. Turner v. Williamson [Ark.] 92 S. W. 867. Taxpayers who were not parties to a suit against county commissioners cannot appeal from a judgment in such suit. Board of Com'rs of Newton County v. Wild [Ind. App.] 76 N. E. 256. Other creditors could not appeal where only one creditor appeared and saved an exception to an allowance in an administrator's account but did not appeal. In re Lund's Estate [Iowa] 104 N. W. 1139. County cannot appeal from an ex parte allowance of a reward. Warren County v. Lanier [Miss.] 40 So. 429.

46. Strangers to the record cannot appeal in their own names or that of a party. Salomon v. Taylor [Fla.] 39 So. 48. It is not permissible to show by affidavit that, at the time the writ of error was sued out, certain parties joined therein had an inter-

est in the subject-matter by inheritance. The interests of the parties must appear of record. Wuerzburger v. Wuerzburger [Ill.] 77 N. E. 419.

47. Relief by appeal from chancery is only for persons aggrieved by the order or decree in question. Beckhard v. Rudolph [N. J. Err. & App.] 63 A. 708. To be a party "aggrieved" as used in Kirby's Dig. § 1487, one must have been a party to the action, unless such action determined some private right of such person. Turner v. Williamson [Ark.] 92 S. W. 867.

Held to be parties aggrieved: The inchoate right of dower in the homestead is sufficient to enable a wife to join in the assignment of error with her husband from a decree allowing a foreclosure in a suit to which she was a party. Sandlin v. Dowdell [Ala.] 39 So. 279. The defendant in habeas corpus proceedings for the custody of a child may maintain error to a decree against him, although he is not related to the child. Mahon v. People, 218 Ill. 171, 75 N. E. 768. Persons sued in a representative capacity may appeal. Where the president of a board of trade is made a party defendant to a suit involving the validity of resolutions of such board, he may appeal from a decree adverse to the validity of such resolutions. Pecaud v. Waite, 218 Ill. 138, 75 N. E. 779. A surety on the bond of a guardian may appeal from an order restating the account of his principal as such guardian. Mertz v. Mehlhop, 117 Ill. App. 77. An executor is not deprived of his right to appeal in his official capacity from an order of the probate court sustaining exceptions to his report by the fact that he may be personally aggrieved. Herschel V. Teel v. Mills, 117 Ill. App. 97. A party who owns property for which a receiver is appointed may appeal from an order allowing the account of the receiver and directing a substituted receiver to pay certain expenses and fees to the retiring receiver. Polk v. Johnson [Ind. App.] 76 N. E. 634. An heir presumptive to one who is non compos mentis may appeal from an order for the sale of the dower and homestead rights of such person, under Rev. Laws, c. 162, § 9, providing that persons "aggrieved" may appeal. Robinson v. Dayton [Mass.] 77 N. E. 503. Under Rev. Laws, c. 173, § 97, allowing an appeal to every party aggrieved by the judgment of a municipal court, a plaintiff in whose favor a judgment for a less sum than that claimed was entered over her protest, on an agreement signed by the attorneys, could appeal. Preston v. Henshaw [Mass.] 77 N. E. 1153. The fact that the entry recited "Judgment satisfied" did not affect her right. Id. A party whose property has been adjudged subject to a lien in an action in which the court had no jurisdiction of the person, may appeal from an order refusing to vacate the judgment. Little Rock Trust Co. v. Southern Missouri & R. A. Co. [Mo.] 93 S. W. 944. Where in an action to enjoin a county board from paying certain claims and that they are charged with costs, the board has sufficient interest as to entitle it to appeal from the costs. Fitch v. Hay, 98 N. Y. S. 1090. Where a motion for an order setting off costs awarded defendant against a judgment in favor of plaintiff in another action is opposed on the ground that defendant's attorney has a lien thereon, which motion is granted, the defendant may appeal. Agricultural Ins. Co. v. Smith, 98 N. Y. S. 347. From an order restraining the common council of a city from proceeding to fill a vacancy on the ground that their term of office had expired, such aldermen may appeal as the action must determine their status and also interferes with the discharge of their duties. Koster v. Coyne, 110 App. Div. 742, 97 N. Y. S. 433. One who procures the full measure of relief sought cannot appeal from a judgment in his favor, but an appeal will not be dismissed on this ground where appellant did not secure the full measure of relief below which his counsel reasonably supposed could have been obtbained. Multnomah County v. White [Or.] 85 P. 78. An appeal by the township from a mandamus requiring the supervisors to draw an order on the township treasurer is not objectionable that the township is not the party aggrieved. Marcy v. Springfield Tp., 24 Pa. Super. Ct. 521. A surety in an execution levied on the property of the principal debtor has such interest in the controversy over the ownership of such property, to which he is a party, as to be entitled to appeal from a judgment discharging such property from the lien of the execution. Hanna v. Charleston Nat. Bank, 55 W. Va. 185, 46 S. E. 920. An executrix has a right to appeal under Rev. St. 1898, § 4031, providing that in an action to construe a will any aggrieved party may appeal. In re Paulson's Will [Wis.] 107 N. W. 484. A party induced by the false representations of an administrator to purchase land from him, was aggrieved by order confirming the sale and could appeal. Greiling v. McLean's Estate [Wis.] 107 N. W. 339.

Held not to be parties aggrieved: A party cannot appeal where a reversal would give him nothing more than that which he received under the decree. Rowland v. Rowland [Va.] 52 S. E. 366. Foreclosure decree without personal liability does not aggrieve mortgagor who has already conveyed. Ridgely v. Abbott Quick Silver Min. Co. [Cal.] 79 P. 833. Under Acts 30th Gen. Assem. cc. 67, 68, authorizing a reassessment of expenses for the construction of ditches by the board of supervisors and allowing an appeal by any party aggrieved, the county has no interest entitling it to appeal from a judgment of the district court entered on appeal from the board of supervisors, setting aside the board's order of assessment. Yockey v. Woodbury County [Iowa] 106 N. W. 950. That the appeals to the district court were entitled in that court as against the county and docketed as such without objection did not make the county a party in the district court entitling it to appeal (Id.), nor the fact that the county attorney and his assistants appeared in the assessment proceedings before the board, especially in view of Code § 302 prohibiting the county attorney from appearing before the board where the county is not interested (Id.). The unauthorized appearance of attorneys claiming to represent the county did not give the court jurisdiction over the county. Id. An ex parte judgment putting heirs into possession does not affect the right of the state to inheritance tax and the state cannot appeal from such order. Succession of Schirm [La.] 41 So. 53. Where the property of appellant was neither taken, damaged nor assessed, he cannot appeal un-

interest;[48] and in proceedings not inter-parties, or which may affect others than parties, persons having a litigable interest,[49] affected detrimentally, may appeal. The nominal party in an appeal by a citizen in public proceedings is the citizen himself unless the right of appeal is conferred on him in the name of the public.[50]

der Kansas City Charter, art. 7, § 5, relating to street opening proceedings. In re Seventeenth St., 189 Mo. 245, 88 S. W. 45. Defendant in foreclosure who disclaimed and was not cast in judgment. Rock v. Huff [Neb.] 102 N. W. 267. Appellant was not legally aggrieved where his claim on a stop notice under the mechanic's lien law was denied because of the allowance of other claims admitted prior to his own which exhausted the entire fund. Beckhard v. Rudolph [N. J. Err. & App.] 63 A. 708. Appellant cannot allege as error the failure of the chancellor to allow compensation due another. In an action to enjoin the county board from paying certain claims, the board has not such an interest as to entitle it to appeal on the merits. Fitch v. Hay, 98 N. Y. S. 1090. Kelly v. Keith [Ark.] 90 S. W. 150. A party cannot appeal from a judgment against his co-defendants but not against himself. Byrnes v. Holscher, 96 N. Y. S. 89. Appellant was not aggrieved where a judgment was rendered pursuant to his express consent. Sidney Novelty Co. v. Hanlon [Conn.] 63 A. 727. Under G. L. 1896, c. 248, § 1, granting the right of appeal to any person aggrieved by an order or decree of the probate court a creditor of an estate is not aggrieved by an order of said court amending its record so as to show an order directing the executors to give notice of their appointment enabling them to have the benefit of c. 218, §§ 8, 9, limiting the time within which actions may be brought against them. Smith v. Whaley [R. I.] 61 A. 173. A **principal** cannot appeal on the ground that judgment for costs was wrongfully rendered against his **sureties.** Thompson v. Baxter [Ark.] 88 S. W. 985.

A receiver has no authority to appeal from orders of the court except as to matters relating to his official conduct or his accounts and credits, unless authorized to appeal by the court. Polk v. Johnson [Ind. App.] 76 N. E. 634.

Persons having no interest in the property in controversy cannot complain. City of Port Townsend v. Trumbull [Wash.] 82 P. 715. Where complainants were adjudged to be without interest in property of decedent which was held escheated to state, they could not appeal on the single point that the trial court had no authority to render the decree it did. In re Pipers Estate, 147 Cal. 606, 82 P. 246. Party transferring or losing his interest pending appeal. Chicago & S. E. R. Co. v. Grantham [Ind.] 75 N. E. 265.

Defendants as to whom proceeding is dismissed: Defendants as to whom the bill is dismissed cannot appeal from the decree subsequently rendered. Merritt v. Alabama Pyrites Co. [Ala.] 40 So. 1028. The defendant cannot appeal where a bill for an injunction is dismissed at the plaintiff's own cost. Williams v. Breitung, 216 Ill. 299, 74 N. E. 1060. Defendants dismissed before verdict is rendered, but inadvertently included in a judgment against all defendants, are not aggrieved parties and cannot appeal. Schulze v. Oregon R. & Nav. Co. [Wash.] 84 P. 587.

One cannot complain of a decree favorable to himself: Where a demurrer is sustained on some of the grounds and overruled as to the others, the party interposing it cannot appeal. Esslinger v. Herrin [Ala.] 40 So. 142. A defendant cannot complain of the inadequacy of the damages awarded against him. Louisville & N. R. Co. v. Thomas [Miss.] 40 So. 257. Where the court instructs that a verdict shall be returned for plaintiff only for the amount due in excess of that owing by him to the garnishee plaintiff, defendant cannot complain that the jury did not allow the garnishee plaintiff all that was due. Kothman v. Faseler Tex. Civ. App.] 84 S. W. 390.

One in whose favor judgment is rendered: As a general rule, a party may prosecute a writ of error to reverse a judgment in his own favor, or take an appeal from such judgment; but such right is confined to cases where the court has committed some error prejudicial to him, or where by the judgment he has not obtained all he is entitled to. For example, if the judgment in favor of the plaintiff is for a less amount than it ought to be, he may take an appeal, or sue out a writ of error to review it. Williams v. Breitung, 216 Ill. 299, 74 N. E. 1060. Another class of cases where a party in whose favor a judgment has been rendered is allowed to appeal or sue out a writ of error for its reversal are cases against a number of defendants jointly liable, where the judgment is in favor of the plaintiff against one or more of the defendants, and in favor of the other defendants against the plaintiff; and the principle upon which the rule is applied in this class of cases is that, as a general rule where an action is brought on a joint contract, the judgment must be rendered against all of the defendants or none. Id. There is another class of cases, in which the rule is applied, where there is some error or irregularity in the judgment which would make it infective in the future as a security to the party in whose favor it was rendered. Id. But where the decree or judgment is wholly in favor of the party seeking to review it, he is not entitled to an appeal. Id. One in whose favor a judgment was rendered cannot appeal from a finding of facts. In re Jenks [Iowa] 105 N. W. 396. Appellant cannot review findings in his favor. Darnelll v. Lafferty, 113 Mo. App. 282, 88 S. W. 784.

48. A general guardian appointed and authorized by the court to prosecute an appeal from a judgment in a suit on the part of minors by a guardian ad litem to construe a will, was a proper party to the appeal and notices served by him gave the court jurisdiction to consider the merits. In re Strang's Estate [Iowa] 106 N. W. 631.

49. On a decision by a county court in the probate of a will, any person interested in the will may appeal to the circuit court. Senn v. Gruendling, 218 Ill. 458, 75 N. E. 1020.

50. A citizen appealing from the findings

Both parties to an action may appeal where the judgment authorizes it.[51] A partnership as such cannot appeal from a judgment against the individuals composing it.[52] An appeal by one secondarily liable brings up the case as to his co-defendant primarily liable, though the latter does not appeal.[53]

(§ 3) *B. Necessary or proper parties.*[54] *Parties appellant.*—Necessary parties appellant include all co-parties united in interest and aggrieved by the judgment [55] though a severance may be had in some jurisdictions,[56] and in some the non-joining parties may be brought in as respondents.[57] Parties defaulting [58] or dis-

of the board of supervisors relative to a statement of consent to sell liquor may prosecute an appeal from the district to the supreme court by private counsel. It is not necessary that the appeal be taken by the county attorney. In re Intoxicating Liquors [Iowa] 105 N. W. 702.

51. Both parties to an action may appeal from a judgment where such judgment authorizes it. Allen County v. U. S. Fidelity & Guaranty Co. [Ky.] 93 S. W. 44.

52. An appeal by a firm in an action against the individual members cannot be sustained. Johnston, Nesbitt & Co. v. First Nat. Bank [Ala.] 40 So. 78.

53. An appeal for trial de novo from a judgment dependent upon another judgment in same case carries up both judgments and all parties necessary to the consideration of either. Woldert Grocery Co. v. Boonville Elevator Co. [Tex.] 91 S. W. 1082.

54. See 5 C. L. 129.

55. One appealing from a judgment rendered against him and his surety on a bond should join such surety. Sellers v. Smith [Ala.] 39 So. 356. Civ. Code, § 400, providing that where judgment is rendered against two or more persons any one of them may remove suit to supreme court by appeal or writ of error and may use name of all of said persons if necessary, does not affect the rule that a joint appeal by all the defendants must be prosecuted by all. Tanquary v. Howard [Colo.] 83 P. 647. Where only one of two joint appellants signs an appeal bond and for himself alone, and prosecutes the appeal alone in his own behalf, the appeal will be dismissed. Id. Same rule applies to writ of error, and hence cause cannot be entered as pending on writ of error under Mills' Ann. Code, § 388a. Id. Where an action was brought against a number of persons as beneficiaries of a trust, and the relief prayed for was such that all the beneficiaries were interested therein, and the case was in default as to all except three of the defendants, who filed a demurrer to the petition, and upon a hearing the court sustained the demurrer and dismissed the entire case, all of the defendants were necessary parties to a bill of exceptions complaining of the judgment sustaining the demurrer, and dismissing the entire case. Kahn v. Hollis [Ga.] 53 S. E. 95. A writ of error must be sued out in the names in which the proceedings below were conducted. Wuerzburger v. Wuerzburger [Ill.] 77 N. E. 419. A defendant cannot prosecute a writ of error without joining his co-defendants who are identified in interest with him. Id. Act Apr. 1, 1872, § 70, requiring the bringing in of all parties in appeals from justice courts did not apply to tort actions. Long v. Frank, 117 Ill. App. 207. When a judgment at law is rendered against several persons jointly, all must unite in an appeal. Oldenburg v. Dorsey [Md.] 62 A. 576. The rule firmly established in the appellate courts of United States, requiring all parties against whom a decree or judgment is rendered, in the absence of a severance to join in suing out a writ of error or prosecuting an appeal applies only to a joint judgment or decree against such parties, and has no application to separate judgments or decrees though rendered at the same time and contained in the same entry. Love v. Export Storage Co. [C. C. A.] 143 F. 1. Trustees in their capacity as stakeholders of a fund in litigation are not necessary parties to an appeal determining which of two litigants is entitled to the fund. Id. In a **vacation appeal** the court cannot take jurisdiction unless all the parties in whose favors the judgment was rendered or who would be affected by a disturbance of such judgment, are before the court as parties in the assignment of error. Kemp v. Prather [Ind. App.] 75 N. E. 673. All joint judgment defendants must be joined as co-appellants in an appeal taken by one or more of them in vacation. New American Oil & Min. Co. v. Troyer [Ind.] 77 N. E. 739.

A part of several co-parties may appeal to the supreme court or the appellate court; but if it be a vacation appeal, the party or parties so appealing must serve a written notice of the appeal upon all the other co-parties or their attorneys of the record, and file proof thereof with the clerk of the court to which the appeal is taken. After such notice, unless the parties notified appear and decline to join in the appeal, they must be regarded as properly joined. If they decline to join, their names may be struck out on motion and they cannot take an appeal afterward. See sections 647, 647a, Burns' Ann. St. 1901. Helberg v. Dovenmuehle [Ind. App.] 76 N. E. 1020.

56. If any co-parties refuse to join a summons and severance is necessary, and after such summons and severance the writ may be prosecuted in the name of such co-parties. Wuerzburger v. Wuerzburger [Ill.] 77 N. E. 419; Bellinger v. Barnes [Ill.] 77 N. E. 421; Sellers v. Smith [Ala.] 39 So. 356. A judgment at law being rendered against three persons jointly, two of them could not prosecute an appeal without applying to the appellate court for a writ of summons and severance. Oldenburg v. Dorsey [Md.] 62 A. 576.

57. All parties to the record to which a writ of error issues must be made parties, either plaintiff or defendant. Scott v. Great Western Coal & Coke Co., 220 Ill. 42, 77 N. E. 122.

58. Zinkeisen v. Lewis [Kan.] 83 P. 28.

claiming need not be joined.[59] Statutes in some states permit one of several executors or administrators to appeal, though the others do not consent.[60] The fact that one is a necessary party in the lower court does not necessarily render him an indispensible party on appeal.[61]

Parties respondent.[62]—Necessary parties respondent include all persons who may be affected by a reversal.[63] Successors in title and interest may be substituted,[64] or brought in. The petitioner or other agency by which a juvenile court obtains jurisdiction of a child cannot be made defendant in error to a writ to review its action in the premises.[65]

§ 4. *Adjudications which may be reviewed, either generally or in one of two appellate courts.*[66] *A. Statutes*[67] may provide for the review of any proceeding, affix conditions or withdraw such right.[68]

(§ 4) *B. Reviewableness may be dependent on the general form or character of the adjudication.*[69]—A decision must amount to the judgment,[70] of the court as

59. Where a defendant in an action to quiet title files a disclaimer. New American Oil & Min. Co. v. Troyer [Ind.] 77 N. E. 739.

60. Under Comp. L. 9386, allowing any administrator, etc., to appeal from decision of commissioners to the circuit court one of two administrators may appeal from order allowing claims though his co-administrator does not consent. Hammond v. Frazer [Mich.] 12 Det. Leg. N. 254, 103 N. W. 996.

61. To be indispensable in the appellate court, he must be interested in the questions carried there. Love v. Export Storage Co. [C. C. A.] 143 F. 1.

62. See 5 C. L. 129.

63. A co-defendant having recovered pro-rata against appellant whose judgment might be affected to his loss on appeal is a necessary party. Wedd v. Gates [Okl.] 82 P. 808. Parties interested in the sustention of a judgment are necessary to a bill of exceptions assigning as error the overruling of a motion for new trial. Hodnett v. Douglas [Ga.] 53 S. E. 687. In an appeal to the supreme court from a determination of a district court, persons not affected by or interested in the result need not be made parties. Southern Pine Lumber Co. v. Ward [Okl.] 85 P. 459. A substituted receiver is not a necessary party to an appeal by the owner of the property from an order allowing the account of the original receiver and directing the substituted receiver to pay certain expenses to the original receiver. Polk v. Johnson [Ind. App.] 76 N. E. 634. Defendants not served with process and not appearing and against whom no judgment is taken need not be served with notice of appeal. Nason v. John [Cal. App.] 82 P. 566. When an appeal was seasonably taken and docketed, it was within the power of the court to direct the issuance of an alias citation to necessary omitted parties and to have allowed time for its service, had application therefor been made before the expiration of the first term at which the case could have been heard, and where this was not done, appeal became inoperative as to them. Gray v. Grand Forks Mercantile Co. [C. C. A.] 138 F. 344.

64. In replevin for goods held by a sheriff under a writ, if he dies pending an appeal his successor in office is the proper party to substitute. Mugge v. Jackson [Fla.] 39 So. 157. When it is made to appear that a defendant in error has been formally adjudged insane since the signing of the bill of exceptions, the guardian appointed by the ordinary, under Civ. Code 1895, § 2570 et seq., may be made a party to the record. Central of Georgia R. Co. v. Harper [Ga.] 53 S. E. 391.

65. In re Vera Brown, 117 Ill. App. 332.

66, 67. See 5 C. L. 130.

68. The part of chapter 80 of the Acts of the Legislature of 1901 (Acts 1901, p. 80), which provides for an appeal by either party from the final order or decision of the county court in an election contest for a county or district office to the circuit court, and a trial de novo in that court, is constitutional. Williamson v. Musick [W. Va.] 53 S. E. 706. In **Indiana** writs of error coram nobis have been abolished. See Hurd's Rev. St. 1903, c. 110, § 67. This statute, however, did not abolish the essentials of the proceedings, which remain the same, and the motion in the court in which the error was committed which was substituted for the writ is the commencement of a new suit in which new issues are made, upon which there must be a finding and a judgment, and such motion stands in the place of the declaration. The proceeding is one at law, and, unless an issue of law is made upon the motion in the trial court, the question there passed upon is a question of fact, which can be reviewed only by appeal or writ of error from the judgment rendered in the particular case, upon proper assignments of error in the court of review. Domitzki v. American Linseed Co. [Ill.] 77 N. E. 428.

69. See 5 C. L. 130.

70. Philadelphia v. Miller, 27 Pa. Super. Ct. 11; Delaware County Trust S. D. v. Title Ins. Co. v. Lee, 24 Pa. Super. Ct. 74. Appeal before signature of judgment is premature. Hauch v. Drew Inv. Co [La.] 40 So. 847; State v. Salyers [Iowa] 106 N. W. 516. No judgment rendered on demurrer. Sloss-Sheffield Steele & Iron Co. v. Holloway [Ala.] 40 So. 211. Not from mere memorandum of a ruling. Ferrell v. Opelika [Ala.] 39 So. 249. Where the clerk copied into the records the minutes of the presiding judge in his calendar and the records were subsequently approved, there was an entry of judgment sufficient to give the supreme court jurisdiction of the appeal. Kuhlman v. Wieben [Iowa] 105 N. W. 445. Under Rev.

such [71] having, at least, a semblance of validity,[72] on matters of law or fact as opposed to matters of discretion [73] such as cost awards,[74] and it must have reached a finality,[75] became of record,[76] and been against appellant's consent or not due to

Code Civ. Proc., § 316, 317, providing that an order shall become complete and effective when made in writing, signed by the court or judge, attested by the clerk and filed in his office, and § 318, making it the duty of the clerk immediately after the filing of the order to attest and record the same in the judgment book, an appeal from an order denying a new trial taken before such order had been attested was wholly ineffectual. Stephens v. Faus [S. D.] 106 N. W. 56.

71. No appeal will lie from the refusal of the county court to cause drainage ditches to be constructed as provided by Rev. St. 1899, § 1110, such act being ministerial. Sanders v. St. Louis, etc., R. Co. [Mo. App.] 92 S. W. 736.

72. Appeal will not lie from a judgment absolutely void. Barber v. State [Ala.] 39 So. 318; Mattox Cigar & Tobacco Co. v. Gato Cigar Co. [Ala.] 39 So. 777; McMillan v. Gadsden [Ala.] 439 So. 569.

73. Selecting a depository for trust funds. Gottschalk v. Mercantile Trust & Deposit Co. [Md.] 62 A. 810. Granting or refusing a new trial. Whitcomb v. Mason [Md.] 62 A. 749. An order of the orphan's court refusing to make partial distribution of the assets in the hands of an assignee under § 8 of the act concerning general assignments (P. L. 1899, p. 146). In re Browning [N. J. Err. & App.] 61 A. 1066. Ruling upon motion to recommit auditor's report. Allwright v. Skillings, 188 Mass. 538, 74 N. E. 944. Order of reference in an equity case. Lockwood v. Lockwood [S. C.] 53 S. E. 87. Order granting the defendant further time to answer. Belle v. Western Union Tel. Co. [S. C.] 53 S. E. 177; Dunn v. Marks [N. C.] 53 S E. 845. An order for a reference to take testimony in a case involving the constitutionality of a statute is not appealable, though the defendant admits that the statute is unconstitutional, such admission not being sufficient in such case to relieve the court of the duty to pass upon the case. Hall v. McBride [S. C.] 53 S. E. 368. No appeal lies as a matter of right from an order of the appellate division affirming an assessment of damages, but where the items of damages disallowed are definitely fixed and the court in making the assessment certified that they were "rejected as a matter of law and not as a matter of discretion," such order is applicable. City Trust, Safe Deposit & Surety Co. v. American Brewing Co., 182 N. Y. 285, 74 N. E. 948. It can very rarely happen that making an additional party will be serious prejudice, and hence such orders are usually discretionary and not appealable. Bernard v. Shemwell, 139 N. C. 446, 52 S. E. 64. While an appeal will not lie from a discretionary order, yet the question whether the subject-matter of the order or decree was within the discretion of the court is open to examination in an appeal in the case in which the order or decree was rendered. Gottschalk v. Mercantile Trust & Deposit Co. [Md.] 62 A. 810.

74. Chicago Portrait Co. v. Chicago Crayon Co., 118 Ill. App. 98; Stevens v. Jones [Wash.] 82 P. 754; Hopkins v. Pritchard [W. Va.] 53 S. E. 557; Pickens v. Daniels [W. Va.] 52 S. E. 215; Klugh v. Pennsylvania R. Co., 29 Pa. Super. Ct. 583; Durk v. Scully [Wash.] 83 P. 426. An irregularity in taxation of costs in municipal court cannot be reviewed on appeal unless a motion to review the taxation is made in the municipal court. Municipal Court Act, Laws 1902, p. 1589, c. 580, § 342. Turtel v. Greenwald, 96 N. Y. S. 1074. Ordinarily an appeal does not lie from a decree for costs only in a chancery suit, but there are exceptions to the rule, turning on the question of the discretionary power of the trial court respecting costs. A decree for such costs as are discretionary is not appealable, but one for costs not in the discretion of the court is appealable, provided the amount thereof is more than $100. Nutter v. Brown [W. Va.] 52 S. E. 88. Extraordinary costs such as allowances of expenses and compensation of receivers, either as between the receiver and the fund in court and parties, or as between party and party, are not discretionary and a decree respecting such costs is appealable. Id.

75. In Indiana appeals to the supreme and appellate courts can only be taken from a final judgment. Bozarth v. McIntyre [Ind. App.] 76 N. E. 317. Court cannot review unless record shows a judgment or final order. Modern Woodmen of America v. Plummer [Neb.] 105 N. W. 181; Montgomery v. Reynolds [Ga.] 53 S. E. 512; Honerine Min. & Mill. Co. v. Tallerday Steel Pipe & Tank Co. [Utah] 85 P. 626. In the county court the final decree consists of the findings of fact, conclusions of law and statement of the relief awarded. In re Lemery's Estate [N. D.] 107 N. W. 365. A so-called judgment inserting costs, entered by the county court after filing the findings and conclusions held a mere amendment, and both documents together considered the final decree. Id. A default judgment in which the amount of recovery is not ascertained is not final and no appeal lies. Sharp v. Bates [Md.] 62 A. 747. Allowance of fees not final order. Symms v. Jamieson, 115 Ill. App. 165. The essence of what is done and not what the decree is called determines whether it is final. Loughlin v. U. S. School Furniture Co., 118 Ill. App. 36. A decree ordering a reference is not rendered final by a mere recital in the order, showing that a prima facie case rendering a decree of reference proper has been made. Rainey v. Freeport Smokeless Coal & Coking Co. [W. Va.] 52 S. E. 473. Record must show such disposal of motions for new trial that judgment has reached finality. Wall v. Kerr [Neb.] 104 N. W. 1076. An appeal will not lie from a judgment during the pendency of a motion in arrest thereof. State v. Ryan, 115 Mo. App. 414, 90 S. W. 418. Appeal from order denying motion for new trial before such order was attested as required by statute held ineffectual. Rev. Code Civ. Proc., §§ 316, 317, 318. Stephens v. Faus [S. D.] 106 N. W. 56. Where the court found on conflicting evidence that a nuisance existed its order directing abatement and granting an injuncton after 60 days in

his default.[77] Decisions other than the foregoing are reviewable under various statutes if they determine the "merits," "principles of the cause," deny a rightful mode of trial, "in effect discontinue the cause" or "prevent judgment,"[78] or if they "change possession"[79] or "affect property rights," or if they would have been "final if rendered as claimed."[80] In some jurisdictions any interlocutory order is appealable by leave of court, and as to some of such orders, even this is needless.[81] Error will not lie to a judgment rendered pursuant to directions given on remand,[82] but where a judgment is affirmed with directions, the lower court must construe the same, and, if error is committed in so doing, the judgment is not void but subject to correction on review.[83] Decisions by nonjudicial tribunals or boards are review-

case the nuisance was not abated, was final and appealable. Schmelzer v. Bartlett Illuminating Co. [Mich.] 12 Det. Leg. N. 670, 10 N. W. 129. A judgment will be regarded as final though inartificial and lacking formal entry if it assumed to decide the case and was so treated by parties. Buckley v. McDonald [Mont.] 84 P. 1114.

76. Appeal will be dismissed where the record does not show the making and entry of any order or decree from which an appeal could be taken. Schneider v. Metcalf [Iowa] 106 N. W. 270. A judgment may be appealed from though the journal entry has not been signed by the judge, the statute as to the signing of the record by the judge being merely directory. In re Jones' Estate [Iowa] 106 N. W. 610.

77. No appeal lies from a defnult judgment. Catalano v. North British & Mercantile Ins. Co., 99 N. Y. S. 524; Consumers' Park Brewing Co. v. Greenberger, 47 Misc. 398, 94 N. Y. S. 38; Happel v. Lippe, 95 N. Y. S. 523; Lesser v. Kahn, 98 N. Y. S. 212; Levenson v. Arnold, 97 N. Y. S. 990.

Unless due to defective service of process: Under Code Civ. Proc., § 3057, an appeal from a judgment is the proper remedy where defendant shows by affidavit that the summons was not served on it and the affidavit of service fails to show service on defendant. Mears v. North American Brewing Co., 98 N. Y. S. 1042. A motion to amend and not appeal is the proper procedure to correct a judgment including costs not allowed on appeal. Carolan v. O'Donnell, 109 App. Div. 700, 96 N. Y. S. 493. Under Mun. Ct. Act, Laws 1902, p. 1578, c. 580, § 311, a defendant who was not personally served and who did not appear, may appeal from a judgment entered by default any time within 20 days from personal service of notice of entry of judgment. Dixon v. Carrucci, 97 N. Y. S. 380. A special appearance to object to the jurisdiction of the court is not an appearance within Mun. Ct. Act, Laws 1902, p. 1578, c. 580, § 311. Dixon v. Carrucci, 97 N. Y. S. 380.

Nor from a judgment by consent. Brown v. McKie [N. Y.] 78 N. E. 64; Sidney Novelty Co. v. Hanlon [Conn.] 63 A. 727; King v. King, 215 Ill. 100, 74 N. E. 89; Pacific Paving Co. v. Vizelich [Cal. App.] 82 P. 82. That defendant confesses judgment does not debar an interested third person from appeal. Oil City Ironworks v. Pelican Oil & Pipe Line Co. [La.] 38 So. 987.

78. Direct exception may be taken to the refusal of a judgment that would have been final. Head v. Marietta Guano Co. [Ga.] 53 S. E. 676. Order denying a motion to dismiss an appeal to the circuit court from an award in condemnation proceedings is not appealable under Rev. St. 1898, § 3069, authorizing appeals from orders affecting a substantial right, determining the action, and preventing a judgment from which an appeal may be taken. Putney v. Milwaukee Light, Heat & Traction Co. [Wis.] 105 N. W. 1066. Rev. St. 1898, § 1210b, relative to actions to compel a reassessment of taxes contemplates that the action shall be closed by a judgment. An order in such action staying proceedings pending reassessment was not appealable under § 3069 as determining the action or preventing a judgment. Land & Securities Co. v. South Milwaukee [Wis.] 106 N. W. 850. An adequate remedy in such case existed under § 3047, Rev. St. 1898, providing for appeals from interlocutory judgments and § 2883 relative to the entry of such judgments. Id.

79. A decree or order in a chancery case appointing a receiver, and thereby changing the possession of personal property, is appealable. See Code 1899, c. 135, § 1. Baltimore Bargain House v. St. Clair [W. Va.] 52 S. E. 660.

80. The refusal of the court to sustain a motion to dismiss a caveat to the return of appraisers upon an application for year's support is appealable, although the case has not been finally disposed of in the trial court, since if the court had sustained such motion its ruling would have brought about a final disposition of the case. Mathews v. Rountree, 123 Ga. 327, 51 S. E. 423. The supreme court has jurisdiction to pass upon an assignment of error complaining of a refusal to sustain a motion to make a mandamus absolute, because if this motion had been granted it would have finally disposed of the case. Mineral Bluff Board of Education v. Mineral Bluff, 123 Ga. 669, 51 S. E. 577. No cause shall be carried to the supreme court upon any bill of exceptions, so long as the same is pending in the court below, unless the decision of judgment complained of would have been a final disposition of the cause, or final as to some material party thereto. Civ. Code 1895, § 5226. Du Vall v. Brogden, 123 Ga. 411, 51 S. E. 404. Until final judgment be rendered in the trial court, no interlocutory ruling which would not have finally disposed of the case if rendered in favor of the excepting party can be brought under review in the supreme court. Mathews v. Rountree, 123 Ga. 327, 51 S. E. 423.

81. An interlocutory judgment in partition proceedings is reviewable on exceptions although there has been no final judgment. Joyce v. Dyer, 189 Mass. 64, 75 N. E. 81.

82. Champion v. Rice [N. M.] 82 P. 359.

83. When the court of review directs the lower court to enter judgment, it can do so

able only by statute.[84] Rulings relating to pleadings,[85] and process,[86] and matters

only in view of having adjudicated the contention between the parties which adjudication will not be reviewed on appeal from judgment entered in conformity with the remittitur on the former appeal. Lambert v. Bates [Cal.] 82 P. 767.

84. Under Burns' Ann. St., § 7859, an appeal will be from an order granting or refusing prayer of a petitioner to board of commissioners. Good v. Burk [Ind.] 77 N. E. 1080. But such order or decision must be final in its nature and put an end to the proceeding before the board. Id. The rejection of an account or claim by the commissioner of revenues may be reviewed by the circuit court, under the Tucker Act, 24 St. 505, as amended by 30 St. 494, as, proceedings to recover a tobacco rebate as authorized by 32 St. 97. Hyams v. U. S., 139 F. 997. An order of a board of commissioners ordering an election and fixing date when it should be held is an interlocutory order from which no appeal would lie. Good v. Burk [Ind.] 77 N. E. 1080. An appeal does not lie to the circuit court from the action of a city council granting or refusing a permit to build a house. Ex parte Evans [S. C.] 52 S. E. 419. Whether the funds with which to meet the expenditure shall be raised by tax for the current year, or by affording the voters of the county an opportunity to authorize the issuance of bonds at an election duly held for that purpose is a matter solely for the determination of the county authorities, and no appeal lies from their decision. Anderson v. Newton, 123 Ga. 512, 51 S. E. 508.

85. Rulings on demurrer: An appeal will not lie from a judgment overruling a demurrer. Pine Lumber Co. v. Covington County [Miss.] 40 So. 260; Duryee v. Parker, 105 App. Div. 442, 94 N. Y. S. 981; Wenom v. Fossick, 115 Ill. App. 605. Demurrer for multifariousness held special. Kerr v. Rupp [Mich.] 13 Det. Leg. N. 223, 107 N. W. 1059; Flynn v. Holmes [Mich.] 12 Det. Leg. N. 744, 105 N. W. 875; Arnold v. Russell Car & Snow Plow Co., 212 Pa. 303, 61 A. 914. An order sustaining a demurrer is not appealable. De Beckwith v. Superior Ct. of Colusa County, 146 Cal. 496, 80 P. 717; Schenectady R. Co., 106 App. Div. 336, 94 N. Y. S. 401; Chicago Portrait Co. v. Chicago Crayon Co., 217 Ill. 200, 75 N. E. 473; Bernard v. Shemwell, 139 N. C. 446, 52 S. E. 64.

A judgment refusing to allow an amendment of a general demurrer to a petition is not a final judgment, nor would a judgment allowing the amendment have been final disposition of the cause, so as to authorize a writ of error to the judgment first named while the case was pending in the trial court. Henderson v. State, 123 Ga. 465, 51 S. E. 385. A decision sustaining a demurrer, as distinguished from an interlocutory judgment entered thereon is not appealable. Rees v. New York Herald Co., 98 N. Y. S. 548. Where, in equity, legal questions raised by a demurrer clause in the answer to which replications were filed were erroneously considered by the court before hearing on the proofs an appeal from the decree of the court thereon will not be entertained. Gray v. Eldred [Mich.] 13 Det. Leg. N. 88, 107 N. W. 719. An order sustaining a demurrer to an amended complaint because of a ruling made by another judge in sustaining a demurrer to the original complaint, was not a mere pro forma order but was appealable. State v. Turner [Md.] 61 A. 334. Code Civ. Proc., § 542, gives the appellate court the right to review an order on a demurrer even though no judgment follows it. Bartholomew v. Guthrie [Kan.] 81 P. 491. The supreme court has no jurisdiction to pass upon an assignment of error complaining of the overruling of a demurrer to the answer to an application for the writ of mandamus, when the trial court holds that the answer presents an issue of fact, and refers the issue of fact to a jury, and when there has been no final judgment thereon. Mineral Bluff Board of Education v. Mineral Bluff, 123 Ga. 669, 51 S. E. 577. An order sustaining a demurrer to the complaint on the ground of defect of parties is appealable where the plaintiff declines to bring in the additional parties and allows the action to be dismissed. Bernard v. Shemwell, 139 N. C. 446, 52 S. E. 64.

Rulings on motion to strike: Order refusing to strike certain allegations from a pleading not appealable. Harbert v. Atlanta & C. Air Line R. Co. [S. C.] 53 S. E. 1001. An order striking a complaint from the files for duplicity is not a final judgment and hence not appealable. Vaktaren Pub. Co. v. Pacific Tribune Pub. Co. [Wash.] 83 P. 426. No appeal lies from a decree of the chancellor **refusing an amendment to the bill** and overruling demurrers to the cross bill and motion to strike, the decree not being final within Code 1896, § 426, nor interlocutory within § 427. Cofer v. Wilhite [Ala.] 40 So. 340. Granting or refusing leave to amend not final. Henderson v. State, 123 Ga. 465, 51 S. E. 385. Where **judgment on the pleadings** is entered on motion it will be presumed, in the absence of evidence to the contrary, that the court considered all the pleadings and entry of an erroneous judgment is reviewable on appeal and is not a mere irregularity authorizing a vacation. Ellis v. Moon [Wash.] 82 P. 186.

86. An order vacating "on the papers" a warrant of seizure issued pursuant to Municipal Court Act, Laws 1902, p. 1532, c. 580, § 138, is not appealable. Wuertz v. Braun, 99 N. Y. S. 340. An order quashing the service of a summons is not a final judgment either within the Constitution or the statute, and hence not appealable. Honerine Min. & Mill. Co. v. Tallerday Steel Pipe & Tank Co. [Utah] 85 P. 626. Quashing the service of a writ of garnishment, preventing further proceedings on that writ and final judgment, is in effect a final determination and, therefore, appealable. Tatum v. Geist [Wash.] 82 P. 902. No appeal lies from the refusal to stay or set aside an execution, where the application is based upon facts outside the record. Hanscom v. Chapin, 27 Pa. Super. Ct. 546. The decision of the superior court upon a motion to dismiss proceedings to enforce a lien for material furnished for the construction on a vessel, under Pub. St. 1882, c. 192, § 17, on the ground of the insufficiency of the attachments, is not a motion to dismiss for defect of form of process, and hence is appealable, notwithstanding Rev. Laws, c. 173, § 76, provid-

of practice before the trial [87] or judgments on diliatory pleas,[88] are not generally reviewable in the absence of statute unless their effect is to finally determine the action or involve "substantial rights," "merits," etc. Dismissals,[89] nonsuits, orders to strike cause and the like,[90] are reviewable when determinative of the action,[91] otherwise not. Directed verdicts, orders directing or arresting judgment or orders for new trial,[92] and others of similar operation,[93] are not reviewable at common law, since they are often discretionary and are not final. In some states, however, they are made directly appealable.[94] A reviewable final judgment or decree must be finally determinative [95] of the controversy to the aggrievement of the person claim-

ing that the decision of the superior court upon a motion to dismiss for defect of form of process is final. Merriman v. Currier [Mass.] 77 N. E. 708.

87. An order of reference. Southern Chemical Co. v. Lackey [N. C.] 52 S. E. 272; Lockwood v. Lockwood [S. C.] 53 S. E. 87. Order denying change of venue. Sanders v. German Fire Ins. Co. [Wis.] 105 N. W. 787; Taylor v. Grand Lodge A. O. U. W. [Minn.] 107 N. W. 545. Sustaining a motion to suppress a deposition made by one party after the other has announced readiness for trial is a decision of the court on the trial and comes under the application of sec. 1614 of the Code of 1896, allowing a party to take as nonsuit and appeal. Scheidegger v. Terrill [Ala.] 39 So. 172.

88. Plea of prior garnishment not yet brought to judgment is not reviewable under R. S. § 1011; 4 Fed. Stat. Ann. p. 624. Barnsdall v. Waltemeyer [C. C. A.] 142 F. 415.

89. An order vacating the dismissal of a petition to contest a will is a final order, affecting a substantial right of the parties and therefore appealable. In re Sullivan's Estate [Wash.] 82 P. 297. An appeal from an order dismissing an action on plaintiff's motion where there is no counterclaim or other special reason for refusing to dismiss, is not appealable under Rev. Code Civ. Proc. § 440, substituting appeal for writ of error, etc., nor under § 462 designating the appealable orders. Deer & Webber Co. v. Hinckley [S. D.] 106 N. W. 138. An ex parte order is not directly appealable. Order dismissing action on plaintiff's motion where there was no counterclaim. Id. Where the lower court overruled a motion to dismiss after the appellate court had dismissed an appeal on the ground that the case had become a moot one, an appeal from the order will be entertained. Montgomery County v. Montgomery Traction Co. [Ala.] 39 So. 518. An order dismissing a bill as against one defendant is not appealable while the cause is still pending as to the other defendant except in cases of great hardship. Dillon v. Griswold, 118 Ill. App. 627. An order dismissing a bill as to one party is not a final order as a general rule, but will be so considered where it denies such party justice and he has a prima facie case on the merits. Loughlin v. United States School Furniture Co. 118 Ill. App. 36. Decree dismissing bill as to one branch only of controversy not final. Memphis Keeley Inst. v. Leslie E. Keeley Co. [C. C. A.] 144 F. 628. The dismissal of a rule to cancel inscribed mortgages as disclosing no cause of action is rather in the nature of a final than an interlocutory order, and is appealable. Fitzner v. Noullet, 114 La. 167, 38 So. 94.

90. A ruling of the court discharging the jury in a case if made over objections of defendant and an exception saved, is reviewable. Williams v. Jones [Ariz.] 85 P. 399.

91. Order abating action and denying substitution of executor of deceased plaintiff held final so as to allow review by writ of error. Strauss v. Merchants Loan & Trust Co., 119 Ill. App. 588.

92. Appeal will not lie from an order setting aside a verdict and granting plaintiff a right to replead. Birmingham R., Light & Power Co. v. Tanner [Ala.] 40 So. 58.

93. An order denying a motion to amend findings is not appealable. Peterson v. Hutchinson [Minn.] 107 N. W. 1124. An order denying a motion for amended findings on appeal from the probate court is not appealable. In re Pederson's Estate [Minn.] 106 N. W. 958.

94. Appeal may be taken from ruling on motion for new trial notwithstanding judgment has theretofore been entered. In re Bishop's Estate [Iowa] 106 N. W. 637.

95. A judgment is not final unless it disposes of the cause both as subject-matter and the parties so far as the court has the power to dispose of it. Starkey v. Starkey [Ind.] 76 N. E. 876. The word "final" in Chap. 93, p. 122, Sess. L. 1903, has reference not to the character of the judgment as distinguished from interlocutory, but was intended to mean that such a judgment should be conclusive of the litigation and without right of further appeal. Mau v. Stoner [Wyo.] 83 P. 218. The termination of the particular action, not of the subject-matter of the litigation, marks the finality of the judgment. Honerine Min. & Mill. Co. v. Tallerday Steel Pipe & Tank Co. [Utah] 85 P. 626. A final decree is one which fully decides and finally disposes of the entire merits of the case, although some order or decree may be necessary to carry out the rights of the parties or some incidental matter may be reserved for consideration, the decision of which, though, cannot effect the decree by which the rights of the parties have been declared. Gray v. Ames, 220 Ill. 251, 77 N. E. 219.

Held final: A decree fixing the right of a party to receive a certain sum from partnership assets and which leaves nothing to be done except its execution in case it is affirmed. Heyman v. Heyman, 117 Ill. App. 542. An order of the probate court denying a motion to set aside a judgment approving the final account of an executor, without allowance of fees. Griswold v. Smith [Ill.] 77 N. E. 551. Where the record disclosed that the appellants declined to plead further and thereupon it was adjudged

that "the defendants jointly and severally, and separately and severally, have and recover of and from the plaintiffs their costs," such language was broad enough to include a defendant served by publication but as to whom no default was entered, and as to whom the record did not show any disposition of the case. Starkey v. Starkey [Ind.] 76 N. E. 876. A decree adjudging that the grantee in an absolute conveyance holds the property in trust for the benefit of certain parties is final so as to be appealable, though the case is referred to a master for an accounting. Stahl v. Stahl, 220 Ill. 188, 77 N. E. 67. A decree in partition proceedings for the sale of lands, after it has been ascertained that such lands cannot be partitioned in kind without injury. Barnett v. Thomas [Ind. App.] 75 N. E. 868. The fact that a reference is ordered after decree will not prevent the decree from being final, provided the principles by which the questions are to be stated are fixed by the decree. Gray v. Ames, 220 Ill. 251, 77 N. E. 219. An order striking a bill from the files, being a final determination of the right of complainant to pursue her remedy against the movant. Carpenter v. Auditor General [Mich.] 13 Det. Leg. N. 160, 107 N. W. 878. In an action at law with an equitable counterclaim necessitating a determination of all the issues on the law side a decree on the equity side. Colton v. Butterfield [N. D.] 10 N. W. 236. A decree on a foreclosure suit on a mechanic's lien. Marean v. Stanley [Colo.] 81 P. 759. The finality of an order denying a motion to discharge, upon an undertaking, a mechanic's lien is not affected by the fact that the order grants permission to renew the motion upon additional papers. In re Hudson Waterworks, 98 N. Y. S. 33. A decree that there has never been a sale under the powers contained in the mortgages and that complainants be let in to redeem is a final decree although a reference is ordered to determine the amount due. Zimmerman Mfg. Co. v. Pugh [Ala.] 39 So. 989. The refusal to permit appellant to file his petition to be made a party to the action and the issuance of a writ of possession against him. Aull v. Bowling Green Opera House Co. [Ky.] 92 S. W. 943. An order of the probate court requiring a former administrator to turn over to his successor money claimed by the former to have been given him as a gift by the intestate. Foster v. Murphy [Neb.] 107 N. W. 843.

Held not final: A decree, though involving the merits, is not final if it contemplates further proceedings. Sale of land ordered requiring confirmation and distribution of proceeds. Clark v. Roller, 199 U. S. 541, 50 Law. Ed. —. Decree in suit for divorce and separate maintenance, awarding plaintiff support until further order of the court and costs incurred to date, and referring the cause to a commissioner to report the value of defendant's property and what would be a reasonable allowance. Beatty v. Beatty [Va.] 53 S. E. 2. A decree merely ascertaining a personal indebtedness from a defendant to the plaintiffs, but not decreeing payment thereof, and not fixing a lien therefor or otherwise providing for the payment thereof. Pickens v. Daniels [W. Va.] 52 S. E. 215. A judgment for costs upon the sustaining of a demurrer. State v. Lung [Ind. App.] 77 N. E. 860. A decree in an action for specific performance directing the conveyance of the property upon the delivery of certain property and payment of a certain sum of money less certain amounts to be thereafter ascertained, the case to be referred to a master to ascertain such amounts, was not final, since the reference to the master was for the purpose of ascertaining facts upon which the final decree was to be based. Gray v. Ames, 220 Ill. 251, 77 N. E. 219. An order of a single judge of the circuit court entered in vacation refusing a writ of habeas corpus to a party deprived of his liberty by virtue of a writ of execution in an action of debt at the suit of the people, for practicing medicine without a license. People v. McAnally [Ill.] 77 N. E. 544. Order on the settlement of accounts of bankrupt trustees disallowing dower to the wives of the trustees, reserving a question for further consideration, etc., held not final but appealable under Code Pub. Gen. Laws 1904, art. 5, § 27, authorizing appeal from an order determining a question of right and directing an account. Slingluff v. Hubner [Md.] 61 A. 326. Order overruling motion to deny confirmation of a judicial sale and to set aside the sale. Hall v. Moore [Neb.] 106 N. W. 785. A decree that two tracts of land be sold either jointly or severally at the discretion of a trustee. Warner v. Grayson, 200 U. S. 257, 50 Law. Ed. —. A writ of error will not lie from the judgment or from an intermediate order while a motion for a new trial is pending. Kelly & Jones Co. v. Moore [Ga.] 54 S. E. 118. Where the appellate court sustains an injunction but holds an accounting asked for in abeyance until a certain question can be determined in the lower court, and remands the cause, the judgment is final as to the injunction, but not as to the accounting, and hence the plaintiff cannot sustain an appeal to the supreme court, the affirmance of the injunction being in his favor and the decisions relating to the accounting not being final. Sanche v. Mahler, 219 Ill. 349, 76 N. E. 485. A decree of a chancellor confirming a report of a register and requiring appellant to pay attorney fees and a specific amount for the maintenance of wife, or go to jail. Brady v. Brady [Ala.] 39 So. 237. A decree of reference not determining the equities of the case. Robbins v. Brown [Ala.] 39 So. 588. An order of the special term of the supreme court confirming a part of the report of the commissioners of estimates and sending the rest back for correction. In re Commissioner of Public Works, 97 N. Y. S. 503. The refusal of the court to render judgment by default against one of the defendants. Carpenter v. Ingram [Ark.] 91 S. W. 24. No appeal lies from an order confirming a commissioner's report as the court may disregard such report and enter judgment according to the rights of the parties. Cottrell v. Barnes' Adm'r [Ky.] 90 S. W. 1048. Where two distinct counts are tried together no appeal will lie from a judgment on one pending a new trial on the other. Cramer v. Barmon [Mo.] 91 S. W. 1038. Where demurrers of several co-defendants are sustained and judgment entered thereon and the action is dismissed as to another who interposed a general denial, appeal will not lie from the judgment on demurrer while a motion to set aside the dismissal is pending. Baker v. St. Louis, 189 Mo. 375, 88 S. W. 74. Under Mun. Ct.

ing review. Orders and adjudications in interlocutory [96] or provisional,[97] extraordinary [98] and special [99] proceedings, are not reviewable except as provided by stat-

Act Laws 1902, p. 1563, c. 580, § 257, plaintiff cannot appeal from a judgment in his favor to obtain a review of an order of the court vacating such judgment, but must proceed to a new trial and appeal from such final judgment if adverse. Wendin v. Brooklyn Heights I. Co., 97 N. Y. S. 1073.

96. In Texas the only exception to the rule that appeals can be taken only from final judgments, is an appeal from an interlocutory order of the district court appointing a receiver or trustee in any cause. Cotton v. Rand [Tex. Civ. App.] 92 S. W. 266. An order denying a motion to vacate an attachment is not appealable. Maas v. Nankeville, 97 N. Y. S. 980; Great Falls Meat Co. v. Jenkins [Mont.] 84 P. 74. Neither the provision for appeals from orders (Mun. Ct. Act Laws 1902, pp. 1562, 1563, c. 580, §§ 253-257) nor from judgments (Id. p. 1578, § 310) cover orders in attachment proceedings. Delamanarus v. Chuclos, 98 N. Y. S. 515. An order under § 2679 Code of Civil Proc. to make deposit or to show cause, is not appealable. In re Hopkins' Will, 96 N. Y. S. 941. Refusal of court to quash a writ of habeas corpus is not a final judgment and cannot be reviewed on appeal or error. Rigor v. State [Md.] 61 A. 631. An interlocutory order for an accounting is not appealable under Code Civ. Proc. § 963. Grey v. Brennen, 147 Cal. 355, 81 P. 1014. An order denying a motion for leave to renew a motion upon additional papers, is appealable. Conlen v. Rizer, 109 App. Div. 537, 96 N. Y. S. 566. No appeal lies from an order entered after decree, under Hurd's Rev. St. 1903, c. 22, § 19, allowing a defendant who has not been summoned or who has not received a notice, to appear and answer the complainant's bill. Jenkins & Reynolds Co. v. Wells [Ill.] 77 N. E. 236. An order dismissing a motion to set aside a rule nisi is not appealable, nor is an order dismissing the response. Fiscal Court of Marion County v. Marion Circuit Ct. [Ky.] 89 S. W. 704. Appeal will not lie under Rev. St. 1895, art. 1383, from an interlocutory order refusing to vacate an appointment of a receiver. Fidelity Funding Co. v. Hirshfeld [Tex. Civ. App.] 91 S. W. 246.

97. An order modifying a previous order passed on a motion for alimony, determining the custody of children pending the litigation, cannot be reviewed on fast writ of error. Thompson v. Thompson [Ga.] 53 S. E. 507. Alimony pendente lite. Beatty v. Beatty [Va.] 53 S. E. 2.

Granting or dissolving injunction: Under Act March 3, 1891, c. 517, § 7, an order dissolving an injunction may be appealed from. Chapman v. Yellow Poplar Lumber Co. [C. C. A.] 143 F. 201. Rev. St. 1887, § 4807, subd. 3, authorizes an appeal from an order dissolving an injunction. Dougal v. Eby [Idaho] 85 P. 102. A decree granting or refusing an injunction is appealable. Hansono v. Police Jury of St. Mary's Parish [La.] 41 So. 321. There is no appeal from an interlocutory order denying a motion to dissolve an injunction. Lasher v. Annunziata, 119 Ill. App. 653. An order denying a motion for an injunction is not appealable. Builders' Painting & Decorating Co. v. Advisory Board Bldg. Trades of Chicago, 116 Ill. App. 264. Order enlarging scope of an injunction is not appealable. National Hollow Brake Beam Co. v. Leigh, 119 Ill. App. 344. In South Carolina an order granting an interlocutory injunction is appealable, under Code Civ. Proc. 1902, § 11. Lamar v. Croft [S. C.] 53 S. E. 540. Though an order granting an injunction is appealable under the United States statutes, plaintiff in injunction cannot take a cross appeal on a claim that the injunction was unduly limited in scope. Act Mar. 3, 1891. Ex parte Nat. Enameling & Stamping Co., 201 U. S. 156, 50 Law. Ed. ——; Ex parte Automatic Switch Co., 201 U. S. 166, 50 Law. Ed. ——.

Appointing or discharging receiver: Under Const. art. 5, § 9, the supreme court of Idaho may review any decision upon appeal from the district court, hence it could review the refusal to appoint a receiver, pending litigation. Chemung Min. Co. v. Hanley [Idaho] 81 P. 619. An appeal from an order refusing to vacate the order appointing a receiver lies under the statute permitting an appeal from an order removing or refusing to remove a receiver. Davis v. Consolidated Coal Co. [Wash.] 84 P. 22. An order setting the compensation of a receiver is a final decree and hence appealable. Ruggles v. Patton [C. C. A.] 143 F. 312.

98. Quashal of an alternative writ of mandamus but with leave to relator to amend is not a final judgment. State v. Landis [Fla.] 39 So. 15.

99. A dismissal of a petition for admission to the bar, the petition being based on the ground that petitioner was unjustly deprived of the right to admission by the act of the county bar, is a final judgment within Gen. St. 1902, §§ 788, 819, authorizing appeals from final judgments, etc. In re O'Brien's Petition [Conn.] 63 A. 777. No appeal lies from an order of the court of common pleas making absolute a rule granted under Act Mar. 8, 1889 (P. L. 10) as amended by Act May 25, 1893 (P. L. 131) to bring an action of ejectment within six months. Gabler v. Black [Pa.] 60 A. 257. A final order incorporating a village in a special proceeding under Rev. St. 1898, §§ 854-866, is a final order in a special proceeding, and appealable. In re Salter [Wis.] 106 N. W. 684. A person filing a claim for damages in proceedings to establish a highway may appeal from the award of damages but not from the order establishing the road. In re Dugan [Iowa] 105 N. W. 514. Where an unauthorized rule is entered for taking a deposition an order directing a witness to answer a question is a final order from which the witness may appeal. International Coal Min. Co. v. Pennsylvania R. Co. [Pa.] 63 A. 80. An order directing witnesses to answer questions propounded before a special examiner lacks finality. Alexander v. U. S., 201 U. S. 117, 50 Law. Ed. ——. Disallowance of an opposition to appointment of administrator by one claiming preference of appointment is final as to opponent's rights. Miguez v. Delcambre, 114 La. 1032, 38 So. 820. Under the Nebraska "Refunding Bond Act," Laws 1899, p. 59, c. 8, an appeal may be taken from the findings of

ute,[1] and then must be finally determinative, work irreparable injury,[2] or affect substantial rights.[3] Orders punishing for contempt [4] are not reviewable except as provided by statute. Orders after judgment [5] are not reviewable separately from the judgment if merely a part or continuation of it; otherwise if they newly determine rights [6] or vacate,[7] modify, or deny vacation of modification [8] of the judgment as distinguished from a default [9] and on some ground not resting in discretion.[10] De-

the district court as to the validity of county bonds to the supreme court which may make a final and binding decision on the question. Colburn v. McDonald [Neb.] 100 N. W. 961. The court will not attempt in such proceedings to adjudicate the rights of persons not parties to the record. Id. Under Code Civ. Proc. §§ 2260, 3405, an appeal lies to the appellate division from final orders in summary proceedings in justices' courts to recover the possession of realty, notwithstanding section 1357 giving a right of appeal to the appellate division in special proceedings in courts of record. In re Soop [N. Y.] 76 N. E. 14.

1. An order vacating an order granting leave to a foreign guardian to sue is appealable as a final adjudication. In re Crosby [Wash.] 85 P. 1.

2. Where the acts against which an injunction is directed have been accomplished, the dissolution of the injunction works no such irreparable injury as will warrant an appeal. Xavier Realty v. Louisiana R. & Nav. Co. [La.] 39 So. 6. A judgment ordering sale by the receiver of all the assets of an insolvent in bulk instead of in lots may work irreparable injury. Wenar v. Leon L. Schwartz [La.] 40 So. 599. Interlocutory order not appealable unless working irreparable injury. Where bond affords ample protection, order for release of sequestration not appealable. Richardson v. Johnson, 114 La. 1050, 38 La. 826. An order of recusation does not work irreparable injury; an order refusing recusation does. State v. Reid [La.] 40 So. 369.

3. Judgment vacating a town plat in proceedings under § 2315 et seq., Gen. St. 1894, is appealable as a "final order affecting a substantial right" within subd. 6, § 6140, Gen. St. 1894. Koochiching Co. v. Franson, 91 Minn. 404, 98 N. W. 98. An order declaratory of an undisputed fact is not appealable. Fromme v. Poerschke, 95 N. Y. S. 525.

4. A judgment of contempt based upon a complaint charging the violation of an injunction is not appealable under Rev. St. 1899, § 2696. State v. Bland, 189 Mo. 197, 88 S. W. 28. A judgment finding appellants guilty of contempt for violating an injunction prohibiting the sale of certain scalper's tickets is a final judgment in a civil actior and appealable under Rev. St. 1899, § 806. Id. A judgment of commitment for contempt made conditional on future conduct is not final. State v. Peralta [La.] 39 So. 550. Errors in contempt proceedings are reviewable only on appeal, not by habeas corpus. Perry v. Pernet [Ind.] 74 N. E. 609.

5. Order for writ of assistance after confirmation and order for deed from which appeal was pending is appealable. Escritt v. Michaelson [Neb.] 103 N. W. 300. Refusal of judge to settle a bill of exceptions not an appealable order or subject. Miller v. American Central Ins. Co. [Cal. App.] 83 P. 289. An appeal from a part of a judgment awarding compensation and costs to a guardian ad litem does not come within Code Civ. Proc. § 939, allowing an appeal in special orders made after final judgment. Aronson v. Levison [Cal.] 83 P. 154.

6. Order for **writ of assistance** after confirmation in foreclosure is appealable as a final order. Escritt v. Michaelson [Neb.] 106 N. W. 1016. An order of the county judge denying appellant's right to appeal under Rev. St. 1895, art. 1401, without a bond for costs, is appealable. Murray v. Robuck [Tex. Civ. App.] 13 Tex. Ct. Rep. 915, 89 S. W. 781.

7. An order setting aside a judgment under Code Civ. Proc. § 602, is an interlocutory and not a final order and cannot be reviewed on appeal. Continental Trust Co. v. Peterson [Neb.] 107 N. W. 786. Under Code Civ. Proc. § 647, an order refusing to set aside a default judgment is an interlocutory decision finally determining the rights of the parties and hence need not be excepted to. Roberts v. Wilson [Cal. App.] 84 P. 216. Under Code Civ. Proc. § 963, subd. 3, an appeal from an order vacating the order denying probate to the will is within appellate jurisdiction of supreme court. In re Bouyssou's Estate [Cal. App.] 82 P. 1066. An order vacating a judgment in garnishment proceedings, which does not determine the proceeding and prevent final judgment is not appealable. Tatum v. Geist [Wash.] 82 P. 902. An order vacating judgment not appealable. Sengfelder v. Powell-Sanders Co. [Wash.] 82 P. 931. Even though the order be made in a separate proceeding especially instituted for the purpose. Id. An appeal will not lie from a memorandum but only from a formal order setting aside a judgment. Chambers v. Morris [Ala.] 39 So. 375. Where the appellate jurisdiction is purely statutory, failure of the statute to enumerate an order revoking an order refusing to admit a will to probate, renders it unappealable. In re Bouyssou's Estate [Cal App.] 82 P. 1066. Under Ky. St. 1903, § 4250, appeal from an order setting aside an order previously granted exonerating appellant from a tax assessment will lie to the circuit court. Garrett v. Creekmore [Ky.] 89 S. W. 166.

8. Appeal will lie from an order denying a motion to open a default judgment, which is the proper procedure. Lesser v. Kahn, 98 N. Y. S. 212. Under Code Civ. Proc. as amended by Sess. Laws 1899, p. 146, an order made before final judgment, refusing to set aside a default is not an appealable order. Bowen v. Webb [Mont.] 85 P. 739. Under 2 Ball. Ann. Codes & St. & 6500, subd. 7, a refusal to vacate a final judgment is a final order made after judgment, affecting a subbstantial right. Jordan v. Hutchinson, 39 Wash. 373, 81 P. 867.

9. Where defendant moved to set aside a municipal court judgment for nonservice

cisions of lower appellate or intermediate courts are reviewable in cases usually prescribed by statute [11] if they possess finality.[12] Such minor court decisions are appealable as provided by statute.[13] Parts of judgments may be reviewed if severable and complete in themselves.[14] As costs are part of the judgment, the taxation of them is not separately reviewable.[15]

(§ 4) *C. Reviewableness may depend on character or value of action, subject-matter, or controversy.*[16]—The action must be civil in its nature [17] to be reviewable

of summons, which motion was granted and the case set for hearing, and appeal from the latter part of the order will be regarded as opening a default, and is not appealable. Spiropulos v. Magnioni, 96 N. Y. S. 438. Where a demurrer to an affirmative defense was sustained with permission to amend answer, but no amended answer ever served, and thereupon default entered, with no request to set aside such default, no appeal will lie. Macy v. Sullivan [Wash.] 84 P. 601. Under Laws 1902, p. 1563, c. 580, § 257, no appeal lies in the first instance from an order opening a default judgment. Margolys v. Mollenick, 94 N. Y. S. 301.

10. An order opening a default is not appealable, especially where no final judgment on default has been entered. Raner's Law & Collecting Co. v. Standley [Cal. App.] 84 P. 214.

11. An order of the district court dismissing an appeal from the justice court is not appealable either as a final judgment nor an appealable order under Code Civ. Proc. § 1722, amended by Act of 1899, Sess. L. 1899, p. 146. Palmer v. Spaulding [Mont.] 85 P. 369. An order by the county court removing a special administrator and appointing another to take his place is a final order and appealable under § 42, c. 20, Comp. St. 1903, authorizing appeals in probate proceedings by any person affected by a final order, judgment, or decree. In re Pope's Estate [Neb.] 106 N. W. 659. In Pennsylvania the decision of the court of common pleas is final in cases of trespass appealed from the justice court. Minogue v. Ashland Borough, 27 Pa. Super. Ct. 506. Code Civ. Proc. § 2260, does not authorize an appeal to appellate division of supreme court from a final order of the county court in a summary proceeding instituted before a justice of peace. Burrus v. Parsons, 109 App. Div. 634, 96 N. Y. S. 359. Code Civ. Proc. § 1357, does not apply to summary proceedings originating before a justice of peace and appealed to county court. Id. Code Civ. Proc. §§ 1340, 1342, apply to appeals from judgments and orders made in actions, and not in special proceedings. Id.

12. A decision of the appellate court reversing a judgment to allow a widow an award and remanding the case for further proceedings, is final and hence appealable to the supreme court. Kroell v. Kroell, 219 Ill. 105, 76 N. E. 63. Where the judgment of the circuit court is partly affirmed and partly reversed by the appellate court, the decision of the appellate court is not final so as to be appealable under 3 Starr and C. Ann. St. 1896, p. 3153, c. 110. Funk v. Kempton [Ill.] 77 N. E. 683. Where a case was carried to the superior court by certiorari, the answer of the justice of the peace traversed, verdict rendered against the traverse, and a motion for a new trial made and overruled, a writ of error did not lie, as the main case was still pending, and it would not have been finally disposed of had a new trial been granted. Du Vall v. Brodgen, 123 Ga. 411, 51 S. E. 404. Where a judgment of reversal and remand by the court of civil appeals practically settles the case, upon the allegation of that fact in the petition for writ of error, it may be reviewed by the supreme court. Brown v. Cates [Tex.] 13 Tex. Ct. Rep. 179, 87 S. W. 1149.

13. Order of county court on appeal from city court of Kingston is not further appealable to supreme court. Code Civ. Proc. §§ 1356, 1357, do not apply. In re Soop, 106 App. Div. 341, 94 N. Y. S. 463.

14. An order after judgment, made without jurisdiction, is separately appealable. Dahlstrom v. Portland Min. Co. [Idaho] 85 P. 916. A portion of an order may be appealed from the same as a portion of a judgment. Code Civ. Proc. § 940. Donnelly v. Gray Bros. [Cal. App.] 84 P. 451. Where the whole decree is appealed from, but error is only assigned to a part thereof, the court on appeal has jurisdiction only of the part of the decree to which the assignment is made. Kouka v. Kouka [Ill.] 77 N. E. 556. Where a decree adjudges that the grantee in an absolute conveyance holds the property in trust, and the case is referred to a master for an accounting, the part of the decision declaring the trust is appealable, though the reference to the master is interlocutory and unappealable. Stahl v. Stahl, 220 Ill. 188, 77 N. E. 67. Where a decree in chancery is severable, and is composed of distinct parts, each part may be treated as a distinct decree, and an appeal taken from only one part without affecting the other. Kouka v. Kouka [Ill.] 77 N. E. 556.

15. Question of costs is ancillary and reviewable only on appeal, if at all, from final decree. Memphis Keeley Inst. v. Leslie E. Keeley Co. [C. C. A.] 144 F. 628. An order denying defendant's motion for costs of plaintiff's motion to amend the complaint is not appealable except on appeal from the allowance of motion to amend. Abrahams v. Finkelstein, 97 N. Y. S. 987.

16. See 5 C. L. 139.

17. A judgment of the circuit court on appeal from the board of supervisors allowing a claim against the county is a "judgment in a civil action." Marshall County v. Rivers [Miss.] 40 So. 1007. An order in habeas corpus proceedings disposing of the custody of a child is appealable. Mahon v. People, 218 Ill. 171, 75 N. E. 768. Under Rev. Laws c, 173, § 106, providing for an appeal in any civil cause, according to the course of the common law or otherwise, tried by a jury or heard by the court, an ap-

by civil remedies. It must involve questions of law [18] or of fact to be reviewable by the remedies appropriate to each, e. g., error or appeal. The case may go either to an intermediate or to the highest court or may or may not be subject to further appeal from the former to the latter if any of the criteria hereafter referred to exist.[19] Jurisdiction because of the subject-matter usually prevails over that dependent on the amount,[20] and the existence of one jurisdictional predicate makes others needless.[21] But where by failure to assign it as error the question giving jurisdiction is waived, other questions will not be considered.[22] Joinder with a cause within the jurisdiction will not suffice.[23]

Particular jurisdictional facts.[24]—Among the criteria prescribed by various statutes to determine appealability are the existence [25] of a constitutional [26] question particularly pointed out,[27] set up,[28] necessary to decision, and adversely or preju-

peal lies by way of exceptions from an order denying a petition for prohibition. Tehan v. Brown [Mass.] 77 N. E. 313.

18. Appeal lies in Oklahoma from probate court to supreme court in civil causes involving only questions of law. Thompson v. Crosby [Okl.] 82 P. 643.

19. No appeal lies to the court of appeals from the superior court in cases originating in the justice courts. Pool v. Superior Ct. of Siskiyou County [Cal. App.] 84 P. 53. Hence no writ of error will lie. Id.

20. In proceedings to set off a widow's award, the supreme court has jurisdiction of an appeal from the Appellate Court regardless of the amount. Kroell v. Kroell, 219 Ill. 105, 76 N. E. 63. Court of appeals has jurisdiction of an appeal from a judgment refusing to enjoin collection of a judgment and vacate if the amount in controversy is less than $200. Cincinnati, P., B. S. & P. Packet Co. v. Thomas Malone & Co. [Ky.] 92 S. W. 306.

21. Constitution, giving court of appeals jurisdiction in actions to abate a nuisance, would include an appeal from that part of the judgment in such an action, awarding costs even though amounts were less than $300. White v. Gaffney [Cal. App. 82 P. 1088]. On an appeal in which the supreme court has jurisdiction solely because the validity of an ordinance is involved, the proper construction of the ordinance is not before the court, and the judgment will be reviewed only in case the statute is found invalid and then only to the extent that it was affected by the invalid statute. Gies v. Broad [Wash.] 83 P. 1025.

22. Where a freehold is involved in the original decree but is not the point assigned for error, the supreme court will not take jurisdiction. In re Ross' Estate, 220 Ill. 142, 77 N. E. 126.

23. A cause not appealable to the supreme court cannot be brought within its jurisdiction by being united with another distinct cause of action of which it has jurisdiction. Brown v. Cates [Tex.] 13 Tex. Ct. Rep. 179, 87 S. W. 1149.

24. See 5 C. L. 140.

25. Where the record presents a fairly debatable question as to constitutionality of a statute, the supreme court has jurisdiction. Chicago, etc., R. Co. v. People, 217 Ill. 164, 75 N. E. 368. An appeal fairly raising a constitutional question, and having been taken before the supreme court had decided the question, will be retained by the supreme court and not sent to the court of appeals. Boling v. St. Louis, etc., R. Co., 189 Mo. 219, 88 S. W. 35.

26. Hood v. Baker [Ind. App.] 75 N. E. 608. An instruction that nine of the twelve jurors might return a verdict objected to as not being authorized by the constitution, raised a constitutional question and gives the supreme court jurisdiction. Logan v. Field, 192 Mo. 54, 90 S. W. 127. A record which shows an instruction that the law permits three-fourths of the jury to return a verdict as a verdict returned by all does not show a constitutional question as to the validity of the amendment permitting such verdict. Hutchinson & Co. v. Morris Bros., 190 Mo. 673, 89 S. W. 870, where the record shows a constitutional question raised by appellant and decided against him, the supreme court has jurisdiction of the case on appeal. Shareman v. St. Louis Transit Co., 114 Mo. App. 372, 89 S. W. 575.

27. An exception to an instruction based upon the provision with a statute followed by a motion for a new trial in support of which the grounds expressly specified the unconstitutionality of the statute as a reason why the instruction accepted was incorrect, is sufficient to raise a constitutional question so as to authorize an appeal directly to the supreme court. Christy v. Elliott, 216 Ill. 31, 74 N. E. 1035.

28. Masonic Fraternity Temple Ass'n v. Chicago, 217 Ill. 58, 75 N. E. 439. A bill alleging that an ordinance is unjust, unreasonable, and oppressive, does not raise a constitutional question so as to give the supreme court jurisdiction. Masonic Fraternity Temple Ass'n v. Chicago, 217 Ill. 58, 75 N. E. 439. The refusal to allow an amendment to a bill setting up a constitutional question, does not raise a constitutional question so as to give the supreme court jurisdiction. Id. A constitutional question held sufficiently presented by a petition by property owners to restrain the building of a commercial railroad in a city street, without payment of due compensation, in violation of the constitutional rights of the complainants, so as to authorize an appeal directly to the supreme court. Wilder v. Aurora, De Kalb & R. Elec. Traction Co., 216 Ill. 493, 75 N. E. 194. In order to give the supreme court jurisdiction on the ground that a constitutional question is involved, a specific constitutional guaranty must have been invoked and denied. Carmody v. St. Louis Transit Co., 188 Mo. App. 572, 87 S. W. 913. By merely excepting to the court's

dicially decided,[29] the construction [30] of statutes or public regulations, a case involving the revenue [31] or taxes,[32] a case involving freeholds,[33] titles,[34] boundaries, or fran-

charge that nine of the jury had power to render a verdict, the appellant invoked no constitutional protection so as to give the supreme court jurisdiction. Carmody v. St. Louis Transit Co., 188 Mo. App. 572. 87 S. W. 913. Not sufficient to object on trial but must be made ground of motion for new trial. State v. Grant [Mo.] 92 S. W. 698.

29. Where the judgment might have been predicated either on the decision of a constitutional question or on another ground, it will not be presumed that the constitutional question was passed on. State v. Yazoo, etc., R. Co. [La.] 40 So. 630.

30. Validity of statute or municipal ordinance. See Acts 1901, p. 566, c. 287, § 8. Hood v. Baker [Ind. App.] 75 N. E. 608. The construction of a statute must be really involved, and where there is no ambiguity in a statute no question of construction can arise. It is not sufficient merely to claim that the construction of a statute is involved. Hood v. Baker [Ind.] 76 N. E. 243.

31. A judgment awarding a writ of mandamus to compel the enforcement on a judgment and order of sale for delinquent special assessments against land is not a case relating to revenue, since neither the liability to pay nor the amount to be paid is in controversy. Murphy v. People [Ill.] 77 N. E. 439.

32. Although questions relating to the "legality" of a tax are generally appealable to the supreme court without regard to the amount, where the action involves merely overcharge through assessor's error in number of acres, the amount being less than $200, presents no appealable question. Thomas v. Lincoln County [Wash.] 83 P. 18. Validity of tax dependent on construction of revenue law gives jurisdiction. Monongahela River Consol. Coal & Coke Co. v. Board of Assessors [La.] 39 So. 601. An action to recover back taxes paid by mistake on property alleged to be exempt presents no question as to the legality of the tax. McCaleb v. Buras Levee Dist. Com'rs [La.] 41 So. 217. Where the amount of a tax depends on the construction of the revenue law the legality of the tax is involved. State v. Orfila [La.] 41 So. 227. The supreme court has jurisdiction of an appeal involving validity of a local option election. Marshall v. Mansura [La.] 41 So. 56.

33. Although the freehold is located in another state or territory, the supreme court has jurisdiction where the lower court had jurisdiction of the parties by personal service and could enforce its decree in personam. White Star Min. Co. v. Hultberg [Ill.] 77 N. E. 327. A freehold is involved, within the meaning of the constitution and statute providing for appeals from the trial to the supreme court, only in cases where the necessary result of the judgment or decree is that one party gains or the other loses a freehold estate, or where the title is so put in issue by the pleadings that the decision of the case necessarily involves the decision of such issue. In re Ross' Estate, 220 Ill. 142, 77 N. E. 126. Where the appellant's sole interest under a will is a legacy to be paid in money, an appeal will not lie by him to the supreme court in proceedings to establish the will, although the main body of the property of the estate consists of real estate. Id. Where a freehold is involved in the original decree, but is not the point assigned for error, the appeal should be to the appellate court. Id. A bill in aid of an execution for the purpose of subjecting real estate to the lien of a judgment and satisfying the execution does not involve a freehold. Fairbanks v. Carle, 217 Ill. 136, 75 N. E. 360. Where a judgment was levied upon land as the absolute property of the attachment defendant, and an interplea was filed by a third party claiming to be the owner of such land, it was held that the case involved a freehold, although the interplea did not show by what title the interpleader claimed. Ray v. Keith, 218 Ill. 182, 75 N. E. 921. Where the only effect of a judgment awarding a writ or mandamus is to compel the proper officer to enforce a judgment and order of sale for a delinquent special assessment against the land, such judgment does not necessarily involve a freehold, since the loss of the land may be obviated by payment of the judgment before sale or by a redemption after sale. Murphy v. People [Ill.] 77 N. E. 439. A freehold may be involved in the original decree and yet not involved in the appeal; as where the only question on an appeal in a suit for partition was whether there was a lien on the appellant's share of the real estate created by a decree in separate maintenance proceedings. Hutchinson v. Spoehr [Ill.] 77 N. E. 580. Where, in mandamus proceedings to compel park commissioners to grant the relator right to construct a railroad track across a city street, the title of the relator to a strip of land crossing such street was in issue, it was held that an appeal of land from a judgment denying the right involved a freehold. People v. South Park Com'rs [Ill.] 77 N. E. 925. A petition to set aside an execution and a sale of land thereunder, and to enjoin the further issue of executions upon the judgment, does not involve a freehold. First Nat. Bank v. Gibson [Ill.] 77 N. E. 562. If a freehold is not involved in the assignments of error, though involved in the pleas or original decree, the appeal goes to the appellate court. Douglas Park Bldg. Ass'n v. Roberts, 218 Ill. 454, 75 N. E. 1018. Where declarations alleged trespass quare clausum fregit, but title to the freehold was not involved and the sole issue was who was entitled to possession, appeal lies to appellate court only. Id. Although a will does not in terms devise real estate, if it sufficiently appears from the record that the decedent owned real estate, devised by the residuary clause, a freehold is involved in an order permitting a will to probate and an appeal will lie to the supreme court. Senn v. Gruendling, 218 Ill. 458, 75 N. E. 1020. Appeal will not lie to supreme court from a decree declaring a deed absolute in form to be a mortgage, permitting redemption, and cancelling a deed to a third person from mortgagee, on the ground that it does not involve a freehold. Eddleman v. Fasig, 218 Ill. 340, 75 N. E. 977. Where in a suit to enjoin a railroad company from building its road in a city street the bill averred that the complainant was the owner in fee of certain land, and that such owner-

chises, or the validity thereof,[35] or title to office,[36] or questions involving civil or political rights, a minimum [37] or maximum [38] amount as prescribed by statute or con-

ship extended to the center of the street, subject only to the easement of the public in the street as a public highway, and the defendant denied that the complainant was the owner of such part of such street, it was held that a freehold was involved so as to authorize an appeal directly to the supreme court. Wilder v. Aurora, De Kolb & R. Elec. Traction Co., 216 Ill. 493, 75 N. E. 194. A mining claim under laws of the United States is a freehold, within the rule, although the title to the fee is in the United States. White Star Min. Co. v. Hultberg [Ill.] 77 N. E. 327. In an action of trespass necessarily involving title to realty, the appeal should have been to the supreme court. Schwartz v. McQuaid, 115 Ill. App. 353. A bill to remove a cloud upon the title to realty involves a freehold and the appellate court can consider no questions involved in the cause though appellant waives all matters relating to the freehold. Glos v. Shedd, 118 Ill. App. 238. The appellate courts of this state have power to entertain appeals from interlocutory orders granting injunctions though a freehold may be involved. New Ohio Washed Coal Co. v. Coal Belt R. Co., 116 Ill. App. 153. A freehold is not involved in a bill to collect a judgment by compelling the execution of a trust created by a will so as to oust the appellate courts of jurisdiction. Linn v. Downing, 116 Ill. App. 454.

34. Where title to land is involved the court of appeals has jurisdiction regardless of value. Morgan v. Lewis [Ky.] 92 S. W. 970. A judgment upon a motion to quash an execution levy on the ground that the real estate is not subject to execution does not involve the title to real estate so as to give supreme court jurisdiction. Moore v. Stemmons, 192 Mo. 46, 90 S. W. 434. An order quashing an execution because levied upon exempt homestead does not involve title to real estate so as to give supreme court jurisdiction, specially where no sale has taken place. Lawson v. Hammond, 191 Mo. 522, 90 S. W. 431. An action for cutting and hauling away logs is not an action involving title to real estate so as to give supreme court appellate jurisdiction though it may be necessary to determine the title. McKinney v. Wright Lumber Co., 192 Mo. 32, 90 S. W. 726. A decree confirming an assignment of dower is one "concerning title to land." Hobson's Adm'r v. Hobson's Adm'r [Va.] 53 S. E. 964.

35. An appeal involving the dissolution of a corporation and the forfeiture of its franchise lies directly to the supreme court. Cratty v. Peoria Law Library Ass'n, 219 Ill. 516, 76 N. E. 707. Validity of franchise. See Act 1901, p. 566, c. 287, § 8. Hood v. Baker [Ind. App.] 75 N. E. 608. Acts 1901, p. 566, c. 247, § 8, authorizing an appeal to the supreme court where any question is presented as to validity of a franchise or of a municipal ordinance of a validity of a statute or a constitutional right, is applicable to civil causes mentioned in Acts 1903, p. 280, c. 156, amending § 6, Acts of 1901, relating to the jurisdictional amount. Id.

36. The jurisdiction of the supreme court of appeals involving title to office depends solely on the sum involved, and hence there is no jurisdiction where no salary is attached to the office (State v. Dallas [La.] 40 So. 847), and the amount of public funds to be handled by the incumbent is not to be considered (Id.). Under Const. art. 6, § 12, the supreme court has exclusive appellate jurisdiction of cases involving the title to the office of school director. State v. Fasse, 189 Mo. 532, 88 S. W. 1.

37. Ann. Code, § 85, relating to minimum amount in controversy applies only to actions originating in justice court and not to judgments of the circuit court on appeal from the board of supervisors. Marshall County v. Rivers [Miss.] 40 So. 1007. A recital in a judgment rendered in 1904 that it was to have effect as though entered Mar. 8, 1900, definitely fixed the date of the judgment, and a remittitur after Mar. 8, 1900, could not effect the amount in controversy for the purpose of appeal. Kennedy v. Citizens' Nat. Bank [Iowa] 104 N. W. 1021. The supreme court of Washington has no jurisdiction to entertain an appeal from a case originally involving not more than $200. National Grocery Co. v. Cann, 39 Wash. 596, 81 P. 1054. Where after the rendition of a judgment for less than $500, but before the adjournment of the term at which such judgment was rendered, the minimum jurisdictional limit of the court of appeals was reduced to $300, it was held that an appeal from such judgment was governed by the jurisdictional limit as reduced. Allison's Ex'r v. Wood [Va.] 52 S. E. 559. Where several and distinct judgments each for less than $100 are rendered against different defendants upon their individual liabilities as stockholders in a corporation, they cannot by aggregating their judgments and uniting in a proceeding in error give the supreme court jurisdiction although judgments were rendered in same action and involved common questions of law. Samp v. Braden [Kan.] 85 P. 289. Although immaterial findings as to title to land were included in an action whose gist was negligence in killing horses, the supreme court had no jurisdiction as the amount was less than $300. Cox v. Southern Pac. R. Co. [Cal. App.] 83 P. 290. Under Const. art. 4, § 4, in an action at law for recovery of money, amount in controversy less than $200, supreme court without jurisdiction. Durk v. Scully [Wash.] 83 P. 426. Although amount of costs awarded less than $300, appeal therefrom allowed because part of judgment in a nuisance case. White v. Gaffney [Cal. App.] 82 P. 1088. Under Const. art. 4, § 4, limiting appellate jurisdiction of supreme court in civil actions at law for money judgments to controversies involving originally more than $200, the supreme court has no jurisdiction of an appeal from a judgment granting a mandamus to compel a city to issue a warrant for less than $200 to pay costs of a former appeal to supreme court. State v. Coon [Wash.] 82 P. 993. In Washington an order by the superior court to a justice of the peace vacating a judgment and granting a change of venue in a case not involving over $200 nor the legality of a tax, impost, assessment, toll, municipal fine, or the validity of a statute, is not appealable. State v. Freasure, 39 Wash. 198,

stitution, "demanded,"[39] "involved,"[40] "in dispute,"[41] "in controversy,"[42] or "recovered," including or excluding costs, interest, and other items, according to the terms

81 P. 688. A part of a judgment awarding a guardian $200 costs and compensation is not appealable because amount is insufficient to give supreme court jurisdiction. Aronson v. Levison [Cal.] 83 P. 154. Appeal transferred from supreme court of appeals because $2,000 not involved. Schutten v. Schaffhausen [La.] 38 So. 964. Order on a rule to require the payment to a particular party of a fund in court is not appealable unless the amount of the fund is within the appellate jurisdiction. Succession of Glancey, 114 La. 105, 38 So. 826. Acts 1902-04, p. 590, c. 373, Code 1904, p. 1837, § 3455, reducing the minimum appealable amount from $500 to $300, held to apply to judgments rendered before as well as those rendered after the passage of the act. Allison Ex'r v. Wood [Va.] 52 S. E. 559. The supreme court has no jurisdiction of an appeal from the appellate court in a creditor's bill where the amount involved is less than $1,000, unless there is a certificate of importance. Aultman, Miller & Co. v. Jackson [Ill.] 77 N. E. 454. The supreme court has no jurisdiction of an appeal from the appellate court when the amount in controversy exclusive of costs and interest does not exceed $6,000. See Burns' Ann. St. 1901, § 1337j, subd. 3. Tyler v. Davis [Ind.] 77 N. E. 400. Where amount involved does not exceed $50. Yakey v. Leich [Ind. App.] 76 N. E. 926. Court of appeals has no jurisdiction of an appeal from a judgment for $200, the amount sued for, where defendant admitted a debt of $40. United States Health & Accident Ins. Co. v. Webb's Adm'r [Ky.] 88 S. W. 1108.

38. In California, appeals involving amounts exceeding that of which the court of appeals has jurisdiction will, under supreme court Rule 32, be transferred to the supreme court. Weldon v. Rogers [Cal. App.] 82 P. 352.

39. Plaintiff is bound by the allegations of his petition as to the value of the property involved, and having alleged a value below the jurisdiction is not entitled to appeal because the property has increased in value. Spremich v. Maurepas Land & Lumber Co., 114 La. 1053, 38 So. 827. A case is appealable to the supreme court where the original petition in the district court was for an amount in excess of the county court's jurisdiction, though, an amended petition upon which the case was tried claimed an amount cognizable by the county court, notwithstanding Rev. St. 1890, art. 996. Nashville, etc., R. Co. v. Grayson County Nat. Bank [Tex.] 93 S. W. 431. Appeal from a proceeding to set aside a tax assessment lies to the court of appeals though the assessment is less than $200, Ky. St. 1903, § 950, having no application. Garrett v. Creekmore [Ky.] 89 S. W. 166.

40. The amount involved in a suit is the amount in controversy at the time the suit is brought with interest, and pending the suit cannot be added in order to make up the necessary amount. Lydston v. Auburgh, 216 Ill. 210, 74 N. E. 796. The amount involved in a suit to subject property to the payment of a debt is the amount of the debt and not the value of the property. Id. The amount involved on appeal from a judgment dismissing a creditor's bill is determined by the amount of the indebtedness due the complainant and not by the value of the property sought to be subjected. Aultman, Miller & Co. v. Jackson [Ill.] 77 N. E. 454. Where it appeared from the opinion of the appellate court that the claim allowed the appellant in the circuit court was only $770, and there was nothing in the record to show how his amount was increased to the jurisdictional amount, it was held that it was doubtful whether the appeal involved the jurisdictional amount, although an entry of the appellate court recited that the amount involved exceeded the minimum jurisdictional limit. Funk v. Kempton [Ill.] 77 N. E. 683. In a suit by the assignee of a life insurance policy to enjoin the payment of dividends on such policy to the assignor, the supreme court has no jurisdiction of an appeal, where the amount of such dividends is less than $1,000, though the value of the policy exceed such sum and although premiums paid by the assignee together with the debt secured by the assignment exceed $1,000. Breuggemann v. Brueggemann, 215 Ill. 509, 74 N. E. 800. Where the appellate court affirmed a decree in a suit to foreclose a mortgage except as to an attorney's fee, the right to which being based on contract, an appeal did not lie to the supreme court from the decision as to the attorney's fee, such fee not being within the jurisdictional amount, although the decree of foreclosure involved a sufficient amount. McCagg v. Touhy, 220 Ill. 216, 77 N. E. 207. In a suit to enjoin a seizure under execution on a judgment alleged to be invalid, the amount involved is the amount of the judgment, not the value of the property seized. Lhote & Co. v. Church Extension Soc. of M. E. Church [La.] 39 So. 502. Suit to enjoin nuisance held not to involve sufficient value to be within jurisdiction of supreme court. Krantz v. Noonan [La.] 41 So. 364. No money controversy is imparted to a judgment in quo warranto to try title to office after the expiration of the time by either the possibility of a fine on judgment of ouster or the effect of the judgment as an estoppel in a suit for the emoluments of the office. Albright v. Territory, 200 U. S. 9, 50 Law. Ed. —. Under Ky. St. 1903, § 950 and § 458, appeal will not lie to the court of appeals to recover less than $200 in foreclosure of a mechanic's lien on a leasehold. Combs Lumber Co. v. Chinn [Ky.] 90 S. W. 251. Under Act March 20, 1901, supreme court has no appellate jurisdiction of cases involving less than $4,500 in the absence of other grounds conferring jurisdiction. McKinney v. T. L. Wright Lumber Co., 192 Mo. 32, 90 S. W. 726. Where defendant asserts a counterclaim of $225 which is decided against him, there is sufficient involved to entitle him to an appeal. Horn v. Carroll [Ky.] 90 S. W. 559. Where the judgment states that the appellee recovered $75 and there is nothing else in the record indicating that more was involved in the controversy, the court of civil appeals has no jurisdiction. McCord-Collins Co. v. Hubbard [Tex. Civ. App.] 90 S. W. 524. A judgment for $507 does not involve sufficient amount to give the supreme court jurisdic-

of the statute. No appeal lies in Kentucky from the grant of a divorce.[43] Bankruptcy orders [44] and as a rule probate and administration orders, and lunacy or curatorial proceedings, are appealable according to terms of statutes regulating such matters. Eminent domain proceedings [45] and election contests [46] are covered by statute, as shown below. Federal review of state or territorial decisions, or the right to a

tion. State v. Butler, 191 Mo. 201, 90 S. W. 378. A judgment for costs in a criminal case is not a criminal appeal, and hence the supreme court has no jurisdiction unless the amount involved is sufficient to give it jurisdiction. Id. The supreme court of appeals has jurisdiction of a writ of error to review a judgment against a stockholder of the corporation to enforce his liability as such where the total liability of such stockholder aggregates $1,000, although the judgment is for only $140. Elliott v. Ashby [Va.] 52 S. E. 383.

41. Where a judgment was reversed in part, the amount disallowed is the "matter in dispute" on further appeal by plaintiff. Territory of New Mexico v. Atchison, etc., R. Co., 201 U. S. 41, 50 Law. Ed. —.

42. The supreme court of Washington has no jurisdiction to review proceedings where the original controversy involved less than $200. This excludes proceedings in appeal, mandamus, certiorari, etc. State v. Cole [Wash.] 82 P. 749. In a suit for $1,349, the defendant admitted a debt for $1,000, and the verdict was for $1,094.60; held the amount in controversy on appeal by defendant was $94.60, of which supreme court had no jurisdiction. Fredonia Gas Co. v. Bailey [Kan.] 83 P. 982. Upon an appeal from an order taxing costs, the amount in controversy under the original complaint is the jurisdictional criterion and not the amount of costs. Gaffey v. Mann [Cal. App.] 84 P. 424. Where a rejected counterclaim was for more than $200, the court of appeals has jurisdiction. Gates v. Davis [Ky.] 89 S. W. 490. Under Ky. St. 1903, § 950, appeal will not lie to the court of appeals from a judgment for $200, the amount claimed, where a part of the claim was admitted. Citizens' Sav. Bank v. Mitchell Tea & Coffee Co. [Ky.] 91 S. W. 261. The amount really in controvesy within Act May 5, 1899 (P. L. 249), where judgment for want of a sufficient defense was refused below, is the amount claimed in the statement as of the time of bringing suit and not as of the time of appeal. Commonwealth v. Magee [Pa.] 62 A. 1106. A decree that the defendant pay the plaintiff a certain sum monthly after a certain date does not necessarily involve $1,000, where the decree does not exclude contingencies upon which such monthly payment might cease. Kouka v. Kouka [Ill.] 77 N. E. 556. In a suit to set aside a conveyance of real estate as fraudulent, and to have such property applied to the payment of a judgment previously recovered in another action, the amount of such judgment is not the amount in controversy. Tyler v. Davis [Ind.] 77 N. E. 400. Under Burns' Ann. St. 1901, § 1339j, subd. 3, the amount in controversy which is determinative of the right of appeal from the appellate court to the supreme court is the amount in controversy as established by the judgment of the trial court; and hence no appeal lies from a judgment of the appellate court reversing an order of the trial court overruling a demurrer to the answer of one of the defendants, although judgment was rendered against the other defendant for an amount in excess of the statutory minimum. The remedy of the defendant in such cases is by petition to transfer. Durbin v. Northwestern Scraper Co. [Ind.] 75 N. E. 1. Where the plaintiff is satisfied with the amount recovered, and there is no set-off or counterclaim, the sum recovered must control on appeal by defendant as to amount in controversy within the meaning of Acts 1903, p. 280, c. 156, amending Acts 1901, § 6, prescribing the minimum amount appealable to the supreme court or the appellate court. Hood v. Baker [Ind. App.] 75 N. E. 608.

43. Muir v. Muir [Ky.] 92 S. W. 314.

44. § 25a of the Bankr. Act, allowing appeals from courts of bankruptcy to circuit courts of appeal from judgments allowing or rejecting a debt or claim of five hundred dollars or over refers not to the amount of the claim but to the amount allowed or rejected; hence the court has no authority to review judgments rejecting or allowing amounts less than $500. Gray v. Grand Forks Mercantile Co. [C. C. A.] 138 F. 344. An appeal from an order of the county court declining to discharge an insolvent debtor lies to the appellate court, section 26 of the insolvent debtors' act, having been repealed by Appellate Court Act, § 8. Groszglass v. Von Bergen, 220 Ill. 340, 77 N. E. 195. Order disallowing dower to the wives of bankrupt trustees, and among other things requiring auditor to restate his account so as to conform to the terms of the order was appealable under Code Pub. Gen. Laws 1904, art. 5, § 27, authorizing appeal from an order determining a question of right and directing an account. Slingluff v. Hubner [Md.] 61 A. 326.

45. Under Burns' Ann. St. 1901, § 4833 et seq., an appeal in condemnation proceedings could not be taken directly to the supreme court. The appeal lay to the circuit court by exceptions to the award. Stoy v. Indiana Hydraulic Power Co [Ind.] 76 N. E. 1057. Under Acts February 27th, 1905, § 5, 4 Burns' Supp. 1905, § 893, an appeal lies from the interlocutory order in condemnation proceedings overruling objections and appointing appraisers. Morrison v. Indianapolis & W. R. Co. [Ind.] 76 N. E. 961. In an action by city to acquire the title of lands, an order of the special term confirming the report of commissions of estimate and assessment in part and sending it back in part, is appealable as to part confirmed to the appellate division, and thence to the court of appeals. See Laws 1901, pp. 416-418, c. 466, §§ 986, 988, 989. It was at one time a disputed question whether an appeal could be taken under § 986 to the appellant division until the special term had so dealt with the report of the commissioners as to be able finally to confirm the same as to all claims in the proceedings, but the statute authorizes partial confirmation, for the pur-

further appeal from the circuit court of appeals to the United States supreme court, or the right of direct appeal to it, depends on the existence of a real, meritorious, Federal question [47] set up [48] and necessarily involved, and finally decided [49] adversely to appellant. If there be both diverse citizenship and another ground of original Federal jurisdiction, as a Federal question, then appeal lies from a circuit court to either the circuit court of appeals or direct to the supreme court [50] and a further appeal to the supreme court may be had if the former course be chosen.[51] Review is direct in the supreme court if there is a question of construction of the Federal constitution or of treaties, or of the jurisdiction of a United States court "as such."[52]

pose of limiting appeals and settling rights pro tanto, and a full confirmation for the purpose of establishing the lien of the assessment when perfected by the entry of record in the offices designated. In re City of New York, 182 N. Y. 281, 74 N. E. 840.

46. The statute gives the right of appeal in contested election cases from any decision of the Board of Commissioners. See Burns' Ann. St. 1891, §§ 6318, 7859. Summe v. Browne [Ind.] 76 N. E. 99. A decision of the board of commissioners in an election case, in order to be appealable under Burns' Ann. St. 1901, §§ 6318, 7859, must be final in its nature, and must put an end to the proceedings before that tribunal. Id. A decision of the board of commissioners in a contested election case, that the contestee was elected, was a mere finding of fact, and hence not such a final order or decision as was appealable. Id.

47. The mere interpretaion of a Spanish land grant as determining title involves no Federal question. O'Conor v. State of Tex., 202 U. S. 501, 50 Law. Ed. —. Judgment against a trusteee in bankruptcy suing for property claimed to be assets under the bankruptcy law is appealable as a denial of a right claimed under the statutes of the United States. Rector v. City Deposit Bank Co., 200 U. S. 405, 50 Law. Ed. —. A judgment holding the Federal statute fixing rates of exchange in Porto Rican money to be inapplicable and requiring payment according to a different rate is reviewable in the Federal supreme court, as denying a right claimd under statutes of the United States. Serralles' Succession v. Esbri, 200 U. S. 103, 50 Law. Ed. —. A holding that a tax title was good against a title claimed under an act of congress involves no Federal question. Corkran Oil & Development Co. v. Arnaudet, 199 U. S. 182, 50 Law. Ed. —. A decision as to the effect of acts of the comptroller of the currency to start the running of limitations against stockholders of a national bank involves a Federal question. Rankin v. Barton, 199 U. S. 228, 50 Law. Ed. —.

48. Federal question first raised on motion for rehearing in state court not timely. Corkran Oil & Development Co. v. Arnaudet, 199 U. S. 182, 50 Law. Ed. —. The petition for writ of error and assignments of error cannot be looked to in determining whether a Federal question was involved. Id. Though no affirmative right is claimed under a statute if it is unsuccessfully urged as a defense, a right claimed under such statute has been denied. Rev. St. § 3477, declaring void assignments of certain claims. Nutt v. Knut, 200 U. S. 12, 50 Law. Ed. —. A right under a Federal statute is timely claimed if the intention to assert it was manifested at every stage of the case, though the precise form in which it was ultimately denied was not at first anticipated. Merchants' Nat. Bank v. Wehrmann, 202 U. S. 295, 50 Law. Ed. —. Claim of right under U. S. Stat. must be clearly brought to attention of state court. Hulbert v. City of Chicago, 202 U. S. 275, 50 Law. Ed. —. Federal questions not so raised in the state court that under its practice such court must consider them will not support a writ of error to the Federal supreme court. Id.

49. A state decision so construing a state statute as to eliminate all question as to repugnancy to the Federal constitution is not reviewable. Exception against impairing obligation of contracts read into statute authorizing rate regulation. Tampa Waterworks Co. v. Tampa, 199 U. S. 241, 50 Law. Ed. —. That a state court decided on grounds involving only construction of state laws that a contract alleged to be impaired by a statute did not exist does not prevent Federal review. Attorney General v. Lowrey, 199 U. S. 233, 50 Law. Ed. —. The interpretation of a state statute by the local courts will be followed in determining whether it infringes the Federal constitution. Mead v. Portland, 200 U. S. 148, 50 Law. Ed. —. Enactment of another statute in lieu of one alleged to infringe the Federal constitution does not make the Federal question a moot one unless it appears that the parties are relieved from all liability under the former act. Campbell v. State of California, 200 U. S. 87, 50 Law. Ed. —. If a Federal right was urged which if recognized would have required a different decision, it is immaterial that the decision was expressly put solely on grounds of local law. Chicago, B. & Q. R. Co. v. People of Illinois, 200 U. S. 561, 50 Law. Ed. —.

50, 51. An appeal will lie to the circuit court of appeals from the circuit court in cases where the parties are citizens of different states and the validity and construction of a Texas statute under the Federal constitution is involved. Love v. Busch [C. C. A.] 142 F. 429.

52. Whether the circuit court had jurisdiction can only be reviewed by the supreme court on a writ of error and the circuit court of appeals has no jurisdiction of such an appeal. Halpin v. Amerman [C. C. A.] 138 F. 548. Where the record proper shows that a bill was dismissed in circuit court on jurisdictional grounds, it is sufficient to sustain a writ of error to the supreme court though the certificate is defective. Petri v. Creelman Lumber Co., 199 U. S. 487, 50 Law. Ed. —.

Appeal grounded on a constitutional question goes from the district to the Federal supreme court even in habeas corpus cases. The provision for direct appeal to the supreme court applies to proceedings to compel the production of papers before the Interstate Commerce Commission. Appeals and writs of error from district courts of Alaska are governed by Alaska Civil Code, and not by the Territorial Courts Appeals Act.

(§ 4) *D. Reviewableness may depend on the parties.*[53]

(§ 4) *E. Certificate or reserved questions and reported cases.*[54]

§ 5. *Courts of review and their jurisdiction*[55] exist by force of statute[56] except as such jurisdiction is prescribed by the constitution in which case it cannot be enlarged or limited by statute.[57] A constitutional general grant of appellate jurisdiction carries with it by necessary intendment all powers reasonably essential to the complete exercise in all cases of the jurisdiction conferred.[58] Consent of the parties cannot confer jurisdiction.[59] Review proper cannot exist between courts of co-ordinate jurisdiction.[60] As between courts of primary and final appeal, the jurisdiction nearly always depends on the existence of one or more of the criteria mentioned in the preceding section.[61] The principle that courts cannot directly adjudicate the rights of a person who is not before it is applicable to courts exercising appellate jurisdiction.[62] Appeal by a nonresident confers on the appellate court jurisdiction of the person to support provisional orders.[63] Appellate jurisdiction must be supported by a sufficient original jurisdiction to pronounce the judgment

53. See 5 C. L. 146.

54. See 5 C. L. 146. A report of a reserved question, even though the reservation is informal, may be made by a justice of the supreme court under Rev. L., c. 156, § 7, providing for reservation for consideration by the full court of questions of law, arising on a trial or other proceeding or motion for a new trial by reason of an opinion, direction, order, or refusal of one justice in a matter of law. Attorney General v. Preferred Mercantile Co. [Mass.] 73 N. E. 669.

55. See, also, Jurisdiction, 6 C. L. 267.

56. The law court is a creature of the statute, and has no powers except such as are conferred upon it by statute. Morin v. Claflin [Me.] 61 A. 782. A constitutional grant of appellate jurisdiction alone is not sufficient to authorize an appeal. There must be a statutory right to appeal in a given case. State v. Chittenden [Wis.] 107 N. W. 500.

57. The legislature cannot enlarge the scope of the original jurisdiction of the supreme court beyond what was intended by the Constitution either directly, or indirectly by including cases within its review power on appeal. In re Burnette [Kan.] 85 P. 575.

58. Kroning v. St. Paul City R. Co. [Minn.] 104 N. W. 888.

59. Anderson v. Halthusen Mercantile Co. [Utah] 83 P. 560. The parties to an appeal cannot grant jurisdiction by waiving objections. Wong Sing v. Independence [Or.] 83 P. 387.

60. One special term cannot review an order of another special term; review can be had only on appeal. In re Cullinan, 109 App. Div. 816, 96 N. Y. S. 751.

61. Const. Art. 6, § 4, gives right of appeal direct to supreme court from superior courts in equity cases. Marston v. Kuhland [Cal. App.] 84 P. 357. In cases for breach of warrant cognizable in the county court, the determination of the court of civil appeals is final, and the supreme court has no jurisdiction. Brown v. Cates [Tex.] 13 Tex. Ct. Rep. 179, 87 S. W. 1149. Appeal from removal from office by mayor lies to the special term, not appellate division under Oswego City Charter, § 63, as amended by Laws 1902, p. 551, c. 207. O'Neil v. Mansfield, 47 Misc. 516, 95 N. Y. S. 1009. Causes appealable to the supreme court under Acts 1901, p. 566, c, 247, § 8, regardless of the amount in controversy, are not appealable to the appellate court. Hood v. Baker [Ind. App.] 75 N. E. 608. Since Hurd's Rev. St. 1903, pp. 776-777, c. 42, §§ 204-209, relating to the assessment of the expenses of enlarging ditches and drains upon the districts benefited thereby, does not provide for an appeal, an appeal in such case lies to the appellate court and not to the supreme court, unless the construction of the Constitution, a franchise, a freehold, or the revenue is involved. Union Drainage Dist. No. 1 of Towns of South Homer & Sidell v. Drainage Dist. No. 1 of Towns of Vance & Sidell, 220 Ill. 104, 77 N. E. 98.

62. Gray v. Grand Forks Mercantile Co. [C. C. A.] 138 F. 344.

63. A **nonresident defendant in a divorce suit** who appeals to supreme court gives the latter jurisdiction over him to determine all matters determinable on appeal and a motion served upon his attorney that he be required to pay the appellee alimony pendente lite and attorney's fees is sufficient to invest the court with authority to consider such motion. Gardiner v. Gardiner [Colo.] 83 P. 646.

being reviewed [64] and by orderly procedure efficient to bring up the case [65] else it can do nothing but dismiss.[66]

§ 6. *Bringing up the cause. A. General nature and mode of practice.*[67]—The appropriate remedy for review [68] and matters relating to the transmission and filing of the record on appeal [69] are discussed in other sections. Appeals must be single.[70] The right of review being purely statutory,[71] the statutes granting it must be strictly complied with.[72] In case a statute giving the right of appeal fails to prescribe a method of procedure, the method prescribed in other like cases will be adopted.[73] One cannot sustain an appeal from a named decree by showing that a decree not named was erroneous.[74]

(§ 6) *B. Time for instituting and perfecting.*[75]—Proceedings for review must be taken as to all necessary parties [76] within the time prescribed by statute,[77]

64. Circuit court acquired no jurisdiction of an appeal from an order of the probate court made on petition to reverse an order appointing a guardian when the only method for reviewing the order first made was by appeal. Jacqueth v. Benzie Circuit Judge [Mich.] 12 Det. Leg. N. 664, 105 N. W. 148. Where the circuit court had no jurisdiction of an appeal, the supreme court, on a further appeal, had no jurisdiction except to pass upon the jurisdiction of the circuit court. Ex parte Evans [S. C.] 52 S. E. 419. County Court can acquire no jurisdiction on appeal where justice had none. Patrick v. Brown [Colo.] 85 P. 325. Where the original tribunal has no jurisdiction over the subject-matter, its judgment is void and the appellate court acquires no jurisdiction of the merits on appeal. Bickford v. Franconia [N. H.] 60 A. 98. Appeal from superior court in an action against the railroad commission which was not brought in a county where one or more of the members of such commission resided. Railroad Commission of Georgia v. Palmer Hardware Co. [Ga.] 53 S. E. 193. Where a case is removed by writ of error from a court having no jurisdiction, the appellate court has no jurisdiction. El Paso & N. E. R. Co. v. Whatley [Tex.] 13 Tex. Ct. Rep. 186, 87 S. W. 819.

65. The supreme court has no jurisdiction to hear a petition for a new trial unless presented as provided by law. Haggelund v. Oakdale Mfg. Co., 26 R. I. 520, 60 A. 106. Jurisdiction is not transferred unless appeal bond is filed within time prescribed by statute. El Paso & N. E. R. Co. v. Whatley [Tex.] 13 Tex. Ct. Rep. 186, 87 S. W. 819.

66. The statutory right of a hearing is conditioned upon furnishing the court with a report of the evidence. This condition cannot be waived or dispensed with by the law court. Report of evidence impossible to obtain because of death of stenographer. Morin v. Claflin [Me.] 61 A. 782.

67. See 5 C. L. 148.

68. See ante, § 2.

69. See post, § 10.

70. A single appeal from a judgment and from an appealable order is not permissible in South Dakota except an appeal from a judgment and from an order granting or denying a new trial made after judgment. Appeal from default and from order overruling motion to vacate and allow answer, dismissed. Gordon v. Kelley [S. D.] 104 N. W. 605.

71. See ante, § 1.

72. Hill v. Chicago, 218 Ill. 178, 75 N. E. 766; Cain v. State [Ind. App.] 74 N. E. 1102. As a general rule acts required by statute to perfect an appeal are jurisdictional and must be strictly complied with. Cain v. State [Ind. App.] 74 N. E. 1102. A judgment is not subject to direct attack by appeal, motion, or bill of review, except in the manner and within the time prescribed and allowed by law. Philbrook v. Newman [Cal.] 82 P. 772. Appellate procedure regulated by statute in Wyoming. Mau v. Stoner [Wyo.] 83 P. 218.

73. Appeals in proceedings to alter public roads under Code § 2039, will be regulated according to the practice in taking the appeals from justices of the peace under Code §§ 875, 873, 565. Blair v. Coakley, 136 N. C. 405, 48 S. E. 804.

74. In re Gurdy [Me.] 63 A. 322.

75. See 5 C. L. 148.

76. An appeal must be taken as to all necessary parties within the prescribed time. Wedd v. Gates [Okl.] 82 P. 808.

77. Under Code 1896, § 427, appeal must be taken within 30 days. Dennis v. Currie [Ala.] 38 So. 802. Under Code Civ. Proc., § 939, subd. 1, an appeal taken more than 6 months after entry of judgment will be dismissed. Robinson v. Eberhart [Cal.] 83 P. 452; Calkins v. Howard [Cal. App.] 83 P. 280; Brownlee v. Reiner, 147 Cal. 641, 82 P. 324. Court is without jurisdiction if not taken within that time. County Bank of San Luis Obispo v. Jack [Cal.] 83 P. 705. Under Civ. Code, § 131, an appeal from an interlocutory decree for divorce may be taken any time within six months after entry. Smith v. Superior Court, 147 Cal. 336, 82 P. 79. Appeal from order granting or refusing new trial must be taken within 60 days after order is made and entered. Walbridge v. Cousins [Cal. App.] 83 P. 462. Appeal from a judgment more than 60 days after the rendition thereof cannot bring up the insufficiency of the evidence to sustain it. In re Dellow's Estate [Cal. App.] 82 P. 558. Under Code Civ. Proc. § 1127, failure to appeal within ten days from a judgment annulling a certificate of election renders the office vacant and a bill of exceptions served, signed, and filed thereafter, would be ineffectual, for any purpose. Wilson v. Arnot [Cal. App.] 84 P. 293. Appeal not perfected within one year from entry of judgment is ineffectual for any purpose.

which ordinarily runs from the date when an appealable order or judgment,[78] legally sufficient,[79] becomes a finality on the record,[80] or from the time when notice of entry of judgment is served,[81] and is computed according to the rules applicable to other procedure. Death of the judgment creditor and pendency of proceedings

Cox v. Odell [Cal. App.] 82 P. 1086. A prayer for appeal under Civ. Code, § 388, must be made within five days after judgment and decree is rendered, otherwise appeal is dismissed. Roseberry v. Valley Bldg. & Loan Ass'n [Colo.] 83 P. 637. Where an appeal is dismissed for delay in perfecting, but the appellate court would have jurisdiction on error, the cause will be entered as pending on a writ of error, under Mills' Ann. Code, § 388a. Id. Appeal from a judgment vacating a town plat in proceedings under § 2315 et seq., Gen. St. 1894, must be taken within 30 days from notice. Koochiching v. Franson, 91 Minn. 404, 98 N. W. 98. Appeal from judgment will be dismissed if not taken within a year. Twaddle v. Winters [Nev.] 85 P. 280. When some of the plaintiffs in a joint judgment are made parties defendant to a petition in error to reverse the judgment, and their appearance in the proceeding has been effected by service of process or otherwise within the statutory limit for commencing proceedings in error, the proceedings must be deemed commenced not only as to such defendants, but also as to all other persons united in the interest with them, so as to stop the running of the statute of limitations in favor of such other persons who are not made defendants. Snider's Ex'rs v. Young, 72 Ohio St. 494, 74 N. E. 822. An appeal from an order granting a new trial may be taken at any time within one year and even though appellant participated in the new trial when heard. Linderman v. Nolan [Okl.] 83 P. 796. Under act of May 19, 1897, P. L. 67, appeals from a judgment of nonsuit must be taken within six months from entry. Farrel v. Scranton R. Co., 27 Pa. Super. Ct. 127. Under Gen. Laws 1896, c. 248, § 1, an appeal to the supreme court from probate orders must be taken within 40 days next after the making of the order or decree. Smith v. Whaley [R. I.] 61 A. 173. Appeal not taken within six months after entry of order or judgment will be dismissed. Anderson v. H. Halthusen Mercantile Co. [Utah] 83 P. 560. Judgment of dismissal is final within Laws 1903, p. 74, c. 59, § 4, requiring appeal in tax foreclosure proceedings to be taken within 30 days after rendition of judgment. Harris v. Levy, 39 Wash. 158, 81 P. 550. Writ of error must be sued out within 6 months after entry of judgment and the time cannot be extended by consent of the parties. Clark v. Doerr [C. C. A.] 143 F. 960. Where the time for appealing from a decree has expired it will not be reviewed on appeal from a decree modifying it. Smith v. Smith [Mich.] 102 N. W. 631. Petition for **transfer of cause** from court of appeals to supreme court filed more than ten days after judgment in former court becomes final will be stricken from the files. Hewlett v. Beede [Cal.] 83 P. 1089.

Extension of time: Where the time in which to appeal from a judgment has expired, a correction of a clerical error therein does not enable the party to appeal therefrom. Commonwealth v. Caudill [Ky.] 89 S. W. 535.

78. Where an order of dismissal is entered on the minutes of the court and subsequently a judgment of dismissal, an appeal must be taken within six months of the former, as it is considered a final judgment. Matthai v. Kennedy [Cal.] 84 P. 37. The order recognizing the necessity of a receiver and the order making the appointment constitute together a single judgment and time to appeal runs from the making of the latter order. Oil City Iron Works v. Pelican Oil & Pipe Line Co. [La.] 38 So. 987.

79. Where appellant's right to appeal is dependent upon the sufficiency of an entered judgment to start the running of the period for appeal, appellant is entitled to benefit of technicalities as to acts of appellee. Dobyns v. Commercial Trust Co., 98 N. Y. S. 748.

80. Time within which appeal from order of dismissal may be taken begins to run from date of entry of such order in the minute book of the court, such entry being declared by statute to be effective for all purposes, and being in the nature of a final judgment. Matthai v. Kennedy [Cal.] 84 P. 37. An appeal will not lie from a judgment until it has been entered. Code Civ. Proc. § 1722. State v. Taylor [Mont.] 83 P. 597. The time within which an appeal may be taken from a decree or judgment of the district court begins to run at the time the judgment or decree is entered of record in that court. Morrison v. Gosnell [Neb.] 107 N. W. 753. The time within which an appeal may be taken from an order does not commence to run until entry of order. Howe v. Noyes, 48 Misc. 356, 95 N. Y. S. 542. Time within which to appeal from a **nunc pro tunc order** denying a new trial does not commence to run until the order is actually entered of record. In re Bishop's Estate [Iowa] 106 N. W. 637. Appellant may prosecute an appeal from the original case within the statutory period after the entry of the nunc pro tunc judgment. Slayden & Co. v. Palmo [Tex. Civ. App.] 90 S. W. 908. The time to bring error runs from the **filing** by the judge of a formal judgment, not from its subsequent entry by the clerk. Simmons v. Hanne [Fla.] 39 So. 77. Where judgment was rendered against all defendants inadvertently and later it was modified so as to read against the proper defendants, for the purposes of an appeal the period of appeal ran from the entry of the original judgment, not its **modification.** Schulze v. Oregon R. & Nav. Co. [Wash.] 84 P. 587.

81. The abbreviation of the word "Thomas" to "Thos." in the clerk's signature upon the copy of the notice of entry of judgment is insufficient to invalidate the notice so as to prevent the running of the time within which to appeal. Salzman v. Mandel, 97 N. Y. S. 298. Entry of judgment leaving the question of costs open will not support a notice of entry which will operate to limit the time of appeal. Dobyns v. Commercial Trust Co., 98 N. Y. S. 748.

to appoint an administrator do not suspend the running of the time.[82] In some states if the appeal be taken and bond given within the time allowed for appealing, it is sufficient though the citation was not served within such time.[83] The court has no authority to extend the time, in the absence of a statute to the contrary,[84] nor can it be extended by stipulation.[85]

(§ 6) *C. Affidavits and oaths* [86] either of good faith [87] or to verify the grounds of appeal are required in some states, and when required must conform to the statutory provisions.[88] A recital in the record as to the date of filing the affidavit is controlled by the affidavit itself where it shows that it was filed subsequently.[89]

(§ 6) *D. Notice, citation, or summons.*[90]—The sections dealing with the sufficiency and timeliness of those acts whose omission is generally deemed ground for dismissal should be also consulted. Timely [91] and regular service by the appellant on the opposing parties,[92] or those of them whose rights will be affected by a re-

82. Ropes v. Golman [Fla.] 39 So. 16. Under a statute providing that an appeal or writ of error shall not be granted unless taken within one year from the rendition of judgment, unless at the time of such rendition the party applying therefor was a minor or insane, the fact that one dies during the year does not extend time. Evans v. St. Louis, etc., R. Co. [Ark.] 88 S. W. 994.

83. Dewez v. Orleans R. Co. [La.] 39 So. 433.

84. Appellant from a judgment of the city court who has not filed and served the return within time allowed must apply to the appellate court, not to the city court, for extension of time. Rule 3 for the Hearing of Appeals from the City and Municipal Courts. McCarthy v. Metropolitan St. R. Co., 48 Misc. 633, 96 N. Y. S. 139.

85. Anderson v. Halthusen Mercantile Co. [Utah] 83 P. 560. Where the statute fixes the time, an appeal perfected thereafter though by stipulation of the parties is beyond the jurisdiction of the appellate court. Wedd v. Gates [Okl.] 82 P. 808.

86. See 5 C. L. 151.

87. Before an appeal can be perfected in the Indian Territory an affidavit must be filed in the court of first instance that said appeal was not taken for purposes of delay, and failure to file such affidavit is fatal. Fortune v. Incorporated Town of Wilburton [C. C. A.] 142 F. 114. Under Mansfield's Dig. § 797, an appeal from a decision of the mayor of a town, acting in his capacity as conservator of the peace may be perfected the same as an appeal from a justice of the peace. Id.

88. An affidavit of appeal from street-opening proceeding which merely states that appellant was the owner of property affected by the judgment does not allege appellant's interest as required by Kansas City Charter, art. 7, § 5. In re Seventeenth St., 189 Mo. 245, 88 S. W. 45.

89. State v. Gates, 113 Mo. App. 649, 88 S. W. 640.

90. See 5 C. L. 151.

91. Under Civ. Code 1902, § 2005, notice of appeal from a city court in a city of less than 5,000 inhabitants, must be given within twenty-four hours after the rendition of the judgment. This provision is constitutional. Town Council of Due West v. Fuller [S. C.] 51 S. E. 546. Notice of appeal given in open court at the time of an order denying a motion for a new trial is made is a timely notice of appeal from a judgment under Ballinger's Ann. Codes & St. § 6503. Creech v. Aberdeen [Wash.] 84 P. 623. Where two full terms were allowed to elapse without issue of citation to omitted parties, the appeal became inoperative as to them. Gray v. Grand Forks Mercantile Co. [C. C. A.] 138 F. 344.

Extension of time: Where the notice of appeal is wholly ineffectual because not signed, the appellate court cannot extend the time for service under § 313, Mun. Ct. Act, Laws 1902, p. 1579. Necker v. Nardi, 99 N. Y. S. 381.

92. Service of notice of appeal on every **adverse party** to be affected by the appeal is essential to give appellate court jurisdiction. In re Young's Estate [Cal.] 85 P. 145. An adverse party is not merely one who may be affected by a reversal or modification on appeal, but he must appear adverse of record. Id. Where judgment was rendered against several defendants, notice of appeal need not be served on nonappealing defendants, they not being adverse parties. Worth v. Emerson [Cal. App.] 85 P. 664. Under the statute requiring notice of appeal to be served upon the person filing the petition of general consent to sell intoxicating liquors, a service on the one who filed the petition is proper though he acted as agent for others. In re Intoxicating Liquors [Iowa] 105 N. W. 702. Failure to serve all defendants is available only to those not served. Frost v. Alturas Water Co. [Idaho] 81 P. 996. Notice need not be served on defendant as to whom plaintiff dismisses action prior to or during trial. Sheehan v. Bailey Bldg. Co. [Wash.] 85 P. 44. Motion to dismiss for failure to serve citation on parties not shown by the record to have any interest in the decree appealed from will be denied. Tull v. Nash [C. C. A.] 141 F. 557.

Service upon attorney for county is sufficient service of notice of appeal. Corker v. Elmore County [Idaho] 84 P. 509. Notice may be served on counsel. Burns' Ann. St. 1901, § 652. Although such counsel has, since the judgment, severed his connection with the case, no notice of such fact however, being given to the appellant. Rose v. Owen [Ind. App.] 76 N. E. 412. Where notice has been served on the appellant's attorney pursuant to Burns' Ann. St. 1901, § 652, there is no necessity for an order of publication as provided by § 663, although

versal,[93] of such notice of appeal, citation, or summons as the practice requires, in due form,[94] distinctly specifying the order or judgment appealed from,[95] properly

the appellee has removed to another state and his address is unknown. Id. An accepted service of citation by an attorney dispenses with service upon the client, specially as against objections of the other appellees. Conery v. His Creditors [La.] 39 So. 792. Service of notice of appeal in suits against a minor or an insane person may be made upon such minor or insane person; but where a petitioner for the probate of a will employed an attorney and after the return date and the entry of appearances but prior to the hearing and decree, the petitioner became insane and was committed to an insane asylum and no guardian was appointed nor any adjudication of insanity had other than that made by the committing magistrate, and no suggestion was made to the probate court or the supreme judicial court for a stay of proceedings or for the appointment of any person to prosecute the petition, it was held that a notice of appeal from the decree allowing the will might be served upon the attorney. See Rev. Laws c. 162, §§ 11, 40, and chancery rule No. 22, providing for service of notices upon attorneys. McKenna v. Garvey [Mass.] 77 N. E. 782. Service of citation on attorney of appellee is insufficient when appellee was at the time a resident of the county and no search was made. Rev. St. 1895, art. 1395. Aspley v. Alcott [Tex. Civ. App.] 90 S. W. 885. A service on attorney without an attempt to serve on defendant does not give jurisdiction. Louisville & N. R. Co. v. Missouri, etc., R. Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 1016, 89 S. W. 276. A service of citation on the attorney of record is insufficient where it does not appear but that the appellee resided within the county. Sayles' Rev. Civ. St., art. 1398. Vineyard v. McCombs [Tex. Civ. App.] 93 S. W. 482. Where the citation directs the officer to serve on the party, a service on his attorney is insufficient. M. & M. Printing Co. v. Robertson [Tex. Civ. App.] 91 S. W. 1110.

Acceptance of service signed "C., Deputy Clerk" does not show service of notice of appeal on the clerk of the court. In re Lund's Estate [Iowa] 104 N. W. 1139. That the superintendent of an insane hospital accepted service of notice of appeal for an inmate by a name different from that by which he was sued did not vitiate the service there being no question as to identity. In re Strang's Estate [Iowa] 106 N. W. 631.

93. Where modification of decree will not injuriously affect defendant not served, motion to dismiss will be denied. Southside Imp. Co. v. Burson, 147 Cal. 401, 81 P. 1107. On appeal by one or more defendants, a codefendant must be served with notice where he might be subjected to a more unfavorable judgment than that entered in the trial court. Failure to serve a devisee whose interest was adverse to appellants but whom plaintiffs had made defendant deprived the appellate court of jurisdiction. Dillavou v. Dillavou [Iowa] 106 N. W. 949. Notice to the petitioners for a highway need not be given by a person appealing from an award of damages unless the road has been established on condition that they pay the damages arising therefrom. In re Dugan [Iowa] 105 N. W. 514.

94. A notice of appeal from a judgment dismissing the complaint is not impaired by including therein appeals from orders not affecting the final judgment and which are no longer appealable because of lapse of time. Armstrong v. Heide, 99 N. Y. S. 818, overruling 49 Misc. 430, 99 N. Y. S. 817. Failure to state that the George Summers mentioned in the notice is the plaintiff in the action appealed is not fatal for uncertainty. Summers v. Geer [Or.] 85 P. 513. In an appeal from the county to the circuit court by the authorized representative of the parties in interest, the fact that the notice of appeal stated that such representative "being aggrieved hereby appeals" did not vitiate the appeal under Rev. St. 1898, § 4031, confining the right of appeal to parties aggrieved and the manner of asserting it to the filing of notice, etc., within a specified time no form of notice being prescribed by statutes. In re Sander's Estate [Wis.] 105 N. W. 1064. Rule requiring writs of error and citations to be made returnable within 30 days from signing of citation is directory only, and its violation will rarely result in dismissal where appellee has appeared and no injury has resulted. Love v. Busch [C. C. A.] 142 F. 429.

95. A notice sufficiently definite for a reasonably certain identification of the judgment order or decision appealed from is good. In re Dugan [Iowa] 105 N. W. 514. Notice held sufficient to show that the appeal was from the award of damages, and not from the order establishing the highway. Id. There wwas no appeal from a judgment for costs where it was not mentioned in a notice of appeal from another judgment not necessarily involving the judgment for costs. Yockey v. Woodbury County [Iowa] 106 N. W. 950. Where defendant appealed "from the judgment * * * and take further notice that the defendant intends to bring up for review upon such appeal * * * the order * * * denying the defendant's motion for leave to serve a supplemental answer herein," held to be an appeal direct from the order as well as the judgment. Gleason v. Northwestern Mut. Life Ins. Co., 98 N. Y. S. 991. A notice of appeal from a "decision" will not sustain an appeal from a judgment on the decision. Gansevoort Bank v. Empire State Surety Co., 98 N. Y. S. 382. A notice dated and served after the perfection of a probate decree and clearly showing an appeal from the whole final decree but describing the decree as one dated on the day of filing the findings and conclusions should be construed as a notice of an appeal from the final decree and not from the findings and conclusions alone. In re Lemery's Estate [N. D.] 107 N. W. 365. Single notice combining an appeal from a judgment and from an order made after judgment denying a motion for a new trial held commendable. Kinney v. Brotherhood of American Yeomen [N. D.] 106 N. W. 44. A notice, not given in open court, must contain the title of the cause, the names of the parties, and notify the adverse party that an appeal is taken to the supreme or cir-

signed,[96] and addressed to the party to be notified, is usually requisite,[97] and the notice with return of service is usually required to be filed.[98] Notice given in open court is generally sufficient.[99] Where a second order of appeal is obtained on abandonment of the first, a new citation must be issued.[1] The notice must be liberally construed,[2] and the service of an amended notice may ordinarily be allowed even after the expiration of the time for appeal.[3] The notice is not conclusive as to the nature or character of the appeal.[4] Notice by one appellant may inure to the benefit of the others.[5] Appearance cures failure to serve notice.[6]

(§ 6) *E. Application for leave to appeal*[7] or for a writ of error, made within the time[8] and in the manner required by law, is necessary in some jurisdictions.

cuit court, from the judgment, order, or decree, or some specified part thereof. B. & C. Comp., § 549. Summers v. Geer [Or.] 85 P. 513. A misdescription of the book in which a judgment is entered is not a fatal error and may be disregarded as mere surplusage. Id. A notice is not insufficient for irregularity in describing judgment appealed from which does not cause any doubt or confusion as to what judgment is appealed. Horrell v. California, Or. & Wasb. Homebuilders' Ass'n [Wash.] 82 P. 889.

96. Under Municipal Court Act, Laws 1902, p. 1578, c. 580, § 311, a notice of appeal not signed by either appellant or his attorney is ineffectual. Necker v. Nardi, 99 N. Y. S. 381.

97. Where the appellant served exceptions, but failed to serve notice of intention to appeal, the exceptions were not properly before the appellate court for consideration. Brantley v. Bittle [S. C.] 51 S. E. 561.

98. A clerical error in the jurat of service of notice of appeal may be corrected by an explanatory affidavit. Corker v. Elmore County [Idaho] 84 P. 509. Under statute providing that no appeal shall be dismissed for any defect in notice or service thereof provided appellant shall perfect it forthwith, failure to file proof of service in time is not ground for dismissal where service is in time. Reynolds v. Reynolds [Wash.] 84 P. 579. Though Bal. Ann. Codes & St., § 6503, provides that notice must first be served and then filed with proof of service, supreme court has jurisdiction if notice is filed first, served same day, and proof of service acknowledged, especially under Sess. Laws 1899, p. 79, c, 49, providing that appeals shall not be dismissed for technical irregularities. Lawler Land Co. v. Steel [Wash.] 83 P. 896.

99. Sufficient under Bal. Ann. Codes & St. § 6503. Creech v. Aberdeen [Wash.] 84 P. 623.

1. Hymel v. Illinois Cent. R. Co. [La.] 40 So. 525.

2. Notice of appeal from order of probate court held to show appeal from the entire order where it gave its date and referred to it as allowing a claim in a certain sum though it did not say that part of the claim was disallowed, and that it was error for the district court to dismiss the appeal. In re Andrus' Estate [Minn.] 105 N. W. 66; Dist'g Capehart v. Logan, 20 Minn. 442, and Stellmacher v. Bouder, 93 Minn. 98, 100 N. W. 473. Is to be construed liberally and held sufficient when its meaning is obvious. Sustained though word "applies" was used for "appeals." Minnesota Debenture Co. v. Johnson [Minn.] 104 N. W. 1149. Will be very liberally construed, inconsistencies and uncertainties being eliminated by the court if at all possible. Summers v. Geer [Or.] 85 P. 513.

3. The county court has power to allow service of an amended notice of appeal to the district court after the statutory time for appeal has expired where the original notice was defective because of a mistake in omitting necessary parties. Section 6259, Rev. Codes 1899. In re Lemery's Estate [N. D.] 107 N. W. 365.

4. A mere recital in a notice of appeal that the appeal was both as to law and fact could not change the appeal from one of law alone. Smith v. Superior Ct. of Napa County [Cal. App.] 84 P. 54.

5. In a suit by a married woman and her husband, a notice of appeal from a judgment given by the woman inures to the benefit of the husband and the sureties on the replevin bond. Wandelohr v. Grayson County Nat. Bank [Tex. Civ. App.] 90 S. W. 180.

6. Where a party embraces his suggestion for dismissal of an appeal in his brief upon the merits, he must be treated as having made full appearance and therefore as having waived notice on appeal. Pittsburgh, etc., R. Co. v. Reed [Ind. App.] 75 N. E. 50.

7. See 5 C. L. 153. In New York an application for leave to appeal from the appellate division to the court of appeals is necessary under Civ. Code Proc. § 191. Carlisle v. Barnes [N. Y.] 76 N. E. 27. Such an application cannot be repeated after its denial by one judge of the court to other judges of the court in succession. An appellant may in the first instance select any judge to whom to make application; but having made his election he is concluded by the decision of such judge. Id.

8. A prayer for appeal under Civ. Code, § 388, must be made within 5 days after judgment or decree is rendered or appeal will be dismissed. Roseberry v. Valley Bldg. & Loan Ass'n [Colo.] 83 P. 637. A petition for review of an order appointing a guardian, which, on analogy with the time for appeal, would not be allowed as being too late, will be allowed where it appears that by order complained of, appellant was deprived of her property and is without means to employ counsel or furnish bond, and where appellant was charged and found by trial court to be mentally incompetent. State v. Superior Ct. of Lincoln County [Wash.] 83 P. 726. Rule 11 of the circuit court of appeals requiring an appellant to file his petition and assignments of error before his appeal will be allowed by the ap-

A petition for a writ of error must ordinarily describe the judgment with sufficient certainty to identify it.[9] If radically defective, it cannot be aided by what is subsequently done by the plaintiff in error or the clerk after the expiration of the time for suing out the writ,[10] nor are such defects cured by an acceptance of service.[11] As a general rule an application cannot be amended after it has been dismissed or refused.[12] Practice varies as to the necessity of an accompanying assignment of errors.[13] New assignments of error cannot be set up by amendment of the petition after the expiration of the time within which they might have been presented.[14]

(§ 6) *F. Allocatur, order for or allowance of appeal; certificate.*[15]—An allowance of the appeal is necessary in all practices where an appeal does not go as of right.[16] Only the court to which the appeal is directed can compel its allowance.[17] A member of the circuit court of appeals, ninth circuit, may allow an appeal from the district court of Alaska, there being nothing inconsistent with this right in the Alaskan Code.[18] Want of signature to the order of appeal is absolutely fatal and cannot be cured by signing after motion to dismiss.[19] An order signed only with the initials of the trial judge is insufficient.[20] Clerical errors in the order will be disregarded.[21] Where the order is in the alternative, an attempted suspensive appeal will be sustained as a devolutive appeal where the bond is sufficient for the latter though not for the former.[22]

(§ 6) *G. Bonds, security, payment of costs.*[23]—Supersedeas bonds[24] and liability on appeal bonds are treated in other sections.[25] A bond or security for the

pellate court is sufficiently complied with if the petition and assignments of error are filed on the same day that the appeal is allowed. Copper River Min. Co. v. McClellan [C. C. A.] 138 F. 333.

9. A petition describing the judgment as being rendered by a court of one county when it was rendered by a court of a different county, is fatally defective. Dixon v. Watson [Tex. Civ. App.] 91 S. W. 618.

10. Cannot be cured by filing an amended petition after expiration of period for filing. Dixon v. Watson [Tex. Civ. App.] 91 S. W. 618.

11. Acceptance of service of petition improperly describing the judgment does not waive the defect. Dixon v. Watson [Tex. Civ. App.] 91 S. W. 618.

12. Where an application for a writ of error is dismissed for want of merit, an amended application based on another ground will not be entertained. Hord v. Gulf, etc., R. Co. [Tex.] 89 S. W. 404.

13. The validity of the selection of the judge presiding at the trial cannot be raised for the first time in a supplemental brief on appeal, where the statute (Civ. Code, § 544) provides no error shall be considered unless set forth in the petition of errors, which fails to make reference to the matter complained of. Missouri, etc., R. Co. v. Murphy [Kan.] 84 P. 478. Failure to assign as error in the petition in error, the overruling of a motion for a new trial, precludes consideration of all questions arising upon the trial of the cause. Coffeyville Gas Co. v. Dooley [Kan.] 84 P. 719. Petition on appeal held to sufficiently assign error in refusing to allow amended pleading to be filed. Laskey v. Burrill [Va.] 54 S. E. 23. See, also, Aspley v. Hawkins [Tex.] 14 Tex. Ct. Rep. 213, 89 S. W. 972.

14. Brewer v. Moyer [Kan.] 84 P. 719.

15. See 5 C. L. 153.

16. Upon a petition for a writ of error or appeal the court of appeals is required to grant the right prayed for unless the decision is called in question be plainly right. Townsend v. Norfolk R. & Light Co. [Va.] 52 S. E. 970. The supreme court of West Virginia exercises its appellate jurisdiction by appellate process only, and where no such process has been allowed the court is without jurisdiction to review. Robinson v. Goldman's Adm'r [W. Va.] 53 S. E. 12. Appeal on habeas corpus proceedings from the inferior Federal courts is a matter of right and probably a district judge must allow such appeal even though he deem the case quite destitute of meritorious grounds and operating only to delay the administration of justice. In re Marmo, 138 F. 201.

17. The supreme court has no jurisdiction to issue a writ of mandamus directing the probate court to enter a nunc pro tunc order granting an appeal to the circuit court. Featherstone v. Folbre [Ark.] 88 S. W. 554.

18. Copper River Min. Co. v. McClellan [C. C. A.] 138 F. 333.

19, 20. Conery v. His Creditors [La.] 40 So. 173.

21. Where a motion to set aside a judgment was made by both defendants and the affidavit for appeal was executed by both, held that appeal was allowed to both though the clerk, in entering the judgment, used the singular number in the body of the order allowing the appeal in referring to the application and affidavit. Little Rock Trust Co. v. Southern Missouri & A. R. Co. [Mo.] 93 S. W. 944.

22. Gilmore & Maginnes v. Meeker [La.] 40 So. 244.

23. See 5 C. L. 154.

24. See post, § 7.

25. See post, § 17.

payment of costs is ordinarily required [26] except as dispensed with by statute [27] as in the case of poor litigants.[28] It need run only to such parties as may be affected by the appeal.[29] The amount,[30] sureties,[31] and the terms and conditions of the bond,[32] are largely regulated by statute. Approval by the court is generally re-

26. Filing of an appeal bond is preliminary step to perfection of an appeal. Morgan v. Morgan, 25 App. D. C. 389. Failure to file undertaking on appeal is ground for dismissal. In re Wells' Estate [Cal.] 84 P. 37. Failure to give appeal bond as required by Rev. St. 1895. arts. 1400-1402, 1408 ground for dismissal even after decision has been rendered in both court of appeals and supreme court. Logan v. Gay [Tex.] 92 S. W. 255.

27. Under § 4241, Ky. St. 1903, an appeal bond is not necessary in an appeal from a judgment of the county court holding that appellee had no personal property not assessed for taxes. Commonwealth v. Reed [Ky.] 89 S. W. 294. Appeal from an order denying a motion to vacate an order dismissing a petition to set aside a tax sale held a general chancery appeal requiring no bond except to stay proceedings. Comp. L. § 550, as amended by Act No. 243, p. 380, Laws 1899. Hayward v. O'Connor [Mich.] 12 Det. Leg. N. 667, 105 N. W. 596. Where the only judgment against plaintiff in justice court is for costs, an appeal bond is unnecessary on appeal to the county court. Feagan v. Barton-Parker Mfg. Co. [Tex. Civ. App.] 93 S. W. 1076.

28. A trustee in bankruptcy may take a case to the supreme court of Georgia in forma pauperis by filing an affidavit which discloses his inability, as the representative of the bankrupt estate, to pay the costs. Hawes v. Bank of Elberton [Ga.] 52 S. E. 922. The question whether appellant, attempting to appeal under Rev. St. 1895, art. 1401, furnished proof of his inability, may be raised in the appellate court by affidavits. Kalklosh v. Bunting [Tex. Civ. App.] 13 Tex. Ct. Rep. 676, 88 S. W. 389. A judge who was formerly attorney for appellant in the case cannot sit upon a determination of appellant's affidavit. Kalklosh v. Bunting [Tex. Civ. App.] 13 Tex. Ct. Rep. 676, 88 S. W. 389. One attempting to appeal under this section is not required to prove on the contest of his affidavit that he was unable to get sureties on his bond. Murray v. Robuck [Tex. Civ. App.] 13 Tex. Ct. Rep. 915, 89 S. W. 781. Proof that appellant's entire property consists of a cow, worth $10, and a calf, a small hog and three pigs, and a growing crop on 15 acres of land covered by a landlord's lien, all of which is exempt, is sufficient showing to bring appellant within the statute. Murray v. Robuck [Tex. Civ. App.] 13 Tex. Ct. Rep. 915, 89 S. W. 781. The act of July 20, 1892, c. 209, permitting poor persons to prosecute a writ of error in forma pauperis without a deposit, does not apply to appellate proceedings (In re Bradford's Petition [C. C. A.] 139 F. 518), and independent of statute the court of appeals cannot allow an appeal in forma pauperis (Id.).

29. Where some of the defendants are dismissed from the action, it is not necessary for plaintiff's appeal bond to run to such defendants, the appeal being on the merits. Atascosa County v. Alderman [Tex. Civ. App.] 91 S. W. 846.

30. The appellee cannot complain that the bond is in an amount greater than that fixed by the court. Price v. Huddleston [Ind. App. 75 N. E. 972. A bond is sufficient although greater than required by law. Horrell v. California, Or. & Wash. Homebuilders' Ass'n [Wash.] 82 P. 889. Where the law fixes the amount of a bond in a personal judgment, an order of the court fixing a different amount is nugatory. Id.

31. A United States Commissioner is not qualified to act as surety under B. & C. Comp. § 549, subd. 3. Paxton v. Lively [Or.] 85 P. 501. Under Rev. St. 1898, 3065, declaring the appeal bond shall be of no effect unless the sureties' affidavit states that each is worth a certain sum, and the aggregate of the sums shown is double the amount specified in the undertaking, the appeal was dismissed where the affidavit stated that each of two sureties was worth $394 and the bond was for not exceeding $250 costs and damages, and a judgment for $394. Bliss v. Rosenkranz, 125 Wis. 532, 104 N. W. 746. The failure of the court to approve the sureties as provided by statute may be waived by the appellee. Price v. Huddleston [Ind App.] 75 N. E. 972. An appeal bond reading "We, A. as principal, B. and . . . as surety, are held," etc., sufficiently designates B. as surety. Conery v. His Creditors [La.] 39 So. 792. Fact that names of two sureties were erased held not ground for dismissal where it appeared that it was done with consent of third who was still liable. First Nat. Bank v. Coles [Wash.] 82 P. 892. An appelle must watch the clerk's office during the five days after service of notice of appeal granted for filing an appeal bond if he wishes to **object to the sureties.** Rauer's Law & Collection Co. v. Standley [Cal. App.] 84 P. 214.

32. Bond in foreclosure need not require personal liability to discharge judgment. Marean v. Stanley [Colo.] 81 P. 759. The bond on appeal from an order denying a motion to vacate a foreclosure judgment sale is governed by the general provisions as to appeal and not by § 104 of Laws 1897, p. 186, c. 71, as amended by § 4 Laws 1903, pp. 74, 75, c. 59. Owen v. Owen [Wash.] 84 P. 606. The fact that a bond is not sufficient for the purpose of an appeal in term will not defeat an appeal in vacation. Pittsburgh, etc., R. Co. v. Reed [Ind. App.] 75 N. E. 50.

Bond must conform to the order granting the appeal: Where the abstract recites that the appellant prayed an appeal to the circuit court from the probate court without stating whether the appeal was taken in an individual capacity or as executor, a bond executed by the appellant in his individual capacity was in conformity with the record. Griswold v. Smith [Ill.] 77 N. E. 551. Appeal will be dismissed for failure to comply with condition in grant of appeal that parties give bond. Not complied with where all did not join in execution. Singmaster v. American Percheron Horse Breeder's and Importer's Ass'n, 116 Ill. App. 245.

Improper condition in bond held waived by filing bond and taking appeal. Indiana

quired.[33] When the filing and approval is an integral part of the transfer of the cause it must be done within the time prescribed,[34] but if merely adjunctive to procedure otherwise efficient to bring up the cause, filing after time may be allowed until motion to dismiss.[35] In a joint appeal the bond must be executed by all the appellants.[36] Defects may ordinarily be cured by the filing of an amended or substituted bond.[37]

The clerk below is not justified in refusing to issue citation until his costs are advanced.[38] In the Federal circuit court of appeals a deposit as security for taxable costs is generally required before a transcript of the record in the lower court will docketed.[39]

(§ 6) *H. Entry below.*[40]—In some states a notice of appeal given in open court must be entered in the journal by the clerk.[41]

§ 7. *Transfer of jurisdiction; supersedeas and stay.*[42]—*The transfer* is not accomplished until the appeal is fully perfected,[43] and an unappealable order can support no jurisdiction to be transferred.[44]

Match Co. v. Kirk, 118 Ill. App. 102. Although a bond inadvertently contained words of supersedeas, when the amount and the plain intent show that it was meant for an appeal bond only the appellate court will so construe it. Douglas v. Badger State Mine [Wash.] 83 P. 178. Fact that bond contains language making it in form a supersedeas bond, though in amount and purpose it is only an appeal bond, does not authorize a dismissal. State v. White [Wash.] 82 P. 907. Bond held to sufficiently **identify the cause** in which it was given. Hayes v. Eubanks [Ga.] 54 S. E. 174. An appeal bond payable to "the defendants" and correctly stating the case and its docket number, is not fatally defective because it fails to properly recite the name of one of the defendants, but is amendable under Rev. St. 1895, art. 1025. Wandelohr v. Grayson County Nat. Bank [Tex. Civ. App.] 90 S. W. 180. Substantial compliance with statute sufficient. Ahrens v. Seattle, 39 Wash. 168, 81 P. 558.

33. Under the Illinois statute a bond in an appeal from an order of the probate court restating the account of the guardian of a minor must be approved by the court. The court cannot delegate authority to approve to the clerk. Mertz v. Mehlhop, 117 Ill. App. 77.

34. The undertaking on an appeal in California must be filed within five days after notice of appeal is served, otherwise appeal is ineffectual for any purpose. Buhman v. Nickels & Brown Bros. [Cal. App.] 82 P. 85; Rauer's Law & Collection Co. v. Standley [Cal. App.] 84 P. 214. If last day for filing a bond is a holiday the day succeeding will be the proper day. Id. Where a statute fixes the time within which the bond must be filed, the provision is mandatory and jurisdictional, and the court from which the appeal is taken is without power to extend the time Hill v. Chicago, 218 Ill. 178, 75 N. E. 766. Where the statute gives the court the right to fix the time such bond must be filed within the time limited by the court. Id. Appellate court has no jurisdiction when appeal bond is not filed within the time prescribed by statute. Vineyard v. McCombs [Tex. Civ. App.] 90 S. W. 720; El Paso & N. E. R. Co. v. Whatley [Tex.] 13 Tex. Ct. Rep. 186, 87 S. W. 819.

Extension of time: Where the statute gives the court the right to fix the time, he may extend it either at the term at which the appeal is allowed or at a subsequent term, before the expiration of the time so fixed. Hill v. Chicago, 218 Ill. 178, 75 N. E. 766. But if the time fixed by the court has expired, jurisdiction is lost, and the act of the court in approving bond after such time is a nullity. Id. An extension of time for settling a bill of exceptions does not extend the time for filing appeal bond. Id. An order granting an extension of time must be filed within the time for filing the bond or it is ineffectual to grant the extension. Rauer's Law & Collection Co. v. Standley [Cal. App.] 84 P. 214.

35. Under Rev. St. 1898, § 4031, allowing an appeal from the county court to the circuit court on 60 day's notice together with such undertaking as is required by § 4032, the fact that the undertaking was not filed till 3 days after filing the notice of appeal held not fatal. Charmley v. Charmley, 125 Wis. 297, 103 N. W. 1106. Under Rev. St. 1898, §§ 4031, 4032, authorizing an appeal from the county court on notice of appeal within 60 days from the rendition of judgment together with an undertaking the fact that the undertaking was not filed within the 60 days was not fatal where the notice was served in time. In re Box's Will [Wis.] 106 N. W. 1063.

36. Singmaster v. American Percheron Horse Breeder's & Importer's Ass'n, 116 Ill. App. 245.

37. District court may allow an appellant to file an amended appeal bond within a specified time. McGinnis v. Johnson Co. [Neb.] 104 N. W. 869.

38. Dewez v. Orleans R. Co. [La.] 39 So. 433.

39. In re Bradford's Petition [C. C. A.] 139 F. 518.

40. See 5 C. L. 157.

41. Though Ball. Ann. Codes & St. § 6503, requires entry in journal, appeal is not rendered invalid because clerk through neglect or mistake makes entry in minute book only. Creech v. Aberdeen [Wash.] 84 P. 623.

42. See 5 C. L. 157.

43. Entry of notice of appeal has no effect to stay proceedings. Byrne v. Morrison, 25 App. D. C. 72. An imperfected appeal from an order dismissing a defendant by one party does not affect the binding effect of such order on the appeal from judgment on the merits by the other. Atascosa County v. Alderman [Tex. Civ. App.] 91 S. W. 846.

44. An attempted appeal from an order clearly not appealable may be disregarded by

Supersedeas [45] of the judicial power of the lower court results with the transfer of jurisdiction [46] if the appeal be from the judgment,[47] but the judgment ordinarily remains valid and enforceable [48] unless a supersedeas bond is given or order for supersedeas is made, though in some states the judgment below is said to be vacated.[49] Aside from those judgments as to which supersedeas is allowed or denied absolutely,[50] the propriety of granting a supersedeas,[51] or suspensive appeal, rests

the trial court. Appeal from order dismissing action on plaintiff's motion properly disregarded in subsequent action involving the same matter. Deer & Webber Co. v. Hinckley [S. D.] 106 N. W. 138.

45. See 5 C. L. 157.

46. Where a motion for a new trial was overruled by the superior court, and the judgment of such court was affirmed by the supreme court, it was too late to make an amendment in the superior court by adding new grounds to the motion, though the amendment was tendered before the remittitur from the supreme court. Benning v. Horkan, 123 Ga. 454, 51 S. E. 333. On appeal from the superior court to the district court of appeals, the former is precluded from taking any further action in the case until remittitur is sent down from the appellate court. In re Smith [Cal. App.] 83 P. 167. An appeal without the execution of a supersedeas bond is not a waiver of a pending motion for a new trial in the district court and does not deprive that court of jurisdiction to grant the motion. Rice v. Parrott [Neb.] 107 N. W. 840. After the appeal papers Koeppel, 48 Misc. 358, 95 N. Y. S. 812. After the case has been transferred to the supreme court by writ of error, it is too late to dismiss as to a defendant improperly joined and to amend the pleadings. Commissioners of Union Drainage Dist. No. 3 v. Highway Com'rs of Towns of Virgil & Cortland, 220 Ill. 176, 77 N. E. 71. Pending an appeal from a decree adjudging defendant liable in a certain sum as the partner of plaintiff, referring the cause to a master and ordering defendant to transfer the partnership assets to a receiver, the master could not proceed under the reference, nor could the receiver take possession of the property. Heyman v. Heyman, 117 Ill. App. 452. An appeal to the supreme court operates as a supersedeas, and its effect is to stay further proceedings until it is dismissed; and the trial court has no power to render any further decision upon the rights of the parties in the cause until the cause is remanded. Cowan v. Curran, 216 Ill. 598, 75 N. E. 322.

47. An appeal from an interlocutory order does not transfer the cause to the appellate court. Starr & C. Ann. St. 1896, pp. 3111, 3171, c. 110, applies only to final judgments, and not to an interlocutory order granting an injunction. Fry v. Radzinski, 219 Ill. 526, 76 N. E. 694.

48. Rice v. Parrott [Neb.] 107 N. W. 840. An appeal from a judgment cancelling a license to sell liquors does not supersede the judgment so as to make a sale in the meantime legal. Goldman v. Goodrum [Ark.] 92 S. W. 865.

49. Generally an appeal vacates the judgment in the court below, and the judgment in the appellate court is a distinct and original judgment. Highway proceedings. Pub. St. 1901, c. 68, § 8, considered. Bickford v. Franconia [N. H.] 60 A. 98. Since an appeal vacates the judgment appealed from and the cause stands in the appellate court as a pending action without judgment, the provision of section 3 of the act of April 25, 1904, relating to joinder in suits for the sale of real estate for taxes, is applicable to suits pending at the time of its enactment and brought up on appeal subsequently thereto. Gibson v. Miller, 7 Ohio C. C. (N. S.) 96. Upon an appeal from a decree granting an administrator a license to sell realty the decree becomes of no effect as to future proceedings, and if it is finally affirmed a new decree is entered, which takes effect from the time of entry under the order of affirmation. It does not relate back to the time of the original decree appealed from, so as to render illegal all intervening action of owners or others for which there was lawful authority so long as the decree was suspended, and to render legal other intervening action in accordance with the decree, which action was without authority and unlawful so long as the decree was suspended. Tyndale v. Stanwood [Mass.] 77 N. E. 481.

50. Since it is provided by statute that a judgment appointing a curator for an interdict shall be executed provisionally pending appeal, a judgment on an issue of recusation vel non of the judge before whom such appointment is asked cannot be suspensively appealed from. Interdiction of Watkins [La.] 41 So. 242.

51. In re Ray [Neb.] 104 N. W. 1150. The court may in his discretion allow an order for writ of assistance after foreclosure to be superseded on condition that appellant give a bond for use and occupation of the premises pending appeal. Escritt v. Michaelson [Neb.] 106 N. W. 1016. On interlocutory appeals from rulings not involving the merits and subject to supersedeas under the statute, the trial court has inherent power to order a stay of proceedings pending the appeal. First Nat. Bank v. Dutcher [Iowa] 104 N. W. 497. Defendant in a divorce suit could not have proceedings stayed pending her appeal from an order overruling her plea to the jurisdiction where the court had no doubt of the correctness of its ruling and where owing to pressure of business in the appellate court, the appeal could not be determined until plaintiff's evidence might be lost. Duke v. Duke [N. J. Eq.] 62 A. 471. That defendant intended to put forth a counterclaim was immaterial. Id. Under P. L. 1902, p. 510, requiring an order from the court to suspend the operation of an injunction pending appeal and providing that the suspension shall extend only so far as necessary to preserve the subject of appeal and shall not destroy the right established or protected by the decree appealed from, an order will be granted suspending the injunction pending defendant's appeal from a decree restraining him from using certain trade symbols in connection with a dressing of packages of merchandise. Johnson v. Seabury [N. J. Eq.] 61 A. 563.

in discretion subject to review in case of abuse.[52] The appellate court may look into the merits to determine the propriety of granting supersedeas.[53]

Bond is usually requisite to a supersedeas,[54] the amount thereof being fixed by the court[55] unless the amount of the bond is ascertainable by a statute conferring the right to a stay on compliance with its terms, the penalty of the bond being usually based upon the amount involved in the appeal,[56] and the order or statute must be strictly followed.[57] Failure to give the bond affects only the supersedeas.[58]

The effect[59] of a supersedeas is simply to suspend the judgment[59a] and not to vacate or dissolve it,[60] the lower court losing its power only in respect to those things

52. Supersedeas being refused, the appellate court will, in a proper case, supersede the judgment of the district court on proper terms. Action of district court will not be disturbed. In re Ray [Neb.] 104 N. W. 1150.

53. The appellate court, upon an application for a temporary injunction pending the appeal, will consider the whole record in order to determine whether the appellant will be entitled to the relief sought upon the final hearing. State v. Newton County Com'rs [Ind. App.] 76 N. E. 308. Accordingly, on appeal from a decree enjoining county officers from building a court house on the ground that the proper legal steps had not been taken, it was held that a temporary injunction would not be granted restraining such officers from taking the proper steps to complete the court house. State v. Newton County Com'rs [Ind. App.] 76 N. E. 308.

54. Writ of error without bond not supersedeas. Montgomery v. King [Ga.] 54 S. E. 135.

55. Where a supersedeas is otherwise sufficient, an order of the court is not necessary fixing the amount, in an action for the recovery of real property although the value of the property and amount of recovery under a counterclaim were fixed in the same action. Barton v. Wickizer [Wash.] 83 P. 312. Where there is no money judgment by which to fix the amount of the bond on a suspensive appeal, the amount must be fixed by the judge in the same manner as on devolutive appeals. Day v. Bailey [La.] 41 So. 223. An appeal from a judgment of the superior court confirming on appeal a special assessment for local improvements by a city council will not stay the judgment of the superior court unless the judge fixes the amount of the supersedeas bond. Ahrens v. Seattle, 39 Wash. 168, 81 P. 558. On appeal from an order other than a judgment for money, the amount of the stay bond must be fixed by the court, and a bond given both as an appeal and supersedeas bond, without any order of the court fixing the amount is insufficient to give jurisdiction. Macy v. Sullivan [Wash.] 84 P. 601. On appeal from an order other than a judgment for money, the amount of the stay bond must be fixed by the court, and a bond given both as an appeal and supersedeas bond, without any order of the court fixing the amount is insufficient to give jurisdiction. Id. Mandamus to compel lower court to fix amount of supersedeas bond on an appeal from an order dissolving a temporary injunction not to destroy certain buildings will not lie after the buildings have been destroyed. State v. Irwin [Wash.] 82 P. 420. Amount may be limited under Code Civ. Proc. § 1312, though appellant does not act in another's right. National Contracting Co. v. Hudson River Water Power Co., 47 Misc. 491, 94 N. Y. S. 137.

56. A bond for costs is sufficient to sustain a suspensive appeal where the disposition of a fund in court is involved. Succession of Landry [La.] 40 So. 696. Where the judgment of the court is an order to the clerk to pay over to one of the parties $2,500 in his possession, it is a judgment for personal property and not a judgment for the payment of money within 2 Ballinger's Ann. Codes & St. § 6506, hence a supersedeas bond for $800 fixed by the court is sufficient. Peirson v. Pierce [Wash.] 84 P. 731. A final judgment for $17 costs fixed the amount for a supersedeas bond so that a bond for $240 is sufficient even though garnishment proceedings for $305.50 are involved. Russell v. Graumann [Wash.] 82 P. 998. An order for the sale of a steamship is not a judgment to pay money coming with Civ. Code Proc. § 942, requiring a stay bond of twice the amount of the judgment to stay proceedings, and the sureties on such a bond are released from liability for want of a consideration. Olsen v. W. H. Birch & Co. [Cal. App.] 81 P. 656. An order for a writ of assistance after foreclosure, though appealable, cannot be superseded by a waste bond provided for in § 677 Code Civ. Proc. Escritt v. Michaelson [Neb.] 106 N. W. 1016.

57. Suspensive appeal will be dismissed where the bond is slightly below the required amount. The maxim "de minimis" has no application. Gilmore v. Meeker [La.] 40 So. 244.

58. Failure to file supersedeas bond no ground for dismissal. Nixon v. Boiling [Ala.] 40 So. 210.

59. See 5 C. L. 159.

59a. During pendency of a writ of error operating as a supersedeas, judgment creditor could not enforce original judgment. Giles v. De Cow [Colo.] 83 P. 638. Under Rev. St. 1898, § 4036, providing that on appeal from the county court all further proceedings in pursuance of the act appealed from shall cease, an appeal from an order in accounting proceedings between a guardian and ward did not stay the institution of a suit in the circuit court on the guardian's bond so as to prevent a bar by limitations. Wescott v. Upham [Wis.] 107 N. W. 2.

60. An appeal and supersedeas does not vacate the judgment but merely stays proceedings thereunder, and consequently in actions which die with the party, a death during appeal does not affect the appeal. Miller v. Nuckolls [Ark.] 89 S. W. 88. Though the effect of an appeal from a decree granting a permanent injunction is to stay all proceedings in the lower court. Wilkinson v.

which might trench on the appellate functions.[61] If, after an appeal amounting to a supersedeas, the lower court attempts to amend a decree, objection to such amendment must be brought to the attention of the appellate court in that appeal and cannot be raised in a subsequent independent appeal.[62] While exceptions are pending, a final decree inadvertently entered will take effect only as an order for a decree to take effect on the disposition of the exceptions.[63] A self-executing decree cannot be superseded.[64]

§ 8. *Appearance,*[65] *entry, and docketing above* [66] within the time required by statute or rule [67] are generally essential. In Colorado a mistaken appeal may be dismissed and redocketed as on error.[68] Appearance and argument gives jurisdiction of the person [69] and waives defects of procedure.[70]

§ 9. *Perpetuation of proceedings and evidence for the reviewing court.* (*Record on appeal.*) *Scope and terminology.*—The "record proper" sometimes designated as the "fundamental record," "judgment roll" or "common-law record" includes those matters which are at common law of record ex propria vigore. The "secondary record" includes the various means by which matters not part of the record proper are made of record, by bill of exceptions, settled case, abstract, approved motion for new trial, etc. The "entire record" or "record on appeal" comprises all that is transmitted to the reviewing court, including both record proper and secondary record.

(§ 9) *A. What the record proper must show.*[71]—That which is a part of the record proper must appear by such record, and its omission cannot be supplied by the secondary record.[72] The facts essential to appellate jurisdiction such as a con-

Dunkley-Williams Co. [Mich.] 12 Det. Leg. N. 521, 104 N. W. 772. The appeal does not operate to dissolve the injunction. Ignoring or violating its terms pending appeal renders defendant guilty of contempt. Id.

61. Appeal from order denying a trial as in equity and supersedeas bond therein did not deprive the court of jurisdiction to proceed with the case. First Nat. Bank v. Dutcher [Iowa] 104 N. W. 497. On appeal from an order granting a new trial, a bond executed on the appeal did not stay execution of the judgment. Coombs v. Barker [Mont.] 81 P. 737.

62. Could not be considered in an appeal from a decree affirming the report of a master in chancery to whom the cause had been referred by the decree formerly appealed from. Heyman v. Heyman, 117 Ill. App. 542.

63. Tyndale v. Stanwood [Mass.] 73 N. E. 540.

64. Decree annulling certain contracts. Forrell v. California, Or. & Wash. Homebuilder's Ass'n [Wash.] 82 P. 889. A decree in habeas corpus proceedings awarding the appellee the care and custody of a child is self-executing, and the only effect of an appeal bond given by the appellant under Burns' Ann. St. 1901, § 650, is to stay execution for the collection of the appellee's cost, and does not operate to give the appellant the right to retain custody of the child. Willis v. Willis [Ind.] 75 N. E. 655. An injunction restraining defendants from preventing plaintiff, with a strong hand, from constructing improvements under a lease, would not be suspended pending appeal under a statute declaring that no appeal shall suspend or modify the operation of an injunction without an order from the court, and that the suspension shall not destroy the right established or protected by the decree. Hoboken & M. R. Co. v. Jersey City, etc., R. Co. [N. J. Eq.] 62 A. 539. Order vacating attachment not self-executing and may be stayed. Norden v. Duke, 47 Misc. 473, 95 N. Y. S. 940.

65. Lack of an authorized appearance by a party to an appeal is not jurisdictional and does not avoid the judgment on appeal. Rumeli v. Tampa [Fla.] 39 So. 101. In Georgia the case must be docketed. State v. Telfair, 139 N. C. 555, 51 S. E. 911.

66. See 5 C. L. 160.

67. If the clerk fails to forward the case to the judge or docket it upon the regular civil issue docket, according to the character of the case, it is the appellant's duty in apt time to apply for a proper order to compel the clerk to perform his duty. Accordingly where an appeal from the decision of the clerk was taken in February, 1897, and the appeal was not docketed until Jan. 1899, the appeal was abandoned. Love v. Love, 139 N. C. 363, 51 S. E. 1024. Failure to docket in time not ground for dismissal when the case is properly docketed before a motion to dismiss is made. Craddock v. Barnes [N. C.] 53 S. E. 239.

68. Where an appeal is dismissed for delay in perfecting, but the appellate court would have jurisdiction on error, the cause will be entered as pending on a writ of error. Mills' Ann. Code, § 388a. Roseberry v. Valley Bldg. & Loan Ass'n [Colo.] 83 P. 637.

69. See § 5, ante.

70. Appearance and argument on the merits waived defendant's objection to the right of plaintiff in error to have proceeding heard at this term. Field v. Field, 117 Ill. App. 307.

71. See 5 C. L. 161.

72. Bill of exceptions cannot be made a vehicle to carry into an appellate court that

stitutional [73] or Federal [74] question involved must always appear. The record proper must also show the organization of the trial court,[75] the pleadings [76] and judgment below,[77] and that the same has become a finality,[78] the motion for new trial and order thereon,[79] and in some jurisdictions the making of objections, and taking of exceptions,[80] the making of the secondary record,[81] and the timely taking of all steps necessary to bring up the case for review.[82] In some states, however, the secondary

which is a matter of record proper. State v. Holland [Mo. App.] 92 S. W. 362. Recitals in bill of exceptions will not cure omission of record to show that the bill was presented and settled in time. Dorthan Nat. Bank v. Wiggins [Ala.] 40 So. 967; Porter & Co. v. Loeb [Ala.] 40 So. 761; Wilson v. Mason [Ala.] 39 So. 916; McMullen v. Long [Ala.] 39 So. 777. Showing in bill of exceptions as to ruling on demurrer is insufficient. Keller v. State [Ala.] 40 So. 84; Forbes & Carloss v. Davidson [Ala.] 41 So. 312; School Dist. No. 1, Tp. 24, R. 4 v. Boyle, 113 Mo. App. 340, 88 S. W. 136. Showing in bill of exceptions as to filing of motion for new trial insufficient. Fleischer v. Hinde [Mo. App.] 93 S. W. 1126. Insertion of judgment in bill of exceptions will not cure its omission from record proper. Wilson v. Mason [Ala.] 39 So. 916.

73. State v. Yazoo & M. V. R. Co. [La.] 40 So. 630.

74. Hulbert v. Chicago, 202 U. S. 275, 50 Law. Ed. —. Though the certificate of the state court cannot import a Federal question into the record, it may elucidate a doubt as to whether such a question was decided. Rector v. City Deposit Bank Co., 200 U. S. 405, 50 Law. Ed. —. Failure of the record to show a Federal question is not aided by the fact that the writ of error was allowed by the presiding justice of the state court. Hulbert v. Chicago, 202 U. S. 275, 50 Law. Ed. —.

75. Pensacola A. & W. R. Co. v. Big Sandy Iron Co. [Ala.] 41 So. 418; Mayhall v. Eddleman [Ala.] 41 So. 425; McPherson v. Wiggins [Ala.] 40 So. 961.

76. Where the record omits the answer it cannot be supplied by a recital in the briefs that it was a general denial. Daggs v. Smith [Mo.] 91 S. W. 1043. The ruling and judgment on a motion to strike and on demurrer to complaint should appear in the record proper. Ferrell v. Opelika [Ala.] 39 So. 249. A ruling on a demurrer to a special plea should appear in the judgment entry and it is insufficient if it appears only in the bill of exceptions. Keller v. State [Ala.] 40 So. 84; Forbes v. Davidson [Ala.] 41 So. 312. If amendments to the pleadings are in the record they will be considered though there is no minute entry of their allowance. Alabama Steel & Wire Co. v. Clements [Ala.] 40 So. 971. Ruling on motion to strike pleas need not appear by the record proper. Allen v. Alston [Ala.] 41 So. 159.

77. Price v. Workman Pub. Co. [Ala.] 40 So. 824; Duncan v. State [Neb.] 106 N. W. 1014; State v Salyers [Iowa] 106 N. W. 516; Schneider v. Metcalf [Iowa] 106 N. W. 270; Modern Woodmen v. Plummer [Neb.] 105 N. W. 181; Flanerty v. North Jersey St. R. Co. [N. J. Err. & App.] 62 A. 425. Order for judgment held insufficient. Carlson v. Ziehme [Fla.] 40 So. 502. The record must show the judgment. Wilson v. Mason [Ala.] 39 So. 916; Goodykoontz v. Imes [Colo.] 85 P. 839. The record must show a final disposition of the cause in the lower court. Bozarth v. McIntyre [Ind. App.] 76 N. E. 317.

78. The court has no jurisdiction of an appeal where the transcript shows the verdict and motion for a new trial but no order disposing of the motion and no final judgment. Wall v. Kerr [Neb.] 104 N. W. 1076.

79. State v. Holland [Mo. App.] 92 S. W. 362. Filing of motion for new trial must appear from the record proper. Fleisher v. Hinde [Mo. App.] 93 S. W. 1126.

80. Must show exception taken to denial of motion for new trial. Jacksonville Elec. Co. v. Adams [Fla.] 39 So. 183.

81. Where a bill was presented for signature after term and there is no order for extension in the record a recital in the bill that it was presented in time is insufficient. Dothan Nat. Bank v. Wiggins [Ala.] 40 So. 967. Court will not presume filing of bill of exceptions in clerk's office after it was signed by judge from file mark of clerk of court below upon appellants' praecipe. Elrod v. Purlee [Ind.] 74 N. E. 1085, for former opinion see 73 N. E. 589. Record proper must show that a bill of exceptions was allowed and filed. Fleisher v. Hinde [Mo. App.] 93 S. W. 1126; Davison v. Valin [Mich.] 12 Det. Leg. N. 647, 105 N. W. 82. Where the record shows that time was allowed to present bill of exceptions after adjournment and does not show how much time was allowed, it will be presumed that the bill was presented in time. Walker v. Parry [Fla.] 40 So. 69. Record failing to show when court adjourned held not to show that extension of time to present bill of exceptions was made before expiration of time originally allowed. Capehart v. McGahey [Ala.] 40 So. 657. Record must show an extension of time to present bill of exceptions and recital in the bill is insufficient. Porter & Co. v. Loeb [Ala.] 40 So. 761; Wilson v. Mason [Ala.] 39 So. 916; Henry v. Nashville, etc., R. Co. [Ala.] 39 So. 1024; McMullen v. Long [Ala.] 39 So. 777; State v. Holland [Mo. App.] 92 S. W. 362. It must appear from the record proper that the bill of exceptions was filed within time. School Dist. No. 1, Tp. 24, R. 4 v. Boyle, 113 Mo. App. 340, 88 S. W. 136; Burns v. Gibbs [Ala.] 41 So. 303. Where record or abstracts of record fail to show that a bill of exceptions was ever filed in trial court, there is nothing for appellate court to review but record proper. Scott v. Adams Express Co. [Mo. App.] 92 S. W. 169. Sufficiently shown by recital "Now comes the plaintiff and in term time tenders the foregoing * * * and asks that the same be refiled, which is accordingly done." Maddox v. Maddox [Ala.] 41 So. 426. A journal entry showing that a bill of exceptions was allowed is not required. Harden v. Card [Wyo.] 85 P. 246.

82. Filing of affidavit for appeal and order granting appeal. State v. Holland [Mo. App.] 92 S. W. 362. Though an order for appeal does not show when it was signed, the presumption that it was signed before filing

record must itself show that it was properly made and a showing thereof in the record proper is insufficient.[83] While in actions at law every presumption is in favor of the decision below and error must be made to affirmatively appear,[84] in equity a complainant to whom relief is granted must preserve in the record the evidence on which it is based by a certificate of evidence or by recitals in the decree.[85]

(§ 9) *B. What is part of record proper; necessity of secondary record.*[86]—The office of the bill of exceptions or other secondary record is to make of record that which is not part of the record proper, and it is necessary except to review errors apparent on the face of the judgment roll.[87] The record proper consists of the summons, pleadings, and judgment,[88] and orders made with reference to the record. Proposed pleadings and amendments which have never become pleadings in the action are no part of the record.[89] Other proceedings had below, in order to be reviewed, must be brought into the record by a bill of exceptions,[90] journal entry, or equivalent proceedings. In chancery cases and some special statutory proceed-

will suffice to show that it was signed in time. Dewez v. Orleans R. Co. [La.] 39 So. 433.

83. See post, § 9 C 1.

84. See post, § 9 D.

85. In Chancery Appeals rulings on evidence must appear by the decree. Sellers v. Farmer [Ala.] 41 So. 291. A certificate of evidence necessary to sustain the decree will not be stricken though no questions requiring the consideration of evidence are involved and though it was not filed in time to allow consideration of such questions. Berger v. Neville, 117 Ill. App. 72. On appeal in an equity case, the trial being largely de novo, the court cannot affirm a decree in favor of plaintiff in the absence of the bill and the evidence from the record, the answer admitting the indebtedness but not the amount, and the execution of a trust deed but not identifying the land covered. Hearst v. Proffit [Tenn.] 91 S. W. 207.

86. See 5 C. L. 163.

87. Errors apparent on the face of the record can be reviewed without a bill of exceptions. Roden v. Helm, 192 Mo. S. 71, 90 S. W. 798;; Olsen v. Birch & Co. [Cal. App.] 81 P. 656;; Roberts v. Heinsohn, 123 Ga. 685, 51 S. E. 589; Stansell v. Merchants' & Farmers' Bank, 123 Ga. 278, 51 S. E. 321; City of Chicago v. Mecartney, 216 Ill. 377, 75 N. E. 117; City of Rockford v. Compton, 115 Ill. App. 406; Standard Fuel Co. v. Garden City Fuel Co., 117 Ill. App. 259; Commonwealth v. Maysville, etc., R. Co. [Ky.] 91 S. W. 1139; Turner v. Burr [Mich.] 12 Det. Leg. N. 346; 104 N. W. 379; King v. Burden [Mich.] 12 Det. Leg. N. 776, 105 N. W. 1120; Johnson v. Emerick [Neb.] 104 N. W. 169; People v. Board of Education, 99 N. Y. S. 1; First Nat. Bank v. Cowles [Wash.] 82 P. 892. Objections which do not arise on the face of the record cannot be reviewed in the absence of a bill of exceptions. Kalish v. Chicago, 219 Ill. 133, 76 N. E. 40; Frank v. Chicago, 216 Ill. 587, 75 N. E. 213; City of Chicago v. Mecartney, 216 Ill. 377, 75 N. E. 117; Close v. Chicago, 217 Ill. 216, 75 N. E. 479; Supreme Lodge, Knights & Ladies of Honor v. Rehg, 116 Ill. App. 59; Duker's Adm'r v. Kaelin [Ky.] 90 S. W. 959; Sicher v. Rambousek [Mo.] 91 S. W. 68; In re Schmid, 98 N. Y. S. 921. Record proper held insufficient to enable the supreme court to determine whether Revisal 1905, § 2646, known as the Fellow Servant Act, was applicable to the defendant. Tanner v. Hitch [N. C.] 53 S. E. 287; Hotel Co. v. Merchants' Ice & Fuel Co. [Wash.] 84 P. 402. Where the judgment on its face shows that costs and counsel fees have been awarded contrary to the law no bill of exception is necessary as question is presented by the judgment roll. White v. Gaffney [Cal. App.] 82 P. 1088.

88. On appeal from a judgment without a statement or a bill of exceptions, nothing belongs to the record except the judgment roll. Williams v. Boise Basin Min. & Development Co. [Idaho] 81 P. 646. On appeal from a judgment, the judgment roll consists of the pleadings, a copy of the verdict of the jury or findings of the court or referee, all bills of exceptions taken and filed, and a copy of any order made on demurrer or relating to any change of parties, and a copy of the judgment. Rev. St. 1887, § 4456, subd. 2. Id. Where a complaint was amended but was not refiled, and both parties treated it as if it had been amended at the time demurrer thereto was overruled, the rule that an amended pleading when refiled supersedes the original is not applicable, and hence the original complaint is not expunged from the record. Stewart v. Knight & Jillson Co. [Ind.] 76 N. E. 743. A memorandum of decision by the justice who heard the evidence reporting his findings of fact is a part of the record. See Rev. Laws, c. 159, § 23. Cohen v. Nagle [Mass.] 76 N. E. 276.

89. An amendment offered to a petition and disallowed by the court is no part of the record, and can come to the supreme court only by being set out in the bill of exceptions, or annexed thereto as an exhibit duly authenticated. Hays v. Clay [Ga.] 53 S. E. 399. Under Rules of Practice 29, 30, supreme court (Code 1896, pp. 1191, 1192), the answer to the original bill before amendment and also the answer to the amended bill and the exhibits thereto must go into the transcript unless expunged from the record by agreement of the parties. Hutchinson v. Palmer [Ala.] 40 So. 339.

90. An objection that no petition of property owners was presented to the board of local improvements requesting the improvement will not be considered in the absence of a bill of exceptions. Harrigan v. Jacksonville, 220 Ill. 134, 77 N. E. 85. The report and findings of a master must be brought into the record by a bill of exceptions. St. Joseph Mfg. Co. v. Hubbard [Ind. App.] 75 N. E. 17. Matters not appearing of record and oc-

ings,[91] the record includes all proceedings and files below, including the testimony, if taken by deposition, or as settled if taken in open court, and statutes sometimes provide that documents filed become part of the record.[92] Stipulations,[93] appearance,[94] interlocutory motions and orders thereon,[95] bills of particulars,[96] agreed statement of facts,[97] depositions, proceedings at the trial,[98] motion for new trial and order thereon,[99] affidavits,[1] propositions of law,[2] the opinion of the trial court,[3] and

curring during the course of trial must be presented in the bill of exceptions. Finlay Brewing Co. v. People, 111 Ill. App. 200.

91. By statute, a bill of exceptions is necessary in equity cases where oral testimony is heard. §§ 336, 337, Civ. Code. Dupoyster v. Ft. Jefferson Imp. Co.'s Receiver [Ky.] 89 S. W. 509. Under Acts 1903, p. 338, c. 193, the petition and bond in proceedings for removal to the Federal court need not be brought into the record by a bill of exceptions Southern R. Co. v. Sittasen [Ind. App.] 74 N. E. 898. Under Acts 1903, p. 339, c. 193, § 3, motion of appellant in court below to dismiss the appeal from the board of commissioners and the ruling of the court thereon and the exceptions of the appellants to said ruling were parts of the record without a bill of exceptions Good v. Burk [Ind.] 77 N. E. 1080. Where a commission appointed by the court to hear testimony and make findings does so and fails to return the testimony with its report such testimony does not become a part of the record under Ballinger's Ann. Codes and St. § 5064, by being filed with the clerk of the court by the attorney of a party in suit. Richardson v. Steiner [Wash.] 83 P. 1027. Such testimony can be made a part of the record only by a bill of exceptions or statement of facts. Id.

92. In Indiana all papers filed or offered to be filed in any cause or proceedings constitute a part of the record. See Acts 1903, p. 338, c. 193, § 3. Findings of fact by master along the hand of the report of evidence heard by him. Harrah v. State [Ind. App.] 76 N. E. 443; Cincinnati, etc., R. Co. v. Stahtle [Ind. App.] 76 N. E. 551.

93. Gaston v. Modern Woodmen of America, 116 Ill. App. 291.

94. A written appearance is not a necessary part of the common-law record. Long v. Frank, 117 Ill. App. 207.

95. Motions are not in the record on proceedings in error unless embraced in a bill. Harden v. Card [Wyo.] 85 P. 246; Everett v. Wilson [Colo.] 83 P. 211. Motion to dismiss petition for condemnation. Cella v. Chicago & W. I. R. Co., 217 Ill. 326, 75 N. E. 373. Motion to quash a writ of attachment and the certificate of levy. Everett v. Wilson [Colo.] 83 P. 211. Motion to strike pleading and ruling thereon. Lindley v. Kemp [Ind. App.] 76 N. E. 798; Allen v. Alston [Ala.] 41 So. 159; Swanson v. Groat [Idaho] 85 P. 384. Mills' Ann. Code, § 387, does not include a motion to set aside and vacate an order of dismissal of appeal from justice to county court. Carr v. Willoughoy & Co. [Colo.] 85 P. 428. A motion to dismiss an action and quash attachment and levy does not come under § 387, Mills' Ann. Code, and is not a part of the record proper. Everett v. Wilson [Colo.] 83 P. 211. Motions presented in the trial court, the rulings thereon and exceptions are not properly part of the record. McCarthy v. Bentley [Okl.] 83 P. 713. An affidavit and notice in pursuance of which a cause is placed on the short cause calendar have no place in the trnascript of record. They must be presented by bill of exceptions. Kaestner v. Farmers & Merchants State Bank of Marion, 112 Ill. App. 158.

96. Forbes Co. v. Leonard, 119 Ill. App. 629.

97. Carr v. Willoughby & Co. [Colo.] 85 P. 428. A stipulation at the trial that evidence set forth in the bill of exceptions in the former record on appeal should be considered as before the court on a subsequent appeal is ineffectual where such evidence is not made a part of the record. Krippendorf-Dittman Co. v. Trenoweth [Colo.] 84 P. 805.

98. Practice Act of July 1, 1872, did not obviate necessity of preserving in bill of exceptions objections to the giving or refusing of instructions. Zipkie v. Chicago, 117 Ill. App. 418. A bill of exceptions is necessary to preserve remarks of counsel made in the course of the trial. Ex parte affidavits will not do. Finlay Brewing Co. v. People, 111 Ill. App. 200. An objection in proceedings by a city to widen a street that the question of public benefits should not be submitted to the jury. Kalish v. Chicago, 219 Ill. 133, 76 N. E. 40.

99. Burns v. Chicago, B. & Q. R. Co. [Wyo.] 85 P. 379; Watkins v. Green [Mo. App.] 92 S. W. 1131. The notice of intention to move for a new trial upon the minutes of the court which is printed in the transcript, and contains many specifications, not being contained in any statement or bill of exceptions constitutes no part of the record on appeal. Roberts v. Hall, 147 Cal. 434, 82 P. 66.

1. Allen v. Baxter [Wash.] 85 P. 26; Jordan v. Jackson [Neb.] 106 N. W. 999; Town of Poulan v. Atlantic Coast Line R. Co., 123 Ga. 605, 51 S. E. 657; Anderson v. Anderson [Ga.] 52 S. E. 161; Wilbanks v. Crosno, 112 Ill. App. 503; Builders' Painting & Decorating Co. v. Advisory Board Bldg. Trades of Chicago, 116 Ill. App. 264. Affidavit that since entry of decree appealed from plaintiff had been removed as executrix and so could not prosecute appeal in that capacity not considered. Field v. Field, 117 Ill. App. 307. Affidavits and documents introduced in evidence on the hearing before the trial judge must be incorporated in the bill of exceptions seeking to review his judgment or attached thereto as exhibits, duly and properly identified, or be embraced in an approved brief of evidence and brought up as record. The mere filing of affidavits and documents in the office of the clerk of the court does not make them parts of the record in the case. Civ. Code, § 5528. Anderson v. Anderson [Ga.] 52 S. E. 161. Affidavits and documents introduced in evidence on the hearing before the trial judge must be incorporated in the bill of exceptions seeking to review his judgment or attached thereto as exhibits, duly and properly identified, or be embraced in an approved brief of evidence and brought up as record. The mere filing of

the evidence,[4] are no part of the record proper, and statutes providing for the filing of the reporter's transcript of the evidence does not make it of record,[5] nor do recitals in the motion for new trial make of record the matters recited.[6] Statutes sometimes provide that instructions may be made of record by order,[7] but unless so authenticated they must be embodied in the bill of exceptions.[8] Statutes providing for entry of exceptions of record do not dispense with a secondary record.[9] Recital in the record proper of matters which are no part of such record are unavailing to supply omissions from the bill of exceptions.[10]

affidavits and documents in the office of the clerk of the court does not make them parts of the record in the case. Civ. Code, § 5528. Anderson v. Anderson [Ga.] 52 S. E. 161.

2. Propositions of law are no part of the common-law record. Luther v. Crawford, 116 Ill. App. 351.

3. The opinion of the trial judge though written in no part of the record. Grand Central Min. Co. v. Mammoth Min. Co., 29 Utah, 490, 83 P. 648; Townsend v. Beatrice Cemetery Ass'n [C. C. A.] 138 F. 381; Milella v. Simpson, 47 Misc. 690, 94 N. Y. S. 464. A letter written personally by the trial judge to a counsel stating the grounds on which he granted a general order for a new trial constitutes no part of the record and cannot be made such. Weisser v. Southern Pac. R. Co. [Cal.] 83 P. 439.

4. Close v. Chicago, 217 Ill. 216, 75 N. E. 479; Kalish v. Chicago, 219 Ill. 133, 76 N. E. 40; City of Jeffersonville v. Gray [Ind.] 74 N. E. 611; Dudley v. Barrett [W. Va.] 52 S. E. 100; Lemmert v. Lemmert [Md.] 63 A. 380.

5. A transcript of the stenographer's notes filed at a subsequent term does not become a part of the record, and cannot be used on appeal. Dupoyster v. Ft. Jefferson Imp. Co.'s Receiver [Ky.] 89 S. W. 509. Testimony not incorporated in a bill of exceptions or case-made allowed and settled by the judge will not be considered on appeal from an action in disbarment, notwithstanding that the statute requires the evidence to be reduced to writing, filed and preserved and all original papers, together with a transcript of the docket entries, sent up. In re Burnette [Kan.] 85 P 575.

6. Alleged improper argument. Stagg Co. v. Brightwell [Ky.] 92 S. W. 8. Remarks of trial judge in presence of jury. Bird v. Bird, 218 Ill. 158, 75 N. E. 760.

7. Instructions filed twelve days after the verdict, each instruction being indorsed by the judge "given and excepted to" did not make such instructions a part of the record. Baker v. Gowland [Ind. App.] 76 N. E. 1027. An indorsement on the margin on an instruction "given and excepted to," signed by the judge, does not present any question where it is not shown by the bill of exceptions that either party took or reserved exceptions to such instruction. Fletcher v. Kelly [Ind. App.] 76 N. E. 813. A written memorandum of instructions signed by counsel stating that the appellant excepted to the refusal to give such instructions is not sufficient compliance with a statute authorizing requested instructions to be included in the record without a bill of exceptions, by a memorandum in writing signed by the judge. Inland Steel Co. v. Smith [Ind. App.] 75 N. E. 852. Instruction held not in the record under Acts 1903, p. 338, c. 193. Baker v. Gowland [Ind. App.] 76 N. E. 1027. Where the appellant at the close of the instructions requested by him entered a memorandum showing that he excepted to the refusal to give such instructions, this brings the instructions refused and the instructions given by the court into the record. Cincinnati, etc., R. Co. v. Stahle [Ind. App.] 76 N. E. 551. An objection to the consideration of the instructions on the ground that they and the exceptions thereto are not in the record as provided for by the statute of 1903 (Acts 1903, p. 338, c. 193), is sufficiently met by reference to the closing provision that the act shall not be so construed as to preclude any matter from being made a part of the record by bill of exceptions under the rules of practice in force at the taking effect of the statute. Pittsburg, etc., R. Co. v. Reed [Ind. App.] 75 N. E. 50.

Acts 1903, p. 330, c. 193, § 9, providing that no provision of such act shall be construed so as to preclude any matter from being made a part of the record by a bill of exceptions under the rules of practice then in force, cannot be construed as abrogating or modifying the method previously in this statute designated for taking exceptions to oral instructions, and when such matter is preserved in the record by a bill of exceptions such bill must show the taking of the exceptions in the manner prescribed. Strong v. Ross [Ind. App.] 75 N. E. 291.

8. Elrod v. Purlee [Ind.] 74 N. E. 1085; McKnight-Keaton Grocery Co. v. Hudson [Mo. App.] 92 S. W. 1130; Beery v. Driver [Ind.] 76 N. E. 967; Milner Coal & R. Co. v. Wiggins [Ala.] 38 So. 1010; Kinney v. Brotherhood of American Yoemen [N. D.] 106 N. W. 44.

9. Rev. St. 1899, § 3742, providing that exception to decision entered on record with the grounds of objection thereto may be made by entry of exception at end of entry he excepts to does not make such section a substitute for a bill of exceptions. The statute applies only where the decision would have been properly entered of record had no exceptions been taken to it. Burns v. Chicago, B. & Q. R. Co. [Wyo.] 85 P. 379.

10. Recital by clerk in transcript of proceedings relative to new trial unavailing. Garthwait v. Board of Education Dist. No. 118, Vermillion County, 117 Ill. App. 59. Papers and proceedings upon which was based an order refusing to prohibit a party from prosecuting a suit for plaintiff must be contained in the bill of exceptions. They cannot be set out by the clerk in the record. Knights Templars & Masons' Life Indemnity Co. v. Crayton, 110 Ill. App. 648. A reference in record proper to motion for new trial insufficient. Browne v. Nussbaumer, 117 Ill. App. 501. Petition and affidavit for change of venue. Wilbanks v. Crosno, 112 Ill. App. 503. Recital in record proper of disposition of motion for new trial does not

(§ 9) *C. Form, requisites, and settlement of secondary record.* **1.** *The bill of exceptions.*[11]—The bill of exceptions in some jurisdictions embraces all matters not part of the record proper, while in others it is confined to specific errors, being used concurrently with other forms of secondary record,[12] while in yet others separate bills are settled to each alleged error; each bill must in such case be in the form appropriate to bring up the particular error,[13] and each complete in itself. The bill of exceptions is ordinarily required to be embraced in one document,[14] and should include all matters essential to the question involved,[15] which were presented to the trial court, and nothing that was not so presented. Where appellant instead of preserving his exceptions in a separate bill of exceptions blended it with the transcript which was certified and attested to by the judge and the clerk, the exceptions were nevertheless sufficiently preserved to be considered.[16] Unnecessary or immaterial matters should not be included.[17] Papers referred to therein must be annexed or identified beyond doubt.[18] Skeleton bills, that is bills which provide for

cure omissions thereof from bill of exceptions. Fisher v. Lederer, 115 Ill. App. 289. Exceptions to the findings and judgment of the court in trial without a jury must be preserved by a bill of the exceptions, and a record recital of such exceptions and a motion for a new trial, the overruling thereof and exceptions to such ruling, cannot take the place of the bill of exceptions. Grand Pacific Hotel Co. v. Pinkerton, 217 Ill. 61, 75 N. E. 427, afg. 118 Ill. App. 89. The preservation in the record of expressions ussed by the court in a colloquy between the court and the counsel will not authorize a review of the conclusions of law in the absence of proper proceedings below to save the question as to such conclusions. No objection was made or exception taken to any ruling of the court relative to the admissibility of testimony, and no propositions were presented to the court as provided by Hurd's Rev. St. 1901, p. 132, c. 110. Hulbert v. Chicago, 217 Ill. 286, 75 N. E. 486. The objection to the allowance of an amendment must be shown in the bill of exceptions, and it is insufficient that it appears in the court's minutes. Southern R. Co. v. Pogue [Ala.] 40 So. 565. Under Kirby's Dig. § 6224, where exceptions to the overruling of a motion for a new trial appear in the record entry of its over-ruling, they need not appear in the bill of exceptions. Carpenter v. Dressler [Ark.] 89 S. W. 89.

11. See 5 C. L. 166.

12. The bill of exceptions cannot be used to bring up the whole testimony for review, where there is a general verdict by the court which includes or may include mixed questions of law and fact. Fitzgerald v. Bassford [C. C. A.] 142 F. 134. Where a bill of exceptions refers to the transcript of the stenographer's notes for the evidence, which transcript is not filed during the term, it does not become a part of the record and the bill of exceptions is insufficient. Knecht v. Louisville Home Tel. Co. [Ky.] 89 S. W. 508. Under Sayles' Ann. St. 1897, art. 1362, where evidence contained in the statement of facts would explain the relevancy of evidence embraced in the bill of exceptions it is sufficient for the bill to refer to such evidence without setting it out. Northern Tex. Traction Co. v. Yates [Tex. Civ. App.] 88 S. W. 283.

13. Affirmative charge is reached by ordinary bill, not by "evidentiary" bill. Atlantic Coast Line R. Co. v. Calhoun, 47 Fla. 132, 36 So. 361.

14. Where the bill of exceptions was in two volumes not attached to the transcript as required by statute and only one of which was certified to by the clerk and there was no reference to the other volume, the bill was quashed. State v. Paxton [Neb.] 106 N. W. 166.

15. The bill of exceptions should be argumentative to the extent of setting out the reasons why the judgment or ruling complained of is alleged to be erroneous. Philipps v. Collinsville Granite Co., 123 Ga. 830, 51 S. E. 666. Where the principal errors assigned and argued are the insufficiency of the evidence, a bill of exceptions which fails to give the evidence and is not certified to by the judge will be struck. Hannan Bros. v. Waltenspiel, 29 Utah, 466, 82 P. 859. For failure to state that evidence is included or that there was none a bill will not be dismissed where it sets out a motion, a statement in response thereto, the allowance of an amendment, and the consequent denial of the motion. Head v. Marietta Guano Co. [Ga.] 53 S. E. 676. A bill of exceptions narrating what was done by way of amendment of parties on appeal to superior court excepting thereto and assigning error therein held to sufficiently assign the error in the bill. Id.

16. Davidson v. Fraser [Colo.] 84 P. 695.

17. An exhibit containing the opinions of college professors as to the meaning of a contract will be stricken from the files on the court's own motion. Chicago Portrait Co. v. Chicago Crayon Co., 118 Ill. App. 98. A note reciting that bill of exceptions presented by plaintiff was objected to as being too brief whereupon defendant introduced a draft of a bill of exceptions which plaintiff admitted was correct but objected to as being too long, which latter bill was approved by the court will not be construed to be bill of defendant to preclude him from objecting to its sufficiency. Id. Such a note may, however, tend to show that no material evidence is omitted from the record. Id.

18. An assignment of error for denying a new trial on the ground of misconduct of a juror and of newly discovered evidence cannot be considered where the affidavits are not contained in the bill of exceptions nor attached thereto nor described in any way by

the subsequent copying by the clerk into and as a part of them of some paper or document, are allowed in some states.[19] Appellant must see that record contains everything necessary to review, and its omissions will be construed against him,[20] the burden being upon him to affirmatively show error,[21] but mere formal defects or irregularities which do not cloud the record or violate a statutory requirement will be disregarded.[22] As a general rule deficiencies in matters which belong to the bill of exceptions cannot be aided by other parts of the record.[23] An order that objections and exceptions need not be taken at the trial does not dispense with the necessity of inserting them in the bill of exceptions precisely as if they had been so taken.[24] The office of the bill of exceptions is not only to verify the recitals, but

which they can be identified. Griswold v. Nichols [Wis.] 105 N. W. 815 Certified transcripts attached to a bill of exceptions, but not referred to in or made a part of the bill, cannot be considered by a reviewing court as a part of the bill. Whitman v. State, 7 Ohio C. C. (N. S.) 334. It is the better practice for the proper identification of an exhibit introduced in evidence with the intention of attaching it to the bill of exceptions, that the stenographer in his reference to it should add the words, "and the same is hereto attached and made part of the bill of exceptions." Young v. Young, 7 Ohio C. C. (N. S.) 419. Where a paper which is to constitute a part of a bill of exceptions is not incorporated into the body of the bill, it must be annexed to it, or so marked by letter, number, or other means of identification mentioned in the bill, or so described in the bill, as to leave no doubt, when found in the record, that it is the one referred to in the bill of exceptions. Dudley v. Barrett [W. Va.] 52 S. E. 100; Parr v. Currence [W. Va.] 52 S. E. 496. A document cannot be made a part of a bill of exception by reference This is the rule even though document be found in some other place in the record. And a fortiori a bill of exceptions in another case cannot be brought into the record by incorporating therein an abstract of such bill. Magnolia Metal Co. v. Gale, 189 Mass. 124, 75 N. E. 219. Where an exhibit has properly been made a part of the record by reference, it may be incorporated into the bill of exceptions by reference; but when a paper has not thus been made a part of the record it cannot be incorporated into the bill by reference. Cincinnati, etc., R. Co. v. Stahtle [Ind. App.] 76 N. E. 551. On appeal in proceedings by city to widen a street matter contained in the record of another appeal cannot be incorporated into the record by mere reference Kalish v. Chicago, 219 Ill. 133, 76 N. E. 40. A mere reference to papers or proceedings without embodying them in the bill of exceptions is not sufficient. Humbarger v. Humbarger [Kan.] 83 P. 1095.

19. A recital in a bill that the evidence is "attached hereto and made a part of this bill of exceptions" is sufficient to incorporate such evidence into the bill. Humbarger v. Humbarger [Kan.] 83 P. 1095. A bill of exceptions, relied on to make the evidence a part of the record in an action at law, must incorporate, to have annexed to it, the evidence, or contain a sufficient description or other means of identification of such evidence. Otherwise the bill is insufficient to make the evidence a part of it or of the record. The bill in this case was a skeleton bill with direction to insert all the testimony, but such testimony was not inserted in or annexed to the bill. Woods v. King [W. Va.] 53 S. E. 605. Affidavit and certificate of the clerk of the lower court relating to the time of transcribing and forwarding the record and the usual practice in such court as to skeleton bill of exceptions, held inadmissible to supply the failure of the bill to incorporate the evidence. Id. The practice as to skeleton bills of exceptions as stated in Tracy's Adm'x v. Carver Coal Co., 57 W. Va. 587, 50 S. E. 825, followed and approved. Parr v. Currence [W. Va.] 52 S. E. 496. The skeleton bill of exceptions relied on in this case for the purpose of making the evidence a part of it did not do so, and the evidence was not a part of the record, under the authority of the cases of Parr v. Currence [W. Va.] 52 S. E. 496; Dudley v. Barrett [W. Va.] 52 S. E. 100; Tracy's Adm'x v. Carver Coal Co., 57 W. Va. 587, 50 S. E. 825 and McKendree v. Shelton, 51 W. Va. 516, 41 S. E. 909; Coal & Coke R. Co. v. Joyce [W. Va.] 52 S. E. 498. Whether a statement in the bill of exceptions that "evidence upon a motion for a new trial, if printed, may be referred to, to illustrate and explain the exceptions" sufficiently makes the report of the evidence a part of the bill of exceptions—quaere. Neal v. Rendall [Me.] 62 A. 706. A skeleton bill not identifying the evidence to be inserted or showing what was before the court when it was settled is insufficient. Schwarzchild & Sulzberger Co. v. Chesapeake & O. R. Co. [W. Va.] 53 S. E. 785. Where a skeleton bill called for the insertion of a document of a certain date, and then instructed the clerk to insert one of another date, the error is not cured by certificate of the clerk that the document inserted is the only one on file. Anniston Mfg. Co. v. Southern R. Co. [Ala.] 40 So. 965.

20. And matters put into the record at the instance of the appellee will likewise be construed against him. A statement in a bill of exceptions at the instance of the defendant that coal was taken from land under a church and cemetery without injuring them is an admission by him that it was taken from the entire tract. Penny v. Central Coal & Coke Co. [C. C. A.] 138 F. 769. A bill of exceptions being a pleading will be construed most strongly against the appellant. Martin v. Chicago & M. Elec. R. Co., 220 Ill. 97, 77 N. E. 86.

21. See post, § 9 D.

22. Humbarger v. Humbarger [Kan.] 83 P. 1095.

23. See ante, § 9 B.

24. A certificate of the trial judge that exceptions are deemed to be taken to his rulings without the formality of exceptions

to authenticate itself, and to show all facts, including the signature, within the proper time, needed to give the reviewing court jurisdiction.[25] The bill of exceptions must, in some states, show on its face that it was signed in due time,[26] while in others such a showing is deemed an essential part of the record proper.[27]

Settlement, signing, and filing.[28]—The bill must be settled by the judge who tried the case [29] unless disqualified,[30] deceased, or retired.[31] It must be presented [32] during the term [33] or within the time limited by statute rule, or order,[34] or an ex-

does not present such rulings for review unless they are incorporated in the bill of exceptions. McLennon v. Fenner [S. D.] 104 N. W. 218.

25. Under Rev. St. § 5302 as amended, the signature of the judge to a bill of exceptions is evidence of the settling, as well as of the allowing and signing of the bill. Cincinnati Traction Co. v. Stephens, 7 Ohio C. C. (N. S.) 454. A bill of exceptions is not rendered invalid by reason of the failure of the trial judge to certify that it was "settled," where there was no controversy over the bill, but it was allowed as presented. Sullivan v. Franklin Bank, 6 Ohio C. C. (N. S.) 468. The signature of the judge to the bill allowing it and ordering it to be filed as part of the record authenticates all the statements of the bill, both evidence and exceptions. Harden v. Card [Wyo.] 85 P. 246.

26. Mistake in date cured by recital. Clegg Lumber Co. v. Atlantic & B. R. Co., 123 Ga. 603, 51 S. E. 575. The question as to whether a bill of exceptions was presented in time must be determined from the bill itself and not from affidavits of the attorneys. Harden v. Card [Wyo.] 85 P. 246. A recital in an order filing a bill of exceptions that it was tendered on a day prior to the expiration of the time for filing, is insufficient to show that the bill was actually tendered on such day. Nickell v. Hurst [Ky.] 93 S. W. 1043. A bill of exceptions must affirmatively show that it was timely signed. Kellar v. State [Ala.] 40 So. 84. A bill is settled in good time where from the face of the bill it appears that successive steps were taken immediately, each being introduced by the word "thereupon" without further date. Humbarger v. Humbarger [Kan.] 83 P. 1095. The clerk's indorsement on a bill of exceptions showing date of filing has no other effect than to supplement the recital in the bill as to date of presentation. Harden v. Card [Wyo.] 85 P. 246.

27. See ante, § 9 A.

28. See 5 C. L. 168.

29. While a judge cannot properly certify to what did not take place before him, he may certify to matters of record in the case before him, and, therefore, a judge may certify that a bill of exceptions pendente lite was certified, filed, and appears of record in the case, though the ruling complained of by the exceptions pendente lite may have been made by another judge than himself. Hall County v. Gilmer, 123 Ga. 173, 51 S. E. 307. The trial judge alone can certify to proofs, rulings, and exceptions. Knights Templars & Masons' Life Indemnity Co. v. Crayton, 110 Ill. App. 648. The bill of exceptions must be signed by the trial judge. That trial judge was sick held not sufficient to authorize signing by another judge. Supreme Lodge, Knights & Ladies of Honor v. Rehg, 116 Ill. App. 59. The approval of the judge of a statement of facts and bill of exceptions cannot be delegated. Gray v. Frontroy [Tex. Civ. App.] 89 S. W. 1090.

30. A judge who was formerly of counsel in a case is not, under Rev. St. 1899, § 1602, qualified to sit in the case for the purpose of settling a bill of exceptions, without consent of the parties. State v. Bradley [Mo.] 92 S. W. 464.

31. Under Rev. Laws, c, 173, § 108, where the judge who tried the case is dead, a bill of exceptions may be signed by another judge. Neyburyport Inst. for Sav. v. Coffin, 189 Mass. 74, 75 N. E. 81. Acts 1902, p. 44, No. 35, providing that in case of the death of a judge of the supreme court any judge of that court may allow or amend exceptions in a case tried by such deceased judge, applied to a cause pending at the time it took effect, and a party to such cause was not entitled to a new trial because of the death of the trial judge. Johnson v. Smith [Vt.] 62 A. 9. While in some states a judge cannot settle a bill of exceptions after his term has expired, the weight of authority and better reasoning favors such a power. Larkin v. Saltair Beach Co. [Utah] 83 P. 686. The provision whereby a judge is empowered to settle a bill of exceptions after his term has expired is within the proper legislative authority of the legislature and such a bill is valid. Id.

32. Presentation was sufficient to authorize signing and sealing after the period limited for presentation though at the time of presentation the judge immediately surrendered the bill to opposing counsel who retained it until the time of signing. Provident Sav. Life Assur. Soc. v. King, 117 Ill. App. 556.

33. A bill of exceptions to the overruling of a motion to dismiss a petition for condemnation which was filed at a term subsequent to the term in which such motion was overruled, without leave for time for settling the bill of exceptions, will be expunged. Cella v. Chicago & W. I. R. Co., 217 Ill. 326, 75 N. E. 373. A bill of exceptions signed by the court after the adjournment of the court where the time has not been extended by order or agreement will not be considered. Browning v. Daniels [Ala.] 39 So. 571. A bill of exceptions signed after the expiration of the term and without an order or agreement extending the time, cannot be considered. Meyer v. Alverson [Ala.] 39 So. 984.

34. In computing the time the usual mode of computation, excluding the first and including the last day, will be adopted. Lewis Tp. Imp. Co. v. Royer [Ind. App.] 76 N. E. 1068. A bill of exceptions not signed within the time cannot be considered. Cooley v. U. S. Sav. & Loan Co. [Ala.] 39 So. 515; Gray v. Frontroy [Tex. Civ. App.] 89 S. W. 1090. A bill of exceptions in California must be presented to judge or clerk for the judge within 10 days after service of proposed amendments (Code Civ. Proc., § 650); how-

tension of such time duly allowed [35] before the expiration of the time originally limited [36] and made of record.[37] Relief in case of accident, mistake, or other excusable neglect, is generally provided.[38] A bill of exceptions will not be disregarded although the motion to the court was for leave to serve statement while notice of intentions to move for new trial stated that it would be made on bill of exceptions.[39] The bill must be approved [40] as and for a bill [41] in such manner as to verify it.[42]

ever, if service is by mail one additional day for each 25 miles is granted not to exceed 90 days [§§ 1012, 1013] (Prefumo v. Russell [Cal.] 83 P. 810), and a letter acknowledging receipt of the proposed amendments does not change service by mail into personal service so as to deprive appellant of the benefit of § 1013 (Id.).

35. Where a judge extends time to settle a case-made beyond his term of office and his successor within that extension again extends it to a definite date, providing that the trial judge shall settle said bill, a bill so settled is proper. Stanton v. Barnes [Kan.] 84 P. 116. Objections to the extension of time for settling the bill of exceptions may be waived by stipulations based on such extension. Culver v. Van Buren Circuit Judge [Mich.] 12 Det. Leg. N. 597, 105 N. W. 139. Time for settling bill of exceptions was extended to Sept. 1. The parties then stipulated that they would if possible agree on a bill before July 25 to be signed by the judge Sept. 1, as of July 29. No agreement being made the bill was presented, and amended Sept. 1, and settled as per order on Sept. 5, as of July 29, according to stipulation. Held, objection to extension to Sept. 1, waived by the stipulation. Id. An order granting an extension of time within which to serve a bill of exceptions based on certain conditions must be fully complied with to entitle appellant to said extension. Wilson v. Arnot [Cal. App.] 84 P. 293. Under Acts 1900-01, pp. 830, 831, an order extending the time for filing a bill of exceptions must be signed by the presiding judge and not by the court. Arnett v. Western R. Co. [Ala.] 39 So. 775. An order made by the court instead of the judge extending the time for signing the bill of exceptions is void. Western Ry. of Alabama v. Russell [Ala.] 39 So. 311. Where an order extended the time for signing "until the 22nd day of December," the time for signing expired on December 21st. Heal v. State [Ala.] 40 So. 571. A bill of exceptions may be signed during the next term succeeding that at which it was tried if within the time allowed by order of court. Code 1896, p. 1200, Practice Rule 30 has no application. Driver v. King [Ala.] 40 So. 315. A bill signed within the time allowed by order of court and within six months from the adjournment of the term at which it was tried is valid. Code 1896, § 620. Id. When the time to file a bill of exceptions has been extended into a subsequent term, the court will probably retain jurisdiction to sign, seal, and order it filed at any time within such subsequent term even after the extended time if within the same term. Provident Sav. Life Assur. Soc. v. King, 117 Ill. App. 556. A bill of exceptions being presented in time, the court has power to sign and seal the same at any time during that term. Id. Under Inferior Court Rule No. 30 (Code 1896, p. 1200), a bill of exceptions signed at a subsequent term though within the time specified by the agreement of the parties, is invalid. Vines v. Vines [Ala.] 40 So. 84. A bill of exceptions must be presented for signature and seal during term at which the cause is disposed of, or within such future time as shall be limited by the court by an order entered during that term. Pieser v. Minkota Milling Co. [Ill.] 78 N. E. 20.

A **probate court** as a court of record has authority to settle and sign a bill of exceptions and extending the time for so doing beyond its term under L. 1901, p. 502, c. 275, § 1; Gen. St. 1901, § 4753. Humbarger v. Humbarger [Kan.] 83 P. 1095.

36. Extension of time to settle must be granted before expiration of time originally allowed. Burns v. Gibbs [Ala.] 41 So. 303; Sandstrom v. Smith [Idaho] 84 P. 1060; Wilson v. Arnot [Cal. App.] 84 P. 293; Butter v. Lamson, 29 Utah, 439, 82 P. 473; Henderson v. Roy [Ala.] 40 So. 59; Hack v. Nason [Mass.] 76 N. E. 906; Jordan v. Simmons [Ala.] 39 So. 670; Dothan Nat. Bank v. Wiggins [Ala.] 40 So. 967; Pieser v. Minkota Milling Co. [Ill.] 78 N. E. 20.

37. An order extending the time for signing a bill of exceptions must be entered on record or a minute made within the time for signing. Cooley v. U. S. Sav. & Loan Co. [Ala.] 39 So. 515. A statement by the trial judge that an order extending the time for signing was made but through error was not entered of record until after the expiration of the time does not relieve the appellant. Id.

38. If the party who prepares and tenders the bill of exceptions is not at fault, delay that is occasioned by his adversary or by the act of the judge may be excused. Franklin County v. Furry [C. C. A.] 144 F. 663. Where appellant had an adequate remedy under Rev. St. 1889, § 1679, to procure an extension of time for settling a bill of exceptions, the judge being disqualified, by causing election of a special judge, which he failed to make use of, mandamus to compel the disqualified judge to extend time for settling bill will be denied. State v. Bradley [Mo.] 92 S. W. 464. Under Code Civ. Proc. § 473, it is within power of trial court to relieve a party from default in serving and filing a bill of exceptions upon a sufficient showing of mistake, inadvertence, or excusable neglect. Sauer v. Eagle Brewing Co. [Cal. App.] 84 P. 425. Such an order will be interfered with only on showing of gross abuse of discretion. Id.

39. Sauer v. Eagle Brewing Co. [Cal. App.] 84 P. 425.

40. A bill of exceptions though filed does not become a part of the record if not signed by the judge. Everett v. Butler, 192 Mo. 564, 91 S. W. 890. A supplemental bill or exceptions cannot be considered on appeal where it was not signed or approved by the judge. Flint v. Illinois Cent. R. Co. [Ky.] 88 S. W. 1055. Where the judge actually signs a bill

Approval must be the judge, as such, within the time allowed by law,[43] and the approved bill must be filed [44] in the court below after signature,[45] within the time allowed by law;[46] and in some jurisdictions it is required to be served on the adverse party.[47] It is generally held that if the bill is presented in time, delay of the court

of exception but through inadvertence signs below the attorney's signature while the space for signature was above does not invalidate the bill. Fleisher v. Hinde [Mo. App.] 93 S. W. 1126. In Georgia a bill of exceptions may be settled and signed pendente lite, and in such case it is not necessary that the bill of exceptions on final writ of error be certified by the judge. Hall County v. Gilmer, 123 Ga. 173, 51 S. E. 307. An exception not authenticated by the signature of the trial judge cannot be considered. Jones v. State [Md.] 61 A. 222. The failure of the trial judge to sign a bill of exceptions at the end thereof does not render the bill invalid, where the cover which is attached to the bill shows the time it was received and other matters, and there is a statement in the bill as to the time it was received and allowed, which is signed by the judge. City of Norwalk v. Jacobs, 7 Ohio C. C. (N. S.) 229.

41. Where the transcript of the evidence was not signed by the judge as and for a bill of exceptions and there was nothing to identify such transcript as a bill of exceptions, the appellate court could not consider the sufficiency of the evidence. Adams v. Pittsburgh, etc., R. Co. [Ind.] 74 N. E. 991. Although a document is set forth in the transcript as "Statement of the Case" it may also be treated as a bill of exceptions. Pease v. Fink [Cal. App.] 85 P. 657.

42. A certification which does not verify the truth of the bill is insufficient. Anderson v Winer [Fla.] 39 So. 31. Where on application to settle a bill of exceptions there is a dispute as to occurrences at the trial, the trial judge must decide it and certify the bill according to his decision and a certificate leaving to the appellate court the settlement of such disputes is insufficient. Id. Findings of trial court conclusive on conflicting evidence as to settlement. Glassell v. Glassell, 147 Cal. 510, 82 P. 42. The word "allowed" is not essential in the allowing of a bill of exceptions and it may be supplied by equivalents. Harden v. Card [Wyo.] 85 P. 246.

43. Butter v. Lamson, 29 Utah, 439, 82 P. 473. Under Code Civ. Proc. § 650, bill of exceptions in election contests must be settled within 10 days after entry of judgment and motion therefor and such a case does not come within § 649. McCarty v. Wilson [Cal. App.] 83 P. 170. If the appellant tenders a complete bill of exceptions within the time allowed, the court may sign it at a subsequent term. Proctor Coal Co. v. Strunk [Ky.] 89 S. W 145. If appellant timely presents a complete bill of exceptions, the court may correct it before signing though he signs at a subsequent term Id. Where the statute requires the statement of facts and bill of exceptions to be approved by the judge, such approval is essential. Gray v. Frontroy [Tex. Civ. App.] 89 S. W. 1090. Under Code 1904. § 3385, the trial judge may sign the bill of exceptions at any time during the term at which the opinion of the court is announced, or within thirty days after such term expires, provided another term does not occur before the expiration of such thirty days, in which case the bill must be signed before the beginning of such term. Hoover v. Saunders [Va.] 52 S. E. 657.

44. Bill of exceptions not filed below nor authenticated by certificate of the clerk cannot be considered. Duncan v. State [Neb.] 106 N. W. 1014. A bill of exceptions has no validity and is no part of the record in the absence of an order of the court filing it and making it a part of the record. Holmes v. Robertson County Ct. [Ky.] 89 S. W. 106. A bill of exceptions must be filed by an order of the court entered in its order book; a certificate of the judge appended to the bill does not make it a part of the record. Proctor Coal Co. v. Strunk [Ky.] 89 S. W. 145. An entry in the clerk's minute book reciting that the bill of exceptions was filed and made a part of the record is a sufficient record of the filing and allowance until the formal record is made up. Fleisher v. Hinde [Mo. App.] 93 S. W. 1126. It is necessary that a bill should be filed after allowance and signing. Harden v. Card [Wyo.] 85 P. 246. Where it is apparent that a bill of exceptions was left with the clerk of court for filing his failure to indorse it as filed cannot invalidate it. Id

45. The filing before allowance is insufficient. Harden v. Card [Wyo.] 85 P. 246.

46. Hesse v. Queen Ins. Co., 115 Mo. App. 89, 90 S. W. 1165; School Dist No. 1, Tp. 24, R. 4 v. Boyle, 113 Mo. App. 340, 88 S. W. 136; Henry v. Beal & D. Dry Goods Co. [Ark.] 88 S. W. 987. Bill must be filed below within 15 days after judge's certificate. Swafford v. Swafford [Ga.] 53 S. E. 959.

47. Sending to the adverse party by mail a copy of the bill of exceptions without any signature of counsel, without any accompanying letter, and without any memorandum of statement as to the filing thereof, is not a sufficient notice under Rev. Laws, c. 173, § 106, and Superior Ct. Rules 29, 47. Broomfield v. Sheehan [Mass.] 77 N. E. 525. Where several causes were consolidated by an order of the court, service of notice of the filing of exceptions upon an attorney of record of one of the petitioners, who appeared in court and tried the case for all of the petitioners, was sufficient service on all of the petitioners. Pierson v. Boston El. R. Co. [Mass.] 77 N. E. 769. Where pending a suit against an executor the defendant died, whereupon the court refused the plaintiff's motion to make residuary legatees parties, and at the instance of such legatees and pursuant to an order previously passed dismissed the plaintiff's petition for failure to bring in a certain party, and the plantiff thereupon sued out a writ of error excepting to such ruling, an acknowledgment of service of the bill of exceptions by one of the counsel who moved for the dismissal, as attorney for the estate, was held insufficient. Searcy v. Walker [Ga.] 53 S. E. 606. The return of service of a bill of exceptions must be entered upon or annexed to the

will not prejudice appellant,[48] and the judge may make amendments after expiration of the time to present,[49] but a motion to settle must be brought on with due diligence.[50] If counsel makes no objection to a bill except that it was not prepared by the official reporter, the judge is authorized to sign and seal it as correct.[51] The duty of the trial court to approve a truthful bill presented in time will be enforced by mandamus;[52] but an appellate court will not, on mandamus, overrule the statement of the trial judge as to what were the facts.[53] In some states provision is made for authentication by affidavit of bystanders if the judge refuses to sign.[54] A bill duly settled is a record and can only be corrected as such,[55] and this rule is applicable to the certificate to the bill.[56]

original bill of exceptions, and where such a return is made upon a separate paper, which is not annexed to the bill of exceptions prior to the time that it is transmitted to the clerk of the supreme court, the judge of the trial court, while the case is pending in the supreme court, has no authority to pass an order declaring such entry of service to be a part of the record in the case and ordering the same to be transmitted to the clerk of the supreme court. Kahn v. Hollis [Ga.] 53 S. E. 95. Where the service is made by an officer, and the return shows personal service, it will be presumed, in the absence of anything in the record to the contrary, that the person on whom the service was made lived in the county over which the jurisdiction of the officer extended. Jones v. McCrary, 123 Ga. 282, 51 S. E. 349. Where the only evidence of service of the bill of exceptions is an entry of an officer to the effect that he had left a copy of the same at the most notorious place of abode of a named officer of the corporation which was the defendant in error, the writ of error must be dismissed for insufficient service of the bill of exceptions. Anderson v. Albany & N. R. Co., 123 Ga. 318, 51 S. E. 342. Where devisees appear and defend on a petition for partial distribution of an estate, they are such adverse parties as to be entitled to be served with a copy of the bill of exceptions. In re Young's Estate [Cal.] 85 P. 145. Under Code Civ. Proc. § 650, a bill of exceptions must within ten days after notice of entry of judgment be served upon the adverse party, which under § 940 means every party in interest. In re Young's Estate [Cal.] 85 P. 145. A failure to serve some of the necessary parties with the bill of exceptions does not require or authorize trial court to refuse to settle the bill at all (Id.), nor does it affect the jurisdiction of appellate court (Id.).

48. The fact that a bill was not signed until after the time allowed for presentation, will not defeat a bill timely and properly presented. Harden v. Card [Wyo.] 85 P. 246.

49. Harden v. Card [Wyo.] 85 P. 246. The appellate court cannot say that a bill was not properly presented to the trial court where the certificate states that at the time of presentation being the statutory limit, little more than one-half of the evidence and exceptions had been transcribed, which the court thereafter permitted to be corrected and amended by the incorporation therein of all the evidence and exceptions. Id. The judge's denial of the correctness of the statement recited in the bill of exceptions and refusal to sign it because record did not show that appellant had taken exceptions is a sufficient correction thereof under Burns' Ann. St. 1901, § 641, requiring a judge to correct a bill of exceptions presented for his signature. Indianapolis Traction & Terminal Co. v. Grey [Ind. App.] 77 N. E. 1131.

50. Motion to settle bill may be regarded as abandoned when allowed to rest for so long a time that court could not entertain it. Moultrie v. Tarpio, 147 Cal. 376, 81 P. 1112.

51. People v. Chetlain, 219 Ill. 248, 76 N. E. 364.

52. Where the trial judge refuses to allow exceptions actually taken, or in the form proposed, or in the form appearing in the reporter's minutes, on petition to the supreme court under Code Civ. Proc. § 652, a bill of exceptions setting out the proceedings as they appear in the reporter's notes will be allowed. In re Dolbeer's Estate, 147 Cal. 569, 82 P. 192. Any improper or unauthorized refusal to settle or certify a bill of exceptions can be corrected by a writ of mandate. Miller v. Central Ins. Co. [Cal. App.] 83 P. 289. Mandamus is the proper remedy where the judge has refused to sign the bill without examining the evidence stated therein on the ground that the transcrip of the evidence was not prepared by the official stenographer. People v. Chetlain, 219 Ill. 248, 76 N. E. 364. If an exception has actually been taken and the trial judge refuses to allow it, under Code Civ. Proc. § 652, the aggrieved party may apply to the supreme court and have it allowed whereby it becomes a separate and independent bill of exceptions. In re Dolbeer's Estate, 147 Cal. 359, 81 P. 1098.

53. An answer by a judge in mandamus to compel him to sign a bill of exceptions, which merely states that the bill presented was not a true bill, and does not show a willingness and effort on the part of the judge to perfect the bill, is insufficient. State v. Fiedler, 3 Ohio N. P. (N. S.) 283.

54. An exception attested by bystanders not filed until six days after the correction of an exception by the judge cannot be considered Civ. Code, § 337, subsec. 3. Asher v. Brashear [Ky.] 90 S. W. 1060.

55. A bill of exceptions is settled at the time the judge determines what shall go into it, not at the time of certification. A bill of exceptions when settled is part of the record and cannot be amended after the term unless there is matter of fact to amend by. Callahan v. Houck & Co. [Wyo.] 83 P. 372. After settlement the only duty of the court and only right of the parties is to see that the engrossed statement or

(§ 9C) 2. *The settled case or statement of facts.*[57]—The case must be settled and approved, unless a statute provides for an agreed case, by the judge who tried the case,[58] within the district,[59] within the time limited by law,[60] rule, or stipulation of parties, or an extension thereof duly granted.[61] An objection that the statement has not been presented to the judge in time must be urged at the time of actual

bill of exceptions shall incorporate all that the court intended it to at the time of settlement. Ryer v. Rio Land & Improvement Co., 147 Cal. 462, 82 P. 62. A party may be allowed to amend his bill of exceptions to state more accurately an exception stated by him in his bill within the time allowed for filing a bill, but not to add an exception not originally stated in the bill of exceptions. Currier v. Williams, 189 Mass. 214, 75 N. E. 618. In California when a bill of exceptions has been settled by the trial judge. the bill so settled is complete and unchangeable as to every exception therein contained. In re Dolbeer's Estate, 147 Cal. 359, 81 P. 1098. Where the record shows that the proper exceptions were taken but through clerical error fail to appear in the bill of exceptions, the appellate court will permit appellant to amend the bill. Carpenter v. Dressler [Ark.] 89 S. W. 89.

56. Callahan v. Houck & Co. [Wyo.] 83 P. 372.

57. See 5 C. L. 171.

58. City of Enid v. Wigger [Okl.] 85 P. 697; Newburyport Inst. for Sav. v. Coffin, 189 Mass. 74, 75 N. E. 81. Where counsel for plaintiff in error attaches to a case-made after the same has been settled and signed by the court, a certificate of the clerk that the copies of documents therein contained from his office are true and correct, such a certificate is not a part of the case made nor an amendment thereto, and can have no office with reference thereto unless such case-made should at some time be used as a transcript. Southern Pine Lumber Co. v. Ward [Okl.] 85 P. 459. Where a visiting judge tried case in one county. Downs Farmers' Warehouse Ass'n v. Pioneer Mut. Ins. Ass'n [Wash.] 83 P. 423. Certificate of counsel and stenographer that case-made contains all the evidence is not sufficient. Sawyer & A. Lumber Co. v. Champlin Lumber Co. [Okl.] 84 P. 1093. Case-made should be certified by judge, not by clerk. Williamson v. Williamson [Okl.] 83 P. 718. The trial judge may, in his absence, authorize another judge to extend the time for preparing a statement of facts. Twaddle v. Winters [Nev.] 85 P. 280.

59. A case settled and signed by the judge out of the district where it was tried but within the territory and within a district where he then is exercising judicial powers is properly signed and settled. City of Enid v. Wigger [Okl.] 85 P. 697. A case need not be settled and signed in the district where it was tried. Id.

60. Franz-Milton Co. v. Hall [N. J. Law] 62 A. 269. In Washington no time is fixed by statute within which a proposed statement of facts must be settled and certified or notice of settlement served. 2 Ballinger's Ann. Codes & St. § 5058. Floding v. Denholm [Wash.] 82 P. 738. The burden is upon the appellant to perfect his statement of facts within a reasonable time; or he will be presumed to have abandoned his appeal. Id. The court had jurisdiction to consider an equity appeal on the merits as against an objection that the case was not settled within four months from the entry of decree where the record did not show the date of "entry" out that the decree "was granted" Sep. 18, 1903, case settled as of Jan. 18, 1904, and the date of the certificate was Feb. 1, 1904. Wheeler v. Lasch [Mich.] 12 Det. Leg. N. 987, 106 N. W. 689. Laws 1905, p. 536, c. 320, § 4, is prospective and not retrospective in its operation and conferred no power upon a trial judge who had, prior to the passage of the act, lost jurisdiction, to settle a case-made. Walton v. Woodward [Kan.] 84 P. 1028. A case-made settled after the lower court lost jurisdiction will not enable the court of review to take cognizance of the case. Naylor v. Berry [Kan.] 81 P. 473. Where judgment was entered on the 16th day of March, 1903, and a motion for a new trial was made and filed the next day and considered and overruled April 4th, 1903, at which time appellants were allowed 60 days in which to make and serve a case-made; the time so allowed commenced to run from the 4th of April. Southern Pine Lumber Co. v. Ward [Okl.] 85 P. 459. Where a judgment was rendered March 16, 1903, and a case-made settled, signed and filed in the supreme court, March 16, 1904, and the same is filed within one year under the rule fixed by the statute of Oklahoma which provides that "in the computation of time the first day shall be excluded and the last included." Id. Floding v. Denholm [Wash.] 82 P. 738.

61. The extension of time to make and serve a case-made is not an extension of time within which the same may be settled and signed. Southern Pine Lumber Co. v. Ward [Okl.] 85 P. 459. Orders extending time for filings can be made by the judge properly authorized, in any part of the state in chambers or in open court. Twaddle v. Winters [Nev.] 85 P. 280. Where a court reporter has left state, appellant is entitled to an extension of time to procure a transcript of the testimony for purpose of preparing statement. Id. Under Pub. Acts 1905, p. 178, No. 129, giving the circuit court power to extend the time for making and filing a case for one year after the filing of the decree, the court has no power to settle a case where no action is taken till after the expiration of the 40 days allowed by circuit court rule 47 for the settlement. City of Detroit v. Hosmer [Mich.] 12 Det. Leg. N. 878, 106 N. W. 399. In the absence of a showing otherwise, an order extending the time for a bill of exceptions is made on the day said order is filed. Sandström v. Smith [Idaho] 84 P. 1060. Court will not review refusal of trial court to grant an extension of time within which to serve and file a proposed statement of facts, after entire time for filing has expired. Hotel Co. v. Merchants' Ice & Fuel Co. [Wash.] 84 P. 402.

settlement and counsel must have such objection if overruled embodied in his statement to be available on appeal.[62] Mandamus will lie to compel a judge to settle and sign a properly presented case-made.[63] Provision is usually made for settlement in case of the death or retirement of a judge.[64] It is generally provided that the proposed case, with notice of settlement,[65] be served on the adverse party,[66] who may present amendments or accept the case as proposed,[67] at the time of settlement. The proposed case when served must be complete or must refer intelligibly to matters to be inserted.[68] Cases dealing with the necessary contents of a settled case are discussed below.[69] The statement is sometimes required by rule to be indexed.[70]

62. Ryer v. Rio Land & Imp. Co., 147 Cal. 462, 82 P. 62. Where plaintiff fails to appear at the settlement of a statement to urge an objection, previously reserved, that the statement was not prepared and presented in time, the judge may assume that such objection is without foundation. Perry v. J. Noonan Loan Co. [Cal. App.] 82 P. 623. But objections or motions urged subsequent to the time of settlement need not be so incorporated. Ryer v. Rio Land & Imp. Co., 147 Cal. 462, 82 P. 62.

63. A mandate will issue compelling trial judge to embody in settled case such evidence as was heard by commissioners, which was not properly a part of the record but considered by the court in hearing application for judgment on the report of the commission, under Ballinger's Ann. Codes & St. § 5060, nor is it any defense to such a mandate that the court has already settled a statement of facts which omits such testimony. Richardson v. Steiner [Wash.] 83 P. 1027.

64. Mandamus will not issue to compel a judge to settle a case-made after his term of office has expired, if no definite time for its settlement has been set before his term expired. State v. Lewis [Kan.] 83 P. 619.

65. Excusable absence from copy served of the demand for review contained in the original. Case Threshing Mach. Co. v. Balks [N. D.] 107 N. W. 57.

66. The court having ordered judgment for plaintiff in an action to recover personal property, the judge could not refuse to settle defendant's case on the ground that an intervener had not been served, such intervener not being an adverse party within § 5400, G. S. 1894. State v. Flaherty [Minn.] 106 N. W. 1133. An objection that an engrossed statement was not served on opposing counsel might justify a refusal of the judge to certify until after such examination but would not justify an absolute refusal to certify. Ryer v. Rio Land & Imp. Co., 147 Cal. 462, 82 P. 62. Under Ballinger's Ann. Codes & St. § 5058, it is the duty of the trial judge to certify a statement of facts without notice where no amendments are offered by appellee. Downs Farmers' Warehouse Ass'n v. Pioneer Mut. Ins. Ass'n [Wash.] 83 P. 423. An admission by plaintiff's attorney of correctness of statement and his consent that it be settled waives any right of proposing amendments and authorized defendant to present it to the judge for settlement, without any notice to him. Code Civ. Proc. § 659. Perry v. Noonan Loan Co. [Cal. App.] 82 P. 623. Statement of facts need not be served on one as to whom plaintiff dismisses action prior to or during trial. Sheehan v. Bailey Bldg. Co. [Wash.] 85 P. 44.

67. When appellee files an additional statement, he is required by the rule to point out wherein appellant's statement is incorrect, otherwise the latter will be taken as correct. Cobe v. Summers [Mich.] 12 Det. Leg. N. 965, 106 N. W. 707.

68. A statement in a proposed statement of facts to the effect that a certain exhibit or deposition was offered and received in evidence is an appropriate reference thereto within 2 Ballinger's Ann. Codes & St. § 5059. Thornley v. Andrews [Wash.] 82 P. 899. And such exhibits or depositions may be attached to the statement of facts by order of the court without notice to the respondents. Id. Papers may be included in the settled case though not marked where there is no question as to identity. Satkofsky v. Jarmulowsky, 95 N. Y. S. 555.

69. Where a motion is heard on papers alone, the appellant should print the papers recited in the order, which papers should be certified to by the surrogate or stipulated by the attorneys according to the rules. In re Schmid, 98 N. Y. S. 921. In California the court will not strike the statement of facts for failure to except properly to findings but will consider it only for the purpose of reviewing the exclusion of evidence and not on the facts generally. Bringgold v. Bringgold [Wash.] 82 P. 179. Where the certificate of trial judge recites that the statement contains all the evidence except that dealing with issues found in favor of appellant and not necessary to the issues now before the court, a motion to strike the statement for failure to contain all the evidence will be denied. Smith v. Glenn [Wash.] 82 P. 605. There is no substantial difference in California between a statement of the case and a bill of exceptions, the former merely, in addition to setting forth the exceptions, must also specify the particular ones upon which appellant relies in support of his motion. Pease v. Fink [Cal. App.] 85 P. 657. It is improper even in equity cases to print the entire stenographer's minutes including immaterial testimony, repetitions, and arguments. Tower v. Somerset Tp. [Mich.] 12 Det. Leg. N. 983, 106 N. W. 874. The stenographic report of a trial in the district court may be certified by the trial judge as the statement of case on appeal under Act April 12, 1905 (P. L. 1905, p. 259), but the attorneys cannot certify. Speiser v. North Jersey St. R. Co. & Pub. Service Corp. [N. J. Law] 63 A. 867.

70. Statement will not be stricken for failure to index if an index is prepared by clerk of appellate court. Smith v. Glenn

(§ 9C) 3. *Abstracts.*[71]—Where the practice of abstracting prevails, the appellant should, in every case,[72] present in due time[73] an abstract containing all that is necessary to an understanding of the matters which he wishes to urge,[74] and showing the names of the parties, and nature of the proceedings, a short abstract of the bill or petition, and the testimony on which the findings are based,[75] presenting the evidence with intelligible fullness,[76] and in a total absence thereof, the case will not be considered on its merits.[77] The court is not bound to go to the bill of exceptions in search of evidence not abstracted but may do so in its discretion.[78] On the other hand, the evidence and proceedings must be condensed as far as practicable,[79]

[Wash.] 82 P. 605. Failure to index not fatal if transcript is paged. Williamson v. Williamson [Okl.] 83 P. 718.

71. See 5 C. L. 173.

72. Although a complete transcript is filed, appellant must file a printed abstract as required by court rule 13 (73 S. W. VI). Shaffer v. Detie, 191 Mo. 377, 90 S. W. 131. The filing of a complete transcript does not dispense with an abstract as required by Rev. St. 1899, § 813, and court rules 12, 13 (73 S. W. VI). Whiting v. Big River Lead Co. [Mo.] 92 S. W. 883.

73. McDonald Bros. v. Adams Ex. Co. [Mo. App.] 91 S. W. 444.

74 A mere index of the record insufficient. Lamoert v. Janss, 117 Ill. App. 71.

75. An abstract containing only two divisions of a notice of public hearing as to a special assessment for local improvements, when the notice consisted of 12 divisions, is insufficient to present any question as to the sufficiency of such notice. Heikle v. Washington, 219 Ill. 604, 76 N. E. 854. An abstract not showing the pleadings and judgment, nor that the court found for defendant, nor exceptions to the finding or to the judgment, presents nothing for review. Anderson v. Galesburg, 118 Ill. App. 525. Appellant must furnish a complete abstract or abridgement of the record referring to appropriate pages on the record by numerals on the margin, and indexed. Rule 23, Fourth Dist. Johnson v. Hartman, 119 Ill. App. 206. Abstract in replevin appeal not containing affidavit, writ, return, justice's transcript, instructions, verdict, motion for new trial, judgment appealed from, or any of them, and not indexed, insufficient. Id. The abstract must be a complete abstract or abridgement of the record. Enright v. Gibson, 119 Ill. App. 411. Appellant is required to furnish a complete abstract or abridgement of the record, showing everything upon which error is assigned. Grabill v. Ren, 110 Ill. App. 587. The abstract must be sufficiently full to show all the errors relied on for reversal. Hixson v. Carquevlle Lithographing Co., 115 Ill. App. 427. An appellate court may refuse to examine the record for errors and exceptions when the abstract does not sufficiently show the matter from which they arise. A mere index of the record insufficient. Mayer v. Schneider, 112 Ill. App. 628. An abstract will not be stricken which contains everything necessary to a determination of questions involved on appeal. Berger v. Neville, 117 Ill. App. 72. Where abstract contains a recital of the proceedings resulting in the appeal, the pleadings, and a summary of the evidence of each witness introduced, substantially complies with rule of court in cases where a full transcript is filed. White v. Blankenbeckler, 115 Mo. App. 722, 92 S. W. 503. The abstract of the record must show at least a sufficient recital of the clerk's record to show that the bill of exceptions was timely filed. Bradbury v. McGeehan, 115 Mo. App. 99, 91 S. W. 437. An abstract which fails to show an order extending the time for filing the bill of exceptions, is defective, though it does contain a recital that the bill of exceptions was filed on a certain day "In accordance with the order of the court made and entered." Everett v. Butler, 192 Mo. 564, 91 S. W. 890. Where the appellant fails to give an abstract of a pleading, the appellate court will not consider the sufficiency of such pleading. Union Inv. Co. v. McKinney [Ind. App.] 74 N. E. 1001.

76. Where the abstract is a mere index, appeal dismissed. Lambert v. Janss, 117 Ill. App. 71. An abstract reducing 39 pages of evidence to less than 4 pages, without any exhibits being abstracted, reference to the record being made as to such exhibits, is not a compliance with the rules of the court. Glos v. Shedd, 218 Ill. 209, 75 N. E. 887. An abstract failing to set out the evidence necessary to the consideration of the questions raised though it refers to the complete transcript, is insufficient. Sup. Ct. Rule 12 (73 S. W. VI). Vandeventer v. Goss, 190 Mo. 239, 88 S. W. 610. A brief of the evidence cannot properly include evidence which was rejected. Screws v. Anderson [Ga.] 52 S. E. 429. A recital in an abstract of a conclusion from testimony, insufficiently presents the testimony to the supreme court. Shorter University v. Franklin Bros. Co. [Ark.] 88 S. W. 587.

77. Will consider defective abstract if the questions involved are accessible. Hurd v. Fleck [Colo.] 82 P. 485; McMurty v. Fairley [Mo.] 91 S. W. 902. The court may refuse to consider errors where the matters on which they are predicated are not sufficiently set out in the abstract. Enright v. Gibson, 119 Ill. App. 411.

78. Denver & R. G. R. Co. v. Vitello [Colo.] 81 P. 766.

79. An abstract must be an abridgement of the record sufficiently complete to fully present every error and exception relied upon. A mere index referring to pages on the record is insufficient. Mayer v. Schneider, 112 Ill. App. 628. The supreme court will not review the evidence when it is apparent that there has been no bona fide effort to brief the evidence as required by law, and when the document purporting to be a brief of the evidence is extensively interspersed with objections to testimony, statements, motions, and arguments of

and proceedings and papers need not be set out in full, but the fact that each was duly had or served must be shown.

Supplemental or counter abstracts.[80]—Where an appellee is not satisfied with appellant's abstract, he is entitled to file on supplying the omissions.[81] In case of conflict between the abstracts the court will usually resort to the transcript.[82] In some jurisdictions, the abstract must be approved,[83] but where the practice of counter abstracting prevails, approval is usually unnecessary.

(§ 9) *D. Sufficiency of entire record to present particular questions (Presumptions on appeal).*[84]—The appellate court will look to the entire record[85] but to nothing outside of it,[86] and a record made for one purpose may sometimes be

counsel, ruling of the court, evidence to which objections were sustained, and also with colloquies between counsel and court, none of which could properly have been placed in a brief of evidence. McComb v. Hines, 123 Ga. 246, 51 S. E. 300.

80. See 5 C. L. 174.

81. A mere denial in an amended abstract is not sufficient to overcome the presumption that the entire record is before the appellate court. That appellee filed an amended abstract denying that the entire record was before the court but containing nothing material by way of amendment, did not overcome the presumption supported by a certificate of appellant's counsel, that the entire record was sent up. Raher v. Raher [Iowa] 107 N. W. 810. An independent abstract by appellee made after all necessary amendments had been made by him to appellant's abstract, and to which little reference is made in argument, will be stricken. Dale v. Colfax Consol. Coal Co. [Iowa] 107 N. W. 1096. Failure of appellee to make denial of appellant's abstract though operating as an admission that the supreme court has before it everything made of record in the case it does not admit that all the evidence was made of record by being duly certified and filed within the statutory period. Oskaloosa Nat. Bldg., Loan & Inv. Ass'n v. Baily [Iowa] 105 N. W. 417. Where the abstract contains statements not supported by the transcript as to exceptions taken, it is not the duty of the defendant in error to file an amended abstract to supply the omissions in the transcript, and failure to supply such omissions does not waive objection to sufficiency of transcript. Conrey v. Nichols [Colo.] 84 P. 470. In the absence of a sufficiently specific denial of appellant's abstract it will be presumed to contain the record with sufficient completeness to enable the court to pass upon the questions raised. Kossuth County State Bank v. Richardson [Iowa] 106 N. W. 923. Denial that the abstract with amendment thereto contains all the evidence offered, introduced, read or received, held too general under rule 22 requiring defects in the abstract to be specifically pointed out. Id. Sup. Ct. Rule 9, imposes on appellant the duty of abstracting the entire case; but in case of difference of opinion as to what should be abstracted, appellant may abstract what he deems material, referring to testimony which he considers immaterial by giving the facts which it tends to prove and the places in the record where it may be found, leaving it to the appellee to abstract further matter if he wishes. Beavers v. Security Mut. Ins. Co. [Ark.] 88 S. W. 848. Though rule 31 requires appellee to file his amended abstract within 10 days after receiving appellant's abstract, an amended abstract filed at a later date will not be stricken in all cases. Baker v. Oughton [Iowa] 106 N. W. 272. An amendment to appellee's abstract and his reply argument will not be stricken on the ground that the amendment was filed after appellant's argument and that the reply was mostly a reargument, where after the filing of the abstract and arguments on an appeal the submission of the case had been postponed pending the determination of another cause involving appellee's interest in the subject-matter of the suit and the papers objected to had been filed by appellee after the decision of the other case and in ample time to enable appellants to file further argument. Hickey v. Davidson [Iowa] 105 N. W. 678. An additional abstract curing material defects in the original cannot be filed after briefs have been filed and served without the consent of counsel or leave of court. Everett v. Butler, 192 Mo. 564, 91 S. W. 890.

82. In case of conflict between appellant's abstract and respondent's additional abstract, the court may examine the original record. Wood v. Saginaw Gold Min. & Mill. Co. [S. D.] 105 N. W. 101.

83. A paper purporting to be a brief of the evidence introduced on the trial in the court below, but which is not approved by the trial judge as correct, cannot be considered by this the supreme court. De Loach v. Planters' & People's Mut. Fire Ass'n, 122 Ga. 385, 50 S. E. 141. Though it does not appear, either from the transcript of the record or by a recital in the bill of exceptions, that a brief of the evidence has been approved by the court, or has been agreed upon by the counsel, the supreme court will not dismiss the bill of exceptions; but it cannot pass upon those assignments of error which depend for their determination upon the evidence, and, if all of the assignments of error are of this character, the judgment will be affirmed. Stansell v. Merchants' Farmers' Bank, 123 Ga. 278, 51 S. E. 321.

84. See 5 C. L. 174.

85. In Indiana, the appellate court may refer to the entire record and briefs of counsel on both sides to determine on what theory complaint proceeds, where issue is its sufficiency. Indianapolis Northern Traction Co. v. Harbaugh [Ind. App.] 78 N. E. 80.

86. Affidavits as to matters occurring at the trial not considered. Maddox v. Barr [Fla.] 38 So. 766.

The opinion of the trial judge if any cannot limit or qualify the findings of fact or

looked to for another.[87] Every presumption favors the correctness of the rulings below,[88] and accordingly the record, to present an alleged error, must not only show

decision. Grand Central Min. Co. v. Mammoth Min. Co. [Utah] 83 P. 648. Where the order appealed from, making a distribution of money, provided that the amount fixed was determined in the manner stated in the written opinion, the appellate court may refer to the opinion. Hogg v. Rose, 107 App. Div. 618, 94 N. Y. S. 914. A memorandum of the trial court attached to but not expressly made a part of its decision or order will be considered when it furnishes a controlling reason for the court's decision. Kipp v. Clinger [Minn.] 106 N. W. 108. But it may not be referred to for the purpose of impeaching express findings of fact or conclusions necessarily following from the decision made. Id. On appeal from an order setting aside a verdict and judgment thereon, a narrative of the justice in his opinion stating the facts on which he acted together with the minutes of the clerk are conclusive. Chichester v. Winton Motor Carriage Co., 110 App. Div. 78, 96 N. Y. S. 1006.

87. Bill of exceptions or statement may be used on appeal for determining whether errors of law had been made in the trial of the case. Bank of Commerce v. Ada County Abstract Co. [Idaho] 85 P. 919.

88. Carr v. Willoughby & Co. [Colo.] 85 P. 428; German v. Browne [Ala.] 39 So. 742; Boyer v. Pacific Mut. Life Ins. Co. [Cal. App.] 81 P. 671; Baldwin v. Napa & S. Wine Co. [Cal. App.] 81 P. 1037; Miller v. Queen Ins. Co. [Cal. App.] 83 P. 287; Bank of Visalia v. Dillonwood Lumber Co. [Cal.] 82 P. 374; Pelegrinelli v. McCloud River Lumber Co. [Cal. App.] 82 P. 695; Grunsky v. Field [Cal. App.] 82 P. 979; In re Bouyssou's Estate [Cal. App.] 84 P. 460; Hewel v. Hogan [Cal. App.] 84 P. 1002; Showers v. Zanone [Cal. App.] 85 P. 857; Hoodless v. Jernigan [Fla.] 41 So. 194; Lamar, T. & R. Drug Co. v. Lamar, 123 Ga. 667, 51 S. E. 584; Franklin Union, No. 4 v. People, 220 Ill. 355, 77 N. E. 176; Indianapolis St. R. Co. v. Johnson, 163 Ind. 518, 72 N. E. 571; Lake Erie & W. R. Co. v. McFall [Ind.] 76 N. E. 400. See Harmless and Prejudicial Error, 5 C. L. 1620. Greer-Wilkinson Lumber Co. v. Steen [Ind. App.] 77 N. E. 673; Bowen v. Webb [Mont.] 85 P. 739; Hyatt v. De Hart [N. C.] 52 S. E. 781; Edwards v. Eagles [N. D.] 107 N. W. 43; Byers v. Thacher [Tex. Civ. App.] 94 S. W. 138. Question allowed by the trial court susceptible of two constructions. Arnold v. Harrington Cutlery Co., 189 Mass. 547, 76 N. E. 194. Instrument is marked as an exhibit and annexed to the return, presumed that it was offered at the trial. Conroy v. Boeck, 45 Misc. 625, 91 N. Y. S. 80. A presumption will not be indulged unless called for by the silence of the record on the fact in question. Appearance being shown no presumption that process was issued and returned earlier and before bar of limitations. Dolan v. Burlington, etc., R. Co. [Iowa] 105 N. W. 834. Where in an action to determine title to land the record in tax proceedings shows the manner in which service of a summons or other jurisdictional notice was made and such service is ineffectual to confer jurisdiction, it will not be presumed that a valid service was made in some other way. Holmes v. Loughren [Minn.] 105 N. W. 558. To support a condemnation judgment it will be presumed that a bridge company performed its work within the statutory time, where such performance was prerequisite to the exercise of the power of eminent domain. Southern Ill. & M. Bridge Co. v. Stone [Mo.] 92 S. W. 475. Presumed in the absence of a countervailing ruling, that an erroneous ruling was adhered to. Boonville Nat. Bank v. Blakey [Ind.] 76 N. E. 529. Where the record shows leave to amend by substituting parties, such amendment will be presumed, on report to the supreme judicial court, to have been made. Mee v. Fay [Mass.] 76 N. E. 229. Where a complaint for services contains a count upon contract and one upon quantum meruit and proof is offered as to the former, a judgment for plaintiff will be presumed on appeal to have been rendered upon the contract count. Finney v. Bennett, 97 N. Y. S. 291. Where a chancellor modifies the report of a register, no presumption of correctness arises in favor of the chancellor, and it will be tried de novo. Andrews v. Frierson [Ala.] 39 So. 512. Where in an action on an injunction bond the court allowed attorney's fees it will be presumed, nothing to the contrary appearing, that they are for attorney's fees in getting rid of an injunction. Sutliff v. Montgomery, 115 Mo. App. 592, 92 S. W. 515. Where a case is tried by the court without a jury, it may be presumed on appeal that court considered and weighed the evidence with reference to those benefits which under the law could be deemed special. Spokane Traction Co. v. Granata [Wash.] 85 P. 261. Where record fails to show that notice of hearing of petition for appointment as administrator was given, or a day for the hearing set, the order of the court in vacating the appointment of an administrator will be assumed proper. In re Bouyssou's Estate [Cal. App.] 84 P. 460. Whenever from facts found trial court may have inferred other facts which would support the judgment, such other facts will be presumed to have been inferred by the appellate court. Griffin v. Pacific Electric R. Co. [Cal. App.] 82 P. 1084. Where plaintiff sues by his next friend, it must be assumed by the supreme court that the plaintiff is in esse where the only intimation to the contrary is a defense alleging warning plaintiff's intestate. Sloss-Sheffield Steel & Iron Co. v. Smith [Ala.] 40 So. 91. The appellate court will presume that the secretary of state performed his duty and did not file the articles of incorporation until the necessary fees were paid. State v. Superior Ct. of Pierce County [Wash.] 85 P. 669. It may be presumed if necessary, in favor of the action of the court below, there being nothing shown to the contrary, that a board of county commissioners, though its regular session was to continue only so long as business rendered absolutely necessary, was still in session when the appeal was taken, and, therefore, that no summons requiring the appellee in the court below to appear and answer the appeal was necessary (Burns' Ann. St. 1901, § 7862). Perdue v. Gill [Ind. App.] 73 N. E. 844. After judgment, it will be presumed that a juror had the necessary qualifications unless the contrary affirmatively appears in the record. McKnight v.

the ruling complained of,[89] and objection and exception thereto,[90] but so much of the evidence [91] and proceedings below as to exclude every fair intendment in sup-

Seattle, 39 Wash. 516, 81 P. 998. Will presume that the judgment was entered upon the theory which makes it valid. Ross Oil & Gas Co. v. Eastham [Kan.] 85 P. 531. Where a certificate of the judge was necessary to justify the damages allowed and the record does not show any such certificate, it will not be presumed that it was made. Rarden v. Maddox [Ala. 39 So. 95. Depositions although taken to be used in a case will not be presumed to have been admitted and read in evidence merely because they are forwarded to the appellate court by the clerk below. Swift v. Swift, 39 Wash. 600, 81 P. 1052. Where the pleadings failed to allege that lease was made with consent of the county court held it would be presumed that it was made without such consent. Sess. Acts 1853-54, vol. 1, § 358, c. 178 and Ky. St. 1903, § 1808 construed. Brooke v. Maysville & B. S. R. Co., 26 Ky. L. R. 1022, 83 S. W. 117. Testimony which should not have been admitted will be treated as having been disregarded where trial was by court and it does not affirmatively appear that findings are based on them. California Development Co. v. Yuma Valley Union Land & Water Co. [Ariz.] 84 P. 88. It will be assumed that the district court in making an order of revivor permitting an administrator to be impleaded in suit involving real estate had adequate reasons therefor, no showing to the contrary being made. Moore v. Wa-me-go [Kan.] 83 P. 400. Appellate court must presume that valid reasons exist for continuing the administration of an estate beyond the six-year period, so as to allow representative to file a cross bill. Lindemann v. Rusk, 125 Wis. 210, 104 N. W. 119. On appeal by a surety on a supersedeas bond it was presumed, on the state of the record, nothing appearing to the contrary, that the clerk had issued an order of supersedeas in the former appeal. United States Fidelity & Guaranty Co. v. Boyd [Ky.] 94 S. W. 35. Where motion for new trial was on bill of exceptions, it will be presumed that the bill was before the court though it was not filed till later. City of Austin v. Forbis [Tex.] 13 Tex. Ct. Rep. 818, 89 S. W. 405.

89. Williams v. Jones [Ariz.] 85 P. 399. Where the record does not show what disposition was made of a motion to strike out certain evidence it will be assumed that it was decided in favor of the succesful party. Maslon v. Sprickerhoff, 98 N. Y. S. 618. An assignment of error cannot be considered where the bill of exceptions fails to show the ruling complained of was ever made. Rice v. Dewberry [Tex. Civ. App.] 93 S. W. 715. Ruling on a demurrer. Henderson v. Berry Co. [Ala.] 39 So. 662; Troy v. Elyton Land Co. [Ala.] 39 So. 589; Union Fertilizer Co. v. Johnson [Ala.] 39 So. 684; Greely-Barnham Grocery Co. v. Cottingham [Ala.] 39 So. 567; Calhoun v. Texas Quarry & Mfg. Co. [Tex. Civ. App.] 90 S. W. 671; Moore v. Snell [Tex. Civ. App.] 88 S. W. 270; Lemp Brewing Co. v. McDougle [Tex. Civ. App.] 90 S. W. 215; Crawford v. Hord [Tex. Civ. App.] 14 Tex. Ct. Rep. 71, 89 S. W. 1097. Disposition made of motion for new trial. Fisher v. Lederer, 115 Ill. App. 289; Milner Garthwait v. Board of Education of School Coal & R. Co. v. Wiggins [Ala.] 38 So. 1010; Dist. No. 118, 117 Ill. App. 59.

90. The record must show definitely and specifically what was excepted to. Bringgold v. Bringgold [Wash.] 82 P. 179. One exception after two rulings insufficient as to first. Weske v. Chicago Union Traction Co., 117 Ill. App. 298. An assignment of error based upon an exception stating "defendant at the time excepted to the giving of instructions Nos. 2, 3, 4, 5, 8, and 9," will not be considered if any of the instructions are good. Wells v. Parker [Ark.] 88 S. W. 602. Must show exceptions. Dominion Co. v. Atwood, 114 Ill. App. 447; Seaboard Air Line R. Co. v. Hubbard [Ala.] 38 So. 750; Fleming v. State [Ala.] 39 So. 58; Gadsden Distilling Co. v. Kennedy Stave & Cooperage Co. [Ala.] 39 So. 622; Baker v. Jackson [Ala.] 40 So. 348; Axelson v. Anderson [Colo.] 83 P. 626; Hixon v. Carguevile Lithographing Co., 115 Ill. App. 427; Keeley Brewing Co. v. Mason, 116 Ill. App. 603; Standard Fuel Co. v. Garden City Fuel Co., 117 Ill. App. 259; Zipkie v. Chicago, 117 Ill. App. 418; Johnson v. Farrell, 215 Ill. 542, 74 N. E. 760; Fleisher v. Hinde [Mo. App.] 93 S. W. 1126; Western Cattle Brokerage Co. v. Gates, 190 Mo. 391, 89 S. W. 382; Bradbury v. McGeehan, 115 Mo. App. 99, 91 S. W. 437; Hamilton v. Peyonsky, 48 Misc. 554, 96 N. Y. S. 216; Battery Park Bank v. Western Carolina Bank, 138 N. C. 467, 50 S. E. 848; St. Louis S. W. R. Co. v. Boyd [Tex. Civ. App.] 13 Tex. Ct. Rep. 233, 88 S. W. 509; Southwestern Tel & T. Co. v. James [Tex. Civ. App.] 97 S. W. 654. Where no grounds of objection are stated either in the printed case or the argument, exceptions to the admission of evidence will not be considered. Jennings v. Edgefield Mfg. Co. [S. C.] 52 S. E. 113; Bennett & Co. v. Farmers' & Merchants' Bank [Ga.] 52 S. E. 330; Bowden v. Bowden [Ga.] 53 S. E. 606; Rose & Co. v. Woods [Ala.] 39 So. 581; Georgetown & T. R. Co. v. Smith, 25 App. D. C. 259; Buckler v. Kneezell [Tex. Civ. App.] 91 S. W. 367; Texas Cent. R. Co. v. Miller [Tex. Civ. App.] 88 S. W. 499; Hoodless v. Jernigan [Fla.] 41 So. 194. Where the record does not show that the court was requested to allow the appellants to file a bond for the payment of the tax as provided in section 2 of the Inheritance Tax Law (Hurd's Rev. St. 1903, c. 128, § 367), error cannot be assigned to the refusal of the court below to allow the filing of such bond. In re Kingham's Estate, 220 Ill. 563, 77 N. E. 135. Bill of exceptions showed that motion for new trial was overruled with judgment on the finding, "to which ruling defendant excepted." Held, no exception to overruling motion for new trial so as to allow consideration of errors in admission or exclusion of evidence. St. Louis & S. F. R. Co. v. Puterbaugh, 117 Ill. App. 569. The bill of exceptions first showed the denial of a motion and exception thereto. Then followed certain language of the court complained of but ending with the words "Motion denied;" then a statement "To which ruling, etc., defendant duly excepted." Held, the bill sufficiently showed that an exception was preserved to the language. Churchill v. Thompson Elec. Co., 119 Ill. App. 430.

91. That the evidence was not preserved is no ground for refusing to consider on appeal where the question for determination was raised by the pleadings and did not de-

port of such rulings,[92] and the record must affirmatively show that it contains all such matters.[93] This rule has been applied to rulings relating to jurisdiction,[94]

pend on evidence. Dillavou v. Dillavou [Iowa] 104 N. W. 432. Decision depending on evidence not reviewed where evidence relating thereto is not in record. Wilson v. Ivy Lodge No. 93, K. P. [La.] 40 So. 864; Turner v. Lawson [Ala.] 39 So. 755; Axelson v. Anderson [Colo.] 83 P. 626; Keating v. Hull [Conn.] 62 A. 661; Klopfer v. District of Columbia, 25 App. D. C. 41; McCaully v. U. S., 25 App. D. C. 404; Close v. Chicago, 217 Ill. 216, 75 N. E. 479; Grau v. Grau [Ind. App.] 77 N. E. 816; Rudisell v. Jennings [Ind. App.] 77 N. E. 959; Stansell v. Merchants' & Farmers' Bank, 123 Ga. 278, 51 S. E. 321; Anderson v. Anderson [Ga.] 52 S. E. 161; Knecht v. Louisville Home Tel. Co. [Ky.] 89 S. W. 508; Dupoyster v. Ft. Jefferson Imp. Co.'s Receiver [Ky.] 89 S. W. 509; Brumley v. Nichols & Shepherd Co. [Ky.] 93 S. W. 667; Gadd v. Detroit [Mich.] 12 Det. Leg. N. 900, 106 N. W. 210; Roden v. Helm, 192 Mo. 71, 90 S. W. 798; Bouton v. Pippin, 192 Mo. 469, 91 S. W. 419; Sutyvaert v. Arnold [Mo. App.] 91 S. W. 419; Carson v. Dewar [Mo. App.] 92 S. W. 723; Hanover State Bank v. Henke [Okl.] 83 P. 926; Stephens v. Herron [Tex.] 13 Tex. Ct. Rep. 1007, 87 S. W. 1144; Lee v. Hickson [Tex. Civ. App.] 91 S. W. 636; Poplin's Adm'x v. Southern R. Co. [Va.] 54 S. E. 45; Hotel Co. v. Merchants' Ice & Fuel Co. [Wash.] 84 P. 402; Dudley v. Barrett [W. Va.] 52 S. E. 100. It will be assumed that evidence showed that property was sufficient to satisfy mortgage, where on appeal from an order denying an application for a receiver pending foreclosure, the bill of exceptions showed that evidence as to the value of the property was introduced but did not set it forth. Aetna Life Ins. Co. v. Broecker [Ind. Sup.] 77 N. E. 1092. Where certain deeds and photographs are omitted by stipulation of parties from the transcript, the case may be considered on its merits without them. Sanders v. Dixon, 114 Mo. App. 229, 89 S. W. 577. Record will be deemed to incorporate all necessary testimony, where appellee does not contend that any essential testimony is omitted, and record states after detailing testimony: "Counsel for both plaintiff and defendant announced that they had no further testimony to offer, and rested their case." Klopfer v. District of Columbia, 25 App. D. C. 41. Objection in proceedings by a city to widen a street that no resolution had been passed by the city providing for such improvement. Kalish v. Chicago, 219 Ill. 133, 76 N. E. 40. Question as to whether the widening of a street was a public or a local improvement. Id. Where a lease contains a waiver of the right to appeal and the lessee relies on the substitution of a new lease to defeat a motion to quash his appeal, he must produce the evidence showing the substitution. Seagrave v. Lacy, 28 Pa. Super. Ct. 586. Where the assignment of error was the entering of judgment in an action scire facias sur mortgage non obstante veredicto, the mortgage and assignment which were in evidence should have been printed in the proper book. Union Trust Co. v. Cain, 29 Pa. Super. Ct. 197. Exception to the refusal of an auditor to allow an amendment of a pleading to conform to the evidence will not be considered unless so much of the evidence as is necessary to determine the propriety of such amendment is set forth or pointed out in the exception. First State Bank v. Avera, 123 Ga. 598, 51 S. E. 665. Where the assignment of error is the finding of the court that there was "no evidence upon which plaintiff could recover," a paper book which fails to set out the evidence will be dismissed. Hoff v. Hamilton, 28 Pa. Super. Ct. 76. Recital of facts in the opinion filed will not take the place of the duly certified evidence, particularly where there is no agreement that it contains all the facts concerning which evidence was given. Id. Where the record does not recite facts sufficient to enable the court to properly comprehend the location of the land involved, assignments of error as to the introduction of evidence will not be considered. Coker v. Payne [Ala.] 39 So. 1025. Where the record contains sufficient of the evidence to make the rulings complained of and exceptions thereto intelligible and to enable the court to determine them, an objection that the bill of exceptions does not purport to contain all the evidence in the case is without merit. Lerum v. Geving [Minn.] 105 N. W. 967. Objection that the tax roll showed on its face that plaintiff could not sue could not be considered when the tax roll was not in the record. Village of Wayne v. Goldsmith [Mich.] 12 Det. Leg. N. 516, 104 N. W. 689. The affidavit of counsel could not be accepted. Id. The proper practice is for the bill of exceptions to set out or by reference to the brief of evidence to show the evidence necessary to go up, and if none was adduced was unnecessary so to state. Head v. Marietta Guano Co. [Ga.] 53 S. E. 676. Appellate court will not consider rulings in dismissing an action and failure to reinstate when facts on which lower court based its action are not preserved in the record. Carr v. Willoughby & Co. [Colo.] 85 P. 428.

92. Evidence and rulings relative to an arbitration clause in an insurance policy not considered where record deed did not disclose its terms. Kinney v. Brotherhood of American Yoemen [N. D.] 106 N. W. 44. Where the sending out of a certain statement with the jury is relied on as error, the record must show the nature of the statement. Welliver v. Pennsylvania Canal Co., 23 Pa. Super. Ct. 79. A bill of exceptions by defendant held not to negative the fact that defendant may have introduced evidence after close of plaintiffs on which findings for plaintiff are based. Ausplund v. Higgins [Or.] 82 P. 12.

93. Necessity of recital or certificate: Matters depending on the evidence cannot be reviewed unless the bill of exceptions is certified to contain all the evidence. Callahan v. Houck & Co. [Wyo.] 83 P. 372; German v. Brooklyn Heights R. Co., 107 App. Div. 354, 95 N. Y. S. 112; Roth v. Spero, 48 Misc. 506, 96 N. Y. S. 211; Voss v. Smith, 110 App. Div. 104, 97 N. Y. S. 3; Ceballos v. Munson S. S. Line, 98 N. Y. S 464; Ausplund v Aetna Indemnity Co. [Or.] 81 P. 577; Standard Mfg. Co. v. Stallmann [Wis.] 107 N. W. 662; Franklin County v. Furry [C. C. A. 144 F.

663. In the absence of a recital or statement in the case-made that it contains all the evidence, the court of review will not consider the weight of the evidence, nor determine any issue of fact depending on the evidence. Crossley v. Couch [Okl.] 82 P. 831; Garretson v. Witherspoon [Okl.] 83 P. 415; Hanover State Bank v. Henke [Okl.] 83 P. 926; Sawyer & A. Lumber Co. v. Champlin Lumber Co. [Okl.] 84 P. 1093. Exception for want of "any" evidence may be reached without certificate of "all" evidence, motions to dismiss, and for directed verdict for defendant. German v. Brooklyn Heights R. Co., 107 App. Div. 354, 95 N. Y. S. 112. A certificate that the record contains all the evidence is not necessary to present for review exceptions to a court's refusal to dismiss the case on the ground of insufficiency of evidence and denial of motion to direct verdict. Id. It is presumed that bill of exceptions contains all evidence given at trial material to specified errors, and if there was any evidence to overcome that presented in the record by appellant, respondent should cause it to be incorporated in the record. Couson v. Wilson [Cal. App.] 83 P. 262. Supreme court cannot review the findings of fact in the absence of a certificate by the trial judge that the bill of exceptions contains all the evidence or so much as is necessary to present the questions of law raised at the trial. Charles v. Godfrey, 125 Wis. 594, 104 N. W. 814. A judgment having been ordered on the pleadings, it must be certified on appeal that all the records and files are returned in order to entitle to review. Purvis v. Roholt [Minn.] 104 N. W. 551. In absence of certificate that record contains all the evidence, it must be presumed that the evidence was sufficient to sustain the findings of fact. Grout v. Stewart [Minn.] 104 N. W. 966. Under statutes requiring the evidence in equitable actions to be taken down in writing and made a part of the record when certified by the trial judge, the evidence will not be considered unless so preserved. Code § 3652. Co-operative Bank v. Meldrum [Iowa] 105 N. W. 206. The fact that the case was submitted on a written statement of facts did not render the certificate of the judge unnecessary. Id.

Sufficiency of recital or certificate: Certificate of stenographer attached to transcript that it contains all the evidenec will not supply necessity of affirmatively showing that case-made contains all the evidence. Crossley v. Couch [Okl.] 82 P. 831. In the absence of any showing that omitted evidence was material to the consideration of the appeal, the certificate of the presiding judge that the record contains all the evidence will be taken to import verity. Hickey Anaconda Copper Min. Co. [Mont.] 81 P. 806. The trial judge certified that the bill of exceptions contained the substance of all testimony affecting the exceptions noted. Held, it will be assumed that it contained all the evidence affecting an exception that the evidence did not sustain the finding, though the testimony was in an abbreviated narrative form. Farrell v. Danbury [Mich.] 12 Det. Leg. N. 380, 104 N. W. 383. Bill of exceptions need not state that it contains all the evidence, when it otherwise reasonably appears that the court has before it all the testimony upon which this judgment of the trial court is founded. Fisher v. Chicago City R. Co., 114 Ill. App. 217. When record reads "But the court upon hearing argument of counsel . . . overruled the motion for a new trial, and entered judgment upon the verdict against the plaintiff for costs. To the overruling of which said motion for a new trial, and to the entry of said judgment, plaintiff then and there duly excepted" this is a sufficient exception to the overruling of the motion for a new trial. Id. Where a proposed statement of facts was served on respondent to which he filed no exceptions nor proposed any amendments, and it was subsequently certified to by the court to contain all material evidence not already in the record, is sufficient to authorize the court of review to try an application for a divorce de novo. Swift v. Swift, 39 Wash. 600, 81 P. 1052. Where it is shown by a case-made that "all of said evidence so introduced at said trial in said action and the objections made and exceptions saved and the orders and rulings of the court are in words and figures as follows, to wit:"—such declaration is a sufficient statement that the record contains all of the evidence. Southern Pine Lumber Co. v. Ward [Okl.] 85 P. 459. Bill of exceptions need not state that it contains all the evidence where it otherwise reasonably appears that the court has before it all the testimony upon which the judgment is founded. Fisher v. Chicago City R. Co., 114 Ill. App. 217. A certificate by the clerk, unauthorized by statute, that case-made contains all the evidence will not supply omissions in the case-made itself. Hanover State Bank v. Henke [Okl.] 83 P. 926. Statement that "the foregoing was all the evidence introduced on the trial of this cause" shows that bill contains all the evidence so as to authorize review. Morehouse & Wells Co. v. Schwaber, 118 Ill. App. 44. Intendment of certificate of judge that plaintiff's evidence "tended to prove the following facts" held to be that all the material parts of such evidence, relating to instructions complained of in motion for new trial, set forth in the same bill of exceptions, were summarized. Regan v. McCarthy, 119 Ill. App. 578. Statement in abstracts: "Certificate of S. judge, and B, filed in due form to shorthand notes and transcript of evidence" held not to show that the record of the evidence was preserved by proper certificate filed with clerk of the trial court within 6 months from entry of decree. Oskaloosa Nat. Bldg. Loan & Inv. Ass'n v. Bailey [Iowa] 105 N. W. 417. A certificate by the clerk that the record contains all of the proceedings between certain dates while the proceedings covered a longer time, is insufficient. Conery v. His Creditors [La.] 39 So. 792. Where the record declares that it contains all the evidence, findings of fact may be reviewed despite a contention of counsel that it does not contain all. In re Waterman's Estate, 98 N. Y. S. 583. A bill of exceptions which purports to recite the evidence in the order of its introduction giving name of each witness, giving often both questions and answers, and containing a recital that action of court in directing verdict was founded "on all of the evidence as above set forth on behalf of the plaintiff," sufficiently shows that it embodies all the material evidence necessary for review, of an order directing or refusing to direct a verdict. Rockwell v. Capital Traction Co., 25 App. D. C. 98. Where the record proper affirmatively shows that all the evidence

process [95] and pleading,[96] appearance,[97] motions and affidavits,[98] matters prelim-

taken on the trial is not incorporated therein and the only attempts to cure the omission in the record is by statements in the petition in error, the court will not review assignments of error arising on the evidence. Rees v. Gray [Okl.] 83 P. 719. Certificate that bill of exceptions contained all the evidence offered by either party was a sufficient certification that the bill contained all the evidence received or offered. Sheibley v. Huse [Neb.] 106 N. W. 1028.

94. An objection to the jurisdiction of the trial court will not be considered on appeal unless such objection has been brought into the record. Stoy v. Indiana Hydraulic Power Co. [Ind.] 76 N. E. 1057. Where the record shows an order of adjournment of court to a future day in the term and judicial proceedings in the interval, it will be presumed in favor of the jurisdiction of the court over such proceedings that the order had been vacated and the court reconvened. Back v. State [Neb.] 106 N. W. 787. Under Rev. St. 1898, § 3845, as amended by L. 1899, p. 7, c. 5, allowing actions against executors in the circuit court when the remedy in the county court would not be adequate the decision of the circuit court that it has jurisdiction will not be disturbed unless clearly erroneous. Lindemann v. Rusk, 125 Wis. 210, 104 N. W. 119. The question of loss of jurisdiction of trial court because the case was not decided within 6 months after submission not presented where record showed when the testimony was taken and the decree rendered but did not show when cause was argued or submitted. Barkume v. Phelps, Brace & Co. [Mich.] 12 Det. Leg. N. 547, 104 N. W. 980. Where the record discloses that the regular judge certified his disqualifications, that the Governor appointed the special judge and that he took the oath and proceeded to try the case, it sufficiently shows the commission of the special judge to try the case. Bauman v. Wells Fargo Exp. Co. [Ark.] 91 S. W. 13. Where the circuit court retained jurisdiction of garnishment proceedings, it will be assumed on appeal that the return on the execution was sufficient to give jurisdiction, where the contrary is not shown. Commercial Real Estate & Brokerage Co. v. Riemann [Mo. App.] 93 S. W. 305.

95. In the absence of a bill of exceptions containing the evidence offered upon a motion to quash the service of summons, a reviewing court will presume that the court below found from the evidence every fact in issue necessary to sustain its action in overruling the motion. Caldwell Furnace Foundry Co. v. Peck-Williamson Heating, etc., Co., 6 Ohio C. C. (N. S.) 629. Presumption is that an alias summons was issued where it is urged that a summons was served by publication after the original summons was returned. Boyer v. Pacific Mut. Life Ins. Co. [Cal. App.] 81 P. 671. Where the record shows the giving of note to a ward, of the hearing of his guardian's application for leave to sell his real estate, and such notice is unavailing, as not coming within the statutory provision, on appeal it cannot oe presumed from the facts that the sale was confirmed by the probate court that any other notice was given, the record being silent. Beachy v. Shomber [Kan.] 84 P. 547.

96. A judgment in favor of a plaintiff must be reversed where a demurrer has been overruled to an insufficient paragraph of complaint, unless it is affirmatively shown that the verdict or finding rests exclusively upon a good paragraph. Lake Erie & W. R. Co. v. McFall [Ind.] 76 N. E. 400. Where the record shows that the complaint was signed by the plaintiff's attorneys as required by Burns' Ann. St. 1901, § 361, and the record does not disclose that it was not signed when filed, the appellate court cannot say that there was error in the trial court in refusing to strike the complaint on account of not being signed. Whinery v. Brown [Ind. App.] 75 N. E. 605. Erroneous overruling of a demurrer to a bad paragraph of a complaint will reverse, though the complaint contains a good paragraph, where it does not affirmatively appear that the judgment rests exclusively upon the good. Lake Shore, etc., R. Co. v. Barnes [Ind.] 76 N. E. 629. Where there is nothing in the record to show whether or not a pleading was filed in time, the refusal of the lower court to sustain a motion to strike the pleading because not filed in time cannot be considered. Neal Loan & Banking Co. v. Chastian [Ga.] 53 S. E. 459. Where the transcript fails to show the motion for judgment on the pleadings, objection to introduction of testimony under pleadings, or any ruling on such motions or any objections thereto, assignments of error relating to them cannot be considered. Missouri, etc., R. Co. v. Murphy [Kan.] 81 P. 478. On appeal from judgment on pleadings, no application for amendments being disclosed, it must be presumed that appellant stood on his pleadings as originally filed. Fishburne v. Merchants' Bank of Port Townsend [Wash.] 85 P. 38. An order requiring a party to plead will, in the absence of an affirmative showing of error, be presumed valid. Everett v. Wilson [Colo.] 83 P. 211.

Necessity of including pleadings: Where the judgment entry does not show that issue was joined on special issue filed in garnishment proceedings, it will be assumed that the case was tried on the statutory issue raised under Code 1896, § 2200. Ober & Sons Co. v. Phillips Buttorff Mfg. Co. [Ala.] 40 So. 278. Dismissal of petition for interest on a decree will not be reviewed where the bill to which petition was auxiliary is not in the record. Galt v. Nevitt, 116 Ill. App. 308. Where an answer alleges champerty and no reply is made, but the parties proceed to try the issue on its merits, on appeal it will be presumed that the answer was controverted of record and that the order was by oversight not entered. Fitzpatrick v. Vincent [Ky.] 88 S. W. 1073. Failure to bring up pleadings precludes consideration of alleged error in overruling demurrer or in trying title to real estate. Axelson v. Anderson [Colo.] 83 P. 626. The correctness of court's ruling in sustaining a demurrer to a plea cannot be considered where the plea as it then existed does not appear. Phillips-Buttorff Mfg. Co. v. Wild Bros. [Ala.] 39 So. 359.

Necessity of including amendments: Dismissal of bill for insufficiency cannot be reviewed when an amendment thereto is not in the record. Granger v. Simmons Hard-

ware Co. [Ala.] 40 So. 951. Alleged error in allowing amendment so as to change cause of action not considered where papers amended were not in the abstract. De Moss v. Thomas, 118 Ill. App. 467. It will be assumed, in the absence of the showing of any prejudice to the opposite party that, where the evidence was sufficient to sustain an application for letters of administration, the application amended to conform with the proof. In re Long's Estate [Wash.] 81 P. 1007. An application for leave to amend answer which court intimates will be denied, but no formal ruling thereon appearing, it will be assumed that application was denied. Hewel v. Hogan [Cal. App.] 84 P. 1002.

Necessity of including motions and demurrers: Assignments of error to the striking of portions of pleadings will not oe considered where there is no statement in the record of the parts stricken. Lindley v. Kemp [Ind. App.] 76 N. E. 798. No available error can be predicated upon the ruling of the court on a demurrer not copied in the record. Town of Knightstown v. Homer [Ind. App.] 75 N. E. 13. An assignment in overruling a demurrer and a motion to strike will not be considered where neither the demurrer nor motion is in the record. Equitable Mfg. Co. v. Martin [Ala.] 39 So. 769. Rulings on motions to strike pleas cannot be considered where neither the pleas nor rulings are contained in the bill of exceptions. Harrison v. Alabama Midland R. Co. [Ala.] 40 So. 394. Where it is assigned that the court erred in sustaining plaintiff's special exception to defendant's answer and the state of facts does not show what the exception was, the court will consider any valid exception which may have been interposed and assume in favor of the judgment. Hummel v. Del Greco [Tex. Civ. App.] 90 S. W. 339. An assignment of error that the court erred in not sustaining a demurrer can not be considered where the record fails to show that such demurrer was considered by the court. St. Louis S. W. R. Co. v. Rollins [Tex. Civ. App.] 14 Tex. Ct. Rep. 82, 89 S. W. 1099. Where the record fails to show that the exception to appellee's petition was taken before answering, it will be presumed on appeal that the court overruled it because made too late. St. Louis, etc., R. Co. v. Berry [Tex. Civ. App.] 93 S. W. 1107. Assignment of error in overruling exceptions to defendant's pleadings will not be considered where the record shows no exceptions, although the judgment of the court recites the overruling of exceptions to defendant's pleadings. Lee v. Hickson [Tex. Civ. App.] 91 S. W. 636.

97. The fact that the record does not contain a written appearance does not raise the presumption that a party did not appear and submit to the jurisdiction of the trial court. Long v. Frank, 117 Ill. App. 207. The appearance of a party in the court below will be presumed where necessary to the power of the court to enter an order sought to be reviewed for lack of jurisdiction to enter it. Id.

98. On appeal from an order denying a motion to quash an alternative mandamus, it will oe presumed that it was properly granted where the petition upon which it was issued was not in the record. People v. Hayes, 106 App. Div. 563, 94 N. Y. S. 754. All presumptions being in favor of the validity of the judgment, an appeal from an order appointing a receiver, which fails to bring up the facts and affidavits upon which such order was made is not reviewable. Hannon v. Millichamp [Wash.] 82 P. 168. Where the record shows that evidence was heard by the trial court without showing what the evidence was, the correctness of the ruling of the lower court in dissolving a restraining order will be presumed. Kubillus v. Ewert [Wash.] 82 P. 147. A motion to dismiss an appeal from an order dismissing a petition to contest a will and vacating a prior order to the same effect is a collateral attack on the latter part of the order and encounters the presumption that the trial court had sufficient grounds for vacating the same. In re Sullivan's Estate [Wash.] 82 P. 297. Order refusing to prohibit a party from prosecuting the suit for plaintiffs was not before the appellate court where papers and proceedings on which it was based were not contained in bill of exceptions. Knights Templars & Masons' Life Indemnity Co. v. Crayton, 110 Ill. App. 648. Error cannot be assigned for overruling a motion for a continuance where the bill of exceptions does not contain the motion, or the affidavit, or any exception to the ruling of the court. Foley v. Kane, 114 Ill. App. 544. That documents mentioned in a motion are not in the record does not preclude review if everything actually before the court on the motion is in. Richardson v. Johnson [La.] 39 So. 449 [advance sheets only]. Denial of a motion based on a showing of facts cannot be reviewed unless the record shows either the facts before the trial court or that the denial was wholly on a question of law. Hayes v. Eubanks [Ga.] 54 S. E. 174. Rulings on a motion cannot be reviewed unless the grounds of the motion appear. Stallings v. Gilbreath [Ala.] 41 So. 423. Where a motion for a reinstatement of a cause asserted that the court intimated that he would direct a verdict, but the record on appeal from an order denying such motion does not so state, it will be presumed that the court found the statements untrue. Sanchez v. Atchinson, etc., R. Co. [Tex. Civ. App.] 90 S. W. 689. Discharge of garnishee sustained where motion to strike claim of exemptions was denied and claim was not patently bad. Chamberlain v. Mobile Fish & Oyster Co., 141 Ala. 464, 37 So. 690. Ruling on a motion for a verdict will not be disturbed unless the record shows it to be clearly wrong. McCune v. Badger [Wis.] 105 N. W. 667. Where motion for a directed verdict on several sufficient grounds is sustained generally, the ruling will not be disturbed if the record is sufficient to sustain it on any of the grounds assigned. Dolan v. Burlington, etc., R. Co. [Iowa] 105 N. W. 834. A motion to set aside a nonsuit and the action of the court upon it cannot be reviewed except upon a bill of exceptions. Wafford v. St. Louis, etc., R. Co. [Mo.] 93 S. W. 247. In the absence from the record the grounds on which a nonsuit was asked, it will be presumed that the motion was general and accordingly the grant thereof will not be sustained on grounds which could have been obviated if a specific motion had been made. De Leonis v. Hammel [Cal. App.] 82 P. 349. An appeal from an order granting a motion to dismiss will not oe reviewed in the absence of a bill of exceptions. Hawthorn v. Alexander [Mo. App.] 91 S. W. 444. Bill of exceptions is

inary to trial,[99] proceedings at trial in general,[1] admission,[2] exclusion,[3] and suffi-

necessary to a review of an order refusing a continuance. Gray v. Frontroy [Tex. Civ. App.] 89 S. W. 1090. The action of the trial court in overruling a motion for a venire de novo will not be reviewed where the record is silent as to the grounds upon which such motion was based. Douglas v. Indianapolis & N. W. Traction Co. [Ind. App.] 76 N. E. 892. Ruling on motion to dismiss action and quash attachment and levy, cannot be considered on appeal without a bill of exceptions. Everett v. Wilson [Colo.] 83 P. 211.

99. Where the record fails to show the facts upon which the court based its refusal to grant leave to sue a receiver, the order will not be reviewed and an appeal therefrom dismissed. Whitehouse v. Nelson Dry Goods Co. [Wash.] 82 P. 161. Nothing appearing to the contrary, it will be presumed the court rightfully overruled an unsupported objection to placing the cause on the short cause calendar. Kaestner v. Farmers' & Merchants' State Bank, 112 Ill. App. 158.

1. Where the record fails to show on what theory a case was tried in the justice court, an allegation of error that it was changed during trial in county court will be considered unsupported by the evidence. Hasse v. Herring [Colo.] 85 P. 629. It will be presumed that until the cause was submitted the jury was in its proper place in court and heard the rulings. Gardner-Wilmington Coal Co. v. Knott, 115 Ill. App. 515. It will not be presumed that interrogatories were given without first submitting them to plaintiff. Fisk v. Chicago Water Chute Co., 119 Ill. App. 536. Where bill of exceptions is silent the court will not presume that certain interrogatories were given without first submitting them to plaintiff. Id. Answers not shown, presumed to have been responsive. Southwestern A. R. Co. v. Maddox [Ala.] 41 So. 9. Where the court grants a motion for nonsuit, on grounds, some of which are too general to sustain the order, it will be presumed that the order is based on those grounds which will sustain it. Mackel v. Bartlett [Mont.] 82 P. 795. Where the abstract does not contain all the questions asked the jurors, an assignment that the trial court erred in refusing to permit certain questions to be asked of the jurors will not be considered. Helple v. Washington, 219 Ill. 604, 76 N. E. 854. It must be assumed upon exceptions that the jury heaided the statement of counsel and the ruling of the court relative to the purpose for which papers were received in evidence. McLaughlin v. Joy [Me.] 62 A. 348. On appeal findings and proceedings may be deemed amended in accordance with the facts proved below. Coe v. Rockman [Wis.] 106 N. W. 290. Action of court in excusing a juror not considered where record wholly omitted the examination and challenge. Aultman, Miller & Co. v. Jones [N. D.] 106 N. W. 688. Where defendant pleaded extinguishment of the action by previous settlement but the record showed no motion based thereon, or action of the court or any exception on the ground that the case was not properly in court, it will be presumed pending when tried. Burr's Damascus Tool Works v. Peninsular Tool Mfg. Co. [Mich.] 105 N. W. 858. To justify reversal on the ground of an order erroneously giving defendant the right to open and close prejudice must be shown. Farmer v. Norton [Iowa] 105 N. W. 371. Action of trial court in striking pleas will not be considered where bill of exceptions fails to set out the motion. Forbes v. Rogers [Ala.] 38 So. 843. Exceptions to remarks made by counsel cannot be considered where the remarks are not set out in the record. Alden v. Robinson, 98 N. Y. S. 675. An assignment of error that a district court cannot issue a writ of certiorari to a justice of peace in another district unless designated to act under Sayles' Ann. Civ. St. 1897, art. 1069, will not oe considered where the bill of exceptions does not negative such designation. Seiber v. Johnson Mercantile Co. [Tex. Civ. App.] 90 S. W. 516. It will not be assumed on appeal that the plaintiff made the servants of defendant railroad company parties defendant merely to defeat Federal jurisdiction, in the absence of the evidence against them, specially where the lower court refused a peremptory instruction in favor of such servants. Illinois Cent. R. Co. v. Rutherford [Ky.] 91 S. W. 255. Improper conduct of counsel, exceptions thereto not preserved in a bill, not reviewable on appeal. Stagg Co. v. Brightwell [Ky.] 92 S. W. 8. Where on appeal it appears that notice was served on one named in the precept as attorney, and it does not appear that he was not attorney, it will be presumed that he was. Gilmer v. Beauchamp [Tex. Civ. App.] 87 S. W. 907. An assignment that the court erred in refusing to allow leading questions will not be considered where the bill of exceptions does not contain the questions and the expected answer. Galveston, etc., R. Co. v. Currie [Tex. Civ. App.] 91 S. W. 1100. An assignment of error that erred in direcing a verdict will be dismissed where the record does not contain the evidence. Hart v. Foley [Ind. T.] 91 S. W. 33. Remarks alleged to have been made by counsel cannot be considered where the bill of exceptions does not state that such remarks were made, though it does contain affidavits that such remarks were made. Glasgow v. Metropolitan St. R. Co., 191 Mo. 347, 89 S. W. 915. Remarks of counsel will not be considered where not contained in a bill of exceptions, though set out in the motion for a new trial. Mitchell v. Robertson [Mo. App.] 93 S. W. 871. The action of the trial court in permitting a witness to testify as an expert cannot be reviewed unless the evidence upon which the court acted is brought up. Texas & P. R. Co. v. Warner [Tex. Civ. App.] 93 S. W. 489. It will be presumed, in the absence of a contrary showing upon the record, that the trial court was justified in denying separate trials in condemnation proceedings. Martin v. Chicago & M. Elec. R. Co., 220 Ill. 97, 77 N. E. 86.

2. Where there is evidence to support the findings of the chancelor, it will be presumed that evidence improperly admitted was disregarded. Telford v. Howell, 220 Ill. 52, 77 N. E. 82; Forbes Co. v. Leonard, 119 Ill. App. 629. Where the court admitted a deed 30 years old without proof of execution it will be presumed on appeal that it came from the proper custody and, therefore, admissible. Campbell v. Bates [Ala.] 39 So. 144. Where from the bill of exceptions it is impossible to determine who introduced certain testimony and such testi-

mony might be admissible if presented by defendant, court will not hold such evidence inadmissible. Hagar v. Norton, 188 Mass. 470, 73 N. E. 1073. Error in admitting testimony as to value of flawless diamonds not available where bill of exceptions fails to show that the diamonds in controversy were not of that character. Austin v. Vanderbilt [Or.] 85 P. 519. Where in an action for damages for canceling an insurance policy, certain mortality tables were introduced in evidence and computations made, in the absence of a showing to the contrary it will be assumed on appeal that the computations were made from the tables in evidence. Kelley v. Security Mut. Life Ins. Co., 106 App. Div. 352, 94 N. Y. S. 60. Whether record entries were properly verified as basis for receiving them in evidence was within discretion of trial court and his decision will be upheld if any evidence reasonably supports it. Swedish-American Nat. Bank v. Chicago, etc., R. Co. [Minn.] 105 N. W. 69. Court could not review alleged error in upholding a judgment introduced in evidence and disputed by defendant, in the absence of a finding of facts. Hosie v. Hart [Mich.] 12 Det. Leg. N. 596, 105 N. W. 32. Question of admissibility not raised where it did not appear that a contract objected to was subsequently introduced or read. Willis v. Weeks [Iowa] 105 N. W. 1012. Court could not say that error was committed in admitting evidence on cross-examination where the record did not contain the direct examination. Kinney v. Brotherhood of American Yoemen [N. D.] 106 N. W. 44. On objection to evidence of the condition of an injured ankle at the time of trial on the ground that it was not admissible under the declaration, it will be presumed on appeal in the absence of a showing to the contrary, that the evidence was connected with testimony as to the injuries sustained. Lewes v. John Crane & Sons [Vt.] 62 A. 60. Where bill of exceptions recites that certain testimony objected to was elicited by the questions asked, without setting forth what the questions were, or how it injured appellant, is insufficient to base a reversal thereon. Galveston, etc., R. Co. v. Paschall [Tex. Civ. App.] 92 S. W. 446. Appellant could not object that a decree introduced in evidence did not relate to matters existing prior to the action where neither the record nor the abstract showed the date of the decree or of filing the papers. Fairbank Co. v. Nicolai, 112 Ill. App. 261. Where evidence admitted or rejected does not show its relevancy or irrelevancy on its face, a bill of exceptions must contain so much of the other evidence as will make the error apparent. Hoodless v. Jernigan [Fla.] 41 So. 194. Assignments of error in the admission of evidence may be considered though the bill of exceptions does not contain all the evidence. Duggar v. Pitts [Ala.] 39 So. 905. Rulings on the admissibility of evidence may be reviewed although the bill of exceptions does not set out all of the evidence in the case. Court rule 33 (Code 1896, p. 1201). Callaway v. Gay [Ala.] 39 So. 277.

Evidence admitted must appear. Perrin v. Carbone [Cal. App.] 82 P. 222; Williams v. Jones [Fla.] 40 So. 28; Johnson v. Thrower, 123 Ga. 706, 51 S. E. 636; Bennett & Co. v. Farmers' & Merchants' Bank [Ga.] 52 S. E. 330; Stanley v. Core, 119 Iowa, 417, 93 N. W. 343; Blake v. Grondin [Mich.] 12 Det. Leg. N. 353, 104 N. W. 423; State v. Wooldridge, 192 Mo. 12, 91 S. W. 125; De Coster v. Herzog Co., 97 N. Y. S. 295; Pizzi v. Nardello, 23 Pa. Super. Ct. 35; Jenkinson Co. v. Eggers, 28 Pa. Super. Ct. 151; Armour v. Produce Co., 28 Pa. Super. Ct. 524; St. Louis Southern R. Co. v. Demsey [Tex. Civ. App.] 13 Tex. Ct. Rep. 961, 89 S. W. 786; Mullen v. Galveston, etc., R. Co. [Tex. Civ. App.] 92 S. W. 1000; Maffi v. Stephens [Tex. Civ. App.] 93 S. W. 158; Hamann v. Milwaukee Bridge Co. [Wis.] 106 N. W. 1081.

3. Exclusion to testimony will only be considered, in the absence of a statement of facts, when it appears not only that it was error but that such error, to a reasonable certainty, was prejudicial to appellant. Gatlin v. Street [Tex. Civ. App.] 90 S. W. 318. To sustain exceptions they must contain within themselves sufficient to show that the exceping party was aggrieved. Lenfest v. Robbins [Me.] 63 A. 729. The rule that an assignment of error in refusing to allow a witness to answer cannot be considered where it does not appear what the answer would have been does not apply where the court rules out an entire line of evidence or where he holds a witness to be incompetent. Union R. Co. v. Hunton, 114 Tenn. 609, 88 S. W. 182. When the alleged error is the rejection of evidence, it is not necessary that the record contain all the evidence. Mackel v. Bartlett [Mont.] 82 P. 795. Exclusion of evidence will not be considered where the record does not show its relevancy. Luhn v. Luhn [Tex. Civ. App.] 93 S. W. 525; In re Angle's Estate [Cal.] 82 P. 668; Cook v. State [Tex. Civ. App.] 13 Tex. Ct. Rep. 1029, 89 S. W. 641; Humphrey v. Pope [Cal. App.] 82 P. 223; Merrill v. Milliken [Me.] 63 A. 299; Sneuecor v. Pope [Ala.] 39 So. 318.

Must show ground of exclusion: Assignment of errors in excluding evidence will not be considered when the record does not disclose what the objection to it was. Bryson v. Boyce [Tex. Civ. App.] 92 S. W. 820; Jennings v. Edgefield Mfg. Co. [S. C.] 52 S. E. 113; Kinney v. Brotherhood of American Yoemen [N. D.] 106 N. W. 44; Veatch v. Gray [Tex. Civ. App.] 91 S. W. 324; Jones v. Humphreys [Tex. Civ. App.] 13 Tex. Ct. Rep. 684, 88 S. W. 403; Gulf, etc., R. Co. v. Hays [Tex. Civ. App.] 13 Tex. Ct. Rep. 762, 89 S. W. 29; Metropolitan St. R. Co. v. Wishert [Tex. Civ. App.] 13 Tex. Ct. Rep. 799, 89 S. W. 460.

The evidence excluded must appear. Screws v. Anderson [Ga.] 52 S. E. 429; Dowie v. Priddle, 116 Ill. App. 184; Flint v. Illinois Cent. R. Co. [Ky.] 88 S. W. 1055; Magnolia Metal Co. v. Gale [Mass.] 78 N. E. 128; Parker v. Holland, 115 Mo. App. 681, 91 S. W. 978; Peterson v. Hansen [N. D.] 107 N. W. 528; O'Keefe v. Dillenbeck [Okl.] 83 P. 540; Creachen v. Bromley Bros. Carpet Co. [Pa.] 63 A. 195; Ramm v. Galveston, etc., R. Co. [Tex. Civ. App.] 92 S. W. 426. In order for the exclusion of oral testimony to be considered, it must appear that a pertinent question was asked, and that the court ruled out the answer, and that a statement was made to the court at the time, showing what the answer would be; and that such testimony was material and would have benefited the complaining party. Moore v. Mobley, 123 Ga. 424, 51 S. E. 351; Screws v. Anderson [Ga.] 52 S. E. 429; Bowden v. Bowden [Ga.] 53 S. E. 606; Fleener v. John-

ciency of evidence,[4] instructions,[5] findings,[6] verdict,[7] judgment and relief granted,[8] grant or denial of a new trial,[9] proceedings on intermediate appeals.[10]

son [Ind. App.] 77 N. E. 366; Meyers v. Clarke [Ky.] 90 S. W. 1049; Union R. Co. v. Hunton, 114 Tenn. 609, 88 S. W. 182.

4. Must show all the evidence. Townsend v. Beatrice Cemetery Ass'n [C. C. A.] 138 F. 381; Williams v. Jones [Ariz.] 85 P. 399; Empire Smelter Co. v. Gardiner Worthen & Goss Co. [Ariz.] 85 P. 729; Merritt v. Wallace [Ark.] 88 S. W. 876; Matlock v. Stone [Ark.] 91 S. W. 553; Bither v. Christensen [Cal. App.] 81 P. 670; Lewis v. San Francisco [Cal. App.] 82 P. 1106; Downing v. Donegan [Cal. App.] 82 P. 1111; Mahoney v. American Land & Water Co. [Cal. App.] 83 P. 267; In re Wikman's Estate [Cal.] 84 P. 212; Axelson v. Anderson [Colo.] 83 P. 626; Noxon v. Remington [Conn.] 61 A. 963; Louisville & N. R. Co. v. Jones [Fla.] 39 So. 485; Vanek v. Senft [Ill.] 78 N. E. 17; King v. King, 215 Ill. 100, 74 N. E. 89; City of Chicago v. Mecartney, 216 Ill. 377, 75 N. E. 117; City of Mattoon v. Noyes, 218 Ill. 594, 75 N. E. 1065; Kalish v. Chicago, 219 Ill. 133, 76 N. E. 40; Lumbard v. Holdiman, 115 Ill. App. 458; Todd v. Banning, 118 Ill. App. 676; Kingsbury v. Andrews, 119 Ill. App. 35; Bldg. & Loan Ass'n, 119 Ill. App. 39; McKnight v. Walker, 119 Ill. App. 138; Standley v. Cleveland, etc., R. Co. [Ind. App.] 75 N. E. 674; Missouri, etc., R. Co. v. Sheppard [Kan.] 82 P. 787; Holmes v. Robertson County Ct. [Ky.] 89 S. W. 106; Durrett v. Durrett [Ky.] 89 S. W. 210; Providence-Washington Ins. Co. v. Paducah Towing Co. [Ky.] 83 S. W. 722; Walker v. Baldwin [Md.] 63 A. 362; O'Brien v. Murphy, 189 Mass. 353, 75 N. E. 700; Hosher-Platt Co. v. Miller [Mass.] 76 N. E. 650; Whitehouse v. Aiken [Mass.] 77 N. E. 499; Reelman v. Grosfend [Mich.] 12 Det. Leg. N. 335, 104 N. W. 331; Vandeventer v. Goss, 190 Mo. 239, 88 S. W. 610; Harrison v. Pounds, 190 Mo. 349, 88 S. W. 713; McKinney v. Northcutt, 114 Mo. App. 146, 89 S. W. 351; Sovereign Camp, Woodmen of the World v. Wood, 114 Mo. App. 471, 89 S. W. 891; Hickey v. Anaconda Copper Min. Co. [Mont.] 81 P. 806; Kupke v. Polk [Neb.] 103 N. W. 321; Kinney v. Brotherhood of American Yoemen [N. D.] 106 N. W. 44; Diamond Rubber Co. v. McClurg, 6 Ohio C. C. (N. S.) 556; McKinnon v. Higgins [Or.] 81 P. 581; Miles v. Swanson [Or.] 82 P. 954; Featherstone v. Brown [Tex. Civ. App.] 13 Tex. Ct. Rep. 387, 88 S. W. 470; Mears v. Jesse French Piano & Organ Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 1017, 89 S. W. 456; Guyer v. Snow [Tex. Civ. App.] 90 S. W. 71; Thatcher v. Jeffries [Tex. Civ. App.] 91 S. W. 1091; Western Supply & Mfg. Co. v. U. S. & Mexican Trust Co. [Tex. Civ. App.] 92 S. W. 986; Pinto v. Rintleman [Tex. Civ. App.] 92 S. W. 1003; Sawyer v. First Nat. Bank [Tex. Civ. App.] 93 S. W. 151; Stewart v. Gold & Copper Co., 29 Utah, 443, 82 P. 475; Dawson v. Dawson [Wash.] 82 P. 937; Allen v. Baxter [Wash.] 85 P. 26; Callahan v. Houck & Co. [Wyo.] 83 P. 372. The rule that a verdict will not be reviewed unless all the evidence is brought up cannot be invoked to prevent review of a verdict in a case in which jury themselves viewed the premises on the ground that such knowledge as they gained for themselves cannot be brought up (Williams v. Seattle [Wash.] 83 P. 242), because they are presumed to view the premises merely so as better to understand the evidence adduced, not to obtain evidence for themselves (Id.). Where the order denying a motion for a new trial was not attested at the time of the appeal, it must be presumed that the evidence was sufficient to justify the decision. Stephens v. Faus [S. D.] 106 N. W. 56. Where the return of the justice showed that certain exhibits were introduced in evidence, but did not contain them, the question of the sufficiency of the evidence could not be considered though the return stated that it contained all the evidence in the case, the exhibits not being before the court. Village of Wayne v. Goldsmith [Mich.] 12 Det. Leg. N. 516, 104 N. W. 689.

5. The bill of exceptions must show at whose instance instructions complained of were given. Martin v. Chicago & M. Elec. R. Co., 220 Ill. 97, 77 N. E. 86. An assignment that the charge submitted a ground of recovery not authorized by the pleadings will not be considered without a statement of facts, unless it appears from the record that it was prejudicial. Missouri, K. & T. R. Co. v. Elliott [Tex. Civ. App.] 93 S. W. 706. An instruction premised with the phrase "in view of the argument of the counsel," will not be reviewed in the absence of a showing of what the argument consisted. Beaty v. El Paso Elec. R. Co. [Tex. Civ. App.] 91 S. W. 365. Where an instruction did not limit the right to recover to damages for negligence charged in the declaration, but the declaration is not in the abstract, it will be presumed that the proof was confined to the negligence charged. City of Waukegan v. Weale, 118 Ill. App. 460.

Necessity of showing instructions refused or excepted to: Failure to observe clause 5 of rule 22 requiring a setting out of instructions requested and refused precludes their consideration. Perdue v. Gill [Ind. App.] 73 N. E. 894. Refusal of a charge not appearing in the bill of exceptions, the assignment will not be reviewed. Chambers v. Milner Coal & R. Co. [Ala.] 39 So. 170. The supreme court will not consider grounds of appeal relating to the charge of the court, where there is no reference to such charge in the "case." Ragsdale v. Southern R. Co. [S. C.] 51 S. E. 540; Abrahams v. Columbia, etc., R. Co. [S. C.] 53 S. E. 819. Error in refusing requests to charge not considered unless requests are in record. Max Simons & Co. v. McDowell [Ga.] 53 S. E. 1031. Where none of the instructions are set out in the abstract as required by Sup. Ct. Rule 9, it will be presumed that they were correct. Shorter University v. Franklin Bros. Co. [Ark.] 88 S. W. 587. Errors in instructions will not be considered where the instructions are not copied or called for in the bill of exceptions, though they appear in other parts of the transcript. Hartin Commission Co. v. Pelt [Ark.] 88 S. W. 929.

Necessity of showing entire charge: The fact that a bill of exceptions purporting to contain the instructions given below does not expressly state that it contains all the

instructions does not warrant a presumption in the appellate court that other instructions were given covering a point presented by an instruction claimed to have been erroneously refused. Zipkie v. Chicago, 117 Ill. App. 418. The giving or refusal of instructions cannot be reviewed unless the record contains the entire charge. Baker v. Gowland [Ind. App.] 76 N. E. 1027; Snedecor v. Pope [Ala.] 39 So. 318; Denver City Tramway Co. v. Nicholas [Colo.] 84 P. 813; Gumaer v. White Pine Lumber Co. [Idaho] 83 P. 771; Pittsburg, etc., R. Co. v. Smith, 110 Ill. App. 154; Village of Wilmette v. Brachle, 110 Ill. App. 356; The Fair v. Hoffmann, 110 Ill. App. 500; Willey v. Dake, 118 Ill. App. 47; Chicago Furniture Co. v. Cronk [Ind. App.] 74 N. E. 627; State v. Kirkpatrick [Iowa] 105 N. W. 121; Grantz v. Deadwood [S. D.] 107 N. W. 832.

Necessity of showing evidence: A charge which is not obviously erroneous in the light of the pleadings and verdict will not be considered in the absence of a bill of exceptions or statement of facts. Granberry v. Mussman [Tex. Civ. App.] 90 S. W. 533. An assignment of error in refusing to instruct the jury to disregard a certain schedule will not be considered where it does not point out any evidence in the record as to such schedule. Buckler v. Kneezell [Tex. Civ. App.] 91 S. W. 367. An assignment of error as to instructions given or refused cannot be considered in the absence of a statement of facts. Guyer v. Snow [Tex. Civ. App.] 90 S. W. 71. In the absence of a statement of facts, the court on appeal in a criminal case cannot review requested charges and bill of exceptions. Patterson v. State [Tex. Cr. App.] 88 S. W. 226. Where an objection to an instruction based on an admission of appellant made in open court but not in the record is urged as ground for reversal, appellate court will presume statement in instructing to be true nothing to the contrary appearing in the record. Cincinnati, etc., R. Co. v. Swales [Ind. App.] 73 N. E. 1093. The substance of the evidence is material to the consideration of errors in instructions, other than abstract propositions of law, and must be incorporated in appellant's abstract. Beavers v. Security Mut. Ins. Co. [Ark.] 88 S. W. 848. Where error is alleged as to an instruction, appellant must affirmatively show that the evidence did not justify it, as the presumption is otherwise. Flinn v. Crooks [Cal. App.] 83 P. 812. Where, in an action for injuries, the jury were not instructed to pass on certain evidence, it was presumed on appeal that such evidence was true and would have established in the hands of the jury everything it tended to prove. Hanson v. Manchester St. R. Co. [N. H.] 62 A. 595. A bill of exceptions to a refusal to give requested instructions based on factual hypothesis must show in itself, or by express reference, that there was evidence in support of the hypothesis even though the legal proposition contained in the request was correct. Neal v. Allen [Me.] 62 A. 706. An assignment of error in giving a charge cannot be considered where the record does not contain all the evidence. Ross v. Roy [Ala.] 39 So. 583. Errors assigned upon instructions may be examined though the bill of exceptions does not purport to contain all the evidence in the case. Regan v. McCarthy, 119 Ill. App. 578. To warrant an appellate court in determining whether there was error in giving or refusing an instruction to return a certain verdict, the bill of exceptions must show that all of the evidence has been set forth. Rockwell v. Capital Traction Co., 25 App. D. C. 98. Where bill of exceptions sets forth no evidence entitling appellant to instructions asked for, it was not error to refuse them. Crandell v. Classen, 25 App. D. C. 5. Where the evidence is not contained in the record, the instructions will be presumed to be correct unless wrong under any state of facts which might have been proven at the trial. Grantz v. Deadwood [S. D.] 107 N. W. 832. Objection that a certain instruction for plaintiff ignored a certain "paper writing" claimed to affect defendants' rights could not be reviewed where the writing was not in the record. Oldenburg v. Dorsey [Md.] 62 A. 576. Where an "agreement in writing" and supplement thereto referred to in one of appellants' refused prayers was not contained in the record the presumption was that there was nothing in them to justify the granting of the prayer. Id.

6. Judgment imports such findings as are necessary to sustain. Hughes v. Landrum [Tex. Civ. App.] 13 Tex. Ct. Rep. 787, 89 S. W. 85; White v. Hines, 114 Mo. App. 122, 89 S. W. 349. Findings of a trial court are to be so construed as to uphold them rather than otherwise. Griffin v. Pacific Elec. R. Co. [Cal. App.] 82 P. 1084. The appellate court will reconcile findings when it can reasonably do so. Stohr v. Stohr [Cal.] 82 P. 777. When a judgment entered upon a short decision has been unanimously affirmed by the appellate division, the court of appeals is bound to assume that the trial court found all the facts warranted by the evidence and necessary to support the judgment. Miller v. New York, etc., R. Co. [N. Y.] 75 N. E. 1111. But this rule cannot be applied to a judgment void upon its face by complete failure to make a finding upon an essential issue in the case. Id. Nor where the judgment of the trial court can find no support in the findings however construed. Id. A judgment cannot stand on appeal unless supported by the findings. Lambert v. Bates [Cal.] 82 P. 767. Where the judgment is sustained by findings made on sufficient evidence, other findings are immaterial. People v. Davidson [Cal. App.] 83 P. 161. Where the trial court hears all the evidence, noting exceptions to parts thereof but reserving his rulings, it will be presumed on appeal that he disregarded improper evidence in making his findings, in the absence of conclusions of law and fact to the contrary. Goodson v. Fitzgerald [Tex. Civ. App.] 90 S. W. 898. The existence of unpaid taxes being immaterial unless they were claims within the meaning of a contract a finding that the taxes "were valid claims against the property" should be regarded as meaning valid claims within the meaning of the contract. Dodson v. Crocker [S. D.] 105 N. W. 929. Where, in equity, special findings of fact are made but no general finding and the evidence is not preserved, the sole question is whether the judgment is supported by the special findings and the pleadings. Kupke v. Polk [Neb.] 106 N. W. 459. If in such case there is no finding on a material issue such issue must be determined against the party charged with establishing it. Id. Where

the record fails to show any evidence in support of alleged affirmative defenses or counterclaims, failure to make any findings as to such issues will create the presumption that no evidence was introduced to support them, especially when the statement purports to contain all the material evidence. Roberts v. Hall, 147 Cal. 434, 82 P. 66. The record containing no findings of fact, the appellate court will impute to the trial court such findings, if supported by the evidence, as will support the judgment. Ragley Lumber Co. v. Insurance Co. [Tex. Civ. App.] 94 S. W. 185. Appellate courts must assume, in the absence of specific and unambiguous findings of fact to the contrary, that the lower court intended to find those facts which are responsive to the issue made by the pleadings and essential to the judgment rendered. Burnett v. Doyle [Colo.] 83 P. 967. Where a case is submitted to the jury upon special issues, it will be assumed, under the statute of practice, on appeal that an issue which was not submitted though there was evidence justifying its submission, was decided by the court in favor of the prevailing party. Horstman v. Little [Tex. Civ. App.] 88 S. W. 286. Omitted finding presumed to have been against appellant. Kaestner v. Farmers' & Merchants' State Bank, 112 Ill. App. 158. Failure to find upon some issue, which would invalidate a judgment otherwise fully sustained by the findings, is not ground for reversal in the absence of proof in the record that evidence was introduced on that point. Downing v. Donegan [Cal. App.] 82 P. 1111. Reversal cannot be had for failure to find on an affirmative defense where record fails to contain the evidence. Prince v. Kennedy [Cal. App.] 85 P. 859.

7. Nothing can be presumed in favor of the special findings or answer to interrogatories. Indianapolis St. R. Co. v. Johnson, 163 Ind. 518, 72 N. E. 571. Appellate courts must presume that the jury obeyed instructions. Chicago City R. Co. v. Hyndshaw, 116 Ill. App. 367. In the absence of a showing to the contrary it must be presumed that issues arising in a case were properly submitted to the jury and that the jury heeded the instructions. Kinney v. Brotherhood of American Yoemen [N. D.] 106 N. W. 44. Where plaintiff relied on two distinct propositions of fact either of which would warrant a recovery if true, and the record does not show how the questions were submitted to the jury or which proposition was found to be true, the verdict cannot be disturbed unless it is clear that neither proposition was true. Id. Must be presumed that jury followed repeated instructions that plaintiff could not recover any damages because of the operation of a street railroad on a particular street. Abbott v. Milwaukee Light, Heat & Traction Co. [Wis.] 106 N. W. 523. Where the evidence is not before the court, it will be presumed that the verdict was according to the evidence and the statute requiring the jury to assess the value of each item. Johnson v. Citizens' Bank [Ala.] 39 So. 577. Where either of two rulings, one correct and one erroneous, would have supported a general verdict, it will not be presumed to rest on the correct ruling. Jaquith v. Davenport [Mass.] 78 N. E. 93.

8. A judgment will be given such a construction as will support it, if possible within reason and accepted rules of construction. Pacific Pav. Co. v. Vizelich [Cal. App.] 82 P. 82. Where a general judgment is rendered and the grounds upon which it was based are not saved, it will have to be sustained if there is any ground supporting it. Galveston, etc., R. Co. v. Kropp [Tex. Civ. App.] 91 S. W. 819. Where judgment was rendered absolutely for defendant, it will be assumed on appeal under Mun. Ct. Act, § 249 (Laws 1902, p. 1561, c. 580), that the justice concluded from the whole case as a matter of law that plaintiff could not recover. Sultan v. Misrahi, 47 Misc. 655, 94 N. Y. S. 519. A decree will be presumed to have been based on pleas though they are not mentioned therein. Sellers v. Farmer [Ala.] 41 So. 291. On appeal from the entry of nunc pro tunc judgment, it will be presumed that the court acted correctly where the bill of exception does not contain all facts upon which the judge acted. Slayden & Co. v. Palmo [Tex. Civ. App.] 90 S. W. 908. It will be presumed that orders necessary to sustain a judgment were entered in the trial court in the absence of a showing that they were not entered. That order of adjournment was entered. Weske v. Chicago Union Traction Co., 117 Ill. App. 298. Where the finding of the trial court is that $300 is a reasonable attorney's fee, while judgment is for $350, and no explanation is contained in the briefs nor any point made thereon by appellant, it will be presumed on appeal that $350 was regarded as a reasonable fee by trial court. Corson v. McDonald [Cal. App.] 85 P. 861. Action of the court in entering an affirmance of an assessment on failure of appellant to perfect the appeal in time is presumed without error in the absence of a clear showing to the contrary. Stephens v. City Council of City of Marion [Iowa] 107 N. W. 614. Where the court imposed a sentence to begin on the future termination of another sentence of a different court, it will be presumed, in the absence of a showing to the contrary, that it had before it a record of the conviction in the prior proceeding to justify its action. Rigor v. State [Md.] 61 A. 631. A judgment dismissing an appeal to the district court could not be reviewed where neither the motion to dismiss nor the grounds thereof appeared in the record. Edwards v. Fagles [N. D.] 107 N. W. 43. The oversight and direction of the settlement of estates is committed to the district courts and the appellate court will not interfere except upon a clear showing that justice demands it. Wheeler v. Long [Iowa] 105 N. W. 161. Where a decree declined to clear up a building on account of a liquor nuisance and the complaint did not show that defendant was the owner, it was presumed that the owner was not made a party to the action. Stahl v. Weston [Iowa] 106 N. W. 206. Where the record is indefinite the determination of the court below as to amount undue on a mortgage will not be interfered with especially where it sought to enforce an unconscionable claim. Oskaloosa Nat. Bldg. L. & Invest. Ass'n v. Baily [Iowa] 105 N. W. 417. The supreme court will not grant relief on the ground of alleged fraud on the part of representatives of an estate where the court below refused to find fraud and there is nothing in the record to suggest it. Barry v. Minahan [Wis.] 107 N. W. 488. The appellate court

is bound to presume any finding of fact supported by the record which would warrant the judgment. Smily v. McIntosh [Iowa] 105 N. W. 577. On appeal from a judgment, the successful party is entitled to have the evidence construed most favorably to support the judgment. Bannon v. New York, etc., R. Co., 98 N. Y. S. 770. Where in a suit for specific performance the appellant's abstract contains only a meager portion of the evidence and does not disclose the theory of the trial court, it will be assumed that the evidence was sufficient to sustain the judgment. Mitchell v. Mitchell, 191 Mo. 475, 90 S. W. 1147. In a suit for divorce and partition of community property, it must be assumed, in the absence of a statement of facts, that the court made a fair and equitable distribution and was founded on evidence sustaining it. Longwell v. Longwell [Tex. Civ. App.] 13 Tex. Ct. Rep. 600, 88 S. W. 416. In the aosence of a statement of facts, it must be presumed that all matters pleaded by the parties and necessary to sustain the judgment were proven. Id. In the absence of some of the pleadings, it will be presumed on appeal that they were sufficient to sustain the judgment. Western Supply & Mfg. Co. v. U. S. & Mexican Trust Co. [Tex. Civ. App.] 92 S. W. 986. In the absence of a statement of facts it will be presumed that all facts included in the judgment were amply established. Owens v. Owens [Tex. Civ. App.] 90 S. W. 664. In the absence of a certificate on the clerk that the appellant has filed a complete record, the appellant cannot raise any question as to whether the recitals in the orders appealed from are sufficient to sustain the judgment. Franklin Union, No. 4 v. People, 220 Ill. 355, 77 N. E. 176.

Bar by limitations: Return of service in time to toll statute not presumed against fact of appearance when too late. Dolan v. Burlington, etc., R. Co. [Iowa] 105 N. W. 834. Whether action was barred by limitations was not properly before the court for review where it did not affirmatively appear from the record when the action was commenced. Bruce v. Wanzer [S. D.] 105 N. W. 282.

9. All presumptions favor the order granting a new trial. Le Tourneux v. Gilliss [Cal. App.] 82 P. 627. In absence of affirmative showing action of trial court in granting a new trial presumed correct. Linderman v. Nolan [Okl.] 83 P. 796. The record on appeal from an order refusing a new trial should contain the judgment roll, the bill of exceptions used at the hearing, and a copy of the order refusing a new trial. Mendocino County v. Peters [Cal. App.] 82 P. 1122. The merits of an order setting aside a verdict cannot be considered on appeal where no evidence is returned. Herrmann v. Herrmann, 98 N. Y. S. 655. On appeal from an order granting a new trial because of an instruction given, the order will be affirmed where the evidence necessary to determine whether such instruction was erroneous or correct is not in the record. Goodwin Mfg. Co. v. Arthur Fritsch Foundry & Mach. Co. [Mo. App.] 89 S. W. 911. Where a judgment setting aside a verdict and granting a new trial does not show on which of the many grounds specified it was based, and no bill of exceptions touching the trial was filed, it will be presumed that the court was justified. Pace v. Paducah R. & Light Co. [Ky.] 89 S. W. 105. The rule that where the bill of exceptions or certificate of evidence fails to show exceptions to the action of the court in overruling a motion of a new trial the appellate court will not inquire into the sufficiency of the evidence applies to contested will cases as well as to ordinary action at law. Johnson v. Farrell, 215 Ill. 542, 74 N. E. 760. Where alleged newly discovered evidence is not set out in motion for new trial, the refusal of the new trial will not be disturbed. Johnson v. Thrower, 123 Ga. 706, 51 S. E. 636; Seattle Lumber Co. v. Sweeney [Wash.] 85 P. 677. An order granting a new trial will not be sustained as a discretionary order based upon the ground that the verdict or findings were contrary to the evidence unless it affirmatively appears from the record to have been based upon the ground. In re Bradley's Estate [Minn.] 106 N. W. 338. Where the court improperly submitted the case to the jury on the theory that the entire sale was presumed fraudulent, and no other error appeared, it was presumed that a new trial was granted on that ground, though the reason therefor was not given. Kolander v. Dunn [Minn.] 104 N. W. 371. The supreme court will not presume that a new trial was granted on the ground that the verdict was contrary to the evidence that fact not appearing from the order itself or a memorandum thereto attached. Laws 1901, c. 46, p. 51. Kolander v. Dunn [Minn.] 104 N. W. 371. A new trial being granted for error in sustaining a plea in abatement to a counterclaim, the appellate court would presume if such presumption were necessary to uphold the decision, that a new trial was granted on the counterclaim alone. Schmidt v. Rosner [Iowa] 106 N. W. 760. Exceptions to the refusal of a new trial will not be considered where the grounds upon which the motion was made are not set out in the record. Carter v. Western Union Tel. Co. [S. C.] 53 S. E. 539; Armstrong v. Stewart [Iowa] 106 N. W. 512; Houghton v. Market St. R. Co. [Cal. App.] 82 P. 972; Clark v. Rauer [Cal. App.] 83 P. 291.

10. Alleged error in assessing damages against defendant on the ground that his appeal from a justice was taken for delay, and in failing to apportion costs on such appeal, could not be reviewed in the absence of a bill of exceptions, both questions depending upon the evidence. Salomon v. Central House Furnishing Co., 112 Ill. App. 187. Dismissal of appeal from a justice not reviewed in aosence of bill of exceptions containing motion, ruling, or exception. Lambert v. Janss, 117 Ill. App. 71. Objection to an intermediate appeal bond where abstract did not show in what capacity appellant asked for an appeal, not considered. Griswold v. Smith, 116 Ill. App. 223. The refusal of the circuit court on appeal from the probate court to allow the appellant to amend the record by having a certified copy filed will not be disturbed by the supreme court where it does not appear in the record that any application was ever made to the circuit court to allow such amendment. Watson v. Pollitzer [S. C.] 51 S. E. 914. Where an order of reversal entered by the appellate division is silent as to the ground of reversal, the court of appeals will presume that the judgment of the trial court was not reversed upon a question of fact and that facts as found were approved by the appel-

(§ 9) *E. Conclusiveness of record and effect of conflicts therein.*[11]—The record imports absolute verity,[12] and cannot be impeached by affidavits[13] or by the statement of counsel.[14] In case of conflict, that part of the entire record whose appropriate function it is to present that particular matter prevails.[15] The presumption of absolute verity will not be indulged to prohibit correction of an obvious clerical mistake.[16]

§ 10. *Transmission of record to reviewing court. A. Form and contents of transcript or return.*[17]—The transcript includes both the record proper and the secondary record, and generally all of such records should be included[18] though

late division. McClure v. Leaycraft [N. Y.] 75 N. E. 961.

11. See 5 C. L. 184.

12. Lindley v. Kemp [Ind. App.] 76 N. E. 798. The record entry as to the dates when the bill of exceptions was filed below cannot be impeached. Swafford v. Swafford [Ga.] 53 S. E. 959. Upon a dispute as to whether a certain allegation was in the answer when the case was tried, the case must be disposed of on the record as certified. United States Fidelity & Guaranty Co. v. Boyd [Ky.] 94 S. W. 35. In a petition for review by certiorari, the return of the officer serving the summons must be treated as absolutely true. Party cannot say he forebore to appeal because not served, and hence ignorant. McAnaney v. Quigley, 105 Ill. App. 611. Justice docket entry of judgment conclusive on matters within his jurisdiction. Town of Chalmers v. Tandy, 111 Ill. App. 252. An order denying a motion to set aside a verdict will not be considered where the record shows that no motion was made. Koeppel v. Koeppel, 98 N. Y. S. 670. A record entry of a continuance of 30 days is insufficient to impeach the record entry of a decree on the same day. Lyon v. Bass [Ark.] 89 S. W. 849. If the court having jurisdiction of a cause proceeds in an irregular or erroneous manner, the remedy is not in habeas corpus but in the prosecution of error; and in such a case the record imports absolute verity until it is corrected in a proper proceeding for that purpose. Lillibridge v. State, 7 Ohio C. C. (N. S.) 452.

13. Where on appeal appellee filed affidavits that a certain deposition was read on trial and not copied in the transcript and there were counter-affidavits, the court cannot decide the question. Gaboury v. Coombs [Ky.] 89 S. W. 300. The certificate of clerk that the transcript is complete cannot be impeached by affidavits. Gaboury v. Coombs [Ky.] 90 S. W. 281. Records cannot be impeached by affidavits. Gregory v. Webb [Tex. Civ. App.] 13 Tex. Ct. Rep. 1016, 89 S. W. 1109. Where the order book entry showed that an oral motion for venire de novo was joint and the bill of exceptions showed that it was several, it was held that the bill of exceptions would prevail. Douglas v. Indianapolis & N. W. Traction Co. [Ind. App.] 76 N. E. 892. A recital in the record as to the date of filing an affidavit of appeal is controlled by the affidavit itself, where it shows that it was filed subsequently. State v. Gates, 113 Mo. App. 649, 88 S. W. 640. Omissions of proceedings in return cannot be supplied by affidavit. Forman v. New York Transp. Co., 95 N. Y. S. 581.

14. Where bill erroneously recites that a lease expired on Nov. 25, instead of Nov. 24, said recital is nevertheless binding and counsel cannot correct it in his argument. Byrne v. Morrison, 25 App. D. C. 72.

15. The correctness of a record certified as correct by the clerk as to the date of entry of a decree is not overcome by a record entry on the same day of a continuance for taking a deposition and a certificate to the deposition reciting that it was taken at a later date, though the decree recites that such deposition was considered. Lyon v. Bass [Ark.] 89 S. W. 849. The certificate of the clerk that a decree was rendered on a certain term day controls an indorsement on the record entry showing that it was recorded at a late date. Williams v. Ritchie [Ark.] 91 S. W. 183. If the record shows a refusal to plead over after sustaining demurrers to the replications but the judgment shows a joinder of issue, the latter will control and enables plaintiff to claim review of the rulings on the demurrers. Alabama Jail & Bridge Co. v. Marion County [Ala.] 40 So. 100. Recitals in a judgment that the parties appeared by their attorneys at the time the judgment was rendered, while presumptively true, are controlled by an affirmative showing in the bill of exceptions that they are not true. Schlachter v. St. Bernard's Roman Catholic Church [S. D.] 105 N. W. 279. Where the bill of exceptions purports to contain an extract from the record in the case, and the same is at variance with what is contained in the transcript of the record duly certified by the clerk, the latter will control as to what is the true record in the case. Georgia Southern & F. R. Co. v. Pritchard, 123 Ga. 320, 51 S. E. 424. Where the statement of facts contains evidence which the bill of exceptions recites as excluded, the appellate court cannot hold that such evidence was excluded. Mullen v. Galveston, etc., R. Co. [Tex. Civ. App.] 92 S. W. 1000. A bill of exceptions reciting that a notice of intention to move for new trial was seasonably served and filed takes precedence over a recital in the notice of intention that it was filed one day after time had expired, inasmuch as such notice is not part of the record. Mendocino County v. Peters [Cal. App.] 82 P. 1122. Statement of facts agreed to by the parties must control the bill of exceptions if in conflict. Houston, etc., R. Co. v. O'Donnell [Tex. Civ. App.] 90 S. W. 886.

16. Where there is a palpable mistake in the clerk's return, the record must control. Maggio v. Ocean View Cemetery, 47 Misc. 680, 94 N. Y. S. 595.

17. See 5 C. L. 186.

18. Transcript must contain the judgment or final order of the court below. Modern Woodmen of America v. Plummer [Neb.] 105 N. W. 181. Where, upon a change of venue,

in some states the parties indicate by precipe what shall be included.[19] Ore samples need not be brought to the supreme court for examination but they may if desired be brought as original exhibits under the rules of the court.[20] Transcript should be made up in strict accordance with the rules of the appellate court.[21] Copies, not the original files, should be sent up [22] unless the statute requires originals.[23] Rules usually require the transcript to be indexed,[24] paged, and arranged in an orderly manner.[25] One transcript for two closely related appeals may be allowed.[26]

(§ 10) *B. Authentication and certification.*[27]—The transcript must be au-

the clerk of the court in which the case was originally brought copied a pleading into the transcript and the clerk of the court to which the cause was transferred certified that the transcript contained a full true, and complete copy of all papers and entries in the cause, it was held that the pleading was in the record, though not copied therein by the clerk of the court to which the cause was removed. Chicago, etc., R. Co. v. Reyman [Ind.] 76 N. E. 970. Under Rules p. 99, § 22, preliminary pleadings rendered unimportant by reason of amended substituted pleadings and on which no reason of appeal is predicated should not be printed for use of the supreme court of errors. Osborn v. Norwalk, 77 Conn. 663, 60 A. 645. A transcript should contain the judgment or order appealed from and only such matters as may be necessary to present the rulings sought to be reviewed. Fike v. Ott]Neb.] 107 N. W. 774. In Oklahoma, there are two methods for bringing case up to supreme court by transcript or case-made. Williamson v. Williamson [Okl.] 83 P. 718. Although it is proper to omit a voluminous schedule from the record, when no exceptions are based on its various items, but the tenor and purport of the entire schedule have been reported. Gilbert v. Endowment Ass'n, 21 App. D. C. 344. Acts 29th, Leg. p. 220, providing that when a stenographic transcript of the evidence is brought up, it shall constitute the exclusive record as to such matters, is constitutional. Johnson v. State [Tex. Cr. App.] 93 S. W. 735. Acts 29th Leg. p. 219, §§ 3-5, does not apply where no stenographic transcript is made out, and in such case it is the duty of the clerk to prepare and deliver to appellant a transcript of the statement of facts prepared by the trial judge. Ferguson v. Kelly [Tex. Civ. App.] 91 S. W. 804.

19. Where a written praecipe is inserted immediately before the clerk's certificate which expressly refer to "the above and foregoing praecipe," it was held that this was a substantial compliance with the statute relating to the praecipe. See Acts 1903, p. 338, 340, c. 193. Pittsburgh, etc., R. Co. v. Reed [Ind. App.] 75 N. E. 50. Where the praecipe calls for a particular part of the record, only such part is before the appellate court, and hence where the part of the record called for does not show that co-parties who were not joined were not affected by the judgment, the appellate court will not presume that there were such parties. Helberg v. Dovenmehle [Ind. App.] 76 N. E. 1020. Where the praecipe called for entries in the trial of the cause, the verdict of the jury, both special and general, etc., and the clerk's certificate was identical with the praecipe, it was held that the interrogatories submitted to the jury and their answers thereto were properly transcribed in the record. Lindley v. Kemp [Ind. App.] 76 N. E. 798. Under Acts 1903, p. 338, c. 193, the original bill of exceptions containing the evidence becomes a part of the record when certified according to the statute, whether named in the praecipe or not. Brotherhood of Painters, Decorators & Paperhangers of America v. Moore [Ind. App.] 76 N. E. 262. Where the bill of exceptions contains the evidence and is the only bill that has been filed, and is the only paper or document permitted by a statute to be incorporated in the transcript in its original form, a praecipe directing the clerk to include in the transcript certain papers, including "the original bill of exceptions," is sufficient to authorize the clerk to incorporate such bill of exceptions in the record, and the evidence becomes a part of the record. New American Oil & Min. Co. v. Troyer [Ind.] 76 N. E. 253.

20. Hickey v. Anaconda Copper Min. Co. [Mont.] 81 P. 806.

21. Florida Land Rock Phosphate Co. v. Anderson [Fla.] 39 So. 392.

22. In proceedings in error the original papers cannot take the place of a transcript. Code Civ. Proc. § 586. Smith v. Delane [Neb.] 104 N. W. 1054. In proceedings in error unlike appeals, the original papers should not be sent up. Code Civ. Proc. § 586. Smith v. Delane [Neb.] 104 N. W. 1054.

23. Under the practice in Wyoming the original papers are sent to the supreme court by the clerk of the court below upon an order of the clerk of the supreme court. Harden v. Card [Wyo.] 85 P. 246.

24. Hannan Bros. v. Waltenspiel, 29 Utah, 466, 82 P. 859. An index to the bill of exceptions containing the evidence inserted immediately before the bill, is insufficient where there is no index to the other portions of the record, such record consisting of 27 type-written pages preceding the bill of exceptions. McCormick Harvesting Mach. Co. v. Hinchman [Ind. App.] 76 N. E. 327. See Appellate Court Rule § 3, 55 N. E. 1V.

25. Harden v. Card [Wyo.] 85 P. 246. A record which does not set out the various papers in the order prescribed by rule 41 of supreme court practice is not entitled to record. Brady v. Powers, 105 App. Div. 476, 94 N. Y. S. 259. Confused and unintelligible record, appeal dismissed. Trescott v. Co-operative Bldg. Bank, 212 Pa. 47, 61 A. 478.

26. Appeal from order removing administrator and one from order appointing his successor. Boyd v. Cloud [Del.] 62 A. 294.

27. See 5 C. L. 187. Settlement and signature of bill of exceptions or case, see ante,

thenticated [28] by the clerk [29] of the court from which it comes,[30] showing its completeness and verity.[31]

(§ 10) *C. Transmission, filing, and printing.*[32]—The transcript must be filed in the appellate court [33] within the time prescribed by rule or statute,[34] or an extension thereof duly granted,[35] and complete jurisdiction is not acquired until

§ 9c. Certificate of contents of record as requisite to review of particular questions, see ante, § 9d.

28. A bill of exceptions will be quashed where not certified and identified sufficiently to enable the appellate court to know that it is the identical bill allowed by the trial court and the whole thereof. State v. Paxton [Neb.] 106 N. W. 166. Document purporting to be a bill of exceptions cannot be considered unless authenticated by certificate of the clerk. Duncan v. State [Neb.] 106 N. W. 1014. Appeal from order disposing of an interlocutory motion is well taken when it affirmatively appears by the certificate of the clerk that his return contains correct copies of all the records and files in the case. McAllen v. McAllen [Minn.] 106 N. W. 100. The fact that exhibits attached to certain affidavits were detached at the suggestion of the trial court held immaterial. Id.

29. Rule 11 requires the clerk of the lower court to authenticate the papers sent up as all or certain ones of the papers in the case. Harden v. Card [Wyo.] 85 P. 246.

30. A transcript purporting to be from the superior court but certified by the clerk of the circuit court and under the seal of such court, is not sufficiently authenticated. See Burns' Ann. St. §§ 1426dl, 1426ql. Haralovich v. State [Ind. App.] 74 N. E. 903. Record of register of wills remanded for certification. Boyd v. Cloud [Del.] 62 A. 294.

31. A certificate stating "The above and foregoing to be a true, full and complete copy of all papers, proceedings and papers" in an action, not including a certificate that it is a true copy of the record, is insufficient as a transcript. Naylor v. Berry [Kan.] 81 P. 473. A certificate attached to the transcript reciting that a true and correct copy of the order refusing a new trial is therein contained is a sufficient authentication. Mendocino County v. Peters [Cal. App.] 82 P. 1122.

32. See 5 C. L. 187.

33. In Kansas in the proceedings in error in the supreme court, the provisions of Code Civ. Proc. § 546, L. 1905, c. 320, p. 534, are jurisdictional and mandatory and no degree of diligence will excuse the plaintiff in error from filing a transcripe or case-made with his petition in error. Kennard v. Alexander [Kan.] 84 P. 377. But where a transcript is filed with petition, in which there is a mistake or material omission, it is within the jurisdiction of the court to allow an amendment within the year for filing the petition at least. Id. Where a party has, within due time, done all that is legally required to effect an appeal from the county to the district court, and no waiver of the transmission of the records by the county judge is shown, the district court does not lose jurisdiction of the appeal by reason of its being filed six days late. Drexel v. Reed [Neb.] 95 N. W. 873.

34. Wandelohr v. Grayson County Nat. Bank [Tex. Civ. App.] 90 S. W. 180; Butter v. Lamson, 29 Utah, 439, 82 P. 473; Oppenheim v. Richardson & Co. [Ind. T.] 90 S. W. 480; Mix v. Campbell [La.] 38 So. 877; California Consol. Min. Co. v. Manley [Idaho] 85 P. 919; McClelland v. Cedar Rapids [Iowa] 107 N. W. 428; Incorporated Town of Gilman v. Fernald [C. C. A.] 141 F. 940. In case of failure of appellant to file transcript within prescribed period, appellee at his own cost may obtain and file one. Morgan v. Morgan, 25 App. D. C. 389. Appeal will be dismissed where the record is not filed within the time allowed unless sufficient excuse for delay is shown. Peacock v. Kirkland [Ala.] 39 So. 670. Appellants have three judicial days from the return day to file the transcript whether the court is in session on that day or not. Lopes v. Sahuque, 114 La. 1004, 38 So. 810. An appeal must be perfected and transcript filed within 40 days after entry of order on a motion for a new trial regardless of whether appellant had notice of such order or not. Belle v. Staacke [Cal.] 83 P. 245. In California under Supreme Court Rule 2, the appellant may file his transcript within 40 days after perfecting his appeal from the judgment and if a motion for a new trial is pending then 40 days from the entry of the order on the motion. Bell v. Staacke [Cal.] 83 P. 245. The rule allowing an appeal from a judgment and an order denying a new trial to be made from the same transcript was not intended to extend the time for filing the transcript from the date of perfecting the appeal from the order on the motion for a new trial. Bell v. Staacke [Cal.] 83 P. 245. In California, time to file transcript does not run until after the motion for a new trial is disposed of. Pollitz v. Wickersham, 147 Cal. 371, 81 P. 1099. According to rule 2 of the supreme court the transcript must be filed within 40 days after the appeal is perfected, unless a proceeding for the settlement of the bill of exceptions to be used on appeal is pending. Moultrie v. Tarpio, 147 Cal. 376, 81 P. 1112. A proceeding to settle a bill of exceptions is not pending so as to extend time of filing transcript where appellant has so long delayed prosecuting an undisposed-of motion to settle that it is under all circumstances too late to do so. Moultrie v. Tarpio, 147 Cal. 376, 81 P. 1112. Transcript filed after appellate court has taken case for decision will not be considered. Mayer v. Schneider, 112 Ill. App. 628. The time for filing transcript on appeal runs from the final determination of a motion for a new trial, hence a conditional grant, which suspends the absolute determination of the motion until the removal of the condition, suspends time for filing the transcript. Shepard v. Rohbins Press Works [Cal.] 85 P. 307. Failure to file transcript within time limited by rules of the court without good excuse is ground for dismissal. Bell v. Staacke [Cal.] 83 P. 245. Failure to transmit in time, due to negligence, ground of dismissal. Budden v. Brooks, 123 Ga. 882, 51 S. E. 727.

35. Under Pub. L. 1903, p. 47, c. 1111, the supreme court is not authorized to extend the

such filing.[36] Relief against accident or mistake is usually grantable.[37] Where a bill of exceptions is brought into court on a motion to dismiss and is admitted to be authentic, it will be received as if regularly transmitted.[38] Printing of the transcript is usually required by rule.[39]

(§ 10) *D. Amendment and correction.*[40]—Until the record is sent up the lower court has full power to correct it.[41] After it is filed in the appellate court, the practice in some states is to make corrections in the appellate court,[42] while in others the appellate court disclaims such power,[43] and they must be made below and brought up[44] on leave.[45] Unnecessary amendments will be stricken.[46] An

time for filing the transcript and petition for a new trial after the expiration of the time already granted by the trial justice. Haggelund v. Oakdale Mfg. Co., 26 R. I. 520. 60 A. 106. An order extending the time within which to file a transcript, may be made after notice of appeal has been given and before appeal is perfected by the filing of an undertaking. Wolf v. City R. Co. [Or.] 85 P. 620. The provision that an order enlarging the time within which to file a transcript "shall be made within the time allowed to file the transcript" simply means that it should be made before the appellant is in default. Wolf v. City R. Co. [Or.] 85 P. 620. Extension of time to settle bill of exceptions in court below cannot operate as an extension of the time in which to file transcript. Butter v. Lamson, 29 Utah, 439, 82 P. 473.

36. Morgan v. Morgan, 25 App. D. C. 389. Without a transcript, appellate court has no proper foundation for exercise of discretion upon a prayer for an order either affecting the merits of the appeal, or the charges incidental to its effective prosecution. Id.

37. Facts considered and held not to show that failure to file the evidence in time was due to accident, etc., so as to authorize appellate court to grant a new trial under Gen. Laws 1896, c. 251, § 2. Haggelund v. Oakdale Mfg. Co., 26 R. I. 520, 60 A. 106. The appellate court is without jurisdiction to allow an extension of time to complete the record unless within the statutory period a sufficient transcript is filed to show the pendency of the cause on appeal in that court. Appeal dismissed where the final decree was not filed on or before the second day of the term. Mahler v. Sanche, 117 Ill. App. 572. Where it appears that clerks did not have time to transcribe and forward the record, and it does not appear that plaintiff in error is chargeable with delay in transcribing and forwarding the record, appeal will not be dismissed for delay. Fricker v. American Mfg. & Imp. Co. [Ga.] 52 S. E. 65. Delay caused by favor of judge not ground for dismissal. Railroad Commission v. Palmer Hardware Co. [Ga.] 53 S. E. 193.

38. Schwarzchild & Sulzberger Co. v. Chesapeake & O. R. Co. [W. Va.] 53 S. E. 785.

39. The circuit court of appeals for the 6th circuit will no longer waive the printing of the transcript as required by rule 23. In re Brandford's Petition [C. C. A.] 139 F. 518.

40. See 5 C. L. 188.

41. During term at which the trial occurs the entire record is within possession and control of court. Callahan v. Hauck & Co. [Wyo.] 83 P. 372. An order of the court correcting the record as to some proceeding had before him is equivalent to a finding of fact on evidence and cannot be reviewed. Christisen v. Bartlett [Kan.] 84 P. 530.

42. On appeal, findings and proceedings will be deemed amended in accordance with the facts proved or an amendment will be allowed on appeal when evidence was received below without objection. Coe v. Rockman [Wis.] 106 N. W. 290.

43. If the order shown by the transcript was not the one actually entered in the trial court the correction must be made in that court and not in the appellate court. Field v. Field, 117 Ill. App. 307. A statement of facts certified to by the trial court cannot be amended on appeal. Atascosa County v. Alderman [Tex. Civ. App.] 91 S. W. 846. A bill signed and filed can be corrected only by the court where the record is made. Callahan v. Hauck & Co. [Wyo.] 83 P. 372. Where a case is submitted on appeal on an agreed statement of facts, the court cannot amend the statement to award ambiguity, but may decline to consider the question of law until the facts are clearly presented (Dame v. Woods [N. H.] 62 A. 379), but if the court considers the question and suggests an amendment believing that the facts had been found by the trial court the only remedy of the defeated party is to apply to the superior court to be relieved from his agreement and for a trial of the questions of fact (Id.). Appellate court cannot correct the bill of exceptions. Callaghan v. Houck & Co. [Wyo.] 83 P. 372. A record authenticated by trial court cannot be changed by appellate court. Mendocino County v. Peters [Cal. App.] 82 P. 1122.

44. Where a deposition was omitted from the transcript, it may be copied and tendered as an additional transcript. Gaboury v. Coombs [Ky.] 89 S. W. 300. The bill sent up on certiorari to complete the record will be regarded as correct where it conflicts with that originally sent up. Anniston Mfg. Co. v. Southern R. Co. [Ala.] 40 So. 965. The trial court may correct its record after an appeal has been taken. Pease v. Fink [Cal. App.] 85 P. 657.

45. A court of appeals will not, as a matter of course, permit a bill of exceptions to be withdrawn for purposes of amendment, especially where omission or inaccuracy is due to laches of the appellant. Callahan v. Houck & Co. [Wyo.] 83 P. 372. When and under what circumstances a bill of exceptions will be returned to trial court for correction lies within discretion of appellate court. Id. Certiorari will not issue to complete a skeleton bill which does not identify the matters to be inserted. Anniston Mfg. Co. v. Southern R. Co. [Ala.] 40 So. 965. Where a statute, not mandatory, requires all

amendment converting an appeal into an appeal from another different decree than the one appealed from introduces a new cause of action and is not allowable.[47] Superfluous matters in the record will be ignored or stricken.[48] The time within which amendments may be made is usually limited by rule and where there is laches the application will be denied.[49]

§ 11. *Practice and proceedings in appellate court before hearing. A. Joint and several appeals; consolidation, severance.*[50]—Though two appeals from successive orders are consolidated for hearing, each must be decided on its own merits.[51] One joint appellant will not be permitted to assume a position antagonistic to another joint appellant.[52]

(§ 11) *B. Original and cross proceedings.*[53]—The cross assignment of errors is treated elsewhere.[54] The appellee cannot complain of provisions of the decree unless there is a cross-appeal.[55]

evidence in an appeal in an equity case to be identified by the judge, a motion to strike for lack of identification will be granted with leave to apply to trial judge for proper certificates as to such evidence, especially where there is considerable confusion as to the proper evidence, exhibits and documents to be brought up on appeal. Hume v. Burns [Or.] 83 P. 391.

46. Where only a part of a stipulation of facts was introduced in evidence by plaintiff and defendant offered no testimony but obtained a directed verdict only the part introduced in evidence should have been incorporated in the record. Clark v. American Exp. Co. [Iowa] 106 N. W. 642.

47. In re Gurdy [Me.] 63 A. 322.

48. Motion to strike bill of particulars on the ground that it was not contained in the bill of exceptions. Forbes Co. v. Leonard, 119 Ill. App. 629. A motion will be sustained to strike from the record on appeal from a judgment any papers, records or copies thereof, which under Rev. St. § 4456, subd. 2, have no place in the judgment roll. Williams v. Boise Basin Min. & Development Co. [Idaho] 81 P. 646. Where court cannot determine the propriety of striking out a certain stipulation in the transcript from the information then before it, the determination of the motion will be postponed until the final hearing. Hume v. Burns [Or.] 83 P. 391. A motion to strike a transcript because of incorporating improper evidence, will not be decided where evidence is very voluminous, until the appeal is heard on its merits. Id. Matter improperly included in the transcript will be struck on motion by adverse party. Swanson v. Groat [Idaho] 85 P. 384.

49. Under the rule that suggestions of diminutions of record shall be made before a case is called for trial and at such time as will give opportunity to have the record perfected before hearing or the imperfection will be waived provided, however, that such an amendment thus supplied brought before the court before the case is finally disposed of, after hearing, may be considered, it has been uniformly held that suggestions of diminution and leave to perfect the record must be applied for before the case is finally disposed of. La Follette Coal, Iron & R. Co. v. Smith [Tenn.] 92 S. W. 237. Where appellant failed to correct appeal record by incorporating the minutes of a motion for new trial and grounds thereof although his attention was called thereto in appellee's reply brief, and no effort at correcting was made while case was under advisement for a week, it is too late to suggest diminution of record and its correction on petition for rehearing. Id. Where a writ of error was dismissed because of defective service of the citation, appellant will not be permitted to amend the record to show valid service where he had ample time to amend before the motion to dismiss was acted upon. Vineyard v. McCombs [Tex. Civ. App.] 93 S. W. 482. In order to have a record amended, the party must not only apply without delay but must show that the condition was not attributable to a want of reasonable diligence. Id. Where appellant failed to have a bill of exceptions corrected although his attention to its deficiency was called during the term at which it is signed and filed, it will be such laches as will prevent granting a motion to send it down for correction subsequently made and will result in the granting of a motion to strike it. Callahan v. Houck & Co. [Wyo.] 83 P. 372. Where the appellant, by the report of the case, had full benefit of every argument which could have been based upon certain papers, it was held that the trial court properly denied a motion, made after the final decree and appeal therefrom, to have such papers reported. Alexander v. Grover [Mass.] 77 N. E. 487. Where defect in certificate was due to the negligence of appellant's counsel and was called to his attention below, an application to withdraw the bill for correction, made after motion to dismiss, will be denied. Callahan v. Houck & Co. [Wyo.] 83 P. 372. An amendment of the abstract filed after the other party has fully argued will be stricken on motion. McDermott v. Mahoney [Iowa] 106 N. W. 925. A writ of certiorari will not issue for the purpose of aiding a petiton for a rehearing or for the purpose of correcting a record in any manner or form after decision on appeal. Aetna Life Ins. Co. v. Stryker [Ind. App.] 76 N. E. 822.

50. See 5 C. L. 190.

51. Succession of Henry [La.] 40 So. 635.

52. Anderson v. Northern Pac. R. Co. [Mont.] 85 P. 884.

53. See 5 C. L. 190.

54. See post, § 1183.

55. Griffith v. Vicksburg Waterworks Co. [Miss.] 40 So. 1011. Where plaintiff did not appeal from the decree he could not complain that the judgment should have been

(§ 11) *C. Amendment of parties.*[56]—Amendment and substitution may be allowed in case of the death of a party.[57] So, too, necessary parties who have been omitted may be brought in by way of amendment.[58] A substitution of parties on a showing made in the appellate court, though sometimes proper, will be denied where the refusal of such an order is appealed from and the showing made for it below was insufficient.[59]

(§ 11) *D. Calendars, trial dockets, terms.*[60]—A notice of argument should not ordinarily be given before the time for filing the record has expired.[61] Where there are different calendars, the nature of the case usually determines upon which calendar it should be entered.[62] In North Carolina appeals in civil cases tried without a jury may be docketed at a criminal term.[63] Appeals to intermediate courts for trial de novo are regular causes in such courts and should be tried in their proper sequence.[64] An agreement to reset the appeal, sanctioned by the court, re-

for a larger amount. Arrison v. Supreme Council of Mystic Toilers [Iowa] 105 N. W. 580. Where no appeal is taken by the appellee a ruling against him in favor of the appellant is not before the appellate court. Tabor-Prang Art Co. v. Durant, 189 Mass. 173, 75 N. E. 221. Court reviews the errors presented by appellant and not those presented by respondent. Mackel v. Bartlett [Mont.] 82 P. 795. The supreme court cannot review the validity of a foreclosure judgment rendered against defendants who prosecute no appeal on plaintiff's appeal from the conditions imposed in a part of said judgment. Keely v. Gregg [Mont.] 82 P. 27. Where a bill for divorce was dismissed but the custody of the children awarded to plaintiff, the appellate court was not called upon to consider the disposition of the children, plaintiff not complaining thereof on appeal, and defendant not having taken a cross appeal. Wheeler v. Wheeler [Md.] 61 A. 216. An appellee may by complaint in the nature of a cross appeal be relieved from erroneous or unjust conditions imposed upon him by a decree. Where a charge was not within the pleadings and appellee had no opportunity to litigate it. Kupke v. Polk [Neb.] 103 N. W. 321. Decision in favor of appellant will not be reviewed where there is no cross appeal or cross assignment of errors. Snyder v. Pike [Utah] 83 P. 692. Will not review a ruling in favor of appellant on the suggestion of the respondent, where the latter has not appealed from it. Lawler Land Co. v. Steel [Wash.] 83 P. 896.

56. See 5 C. L. 190.

57. Upon the death of one of the parties pending an appeal failure of the opposite party to suggest death is an irregularity which may be waived by the survivor. Walton v. Ryan [Mich.] 12 Det. Leg. N. 516, 104 N. W. 736. Under Comp. L. § 10121, providing for a continuation of a suit by or against the survivors in case of death of one of several plaintiffs or defendants it is proper to allow suggestion of death of one co-party on appeal to be made after judgment as of the time of the death and to modify the judgment so that costs may go against the survivor only. Daniels v. Crane [Mich.] 12 Det. Leg. N. 547, 104 N. W. 736.

58. If parties who should be plaintiffs in error are omitted, they can be added by amendment to the bill of exception filed by one proper plaintiff in error. Screws v. Anderson [Ga.] 52 S. E. 429. While an appeal is amendable as to parties yet a stranger to the record cannot appeal then amend so as to stand as appellant to use of the real party and again amend by striking out appellant's name and the words "to use of" letting the appeal stand as one by the party. Head v. Marietta Guano Co. [Ga.] 53 S. E. 676. The court may amend the proceedings by adding to the petition in error as defendants thereto the names of the persons who have been omitted, and causing service to be duly made on such persons, although application for such amendment is not brought to the notice of the court until after the statutory period for commencing proceedings in error has elapsed. Snider's Ex'rs v. Young, 72 Ohio St. 494, 74 N. E. 822. If a necessary party to a bill of exceptions was omitted therefrom it could be added by amendment at its own instance and that of the plaintiff in error, not changing the record or raising new points, but simply joining the new party in the bill of exceptions already filed by the others. Fricker v. Americus Mfg. & Imp. Co. [Ga.] 52 S. E. 65. In North Carolina the supreme court has a discretionary power to allow amendments by making proper parties to any case, and such discretion will not be exercised where an objection for defect of parties was made below and overruled. West v. Aberdeen, etc., R. Co. [N. C.] 53 S. E. 477.

59. Marion v. City Council of Charleston [S. C.] 52 S. E. 418.

60. See 5 C. L. 191.

61. Under Sup. Ct. Rule 15 (68 N. W. vi), requiring the registrar to transmit the record below to the supreme court in all chancery appeals within 40 days from the filing of the appeal bond. Byrne v. Gypsum Plaster & Stucco Co. [Mich.] 12 Det. Leg. N. 339, 104 N. W. 410.

62. An appeal from a final order in a mandamus proceeding presenting only questions of law and there being no appeal from an order to set aside the verdict it should be placed upon the nonenumerated calendar, as provided by General Practice Act, Rule 44, and Appellate Division Rules 2, 3 and 4. People v. Board of Education, 99 N. Y. S. 1.

63. See Acts 1901, p. 175, c. 28, § 2; Code, 2039. Blair v. Coakley, 160 N. C. 405, 48 S. E. 804.

64. An appeal to the circuit court from an order of the probate court directing the placing of property of a minor in the hands of a guardian and which requires a trial de

vokes the former setting and accordingly the time for filing and answer to the appeal is to be calculated with respect to the time for which it is finally set.[65]

(§ 11) *E. Forming issues: pleading, assigning, and specifying error.* 1. *In general.*[66]—Appellate courts are bound by their own rules of procedure which are to be construed in applying them in the same manner as statutes.[67] The assignment of errors is appellant's pleading tendering an issue of law.[68] In the absence of a provision to the contrary it must be filed in the appellate court.[69] In some states assignments must be filed at the time of filing the transcript,[70] or attached to the record,[71] or tabulated and inserted at the end of the case.[72] Assignments first made in the reply brief will not be considered.[73]

Errors not assigned will not ordinarily be considered,[74] though the court may re-

novo in the circuit court. Ford v. Ford, 117 Ill. App. 502.

65. Des Allemands Lumber Co. v. Morgan City Timber Co. [La.] 41 So. 332.

66. See 5 C. L. 191.

67. Hoodless v. Jernigan [Fla.] 41 So. 194. Plain and well settled rules of practice cannot be ignored except under special circumstances, to prevent miscarriage of justice. Neely Elec. Const. & Supply Co. v. Browning, 25 App. D. C. 84.

68. Performs the same office as a declaration in a court of original jurisdiction. Brown v. Otrich, 119 Ill. App. 136. Where there is no assignment of errors the cause stands in the appellate court in the same condition as a cause in the circuit court without a declaration. Schaeffer v. Burnett, 217 Ill. 84, 75 N. E. 440.

69. In the absence of statute or rule prescribing the time and place of making assignments, the proper place is in the supreme court. Smith Table Co. v. Madsen [Utah] 84 P. 885. The statute, L. 1899, p. 84, c. 62, § 2, requiring the petition in error to be attached to the transcript and filed in the appellate court, was repealed by L. 1903, p. 186, c. 134, and since then no statutory provision exists, and hence assignments need not be filed below nor contained in bill of exceptions. Id.

70. Printing assignment of errors in the abstract of the record, and filing it at the same time that the transcript is filed is a sufficient compliance with Rule 11 of the supreme court. Equitable Securities v. Johnson [Colo.] 85 P. 840.

71. The assignment of errors and cross errors must be written upon and attached to the record after it is made up for presentation to the supreme court. Schaeffer v. Burnett, 217 Ill. 84, 75 N. E. 440. A recital of assignments of error in the abstract is not sufficient, where the assignment was not attached to the record itself. McCormick v. Chicago & S. L. R. Co., 219 Ill. 593, 76 N. E. 833. Assignment in the abstract only presents nothing for decision. Cooperman v. People, 113 Ill. App. 99. No errors can be considered but such as are assigned on the record. Chicago City R. Co. v. Matthieson, 113 Ill. App. 246; Brown v. Otrich, 119 Ill. App. 136; Cooperman v. People, 113 Ill. App. 99. Cross errors. Grand Pacific Hotel Co. v. Pinkerton, 118 Ill. App. 89.

72. See Code, § 550, and supreme court rule No. 27. Kicks v. Kenan, 139 N. C. 337, 51 S. E. 941.

73. See post, § 11, h.

74. Nishkian v. Chisholm [Cal. App.] 84 P. 312; Schaeffer v. Burnett, 217 Ill. 84, 75 N. E. 440; Kominski v. People, 219 Ill. 595, 76 N. E. 717; The Fair v. Hoffman, 110 Ill. App. 500; Toan v. Russell, 111 Ill. App. 629; Barker v. Smith, 116 Ill. App. 66; Ambrosius v. O'Farrell, 119 Ill. App. 265; People v. Sterne, 119 Ill. App. 466; In re Touhy's Estate [Mont.] 83 P. 486; Devencenzi v. Cassinelli [Nev.] 81 P. 41; Chaves v. Myer [N. M.] 85 P. 233; Smith Table Co. v. Madsen [Utah] 84 P. 885; Long v. Patton [Tex. Civ. App.] 93 S. W. 519. Rule 11. Davidson S. S. Co. v. U. S. [C. C. A.] 142 F. 315. Questions neither specifically assigned as error nor referred to in argument. State v. Starr [Conn.] 63 A. 512. Although argued in the brief. Prather v. Chicago Southern R. Co. [Ill.] 77 N. E. 430. Though they appear in the record. Schaeffer v. Burnett, 217 Ill. 84, 75 N. E. 440. Rulings not assigned as error either in the appellate court or in the supreme court. Anglo-Wyoming Oil Fields v. Miller, 216 Ill. 272, 74 N. E. 821. Reasons assigned or ground of a motion or petition for appeal to the supreme court filed in the appellate court cannot take the place of assignments of error in the supreme court. Schaeffer v. Burnett, 217 Ill. 84, 75 N. E. 440. Errors cannot be embodied in the transcript of the proceedings of the appellate court. Id. On an appeal in an injunction suit the burden is upon the appellant to assign and show error, it being presumed that the judgment and proceedings below are correct. Hyatt v. De Hart [N. C.] 52 S. E. 781. Bill of exceptions consisting merely of the stenographer's notes with papers attached and the certificate of the judge and containing no specifications of error will be disregarded. Wilson v. Commercial Union Assur. Co. [S. D.] 106 N. W. 140. The granting of a petition for certiorari to supplement the transcript will not present anything for review in the absence of an assignment of error covering the matter brought up by the certiorari. Aetna Life Ins. Co. v. Stryker [Ind. App.] 76 N. E. 822.

Pleadings: Overruling of demurrer. Illinois, etc., R. Co. v. Ring, 219 Ill. 91, 76 N. E. 83. Failure of the court to carry a demurrer to answer back to complaint. McAfee v. Banding [Ind. App.] 76 N. E. 412.

Variance: Oehmler v. Pittsburg R. Co., 25 Pa. Super. Ct. 617; Dowie v. Priddle, 116 Ill. App. 184.

Sufficiency of evidence: Insufficiency of evidence as to findings of the amount due. Anglo-Californian Bank v. Cerf, 147 Cal. 384, 81 P. 1077.

Admission of evidence: Refusing to ex-

view them in its discretion.[75] The rule does not apply to fundamental or jurisdictional errors apparent on the face of the record.[76] As a general rule where a motion for a new trial is necessary to preserve errors at the trial, the denial of such motion must also be assigned,[77] though there seems to be some conflict of authority in this regard.[78] Assignments must name all the parties.[79]

Material amendments cannot ordinarily be made after the expiration of the statutory limit for taking an appeal,[80] nor can assignments ordinarily be corrected in the appellate court.[81]

(§ 11E) 2. *Proper parties to assign error.*[82]—Only parties to the cause[83] who are aggrieved[84] can assign error, and one in default cannot.[85]

clude an answer. Sloss-Sheffield Steel & Iron Co. v. Hutchinson [Ala.] 40 So. 114. Correctness of the ruling on motion to exclude evidence admitted without objection. Daniel v. Maddox-Rucker Banking Co. [Ga.] 53 S. E. 573. Admission of a note. Bunnell v. Kintner, 27 Pa. Super. Ct. 605.

Instructions: Ranta v. Supreme Tent, Knights of Maccabees of the World [Minn.] 107 N. W. 156. No other ground of attack on an instruction was available than that contained in the assignment. Davis v. Holy Terror Min. Co. [S. D.] 107 N. W. 374.

Findings and judgment: Where the appellant fails to attack insufficiency of damages in specifications, the point that only $700 was awarded instead of $13,500 is not reviewable. Fitzhugh v. Mason [Cal. App.] 83 P. 282. An attempt of the jury to determine who shall pay the costs. Strickland v. Hutchinson, 123 Ga. 396, 51 S. E. 348. Exceptions taken to the conclusions of law in the trial court. Scott v. Collier [Ind. App.] 77 N. E. 666. Finding of jury not excepted to, nor any assignment of error predicated on it, will, on appeal, be deemed conclusive of the facts determined. Johnston v. Fraser [Tex. Civ. App.] 92 S. W. 49. Excessiveness of judgment. Texas & P. R. Co. v. Wheeler [Tex. Civ. App.] 91 S. W. 234.

Miscellaneous: Striking out exceptions to the award in condemnation proceedings. Stoy v. Indiana Hydraulic Power Co. [Ind.] 76 N. E. 1057. A determination that there was a mistrial. Terriberry v. Mathot, 110 App. Div. 370, 97 N. Y. S. 20. A contention that a bank acted ultra vires in executing an indemnity bond. Miles v. Coleman Nat. Bank [Tex. Civ. App.] 84 S. W. 284.

75. The right to consider errors not assigned will not be exercised when the question of error is doubtful. McNeely v. South Penn. Oil Co. [W. Va.] 52 S. E. 480.

76. Judgment reversed because it was for only $200 while the findings as to the amount were $250. State v. Richeson [Ind. App.] 75 N. E. 846. Where an instruction authorizes a finding for plaintiff on an issue not made by the pleadings, the error is so fundamental that it may be considered on appeal though not assigned, where apparent on the face of the record. San Antonio Traction Co. v. Yost [Tex. Civ. App.] 43 Tex. Ct. Rep. 575, 88 S. W. 428.

77. Judgment will not be reversed for errors of law occurring at the trial unless it is alleged in the petition in error and shown by the record that the court erred in overruling the motion for a new trial. Beckwith v. Dierks Lumber & Coal Co. [Neb.] 106 N. W. 442.

78. The rule that the order of the court denying the motion for a new trial must be assigned as error does not prevail in Montana. Hickey v. Anaconda Copper Min. Co. [Mont.] 81 P. 806.

79. All the parties affected by the judgment. Helberg v. Dovenmuehle [Ind. App.] 76 N. E. 1020. Assignment of error on appeal from a judgment in favor of several plaintiffs must make all the plaintiffs parties. In a vacation appeal. Kemp v. Prather [Ind. App.] 75 N. E. 673. The assignment of errors must contain full names of the parties. Spitzer v. Wright [Ind. App.] 76 N. E. 261. Where it appears that the parties below signed a petition by their nick names, initials and partnership names, but their full and correct names are given on appeal and the assignment of errors states that they are the same parties who signed the petition, an objection to assignments of error is not tenable. Good v. Burk [Ind.] 77 N. E. 1080.

80. Chicago Terminal Transfer R. Co. v. Walton [Ind.] 74 N. E. 988.

81. Supreme court cannot correct an assignment. Driver v. King [Ala.] 40 So. 315.

82. See 5 C. L. 192.

83. Error of the court in dismissing an action as to some defendants and not as to others is available only to those defendants prejudiced thereby and not to a stranger to the action (Worth v. Emerson [Cal. App.] 85 P. 664), nor to the defendants as to whom the action was dismissed (Id.). One not shown by the transcript to be a party to the cause cannot assign error. People v. Sterne, 119 Ill. App. 466.

84. In an action for death the defendant cannot on appeal assign error based upon the distribution of the judgment by the administrator. United Breweries Co. v. O'Donnell [Ill.] 77 N. E. 547. A party cannot assign error to an order entered on his own motion. Order of the appellate court affirming judgment of circuit court pro forma. Griswold v. Smith [Ill.] 77 N. E. 551. The plaintiff cannot complain because the verdict is for less than its face shows that the defendant is entitled to. Newport News & O. P. R. & Elec. Co. v. Bickford [Va.] 52 S. E. 1011. Where the record does not show that a demurrer to the declaration was passed upon, it will be presumed on appeal that the demurrer was overruled, and hence the plaintiff cannot complain. Dimmack v. Wheeling Traction Co. [W. Va.] 52 S. E. 101.

85. Where the allegations of the bill were sufficient to authorize the court to grant the relief prayed for, and the defendant being in default and having failed to except to the master's report, and decree pro confesso having been entered against him, he was precluded from questioning the competency or

(§ 11E) 3. *Cross errors.*[86]—The appellee cannot be heard as to errors which he does not raise by cross assignment,[87] made [88] and filed in the manner prescribed.[89]

(§ 11E) 4. *Specifications and averments.*[90]—Assignments of error must be definite and specific.[91] Applications of this rule to assignments respecting pleadings,[92] the admission and exclusion of evidence,[93] instructions,[94] the sufficiency of

sufficiency of the evidence to support the decree. Williams v. Williams [Ill.] 77 N. E. 928.

86. See 5 C. L. 192.

87. American Bonding & Trust Co. v. Burke [Colo.] 85 P. 692; People v. Chicago Tel. Co., 220 Ill. 238, 77 N. E. 245; Adams v. Long, 114 Ill. App. 277; Gardner-Wilmington Coal Co. v. Knott, 115 Ill. App. 515; Gregory v. Root [Ky.] 91 S. W. 1120. Could not contend that certain guarantees were erroneously admitted in evidence (News Pub. Co. v. Associated Press, 114 Ill. App. 241), or that the case should have been tried on a different theory (Sauter v. Anderson, 110 Ill. App. 574), or question the amount of a decree (Barlow v. McDowell, 118 Ill. App. 506). Though plaintiff in error who by his bill questioned the sufficiency of his recovery did not show himself entitled to recover anything, there will be no reversal where appellee has assigned no cross errors. Parker v. Supreme Lodge Knights of Pythias, 115 Ill. App. 501. Where the appellee in the Appellate Court does not cross assign of error upon the holding of the trial court, he cannot on appeal to the supreme court assign error to such holdings. Penn Plate Glass Co. v. Rice Co., 216 Ill. 567, 75 N. E. 246. Court will not review a decision in favor of appellant where appellee has no cross appeal, or cross assignments. Snyder v. Pike [Utah] 8 P. 692. Refusal to quash attachment on one of the grounds assigned in the motion. Norvell-Shapleigh Hardware Co. v. Hall Novelty & Mach. Works [Tex. Civ. App.] 91 S. W. 1092. **In Louisiana.** Where one distinct defense is sustained and another overruled, the latter cannot be considered on an appeal by plaintiff unless an answer to the appeal is filed. City of New Orleans v. New Orleans Jockey Club [La.] 40 So. 331.

88. An assignment of cross errors must be made on the record. Assignment printed in the additional abstract of the record not valid. Grand Pacific Hotel Co. v. Pinkerton, 118 Ill. App. 89.

89. Where neither the cross assignments of error nor a copy of appellant's brief containing them was filed below as required by county court rule 101, they will not be considered. City of Austin v. Cahill [Tex. Civ. App.] 88 S. W. 536. An answer to an appeal must be filed at least three days before the date when the cause is set for hearing. Hammond Oil & Development Co. v. Feitel [La.] 38 So. 941.

90. See 5 C. L. 193.

91. Must be specific. White v. Denning [Kan.] 83 P. 830. Will be deemed sufficient if it is possible for the court, by reference to the whole record, to ascertain what questions were passed on by the trial judge and what rulings the plaintiff in error seeks to have reviewed. Anderson v. Newton, 123 Ga. 512, 51 S. E. 508. Need not be scientifically drawn. Jones v. McCrary, 123 Ga. 282, 51 N. E. 349. The burden is upon the one assigning errors to direct the attention of the court to the specific respects in which the decree is erroneous. Verble v. Dillow, 218 Ill. 537, 75 N. E. 1046. Since the abolishment of the statutory requirement of assignments of error by Acts 30th Gen. Assem. p. 118, c. 126, assignments are sufficient if they indicate to the court and to the appellee the errors relied on. Technicalities will not be considered. Dale v. Colfax Consolidated Coal Co. [Iowa] 107 N. W. 1096. Appeal will be dismissed where assignment is so defective that it presents no question for review on the merits. Hayes v. Ivens [Ind. App.] 76 N. E. 649; Spitzer v. Wright [Ind. App.] 76 N. E. 261. Should definitely point out the ground of error. Loper v. Somers, 71 N. J. Law, 657, 61 A. 85. An unintelligible assignment not supported by the statement following will not be considered. Houston & T. C. R. Co. v. Bath [Tex. Civ. App.] 90 S. W. 55. The purpose of the rule requiring that each error shall be assigned separately and particularly is to secure a clear but brief statement of the precise question to be reviewed and enable the court to understand the subject of controversy without laborious research, and if this appears by the assignments of error, it is all that is required. Malone v. Jackson [C. C. A.] 13 F. 878.

92. An assignment of error to the sustaining of several causes of demurrer to several pleas will be overruled if any one of the grounds constituted a valid objection. Alabama Great Southern R. Co. v. Clark [Ala.] 39 So. 816. An assignment that "the court erred in its decree overruling the demurrer of respondents and their motion to strike parts of said bill" is too general. Reynolds v. Lawrence [Ala.] 40 So. 576. Alleging error in findings by court that certain sums were due the plaintiff insolves merely sufficiency of evidence and not rulings on admissions in pleadings. Mitay v. Roddan [Cal.] 84 P. 145. A bill of exceptions which recites that the trial judge overruled a demurrer to the plaintiff's petition, and that exception is taken to such ruling and such ruling is assigned as error, presents a legally sufficient assignment of error, when the demurrer is specified as a material part of the record and discloses what objections were urged against the petition. McGregor v. Third Nat. Bank [Ga.] 53 S. E. 93. A bill of exceptions which recites that a motion to dismiss a petition was made upon various grounds and overruled, and that to this ruling "the defendant then and there excepted, and now assigns the same as error," specified plainly the decision complained of and the alleged error, "and specifically sets forth the error alleged to have been committed," within Civ. Code 1895, §§ 5527, 5528. Huxford v. Southern Pine Co. [Ga.] 52 S. E. 439. An assignment to the sufficiency of the complaint in its entirety is unavailable if it contains a good count. Roberts v. Wolfe [Ind.] 74 N. E. 990; Rink v. Lowry [Ind. App.] 77 N. E. 967. Where separate assignments to the action of the court upon a demurrer to the complaint assign error to the overruling of the demurrer to a certain one of several

paragraphs of the complaint, thus treating the demurrer as several and not joint, no question is presented as to the action of the court in overruling the demurrer to the complaint as a whole. Pittsburg, etc., R. Co. v. Reed [Ind. App.] 75 N. E. 50. Separate assignments made to the overruling of a demurrer addressed to each paragraph of a complaint, are supported by a joint exception to the action of the court in overruling the demurrer. Perry-Matthews-Buskirk Stone Co. v. Speer [Ind. App.] 74 N. E. 1114. Where judgment was entered below upon a default, an assignment of error that the complaint does not state facts sufficient to constitute a cause of action presents the same question that would have been presented if the appellant had filed a demurrer for want of facts and had assigned error to the overruling of such demurrer. Migatz v. Stieglitz [Ind.] 77 N. E. 400. On appeal in an action wherein there had been a change of venue, an assignment that the court to which the change was made erred in overruling a demurrer will not be considered where the record shows that the demurrer was overruled by the court in which the action was originally brought. Chicago Terminal Transfer R. Co. v. Walton [Ind.] 74 N. E. 988. Under Burns' Ann. St. 1901, § 667, requiring that the pleading which is to be filed in the supreme court shall be a specific assignment of error, the sufficiency of the complaint in condemnation proceedings cannot be questioned by assigning as ground therefor the overruling of a motion for a new trial or the rendition of final judgment. Stoy v. Indiana Hydraulic Power Co. [Ind.] 76 N. E. 1057. Assignments alleging insufficiency of complaint will be deemed waived on failure to point out the objections to its sufficiency. Indianapolis St. R. Co. v. Hackney [Ind. App.] 77 N. E. 1048. Assignment that court erred in overruling "defendant's general demurrer and its first, second, third, fourth, and fifth special exceptions to the first amended original petition" is too general. Western Union Tel Co. v. Carter [Tex. Civ. App.] 94 S. W. 205. Petition on appeal held to sufficiently assign error in refusing to allow amended pleading to be filed. Laskey v. Burrill [Va.] 54 S. E. 22.

93. Assignment based on exclusion of "other chancery causes relating to the subject-matter" is too vague and indefinite to be considered. Boogher v. Roach, 25 App. D. C. 324. Where assignment alleged that court erred in refusing to permit witness to explain the expression, "certain existing incumbrances," and the record shows that court refused to permit witness to explain in what sense the words "existing incumbrances" were used in a deed, there is no proper assignment. Whipple v. Geddis, 25 App. D. C. 333. An assignment upon the admission of testimony should show, not only that it was admitted over objection of the complaining party, but what grounds of objection he urged at the time the evidence was offered. Sanders v. Central of Georgia R. Co., 123 Ga. 763, 51 S. E. 728. An assignment, in exceptions pendente lite or in a motion for a new trial, that the court erred in refusing to sustain a motion to rule out the testimony of a named witness, does not properly present any question for determination by appellate court, when the testimony in question is not, either literally or substantially, set forth in connection with the assignment of error in such exceptions, or in the ground of the motion for new trial complaining of the ruling of the court, and no statement thereof is attached as an exhibit to the exceptions or the motion. Georgia Co-op. Fire Ass'n v. Borchardt & Co., 123 Ga. 181, 51 S. E. 429. An assignment to the effect that the court erred in sustaining a motion to "rule out all of the evidence tending to show" a given state of facts, without specifying, either literally or in substance, the evidence which was ruled out, presents no question upon which appellate court can pass. Lamar, Taylor & Riley Drug Co. v. Lamar, 123 Ga. 667, 51 S. E. 584. An assignment upon the refusal of the court to allow a witness to answer a specified question propounded must state what evidence was thus sought to be elicited, and that the court was informed thereof at the time of the ruling. Rountree & Co. v. Gaulden, 123 Ga. 449, 51 S. E. 346; Sanders v. Central of Georgia R. Co., 123 Ga. 763, 51 S. E. 728. The mere allegation that the court refused to permit the plaintiff "to show by (a named witness) that the property sued for was the property of" the plaintiff is not good assignment. Ferguson v. McGowan [Ga.] 52 S. E. 886. On an appeal in an action by a minor under Laws 1899, pp. 315, 317, §§ 16, 18, for injuries resulting from willful violation of such act in that the mine manager failed to provide sufficient props, etc., it was held that an assignment to the action of the court in refusing to allow appellant by cross-examination to show that it was the custom of the miners to get props from any place they could, would not be considered where counsel failed to point out the relevancy of materiality of such testimony. Henrietta Coal Co. v. Martin [Ill.] 77 N. E. 902. General assignment of error in admitting evidence without specifying particular rulings could not be considered. Puritan Mfg. Co. v. The Emporium [Iowa] 107 N. W. 428. Specifications of error relating to rejection of testimony will be disregarded unless they set out the offers and the ruling of the court thereon as provided by rule 31. Sheridan v. Gray's Ferry Abattoir Co. [Pa.] 63 A. 418. Where assignments to rulings on evidence do not refer to the printed pages of the testimony or refer to more than one bill of exceptions they will be disregarded. Brown v. Forest Water Co. [Pa.] 62 A. 1078. An assignment is bad, which alleges error below in sustaining an objection to a question, and then quotes the question and nothing further. Creachen v. Bromley Bros. Carpet Co. [Pa.] 63 A. 195. An assignment of error to the admission of evidence or refusal to withdraw evidence will not be considered where the evidence is not quoted in connection with the assignment. Whaley v. Citizens' Nat. Bank, 28 Pa. Super. Ct. 531; McCullough v. Seitz, 28 Pa. Super. Ct. 458. An assignment that the court erred in allowing a lease to be introduced in evidence as an absolute criterion of the value of the leasehold is too general. Union R. Co. v. Hunton, 114 Tenn. 609, 88 S. W. 182. Where a certain interrogatory and answer in a deposition were suppressed on motion, but when offered in evidence were merely objected to as hearsay, an assignment predicated upon the ruling thereto should not be favorably considered. Gulf, etc., R. Co. v. Luther [Tex Civ. App.] 90 S. W. 44. In the Federal courts

the evidence,[95] orders,[96] findings,[97] judgments,[98] nonsuits,[99] and rulings on motions for new trials,[1] and motions to quash,[2] will be found in the notes.

in an assignment of error on the admission of evidence the full substance of the evidence admitted must be quoted. Rule 11. Davidson S. S. Co. v. U. S. [C. C. A.] 142 F. 315. Failure to set forth a letter referred to by name of sendor and sendee held fatal. Crosby v. Emerson [C. C. A.] 142 F. 713.

94. Alleged error in refusing to give the "4th" instruction, no instruction in body of statement being so numbered is futile. Kelly v. Ning Yung Benev. Ass'n [Cal. App.] 84 P. 321. Assignments of error based on the instructions not appearing in the transcript nor elsewhere in the record except in the abstract, are not sufficiently set forth to be considered. Conrey v. Nichols [Colo.] 84 P. 470. Where there is no assignment upon a charge of the court save that the court erred in so charging, and the charge states a proposition of law which is in the abstract correct, the Supreme Court will not consider whether the charge is applicable or appropriate in the case. Stansell v. Merchants' Farmers' Bank, 123 Ga. 278, 51 S. E. 321. An assignment of the giving of instructions asked by the opposite party as a ground for a new trial, is sufficient to authorize a review of the action of the court in giving such instructions after having modified them. Chicago, etc., R. Co. v. Mines [Utah] 77 N. E. 898. An objection being general in terms, appellant will be deemed to have waived the error, if there was one. Mere statement that court refused certain instructions. Pennsylvania Co. v. Rossett, 116 Ill. App. 342. A joint assignment to the giving and refusal of particular instructions cannot be sustained unless the court erred in its rulings as to all of such instructions. Heaston v. Kreig [Ind.] 77 N. E. 805. Instructions objected to must be set out in full. White v. Denning [Kan.] 83 P. 830. Assigning error "upon the charge as a whole" is not allowable. Snyder v. Patton & Gibson Co. [Mich.] 12 Det. Leg. N. 1041, 106 N. W. 1106. When several instructions are grouped in one assignment and there is nothing in the language of the assignment to indicate that the objection goes to them severally, they will be examined only so far as may be necessary to determine whether any one of them was rightly given or refused. Skinner v. Wilson [Neb.] 107 N. W. 771. Specification of error as to instructions should set them out. Sheridan v. Gray's Ferry Abattoir Co. [Pa.] 63 A. 418. Where the assignment of error is to answers to points, the answer must be quoted totidem verbis, and will not be considered unless so quoted. Dotterer v. Scott, 29 Pa. Super. Ct. 553. Assignment not quoting the part of the charge complained of "totidem verbis" violates rule 30 and will not be considered. English v. Murtland [Pa.] 63 A. 882. Assignment failing to point out wherein one paragraph of a charge was claimed to conflict with another need not be considered. Jones & Co. v. Gammel-Statesman Pub. Co. [Tex. Civ. App.] 94 S. W. 191. Where the correctness of a requested instruction depends upon the evidence, a general reference in the assignment to all the evidence is too indefinite. Gulf, etc., R. Co. v. Beattie [Tex. Civ. App.] 13 Tex. Ct. Rep. 598, 88 S. W. 367. An assignment that the court erred in not presenting to the jury the issue of assumption of risk, which matter was called to the attention of the court by special instruction "2, 5, 7," is not an assignment for refusing to give such instructions. Houston & T. C. R. Co. v. Fanning [Tex. Civ. App.] 91 S. W. 344. An assignment that one specific instruction is in conflict with another specific instruction without pointing out wherein they are in conflict, will not be considered. Galveston, etc., R. Co. v. Currie [Tex. Civ. App.] 91 S. W. 1100. Assignments of error submitting as propositions that certain charges were "erroneous and confusing" without showing in what manner, are too indefinite. Galveston, etc., R. Co. v. Vollrath [Tex. Civ. App.] 13 Tex. Ct. Rep. 777, 89 S. W. 279. An assignment complaining that the court did charge more specifically upon certain points, and stating that these matters were called to the attention of the court by special charges "3, 4, 6," is not an assignment of error for refusing to give such instructions. Houston & T. C. R. Co. v. Fanning [Tex. Civ. App.] 91 S. W. 344.

95. An assignment that the evidence does not support the findings or judgment, which fails to specify in what particulars the evidence is insufficient, is defective. Roy v. Flin [Ariz.] 85 P. 725. Whether specifications as to insufficiency of evidence to sustain findings are sufficient for the consideration of the court is immaterial where the questions sought to be raised under them are equally valid on the agreed statement of facts or under the exceptions to the ruling of the court on the admission of evidence. Southern Pac. R. Co. v. Lipman [Cal.] 83 P. 445. The test in Idaho is whether the specification is sufficient to inform opposing counsel of the grounds of the alleged insufficiency of the evidence to support the finding or verdict. Palmer v. Northern Pac. R. Co. [Idaho] 83 P. 947. Where a specification of error designates some particular issue in a case and avers that it is not sustained or jutified by the evidence, such specification is sufficient. Id. A specification that "the evidence is undisputed that the road in question was a private road" where the issue is whether a road was public or private is a sufficient specification of the insufficiency of the evidence. Id. An assignment questioning the sufficiency of the evidence without specifying wherein it is insufficient is unavailing. Stephens v. Faus [S. D.] 106 N. W. 56. Where on an assignment it is contended that the 13 special verdicts are unsupported by the evidence, and the evidence is set out in one statement without reference to the parts bearing upon the several verdicts, the assignment is too indefinite. Bourland v. Schulz [Tex. Civ. App.] 13 Tex. Ct. Rep. 423, 87 S. W. 1167.

96. Assignment to orders appointing a receiver and granting an injunction will not be considered where the orders are not quoted. Arnold v. Russell Car & Snow Plow Co., 212 Pa. 303, 61 A. 914.

97. Where error is specified as to a finding in a certain particular, the sufficiency of the evidence to sustain the finding in another particular is not raised. In re Wikman's Estate [Cal.] 84 P. 212. Assignments that the court erred in deciding for plaintiff, in refusing to sign the findings of fact pre-

The assignment should be accurate.[3] Distinct errors must not be grouped in one assignment.[4] Specifications calling for mere conclusions of law cannot be considered where the statute requires specifications of questions of fact.[5]

A joint assignment by several parties presents no question if the ruling was

sented by defendant rather than those presented by plaintiff and in refusing to sign the conclusions of law presented by defendant held fatally defective as specifying no particular errors occurring at the trial. Stephens v. Faus [S. D.] 106 N. W. 56.

98. Assignment that the "decision is not justified by the evidence and is contrary to law" is insufficient to call in question any of the findings of fact. Nye v. Karlow [Minn.] 107 N. W. 733. An assignment attacking a judgment on the ground that it is contrary to law in that the petition did not allege a certain fact, presents the question of the sufficiency of the pleading. Western Union Tel. Co. v. Bell [Tex. Civ. App.] 92 S. W. 1036.

Assignments held too general: That "the court erred in making the rule for judgment absolute." International Sav. & Trust Co. v. Kleber, 29 Pa. Super. Ct. 200. That the court erred in not rendering judgment for defendant and against plaintiff. City of Houston v. Potter [Tex. Civ. App.] 91 S. W. 389. That "the court erred in giving plaintiff a nonsuit, and then entering judgment against plaintiff." Logan v. Lennix [Tex. Civ. App.] 13 Tex. Ct. Rep. 572, 88 S. W. 364. That the judgment is contrary to the law and the evidence. Thompson v. Chaffee [Tex. Civ. App.] 13 Tex. Ct. Rep. 167, 89 S. W. 285.

99. An assignment that "the court erred in refusing to allow plaintiff to take a nonsuit," is too general. Logan v. Lennix [Tex. Civ. App.] 13 Tex. Ct. Rep. 572, 88 S. W. 364.

1. An assignment that a motion for a new trial was made and overruled and that to this ruling the defendant excepted and now assigns the same as errors, specifies plainly the decision complained of and the alleged error within Civ. Code 1895, §§ 5527, 5528, and Supreme Court Rule No. 6. Huxford v. Southern Pine Co. [Ga.] 52 S. E. 439. An assignment of error in granting a new trial on the ground that the evidence in the action was manifestly in favor of the verdict is sufficient. Ecker v. Isaacs [Minn.] 107 N. W. 1053. An assignment that "the court erred in refusing to grant defendants a new trial because the verdict was contrary to the evidence as complained of in the 28th ground of defendant's motion" is too indefinite where the 28th ground is not set out and the statement refers to transcript for the facts. Brewster v. State [Tex. Civ. App.] 13 Tex. Ct. Rep. 685, 88 S. W. 858.

2. An assignment that "the court erred in overruling defendant's motion to quash the proceedings, and in overruling each separate ground of such motion, etc.," is too general. Supreme Court Practice Rule 1. Ferrell v. Opelika [Ala.] 39 So. 249.

3. Where the assignment incorrectly referred to evidence as having been given by a certain witness, it is fatally defective. Driver v. King [Ala.] 40 So. 315. Where an assignment is entitled with the name of a party as administrator of the estate of another named party, as appellant, and gives the name of the appellee, such assignment is sufficient, in the absence of anything to show that there were parties not named. Williams v. Dougherty [Ind. App.] 77 N. E. 305. The practice of filing a large number of assignments of error is not to be approved. Michigan Home Colony Co. v. Tabor [C. C. A.] 141 F. 332.

4. An assignment that the court erred in sustaining a demurrer cannot be joined with an assignment that the court erred in rendering judgment against the appellants upon their refusal to plead further. Spitzer v. Wright [Ind. App.] 76 N. E. 261. An assignment of error covering several rulings in this language: "Errors at law occurring at the trial and duly excepted to by defendant as follows as shown on page 6," etc., held too general to call for consideration especially since objections to one or more of the questions included in the assignment were properly overruled. Brooks v. Stanley [Neb.] 105 N. W. 551. Assignments must be numbered and subdivided. Dotterer v. Scott, 29 Pa. Super. Ct. 513. A simple assignment alleging error in refusing to strike out the testimony of several witnesses will not be considered. Brown v. Forest Water Co. [Pa.] 62 A. 1078. A joint and several assignment attacking a plurality of rulings is unavailing if one of the rulings is correct. Seaboard Air Line R. Co. v. Hubbard [Ala.] 38 So. 750. Each error should be "set out separately." Rule 11. Davidson S. S. Co. v. U. S. [C. C. A.] 142 F. 315. An assignment raising two or more distinct questions of law is not such a distinct specification of error as contemplated by rules 24, 25, and 26. Evans v. Jackson [Tex. Civ. App.] 92 S. W. 47. An assignment asking the court to reverse judgment because of undisputed facts, to consider a finding upon the plea of the 5 years' statute of limitations, to consider a finding upon the plea of the 10 years' statute of limitations and to consider findings on the plea of laches and state demand, is objectionable as multifarious and too general whether considered as a single assignment or a group of assignments. Id. An assignment which raises several independent and distinct matters contrary to the rules of the court will not be considered. Parlin & Orendorff Co. v. Vawter [Tex. Civ. App.] 13 Tex. Ct. Rep. 47, 88 S. W. 407. An assignment complaining of the court's rulings on six distinct special exceptions. Scott v. DeWitt [Tex. Civ. App.] 93 S. W. 215. A group of assignments held to be one assignment and several propositions thereunder and not distinct assignments grouped as one as viewed by the court of civil appeals, 93 S. W. 715. Rice v. Dewberry [Tex.] 93 S. W. 721.

5. Under § 5630 Rev. Codes 1899, requiring a specification of the questions of fact which appellant desires to have reviewed or that appellant specify that he desires a review of the entire case, a specification inquiring as to the fraudulent character of a conveyance did not authorize a review of the evidence. Stevens v. Myers [N. D.] 104 N. W. 529.

right as to any of them [6] and unless the error affected all of them,[7] but where the assignments are joint and several, each appellant has the benefit of all of them.[8] A joint exception will not support a separate assignment,[9] nor can a joint assignment be based upon several exceptions.[10]

In New Jersey the common errors relate only to the record itself and when such are assigned the court will not reverse except for errors manifest on the face of the record.[11] In Indiana matters which are grounds for a new trial cannot be assigned as independent errors.[12]

(§ 11E) 5. *Demurrers, pleas, and replication.*[13]—No plea is necessary to raise objections apparent on the face of the record.[14] In Illinois matter operating as a release of errors must be set up in a plea to the assignment of errors.[15] In New Mexico unless exception is filed or taken to the assignments of error, in cases brought to the supreme court, the opposite party will be deemed to have joined in error upon the assignments so filed and no formal joinder is necessary.[16]

6. A joint assignment in a petition in error by two or more persons which is not good as to all who joined therein, will be overruled as to all. Kupke v. Polk [Neb.] 103 N. W. 321. Where an assignment of error is overruled as to one of the parties thereto, such assignment will not be available to the other parties. Starkey v. Starkey [Ind.] 76 N. E. 876.

7. A joint assignment will not avail unless the error affected all the parties who join. Where three parties claimed under a parol gift a joint assignment of the exclusion of a declaration showing gift to two of them is bad. Anthony v. Seed [Ala.] 40 So. 577. Joint assignment based on a plea filed by one defendant will not be considered. Shiff v. Andress [Ala.] 40 So. 824. A joint assignment cannot be made by several plaintiffs to the overruling demurrers to several paragraphs of the answer, where all of the plaintiffs joining in the assignment are not affected by the court's rulings upon each of such paragraphs. Starkey v. Starkey [Ind.] 76 N. E. 876. Where the judgment awarded costs against the plaintiff in favor of four out of seven defendants, and adjudged that the plaintiff recover from one defendant, but no judgment was rendered either for or against the other two defendants, a joint assignment of error by all the defendants was improper. Stemen v. Knudson-Mercer Lumber Co. [Ind. App.] 76 N. E. 812.

8. Morehouse & Wells Co. v. Schwaber, 118 Ill. App. 44.

9. A joint exception by two parties to a ruling upon a motion for a new trial will not support a separate assignment of error by one of the parties. Willis v. Willis [Ind.] 75 N. E. 653.

10. Where separate motions for a new trial are filed by several co-plaintiffs, and exceptions to the court's rulings thereon are taken by the plaintiff severally, they cannot on appeal assign error to such rulings jointly. But where all the plaintiffs join in the motion for a new trial, and all except to the ruling thereon, a joint assignment of error predicated upon such ruling is sufficient, although plaintiffs attempted to take several exceptions. Stametz v. Mitchenor [Ind.] 75 N. E. 579.

11. Will be no reversal where judgment record itself appears, on inspection, to be sufficient in law. Loper v. Somers, 71 N. J. Law, 657, 61 A. 85.

12. Grounds or reasons which might form the basis for, and be properly embraced in, a motion for a new trial, cannot be independently assigned. Migatz v. Stieglitz [Ind.] 77 N. E. 400. Overruling of petition for removal to the Federal court. Southern R. Co. v. Sittasen [Ind.] 76 N. E. 973, rog. [Ind. App.] 74 N. E. 898. Error in refusing to sustain an application for a change of venue. Bonham v. Doyle [Ind. App.] 77 N. E. 859. Questions depending upon evidence. St. Joseph Mfg. Co. v. Hubbard [Ind. App.] 75 N. E. 17; City of Jeffersonville v. Gray [Ind.] 74 N. E. 611. Assignment to ruling on motion to strike out and suppress questions and answers in depositions. Capital Nat. Bank v. Wilkeson [Ind. App.] 76 N. E. 258. Assignment that judgment is contrary to the law and not supported by sufficient evidence. St. Joseph Mfg. Co. v. Hubbard [Ind. App.] 75 N. E. 17. An assignment of error to the action of the court upon a motion for a judgment upon the answers to special interrogatories notwithstanding the general verdict does not raise any question as to the sufficiency of the evidence. To present such question the same must be assigned as a ground for a new trial and the overruling of such motion must be assigned as error. City of Jeffersonville v. Gray [Ind.] 74 N. E. 611. The action of a master in admitting evidence cannot be assigned as a reason for a new trial, and hence cannot be made the subject of an assignment of error. The proper practice is to request the court to correct the errors of the masters, and then to assign error upon the action of the court. St. Joseph Mfg. Co. v. Hubbard [Ind. App.] 75 N. E. 17. It seems that the sufficiency of the complaint or an instrument of appropriation in condemnation proceedings may be raised by an independent assignment of error. Stoy v. Indiana Hydraulic Power Co. [Ind.] 76 N. E. 1057.

13. See 5 C. L. 197.

14. Objections to jurisdiction. In re O'Brien's Petition [Conn.] 63 A. 777.

15. That the appellant has waived error by accepting the benefit of subsequent proceedings and ruling in the same cause of action. Compher v. Browning, 219 Ill. 429, 76 N. E. 678.

16. Jones, Downs & Co. v. Chandler [N. M.] 85 P. 392.

(§ 11) *F. Briefs and arguments.*[17]—Briefs must be filed [18] and served within the time prescribed.[19] In some states they must be signed.[20] Statutes and rules of court prescribing the form and contents of the brief must be complied with,[21] but the court generally has discretionary power to consider matters not properly presented.[22] Among the common requirements is a summary of so much of the record as presents the errors relied on,[23] with references to the record for verification,[24]

17. See 5 C. L. 197.

18. Briefs must be filed within 30 days after transcript is filed. Rules 2 and 5. Santa Rosa Bank v. Striening [Cal. App.] 82 P. 551. Under rule 55 providing that for failure to file an argument within the time specified the adverse party may have a continuance or submission of the case on the papers on file at the time of the breach unless the court shall for sufficient cause otherwise order, it is discretionary with the appellate court to consider arguments filed after the time specified when justice will be promoted thereby. Baker v. Oughton [Iowa] 106 N. W. 272. Appeal will be dismissed where there is no brief or argument for either party. Honaker v. Fitzgerald [Iowa] 106 N. W. 649. Appellant's argument will not be stricken on appellee's motion because of noncompliance with the rules where appellee's argument is equally faulty. McDermott v. Mahoney [Iowa] 106 N. W. 925. The case will be examined upon merits although the appellee files no brief. McAfee v. Bending [Ind. App.] 76 N. E. 412. Failure to file within time agreed upon by counsel is ground for dismissal. Missouri, etc., Ry. Co. v. Kidd [Ind. T.] 88 S. W. 308. Where appellant makes a motion for an oral argument which is granted, the court not knowing that his brief was not filed as required by rule 3 (75 S. W. V), the court may treat the grounds filed for oral argument as a brief and allow the order for oral argument to stand, adjudging the appellant liable for all costs up to date. Louisville Home Tel. Co. v. Gasper [Ky.] 90 S. W. 1071. Failure to file brief ground for affirmance. Jackson v. McMillan [La.] 38 So. 902. Failure of printer to get brief ready in time will not prevent dismissal where there is no showing as to when it was put in his hands. Hammer v. Crayford [Mo. App.] 91 S. W. 57. Failure to file brief within forty days after filing of case-made and petition in error will result in dismissal under rule 6. First Nat. Bank v. Smith [Okl.] 83 P. 1119. Although sickness might excuse delay, press of business will not. Id. In Oklahoma error will not be deemed confessed by failure to file brief as in some other jurisdictions. Aldridge v. Board of Education [Okl.] 82 P. 827. Fact that printer failed to print brief in time and counsel overlooked time within which to file it will not excuse several months' delay. Carter v. Wakeman [Or.] 82 P. 858. Where appellee fails to file a brief, the court of civil appeals may regard appellant's brief as presenting the case without examining the record as contained in the transcript. Court of Civil Appeals, Rule 40 (67 S. W. XVII). Maffi v. Stephens [Tex. Civ. App.] 93 S. W. 158.

19. Under provisions of Rule 6, par. 3, brief of appellant, in a case to which any county is a party not adversely to the state, should be served on the Attorney General, Rev. St. 1887, §250, subd. 1, amended by L. 1901, p. 163, and failure so to serve is ground for dismissal. Corker v. Elmore County [Idaho] 84 P. 509.

20. A rule requiring briefs to be signed is sufficiently complied with where the brief of the appellants is signed at the close of the argument which is bound with the brief proper, although it is not signed at the conclusion of the statements of points and authorities. Low v. Dallas [Ind.] 75 N. E. 822.

21. Failure to print reply brief held ground for affirmance. Mitchell v. Pearson [Colo.] 82 P. 447. Failure to comply with ruling of court as to preparation of brief held ground for affirmance. Hay v. Bash [Ind. App.] 76 N. E. 644. While the rules of the Appellate Court are the same as those of the supreme court so far as applicable, yet, in a particular case pending in either court the rules of court applicable thereto are for the purposes of that case, the rules of the particular court in which the cause is pending. The rule relating to the contents of the appellant's brief is one intended in part to subserve the convenience of the court to which the appeal belongs and in which cause is decided on appeal. Hood v. Baker [Ind. App.] 75 N. E. 608. Where a case which is appealable only to the supreme court under Acts 1901, p. 566, c. 247, § 8, is appealed to the Appellate court, the Appellate court will leave the question as to the sufficiency of the appellant's brief under the rules of the supreme court to such court. Id. Failure to present questions in accordance with the rules of the court may prevent their consideration, but where the propositions stated indicate with sufficient certainty the points in dispute, objection to their form and substance is not ground for rejection of the brief. Low v. Dallas [Ind.] 75 N. E. 822. Motion to dismiss for failure to comply with rules will be denied where appellant's omissions are supplied by appellee. State v. Terheide [Ind.] 78 N. E. 195. Where some assignments are not discussed in brief and those discussed retain their original numbers but are discussed in order, the violation of the rule requiring consecutive numbering is merely technical and no ground for refusing to consider the assignment. Lewis v. Houston Elec. Co. [Tex. Civ. App.] 13 Tex. Ct. Rep.] 378, 88 L. R. 489.

22. The court may, if it choose so to do, consider the instructions though the rules of the court in regard to the presentation of instructions in the appellant's brief have been disregarded. Baker v. Gowland [Ind. App.] 76 N. E. 1027.

23. Referring in brief to exceptions by "Exception No. 7, folio 138, and No. 8, folio 142, should have been sustained" with nothing further will not be reviewed on appeal. Stohr v. Stohr [Cal.] 82 P. 777. It has been uniformly held by the supreme court that rule 22, cl. 5, requires that the brief be so prepared that all questions presented by the assignment of errors can be determined by an examination of the briefs, without

looking to the record, and that, to the extent said rule is not complied with, the same will be considered waived. Chicago Terminal Transfer Co. v. Walton [Ind.] 74 N. E. 1090; American Food Co. v. Halstead [Ind.] 76 N. E. 251.

Rulings on pleadings: If rulings on pleadings are objected to, a concise statement of their contents is necessary. See Supreme Court Rule No. 22, cl. 5, 55 N. E. VI. Springer v. Bricker [Ind.] 76 N. E. 114; Swing v. Hill [Ind.] 75 N. E. 658. An epitome of a pleading will be sufficient where enough of the pleading is set out to enable the court upon reading the appellant's principal brief to ascertain the question which is presented for review. Swing v. Hill [Ind.] 75 N. E. 658. Where the appellant's brief fails to set forth a copy of the demurrer, the overruling of which is assigned as error, and also the succinct statement and grounds thereof, such assignment of error is waived. Chicago Terminal Transfer Co. v. Walton [Ind.] 74 N. E. 1090. Reference to the place in the transcript where the pleading sought to be reviewed as set forth is not a sufficient compliance with the rule. Ledbetter v. Coggeshall [Ind. App.] 76 N. E. 787. Where the brief sets out fully the second paragraph of an answer, and also contains a copy of the opening statement of the cross complaint and then says that the averments of the cross complaint following this opening were identical with the allegations of the second paragraph of the answer, and then gives the concluding averments of the cross complaint, this is a sufficient compliance. Nichols & Shepard Co. v. Berning [Ind. App.] 76 N. E. 776. Where the appellant's brief gives the substance of all material averments of the complaint and states where the appellant's demurrer to the complaint will be found in the record, and that such demurrer insists that the complaint does not contain facts sufficient to constitute a cause of action, and that the demurrer was overruled and an exception reserved, this is a sufficient compliance. Hay v. Bash [Ind. App.] 76 N. E. 644. Merely stating that a pleading fails to allege certain facts cannot be regarded as a concise statement of so much of the record as fully presents the error. Springer v. Bricker [Ind.] 76 N. E. 114.

Evidence: Alleged error in exclusion of proof of certain facts cannot be considered where brief fails to point out the evidence by which such facts were to be proven. Stewart v. Phittemore [Cal. App.] 84 P. 841. Where the evidence alleged to have been improperly admitted or excluded is not pointed out, it will not be considered. Johnson v. Farrell, 215 Ill. 542, 74 N. E. 760. Under rule 22 of the Appellate Court, 55 N. E. VI, the sufficiency of the evidence will not be examined unless there is a "condensed" recital of the evidence so as to present the "substance" thereof in the statement. A recital occupying 76 pages of the appellant's printed brief and setting out the questions and answers together with argument of counsel is not a compliance with this rule. Cleveland, etc., R. Co. v. Snow [Ind. App.] 74 N. E. 908. Must contain a condensed recital of the evidence, in narrative form. Rush v. Kelley, 34 Ind. App. 449, 73 N. E. 130. Where the evidence occupied more than 260 pages of the record and no attempt was made to set out such evidence in the brief, it would not be examined. Hartzell v. Hartzell [Ind. App.] 76 N. E. 439. Where the appellant's brief sufficiently conforms to the rule to enable the court to comprehend the propositions relied upon, the failure of such brief to comply literally with the rules of the court is immaterial. Hall v. Terre Haute Elec. Co. [Ind. App.] 76 N. E. 334. The statement in the brief of the conclusions of counsel as to what the evidence showed was not a compliance with the rule. Baker v. Gowland [Ind. App.] 76 N. E. 1027. Reprinting of large part of evidence in appellant's brief held violation of S. Ct. Rule 9 (59 N. W. V), prohibiting extended discussion in briefs of mere questions of fact and requiring a reference to the printed case. More v. Milwaukee Monument Co. [Wis.] 104 N. W. 1013. Under L. 1905, p. 589, c. 365, § 1, limiting amount allowed for printing to 150 pages, the redundency of the brief in this case containing over 150 pages, is immaterial, but the rule is noticed to show its proper construction. Id.

Instructions: If the instructions complained of or a succinct statement thereof are not set out, they will not be considered. Supreme Court Rule No. 22. Springer v. Bricker [Ind.] 76 N. E. 114; Garrigue v. Kellar, 164 Ind. 676, 74 N. E. 523; Henderson v. Henderson [Ind.] 75 N. E. 269; Griffiths v. Anderson Iron & Mfg. Works [Ind. App.] 75 N. E. 673; Indianapolis St. R. Co. v. Marschke [Ind. App.] 77 N. E. 945. Where the brief makes no reference to the place in record where the instructions complained of may be found and does not contain the substance or a copy of such instructions. Capital Nat. Bank v. Wilkerson [Ind. App.] 76 N. E. 258.

Findings: It is not the duty of the appellate court to look through the transcript to find the evidence to overthrow findings of trial court, but appellant should in his brief point it out. Clark v. Rauer [Cal. App.] 83 P. 291. The legal sufficiency of special findings is not before the supreme court in the absence of a compliance with rule 22. Todd v. Crail [Ind.] 77 N. E. 402.

A motion for a new trial cannot be considered where the cause assigned or a succinct statement thereof was not stated. Supreme Court Rule 22, 55 VI. Tongret v. Carlin [Ind.] 75 N. E. 887. Where the causes assigned are not set out. Gregg v. Gregg [Ind. App.] 75 N. E. 674. Failure to comply with rule will waive assignment to the overruling of a motion for a new trial. Korporal v. Robinson [Ind. App.] 78 N. E. 84.

24. Where the court is referred to specific pages of the bill of exceptions for certain evidence and the original bill is not filed and the evidence is not on the corresponding pages of the transcript, the court will not search for it. Armour Packing Co. of Louisiana v. Vietch-Young Produce Co. [Ala.] 39 So. 680. Where error is assigned to the admission of evidence, the brief must point out the place in the record where such errors may be found. See Appellate Rule No. 22, 55 N. E. V. Inland Steel Co. v. Smith [Ind. App.] 75 N. E. 852; Tyler v. Davis [Ind. App.] 75 N. E. 3. Under Sup. Ct. Rule 29 appellant contending that the evidence does not sustain the findings must point out in his brief the particular portions of his abstract, giving the folios thereof, deemed insufficient, as well as in his assignment of error. Griffin v. Walworth County Com'rs [S. D.] 104 N. W. 1117. It is frequently required that counsel refer back from brief to page of the record, which they desire examined. Rule

a separate assignment or statement of the contentions or alleged errors,[25] and the

24. Davidson S. S. Co. v. U. S. [C. C. A.] 142 F. 315.

25. Assignments not insisted upon in the brief are deemed waived. Kansas City, etc., R. Co. v. Randolph [Ala.] 39 So. 920; Kansas City, etc., R. Co. v. Simmons [Ala.] 40 So. 573. Briefs must contain a short clear statement of points and authorities in support thereof. Anglo Wyoming Oil Fields v. Miller, 117 Ill. App. 552. Errors assigned but not noticed in brief or argument are waived or abandoned. Rabbermann v. Alhambra Highway Com'rs, 116 Ill. App. 26; Summerville v. Penn Drilling Co., 119 Ill. App. 152. Application for new trial on ground of newly discovered evidence was deemed abandoned in the absence of showing by affidavit or otherwise concerning such evidence, and where point was not raised in appellant's brief. Richardson v. Benes, 115 Ill. App. 532. The failure to designate or point out a specific objection, or argue it in the brief, is a waiver of such objection, even though it be assigned as error upon the record. Glos v. Davis, 216 Ill. 532, 75 N. E. 208. Assignments of error not presented in the appellant's brief are waived. Major v. Miller [Ind.] 75 N. E. 159. Errors not urged in brief. May v. Dobbins [Ind.] 77 N. E. 353. Errors must be specifically pointed out. A general discussion of legal propositions is insufficient. Sunley v. Metropolitan Life Ins. Co. [Iowa] 105 N. W. 408. Where counsel does not deem a point of sufficient importance to specifically state the grounds of his contention the appellate court will not go minutely through the record in search of them. In re Intoxicating Liquors [Iowa] 105 N. W. 702. Failure to comply with rule 10 as to contents and arrangement ground for affirmance. Hatch v. Geiser [Kan.] 84 P. 555. Errors not assigned in the brief, under Rule 10, subd. 3, cannot be considered on appeal. Dorais v. Doll [Mont.] 83 P. 884. Failure to comply with rule 10 requiring specifications of errors relied on is ground for affirmance. Hickey & Co. v. Kaufman [Mont.] 85 P. 870. The mere printing of an assignment of error in a brief without comment or without statement attempting to show why or in what respect the trial court erred is not sufficient to require a discussion of the errors complained of. Hoch v. Schlattan [Neb.] 107 N. W. 759. Failure to comply with rule 14 requiring assignment of errors relied on is ground for affirmance. Marck v. Minneapolis, etc., R. Co. [N. D.] 105 N. W. 1106. Statement of errors involved must not exceed half a page under Rule 26. Creachen v. Bromley Bros. Carpet Co. [Pa.] 63 A. 195. Cross assignments duly filed in the district court but not presented in appellee's brief to the supreme court, as required by district court rule No. 101, are waived. Lauenheimer & Sons v. Coop [Tex.] 89 S. W. 1061. Where the petition to try title does not indicate what title plaintiff is asserting, nor does his brief, but appellee's brief recites that plaintiff sues as heir of a certain person, the court is justified in assuming that plaintiff was claiming only as such heir, and on rehearing is not required to consider the case from the standpoint of heirship to another. Cope v. Blount [Tex. Civ. App.] 91 S. W. 615. Charge as to measure of damages held not cause for reversal where brief contained no assignment of error complaining of refusal to give additional charge requested. International & G. N. R. Co. v. McVey [Tex. Civ. App.] 83 S. W. 34.

Rulings on pleadings: A statement that certain paragraphs of an answer which was demurred to were based on claims of set-off and that another paragraph was in the nature of an accord situation, without pointing out any specific objection, is insufficient. American Food Co. v. Halstead [Ind.] 76 N. E. 251.

Instructions: A defect in an instruction not pointed out in appellant's argument or brief is waived. Lange v. Missouri Pac. R. Co., 115 Mo. App. 582, 91 S. W. 989. Where counsel does not point out the alleged defects, the court will not critically examine instructions to ascertain alleged errors therein. Enright v. Gibson, 119 Ill. App. 411.

Verdict and findings: The question of the excessiveness of the verdict is open to consideration, where it was one of the grounds for a motion for a new trial, and the opening brief assigns the overruling of such motion as error. Williams v. Spokane Falls & N. R. Co. [Wash.] 84 P. 1129. On appeal from judgment on ground that the findings are not supported by evidence, by failure of appellant to point out in his brief how the evidence fails to support findings except in two particulars, the court in its review will be restricted to these particulars. Talt v. McInnes [Cal. App.] 84 P. 674.

Assignment, statement, and proposition under the Texas rule. Assignment: Where neither the assignment nor the proposition cited thereto points out the error complained of as required by rule 30 of Rules for Courts of Civil Appeals [67 S. W. XVI), the assignment will not be considered. Lowenthal-Harrison Co. v. Edmiston Bros. [Tex. Civ. App.] 13 Tex. Ct. Rep. 805, 89 S. W. 308. Where several assignments are the same except a different reason is given, they are but one assignment supported by different propositions. Aspley v. Hawkins [Tex.] 14 Tex. Ct. Rep. 213, 89 S. W. 972.

Statement: An assignment not followed by a statement may be disregarded. Brewster v. State [Tex. Civ. App.] 13 Tex. Ct. Rep. 685, 88 S. W. 858; Parlin & Orendorff Co. v. Vawter [Tex. Civ. App.] 13 Tex. Ct. Rep. 47, 88 S. W. 407; Peach River Lumber Co. v. Ayers [Tex. Civ. App.] 91 S. W. 387; Johnston v. Fraser [Tex. Civ. App.] 92 S. W. 49; El Paso & S. R. Co. v. Darr [Tex. Civ. App.] 93 S. W. 166. Assignments complaining of charges cannot be considered where the charges are not incorporated in or referred to in the statement. Feagan v. Barton-Parker Mfg. Co. [Tex. Civ. App.] 93 S. W. 1076. The statement cited to an assignment must state the facts and not the legal conclusion thereof. Lowenthal-Harrison Co. v. Edmiston Bros. [Tex. Civ. App.] 13 Tex. Ct. Rep. 805, 89 S. W. 308. Assignments followed by a reference to the statement of facts in the beginning of the brief will not be considered. Kilday v. Perkins [Tex. Civ. App.] 90 S. W. 215. A reference for a statement of facts in an assignment of error to a statement in a prior assignment which includes nearly all the evidence of the case is insufficient. Gulf, etc., R. Co. v. Harbison [Tex. Civ. App.] 13 Tex. Ct. Rep. 67, 88 S. W. 452.

citation of authorities.[26] Assignments not argued[27] will ordinarily be deemed waived, though the court may consider them when they are apparent on the face of

Where an assignment is based upon the total absence of evidence on a proposition, a statement referring to the record is sufficient. Galveston, etc., R. Co. v. Parish [Tex. Civ. App.] 93 S. W. 682. A statement consisting of an opinion as to the effect of the pleadings and making a reference to the transcript for the pleadings, is insufficient. Logan v. Lennix [Tex. Civ. App.] 13 Tex. Ct. Rep. 572, 88 S. W. 364. Where statement containing fail to refer to the pages of the record for verification, the violation is technical and the assignments will be considered. Lewis v. Houston Electric Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 378, 88 S. W. 489. Where two distinct assignments are followed by a single proposition which, in turn, is followed by statement of the substance of the testimony without reference to pages of the record, and there is no statement of facts in the transcript, the assignment will not be considered. Waggoner v. Missouri, etc., R. Co. [Tex. Civ. App.] 92 S. W. 1028.

Proposition: Assignments not in themselves propositions must be accompanied by propositions. Kildan v. Perkins [Tex. Civ. App.] 90 S. W. 215; Ragley v. Godley [Tex. Civ. App.] 90 S. W. 66; San Antonio & A. P. R. Co. v. Wood [Tex. Civ. App.] 92 S. W. 259. Where the assignment of error is not a proposition, and no propositions are submitted under the assignment, and no statement is made. Gulf, etc., R. Co. v. St. John [Tex. Civ. App.] 88 S. W. 297. An assignment that the court erred in overruling defendant's demurrer, not followed by any proposition, is insufficient. Western Union Tel. Co. v. Bell [Tex. Civ. App.] 92 S. W. 1036. An assignment that "the court erred in permitting to be read in evidence (over defendant's objection, on the ground of immateriality and irrelevancy)" a certain interrogatory, fully set out, is sufficient without a proposition. International, etc., R. Co. v. Boykin [Tex.] 89 S. W. 639. Propositions not germane to the assignment will not be considered. International, etc., R. Co. v. Glover [Tex. Civ. App.] 13 Tex. Ct. Rep. 263, 88 S. W. 515; Sweet v. Lyon [Tex. Civ. App.] 88 S. W. 384; Texas Cent. R. Co. v. Miller [Tex. Civ. App.] 13 Tex. Ct. Rep. 587, 88 S. W. 499. An assignment followed by a proposition not germane will not be considered. Ellis v. Littlefield [Tex. Civ. App.] 93 S. W. 171. Propositions as to the burden of proof of the execution of an alleged forged deed are not germane to assignments of error as to the admission of evidence of the existence of the deed when execution according to law has not been shown. Garrett v. Spradling [Tex. Civ. App.] 88 S. W. 293. A proposition that it was error not to exclude testimony as to price on the ground that it was based upon original entries made by another, is not supported by a motion to exclude on the ground that the witness has no independent recollection and the entries are not in evidence. Hubbard City Cotton Oil & Gin Co. v. Nichols [Tex. Civ. App.] 14 Tex. Ct. Rep. 1, 89 S. W. 795. An assignment followed by a reference to the propositions and statements under another assignment, which propositions and statements are not germane, will not be considered. Kane v. Sholars [Tex. Civ. App.] 90 S. W. 937. The propositions that the evidence is insufficient to sustain the allegation of the answer and that defendant's promise to pay the debts of another was within the statute of frauds, cannot be raised by an assignment complaining of the overruling of exceptions to defendant's answer. Louisiana & Tex. Lumber Co. v. Carter [Tex. Civ. App.] 93 S. W. 714.

26. Briefs must contain points and authorities. Anglo-Wyoming Oil Fields v. Miller, 117 Ill. App. 552. Appellee should file a brief citing authorities. Aldridge v. Board of Education of Stillwater [Okl.] 82 P. 827.

27. Errors or assignments not argued will not be considered. McClendon v. McKissack [Ala.] 38 So. 1020; Greely-Barnham Grocery Co. v. Cottingham [Ala.] 39 So. 567; Southern R. Co. v. Bradford [Ala.] 40 So. 100; Driver v. King [Ala.] 40 So. 315; Ball v. Hartman [Ariz.] 83 P. 358; Hewel v. Hogin [Cal. App.] 84 P. 1002; Price v. Central of Georgia R. Co. [Ga.] 53 S. E. 455; Sauter v. Anderson, 110 Ill. App. 574; Knights Templars & Masons' Life Indemnity Co. v. Crayton, 110 Ill. App. 648; Dowie v. Priddle, 116 Ill. App. 184; Ford v. Ford, 117 Ill. App. 502; Western Union Tel. Co. v. State [Ind.] 76 N. E. 100; McCaslin v. State [Ind. App.] 75 N. E. 844; City of Indianapolis v. Mullally [Ind. App.] 77 N. E. 1132; American Woolen Co. v. Boston & M. R. Co. [Mass.] 76 N. E. 658; Anderson v. Northern Pac. R. Co. [Mont.] 85 P. 884; Loper v. Somers, 71 N. J. Law, 657, 61 A. 85; Jones v. Ballou, 139 N. C. 526, 52 S. E. 254; Stephens v. Faus [S. D.] 106 N. W. 56. Assignments in the bill of exceptions, not discussed in the briefs. Castle v. Sibley [Cal. App.] 82 P. 1067. The appellate court will notice only those assignments discussed in appellant's brief and will not prosecute an independent inquiry in order to find out reasons for or against the correctness of the rulings of the trial court. Humphrey v. Pope [Cal. App.] 82 P. 223. Matters not assigned as error nor referred to in argument. State v. Starr [Conn.] 63 A. 512. Errors not argued in the brief or discussed in the argument. Exceptions noted in the abstract and referred to in the statement but not argued. Illinois Cent. R. Co. v. Andrews, 116 Ill. App. 8. Where the appellant states in his brief that he relies on all objections set forth in the exceptions, none of such objections will be deemed to be waived; the appellate court, however, will in its discretion notice only those objections which are argued. Fay v. Hunt [Mass.] 77 N. E. 502. Errors not argued either in the brief or at the bar. Coolidge v. Hallauer [Wis.] 105 N. W. 568. Question as to whether sale was legal. Berry v. Pelneault, 188 Mass. 413, 74 N. E. 917. That damages were excessive. Indianapolis & M. Rapid Transit Co. v. Reeder [Ind. App.] 76 N. E. 816. Grounds for quashing assessment for local improvement. Harwood v. Donovan, 188 Mass. 487, 74 N. E. 914.

Cross errors. Indiana Mach Co. v. Kirk, 118 Ill. App. 102.

Sufficiency of pleadings. Metropolitan Life Ins. Co. v. Willis [Ind. App.] 76 N. E. 560. Complaint. Sovereign Camp Woodmen of the World v. Cox [Ind. App.] 75 N. E. 290; Morrison v. Indianapolis & W. R. Co. [Ind.] 76 N. E. 961.

Sufficiency of answer. Starkey v. Starkey

the record.[28] It is the duty of the court to make the proper answer to a claim of error though such answer is not suggested by counsel in his brief.[29] New points first raised in the reply or supplement brief will not ordinarily be considered.[30] Admissions and statements in a brief are binding on the party making them.[31] Counsel will not be permitted to attack the trial court, or to criticise his rulings disrespectfully.[32] Scandalous [33] or unauthorized briefs [34] and arguments not prepared in accordance with the rules [35] may be stricken from the files. In the former case, the court may permit the filing of a new brief within a specified time.[36]

[Ind.] 76 N. E. 876. Overruling appellant's demurrer to alternative writ of mandamus and sustaining demurrers to each paragraph of answer. Funk v. State [Ind.] 77 N. E. 854. Refusal of court to require appellee to make pleading more specific. Unger v. Mellinger [Ind. App.] 77 N. E. 814.

Evidence: Objection to the admission of hearsay. Bennett & Co. v. Farmers' & Merchants' Bank [Ga.] 52 S. E. 330. Exceptions to the admission of evidence. Carroll v. Metropolitan Coal Co., 189 Mass. 159, 75 N. E. 84; Mahan v. Newton & B. St. R. Co., 189 Mass. 1, 75 N. E. 59. Exceptions to exclusion of evidence. Swain v. Boston El. R. Co., 188 Mass. 405, 74 N. E. 672.

Refusal to give instructions. Martin v. Chicago & M. Elec. R. Co., 220 Ill. 97, 77 N. E. 86. Refused propositions of law not discussed or mentioned in the brief. Moore v. Wells Fargo & Co. Exp., 116 Ill. App. 581. Exceptions to certain items of a **decree** not considered, in view of certain admissions, and failure of counsel to argue them. United States Rubber Co. v. Peterman, 119 Ill. App. 610.

Grounds of motion for a new trial. Capital Nat. Bank v. Wilkerson [Ind. App.] 76 N. E. 258. Smith v. Smith [Ind. App.] 74 N. E. 1008. If not urged nor referred to in the brief of counsel for the plaintiff in error, will be treated as abandoned. Bowden v. Bowden [Ga.] 53 S. E. 606.

A simple statement in appellant's brief that he insists upon a certain assignment is no such argument as requires the court to pass upon it. Western R. Co. v. Russell [Ala.] 39 So. 311. Where the assignment related to one bill and the argument to another, the assignment will not be considered as insisted upon. Louisville & N. R. Co. v. Britton [Ala.] 39 So. 585. The argument must be prepared in accordance with the rules of the court. Taylor v. Home Sav. & Loan Ass'n [Iowa] 105 N. W. 193. Where one of the parties to a joint assignment fails to discuss the same in his brief and thereby waives the same, such waiver will preclude the other party to the assignment from further insisting thereon. Starkey v. Starkey [Ind.] 76 N. E. 876.

Where by leave of the court the brief filed in the appellate is filed in the supreme court, only such errors will be considered by the supreme court as were urged in the appellate court. Chicago City R. Co. v. Schmidt, 218 Ill. 92, 75 N. E. 383. Questions not discussed upon the argument in the court of appeals will not be considered. Vroom v. Tilly [N. Y.] 77 N. E. 1017.

28. The appellate court may reverse on account of a discrepancy between the findings and the judgment, although the point is not made. Finding was for $250 damages and judgment was for only $200. State v. Richeson [Ind. App.] 75 N. E. 846.

29. To answer contention that complainant did not prove certain facts, by showing that he was not required to do so under the pleadings. J. E. Greslick Co. v. Rogers [Mich.] 107 N. W. 885.

30. Harrow v. Grogan, 219 Ill. 228, 76 N. E. 350; Sands v. Stagg [Va.] 54 S. E. 21; American Locomotive Co. v. Hoffman [Va.] 54 S. E. 25. Errors suggested in the brief of the plaintiff in error filed after the brief of the defendant in error has been filed. Newport News & O. P. R. & Elec. Co. v. Bickford [Va.] 52 S. E. 1011. Questions raised for the first time in the supplemental brief of appellant. Foster v. East Jordan Lumber Co. [Mich.] 12 Det. Leg. N. 426, 104 N. W. 617. A defense not presented below cannot be presented for the first time by supplemental brief. Lucas v. Cella, 115 Mo. App. 395, 91 S. W. 996. Whether or not the court will consider points and arguments raised for the first time in the closing brief is not a right which the respondent may invoke but for the appellate court to determine for itself. Lewis v. San Francisco [Cal. App.] 82 P. 1106.

31. Counsel cannot object that facts admitted in his own brief were not proven. Kessel v. Mayer, 118 [Ill. App.] 267. A statement in appellant's brief that the only question in the case is that the verdict was unsupported by the evidence waives all other questions. City of Kankakee v. Sannes, 118 [Ill. App.] 534.

32. Brief held not so objectionable as to require it to be stricken, or as to require dismissal. Colorado & S. R. Co. v. Davis [Colo.] 83 P. 777. May not go outside the record and charge the court below with freely and publicly admitting his prejudice against building and loan associations. Oskaloosa Nat. Bldg., Loan & Inv. Ass'n v. Bailey [Iowa] 105 N. W. 417.

33. Referring to the trial and supreme court in discourteous and scurrilous language and questioning the honesty of the trial court. Pittsburgh, etc., R. Co. v. Muncie & P. Traction Co. [Ind.] 77 N. E. 941. Where the brief contains contemptuous references to the trial court of a character unwarranted and indefensible. Smith v. Simpson [C. C. A.] 140 F. 712.

34. An "answer to appellant's reply" will be stricken on appellant's motion and costs thereof taxed to appellee. Anundsen v. Standard Printing Co. [Iowa] 105 N. W. 424. A brief will not be stricken as a reply to a reply if it replies to what is in substance an argument in chief falsely called a reply. Henning v. Colsch [Iowa] 106 N. W. 922.

35. Taylor v. Home Sav. & Loan Ass'n [Iowa] 105 N. W. 193.

36. May grant leave to file another within a stated time, directed to specific points in controversy. Smith v. Simpson [C. C. A.] 140 F. 712.

(§ 11) *G. Dismissal and abatement of appeal, and reinstatement of the same.*[37]—An appeal will be dismissed for want of jurisdiction [38] or of a litigable right,[39] or of authority to prosecute the appeal,[40] for want of a real controversy [41]

37. See 5 C. L. 201.

38. See § 13 B, post. Bickford v. Franconia [N. H.] 60 A. 98. An appellate court may of its own motion dismiss an appeal where it has no jurisdiction. Chicago Portralt Co. v. Chicago Crayon Co., 217 Ill. 200, 75 N. E. 473; Memphis Keeley Institute v. Leslie E. Keeley Co. [C. C. A.] 144 F. 628. A motion to dismiss may be made at any time where appellate court has no jurisdiction. Town of Chalmers v. Tandy, 111 Ill. App. 252. Question of jurisdiction may be determined by supreme court on motion to dismiss. Yockey v. Woodbury County [Iowa] 106 N. W. 950. It cannot be urged as want of jurisdiction that the proceeding was based on an invalid order of court. On appeal from judgment in reopened case it is collateral attack, hence not permissible to say that the order reopening the case was wrong. In re Sullivan's Estate [Wash.] 82 P. 297. In an action involving priority of patents, an appeal from the commissioner of patents will be dismissed and remanded to the patent office for settlement, where any judgment of priority by the court would be void. Lattig v. Dean, 25 App. D. C. 591. It is not ground for dismissal for want of jurisdiction that the action of the court below was the exercise of a discretion not subject to review. In re O'Brien's Petition [Conn.] 63 A. 777. Failure to serve a co-defendant deprived the court of jurisdiction. Dillavou v. Dillavou [Iowa] 106 N. W. 949. An appeal will not be dismissed for want of jurisdiction in the trial court where no objection was made below. Pere Marquette R. Co. v. Wabash R. Co. [Mich.] 12 Det. Leg. N. 466, 104 N. W. 650.

Where **amount involved** is less than jurisdictional amount. Yakey v. Leich [Ind. App.] 76 N. E. 926; Tyler v. Davis [Ind.] 77 N. E. 400.

Appeal to wrong court: Ground for dismissal. In re Ross' Estate, 220 Ill. 142, 77 N. E. 126; Murphy v. People [Ill.] 77 N. E. 439; First Nat. Bank v. Gibson [Ill.] 77 N. E. 562; Funk v. Kempton [Ill.] 77 N. E. 683. Appeal to the supreme court instead of to the appellate court. Fairbanks v. Carle, 217 Ill. 136, 75 N. E. 360. Appeal to the supreme court in proceedings under Hurd's Rev. St. 1903, pp. 776-777, c. 42, §§ 204-209, relating to ditches and drains. Union Drainage Dist. No. 1 of Towns of South Homer & Sidell v. Drainage Dist. No. 1 of Towns of Vance & Sidell, 220 Ill. 104, 77 N. E. 98. Bill of review to impeach decree in partition of freehold involves a freehold and the appellate court has no jurisdiction. Crane v. Stafford, 117 Ill. App. 57.

Nonappealable order. People v. McAnally [Ill.] 77 N. E. 544. Chicago Portrait Co. v. Chicago Crayon Co., 217 Ill. 200, 75 N.E. 473. Order of reference in equity case. Lockwood v. Lockwood [S. C.] 53 S. E. 87. Discretionary order. Bell v. Western Union Tel. Co. [S. C.] 53 S. E. 177; Hall v. McBride [S. C.] 53 S. E. 368. Fast writ of error dismissed on ground that the order to which it was taken was not reviewable by such a writ. Thompson v. Thompson [Ga.] 53 S. E. 507. Where an appeal is taken from an interlocutory decree, but no appeal is taken from subsequent interlocutory decrees which were not brought up by the appeal taken, a motion to dismiss on the ground that the appeal taken involved only costs was without merit, the whole judgment in favor of the appellee against the appellant being necessarily involved, though the subsequent interlocutory decrees were not reviewable. Hopkins v. Prichard [W. Va.] 53 S. E. 557.

Appeal improvidently awarded in that it was allowed to an order in another case. Robinson v. Goldman's Adm'r [W. Va.] 53 S. E. 12.

Death of party: Where one of the appellees who was a defendant in the court below died after judgment and before the transcript was filed in the appellate court, such court did not have jurisdiction of the appeal. Ehlers v. Hartman [Ind. App.] 77 N. E. 745.

39. Abatement of appeal by transfer or extinguishment of right is treated in § 1 B, post.

40. Under Code, § 320, providing that the authority of an attorney may be questioned by the opposite party, where it appeared that attorneys had no authority to take the appeal, the same was dismissed. Yackey v. Woodbury County [Iowa] 106 N. W. 950.

41. Rule that abstract questions will not be considered is discussed in § 13 B, post. The court will not entertain an appeal unless appellant has an existing right which the judgment or order appealed from if erroneous has substantially prejudiced. Lamoreux v. Williams, 125 Wis. 543, 104 N. W. 813. When pending an appeal, an event occurs without fault of appellee, which renders it impossible for the court should its decision be favorable to the appellant, to grant him any effectual relief, whatever, the court upon that fact being brought to its knowledge will not proceed to formal judgment, but will dismiss the appeal. Territory v. Dame [N. M.] 85 P. 473. Will not dismiss a case for cessation of controversy unless it is clearly and satisfactorily shown. State v. Superior Court of Lincoln County [Wash.] 83 P. 726.

Appeal dismissed: Under Kirby's Dig. § 1227, appellee may move for a dismissal on the ground that a judgment has been rendered since the appeal was taken settling all the rights contended for by appellant. Church v. Gallic [Ark.] 88 S. W. 979. A judgment of ejectment sustaining a deed from appellant to appellee is a bar to the further prosecution of an appeal in an action to cancel such deed. Id. An appeal from an order granting respondent right to use of land until final conclusion of litigation involving title to the land, on coming up for consideration after the main litigation has been finally concluded. Mendocino County v. Peters [Cal. App.] 82 P. 1124. Where a litigant claiming to be the de facto officer, brings an action purely in aid of or for the protection of his possession of such office, and pending an appeal from an adverse decision in such action surrenders the possession of such office and institutes proceedings in the nature of quo warranto. Territory v. Dame [N. M.] 85 P. 473. Where before the hearing of an appeal from an order refusing to discharge the appellant from imprison-

properly saved below,[42] for abandonment[43] or want of prosecution,[44] for substantial[45] and inexcusable[46] defects of procedure in bringing up the case,[47] unless the

ment, the term of appellee's imprisonment expired. Ex parte Person [N. C.] 52 S. E. 1033. Neither the liability to fine on judgment of ouster nor the effect of the judgment as an estoppel in proceedings to recover the emoluments of the office will prevent quo warranto proceedings from becoming moot on expiration of the term. Albright v. Territory of New Mexico, 200 N. S 9, 50 Law. Ed. —-. Where a city passed an ordinance to repay pro rata an excess assessment pending an appeal from a judgment denying a writ of mandamus to compel the city to repay to plaintiff his pro rata share of an assessment over the actual cost of the improvement. Miller v. Seattle [Wash.] 84 P. 583. Writ of error from a judgment revoking a permit to a foreign corporation to do business in the state becomes moot when the permit expires by its terms. Security Mut. Life Ins. Co. v. Prewitt, 200 U. S. 446, 50 Law, Ed. —-. On proper showing that the subect-matter has been settled. In re Tucker [Cal. App.] 83 P. 814. An appeal from an order granting a new trial, where pending the appeal the new trial comes on for hearing and appellant dismisses his own action. Stein v. Kesselgrub, 45 Misc. 652, 91 N. Y. S. 64.

Where judgment appealed from is vacated. Ft. Collins Development R. Co. v. Hoyt [Colo.] 84 P. 69. Where on appeal the order granting a new trial is affirmed, thereby vacating the judgment. Donnelly v. Gray Bros. [Cal. App.] 84 P. 451. Appeal from dismissal of complaint praying for an **injunction,** if to grant the injunction has become a useless ceremony. Hubbell v. Armijo [N. M.] 85 P. 477. An appeal from an order dismissing a suit to restrain the clerk to put certain names on the election ballot, where the names have in the meanwhile been put on the ballot and an election held. Finley v. Smith [Ky.] 89 S. W. 547. Appeal from order enjoining officer from printing defendant's name on ballot until he designated his party, where election was over. Lamoreux v. Williams, 125 Wis. 543, 104 N. W. 813. An appeal from an order refusing a writ of **mandamus** where mandamus would now be useless. State v. Clem [Ala.] 39 So. 214. Appeal from a judgment denying appellant a writ of mandamus to restore him to office, where it appears that he has been legally removed pending the appeal. State v. Lyons [Ala.] 39 So. 214.

Appeal not dismissed: Although time set by a board of commissioners for the holding of a special election has passed, an appeal from said decision will not be dismissed because question has become moot where the commissioners would have to set another day for election. Good v. Burk [Ind.] 77 N. E. 1080. The fact that since decree for defendant in a suit to compel performance of a contract to purchase real estate complainant has so altered the condition of the real estate as to make enforcement of the contract impossible is no ground for dismissing complainant's appeal. Moore v. Galupo [N. J. Err. & App.] 62 A. 699. The proper practice is to present that fact by bill of review in case of reversal. Id. The constitutionality of a law relating to the striking of an elector's name from the registration list will be considered though the question has become academic by lapse of time as far as the party litigating is concerned. In re Morgan, 99 N. Y. S. 775. The fact that, after entering a decree on the merits dismissing a bill, other suits in the same court between the same parties and involving the same matters were dismissed on the ground that the issues were determined in the prior suit, and that no appeals were taken in the latter suits, does not prevent a review of the first decree on the merits by the appellate court. Copper River Min. Co. v. McClellan [C. C. A.] 138 F. 333.

42. See Saving Questions for Review, 6 C. L. 1385. Failure to take any exception to the order of the trial court overruling a motion for a new trial is ground for dismissal. City of Enid v. Wigger [Okl.] 85 P. 697.

43. On showing by certificate of appellant's abandonment of appeal. Morgan v. Morgan, 25 App. D. C. 389. In South Carolina the trial court may adjudge the appeal abandoned as not having been perfected. Where the circuit court overruled a motion for a continuance on account of an alleged pending appeal to the supreme court, it virtually dismissed the appeal. Uzzell v. Horn, 71 S. C. 426, 51 S. E. 253. Where appellant sues out a writ of error before the expiration of the period for filing a transcript the appeal is abandoned. Wanderlohr v. Grayson County Nat. Bank [Tex. Civ. App.] 90 S. W. 180.

44. The Supreme Court has inherent power to dismiss an appeal where appellant has practically abandoned all proceedings for 1 1-2 years looking to preparation of a record essential to a hearing thereon. Moultrie v. Tarpio, 147 Cal. 376, 81 P. 1112. An appeal will not be dismissed for want of prosecution where it appears that the delays were due to the fact that the records were destroyed and had to be replaced, specially where appellee was not prejudiced. Healey v. Healey [Ark.] 90 S. W. 845. The law court has no authority to remand a case for a new trial at law or to entertain an appeal in equity where by reason of the death of the official court stenographer the party seeking review is unable to procure a report of the evidence, and the motion for a new trial must be overruled or the appeal dismissed for want of prosecution. Morin v. Claflin [Me.] 61 A. 782.

45. Should not dismiss for technical reasons unless imperative under requirements of the statute. State v. White [Wash.] 82 P. 907. The fact that through clerical error the title of parties appears in the appellate court the same as in the original jurisdiction is not ground for dismissal. Hackfeld & Co. v. U. S. [C. C. A.] 141 F. 9.

46. The fact that an order for a new trial is granted from which an appeal has been prosecuted, will not excuse failure to file a transcript and prosecute an appeal from an adverse judgment. Puckhaber v. Henry, 147 Cal. 424, 81 P. 1105. Where it appears that the clerk did not have time to transcribe and forward the record, and it does not appear that the plaintiff in error is chargeable with delay in transcribing and forwarding the record, a motion to dismiss on account of such delay will be overruled. Fricker v.

Americus Mfg. & Imp. Co. [Ga.] 52 S. E. 65. Where the trial judge fails to settle case in time to have the case docketed at the proper term, such failure will not excuse the appellant from docketing his case, and asking for a writ of certiorari to perfect the transcript. State v. Telfair, 139 N. C. 555, 51 S. E. 911. Although sickness might excuse delay in filing briefs, press of business will not. First Nat. Bank v. Smith [Okl.] 83 P. 1119. The fact that printers failed to print the brief within the time and counsel overlooked time within which to file said brief will not excuse several months delay. Carter v. Wakeman [Or.] 82 P. 858. A motion to dismiss for failure to file transcript will be denied if it is shown that a transcript of the reporter's notes could not be obtained, and the judge granted extension of the right to settle the bill of exceptions. Butter v. Lamson, 29 Utah, 439, 82 P. 473.

47. Prematurity: No final judgment. Henderson v. State, 123 Ga. 465, 51 S. E. 385; Chicago Portrait Co. v. Chicago Crayon Co., 217 Ill. 200, 75 N. E. 473. Appeal from order of re-reference. Southern Chemical Co. v. Lackey [N. C.] 52 S. E. 272. Interlocutory order in separate maintenance suit. Beatty v. Beatty [Va.] 53 S. E. 2. The court would be justified in dismissing where the clerk's certificate did not mention the rendition or entry of a final judgment. Duncan v. State [Neb.] 106 N. W. 1014. Where appellant's abstract fails to show any final judgment. Goodykoontz v. Imes [Colo.] 85 P. 839. Appeal from a decree dismissing a subordinate branch of a controversy without passing upon the chief issues. Memphis Keeley Institute v. Keeley Co. [C. C. A.] 144 F. 628. An appeal dismissed because the decree was not final does not authorize appellate court to pass upon merits of the decree or reasons on which it is based. Id. An appeal from an order sustaining a demurrer on the ground that the mortgagor who had assigned his equity of redemption was not made a party to foreclosure proceedings, dismissed. The plaintiff should either have declined to bring in the additional party and allowed the action to be dismissed or should have noted an exception and brought the interlocutory order up for review on appeal from the final judgment. Bernard v. Shemwell, 139 N. C. 446, 52 S. E. 64.

Failure to appeal in time: Under Code Civ. Proc. § 939, subd. 1, an appeal taken more than 6 months after entry of judgment. Robinson v. Eberhart [Cal.] 83 P. 452; Mathai v. Kennedy [Cal.] 84 P. 37; Brownlee v. Reiner, 147 Cal. 641, 82 P. 324; Calkins v. Howard [Cal. App.] 83 P. 280. An appeal not perfected within 1 year from rendition of judgment. Cox v. Odell [Cal. App.] 82 P. 1086. Appeal from order denying motion for new trial not taken within 60 days after entry of order. Code Civ. Proc. § 939, subd. 3. Walbridge v. Cousins [Cal. App.] 83 P. 462. A petition, transferring a cause from the court of appeals to the supreme court, inadvertently filed by the clerk, more than 10 days after judgment in court of appeals became final, will be stricken from the files. Hewlett v. Beede [Cal.] 83 P. 1089. A prayer for appeal under Civ. Code, § 388, not made within 5 days after judgment or decree is rendered. Roseberry v. Valley Bldg. & Loan Ass'n [Colo.] 83 P. 637. Appeal from a judgment not taken within a year. Twaddle v. Winters [Nev.] 85 P. 280. An appeal not taken within six months after entry of order or judgment. Anderson v. H. Halthusen Mercantile Co. [Utah] 83 P. 560. A judgment of dismissal is a final judgment coming within Laws 1903, p. 74, c. 59, § 4, requiring an appeal in tax foreclosure proceedings to be taken within 30 days after the rendition of judgment and an appeal made thereafter will be dismissed. Harris v. Levy, 39 Wash. 158, 81 P. 550. The rule requiring writs of error and citations to be made returnable within 30 days from signing of citation is directory and not jurisdictional, and its violation will rarely result in dismissal where appellee has appeared and no injury has resulted. Love v. Busch [C. C. A.] 142 F. 429.

Defect of parties: Hodnett v. Douglas [Ga.] 53 S. E. 687; Scott v. Great Western Coal & Coke Co., 220 Ill. 42, 77 N. E. 122; Wuerzburger v. Wuerzburger [Ill.] 77 N. E. 419; Helberg v. Dovenmuehle [Ind. App.] 76 N. E. 1020. Where stranger to record appealed and by erroneous amendments it was sought to make appeal stand in party's name. Head v. Marietta Guano Co. [Ga.] 53 S. E. 676. Where the party assigning errors does not appear as one of the parties to the cause as shown by the transcript, the court may dismiss proceedings in error upon its own motion. People v. Sterne, 119 Ill. App. 466. Where all parties to a judgment are made parties to a petition for a writ of error and citation was prayed for against all, the writ will be dismissed if service is not made on all, though judgment is several. Aspley v. Alcott [Tex. Civ. App.] 90 S. W. 885. A cause which must be dismissed for failure of necessary parties as an appeal must also be dismissed as a writ of error under Mill's Ann. Code, § 388a. Tanquary v. Howard [Colo.] 83 P. 647. Where by an affidavit of nonresidence it appears that the plaintiffs in error have made an effort to bring their co-plaintiffs before the appellate court, the writ will not be dismissed for want of a summons and severance. Bellinger v. Barnes [Ill.] 77 N. E. 421. Appellate court will of its own motion dismiss a pretended appeal from an order denying a new trial where such order indicates that defendants joined in the motion, while the notice indicates that only one of the defendants made such motion, and there is nothing to indicate which defendant did so. Anderson v. Northern Pac. R. Co. [Mont.] 85 P. 884.

Notice of appeal: Under the statute providing that no appeal shall be dismissed for any defect in the notice or service thereof, provided appellant shall perfect it forthwith, failure to file proof of service in time when service was in time is not ground for dismissal. Reynolds v. Reynolds [Wash.] 84 P. 579. Where modification of decree will not injuriously affect a defendant not served with notice, motion to dismiss for failure to serve such notice will be denied. South Side Imp. Co. v. Burson, 147 Cal. 401, 81 P. 1107. Failure to serve all defendants is available only to those not served. Frost v. Alturas Water Co. [Idaho] 81 P. 996. Where the motion for dismissal fails to specify which defendants were not served or that all the defendants were served by process and brought into the trial court, it will not justify dismissal. Id. Where no change in a decree less favorable to defendants was possible the failure of appealing defendants

same are waived,[48] or for failure to file [49] a proper record [50] assigning error,[51] or

to serve a notice of appeal upon their co-defendants was no ground for dismissal. Dillavou v. Dillavou [Iowa] 104 N. W. 432. Where plaintiff dismisses action as to one of the defendants prior to or during trial it is not necessary to serve notice of appeal and statement of facts on such defendant, hence no ground for striking statement of facts or dismissing appeal. Sheehan v. Bailey Bldg. Co. [Wash.] 85 P. 44. Although Ballinger's Ann. Codes and St. § 6503, provide that a notice of appeal must first be served and then filed with proof of service, the supreme court has jurisdiction if notice is filed first, served the same day and proof of service acknowledged, especially under Sess. Laws 1899, p. 79. c. 49, providing that an appeal shall not be dismissed for a mere technical irregularity. Lawler Land Co. v. Steel [Wash.] 83 P. 896. A motion to dismiss for failure to serve citation on certain parties defendant will not be granted where it does not appear from the record that the omitted parties have any interest in the decree appealed from. Tull v. Nash [C. C. A.] 141 F. 557.

Bonds. Failure to give, and defects therein: In re Wells [Cal.] 84 P. 37. An appeal is ineffectual unless within five days after service of notice of appeal a bond is filed. Rauer's Law & Collection Co. v. Standley [Cal. App.] 84 P. 214. Failure to file appeal bond in proper time. Hill v. Chicago, 218 Ill. 178, 75 N. E. 766. Failure to give appeal bond as required by Rev. St. 1895, arts. 1400-1402, 1408, is ground for dismissal even after decision has been rendered in both court of civil appeals and supreme court. Logan v. Gay [Tex.] 92 S. W. 255. For failure to comply with condition in grant of a joint appeal that parties give bond. Not complied with where all did not join in its execution. Singmaster v. American Percheron Horse Breeders' & Importers' Ass'n, 116 Ill. App. 245.

Held not to be ground for dismissal: Failure to file a supersedeas bond. Nixon v. Boling [Ala.] 40 So. 210. Fact that the bond was approved by the clerk and not by the court where appellant filed cross motion for leave to substitute a new bond. Mertz v. Mehlhop, 117 Ill. App. 77. Mere failure of a bond to use the exact words of the statute though covering all its provisions in fact. Ahrens v. Seattle, 39 Wash. 168, 81 P. 558. Because a bond contains language making it in form a supersedeas bond though in amount and purpose only an appeal bond. State v. White [Wash.] 82 P. 907. Fact that the names of two sureties were erased from a bond where it appears that it was done with the consent of the 3d surety who is still liable on the bond. First Nat. Bank v. Coles [Wash.] 82 P. 892.

Delay in settling case: Allowing 15 days to elapse after judgment without having the case agreed upon or settled and without obtaining an extension of time therefor terminates the right to appeal. Franz-Milton Co. v. Hall [N. J. Law] 62 A. 269. That the judge at appellants' request put his findings in writing could not be deemed an implied extension. Id. An appeal will not be dismissed merely for delay in serving notice to settle the statement of facts, an intention to prosecute appeal appearing from prompt taking of all other necessary steps. Flodin v. Denholm [Wash.] 82 P. 738.

Delay in docketing: Failure to docket an appeal from the superior court seven days before the call of the district, as required by superior court rule No. 5, 28 S. E. v., is not ground for dismissal where the appeal is docketed at the next term of the supreme court after the trial in the superior court, and the appellee does not move for a dismissal until after the case has been docketed. Craddock v. Barnes [N. C.] 53 S. E. 239. That the case on appeal was not settled by the judge until too late to docket the case at the proper term is no excuse for failure to so docket it, it being appellant's duty to docket the record proper and ask for a writ of certiorari to perfect the transcript, and hence such appeal will be dismissed under rule 16 (39 S. E. vi). State v. Telfair, 139 N. C. 555, 51 S. E. 911.

48. See post, § 11 H.

49. Abstract: Where the appeal is prosecuted on a short form transcript, and appellant fails to file his abstract, as required by Rev. St. 1899, § 813, and court rule 15 (67 S. W. vi). McDonald Bros. v. Adams Express Co. [Mo. App.] 91 S. W. 444.

Bill of exceptions: Whenever it appears that the clerk of a trial court has failed to transmit to the supreme court, within the time prescribed by law, a bill of exceptions and transcript, and that an attorney for the plaintiff in error "has been the cause of the delay . . . by consent, direction, or procurement of any kind," the writ of error will be dismissed. Civ. Code 1895, §§ 5571, 5572. Budden v. Brooks, 123 Ga. 882, 51 S. E. 727. Delay in filing bill of exceptions is not ground for dismissal where it is caused by the absence of the trial judge and the plaintiff in error is without fault. This rule applies to cases under Code 1895, § 5543, relating to the so-called "fast" bill of exceptions, such as those excepting to the granting or refusal of interlocutory injunction, as well as to ordinary bills. Railroad Commission of Ga. v. Palmer Hardware Co. [Ga.] 53 S. E. 193, overruling Jackson v. State, 93 Ga. 216, 18 S. E. 558, and Gibson v. Thornton, 99 Ga. 647, 26 S. E. 78, and dist'g Markhan v. Huff, 72 Ga. 106.

Transcript: Failure to file transcript within time limited by rules of the court without good excuse. Bell v. Staacke [Cal.] 83 P. 245. Failure to file transcript with the clerk of the appellate court within the time provided by the rules, where it does not appear that an extension of time has been granted. California Consol. Min. Co. v. Manley [Idaho] 85 P. 919. Failure to certify and file evidence within the 6 months in equity case. McClelland v. Cedar Rapids [Iowa] 107 N. W. 428. Where a transcript of the U. S. Commissioner is not filed on or before the first day of the term of the circuit court next after the appeal the appellee may have the case dismissed under Mansf. Dig. § 4152 (Ind. T. Ann. St. 1899, § 2832) though the case is not triable at that term. Oppenheim v. Richardson & Co. [Ind. T.] 90 S. W. 480. Failure to file the transcript in time. Mix v. Campbell [La.] 38 So. 877; Mix v. Hawkins [La.] 38 So. 877. Failure to file transcript of record within 30 days after perfecting of appeal. Butler

v. Lamson, 29 Utah, 439, 82 P. 473. Where a transcript of the record is filed within 60 days from the signing of the citation and within the time specified therein but after the return day of the writ of error, and the failure to file it before that return day has not continued the hearing of the case over any term of the court, and no motion to dismiss the writ is made until expense of printing the transcript has been incurred, the writ will not be dismissed. Incorporated Town of Gilman v. Fernald [C. C. A.] 141 F. 940. Upon a motion to dismiss, the failure to file the record in time may be met by imposition of terms the record being filed at the time of the motion. Bliss v. Rosenkrans, 125 Wis. 532, 104 N. W. 746.

50. For failure to comply with rules requiring proper paging, indexing, arrangement, etc., of the record. Hannan Bros. v. Waltenspiel, 29 Utah, 466, 82 P. 859. In discretion of court for failure on part of appellant to arrange papers properly with proper numbering within a specified time either on motion of court or respondent. Harden v. Card [Wyo.] 85 P. 246. Where record fails to show that judgment was rendered in the case the appellate court has no jurisdiction. State v. Salyers [Iowa] 106 N. W. 516.

Defects in abstract: Although an appeal might be summarily dismissed for failure to incorporate in the abstract of the record a copy of or reference to the decree, and the special findings of the jury as confirmed by the court, nevertheless the court may consider an appeal on its merits where the questions involved are easily disposed of. Hufd v. Fleck [Colo.] 82 P. 485. Motion to dismiss on ground that cause was entitled in the abstract as at law where an application for dower was filed in probate and was, therefore, at law, denied. Brandes v. Brandes [Iowa] 105 N. W. 499. Failure of appellant to index his abstract, insert all the evidence and to give the testimony of one witness in narrative form, as required by Sup. Ct. Rules 12, 13 (73 S. W. vi) was not ground for dismissal where there was sufficient to consider the question raised and no confusion arose from the absence of the index because of the shortness of the record. McMurtry v. Fairley [Mo.] 91 S. W. 902.

Defects in transcript or paper book: Where record discloses neither bill of exceptions nor requests for finding of ultimate facts, nor agreed statement of facts, on appeal from a judgment dismissing a petition by an intervening claimant of goods seized under execution. Neely v. Elec. Construction & Supply Co. v. Browning, 25 App. D. C. 84. Where the book furnished contained no transcript of the proceedings, no pleadings in the court below and no statement of the case. Boland v. Kaveny [N. J. Err. & App.] 62 A. 552. Where only assignment of error is erroneous, finding of fact and record fails to bring up evidence. Miles v. Swanson [Or.] 82 P. 954. Failure of record to disclose any order or decree. Schneider v. Metcalf [Iowa] 106 N. W. 270. Where transcript did not contain any final order or judgment. Modern Woodmen of America v. Plummer [Neb.] 105 N. W. 181. Where no judgment was returned with writ. Flanerty v. North Jersey St. R. Co. [N. J. Err. & App.] 62 A. 425. Failure to index transcript. McCormick Harvesting Mach. Co. v. Hinchman [Ind. App.] 76 N. E. 327. Where the docket entries were scattered haphazard over the page of the record without regard to dates or proper sequence, showing the filing of exceptions before the decisions, etc., the irregularities were destructive of all confidence in the record and required dismissal. Trescott v. Co-operative Bldg. Bank, 212 Pa. 47, 61 A. 478.

Held not ground for dismissal: Failure of the register of wills to certify the record in an appeal from his order removing an administrator and appointing another. The papers will be remanded for the required certificates. Boyd v. Cloud [Del.] 62 A. 294. A statement of facts will not be struck for failure to index when the index is prepared by the clerk of the appellate court. Smith v. Glenn [Wash.] 82 P. 605. Failure to index case-made where record is paged. Williamson v. Williamson [Okl.] 83 P. 718. Failure to incorporate evidence in the record when there is nothing to show that any evidence was taken. Appeal in bankruptcy. Taft Co. v. Century Sav. Bank C. C. A.] 141 F. 369. Failure to number pages of record is not a ground for dismissal in first instance. Harden v. Card [Wyo.] 85 P. 246. Two appeals from two orders of the register of wills, one removing an administrator and one appointing another in his stead, will not be dismissed for failure to file separate transcripts under Rev. Codes 1893, p. 673, c. 89, § 15. Boyd v. Cloud [Del.] 62 A. 294.

Bill of exceptions: Where record does not disclose that a bill of exceptions was settled and signed by the circuit judge. Davison v. Valin [Mich.] 12 Det. Leg. N. 647, 105 N. W. 82. For failure to bring up facts on which court based refusal of leave to sue a receiver. Whitehouse v. Nelson Dry Goods Co. [Wash.] 82 P. 161. Where it appears **that the bill of exceptions was not served.** Anderson v. Albany & N. R. Co., 123 Ga. 318, 51 S. E. 342.

Held not ground for dismissal: Because the certificate to the bill of exceptions is dated prior to the rendition, where the bill itself recites that it was tendered after the rendition of the judgment, such mistake in the date certified being palpably a typographical error. Clegg Lumber Co. v. Atlantic & B. R. Co., 123 Ga. 603, 51 S. E. 575. A bill of exceptions which sets forth a general complaint to the granting of an injunction will not be dismissed on the ground that it does not contain a legally sufficient assignment of error, if it be practicable for the supreme court, looking to both the bill of exceptions and the transcript of the record to ascertain what questions were passed on by the trial judge, and what rulings the plaintiff in error seeks to have reviewed. Anderson v. Newton, 123 Ga. 512, 51 S. E. 508. While the practice of bringing exceptions to an auditor's report to the supreme court in a bill of exceptions, instead of specifying them as part of the record to be transmitted by the clerk of the court below, may be open to objection, the writ of error will not be dismissed on this account. Phillips v. Collinsville Granite Co., 123 Ga. 830, 51 S. E. 666. For absence of secondary record, where the absence or presence of error is apparent from the record proper. King v. Burden [Mich.] 12 Det. Leg. N. 776, 105 N. W. 1120. For want of a bill of exceptions where such bill is not necessary to the determination of the question involved. Question of law presented by the transcript.

for failure to file and serve a proper brief[52] within the time prescribed.[53] Pro forma affirmance is sometimes ordered instead on the same grounds.[54] The appeal will not be dismissed because the record contains some matters not authorized

Johnson v. Emerick [Neb.] 104 N. W. 169. For failure to serve and settle a bill of exceptions the proper remedy being a motion to strike the bill from the record. Schlachter v. St. Bernard's Roman Catholic Church [S. D.] 105 N. W. 279.

Failure to brief evidence is not ground for dismissal of writ of error. McGregor v. Third Nat. Bank [Ga.] 53 S. E. 93. Case will be retained for a consideration of such questions as do not depend upon the evidence for determination. Roberts v. Heinsohn, 123 Ga. 685, 51 S. E. 589.

Failure to bring up exhibits: Whether failure to bring up exhibits introduced in evidence below and made a part of the bill of exceptions is sufficient ground for dismissal depends on the circumstances of each case. Dalton v. Moore [C. C. A.] 141 F. 311. Such failure in absence of waiver by opposing counsel is ground for eensure even though court does not deem them necessary to determine the questions of law involved. Id. A writ of error brought by a garnishee to review a final judgment against him rendered in advance of a trial of the statutory issue will not be dismissed because certain exhibits referred to by him in his oral examination are not in the record. King v. Burden [Mich.] 12 Det. Leg. N. 776, 105 N. W. 1120.

51. Where the only attempt to assign error upon a final judgment is ineffective, and every other assignment of error is in the form of a direct exception to a ruling made pendente lite. Montgomery v. Reynolds [Ga.] 53 S. E. 512. For failure to assign errors. Schaeffer v. Burnett, 217 Ill. 84, 75 N. E. 440. Where assignment is defective in substance. Spitzer v. Wright [Ind. App.] 76 N. E. 261. Where the appellant fails to take advantage of a notice from the appellee that there is no assignment of errors in the record, which may be done upon motion asking leave to make the necessary assignments, during the term and before the case is taken up for consideration. McCormick v. Chicago, etc., R. Co., 219 Ill. 593, 76 N. E. 833. Failure to assign error upon the transcript of the appellate court is ground for dismissing an appeal to the supreme court. Kominski v. People, 219 Ill. 595, 76 N. E. 717. If assignments do not contain the names of all the parties. Kemp v. Prather [Ind. App.] 75 N. E. 673. Will be dismissed on the court's own motion where the assignment is so defective that it presents no questions for review upon the merits. Hayes v. Locus [Ind. App.] 76 N. E. 649. For failure to comply with rules as to allegations of error being specific, and with rules requiring instructions objected to to be set out in full, where no injustice will result. White v. Deming [Kan.] 83 P. 830. An appeal from a decree refusing to grant letters testamentary will be dismissed, when it does not appear that the will has been allowed and admitted to probate. In re Gurdy [Me.] 63 A. 322. Appeal quashed where there was no assignment of errors or paper book and a motion by appellant to remit the appeal to the superior court was not made until after 8 months from taking the appeal. McFadden v. McFadden [Pa.] 61 A. 75.

Held not to be ground for dismissal: That assignments of error are not scientifically drawn. Jones v. McCrary, 123 Ga. 282, 51 S. E. 349.

52. Unexcused failure to file. Aldridge v. Board of Education [Okl.] 82 P. 827. Where there is no brief or argument for either party. Honaker v. Fitzgerald [Iowa] 106 N. W. 649. Violation of Rule 26, requiring a statement of the question not to exceed a half page, is ground for quashing an appeal. Creachen v. Bromley Bros. Carpet Co. [Pa.] 63 A. 195. Under provisions of Rule 6, par. 3, brief of appellant, in a case to which any county is a party not adversely to the state, should be served on the attorney general. Rev. St. 1887, § 250, subd. 1, amended by Laws 1901, p. 163, and failure so to serve is ground for dismissal. Corker v. Elmore County [Idaho] 84 P. 508. Motion to dismiss for failure to comply with the rules of the court in the preparation of the brief will be denied where appellant's omissions are supplied by appellee. State v. Terheide [Ind.] 78 N. E. 195. Improper remarks concerning trial judge does not necessarily result in dismissal. Colorado & S. R. Co. v. Davis [Colo.] 83 P. 777.

53. Failure to file briefs within 30 days after trascript is filed (as required by Rules 2 and 5) nor until after notice of motion to dismiss has been given. Santa Rosa Bank v. Striening [Cal. App.] 82 P. 551. Failure to file within the time agreed upon by counsel. Missouri, etc., R. Co. v. Kidd [Ind. T.] 88 S. W. 308. Where the only excuse offered for failure to file brief on time is that the printer did not get it printed in time, but there is no showing as to when it was put in hands of the printer, it is insufficient to preclude a dismissal. Hammer v. Crawford [Mo. App.] 91 S. W. 57. Failure to file within 40 days after filing of case-made and petition in error. First Nat. Bank v. Smith [Okl.] 83 P. 1119.

54. Where there is no error apparent, no bill of exceptions and no brief for appellant. Duncan Livery Co. v. Alabama Mill & Elevator Co. [Ala.] 40 So. 661. Excusable omission from copy of statement of the case served on respondent, of demand for review of entire case under § 5630. Rev. Codes 1899, held not ground for affirmance where original statement contained such demand. Case Threshing Mach. Co. v. Balke [N. D.] 107 N. W. 57. Where court of appeals finds on appeal from judgment of reversal by appellate division, that questions of fact are involved on which latter court could properly reverse, and it is evident that a motion to have remittitur in form of dismissal rather than affirmance with judgment absolute is merely for purpose of doubling the chances of a favorable decision and justice can be done by affirmance, dismissal with new trial will not be granted. In re Mosher's Estate [N. Y.] 78 N. E. 145.

Failure to give notice of appeal in proper time. Town Council of Dues West v. Fuller [S. C.] 51 S. E. 546.

Failure to perfect appeal: Where a tax

by the statute,[55] nor will the fact that it appears from the record that some of the defendants in error were non compos mentis necessarily require a dismissal.[56]

Appellants are generally entitled to dismiss as of course at any time before hearing on payment of the costs.[57] So, too, they may abandon their appeal after

payer appealed to the district court from the board of review but failed to perfect her appeal by noon of the second day of the term to which the same was returnable the appellee could procure the case to be docketed and have the assessment affirmed under Code, § 3660, without filing any petition or giving notice to appellant. Stephens v. City Council of City of Marion [Iowa] 107 N. W. 614. Appellee's failure to file a copy of his motion for affirmance for use of appellant under Code 1897, § 3558, was not ground for vacating the judgment of affirmance. Id. That the filing fee was paid to the clerk secretly was immaterial. Id.

Transcript: In Texas the appellate court will affirm on certificate of clerk of the trial court that appellant has failed to file a transcript within the time required. Where appellant has perfected an appeal he can only prevent appellee from acquiring the right to an affirmance under Rev. St. 1895, art. 1016, by adhering to the appeal and filing the transcript within the time allowed, and he has no right to sue out a writ of error. Wanderlohr v. Grayson County Nat. Bank [Tex. Civ. App.] 90 S. W. 180. The right of appellee to affirmance on certificate is not affected by the fact that a co-defendant has sued out a writ of error to review the same judgment. Id. A judgment cannot be affirmed on certificate, where a writ of error has been sued out, unless there has been a service of the writ. McClosky v. McCoy [Tex. Civ. App.] 13 Tex. Ct, Rep. 915, 89 S. W. 450. Service on attorney is no service where defendant in error resides within the county. Id. Where appellee has become entitled to an affirmance on certificate appellant cannot defeat such right by suing out a writ of error on the judgment after default. Welch v. Weiss [Tex.] 90 S. W. 160. Where an appeal has been perfected, appellant cannot abandon the appeal and sue out a writ of error, though done in good faith and before the filing of the motion for an affirmance on certificate. Wandelohr v. Grayson County Nat. Bank [Tex. Civ. App.] 90 S. W. 180.

Bill of Exceptions: Insufficient bill of exceptions. Woods v. King [W. Va.] 53 S. E. 605. Failure to serve draft of a bill of exceptions on an adverse party will result in affirmance if points for reversal appear only in bill. In re Young's Estate [Cal.] 85 P. 145. Where no error appears on the face of the record, and the bill of exceptions must be disregarded for failure to serve a draft on some of the necessary parties. Id. Where there is no bill of exceptions whatever, a judgment will not be affirmed on that ground alone, the common-law record being before the court. Standard Fuel Co. v. Garden City Fuel Co., 117 Ill. App. 259.

Failure to brief evidence properly. McComb v. Hines, 123 Ga. 246, 51 S. E. 300. Insufficiency of evidence in cases depending upon the evidence. Stansell v. Merchants' & Farmers' Bank, 123 Ga. 278, 51 S. E. 321. A judgment will not be affirmed because the exceptions, which are separately stated and numbered, are not brought together at the end of the case as required by Code, § 550, and Supreme Court Rule No. 27, where the error intended to be assigned is plainly apparent. Hicks v. Kenan, 139 N. C. 337, 51 S. E. 941.

Defects in abstract: For failure to prepare the abstract in accordance with the rules as to numbering and contents. Mitchell v. Pearson [Colo.] 82 P. 447. Where abstract is a mere index of the record and not in compliance with the rules of the court. Lambert v. Janss, 117 Ill. App. 71. Where it did not show that authenticated copy of record below had been filed on appeal. Illinois Cent. R. Co. v. Seitz, 117 Ill. App. 154. Where it is insufficient and misleading. Globe Mut. Life Ins. Ass'n v. Meyer, 118 Ill. App. 155.

Briefs: Failure to file brief. Jackson v. McMillan [La.] 38 So. 902. Failure without good cause. Aldridge v. Board of Education [Okl.] 82 P. 827. For failure to print reply brief. Mitchell v. Pearson [Colo.] 82 P. 447. Failure to comply with ruling of the court as to preparation of brief. Hay v. Bash [Ind. App.] 76 N. E. 644. For failure to set out instructions, where only errors alleged were based upon the instructions. Griffiths v. Anderson Iron & Mfg. Co. [Ind. App.] 75 N. E. 673. If the argument is not prepared in accordance with the rules of the court and no excuse is offered it will be stricken and the case affirmed for want of argument. Taylor v. Home Sav. & Loan Ass'n [Iowa] 105 N. W. 193. Where there is no statement of errors and no specific challenge of any action of the court. Sunley v. Metropolitan Life Ins. Co. [Iowa] 105 N. W. 408. Failure to comply with Rule 10 relative to contents and arrangement of brief. Hatch v. Geiser [Kan.] 84 P. 555. For failure to comply with Rule 10, requiring specification of errors relied upon. Hickey & Co. v. Kaufman [Mont.] 85 P. 870. If brief does not contain an assignment of errors in compliance with Sup. Ct. Rules 14 (74 N. W. x) and the record not showing a cause for relaxing the rule. Marck v. Minneapolis, etc., R. Co. [N. D.] 105 N. W. 1106.

55. Dougal v. Eby [Idaho] 85 P. 102.

56. As where it does not appear that such persons have even been adjudged lunatics, and it appears that they appeared in the lower court and secured the benefit of the ruling sought to be reviewed. Jones v. McCrary, 123 Ga. 282, 51 S. E. 349.

57. See 5 C. L. 209, n. 57. An appeal will be dismissed without costs on application by appellants. In re Wells' Estate [Cal.] 84 P. 37. The party taking an appeal in a probate case has a right to control his appeal and to dismiss it at his pleasure. Senn v. Gruendling, 218 Ill. 458, 75 N. E. 1020. Where a number of plaintiffs in error sue out a writ of error, a part or all of them may dismiss the writ as to themselves and their purpose in dismissing is not subject to review or control. Field v. Kenneweg, 218 Ill. 366, 75 N. E. 986. Where the false statements of one appellee led counsel for appellant to sign a stipulation for the dis-

taking preliminary steps to perfect it.[58] Abandonment is equivalent to a dismissal,[59] but where appellant is not entitled to dismiss as of right, it can only operate as an estoppel.[60] Where a perfected appeal is abandoned a second one cannot be allowed.[61]

Abatement[62] of an appeal ordinarily results from the death of a necessary party[63] before[64] but not after[65] the appellate court acquires jurisdiction, amendment of parties by substitution[66] being allowed in the latter case.

A motion to dismiss[67] is determined by the facts existing when notice of such motion is given.[68] The motion must be properly docketed.[69] When its consideration involves the examination of a long transcript, it may be continued until the hearing of the appeal.[70] The court may require the record of proceedings subsequent to the order appealed from to be certified up if relevant.[71] A motion to dismiss on the ground that the reasons of appeal stated are not sufficient is in effect a demurrer, so that in passing upon it all allegations in the appeal and reasons of appeal must be taken as true.[72] The motion will be granted where notice is served on counsel for appellant and he fails to appear.[73] The dismissal takes effect as of the actual date of the order of dismissal.[74] In some states where an appeal is dismissed for delay in perfecting, but the appellate court would have jurisdiction on error, the cause will be entered as pending on a writ of error.[75] A motion to dismiss, having once been overruled, will not ordinarily be considered again,[76] though it may be.[77]

missal of the appeal as to him, such stipulation may be repudiated, and the mandate dismissing the appeal may be recalled. Livesley v. Johnston [Or.] 82 P. 854. In Washington an appellant cannot dismiss an appeal as a matter of right. In re City of Seattle [Wash.] 82 P. 740. Jurisdiction of an appellate court once perfected cannot be defeated by any act of the parties. Id. Ballinger's Ann. Codes & St. § 6519 providing that no withdrawal or dismissal of an appeal which does not go to the substance of, or the right of, appeal, shall preclude a party from taking a further appeal within the time limited by law, does not authorize an absolute and unconditional withdrawal, but only a withdrawal for the purpose of taking a further appeal within the time limited by law. Id. An appeal will on application by appellant be dismissed without costs if no costs have been incurred by respondent and no rights of his are affected by the dismissal. Id. If appellant does not procure a dismissal at his own expense, the respondent is entitled to a formal dismissal with incidental costs. Id.

58. After filing bond. Morgan v. Morgan, 25 App. D. C. 389.

59. Where an appeal from the decision of the clerk in proceedings by an administrator for a settlement of his account was abandoned, a sale of land belonging to the estate and a decree of confirmation thereof was valid. Love v. Love, 139 N. C. 363, 51 S. E. 1024.

60. In re City of Seattle [Wash.] 82 P. 740.

61. Hymel v. Illinois Cent. R. Co. [La.] 40 So. 525.

62. See 5 C. L. 148, n. 60.

63. Death of the nominal sole plaintiff will not abate a writ of error where it appears by the pleadings that he sued to the use of another. Amadeo v. Northern Assur. Co., 201 U. S. 194, 50 Law. Ed. —.

64. Where one of the appellees who was a defendant in court below died after judgment and before transcript was filed in appellate court, latter court did not have jurisdiction of appeal. Ehlers v. Hartman [Ind. App.] 77 N. E. 745.

65. Death of a party after submission of the appeal does not abate the appeal and decision may be rendered without a revival. Mugge v. Jackson [Fla.] 39 So. 157.

66. See ante, § 11 C.

67. See 5 C. L. 208, § 11 H.

68. Subsequent filing of points and authorities does not affect the right. Santa Rosa Bank v. Striening [Cal. App.] 82 P. 551. A correction of the transcript not made until afer the case is submitted will not avert dismissal. Conery v. His Creditors [La.] 40 So. 863.

69. A motion to dismiss is not technically before the court where it did not reach the clerk's office in time to be placed upon the docket for the date specified and no further effort to bring it on for hearing was made. Kubillus v. Ewert [Wash.] 82 P. 147.

70. Mannix v. Tryon [Cal. App.] 84 P. 278. It is discretionary with court to consider motion to dismiss, though requiring an examination of the record. Grey v. Brennan, 147 Cal. 355, 81 P. 1014.

71. Kelly & Jones Co. v. Moore [Ga.] 54 S. E. 118.

72. In re Gurdy [Me.] 63 A. 322.

73. In re Wells' Estate [Cal.] 84 P. 37; National Bank of the Republic v. Agnew [Idaho] 85 P. 116.

74. The appeal does not continue to the end of the term during which the order of dismissal is entered. Dunfee v. Childs [W. Va.] 53 S. E. 209.

75. Mills' Ann. Code, § 388a. Roseberry v. Valley Bldg. & Loan Ass'n [Colo.] 83 P. 637.

76. Ellis v. Moon [Wash.] 82 P. 186.

77. On a rehearing of a motion to dis-

Reinstatement.—The court may reinstate an appeal after dismissal, where justice requires it,[78] and statutory provision is sometimes made for the renewal of such appeals in certain cases.[79]

(§ 11) *H. Raising and waiver of defects.*[80]—Nonjurisdictional defects are waived by failure to object at the proper time [81] or by proceeding with the case without objection,[82] but this rule does not apply to fundamental or jurisdictional defects.[83] The court will of its own motion dismiss for want of jurisdiction.[84] A

miss an appeal, the appellee may have the record perfected where the record returned by the clerk as complete omitted an order granting a second appeal, but on condition that supersedeas bond be allowed to stand. Leonard's Adm'r v. Cowling [Ky.] 89 S. W. 131.

78. Where an appeal is dismissed at the final hearing for defect in proceedings it will not be reinstated where the defect was due to the error or oversight of counsel. Porter v. Ewing [Fla.] 39 So. 993. Mere failure of counsel to observe a defect in the certificate not ground for reinstatement. Akin v. Morgan [Fla.] 39 So. 534. An appeal dismissed because the bond was an "appeal and supersedeas bond" for $500 when clerk's entry showed that court fixed "supersedeas" bond at $500 will be reinstated on showing that clerk's entry is erroneous and the bond is for the full amount as actually fixed by the court. Ames v. Kinnear [Wash.] 82 P. 994. An appeal will not be reinstated under Pub. Acts 1905, No. 15, amending Comp. Laws, § 552, so as to allow reinstatement where justice requires it, if the supreme court from examining the record is satisfied that justice does not require revision on its merits. Collat v. Ives [Mich.] 12 Det. Leg. N. 515, 104 N. W. 666. Pub. Acts 1905, No. 15, amending Comp. Laws 1897, § 552, so as to allow under certain circumstances the reinstating of an appeal dismissed under § 552 for failure to pay the register's fee, is unconstitutional as to appeals dismissed before its passage. Lohrstorfer v. Lohrstorfer [Mich.] 12 Det. Leg. N. 296, 104 N. W. 142.

79. Where an appeal and supersedeas have been dismissed under Supreme Court Rule No. 3, for failure to print the record, such appeal may, under the fourth section of such rule, be renewed upon a new petition reciting the fact of the former petition and allowance and dismissal and referring to the assignment of errors in the former petition. Swiger v. Swiger [W. Va.] 52 S. E. 23.

80. See 5 C. L. 208. Procedure to amend or correct record, see ante, § 10 D.

81. Failure to raise objection that notice of intention to move for new trial was served and filed too late, at time of settling bill of exceptions, will waive it. Mendocino County v. Peters [Cal. App.] 82 P. 1122. Especially where a stipulation attached to bill of exceptions declares it a "correct bill of exceptions." Id. Appellee held to have impliedly consented in open court that the sureties on the appeal bond might be approved by the clerk of the trial court. Price v. Huddleston [Ind. App.] 75 N. E. 972. Under Pub. Acs 1905, p. 484, No. 310, allowing a review by certiorari of an adverse ruling on a motion to quash the writ or on a dilatory plea to the jurisdiction, an objection that the denial of defendant's motion to vacate the return of service of process could not be reviewed on certiorari, when made for the first time in plaintiff's brief was disregarded the objection being only to the form in which the question was brought up for review. Moinet v. Burnham, Stoepel & Co. [Mich.] 13 Det. Leg. 38, 106 N. W. 1126.

82. If the appellate court has jurisdiction of the subject and parties, an objection to the manner in which the case reaches the court is waived by appearance without objection. Chicago Portrait Co. v. Chicago Crayon Co., 217 Ill. 200, 75 N. E. 473. After a party has participated in a hearing of a motion for a new trial, with full knowledge that no brief of the evidence had been filed, and without objection on account thereof, he is not entitled to a dismissal of a writ of error on account of the failure to file such brief before the hearing of the motion for a new trial. Rigall v. Sirmans, 123 Ga. 455, 51 S. E. 381. An objection to an appeal bond on an appeal by an executor in that it was executed in an individual capacity cannot be raised for the first time on appeal to the appellate court. Griswold v. Smith [Ill.] 77 N. E. 551. Objection that appeal was prematurely entered cannot be made for the first time upon the argument in the appellate court. Provident Sav. Life Assur. Soc. v. King, 216 Ill. 416, 75 N. E. 166. Where the defendant in error joined in error in the appellate court, he could not contest the corporate existence of the plaintiff in error in the supreme court by a motion to dismiss. Kanawha Dispatch v. Fish, 219 Ill. 236, 76 N. E. 352. A motion to strike a bill of exceptions is too late after the case has been taken and there has been joinder in error. City of Chicago v. Rust, 117 Ill. App. 427. An irregularity is waived by proceeding to the merits without raising the objection. Where regularity of appeal was not questioned until a rehearing had been ordered. Raymond v. Edelbrock [N. D.] 107 N. W. 194. On an appeal from a tax assessment the objection that the appeal was not taken in time cannot be raised after plaintiff has filed a statement and defendant has taken a rule for judgment. Commonwealth v. Crum Lynne Iron & Steel Co., 27 Pa. Super. Ct 508. Where exceptions to a referee's finding are argued before the court below in which argument both sides use the stenographer's notes of testimony, an objection can not be raised that the notes were not certified. Lenz v. Spencer, 28 Pa. Super. Ct. 31. Motion to dismiss writ of error based on failure to incorporate certain exhibits used at the trial in the bill of exceptions denied when same were used by consent of both parties in argument and submission of case in appellate court, such irregularity held waived. Wilson v. Chicago Lumber & Timber Co. [C. C. A.] 143 F. 705.

83. Motion to dismiss may be made at any time. Town of Chalmers v. Tandy, 111

motion to dismiss on one ground does not constitute a waiver of the right to a dismissal on other grounds.[85] Grounds of objection to jurisdiction apparent on the face of the record should be taken advantage of by motion to erase the appeal.[86] The practice on motions to dismiss is treated elsewhere.[87]

§ 12. *Hearing.*[88]—The parties are generally entitled to present an oral argument unless they waive the same.[89] In Illinois a party to an appeal to the appellate court is entitled to a hearing by three judges when possible.[90]

§ 13. *Review. A. Mode of review; review proper or trial de novo.*[91]—Judgments at law[92] and judgments or orders brought up on error or like proceedings, though called an appeal,[93] are reviewed for matter of law only,[94] as found in the record and bill of exceptions.[95] Equitable decrees and orders are usually reviewed de novo.[96] A trial de novo is also frequently provided for on appeals in certain

Ill. App. 252. Failure to assign errors is a matter of substance, not waived though not objected to. Barker v. Smith, 116 Ill. App. 66. Where the court has no jurisdiction of the subject-matter, as where the judgment appealed from is not final, jurisdiction cannot be conferred either by agreement of parties or by failure to object. Hence, the fact that a party appealed from such a judgment to the appellate court will not estop him from setting up want of jurisdiction in the supreme court. Chicago Portrait Co. v. Chicago Crayon Co. 217 Ill. 200, 75 N. E. 473. An appearance in the supreme court does not waive the right to ask for a dismissal on the ground that the case is not appealable to such court. Murphy v. People [Ill.] 77 N. E. 439. Joinder in error is not a waiver of a substantial defect in the assignment of errors. Spitzer v. Wright [Ind. App.] 76 N. E. 261. Where assignment of errors is so defective as not to present any question upon the merits, delay below in objecting to such assignment is not a waiver of defect. Hayes v. Locus [Ind. App.] 76 N. E. 649.

84. Chicago Portrait Co. v. Chicago Crayon Co., 217 Ill. 200, 75 N. E. 473; Memphis Keeley Institute v. Keely Co. [C. C. A.] 144 F. 628. Where it appears from the record that the appeal should have been taken to the appellate court. Fairbanks v. Carle, 217 Ill. 136, 75 N. E. 360.

85. A motion to dismiss on the ground that an incomplete transcript was filed does not constitute a waiver of an untimely filing of appeal bond, and a motion to dismiss on that ground may be subsequently made. Franzman v. Louisville & I. R. Co. [Ky.] 89 S. W. 105.

86. A plea to the jurisdiction is unnecessary. In re O'Brien's Petition [Conn.] 63 A. 777.

87. See ante, § 11 G.

88. See 3 C. L. 240.

89. Appellant, as administrator, after the suspension of his attorney from practice and the striking of the brief filed by the latter from the files, filed a new brief but took no steps to procure another attorney, and failed to appear on day set for oral argument, and case was therefore ordered submitted to justices in department on briefs. Appellant then resigned as administrator. Held that his successor was not entitled to oral argument on case being submitted to court in bank, in view of Sup. Ct. Rule 28, subd. 2 (64 P. xii). Philbrook v. Newman [Cal.] 82 P. 772.

90. See constitution, art. 6, § 11. Where, therefore, the branch appellate court to which a case was transferred under the act of 1897, consisted of three judges, one of whom tried the case below the appellant's petition to have the case transferred back to the appellate court should have been allowed. In this case, however, the refusal to allow such petition was held harmless in that the motion to strike the bill of exception from the record made walle the judge objected to was a member of the branch court, was finally decided in favor of the appellant, and neither the motion nor the case was decided until such judge had ceased to be a member of the court. Provident Sav. Life Assur. Soc. v. King, 216 Ill. 416, 75 N. E. 166.

91. See 5 C. L. 209.

92. On appeal from a judgment only questions of law are reviewable. Bannon v. New York Cent., etc., R. Co., 98 N. Y. S. 770. An appeal to the supreme court from the superior court does not transfer the entire case, but only such questions of law as are apparent upon the face of the record. Corsiglia v. Burnham, 189 Mass. 347, 75 N. E. 253. Since Rev. Codes 1899, § 5630, was amended by Laws 1903, c. 201, p. 277, a case properly triable to a jury but in which a jury is waived and trial had to the court cannot be reviewed on the "entire case" but only on erroneous rulings properly objected to, saved for review and assigned. More v. Burger [N. D.] 107 N. W. 200.

93. On an appeal from an order awarding the custody of children, the appellate court is confined to the record proper, and cannot consider the evidence. Commonwealth v. Strickland, 27 Pa. Super. Ct. 309.

94. Interstate Independent Tel. & T. Co. v. Towanda [Ill.] 77 N. E. 456.

95. See ante, § 9.

96. Mack v. Mack, 39 Wash. 190, 81 P. 707; Keene v. Behan [Wash.] 82 P. 884. When an action involving both legal and equitable issues which ought to be separately tried and determined is tried to the court all issues being tried together and a single judgment rendered disposing of all the issues the case is not triable de novo on appeal under § 5630, Rev. Codes 1899, as amended by c. 201, p. 277, Laws 1903. Laffey v. Gordon [N. D.] 107, Laws 1903. Where in such action a determination of the equitable issues does not settle all the legal ones the case is one "properly triable with a jury" within c. 201, p. 277, Laws 1903, withdrawing such cases from the operation

special proceedings [97] or from inferior courts or tribunals,[98] or in cases tried to the court without a jury.[99] In some states a trial de novo is allowed only on demand.[1] Subject to limitation to the issues as originally made, the rules of pleading and practice are the same as in ordinary actions when there is a formal retrial by a court of general superior jurisdiction.[2]

of § 5630. Id. Where the action is at law, with a counterclaim in equity and the issues on the equity side of the case determine all the questions on the law side, and the case is tried as if both the cause of action and the counterclaim were in equity, an appeal from a judgment for plaintiff is an appeal from a final judgment in an action properly triable without a jury under § 5630, Rev. Codes 1899, and triable de novo on appeal. Cotton v. Butterfield [N. D.] 105 N. W. 236. Under B. & C. Comp. § 555, an appeal in equity from a decree rendered on an issue of fact, brings up the cause for trial anew on the transcript and evidence accompanying it and final decree is usually rendered in such cases in appellate court, which is sent down by mandate and there entered as decree of appellate court. State v. Richardson [Or.] 85 P. 225. On a trial de novo of a case heard before a chancellor, the case is weighed solely on the competent evidence, and questions relating to the admission of incompetent evidence will not be considered on appeal. Niagara Fire Ins. Co. v. Boon [Ark.] 88 S. W. 915. Where all the evidence in an equity case is before the appellate court, it will proceed to determine whether the decree is supported by competent evidence without regard to questions of admissioility. Morrison v. Turnbaugh, 192 Mo. 427, 91 S. W. 152. Judgment will be reversed for error in admitting incompetent evidence where it cannot be separated from the competent. Russell v. Sharp, 192 Mo. 270, 91 S. W. 134. Evidence improperly admitted will be disregarded. Winsor v. Hanson [Wash.] 82 P. 710.

97. In Kansas it is held that the jurisdiction to consider causes de novo on appeal, and to decide them on the law and the evidence according to the right of the case independent of the rulings and judgment of the lower court, is original and not appellate. In re Burnette [Kan.] 85 P. 575. The statute relating to appeals in disbarment cases which provides that all the original papers, together with a transcript of the docket entries, shall be transferred to this court to be finally considered and acted upon, being ambiguous, is held not to constitute a trial de novo, but to create a special method for bringing such causes to this court for consideration according to its constitutional appellate jurisdiction. Id. Appeals to the circuit court from orders of the county court refusing a liquor license are not tried de novo but on the evidence heard below. Holmes v. Robertson County Court [Ky.] 89 S. W. 106.

98. Appeal on questions of law and fact from justice court judgment after trial on merits. Smith v. Superior Ct. of Napa County [Cal. App.] 84 P. 54. Rule does not apply where appeal is on questions of law alone. Id. On appeal from justice to county court. Hasse v. Herring [Colo.] 85 P. 629. In Illinois the appellate jurisdiction of the circuit court has almost universally been exercised by a trial de novo. City of Rockford v. Compton, 115 Ill. App. 406. The mere fact that a statute grants an appeal to such court without especially providing that the trial shall be de novo does not mean that only a review of the record of the lower tribunal was intended. Id. Under §§ 12, 18, of the act in force April 2, 1903, relative to boards of fire and police commissioners an appeal from the action of the board of commissioners removing a patrolman should be determined upon a hearing de novo and not upon the transcript of the proceedings transmitted by such board. City of Rockford v. Compton, 115 Ill. App. 406. Under Civ. Code Prac. §§ 700, 726, and Ky. St. 1903, § 4241, on appeal from the county court in a proceeding under the latter statute, a trial de novo will be had in the circuit court. Commonwealth v. Reed [Ky.] 89 S. W. 294. On appeal to the circuit court from a judgment of the county court in condemnation proceedings, the fact that appellant did not file exceptions to the damages allowed for the land taken does not preclude a retrial of that issue in the circuit court. Shirley v. Southern R. Co. in Kentucky [Ky.] 89 S. W. 124. The report of an auditor duly appointed by the probate court under Rev. Laws, c. 165, § 5], is admissible as evidence on a hearing before a master appointed by the Supreme Judicial Court on appeal from a decree of the probate court. Collins v. Poole [Mass.] 77 N. E. 484. In such cases it is to be assumed that the report contains statements material to the inquiry. Id. Appeal to circuit court from the admission of a will to probate. In re Solomons' Estate [S. C.] 54 S. E. 207. On trial de novo on appeal from a judgment dependent upon another in the same case, both will be retried. Woldert Grocery Co. v. Boonville Elevator Co. [Tex.] 91 S. W. 1082.

99. Reynolds v. Great Northern R. Co. [Wash.] 82 P. 161.

1. In North Dakota, in cases tried under Rev. Code 1899, § 5630. Bank of Park River v. Norton [N. D.] 104 N. W. 525.

2. Sections 138, 139, 144, Code Civ. Prac., relative to variances and amendments applies to trials de novo of suits in equity on appeal. Lichty v. Beale [Neb.] 106 N. W. 1018. Where, after appeal from county to district court in action for conversion, plaintiff pleaded facts as to his title inconsistent with those set up below, but same conversion of same property was alleged held that there was a departure, but no change in the cause of action. Epley v. Lovell, 5 Neb. Unoff. 251, 97 N. W. 1027. Where the warrant in an action before the justice of the peace sets out two causes of action, and the defendant did not call upon the plaintiff to make his complaint more specific, either in the justice's court or on appeal to the superior court, it was held that the superior court properly submitted the case upon the cause of action which seemed to be sustained by the evidence, and

(§ 13) *B. General scope or objects of review.*[3]—Unnecessary points [4] or abstract questions will not be decided.[5] Accordingly errors which may not arise,

refused to submit it upon the other cause of action. See Revisal 1905, §§ 496, 1459, 1496, relating to practice in justices' courts and appeals therefrom. Smith v. Newberry [N. C.] 53 S. E. 234. Any competent evidence relating to the same transaction tried in the justice court is admissible upon the trial in the county court and its admission is not a change of the cause of action. Hasse v. Herring [Colo.] 85 P. 629. On appeal to the superior court from a judgment of its clerk, it is proper to allow additional evidence. In re Scarborough's Will, 139 N. C. 423, 51 S. E. 931.

3. See 5 C. L. 211.

4. Sufficiency of complaint where court erred in overruling affirmative defense in the answer (Giles v. De Cow [Colo.] 83 P. 638), or where errors of law necessitate a reversal (Herrington v. Macon [Ga.] 54 S. E. 71). The supreme court in reversing judgment on the ground that trial court was without jurisdiction will not consider the merits. Railroad Commission of Georgia v. Palmer Hardware Co. [Ga.] 53 S. E. 193. Questions which do not concern the appellant. Where the appellant in partition proceedings was only concerned as to whether the party under whom he claimed had a greater interest than a life estate, he could not raise the question as to whether the property was partitioned among the proper parties, the court having decided that the party under whom the appellant claimed took only a life estate. Hill v. Gianelli [Ill.] 77 N. E. 458. Where the decision of the trial court is such that it makes no difference whether the transaction forming the basis of the suit was a loan or an investment, the appellate court will not consider the question as to whether the trial court was right in considering such transaction as a loan. Hanks v. Hanks, 217 Ill. 359, 75 N. E. 352. In reviewing a ruling refusing to sustain a demurrer to one paragraph of a pleading, the appellate court will not consider the evidence, the inquiry being limited to the question whether the evidence tending to support such pleading could have properly been admitted under some other paragraph. McAfee v. Bending [Ind. App.] 76 N. E. 412. Where the appellants in a suit to prevent certain names from being placed on a ballot have acquiesced in the decree of the trial court that a certain number of such names should not be placed on the ballot, the appellate court in affirming the decision of the trial court will not consider the action of such court in rejecting such names, on the ground that the petitions for such names were not acknowledged, nor will it consider the necessity for such acknowledgment as to petitioners of the names allowed. Remster v. Sullivan [Ind. App.] 75 N. E. 860. The sufficiency of the pleadings, where the same question is presented by the findings of fact and conclusions of law. Western Ind. Coal Co. v. Brown [Ind. App.] 74 N. E. 1027; Union Inv. Co. v. McKinney [Ind. App.] 74 N. E. 1001; Ray v. Baker [Ind.] 74 N. E. 619; Home Nat. Bank v. Hill [Ind.] 74 N. E. 1086; Board of Com'rs of LaPorte County v. Wolff [Ind.] 76 N. E. 247. The formal sufficiency of a demurrer which is sustained to a bad answer. Board of Com'rs of Morgan County v. Crone [Ind. App.] 75 N. E. 826; Watkins & Co. v. Guthrie & Co. [Miss.] 38 So. 370. Where upon a motion to set aside a verdict the counsel for the plaintiff was allowed to file affidavits challenging the fairness of a settlement upon which the motion was based, on appeal from the refusal of the motion it was held that the appellate court, having decided that the defendant's application for leave to file additional affidavits should have been granted, would not consider the question as to whether the trial court erred in permitting the trial to continue after the defendant had offered the settlement in evidence, or whether it was necessary for the defendant to plead the release, or whether the defendant was entitled to an order discontinuing the action and to have the verdict set aside. Kuehn v. Syracuse Rapid Transi tR. Co. [N. Y.] 76 N. E. 489. Constitutional questions not squarely raised by the record. Montgomery v. Seaboard Air Line R. Co. [S. C.] 53 S. E. 987. Ordinarily, on an appeal from an order granting a temporary injunction restraining the enforcement of a statute claimed to be unconstitutional, nothing more should be considered than manifest abuse of discretion in granting the injunction; but where the question will necessarily arise in the court below and the constitutional questions have been argued and the parties desire a speedy termination of the litigation it is proper to determine whether the facts stated constitute a causo of action. Jewett Bros. v. Smail [S. D.] 105 N. W. 738. On habeas corpus, where bail is the only question, errors of the trial judge in admitting or rejecting evidence will not be considered. Ex parte Parker [Tex. Cr. App.] 88 S. W. 230. Where the decree on appeal on some issues disposes of the case, the remaining assignments will not be passed upon. Love v. Busch [C. C. A.] 142 F. 429.

5. Dismissal of appeal where all questions involved become abstract is treated in § 11 G, ante. Where two necessary parties defendant were not properly served so as to give the trial court jurisdiction, the merits of the case will not be considered on appeal though both parties so request. Wright v. Hink [Mo.] 91 S. W. 933. Where an appeal is unauthorized, court will not express an opinion upon the merits of the case in the absence of any peculiar necessity therefor. Putney v. Milwaukee Light, Heat & Traction Co. [Wis.] 105 N. W. 1066.

Moot questions: An appeal involving only a question which has become moot will not be entertained merely to determine liability for costs Campbell v. Shelby County [Ala.] 41 So. 407. An ordinance cannot be assailed as unconstitutional unless the record shows a violation. A mere concession of violation when not true raises only a moot question. State v. Smithart [Iowa] 105 N. W. 128. Denial of an injunction against the holding of an election after the election has been held. McDaniel v. Hurt [Miss.] 41 So. 381. Moot questions in an agreed case containing no provision for judgment, in the absence of special reasons. Attorney General v. Fogarty [N. H.] 62 A.

or which may be cured, on a retrial,[6] or which have been eliminated by a settlement[7] or change of facts,[8] or other collateral matter,[9] or which have been cured[10] or merged in a later and final decision,[11] will be ignored. As a general rule no question not properly saved below,[12] preserved and presented in the record,[13] properly assigned,[14] and briefed and argued,[15] and no question which does not harm the person appealing or objecting,[16] will be considered, but fundamental errors and jurisdictional defects apparent on the face of the record are reviewable though never before claimed or urged,[17] unless they are such as can be and have been waived by act of appellant.[18] The appellate court may, also, when justice requires it, consider questions not properly saved.[19] Statutes permitting a review of only a single question of fact do not require the court to ignore errors of law apparent on the record.[20] An appellant, whose sole connection with the case below was as complain-

219. An appeal from a refusal to discharge from imprisonment upon a petition for habeas corpus, where the term of imprisonment is expired. Ex parte Person [N. C.] 52 S. E. 1033. Right to office after term expired. State v. Moody [N. D.] 106 N. W. 1135.

6. Exceptions which may be remedied. Couson v. Wilson [Cal. App.] 83 P. 262. The statute requiring an appellate court to pass on all assignments presented where the case is remanded for a new trial does not require it to pass on questions which cannot arise on the new trial. Worcester v. Galveston, etc., R. Co. [Tex. Civ. App.] 91 S. W. 339.

7. The payment of the damages awarded in condemnation proceedings will not prevent either party litigating such question on appeal. Douglas v. Indianapolis & N. W. Traction Co. [Ind. App.] 76 N .E. 892.

8. Where the defendants comply with an alternative writ of mandate, and the case is dismissed, the appellate court will not consider the questions involved in the rulings of the trial court. McCormick v. State [Ind.] 76 N. E. 293.

9. Where the statute under which relief was sought becomes inoperative pending appeal. Browne v. State [Ala.] 41 So. 407. Appeal depending on rights under a statute repealed pending the appeal. Campbell v. Shelby County [Ala.] 41 So. 407. Enactment of another statute in lieu of the one under which the suit was brought does not make the case a moot one unless it appears that the parties are relieved of all liability under the former statute. Campbell v. California, 200 U. S. 87, 50 Law. Ed. —.

10. Where amendment to a declaration is withdrawn upon the introduction of evidence to support the original allegations, any error in allowing the amendment is cured. Georgia R. & Elec. Co. v. Reeves, 123 Ga. 697, 51 S. E. 610. If a motion for nonsuit should have been granted at the time when it was refused, yet if the evidence afterwards introduced supplied the deficiency, no reversal will result from such refusal. Il. Error in modification of instruction cured by another instruction. Coal Belt Elec. R. Co. v Kays, 217 Ill. 340, 75 N. E. 498. An unwarranted statement by counsel made in the argument excepted to by opposing counsel but cured by instructions to disregard, given by the court. Taylor v. Modern Woodmen of America [Wash.] 84 P. 867.

11. An exception by the plaintiff to the transfer of the case to the law calendar for the purpose of directing a legal issue will not be considered after a verdict has been rendered for the plaintiff, such exception being, as to the plaintiff, merely speculative. Brock v. Kirkpatrick [S. C.] 52 S. E. 592.

12. See Saving Questions for Review, 6 C. L. 1385. An instruction not objected to will not be passed upon for the guidance of the court below, on a retrial. Troxell v. Anderson Coal Min. Co. [Pa.] 62 A. 1083.

13. See ante, § 9.

14. See ante, § 11 E.

15. See ante, § 11 F.

16. See Harmless and Prejudicial Error, 5 C. L. 1620.

17. See, also, Saving Questions for Review, 6 C. L. 1385. The objections that the petition does not state a cause of action and that the court has no jurisdiction of that kind of cases can be raised for the first time on appeal. Hudson v. Cahoon [Mo.] 91 S. W. 72. Where the lack of jurisdiction over the defendant or the res appears on the face of the record, the question may be raised for the first time on appeal. Little Rock Trust Co. v. Southern Missouri & A. R. Co. [Mo.] 93 S. W. 944. Insufficiency of complaint to entitle plaintiff to relief may be urged for first time on appeal from a foreclosure decree. Horn v. United States Min. Co. [Or.] 81 P. 1009. On error to a decree pro confesso, the sufficiency of the evidence will not be reviewed. Glos v. Sheed, 218 Ill. 209, 75 N. E. 887. Party in default cannot challenge venue or raise defense of usury. Carson Bros. v. McCord-Collins Co. [Tex. Civ. App.] 84 S. W. 391.

18. Appellant cannot object in the appellate court that the action is of an equitable character and that the law court below had no jurisdiction when he voluntarily brought the action in that court. Reichardt v. American Platinum Works, 47 Misc. 650, 94 N. Y. S. 384. But if the court and the parties have proceeded on the theory that the pleadings sufficiently present certain issues, not jurisdictional, the court on appeal will not examine the pleadings to determine their sufficiency to clearly make the issue. Morrill v. McNeill [Neb.] 104 N. W. 195.

19. May waive the rule precluding a party from raising a question in the absence of exception to the ruling below. In re Moebus [N. H.] 62 A. 170.

20. Rev. Codes 1899, § 5630. Buckingham v. Flummerfelt [N. D.] 106 N. W. 403.

ant in a cross complaint cannot challenge any of the rulings or proceedings of the trial court made or had in the action as maintained by appellee under his complaint.[21] An appellate court may inquire into the jurisdiction of the court below in order to determine its own jurisdiction.[22]

(§ 13) *C. Restriction of review to rulings and issues below.*[23]—Review proper is of course strictly confined to the rulings made [24] and the issues joined and decided [25] below.[26] As a general rule the theory of the case acquiesced in below will be adhered to,[27] and a correct ruling will be sustained though wrong or deficient reasons were given therefor below.[28]

21. State v. Wimer [Ind.] 77 N. E. 1078.

22. Jurisdiction of appellate court as dependent on that of lower court. See ante, § 5. Jurisdiction of the court below will be examined suo moto. Fernandez Y Perez v. Perez Y Fernandez, 202 U. S. 80, 50 Law. Ed. ——. As whether the removal from the state to the Federal courts was proper Fred Macey Co. v. Macey [C. C. A.] 135 F. 725. As where in bankruptcy proceedings the petition fails to show an indebtedness of $1,000 or over. Taft Co. v. Century Sav. Bank [C. C. A.] 141 F. 369.

23. See 5 C. L. 214.

24. For full treatment of this question, see Saving Questions for Review, 6 C. L. 1385. On appeal from an order on demurrer nothing outside the pleadings can be considered. Peebles v. Yates [Miss.] 40 So. 996. The rule applies to questions raised in court of final appeal which were beyond the jurisdiction of the court of primary appeal. Inasmuch as appellate court has no jurisdiction to consider constitutional questions, an appeal to that court though subsequently carried to supreme court waives such questions. Case v. Sullivan [Ill.] 78 N. E. 37.

25. See Saving Questions for Review, 6 C. L. 1385. An order entered by the trial court after final judgment, reciting that certain evidence was heard on the trial, cannot be considered on appeal. Gaboury v. Coombs [Ky.] 89 S. W. 300. Where co-defendants set up different issues and one is defeated, he cannot on appeal raise the issues of his co-defendant but is confined to his own. City of Covington v. Noland & Co. [Ky.] 89 S. W. 216. Upon a question as to whether a contract was usurious under the laws of another state, the appellate court will consider only the evidence offered at the trial. Mercantile Guaranty Co. v. Hilton [Mass.] 77 N. E. 312. Where there is no statement of facts and no finding as to an issue, such issue cannot be considered on appeal. Featherstone v. Brown [Tex. Civ. App.] 13 Tex. Ct. Rep. 387, 88 S. W. 470. Upon appeal under Rev. St. 1895, § 1383, from an order appointing a receiver without notice to opposing party, the case must be presented on the petition and order alone. Haywood v. Scarborough [Tex. Civ. App.] 92 S. W. 815. Errors made upon a first trial cannot be urged upon an appeal from the denial of a motion for a new trial made in consequence of errors committed upon the second trial. White v. Madison [Okl.] 83 P. 798. The action of the court in sustaining a demurrer to a plea is to be considered with reference to the complaint on file when the court made its ruling upon the demurrer to the plea, without reference to subsequent developments in the cause. Chicago & W. I. R. Co. v. Marshall [Ind. App.] 75 N. E. 973. So also the sufficiency of a complaint as against a demurrer will be considered on appeal without indulging those intendments which are allowed after the verdict to cure a defective complaint. Id.

Amendment of pleadings: Amendment of the complaint will not be allowed on appeal, where the amendment would present a case substantially different from the one tried, and raise a question of law not involved in the appeal. Bonner v. Stotesbury, 139 N. C. 3, 51 S. E. 781. See, also, Pleading, 6 C. L. 1008. Upon the report of a case to the supreme judicial court, an amendment changing the action from law into equity will not be allowed, where by the terms of the report such privilege has not been reserved. Mee v. Fay [Mass.] 76 N. E. 229. Where plaintiff voluntarily, but by mistake, dismissed one count of his complaint, thereby making an instruction relating thereto erroneous, he cannot amend on appeal so as to restore such count, and thus obviate the error. Landers v. Quincy, etc., R. Co., 114 Mo. App. 655, 90 S. W. 117.

Matters arising after entry of judgment or appeal: The appellate court will not entertain any evidence of matters occurring subsequent to rendition of judgment by trial court, as death of judgment debtor and failure to present claim to his executors. People's Home Savings Bank v. Sadler [Cal. App.] 81 P. 1029. Proceedings subsequent to the order appealed from cannot be considered though an appeal from the order in such proceedings is jointly heard. Succession of Henry [La.] 40 So. 635. Special findings made and filed by the trial court after entry of its decree cannot be considered. Shaffer v. Detie, 191 Mo. App. 377, 90 S. W. 131. An affidavit of a juror to impeach a verdict which was stricken, at appellant's request, is not before the court on appeal from a judgment setting verdict aside. Buchanan v. Laber, 39 Wash. 410, 81 P. 911. The Federal supreme court cannot reverse a judgment in state court on the ground that it was invalidated by a state statute subsequently enacted. Campbell v. State of California, 200 U. S. 87, 50 Law. Ed. ——.

26. The consequence of this rule is that one must join issue or procure a ruling by properly objecting or challenging the court's attention. See full treatment in Saving Questions for Review, 6 C. L. 1385.

27. For full treatment of this question see Saving Questions for Review, 6 C. L. 1385.

28. For a full discussion of this question see Harmless and Prejudicial Error, 5 C. L. 1620.

(§ 13) *D. The extent of the review and the questions reached is determined by the character and effect of the order or judgment.*[29]—Where the jurisdiction is ex ratione materia, some courts will not extend review beyond the jurisdictional matter.[30] Others, however, will consider all questions arising on the record.[31] Generally speaking, the main or final judgment takes up all intermediate orders or proceedings,[32] but not those subsequent to it,[33] nor separate parts not appealed,[34] nor ancillary remedies,[35] nor appealable interlocutory orders made in the course of the trial.[36] An appeal from an interlocutory order brings up only the order itself

29. See 5 C. L. 215.

30. A case directly appealable to the supreme court, regardless of the amount in controversy, under acts 1901, p. 566, c. 247, § 8, is appealable for the purpose of presenting only such questions as are mentioned by the statute. Hood v. Baker [Ind. App.] 75 N. E. 608. On an appeal in which the supreme court has jurisdiction solely because the validity of an ordinance is involved, the proper construction of the ordinance is not before the court, and the judgment will be reviewed only in case the ordinance is found invalid and then only to the extent that it was affected by the invalid ordinance. Gies v. Broad [Wash.] 83 P. 1025.

31. In Illinois the supreme court, where it has jurisdiction by reason of a constitutional question, will consider all the questions arising in the record. Chicago, etc., R. Co. v. People, 217 Ill. 164, 75 N. E. 368.

32. Generally an appeal from a final judgment brings up for review any order made in the same case before judgment. 2 Ball. Ann. Codes & St. § 6500, subd. 1. Jordan v. Hutchinson, 39 Wash. 373, 81 P. 867. In California by statute, an appeal from an order admitting a will to probate brings up for review an order dismissing the contest of a will for lack of interest, as an intermediary order. In re Edelman's Estate [Cal.] 82 P. 962. An assignment of error to rulings made in the case preliminary to final judgment can be considered only on appeal from final judgment. Goodykoontz v. Imes [Colo.] 85 P. 839. Where a demurrer interposed by the defendant setting up the statute of frauds was overruled, and the defendant took no appeal from the order overruling the demurrer, but filed his answer in which, however, he did not set up the frauds, the order overruling the demurrer was reviewable on an appeal from the final judgment. Harrell v. Sonnabend [Mass.] 77 N. E. 764. An appeal from the final decree in a suit for specific performance held to bring up an exception to the ruling of a master that the plaintiff derived a good and sufficient title to the premises described in a certain deed. Cawley v. Jean, 189 Mass. 220, 75 N. E. 614. No appeal having been taken from an order disallowing dower to the wives of certain bankrupt trustees, allowing commissions, etc., which order was not final, but appealable under Code Pub. Gen. Laws 1904, art. 5, § 27, it was reviewable on appeal from the final order as authorized by § 28. Slingluff v. Hubner [Md.] 61 A. 326. Code Civ. Proc. § 1742, provides that on appeal from a judgment the court may review the verdict or decision, and any intermediate order or decision excepted to which involves the merits or necessarily affects the judgment except a decision or order from which an appeal might be taken. Great Falls Meat Co. v. Jenkins [Mont.] 84 P. 74. Though a decree in foreclosure proceedings finding personal liabilities may be regarded as interlocutory yet as to facts well pleaded it is not subject to review on objections to a deficiency judgment. Parratt v. Hartsuff [Neb.] 106 N. W. 966. Error, excepted to, in denying a motion for judgment notwithstanding the verdict made before judgment, is reviewable on appeal from the judgment. Satterlee v. Modern Brotherhood [N. D.] 106 N. W. 561. Where a motion of adjournment is denied and judgment rendered dismissing the complaint, plaintiff's remedy is by appeal from the judgment. Lefenfeld v. Adler, 99 N. Y. S. 799. On writ of error to a judgment the case is before the court on the entire record and the refusal to strike part of a pleading is before the court for review. Bosler v. Coble [Wyo.] 84 P. 895. An order denying a change of venue though not appealable is reviewable on appeal from the judgment rendered in the case. Sanders v. German Fire Ins. Co. [Wis.] 105 N. W. 787.

33. That improper conditions were required to be inserted in the supersedeas bond is not reviewable on assignment of error. Howell v. Commercial Bank, Ocala Branch [Fla.] 40 So. 76. Orders correcting a record nunc pro tunc are reviewable, and are presented to an appellate court by bill of exceptions. State v. Ryan, 115 Mo. App. 414, 90 S. W. 418. Judgments and orders, entered by the court after appeal, are not before the appellate court where no appeal has been taken from such judgment or order, though the party objecting save exceptions in a separate bill of exceptions. Western Cattle Brokerage Co. v. Gates, 190 Mo. 391, 89 S. W. 382. A request to amend a complaint made after nonsuit can give no rights on appeal from the judgment entered upon the nonsuit. Sutherland v. Ammann, 98 N. Y. S. 574.

34. While an order was appealable because, inter alia, it dissolved an injunction, failure to appeal although destroying the right of review as to the injunction did not lose the right of review as to other matters decided by the orders on an appeal from the final decree. Chapman v. Yellow Poplar Lumber Co. [C. C. A.] 143 F. 201.

35. Delamanarus v. Chuclos, 98 N. Y. S. 515.

36. Upon a writ of error to review a ruling of the trial court refusing to sustain a motion to dismiss a caveat to the return of appraisers upon an application for a year's support, exceptions to the allowance of an amendment to the caveat or to a continuance of the case cannot be considered. Mathews v. Rountree, 123 Ga. 327, 51 S. E. 423. On an appeal from an order refusing

as it stood at the making thereof, and nothing subsequent.[37] Appeals from the grant or refusal of a new trial [38] or other orders made in the course of the trial [39] or after judgment, reach only those matetrs which entered into the order itself,[40]

to sustain a motion to make a mandamus absolute, the supreme court cannot consider an assignment of error complaining of the overruling of a demurrer to the answer, where the trial court holds that the answer presents an issue of fact, and refers such issue to a jury, and there has been no final judgment thereon. Mineral Bluff Board of Education v. Mineral Bluff, 123 Ga. 669, 51 S. E. 577. In the absence of statute authorizing it, interlocutory orders made in the progress of the cause cannot be reviewed on appeal from the final judgment. Jenkins & Reynolds Co. v. Wells [Ill.] 77 N. E. 236 An appeal from a decree establishing a trust does not bring up an interlocutory order for an accounting. Stahl v. Stahl, 220 Ill. 188, 77 N. E. 67. An order reserving for future consideration the question as to the application of a fine imposed in contempt proceedings will not be considered on appeal from a decree imposing the fine. Franklin Union, No. 4 v. People, 220 Ill. 355, 77 N. E. 176. On appeal from an order denying a motion to vacate an order to show cause why judgment for plaintiff in foreclosure proceedings against a corporation should not be set aside, an order permitting the stockholders to represent the corporation in defense of the suit could not be reviewed, the same not having been appealed from. Frederick Milling Co. v. Frederick Farmers' Alliance Co. [S. D.] 106 N. W. 298. The propriety of the appointment of a receiver can be raised only on appeal from the order appointing him and not on appeal from final judgment. Jones v. Northern Pacific Fish & Oil Co. [Wash.] 84 P. 1122.

37. Where exceptions are duly taken to an order sustaining a demurrer to the complaint and another amended complaint is filed to which defendant demurred and pleaded res adjudicata, on appeal from a dismissal taken within a year from the first order, the order will be reversed if erroneous notwithstanding plea of res adjudicata. Bush v. Prescott & N. W. R. Co. [Ark.] 89 S. W. 86. The sufficiency of the pleadings to state a cause of action is the only question that can be considered on appeal from a ruling on a general demurrer. Andrews v. Andrews' Committee [Ky.] 90 S. W. 581. On an appeal from a decree of a single justice affirming the action of the probate court upon a petition to sell the dower and homestead rights of an insane person, nothing can be reviewed except the power of the court to make the order appealed from under the evidence that may have been adduced. Robinson v. Dayton [Mass.] 77 N. E. 503. Where alleged error is granting of nonsuit, court will consider case as it was at time of passing on motion. and will consider only the grounds urged in the motion. Makel v. Bartlett [Mont.] 82 P. 795. On an appeal from an interlocutory order appointing a receiver, there can be no inquiry as to the merits of the cause in which the interlocutory order has been granted, except in so far as the facts bear upon question of the propriety of appointing a receiver at all. Cotton v. Rand [Tex. Civ. App.] 92 S. W. 266. When an interlocutory decree is rendered in a cause which so far settles the principles of the cause as to make the decree appealable, and subsequent decrees carrying out the principles so settled are entered in the cause, an appeal from such interlocutory decree alone will not bring up for review such subsequent decrees, although the same were entered long prior to the granting of such appeal. Hopkins v. Prichard [W. Va.] 53 S. E. 557. Important water rights will not be decided on an appeal from an application for a temporary injunction heard upon affidavits. James v. Wild Goose Min. & Trading Co. [C. C. A.] 143 F. 868. On an appeal from an interlocutory order dissolving an injunction in the Federal courts, the court has power to hear the whole case and dispose of it. Chapman v. Yellow Poplar Lumber Co. [C. C. A.] 143 F. 201.

38. In California an appeal from an order denying a motion for a new trial, the court is restricted to an examination of the record to determine whether findings are supported by evidence or whether errors of law occurred at the trial. McLean v. Llewellyn Iron Works [Cal. App.] 83 P. 1082. May inquire whether evidence supports findings. Burns v. Schoenfield [Cal. App.] 81 P. 713. Insufficiency of evidence to sustain certain findings on which judgment is based is available though appeal from judgment is dismissed as being too late. Robinson v. Eberhart [Cal.] 83 P. 452. Sufficiency of complaint or findings to support judgment cannot be considered. County Bank of San Luis Obispo v. Jack [Cal.] 83 P. 705; Wadman v. Burke, 147 Cal. 351, 81 P. 1012. Especially where defect is merely technical and can be remedied by amendment. County Bank of San Luis Obispo v. Jack [Cal.] 83 P. 705. Point that the findings do not support the judgment cannot be considered. People's Home Sav. Bank v. Rauer [Cal. App.] 84 P. 329; Brownlee v. Reiner, 147 Cal. 641, 82 P. 324; Burns v. Schoenfeld [Cal. App.] 81 P. 713. The question presented on appeal from order granting a motion for a nonsuit is a question of law. Smith v. Superior Ct. of Napa County [Cal. App.] 84 P. 54. On appeal from an order granting a new trial and arresting judgment, the appellate court can only consider the questions of law involved in the grounds assigned by the court for his action. Taylor v. Gossett, 114 Mo. App. 723, 90 S. W. 1030.

39. In determining the correctness of the action of the lower court in overruling a motion for judgment upon special findings notwithstanding the general verdict, the appellate court can consider only the complaint, answers, general verdict, and special findings. City of Jeffersonville v. Gray [Ind.] 74 N. E. 611. On appeal from a judgment dismissing a case for want of service, the complaint is not properly before the supreme court. Sherwood Higgs & Co. v. Sperry & Hutchinson Co., 139 N. C. 299, 51 S. E. 1020.

40. On appeal from order of appellate court quashing a writ of certiorari, no question except those reviewable by certiorari will be considered. Barnes v. Drainage

and other matters can be considered only on appeal from final judgment.[41] In some states, however, an appeal from the order on a motion for a new trial, rather than an appeal from the judgment, reaches the facts,[42] and only matters urged as grounds for a new trial can be reviewed.[43] For the purpose of reviewing a ruling on a motion to direct a verdict, rulings made in connection with the introduction of evidence must be regarded as the law of the case,[44] and the opposing party is entitled to the most favorable construction the evidence as a whole will reasonably bear.[45] On appeal from a judgment dismissing the complaint upon a motion admitting its allegations, the case may be treated as if coming up on demurrer.[46] In reviewing a ruling on demurrer, facts not alleged cannot be considered.[47]

Com'rs [Ill.] 77 N. E. 1124. On appeal from an order setting aside a judgment, only the court's action in respect to such motion can be reviewed. Chambers v. Morris [Ala.] 39 So. 375. On appeal from an order granting a stay of execution on a final judgment, the court may consider such judgment so far as necessary to justify the stay. Goldman v. Abd-el-Nour, 96 N. Y. S. 335.

41. The point that the findings do not support the judgment can be considered only on appeal from the judgment. People's Home Sav. Bank v. Rauer [Cal. App.] 84 P. 329; McLean v. Llwellyn Iron Works [Cal. App.] 83 P. 1082. Alleged errors as to denial of motion to dismiss before trial, overruling demurrer, making findings of fact outside of the issues raised in the pleadings, and rendering a judgment unsupported by the findings, are available only on the appeal from the judgment, and will not be reviewed on appeal from an order denying the motion for a new trial. Vestal v. Young, 147 Cal. 721, 82 P. 383. That the judgment is defective should be urged on direct exceptions and not on approved motion for new trial. Thomas v. Clarkson [Ga.] 54 S. E. 77. It is proper and commendable practice to appeal from a judgment and from an order made after judgment denying a motion for a new trial or for judgment notwithstanding the verdict. Kinney v. Brotherhood of American Yeomen [N. D.] 106 N. W. 44.

42. All orders that could as well be reviewed on an appeal from the judgment or from the order granting or refusing a new trial as on separate appeals should be so reviewed. Dahlstrom v. Portland Min. Co. [Idaho] 85 P. 916. In the absence of motion and grounds for a new trial there is nothing before the court except as to whether the pleadings stated a cause of action. Orient Ins. Co. v. Meers [Ky.] 92 S. W. 584. Findings of fact cannot be disturbed by appellate division where appeal is from judgment solely. Hathaway v. Delaware County [N. Y.] 78 N. E. 153. On an appeal from an order denying appellant's motion for new trial upon the court's minutes, an order granting extra costs is not reviewable. Harris v. Baltimore Mach. & Elevator Works, 98 N. Y. S. 440. An appeal from an order refusing a new trial brings up for review the judgment and all the proceedings on trial. Benton v. Moss, 47 Misc. 376, 93 N. Y. S. 1113. An appeal from an order denying a new trial moved for on the merits and the grounds set forth in Code Civ. Proc. § 999, presents the question whether the evidence was sufficient to justify the verdict. Weizinger v. Erie R. Co., 106 App. Div. 411, 94 N. Y. S. 869. Presents the question raised by motion for judgment on pleadings. Home v. Noyes, 48 Misc. 356, 95 N. Y. S. 542. On appeal from a judgment court can review only exceptions. Selesky v. Vollmer, 107 App. Div. 300, 95 N. Y. S. 130. That the evidence was insufficient to justify the decision can be considered only on appeal from an order denying a new trial where such order is made after judgment. Stephenson v. Faus [S. D.] 106 N. W. 56. Upon an appeal from the judgment only entered before the order granting or denying a new trial was made, the sufficiency of the evidence cannot be considered. Foss v. Van Wagenen [S. D.] 104 N. W. 605.

NOTE. Proceedings in South Dakota: "When the **motion for a new trial** is made and determined before a judgment is entered in the action, an appeal from the judgment brings up the order of the court denying or granting the motion for a new trial as an intermediate order that can be reviewed by the supreme court, provided the decision of the court denying or granting the motion is assigned as error. Hawkins v. Hubbard, 2 S. D. 631, 51 N. W. 774; Granger v. Roll, 6 S. D. 611, 62 N. W. 970. On such an appeal from the judgment, the sufficiency of the evidence to justify the findings or verdict may be reviewed; but, when the order denying or granting a new trial is made after judgment in the action, an appeal from the judgment alone does not bring up such order made after judgment. Hawkins v. Hubbard, 2 S. D. 631, 51 N. W. 774; Manufacturing Co. v. Galloway [S. D.] 58 N. W. 565. And if the appellant desires a review of the evidence in such case, he must appeal from the order denying or granting a new trial to entitle him to such review. A party may, however, include such an appeal in the notice of appeal from the judgment. Hawkins v. Hubbard, 2 S. D. 631, 51 N. W. 774. Unless the order denying or granting a new trial made after judgment is appealed from, either in connection with the appeal from the judgment or independently, the decision of the court below upon the question of the sufficiency of the evidence to justify the findings or verdict will be res adjudicata. Weber v. Tschetter, 1 S. D. 205, 46 N. W. 201."—See Foss v. Van Wagenen [S. D.] 104 N. W. 605.

43. See Saving Questions for Review, 6 C. L. 1385.

44. Hamilton v. Jos. Schlitz Brewing Co. [Iowa] 105 N. W. 438.

45. In reviewing a denial of plaintiff's motion. Hamilton v. Jos. Schlitz Brewing Co. [Iowa] 105 N. W. 438.

46. As if coming up on a demurrer as to sufficiency of complaint to state a cause of

(§ 13) *E. Restriction to contents of record.*[48]—The sufficiency of the record to permit the review of particular questions is treated elsewhere.[49] Except as to matters judicially noticed,[50] fundamental errors,[51] and on applications for interlocutory or provisional relief [52] and some matters arising after judgment,[53] appellate review is ordinarily confined to the record, and matters alinude will not be considered.[54] Where two cases are argued together as one, the court may consider the facts appearing in each as applying to both.[55]

action. Knieriem v. New York, etc., R. Co., 109 App. Div. 709, 96 N. Y. S. 602.

47. Statements of fact in a bill of exceptions to a ruling sustaining a demurrer to the declaration cannot be considered where not also stated in the declaration. Williams v. Ellis [Me.] 63 A. 818.

48. See 5 C. L. 218.

49. See ante, § 9 D.

50. The supreme court will take judicial notice that a circuit court was not in session on a certain date not within the term. McMullen v. Long [Ala.] 39 So. 777. Ordinance affecting case may be considered though not read in evidence below. De Agramonte v. Mount Vernon, 98 N. Y. S. 454. On appeal from a garnishment judgment, the appellate court will take judicial notice of its own record reversing the principal judgment. Chicago Herald Co. v. Bryan [Mo.] 92 S. W. 906. Court cannot take judicial notice of the truth of statements made by counsel on a preliminary motion raising objection to the justice then holding court (Auerfeld v. Feuer, 98 N. Y. S. 687), or of facts contained in the records of tax proceedings (Auditor General v. Clifford [Mich.] 13 Det. Leg. N. 127, 107 N. W. 287).

51. The rule that evidence may be heard dehors the record applies only to evidence relating to the jurisdiction of the court, and to the extent of establishing such jurisdiction. Lillibridge v. State, 7 Ohio C. C. (N. S.) 452.

52. See post, § 14.

53. Fact that appellant has, by some act subsequent to judgment or decree appealed from, waived right of appeal or otherwise terminated controversy, may be shown by evidence dehors the record. Livesley v. Johnston [Or.] 84 P. 1044. Court may in the interest of justice take notice of matters occurring since judgment. Diefenderfer v. State [Wyo.] 83 P. 591.

54. Will not consider matters not in the record. Dougal v. Eby [Idaho] 85 P. 102; Williams v. Boise Basin Min. & Development Co. [Idaho] 81 P. 646; Whipple v. Geddis, 25 App. D. C. 333; Livesley v. Johnston [Or.] 84 P. 1044. Not in the record or in the abstract. Toan v. Russell, 111 Ill. App. 629. Though stated in the appellant's brief. Levenson v. Arnold, 97 N. Y. S. 990. An admission by the opposing party in his brief cannot supply what should appear in the record, especially where it relates to the acts of the court. Sanchez v. Atchison, etc., R. Co. [Tex Civ. App.] 90 S. W. 689. Evidence properly excluded by lower court cannot be considered by appellate court on review. Score v. Griffin [Ariz.] 83 P. 350. The validity of a judgment cannot be impeached by affidavits outside of the record. Worth v. Emerson [Cal. App.] 85 P. 664. Will determine issues on such pleadings as are in the record, and on failure to bring up original complaint, appeal will be determined on amended complaint. Boca & L. R. Co. v. Sierra Valleys R. Co. [Cal. App.] 84 P. 298. From testimony that witness was married at time of trial, appellate court will not presume that witness was married at previous time, there being nothing to that effect in the record. Crandell v. Classen, 25 App. D. C. 5. An assignment of error which has no foundation in the record, presents nothing for review. The record showed a joint exception to a ruling on a motion for a new trial and it was held that this would not support a separate assignment by one of the exceptors. Willis v. Willis [Ind.] 75 N. E. 653. Where petitioners who signed names improperly to a petition, were parties to proceedings below and bound thereby they had the right to take steps looking to and perfecting their appeal, the same as if they had signed their full Christian names below. Good v. Burk [Ind.] 77 N. E. 1080. That a certain decree had been entered below where this fact was denied by intervenor's pleading. McCullough v. Connelly [Iowa] 106 N. W. 756. The supreme court cannot take notice of records below not brought to it in the manner provided by statute and the rules of the court. Id. Where question of settlement of controversy prior to appeal is one of controverted fact, the appellate court will not determine it on ex parte affidavits. Livesley v. Johnston [Or.] 84 P. 1044. An agreement not shown by the record cannot be considered although considered on former appeal and cited in the opinion. Grayson County Nat. Bank v. Hall [Tex. Civ. App.] 91 S. W. 807. Will not consider evidence dehors the record had in another case or before a senate committee on the question of the marriage status in Utah. In re Park's Estate, 29 Utah, 257, 81 P. 83. Cannot take cognizance of ordinances not admitted in evidence though used in argument. City of North Yakima v. Scudder [Wash.] 82 P. 1022. An affidavit as to misconduct of respondent's counsel will not be considered when not embodied in any statement of facts certified to by the court. Taylor v. Modern Woodmen of America [Wash.] 84 P. 867. An affidavit in support of a motion for a new trial not embodied in a statement of facts or bill of exceptions will not be reviewed. Carstens v. Alaska S. S. Co., 39 Wash. 229, 81 P. 691. On appeal from an order on an application for a new trial based on facts aliunde the record and upon alleged errors not incorporated in the record by any bill of exceptions seasonably taken, there was no question presented to the appellate court for review. Hanaway v. Guarantee Sav. Loan & Investment Co. [C. C. A.] 143 F. 962.

55. Rosenthal v. New York, etc., R. Co., 98 N. Y. S. 479.

(§ 13) *F. Rulings peculiar to province of trial court.* 1. *Discretionary rulings in general.*[56]—A discretionary ruling is not absolute but will be reviewed only for abuse or to prevent manifest injustice.[57] This rule has been applied to rulings on motion for a change of venue,[58] motions for continuance,[59] orders relating to pleadings,[60] application to allow proper but unnecessary party to be joined,[61] to the granting or refusing to grant a temporary injunction[62] or the dissolution of such an injunction,[63] grant of motion to dismiss for want of prosecution,[64] refusal of issue to jury in equity case,[65] taking up case out of order,[66] rulings in regard to selection of jury,[67] rulings at trial generally,[68] refusal to administer special oath

56. See 5 C. L. 219.

57. Augusta Water Dist. v. Augusta Water Co. [Me.] 61 A. 176; George v. Cone [Ark.] 91 S. W. 557; Holzman & Co. v. Henneberry [Idaho] 83 P. 497; Richard v. National Distilling Co., 95 N. Y. S. 547. Burden of showing abuse of discretion always on appellant. Pelegrinelli v. McCloud River Lumber Co. [Cal. App.] 82 P. 695. Where an appeal the construction which the court below placed on one of its own rules is questioned, there should be no interference by the appellate court unless there has been a gross and injurious perversion of the rule. Perdue v. Gill [Ind. App.] 73 N. E. 844.

58. Drake v. Holbrook [Ky.] 92 S. W. 297. Denial on conflicting affidavits. Wadleigh v. Phelps, 147 Cal. 541, 82 P. 200. Granting change. Pattison v. Hines, 105 App. Div. 282, 93 N. Y. S. 1071.

59. Myers v. Kessler [C. C. A.] 142 F. 730; Copper River Min. Co. v. M'Clellan, 138 F. 333; Reynolds v. Smith [Fla.] 38 So. 903; Supreme Lodge K. P. v. Lipscomb [Fla.] 39 So. 637; Peacock v. Feaster [Fla.] 40 So. 74; Wilson v. Johnson [Fla.] 41 So. 395; Johnson v. Thrower, 123 Ga. 706, 51 S. E. 636; Percival-Porter Co. v. Oaks [Iowa] 106 N. W. 626; City of Paducah v. Johnson [Ky.] 93 S. W. 1035; Dorais v. Doll [Mont.] 83 P. 884; Corporation of Members of Church of Jesus Christ v. Watson [Utah] 83 P. 731; Brown v. Blaine [Wash.] 83 P. 310; Levy v. Scottish Union & Nat. Ins. Co. [W. Va.] 52 S. E. 449; Miller v. Mitchell [W. Va.] 52 S. E. 478. Where it appears, upon consideration of all the facts and circumstances in the cause, that the action of the lower court in denying the motion of a party for a continuance, and in ruling him into a hearing, was plainly erroneous, the appellate court will reverse such action and the decree against him. Yokum v. Stalnaker [W. Va.] 53 S. E. 562.

60. Allowance of or refusal to allow amendments. Sidney Novelty Co. v. Hanlon [Conn.] 63 A. 727; Todd v. Crail [Ind.] 77 N. E. 402; Wright v. Crane [Mich.] 12 Det. Leg. N. 794, 106 N. W. 71; Joyner v. Early, 139 N. C. 49, 51 S. E. 778; Bonner v. Stotesbury, 139 N. C. 3, 51 S. E. 781; Toher v. Schaefer, 96 N. Y. S. 470; State v. Richardson [Or.] 85 P. 225; Missouri, etc., R. Co. v. Tolbert [Tex. Civ. App.] 90 S. W. 508; Shine v. Culver [Wash.] 85 P. 271.

Imposing terms on which pleadings may be amended. Western Union Telegraph Co. v. Haley [Ala.] 39 So. 386; Putnam Lumber Co. v. Ellis-Young Co. [Fla.] 39 So. 193; Peacock v. Feaster [Fla.] 40 So. 74; Summerville v. Penn Drilling Co., 119 Ill. App. 152; Eastern R. Co. v. Tuteur [Wis.] 105 N. W. 1067.

Allowing additional pleas out of time. Lewis v. Glass [Ala.] 39 So. 771; Cahaba Southern Min. Co. v. Pratt [Ala.] 40 So. 943; Knights Templars & Masons' Life Indemnity Co. v. Crayton, 110 Ill. App. 648.

Permitting cross complaint to be filed. Syvertson v. Butler [Cal. App.] 85 P. 164.

Motion to make complaint more definite within the reach of either party. City of Port Townsend v. Trumbull [Wash.] 82 P. 1022.

Granting further time to answer. Bell v. Western Union Tel. Co. [S. C.] 53 S. E. 177.

61. Aiken v. Rhodhiss Mfg. Co. [N. C.] 53 S. E. 867.

62. Ellis v. Stewart, 123 Ga. 242, 51 S. E. 321; Townsend v. Norfolk R. & Light Co. [Va.] 52 S. E. 970; City of La Porte v. Scott [Ind.] 76 N. E. 878; Hammond Elevator Co. v. Board of Trade [C. C. A.] 143 F. 292; New Ohio Washed Coal Co. v. Coal Belt R. Co., 116 Ill. App. 153.

63. Dougal v. Eby [Idaho] 85 P. 102.

64. When summons was served a year after complaint was filed, hence court of review would not disturb the ruling. Marks v. Keenan [Cal.] 82 P. 772.

65. Cochran v. Cochran [Minn.] 105 N. W. 183; Hewel v. Hogan [Cal. App.] 84 P. 1002.

66. It is no abuse of discretion reviewable on appeal, for a court to call a case set for a certain day, out of its order and proceed to trial though appellant and his attorney were not present in court and not notified. Linderman v. Nolan [Okl.] 83 P. 796.

67. Theobald v. St. Louis Transit Co., 191 Mo. 395, 90 S. W. 354; Burns v. Dunham, Carrigan & Hayden Co. [Cal.] 82 P. 959; Wilson v. Wapello County [Iowa] 105 N. W. 363.

68. Interpretation and administration by the trial court of its own rules will not be disturbed on appeal except for manifest errors substantially prejudicial. Trescott v. Co-operative Bldg. Bank, 212 Pa. 47, 61 A. 478; Perdue v. Gill [Ind. App.] 73 N. E. 844. Exercise of discretionary right, under Clark's Code, § 393, to submit **additional issue.** Crawford v. Masters [N. C.] 52 S. E. 663. Where the **giving or refusal of an instruction** is wholly within the discretion of the trial judge, the mere fact that it was given after it had been refused and after the other instructions had been read did not constitute reversible error in the absence of proof that the discretion was abused. Harvey v. Chicago & A. R. Co. [Ill.] 77 N. E. 569. The refusal of the court to give an instruction upon the credibility of witnesses will not be a ground for reversal unless there was an abuse of discretion. Beasley v. Jefferson Bank, 114 Mo. App. 406, 89 S. W. 1046. A ruling of the circuit court that no foundation has been laid for reception of sec-

to witnesses,[69] rulings in respect to examination of witnesses,[70] rulings in regard to qualification of experts, [71] allowing repetition of testimony,[72] the order of proof,[73] the action of the court in respect to misconduct of counsel,[74] the ordering of a reference,[75] rulings on exceptions to referee's report,[76] the distribution of costs,[77] the refusal to direct a verdict [78] or grant a nonsuit,[79] rulings on motions to set aside judgments [80] or open defaults,[81] the granting [82] or denial [83] of a motion for a new

ondary evidence is discretionary and will not be reviewed where no abuse is shown. Tucker v. Tucker [S. C.] 51 S. E. 876. Where it does not affirmatively appear that there was an abuse of discretion in **allowing one witness to remain in the court room** during trial while the others were excluded, it will be presumed that there was good cause. Hlass v. Fulford [Ark.] 92 S. W. 862.

Right to open and close. Farmer v. Norton [Iowa] 105 N. W. 371; Seeley v. Manhattan Life Ins. Co. [N. H.] 61 A. 585. If statutory, denial of right is reversible error. Cilley v. Preferred Acc. Ins. Co., 109 App. Div. 394, 96 N. Y. S. 282. **Denying separate trials.** Martin v. Chicago & M. Elec. R. Co., 220 Ill. 97, 77 N. E. 86. Under the rule that "when the **competency of a witness** depends upon the determination of a question of fact the decision of the judge will not generally be disturbed if there is any evidence to authorize his findings," the ruling of the court below in excluding the testimony of the defendant as to a conversation had with the deceased member of the plaintiff's firm, alleged to have been heard by surviving member who was at the time engaged in writing at a desk in the same room, but who denied having heard any such conversation, will not be interfered with. Zipperer v. Doyle [Ga.] 53 S. E. 505. A finding of the trial court upon a **preliminary question** upon which the **admissibility of evidence** was dependent will not be reviewed unless it appears that the evidence did not warrant the finding, as where conversations between the plaintiff's husband and the husband of the defendant were excluded on the ground that the court was not satisfied that the plaintiff's husband was authorized to act for her as her agent. Dexter v. Thayer, 189 Mass. 114, 75 N. E. 223.

69. Curtis v. Lehman & Co. [La.] 38 So. 887.

70. Latitude given in cross-examination. Williams v. Spokane Falls & N. R. Co. [Wash.] 84 P. 1129; Herbeck v. Germain [Mich.] 13 Det. Leg. N. 175, 107 N. W. 901; City of Lawton v. McAdams [Okl.] 83 P. 429; Henderson v. Henderson [Ind.] 75 N. E. 269; Robinson v. Old Colony St. R. Co., 189 Mass. 594, 76 N. E. 190; Swygart v. Willard [Ind.] 76 N. E. 755.

Allowance of leading questions. Phinazee v. Bunn, 123 Ga. 230, 51 S. E. 300; Smith v. Hope [Fla.] 41 So. 69.

71. Virginia Iron, Coal & Coke Co. v. Tomlinson [Va.] 51 S. E. 362; Bird v. Utica Gold Min. Co. [Cal. App.] 84 P. 256; Texas & P. R. Co. v. Warner [Tex. Civ. App.] 93 S. W. 489; Dallas Consol. Elec. St. R. Co. v. English [Tex Civ. App.] 93 S. W. 1096.

72. Smith v. Birmingham R., Light & Power Co. [Ala.] 41 So. 307.

73. Kinney v. Brotherhood of American Yeomen [N. D.] 106 N. W. 44; Todd v. Crail [Ind.] 77 N. E. 402; Louisville & N. R. Co. v. Board [Ky.] 90 S. W. 944; In re Walker's Estate [Cal.] 82 P. 770; Southern Industrial Inst. v. Hellier [Ala.] 39 So. 163; Wilson v. Johnson [Fla.] 41 So. 395.

74. Denver City Tramway Co. v. Nicholas [Colo.] 84 P. 813.

75. Hall v. McBride [S. C.] 53 S. E. 368; Brookshire v. Farmers' Alliance Exch., 71 S. C. 451, 51 S. E. 442.

76. Auditor's findings of fact confirmed by the court will not be disturbed except for manifest error. In re Plankinton's Estate, 212 Pa. 235, 61 A. 888. Order setting aside a sale made by a master in chancery and ordering another sale. Slack v. Cooper, 219 Ill. 138, 76 N. E. 84. Motion to recommit master's report. Gurley v. Reed [Mass.] 77 N. E. 642. No errors being shown, the action of the court below affirming the report of a master on the account of a trustee will not be disturbed. Pierce v. Schoonover [Pa.] 61 A. 244.

77. Action of court in apportioning costs not disturbed. United States Rubber Co. v. Peterman, 119 Ill. App. 610. On an appeal from an order allowing taxation of costs, the superior court can not review the order where the complaint relates to number of witnesses, materiality, etc. Hartley v. Weideman, 28 Pa. Super. Ct. 50.

78. Johnson v. Thrower, 123 Ga. 706, 51 S. E. 636.

79. MacFeat v. Philadelphia, etc., R. Co. [Del.] 62 A. 898.

80. Opperman v. Conway, 117 Ill. App. 524; D. Holzman & Co. v. Henneberry [Idaho] 83 P. 497; Keeney v. Fargo [N. D.] 105 N. W. 92.

81. Cowell v. City Water Supply Co. [Iowa] 105 N. W. 1016; Lewis v. Cunningham [Ariz.] 85 P. 244; Pelegrinelli v. McCloud River Lumber Co. [Cal. App.] 82 P. 695; Germania Fire Ins. Co. v. Muller, 110 Ill. App. 190; Hartman v. Viera, 113 Ill. App. 216; Carver v. Seevers, 126 Iowa, 669, 102 N. W. 518; Wilson v. Pfaffe [Iowa] 103 N. W. 992; Graf v. Vermont Sav. Inv. Co. [Kan.] 83 P. 821; Harkness v. Jarvis [Mo. App.] 88 S. W. 1025; Bowen v. Webb [Mont.] 85 P. 739; Jordan v. Jackson [Neb.] 106 N. W. 999; Turtel v. Greenwald, 96 N. Y. S. 1074; Olson v. Sargent County [N. D.] 107 N. W. 43; Linderman v. Nolan [Okl.] 83 P. 796; Horn v. United Securities Co. [Or.] 81 P. 1009; Roberts Machine Co. v. Kelly, 28 Pa. Super. Ct. 540; Meade County Bank v. Decker [S. D.] 102 N. W. 597; Kjetland v. Pederson [S. D.] 104 N. W. 677; Jordan v. Hutchinson, 39 Wash. 373, 81 P. 867; Douglas v. Badger State Mine [Wash.] 83 P. 178.

82. Weisser v. Southern P. R. Co. [Cal.] 83 P. 439; Martin v. Markarian & Co. [Cal. App.] 82 P. 1072; Bresee v. Los Angeles Traction Co. [Cal.] 85 P. 152; Colvin v. Northern Pac. R. Co. [Wash.] 84 P. 616; Jones v. Campbell [Idaho] 84 P. 510; Harrison v. Harrison [Ga.] 52 S. E. 813; Atlantic & B. R. Co. v. Coob [Ga.] 53 S. E. 591. The first grant of a new trial will not be disturbed where it does not appear that there was any abuse

trial on questions of fact, extension of time to settle bill of exceptions or statement of facts,[84] the allowance of fees [85] or allowances.[86] An order granting or denying a new trial made by a judge who did not preside at the trial does not carry with it the usual presumption under which such orders will be sustained,[87] but upon a review of such order the question is whether the court erred.[88] Where an application addressed to discretion is denied generally it will be presumed that the denial was in the exercise of discretion.[89]

of discretion by the court below. Civ. Code 1895, § 5585. Baldwin v. Napa & Sonoma Mine Co. Cal. App.] 81 P. 1037; Perry v. Noonan Loan Co. [Cal. App.] 82 P. 623; Le Tourneux v. Gillis [Cal. App.] 82 P. 627; Houghton v. Market St. R. Co. [Cal. App.] 82 P. 972; Rappel v. United Railroads of San Francisco [Cal. App.] 82 P. 1073 Weisser v. Southern P. R. Co. [Cal.] 83 P. 439; Harrison v. Harrison [Ga.] 52 S. E. 813; Kansas City Southern R. Co. v. Fields & Slaughter Co. [Kan.] 85 P. 412; Pace v. Paducah R. & Light Co. [Ky.] 89 S. W. 105; Loevenhart v. Lindell R. Co., 190 Mo. 342, 88 S. W. 757; First Nat. Bank v. Bennett, 114 Mo. App. 691, 90 S. W. 417; McCarty v. St. Louis Transit Co., 192 Mo. 396, 91 S. W. 132; Brod v. St. Louis Transit Co., 115 Mo. App. 202, 91 S. W. 993; Seeger v. St. Louis Silver Co. [Mo. App.] 91 S. W. 1030; Metropolitan Lead & Zinc Min. Co. v. Webster [Mo.] 92 S. W. 79; Smoot v. Kansas City [Mo.] 92 S. W. 363; Lowenstein v. Missouri Pac. R. Co. [Mo. App.] 93 S. W. 871; Case v. Kramer [Mont.] 85 P. 878; Anderson v. Wood, 99 N. Y. S. 474; Cunningham v. Springer [N. M.] 82 P. 232; Tham v. Steeb Shipping Co., 39 Wash. 271, 81 P. 711; Buchanan v. Laber, 39 Wash. 410, 81 P. 911; Brennan v. Seattle, 39 Wash. 640, 81 P. 1092; Godfrey v. Godfrey [Wis.] 106 N. W. 814.

83. Missouri, etc., R. Co. v. Kahn [Tex. Civ. App.] 91 S. W. 816; Myers v. Kessler [C. C. A.] 142 F. 730; Birmingham R., Light & Power Co. v. Willis [Ala.] 38 So. 1016; Birmingham R. & Elec. Co. v. Mason [Ala.] 39 So. 590; Williamson Iron Co. v. McQueen [Ala.] 40 So. 306; Hot Springs R. Co. v. McMillan [Ark.] 88 S. W. 846; Cochran v. Cochran [Ky.] 93 S. W. 18; Epstein v. Chicago, etc., R. Co. Minn.] 104 N. W. 12; Mohr v. Williams [Minn.] 104 N. W. 12; English v. Minneapolis, etc., R. Co. [Minn.] 104 N. W. 886; Bunker v. United Order of Foresters [Minn.] 107 N. W. 392; Hanforth v. Tareutum Traction Pass. R. Co. [Pa.] 62 A. 1060; Prewitt-Spurr Mfg. Co. v. Woodall [Tenn.] 90 S. W. 623; Coolidge v. Ayers, 77 Vt. 448, 61 A. 40; Marcy v. Parker [Vt.] 62 A. 19; Bazelon v. Lyon [Wis.] 107 N. W. 337; Peat v. Chicago, etc., R. Co. [Wis.] 107 N. W. 355. Determination of court on application for leave to appeal from a probate order after the expiration of the time for such appeal will not be disturbed in the absence of a clear abuse of discretion. In re O'Hara's Will [Wis.] 106 N. W. 848; Bishop Co. v. Shelhorse [C. C. A.] 141 F. 643; Von Schroeder v. Spreckels, 147 Cal. 186, 81 P. 515; In re Walker's Estate [Cal.] 82 P. 770; Frutig v. Trafton [Cal. App.] 83 P. 70; Rauer's Law & Collection Co. v. Bradbury [Cal. App.] 84 P. 1007; McMullen v. Citizens' Bank, 123 Ga. 400, 51 S. E. 342; Hansen v. Haley [Idaho] 81 P. 935; Jones v. Campbell [Idaho] 84 P. 510; Thrush v. Graybill [Iowa] 104 N. W. 472; State v. Lackey [Kan.] 82 P. 527; Smoot v. Kansas City [Mo.] 92 S. W. 363; Casner v. New York City R. Co., 48 Misc. 630, 96 N. Y. S. 257; Robinson v. Interurban St. R. Co., 98 N. Y. S. 918; Libby v. Barry [N. D.] 107 N. W. 972; Shores v. Southern R. Co. [S. C.] 51 S. E. 699; Georgia R. & Banking Co. v. Newmeyer, 123 Ga. 882, 51 S. E. 709; Providence Mach. Co. v. Browning [S. C.] 52 S. E. 117; Irwin v. Buffalo Pitts Co., 39 Wash. 346, 81 P. 849.

84. City of Seattle v. Board of Home Mission of Methodist Protestant Church [C. C. A.] 138 F. 307; Murphy v. Stelling [Cal. App.] 81 P. 730; Ryer v. Rio Land & Imp. Co., 147 Cal. 462, 82 P. 62; McCarty v. Wilson [Cal. App.] 83 P. 170; Miller v. Queen Ins. Co. [Cal. App.] 83 P. 287; Miller v. American Cent. Ins. Co. [Cal. App.] 83 P. 289; Sauer v. Eagle Brewing Co. [Cal. App.] 84 P. 425; Peterson v. Hansen [N. D.] 107 N. W. 528.

85. Decree fixing the fee of a master in partition will not be disturbed in the absence of abuse of discretion. Cunningham v. Wallace [Pa.] 62 A. 784. Condemnation proceedings having been abandoned, a judgment in favor of the landowner for attorney's fees and expenses will not be disturbed in the absence of manifest abuse of discretion. Wilder v. Logan Natural Gas & Fuel Co., 6 Ohio C. C. (N. S.) 206. Order of court allowing reasonable counsel fees is discretionary, not reviewable except for palpable abuse. Morimura v. Samaha, 25 App. D. C. 189. The appellate court cannot reverse the action of the trial court in refusing to allow an attorney's fee to an intervener making a claim against a trust fund, although the trial judge may have entered into an oral agreement with the intervener to allow such fee. Myers v. Mutual Life Ins. Co. [Ind. App.] 75 N. E. 31. The allowance of costs, including a docket fee, is not alone a ground of appeal; but where the court finds other error for which the decree must be reversed, it may review the judgment awarding costs. Pickens v. Daniels [W. Va.] 52 S. E. 215.

86. The action of the trial court in awarding compensation to a defendant for trouble and expense in attending a trial in the wrong county under Code, § 3504, will not be disturbed unless an abuse of discretion is shown. Moyers v. Council Bluffs Nursery Co. [Iowa] 107 N. W. 924. Whether expenses of keeping attached property should be denied because a keeper could have been dispensed with held a question of fact within the discretion of the trial court and its ruling was not disturbed, there being no abuse of discretion. Kivel v. Murray Cone Shoe Co. [N. H.] 63 A. 673.

87. Lavin v. Kreger [S. D.] 104 N. W. 909.

88. Not disturbed where practically the only witnesses were the parties and testimony was conflicting. Lavin v. Kreger [S. D.] 104 N. W. 909.

89. Aiken v. Rhodhiss Mfg. Co. [N. C.] 53 S. E. 867.

(§ 13F) 2. *Questions of fact.*[90]—Rulings such as upon motion for continuance, motion to dissolve injunction, etc., involve questions of fact, but being deemed to rest primarily on discretion are elsewhere treated.[91] Generally speaking questions of fact will not be reviewed [92] unless the decision below is wholly unsustained by the evidence, the wording of the rule varying somewhat in the various jurisdictions.[93] Every presumption favors the correctness of the finding below,[94] and the

90. See 5 C. L. 224.

91. See ante, § 13 F 1.

92. Pittsburgh, etc., R. Co. v. Nicholas [Ind.] 76 N. E. 522; Osborn v. Norwalk, 77 Conn. 663, 60 A. 645; Appeal of Melony [Conn.] 62 A. 151; Illinois Third Vein Coal Co. v. Cioni, 215 Ill. 583, 74 N. E. 751; Anglo-Wyoming Oil Fields v. Miller, 216 Ill. 272, 74 N. E. 821; Hayes v. Chicago Tel. Co., 218 Ill. 414, 75 N. E. 1003; Illinois Steel Co. v. Preble Mach. Works Co., 219 Ill. 403, 76 N. E. 574; Inland Steel Co. v. Smith [Ind. App.] 75 N. E. 852; Supreme Lodge K. P. v. Andrews [Ind. App.] 77 N. E. 361; Whitridge v. Baltimore [Md.] 63 A. 808; McCarthy v. Dedham, 188 Mass. 204, 74 N. E. 319; Burke v. Coyne, 188 Mass. 401, 74 N. E. 942; Winnipiseogee Lake Cotton & Woolen Mfg. Co. v. Laconia [N. H.] 61 A. 676; Graves v. Woodbridge Tp. [N. J. Law] 62 A. 267; Stroppel v. Plageman, 3 Ohio N. P. (N. S.) 501; In re Crosetti's Estate, 211 Pa. 490, 60 A. 1081; Fitzsimmons v. Hand, 27 Pa. Super. Ct. 598. The question whether good cause was shown for the extension of time within which a husband could waive a provision in his wife's will is a question of fact for the trial court and its determination will not be interfered with in the absence of abuse of discretion or mistake. Jaques v. Chandler [N. H.] 62 A. 713. The supreme court, on appeal from a decree in partition, cannot review the findings of fact, where the answer denied the tenancy in common and the right to partition, and raised issue of title by claiming possession and use of lands exclusively. Corbett v. Fogle [S. C.] 51 S. E. 884. Under Mun. Ct. Act, Laws 1902, p. 1583, c. 580, § 326, the appellate court on an appeal from the judgment can review facts to determine whether the verdict is contrary to the weight of the evidence. Feuer v. Brooklyn, etc., R. Co., 97 N. Y. S. 293; De Coster v. Herzog Co., 97 N. Y. S. 295. The findings of the municipal court upon issues of fact is conclusive upon appeal under Municipal Court Act, Laws 1902, p. 1581, c. 580, § 319, where the affidavits show a conflict of evidence. Metal Stamping Co. v. Samuel, 94 N. Y. S. 11. A judgment of the district court that is based upon its conclusion upon a mixed question of law and fact will not be reversed if the conclusion is legally inferable from the facts proven. Ruppert v. Zang [N. J. Law] 62 A. 998. It is the province of a court of review when the question is properly presented to determine whether the trial court or jury has misconceived the force and effect of the evidence. Denver & R. G. R. Co. v. Vitello [Colo.] 81 P. 766. An assignment that there is no evidence to support the judgment raises a question of law as well as of fact, viz., whether the facts justify in law the decision rendered. Wilson v. Alexander [Tenn.] 88 S. W. 935.

The Federal supreme court reviewing a territorial supreme court will ordinarily make no greater examination of the facts than is made by the territorial court. Halsell v. Renfrow, 202 U. S. 287, 50 Law. Ed. —. Findings of fact by the court of claims are conclusive on appeal to the Federal supreme court. District of Columbia v. Barnes, 197 U. S. 146, 49 Law. Ed. 699. The Federal supreme court will not review findings of fact by a state court. Minneapolis, etc., R. Co. v. State of Minnesota, 193 U. S. 52, 48 Law. Ed. 614.

As to amount of damages. Cook v. Proskey [C. C. A.] 138 F. 273; Southern Pac. Co. v. Cavin [C. C. A.] 144 F. 348; Sloss-Sheffield Steel & Iron Co. v. Smith [Ala.] 40 So. 91; Western Underwriters' Ass'n v. Hankins [Ill.] 77 N. E. 447; Pittsburgh, etc., R. Co. v. Smith, 110 Ill. App. 154; Village of Wilmette v. Brachle, 110 Ill. App. 356; Missouri, etc., R. Co. v. Wade [Kan.] 85 P. 415; Bell-Coggeshall Co. v. Lewis [Ky.] 89 S. W. 135; Board of Councilmen of Frankfort v. Chinn [Ky.] 89 S. W. 188; Lexington R. Co. v. Fain [Ky.] 90 S. W. 574; Parriconi v. Greco [La.] 39 So. 599; Locke v. Independence, 192 Mo. 570, 91 S. W. 61; Sorenson v. Oregon Power Co. [Or.] 82 P. 10; Gulf, etc., R. Co. v. Luther [Tex. Civ. App.] 90 S. W. 44. In bastardy proceedings the determination of the amount of the recovery rests solely with the trial court, and cannot be disturbed on appeal though manifestly inadequate. State v. Richeson [Ind. App.] 75 N. E. 846; Brown v. White, 219 Ill. 632, 76 N. E. 833; Hancheft v. Haas, 219 Ill. 546, 76 N. E. 845; Stagg Co. v. Brightwell [Ky.] 92 S. W. 8; Waechter v. St. Louis, etc., R. Co., 113 Mo. App. 270, 88 S. W. 147; Brown v. Weaver Power Co. [N. C.] 52 S. E. 954; English v. Murtland [Pa.] 63 A. 882; Davis v. Holy Terror Min. Co. [S. D.] 107 N. W. 374; Southern Pac. Co. v. Bailey [Tex. Civ. App.] 91 S. W. 820. Where the jury in condemnation proceedings has viewed the premises and the evidence is conflicting, their verdict as to the amount of damages will not be disturbed unless manifestly against the weight of the evidence. Prather v. Chicago Southern R. Co. [Ill.] 77 N. E. 430.

93. If there is any substantial evidence to support it. Hot Springs R. Co. v. McMillan [Ark.] 88 S. W. 846; St. Louis S. W. R. Co. v. White Sewing Mach. Co. [Ark.] 93 S. W. 58; Dallman v. Frank [Cal. App.] 82 P. 564; In re Walker's Estate [Cal.] 82 P. 770; People v. Davidson [Cal. App.] 83 P. 159; Nofziger Bros. Lumber Co. v. Shafer [Cal. App.] 83 P. 284; Gray v. Maier & Zobelein Brewery [Cal. App.] 84 P. 280; Nishkian v. Chisholm [Cal. App.] 84 P. 312; Showers v. Zanone [Cal. App.] 85 P. 857; McClelland v. Bullis [Colo.] 81 P. 771; Clark v. Ball [Colo.] 82 P. 529; Minnesota Canal Supply Ditch & Reservoir Co. v. Conine [Colo.] 83 P. 628; Clark v. Fitzsimmons [Conn.] 62 A. 342; Town of Ormond v. Shaw [Fla.] 39 So. 108; City of Orlando v. Orlando Water & Light

Co. [Fla.] 39 So. 532; Carlton v. King [Fla.] 40 So. 191; Shores of Southern R. Co. [S. C.] 51 S. E. 699; Georgia R. & Banking Co. v. Newmeyer, 123 Ga. 882, 51 S. E. 709; Carter v. Southern Banking & Trust Co., 123 Ga. 876, 51 S. E. 714; Bennett & Co. v. Farmers' & Merchants' Bank [Ga.] 52 S. E. 330; Killough & Co. v. Simmons [Ga.] 53 S. E. 819; Johnson v. Farrell, 215 Ill. 542, 74 N. E. 760; Grand Pacific Hotel Co. v. Pinkerton, 217 Ill. 61, 75 N. E. 427; Leighton & H. Steel Co. v. Snell, 217 Ill. 152, 75 N. E. 462; Compher v. Browning, 219 Ill. 429, 76 N. E. 678; Shickle-Harrison & H. Iron Co. v. Beck, 112 Ill. App. 444; Kittler v. Studabaker, 113 Ill. App. 342; Mundt v. Cooke Rutledge Coal Co., 118 Ill. App. 124; American Steel Foundries v. Scherrer, 119 Ill. App. 162; Chicago Furniture Co. v. Cronk [Ind. App.] 74 N. E. 627; Williams v. Hoffman [Ind. App.] 76 N. E. 440; Case v. Collins [Ind. App.] 76 N. E. 781; Southern Ind. R. Co. v. Baker [Ind. App.] 77 N. E. 64; Board of Com'rs of Hendricks County v. Eaton [Ind. App.] 77 N. E. 958; State v. Wimer [Ind.] 77 N. E. 1078. Supreme court is bound to accept as established all that the testimony fairly tends to prove in appellee's favor. Pneumatic Weigher Co. v. Burnquist [Iowa] 105 N. W. 326; Chariton Ice Co. v. Spring Lake Ice Co. [Iowa] 105 N. W. 1014; Taylor v. Herron [Kan.] 82 P. 1104; Leverton v. Rork [Kan.] 85 P. 800; Flint v. Illinois Cent. R. Co. [Ky.] 88 S. W. 1055; Smith v. Wyatt [Ky.] 92 S. W. 587; Bolster v. Graves, 189 Mass. 301, 75 N. E. 714; Chadwick v. Phoenix Acc. & Sick Ben. Ass'n [Mich.] 12 Det. Leg. N. 50, 106 N. W. 1122; Stitt v. Rat Portage Lumber Co. [Minn.] 104 N. W. 561; Watkins v. McDonald [Miss.] 41 So. 376; Harrison v. Lakenan, 189 Mo. 581, 88 S. W. 53; John A. Tolman Co. v. Hunter, 113 Mo. App. 671, 88 S. W. 636; Chicago Lumber & Coal Co. v. Georgia Southern & F. R. Co., 114 Mo. App. 327, 89 S. W. 576; Gibson v. Bailey Co., 114 Mo. App. 850, 89 S. W. 597; Sayre v. Trustees of Princeton University, 192 Mo. 95, 90 S. W. 787; Schaaf v. Peters [Mo. App.] 90 S. W. 1037; Morgan v. Keller [Mo.] 92 S. W. 75; Matthews v. French [Mo.] 92 S. W. 634; Dowling v. Wheeler [Mo. App.] 93 S. W. 924; Levels v. St. Louis & H. R. Co. [Mo.] 94 S. W. 275; Brookhouse v. Union Pub. Co. [N. H.] 62 A. 219; Candelaria v. Miera [N. M.] 84 P. 1020; Brown v. Weaver Power Co. [N. C.] 52 S. E. 954; Brock v. Williams [Okl.] 82 P. 922; Greeley v. Greeley [Okl.] 83 P. 711; Tabet v. Powell [Tex. Civ. App.] 13 Tex. Ct. Rep. 436, 88 S. W. 273; Scott & Co. v. Woodard [Tex. Civ. App.] 88 S. W. 406; Bradford v. Malone [Tex. Civ. App.] 90 S. W. 706; Mattfield v. Kimbrough [Tex. Civ. App.] 90 S. W. 712; Galveston, etc., R. Co. v. Green [Tex. Civ. App.] 91 S. W. 380; Gulf, etc., R. Co. v. Wynne [Tex. Civ. App.] 91 S. W. 823; Rutherford v. Mothershed [Tex. Civ. App.] 92 S. W. 1021; Tuckfield v. Crager [Utah] 82 P. 860; Utah Savings & Trust Co. v. Bamberger, 29 Utah, 370, 81 P. 887; Prescott v. Puget Sound Bridge & Dredging Co. [Wash.] 82 P. 606; Irby v. Phillips [Wash.] 82 P. 931; Williams v. Ballard Lumber Co. [Wash.] 83 P. 323; Burdon v. Briquelet, 125 Wis. 341, 104 N. W. 83; Eastern R. Co. of Minnesota v. Tuteur [Wis.] 105 N. W. 1067. A verdict will not be disturbed where there is any evidence to support it, though the court is of the opinion that the evidence was not of such weight as the jury gave it. Martin v. Kennedy [Ky.] 90 S. W. 975; St Louis S. W. R. Co. v. Parks [Tex. Civ. App.] 90 S. W. 343; Sandy River Co. v. Sparks [Ky.] 91 S. W. 265; Galveston, etc., R. Co. v. Udalle [Tex. Civ. App.] 91 S. W. 330; Miller v. Metropolitan Life Ins. Co. [Ky.] 89 S. W. 183.

The weight of the evidence will not be passed on. Bishop Co. v. Shelhorse [C. C. A.] 141 F. 643; Southern Pac. Co. v. Cavin [C. C. A.] 144 F. 348; Burke v. Hulett, 216 Ill. 545, 75 N. E. 240; Leighton & H. Steel Co. v. Snell, 217 Ill. 152, 75 N. E. 462; Perdue v. Gill [Ind. App.] 73 N. E. 844; Karges Furniture Co. v. Amalgamated Woodworkers' Local Union No. 131 [Ind.] 75 N. E. 877; American Food Co. v. Halstead [Ind.] 76 N. E. 251; Swygart v. Willard [Ind.] 76 N. E. 755; Beery v. Driver [Ind.] 76 N. E. 967; Bennett v. Louisville R. Co. [Ky.] 90 S. W. 1052; Hoogewerff v. Flack [Md.] 61 A. 184; Illinois Cent. R. Co. v. Schultz [Miss.] 39 So. 1005; Lenoir v. People's Bank [Miss.] 40 So. 5; Fitch v. Martin [Neb.] 104 N. W. 1072; Wheaton v. Liverpool & London & Globe Ins. Co. [S. D.] 104 N. W. 850; Lee v. Dwyer [S. D.] 107 N. W. 674; Domenico v. El Paso Elec. R. Co. [Tex. Civ. App.] 90 S. W. 60; Galveston, etc., R. Co. v. Roberts [Tex. Civ. App.] 91 S. W. 375; International & G. N. R. Co. v. Edwards [Tex. Civ. App.] 91 S. W. 640; Norfolk & W. R. Co. v. Spencer's Adm'x [Va.] 52 S. E. 310; In re Arneson's Will [Wis.] 107 N. W. 21. Where evidence can be reasonably reconciled to the physical facts, the appellate court will not reject it nor weigh it though the weight of the physical evidence seems against that given by the witness. Stafford v. Adams, 113 Mo. App. 717, 88 S. W. 1130.

Credibility of witnesses will not be passed on by reviewing court. Anglo-Californian Bank v. Cerf, 147 Cal. 393, 81 P. 1081; Neander v. Neander [Colo.] 84 P. 69; Hoyt v. New York, etc., R. Co. [Conn.] 63 A. 393; Christy v. Elliot, 216 Ill. 31, 74 N. E. 1085; Chicago R. Co. v. Hyndshaw, 116 Ill. App. 367; Krahn v. Bickford, 118 Ill. App. 511; Chicago Furniture Co. v. Cronk [Ind. App.] 74 N. E. 627; Marshall v. Levich [Iowa] 106 N. W. 516; City of Cheney v. Anderson [Kan.] 84 P. 137; Leverton v. Rork [Kan.] 85 P. 800; McDonnell v. New Orleans Cypress Co. [La.] 38 So. 896; Berry v. Pelneault, 188 Mass. 413, 74 N. E. 917; In re Pederson's Estate [Minn.] 106 N. W. 958; Moore v. Wallace [Okl.] 82 P. 825; Texas & P. R. Co. v. Skates [Tex. Civ. App.] 87 S. W. 1166; Citizens' R. Co. v. Sinclair [Tex. Civ. App.] 93 S. W. 703; Norfolk & W. R. v. Spencer's Adm'x [Va.] 52 S. E. 310. It is the province of the trial court to decide which of two contradictory statements of a witness is true. Clark v. Torrington [Conn.] 63 A. 657.

Number of witnesses: That more witnesses testified against the finding than for it does not warrant reversal. Sanford v. Hoge, 118 Ill. App. 609; Barry v. Union R. Co., 105 App. Div. 520, 94 N. Y. S. 449; Fidelity & Casualty Co. v. Harder, 212 Pa. 96, 61 A. 880.

Though appellate court would have decided otherwise it will not reverse. Maitland v. Reed [Ind. App.] 77 N. E. 290; McCormick v. Shea, 99 N. Y. S. 467.

Judgment based on conflicting evidence will not be disturbed. Garrett v. Garner [Ark.] 89 S. W. 1005; Lake v. Little Rock Trust Co. [Ark.] 90 S. W. 847; Central of Georgia R. Co. v. Sparks [Ga.] 54 S. E. 194;

Village of Wilmette v. Brachle, 110 Ill. App. 356; Sauter v. Anderson, 110 Ill. App. 574; Chicago & J. Elec. R. Co. v. Herbert, 115 Ill. App. 248; Madison Coal Co. v. Hayes, 116 Ill. App. 94; Brown v. Thomas, 116 Ill. App. 114; Pittsburg, etc., R. Co. v. Campbell, 116 Ill. App. 356; Springfield Consolidated R. Co. v. Lane, 116 Ill. App. 517; Henderson v. Tobey, 116 Ill. App. 539; Chicago, etc., R. Co. v. Funk, 117 Ill. App. 69; Loyal Americans v. Fisher, 117 Ill. App. 150; Chicago Union Traction Co. v. Lundahl, 117 Ill. App. 220; Anglo-Wyoming Oil Fields, Limited, v. Miller, 117 Ill. App. 552; Linn Co. v. Harris, 118 Ill. App. 5; City of Waukegan v. Weale, 118 Ill. App. 460; City of Kankakee v. Sannes, 118 Ill. App. 531; Brueggemann v. Brueggemann, 119 Ill. App. 112; Chicago & A. R. Co. v. Wightman, 119 Ill. App. 263; Warman-Block-Chamberlain Co. v. Indianapolis Mortar & Fuel Co. [Ind. App.] 75 N. E. 672; Fraternal Const. Co. v. Jackson Foundry & Machine Co. [Ky.] 89 S. W. 265; Louisville & N. R. Co. v. Helm [Ky.] 89 S. W. 709; Tevis v. Carter [Ky.] 90 S. W. 264; Graham v. Bryant [Ky.] 91 S. W. 253; East Tennessee Tel. Co. v. Luttrell [Ky.] 93 S. W. 904; Goodwin v. Mitchell [Miss.] 38 So. 657; Dysart-Cook Mule Co. v. Reed, 114 Mo. App. 296, 89 S. W. 591; Sayre v. Trustees of Princeton University, 192 Mo. 95, 90 S. W. 787; Carp v. Queen Ins. Co. [Mo. App.] 92 S. W. 1137; Hill v. Davis [Mo. App.] 93 S. W. 829; Freeman v. Slay [Tex. Civ. App.] 13 Tex. Ct. Rep. 664, 88 S. W. 404; International, etc., R. Co. v. Smith [Tex. Civ. App.] 90 S. W. 709. A finding of the city court of Gadsden will not be disturbed where the evidence is conflicting and oral, unless clearly and manifestly against the weight, notwithstanding Acts 1890-91, § 14, p. 1098. Gadsden Grocery & Feed Co. v. McMahen [Ala.] 40 So. 87; California Development Co. v. Yuma Valley, U. L. & W. Co. [Ariz.] 84 P. 88; St. Louis, etc., R. Co. v. Coombs [Ark.] 88 S. W. 595; Luster v. Robinson [Ark.] 88 S. W. 896; St. Louis, etc., R. Co. v. Shaver [Ark.] 88 S. W. 961; Remmel v. Witherington [Ark.] 88 S. W. 967; Thompson v. Baxter [Ark.] 88 S. W. 985; Patterson v. San Francisco & S. M. Electric R. Co., 147 Cal. 178, 81 P. 531; Burns v. Schoenfeld [Cal. App.] 81 P. 713; Anglo-Californian Bank v. Cerf, 147 Cal. 384, 81 P. 1077; Cave v. Tyler, 147 Cal. 454, 82 P. 64; Heath v. Manson [Cal.] 82 P. 331; Doe v. Allen [Cal. App.] 82 P. 568; Albion Lumber Co. v. California Bridge & Construction Co. [Cal. App.] 82 P. 631; In re Walker's Estate [Cal.] 82 P. 770; Grunsky v. Field [Cal. App.] 82 P. 979; Castle v. Sibley [Cal. App.] 82 P. 1067; Jordahl v. Hayda [Cal. App.] 82 P. 1079; McNeill v. Stitt [Cal. App.] 82 P. 1121; Wickersham Banking Co. v. Nicholas [Cal. App.] 82 P. 1124; Hanse v. Phillips [Cal. App.] 82 P. 1127; Frutig v. Trafton [Cal. App.] 83 P. 70; McGue v. Rommel [Cal.] 83 P. 1000; McLean v. Llewellyn Iron Works [Cal. App.] 83 P. 1082; Exchange Bank v. Veirs [Cal. App.] 84 P. 455; Smith v. Dubost [Cal.] 84 P. 38; Showers v. Zanone [Cal. App.] 85 P. 857; Kahn v. Earnest [Colo.] 81 P. 754; Hurd v. Fleck [Colo.] 82 P. 485; Frazier v. Shoup [Colo.] 83 P. 777; Colorado & S. R. Co. v. Charles [Colo.] 84 P. 67; Neander v. Neander [Colo.] 84 P. 69; Patrick v. Brown [Colo.] 85 P. 325; Walker v. Lee [Fla.] 40 So. 881; Pool v. Warren County, 123 Ga. 205, 51 S. E. 328; Southern R. Co. v. Holbrook [Ga.] 53 S. E. 203; Atlantic Coast Line R. Co. v. Baxter [Ga.] 53 S. E. 959; Corker v. Stafford [Ga.] 54 S. E. 92; Davison v. Herndon [Ga.] 54 S. E. 92; Trust Co. v. Ray [Ga.] 54 S. E. 145; Hansen v. Haley [Idaho] 81 P. 935; Gumaer v. White Pine Lumber Co. [Idaho] 82 P. 771; Turmes v. Kiesner [Idaho] 85 P. 212; Illinois, etc., R. Co. v. Ring, 219 Ill. 91, 76 N. E. 83; Compher v. Browning, 219 Ill. 429, 76 N. E. 678; Martin v. Chicago & M. Elec. R. Co., 220 Ill. 97, 77 N. E. 86; Mueller & Co. v. Kinkead, 113 Ill. App. 132; Chicago Furniture Co. v. Cronk [Ind. App.] 74 N. E. 627; Stametz v. Mitchenor [Ind.] 75 N. E. 579; Warman-Black-Chamberlain Co. v. Indianapolis Mortar & Fuel Co. [Ind. App.] 75 N. E. 672; Grand Lodge A. O. U. W. v. Barwe [Ind. App.] 75 N. E. 971; Over v. Dehne [Ind. App.] 76 N. E. 883; Pittsburgh, etc., R. Co. v. Simons [Ind. App.] 76 N. E. 883; Supreme Lodge K. P. v. Andrews [Ind. App.] 77 N. E. 361; Polk v. Johnson [Ind. App.] 77 N. E. 1139; First Nat. Bank v. Dutcher [Iowa] 104 N. W. 497; Ousley v. Hampe [Iowa] 105 N. W. 122; Buchholtz v. Incorporated Town of Radcliffe [Iowa] 105 N. W. 336; Chariton Ice Co. v. Spring Lake Ice Co. [Iowa] 105 N. W. 1014; Gladiator Consol. Gold Mines & Milling Co. v. Steele [Iowa] 106 N. W. 737; Gibbons v. Woolley [Kan.] 85 P. 809; Smith's Adm'r v. Louisville & N. R. Co. [Ky.] 89 S. W. 694; Drake v. Holbrook [Ky.] 92 S. W. 297; Nashville, etc., R. Co. v. Higgins [Ky.] 92 S. W. 549; Smith v. Minden Lumber Co., 114 La. 1035, 38 So. 821; Harvey v. Louisiana Western R. Co., 114 La. 1065, 38 So. 859; Morrison v. Morrison [Me.] 63 A. 392; Gowey v. Gowey [Mass.] 77 N. E. 526; Pels & Co. v. Cambridge Architectural Iron Works [Mass.] 77 N. E. 1152; Draggo v. West Bay City Sugar Co. [Mich.] 13 Det. Leg. N. 245, 107 N. W. 911; Libby v. Barry [N. D.] 107 N. W. 972; Dart v. Richardson [Minn.] 104 N. W. 1094; Alabama & V. R. Co. v. Dear [Miss.] 39 So. 812; Harrison v. Pounds, 190 Mo. 349, 88 S. W. 713; Lehman v. Knapp [Mont.] 82 P. 798; Union Bank & Trust Co. v. Knobb [Mont.] 82 P. 837; Douglas v. Smith [Neb.] 106 N. W. 173; Cuatt v. Ross [Neb.] 106 N. W. 1044; Fike v. Ott [Neb.] 107 N. W. 774; Union Pac. R. Co. v. Meyer [Neb.] 107 N. W. 793; Berry v. Hutchins [N. H.] 61 A. 550; Cunningham v. Springer [N. M.] 82 P. 232; Hill v. Page, 108 App. Div. 71, 95 N. Y. S. 465; Wamser v. Browning, King & Co., 109 App. Div. 53, 95 N. Y. S. 1051; New York Metal Ceiling Co. v. Leonard, 48 Misc. 500, 96 N. Y. S. 187; Olsen v. Mahoney, 96 N. Y. S. 196; Sheppard Engineering & Construction Co. v. Spofford, 96 N. Y. S. 206, Sammis v. Day, 48 Misc. 327, 96 N. Y. S. 777; Neumann v. Welkowitz, 97 N. Y. S. 980; Palmer v. Cowie, 7 Ohio C. C. (N. S.) 46; Reaves v. Reaves [Okl.] 82 P. 490; Davis v. Fitzmaurice [Okl.] 83 P. 415; Fay v. Fay, 27 Pa. Super. Ct. 328; Lazzari v. Pennsylvania R. Co., 28 Pa. Super. Ct. 175; Stoner v. Honse, 28 Pa. Super. Ct. 485; Fidelity Title & Trust Co. v. Illinois Life Ins. Co. [Pa.] 63 A. 51; Conard v. Pennsylvania R. Co. [Pa.] 63 A. 424; Fries v. Mather [Pa.] 63 A. 695; Galligan v. Woonsocket St. R. Co. [R. I.] 62 A. 376; Keys v. Winnsboro Granite Co. [S. C.] 51 S. E. 549; Cain v. Atlantic Coast Line R. Co. [S. C.] 54 S. E. 244; Quale v. Hazel [S. D.] 104 N. W. 215; Barton v. Koon [S. D.] 104 N. W. 521; Dodson v. Crocker [S. D.] 105 N. W. 929; Morrill v. Bosley [Tex. Civ. App.] 13 Tex. Ct. Rep. 529, 88 S. W. 519; Galveston, etc., R. Co. v. Paschall [Tex. Civ. App.] 92 S. W. 446; Tuttle

presumption in favor of a verdict is strengthened by approval by the trial judge on

v. Robert Moody & Son [Tex. Civ. App.] 94 S. W. 134; Walker v. Tenison Bros. Saddlery Co. [Tex. Civ. App.] 94 S. W. 166; Smith Table Co. v. Madsen [Utah] 84 P. 885; Lyndon Sav. Bank v. International Co. [Vt.] 62 A. 50; Norfolk & W. R. Co. v. Spencer's Adm'x [Va.] 52 S. E. 310; Virginia Fire & Marine Ins. Co. v. Hogue [Va.] 54 S. E. 8; Wallace v. Douglas [W. Va.] 51 S. E. 869; Shaw v. Seattle, 39 Wash. 590, 81 P. 1057; Woods v. Globe Nav. Co. [Wash.] 82 P. 401; Wick v. Tacoma Eastern R. Co. [Wash.] 82 P. 711; Creamer v. Moran Bros. Co. [Wash.] 84 P. 592.

In Georgia: A judge of the superior court, in passing on a certiorari, where questions of fact are involved and the evidence is conflicting, has a discretion to sustain the certiorari similar to the discretion allowed him in passing upon a first new trial, and the discretion will not be controlled, unless it has been manifestly abused. Houston v. Polk [Ga.] 52 S. E. 83. The supreme court will not disturb the first grant of a new trial upon certiorari from the city court to the supreme court, unless the verdict is demanded by the evidence. Fokes v. Wells, 123 Ga. 361, 51 S. E. 333. Where the evidence is conflicting, and **the trial judge made a personal examination of the premises,** the appellate court will not disturb findings and decree based thereon. Red Wing Gold Min. Co. v. Clays [Utah] 83 P. 841.

Unless so contrary to evidence as to denote passion or prejudice. West Chicago St. R. Co. v. Brown, 112 Ill. App. 351; Fabian v. Traeger, 117 Ill. App. 176; Summerville v. Penn Drilling Co., 119 Ill. App. 152; Mallott v. Schlosser, 119 Ill. App. 259; Baltimore & O. S. W. R. Co. v. Thurston, 119 Ill. App. 321; Standard Mfg. Co. v. Hudson, 113 Mo. App. 344, 88 S. W. 137; Fleming v. Brauer, 96 N. Y. S. 594; Mitchell v. Pinckney, 127 Iowa, 696, 104 N. W. 286.

Unless manifestly against weight of evidence. Brown v. Los Angeles R. Co. [Cal. App.] 84 P. 362; St. Aubin v. Turley [Colo.] 82 P. 944; Bluthenthal v. Mohlmann [Fla.] 38 So. 709; Pinkstaff v. Steffy, 216 Ill. 406, 75 N. E. 163; Leathe v. Thomas, 218 Ill. 246, 75 N. E. 810; Chicago Union Traction Co. v. O'Donnell, 113 Ill. App. 259; Pennsylvania Co. v. Rosset, 116 Ill. App. 342; Wallace v. Nergenah, 116 Ill. App. 453; Morrissey v. Rogers, 116 Ill. App. 545; South Chicago City R. Co. v. Kinnare, 117 Ill. App. 1; Provident Sav. Life Assur. Soc. of N. Y. v. King, 117 Ill. App. 556; Willey v. Dake, 118 Ill. App. 47; Kinser v. Barnes, 118 Ill. App. 471; Chicago Chronicle Co. v. Franklin, 119 Ill. App. 384; Fisk v. Chicago Water Chute Co., 119 Ill. App. 536; Louisville Water Co. v. Philip's Adm'r [Ky.] 89 S. W. 700; Louisville & N. R. Co. v. Eaden [Ky.] 93 S. W. 7; Gorton v. Milwaukee Mechanics' Ins. Co., 115 Mo. App. 69, 90 S. W. 747; Union Pac. R. Co. v. Fickenscher [Neb.] 105 N. W. 39; Linderman v. Nolan [Okl.] 83 P. 796; Miles v. Swanson [Or.] 82 P. 954; Jackson v. Prior Hill Min. Co. [S. D.] 104 N. W. 207; Missouri, etc., R. Co. v. Dickson [Tex. Civ. App.] 90 S. W. 507; Chase v. Hinkley [Wis.] 105 N. W. 230.

In Indiana: The appellate court, notwithstanding Acts 1903, c. 193, § 8, requiring it to pass upon the weight of the evidence will not disturb the decision of the lower court upon the weight of the evidence unless there is a clear lack of evidence to support a material fact necessary to support the finding of such court, or the evidence before such court was all documentary, by depositions, or otherwise of such a clear and conclusive character as to warrant the appellate court in saying as a matter of law that the lower court's decision was erroneous. Parkison v. Thompson, 164 Ind. 609, 73 N. E. 109; Hudelson v. Hudelson, 164 Ind. 694, 74 N. E. 504; Smith v. Smith [Ind. App.] 74 N. E. 1008; Ray v. Baker [Ind.] 74 N. E. 619; United States Board & Paper Co. v. Moore [Ind. App.] 74 N. E. 1094; Tyler v. Davis [Ind. App.] 75 N. E. 3; Doell v. Schier [Ind. App.] 75 N. E. 600; Over v. Dehne [Ind. App.] 75 N. E. 664; Nichols & Shepherd Co. v. Berning [Ind. App.] 76 N. E. 776; New York, etc., R. Co. v. Robbins [Ind. App.] 76 N. E. 804.

Where the verdict is palpably against the evidence it will be set aside. Denver & R. G. R. Co. v. Vitello [Colo.] 81 P. 766; Hassell Iron Works Co. v. Cohen [Colo.] 85 P. 89; Garrett v. Cronin [Idaho] 81 P. 615; The Fair v. Hoffmann, 110 Ill. App. 500; Singer Mfg. Co. v. Weil, 115 Ill. App. 384; Chicago, etc., R. Co. v. Nelson, 115 Ill. App. 432; Espert v. Ahlschlager, 117 Ill. App. 484; Love v. McElroy, 118 Ill. App. 412; Elkhart Paper Co. v. Fulkerson [Ind. App.] 75 N. E. 283; Hoyt v. Graham [Iowa] 105 N. W. 456; Shoemaker v. Commercial Union Assur. Co. [Neb.] 106 N. W. 316; Lawrence v. Wilson, 107 App. Div. 365, 95 N. Y. S. 147; Singer Mfg. Co. v. Pollock, 96 N. Y. S. 202; Hamilton v. Mahn, 96 N. Y. S. 281; Morlarity v. Board of Education, 98 N. Y. S. 251; McBride v. Korff, 98 N. Y. S. 822.

94. Ah Gett v. Carr [Cal. App.] 84 P. 458; South Chicago City R. Co. v. Kinnare, 117 Ill. App. 1; Shevlin v. Shevlin [Minn.] 105 N. W. 257; Casey v. Wrought Iron Bridge Co., 114 Mo. App. 47, 89 S. W. 330; Hyatt v. De Hart [N. C.] 52 S. E. 781; Millhiser & Co. v. Leatherwood [N. C.] 52 S. E. 782; Wilson v. Alexander [Tenn.] 88 S. W. 935. The findings of the trial court will be reviewed as upon a demurrer to the evidence. United Moderns v. Rathbun [Va.] 52 S. E. 552. Presumption does not obtain in favor of a judgment based upon contradictory evidence where the record reveals further available evidence on the disputed points. State Bank v. Greenberg, 95 N. Y. S. 503; Harding v. Harding [Colo.] 85 P. 423; Atlanta & B. Air Line R. v. Weaver, 121 Ga. 466, 49 S. E. 291; Ford v. Fargason, 123 Ga. 257, 51 S. E. 318; Southern R. Co. v. Henry, 123 Ga. 642, 51 S. E. 579; Screws v. Anderson [Ga.] 52 S. E. 429; Andrew v. Carithers [Ga.] 52 S. E. 653; Small v. Small [Ga.] 52 S. E. 768; Southern R. Co. v. Rumsey [Ga.] 52 S. E. 812; Alfriend v. Fox [Ga.] 52 S. E. 925; Southern R. Co. v. Howard [Ga.] 52 S. E. 1038; James v. Ayer [Ga.] 53 S. E. 103; Murphey v. Moreland [Ga.] 53 S. E. 103; Caverly v. Heaton [Ga.] 53 S. E. 103; Slaton v. Fowler [Ga.] 53 S. E. 567; Wright v. Davenport [Iowa] 104 N. W. 1022; Scott v. Sloan [Kan.] 84 P. 117; Great Falls Meat Co. v. Jenkins [Mont.] 84 P. 74.

motion for new trial,[95] or by the concurrence of several verdicts on successive trials,[96] or the concurrent findings of two lower courts.[97] The presumption applies to findings in law [98] or equity cases [99] and to the findings of referees,[1] auditors,[2] commis-

95. Keefer v. Union County, 212 Pa. 520, 61 A. 1021; Shores of Southern R. Co. [S. C.] 51 S. E. 699; Drugalis v. Northwestern Imp. Co. [Wash.] 83 P. 101; Wittmann v. Berger [Wis.] 104 N. W. 815; Hirte v. Eastern Wisconsin R. & Light Co. [Wis.] 106 N. W. 1068; Meyer v. Home Ins. Co. [Wis.] 106 N. W. 1087; Ritter v. Chicago, etc., R. Co. [Wis.] 106 N. W. 1103. Conversely, a reluctant approval weakens the presumption. A finding of a justice in favor of plaintiff will be reversed where the evidence is conflicting and the justice endorsed a memorandum upon the summons that he did not believe plaintiff's story. Sullivan v. Wolff, 98 N. Y. S. 824. Where the trial court unconditionally overruled a motion for a new trial, the appellate court would not consider a colloquy between the judge and counsel in which the judge expressed the opinion that the amount was excessive and that if appellant would enter a remittitur for a certain amount and agree not to appeal a new judgment would be rendered for the amount of the original judgment less the amount of the remittitur. Hancheft v. Haas, 219 Ill. 546, 76 N. E. 845.

96. Koester v. New York City R. Co., 96 N. Y. S. 117; Georgia R. & Banking Co. v. Newmeyer, 123 Ga. 882, 51 S. E. 709; Equitable Loan & Security Co. v. Lewman [Ga.] 52 S. E. 593; Love v. McElroy, 118 Ill. App. 412; Malott v. Woods, 119 Ill. App. 90; Lacs v. James Everard's Breweries, 107 App. Div. 250, 95 N. Y. S. 25. See 5 Columbia L. R. 619; Clinton v. Frear, 107 App. Div. 571, 95 N. Y. S. 321. Statements of counsel in argument unsupported by evidence, may destroy this presumption. Mullarkey v. Interurban St. R. Co., 48 Misc. 638, 96 N. Y. S. 115.

97. McCahan Sugar Refining Co. v. The Wildcroft, 201 U. S. 378, 50 Law. Ed. —; Darlington v. Turner, 202 U. S. 195, 50 Law. Ed. —; United States v. Clark, 200 U. S. 601, 50 Law. Ed. —; Madden v. Hughes [N. Y.] 78 N. E. 167. Findings supported by evidence and sustained by court in banc, will be sustained by superior court. McArdle's Estate, 28 Pa. Super. Ct. 106.

98. Broderick v. O'Leary, 112 Ill. App. 658; Barnsdall v. Waltemeyer [C. C. A.] 142 F. 415; Fitzgerald v. Bassford [C. C. A.] 142 F. 134; Neely Elec. Construction & Supply Co. v. Browning, 25 App. D. C. 84; Loyd v. Oates [Ala.] 38 So. 1022; Cooper v. Shannon [Colo.] 85 P. 175; McCarthy v. Consolidated R. Co. [Conn.] 63 A. 725; Mitchell v. Pinckney, 127 Iowa, 696, 104 N. W. 286; Levy v. Stegemann [Iowa] 104 N. W. 372; Shaw v. Chicago, etc., R. Co. [Iowa] 105 N. W. 120; Bullard v. Hopkins [Iowa] 105 N. W. 197; Blackledge v. Davis [Iowa] 105 N. W. 1000; Rauen v. Prudential Ins. Co. [Iowa] 106 N. W. 198; Love v. Love [Kan.] 83 P. 201; Fillebrown v. Haywood [Mass.] 77 N. E. 45; Lund v. Smith [Mass.] 77 N. E. 893; Rausch v. Michel, 192 Mo. 293, 91 S. W. 99; Fallis v. Gray, 115 Mo. App. 253, 91 S. W. 175; Spencer v. Wilson [Neb.] 104 N. W. 930; Josephson v. Woods, 94 N. Y. S. 30; Pillsbury v. Streeter, Jr., Co. [N. D.] 107 N. W. 40; McClung v. McPherson [Or.] 81 P. 567; Flegel v. Chas. Koss & Bros. Co. [Or.] 83 P. 847; Savage v. Salem Mills Co. [Or.] 85 P. 69; In re McClellan's Estate [S. D.] 107 N. W. 681; Paris Transit Co. v. Alexander [Tex. Civ. App.] 90 S. W. 1119. In habeas corpus to determine the right to the custody of an infant, the finding of the lower court as to the facts has the effect of a verdict of a jury. Smiley v. McIntosh [Iowa] 105 N. W. 577. Findings of a court in probate proceedings are as binding on appeal as a verdict of a jury. McClanahan v. McClanahan [Iowa] 105 N. W. 833. Only special findings required to be reviewed under Code §§ 2196, 3319, where jury is waived. First Bank of Elba v. Mayfield Woolen Mills [Ala.] 40 So. 954. A finding as to the execution of a deed, though stated as a conclusion of law, there being no direct evidence, will not be disturbed where authorized by the evidence and not against the great preponderance of the evidence. Veatch v. Gray [Tex. Civ. App.] 91 S. W. 324. The conclusiveness of a finding of the court supported by the evidence is not affected by incorporating findings of evidentiary facts. Rausch v. Michel, 192 Mo. 293, 91 S. W. 99.

99. Graves v. Hicks [Mass.] 77 N. E. 831; Big Six Development Co. v. Mitchell [C. C. A.] 138 F. 279; Calkins v. Worth, 117 Ill. 478; Letchworth v. Vaughan [Ark.] 90 S. W. 1001; Arnold v. McBride [Ark.] 93 S. W. 989; Hazard Powder Co. v. Somersville Mfg. Co. [Conn.] 61 A. 519; Amos v. American Trust & Savings Bank [Ill.] 77 N. E. 462; Ray v. Baker [Ind.] 74 N. E. 619; Hudleson v. Hudleson, 164 Ind. 694, 74 N. E. 504; Smith v. Smith [Ind. App.] 74 N. E. 1008; Gay v. Ray, 189 Mass. 112, 75 N. E. 138; Cohen v. Nagle [Mass.] 76 N. E. 276; Layne v. Layne [Ky.] 90 S. W. 555; Spurrier v. Hodges [Ky.] 90 S. W. 559; Roberts v. Williams [Ky.] 90 S. W. 565; Bowling v. Rouse [Ky.] 90 S. W. 1073; Jackson v. Jackson [Ky.] 93 S. W. 654; Grand Cent. Min. Co. v. Mammoth Min. Co. [Utah] 83 P. 648. As to demonstrate some oversight or mistake which affects the substantial rights of appellant. Grand Cent. Min. Co. v. Mammoth Min. Co. [Utah] 83 P. 648; Johnson v. Jones [S. C.] 51 S. E. 805; Lowe v. Walker [Ark.] 91 S. W. 22. Ordinarily great weight is given to the findings of the chancellor. Caudill v. Bayes [Ky.] 89 S. W. 114; Bourne v. Salin [Ky.] 89 S. W. 673; McKinney v. Northcutt, 114 Mo. App. 146, 89 S. W. 351; Iowa Nat. Bank v. Cooper [Iowa] 107 N. W. 625; Meehan v. Nelson [C. C. A.] 137 F. 731. In equity cases the appellate court will examine the evidence and arrive at an independent opinion of the facts established except in so far as a presumption in favor of the findings is derived from the opportunity of the lower court to see, hear, and judge the witnesses. Roe v. Howard County [Neb.] 106 N. W. 587. Assuming that the lower court in this case exercised equity powers so as to render its conclusion subject to review on the evidence, the appellate court was justified in giving some weight to that conclusion on the facts. Mosher v. Goodale [Iowa] 106 N. W. 195. In cases of exclusive equitable jurisdiction, the appellate court may pass upon the weight

sioners,[3] registers,[4] masters,[5] and special tribunals.[6] Slighter evidence will suffice where a fact was not seriously disputed or the theory of trial admitted it.[7]

(§ 13) *G. Rulings and decisions on intermediate appeals.*[8]—Where an intermediate appeal is had, the findings of fact therein[9] are usually final, review in the court of last resort being confined to questions of law.[10] The judgment only of the

of the evidence. State v. Newton County Com'rs [Ind.] 74 N. E. 1091. A verdict of a jury in an equity case adopted by the court, must be treated as a finding of the court. Hackett v. View, 109 App. Div. 351, 95 N. Y. S. 675. Under Code 1896, § 3826, subd. 1, no consideration can be given to the finding of the chancellor as to which party was the dominate party to a transfer of an interest in certain properties. McLeod v. McLeod [Ala.] 40 So. 414. Although the judgment of the circuit court in an equity case is entitled to weight where oral testimony was given, yet where the facts are practically undisputed, the appellate court will weigh them. Harris Banking Co. v. Miller, 190 Mo. App. 640, 89 S. W. 629. Where the evidence is in conflict, the findings of the trial court in a suit in chancery will not be disturbed on appeal, notwithstanding Act 1903, P. 341, p. 338, c. 193, § 8, requiring the supreme court to weigh the evidence in case tried by the court without a jury. Ray v. Baker [Ind.] 74 N. E. 619. Upon appeal in equity without a bill of exceptions only such special findings will be considered as are embraced within the issues and a decree if supported by the pleadings will be upheld in so far as it is not contrary to such findings. Kupke v. Polk [Neb.] 103 N. W. 321.

1. Mogenson v. Zubler [Colo.] 84 P. 981; Poole v. Poindexter [Kan.] 83 P. 126; La Jara Creamery & Live Stock Ass'n v. Hansen [Colo.] 83 P. 644; Tanner v. Echard, 107 App. Div. 79, 94 N. Y. S. 1013; Wood v. Saginaw Gold Min. & Mill. Co. [S. D.] 105 N. W. 101; Alachua Phosphate Co. v. Anglo-Continental Guano Works [Fla.] 40 So. 71. A bill in equity having been referred by a rule of court without conditions or limitations and the report of the referee accepted by the court, an appeal from a final decree made in accordance with the terms of the report cannot be sustained. Piscataquis Sav. Bank v. Herrick [Me.] 62 A. 214. A referee has full power to decide all questions arising both of law and fact, and in the absence of fraud, prejudice, or mistake on his part, his decision is final. Id.

2. Johnson's Estate, 29 Pa. Super. Ct. 255; Stewart's Estate, 29 Pa. Super. Ct. 260; In re Reinoehl's Estate, 212 Pa. 359, 61 A. 943; In re McPherran's Estate, 212 Pa. 425, 61 A. 954; In re McPherran's Estate, 212 Pa. 432, 61 A. 956; In re Mace's Estate [Pa.] 62 A. 370; In re Logan & Moulds' Assigned Estate [Pa.] 62 A. 843.

3. Burger v. Allen [Ky.] 89 S. W. 542; Pickens v. Daniels [W. Va.] 52 S. E. 215; Hall v. Hall [Va.] 52 S. E. 557.

4. Rust v. Electric Lighting Co. [Ala.] 40 So. 89; Walter v. Moseley [Ala.] 39 So. 765.

5. Reed v. Joiner, 119 Ill. App. 248; General Fire Extinguisher Co. v. Lamar [C. C. A.] 141 F. 353; Love v. Export Storage Co. [C. C. A.] 143 F. 1; Smith's Adm'r v. Smith [Vt.] 61 A. 558.

6. The court has no authority to review the action of the school superintendent and of the board of county commissioners in organizing a new school district under Ballinger's Ann. Codes and St., § 2275, unless there was want of jurisdiction or an excess of jurisdiction. Wilsey v. Cornwall [Wash.] 82 P. 303.

7. Chicago Union Traction Co. v. Lundahl, 117 Ill. App. 220.

8. See 5 C. L. 233.

9. Where there is no dispute as to the facts stated in the record, it is unnecessary for the court of civil appeals to make additional findings. State v. Galveston, etc., R. Co. [Tex. Civ. App.] 93 S. W. 469.

10. **Illinois:** Findings of fact made by the appellate court are conclusive upon the supreme court. Wells & French Co. v. Kapaczynski, 218 Ill. 149, 75 N. E. 751; Chicago Union Traction Co. v. Newmiller, 215 Ill. 383, 74 N. E. 410. Finding as to the amount of damages. Penn Plate Glass Co. v. Rice Co. 216 Ill. 567, 75 N. E. 246. Where there is evidence to support such findings. Illinois Steel Co. v. Preble Mach. Works Co., 219 Ill. 403, 76 N. E. 574. The supreme court will not pass upon the credibility of witnesses or the weight of preponderance. Chicago City R. Co. v. McDonough [Ill.] 77 N. E. 577. Cannot deal with the preponderance of the testimony. Mills v. Larrance, 217 Ill. 446, 75 N. E. 555. Where the appellate court reverses the judgment of the trial court and makes findings of fact for itself. Malkan v. Chicago, 217 Ill. 471, 75 N. E. 548. Where the evidentiary facts are agreed upon, the finding of the appellate court upon the ultimate fact is binding upon the supreme court. First Nat. Bank v. Whittier [Ill.] 77 N. E. 563. The judgment of the appellate court affirming a judgment of the circuit court is conclusive upon the supreme court upon questions of fact. Barbee v. Findlay [Ill.] 77 N. E. 590. Findings of the trial court which have been affirmed by the appellate court. Interstate Independent Tel. & Tel. Co. v. Towanda [Ill.] 77 N. E. 456; Anglo-Wyoming Oil Fields v. Miller, 216 Ill. 272, 74 N. E. 821; Chicago City R. Co. v. Shaw, 220 Ill. 532, 77 N. E. 139; Kellyville Coal Co. v. Strine, 217 Ill. 516, 75 N. E. 375. If there is any evidence to support them. Chicago Union Traction Co. v. Rosenthal, 217 Ill. 458, 75 N. E. 578. Where the evidence fairly tends to support the findings of the jury. Stecher v. People, 217 Ill. 348, 75 N. E. 501. Will not consider whether the weight of the evidence supports the verdict or finding. United Breweries Co. v. O'Donnell [Ill.] 77 N. E. 547; Burke v. Hulet, 216 Ill. 545, 75 N. E. 240; Central Acc. Ins. Co. v. Rembe, 220 Ill. 151, 77 N. E. 123. Cannot consider the question of excessiveness of damages. United Breweries Co. v. O'Donnell [Ill.] 77 N. E. 547; Chicago & J. Elec. R. Co. v. Patton, 219 Ill. 214, 76 N. E. 381. May consider application of the law to the facts. Hayes v. Chicago Tel. Co., 218 Ill. 414, 75 N. E. 1003. The supreme

appellate court and not its opinion is reviewable,[11] and the review is limited to the questions there litigated.[12]

court must presume that the appellate court applied to the evidence rules of law held in proposition submitted. If the evidence did not justify the conclusion of fact when the principles of law held in the propositions were applied to it, the finding was still one of fact just like the verdict of a jury under instructions as to the law, and the power to review such questions as committed to the appellate court. Provident Sav. Life Assur. Soc. v. King, 216 Ill. 416, 75 N. E. 166.

New York: Court of appeals will not review the sufficiency of the evidence to sustain a finding of fact where there has been a unanimous decision of the appellate court that such finding is sustained by the evidence, although the case was tried prior to the re-enactment of Code Civ. Proc. § 1033, Laws 1904, p. 1252, c. 491, and the plaintiff did not have an opportunity to present at special term a statement of facts which he deemed established by the evidence to obtain a ruling thereon. See Const. art. 6, § 9. Jacobson v. Brooklyn Lumber Co. [N. Y.] 76 N. E. 1075. Cannot under Code Civ. Proc. § 1023, amended by Laws 1904, p. 1252, c. 491, review the refusal of the trial court to make a requested finding of fact where the fact which the trial court has been requested to find is a fact directly in conflict with a fact actually found by the trial court as the basis of its decision, or a fact which would necessarily nullify such finding, and where the finding of fact as made has the support of a unanimous affirmance by the appellate division. Le Gendre v. Scottish Union & Nat. Ins. Co. [N. Y.] 76 N. E. 472. While refusal of the trial court to make findings of fact may be reviewed on appeal to the appellate division, it cannot be in the court of appeals. Id. Exceptions under Code Civ. Proc. § 1023, to refusal to make findings, was available on appeal to the appellate division and on appeal from the appellate division to the court of appeals, where the decision of the appellate division was not unanimous. Id. It is only the evidence and proceedings on the trial which the court canont examine. The pleadings, being a part of the judgment roll, any admissions therein may always be read in connection with the findings, in order to ascertain whether the facts so admitted and found sustain the judgment. Jacobson v. Brooklyn Lumber Co. [N. Y.] 76 N. E. 1075. On appeal from a decision of the appellate division affirming a judgment for the defendant entered upon a verdict, the court of appeals will affirm the judgment of the appellate division where there was evidence to sustain the finding of the jury as a matter of fact, although the evidence was not such as authorized the decision of the appellate division that the defendant was entitled to dismissal of complaint as a matter of law. Levy v. James McCreery Realty Corp. [N. Y.] 76 N. E. 1079.

Pennsylvania: On an appeal from a judgment of the supreme court reversing a judgment of the common pleas, the question before the supreme court is, whether the judgment of the court is correct on the record which was before it. In case of a misapprehension of facts by superior court, through inadvertent error of counsel in presenting case, remedy is by application to that court and not by appeal to supreme court. City of Philadelphia v. Pennsylvania Inst. for the Instruction of the Blind [Pa.] 63 A. 420.

In North Carolina the approval of the findings of the clerk by the judge to whom the case is appealed is final. Carraway v. Lassiter, 139 N. C. 145, 51 S. E. 968.

South Carolina: Findings of circuit court on appeal from magistrate are final. Roberts v. Jones, 71 S. C. 404, 51 S. E. 240. The supreme court cannot, on appeal from the judgment of the circuit court overruling or sustaining exceptions to the judgment of a magistrate, consider any exceptions involving questions of fact. Jenkins v. Southern R. Co. [S. C.] 53 S. E. 481. Finding of a magistrate as to the amount of damages which has been affirmed by the circuit court, cannot be disturbed on a further appeal unless there was absolutely no evidence tending to sustain it. Seegers Bros. v. Seaboard Air Line R. Co. [S. C.] 52 S. E. 797. Conclusion of the circuit court on a question of fact on appeal from the probate court in dower proceedings is binding on the supreme court. Ex parte Wallace [S. C.] 52 S. E. 873.

11. Error cannot be assigned to the opinion of the appellate court. Penn Plate Glass Co. v. Rice Co., 216 Ill. 567, 75 N. E. 246. But where the appellate court has refused to follow its former opinion filed upon a first appeal, the supreme court may look into the opinions of that court, in connection with the record then before it, for the purpose of satisfying itself whether the case presented to the appellate court upon the second appeal is the same case as that which was presented to it on the first appeal. Id. Will consider whether the trial court erred and not whether the intermediate appellate court was wrong. If the trial court correctly dismissed a cause for reasons set out in the motion it is immaterial that the intermediate court of appeals sustained the ruling for a different and wrong reason. Aspley v. Hawkins [Tex.] 14 Tex. Ct. Rep. 213, 89 S. W. 972.

12. A ground for the dismissal of an appeal in the superior court which was not there raised and insisted upon, cannot be successfully urged in the supreme court as a reason for the affirmance of the judgment rendered in the superior court in the case on appeal. Union Fraternal League of Boston v. Johnston [Ga.] 53 S. E. 241. Failure to assign error upon transcript of appellate court is ground for dismissing appeal to supreme court. Kominski v. People, 219 Ill. 595, 76 N. E. 717. The supreme court of appeal from appellate court cannot consider questions as to dissolution of a corporation and forfeiture of its franchises, since such questions could not be considered by the appellate court. Cratty v. Peoria Law Library Ass'n, 219 Ill. 516, 76 N. E. 707. Although it apears that an instruction, together with other instructions, was mentioned by the assignment of errors in the appellate court, where it appears from the

(§ 13) *H. Effect of decision on former review in the same case.*[13]—The binding effect of a decision on appeal on a retrial in the lower court,[14] and the effect of appellate decisions as precedents in other cases are treated elsewhere.[15] In case of reversal everything decided,[16] and in case of affirmance everything that might have been raised,[17] unless decision thereon is pretermitted,[18] is the law of the case on a

appellant's brief and argument in the appellate court that no point was made upon such instruction, it will not be considered in the supreme court. United Breweries Co. v. O'Donnell [Ill.] 77 N. E. 547. On appeal to the supreme court in condemnation proceedings, questions not properly presented on appeal to the circuit court will not be considered. Stoy v. Indiana Hydraulic Power Co. [Ind.] 76 N. E. 1057. Upon an appeal in condemnation proceedings under Burns' Ann. St. 1901, § 4834 et seq., preliminary objections to the service and the appointment of appraisers could not be considered, and hence could not be assigned as error on a further appeal to the supreme court. Id. Questions not raised before the appellate division will not be considered by the court of appeals. Vroom v. Tilly [N. Y.] 77 N. E. 1017. The various questions presented having been adjudicated in a trial de novo on appeal to the circuit court from the committee provided for by Rev. Code, § 2410, as amended by Laws 1903, p. 150, c. 133, relative to proceedings for the annexation and detachment of territory of school districts, questions as to the action of the committee in adjusting the property were immaterial. Independent School Dist. No. 2, Turner County, v. District No. 37, Clay County [S. D.] 106 N. W. 302. On writ of error to the court of civil appeals, the supreme court will not review assignments of error not passed upon by the former. Eastin v. Texas & P. R. Co. [Tex.] 92 S. W. 838.

13. See 5 C. L. 234.

14. See post, § 15 F.

15. See Stare Decisis, 6 C. L. 1510.

16. Jancko v. West Coast Mfg. & Inv. Co. [Wash.] 82 P. 284. Matters considered on former appeal. Greely-Barnham Grocery Co. v. Cottingham [Ala.] 39 So. 567. The doctrine applies only to such questions as were decided on a former appeal. Questions raised but not determined may be considered on a second appeal. Kramer v. Northwestern Elevator Co. [Minn.] 106 N. W. 86. An appellee on a former appeal from an order granting a new trial was not, on a subsequent appeal from the judgment entered after reversal, precluded from presenting a ruling on a motion for change of venue made before the trial, that question not having been considered on the former appeal. Taylor v. Grand Lodge A. O. U. W. [Minn.] 107 N. W. 545. The district court denied plaintiff's motion to remand the cause to another county for trial and the case was tried and judgment directed for defendant. An order for a new trial was made but reversed on appeal, and judgment entered for defendant. Held the question of change of venue was not res adjudicata on appeal from the judgment, that question not having been considered on the former appeal. Id. Where the judgment was reversed on a former appeal on the ground that the lower court erred in sustaining a demurrer to the bill and it was held on appeal that the facts were sufficient to require the court to grant the relief prayed for, the judgment on such appeal was, on a second appeal, conclusive of all the questions of law, including the question as to whether the statute of frauds was available as a defense to the bill. Heimann v. Wilke, 219 Ill. 310, 76 N. E. 378. When a case is reversed, its opinion, on a retrial of the case in the court to which the case if remanded and upon an appeal from a judgment rendered upon such remand, must control, if the case presented upon the second trial and appeal is the same case as the case in which the opinion was filed reversing and remanding the case. Penn Plate Glass Co. v. Rice Co., 216 Ill. 567, 75 N. E. 246. Where on a former appeal in an action for the violation of a prescriptive right, the complaint was held sufficient and judgment in favor of the defendant was reversed because not sustained by sufficient evidence, such decision was not an adjudication of the question as to whether the plaintiff had such prescriptive right. Terre Haute & I. R. Co. v. Zehner [Ind.] 76 N. E. 169. Where on appeal in proceedings upon a writ of entry, brought by an administrator to recover real estate, it was held that the action was prematurely brought on account of a pending appeal from an order of the probate court granting the administrator license to sell the real estate, such decision was conclusive upon a second appeal, although the appeal from the decree granting the license had really been decided, and although the record in such appeal had been corrected at the time of the second appeal. Tyndale v. Stanwood [Mass.] 77 N. E. 481. Decision interpreting reservation in deed held not to bar an amendment after reversal seeking to reform it. Barataria Canning Co. v. Ott [Miss.] 41 So. 378. A reversal of a nonsuit only decides that there is evidence for the jury. Cooper v. Brooklyn Trust Co., 109 App. Div. 211, 96 N. Y. S. 56. A reversal of an order striking off a judgment is not res adjudicata as to the right to open judgment. American Mfg. Co. v. Smith Co., 28 Pa. Super. Ct. 124. Where the circuit court does not hear the case upon the merits its findings are not conclusive on a second appeal. Roberts v. Jones, 71 S. C. 404, 51 S. E. 240.

17. A decision by the district court of appeals made with a view to "further proceedings" and concurred in by only two of the judges is not conclusive as the law of the case. Turner v. Fidelity Loan Concern [Cal. App.] 83 P. 70. The judgment of an appellate court rendered in a former appeal of a case brought up on a second appeal is res adjudicata as to all persons who were parties to the proceedings at the time of the first appeal both as to matters actually decided and such as might have been decided had they been properly presented. Christensen v. People, 114 Ill. App. 40. All questions open to consideration and which could have been presented relating to the same subject-matter are res judicata

subsequent review of the same case, where the evidence is substantially the same,[19]

whether presented or not. Muren Coal & Ice Co. v. Howell, 119 Ill. App. 209. The decision of the supreme court on a former appeal, affirming a judgment necessarily determines finally and conclusively all questions presented and determined in the court below, whether presented by the report or not. And a nunc pro tunc entry by the trial court showing that a ruling of such court was excepted to by the appellant, such exception not appearing in the report of the first appeal, will not authorize the consideration of such rulings on a second appeal. Adams v. Whitley County Com'rs [Ind.] 76 N. E. 113. Where the appellate court affirms an order granting a new trial but provides that if defendant does not pay the costs of the trial, the order will be reversed and judgment entered on the verdict amounts to a holding that the evidence is sufficient to sustain the verdict and becomes the law of the case. Larsen v. U. S. Mortg. & Trust Co., 99 N. S. 218. On appeal from a judgment, all alleged errors must be presented to the court, and such judgment cannot be attacked on subsequent appeal for errors appearing on its face. Dupuyster v. Jefferson Imp. Co.'s Receiver [Ky.] 89 S. W. 509.

18. Where it is apparent that upon a former appeal a party has led the court to omit to consider the questions sought to be raised as grounds for reversal of the judgment by deliberately representing it as not precluding the appellant on a certain line of questions, and the court has, in effect, so held, it will not permit such party, on a second appeal, to take a position in respect to his rights in such judgment which is directly antagonistic to his former representation, and to the theory upon which he induced the court to decide the case. State v. Clinton County Com'rs [Ind.] 76 N. E. 986.

19. Ellis v. Witmer [Cal.] 83 P. 800; Warner v. Grayson, 24 App. D. C. 55; Hoodless v. Jernigan [Fla.] 41 So. 194; Georgia R. & Banking Co. v. Wright [Ga.] 54 S. E. 52; Fifer v. Rachels [Ind. App.] 76 N. E. 186; Vohs v. Shorthill & Co. [Iowa] 107 N. W. 417; Cumberland Tel. & T. Co. v. Harp [Ky.] 90 S. W. 980; Braucht v. Graves-May Co. [Minn.] 104 N. W. 1089; Nelson v. Charles Betcher Lumber Co. [Minn.] 104 N. W. 833; Korff's Estate v. Bueker [Neb] 105 N. W. 1099; Hargardine v. Omaha Bridge & Terminal R. Co. [Neb.] 107 N. W. 864; Nashville, etc., R. Co. v. Grayson County Nat. Bank [Tex. Civ. App.] 91 S. W. 1106; Corporation of Members of Church of Jesus Christ v. Watson [Utah] 83 P. 731; Cook v. Stimson Mill Co. [Wash.] 83 P. 419; Barton v. Wickizer [Wash.] 83 P. 312; Mutual Reserve Fund Life Ass'n v. Ferrenbach [C. C. A.] 144 F. 342. Where on a former appeal and reversal the court announced the law controlling the case. City of St. Joseph v. Baker, 113 Mo. App. 691, 88 S. W. 1122. On appeal from a judgment entered by trial court pursuant to a remittitur sent down by the court on a previous appeal. Lambert v. Bates [Cal.] 82 P. 767. Order denying a motion to dismiss an appeal. Murphy v. Stelling [Cal. App.] 81 P. 730. An order of the appellate court to the trial court as to striking out special defenses and permitting an amended answer. Prouty v. Adams [Cal. App.] 82 P. 1081. Westfall v. Wait [Ind.] 73 N. E. 1089. Questions decided adversely to the appellant on a former appeal, are not available on the second appeal. Supreme Lodge K. P. v. Andrews [Ind. App.] 77 N. E. 361. Decision binding on parties and privies. Western Bank v. Coldeway's Ex'r [Ky.] 94 S. W. 1. Holding that a certain person was acting as defendant's superintendent when his negligence caused plaintiff's intestate's death. McBride v. New York Tunnel Co., 99 N. Y. S. 571. Holding that the lower court had no authority to sell certain lands. Marcum v. Davidson [Ky.] 93 S. W. 1035. A decision holding the sureties on a contractor's bond liable, Hart v. Mayes [Ky.] 93 S. W. 616. Where evidence is substantially same, error based on it, decided on a former appeal, are deemed settled and reargument of them in substance cannot be entertained. Creachen v. Bromley Bros. Carpet Co. [Pa.] 63 A. 195. Defendants having abandoned all grounds, except one, claimed to justify the lower court in granting them a new trial, and the order being reversed and judgment for plaintiff entered below persuant to the mandate of the court, they could not upon appeal from such judgment assign further grounds calling for a new trial. Stafford v. Levinger [S. D.] 106 N. W. 133. Decision of Federal supreme court on former trial is binding on subsequent appeal in state court as to every question of fact or law arising upon the record which may have been decided therein. Sherman v. Ward [Ariz.] 83 P. 356.

Sufficiency of pleadings: Decision that complaint stated cause of action. Zuelly v. Gasper [Ind. App.] 76 N. E. 646. Insufficiency of a petition. Southern Illinois & M. Bridge Co. v. Stone [Mo.] 92 S. W. 475. Failure to raise insufficiency of answer on a prior appeal, with the result that court in effect holds such answer sufficient, is conclusive on a subsequent appeal. Drake v. Holbrook [Ky.] 92 S. W. 297. Where petition was held to state a cause of action as against a general demurrer the ruling was adhered to on a second appeal, the cause having been tried in the district court without specific objection to the sufficiency of the petition. First Nat. Bank v. Gibson [Neb.] 105 N. W. 1081. As to **sufficiency of evidence.** Hughes v. Chicago, etc., R. Co. [Wis.] 106 N. W. 526. That certain issues should not have been submitted to the jury. City of Bardstown v. Nelson County [Ky.] 90 S. W. 246. That the evidence in a case of libel did not warrant the submission of the question of falsity of a part of the publication to the jury. Carpenter v. New York Journal Pub. Co., 97 N. Y. S. 478.

Instructions conforming to decision on former appeal. Pritchett v. Moore [Ga.] 54 S. E. 131. Where on appeal it is held that the only error was in the formation of the jury, the decision became the law of the case as to the correctness of the instructions given. Covington & C. Bridge Co. v. Smith [Ky.] 89 S. W. 674. An instruction given to which no objection is raised on appeal, if the same party appeals. Lexington R. Co. v. Fain [Ky.] 90 S. W. 574. In considering assignments that the verdict is not sustained by the evidence, is excessive and contrary to law, instructions not so complained of as to be reviewable on appeal

and as a general rule this is true whether the former decision was right or wrong,[20] though there seems to be some conflict in this regard.[21] The principle applies, however, only to decisions on points necessary to a determination of the case,[22] and where the evidence[23] and issues are the same.[24] The court will always look into the record on the former appeal to ascertain what was then decided.[25] Errors not assigned upon a first appeal cannot be assigned on a second one.[26]

must be taken as the law of the case, and if when tested by such instructions the verdict is not subject to the objections made, the assignments will not be sustained. Skinner v. Wilson [Neb.] 107 N. W. 771.

20. Ellis v. Witmer [Cal.] 83 P. 800; Curless v. Diamond Plate Glass Co. [Ind. App.] 77 N. E. 289; Hancock v. Diamond Plate Glass Co. [Ind. App.] 75 N. E. 659; Hancock v. Diamond Plate Glass Co. [Ind. App.] 77 N. E. 413; Pautz v. Plankinton Packing Co. [Wis.] 105 N. W. 482. The supreme court is bound by a former majority decision in the same case, although upon its second appearance the court, as then constituted, disapproved of the majority decision previously rendered. Price v. Central of Georgia R. Co. [Ga.] 53 S. E. 455.

21. Unless the opinion first expressed is manifestly erroneous. Brewster v. Meng [Neb.] 107 N. W. 751. Ordinarily will not be departed from unless clearly wrong so that it cannot be supported upon reason or authority. First Nat. Bank v. Gibson [Neb.] 105 N. W. 1081. Where a case was remanded generally for a new trial at which the same questions were presented, appellate court is not bound by its former opinion on questions of law, but should re-examine and reverse its rulings when such opinion is manifestly wrong. Eccles v. Walker [Neb.] 106 N. W. 977. The appellate court, while recognizing its right and duty to change its former ruling in the same case in order to correct or render harmless any error therein, it will do so only when it becomes satisfied that error was committed. Southern Illinois & M. Bridge Co. v. Stone [Mo.] 92 S. W. 475.

22. On a second appeal, all questions presented by counsel, existing in the record and necessarily involved in the decision are the law of the case and will not be reexamined. Harwi Hardware Co. v. Klippert [Kan.] 85 P. 784. Where on a former appeal an answer was held sufficient, nothing being said as to the sufficiency of the complaint, on the second appeal, the sufficiency of the complaint is reviewable. Stafford v. St. John, 164 Ind 277, 73 N. E. 596.

23. Where other and different questions arise on a subsequent appeal or a different state of facts is presented, the former decision is not controlling. Corporation of Members of Church of Jesus Christ v. Watson [Utah] 83 P. 731; Penn Plate Glass Co. v. Rice Co., 216 Ill. 567, 75 N. E. 246; Denver & R. G. R. Co. v. Arrighi [C. C. A.] 141 F. 67. Rule applies only so far as case in its subsequent course presents same facts and involves same principles of law. Ellis v. Witmer [Cal.] 83 P. 800. Former decision controls only so far as it is applicable to the facts developed on the second trial. Nelson v. Charles Betcher Lumber Co. [Minn.] 104 N. W. 833. Evidence held the same. McLendon v. Macon, etc., R. Co., 123 Ga. 253, 51 S. E. 317. Where there is additional evidence on the second trial, not merely cumulative, the principle of the law case is not applicable. Fifer v. Rachels [Ind. App.] 76 N. E. 186. Even where new evidence is introduced on the second trial, the decision on the former will be adhered to on the second appeal where the material facts were the same on the second trial as upon the first, and precisely the same legal principles were applicable in both trials. In ejectment suit. Weigel v. Green [Ill.] 77 N. E. 574. Where additional evidence did not affect materially the question involved. Landis v. Wolf, 119 Ill. App. 88. The appellate court cannot review and overrule conclusions reached at a former appeal on the ground of change of issues and evidence where the record shows no change of issues and the evidence taken at the former trial is not before the court. Hargadine v. Omaha Bridge & Terminal R. Co. [Neb.] 107 N. W. 864. The decision of a court on appeal, as to questions of fact, does not become the law of the case. In re Harrington's Estate, 147 Cal. 124, 81 P. 546. A decision on a former appeal is not an adjudication of the facts. South Chicago City R. Co. v. Kinnare, 117 Ill. App. 1. Where on a former appeal the evidence was held sufficient but the case was remanded for a new trial for errors of law, the appellate court on appeal from the second trial is not bound by the finding on sufficiency of the evidence. St. Louis, etc., R. Co. v. Cleere [Ark.] 88 S. W. 995.

24. A decision that a certain bond and assessment are valid is the law of the case on a subsequent appeal as to all objections against their validity, but does not conclude the court against considering objections raised for first time on second trial under amended complaint. Ellis v. Witmer [Cal.] 83 P. 800. Where on remand in a former appeal, plaintiff filed an amended complaint, with nothing in the record to show that material facts alleged in amended complaint are the same as those in original complaint, the court may review such amended complaint as to its sufficiency. Stafford v. St. John, 164 Ind. 277, 73 N. E. 596.

25. State v. Clinton County Com'rs [Ind.] 76 N. E. 986; Hancock v. Diamond Plate Glass Co. [Ind. App.] 75 N. E. 659. The opinion in the record will be looked to as well as the order. Dent v. Pickens [W. Va.] 53 S. E. 154. To see if evidence was the same. McLendon v. Macon, etc., R. Co., 123 Ga. 253, 51 S. E. 317.

26. Muren Coal & Ice Co. v. Howell, 217 Ill. 190, 75 N. E. 469. A party is estopped from assigning errors which he could have assigned on a former appeal. Muren Coal & Ice Co. v. Howell, 119 Ill. App. 209. The fact that a suit was prematurely filed cannot be raised for first time on second appeal. Byrne v. Morrison, 25 App. D. C. 72.

§ 14. *Provisional, ancillary, and interlocutory relief*[27] may be allowed when necessary to the administration of justice, but unless an appeal is pending such relief must rest upon the original jurisdiction of the appellate court.[28] On affirming a decree invalidating a franchise, the appellate court will not order the property involved kept in statu quo to await the event of another action, but such order must be applied for in the court having jurisdiction of such other action.[29]

§ 15. *Decision and determination. A. Affirmance or reversal.*[30]—Assuming the existence[31] and the proper acquisition of appellate power,[32] the appellate review within the rules before pointed out[33] will ordinarily lead to affirmance or reversal according to the absence or presence of error. A profitless reversal or one to permit the recovery of nominal damages only[34] will not be granted, unless rights are thereby established;[35] nor will a judgment be reversed for errors which in no way prejudiced the party complaining,[36] nor for a mere clerical misprision which may be corrected in the trial court.[37] Pro forma affirmance is sometimes allowed for failure to properly prosecute the appeal, such affirmance being governed by the same consideration as dismissal and treated with it.[38] On failure of the appeal to present any matter open to review, affirmance, not dismissal, will be ordered.[39] It is sometimes provided by statute that certain error shall not be ground for reversal.[40] Reversal or affirmance must ordinarily be entire,[41] though a reversal in part of a

27. See 5 C. L. 235. The supreme court of Idaho in the exercise of its appellate jurisdiction may apopint a **receiver.** Chemung Min. Co. v. Hanley [Idaho] 81 P. 619. Where an appeal from an interlocutory order must be reversed for lack of finality and it appears that mischief of the order will have been done before it can be corrected by the appropriate remedy, the court may entertain a motion for a **mandamus** where the record is sufficient and a motion is timely made. Brady v. Brady [Ala.] 39 So. 237. Pending appeal from confirmation of a judicial sale, the supreme court has jurisdiction to allow and **determine the terms of redemption** so as to conclude the parties. Thesing v. Westergren [Neb.] 106 N. W. 438.

28. The appellate court, being without original jurisdiction in equity, could not restrain defendant from interfering with the road pending condemnation proceedings. Thesing v. Westergren [Neb.] 106 N. W. 438. See Jurisdiction, 6 C. L. 267.

29. Little Rock R. & Elec. Co. v. North Little Rock [Ark.] 88 S. W. 1026.

30. See 5 C. L. 236.

31. See ante, §§ 4, 5.

32. See ante, §§ 6-11.

33. See ante, § 13.

34. Green v. Macy [Ind. App.] 76 N. E. 264; Clark v. American Exp. Co. [Iowa] 106 N. W. 642. The general rule that there will be no reversal of a nonsuit or an order sustaining a demurrer although erroneous where plaintiff could at best recover only nominal damages does not apply to cases involving a permanent right, such as right of entry to a quarry. Arkley v. Union Sugar Co., 147 Cal. 195, 81 P. 509.

35. Where the evidence was insufficient to show that the contract sued on was void for fraud, a judgment for defendant was reversed though plaintiff had showed himself entitled to nominal damages only as affirmance would have deprived plaintiff of costs and forever barred him from asserting any rights under the contract. Raymond v. Edelbrock [N. D.] 107 N. W. 194.

36. See Harmless and Prejudicial Error, 5 C. L. 1620.

37. Error in granting judgment for more than the plaintiff is entitled to on his petition should be corrected in the trial court as a clerical misprision. United States Fidelity & Guaranty Co. v. Boyd [Ky.] 94 S. W. 35.

38. See ante, § 11 G.

39. Under Rev. St. 1899, § 806, authorizing an appeal from a final judgment, an appeal from a final judgment entered pursuant to a mandate cannot be dismissed though all matters raised are res adjudicata, but judgment will be affirmed. Esler v. Wabash R. Co., 115 Mo. App. 574, 91 S. W. 400.

40. It is provided by Burns' Ann. St. 1901, § 344, that "no judgment shall ever be reversed for any error committed in sustaining or overruling a demurrer for misjoinder of causes of action." City of Huntington v. Stemeh [Ind. App.] 77 N. E. 407. An equity action in which a jury finds a part or all of the facts is not an "action tried without a jury" within the meaning of § 5630, Rev. Codes 1899, providing that in such actions the failure of the court to find on all issues shall not be ground for new trial or reversal. Spencer v. Beiseker [N. D.] 107 N. W. 189. Although under Civ. Code Prac. § 341, new trial cannot be granted on account of the smallness of the damages in personal injury actions, nevertheless if smallness of damages is due to other errors of the court, the fact that reversal be procured for the smallness of the damages, would not prevent reversal and new trial on other reasons appearing in the record. Pendly v. Illinois Cent. R. Co. [Ky.] 92 S. W. 1.

41. Massey v. Oates [Ala.] 39 So. 142; East Baltimore Lumber Co. v. Waldeman [Md.] 62 A. 575; Chicago City R. Co. v. People, 116 Ill. App. 633; North Chicago St. R. Co. v. O'Donnell, 115 Ill. App. 110; Little

severable judgment is proper,[42] but the benefits of reversal will be limited to those who complained of the judgment.[43] In case of contradictory verdicts in actions by or against several parties, the one sustained by the evidence, if any, will be affirmed and the others disposed of as the case may require.[44] Concurrence of a majority of the court in the result in some states,[45] and in others upon a single ground,[46] is necessary to a reversal, and where the justices are equally divided in opinion, the judgment stands affirmed by operation of law.[47] A judgment may be affirmed upon condition [48] or without prejudice to a new trial below.[49] Remand with neither affirmance nor reversal,[50] will not be ordered because of alleged facts arising after judgment going only to the practibility of enforcing it.[51] While the appellate court

Rock Trust Co. v. Southern Missouri & A. R. Co. [Mo.] 93 S. W. 944. Where a judgment is rendered in favor of plaintiff for a certain sum for the use of several persons in specific amounts, it is a joint judgment and cannot be reversed as to one upon stipulation of attorneys over the objection of the others. Kansas City v. Schroeder [Mo.] 93 S. W. 405. Where a judgment erroneously directs an accounting between the plaintiff and one of the defendants when it should have directed an accounting between plaintiff and defendants as partners, must be reversed as to both defendants if reversed as to one. Boice v. Jones, 106 App. Div. 547, 94 N. Y. S. 896. A decree of partition is entire. Lawson v. Bonner [Miss.] 40 So. 488.

42. Byrnes v. Holscher, 96 N. Y. S. 89; Anderson v. Northern Pac. R. Co. [Mont.] 85 P. 884. A judgment against an intervenor who claimed the property in controversy, is not affected by a reversal of the judgment between plaintiff and defendant where his claim was independent. Lauchheimer v. Coop [Tex.] 89 S. W. 1061. Where the judgment in favor of intervenor is distinct from a judgment in favor of intervenor against defendant, the reversal of the latter on appeal will not affect the former, the plaintiff having not appealed. Lauchheimer v. Coop [Tex.] 90 S. W. 1098. Where damages are erroneously awarded in addition to the partial release of a judgment lien demanded, such part of the judgment as awards damages is separable from that declaring a partial discharge from the lien, and therefore does not affect the validity of the judgment. Bryne v. Kelsey [Conn.] 61 A. 965.

43. Where defendant alone appealed from the judgment of the county court setting aside a judgment of the justice of peace and granting a new trial, respondent cannot complain that the reversal was not absolute. International Tailoring Co. v. Bennett, 99 N. Y. S. 438. Defendants who do not appeal from a judgment against them, which is affirmed as to them, cannot interpose any defense to the rights of plaintiff thereunder, though another appeals successfully. Sanger Bros. v. Corsicana Nat. Bank [Tex. Civ. App.] 87 S. W. 737. Where an appeal has been taken by some parties to an action involving an illegal assessment only those parties appealing can share in the benefits of a reversal. In re Westlake Ave. [Wash.] 82 P. 279.

44. If a finding in favor of one of two joint defendants is the only one possible under the evidence, a judgment thereon will be affirmed and a judgment against the other defendant based on an inconsistent finding on the same issue will be reversed. Chicago, etc., R. Co. v. McManigal [Neb.] 107 N. W. 243.

45. In California the concurrence of four justices is necessary to pronounce a judgment of court in bank, but it is not necessary to the validity of such judgment that all four concur upon the same grounds. Philbrook v. Newman [Cal.] 82 P. 772.

46. Where all the exceptions are overruled by a majority of the court, the decision stands affirmed, though a majority are for reversal upon the whole case. Battle v. Columbia, etc., R. Co., 70 S. C. 329, 49 S. E. 849.

47. Cook v. Minneapolis, etc., R. Co., 125 Wis. 528, 103 N. W. 1097; Chicago, etc., R. Co. v. Davenport, 127 Iowa, 677, 103 N. W. 996; Chicago, etc., R. Co. v. Cedar Rapids, 127 Iowa, 678, 103 N. W. 997. Where the appellate court is equally divided as to whether the evidence supports the finding of the chancellor, his finding will be affirmed. Barnard & Leas Mfg. Co. v. Smith [Ark.] 92 S. W. 858.

48. Where action was improperly brought in the name of an agent, the judgment was affirmed on condition that the lower court would allow an amendment substituting the proper party plaintiff, with opportunity, however, to the defendant to be heard upon the allowance of such amendment. Fay v. Walsh [Mass.] 77 N. E. 44.

49. Where the jury awarded damages upon the theory that the plaintiff would suffer from paralysis as the result of the injury sued for, and it appeared upon the hearing of the case on appeal several years after the accident that no such paralysis had appeared, and that the probability of its subsequent occurrence rested very largely upon the opinion of a physician who stated at the trial that the paralysis would occur within 2 or 3 years from the date of the accident or not at all, the court of appeals affirmed the judgment appealed from without prejudice to the right of the defendant, upon proper proofs to move for a new trial. Fogel v. Interborough Rapid Transit Co. [N. Y.] 77 N. E. 1022.

50. The supreme court has jurisdiction to remand a case and the record to the trial court to enable appellant to renew a motion for a new trial on the ground of newly discovered evidence arising since the filing of the return. Const. art. 6, § 2. Kroning v. St. Paul City R. Co. [Minn.] 104 N. W. 888.

51. After judgment defendant died; his executors were substituted but the claim in judgment was not presented as one against the estate wherefore nonenforceability was

will not grant leave to enter judgment on the theory that a bond fixed by the trial court is inadequate, it may remand the cause temporarily to permit a motion for relief to the trial court if the inadequacy be great enough to indicate inadvertence.[52] Affirmance acts of the date which judgment was rendered,[53] and where appellee dies after submission, a judgment of affirmance theretofore rendered will be modified so as to be of the date of submission.[54] A reversal in legal effect relates back to the time when the judgment was recovered, or at least to time when costs on the trial were paid.[55]

(§ 15) *B. Transfers and removals, certifications, and reservations.*[56]—Certification and reservation by trial court to reviewing court is elsewhere treated.[57] An appeal may, if taken to the court not having jurisdiction, be transferred by a court of primary to one of final appeal,[58] or vice versa [59] if the time for appealing to the right court has not expired.[60] That a more speedy hearing may be had is no ground for transfer.[61] Petition for transfer must be timely made.[62] A formal order of transfer may be dispensed with.[63] Transfer in case of failure of judges to agree is sometimes allowed.[64] Where the court of appeals erroneously declines jurisdiction and transfers the case to the supreme court, the remedy is by certiorari and not

averred. People's Home Sav. Bank v. Sadler [Cal. App.] 81 P. 1029

52. $250 bond to supersede $5,500 verdict. Reichel v. Mooney [Minn.] 106 N. W. 1133.

53. People's Home Sav. Bank v. Sadler [Cal. App.] 81 P. 1029.

54. Town of Winamac v. Stout [Ind.] 75 N. E. 651.

55. Royal Baking Powder Co. v. Hoagland, 180 N. Y. 35, 72 N. E. 634.

56. See 5 C. L. 237.

57. See ante, § 2 B.

58. In Indiana the appellate court must transfer a case to the supreme court for the determination of the constitutionality of a statue. Shelbyville Coal & Min. Co. v. McGlosson [Ind. App.] 76 N. E. 562. Where an appeal in an action of mandate is taken to the appellate court the case will be transferred to the supreme court. Funk v. State [Ind. App.] 76 N. E. 635. An appeal cannot be transferred from the district to the supreme court. Town of Leesville v. Hadnot [La.] 38 So. 877. An appeal in equity wrongly appealed to the court of appeals will not be dismissed under the Constitution but transferred to the supreme court. Marston v. Kuhland [Cal. App.] 84 P. 357. Where notice of appeal is to wrong court, the appellant should nevertheless file his record there and then move in such a court for a transfer. In re Russell's Estate [Cal.] 84 P. 155.

59. Where a case was wrongly appealed to supreme court, that court under Rev. St. 1899, § 1657, has jurisdiction only to the extent of transferring the case to the proper court and an opinion of the supreme court on the merits, concurred in by two of the judges thereof is not conclusive on the court of appeals. State v. Louisiana, B. G. & A. Gravel Road Co. [Mo. App.] 92 S. W. 153. Where the supreme court has no jurisdiction of a case, it has no power to make any order except to transfer it to the court of appeals. Carmody v. St. Louis Transit Co., 183 Mo. App. 572, 87 S. W. 913.

60. A statute providing for transfer of cases appealed to the wrong court does not apply to a case where the time to appeal to the right court had expired before the statute took effect. Act 1904, No. 56. Spremich v. Maurepas Land & Lumber Co., 114 La. 1053, 38 So. 827. Where appeal is dismissed by the appellate court for want of jurisdiction, and appellant, allowing the judgment of dismissal to become final without applying to the supreme court for relief, takes the case to the latter court by appeal from the district court, and the supreme court finds itself to be without jurisdiction, the case will not be transferred to the court of appeals, but the appeal will be dismissed. Muntz v. Jefferson R. Co., 114 La. 860, 38 So. 586.

61. An application for a transfer of an appeal from the supreme court to the court of appeals based on the necessity of a speedy adjudication will be denied. Gates v. Green [Cal.] 84 P. 37. Such a reason is ground for advancing the case on the calendar but not for transfer. Id.

62. Supreme court has no power to act on a petition for a transfer of an appeal filed more than 60 days after judgment was rendered in the court of appeals. National Bank v. Los Angeles Iron & Steel Co. [Cal. App.] 84 P. 468.

63. The omission of appellate court to make a specific order relating to the transfer of the accusation to the district court, and its custody pending the proceedings there does not deprive the district court of jurisdiction. In re Burnette [Kan.] 85 P. 575.

64. Art. 6, § 4, Const. and Rule 33 of court of appeals provide that whenever the judges of the district court of appeals fail to agree on a judgment, the supreme court may transfer cause to itself or to another district court, but this does not apply to a habeas corpus proceeding and inability to agree on such a writ will cause its dismissal. Ex parte Oates [Cal. App.] 83 P. 261. Court of civil appeals is not required to certify to the supreme court question upon which the court is divided where their determination is final. Miller v. Mosely [Tex. Civ. App.] 91 S. W. 648.

by application to retransfer the case.[65] Ruling refusing to transfer a case from the highest court to an intermediate court may amount to an affirmance.[66] In Indiana a losing party who has applied for a rehearing in the appellate court and has been refused may, on certain grounds, have the case transferred to the supreme court.[67]

(§ 15) *C. Remand or final determination.*[68]—On reversal the ordinary practice is to remand for a new trial,[69] but if the error is formal or clerical [70] or a mere matter of computation,[71] the error will be corrected and the judgment affirmed as reformed or the party may be required to cure the error by remittitur [72] unless such

65. State v. Yazoo, etc., R. Co. [La.] 40 So. 630.

66. The rulings of the supreme court denying a petition to transfer a cause to the appellate court is in effect an approval of the opinion in that case in so far as it was challenged by the specific reasons assigned for the transfer. New York, etc., R. Co. v. Martin [Ind. App.] 77 N. E. 290.

67. See Burns' Ann. St. 1901, § 1337j. Under this statute an appellant who files a motion to modify the mandate of the appellate court so as to direct the lower court to enter judgment in his favor instead of granting a new trial, is not to be considered as an applicant for a rehearing, the applicant in such cases not being the losing party upon the appeal to the appellate court nor an unsuccessful petitioner for a rehearing. Standard Pottery Co. v. Moudy, 164 Ind. 656, 74 N. E. 242.

68. See 5 C. L. 238.

69. When a judgment rendered on an issue of fact in a law action is reversed on appeal, a new trial is generally ordered, unless the court below should have sustained a motion for a judgment of nonsuit, because of an entire lack of evidence. State v. Richardson [Or.] 85 P. 225. Code Pub. Gen. Laws 1904, art. 5, § 22, gives the court of appeals power in its discretion to remand a case for new trial on the merits. Milske v. Steiner Mantel Co. [Md.] 63 A. 471. Where a nonsuit was improperly granted after verdict which verdict the court would have been justified in setting aside, the appellate court will reverse and order a new trial rather than restore the verdict. Yates v. New York, etc., R. Co., 107 App. Div. 629, 95 N. Y. S. 497. Where the jury render a verdict for plaintiff when it was impossible so to do under the erroneous instructions given, which verdict is set aside and the complaint is dismissed, on appeal from the latter order, a new trial should be ordered rather than to reinstate the verdict. Duhme v. Hamburg-American Packet Co., 107 App. Div. 237, 94 N. Y. S. 1102. Failure to enter judgment as delivered by the court, will not authorize a reversal and order for a new trial on appeal but merely a reversal with an order to enter the judgment actually rendered. Brown v. McKie [N. Y.] 78 N. E. 64. On reversing a judgment for want of evidence to sustain it, the cause should be remanded for further proceedings. Chicago, etc., R. Co. v. McManigal [Neb.] 107 N. W. 243. In North Carolina where the plaintiff unnecessarily takes a nonsuit and then appeals, the cause will be remanded with direction to set aside the nonsuit and thereafter to proceed with the cause. The reason for this practice is that to dismiss the appeal would put an end to the action. Hayes v. Atlanta & C. Air Line R. Co. [N. C.] 52 S. E. 416. If in an action to determine adverse claims the trial court without satisfactory reasons disclosed by the record limits its adjudication to the date of the commencement of the action, and a review is had only upon the judgment roll proper the judgment will be reversed and a new trial ordered. Brown v. Hodgson [N. D.] 105 N. W. 941. In such case the appellate court cannot modify the judgment so as to make it effective as rendered but as of the date of its rendition. Id.

70. Corson v. McDonald [Cal. App.] 85 P. 861; Johnson v. Citizens' Bank [Ala.] 39 So. 577. Error in not requiring a writ of sequestration to be amended so as to conform to the statute is not ground for reversal. Dean v. Boyd, 86 Miss. 204, 38 So. 297. See Code Civ. Proc. § 1337. Judgment of the appellate division in mechanic's lien proceedings modified by striking out provision for personal judgment and substituting original provision adjudicating lien and sale thereunder. Gilmour v. Colcord [N. Y.] 76 N. E. 273. Error in referring cause to the assessor in an action upon a penal bond before entry of judgment for the penalty may be corrected in the appellate court by entry of such judgment nunc pro tunc. Donaher v. Flint, 188 Mass. 525, 74 N. E. 927. The fact that the judgment was rendered against appellant as an individual instead of as an officer may be remedied by a proper judgment in the appellate court. Malott v. Schlosser, 119 Ill. App. 259.

71. Error in computing interest. Seattle Lumber Co. v. Sweeney [Wash.] 85 P. 677. Where a verdict awards compensatory and punitive damages separately, the appellate court on finding that the trial court erred in allowing punitive damages may so modify the judgment and affirm. Walsh v. Hyde & Behman Amusement Co., 98 N. Y. S. 960. Where judgment was rendered through oversight for defendant after he had admitted owing $15, the appellate court will correct the judgment instead of ordering a new trial. Brush & Stephens Co. v. Ross, 99 N. Y. S. 796. Where in an action on a note the judgment was for $52.16 in excess of the amount due the error will be corrected by a modification of judgment. Downing v. Donegan [Cal. App.] 82 P. 1111. Finding as to the amount was $250, and judgment was $200. Reversed with direction to enter judgment for $250. State v. Richeson [Ind. App.] 75 N. E. 846. Where the jury state separately the amount allowed for damages and erroneously allowed for penalty, the appellate court will correct the error and affirm. San Antonio, etc., R. Co. v. Stribling [Tex.] 14 Tex. Ct. Rep. 38, 89 S. W. 963.

72. A judgment dismissing plaintiff's complaint need not be reversed where the

correction involves the rights of a party not in court;[73] and though the appellate court will not, except where the appeal is triable de novo,[74] find additional facts or adjudicate matters not tried below,[75] it may, if it has all the facts before it, proceed to do complete justice.[76] If it clearly appears on reversal that but one result could

referee erred in not allowing a certain item, where such item can be deducted from the costs allowed against plaintiff. American Fruit Product Co. v. Ward, 99 N. Y. S. 717. Where error in the court below did not involve a loss of more than $95 on the change of the verdict to that extent in the court below the judgment will be affirmed, otherwise reversal and new trial. Irwin v. Buffalo Pitts Co., 39 Wash. 346, 81 P. 849. Where a judgment was excessive, but appellant was at fault in not tendering amount of acknowledged liability, heavy costs having been incurred by successive appeals, appellate court will affirm judgment on remittitur of excess. Missouri, etc., R. Co. v. Patrick [C. C. A.] 144 F. 632. Where the court can reasonably estimate the excess in the verdict or judgment and it is apparent that no injury can be done the defendant by entering a remittitur, the appellate court will permit its entry. Smoot v. Kansas City [Mo.] 92 S. W. 363. Where a charge as to the measure of damages permits a recovery greater than is allowable under the pleadings and the evidence is too indefinite to be cured by a remittitur, a reversal must be had. Texas & P. R. Co. v. Frank [Tex. Civ. App.] 13 Tex. Ct. Rep. 236, 88 S. W. 382. Where the verdict awards plaintiff damages to which he is not entitled but the evidence does not show the amount of such excess, case must be reversed. Atchison, etc., R. Co. v. Dawson [Tex. Civ. App.] 90 S. W. 65. Appellate court will not permit a remittitur of excessive damages to be entered in a case where instructions authorized recovery for doctor's fees and loss of time in excess of amounts claimed in petition, and evidence as to permanent injuries were very contradictory, while some of the injuries were not pleaded until nearly two years after beginning of action. Smoot v. Kansas City [Mo.] 92 S. W. 363. Where compensation for loss of time was included in the judgment but not authorized by the pleadings, the appellate court will order a remittitur where the amount allowed can be ascertained. Stafford v. Adams, 113 Mo. App. 717, 88 S. W. 1130. Where a judgment erroneously includes an item of damage, the appellate court may affirm the judgment upon condition that appellee remit the greatest amount that the jury could have found from the evidence. Chicago, etc., R. Co. v. Seale [Tex. Civ. App.] 14 Tex. Ct. Rep. 48, 89 S. W. 997. Error in permitting an item of damages to be considered may be cured by remittitur and is not a ground for reversal. Houston, etc., R. Co. v. McCarty [Tex. Civ. App.] 89 S. W. 805. Where a judgment includes an improper item of damages definite in amount, but is otherwise correct, it will be affirmed upon condition that such item be remitted. St. Louis, etc., R. Co. v. Foster [Tex. Civ. App.] 89 S. W. 450. Erroneous allowance of attorney's fees corrected by remittitur. West v. Wabash R. Co. [Mo. App.] 94 S. W. 310.

73. An error in a judgment cannot on appeal be corrected where it involves the rights of one not made a party on appeal. Frazer v. Fidelity & Deposit Co. [Ky.] 89 S. W. 134.

74. See ante, § 13 B.

75. Appellate court cannot adjudicate matters left undetermined and not fully developed below. Gray v. Bryson [Miss.] 39 So. 694. Upon reversal of a decree for specific performance rendered in favor of a railroad company wrongfully in possession of the property under a void option, the supreme court had no jurisdiction to determine defendant's damages for taking the right of way in view of Const. art. 15, § 9, providing that in taking property for public use, the necessity and compensation shall be ascertained by jury. Grand Rapids, etc., R. Co. v. Stevens [Mich.] 13 Det. Leg. N. 86, 253, 107 N. W. 436. Where in an action to cancel a deed, the special findings show that plaintiff should have recovered but the verdict does not show the amount to be paid for the land and for the personalty, appellate court cannot render judgment for plaintiff. Cecil v. Henry [Tex. Civ. App.] 93 S. W. 216. Where the trial court failed to protect the rights of one of the parties by striking his name from the record, the appellate court may do so. Bouton v. Pippin, 192 Mo. 469, 91 S. W. 49. Where the judgment on a replevin bond failed to find the value of each article replevied, and to allow the return of the property, the appellate court may modify it where the evidence shows the value of each article. Cummings & Co. v. Masterston [Tex. Civ. App.] 93 S. W. 500. An appellate court will find the facts in certain cases when such course is necessary to put an end to protracted and expensive litigation. Whene several juries had found verdicts clearly contrary to the evidence. Love v. McElroy, 118 Ill. App. 412. The appellate court upon dissolving an injunction granted by the trial court cannot take testimony and assess damages. Fry v. Radzinski, 219 Ill. 526, 76 N. E. 694. On appeal from a judgment of the court of claims on the ground of insufficiency, the appellate court cannot make a new finding increasing the amount of damage. Crowley v. State, 98 N. Y. S. 1094; Ostrander v. State, 98 N. Y. S. 1061. Where the court erred in refusing plaintiff all relief in an action to set aside a contract on the ground of fraud and duress, the appellate court could only grant a new trial and could not make a finding of facts in lieu of those which the trial court should have found. Shevlin v. Shevlin [Minn.] 105 N. W. 257. Where the trial court held that the defense of the statute of frauds was not available under the pleadings which is reversed by the appellate court, the appellate court cannot pass upon the question whether the statute was satisfied. Levin v. Dietz, 106 App. Div. 208, 94 N. Y. S. 419.

76. Where the evidence is written so that the appellate court can judge of its probative force as well as the trial court, it is competent for the appellate court both by virtue of its inherent power and by the stat-

be reached on a retrial, the court will order judgment absolute[77] or remand with specific directions to the court below,[78] and statutes authorizing such action are

ute (Acts 1903, page 341, c. 193, § 8), to render such a decree in the premises as the justice of the case requires. State v. Newton County Com'rs [Ind.] 74 N. E. 1091. On appeal from an interlocutory judgment decreeing specific performance and an accounting, the appellate court cannot strike out the erroneous provision for specific performance and sustain the remainder, as the accounting is dependent upon the decision of questions of law involved. Rudiger v. Coleman, 98 N. Y. S. 461; Ladensack v. Johnson [Mich.] 13 Det. Leg. N. 63, 107 N. W. 267. Under Municipal Court Act, § 326 (Laws 1902, p. 1583, c. 580), appellate court is enjoined to render judgment according to the justice of case. Couch v. New York City R. Co., 94 N. Y. S. 393. Where on appeal court found the amount for which appellee was entitled to redeem, the trial court did not err in entering a decree without formal proof on reversal of an order sustaining a demurrer, and remand to trial court. Vanek v. Senft [Ill.] 78 N. E. 17. On appeal from an order granting a temporary injunction, the appellate court may correct the order in its scope and affirm. American Ice Co. v. Meckel, 109 App. Div. 93, 95 N. Y. S. 1060. Where plaintiff appealed from the judgment in his favor as well as from an order denying a motion to amend the same, the appellate court under Mun. Ct. Act, Laws 1902, p. 1578, c. 590, § 310, has authority to amend by adding a clause for defendant's arrest. Ostrom v. Sapolsky, 96 N. Y. S. 1070. Where the appeal is from the inadequacy of the amount allowed plaintiff, the appellate court may modify the judgment as to allow the correct amount where the facts before it are sufficient to reveal it. Tolchinsky v. Schiff, 47 Misc. 371, 93 N. Y. S. 1073. Where plaintiff's complaint set out a cause of action in assault of which the municipal court has no jurisdiction, but the evidence reveals a cause of action ex contractu of which it has jurisdiction, pleadings may be amended under § 166, p. 1542, Mun. Ct. Act (Laws 1902) in the appellate court to conform to the latter cause of action. Rein v. Brooklyn Heights R. Co., 47 Misc. 675, 94 N. Y. S. 636.

77. Final judgment rendered on reversing judgment for defendant in personal injury case as against weight of evidence. Gomez v. Tracey [La.] 40 So. 234; Chicago, etc., R. Co. v. Bryan [Ind. App.] 75 N. E. 678. Upon reversal of judgment overruling motion to exclude plaintiff's evidence, or upon reversal for insufficiency of the evidence to support the verdict. Anderson v. Tug River Coal & Coke Co. [W. Va.] 53 S. E. 713. Where the reversal is upon the evidence, the appellate court will enter such judgment as the lower court should have rendered. United Moderns v. Rathbun [Va.] 52 S. E. 552. The complaint not stating a cause of action, and the evidence affirmatively showing that no cause of action exists, the appellate court will direct the action to be dismissed. Hart v. Evanson [N. D.] 105 N. W. 942. Where two corporations existed of similar names but organized in different states and an action was begun against one and judgment taken against the other, on appeal the appellate court will remand with direction to correct and modify findings and judgment so as to run against the true defendant. Shephard v. Coeur d'Alene Lumber Co. [Idaho] 83 P. 601. Judgment of dismissal notwithstanding verdict, directed. Satterlee v. Modern Brotherhood of America [N. D.] 106 N. W. 561. Where it appeared that a claim against a city for injuries from defective sidewalks was barred, and appellant defendant had moved for a verdict, the appellate court ordered entry of judgment dismissing the action. Hay v. Baraboo [Wis.] 105 N. W. 654. On reversing for insufficiency of evidence judgment for defendant will be ordered if it appears that no better case can be made. Ruffner Bros. v. Dutchess Ins. Co. [W. Va.] 53 S. E. 943. Where the case made out by the record does not show that plaintiff is entitled to recover no new trial will be granted. Whitcomb v. Mason [Md.] 62 A. 749. Where all the evidence accessible was introduced on trial and is held insufficient to establish a partnership, the appellate court will render judgment accordingly and not remand. Rascoe v. Walker-Smith Co. [Tex. Civ. App.] 88 S. W. 439. Where the trial court should have directed a verdict for appellant but did not, on appeal the appellate court will render such judgment. Missouri, etc., R. Co. v. Greenwood [Tex. Civ. App.] 14 Tex. Ct. Rep. 10, 89 S. W. 810. Where in appeal allowed by appellate term to the appellate division there is no stipulation for judgment absolute, the appellate division cannot render such judgment notwithstanding Code Civ. Proc. § 319. Hart v. North German Lloyd S. S. Co. 108 App. Div. 279, 95 N. Y. S. 733.

78. In reversing an order of distribution in an action by an administrator to pay debts, the appellate court should either make the order of distribution or remand the case to the probate court with specific instructions as to the items to which the fund should be applied. Sherman v. Millard, 6 Ohio C. C. (N. S.) 338. The appellate court will remand with instructions to dismiss, where pending the appeal, a decision in the state court on the construction of the statute in controversy practically disposes of the main issue. Appeal on Constitutionality of State Statute, which was construed in state court during pendency of appeal in Federal courts. Love v. Busch [C. C. A.] 142 F. 429. Where the evidence shows no cause of action against defendant, he is entitled to a remand with instructions to dismiss. Larson v. Centennial Mill Co. [Wash.] 82 P. 294. Under Laws 1901, p. 240, c. 118, appeal from judgments of the superior court, relating to special assessments, the supreme court may correct, change, modify, confirm, or annul the same in so far as it affects the property of the appellant, it will remand with directions to vacate a judgment reached without the admission of any evidence and proceed to full trial permitting introduction of testimony, hearing, and determining the case as in equity causes. Ahrens v. Seattle, 39 Wash. 168, 81 P. 558. Where judgment was erroneously entered for defendant on ground that plaintiff had no authority to sue for rent and amount advanced for repair of a machine, judgment

valid.[79] This power is to be exercised with great caution and not in a case where further evidence [80] or an amendment of the pleadings [81] may change the result. In some states if plaintiff fails to establish his case on a second trial, judgment absolute is ordered.[82] In some cases where a special verdict has been found [83] or where under a statute a single question is specified for review [84] or the case was submitted below on agreed facts [85] or the trial was without a jury,[86] the appellate court will proceed to render final judgment.

was reversed and judgment for plaintiff directed. Town of Beloit v. Heineman [Wis.] 107 N. W. 334. In the event of the denial of a proper motion for judgment notwithstanding an erroneous verdict or of a motion to modify such verdict to correspond with the established case and of a judgment being rendered on the erroneous verdict and reversed on appeal the case may be remanded with directions to grant the motion and render judgment accordingly. Hay v. Baraboo [Wis.] 105 N. W. 654. In the case just cited this **rule** was **extended** so that in case of an improper denial of a motion to direct a verdict and a verdict rendered for the adverse party, and its being held on appeal that the motion should have been granted for reasons necessarily precluding appellee from securing any other result from another trial than that which would have followed the granting of the motion in the first instance, the appellate court may cause the litigation to be terminated without a new trial and to that end remand the cause with directions to grant the motion previously denied and enter judgment accordingly. denied and enter judgment accordingly. Id.

79. History of right to trial by jury considered, and held, in view of conditions existing in Rhode Island and even under the rule of the common law of England as expounded by Federal decsions. Gen. Laws 186 c. 251, § 11, authorizing the supreme court to direct judgment without further trial by jury is not unconstitutional. Gunn v. Union R. Co. [R. I.] 62 A. 118.

80. Where it is probable that insufficiency of evidence may be supplied there should be remand on reversal. Sallier v. St. Louis, etc., R. Co., 114 La. 1090, 38 So. 868. Where at the close of plaintiff's evidence both parties made a motion for a directed verdict and that of the defendant was erroneously granted, the court will reverse and remand where from the facts rendition of final judgment would be unjust to some of the defendants who have pleaded separate and affirmative defenses. Allen v. Parmalee [C. C. A.] 142 F. 354. Where there is an erroneous instruction given directing the jury as to their authority to assess damages in a personal injury case, the appellate court will consider all the evidence and say whether or not the ends of justice require re-submission of case to a jury upon instructions which are free from error. Smoot v. Kansas City [Mo.] 92 S. W. 363. Where an appeal by defendant from an equity decree is reversed for defects in the record but it appears that complainant has a meritorious case, it will be remanded to the lower court for a rehearing. Hearst v. Proffit [Tenn.] 91 S. W. 207. When on appeal from a decree in equity the cause is sent back, because complaint is considered insufficient or evidence inadequate to support a material averment, no final decree is rendered in the court of review, except to set aside the decree of the court below and to require further proceedings to be had therein. State v. Richardson [Or.] 85 P. 225. Where it appears that the trial court did not pass upon plaintiff's claim of title under a tax deed but rendered judgment on the other issues, on reversal, the case will be remanded for further proceedings and not dismissed. Wagner v. Arnold [Ark.] 88 S. W. 852.

81. Where the appellate court reverses the decision of the trial court upon a question of law, without determining the facts, the case should be remanded; where, therefore, the appellate court differed with the trial court on the question as to whether the want of corporate existence of the plaintiff was a good defense, the case should have been remanded, especially since the statutes relating to amendment would have allowed an amendment as to the parties plaintiff after such remand. Kanawha Dispatch v. Fish, 219 Ill. 236, 76 N. E. 352. It appearing from facts imperfectly pleaded that plaintiff by amendment might plead a good cause of action, on reversal of a judgment in his favor the case will be remanded to enable plaintiff to amend. Texas & P. R. Co. v. Hughes [Tex. Civ. App.] 94 S. W. 130; Marion v. City Council of Charleston [S. C.] 52 S. E. 418.

82. Civ. Code Proc. § 341, limiting the number of new trials to be granted has no application to new trials for errors of law. City of Bardstown v. Nelson County [Ky.] 90 S. W. 246. By statute the court of civil appeals of Texas has power to enter judgment against plaintiff where he has failed to establish his case on the opportunity. Texas Cent. R. Co. v. Harbison [Tex. Civ. App.] 13 Tex. Ct. Rep. 610, 88 S. W. 414.

83. In New York, on appeal from the judgment where a special verdict is taken and the decision of motion for nonsuit reserved, the appellate court may direct such judgment on the special verdict as either party may be entitled to. Code Civ. Proc. § 1187. Sutherland v. St. Lawrence County, 103 App. Div. 597, 93 N. Y. S. 958.

84. A review being sought under § 5630, Rev. Codes 1899, it is the duty of the appellate court to dispose of the case finally on its merits unless a new trial is deemed necessary to the accomplishment of justice; this whether all the evidence or only a single fact is specified for review. Buckingham v. Flummerfelt [N. D.] 106 N. W. 403.

85. Where a case is tried on an agreed statement of facts and only one defense is interposed the appellate court on overruling that defense will render judgment for plaintiff. Daniell v. Baldwin [Ala.] 40 So. 421.

86. Where the case is tried without a jury, it becomes the duty of the appellate

(§ 15) *D. Findings, conclusions and opinions on which decision is predicated.*[87]—Obvious errors will be summarily disposed of.[88] The appellate court is not required to recite the evidence or to find the mere evidentiary facts, but only to find the ultimate facts.[89]

(§ 15) *E. Modifying or relieving from appellate decree.*[90]—For thirty days after rendition of judgment by the district court of appeals of California, its opinion is subject to change.[91] A motion or petition addressed to the supreme court to vacate, as erroneous on the merits a decision of that court itself, will not lie.[92] Where an execution issued out of the appellate court is recalled for reformation to comply with an amended judgment, any rights which have accrued by levy under the execution will be saved.[93]

(§ 15) *F. Mandate and retrial.*[94]—The mandate or remittitur[95] is usually withheld for a time fixed by the rules to permit of motion for modification[96] or reargument[97] at the end of which time it is filed in the court below,[98] and jurisdiction is thereby transferred to the lower court[99] subject to the recall of the mandate.[1] It is conclusive on the court below which must implicitly follow its directions,[2]

court on reversal to render such judgment as should have been rendered by the court below. Cook v. Spencer [Tex. Civ. App.] 91 S. W. 813.

87. See 5 C. L. 241.

88. Where it appears that the statement of cause in a motion for new trial for exclusion of evidence is materially different from offer of proof shown in the bill of exceptions, where action of court appears plainly correct, court will not take the space for a full showing of the matter. Rush v. Kelley, 34 Ind. App. 449, 73 N. E. 130.

89. Hayes v. Chicago Tel. Co., 218 Ill. 414, 75 N. E. 1003.

90. See 5 C. L. 241.

91. In re Smith [Cal. App.] 83 P. 167.

92. Philbrook v. Newman [Cal.] 82 P. 772.

93. Seymour v. Bruske [Mich.] 12 Det. Leg. N. 520, 104 N. W. 691.

94. See 5 C. L. 242.

95. "Remittitur" in the appellate practice of California courts means the judgment of the appellate court authenticated back to the court from which the appeal was taken, or over which it exercises control, and corresponds to mandate in the United States courts. In re Smith [Cal. App.] 83 P. 167.

96. See ante, § 15 E.

97. See post, § 16.

98. An order redocketing a cause after reversal does not require the formality of a judgment. Gage v. People, 219 Ill. 369, 76 N. E. 498. An objection that the case was not redocketed after remand is waived by appearance, and cannot be raised for the first time on a second appeal. Stahl v. Stahl, 220 Ill. 188, 77 N. E. 67. Notice redocketing of the case after reversal should be given to the respective parties, and the record should specifically recite such notice. Gage v. People, 219 Ill. 20, 76 N. E. 56. An order of the county court reinstating a cause after reversal, which recited that the cause had been filed by the said court for more than ten days and that due notice had been given that a motion would be made to redocket the said cause, was sufficient to show due notice of the redocketing of the cause as against a collateral attack. Gage v. People, 219 Ill. 369, 76 N. E. 498. Act 1901, requiring a mandate to be filed within 12 months after rendition of final judgment by the appellate court, is applicable to a judgment of reversal in part rendered in 1894 in which no mandate was filed in 1903. Aspley v. Hawkins [Tex. Civ. App.] 88 S. W. 289.

99. On appeal from the superior court to the district court of appeals, the former was precluded from taking any further action in the case until remittitur was sent down from the appellate court. In re Smith [Cal. App.] 83 P. 167. Where an interlocutory order granting an injunction was dissolved by the appellate court, it was not necessary for the trial court to wait for the mandate from the appellate court before assessing damages. See ante, § 7, Transfer of Jurisdiction. Fry v. Radzinski, 219 Ill. 526, 76 N. E. 694. Motion for leave to amend cannot be made until remittitur. Central Trust Co. v. West India Imp. Co., 109 App. Div. 517, 96 N. Y. S. 519.

1. The appellate court may recall a mandate to correct errors, irregularities or an inadvertence. Livesley v. Johnston [Or.] 82 P. 854.

2. Halsey v. Waukesha Springs Sanitarium [Wis.] 107 N. W. 1; Barbour v. Tompkins [W. Va.] 52 S. E. 707; Scullin v. Wabash R. Co., 192 Mo. 6, 90 S. W. 1026; Boggiano v. Chicago Macaroni Mfg. Co., 118 Ill. App. 225. A lower court can enter no other decree than that ordered by the appellate court though matters arising at the time of the entry were not considered by the appellate court. Galt v. Nevitt 116 Ill. App. 308. The judgment of an appellate court is conclusive of all matters which in fact were or might have been litigated. Lower court can enter no other decree than that directed though question of interest was not discussed in or considered by supreme court. Id. A mandate directing the lower court to appoint commissioners to ascertain damages is sufficiently complied with if the judge in vacation appoints such commissioners. Southern Illinois & M. Bridge Co. v. Stone [Mo.] 92 S. W. 475. Where an order granting a new trial is reversed with directions to enter judgment on the verdict, the lower court can do nothing but enter such judgment and it was not er-

and mandamus lies to enforce its commands.[3] A general reversal leaves the case as though it had not been tried [4] except as to matters adjudicated on the appeal,[5]

ror to refuse defendant the right to interpose an amended answer. Esler v. Wabash R. Co., 115 Mo. App. 574, 91 S. W. 400. Where the appellate court issues a mandate to enter judgment in accordance with the verdict, the trial court cannot allow interest. Scullin v. Wabash R. Co., 192 Mo. 6, 90 S. W. 1028. Where a case is remanded with directions to allow appellant to bring in other lienholders and, if she refused to do so, to enter judgment discharging the property from her lien, the court properly discharged the lien where the only thing which appellant did was to amend the pleadings so as to make another lienholder a party, upon whom no summons was issued. Weber v. Gardner [Ky.] 93 S. W. 671. A writ of mandate ordering a trial judge forthwith to procure the services of another judge to try a cause, or show cause why he should not, itself operates as a stay of proceedings without a formal order. In re Smith [Cal. App.] 83 P. 167. A mandate directing a new trial by jury does not deprive the trial court of the power to direct a verdict. People v. Alton [Ill.] 77 N. E. 429. Where the judgment of reversal finally decides the only question in issue, the trial court, on remand, has no power except to enter a final order or judgment without a retrial, although the mandate does not specifically so direct. Chicago, etc., R. Co. v. People, 219 Ill. 408, 76 N. E. 571. The lower court cannot add to the relief decreed on appeal. Reems v. Dielman [La.] 41 So. 217. Judgment being reversed and remanded with directions to enter judgment for plaintiff in accordance with the opinion of the supreme court, the trial court had no power to reframe any issue and retry it, and could only render judgment in accordance with the opinion. Halsey v. Waukesha Springs Sanitarium [Wis.] 107 N. W. 1. A cause having been remanded with directions to submit certain issues to the jury, the court will, on a second appeal, consider errors committed by the trial court in submitting those issues though defendant in error contends that the issues had been settled at the former hearing. Morrill v. McNeill [Neb.] 104 N. W. 195. On remand by supreme court with directions to trial court to reconsider on a specified point, trial court has no authority to reconsider the entire case. In re Brown's Estate [Pa.] 63 A. 133. Where it was held on appeal that plaintiff was entitled to recover a certain sum and the cause was remanded for further proceedings in conformity with the opinion of the court the entry below of a decree for such sum constituted such further proceedings though the appellate court could have passed a final decree under Code Pub. Gen. Laws, art. 5, § 36. Safe Deposit & Trust Co. v. Gittings [Md.] 62 A. 1033. On reversal, supreme court may order lower court to permit amendment of complaint. City of Denver v. Spencer [Colo.] 82 P. 590. The trial court has no power or authority to issue again in the same case an injunction or restraining order which has on appeal been dissolved by the supreme court. Kerns v. Morgan [Idaho] 83 P. 954. On an affirmance by the appellate court the court of original jurisdiction has no authority to modify the mandate but must act in accordance therewith. Persons v. Wirgman, 140 F. 207. Under the sentence, "this cause is held for further direction," the trial cannot modify the mandate of the appellate court, but it can construe it. Id. Mandate construed that parties defendant be taxed with costs of litgation up to and including the final decree, and that the fund or land in controversy be taxed with the costs accruing after final decree. Id. On mandate to trial court, it cannot vary decree of appellate court nor examine it except for execution. Warner v. Grayson, 24 App. D. C. 55.

3. Where the court of appeals adjudges invalid the claims of a patent, reversing the circuit court and issuing a mandate for the entry of a decree in conformity with its opinion, the authority of the circuit court is limited to the entry of such decree, and cannot grant a rehearing, unless by leave of the appellate court, and mandamus will issue to enforce the mandate. American Soda Fountain Co. v. Sample [C. C. A.] 136 F. 857.

4. On remand from an appeal reversing an order of the lower court sustaining a demurrer, it is within discretion of lower court to make an order upon defendant to answer. Vanek v. Senft [Ill.] 78 N. E. 17. But if defendant asks leave to answer, trial court as a rule has no discretion in the matter. Id. On remittitur from Federal supreme court to state supreme court, an appeal is before the latter for such disposition as it may deem proper and not inconsistent with the opinion of the Federal court. Harding v. Harding [Cal.] 83 P. 434. Where the court found in a replevin action that the evidence failed to show plaintiff's ownership, which finding was reversed on appeal, a mandate directing the court to proceed in accordance with the views expressed in the opinion does not authorize a judgment for plaintiff without a trial of the facts. Case v. Espenschied, 188 Mo. 725, 87 S. W. 987. The effect of a general reversal is to entirely abrogate the former judgment of the trial court and to remand the cause to such court for further proceedings precisely as if no trial had ever occurred, and on a rehearing to authorize either party to introduce testimony in the same manner as if the case had never before been tried, save that no proceedings should be had or taken inconsistent with the legal principles announced in the opinion rendered by the appellate court. Illinois State Trust Co. v. St. Louis, etc., R. Co., 217 Ill. 504, 75 N. E. 562. Upon a reversal of an order granting defendant a new trial and the cause being remanded for further proceedings, an order of the lower court adopting the judgment of the supreme court vacating its former order, directing a reentry of the verdict, denying the motion for new trial and directing judgment for plaintiff, is proper. Stafford v. Levinger [S. D.] 106 N. W. 133. Where trial on merits was never had, that matter was still before court on remand. United States v. Rio Grande Dam & Irrigation Co., [N. M.] 85 P. 393. Lower court, having jurisdiction both of the persons and

as to which the decision is the law of the case[5] in so far as the evidence is in legal subject during a prior proceeding, did not lose it on remand by supreme court on appeal. (Id.) While the usual practice on remand from an appeal reversing an order sustaining a demurrer, would have been to redocket cause, overrule demurrer and enter a rule on defendant to answer the bill, that is not necessary in the absence of anything to show that defendant asked leave to answer. Vanek v. Senft [Ill.] 78 N. E. 17. After a judgment in the supreme court in a disbarment appeal, remanding the cause to the district court for trial, it is not essential to jurisdiction that the accusation be refiled in the district court. In re Burnette [Kan.] 85 P. 575. Where plaintiff in ejectment elected to have title confirmed in defendant under Gen. St. 1903, § 4052, but on appeal secured a reversal of a judgment of confirmation on the ground of error in the application and interpretation of the statute and in ascertaining the amount awarded plainiff as a condition of confirmation, such reversal affected the entire judgment and entitled plaintiff to withdraw his election to have the title confirmed in defendant. Lewis v. Yale [Conn.] 61 A. 364.

5. A reversal of an interlocutory decree does not affect the validity of other subsequent interlocutory decrees which were not brought up. Hopkins v. Prichard [W. Va.] 53 S. E. 557. A general reversal in condemnation proceedings held not res judicata as to whether the railroad sought to be constructed was parallel to another road. Illinois State Trust Co. v. St. Louis, etc., R. Co., 217 Ill. 504, 75 N. E. 562. As to those proceedings which did not go up with the appeal, the trial court may proceed after decision. Houssiere-Latreille Oil Co. v. Jennings-Heywood Oil Syndicate [La.] 40 So. 727. The circuit court may consider any matters left open by the mandate of the appellate court and its decision of such matters can be reviewed by a new appeal. United States v. Rio Grande Dam & Irrigation Co. [N. M.] 85 P. 393. Mandate can not refer to nor prohibit consideration of matters raised by supplemental pleadings filed after a remand. Id. Issues of fact decided on appeal cannot be relitigated on a second trial below. City Council of Marion v. National Loan & Investment Co. [Iowa] 107 N. W. 309. Under amendment to Const., art. 6, § 6, the last previous rulings of the supreme court in cases in which the court assumes to proceed as having jurisdiction on any question of law or equity shall in all cases be controlling authority in courts of appeal. State v. Louisiana, B. G. & A. Gravel Road Co. [Mo. App.] 92 S. W. 153.

6. Grant v. Walsh [Wash.] 83 P. 1113; Ellis v. Witmer [Cal.] 83 P. 800; Pautz v. Plankinton Packing Co. [Wis.] 105 N. W. 482; Warner v. Grayson, 24 App. D. C. 55; Hancock v. Diamond Plate Glass Co. [Ind. App.] 75 N. E. 650; Penn State Glass Co. v. Rice Co., 216 Ill. 567, 75 N. E. 246; Dent v. Pickens [W. Va.] 53 S. E. 154. Not only all the matters that were actually litigated, but also all others that the parties were bound by state of the pleading to assert, by way of defense to or in support of the demand or demands set up in a clause, are res judicata by the decision rendered therein. Id. Ellis v. Witmer [Cal.] 83 P. 800. An instruction fully in accord with a decision in the same case on a former appeal cannot be erroneous. Griswold v. Nichols [Wis.] 105 N. W. 815. Where on appeal to the appellate division, it was held that a testamentary trust was void as offending the rule against perpetuities, such decision was binding when the question was again raised on another trial before single justice of supreme court. People's Trust Co. v. Flynn, 96 N. Y. S. 421. Decision on appeal that evidence in libel case did not warrant submission of question of falsity of publication to jury is law of the case on trial court and on second appeal. Carpenter v. New York Journal Pub. Co., 97 N. Y. S. 478. Where the court of appeals held a verification of a mechanic's lien, which was attacked as being made by an agent, sufficient, on a subsequent trial, it cannot be attacked as being upon "information and belief." McDonald v. New York, 99 N. Y. S. 122. Where on appeal it was held that the court did not err in giving a peremptory instruction, such holding becomes the law of the case on retrial where the evidence is substantially the same. South Covington, etc., R. Co. v. Schilling [Ky.] 89 S. W. 220. On an application for the construing of a decree, a statement of the trial judge defining the boundaries of a right of way, quoted with approval by supreme court of the United States on a previous appeal, is the law of the case. Central Trust Co. v. Wabash, etc., R. Co., 144 F. 476. Where an order of sale is reversed on the ground that no service of summons was had and the case remanded, the parties could not on return of the case introduce evidence that the defendants were actually before the court. Harding v. Wooldridge [Ky.] 93 S. W. 1056. Where on appeal, the appellate court indicates certain instructions which should have been given, they become the law of the case on retrial, the facts being substantially the same. Miller v. Metropolitan Life Ins. Co. [Ky.] 89 S. W. 183. Where the supreme court ruled that a certain issue was not made by the pleadings in a case, and that the judge of the trial court should have instructed the jury not to consider that question, on a second trial there was no error in not submitting to the jury an exception to an auditor's report which merely raised the same question. Mitchell v. Schmidt, 123 Ga. 418, 51 S. E. 408. Where the appellate court dismisses an appeal because it has become a moot case, the lower court must dismiss the case. Montgomery County v. Montgomery Traction Co. [Ala.] 39 So. 518. The precise question decided by this court upon appeal or error cannot be relitigated upon a retrial of the same case in the district court. Supreme Court of Honor v. Tracy [Neb.] 101 N. W. 1021. When the appellate court affirms a case on one point and as to other points raised says that the decision of the lower court was correct, all questions of law or fact become res judicata in another suit for the same cause of action. Hall v. Kalamazoo [Mich.] 12 Det. Leg. N. 500, 104 N. W. 689. Where the supreme court expresses no opinion on questions raised, at the first trial and the case is sent back for retrial on account of certain errors that had been pointed out, and the same questions are again presented on

effect the same.[7] A party may change his theory,[8] amend his pleadings,[9] bring in new parties,[10] and introduce additional evidence.[11]

§ 16. *Rehearing and relief thereon.*[12]—After final decision,[13] a motion for rehearing may in the discretion of the court[14] be entertained to correct errors or oversights of the court.[15] A motion based on points not urged at the hearing[16] or one

the retrial of the case, they may be considered as having been properly determined at the first trial. Breuer v. Frank, 3 Ohio N. P. (N. S.) 581.

7. Ellis v. Witmer [Cal.] 83 P. 800. Where on the first trial, the appellate court held defendant entitled to a directed verdict, he will not be so entitled on the second, unless the evidence is the same. Denver & R. G. R. Co. v. Arrighi [C. C. A.] 141 F. 67.

8. Upon a new trial one may take a position inconsistent with his position upon the former trial in order to conform to the rulings of the appellate court. Chauvet v. Ives, 104 App. Div. 303, 93 N. Y. S. 744.

9. Where the order of affirmance of judgment of dismissal of an alternative writ of mandamus concludes in the words, "It is further ordered that the cause be remanded to the said court below and that a judgment be there entered and docketed in accordance therewith," the trial court might permit the alternative writ of mandamus to be amended. State v. Richardson [Or.] 85 P. 225. Where a demurrer to complaint was sustained and plaintiff refused to amend, and judgment was rendered thereon, which was affirmed on appeal, an order for a new trial will not be granted, but on remand the plaintiff on payment of costs will be permitted to amend his complaint reasonably. Id. Where a judgment in a law action is reversed on appeal, and cause is remanded for new trial or for further proceedings, the court below possesses power to allow reasonable amendments to be made to the pleadings, and its action in this respect will not be disturbed except for abuse. Id.; Mitchell v. Schmidt, 123 Ga. 418, 51 S. E. 408. Such a rule does not prevent trial court in its discretion to permit amendments of the pleadings, present new or additional facts, nor is any express leave from appellate court necessary. Ellis v. Witmer [Cal.] 83 P. 800; Fair Haven & W. R. Co. v. New Haven, 77 Conn. 667, 60 A. 651. When a case has been tried and upon appeal has been remanded to the district court with directions to enter a specified decree, defendant will not be allowed to amend his answer by alleging facts of which he had knowledge prior to the trial first had. Brewster v. Meng [Neb.] 107 N. W. 751. Upon the filing of a mandate directing judgment, the defeated party cannot thereafter file amended pleadings but can only apply for a modification or vacation of the judgment on the grounds stated in Code Civ. Proc. 518. Western Bank v. Coldeway's Ex'r [Ky.] 94 S. W. 1. Where after reversal of order sustaining demurrer demurrant does not ask leave to withdraw it, judgment should go against him. National Contracting Co. v. Hudson River Water Power Co., 110 App. Div. 133, 97 N. Y. S. 92. Right to amend after reversal held lost by delay. Murphy v. Plankinton Bank [S. D.] 105 N. W. 245.

10. Where a case must be sent back because of failure of parties, a new trial will not be granted, where not necessary as to issues already settled, but only as to new issues raised by pleadings of the new parties to the action. Mitau v. Roddan [Cal.] 84 P. 145.

11. On reversal plaintiff may show that a defense held to be sufficient in law, such as a foreign judgment, did not in fact exist. Harding v. Harding [Cal.] 83 P. 434. Payment received on a judgment must be restored on a reversal thereof. Royal Baking Powder Co. v. Hoagland, 180 N. Y. 35, 72 N. E. 634.

12. See 5 C. L. 245.

13. The court will not review its action on a mere motion made and disposed of at a previous term, upon a petition for a rehearing. Village of North Chicago v. American Steel & Wire Co. [Ill.] 77 N. E. 1041.

14. A petition for rehearing is allowed to be filed only by the grace and favor of the court. Village of North Chicago v. American Steel & Wire Co. [Ill.] 77 N. E. 1041.

15. Upon a rehearing the appellate court may modify its previous holding if it is necessary for the ends of justice. Diefenderfer v. State [Wyo.] 83 P. 591. If upon the face of the record the judgment appealed from is in contravention of some statute or of a well established rule of law, the appellate court would be justified in setting its judgment aside on rehearing even though appellant had not pointed out, and its attention had not been called to, the objection until after it had filed an opinion for affirming the judgment. Lewis v. San Francisco [Cal. App.] 82 P. 1106.

16. Although there is no provision in the state constitution for a rehearing in a case where judgment was rendered by the court sitting in bank but its authority to order a stay of remittitur until after a decision upon a decision for a rehearing, has been clearly esablished. In re Smith [Cal. App.] 83 P. 167. Where appellees cannot be prejudiced by the judgment and nothing but costs of appeal are involved, and the petition relates to matters which the petitioner failed to call attention to on the original hearing although he had opportunity to, a rehearing will be denied. Reece Folding Mach. Co. v. Fenwick [C. C. A.] 140 F. 287. It is no ground for a rehearing that a question was not assigned or heard on the previous hearing. In re Tuohy's Estate [Mont.] 83 P. 486. Points not urged on the original hearing can not be urged on the rehearing. Powell v. Nevada, etc., R. Co. [Nev.] 82 P. 96. Where a case was briefed, argued, and presented as though regular, although in fact containing irregularities, its sufficiency cannot be questioned upon petition for rehearing. Brandon v. West [Nev.] 85 P. 449. No new ground or position not taken in the argument submitting the case or question waived by silence can be considered on petition for rehearing. Id. A rehearing will not be granted to enable the court to make a

which is a mere reargument of points decided [17] will not be considered, nor, as a rule, will amendments of the record be allowed.[18] A rehearing will not be granted because both parties ask it but only when authorized by the rules.[19] The petition for rehearing must be respectful in tone [20] and be filed within the time limited.[21] Oral argument is not allowed on suggestion of error,[22] and the rules requiring that a petition for reargument be submitted without argument, an argumentative petition is improper.[23] In California the court of appeal on granting a rehearing must continue the case on the docket for the next term and cannot forthwith reverse its former judgment.[24] A motion once denied may be allowed to be renewed.[25]

§ 17. *Liability on bonds and damages and penalties for delay.*[26]—A bond invalid under the statute may be enforceable as a common-law obligation [27] or on principles of estoppel,[28] but where the judgment appealed from was unenforceable [29] or the bond was unnecessary,[30] or the appeal so defective as to be wholly ineffectual,[31] the bond is void, and provisions in the bond not required by statute are nugatory.[32] The validity of an appeal bond given in an appeal from a judgment in fa-

final adjudication instead of a remand where on the former hearing the case was remanded for lack of sufficient facts to dispose of the case without objection. Reece Folding Mach. Co. v. Fenwick [C. C. A.] 140 F. 287. Where no request was made for postponement of the original hearing on account of sickness of counsel, such sickness was not ground for a rehearing. Price v Central of Georgia R. Co. [Ga.] 53 S. E. 455. A question not raised on the trial or on the appeal cannot be raised on rehearing. Phippin v. Missouri Pac. R. Co. [Mo.] 93 S. W. 410.

17. The function of a petition for rehearing is to present something which has been overlooked by the court, and one which merely asks reconsideration of matters decided will be denied. Florida Land Rock Phosphate Co. v. Anderson [Fla.] 39 So. 392. A petition for rehearing which merely seeks to reargue the matters covered by the opinion will not be considered. Id. Suwanee, etc., R. Co. v. West Coast R. Co. [Fla.] 39 So. 538.

18. A rehearing will not be granted to correct the record when defendant's attention was called to the alleged erroneous statements on original hearing and they were waived. Buhman v. Nickels & Brown Bros. [Cal. App.] 82 P. 85.

19. Florida Land Rock Phosphate Co. v. Anderson [Fla.] 39 So. 392.

20. A motion for rehearing will not be stricken from the docket on account of discourteous terms used therein unless it is absolutely necesary to protect the dignity of the court. Western Union Tel. Co. v. McGown [Tex. Civ. App.] 93 S. W. 710.

21. A petition for rehearing which does not comply with the rules or is not filed in time will be denied without consideration of its merits. Florida Land Rock Phosphate Co. v. Anderson [Fla.] 39 So. 392. A petition for rehearing on an appeal in the Federal courts will not be granted unless presented during the term of the original hearing or leave granted during that time. Rule 29, C. C. A. Kirchbebrger v. American Acetylene Burner Co. [C. C. A.] 142 F. 169. Under the rule requiring a petition for a rehearing to be filed within 10 days after a decision is entered of record, a petition to strike the transcript from the record need not be renewed within 10 days after the first hearing of the petition but may be renewed within 10 days after the final determination of the case. Pieser v. Minkota Milling Co. [Ill.] 78 N. E. 20.

22. Hall Commission Co. v. R. L. Crook & Co. [Miss.] 40 So. 1006.

23. Florida Land Rock Phosphate Co. v. Anderson [Fla.] 39 So. 392.

24. Reed v. Corbin [La.] 38 So. 942.

25. An appellate court may, after overruling a motion for rehearing, during the same term reopen the case and grant an application for a rehearing. Gregory v. Webb [Tex. Civ. App.] 13 Tex. Ct. Rep. 1016, 89 S. W. 1109. A former decision on rehearing will be reviewed where a mistake of fact was made. Multnomah County v. White [Or.] 85 P. 78.

26. See 5 C. L. 246.

27. Locke v. Skow [Neb.] 106 N. W. 1013.

28. Though an appeal bond be unauthorized it may still be valid as a contract when appellant derives a benefit therefrom. Bond in attempted appeal from order for writ of assistance conditioned on payment of rent, held valid as a contract where obligor had retained possession of the premises. Escritt v. Michaleson [Neb.] 103 N. W. 300.

29. Action on appeal bond cannot be maintained when the judgment itself is nonenforceable or suspended. Giles v. De Cow [Colo.] 83 P. 638.

30. Where a stay bond was unnccessarily given, the sureties thereon are not liable. Olsen v. Birch & Co. [Cal. App.] 81 P. 656.

31. An appeal bond from county to district court is not enforceable while a writ of error operating as a supersedeas is pending from county to supreme court. Giles v. De Cow [Colo.] 83 P. 638. Bond is a nullity where the appeal is not taken in time. Where one of the grounds for dismissal was that the appeal was not taken in time, it will be presumed that the dismissal was on that ground rather than other insufficient grounds alleged. Zimmer v. Massie [Mo. App.] 93 S. W. 859.

32. Provision for summary judgment against sureties. David v. Tacoma R. & Power Co. [Wash.] 81 P. 688.

ver of a foreign corporation is not affected by the failure of the corporation to comply with a statute requiring certain formalities as a condition precedent to the right to do business in the state.[33]

Extent of liability.[34]—In the absence of fraud, mistake or circumstances working an estoppel, a surety on a supersedeas bond can be held only for consequences of the proceedings in which the instrument was given.[35] Though a bond requires the payment of a judgment, the rendition of a judgment which could be paid is not a condition precedent to the enforcement of other obligations contained in the bond.[36] That an appeal is dismissed on motion of appellee is no defense to an action on the bond.[37] On an appeal from the court of appeals to the supreme court in an action involving a foreclosure decree, the appeal bond does not require or impart a personal liability to discharge the judgment appealed from.[38]

Rights and liabilities of sureties.[39]—A surety is estopped by the judgment against his principal [40] and by the recitals of the bond.[41] Mere indulgence to the judgment debtor will not release the surety on a supersedeas bond.[42] Where no judgment is rendered against the appellant because of a discharge in bankruptcy pending the appeal, the sureties on the appeal bond will not be liable.[43]

Forfeiture and enforcement.[44]—The appeal bond cannot be sued on until the judgment of the appellate court has become final.[45] Summary judgment against

33. The giving of such bond by the appellant does not constitute a transaction of business on the part of the appellee. McCarthy v. Alphons Custodis Chimney Con'st. Co., 219 Ill. 616, 76 N. E. 850.

34. See 5 C. L. 246.

35. Surety on appeal not liable for costs in proceedings by writ of error. American Bonding Co. v. Heye [Neb.] 107 N. W. 591. A surety not liable where bond was entirely foreign to the litigation in which it was attempted to be used. Id. On affirmance of a judgment on appeal, appellee was entitled to an additional judgment for the amount of expenses and disbursements incurred below after judgment in aid of execution which was rendered useless by the appeal and stay of proceedings, against the defendant and his sureties. Mee v. Bowden Gold Min. Co. [Or.] 81 P. 990. A surety on a waste bond given to supersede an order of confirmation in foreclosure proceedings is not liable to the mortgagee or to the purchaser at the sale, for taxes pending final confirmation in the appellate court. United States Fidelity & Guaranty Co. v. Rieck [Neb.] 107 N. W. 389.

36. The bond being conditioned that if judgment should be rendered against defendant on appeal he would pay such judgment and rent for the occupation of certain premises, the petition was not demurrable because it did not show the rendition of a judgment which could be paid where it showed liability for failure to pay the rent. Locke v. Skow [Neb.] 106 N. W. 1012.

37. Defendants were precluded from asserting that plaintiff was estopped from maintaining the action because the appeal was dismissed on his own motion (Locke v. Skow [Neb.] 106 N. W. 1013), nor is dismissal a failure of consideration so as to avoid liability (Id.).

38. Marean v. Stanley [Colo.] 81 P. 759.

39. See 5 C. L. 247.

40. A matter which is res judicata as to the principal on an appeal bond is res judicata as to the surety. Zimmer v. Massie [Mo. App.] 93 S. W. 859. In an action upon an appeal bond, the decision of the appellate court affirming the judgment is conclusive as to the right of the plaintiff to maintain the suit. A plea alleging that the plaintiff and appellee was a foreign corporation, and had not complied with Hurd's Rev. St. 1903, c. 32, §§ 67b-67d, presented no defense where it appeared that the judgment had been affirmed by the appellate court, such judgment being res judicata as to such defense if it was raised in the original suit, and if not so raised it being too late to take the advantage of it in a collateral proceedings on the appeal bond. McCarthy v. Alphons Custodis Chimney Const. Co., 219 Ill. 616, 76 N. E. 850.

41. A surety is estopped to deny the judgment sued on where the bond recites existence of such judgment. McCarthy v. Alphons Custodis Chimney Const. Co., 219 Ill. 616, 76 N. E. 850. While the obligors on an appeal bond are estopped from denying the recitals therein, they are not estopped from obtaining a judicial construction of the terms to the effect that the words "shall pay and satisfy the judgment" in a foreclosure suit does not impart a personal liability. Marean v. Stanley [Colo.] 81 P. 759.

42. United States Fidelity & Guaranty Co. v. Boyd [Ky.] 94 S. W. 35. A mere unilateral promise not to issue execution is no defense. Must be a binding agreement disabling creditor from enforcing debt. Id.

43. Lafoon v. Kerner, 138 N. C. 281, 50 S. E. 654.

44. See 5 C. L. 247.

45. While enforcement of the judgment is suspended, appeal bond is a mere contingent security and appellee can have no remedy on it during suspension as where appeal is taken to court of appeals and subsequently by a writ of error the case is taken from trial court to supreme court, suspending the judgment of trial court. Giles v. De Cow [Colo.] 83 P. 638.

the sureties is proper only on statutory authorization,[46] and provisions in the appeal bond for summary judgment are nugatory if not demanded by statute.[47]

Damages and penalties for delay [48] are allowed in some states.[49]

APPEARANCE.

§ 1. General; Special; What Constitutes Each (251). General Appearance (251). Special Appearance (252).
§ 2. Who May Make or Enter (253).
§ 3. Effect (253). Withdrawal (254).

§ 1. *General; special; what constitutes each. General appearance.*[50]—The word "appear" as used in the trial of a cause means the act or proceeding whereby a defendant places himself within the jurisdiction of the court.[51] The presumption is that an appearance is general,[52] and, therefore, if one wishes to appear specially, he must limit his appearance to a specific purpose.[53] The taking of any step looking to the trial of the cause on its merits, as a plea that the court has no jurisdiction of the subject-matter,[54] requesting an adjournment,[55] moving for a separate jury trial,[56] offering to confess judgment,[57] executing a redelivery bond in a replevin action,[58] applying for and obtaining a stay of proceedings,[59] pleading to the merits,[60]

46. Under § 6523, 2 Ball. Ann. Codes and St., the supreme court may upon affirmance of a judgment render judgment against both the appellant and his sureties on the appeal bond. But there is no such provision relating to the lower court. David v. Tacoma R. & Power Co. [Wash.] 81 P. 688.

47. David v. Tacoma R. & Power Co. [Wash.] 81 P. 688.

48. See 5 C. L. 247.

49. Under Hurd's Rev. St. 1897, c. 33, § 23, in connection with the Appellate Court Act, § 10, the appellate court may assess damages against a party who has prosecuted an appeal or writ of error merely for delay, and the supreme court will not review the exercise of the appellate court's discretionary power in assessing such damages, in the absence of any showing that such power has been abused. McCarthy v. Alphon Custodis Chimney Const. Co., 219 Ill. 616, 76 N. E. 850. Ten per cent of amount of judgment awarded appellee for vexatious delay. Chicago & A. R. Co. v. Moore, 117 Ill. App. 147. Damages for an appeal taken for delay only will not be imposed where court cannot reach a unanimous concurrence either way. Prince v. Kennedy [Cal. App.] 85 P. 859. The $25 penalty provided for by Act May 19, 1897 (P. L. 67), for payment of costs to appellee, imposed where there was no assignment of errors or paper book and appellant's motion to remit his appeal to the superior court was not made until 8 months after taking the appeal. McFadden v. McFadden [Pa.] 61 A. 75. The fact that a party appeals from an order refusing to vacate a judgment on the ground that appellant through some "oversight" neglected to attend the trial does not justify the allowance of damages. Opperman v. Conway, 117 Ill. App. 524. Appellate court will award damages to appellee under Comp. L. 1897, § 3142, where appeal is trivial and taken for purpose of delay only. Jones, Downs & Co. v. Chandler [N. M.] 85 P. 392. Where an appeal is nonprossed and it appears that no paper books were served or filed and no notice of abandonment given, a penalty will be imposed though some irrelevant excuses were set up in the answer. Dietrich v. Loughran, 29 Pa. Super. Ct. 320. Penalty allowed where the uncontradicted evidence is that defendant took an appeal without assigning any definite error, served no paper book, and gave no notice of abandonment though a long period elapsed between the taking of the appeal and the entering of the non-pros. Twibill's Estate, 29 Pa. Super. Ct. 319.

50. See 5 C. L. 248.

51. A physical appearance is not essential. Thornhill v. Hargreaves [Neb.] 107 N. W. 847.

52. Everett v. Wilson [Colo.] 83 P. 211.

53. An appearance "de bene esse," being unknown in equity procedure, constitutes a general appearance. Taylor v. McCafferty, 27 Pa. Super. Ct. 122. But where defendant did not intend to appear generally and plaintiff so understood, a notice of appearance will be construed a special appearance in case of doubt. Moore v. Blake, 98 N. Y. S. 233.

54. Notwithstanding it is coupled with a plea to the court's jurisdiction of the person. Mahr v. Union Pac. R. Co., 140 F. 921. An averment that the subject-matter "was not and never has been and is not now within the state" is equivalent to a plea that the court has no jurisdiction of the subject-matter. Id.

55. McGeehan v. Bedford [Wis.] 107 N. W. 296.

56. Martin v. Chicago & M. Elec. R. Co., 220 Ill. 97, 77 N. E. 86.

57. Maryland Casualty Co. v. Bank of Murdock [Neb.] 107 N. W. 562.

58. Fowler v. Fowler [Okl.] 82 P. 923.

59. East Coast Lumber Co. v. Ellis-Young Co. [Fla.] 39 So. 197.

60. Roby v. South Park Com'rs, 215 Ill. 200, 74 N. E. 125. Demurring to complaint before a judge in chambers. Shafor v. Fry, 164 Ind. 315, 73 N. E. 698. Filing affidavit of defense. Southern Bldg. & Loan Ass'n v. Pennsylvania Fire Ins. Co., 23 Pa. Super. Ct. 88. Answering an application for ali-

moving to set aside a default judgment [61] or for a new trial,[62] constitutes a general appearance. An appearance to set aside an entire proceeding for lack of personal jurisdiction, a part of which is valid without, constitutes a general appearance.[63]

The power conferred upon the circuit courts to prescribe rules of practice and procedure authorizes them to adopt a rule requiring one appearing specially to so state and to stipulate that if his special plea be denied, he will appear generally, and providing that all other appearances shall be deemed general.[64]

The filing of a paper expressly waiving service of process, confessing the debt and authorizing the entry of judgment thereon, is a "personal appearance" within a statute relating to confessing of judgment.[65]

Appeal.[66]—By appealing, defendant makes an appearance and confers jurisdiction of his person upon the appellate court,[67] and it may make any order appropriate on appeal.[68] Where the appellate court has acquired jurisdiction it may remand the case to the trial court and thus confer jurisdiction upon it.[69]

Special appearance.[70]—The right to appear specially is not an inherent one but a privilege allowed by practice [71] and when one appears to deny jurisdiction of his person he must confine himself to that particular branch of jurisdiction [72] or his appearance becomes general.[73] The filing of a petition for removal from a state court to a Federal court is a special appearance, and hence does not prevent defendant from moving for a dismissal for want of jurisdiction of his person in the latter court.[74]

A party appearing specially to object to the jurisdiction of the court because of irregularities in the service of process must point out such irregularities.[75] A special appearance to object to the court's jurisdiction of defendant's person is no "appearance" within a statute allowing an appeal from a default judgment where there has been no appearance.[76]

mony. Hamilton v. Hamilton [Iowa] 106 N. W. 55. Entering plea of nonassumpsit. Daley v. Iselin, 212 Pa. 279, 61 A. 919.

61. Meyer v. Ruby-Trust Min. & Mill. Co., 192 Mo. 162, 90 S. W. 821.

62. Tootle-Weakley Millinery Co. v. Billingsley [Neb.] 105 N. W. 85.

63. As where defendant appears to set aside a decree granting a limited divorce and alimony, based upon notice served in another state, the divorce being expressly authorized by statute. McGuinness v. McGuinness [N. J. Eq.] 62 A. 937.

64. Rule 22 of the circuit court of the Ninth circuit is authorized by Rev. St. § 918 (U. S. Comp. St. 1901, p. 685). Mahr v. Union Pac. R. Co., 140 F. 921.

65. Code Civ. Proc. § 433. Thornhill v. Hargreaves [Neb.] 107 N. W. 847.

66. See 5 C. L. 248.

67. Specially where the appellate court tries the case de novo. Fowler v. Fowler [Okl.] 82 P. 923. Although the amount was not within the jurisdiction of the trial court if within the jurisdiction of the appellate court and the trial is de novo. Thayer v. Gibbs [Mich.] 12 Det. Leg. N. 93, 103 N. W. 526.

68. Allowance of attorney's fees on appeal by a nonresident from an order granting temporary alimony. Gardiner v. Gardiner [Colo.] 83 P. 646.

69. Rumeli v. Tampa [Fla.] 37 So. 563. An appearance in the appellate court for the purpose of raising the question of the court's jurisdiction of the person of the appellee is not such an appearance as to waive nonservice of notice of appeal. Roll v. Cummings [Mo. App.] 93 S. W. 864. Not necessary that appearance be evidenced by writing. Personal appearance sufficient. Long v. Frank, 117 Ill. App. 207.

70. See 5 C. L. 248.

71. Mahr v. Union Pac. R. Co., 140 F. 921.

72. Mahr v. Union Pac. R. Co., 140 F. 921. Where one appears conditionally his motion must be directed only to some defect in the bill or irregularity of service. Taylor v. McCafferty, 27 Pa. Super. Ct. 122.

73. Plea to the merits filed simultaneously with one to the jurisdiction of defendants person waives the latter plea, irrespective of the order in which they are numbered. Putnam Lumber Co. v. Ellis-Young Co. [Fla.] 39 So. 193. Rule not changed by Rev. St. 1892, §§ 1062, 1063, and common-law rule 60, permitting defendant to plead all the defenses he has, and allowing contradictory pleas. Id. Coupled with motion to dismiss. Everett v. Wilson [Colo.] 83 P. 211. Joined plea to the merits. Taylor v. McCafferty, 27 Pa. Super. Ct. 122; Thomasson v. Mercantile Town Mut. Ins. Co., 114 Mo. App. 109, 89 S. W. 564.

74. International Text-Book Co. v. Heartt [C. C. A.] 136 F. 129.

75. Smith v. Delane [Neb.] 104 N. W. 1054.

76. Municipal Court Act, Laws 1902, p. 1578, c. 580, § 311. Dixon v. Carrucci, 97 N. Y. S. 380.

§ 2. *Who may make or enter.*[77]—An appearance may be made by an authorized attorney,[78] and authority to appear will be presumed unless the contrary is shown.[79] An unauthorized appearance of a county attorney does not make the county a party to the proceedings.[80] A general appearance by attorneys though unauthorized when entered may be ratified.[81] A general appearance may also be entered by one appearing as counsel though not admitted to practice.[82]

§ 3. *Effect.*[83]—A general appearance waives all irregularities in the proceedings to acquire jurisdiction of defendant's person, as want of service of process,[84] irregularities in the manner of service,[85] and defects in the process itself,[86] and confers jurisdiction of his person upon the court.[87] But a general appearance, entered after a special appearance objecting to the jurisdiction of the party has been overruled, does not waive the question of jurisdiction [88] where the ruling has been properly preserved.[89] Appearance cannot give jurisdiction of subject-matter where the court has no power to try that class of cases,[90] but where the action is brought in the wrong district, a general appearance without objection perfects the court's jurisdiction.[91]

A general appearance to a contest of the merits waives error in denying a motion to quash summons for non-service,[92] cures a pleading which fails to name defendant as a party,[93] waives the objection that no leave of court to file the information was secured,[94] dispenses with proof of notice of levy in attachment proceedings,[95] and with proof that defendant was a resident of the county in a summary proceeding in the city court for misfeasance as an attorney.[96]

A general appearance after judgment gives jurisdiction which relates back to the prior proceedings.[97]

77. See 5 C. L. 249.

78. Though the party is a minor. Sears v. Duling, 77 Vt. 496, 61 A. 518.

79. Mahr v. Union Pac. R. Co., 140 F. 921.

80. Immaterial that the individual members of the board of supervisors understood that he was to appear for the county. Yokey v. Woodbury Co. [Iowa] 106 N. W. 950.

81. Where defendant knew of the entry and acquiesced therein for four months he ratified such appearance and it cannot be withdrawn. Raymondville Paper Co. v. St. Gabriel Lumber Co., 140 F. 965.

82. Where defendant's counsel authorized a person not admitted to practice to enter a special appearance, a general appearance entered by him will bind the defendant. Kerr v. Walter, 104 App. Div. 45, 93 N. Y. S. 311.

83. See 5 C. L. 249.

84. Mahr v. Union Pca. R. Co., 140 F. 921.

85. Summary proceedings. Peabody v. Long Acre Square Bldg. Co., 98 N. Y. S. 242; Hearn v. Ayres [Ark.] 92 S. W. 768. Irregularity in obtaining an order of publication against a nonresident. Landram v. Jordan, 25 App. D. C. 291. Questions as to sufficiency of notice by publication in condemnation proceedings. Orange County v. Ellsworth, 98 App. Div. 275, 90 N. Y. S. 576.

86. Omission of year in which it was returnable. Wilkinson v. New York City R. Co., 99 N. Y. S. 380.

87. Shorter University v. Franklin Bros. Co. [Ark.] 88 S. W. 974; Jenkins v. Southern R. Co. [S. C.] 53 S. E. 481; Greenwood Loan & Guarantee Ass'n v. Williams, 71 S. C. 421, 51 S. E. 272; Camplin v. Jackson [Colo.] 83 P. 1017; Ennis Brown Co. v. Hurst [Cal. App.] 82 P. 1056; Rickert v. Pollack, 48 Misc. 348, 95 N. Y. S. 578; Dominion Co. v. Atwood, 114 Ill. App. 447; See v. Heppenheimer [N. J. Eq.] 61 A. 843. A foreign corporation by voluntarily appearing gives jurisdiction to the court. Pruyn v. McCreary, 105 App. Div. 302, 93 N. Y. S. 995; McGeehan v. Bedford [Wis.] 107 N. W. 296; Douglas v. Indianapolis & N. W. Traction Co. [Ind. App.] 76 N. E. 892. Voluntarily appearance in contempt proceedings. O'Neil v. People, 113 Ill. App. 195.

88. Stephens v. Molloy, 99 N. Y. S. 385. Defective service. Medical College of Georgia v. Rushing [Ga.] 52 S. E. 333; York County Sav. Bank v. Abbot, 139 F. 988.

89. Waived because not preserved. Gaffner v. Johnson, 39 Wash. 437, 81 P. 859.

90. State Bank v. Thiveatt, 111 Ill. App. 599.

91. Actions to be brought before a justice of peace in the township where defendant resides. Thompson v. Wood [Ind. T.] 91 S. W. 36. Right of defendant in Federal courts to be tried in the district where he resides. Iowa Lillooet Gold Min. Co. v. Bliss, 144 F. 446.

92. Eddleman v. Union County Traction & Power Co., 217 Ill. 409, 75 N. E. 510.

93. First Baptist Church of Sharon v. Harper [Mass.] 77 N. E. 778.

94. Proceeding in the nature of quo warranto. Attorney General v. A. Booth & Co. [Mich.] 12 Det. Leg. N. 991, 106 N. W. 868.

95. Pacific Selling Co. v. Collins [Ala.] 39 So. 579.

96. Failure to turn over money collected. McDonald v. State [Ala.] 39 So. 257.

97. Tootle-Weakley Millinery Co. v. Billingsley [Neb.] 105 N. W. 85.

By statute in some states a special appearance to object to the sufficiency of the process or service confers jurisdiction of the person, but may entitle him to a continuance.[98]

Withdrawal.[99]—A general appearance once entered cannot be withdrawn without notice to opposing parties.[100]

APPELLATE COURTS AND JURISDICTION; APPLICATION OF PAYMENTS; APPOINTMENT; APPORTIONMENT LAWS, see latest topical index.

APPRENTICES.[1]

The statutes of Kentucky make it the duty of the county court to inquire after and put in apprenticeship such poor orphans and other children within its knowledge whose relatives or parents the court judges will not bring them up in moral courses,[2] and provide that any minor orphan may be bound as an apprentice by its guardian, or, if it has none, by its mother, with the consent entered of record in the county where it resides.[3] Before an order can be made binding out any such child, the person with whom it resides must be summoned to show cause to the contrary.[4] The remedies provided for the master in case his apprentice is enticed or taken away or runs away are exclusive.[5]

ARBITRATION AND AWARD.

1. The Remedy in General (254).
§ 2. The Submission and Agreements to Submit (254).
§ 3. The Arbitrators and Umpire (255).
§ 4. Hearing and Procedure Before Arbitrators (255).
§ 5. The Award; Requisites, Validity and Effect (255). Enforcement of Award (256). Review of Award (256).
§ 6. International Disputes (256).
§ 7. Statutory Arbitration Between Employers and Employes (256).

§ 1. *The remedy in general.*[6]

§ 2. *The submission and agreements to submit.*[7]—Contracts to submit questions in dispute to the determination of persons or tribunals other than the courts are binding.[8] It is not essential to a submission that there exist a valid cause of action between the parties,[9] nor is it necessary that questions of law be submitted at all.[10] The fact that the submission provides that the decision shall be based upon competent evidence and be according to law and equity does not make the submission special.[11] By statute in some states an agreement to arbitrate is void if it denies the unsuccessful party the right of review in the courts.[12] An unexecuted agreement to submit will not be recognized or enforced,[13] and any party thereto may withdraw and revoke the submission any time before the award,[14] but not after

98. Code, § 3541. Hamilton v. Hamilton [Iowa] 106 N. W. 5.
99. See 3 C. L. 303.
100. Daley v. Iselin, 212 Pa. 279, 61 A. 919.
1. See 5 C. L. 250.
2. Ky. St. 1903, § 2591. Brock v. Whittaker [Ky.] 93 S. W. 623.
3. Ky. St. 1903, § 2593. Brock v. Whittaker [Ky.] 93 S. W. 623. Order binding out apprentice to mother held void because record failed to show facts necessary to give court jurisdiction to make it. Id.
4. Ky. St. 1903, § 2592. Brock v. Whittaker [Ky.] 93 S. W. 623.
5. Circuit court has no jurisdiction of petition for mandatory injunction directing one who has unlawful custody of apprentice to surrender him to master. Brock v. Whittaker [Ky.] 93 S. W. 623.
6. See 3 C. L. 303.
7. See 5 C. L. 250.
8. Pacaud v. Waite, 218 Ill. 138, 75 N. E. 779.
9. Any difference of opinion as to liability or amount of damages is sufficient. Houston Saengerbund v. Dunn [Tex. Civ App.] 92 S. W. 429.
10. An instruction in an action on an award to find for the plaintiff only in the event that the jury found that both questions of law and of fact were submitted is erroneous. Houston Saengerbund v. Dunn [Tex. Civ. App.] 92 S. W. 429.
11. White Star Min. Co. v. Hultberg [Ill.] 77 N. E. 327.
12. Rev. St. 1887, § 3229. Huber v. St. Joseph's Hospital [Idaho] 83 P. 768.
13. Havens v. Robertson [Neb.] 106 N. W. 335.
14. In an action on an award where there is evidence tending to show that defendant

without the consent of the other parties thereto.[15] Where a submission has been revoked by nonaction of the arbitrators, the court may strike it from the record.[16]

Who may make.[17]—One may agree to the submission of matters in dispute to arbitration through an agent.[18] Where a corporation through its president executed articles of submission, the corporation is bound thereby though the submission was not authorized by the directors.[19]

Effect.[20]—An agreement to submit a matter involved in a pending suit to arbitration constitutes a ground for dismissal of the suit.[21]

§ 3. *The arbitrators and umpire.*[22]—In some states an oath is required of all arbitrators.[23] Arbitrators are not parties to a contract of submission and hence cannot sue upon it.[24] Where both parties to an arbitration request the services of the arbitrators, they are jointly and severally liable for their compensation,[25] but where one of the parties has paid his share of the costs of arbitration, it may be a full and effectual discharge under the statute of his obligation.[26]

§ 4. *Hearing and procedure before arbitrators.*[27]—The arbitrators must act within the specified time and failure so to do revokes the submission.[28] The terms of the submission must be followed,[29] but the rules relative to the admissibility of evidence are not enforced with the same strictness as in proceedings before a court.[30]

§ 5. *The award; requisites, validity and effect.*[31]—An award not filed within the time specified in the agreement is void.[32] An award in a common-law submission is not vitiated by the fact that the proceedings are not in writing and that neither the arbitrator nor witnesses were sworn,[33] nor by mistakes of law.[34]

The scope and effect of an arbitration must be determined from the terms and provisions of the submission and award.[35] A claim which might have been presented to the arbitrators while considering the controversy, but not presented, will be deemed abandoned.[36] An award is conclusive in the absence of fraud or gross

withdrew before the award was made, an instruction basing the right to recover solely on the submission and award is erroneous. Houston Saengerbund v. Dunn [Tex. Civ. App.] 92 S. W. 429. Until an award has been made final by publication either party may withdraw the submission. Harrell v. Terrell [Ga.] 54 S. E. 116.

15. Levy v. Scottish Union & Nat. Ins. Co. [W. Va.] 52 S. E. 449.

16. Johnson v. Crawford, 212 Pa. 502, 61 A. 1103.

17. See 5 C. L. 251.

18. Houston Saengerbund v. Dunn [Tex. Civ. App.] 92 S. W. 429. Contractors are not the agents of the property owners so that an arbitration by them of the amount of work performed by an employe is binding upon the owner in an action to enforce a lien. B. & C. Comp. § 5640. Quackenbush v. Artesian Land Co. [Or.] 83 P. 787.

19. Especially where the corporation participated in the proceedings. White Star Min. Co. v. Hultberg [Ill.] 77 N. E. 327.

20. See 3 C. L. 304.

21. Notwithstanding the parties fail to carry out the agreement. Thompson v. Turner, 114 Mo. App. 697, 89 S. W. 897.

22. See 5 C. L. 251.

23. Code Civ. Proc. § 2369, applies to common-law arbitration as well as to statutory arbitration. Kinkle v. Zimmerman [N. Y.] 76 N. E. 1080.

24, 25. Harris v. Brand, 7 Ohio C. C. (N. S.) 105.

26. Rev. St. §§ 3162, 3166. Harris v. Brand, 7 Ohio C. C. (N. S.) 105.

27. See 5 C. L. 251.

28. Johnson v. Crawford, 212 Pa. 502, 61 A. 1103.

29. An award is invalid where only two of the three arbitrators took part in the investigation while the agreement contemplated the concurrent action of all. Harvin v. Denton [Miss.] 39 So. 456.

30. Error to refuse to admit a deposition on the ground that it was mailed to one of the parties instead of to the arbitrators, especially where it appears that it was not opened by such party. Roberts Bros. v. Consumers' Can Co. [Md.] 62 A. 585.

31. See 5 C. L. 251.

32. Immaterial that it was not necessary to stipulate time. Abrams v. Brennan [Cal. App.] 84 P. 363.

33. Especially where waived by the parties. Hurst v. Funston [Tex. Civ. App.] 91 S. W. 319.

34. As to the legal effect of a contract. Phaneuf v. Corey [Mass.] 76 N. E. 718.

35. A submission and award as to one's right to "make and construct" a certain levee is no determination of the right to rebuild. Pinkstaff v. Steffy, 216 Ill. 406, 75 N. E. 163.

36. Roberts, Johnson & Rand Shoe Co. v. Westinghouse Elec. & Mfg. Co. [C. C. A.] 143 F. 218.

mistake,[37] and prevents either party from maintaining an action at law for the same cause.[38] But it is binding only on the parties thereto.[39]

Proof of award.[40]

Enforcement of award.[41]—A judgment will be issued on an award only when all the provisions of the statute authorizing it have been strictly complied with,[42] and irregularities cannot be waived by the parties so as to authorize judgment thereon.[43] In those states where the statutory does not supersede the common-law arbitration, an arbitration failing as the former may be enforced as a common-law arbitration if sufficient.[44]

Review of award.[45]—An award may be set aside in a suit brought for that purpose for misconduct of the arbitrators,[46] but where the parties have had a fair hearing, the award will be expounded favorably and every reasonable intendment made to support it.[47] As a general rule an award in conformity with the submission will not be disturbed for errors of law or fact,[48] but where the facts appear upon the face of the award and it further appears that the arbitrators based their decision upon certain facts or rules of law misapprehended, a court of equity will set aside or correct it.[49] But in determining whether there was such a misapprehension of law or fact, the court is confined to the award itself.[50] An award will be set aside for fraud, and the question whether fraud exists is for the jury.[51]

Irregularities may be waived by proceeding, but whether such is the effect depends upon the intention of the party as evidenced by his acts.[52] An acceptance of benefits under an award estops a party from questioning its validity.[53] Where a submission agreement is so defective as not to amount to a statutory arbitration, the court has no power to vacate the award.[54]

Devisees or legatees may except to an award of arbitration in an action against the administrator to charge the estate with a claim though not nominally parties thereto,[55] and the superior court has jurisdiction to determine such exceptions.[56]

§ 6. *International disputes.*[57]

§ 7. *Statutory arbitration between employers and employes.*[58]

37. Specially where the parties fail to exercise the reserved right of appeal to another set of arbitrators. Roberts, Johnson & Rand Shoe Co. v. Westinghouse Elec. & Mfg. Co. [C. C. A.] 143 F. 218. The determination of a committee appointed by the president of the board of trade pursuant to the by-laws, is binding in the absence of fraud. Pacaud v. Waite, 218 Ill. 138, 75 N. E. 779.

38. March v. Lukins [Pa.] 63 A. 427.

39. Evidence held sufficient to prima facie show that defendant was a party thereto so as to render it error not to admit it in evidence. Levy v. Scottish Union & Nat. Ins. Co. [W. Va.] 52 S. E. 449. Where an award has been received in evidence, the other party may introduce evidence that he was not a party thereto. Id.

40. See 5 C. L. 252.

41. See 3 C. L. 305.

42. Failure to secure an order of court submitting the matter to arbitration is fatal. Duffy v. Odell, 117 Ill. App. 336.

43. Duffy v. Odell, 117 Ill. App. 336.

44. Hurst v. Funston [Tex. Civ. App.] 91 S. W. 319.

45. See 5 C. L. 252.

46. Cohn v. Wemme [Or.] 81 P. 981.

47. Roberts Bros. v. Consumers' Can Co. [Md.] 62 A. 585.

48. White Star Min. Co. v. Hultberg [Ill.] 77 N. E. 327. As a rule the courts will not review the merits or the findings of law or fact. Roberts Bros. v. Consumers' Can Co. [Md.] 62 A. 585.

49. White Star Min. Co. v. Hultberg [Ill.] 77 N. E. 327.

50. Cannot consider an opinion or statement of one of the arbitrators. White Star Min. Co. v. Hultberg [Ill.] 77 N. E. 327.

51. Pepper v. Pepper [Del.] 62 A. 232.

52. Error in rejecting a deposition is not waived where a formal and timely objection was made. Roberts Bros. v. Consumers' Can Co. [Md.] 62 A. 585.

53. As where a landlord accepts the crops awarded. Harrell v. Terrell [Ga.] 54 S. E. 116.

54. Electric Steel Elevator Co. v. John Kam Malting Co., 98 N. Y. S. 604.

55. Not necessary to obtain leave to intervene. Pepper v. Pepper [Del.] 62 A. 232.

56. Pepper v. Pepper [Del.] 62 A. 232.

57, 58. See 3 C. L. 306.

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ARGUMENT AND CONDUCT OF COUNSEL.

§ 1. Right of Argument and Order of Same (257). Right to Open and Close (257).
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§ 5. Excuses for Impropriety (263).
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§ 7. Action of Court or Counsel Curing Objections (264).

Argument and conduct of counsel in criminal cases is treated elsewhere.[59]

§ 1. *Right of argument and order of same.*[60]—The judge has large discretion in controlling and directing argument of counsel,[61] which he must exercise soundly in confining him to the discussion of vital issues,[62] but this does not include the right to deprive a litigant of the benefit of his counsel's argument when it is confined within proper bounds and is addressed to the material facts of the case.[63]

The indulgence of counsel in additional argument, after the regular course of trial, to discuss a matter improperly argued by opposing counsel, lies in the discretion of the court.[64] The refusal to hear argument in support of a motion for a new trial and arrest of judgment is no ground for reversal when the court's ruling thereon is undoubtedly correct.[65]

Right to open and close.[66]—As a general rule the right to open and close rests with the party having the burden of proof.[67] In some states in all cases, civil or criminal, when no evidence is introduced by defendant, the right of reply and conclusion belongs to him.[68] The tendering of witnesses by the defendant to plaintiff for the mere purpose of taxing their fees as costs does not amount to the introduction of evidence within this rule.[69]

If a defendant desires to admit a cause of action set forth in a complaint, and to secure the opening and closing by setting up an affirmative defense, he must make his admissions clear and comprehensive, leaving nothing no matter how inconsequential to be proved by the plaintiff in order to make a prima facie case.[70]

59. See Indictment and Prosecution, 5 C. L. 1790.

60. See 5 C. L. 253.

61. Puett v. Caldwell & N. R. Co. [N. C.] 53 S. E. 852.

62. It does not appear from the record whether the court erred in refusing to let counsel comment on a previous attempt to sue defendant for alleged breach of promise. Wrynn v. Downey [R. I.] 63 A. 401.

63. Comment in an action against carrier on remarks of person in charge of train warning them of danger from a drunken engineer, which remarks were part of the res gestae. Puett v. Caldwell & N. R. Co. [N. C.] 53 S. E. 852.

64. Gulf, etc., R. Co. v. Matthews [Tex. Civ. App.] 13 Tex. Ct. Rep. 949, 89 S. W. 983.

65. John Hancock Mut. Life Ins. Co. v. Powell, 116 Ill. App. 151.

66. See 5 C. L. 253.

67. If defendant by his answer raises no issues upon which plaintiff is in the first instance required to present proof in order to succeed, he is entitled to open and close. Cilley v. Preferred Acc. Ins. Co., 109 App. Div. 394, 96 N. Y. S. 282. The denial of facts alleged in a complaint which are unnecessary to be proved, will not raise issues entitling plaintiff to open and close. Id. In a proceeding for the widening of a highway, not involving ownership of land, but expressly admitting it, defendant does not have the right to open and close the argument. Code Civ. Proc. § 607. Mendocino County v. Peters [Cal. App.] 82 P. 1122. Where petition in action for assault and battery alleges that defendant both shot and struck plaintiff, but sets out but one assault and battery, and answer denied the striking but admitted and attempted to justify the shooting, held that the burden on the whole case was on defendant so that he was entitled to closing argument. Torian v. Terrell [Ky.] 93 S. W. 10.

68. Rule 3. Brown v. Southern R. Co. [N. C.] 52 S. E. 198.

69. Brown v. Southern R. Co. [N. C.] 52 S. E. 198.

70. Cilley v. Preferred Acc. Ins. Co., 109 App. Div. 394, 96 N. Y. S. 282. Where under the pleadings the plaintiff was required to prove that death occurred as prescribed by the policy sued on, the defendant was not entitled to open and close. Id. It was not error in an action for libel to refuse the opening and closing to defendant although the general issue was withdrawn, as plain-

The substance rather than the form of the answer is controlling.[71] In most states the question is held to be one relating to procedure merely so that the ruling of the court in relation thereto will not be interfered with, even if erroneous, unless prejudice is shown.[72] Some courts, however, hold the right to be an absolute one, and its denial to be reversible error in all cases.[73]

§ 2. *Opening statement.*[74]—In his opening statement, counsel should confine himself to the case made by the declaration,[75] and to facts which he expects to prove

tiff still had the right to introduce evidence on the question of damages. Geringer v. Novak, 117 Ill. App. 160. In an action for gross negligence and substantial damages, defendant admitted ordinary negligence and insignificant damages, and therefrom claimed right to close argument, but it was properly denied. Southern R. Co. v. Steele [Ky.] 90 S. W. 548. In an action for slander where defendant denies malice and a part of the alleged slanderous words, and pleads privileged communication, plaintiff still has opening and closing argument. Shipp v. Patton [Ky.] 93 S. W. 1033. The defendant in an action for assault and battery by denying the allegations in the complaint and setting up a state of facts which would reduce the encounter to mere amusement does not obtain the right to close the argument. Hess v. Hymson [Ky.] 93 S. W. 9.

NOTE. Admissions how and when made: Aside from statutory provisions, the weight of authority is that the burden of proof and consequent right to open and close must be determined from the pleadings only, at the beginning of the trial. Dorough v. Johnson, 108 Ga. 812, 34 S. E. 168; Goodrich v. Friedersdorff, 27 Ind. 308; Woodruff v. Hensley, 26 Ind. App. 592, 60 N. E. 312; Kentucky Wagon Mfg. Co. v. Louisville, 97 Ky. 348, 31 S. W. 130; Lake Ontario Nat. Bank v. Judson, 122 N. Y. 278, 25 N. E. 367. With the exception of Goldsberry v. Stuteville, 3 Bibb. [Ky.] 345, it is believed the cases quite unanimously hold that defenses, not made in good faith and unsupported by any show of evidence, but made solely to procure the right to open and close will not be accorded that privilege. Wheatley v. Phelps, 3 Dana [Ky.] 303; Van Zant v. Jones, 3 Dana 464; Sodousky v. M'Gee, 4 J. J. Marsh. [Ky.] 267; Perkins v. Guy, 55 Miss. 153, 30 Am. Rep. 510; Coleman v. Hagerman, 5 N. Y. City Hall Rec. 63, in which the right was taken from defendant after having been granted where evidence showed it was unjust. So an amendment of his pleading by defendant solely to procure right of closing should be defeated by trial court if discovered in time Hartman v. Keystone Ins. Co., 21 Pa. 466. In some jurisdictions admission may be made on the record. St. Louis & S. F. R. Co v. Thomason, 59 Ark. 140, 26 S. W. 598; Smith v. Wellborn, 75 Ga. 799; Ayers v. Lancaster, 64 Tex. 305 (under Rule of Court 13); Munn v. Martin [Tex. App.] 15 S. W 195. And the general issue may be withdrawn or waived. Lake Ontanio Nat. Bank v. Judson, 122 N. Y. 278, 25 N. E. 367; Harvey v. Ellithorpe, 26 Ill. 418; Bemis v. Horner, 165 Ill. 347, 46 N. E. 277; Gardner v. Girtin, 169 Ill. 40, 48 N. E. 307; Blackledge v. Pine, 28 Ind. 466. Admissions may, in some states, be made even on the trial of facts so as to shift the right to open and close (Merchants' Life Asso. v. Treat, 98 Ill App. 59; Willingham v. Macon & B. R. Co., 113 Ga. 374, 38 S. E. 843), but **contra,** Kendrick v. Ravens, 47 Ga. 612; Porter v. Still, 63 Miss. 357; Zweibel v. Myers [Neb.] 95 N W. 597. In case there are several defendants, plaintiff retains right to open and close so long as he retains burden of proof as to any of the defendants. Kirkpatrick v Armstrong, 79 Ind. 384; Clodfelter v. Hulett 92 Ind. 426; Lieb v. Craddock, 87 Ky. 525, 9 S. W. 838; Boatmen's Sav. Inst. v. Forbes, 52 Mo. 201. Admissions made after trial has commenced (Boyd v. Smith, 15 Ind. App. 324 43 N. E. 1056), or after evidence has been introduced (Central R. Co. v. Morgan, 110 Ga. 168, 35 S. E. 345), are unavailable to obtain the right of opening and closing, and even though plaintiff has a prima facie case without proof, if no request for the right is made until both sides have presented all their testimony, it comes too late (Southern R. Co. v. Gresham, 114 Ga. 183, 39 S. E. 883). —From Note to Brunswick & W. R. Co. v Wiggins [Ga.] 61 L. R. A. 529.

71. A party cannot, by mere ingenuity of pleading, as, for instance, by putting his answer in the form of an affirmative allegation, rather than specific denial, deprive his opponent of the right to open and close. Farmer v. Norton [Iowa] 105 N. W. 371. Where the complaint alleges that defendant borrowed certain moneys from plaintiff and converted certain store fixtures owned by the latter, and answer admits the liability on the loan but asserts that the fixtures were bought with the borrowed money, that plaintiff has no interest in them and that defendant has a valid counterclaim against plaintiff for malicious prosecution, was not an admission of any indebtedness for conversion and the court perhaps erred in awarding the opening and closing to defendant. Id.

72. The ruling of court in awarding opening and closing will not be interferred with unless prejudicial abuse of discretion is shown (Farmer v. Norton [Iowa] 105 N. W. 371), but since the real controversy was a counterclaim for malicious prosecution it was not prejudicial to plaintiff to let defendant open and close (Id.). A verdict will not be set aside because the prevailing party was allowed to open and close unless it is shown that the other party has suffered actual injustice. Seeley v. Manhattan Life Ins. Co. [N. H.] 61 A. 585. A defendant was not prejudiced by refusal of court to grant them the closing argument where they were given full opportunity to answer surprises in the argument of opposing counsel or make suggestions invertently omitted and the burden of proof was put on plaintiff. Id.

73. Cilley v. Preferred Acc. Ins. Co., 109 App. Div. 394, 96 N. Y. S. 282.

74. See 5 C. L. 255.

75. Douglas v. Marsh [Mich.] 12 Det. Leg. N. 459, 104 N. W. 624.

by competent evidence.[76] His admissions or statements will not authorize the withdrawal of a cause of action or defense from the jury unless they, as a matter of law, preclude him from recovering thereon.[77]

§ 3. *Kind, extent, and mode of argument or comment during trial.*[78]—Counsel may comment on the fact that a defense set up by an amendment was not originally pleaded.[79] Remarks in argument contradicting an admission previously made at the trial are prejudicial and ground for reversal.[80] Counsel on appeal will not be permitted to go outside the record and charge the court below with freely and publicly admitting his prejudice against one of the parties.[81]

Statements of law and reading from decisions or papers pertinent to other cases.[82]—Counsel should not argue the law to the jury, or attempt to lead them to believe that they may do otherwise than take the law from the court,[83] misstate the law,[84] or read to the jury and comment on the part of a former opinion of the appellate court in the same case which recites the verdict on a former trial and its amount.[85] In some states, however, he may read a decision of the supreme court to the jury and to argue therefrom the manner in which they are to ascertain the amount of their verdict.[86] During the argument on a motion for a directed verdict, the jury should be retired on request while decisions are being read and commented on,[87] but a failure to do so will not be ground for reversal unless injurious.[88]

Comments on evidence and scope of argument in relation thereto.[89]—It is proper to comment on the evidence in the case[90] and to draw fair inferences there-

76. Charging fraud in procuring a settlement, unsupported by any evidence. Lansing v. Michigan Cent. R. Co. [Mich.] 12 Det. Leg. N. 912, 106 N. W. 692.

77. In an action for partition, ejectment and rents and profits by part of the heirs of deceased against two others, admissions by the one of the latter that legal title stood in the ancestor and that on advice of counsel he procured a quitclaim deed from a tax-deed holder to the deceased instead of to himself, does not preclude proof of ownership as alleged. Hall v. Davidson [Kan.] 84 P. 556.

78. See 3 C. L. 307.

79. In a suit for damages arising from destruction of property, fact that defense of insanity of engineer was set up by amendment two years after suit was instituted may be commented on. Central of Georgia R. Co. v. Hall [Ga.] 52 S. E. 679.

80. In a personal injury suit an admission that an engine was going slow cannot be contradicted in the argument by asserting that it was going fast. St. Louis, S. W. R. Co. v. Hall [Tex. Civ. App.] 92 S. W. 1079.

81. Prejudice against building and loan associations. Oskaloosa Nat. Bldg. Loan & Inv. Ass'n v. Bailey [Iowa] 105 N. W. 417.

82. See 5 C. L. 260.

83. Stating the law of negligence to the jury in the opening argument with the declaration that he did not intend to be accurate, that defendant would make different claims, and that they must get the law from the court, saying nothing inflammatory, furnished no ground for an exception. Lewis v. John Crane & Sons [Vt.] 62 A. 60.

84. In action against carrier for assault by conductor on passenger growing out of a defective pass, argument to the effect that jury might consider the negligence of the defendant in writing the pass in determining the liability of defendant, held improper and ground for reversal where court overruled objection thereto and refused an instruction correctly stating the law. St. Louis, etc., R. Co. v. Harrison [Ark.] 89 S. W. 53.

85. It is highly improper to permit him to read to the jury from a former opinion of the appellate court in the same case, the part reciting the verdict of the jury and its amount, in the presence of the jury, declaring this to be what the appellate court had said in the case and calling the jury's attention thereto. Lewter v. Lindley [Tex. Civ. App.] 89 S. W. 784.

86. Cahaba Southern Min. Co. v. Pratt [Ala.] 40 So. 943.

87. Rice v. Dewberry [Tex. Civ. App.] 93 S. W. 715. Objection to their retirement that much of argument on motion will be such as must be repeated to jury if they are retired, is not sufficient. Id.

88. Irregularity will not authorize a reversal of judgment, where the court cannot say that such argument was injurious in view of the admonitions from the court and offending counsel that the jury should not consider anything contained in the decisions, but should confine themselves to the evidence adduced before them and the law given them in the charge of the court. Rice v. Dewsberry [Tex. Civ. App.] 93 S. W. 715.

89. See 5 C. L. 257.

90. In an action for the price of a cash register, defense being fraudulent representations, it is not error for counsel for plaintiff in argument to jury to operate the machine and comment on manner defendant tried to operate it, being based on evidence. Hallwood Cash Register Co. v. Rollins [N. H.] 62 A. 380. It is not error to prevent counsel from discussing irrelevant parts of pleadings from another case introduced in evidence. Cross v. Coffin-Fletcher Packing Co., 123 Ga. 817, 51 S. E. 704.

from.[91] A mere expression of opinion, not amounting to a statement of a fact not in evidence, is legitimate,[92] and a mere inadvertent misstatement of an immaterial matter of testimony heard by the jury is not ground for reversal;[93] but reversal may be granted for failure to exclude a statement of a fact, not supported by the evidence, not pertinent to the issue, and naturally tending to influence the jury,[94] for commenting on evidence excluded,[95] for alleging attempts to change the testimony of a witness by threats, nothing to that effect being in evidence,[96] or for permitting counsel to suggest a tort on the part of defendant unsupported by any evidence, without cautioning him or instructing jury therein although exceptions were taken,[97] or for permitting him with the approval of court to refer to specific facts in a case similar to the one on trial and comment thereon.[98] It is improper to attempt to go outside the record and refer to judgments sanctioned in other cases,[99] or to refer to another trial of the same cause,[1] or to attempt to invoke as matters of common knowledge matters which are not of that character,[2] or to refer to damages not recoverable in the action,[3] or to misstate the evidence.*

91. Plaintiff in an action on an attachment bond, putting in evidence its answer in the attachment case, gave right to counsel for defendant to comment to the jury on the answer and draw from them any legitimate conclusions which would illustrate the issues involved in the case on trial. Cross v. Coffin-Fletcher Packing Co., 123 Ga. 817, 51 S. E. 704. It was not improper to argue that defendant was negligent where evidence showed that switch arm or lever was not locked and that the switchman was watching a ball game while another wrongfully turned the switch. Elgin, A. & S. Traction Co. v. Wilson, 217 Ill. 47, 75 N. E. 436. An attorney may argue that his client would not have begun action if she had known that she had no cause of action where such argument is a logical inference from evidence that she never received a notice forfeiting the policy on which she sues. Seely v. Manhattan Life Ins. Co. [N. H.] 61 A. 585. May suggest any inference which does not misstate the evidence. Yeaton v. Boston, etc., R. Co. [N. H.] 61 A. 522. Is not debarred from urging inference of fact because it may be successfully answered. Seely v. Manhattan Life Ins. Co. [N. H.] 61 A. 585. Whether from facts in proof a particular inference can be drawn is a question of law. Id. From the fact that fireman saw plaintiff on track when train was 800 feet away and failed to notify the engineer may urge inference in argument to jury that he did not notify the engineer at all. Yeaton v. Boston, etc., R. Co. [N. H.] 61 A. 522. It was competent to argue from the fact that decedent was killed the first time he went over the route taken in connection with other evidence showing manner in which accident occurred, that the jury could infer he did not know of the danger to which he was subjected. Miller v. Boston & M. R. Co. [N. H.] 61 A. 360.

92. That there is as much difference between tweddledum and tweddledee as between the Armour Packing Co. of Kansas City, and the Armour Packing Co. of Louisiana, Limited. Armour Packing Co. v. Vietch-Young Produce Co. [Ala.] 39 So. 680.

93. Seely v. Manhattan Life Ins. Co. [N. H.] 61 A. 585.

94. Counsel stating that if defendant, manager of a hotel, had asked plaintiff his name, he would have known that he was dealing with the member of a family whose name was known and honored all over the county. Morris Hotel Co. v. Henley [Ala.] 40 So. 52.

95. Declaring that it was necessary to produce a written memorandum to refresh a doctor's memory, which writing had been excluded. Chicago City R. Co. v. Gregory [Ill.] 77 N. E. 1112.

96. Threats to discharge son of witness. Chicago City R. Co. v. Heydenburg, 118 Ill. App. 387.

97. Remark leading jury to believe that defendant might have dug certain holes in the nighttime. Sweezy v. Fisher [Mich.] 12 Det. Leg. N. 713, 105 N. W. 749.

98. Baxter v. Krainik [Wis.] 105 N. W. 803. In an action for injuries resulting from the frightening of plaintiff's horses by the firing of a revolver, counsel could not refer to a similar case of shooting followed by confession and imprisonment of culprit. Id.

99. In closing argument. Richardson v. Nelson [Ill.] 77 N. E. 583.

1. Chicago Union Traction Co. v. Lawrence, 113 Ill. App. 269. Counsel for plaintiff on second trial in his argument to jury asserting that on the first trial the engineer as a witness for the defendant swore to a different set of facts, there being nothing in evidence warranting the assertion, held prejudicial error. Missouri, etc., R. Co. v. Wood [Tex. Civ. App.] 91 S. W. 803.

2. In an action against a hotelkeeper for property lost in the hotel, it is improper for counsel in his argument to jury to declare that in nine cases out of ten such robberies were committed by servants but where the evidence points towards their guilt it is not ground for reversal. Kerlin v. Swart [Mich.] 12 Det. Leg. N. 924, 106 N. W. 710.

3. Reference to probable future damages, none being recoverable, nor justified by the pleadings and evidence, are improper, and permitting it over objection is error. Gulf, etc., R. Co. v. McClerran [Tex. Civ. App.] 91 S. W. 653. Action for damages to land by overflow through negligent construction of embankments. Id. In an action for the death of the husband, counsel may ask jury to "consider the interests of widow 'and children,'" especially under prompt admoni-

The effect of evidence cannot be limited by statement of counsel as to his purpose in introducing it,[5] and his statements in his closing argument can not control the theory of the case, when pleadings, evidence, and instructions are otherwise.[6]

Comments on witnesses.[7]—Counsel may draw any and all proper inferences from the evidence tending to discredit a witness,[8] even though no attempt has been made to impeach him,[9] but has no greater latitude in this regard than in commenting on one of the parties.[10] It is improper to abuse a witness,[11] but such abuse is not ground for reversal where it appears that no prejudice resulted.[12] Possible inferences from the absence of a witness may be rebutted by explanation.[13]

Comments on instructions and special interrogatories.[14]—Counsel may tell jury that if their answers to special questions are in the affirmative, their verdict must be for defendant,[15] and may read and comment on interrogatories requested by defendant, and allowed by the court,[16] nor is it prejudicial to state in the presence of the jury that he has no requests for instructions.[17]

Appeals to passion, prejudice, and sympathy.[18]—Great latitude is allowed counsel in arguing to the jury, and where there is no misrepresentation of the law or the facts and no abuse of privilege, no ground for reversal exists.[19] For the purpose of impressing the jury he may use oratorical embellishments and is not restricted to a cold statement of the facts,[20] but appeals on considerations other than the merits

tion from the court to jury to observe only his instructions as to the measure of damages. Horr v. Howard Paper Co. [Wis.] 105 N. W. 668.

4. A misstatement by counsel that defendant had admitted damages to the amount of $9,000 or $10,000 to have been sustained, which on being interrupted he immediately corrected by saying that he meant that the testimony was uncontradicted as to these items followed by a charge from the court no amount had been admitted and that the items mentioned was the amount claimed corrected error of counsel without prejudice to the defense. Dougherty v. Pittsburgh R. Co. [Pa.] 62 A. 926. Is improper to permit plaintiff's counsel against objection to read as the testimony of the defendant what is in fact the testimony of plaintiff's witness. Baxter v. Krainik [Wis.] 105 N. W. 803.

5. Although, in an action against an ex-county treasurer for not turning over to his successor a balance of money received by him, a ledger is introduced for the purpose, as stated by his attorneys, of showing merely how the accounts were kept and not to show actual disbursements, nevertheless the ledger may be so considered. Board of Sup'rs of Macomb County v. Lovejoy [Mich.] 13 Det. Leg. N. 51, 107 N. W. 276.

6. Claim that case was tried on guilt of conductor alone whereas it was actually tried on theory of guilt of both conductor and motorman. Chicago City R. Co. v. Shaw, 220 Ill. 532, 77 N. E. 139.

7. See 5 C. L. 256.

8. Chicago Union Traction Co. v. O'Brien, 219 Ill. 303, 76 N. E. 340. It was competent for counsel to comment on language of an officer of defendant "to watch out" in a case where because the engineer was drunk and mad, the conductor had gone ahead to get another engineer and fireman, and left the train in charge of the officer who warned the passengers that the engineer had threatened to go up the mountain, come back and run through the train. Puett v. Caldwell & N. R. Co. [N. C.] 53 S. E. 852.

9. Chicago Union Traction Co. v. O'Brien, 219 Ill. 303, 76 N. E. 341, afg. 117 Ill. App. 183. Instruction telling the jury to disregard counsel's argument in attempting to discredit an unimpeached witness is error. Id.

10. Objection not sustained on ground of no substantial injustice done. Davis v. Kerr [N. C.] 53 S. E. 519.

11. He may not call a witness "an ungodly liar" (Galveston, etc., R. Co. v. Wash ington [Tex. Civ. App.] 92 S. W. 1054), or in the absence of provocation or justifying evidence, "a fraud and a fake" (Id.).

12. Counsel for female passenger, insulted by conductor on defendant's road, severally characterized him before the jury. Texas & P. R. Co. v. Zink [Tex. Civ. App.] 92 S. W. 812.

13. District attorney in a prosecution on a liquor dealer's bond for breach in permitting a minor to remain on the premises may state that the minor's mother was not introduced as a witness because of mental unsoundness. Brewster v. State [Tex. Civ. App.] 13 Tex. Ct. Rep. 685, 88 S. W. 858.

14. See 5 C. L. 261.

15. Missouri, etc., R. Co. v. Wade [Kan.] 85 P. 415.

16. McIntyre v. Orner [Ind.] 76 N. E. 750.

17. Statement "that they had no requests for instructions." Indiana, etc., R. Co. v. Otstot, 113 Ill. App. 37.

18. See 5 C. L. 259.

19. In a personal injury action counsel may appeal to jury to remember if they had any little girls that when the finger of scorn should be pointed at them, they would be there to defend them with their strong right arms and to so act that they would be able to look into the woman's (plaintiff's) countenance and say to her that their duty has been discharged. Stecher Cooperage Works v. Steadman [Ark.] 94 S. W. 41.

20. Miller v. Nuckolls [Ark.] 91 S. W. 759. A statement that the case was interesting to plaintiff though dry to others is not such an appeal for sympathy as to war-

of the case, or the use of language or argument calculated to arouse their sympathy,[21] or their passion and prejudice against the opposite party,[22] are improper. Thus, it is improper to contrast the plaintiff's poverty with the wealth of the defendant,[23] to dwell upon the ability of the defendant to pay,[24] to appeal to the prejudice against corporations,[25] or to refer to the latter's preference for the Federal courts,[26] to appeal to class prejudice,[27] to speculate on the probable effects of large or small verdicts,[28] to impute mercenary motives to one defending a case in a representative capacity,[29] or to make charges of unprofessional conduct against opposing counsel.[30] A characterization of a defendant based upon an assumption of his misconduct rather than on the evidence, while a mistake, is not reversible error where the testimony justifies some severity of remark.[31]

rant the court in setting a case aside. Seely v. Manhattan Life Ins. Co. [N. H.] 61 A. 585. Refusal of court to exclude from the jury argument of counsel to the effect "It is the duty of the jurors of this county to teach defendant that he cannot collect debts in this way" in an action for false imprisonment not error. Oates v. McGlaun [Ala.] 39 So. 607.

21. Argument that property in litigation was all that plaintiff possessed and how much it cost him, not sufficient for reversal in view of the testimony, the charge and the judgment of the trial court that it was not prejudicial. Graves v. Bonness [Minn.] 107 N. W. 163.

22. Party cannot be said to have had a fair trial when the jury is required to view the case through an atmosphere of passion and prejudice excited by the conduct of counsel. Columbus R. Co. v. Connor, 6 Ohio C. C. (N. S.) 361. In an action for libel and slander, defendant having charged plaintiff with fornication, plaintiff's attorney in his argument may not declare that such a man charging a woman with such a crime "should not be permitted to live in the county," but he may declare that "he is not fit to live in the county." Miller v. Nuckolls [Ark.] 91 S. W. 759. Reversal granted for persistence of counsel in making statements to the jury unsupported by any evidence calculated as well as designed to prejudice the jury against the defendant, where it is doubtful whether verdict is sustained by the evidence. Mullarkey v. Interurban St. R. Co., 48 Misc. 638, 96 N. Y. S. 115. Argument largely outside of the record which is vituperative and inflammatory and prejudicial is ground for reversal. Calling witnesses "frauds and fakes," an "ungodly liar" and characterizing defendant as "an octopus" as well as imputing interested motives to an officer in taking a deposition. Galveston, etc., R. Co. v. Washington [Tex. Civ. App.] 92 S. W. 1054.

23. Argument that "the plaintiff is a poor girl compelled to support a widowed mother and defendant a rich corporation," is improper even though evidence shows it. Dallas Consol. Elec. St. R. Co. v. Black [Tex. Civ. App.] 13 Tex. Ct. Rep. 897, 89 S. W. 1087. Ground for reversal where it probably influenced jury. Id. Improper to refer to the disadvantage of the plaintiff owing to his poverty as compared with the defendant corporation and his consequent inability to hire a stenographer. Illinois Cent. R. Co. v. Proctor [Ky.] 89 S. W. 714.

24. In a personal injury suit against a railroad counsel referred to fact that a verdict for full amount would not affect their counsel's salary, the clipping of an interest coupon, the running of a single train, or affect employe. Houston, etc., R. Co. v. McCarty [Tex. Civ. App.] 89 S. W. 805.

25. To point out that defendant is a corporation without sympathy or feeling or fear such as operate on living persons. Personal injury action. Whipple v. Michigan Cent. R. Co. [Mich.] 12 Det. Leg. N. 905, 106 N. W. 690. Held not improper to refer to man as God's creature and a corporation as the law's creature, soulless, conscienceless, and heartless. Galveston, etc., R. Co. v. Smith [Tex. Civ. App.] 93 S. W. 184.

26. Illinois Cent. R. Co. v. Proctor [Ky.] 89 S. W. 714.

27. Even though intended as harmless pleasantry. Relating story that in a certain case the defendant whispered in the ear of each juror just before they retired, "We fellows must stand together," and applying it to the case by characterizing defendant as one of a number of commission merchants, implying that plaintiff and jury should stick together. Whaley v. Vannatta [Ark.] 91 S. W. 191. But not ground for reversal in absence of showing that a ruling was demanded and made adversely or refused. Id.

28. A statement that defendant would appeal from a small verdict as quickly as a large one. Pittsburg, etc., R. Co. v. Campbell, 116 Ill. App. 356. Stating, "It is for you to decide how much damages you shall give plaintiff, whether it be $500, $1,000 or $1,500, or the full amount sued for, and you need not fear that a large verdict will not be sustained by our higher courts, because large verdicts from this court have been sustained." Western Union Tel. Co. v. Cralge [Tex. Civ. App.] 90 S. W. 681.

29. Stating that all parties to a will case were desirous of setting it aside except executor who wanted to get his commissions and manage estate for 20 years without a bond, unwarranted by any evidence. Todd v. Todd [Ill.] 77 N. E. 680.

30. Columbus R. Co. v. Connor, 6 Ohio C. C. (N. S.) 361.

31. Bushey v. Northrop [Vt.] 62 A. 1015. Counsel asked jury: "What is the feeling towards an intelligent man who takes advantage of a poor man's ignorance?" in an action for wages. Bushey v. Northrop [Vt.] 62 A. 1015.

§ 4. *Conduct and demeanor during trial.*[32]—It is error for counsel by questions to insinuate matters not admissible in evidence,[33] to make statements of alleged facts under cover of questions against objections of counsel and rulings of the court,[34] to convey to jury by suggestive interrogatories the very information which court has held they should not have,[35] and for the court to permit counsel to make an offer of proof in the presence of jury of matter repeatedly held improper.[36] It is also improper to abuse witnesses while examining them.[37] Merely proffering inadmissible evidence is not error,[38] but may call for rebuke or censure when designed to influence the jury.[39] Persistently doing so is generally error,[40] especially if coupled with misconduct of the party in volunteering statements of the objectionable facts,[41] but may not be so if the evidence is rejected.[42]

§ 5. *Excuses for impropriety.*[43]—Allowance will be made because of the fact that improprieties occur in the heat of a sharply contested trial,[44] but the fact that a case was bitterly fought will not excuse continued misconduct.[45] There is a con-

32. See 5 C. L. 256, n. 23.

33. Asking jurors on their voir dire whether they were interested in a casualty insurance company and offering to show that defendant's counsel was attorney for such a company. Stratton v. Nichols Lumber Co., 39 Wash. 323, 81 P. 831.

NOTE: Counsel should not disparage evidence offered by his advantage as it comes in (Travelers' Ins. Co. v. Sheppard, 85 Ga. 751, 12 S. E. 18), nor improperly question or address a juror (Lipschutz v. Ross, 84 N. Y. S. 632) by asking them, while being selected if they knew a certain man connected with an insurance company (Grundlach v. Schott, 95 Ill. App. 110, affirmed 192 Ill. 509, 85 Am. St. Rep. 348, 61 N. E. 332), or by abusing jury (State v. Noland, 85 N. C. 576), nor should he make remarks derogatory of the law governing the case (Martin v. Courtney, 81 Minn. 112, 83 N. W. 503).—From Note to Cleveland, etc., R. Co. v. Pritschau [Ohio] 100 Am. St. Rep. 693.

34. Ground for reversal. Stratton v. Nichols Lumber Co., 39 Wash. 323, 81 P. 831.

35. Chicago & S. L. R. Co. v. Mines [Ill.] 77 N. E. 898.

36. Chicago City R. Co. v. Gregory [Ill.] 77 N. E. 1112. An offer to impeach his own witness by a written memoranda of ailments of plaintiff made by doctor and contradicting his oral testimony. Id.

37. Counsel has no right to call a witness a liar while examining him. Dillard v. U. S. [C. C. A.] 141 F. 303.

NOTE. Insulting witnesses: Counsel should not insult a witness while on the stand (West Chicago St. R. Co. v. Groshon, 51 Ill. App. 463; Chicago City R. Co. v. Barron, 57 Ill. App. 469) whatever may be his character or station in life; nor accuse a witness of having been "fixed" (Ashland Land, etc., Co. v. May, 51 Neb. 474, 71 N. W. 67. See, also, Sutton v. Chicago, etc., R. Co., 98 Wis. 157, 73 N. W. 993, nor ask a question so as to charge dishonesty (George v. Swafford, 75 Iowa, 491, 39 N. W. 804), but he may call a witness by his first name (Enright v. Atlanta, 78 Ga. 288).—From note to Cleveland, etc., R. Co. v. Pritschau [Ohio] 100 Am. St. Rep. 692.

38. Dillard v. U. S. [C. C. A.] 141 F. 303.

39. The improper conduct of plaintiff counsel by an offer before the jury to make proof of a matter already excluded by the court's ruling, if done with a purpose to influence the jury is deserving of rebuke but is not of itself necessarily ground for reversal. Henrietta Coal Co. v. Campbell, 112 Ill. App. 452. It is the duty of counsel to submit to the rulings of the court, and if by persistent improper conduct he exasperates the court, calling forth strictures under ordinary circumstances improper, he cannot complain. Persisting in attempts to introduce inadmissible evidence, using improper arguments to jury, needlessly resisting rulings of the court, and unjustifiably evading them. Chicago City R. Co. v. Shaw, 220 Ill. 532, 77 N. E. 139.

40. Lansing v. Michigan Cent. R. Co. [Mich.] 12 Det. Leg. N. 912, 106 N. W. 692. In a personal injury actlon, attempts to show the loss would be paid by a casualty insurance company. Westby v. Washington Brick, Lime & Mfg. Co. [Wash.] 82 P. 271.

41. Frequent voluntary statement by a party to an action of incompetent evidence coupled with the repeated effort of his counsel in the face of objection, to elicit such testimony. Robison v. Bailey, 113 Ill. App. 123.

Note: Asking leading questions, and after they have been excluded, putting them in proper form (Sullivan v. Chicago, etc., R. Co., 119 Iowa, 464, 93 N. W. 367), or putting a question in such form as to convey to jury information inadmissible in evidence, unless rendered harmless by evidence admitted without objection, may be ground for reversal (Dow v. Weare, 68 N. H. 345, 44 A. 489). There would seem to be no rule of law excluding any question that is civil and respectful, but sharp practices will not be allowed. Hollenbeck v. Missouri Pac. R. Co. [Mo.] 38 S. W. 723.—From note to Cleveland, P. & E. R. Co. v. Pritschau [Ohio] 100 Am. St. Rep. 690.

42. Birmingham R. & Elec. Co. v. Mason [Ala.] 39 So. 590.

43. See 5 C. L. 261.

44. Especially where trial court passed upon the question and did not consider such error, if any, sufficiently prejudicial to warrant the granting of a new trial. South Chicago City R. Co. v. Kinnare, 117 Ill. App. 1.

45. Stratton v. C. H. Nichols Lumber Co., 39 Wash. 323, 81 P. 831. Not an excuse for continually making statements of alleged

flict of authority as to whether misconduct is excused because provoked by counsel for the opposite party, or because the latter was guilty of the same offense.[46]

§ 6. *Objections and rulings.*[47]—It is the duty of the court on objection to admonish counsel to discontinue improper remarks and to instruct the jury to disregard them,[48] and upon his failure to state law correctly to the jury, where he may state it, to set him right, especially upon a material point and if properly requested.[49] Failure to object to improper argument does not forfeit the right to instructions counteracting it.[50] Objection must be made, a ruling obtained, and an exception thereto taken to preserve the question of misconduct for review on appeal,[51] and the ordinary steps to perfect the appeal and to present the matter to the reviewing court must also be taken.[52]

§ 7. *Action of court or counsel curing objections.*[53]—Unless the misconduct is such as to prevent a fair verdict[54] its harmful influence may generally be cured by sustaining objections thereto promptly,[55] by reprimanding counsel or admonishing him to desist,[56] by the court declaring in the presence of the jury that the remark is improper,[57] by instructing the jury to disregard it,[58] or by two or more

facts, under cover of questions propounded to a witness, against objections of opposing counsel and the rulings of the court. Id.

46. Improprieties are not sufficiently excused by saying that there was provocation and that opposing counsel were guilty of same offense. Columbus R. Co. v. Connor, 6 Ohio C. C. (N. S.) 361. **Contra.** See 5 C. L. 261, n. 79, 80.

Note: The cases are in conflict as to whether an impropriety provoked by opposing counsel is excused. Ensor v. Smith, 57 Mo. App. 584, and Welch v. Union Cent. Life Ins. Co., 117 Iowa, 394, 90 N. W. 828, hold not, but St. Louis, etc., R. Co. v. Daughtry [Tex. Civ. App.] 31 S. W. 705, and State v. Haverly, 4 Idaho, 484, 42 P. 506, lean the other way.—From note to Cleveland, P. & E. R. Co. v. Pritschau [Ohio] 100 Am. St. Rep. 694.

47. See 5 C. L. 261.

48. Failure to sustain objection to argument incorrectly stating the law and refusal to give instruction embodying correct statement held reversible error. St. Louis, etc., R. Co. v. Harrison [Ark.] 89 S. W. 53. It is error not to admonish counsel to discontinue remarks not based on evidence and not to instruct the jury to disregard them, exceptions having been taken. Sweezy v. Fisher [Mich.] 12 Det. Leg. N. 713, 105 N. W. 749.

49. Farnandis v. Great Northern R. Co. [Wash.] 84 P. 18.

50. Failure to object to an improper attack did not forfeit executor's right to instructions counter-acting such argument and their refusal was error. Todd v. Todd [Ill.] 77 N. E. 680.

51. See Saving Questions for Review, 6 C. L. 1385.

52. See Appeal and Review, 7 C. L. 128.

53. See 5 C. L. 262.

54. Although improper argument by counsel was attempted to be withdrawn and was instructed against by the court, nevertheless where it is evident that the harm done thereby was irreparable, a new trial should be granted. Prewitt-Spurr Mfg. Co. v. Woodall [Tenn.] 90 S. W. 623. Argument that the defendant was insured in a casualty company against loss, the evidence having been excluded, not cured by attempted withdrawal by counsel or by instructions of court necessitating a new trial. Id. The action of the court in rebuking or restraining counsel and instructing the jury, or in failing to do so is to be considered only in its probable influence as couteracting the improper argument, and where an argument is grossly improper, appellate court will still be strongly inclined to reverse. Houston, etc., R. Co. v. McCarty [Tex. Civ. App.] 89 S. W. 805.

55. Attempts by counsel in his closing argument to go outside of record and refer to judgments sanctioned in other cases. Richardson v. Nelson [Ill.] 77 N. E. 583.

56. On improper argument by counsel for plaintiff, a young girl, in a libel suit, the reprimand of the judge is not objectionable because made "quietly" and "mildly" in the absence of a request for more emphatic admonitions. Miller v. Nuckolls [Ark.] 91 S. W. 759. Argument that "defendant railway company spares no money, no means, nothing, to defend their cases," cured by the court stating to counsel upon objection by defendant "there is no evidence of that," nothing further being requested. Chicago & J. Elec. R. Co. v. Herbert, 115 Ill. App. 248. Where in his closing argument counsel gave watch to jurymen to demonstrate by pulling a string how often a bell-rope could have been jerked in two seconds, the court admonished the attorney that it was his duty to argue the testimony as adduced, but did not instruct the jury to disregard the attempted demonstration, the court's admonition sufficiently cured the impropriety of the argument if there was one. Louisville, etc., R. Co. v. Sander's Adm'r [Ky.] 92 S. W. 937.

57. Reference by counsel to another trial of the same cause is improper but not reversible error where the jury are not directly informed what the result of such former trial was, especially when the court in the presence of the jury states that such reference was improper. Chicago Union Traction Co. v. Lawrence, 113 Ill. App. 269.

58. In a personal injury suit, remarks by counsel for plaintiff that in his opinion the defendant would not hesitate at perjury or subornation of perjury to win the case were cured by the court's admonition to the jury to disregard such remarks. Chicago, etc., R.

of these combined.[59] If the verdict shows that the impropriety was unprejudicial, it will not constitute reversible error,[60] and no presumption arises that verdict was obtained by the improper remarks if there is evidence to sustain it.[61]

Granting or refusing a new trial for misconduct of counsel in his argument rests within the sound judicial discretion of the trial court, and will not be interfered with unless it manifestly appears that such discretion is clearly abused.[62]

ARMY AND NAVY; ARRAIGNMENT AND PLEAS, see latest topical index.

ARREST AND BINDING OVER.

§ 1. Occasion or Necessity for Warrant (265).
§ 2. Privilege from Arrest (268).
§ 3. Complaint, Affidavit, or Information to Procure Warrant (268).
§ 4. The Warrant and Its Issuance (269).
§ 5. Making Arrest, and Keeping and Disposal of Prisoner (269).
§ 6. Preliminary Hearing, Binding Over, or Discharge (270).
§ 7. Custody Awaiting Indictment or Trial (271).

§ 1. *Occasion or necessity for warrant.*[63]—At common law an arrest cannot be made without a warrant for an offense less than a felony, except for a breach of the peace,[64] but any person may make an arrest without a warrant where a felony

Co. v. Hollis' Adm'r [Ky.] 91 S. W. 258. Oral instruction sufficient where no written charge was requested. Jones v. Wright [Tex. Civ. App.] 92 S. W. 1010. Argument of counsel outside of evidence, followed by instructions from court to disregard. Taylor v. Modern Woodmen of America [Wash.] 84 P. 867.

59. **Misconduct cured:** By sustaining objections to remarks and instructing jury to disregard them. Chicago Union Traction Co. v. Yarus [Ill.] 77 N. E. 1129; Chicago City R. Co. v. McDonough [Ill.] 77 N. E. 577; Southern Ind. R. Co. v. Baker [Ind. App.] 77 N. E. 64; Jones v. Wright [Tex. Civ. App.] 92 S. W. 1010. Where counsel asks a party on cross examination if he had not offered to settle the case, and an objection is sustained and the jury are instructed to disregard such matter, the misconduct of counsel held cured. Bennett v. Susser [Mass.] 77 N. E. 884. There was no error in permitting counsel to appeal to the personal experience of a juryman as to whether a shipper ever read his contract when made in his opening argument giving opposing counsel an opportunity to reply and the court instructed the jury that the shipper was bound by the terms of the contract, whether he read it or not. Missouri, etc., R. Co. v. Avis [Tex. Civ. App.] 91 S. W. 877. By instructions to disregard accompanied by withdrawal by counsel. Covington & C. Bridge Co. v. Smith [Ky.] 89 S. W. 674. In an injury suit argument by counsel calling attention to sex and age of plaintiff and making an appeal thereon to which objection was taken, whereupon the court instructed the jury to disregard the remarks and the counsel withdrew them, and the verdict was supported by evidence, no ground for reversal is shown. International & G. N. R. Co. v. Brisenio [Tex. Civ. App.] 92 S. W. 998. Where counsel in a personal injury suit in argument to jury stated that defendant admitted the damages to be $9,000 or $10,000 which was erroneous, but on being interrupted immediately corrected himself by saying he meant that the evidence to that effect was uncontradicted, followed by a charge from the court also setting the counsel straight, the error was sufficiently cured. Dougherty v. Pittsburgh R. Co. [Pa.] 62 A. 926. Where court and counsel unite in instructing jury to disregard it. Rice v. Dewberry [Tex. Civ. App.] 93 S. W. 715. Accidental misrepresentation of the evidence, where it was immediately corrected by counsel and further explained by the court in his charge. Overton v. White [Mo. App.] 93 S. W. 363. Argument that large verdicts will be sustained in higher courts, by sustaining objection and ordering counsel to desist. Western Union Tel. Co. v. Craige [Tex. Civ. App.] 90 S. W. 681.

60. See, also, previous sections, and Harmless and Prejudicial Error, 5 C. L. 1620. No objection urged to amount of verdict and preponderance of evidence supporting it. Galveston, etc., R. Co. v. Smith [Tex. Civ. App.] 93 S. W. 184. Counsel did not commit reversible error in appealing to the jury in his closing argument for a verdict for $4,000 it being apparent that the jury were not influenced thereby since their verdict was for $2,500. Missouri, etc., R. Co. v. Avis [Tex. Civ. App.] 91 S. W. 877. A remark by counsel in a personal injury case that "the reason appellant has not been able to earn as much in shipping and selling mules since his injury as he was before, was because there had been a bad horse market and that he was trying to make the railroad company pay for it." Mullen v. Galveston, etc., R. Co. [Tex. Civ. App.] 92 S. W. 1000.

61. Mullen v. Galveston, etc., R. Co. [Tex. Civ. App.] 92 S. W. 1000.

62. Denver City Tramway Co. v. Nicholas [Colo.] 84 P. 813. It was not an abuse of discretion for the trial court to refuse to grant a new trial on the ground of the misconduct of counsel in referring in his argument to an exhibit which had been excluded from evidence. Carey v. Switchmen's Union of North America [Minn.] 107 N. W. 129. Where persistent abuse of correct practice evidently influenced the jury, in their verdict, a new trial will be granted on appeal. Prewitt-Spurr Mfg. Co. v. Woodall [Tenn.] 90 S. W. 623.

63. See 5 C. L. 264.

64. State v. Byrd [S. C.] 51 S. E. 542.

has actually been committed and there is reasonable ground to suspect that the person arrested has committed it,[65] and will not be liable though it ultimately appears that the party arrested was innocent.[66] So, too, one under sentence for felony and unlawfully at large may lawfully be arrested and returned to imprisonment, even by a private person, without a warrant.[67]

The right to make arrests without warrants is now generally regulated by statute, and varies in the different states. As a general rule, a peace officer may make an arrest either with or without a warrant for a crime committed in his presence or view [68] at least where the offense is a felony or a breach of the peace,[69] or if he knows or has reasonable grounds to believe that a felony [70] or criminal offense has been committed, and that the person arrested has committed it,[71] and, in some states, believes that he will escape if not immediately apprehended.[72] In some states officers may also arrest without a warrant if the offender is endeavoring to escape,[73] or for other cause there is liable to be a failure of justice for want of an officer to issue a warrant.[74]

65. Enright v. Gibson, 219 Ill. 550, 76 N. E. 689; Martin v. Houck [N. C.] 54 S. E. 291.

66. Martin v. Houck [N. C.] 54 S. E. 291.

67. In re Moebus [N. H.] 62 A. 170.

68. If the offense is committed in his presence. Pen. Code 1895, § 896. Porter v. State [Ga.] 52 S. E. 283. For gambling. Earl v. State [Ga.] 52 S. E. 78. When such person is committing an offense in his presence or when he has reasonable grounds to believe and does believe in good faith that the person is committing an offense in his presence. Ky. St. 1903, § 2885; Cr. Code Pr. §§ 36, 395. Weaver v. McGovern [Ky.] 90 S. W. 984. Police officer stationed outside a polling place held authorized to arrest persons within without a warrant if he had reasonable grounds to believe from noises that disorderly conduct was taking place therein though no offense was in fact being committed. A magistrate may arrest without a warrant one committing any misdemeanor whatever in his view. Cr. Code 1902, § 26. May arrest one hauling contraband liquor within his view, which is a misdemeanor. State v. Byrd [S. C.] 51 S. E. 542 Statute does not violate Const. art. 1, § 16, protecting a citizen from unreasonable seizure of his person and property. Id.

69. A constable has original and inherent power to arrest without a warrant for treason, felony, breach of the peace, and some misdemeanors less than a felony committed in his view. Martin v. Houck [N. C.] 54 S. E. 29. A peace officer or any other person may, without a warrant, arrest an offender when the offense is committed in his presence or within his view, if the offense is a felony or an offense against the public peace. Code Cr. Proc. 1895, art. 247. Brown v. King [Tex. Civ. App.] 93 S. W. 1017. Under Pen. Code, tit. 9, c, 3, it is a disturbance of the peace to rudely display a pistol or other deadly weapon in or near any private house, in a manner calculated to disturb the inhabitants thereof. Id. Evidence held insufficient to show that plaintiff displayed a weapon, or that he committed this offense in the presence of the deputy sheriffs who attempted to stop and search him. Id. Under Pen. Code 1895, art. 342, any person unlawfully carrying a pistol about his person under the circumstances therein set forth may be arrested by any peace officer without a warrant and carried before the nearest justice for trial, and any such person who fails or refuses to arrest such person on his own knowledge or upon information from some credible person is punishable by a fine. Id. Before such duty arises or the power so conferred can be exercised, however, it must appear that fact constituting violation of the law is within the personal knowledge of the officer, or that some credible person has informed him of the fact. Id. Evidence held not to justify arrest. Id.

70. When he has reasonable grounds for believing that the person arrested has committed a felony. Cr. Code Prac. § 26. Johnson v. Collins [Ky.] 89 S. W. 253. Evidence held to show that officers had reasonable grounds to believe that felony had been committed. Instruction approved. Id.

71. When a criminal offense has in fact been committed and he has reasonable ground for believing that the person to be arrested has committed it. Cr. Code, § 342 (Rev. St. 1903, p. 677). Wood v. Olson, 117 Ill. App. 128. Arrest by officer for gambling held unlawful unless it appears from greater weight of the evidence that offense was actually committed. Id. An officer may justify an arrest without a warrant for an offense not committed in his presence by showing that a charge had been made of the commission of a felony, and that he had reasonable cause to believe that such felony had been committed and that the person arrested had committed it. Shannon's Code, § 6997. McCaslin v. McCord [Tenn.] 94 S. W. 79.

72. If he knows or has reasonable ground to believe that a felony has been committed, and that a particular person is guilty, and also believes that he will escape if not immediately apprehended. Revisal 1905, § 3178. Martin v. Houck [N. C.] 54 S. E. 291.

73. Pen. Code 1895, § 896. Porter v. State [Ga.] 52 S. E. 283. The evasion of an illegal arrest by flight does not authorize the arrest of a person as a fugitive endeavoring to escape. Refusal to give instruction held error. Id. Where it is not shown that person attempted to be arrested by marshal had violated any ordinance of the town other than by proof of a verbal complaint made

As a general rule a private citizen may make an arrest for a public offense committed in his presence, when the person arrested has committed a felony, though not in his presence, or when a felony has been committed and he has reasonable cause to believe that the person arrested committed it,[75] or on an immediate and fresh pursuit of one who has escaped from jail or from his custody after having been lawfully arrested,[76] and in order to justify an arrest for a crime committed out of his presence he must be able to show by a preponderance of the evidence that a felony was in fact committed, and that the person arrested committed it or that he had reasonable cause to believe that he did so.[77] In some states, however, he may make an arrest only when an offense is committed or attempted to be committed in his presence,[78] or when he knows that the person arrested has committed or is about to commit an offense,[79] in which case he must show both that a crime has been committed and that the person arrested is in fact the guilty party.[80]

An officer having reasonable cause to believe that a person named in a warrant, or one whom he seeks to arrest on a charge of felony, is in the dwelling house of another, may, after giving notice of his intention and a refusal to admit him, break open doors if necessary to the prosecution of his search.[81] A private person seeking to make an arrest for a felony has, however, as a general rule, no right to break into

to the officer by another that he had created a disturbance and he eluded the officer to prevent an illegal arrest, his avoidance of the officer by flight is not such an endeavor to escape as will justify his arrest without a warrant. Id. Under Shannon's Code, §§ 7006, 7007, an officer without a warrant may make an immediate pursuit and recapture of a person charged with crime who has escaped, either from jail or from his personal custody. McCaslin v. McCord [Tenn.] 94 S. W. 79.

74. Pen. Code 1895, § 896. Porter v. State [Ga.] 52 S. E. 283. Where mayor had authority to issue warrant for apprehension of persons charged with violation of town ordinances, and was in town, and name and identity of accused was known and haste was not imperative, held that arrest could not be justified on this ground though mayor was at home sick, where it did not appear that he was incapacitated from attending to business. Id.

75. Shannon's Code, §§ 7002, 7005, was intended to cover whole subject of arrest without a warrant by a private person. McCaslin v. McCord [Tenn.] 94 S. W. 79.

76. Under Shannon's Code, §§ 7006, 7007, a private person may immediately pursue and recapture one who has been lawfully arrested by him under §§ 7002-7005, and who has escaped from his custody. McCaslin v. McCord [Tenn.] 94 S. W. 79. Sections 7002-7005 do not authorize a private person to make an arrest for an escape except where the escape is itself by law a felony. Id. Statute does not authorize either a private person or an officer to arrest, without a warrant, one who has escaped from jail or from custody when the pursuit is not immediate or fresh. Id. Instructions held erroneous. Id. Nor does it authorize private citizens of one county to go into other counties without warrants in search of criminals, except in cases of fresh pursuit of a fleeing felon endeavoring to avoid immediate capture on an original arrest, or on immediate pursuit after arrest and escape. Id.

77. Must be able to show by a preponderance of the evidence that a felony has been committed, and, on proving this, may complete his justification by showing that he had reasonable cause to believe that the person arrested committed it. Shannon's Code, § 7002. McCaslin v. McCord [Tenn.] 94 S. W. 79.

78. Under Hurd's Rev. St. 1903, c. 38, § 342, p. 677, cannot make an arrest on the ground of probable cause. Enright v. Gibson, 219 Ill. 550, 76 N. E. 689. Averment in count for false imprisonment that arrest and imprisonment were without reasonable or probable cause, held properly treated as surplusage. Id. Where declaration in action against private citizen contained a count for false imprisonment and one for malicious prosecution, held that instructions with reference to doctrine of probable cause were properly modified so as to be rendered applicable to last count only. Id. May arrest for a felony without a warrant if the offense has been committed in his presence, and he has reasonable ground to believe the suspected party to be guilty. Revisal 1905, § 3177. Martin v. Houck [N. C.] 54 S. E. 291. But if no such crime has been committed by any one, an arrest by a private individual without a warrant is illegal. Evidence in action for false imprisonment held not to show that any crime had been committed. Id.

79. A private citizen knowing that one has committed or is about to commit a crime may arrest him or cause him to be arrested without a warrant. Pandjiris v. Hartman [Mo.] 94 S. W. 270.

80. Enright v. Gibson, 219 Ill. 550, 76 N. E. 689. If he was not guilty then such citizen is liable to him for damages sustained by reason of such arrest. Pandjiris v. Hartman [Mo.] 94 S. W. 270. Fact that party making the arrest acted without malice, or under advice of counsel, or had reasonable cause to believe the arrested party to be guilty is no defense. Id.

81. McCaslin v. McCord [Tenn.] 94 S. W. 79.

the house of any person other than the one sought to be arrested,[82] except upon immediate and fresh pursuit of one whom he has lawfully arrested and who is escaping from his custody.[83]

A police officer was not known to the common law and therefore can exercise only such powers as are given him by statute.[84] Statutes regulating the right to make arrests without warrants apply equally to municipal peace officers, such as policemen, or town marshals.[85] In executing warrants a constable is a ministerial officer, and in the apprehension of those who violate the law is a conservator of the peace,[86] The fact that the violation of a municipal ordinance may not amount to either a felony or a misdemeanor does not dispense with the statutory requirements in regard to issuing a warrant for the offender.[87]

§ 2. *Privilege from arrest.*[88]— The fact that one is in bankuptcy exempts him from arrest on civil process in proceedings to collect a debt from which a discharge in bankuptcy would be a release.[89] A final adjudication on the bankrupt's application for a discharge terminates his privilege.[90]

§ 3. *Complaint, affidavit, or information to procure warrant.*[91]—When a charge has been examined by a magistrate, and the evidence taken, and the examination warrants an order holding the defendant to answer, the imperfections of the complaint are cured and the commitment is legal.[92] In some states an information not predicated upon an affidavit made before an officer authorized by law to take the same has no proper basis and a prosecution cannot be maintained thereon.[93] The affidavit need not negative exceptions in the statute which the defendant is alleged to have violated.[94] A city court auhorized to issue warrants has authority

82. Under Shannon's Code, § 7004, a private person seeking to make an arrest for felony may, after notice of his intention to make an arrest, and a refusal to admit him, break open an outer or inner door, or window, of the dwelling house of the person sought to be arrested, but not that of a stranger. McCaslin v. McCord [Tenn.] 94 S. W. 79. Where one convicted of felony in H. county escaped to B. county and from there to G. county, and about a week later the sheriff of B. county and others attempted to arrest him in G. county without a warrant, held that they were to be regarded as private citizens and hence had no right to break open doors of dwelling house of a stranger. Id. Instructions held erroneous. Id.

83. Under Shannon's Code, § 7007, a private person may, upon immediate and fresh pursuit of one whom he has arrested for felony and who is attempting to escape, break open the outer or inner door, or window, of any dwelling house in which the fugitive has sought refuge no matter to whom it belongs, provided he first gives proper notice. McCaslin v. McCord [Tenn.] 94 S. W. 79.

84. Martin v. Houck [N. C.] 54 S. E. 291.

85. Pen. Code 1895, § 896, applies to marshals, and while they have authority to make arrests for violations of town ordinances, they cannot do so without warrants save under the circumstances therein enumerated. Porter v. State [Ga.] 52 S. E. 283.

86. Constable under Revisal 1905, § 2939. Martin v. Houck [N. C.] 54 S. E. 291.

87. Porter v. State [Ga.] 52 S. E. 283. Ordinance defining disorderly conduct and prescribing duties of marshal held relevant in trial for assault with intent to murder him by one resisting arrest, as showing his authority to make arrests for misconduct such as he was informed defendant had committed. Id.

88. See 5 C. L. 265.

89. Must appear that he was in bankruptcy. Gibson v. Holmes [Vt.] 62 A. 11. Certified copies of docket entries in bankruptcy court held inadmissible to show such fact, since they were no record, but only minutes from which to make a record. Id.

90. Gibson v. Holmes [Vt.] 62 A. 11. Plaintiff's testimony that he had filed his petition in bankruptcy before his arrest held insufficient to show that he was in bankruptcy at the time of his arrest, where it did not appear when he filed such petition. Id.

91. See 5 C. L. 265.

92. People v. Warner, 147 Cal. 546, 82 P. 196.

93. Code Cr. Proc., art. 467. Johnson v. State [Tex. Cr. App.] 85 S. W. 274. In Texas city attorneys have no authority to take oaths to complaints before any other court, or for use before any other court, than the corporation court. Code Cr. Proc., arts. 34, 36, 467, Acts 26 Leg. p. 42, c. 33, § 6, construed. Johnson v. State [Tex. Cr. App.] 85 S. W. 274.

94. An affidavit for arrest under Rev. St. § 4364—20, is sufficient when the defendant is charged with keeping a place open on Sunday, "the same being a place where intoxicating liquors are on other days of the week exposed for sale and sold." The exception provided by the statute must in such a case be established by the defendant, and it is not necessary that it be pleaded. Schlagel v. State of Ohio, 3 Ohio N. P. (N. S.) 429.

to allow the amendment of an affidavit of complaint made before a justice of the peace and returnable to it.[95] The defendant may raise any questions touching the legality of his arrest upon a proceeding to be discharged from custody, but if he gives bail to answer the charge, he cannot raise such questions by motion to quash after indictment found.[96]

§ 4. *The warrant and its issuance.*[97]—A warrant may generally be issued in any county in which the person sought to be arrested is found.[98] The statutes of Missouri provide that complaints subscribed and sworn to by anyone competent to testify against the accused may be filed with any justice of the peace, and that if the justice is satisfied that the accused is about to escape and has no known place of permanent residence or property in the county likely to restrain him from leaving for the offense charged, he shall immediately issue his warrant and have the accused arrested and held until the prosecuting attorney shall have time to file an information.[99] The filing of the complaint with the justice gives him jurisdiction of the subject-matter,[1] and the objects and purposes of the person making it do not affect his jurisdiction.[2] He is not required to execute any writing evidencing the necessity arising for the issuance of a warrant, either by a docket entry, or an indorsement on the writ, or otherwise.[3]

Where the statute authorizes the appointment by the board of commissioners of a mayor pro tempore to exercise the duties of the mayor in the event of his sickness or absence, and authorizes the mayor to issue warrants in criminal cases, the mayor pro tempore may issue such warrants.[4] The regularity of his appointment cannot be questioned collaterally.[5] Mere irregularities do not render a warrant void.[6]

§ 5. *Making arrest, and keeping and disposal of prisoner.*[7]—As a general rule it is the duty of an officer, in making an arrest, to state his official character and the cause of the arrest, exhibiting his warrant, if he has one,[8] but the failure to do so does not justify homicide or even physical resistance by the party arrested, without an inquiry on his part as to the authority for his arrest.[9] One may resist an

95. Under Acts 1901, p. 1865, § 24, giving city court of Bessemer authority to issue warrants. Witherspoon v. State [Ala.] 39 So. 356.

96. When a defendant enters bail to answer to a charge of having at a given time and place stolen personal property from the possession of a person named, he is presumed to know that the indictment founded upon the preliminary accusation will in legal language charge the crime of larceny, and state the quantity of the goods, and aver the property to be in a certain owner. Written accusation held sufficient. Commonwealth v. Dingman, 26 Pa. Super. Ct. 615.

97. See 5 C. L. 266.

98. Warrant may be issued in any county in which the person sought to be arrested is found. McCaslin v. McCord [Tenn.] 94 S. W. 79.

99. Rev. St. 1899, § 2750. State v. Stobie [Mo.] 92 S. W. 191. Is not necessary that justice be satisfied that accused is about to escape to avoid arrest before he can issue warrant, but it is sufficient if accused has no known place of permanent residence or property in the county. Id.

1. State v. Stobie [Mo.] 92 S. W. 191.

2. The objects and purposes of one making and prosecuting a charge against one for a misdemeanor. State v. Stobie [Mo.] 92 S. W. 191.

3. State v. Stobie [Mo.] 92 S. W. 191.

4. State v. Thomas [N. C.] 53 S. E. 522. Revisal 1905, §§ 2933-2935, 3156-3162, construed. Id.

5. Not in prosecution for resisting arrest where defendant claims warrant was void because of want of power to issue it. State v. Thomas [N. C.] 53 S. E. 522.

6. Fact that warrant was signed by judge when it should have been issued by clerk by order of the court held not to render it void. Monroe v. Berry [Ky.] 94 S. W. 38.

7. See 5 C. L. 266.

8. State v. Byrd [S. C.] 51 S. E. 542.

9. State v. Byrd [S. C.] 51 S. E. 542. Where magistrate had right to make the arrest, defendants could not justify resistance on ground that he did not give them express notice that he was an officer, if that fact was known to them. Id. Where defendants knew they were actually engaged in the commission of a crime which subjected them to arrest without a warrant by magistrate or certain other officers, and shot without inquiry, held that they did so at their peril. Id. Instruction in trial for homicide as to right to resist arrest held properly refused. Id.

unlawful arrest by the use of all necessary force,[6] or may avoid the attempted arrest by running away from the officer,[11] but resistance disproportionate to the effort made to take him into custody is unlawful.[12] An illegal arrest is usually nothing more than a trespass, and does not excuse a homicide committed in resisting it, unless it appears that such killing was necessary in self-defense, that is to prevent death or great bodily harm.[13] If one fires at the officer with a gun and misses him, when such resistance is unnecessary to defend himself from an illegal arrest, the offense is merely an unlawful shooting at another, not in self-defense, and does not amount to an assault with intent to murder.[14]

In Kentucky a justice of the peace has no authority to appoint a special bailiff to execute a warrant of arrest issued under the criminal code.[15] In Georgia an inspector of roads and bridges who has been sworn in as a deputy sheriff as authorized by law has the same power as other deputy sheriffs to make arrests for violations of the criminal laws.[16] His appointment and qualification as deputy sheriff may be shown by proof that he acts as such, without production of the written appointment.[17]

Sheriffs making arrests without warrants outside of their counties have no greater rights than private citizens.[18] The right of a constable to arrest without a warrant is generally confined to the limits of the town,[19] and a police officer has, as a rule, no authority to make arrests outside of the city for offenses committed beyond its limits.[20]

§ 6. *Preliminary hearing, binding over, or discharge.*[21]—When an arrest is made without a warrant defendant must ordinarily be forthwith carried before the most convenient magistrate of the county, to whom the grounds of arrest must be stated, and who must forthwith proceed to an examination.[22]

The examination must be conducted substantially in the manner prescribed by the statute,[23] but irregularities or errors in the proceedings are immaterial where

10. Porter v. State [Ga.] 52 S. E. 283. One who has committed a misdemeanor may use proportionate force in resistance. Id.

11, 12. Porter v. State [Ga.] 52 S. E. 283.

13. State v. Byrd [S. C.] 51 S. E. 542. One has no right to kill another or to do him great bodily harm to prevent a mere trespass arising from the attempt of the latter to arrest him without authority. Neeley v. Com. [Ky.] 93 S. W. 596. If resistance disproportionate to the effort made to take one into custody culminates in a homicide, he is guilty of manslaughter. To slay officer who is without authority of law to make an arrest for a misdemeanor, where the motive is merely to avoid an illegal arrest, is manslaughter and not murder. Porter v. State [Ga.] 52 S. E. 283.

14. Where it appeared that firing on marshal was without excuse, verdict finding defendant guilty of assault with intent to murder held wholly unauthorized. Porter v. State [Ga.] 52 S. E. 283.

15. Not to execute warrant in proceedings to require one to keep the peace. Cr. Code Prac., §§ 26, 382-393, construed. Neeley v. Com. [Ky.] 93 S. W. 596.

16. Inspectors under Act Dec. 8, 1899 [Acts 1899, p. 89, Epps' Code Supp., §§ 6097, 6103). Earl v. State [Ga.] 52 S. E. 78.

17. Earl v. State [Ga.] 52 S. E. 78.

18. Where one convicted of felony in H. county escaped to B. county and from there to G. county, and about a week later the sheriff of B. county and others attempted to arrest him in G. county without a warrant, held that they were to be regarded as private citizens, and hence had no right under Shannon's Code, §§ 7004, 7006, to break open doors of dwelling of a stranger. McCaslin v. McCord [Tenn.] 94 S .W. 79.

19. Revisal 1905, § 2939. Cannot justify arrest as an officer where he did not arrest in the town. Martin v. Houck [N. C.] 54 S. E. 291. In such case co-defendants who acted as his deputies cannot justify under him. Id.

20. Police officers of the city of St. Louis have no authority to arrest offenders in St. Louis county for offenses committed in such county and outside of the city. Act March 15, 1899 (Laws 1899, p. 51), and St. Louis city charter, § 14, Rev. St. 1899, p. 2467, construed. State v. Stobie [Mo.] 92 S. W. 191.

21. See 5 C. L. 267.

22. Cr. Code Prac., §§ 46, 48. Johnson v. Collins [Ky.] 89 S. W. 253. Statute held sufficiently complied with. Id.

23. Where accused was arrested on a complaint and warrant charging murder in the first degree, pleaded not guilty, and an adjournment was taken, and on the adjourned day an examination was held and an inquest taken, and the justice found that there was probable cause to believe the defendant guilty of murder, ordered the proceedings stopped, and the defendant sent to jail to appear before the circuit court to answer thereto, and issued a commitment under which defendant was committed to

the defendant is not thereby deprived of any substantial rights.[24] In the absence of a showing to the contrary it is presumed that the proceedings leading up to the commitment of the defendant by the magistrate were regularly conducted.[25] In order to hold the defendant and put him on his trial, the committing magistrate is not required to find evidence sufficient to warrant a conviction,[26] but all that is necessary is that there be sufficient legal evidence to make it appear that a public offense has been committed, and that there is sufficient cause to believe the defendant guilty thereof.[27]

In Texas there is no legal necessity for examining trials by justices of the peace in misdemeanor cases,[28] and the justice is not entitled to fees for holding them.[29] In Louisiana neither the coroner's jury nor the coroner has authority to determine the degree of criminality on the part of the accused, and their action in so doing, and the action of the district judge in making such action or the evidence taken at the inquest the basis and authority for admitting the parties to bail, are nullities and should be disregarded when one offers to make affidavit charging them with a higher crime.[30]

§ 7. *Custody awaiting indictment or trial.*[31]—In Kentucky the transfer of a prisoner from one jail to another in the same county is discretionary.[32]

ARREST OF JUDGMENT; ARREST ON CIVIL PROCESS, see latest topical index.

ARSON.[33]

The Crime (271). Indictment and Prosecutions (272).

The crime.[34]—At common law the offense of arson was one against the habitation and not against property,[35] the purpose being to protect human life and safety, and its gist lay in the malicious burning of a house or dwelling of another.[36] Where

jail, held that defendant had a legal preliminary examination. Montgomery v. State [Wis.] 107 N. W. 14.

24. Order of county judge, sitting as an examining court, transferring prosecution of accused to circuit court pending examination, held irregular, but not illegal where evident intention was to surrender jurisdiction of the investigation to circuit court and grand jury, and the latter had concurrent jurisdiction to conduct such investigation, and there was no objection or exception by the accused. Monroe v. Berry [Ky.] 94 S. W. 38. Effect was to give circuit court and grand jury complete jurisdiction over the person of the accused, the same as if he had been held over by the examining court. Id. The adjournment of a preliminary examination by a justice of the peace for a longer period than that allowed by statute does not dender the subsequent examination a nullity unless it has actually prejudiced the defendant, or has tended to his prejudice in respect to a substantial right. Adjournment for more than three days in violation of Rev. Codes 1899, § 7954. State v. Foster [N. D.] 105 N. W. 938. Is a mere error or mistake in proceedings which, under Rev. Codes 1899, § 8423, does not render it void where no prejudice is shown. Id. Irregularities in examination held not to have sacrificed any substantial rights of defendants. Johnson v. Collins [Ky.] 89 S. W. 253.

25. Defendant must make some showing to the contrary. People v. Warner, 147 Cal. 546, 82 P. 196.

26. In re Mitchell [Cal. App.] 82 P. 347.

27. Evidence held sufficient to warrant justice in holding accused and committing him for trial. In re Mitchell [Cal. App.] 82 P. 347.

28. Justice can take the affidavit and turn it over to the county attorney, upon which he can file an information in the county court, from which court a warrant may issue for the arrest of the accused, and in which court he may be subsequently tried. Ex parte Way [Tex. Cr. App.] 89 S. W. 1075.

29. No statute authorizing them. Ex parte Way [Tex. Cr. App.] 89 S. W. 1075.

30. Coroner's jury returned verdict that for the death of a certain person a certain other named person was responsible for manslaughter as principal and certain other persons as accessories, and coroner made affidavit against such persons in conformity thereto. Parties were not arrested and no preliminary examination was had, but district judge admitted the parties to bail on the force and strength of the antecedent proceedings, and thereafter refused to take affidavit of one who alleged that he was present at the homicide and personally cognizant of the facts, and who requested that he be allowed to make affidavit to the fact and to charge the parties with murder. Held that it was the duty of the court to accept the affidavit, and to cause the parties to be arrested and a preliminary examination to be made, and mandamus would lie to compel him to do so. State v. Elfer [La.] 40 So. 370.

31. See 5 C. L. 268.

32. Not subject to review by mandamus. Monroe v. Berry [Ky.] 94 S. W. 38.

33. See Clark & Marshall on crimes [2nd Ed.] § 410, p. 619.

34. See 5 C. L. 268.

congress by statute provides for the punishment of arson without further definition, the common-law definition is deemed adopted.[37] In some states malice and willfulness are both essential ingredients of the crime.[38] An act is willful in law only when it involves some degree of conscious wrong or evil purpose upon the part of the actor, or at least an inexcusable carelessness or recklessness on his part, whether the act be right or wrong.[39] A malicious act generally involves all that is included in the term willful, and is further marked by either hatred or ill will toward the party injured, or such utter recklessness and disregard of the rights of others as denotes a corrupt or malevolent disposition.[40] As in other cases to constitute an attempt to commit the crime there must be an intention to commit it, and some overt act, falling short of the completed crime, must be done toward its commission.[41]

Indictment and prosecution. Indictment.[42]—As in other cases the indictment must fully apprise defendant of the accusation against him,[43] and aver all the essential elements of the crime.[44] An indictment for the common-law crime must charge that the burned building was a dwelling house or place of abode.[45] An averment of the value of the property is unnecessary unless value enters into the degree of the crime or affects the punishment.[46] An averment that the burned building was situated in a designated city sufficiently describes it.[47] The proof must, of course, correspond with the allegations of the indictment.[48]

Evidence.[49]—The usual rules of criminal evidence apply.[50] A quarrel between the defendant and the occupant of the house burned and accompanying threats to burn may be shown.[51] Where defendant occupied the burned building the fact

35, 36. United States v. Cardish, 143 F. 640.

37. United States v. Cardish, 143 F. 640. Act March 3, 1885, c. 342, § 9, 23 St. 385, providing for the trial and punishment of Indians committing "arson" and other crimes on an Indian reservation, uses that term in its common-law sense, and it does not include burning of building other than a dwelling house and not occupied as such. Id. Congress did not have in mind and intend to include the malicious burning penalized by Rev. St., § 5386,, punishing the burning of buildings in forts, etc. Id.

38. Code, § 4776-4780. State v. Willing [Iowa] 105 N. W. 355. Instruction defining malice in terms identical with the accepted definition of willfulness, held prejudicially erroneous, where charge as a whole ignored necessity which state was under to establish malice as an essential element of the crime. Id. Involves the elements of both willfulness and malice. State v. Harvey [Iowa] 106 N. W. 938.

39, 40. State v. Willing [Iowa] 105 N. W. 355.

41. Mere preparation for its commission is not sufficient. State v. Taylor [Or.] 84 P. 82. Where defendant employed two other persons to commit the crime, gave them the materials with which to do it, showed them how to start a slow burning fire, paid them for their services, gave them a horse to ride, and started them on their way, held that he was guilty of overt acts justifying his conviction of an attempt under B. & C. Comp., § 2159. Id.

42. See 5 C. L. 269.

43. Indictment charging that accused in the nighttime did unlawfully, willfully, and maliciously set fire to and attempt to burn a certain building owned by A. and occupied by B. as a dwelling house held to sufficiently allege an attempt to commit arson, though needlessly prolix. Kinchien v. State [Fla.] 39 So. 467. Information held to charge defendant and his wife with the consummated offense of arson and not with a conspiracy to commit it, and hence to be good. State v. Mann, 39 Wash. 144, 81 P. 561.

44. Neither count of indictment held to allege arson in either the first or second degree under Code 1896, §§ 4336, 4337, prescribing forms for such indictments. Stoudenmire v. State [Ala.] 40 So. 321.

45. Indictment charging the burning of a building "used as a schoolhouse and building," etc., held insufficient to aver offense under Act March 3, 1885, c. 342, § 9, 23 St. 385. United States v. Cardish, 143 F. 640.

46. Held unnecessary. Ayres v. State [Tenn.] 91 S. W. 195.

47. Is sufficient to allege that it is within jurisdiction of court. Ayres v. State [Tenn.] 91 S. W. 195.

48. Fatal variance between proof that building burned was a barn and indictment under Code, § 4337, for arson in second degree charging the burning of a corncrib, the statute showing an intention to regard the two as separate and distinct strucures. Jackson v. State [Ala.] 40 So. 979.

49. See 5 C. L. 269.

50. See Indictment and Prosecution, 5 C. L. 1790. As between memory of witness as to contents of insurance policy and a memorandum of its contents his memory is the best evidence, even though he is compelled to use the memorandum to refresh his memory. State v. Mann, 39 Wash. 144, 81 P. 561. Testimony of insurance agent as to contents of policy on property held inadmissible as not the best evidence. State v. Harvey [Iowa] 106 N. W. 938.

51. Where witness's testimony shows

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ARSON—Cont'd.

that he removed goods therefrom shortly before the fire is admissible as tending to show motive and to connect the defendant with the crime charged.[52] The remoteness of the removal from the time of the fire does not render such evidence inadmissible but goes only to its probative force.[53] Testimony that the witness could have saved certain persons had he known that they were in the building,[54] evidence of admissions of defendant to an insurance adjuster that he had had fires in other buildings previously occupied by him,[55] and evidence that he refused to allow an examination of his goods after the fire,[56] is inadmissible. So is evidence of the chief of the fire department that he had one of his men watching the building at night for several days after the fire,[57] and his opinion as to the effect of certain conditions in the building produced by opening doors and windows.[58] Cases dealing with the admissibility of evidence to show the origin and cause of the fire,[59] motive,[60] the ownership of the burned building,[61] and to impeach or contradict the defendant,[62] and the sufficiency of the evidence to sustain a conviction,[63] will be found in the notes.

that he was present at a quarrel on the afternoon of the night of the burning. Kinchien v. State [Fla.] 39 So. 467.

52. State v. Mann, 39 Wash. 144, 81 P. 561.

53. Fact that shipments were made seven and five days before fire. State v. Mann, 39 Wash. 144, 81 P. 561.

54. Testimony that witness could have saved certain persons had he known that they were in the building held irrelevant and prejudicial as calculated to inflame the jurors' minds against the accused. State v. Harvey [Iowa] 106 N. W. 938.

55. Where alleged motive was to secure insurance. People v. Brown, 96 N. Y. S. 957. Its admission and the refusal to strike it out held error, particularly where court refused to admit evidence that one of the other fires referred to was in a building occupied by defendant's brother. Id.

56. People v. Brown, 96 N. Y. S. 957.

57. Is in effect giving action of chief as indicating his opinion that fire was suspicious and premises needed watching to prevent a further fire. People v. Brown, 96 N. Y. S. 957.

58. That it would create a "nice kind of a draft." People v. Brown, 96 N. Y. S. 957. Is not a proper subject for expert evidence and chief is no more an expert than the jurors. Id.

59. Where state's theory was that defendant set fire to the building after saturating a part of it with kerosene, evidence that three or four days after the fire witness examined the ground under defendant's room in the house and that it smelled of kerosene was admissible. Was not too remote, but its value was for the jury. State v. Watson [Or.] 85 P. 336. Coal oil can, sacks and excelsior saturated with oil, etc., taken from defendant's room in the burned house, which were shown to have been safely preserved until the time of the trial and which were properly identified held admissible as tending to show the origin and cause of the fire. Id.

60. Where existence of motive attempted to be shown by the state depended largely on the relative value of the property to the amount of insurance, and insurance agent had testified as to the writing of a policy on the property, held error to strike out his statement on cross-examination that he took the usual precautions required by the company to ascertain the value of the property, and thought it a good risk and not overinsured. State v. Harvey [Iowa] 106 N. W. 938.

61. Where indictment laid ownership in W. and state claimed that W. subleased from defendant, and that defendant leased a room from W., held that a receipt given by defendant to W. while he was in jail was admissible to show that W. was the owner for the purposes of the case. State v. Watson [Or.] 85 P. 336. Where witness swore that he had used a brush and oil in sweeping the floor of the burned building, his declarations ten days after the fire that oil on floor was put there for a purpose did not tend to contradict such testimony and was inadmissible to impeach him. People v. Brown, 96 N. Y. S. 957.

62. Testimony that witness saw female defendant in the crowd at the fire and that her hair was in perfect order held admissible, where defendant resided in the building which was burned in the nighttime, and she claimed to have hastily escaped through the window after discovering the fire. State v. Harvey [Iowa] 106 N. W. 938.

63. Evidence held sufficient to sustain a conviction. State v. Mann, 39 Wash. 144, 81 P. 561. For attempt. Kinchien v. State [Fla.] 39 So. 467. Held not such a lack of evidence as to warrant appellate court in directing a dismissal of the prosecution. State v. Harvey [Iowa] 106 N. W. 938.

Evidence held insufficient. Scott v. Com. [Ky.] 90 S. W. 960. Circumstantial evidence. State v. Morney [Mo.] 93 S. W. 1117.

Instructions.[64]—Willfulness and malice should both be defined where they are elements of the crime.[65] Instructions may assume the truth of facts in regard to which there is no conflict in the evidence.[66]

ASSAULT AND BATTERY.

§ 1. Nature and Elements of Criminal Offense (274). Aggravated Assault (274).
§ 2. Defenses (274).
§ 3. Indictment (274).
§ 4. Evidence; Instructions; Verdict; Punishment (274).
§ 5. Civil Liability (275). Defenses (276). Pleading, Evidence, and Trial (276).

Qualified assaults are elsewhere treated.[67]

§ 1. *Nature and elements of criminal offense.*[68]—Assault is defined in many states by statute,[69] but, in general, is an unlawful attempt, by violence, to do injury to the person of another,[70] with the present ability to carry the attempt into execution.[71]

Aggravated assault.[72]—Where one fires upon his assailant while under a sudden passion aroused by the attack, the offense is reduced from an assault to murder to aggravated assault,[73] though the right of self-defense has ceased.[74] An assault with intent to commit rape may constitute an aggravated assault where the force used was insufficient to constitute the former offense.[75] One who fires a revolver merely to frighten his assailant is guilty of simple assault only.[76]

§ 2. *Defenses.*[77]—Since the act must be unlawful, a person standing in loco parentis may administer reasonable chastisement to a child,[78] but if the punishment is immoderate and results in permanent injury or is done malo animo, it becomes criminal.[79] One attacked may use force in the defense of his person, but the force employed must be commensurate with the necessity therefor,[80] and he must not have provoked the difficulty in the first instance.[81] No looks or gestures, however insulting, or words, however offensive, justify an assault,[82] nor does the demanding of illegal fees by a toll gate keeper.[83] As specific intent is not an essential element of assault, drunkenness constitutes no defense.[84]

§ 3. *Indictment.*[85]—An indictment charging assault in the language of the statute defining the offense is sufficient.[86] Present means of carrying the attempt into execution must be alleged.[87]

§ 4. *Evidence; instructions; verdict; punishment.*[88]—The general rules of criminal practice as to the admissibility of evidence are applicable.[89] In Texas on

64. See 5 C. L. 269, n. 97.
65. State v. Harvey [Iowa] 106 N. W. 938.
66. Statement in instruction that evidence tended to show that defendant leased room where fire occurred, and that there were found in such room a can of oil, etc., held not to invade provice of jury. State v. Watson [Or.] 85 P. 336.
67. See Homicide, 5 C. L. 1702; Rape, 6 L. 1237, and like topics.
68. See 5 C. L. 269.
69. Where defendant drew a revolver saying that he would put prosecuting witness out of misery, and was only prevented by third persons, he is guilty within the Code. State v. McFadden [Wash.] 84 P. 401.
70. State v. Truitt [Del.] 62 A. 790.
71. State v. Wilson [Del.] 62 A. 227; State v. Brown [Del.] 63 A. 328.
72. See 5. C. L. 270, n. 6-8.
73. Barnett v. State [Tex. Cr. App.] 93 S. W. 722
74. Cooper v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 94, 89 S. W. 1068.
75. Fewox v. State [Tex. Cr. App.] 90 S. W. 178.
76. Not of aggravated assault. Barnett v. State [Tex. Cr. App.] 93 S. W. 722.
77. See 5 C. L. 270.
78. As a teacher. Holmes v. State [Ala.] 39 So. 569.
79. Holmes v. State [Ala.] 39 So. 569.
80. One is not justified in stabbing an unarmed assailant unless there are circumstances producing great inequality, as great superiority in physical strength, etc. McEvoy v. State, 123 Ga. 506, 51 S. E. 500.
81. Crowe v. Com. [Ky.] 91 S. W. 663.
82. State v. Bell [Del.] 62 A. 147.
83. Commonwealth v. Rider, 29 Pa. Super. Ct. 621.
84. State v. Truitt [Del.] 62 A. 790.
85. See 5 C. L. 271.
86. State v. Cummings [Iowa] 105 N. W. 57.
87. Guy v. State [Ind. App.] 77 N. E. 855.
88. See 5 C. L. 272.
89. Evidence of a subsequent difficulty between prosecuting witness and a third person is immaterial where it is not shown that her injuries were then received. Honeycutt v. State [Tex. Cr. App.] 92 S. W. 421.

trial for aggravated assault, where the infliction of an injury is shown, the statute imposes the burden on defendant to show that the act was innocent.[90] On a trial for an assault, proof of a battery may be admitted as a part of the res gestæ of the assault.[91] Under an indictment charging that the aggravated assault was committed with a knife, such means of assault must be proved,[92] and also that the knife was a dangerous weapon.[93] On trial of a charge of assault against a teacher for punishing a pupil, the effect of the battery may be shown.[94] Cases dealing with the sufficiency of the evidence will be found in the notes.[95]

The necessity of giving an instruction upon a particular matter is largely determined by the nature of the evidence.[96] The instructions should be definite[97] and clear,[98] but need not cover immaterial matters.[99] Where defendant's acts clearly evince the intent to do injury, it is not error to omit to submit such question to the jury.[1]

Under a statute authorizing a fine or imprisonment, a judgment imposing both is irregular,[2] and if imprisonment is imposed it must not be in excess of that allowed by statute.[3]

§ 5. *Civil liability.*[4]—Where two or more assist one another in committing an

90. White's Ann. Pen. Code, art. 588. Thompson v. State [Tex. Cr. App.] 89 S. W. 1081.

91. Davis v. State [Tex. Cr. App.] 90 S. W. 646.

92. Hext v. State [Tex. Cr. App.] 90 S. W. 43.

93. Otherwise the offense will be a simple assault. Hext v. State [Tex. Cr. App.] 90 S. W. 43.

94. As that she was confined to her bed and the length of time. Holmes v. State [Ala.] 39 So. 569.

95. Evidence held sufficient to convict of aggravated assault where it appears that defendant rudely jerked a rope from the hands of a two year old child, throwing her down and injuring her. Davis v. State [Tex. Cr. App.] 90 S. W. 646. Evidence which is sufficient to authorize a conviction of assault with intent to kill does not thereby become insufficient to convict of aggravated assault. Butler v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 937, 89 S. W. 647.

96. The giving of an instruction as to the effect of provoking an assault upon the right of self-defense is proper where the evidence tends to show that defendant used abusive language towards prosecutor. Coleman v. State [Tex. Cr. App.] 91 S. W. 783. Where the evidence presents two issues of defense, of persons and of property, pertinent instructions on both should be given. Wenzel v. State [Tex. Cr. App.] 90 S. W. 28. Where there is no evidence that defendant who was the aggressor had abandoned his attack, the court is not required to instruct upon the right of self-defense after abandonment. Crowe v. Com. [Ky.] 91 S. W. 663. Evidence in an action of aggravated assault that defendant fired the revolver to show that it was loaded did not entitle him to an instruction on simple assault as he should then be acquitted. Butler v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 937, 89 S. W. 647.

97. An instruction using the words "began the difficulty by advancing upon prosecutor with a hoe held in a threatening manner" is not too general in that it allowed the jury to find that defendant provoked the difficulty by some unimportant act. Crowe v. Com. [Ky.] 91 S. W. 663. An instruction defining an assault is not erroneous in omitting to state defendant's right of self-defense, specially where it is separately stated. State v. Cummings [Iowa] 105 N. W. 57.

98. Where the defense of property is interposed by one in possession, an instruction that the jury could not consider the ownership is misleading as turning the issue upon ownership instead of possession. Wenzel v. State [Tex. Cr. App.] 90 S. W. 28. An instruction "An assault and battery is justified * * * in the necessary defense of the person of defendant or of his lawful possession of his property, etc." is insufficient. Id. On trial of an indictment charging aggravated assault and simple assault, it is sufficient if the court defines the former by reading the statute and the latter in clear language of his own. Commonwealth v. D'Angelo, 29 Pa. Super. Ct. 378.

99. Where words, however false and insulting, do not justify an assault, the court need not give an instruction as to the truth of the statements made. Coleman v. State [Tex. Cr. App.] 91 S. W. 783.

1. As where defendant advanced upon prosecuting witness with a hoe raised in a threatening manner after making a threat to kill him. Crowe v. Com. [Ky.] 91 S. W. 663.

2. Pen. Code, § 208. Young v. Territory [Ariz.] 85 P. 482. A judgment sentencing defendant to pay a fine of $300, "and, in case of nonpayment, to be imprisoned for 300 days" fails to impose the imprisonment as a method of satisfying the fine, but imposes it as a penalty. Id.

3. Pen. Code, § 208. Young v. Territory [Ariz.] 85 P. 482.

4. See 5 C. L. 273. Liability of master for assaults by servant is excluded. See Master and Servant, 6 C. L. 521; also, Special Article, 5 C. L. 275.

assault, they are principals and alike liable for the results.[5] The same rules as to what constitutes concerted action in other torts apply to assault.[6]

What constitutes.[7]—The making of an indecent proposal to a female does not amount to an assault upon her.[8]

Defenses.[9]—Ownership of property does not justify an assault to recover possession from one who came rightfully thereby, though wrongfully withheld.[10] Abusive language does not justify an assault.[11]

The right to defend one's person is recognized, but to be available, the party must not have provoked the attack,[12] nor used more force than was reasonably necessary.[13]

Where one attempts to prevent another from doing that which he has a legal right to do, the latter is not guilty of assault in using the force necessary to overcome such resistance.[14] Sheriff and judges may use force in recovering the court records in the wrongful possession of another.[15] A conductor may use reasonable force in preventing an ejected person from re-entering the train.[16] In an action against the manager of a hotel for assault, it is no defense that he did not know that plaintiff was a guest.[17]

Pleading, evidence, and trial.[18]—A notice within a year from the assault is not necessary in Wisconsin.[19]

Pleading.[20]—A declaration in trespass vi et armis is sufficient to justify proof of an assault by a conductor while preventing a person from re-entering a train from which he had been ejected, and of justification.[21]

Evidence.[22]—Plaintiff must establish his case by a fair preponderance of evidence.[23] The courts are divided upon the question whether the burden is upon plaintiff to show want of just cause or provocation as a part of his case, or upon defendant to justify his assault.[24] Where an assault was committed by the owner

5. Parham v. Langford [Tex. Civ. App.] 93 S. W. 525.

6. Instruction held sufficient. Brouster v. Fox [Mo. App.] 93 S. W. 318.

7. See 5 C. L. 273.

8. Davis v. Richardson [Ark.] 89 S. W. 318.

9. See 5 C. L. 273.

10. Possession of tenant of things left on the premises is rightful. Stanley v. Payne [Vt.] 62 A. 495; Winter v. Beebe [Wis.] 105 N. W. 953. Assault is not justified to recover possession of animals straying upon the premises of another and seized by him. Shelabarger v. Morris, 115 Mo. App. 566, 91 S. W. 1005.

11. Parham v. Langford [Tex. Civ. App.] 93 S. W. 525; Rarden v. Maddox [Ala.] 39 So. 95. A charge of swindling. Wells v. Englehart, 118 Ill. App. 217. Abusive language to a wife does not justify an assault by the husband. Hubbard v. Perlie, 25 App. D. C. 477.

12. Wells v. Englehart, 118 Ill. App. 217; Morris Hotel Co. v. Henley [Ala.] 40 So. 52. One who is at fault, and sues for damages resulting therefrom, cannot recover though the perpetrator was not justified in law in his conduct. Massett v. Keff [La.] 41 So. 330.

13. Wells v. Englehart, 118 Ill. App. 217. One who follows up an assailant after he has retreated is guilty of assault himself. Brouster v. Fox [Mo. App.] 93 S. W. 318. Plea of self-defense is not available where defendant, after plaintiff had thrown his oars at him, rowed up to plaintiff's boat and beat him. Monize v. Begaso [Mass.] 76 N. E. 460.

14. As where plaintiff attempted to prevent defendant from delivering ice to a tenant through a common passageway and defendant used only such force as was necessary to effect a delivery. Williams v. Lubbering [N. J. Law] 63 A. 90.

15. Morgan v. Owen [Mo.] 91 S. W. 1055.

16. Where the ejected person caught hold of the moving train, the conductor held justified in striking to compel him to let go. Lindsay v. Wabash R. Co. [Mich.] 12 Det. Leg. N. 430, 104 N. W. 656.

17. Morris Hotel Co. v. Henley [Ala.] 40 So. 52.

18. See 5 C. L. 274.

19. Personal injury from assault is not included within Rev. St. 1898, § 4222, requiring a notice. Drinkwater v. Andrews [Wis.] 105 N. W. 575.

20. See 5 C. L. 274. Complaint construed to allege a cause of action in assault and in conversion. Rector v. Anderson [Minn.] 104 N. W. 884.

21. Lindsay v. Wabash R. Co. [Mich.] 12 Det. Leg. N. 430, 104 N. W. 656.

22. See 5 C. L. 274.

23. Kerley v. Germscheid [S. D.] 106 N. W. 136; Solomon v. Buechele, 119 Ill. App. 595.

24. New York imposes the burden on plaintiff. Cassidy v. Cady, 97 N. Y. S. 1046. Plea of son assault demesne held to impose the burden on defendant although coupled

of property to recover possession, evidence as to why the party did not give up the property is not admissible, where the refusal did not justify an assault.[25] In a civil action for damages for rape, the jury may consider plaintiff's failure to make complaint and her subsequent relations with defendant.[26] Sufficiency of evidence is discussed in the notes.[27]

The instructions [28] should conform to the issues and the evidence,[29] and those given should be clear and definite.[30]

Findings.[31]

ASSIGNMENT OF ERRORS, see latest topical index.

ASSIGNMENTS.

§ 1. Rights Susceptible of Assignment (277). Contracts for Personal Services or Otherwise Appurtenant to Persons or Specific Property (278). An Assignment of Future Earnings (279). Contingent Interests May be Assigned (279).
§ 2. Requisite and Sufficiency of Express Assignments (279). Notice to the Debtor (281). Record (281).
§ 3. Constructive or Equitable Assignments (281).
§ 4. Construction, Interpretation, and Effect (282).
§ 5. Enforcement of Assignment and of Rights Assigned (285).

§ 1. *Rights susceptible of assignment.*[32]—Generally speaking, all choses in action, which may survive the owner's death, may now be assigned,[33] though by statute claims against the United States cannot be assigned in advance of their allowance,[34] and a lien of attorney on the claim is bad as such an assignment.[35] Promis-

with a general denial. Wells v. Englehart, 118 Ill. App. 217.

25. Winter v. Beebe [Wis.] 105 N. W. 953.

26. Champagne v. Hamey, 189 Mo. 709, 88 S. W. 92.

27. Evidence held sufficient to prove rape. Champagne v. Hamey, 189 Mo. 709, 88 S. W. 92; Deppeart v. Romboits [La.] 38 So. 890. Defendant's evidence shows that he continued assaulting plaintiff when no longer necessary for self-defense. Plaintiff entitled to at least nominal damages. Hetrick v. Crouch [Mich.] 12 Det. Leg. N. 578, 105 N. W. 131.

28. See 5 C. L. 275, n. 75.

29. Where there was no evidence as to the future effects of the assault, an instruction thereon should not have been given. Davis v. Richardson [Ark.] 89 S. W. 318. Where there is evidence that defendant did not fire to hit plaintiff but to stop him to effect an arrest, an instruction on simple negligence properly given. Johnson v. Mack [Mich.] 12 Det. Leg. N. 351, 104 N. W. 395. Where there was no evidence to show any attack on defendant or his wife as would justify defendant in assaulting plaintiff it was not error to so instruct as a matter of law. Hubbard v. Perlie, 25 App. D. C. 477.

30. Instruction held to be misleading as not allowing a recovery against the servant as well as the master unless acting within the scope of his authority. Morris Hotel Co. v. Henley [Ala.] 40 So. 52.

31. A finding that the danger to his father was not such as to induce a person exercising reasonable and proper judgment to interfere in order to prevent the consummation of such injury is open to a construction that gives the word "danger" the force of "apparent danger," so as to render an error in instruction as to self-defense harmless. Sloan v. Pierce [Kan.] 85 P. 812.

32. See 5 C. L. 279.

33. See 5 C. L. 279.

Held assignable: A depositor's right of action to sue on the personal obligation of a private banker to repay the deposit on demand. Johnson v. Shuey [Wash.] 82 P. 123.

Contract by an electric company **to furnish electrical power** to a cement company for a definite term. Hudson River Water Power Co. v. Glens Falls Portland Cement Co., 107 App. Div. 548, 95 N. Y. S. 421. Under Code Civ. Proc. § 1910, making any claim or demand transferrable, and 2 Rev. St. (1st Ed.) p. 447, pt. 3, c. 8, tit. 3, § 1, relative to the survival of actions for wrongs to property rights, a right of **action for false representations** on a sale of property to decedent was assignable by his administrator. Wickham v. Roberts, 98 N. Y. S. 1092. In Indiana any **written promise to pay money** is made assignable by Burns' Ann. St. 1901, § 7517. Rosenthal v. Rambo [Ind.] 76 N. E. 404.

Crop lien: In North Carolina, a lien bond under Code, § 1799, to secure advances to be made to aid in the cultivation of a crop is assignable, and such assignment carries with it an assignment of the account for advances actually made, without a separate assignment thereof. Virginia-Carolina Chemical Co. v. McNair, 139 N. C. 326, 51 S. E. 949.

34, 35. A provision in a contract for the prosecution of a claim against the United States that the compensation for services should be a lien upon the claim, and any evidence of indebtedness issued in payment thereof, was repugnant to U. S. Rev. Stat. § 3477, U. S. Comp. Stat. 1901, p. 2320, annulling assignments of claims prior to their allowance. Nutt v. Knut, 200 U. S. 12, 50 Law. Ed. ---.

sory notes are assignable though not negotiable.[36] Although money due a pensioner is not liable to legal or equitable process under the Federal statutes,[37] yet, where defendants took possession of a pension check, after indorsement by plaintiff, and retained a part of the proceeds, she could assign her claim and cause of action.[38] The assignment of a future estate is separable from the assignment of future income and may be sustained, although the latter is void.[39] So the assignment of a sum of money under a contract may be valid though the contract be unassignable.[40] A benefit fund though ordinarily inalienable may be assignable to secure advances to keep the benefit alive.[41] Likewise a spendthrift trust of income has been held assignable to the extent of one-half to the beneficiary's wife,[42] but where the deed creating a spendthrift trust estate gave the body of the estate to the next of kin of the beneficiary after his death, he could not assign to his wife any interest in the income of the trust fund that would continue after his death.[43] In New York the right to the benefit of rents and profits of property cannot be so assigned.[44] A claim for personal injuries is unassignable before judgment.[45]

Contracts for personal services or otherwise appurtenant to persons or specific property[46] are unassignable separately from such property.[47] Rights arising out of contracts involving a relation of personal credit, confidence, or skill cannot be

36. Under the laws of Indiana there are two kinds of assignable promissory notes—one governed by the law of merchants and the other subject to any defenses held by the maker before notice of assignment. Rosenthal v. Rambo [Ind.] 76 N. E. 404.

37. Rev. St. U. S. § 4747 [U. S. Comp. St. 1901, p. 3279]. Alexander v. Gloversville, 110 App. Div. 791, 97 N. Y. S. 198.

38. Alexander v. Gloversville, 110 App. Div. 791, 97 N. Y. S. 198.

39. Stringer v. Barker, 110 App. Div. 37, 96 N. Y. S. 1052. Under Real Property Law, Laws 1896, p. 572, c. 547, § 83, and Laws 1897, p. 508, c. 417, § 3, prohibiting the beneficiary of a trust to receive rents and profits, from assigning them, future income cannot be so assigned, though the trust is not a spenthrift trust. Id.

40. Where a contractor gave an order to a building committee directing the payment of a sum of money to a bank after the completion of the building, the acceptance of such order did not constitute a payment before completion of the building and did not violate a contract provision forbidding its assignment. Hipwell v. National Surety Co. [Iowa] 105 N. W. 318.

41. Where a by-law of the New York Produce Exchange provided that the gratuity fund established under Laws 1882, p. 28, c. 36, should not be mortgaged or pledged for any debt but be considered as a gift to the family of a deceased member, held to prevent its assignment for any debt having no relation thereto, but it was assignable to secure repayment of moneys paid by another to keep the interest alive. Holmes v. Seaman [N. Y.] 77 N. E. 724.

42. Where a spendthrift trust provided that the beneficiary should have no power to anticipate, charge or encumber the same, the beneficiary could nevertheless assign to his wife one-half interest in the income for the support of herself and minor children. Wright v. Leupp [N. J. Eq.] 62 A. 464.

43. Wright v. Leupp [N. J. Eq.] 62 A. 464.

44. The assignment of a portion of the income of an estate, which was bequeathed to the widow absolutely for life, by her to her son and daughter, so far as it affected the real property, was void under Real Property Laws 1896, p. 572, c. 547, § 83; and so far as it affected the personal property, it was void under Personal Property Law, Laws 1897, p. 508, c. 417, § 3. Slater v. Slater, 99 N. Y. S. 564.

45. Flynn v. Butler, 189 Mass. 377, 75 N. E. 730; Boogren v. St. Paul City R. Co. [Minn.] 106 N. W. 104, citing Hammons v. Great Northern R. Co., 53 Minn. 249, 54 N. W. 1108. Under Code Civ. Proc. § 3343, subd. 9, defining a personal injury as an actual injury to the person, an action for deceit is not a personal injury, within § 1910, which makes any claim or demand transferrable, except for damages for personal injury or breach of promise to marry. Keeler v. Dunham, 99 N. Y. S. 669.

46. See 5 C. L. 280.

47. NOTE. Assignment of trade mark in gross: The plaintiff as assignee of the trade mark of a defunct corporation sued the defendants for an infringement thereof. The plaintiff had acquired no interest in the business or good will of the said corporation. Held, the plaintiff has no title to the trade mark, it not being assignable apart from the business. Falk v. American West Indies Trade Co., 180 N. Y. 445, 105 Am. St. Rep. 778. A trade mark is a recognized form of property (2 Columbia L. R. 245, 406; 3 Columbia L. R. 494; La Croix v. May, 15 F. 236; Bradley v. Norton, 33 Conn. 157), but only in connection with the business to which it is attached (Prince Mfg. Co. v. Paint Co., 20 N. Y. S. 462). It may be assigned together with such business (Atlantic Milling Co. v. Robinson, 20 F. 217; Dixon Crucible Co. v. Guggenheim, 2 Brewst. [Pa.] 721), but not independently thereof (Cotton v. Gillard, 44 Law J. Ch. 90; Weston v. Ketcham, 51 How. [N. Y.] 455). Such an assignment would be a fraud on the public since it would enable one man to sell his goods as those of another.—5 Columbia L. R. 401.

transferred in invitum, even by assignment by operation of law.[48] A contract to render professional services as a physician is personal and nonassignable, and no other person than the one named can render or tender performance, without consent of the other party;[49] but a covenant in a bill of sale of a business, by the seller, not to engage in such business, within a designated place, for a fixed time, is not personal to the buyer,[50] and is assignable.[51] A written guaranty to pay a contractor the contract price, in case the owner does not do so, is not assignable prior to its breach if special in its terms to the contractor.[52]

An assignment of future earnings[53] for which there is such relation between the assignor and his employer, that the employe may reasonably be expected to earn wages in the future, is valid,[54] and transfers the ownership of the wages to be earned;[55] and when the money is due the assignee may recover it in his own name, subject to such defenses as the debtor may be entitled to make as to the real party in interest.[56]

Contingent interests may be assigned,[57] but a mere expectancy or possibility is not assignable at law.[58]

§ 2. *Requisite and sufficiency of express assignments.*[59]—No consideration for

48. Where, in a contract between an author and publisher of Catholic textbooks, the right was reserved by the author, in case of the non-fulfillment of the contract by the publisher, to a reversion of the copyrights, such copyrights could not be sold by the trustee in bankruptcy as part of the publisher's estate, but should be assigned to the author by the trustee. In re McBride & Co., 132 F. 285. An agreement by defendant to buy beer only from the John Kress Brewing Company was in its nature unassignable without defendant's consent. Jetter v. Scollan, 48 Misc. 546, 96 N. Y. S. 274.

49. Deaton v. Lawson [Wash.] 82 P. 879.

50. American Ice Co. v. Meckel, 109 App. Div. 93, 95 N. Y. S. 1060.

51. American Ice Co. v. Meckel, 109 App. Div. 93, 95 N. Y. S. 1060. The good will of a business and a contract for its protection are property rights, valuable and assignable, and are not affected by a change made from a partnership to a corporation for the conduct of the business. Bradford v. Montgomery Furniture Co. [Tenn.] 92 S. W. 1104.

52. Guarantors not liable to assignee even if they consented to the assignment, unless followed by a new written guaranty to the assignee, based on a new consideration. Levy v. Cohen, 45 Misc. 95, 91 N. Y. S. 594.

53. See 5 C. L. 281.

54. Brooks Co. v. Tolman, 6 Ohio C. C. (N. S.) 137. While a mere possibility is not assignable, like wages to be earned in the future where there is no existing employment (Rodijkeit v. Andrews [Ohio] 77 N. E. 747), yet, if there is an existing employment, under which it may reasonably be expected that the wages assigned will be earned, then the possibility is coupled with an interest and the wages may be assigned (Id.). This doctrine is recognized by an unbroken line of authority. (Brooks Co. v. Tolman, 6 Ohio C. C. (N. S.) 137, cited). Andrews v. Lake Shore & M. S. R. Co., 7 Ohio C. C. (N. S.) 161.

55. Brooks Co. v. Tolman, 6 Ohio C. C. (N. S.) 137. Assignor is not entitled to an exemption in lieu of homestead in such wages. Id.

56. Virginia-Carolina Chemical Co. v. McNair, 139 N. C. 326, 51 S. E. 949.

57. See 5 C. L. 281. Courts of equity support assignments, not only of choses in action, but of contingent interests and expectations. Rodijkeit v. Andrews [Ohio] 77 N. E. 747. Under Real Property Law, Laws 1896, p. 560, c. 547, § 3, and § 49, p. 567, a future estate may be assigned, if the uncertainty is not as to the person. Stringer v. Barker, 110 App. Div. 37, 96 N. Y. S. 1052.

NOTE. Assignment of proceeds of future sales: To secure advances of merchandise from a certain company, the defendant gave it a written order directing a person to whom he sold milk to pay the proceeds of future sales to the company. There was no contract requiring further delivery or acceptance of milk. **Held,** that the order does not operate as an assignment either at law or in equity. O'Niel v. Wm. B. H. Kerr Co., 124 Wis. 234, 102 N. W. 573. In most jurisdictions a mortgage of goods to be afterwards acquired is enforceable in equity. Holroyd v. Marshall, 10 H. L. Cas. 191. There would seem to be no reason for distinguishing between choses in possession and choses in action. Accordingly, it has been held, contrary to the decision in the present case, that the proceeds of possible future sales are assignable in equity. East Lewisburg, etc. Co. v. Marsh, 91 Pa. 96; Field v. New York, 6 N. Y. 179. The cases which hold that there can be no valid assignment of wages to be earned under a possible future engagement must be recognized as resting upon grounds peculiar to themselves. Herbert v. Bronson, 125 Mass. 475. This exceptional doctrine has been established to prevent workmen from mortgaging their future wages for long and indefinite periods, which would often lead to improvidence and poverty. But even in these cases, if there is an existing employment, though the contract of service is terminable at any time by either party, the assignment is supported. Lannan v. Smith, 7 Gray [Mass.] 150.—18 Harv. L. R. 618.

58. Rodijkeit v. Andrews [Ohio] 77 N. E. 747.

59. See 5 C. L. 281.

an assignment is necessary to protect the defendant in an action on an assigned claim against any claim by the assignor.[60] A contract of assignment is subject to rescission [61] or ratification [62] the same as other contracts. The exact time when any assignable indebtedness was assigned to the assignee does not concern the debtor.[63] An assignment by an agent without authority confers no title upon the assignee, although he had no notice of the principal's claim;[64] and an assignment to the heirs and executors of a living person is void.[65] If the transfer is actual and for a valuable consideration, the motives actuating the parties are immaterial;[66] but where the transfer was fictitious, to a mere nominal or colorable party, to create a venue in a county other than where defendant resided, the original claimants being still the real parties in interest, it was invalid.[67] The deposit of a deed with a bank on an understanding that it should deliver the same to the grantee on payment of the purchase price was a sufficient assignment to the bank to entitle it to sue for the price.[68] An original creditor does not stand as an assignee towards one who assumes the debt.[69] In Alabama, the assignment of the insured's interest in a fire policy, indorsed on the policy after the fire, is sufficient to authorize an action by the assignee, although the policy contains a stipulation against assignment.[70]

Assignment of judgments, see 6 C. L. 255.

60. The defendant in such action cannot attack the assignment for want of consideration. St. Louis S. W. R. Co. v. Jenkins [Tex. Civ. App.] 14 Tex. Ct. Rep. 77, 89 S. W. 1106; Rutan v. Huck [Utah] 83 P. 833.

61. Where a partner, in the name of the firm, assigned accounts as security for an advance of money to the firm, and the other partner insisted that the indorsement of the firm's name on the check was a forgery as the borrower was not a partner, whereupon the amount paid was refunded and the accounts were collected by the firm, held that this constituted a rescission of the contract by the other partner. Silverman v. National Butchers' & Drovers' Bank, 98 N. Y. S. 209.

Mutual mistake: Where a claim thought to be worthless was assigned for $10, whereas in fact it was secured by stock worth $1,120, of which security neither party had knowledge, there was no meeting of minds and the assignment could be rescinded. Flynn v. Smith, 98 N. Y. S. 56.

62. Where a husband assigned building contracts to his wife without her knowledge at the time, her subsequent assignment of sums becoming due under contracts to materialmen, operated as a ratification rendering her liable on the contracts. In re Berkebile, 144 F. 572.

63. Complaint held to state a cause of action although the assignment was alleged to have been made two days before the services were fully performed. Union Collection Co. v. National Fertilizer Co. [Cal. App.] 82 P. 1129. A special charge to the jury to the effect that in order to render an assignment of the contract valid there would have to be a new agreement between the parties "simultaneously" will be interpreted to mean that the new agreement be or exist between the parties simultaneously, and not that it must be made between them simultaneously. Caldwell Furnace Foundry Co. v. Peck-Williamson Heating, etc. Co., 6 Ohio C. C. (N. S.) 629.

64. Where a selling agent was bound to deliver to his principal the notes of buyers to be held as collateral security and to hold the proceeds of goods sold in trust for the payment of the notes, he was a mere trustee and could not assign such accounts. Virginia-Carolina Chemical Co. v. McNair, 139 N. C. 326, 51 S. E. 949. Power of attorney held not to have authorized the filling of blanks in an assignment of salary for a period other than the month specifically mentioned. Wabash R. Co. v. Papin, 119 Ill. App. 99. The admission of an assignment in evidence was improper, where it appeared that it was executed in blank and where a power of attorney alleged to authorize the filling of such blanks was not produced. Wabash R. Co. v. Meyer, 119 Ill. App. 104.

65. Sayer v. Humphrey, 216 Ill. 426, 75 N. E. 70.

66. Douglas v. Walker [Tex. Civ. App.] 92 S. W. 1026. An agreement by the assignee to become the wife of the assignor is a sufficient consideration for the assignment of a life policy. Howe v. Hagan, 110 App. Div. 392, 97 N. Y. S. 86. Where a party paid the consideration for the assignment of a life policy as collateral, relying upon the insured's promise to assign it and the latter did so but did not deliver the policy before his death, the assignment was good against everyone except a purchaser in good faith for value. Id. And the burden would be on the first assignee to show that the subsequent assignment was not valid. Id. Under an agreement for the assignment to plaintiff of a certain contract of purchase of land, plaintiff held to have broken the contract by failure to make a prescribed payment. Yacknowitz v. Spiro, 99 N. Y. S. 460.

67. Douglas v. Walker [Tex. Civ. App.] 92 S. W. 1026.

68. Under Rev. St. 1899, § 540, providing for the prosecution of actions by the real party in interest. Farmers' Exch. Bank v. Crump [Mo. App.] 92 S. W. 724.

69. He is, therefore, not entitled to sue the one who assumes the debt as an assignee of a chose in action. Code of 1904, § 2860, does not apply. McIlvaine v. Big Stony Lumber Co. [Va.] 54 S. E. 473.

70. Under Code 1896, § 876, authorizing

Notice to the debtor[71] of the assignment of a nonnegotiable instrument is not necessary as between assignor and assignee[72] or their personal representatives[73] in the absence of any agreement requiring such notice,[74] and not as to subsequent assignees charged with the risk of a prior assignment,[75] but is necessary to protect the assignee from the effect of a payment to the original creditor.[76] An "order" assigning moneys is not effective against the assignor in favor of the assignee until accepted.[77]

Record.[78]—A statute providing for constructive notice by filing and noting an assignment of a judgment suit or claim does not exclude from evidence an unfiled assignment.[79] An assignment by check is absolute and the property does not remain in the possession of the assignor, and hence, as in the case of assignment of book accounts, recording is unnecessary.[80] The failure to record an assignment of an interest in an estate in the probate court, in the absence of any requirement to do so, is not in itself a lack of vigilance as against other claimants,[81] especially where the claimant filed such assignment in the recorder's office and delivered the original instrument to the executors of the estate.[82] But record evidence of assignments in some cases is required.[83]

§ 3. *Constructive or equitable assignments.*[84]—Assignment may be inferred from the doing of work by one person and the making of a contract for it by another.[85] The great weight of authority is that an unaccepted check or draft in the usual form does not, in the absence of exceptional circumstances, amount to an assignment in law or equity of any part of the drawer's deposit;[86] and this rule has

assignments by indorsement of contracts for the payment of money. Ober & Sons Co. v. Phillips Buttorff Mfg. Co. [Ala.] 40 So. 278.

71. See 5 C. L. 282, n. 4.

72. Virginia-Carolina Chemical Co. v. McNair, 139 N. C. 326, 51 S. E. 949.

73. The failure of the assignee of a chose in action to notify the debtor of the assignment, until after the assignor dies insolvent, does not defeat the rights of the assignee to the fund, as against the assignor's administrator. Shepherd v. Pennsylvania R. Co., 29 Super. Ct. 291.

74. Knickerbocker Trust Co. v. Coyle, 139 F. 792. A plea in bar, of assignment of a chose in action was bad in the absence of any agreement requiring notice and of any allegation of injury arising from want of notice. Id.

75. A judgment debtor, who obtained an assignment of a judgment against his judgment creditor was not required to file a notice of the assignment as against a subsequent assignee, the rule of caveat emptor applying. Brown & Bro. v. Lapp [Ky.] 89 S. W. 304.

76. Virginia-Carolina Chemical Co. v. McNair, 139 N. C. 326, 51 S. E. 949; Knickerbocker Trust Co. v. Coyle, 139 F. 792. Notice of assignment to bank, as collateral security for loans, of accounts for goods sold and delivered, held sufficient. Brunnell v. Bronson [Conn.] 63 A. 396. Affidavit of defense that the claim assigned and sued had been compromised for 25 per cent. was insufficient for failure to deny notice of assignment prior to the attempt to compromise. Kamber v. Becker, 27 Pa. Super. Ct. 266.

77. Order was pleaded as set-off against. Usher v. Seaboard Air-Line R. Co. [Ga.] 54 S. E. 704.

78. See 5 C. L. 282.

79. Rev. St. 1895, art. 4647. Standifer v. Bond Hardware Co. [Tex. Civ. App.] 94 S. W. 144.

80. Kuhnes v. Cahill [Iowa] 104 N. W. 1025.

81, 82. Indiana Match Co. v. Kirk, 118 Ill. App. 102.

83. An attorney has no standing in an action to set aside an assignment of a cause of action for damages and a compromise, procured from his client by fraud, unless an assignment of an interest in the cause of action has been made in writing, acknowledged, filed and docketed, as required by Kirby's Dig. § 4457, or unless defendant in the compromised cause of action had actual notice of the assignment to the attorney. Bush v. Prescott & N. W. R. Co. [Ark.] 89 S. W. 86. But not so in a suit by the client and the attorney, for the latter's rights are worked out through the former, and it is immaterial whether such an assignment and filing, or notice, is shown. Id.

84. See 5 C. L. 282.

85. Bunke v. New York Tel. Co., 110 App. Div. 241, 97 N. Y. S. 66.

86. Clark v. Toronto Bank [Kan.] 82 P. 582.

Note: The weight of authority, both in England and this country, is in accord with the above. Laclede Bank v. Schuler, 120 U. S. 511, 30 Law. Ed. 704; Commonwealth v. American Life Ins. Co., 162 Pa. 586, 42 Am. St. Rep. 844. The provision of the negotiable instrument act, section 189, follows the current American Law. As construing this section see Baltimore, etc., R. Co. v. First Nat. Bank, 102 Va. 753, 47 S. E. 837. The minority ruling, however, is set forth in Springfield Marine & Fire Ins. Co. v. Peck, 102 Ill. 265; Farmers' Bank & Trust Co. v. Newland, 97 Ky. 464. As to effect between parties, see Pease v. Laudaner, 63 Wis. 20,

been frequently enforced in controversies between the holder of a draft and the assignee or receiver of its insolvent drawer.[87] A contingent fee contract by an attorney is not a constructive assignment of the proceeds of settlement.[88] Assignments insufficient at law may be good in equity.[89] Advances made to a bank by one partner without the other's consent, from the proceeds of the firm, for the payment of his individual debts, with the bank's knowledge, constituted an equitable assignment to the bank of such partner's interest, subject to the other partner's interest on final settlement.[90]

§ 4. *Construction, interpretation, and effect.*[91]—In ascertaining what passes by an assignment, the intention of the parties will control.[92] A written assignment, made in pursuance of a parol assignment of a judgment, relates back to the parol agreement,[93] but an unambiguous written assignment cannot be explained or varied by parol evidence.[94] Assignments may be absolute, or for collateral security,[95] and the fact that an assignment was intended merely as a security for a debt may be established either by the conduct or statements of the parties.[96] An assignee takes

53 Am. Rep. 247. But an order payable out of a particular fund may operate as an equitable assignment. Florence Mining Co. v. Brown, 124 U. S. 391, 31 Law. Ed. 427; also Fortier v. Delgardo, 122 F. 604; where check operated as an assignment.—15 Yale L. Jr. 243.

Contra: In South Carolina a check on a bank deposit is regarded as an assignment pro tanto. Loan & Sav. Bank v. Farmers' & Merchants' Bank [S. C.] 54 S. E. 364. The giving of a check drawn on a general deposit fund in a bank amounts to an equitable assignment pro tanto of such fund. Kuhnes v. Cahill [Iowa] 104 N. W. 1025.

87. Where a bank passes into the hands of a receiver after the issue of a draft on a correspondent bank, and the drawee has notice of the recievership before the draft is presented, the title to the deposit on which the draft was drawn passes to the receiver, and the holder of the draft, ordinarily, is entitled to no priority over other creditors. Clark v. Toronto Bank [Kan.] 82 P. 582.

88. While it may be that an attorney, who has a contract for a percentage of the judgment recovered or of the proceeds of settlement, can recover in an action in equity against the defendant, upon a showing that the defendant had notice of his said interest therein, such recovery cannot be had in an action at law; and a motion by the plaintiff for a dismissal of the suit brought upon the claim will be granted over the protest of the attorney. Bailey v. Toledo, etc., R. Co., 3 Ohio N. P. (N. S.) 366.

89. To make a grant or assignment valid at law, the thing which is the subject of it must have an existence, actual or potential, at the time of such grant or assignment; but courts of equity support assignments not only of choses in action, but of contingent interests and expectations and also of things which have no present actual or potential existence, but rest in mere possibility only. Rodijkeit v. Andrews [Ohio] 77 N. E. 747. An assignment of wages expected to be earned in the future, in a specified employment, though not under an existing employment or contract, is valid in equity. Id. While at common law transfers or assignments of expectancies in estates are of no validity, yet it is within the jurisdiction of courts of equity to enforce such contracts after the death of the ancestor. Richey v. Rowland [Iowa] 107 N. W. 423.

90. Jefferson County Sav. Bank v. Jeffers [Ala.] 39 So. 228.

91. See 5 C. L. 283.

92. Virginia-Carolina Chemical Co. v. McNair, 139 N. C. 326, 51 S. E. 949. Agreement between a subcontractor for the construction of a railroad and defendant who agreed to make advances to him, for the payment by the subcontractor to defendant of a certain percentage of the cost of the road, held not to amount to an assignment of any claim for work actually done under his contract. Interurban Const. Co. v. Hayes, 191 Mo. 248, 89 S. W. 927. Contract of sale by defendants to a third party of certain interests, concerning which plaintiff and defendants had contracted, held not to be an assumption of liability to plaintiff by such party. Gammel Book Co. v. Paine [Neb.] 106 N. W. 777. After an assignment for the benefit of creditors, a reassignment was made to the assignor, he giving the assignee a bond to protect him from expenses on account of the assignment and reassignment, which bond assignee assigned to plaintiff in consideration of such sums as might be advanced to him as assignee by plaintiff. Held that plaintiff could not recover from the sureties on such bond sums advanced to assignee for expenses and disbursements, after the assignment of the bond. Dunham & Co. v. McCann, 110 App. Div. 157, 97 N. Y. S. 212.

93. Brown & Bro. v. Lapp [Ky.] 89 S. W. 304.

94. Flynn v. Butler, 189 Mass. 377, 75 N. E. 730.

95. Bank held to be the bona fide owner of accounts for goods sold and delivered, which were assigned to it as security for loans. Bunnell v. Bronson [Conn.] 63 A. 396. One who asserts that an assignment absolute in form was intended only as an indemnity for a particular debt, has the burden of proving his contention. Reinhart v. Marks' Adm'r [Ky.] 93 S. W. 32. Evidence held not to support the claim of the administrator of the beneficiary in a life insurance policy that an assignment thereof was merely as security. Id.

96. Conduct and conversation of the par-

all the right, title, and interest of his assignor,[97] but nothing more.[98] The assignor cannot make any contract with the obligor in an assigned instrument, which will affect the holder of it,[99] but the assignee takes it subject to every defense existing before notice of assignment.[1] And where a judgment creditor assigned a portion of his judgment, the assignees took it subject to a set-off against it owned by another.[2] But the bona fide assignee of a contract to construct a ditch, who has completed the work, is entitled to the payment of the assessments therefor, notwithstanding any private agreements with the original contractor.[3] An assignment by a building contractor of the sum due is subordinate to a mechanic's lien which has attached.[4] There are several doctrines respecting the priorities of successive assignees.[5] In New York as between two assignees for a valuable consideration, priority in time determines the right.[6] The assignee of a lease by the state of water rights, provid-

ties at the time of the execution of the assignment and subsequently, held to show that it was as a pledge or collateral security. Daly v. Spiller, 119 Ill. App. 272. Where an insolvent, within 4 months of his bankruptcy, assigned a judgment in his favor, from which an appeal was pending, and goods were sold and charged to him by the assignee, from time to time, such assignment, though absolute on its face, was held to be as security only, and the assignee was accountable to the trustee in bankruptcy for the excess of the proceeds. English v. Ross, 140 F. 630.

97. Assignor held to have no attachable interest in property. Berz v. Mecartney, 115 Ill. App. 66. In Indiana the assignment of any written promise to pay money vests the property thereof in the assignee. Burns' Ann. St. 1901, § 7517. Rosenthal v. Rambo [Ind.] 76 N. E. 404. Assignee of a contract for manufacture and handling lumber held entitled to demands of defendant the same accounting for lumber used as "crossers" that assignor had. St. Regis Paper Co. v. Watson Page .Lumber Co., 97 N. Y. S. 636. But held that the assignment did not of itself entitle assignee to demand the "covers," or boards used in covering the lumber piles, but, in the absence of any other transfer, such covers belonged to defendant. Id. The assignee of "all claims, demands or causes of action for or on account of any trespass upon the real estate described," was entitled to recover for not merely for trespasses on the land, but also for logs taken therefrom and converted. Dunbar v. Montreal River Lumber Co. [Wis.] 106 N. W. 389. The sureties on a bond for the performance of a lease by the lessee could not question an assignment of the lease and bond to the de facto holder thereof, the assignment being regular on its face. White River, etc., R. Co. v. Star Ranch & Land Co. [Ark.] 91 S. W. 14.

98. A railroad company which began the occupation of land under an assignment of a written agreement with the owner cannot, by usurping rights prohibited by the agreement, be said thereafter not to be occupying under the agreement; nor do the rights of the railroad company under such an assignment rise higher than those of the original grantee. Collins v. Craig Shipbuilding Co., 7 Ohio C. C. (N. S.) 350. A general creditor who becomes an attaching creditor stands in the position of the assignor, with only such rights as the assignor had against the assignee. Shepherd v. Pennsylvania R. Co., 29 Pa. Super. Ct. 291. Where creditors acquired no vested rights under a trust of the proceeds of hay to be sold by the trustee for their debtor, they not being parties to the trust agreement, an assignment of whatever interest they had therein to their debtor did not give him a right of action, or of counterclaim. Ives v. Sanguinetti [Ariz.] 85 P. 480. The settlement of a claim satisfies the cause of action and the assignment thereof confers on the assignee no further cause of action. Tanner v. Bowen [Mont.] 85 P. 876. The owner of a horse let it to a livery stable keeper, who hired it to defendant, on account of whose negligent driving the horse died. Plaintiff settled for the horse and took an assignment of the owner's cause of action against defendant. Held that he could not recover as assignee of a claim that had been satisfied. Id.

99. Parkhurst v. Dickinson [Wash.] 83 P. 895.

1. Comp. Laws 1897, § 10,054. Where the assignor of a contract is sued for payments made, by the other party who has himself breached the contract, the limit of his recovery is the excess of payments over the damages caused by the breach. Michigan Yacht & Power Co. v. Busch [C. C. A.] 143 F. 929. Where the right to defend against notes, on the ground of a breach of warranty and the return of the property, existed at the time of the renewal, the assignee took subject to such defense and was not prejudiced by a renewal of the warranty and agreement to take the property back. Rosenthal v. Rambo [Ind.] 76 N. E. 404.

2. Civ. Code Prac. § 377, provides for the set-off of judgments against each other. Brown & Bro. v. Lapp [Ky.] 89 S. W. 304.

3. Assignee of a contract for constructing a ditch held entitled, under Burns' Ann. St. 1901, § 5675, to the payment of an assessment against plaintiff, notwithstanding plaintiff's agreement with the original contractor for a credit on his assessment, arising out of his suretyship and payment of the contractor's note. Stitt v. Horton [Ind.] 76 N. E. 241.

4. Carter v. Brady [Fla.] 41 So. 539.

5. See note In re Phillips [Pa.] 66 L. R. A. 760.

6. Where an assignee of a life policy delivered to the insured bonds and securities which the latter absorbed by pledging them,

ing for a forfeiture for one year's default in payment of rent, after a neglect by the state for 54 years to collect rent or enforce forfeiture, was liable for interest on each payment of rent coming due, only from the time he began to use water and not from the time of the first default.[7] An assignment of a debt is good as against a garnishment,[8] and an assignment of earned wages is not defeated by a subsequent discharge in bankruptcy.[9] An assignment of a claim for personal injuries, to which the defendants were not parties and which did not purport to be made for their benefit or to extinguish the claim, but treated it as an existing cause of action, could not operate as a release.[10] The assignment to an innocent purchaser for value of a usurious debt and mortgage does not give them vitality,[11] but where a debtor borrowed from a third person to pay a usurious debt and procured the assignment to the lender of such usurious debt and mortgage security, promising to execute a new mortgage, upon his failure to do so, the assigned mortgage was regarded as the equivalent of the new one.[12] An assignment may be set aside on the ground of fraud,[13] but in the absence of contradictory evidence, where a consideration is expressed, it will be presumed bona fide.[14] The assignment of the cause of action involved in a suit in equity abates the suit.[15] The assignor of a cause of action does not warrant a recovery thereon,[16] and the sale of a judgment by assignment, containing mere words of description, warrants only that the judgment was entered in due form of law, its genuineness, jurisdiction of the court, and that it has not been paid, released, or otherwise nullified.[17] "An assignment" of the balance due under a contract and the debtor's acceptance thereof on condition that the assignee finish the contract is not tantamount to an abandonment of the contract by the original contractor.[18]

the assignee held as against a subsequent assigneee on a promise of marriage. Howe v. Hagan, 110 App. Div. 392, 97 N. Y. S. 86.

7. People v. Freeman, 110 App. Div. 605, 97 N. Y. S. 343.

8. Kuhnes v. Cahill [Iowa] 104 N. W. 1025.

9. Wabash R. Co. v. Meyer, 119 Ill. App. 104.

10. Flynn v. Butler, 189 Mass. 377, 75 N. E. 730.

11, 12. Lowe v. Walker [Ark.] 91 S. W. 22.

13. A bankrupt's trustee, or a trustee in insolvency, like an attaching creditor, can avoid assignments which could not be avoided by the bankrupt or insolvent. Bunnell v. Bronson [Conn.] 63 A. 396. As contracts in fraud of creditors in equity are voidable only, one who predicates a right on the invalidity thereof should include in his pleading all the facts upon which invalidity depends. Richey v. Rowland [Iowa] 107 N. W. 423. Where a bill attacks an assignment as fraudulent, the answer must deny notice of fraudulent intent on the part of the assignor, as well as fraudulent intent on the part of the assignee, failure to do so being, in effect, equivalent to an admission. Dent v. Pickens [W. Va.] 53 S. E. 154. Where the answer specifically denied fraudulent intent on the part of the assignee, was silent as to the fraudulent intent imputed to the assignor and as to the allegation of notice of the latter's fraud, and generally denied every charge of fraud, the general denial was insufficient to negative the fraudulent intent of the assignor and notice thereof to the assignee. Id. An assignment of the entire cause of action against a railroad company for damages and a compromise of the claim, procured by plaintiff's attorney on the fraudulent representation that the assignment covered only such part of the claim as plaintiff had agreed to assign to him, was set aside as to plaintiff and the other attorney, but held good against the attorney fraudulently procuring it. Bush v. Prescott & N. W. R. Co. [Ark.] 89 S. W. 86.

14. Where certain accounts for goods sold and delivered were assigned to a bank, acting in good faith and without knowledge of assignor's insolvency, as security for money presently advanced by the bank, such assignment could not be vacated by the insolvent's trustee as constructively fraudulent. Bunnell v. Bronson [Conn.] 63 A. 396.

15. The suit cannot be revived, but the assignee must proceed by original bill. Brown v. Fletcher, 140 F. 639.

16. Where the seller of a piano took from the purchaser another one which had been injured by an expressman, agreeing to look to the expressman for the difference between the price of the new one and the value of the one injured and the purchaser disclaimed any authority to represent the expressman, the seller could not recover such difference from the purchaser. Steinert & Sons Co. v. Jackson [Mass.] 76 N. E. 905.

17. Caveat emptor applies to the purchase of a judgment by assignment with no express warranty. Hinkley v. Champaign Nat. Bank, 117 Ill. App. 584.

18. Carter v. Brady [Fla.] 41 So. 539.

§ 5. *Enforcement of assignment and of rights assigned.*[19]—In New York, the assignee in whom the legal title is vested must bring action,[20] but where plaintiff commenced action on a claim after he had assigned it, a subsequent reassignment to him did not have the retroactive effect of creating a cause of action in him.[21] A transfer by a litigant of a suit is not an assignment of the kind which under the Texas statute is admitted by failure to specifically deny it.[22] The assignee without consideration of a claim by the wife against her husband, in order that such assignee might sue in his own name for the assignor's benefit, was not the assignee and equitable and bona fide owner of the cause of action and could not sue thereon.[23] A written assignment and the testimony of the assignor are sufficient evidence of the assignment to sustain the assignee's action on a claim;[24] and evidence of an oral assignment, to which no objection was made, was sufficient although there was a written assignment which had been lost and though the best evidence thereof was not introduced.[25] As against another who claims certain specific accounts, the burden is on a creditor who claims an assignment of all of a debtor's accounts, to show that the specific accounts were included in the list of accounts furnished by the debtor.[26] The assignee of certain accounts by a debtor cannot recover money paid by the debtor to other creditors, without showing it to be the identical money collected by the debtor from the parties owing the assigned accounts.[27] To recover from the alleged employer wages assigned, the assignee must show that the assignor was in the employ of such employer and that the wages were due and unpaid,[28] and there can be no recovery in law on an assignment of wages due and to become due, where there is no proof that the debtor assented to the assignment, and the amount due exceeds the amount assigned.[29] The executrix of a testator, to whom a life insurance policy was alleged to have been assigned to secure indebtedness from the insured to the testator, in claiming the proceeds of such policy under the assignment, was required to allege and prove an existing indebtedness.[30] An averment in an affidavit of defense of an assignment of the claim pleaded as a set-off that it was due and owing to the assignor when assigned, and was still due and payable to defendant as assignee, without giving further particulars, was vague and uncertain, and insufficient to prevent judgment.[31] The defendant in an action at law

19. See 5 C. L. 285. Suits and bills of revivor by assignees, see Fletcher, Eq. Pl. & Pr. p. 62 et seq., 923, 1023.

20. Under Code, § 449. Foster v. Central Nat. Bank [N. Y.] 76 N. E. 338. Where an action was commenced before assignment and an amended complaint was thereafter filed, setting forth a cause of action essentially different from the original one, the action could not be continued in the assignor under Code Civ. Proc. § 756. Id. Such amended complaint did not relate back to the cause of action and authorize the assignor to recover, as he had no interest in the cause of action when it was filed. Id. Where plaintiff had assigned his entire cause of action to a co-plaintiff before commencement of action, the complaint was demurrable for misjoinder of parties plaintiff (Alexander v. Gloversville, 110 App. Div. 791, 97 N. Y. S. 198), and authority from the assignee to attorneys to bring suit is sufficient, where a right of action has been assigned for a valuable consideration, even though the assignor may be the nominal plaintiff (Massachusetts Const. Co. v. Kidd, 142 F. 285).

21. Walsh v. Woarms, 109 App. Div. 166, 95 N. Y. S. 824.

22. Standifer v. Bond Hardware Co. [Tex. Civ. App.] 94 S. W. 144.

23. Muller v. Witte [Conn.] 62 A. 756.

24. Southwestern Commercial Co. v. Owesney [Ariz.] 85 P. 724.

25. Dorais v. Doll [Mont.] 83 P. 884.

26, 27. Virginia-Carolina Chemical Co. v. McNair, 139 N. C. 326, 51 S. E. 949.

28. Wabash R. Co. v. Papin, 119 Ill. App. 99. An allegation that the assignor of unearned wages was in the employ of the debtor at the time of the assignment, and continued in such employment during the time of the earning of the wages for which judgment is asked, sufficiently alleges a contract of employment whereon to base an assignment of such wages. Andrews v. Lake Shore & M. S. R. Co., 7 Ohio C. C. (N. S.) 161. Recovery of wages under an assignment is an equity proceeding, when. Cincinnati, etc., R. Co. v. Lima R. Supply Co., 6 Ohio C. C. (N. S.) 429.

29. Cincinnati, etc., R. Co. v. Lima R. Supply Co., 6 Ohio C. C. (N. S.) 429.

30. Troy v. London [Ala.] 39 So. 713.

31. Caven-Williamson Ammonia Co. v. Ice Mfg. Co., 27 Pa. Super. Ct. 381.

cannot attack the validity of the assignment by the nominal plaintiff to the usee who institutes the action,[32] and where suit is brought in the name of the legal plaintiff for the use of the assignee and the defendant does not deny that the whole demand is due and unpaid, it is no concern of defendant whether the assignment was bona fide or not,[33] or whether assignor or assignee receives the proceeds of the judgment when recovered, as he is protected from further suit.[34] The declarations of the assignor subsequent to the assignment cannot be admitted to defeat the assignment, although the assignor has since died.[35] A release of a claim by plaintiff's assignor, made before assignment for defendant's benefit, was available against plaintiff's action on the claim.[36] An assignment of an open account is not sufficiently proved by parol which also discloses an assignment in writing.[37] Where a surety company paid its liability on the bond of the treasurer of an insurance society, who embezzled its funds, and took an assignment of the society's claims against the depositaries of the society's funds and brought action against them, since it claimed under the assignments and not as surety, it was no defense that the society's loss was caused by the treasurer's criminal offense for which complainant was liable as surety.[38]

ASSIGNMENTS FOR BENEFIT OF CREDITORS.

§ 1. Nature of Transaction in General (286).
§ 2. Statutory Provisions and Conflict of Laws (287).
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§ 16. Rights of Creditors Under a Void Assignment, or After Assignee's Discharge (293).

This topic treats only of voluntary assignments.[39]

§ 1. *Nature of transaction in general.*[40]—A mere trust in which the creditors have no vested interest does not constitute an assignment for the benefit of creditors.[41] In Texas a transfer of a debtor's property for the benefit of creditors, not, however, to become operative until each and all of the creditors accept the terms of the instrument, which they never do, does not constitute a statutory assignment.[42] The validity of an assignment to a trustee for the purpose of paying the assignor's debts does not depend on the latter's insolvency.[43]

32. Chamberlain v. Fernbach, 118 Ill. App. 145.

33, 34. Kamber v. Becker, 27 Pa. Super. Ct. 266.

35. Crawford v. Hord [Tex. Civ. App.] 14 Tex. Ct. Rep. 71, 89 S. W. 1097.

36. Under Civ. Code, § 1559, providing for the enforcement of a contract made for a third person's benefit. Castor v. Bernstein [Cal. App.] 84 P. 244.

37. Standifer v. Bond Hardware Co. [Tex. Civ. App.] 94 S. W. 144.

38. Fidelity & Deposit Co. of Maryland v. Fidelity Trust Co., 143 F. 152.

39. For involuntary assignments see Creditors' Suit, 5 C. L. 880; Insolvency, 6 C. L. 38. See, also, Bankruptcy, 5 C. L. 367.

40. See 5 C. L. 286.

41. Ives v. Sanguinetti [Ariz.] 85 P. 480. Defendant agreed to sell to plaintiff a hay crop harvested on certain ranches belonging to defendant's wife, the proceeds to be applied to certain debts of defendant and his wife and plaintiff agreeing to account to defendant for the balance. Held, that such an agreement created a mere trust of such proceeds, in which the creditors had not vested interest, and that it was not an assignment for benefit of creditors. Id.

42. Peeples v. Slayden-Kirksey Woolen Mills [Tex. Civ. App.] 90 S. W. 61.

43. An assignment by a corporation of all its property to a trustee who is to operate its business and use the proceeds to pay its

§ 2. *Statutory provisions and conflict of laws.*[44]—The national bankruptcy act supersedes all state insolvency laws except as to cases and persons not within its purview.[45]

A deed of assignment executed under the laws of one state passes title to real estate situated in another, which title is good against creditors not resident in the latter state even though the deed contains preferences in contravention of the statutes of the same.[46] When the estate assigned consists of property situated in several states and the courts of one state have taken jurisdiction of the whole estate the courts of another state will not take jurisdiction of the assignment in order to effect a distribution of the property within that state.[47]

§ 3. *Right to make a general assignment.*[48]

§ 4. *Filing, recording or registering; qualifying of assignee; removals and substitution.*[49]

§ 5. *Meaning and effect in general.*[50]—At common law a voluntary assignment for the benefit of creditors accepted by the assignee establishes a trust, the enforcement of which may be compelled in equity by a creditor or the assignor.[51]

§ 6. *Legality and equitableness.*[52]—An agreement between assignor and assignee in fraud of creditors is void.[53]

Reservation of property.[54]—An agreement between the assignor and his creditors whereby he is, for a valuable consideration, permitted to retain certain of his property, is valid.[55] Creditors who present their claims and obtain their pro rata share of the debtor's property are estopped from thereafter proceeding against the land retained by the debtor under such agreement though they were not parties thereto.[56]

Preferences.[57]—As a general rule assignments preferring certain creditors are void.[58] In most states the time for bringing an action to set aside unlawful preferences is limited by statute.[59]

debts. Right to create trusts or to enforce them is not limited to cases where the assignor is insolvent. Brockett v. Lewis [Mich.] 13 Det. Leg. N. 322, 108 N. W. 429.

44. See 5 C. L. 286.

45. Dille v. People, 118 Ill. App. 426.

46, 47. In re Browning [N. J. Err. & App.] 61 A. 1066.

48. See 5 C. L. 286.

49, 50. See 5 C. L. 287.

51. Creditors must move promptly if they desire relief in equity. Andrews v. Tuttle-Smith Co. [Mass.] 78 N. E. 99.

52. See 5 C. L. 287.

53. Haswell v. Blake [Tex. Civ. App.] 90 S. W. 1125. A contract between a solvent debtor and a trustee, to whom he has conveyed his property with authority to convert the same into cash and pay creditors, which bound the trustee to settle with the creditors as cheaply as possible and give the debtor the benefit of the discounts procured from creditors is contrary to public policy but this agreement is distinct from the implied contract binding the trustee to return property not needed to satisfy claims of creditors. Id.

54. See 3 C. L. 339, where an extensive note on this subject will be found.

55. Debtor conveyed for benefit of his creditors all his personalty, except such as was exempt, and all his realty, including his right of homestead and his wife's right of dower therein, except one tract of land which creditors agreed that he might retain for a home for himself and his wife, they to have a life estate therein with remainder to their children. Held that the conveyance was supported by a sufficient consideration and was not fraudulent. Royster v. Heck [Ky.] 94 S. W. 8.

56. Royster v. Heck [Ky.] 94 S. W. 8.

57. See 5 C. L. 287.

58. Where a transfer by an insolvent debtor to his creditor was a fraudulent preference, so far as it was intended to secure a pre-existing debt, the creditor did not have a lien on the property transferred to the amount of loans made after the transfer and on the faith of it as, if any part of the original contract was fraudulent, the whole was invalid. Bolster v. Graves, 189 Mass. 301, 75 N. E. 714. Under Mass. Pub. St. c. 157, § 96, an assignee of an insolvent debtor suing for the recovery of an alleged preference need only show, in order to recover, that the debtor was insolvent, that the transfer was made within six months of the filing of the petition in insolvency, and with a view to give a preference; that the creditor receiving the property had reasonable cause to believe that the debtor was insolvent; and that the transfer was made in fraud of the insolvency laws. Id. By statute in Alabama every conveyance by a debtor of substantially all of his property in payment of a prior debt, by which a preference or priority of payment is given to one

§ 7. *Property passing to and rights of assignee therein.*[60]—The assignee takes all the right, title, and interest of the assignor in the property conveyed,[61] and is entitled to the control and custody thereof.[62] His rights therein are the same and no greater than those of the assignor.[63] In Virginia a trustee under a deed of trust for creditors is a holder in due course of negotiable paper.[64] Where the statutes

or more creditors inures to the benefit of all and equity will take charge of the property for the benefit of all. Locke v. Martin [Ala.] 40 So. 387.

59. Under St. 1903, action to set aside preferential transfers of all of debtor's property must be brought within six months after conveyance is legally lodged for record. Julius Locheim & Co. v. Eversole [Ky.] 93 S. W. 52.

60. See 5 C. L. 288.

61. Where, when an insolvent made an assignment for the benefit of creditors, he was the owner of certain shares of stock, which were pledged as collateral for certain notes, such pledge could not be changed, without the consent of the insolvent's assignee, by an agreement between the insolvent and a purchaser of the notes secured thereby, such assignee being entitled to redeem the shares by paying the amount due on the notes for which they were originally pledged. Jennings v. Moore, 189 Mass. 197, 75 N. E. 214.

NOTE. Right of assignee of corporation to collect stock subscriptions: A general assignment by a corporation for the benefit of creditors passes to the assignee, with the other assets of the corporation, the right to collect, for the benefit of creditors, balances due from the stockholders on subscriptions to stock. Glenn v. Marbury, 145 U. S. 499, 36 Law. Ed. 790; Chamberlain v. Bromberg, 83 Ala. 576; Beal v. Dillon, 5 Kan. App. 27; Glenn v. Williams, 60 Md. 93; Shockley v. Fisher, 75 Mo. 498; Eppright v. Nickerson, 78 Mo. 482; Franklin v. Menown, 10 Mo. App. 570, 11 Mo. App. 592; Lionberger v. Broadway Sav. Bank, 10 Mo. App. 499; Haskell v. Sells, 14 Mo. App. 91; Germantown Pass. R. Co. v. Fitler, 60 Pa. 124, 100 Am. Dec. 546; Citizens' & Miners' Sav. Bank & Trust Co. v. Gillespie, 115 Pa. 564; West Chester & Philadelphia R. Co. v. Thomas, 2 Phila. [Pa.] 344; Cartwright v. Dickinson, 88 Tenn. 476, 17 Am. St. Rep. 910, 7 L. R. A. 706; Lewis' Adm'r v. Glenn, 84 Va. 947; Vanderwerken v. Glenn, 85 Va. 9; McKay v. Elwood, 12 Wash. 579; Stoddard v. Lum, 159 N. Y. 265, 70 Am. St. Rep. 541, 45 L. R. A. 551, rvg. 32 App. Div. 565; Dunn v. Howe, 96 F. 160 (under the Maine statute). The assignee may maintain a suit in equity against the stockholders, and the court may make a decree calling for payment of subscriptions. Lionberger v. Broadway Sav. Bank, 10 Mo. App. 499; Glenn v. Williams, 60 Md. 93; Stoddard v. Lum, 159 N. Y. 265, 70 Am. St. Rep. 541, 45 L. R. A. 551, rvg. 32 App. Div. 565. At common law, the assignee cannot sue in his own name at law, but must sue in the name of the corporation. Glenn v. Marbury, 145 U. S. 499, 36 Law. Ed. 790. When the court makes a call for unpaid subscriptions at the instance of the assignee, all the stockholders are bound thereby, whether parties to the suit or not, as they are represented by the corporation (Glenn v. Williams, 60 Md. 93); and the assignee may enforce the calls by actions against the stockholders in other states (Id.; Stoddard v. Lum, 159 N. Y. 265, 70 Am. St. Rep. 541, 45 L. R. A. 551, rvg. 32 App. Div. 565). It has been held that, where a corporation has made an assignment for the benefit of creditors, and the assignee sues to recover unpaid subscriptions, there can be no recovery, in the absence of an assessment, unless the whole of the unpaid subscriptions are necessary to pay the debts of the corporation. Citizens' & Miners' Sav. Bank & Trust Co. v. Gillespie, 115 Pa. 564. No call or assessment is necessary if all the assets of the corporation, including the unpaid subscriptions, are insufficient to pay the corporate debts. McKay v. Elwood, 12 Wash. 579.—From Clark & M. on Corp, § 779.

62. Where after the passage of the insolvency act (P. L. 404), a judgment was entered upon a bond secured by a mortgage executed prior to the passage of the act, and execution was issued on the judgment and thereafter the defendant made a general assignment for the benefit of creditors, the assignee for creditors was entitled to have the execution on the personal property of the defendant set aside. The act does not defeat the plaintiff of his preference, if he has one, but the assignee is entitled to control and custody of the personal property of the assignor. Musser v. Brindle, 23 Pa. Super. Ct. 37.

63. His rights in respect to property and things in action transferred. Webber v. Conklin [S. D.] 104 N. W. 675. Trust property in the hands of the assignor retains its character as such when in the hands of the assignee. Hutchinson v. Nat. Bank of Commerce [Ala.] 41 So. 143. Assignees for benefit of creditors or general creditors of brokers have no claim on any bonds in their possession but actually belonging to customers. Hunt v. Marquant, 109 App. Div. 729, 96 N. Y. S. 546. The vendor in a conditional sale may enforce the contract as against the vendee's assignee for the benefit of creditors. In re Jenks [Iowa] 105 N. W. 396. As a general rule, an assignee for the benefit of creditors or a receiver cannot acquire or exercise any greater title or rights in and to the property committed to his control than the insolvent or embarrassed debtor had or could enforce, and as against a bona fide and valid incumbrance upon debtors property, the assignment covers only the equity of redemption. McDaniel v. Osborne [Ind.] 75 N. E. 647. In an action by a depositor to recover from the assignee for benefit of creditors of bankers a deposit alleged to have been received by the bankers with knowledge of their insolvency, evidence held insufficient to establish that any part of plaintiff's money came into the hands of the assignee. Williams v. Van Norden Trust Co., 104 App. Div. 251, 93 N. Y. S. 821.

64. Under negotiable instrument law. Trustees of American Bank of Orange v. McComb [Va.] 54 S. E. 14.

provide that no corporation shall part with its franchise except with the consent of the stockholders, an assignment by a corporation does not pass its corporate franchise.[65] Courts have no power to compel an insolvent debtor, who has made a voluntary assignment of his property, to disclose the location of the same until the assignee's right to the property has been established in a court of competent jurisdiction.[66]

Property transferred or conveyed by assignor.[67]—The property conveyed depends largely upon the description in the instrument.[68]

§ 8. *Liability of assignee; bond.*[69]—An assignee who acts in good faith with regard to the property in his charge is not liable for any loss from the invoice value thereof,[70] but where he permits the assignor to remain in possession, continue the business on a salary and replenish the stock without the consent of creditors, he assumes all the risk of loss, and is rightly surcharged with a deficiency, either in whole or in part, depending upon the degree of neglect under the circumstances.[71]

§ 9. *Collection of assets and reduction to money. Sale of assets by assignee.*[72]—The court has no authority to direct a sale of exempt property.[73] As a general rule an order of the court confirming the sale is necessary.[74]

65. Maine corporation under Rev. St. Me. c. 47, § 5. Lothrop Pub. Co. v. Lothrop, Lee & Shepard Co. [Mass.] 77 N. E. 841.

66. Dille v. People, 118 Ill. App. 426.

67. See 5 C. L. 288.

68. A trust deed executed by a corporation conveyed its property to a trustee to "conduct and carry on the sawmill and lumber business" of the corporation as trustee, and from such "business" to first pay the running expenses, and from the "property" or product thereof to pay the indebtedness of the corporation. It also provided that the trustee should have power to sell, mortgage, or dispose of any part of the real or personal property for any and all of such purposes. Held, that such deed did not create two trusts, one of the "business" and the other of the property; and hence though the trustee had power to mortgage "to pay" the indebtedness then existing, he had no power to mortgage "to secure" such indebtedness. Bank of Visalia v. Dillonwood Lumber Co. [Cal.] 82 P. 374. An assignment by a publishing company for the benefit of creditors of all its property excepting that exempt by law from attachment or execution, passes to the assignee the good will, the rights to publish owned by the company, and its trade marks and trade names, the exemption applying only to property expressly exempted by statute. Lothrop Pub. Co. v. Lothrop, Lee & Shepard Co. [Mass.] 77 N. E. 841. Under Md. Code Pub. Gen. Laws, art. 21, § 9, providing that all deeds conveying real estate shall contain a description of the real estate sufficient to identify the same with reasonable certainty, a deed of trust for benefit of creditors is valid where it assigns "all and singular the real and personal estate, wheresoever situate, and all other property, of any nature, kind and description, wheresoever situate belonging to" the grantors. Roberts v. Roberts [Md.] 62 A. 161. A deed of trust for the benefit of creditors executed by husband wife recited that the grantors, being "indebted unto sundry persons and corporations in several sums of money and being unable to pay the same in full, have proposed and agree to assign all our oroperty . . . in trust for the benefit of our creditors, as hereinafter mentioned." Held that they conveyed not only the property owned by them jointly but also the individual property of the wife. Id.

69. See 5 C. L. 288.

70. Merrit, Allen & Co. v. Torrance [Iowa] 105 N. W. 585.

71. Krodel's Assigned Estate, 27 Pa. Super. Ct. 419.

72. See 5 C. L. 289.

73. Under Ky. St. 1903, § 85, providing that if an assignor for the benefit of creditors reserves property as exempt, the court shall appoint three persons to set aside the property so claimed, etc., and § 86, declaring that if a homestead is claimed, the court may, by consent of the assignor, and if it appears best for the creditors, or if the land is not divisible, direct a sale of the property and payment of the value of the homestead to the assignor, the court has no authority to direct a sale of all the property of the assignor, reserving a homestead and all exempt property except for the reasons set forth in the statute. Maupin v. Maupin's Assignee [Ky.] 89 S. W. 238.

74. Where an assignee for the benefit of creditors brought an action in the circuit court under the express provisions of Ky. St. 1903, § 96, for the settlement of the estate, the county court lost jurisdiction, and exceptions to the report of the sale of land, filed in the county court subsequent to the institution of the suit in the circuit court, were properly stricken from the record. Maupin v. Maupin's Assignee [Ky.] 89 S. W. 238. Where in an action by an assignee for the benefit of creditors for the settlement of the estate, it was shown that the wife of the assignor answered the petition and alleged ownership of a part of the land in her own right, and also that she had brought a suit against the assignee in which she set forth the same claim, but there was nothing to show that her claim had been determined, the court had no authority to confirm the assignee's sale. Id. Under Ky. St. 1903, § 87, providing that the report of sale of real estate in voluntary assignment pro-

§ 10. *Administration of trust in general.*[75]—One to whom property is conveyed in trust for creditors must exercise the utmost good faith in its management and in caring for the interest of the beneficiaries.[76] The beneficiaries in a trust deed are necessary parties to a suit by or against the trustee,[77] except where the number of them is so large that great inconvenience and delay would result,[78] or where the instrument itself confers power upon a trustee to represent the beneficiaries in all respects as fully as the grantor in the instrument himself might have done.[79]

§ 11. *Debts and liabilities of the estate.*[80]—An assignment for the benefit of creditors by a lessee does not deprive the lessor of his right of action at law for royalties under the lease.[81] A note of one partner indorsed by his co-partner is not a firm debt and on a general assignment of the firm property and that of the individual partners for the benefit of creditors, with no reference to the payment of claims of the creditors, the note cannot be allowed against the firm assets until payment of claims against the firm.[82] By statute in some states all the debts of the assignor become due and payable immediately upon the execution of the assignment.[83] An assignee is liable for taxes on the property of the assignor coming into his hands.[84] Counsel for the minority creditors by whose efforts the fund for distribution has been increased through surcharges against the assignee, will be awarded compensation out of the fund notwithstanding the objection of the assignor who has become a creditor by purchasing claims against the estate.[85]

Claim of assignee for compensation and allowance.[86]—The compensation of the

ceedings shall be filed within 10 days after the sale, and, if no exceptions are filed, the same shall be confirmed at the second regular term after it has been filed, a county court cannot confirm a report of sale on the day of the filing of the report. Id.

75. See 5 C. L. 289.

76. Evidence held sufficient to show fraud and collusion between trustee and attaching creditors on failure of trustee to assert the rights of beneficiaries in a deed of trust in an action of garnishment by the attaching creditors. Sawyer v. First Nat. Bank [Tex. Civ. App.] 93 S. W. 151. A suit brought by one of the beneficiaries of a deed of trust against the trustee and certain others alleging fraud on the part of the trustee is properly instituted in the county where the trustee resides against all the defendants though some of them were nonresidents of that county. Id.

77, 78, 79. Sawyer v. First Nat. Bank (Tex. Civ. App.] 93 S. W. 151.

80. See 5 C. L. 289.

81. When a mining lessee covenanted to pay a royalty to complainant on all ore mined, but no lien was reserved in the lease to secure such royalty and none was given by law, complainant was not entitled to maintain a bill in equity to declare and enforce a prior lien for royalties unpaid both by lessee and its assignee for benefit of creditors on the lessee's property in the hands of such assignee, but was only entitled to recover such royalties at law. Etowah Min. Co. v. Wills Valley Min. & Mfg. Co. [Ala.] 39 So. 336.

82. In re Hallock, 47 Misc. 571, 96 N. Y. S. 105.

83. Laws 1893 N. C. p. 433, c. 453, § 1, providing that, on the execution of any voluntary deed of trust or deed of assignment for benefit of creditors, all debts of the maker thereof shall become due and payable at once, applies to sureties on a note of the assignor. Pritchard v. Mitchell, 139 N. C. 54, 51 S. E. 783.

84. Where property assigned to plaintiff for benefit of creditors was not claimed to be other than that owned by the debtor when the assignment was made or that the debtor's personal estate was materially less in value when assigned than when he listed it for taxation and the assignee received the property on which the tax was levied against the debtor based on a return from which he had purposely failed to deduct debts from credits, the assignee was not relieved of liability for such taxes by Code § 3078, providing that assignee for the benefit of creditors shall only be liable for taxes levied on assigned property. Carpenter v. Jones County [Iowa] 107 N. W. 435; Krodel's Assigned Estate, 27 Pa. Super. Ct. 421.

85. After an assignment for benefit of creditors an arrangement was made for a reassignment to the assignor, and he give the assignee a bond conditioned to protect the assignee from expenses by reason of the assignment and reassignment, and the assignee, in consideration of such sums as might thereafter be advanced to him as assignee by plaintiff, assigned the bond to plaintiff. Plaintiff was surety on the assignee's bond. Held that plaintiff could not recover of the sureties on the bond given to the assignee for moneys advanced after the assignment on account of expenses and disbursements by the assignee growing out of the assignment and reassignment. Dunham & Co. v. McCann, 110 App. Div. 157, 97 N. Y. S. 212.

86. See 5 C. L. 289.

assignee may be fixed by the deed of assignment but the court has power to award him extra compensation.[87] He is also entitled to be reimbursed for expenses necessarily incurred.[88]

§ 12. *Presentment and allowance of claims.*[89]—Any creditor may generally appear and object to the allowance of claims.[90]

§ 13. *Classes and priorities of debts.*[91]—The statutes in most states provide that preference shall be given to certain classes of claims, as, claims for labor and supplies,[92] the claims of depositors in, and holders of bank notes of, insolvent banks,[93] and claims for public moneys deposited in banks by officers having their custody.[94] A creditor filing a petition before the register in chancery seeking a preference over other creditors is not thereby estopped from asserting that a fund in the hands of the assignee is a trust fund held for his benefit.[95] Secured creditors may when it is equitable have the proceeds of the security and also rents and profits made by the assignee in possession by their consent and forbearance.[96] The personal

87. McDougal v. Fuller [Cal.] 83 P. 701. Where the premises conveyed by an assignment for the benefit of creditors are sold by a commissioner appointed by the court the trustee under the deed of assignment is not entitled to commissions upon the fund realized by the sale under a clause of the deed entitling him to commissions for the sale of the property by him. Neither can he bind creditors otherwise represented by counsel by employing counsel to conduct an appeal. Wilson v. Langhorne [Va.] 52 S. E. 841. Where a deed of trust for the benefit of creditors provided that the trustee should receive $150 a month to conduct the business and it did not appear that the trustee rendered any service after the business ceased to be a going concern, to which time he was allowed a salary, it was not error for the court to refuse to allow him his claim for further compensation till the rendition of a decree for the distribution of the proceeds of the corporation's property. Bank of Visalia v. Dillonwood Lumber Co. [Cal.] 82 P. 374.

88. The assignee of a corporation rented the corporation premises and conducted the business of the assignment at his own private office. The arrangement resulted in a net profit to the assigned estate of several hundred dollars. Held that he was entitled to compensation for rent of his office. In re Real Estate Inv. Co.'s Assigned Estate, 212 Pa. 304, 61 A. 924.

89. See 5 C. L. 290.

90. Code Ala. 1896, § 4164, allowing "any creditor" to object to the allowance of a claim against an insolvent who has made an assignment for the benefit of creditors, gives the right to any creditor whether preferred or not. Taylor v. Hutchinson [Ala.] 40 So. 108.

91. See 5 C. L. 290.

92. McDaniel v. Osborne [Ind.] 75 N. E. 647; Bank of Visalia v. Dillonwood Lumber Co. [Cal.] 82 P. 374. Burns' Ann. St. (Ind.) 1901, § 7058, entitled "An act in regard to the payment of employes of companies, copartnerships, individuals, and associations," provides that all debts due any person for labor shall be a preferred claim where the debtor's property passes into the hands of an assignee; and such assignee, in the payment of debts, shall be required to first pay in full all debts due for labor. The assignment statute provides that any part of the property assigned on which there are liens or incumbrances may be sold by the trustee, subject to such liens or incumbrances, except when otherwise ordered. Held, that a claim for labor does not, on the debtor's executing an assignment for the benefit of creditors, become a lien upon the assigned estate superior to the liens of prior existing mortgages on the property included in the assignment but becomes merely a preferred debt, to be satisfied in preference to the claims of the general creditors. McDaniel v. Osborne [Ind.] 75 N. E. 647. Where a transfer by a corporation in trust for creditors did not provide for any preference in favor of trustee for money advanced, except that there was given "to the principal creditors" mentioned therein the right to determine the order in which the "principal debts" should be paid, and the principal creditors thereafter, including the trustee, agreed on an order which gave the trustee a preference such creditors having only authority to bind themselves, neither the trust agreement nor the agreement between the creditors entitled the trustee to preferred payment over claimants for labor and supplies either for money advanced or salary earned prior to the assignment. Bank of Visalia v. Dillonwood Lumber Co. [Cal.] 82 P. 374.

93. Taylor v. Hutchinson [Ala.] 40 So. 108.

94. Ann. Code 1892, § 307. Metcalfe v. Merchants' & Planters' Bank [Miss.] 41 So. 377.

95. Hutchinson National Bank of Commerce [Ala.] 41 So. 143.

96. Phoenix Brewing Co.'s Assignee v. Central Consumers Co. [Ky.] 88 S. W. 1051. First mortgagees who had forborne to foreclose on default allowing assignee to operate property and pay interest to mortgagee held not accountable for such payments as to other creditors on distributing the proceeds of the mortgaged property, the right to take possession and apply rents being given by the mortgage. Phoenix Brewing Co.'s Assignee v. Central Consumers' Co. [Ky.] 88 S. W. 1051.

property received by the assignee is subject to unpaid taxes before the real estate can be subjected thereto.[97]

§ 14. *Satisfaction and discharge of debts and claims.*[98]—Trust deeds and deeds of assignment frequently contain provisions in regard to interest on claims.[99] An assignee may in good faith convey property of the estate to creditors in settlement of claims and he is not chargeable with the difference between the appraised value of the property and the value at which it was taken by the creditors.[1] The right to order a partial distribution is generally discretionary.[2] The courts will not set aside a judgment of distribution on account of a trivial error occurring in the settlement of accounts of the trustees.[3]

§ 15. *Accounting, settlement and discharge, or failure of trust.*[4]—Either a creditor or the assignor may demand an accounting by the assignee at reasonable intervals,[5] and this right does not depend on maladministration.[6] Statutes in some states provide for the substitution of the assignee's personal representatives or successor in office in case of his death pending the proceedings.[7] A bill brought to remove a trustee to whom personal property has been assigned for the benefit of creditors, and to appoint a receiver for the trust property to be sufficient must contain full and precise allegations showing the necessity for the removal, and that there is danger of loss or misappropriation of the property.[8]

§ 16. *Rights of creditors under a void assignment, or after assignee's dis-*

97. Phoenix Brewing Co.'s Assignee v. Central Consumers' Co. [Ky.] 88 S. W. 1051.

98. See 5 C. L. 290.

99. A deed to trustees for the benefit of creditors provided that all claims against the grantor not bearing interest by agreement should bear 7 per cent. interest from a specified date and all claims bearing interest by agreement should continue to bear the interest agreed on. The principal of each claim was paid in full. The amount remaining was insufficient to pay all the accrued interest. Held, that each creditor was entitled to his share of the amount remaining, ascertained by determining the amount of interest due each under the agreement. McDougal v. Fuller [Cal.] 83 P. 701.

1. An assignee, after trying to sell equities in certain mortgaged houses without success, conveyed them to certain of the creditors in settlement of their claims. Held, that he would not be surcharged with the difference between the rate at which the houses were taken by the creditors and their appraisement, where the evidence showed that the arrangement was as favorable as could be expected. In re Real Estate Inv. Co.'s Assigned Estate, 212 Pa. 304, 61 A. 924.

2. Under N. J. P. L. 1899, p. 46. Order refusing to direct partial distribution is not appealable. In re Browning [N. J. Err. & App.] 61 A. 1066.

3. McDougal v. Fuller [Cal.] 83 P. 701.

4. See 5 C. L. 290.

5. Andrews v. Tuttle-Smith Co. [Mass.] 78 N. E. 99. Corporation assigned all its property to a trustee who was to operate its business and use proceeds to pay its debts. Held that a suit by one of the creditors seeking an accounting by the assignee and a payment of his claim was not a creditor's bill, which would have been maintainable only by a judgment creditor, but was a suit by a cestui que trust against a trustee to compel a proper application of the trust property. Brockett v. Lewis [Mich.] 13 Det. Leg. N. 322, 108 N. W. 429. Court of equity has jurisdiction of such a suit. Id. Assignor was proper party to such suit and should have been joined. Id.

6. Under Rev. Laws, c. 173, § 4, an assignee of the interests of creditors under an assignment for benefit of creditors and of the residuary interest of the assignor may sue in his own name to enforce liability for fraudulent administration of the trust. Andrews v. Tuttle-Smith Co. [Mass.] 78 N. E. 99. Sufficiency of bill in suits by creditors against assignee. Id.

7. General Assignment Act Laws 1877, p. 545, c. 466, § 10, as amended by Laws 1878, p. 408, c. 318, relative to assignments for the benefit of creditors, provides that if the assignee shall die during the pendency of proceedings the personal representative or successor in office, or both, may be substituted, and that any decree made thereafter shall bind the parties thus substituted, as well as the property of the deceased assignee. Held that when assignee dies pending a reference in proceedings to compel him to account, a report filed after the death of the assignee and before the substitution of his personal representative is a nullity. In re Venable, 97 N. Y. S. 938. Code Civ. Proc. § 1019, providing that upon a trial by a referee of an issue of fact the referee's written report must be filed within 60 days from submission, or the other party may serve a notice that he elects to end the reference, applies to a reference in a proceeding to compel an assignee to account and where assignee dies pending the reference his personal representativ may end it by notice. Id.

8. Baltimore Bargain House v. St. Clair [W. Va.] 52 S. E. 660.

charge.[9]—In a suit to enforce in equity a defective assignment only such persons as have an interest in the fund should be made parties.[10]

ASSISTANCE, WRIT OF.[11]

The function of the writ of assistance is to put into actual possession of property the person who, under decree of court, becomes entitled thereto.[12] The remedy is founded on the general principle that a court of equity will, when it can do so justly, carry its own decree into full execution without relying on the co-operation of any other tribunal.[13] Its scope is co-extensive with the court's jurisdiction to hear and determine the rights of the parties.[14] Its issuance rests in the sound discretion of the court, and the writ will never be awarded in case of doubt.[15] It will issue in favor of a purchaser at a sale of real estate under a decree,[16] but will only be allowed against parties to the suit, their representatives, privies, or those who come into possession under either of the parties while the suit is pending.[17] Whether or not it will issue in favor of a grantee of a purchaser depends on circumstances and rests largely in the discretion of the court.[18] It will not issue where the rights of the parties have not been fully adjudicated in the principal suit.[19] At common law the writ could not issue without notice to the person in possession but this rule has been changed by statute in some states.[20] Mere delay in applying for it is not sufficient to warrant the court in withholding it.[21] The sale cannot be collaterally attacked on the application,[22] nor will a question of legal title be tried or decided in proceedings having in view the issuance of the writ.[23] There is a conflict of authority as to whether an order granting the writ is appealable.[23a]

9. See 5 C. L. 291.

10. Where guardian assigned judgment in favor of ward without order of court and the guardian was subsequently removed held a complaint by the assignee joining the first guardian, his sureties, the second guardian and the judgment debtor was demurrable in that the first guardian and his sureties should not have been joined. Conservative Sav. & Loan Ass'n v. Omaha [Neb.] 103 N. W. 286.

11. See 5 C. L. 291.

12. Strong v. Smith [N. J. Err. & App.] 63 A. 493.

13. Writ is a process issued from a court of equity to enforce its decree. Fay v. Stubenrauch [Cal. App.] 83 P. 82.

14. Fay v. Stubenrauch [Cal. App.] 83 P. 82.

15. Board of Home Missions v. Davis [N. J. Eq.] 62 A. 447; Strong v. Smith [N. J. Err. & App.] 63 A. 493.

16. Escritt v. Michaleson [Neb.] 106 N. W. 1016.

17. Escritt v. Michaleson [Neb.] 106 N. W. 1016. A purchaser under a decree in chancery for a foreclosure of a mortgage may by proper proceedings obtain a writ of assistance against a person who was not a party in the foreclosure suit, but who claims possession of the mortgaged premises under such a party, and whose right of possession is clearly subordinate to that of the purchaser. Even though the rights of the possessor have not been foreclosed under the decree. Strong v. Smith [N. J. Err. & App.] 63 A. 493. Where defendants were in possession before the existence of the lien under which the plaintiff acquired title and were not made parties to the proceedings to foreclose the lien, and not allowed to become parties on their application, plaintiff is not entitled to a writ of assistance. Urlan v. Ruhe [Neb.] 104 N. W. 1053.

18. Grantee is not necessarily incompetent to prosecute application for writ, at least under statute providing that actions are to be brought in name of real party in interest. Clark & Leonard Inv. Co. v. Lindgren [Neb.] 107 N. W. 116.

19. Escritt v. Michaleson [Neb.] 106 N. W. 1016.

20. Prahl v. Rogers [Wis.] 106 N. W. 287.

21. Prahl v. Rogers [Wis.] 106 N. W. 287. Objection of delay is addressed to sound discretion of court, and it will not be upheld where it is not made to appear that new rights have intervened or that defendants have been prejudiced by the delay. Clark & Leonard Inv. Co. v. Lindgren [Neb.] 107 N. W. 116.

22. The action of a commissioner appointed to enforce a foreclosure decree in making a return of the sale and deed pursuant thereto is not subject to collateral attack on the application of the purchaser for a writ of assistance. Fay v. Stubenrauch [Cal. App.] 83 P. 82.

23. The defendant in a foreclosure proceeding who after the filing of a bill for foreclosure purchases a paramount title will not be ousted from his paramount title by a writ of assistance. Board of Home Missions v. Davis [N. J. Eq.] 62 A. 447. Title to property cannot be litigated on application for writ by purchaser at mortgage foreclosure sale. Fay v. Stubenrauch [Cal. App.] 83 P. 82. Tenant of one claiming title to property under a deed made by a party defendant to a foreclosure suit after the com-

ASSOCIATIONS AND SOCIETIES.

§ 1. Definition, Nature, and Organization (294).
§ 2. Internal Relations, Rights, and Duties (294).
§ 3. The Association, and Persons not Members (295).
§ 4. Actions and Litigation (295).
§ 5. Dissolution and Termination (296).

This article treats only of voluntary unincorporated associations and membership corporations organized for purposes not pecuniary.[24] Since the rights, duties, and liabilities of members of fraternal benefit associations are more or less dependent on the accompanying contract of insurance, cases dealing with them have been excluded.[25]

§ 1. *Definition, nature, and organization.*[26]—A law authorizing the organization of voluntary associations into corporations which is in existence when such an association is formed must be deemed to be incorporated into the association agreement by necessary implication and every member must be conclusively presumed to have impliedly agreed, in joining the association, that it might at any future time be converted into a corporation in accordance therewith.[27] Statutes in some states prohibit the incorporation of benevolent or religious societies under names already assumed by existing corporations.[28]

§ 2. *Internal relations, rights, and duties.*[29]—Every participant in a voluntary organization has an absolute right which the courts will protect, to have its property controlled and administered according to its organic plan, and to participate in its affairs in harmony therewith.[30] The by-laws frequently provide that members may be fined [31] or expelled for their breach.[32] Before a member can be deprived of his

mencement of such suit and the filing of lis pendens, and who purchased with knowledge of the pendency of the action cannot plead such title to defeat writ to put purchaser under foreclosure decree in possession, but is remitted to action at law to try title. Id.

23n. In Nebraska it is held to be final and appealable. Escritt v. Michaleson [Neb.] 106 N. W. 1016. Order granting the writ is not an order for the delivery or possession of real estate within Code Civ. Proc. § 677, and hence is not such an order as may be superseded by giving waste bond therein provided for. Id. Order is one which can be superseded only by order of court in making which the court may require it to be conditioned upon such reasonable terms as he may direct. Id. Held proper to require a bond for the payment of a reasonable rent for use and occupation of the premises during the pendency of the appeal. Id.

24. For general corporation law see Corporations, 5 C. L. 764. Reference should also be had to Joint Stock Companies, 6 C. L. 209; Exchanges and Boards of Trade, 5 C. L. 1383; Building and Loan Associations, 5 C. L. 478; Religious Societies, 6 C. L. 1289.

25. See Fraternal Mutual Benefit Associations, 5 C. L. 1523.

26. See 5 C. L. 292.

27. Spiritual & Philosophical Temple v. Vincent [Wis.] 105 N. W. 1026.

28. Under Rev. St. 1899, § 1394, which prohibits the incorporation of a benevolent society bearing a corporation name already assumed by another corporation and provides that when the petition for the incorporation of a religious or benevolent society is filed in the circuit court the judge may appoint some person to investigate as to the propriety of incorporation and such person may take testimony, and the court may grant or dismiss the petition, held that the statute contemplates an ex parte proceeding and the parties objecting to the incorporation have no right to become parties to the proceeding and to appeal from the decree. Young Women's Christian Ass'n v. St. Louis Women's Christian Ass'n, 115 Mo. App. 228, 91 S. W. 171.

29. See 5 C. L. 293.

30. Spiritual & Philosophical Temple v. Vincent [Wis.] 105 N. W. 1026.

31. A by-law of a union of musicians providing that a violation of certain sections of the by-laws "shall be considered a breach of faith and the offender" shall be fined a fixed sum does not authorize the imposition of fines for a violation of each of the sections, but only provides for the imposition of one fine for violations thereof. Fuerst v. Musical Mut. Protective Union, 95 N. Y. S. 155. A by-law of a union of musicians which provides that any leader engaging members to perform for less than the stipulated price shall become personally responsible for all fines that may be imposed on the members means that the leader is responsible therefor, but before he can be held, charges must be preferred and an opportunity given to defend, as expressly provided in another by-law. Id.

32. NOTE. Grounds for expulsion: It has been held that an incorporated chamber of commerce, board of trade, or other like institution, may disfranchise, expel, or suspend a member, in pursuance of a by-law, for refusal or failure to properly perform a contract, even though it is unenforceable under the statute of frauds (Dickinson v. Chamber of Commerce, 29 Wis. 45, 9 Am. Rep. 544. And see People v. Chicago Board of Trade, 45 Ill. 112; People v. New York

membership he must have notice of any charges against him, with an opportunity to be heard in his own defense before an impartial tribunal.[33] A summons from the directors of the association, in order to be sufficient to sustain a dismissal, must specify the charges, though the by-laws do not provide for such specification, but service of such charges may be waived by the appearance of the defendant.[34] An incorporated athletic club, conducting club houses, and sustained by membership dues, is liable to its members for negligence.[35]

§ 3. *The association and persons not members.*[36]—As a general rule the members of an unincorporated joint stock company are liable as partners.[37] The constitution and rules of an association cannot be enforced so as to affect bona fide purchasers of its property.[38]

§ 4. *Actions and litigation.*[39]—At common law an unincorporated association must sue and be sued in the names of its individual members, but this rule has been changed by statute in many states so that it may sue and be sued under its associate name.[40]

Com. Ass'n, 18 Abb. Pr. [N. Y.] 271; Lewis v. Wilson, 121 N. Y. 84; People v. New York Produce Exch., 149 N. Y. 401), for violating a by-law prohibiting members from gathering in any public place in the vicinity of the exchange room and forming a market for dealing in grain futures before the opening or after the closing of the exchange (State v. Milwaukee Chamber of Commerce, 47 Wis. 670); for allowing rebates to customers contrary to the rules and regulations of the association (Jackson v. South Omaha Live Stock Exch., 49 Neb. 687); for making or reporting any false or fictitious purchases or sales, or acting in any way in bad faith, or dishonestly or dishonorably (Pitcher v. Board of Trade, 121 Ill. 412); or for obtaining goods under false pretenses (People v. New York Com. Ass'n, 18 Abb. Pr. [N. Y.] 271); but not for refusal or failure to submit a matter in dispute to arbitration after having commenced suit upon it (State v. Chamber of Commerce, 20 Wis. 63); or for refusal to pay an award rendered in an arbitration, where the member protested against the arbitration on the ground that the association had no jurisdiction (Savannah Cotton Exch. v. State, 54 Ga. 668); or for selling a seat to which the managers have declared his title invalid (People v. New York Cotton Exch., 8 Hun [N. Y.] 216). As to the power of the New York stock exchange to expel members see Belton v. Hatch, 109 N. Y. 593. It has also been held that a member of a board of fire underwriters may be expelled for charging lower rates than those fixed by the association (People v. New York Board of Fire Underwriters, 7 Hun [N. Y.] 248, afg. 54 How. Pr. 240); that a physician who is a member of a medical association may be expelled for selling out his practice and then resuming practice in the same locality to the purchaser's injury (Barrows v. Massachusetts Med. Soc., 12 Cush. [Mass.] 402); for gross immorality in a professional transaction (Id.); or for holding himself out as prepared and willing to practice either as an allopath or homeopath (Ex parte Paine, 1 Hill [N. Y.] 665); but not for receiving for his services a less fee than that prescribed by the by-laws of the society (People v. Medical Soc., 25 Barb. [N. Y.] 570); or for advertising a particular remedy (Id.); or for becoming surety on the official bond of a negro elected to office, or surety on the bonds of negroes charged with inciting riot, etc. (State v. Georgia Medical Soc., 38 Ga. 608, 95 Am. Dec. 408); or because his political views are distasteful to the other members (Id.); and that a member of a trades union may be expelled for working in violation of the by-laws of the union. for one who does not pay weekly and employs nonunion men (Burns v. Bricklayers' Union, 27 Abb. N. C. [N. Y.] 20. But see Otto v. Journeymen Tailors' Protective Union, 75 Cal. 308, 7 Am. St. Rep. 156, and People v. New York Benev. Soc., 3 Hun [N. Y.] 361).—From Clark & M. Corp, § 373b.

33. Unincorporated stock exchange. Williamson v. Randolph, 48 Misc. 96, 96 N. Y. S. 644.

34. Williamson v. Randolph, 48 Misc. 96, 96 N. Y. S. 644.

35. Beecroft v. New York Athletic Club, 97 N. Y. S. 831.

36. See 5 C. L. 295.

37. Norwood v. Francis, 25 App. D. C. 463; Patch Mfg. Co. v. Capeless [Vt.] 63 A. 938. In an action by a depositor in an insolvent unincorporated savings bank against certain of its members as copartners when the defense of one of them is that he had withdrawn as a member as provided by the by-laws prior to plaintiff's becoming a depositor, testimony of a former suit, tried six years before plaintiff made his deposit and three years before such defendant withdrew as a member, in which suit it was shown that defendant was then a member of the association, and offered by plaintiff to show that it was generally known that such was the case, is inadmissible. Norwood v. Francis, 25 App. D. C. 463.

38. Grand Lodge I. O. O. F. v. Barker [Mich.] 103 N. W. 193.

39. See 5 C. L. 296.

40. Patch Mfg. Co. v. Capeless [Vt.] 63 A. 938. V. S. 1099, which provides that any partnership, unincorporated association and joint stock company may sue and be sued in its firm, associate or company name and that service of process on its officers shall have the same force and effect as regards the joint rights, property, and effects of the

§ 5. *Dissolution and termination.*[41]—The method of dissolution of voluntary associations is frequently regulated by the constitution and by-laws of the same.[42] The right to enforce the payment of the debts of an association by an assessment against the members thereof on its dissolution is regulated by statute.[43] The right to forfeit the charter of an association for a violation of the liquor law is treated elsewhere.[44]

ASSUMPSIT.

§ 1. Nature, Form, and Propriety of Action (296).
§ 2. The Common Counts (296).
§ 3. Declaration, Pleas, and Defenses (297).
§ 4. Evidence (297).

§ 1. *Nature, form, and propriety of action.*[45]—Assumpsit will lie only on a simple[46] contract express or implied.[47] It will not lie to try title to the product of real estate where defendant is in possession under claim of right.[48]

Waiver of tort.[49]—Where personal property has been converted, the owner may waive the tort and sue in assumpsit.[50] Whether one is suing in tort or in assumpsit may be determined by the nature of the relief sought.[51]

§ 2. *The common counts.*[52]—Where a contract has been fully executed on plaintiff's part and nothing remains but payment by defendant, recovery may be had under the common counts.[53]

partnership, association or company as if served on all the members, is conclusive against all persons who were members when the liability merged in judgment was created, but persons whose membership had thence ceased or did not commence until subsequent thereto were not responsible in supplemental proceedings under § 1183, U. S., which provides that a suit for the amount unpaid on a judgment against an unincorporated association may be brought against any and all of the partners, associates or shareholders upon their original liability. Id. Statutes providing for a judgment binding all the members of an unincorporated association after service on an officer is not violative of the fourteenth amendment to the Federal constitution as taking of property without due process of law. Id.

41. See 5 C. L. 297.

42. In a suit involving the validity of dissolution of a voluntary association, the constitution of which stipulated that it should not be dissolved as long as ten members voted to continue its existence, the exclusion of evidence of the number of members who voted against dissolution by voting against consolidation was prejudicial to the rights of the dissenting minority. Rosenthal v. Reinfeld, 48 Misc. 652, 96 N. Y. S. 199.

43. "An act for winding up voluntary associations and associations with partnership liabilities" (N. J. P. L. 1899, p. 485, c. 182), does not clothe the chancellor with power to enforce the payment of debts contracted by such association by an assessment against the members thereof in a case where by a previous proceeding in chancery the business in the course of which such debts were contracted had been wound up and the assets of such association got in and distributed. Henry v. Simanton, 67 N. J. Eq. 606, 61 A. 1065.

44. See Intoxicating Liquors, 6 C. L. 165.

45. See 5 C. L. 297. See, also, Contracts, 5 C. L. 664, and Implied Contracts, 5 C. L. 1756.

46. Assumpsit will not lie upon a contract under seal, unless it has been reduced to parol by a subsequent modification. Conroy v. Equitable Acc. Co. [R. I.] 63 A. 356.

47. Law will not imply a promise to pay for products removed from real estate held adversely. Reilly v. Crown Petroleum Co. [Pa.] 63 A. 253.

48. But where the manager of one company turns over gas wells to himself as president of another without notice, the latter has no such claim of title as necessitates an action in ejectment before maintaining assumpsit for the gas taken. McCullough v. Ford Natural Gas Co. [Pa.] 62 A. 521.

49. See 5 C. L. 298. See, also, Election and Waiver, 5 C. L. 1078.

50. Conversion of certain fixtures in a barber shop. Kleinbohe v. Hoffman House, 97 N. Y. S. 1122; Tidewater Quarry Co. v. Scott [Va.] 52 S. E. 835. Assumpsit will lie against a bailee who converts the property. De Loach Mill Mfg. Co. v. Standard Sawmill Co. [Ga.] 54 S. E. 157. Money fraudulently appropriated recovered as money had and received. Donovan v. Purtell, 119 Ill. App. 116. Gas taken from plaintiff's wells. McCullough v. Ford Natural Gas Co. [Pa.] 62 A. 521.

51. Although plaintiff uses language in his pleading appropriate to tort, yet where he seeks to recover money actually received by defendant and belonging to him, the action is assumpsit. Kirchner v. Smith, 7 Ohio C. C. (N. S.) 22.

52. See 5 C. L. 298.

53. Lessor may recover rent due where she has fully performed her obligations under the common counts. Rubens v. Hill, 115 Ill. App. 565. Recovery of sale price of goods sold. Weigand v. Cannon, 118 Ill. App. 635. For a public improvement completed and accepted. Immaterial that other

Use and occupation of land.[54]

Goods sold and delivered.[55]

Money had and received.[56]—Assumpsit for money had and received will lie where defendant has received[57] money or its equivalent which in equity and good conscience he ought not to retain from plaintiff.[58] Money paid to one to be used for a specified purpose may be recovered as for money had and received if not so applied.[59] Assumpsit for money had and received lies against a guardian de son tort by the ward for the value of services rendered during minority,[60] but it will not lie against a trustee of an express trust until the trust has been fully executed and the final account settled.[61] An action of assumpsit to recover a share of the proceeds of real estate will not lie where the transaction is so complicated as to require an accounting.[62]

Money paid.[63]

Work, labor, and materials.[64]

§ 3. *Declaration, pleas, and defenses.*[65]

§ 4. *Evidence.*[66]—Under a declaration alleging assumpsit, plaintiff may prove facts constituting a conversion, thereby establishing an implied debt.[67] In assumpsit to recover rent due under a contract fully performed by plaintiff, the contract may be introduced to determine the amount due.[68]

ASSUMPTION OF OBLIGATIONS; ASSUMPTION OF RISK, see latest topical index.

ASYLUMS AND HOSPITALS.

§ 1. Corporations or Societies and Their Officers (297).
§ 2. Establishment and Maintenance of Institutions and Support of Inmates (298).
§ 3. Liability of Institutions or Officers for Injuries to Inmates (300).

§ 1. *Corporations or societies and their officers.*[69]—In New York, a state hospital for the treatment of indigent insane may sue and be sued as a natural person,[70] and may institute proceedings for the sale of the real estate of a decedent for the enforcement of a debt.[71] The mayor of a city who is ex officio a trustee of a city

special counts alleged are insufficient. City of Chicago v. Duffy, 218 Ill. 242, 75 N. E. 912.

54. See 5 C. L. 299.

55. See 5 C. L. 298.

56. See 5 C. L. 299.

57. Will not lie against an insurance company reinsuring another, for premiums paid the latter but not received by the former. Illinois Life Ins. Co. v. Jaffe [Ala.] 40 So. 47. Evidence held insufficient to show that one of the defendants had received the money or had ratified the acts of the person who assumed to act as her agent. Brady v. Messler [R. I.] 62 A. 511. Plaintiff held not to be equitably entitled to certain earned premiums paid to defendant. Foresters' Bldg. & Loan Ass'n v. Quinn, 119 Ill. App. 572.

58. Henderson v. Koenig, 92 Mo. 690, 91 S. W. 88. A probate judge may recover fees of his office illegally paid to the clerk and the city under a void law, but not fees paid to the clerk as salary. Id.

59. As where a part owner of premises pays money to a complainant in a mortgage foreclosure to be applied on account of interest, costs, and sheriff's fees, and not applied. Brady v. Franklin Sav. Inst. [N. J. Law] 62 A. 277. Acceptance of his share of the surplus proceeds of a subsequent mortgage foreclosure sale does not estop a part owner from recovering money paid but not applied to the debt. Id.

60. Zeideman v. Molasky [Mo. App.] 94 S. W. 754.

61. Hence, where plaintiff worked for defendant under an understanding that he was to invest her earnings and account to her for them when she married, assumpsit will not lie. Zeideman v. Molasky [Mo. App.] 94 S. W. 754.

62. Where four persons enter into a contract to buy and sell certain real estate for speculation and contribute various amounts at various times assumpsit will not lie to recover a share of the proceeds of a sale. Burton v. Trainer, 27 Pa. Super. Ct. 626.

63, 64. See 5 C. L. 299.

65. See 5 C. L. 300.

66. See 5 C. L. 301.

67. Kleinbohe v. Hoffman House, 97 N. Y. S. 1122.

68. Rubens v. Hill, 115 Ill. App. 565.

69. See 5 C. L. 301.

70. Const. art. 8, § 3; Laws 1896, p. 478, c. 545, § 30. In re Buffalo State Hospital, 47 Misc. 33, 95 N. Y. S. 209.

71. In re Buffalo State Hospital, 47 Misc 33, 95 N. Y. S. 209.

hospital not under the supervision of the city as trustee should exercise his own judgment and perform his duties as trustee without dictation from the city,[72] and he is not as mayor nor as a citizen and tax payer a proper party complainant against the trustees of the hospital to correct alleged abuses of trust.[73] The power of insane asylum trustees under authority delegated by the legislature of Ohio to contract with railroad companies with reference to a track across the asylum lands is exhausted by its exercise and the contract cannot be afterward modified.[74] The statute of Florida creating a board of control and placing certain state institutions, including the institute for the blind, deaf, and dumb, under its management, is constitutional,[75] and this institute is held to be properly included within the term "schools of higher grades."[76] A statute providing that the appointment of a physician for a hospital shall be for a term not exceeding a certain period and prohibiting a removal within such term does not prevent an appointment for a shorter term than the period mentioned and removal at the end of the term.[77]

§ 2. *Establishment and maintenance of institutions and support of inmates.*[78]—The power to purchase land and erect and furnish hospitals is variously regulated by statute. In New Jersey this power in regard to building new hospitals in cities of the first class is vested in a board of trustees to be appointed by the mayor and not in the board of health,[79] and the power of the trustees delegated to them by a valid statute is not impaired by a subsequent rescission of the resolutions on the basis of which they were appointed.[80] It is often provided that hospitals may be erected outside the city limits,[81] and in such case where the city authorities and outlying school districts have concurrent powers relative to health and contagious diseases, one power must be exercised with due regard to the other.[82] Boards of county commissioners in Montana have no power of their own motion to acquire land and erect thereon permanent detention hospitals.[83] A valid statute conferring the

72. Stearns v. Newport Hospital [R. I.] 62 A. 132.

73. The attorney general being the proper party to represent the public. Stearns v. Newport Hospital [R. I.] 62 A. 132.

74. State v. Toledo & O. Cent. R. Co., 3 Ohio N. P. (N. S.) 234.

75. Chapter 5384, Laws 1905. State v. Bryan [Fla.] 39 So. 929.

76. State v. Bryan [Fla.] 39 So. 929.

77. Female physician appointed for one year and her successor elected at end of year. Statute that appointment should not exceed five years and prohibiting removal within the term did not apply. St. June 4, 1897 (P. L. 98). Taber v. Trustees of State Hospital for Insane [C. C. A.] 138 F. 865.

78. See 5 C. L. 301.

79. Under the acts of April 3, 1902 (P. L. p. 549), April 7, 1903 (P. L. p. 208), and March 29, 1904 (P. L. 343), and facts disclosed in this case the power of purchasing land and erecting and furnishing buildings for a new hospital in Jersey City is vested in the board of trustees appointed in accordance with the act of April 3, 1902, and not in the board of health appointed under the act of March 29, 1904. Lampson v. Jersey City [N. J. Law] 61 A. 513.

80. Lampson v. Jersey City [N. J. Law] 61 A. 513.

81. The act of March 30, 1903 (P. L. 115), amending clause 22, § 3, art. 5, of the act of May 23, 1889 (P. L. 290), and providing for hospitals beyond city limits is constitutional as to its title. City of Allentown v. Wagner [Pa.] 63 A. 697. In the Act March 30, 1903 (P. L. 115), providing for the establishment of a hospital for contagious diseases within the limits of a city or "within the county adjacent," the word "adjacent" does not apply to the location of the hospital but to the county in which it and the city are located. Id. Equity will not pass upon the right of a municipality to acquire and hold land for hospital purposes outside of its territorial limits. State v. Inhabitants of Trenton [N. J. Eq.] 63 A. 897. P. L. 1902, p. 559, requiring the consent of an outside municipality before a hospital for contagious diseases can be located therein did not affect the right of a city to maintain old and build new hospitals on land acquired and used prior to its enactment. Id.

82. School board could not prevent erection of pest house. City of Allentown v. Wagner [Pa.] 63 A. 697. Act April 11, 1899 (P. L. 38), giving school boards certain powers in these matters was not repealed by the act of March 30, 1903 (P. L. 115), authorizing cities of the third class to establish hospitals outside their limits. Id.

83. Title of Laws 1901, p. 80, creating a state board of health held insufficient to include the provisions therein granting the commissioners this power. Yegan v. Yellowstone County Com'rs [Mont.] 85 P. 740. Pol. Code, § 2864, empowering the county board of health consisting of the county commissioners and one physician to provide for the temporary detention of persons suffering from contagious diseases where necessary,

power to build hospitals also confers the power to acquire by purchase or otherwise sites for the erection of such hospitals.[84]

Members of boards of health are not liable for negligence or mistake in locating hospitals for the treatment of contagious diseases when required to do so under the statute,[85] but they have no power to take private lands for such hospitals without proceeding according to statute or obtaining permission from the owner,[86] and will be held liable for so doing if the acts are done by them personally or by others under their direction.[87] They are also held liable for maintaining hospitals so as to make them nuisances to adjoining owners where the negligence is a misfeasance as distinguished from a nonfeasance.[88] A hospital for the treatment of contagious and infectious diseases is not per se a nuisance,[89] and the erection and use of such a building will not be restrained simply because of an apprehension that it may become a nuisance.[90] Whether such hospital will be abated as a nuisance must depend upon circumstances.[91] A court of equity cannot of its own motion and without authority interfere with the management of hospitals established and maintained by trust funds.[92] A hospital having been maintained and supported under authority of the legislature by excise money and fines which otherwise would have gone to a certain county, it is proper for the legislature, upon the dissolution of the corporation, to direct that the proceeds of its property shall be returned to the treasury of such county.[93]

A lunatic asylum may recover on a quantum meruit for the care and treatment of a lunatic though the judgment of the court committing the lunatic is void,[94] but the courts cannot enforce contracts made by boards of trustees of state charitable institutions contrary to statute.[95]

did not give the county commissioners, as such, the power to acquire land on their own motion for the erection of permanent detention hospitals. Id. Pol. Code, § 4230, subds. 5-7, 9, authorizing the erection of hospitals for the indigent sick, etc., did not give authority. Id. The phrase "such other buildings as may be necessary" did not enlarge the purpose for which the board may erect buildings. Id.

84. Yegan v. Yellowstone County Com'rs [Mont.] 85 P. 740.

85. Rev. Laws, c. 75, § 42. Barry v. Smith [Mass.] 77 N. E. 1099. Rev. Laws, c. 75, § 42, providing that upon the breaking out of a dangerous disease in a "town" the board of health shall provide a hospital applies also to cities. Id.

86. Barry v. Smith [Mass.] 77 N. E. 1099.

87. Encroaching upon private premises in maintaining smallpox hospital. Barry v. Smith [Mass.] 77 N. E. 1099.

88. Barry v. Smith [Mass.] 77 N. E. 1099. One whose dwelling is in a city in which is located a hospital for dangerous diseases cannot complain because it is located too near an inhabited dwelling in an adjoining town contrary to Rev. Laws, c. 75, § 37. Id.

89. State v. Inhabitants of Trenton [N. J. Eq.] 63 A. 897.

90. Single case of smallpox in 13 years not traced to the hospital did not authorize injunction. State v. Inhabitants of Trenton [N. J. Eq.] 63 A. 897.

91. A smallpox hospital, established under 72 O. L. 77, as long ago as 1878, by a municipality, within the township but outside of its own corporate limits, at a distance of 250 feet back from a public highway, will not be abated as a nuisance, although a large township school house has since been erected on the highway opposite hospital lot, and dwellings have also been built adjacent thereto. But the erection of an additional building directly opposite the school house, and within fifty feet of the highway upon which the hospital lot abuts, will be enjoined as a public nuisance where the purpose is to use said building for hospital purposes. Trustees of Youngstown Township v. Youngstown, 6 Ohio C. C. (N. S.) 498. Evidence held to show hospital buildings so far isolated as not to show a nuisance from any dangerous transmission of smallpox, and injunction refused. State v. Inhabitants of Trenton [N. J. Eq.] 63 A. 897.

92. Where a will creating a trust for the establishment of a charitable hospital gave the court no authority to supervise the management of the hospital or its funds, the fact that some of the patients were treated and cared for at public expense did not authorize interference independently of an action. Jenkins v. Berry [Ky.] 92 S. W. 10.

93. Avila v. New York, 106 App. Div. 120, 94 N. Y. S. 1132. The trustees could not recover back the proceeds of the property voluntarily paid over by them to the county treasurer pursuant to a statute alleged to be unconstitutional where the corporation was a charitable one without creditors and no one laid claim to its property by reversion. Id.

94. Hopper v. Eastern Kentucky Lunatic Asylum, 27 Ky. L. R. 649, 85 S. W. 1187.

95. Purchase of coal four months in advance where statute required monthly ad-

§ 3. *Liability of institutions or officers for injuries to inmates.*[96]—A public charitable hospital is not liable for the negligence of a surgeon in operating on a patient who does not pay for the surgeon's services in the absence of negligence in the selection or employment of the surgeon,[97] nor can it be liable for the breach of express contract in such case where its superintendent has no authority to make it.[98]

Liability for injuries to third persons.—A hospital exercising only benevolent or charitable functions and the directors and managers of which derive no financial benefit is not liable for the negligence of its employes,[99] though it receives compensation from some of its patients,[1] and where such hospital under an agreement with the city conducts the city's ambulance service it cannot be held responsible for injuries caused by the negligence of its ambulance driver while responding to a call from the city.[2] An insane asylum established and maintained by the state being a mere government instrumentality is not liable for injuries to others caused by its inmates or employes.[3] The fact that the statute creating it provides that it may sue and be sued does not extend its liability.[4]

ATTACHMENT.

§ 1. Definition, Nature and Distinction (300).
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§ 18. Wrongful Attachment (316). Pleading (316). Evidence and Questions of Fact (317). Instructions (318). Damages (318).

§ 1. *Definition, nature and distinction.*[5]—Attachment is purely a statutory remedy and local statutes should in all cases be consulted, any seemingly general rule being so only because of similarity of statutes.

§ 2. *In what actions it will issue.*[6]—An attachment may issue in an action on contract,[7] where the damages claimed are actual and capable of being estimated by

vertisement. Bunch v. Tipton [Ark.] 88 S. W. 888.

96. See 5 C. L. 301.

97. Where patient paid for board and attendance only. Wilson v. Brooklyn Homeopathic Hospital, 97 App. Div. 37, 89 N. Y. S. 619.

98. Though superintendent agreed that the price charged for board and attendance included surgical treatment. Wilson v. Brooklyn Homeopathic Hospital, 97 App. Div. 37, 89 N. Y. S. 619.

99. Noble v. Hahnemann Hospital, 98 N. Y. S. 605.

1. Personal injury by negligence of ambulance driver. Noble v. Hahnemann Hospital, 98 N. Y. S. 605.

2. Exercising governmental functions. Noble v. Hahnemann Hospital, 98 N. Y. S. 605.

3. Employe injured by inmate. Leavell v. Western Kentucky Asylum for the Insane [Ky.] 91 S. W. 671.

4. Leavell v. Western Kentucky Asylum for the Insane [Ky.] 91 S. W. 671.

5, 6. See 5 C. L. 302.

7. In California an attachment may issue in an action on account for the payment of money where the contract is made or to be performed within the state and is not se-

the usual means of proof and do not rest in the discretion of the jury.[8] An attachment may issue in equitable proceedings.[9]

§ 3. *Right to and grounds for the writ.*[10]—In Massachusetts an attachment may issue upon the ground of mere want of security for the payment of the judgment to be recovered;[11] and so also in California, where the contract sued on was made or to be performed in the state.[12] In some cases an attachment may issue on the ground of fraudulent misappropriation of funds.[13]

Removal from state.[14]—The temporary absence of a debtor from the state, though he does not inform his creditors, does not per se authorize the creditor to resort to the writ of attachment.[15]

Nonresidence.[16]—One nonresident may maintain an attachment in an action on contract against another nonresident.[17] But an attachment cannot be sued out against a nonresident unless the debt is due.[18]

Attachment against corporations.[19]—The fact that a foreign corporation has complied with a statute requiring such corporation to appoint an agent upon whom process may be served will not deprive the creditors of the corporation of the right to attach the property thereof as a nonresident of the state.[20]

Fraudulent transfer or disposition of property.[21]—That the defendant is about to dispose of his property with intent to defraud his creditors is ground for an attachment, though the debt is not due.[22] The conveyance by a partnership of the

cured by any lien. Code Civ. Proc. § 537. Drake v. Dewitt [Cal. App.] 82 P. 982. Where the contract was between a resident of California and a resident of Minnesota to sell California lands, and there were stipulations as to the making of reports to the California office of the defendant, but there was no stipulation as to where the commission was to be paid, it was held that an attachment would lie for such commission. Id.

8. Breach of contract for delivery of cattle. McKay v. Elder [Tex. Civ. App.] 92 S. W. 268.

Unliquidated demand: In Mississippi an attachment will lie for an unliquidated demand arising out of a contract as well as for a liquidated demand. Hall Commission Co. v. Crook & Co. [Miss.] 40 So. 20. But it has been held in Pennsylvania that an attachment cannot be issued to enforce a decree for an unliquidated amount, as in a creditor's bill seeking to make the defendants, officers of a corporation, refund so much of the assets of such corporation as may be necessary to pay the plaintiff's judgment, with interest and costs. First Nat. Bank v. McKinley Coal Co. [Pa.] 62 A. 1067.

9. Under Mills' Ann. Code, § 59, permitting the defendant to plead legal and equitable defenses and § 70, providing that in all cases equitable relief may be granted, the same court possesses both law and equity jurisdiction and hence is authorized to take cognizance alike of legal and equitable rights and to administer legal remedies or grant equitable relief, or do both. Adams v. Clark [Colo.] 85 P. 642. Hence an attachment may issue in a suit to enforce the liability of stockholders in a bank under 1 Mills' Ann. St. § 533. Id.

10. See 5 C. L. 303.

11. Under Rev. Laws Mass. c. 167, § 80, an attachment for want of security may issue out any time during the continuance of the suit, as well as upon other grounds of attachment. United Waterworks Co. v. Stone, 143 F. 1022.

12. Code Civ. Proc. § 537. Drake v. Dewitt [Cal. App.] 82 P. 982.

13. An attachment on the ground of fraud cannot be issued in a creditor's bill against officers of a corporation for misappropriation of the assets of the corporation where the only finding upon the question is that there was a misappropriation by the defendants. First Nat. Bank v. McKinley Coal Co. [Pa.] 62 A. 1067.

14. See 5 C. L. 303.

15. A charge that the temporary absence of a debtor from a state, without informing his creditors, does not per se authorize the issue of an attachment, held argumentative, and in one respect abstract, in that there was no evidence that the defendant had left the state, but that the charge did not preclude the jury from considering evidence tending to show that the defendant was absent in the sense that he had absconded. Vandiver & Co. v. Waller [Ala.] 39 So. 136.

16. See 5 C. L. 303.

17. Bridges v. Wade, 110 App. Div. 106, 97 N. Y. S. 156.

18. Plaintiff's demand became immediately due after defendant had breached its contract by delivering grain inferior in quality to that agreed upon, at least after the delivery of the grain and the actual payment of the price to defendant's agent. Hall Commission Co. v. Crook & Co. [Miss.] 40 So. 20.

19. See 5 C. L. 303.

20. Albright v. United Clay Production Co. [Del.] 62 A. 726.

21. See 5 C. L. 304.

22. Ballinger's Ann. Codes & St. § 5352. Carstens v. Milo [Wash.] 82 P. 410. But See **post**, § 5, Procedure in General.

partnership property, in such manner that it is a conveyance to the partnership's own use, is such an act of the individual partner as will sustain an attachment against him for his individual debt.[22]

§ 4. *Attachable property.*[24]—At common law only the legal title to property is liable to levy;[25] but by statute in many states the common law has been changed so as to render equitable as well as legal interests attachable.[26] Land held by a third person in trust for the debtor is, therefore, subject to general attachment.[27] So also the interest of a pledgor in the pledged property may be attached.[28] But the fact that others may have equitable interests in the property of the debtor under an executory agreement will not prevent the attachment of the property as belonging to the debtor.[29] Trust funds are not attachable for the debt of the trustee,[30] nor is property in the hands of a bailee for care and sale attachable as the property of the bailee,[31] nor is partnership property subject to ordinary levy and seizure for the debt of one of the partners;[32] but the interest of the partner may be attached.[33] Property which has been sold is not subject to attachment for the debts of the seller, although the seller retains possession as the agent of the purchaser, the attaching creditor having notice of the sale.[34] And so, also, where a bill of lading is attached to a draft, the goods covered by the bill are not attachable as the property of the shipper, as against the holder of the draft.[35] Property, both real and personal, belonging to the estate of a deceased person, may be attached on mesne process in any

23. Fleisher v. Hinde [Mo. App.] 93 S. W. 1126.

24. See 5 C. L. 304.

25. Tucker v. Denico [R. I.] 61 A. 642.

26. Gen. Laws R. I. 1896, c. 253, § 10, providing that "the right, title, and interests of the defendant" in any real estate may be attached. Tucker v. Denico [R. I.] 61 A. 642.

27. Rev. Laws, c. 178, § 1. Lyons v. Urgalones, 189 Mass. 424, 75 N. E. 950. Statutes 1844, p. 211, c. 107, providing for a special attachment of land fraudulently conveyed by the debtor, has no application to an attachment of lands held in trust for the debtor, and hence no special attachment is necessary in such case. Id.

28. The pledgee by attaching the interests of the pledgor is not thereby estopped to assert his rights as pledgee as against a subsequent mortgagee. Ottumwa Nat. Bank v. Totten, 114 Mo. App. 97, 89 S. W. 65.

29. Where a vendor of land died before conveying the property, the interests of one of his heirs are attachable although such heirs had signed a deed conveying the property to the vendee, other heirs not having signed the deed and the circumstances being such as to indicate that the vendee did not intend to accept the deed until executed by all of the heirs. Sheeby v. Scott [Iowa] 104 N. W 1139.

30. Funds in the hands of the local collector of a benefit society held not subject to attachment by a creditor of the society. Brenizer v. Supreme Council of Royal Arcanum [N. C.] 53 S. E. 835. Where such funds are attached the trustee may move to dismiss the attachment. Id.

31. Where the owner of cattle delivered them to another person under an agreement that such person was to attend to them and sell them, the proceeds to be shared between him and the owner upon an agreed ratio, such person had no attachable interest in the cattle, his interest being dependent entirely upon the sale. National Cotton Oil Co. v. Ray [Tex. Civ. App.] 91 S. W. 322.

32. Such property can only be levied on as provided by Rev. St. 1895, art. 2352. National Cotton Oil Co. v. Ray [Tex. Civ. App.] 91 S. W. 322.

33. The right existing in the other partners and in partnership creditors would not be affected, but may be protected, if it should become necessary, by appropriate proceedings. Fleisher v. Hinde [Mo. App.] 93 S. W. 1126.

34. A debtor agreed that his creditor could have all the crops raised by the debtor during a certain year, and that the creditor should sell the same and apply the proceeds to the payment of the debt, the balance of such proceeds, if any, to be paid to the debtor. This agreement was being carried out when the attachment was issued, and the attaching creditor had notice of the agreement. Evans v. Groesbeck [Tex. Civ. App.] 93 S. W. 1005. And in such case the burden of proving that the debt secured by such agreement has been paid was upon the attaching creditor. Id.

35. American Nat. Bank v. Lee [Ga.] 53 S. E. 268. Where a draft with bill of lading attached is sent to a bank for collection from the purchaser, and the bank credits the proceeds of the draft to the shipper, the goods are not attachable as the property of the shipper. Tishomingo Sav. Inst. v. Johnson, Nesbitt & Co. [Ala.] 40 So. 503. Where a draft with bill of lading attached is discounted by a bank and the proceeds are, by agreement with the shipper and drawer, credited upon a debt due by him to the bank, but the draft is subsequently dishonored and is charged back to his account, the banker's lien upon the goods is superior to that of an attaching creditor of the shipper and drawer. Kentucky Refining Co. v. Bank of Morilton [Ky.] 89 S. W. 492.

suit for a debt of the deceased properly brought against the executor or administrator;[36] but a court of equity cannot by a species of equitable attachment seize and hold funds coming to the heirs of a decedent to satisfy a decree which the complainant could never obtain.[37]

Attachment of debts and choses in action.[38]—A debt due by a foreign corporation to nonresident cannot be attached in a suit by a nonresident.[39] The assured's interest in an unmatured policy of life insurance is not such as can be reached by attachment, unless the policy has, at the time the attachment is issued, a cash surrender value.[40]

§ 5. *Procedure in general.*[41]—Under a statute authorizing substituted service by publication for a certain number of weeks, the declaration and an affidavit for an attachment may be filed after the last publication, though the full number of weeks specified by the statute have not expired.[42] An averment that the defendant is about to dispose of his property with intent to defraud his creditors is necessary to sustain an attachment before the debt is due.[43] Circuit courts of the United States are not governed by any separate attachment law, but are required to administer the remedy in attachment provided in the laws of the state in which the courts are held.[44]

36. Since under Rev. Laws, c. 142, §§ 30-32, it is impossible for a creditor by bringing an action and by attachment on mesne process to obtain an improper preference over other creditors, there is no reason why the general provisions relating to attachment should not apply to suits against deceased persons as well as others. See Rev. Laws, c. 178, § 53, providing that the land of a deceased person may be taken on execution upon a judgment against his executor or administrator for the debt of the deceased, and Rev. Laws, c. 167, § 38, providing that the real and personal property of a deceased person which is liable to execution may be attached, and Rev. Laws, c. 172, § 5, which expressly recognizes the right to attach the property of a deceased person in suits against his executor and administrator for his debts. Herthel v. McKim [Mass.] 77 N. E. 695.

37. Zimmerman Mfg. Co. v. Wilson [Ala.] 40 So. 515.

38. See 5 C. L. 305.

39. A company organized under the laws of the state of New Jersey, but whose sole presence there seemed to be a name on a billboard, with hundreds of others, outside the offices of a company organized to comply with the law of that state, to give a legal fiction to a principal office within the state, but whose real main office was within the state of New York, much of whose business was done within such state, and which had complied with the law of such state by filing its certificate and paying its taxes so as to entitle it to sue on its own contracts in the courts of such state, came within this rule. Bridges v. Wade, 99 N. Y. S. 126. Even under the rule that attachment will lie if the creditor or garnishee could sue, such attachment will not lie upon a debt due from a foreign corporation to the defendant, a nonresident, on a contract made in another state, payments on account of which were to be made by checks upon a bank in such state the complainant being also a resident of such state. Id.

40. And hence a bill to enforce a judgment out of the proceeds of a life insurance policy which has been attached should allege the facts showing that the policy has a cash surrender value. Marks v. Equitable Life Assur. Soc., 109 App. Div. 675, 96 N. Y. S. 551.

41. See 5 C. L. 305.

42. But the time to plead to the declaration would not begin to run until the service was completed by the expiration of the full number of weeks from the date of the publication. See Comp. Laws, §§ 10,572, 10,574. Kurtz v. Gartner [Mich.] 12 Det. Leg. N. 439, 104 N. W. 596.

43. Under Ballinger's Ann. Codes & St. § 5352. Carstens v. Milo [Wash.] 82 P. 410. But where the complaint fails to allege that the defendant is about to dispose of his property with intent to defraud his creditors, the defect may be cured by amendment so as to prevent the attachment from being dismissed. See Ballinger's Ann. Codes & St. § 5352, authorizing the issue of an attachment before the debt is due upon an allegation of fraudulent disposition of property, and § 5380 relating to amendments. Id. But where no application to amend was made it was no error to dismiss the attachment for want of such allegation. Id.

44. Fernandez Y Peres v. Peres Y Fernandes, 202 U. S. 80, 50 Law. Ed. —. In the Revised Statutes of the United States, § 915 (U. S. Comp. Stat. 1901, p. 684), it is provided as to attachments: "In common-law causes in the circuit and district courts the plaintiff shall be entitled to similar remedies, by attachment or other process, against the property of the defendant, which are now provided by the law of the state in which such court is held, for the courts thereof; and such circuit or district courts may, from time to time, by general rules, adopt such state laws as may be in force in the states where they are held in relation to attachments and other process: Provided, that similar preliminary affidavits or proofs and similar security as required by such state laws,

Jurisdiction.[45]—Where notice is required by statute to be given in a particular manner, actual notice acquired in any other manner will not give the court jurisdiction.[46] But the appearance of the defendant by counsel gives the court jurisdiction of the person of the defendant,[47] and dispenses with the necessity of any further recital in the judgment as to the court's jurisdiction.[48] Where the only ground alleged for the issuance of an attachment is that the defendant is a nonresident, he is not entitled to make a special appearance or to answer attacking the jurisdiction of the court upon the sole ground that he is not the owner of the property seized under the writ.[49] A city court of Alabama has no jurisdiction of an attachment issued by a justice against real estate.[50]

Necessity of issuance of summons and service thereof.[51]—Where service of the summons is necessary, it is usually provided by the statute that substituted service will be sufficient;[52] but care should be taken not to make such a service as will negative the grounds of the attachment.[53]

§ 6. *Affidavit and its sufficiency.*[54] *Averments in general.*[55]—Averments as to the personal movements of the defendant will not sustain an attachment based on the ground that the defendant has removed or is about to remove his property from the state with intent to defraud his creditors.[56] The affidavit must set out the plaintiff's damages;[57] but the averment as to the amount sued for may be upon in-

shall be first furnished by the party seeking such attachment or other remedy." By analogy it would seem that the district court of Porto Rico, exercising the jurisdiction of a circuit court in its practice as to the issuing of attachments, is to adapt itself to the local practice recognized and established in Porto Rico. Id. See post, § 18, Wrongful Attachment.

45. See 5 C. L. 306.

46. Where upon the attachment of the land of a nonresident the defendant was not served, and the sheriff in levying the attachment failed to give notice to the defendant in possession at least ten days before the return day of the writ, and did not state the fact of such notice and the name of the tenant in his return, as required by Rev. St. 1899, § 388, par. 3, a sale under such attachment was void, although the tenant had actual knowledge of the attachment. Siling v. Hendrickson [Mo.] 92 S. W. 105.

47. Pacific Selling Co. v. Collins [Ala.] 39 So. 579. See post, § 15, subd. Judgment. Appearance for the purpose of making a motion to retax the costs and to strike certain items from the cost bill admits the jurisdiction of the court over the person of defendant. Nisbet v. Clio Min. Co. [Cal. App.] 83 P. 1077. If a defendant separately, or in conjunction with a motion going only to the jurisdiction, invokes the power of the court on the merits, or moves to dismiss the action, or asks relief which presupposes that jurisdiction has attached, this constitutes a general appearance. Everett v. Wilson [Colo.] 83 P. 211.

48. And a recital as to proof of notice of the levy will be treated as surplusage. Pacific Selling Co. v. Collins [Ala.] 39 So. 579.

49. Welch v. Ayres, 43 Neb. 326, 61 N. W. 635, modified. Kneeland v. Weigley [Neb.] 107 N. W. 574.

50. See acts 1871-72, p. 109, § 2; Code 1896, §§ 481, 574, 944, 1947. Moog v. McDermott [Ala.] 40 So. 390. In case of a levy of an attachment issuing from a justice court on real estate, the papers must be returned to the clerk of the circuit court, and the duty imposed and which is to be performed by the justice is ministerial and must comply with the requirement of the statute. Id.

51. See 5 C. L. 306.

52. Where the property has already been seized after the departure of the defendant from his last known place of residence, service by leaving a copy of the summons at such place of residence a short while after the departure of the defendant, diligent inquiry having been made as to his whereabouts, was a sufficient compliance with Municipal Court Act, §§ 78, 83. Dixon v. Carrucci, 97 N. Y. S. 380. The return of the marshal that he left a copy of the papers at "the last known place of residence of the defendant" instead of "at the last place of residence" was sufficient under § 83 of the Municipal Court Act. Id. As to the effect of a judgment rendered upon such service, see post, § 15 B, subd. Judgment and Decree or Order.

53. Ground that defendant had absconded negatived by return of service at usual place of abode. Rosenthal v. Widensohler, 115 Mo. App. 237, 91 S. W. 432.

54. See 5 C. L. 306.

55. See 5 C. L. 307.

56. An averment that the defendant was held in default of bail and that he might be discharged from custody at any time, and that in the event of his discharge he would leave the state, having already engaged passage on a steamer, for the purpose of defrauding the plaintiff, was insufficient to sustain an attachment under Code Civ. Proc. § 3169, subd. 3, providing that an attachment may issue where the defendant has or is about to remove his property from the state, etc. Tocci v. Gianvecchio, 48 Misc. 351, 95 N. Y. S. 583.

57. Where the affidavit referred to the complaint as setting forth the plaintiff's damages and the complaint alleged that in

formation and belief, where the affidavit also states a sufficient and proper source of information and ground of belief.[58] An averment that the defendant is about to dispose of his property with intent to defraud his creditors is not inconsistent with an averment that the defendant is about to convert his property into money for the purpose of placing it beyond the reach of his creditors.[59] Clerical errors in the statement of the cause of action may be treated as surplusage.[60]

Averments as to nonresidence.[61]—Where the affidavit of nonresidence is made by a party having no connection with the suit either in a representative capacity or otherwise, it must contain an averment that it is made upon personal knowledge, or show such facts as are inconsistent with the residence of the defendant in the state where the attachment is issued.[62] So, also, in order to obtain an attachment against a foreign corporation, the plaintiff must show and not merely allege that the defendant is a foreign corporation.[63] But the affidavit upon which a foreign attachment is issued need not recite the venue.[64] An admission of nonresidence made in an affidavit filed by the defendant on a motion to vacate cures any insufficiency in the averments of nonresidence in the plaintiff's affidavit.[65]

§ 7. *Attachment bond or undertaking; terms.*[66]—A court rule requiring the approval of the clerk to be indorsed upon the bond is ineffective to render the failure to make such indorsement fatal to the validity of the bond, where the statute only requires that the clerk shall be satisfied with the bond.[67]

Liabilities on bond.[68]—Where an attachment is wrongfully issued, the defendant

consequence of the defendant's misrepresentation the plaintiff was compelled to spend a certain sum to put a furnace, range, and plumbing in shape for use, a certain sum for a caretaker, a certain sum for coal while making said repairs, a certain sum for two months rent, during which time the necessary repairs were being made, and a certain sum for loss of business and profits, it was held that the complaint did not set forth any legal measure of damages, and hence was insufficient to sustain the attachment. Downing v. Nelson, 97 N. Y. S. 1005.

58. Where the affidavit alleged that the plaintiff's information was based upon a written statement, which was annexed to the affidavit of the plaintiff's former clerk, who had left the plaintiff's service and entered that of the defendant, taking with him the books in which the original entries were made. Lewis v. Tindel-Morris Co., 109 App. Div. 509, 96 N. Y. S. 576.

59. And where such averments are not stated disjunctively the attachment will not be quashed on the ground that separate and distinct grounds for attachment are set forth. McKay v. Elder [Tex. Civ. App.] 92 S. W. 268.

60. Plaintiff's affidavit alleged that the goods sold to the defendant were sold Sept. 2, 1905, and the affidavit upon which the attachment was based was verified June 5, 1905, and it was held that the date of the sale was clearly a clerical error which might be treated as surplusage, thus leaving the affidavit without any statement as to the date of the sale, and such statement being unnecessary the affidavit was sufficient. Vogelman v. Lewit, 48 Misc. 625, 96 N. Y. S. 207.

61. See 5 C. L. 307.

62. Mere averments in an affidavit made by a resident of another state that the defendant resides in such state and does business therein, the affiant, however, being unacquainted with the defendant and not connected in any way with the suit, were insufficient to sustain an attachment upon the ground of nonresidence, there being no averment of personal knowledge of the defendant's nonresidence and no statement of facts necessarily showing such nonresidence. Beckermann v. Chambers, 47 Misc. 289, 95 N. Y. S. 914.

63. Such fact may be said to be shown if it is positively alleged by some person who may be deemed to have personal knowledge upon the subject, so that his statement can be accepted as evidence of the fact. American Trading Co. v. Bedouin Steam Nav. Co., 48 Misc. 624, 96 N. Y. S. 271. It cannot be said to be shown when the person making the allegation, although he may do so positively as of his own knowledge, is evidently and obviously not in a position to possess personal knowledge upon the subject. Id. An averment that the affiant was the manager of the plaintiff's hemp department did not support his statement that he had personal knowledge of the place of incorporation of the owner of the steamship by which the hemp was conveyed from a foreign port to New York. Id.

64. Where the affidavit did not show that it was taken within the jurisdiction of the notary before whom it was made, it was held that it would be presumed that it was taken within the notary's jurisdiction. Albright v. United Clay Production Co. [Del.] 62 A. 726.

65. Vogelman v. Lewit, 48 Misc. 625, 96 N. Y. S. 207.

66. See 5 C. L. 307.

67. See circuit court rule No. 69, and Code Civ. Proc. 1902, § 156. Watson v. Paschall & Co. [S. C.] 53 S. E. 646.

68. See 5 C. L. 308.

may recover, in an action on the attachment bond, all the actual damages accruing to him by reason of the issue and levy of the writ,[69] including reasonable attorney's fees.[70] The damages recoverable must be the natural and proximate consequence of the attachment;[71] but where there is malice, punitive or exemplary damages may be recovered as well as actual.[72] But the sureties on the attachment bond, having had no other part in the transaction beyond the execution of the bond, can in no event be held for anything beyond the actual damages.[73] It is no defense that the attachment defendant could have avoided the damages claimed by giving the statutory undertaking and retaining possession of the property.[74] The question of probable cause for the issue of an attachment is not in issue in a suit on the attachment bond to recover damages for the seizure and conversion, under the guise of a writ of attachment, of the property of a third person.[75]

Actions on bond; evidence.[76]—A party cannot testify directly as to the existence of malice,[77] nor is it proper to permit a party to testify directly to the amount of his

69. Vandiver & Co. v. Waller [Ala.] 39 So. 136; Faroux v. Cornwell [Tex. Civ. App.] 90 S. W. 537. See post, § 18, Wrongful Attachment.

The measure of damages in the case of attachment of personal property is generally the difference in value of the attached property when seized and when restored, with the loss of its use meanwhile. This rule applied to a case where corporate stock was attached and the value of such stock depreciated pending the attachment proceedings. McCarthy Co. v. Boothe [Cal. App.] 83 P. 175. The defendant was furthermore liable for the depreciation in the value of the stock under Code Civ. Proc. § 3300, providing that the measure of damages for breach of contract shall be the amount which will compensate the party aggrieved. Id. See post, § 18, subd. Damages

In Mississippi the defendant is entitled to damages whenever the verdict is in his favor. Rev. Code 1892, § 166. Carrier v. Poulas [Miss.] 40 So. 164. And such damages may be recovered from the bondsmen in the same action, upon a writ of inquiry. Id. But the whole matter of damages in attachment proceedings is purely statutory, and there being no statutory provisions for damages upon the dismissal of an attachment in equity, it was error upon the dismissal of such an attachment to award the defendant an attorney's fee by way of damages. Bonds v. Garvey & Co. [Miss.] 39 So. 492. See post, § 18, subd. Damages.

In Porto Rico all the damages accruing from an attachment, whether rightful or wrongful, must be assessed and recovered in the same action. Fernandez Y Perez v. Perez Y Fernandez, 26 S. Ct. 561. See post, § 18, subd. Pleading.

70. Reasonable and necessary counsel fees paid or incurred in defending the attachment suit are recoverable in a suit on the attachment bond as actual damages, whether attachment was rightful, or wrongful and malicious. Vandiver & Co. v. Waller [Ala.] 39 So. 136. See post, § 18, subd. Damages. Fees paid counsel for services rendered in and about the preparation and filing of the exemption declaration and in defending the declaration on a contest thereof by the plaintiff in the attachment suit are recoverable as actual damages in suit on the bond, as a proximate consequence of the wrongful suing out of the attachment. Id.

In Mississippi attorney's fees are not recoverable as damages upon the dismissal of an attachment in equity. Bonds v. Garvey & Co. [Miss.] 39 So. 492.

71. Damages to perishable goods caused by their being locked up in a store house in warm weather and neglected are recoverable. Vandiver & Co. v. Waller [Ala.] 39 So. 136. Injury to the credit and business of a defendant in attachment may result from the wrongful or vexatious suing out of an attachment, and form the basis for the recovery of special damages in a suit on the attachment bond. Id.

72. Faroux v. Cornwell [Tex. Civ. App.] 90 S. W. 537. Malice and want of probable cause must concur in order to authorize a recovery for exemplary damages for the wrongful issuance of the writ, and the pleader must allege what is material to his recovery. Id. But where the attachment is levied on exempt property, under circumstances of malice and vexation, exemplary damages may be awarded regardless of whether the attachment was rightful or wrongful. Id. Exemplary damages may be awarded, though the attachment was sued out by an agent, if the principal with full knowledge ratified the act of the agent. Vandive & Co. v. Waller [Ala.] 39 So. 136. An instruction that punitive or exemplary damages cannot be proven in dollars and cents, but when the proof shows acts of malice and vexation the jury alone can fix in dollars and cents the measure of damages as may seem right to them, not exceeding the amount of the attachment bond, held informal but substantially correct. Id.

73. Faroux v. Cornwell [Tex. Civ. App.] 90 S. W. 537. The same is true of the constable's official sureties and his indemnitors. Id.

74. Where corporate stock which was attached depreciated pending the attachment. McCarthy Co. v. Boothe [Cal. App.] 83 P. 175.

75. Epps v. Hazlewood [Tex. Civ. App.] 14 Tex. Ct. Rep. 20, 89 S. W. 809.

76. See 5 C. L. 308.

77. A charge to this effect did not prohibit the jury from considering letters written by the defendant, it not appearing that

damages.[78] And upon an issue as to whether the attachment was wrongful and without probable cause, evidence that exempt property was levied on is irrelevant.[79] But where the plaintiff puts in evidence his answer in the attachment case, counsel for the defendant may comment to the jury upon the answer and draw from it any legitimate conclusion which would illustrate the issues involved in the case on trial.[80] An objection that the attachment bond was not put in evidence on the trial of the claim for damages cannot be raised for the first time on appeal.[81]

Verdict.—The verdict in an action on an attachment bond should be in an aggregate sum without itemizing the amount found or stating the process by which it was arrived at.[82]

§ 8. *The writ or warrant.*[83]

§ 9. *The levy or seizure; indemnifying bonds.*[84] *The levy or seizure.*[85]—To constitute a levy on personal property, the officer must not only have a view of the property, but must assume dominion over it.[86] And, while a summons of a garnishee may constitute a levy of an attachment, the service of garnishment process upon persons in possession of specific chattels creates no lien thereon, in the absence of an actual levy, and does not constitute an act of possession or dominion over such chattels.[87] A notice of attachment of credits and effects is not a sufficient garnishment of a debt due from the garnishee to the attachment of the debtor.[88] The running of the statute of limitations in favor of the garnishee, as against both the attachment defendant and the attachment plaintiff, is not interrupted by the levy of the attachment.[89] Funds in the hands of the court may be attached by service of the writ upon the clerk of the court.[90]

the jury was misled to the prejudice of the defendant. Vandiver & Co. v. Waller [Ala.] 39 So. 136.

78. It was error to allow an answer to an interrogatory to be read stating merely in general terms that the plaintiff had suffered damages in a named sum because the goods levied on were kept in stock by reason of the levy, such evidence being too general and stating merely a conclusion of the witness. Cross v. Coffin-Fletcher Packing Co., 123 Ga. 817, 51 S. E. 704.

79. Faroux v. Cornwell [Tex. Civ. App.] 90 S. W. 537.

80. Cross v. Coffin-Fletcher Packing Co., 123 Ga. 817, 51 S. E. 704.

81. Carrier v. Poulas [Miss.] 40 So. 164.

82. Cross v. Coffin-Fletcher Packing Co., 123 Ga. 817, 51 S. E. 704.

83, 84. See 5 C. L. 308.

85. See 5 C. L. 309.

86. Fountain v. 624 Pieces of Timber, 140 F. 381.

87. Where the officer approached a raft of timber in a boat, but did not come in actual contact with it, and merely made an arrangement with the boom owner to estimate the amount of the timber, it was held that the levy was insufficient to give the court jurisdiction as against a subsequent levy under process from a Federal court. Fountain v. 624 Pieces of Timber, 140 F. 381.

88. Clyne v. Easton Eldridge & Co. [Cal.] 83 P. 36. An admission of the garnishee consisting of a pencil entry by one of its bookkeepers on the margin of the account of the attachment debtor in the garnishee's ledger and the statement of the garnishee's president that the debt was attached, as an excuse for refusing further payments, was evidence that the debt had been attached, but not conclusive. Id. A garnishee by refusing further payments to the attachment debtor on the ground that the debt had been attached was not estopped to deny the efficiency of the notice of attachment as against the attachment plaintiff. Id.

In California a garnishee is not required, and has no right to appear in the action. The only answer he makes is to the sheriff at the time of the service of the writ, and that relates only to the property actually attached which he has in his possession or under his control; and hence the garnishee, when sued for a debt alleged to have been due from the garnishee to the attachment debtor at the date of service of the attachment upon the garnishee, may object, for the first time, to the return of the sheriff to the attachment. Clyne v. Easton Eldridge & Co. [Cal.] 83 P. 36.

89. A literal construction of Code Civ. Proc. § 544, would lead to the conclusion that the statute of limitations is interrupted by the service of the attachment upon a garnishee, but this statute applies only to cases where the garnishee admits his indebtedness. Clyne v. Easton Eldridge & Co. [Cal.] 83 P. 36. It seems that if the attachment creditor wishes to save his claim against the garnishee from being barred before he can obtain a judgment against the principal debtor, he may bring suit against the garnishee based upon his contingent interest in the debt. Id.

90. But funds of an estate in the hands of an administrator are not funds in court, although there is a suit pending in the court to settle the estate. Sanders v. Herndon [Ky.] 93 S. W. 14.

Indemnifying bonds.[91]—In an action against a sheriff for unlawful levy, formal notice should be given to the indemnitors.[92] In Wisconsin an attorney holding for collection a claim sent from another state has authority to indemnify the sheriff for his clients when the sheriff is required to levy an attachment.[93]

§ 10. *Return to the writ.*[94]—An attachment may be made returnable to the first day of a term of court.[95]

§ 11. *Custody, sale, redelivery or release of attached property.*[96]—The right of the sheriff to poundage is fixed by statute.[97] Where it appears that the property attached is portable and of considerable value, the sheriff should be allowed his expenses in caring for and preserving the property.[98] The defendant upon filing the statutory undertaking for the release of the attachment is entitled to have the property delivered to him.[99]

§ 12. *Forthcoming bonds and receipts.*[1]—In Massachusetts the defendant may give bond, and thus secure the release of the attachment,[2] and this may be done even where the attachment is levied upon land the record title to which is in a third party;[3] and the right to have an attachment dissolved in this manner may be enforced by mandamus.[4] So also in New York, the defendant may regain possession of the property by filing the statutory undertaking.[5] In an action upon a bond to dissolve an attachment, the sureties may contest the effect of amendments to the declaration in the original suit which were made without notice to the sureties;[6] but if the effect of such amendments is merely to put in proper form the statement of the cause of action upon which the suit was brought, they are binding upon the sureties, even though they greatly change the form of the statement of the claim, or greatly enlarge the amount claimed according to the language of the original declaration.[7]

91. See 5 C. L. 309.

92. But where the plaintiff turned the summons and complaint over to the attorney in the attachment action, and the attorney wrote the indemnitors informing them of the action and that the attorney had put in their answer, to which the indemnitors made no reply, their acquiescence was a waiver of formal notice, and they were bound by the judgment against the sheriff. Audley v. Townsend, 96 N. Y. S. 439.

93. Audley v. Townsend, 96 N. Y. S. 439.

94. See 5 C. L. 310.

95. Where an attachment was made returnable to the first day of the June term, which term according to statute commenced on June 5th, but the judge in the exercise of the right conferred by Code 1904, § 2132, did not commence the term until June 7th, it was held that an attachment issued on June 6th, and returned on June 7th, was valid, in the absence of any injury to the defendant by reason of the irregularity. May v. Newlin, 143 F. 574.

96. See 5 C. L. 310.

97. Laws 1890, p. 940, c. 523, § 17, subd. 2, as amended by Laws 1892, c. 418, p. 868. Jones v. Gould, 99 N. Y. S. 789.

98. Even though the property be classed as fixtures. Nisbet v. Clio Min. Co. [Cal. App.] 83 P. 1077.

99. It was error to refuse to deliver a portion of the property to the defendant upon the filing of the statutory undertaking provided for by Code Civ. Proc. §§ 687, 688, although the plaintiff claimed that the sheriff levied on more property than was necessary and contrary to oral instructions given by the plaintiff to him. Jones v. Gould, 99 N. Y. S. 789. See post § 12, Forthcoming bonds and receipts. But the defendant is not entitled to have the property returned to him under provisions of Code Civ. Proc. §§ 687, 688, 709, until payment of the sheriff's poundage. Id. Where the defendant recognizes the validity of the levy by filing the undertaking provided for by Code Civ. Proc. §§ 687, 688, the plaintiff cannot resist the sheriff's application for poundage on the ground that an excessive levy was made, and it was error for the court to refuse to turn over all the property to the defendant upon the filing of such undertaking. Id.

1. See 5 C. L. 311.

2. Rev. Laws, c. 167, § 121. Hawkins v. Farley [Mass.] 77 N. E. 319. The report of the appraisers provided for by this statute is conclusive upon the magistrate, so that he cannot hear further evidence either to increase or decrease the value of the property as fixed by the appraisers. Id.

3. Rev. Laws, c. 167, § 123. Hawkins v. Farley [Mass.] 77 N. E. 319. It is the value of the attached property and not merely the interests therein held by the owner of the record title which is to be appraised under Rev. Laws, c. 167, § 121. Id.

4. Hawkins v. Farley [Mass.] 77 N. E. 319.

5. Code Civ. Proc. §§ 687, 688. Jones v. Gould, 99 N. Y. S. 789. See ante, § 11, Custody, Sale, Redelivery, or Release of Attached Property.

6. Morton v. Shaw [Mass.] 77 N. E. 633.

7. See Rev. Laws, c. 173, § 121. Morton

§ 13. *Lien or other consequences of levy.*[8]—An attaching creditor gets no greater right as against holders of equities upon the attached property than the debtor himself then had.[9] But a plaintiff in attachment has a status to file a bill in chancery to set aside a fraudulent deed which impedes the operation of the lien of his attachment.[10] The inherent jurisdiction of equity cannot be invoked by an attachment creditor to remove a prior lien upon the attached property upon an allegation based upon information and belief that the lien is fraudulent or inequitable.[11] The levy of an attachment upon the land gives the court constructive possession and control of such land.[12] Where the statute does not provide the length of time an attachment shall continue, the attachment will continue until the debt is paid or the property is sold under execution issued on the judgment or until the judgment is satisfied or the attachment discharged or vacated in some manner provided by law.[13] Where the attachment is discharged before the judgment in the principal action, any lien obtained by reason of the attachment is lost.[14]

§ 14. *Conflicting levies, liens, and creditors; priorities.*[15]—Property seized by the sheriff under the process of attachment from the state court, and while in the custody of the officer, cannot be seized or taken from him by process from any other court.[16] The right of the attaching creditor to invoke the aid of the courts to remove conflicting claims or liens is considered elsewhere.[17]

Priorities between attachments and mortgages.[18]—To render a transfer of shares of stock as collateral security valid against the subsequent attaching creditors of the owner, the transfer must be by assignment and delivery, with notice to the corporation, followed by a memorandum of such transfer upon its stock ledger.[19] The voluntary surrender of the property attached made by the defendant to a party claiming the property under a mortgage will not enlarge the mortgagee's rights or defeat the lien of the attachment.[20] Nor is a pledgee, by attaching the interest of the

v. Shaw [Mass.] 77 N. E. 633. Where the declaration in the original suit stated the claim as founded upon a written contract for the sale of goods, an amendment basing the ground of action upon an oral contract supported by a written memorandum did not change the cause of action so as to discharge sureties. Id. The correction of a clerical error as to the amount of goods delivered and the amount undelivered did not change the cause of action. Id.

8. See 5 C. L. 312.

9. Kentucky Refining Co. v. Bank of Morilton [Ky.] 89 S. W. 492. See post, § 17, Hostile and Opposing Claims to Attached Property.

10. The decree in such case will nullify the fraudulent deed only to the extent of the property attached. Bainbridge v. Allen [N. J. Eq.] 61 A. 706.

11. In such case the allegation must be followed up by statement of the facts from which the inference may be drawn that the lien sought to be removed is fraudulent or inequitable. Gavezzi v. Dryfoos, 110 App. Div. 9, 97 N. Y. S. 59.

12. So that where an attachment issued by a Federal circuit court upon land situated in the district over which such court has jurisdiction is properly levied by filing it in the office of the clerk of such court, an injunction cannot issue against the United States marshal to restrain him from selling such land under such attachment. Beardslee v. Ingraham [N. Y.] 76 N. E. 476. Where the gist of the cause of action was the apprehension that a sale under the attachment would throw a cloud upon the title to the land, the injunction could not be sustained on the ground that the attachment did not create any lien upon the property because it was never filed in the office of the clerk of the county in which such property was situated; since if the attachment was not properly levied, that fact would necessarily appear in proof upon any attempt to establish the existence of a lien by virtue of such attachment, and, therefore, the facts necessary to support an action to prevent a cloud upon title did not exist. Id.

13. Attachment against land. Katz v. Obenchain [Or.] 85 P. 617. See post, § 15 C, subd. Judgment and Decree or Order.

14. And the defendant may sell the property, and the officer who made the levy may buy it, and thus render useless execution thereafter issued upon the judgment, without rendering themselves liable for a conspiracy. Menner v. Slater [Cal.] 83 P. 35.

15. See 5 C. L. 312.

16. But to give the court claiming such custody jurisdiction, there must be a valid seizure and actual control of the res under the process. Fountain v. 624 Pieces of Timber, 140 F. 381.

17. See ante, § 13, Lien and other consequences of levy; post, § 15 A, Validity and Grounds for Setting Aside.

18. See 5 C. L. 313.

19. This is the rule both at common law and under V. S. 3689. French v. White [Vt.] 62 A. 35.

20. Fidelity & Deposit Co. v. Sturdevant Co., 86 Miss. 509, 38 So. 783.

pledgor in the pledged property, estopped to assert his rights as pledgee as against a subsequent mortgagee.[21] Where the owner of a prior mortgage acquires the mortgaged property after it is levied under an attachment, the mortgage lien is not merged in the legal title as against the attaching plaintiff;[22] nor is the lien necessarily waived in favor of the mortgage by the withdrawal of an execution issued upon the judgment.[23]

Priorities between attachments and receivers.[24]

Effect of bankruptcy proceedings.[25]—Where a party is adjudged a bankrupt his property which is in possession of an officer by virtue of the levy of an attachment becomes vested in the trustee in bankruptcy as soon as he qualifies.[26] But proceedings in bankruptcy do not affect the lien of attachments or garnishments acquired more than four months preceding the bankruptcy.[27] Property in the hands of a trustee in bankruptcy cannot be attached by process from a state court.[28]

§ 15. *Enforcement and dissolution, discharge, vacation, or abandonment of attachment.*[29] *A. Release or abatement.*—Payment of the debt for which an attachment is issued releases the property attached;[30] but a decree for the amount of a tender does not discharge a bond given for the release of the property.[31] An attachment is dissolved by the decease of the defendant during the pendency of the suit.[32]

(§ 15) *B. Validity and grounds for setting aside.*[33]—The debtor alone can question the existence of the grounds upon which the attachment is based.[34] And the general rule is that an attachment will not be dissolved on the ground that the defendant has no title to the property:[35] but this rules does not apply where the court obtains jurisdiction of a nonresident by virtue of the attachment of his property in the state.[36]

21. Ottumwa Nat. Bank v. Totten, 114 Mo. App. 97, 89 S. W. 65.

22. In such case a suit by the mortgagee to restrain the sale of the property under the attachment was not subject to the limitations relating to foreclosure. Katz v. Obenchain [Or.] 85 P. 617. A complaint setting out the facts out of which the equities in favor of the mortgagee and owner arose and containing a general prayer for relief was sufficient to enable such a decree as the law and facts warranted. Id.

23. Where the attorney of the attachment plaintiff directed the sheriff not to sell the attached property under an execution because such property was subject to a mortgage and would not at that time bring the amount of such mortgage, and there was no evidence of any intention to waive the attachment lien, such lien was not waived as against the mortgagee who purchased the property after levy of the attachment. Katz v. Obenchain [Or.] 85 P. 617.

24, 25. See 5 C. L. 313.

26. Goodnough Mercantile Co. v. Galloway [Or.] 84 P. 1049.

27. Bloch Bros. v. Moore [Ala.] 39 So. 1025.

28. French v. White [Vt.] 62 A. 35.

29. See 5 C. L. 314.

30. But where the attachment defendant sells the property to a third person with the consent of the officer who levied the writ, the purchaser agreeing to pay the purchase money to the officer, payment of the debt for which the attachment was issued is no defense to a suit by the officer against the purchaser for the purchase money. Lamb v. Zundell [Vt.] 62 A. 33. In such case, however, the officer merely sues as the representative attachment debtor, and hence under V. S. 1374, the purchaser may plead under the general issue payment in trustee proceedings against the attachment debtor. Id.

31. Where, in a suit against a foreign corporation, in which its property has been attached and afterwards released by giving of a bond, pursuant to statutory provisions, the defendant appears and makes defense, and a personal decree is rendered against it for an amount of which it has previously tendered on account of the demand set up in the bill, but not paid into court, it is error to dismiss the attachment and decree a release of the bond. Dudley v. Chicago, etc., R. Co. [W. Va.] 52 S. E. 718.

32. Herthel v. McKim [Mass.] 77 N. E. 695.

33. See 5 C. L. 314.

34. A subsequent purchaser of lands, upon which an attachment has been levied cannot question the existence of the grounds of the attachment. Wagner v. Wolf [Neb.] 106 N. W. 1024.

35. Greenwood Grocery Co. v. Canadian County Mill & Elevator Co. [S. C.] 52 S. E. 191; Vogelman v. Lewit, 48 Misc. 625, 96 N. Y. S. 207.

36. In such case the jurisdiction of the court and the validity of the attachment depend upon the defendant having property in the state. Greenwood Grocery Co. v. Canadian County Mill & Elevator Co. [S. C.] 52 S. E. 191.

(§ 15) *C. Procedure.*[37]—An attachment may be vacated on motion,[38] but the lien of an attachment upon land levied in the lifetime of a debtor cannot be enforced by motion in the same cause to have the land sold.[39] On a motion to quash, the essential statements in the affidavit for an attachment are not traversable, but, quoad hoc, must be taken as absolutely true;[40] nor will the merits of the action be considered, and the attachment will not be vacated unless it clearly appears that the plaintiff must ultimately fail.[41] A denial of the debt cannot be pleaded in abatement, but must be pleaded in bar,[42] but where the defendant appears the question of his liability should be tried before the question of the propriety of the attachment.[43] Where the defendant does not appear and answer, the plaintiff cannot recover without proving his claim,[44] and under New York municipal court act, where there has been no personal service of the summons and no appearance by the defendant, the defendant may appear at any time within twenty days after personal service of written notice of the entry of the judgment.[45] Where a statute makes the delivery of the attachment to the officer for service the commencement of the action, the causes for the attachment alleged in the affidavit must be tried and determined as of the date on which the writ was delivered to the officer for service.[46] Where the attachment is levied upon the property of the real defendant, a misnomer of the defendant may be cured by amendment, where the defendant has not been misled by the misnomer.[47] In a proper case the prosecution of an attachment may be enjoined.[48]

Evidence.[49]—The ground of the attachment may be disproved by the return of the officer.[50]

37. See 5 C. L. 314.

38. Under circuit court rule No. 57, when the motion is for irregularity, the motion or order must specify the irregularity complained of, and under this rule the question of irregularity based upon insufficiency of the affidavit cannot be considered where the rule has not been complied with. Coker v. Co. v. Barfield [S. C.] 53 S. E. 174; Watson v. Paschall & Co. [S. C.] 53 S. E. 646. Where it clearly appears that the levy is invalid and cannot be cured the attachment may be vacated on motion. Bridges v. Wade, 99 N. Y. S. 126.

39. The proceedings in such case must be pursuant to Revisal 1905, §§ 43, 100, 103, 131. Atkinson v. Ricks [N. C.] 53 S. E. 230. See ante, § 15, Enforcement and Dissolution, Discharge, Vacation, or Abandonment of Attachment.

40. So it can make no difference whether there be a variance or discrepancies between the exhibits attached to the original and amended petitions, so long as the amount of indebtedness claimed in the affidavit for the attachment is the same, or if different in amount, such difference is accounted for by a payment alleged to have been made after the affidavit was filed and the attachment issued. Norvell-Shapleigh Hardware Co. v. Hall Novelty & Machine Works [Tex. Civ. App.] 91 S. W. 1092.

41. Where the complaint was proper in form and properly alleged a cause of action for commission, the sole doubt being raised by the terms on the contract attached thereto, which was sought to be interpreted by the plaintiff according to its plain and ordinary meaning and by the defendant by giving to it quite a different meaning, such meaning moreover not being an obvious one, it was held that it was error to vacate the attachment on the ground that the complaint did not state a cause of action. Jones v. Hygienic Soap Granulator Co., 110 App. Div. 331, 97 N. Y. S. 104.

42. Hall Commission Co. v. Crook & Co. [Miss.] 40 So. 20.

43. Philbin v. Thurn [Md.] 63 A. 571.

44. See Municipal Court Act. Dixon v. Carrucci, 97 N. Y. S. 380. Municipal Court Act, § 831, providing for substituted service of the summons for the purpose of obtaining jurisdiction over the attached property, makes no provision for the service of a complaint, and hence it follows that in a proceeding by attachment the plaintiff cannot recover without proof of his claim. Id.

45. The appearance contemplated by the statute is such a one as is equivalent to a personal service of the summons, and not one made specially to object to the jurisdiction of the court. Dixon v. Carrucci, 97 N. Y. S. 380.

46. See Rev. St. 1899, § 3850, relating to attachments before justices of the peace. Rosenthal v. Widensohler, 115 Mo. App. 237, 91 S. W. 432. And likewise the issue as to the truth or falsity of the averments on the affidavit. Id.

47. Misnomer of corporation. See Civ. Code, § 357, providing that the misnomer of a corporation in any written instrument shall not be fatal to the validity of the instrument, provided that it can be reasonably ascertained what corporation is intended, and Code Civ. Proc. § 472, specifically allowing amendments of pleadings as to the names of parties. Nisbet v. Clio Min. Co. [Cal. App.] 83 P. 1077.

48. Bill for injunction against attachment proceedings held properly dismissed on demurrer. White v. Bailey & Co. [Ga.] 53 S. E. 589.

49. See 5 C. L. 315.

50. Where in an attachment based upon

Judgment and decree or order.[51]—Where the defendant appears, a personal judgment may be rendered, and such judgment is not in any way affected by the judgment upon a motion to quash the attachment;[52] but where the jurisdiction of the court is dependent solely upon the attachment of property, no personal judgment can be rendered.[53] The judgment against the attachment defendant should not include his bondsmen.[54] But mere irregularities in the judgment may be amended.[55]

A judgment against the property, directing it to be sold to satisfy the debt of the attaching creditor, merges the rights acquired by the attachment;[56] but the plaintiff's lien upon the property is not lost, the lien of the attachment being merely merged in the lien of the judgment.[57] But where there is no personal judgment against the defendant, the entry of the judgment in attachment proceedings against land upon the lien docket will not create a general lien upon the other property of the defendant.[58] The continuation of the attachment lien is not, therefore, dependent upon the entry of the judgment in the judgment lien docket.[59]

Appeal.[60]—An appeal by the plaintiff from a judgment against him, accompanied by the filing of the statutory undertaking, operates to continue the attachment in force pending the appeal.[61] Objections must be presumed by bill of excep-

averments that the defendant has absconded, absented and concealed himself so that ordinary process of law cannot be served upon him, the return of service in the cause shows that it was made by delivering a copy to a member of the defendant's family, over fifteen years of age, at the defendant's usual place of abode, the attachment cannot be sustained, the grounds therefor being negatived by the return. See Rev. St. 1899, § 3850, making the delivery of the writ to the officer for service the commencement of the action. Rosenthal v. Widensohler, 115 Mo. App. 237, 91 S. W. 432.

51. See 5 C. L. 315.

52. Philbin v. Thurn [Md.] 63 A. 571.

53. May v. Getty [N. C.] 53 S. E. 75; Bainbridge v. Allen [N. J. Eq.] 61 A. 706; French v. White [Vt.] 62 A. 35. Where substituted service is properly made, the court can render a judgment against the defendant, although he is not personally served; but such judgment is only presumptive evidence of the indebtedness, the defendant is not barred from any counterclaim, and the execution issued thereon must contain a direction that it be satisfied only out of the property attached, Municipal Court Act, § 91 (Laws 1902, p. 1519, c. 580). Dixon v. Carrucci, 97 N. Y. S. 380. But a general judgment in such case is not void as to the property attached and is not subject to collateral attack, and a purchaser of such property at a sale under an execution issued upon such general judgment may obtain a good title to such property. May v. Getty [N. C.] 53 S. E. 75.

54. A judgment could not have been properly rendered against them for thirty days after the rendition of the judgment against the defendant, and only then in the event the bond had been properly returned forfeited. Section 556, Code 1896. But this in no sense rendered the judgment void as to the defendant. Stephens v. Davis [Ala.] 39 So. 831. But see ante, § 7, subd. Liabilities on Bond.

55. Under Rev. Code 1892, § 940. Carrier v. Poulas [Miss.] 40 So. 164. Judgment for costs in favor of the defendant in an attachment suit instituted by a corporation entered as against a partnership. Id.

56. Oliver v. Wright [Or.] 83 P. 870. And hence a suit to enforce a judgment out of the proceeds of a life insurance policy held by the defendant was not a suit in aid of an attachment. Marks v. Equitable Life Assur. Soc., 109 App. Div. 675, 96 N. Y. S. 551. Nor was the suit a creditor's bill, where the complaint showed that the execution was still outstanding. Id.

57. Katz v. Obenchain [Or.] 85 P. 617. See ante, § 13, Lien or Other Consequences of Levy.

58. Katz v. Obenchain [Or.] 85 P. 617. But see Oliver v. Wright [Or.] 83 P. 870, where it was held that the docketing of a judgment in attachment proceedings against a portion of the defendant's land created a lien upon all the land of the defendant, but did not establish any specific interest in such land.

59. See B. & C. Comp., §§ 301, 303, giving the plaintiff a lien on the real property attached, and section 309, providing that if judgment be recovered by the plaintiff the court shall order the attached property to be sold to satisfy the plaintiff's demand. Katz v. Obenchain [Or.] 85 P. 617.

60. See 5 C. L. 316.

61. Code Civ. Proc. § 553, providing that when the attachment is discharged, the attached property must be delivered to the defendant, is subject to section 946, providing that an appeal, when perfected, stays all proceedings upon a judgment, provided that an attachment is not continued unless the appeal is perfected and an undertaking is filed as required by the concluding clause of such section. Primm v. Superior Ct. of Shasta County [Cal. App.] 84 P. 786. Prohibition will lie to test the validity of an order continuing an attachment in force pending an appeal by the plaintiff from a judgment against him in the principal action. Id. Under Code Civ. Proc. § 1351, a stay of proceedings on the part of the defendant is properly granted pending an ap-

tions as in other proceedings.[62] And on an appeal from a judgment quashing or refusing to quash an attachment, the particular ground stated in the motion to quash cannot be considered where there is no cross-assignment of error by the appellee upon the point.[63] Where a judgment quashing an attachment is reversed, the usual practice is to enter judgment in favor of the appellant against the appellee and the sureties on the replevy bond.[64]

§ 16. *Other remedies.*[65]—A bill to enforce a judgment rendered in attachment proceedings out of a life insurance policy which has been attached should allege that the policy has a cash surrender value;[66] and where the attachment cannot be enforced until there has been an actual surrender of the policy, it seems a suit in equity may be maintained to compel such surrender.[67] The equitable remedy given a cestui que trust to follow trust funds into property in which they may have been fraudulently invested by his trustee is not taken away by statutory provisions affording a remedy by attachment or garnishment; but the legal and equitable remedies are to be considered concurrent.[68]

§ 17. *Hostile and opposing claims to attached property.*[69]—As against the holders of equities against the attachment defendant, the attaching creditor stands in the shoes of his debtor.[70] But an attaching creditor acquires a lien superior to the rights of the holder of an unrecorded deed to the property, where the creditor had no notice of the deed.[71] Nor can the attachment lien be defeated by a subsequent purchaser unless the purchase was for value and without notice of the attachment.[72] But an attaching creditor of a shipper of goods is not a bona fide purchaser for value as against a bank holding a draft upon the purchaser, with bill of lading as security.[73] A statute requiring notice of the lien of an attachment to be filed in the clerk's office is applicable to an attachment upon a contract executed prior to the

peal by the plaintiff from an order vacating an attachment. Norden v. Duke, 47 Misc. 473, 95 N. Y. S. 940.

62. The objection that the trial court, without due notice to defendant's counsel, heard and determined his motion to dismiss the action and quash the attachment and levy, could not be considered, in the absence of a bill of exceptions. To sustain the motion reliance was had upon affidavits and certain files and records in the case, and did not come within Mill's Ann. Code, § 387. Everett v. Wilson [Colo.] 83 P. 211. An objection that the court erred in overruling defendant's motion to quash the writ of attachment and the certificate of levy, not being based on or affecting the pleadings, must be preserved by bill of exceptions. Id.

63. In such case the question to be considered is whether the lower court erred in quashing the attachment on the other grounds assigned. Norvell-Shapleigh Hardware Co. v. Hall Novelty & Machine Works [Tex. Civ. App.] 91 S. W. 1092.

64. But where the bond given was not such as provided by Rev. St. 1895, art. 204, relating to attachment proceedings, but such as is required by article 4874 in sequestration cases, no judgment could be rendered foreclosing the attachment lien on the property levied on, and the appellant was left to pursue his remedy against the sheriff if the property was not on hand or against the principal and sureties on the sequestration bond. Norvell-Shapleigh Hardware Co. v. Hall Novelty & Mach. Works [Tex. Civ. App.] 91 S. W. 1092.

65. See 5 C. L. 316.

66. Marks v. Equitable Life Assur. Soc., 109 App. Div. 675, 96 N. Y. S. 551. See ante, § 4, Attachable property. The complaint should also state the amount due by the defendant insurance company at the time the action was commenced. Id.

67. The bill in such case must allege that the lien cannot be enforced without the surrender of the policy, and such fact cannot be inferred from the use of the words "surrender value." Marks v. Equitable Life Assur. Soc., 109 App. Div. 675, 96 N. Y. S. 551. The complaint should also allege that the defendant has refused to surrender the policy or to recognize the plaintiff's claim upon it. Id. The assignment of the policy subsequent to the attachment is not alone ground for equitable relief. Id.

68. Chaves v. Myer [N. M.] 85 P. 233.

69. See 5 C. L. 316.

70. Kentucky Refining Co. v. Bank of Morilton [Ky.] 89 S. W. 492.

71. Ray v. Keith, 218 Ill. 182, 75 N. E. 921.

72. A party who purchases land upon which an attachment has been levied cannot invoke the doctrine of estoppel as against the attachment plaintiff on account of the plaintiff's attorney having directed the sheriff not to sell the property under a previous execution, where the purchaser had no knowledge of the fact at the time of the purchase. Katz v. Obenchain [Or.] 85 P. 617.

73. Tishomingo Sav. Inst. v. Johnson, Nesbitt & Co. [Ala.] 40 So. 503. See ante, § 4, Attachable property.

enactment of the statute.[74] A subsequent purchaser of property upon which an attachment has been levied cannot question the existence of the grounds of the attachment.[75]

The owner of personal property cannot maintain replevin for it after it has been levied on under an attachment against a third person and while such attachment is still pending.[76] And in replevin against an officer, who justifies under a writ of attachment against the property on the ground of a fraudulent transfer of the property by the attachment defendant to the replevin plaintiff, the question as to whether such transfer was fraudulent is immaterial until the officer has shown that he represents the creditors in the attachment.[77] But a party whose property is sold under an attachment against another may recover the property from the purchaser, without tendering or repaying the purchase money.[78] Attachment of goods in a warehouse is a defense to an action by the owner against the warehouseman for conversion.[79] Intention to occupy a house as a homestead in the future will not protect it from the lien of an attachment.[80] Where an attachment is levied upon real estate as the absolute property of a defendant, an interplea claiming that the property belongs to the interpleader puts a question of freehold in issue so as to authorize an appeal to the supreme court.[81]

Pleading.[82]—A claimant of the property attached may assert his claim by an interplea in the attachment proceedings[83] or by petition,[84] but cannot contest the grounds of the attachment.[85] As against a general demurrer by the attachment plaintiff, a general demurrer and a general answer by the claimant is sufficient.[86] But the irregularity of the seizure under the writ of attachment must be specially pleaded.[87] The rule that an interplea can be interposed only while the attachment is pending, that is during or before the term at which the final judgment is entered

74. Kentucky St. 1903, § 2358. Boltz v. Boain [Ky.] 90 S. W. 593. This section does not in such case impair all obligation to a contract. Id.

75. The debtor alone can do this. Wagner v. Wolf [Neb.] 106 N. W. 1024. But in Texas it is held that a claimant may attack the regularity of the attachment when the objection is specially pleaded. Scott v. DeWitt [Tex. Civ. App.] 93 S. W. 215.

76. Baltimore, etc., R. Co. v. Klaff & Co. [Md.] 63 A. 360.

77. Dunn v. Overton [Okl.] 83 P. 715.

78. Property of wife sold under attachment against husband, and suit brought by heir of wife to recover property from purchaser. Siling v. Hendrickson [Mo.] 92 S. W. 105. Where a tenant of land owned by a nonresident knew of attachment proceedings against the owner, and not only failed to notify the owner but prevented other persons from bidding at the sale, he himself purchasing the property at a grossly inadequate price, a court of equity would not regard such purchaser as an innocent party, and hence the tender of the purchase money to him was not a necessary condition to the action to recover the property. Id.

79. And in the absence of a special demand for portions of such property which were exempt from execution, such portions being mixed with the other portions, the warehouseman was not in fault in not delivering to the owner such portions. Cornwell v. Mahoney [Mass.] 76 N. E. 664.

80. Gibbs v. Adams [Ark.] 89 S. W. 1008.

81. Ray v. Keith, 218 Ill. 182, 75 N. E. 921. See Appeal and Review, 7 C. L. 146, n. 33.

82. See 5 C. L. 317.

83. Interplea by holder of a draft secured by a bill of lading. Tishomingo Sav. Inst. v. Johnson, Nesbitt & Co. [Ala.] 40 So. 503. It is the office and purpose of the interplea to try and determine the title and ownership to specific chattels, and the right of the sheriff to seize and hold them under his writ as the property of the attachment defendant. The sole issue thereon is, therefore, the question of ownership, and, as ownership is usually accompanied with the right of possession, the right of possession is incidentally tried and determined. Ottumwa Nat. Bank v. Totten, 114 Mo. App. 97, 89 S. W. 65.

84. Where, under Code 1899, c. 106, § 23, a petition is filed in a suit founded upon an attachment, setting up title by purchase, and the plaintiff in the cause relies upon fraud in the alleged purchase to defeat the claim of title so set up, the trial of the issue must be upon the petition without any other pleading, and by a jury unless a jury trial is waived. Lipscomb's Adm'r v. Condon, 56 W. Va. 416, 49 S. E. 392. In such case it is reversible error to hear and determine the issue upon the petition and answer thereto, and depositions of witnesses according to the rules and principles ordinarily covering courts of equity. Id.

85. Wagner v. Wolf [Neb.] 106 N. W. 1024. See ante, § 15 A, Validity and Grounds for Setting Aside.

86, 87. Scott v. De Witt [Tex. Civ. App.] 93 S. W. 215.

against the attachment defendant, does not apply where the party having the right to interplead has no notice of the attachment proceedings.[88] An attaching creditor, in order to be deemed a purchaser in good faith of the property as against one having an outstanding equity, must allege and prove all the facts necessary to establish that character of ownership in favor of a purchaser of such property as against such an equity.[89] Where a suit is brought in a Federal court to recover property held by a United States marshal under a writ of attachment, a party coming into the case and defending it on the ground that the property belongs to him is entitled to have the cause removed to the district in which he resides.[90]

Evidence and questions for the jury.[91]—In a statutory claim suit to try right of property levied on under an attachment, the burden of proof in the first instance is on the plaintiff to show that the property levied on under the attachment writ is the property of the defendant in attachment and subject to levy,[92] and in order to make a prima facie case the plaintiff must at least show that the defendant in execution was in the possession of the property at the time of the levy by the sheriff.[93] So, also, as against a party claiming the property as a subsequent bona fide purchaser without notice, the burden of proving notice is upon the attachment plaintiff.[94] But, when a prima facie case is made out by the plaintiff the burden is then shifted to the claimant to show ownership in himself.[95] And he must recover upon the strength of his own title.[96] And where the property claimed has been mingled with other property, the burden is upon the claimant to identify the property claimed.[97] As

88. In such case the interplea may be filed at any time before or during the term at which judgment is rendered against the attachment garnishee, and hence a bill for an injunction against a judgment against such garnishee at the instance of the assignee of the attachment debtor, was without equity, where it merely alleged that the complainant had no knowledge of the judgment against the attachment debtor until after the term at which such judgment was rendered, there being no allegation of want of knowledge before the expiration of the term at which judgment against the garnishee was rendered. See 2 Starr. & C. Ann. St. 1896, pp. 8056, 2060, 2062, c. 62, §§ 5, 8, 10, 11, 12. Fry v. Radzinski, 219 Ill. 526, 76 N. E. 694.

89. Where the answer in an action upon an undertaking for the redelivery of the attached property was confined strictly to a traverse of the allegations of the complaint, a reply consisting of a general denial of the claim of ownership made in the answer, did not bring the plaintiff within B. & C. Comp. § 302, providing that an attaching creditor shall be deemed a bona fide purchaser for value. Flegel v. Charles Koss & Bros. Co. [Or.] 83 P. 847. But where an interpleader claims the property attached it is not necessary for the replication of the attachment plaintiff setting up lack of notice of the interpleader's claims to set out the various acts by which the officer made the levy, such as the filing of the certificate required by 1 Starr & C. Ann. St. 1896, p. 453, c. 11. Ray v. Keith, 218 Ill. 182, 75 N. E. 921. Where upon the filing of an interplea claiming the property attached, the attachment plaintiff filed a general replication denying the claim of the interpleader, and thereafter filed an amended replication admitting such claim, but alleging that the plaintiff had no notice thereof at the time of the attachment, it was held that the failure to dispose of the issue made by the general replication was not ground for reversing a judgment entered upon the issue made by the amended replication. Id.

90. Under act of March 1, 1895, c. 145, § 7, 28 Stat. 697, providing that all civil suits shall be brought in the district in which the defendant or defendants reside or may be found; * * * and if a resident, in the court nearest to his residence. Purcell Wholesale Grocery Co. v. Bryant [Ind. T.] 89 S. W. 662.

91. See 5 C. L. 316.

92. Generally a prima facie case is made by the plaintiff when he shows that the property was in the possession of the defendant when levied on. Roberts, Long & Co. v. Ringemann [Ala.] 40 So. 81.

93. Ringemann v. Wiggs Bros. [Ala.] 40 So. 323. Upon the trial of a claim case, where the levy of the attachment does not recite that the property was found in the possession of the defendant at the time of the levy, the plaintiff successfully carries the burden of proof by showing affirmatively that the defendant in attachment was vested with title at or before the time of the levy. American Nat. Bank v. Lee [Ga.] 53 S. E. 268.

94. Evidence held insufficient to show that the claimant, who purchased the property after the attachment, had actual notice of the attachment. Boltz v. Boain [Ky.] 90 S. W. 593.

95. Roberts, Long & Co. v. Ringemann [Ala.] 40 So. 81.

96. Ottumwa Nat. Bank v. Totten, 114 Mo. App. 97, 89 S. W. 65. A statutory interplea in its essential characteristics is an action of replevin, and it devolved upon the interpleader to show in himself the existence of legal right or title to the immediate possession of the property. Kelly-Goodfellow Shoe Co. v. Sally, 114 Mo. App. 222, 89 S. W. 889.

97. An interpleader cannot recover a por-

the sole issue on the interplea is the ownership of and right of the interpleader to the property, it is competent for the attachment plaintiff, in defending against the asserted right of the interpleader, to show anything which would tend to overthrow his right or title to the property;[98] and it is likewise competent for the defendant to introduce any evidence tending to show title in himself.[99] Where the result of the pleadings upon an interpleader is to submit only a question of law, such issue need not be tried by a jury.[1] But where the evidence is conflicting, the question as to the claimant's right to the property should be submitted to the jury.[2]

Trial.[3]—In Texas if the claimant neglects or refuses to join issue under the direction of the court within the time prescribed for pleading, the plaintiff is entitled to a judgment by default.[4] In West Virginia the right to the property must be tried by a jury unless a jury trial is waived.[5]

§ 18. *Wrongful attachment.*[6]—Where an attachment is wrongfully issued, the attachment plaintiff is liable in damages to the defendant.[7] If the attachment be levied upon exempt property by order of the plaintiff, both he and the levying officer will be liable.[8] And since a right of attachment only gives the officer the right to seize the property of the person against whom the attachment is issued, such officer is liable to any other person for the seizure of his property.[9] A party who replevies property belonging to him which has been wrongfully attached does not thereby waive his right of action for damages, the replevy being pleadable only in mitigation by damages.[10]

Pleading.[11]—A wrongful attachment may be made the basis of an action for malicious prosecution;[12] but in order to maintain an action for malicious prosecution of an attachment, the essential averment to be established by the plaintiff is the absence of probable cause for the attachment,[13] and the question to be tried is not

tion of a stock merchandise on the ground that at the time such stock was attached he had purchased the portion claimed, unless he can identify such portion. Kelly-Goodfellow Shoe Co. v. Sally, 114 Mo. App. 222, 89 S. W. 889.

98. Where the interpleader predicated his right solely upon a mortgage executed by the defendant, pursuant to which the defendant turned over to him the property in question, the plaintiff had the right to overcome the case thus made by showing that at the time of the mortgage the plaintiff had a pledge upon the property and that, therefore, the defendant had no right to execute the mortgage. Ottumwa Nat. Bank v. Totten, 114 Mo. App. 97, 89 S. W. 65.

99. Where, in an action upon a redelivery bond, the defendant claimed to be a dealer in property of the kind attached, buying and selling the same, it was held that evidence of his financial condition, both at the date of the purchase of the property in question and prior thereto, was admissible. Oliver v. Wright [Or.] 83 P. 870.

1. Section 26 of the attachment act (1 Starr & C. Ann. St. 1896, p. 460, c. 11), provides that the practice and pleading in attachment suits, except as otherwise provided in the act, shall conform, as near as may be, to the practice and pleadings in other suits at law. This section applied to an interpleader filed under the 29th section of the attachment act. Ray v. Keith, 218 Ill. 182, 75 N. E. 921.

2. Ringemann v. Wiggs Bros. [Ala.] 40 So. 323.

3. See 5 C. L. 317.

4. Sayles' Ann. St. 1892, art. 5299. Scott v. DeWitt [Tex. Civ. App.] 93 S. W. 215. But where upon the call of the docket counsel for the claimant stated to the court that he was ready to join issue when the case was reached on the docket and the court should direct issue to be made, no objection being taken and the cause not having been called or the trial reached until the fifth day of the fourth week of the term, it was held that the court did not abuse its discretion in refusing a judgment by default in the absence of counsel for the claimant. Id.

5. Lipcomb's Adm'r v. Condon, 56 W. Va. 416, 49 S. E. 392.

6. See 5 C. L. 317.

7. Vandiver & Co. v. Waller [Ala.] 39 So. 136; Faroux v. Cornwell [Tex. Civ. App.] 90 S. W. 537. See ante, § 7, subd. Liabilities on Bond.

8. Faroux v. Cornwell [Tex. Civ. App.] 90 S. W. 537.

9. Epps v. Hazlewood [Tex. Civ. App.] 14 Tex. Ct. Rep. 20, 89 S. W. 809.

10. Davidson v. Oberthier [Tex. Civ. App.] 93 S. W. 478.

11. See 5 C. L. 317.

12. Attachment before justice of the peace for an amount in excess of the justice's jurisdiction, and without grounds for attachment other than the mere fact that the debt was due. Ailstock v. Moore Lime Co. [Va.] 52 S. E. 213.

13. Probable cause in cases of this kind is a belief by the attaching creditor in the existence of the facts essential to the prosecution of his attachment founded upon such circumstances as, supposing him to be a man

whether there were actual legal grounds for the attachment, but whether there was probable cause therefor.[14] The wrongful seizure of personal property under an attachment may also give rise to an action for conversion.[15] An officer, to justify his seizure by virtue of a writ of attachment and his possession thereunder, must allege all the jurisdictional facts by which he justifies his right of possession.[16]

In administering the remedies provided for in the Porto Rican Code, the Federal courts may, in assessing damages, adapt itself to the requirements on the local code.[17] In Porto Rico, therefore, an action will not lie for a wrongful attachment,[18] the damages resulting from a wrongful attachment being amply provided for in the provision made for the adjudication and recovery of damages in the principal action.[19]

Evidence and questions of fact.[20]—Questions of the admissibility [21] and sufficiency of evidence [22] are considered in the notes. Ordinarily the question of malice

of ordinary caution, prudence, and judgment, were sufficient to induce such belief. Moore v. First Nat. Bank [N. C.] 52 S. E. 944.

14. Hence an instruction that the defendant would be liable if he sued out his attachment without "just cause" or "legal cause" was erroneous. Sehon v. Whitt [Ky.] 92 S. W. 280.

15. Davidson v. Oberthier [Tex. Civ. App.] 93 S. W. 478.

16. Beckstead v. Griffith [Idaho] 83 P. 764.

17. Fernandes Y Peres v. Peres Y Fernandes, 202 U. S. 80, 50 Law. Ed. —.

18. Civ. Code, art. 1902, providing for actions for fault or negligence does not authorize an action for a wrongful attachment. Fernandes Y Peres v. Peres Y Fernandes, 202 U. S. 80, 50 Law. Ed. —.

19. Civ. Code Proc., arts. 1409-1415. Fernandes Y Peres v. Peres Y Fernandes, 202 U. S. 80, 50 Law. Ed. —. The difference between the liability for the wrongful levying an attachment at common law and the assessment of costs and damages under these provisions of the Porto Rican Code is not one of form merely. The former action is substantially one for malicious prosecution, and can be maintained only upon proof of malice and want of probable cause. Under the Code the court is required to assess damages, although malice or want of probable cause in suing out the attachment may not be expressly shown. The remedy given seems to cover all cases where the attachment is vacated, irrespective of the motive in suing it out. Id. Nor would the general provisions o the Revised Statutes (§ 648, U. S. Comp. Stat. 1901, p. 525), providing for a jury trial as to issues of fact in circuit courts, except in cases of admiralty and equity jurisdiction, prevent the enforcement of the express provisions of the Porto Rican Code as to assessment for damages for wrongful attachment. Id. The Porto Rican statute is applicable in a case where the attachment was instituted by an attorney in fact in the name of his principal. The fact that the statute provides that the costs and damages of the attachment shall be assessed against his plaintiff in the action does not prevent the statute from applying in such case, since the principal would be liable for the act of the attorney, and there is no reason why the attorney might not be made a party of the attachment proceedings if the damages are to be assessed against him alone. Id.

20. See 5 C. L. 317.

21. Those facts and circumstances alone which were known to defendant at the time the affidavit upon which the warrant of attachment was based are to be considered in determining the question whether he had probable cause. Moore v. First Nat. Bank [N. C.] 52 S. E. 944. In an action for malicious use of judicial process by suing out an attachment without probable cause, evidence that the defendant submitted the facts to a reputable and competent attorney and was advised that there were grounds for an attachment, is admissible to show want of malice and that there was probable cause. But where the defendant did not plead such matter in defense, he could not complain of the refusal of the court to instruct on the point. Sehon v. Whitt [Ky.] 92 S. W. 280. Statements of the general manager of a corporation made at its office, of which he was apparently in charge, as a consequence of which proceedings in an action by the corporation were actually stayed, accompanied by evidence of his subsequent acting with authority in the matter, were admissible in evidence against the corporation. Carey v. D. Wolff & Co. [N. J. Err. & App.] 63 A. 270. In an action by infant heirs for damages for the seizure, under an attachment, of property inherited by them from their mother, evidence that their father, the attachment defendant, used and controlled the property after the death of the mother, is inadmissible. Terry v. Clark [Ark.] 92 S. W. 788.

22. Evidence held not sufficient to show a want of probable cause for the issue of an attachment on the ground of fraudulent disposition of property and that the attachment defendant had left the state with intent to defraud his creditors. Moore v. First Nat. Bank [N. C.] 52 S. E. 944. In an action of trespass for wrongful seizure of the plaintiff's household goods by an officer under a writ of attachment against her husband, proof that the president of the defendant corporation, the plaintiff in the attachment, guarded the goods after the seizure, with knowledge of the plaintiff's claim, that the general manager of the corporation, upon complaint made to him, stated that he had done this many times and must take all the furniture there was to make himself safe, that the general manager assumed some control over the goods while stored

is a question of fact for the jury.[23] But when the facts are admitted it is the duty of the court to declare as a question of law whether there is probable cause.[24]

Instructions.[25]—As in other cases the instructions in an action for wrongful attachment must conform to the evidence,[26] and must not invade the province of the jury.[27] Examples of particular instructions are given in the notes.[28]

Damages.[29]—For the wrongful issuance and levy of an attachment, the plaintiff in the writ is liable in actual damages.[30] The measure of such damages is ordinarily the value of the property at the time and place of seizure.[31] But where the property is attached in transitu, the measure of the owner's damages is the value of the property at its destination at the time when it would have arrived, less the expense of transportation and the costs of selling at the place of destination.[32] Where a party replevies his property which has been wrongfully seized under an attachment, such replevy may be shown in mitigation of damages;[33] but the owner may recover as acutal damages the legal interest on the value of the property during the time of its detention.[34] As a general rule interest upon the value of the property for the time of its detention constitutes one of the elements of the damages recoverable.[35] And attorney's fees are likewise generally recoverable.[36] Where malice

in a warehouse, with knowledge that some of the goods belonged to the plaintiff, held evidence of subsequent consent to the wrongful seizure by the officer sufficient to sustain the action. Carey v. Wolff & Co. [N. J. Err. & App.] 63 A. 270. An action for wrongful attachment based upon the ground of a conspiracy between the defendants cannot be sustained in the absence of proof of a conspiracy. But where the defendants failed to move the court to make the plaintiff elect which defendant he would prosecute, the question could not be raised on appeal. Sehon v. Whitt [Ky.] 92 S. W. 280.

23. In an action by a third party against the attachment plaintiff and the officer who made the levy for actual and exemplary damages for the seizure of such third party's property, the question of malice is a question for the jury. Epps v. Hazelwood [Tex. Civ. App.] 14 Tex. Ct. Rep. 20, 89 S. W. 809.

24. Moore v. First Nat. Bank [N. C.] 52 S. E. 944.

25. See 5 C. L. 318.

26. In an action by infant heirs for damages for the seizure under an attachment against their father of property inherited by them from their mother, in the absence of any evidence that the father was indebted to the attachment plaintiff at or before the time when the property was acquired by the mother or the heirs, it was error to instruct that if the attachment defendant gave the property to his children after he became indebted to the attachment plaintiff, the jury should find for such plaintiff. Terry v. Clark [Ark.] 92 S. W. 788.

27. A charge that the absence of a debtor from his home does not subject his property to attachment upon the allegation that he absconds or secretes himself, and his neglect to inform his creditors of his intended absence does not alone authorize the latter to resort to the extraordinary remedy of attachment, and that if the debtor left his usual place of business and abode with the intention of again returning and without any fraudulent intent, then his absence was not an absconding within the meaning of the law, held not erroneous as invading the province of the jury, and that if the defendant considered such charge as being misleading he should have requested an explanatory charge. Vandiver v. Waller [Ala.] 39 So. 136.

28. Upon an issue of malice in an action by a third party against the attachment plaintiff and the officer who levied the writ, the jury was correctly instructed by the court that any unlawful act done willfully and purposely to the injury of another is, as against that person, malicious and that it need not imply malignity or even corruption in the ordinary sense of these words, and that any improper motive constitutes malice, in the sense it is here used. Epps v. Hazlewood [Tex. Civ. App.] 14 Tex. Ct. Rep. 20, 89 S. W. 809.

29. See 5 C. L. 318.

30. Vandiver & Co. v. Waller [Ala.] 39 So. 136; Faroux v. Cornwell [Tex. Civ. App.] 90 S. W. 537. If the writ be levied upon exempt property by order of the plaintiff, both he and the levying officer will be liable in any event in actual damages. Faroux v. Cornwell [Tex. Civ. App.] 90 S. W. 537.

31. Davidson v. Obertheir [Tex. Civ. App.] 93 S. W. 478. The measure of damages for the seizure of cattle upon an attachment against the bailee thereof is the market value of the cattle at the time of the seizure. National Cotton Oil Co. v. Ray [Tex. Civ. App.] 91 S. W. 322.

32. In such case the evidence of an expert based upon description was inadmissible upon the question of value. Wallingford v. Kaiser, 96 N. Y. S. 981. But where the owner bids the property in, the measure of his damages is the amount of his bid. Id.

33. Davidson v. Oberthier [Tex. Civ. App.] 93 S. W. 478.

34. Although there was no allegation of such damage. Davidson v. Oberthier [Tex. Civ. App.] 93 S. W. 478.

35. Davidson v. Oberthier [Tex. Civ. App.] 93 S. W. 478. Interest may be recovered on the value of the property for the time during which it was detained under a general allegation of damages because of the wrongful levy and conversion. Id.

36. Vandiver & Co. v. Waller [Ala.] 39 So. 136. See ante, § 7, subd. Liabilities on Bond.

is shown, exemplary or punitive as well as actual damages may be recovered,[37] not only from the attachment plaintiff[38] but from the levying officer, where participation by him in the malicious use of the process is shown.[39]

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ATTORNEYS AND COUNSELORS.

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§ 1. *Admission to practice and license taxes.*[40]—Admission to the bar is a matter of constitutional and statutory regulation in the several states,[41] and the practice of law is not an inalienable right such as are the common industrial pursuits.[42] The practice in Connecticut of admitting no attorneys, except on the recommendation of the county bar, to the state bar examining committee, is a reasonable one,[43] and the refusal of such bar to recommend an applicant does not take

37. Epps v. Hazlewood [Tex. Civ. App.] 14 Tex. Ct. Rep. 20, 89 S. W. 809; Faroux v. Cornwell [Tex. Civ. App.] 90 S. W. 537. And where a levy is made upon exempt property, under circumstances showing malice, such damages may be recovered whether the attachment was rightful or wrongful. Faroux v. Cornwell [Tex. Civ. App.] 90 S. W. 537.

38. The issue of an attachment against a man for a debt which the plaintiff in attachment, a corporation, must be held to have known had no existence in fact, the seizure under that writ of the household goods and wearing apparel of his wife by the officer, the subsequent assent of the executive officers of the corporation to the seizure of the wife's property, their refusal to release it, and their subsequent assumption of authority over the property, justified an award of punitive damages in an action of trespass by the wife against the corporation. Carey v. Wolff & Co. [N. J. Err. & App.] 63 A. 270.

39. Epps v. Hazlewood [Tex. Civ. App.] 14 Tex. Ct. Rep. 20, 89 S. W. 809. If a levy on exempt property be made by the one, and participated in by the other, under circumstances of oppression and aggravation, both the plaintiff and the officer will be subject to a verdict for exemplary damages. Faroux v. Cornwell [Tex. Civ. App.] 90 S. W. 537.

40. See C. L. 319.

41. The declaration of rights in the Connecticut constitution of 1818 did not abridge the then existing powers of the courts to admit attorneys only on the recommendation of the county bar. In re O'Brien's Petition [Conn.] 63 A. 777. Nor were such powers restricted by the fourteenth amendment to the Federal constitution. Id. In Tennessee, under Acts 1903, p. 576, c. 247, § 5, a preliminary license may be issued, revocable for fraud in obtaining it, within two years from its issue. State Board of Law Examiners v. Williams [Tenn.] 92 S. W. 521.

42. In re O'Brien's Petition [Conn.] 63 A. 777.

43. Pursuant to rules adopted as authorized by Act 1855 (Gen. St. 1902, § 458). In re O'Brien's Petition [Conn.] 63 A. 777. An application to the county bar for its recommendation is properly referred to the examining committee on admission. Id. And the applicant is not entitled to be heard at the county bar meeting, on the question of the adoption of the committee's report. Id. The vote of the county bar against recommendation is not defective, because no reason is given to the state bar examining committee for refusal to recommend. Id. It was proper for the county bar to refuse to give to the applicant the names of those who appeared before it in its examination into the matter of the application for recommendation. Id. On a petition for admis-

away from him either liberty or property.[44] The dismissal of a petition to the superior court based on the ground that the petitioner had been unjustly denied the right of admission by the act of a county bar is a final judgment and appealable.[45] The supreme court of Nebraska can alone pass upon the qualifications of applicants for admission to the bar.[46] The finding of a referee appointed to ascertain and report as to the moral character of an applicant for admission to the bar, that it was good prior to his arrival in the state and had been good ever since, was conclusive.[47] The applicant should make known all facts affecting his character and moral fitness for a license,[48] especially crimes and disreputable acts recently committed.[49]

Under the constitution and statutes of Kentucky, a second class city may impose a license.[50]

§ 2. *Duties, privileges, and disabilities.*[51]—The particular duties of an attorney are sometimes prescribed by statute.[52] When an attorney, who is an officer of the court, assumes the defense of a prisoner at the bar, he must do his duty in the premises. His correct conduct as an officer of the court involves the dignity of the court itself, and when the misbehavior of an attorney interferes with the work of the court, it amounts to a contempt of court.[53] By a rule of privilege, attorneys are disabled to disclose professional communications from clients,[54] but communications made to an attorney in the presence of a third person are not privileged;[55] and where an attorney was employed jointly to draw wills of like import for two persons, communications made to him by them were not privileged as against persons claiming under one will.[56] A communication from an attorney to his client, to be privileged, must be of a confidential character and so regarded, at least by the client, and must relate to a matter naturally private and properly the subject of confidential disclosure.[57]

sion, the superior court should not hear evidence relating to the decision of the state bar examining committee, in the case of an applicant who has not the approval of the county bar. Id. But the court may inquire whether the recommendation was withheld after a fair investigation. Id.

44. One who asks admission to the bar is seeking to obtain a right of property which he has not got. In re O'Brien's Petition [Conn.] 63 A. 777.

45. Under Gen. St. 1902, §§ 788, 819. In re O'Brien's Petition [Conn.] 63 A. 777.

46. In re Newby [Neb.] 107 N. W. 850. The power of the district court to admit attorneys of other states to practice in Nebraska was taken away by Laws 1895, c. 6, p. 72. In re Burton [Neb.] 107 N. W. 1015.

47. In re Hovey [Cal. App.] 81 P. 1019.

48. The failure to disclose the fact of pendency of disbarment proceedings in the state of one's former domicile, does not materially affect his moral character or eligibility to admission to the bar, the mere pendency of such proceedings alone not being a disqualification. In re Hovey [Cal. App.] 81 P. 1019.

49. People v. Propper, 220 Ill. 455, 77 N. E. 208.

50. Yantis v. Lexington [Ky.] 94 S. W. 653.

51. See 5 C. L. 320.

52. Cobbey's Ann. St. 1903, §§ 3604, 3605. In re Newby [Neb.] 107 N. W. 850.

53. The abandonment of a defendant in a criminal case on the day of trial by an attorney who has agreed to undertake the defense, when there is no cause for such abandonment except that the fee was not all paid, and the work of the court is thereby interfered with, is misbehavior which amounts to a contempt of court. State v. Shay, 3 Ohio N. P. (N. S.) 657. An attorney who disregards an order of court upon the ground that it was not technically correct in its terms is guilty of contempt. Id. When an attorney is charged with a contempt because of misbehavior in the presence of the court, the judge in whose presence the misbehavior took place has an inherent right to try the case. The General Assembly cannot abridge this right, and the statute giving a party the privilege of filing an affidavit of prejudice on the part of the judge was not intended by the legislature to enable a defendant in a case of contempt in the presence of the court to take the trial of that case before another judge. Id.

54. See Witnesses, 6 C. L. 1975.

55. Code Civ. Proc. § 835, does not protect such communications. In re Simmons' Estate, 48 Misc. 484, 96 N. Y. S. 1103.

56. Wilson v. Gordon [S. C.] 53 S. E. 79.

57. An answer prepared to be filed, and read by others and substantially published in the papers, with the client's consent, and otherwise made public held not to be such a communication. In re Elliott [Kan.] 84 P. 750; In re Burnett [Kan.] 85 P. 575.

The attorney for plaintiff in an action for malicious prosecution for murder is disqualified to act as prosecuting attorney, in a subsequent prosecution of him for the murder.[58] There is nothing in the law or general practice of Illinois that prohibits a justice of the peace from acting as attorney in behalf of suppliants at the bar of the court over which he presides.[59]

§ 3. *Suspension and disbarment.*[60]—The privilege of a regularly licensed attorney to practice is a most valuable right and one of which he cannot be deprived except for legal cause and only in the manner pointed out by law.[61]

Grounds.[62]—The enumeration in a statute of certain acts that will be deemed sufficient for the revocation or suspension of a license to practice law, does not limit the common-law jurisdiction of the court and an attorney may be disbarred for other than the statutory grounds.[63] Procuring admission by concealment of disqualifications,[64] conviction of felony,[65] unfitness for the confidential relation to his client or unworthiness of public confidence,[66] flagrant disrespect to the courts,[67] attempts to subvert justice,[68] acts of fraud and dishonesty,[69] false representations to

58. State v. Rocker [Iowa] 106 N. W. 645.

59. Brancecum v. Simmons, 116 Ill. App. 98.

60. See 5 C. L. 320.

61. People v. Kavanagh, 220 Ill. 49, 77 N. E. 107.

62. See 5 C. L. 320.

63. In re Smith [Kan.] 85 P. 584.

64. Concealment and failure to disclose crimes and disreputable acts, recently committed by an applicant for admission to the bar, are as much a fraud on the court and cause for disbarment as crimes committed after admission. People v. Propper, 220 Ill. 455, 77 N. E. 208. In Tennessee the concealment of the fact that the applicant had been disbarred in another state is such fraud as will justify the revocation of a preliminary license to practice granted by the board of law examiners, under Acts 1903, p. 576, c. 247, § 5. State Board of Law Examiners v. Williams [Tenn.] 92 S. W. 521.

65. An attorney convicted of embezzlement and sentenced to a term in prison will be disbarred, under 1 Mills' Ann. St. § 1450. People v. Bryce [Colo.] 84 P. 816.

66. Numerous disreputable practices and criminal offenses held to render an attorney unfit to be allowed to practice. People v. Propper, 220 Ill. 455, 77 N. E. 208. Gross misconduct, showing him to be unworthy of the privileges which the law confers on him and unfit to be intrusted with the duties and powers of an attorney. In re Smith [Kan.] 85 P. 584. An attorney who, during a trial, goes into a saloon with a juror and furnishes him with liquor, is guilty of a very serious violation of the obligations imposed upon him by law and custom. In re Reynolds [Minn.] 107 N. W. 144. The statute of Montana authorizes the suspension from practice of an attorney guilty of deceit and malpractice involving moral turpitude. Code Civ. Proc. § 402, subsec. 5, amd. by Laws 1903, p. 51, c. 36. In re Carleton [Mont.] 84 P. 788. Evidence held to show that the accused acted as attorney for both sides in a case, and grossly deceived the court in various ways. Id.

67. Where an attorney after a defeat wrote a letter to the justice of the court that tried the case, reflecting on his integrity and by inference on that of other members of the court, but afterward explained that his letter was written on the impulse of the moment, without any intention of publishing his grievance or doing more than expressing his feelings, while the action was highly objectionable, it was not ground for more than a reprimand. In re Manheim, 99 N. Y. S. 87.

68. A conspiracy by attorneys to return a bill for divorce for their client on grounds known by them not to exist, signing her name without her consent to the bill and affidavit, and seeking to get service by publication, though they knew that respondent resided in the state, constitute good ground for disbarment. People v. Huggard, 217 Ill. 366, 75 N. E. 371.

69. Fraudulently representing, as executor, to a creditor that the estate was insolvent and inducing him to assign his judgments for a nominal consideration and procuring the creditor to satisfy the judgments. In re Clark, 108 App. Div. 150, 95 N. Y. S. 388. Abstraction of papers from the files to conceal fraudulent acts in a case. People v. Hooper, 218 Ill. 313, 75 N. E. 896. Procuring the clerk of the court to sign and certify a fraudulent transcript of the record, etc. Id. Where plaintiff's attorney dismissed a suit in justice's court, inducing defendant to believe it was dropped, then took an appeal and obtained judgment by default and caused an execution to be levied without notice to defendant, to get title to the real estate, it was ground for disbarment. Id. Deceiving the court into entering a judgment by default, with knowledge of a special appearance and motion by defendant to quash the service of summons. Id. Attempt to suborn witnesses, purchase of property under false representations and mortgaging the same and manipulating checks so as to defraud a bank. People v. Brown, 218 Ill. 301, 75 N. E. 907. Forgery of a client's indorsement on a check, converting it to his own use, and converting a deposit in court made by another client, were sufficient to authorize disbarment. In re Thresher [Mont.] 84 P. 876.

client,[70] and the procuring of money from them by such means,[71] bad faith to clients,[72] receiving money as collections and refusing to pay it over to his clients on demand and tender of his fees and expenses,[73] are grounds for disbarment. In New York the making of champertous agreements with clients subjects an attorney to removal.[74]

Defense or excuse.[75]—The motive of those instrumental in the conduct of the proceedings may be a proper matter to consider in connection with the evidence offered to establish respondent's guilt.[76] The statute of limitations is no defense,[77] and the courts will not establish a limitation, by analogy to the statute of limitations, unless from the nature or circumstances of the case it would be unjust or unfair to require the attorney to answer.[78] But courts will not consider stale charges.[79]

Proceedings in general.[80]—Disbarment proceedings are usually held to be civil,[81] and not criminal;[82] but they are in the interest of the public,[83] and their gravity suggests caution and strictness, and the special steps to be taken must be followed so far as they are prescribed.[84] The formal and technical requirements of criminal pleading are not necessary in the accusation, but it must fairly inform the accused of the precise nature of the misconduct charged,[85] and must give time and place and allege the acts of misconduct with reasonable certainty,[86] and must be estab-

70. Evidence held not to sustain charges of misrepresentation and corrupt conduct. In re Kolstad [N. D.] 105 N. W. 232.

71. Where the attorney for an administrator, prior to the administrator's appointment, had arranged to borrow money of him, and deposited money withdrawn from the estate in his name, using part to cover an overdraft, giving the administrator a check for part, and a note for the balance and paying him $50 for making the loan, held that the attorney was guilty of misconduct under Code Civ. Proc. § 67, authorizing suspension. In re Freedman, 99 N. Y. S. 135. Instituting criminal proceedings to extort money from clients, by representing that they would be sent to prison on a charge which was dismissed for want of prosecution after they had paid the money. People v. Frisch, 218 Ill. 275, 75 N. E. 904. Evidence sufficient to show attorney's collusion in the criminal proceedings. Id.

72. Failure to pay over money collected for clients; and the procuring of claims against corporations to be prosecuted, which he settled for substantial compensation as for costs, leaving the clients to shift for themselves. In re Clark, 108 App. Div. 150, 95 N. Y. S. 388. Settling with a party against whom he was retained to enforce claims, in order to secure his fee, and assigning his contracts with clients to enforce such claims and notifying them to settle directly with the other party, etc., is malpractice. Id.

73. People v. Nicholas [Colo.] 84 P. 67. Held to show embezzlement of money of clients where respondent claimed to have sent American money to clients in foreign land but could produce no instructions to send it that way and no receipts for registered letters containing it and where there was a corresponding item in his private accounts. In re Nekarda, 100 N. Y. S. 42.

74. Under Code Civ. Proc. § 74, the giving of any consideration to a client to obtain his claim to bring suit thereon, or agreeing to pay an agent of the profits of cases, for services in inducing other persons to place claims in the attorney's hands, is champertous. In re Clark [N. Y.] 77 N. E. 1.

75. See 5 C. L. 321.

76. In re Byrnes [Minn.] 105 N. W. 965.

77. There is no statute of limitations technically applicable to disbarment proceedings. In re Smith [Kan.] 85 P. 584.

78. People v. Hooper, 218 Ill. 275, 75 N. E. 896.

79. Where the alleged misconduct occurred more than 13 years before the charge was filed, and had been the subject of a former proceeding which was abandoned after the accused's defense was made known, and the accused had ben recognized professionally and socially ever since, the court refused to consider it. In re Elliott [Kan.] 84 P. 750.

80. See 5 C. L. 321.

81. Its purpose is to ascertain whether the accused is worthy of confidence and possessed of that good moral character which is a condition precedent to the privilege of practicing law and continuing in its practice. In re Thresher [Mont.] 84 P. 876. The remedy of disbarment is a special proceeding to deprive the accused of the power to abuse the office of attorney and counselor at law. In re Burnett [Kan.] 85 P. 575. The proceedings are conducted generally in harmony with the practice in civil cases. Id.

82. The proceeding is in no sense a criminal prosecution, nor in aid of a criminal investigation. In re Thresher [Mont.] 84 P. 876. The end to be attained is not punishment but protection. Id.

83. In re Byrnes [Minn.] 105 N. W. 965.

84. In re Burnette [Kan.] 85 P. 575. In Illinois an attorney can be suspended from practice by a nisi prius court only in proceedings for that purpose, as provided by Hurd's Rev. St. 1903, c. 13 (People v. Kavanagh, 220 Ill. 49, 77 N. E. 107), and such a court cannot suspend an attorney as a punishment for contempt in the presence of the court (Id.).

85. In re Smith [Kan.] 85 P. 584.

86. People v. Matthews, 217 Ill. 94, 75 N. E. 444.

lished by clear evidence.[87] The failure of the prosecutor to include in a particular proceeding against an attorney all acts of misconduct will not bar subsequent proceedings for misconduct not so included.[88] Where the charges involve moral turpitude, proof of conviction of crime is not essential to disbarment.[89] The court itself is the trier of both facts and law, and those functions cannot be delegated to a committee, commission, or referee.[90] In Nebraska the supreme court has the sole power to annul an admission to the bar,[91] but, if the charges upon which proceedings to disbar are based involves professional misconduct in the relations of an attorney with the court in which he practices, such court may, upon satisfactory proof, disbar him from practicing before it.[92] Where proceedings are begun against an attorney for disbarment based upon a criminal charge alone, which is not admitted by the accused, such matter will not be investigated while the charge is pending upon indictment in the criminal court.[93] It is not necessary that the accused attorney be given an opportunity to be heard before the board of law examiners or the officer thereof who conducts the preliminary investigation.[94] Where a criminal offense is charged in disbarment proceedings, the presumption of innocence arises and the crime charged must be proved beyond a reasonable doubt.[95] The statute of Kansas relating to appeals in disbarment cases, which provides for a transfer of all the original papers and a transcript of the docket entries, does not contemplate a trial de novo in the supreme court, but to create a special method for bringing up such cases for consideration, according to the constitutional appellate jurisdiction of that court.[96] After a judgment in the supreme court remanding such a cause to the district court for trial, it is not essential to jurisdiction that the accusation be refiled in the district court; and, although the supreme court omits to make an order for the transfer of the accusation to the district court, if it actually be present then and accessible during the trial, the accused sustains no injury of which he can complain.[97] Suspension operates simply to deprive an attorney temporarily of the right to practice,[98] and he is still an attorney and subject to the jurisdiction of the court.[99]

Reinstatement,[1]—An attorney, disbarred for professional misconduct involving no criminality or serious wrong, after living a life of probity, sobriety and industry for ten years thereafter, was reinstated.[2]

§ 4. *Creation and termination of relation with client.*[3]—A proposal and acceptance will constitute the relation of attorney and client.[4] An insane person may

87. Proof of other acts of misconduct will not justify disbarment, when those charged are not proven. People v. Matthews, 217 Ill. 94, 75 N. E. 444.

88. In re Byrnes [Minn.] 105 N. W. 965.

89. In re Smith [Kan.] 85 P. 584. Under Code Civ. Proc. § 402, subd. 5, and by Act 1903 (Sess. Laws 1903, p. 51). In re Thresher [Mont.] 84 P. 876.

90. In re Smith [Kan.] 85 P. 584.

91 92, 93. In re Newby [Neb.] 107 N. W. 850.

94. In re Byrnes [Minn.] 105 N. W. 965.

95. Conflicting evidence held insufficient to support a charge of conspiracy to bribe jurors and to induce a witness to abscond. People v. Sullivan, 218 Ill. 419, 75 N. E. 1005.

96, 97. In re Burnette [Kan.] 85 P. 575.

98. In re Byrnes [Minn.] 105 N. W. 965. Where, after the suspension of appellant's attorney from practice and the striking of his brief from the files, appellant filed a brief in person but failed to appear for argument and the cause was submitted to the department on the briefs he was not entitled to an oral argument on the submission of the cause to the court in bank, regardless of the validity of the suspension. Sup. Ct. Rule 28, subd. 2 (64 Pac. xii) ,provides that submitting a cause to a department without oral argument shall be a waiver of an oral argument in bank. Philbrook v. Newman [Cal.] 82 P. 772.

99. Motion to dismiss proceedings against an attorney under suspension, on the ground that he was not an attorney under the laws of the state, denied. In re Byrnes [Minn.] 105 N. W. 965.

1. See 5 C. L. 322.

2. In re Burris, 147 Cal. 370, 81 P. 1077.

3. See 5 C. L. 322.

4. State v. Shay, 3 Ohio N. P. (N. S.) 657. Evidence of interview between client and attorney held admissible to show relation of attorney and client. Baker v. Jackson [Ala.] 40 So. 348.

NOTE. Implied contract: A contract to pay for legal services may be implied or negatived according to the circumstances. Mathews v. Lincoln County Commissioners,

appear and prosecute or defend by attorney, at least while not under guardianship, any ordinary action at law, if no special reason is shown to the contrary, and he will be bound by the result.[5] The employment of an attorney by a private corporation may be proved by conduct constituting an estoppel.[6] Sound policy forbids an attorney from appearing for conflicting interests.[7] A contract to procure legislation is not necessarily bad,[8] but a mere lobbying contract is against public policy.[9] A client has the right to discharge an attorney at any time,[10] but must pay the discharged attorney money due him,[11] and is liable in damages if he breaks a contract.[11a] An attorney of record can withdraw only with leave of court;[12] but where the court appoints three practicing attorneys to aid a prisoner in his defense, it is not error for one to withdraw, where the prisoner makes no objection at the time.[13] And a court has no power to dismiss a lawyer from his client's service.[14] The authority of an attorney merely to bring an action ends with the rendition of final

90 Minn. 348. A client, knowing the attorney is rendering services and who does not dissent, is liable on an implied contract for fees. Davis v. Walker, 131 Ala. 204; Cooper v. Hamilton, 52 Ill. 119. Mere incidental benefits derived from professional services are not sufficient basis for an implied contract to pay for such services. Lamar v. Hall and Wimberly, 129 F. 79; Roselius v. Delachaise, 5 La. Ann. 481. If the party avails himself of the professional services in the ordinary mode in which clients avail themselves of such services and nothing more appears, a promise to pay for such services is implied. Ames v. Potter, 7 R. I. 265, 15 Yale L. R. 38.

5. Where, pending proceedings to probate a will, the petitioner became insane but nothing further was done as to his insanity except commitment to a hospital, the relation of attorney and client continued as to the original contract of employment notwithstanding the insanity. McKenna v. Garvey [Mass.] 77 N. E. 782.

6. Where a corporation assumed to employ an attorney and received the benefit of his services, the contract being fully executed on his part, its liability to pay for the services could not be evaded on the ground that such employment was ultra vires. Kelly v. Ning Yung Benev. Ass'n [Cal. App.] 84 P. 321.

7. Attorney suspended under Code Civ. Proc. § 402, subsec. 5, and Laws 1903, p. 51, c. 36, for acting as attorney for both parties in a suit, and for deceiving the court. In re Carleton [Mont.] 84 P. 788. On the hearing of a motion to set aside a judgment of annulment of a marriage, the parties must appear by separate counsel and the same counsel cannot represent both parties. Johnson v. Johnson [N. C.] 53 S. E. 623. The attorney of the executors of an estate cannot represent the heirs for th purpose of supervising the executors' acts in the distribution of the estate. Bryant v. McIntosh [Cal. App.] 84 P. 440. The payment by the executors of the balance due certain heirs to such attorney was wrongful and the heirs could recover such sums from the executors, under Code Civ. Proc. § 1666. Id.

8. The fact that an attorney, in carrying out an agreement to collect facts and present arguments to the proper authorities to secure a reduction in the purchase price of certain Indian lands, appears before committees of Congress and explains the nature of a bill authorizing such reduction does not render the contract void or prevent the recovery of compensation. Stroemer v. Van Orsdel [Neb.] 107 N. W. 125.

9. Stroemer v. Van Orsdel [Neb.] 107 N. W. 125. An allowance, as expenses, for services of persons assisting in the collection of French spoliation claims, where such services were of the nature of "lobbying," was held improper. Waggaman v. Earle, 25 App. D. C. 582.

10. A client may discharge an attorney, under contract to render services, who fails to pay over on demand the amount due the client under the contract. Goodin v. Hays [Ky.] 88 S. W. 1101. The question of whether the revocation of a power of attorney was intended as a dismissal of an attorney from the case, was properly submitted to the jury. Weil v. Fineran [Ark.] 93 S. W. 568.

11. An attorney discharged without cause can recover for his services at the contract price, less such sum as reasonably represents the unperformed part of the services (Goodin v. Hays [Ky.] 88 S. W. 1101), and if discharged for cause, he can recover only a reasonable compensation, without regard to the contract price (Id.). One may dismiss his attorney at will without any cause subject to liability for accrued or agreed compensation. Johnson v. Ravitch, 99 N. Y. S. 1059.

11a. An instruction, in an action by an attorney for breach of contract of employment, that if defendant intended to dismiss plaintiff, he was entitled to recover damages therefor, was proper. Weil v. Fineran [Ark.] 93 S. W. 568.

12. When a solicitor has entered his appearance of record for a client, he cannot terminate the relation, so far as the rights of the opposite party are concerned, until there has been a withdrawal of record by leave of court. Krieger v. Krieger [Ill.] 77 N. E. 909.

13. State v. Briggs [W. Va.] 52 S. E. 218.

14. When the attorney for a defendant in a criminal case has abandoned his client on the day of trial, and the defendant cannot give bond and secure a lawyer to look after his interests until his paid attorney can be found, it is proper for the court to appoint counsel for the defendant, if he has no means to employ a lawyer. This action

judgment,[15] and an attorney has no authority to take an appeal without further employment,[16] or to make a gratuitous waiver of appeal.[17] But where a transaction with a client, favorable to the attorney, took place within an hour after the attorneys' receipt and cashing of a check given by the adverse party in settlement the relation of attorney and client still existed, so as to render it incumbent upon the attorneys to show that the transaction was fair.[18] When a termination of litigation and not a substitution is sought, an order terminating the employment should be allowed on referring the matter of compensation earned.[19]

Substitution.[20]—A party has an absolute right to change his attorney at any time,[21] subject only to the payment or securing of the fees and charges due him,[22] but it must be done by order of the court, which will provide for such payment or security,[23] where no misconduct of the attorney is shown.[24] Where a case is taken upon a contingent fee, the client may nevertheless substitute another attorney,[25] and it is discretionary with the court to compel payment for services already rendered as a condition of substitution,[26] although it will not do so when the contract for compensation is of doubtful validity,[27] An order of substitution giving the supplanted attorney a "first lien" on the recovery does not fail to protect him nor destroy his lien because it directs surrender of papers.[28]

§ 5. *Rights, duties, and liabilities between attorney and client; loyalty and good faith.*[29]—The duty assigned to an attorney is a personal duty which cannot be delegated or performed by another,[30] or be transferred to another, without consent of his client.[31]

Diligence.[32]—An attorney must, at least, be familiar with the well-settled principles of law and rules of practice which are of frequent application.[33] He must use all proper and legal means of establishing his client's rights.[34] He must be held to know the return day of process issued by his direction, must keep himself informed of the steps taken by the sheriff in its execution, and must give all instructions to secure his client's interests.[35] He must at all times inform himself of the state of the record, before taking any further step.[36]

of the court does not, however, discharge the paid attorney from the case. State v. Shay, 3 Ohio N. P. (N. S.) 657.

15. Hey v. Simon [Ky.] 93 S. W. 50. The authority of an attorney employed to procure a divorce terminated after the entry of a decree in plaintiff's favor. Conklin v. Conklin, 99 N. Y. S. 310. A demand for the payment of alimony made by one who had been attorney for the other party in the divorce proceedings was insufficient to justify a commitment for contempt by refusal to pay. Kalmanowitz v. Kalmanowitz, 95 N. Y. S. 627.

16. A petition alleging negligence of an attorney in not taking an appeal, etc., held not to state a cause of action. Hey v. Simon [Ky.] 93 S. W. 50.

17. Keoughan & Co. v. Equitable Oil Co. [La.] 41 So. 88.

18. Hill v. Hall [Mass.] 77 N. E. 831.

19. In re Cable, 99 N. Y. S. 1096.

20. See 5 C. L. 323.

21. Silverman v. Pennsylvania R. Co., 141 F. 382; Anglo-Continental Chemical Works v. Dillon, 97 N. Y. S. 1081.

22. People v. Bank of Staten Island, 99 N. Y. S. 486.

23. Rule 10 of the supreme court has been so construed. People v. Bank of Staten Island, 99 N. Y. S. 486. This is applicable to the surrogate's court. In re Bender's Will, 97 N. Y. S. 171.

24. Anglo-Continental Chemical Works v. Dillon, 97 N. Y. S. 1081.

25, 26. Silverman v. Pennsylvania R. Co., 141 F. 382.

27. A contract for contingent fee, "all disbursements to be advanced by the attorney," held void for champerty under the law of New York, but possibly valid in Pennsylvania where it was made. Silverman v. Pennsylvania R. Co., 141 F. 382.

28. Johnson v. Ravitch, 99 N. Y. S. 1059.

29. See 5 C. L. 323.

30. Chicago & S. Traction Co. v. Flaherty [Ill.] 78 N. E. 29.

31. Johnston v. Baca [N. M.] 85 P. 237.

32. See 5 C. L. 323.

33. Enterline v. Miller, 27 Pa. Super Ct. 463. A charge simply that the negligence or ignorance of attorneys must be gross is properly refused as not sufficiently defining the duty of attorneys. Patterson v. Frazer [Tex.] 94 S. W. 324.

34. Dart v. Richardson [Minn.] 104 N. W. 1094. As long as an attorney remains in the case, he is bound as an officer of the court not to impede the business of the court by neglecting his duty to his client. State v. Shay, 3 Ohio N. P. (N. S.) 657.

35, 36, 37. Enterline v. Miller, 27 Pa. Super. Ct. 463.

An attorney is not liable to his client for a failure to succeed, resulting in loss to his client,[37] unless this is due to his mismanagement of the business intrusted to him, through bad faith, inattention, or want of professional skill;[38] nor is an attorney responsible for a mistake of the sheriff, to which he in no way contributes, but when he acquiesces therein and directs further proceedings founded on it, he makes the error his own and is answerable for the resulting loss to his client.[39] Although the cases in which damages have been recovered against attorneys for negligence in failing to prosecute suits are generally where the cause of action was a liquidated demand,[40] yet the client's right of recovery of damages on account of his attorney's negligence is not restricted to such cases;[41] and a recovery may be had of both the actual and exemplary damages that might have been recovered in an action for slander, which was lost by the attorney's negligence.[42] In detailing to the jury the cause of action wherein negligence of attorneys is predicated, it is error to misstate it so that the amount recoverable would have been enhanced.[43] In an action against an attorney for misconduct, which operated to deprive the client of title to property sold under a conditional contract, the measure of damages was the market value of the property at the time of the bringing of the suit which deprived the client of it.[44]

Dealings between attorney and client.[45]—He owes to his client the duty of the utmost loyalty and good faith,[46] and should disclose facts within his knowledge essential to his client's full understanding of dealings with him.[47] The law does not prohibit an attorney from dealing with his clients,[48] but transactions between them will be closely scrutinized, especially where the attorney acquires any of the client's property.[49] To sustain a transaction between attorney and client, which is favorable

38. Enterline v. Miller, 27 Pa. Super. Ct. 463. Where an indictment for a misdemeanor returned against plaintiff was so insufficient that he could not have been required to plead thereto and his attorney could doubtless have obtained a dismissal thereof, having effected a settlement out of court, but, instead, advised plaintiff to plead guilty to petty larceny, for which offense plaintiff was sentenced to one year's imprisonment, whether the attorney was remiss in his duty, entitling plaintiff to damages, was a question for the jury. Cleveland v. Cromwell, 110 App. Div. 82, 96 N. Y. S. 475.

39. Attorney held liable, where the sheriff made a levy after the return day of a writ and the attorney directed further proceedings based on the void levy, resulting in loss to his client. Enterline v. Miller, 27 Pa. Super. Ct. 463.

40. Patterson v. Frazer [Tex. Civ. App.] 93 S. W. 146.

41. Patterson & Wallace v. Frazer [Tex. Civ. App.] 93 S. W. 146. Complaint held to state a cause of action by an attorney against his partner for instigating disbarment proceedings against plaintiff while mentally weak and incapacitated and for failure to defend plaintiff as his attorney in the disbarment proceedings, whereby judgment by default was taken against him. Burnette v. Elliott [Kan.] 84 P. 374.

42. A verdict for both "actual damages" and for "exemplary damages" in such case held to have intended the exemplary damages that plaintiff might have recovered in the action for slander. Patterson v. Frazer [Tex. Civ. App.] 93 S. W. 146.

43. Narrating alleged actionable words variant from the evidence so that punitive damages might be warranted. Patterson v Frazer [Tex.] 94 S. W. 324.

44. Whitney v. Abbott [Mass.] 77 N. E. 524.

45. See 5 C. L. 324.

46. Enterline v. Miller, 27 Pa. Super. Ct. 463; Dart v. Richardson [Minn.] 104 N. W. 1094.

47. Attorneys in making contracts of employment are required to exercise the highest order of good faith with their clients and to disclose all information which would or might influence the client in making the contract. Weil v. Fineran [Ark.] 93 S. W. 568. A contract of retainer, dictated by an attorney and signed by a client unable to read English and knowing nothing of its contents except as it was explained to her, should be interpreted as favorably to the client as the language will permit. Harkavy v. Zisman, 96 N. Y. S. 214.

48. Mansfield v. Wallace, 217 Ill. 619, 75 N. E. 682.

49. Equity has jurisdiction of a suit to rescind a sale by an attorney to his client, where the sale was induced by a misuse of the attorney's position of trust. Hill v. Hall [Mass.] 77 N. E. 831. An attorney who purchases his client's property at a partition sale conducted by him must show that the purchase was made with the utmost fairness. Mansfield v. Wallace, 217 Ill. 619, 75 N. E. 682. Such a sale to the attorney will not be sustained, where he failed to make lienholders parties to the proceeding, so that the real condition of the title was concealed and others could not bid intelligently (Id.), or where he successfully de-

to the attorney, he must show that he used no undue influence, that he gave his client all information and advice that he should have done were he not interested, and that the transaction was as beneficial to the client as it would have been if the client had been dealing with a stranger.[50] A client may attack or sue on a contract with his attorney as to which if made with an ordinary person he would be defeated as one in pari delicto.[51] In impressing a trust on property held by the attorney as a result of such transaction, equity may be done in the decree without previous tender.[52] Where one of two attorneys, employed for a contingent fee, fraudulently procured the assignment of the client's whole cause of action of damages and a compromise of the same, it was set aside as to the rights of the innocent attorney, but held good as to the other.[53] In the suit by the client and the attorney to set aside such fraudulent assignment to the other attorney, the rights of the plaintiff attorney are worked out through the party, and it is immaterial that there is no assignment of an interest to him, in writing, duly acknowledged, filed and noted in the docket of the court, or actual notice to defendant;[54] but without such assignment of interest or notice, her attorney would have no standing alone to set aside the fraudulent assignment.[55]

Accounting to client.[56]—Where a creditor sent a claim to an attorney for collection and in the settlement of another controversy money came into the attorney's hands, on the understanding that the attorney would send his check to the creditor

terred others from bidding and bought the property for himself at an inadequate price (Id.).

50. In re Holland, 110 App. Div. 799, 97 N. Y. S. 202; Hill v. Hall [Mass.] 77 N. E. 831.

51. Richardson v. Johnson [La.] 39 So. 449 [advance sheets only].

Note: This case is interesting because of the peculiar facts involved and shows how zealously the courts will guard the interest of a client. The court says "that the client may sue on a contract made with his attorney which he could not attack if made with another person, and the doctrine may be extended to the case of a contract alleged to have been entered into by one attorney with the client of another and superinduced by a conspiracy between the two attorneys to injure or despoil the client." The general rule is that a conveyance fraudulent as to both parties cannot be attacked by either since the law gives no action for the enforcement of fraudulent contracts. Mason v. Baker, 8 Ky. 208, 10 Am. Dec. 724; Broughton v. Broughton, 4 Rich. L. [S. C.] 491; Hess v. Final, 32 Mich. 515; Neal v. Neal, 26 Ky. L. R. 962, 82 S. W. 981. A breach of promise to marry constitutes the person to whom the promise is made a creditor from the time of the breach. 14 Am. & Eng. Enc. of Law [2d Ed.] 252, and cases cited. And as a conveyance to defeat the creditor is fraudulent the courts will not generally relieve the grantor if the grantee will not reconvey. But as laid down in the principal case, though the attorney and client may both be in delicto, they are not necessarily in pari delicto and a conveyance will be set aside for any fraud. Yerkes v. Crum, 2 N. D. 72; Hooker v. Oxford, 33 Mich. 453; Jennings v. McConnell, 17 Ill. 148. However, the fact that the defendant holding the land was a lawyer should not of itself give cause for enforcing a reconveyance in contravention of the rule before mentioned, though the court lays some stress on the fact that he was an officer of the court. The bill was sustained because of the allegation of confederacy between plaintiff's lawyer and the other defendant. Young v. Murphy, 120 Wis. 49, 97 N. W. 496. In this case the facts were somewhat similar except that the lawyer's wife held the title. A reconveyance was ordered.—4 Mich. L. R. 301.

When one party to an illegal contract bears a fiduciary relation to the other (Barnes v. Brown, 32 Mich. 146), or is in a more advantageous position (Smith v. Bromley, 2 Doug. [Mich.] 696), the other is not in pari delicto and can recover (Schermerhorn v. Talman, 14 N. Y. 93, 123). For these reasons, a client is given a remedy against his attorney for consideration paid on an illegal contract. Freelove v. Cole, 41 Barb. [N. J.] 318; Herrick v. Lynch, 150 Ill. 283. See note to 83 Am. St. Rep. 159. The principal case correctly applies these principles. The additional reason given by the court, that the defendant was an officer of the court, is open to the objection that he was not acting as such in this transaction. See Roman v. Mali, 42 Md. 513, 6 Columbia L. R. 198.

52. Richardson v. Johnson [La.] 39 So. 449 [advance sheets only].

53. Plaintiff not required, as a condition of setting aside the assignment, to first surrender and restore to the attorney who procured it, a tract of land conveyed to her by the attorney. Bush v. Prescott & N. W. R. Co. [Ark.] 89 S. W. 86.

54. As required by Kirby's Dig. § 4457. Bush v. Prescott & N. W. R. Co. [Ark.] 89 S. W. 86.

55. Bush v. Prescott & N. W. R. Co. [Ark.] 89 S. W. 86.

56. See 5 C. L. 325.

in payment of the claim, whether the creditor could recover from the attorney on the theory that the debtor had paid the claim to him, was a question for the jury.[57]

The client may compromise and dismiss[58] a suit without his attorney's consent;[59] and it follows that a defendant has the right to procure a release of a claim for injuries, if done fairly and with due regard for rights of plaintiff's counsel.[60] It is against public policy to stipulate in a contract for a contingent fee that the client shall not settle without the attorney's consent,[61] or prior to the rendition of a judgment or decree, when the attorney's lien would attach.[62] And where the plaintiff settles and withdraws the action before verdict,[63] the case will not be restored to the docket on a claim by the attorney that it was done to defraud him of his fees and disbursements, where his only showing was of a verbal agreement to give him so much of the judgment as was necessary to compensate him.[64]

§ 6. *Remedies between the parties.*[65]—The claim of a client for money collected by his attorney is an implied contract, within the terms of a statute providing for bringing actions on contract, express or implied, in the name of the person really interested.[66] An action cannot be maintained against an attorney to recover money in his hands belonging to his client, until after demand and refusal to pay over,[67] and in such action the burden is on the attorney to prove that he was justified in making a settlement for less than was agreed on between him and his client.[68] The attorney is liable for interest on such money only from the time he actually collected it.[69] The attorney's right of lien does not necessarily and of itself prevent an action by the client to recover the funds held;[70] but, if the attorney has a valid claim on the funds for services, that is a matter of defense or counterclaim.[71] By statute in Alabama, a summary judgment may be had against an attorney for failure to pay over money collected by him.[72] The movant for summary judgment

57. Millhiser & Co. v. Leatherwood [N. C.] 52 S. E. 782.

58. See 5 C. L. 327, n. 97, and see, also, post § 7, Lien.

59. Olson v. Sargent County [N. D.] 107 N. W. 43. It is well settled that the plaintiff has a right to settle his action whether his attorney consents or not. Van Der Beek v. Thomason, 99 N. Y. S. 538. One who, as attorney, brings a proceeding of unlawful detainer in the name of another, may thereby estop himself to deny that the nominal plaintiff is the real party in interest and entitled to settle the litigation, though the defendant may know that the attorney claims possession of the premises. Edwards v. Sourbeer [Kan.] 84 P. 1033. It is for the client alone to determine whether he will continue the litigation or agree with his adversary to settle and discontinue it. That is a matter in which the attorney has no legal interest and in which his judgment and will must at all times be subordinated to his client's. Oishei v. Metropolitan St. R. Co., 110 App. Div. 709, 97 N. Y. S. 447.

60. Kuehn v. Syracuse Rapid Transit R. Co. [N. Y.] 76 N. E. 589.

61. Papineau v. White, 117 Ill. App. 51; Jackson v. Stearns [Or.] 84 P. 798.

62. Under B. & C. Comp. § 1063, giving such lien. Jackson v. Stearns [Or.] 84 P. 798.

63. Under Gen. St. 1902, §§ 595, 596, providing for such action. De Wandelaer v. Sawdey [Conn.] 63 A. 446.

64. De Wandelaer v. Sawdey [Conn.] 63 A. 446.

65. See 5 C. L. 325.

66. Code 1896, § 28. Allen v. Alston [Ala.] 41 So. 159.

67. Evidence held to warrant a finding that such demand had been made. Whinery v. Brown [Ind. App.] 75 N. E. 605.

68, 69. Harkavy v. Zisman, 96 N. Y. S. 214.

70. Whinery v. Brown [Ind. App.] 75 N. E. 605.

71. Whinery v. Brown [Ind. App.] 75 N. E. 605. Where a client discharged his attorney under contract, and sued him for money collected, the attorney could set off his claim for services against the amount in his hands. Goodin v. Hays [Ky.] 88 S. W. 1101. In such case interest should be allowed from the time the attorney collected the money; but, if the attorney recovers judgment, interest should be allowed on the balance due from the time of the discharge. Id.

72. Code 1896, c. 106. Notice of motion for summary judgment, served on defaulting attorney, held sufficient. McDonald v. State [Ala.] 39 So. 257. The proper demand on a defaulting attorney under Code 1896, §§ 3810, 3811, is for the gross sum collected and in his hands, though he is entitled to retain part as compensation. Id. And he cannot set up a set-off in defense, the theory of the statute being that he can make no claim until he has discharged his duty by putting the fund in control of the court, and then only for compensation for collection. Id. Reasonable time after demand held to have elapsed, authorizing entry of

against an attorney in such cases must prove the demand for the money collected and the refusal to pay, when the same is alleged and denied.[73]

§ 7. *Compensation and lien. Right to and amount and items of compensation.*[74]—The right depends on the performance of the service or engagement and not on a successful outcome,[75] except that parties may by contract make the fee contingent.[76] If the attorney repudiates[77] his contract he cannot recover thereon. Lack of skill in his profession, inattention to duty or bad faith toward his client forms defense;[78] but not malpractice or unskilfulness in another engagement.[79] The fact that others received some benefit from the services of an attorney employed by defendant is no defense.[80] There can be no recovery on a contract champertous or otherwise invalid.[81] The knowing acceptance of services from an attorney who had represented other parties waives that defense.[82] The claim of attorneys, under an express contract for one-half of the land recovered as their compensation for services, was not barred by laches, where the party in possession had made no real improvements, had got as much off of the land as he had paid in taxes and had not established adverse possession.[83] Where an attorney agreed to defend defendant's son against a charge of murder, for a stipulated fee, a promise to pay such attorney for another attorney a further sum, due him by witnesses against the son, for securing their release from jail, was without consideration.[84] An administrator may be allowed for legal services done for the estate in conjunction with another lawyer.[85] A bankrupt's trustee, though an attorney, is not bound to perform legal services for the estate, and if he does so, is not entitled to recover attorney's fees therefor.[86]

Any sum not in itself unconscionable and fraudulent may be agreed,[87] and an agreement to pay for services requested by another is not one to answer his debt.[88] If there is no agreed fee for services rendered, a reasonable compensation is due therefor.[89] On the dismissal of an attorney he may recover only what he has then

summary judgment against the attorney. Id.

73. McCarley v. White [Ala.] 39 So. 978.

74. See 5 C. L. 325. An action to foreclose a mortgage for fees held not barred by earlier judgments. Cathers v. Linton [Neb.] 106 N. W. 468.

75. An attorney employed to conduct proceedings under a statute was entitled to recover for his services in litigation and appeals necessary in support of the validity of the statute, where the clients knew of the litigation and of the attorney's appearance in their behalf in good faith, although he was unsuccessful because of the invalidity of the only statute authorizing the proceedings. Sanford v. Bronson, 109 App. Div. 835, 96 N. Y. S. 859.

76. See post, this section.

77. The fact that attorneys who had agreed for a contingent fee, based on the amount recovered, made their client defendant in the partition suit relating to the property, in order to have the amount of their fee settled, did not amount to a repudiation of the contract and deprive them of the right to recover the stipulated fee. Tull v. Nash [C. C. A.] 141 F. 557.

78. Enterline v. Miller, 27 Pa. Super. Ct. 463.

79. Alleged mismanagement of another case held not to be malpractice defeating recovery on quantum meruit by dismissed attorney. Smith v. Hoctor, 99 N. Y. S. 843.

80. Kelly v. Ning Yung Benev. Ass'n, [Cal. App.] 84 P. 321.

81. See Champerty and Maintenance, 5 C. L. 565. And see Dreyfuss, Weil & Co. v. Jones, 116 Ill. App. 75; Papineau v. White, 117 Ill. App. 51.

82. Patterson v. Fleenor [Ky.] 89 S. W. 705.

83. Lipscomb v. Adams, 193 Mo. 530, 91 S. W. 1046.

84. Bailey v. Devine, 123 Ga. 653, 51 S. E. 603.

85. John v. Sharpe [Ala.] 41 So. 635.

86. In re Felson, 139 F. 275.

87. The amount agreed will not be reviewed by the court, unless it is so excessive as to show a purpose by the attorney to obtain an undue advantage. Burke v. Baker, 97 N. Y. S. 768.

88. Promise, by one who receives papers drawn by an attorney at the request of another, to pay the attorney. Rev. Laws, c. 74, § 1, cl. 2. Paul v. Wilbur, 189 Mass. 48, 75 N. E. 63.

89. Where plaintiffs were employed by defendant as attorneys and rendered services, in the absence of any stipulated compensation, they were entitled to what the services were reasonably worth, whether defendant knowingly accepted the benefit of them or not. Simmons v. Davenport [N. C.] 53 S. E. 225. An allowance of $400 as attorney fee who assisted in the recovery of land worth from $30,000 to $50,000, was authorized, in view of his doing the most of the work in the case. Patterson v. Fleenor [Ky.] 89 S. W. 705. In the foreclosure of a lien for $385, where the only substantial

earned.[90] The right of an attorney to charge a retainer, in addition to charges for ordinary services, is not limited to cases of express agreement for a retainer.[91] Services rendered for a company subsidiary to the client may be recovered when requested by promoters of the client company who were interested in both.[92] A suit for services rendered for a sum agreed is no evidence that other services were included in that sum.[93]

Contingent fees.[94]—A contract for a contingent fee is not necessarily invalid.[95] but such contracts are condemned, where they tend to a result contrary to public policy,[96] or where the attorney has taken advantage of the claimant, by reason of poverty or surrounding circumstances, to extort an unreasonable and unconscionable portion of the claim.[97] But it is the universal practice of lawyers to charge more

contest was over the sum of $73 an allowance of $100 as attorney fee under 2 Ball. Ann. Codes & St. § 5911 was reduced to $50 on appeal. Littell v. Saulsberry [Wash.] 82 P. 909. Where, in an action for an attorney's services, no objection was made in the trial court to the fairness of the attorney's charge, **objections could not be made on appeal** to the amount allowed. Burke v. Baker, 97 N. Y. S. 768.

90. Not the contingent fee which would have followed success. Johnson v. Ravitch, 99 N. Y. S. 1059. Fifty dollars held not inadequate for drawing complaint in personal injury cause and putting case on calendar. Id.

91. Blair v. Columbian Fireproofing Co. [Mass.] 77 N. E. 762.

92, 93. Randolph v. St. Joseph, etc. Ry. Co. [Mo. App.] 94 S. W. 309.

94. See 5 C. L. 326.

95. Morehouse v. Brooklyn Heights R. Co. [N. Y.] 78 N. E. 179. An agreement that an attorney for his services shall have one-half of what he may recover is not the purchase of a litigious right and is valid. Succession of Landry [La.] 41 So. 226. In an action against attorneys to recover a sum retained as fees, where the contract was for a reasonable compensation in case of recovery, and the amount retained was less than 50 per cent, an affirmative charge for defendants was proper. German v. Browne [Ala.] 39 So. 742. Contract to collect a claim for $10, if $50 were recovered, and a proportionate fee if more was recovered, made in good faith and without fraud or imposition, was valid. Whinery v. Brown [Ind. App.] 75 N. E. 605. Contract to oppose the probate of a father's will, in behalf of a son, for a percentage based on the nature of the settlement realized, was not unconscionable in the absence of fraud. Ransom v. Cutting, 98 N. Y. S. 282. Where the owner of land agreed to give an attorney for his services, one-half the damages recovered for the taking of land for street purposes and represented that a mortgage on the land had been paid, he was estopped, after the services were rendered in good faith, to deny the payment of the mortgage and to insist upon its deduction from the amount recovered before a division thereof. Deering v. Schreyer, 110 App. Div. 200, 97 N. Y. S. 14. Under a contract to receive one-half of lands described, as compensation for recovering the same, attorneys were entitled to one-half of a tract within the description, although it was not occupied. Lipscomb v. Adams, 193 Mo. 530, 91 S. W. 1046. Where the half was worth from $1,500 to $2,000, the contract was not so unreasonable as to be unenforceable in equity, where the labor actually performed by the attorneys was rendered small by the client's compromise of the suit without the attorneys' consent. Id. Where attorneys agreed to conduct litigation for one-half of the land recovered and the client subsequently agreed to convey the other half, if recovered, such contract will not be specifically enforced, for lack of consideration. Id. Where the agreement with an attorney was to pay the client 25 per cent of the amount realized, in a number of French spoliation claims, after deducting certain expenses including office rent, a charge of $35.96 out of $45 a month rent held reasonable under the circumstances of the case. Waggaman v. Earle, 25 App. D. C. 582. An allowance of "clerk hire," contemplated in the contract also held reasonable. Id. But an allowance for the professional services of other persons, alleged to have been rendered in collecting the claims, where such services were of the "lobbying" kind, was improper. Id. Where the county commissioners enter into a contract with the prosecuting attorney for the bringing of suits for the collection of taxes on property theretofore treated as exempt from taxation, and by agreement a test case is tried, the defendants in other similar cases agreeing to abide the result, the percentage the attorney is to receive in the event of his securing a judgment is not limited by either law, justice, or equity to the amount involved in the test case. State v. Taylor, 3 Ohio N. P. (N. S.) 505. The discretion lodged with county commissioners in the matter of fixing fees to be paid for the collection of taxes in such cases will not be interfered with by a court, where the fee is made contingent and is fixed at five per cent. and where two separate contracts have been entered into, and the parties refuse to treat the second as superseding the first, a court will not under the circumstances of this case decree differently. Id.

96. A wife's agreement to compensate an attorney by a percentage of what she may receive for her support and maintenance in an action for separation is void as against public policy. In re Brackett, 99 N. Y. S. 802. Champertous agreements cannot be enforced in Indiana. Whinery v. Brown [Ind. App.] 75 N. E. 605.

97. Whether an agreement for 50 per cent of any recovery for prosecuting an ac-

for their services, when the receipt of any compensation is conditional on their success in the litigation.[98] A contract to collect a claim for a certain fee for a certain amount collected, and a proportionately larger fee, if more were collected, was not champertous or void for maintenance.[99] Such agreements are not champertous where the attorneys are to make no advances or payments;[1] but an agreement by an attorney to pay an agent one-half of the proceeds realized by the attorney from causes of action obtained by the agent with authority to bring suit for their enforcement was champertous and void.[2] The fact that a case was taken upon a contingent fee does not prevent substitution of attorneys.[3]

Implied contracts[4] arise from the knowing acceptance of an attorney's services where there is no specific understanding as to the compensation,[5] but it does not always follow that because one receives the benefit, directly or indirectly, of such services, the law implies a contract to pay therefor.[6] Implied promises to pay an associate counsel do not arise merely from a knowledge of his services by the client;[7] but may be implied from the conduct of the client.[8]

Quantum meruit.[9]—Where the client prevents the full performance by the attorney of his contract of employment, the attorney is entitled to compensation for services actually rendered.[10] If he so elects[11] he can recover on a quantum meruit

tion is unconscionable and void depends upon the circumstances of each case. Morehouse v. Brooklyn Heights R. Co. [N. Y.] 78 N. E. 179. Where the client, before making an agreement with an attorney for a contingent fee, was fully advised of all the circumstances and contingencies of the case, and afterward urged the consummation of a compromise which was made, there was no ground for setting aside the contract with the attorney as fraudulent or exorbitant. Humphries v. McLachlan [Miss.] 40 So. 151.

98. Smith v. Couch [Mo. App.] 92 S. W. 1143. The fact that a fee is contingent cannot be excluded in considering the amount thereof. Burke v. Baker, 97 N. Y. S. 768.

99. Whinery v. Brown [Ind. App.] 75 N. E. 605.

1. An unsolicited contract for a percentage of the recovery, the attorneys agreeing not to call on the client for money to pay necessary disbursements, should be construed as providing that the percentage was to be computed after deducting the expense incurred from the recovery, and it was therefore not void for champerty. Ranson v. Cutting, 98 N. Y. S. 282. An agreement for a contingent fee, "all disbursements to be advanced by the attorney," is champertous under the law of New York. Silverman v. Pennsylvania R. Co., 141 F. 382.

2. In violation Code Civ. Proc. §§ 73, 74, prohibiting the buying of things in action, to prosecute them, and prohibiting an attorney from promising a consideration for the placing of any demands in his hands for the purpose of suing thereon. In re Clark, 108 App. Div. 150, 95 N. Y. S. 388.

3. Silverman v. Pennsylvania R. Co., 141 F. 382.

4. See 5 C. L. 327.

5. Patterson v. Fleenor [Ky.] 89 S. W. 705. Where there is no agreement for compensation. Davis v. Trimble [Ark.] 88 S. W. 920.

6. The fact that directors of a railroad company and trustees of an estate holding a large amount of its bonds, took an interest in a suit, attended the trial, claimed exemption as parties in interest from an order excluding witnesses, paid the stenographer fees and assured the attorneys that they would be paid, did not render them liable, under implied contract, to pay the attorneys who were hired by the principal stockholder and manager to defend him in the suit. Davis v. Trimble [Ark.] 88 S. W. 920. Attorneys representing certain heirs in litigation over real estate, who obtained the appointment of a guardian ad litem for another heir who was a minor, could not afterward claim compensation from the minor, on the ground that their services had been of benefit to him. Tull v. Nash [C. C. A.] 141 F. 557. Where husband and wife were parties defendant in an action and the husband, in presence of the wife, told his attorneys to go ahead and defend her, she saying nothing, her mere silence was not sufficient to charge her with liability for services in the suit. Altkrug v. Horowitz, 97 N. Y. S. 716.

7. In a case where defendant's attorney requested plaintiff to appear in court for defendant and take a default in such and there was conflict of evidence as to her assent, the facts were held insufficient to establish a contract for services. Kneeland v. Hurde, 97 N. Y. S. 957.

8. Where, without any definite understanding as to the amount of compensation, defendant wrote plaintiffs "by all means keep your eye on the case," there was an implied promise to pay a reasonable compensation for their services. Emblen v. Bicksler [Col.] 83 P. 636.

9. See 5 C. L. 326, n. 85.

10. Where an attorney was employed to effect a settlement of certain actions but not to contest them in court, at a stated compensation, and the client refused to allow him to settle and repudiated the contract, the attorney was entitled to compensation for services rendered before the repudiation, although he had effected no settlement. Philbrook v. Moxey [Mass.] 77 N. E. 520.

11. In an action by an attorney to recover for services and disbursements made under a

for services rendered, though his contract was champertous.[12] No quantum meruit for unfinished cases can be recovered in the face of a different agreed compensation.[13] An attorney who volunteers his services for a minor at the suggestion of the relatives of the minor cannot ordinarily recover compensation therefor.[14] The services of an attorney, rendered to a minor in regard to ordinary rights of property, are not necessaries,[15] the cases where such services are deemed necessaries being limited to those where the services are rendered in connection with the minor's personal relief, protection, or liberty.[16]

Employment of several attorneys, or by several clients.[17]

Allowance of fees by court or taxation as costs.[18]—Except as provided by statute[19] or by contract,[20] fees of counsel are not allowed as incident to recovery.[21] The allowance of a statutory attorney fee will not be defeated by a slight variance in the declaration from the words of the statute, where the case is tried upon the theory of the language of the statute and the proofs brought the case within it.[22] An attorney in partition proceedings, who purposely omits lienholders from the bill, is not entitled to attorney's fees.[23] Where a bankrupt's trustee was represented by able counsel in the recovery of concealed property, attorneys employed by creditors to assist were not entitled to fees out of the bankrupt's estate.[24]

The amount of allowance by court[25] is the reasonable value or if there be a contract then the agreed fee.[26]

Evidence as to value of services.[27]—The value of an attorney's services is based

special contract of employment, which he was prevented by his client from carrying out, he could not recover on a quantum meruit, where he **had not elected to treat the contract as rescinded.** Weil v. Fineran [Ark.] 93 S. W. 568.

12. Dreyfuss, Weil & Co. v. Jones, 116 Ill. App. 75; Papineau v. White, 117 Ill. App. 51.

13. City of Wilmington v. Bryan [N. C.] 54 S. E. 543.

14. McIsaac v. Adams [Mass.] 76 N. E. 654.

15. The services of an attorney in settling an estate in which a minor is interested are not necessaries for which the minor is liable, in the absence of an employment by the minor's guardian, in view of Rev. Laws, c. 145, § 25, requiring guardians to sue for and receive debts due their wards. McIsaac v. Adams [Mass.] 76 N. E. 654.

16. McIsaac v. Adams [Mass.] 76 N. E. 654.

17. See 5 C. L. 327. As to associate counsel, see, also, ante, this section, Implied Contracts.

18. See 5 C. L. 328.

19. In Missouri, courts are allowed to tax as costs in partition proceedings reasonable fees to the attorneys bringing the suit. Liles v. Liles, 116 Mo. App. 413, 91 S. W. 983. Under Rev. St. 1899, § 4422, a verbal agreement between plaintiff and his attorneys in a partition suit, made before bringing the suit, is sufficient to justify the court in allowing a reasonable fee, where no amount was stipulated. Id. Under that section, the allowance should be for services rendered for the benefit of all the owners of the land, and not for the plaintiff exclusively, in conducting adverse litigation on contested issues. Id. 2 Ballinger's Ann. Codes & St. § 5911, providing for the allowance by the court of a reasonable attorney fee, in the foreclosure of a mechanic's or materialman's lien, is constitutional. Littell v. Saulsberry [Wash.] 82 P. 909. A statute allowing a reasonable counsel fee to an alleged fraudulent transferee as a garnishee, where the issue as to the validity of the transfer is found in his favor, is not void; but it does not permit the taxation of a counsel fee against him, when the issue is found against him. D. C. Code, §§ 460, 470, 472, 473. Morimura v. Samaha, 25 App. D. C. 189. What is a reasonable counsel fee in such a case is discretionary with the trial court, whose discretion will not be reviewed unless abused. Id.

20. See 5 C. L. 328, n. 10.

21. See, also, Costs, 5 C. L. 852, n. 72.

22. The statutory provisions regulating the case of railroad rights of way require them to be kept clear of "dead grass, dry weeds," etc., but the declaration specified "dry" grass, etc. Cleveland, etc. R. Co. v. Vickery, 116 Ill. App. 293.

23. Mansfield v. Wallace, 217 Ill. 610, 75 N. E. 682.

24. In re Felson, 139 F. 275. Where an involuntary bankrupt's attorney prepared the schedules and attended the examination of the bankrupt, but afterward represented the bankrupt, such attorney was entitled to $50 for preparing the schedules and attending the examination, but nothing for his subsequent services. Id.

25. See 5 C. L. 329.

26. Under Laws 1897, p. 218, providing for a reasonable attorney fee in eminent domain cases, the court can allow only what the defendant is liable for, either under contract with his attorney, or as the reasonable value of his services. Chicago & S. Traction Co. v. Flaherty [Ill.] 78 N. E. 29. Allowance of $800 attorney fees held to be against the weight of evidence. Id.

27. See 5 C. L. 326, n. 86, 87, 88, 89.

to some extent upon his standing and character in the profession;[28] but there must be some evidence of standing and character in the case, it cannot be left to the jury's conjecture.[29] It is always competent, in a controversy as to the value of legal services, to prove the nature of the litigation and the amount involved;[30] but evidence as to the usual per diem charge of attorneys does not tend to prove, or throw light upon, the value of an attorney's services in negotiating a consolidation of corporate interests,[31] and proof as to what plaintiff had charged in other particular matters is irrelevant.[32] An attorney, after being informed as to what services had been rendered by another attorney in a matter, is qualified to testify to their value, without being shown to be familiar with plaintiff's attainments and experience.[33]

Proceedings to recover.—Fees should be collected by a separate action or proceeding.[34] Attorneys cannot intervene in a divorce suit to collect fees under statutes authorizing the court to allow them to the wife against the husband.[35] Under the common law of New York, a lawyer may recover by action just compensation for his services.[36] Where three attorneys prosecuted an action for which one collected the fee, in a suit by another to collect his share, the third was not a necessary party.[37] Where the complaint alleged an employment by defendant as attorneys and that services had been rendered which were worth a certain reasonable sum, it was not defective in not alleging a promise to pay,[38] or that anything was due from defendant.[39] Alleging that plaintiffs were partners engaged in the practice of law, serves to allege that they were authorized to practice.[40] A reference will not be made unless it is apparent that, from the complicated nature of the issues, it is practically impossible for a jury to determine them.[41] The attorney suing a corporation need not prove that the officer employing him was authorized by by-law or formal resolution.[42] Where the defendant, in an action for attorney's services, alleges a special agreement that the attorney was to receive no pay unless successful, the burden is on him to prove it or the defense fails.[43] Plaintiff must prove that the services were rendered.[44] Diary entries by an attorney since de-

28. Smitn v. Couch [Mo. App.] 92 S. W. 1143. In determining what is a reasonable retainer, the ability and reputation of an attorney, extent of his practice, probability of the retainer's interference with other affairs, magnitude, and nature of the business, and probability of the business bringing large remuneration from the client, are all to be considered. Blair v. Columbian Fireproofing Co. [Mass.] 77 N. E. 762.

29. An instruction that the jury might take into consideration the character and standing of an attorney in estimating the value of his services was erroneous, where there was no evidence thereof. Smith v. Couch [Mo. App.] 92 S. W. 1143.

30. Evidence as to the value of real estate in litigation, or the monthly rental thereof, and that a life estate was secured to defendant by the services, was admissible. Cusick v. Boyne [Cal. App.] 82 P. 985. Evidence of an increase in value of the property in litigation is admissible, where the attorney was to receive no compensation if he were unsuccessful. Smith v. Couch [Mo. App.] 92 S. W. 1143.

31. Hughes v. Ferriman, 119 Ill. App. 169.

32. Fuller v. Stevens [Ala.] 39 So. 623.

33. Such matters are a proper subject for cross-examination. Fuller v. Stevens [Ala.] 39 So. 623.

34, 35. Divorce suit has been compromised and dismissed, and they sought judgment against both husband and wife for their fees, under statute providing for the payment by the husband of the wife's reasonable expenses in divorce suits. Ballinger's Ann. Codes and St. § 5722; Hillman v. Hillman [Wash.] 85 P. 61.

36. The rule which has for centuries obtained in England, that advocates and barristers might not by action compel payment for their services, is peculiar to that country and has never obtained in New York. Spencer v. Busch, 98 N. Y. S. 690. The common law of Missouri in this respect presumed to be the same in Missouri as in New York, in the absence of evidence to the contrary. Id.

37. Rev. St. 1899, §§ 543, 544, do not require such party to be made defendant. State v. Bradley, 193 Mo. 33, 91 S. W. 483.

38. Cusick v. Boyne [Cal. App.] 82 P. 895.

39, 40. Prince v. Kennedy [Cal. App.] 85 P. 859.

41. Under Code Civ. Proc. § 1013. Hoff v. Robert H. Reid & Co., 110 App. Div. 95, 97 N. Y. S. 107.

42. Kelly v. Ning Yung Benev. Ass'n [Cal. App.] 84 P. 321.

43. Cusick v. Boyne [Cal. App.] 82 P. 985.

44. **Evidence held insufficient** to show 250

ceased, are admissible to do so.[45] On the issue that services had been rendered and not yet paid for, evidence that the attorney in another matter had gone beyond his authority in settling a judgment or in retaining money is irrelevant.[46]

Assignments as security.[47]—An alleged verbal assignment of so much of the judgment to be secured, as would be necessary to compensate the attorney for his services, was at the most but an agreement which could take effect as an assignment only when the judgment came into existence.[48]

Lien.[49]—An attorney has a lien, for his compensation for services, on moneys or papers in his hands received by him in the course of his employment.[50] There is also in many states a statutory lien[51] which, when the statute so intends, supersedes the common-law lien.[52] Statutes giving such liens are remedial in character and must be liberally construed.[53]

The lien is a mere claim to the equitable interference of the court for his benefit,[54] and its amount is measured by what he has become entitled to receive;[55] hence, an attorney employed on a contingent fee has no lien for the same before judgment.[56]

The lien is not confined to property recovered by judgment.[57] A judgment for costs may be one "in favor of" the client to which a lien may attach though no counterclaim was made.[58] The right to a lien on moneys recovered for one common in interest but not the same as the client has been denied.[59] It does not at-

days' services actually rendered on a contract for $100 per day. People v. New York Building-Loan Banking Co., 98 N. Y. S. 290.

45. Burke v. Baker, 97 N. Y. S. 768.

46. Thompson v. Emerson [Mo. App.] 94 S. W. 818.

47. See 3 C. L. 385.

48. De Wandelaer v. Sawdey [Conn.] 63 A. 446.

49. See 5 C. L. 329.

50. First State Bank v. Sibley County Bank [Minn.] 105 N. W. 485; In re Bender's Will, 97 N. Y. S. 171.

51. In New York there is a statutory and a common-law lien. In re Edward Ney Co., 99 N. Y. S. 982.

52. The statute of Kansas gives an attorney a lien for his compensation upon money due his client from the adverse party in any action or proceeding in which the attorney is employed (Gen. St. 1901, § 395, and by Laws 1905, p. 102, c. 68). Holmes v. Waymire [Kan.] 84 P. 558. This statute is a substitute for and a substantial enactment for the common law upon the subject of attorneys' liens. Id.

53. Code Civ. Proc. § 66. Oishei v. Metropolitan St. R. Co., 110 App. Div. 709, 97 N. Y. S. 447.

54. Whinery v. Brown [Ind. App.] 75 N. E. 605. Where an attorney takes a case with the understanding that he must look to the judgment for his services and disbursements, he has an equitable lien upon the judgment obtained. De Wandelaer v. Sawdey [Conn.] 63 A. 446.

55. "Costs" to which an attorney never became entitled will not be included in the amount of a lien on proceeds of a settlement. Oishei v. Metropolitan St. R. Co., 110 App. Div. 709, 97 N. Y. S. 447.

56. Under B. & C. Comp. § 1063, giving attorneys a lien on the judgment or decree. Jackson v. Stearns [Or.] 84 P. 798. Where an attorney had a contract with his clients for a contingent fee of 12 1-2 per cent. of any sum recovered, and the action was dismissed by his client as ill advised, without extinguishment of the claim or any settlement thereof, the attorney had no lien enforcible against defendants. Sullivan v. McCann, 98 N. Y. S. 947.

57. In re Bender's Will, 97 N. Y. S. 171.

58. Under a statute providing for an attorney's lien, from the commencement of an action or the service of an answer containing a counterclaim, on a judgment in his client's favor (Code Civ. Proc. § 66), although an answer contained no counterclaim, yet where a judgment for costs was rendered in favor of defendant, the attorney's lien attached thereto. Agricultural Ins. Co. v. Smith, 98 N. Y. S. 347.

59. **NOTE. Lien on moneys recovered for another than client:** Minority stockholders of a corporation brought action against certain directors, with whom the corporation was joined as defendant, to recover dividends wrongfully paid. After commencement of the action, but before trial, the defendant directors repaid to the corporation the full amount claimed. Held, that the plaintiffs' attorneys are not entitled to have their claim for compensation declared a lien thereon. In re Meighan, 106 App. Div. 599.

The New York Code of Civil Procedure, § 66, gives an attorney a lien upon his client's cause of action that cannot be affected by any settlement between the parties before judgment. But here the attorneys were not retained by the corporation; and the general rule is that an attorney must look to his client alone for his fee, not to other persons who may be benefited by the action. Scott v. Dailey, 89 Ind. 477. It is true that the minority stockholders merely set the judicial machinery in motion, and that in effect the action is that of the corporation. Pom. Eq. Jur. [3d Ed.] § 1095. And doubtless they should be given

tach to land which is the subject of the litigation.[60] An attorney's right to the lien is not affected by the fact that his client is an executor and the services were rendered and property received on behalf of an estate,[61] nor can an attorney's lien exist concerning property to which the client had no title or claim.[62] And where the agreement between client and attorney provided that the attorney should receive one-half of the land involved in the litigation as his compensation, and rested in parol, the attorney, never having had possession of the land, could not maintain a suit to set aside a deed from his client to defendant, in view of the statute requiring conveyances of land to be in writing.[63]

The attorney's lien on a judgment, for his contract fee, is superior to the right of set-off.[64] But fees of the attorney of an administrator in a suit to sell property to pay debts are not prior to a mortgage lien nor payable as extraordinary expenses.[65] Failure to appear of record or give notice does not put the assignee of a judgment superior to the attorney under a statute calling for notice to defendant only.[66]

the right of reimbursement for reasonable attorney's fees from the fund recovered in an action which the corporation should have brought. Meeker v. Winthrop Iron Co., 17 F. 48. And see Trustees v. Greenough, 105 U. S. 527, 26 Law. Ed. 1157. But the attorneys should look to their clients for remuneration, and not be given a direct lien on this fund. If the minority stockholders had agreed that their attorneys should have one-quarter of the judgment recovered, no one would maintain that the attorneys would have a lien for this amount against the fund paid to the corporation. There is, however, direct authority against this decision. Grant v. Lookout Mountain Co., 93 Tenn. 691; Central R. etc., of Georgia v. Pettus, 113 U. S. 116, 124, 28 Law. Ed. 915; Id., 28 Law Ed. 918.—From 19 Harv. L. R. 211.

60. Neither the statute of Kansas [Gen. St. 1901, § 395, amended by Laws 1905, p. 102, c. 68] (Holmes v. Waymire [Kan.] 84 P. 558), nor that of Kentucky [Ky. St. 1903, § 107] can be so extended (Lytle v. Bach [Ky.] 93 S. W. 608.

61. In re Bender's Will, 97 N. Y. S. 171.

62. Where in an action by the wife for separation, the parties stipulated that the wife should have $3,000 in lieu of all claims against her husband for damages and alimony and the husband deposited that sum with his attorney to carry out the agreement, but marital relations were subsequently resumed, the wife had no claim and her attorney no lien on the money. In re Brackett, 99 N. Y. S. 802.

63. B. & C. Comp. § 793. Jackson v. Stearns [Or.] 84 P. 798.

64. Brown v. Lapp [Ky.] 89 S. W. 304. Where the judgment is wholly for disbursements and services in correcting an erroneous decision, and plaintiff is an insolvent nonresident, the lien is superior to defendant's claim of set-off on a judgment rendered by another court. Smith v. Cayuga Lake Cement Co., 107 App. Div. 524, 95 N. Y. S. 236.

Note. Priority as to right of set off: The conflict in England on this question between the courts of Common Pleas and the King's Bench was finally settled after the Judicature Acts of 1873 in favor of the equitable rule that the attorney's lien is subject to a set-off. See Jones, Law of Liens [2d Ed.] § 215. There is a singular conflict in this country. If the client has assigned the judgment to his attorney before an attempt at set-off has been made, the attorney's right will defeat the set-off. Ripley v. Bull, 19 Conn. 53. **Contra.** Fitzhugh v. McKinney, 43 F. 461. But if no such assignment has been made, the courts are about evenly divided as to whether the lien is prior. The New York court has already allowed the lien to prevail when the judgments were rendered in separate actions although between the same parties. This court now applies the rule where the judgments are rendered in the same action. The attorney's lien is a derivative claim depending upon the interest of his client in the judgment. If this interest in the hands of the client is subject to an existing right of set-off, logically it is difficult to see how the attorney has a greater right. National Bank of Winterset v. Eyre, 8 F. 733. In England, the attorney's right to have his fees and disbursements paid out of the judgment obtained has long been recognized. Marshall v. Meech, 51 N. Y. 140, 10 Am. Rep. 572. The courts of common pleas and chancery held the lien subordinate to defendants's right of set-off. Taylor v. Popham, 15 Ves. 79. Later, these courts reversed their position and adopted the rule of the Court of King's Bench. Simpson v. Lamb, 49 Eng. L. & Eq. 59. The same rule was adopted by the supreme court of New York in the early case of Devoy v. Boyer, 3 Johns. [N. Y.] 247. In the majority of states the attorney is deemed, to the amount of his lien, an equitable assignee of the judgment. Marshall v. Meech, 51 N. Y. 140, 10 Am. Rep. 572. On the other hand, the courts of a few states hold the right of set-off is superior to the attorney's lien. McDonald v. Smith, 57 Ves. 502; Moseley v. Norman, 74 Ala. 422.—From 15 Yale L. J. 143. Smith v. Cayuga Lake Cement Co., 107 App. Div. 524, 95 N. Y. S. 236. See 15 Yale L. Jr. 143; Smith v. Cayuga Lake Cement Co., 107 N. Y. App. Div. 524, 95 N. Y. S. 236. See 19 Harv. L. R. 211.

65. Sherman v. Millard, 6 Ohio C. C. (N. S.) 338.

66. An attorney employed on commission to enforce a judgment, whose name did not appear in the records, upon assignment of the judgment without notice to the assignee

An attorney's lien is subject to his client's right to settle,[67] and an honest settlement will not be interfered with.[68] But if it appears that such settlement was collusive and intended to defraud the attorney, the court may set aside the order of dismissal and permit the attorney to proceed in the name of his client as plaintiff, to ascertain what sum, or what interest in the subject-matter is due the attorney for his services;[69] but before such order will be set aside, it must appear that the defendant participated in the fraudulent intent.[70]

Loss of lien.[71]—In New York the attorney's statutory lien is not lost by a settlement made by his client, but attaches to the proceeds of such settlement,[72] and an attorney has a lien on the proceeds of a settlement made by his client with the defendant, which he may enforce against such defendant, who has constructive notice thereof, although the defendant has paid the money to the client;[73] and such enforcement may be had without regard to the question of solvency of the client, or of any prior proceedings against him, but the client must be made a party to the proceeding against the defendant.[74]

Enforcement of lien.[75]—Ordinarily the remedy is equitable[76] and not at law,[77] except by statutory modes. Where an attorney has a contract with his client for a contingent fee of a certain percentage of the recovery and his client dismisses the action, the attorney has an undeniable right to have his fee fixed as between him and his client.[78] In New York a surrogate's court can determine and enforce the lien of an attorney rendering services in the settlement and distribution of the estate of a testator;[79] but the municipal court of the city of New York has no power to enforce such lien, even if it exists in that court.[80] The summary power of courts to determine liens is limited to professional engagements and does not

of his employment, was nevertheless entitled to a lien for his agreed commission on the amount recovered, it not having been paid over, notwithstanding Ky. St. 1903. § 107, relating to the enforcement of attorneys' liens and providing for notice of the lien to the defendant, if the record shows the name of the attorney, such provision being for defendant's benefit. Tyler v. Slemp [Ky.] 90 S. W. 1041.

67. An agreement between an attorney and his client whereby they were each to receive 50 per cent. of the amount recovered for personal injuries after payment of expenses will not prevent the client from settling his claim against defendant and dismissing the action without his attorney's consent. Security Nat. Bank v. St. Croix Power Co. [Wis.] 105 N. W. 914. Where an attorney made an agreement to bring an action and pay all expenses on a right of action for damages, for 50 per cent. of moneys recovered, after payment of expenses, the attorney had no lien on the right of action such as to prevent a compromise of the claim by the client. Boogren v. St. Paul City R. Co. [Minn.] 106 N. W. 104. See, also, ante, this section.

68. Petition by attorney for leave to continue dismissed. Boogren v. St. Paul City R. Co. [Minn.] 106 N. W. 104. After a case has been amicably adjusted by the parties, it will not be continued in court merely to enable the attorney to collect his fees by obtaining a judgment. De Wandelaer v. Sawdey [Conn.] 63 A. 446.

69. Jackson v. Stearns [Or.] 84 P. 798.

70. Where no adequate consideration is given by the defendant for the settlement, it is evidence of his bad faith. Jackson v. Stearns [Or.] 84 P. 798.

71. See 5 C. L. 330.

72, 73. Under Code Civ. Proc. § 66. Olshei v. Metropolitan St. R. Co., 110 App. Div. 709, 97 N. Y. S. 447.

74. Olshei v. Metropolitan St. R. Co., 110 App. Div. 709, 97 N. Y. S. 447.

75. See 5 C. L. 330.

76. Where the attorneys were by agreement entitled to ten per cent. of the proceeds of an annuity as the same was paid, with a lien to secure the same, and both the trust company charged with the payment and the annuitant refused to recognize the lien, the attorneys' remedy was by suit in equity to enforce the lien. Ransom v. Cutting, 98 N. Y. S. 282.

77. While it may be that an attorney, who has a contract for a percentage of the judgment recovered or of the proceeds of settlement, can recover in an action in equity against the defendant, upon a showing that the defendant had notice of his said interest therein, such recovery cannot be had in an action at law; and a motion by the plaintiff for a dismissal of the suit brought upon the claim will be granted over the protest of the attorney. Bailey v. Toledo & O. C. R. Co., 3 Ohio N. P. (N. S.) 366.

78. As provided by Code Civ. Proc. § 66. Affidavit in return to order to show cause why the action should not be dismissed in accordance with a stipulation between the parties, could not be regarded as a petition for the fixing of fees. Sullivan v. McCann, 98 N. Y. S. 947.

79. Under Code Civ. Proc. §§ 2, 66, and Const. 1894, art. 6, § 15. In re Bender's Will, 97 N. Y. S. 171.

80. Van Der Beek v. Thomason, 99 N. Y. S. 538.

cover liens for nonprofessional business services [81] and on issue joined as to the professional character of services and a negative finding the petitioner is left to his remedy by action.[82] Where the statute fastens the lien of a contingent fee on the cause of action after notice to defendant, the attorney may follow proceeds paid over, to the hands of the client or any other person who may have received them, or may recover his share from defendant in a separate action, or may if judgment has been reached enforce it against that.[83] A stipulation against compromise without consent of counsel does not bind defendant when not included in the statutory notice given to attach the lien.[84] A contract for a percentage of recovery is computed on the amount of settlement and not on a judgment which by pendency of motions has not become final.[85] While a judgment not final may not be settled for less than face in fraud of attorneys' liens, settlement for less than face is not of itself fraudulent.[86] In case of settlement pending motion in arrest, the motions may be overruled to protect a lien which attaches to the judgment [87] and execution may then go for the amount of the fee.[88] Where the attorney may notify the party sought to be charged of his intention to proceed in his client's name, and so recover his fees,[89] he is not entitled to maintain a proceeding to enjoin the dismissal of the suit.[90] In New York neither in case of a common-law nor statutory lien can it be referred "to hear and determine" but only "to take and report" evidence.[91]

§ 8. *Authority of attorney to represent client. Creation, proof, and termination of authority.*[92]—The legal presumption is that an attorney has authority to appear for the person for whom he assumes to act,[93] and the authority of attorneys

81. In re Edward Ney Co., 99 N. Y. S. 982.

82. In re Edward Ney Co., 99 N. Y. S. 982. Services held to have been professional where employment began as such and property claimed under lien was so acquired. Id.

83, 84, 85, 86, 87, 88. Curtis v. Metropolitan St. R. Co. [Mo. App.] 94 S. W. 762.

89, 90. Jackson v. Stearns [Or.] 84 P. 798.

91. In re Edward Ney Co., 99 N. Y. S. 982.

92. See 5 C. L. 331.

93. Bacon v. Mitchell [N. D.] 106 N. W. 129. Presumption of authority of attorney to appear for a bank held to render immaterial the question of the validity of the resolution of the directors authorizing him to enforce collection. People's Home Sav. Bank v. Rauer [Cal. App.] 84 P. 329.

NOTE. Rebuttal of presumption that attorney has authority to appear. When and by whom this presumption may be rebutted: This presumption may be rebutted, and an investigation by the court be called for, under various circumstances. Either the client or the opposite party may make application for an investigation by the court during the pendency of legal proceedings. Or the question may arise in a subsequent action on the judgment obtained through his unauthorized appearance.

(a) During lis pendens. 1. By the client: If an attorney undertakes to appear in a case, without authority from the party whom he professes to represent, his act is an abuse of the privileges granted to him by the court, which it will investigate and correct, upon the application of the alleged client. Clark v. Willett, 35 Cal. 534; People v. Mariposa, 39 Cal. 683. But although the client may thus make his application to the court for relief, it is not in all cases of assumed authority that the court will grant it. For if the party has himself been guilty of laches, and has permitted the attorney to act, without authority, for him, when he had notice that he was so acting, or had knowledge of such facts as would put him on inquiry, he may thus deprive himself of the right to deny the attorney's authority. Jones v. Williamson, 5 Cold [Tenn.] 377; Harshey v. Blackmarr, 20 Iowa, 161, 89 Am. Dec. 520; Bryant v. Williams, 21 Iowa, 329; Macomber v. Peck, 39 Iowa, 351; Seale v. McLaughlin, 28 Cal. 668. Such cases rest on the ground of estoppel. A party cannot sleep upon his rights, or intrust his business to attorneys, and without the least show of diligence, come in years after the time at which he could have availed himself of the advantage the law gave him, and on that, set aside a judgment or decree of a court of competent jurisdiction. Jones v. Williamson, 5 Cold [Tenn.] 377.

2. **By the adverse party:** Not only may the authority of the attorney to appear in a case be called into question by his alleged client, but also by the adverse party in a proper case. If he has reasonable grounds to believe that the attorney is not acting under proper authority, he may make a motion to the court to require him to produce it. But before the court will grant such motion, and require the attorney of his adversary to produce his authority, he must show that the attorney does not in fact possess the authority he assumes, and that his rights will be jeopardized by being brought into litigation, without the consent of the man who stands on the record as his adversary. The court will not proceed upon light grounds or mere suspicions. If, however, the party does show such facts and raises a presumption that the attorney does not possess the assumed authority from his client, or shows that the justice of the case

requires it, the court will require the attorney to show his authority. ["A lawyer prosecuting a suit should be required to produce satisfactory evidence of his authority to do it in every case, when there is reasonable ground to apprehend that he is proceeding without permission of the individual who stands on the record as plaintiff, and in case of his failure to produce such evidence the suit should be dismissed by the court."] Low v. Settle, 22 W. Va. 392. And it is the duty of the court to require the attorney to show his authority, where it is questioned, not capriciously, but upon evidently good grounds. Tally v. Reynolds, 1 Ark. 99, 31 Am. Dec. 737; People v. Mariposa County, 39 Cal. 683; Hunter v. Bryant, 98 Cal. 248; State Use of West v. Houston, 3 Har. [Del.] 15; Spencer v. Bailey, 1 Hawaii, 205; Leslie v. Fischer, 62 Ill. 118; Bell v. Farwell, 89 Ill. App. 638; State v. Tilghman, 6 Iowa, 496; McAlexander v. Wright, 3 T. B. Mon. [Ky.] 189, 16 Am. Dec. 93; Belt v. Wilson's Adm'r, 6 J. J. Marsh. [Ky.] 495, 22 Am. Dec. 88; O'Flynn v. Eagle, 7 Mich. 306; McKiernan v. Patrick, 5 How. [Miss.] 333; Keith v. Wilson, 6 Mo. 435, 35 Am. Dec. 443; Manchester Bank v. Fellows, 28 N. H. 302; Hamilton v. Wright, 37 N. Y. 502; Ninety-nine Plaintiffs v. Vanderbilt, 1 Abb. Pr. [N. Y.] 193, 4 Duer. [N. Y.] 632; Reece v. Reece, 66 N. C. 377; Allen v. Green, 1 Bailey [S. C.] 448; Hellman v. McWhennie, 3 Rich. L. [S. C.] 364; Jones v. Williamson, 5 Cold. [Tenn.] 379; Ex parte Gillespie, 3 Yerg. [Tenn.] 325; Colorado Coal & Iron Co. v. Carpita, 6 Colo. App. 248. Objection to the opposing attorney's authority should be made at the earliest possible opportunity, and as a general rule, at least, should be made by motion before the trial, and is not a question to be disposed of at the trial. People v. Lamb, 85 Hun [N. Y.] 171; Clark v. Fitch, 2 Wend. [N. Y.] 464; Indiana B. & W. R. Co. v. Maddy, 103 Ind. 200. As was said in a Delaware case: "In our practice, therefore, the court would expect some grounds to be laid by affidavit or otherwise, before they would, at the instance of the defendants require the plaintiff's attorney to produce a written warrant, or other proof of his authority. Doubtless where fraud was suggested, and especially if a minor was concerned and in danger of being injured by an unauthorized proceeding before us, we would, for the protection of either guardian, ward, or defendant inquire into the attorney's authority; and would, if the case required it, apply other remedy than the mere striking of the suit." State v. Houston, 3 Har. [Del.] 15, 20. But the attorney need not show his authority on a mere demand (Norberg v. Heineman, 59 Mich. 210), nor can he be called on to produce it without previous notice (Beckley v. Newcomb, 24 N. H. 359; Holder v. State [Tex. Cr. App.] 29 S. W. 793). "The right of the court to compel an attorney of the court to exhibit his authority to sue, arises from the control which it exercises over all its process and proceedings, and over its officers in order to prevent abuse. It arises from no statute but emanates from the breast of the court, and from its desire to cause justice between the parties." Ninety-nine Plaintiffs v. Vanderbilt, 1 Abb. Pr. [N. Y.] 196.

(b) In subsequent proceedings. 1. **On a domestic judgment:** The authorities do not all agree as to the effect the attorney's unauthorized appearance, in an action on the judgment obtained through such appearance, where the judgment is a domestic one. Many of the decisions hold that where the attorney's authority is sought to be impeached in a collateral proceeding on the judgment or on appeal, the presumption that the appearance of the attorney was authorized by the litigant is not merely prima facie, but is conclusive, and the party whom the attorney professed to represent will not be permitted to prove that he never authorized the attorney to appear for him. Bonnifield v. Thorp, 71 F. 924; Finneran v. Leonard, 7 Allen [Mass.] 54, 83 Am. Dec. 665; Young v. Watson, 155 Mass. 77; Corbitt v. Timmerman, 95 Mich. 581, 35 Am. St. Rep. 586; Bunton v. Lyford, 37 N. H. 512, 75 Am. Dec. 144; Brown v. Nichols, 42 N. Y. 26; Washbon v. Cope, 144 N. Y. 287; Pilsbury v. Dugan's Adm'r, 9 Ohio 117, 34 Am. Dec. 427; Town of St. Albans v. Bush, 4 Vt. 58, 23 Am. Dec. 246; Abbott v. Dutton, 44 Vt. 546, 8 Am. Rep. 394. Thus in an action of debt on a judgment, a plaintiff is bound by a judgment for costs rendered against him in an action brought in his name by an attorney, without his knowledge or consent. Town of St. Albans v. Bush, 4 Vt. 58, 23 Am. Dec. 246. But this rule is inapplicable in a case where the defendant in the judgment was a nonresident of the state during the pendency of the proceedings and was not within the jurisdiction. Vilas v. Plattsburgh & M. R. Co., 123 N. Y. 440, 20 Am. St. Rep. 771; Mastin v. Gray, 19 Kan. 458, 27 Am. Rep. 149. Other decisions however, tend toward holding that a judgment rendered upon the unauthorized appearance of the attorney is invalid, and the person against whom such judgment is rendered may question its validity, either in a direct or collateral proceeding. Robson v. Eaton, 1 Term. R. 62; Bayley v. Buckland, 1 Exch. 1, 16 Law J. Exch. 204; Reynolds v. Howell, L. R. 8 Q. B. 398; Merced County v. Hicks, 67 Cal. 108; Williams v. Neth, 4 Dak. 360; Anderson v. Hawhe, 115 Ill. 33; White v. Jones, 38 Ill. 163; Sherrard v. Nevius, 2 Ind. 241, 52 Am. Dec. 508; Macomber v. Peck, 39 Iowa, 351; Powell v. Spaulding, 3 G. Greene [Iowa] 443; Harshey v. Blackmarr, 20 Iowa 161, 89 Am. Dec. 520; Reynolds v. Fleming, 30 Kan. 106, 46 Am. Rep. 86; Brinkman v. Shaffer, 23 Kan. 528; Christie v. Garrity, 14 Ky. L. R. 910, 22 S. W. 158; Walworth v. Henderson, 9 La. Ann. 339; Decuir v. Lejeune, 15 La. Ann. 569; McNamara v. Carr, 84 Me. 299; Stocking v. Hanson, 35 Minn. 207; Keith v. Wilson, 6 Mo. 435, 35 Am. Dec. 443; Kepley v. Irwin, 14 Neb. 300; Kirschbaum v. Scott, 35 Neb. 199; Bryn Mawr Nat. Bank v. James, 152 Pa. 364. Thus, it has been held that a domestic judgment may be impeached collaterally by the defendant, by proof that he was not served with process and did not appear, although the record recites that he was served, and contains a forged appearance by attorney on his behalf. Ferguson v. Crawford, 70 N. Y. 253, 26 Am. Rep. 589. This doctrine is based upon the principle that as the attorney's appearance was unauthorized, there was no appearance of the party and consequently, the court had no jurisdiction of the latter's person, and not having jurisdiction

its judgment was voidable. Thus, where, in an action by attachment, there was no service of summons or publication of notice on the defendant, an appearance by an attorney at law, of his own motion and without authority, in the name of the defendant, cannot confer jurisdiction over the person of the defendant. Anderson v. Hawhe, 115 Ill. 33. So the court will strike off a judgment when the affidavit of the defendant states that she had no knowledge that a suit had been brought against her until execution was issued upon the judgment; that the attorney who accepted service of the writ and statement was not her attorney; that she had never consulted him professionally in respect to the said suit, and that he had no authority from her to accept service as her attorney of such writ and statement. Bryn Mawr Nat. Bank v. James, 152 Pa. 364. If damages are sustained by the defendant, by reason of the judgment rendered against him through the unauthorized appearance of the attorney, the party may have his remedy by a civil action against the attorney. Anon., 1 Salk. 86; Anon., 6 Mod. 14; Field v. Gibbs, Pet. C. C. 155, Fed. Cas. No. 4,766; Marvel v. Manouvrier, 14 La. Ann. 3, 74 Am. Dec. 425; Dorsey v. Kyle, 30 Md. 512, 96 Am. Dec. 617; Munnikuyson's Adm'x v. Dorsett's Adm'x, 2 Har. & G. [Md.] 378; Schirling v. Scites, 41 Miss. 644; Bunton v. Lyford, 37 N. Y. 512, 75 Am. Dec. 144; Everett v. Warner Bank, 58 N. H. 340; Bogardus v. Livingston, 2 Hilt. [N. Y.] 236; Hoffmire v. Hoffmire, 3 Edw. Ch. [N. Y.] 173; Jackson v. Stewart, 6 Johns. [N. Y.] 34; American Ins. Co. v. Oakley, 9 Paige [N. Y.] 496, 38 Am. Dec. 561; Cyphert v. McClune, 22 Pa. 195. In some cases it has been held that such a judgment will not be set aside, if the attorney is an able and responsible person. Anon., 1 Salk. 88; Anon., 6 Mod. 16; Bayley v. Buckland, 1 Exch. I, 16 Law J. Exch. 204; Munnikuyson's Adm'x v. Dorsett's Adm'x, 2 Har. & G. [Md.] 378; Denton v. Noyes, 6 Johns. [N. Y.] 298, 5 Am. Dec. 237; Allen v. Stone, 10 Barb. [N. Y.] 547; American Ins. Co. v. Oakley, 9 Paige [N. Y.] 496, 38 Am. Dec. 561; Campbell v. Bristol, 19 Wend. [N. Y.] 101; University of N. C. v. Lassiter, 83 N. C. 38 [In Hamilton v. Wright, 37 N. Y. 502, the court says. "When an appearance is entered by an attorney without authority, the inquiry, whether such attorney is of sufficient responsibility to answer for his unauthorized conduct to the party injured thereby, is entertained. And it may be proper always to inquire whether the injury to the party is irremediable unless such appearance be set aside, and the proceedings founded thereon vacated. In exercise of their general equitable control over their own judgments, the court may and should consider whether they can relieve the party for whom an unauthorized appearance is made, without undue prejudice to the party who has in good faith relied upon such appearance and the official character of the attorney who appears. But it would be at variance with the scheme and plan upon which we universally administer the law, if a defendant could be prosecuted by a responsible attorney, in full authority to practice in our courts, and after having successfully and in good faith defended, as the case might be, through all the tribunals of justice, and to final judgment in the court of last resort, be required to submit to an order setting aside the proceedings, and be left to be again prosecuted for the same cause of action, on the mere ground that the plaintiff's attorney had no authority from the plaintiff to bring the action. The law which gives to attorneys their commissions must be deemed to guarantee to defendants protection against such a result."] or if the adverse party has acquired rights. Williams v. Johnson, 112 N. C. 424; American Ins. Co. v. Oakley, 9 Paige [N. Y.] 496, 38 Am. Dec. 561. Thus, where rights have been acquired by one who had no notice of the lack of authority on the part of an attorney who professed to represent the owners in a proceeding for the sale of land, no evidence tending to disprove the existence of such authority ought to be admitted to overthrow the rights so acquired. Williams v. Johnson, 112 N. C. 424. But a judgment rendered upon an unauthorized appearance of an attorney will be absolutely vacated and set aside, where the attorney is insolvent at the time the application for relief is made, although he may not have been insolvent when the judgment was rendered, provided the application is made before the rights of the party procuring the judgment have changed to his prejudice. Vilas v. Plattsburgh & M. R. Co., 123 N. Y. 440, 20 Am. St. Rep. 771, 9 L. R. A. 844; Campbell v. Bristol, 19 Wend. [N. Y.] 101; Smyth v. Balch, 40 N. H. 363 [the court will grant a perpetual injunction from enforcing the judgment where the attorney is poor and irresponsible]; Anon., 6 Mod. 16; Bayley v. Buckland, 1 Exch. 1, 16 Law J. Exch. 204. If the adverse party has acquired no rights in the case, the court may, upon the application of the supposed client, correct the proceedings and compel the attorney to pay the costs. American Ins. Co. v. Oakley, 9 Paige [N. Y.] 496, 38 Am. Dec. 561; French v. French, 4 Law Rec. (N. S.; Irish) 123. It will be seen, however, by reference to these cases, that the prevailing opinion is that, on principle, the responsibility or solvency of the attorney really has nothing to do with the question and that no party not guilty of negligence should be bound by the act of another, which was wholly and confessedly unauthorized. Harshey v. Blackmarr, 20 Iowa, 161, 89 Am. Dec. 520, 527. The better rule, in the United States, now seems to be that where a judgment is rendered against a party upon the unauthorized appearance of an attorney he may be relieved therefrom, irrespective of the question whether the attorney is responsible or not, by a prompt and proper application to the court or by bill in equity; and the presumption of authority may be contradicted by extrinsic as well as intrinsic evidence. Shelton v. Tiffin, 6 How. [U. S.] 163, 12 Law. Ed. 643; Truett v. Wainright, 9 Ill. 418; Wiley v. Pratt, 23 Ind. 628; Dec. 520; Bryant v. Williams, 21 Iowa, 331; Newcomb v. Dewey, 27 Iowa, 390; Marvel v. Manouvrier, 14 La. Ann. 3, 74 Am. Dec. vel v. Manouvrier, 14 La Ann. 3, 74 Am. Dec. 424; Ridge v. Alter, 14 La. Ann. 866; Hess v. Cole, 23 N. J. Law, 116; Price v. Ward, 25 N. J. Law, 225; McKelway v. Jones 17 N. J. Law, 345; Porter v. Bronson, 19 Abb. Pr. [N. Y.] 236, 29 How. Pr. 292; Yates v. Horanson, 7 Rob. [N. Y.] 12; Rogers v. McLean, 31

Barb. [N. Y.] 134; Critchfield v. Porter, 3 Ohio, 518; Abernathy v. Jenkins, 19 Ohio, 286; Jones v. Williamson, 5 Cold. [Tenn.] 371; Boro v. Harris, 13 Lea [Tenn.] 36.

2. **On a foreign judgment:** In the case of foreign judgments, however, recovered in other states through the unauthorize appearance of an attorney, it is a well settled rule that in an action brought upon them the defendant may show that he was not served with process, and that the attorney who entered the appearance for him had no authority to do so; and consequently the court had no jurisdiction over him. D'Arcy v. Ketchum, 11 How. [U. S.] 165, 13 Law. Ed. 648; Harris v. Hardeman, 14 How. [U. S.] 334, 14 Law. Ed. 444; Shelton v. Tiffin, 6 How. [U. S.] 164, 12 Law. Ed. 643; Kingsbury v. Yniestra, 59 Ala. 320; Eaton v. Pennywit, 25 Ark. 144; Aldrich v. Kinney, 4 Conn. 380, 10 Am. Dec. 151; Thompson v. Emmert, 15 Ill. 415; Welch v. Sykes, 8 Ill. 197, 44 Am. Dec. 689; Sherrard v. Nevius, 2 Ind. 241, 52 Am. Dec. 508; Harshey v. Blackmarr, 20 Iowa, 161, 89 Am. Dec. 520; Baltzell v. Nosler, 1 Iowa, 588, 63 Am. Dec. 466; Latterett v. Cook, 1 Iowa, 1, 63 Am. Dec. 428; Hindman v. Mackall, 3 G. Greene [Iowa] 170; Whetstone v. Whetstone, 31 Iowa, 281; Miller v. Gaskins, 3 Rob. [La.] 94; Phelps v. Brewer, 9 Cush. [Mass.] 390, 57 Am. Dec. 56; Carleton v. Bickford, 13 Gray [Mass.] 591, 74 Am. Dec. 652; Finneran v. Leonard, 7 Allen [Mass.] 54, 83 Am. Dec. 665; Wright v. Andrews, 130 Mass. 149; Napton v. Leaton, 71 Mo. 358; Price v. Ward, 25 N. J. Law, 225; Hess v. Cole, 23 N. J. Law, 116; Kerr v. Kerr, 41 N. Y. 275; Long v. Long, 1 Hill [N. Y.] 599; Gardner v. Tyler, 16 Abb. Pr. [N. Y.] 22, 25 How. Pr. 220; Norwood v. Cobb, 24 Tex. 551; Chunn v. Gray, 51 Tex. 112; Newcomb v. Peck, 17 Vt. 302, 44 Am. Dec. 340; Wilson v. Bank of Mt. Pleasant, 6 Leigh [Va.] 570; Rape v. Heaton, 9 Wis. 328, 76 Am. Dec. 269. And this rule is true, notwithstanding any recitals in the judgment record to the contrary. Arnott v. Webb, 1 Dill. 362, Fed. Cas. No. 562; Dozier v. Richardson, 25 Ga. 90; Lawrence v. Jarvis, 32 Ill. 304; Gilman v. Gilman, 126 Mass. 26, 30 Am. Rep. 646, Wright v. Andrews, 130 Mass. 149; Hall v. Williams, 6 Pick. [Mass.] 232, 17 Am. Dec. 356; Price v. Ward, 25 N. J. Law, 225; Hess v. Cole, 23 N. J. Law, 116; Starbuck v. Murray, 5 Wend. [N. J.] 148, 21 Am. Dec. 172; Chapman v. Austin, 44 Tex. 133; Rape v. Heaton, 9 Wis. 328, 76 Am. Dec. 269. When an action is brought against a person on a foreign judgment and he wishes to defend by showing that the court had no jurisdiction of his person, he may do so by showing that he had no legal notice of the suit, and that he had authorized no one to appear in his name. The mere fact that there was a recital in the judgment record that the party "came in" or "executed" or a similar recital does not show conclusively that he had legal notice, or that the attorney's appearance was authorized. Pollard v. Baldwin, 22 Iowa, 328 ["duly served"]; Gleason v. Dodd, 4 Metc. [Mass.] 333; Watson v. New England Bank, 4 Metc. [Mass.] 343; Marx v. Fore, 51 Mo. 69, 11 Am. Rep. 432; Starbuck v. Murray, 5 Wend. [N. Y.] 148, 21 Am. Dec. 172; Hoffman v. Hoffman, 46 N. Y. 30, 7 Am. Rep. 299; Noyes v. Butler, 6 Barb. [N. Y.] 613; Pennywit v. Foote, 27 Ohio St. 600, 22 Am. Rep. 340; Chunn v. Gray, 51 Tex. 112; Norwood v. Cobb, 24 Tex. 551 [return "executed"]; Easley v. McClinton, 33 Tex. 288 ["executed"]. This rule is not in conflict with Article IV, § 1, of the constitution of the United States, which provides that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state," because this provision refers only to such records, when the court had jurisdiction over the parties; but in these cases, as the attorney appeared without authority, the cause was not properly within the jurisdiction of the court. Gilman v. Gilman, 126 Mass. 26, 30 Am. Rep. 646; Pennywit v. Foote, 27 Ohio St. 600, 22 Am. Rep. 340, note; Thompson v. Whitman, 18 Wall. [U. S.] 457, 21 Law. Ed. 897; Knowles v. Gaslight & C. Co., 19 Wall. [U. S.] 58, 22 Law. Ed. 70; Mills v. Duryee, 7 Cranch [U. S.] 481, 3 Law. Ed. 411; D'Arcy v. Ketchum, 11 How. [U. S.] 165, 13 Law. Ed. 648. It will be seen that a distinction is made between domestic and foreign judgments obtained by the authorized appearance of the attorney. The only apparent reason for this distinction is, that, "in the case of a foreign judgment it is impossible, or at least unreasonable, to require the defendant to go to the state which rendered it and attack it directly by motion or bill;" therefore he is permitted to plead the lack of authority in the attorney, in a collateral as well as a direct proceeding. "Whereas in the case of a domestic judgment, it may be deemed better to force the party to assail it directly, * * * by prohibiting him from resorting to the plea of a want of authority in the attorney, collaterally," as a defense to an action on the judgment. Harshey v. Blackmarr, 20 Iowa, 161, 89 Am. Dec. 523. [And as was said in Finneran v. Leonard, 7 Allen [Mass.] 54, 83 Am. Dec. 665, 666: "The strong reason for permitting judgments rendered in other states to be impeached for want of jurisdiction of the parties, was the necessity of such a rule of law, as the only effectual way to protect our citizens from the effects of judgments improperly rendered against them by courts having no jurisdiction over them. But in the case of our domestic judgments, between our own citizens, if such judgment has been obtained improperly, either for want of service or of authority to appear, or other cause, the remedy is at hand, and the party aggrieved may obtain relief in our own courts, by proper application for review, or by writ of error, or in a proper case by bill in equity, and a stay of proceedings may be had until such claim for relief has been duly heard and adjudicated upon."]

Judgment through fraud: But, where a judgment, whether foreign or domestic, is rendered against a party upon an unauthorized appearance through fraud or collusion between the plaintiff's attorney and the attorney for the defendant or other party interested, or by the attorney alone, relief in equity will be granted to the defendant, if he seeks the relief promptly and properly, and has not been guilty of laches. Harshey v. Blackmarr, 20 Iowa, 161, 89 Am. Dec. 520; De Louis v. Meek, 2 G. Greene [Iowa] 55, 50 Am. Dec. 491; Baker v. O'Riordan, 65 Cal. 368; Dorsey v. Kyle, 20 Md. 512, 96 Am. Dec. 617; Kelso v. Stigar, 75 Md. 378; Bur-

must be promptly challenged,[94] for a party knowingly permitting the attorney to appear and act is estopped.[95] Dismissal is proper when there is no authority,[96] and under a statute providing that an attorney may be required to show his authority, the authority may be questioned by a motion to dismiss.[97] In a superior court the validity of a judgment because of alleged want of authority in the attorney may be investigated without resort to chancery.[98] The existence of authority is a question of fact.[99]

Scope of authority.[1]—An attorney has power to bind his client by acts within his actual or implied authority;[2] and an admission by[3] or notice to an attorney

ton v. Lyford, 37 N. H. 512, 75 Am. Dec. 144; Denton v. Noyes, 6 Johns. [N. Y.] 298, 5 Am. Dec. 237; Jones v. Williamson, 5 Cold. [Tenn.] 371.

What evidence required to rebut: Where a party questions an attorney's authority to appear, he must usually show, by affidavit, facts sufficient to raise a reasonable presumption that the attorney is acting without authority, or to rebut the presumption that he is authorized. Tally v. Reynolds, 1 Ark. 99, 31 Am. Dec. 737; Cartwell v. Menifee, 2 Ark. 356; Turner v. Caruthers, 17 Cal. 432; Dillon v. Rand, 15 Colo. 372; State v. Houston, 3 Har. [Del.] 15, 20; Williams v. Butler, 35 Ill. 545; Bell v. Farwell, 89 Ill. App. 638; New Orleans v. Steinhardt, 52 La. Ann. 1043; Bender v. McDowell, 46 La. Ann. 393; Postal Telegraph Cable Co. v. Louisville, etc. R. Co., 43 La. Ann. 522; Dockham v. Potter, 27 La. Ann. 73; Hollins v. St. Louis & C. R. Co, 57 Hun [N. Y.] 139; Bryn Mawr Nat. Bank v. James, 152 Pa. 364; Danville, etc. R. Co. v. Rhodes, 180 Pa. 157. [Under Georgia Civil Code, § 4423, it is held that the presumption of an attorney's authority to appear can be overcome only as provided by that statute. Planters' & Peoples' M. Fire Ass'n v. De Loach, 113 Ga. 802.] But the affidavit of an attorney which states that he is informed and believes that the attorney who represents the opposite party is not authorized to appear is insufficient to show the want of authority in the opposing attorney. People v. Mariposa County, 39 Cal. 683; Valle v. Picton, 91 Mo. 207; Robinson v. Robinson, 32 Mo. App. 88. See Famous Mfg. Co. v. Wilcox, 180 Ill. 246. So his authority cannot be impugned by mere suggestion. Campbell v. Arcenaux, 3 La. Ann. 558; Turner v. Caruthers, 17 Cal. 431; Williams v. Uncompahgre Canal Co., 13 Colo. 469, 475; Connell v. Galligher, 36 Neb. 749; State v. Passaic County Agricultural Soc., 54 N. J. Law, 260. The burden of proof showing such lack of authority is on the party that denies the authority, and he must establish his allegations by positive proof. Bonnifield v. Thorp, 71 F. 924; Stubbs v. Leavitt, 30 Ala. 352; Garrison v. McGowan, 48 Cal. 600; Esley v. People, 23 Kan. 510, Mutual L. Ins. Co. v. Pinner, 43 N. J. Eq. 52; Day v. Hathaway Printing Tel. & T. Co., 41 N. J. Eq. 419; Holder v. State, 35 Tex. Cr. R. 19; Schlitz v. Meyer, 61 Wis. 418; Thomas v. Steele, 22 Wis. 207. [But see Brooks v. Kearns, 86 Ill. 547, where the burden of proving authority was on the person alleging it]; Stewart v. Stewart, 56 How. Pr. [N. Y.] 256; Dangerfield's Ex'x v. Thurston's Heirs, 8 Mart. N. S. [La.] 119. whether or not an attorney had authority to appear in a case is a question to be determined by the jury from all the facts of the case, or if there be no jury by the court alone. Alspaugh v. Jones, 64 N. C. 29; Howard v. Smith, 33 N. Y. Super. Ct. 124; Clark v. Holliday, 9 Mo. 711; Henderson v. Terry, 62 Tex. 281.—From Clark & Skyles Agency, §§ 636, 637.

94. Where an objection to the appearance of an attorney without authority in contempt proceedings, growing out of the violation of an injunctional order, was not promptly made by defendant, his right to object was waived. State v. Harris [N. D.] 105 N. W. 621.

95. He cannot take the hazard of a trial and afterward have the judgment against him vacated on the ground of the attorney's want of authority to represent him at the trial. Bacon v. Mitchell [N. D.] 106 N. W. 129. Evidence held to show that defendant knew he was represented by attorneys, that they had filed a stipulation for judgment and that he had made no objection thereto, so that he was bound by it. Pacific Pav. Co. v. Vizelich [Cal. App.] 83 P. 459.

96. Attorney held to have had no authority to commence a partition suit and it was properly dismissed on motion. Timpson v. Mock, 105 App. Div. 299, 94 N. Y. S. 664.

97. Code § 320. Yockey v. Woodbury County [Iowa] 106 N. W. 950.

98. The orphans' court of New Jersey being a superior court of general probate jurisdiction, it has the same control over its decrees by inquiring into the authority of its attorneys to appear, as may be exercised by every court of general jurisdiction. Hence a court of equity will not entertain jurisdiction to set aside a will or an irregular probate thereof, procured through the unauthorized appearance of an attorney. Vincent v. Vincent [N. J. Eq.] 62 A. 700.

99. The question whether an attorney had authority to settle his client's claim for less than a specified sum held to be one for the jury. Erickson v. McNeeley & Co. [Wash.] 84 P. 3.

1. See 5 C. L. 332.

2. In the **collection of a debt** due to his client an attorney **can accept a deed** from the debtor in satisfaction of the claim. Sawyer v. Vermont Loan & Trust Co. [Wash.] 84 P. 8. A mortgagee, in a mortgage executed by husband and wife, cannot question, after the husband's death, the authority of an attorney to receive a **conveyance** by the wife of her interest in the mortgaged premises **in payment** of a debt due to his client. Id.

3. **A receipt** given by an attorney to a debtor is not evidence against the creditor in the absence of proof that the attorney

as to matters within the scope of his employment binds all whom he represents[4] even for a client since become insane.[5] Unauthorized acts of an attorney may be ratified by accepting the fruits of his acts.[6] A letter of authority unaccompanied by any statement of the client's secret intentions, must be taken as conferring such authority as it purports on its face to give.[7] An attorney ordinarily has no implied power to bind his client by contract;[8] and since the liability of a party to pay for legal services stands upon precisely the same footing as other contracts,[9] an attorney employed by a party to a suit has no implied authority to employ an assistant attorney at his client's expense;[10] and a client is not bound to pay for such services unless he has authorized the employment or assented to it in some manner,[11] in which case the assistant attorney is entited to a reasonable compensation for his services.[12] A general retainer does not authorize an attorney either to sell or purchase property,[13] or release, compromise, or settle a cause of action,[14] or to satisfy a judgment without full payment.[15] or to make an offer of judgment;[16] but the authority of an attorney extends to all acts needful to the prosecution or defense of the suit in which he is retained.[17]

was the creditor's attorney. Payment to an attorney without special authority to collect a note was not such a payment as to affect the liability of the sureties on the note. Bank of Batesville v. Maxey [Ark.] 88 S. W. 968.

4. Where an attorney was intrusted not only with the final account of the executors to be presented to the probate court, but also with the written entry of appearance and ratification of the report, signed by the heirs and legatees, he is to be regarded as representing both the executors and the heirs and legatees, so that notice to him of a certain motion by the executors was sufficient notice to the heirs and legatees. Griswold v. Smith [Ill.] 77 N. E. 551. An attorney who examined the title to lands for one wishing to obtain a loan thereon and who was paid by him, was not the agent of the party from whom he procured the loan, so as to make such person chargeable with the attorney's knowledge as to the title. Flanders v. Rosoff, 97 N. Y. S. 514.

5. Under Rev. Laws, c. 162, §§ 11, 40, and Chancery Rule 22, service of notice of appeal of proceedings for probate of a will, on the attorney of petitioner who, pending proceedings became insane but no steps for the appointment of any person to represent him had been taken, was held sufficient. McKenna v. Garvey [Mass.] 77 N. E. 782.

6. The ratification by a creditor of the act of her attorney in accepting a deed of her interest in mortgaged land in payment of the debt due to the creditor is binding on the mortgagee. Sawyer v. Vermont Loan & Trust Co. [Wash.] 84 P. 8. To make acceptance a ratification of the unauthorized acts of an attorney, it **must be with full knowledge** of the facts and inconsistent with any other reasonable hypothesis than that of approval of the attorney's acts. Bank of Batesville v. Maxey [Ark.] 88 S. W. 968. The acceptance by a bank of the money paid to an attorney without special authority to collect a note was not such a ratification of his act as to make him the bank's attorney or to estop the bank, as against the sureties on the note, to deny the attorney's authority. Id.

7. Third persons are not affected by any secret intentions. Mabb v. Stewart, 147 Cal. 413, 81 P. 1073.

8. Baker v. New York, 98 N. Y. S. 331.

9. Chicago & S. Traction Co. v. Flaherty [Ill.] 78 N. E. 29.

10. Chicago & S. Traction Co. v. Flaherty [Ill.] 78 N. E. 29; Emblen v. Bicksler [Colo.] 83 P. 636; Kneeland v. Hurde, 97 N. Y. S. 957.

11. Chicago & S. Traction Co. v. Flaherty [Ill.] 78 N. E. 29.

12. Emblen v. Bicksler [Colo.] 83 P. 636.

13. An attorney's offer to sell to the city land involved in condemnation proceedings held properly rejected. Baker v. New York, 98 N. Y. S. 331.

14. Baker v. New York, 98 N. Y. S. 331. Attorney for the executor of an estate has no authority to compromise his rights or to settle with the heirs. Succession of Landry [La.] 41 So. 490. Authority to release the lien of the client's mortgage or to sell the property free of liens is not implied merely from the relation. Hirsch & Co. v. Beverly [Ga.] 54 S. E. 678.

15, 16. Baker v. New York, 98 N. Y. S. 331.

17. Under the law of Wisconsin, an attorney has authority to **indemnify the sheriff,** in the name of his client, to induce him to levy, in the case of debts sent from other states for collection. Audley v. Townsend, 96 N. Y. S. 439. Where a suit in equity was brought on behalf of complainant and all others similarly situated, a person could not **intervene by separate counsel,** to assert a claim similar in all respects to claimants, unless it was proposed to dispose of the cause in some unusual manner. Bowker v. Haight & Freese Co. 140 F. 794.

Pleadings: In Indiana, plaintiff's attorney must sign the complaint filed. Burns' Ann. St. 1901, § 361. Whinery v. Brown [Ind. App.] 75 N. E. 605. But where the record showed that the complaint was so signed and did not disclose that it was not signed when filed, it was no error to refuse to strike it. Id. Allegations are sometimes made in pleadings upon a misunderstanding of the facts by attorneys and not by authority of the parties and that fact may be shown (Galveston, etc., R. Co. v.

Fitzpatrick [Tex. Civ. App.] 91 S. W. 355), and the plaintiff has the right to testify that he did not make such statements to his attorneys as would justify a particular allegation in his pleading. Id.

Dismissal of action: Under his general authority an attorney has the exclusive control of the remedy and may discontinue the action by a dismissal without prejudice. Bacon v. Mitchell [N. D.] 106 N. W. 129. Neither an attorney's mistake of judgment as to the law nor his ignorance of facts is sufficient ground for vacating a judgment of dismissal entered on his motion. Id.

Judgment by consent: An agreement made in open court by an attorney, who has been retained by a defendant, that a judgment may be taken against his client for a certain sum, is binding upon such client in the absence of fraud, collusion, surprise, or some similar ground unless it appears that such attorney is insolvent. Meriden Hydro-Carbon Arc Light Co. v. Anderson, 111 Ill. App. 449.

Compromise of case: An attorney can compromise a case during its progress before the master. Code Civ. Proc. 1902, § 194, providing for relief from a judgment taken through mistake, surprise, or excusable neglect, does not apply where the attorney had full knowledge of the facts and consented to the judgment. Dixon v. Floyd [S. C.] 53 S. E. 167.

Admissions and stipulations: General admissions of facts in the course of a trial, made to save time and facilitate the trial, where counsel are confident of success upon some other point, are understood to have reference to the trial then pending and not as stipulations which shall be binding on a future trial (Daneri v. Gazzola [Cal. App.] 83 P. 455), especially when made in ignorance of very important facts subsequently brought to the attorney's attention (Id.). Held not an abuse of discretion on the part of the court to relieve plaintiff, on a second trial, from the admission that a deed had been "duly executed and delivered" (Id.). Code Civ. Proc. § 283, giving an attorney authority to bind their clients by agreement filed with the clerk or entered on the minutes of the court, refers to executory agreements and not to those which have been, wholly or in part, executed. Id. An exact compliance with the statute will not be required, where one party has received the advantage of a stipulation, or the other party has given up some right or lost some advantage in reliance thereon. Id. In such case a verbal stipulation cannot be repudiated, upon the ground that it was not entered in the minutes of the court. Id.

NOTE. Attorney's Power Over or After Judgment: It has been laid down as a general rule that the authority of an attorney ceases upon the entry of final judgment (Butler v. Knight, L. R., 2 Exch. 109, 113, Macbeath v. Ellis, 4 Bing. 578; Hillegans v. Bender, 78 Ind. 225; Berthold v. Fox, 21 Minn. 51), or at least with its execution within a year (Jackson v. Bartlett, 8 Johns. [N. Y.] 281). Where such rule obtains after final judgment has been entered, the attorney has no authority, by virtue of his original retainer to consent to set it aside. Holbert v. Montgomery's Adm'rs, 5 Dana [Ky.] 11; Quinn v. Lloyd, 7 Rob. [N. Y.] 538. If, however, the judgment has been entered by default he may consent to its being opened, although contrary to his client's instructions, if it has been entered under such circumstances that the court, of itself, would open it. Anon., 1 Wend. [N. Y.] 108; Clussman v. Merkel, 3 Bosw. [N. Y.] 402; Read v. French, 28 N. Y. 285. While this was the rule at common law, the more modern rule now is otherwise. It seems to be now generally conceded in this country that the authority of an attorney at law over his client's cause continues not only until judgment is recovered and a year and a day afterwards, as was the rule in the old books (Pennington's Ex'rs v. Yell, 11 Ark. 212, 52 Am. Dec. 262; Berthold v. Fox, 21 Minn. 51, 53); but if the judgment be not satisfied and is continued in force, his authority will be prolonged accordingly for the purpose of enforcing it (Pennington's Ex'rs v. Yell, 11 Ark. 212, 52 Am. Dec. 262; Miller v. Scott, 21 Ark. 396; Conway County v. Little Rock & Ft. S. R. Co., 39 Ark. 50; Frazier v. Parks' Adm'rs, 56 Ala. 363; McCarver v. Nealey, 1 G. Greene [Iowa] 360; Smith v. Cunningham, 59 Kan. 552; Gray v. Wass, 1 Me. 257; White v. Johnson, 67 Me. 287; Wyckoff v. Bergen, 1 N. J. Law, 214; Rogers v. McKenzie, 81 N. C. 164; Yoakum v. Tilden, 3 W. Va. 167). [As was said in Smyth v. Harvie, 31 Ill. 62, 83 Am. Dec. 202: "Whilst by the rules of the ancient common law it was no part of an attorney's duty to receive money on a judgment, yet in more modern times attorneys have become collecting agents as well as lawyers. By uniform custom and practice, attorneys engage in and attend to the collection of money as a part of their professional duty. Such is inseparable from the practice at the present day. It is not reasonable to suppose that either party imagined, at the time of this retainer, that the duty of the defendants ceased when they obtained the judgment on the plaintiff's claim"]. In order to render the judgment effectual he may institute all supplementary proceedings necessary therefor (Ward v. Roy, 69 N. Y. 96; Heard v. Lodge, 20 Pick. [Mass.] 53, 32 Am. Dec. 197), as a scire facias (Nicholas v. Dennis, R. M. Charlt. [Ga.] 188; Dearborn v. Dearborn, 15 Mass. 316 [it is his duty to do so]), or demand payment of an administrator, pursuant to statute (Heard v. Lodge, 20 Pick. [Mass.] 53, 32 Am. Dec. 197; or Sheriff Spence v. Rutledge, 11 Ala. 557); and when necessary he may issue an alias (Cheever v. Mirrick, 2 N. H. 376). He may after judgment, by virtue of his general retainer, sue out execution or other process and receive the money collected thereon (Savory v. Chapman, 11 Adol. & E. 829; Erwin v. Blake, 8 Pet. [U. S.] 18; Union Bank v. Geary, 5 Pet. [U. S.] 98; Conway County v. Little Rock & Ft. S. R. Co., 39 Ark. 50; Black v. Drake, 2 Colo. 330; Brackett v. Norton, 4 Conn. 517, 10 Am. Dec. 179; Canterberry v. Com., 1 Dana [Ky.] 415; White v. Johnson, 67 Me. 287; Farmers' Bank v. Mackall, 3 Gill. [Md.] 447; Parker v. Downing, 13 Mass. 465 [but not where his authority has been revoked before payment by the sheriff]; McDonald v. Todd, 1 Grant Cas. [Pa.] 17; Poole v. Gist, 4 McCord [S. C.] 259; Hyams v. Michel, 3 Rich. Law [S. C.] 303; Wilson v. Stokes, 4 Munf. [Va.] 455), but he cannot sue out such execution against

his client's wish (Barker v. St. Quintin, 12 Mees & W. 441), or have execution levied on land conveyed as security, before it is reconveyed to the debtor (Parker v. Home Mut. Bldg. & Loan Ass'n, 114 Ga. 702). So the plaintiff's attorney may direct the sheriff or other officer as to the time and manner of enforcing the execution (Erwin v. Blake, 8 Pet. [U. S.] 25, 8 Law. Ed. 8; Smith v. Gayle, 58 Ala. 600; Brackett v. Norton, 4 Conn. 517, 10 Am. Dec. 179; State v. Boyd, 63 Ind. 428; Stevens v. Colby, 46 N. H. 163; Read v. French, 28 N. Y. 285; Gorham v. Gale, 7 Cow. [N. Y.] 739, 17 Am. Dec. 549; Lynch v. Com., 16 Serg. & R. [Pa.] 368, 16 Am. Dec. 582; Willard v. Goodrich, 31 Vt. 597; Kimball v. Perry, 15 Vt. 414), or even authorize the sheriff to depart from his regular course of executing such process (Corning v. Sutherland, 3 Hill [N. Y.] 552; White v. Johnson, 67 Me. 287), or agree to delay issuance of execution for a limited time (Wieland v. White, 109 Mass. 392; White v. Johnson, 67 Me. 287; Silvis v. Ely, 3 Watts & S. [Pa.] 420), or stay proceedings under it for a reasonable time (Wieland v. White, 109 Mass. 392; White v. Johnson, 67 Me. 287), or direct return thereon to be delayed, if it will not be detrimental to the judgment lien (McClure v. Colclough, 5 Ala. 65; Crenshaw v. Harrison, 8 Ala. 342; Walker v. Goodman, 21 Ala. 647), or direct a sale under it to be suspended (Lynch v. Com., 16 Serg. & R. [Pa.] 368, 16 Am. Dec. 582) or postponed (Albertson v. Goldsby, 28 Ala. 711, 65 Am. Dec. 380), or he may receive seisin of land taken by the sheriff in execution (Pratt v. Putnam, 13 Mass. 361, 363). So he may assent to the correction of a mere clerical error in a judgment or decree. Hill v. Bowyer, 18 Grat. [Va.] 364. But he is not authorized to bid, or to authorize anyone else to bid, for his client at an execution sale (Averill v. Williams, 4 Denio [N. Y.] 295, 47 Am. Dec. 252; Beardsley v. Root, 11 Johns. [N. Y.] 464, 6 Am. Dec. 386 [he cannot purchase land sold under an execution in favor of his client, either in trust, or for the benefit of his client]; Washington v. Johnson, 7 Humph. [Tenn.] 468; Savery v. Sypher, 6 Wall. [U. S.] 157, 18 Law. Ed. 822. See, also, Wade v. Pettibone, 11 Ohio, 57, 37 Am. Dec. 408; Leisenring v. Black, 5 Watts [Pa.] 303, 30 Am. Dec. 322), nor has he authority to direct what particular property shall be levied on under his client's execution (Averill v. Williams, 4 Denio [N. Y.] 295, 47 Am. Dec. 252; Welch v. Cochran, 63 N. Y. 181, 20 Am. Rep. 521; Oestrich v. Gilbert, 9 Hun [N. Y.] 244), although he may authorize goods levied on to be sold, if perishable, and the proceeds kept for future distribution (Nelson v. Cook, 19 Ill. 440). Nor is he authorized on his own motion, to commence affirmative proceedings to keep alive a judgment which he has for collection. Cullison v. Lindsay, 108 Iowa, 124. Nor has he authority to release the defendant from imprisonment on execution, without satisfaction (Savory v. Chapman, 11 Adol. & E. 829, 8 Dowl. 656; Connop v. Challis, 2 Exch. 484, 17 Law J. Exch. 319; Lewis v. Gamage, 1 Pick. [Mass.] 347; Kellogg v. Gilbert, 10 Johns. [N. Y.] 220, 6 Am. Dec. 335; Jackson v. Bartlett, 8 Johns. [N. Y.] 821; Crary v. Turner, 6 Johns. [N. Y.] 51; Simonton v. Barrell, 21 Wend. [N. Y.] 362; Treasurers v. McDowell, 1 Hill [N. Y.] 184, 26 Am. Dec. 166. But see Hopkins v. Willard, 14 Vt. 474; Scott v. Seiler, 5 Watts [Pa.] 235), nor to release property bound by his client's judgment, without the latter's knowledge or consent .(Phillips v. Dobbins, 56 Ga. 617; Holbert v. Montgomery, 5 Dana [Ky.] 11; Harrow v. Farrow's Heirs, 7 B. Mon. [Ky.] 126, 45 Am. Dec. 60; Horsey v. Chew, 65 Md. 555; Fritchey v. Bosely, 56 Md. 94; Doub v. Barnes, 1 Md. Ch. 127; Banks v. Evans, 10 Smedes & M. [Miss.] 35, 48 Am. Dec. 734; Wilson v. Jennings, 3 Ohio St. 528; Kirk's Appeal, 87 Pa. 243, 30 Am. Rep. 357; Ely v. Lamb, 10 Pa. Co. Ct. R. 209; Dollar Sav. Bank v. Robb, 4 Brewst. [Pa.] 106; Ludden v. Sumter, 45 S. C. 186, 25 Am. St. Rep. 761), nor to postpone his client's lien until another one has been satisfied (Fritchey v. Bosley, 56 Md. 96; Phillips v. Dobbins, 56 Ga. 617). He cannot release property from the levy of an execution (Banks v. Evans, 10 Smedes & M. [Miss.] 35, 48 Am. Dec. 734; Jackson v. Bartlett, 8 Johns. [N. Y.] 281; Benedict v. Smith, 10 Paige [N. Y.] 126; Jewett v. Wadleigh, 32 Me. 110), nor agree to a stay of execution, if it will destroy his client's lien (Reynolds v. Ingersoll, 11 Smedes & M. [Miss.] 249, 49 Am. Dec. 57; Union Bank v. Govan, 10 Smedes & M. [Miss.] 343; Silvis v. Ely, 3 Watts & S. [Pa.] 420 [it is within his power to stay execution upon the promise of a third person to pay the debt]), nor may he sell or assign a judgment recovered by him in favor of his client (Boren v. McGehee, 6 Port. [Ala.] 432, 31 Am. Dec. 695; Gardner v. Mobile & N. W. R. Co., 102 Ala. 635, 48 Am. St. Rep. 84; Mayer v. Sparks, 3 Kan. App. 602; Smiley v. U. S. Bldg. & Loan Ass'n's Assignee, 23 Ky. L. R. 250, 62 S. W. 853; Walden v. Grant, 8 Mart. N. S. [La.] 565; Wilson v. Wadleigh, 36 Me. 496; Clark v. Kingsland, 1 Smedes & M. [Miss.] 256; Rice v. Troup, 62 Miss. 186; Head v. Gervais, Walk. [Miss.] 431, 12 Am. Dec 577; Wyatt v. Fromme, 70 Mo. App. 613; Henry & Coatsworth Co. v. Halter, 58 Neb. 685; Fassitt v. Middleton, 47 Pa. 214, 86 Am. Dec. 535; Campbell's Appeal, 29 Pa. 401, 72 Am. Dec. 641; Basler v. Searight, 149 Pa. 241; Noonan v. Gray's Ex'rs, 1 Bailey [S. C.] 437; Mayer v. Blease, 4 Rich. [S. C.] 10; Maxwell v. Owen, 7 Cold. [Tenn.] 630; Baldwin v. Merrill, 8 Humph. [Tenn.] 132. [But where the client receives the money on such assignment he will be presumed to have authorized or ratified the act.] Marshall v. Moore, 36 Ill. 321), nor agree to suspend the proceedings on a judgment (Pendexter v. Vernon, 9 Humph. [Tenn.] 84), nor may he move to set aside or reverse a judgment, when he was employed merely to prosecute the action to judgment (Richardson v. Talbor, 2 Bibb. [Ky.] 382). But even under the modern cases it seems to be the rule that the attorney cannot begin proceedings for an appeal from a judgment, without further authority from his client (Riddle v. Hanna, 25 Ala. 484; Commissioners of Roads v. Griffin & W. P. Plank-Road Co., 9 Ga. 487; Covill v. Phy, 27 Ill. 37; Hopkins v. Mallard, 1 G. Greene [Iowa] 117; Ikerd v. Borland, 35 La. Ann. 337; National Park Bank v. Lanahan, 60 Md. 477; Delaney v. Husband, 64 N. J. Law. 275; Coles v. Anderson, 8 Humph. [Tenn.] 489; Hooker v. Village of Brandon,

§ 9. *Rights and liabilities to third persons.*[18]—The general principles of agency apply.[19] An attorney who knowingly pays over proceeds of a suit which it was agreed should be devoted first to discharge a mortgage is liable to the mortgagee.[20] It is not necessary that defendant notify plaintiff's attorney of a settlement.[21]

§ 10. *Law partnerships and associations.*[22]—Where a law partnership is dissolved by the suspension from practice of one of the attorneys, the remaining members may continue the unfinished business of the firm.[23] In the absence of an express contrary agreement any professional service by one of a firm is for its benefit.[24]

§ 11. *Public attorneys. A. Attorneys general.*[25]—A prosecution taken up by the state is a "criminal case" wherein the attorney general must represent the state.[26] In Idaho the attorney general of the state is the attorney for a county, when it is a party in a case on appeal, unless the county's interest is adverse to the state or some officer thereof acting in his official capacity.[27] In Texas it is the duty of the attorney general, on request of the controller, to sue in the name of the state, for the taxes imposed on railroad, express and sleeping car companies, and the county and district attorneys cannot prosecute such cases.[28] The power to employ assistants is wholly statutory.[29]

75 Wis. 8), although some of the cases hold that he may (Grosvenor v. Danforth, 16 Mass. 74; Nisbet v. Lawson, 1 Ga. 280; Woodmen of the World v. Rutledge 133 Cal. 640; Ricketson v. Torres, 23 Cal. 636; Connett v. Chicago, 114 Ill. 233; Norberg v. Heineman, 59 Mich. 210 [from justice's to circuit court]; Appeal of Spaulding, 33 N. H. 479 [from probate court]; Hallam v. Tillinghast, 19 Wash. 20). It seems, however, that the foregoing rules apply only to the attorney for the plaintiff. "Neither the common law nor any statute continues after judgment the authority of the attorney for the defeated party the judgment debtor or the defendant in the judgment, as he is aptly styled." Thus the employment of an attorney to defend a suit does not authorize him to receive from the sheriff the proceeds of the defendant's property sold under judgment in his suit. Germaine v. Mallerich, 31 La. Ann. 371. See Welsh v. Cochran, 63 N. Y. 181, 20 Am. Rep. 519. So it is held that the general power and liability of an attorney for a defendant cease upon the entry of a judgment finally terminating the litigation, and do not include the payment of the judgment, although he be furnished with money for the purpose. Hillegass v. Bender, 78 Ind. 225.—From Clark & Skyles Agency, § 650.

Discharge or satisfaction of judgment: Ballinger's Ann. Codes & St. § 4766, authorizing an attorney to discharge a judgment or acknowledge satisfaction on payment thereof, applies to the attorney for a minor in an action by his guardian ad litem. State v. Ballinger [Wash.] 82 P. 1018. Issue of warrant, under § 5676, in payment of judgment against city of Seattle, in favor of infant plaintiff, to his attorney in an action by his guardian ad litem held proper. Id.

18. See 5 C. L. 333.

19. See Agency, 7 C. L. 61. And see Hayes v. Bronson [Conn.] 61 A. 549. Note, 15 Yale L. J. 194.

20. Insurance moneys. Beistle v. McConnell [Mich.] 12 Det. Leg. N. 505, 104 N. W. 729. See 6 Columbia L. R. 356; Beistle v. McConnell [Mich.] 12 Det. Leg. N. 505, 104 N. W. 729.

21. Olson v. Sargent County [N. D.] 107 N. W. 43.

22. See 5 C. L. 333.

23. They can settle partnership contracts and bind the other members; and their rights will be determined under the existing contracts, in the absence of any showing that new contracts were made after the dissolution. Bessie v. Northern Pac. R. Co. [N. D.] 105 N. W. 936. Evidence held not to show the making of any new contract as to compensation. Id.

24. Partnership to share in all fees due or to become due includes subsequent earnings from unfinished cases. Macfarland v. Altschuler [Neb.] 108 N. W. 151.

25. See 5 C. L. 333.

26. Rev. St. 1899, §§ 5378-5381. State v. Cornwell [Wyo.] 85 P. 977.

27. Under Rev. St. 1887, § 250, subd. 1, as amd. by Laws 1901, p. 163. The transcript on appeal and the briefs of appellant in such cases must be served on the attorney general, under Supreme Court Rule 27, par. 9 (32 Pac. xi) and rule 6, par. 3 (32 Pac. vii) respectively). Corker v. Elmore County [Idaho] 84 P. 509.

28. The provisions of Laws 1905, p. 338, c. 141, § 5, and of Laws 1905, p. 358, c. 148, imposing such duties on the attorney general, are not rendered invalid by Const. art. 5, § 21, construed with art. 4, § 22, relative to the duty of the attorney general to represent the state. Brady v. Brooks [Tex.] 14 Tex. Ct. Rep. 163, 89 S. W. 1052.

29. An act entitled to prohibit, etc., except for certain purposes, the sale of liquor and to regulate the sale, held broad enough to include a clause authorizing appointment of assistant to attorney general if county attorney fails to act. State v. Brooks [Kan.] 85 P. 1013. Under the constitutional and statutory provisions defining his duties, the attorney general of Washington has no implied authority to employ an expert to as-

(§ 11) *B. District and state's or prosecuting attorneys.*[30]—A county attorney constitutionally directed to represent the state "in all cases' cannot be deprived of that authority in criminal cases prosecuted in a corporation court to which a city attorney is attached,[31] nor can he be reduced to a merely assistant function.[32] If the compensation be not fixed otherwise by the constitution, he may be denied fees for his services in such cases though entitled to officiate.[33] In Idaho by and with the consent of the attorney general in the supreme court or the county attorney in the lower court, other attorneys may assist in the prosecution of a criminal case, and it is not error to allow such appearance in the trial court.[34] Where the board of supervisors authorized a committee to ascertain what sums were due the county from the state and to take steps to recover them, the committee had power to employ the district attorney to prosecute the claim.[35] While a county can employ counsel whenever it has litigation, the board of supervisors cannot appoint a person as counsel at an annual salary, irrespective of litigation.[36] Assistant prosecuting attorneys are not officers in the sense the word is used in the Ohio Constitution, but are persons authoritatively appointed to assist an officer in an office provided by law.[37] The statutes of Missouri prescribe how assistant and deputy prosecuting attorneys shall be appointed, classified, and compensated.[38] The appearance of the county attorney and his assistants in proceedings before the board of supervisors relative to a ditch assessment, without special authority, did not make the county a party.[39] Where, during the trial of a criminal case, the district attorney obtained leave to absent himself and leave the prosecution in charge of his assistants, and defendant made no objection at the time, he was without ground of complaint.[40]

Salaries and compensation are statutory matters.[41] Where the board of supervisors is authorized to fix the salary, the right to extra compensation depends upon

sist in the defense of an action against the state, though it is in the state's interest, so as to make the state liable for his services. Const. art. 3, § 21; Act Mar. 20, 1895 (Laws 1895, p. 188, c. 95), § 3; Act Mar. 7, 1895 (Laws 1895, p. 58, c. 35) § 1; Laws 1901, p. 122, c. 72. Ritchie v. State [Wash.] 85 P. 417.

30. See 5 C. L. 334.

31. Const. art. 5, § 21, construed harmoniously with act establishing corporation courts. Upton v. San Angelo [Tex. Civ. App.] 94 S. W. 436. In Texas the county attorney has the exclusive right to represent the state in all prosecutions for violations of state laws and ordinances covering the same ground as the laws of the state. Under Const. art. 5, § 21, and Gen. Laws 1899, p. 40, c. 33, establishing the corporation court of a city and giving it concurrent jurisdiction with justices in criminal cases under the state law. Howth v. Greer [Tex. Civ. App.] 14 Tex. Ct. Rep. 61, 90 S. W. 211.

32. Upton v. San Angelo [Tex. Civ. App.] 94 S. W. 436. Dictum that an act authorizing him if he desires to "also represent the state" does not make him an assistant. Id.

33. Upton v. San Angelo [Tex. Civ. App.] 94 S. W. 436. **Mandamus** held improper against officers who merely denied such fees. Id. Under Const. art. 5, § 21, limiting the fees of county attorneys to such as are provided by law, and Gen. Laws 1899, p. 40, c. 32, prohibiting compensation of county attorneys for such services in corporation courts. Howth v. Greer [Tex. Civ. App.] 14 Tex. Ct. Rep. 61, 90 S. W. 211.

34. State v. Steers [Idaho] 85 P. 104.

35. People v. Delaware County Sup'rs, 108 App. Div. 83, 95 N. Y. S. 458.

36. Vincent v. Nassau County, 96 N. Y. S. 446.

37. State v. Taylor, 3 Ohio N. P. (N. S.) 505.

38. Under Rev. St. 1899, §§ 3286, 3287 (Acts 1893, pp. 168, 169), in counties having from 100,000 to 300,000 population only one chief deputy (Class A $1,500) can be appointed, and the criminal court only can determine the number of Class B ($1,200) to be appointed. Elliott v. Jackson County, 194 Mo. 532, 92 S. W. 480.

39. Especially in view of Code, § 302, prohibiting his appearance before the board in any cause in which the county is not interested. Yockey v. Woodbury County [Iowa] 106 N. W. 950.

40. State v. Cato [La.] 40 So. 633.

41. Section 2 of Laws 1901, p. 207, fixing the salary of the state's attorney of Cook county was not legally adopted and is void. People v. Olsen [Ill.] 73 N. E. 23. An allowance of $1,250 per annum, made by county commissioners to a prosecuting attorney, whereas Section 845 limits the allowance to $250 for each case in which counsel is employed, will be upheld by a court only in the event in the number of cases exceeding five in a given year. State v. Taylor, 3 Ohio N. P. (N. S.) 505. A statute making an exception of certain counties should be distinguished from one which limits the operation of the law throughout the state; and the statutory exceptions which have been made relative to the compensation of prosecuting attorneys in different counties, the

the construction to be given the terms of the board's action.[42] "Such fees as are allowed by law" in addition to salary means only those expressly given by statute.[43] When allowed in cases of a "criminal nature" as distinguished from criminal cases they are not allowable for attendance on a preliminary examination for felony.[44] Such examination is not a "case" before a justice of the peace [45] or an "action which it is * * * his duty to prosecute"[46] within the Missouri statutes.

United States district attorney.[47]—The relator in a mandamus proceeding to compel a justice of the peace to approve an appeal bond may use the name of the United States without the intervention of the United States district attorney.[48]

(§ 11) *C. Municipal attorneys.*[49]—In Pennsylvania, by statute, the city solicitor, under the direction of the council, is the duly appointed representative of the municipality in legal affairs; [50] and it is at least very doubtful whether the city controller is entitled to appear on behalf of the city and contest a claim.[51] Where a village ordinance made it the duty of its attorney to prosecute and defend actions by or against the corporation or any officer thereof, it did not, as a matter of law, disqualify him from appearing against the president and clerk in proceedings to compel them to sign and issue an order for the payment of a claim against the village.[52] The employment of one as a city attorney creates no contract with his associates even if he be authorized to associate others.[53] When no time is specified a special employment of the "city attorney" continues at will or for his official term.[54] Irrevocability is not communicated to employment to collect taxes by a direction that he turn back tax books "when collected [55] or by fixing a per centum rate of compensation,[56] and no implied contract for services in unfinished cases arises in the face of an express mode of compensation.[57] For all public moneys collected after cessation of authority he must account without deduction and with interest.[58]

ATTORNEYS FOR THE PUBLIC, see latest topical index.

AUCTIONS AND AUCTIONEERS.

License and regulation.[59]

Sale.[60]—Without further authority than that which comes from his position as auctioneer to sell real estate, one cannot bind the parties by a memorandum to

provision for the appointment of assistants in certain counties, and the further provision that in counties not having a county solicitor the prosecuting attorney shall act as the legal adviser of the county commissioners who shall fix his compensation, are not unconstitutional. Id.

42. District attorney held not entitled to extra compensation for services during his term in suits already commenced to recover taxes paid the state, but belonging to the county (People v. Delaware County Sup'rs 108 App. Div. 83, 95 N. Y. S. 458), but entitled to extra compensation for services in a suit against the state to recover taxes, brought under Act Apr. 17, 1899 (c. 336, p. 725, Laws 1899) authorizing such suits to be brought (Id.).

43. Hill v. Butler County [Mo.] 94 S. W. 518.

44. Rev. St. 1899, § 3237. Hill v. Butler County [Mo.] 94 S. W. 518.

45, 46. Rev. St. 1899, §§ 3237, 4951. Hill v. Butler County [Mo.] 94 S. W. 518.

47. See 5 C. L. 336.

48. Bundy v. U. S., 25 App. D. C. 459.

49. See 5 C. L. 336.

50. Act March 7, 1901, art. 9 (P. L. 20, 29). Valentine Clark Co. v. Allegheny City, 143 F. 644.

51. Valentine Clark Co. v. Allegheny City, 143 F. 644.

52. Smith v. Hubbell [Mich.] 12 Det. Leg. N. 860, 106 N. W. 547. Village held not liable for the services of the village attorney in such mandamus proceedings, instituted at the instance of the council. Id.

53. City of Wilmington v. Bryan [N. C.] 54 S. E. 543. Their rights terminate with his. Id.

54, 55, 56, 57, 58. City of Wilmington v. Bryan [N. C.] 54 S. E. 543.

59. See 3 C. L. 394.

60. See 5 C. L. 336.

satisfy the statute of frauds of any other contract than that which was actually made.[61] Whether particular articles passed by a sale in bulk is a question of fact.[62]

Rights and liabilities.—Auctioneer's bonds are to secure the public against the wrongful acts of the auctioneer as such, hence no liability where he personally buys mortgaged property and thereafter sells at auction, keeping the proceeds.[63] Where the circumstances surrounding the rendition of services as an auctioneer are developed, a register is not bound to accept a value placed thereon by an expert witness.[64]

Acdita Querela; Australian Ballots; Autrefois Acquit; Baggage, see latest topical index.

BAIL, CIVIL.[65]

Indorsement of the order liberating the bail on a piece of paper attached to the bail piece is sufficient.[66] The surety on an appearance bail bond will be released from liability on surrender of the principal even after action on the bond for forfeiture has been commenced against him.[67] In a suit against a surety upon a recognizance given by a debtor arrested on execution on a judgment for assault and battery, for false imprisonment, and for malicious prosecution, he is bound by the record.[68] It is no defense to an action on a bail bond that the sheriff did not return the writ of arrest before judgment,[69] nor that the defendant attended court during the term at which the judgment was rendered and for a few days thereafter was within its jurisdiction, where the condition was that he would at all times render himself amenable to such process as might be issued to enforce the judgment, and he could not be found on an execution against the person,[70] nor can the sufficiency of the complaint in the action in which the bond was given be assailed in the action on the bond.[71] Where money, voluntarily placed on deposit as bail under a charge in the police court, is attached for debt, the petition is defective if it does not allege that the deposit was made in fraud of creditors, or that the defendant was a debtor to plaintiff at the time the deposit was made.[72]

BAIL, CRIMINAL.

§ 1. Authority to Take and Right to Give Bail (348).
§ 2. Making of Recognizance and Sufficiency Thereof (350).
§ 3. Fulfillment or Forfeiture; Discharge; Rights and Liabilities of Sureties (351).
§ 4. Enforcement of Bond or Recognizance (352).
§ 5. Remission of Forfeiture and Return of Deposits Made in Lieu of Bail (352).

§ 1. *Authority to take and right to give bail.*[73]—The power to admit to bail is usually conferred by statute,[74] and while courts are said to have inherent power

61. Hence when the memorandum signed by the auctioneer sets out a contract materially different than the true one, the latter is within the statute and cannot be enforced. Kelley v. Holbrook [Mass.] 77 N. E. 1037.

62. Evidence held to support a finding that a model typewriter was included in an auction sale of unassembled parts of typewriters. Scharndorf v. Alten, 96 N. Y. S. 452.

63. Laws 1897, p. 776, c. 682, § 5. Moser v. Bankers' Surety Co., 109 App. Div. 172, 95 N. Y. S. 609.

64. Finding of a register in an action for the reasonable value of services rendered, for an amount less than that fixed by the only witness, an expert, upheld. Andrews v. Frierson [Ala.] 39 So. 512. Chancellor held not justified in reducing the amount due for services from 3 per cent of the gross sale, as found by the register, to 1 1-2 per cent. Id.

65. See 5 C. L. 337.

66. Under Comp. Laws, § 10,048, subs. 3, requiring its endorsement on the second copy of the bail piece. McNeal v. Van Duser [Mich.] 12 Det. Leg. N. 828, 105 N. W. 1109.

67. Under Comp. Laws, §§ 10,047, 10,048, 10,049. Action begun July 15th, surrender of principal July 21st. McNeal v. Van Duser [Mich.] 12 Det. Leg. N. 828, 105 N. W. 1109.

68. Having pleaded debtor's discharge in bankruptcy before arrest, he cannot show that in all matters referred to in the declaration on the original suit, the debtor acted in good faith and without any express malice. McChristal v. Clisbee [Mass.] 76 N. E. 511.

69, 70, 71. Banning v. Roy [Or.] 82 P. 708.

72. Bergin & Brady Co. v. Fraas, 3 Ohio N. P. (N. S.) 206.

73. See 5 C. L. 337.

74. Under statutes permitting bail to be received only by persons or courts author-

to take bail or recognizance in a criminal case,[75] sheriffs [76] and clerks have such power only when it is conferred upon them by statute.[77] One arrested for a crime against the United States has no right to demand bail of the sheriff apprehending him, but only of the circuit court commissioner or other judicial officer having jurisdiction to hear the complaint.[78] A statute giving to "courts and magistrates" the power of admitting to bail and fixing the amount negatives the power of clerks to do so,[79] and authority to them to issue bail bonds not exceeding a sum stated does not include authority to fix the sum.[80] A recognizance taken by a sheriff is binding, although at the time he no longer retained the original writ of commitment and no other writ superseding it or commanding further detention had been served upon him; and though the amount of bail fixed by the district court was never indorsed on the original writ.[81]

Bail is of right even in cases punishable by death, where the proof is not evident and the presumption is not great, and statutes making the granting of bail discretionary in such cases are unconstitutional,[82] and in an application for bail by one charged with a capital offense, the burden is on the state to show that defendant is not entitled to it,[83] but the finding of the lower court thereon will be upheld unless clearly wrong.[84] Admittance to bail after conviction and pending appeal is within the discretion of the court,[85] and under a constitutional provision [86] that all prisoners shall be bailable unless in execution or committed for capital offenses when proof is evident or the presumption is great, the defendant, convicted, sentenced, and in the custody of the sheriff on the mittimus, is not entitled to bail as a matter of right pending appeal.[87] In some states, statutes provide that stay of proceedings and bail pending review may be allowed [88] if timely applied for.[89]

ized by law to arrest and imprison persons charged with crime, a judge of the district court is authorized to take and approve bail in a criminal case (Code Cr. Proc. § 633, Territory v. Allen [Okl.] 82 P. 574; Territory v. Allen [Okl.] 82 P. 575), but not a clerk thereof (Territory v. Woodring [Okl.] 82 P. 572; Territory v. Reynolds [Okl.] 82 P. 574).

75. Territory v. Reynolds [Okl.] 82 P. 574.

76. A sheriff has no authority to fix amount of bail in a felony case under a statute authorizing him to take bail in felony cases where amount of bail required is specified on the warrant or in cases of misdemeanor. Rev. St. 1899, § 2546. State v. Crosswhite [Mo.] 93 S. W. 247.

77. Territory v. Woodring [Okl.] 82 P. 572; Territory v. Reynolds [Okl.] 82 P. 574.

78. Under U. S. Rev. St. §§ 1014, 1015. Roberts v. Brown [Tex. Civ. App.] 94 S. W. 388.

79. Pen. Code, §§ 821, 823, 824, 1268, 1269, 1273, 1277. City and County of San Francisco & Hartnett [Cal. App.] 82 P. 1064.

80. Under San Francisco Charter, c. 8, art. 5, §§ 5, 6, the warrant and bond clerk cannot do so. City & County of San Francisco v. Hartnett [Cal. App.] 82 P. 1064.

81. Defendant committed under original writ issued by justice of the peace, binding him over to district court, which court continued the case and entered an order on the journal committing him to jail in default of bail in the sum of $500, the recognizance being in this amount. McKie v. State [Kan.] 85 P. 827.

82. Rev. Code Cr. Proc. §§ 585, 586, unconstitutional to that extent under Const. art. 6, § 8. State v. Kauffman [S. D.] 108 N. W. 246.

83. By showing that proof is evident or presumption of guilt great within Const. art. 6, § 8. State v. Kauffman [S. D.] 108 N. W. 246.

84. On habeas corpus proceedings to review, such refusal prima facie correct, throwing onus on defendant. State v. Zummo [La.] 39 So. 442.

85. Vt. St. § 2027. In re Comolli [Vt.] 63 A. 184. Under a statute requiring the greatest caution in ordering bail after conviction of felony, it was no abuse of discretion to deny bail pending an appeal from a conviction of grand larceny to defendant forty-nine years of age, because of alleged bad health (Rev. Code 1892, § 66) consisting of heart disease, asthma, catarrh, and indigestion. Winegarden v. State [Miss.] 39 So. 1013. A physician convicted of grand larceny is not entitled to bail because his services are needed by his family and his patients, he being only means of support of family and the only one competent to treat his invalid daughter and his clientele of patients. Id.

86. Const. Vt. Art. 2, § 33.

87. Held to be in execution notwithstanding final commitment has not been made. In re Comolli [Vt.] 63 A. 184.

88. In New York defendant, who, after a conviction of a crime not punishable with death, has appealed and obtained an order from a justice of the supreme court staying the execution of the judgment pending the determination of an application for a certificate of reasonable doubt, may be admitted to bail before the granting of the ap-

The judge of a county court may admit the defendant to bail pending an adjournment of the hearing on habeas corpus proceedings.[90] Requirement of excessive bail is universally prohibited by constitution and appellate courts usually have the power of reduction,[91] but in the absence of an application to the trial court for reduction of bail, mandamus will not be issued by court of appeals.[92]

§ 2. *Making of recognizance and sufficiency thereof.*[93]—A recognizance is sufficient if substantially in the form of the statute,[94] and the bond will be sustained if by construing the whole instrument together the intent is plain.[95] An appearance bond approved on the same day that it was taken is presumed to have been taken, accepted, and approved before the prisoner was released and therefore valid.[96] In Arizona where defendant is held to answer after examination, an undertaking is sufficient.[97] The charge and proceedings must be recited with reasonable certainty,[98] but a variance between the crime charged in the complaint and the recital of the charge against the defendant in the bail bond will not invalidate the latter.[99] Of course, a bail bond taken by one without authority is void,[1] and the fixing of the amount of bail and the taking of a bond by one wholly without authority to do so is not merely an irregularity within the statute declaring that irregularities of form, omission, or recital shall not invalidate the undertaking.[2] If bail be allowed in a sum fixed by one without authority it is void both as a statutory bond and as one at common law,[3] and likewise a bail bond void for want of statutory authority to

plication. People v. Reardon, 98 N. Y. S. 399. The authority conferred upon a common pleas judge to suspend the execution of sentence of one convicted of a felony, for such period as will give a reasonable time to file a petition in error, does not authorize the admission to bail of the one so convicted, pending the hearing on the petition in error. State v. Baker, 3 Ohio N. P. (N. S.) 622.

89. An application for admittance to bail and stay of proceedings pending appeal to review a conviction of larceny will be denied by the supreme court unless made at the time the writ of error is sued out. People v. West [Mich.] 107 N. W. 283.

90. State v. Simons [Ala.] 40 So. 662.

91. Defendant for 14 violations of local option law was required to give $400 bail in each case; held in violation of Const. Art. 1, § 13, providing that excessive bail shall not be required, and it was reduced to $100 in each case, this being probably the sum he could give. Ex parte Finn [Tex. Cr. App.] 90 S. W. 29. Bail reduced on application from $2,500 to $1,500 on showing that this was all that defendant could give, that state could ask for a conviction of murder in 2nd degree only, as defendant and deceased were unacquainted prior to day of difficulty, but one blow had been struck, and deceased died 18 days after he was struck. Ex parte Harris [Tex. Cr. App.] 91 S. W. 794.

92. Defendant unable to give $1,000 bail required, but having made no application for a reduction to trial court. Monroe v. Berry [Ky.] 94 S. W. 38.

93. See 5 C. L. 338.

94. People v. Torn, 110 App. Div. 676, 97 N. Y. S. 523.

95. On a bond reciting that it was given for "twenty hundred dollars" and the surety had justified for "forty hundred dollars," the word "twenty" was omitted preceding the printed words "hundred dollars," in the penalty clause; held he was nevertheless liable for the full amount. People v. Torn, 110 App. Div. 676, 97 N. Y. S. 523.

96. Territory v. Sellers [Okl.] 82 P. 575.

97. Under Code Cr. Proc. §§ 1074, 1076, 1077, 1084. Thomas v. Territory [Ariz.] 85 P. 1063.

98. An appeal bond setting out the number and style of the case, stating that defendant was convicted of a certain misdemeanor, named, and that notice of an appeal to the county court had been given, is sufficient under Acts 27th Leg. Laws 1901, p. 291, c. 124, requiring that defendant if in custody shall be committed on an appeal from the justice to the county court unless he give a bond, describing the judgment appealed from with sufficient accuracy to identify it and reciting that defendant has appealed to county court. McCarty v. State [Tex. Cr. App.] 94 S. W. 899.

99. Bail bond condition on defendant answering to charge of "grand larceny," whereas complaint charged him with the crime of stealing a domestic animal within the meaning of Laws 1895, c. 20, p. 104, sufficient under Wilson's Rev. & Ann. St. 1903, §§ 5245, 5291. Trimble v. Territory [Okl.] 86 P. 64.

1. In Oklahoma bail taken by a clerk of the district court in a criminal case, being unauthorized. Code Cr. Proc. § 633. Territory v. Woodring [Okl.] 82 P. 572. Express statutory authority necessary. Territory v. Reynolds [Okl.] 82 P. 574. A recognizance in a felony case is void when the amount was fixed by the sheriff, authorized to fix bail in cases of misdemeanor only. Rev. St. 1899, § 2546. State v. Crosswhite [Mo.] 93 S. W. 247.

2. Rev. St. 1899, § 2800. State v. Crosswhite [Mo.] 93 S. W. 247.

3. City & County of San Francisco v. Hartnett [Cal. App.] 82 P. 1064.

execute it is void as a common-law obligation as well.[4] Money deposited in lieu of a bail bond to procure the release of one restrained without legal justification is involuntarily deposited, and the title and right to possession of such money remains in the depositor, although accused does not appear.[5]

§ 3. *Fulfillment or forfeiture; discharge; rights and liabilities of sureties.*[6]—A principal may voluntarily surrender himself in open court,[7] and upon such surrender the old recognizance is nullified and the surety upon a subsequent recognizance is bound.[8] A recognizance can be forfeited only by calling accused some

4. Bond taken by clerk of district court without statutory authority. Territory v. Woodring [Okl.] 82 P. 572; Territory v. Reynolds [Okl.] 82 P. 574.

NOTE. Defective statutory bail bonds good as common-law bonds: Undoubtedly a bond is not rendered void by a mere irregularity, such as the failure of sureties to justify; it being held that the justification is no part of the bond, but a matter for the benefit of the obligee only, which he may, of course, waive. Murdock v. Brooks, 38 Cal. 603, is a type of this class of cases. See, also, People v. Shirley, 18 Cal. 121; People v. Penniman, 37 Cal. 273; Moffat v. Greenwalt, 90 Cal. 371, 27 P. 296; Carpenter v. Furrey, 128 Cal. 669, 61 P. 369. The only states in which it has been held that a bail bond given on the order of an officer not authorized to admit to bail is valid at all we believe to be Iowa and Georgia. State v. Canon, 34 Iowa, 325; Dennard v. State, 2 Ga. 137; Park v. State, 4 Ga. 329; Jones v. Gordon, 82 Ga. 570, 9 S. E. 782. In the Iowa case no authorities are cited, and the matter is disposed of in a few sentences. In Georgia the ruling of the court seems to be in part founded on a statute peculiar to that state, and the doctrine laid down in the Georgia cases has been discredited in other jurisdictions, and especially by Freeman in his note to Harris v. Simpson, 4 Litt. [Ky.] 165, 14 Am. Dec. 101. On the other hand, it has been held that where the amount of the bail bond has been fixed, or the bail bond accepted and approved, by an officer not authorized by the law so to do, such bail bond is entirely void, in the following states, viz.: Kentucky, Oregon, Colorado, Massachusetts, Indiana, Texas, New Jersey, Maine, Nebraska, Ohio, Missouri, and other states. Commonwealth v. Roberts, 1 Duv. [Ky.] 199; Williams v. Shelby, 2 Or. 145; Rupert v. People, 20 Colo. 424, 38 P. 702; People v. Meller, 2 Colo. 705; Haney v. People, 12 Colo. 345, 21 P. 39; State v. Winninger, 81 Ind. 51; State v. Russell, 24 Tex. 505; State v. Kruise, 32 N. J. Law, 313; State v. Young, 56 Me. 219; Dickenson v. State, 20 Neb. 72, 29 N. W. 184; Harris v. Simpson, 14 Am. Dec. 101; Powell v. State, 15 Ohio, 579; People v. Brown, 23 Wend. [N. Y.] 45; Couchman v. Lisle, 15 Ky. Law Rep. 543. In Williams v. Shelby, 2 Or. 145, a justice without authority took the bail bond, and the court said: "There was no statute in existence at the time of the proceeding authorizing the justice to take such a bond. Therefore it must be treated as void. Vose v. Deanel, 7 Mass. 280; Commonwealth v. Otis, 16 Mass. 199; Commonwealth v. Loveridge, 11 Mass. 337; People v. Brown, 23 Wend. [N. Y.] 47. The circuit court held that, although there was no statute then in existence authorizing the taking of this bond by the justice, yet it might be sustained and held valid as a common-law undertaking; that the discharge of the principal for the time being was a sufficient consideration to sustain the promise and agreement entered into. This holding, we think, cannot be sustained by the authorities. In fact none have been produced to that effect. Authority has been cited to this effect, that another class of bonds might well be sustained from their form and structure without the aid of statute such as injunction bonds, replevin bonds, bail bonds in civil cases, forthcoming bonds, appeal bonds, and all such as are made payable to the beneficiary or interested party. Such have been held valid at common law, without resorting to the statute to give them effect, but it is held otherwise in criminal cases." In Rupert v. People, 20 Colo. 424, 38 P. 702, the Oregon case just referred to is cited, and the court said: "The recognizance, therefore, having been taken and approved by an officer without authority, is void, both as a statutory bond and as a common-law obligation." To the same effect are Morrow v. State, 5 Kan. 563; U. S. v. Goldstein, 1 Dill. 413, Fed. Cas. No. 15,226; Vose v. Deane, 7 Mass. 280; Commonwealth v. Loveridge, 11 Mass. 336. In State v. Winninger, 81 Ind. 51, it is said: "It is well settled that a bond or recognizance taken by a court without jurisdiction, or an officer without authority, is utterly void." In Benedict v. Bray, 2 Cal. 251, 56 Am. Dec. 332, and People v. Cabannes, 20 Cal. 529, it was held that a bond exacted by a justice of the peace without authority was void. In Commonwealth v. Roberts, 1 Duv. [Ky.] 199, after holding that a bond taken without authority is void, the court said: "It is not within the province of courts to invest persons with authority to take bonds and discharge prisoners from custody from whom the legislature have withheld such authority; nor should courts, by recognizing such as binding on either party, contravene the policy of the commonwealth in designating by law the officers authorized to bind her."—From opinion in City & County of San Francisco v. Hartnett [Cal. App.] 82 P. 1064.

5. In extradition proceedings, defendant arrested under a warrant issued on a complaint insufficient to justify issuance of warrant, in failing to charge commission of crime in another state. State v. White [Wash.] 82 P. 907.

6. See 5 C. L. 339.

7. Cr. Code Div. 3, § 11. Young v. Deneen, 220 Ill. 350, 77 N. E. 193.

8. Young v. Deneen, 220 Ill. 350, 77 N. E. 193.

time during the term at which he is bound to appear, and entering his default of record,[9] but if the term at which the accused is recognized to appear adjourns without his default having been entered of record, the recognizance cannot thereafter be forfeited, and the recognizors will be discharged from liability thereunder.[10] The court may properly declare and enter a forfeiture of the recognizance, when attorneys for defendant refuse to appear for him in answer to an amended information allowed by the court, although signifying a willingness to appear and plead to the original information, the defendant himself not appearing in court.[11] Voluntary enlistment in the navy, enabling the principal to depart from the state beyond the reach of the sureties and without their fault, will not discharge them.[12] Sureties will be discharged from liability on a recognizance issued without authority.[13] A proceeding by sureties for their discharge on a forfeited recognizance is civil, entitling the state to exceptions.[14]

§ 4. *Enforcement of bond or recognizance.*[15]—A justice of the peace has general jurisdiction to order the accused to be held to answer to the grand jury, hence the complaint in an action on a bail bond given to secure a release from custody under such an order need not show jurisdiction of the justice, nor allege that such order was duly made.[16] In scire facias on a recognizance given in a criminal proceeding, oyer of the recognizance and of the record on which it is founded may be demanded.[17] Neither the fact that the solicitor general who signed the indictment was a second cousin of the accused nor that his successor in office who took the forfeiture nisi was also related within the fourth degree furnishes a good defense to a scire facias to forfeit a criminal bond, both being out of office and another solicitor general acting when the case was heard.[18] Granting a final judgment on a forfeited recognizance is manifestly erroneous, when the scire facias returnable on the first day of the term was not executed until the second day of the term and after the return day.[19] A judgment on a bail bond that plaintiff recover against each defendant the amount in which he was obligated making the total in excess of the amount of the bond is improper in form, and should be that plaintiff recover of defendants the amount specified in the bond, and of such sum, from each defendant the amount of his obligation, and payment of the amount of the bond, by any or all, operates as a satisfaction.[20]

§ 5. *Remission of forfeiture and return of deposits made in lieu of bail.*[21]—An application to set aside a judgment of forfeiture on an appearance bond nearly four months after its rendition is properly denied where it appears that the sureties are protected by transfers of property and the defendant did not surrender himself nor was surrendered by the sureties, but was captured.[22]

9. Recognizance conditioned on accused appearing at November, 1904, term; but he was not called until following January term. State v. Dorr [W. Va.] 53 S. E. 120.

10. State v. Dorr [W. Va.] 53 S. E. 120.

11. Jones v. State [Kan.] 85 P. 302.

12. Under Pub. St. 1901, c. 252, § 30, providing for discharge of sureties when prevented from surrendering principal by act of God, or of government of the state or the United States or by sentence of law. Lamphire v. State [N. H.] 62 A. 786.

13. Rev. St. 1899, § 2800, declaring that mere irregularities of form, omission or recital shall not invalidate it, not applicable to the fixing and approval of recognizance by a sheriff wholly without authority. State v. Crosswhite [Mo.] 93 S. W. 247.

14. Lamphire v. State [N. H.] 62 A. 786.

15. See 5 C. L. 340.

16. Rev. St. 1902, par. 1282. Thomas v. Territory [Ariz.] 85 P. 1063.

17. State v. Dorr [W. Va.] 53 S. E. 120.

18. Salter v. State [Ga.] 54 S. E. 685.

19. Code 1892, §§ 1396, 3417, requiring scire facias to be returnable on first day of term and to be executed five days before the return day. Robertson v. State [Miss.] 39 So. 478.

20. Thomas v. Territory [Ariz.] 85 P. 1063.

21. See 5 C. L. 342.

22. Under Act No. 17, p. 23, of 1900, requiring such application to be made within 5 days after rendition of judgment. State v. Adair [La.] 40 So. 41.

is the father of the child are admissible.[99] Evidence of intercourse with other men not within the period when conception must have taken place is inadmissible,[1] and where defendant has shown facts which might raise an inference of intercourse with a third person, evidence tending to rebut such inference is admissible.[2] While an offer by way of compromise is not admissible against the defendant, admissions of independent facts made in an effort to settle may be shown.[3] Evidence which tends to prove that defendant could not have had intercourse with the relatrix at the time and place charged is admissible.[4] In weighing defendant's testimony, the jury may consider his interest.[5] The fact that relatrix was unmarried at the time of making the complaint need not be proven directly.[6] In most states only a preponderance of the evidence is necessary in bastardy proceedings to establish guilt.[7] Where defendant's paternity must be established beyond a reasonable doubt, proof of intercourse with a third party during the period when conception may have taken place is fatal to a prosecution.[8] Instructions should conform to the evidence,[9] and not be misleading.[10]

Judgment and bond.[11] *Commitment and discharge.*—Where an order required the father to support an illegitimate child at an institution designated by the court, the court in selecting the institution could not require the father to give securities for such support.[12]

Where defendant is discharged on appeal from an order of filiation because the child is still-born, costs incurred below cannot be assessed against the appellee.[13] By statute, a judgment for costs on appeal should be rendered against the appellant and her sureties jointly, where the appeal terminates in favor of appellee.[14] In some states the adjudged father of a bastard child may be imprisoned for noncompliance with a judgment requiring him to pay costs, support the child, and give bond therefor,[15] and a statute authorizing such imprisonment is not unconstitutional as imprisoning for debt.[16] Being a civil action, a putative father committed for nonpayment of costs is not subject to the same provisions as those committed in criminal actions,[17] and though the discharge of putative fathers from imprison-

99. As that another man took her to another city and made arrangements for her to remain until the birth of her child, paying her expenses, etc. Zimmerman v. People, 117 Ill. App. 54.

1. Zimmerman v. People, 117 Ill. App. 54.

2. As a gift of underwear to the relatrix, raising the inference that he had discovered her need while unlawfully familiar, may be rebutted by proof of similar gifts to other members of the family. Leek v. People, 118 Ill. App. 514.

3. Alminowicz v. People, 117 Ill. App. 415.

4. As evidence that defendant was confined to his bed with illness when the child must have been begotten. Commonwealth v. Pearl, 29 Pa. Super. Ct. 307; Jones v. People, 116 Ill. App. 64. Evidence held to be insufficient to establish an alibi. Eckhardt v. People, 116 Ill. App. 408.

5. Eckhardt v. People, 116 Ill. App. 408.

6. May be inferred from facts in evidence. Alminowicz v. People, 117 Ill. App. 415.

7. Preponderance is not necessarily determined by the number of witnesses on each side. Alminowicz v. People, 117 Ill. App. 415. Evidence held insufficient to show defendant's paternity as the birth of the child occurred within too short a period after his only opportunity of access. Matteson v. People, 122 Ill. App. 66.

8. Evidence held to show such intercourse. Busse v. State [Wis.] 108 N. W. 64. Evidence insufficient to sustain a conviction. Id.

9. Not error to refuse an instruction where there is no evidence calling for such an instruction. Eckhardt v. People, 116 Ill. App. 408.

10. An instruction that if the evidence of relatrix and defendant are in direct conflict, you are not to say that it is evenly balanced, is misleading as it might be so balanced. Leek v. People, 118 Ill. App. 514. An instruction to the general effect that if the testimony of relatrix and defendant are in direct conflict and both are equally credible and neither was corroborated more than the other, the evidence is balanced, held not proper. Id.

11. See 5 C. L. 415.

12. People v. Stringer, 97 N. Y. S. 40.

13. Code Cr. Proc. § 873, relating to costs when the appeal terminates in appellant's favor, has no application. Burnham v. Tryon, 98 N. Y. S. 600.

14. Code 1892, §§ 250, 85. Norton v. Wicker [Miss.] 39 So. 809.

15. Revisal 1905, § 262. State v. Morgan [N. C.] 53 S. E. 142.

16. State v. Morgan [N. C.] 53 S. E. 142.

17. Cannot be compelled to work on the public roads under Revisal 1905, §§ 1352,

ment be regulated by a statute embracing also imprisonment for nonpayment of fines and criminal costs, yet conditions attached only to the latter classes do not apply to the former.[18] And it seems where such commitment is wrongfully continued, a habeas corpus proceeding is more appropriate than a petition to be discharged.[19] Where the court erroneously discharges defendant from an undertaking which as a fact he never gave, it may vacate its order,[20] though an appeal has been taken.[21]

An indictment for failure to support an illegitimate child need not allege a prior adjudication of the paternity,[22] nor is such record admissible [23] or essential to a valid conviction.[24]

Contracts and bonds for support.[25]

§ 4. *Legitimation, recognition, adoption.*[26]—In Illinois the marriage of the parents legitimatizes the issue.[27] By statute in North Carolina, children born before January 1st, 1868, of negro parents living together as husband and wife are legitimate though they were illegitimate when born.[28] Where a child has once been legitimatized by the marriage of the parents, subsequent acts of the parents do not affect the status of the child.[29] Slave marriages legalized under the acts relating thereto became legal ab initio, and acting retrospectively, legitimated all offspring.[30] In some states legitimation may be affected, except in certain cases, by an acknowledgment before a notary,[31] and it is not necessary that the act of acknowledgment show that the case is not one of the excepted.[32] Whether the act was one of legitimation or a mere acknowledgment is determined by the intent as manifested by the act.[33]

BENEFICIAL ASSOCIATIONS; BENEFICIARIES; BETTERMENTS, see latest topical index.

BETTING AND GAMING.

§ 1. Offense and Criminal Prosecution (434).
A. The Offense (434). Validity of Regulations (435). Cards and Other Table Games (435). Racing and Race Tracks (436). Slot Machines (436). Dealing in Futures (436). Guessing Contests (436). Gaming at Public Place (436). Keeping a Gaming Place (437).
B. Indictment or Information and Trial Procedure (438).
§ 2. Penalties and Seizure of Implements; Injunction (439).
§ 3. Recovery Back of Money Lost (440).

Gambling contracts [34] and lotteries [35] are treated elsewhere.

§ 1. *The offense and criminal prosecutions. A. The offense.*[36]—Gambling is the playing of a game of chance or skill for money or other stakes, or betting on

1355, which is applicable only to criminal actions. State v. Morgan [N. C.] 53 S. E. 142.

18, 19. State v. Morgan [N. C.] 53 S. E. 142.

20, 21. Burnham v. Tryon, 98 N. Y. S. 600.

22. Rev. St. 3140—2, does not require such an adjudication as a condition of guilt. Ogg v. State [Ohio] 75 N. E. 943.

23, 24. Ogg v. State [Ohio] 75 N. E. 943.

25, 26. See 5 C. L. 416.

27. Hurd's Rev. St. 1899, p. 205, c. 17, § 15. Miller v. Pennington, 218 Ill. 220, 75 N. E. 919.

28. Code § 1281, rule 13. Bettis v. Avery [N. C.] 52 S. E. 584.

29. Where a slave marriage became legalized by virtue of the relation continuing until the Act of March 10, 1866 (Laws 1866, p 99, c. 401), went into effect, the subsequent abandonment of the wife did not affect the status of the children. Nelson v. Hunter [N. C.] 53 S. E. 439.

30. Act of March 10, 1866 (Laws 1866, p. 99, c. 40). Nelson v. Hunter [N. C.] 53 S. E. 439.

31. Civ. Code 1900, art 200. Davenport v. Davenport [La.] 41 So. 240.

32. Burden of proving such fact rests upon the party attacking the legitimation. Davenport v. Davenport [La.] 41 So. 240.

33. Where a father declares that he acknowledges the child and "does hereby legitimate him," and further that he wishes him to inherit as if born in lawful wedlock, the act is one of legitimation, though he further declares that he does "hereby legitimate said child" as is contemplated by a certain statute, which statute relates solely to acknowledgments. Davenport v. Davenport [La.] 41 So. 240.

34. See Gambling Contracts, 5 C. L. 1571.

35. See Lotteries, 6 C. L. 487.

36. See 5 C. L. 417.

the result of a game.[37] One who bets on the result of a game may be guilty of gaming though he be not a player.[38] An ordinance reading "whoever shall gamble" is broad enough to cover lay as well as professional gamblers.[39] Under statutes prohibiting gambling with minors it is no defense that the accused was ignorant that the gaming party was a minor.[40] A statute authorizing a civil action for the recovery of property lost at gaming does not affect the criminal remedy of the state though it provides that such civil action shall constitute the exclusive penalty for the acts specified.[41]

Validity of regulations.[42]—The legislature may confer upon municipalities power to pass ordinances for the suppression of gambling games of all kinds, including those not specially penalized by the statutes of the state.[43] Municipalities authorized to pass ordinances for the suppression of immoral behavior or conduct calculated to disturb the peace and dignity of the place may pass ordinances for the punishment of gambling.[44] A statute empowering cities to suppress billiard tables passed at a time when that term included pool tables authorizes the suppression of the latter.[45] Licenses authorizing gaming confer no such vested contract or property rights as equity will protect by enjoining prosecutions under the gambling law [46] but may be modified, revoked, or continued at the pleasure of the state.[47]

Cards and other table games.[48]—Draw poker is gambling.[49] Statutes in some states prohibit card playing at any place except a private residence occupied by a family,[50] and card playing accompanied by a bet or wager at such a residence which is commonly resorted to for the purpose of gaming.[51] In Texas it is no offense to play a game of dice at a private residence.[52]

37. Card playing without evidence of betting for money or other valuable thing did not authorize conviction for gambling. Fleming v. State [Ga.] 53 S. E. 579. That witness called it "gambling" was a mere conclusion. Id. That defendant was caught in act of playing by three officers who saw him engage in play and take and put down stakes held sufficient to establish offense of engaging in game of chance and hazard. Goslin v. Com. [Ky.] 90 S. W. 223. To gamble is "to play or game for money or other stakes." City of Shreveport v. Bowen [La.] 40 So. 859.

38. Instruction that if defendant played or bet for money contrary to the state law he would be guilty held not erroneous. Groves v. State, 123 Ga. 570, 51 S. E. 627.

39. City of Lake Charles v. Roy [La.] 40 So. 362.

40. Rev. St. 1899, § 2193. Quo warranto against corporation. State v. Delmar Jockey Club [Mo.] 92 S. W. 185. But under Ky. St. 1903, § 1972, prohibiting one from knowingly allowing a minor to play a game on a billiard table owned or controlled by him, it must appear that accused knew that the player was a minor. Commonwealth v. Wills [Ky.] 89 S. W. 144.

41. In re Opinion of the Justices [N. H.] 63 A. 505. Laws 1905, p. 648, c. 232, creating the "New England Breeders' Club" and authorizing it to hold races, offer purses, etc., but requiring it to prohibit betting on races and authorizing a civil action for the recovery of money or property wagered, did not authorize the corporation to allow betting on horse races on its grounds, though the act provided that such action should be the exclusive penalty for the acts specified, but such acts still remained criminal. Id.

42. See 5 C. L. 418.

43. Such as poker. City of Lake Charles v. Roy [La.] 40 So. 362.

44. In Kentucky cities of the fourth class so authorized may suppress gaming. White v. Com. [Ky.] 92 S. W. 285.

45. Gen. St. 1901, § 1129, empowering cities to suppress billiard tables enacted while that term included tables substantially the same as pool tables at the present time. City of Clearwater v. Bowman [Kan.] 82 P. 526. Must be construed in light of the approved usage of words at the time of its enactment. Id.

46, 47. Littleton v. Burgess [Wyo.] 82 P. 864.

48. See 5 C. L. 418.

49. City of Shreveport v. Bowen [La.] 40 So. 859.

50. Where a house was occupied only by two boys, 17 and 15 years old, the rest of the family having moved away, gaming was not authorized there as at a private residence occupied by a family. McCollum v. State [Tex. Cr. App.] 92 S. W. 848. Evidence insufficient to sustain conviction of playing game of cards. Hale v. State [Tex. Cr. App.] 90 S. W. 654. Evidence insufficient to support conviction for card playing or betting. Ables v. State [Tex. Cr. App.] 92 S. W. 414. Evidence insufficient to support conviction of gaming with cards. Berry v. State [Tex. Cr. App.] 85 S. W. 14.

51. The playing of cards at a private residence occupied by a family and commonly resorted to for the purpose of gaming is not an offense unless accompanied by a bet or wager. Under Pen. Code, arts. 379, 381, as amended by Acts 27th Leg. p. 26, c. 22. Gallegos v. State [Tex. Cr. App.] 95 S. W. 123. To sustain a conviction for playing cards at

Racing and race tracks.[53]—Gaming includes horse racing;[54] and pool selling, book making, or betting upon horse races, is generally considered gambling.[55] Pool selling and book making[56] and the operation of pool rooms[57] are generally prohibited. Where offers are made and bets received and paid within the state, it is no defense to a prosecution for operating a pool room, that they are telegraphed to a confederate out of the state.[58] Authority to conduct the business of pool selling and bookmaking does not include the right to transact such business with minors contrary to statute.[59]

Slot machines.[60]—The operation of slot machines is gambling though the operator cannot lose, provided the element of chance is still present.[61]

Dealing in futures where delivery is not intended is gambling.[62]

Guessing contests are generally considered within the statutes prohibiting lotteries and schemes of chance.[63]

Gaming at public place.[64]—An ordinance imposing a penalty on inmates or frequenters of gambling houses is a reasonable exercise of the police power and valid.[65] Any place made public by the assemblage of people is a public place within the meaning of statutes prohibiting gaming at public places.[66] Thus any place is a

a private residence it must be shown that the place was commonly resorted to for that purpose. Handy v. State [Tex. Cr. App.] 92 S. W. 848. Defendant could not be convicted for gaming in his private residence on proof of only one playing and no evidence that the place was commonly resorted to for the purpose of gaming. Spencer v. State [Tex. Cr. App.] 92 S. W. 847. Perjury could not be predicated on false testimony given before grand jury, where indictment therefor did not allege that there was any bet or wager in the offense investigated. Gallegos v. State [Tex. Cr. App.] 95 S. W. 123. Whether accused had seen certain parties play was not the material inquiry before the grand jury as it was no offense to see them play. Id.

52. Waggoner v. State [Tex. Cr. App.] 92 S. W. 38.

53. See 5 C. L. 419.

54. In re Opinion of the Justices [N. H.] 63 A. 505.

55. Within Pub. St. 1901, c. 270, § 6, prohibiting gambling places. In re Opinion of the Justices [N. H.] 63 A. 505.

56. Act March 21, 1905 (Laws 1905, p. 131), "prohibiting book-making and pool-selling" not unconstitutional in that title contains more than one subject. State v. Delmar Jockey Club [Mo.] 92 S. W. 185.

57. Act No. 128, p. 292, of 1904, providing for the suppression of "pool rooms," declaring their operation to be gambling and providing punishment, is not unconstitutional or inoperative for failing to define the crime denounced. State v. Rhodes [La.] 39 So. 972; State v. Rabb [La.] 39 So. 971. Not unconstitutional or inoperative for obscurity in defining "pool room." State v. Maloney [La.] 39 So. 539. Statutes must be construed with reference to the evil sought to be remedied and the popular signification of terms of whose meaning the court will take notice. Id. The words "pool room" and "turf exchange" are used synonymously. State v. Rabb [La.] 39 So. 971. "Pool room" in Act 128, p. 292, of 1904, and "turf exchanges" in Act 127, p. 291, of 1904, held to mean rooms or places where gambling or betting on horse races is carried on. State v. Maloney [La.] 39 So. 539. That the offense was committed at a cigar store was not incompatible with the idea that the pool room was kept in that cigar store, the question being one of fact. State v. Rabb [La.] 39 So. 971.

58. Pool room away from tracks within state. State v. Maloney [La.] 39 So. 539.

59. State v. Delmar Jockey Club [Mo.] 92 S. W. 185.

60. See 5 C. L. 419.

61. Maintenance and operation of slot machine giving at least five cents, and possibly more, in trade for a nickel, violated Liquor Law 1896, p. 66, c. 112, § 23, subd. 7, prohibiting gambling in a saloon. In re Cullinan, 99 N. Y. S. 1097. Criticizing and comparing Cullinan v. Hosmer, 100 App. Div. 148, 91 N. Y. S. 607.

62. Evidence sufficient to sustain conviction of gambling in cotton futures. Barnes v. State [Ark.] 91 S. W. 10. See, also, Gambling Contracts, 5 C. L. 1571.

63. See, also, Lotteries, 6 C. L. 487. A contest by which part of a newspaper subscription was paid for the privilege of guessing on votes cast at an election, the nearest guesser to receive a portion of the fund created by the contributions was unlawful within the statute of Ohio prohibiting lotteries and schemes of chance. Stevens v. Cincinnati Times-Star Co., 72 Ohio St. 112, 73 N. E. 1058.

64. See 5 C. L. 419.

65. Lane v. Springfield, 120 Ill. App. 5. Ordinance imposing penalty on one "found" in such house is not unreasonable. Flynn v. Springfield, 120 Ill. App. 266.

66. Ferrell v. Opelika [Ala.] 39 So. 249. The word "public" in requested instruction as to what would constitute a public place, held confusing and authorized refusal of charge. Id. Gambling ordinance remained in force after change from district to city of Opelika and adoption of new charter Feb. 20, 21, 1899. Id.

public one where the parties can be seen from the highway,[67] though only by careful observers,[68] but to make the place a private one it is not necessary that it should be entirely shut off from all view.[69] A boarding house is not per se a public place.[70] When the evidence tends to show that a dwelling is used for other than private purposes and as a resort by those who would indulge in gaming, the question of its being a public place is for the jury.[71]

Keeping a gaming place.[72]—Statutes generally prohibit the keeping of gaming places,[73] and all persons concerned therein are held equally guilty.[74] The offenses of keeping and maintaining a gambling house and of being an inmate or frequenter of such a house are separate and distinct and separate penalties imposed by ordinance for each may be collected in the same action from one person.[75] The setting up [76] or exhibiting,[77] of gambling devices [78] or permitting gambling to be conducted [79] on one's premises,[80] or on premises under one's control [81] or in his possession,[82] is generally prohibited by statute. Knowingly renting premises for gaming purposes

67. Error to charge that if the place where cards were played was within seventy-five yards from a certain public road and could be seen therefrom, it was a public place. The question was whether the parties who were playing cards and not the place where they played could be seen from the highway. Brannon v. State [Ala.] 39 So. 983.

68. Where accused bet on a game of cards in the daytime within fifteen steps from public road and the game and betting were seen from the road, the place was public though the playing and betting might have been seen only by careful observers. Davis v. State [Ala.] 41 So. 404.

69. A place in a private yard shut out of view from the public highway was not a public place. Walker v. State [Ala.] 41 So. 176. It was not necessary that the place should be completely surrounded by obstructions. It was sufficient that the view was shut off from the public road. Id.

70. Walker v. State [Ala.] 41 So. 176. That place where cards were played was in yard of a boarding house did not make it public in absence of proof that any other game had ever been played there. Id.

71. Ferrell v. Opelika [Ala.] 39 So. 249.

72. See 5 C. L. 419.

73. Evidence held sufficient to support a general verdict of guilty on three counts, viz., keeping a gaming house, keeping a gaming table, and gaming. Groves v. State, 123 Ga. 570, 51 S. E. 627. Evidence held sufficient to sustain a conviction for unlawfully keeping a gambling house. State v. Hoyle [Minn.] 107 N. W. 1130.

74. Held not error to instruct that if accused loaned money to another for purpose of maintaining gaming house and thereafter visited the house and did anything toward keeping and maintaining such house so kept and maintained for gaming he would be guilty equally with such other person "inasmuch as keeping and maintaining a gaming house in Georgia is a misdemeanor and all persons concerned in such keeping and maintaining are principals." Groves v. State, 123 Ga. 570, 51 S. E. 627.

75. Lane v. Springfield, 120 Ill. App. 5.

76. Conviction for setting up gambling devices held proper on the evidence. City of Mexico v. Harris, 115 Mo. App. 707, 92 S. W. 505.

77. Evidence held to sustain conviction for exhibiting gaming table though there was no positive testimony that defendant knew that games of chance were being played upon the pool table. Moore v. State [Tex. Cr. App.] 92 S. W. 1083. Evidence insufficient to sustain conviction for exhibiting a gaming table in that accused was not in charge of the pool table or pool hall. Moore v. State [Tex. Cr. App.] 92 S. W. 1082. One who conducts a pool room does not exhibit a gaming table and bank merely because certain parties frequent the room and bet the table fees unless he knows of the custom and permits it. Berry v. State [Tex. Cr. App.] 92 S. W. 1081.

78. Dice is a gambling devise within Burns' Ann. St. 1901, § 2181, prohibiting the keeping or exhibiting for gain of any gambling device, etc., "of any kind or description under any name or denomination whatever," and is not excluded by the rule ejusdem generis. White v. State [Ind. App.] 76 N. E. 554.

79. Under Ky. St. 1903, § 1967, prohibiting one from permitting the games mentioned in section 1960, to be conducted on one's premises, one may be indicted for permitting the game of craps to be conducted, and the indictment need not state that the game was permitted for compensation, percentage, or commission. Herr v. Com. [Ky.] 91 S. W. 666.

80. Evidence sufficient to support conviction for permitting game of craps to be conducted on defendant's premises contrary to Ky. St. 1903, § 1967. Herr v. Com. [Ky.] 91 S. W. 666.

81. Where defendant rented the third floor of a house to others for bed rooms, evidence of gaming on that floor on only one occasion held insufficient to convict for permitting gaming in house under his control, his testimony excluding the idea that he was aware of such gaming. Brown v. State [Tex. Cr. App.] 93 S. W. 723.

82. An ordinance against any person setting up or permitting to be set up, gambling devices in premises owned by him or in his possession is directed not only against an owner or proprietor but also against a mere occupant. City of Mexico v. Harris, 115 Mo. App. 707, 92 S. W. 505.

is also frequently prohibited,[83] but one who does not rent premises for gaming purposes is under no obligation to discover the use to which they are subsequently put.[84]

(§ 1) *B. Indictment or information and trial procedure.*[85]—The language of the statute sufficiently states the offense charged though other matters are necessarily included.[86] An indictment charging different ways of committing the same offense is not objectionable as a misjoinder of distinct causes.[87] An accusation of playing and betting "at a game played with cards" need not set out the name of the game.[88] A charge that defendant bet and wagered need not aver that money or something of value was bet or wagered,[89] and an indictment for renting a house for gaming need not state the name of the tenant.[90] Indictments in the alternative are generally held bad.[91] On an indictment charging defendants with having played a game together, evidence of a joint game is necessary for conviction.[92] An indictment charging betting at a game of dice and permitting dice to be played on one's premises does not justify a conviction for exhibiting a banking game.[93] Where a case is tried on affidavit, the state is not bound to rely for conviction on the game the witness had in mind when he made the affidavit.[94]

That a certain place is maintained as a gambling house may be shown by the general reputation of the place,[95] by the reputation of its inmates and frequenters as professional gamblers,[96] and by gambling paraphernalia found at the place.[97] A place not being per se a public one, proof of other games played there is admissible to show that it was a public place.[98] Where guilty knowledge is the gist of the offense anything showing the existence of such knowledge is admissible in evidence, it being immaterial when or from what source such knowledge was acquired.[99] The court will take judicial notice of the meaning of the term pool room.[1] Other applications of the ordinary rules of evidence[2] and instructions[3] in criminal cases are given in the notes.

83. Bashinski v. State, 123 Ga. 508, 51 S. E. 499. But if, at the time of renting, the circumstances were such as to charge him with notice that the premises were being or would be used for gaming the jury is authorized to find that he had knowledge that the premises would be so used. Id.

84. Instruction criticized. Bashinski v. State, 123 Ga. 508, 51 S. E. 499.

85. See 5 C. L. 420.

86. Information under Rev. St. 1899, § 439, for permitting minor to play on gaming table was sufficient, though name of defendant had to be stated therein. State v. Bell, 115 Mo. App. 13, 90 S. W. 757.

87. Penal Code 1895, § 398, penalizing the keeping of a gaming house or renting a house for gaming defines but a single offense committable in any of the three ways therein designated so that an indictment of two counts, one charging the keeping of a gaming house and the other a renting for gaming did not misjoin distinct offenses. Bashinski v. State, 123 Ga. 508, 51 S. E. 499.

88. Demurrer without merit. Slade v. State [Ga.] 54 S. E. 750.

89. Handy v. State [Tex. Cr. App.] 92 S. W. 848.

90. Bashinski v. State, 123 Ga. 508, 51 S. E. 499.

91. Accusation charging that accused did "unlawfully play and bet for money or other valuable thing at a game of skin or other game played with cards," bad as against special demurrer. Haley v. State [Ga.] 52 S. E. 159. Statement of court that he would confine state to proof of bet of money at game of skin did not cure. Id. Indictment that accused bet at a "gaming table or bank" held bad though the words "to wit, a pool table" followed. Taylor v. State [Tex. Cr. App.] 95 S. W. 119.

92. Reno v. State [Miss.] 41 So. 7.

93. Waggoner v. State [Tex. Cr. App.] 92 S. W. 38.

94. Winston v. State [Ala.] 41 So. 174.

95, 96. State v. Hoyle [Minn.] 107 N. W. 1130.

97. Not inadmissible because officers forced their way into room. State v. Hoyle [Minn.] 107 N. W. 1130.

98. Boarding house. Winston v. State [Ala.] 41 So. 174.

99. In prosecution for renting premises for gaming, evidence that defendants' alleged tenant had been a professional gambler for longer than period of limitations, held admissible. Bashinski v. State, 123 Ga. 508, 51 S. E. 499.

1. State v. Maloney [La.] 39 So. 539.

2. Testimony that defendant was lessee of the premises during period within which it was alleged gaming was carried on in the house, admissible to show his control over the premises. Bashinski v. State, 123 Ga. 508, 51 S. E. 499. Evidence of prior conviction of similar offense or pendency of a like indictment, offered by state, was incompetent and hurtful. Id. In prosecution for setting up gambling devices, evidence of complaint against, and plea of guilty by, defendant in a previous prosecution for gam-

A conviction for gaming is not a bar to a subsequent prosecution for setting up a gambling device.[4] A constitutional provision making a conviction under a municipal ordinance a bar to further prosecution for the same offense, applies to convictions for gaming.[5] The minimum punishment for gaming may be fixed by one statute and the maximum by another.[6] Where the statute authorizes a city to punish the violation of its ordinances by fine only, a clause in an ordinance providing either a fine or imprisonment for gambling is not entirely void, but the part relating to imprisonment may be treated as surplusage.[7]

§ 2. *Penalties and seizure of implements; injunction.*[8]—The complaint in a civil action to recover a penalty for violating a municipal ordinance prohibiting the setting up and keeping of gaming devices is sufficient if it notifies defendant of the ordinance violated, and is definite enough to bar another prosecution for the same offense.[9] The continuous operation of a gambling house authorizes the imposition of but one penalty under an ordinance imposing a penalty upon any one setting up, keeping, or maintaining such a house.[10] Statutes authorizing the seizure and destruction of gaming devices are generally considered constitutional and embrace devices which may be used for other than gaming purposes.[11] A state recognizing

bling based on the same transaction, held competent to show that a certain table produced in evidence was used as a gambling device. City of Mexico v. Harris, 115 Mo. App. 707, 92 S. W. 505. Indefiniteness of question as to other games played cured by answer of witness showing time within which they must have been played. Winston v. State [Ala.] 41 So. 174. "This gambling took place the same night E. was killed at C.'s" was prejudicial where not admitted for purpose of showing when alleged gambling occurred. Fleming v. State [Ga.] 53 S. E. 579.

3. Defendant was not prejudiced by the omission of the word "with" in the instruction. "This is a prosecution charging defendant—keeping and exhibiting a gambling device." White v. State [Ind. App.] 76 N. E. 554.

4. City of Mexico v. Harris, 115 Mo. App. 707, 92 S. W. 505.

5. Under Const. § 168, there could be no prosecution in the circuit court for an offense of gaming for which defendant had been convicted in the police court of a city of the fourth class. White v. Com. [Ky.] 92 S. W. 285.

6. In Idaho the Anti-Gambling Act (Sess. Laws 1899, p. 389), merely fixes the minimum punishment for gambling at a fine of not less than $200 or imprisonment in the county jail for not less than four months, the maximum being fixed by § 6313, Rev. St. 1887, at $300 fine and six months imprisonment, so that upon a conviction under the Anti-Gambling Act, the court could impose both a fine of $250 and imprisonment for three months. In re Burgess [Idaho] 84 P. 1059.

7. City of Clearwater v. Bowman [Kan.] 82 P. 526.

8. See 3 C. L. 505.

9. Sufficient. City of Mexico v. Harris, 115 Mo. App. 707, 92 S. W. 505. Immaterial whether complaint conformed to affidavit on which it purported to be based as statute did not require it to be supported by affidavit. Id.

10. Lane v. Springfield, 120 Ill. App. 5.

11. Furth v. State, 72 Ark. 161, 78 S. W. 759. Sand. & H. Dig. §§ 1618, 1619, not void for uncertainty or ambiguity. Id. Willson Act 1901, p. 114, did not repeal it. Id.

NOTE. Right to seize gambling devices: Gambling apparatus is subject to summary seizure and detention or destruction under the police power: Board of Police Com'rs v. Wagner, 93 Md. 182, 86 Am. St. Rep. 423, 52 L. R. A. 775; Frost v. People, 193 Ill. 635, 86 Am. St. Rep. 352. However, if property may be used for legal as well as for gambling purposes, it seems that the police have no authority to seize it as a preventive measure, unless it is first established that the property was procured or held for an illegal purpose: Wagner v. Upshur, 95 Md. 519, 93 Am. St. Rep. 412. In Kite v. People, 32 Colo. 5, 74 P. 886, a statute providing for the summary seizure and destruction of gambling devices is upheld as constitutional. The opinion of the court reads, in part, as follows: "The specific objections now urged are, first, that the foregoing statute is unconstitutional in that it violates section 25 of aricle 2 of our constitution, which provides that no person shall be deprived of life, liberty, or property without due process of law in the respect that no provision for a jury trial is made; and, second, that, inasmuch as this wheel might have been used for some other purpose than for gambling, and the intervener Assmussen, as the mortgagee, though leaving it in the possession of the mortgagor, was not aware of its use for an illegal purpose, and did not knowingly permit of, or give his consent to, such use, the destruction as to him is illegal. Since the defendant made no demand for a jury, but consented to a hearing by the judge, we might very properly hold that he cannot be heard here to say that he was deprived of the right to a jury trial. But there is a much more satisfactory way to decide the point. The right of trial by jury does not apply to this proceeding. As was said in McInerney v. Denver, 17 Colo. 302, 313, 29 P. 516: 'Though a particular offense

the validity of a statute authorizing pool selling by a corporation is estopped to forfeit its franchise for so doing.[12]

In Texas the habitual use, actual or threatened, of any premises for the purpose of gaming, may be restrained by injunction at the suit of the state or any citizen thereof.[13]

§ 3. *Recovery back of money lost.*[14]—In the absence of statute, money advanced for the purpose of gaming cannot be recovered,[15] but one who does not participate in a gambling transaction may recover money advanced to the loser after the gambling has taken place for the purpose of enabling him to pay the gambling debt.[16] So, too, one may recover money lost on a pretended wager where the loss is due to a fraudulent conspiracy on the part of the other participants.[17] Statutes have been passed in most jurisdictions authorizing a civil action in the name of the

may have been unknown to the common or statutory law before the adoption of our constitution, yet if it clearly belongs to a class of offenses that were theretofore not triable by jury, the constitutional guaranties relating to jury trials do not apply.' Under similar statutes in other states the doctrine has been firmly established that the proceeding provided for in the foregoing section is in rem, that it is summary, and the constitutional right to a jury trial does not exist: Glennon v. Britton, 155 Ill. 232, 40 N. E. 594; Frost v. People, 193 Ill. 635, 86 Am. St. Rep. 352; Oppenheimer v. Lalor, 36 Misc. Rep. 546, 73 N. Y. S. 948; Commercial Ins. Co. v. Scammon, 123 Ill. 601, 14 N. E. 666; Davidson v. New Orleans, 96 U. S. 97, 24 Law. Ed. 616; Waples' Proceedings in Rem, §§ 23, 24, 65, 68, 72, 110, 140, 231, 238; Lawton v. Steele, 152 U. S. 133, 38 Law. Ed. 385; 2 State and Federal Control of Persons and Prop. p. 826. In Frost v. People, 193 Ill. 635, 86 Am. St. Rep. 352, speaking of a statute much like ours, the court said: 'Trial by jury was never a right in summary proceedings, and the legislature did not violate the constitution by providing that gaming implements and apparatus should be destroyed, after a hearing, under the direction of the judge, justice or court.' This observation has our approval. The record shows that this wheel was not only used for gambling purposes, but such was the only use to which it could reasonably be devoted. It was purchased with that distinct object in view, was so used, and for no other purpose. When it was left by the mortgagee in the possession of the mortgagor, it was known that the latter might, if he saw fit, continue to use it, as he had theretofore, for the purposes inhibited by the statute. The fact that Assmussen, the mortgagee, did not expressly, or otherwise, give his consent that the mortgagor might use it for gambling purposes, and that the mortgagee did not permit, or know of, such use, is not material. According to the decided weight of authority, it is held to be the duty of the person owning or having property that might be put to illegal uses to see that it is not done: Commonwealth v. Gaming Implements, 155 Mass. 165, 29 N. E. 468; Oppenheimer v. Lalor, 36 Misc. 546, 73 N. Y. S. 948; State v. Soucie's Hotel, 95 Me. 518, 50 A. 709. In the case from Maine, the supreme court of that state well says: 'Gambling apparatus and implements are treated by the statute as noxious per se, and they are ordered destroyed to remove a danger imminent from their very existence not merely to punish the owner for an unlawful use. The statute by its terms strikes at the thing itself, and not at any act or intent of its owner. The owner of this particular gambling apparatus did not effectually keep it harmless. It escaped from him to the hurt of society. It can, therefore, be lawfully destroyed in the manner provided by statute."

In a recent Ohio case a statute declaring that any net or any other means or device for catching fish in violation of the law for their protection to be a public nuisance, and making it the duty of certain public officers to destroy such nets and devices, is pronounced constitutional. State v. French, 71 Ohio St. 186, 104 Am. St. 770, ante, p. 770.—From note to Woods v. Cottrell [W. Va.] 104 Am. St. Rep. 1011.

12. State by receiving and appropriating the money obtained under Rev. St. 1899, § 7419, authorizing book making and pool-selling recognized its validity and could not demand forfeiture of corporation franchise where such business was authorized by its charter. State v. Delmar Jockey Club [Mo.] 92 S. W. 185.

13. Gen. Laws 29th Leg. p. 372, c. 153. Ex parte Allison [Tex. Cr. App.] 90 S. W. 492. District court could grant injunction though county court might have had concurrent jurisdiction. Id. Statute is not unconstitutional as depriving a party of a trial by jury, or denying him due process of law (Ex parte Allison [Tex. Cr. App.] 90 S. W. 492; Ex parte Allison [Tex.] 90 S. W. 870), but is valid as a remedy for enjoining a public nuisance though it may also prevent the commission of a crime (Id.). Constitutional as to title. Id. Not invalid because gives right of action to state or a citizen. Id. Does not put twice in jeopardy for same offense. Id.; Ex parte Allison [Tex. Cr. App.] 90 S. W. 492.

14. See 5 C. L. 421.

15. Cooley v. Allen [Ky.] 90 S. W. 1048.

16. Payee did not know that note was executed for gambling debt and did not participate in gambling transaction. Note valid. Cooley v. Allen [Ky.] 90 S. W. 1048.

17. Plaintiff could recover large sums of money which he was induced to put up on pretended foot race on representations that a certain party was sure to win, where race was not bona fide. Lockman v. Cobb [Ark.] 91 S. W. 546.

loser, his legal representatives,[18] or of the state,[19] against the winner for the recovery of money or property lost in gambling or speculation in "futures."[20] But a statutory provision allowing a recovery of money lost at any wager whatever followed by one rendering unenforceable any contract for dealing in futures does not authorize recovery of money lost in dealing in futures,[21] and one licensed by the legislature to deal in futures is not subject to the penalty imposed by statutes allowing a recovery of money lost at gaming.[22] A statute subjecting property which an owner knowingly permits to be used for gaming purposes to the payment of judgments against the winner for money lost is constitutional.[23] In the absence of a conspiracy[24] or a statutory provision to the contrary, one of several winners is liable to the loser only for the proportion of the winnings actually received by him,[25] and a judgment against the contributors jointly is erroneous.[26] One of numerous "guessers" in a newspaper guessing contest on the votes cast at an election has no standing in equity for an injunction and receiver on a claim that the fund created belongs to the contributors, that their names are unknown, and that they cannot be brought into court.[27]

18. The right of action given by Rev. Laws, c. 99, § 4, for the recovery of money paid on account of contracts to buy or sell securities on margin survives to the legal representatives of the payor. Anderson v. Metropolitan Stock Exch. [Mass.] 77 N. E. 706.

19. Under Burns' Ann. St. 1894, §§ 251, 252, 273, 6678, the wife of a loser at gambling may be substituted for the state as plaintiff after recovery of judgment by the state for the money lost, so that the wife may enforce the judgment. Tyler v. Davis [Ind. App.] 75 N. E. 3.

20. Rev. Laws, c. 99, § 4, constitutional. Anderson v. Metropolitan Stock Exchange [Mass.] 77 N. E. 706. Under Rev. Laws, c. 99, § 4, providing that one who contracts to buy or sell securities intending at the time that there shall be no actual purchase or sale may recover from the other party any payments made if the other party had reasonable cause to believe that such intention existed, evidence of defendant's dealings with other parties is inadmissible to show the intention of a plaintiff who has no knowledge of such dealings. Id. Evidence of defendant's undisclosed intention to deliver stock is not admissible in an action under Rev. Laws, c. 99, § 4, to show that defendant did not have reasonable grounds to believe that plaintiff did not intend to actually buy and sell. Id. The voluntary release by an insolvent of his right to recover, under Rev. Laws, c. 99, § 4, payments made on margin contracts was fraudulent as to creditors and did not bar recovery. Id. An action to recover property pledged to make good marginal accounts in stock speculations brought under section 5 of the "Act to Prevent Gaming" (2 Gen. St. p. 1606), must be brought within six months from the time of delivery of the property. Myers v. Fridenberg [N. J. Eq.] 62 A. 532. Relief in equity to recover stock pledged to secure margins in stock speculations cannot be had under § 2 of 2 Gen. St. p. 1606, where there is an adequate remedy at law by conversion. Id.

21. Sections 2116, 2117, Code 1892. Isaacs v. Silverberg, Parry & Co. [Miss.] 39 So. 420.

22. Not subject to Civ. Code 1895, § 3671, where license tax was paid. Miller & Co. v. Shropshire [Ga.] 53 S. E. 335.

23. Does not deprive owner of his property without due process of law. Ohio Rev. St. § 4275. Marvin v. Trout, 199 U. S. 212, 50 Law. Ed. ——. Ohio Rev. St. § 4275, does not violate federal constitution in not permitting or providing for trial by jury. Id. Defendant could not raise objection that statute was void in making the judgment against the winner conclusive evidence of the amount lost where other proof as to amount was given over his objection that the fact was not in issue. Id.

24. No conspiracy where contributor did not know with whom bet was to be made and loser did not know that contributor was interested. Motlow v. Johnson [Ala.] 39 So. 710. Where several conspire together to induce one to become intoxicated and then to obtain his money under pretext of a game of cards, all are jointly and severally liable for all the damages sustained. Not necessary to show that each and every defendant actually won something from plaintiff, nor to establish the respective relations of the defendants. Batman v. Cook, 120 Ill. App. 203. Evidence held to warrant finding of conspiracy. Id.

25. One who contributes to a fund bet against another party. Code 1896, § 2263. Motlow v. Johnson [Ala.] 39 So. 710. Where declaration relies on the statute and is in trover plaintiff must establish that he lost and that some defendant or defendants won some definite, fixed sum or sums. Batman v. Cook, 120 Ill. App. 203.

26. Motlow v. Johnson [Ala.] 39 So. 710.

27. Action dismissed, the court not having jurisdiction at law in actions to recover fifty cents. Stevens v. Cincinnati Times-Star Co., 72 Ohio St. 112, 73 N. E. 1058.

BIGAMY.[28]

The offense.[29]—Statutes including within the definition of bigamy the continued cohabitation within a state under a bigamous marriage contracted without the state are generally considered constitutional,[30] being leveled not at the bigamous marriage itself but at the offense of cohabitation committed within the state.[31] The prohibitory words "shall marry another person" as used in statutes directed against bigamy mean "shall go through the form and ceremony of marriage with another person."[32] A common-law marriage will sustain a conviction for bigamy in jurisdictions where such a marriage is valid.[33] A subsequent repudiation of the marriage by the alleged second wife is no defense.[34]

The indictment in Alabama need not allege where the offense was committed.[35] In the proof of names the rule of idem sonans applies.[36]

Evidence and instructions.[37]—The record of a prior divorce suit showing that a divorce was granted to prosecuting witness on the ground that at the time of her marriage with the accused he had another wife living, cannot be used in a criminal prosecution for bigamy.[38] The acts, declarations, or admissions of the accused in recognition of his alleged first wife as his legal spouse are admissible to supplement other evidence of the prior marriage.[39] Evidence that the alleged second wife knew that defendant was already married is irrelevant.[40] The testimony of defendants alleged legal wife is admissible to prove that she was married to defendant,[41] and in some jurisdictions the wife is a competent witness against her husband to prove the crime.[42] Prosecuting witness cannot be impeached by particular acts of dishonesty or unchastity.[43]

Sufficiency of evidence.[44]

Bill of Discovery; Bills and Notes; Bills in Equity; Bills of Lading; Bills of Sale; Birth Registers, see latest topical index.

BLACKMAIL.[45]

It is not necessary to charge crime directly,[46] nor is demand in formal language necessary, if there is an intent by threat to extort or gain money.[47] It is no de-

28. See 5 C. L. 421. See, also, Clark & M. Crimes [2d Ed.], 700.

29. See 3 C. L. 506; 5 C. L. 421.

30. Rev. St. 1899, § 2169, valid, though the offense therein denounced would not have constituted bigamy as that term is used in Rev. St. 1899, § 2167, prohibiting a second marriage by a person having a husband or wife living. State v. Stewart, 194 Mo. 345, 92 S. W. 878.

31. State v. Stewart, 194 Mo. 345, 92 S. W. 878. Indictment held sufficient and not merely to charge adultery. Id.

32. Rev. St. 1899, § 2169. State v. Stewart, 194 Mo. 345, 92 S. W. 878.

33, 34. Burks v. State [Tex. Civ. App.] 94 S. W. 1040.

35. Under Cr. Code 1896, § 4902, it was not necessary to allege that the bigamous cohabitation occurred in the state or within the county. Caldwell v. State [Ala.] 41 So. 473.

36. Name of alleged second wife "Lydia E.," proof "Liddie E." no variance. Caldwell v. State [Ala.] 41 So. 473.

37. See 3 C. L. 506; 5 C. L. 421.

38. State v. Sharkey [N. J. Law] 63 A. 866.

39. A letter by defendant to the alleged first wife wherein he called her his wife and subscribed himself as her loving husband, but containing nothing confidential held admissible. Caldwell v. State [Ala.] 41 So. 473.

40, 41. Richardson v. State [Md.] 63 A. 317.

42. Under Code Pub. Gen. Laws 1904, art. 35, § 4, providing that in all proceedings the husband or wife of accused shall be competent to testify. Richardson v. State [Md.] 63 A. 317.

43. Richardson v. State [Md.] 63 A. 317.

44. Evidence sufficient to support conviction as against evidence that defendant was tricked into the second marriage while intoxicated. Richardson v. State [Md.] 63 A. 317.

45. See 5 C. L. 422.

46. People v. Wickes, 98 N. Y. S. 163. Trying to obtain a settlement of a civil suit in order to realize a contingent fee, by practicing on the fears of a person by innuendo, suggestion, and threat of a prosecution for perjury, is sufficient. Id.

47. Suggesting settlement of a suit by which the writer of the letter would obtain

fense that the same acts also constitute robbery,[48] nor that the crime threatened to be charged has been perpetrated, nor that the defendant had cause to believe it had been, or did believe it,[49] nor does the privilege of an attorney in attempting to collect a just debt authorize the malicious threatening to accuse the debtor of a crime.[50] An indictment which alleges that the defendant with intent to extort money from a named person did accuse him of a particular crime and compel him to do certain acts against his will is sufficient,[51] and it is not necessary to describe the check extorted.[52]

Blended Properties; Board of Health; Boards; Body Execution; Bona Fides, see latest topical index.

BONDS.

§ 1. The Instrument; Essentials and Validity (443). Consideration (444). Execution (444). Delivery (444).
§ 2. Rights and Parties and Transferees (444).
§ 3. The Terms and Conditions in General; Interpretation and Legal Effect (444).
§ 4. Remedies and Procedure (445).

Scope of title.—Questions relating to negotiable bonds and the like,[53] to indemnity[54] and to suretyship,[55] are treated elsewhere. Matters concerning bonds in particular actions and proceedings,[56] and bonds of particular officers,[57] will be found in the appropriate titles.

§ 1. *The instrument; essentials and validity.*[58]—A bond is an obligation in writing, under seal, binding the obligor to pay a sum of money to the obligee.[59] An instrument may be valid as a common-law obligation though not good as a statutory bond,[60] especially where it is executed at the request of the obligors and they have derived a benefit therefrom.[61] But a bond void under the statute for want of authority to execute it cannot be enforced as a common-law obligation.[62] In this connection it has been held that while a statute may be unconstitutional when its purpose is to make surety companies' bonds the exclusive security to be given by

as contingent fee one-fourth of the settlement. People v. Wickes, 98 N. Y. S. 163. On a showing that an attorney at law employed as counsel in an action for false arrest upon a contingent fee wrote several letters to defendant under an assumed name, with suggestions of perjury, continued unpleasant notoriety and increased expense, repeatedly urging the defendant against whom he is conducting the litigation to make settlement, insuring himself one-fourth the amount paid, held that knowledge, threat and intent were sufficiently proved to sustain verdict of blackmail. Id.

48. Chunn v. State [Ga.] 54 S. E. 751.

49. People v. Wickes, 98 N. Y. S. 163.

50. Writing to defendant, warning him of a possible prosecution for perjury unless settlement is made. People v. Wickes, 98 N. Y. S. 163.

51. To set forth offense of blackmail according to Pen. Code 1895, § 116. Chunn v. State [Ga.] 54 S. E. 751.

52. Chunn v. State [Ga.] 54 S. E. 751.

53. See Corporations, 5 C. L. 764; Municipal Bonds, 6 C. L. 704; Negotiable Instruments, 6 C. L. 777; Non-negotiable Paper, 6 C. L. 812; Railroads, 6 C. L. 1194.

54. See Indemnity, 5 C. L. 1777.

55. See Suretyship, 6 C. L. 1590.

56. See Appeal and Review, 5 C. L. 121; Attachment, 5 C. L. 302; Replevin, 6 C. L. 1301; and like titles.

57. See Estates of Decedents, 5 C. L. 1183; Guardianship, 5 C. L. 1603; Officers and Public Employes, 6 C. L. 841; Receivers, 6 C. L. 1250; and other like titles.

58. See 5 C. L. 422.

59. Addition to complaint of allegation that bond was under seal did not require a refiling of special pleas, where complaint otherwise remained the same. Gutta Percha & Rubber Mfg. Co. v. Attalia [Ala.] 39 So. 719.

60. Locke v. Skow [Neb.] 106 N. W. 1013; Hummel v. Del Greco [Tex. Civ. App.] 14 Tex. Ct. Rep. 246, 90 S. W. 339.

61. Where a bond for the payment of a legacy was executed at the request of the obligors in consideration that the legatee surrendered her right to have an administrator appointed and the legacy paid in due course of administration, the obligors could not complain that the bond was not a statutory one or that it contravened public policy. Hummel v. Del Greco [Tex. Civ. App.] 14 Tex. Ct. Rep. 246, 90 S. W. 339.

62. Territory v. Woodring [Ohio] 82 P. 572; Territory v. Reynolds [Okl.] 82 P. 574. A bail bond allowed without authority is wholly void and cannot be enforced as a common-law obligation. City and County of San Francisco v. Hartnett [Cal. App.] 82

depositaries of public moneys, it is valid when the provision as to such security is merely incidental to another primary purpose.[62]

Consideration.[64]—One who executes a bond under circumstances that would estop him to assert its invalidity for a want of consideration cannot avoid liability on the ground that plaintiff is estopped to assert that there was a consideration.[65]

Execution.[66]—The obligors may estop themselves by recitals[67] or conduct[68] from questioning the proper execution of a bond. Where it is provided by statute that the validity of official bonds shall not be affected by informalities, misrecitals, or failure to insert the proper penalty, upon the signing of what purports and is intended to be an official bond, the law writes into it all necessary recitals including the proper penalty.[69] Power to execute a note does not authorize the execution of a bond.[70]

Delivery.[71]—The question of delivery is one of intention.[72] Where a bond which is clearly incomplete is delivered by the principal before the signatures of all the sureties are obtained, the liability of the sureties who sign depends upon the authority of the principal to deliver,[73] and this may be implied from the conduct of the sureties.[74]

§ 2. *Rights and parties and transferees.*[75]

§ 3. *The terms and conditions in general; interpretation and legal effect.*[76]—A bond like other legal documents should be construed as a whole.[77] Obligors in a bond executed pursuant to the requirement of a statute are presumed to have known the terms of the statute and to have bound themselves with reference thereto,[78] and where it appears by the language of a bond that it is intended to be retrospective as well as prospective, such effect must be given to it.[79]

P. 1064; Territory v. Woodring [Okl.] 82 P. 572; Territory v. Reynolds [Okl.] 82 P. 574.

63. Inasmuch as the primary purpose of Rev. St. § 3968, providing for the designation of an official depositary for school funds, is to obtain a revenue from the idle moneys of school boards, the provision of the act that the depositary shall give a good and sufficient bond "of some approved surety company" is incidental merely, and indicates a purpose to require a good and sufficient lawful bond, and nothing more, and the act is therefore constitutional. State v. Rehfuss, 7 Ohio C. C. (N. S.) 179.

64. See 5 C. L. 424.

65. Locke v. Skow [Neb.] 106 N. W. 1013.

66. See 5 C. L. 424.

67. A surety was estopped to deny that the principal was plaintiff's treasurer at the time of the execution and delivery of the bond where this was admitted in the bond. Spreyne v. Garfield Lodge No. 1, 117 Ill. App. 253. Where a bond for the observance of the revenue laws recited that it was given in compromise of a pending prosecution, the obligor and his surety were estopped to question the regularity and validity of proceedings resulting in its execution. Anderson v. Com. [Va.] 54 S. E. 305.

68. A bonding company **accepting** and retaining **premiums** with full knowledge that its authorized agents did not sign the bond thereby estopped itself from asserting informalities in its execution. Farmers' & Merchants' Irr. Co. v. U. S. Fidelity & Guaranty Co. [Neb.] 108 N. W. 156.

69. So held in quo warranto against member of board of supervisors on ground of invalidity of his bond. State v. Smith [Miss.] 40 So. 22.

70. Suit on a bond introduced in evidence but plaintiff's evidence showed that mayor of city had authority only to execute a note. Gutta Percha & Rubber Mfg. Co. v. Attalla [Ala.] 39 So. 719.

71. See 5 C. L. 424.

72. Appeal bond. Locke v. Skow [Neb.] 106 N. W. 1013. That appeal bond on which action was brought was found among the papers in the proper action, and produced by the clerk at the trial, the docket entries showing that it had been filed, justified finding that it had been delivered. Nolan v. Fidelity & Deposit Co. [Cal. App.] 82 P. 1119.

73. Not upon any express restriction by the sureties against delivery. Baker County v. Huntington [Or.] 83 P. 532.

74. Baker County v. Huntington [Or.] 83 P. 532. Where sureties attempted to limit their liability by placing sums before their names, their mere act of signing and leaving bond with principal without express restriction as to delivery did not show authority as a matter of law. Id.

75. See 5 C. L. 425. And see post, § 3.

76. See 5 C. L. 425.

77. The obligation and condition of a **county highway bond** construed together and bond held to require payment of a specific sum of money at a certain time with interest and not to be insufficient in that it was not an unconditional promise to pay. Ontario County v. Shepard, 100 App. Div. 200, 91 N. Y. S. 611.

78. United States Fidelity & Guaranty Co. v. Fultz [Ark.] 89 S. W. 93.

79. Bond of insurance company covered

A bond may have separate and distinct conditions making it one of indemnity or of guaranty, or both,[80] and in the latter case failure to perform the obligation imposed by the contract of guaranty is a breach of the condition of the bond and gives rise to a cause of action.[81] A bond required to be given for the performance of an obligation until the further order of the court but in fact given for a definite period, is binding on the sureties for the entire period though the court requires the principal to file a new bond on or before a date anterior to the expiration of the period.[82] A bond being silent as to interest, a mortgage securing it may be referred to for the purpose of ascertaining the rate,[83] but when the bond is wholly silent and there is neither fraud, mistake, or accidental omission, extrinsic evidence of the violation of a collateral agreement is inadmissible.[84] A coupon being a separate obligation draws interest after maturity though still in the possession of the holder of the bond and attached thereto.[85]

§ 4. *Remedies and procedure.*[86]—That a statute prescribes a remedy for the breach of a bond does not necessarily exclude other remedies.[87] An action will lie for the breach of any one of several independent conditions.[88]

A stranger to a private as distinguished from a public bond is not entitled to its benefits,[89] and an obligee whose wrongful act caused a breach has no cause of action.[90] That a corporation fails to file annual reports with the secretary of state pursuant to statute is no defense to an action by it on the bond of its treasurer.[91]

Pleading and evidence.[92]—In an action on a bond it is necessary to plead the existence[93] and breach of a condition;[94] mere legal conclusions will not suffice.[95] The plea of nul tiel record is improper where an action is upon a bond given in judicial proceedings and not upon the record.[96]

losses occurring prior to its delivery to and approval by state auditor. United States Fidelity & Guaranty Co. v. Fultz [Ark.] 89 S. W. 93.

80. Equitable Trust Co. v. National Surety Co. [Pa.] 63 A. 699.

81. First clause of condition in building contractor's bond, a contract of indemnity; second clause one of guaranty to furnish material, failure to do which gave rise to action. Equitable Trust Co. v. National Surety Co. [Pa.] 63 A. 699.

82. Bond approved but indorsement by court required principal to file new bond. Keefer v. Keefer, 28 Pa. Super. Ct. 256.

83. Where executed as part of same transaction. Question between obligee in bond and one who had assumed payment by pledge of collateral. Ex parte Powell [S. C.] 54 S. E. 236.

84. McGuire v. Gerstley, 26 App. D. C. 193.

85. Rice v. Shealy, 71 S. C. 161, 50 S. E. 868.

86. See 5 C. L. 427.

87. That the statute provided that upon the forfeiture of a bond for the observance of the revenue laws scire facias should be issued thereon by the clerk of the court, did not exclude other remedies or forms of action by the commonwealth to collect the penalty on the bond. Anderson v. Commonwealth [Va.] 54 S. E. 305.

88. Petition not demurrable because did not show breach of condition to pay a judgment on appeal where another condition was broken. Locke v. Skow [Neb.] 106 N. W. 1013.

89. Materialman could not avail himself of bond given solely for benefit of owner. Herpolsheimer v. Hansell-Elcock Co. [Mich.] 12 Det. Leg. N. 485, 104 N. W. 671

90. Contractor rendered impossible performance of condition of bond given by subcontractor. Brock v. Williams [Okl.] 82 P. 922.

91. Spreyne v. Garfield Lodge No. 1, 117 Ill. App. 253.

92. See 5 C. L. 428.

93. Complaint alleging that a bond was conditional in the payment of a sum of money and that there was a breach of condition in failure of the maker of a note to make payment but not stating that the bond was conditional on payment by him, held insufficient. Gansevoort Bank v. Empire State Surety Co., 98 N. Y. S. 382.

94. Petition on appeal bond held subject to demurrer where there was no allegation that the appealing party had not satisfied the judgment. Moriarty v. Cochran [Neb.] 106 N. W. 1011. No allegation of breach of condition that it should be decreed that certain taxes were a lien on property and that the same should be paid. Lancaster County v. Fitzgerald [Neb.] 104 N. W. 875.

95. That all conditions were fulfilled, all things happened, and all times elapsed necessary for recovery, held mere conclusions. Gansevoort Bank v. Empire State Surety Co., 98 N. Y. S. 382. That "there is now due" a certain sum on the undertaking was insufficient to show breach of condition of appeal bond. Moriarty v. Cochran [Neb.] 106 N. W. 1011.

96. Rogers v. Barth, 117 Ill. App. 323.

An action on a bond is not maintained by proof of an unsealed instrument.[97] The usual rules of pleading [98] and evidence [99] obtain.

Judgment and damages.[1]—The judgment may properly order execution against the principal first and thereafter against the sureties.[2]

"Bottle" and "Can" Laws; Bottomry and Respondentia; Bought and Sold Notes, see latest topical index.

BOUNDARIES.

§ 1. Rules for Locating and Identifying (446). Monuments, Courses, Distances, and Quantity (449). Government Surveys (450). Highways, Streets, or Ways as Boundaries (451).
§ 2. Riparian or Littoral Boundaries (453).
§ 3. Establishment by Agreement of Adjoiners (453).
§ 4. Establishment by Acquiescence, Estoppel, or Adverse Possession (454).
§ 5. Establishment by Arbitration, Action or Statutory Mode (455).

§ 1. *Rules for locating and identifying.*[3]—In locating a boundary the lines should be run with the calls in regular order from a known beginning,[4] but may be reversed where necessary because of insurmountable difficulty in running them in their direct order,[5] or when in so doing the quantity of land embraced will more nearly harmonize with that called for in the grant,[6] or when the terminus of a call cannot be ascertained by running it forward but can by running reversely from the next succeeding line.[7] In reversing the calls it is not permissible to disregard natural objects called for either as corners or lines,[8] and the method should be adopted only to the extent necessary.[9] In determining the location of a boundary from a description in a deed, the general rules as to the construction of deeds [10]

97. Gutta Percha & Rubber Mfg. Co. v. Attalia [Ala.] 39 So. 719.

98. That a paragraph of the complaint did not repeat matters of inducement necessary to state a complete cause of action on a county commissioner's bond was not fatal though the paragraph was mistakenly called a cause of action by the pleader. Patterson v. Watson [Colo.] 83 P. 958.

99. A statement of a shortage found against the principal in an accounting between him and the obligee in the presence of the surety was admissible in evidence in an action on the bond where all the parties had concurred in the statement. Keene v. Newark Watch Case Material Co., 98 N. Y. S. 68.

1. See 5 C. L. 429.

2. Held proper in an action on a bond for the payment of a legacy where obligee asserted no claim against the estate. Hummel v. Del Greco [Tex. Civ. App.] 14 Tex. Ct. Rep. 246, 90 S. W. 393.

3. See 5 C. L. 430.

4. Lindsay v. Austin, 139 N. C. 463, 51 S. E. 990.

5. Davis v. Com. Land & Lumber Co., 141 F. 711. In Kentucky intervening lines connecting extant and nonextant corners should be located by running the lines according to the courses called for whenever it is possible to do so unless there is some circumstance bringing to the mind a contrary conclusion. Circumstances held to warrant a departure from this method. Davis v. Com. Land & Lumber Co., 141 F. 740.

6. Morgan v. Lewis [Ky.] 92 S. W. 970. Courses and distances as given in the survey should be followed when reversing the calls will not have that effect. Id.

7. Lindsay v. Austin, 139 N. C. 463, 51 S. E. 990. Where the first two corners could not be found but the last two could be it was permissible to reverse the calls from the last corner. Id. The rule for finding the location of a lost corner where there are two known corners, one preceding and one following the lost one is to run a line from the preceding known corner according to course and distance called for, then reverse the call from the last known corner until the two lines intersect and locate the lost corner at the point of intersection. Chambers v. Thorp [Ky.] 93 S. W. 627. Where the description in a deed if literally read would not close but it gave courses and distances and referred to monuments, if by reversing the survey and applying it to the monuments the land can be located such course should be followed. Calatro v. Chabut [N. J. Err. & App.] 63 A. 272.

8. Davis v. Com. Land & Lumber Co., 141 F. 711.

9. In Kentucky calls may be reversed only when it is necessary to locate such portion of the boundary in accordance with the courses called for and they cannot be otherwise determined and the method should be resorted to only to the extent necessary to accomplish such purpose. Davis v. Com. Land & Lumber Co., 141 F. 740.

10. See Deeds, 5 C. L. 964.

should be applied [11] and the intention of the parties ascertained.[12] A grant by metes and bounds carries lands under water within such bounds.[13] Tide flats pass by a grant of the upland unless excluded by the terms of the grant.[14] The actual location of a disputed boundary is generally a question of fact [15] to be ascertained by the application of established rules,[16] but when certain principles of law are

11. Where a deed divided a house according to certain partitions running through it the land adjoining the house was held to be divided by the same partition that divided the house and extended in a straight course to the end of the boundary lines. Jeffrey v. Winter [Mass.] 76 N. E. 282. Deed held to convey to the grantee that part of a house southerly of the line of partition in each story. Id. Where uncertainty is introduced in the language of a deed by the word "prolongation" it means a continual line though consisting of several angles where such meaning would be consistent with the other words of description, rather than a direct line which would render the next course in the deed inconsistent with the direction and monuments by which it is described. Chapman v. Hamblet, 100 Me. 454, 62 A. 215. The expression in a grant "to the head of the cove thence around the western side of the cove" excludes the cove and flats. Whitmore v. Brown, 100 Me. 410, 61 A. 985. The expression in a grant "to the shore thence the shore around to the first mentioned bounds" or "then follows the shore to the bound first mentioned" means "to the shore, then by the shore" to the point of beginning, unqualified, excludes tide flats between high and low-water mark. Id. This is so though the grant contains the words "together with all the privileges and appurtenances thereto belonging. Id. Where one platted his lands and sold them with reference to where streets pointed out by him would be located, it being impossible to locate the streets from the unrecorded plat, lines pointed out by him govern as to subsequent purchasers. Haynes v. Dallas [Tex. Civ. App.] 94 S. W. 434. A tract bounded by courses and distances and described as "lying on the west side" of a creek does not call for the creek as a boundary. Crane v. Lynch, 27 Pa. Super. Ct. 565.

12. Where a call for a stake was "near" Cumberland Gap whereas if the call had been "in" Cumberland Gap there would have been no difficulty and it is impossible to run the course according to the call as stated, it will be disregarded and the natural object, i. e., Cumberland Gap, taken as the last corner. The word "near" construed "at." Davis v. Farmer, 141 F. 703; Davis' Heirs v. Hinckley, 141 F. 708.

13. Goudert v. Underhill, 107 App. Div. 335, 95 N. Y. S. 134.

14. Whitmore v. Brown, 100 Me. 410, 61 A. 985.

15. Finding of the jury on conflicting evidence as to the location of a boundary will not be reviewed on appeal. Whitridge v. Baltimore [Md.] 63 A. 808. Where there are no monuments at the points in dispute and such points cannot be located by measurements from known corners of the tracts between which the line is, and to render a verdict for either party the descriptions in the deeds must be departed from, a verdict supported by the testimony of witnesses who testifies that he saw the monument called for at the point fixed by the verdict as corners, and evidence of acts of recognition by owners on both sides of the line, will not be disturbed. Stewart v. Doak [W. Va.] 52 S. E. 95. Where the deeds of adjoining owners called for a straight line from corner to corner and there was no evidence that the line was crooked an instruction that if the jury believed that a certain line was marked they should adopt it though it conflicted with course and distances called for was misleading. Nicholson v. Hopper [Ky.] 92 S. W. 979. In an action to establish a controverted section line where the trial was conducted on the theory that the government corner was not a lost corner, it was proper to charge that the location of the original line is to be determined even though evidence was admitted that a corner had been established by a surveyor who proceeded on the theory that the original corner was lost. Stryker v. Meagher [Neb.] 107 N. W. 792. Finding on conflicting evidence as to the location of beginning corner sustained. Combs v. Stacey [Ky.] 93 S. W. 908. Instructions in boundary dispute approved. Smith v. Curtice [Neb.] 106 N. W. 460.

Question for the jury: Evidence as to the location of a line. Moore v. McClain [N. C.] 54 S. E. 382; Haynes v. Dallas [Tex. Civ. App.] 94 S. W. 434. Evidence on an issue as to the length of certain lines. Giddings v. Thompson [Tex. Civ. App.] 92 S. W. 1043. An issue concerning a boundary relative to which there is evidence should be submitted. Clawson v. Wilkins [Tex. Civ. App.] 93 S. W. 1086.

Evidence Sufficient to establish a boundary. Camp v. League [Tex. Civ. App.] 92 S. W. 1062; Spurlin v. Hauser [Iowa] 105 N. W. 373. To sustain a finding as to the location of a boundary. Harris County Irr. Co. v. Hornberger [Tex. Civ. App.] 94 S. W. 145. That a subsequent survey correctly retraced a former one. Christenson v. Simmons [Or.] 82 P. 805. That a line mentioned in the patent of a tract as 294 poles long was in fact only 194 poles long. Morgan v. Lewis [Ky.] 92 S. W. 970. The declaration of a former owner as to the boundary and the general repute for many years is sufficient to sustain a finding as to its location. Goodson v. Fitzgerald [Tex. Civ. App.] 90 S. W. 898.

16. Method of locating lost corners and lines. Davis v. Com. Land & Lumber Co., 141 F. 740. Proper method of determining location of closing line of a boundary where the corners were ascertained, and the calls for courses clear. Cooper v. Henderson County [Ky.] 90 S. W. 576. Where the boundaries of a tract as given in a patent based on a survey made at the instance of the patentee extend beyond the state line that portion which lies within the state should be ascertained by the usual methods

to be enforced with reference to the dispute which when applied will leave no dispute, the question is one of law.[17] An omitted line in a patent may be supplied by reference to the original plat or survey.[18] Where it is manifest that a line has been omitted by mistake and the undisputed calls enable this mistake to be corrected by supplying the line, it is the duty of the court to make the correction.[19] Where more objects are embraced in a call than are possible, that course must be run which includes the majority of them.[20] All evidence tending to show the true location of the line is admissible.[21] Evidence of general repute is admissible.[22]

and the tract should not be relocated so as to place it all within the state. Bramblet v. Davis [C. C. A.] 141 F. 776. Where a surveyor runs a line at the instance of one party and testifies unequivocally that it is the true line, and such testimony is not contradicted nor is any other survey made by the adjoining owner, the survey so made will be taken as correct. Liddle v. Blake [Iowa] 105 N. W. 649. The testimony of a surveyor who ran a line at the instance of one party is not conclusive. Id. The reports of a surveyor who surveys at the instance of disputing owners at their respective requests is not binding on the other. Huff v. Woolsey [Ky.] 92 S. W. 572.

17. As to the location of a disputed patent. Kerr v. De Laney [Ky.] 91 S. W. 286.

18, 19, 20. Kerr v. De Laney [Ky.] 91 S. W. 286.

21. See 5 C. L. 434, n. 29.

Held admissible: Where a surveyor who had been ordered to make a survey stated that he could not indicate on the map a party's contention it was not error for the court to direct him to plat it out and later be examined concerning it. Bullard v. Hollingsworth [N. C.] 53 S. E. 441. A surveyor who surveyed a line and to whom another pointed out a cove where he said the line ran may on a question of boundary testify that the line run by him was the line of the survey as pointed out to him. Goodson v. Fitzgerald [Tex. Civ. App.] 90 S. W. 898. An expert surveyor may testify that property described in field notes was embraced within metes and bounds of deeds examined by him. Camp v. League [Tex. Civ. App.] 92 S. W. 1062.

Deeds originating from the same grantor though covering a different tract from that in dispute are admissible as showing what particular parcel of an entire tract formerly held by him was intended to be conveyed by the deed to one of the parties litigant. Lee v. Giles [Ga.] 52 S E. 806. On an issue as to a disputed boundary, evidence of a deed of adjoining land was admissible in connection with other testimony showing that the land was fenced, for the purpose of showing the identity of fence rows found near the boundary in question. Camp v. League [Tex. Civ. App.] 92 S. W. 1062. Where both sets of meanderings are in evidence, a surveyor who made one may not testify that in his opinion those made by him correspond with the other set. Goodson v. Fitzgerald [Tex. Civ. App.] 90 S. W. 898. On an issue as to the location of a boundary evidence of the location of a division fence is admissible. Ross v. Roy [Ala.] 39 So. 583. Where the location of a county line was uncertain and the line between owners was the county line, it is permissible to show that fences had been built and a line recognized for many years and that the line run between the lands of the parties by processioners was a continuation of the line so recognized. Ivey v. Cowart [Ga.] 52 S. E. 436. On an issue as to a disputed boundary, **a map** made many years before and produced from the proper custody held admissible to establish the line in dispute. Cravath v. Baylis, 99 N. Y. S. 973. The opinion of a surveyor as to a certain supposed monument is a **conclusion.** Clarke v. Case [Mich.] 13 Det. Leg. N. 193, 107 N. W. 893. Where one coterminous owner pleads an agreement fixing a boundary line, evidence of the statements of the other as to the agreed line is competent. Berry v. Evans [Ky.] 89 S. W. 12.

Ante litem mortem declarations of a deceased disinterested witness are admissible as to the location of a corner. Bullard v. Hollingsworth [N. C.] 53 S. E. 441. Declaration as to boundaries made by one since deceased at a time when he was in possession of the land are admissible. Driver v. King [Ala.] 40 So. 315. The declaration of one in possession when pointing out his boundaries at a time when he had no interest in misrepresenting them is admissible on a question as to location of the line. Goodson v. Fitzgerald [Tex. Civ. App.] 90 S. W. 898.

Inadmissible: Field notes of a survey made many years after the location of a survey in question by a surveyor who had no knowledge of the survey are not admissible on the issue of boundary. Goodson v. Fitzgerald [Tex. Civ. App.] 90 S. W. 898. County commissioner's **court records** showing that a road was laid out where a party claimed the boundary to be held inadmissible where it was shown that he was in possession on both sides of the disputed boundary. Camp v. League [Tex. Civ. App.] 92 S. W. 1062. When a boundary was a county line and processioners ran and marked the line and later it was in dispute between the parties it is not permissible to show that at the time of the processioning one of the parties proposed that a line should be started at a point where the county line was not disputed and both sides should abide by it. Ivey v. Cowart [Ga.] 52 S. E. 436. In a proceeding to establish a boundary where plaintiff claimed under a grant one of the calls of which was the line of a senior grant, a surveyor may not testify as to whether the calls of plaintiff's grant, the beginning point being established as it would ever reach any line of the senior grant. Hill v. Dalton [N. C.] 52 S. E. 273. Where a defendant in a suit involving title pleaded a boundary line agreement which was

stockholder in a national bank.[85] So also one who takes national bank stock as a pledge or collateral security, and puts his name on the registry as the owner of such stock, becomes liable as a stockholder.[86] A stockholder cannot escape liability as such by a colorable transfer to another person for his benefit,[87] or by colluding with an irresponsible person with the design to substitute the latter in his place.[88] But the original stockholder cannot be held liable unless the bank was practically insolvent at the time the transfer was made, and its condition was known or ought to have been known to the stockholder making the transfer.[89] The gist of the liability in such case is the fraud implied from selling with notice of the insolvency of the bank, and with intent to evade the double liability imposed upon the stockholder by the national banking act.[90] This bad faith may be shown by the fact that the bank was known to him to be insolvent, but notwithstanding this the transfer would be valid if made to a person of known financial responsibility.[91] The transferor is not liable, however, for debts created after the transfer.[92] Where a

personal liability under U. S. Rev. St. § 5151, held, that the personal liability of a shareholder cannot be regarded as contractual for the purpose of making applicable the three-year limitation prescribed by the Washington Code, § 4800, Subd. 3, for bringing "an action upon a contract or liability express or implied which is not in writing and does not arise out of any written instrument." The effect of the holding was to dismiss the case as falling within the two-year limitation clause of the statute. McClaine v. Rankin, 197 U. S. 154, 49 Law. Ed. 702. The holding is based on the theory that by reason of the necessity of the intervention of a receiver, between the creditors of the bank and the stockholders to enforce the liability of the latter, the liability is not contractual, but purely statutory. The great weight of authority is to the effect that the personal liability of stockholders over and above the value of their stock to the creditors of a corporation is a contractual one, the law making them liable being a part of the contract which they assumed on becoming stockholders. Ferguson v. Sherman, 116 Cal. 169, 37 L. R. A. 622; Bell v. Farewell, 176 Ill. 489; Whitman v. Oxford Nat. Bank, 176 U. S. 559, 44 Law. Ed. 587; Hancock Nat. Bank v. Ellis, 166 Mass. 414, 55 Am. St. Rep. 414; Pulsifer v. Green, 96 Me. 438. The foregoing cases relate to the effect of the Kansas Constitution as to liability of stockholders outside the state. Also, see Howarth v. Angle, 162 N. Y. 179, 47 L. R. A. 725, and Howarth v. Lombard, 175 Mass. 570, where the constitutional provision in question was very similar to the section of the Federal Statutes here involved. There are, however, decisions to the effect that such liability is not contractual. Halsey v. McLean, 12 Allen, 439, 90 Am. Dec. 157; Crippen v. Leighton, 69 N. H. 540, 46 L. R. A. 467; Hancock Nat. Bank v. Farnham, 20 R. I. 466. But in Concord Nat. Bank v. Hawkins, 174 U. S. 364, 43 Law. Ed. 1007, the liability created by the section here in question was held to be contractual, and it is difficult to see the ground for a different holding when the application of the Statute of Limitations is in question. On the whole the dissenting opinion of Justices White, Brown and McKenna seems to have the better support in both authority and reason. See Carrol v. Green, 92 U. S. 509, 23 Law. Ed. 738; Corning v. McCullough, 1 N. Y. 47; Platt v. Wilmot, 193 U. S. 602, 48 Law. Ed. 809; note 34 L. R. A. 750; Morawetz Corp. §§ 872–875.—3 Mich. L. R. 658.

85. Even in a state where a married woman cannot bind herself by a contract, a married woman who receives stock in a national bank by the bequest is liable as a stockholder, the right to be a stockholder, however, being given to her by the laws of such state. Christopher v. Norvell, 201 U. S. 216, 50 Law. Ed. —.

86, 87. McDonald v. Dewey, 202 U. S. 510, 50 Law. Ed. —.

88. It is immaterial in such case that the stockholder may be able to show consideration for the transfer. McDonald v. Dewey, 202 U. S. 510, 50 Law. Ed. —.

89. Since the transfer is prima facie valid, and shifts to the transferee the burden of the responsibility, which can be laid upon the original stockholder only in case of bad faith, or evidence of a purpose to evade liability. McDonald v. Dewey, 202 U. S. 510, 50 Law. Ed. —.

90. In short, the question of liability is largely determinable by the presence or absence of an intent to evade liability. The fact that the sale was made to an insolvent buyer is doubtless additional evidence of the original fraudulent intent, but would not be in itself sufficient to constitute fraud without notice of the insolvency of the bank. The stockholder is not deprived of his right to sell his stock by the fact that the sale is made to an insolvent person, unless it be made with knowledge of the insolvency of the bank. McDonald v. Dewey, 202 U. S. 510, 50 Law. Ed. —.

91. The burden of showing that the transferee is finally responsible is upon the transferror. McDonald v. Dewey, 202 U. S. 510, 50 Law. Ed. —.

92. See U. S. Rev. St., § 5210 (U. S. Comp. St. 1901, p. 3498), requiring a list of the names and residences of the shareholders and numbers of shares held by each to be kept in the banking house subject to the inspection of shareholders and creditors, and section 5139 (U. S. Comp. St. 9101, p. 3461), providing that every person becoming a shareholder by transfer of shares to himself shall succeed to all the rights and liabilities of the prior holders of such shares, and that no change shall be made in the articles of

national bank goes into voluntary liquidation,[93] the liability of the stockholders may be enforced by a bill in equity in the nature of a creditor's bill.[94] The liability of the stockholders of a national bank accrues when the assessment is made by the comptroller of the currency.[95] A circuit court of the United States has jurisdiction of a suit by a receiver of the national bank to enforce a stockholder's liability, where the amount involved is more than $500.[96] The liability of the stockholder survives his death, and may be enforced against his estate.[97]

State interference and powers of state courts.[98]—While the state has no power to enact legislation contravening the Federal laws for the control of national banks,[99] congress has provided that, for actions against such banks at law or in equity, they shall be deemed citizens of the state in which they are located, and that in such cases the circuit and district courts of the United States shall have such jurisdiction only as they would have in cases between individual citizens of the same state.[1] The stockholders of a national bank may, therefore, enforce their right of inspection of the books of the bank by mandamus from a state court.[2] But it does not follow that the courts will compel the inspection of the bank's books under all circumstances.[3] An attachment cannot issue from a state court against a national bank before final judgment.[4]

association by which the rights, remedies, or securities of the existing creditors of the association shall be impaired. McDonald v. Dewey, 202 U. S. 510, 50 Law. Ed. —.

93. See U. S. Rev. St. § 5220 (U. S. Comp. St. 1901, p. 3503.) A stockholder of a national bank who votes against voluntary liquidation is nevertheless legal as a stockholder where the requisite amount of stock is voted in favor of such liquidation. Poppleton v. Wallace, 201 U. S. 245, 50 Law. Ed. Where a national bank, being in failing circumstances, made arrangements with another national bank whereby such latter bank assumed and paid the obligations of the former and to reimburse and secure the latter bank the former turned over certain property and executed its non-negotiable notes, secured by a pledge of other assets, it was held that upon the voluntary liquidation of the bank which executed such notes the holder of the notes was entitled to maintain a bill to enforce the liability of the stockholders in such bank. Wyman v. Wallace, 201 U. S. 230, 50 Law. Ed. —; Frenzer v. Wallace, 201 U. S. 244, 50 Law. Ed. —.

94. See 19 St. at L. 63, c. 156, § 2 (U. S. Comp. St. 1901, p. 3509). The federal circuit courts have jurisdiction of such a bill as involving a right given by a federal statute. Wyman v. Wallace, 201 U. S. 230, 50 Law. Ed. —; Frenzer v. Wallace, 201 U. S. 244, 50 Law. Ed. —. Such a bill is not multifarious because in addition to seeking to enforce the liability of stockholders, it seeks to have the affairs of the bank wound up and its assets applied upon his claim. Id.

95. A decision of a state court that the statute of limitations begins to run against such liability not when the assessment is made against a stockholder, but is put in motion by delay in making such assessment, involves a Federal question so as to be reviewable by a writ of error from the Federal supreme court. Rankin v. Barton, 199 U. S. 228, 50 Law. Ed. —. The assessment made by the comptroller of the currency is conclusive as to the amount to be collected. Christopher v. Norvell, 201 U. S. 216, 50 Law. Ed. —.

96. Rankin v. Herod, 140 F. 661.

97. Under Comp. Laws Michigan 1897, §§ 9411 et seq., and § 9380, only absolute claims against a decedent's estate are barred by the failure to present to commissioners of the probate court, and even where a contingent claim becomes absolute within the time limited for the presentation of claims, such claim is not barred by failure to present to such commissioners, where at the time such claim became absolute the final account of the administrator had been settled. This doctrine applied to the claim of a receiver of a national bank based on the liability of the decedent as a stockholder. Rankin v. Herod, 140 F. 661.

98. See 5 C. L. 353.

99. Guthrie v. Harkness, 199 U. S. 148, 50 Law. Ed. —.

1. 25 Stat. at L. 433, chap. 866 (U. S. Comp. 1901, p. 508). Guthrie v. Harkness, 199 U. S. 148, 50 Law. Ed. —.

2. The common-law right of a stockholder to have an inspection of the books of the corporation was not curtailed, U. S. Rev. St., § 5211 (U. S. Comp. St. 1901, p. 3498), requiring reports to be made to the comptroller of the currency, or by section 5240 (U. S. Comp. St. 1901, p. 3516) providing the appointment of examiners to investigate the condition of national banks, or by section 5241 (U. S. Comp. St. 1901, p. 3517) providing that no association shall be subject to any visitorial powers other than such as are authorized by this title or are vested in the courts of the justice. Guthrie v. Harkness, 199 U. S. 148, 50 Law. Ed. —.

3. In issuing the writ of mandamus the court will exercise a sound discretion, and grant the right under proper safeguards to protect the interests of all concerned. The writ should not be granted for speculative purposes, or to gratify idle curiosity, or to aid a blackmailer, but it may not be denied to the stockholder who seeks the information for legitimate purposes. Guthrie v. Harkness, 199 U. S. 148, 50 Law. Ed. —.

4. U. S. Rev. St., § 5242 (U. S. Comp. St. 1901, p. 3517). Merchants' Laclede Nat. Bank v. Troy Grocery Co. [Ala.] 39 So. 476. This

Usury by national banks.[5]—The national banking act is exclusive on the subject of usury with respect to the national banks, thus repealing all other laws with respect to usury so far as they might apply to the national banks.[6]

§ 4. *Saving banks. Powers.*[7]—In Vermont a saving bank cannot make a contract or agreement to loan or extend the time of payment of a loan on personal security for longer than a year.[8]

Rules.[9]—Deposits in a savings bank cannot ordinarily be transferred except according to the rules of the bank.[10]

Payment of deposits.[11]—In the absence of something in the rules imposing a greater liability, the bank is only bound to exercise ordinary care not to pay the fund to the wrong person.[12] Where the rules of the bank provide that a payment to a party presenting a passbook shall be deemed a good and valid payment to the owner of the deposit, the negligence of the depositor in permitting his book to come into the hands of unauthorized parties is primarily the cause of the loss due to a payment to them, and the bank is not liable in the absence of negligence.[13] The relations of a depositor in a savings bank with the bank with reference to a withdrawal of the fund depend almost entirely upon the rules of the bank which are brought home to the depositor,[14] such rules being a part of the contract between the parties and binding upon them.[15] A passbbook is at most only evidence of the contract between the bank and the depositor.[16] A rule requiring its presentation in order to transfer the account may be waived by the bank in so far as it is for its benefit.[17] A depositor in a savings bank may assign or transfer his interest in his

prohibition cannot be waived by the parties. Id. The construction placed upon this statute by the United States supreme court is binding upon the state courts. Id.

5. See 5 C. L. 354.

6. Schlesinger v .Lehmeir, 49 Misc. 419, 99 N. Y. S. 819.

7. See 5 C. L. 354.

8. See V. S. 4099. An agreement that a note is to run along indefinitely, provided that the interest is kept paid, the only limitation being the time when the bank shall become dissatisfied with the security and shall call for payment, does not violate this provision. Lyndon Sav. Bank v. International Co. [Vt.] 62 A. 50.

9. See 5 C. L. 355.

Note: To be binding on a depositor, by-laws must have been assented to by him. Wells v. Black, 117 Cal. 157, 59 Am. St. Rep. 162, 37 L. R. A. 619; Ackenhausen v. People's Sav. Bank, 110 Mich. 175, 64 Am. St. Rep. 338, 33 L. R. A. 408. The assent of depositors may be implied, even though the by-laws require depositors to subscribe a certain book. Gifford v. Rutland Savings Bank, 63 Vt. 108, 25 Am. St. Rep. 744, 11 L. R. A. 794. It is generally held that acceptance and use of a pass book containing by-laws is an implied assent. Ladd v. Augusta Sav. Bank, 96 Me. 510; Chase v. Waterbury Sav. Bank, 77 Conn. 295. And in Warhus v. Bowery Sav. Bank, 21 N. Y. 543, assent was implied against a depositor not familiar with the English language. And as to illiterate persons, see Burrill v. Dollar Sav. Bank, 92 Pa. 134, 37 Am. Rep. 669. That knowledge of rules printed in the pass book is not imputed, see Wells v. Black, 117 Cal. 157, 59 Am. St. Rep. 162, 37 L. R. A. 619.

10. Where the pass book contained printed rules that the depositor in order to withdraw money must present the book or that when the book is presented by another than the depositor it shall be accompanied by the depositor's written order, the possession of such a pass book under an agreement whereby it was intended to transfer the deposit was insufficient to operate as a transfer. Drefahl v. Security Sav. Bank [Iowa] 107 N. W. 179.

11. See 5 C. L. 355.

12. Campbell v. Schenectady Sav. Bank, 99 N. Y. S. 927. Plaintiff held not to have been prejudiced by failure of bank officials to make inquiries of the payee as to why plaintiff did not herself come to the bank, where she was, or the relationship existing between her and the payee, where, if the bank did not know the facts, such inquiries would have elicited them. Id. Fact that after a period of time the money is drawn in a lump, or in different checks, is not so unusual or improbable a transaction as to charge officers with negligence in making such payments. Id. Evidence held to show that bank exercised ordinary care in making payments to third person, particularly where it appeared that payee was authorized to draw a part of the money. Id.

13. Campbell v. Schenectady Sav. Bank, 99 N. Y. S. 927.

14. Campbell v. Schenectady Sav. Bank, 99 N. Y. S. 927. Under Laws 1892, p. 1895, c. 689, § 113, providing that deposits shall be repaid under such regulations as trustees shall prescribe, etc. Id.

15. Rule that a payment to a party presenting a pass book shall be deemed a good and valid payment to the owner of the deposit. Campbell v. Schenectady Sav. Bank, 99 N. Y. S. 927.

16. Augsbury v. Shurtliff, 99 N. Y. S. 989.

17. Presentation of pass book held unnecessary where bank recognized order that account of depositor should be paid to her

deposit for a good and valuable consideration without the delivery of the passbook representing such deposit.[18]

§ 5. *Loan, investment, and trust companies.*[19]—The statutes of various states must be consulted with reference to the organization of trust companies,[20] their right to transact business,[21] their powers,[22] and the liability of stockholders therein.[23]

husband if he survived her, and notified parties that their wishes would be respected and presentation of book was unnecessary. Augsbury v. Shurtliff, 99 N. Y. S. 989. Evidence in action to recover savings bank passbook issued to plaintiff's testatrix held to show that order authorizing transfer of book and account to defendant was delivered to, and acted upon by, bank prior to death of testator. Id.

18. Bank must recognize valid transfer though assignee does not have possession of passbook. Augsbury v. Shurtliff, 99 N. Y. S. 989.

19. See 5 C. L. 356.

20. **In Washington** trust companies cannot be incorporated under the general incorporation laws. Such companies must be incorporated under Laws 1903, p. 367, c. 176, and cannot be incorporated under Ballinger's Ann. Codes & St., § 4250 et seq. This is so even as to a trust company whose articles of incorporation do not follow the language of an act 1903, and does not include all the items of powers named therein. State v. Nichols [Wash.] 82 P. 741.

21. Under the general corporation laws of Maryland trust companies which did not actually organize and begin business within two years from granting of its charter has no right to organize and carry on business until the bonus tax imposed by such laws has been paid. See Acts 1900, p. 411, c. 272, §§ 85a, 85c. Murphy v. Wheatley [Md.] 63 A. 62. The failure to pay such tax, however, did not relieve stockholders, who had accepted dividends after the payment of the tax, from their liability to creditors. Id. In the absence of action by the state to forfeit the charter of a trust company for the nonpayment of such tax, such nonpayment did not operate as a forfeiture. Id.

22. In Maryland the purchase by a trust company of its own shares, though merely for a temporary purpose, was in violation of Code Pub. Gen. Laws, art. 23, §§ 82-87, providing the method by which the capital of a corporation may be reduced, and hence a trust company which was subject to the provision of Acts 1892, p. 156, c. 190, § 851, making the stockholders in trust companies liable to creditors for double the par value of their stock, could not purchase its own stock, such purchase being in effect a reduction of the capital stock and thus a reduction of the assets liable to creditors. Maryland Trust Co. v. National Mechanics' Bank [Md.] 63 A. 70. Where the executive committee of a trust company were authorized by a by-law to exercise all the powers of the board of directors when the same was not in session, such executive committee could not enter into a contract whereby the trust company purchased its own stock. Id. And where a national bank knowingly advanced money to a trust company for the purpose of purchasing the stock of such trust company, it was held that a court of equity would not lend its aid to the bank in an effort to recover the money so advanced. Id.

23. **In New York** the individual liability of a stockholder in a trust company cannot be enforced by suit until judgment has been recovered against the company for the debt thus sought to be enforced, and an execution thereon has been returned unsatisfied, in whole or in part. See Laws 1892, p. 1841, c. 668, § 55. This statute is a portion of the general stock corporation law, but applies to banking corporations, notwithstanding law 1892, p. 1913, c. 689, § 162, imposing a broader liability upon a stockholder in banking corporations. These two acts and laws 1869, p. 1813, c. 687, § 2, subd. 4, defining stock corporations so as to include banking corporations, and section 33 making the provisions of the general corporation law applicable to stock corporations, must all be construed together. Gause v. Boldt, 49 Misc. 340, 99 N. Y. S. 442. Const. art. 8, § 7, making stockholders of a banking corporation responsible for the debts of the corporation to the amount of their shares, was adopted subsequently to Laws 1892, p. 1841, c. 688, § 55, and, therefore, such section not being in conflict with the constitutional provision, did not affect such section so far as the condition precedent to the enforcement of the stockholders' liability is concerned. Id. Only the intervention of a paramount authority, rendering the performance of the statutory conditions legally impossible, will excuse compliance. Id. The fact that the calendars were so congested that the plaintiff could not obtain such a judgment is no excuse for failure to obtain it before bringing suit against the stockholder. Id. Nor is the insolvency of the trust company an excuse. Id.

In Maryland the liability of stockholders in deposits, etc., companies under Acts 1892, p. 156, c. 109, § 851, is a contractual one, and the obligation arising therefrom may be enforced by any appropriate remedy at law or in equity. The right of action is transitory, and may be pursued in a court of competent jurisdiction in any state where such stockholder may be found. Myers v. Knickerbocker Trust Co. [C. C. A.] 139 F. 111. Act 1904, p. 597, c. 337, requiring the liability of stockholders in trust, etc., companies under Acts 1892, art. 23, § 851, to be enforced by a bill in equity in the nature of a creditor's bill organized by stockholders, instead of an action against any stockholder to enforce the individual liability of such stockholder, held unconstitutional under U. S. Const., art. 1, § 10, prohibiting states from passing laws impairing the obligations of contracts. Id. Under Code Pub. Gen. Laws, art. 23, § 851, as enacted by c. 109, p. 156, of the Laws 1892, the stockholders of safe deposit, trust, guaranty, loan and fidelity companies, were liable to the creditors of such companies to an amount equal to twice the par value of the stock held by them, regardless of whether or

Where agents of a trust company mingle money collected for another with the current funds of the company, and the fund is thus lost, such agents will be personally liable to the owner therefor.[24]

§ 6. *Deposits and repayment thereof; checks, drafts, certificates, receipts, credits. Relation of banker and depositor.*[25]—The relation between a bank and a general depositor is one of debtor and creditor;[26] and this relation is not changed by reason of the depositor being a corporation whose treasurer is also an officer of the bank.[27] A private banker is personally liable to each depositor for the full amount of his deposit.[28]

Evidence of deposit.[29]—A time check evidencing a deposit signed by the president of the bank in his individual capacity may be sufficient to bind the bank.[30]

Letters of credit.[31]

Repayment of deposits.[32]—The person in whose name a deposit is carried has prima facie authority to check upon such deposit.[33] A check may be signed with

not they had paid their subscriptions. Murphy v. Wheatley [Md.] 63 A. 62. But in 1904 the statute was changed so that such stockholders are now liable only to the extent of the amount of their stock at par value thereof, in addition to the amount invested in such stock, so that the liability of such stockholders does not now exceed that of stockholders in banking companies. Id. Under Code Pub. Gen. Laws, art. 23, § 851, the stockholders of a trust company were liable to depositors who became such prior to the dates at which such stockholders acquired their stock. Id.

24. Although at the time of such misappropriation it was the intent of such agents to account for and return the money to the owner upon demand. Sweet v. Montpelier Sav. Bank & Trust Co. [Kan.] 84 P. 542. Evidence in an action against agents of a trust company for misappropriation of money collected by them as such agents, held sufficient to sustain the verdict. Id.

25. See 5 C. L. 357.

26. Kearny v. Metropolitan Trust Co., 110 App. Div. 236, 97 N. Y. S. 274. The moneys deposited immediately become the property of the bank, and the latter becomes the debtor of the depositor for the amount of the deposit, the same being payable on demand, and on checks of the depositor. Smith's Cash Store v. First Nat. Bank [Cal.] 84 P. 663.

27. Where the treasurer of a brewing company is also the treasurer of a trust company, and as treasurer of the brewing company keeps its accounts in the trust company, the relation between the brewing company and trust company is not thereby rendered different from the ordinary relation of depositor and banker, and the trust company is not thereby rendered responsible for a misappropriation by such treasurer of the funds of the brewing company. Elk Brewing Co. v. Newbert [Pa.] 62 A. 782. The fact that the president of the brewing company was also a director of the trust company at the time of such misappropriation did not render the trust company liable in the absence of fraud or collusion. Id.

28. This personal obligation cannot be evaded by a transfer of the bank and its deposits to a third person. Johnson v. Shuey [Wash.] 82 P. 123. A party who opens a bank and fraudulently pretends that it is incorporated with a certain capital stock, thus inducing persons to make deposits, and then makes a fraudulent sale of the bank, is liable to the depositors for the full amount of their deposits. Id. In such case the banker will be liable for all deposits in the bank at the time of the transfer, or which are deposited thereafter in ignorance of the transfer, unless the failure of the depositor to discover the transfer is due to negligence. Id.

29. See 5 C. L. 357.

30. A party went to the banking house of the defendant bank to make a time deposit, and asked the president of the bank what interest they were paying on money. The president's own testimony was to the effect that he asked the party what amount she had and how long it would be left. The reply was about $1,600 to be left for six months. He replied: "The bank is paying 3 per cent.; but, since you have come up here so far, I will pay you 4." The party then handed him an eastern draft for an amount exceeding $1,600, and he wrote out and returned a time check for the amount payable at the bank in six months, with interest at 4 per cent. This time check was signed by the president in his individual capacity, and it contained nothing to indicate that the money was deposited with the bank, or that the bank assumed any obligation for its repayment. But it was held that the depositor might recover from the bank in an action for money had and received. First Nat. Bank v. Heim [Neb.] 107 N. W. 1019.

31. See 3 C. L. 418.

32. See 5 C. L. 358.

33. Where a bank has no notice of the claims of third persons upon a deposit, it will not be liable to such persons for amounts paid by it upon the individual check of the depositor. Boyle v. Northwestern Nat. Bank, 125 Wis. 498, 104 N. W. 917, 103 N. W. 1123.

Authority of partner: A bank need not look into the co-partnership articles in order to learn the authority of a general partner to draw a check; and where a member of a firm which had succeeded to the assets and liabilities of another firm, drew a check for the payment of an overdraft by the old firm, it was held that the payment of such check

a lead pencil,[34] or with the mark of the drawer;[35] and the fact that the drawer of a check is intoxicated at the time he signed the check does not necessarily render the check invalid.[36] Ordinarily the issuance of a bank draft or check does not, prior to its acceptance, operate as an assignment of a part of the fund against which it is drawn,[37] and may be revoked at any time before payment or acceptance by the drawee;[38] nor is a bank liable to the holder of a check until acceptance or promise to pay.[39] And even where a bank pays a check by mistake, there being no funds of the drawer on deposit at the time, the amount so paid may be recovered.[40] A check prima facie belongs to the payee, and can be presented only by his proper indorsement or that of his duly authorized agent.[41] An agreement between the bank and the payee to defer payment of a check protects the bank from liability for nonpayment though made under mistake.[42] The contract between a banker and

out of a deposit by the new firm was not a misappropriation of such deposit. La Montagane v. Bank of New York Nat. Banking Ass'n [N. Y.] 76 N. E. 33. See Partnership 6 C. L. 911.

34. Drefahl v. Security Sav. Bank [Iowa] 107 N. W. 179.

35. Evidence held sufficient to show genuineness of signature by mark. Drefahl v. Security Sav. Bank [Iowa] 107 N. W. 179.

36. As where the check is executed in fulfilment of a previous agreement. Drefahl v. Security Sav. Bank [Iowa] 107 N. W. 179.

37. Clark v. Toronto Bank [Kan.] 82 P. 582. Where a bank fails and passes into the hands of a receiver after it has issued a draft upon a correspondent bank in which it has funds on deposit, and the drawee has notice of the receivership before the draft is presented for payment, the title to such deposit passes to the receiver, and the holder of the draft, in the absence of any special circumstances, is entitled to no priority over other creditors of the insolvent bank. Id. A check on a bank operates as an assignment pro tanto of the drawer's deposit account or fund in the bank. Loan & Sav. Bank v. Farmers' & Merchants' Bank [S. C.] 54 S. E. 364. The drawer of a check cannot countermand its payment if it has passed into the hands of a bona fide holder. Id. There is sufficient privity between the bank having the necessary funds for the payment of a check on hand and the check holder, at least upon presentation of the check for payment, to give the latter a right of action against the bank if payment is wrongfully refused. Id. The bank cannot occupy the position of a mere stakeholder, and if sued by the holder of a check which it refuses to pay it cannot shift the contest onto the drawer by depositing the money in court and having him interpleaded as a substitute. Where it refuses to pay on being notified by drawer not to do so. Id.

In Iowa the giving of a check upon a general deposit is an equitable assignment pro tanto of such funds as against an attaching creditor of the depositor. Kuhnes v. Cahill [Iowa] 104 N. W. 1025. Such an assignment being absolute and the property not remaining in the possession of the assignor does not involve the recording acts. Id.

38. Hence in an action by the depositor to recover the deposit, payment of a post-dated check by the bank after the depositor had directed the bank not to pay it, was no defense. People's Sav. Bank & Trust Co. v. Lacey [Ala.] 40 S. 346. As against the defense of payment by the bank of the depositor's check, evidence of a verbal revocation by notice to the "receiving teller" was admissible. Id.

39. Van Buskirk v. State Bank of Rocky Ford [Colo.] 83 P. 778. The drawee of a check is not liable to the holder until acceptance in writing. See Laws 1897, p. 235, c. 64, p. 246. §§ 185, 189, p. 238, § 143. Id.; Interstate Nat. Bank v. Ringo [Kan.] 83 P. 119. An acceptance in writing being necessary, information over the telephone that a check is all right was insufficient to charge the drawee, the drawer having in the meantime stopped payment on the check. Van Buskirk v. State Bank of Rocky Ford [Colo.] 83 P. 778.

40. Even from a creditor of the drawer, who has received the money with knowledge that the drawer had no funds or deposit with the drawee. Merchants' Bank v. Superior Candy & Cracker Co. [Wash.] 84 P. 604.

41. It is the duty of a person receiving a check by indorsement of the payee's agent to inform himself of the scope of the agency, and its powers and limitations. Salen v. Bank of State of New York, 110 App. Div. 636, 97 N. Y. S. 361. A person who receives a check from an agent, with knowledge, actual or constructive, that the agent is not acting within his authority in transferring the checks, is liable to the principal as for a conversion of the check and the proceeds thereof. Id. Where an agent takes checks payable to his principal, and deposits them as margins in his own speculative stock account with his personal broker, he is not proceeding within the actual or apparent scope of his employment, to the knowledge of such broker. Id.

42. S. gave check on bank of O. to G. with understanding that G. should draw a check against it for a less amount in favor of K. which was done. K then drew a check on bank of O. for the amount of G.'s check, which bank refused to pay, and check was protested. When G. presented S.'s check bank refused to pay it because S.'s account had been garnished, and bank and G. agreed that check should not be paid until garnishment was released. In suit by K. against bank, held that he was entitled to recover the amount of his check and protest fees, but no damages, it not appearing that the

his customer is to pay the customer's checks or bills to the person or persons designated by the customer and to none other.[43] If a check or bill is payable to order, the banker has only authority to pay it to the payee or to another person who becomes the holder by genuine indorsement,[44] and if he pays on a forged indorsement cannot charge the payment of the depositor's account[45] unless the loss complained of is the result of the drawer's own fault or negleet.[46] Where a check is delivered by the drawer to one who fraudulently represents himself to be the agent of the payee, the bank will not be protected in paying it on the fraudulent indorsement of such agent unless the drawer was negligent in delivering it to him.[47] In such case the drawer is only bound to use the care of a man of ordinary prudence under the circumstances, and, if he does so, is not precluded from holding the bank by the fact that he is deceived in the transaction.[48] Payment by worthless check will not discharge the obligation;[49] but it is the duty of a person receiving a check to exercise reasonable diligence in presenting the same for payment.[50] If the payee and the drawee reside, or have their places of business, in the same city or town, presentment must be made before the expiration of business hours of the day next after the day of the receipt thereof.[51] If the payer and the drawer reside in different places. the checks must be forwarded for presentment, by mail or other usual mode of transmission, on the next day after the receipt thereof at the place in which the payee resides or does business, if reasonably and conveniently practicable, and, if it is not so practicable, then by the next mail, or other similar means of conveyance, leaving after said date.[52]

garnishment was ever released, even though the garnishment was void. Kent & Co. v. Bank of Ozan [Ark.] 94 S. W. 700.

43, 44. Houser v. National Bank of Chambersburg, 27 Pa. Super. Ct. 613.

45. Reason is that there is implied contract by bank that it will not disburse depositor's money except on his order. House v. National Bank of Chambersburg, 27 Pa. Super. Ct. 613.

46. Rule not changed by Bills and Notes Act 1901, § 23. Houser v. National Bank of Chambersburg, 27 Pa. Super. Ct. 613.

47. Houser v. Nat. Bank of Chambersburg, 27 Pa. Super. St. 613.

48. Facts alleged held not to constitute negligence. Houser v. National Bank of Chambersburg, 27 Pa. Super. Ct. 613.

49. Payment of note by indorser with his own check. Interstate Nat. Bank v. Ringo [Kan.] 83 P. 119.

50. A person receiving a check, on a fund in the hands of a bank, for the amount of a demand against the drawer thereof, is bound to exercise reasonable diligence in making presentment thereof for payment, if he wishes to avoid risk of loss by insolvency of the drawee. Lewis, Hubbard & Co. v. Montgomery Supply Co. [W. Va.] 52 S. E. 1017. See post § 8, subd. Duty to preserve rights of parties.

Judicial notice: Though the courts cannot take judicial notice of the existence of any particular bank, or of any mode of business peculiar to a given bank, they will take judicial notice that, in all cities and towns of large population and extensive business, within their jurisdiction, banks exist, and of the fact that their operations are governed by reasonable rules and regulations, to which parties dealing with them, or in commercial paper, are deemed to have subjected themselves. Lewis, Hubbard & Co. v. Montgomery Supply Co. [W. Va.] 52 S. E. 1017.

51. Lewis, Hubbard & Co. v. Montgomery Supply Co. [W. Va.] 52 S. E. 1017.

Judicial notice: Courts cannot take judicial notice of the business hours of any particular bank, but the courts judicially know that ordinarily banks in the cities and larger towns of the state do not open their doors for business at an hour earlier than 9 o'clock a. m. Lewis v. Hubbard & Co. v. Montgomery Supply Co. [W. Va.] 52 S. E. 1017.

52. Lewis, Hubbard & Co. v. Montgomery Supply Co. [W. Va.] 52 S. E. 1017. In such case, the drawer, by allowing his funds to remain in the drawee bank, and the payee, by accepting the check, evinces belief in the solvency of the bank, and the former voluntarily takes the risk of its solvency during the reasonable period necessary for presentment of the check in the usual manner. Id. Neither the payee nor his agent is required to transmit such check by the only, or last, mail of the day next after its receipt, if such mail closes or departs at an hour so early as to render it inconvenient for the holder to avail himself of it. Id. What is an unreasonably early hour in such case depends upon all the circumstances of the transaction and situation of the parties and, the facts being free from controversy and doubt, is a question of law for the court. Id. The parties to a check drawn on a bank and sent to a distant place to be forwarded for presentation are deemed in law to have acted with knowledge of the usual diligent method of making such presentment through a bank at the place to which it is sent, and to have agreed to suffer any reasonable delay incident to such mode of presentment. Id. In the absence, therefore, of any agreement to the contrary, and of any circumstance,

Overdrafts.[53]

Forged or altered checks and drafts.[54]—A payment cannot be charged against the depositor's account unless he has actually directed such payment to be made.[55] The bank upon which a check is drawn is, therefore, chargeable with knowledge of the drawer's signature,[56] and with the duty of paying only upon proper indorsement;[57] and the depositor has a right to assume that the bank has ascertained the indorsements on his checks to be genuine and that no payments have been made, except such as are authorized,[58] and where the depositor has no reason to suspect payments to wrong persons, he is charged with no duty of investigation in regard to such payments;[59] nor will the bank's liability be affected by the negligence of the depositor in discovering the forgery,[60] or by delay in giving notice thereof,[61] where the bank has not been injured by such negligence or delay. Tender of a check which has been paid upon a forged indorsement may be waived by the drawee.[62] One who has paid money to another upon a check bearing a forged indorsement may ordinarily recover back the money paid, even though the other be an innocent holder of the check for value.[63] But where the drawee bank pays a forged check which has been cashed by another bank, it cannot recover the amount

known to the payee, making it imprudent to do so, he may indorse and deliver the check to a bank for collection; but this does not extend the time within which it must be forwarded for the presentment. The bank, however, in such case, is not required to forward it on the next day after its receipt by the payee, if there be no reasonably convenient means of doing so, within the banking hours of that day. Id.

Where check delivered to agent of payee: The drawer, in delivering a check to an agent of the payee having no authority to indorse it, at the place of business of the drawer, impliedly agrees to allow such additional time for presentment as may be necessary for the transmission of the check to the principal of the agent. Lewis, Hubbard & Co. v. Montgomery Supply Co. [W. Va.] 53 S. E. 1017.

53, 54. See 5 C. L. 360.

55. Kearny v. Metropolitan Trust Co., 110 App. Div. 236, 97 N. Y. S. 274.

56. Farmers' & Merchants' Bank v. Bank of Rutherford, 115 Tenn. 64, 88 S. W. 939.

57. Payments made upon forged indorsements are at the peril of the bank, unless it can claim protection upon some principle of estoppel or by reason of some negligent act chargeable to the depositor. Kearny v. Metropolitan Trust Co., 110 App. Div. 236, 97 N. Y. S. 274; Murphy v. Metropolitan Nat. Bank [Mass.] 77 N. E. 693. A banker on whom a check is drawn must ascertain at his peril the identity of the person named in it as payee. It is only when he is misled by some negligence or other fault of the drawer that he can set up his own mistake in this particular against the drawer. The burden is upon the defendant to show that the payment was to the person named in the check or that the plaintiff was guilty of such negligence in regard to the payment as precludes him from recovery. Id.

The death of the payee of a check to whom the drawer has sent it, before it reaches its destination will not excuse the bank for paying the check upon a forged indorsement of the payee's name. Murphy v. Metropolitan Nat. Bank [Mass.] 77 N. E. 693. In such a case the check is either payable to no one, or it may be collected by the executor or administrator, according to the circumstances attending the making and delivery of it. Id.

Who may sue: A party who has given his note in exchange for a check may maintain an action against the bank upon which such check is drawn to recover the amount thereof, the bank having paid the check upon a forged indorsement. Kearny v. Metropolitan Trust Co., 110 App. Div. 236, 97 N. Y. S. 274.

58. Kearny v. Metropolitan Trust Co., 110 App. Div. 236, 97 N. Y. S. 274. Unless there is something to put the depositor upon inquiry, in which case it is the depositor's duty to investigate. Murphy v. Metropolitan Nat. Bank [Mass.] 77 N. E. 693.

59. Where a loan was negotiated through an attorney representing the supposed borrower, and a fraudulent mortgage was executed and delivered in the name of such borrower, and the lender drew his check payable to such borrower, but the whole transaction was in fact a fraud, and the check was paid upon a forged indorsement of the payee's name, the interest on the loan having been paid regularly by the attorney until he absconded, it was held that the lender was not put upon his inquiry as to the genuineness of the payee's indorsement. Murphy v. Metropolitan Nat. Bank [Mass.] 77 N. E. 693.

60. Kearny v. Metropolitan Trust Co., 110 App. Div. 236, 97 N. Y. S. 274.

61. United States v. National Exch. Bank, 141 F. 209; Murphy v. Metropolitan Nat. Bank [Mass.] 77 N. E. 693.

62. Kearny v. Metropolitan Trust Co., 110 App. Div. 236, 97 N. Y. S. 274.

63. United States v. National Exch. Bank, 141 F. 209. The declaration in an action by a bank to recover money paid upon a check on the ground that the indorsement of the payee was forged, need not negative delay in notifying the defendant of the forgery. The court assumed for the sake of argument

of such check from such other bank.[64] An indorsement by an agent for a purpose outside of the scope of his employment is not a forgery.[65]

Set-off of debts due bank against deposit.[66]—As a general rule a bank may set-off against a deposit a debt due from the depositor;[67] but as against the beneficiaries of a trust account a bank cannot charge the individual indebtedness of a depositor against such account.[68] A husband, in making a deposit of his wife's money, has no authority to bind her by an agreement that the bank may apply the deposit to a debt due by him.[69] A proper plea of set-off is necessary in order that a bank may avail itself of any set-off which it may have against the deposit, where the depositor sues for such deposit.[70]

that undue delay on the part of the plaintiff in notifying the defendant would constitute a defense, but did not decide the point. United States v. National Bank of Republic, 141 F. 208.

64. Especially can the drawee bank not recover from a remote indorsing bank which has cashed the check and indorsed it to another bank other than the drawee. Farmers' & Merchants' Bank v. Bank of Rutherford, 115 Tenn. 64, 88 S. W. 939, questioning Peoples' Bank v. Franklin Bank, 88 Tenn. 299, 12 S. W. 716, where it was held that a bank that negligently cashed a forged check, purporting to be drawn upon another bank, and had upon its indorsement of such check received payment of the drawee bank, is liable for the amount paid by it upon discovery that the check is forged, and the fact that the indorser bank is unable to give the name of the person who presented the forged check to whom it was paid, or to positively identify such person, is sufficient evidence of negligence to make it liable, and that the drawee bank will not be precluded from recovery by the fact that, relying upon the indorsement of the indorsing bank, it paid the check without investigation as to its genuineness. The drawee bank, by paying a forged check and holding it, is estopped to deny the genuineness of the drawee's signature, as against another bank which has cashed the check. The drawee paid the check and held it for thirty days. Farmers' & Merchants' Bank v. Bank of Rutherford, 115 Tenn. 64, 88 S. W. 939. The drawee of a check is not a holder in due course within the rule that the indorser of a check warrants the genuineness of the check to all subsequent holders in due course. Id. It is negligence for the cashier of a bank upon which a check is drawn to cash such check without examining the signature closely, although the check had been paid and was indorsed by several other banks. Id.

Where a forged check is payable to the bearer, it is not negligence for a bank other than the one upon which the check is drawn to cash such check without requiring the bearer to be identified. Farmers' & Merchants' Bank v. Bank of Rutherford, 115 Tenn. 64, 88 S. W. 939.

65. Under laws 1897, p. 721, c. 612, § 42, and a bank which cashes the check is not liable as for a conversion, where it had no knowledge that the agent exceeded his authority in indorsing the checks. Salen v. Bank of State of New York, 110 App. Div. 636, 97 N. Y. S. 361.

66. See 5 C. L. 360.

67. Especially where the real purpose of the deposit is to secure a note discounted by the bank. Cherry v. City Nat. Bank [C. C. A.] 144 F. 587. See post, this section, subd. Specific Deposit.

Under bankruptcy act: Where an insolvent person has money on deposit in a bank subject to check, and also owes the bank upon a promissory note, upon such insolvent person being adjudged a bankrupt the bank is entitled to have the amount of the bankrupt's deposit set off against the sum due on the promissory note, and to prove its claim against the bankrupt for the balance. West v. Bank of Lahoma [Okl.] 85 P. 469. Where an insolvent borrows money from a bank and then deposits the money with the bank, the crediting of such deposit upon the indebtedness of the borrower before his bankruptcy is not an unlawful preference. Id.

68. Although the account is carried in the name of the trustee without anything to indicate its trust nature; as where a grain broker deposited proceeds of sales to his individual credit, and the bank charged to such account the indebtedness of the broker to the bank. Boyle v. Northwestern Nat. Bank, 125 Wis. 498, 104 N. W. 917, 103 N. W. 1123. See Code §§ 2223, 2224. As where a party, under a mistaken belief that a partnership existed between himself and a decedent, proceeded to wind up the business, and made a deposit of funds in a bank, it was held that the bank held such deposit in trust for the estate of the decedent, and had no right, even with the consent of the administrator, to apply the deposit upon a mortgage held by it. First Nat. Bank v. Wakefield [Cal.] 83 P. 1076. Where funds in litigation are deposited in a bank, the bank's right to offset its own claims against such deposit is subject to the order of the court; as where a receiver deposits funds belonging to the estate in a bank which is a party to the litigation, the bank cannot apply such deposit upon its claims, nor plead such claims an offset to the receiver's demand for the deposit, at least not in excess of the amount previously ordered by the court to be paid thereon. State v. Corning State Sav. Bank [Iowa] 105 N. W. 159.

69. Peach v. Grubbs [Ala.] 40 So. 110.

70. In an action to recover a deposit the bank cannot set up a claim as a bona fide purchaser of a note of the depositor under a general denial and a plea of payment, in the absence of any claim in set-off or any aver-

Set-off of deposit against debts due bank.—Upon the failure of a bank a depositor may set-off the amount of his deposit against a debt due by him to the bank.[71]

Deposits received after insolvency.[72]—A deposit made while the bank is hopelessly insolvent to the knowledge of its officers may be recovered from the receiver in preference to the claims of general creditors.[73] It is not necessary in such case that the depositor be able to trace the identical money deposited into the receiver's hands but it is sufficient that the amount which went into his hands was increased by the amount of the deposit.[74]

General and special deposits.[75]—A deposit with a bank, in the absence of terms making it a special deposit, becomes immediately a part of its general assets, and the bank thereby becomes the debtor of the depositor to the amount of the deposit.[76] The bank has, in the absence of an agreement to the contrary, a general lien on all securities and money deposited with it by a customer to secure the payment of his indebtedness to it, and may apply such deposits to the extinguishment of the depositor's indebtedness as it matures.[77]

Specific deposits.[78]—Money deposited for a specific purpose constitutes a trust fund;[79] and money may be even so deposited as to deprive the depositor of the right to check upon or withdraw it until the purpose for which it was deposited has been accomplished.[80] But a specific deposit cannot be recovered from he re-

ment of ownership of the note. Elliott v. Worcester Trust Co., 189 Mass. 542, 75 N. E. 944.

71. Where a bank depositor made a general assignment, and a creditor of such depositor, without knowledge of such assignment, attached the deposit on the same day on which the assignment was made, and the bank, without knowledge of such assignment, made a loan to the attaching creditor in reliance upon the probability that the deposit would be acquired by him, the attaching creditor in effect being allowed to check upon such deposit, and the bank thereafter failed, the attaching creditor in the meantime having acquired the right to such deposit by an arrangement with the assignee of the depositor, it was held that the attaching creditor might set-off the deposit against his liability for the amount checked out by him under the arrangement with the bank. Renfro v. Yarbrough [Ala.] 39 So. 660.

72. See 5 C. L. 361.

73. Orme v. Baker [Ohio] 78 N. E. 439. Knowledge of cashier as to hopeless insolvency of bank imputed to the bank under the circumstances. Id.

74. Identification of deposit held sufficient, where checks were collected by receiver several days after his appointment, and money, though mingled with other funds, was not credited to depositor on books of bank until after receiver was appointed, and exact amount of the deposit was known. Orme v. Baker [Ohio] 78 N. E. 439.

75. See 5 C. L. 361.

76. Town of Manitou v. First Nat. Bank [Colo.] 86 P. 75.

77. Bank held entitled to charge amount of town warrants, which were due and payable and which town refused to pay, with interest thereon, against towns deposit. Town of Manitou v. First Nat. Bank [Colo.] 86 P. 75.

78. See 3 C. L. 424.

79. The fact that a bank enters a specific deposit of another bank as a general deposit will not change the character of the deposit, so as to deprive the correspondent bank of the right to apply such specific deposit according to the agreement upon which it was deposited, as against the receiver of the depositing bank. Thus, where a bank discounted the note of the president of another bank under an express agreement that the proceeds were to be placed in a specific deposit to the credit of the borrowing bank, not subject to check but to be retained as security for and to be applied to the note at maturity, it was held that the discounting bank had the right, upon the insolvency of the other bank, to apply the deposit to the payment of the note; the transaction being really for the benefit of the bank which failed, and the object thereof being merely to swell the credits of such bank so as to justify the amount of loans carried by such bank. Cherry v. City Nat. Bank [C. C. A.] 144 F. 587.

80. Where the purchaser of real estate has signed the completed act of purchase, but does not take possession thereunder, and, instead of paying the price, by agreement with the seller, deposits the same in bank, subject to the conditio nthat it shall not be paid to the latter until the title to the property shall have been examined and found to be good, and where it appears that there is a defect in the title, of which the purchaser was informed when the act was signed by him, and which it was the purpose of the agreement and the deposit to give the seller a reasonable opportunity to cure, the money cannot be withdrawn by the purchaser without the consent of the seller until such reasonable opportunity shall have been exhausted. Holliday v. Hammond State Bank [La.] 41 So. 198. The money so deposited is placed beyond the control of the purchaser and withheld from the seller, and the bank,

ceiver of a bank, to the exclusion of the claims of other creditors, unless such deposit can be identified.[81]

Trust funds.[82]—A trust deposit may be created by accident or mistake,[83] or by the wrongful acts of the bank.[84] The fact that a bank has a claim against the trust funds will not necessarily disqualify it from receiving the deposit of such funds.[85] Trust funds on deposit with a bank may be recovered from an assignee or receiver of the bank whenever they can be traced;[86] nor can the bank apply such funds upon an individual debt of the depositor.[87]

Slander of credit or damages for failure to pay check.[88]—A bank is liable in damages to a depositor for refusing to pay his check when he has sufficient funds on deposit to pay it.[89] Such liability is not controlled by the statute of limitations relating to actions founded on fraud.[90]

Action to recover deposits.[91]—As a general rule an action to recover a general deposit must be preceded by a formal demand for payment,[92] and the statute of limitations begins to run against the right to recover upon an open bank account only after formal demand.[93] But a cause of action upon a certificate of deposit is not dependent upon a formal demand for payment.[94] Where the plaintiff claims that

not having been advised by both parties of either the failure or the fulfilment of the condition, the purchaser has no right to draw the money and the seller has no right to demand that it be turned over to him, and the bank incurs no liability for damages for refusing to honor the check of the purchaser therefor. Id.

81. Italian Fruit & Importing Co. v. Penniman, 100 Md. 698, 61 A. 694.

82. See 5 C. L. 361.

83. First Nat. Bank v. Wakefield [Cal.] 83 P. 1076.

84. Trust as to proceeds of collection created by the failure of the bank to comply with directions as to remittance. Hutchinson v. Nat. Bank of Commerce [Ala.] 41 So. 143. An indemnity bond executed to induce a county treasurer to deposit county funds in a bank is valid, regardless of whether it was lawful for the treasurer to make such deposit. Weddington v. Jones [Tex. Civ. App.] 91 S. W. 818.

85. It was not necessarily wrongful for a receiver to deposit funds belonging to the estate in a bank which was a party to the litigation. State v. Corning State Sav. Bank [Iowa] 10 N. W. 159.

86. Trust as to proceeds of collection created by failure of bank to comply with directions as to remitting such proceeds. Hutchinson v. National Bank of Commerce [Ala.] 41 So. 143.

87. Boyle v. Northwestern Nat. Bank, 125 Wis. 498, 104 N. W. 917, 103 N. W. 1123; First Nat. Bank v. Wakefield [Cal.] 83 P. 1076. See ante this section, subd. Set-off of Debts Due Bank Against Deposit.

88. See 5 C. L. 362.

89. Where the refusal to pay was due to an error of the bank teller in supposing that the plaintiff's deposit was in the savings department of the bank. Lorick v. Palmetto Bank & Trust Co. [S. C.] 54 S. E. 206. The liability of a bank to its depositor for substantial damages, temperate in amount, for refusing to pay his check not exceeding his credit, is generally if not universally recognized. And it is not necessary to recovery that there should be proof of special damages, the law presuming that the result is injurious to the credit of the depositor from the general experience of men in such transactions. Id. This rule applies even where the bank officer, in refusing to pay the check, expressly said the drawer had funds to her credit in the savings department, and that the check would be paid on presentation of the passbook, and hence there was no declaration against the solvency and reliability of the depositor. Id.

90. Such an action is not controlled by the three years' limitation provided for by Code Civ. Proc. § 338, subd. 4, but by § 3339, relating to actions upon contracts or other litigations founded upon a written instrument. Smith's Cash Store v. First Nat. Bank [Cal.] 84 P. 663.

91. See 5 C. L. 362.

92. One who deposits money for his credit in such an account, without any special understanding to the contrary, is presumed to accept the undertaking of the bank to pay according to the general usage in such cases, which is known to all men. There being such a general custom, without some special stipulation to the contrary, the contract between the bank and its general depositors, by necessary implication, accords therewith. So a breach of the bank's obligation to pay upon a proper demand being made, or some act on the part of the bank dispensing with such demand, is essential to a cause of action for recovery of it and set the statutes of limitations running in respect to the debt. Koelzer v. First Nat. Bank, 125 Wis. 595, 104 N. W. 838.

93. See Rev. St. 1898, § 4226. Mere bank credits are an exception to the accounts referred to in this statute, since the demand for payment is essential to put the bank in defense. Koelzer v. First Nat. Bank, 125 Wis. 595, 104 N. W. 838. Rev. St. 1898, § 4222, subd. 3, does not cover such case, it being understood that the statutes begin to run only from the time the cause of action is complete. Id.

94. Koelzer v. First Nat. Bank, 125 Wis. 595, 104 N. W. 838.

the bank wrongfully applied his deposit upon a note, plaintiff's failure to return the note to the bank is not per se a defense.[95] An action to recover a bank deposit may be maintained by a person for whose benefit the deposit was made,[96] or by the equitable owner thereof.[97] Questions of pleading [98] and evidence [99] are considered in the notes.

Notes payable at bank.—There is an implied understanding that the bank shall pay notes made by the depositor payable at the bank; [1] and it is not only the privilege of a bank to charge an overdue note to the deposit account of the maker,[2] but as to a surety on the note, it is the duty of a bank to apply the maker's deposit upon the note.[3] But this rules does not apply where the depositor notifies the bank not to apply his deposit to any notes without notice to him.[4]

95. As where the note was received by the plaintiff with other vouchers, no demand having been made by the defendant therefor, and it not appearing that the defendant was injured by the plaintiff's failure to return the note before the suit. Elliott v. Worcester Trust Co., 189 Mass. 542, 75 N. E. 944.

96. As where a vendee of a mining claim deposited with the defendant a certain sum, to be paid to the plaintiff upon the performance by him of his part of the contract and upon the failure of such vendee to make first payment agreed upon in such contract. Peirson v. Pierce [Wash.] 84 P. 731. In such case the vendee may be substituted as defendant, the bank having paid the money into court. Id. Such an action is an action for the recovery of specified property, under 2 Ballinger's codes and statutes, § 6506, providing that on appeal from a judgment for the recovery of money the appeal bond shall be in a penalty double the amount of damages and costs recovered. Id. Newly discovered evidence that a co-purchaser was to receive a commission from the plaintiff was evidence of fraud, but not sufficient to require a new trial. Id.

97. Where in an action by a party claiming to be the equitable owner of a bank deposit, several interveners claimed the deposit as equitable owners, it was held that the amount upon which the plaintiff's proportion should be based upon distribution was the lowest balance to the credit of the depositor between the time when the plaintiff's money was deposited and the time when the first deposit was made for the interveners. Boyle v. Northwestern Nat. Bank, 125 Wis. 498, 104 N. W. 917, 103 N. W. 1123.

98. In an ordinary action at law to recover specified items of deposit, the plaintiff cannot recover upon proof of other deposits. Boothe v. Farmers' & Traders' Nat. Bank [Or.] 83 P. 785. An allegation in an action to recover a deposit that the deposit was made on or about February 21, 1903, did not preclude the plaintiff from relying upon a deposit made on February 24, 1903. Elliott v. Worcester Trust Co., 189 Mass. 542, 75 N. E. 944.

99. In such an action parol evidence is admissible to vary the contract pursuant to which the deposit was made. Peirson v. Pierce [Wash.] 84 P. 731. In an action upon a certificate of deposit, wherein the defendant pleaded payment and relied among other things upon the staleness of the claim, it was held that the abstracts of the bank made by a deceased expert in other proceedings were admissible to contradict the testimony of the bookkeeper of the defendant firm, such bookkeeper having no personal knowledge of the transaction and having testified entirely from memory. Rosenstock v. Dessar, 109 App. Div. 10, 95 N. Y. S. 1064. The fact that a certificate of deposit has been in plaintiff's possession for more than twenty years is evidence of payment. Id. Where an administrator seeks to recover a deposit made by the decedent, he must show that such deposit existed at the time of the decedent's death, and where the date of the decedent's death did not appear, a pass book of the decedent's account showing a deposit, but also showing that the deposit was withdrawn several months later, was sufficient to sustain a recovery. Harris v. State Bank, 97 N. Y. S. 1044.

1. See Rev. Laws, c. 73, § 104. But this would not include notes made long before, and payable at another bank. Elliott v. Worcester Trust Co., 189 Mass. 542, 75 N. E. 944.

2. Partnership note: Where nothing appears to show that an indorsement of a note in the partnership name by one of the partners was without authority of the other partner, and there is nothing to show that the transaction is not within the scope of the partnership business, or to put the bank upon its guard as to the true nature of the transaction, the bank may charge such note to the deposit account of the continuing partner after the dissolution of the firm, although the indorsement was made by and for the benefit of the other partner. Calvert Bank v. J. Katz & Co., 102 Md. 56, 61 A. 411. In an action by a continuing partner against a bank to recover the amount of a note which was charged to the plaintiff's account, after the dissolution of the firm, there was no question of recoupment, and it was error to charge upon that theory. The only question in the case was the right of the bank to charge the note to the plaintiff. Id. In such case the defendant's liability is for the jury. Id.

3. Though the deposit is not made until after the maturity of the note. Bank of Taylorsville v. Hardesty [Ky.] 91 S. W. 729.

4. Where a bank acquired the assets, including the deposits, of another bank, it took such deposits subject to and with notice of the conditions upon which the deposits were held by such other bank, and was bound by a notice to the other bank not to apply them

Certification.[5]—In the ordinary course of business of a bank the certifying of a check imports that the drawee has funds of the drawer at the time, of which a sufficient sum shall be retained to meet the payment of the paper on presentation,[6] and to give validity to negotiable paper, so as to facilitate its circulation, the rules of law impose upon a bank primary liability for certified checks drawn upon it by a depositor or a customer;[7] but where an agent of a bank draws a draft, payable to himself, or certifies a check which he issues, whereby the funds of the bank are or may be withdrawn for his benefit, the transaction is extraordinary, and before the bank can be rendered liable thereon the person receiving such draft or check is bound to make inquiry from other officers of the bank in respect to the validity of the paper.[8]

§ 7. *Circulating notes.*[9]

§ 8. *Loan and discounts.*[10]—Acts forbidding unincorporated persons from conducting a banking business do not necessarily render invalid a contract for the loan of money by an unincorporated banking company,[11] and one who borrows money from such a de facto bank cannot set up, in defense to an action to recover such money, that the bank is not a legally constituted bank.[12] A bank may, under agreement with a depositor, make loans out of the latter's deposit;[13] but a bank has no authority growing out of the relation of depositor and banker to make a loan for the depositor out of his deposit.[14] The depositor, however, may ratify such a loan.[15]

Where a bank discounts paper for one of its depositors, giving him credit therefor upon its books for the proceeds, it is not a bona fide holder, unless some other and valuable consideration passes.[16] Where a bank discounts paper for the

to the notes of the depositor without notice, Elliott v. Worcester Trust Co., 189 Mass. 542, 75 N. E. 944.

5. See 5 C. L. 362.

6. The certifying of a check is equivalent to an acceptance of a bill of exchange, payable on demand, whereby the sum so specified is immediately transferred from the drawer's account, thereby making the bank primarily liable to a bona fide holder of the check for value. State v. Miller [Or.] 85 P. 81.

7. State v. Miller [Or.] 85 P. 81.

8. State v. Miller [Or.] 85 P. 81. Where such a check was cashed by another bank, such bank was chargeable with knowledge of the law and custom applicable to banking business and hence could not have relied upon any primary liability on the part of the bank upon which the check was drawn. Id.

9, 10. See 5 C. L. 363.

11. Banking Act, p. 132, § 57, merely prescribes a penalty upon the officers of an unincorporated banking company. Campbell v. Perth Amboy Shipbuilding & Engineering Co. [N. J. Eq.] 62 A. 319.

12. The plaintiff was incorporated as a bank by act of February 1, 1872, with the privilege to continue as such for twenty years, and in January, 1872, it took proceedings to extend its corporate existence under act April 21, 1876 (Gen. St. p. 972, § 302). It was contended that this latter act did not apply to banks, but it was held that such defense was unavailable in an action to foreclose mortgages securing borrowed money. Campbell v. Perth Amboy Shipbuilding & Engineering Co. [N. J. Eq.] 62 A. 319.

13. Where the cashier of the bank, acting as the agent of a depositor, lent the money of such depositor to a third party, taking a note from the borrower payable to the bank, which note was indorsed by the bank to the depositor without consideration, the bank was not thereby rendered liable upon the note. First Nat. Bank v. Anderson [C. C. A.] 141 F. 926. The fact that the borrower deposited the money so obtained with the bank, and thereafter paid an indebtedness to the bank with a portion of such money, was not such a consideration as would render the bank liable. Id.

14. Valley Bank of Phoenix v. Brown [Ariz.] 83 P. 362. In an action by a depositor to recover the amount of a loan alleged to have been made out of the plaintiff's deposit without authority, evidence that the goods taken as security were of a perishable character was admissible. Id.

15. Evidence held not to show ratification, because the depositor was not informed as to the character of the securities taken by the bank. Valley Bank of Phoenix v. Brown [Ariz.] 83 P. 362.

16. Such transaction simply created the relation of debtor and creditor, and so long as that relation continues and the deposit is not drawn the bank is not an innocent holder, even though it took the paper before maturity and without notice. City Deposit Bank v. Green [Iowa] 106 N. W. 942. But where a bank after discounting notes, the proceeds of which were placed to the account of the borrower, allowed the borrower to check out more than the notes amounted to before the maturity of the notes, it was held that the bank was a bona fide holder for value of such notes. Id.

officers of another bank or corporation, it will depend upon the circumstances of the transaction whether such other bank or corporation will be bound.[17] It is not the custom of bank institutions to give notices to the makers of notes that such notes have been discounted.[18]

A pledge [19] or mortgage [20] given to a bank to secure a loan may cover future advances or loans where it is so agreed.[21]

Under bankruptcy act. A pledge of property to secure a note discounted by a bank, which expressly provides that the pledge shall apply to any liability thereafter contracted is valid, though executed within four months prior to the bankruptcy of the pledgor, not only as to the notes discounted at the time but also as to notes thereafter discounted by the bank on the faith of the pledge.[22] Whatever remains of the proceeds of the security after paying the debt for which it was given belongs to the debtor,[23] or his assignee.[24] A bank holding the title to land as security for a loan is not liable for the removal by another person of timber therefrom.[25] A judgment against a bank with respect to collateral securities held by it is binding upon the assignor of such securities.[26]

17. Many cases have arisen in which the discounting bank has sought to recover from another bank on notes signed personally by one of its executive officers, on the ground that, notwithstanding the personal signature, the loan was really made for and in the interest of the bank itself. One of the tests of liability in such cases is whether the loan was made for the benefit of the bank or of the individual officer; and this has often been determined by ascertaining which party in fact received the benefit of the loan or whether the bank subsequently ratified loan as its own. Cherry v. City Nat. Bank [C. C. A.] 144 F. 587. Where the president of one bank secured the discount of his personal note by another bank, on condition that the proceeds of such note was to be placed to the credit of the borrower's bank, and be held for the payment of the note, the transaction being intended to make a proper showing of the accounts of such bank upon inspection by the examiner, it was held that the transaction was really between the two banks. Id. Where a bank, in order to aid a trust company in carrying out a scheme for consolidation with another trust company, purchased stock from trust company in open market, and took the promissory notes of three employes of such trust company for the amount of the money advanced for the purchase of such stock, the trust company was not primarily liable to the bank for such amount, but was liable only as guarantor. Maryland Trust Co. v. National Mechanics' Bank [Md.] 63 A. 70.

18. A bank having discounted a note in reliance upon the representations of the maker, the maker could not thereafter complain that the bank gave no notice of the discounting of the note. Strang v. MacArthur, 212 Pa. 477, 61 A. 1015.

19. The president of a corporation held to have been authorized to pledge the corporation's property to secure notes discounted by a bank. Love v. Export Storage Co. [C. C. A.] 143 F. 1.

20. Evidence in an action by bank to foreclose a mortgage given to secure discount, held not to show that certain notes given by the mortgagee to the bank as collateral security were to be credited as payments upon the mortgage debts. Campbell v. Perth Amboy Shipbuilding & Engineering Co. [N. J. Eq.] 62 A. 319.

21. A provision in a contract whereby property is pledged to secure a note discounted by a bank, that such pledge should cover any liability thereafter created, was sufficient to make the pledge cover notes subsequently discounted by the bank, although such notes were not specifically mentioned in the contract. Love v. Export Storage Co. [C. C. A.] 143 F. 1. A mortgage reciting that it is given to secure certain notes payable in a certain time to be discounted by a bank in the future will cover demand notes discounted for the mortgagor by the bank, where such is the intention of the parties. Campbell v. Perth Amboy Shipbuilding & Engineering Co. [N. J. Eq.] 62 A. 319.

22. Love v. Export Storage Co. [C. C. A.] 143 F. 1.

23. Evidence in an action against a bank for the balance of the proceeds of an insurance policy assigned to the bank as security for a debt, after the payment of such debt, held that it was error to direct a verdict against the bank. Tharp v. Porter [Tex. Civ. App.] 93 S. W. 530.

24. Where the security held by a bank is assigned by the debtor, it is immaterial what consideration the assignee gives to such debtor; nor is it necessary that the assignee be an innocent purchaser. The only issue between the assignee and the bank is the indebtedness for which the security was given as of the date of notice to the bank of the assignment. Tharp v. Porter [Tex. Civ. App.] 93 S. W. 530.

25. Tucker v. Benedict [La.] 41 So. 226.

26. Where a city assigned tax certificates to a bank as collateral security, giving the bank authority to collect them, the city was bound by a judgment against the bank declaring such certificates void. City of Carthage v. Weesner, 116 Mo. App. 118, 92 S. W. 178.

In New York the banking law is exclusive upon the entire subject of usury so far as it applies to or affects state banks.[27]

Advances against bills of lading.[28]—Where a bank makes an advance upon the security of a bill of lading, the right of possession of the property vests in the bank.[29] A statute prohibiting banks from engaging in trade by buying and selling chattels will not prevent a bank from causing goods to be shipped in its name as security for money advanced to the real owner and shipper of such goods for the purchase thereof.[30]

Drafts with bills of lading attached.[31]—Where the bank gives the seller of the goods credit for the amount of the draft, the title to the goods is thereby vested in the bank,[32] and a delivery of the goods by the carrier to any one except the bank is a conversion.[33] And a bank to which a bill of lading with draft attached is sent has no authority to sell the goods to a party other than the drawee, without notice to the shipper.[34]

§ 9. *Collections.*[35]—An indorsement and deposit of a check upon another bank ordinarily passes the title to the bank with whom the deposit is made.[36] So, also, where a bank holding the title to a check by ordinary indorsement from a depositor reindorses it to a correspondent for collection, the title to the check passes to the correspondent;[37] but where a draft is given to a bank with specific direction to collect and remit the proceeds, the relation of principal and agent, and not that of

27. See laws 1892, p. 1869, c. 698, § 55. Action by a receiver of a state bank to recover upon a promissory note discounted by the bank. Usury held no defense. Schlesinger v. Leheimer, 49 Misc. 419, 99 N. Y. S. 819.

28. See 5 C. L. 363.

29. So, also, where the railroad company delivers the property to a warehouse company which executes its receipts therefor and delivers them to the railroad company which, in turn, exchanges them with the bank for the bills of lading. National Bank v. Citizens' Nat. Bank [Tex. Civ. App.] 93 S. W. 209. A bank having the right of possession of property by reason of having made advances upon the security of bills of lading may avail itself of the remedy of trial of the rights of the property where such property is actually ceased under a levy; but not where the levy is made merely by giving the bank notice without disturbing the possession of the bank. Id.

30. Griffin v. Wabash R. Co., 115 Mo. App. 549, 91 S. W. 1015.

31. See 5 C. L. 363.

32. Tishomingo Sav. Inst. v. Johnson, Nesbitt & Co. [Ala.] 40 So. 503.

33. Where the goods were attached by a creditor of the seller, the intervention by the bank in the attachment proceedings, claiming the goods, constituted an election to pursue its remedy in detinue against the attaching creditor instead of trover against the carrier. Tishomingo Sav. Inst. v. Johnson, Nesbitt & Co. [Ala.] 40 So. 503.

34. Such a sale would be a conversion of the property, for which the bank would be liable to the shipper. Gregg v. Bank of Columbia [S. C.] 52 S. E. 195. Even where the shipper has pledged the goods by indorsement of the draft, he may maintain an action against the bank for conversion, without showing payment of the debt for which the property was pledged or demand for the property, where he has no notice of the conversion until after it has been consummated. Id.

35. See 5 C. L. 364. See, also, special article Collection of Forged or Altered Paper, 3 C. L. 428.

36. If the payee of a check drawn on a bank in a city other than of his residence indorses it and deposits it in his home bank in the usual and ordinary manner, and without any agreement or understanding in reference to the transaction other than such as the law implies, the check becomes the property of the indorsee. Noble v. Doughten [Kan.] 83 P. 1048.

In Alabama it is held that a bank which receives a check for collection, and enters the face value of it as a deposit credit to its owner, becomes the agent of the owner to collect it; and that if the collection is not made, the bank's right to charge off the deposit arises; but if the collection is made, the relation of depositor and banker is consummated. Jefferson County Sav. Bank v. Hendrix [Ala.] 39 So. 295.

37. If the bank holding title to a check under the circumstances stated indorse it to the order of its correspondent in the city where the drawee bank is located, with a guaranty of the previous indorsement, and forward it, with a deposit slip attached for credit as a deposit, to such correspondent, who accepts it on the terms proposed by the indorsement and the deposit slip, and undertakes to collect it, the title to the check, no further facts appearing, vests in the second indorsee. Noble v. Doughten [Kan.] 83 P. 1048. The fact that the indorsee may have the right to charge the check to the depositor's account, if it should be dishonored after due diligence has been exercised to collect it, does not affect the character of the transfer or render the bank any the less the owner of the check. Id.

creditor and debtor or of general depositor, is created.[38] Where a bank holding a check on another bank for collection is informed by the drawee bank, through mistake, that the check is good, the collecting bank is not thereby authorized to charge the amount of such check to the account of the drawee bank,[39] The court will take judicial notice of the custom of bankers to require drafts to be indorsed by the party depositing them.[40]

Duty to preserve rights of parties.[41]—If a bank fails to collect a check through fault of its own, it is liable to the holder for all damages sustained by him through such failure;[42] and this liability may be enforced by an action of assumpsit sounding in damages for a breach of the bank's implied undertaking to use due care and diligence to collect the check,[43] or by an action in case for damages resulting from negligence in performing the duties in respect to the collection imposed upon it by law.[44] But the damages recoverable are by no means necessarily the amount of the check.[45] The depositor cannot, therefore, recover upon the common counts,[46] but must allege and prove his damages.[47] The bank must use due diligence in presenting a check deposited with it for collection.[48] So, also, where a bank, to whom a

38. In such case the collecting bank cannot, without the consent of the owner of the draft, change the relation so created by any subsequent conduct of its own dealing with the proceeds of the draft when collected. Hutchinson v. National Bank of Commerce [Ala.] 41 So. 143. Where, therefore, a bank sent a draft to another bank with instructions to collect and remit the proceeds to a third bank, and the collecting bank remitted the proceeds by its own draft upon another bank direct to the first bank, and such bank immediately forwarded the draft for collection, but payment was refused on account of the insolvency of the drawer, it was held that the violation by the collecting bank of the instruction given to it created a trust as to the proceeds of the draft in favor of the bank from which it was received, and that such proceeds might be traced into the hands of the receiver or the assignee of the collecting bank. Id.

39. A check being a bill of exchange within the meaning of general statutes 1901 providing that no one shall be charged as an acceptor of a bill of exchange except in writing. Interstate Nat. Bank v. Ringo [Kan.] 83 P. 119. See ante § 6, subd. Repayment of Deposits.

40. First Nat. Bank v. Heim [Neb.] 107 N. W. 1019.

41. See 5 C. L. 365.

42. Jefferson County Sav. Bank v. Hendrix [Ala.] 39 So. 295.

NOTE. Negligence: Defendant bank received a cashier's check for collection and entered its face as a deposit to the credit of plaintiff. Defendant sent the check to the drawee bank for collection. Drawee dishonored it, but for nine days defendant failed to notify the plaintiff thereof, the drawee becoming insolvent in the meantime. Plaintiff declared on the common counts and in several special counts but in each failed to allege any damages suffered. Held, judgment for plaintiff should be reversed. Jefferson County Savings Bank v. Hendrix [Ala.] 39 So. 295. There seems to be a conflict as to the effect of the deposit of an out of town check in a bank. Bank v. Loyd, 90 N. Y. 530; Scammon v. Kimball, 92 U. S. 362, 23 Law. Ed. 483; Hoffman v. Bank, 46 N. J. Law, 604. **Contra.** Armour Co. v. Davis, 118 N. C. 548; Beal v. Somerville, 50 F. 647, 17 L. R. A. 291. This conflict is, however, perhaps more apparent than real in that nearly every case turns upon some particular phase of the question which it presents as evidencing the intention of the parties. Bank v. Hubbell, 117 N. Y. 384; In re State Bank, 56 Minn. 119, 45 Am. St. Rep. 454; Bank v. Bank, 114 N. Y. 28. The deposit of a check in a bank for collection does not constitute the bank the owner of the check, so as to give the depositor a right of action for money had and received, but merely an agent for collection. Balbach v. Frelinghuysen, 15 F. 675; Bailie v. Bank, 95 Ga. 277; Sweeny v. Easter, 1 Wall. [U. S.] 166, 17 Law. Ed. 681; In re State Bank, 56 Minn. 119, 45 Am. St. Rep. 454. And the fact that here the bank credited the plaintiff with the amount of the check does not necessarily change the rule. Armour Co. v. Davis, 118 N. C. 548; Beal v. Somerville, 50 F. 647, 17 L. R. A. 291. The special counts were bad because of the lack of averments of damages suffered. Morris v. Bank, 106 Ala. 383; Sohlien v. Bank, 90 Tenn. 221; Trust Co. v. Newland, 97 Ky. 464. For its negligence in collecting the defendant is liable for the resulting damages which may be, although not necessarily so, the amount of the check. American Exp. Co. v. Parsons, 44 Ill. 312. It is prima facie negligence for a collecting bank to send a cashier's check to the drawee bank for collection. Bank v. Goodman, 109 Pa. 422, 58 Am. Rep. 722; Bank v. Packing Co., 117 Ill. 100; First Nat. Bank v. Fourth Nat. Bank, 56 F. 967; Bank v. Burns, 12 Colo. 539.—4 Mich. L. R. 227.

43, 44. Jefferson County Sav. Bank v. Hendrix [Ala.] 39 So. 295.

45. Jefferson County Sav. Bank v. Hendrix [Ala.] 39 So. 295. If a bank violates instructions or is guilty of negligence or misconduct and fails to collect a claim sent to it for collection, it will be liable only for the actual loss caused by its negligence or misconduct. Becker & Co. v. First Nat. Bank [N. D.] 107 N. W. 968.

46, 47. Jefferson County Sav. Bank v. Hendrix [Ala.] 39 So. 295.

48. But due diligence in the presentation of a check for a payment does not require

check has been reindorsed by another bank for collection, accepts the drawee's check upon another bank, it must use the utmost diligence to collect the second check.[49] A bank with which paper is deposited for collection is not in the exercise of ordinary care when it sends such paper directly to the payor for collection, but is guilty of negligence in so doing;[50] nor has the bank any authority to accept the maker's check in payment.[51]

§ 10. *Offenses against banking laws, penalties.*[52]—Intent is an essential element of the crime of subscribing and making a false report to the bank examiner;[53] but the motive of the defendant in making such report is immaterial.[54] Entries of

the collecting bank, in the absence of special circumstances or some special custom, to present it at other than banking hours for payment. Temple v. Carroll [Neb.] 105 N. W. 989. See ante, § 6, subd. Repayment of Deposits. An instruction, in an action by a bank to recover the amount of a check upon another bank, cashed by the defendant, that it was the duty of the defendant, upon receiving notice of the failing condition of the drawee, to present the check for payment "forthwith," was erroneous, in that it imposed upon the defendant the duty of presenting the check forthwith, regardless of the fact that it received the check after banking hours. Id. When the failure of a bank, holding a check as indorsee to present it for payment, is predicated on some act or omission of one of its agents having authority to make presentation, it is not excused by the fact that such agent was ignorant of the existence of the check. Id.

49. Under the circumstances the presentment for payment of the first check and the substitution of the second check in lieu of payment in money fixes the rights of the parties; and after the insolvency of the drawee of the first check has occurred the negligent holder cannot charge the drawer and indorsers with liability by repossessing itself of the instrument, presenting it for payment a second time, and protesting it for nonpayment; and this is true, even though the first presentment might have been rightfully delayed for a longer period of time than that during which the drawee remained solvent. Noble v. Doughten [Kan.] 83 P. 1048. In this case presentment was made and a substituted check taken before noon of a business day closing at 3 p. m. The substituted check could have been collected within 20 minutes. It was not presented for payment at all, but on the following day an attempt was made to collect it through the clearing house. The drawer failed at 2:45 p. m. of that day, and the check was then thrown out. Held, no diligence in collecting it appeared. Id. A local custom of banks to take up checks drawn upon them by their depositors with their own checks on other banks will not excuse holders from exercising the utmost diligence in collecting the substituted checks. Id.

50. This rule applied to a case where a bank, on receiving a certificate of deposit for collection, sent it to another bank whose correspondent at the place where such certificate was issued was the bank which issued the certificate, such bank being the only one at such place, these facts being known to the bank which originally received the certificate for collection, and the correspondent of such bank not being its regular correspondent. It was held that the original forwarding bank, in its letter of instructions, practically directed its correspondent to send the certificate to the bank which issued it, thus taking the case out of the rule which makes the correspondent bank the agent of the holder, in the absence of negligence on the part of the forwarding bank. First Nat. Bank v. Bank of Whittier [Ill.] 77 N. E. 563. Where a bank to which a check was intrusted for collection sent the check to the drawee, and received the drawee's check on New York in payment and such check was protested on account of the failure of the bank drawing it, it was held that the collecting bank could not shield itself behind a custom of transacting business in that way, such custom being unreasonable. Farley Nat. Bank v. Pollock [Ala.] 39 So. 612.

51. Upon the dishonor of the check, the bank regained possession of the note as a subsisting obligation against all makers and indorsers, and no actual prejudice resulted to the owners from the transaction which took place after the close of banking hours upon one day and before their opening on the next, no liability was thereby created against the collecting bank in favor of the owner of the note. Interstate Nat. Bank v. Ringo [Kan.] 83 P. 119. A bank holding a note for collection delivered it to an indorser on the day of maturity, in exchange for the indorser's check upon another bank, and after inquiring by telephone of the drawee bank about the check, and being told, through a mistake as to what check was meant, that it would be paid, entered the amount to the credit of the owner of the note. On the next day payment of the check, which at no time was good, was refused for want of funds, and the collecting bank delivered it to the drawer and in return received the note of its principal. Held, that these transactions did not effect the payment of the note. Id. Under the circumstances stated no liability against the collecting bank arose from the further fact that, upon being orally promised payment by the bank on which the check was drawn, it gave the owner of the note credit on its books for the amount and mailed to the owner a statement to that effect, adding that the credit was subject to collection; notice of the nonpayment of the check having been given to the owner of the note by telephone early in the morning of the next day. Id.

52. See 5 C. L. 365.

53, 54. Under Laws 1903, p. 81, c. 79, § 26. State v. Jackson [S. D.] 105 N. W. 742.

transactions actually consummated will not sustain an indictment for false entries, although the transactions were unauthorized or fraudulent.[55] The exhibiting of false minutes of an alleged meeting of the board of directors of a trust company to an examiner appointed by the banking department with the intent to deceive such examiner as to the financial condition of the company is the exhibiting of a false paper;[56] and where one of two officers of a trust company produce a false minute to the examiner, in the presence of the other, who by his silence acquiesces in such exhibition, although he knows of its falsity, both are guilty of exhibiting under the statute.[57] In Kentucky it is a misdemeanor for any investment company organized for the purpose of selling certificates, bonds, etc., or any officer thereof to transact business without a license.[58] A postdated and postpayable check cannot be made the basis of a prosecution for false pretense.[59] A note executed by an officer of a bank for money borrowed from the bank, in violation of the law, is not void.[60] In a criminal prosecution against an officer of a bank for obtaining money under false pretences in certifying his own check at a time when he had not sufficient money on deposit to pay such check, there can be no conviction where it appears that the party who took the check knew that the defendant had no money on deposit with which to pay it.[61] Violations of the national banking act are considered elsewhere.[62]

55. Under Rev. St. § 5209 (U. S. Comp. St. 1901, p. 3497). Twining v. U. S. [C. C. A.] 141 F. 41. It was contended that the defendants were officers of the Monmouth Trust & Safe Deposit Company which was organized under the acts of 1885, entitled "An act for the incorporation of safe deposit and trust companies" (P. L. 1885, p. 270), and that section 17 of the act of 1899 entitled "An act concerning trust companies," under which this indictment was found, did not apply to "safe deposit and trust companies," created under the act of 1885. It was held that the act of 1885 was expressly repealed by the act of 1899 (P. L. 1899, p. 474), section 8 of the repealing act, however, reserving the right of the companies organized under the acts repealed to continue to enjoy their rights and privileges (P. L. 1899, p. 475), subject, however, to the provision that the act of 1899 should apply to all trust companies and safe deposit companies theretofore organized. Id.

56. Under the statute, and is a misdemeanor under section 17 of the general trust company Act of 1899 (P. L. 1899, p. 461). State v. Twining [N. J. Law.] 62 A. 402. It is within the power of the legislature, in enacting a general law for the creation, government, and control of all trust companies, to impose, under given conditions, certain limitations upon the powers granted, or to reserve to existing trust companies, brought under the act, certain powers already possessed by them under existing laws; and to make it a misdemeanor for the officers of companies, brought under the general act, to do the things prohibited by the general statute, although the things made misdemeanors by the general law were not such under the act under which the trust company so brought under the general law was incorporated. Id. See the title Statutes, 4 C. L. 1522. Section 17 of the act entitled "An act concerning trust companies" (Revision of 1899; P. L. 1899, p. 461), which makes it a misdemeanor for any director, officer, agent, or clerk of any trust company to knowingly subscribe or exhibit any false paper with intent to deceive any person authorized to examine as to the condition of such trust company, is not in conflict with article 4, § 7, subd. 4, of the state Constitution, which provides that every law shall embrace but one subject, and that shall be expressed in its title. Id. It is not error to permit an examiner of the banking department to testify that he was acting as such examiner when the false paper was exhibited. A public officer may testify that he is such officer, without producing his certificate of appointment or official commission. Id.

57. State v. Twining [N. J. Law] 62 A. 402.

58. Ky. St. 1903, § 2223a, subd. 11. An indictment under this statute against an officer of an investment company must state the offense with such certainty to apprise him of the particular acts which will be proved to show his guilt, and therefore must show the particular capacity in which the defendant acted, with the names of the persons with whom the business was transacted. Commonwealth v. Loving [Ky.] 92 S. W. 575.

59. Under Acts 1905, p. 751, c. 169, §§ 677, 687. Brown v. State [Ind.] 76 N. E. 881.

60. Laws 1892, p. 1857, c. 689, § 25, subdivision 4, providing that such a loan must not be made without the consent of a majority of the directors, merely makes such a loan improper upon the condition that the formality required is not complied with, whereas subdivision 1 absolutely prohibits certain other loans. The inference is that the loans referred to in subdivision 4 were not intended to be made void, but that the penalty enforced by such subdivision is intended to be the only result of a violation thereof. People's Trust Co. v. Pabst, 98 N. Y. S. 1045.

61. The fact that the officer of the bank certified his own check was sufficient to put the other party upon inquiry as to the ex-

Receipt of deposit when insolvent.[63]—The statutes making it a crime for officers of the bank to receive deposits, knowing that the bank is insolvent, are considered in the notes.[64]

BANKRUPTCY.

[By William H. Oppenheimer.]

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tent of the authority of such officer. State v. Miller [Or.] 85 P. 81.

62. See ante, § 3, subd. Violation of Banking Act and Liability of Officers.

63. See 3 C. L. 427.

64. Mississippi Code, 1892, § 1089, provides that if the president, manager, cashier, teller, assistant, clerk, or other employe or agent of any bank or broker's office or establishment, conducting the business of receiving on deposit the money or other valuable things of other persons, shall receive any deposit knowing or having good reason to believe the establishment insolvent, without informing the depositor of such condition, on conviction, he shall be imprisoned in the penitentiary not longer than five years. State v. Walker [Miss.] 41 So. 8. The crime created by this statute is not the conducting of the business of receiving deposits while the bank is insolvent, but the failure to inform the depositor of such insolvency, and every time a deposit is accepted while the bank with knowledge or reason to believe that the bank is insolvent without notice to the depositor of such condition, a separate offense is committed. Id. A count in an indictment, therefore, which charges

§ 1. *The bankruptcy act, amendments, and general orders.*[1]—The amendatory act of February 5, 1903, is not retroactive.[2] The general orders have the same force and effect as though they were a part of the bankruptcy statute.[3]

§ 2. *Supersession of state laws.*[4]—The bankruptcy act suspends and supersedes all state insolvency laws [5] except as to cases and persons not within its purview.[6] To render a state insolvency law inoperative because in contravention of the Federal bankruptcy act, it is not essential that the state act shall contain a provision for the discharge of the debtor.[7]

§ 3. *Occasion for proceeding and acts of bankruptcy. A. In general. Insolvency.*[8]—A debtor is not insolvent, under the present bankruptcy law, unless the aggregate of his property, whether legally exempt from execution or not, at a fair valuation and exclusive of any property that he may have conveyed, transferred, concealed or removed, or permitted to be concealed or removed, with intent to defraud, hinder, or delay his creditors, is insufficient to pay his debts.[9] The test of a "fair valuation" of the debtor's property is its market value at the time the legal proceedings were taken, where that can be fairly established and not its value as it may have been affected by such proceedings.[10] There is a conflict as to whether in determining the solvency of a partnership the individual properties of the partners are to be considered.[11] The good will of a business is an asset.[12]

the receiving of deposits from divers persons, when the defendant knew that the bank was insolvent, without notifying such persons of such insolvency, was bad, in that it charged several separate and distinct felonies. Id.

Under the Iowa statute the fact of insolvency at the time a deposit is received raises no presumption that the banker knew such insolvency. See Code, § 1885. Under this statute proof of insolvency and its actual knowledge thereof is necessary to a conviction. State v. Dunning [Iowa] 107 N. W. 927. An instruction, therefore, which authorized a conviction upon the theory that negligence in failing to know that the bank was insolvent was prejudicial error, though another instruction positively declared that the defendant must have actually known of such insolvency. Id.

1. See 5 C. L. 367.

2. Amendment to § 64b, subd. 2, considered. In re Felson, 139 F. 275.

3. Bank of Ravenswood v. Johnson [C. C. A.] 143 F. 463.

4. See 5 C. L. 367.

5. The bankrupt law is paramount to all the state insolvency laws, and where the effect of enforcing the state law is to defeat the object of the provisions of the bankrupt act, that part of the state law must yield to the provisions of the latter. In re International Coal Min. Co., 143 F. 665. Proceedings under Act Pa. April 7, 1870 (P. L. 58), do not work a dissolution of the corporation so as to defeat subsequent bankruptcy proceedings against it, based on such proceedings, nor disenable its directors to admit its insolvency and its willingness to be adjudged a bankrupt. Id. California Insolvency act (St. 1895, p. 153, c. 143, § 69), giving a claim for taxable costs in attachment suits priority, is in conflict with Bankruptcy Act 1898, and suspended. In re The Copper King, 143 F. 649. See post, § 14, subd. G, Priorities. Rev. St. Ohio, § 6343, providing that transfers with intent to prefer and while insolvent may be set aside at the suit of a creditor has no application to a case where bankruptcy proceedings were instituted before any such suit was commenced. In re Chadwick, 140 F. 674. Rev. St. Mo. 1899, §§ 1305, 1306, for liquidating banks, held an insolvency law. In re Salmon & Salmon, 143 F. 495.

6. Dille v. People, 118 Ill. App. 426. Act June 4, 1901, P. L. 304, in force as to wage earners and persons chiefly engaged in farming or the tillage of the soil. Citizens' Nat. Bank v. Gass, 29 Pa. Super. Ct. 125.

7. Rev. St. Mo. 1899, §§ 1305, 1306, liquidating banks held an insolvency law. In re Salmon & Salmon, 143 F. 395.

8. See 5 C. L. 368. As to the burden of proving insolvency and the evidence admissible on such issue, see post, § 5, C.

9. In re Hines, 144 F. 142. Evidence held insufficient to show insolvency. Id.; First State Bank v. Sibley County Bank [Minn.] 105 N. W. 485. Evidence held sufficient to show insolvency at the time payment was made. Benjamin v. Chandler, 142 F. 217. Where bankrupt owed more than $11,000 and his assets amounted to about $1,500 held insolvent. Capital Nat. Bank v. Wilkerson [Ind. App.] 75 N. E. 837. Evidence held sufficient to show insolvency. In re Borelli, 142 F. 296.

10. In re Hines, 144 F. 142. On the issue of insolvency in determining the value of the bankrupt's property, consisting of a printing office plant, it should be taken in the condition it was, as a going concern, at the time of the alleged preference, and not at its value as mere dead property after the bankruptcy proceedings have intervened. Butler Paper Co. v. Goembel [C. C. A.] 143 F. 295.

11. That they are. In re Perley, 138 F. 927. That they are not. In re McMurtrey & Smith, 142 F. 853.

12. Business held not to have any good

(§ 3) *B. Disposition of property with intent to hinder, delay, or defraud creditors.*[13]—A conveyance by an insolvent of all of his nonexempt property in trust for the benefit of his creditors, although without preferences, is one made with intent to hinder and delay his creditors.[14]

(§ 3) *C. A preferential transfer while insolvent.*[15]—An insolvent knowingly preferring a creditor or creditors by a transfer of any portion of his property to them commits an act of bankruptcy.[16] This preferential transfer should be distinguished from the preferential transfer made voidable by the trustee, in that the creditor in this case need not have reasonable cause to believe that a preference was intended.[17]

(§ 3) *D. Suffering or permitting while insolvent, the obtaining of a preference through legal proceedings.*[18]—It is immaterial that the insolvent took no affirmative action in aiding the creditor in securing such preference.[19] It is the failure on his part to have the same vacated or discharged within five days before a sale or final disposition of the property that constitutes the act of bankruptcy.[20] State insolvency laws being suspended by the operation of the bankruptcy act, proceedings thereunder cannot operate as an act of bankruptcy under this section.[21]

(§ 3) *E. General assignment and the appointment of a receiver or trustee.*[22]—An assignment for the benefit of creditors[23] constitutes an act of bankruptcy, regardless of the assignor's solvency.[24] In order to constitute an act of bankruptcy the appointment of a receiver by a court must have been because of the debtor's insolvency,[25] and it is essential that his insolvency shall have been determined either by the admission of the party or by evidence adduced in a judicial inquiry duly had.[26] Placing one's property in the hands of trustees may also constitute an act of bankruptcy.[27]

(§ 3) *F. Admitting insolvency in writing and willingness to be adjudged a bankrupt.*[28]—The debtor admitting in writing his inability to pay his debts and his willingness to be adjudged a bankrupt, the question of insolvency is immaterial.[29]

will and to have been insolvent. Evans v. National Broadway Bank, 48 Misc. 248, 96 N. Y. S. 789.

13. See 5 C. L. 368.

14. In re Salmon & Salmon, 143 F. 395.

15. See 5 C. L. 368.

16. Payments partly on account of current expenses and partly on account of antecedent indebtedness held preferential. In re Foley, 140 F. 300.

17. See post, § 10, subd. E.

18. See 5 C. L. 368.

19, 20. In re Rung Furniture Co. [C. C. A.] 139 F. 526.

21. So held as to proceedings under Act Pa. April 7, 1870 (P. L. 58), which provides that on return of an execution against a corporation of certain classes unsatisfied the judgment creditor may procure a special writ of fieri facias on which all the property of the corporation, except real estate in fee, shall be sold and the proceeds distributed by the sheriff among all its creditors as provided by Act Pa. June 16, 1836 (P. L. 775). In re International Coal Min. Co., 143 F. 665. But see post this section, subd. E.

22. See 5 C. L. 368.

23. Where private bank owned by a partnership became insolvent and its affairs were taken charge of by the secretary of state of Missouri, through its special agent as authorized Rev. St. Mo. 1899, § 1305, and thereafter the partners who were insolvent, conveyed all their nonexempt property to the special agent with power to sell and convey, held an assignment for the benefit of creditors. In re Salmon & Salmon, 143 F. 395. See Assignments for the Benefit of Creditors, 5 C. L. 286.

24. In re Sully, 142 F. 895.

25. In re Spalding [C. C. A.] 139 F. 244. Appointment of receiver because of fraudulent conveyances held not an act of bankruptcy. Id. Proceedings under Act Pa. April 7, 1870 (P. L. 58), which provides that on return of an execution against a corporation of certain classes unsatisfied the judgment creditor may procure a special writ of fieri facias on which all the property of the corporation except real estate in fee, shall be sold and the proceeds distributed by the sheriff among all its creditors as provided in Act Pa. June 16, 1836 (P. L. 775), constitute an act of bankruptcy. In re International Coal Min. Co., 143 F. 665.

26. Zugalla v. International Mercantile Agency [C. C. A.] 142 F. 927. Appointment of temporary receiver ex parte on filing of bill held not to constitute an act of bankruptcy. Appointment was made under general equity powers of state court. Id.

27. A corporation organized under the laws of Connecticut commits an act of bankruptcy, where, because of its insolvency, its stockholders sign an agreement for its dissolution pursuant to Pub. Acts Conn. 1903, pp. 160, 161, c. 194, §§ 29-34, and transfers its property to its directors, as trustees, to wind up its affairs. In re Bennett Shoe Co., 140 F. 687.

28. See 3 C. L. 438.

29. In re Duplex Radiator Co., 142 F. 906.

§ 4. *Persons who may be adjudged bankrupts and who may petition.*[30]—The main object of the bankruptcy act is to secure an equal distribution of the assets of an insolvent among all his creditors and prevent preferences. It is the duty of the courts to carry this object into effect to the extent which the language of the act justifies.[31] Mere schemes and artifices to avoid the letter and spirit of the law will not be tolcrated.[32] In order to be subject to involuntary proceedings the debtor must owe at least $1,000,[33] and must not come within any of the excepted occupations; thus a natural person engaged chiefly in farming or the tilling of the soil cannot be adjudged an involuntary bankrupt.[34] A corporation engaged principally in manufacturing,[35] mining, publishing,[36] or trading and mercantile pursuits, may be adjudged an involuntary bankrupt. The word "mining" as here used includes quarrying.[37] "Mercantile pursuits" is limited to persons engaged in buying and selling commodities.[38] A corporation engaged in a business consisting of manufacturing, mining, and mercantile pursuits, which in the aggregate exceed any other business in which it is engaged may be adjudged a bankrupt regardless which one of the enumerated operations or pursuits is its principal business.[39] With respect to a corporation, its actual business is to be considered and not that which it might possibly have undertaken by virtue of authorized but unexercised powers.[40] In determining whether the bankrupt's indebtedness exceeds $1,000, all provable debts preferentially paid should be counted.[41] An educational corporation cannot be adjudged an involuntary bankrupt.[42] There is some controversy as to the date when the liability of a person, natural or artificial, to bankruptcy, is to be adjudged, some courts holding that the question is to be determined by the occupation of the debtor at the time of the commission of the act of bankruptcy,[43] and others holding that it is to be determined as of the date when the debts due the petitioning creditors were incurred.[44] Whichever date is deemed controlling the debtor cannot escape liability to bankruptcy proceedings by changing his occupation and turning to another to which the exemptions of the law apply,[45] nor can a corporation escape the liability by subsequently stopping business altogether and going into liquidation, voluntary or involuutary.[46] The burden of proof is upon the one setting up exemption from the provisions of the Federal bankrupt law.[47]

30. See 5 C. L. 369.

31, 32. In re Blount, 142 F. 263.

33. Taft Co. v. Century Sav. Bank [C. C. A.] 141 F. 369.

34. Person owning two farms and cultivating them partly by his own labor and his sales of produce amounted to between $1,000 and $1,200 per year held chiefly engaged in farming though he also conducted a small store from which he realized a profit of about $100 a year. Rise v. Bordner, 140 F. 366.

35. Corporation engaged principally in the business of building wharves, bridges, bulkheads, etc., under contract and having no plant to manufacture bridges, etc., for the market, is not engaged in manufacturing. Butt v. MacNichol Const. Co. [C. C. A.] 140 F. 840.

36. Mercantile agency engaged in obtaining, compiling and printing credit reports held not principally engaged in publishing. Zugalla v. International Mercantile Agency [C. C. A.] 142 F. 927.

37. Quarrying slate from an open quarry. Act 1898, § 4b, as amended by the Act of 1903 construed. Burdick v. Dillon [C. C. A.] 144 F. 737, afg., 144 F. 724. Writ of certiorari denied, 26 S. Ct. 764, 50 Law. Ed. ---.

38. Zugalla v. International Mercantile Ag. [C. C. A.] 142 F. 927. "Mercantile agency," held not engaged in mercantile pursuits as here used. Id.

39. Burdick v. Dillon [C. C. A.] 144 F. 737, afg. 144 F. 724. Writ of certiorari denied, 26 S. Ct. 764, 50 Law. Ed. ---.

40. Tiffany v. La Plume Condensed Milk Co., 141 F. 444.

41. In re McMurtney & Smith, 142 F. 853.

42. Dille v. People, 118 Ill. App. 426.

43. Flickinger v. First Nat. Bank [C. C. A.] 145 F. 162. Farmer committing an act of bankruptcy by making a general assignment is not subect to involuntary proceedings though prior to the filing of the petition his assignee sold the farm. Id.

44, 45, 46. Tiffany v. La Plume Condensed Milk Co., 141 F. 444.

47. An application by the assignee in insolvency for an order setting aside a writ of execution issued prior to the assignment, on the ground that the assignor is a farmer will not be granted where the answer denies that assignor is a farmer and petitioner

Who may petition. Voluntary proceedings.[48]—A corporation cannot become a voluntary bankrupt.[49] A debtor having but one debt and no assets to which the trustee can take title may become a voluntary bankrupt.[50]

Involuntary proceedings.[51]—Persons who procure or connive at the commission of an act of bankruptcy are incompetent to maintain proceedings on account of such act.[52] Proceedings by creditors under a state insolvency law do not estop them from thereafter prosecuting proceedings in bankruptcy against their debtors,[53] nor does participation in a suit in a state court to wind up the affairs of a partnership bar the institution of bankruptcy proceedings against the partner, the act of bankruptcy consisting of a transfer of property not employed in the partnership business nor involved in the state suit.[54] The petitioners must have provable claims.[55] In computing the number of creditors persons to whom the bankrupt is indebted for current family necessaries or similar purposes, the bills for which are customarily paid monthly or within a short time, should not be counted so as to defeat proceedings instituted by a bona fide creditor,[56] nor can an insolvent having more than twelve creditors defeat bankruptcy proceedings against him by transferring his property for the benefit of some of his creditors leaving less than three unprovided for, but leaving the preferred creditors actually unpaid for the purpose of requiring them to be counted so that those remaining will be insufficient in number to maintain a petition.[57] Secured creditors cannot be counted unless their claims exceed the value of their securities.[58]

§ 5. *Procedure for adjudication. A. In general.*[59]—Bankruptcy proceedings are proceedings in equity.[60]

Jurisdiction.[61]—The bankruptcy courts have jurisdiction to adjudge persons bankrupt who have had their principal place of business, resided, or had their domicile, within their respective territorial jurisdictions for the preceding six months or the greater portion thereof,[62] and if the alleged bankrupt be a foreign corporation it is immaterial whether or not it has procured a certificate required by the laws of the state to entitle it to do business therein.[63] A foreign corporation cannot become a "resident" of a state other than the one under whose laws it is organized.[64]

adduces no proof. Charles v. Smith, 29 Pa. Super. Ct. 594.

48. See 5 C. L. 370.

49. Dille v. People, 118 Ill. App. 426.

50. Act of 1898, § 1, subd. 29, and § 4, construed. In re Schwaninger, 144 F. 555.

51. See 5 C. L. 370.

52. Failure of insolvent debtor to discharge preference obtained by a judgment creditor by the levy of an execution cannot be charged as an act of bankruptcy, where the levy was procured by the attorney for the petitioning creditors for the sole purpose of laying the foundation for the bankruptcy proceedings. In re Weiss, 142 F. 279.

53, 54. In re Salmon & Salmon, 143 F. 395.

55. In re Ellis [C. C. A.] 143 F. 103. What claims are provable see post, § 14, subd. A.

56, 57. In re Blount, 142 F. 263.

58. Where an insolvent sold and transferred all of his property to one creditor under an agreement that the purchaser should pay all but one of the seller's creditors. The creditors so provided for were notified of the arrangement and expressed no dissent. Held they could not be counted. In re Blount, 142 F. 263.

59. See 5 C. L. 370.

60. Ellis v. Krulewitch [C. C. A.] 141 F. 954; In re Holmes [C. C. A.] 142 F. 391.

61. See 5 C. L. 370, n. 51, 52; 371, n. 73 et seq.

62. Act 1898, § 2, subd. 1. Where a corporation operating factories, mills, or mines in various states, has a principal office where supreme direction and control is exercised, where its directors meet, books of account are kept, general correspondence conducted, sales negotiated, bills sent out and payments received, such office is its principal place of business. Burdick v. Dillon [C. C. A.] 144 F. 737, 144 F. 724. Writ of certiorari denied. 26 S. Ct. 764, 50 Law. Ed. —. Where a manufacturing corporation, although maintaining a nominal office in the state in which it is organized has its manufactory and an office from which it conducts its business within a district in another state, its principal place of business is within the latter district. Tiffany v. La Plume Condensed Milk Co., 141 F. 444.

63. In re Duplex Radiator Co., 142 F. 906.

64. Act 1898, § 2, cl. 1, construed. In re Mathews Consol. Slate Co., 144 F. 724, case afd. [C. C. A.] 144 F. 737, this point not being mentioned.

Schedules.[65]—The schedules ought to contain a careful enumeration of everything in the estate whether or not any exemption is claimed in reference to any article enumerated.[66] A misstatement of a creditor's address is immaterial he having actual knowledge of the proceedings,[67] The use of ditto marks in the schedule is unlawful.[68] A surviving partner of a firm creditor is correctly scheduled as the creditor.[69]

(§ 5) *B. Voluntary proceedings.*[70]

(§ 5) *C. Involuntary proceedings.*[71]—While the bankruptcy proceedings must not be collusive still the mere fact that a debtor admits in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground and thereupon requests certain creditors to file an involuntary petition, constitutes no ground of defense to the proceeding by a creditor who opposes the adjudication.[72] When a bankrupt and all of his creditors have recognized the validity and regularity of proceedings in a course of bankruptcy, have participated therein, and sought the benefit thereof, one of such creditors will not be heard long after the adjudication to object to the jurisdiction of the court upon the ground that the proceedings were instituted in a district in which the bankrupt did not reside or have his domicile or principal place of business for the greater portion of the preceding six months,[73] nor upon the ground that a subpœna to the bankrupt was not issued, he having voluntarily waived the same and entered his appearance,[74] nor upon the ground that the petition failed to allege that the bankrupt was not a wage earner or a person engaged chiefly in farming or tillage of the soil.[75] And, for like reasons, he will not be permitted to otherwise contest the petition upon which the adjudication proceeded.[76]

The petition must be filed within four months of the commission of the act of bankruptcy,[77] and must show that the defendant owes debts to the jurisdictional amount,[78] and that he is not of the excepted classes.[79] The petition should also state the nature and amount of the claims held by the petitioning creditors,[80] and while failure so to do will doubtless render it subject to direct attack,[81] still such an omission will not render a judgment based on the petition void for want of jurisdiction and thus subject to collateral attack.[82] The petition alleging preferential payments, should set out the names of the creditors to whom such payments were made if known; but, if the petitioners do not know their names, the petition is good if it avers in general terms that the payments were made, adding a reason why a more specific allegation is not possible.[83] A defect in the verification is a formal matter and not jurisdictional.[84] The court has discretionary power to permit the amendment of the petition,[85] and if allowed the amendment relates back and takes effect

65. See 5 C. L. 371.

66. In re Mullen, 140 F. 206.

67. Misstatement of creditor's address held immaterial where it was the address given bankrupt by the creditor's attorneys and the latter had actual knowledge of the proceedings. Vaughn v. Irwin, 96 N. Y. S. 742. Compare post, § 22, subd. C.

68. Hoock v. Theise, 99 N. Y. S. 905.

69. Kaufman v. Schreier, 108 App. Div. 298, 95 N. Y. S. 729. See Partnership, 6 C. L. 911.

70, 71. See 5 C. L. 371.

72. In re Duplex Radiator Co., 142 F. 906.

73, 74, 75, 76. In re Worsham [C. C. A.] 142 F. 121.

77. Second adjudication. In re Barton's Estate, 144 F. 540.

78. Must allege that the defendant owes debts to the amount of $1,000 or over. Taft Co. v. Century Sav. Bank [C. C. A.] 141 F. 369.

79. Involuntary petition against a natural person should allege his occupation, or that he is not a wage earner or engaged chiefly in farming. Rise v. Bordner, 140 F. 566.

80, 81, 82. Bail v. Hartman [Ariz.] 83 P. 358.

83. In re Lackow, 140 F. 573.

84. Bail v. Hartman [Ariz.] 83 P. 358.

85. Chicago Motor Vehicle Co. v. American Oak Leather Co. [C. C. A.] 141 F. 518. Amendment, alleging specific acts of bankruptcy shown, without objection, in the evidence, allowed. Id. A petition charging as an act of bankruptcy a transfer of property

as of the date of the filing of the original petition.[86] Creditors other than the original petitioners may join in the petition.[87] After the petitioners have joined in a petition they cannot ordinarily withdraw against the wishes of their fellow petitioners.[88]

Mere irregularities in the form of the notice given by a summons does not render the judgment subject to collateral attack.[89] A subpœna served on a member of a bankrupt firm gives jurisdiction of the firm and its property.[90]

The bankruptcy court has discretionary power to dismiss a petition in involuntary bankruptcy for want of prosecution,[91] and its action is reviewable only where there has been an abuse of discretion.[92] Involuntary proceedings cannot be dismissed, except upon the merits, without notice to the creditors,[93] though, prior to the adjudication, in the absence of reason to suspect collusion, no other creditors having intervened or appeared, notice of a motion to dismiss need only be given the petitioning creditors.[94]

No pleadings being filed by the bankrupt within the time fixed by law, nor within further time granted by the court, it is the duty of the court to adjudicate the debtor a bankrupt.[95]

The malicious institution of proceedings, without probable cause, to have a person declared a bankrupt, is actionable,[96] although not accompanied by any actual seizure of the alleged bankrupt's property.[97]

Second adjudication.[98]—A bond given by bankrupts on an appeal from an order refusing them a discharge is merely one for costs and does not suspend or affect the right of creditors to institute proceedings to have them adjudicated bankrupts a second time on the ground of the commission of a new act of bankruptcy,[99] but such proceedings cannot be maintained more than four months from the date of such act.[1] Creditors who have proved their claims are not, however, entitled, while the estate is still in the process of administration, but after the bankrupt has been refused a discharge, to maintain proceedings to have him adjudged a bankrupt a second time on account of the same debts, on the ground that he acquired property after the first adjudication, which he is alleged to have conveyed in fraud of his creditors.[2]

(§ 5) *D. Exemption of bankrupt from arrest.*[3]—If pending bankruptcy proceedings the bankrupt be arrested or imprisoned upon process in any civil action, the district court, upon his application, may issue a writ of habeas corpus to bring him before the court to ascertain whether such process has been issued for the collection of any claim provable in the bankruptcy proceedings, and if so provable he shall be discharged.[4] Consequently, the bankruptcy court may, and it would

with intent to hinder, delay, and defraud creditors, may properly be permitted to be amended to charge that the transfer was made to prefer certain creditors where such fact is developed on the hearing. In re Hark, 142 F. 279.

86. Chicago Motor Vehicle Co. v. American Oak Leather Co. [C. C. A.] 141 F. 518.

87, 88. In re Black Diamond Copper Min. Co. [Ariz.] 85 P. 653.

89. Subpoena held sufficient if notifying bankrupt of filing of petition and relief prayed for. Bail v. Harman [Ariz.] 83 P. 358.

90. Bail v. Hartman [Ariz.] 83 P. 358.

91, 92. In re Levi & Klauber [C. C. A.] 142 F. 962.

93. In re Black Diamond Copper Min. Co. [Ariz.] 85 P. 653; Texas & P. R. Co. v. McNairy [Tex. Civ. App.] 94 S. W. 111.

94. In re Levi & Klauber [C. C. A.] 142 F. 962.

95. In re Black Diamond Copper Min. Co. [Ariz.] 85 P. 653.

96. King v. Sullivan & Co. [Tex. Civ. App.] 92 S. W. 51; Wilkinson v. Goodfellow-Brooks Shoe Co., 141 F. 218.

97. Wilkinson v. Goodfellow-Brooks Shoe Co., 141 F. 218.

98. See 5 C. L. 371, n. 65.

99, 1, 2. In re Barton's Estate, 144 F. 540.

3. See 5 C. L. 375.

4. Gen. Order No. 30. A bankrupt arrested and held on a capias in an action to recover from him the value of property which

seem to be its duty to, stay contempt proceedings in a civil suit against the bankrupt in a state court on a debt or claim from which his discharge would be a release,[5] the state court not having priority of jurisdiction by the acquisition of a lien upon any specific property or fund.[6] The exemption exists only during the pendency of the bankruptcy proceedings.[7]

(§ 5) *E. Adjudication.*[8]—The adjudication in bankruptcy is not subject to collateral attack.[9] It is a judgment in rem, in the sense that it determines the status of the bankrupt.[10] It does not, however, dissolve or terminate contractual relations of the bankrupt;[11] nor, the bankrupt being a corporation, does it work a dissolution, or a forfeiture or loss of its franchise.[12] The right of a stockholder in a corporation to maintain an action for an accounting for the benefit of the corporation is not affected by the corporation becoming bankrupt after commencement of the action; the only affect thereof being that an accounting must be to the trustee in bankruptcy.[13]

§ 6. *Procedure after adjudication. In general.*[14]—The courts of bankruptcy are expressly limited to the exercise of bankruptcy jurisdiction within their territorial limits.[15] The ordinary proceedings taken in a bankruptcy proceeding to decide questions arising in it are not proceedings in rem.[16]

§ 7. *Protection and possession of the property pending the appointment of trustees; receivers.*[17] *Proceedings prior to adjudication.*[18]—Where pending involuntary proceedings the creditors take possession of their debtor's property giving the bond required by § 3e of the Act of 1898,[19] the alleged bankrupt, upon dismissal of the bankruptcy proceedings, can only recover, from the obligors on the bond, such costs, expenses, and damages, as are incident to the taking and withholding of the property, as distinguished from costs, expenses, and damages incident to the institution of the bankruptcy proceedings.[20] The petitioning creditors taking possession

it is alleged he embezzled and fraudulently converted to his own use, held entitled to release on habeas corpus where no facts are pleaded which show such embezzlement to have been committed while acting in a fiduciary capacity. Barrett v. Prince [C. C. A.] 143 F. 302.

5. In re Adler [C. C. A.] 144 F. 659.

6. So held where a judgment had been rendered against the bankrupt, prior to the bankruptcy proceedings, in a creditor's suit in a state court requiring him to pay over the amount of the proceeds of certain accounts which had been assigned to him by a debtor and collected by him. In re Adler [C. C. A.] 144 F. 659.

7. Testimony that petition in bankruptcy was filed before arrest is insufficient to show an exemption from arrest where it is not shown when the petition was filed. Gibson v. Holmes [Vt.] 62 A. 11.

8. See 5 C. L. 375, n. 30-33.

9. An adjudication of bankruptcy in voluntary proceedings cannot be collaterally attacked on the ground that the bankrupt was not capable of becoming a voluntary bankrupt. In re Rosenthal, 144 F. 548. Debtor of bankrupt on being sued by trustee cannot attack validity of adjudication. In re Sully, 142 F. 895.

10. Whitney v. Wenman, 140 F. 959.

11. Involuntary adjudication against a corporation held not a repudiation by the bankrupt of an executory contract for the sale of annual crops to be raised in successive years, nor was it equivalent to a permanent disenablement to perform the contract. In re Imperial Brewing Co., 143 F. 579.

12. In re Imperial Brewing Co., 143 F. 579.

13. Meyer v. Page, 98 N. Y. S. 739.

14. The procedure in particular actions and proceedings occurring in or as a result of the bankruptcy proceedings are treated in the separate sections of this topic, which see.

15. Cannot allot bankrupt domiciled within district a homestead in lands situated in another district. In re Owings, 140 F. 739.

16. Order passing accounts of receivers. Whitney v. Wenman, 140 F. 959.

17. See 5 C. L. 375.

18. See 5 C. L. 375, and 3 C. L. 444.

19. A bond given to secure an injunction restraining an execution sale and to preserve the property pending the hearing of the bakruptcy petition is not within this provision of the law. Alleged bankrupt held not entitled to recover either attorney's or keeper's fees, damages or expenses for attending court but could only recover a docket or attorney's fee of $20 under chancery rule 34 and the cost of taking certain depositions. In re Hines, 144 F. 147.

20. Selkregg v. Hamilton Bros., 144 F. 557.

of the alleged bankrupt's property through the marshal assume full responsibility for its care.[21]

After adjudication.[22]—By the adjudication the property of the insolvent comes into the hands of the court for disposition and thus becomes a trust fund,[23] and any of the creditors may, prior to the appointment of a receiver or trustee, maintain an action in any competent tribunal, either in an original suit or by way of intervention, to prevent the trust fund from being fraudulently apportioned,[24] or he may file a creditors' suit on behalf of himself and other creditors to set aside a fraudulent transfer of the bankrupt's property.[25] Proceedings under a temporary order restraining one from disposing of property alleged to belong to the bankrupt must be prosecuted with diligence.[26] The sole purpose of a receiver is to take charge of and preserve the estate until a trustee can be chosen and qualified;[27] the alternative provision being to put the property into the custody of the marshal.[28] No title is acquired by either; the receiver having only power to take charge of the visible property of the bankrupt and preserve it as custodian until the appointment of a trustee,[29] and consequently he has no right to sue to recover property of the bankrupt.[30] Nor, the power to appoint him being purely statutory, can the court confer such authority on him.[31] Neither has he any extraterritorial powers.[32] A receiver should only be appointed where absolutely necessary for the preservation of the bankrupt's estate,[33] and such an appointment, either with or without notice, does not constitute a taking of the bankrupt's property without due process of law.[34] A receiver having been appointed, a bankruptcy court of another district may, upon ex parte application,[35] the necessity of the appointment being shown, appoint an ancillary receiver to aid the court of original jurisdiction in preserving the bankrupt's property pending the appointment of a trustee.[36] Wherever it appears that it is necessary for the preservation of the property claimed to be a part of the bankrupt's estate, after petition in bankruptcy has been filed, that the court should take possession of the same, pending the adjudication of title, it is within the jurisdiction of the bankruptcy court, or its referee, to order the marshal or a custodian to take possession of such property.[37] The power to make such seizure should not be lightly exercised or abused so as to needlessly oppress or injure those who claim title, and in all cases creditors who pray for such order of seizure should be required to give bond to indemnify the party injured, in the event that it should be thereafter

21. Where they took possession of a canning factory held liable for permitting certain pipes to freeze and burst, though alleged bankrupts at all times had free access to the factory. Salkregg v. Hamilton Bros., 144 F. 557.

22. See 5 C. L. 375.

23, 24. Depauli v. Espitallier [Cal. App.] 84 P. 999.

25. So held where it was impossible for creditors to pursue their claims to judgment and execution against the property alleged to have been transferred in violation of Act Pa. March 28, 1905 (P. L. 62), within the time specified by such act. Guaranty Title & Trust Co. v. Pearlman, 144 F. 550.

26. Order will be discontinued where such allegation of ownership is denied by the answer, and after the lapse of several months the rule has not been brought to a hearing and no proofs have been taken in support of the bill. In re Latimer, 141 F. 665.

27, 28, 29. Guaranty Title & Trust Co. v. Pearlman, 144 F. 550.

30. Is without power to sue to set aside an alleged fraudulent transfer of the bankrupt's property. Guaranty Title & Trust Co. v. Pearlman, 144 F. 550.

31. Guaranty Title & Trust Co. v. Pearlman, 144 F. 550.

32. In re Benedict, 140 F. 55.

33. Referee held without power to appoint a receiver after adjudication in voluntary proceedings without any finding as to its necessity, the petition merely alleging the belief of the petitioner that the appointment will be for the benefit of all persons in interest. In re Rosenthal, 144 F. 548.

34. Latimer v. McNeal [C. C. A.] 142 F. 451.

35, 36. In re Benedict, 140 F. 55.

37. In re Knopf, 144 F. 245. Held necessary where duly verified petition averred that alleged bankrupt had transferred his property for the purpose of hindering, delaying, and defrauding creditors, and set forth facts tending to show that the transfer was null and void under the bankrupt act and that the party in possession was financially irresponsible and there was danger that the

determined that the party in whose possession the goods are is lawfully the owner thereof.[38] In such cases the subsequent determination of the issues raised between the trustee and the adverse claimant is a proceeding in bankruptcy.[39] An alleged bankrupt will be required to turn over books of accounts relating to his business to a receiver appointed by the court where it is shown that they are necessary to enable the receiver to continue the business as directed by the court, notwithstanding a claim of privilege by the bankrupt on the ground that the books contain evidence which will tend to incriminate him, unless it appears that such claim is made in good faith and has a reasonable foundation; it not being his right to determine such question for himself.[40] A proceeding to pass receiver's accounts is not a proceeding in rem.[41] As a general rule a receiver should not be discharged until the appointment of a trustee or the doing away of the necessity occasioning the receiver's appointment.[42]

§ 8. *Creditors' meetings; appointment of trustee; removals.*[43]—Where objections are filed to a claim, on the ground that the claimant has received a preference, he should not be permitted to participate in creditors' meetings, until the matter has been heard and determined.[44] A power of attorney from a creditor of a bankrupt, running jointly to one of the bankrupt's attorneys and another, does not entitle either to vote on such claim at a creditors' meeting.[45] The election of a trustee by the creditors is not to be disapproved unless there is good reason to believe that the election has been directed, managed, or controlled by the bankrupt or his attorney or by some influence opposed to the creditors' interests.[46]

§ 9. *Compositions.*[47]—The provision of the bankruptcy act providing for compositions with creditors contemplates that dissenting creditors may be compelled to accept the percentage accepted by the majority and may be deprived of their remedies on the balance of their claims, and should be strictly construed.[48] The composition must be entirely free from fraud or guilty collusion.[49] A bankrupt in a composition proceeding is required to deposit, for the purpose of carrying out the composition, sufficient to cover costs, priority claims, and expenses, and, in addition, the percentage named, not only on all claims filed before confirmation, but also on all other claims listed by the bankrupt in his schedule,[50] and this will include, of course, scheduled claims filed after the composition agreement has been accepted.[51] The bankrupt is not, however, required to deposit sufficient to secure a percentage on secured claims, nor for any supposed but unascertained and unfiled deficiency.[52]

goods alleged to belong to the bankrupt would be lost to his estate without the interposition of the court. Id.

38. In re Knopf, 144 F. 245.

39. Act 1898, § 23 construed. In re Knopf, 144 F. 245.

40. In re Rosenblatt, 143 F. 663.

41. Where receivers have credited themselves with property surrendered to third persons and order passing the accounts is not conclusive of the rights of such person to the property nor of the question of their liability therefor to the trustee of the bankrupt's estate, which will bar a suit by him to recover the same. Whitney v. Wenman, 140 F. 959.

42. Refusal to discharge receiver held not erroneous. Latimer v. McNeal [C. C. A.] 142 F. 451.

43. See 5 C. L. 376.

44, 45. In re Columbia Iron Works, 142 F. 234.

46. In re Eastlack, 145 F. 68. Mere fact that bankrupt openly advocated selection of man who was elected held not sufficient to warrant disapproval. Id.

47. See 5 C. L. 377.

48. Act 1898, § 12 construed. Broadway Trust Co. v. Manheim, 47 Misc. 415, 95 N. Y. S. 930.

49. Where by agreement with all the creditors plaintiff paid claims and costs of proceedings and took property, the fact that he sold the property to the bankrupt and two others taking their notes aggregating the face of plaintiff's claim, interest, and costs of the bankruptcy proceedings, held notes were not void, there being no secret agreement between the bankrupt and plaintiff. Hickman v. Galveston Dry Goods Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 629, 94 S. W. 157.

50, 51, 52. In re Harvey, 144 F. 901.

To be bound by the order of confirmation the unscheduled creditor should have notice or actual knowledge of the bankruptcy proceeding prior to the time when the application for the confirmation of the composition agreement.[53] An order confirming a composition is in effect a discharge in bankruptcy and may be pleaded as such.[54] An arrangement made between a debtor and creditor in a petition in involuntary proceedings, whereby the claims of the creditors are compromised, or in other words an "informal composition," is subject to the rights of any creditor who may appear and present his claim.[55]

§ 10. *Property and rights passing to the trustee. A. Particular kinds of property.*[56]—The trustee takes title to all property of the bankrupt which prior to the filing of the petition the latter could by any means have transferred or which might have been levied upon and sold under judicial process against him,[57] and also to any rights of action arising upon contracts or from the unlawful taking or detention of, or injury to, his property.[58] The word "property" as used in the first clause does not cover contingent rights vested by law in the bankrupt and which may in the future result in pecuniary benefit to him.[59] The trustee, also, becomes vested with title to property in the custody of the law.[60] While a trustee cannot sell a retail liquor license issued to the bankrupt,[61] he can sell the nomination of the bankrupt's successor, the proceeds becoming part of the bankrupt's estate,[62] or he can sell the bankrupt's saloon fixtures upon the condition that the license shall be transferred to the purchaser,[63] and in the latter case if the purchaser abandons his purchase without any attempt to secure a transfer of the license he is liable for loss on resale.[64] A corporation becoming insolvent the statutory liability of stockholders may be enforced without the creditors first obtaining judgments and executions returned unsatisfied and without the appointment of a receiver for the corporation by the state court.[65] The trustee can only recover such portions of unpaid stock subscriptions as are essential for the payment of the corporation's debts,[66]

53. Broadway Trust Co. v. Manheim, 47 Misc. 415, 95 N. Y. S. 93.

54. Broadway Trust Co. v. Manheim, 47 Misc. 415, 95 N. Y. S. 93. It follows that it has been deemed wise to keep matter common to the order of confirmation as a discharge and to the discharge together, see post, § 22.

55. In re Black Diamond Copper Min. Co. [Ariz.] 85 P. 653.

56. See 5 C. L. 377.

57. Act 1898, § 70, subd. 5. Stock deposited as collateral no assignment or transfer having been made on the books of the company. French v. White [Vt.] 62 A. 35. Personal property held by a trustee held reachable by trustee process subject to the rights of the lessee and to pass to the lessor's trustee. Clark v. Williams [Mass.] 76 N. E. 723. Where officers of a bankrupt corporation held all the stock of an ancillary corporation as agents for the bankrupt corporation and not as engaged in a separate business held they could be required to surrender it to the bankrupt's receiver. In re Muncie Pulp Co. [C. C. A.] 139 F. 546. Rents, not collected, not transferable, do not pass to the trustee in bankruptcy. Under Act 1898, § 70, bankrupt's only interest in the rents being to apply rents to payment of his commissions and of a mortgage, although legal title to the rents was in him. Keeley Brewing Co. v. Mason, 116 Ill. App. 603.

58. Act 1898, § 70, subd. 6. Action to enforce statutory liability of stockholder in corporation. Stocker v. Davidson [Kan.] 86 P. 136. The right of action given by Comp. St. 1903, c. 91a, § 11; Cobbey's Ann. St. 1903, § 11, 510, is for injury to "business, employment or property" and passes to the trustee. Cleland v. Anderson [Neb.] 105 N. W. 1092, rvg. former opinion, 66 Neb. 252, 92 N. W. 306, 96 N. W. 212, 98 N. W. 1075.

59. Bryan v. Sturgis Nat. Bank [Tex. Civ. App.] 90 S. W. 704. Under a statute providing "that all property acquired by either husband or wife during marriage, * * * shall be deemed the common property of the husband and wife," held none of the accumulated but undivided earnings of a corporation passed to the trustee of a bankrupt whose wife owned stock in the corporation. Id.

60. Property in the hands of a sheriff under an attachment. Goodnough Mercantile Co. v. Galloway [Or.] 84 P. 1049.

61. Snyder v. Bougher [Pa.] 63 A. 893.

62. Proceeds held not money received by the trustee to the use of one whose principal had advanced money to pay for the bankrupt's license but was properly held by the trustee for distribution among the bankrupt's creditors. Tracy v. Ginzbery, 189 Mass. 260, 75 N. E. 637.

63, 64. Snyder v. Bougher [Pa.] 63 A. 893.

65. Stocker v. Davidson [Kan.] 86 P. 136.

66, 67, 68. Felker v. Sullivan [Colo.] 83 P. 213.

the burden of showing the amount necessary for such purpose resting on the trustee.[67] And an action cannot be maintained for such unpaid balances until a release thereof, executed by the corporation, is set aside as in fraud of creditors.[68] Whether or not the beneficial interest of the bankrupt in trust property passes to his trustee in bankruptcy or not depends upon whether it is such an interest as might have been transferred by the bankrupt or levied upon or sold under judicial process against him,[69] and such question is to be determined by the local law.[70] The beneficial interest of the bankrupt passing to the trustee notice to the trustees of the fund is not necessary to complete the title of the trustee in bankruptcy.[71] The trustee in bankruptcy does not, however, take title to trust funds in the hands of the bankrupt as trustee so long as they can be identified.[72] Property held by the bankrupt under a conditional sale, void as to general creditors for want of record, passes to the trustee,[73] but the adjudication is not the equivalent of a judgment or attachment, so as to operate as a lien in favor of the trustee as against the conditional vendor of the property because of noncompliance with a statute rendering an unfiled contract of conditional sale void only as to those creditors who have fastened upon the property by some specific lien.[74] The trustee takes title to insurance policies on the life of the bankrupt which are valuable as assets,[75] subject, however, in the case of policies having a cash surrender value, to the right of the bankrupt to retain them by paying such value[76] before the expiration of 30 days

69. Loveland, Bankruptcy, § 174. Tucker v. Denico [R. I.] 61 A. 642. Where bankrupt took deed to property in his wife's name held to raise a resulting trust in him for the benefit of the one creditor who, in danger of being defrauded, took the necessary steps to enforce his claim by judgment and execution at law, and afterwards proceeding to establish the trust in equity and the beneficial interest did not pass to the trustee. Id. Trust fund, under an express trust for the benefit of the bankrupt, being inalienable does not pass to the trustee in bankruptcy. In re McKay, 143 F. 671. Beneficial interest in trust passes to trustee. Currie v. Look [N. D.] 106 N. W. 131.

70. Whether or not the provisions of a will create a trust, such as to prevent a fund bequeathed from passing to the trustee in bankruptcy of the beneficiary or legatee, is to be determined by the law of the state. In re McKay, 143 F. 671.

71. Petition under act 1867. Whittredge v. Sweetser, 189 Mass. 45, 75 N. E. 222.

72. Held not to take title to trust funds deposited by the bankrupt to the credit of his general bank account. In re Royea's Estate, 143 F. 183.

73. In re Poore, 140 F. 786. Pennsylvania rule. Id., 139 F. 862. What constitutes a conditional sale, see Sales, 6 C. L. 1320.

74. York Mfg. Co. v. Cassell, 201 U. S. 344, 50 Law. Ed. ——. Property in the possession of a bankrupt under an unrecorded conditional sale, the title to which remains in the seller under the state law, except as against attaching creditors or subsequent purchasers from the purchasers without notice, does not pass to the trustee in bankruptcy under Act 1898, § 70a; such right being confined to a particular creditor who attaches without notice, resting on the estoppel of the true owner, and not extending to the general body of creditors some of whom may have had notice. In re Cavagnaro, 143 F. 668.

NOTE. Conditional sales: "Much of the apparent conflict upon the authorities, in respect to the title of a trustee in bankruptcy to property in possession of the bankrupt under conditional sales is relieved by a critical examination of the particular phraseology of the statutes upon which the various decisions are founded. In some of the states it is declared by statute that unrecorded conditional sales are only good as between vendor and vendee, while in others that they shall be void for want of record as against creditors, subsequent purchasers, pledgees, or mortgagees and in others that the contract shall be recorded within thirty days of the delivery of the property, and in others that it shall be acknowledged and recorded in order to be binding as against others than the vendee and his heirs. Isaac on Conditional Sales in Bankruptcy, 9-12. Thus it will be seen that under some of the state statutes creditors may hold against an unrecorded conditional contract of sale without regard to the question of actual notice, and under such circumstances trustees in bankruptcy reasonably enough hold a status, with respect to the title of the property, different from that which would exist under a state statute, where the property could only be held under judicial process by an attaching creditor without notice."—From In re Cavagnaro, 143 F. 668, 669.

75. Policies having no cash surrender value pass to the trustee as assets of the estate of the adjudication free from any claim or right of the bankrupt. Van Kirk v. Vermont Slate Co., 140 F. 38.

76. Clark v. Equitable Life Assur. Soc., 143 F. 175.

after such value has been ascertained and stated to the trustee by the company.[77] This right of the bankrupt is not affected by his death after adjudication, but passes to his legal representatives.[78] The words "cash surrender value" embrace policies, even though a stipulation in respect to surrender value is not contained therein where the policy possesses a cash value which would be recognized and paid by the insurer on the surrender of the policy.[79] The trustee has no right to sue on an agreement made between state receivers of the bankrupt and one of its creditors.[80] He is, however, a proper party to contempt proceedings against the bankrupt's divorced wife to compel her to pay over certain moneys under the divorce decree.[81] Under the act of 1867, the assignment in bankruptcy vested in the assignees the complete ownership of incorporeal interests in personal property,[82] and this ownership drew after it the possession so far as the interest involved was capable of possession,[83] and this result was unaffected by the fact that such trustees were at the time in ignorance of the existence of such property.[84]

Property fraudulently conveyed.[85]—The trustee takes title to and may recover property fraudulently[86] conveyed or incumbered[87] by the bankrupt, unless the transferee is a bona fide purchaser for value prior to the date of the adjudication,[88] for up to the moment of bankruptcy a party may make a valid disposition of his property, where it is done for a fair consideration and with an honest motive,[89] and even where there is a fraudulent intent, in order to affect the purchaser, collusion must be shown.[90] The fact that the bankrupt was solvent at the time of the transfer does not bar this right of the trustee.[91] The trustee may recover such property or its value[92] if the conveyance could have been avoided by any creditor

77, 78. Van Kirk v. Vermont Slate Co., 140 F. 38.

79. In re Mertens [C. C. A.] 142 F. 445.

Note: In view of conflicting decisions on this subject see dicta in Holden v. Stratton, 198 U. S. 214, 49 Law. Ed. 1018, indicating views similar to those held in the principal case.

80. Love v. Export Storage Co. [C. C. A.] 143 F. 1.

81. Carnahan v. Carnahan [Mich.] 12 Det. Leg. N. 1023, 107 N. W. 73.

82. Interest of beneficiary in trust estate. Whittredge v. Sweetser, 189 Mass. 45, 75 N. E. 222.

83, 84. Whittredge v. Sweetser, 189 Mass. 45, 75 N. E. 222.

85. See 5 C. L. 378.

86. An intent to defraud is essential. In re Bloch [C. C. A.] 142 F. 674. Bill of sale by bankrupt to wife and note and chattel mortgage to brother, covering all present and after-acquired property held fraudulent. In re Hemstreet, 139 F. 958. A duly recorded gift of property by husband to wife at time when he was not indebted is valid as against his subsequent creditors. Savage v. Savage [C. C. A.] 141 F. 346. Transfer of property to wife to secure a loan, being made in good faith, without an intent to defraud and more than a year prior to the adjudication, held valid. Vowinkel v. Moser [Pa.] 63 A. 130. Fact that transferee was and had been bankrupt's attorney held insufficient to show fraud it appearing that he paid full value for the property. Webb v. Manheim, 109 App. Div. 63, 95 N. Y. S. 1003. The fact that debtor was insolvent, the transferee not knowing such fact, held not to render an assignment, made in good faith by both parties, of accounts as collateral security, fraudulent. Bunnell v. Bronson [Conn.] 63 A. 396. As to what constitutes a fraudulent conveyance, see Fraudulent Conveyances, 5 C. L. 1556.

87. Mortgage given a creditor within four months prior to the filing of the petition in bankruptcy with intent to prefer such creditor is void against his trustee. In re Hill, 140 F. 984.

88. Maffi v. Stephens [Tex. Civ. App.] 93 S. W. 158. Sale in bulk held void, purchaser failing to show that he took all reasonable and proper steps to ascertain seller's financial condition and bought in good faith. In re Knopf, 144 F. 245. Trustee is not entitled to warehouse receipts pledged to bank within four months of the filing of the petition, the bank taking the receipts in good faith and discounting notes in reliance thereon. Love v. Export Storage Co. [C. C. A.] 143 F. 1.

89. In re Benjamin, 140 F. 320.

90. In re Benjamin, 140 F. 320. Sale of standing timber held fraudulent, price being inadequate, there being a secret understanding as to price and the purchaser paying nothing down but giving a check on which he stopped payment as soon as he heard of trouble. Id.

91. Conveyance or mortgage. Pfeiffer v. Roe, 108 App. Div. 54, 95 N. Y. S. 1014.

92. A bill by a trustee is demurrable if it claims the proceeds of sales of the property and also prays that a conveyance by the bankrupt be set aside as fraudulent and title to the property vested in complainant. Chisholm v. Wallace [Ala.] 40 So. 219.

of the bankrupt other than one whose right is in the nature of a mere lienor,[93] and it is not essential that the creditors be in a position to attack the transfer.[94] Under § 70e the trustee is clothed with plenary power to sue to avoid any transfer made by the bankrupt of his property which any creditor may have avoided, whether made within four months prior to the adjudication or not.[95] Good faith, as well as a valuable consideration, is essential to the validity of a mortgage, and while an agreement to withhold it from record is not of itself such evidence of a fraudulent purpose as to constitute fraud in law so as to set aside the mortgage in a suit by a trustee in bankruptcy, it is a circumstance constituting more or less cogent evidence of a want of good faith, according to the particular situation of the parties and the intent as indicated by all of the facts and circumstances of the case.[96]

A demand by the trustee is a condition precedent,[97] and the purpose of the suit being to obtain funds to pay claims, he must prove that claims have been established against the bankrupt estate.[98] An action to set aside a conveyance as one given with intent to hinder, delay, and defraud creditors, is a suit in equity [99] in which defendants are not entitled to a jury trial,[1] though under the statutes of most states the form of the action makes little difference if upon the pleadings and proof plaintiff is entitled to relief.[2] Though the trustee must have authority from the bankruptcy court to bring suit to set aside a fraudulent conveyance by the bankrupt, it is not necessary for him to allege in his bill the special orders authorizing him to sue.[3] A state court has concurrent jurisdiction to set aside a fraudulent incumbrance though prior to the appointment of the trustee the mortgaged property is sold by a temporary receiver and the proceeds deposited as a special fund to await the further order of the Federal court,[4] and neither the temporary receiver nor the trust company with which the funds are deposited are necessary parties to the action.[5] The petition to set aside must allege that transfer was made with intent to hinder, delay, and defraud.[6] The general rules as to the

93. Where bankrupt took deed to property in his wife's name held to raise a resulting trust in him for the benefit of the one creditor who, in danger of being defrauded, took the necessary steps to enforce his claim by prosecuting it to final judgment and execution at law and afterwards proceeding to establish the trust in equity and the beneficial interest did not pass to the trustee. Id.

94. The reduction of the creditor's claims to judgment is not a condition precedent to the trustee's right to set aside an alleged fraudulent transfer of the bankrupt's property. Crary v. Kurtz [Iowa] 105 N. W. 590.

95. Sharp v. Fitzhugh [Ark.] 88 S. W. 929; Bunch v. Smith [Tenn.] 93 S. W. 80.

96. Rogers v. Page [C. C. A.] 140 F. 596. Agreement and circumstances held to render mortgage voidable. Id.

97. Transfer made years before appointment of trustee. Semon v. Adams [Conn.] 63 A. 661.

Evidence held sufficient to show demand, where trustee went to appraise the property, and was told that the bankrupt had no property there. Semon v. Adams [Conn.] 63 A. 661.

98. Crary v. Kurtz [Iowa] 105 N. W. 590.

99, 1. Vollkommer v. Frank, 107 App. Div. 594, 95 N. Y. S. 324.

2. Pfeiffer v. Roe, 108 App. Div. 54, 95 N. Y. S. 1014.

3. Chisholm v. Wallace [Ala.] 40 So. 219.

4, 5. Vollkommer v. Frank, 107 App. Div. 594, 95 N. Y. S. 324.

6. Richardson v. Winnissimmet Nat. Bank, 189 Mass. 25, 75 N. E. 97.

7. In an action to set aside a transfer as fraudulent held a receiver was not necessary where a lis pendens had been filed and defendant was financially able to respond to any judgment that might be recovered against him for rents. Webb v. Manheim, 109 App. Div. 63, 95 N. Y. S. 1003.

8. Evidence of bankrupt's financial condition 10 months before he purchased land conveyed held too remote. Clark v. Mulcahy [Mass.] 76 N. E. 236. Mutilated ledger held inadmissible it throwing no light on transaction. Id. Conveyance to bankrupt's wife. Evidence that reason for going into bankruptcy was threatened attachment by creditors held inadmissible. Maffi v. Stephens [Tex. Civ. App.] 93 S. W. 158. Evidence of cash surrender value of insurance policies and whether any money was paid trustee thereunder, together with schedule of creditors filed by the bankrupt and evidence of his indebtedness to trustee together with proof that bankrupt had sold a lot of skins to trustee a few months before bankruptcy, held immaterial. Id.

appointment of receivers,[7] the admissibility of evidence[8] and instructions,[9] apply. Where the trustee is discharged pending a suit, in which he had intervened, to set aside a fraudulent conveyance, the suit may, upon the trustee being reinstated, be revived in his name.[10] In a successful suit to set aside a fraudulent conveyance costs are properly decreed against the defendant and his sureties on an appeal bond personally.[11]

A sale being set aside as fraudulent the vendee has a valid claim against the bankrupt's trustee for the full amount of the money paid by him less the expenses of setting aside the sale.[12]

(§ 10) *B. Nature of trustee's title in general.*[13]—Speaking generally in all cases unaffected by fraud,[14] the trustee, upon his appointment and qualification[15] is vested, by operation of law,[16] with the same but no better title than the bankrupt had[17] at the date of the adjudication[18] to all nonexempt[19] property of the bankrupt. There are, however, several exceptions to this statement as clearly appear from the other provisions of the act. Under certain circumstances the trustee is a representative of the creditors, rather than of the bankrupt, in relation to the property of the estate and he may unquestionably exercise rights and enforce a title that the bankrupt himself could neither enforce nor exercise.[20] He occupies the

9. Instructions on good faith, reasonable and fair consideration, held pertinent. Maffi v. Stephens [Tex. Civ. App.] 93 S. W. 158.

10. Bunch v. Smith [Tenn.] 93 S. W. 80.

11. Instead of ordering them paid out of the proceeds of the sale of the property. Bunch v. Smith [Tenn.] 93 S. W. 80.

12. Barber v. Coit [C. C. A.] 144 F. 381.

13. See 5 C. L. 380.

14. York Mfg. Co. v. Cassell, 201 U. S. 344; 50 Law. Ed. —. See ante, § 10, subd. Q. Property fraudulently conveyed.

15, 16. Goodnough Mercantile Co. v. Galloway [Or.] 84 P. 1049.

17. Southern Pine Co. v. Savannah Trust Co. [C. C. A.] 141 F. 802; First Nat. Bank v. Bacon, 98 N. Y. S. 717. Trustee is not a bona fide purchaser for value. Id. Bankruptcy of pledgor of property held not to bar suit for reformation of pledge. Id. A specific lien or claim of a creditor upon the property of a bankrupt remains unaffected by the proceedings in bankruptcy. Bankruptcy proceedings does not affect prior assignee's right to subsequently earned wages under such assignment. Wabash R. Co. v. Meyer, 119 Ill. App. 104. In cases unaffected by fraud the trustee takes the property of the bankrupt in the same plight and condition that the bankrupt himself held it, and subject to all the equities impressed upon it in the hands of the bankrupt. York Mfg. Co. v. Cassell, 201 U. S. 344, 50 Law. Ed. —. Rights under three-sided contract for the purchase of land by the bankrupt, he having borrowed the money to pay the purchase price. Beer v. Wisner [Neb.] 104 N. W. 757. Trustee held to take title and possession to all of the bankrupt's property except such as was covered by valid liens. Wright v. Texas Moline Plow Co. [Tex. Civ. App.] 90 S. W. 905. A mortgagee held entitled to payment from the proceeds of the mortgaged property which had been sold by the bankrupt and recovered and sold by the latter's trustee. Long v. Gump [C. C. A.] 144 F. 824. Trustee of a corporation held not entitled to fund realized from the sale of property on a mortgage given by the corporation to secure bonds some of which were irregularly issued as security to one advancing money to the corporation. Irregularity consisted in acting outside of authority though within apparent scope thereof. Presbyterian Board of Relief for Disabled Ministers v. Gilbee, 212 Pa. 310, 61 A. 925.

18. Southern Pine Co. v. Savannah Trust Co. [C. C. A.] 141 F. 802; In re Mertens [C. C. A.] 144 F. 818.

Contra: Title passes to trustee from **time of filing petition.** Voluntary proceedings. In re Smith Longbottom & Sons, 142 F. 291. Where prior to filing petition bankrupt had improperly used trust funds in his hands, held after filing petition he could not transfer some of his own property to the trust estate to make up for the impairment. Id.

19. Goodnough Mercantile Co. v. Galloway [Or.] 84 P. 1049. Matured crops held not exempt under law of Iowa and to pass to trustee. In re Sullivan, 142 F. 620. See post, § 17, Exemptions; see, also, Exemptions, 5 C. L. 1400.

20. Is authorized to avoid any transfer by the latter which a creditor of such bankrupt might have set aside (Goodnough Mercantile Co. v. Galloway [Or.] 84 P. 1049), and he may recover the property so transferred, or its value, from the person to whom it was assigned, unless such person was a bona fide holder for value prior to the date of the adjudication (Id.). Where creditors reduced claims to judgments after appointment of trustee held latter could attack a chattel mortgage under which the mortgagor was allowed to retain possession, even though the mortgagee took possession before the acquisition of judgment. Zartman v. First Nat. Bank, 109 App. Div. 406, 96 N. Y. S. 633. Absolute deed to bankrupt as security, held trustee could not convey title. General creditors are not within protection of North Dakota recording laws. Vallely v. First Nat. Bank [N. D.] 106 N.

position of an attaching [21] but not of a judgment creditor.[22] The bankruptcy law only operates on property available for distribution among the general creditors,[23] hence the trustee can take for all the creditors only that which one of them might, but for the bankruptcy act, have taken for himself.[24] If, by reason of peculiar circumstances, certain creditors acquire, or become entitled to prosecute, special legal or equitable rights or remedies, respectively, property in which such rights exist or over which such remedies may be exercised does not come within the scope of the bankruptcy law.[25] Bankruptcy proceedings are in rem and when commenced all of the property then held by the bankrupt or for his use (aside from exemptions) is subjected to the jurisdiction of the bankruptcy court and when bankruptcy is adjudicated the sequestration reaches all such property and becomes operative from the institution of proceedings, as a "caveat to all the world," preventing interference by attachments or other means in derogation of the interests of the estate.[26] While title rests in the bankrupt up to adjudication, and in form until a trustee qualifies, it is subject to the pending sequestration, and no rights can be acquired thereunder which are not equally amenable,[27] but until adjudication, however, a lienor or pledgee is at liberty to make any disposition of or perfect any title to the property which the nature of the lien permits.[28] The property being wrongfully attached and sold under concurrent attachments and the trustee affirming the sale and suing in assumpsit he can recover from each attaching creditor only the amount actually received by him.[29] The trustee does not take property acquired after the adjudication.[30] By allowing property to remain in the bankrupt's possession one may become estopped to assert a claim therefor against the trustee.[31] The trustee takes and acts for the benefit of all the bankrupt's creditors.[32] A trustee in bankruptcy is entitled to possession of all of the bankrupt's property and to administer the same, although it may be subject to liens or in possession of a state court in proceedings to enforce a lien instituted within four months prior to the bankruptcy.[33] Where property has been delivered to the bankrupt, the question of right

W. 127. See ante, § 10A. Property fraudulently conveyed.

21. Bunnell v. Bronson [Conn.] 63 A. 396. Assignment of accounts as collateral security held valid against trustee. Id.

22. Under laws of New York cannot reach the surplus income of a trust estate. McNaboe v. Marks, 99 N. Y. S. 960.

23, 24. Tucker v. Denico [R. I.] 61 A. 642.

25. Tucker v. Denico [R. I.] 61 A. 642. Where bankrupt took deed to property in his wife's name held to raise a resulting trust in him for the benefit of the one creditor who, in danger of being defrauded, took the necessary steps to enforce his claim by prosecuting it to final judgment and execution at law, and afterwards proceeding to establish the trust in equity, and the beneficial interest did not pass to the trustee. Id. Where bankrupt was to pay for property on its receipt, and it was sent with draft attached and was wrongfully taken and used by the bankrupt held the vendor, or his assignor, had a lien on the property superior to the rights of general creditors. Erie R. Co. v. Dial [C. C. A.] 140 F. 689.

26. State Bank of Chicago v. Cox [C. C. A.] 143 F. 91.

27. State Bank of Chicago v. Cox [C. C. A.] 143 F. 91. Trustee is entitled to recover money obtained by creditors by attachment between the date of the filing of the petition and the adjudication. Id.

28. In re Mertens [C. C. A.] 144 F. 818.

29. 1 Starr. & C. Ann. St. Illinois 189, p. 466, c. 11, § 37, construed. State Bank of Chicago v. Cox [C. C. A.] 143 F. 91.

30. Beneficial interest in a trust estate is not after-acquired property though decreed to the bankrupt after the filing of the petition in bankruptcy, the decree adjudicating the rights of the parties in the trust estate as of a date prior to the filing of the bankruptcy petition. McNaboe v. Marks, 99 N. Y. S. 960.

31. Under the law of Iowa a wife of a bankrupt permitting her property to pass under her husband's control and allowing him to use it as his own she cannot assert a claim thereto against his trustee in bankruptcy. In re Hemstreet, 139 F. 958.

32. Entire proceeds of sale of property fraudulently conveyed should be turned over to him instead of only a sufficient amount to satisfy the original claims. Bunch v. Smith [Tenn.] 93 S. W. 80. The trustee represents the estate and cannot act on behalf of a particular creditor to the extent of securing for such creditor a preference right which the bankrupt court has not considered or allowed. West v. Bank of Lahoma [Okl.] 86 Pa. 59.

33. In re Kaplan, 144 F. 159.

thereto often depends upon whether or not the transaction was a sale or a bailment,[34] and this question is to be determined by the local law,[35] the burden of proof being upon the original owner.[36] The trustee in such controversy being invested with the rights of the creditors.[37] By proving his claim for the purchase price a vendor of property sold the bankrupt loses his right to rescind for fraud.[38] It is a disputable presumption that the trustee took immediate possession of the bankrupt's property.[39] The defense of usury is as available to the debtor's trustee as to the debtor himself.[40] The title to the bankrupt's property is not affected by the discharge, but remains in the trustee.[41]

(§ 10) *C. The trustee takes title free from liens*[42] acquired by legal proceedings[43] in a state or Federal court within four months of the time of filing the petition[44] in voluntary or involuntary proceedings[45] upon property not exempt as against the trustee. This provision of the bankruptcy act refers solely to the lien acquired by the levy, attachment, etc., as distinguished from the property itself,[46] and consequently it does not apply to a case where the property has been sold under the levy, delivered to the purchaser and the proceeds turned over to the levying creditor prior to the petition in bankruptcy.[47] After the property has so passed it amounts to a transfer and if voidable at all must be on the ground that it constitutes a preference.[48] Liens that remain undisturbed are those that were good against both the bankrupt and his creditors immediately preceding the adjudication.[49] Bona fide claims of the bankrupt's wife may be enforced.[50] In determining the four month period, time is to be computed by excluding the first day and including the last.[51] Liens acquired by attaching creditors on real property which, but for such attachments, would have passed to a subsequent purchaser under an unrecorded deed may be preserved for the benefit of the estate of the bankrupt by the court of bankruptcy in the exercise of its discretionary power.[52]

34. See Chisholm v. Eagle Ore Sampling Co. [C. C. A.] 144 F. 670. What constitutes a bailment or sale see Bailment, 7 C. L. 353; Sales, 6 C. L. 1320.

35. In re Heckathorn, 144 F. 499.

36. In re Wells, 140 F. 752. Where the property is in the possession of the bankrupt and the accounts on his books are in his name. In re Heckathorn, 144 F. 499.

37. In re Heckathorn, 144 F. 499.

38. Standard Varnish Works v. Haydock [C. C. A.] 143 F. 318.

39. Goodnough Mercantile Co. v. Galloway [Or.] 84 P. 1049.

40. In re Stern [C. C. A.] 144 F. 956.

41. McLeod's Trustee v. McLeod [Ky.] 89 S. W. 199.

42. See 5 C. L. 381.

43. Landlord's lien under Act Pa. 1836, §§ 83-85 (P. L. 777), held of no effect where bankruptcy proceedings were instituted within four months after the issuing of the execution. In re Wheaton Restaurant Co., 143 F. 921. Where a secured creditor within four months of the filing of the petition sells security given before the four month period, held valid. Richardson v. Winnissimmet Nat. Bank, 189 Mass. 25, 75 N. E. 97.

44. Proceedings do not affect the lien of attachments and garnishments acquired more than four months preceding bankruptcy. Bloch Bros. v. Moore [Ala.] 39 So. 1025. In the absence of an order of preservation, attachment lien acquired in four month period dissolved. Goodnough Mercantile Co. v. Galloway [Or.] 84 P. 1049.

45. Farrell v. Lockett & Co. [Tenn.] 91 S. W. 209.

46. In re Bailey, 144 F. 214. Applies only to liens alive and existing at the time of the filing of the petition. Farrell v. Lockett & Co. [Tenn.] 91 S. W. 209.

47. In re Bailey, 144 F. 214; Farrell v. Lockett & Co. [Tenn.] 91 S. W. 209. Money paid creditor under execution levied within four months of bankruptcy cannot be recovered. Starbuck v. Gebo, 48 Misc. 333, 96 N. Y. S. 781.

48. In re Bailey, 144 F. 214.

49. Act 1898, § 67d, does not change § 67a into the meaning that "claims which for want of record or for other reasons" are not good liens against the creditors are good liens against the estate if the lender advanced his money without any actual intent to defraud unsecured creditors. He is chargeable with the constructive intent which is attributed to secrecy. Security Warehousing Co. v. Hand [C. C. A.] 143 F. 32.

50. Mortgage given to secure alimony, parties having subsequently remarried. Savage v. Savage [C. C. A.] 141 F. 346.

51. Attachment levied February 8th, held dissolved by an adjudication based on a petition filed June 8th following. In re Warner, 144 F. 987.

52. First Nat. Bank v. Staake, 202 U. S. 141, 50 Law. Ed. —-; McHarg v. Staake, 202 U. S. 150, 50 Law. Ed. —-.

(§ 10) *D. Whether chattel mortgages*[53] executed by the bankrupt are valid must be determined by the law of the state where they are executed.[54] The trustee has no greater right to attack a chattel mortgage executed by the bankrupt than the creditors represented by such trustee at the time of the adjudication.[55] The trustee of a mortgagor is not a party to the mortgage within the recording acts,[56] and under statutes providing that an unrecorded chattel mortgage shall be void against a person other than the parties thereto, unless there has been a delivery of the property, the trustee may recover the property where the same was not delivered and the mortgage was not recorded.[57]

(§ 10) *E. Preferential transfers and payments.*[58]—In order to constitute a preference, there must have been a transfer,[59] by the bankrupt[60] while insolvent[61] within four months prior to the filing of the petition,[62] to a creditor[63] or some one in his behalf.[64] In order that the preference may be avoided by the trustee the person receiving it, or to be benefited thereby or his agent acting therein[65] must have reasonable cause to believe that a preference was intended.[66] He need not have

53. See 5 C. L. 383.

54. In re National Valve Co., 140 F. 679; Zartman v. First Nat. Bank, 109 App. Div. 406, 96 N. Y. S. 633; In re Marine Construction & Dry Dock Co. [C. C. A.] 144 F. 649. Under Laws Illinois 1895, p. 260, assignee of a chattel mortgage and notes which fail to state upon their face the fact of security has no lien upon the property even though he has possession of it. In re Birck & Co. [C. C. A.] 142 F. 438.

55. Trustee representing general creditors, more of whom were, at the time of the bankruptcy, armed with legal process authorizing the seizure of the bankrupt's property, cannot take advantage of failure of chattel mortgagee to comply with New York statute requiring statements of renewal to be filed. In re Burnham, 140 F. 926.

56. Clark v. Williams [Mass.] 76 N. E. 723.

57. Clark v. Williams [Mass.] 76 N. E. 723. Trustee held entitled to attack chattel mortgage for failure to record it, such failure rendering it void to simple contract creditors, though they are not entitled to attack it until they reduce their claims to judgment. Skilton v. Codington [N. Y.] 77 N. E. 790, rvg. 105 App. Div. 617, 93 N. Y. S. 460.

58. See 5 C. L. 383.

59. Where property was obtained from bankrupt by the creditor by deceit and was retained against the wishes of the bankrupt, held no preference. Stern v. Mayer, 98 N. Y. S. 1028. A payment of money is a "transfer." Wright v. Cotten [N. C.] 52 S. E. 141. Money is property and a payment of money constitutes a transfer. West v. Bank of Lahoma [Okl.] 85 P. 469. Where title to goods sold under a sale fraudulent and void as to creditors vests absolutely in the vendee a retaking of the goods by the sellers for the buyer's default may amount to a preference. Conditional sale of goods to be sold by buyer at retail. Fulling v. West [Ind. App.] 76 N. E. 325. Accepted orders, drawn by a bankrupt on third persons, given a creditor as security held effective as assignments of the fund on which they were drawn and to constitute a transfer. In re Hines, 144 F. 543. Where property is levied on within four months prior to filing the petition but before such filing is sold and delivered to the purchaser and the proceeds delivered to the levying creditor it amounts to a transfer. In re Bailey, 144 F. 214.

60. Where after a bankrupt had made an assignment for the benefit of his creditors and just before bankruptcy proceedings were instituted against him, the firm of which he was a member paid an entire claim against him on which the firm was at most only partially liable, held such payment did not constitute a preference. In re Hines, 144 F. 543.

61. See 5 C. L. 383, n. 71. As to when one is insolvent within the meaning of the bankruptcy law see ante, § 3A.

62. A bona fide assignee of life insurance policies pledged more than four months before the bankruptcy of the pledgor held entitled to hold the same. Van Kirk v. Vermont Slate Co., 140 F. 38.

63. Preferences can only be given creditors. Boonville Nat. Bank v. Blakey [Ind.] 76 N. E. 529. Transfer must have been made to pay or secure an antecedent debt. Lesser v. Bradford Realty Co., 47 Misc. 463, 95 N. Y. S. 933. Where an agreement indemnifying a contractor's surety assigned to the latter all the contractor's plant in the event of the contractor's being unable to complete the contract and the contractor subsequently abandoned the contract and was declared a bankrupt, the surety became a creditor of the bankrupt from the date of the latter's abandonment of the contract. Wood v. U. S. Fidelity & Guaranty Co., 143 F. 424.

64. Where creditor procured purchaser of bankrupt's stock, purchaser assuming bankrupt's indebtedness to creditor as part of the purchase price executing a note therefor, held a preference, the other elements being found. Off v. Hakes [C. C. A.] 142 F. 364.

65. Knowledge of son acting as father's general financial agent held knowledge of father. Wright v. Cotten [N. C.] 52 S. E. 141.

66. Off v. Hakes [C. C. A.] 142 F. 364; In re Bloch [C. C. A.] 142 F. 674; Parker v. Block, 143 F. 560; In re Maher, 144 F. 503;

actual knowledge of the debtor's insolvency,[67] though, having reasonable ground to believe the debtor insolvent,[68] he is chargeable with notice of intent to prefer.[69] A

In re Armstrong, 145 F. 202; Wilson v. Weigle [N. J. Eq.] 62 A. 458; Capital Nat. Bank v. Wilkerson [Ind. App.] 75 N. E. 837; Hames v. Bank of Elberton [Ga.] 52 S. E. 922; Starbuck v. Gebo, 48 Misc. 333, 96 N. Y. S. 781; Boonville Nat. Bank v. Blakey [Ind.] 76 N. E. 529. Bill alleging that bankrupt preferred several creditors in fulfillment of fraudulent designs, held not maintainable on the ground of conspiracy. Id.

What constitutes reasonable cause to believe that a preference was intended: The creditor need not have actual knowledge or belief that a preference was intended but only knowledge of such circumstances as would lead an ordinarily prudent man to conclude that this would be the outcome (In re Hines, 144 F. 543), he being chargeable with notice of all facts which would have been brought to light by reasonable inquiry. Capital Nat. Bank v. Wilkerson [Ind. App.] 75 N. E. 837.

Illustrations: A creditor who indirectly purchased goods from an insolvent debtor and sold them at a loss of 30 per cent held to have reasonable cause to believe that a preference was intended. Hardy v. Gray [C. C. A.] 144 F. 922. That a debtor is compounding with his creditors at a fair rate is not evidence that a preference was intended. Wilson v. Weigle [N. J. Eq.] 62 A. 458. Transfer of entire stock to certain creditors on their demand and threats to sue, which property was accepted in full settlement of claims largely exceeding its value, held a preference. In re McMurtrey, 142 F. 853. Assignment of accounts the proceeds of which were applied to the discharge of the bankrupt's debts to third persons held not to constitute a preference. Evans v. National Broadway Bank, 48 Misc. 248, 96 N. Y. S. 789. Evidence that bankrupt was slow in paying debts, particular debt was long due, bankrupt's real estate was heavily mortgaged, had borrowed all he could at the bank and that creditor had at first refused orders on third person but which were finally taken, held sufficient to constitute reasonable cause to believe a preference was intended. In re Hines, 144 F. 543. Instruction on reasonable cause to believe held not prejudicial as assuming that transfer was not made in the ordinary course of business. Hargreaves Bros. v. Hackney [Neb.] 104 N. W. 855. Mortgagee of land held not to have reasonable cause to believe a preference was intended. In re Armstrong, 145 F. 202. Evidence held sufficient to show reasonable cause to believe preference was intended. Hargreaves Bros. v. Hackney [Neb.] 104 N. W. 855; Capital Nat. Bank v. Wilkerson [Ind. App.] 75 N. E. 837. Evidence held insufficient to show that creditor had reasonable cause to believe that a preferenc was intended. In re Oppenheimer, 140 F. 51; Walker v. Tenison Bros. Saddlery Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 866, 94 S. W. 166.

67. Capital Nat. Bank v. Wilkerson [Ind. App.] 76 N. E. 258.

68. Walker v. Tenison Bros. Saddlery Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 866, 94 S. W. 166.

What constitutes reasonable ground to believe debtor insolvent: Reasonable cause to believe a debtor insolvent must not consist of a guess or a mere suspicion of insolvency (Starbuck v. Gebo, 48 Misc. 333, 96 N. Y. S. 781), but a creditor must have reasonable cause to believe his debtor insolvent in fact (Wright v. Cotten [N. C.] 52 S. E. 141). It is not enough that a creditor has some cause to suspect the insolvency of his debtor, but he must have such a knowledge of facts as to induce a reasonable belief of his debtor's insolvency. Off v. Hakes [C. C. A.] 142 F. 364; Starbuck v. Gebo, 48 Misc. 333, 96 N. Y. S. 781. It is sufficient that the facts and circumstances with reference to his financial condition which are brought home to the creditor are such as would put an ordinary man on inquiry, which if pursued would lead to knowledge of insolvency. In re Virginia Hardwood Mfg. Co., 139 F. 209; Capital Nat. Bank v. Wilkerson [Ind. App.] 76 N. E. 258.

Illustrations: Knowledge that bankrupt's ability to pay creditors in full depended upon his ability to collect outstanding accounts of an undisclosed amount held insufficient to charge defendant with knowledge that a preference was intended. Off v. Hakes [C. C. A.] 142 F. 364. Neither the fact that a debtor's accounts are past due, nor the fact alone of his financial embarrassment, is sufficient to impeach the good faith of a creditor taking security where there were circumstances tending to explain such embarrassment upon grounds other than insolvency. Butler Paper Co. v. Goembel [C. C. A.] 143 F. 295. Evidence held to show a common purpose to make a colorable showing of a belief in the debtor's solvency, without making such examination as would have disclosed the truth, which charged both debtor and creditor with knowledge of a preference. Hardy v. Gray [C. C. A.] 144 F. 922. Circular letter advising creditor that debtor was in failing circumstances and desired to effect a compromise with his creditors held sufficient to give creditor reasonable cause to believe debtor insolvent. Benjamin v. Chandler, 142 F. 217. Evidence held sufficient to show reasonable cause to believe debtor insolvent. In re Virginia Hardwood Mfg. Co., 139 F. 209. Evidence held insufficient to show that creditor had implied notice of the debtor's insolvency and purpose in making the transfer. Hames v. Bank of Elberton [Ga.] 52 S. E. 922. Evidence held insufficient to show that creditor knew of debtor's insolvency. In re Oppenheimer, 140 F. 51.

69. English v. Ross, 140 F. 630; Walker v. Tenison Bros. Saddlery Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 866, 94 S. W. 166. Knowledge of insolvency constitutes reasonable cause to believe a preference was intended. Parker v. Block, 143 F. 560. Evidence held sufficient to show creditor's knowledge of debtor's insolvency. Id. Bank taking assignment from debtor of all his uncollected accounts. Evans v. National Broadway Bank, 48 Misc. 248, 96 N. Y. S. 789. Assignment of contracts by husband

preference must have actually resulted,[70] the effect thereof being to prefer one creditor over others of the same class.[71] Whether an intent to prefer on the part of the bankrupt is essential is the subject of conflicting decisions,[72] such intention being

to wife, latter knowing of husband's insolvency held to constitute a preference. Bryan v. Madden, 109 App. Div. 876, 96 N. Y. S. 465.

70. In order to set aside a transfer as preferential it is essential that there are not sufficient assets in the trustee's hands to pay the claims of creditors. Lesser v. Bradford Realty Co., 47 Misc. 463, 95 N. Y. S. 933. Transfer of entire stock to certain creditors on their demand and threats to sue, which property was accepted in full settlement of claims largely exceeding its value, held a preference. In re McMurtrey, 142 F. 853. Where a creditor extended new credits to an insolvent debtor in the ordinary course of business and without knowledge of such insolvency, being induced to do so by the fact that the debtor had settled his prior account by a note which had not yet matured, the payment of the note, although after the giving of the last credit did not constitute a preference when the net result of all the transactions during the debtor's insolvency was to increase its estate. In re Watkinson, 142 F. 782.

71. In re Block [C. C. A.] 142 F. 674; West v. Bank of Lahoma [Okl.] 85 P. 469. A creditor will not be considered preferred because he holds as security for his debt a life insurance policy having no surrender value. In re Blount, 142 F. 263. Assignment of claim against county to apply on pre-existing indebtedness held a preference Keller v. Faickney [Tex. Civ. App.] 15 Tex. Ct. Rep. 541, 94 S. W. 103. Where an insolvent conveyed stock to sureties on a note given a bank, and the sureties in consideration of the transfer agreed to pay the bank, and the bank did not participate in the making of such contract and was not paid by the sureties out of the proceeds of the property conveyed, held there was a preference to the sureties but not to the bank. Horstman v. Little [Tex.] 90 S. W. 1095. Where an insolvent borrows money from a bank, and executes his note therefor, and deposits the money in said bank subject to his check, said transaction does not constitute a preferential transfer under the bankruptcy act, and the bank may, before the depositor is declared a bankrupt, credit the amount of his deposit upon his debt due the bank, and such transaction will not entitle the trustee to recover the amount of such deposit as a preference. West v. Bank of Lahoma [Okl.] 85 P. 469. Where an agreement indemnifying a contractor's surety, containing an assignment of the contractor's "plant" in case he should be unable to carry out the contract, was executed more than four months before the contractor became a bankrupt and when he was solvent, the amount of the surety's claim against the bankrupt is the amount of the loss it might sustain in completing the contract with such aid as it might gain by taking and using the plant so assigned. Wood v. U. S. Fidelity & Guaranty Co., 143 F. 424.

72. That he need not have such intent. In re Block [C. C. A.] 142 F. 674; Parker v. Block, 143 F. 560. See, also, Capital Nat. Bank v. Wilkerson [Ind. App.] 75 N. E. 837.

That he must have such intent. Hardy v. Gray [C. C. A.] 144 F. 922.

NOTE. Is intention to prefer on the part of the debtor essential? It has been stated in a recent case (Hardy v. Gray [C. C. A.] 144 F. 922, 925) that "it can hardly be said that a creditor had reasonable cause to believe that a preference was intended unless it is shown that there was such an intention on the part of the debtor." The court reasons as follows. "Naturally and justly it would be said that no one would be charged with a reasonable cause to believe something unless the something existed to which the belief was supposed to relate. It is true that the ordinary rule that a person who does an act is supposed to contemplate what results therefrom, applies to cases of this class, but only as an element; and it cannot apply even as an element unless the party who does the act has a knowledge of the essential facts which tend to produce the resulting consequences, or at least has a reasonable cause to believe them or purposely shut his eyes. Notwithstanding the view taken in some directions that the bankruptcy statute of 1898 is to be regarded as a new code, the interpretation of which is to be influenced but little, if at all, by pre-existing legislation, to shut our eyes to the history of such legislation, and to the interpretation put on previous statutes, would be a very extreme thing to do; and, certainly, since Wilson v. Nelson, 183 U. S. 191, 194, 46 Law. Ed. 147, and sequence, this is not permitted. Under the act of 1867, the intention to prefer was expressed in the same language whether it related to an act of bankruptcy or to a revocable transaction between a debtor and a creditor giving advantage to the latter, or to an application for the brankrupt's discharge. As it is impossible to hold that a bankrupt should be refused his discharge, where he was, in fact, innocent of any actual, wrongful intent, so the actual intent was necessarily involved in each of the three particulars referred to. The expressions in Toof v. Martin, 13 Wall. [U. S.] 40, 20 Law. Ed. 481, which seemingly support the contrary are more than met in the later cases of Wilson v. City Bank, 17 Wall. [U. S.] 473, 21 Law. Ed. 723; Grant v. National Bank, 97 U. S. 80, 24 Law. Ed. 971; Barbour v. Priest, 103 U. S. 293, 26 Law. Ed. 478, and Stucky v. Masonic Sav. Bank, 108 U. S. 74, 27 Law. Ed. 640. In the last two of which cases Grant v. National Bank was cited and approved, and even its expressions persisted in." These cases "establish that the intent to prefer under the act of 1867 was held to be an actual intent and not an attributed one. We find no change in the decisions with reference to the present statute." Barring all cases not authoritative the principal cases cited against the proposition that intent of the debtor is essential are Pirie v. Chicago Title & Trust Co., 182 U. S. 438, 45 Law. Ed. 1171; Western Tie & Timber Co. v. Brown,

held essential it cannot be presumed from the single fact that the bankrupt knew himself to be insolvent.[73] Under the present law actual fraud is not an element of a preferential transfer,[74] though it has been held that there must be "guilty collusion."[75] The fact that the creditor holds collateral as security does not validate the transaction.[76] A bank which in payment of a clearing house check drawn in its favor on another member, and held as the result of the day's clearings, receives the proceeds of checks presented by such other member for clearing on the next morning, shortly before suspending payment, must account therefor to the bankrupt estate of such defaulting member,[77] and it cannot escape liability to so account upon the doctrine of rescission and following of trust funds.[78] In the absence of evidence that the withholding from record was pursuant to an agreement entered into for the purpose of defeating the provisions of the bankruptcy law or that other persons were thereby induced to extend credit or forego legal rights,[79] where a preference consists in a transfer the period of four months does not expire until four months after the date of recording or registering the transfer, if by law such recording or registering is required.[80] The word "required" as here used has reference to the character of the instrument of transfer required to be recorded by the state law rather than to the particular individuals who by reason of adventitious circum-

196 U. S. 502, 49 Law. Ed. 571, and the same case decided by the court of appeals in [C. C. A.] 129 F. 728; Wetstein v. Franciscus [C. C. A.] 133 F. 900, and In re Eggert [C. C. A.] 102 734. "In the last case the court of appeals for the Seventh Circuit, after some discussion of the authorities, merely concluded that, as a matter of law, the circumstances did not charge the creditors with sufficient knowledge to hold them with having accepted a preference. So in Wetstein v. Franciscus the Court of Appeals for the Second Circuit merely held that there was sufficient to go to the jury on the issue whether the parties sought to be charged had reasonable cause to believe that it was intended to give a preference. There it was admitted that the insolvent, after payment to the preferred creditor, still owed unsecured claims to the amount of $20,000, without any assets applicable thereon. To understand Western Tie & Timber Company v. Brown, it is necessary to examine the case as it appeared in the Court of Appeals as well as in the Supreme Court. The question involved was one of set-off, and not of preference. We think * * * the only expressions of the supreme court under the present statutes are those in Pirie v. Chicago Title & Trust Co., 182 U. S. 446, 45 Law. Ed. 1171, already referred to, which emphatically declare that the subdivision of the statute of 1898, already quoted, adopted by the section of the act of 1903, involves the element that the 'creditor had reason to believe that a preference was intended,' which could not exist unless, in fact, a preference was actually intended on the part of the debtor, or unless there existed what the law regards as the equivalent thereof."—From Hardy v. Gray [C. C. A.] 144 F. 922, 924-927,

73. Hardy v. Gray [C. C. A.] 144 F. 922.

74. Wright v. Cotten [N. C.] 52 S. E. 141.

75. "To constitute a fraudulent preference by an insolvent debtor, the preference must be an advantage actually given to one or more creditors over the others, with the knowledge of his situation and the intent to accomplish this end * * * and there must be guilty collusion." Brandenburg on Bankruptcy, Bacon v. Merchants' Bank [Ala.] 40 So. 413. Evidence held insufficient to show fraudulent preference. Id. See, also, Stern v. Mayer, 98 N. Y. S. 1028, where it is said: Collusion between the bankrupt and the creditor, and conspiring to give a favorite creditor greater advantage than other creditors, is the gravamen of the offense.

Note: The first of the above cases seems to rely wholly upon the quotation from Brandenburg and the cases cited by him. The quotation is apparently from the first edition of Brandenburg on Bankruptcy and the cases cited by him are all under the Act of 1867. While Mr. Brandenburg places such statements in that part of his work which deals with § 60b of the Act of 1898, still as the edition referred to was written in 1898 the statement must be taken in view of the Act of 1867, § 35. Such § 35 is materially different from §§ 60a and b and § 61e of the Act of 1898. Under such sections it would seem that under the present law the element of "guilty collusion" is not necessary in order to have a preferential transfer or payment. As has been stated in a recent case, In re Armstrong, 145 F. 202. "Section 67e" of the Act of 1898 "has reference to conveyances and transfers involving moral turpitude and which are fraudulent in fact. Section 60a defines the word "preference," while 60b provides what preferences can be avoided, and the two must be construed together and as a whole." [Editor.]

76. Capital Nat. Bank v. Wilkerson [Ind. App.] 75 N. E. 837.

77. Rector v. City Deposit Bank Co., 199 U. S. 228, 50 Law. Ed. ——.

78. Rector v. Commercial Nat. Bank, 200 U. S. 420, 50 Law. Ed. ——.

79. In re Hunt, 139 F. 283.

80. Act 1898, § 60a, as amended Act 1903.

stances may or may not be affected by an unrecorded instrument.[81] An instrument is "required" to be recorded when failure to record renders it void as against general creditors.[82] The giving of possession, within the four month period, under a bill of sale[83] or mortgage[84] executed prior to the four month period and recorded or not "required" to be recorded does not constitute a preferential transfer, it not appearing that it was done to hinder, delay, or defraud creditors, and this is true though at the time of its enforcement the creditor knew that his debtor was insolvent and considering going into bankruptcy.[85] That a creditor realizes upon security, given him while his debtor was solvent and before the four month period, within the four month period,[86] or after he learns of his debtor's insolvency,[87] does not constitute a preference. An unrecorded mortgage being valid between the parties and being given before the four month period, in good faith and to secure a valid debt, its payment within the four month period does not constitute a voidable preference,[88] and in an action to avoid such payments as preferential, defendant setting up such facts by way of defense, the burden of the issue thus raised is on defendant.[89] A person is deemed to have given a preference if being insolvent he has within four months before the filing of the petition procured or suffered a judgment to be en-

81. First Nat. Bank v. Connett [C. C. A.] 142 F. 33. The purpose and effect of the amendment was to change the rule applied to the original act. Id. Rev. St. Mo. 1899, § 3404, requires a chattel mortgage to be recorded within the meaning of the bankruptcy act, although it does not make an unrecorded chattel mortgage absolutely void. Id. Even if the question of the effect of delay in recording is to be determined by the state law, under Rev. St. Mo. 1899, § 3404, a chattel mortgage if recorded within the four month period and under circumstances which would render it a voidable preference, the trustee may avoid it. Id.

82. In re Chadwick, 140 F. 674. Code Va. 1904, § 2465, construed. In re Montague, 143 F. 428; In re Hunt, 139 F. 283. Real estate mortgages held to take effect from date of execution. New York law considered. Id. As regards insolvency, time when possession was taken under the instrument controls rather than the date when the paper was made and executed. Lesser v. Bradford Realty Co., 47 Misc. 463, 95 N. Y. S. 933. Under the act as amended it has been held that where an alleged preferential transfer consists in a conveyance of real estate, under which possession is not taken, the question of preference is to be judged by the date of record regardless of the date of delivery. Pennsylvania. English v. Ross, 140 F. 630.

Note: In the last case the court holds that by the amendment of February 5, 1903, to section 60a of the bankruptcy act this section was intended to be brought into substantial accord with § 3, cl. a & b, and that that which as a preference is made an act of bankruptcy by the one is intended to be made voidable as such at the instance of the trustee by the other, the superadded condition being present that the person who has received the preference had reasonable cause to believe that a preference was intended. There is an apparent conflict between this case and those which hold that the right of the trustee to question such a conveyance is to be determined by the state law and what there obtains. Thompson v. Fairbanks, 196 U. S. 516, 49 Law. Ed. 577; Humphrey v. Tatman, 198 U. S. 91, 49 Law. Ed. 956; N. Y. Economical Print Co, 6 Am. Bankr. Rep. 615, 110 Fed. 514, 49 C. C. A. 133; In re Shirley, 7 Am. Bankr. Rep. 299, 112 F. 301, 50 C. C. A. 252. But all these will be found on examination to have arisen prior to the amendment of 1903.—From English v. Ross, 140 F. 630.

83. Bill of sale given as security for a loan more than four months prior to the debtor's bankruptcy held not to constitute a preference though possession was not taken by the creditor until within the four month period at which time the bill of sale was indorsed to the effect that the loan was still due. Christ v. Zehner, 212 Pa. 188, 61 A. 822.

84. Where mortgagee took possession, with the consent of the mortgagor, of after-acquired property covered by a valid mortgage made and recorded prior to the four month period. In re National Valve Co., 140 F. 679. Vests in mortgagee all the rights in respect to the property which follow such taking possession under the state law unaffected by the bankruptcy act. In re Chadwick, 140 F. 674.

85. In re National Valve Co., 140 F. 679.

86. Richardson v. Winnissimmet Nat. Bank, 189 Mass. 25, 75 N. E. 97. Where a contractor, more than four months before becoming a bankrupt, and while solvent, executed an agreement indemnifying his surety, containing an assignment of the contractor's plant in case he shoud be unable to complete the contract, the exercise of the right thereby acquired by the surety within four months of the bankruptcy proceedings and with knowedge that his debtor was insovent, did not constitute a preference. Wood v. United States Fidelity & Guaranty Co., 143 F 424.

87. Hawes v. Bank of Elberton [Ga.] 52 S. E. 922.

88, 89. Rogers v. Page [C. C. A.] 140 F. 596.

tered against himself in favor of any person, and the effect of the enforcement of such judgment will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class,[90] and it is immaterial that the debtor himself did not pay such judgment.[91] The kind of legal services to be performed for which an insolvent debtor contemplating bankruptcy proceedings may contract and make payment for in money or by a transfer of property are such services as conserve and benefit the estate of the bankrupt,[92] or are such services as are contemplated by the act in bringing the bankrupt estate before the court, its subsequent administration and distribution to the creditors and the like.[93] A transfer in payment of any other kind of services may be set aside as preferential.[94] Preferences are not void, only voidable.[95] In a suit by the trustee to recover an unlawful preference, only so much is recoverable as is necessary for the payment of claims and the costs and expenses of administering the estate.[96] The preference consisting of unpaid securities the creditor is not chargeable in equity with the assumed value thereof but should only be required to surrender the securities.[97] A preferentially transferred claim may be sold by the trustee.[98]

§ 11. *Collection, reduction to possession and protection of property. A. Discovery.*[99]

(§ 11) *B. Compelling surrender by bankrupt.*[1]—Jurisdiction exists in the bankruptcy court to require, in a summary manner, the bankrupt to pay over money or surrender other property in his possession and under his control belonging to his estate,[2] and for disobedience of such order the court has power, by attachment for contempt, to enforce compliance.[3] Such an order is not one for the payment of a debt and consequently his commitment upon refusing to comply with the order is not imprisonment for debt.[4] The issue on the question of contempt is a separate one, on which the bankrupt is entitled to a hearing,[5] and is purely of a civil character [6] and therefore may be supported by a mere preponderance of evidence, presumptions, or inferences.[7] The proceeding being civil in its nature it is error to embody in the order what is substantially a judgment for contempt and an alternative order of committal therefor.[8] The order should describe the property with reasonable certainty in order to assure its identity and the command of the court to the bankrupt should be to surrender the very property sought to be recovered.[9] There is a sufficient demand and notice where the order for the delivery of the property is served on the bankrupt and its counsel thirty days before the entry of an order adjudging him guilty of disobedience for contempt.[10] The order should not issue unless the court is satisfied beyond a reasonable doubt that the

90. Act 1898, § 60a. Benjamin v. Chandler, 142 F. 217.

91. Benjamin v. Chandler, 142 F. 217. So held where bankrupt sold realty agreeing to convey clear title and purchaser used purchase money to pay judgment lien. Id.

92. In re Habegger [C. C. A.] 139 F. 623. Does not include services performed in negotiating with creditors for settlement of insolvent's financial difficulties without resort to bankruptcy court. Id. Does not include a transfer made in consideration of attorney's agreeing to defend bankrupt against anticipated criminal prosecutions, which are not brought until after the filing of the petition. Id.

93, 94. In re Habegger [C. C. A.] 139 F. 623.

95. Starbuck v. Gebo, 48 Misc. 333, 96 N. Y. S. 781; Keller v. Faickney [Tex. Civ. App.] 15 Tex. Ct. Rep. 541, 94 S. W. 103.

96. Rogers v. Page [C. C. A.] 140 F. 596.

97. Note received for third person. Off v. Hakes [C. C. A.] 142 F. 364.

98. Keller v. Faickney [Tex. Civ. App.] 15 Tex. Ct. Rep. 541, 94 S. W. 103.

99, 1. See 5 C. L. 386.

2. Samel v. Dodd [C. C. A.] 142 F. 68. Order denied as respects preferential payments made by the trustee. In re Smith Longbottom & Sons, 142 F. 291.

3, 4. Samel v. Dodd [C. C. A.] 142 F. 68.

5. In re Cole [C. C. A.] 144 F. 392; In re Davison, 143 F. 673.

6, 7, 8. In re Cole [C. C. A.] 144 F. 392.

9. Samel v. Dodd [C. C. A.] 142 F. 68.

10. In re Levy & Co. [C. C. A.] 142 F. 442.

bankrupt has the money or property in his possession or under his control.[11] In the absence of satisfactory explanation, it is presumed that property traced into the hands of the bankrupt a short time prior to bankruptcy remains in his hands and the bankrupt must answer therefor,[12] though this rule is not absolute but each case must be governed by its particular circumstances.[13] The court will not commit a bankrupt woman for contempt for failing to comply with an order to turn over property or money, where it is in doubt as to her ability to do so, in order to compel her husband or other persons who appear to have been the principals in the fraudulent conversion of the property to come to her relief.[14] A bankrupt cannot excuse himself from delivering over funds deposited with an agent unless he shows as a matter of fact an inability to obtain the actual possession of what he ought to surrender.[15] That a person has been guilty of fraudulent appropriation of property, and has concealed it by falsehood or perjury, does not always lead to the belief that the failure to make restitution upon an order is contumacious or willful.[16] If the evidence is insufficient to warrant the issuance of the order and the creditors believe that assets have been fraudulently concealed, they should institute criminal proceedings in which the bankrupt may have a jury trial.[17]

(§ 11) *C. Property in the possession of officer appointed by state courts.*[18]—A court of bankruptcy cannot administer upon property of a bankrupt, which at the time of the filing of the petition was in the actual possession of a receiver appointed by a state court more than four months previously, and which was subsequently sold by order of the state court in the same proceeding.[19]

(§ 11) *D. Summary proceedings against third persons; jurisdiction.*[20]—A bankruptcy court has jurisdiction to summarily determine the right of a third party, not an adverse claimant to property of the bankrupt;[21] but in the absence of consent it has no jurisdiction to compel an adverse claimant to surrender property in his possession,[22] the remedy in such case being by an independent plenary suit.[23] A district court has no ancillary jurisdiction to make a summary order on the ap-

11. In re Switzer, 140 F. 976; In re Davison, 143 F. 673. Must be morally certain that obedience to order can be enforced. In re Sax, 141 F. 223. Must plainly and affirmatively appear from the record that he has power to comply with its requirements. Samel v. Dodd [C. C. A.] 142 F. 68. Uncorroborated and unsatisfactory testimony of bankrupt held to warrant court in finding, beyond a reasonable doubt that he had possession or control of the goods. In re Walder, 142 F. 784. Failure to account satisfactorily for goods held insufficient to warrant order. In re Sax, 141 F. 223. A mere failure to satisfactorily account for all the value of goods shown to have been bought, where no books were kept, and the business is shown to have been loosely conducted is not sufficient. In re Switzer, 140 F. 976.

12. So held where bankrupts were given an opportunity to appear before referee and explain but failed to do so. In re Levy & Co. [C. C. A.] 142 F. 442. Uncontradicted testimony of bankrupt that she had money in satchel and that while she was carrying it satchel was cut from handle and taken held incredible, she at the time of discovery of the theft raising no outcry. In re Frankfort, 144 F. 721.

13, 14. In re Davison, 143 F. 673.

15. Rule applied to money of a married woman in the hands of her husband, but which by the law of the state was her separate property and subject to her absolute control. In re Cole [C. C. A.] 144 F. 392.

16. In re Davison, 143 F. 673.

17. In re Switzer, 140 F. 976.

18. See 5 C. L. 386.

19. In re Heckman [C. C. A.] 140 F. 859.

20. See 5 C. L. 386.

21. Where officers of a bankrupt corporation held all the stock of an ancillary corporation as agents of the bankrupt corporation and not as engaged in a separate business, held they could be required to surrender it to the bankrupt's receiver. In re Muncie Pulp Co. [C. C. A.] 139 F. 596.

22. So held where defendant was vendee of property under a sale completed prior to the filing of the bankruptcy petition. In re Davis Tailoring Co., 144 F. 285. Where property was claimed by third person under bill of sale, he alleging bankrupt's possession to be that of an agent. In re Mundle, 139 F. 691. Where property is levied on within four months prior to the filing of the petition but before such filing is sold and delivered to the purchaser and the proceeds delivered to the levying creditor neither the property nor its proceeds can be recovered in summary proceedings. In re Bailey, 144 F. 214.

23. In re Davis Tailoring Co., 144 T. 285.

plication of the trustee of a bankrupt whose estate is being administered in another district requiring a person to turn over property to the trustee.[24] The proof must be decisive in order to justify a summary order against a third person.[25] It will not issue where the fact of the original receipt of the property is denied and the only proof that it was ever received is the oath of interested witnesses, unsupported by corroborative or documentary proof.[26]

(§ 11) *E. Actions to collect or reduce the property to the trustee's possession.*[27]—The trustee may maintain an action in his own name as trustee for the use and benefit of the estate he represents,[28] but he has not the judicial power to determine that an action brought by him in his official capacity for the use and benefit of a third person who claims to be a creditor of the estate would redound to the benefit of the estate and thereupon bring such action in his own name as trustee for the use and benefit of such third person.[29] A demand is not a condition precedent to the recovery of a preference.[30] A trustee by consenting to the discharge of receivers does not estop himself from maintaining a suit against third persons to recover property transferred to them by the receivers.[31] In order to avoid a preferential transfer or payment, the trustee may proceed by plenary suit in law[32] or in equity,[33] the suit in equity being in the nature of a creditors' suit to set aside a fraudulent conveyance.[34] The ordinary procedure is by an action at law,[35] though equity is resorted to when necessary to avoid a multiplicity of actions.[36] An adjudication of a bankrupt based upon the giving of a preference is not an adjudication that the alleged transfer was preferential so as to bind the transferee.[37]

Jurisdiction.[38]—Courts of bankruptcy have equitable jurisdiction of suits to set aside alleged preferences.[39] In a suit in the Federal courts the citizenship of the trustee is immaterial where the citizenship of the bankrupt and the defendant is such that the former might have sued in the Federal court but for the bankruptcy proceedings.[40] The equity jurisdiction conferred on the district courts by the bankruptcy act is limited to matters connected with the bankruptcy estate,[41] the court having neither original nor ancillary jurisdiction of matters not affecting the settlement of the bankrupt's estate,[42] or unless such property is in possession of the

24. In re Von Hartz [C. C. A.] 142 F. 726.
25. In re Gilroy, 140 F. 733.
26. In re Gilroy, 140 F. 733. Evidence held to show a scheme to defraud but insufficient to warrant order requiring attorney to surrender property. Id.
27. See 5 C. L. 387.
28, 29. West v. Bank of Lahoma [Okl.] 86 P. 59.
30. Boonville Nat. Bank v. Blakey [Ind.] 76 N. E. 529; Capital Nat. Bank v. Wilkerson [Ind. App.] 75 N. E. 837. But see 5 C. L. 387, n. 35; 5 C. L. 388, n. 36.
31. Whitney v. Wenman, 140 F. 959.
32. Parker v. Black, 143 F. 560. An action to avoid a preference is one at law and may be brought in a state court which has no equitable jurisdiction. Merritt v. Halliday, 107 App. Div. 596, 95 N. Y. S. 331.
33, 34. Parker v. Black, 143 F. 560.
35. Boonville Nat. Bank v. Blakey [Ind.] 76 N. E. 529.
36. Boonville Nat. Bank v. Blakey [Ind.] 76 N. E. 529. Bill held not maintainable on such ground on mere allegations of a saving of expense and a promotion of convenience, where the effect would be to deprive defendant of a right to a jury trial. Id.
37. John Silvey & Co. v. Tift, 123 Ga. 804, 51 S. E. 748.
38. See 5 C. L. 388.
39. Off v. Hakes [C. C. A.] 142 F. 364.
40. Bush v. Elliott, 202 U. S. 477, 50 Law. Ed. —.
41. Brumby v. Jones [C. C. A.] 141 F. 318.
42. In re Hobbs & Co., 145 F. 211. Where after sale by trustee has been confirmed, bankruptcy court has no jurisdiction of a proceeding to restrain the execution of the deed to the purchaser and to compel the execution by the trustee of a deed to the petitioner based upon an alleged contract between the petitioner and the purchaser. Henrie v. Henderson [C. C. A.] 145 F. 316, rvg. In re Henderson, 142 F. 568. A referee determining that certain property belongs to a third person cannot enjoin its seizure by a sheriff under a writ of replevin issued from a state court, in an action brought therein by the trustee against such third person even if otherwise vested with the power. In re Berkowitz, 143 F. 593. See post, § 18. Where firm of building contractors was adjudged bankrupt, held bankruptcy court had jurisdiction to bring in mechanics' lien claimants and adjudicate the validity of their liens, so far as they effect the bal-

trustee or a part of a fund for distribution among the general creditors of the bankrupt.[43] When property has become subject to the jurisdiction of the bankruptcy court as that of the bankrupt, whether held by him or for him, jurisdiction exists to determine controversies in relation to the disposition of the same and the extent and character of liens therein or rights therein.[44] A court of bankruptcy, which is administering the estate of a bankrupt partnership has jurisdiction to take possession of the property of a partner, though he has not been or could not be adjudged a bankrupt individually, and to administer the same as far as necessary to a settlement of the partnership estate.[45] Even after a discharge a state court has jurisdiction to determine the rights of the trustee to property claimed to have belonged to the bankrupt when he went into bankruptcy and attached by a creditor as such, though standing in the name of another who also claims it.[46] Under the Alabama statutes the trustee cannot resort to chancery to set aside a preference not fraudulent.[47]

Parties.[48]

Pleading.[49]—The complaint must allege that assets are insufficient to pay the claims of creditors,[50] that transfer was made to pay or secure an antecedent indebtedness,[51] and that if it is permitted to stand the creditor will receive a greater percentage of his debt than other creditors of the same class.[52] General rules as to the effect of allegations apply.[53]

Presumptions and burden of proof; evidence.[54]—The burden of proof rests upon the trustee to prove the preference.[55] General rules as to the admissibility of evidence apply.[56] In an action by the trustee, the presumption is in favor of the regularity of all proceedings leading up to the appointment of the trustee and that as trustee he complied with all the requirements of the law and was qualified to act.[57]

Trial and judgment.[58]—It is not within the province of a witness to inform the court or jury whether a hypothetical state of facts would or would not, in his opinion as a business man, constitute implied notice to a creditor of his debtor's

ance due under the contracts as a necessary condition precedent to a settlement between the bankrupts and the owners. Id.

43. Suit to cancel satisfaction of mortgage and to declare trust in property. Brumley v. Jones [C. C. A.] 141 F. 318.

44. Goodnough Mercantile Co. v. Galloway [Or.] 84 P. 1049.

45. Dickas v. Barnes [C. C. A.] 140 F. 849.

46. McLeod's Trustee v. McLeod [Ky.] 89 S. W. 199.

47. Code 1896, § 818 construed. Redd v. Wallace [Ala.] 40 So. 407.

48, 49. See 5 C. L. 388.

50, 51. Lesser v. Bradford Realty Co., 47 Misc. 463, 95 N. Y. S. 933.

52. West v. Bank of Lahoma [Okl.] 85 P. 469.

53. Allegation that money was not paid by third person to the trustee on demand held to render a further allegation that the money had not been paid the bankrupt or his assignee for the benefit of creditors, the trustee's predecessor. Cohen v. Wagar [N. Y.] 75 N. E. 691.

54. See 5 C. L. 389.

55. Butler Paper Co. v. Goembel [C. C. A.] 143 F. 295; Starbuck v. Geho, 48 Misc. 333, 96 N. Y. S. 781. That creditor had reasonable cause to believe a preference was intended. Capital Nat. Bank v. Wilkerson [Ind. App.] 75 N. E. 837.

56. Evidence that alleged preferred creditor was investigating the financial standing of the bankrupt immediately prior to and continuously up to the time the bill of sale was executed held admissible. Capital Nat. Bank v. Wilkerson [Ind. App.] 76 N. E. 258. A certified copy of docket entries made in a bankruptcy court, which entries constitute only the minutes from which to make a record, is inadmissible to show bankruptcy. Gibson v. Holmes [Vt.] 62 A. 11. Where transferee claimed title in that he had rescinded a sale to the bankrupt for fraud, evidence of admissions of the fraud by the bankrupt to the seller which formed the basis of the rescission held admissible and should not be restricted to the sole purpose of impeaching the bankrupt who was a witness for the plaintiff. John Silvey & Co. v. Tift, 123 Ga. 804, 51 S. E. 748. In such a case the fact that the transaction in question was accomplished by consent or agreement between the parties may be considered by the jury in determining the real nature of the transaction. Id.

57. Plaintiff testified in an action by trustee in bankruptcy that he was the trustee. Laubaugh v. Pennsylvania R. Co., 28 Pa. Super. Ct. 247.

58. See 5 C. L. 390.

insolvency.[59] In a plenary suit by the trustee the bankruptcy court has power to issue a temporary injunction restraining defendant from disposing of the property in controversy.[60] General rules as to instructions apply.[61] A party against whom a judgment has been rendered in favor of the trustee of a bankrupt may, by proper proceedings in equity, be allowed to offset against the same a claim allowed in its favor against the bankrupt in the bankruptcy proceedings.[62]

Interest.[63]—On the recovery of an unlawful preference, interest may be recovered from the date of demand.[64] The commencement of a suit to recover an alleged preference is a demand which starts the running of interest.[65]

Costs.[66]

Appeal and review.[67]—The trustee may appeal a suit in a state court in forma pauperis by filing an affidavit which discloses his inability, as the representative of the bankrupt estate, to pay the costs.[68] The trustee failing to prove his case a new trial may be ordered to enable him to supply defects in proof.[69]

(§ 11) *F. Claims not reduced to possession by the trustee.*[70]—A bankrupt failing to disclose property or rights during the pendency of the bankruptcy proceedings cannot claim, after the discharge of the trustee, that such property or rights revested in him except on a showing of an election by the trustee to abandon such asset or that no claims proven against the bankrupt estate remain unpaid.[71] The question of abandonment by the trustee depends on the facts of each case.[72] The bankrupt being refused a discharge on the ground that he has property which he did not schedule, the creditors are entitled to have the estate reopened in order that proceedings may be instituted to recover such property for their benefit.[73] In such case any creditor existing before the bankruptcy may, through the trustee, pursue any property the bankrupt had at the date of his adjudication,[74] and any existing creditor at the date of the adjudication may pursue, in his own right, any after-acquired property in any court of competent jurisdiction.[75]

§ 12. *Protection of trustee's title and possession.*[76] *Restraining interference.*[77]—An application by a creditor for leave to examine the books of a bankrupt in the hands of his trustee should be denied where it fairly appears that it is not made in good faith in his own interest but in the interest of one not a creditor who has no right to such examination.[78]

Right of trustee in actions pending by or against the bankrupt.[79]—An action by or against the bankrupt in a state court does not abate upon the adjudication in bankruptcy or the appointment of a trustee,[80] and, in the absence of an appli-

59. Hawes v. Bank of Elberton [Ga.] 52 S. E. 922.

60. So held where defendant was insolvent. Blake v. Nesbet, 144 F. 279.

61. Issues submitted held sufficient to develop whole case. Wright v. Cotten [N. C.] 52 S. E. 141.

62. Tootle-Weakley Millinery Co. v. Billingsley [Neb.] 105 N. W. 85.

63. See C. L. 391.

64. Benjamin v. Chandler, 142 F. 217.

65. Capital Nat. Bank v. Wilkerson [Ind. App.] 75 N. E. 837.

66, 67. See 5 C. L. 391.

68. Hawes v. Bank of Elberton [Ga.] 52 S. E. 922.

69. Starbuck v. Gebo, 48 Misc. 333, 96 N. Y. S. 781.

70. See C. L. 391.

71. Right to accounting. Laing v. Fish, 119 Ill. App. 645.

72. Where assignees in bankruptcy, having acquired title to the bankrupt's incorporeal interest in trust property under a bankrupt's petition filed in 1878, filed a bill in 1882 to compel the bankrupt to execute conveyances to such assignees of all his interest in the trust property, and to enjoin the trustee under the will under which the bankrupt claims from paying the bankrupt or any person claiming under him any part of the trust fund which might accrue to the bankrupt, the fact that the bankrupt's assignees did not sell their remainder in the fund so acquired held not to establish an abandonment thereof by them. Whittredge v. Sweetser, 189 Mass. 45, 75 N. E. 222.

73, 74, 75. In re Barton's Estate, 144 F. 540.

76, 77. See 5 C. L. 391.

78. In re Sully, 142 F. 895.

79. See 5 C. L. 392.

80, 81. Hahlo v. Cole, 98 N. Y. S. 1049.

cation by the trustee for substitution, it may be prosecuted or defended by the bankrupt.[81] It is improper for a trustee to be substituted as plaintiff in a suit in a state court by a bankrupt without first obtaining the consent of the Federal court to such substitution.[82] The trustee may intervene in a suit brought by a judgment creditor to set aside a fraudulent conveyance by the bankrupt,[83] and it is unnecessary to his proper substitution as plaintiff that a supplemental petition be filed, since the order permitting him to be substituted determined his legal capacity to sue and, in the absence of any subsequent question as to the correctness of the ruling, it will be regarded as final.[84]

Suits against trustee.[85]—After an adjudication of bankruptcy by a Federal court, a suit or action cannot be commenced in a state court affecting the unexempt property of the bankrupt, if objection to the want of jurisdiction of the subject-matter be suitably interposed,[86] and this is true regardless of who is in possession of the property at the time such suit is instituted,[87] and a state court having no jurisdiction of the subject-matter the trustee by answering and praying for affirmative relief cannot confer jurisdiction.[88] Unless enjoined by the bankruptcy court,[89] a lienor on property sold by the trustee, the lien being transferred to the proceeds is entitled to sue the trustee in a state court to establish his claim,[90] but the judgment in such action cannot operate to take the fund from the possession of the bankruptcy court.[91] A trustee or receiver in bankruptcy cannot remove a cause into the Federal courts unless the amount involved exceeds $2,000.[92] General rules as to pleadings apply.[93] In a suit to foreclose an equitable lien on the bankrupt's property the trustee alleging possession in himself he must prove the averment if denied in the reply.[94] The certificate of appointment of a trustee in bankruptcy is admissible to prove the fact of the appointment.[95] The mere designation of a person as "special master" in the order of appointment in bankruptcy proceedings does not deprive him of the express authority conferred by such order to sue to collect all the assets of the bankrupt estate.[96] Where pending replevin in a state court against the trustee for property alleged by the latter to have been preferentially transferred, the bankruptcy court orders the trustee to sell the property, the claimant's right to attach to the proceeds, such sale by the trustee does not constitute a contempt of the state court.[97] The action must be brought or claim set up within the prescribed period of limitations.[98]

82. Hahlo v. Cole, 98 N. Y. S. 1049. The court expressly states that while such action would be "improper" it does not decide that the substitution would be unauthorized unless the consent of the federal court was first obtained and affirmatively shown. Id.

83. Bunch v. Smith [Tenn.] 93 S. W. 80.

84. Crary v. Kurtz [Iowa] 105 N. W. 590.

85. See 5 C. L. 391.

86. Goodnough Mercantile Co. v Galloway [Or.] 84 P. 1049. The trustee having title to the property it is not subject to attachment by a state court. French v. White [Vt.] 62 A. 35.

87. Goodnough Mercantile Co. v. Galloway [Or.] 84 P. 1049.

88. Goodnough Mercantile Co. v. Galloway [Or.] 84 P. 1049. In an action against a trustee in bankruptcy, defendant appeared and demurred, challenging the jurisdiction of the state court over the subject-matter. When his demurrer was overruled he sought by answer to secure the property involved for the benefit of creditors. Held that he did not waive objection to the jurisdiction. Id.

89, 90, 91. Skilton v. Codington [N. Y.] 77 N. E. 790, rvg. 105 App. Div. 617, 93 N. Y. S. 460.

92. Swofford v. Cornucopia Mines of Oregon, 140 F. 957.

93. In an action against a trustee in bankruptcy to enforce an equitable lien on the property of the bankrupt, the complaint stating that the trustee claimed the right to take possession of the property and to sell the same, held entitled to all intendments after answer and tantamount to an allegation that on the day when the action was commenced the trustee had not taken possession of the property. Goodnough Mercantile Co. v. Galloway [Or.] 84 P. 1049.

94. Goodnough Mercantile Co. v. Galloway [Or.] 84 P. 1049.

95. Harrell v. State, 121 Ga. 607, 49 S. E. 703.

96. Suit between creditors and trustee. Royal Ins. Co. v. Miller, 199 U. S. 353, 50 Law. Ed. —.

§ 13. *Management of the property and reduction to money.*[99]—Subject to the control of the court, the right to select counsel is in the trustee,[1] and, where there are disagreements between factions of creditors as to the manner of administering the estate, the court will not approve the selection by the trustee of an attorney who also represents and continues to act for certain creditors.[2] Appraisers should be appointed by the court or referee.[3] One is not disqualified to act as appraiser because of a casual association with one of the creditors in an unrelated business.[4]

Sale of property.[5]—The sale need not be made by the trustee[6] but the court in its discretion may designate or appoint officers other than the trustee to make the sale.[7] Whether the property shall be sold in bulk or in parcels[8] and whether it shall be sold free from incumbrances,[9] is for the court to determine. It is proper and generally desirable to sell the real estate free from the bankrupt's wife's inchoate right of dower, with her consent, and to compensate her for such release by a fair allowance out of the proceeds.[10] Where the time fixed by an order of sale expires without a sale having been made, notice to creditors and others interested is essential before the making of a new order of sale.[11] In the absence of fraud or mistake or a showing of inadequacy of price, a sale at public auction should not be set aside because of an offer of an advanced price by an unsuccessful bidder.[12] An order setting aside a sale and ordering a resale is not reviewable on petition to superintend and revise until after the resale has been made and confirmed.[13] Unless the order otherwise provides, the sale conveys all the right, title, and interest of the bankrupt,[14] and also rights of the trustee to attack preferential transfers of the property.[15] A purchaser making a claim for shortage and it being allowed he is barred from putting in another claim which might have been ascertained and included in the former claim.[16] In the absence of the record of the proceeding, it will be presumed, in a collateral proceeding, that the court had before it the necessary facts and parties to authorize the order of sale.[17] The regularity of a sale by a trustee in bankruptcy cannot be collaterally attacked on the ground of a failure of the trustee to procure an order of sale.[18]

97. Capital Nat. Bank v. Wilkerson [Ind. App.] 76 N. E. 258.

98. Where assignees in bankruptcy of a cestui que trust became vested with the bankrupt's interest in the trust property by virtue of the assignment in 1878, and such ownership continued from that date until 1901 when a bill was filed by them for instructions all persons are barred from claiming an adverse interest in the property so conveyed by Rev. St. U. S. § 5057, providing that such suits should not be maintained unless brought within two years from the time when the cause of action accrued for or against such trustee. Whittredge v. Sweetser, 189 Mass. 45, 75 N. E. 222.

99. See 5 C. L. 392.

1. Held error for referee to permit creditors to determine question. In re Columbia Iron Works, 142 F. 234.

2. In re Columbia Iron Works, 142 F. 234.

3. Held error to submit question to vote of creditors. In re Columbia Iron Works, 142 F. 234.

4. Is not disqualified because some of the officers and directors of a corporation creditor are also officers and directors in another corporation of which the appraiser is president. In re Columbia Iron Works, 142 F. 234.

5. See 5 C. L. 393.

6. Sturgiss v. Corbin [C. C. A.] 141 F. 1.

7. May appoint commissioners. Sturgiss v. Corbin [C. C. A.] 141 F. 1.

8. Held error to submit question to vote of creditors. In re Columbia Iron Works, 142 F. 234.

9. Sturgiss v. Corbin [C. C. A.] 141 F. 1.

10. Savage v. Savage [C. C. A.] 141 F. 346.

11. Allgair v. Fisher & Co. [C. C. A.] 143 F. 962. Sale under second order made without such notice, set aside where price was less than that fixed as the upset price in the first order. Id.

12. So held where offer was about 4 per cent. above the sale price. Sturgiss v. Corbin [C. C. A.] 141 F. 1.

13. West Virginia practice considered. Sturgiss v. Corbin [C. C. A.] 141 F. 1.

14. Bryan v. Madden, 109 App. Div. 876, 96 N. Y. S. 465.

15. Property sold was certain contracts. Bryan v. Madden, 109 App. Div. 876, 96 N. Y. S. 465.

16. So held where second claim was for other packages included in sale. In re Drumgoole, 140 F. 208.

17. That trust had been terminated and perfect lis pendens maintained. Fitch v. Gentry [Ky.] 92 S. W. 586.

18. Keller v. Faickney [Tex. Civ. App.] 15 Tex. Ct. Rep. 541, 94 S. W. 103.

§ 14. *Claims against the estate and proof and allowance. A. Claims provable.*[19]—There is a distinction between provable and allowable claims.[20] A fixed liability of the bankrupt[21] as evidenced by a judgment or instrument in writing[22] is provable if absolutely owing[23] to the claimant[24] at the time of the filing of the petition in bankruptcy,[25] whether then payable or not.[26] The owner of an unmatured note indorsed by the bankrupt has a provable claim.[27] The bankrupt repudiating a contract of purchase, the seller may prove his claim against the bankrupt estate for the profit he would have made on the sale, it being possible to prove such profit with reasonable certainty,[28] and the seller being a selling agent, he can prove his anticipated profits and damages paid the manufacturer without requiring a tender of the latter.[29] A sale by the bankrupt being set aside as fraudulent the vendee has a provable claim for the full amount of the purchase price less the expenses of setting aside the sale.[30] An involuntary adjudication does not constitute a breach of an executory contract for the sale of crops to be raised in successive years so as to enable the vendor to prove his contingent damages.[31] A debt founded upon contract express or implied is provable against the bankrupt's estate notwithstanding the fact that the creditor may have elected to bring his action in trover instead of in assumpsit.[32] Indorsers, guarantors, sureties and other persons secondarily liable, may prove their claims against the bankrupt estate if the creditor declines or fails to do so.[33] A stipulation for a collection fee in a note being one of indemnity it is not provable against the estate of the debtor as part of the debt, when no attorney was in fact employed by the creditor until after the bankruptcy.[34] Whether such fee is to be deemed one for indemnity or not is to be determined by

19. See 5 C. L. 394.

20. Owner of a note, not yet due, indorsed by the bankrupt has a provable claim. In re Rothenberg, 140 F. 798. Evidence held sufficient to show that petitioner's claims were provable. In re Borelli, 142 F. 296.

21. Notes given by a partner to sureties on personal, official bond to cover defalcations, held provable against the partnership estate, the money acquired by the defalcations being used in the firm business. In re Speer Bros., 144 F. 910.

22. Where prior to the brankruptcy proceedings the bankrupt as security for an indebtedness against him gave his crediter a written assignment of his salary, his discharge releases him from personal liability as a drawer of the order. Mitchell v. Leland [Mass.] 76 N. E. 670.

23. A claim based upon a contract express or implied must have been a debt of the bankrupt for which he was liable and under obligation to pay at such time. In re Ellis [C. C. A.] 143 F. 103. A subcontractor held not to have a provable claim against his contractor where he was not to be paid until latter was paid and latter had not been paid. Id.

24. A purchaser at a receiver's sale of the accounts of an insolvent corporation, which include an account against another corporation also insolvent, cannot prove against the bankrupt estate of a stockholder in the debtor corporation a claim for an indebtedness on his stock subscription. In re Watkinson, 143 F. 602. A claim against the estate of a bankrupt, based on the alleged payment by the claimant and others represented by him, of an indebtedness of the bankrupt, disallowed where it appeared that the indebtedness was that of a corporation in which claimants and the bankrupt were stockholders; that it was paid by a second corporation in which claimants were stockholders, which charged it to the first and afterwards became insolvent; and that the only liability of the bankrupt was to the first corporation on his stock subscription. Id.

25. In re Imperial Brewing Co., 143 F. 579; In re Ellis [C. C. A.] 143 F. 103.

26. Liability of bankrupt vender in a contract to convey, he agreeing to pay off a mortgage within 18 months, though 18 months had not elapsed at the time of filing the petition. Sweaney v. Baugher [Ind.] 77 N. E. 1083. Held error for the court to exclude from evidence a duly authenticated certificate of discharge in bankruptcy set up as a defense to an action on a debt, provable and absolutely owing, although not payable, at the time of the filing of the petition. Alling v. Straka, 118 Ill. App. 184.

27. In re Rothenberg, 140 F. 798.

28, 29. In re Saxton Furnace Co., 142 F. 293.

30. Barber v. Coit [C. C. A.] 144 F. 381.

31. In re Imperial Brewing Co., 143 F. 579.

32. Judgment in conversion held released by discharge. Fechter v. Postel, 100 N. Y. S. 207.

33. So held as to a vendee in a contract to convey the vender agreeing to pay off a mortgage but failing to do so before bankruptcy and the mortgagee failing to pay his claim. Sweaney v. Baugher [Ind.] 77 N. E. 1083.

34. Pennsylvania law considered. In re Gebhard, 140 F. 571.

the local law.[35] An unliquidated claim arising ex delicto is not provable.[36] Failure to record a mortgage securing a debt does not affect the provability of the debt.[37] The provision of the bankruptcy act providing for the liquidation of claims refers only to unliquidated provable claims.[38] In liquidating claims the bankruptcy court has ample authority to adopt any procedure appropriate to the particular case whether it be submission to a jury on an issue framed, or production of evidence before the referee or some other method.[39]

(§ 14) *B. Proof of claims.*[40]—Claims must be proved within one year after the adjudication,[41] and while this provision is an absolute bar to the proving or allowance of a claim after the expiration of a year, where the creditor is chargeable with any laches, yet it must be construed in the light of the main purpose of the act, which is to secure an equal division of assets between bona fide creditors, and should not be held to bar a just claim, which, owing to peculiar circumstances, could not have been proved within the year.[42] Consequently it has been held that where payment to a creditor has been set aside as preferential after the expiration of the year the creditor might prove his claim, he having acted in entire good faith.[43] The bar, however, applies to a creditor who has received a voidable preference subsequently recovered by the trustee,[44] and to a creditor who sues in a state court hoping to secure a favorable decision upon a claim of lien preference for the full amount of his indebtedness.[45] In order that judgment creditors may share in the distribution of the estate they must file proofs of debt.[46] The sworn proof of a claim is prima facie evidence of its allegations though objection is made to its allowance,[47] and if such proof sets forth all the necessary facts to establish the claim; and the allegations are not self-contradictory, prima facie, they establish the claim, even in the presence of objections and the objector is then called upon to produce evidence and show facts tending to defeat the claim of probative force equal to that of the allegations of the proofs of claim.[48] The burden of proof is always on the claimant, but, as probative force is given to the allegation of the proofs of claim, and no probative force is given to the objections, this must be met, overcome or at least equalized, by the objecting party.[49] All intendments are in favor of the proof.[50] One filing a claim based on fraudulent security is bound thereby and will not be permitted to prove his claim as one for wages for labor and entitled to priority.[51]

Effect of proof.[52]—The lien of a judgment on property set aside by the bankruptcy court as exempt is not affected by the fact that the creditor proved his judgment in the bankruptcy proceedings where he was allowed by the court to withdraw such proof without prejudice.[53]

35. In re Gebhard, 140 F. 571.
36. In re United Button Co., 140 F. 495.
37. In re Ewald, 135 F. 168.
38, 39. In re United Button Co., 140 F. 495.
40. See 5 C. L. 394.
41. Act 1898, § 57n. In re Kemper, 142 F. 210.
42, 43. In re Fagan, 140 F. 758.
44. In re Kemper, 142 F. 210. Where preferential payment only amounted to a part of the claim and the claim was presented and allowed after deducting the amount of the payment and the trustee subsequently recovered such preferential payment held a claim for the amount thereof could not be allowed after the expiration of a year from the adjudication either as an original claim or by way of amendment to the prior claim. Id.
45. Creditor secured by a mortgage cannot, after adverse decision by state court prove his claim after the expiration of the year. In re Noel, 144 F. 439.
46. In re Rosenberg, 144 F. 442.
47. Whitney v. Dresser, 200 U. S. 532, 50 Law. Ed. —-; In re Castle Braid Co., 145 F. 224.
48. In re Castle Braid Co., 145 F. 224. Proof of contract with directors for the purchase of corporate stock held sufficient to establish claim prima facie. Id.
49. In re Castle Braid Co., 145 F. 224.
50. Proof of notes against corporation held not affected by the fact that the payee was an officer of the corporation. In re Castle Braid Co., 145 F. 224.
51. In re Hemstreet, 139 F. 958.
52. See post, § 22, c.
53. In re Weaver, 144 F. 229.

(§ 14) *C. Contest of claims.*[54]—Objections to the allowance of a claim may be filed by parties in interest.[55] In respect of opposing the allowance of claims, the trustee does not act judicially, but only administratively, and, if he refuses to oppose a claim or to move for its reconsideration when he ought to do so, he may be compelled to act or to permit the objecting creditors to act in his name.[56] And where the trustee is acting under the advice of the counsel who represent the claimant, no presumption arises as to the correctness of the trustee's action.[57] Where an order of a referee sustaining a motion of a trustee to disallow a claim on the prima facie case made by the claimant is reversed, the matter should be sent back to the referee, if the trustee desires to submit evidence in opposition to the claim.[58] The trustee alone is authorized to institute proceedings for the re-examination and expunging of claims.[59] The defense of usury is as available to the debtor's trustee as to the debtor himself.[60] Cases dealing with the sufficiency of the evidence are shown in the notes.[61]

(§ 14) *D. Surrender of preferences and the effect thereof.*[62]—In order to prove his claim, a preferred creditor must surrender his preference,[63] but such surrender need not be voluntary.[64] Under the bankruptcy act as amended, the preferential transfer or payment which must be surrendered is identical with and includes the elements of the transfer or payment rendered voidable by § 60b.[65] A referee, or court, upon finding that certain payments are preferential, should fix a reasonable time within which they may be surrendered and the claims of the creditors allowed.[66]

(§ 14) *E. Secured creditors.*[67]—The claims of secured creditors [68] are allowable for such sums only as are owing over and above the value of the securities,[69] but this rule has no application to cases in which the security is not the property of the bankrupt.[70] A secured creditor may without interference by the trustee or the court, value his own security, provided he turns it into money "according to the terms of the agreement pursuant to which" it was delivered to him.[71] Being un-

54. See 5 C. L. 395.

55. Debtor of bankrupt sued by trustee is not a party in interest in the bankruptcy proceedings and cannot file objections to or litigate claims of creditors. In re Sully, 142 F. 895.

56, 57. In re Stern [C. C. A.] 144 F. 956.

58. In re Livingston [C. C. A.] 144 F. 971.

59. In re Sully, 142 F. 895.

60. In re Stern [C. C. A.] 144 F. 956.

61. Evidence considered and held not to sustain the contention of a claimant as to the conversion of certain stocks by the bankrupt and his claim for the value of the stocks, which remained in the bankrupt's hands, liquidated. In re Hurlbutt, Hatch & Co., 143 F. 958. Evidence held insufficient to defeat the allowance of notes given by a bankrupt corporation for stock in another corporation, either on the ground of fraud or ultra vires. In re New York Car Wheel Works, 141 F. 430.

62. See 5 C. L. 396.

63. See in re Block [C. C. A.] 142 F. 674. What constitutes a preferential transfer, see ante, § 9 E. What constitutes a fraudulent transfer, see ante, § 9 A.

64. The fact that he has, in good faith, retained the same until deprived thereof by a judgment of the court upon a suit brought by the trustee does not bar him from thereafter surrendering his preference and proving his claim against the estate. In re Oppenheimer, 140 F. 51.

65. Hardy v. Gray [C. C. A.] 144 F. 922. What constitutes such a preference see ante, § 9 E.

66. In re Oppenheimer, 140 F. 51.

67. See 5 C. L. 396.

68. A creditor holding a note containing a waiver of exemptions is a secured creditor In re Meredith, 144 F. 230.

69. Act 1898, § 57e. In re Meredith, 144 F. 230. Act 1898, §§ 57e, 57h, construed. Creditor receiving orders drawn on third persons to secure payment of his debt. In re Hines, 144 F. 543.

70. In re Mertens [C. C. A.] 144 F. 818. A creditor of a bankrupt partnership is not required to apply securities in his hands, which are the individual property of one of the partners, upon his claim against the partnership estate, but is entitled to the allowance of his debt in full against such estate, and to apply the securities upon his claim against the individual estate of the partner to which the property belongs. Id.

71. In re Mertens [C. C. A.] 144 F. 818. An agreement of pledge, made by one who subsequently becomes a bankrupt, authorizing the pledgee to sell the security pledged at public or private sale, with or without notice, and to purchase the same, is valid, and a sale made in accordance therewith at

able to so do he is entitled on application to the court to have its value determined.[72] The value of the security should be determined by converting the same into money if it can be done without unduly delaying the distribution of the estate and, if not, by agreement with the trustee or by submitting the question to a referee.[73] In such valuation proceedings both the claimant and the objecting creditors are entitled to be heard and to advance testimony,[74] and the allowance can be reviewed only on a petition by the trustee or another creditor for a re-examination.[75] Where policies of insurance, some having a cash surrender value and others not, are pledged as security for a debt and after the adjudication the bankrupt dies, the debt secured by the pledge should be apportioned between the different policies and the amount apportioned to the policy having a cash surrender value taken pro rata from such surrender value, which belonged to the trustee, and the excess above such value, which belonged to the bankrupt's personal representatives.[76] A secured creditor assigning his security after the adjudication receiving therefor a certain sum and proving his claim for the balance as an unsecured claim, the amount required to be paid by the trustee in redeeming the securities should be distributed between the original pledgee and his assignee in accordance with their equities growing out of the assignment subject to the requirement that the excess claim filed by the former against the estate should be expunged.[77] A secured creditor is accountable to the trustee for any excess in the value of his security over the amount of his claims.[78]

(§ 14) *F. Set-offs.*[79]—Mutual debts and credits may be set-off against each other.[80] Where an insolvent has money on deposit in a bank subject to check and also owes the bank upon a promissory note, upon the insolvent person being adjudged a bankrupt, the bank is entitled to have the amount of the bankrupt's deposit set off against the sum due on the promissory note, and to prove his claim against the bankrupt for the balance.[81] The prohibition against the setting off of claims acquired within four months of the filing of the petition applies only when it would result in diminishing the estate.[82]

(§ 14) *G. Priorities.*[83]—The time of filing the petition fixes the status of persons entitled to priority.[84] The bankruptcy act gives priority to all taxes legally due and owing by the bankrupt,[85] irrespective of the question of lien and although

public auction, but without notice and a purchase thereat by the pledgee, cannot be impeached by the pledgor's trustee unless fraud or bad faith is affirmatively shown. Id.

72. Creditor, assignee of life insurance policies held so entitled. Van Kirk v. Vermont Slate Co., 140 F. 38.

73. Act 1898, § 57h. In re Meredith, 144 F. 230.

74, 75. In re Columbia Iron Works, 142 F. 234.

76, 77. Van Kirk v. Vermont Slate Co., 140 F. 38.

78. An assignment by an insolvent within four months prior to his bankruptcy of a judgment in his favor, from which an appeal was pending, followed by a sale of goods to him by the assignee from time to time, which were charged to his account, although absolute on its face held to have been by way of security only for the account, leaving the assignee accountable to the bankrupt's trustee for the excess of its proceeds. English v. Ross, 140 F. 630.

79. See 5 C. L. 396.

80. Cannot set-off against claim of a landlord for rent, an unliquidated claim for damages in favor of the bankrupt, sounding in tort, and arising independently of the contract of lease. In re Becker Bros., 139 F. 366.

81. West v. Bank of Lahoma [Okl.] 85 P. 469.

82. Claim allowed to be set-off against a subsequent, bona fide assignee from the bankrupt of a claim against defendant. Stich v. Berman, 96 N. Y. S. 743.

83. See 5 C. L. 397.

84. In re Winfield Mfg. Co., 140 F. 185. A provision of a lease to a bankrupt that, in case of his insolvency or the filing of a petition in bankruptcy by or against him, the rent for the entire term shall become at once due and payable and the landlord may proceed as in the case of breach does not entitle the landlord to priority for the rent for the unexpired portion. Id.

85. Liability of corporation to retain tax on bonds out of interest held not entitled to priority. Rev. Act Pa. June 30, 1885 (P. L. 193), construed. In re Wyoming Valley Ice Co., 145 F. 267. An indebtedness due from a bankrupt tax collector for taxes collected

they may have been levied on property which did not pass into the hands of the trustee.[86] The expenses of the bankruptcy proceeding are given priority.[87] Under the bankruptcy act, priority is given debts owing to any person who by the laws of the states or of the United States is entitled to priority.[88] The word "debts" is here used in its technical sense, and refers only to such debts as are based upon contract, express or implied, or to personal obligations for the payment of money imposed upon the bankrupt by statute,[89] and consequently does not include a claim for taxable costs incurred in good faith by a creditor of a bankrupt in an attachment suit to recover a provable debt, which attachment was rendered void by the subsequent bankruptcy proceedings.[90] The amendment in 1903 of subdivision two of section 64b of the Act of 1898 is not retroactive.[91] The surety of a bonded depositary of the assets of a bankrupt has no priority.[92] Under the present bankruptcy law a partnership creditor can only share in the surplus of an individual partner's estate after such partner's individual debts are paid, and there is no exception even when there is no partnership estate and no solvent partner.[93] A creditor who by a false and fraudulent statement, purposely made or caused to be made by him, has induced another to extend credit to his insolvent debtor, and has

but not accounted for is not one for "taxes" legally due and owing by the bankrupt. In re Waller, 142 F. 883.

86. City of Chattanooga v. Hill [C. C. A.] 139 F. 600.

Note: "The opinion of the courts are not agreed upon this matter, and there are holdings which limit this direction to pay 'all taxes due and owing by the bankrupt' to such taxes as constitute a lien upon the bankrupt's estate in the hands of the trustee and remit the sovereign to the enforcement of any lien which it may have had against property which the trustee relinquished to the lien creditors. In re Veitch, 101 F. 251; In re Stalker, 123 F. 961; In re Brincker, 128 F. 634. * * * In the case of In re Tilden, 91 F. 501, it was held that taxes due upon and assessed against the exempt homestead of the bankrupt should be paid by the trustee. That the bankrupt's creditors were not benefited by the bankrupt's homestead was held not enough to raise a doubt upon the plain meaning of so unambiguous a law. In the case of In re Prince v. Walters, 131 F. 546, state taxes assessed upon mortgaged lands of the bankrupt were directed to be paid out of proceeds of the bankrupt's personalty, there being no proceeds of the land out of which to pay after satisfying the mortgage thereon. Looking to the terms of 64a, Judge Archibald said: 'Taxes, as a class, are thus put at the head of everything, even above the expense of preserving the estate of the costs of administration.'" In the case of the City of Waco v. Bryan [C. C. A.] 127 F. 79, it was held that the claim of the city for taxes assessed against the bankrupt was entitled to priority of payment by the trustee for taxes assessed against property which did not come into the hands of the trustee.—From City of Chattanooga v. Hill [C. C. A.] 139 F. 600.

87. The right to pay the costs and expenses of a bankruptcy proceeding from money set aside to the bankrupt as exempt, to which he assented held superior to the claim of a county against the bankrupt as a defaulting tax collector. In re Castleberry, 143 F. 1021.

88. Act 1898, § 64b (5). Costs of attachment suit under Maine insolvency law (Rev. St. Me. c. 72, § 36), held entitled to priority the suit having been commenced in good faith for the benefit of all the creditors and actually resulting in benefit to the estate. In re Goldberg & Bros., 144 F. 565. Under laws of Maryland indebtedness due from a bankrupt tax collector but not accounted for is not entitled to priority. In re Walker, 142 F. 883. Insolvent bank wrongfully taking money from a mortgagor, the bank claiming to be the agent of the mortgagee, in settlement of the mortgage before maturity, held to create merely the relation of debtor and creditor between the bank and the mortgagor, and, under the laws of Kentucky the mortgagor had no right of priority of payment out of the bank's bankrupt estate. In re P. J. Potter's Sons, 143 F. 407.

89. In re The Copper King, 143 F. 649.

90. In re The Copper King, 143 F. 649. The insolvency act of California (St. 1895, p. 153, c. 143, § 69), giving such claim priority consequently is in conflict with the Bankruptcy Act 1898 and is suspended by that act. Id.

91. In re Felson, 139 F. 275.

92. American Surety Co. v. Akron Sav. Bank Co., 6 Ohio C. C. (N. S.) 374. The surety of a bonded depositary of the assets of a bankrupt has the same means of judging of the solvency of such depositary as are possessed by others, and is without priority. Id.

93. In re Henderson, 142 F. 588.

Note: Some of the cases have made an exception to the first part of the above rule when there is no partnership estate and no solvent partner. In re Green, 116 F. 118; In re Conrader, 118 F. 676, afd. [C. C. A.] 121 F. 801. The following cases are in accord with the principal case: In re Wilcox, 94 F. 84; In re Jones [C. C. A.] 133 F. 912, rvg. 128 F. 527.—From In re Henderson, 142 F. 588.

profited thereby, cannot share equally with the one whom he has thus defrauded, in the distribution of the bankrupt's estate.[94]

(§ 14) *H. Expenses of the proceedings.*[95]—The bankruptcy act authorizes the allowance of one reasonable fee only to the petitioning creditors or the bankrupt as reimbursement and such fee should not be allowed except upon notice to parties interested, and upon petition by, or recommendation of, the parties mentioned in the statute.[96] It is essential to the allowance of such fee that the legal services be rendered the petitioning creditors[97] or the bankrupt and that the proceedings terminate in an adjudication.[98] Where the adjudication is not contested an involuntary bankrupt's attorney is entitled to pay from the estate for preparing schedules and attending the examination of the bankrupt,[99] but not for representing the latter in proceedings brought to recover concealed property.[1] Though the trustee is a lawyer he is under no obligation to perform legal services for the estate, but if he does so he is not entitled to additional compensation therefor.[2] Attorneys employed by creditors to assist trustee's counsel in recovering concealed property are not entitled to fees out of bankrupt's estate.[3] A court of bankruptcy will not fix the amount to be paid to counsel for a bankrupt for services in procuring the allowance of his exemptions which is a matter for agreement between the parties.[4] Referees and trustees are generally paid in commissions.[5] The petition being dismissed as unfounded, the bankruptcy court has authority to require the petitioning creditors to bear the expense of a receivership had on their application.[6] Such order may be enforced by contempt proceedings.[7] It is doubtful whether the enforcement of the contempt proceeding is equivalent to imprisonment for debt within the meaning of United States Statutes § 990, and whether this section is not repealed, by implication, so far as it conflicts with the express provision to the contrary in the bankruptcy act.[8] However this may be, such section has no application to a case in which imprisonment for failure to obey the lawful order of the court is permitted by the laws of the state.[9]

(§ 14) *I. Expenses of receivers and assignees appointed prior to bankruptcy proceedings.*[10]—Where an assignee for the benefit of creditors, appointed prior to the bankruptcy proceedings against his assignor, continues, with the approval of the referee, in the management of the bankrupt's business until the appointment of a trustee, he is entitled to compensation for his services, his management being successful,[11] and the trustee should also be required to pay bills properly and legitimately contracted by him in the conduct of the business after the adjudication,

94. In re Ewald, 135 F. 168.

95. See 5 C. L. 398.

96. In re Young, 142 F. 891. Petition of attorneys for the allowance of fees on account denied. Id.

97. Where after petition was filed, attorney for other creditors filed a second petition and demurred to the first, the demurrer was sustained but the first petition was amended and the adjudication had thereon, held attorney filing second petition was not entitled to the allowance of a fee from the estate. Frank v. Dickey [C. C. A.] 139 F. 744.

98. In re Black Diamond Copper Min. Co. [Ariz.] 85 P. 653.

99, 1, 2, 3. In re Felson, 139 F. 275.

4. In re Castleberry, 143 F. 1021.

5. A trustee is entitled to commissions on money realized by him from the sale of property of the bankrupt, which is claimed by the latter as exempt, and also claimed by a creditor, and which has been paid over by the trustee to the receiver of a state court in which such claims are being litigated where no objection to such commissions is made by the bankrupt. In re Castleberry, 143 F. 1021. Where the only sum received by the trustee was that received by way of compromise of a suit brought by him against a mortgagee of the bankrupt and the latter did not participate in the bankruptcy proceedings nor avail itself of the services of the bankruptcy court or its officers to realize on its securities, the commissions of the referee are to be computed only on the sum actually disbursed by the trustee to creditors and not on the value of the mortgaged property. In re Iowa Falls Mfg. Co., 140 F. 527.

6, 7, 8, 9. In re Lacov [C. C. A.] 142 F. 960.

10. See 5 C. L. 399.

but not those previously made,[12] nor should the trustee be obliged to pay for "discounts" which the assignee, though able, failed to take advantage of.[13] The fact that attorneys were employed by a receiver, appointed by a state court for a corporation subsequently adjudged a bankrupt and rendered useful services creates no legal claim for the allowance of their fees out of the estate in bankruptcy, such claim is allowable only on equitable considerations for services from which the estate in bankruptcy has derived benefit and to the extent only that they were beneficial in fact.[14]

§ 15. *Distribution of assets, dividends.*[15]

§ 16. *Exemptions.*[16]—The bankrupt's right to an exemption is governed by state laws.[17] The bankruptcy court can only ascertain exempt character of property and set it aside.[18] A court of bankruptcy cannot allot to a bankrupt domiciled within its district, a homestead in lands situated in another district.[19] While in order to be entitled to his exemptions the bankrupt must comply with the state laws, still such exemptions can be made available only in the manner prescribed by the bankruptcy act and hence failure to follow such prescribed procedure is generally deemed a waiver of the right[20] though in a few cases, when guilty of no wrong doing or neglect, the failure has been held excusable.[21] As a general rule an exemption cannot be claimed in goods obtained by fraud,[22] but a fraudulent conveyance of land does not deprive a bankrupt from claiming a homestead exemption therein where the land has been reconveyed to or recovered by the trustee.[23]

§ 17. *Death of bankrupt pending proceedings.*[24]—Proceedings in bankruptcy do not abate by the death of the alleged bankrupt after the filing of the petition and before adjudication.[25] Where the bankrupt dies pending the bankruptcy proceedings, the widow's right to dower is governed entirely by the local law,[26] and,

11, 12. In re Pattee, 143 F. 994.

13. Failed to pay light bill in time to get discount. In re Pattee, 143 F. 994.

14. In re Zier & Co. [C. C. A.] 142 F. 102. Attorneys held not entitled to any fee where by antagonizing bankruptcy proceedings they caused as much detriment as they had previous good, and their belief that they were within their legal rights and that the state court had priority of jurisdiction is immaterial. Id.

15, 16. See 5 C. L. 399.

17. Facts held to show that bankrupt had concealed property, and under law of Pennsylvania was not entitled to exemption. In re Alex, 141 F. 483. The good faith required of a debtor by Code Ga. 1895, § 2830, to entitle him to his homestead exemption is in making a full and fair disclosure of his property, and a court of bankruptcy is not justified in denying his exemption because of his fraud in other respects. In re Castleberry, 143 F. 1018. The intention of congress portrayed and the public policy embodied in the bankruptcy law is to divide the estate of the bankrupt between him, his wife and children on the one hand, and his creditors on the other in the same way that the laws of the state permitted its division under similar circumstances. In re McKenzie [C. C. A.] 142 F. 383.

As to what property is exempt, see Exemptions, 5 C. L. 1400; Homesteads, 5 C. L. 1689.

18. In re Hartsell & Son, 140 F. 30; In re Castleberry, 143 F. 1018. Where the exemption is claimed in money in the hands of the trustee, upon which a creditor claims an equitable lien superior to the exemption right, the bankruptcy court can merely set aside the exemption and direct the trustee to withhold the fund until proceedings to determine the right thereto can be instituted in a court of competent jurisdiction. In re Castleberry, 143 F. 1018. Has no authority to hold it in custody to await determination of action in tort brought against bankrupt in a state court. In re Hartsell & Son, 140 F. 30.

19. In re Owings, 140 F. 739.

20. In re Kaufmann, 142 F. 898.

21. May be permitted to amend his schedules and claim his exemption from the proceeds of the estate. In re Berman, 140 F. 761. So held where bankrupt asked his attorney who said nothing, and bankrupt was ignorant of the law. In re Kaufmann, 142 F. 898. A claim of exemption may be allowed if perfected after the adjudication and within the time allowed by the state law, and the court, in its discretion, may allow the claim to be made by amendment after the original schedule has been filed. In re Fisher, 142 F. 205. Homestead exemption under Code Va. 1904, § 3642, where deed was made and recorded after filing of schedules. Id.

22. North Carolina. Property acquired by bankrupt falsely representing himself as agent for another. In re Woolcott, 140 F. 460.

23. In re Thompson, 140 F. 257.

24. See 5 C. L. 400.

25. In re Spalding [C. C. A.] 139 F. 244.

26. In re McKenzie [C. C. A.] 142 F. 383. Widow held entitled to dower rights in proceeds of sales of realty made without her

in those states where dower is limited to property whereof the husband died seized and possessed, the widow of a bankrupt who dies after the adjudication, election of trustee, and the taking possession by the latter, is not entitled to dower in the property passing to the trustee.[27]

§ 18. *Referees, proceedings before them, and review thereof.*[28]—The word "herein" as used in the Act of 1898, § 38a, cl. 4, which, with stated exceptions, authorizes referees to perform such part of the duties conferred on courts of bankruptcy as shall be prescribed by their rules and orders "except as herein otherwise provided, refers to the entire act including the general orders[29] and consequently a referee has no jurisdiction to grant an injunction staying proceedings of a court or officer of the United States or of a state,[30] though it would seem that he has authority to issue injunctions to any party not an officer of the United States or of a state, unless the injunction stays the proceedings of the court;[31] but where, in an application for an injunction, the parties submit the issue between them to the referee, it may be regarded as having been referred to him by the court in the first instance.[32] A referee may set aside an adjudication of bankruptcy and dismiss the petition.[33] Hearings before a referee in bankruptcy are within the rule that a party may attend a judicial hearing away from the place of his residence without being subjected to the service of process.[34] The referee, in taking testimony, is required to have it taken down, preferably in narrative form, and an objection being raised, to require the question, the objection and the reason thereof, to be clearly but briefly noted; then enter his ruling thereon, and then though he rule the question to be improper, allow it to be answered.[35] He is not required to stop the proceedings before him and to certify to the court for decision questions raised on objections to evidence.[36] In a case where a referee believes a witness to be in contempt for any reason, it is his duty to set forth the contempt upon his record, certifying the facts to the district judge who will then deal with the question as if the contempt had originally arisen in his court.[37]

Referees in their hearings within the scope of their power are clothed with the authority of judges, and their orders and decrees are to be reviewed, reversed, or annulled under the same rules and conditions as to those governing other courts of equity, subject always to the express provisions of the bankruptcy act.[38] Consequently a petition filed before a referee to review an order previously entered by him after a hearing is in the nature of a bill of review in equity and governed by the same rules of procedure.[39] It can only be filed for error at law upon the face of the decree or because of the discovery of some new evidence since the hearing, and when on the latter ground, it can only be filed by express leave, and the evidence relied on must be relevant, material and such as would have produced a different result, and it must have been unknown to the petitioner at the time of the

consent where bankrupt died after adjudication but before distribution. Kirby's Ark. Dig. § 2687. Id.

27. So held as to personalty under Kirby's Dig. Ark. § 2708. In re McKenzie [C. C. A.] 142 F. 383.

28. See 5 C. L. 400.

29, 30. In re Berkowitz, 143 F. 598.

31. See In re Stener, 5 Am. Bankr. Rep. 214, 104 F. 980; In re Berkowitz, 143 F. 598 (Dicta in both cases). It is doubtful whether a referee can award an injunction. In re Benjamin, 140 F. 320 [dicta].

32. In re Benjamin, 140 F. 320.

33. Texas & P. R. Co. v. McNairy [Tex. Civ. App.] 15 Tex. Ct. Rep. 666, 94 S. W. 111.

34. Morrow v. Dudley & Co., 144 F. 441.

35. Bank of Ravenswood v. Johnson [C. C. A.] 143 F. 463. It is the duty of the referee to receive all evidence which is offered, to note objection and to record the evidence; if immaterial or irrelevant testimony is introduced, the remedy of the other party is by applying to the court to deal with the same. Gen. Order No. 22 considered. In re Sturgeon [C. C. A.] 139 F. 668.

36, 37. Bank of Ravenswood v. Johnson [C. C. A.] 143 F. 463.

hearing and such as he could not have known by the exercise of due diligence.[40] In the absence of a rule of court on the subject, a petition for review need only be filed within a reasonable time.[41] A district court in reviewing an order or report of a referee may properly consider any point presented by the record before it, whether such point was or was not discussed before or by the referee;[42] but where an order is certified for review by the referee, the court cannot review subsequent orders on the same motion.[43] A defect in the petitioners to an application to review an order of a referee may be removed by a preliminary order adding other and qualified persons.[44] Proceedings before and by a referee are presumed to have been in accordance with the orders prescribed by the court of bankruptcy in the district,[45] and the referee's findings are presumptively correct and are reviewable only when there has been manifest error in the consideration given the evidence or in the application of the law.[46]

§ 19. *Modification and vacation of orders of bankruptcy court.*[47]

§ 20. *Appeal and review in bankruptcy cases.*[48]—Bankruptcy proceedings are equitable in their nature.[49] While there are many decisions holding the contrary,[50] the trend of the decisions seems to be that the grant of jurisdiction to the circuit courts of appeals to review by appeal the final decision of a controversy arising in bankruptcy proceedings of which the court would have had appellate jurisdiction if it had arisen in any other case in a Federal court and the grant of jurisdiction to revise and superintend in matter of law the proceedings of inferior courts of bankruptcy are cumulative and concurrent grants, the former of jurisdiction to review questions of law and of fact, the latter of jurisdiction to review questions of law only,[51] unless the finding of the lower court is so wholly unjustified on the proofs as would require the appellate court, on a writ of error, to set aside a verdict of a jury for want of any evidence whatever to sustain it, or for some other reason kindred thereto,[52] and the opinion of the trial court may be looked to for the purpose of ascertaining what propositions of law were determined.[53] In a proper case an aggrieved party has the option to review the controverted facts and the law which condition an order by appeal, or to review the law only by petition for revision.[54] No matter which view is taken, the distinction between "proceedings

38, 39, 40. In re McIntire, 142 F. 593.

41. Three months' delay held unreasonable. In re Grant, 143 F. 661.

42. In re Samuel Wilde's Sons [C. C. A.] 144 F. 972.

43. Ellis v. Krulewitch [C. C. A.] 141 F. 954.

44. So held where preliminary order was made by consent of all parties in interest. Allgair v. Fisher & Co. [C. C. A.] 143 F. 962.

45. Texas & P. R. Co. v. McNairy [Tex. Civ. App.] 15 Tex. Ct. Rep. 666, 94 S. W. 111.

46. Chicago Motor Vehicle Co. v. American Oak Leather Co. [C. C. A.] 141 F. 518. Findings of fact made by a referee upon the conflicting testimony of witnesses examined before him have every reasonable presumption in their favor, and should not be set aside or modified unless it clearly appears that there was error or mistake on his part. Southern Pine Co. v. Savannah Trust Co. [C. C. A.] 141 F. 802.

47. See 5 C. L. 402.

48. See 5 C. L. 402.

Review of referee's report, see, also, ante, § 18.

49. Ellis v. Krulewitch [C. C. A.] 141 F. 954; In re Holmes [C. C. A.] 142 F. 391.

50. The remedies for reviewing matters in bankruptcy by appeal and petition for revision are mutually exclusive, and an appeal erroneously taken cannot be treated as a petition for review. Dickas v. Barnes [C. C. A.] 140 F. 849. See, also, In re Mertens [C. C. A.] 142 F. 445; Davidson & Co. v. Friedman [C. C. A.] 140 F. 853.

51. In re McKenzie [C. C. A.] 142 F. 383; In re Holmes [C. C. A.] 142 F. 391. On petition to superintend and revise only questions of law can be reviewed. Samel v. Dodd [C. C. A.] 142 F. 68; Ellis v. Krulewitch [C. C. A.] 141 F. 954.

52. In re Cole [C. C. A.] 144 F. 392.

53. Samel v. Dodd [C. C. A.] 142 F. 68.

54. In re Holmes [C. C. A.] 142 F. 391; In re McKenzie [C. C. A.] 142 F. 383. A decision of a controversy in bankruptcy proceedings which involves a widow's right of dower in the estate of the bankrupt presents a case of this character. Id. Controversy over the title and property of the estate of the bankrupt between the trustee and mortgagee. In re Holmes [C. C. A.] 142 F. 391. A secured creditor selling his security and filing a claim for the balance due, an order disallowing such claim and directing a resale at public auction is one reject-

in bankruptcy"[55] and "controversies at law or in equity in the course of bankruptcy proceedings"[56] is still important. An adjudication in bankruptcy may be reviewed on appeal though only questions of law are presented for review.[57] An order setting aside a sale and ordering a resale is not reviewable on petition to superintend and revise until after the resale has been made and confirmed.[58] An appeal from a territorial district court, in a matter of bankruptcy, will lie to the territorial supreme court only: (1) From a judgment adjudging or refusing to adjudge the defendant a bankrupt; (2) from a judgment granting or denying a discharge; and (3) from a judgment allowing or rejecting a debt of $500 or over.[59] An appeal from an adjudication of bankruptcy must be taken within ten days after the order is filed with the clerk,[60] and the time cannot be extended by the subsequent entry of an alias adjudication.[61] In the absence of a rule of court on the subject, a petition of review need only be filed within a reasonable time,[62] but a petition for the revision in matter of law of an appealable order or judgment must be presented within the time fixed by the bankruptcy law for the appeal.[63] While the court has power to grant a rehearing after the expiration of the time for appeal and for the purpose of reviving the right of appeal it should not do so unless clearly warranted by the facts in the case.[64] An appeal must be allowed by the judge of the court appealed from or by the court appealed to,[65] and the bond must be approved by the judge, and authority to approve it cannot be delegated to the clerk of the court.[66] It is the duty of the circuit court of appeals, sua sponte, to take notice of want of jurisdiction if the same appears by the record.[67] The assignment of errors must point out the particular errors complained of;[68] but failing to so do it may be amended.[69] A petition to review proceedings in matters of law must set out the facts or findings of fact on which the matters of law sought to be reviewed arise.[70] The failure to incorporate any evidence in the record on appeal from the adjudica-

ing the claim and is appealable under § 25, and reviewable under § 24. In re Martens [C. C. A.] 144 F. 818.

Note: In some cases the party supposing himself aggrieved has both appealed and filed a petition for review and it has been held that an appeal may be treated as a petition for review when only a question of law is presented (Chesapeake Shoe Co. v. Seldner [C. C. A.] 122 F. 593); but this cannot be done where questions of fact and law are both involved in the appeal (In re Whitener [C. C. A.] 105 F. 180).—From Steiner v. Marshall [C. C. A.] 140 F. 710.

55. An order of the bankruptcy court requiring a bankrupt to assign and turn over to his trustee certain life insurance policies as property of his estate is a mere step in the bankruptcy proceedings proper and reviewable only on petition for revision in matter of law. In re Mertens [C. C. A.] 142 F. 445. Orders requiring members of a bankrupt partnership to schedule and surrender their individual property are made in the course of the administration of the estate and are reviewable only on petition to revise. Dickas v. Barnes [C. C. A.] 140 F. 849. An order allowing counsel fees to the trustee is an administrative order and can be reviewed only by a petition to superintend and revise. Appeal dismissed. Davidson & Co. v. Friedman [C. C. A.] 140 F. 853.

56. Controversy arising over the title and property of the estate of the bankrupt between the trustee and a mortgagee, a party adverse to the trustee and the bankrupt. In re Holmes [C. C. A.] 142 F. 391. A petition filed in the court of bankruptcy in the nature of a bill in equity to establish the right of the petitioner to the possession of certain property claimed by the trustee and to enjoin the trustee from interfering with such possession presents a controversy arising in the course of bankruptcy proceedings. Security Warehousing Co. v. Hand [C. C. A.] 143 F. 32.

57. Taft Co. v. Century Sav. Bank [C. C. A.] 141 F. 369.

58. West Virginia practice considered. Sturgiss v. Corbin [C. C. A.] 141 F. 1.

59. In re McCasland & Leftwich [Okl.] 85 P. 1118.

60, 61. In re Berkebile [C. C. A.] 144 F. 577.

62. Three months' delay held unreasonable. In re Grant, 143 F. 661.

63. In re Holmes [C. C. A.] 142 F. 391.

64. In re Hudson Clothing Co., 140 F. 49. Rehearing of adjudication denied where there was no ground for a rehearing on the merits and counsel had failed to have testimony reported though warned by the court on the hearing. Id.

65, 66. In re Black Diamond Copper Min. Co. [Ariz.] 85 P. 656.

67. Taft Co. v. Century Sav. Bank [C. C. A.] 141 F. 369.

68, 69. Flickinger v. First Nat. Bank [C. C. A.] 145 F. 162.

70. Steiner v. Marshall [C. C. A.] 140 F. 710.

tion in bankruptcy is not ground for dismissal where it does not appear from the record that any evidence was taken.[71] The fact that the bankrupt's appeal bond runs only to the original petitioners, and does not name other creditors who by intervention joined in the petition, does not affect its sufficiency.[72] The certificate of a state court of last resort may serve to elucidate the determination whether a Federal question exists.[73] The bankruptcy court deciding a question over which it and the state courts have concurrent jurisdiction, an aggrieved party's remedy is by appeal.[74] The general rules as to the conclusiveness of the findings of a special master [75] and against the urging of matters for the first time on appeal [76] apply.

§ 21. *Trustee's bonds; actions thereon.*[77]

§ 22. *Discharge of bankrupt; its effect and how availed of. A. Procedure to obtain discharge and vacation thereof.*[78]—A petition for a discharge being dismissed for want of prosecution and a motion to reinstate the same being overruled, the bankrupt is in the same position as if the petition had not been filed in time,[79] and hence the matter becomes res judicata and he cannot by any subsequent proceedings secure a discharge from the debts provable in the former proceedings.[80]

The specifications of objection [81] should distinctly allege the particular grounds relied upon to defeat the discharge so as to advise the bankrupt of the grounds relied upon, in order that he may be prepared to meet the same, and the court of the issue to be tried,[82] and should also allege facts showing that the party filing the specification will be affected by the discharge and is therefore interested in defeating the same.[83] An objection to a bankrupt's discharge is a proceeding analogous to that of collecting a debt,[84] hence all the joint owners of a claim must join in a specification of objection.[85] The specification of objections must be sworn to,[86] but an omission to verify it may be cured by amendment.[87]

Evidence and burden of proof.[88]—The bankrupt is entitled to his discharge unless his commission of one of the specified offenses is established by due proof,[89] the burden of proof resting on the objector.[90]

(§ 22) *B. Grounds for a refusal.*[91]—A discharge in bankruptcy is an act of grace and there is nothing analogous between a law preventing a discharge because of an act done before the law was passed and an ex post facto law.[92] A discharge

71. Taft Co. v. Century Sav. Bank [C. C. A.] 141 F. 369.

72. Flickinger v. First Nat. Bank [C. C. A.] 145 F. 162.

73. So held suit by trustee to recover an alleged preference. Rector v. City Deposit Bank Co., 200 U. S. 405, 50 Law. Ed. —.

74. And not by motion in the state court. Fees of sheriff levying on property of a debtor of one who is afterwards declared a bankrupt. Johnson v. Woodend, 44 Misc. 524, 90 N. Y. S. 43.

75. The findings of a special master while not as conclusive as the findings of a jury or trial judge sitting as a jury are very persuasive and will not be disturbed by the court if there is substantial testimony to sustain them and they do not appear to be influenced by any mistaken conclusions of law. In re Harr, 143 F. 421.

76. A bankrupt's trustee held not entitled to urge for the first time on appeal an absence of the bankrupt's liability on certain notes indorsed by it, because of the absence of proof of presentment for payment at maturity and protest. Love v. Export Storage Co. [C. C. A.] 143 F. 1.

77. See 3 C. L. 487.

78. See 5 C. L. 405.

79, 80. In re Kuffler, 144 F. 445.

81. See 5 C. L. 406.

82. In re Servis, 140 F. 222.

83. In re Servis, 140 F. 222. Specification showing that bankrupt obtained property from objector by false pretenses and false representations held insufficient as the discharge would not release the bankrupt from liability therefor. Id.

84. In re Hendrick, 143 F. 647.

85. Where a partnership which had proved a claim against a bankrupt estate was dissolved pending the proceedings, without any disposition of the claim being made as between the partners, no one of them can thereafter maintain objections to the bankrupt's discharge without showing affirmatively that all assented to the action. In re Hendrick, 143 F. 647.

86, 87. In re Meurer, 144 F. 445.

88. See 5 C. L. 406.

89. In re Eades [C. C. A.] 143 F. 293.

90. In re Eades [C. C. A.] 143 F. 293; In re Jacobs, 144 F. 868.

91. See 5 C. L. 406.

92. Amendment of Feb. 5, 1903, making the obtaining of property on credit upon a

will not be withheld at the instance of a creditor whose claim will not be barred.[93] In order that a former discharge should be "within six years" so as to defeat the right to a second discharge in subsequent proceedings, it must have been granted within six years before the time when the second decree is under consideration and about to be entered.[94]

Commission of an offense.[95]—The verification by a bankrupt of an answer containing a false statement of fact does not constitute the making of a false oath in the proceeding, which deprives him of the right to a discharge, where the answer was filed after the time allowed by the bankruptcy act and was not considered.[96] Cases dealing with the sufficiency of the evidence are shown in the notes.[97]

Destruction of or failure to keep books of account.[98]—Cases dealing with the sufficiency of the evidence are shown in the notes.[99]

Obtaining property upon false statements.[1]—Since the amendment of 1903, the fact that the bankrupt obtained property on credit by means of false statements is ground for denying him a discharge,[2] and the law applies to all cases where application for discharge is made after the amendment took effect although the false statements may have been made before.[3] And the rule applies where by means of the statement credit is obtained by a corporation of which the bankrupt owned a majority of the stock.[4] The statement must be the basis of the credit,[5] but it is not essential that the person to whom the statements were made be a creditor at the time of the institution of the bankruptcy proceedings.[6] The statement being made by a partner in the course of the partnership business, it affects all the partners.[7] The right to oppose the discharge on this ground is not limited to the creditor defrauded, but may be properly pleaded by any creditor of the bankrupt.[8] Cases dealing with the sufficiency of the evidence are shown in the notes.[9]

Concealment or transfer of property.[10]—One transferring his property within four months of the filing of the petition, with intent to hinder, delay, or defraud any of his creditors, is not entitled to a discharge.[11] The fraud must be actual as

materially false statement in writing ground for refusing a discharge construed. In re Desser & Co., 144 F. 318.

93. In re Hartsell & Son, 140 F. 30. Where a judgment obtained within four months of the filing of the petition in bankruptcy may be enforced on property set aside by the bankruptcy court as exempt regardless of the bankruptcy proceedings, the bankrupt's discharge will not be withheld until the enforcement of such judgment. Georgia rule considered. In re Weaver, 144 F. 229.

94. In re Jordan, 142 F. 292.

95. See 5 C. L. 407.

96. In re Young, 140 F. 728.

97. Evidence held to show that bankrupt had committed an offense punishable by imprisonment in the making of a false oath in the verification of a motion filed in bankruptcy proceedings. In re Young, 140 F. 728.

98. See 5 C. L. 407.

99. Evidence held insufficient to show that bankrupt concealed certain books of account with intent to conceal his financial condition, where uncontradicted testimony of bankrupt showed that he left such books in his office subject to the trustee's control and that they were not material to the ascertainment of his financial condition. In re Eades [C. C. A.] 143 F. 293.

1. See 5 C. L. 407.

2. See 5 C. L. 407, n. 87.

3, 4. In re Dresser & Co., 144 F. 318.

5. Discharge granted where credit was refused on the statement but was subsequently given on other security. In re Kaplan, 141 F. 463.

6. In re Harr, 143 F. 421.

7. A materially false statement in writing made by a partner in the ordinary course of business of the partnership in buying merchandise, for the purpose of obtaining goods on credit and upon which they were obtained by the firm affects all the partners and bars another partner from a discharge although he had no knowledge of the fraud. In re Hardie & Co., 143 F. 607, distinguished In re Schultz, 109 F. 264.

8. In re Harr, 143 F. 421.

9. Evidence held sufficient to show that bankrupt obtained property on credit from the seller on a materially false statement in writing made for the purpose of obtaining property on credit. In re Harr, 143 F. 421.

10. See 5 C. L. 407.

11. See 5 C. L. 407, n. 91. A mere attempt to hinder and delay creditors, by a conveyance of property made some years before the bankruptcy of the grantor, is not sufficient to sustain an objection to his discharge based on the ground of his concealment of the property. In re Jacobs, 144 F. 868.

distinguished from constructive,[12] consequently a mere preferential payment made by the bankrupt with intent to prefer, but fraudulent in no other sense,[13] is insufficient to bar the discharge.[14] The transfer must have been a valid one.[15] Cases dealing with the sufficiency of the evidence are shown in the notes.[16]

(§ 22) *C. Liabilities released, and use of discharge.*[17]—A discharge in bankruptcy releases a bankrupt from all his provable debts except, among others, liabilities for willful and malicious injuries to the person or property of another,[18] or for obtaining property by false pretenses or false representations,[19] or for maintenance or support of wife or child,[20] or were created by his fraud, embezzlement, misappropriation or defalcation while acting as an officer or in any fiduciary capacity,[21] or were not duly scheduled in time for proof and allowance,[22] with the name of the creditor if known to the bankrupt, unless such creditor had notice or

12. In re Maher, 144 F. 503.

13. Payments made for the purpose of indueing the creditor to supply material with whieh to enable the bankrupts to continue their business held not fraudulent they not reducing the assets available to ereditors but operating to prevent an earlier withdrawal of credit on whieh the bankrupts were relying. In re Maher, 144 F. 503.

14. In re Maher, 144 F. 503.

15. Agreement by bankrupt to transfer property to wife to defraud creditors held not to bar discharge. such contract being void by reason of lack of power to contract with each other, under the state law and not being accompanied by any actual transfer or removal of the property. In re Brown, 140 F. 383.

16. Evidenee held to show a transfer while insolvent, and within four months prior to the filing of the petition, with intent to hinder, delay, and defraud ereditors. In re Young, 140 F. 728. Evidence held insuffieient to establish concealment of property the proof showing a conveyance of heavily incumbered property by the bankrupt to his sons some three years prior to his bankruptey, the conveyanee having been duly recorded and it not appearing that the bankrupt retained any beneficial interest in the property. In re Jaeobs, 144 F. 868.

17. See 5 C. L. 408.

18. No release from a judgment for assault and battery, false imprisonment, and malicious prosecution, though the acts which were the basis of such judgment were not malevolent in faet, they being willful and malicious in law. McChristal v. Clisbee [Mass.] 76 N. E 511. A judgment against a landlord for a personal injury inflicted by a vieious dog owned by a tenant and kept on the leased premises is not one for a "willful and malicious injury to the person," but is based on negligenee only and the debt is released by defendant's discharge. In re Lorde, 144 F. 320.

19. An obligation created by obtaining property by oral false pretenses is not released. Katzenstein v. Reid, Murdock & Co. [Tex. Civ. App.] 91 S. W. 360.

20. This clause refers only to the involuntary liability under the eommon law for support of wife and children, and to any one who relieves their want; it does not refer to liabilities for goods purehased by a husband or parent and used by wife or ehild. Sehellenberg v. Mullaney, 98 N. Y. S. 432. The provision of the act excepting from the debts released by the diseharge "liabilities * * * for maintenance or support of wife or ehild" does not apply to a debt for medical attendance furnished to the wife or child of the bankrupt at his request and while the normal family relations subsist between him and the recipient of his services. In re Ostrander, 139 F. 592. The court says: "The provision" (Act 1898, § 17a, as amended by Aet 1903) "has probable application to eases where the person applying for discharge from his debts had so betrayed his moral and legal duty as a husband or parent that another was justified in providing the maintenanee and support denied by the one upon whom the law places the primary duty." Id.

21. A debt ereated by the fraud of a bankrupt acting in his individual eapaeity not having been redueed to judgment is released by his discharge. Jewett Bros. & Jewett v. Bentson [S. D.] 105 N. W. 173. Indebtedness created by the embezzlement and misappropriation of the funds of a bank by its vice-president held created while acting in a fiduciary capacity. Harper v. Rankin [C. C. A.] 141 F. 626. Mere confidence reposed in the punetuality and integrity of a person with whom one has commercial transactions is not the fiduciary relation covered by the excepting portion of the bankruptcy act. Stockbroker embezzling stock placed in his hands for sale. Barrett v. Prince [C. C. A.] 143 F. 302. A creditor of an insolvent receiving security by a transaction construetively fraudulent, his indebtedness to the other judgment creditors of his debtor, evideneed by a judgment against him in a creditors' suit is not one created by his fraud while acting in a fiduciary eapacity. In re Adler [C. C. A.] 144 F. 659.

Unreversed judgment by a court having jurisdiction that defendant while an officer of a bank embezzled its funds is conclusive of the character of the indebtedness upon an issue as to whether the debt is one from which such defendant would be released by a diseharge in bankruptcy. Harper v. Rankin [C. C. A.] 141 F. 626.

22. In re Boom, 48 Misc. 632, 96 N. Y. S. 215; In re Boom, 48 Misc. 632. 96 N. Y. S. 204. Where creditor, whose name was J. J. H. had no knowledge of proceedings held a sehedule referring to the creditor as J. H. & Wife and using ditto marks when refer-

actual knowledge of the proceedings in bankruptcy.[23] Under the express provision of the bankruptcy act the liability of a person who is a co-debtor with, or a guarantor or a surety for, the bankrupt is not altered by the discharge,[24] but the discharge releases debtor's sureties on bail bond given to secure judgment discharged by the bankruptcy discharge.[25] The discharge does not release property owned by the bankrupt, and standing in the name of a third person, at the time of the bankruptcy proceedings.[26] A suit by a judgment creditor to set aside a fraudulent conveyance is not barred by the debtor's discharge in bankruptcy during the pendency of the suit.[27] A discharge in bankruptcy is prima facie evidence of a release from all provable debts,[28] and the burden is on one attacking the discharge to show cause why he should not be bound by it.[29] As regards debts not released by the discharge, the right is not limited to creditors who have not proved their claims nor accepted the dividends paid by the bankruptcy court,[30] hence the fact that the claimant proves his claim will not bar a subsequent recovery upon his claim is not being released by the discharge.[31] The discharge to be available as a defense must be pleaded [32] together with the facts showing jurisdiction in the bankruptcy court of the parties and the subject-matter [33] or there must be some equivalent allegation [34] such as defendant was "duly adjudged" as bankrupt.[35] The effect of a discharge is generally left to be determined by the court where it is pleaded.[36] Where a creditor proves his claim and successfully resists a discharge but upon notice fails to intervene in subsequent bankruptcy proceedings wherein the debtor is given a discharge from all his debts, a state court will not enforce such creditor's claim.[37] One filing a petition in bankruptcy during the pendency of an action against him does not lose

ring to the residence held claim not barred. Haack v. Theise, 99 N. Y. S. 905.

23. There must be actual notice or actual knowledge either by the creditor or his duly authorized agent in the bankruptcy proceedings. Strickland v. Capital City Mills [S. C.] 54 S. E. 220. Notice to attorney employed to represent creditor in a suit or a claim in a state court held insufficient. Id. Notice to one of two owners of a judgment is not notice to his co-owner. Id. Before a creditor can be deprived of his remedy to enforce his debt by the discharge, he should receive notice of some kind or have actual knowledge of the proceedings in time to participate therein. Broadway Trust Co. v. Manheim, 47 Misc. 415, 95 N. Y. S. 93. The fact that a bankrupt inadvertently failed to include in the schedule of his liabilities a certain creditor as the owner of a note, but listed the note in the name of the original payee, will not prevent the bankrupt's discharge from operating against such creditor, if he had notice or actual knowledge of the bankruptcy proceedings. Id. The creditor having actual notice, he is bound by the discharge though the notice was sent him at an address where he did not reside or have a place of business. Kaufman v. Schreier, 108 App. Div. 298, 95 N. Y. S. 729. Held error to exclude evidence of knowledge. Alling v. Straka, 118 Ill. App. 184.

24. Act 1898, § 16. A surety on a poor debtor's recognizance is not discharged by the subsequent adjudication of the debtor as a bankrupt. Carpenter v. Goddard [Mass.] 76 N. E. 953. The liability of a surety on a poor debtor's recognizance as fixed by Rev. Laws, c. 168, § 66, providing that the execution in an action on a poor debtor's recognizance shall not issue for less than the amount due on the original judgment, with cost and damages cannot be reduced to nominal damages by reason of the debtor's subsequent discharge as a bankrupt. Id. A wife is not discharged from liability on a judgment rendered against herself and her husband by the latter's discharge in bankruptcy. Love v. McGill [Tex. Civ. App.] 91 S. W. 246. Discharge of a lessee held not to release from liability persons who contracted to pay rent in consideration of lease to bankrupt. Dersch v. Walker [Ky.] 89 S. W. 233.

25. Hurd's Sev. St. 1901, § 24, c. 16, construed. Keyes v. Bennett, 218 Ill. 625, 75 N. E. 1075. Issuance and return of a ca. so. on the judgment after the discharge does not fix the liability of bail to the action. Id.

26. McLeod's Trustee v. McLeod [Ky.] 89 S. W. 199.

27. Bunch v. Smith [Tenn.] 93 S. W. 80.

28. Hence not necessary for defendant to show that debt sued on was scheduled in bankruptcy. Alling v. Straka, 118 Ill. App. 184.

29. Broadway Trust Co. v. Manheim, 47 Misc. 415, 95 N. Y. S. 93. Claim that debt was not scheduled. Alling v. Straka, 118 Ill. App. 184.

30, 31. Katzenstein v. Reid, Murdock & Co. [Tex. Civ. App.] 91 S. W. 360.

32. Broadway Trust Co. v. Manheim, 47 Misc. 415, 95 N. Y. S. 93; Lovell & Co. v. Sneed [Ark.] 95 S. W. 157.

33, 34, 35. Broadway Trust Co. v. Manheim, 47 Misc. 415, 95 N. Y. S. 93.

36, 37. Bluthenthal v. Jones [Fla.] 41 So. 533.

his right to plead his discharge by failing to ask for a stay of proceedings in the action, pending the result of such petition,[38] and the action being dismissed prior to his discharge he is entitled to notice, in order to give him an opportunity to plead his discharge, on the setting aside of the dismissal and the prosecution of the action to judgment,[39] and an action brought on such judgment in a foreign jurisdiction will not, under such circumstances, be maintainable.[40]

If, subsequent to the discharge, the former bankrupt promises to pay a released debt as soon as he is able, such promise is enforceable,[41] but in order to recover thereon it is necessary for plaintiff to show that defendant is able to pay.[42] And in such a case, defendant is entitled to show what portion of his earnings is necessary for the support of himself and family, and if the residue is insufficient to pay the debt, ability to pay is not established.[43]

§ 23. *Amendment, reopening, grounds, and effect.*[44]—Where a petition for revocation of a bankrupt's discharge is answered and the matter referred to a referee, the latter may refuse to proceed until the petitioners advance the costs of the hearing and if they refuse to so do the petition will be dismissed for want of prosecution at the cost of the petitioners.[45]

§ 24. *Crimes and offenses against the bankruptcy law.*[46]

BASTARDS.

§ 1. Legal Elements and Evidence of Illegitimacy (430).
§ 2. Rights and Duties of and in Respect to Bastards (430).
§ 3. Procedure to Ascertain Paternity and Compel Support (431). Judgment and Bond (433). An Indictment for Failure to Support (434). Contracts and Bonds for Support (434).
§ 4. Legitimation, Recognition, Adoption (434).

§ 1. *Legal elements and evidence of illegitimacy.*[47]—The law presumes every child to be legitimate [48] and the burden of disproving it rests upon the party attacking.[49] Declarations of the mother's family as to the legitimacy of children are admissible upon the issue.[50] Where the establishment of a marriage will bastardize the issue of a subsequent marriage, it must be established to a moral certainty.[51] On an issue of legitimation by subsequent marriage, every fact relevant to the existence and validity of such marriage is proper evidence.[52]

§ 2. *Rights and duties of and in respect to bastards.*[53]—While the father of an illegitimate child is not entitled in law to his services,[54] it seems that where he assumes and discharges the duties of a parent, he becomes entitled thereto while the relation continues,[55] and where the child lives with the father in ignorance of its true relation, all services rendered will be presumed to be gratuitous.[56] The right to recover for the wrongful killing of a bastard is disputed.[57]

38, 39, 40. Karrick v. Wetmore, 25 App. D. C. 415.
41. Kraus v. Torry [Ala.] 40 So. 956.
42. Proof of ability to borrow the money is insufficient. Kraus v. Torry [Ala.] 40 So. 956.
43. Kraus v. Torry [Ala.] 40 So. 956.
44. See 5 C. L. 411.
45. So held where referee required a deposit of $100. In re Lasch, 142 F. 277.
46. See 5 C. L. 412.
47. See 5 C. L. 412.
48. Bowman v. Little, 101 Md. 273, 61 A. 1084.
49. Evidence held insufficient to overcome the presumption. In re Kelly's Estate, 46 Misc. 541, 95 N. Y. S. 57.
50. In re Kelly's Estate, 46 Misc. 541, 95 N. Y. S. 57.
51. Bowman v. Little, 101 Md. 273, 61 A. 1084.
52. See Nelson v. Hunter [N. C.] 53 S. E. 439. See, also, Marriage, 6 C. L. 515.
53. See 5 C. L. 412.
54, 55, 56. Williams v. Halford [S. C.] 53 S. E. 88.
57. Note: It has several times been held that because in the eye of the law he had no kin no recovery for the wrongful killing of an illegitimate child could be had under the Lord Campbell's acts. Dickinson v. Railroad, 2 H. & C. 734; McDonald v. Railroad Co., 144 Ind. 459, 55 Am. St. Rep. 185, 32 L. R. A. 309. See, also, McDonald v. South-

At common law an illegitimate child was incapable of being the heir to any one,[58] nor could a legitimate child inherit from an illegitimate brother.[59] In North Carolina the statute merely legitimatizes slave children [60] enabling them to inherit from both parents,[61] but not from collaterals,[62] nor can a legitimatized child inherit through an illegitimate mother from lineals or collaterals.[63] The provision that illegitimates shall be considered legitimates as between themselves and representatives and their estates shall descend accordingly does not apply except where they have the same mother.[64] By statute in Indiana the children of a deceased illegitimate child who has been acknowledged, inherit from the grand parent if he leaves no legitimate issue.[65] In many states legitimated children inherit from their parents,[66] but in others, the child must be acknowledged.[67] Where an acknowledgment is essential to the capacity to inherit, usually the acknowledgment of the relation merely and not of the right to inherit is meant.[68] and it must be unequivocal and direct.[69] While it is for the jury to determine whether there was an acknowledgment, an instruction stating what acts and words would constitute an acknowledgment is proper.[70] On application of one of the parents, the court should designate an institution to receive a bastard child in lieu of the institution previously judicially designated pursuant to an agreement.[71]

§ 3. *Procedure to ascertain paternity and compel support.*[72]—In some states bastardy proceedings is said to be a civil action [73] and not criminal,[74] but must be prosecuted in the name of the state [75] and for the benefit of the illegitimate child.[76]

Jurisdiction.[77]—All prosecutions for bastardy must, in Indiana, originate before a justice of the peace.[78]

Abatement.[79]

ern R. Co. [S. C.] 51 S. E. 138. Other cases hold the affirmative (Muhl v. Railroad Co., 10 Ohio St. 272), especially where the statutes confer inheritable capacity on bastards or their natural kin. Marshall v. Railroad Co., 120 Mo. 275; Security, etc., Co. v. Railway Co., 91 Ill. App. 332. But see Robinson v. Railroad Co., 117 Ga. 168, 97 Am. St. Rep. 156, 60 L. R. A. 555. Since the parents are preferably to third persons entitled to custody of bastards and since because of the obligation to support a bastard may sue under the Civil Damage acts (See 3 C. L. 498, n. 50, 51) it would seem that the right to sue for the bastard's death ought to be recognized unless the wrongful death statutes will clearly admit of no such construction.

58. Miller v. Pennington, 218 Ill. 220, 75 N. E. 919.

59. Applied to the distribution of the estate of an illegitimate slave child as against a subsequent legitimate child of the father by another woman. Johnson v. Shepherd [Ala.] 39 So. 223.

60, 61, 62, 63. Bettis v. Avery [N. C.] 52 S. E. 584.

64. Code § 1281, rules 9, 10, 13. Legitimate child held not to inherit from the son of her father's illegitimate slave sister. Bettis v. Avery [N. C.] 52 S. E. 584.

65. The words "illegitimate child or children" as used in Burns' Ann. St. 1901, § 2630a, construed to include grandchildren. Morin v. Holliday [Ind. App.] 77 N. E. 861.

66. Rev. St. § 2173. Davenport v. Davenport [Ia.] 41 So. 240.

67. Hurd's Rev. St. 1899, c. 39, § 3, p. 653. Oral acknowledgment is sufficient. Miller v. Pennington, 218 Ill. 220, 75 N. E. 919. Immaterial that the child was the result of adulterous intercourse. Id. The purpose of the acknowledgment is immaterial, nor is the right of inheritance affected by subsequent declarations. Id.

68. Hence under Burns' Ann. St. 1901, § 2630, it is immaterial that the statute was passed subsequent to the acknowledgment. Townsend v. Meneley [Ind. App.] 76 N. E. 321; Daggy v. Wells [Ind. App.] 76 N. E. 524.

69. A note containing the following words: "Take good care of our boy, and call him Thomas Moore, and I will give him a good start some day," is insufficient under § 31, c. 23, Comp. St. 1903 (Cobbey's Ann. St. 1903, § 4931). Moore v. Flack [Neb.] 108 N. W. 143.

70. Daggy v. Wells [Ind. App.] 76 N. E. 524.

71. Especially where the designated institution refused to receive the child and the other parent makes no objection to the one named in the application. People v. Stringer, 97 N. Y. S. 40.

72. See 5 C. L. 413.

73. Gooding v. State [Ind. App.] 78 N. E. 257.

74. State v. Morgan [N. C.] 53 S. E. 142. See 5 C. L. 413, n. 17, that it is neither civil nor criminal.

75, 76. Gooding v. State [Ind. App.] 78 N. E. 257.

77. See 5 C. L. 414.

78. Gooding v. State [Ind. App.] 78 N. E. 257.

79. See 5 C. L. 414.

Dismissal and new action.—In Indiana while the state is a party to the proceeding, the prosecuting witness, if an adult, may under the statute dismiss the action,[80] and such a dismissal and a judgment rendered thereon constitute a complete bar to another action.[81] But to be a defense, the state must have been a bona fide party to the action,[82] and evidence that the prosecuting attorney had no knowledge of such proceeding is admissible to disprove that the state was a party.[83] Where a dismissal was fraudulently obtained,[84] a return of money given in consideration thereof is not a condition precedent to a new action.[85]

Trial procedure; pleading; indictment.[86]—Where the complaint is made before the birth of the alleged bastard child, the mother must be unmarried at the time of making it;[87] but if made after delivery, she must have been unmarried at the time of birth.[88] While in Maine it is primarily for the court to determine whether the preliminary statutory requirements have been complied with, by practice it has been left to the jury.[89] Where the relatrix testified in chief that she went to a certain place where her child was born, it is proper on cross-examination to inquire how and with whom she went.[90] The admission of evidence of access in rebuttal is within the discretion of the court where a denial on defendant's part could not reasonably have been anticipated.[91] It is not error to allow prosecutrix to carry the child with her to the witness stand.[92]

Evidence; presumptions; sufficiency of proof.[93]—The original complaint and the magistrate's record is admissible to show compliance with the preliminary statutory requirements in Maine.[94] The alleged bastard child is admissible in evidence to show the resemblance between it and the defendant.[95] Under statute in some states a married woman is a competent witness to prove nonaccess of the husband,[96] and while she need not be corroborated,[97] the credibility to be given to her testimony is for the jury.[98] Acts of relatrix inconsistent with her testimony that defendant

80. Burns' Ann. St. 1901, § 1006. Gooding v. State [Ind. App.] 78 N. E. 257.

81. Gooding v. State [Ind App.] 78 N. E. 257.

82. Where a dismissal is executed in a suit fraudulently commenced by defendant without the knowledge of the state, it is void and no defense. Gooding v. State [Ind. App. 78 N. E. 257.

83. Gooding v. State [Ind. App.] 78 N. E. 257.

84. Where fraud is alleged, evidence of the relationship of the parties is admissible. Gooding v. State [Ind. App.] 78 N. E. 257.

85. Especially where such dismissal was obtained in an action to which the state was not a party. Gooding v. State [Ind. App.] 78 N. E. 257.

86. See 5 C. L. 414.

87, 88. Alminowicz v. People, 117 Ill. App. 415.

89. Proper accusation has been filed, etc. McLaughlin v. Joy, 100 Me. 517, 62 A. 348.

90. But not as to who made arrangements, paid the expenses, etc. Zimmerman v. People, 117 Ill. App. 54.

91. As where defendant denied that he was present at relatrix's home when the intercourse was alleged to have taken place. Eckhardt v. People, 116 Ill. App. 408.

92. Benes v. People, 121 Ill. App. 103.

93. See 5 C. L. 415.

94. McLaughlin v. Joy, 100 Me. 517, 62 A. 348.

95. A child nearly a year old. Higley v. Bostick [Conn.] 63 A. 786.

Note: The admissibility of the child to inspect resemblance has been often allowed. Gilmanton v. Haw, 38 N. H. 108; Scott v. Donovan, 153 Mass. 378; State v. Woodruff, 67 N. C. 89; Shailer v. Bullock [Conn.] 61 A. 65. But there are cases to the contrary (Esch v. Graue [Neb.] 101 N. W. 978; Clark v. Bradstreet, 80 Me. 454, 6 Am. St. Rep. 221; Hanawalt v. State, 64 Wis. 84). Especially where the child is very young and the resemblance not developed. Esch v. Graue [Neb.] 101 N. W. 978; State v. Smith, 54 Iowa, 104, 37 Am. Rep. 192; State v. Danforth, 48 Iowa, 331. And see Johnson v. Walker, 86 Miss. 757, 39 So. 49. The admissibility of the child to show facial characteristics is said to be settled. Danford v. Guy, 23 Ark. 50; Bryan v. Walton, 20 Ga. 480; Warlick v. White, 76 N. C. 175. A witness cannot testify that there is a resemblance. McCalman v. State, 121 Ga. 491, 49 S. E. 609.

96. Burns' Ann. St. 1901, §§ 990, 992. Evans v. State [Ind.] 75 N. E. 651. The legislature by carrying Rev. St. 1852, p. 485, pt. 4, c. 3, §§ 1, 3, after it had been construed as making a married woman a competent witness to testify to the nonaccess of the husband, over into Rev. St. 1881, §§ 978, 980, held to have adopted such construction. Id.

97. Evans v. State [Ind.] 75 N. E. 651.

98. Evans v. State [Ind.] 75 N. E. 651. Evidence held sufficient to prove nonaccess of the husband. Id.

is the father of the child are admissible.[99] Evidence of intercourse with other men not within the period when conception must have taken place is inadmissible,[1] and where defendant has shown facts which might raise an inference of intercourse with a third person, evidence tending to rebut such inference is admissible.[2] While an offer by way of compromise is not admissible against the defendant, admissions of independent facts made in an effort to settle may be shown.[3] Evidence which tends to prove that defendant could not have had intercourse with the relatrix at the time and place charged is admissible.[4] In weighing defendant's testimony, the jury may consider his interest.[5] The fact that relatrix was unmarried at the time of making the complaint need not be proven directly.[6] In most states only a preponderance of the evidence is necessary in bastardy proceedings to establish guilt.[7] Where defendant's paternity must be established beyond a reasonable doubt, proof of intercourse with a third party during the period when conception may have taken place is fatal to a prosecution.[8] Instructions should conform to the evidence,[9] and not be misleading.[10]

Judgment and bond.[11] *Commitment and discharge.*—Where an order required the father to support an illegitimate child at an institution designated by the court, the court in selecting the institution could not require the father to give securities for such support.[12]

Where defendant is discharged on appeal from an order of filiation because the child is still-born, costs incurred below cannot be assessed against the appellee.[13] By statute, a judgment for costs on appeal should be rendered against the appellant and her sureties jointly, where the appeal terminates in favor of appellee.[14] In some states the adjudged father of a bastard child may be imprisoned for noncompliance with a judgment requiring him to pay costs, support the child, and give bond therefor,[15] and a statute authorizing such imprisonment is not unconstitutional as imprisoning for debt.[16] Being a civil action, a putative father committed for nonpayment of costs is not subject to the same provisions as those committed in criminal actions,[17] and though the discharge of putative fathers from imprison-

99. As that another man took her to another city and made arrangements for her to remain until the birth of her child, paying her expenses, etc. Zimmerman v. People, 117 Ill. App. 54.

1. Zimmerman v. People, 117 Ill. App. 54.

2. As a gift of underwear to the relatrix, raising the inference that he had discovered her need while unlawfully familiar, may be rebutted by proof of similar gifts to other members of the family. Leek v. People, 118 Ill. App. 514.

3. Alminowicz v. People, 117 Ill. App. 415.

4. As evidence that defendant was confined to his bed with illness when the child must have been begotten. Commonwealth v. Pearl, 29 Pa. Super. Ct. 307; Jones v. People, 116 Ill. App. 64. Evidence held to be insufficient to establish an alibi. Eckhardt v. People, 116 Ill. App. 408.

5. Eckhardt v. People, 116 Ill. App. 408.

6. May be inferred from facts in evidence. Alminowicz v. People, 117 Ill. App. 415.

7. Preponderance is not necessarily determined by the number of witnesses on each side. Alminowicz v. People, 117 Ill. App. 415. Evidence held insufficient to show defendant's paternity as the birth of the child occurred within too short a period after his only opportunity of access. Matteson v. People, 122 Ill. App. 66.

8. Evidence held to show such intercourse. Busse v. State [Wis.] 108 N. W. 64. Evidence insufficient to sustain a conviction. Id.

9. Not error to refuse an instruction where there is no evidence calling for such an instruction. Eckhardt v. People, 116 Ill. App. 408.

10. An instruction that if the evidence of relatrix and defendant are in direct conflict, you are not to say that it is evenly balanced, is misleading as it might be so balanced. Leek v. People, 118 Ill. App. 514. An instruction to the general effect that if the testimony of relatrix and defendant are in direct conflict and both are equally credible and neither was corroborated more than the other, the evidence is balanced, held not proper. Id.

11. See 5 C. L. 415.

12. People v. Stringer, 97 N. Y. S. 40.

13. Code Cr. Proc. § 873, relating to costs when the appeal terminates in appellant's favor, has no application. Burnham v. Tryon, 98 N. Y. S. 600.

14. Code 1892, §§ 250, 85. Norton v. Wicker [Miss.] 39 So. 809.

15. Revisal 1905, § 262. State v. Morgan [N. C.] 53 S. E. 142.

16. State v. Morgan [N. C.] 53 S. E. 142.

17. Cannot be compelled to work on the public roads under Revisal 1905, §§ 1352,

ment be regulated by a statute embracing also imprisonment for nonpayment of fines and criminal costs, yet conditions attached only to the latter classes do not apply to the former.[18] And it seems where such commitment is wrongfully continued, a habeas corpus proceeding is more appropriate than a petition to be discharged.[19] Where the court erroneously discharges defendant from an undertaking which as a fact he never gave, it may vacate its order,[20] though an appeal has been taken.[21]

An indictment for failure to support an illegitimate child need not allege a prior adjudication of the paternity,[22] nor is such record admissible [23] or essential to a valid conviction.[24]

Contracts and bonds for support.[25]

§ 4. *Legitimation, recognition, adoption.*[26]—In Illinois the marriage of the parents legitimatizes the issue.[27] By statute in North Carolina, children born before January 1st, 1868, of negro parents living together as husband and wife are legitimate though they were illegitimate when born.[28] Where a child has once been legitimatized by the marriage of the parents, subsequent acts of the parents do not affect the status of the child.[29] Slave marriages legalized under the acts relating thereto became legal ab initio, and acting retrospectively, legitimated all offspring.[30] In some states legitimation may be affected, except in certain cases, by an acknowledgment before a notary,[31] and it is not necessary that the act of acknowledgment show that the case is not one of the excepted.[32] Whether the act was one of legitimation or a mere acknowledgment is determined by the intent as manifested by the act.[33]

BENEFICIAL ASSOCIATIONS; BENEFICIARIES; BETTERMENTS, see latest topical index.

BETTING AND GAMING.

§ 1. Offense and Criminal Prosecution (434).
A. The Offense (434). Validity of Regulations (435). Cards and Other Table Games (435). Racing and Race Tracks (436). Slot Machines (436). Dealing in Futures (436). Guessing Contests (436). Gaming at Public Place (436). Keeping a Gaming Place (437).
B. Indictment or Information and Trial Procedure (438).
§ 2. Penalties and Seizure of Implements; Injunction (439).
§ 3. Recovery Back of Money Lost (440).

Gambling contracts [34] and lotteries [35] are treated elsewhere.

§ 1. *The offense and criminal prosecutions. A. The offense.*[36]—Gambling is the playing of a game of chance or skill for money or other stakes, or betting on

1355, which is applicable only to criminal actions. State v. Morgan [N. C.] 53 S. E. 142.

18, 19. State v. Morgan [N. C.] 53 S. E. 142.

20, 21. Burnham v. Tryon, 98 N. Y. S. 600.

22. Rev. St. 3140—2, does not require such an adjudication as a condition of guilt. Ogg v. State [Ohio] 75 N. E. 943.

23, 24. Ogg v. State [Ohio] 75 N. E. 943.

25, 26. See 5 C. L. 416.

27. Hurd's Rev. St. 1899, p. 205, c. 17, § 15. Miller v. Pennington, 218 Ill. 220, 75 N. E. 919.

28. Code § 1281, rule 13. Bettis v. Avery [N. C.] 52 S. E. 584.

29. Where a slave marriage became legalized by virtue of the relation continuing until the Act of March 10, 1866 (Laws 1866, p 99, c. 401), went into effect, the subsequent abandonment of the wife did not affect the status of the children. Nelson v. Hunter [N. C.] 53 S. E. 439.

30. Act of March 10, 1866 (Laws 1866, p. 99, c. 40). Nelson v. Hunter [N. C.] 53 S. E. 439.

31. Civ. Code 1900, art 200. Davenport v. Davenport [La.] 41 So. 240.

32. Burden of proving such fact rests upon the party attacking the legitimation. Davenport v. Davenport [La.] 41 So. 240.

33. Where a father declares that he acknowledges the child and "does hereby legitimate him," and further that he wishes him to inherit as if born in lawful wedlock, the act is one of legitimation, though he further declares that he does "hereby legitimate said child" as is contemplated by a certain statute, which statute relates solely to acknowledgments. Davenport v. Davenport [La.] 41 So. 240.

34. See Gambling Contracts, 5 C. L. 1571.

35. See Lotteries, 6 C. L. 487.

36. See 5 C. L. 417.

the result of a game.[37] One who bets on the result of a game may be guilty of gaming though he be not a player.[38] An ordinance reading "whoever shall gamble" is broad enough to cover lay as well as professional gamblers.[39] Under statutes prohibiting gambling with minors it is no defense that the accused was ignorant that the gaming party was a minor.[40] A statute authorizing a civil action for the recovery of property lost at gaming does not affect the criminal remedy of the state though it provides that such civil action shall constitute the exclusive penalty for the acts specified.[41]

Validity of regulations.[42]—The legislature may confer upon municipalities power to pass ordinances for the suppression of gambling games of all kinds, including those not specially penalized by the statutes of the state.[43] Municipalities authorized to pass ordinances for the suppression of immoral behavior or conduct calculated to disturb the peace and dignity of the place may pass ordinances for the punishment of gambling.[44] A statute empowering cities to suppress billiard tables passed at a time when that term included pool tables authorizes the suppression of the latter.[45] Licenses authorizing gaming confer no such vested contract or property rights as equity will protect by enjoining prosecutions under the gambling law [46] but may be modified, revoked, or continued at the pleasure of the state.[47]

Cards and other table games.[48]—Draw poker is gambling.[49] Statutes in some states prohibit card playing at any place except a private residence occupied by a family,[50] and card playing accompanied by a bet or wager at such a residence which is commonly resorted to for the purpose of gaming.[51] In Texas it is no offense to play a game of dice at a private residence.[52]

37. Card playing without evidence of betting for money or other valuable thing did not authorize conviction for gambling. Fleming v. State [Ga.] 53 S. E. 579. That witness called it "gambling" was a mere conclusion. Id. That defendant was caught in act of playing by three officers who saw him engage in play and take and put down stakes held sufficient to establish offense of engaging in game of chance and hazard. Goslin v. Com. [Ky.] 90 S. W. 223. To gamble is "to play or game for money or other stakes." City of Shreveport v. Bowen [La.] 40 So. 859.

38. Instruction that if defendant played or bet for money contrary to the state law he would be guilty held not erroneous. Groves v. State, 123 Ga. 570, 51 S. E. 627.

39. City of Lake Charles v. Roy [La.] 40 So. 362.

40. Rev. St. 1899, § 2193. Quo warranto against corporation. State v. Delmar Jockey Club [Mo.] 92 S. W. 185. But under Ky. St. 1903, § 1972, prohibiting one from knowingly allowing a minor to play a game on a billiard table owned or controlled by him, it must appear that accused knew that the player was a minor. Commonwealth v. Wills [Ky.] 89 S. W. 144.

41. In re Opinion of the Justices [N. H.] 63 A. 505. Laws 1905, p. 648, c. 232, creating the "New England Breeders' Club" and authorizing it to hold races, offer purses, etc., but requiring it to prohibit betting on races and authorizing a civil action for the recovery of money or property wagered, did not authorize the corporation to allow betting on horse races on its grounds, though the act provided that such action should be the exclusive penalty for the acts specified, but such acts still remained criminal. Id.

42. See 5 C. L. 418.

43. Such as poker. City of Lake Charles v. Roy [La.] 40 So. 362.

44. In Kentucky cities of the fourth class so authorized may suppress gaming. White v. Com. [Ky.] 92 S. W. 285.

45. Gen. St. 1901, § 1129, empowering cities to suppress billiard tables enacted while that term included tables substantially the same as pool tables at the present time. City of Clearwater v. Bowman [Kan.] 82 P. 526. Must be construed in light of the approved usage of words at the time of its enactment. Id.

46, 47. Littleton v. Burgess [Wyo.] 82 P. 864.

48. See 5 C. L. 418.

49. City of Shreveport v. Bowen [La.] 40 So. 859.

50. Where a house was occupied only by two boys, 17 and 15 years old, the rest of the family having moved away, gaming was not authorized there as at a private residence occupied by a family. McCollum v. State [Tex. Cr. App.] 92 S. W. 848. Evidence insufficient to sustain conviction of playing game of cards. Hale v. State [Tex. Cr. App.] 90 S. W. 654. Evidence insufficient to support conviction for card playing or betting. Ables v. State [Tex. Cr. App.] 92 S. W. 414. Evidence insufficient to support conviction of gaming with cards. Berry v. State [Tex. Cr. App.] 85 S. W. 14.

51. The playing of cards at a private residence occupied by a family and commonly resorted to for the purpose of gaming is not an offense unless accompanied by a bet or wager. Under Pen. Code, arts. 379, 381, as amended by Acts 27th Leg. p. 26, c. 22. Gallegos v. State [Tex. Cr. App.] 95 S. W. 123. To sustain a conviction for playing cards at

Racing and race tracks.[53]—Gaming includes horse racing;[54] and pool selling, book making, or betting upon horse races, is generally considered gambling.[55] Pool selling and book making[56] and the operation of pool rooms[57] are generally prohibited. Where offers are made and bets received and paid within the state, it is no defense to a prosecution for operating a pool room, that they are telegraphed to a confederate out of the state.[58] Authority to conduct the business of pool selling and bookmaking does not include the right to transact such business with minors contrary to statute.[59]

Slot machines.[60]—The operation of slot machines is gambling though the operator cannot lose, provided the element of chance is still present.[61]

Dealing in futures where delivery is not intended is gambling.[62]

Guessing contests are generally considered within the statutes prohibiting lotteries and schemes of chance.[63]

Gaming at public place.[64]—An ordinance imposing a penalty on inmates or frequenters of gambling houses is a reasonable exercise of the police power and valid.[65] Any place made public by the assemblage of people is a public place within the meaning of statutes prohibiting gaming at public places.[66] Thus any place is a

a private residence it must be shown that the place was commonly resorted to for that purpose. Handy v. State [Tex. Cr. App.] 92 S. W. 848. Defendant could not be convicted for gaming in his private residence on proof of only one playing and no evidence that the place was commonly resorted to for the purpose of gaming. Spencer v. State [Tex. Cr. App.] 92 S. W. 847. Perjury could not be predicated on false testimony given before grand jury, where indictment therefor did not allege that there was any bet or wager in the offense investigated. Gallegos v. State [Tex. Cr. App.] 95 S. W. 123. Whether accused had seen certain parties play was not the material inquiry before the grand jury as it was no offense to see them play. Id.

52. Waggoner v. State [Tex. Cr. App.] 92 S. W. 38.

53. See 5 C. L. 419.

54. In re Opinion of the Justices [N. H.] 63 A. 505.

55. Within Pub. St. 1901, c. 270, § 6, prohibiting gambling places. In re Opinion of the Justices [N. H.] 63 A. 505.

56. Act March 21, 1905 (Laws 1905, p. 131), "prohibiting book-making and pool-selling" not unconstitutional in that title contains more than one subject. State v. Delmar Jockey Club [Mo.] 92 S. W. 185.

57. Act No. 128, p. 292, of 1904, providing for the suppression of "pool rooms," declaring their operation to be gambling and providing punishment, is not unconstitutional or inoperative for failing to define the crime denounced. State v. Rhodes [La.] 39 So. 972; State v. Rabb [La.] 39 So. 971. Not unconstitutional or inoperative for obscurity in defining "pool room." State v. Maloney [La.] 39 So. 539. Statutes must be construed with reference to the evil sought to be remedied and the popular signification of terms of whose meaning the court will take notice. Id. The words "pool room" and "turf exchange" are used synonymously. State v. Rabb [La.] 39 So. 971. "Pool room" in Act 128, p. 292, of 1904, and "turf exchanges" in Act 127, p. 291, of 1904, held to mean rooms or places where gambling or betting on horse races is carried on. State v. Maloney [La.] 39 So. 539. That the offense was committed at a cigar store was not incompatible with the idea that the pool room was kept in that cigar store, the question being one of fact. State v. Rabb [La.] 39 So. 971.

58. Pool room away from tracks within state. State v. Maloney [La.] 39 So. 539.

59. State v. Delmar Jockey Club [Mo.] 92 S. W. 185.

60. See 5 C. L. 419.

61. Maintenance and operation of slot machine giving at least five cents, and possibly more, in trade for a nickel, violated Liquor Law 1896, p. 66, c. 112, § 23, subd. 7, prohibiting gambling in a saloon. In re Cullinan, 99 N. Y. S. 1097. Criticizing and comparing Cullinan v. Hosmer, 100 App. Div. 148, 91 N. Y. S. 607.

62. Evidence sufficient to sustain conviction of gambling in cotton futures. Barnes v. State [Ark.] 91 S. W. 10. See, also, Gambling Contracts, 5 C. L. 1571.

63. See, also, Lotteries, 6 C. L. 487. A contest by which part of a newspaper subscription was paid for the privilege of guessing on votes cast at an election, the nearest guesser to receive a portion of the fund created by the contributions was unlawful within the statute of Ohio prohibiting lotteries and schemes of chance. Stevens v. Cincinnati Times-Star Co., 72 Ohio St. 112, 73 N. E. 1058.

64. See 5 C. L. 419.

65. Lane v. Springfield, 120 Ill. App. 5. Ordinance imposing penalty on one "found" in such house is not unreasonable. Flynn v. Springfield, 120 Ill. App. 266.

66. Ferrell v. Opelika [Ala.] 39 So. 249. The word "public" in requested instruction as to what would constitute a public place, held confusing and authorized refusal of charge. Id. Gambling ordinance remained in force after change from district to city of Opelika and adoption of new charter Feb. 20, 21, 1899. Id.

public one where the parties can be seen from the highway,[67] though only by careful observers,[68] but to make the place a private one it is not necessary that it should be entirely shut off from all view.[69] A boarding house is not per se a public place.[70] When the evidence tends to show that a dwelling is used for other than private purposes and as a resort by those who would indulge in gaming, the question of its being a public place is for the jury.[71]

Keeping a gaming place.[72]—Statutes generally prohibit the keeping of gaming places,[73] and all persons concerned therein are held equally guilty.[74] The offenses of keeping and maintaining a gambling house and of being an inmate or frequenter of such a house are separate and distinct and separate penalties imposed by ordinance for each may be collected in the same action from one person.[75] The setting up [76] or exhibiting,[77] of gambling devices [78] or permitting gambling to be conducted [79] on one's premises,[80] or on premises under one's control [81] or in his possession,[82] is generally prohibited by statute. Knowingly renting premises for gaming purposes

67. Error to charge that if the place where cards were played was within seventy-five yards from a certain public road and could be seen therefrom, it was a public place. The question was whether the parties who were playing cards and not the place where they played could be seen from the highway. Brannon v. State [Ala.] 39 So. 983.

68. Where accused bet on a game of cards in the daytime within fifteen steps from public road and the game and betting were seen from the road, the place was public though the playing and betting might have been seen only by careful observers. Davis v. State [Ala.] 41 So. 404.

69. A place in a private yard shut out of view from the public highway was not a public place. Walker v. State [Ala.] 41 So. 176. It was not necessary that the place should be completely surrounded by obstructions. It was sufficient that the view was shut off from the public road. Id.

70. Walker v. State [Ala.] 41 So. 176. That place where cards were played was in yard of a boarding house did not make it public in absence of proof that any other game had ever been played there. Id.

71. Ferrell v. Opelika [Ala.] 39 So. 249.

72. See 5 C. L. 419.

73. Evidence held sufficient to support a general verdict of guilty on three counts, viz., keeping a gaming house, keeping a gaming table, and gaming. Groves v. State, 123 Ga. 570, 51 S. E. 627. Evidence held sufficient to sustain a conviction for unlawfully keeping a gambling house. State v. Hoyle [Minn.] 107 N. W. 1130.

74. Held not error to instruct that if accused loaned money to another for purpose of maintaining gaming house and thereafter visited the house and did anything toward keeping and maintaining such house so kept and maintained for gaming he would be guilty equally with such other person "inasmuch as keeping and maintaining a gaming house in Georgia is a misdemeanor and all persons concerned in such keeping and maintaining are principals." Groves v. State, 123 Ga. 570, 51 S. E. 627.

75. Lane v. Springfield, 120 Ill. App. 5.

76. Conviction for setting up gambling devices held proper on the evidence. City of Mexico v. Harris, 115 Mo. App. 707, 92 S. W. 505.

77. Evidence held to sustain conviction for exhibiting gaming table though there was no positive testimony that defendant knew that games of chance were being played upon the pool table. Moore v. State [Tex. Cr. App.] 92 S. W. 1083. Evidence insufficient to sustain conviction for exhibiting a gaming table in that accused was not in charge of the pool table or pool hall. Moore v. State [Tex. Cr. App.] 92 S. W. 1082. One who conducts a pool room does not exhibit a gaming table and bank merely because certain parties frequent the room and bet the table fees unless he knows of the custom and permits it. Berry v. State [Tex. Cr. App.] 92 S. W. 1081.

78. Dice is a gambling devise within Burns' Ann. St. 1901, § 2181, prohibiting the keeping or exhibiting for gain of any gambling device, etc., "of any kind or description under any name or denomination whatever," and is not excluded by the rule ejusdem generis. White v. State [Ind. App.] 76 N. E. 554.

79. Under Ky. St. 1903, § 1967, prohibiting one from permitting the games mentioned in section 1960, to be conducted on one's premises, one may be indicted for permitting the game of craps to be conducted, and the indictment need not state that the game was permitted for compensation, percentage, or commission. Herr v. Com. [Ky.] 91 S. W. 666.

80. Evidence sufficient to support conviction for permitting game of craps to be conducted on defendant's premises contrary to Ky. St. 1903, § 1967. Herr v. Com. [Ky.] 91 S. W. 666.

81. Where defendant rented the third floor of a house to others for bed rooms, evidence of gaming on that floor on only one occasion held insufficient to convict for permitting gaming in house under his control, his testimony excluding the idea that he was aware of such gaming. Brown v. State [Tex. Cr. App.] 93 S. W. 723.

82. An ordinance against any person setting up or permitting to be set up, gambling devices in premises owned by him or in his possession is directed not only against an owner or proprietor but also against a mere occupant. City of Mexico v. Harris, 115 Mo. App. 707, 92 S. W. 505.

is also frequently prohibited,[83] but one who does not rent premises for gaming purposes is under no obligation to discover the use to which they are subsequently put.[84]

(§ 1) *B. Indictment or information and trial procedure.*[85]—The language of the statute sufficiently states the offense charged though other matters are necessarily included.[86] An indictment charging different ways of committing the same offense is not objectionable as a misjoinder of distinct causes.[87] An accusation of playing and betting "at a game played with cards" need not set out the name of the game.[88] A charge that defendant bet and wagered need not aver that money or something of value was bet or wagered,[89] and an indictment for renting a house for gaming need not state the name of the tenant.[90] Indictments in the alternative are generally held bad.[91] On an indictment charging defendants with having played a game together, evidence of a joint game is necessary for conviction.[92] An indictment charging betting at a game of dice and permitting dice to be played on one's premises does not justify a conviction for exhibiting a banking game.[93] Where a case is tried on affidavit, the state is not bound to rely for conviction on the game the witness had in mind when he made the affidavit.[94]

That a certain place is maintained as a gambling house may be shown by the general reputation of the place,[95] by the reputation of its inmates and frequenters as professional gamblers,[96] and by gambling paraphernalia found at the place.[97] A place not being per se a public one, proof of other games played there is admissible to show that it was a public place.[98] Where guilty knowledge is the gist of the offense anything showing the existence of such knowledge is admissible in evidence, it being immaterial when or from what source such knowledge was acquired.[99] The court will take judicial notice of the meaning of the term pool room.[1] Other applications of the ordinary rules of evidence [2] and instructions [3] in criminal cases are given in the notes.

83. Bashinski v. State, 123 Ga. 508, 51 S. E. 499. But if, at the time of renting, the circumstances were such as to charge him with notice that the premises were being or would be used for gaming the jury is authorized to find that he had knowledge that the premises would be so used. Id.

84. Instruction criticized. Bashinski v. State, 123 Ga. 508, 51 S. E. 499.

85. See 5 C. L. 420.

86. Information under Rev. St. 1899, § 439, for permitting minor to play on gaming table was sufficient, though name of defendant had to be stated therein. State v. Bell, 115 Mo. App. 13, 90 S. W. 757.

87. Penal Code 1895, § 398, penalizing the keeping of a gaming house or renting a house for gaming defines but a single offense committable in any of the three ways therein designated so that an indictment of two counts, one charging the keeping of a gaming house and the other a renting for gaming did not misjoin distinct offenses. Bashinski v. State, 123 Ga. 508, 51 S. E. 499.

88. Demurrer without merit. Slade v. State [Ga.] 54 S. E. 750.

89. Handy v. State [Tex. Cr. App.] 92 S. W. 848.

90. Bashinski v. State, 123 Ga. 508, 51 S. E. 499.

91. Accusation charging that accused did "unlawfully play and bet for money or other valuable thing at a game of skin or other game played with cards," bad as against special demurrer. Haley v. State [Ga.] 52 S. E. 159. Statement of court that he would confine state to proof of bet of money at game of skin did not cure. Id. Indictment that accused bet at a "gaming table or bank" held bad though the words "to wit, a pool table" followed. Taylor v. State [Tex. Cr. App.] 95 S. W. 119.

92. Reno v. State [Miss.] 41 So. 7.

93. Waggoner v. State [Tex. Cr. App.] 92 S. W. 38.

94. Winston v. State [Ala.] 41 So. 174.

95, 96. State v. Hoyle [Minn.] 107 N. W. 1130.

97. Not inadmissible because officers forced their way into room. State v. Hoyle [Minn.] 107 N. W. 1130.

98. Boarding house. Winston v. State [Ala.] 41 So. 174.

99. In prosecution for renting premises for gaming, evidence that defendants' alleged tenant had been a professional gambler for longer than period of limitations, held admissible. Bashinski v. State, 123 Ga. 508, 51 S. E. 499.

1. State v. Maloney [La.] 39 So. 539.

2. Testimony that defendant was lessee of the premises during period within which it was alleged gaming was carried on in the house, admissible to show his control over the premises. Bashinski v. State, 123 Ga. 508, 51 S. E. 499. Evidence of prior conviction of similar offense or pendency of a like indictment, offered by state, was incompetent and hurtful. Id. In prosecution for setting up gambling devices, evidence of complaint against, and plea of guilty by, defendant in a previous prosecution for gam-

A conviction for gaming is not a bar to a subsequent prosecution for setting up a gambling device.[4] A constitutional provision making a conviction under a municipal ordinance a bar to further prosecution for the same offense, applies to convictions for gaming.[5] The minimum punishment for gaming may be fixed by one statute and the maximum by another.[6] Where the statute authorizes a city to punish the violation of its ordinances by fine only, a clause in an ordinance providing either a fine or imprisonment for gambling is not entirely void, but the part relating to imprisonment may be treated as surplusage.[7]

§ 2. *Penalties and seizure of implements; injunction.*[8]—The complaint in a civil action to recover a penalty for violating a municipal ordinance prohibiting the setting up and keeping of gaming devices is sufficient if it notifies defendant of the ordinance violated, and is definite enough to bar another prosecution for the same offense.[9] The continuous operation of a gambling house authorizes the imposition of but one penalty under an ordinance imposing a penalty upon any one setting up, keeping, or maintaining such a house.[10] Statutes authorizing the seizure and destruction of gaming devices are generally considered constitutional and embrace devices which may be used for other than gaming purposes.[11] A state recognizing

bling based on the same transaction, held competent to show that a certain table produced in evidence was used as a gambling device. City of Mexico v. Harris, 115 Mo. App. 707, 92 S. W. 505. Indefiniteness of question as to other games played cured by answer of witness showing time within which they must have been played. Winston v. State [Ala.] 41 So. 174. "This gambling took place the same night E. was killed at C.'s" was prejudicial where not admitted for purpose of showing when alleged gambling occurred. Fleming v. State [Ga.] 53 S. E. 579.

3. Defendant was not prejudiced by the omission of the word "with" in the instruction. "This is a prosecution charging defendant—keeping and exhibiting a gambling device." White v. State [Ind. App.] 76 N. E. 554.

4. City of Mexico v. Harris, 115 Mo. App. 707, 92 S. W. 505.

5. Under Const. § 168, there could be no prosecution in the circuit court for an offense of gaming for which defendant had been convicted in the police court of a city of the fourth class. White v. Com. [Ky.] 92 S. W. 285.

6. In Idaho the Anti-Gambling Act (Sess. Laws 1899, p. 389), merely fixes the minimum punishment for gambling at a fine of not less than $200 or imprisonment in the county jail for not less than four months, the maximum being fixed by § 6313, Rev. St. 1887, at $300 fine and six months imprisonment, so that upon a conviction under the Anti-Gambling Act, the court could impose both a fine of $250 and imprisonment for three months. In re Burgess [Idaho] 84 P. 1059.

7. City of Clearwater v. Bowman [Kan.] 82 P. 526.

8. See 3 C. L. 505.

9. Sufficient. City of Mexico v. Harris, 115 Mo. App. 707, 92 S. W. 505. Immaterial whether complaint conformed to affidavit on which it purported to be based as statute did not require it to be supported by affidavit. Id.

10. Lane v. Springfield, 120 Ill. App. 5.

11. Furth v. State, 72 Ark. 161, 78 S. W. 759. Sand. & H. Dig. §§ 1618, 1619, not void for uncertainty or ambiguity. Id. Willson Act 1901, p. 114, did not repeal it. Id.

NOTE. Right to seize gambling devices: Gambling apparatus is subject to summary seizure and detention or destruction under the police power: Board of Police Com'rs v. Wagner, 93 Md. 182, 86 Am. St. Rep. 423, 52 L. R. A. 775; Frost v. People, 193 Ill. 635, 86 Am. St. Rep. 352. However, if property may be used for legal as well as for gambling purposes, it seems that the police have no authority to seize it as a preventive measure, unless it is first established that the property was procured or held for an illegal purpose: Wagner v. Upshur, 95 Md. 519, 93 Am. St. Rep. 412. In Kite v. People, 32 Colo. 5, 74 P. 886, a statute providing for the summary seizure and destruction of gambling devices is upheld as constitutional. The opinion of the court reads, in part, as follows: "The specific objections now urged are, first, that the foregoing statute is unconstitutional in that it violates section 25 of aricle 2 of our constitution, which provides that no person shall be deprived of life, liberty, or property without due process of law in the respect that no provision for a jury trial is made; and, second, that, inasmuch as this wheel might have been used for some other purpose than for gambling, and the intervener Assmussen, as the mortgagee, though leaving it in the possession of the mortgagor, was not aware of its use for an illegal purpose, and did not knowingly permit of, or give his consent to, such use, the destruction as to him is illegal. Since the defendant made no demand for a jury, but consented to a hearing by the judge, we might very properly hold that he cannot be heard here to say that he was deprived of the right to a jury trial. But there is a much more satisfactory way to decide the point. The right of trial by jury does not apply to this proceeding. As was said in McInerney v. Denver, 17 Colo. 302, 313, 29 P. 516: 'Though a particular offense

the validity of a statute authorizing pool selling by a corporation is estopped to forfeit its franchise for so doing.[12]

In Texas the habitual use, actual or threatened, of any premises for the purpose of gaming, may be restrained by injunction at the suit of the state or any citizen thereof.[13]

§ 3. *Recovery back of money lost.*[14]—In the absence of statute, money advanced for the purpose of gaming cannot be recovered,[15] but one who does not participate in a gambling transaction may recover money advanced to the loser after the gambling has taken place for the purpose of enabling him to pay the gambling debt.[16] So, too, one may recover money lost on a pretended wager where the loss is due to a fraudulent conspiracy on the part of the other participants.[17] Statutes have been passed in most jurisdictions authorizing a civil action in the name of the

may have been unknown to the common or statutory law before the adoption of our constitution, yet if it clearly belongs to a class of offenses that were theretofore not triable by jury, the constitutional guaranties relating to jury trials do not apply.' Under similar statutes in other states the doctrine has been firmly established that the proceeding provided for in the foregoing section is in rem, that it is summary, and the constitutional right to a jury trial does not exist: Glennon v. Britton, 155 Ill. 232, 40 N. E. 594; Frost v. People, 193 Ill. 635, 86 Am. St. Rep. 352; Oppenheimer v. Lalor, 36 Misc. Rep. 546, 73 N. Y. S. 948; Commercial Ins. Co. v. Scammon, 123 Ill. 601, 14 N. E. 666; Davidson v. New Orleans, 96 U. S. 97, 24 Law. Ed. 616; Waples' Proceedings in Rem, §§ 23, 24, 65, 68, 72, 110, 140, 231, 238; Lawton v. Steele, 152 U. S. 133, 38 Law. Ed. 385; 2 State and Federal Control of Persons and Prop. p. 826. In Frost v. People, 193 Ill. 635, 86 Am. St. Rep. 352, speaking of a statute much like ours, the court said: 'Trial by jury was never a right in summary proceedings, and the legislature did not violate the constitution by providing that gaming implements and apparatus should be destroyed, after a hearing, under the direction of the judge, justice or court.' This observation has our approval. The record shows that this wheel was not only used for gambling purposes, but such was the only use to which it could reasonably be devoted. It was purchased with that distinct object in view, was so used, and for no other purpose. When it was left by the mortgagee in the possession of the mortgagor, it was known that the latter might, if he saw fit, continue to use it, as he had theretofore, for the purposes inhibited by the statute. The fact that Assmussen, the mortgagee, did not expressly, or otherwise, give his consent that the mortgagor might use it for gambling purposes, and that the mortgagee did not permit, or know of, such use, is not material. According to the decided weight of authority, it is held to be the duty of the person owning or having property that might be put to illegal uses to see that it is not done: Commonwealth v. Gaming Implements, 155 Mass. 165, 29 N. E. 468; Oppenheimer v. Lalor, 36 Misc. 546, 73 N. Y. S. 948; State v. Soucie's Hotel, 95 Me. 518, 50 A. 709. In the case from Maine, the supreme court of that state well says: 'Gambling apparatus and implements are treated by the statute as noxious per se, and they are ordered destroyed to remove a danger imminent from their very existence not merely to punish the owner for an unlawful use. The statute by its terms strikes at the thing itself, and not at any act or intent of its owner. The owner of this particular gambling apparatus did not effectually keep it harmless. It escaped from him to the hurt of society. It can, therefore, be lawfully destroyed in the manner provided by statute."

In a recent Ohio case a statute declaring that any net or any other means or device for catching fish in violation of the law for their protection to be a public nuisance, and making it the duty of certain public officers to destroy such nets and devices, is pronounced constitutional. State v. French, 71 Ohio St. 186, 104 Am. St. 770, ante, p. 770.—From note to Woods v. Cottrell [W. Va.] 104 Am. St. Rep. 1011.

12. State by receiving and appropriating the money obtained under Rev. St. 1899, § 7419, authorizing book making and pool-selling recognized its validity and could not demand forfeiture of corporation franchise where such business was authorized by its charter. State v. Delmar Jockey Club [Mo.] 92 S. W. 185.

13. Gen. Laws 29th Leg. p. 372, c. 153. Ex parte Allison [Tex. Cr. App.] 90 S. W. 492. District court could grant injunction though county court might have had concurrent jurisdiction. Id. Statute is not unconstitutional as depriving a party of a trial by jury, or denying him due process of law (Ex parte Allison [Tex. Cr. App.] 90 S. W. 492; Ex parte Allison [Tex.] 90 S. W. 870), but is valid as a remedy for enjoining a public nuisance though it may also prevent the commission of a crime (Id.). Constitutional as to title. Id. Not invalid because gives right of action to state or a citizen. Id. Does not put twice in jeopardy for same offense. Id.; Ex parte Allison [Tex. Cr. App.] 90 S. W. 492.

14. See 5 C. L. 421.

15. Cooley v. Allen [Ky.] 90 S. W. 1048.

16. Payee did not know that note was executed for gambling debt and did not participate in gambling transaction. Note valid. Cooley v. Allen [Ky.] 90 S. W. 1048.

17. Plaintiff could recover large sums of money which he was induced to put up on pretended foot race on representations that a certain party was sure to win, where race was not bona fide. Lockman v. Cobb [Ark.] 91 S. W. 546.

loser, his legal representatives,[18] or of the state,[19] against the winner for the recovery of money or property lost in gambling or speculation in "futures."[20] But a statutory provision allowing a recovery of money lost at any wager whatever followed by one rendering unenforceable any contract for dealing in futures does not authorize recovery of money lost in dealing in futures,[21] and one licensed by the legislature to deal in futures is not subject to the penalty imposed by statutes allowing a recovery of money lost at gaming.[22] A statute subjecting property which an owner knowingly permits to be used for gaming purposes to the payment of judgments against the winner for money lost is constitutional.[23] In the absence of a conspiracy[24] or a statutory provision to the contrary, one of several winners is liable to the loser only for the proportion of the winnings actually received by him,[25] and a judgment against the contributors jointly is erroneous.[26] One of numerous "guessers" in a newspaper guessing contest on the votes cast at an election has no standing in equity for an injunction and receiver on a claim that the fund created belongs to the contributors, that their names are unknown, and that they cannot be brought into court.[27]

18. The right of action given by Rev. Laws, c. 99, § 4, for the recovery of money paid on account of contracts to buy or sell securities on margin survives to the legal representatives of the payor. Anderson v. Metropolitan Stock Exch. [Mass.] 77 N. E. 706.

19. Under Burns' Ann. St. 1894, §§ 251, 252, 273, 6678, the wife of a loser at gambling may be substituted for the state as plaintiff after recovery of judgment by the state for the money lost, so that the wife may enforce the judgment. Tyler v. Davis [Ind. App.] 75 N. E. 3.

20. Rev. Laws, c. 99, § 4, constitutional. Anderson v. Metropolitan Stock Exchange [Mass.] 77 N. E. 706. Under Rev. Laws, c. 99, § 4, providing that one who contracts to buy or sell securities intending at the time that there shall be no actual purchase or sale may recover from the other party any payments made if the other party had reasonable cause to believe that such intention existed, evidence of defendant's dealings with other parties is inadmissible to show the intention of a plaintiff who has no knowledge of such dealings. Id. Evidence of defendant's undisclosed intention to deliver stock is not admissible in an action under Rev. Laws, c. 99, § 4, to show that defendant did not have reasonable grounds to believe that plaintiff did not intend to actually buy and sell. Id. The voluntary release by an insolvent of his right to recover, under Rev. Laws, c. 99, § 4, payments made on margin contracts was fraudulent as to creditors and did not bar recovery. Id. An action to recover property pledged to make good marginal accounts in stock speculations brought under section 5 of the "Act to Prevent Gaming" (2 Gen. St. p. 1606), must be brought within six months from the time of delivery of the property. Myers v. Fridenberg [N. J. Eq.] 62 A. 532. Relief in equity to recover stock pledged to secure margins in stock speculations cannot be had under § 2 of 2 Gen. St. p. 1606, where there is an adequate remedy at law by conversion. Id.

21. Sections 2116, 2117, Code 1892. Isaacs v. Silverberg, Parry & Co. [Miss.] 39 So. 420.

22. Not subject to Civ. Code 1895, § 3671, where license tax was paid. Miller & Co. v. Shropshire [Ga.] 53 S. E. 335.

23. Does not deprive owner of his property without due process of law. Ohio Rev. St. § 4275. Marvin v. Trout, 199 U. S. 212, 50 Law. Ed. ——. Ohio Rev. St. § 4275, does not violate federal constitution in not permitting or providing for trial by jury. Id. Defendant could not raise objection that statute was void in making the judgment against the winner conclusive evidence of the amount lost where other proof as to amount was given over his objection that the fact was not in issue. Id.

24. No conspiracy where contributor did not know with whom bet was to be made and loser did not know that contributor was interested. Motlow v. Johnson [Ala.] 39 So. 710. Where several conspire together to induce one to become intoxicated and then to obtain his money under pretext of a game of cards, all are jointly and severally liable for all the damages sustained. Not necessary to show that each and every defendant actually won something from plaintiff, nor to establish the respective relations of the defendants. Batman v. Cook, 120 Ill. App. 203. Evidence held to warrant finding of conspiracy. Id.

25. One who contributes to a fund bet against another party. Code 1896, § 2263. Motlow v. Johnson [Ala.] 39 So. 710. Where declaration relies on the statute and is in trover plaintiff must establish that he lost and that some defendant or defendants won some definite, fixed sum or sums. Batman v. Cook, 120 Ill. App. 203.

26. Motlow v. Johnson [Ala.] 39 So. 710.

27. Action dismissed, the court not having jurisdiction at law in actions to recover fifty cents. Stevens v. Cincinnati Times-Star Co., 72 Ohio St. 112, 73 N. E. 1058.

BIGAMY.[28]

The offense.[29]—Statutes including within the definition of bigamy the continued cohabitation within a state under a bigamous marriage contracted without the state are generally considered constitutional,[30] being leveled not at the bigamous marriage itself but at the offense of cohabitation committed within the state.[31] The prohibitory words "shall marry another person" as used in statutes directed against bigamy mean "shall go through the form and ceremony of marriage with another person."[32] A common-law marriage will sustain a conviction for bigamy in jurisdictions where such a marriage is valid.[33] A subsequent repudiation of the marriage by the alleged second wife is no defense.[34]

The indictment in Alabama need not allege where the offense was committed.[35] In the proof of names the rule of idem sonans applies.[36]

Evidence and instructions.[37]—The record of a prior divorce suit showing that a divorce was granted to prosecuting witness on the ground that at the time of her marriage with the accused he had another wife living, cannot be used in a criminal prosecution for bigamy.[38] The acts, declarations, or admissions of the accused in recognition of his alleged first wife as his legal spouse are admissible to supplement other evidence of the prior marriage.[39] Evidence that the alleged second wife knew that defendant was already married is irrelevant.[40] The testimony of defendants alleged legal wife is admissible to prove that she was married to defendant,[41] and in some jurisdictions the wife is a competent witness against her husband to prove the crime.[42] Prosecuting witness cannot be impeached by particular acts of dishonesty or unchastity.[43]

Sufficiency of evidence.[44]

Bill of Discovery; Bills and Notes; Bills in Equity; Bills of Lading; Bills of Sale; Birth Registers, see latest topical index.

BLACKMAIL.[45]

It is not necessary to charge crime directly,[46] nor is demand in formal language necessary, if there is an intent by threat to extort or gain money.[47] It is no de-

28. See 5 C. L. 421. See, also, Clark & M. Crimes [2d Ed.], 700.

29. See 3 C. L. 506; 5 C. L. 421.

30. Rev. St. 1899, § 2169, valid, though the offense therein denounced would not have constituted bigamy as that term is used in Rev. St. 1899, § 2167, prohibiting a second marriage by a person having a husband or wife living. State v. Stewart, 194 Mo. 345, 92 S. W. 878.

31. State v. Stewart, 194 Mo. 345, 92 S. W. 878. Indictment held sufficient and not merely to charge adultery. Id.

32. Rev. St. 1899, § 2169. State v. Stewart, 194 Mo. 345, 92 S. W. 878.

33, 34. Burks v. State [Tex. Civ. App.] 94 S. W. 1040.

35. Under Cr. Code 1896, § 4902, it was not necessary to allege that the bigamous cohabitation occurred in the state or within the county. Caldwell v. State [Ala.] 41 So. 473.

36. Name of alleged second wife "Lydia E.," proof "Liddie E." no variance. Caldwell v. State [Ala.] 41 So. 473.

37. See 3 C. L. 506; 5 C. L. 421.

38. State v. Sharkey [N. J. Law] 63 A. 866.

39. A letter by defendant to the alleged first wife wherein he called her his wife and subscribed himself as her loving husband, but containing nothing confidential held admissible. Caldwell v. State [Ala.] 41 So. 473.

40, 41. Richardson v. State [Md.] 63 A. 317.

42. Under Code Pub. Gen. Laws 1904, art. 35, § 4, providing that in all proceedings the husband or wife of accused shall be competent to testify. Richardson v. State [Md.] 63 A. 317.

43. Richardson v. State [Md.] 63 A. 317.

44. Evidence sufficient to support conviction as against evidence that defendant was tricked into the second marriage while intoxicated. Richardson v. State [Md.] 63 A. 317.

45. See 5 C. L. 422.

46. People v. Wickes, 98 N. Y. S. 163. Trying to obtain a settlement of a civil suit in order to realize a contingent fee, by practicing on the fears of a person by innuendo, suggestion, and threat of a prosecution for perjury, is sufficient. Id.

47. Suggesting settlement of a suit by which the writer of the letter would obtain

fense that the same acts also constitute robbery,[48] nor that the crime threatened to be charged has been perpetrated, nor that the defendant had cause to believe it had been, or did believe it,[49] nor does the privilege of an attorney in attempting to collect a just debt authorize the malicious threatening to accuse the debtor of a crime.[50] An indictment which alleges that the defendant with intent to extort money from a named person did accuse him of a particular crime and compel him to do certain acts against his will is sufficient,[51] and it is not necessary to describe the check extorted.[52]

Blended Properties; Board of Health; Boards; Body Execution; Bona Fides, see latest topical index.

BONDS.

§ 1. The Instrument; Essentials and Validity (443). Consideration (444). Execution (444). Delivery (444).
§ 2. Rights and Parties and Transferees (444).
§ 3. The Terms and Conditions in General; Interpretation and Legal Effect (444).
§ 4. Remedies and Procedure (445).

Scope of title.—Questions relating to negotiable bonds and the like,[53] to indemnity [54] and to suretyship,[55] are treated elsewhere. Matters concerning bonds in particular actions and proceedings,[56] and bonds of particular officers,[57] will be found in the appropriate titles.

§ 1. *The instrument; essentials and validity.*[58]—A bond is an obligation in writing, under seal, binding the obligor to pay a sum of money to the obligee.[59] An instrument may be valid as a common-law obligation though not good as a statutory bond,[60] especially where it is executed at the request of the obligors and they have derived a benefit therefrom.[61] But a bond void under the statute for want of authority to execute it cannot be enforced as a common-law obligation.[62] In this connection it has been held that while a statute may be unconstitutional when its purpose is to make surety companies' bonds the exclusive security to be given by

as contingent fee one-fourth of the settlement. People v. Wickes, 98 N. Y. S. 163. On a showing that an attorney at law employed as counsel in an action for false arrest upon a contingent fee wrote several letters to defendant under an assumed name, with suggestions of perjury, continued unpleasant notoriety and increased expense, repeatedly urging the defendant against whom he is conducting the litigation to make settlement, insuring himself one-fourth the amount paid, held that knowledge, threat and intent were sufficiently proved to sustain verdict of blackmail. Id.

48. Chunn v. State [Ga.] 54 S. E. 751.

49. People v. Wickes, 98 N. Y. S. 163.

50. Writing to defendant, warning him of a possible prosecution for perjury unless settlement is made. People v. Wickes, 98 N. Y. S. 163.

51. To set forth offense of blackmail according to Pen. Code 1895, § 116. Chunn v. State [Ga.] 54 S. E. 751.

52. Chunn v. State [Ga.] 54 S. E. 751.

53. See Corporations, 5 C. L. 764; Municipal Bonds, 6 C. L. 704; Negotiable Instruments, 6 C. L. 777; Non-negotiable Paper, 6 C. L. 812; Railroads, 6 C. L. 1194.

54. See Indemnity, 5 C. L. 1777.

55. See Suretyship, 6 C. L. 1590.

56. See Appeal and Review, 5 C. L. 121; Attachment, 5 C. L. 302; Replevin, 6 C. L. 1301; and like titles.

57. See Estates of Decedents, 5 C. L. 1183; Guardianship, 5 C. L. 1603; Officers and Public Employes, 6 C. L. 841; Receivers, 6 C. L. 1250; and other like titles.

58. See 5 C. L. 422.

59. Addition to complaint of allegation that bond was under seal did not require a refiling of special pleas, where complaint otherwise remained the same. Gutta Percha & Rubber Mfg. Co. v. Attalia [Ala.] 39 So. 719.

60. Locke v. Skow [Neb.] 106 N. W. 1013; Hummel v. Del Greco [Tex. Civ. App.] 14 Tex. Ct. Rep. 246, 90 S. W. 339.

61. Where a bond for the payment of a legacy was executed at the request of the obligors in consideration that the legatee surrendered her right to have an administrator appointed and the legacy paid in due course of administration, the obligors could not complain that the bond was not a statutory one or that it contravened public policy. Hummel v. Del Greco [Tex. Civ. App.] 14 Tex. Ct. Rep. 246, 90 S. W. 339.

62. Territory v. Woodring [Ohio] 82 P. 572; Territory v. Reynolds [Okl.] 82 P. 574. A bail bond allowed without authority is wholly void and cannot be enforced as a common-law obligation. City and County of San Francisco v. Hartnett [Cal. App.] 82

depositaries of public moneys, it is valid when the provision as to such security is merely incidental to another primary purpose.[63]

Consideration.[64]—One who executes a bond under circumstances that would estop him to assert its invalidity for a want of consideration cannot avoid liability on the ground that plaintiff is estopped to assert that there was a consideration.[65]

Execution.[66]—The obligors may estop themselves by recitals[67] or conduct[68] from questioning the proper execution of a bond. Where it is provided by statute that the validity of official bonds shall not be affected by informalities, misrecitals, or failure to insert the proper penalty, upon the signing of what purports and is intended to be an official bond, the law writes into it all necessary recitals including the proper penalty.[69] Power to execute a note does not authorize the execution of a bond.[70]

Delivery.[71]—The question of delivery is one of intention.[72] Where a bond which is clearly incomplete is delivered by the principal before the signatures of all the sureties are obtained, the liability of the sureties who sign depends upon the authority of the principal to deliver,[73] and this may be implied from the conduct of the sureties.[74]

§ 2. *Rights and parties and transferees.*[75]

§ 3. *The terms and conditions in general; interpretation and legal effect.*[76]—A bond like other legal documents should be construed as a whole.[77] Obligors in a bond executed pursuant to the requirement of a statute are presumed to have known the terms of the statute and to have bound themselves with reference thereto,[78] and where it appears by the language of a bond that it is intended to be retrospective as well as prospective, such effect must be given to it.[79]

P. 1064; Territory v. Woodring [Okl.] 82 P. 572; Territory v. Reynolds [Okl.] 82 P. 574.

63. Inasmuch as the primary purpose of Rev. St. § 3968, providing for the designation of an official depositary for school funds, is to obtain a revenue from the idle moneys of school boards, the provision of the act that the depositary shall give a good and sufficient bond "of some approved surety company" is incidental merely, and indicates a purpose to require a good and sufficient lawful bond, and nothing more, and the act is therefore constitutional. State v. Rehfuss, 7 Ohio C. C. (N. S.) 179.

64. See 5 C. L. 424.

65. Locke v. Skow [Neb.] 106 N. W. 1013.

66. See 5 C. L. 424.

67. A surety was estopped to deny that the principal was plaintiff's treasurer at the time of the execution and delivery of the bond where this was admitted in the bond. Spreyne v. Garfield Lodge No. 1, 117 Ill. App. 253. Where a bond for the observance of the revenue laws recited that it was given in compromise of a pending prosecution, the obligor and his surety were estopped to question the regularity and validity of proceedings resulting in its execution. Anderson v. Com. [Va.] 54 S. E. 305.

68. A bonding company **accepting** and retaining **premiums** with full knowledge that its authorized agents did not sign the bond thereby estopped itself from asserting informalities in its execution. Farmers' & Merchants' Irr. Co. v. U. S. Fidelity & Guaranty Co. [Neb.] 108 N. W. 156.

69. So held in quo warranto against member of board of supervisors on ground of invalidity of his bond. State v. Smith [Miss.] 40 So. 22.

70. Suit on a bond introduced in evidence but plaintiff's evidence showed that mayor of city had authority only to execute a note. Gutta Percha & Rubber Mfg. Co. v. Attalia [Ala.] 39 So. 719.

71. See 5 C. L. 424.

72. Appeal bond. Locke v. Skow [Neb.] 106 N. W. 1013. That appeal bond on which action was brought was found among the papers in the proper action, and produced by the clerk at the trial, the docket entries showing that it had been filed, justified finding that it had been delivered. Nolan v. Fidelity & Deposit Co. [Cal. App.] 82 P. 1119.

73. Not upon any express restriction by the sureties against delivery. Baker County v. Huntington [Or.] 83 P. 532.

74. Baker County v. Huntington [Or.] 83 P. 532. Where sureties attempted to limit their liability by placing sums before their names, their mere act of signing and leaving bond with principal without express restriction as to delivery did not show authority as a matter of law. Id.

75. See 5 C. L. 425. And see post, § 3.

76. See 5 C. L. 425.

77. The obligation and condition of a **county highway bond** construed together and bond held to require payment of a specific sum of money at a certain time with interest and not to be insufficient in that it was not an unconditional promise to pay. Ontario County v. Shepard, 100 App. Div. 200, 91 N. Y. S. 611.

78. United States Fidelity & Guaranty Co. v. Fultz [Ark.] 89 S. W. 93.

79. Bond of insurance company covered

A bond may have separate and distinct conditions making it one of indemnity or of guaranty, or both,[80] and in the latter case failure to perform the obligation imposed by the contract of guaranty is a breach of the condition of the bond and gives rise to a cause of action.[81] A bond required to be given for the performance of an obligation until the further order of the court but in fact given for a definite period, is binding on the sureties for the entire period though the court requires the principal to file a new bond on or before a date anterior to the expiration of the period.[82] A bond being silent as to interest, a mortgage securing it may be referred to for the purpose of ascertaining the rate,[83] but when the bond is wholly silent and there is neither fraud, mistake, or accidental omission, extrinsic evidence of the violation of a collateral agreement is inadmissible.[84] A coupon being a separate obligation draws interest after maturity though still in the possession of the holder of the bond and attached thereto.[85]

§ 4. *Remedies and procedure.*[86]—That a statute prescribes a remedy for the breach of a bond does not necessarily exclude other remedies.[87] An action will lie for the breach of any one of several independent conditions.[88]

A stranger to a private as distinguished from a public bond is not entitled to its benefits,[89] and an obligee whose wrongful act caused a breach has no cause of action.[90] That a corporation fails to file annual reports with the secretary of state pursuant to statute is no defense to an action by it on the bond of its treasurer.[91]

Pleading and evidence.[92]—In an action on a bond it is necessary to plead the existence[93] and breach of a condition;[94] mere legal conclusions will not suffice.[95] The plea of nul tiel record is improper where an action is upon a bond given in judicial proceedings and not upon the record.[96]

losses occurring prior to its delivery to and approval by state auditor. United States Fidelity & Guaranty Co. v. Fultz [Ark.] 89 S. W. 93.

80. Equitable Trust Co. v. National Surety Co. [Pa.] 63 A. 699.

81. First clause of condition in building contractor's bond, a contract of indemnity; second clause one of guaranty to furnish material, failure to do which gave rise to action. Equitable Trust Co. v. National Surety Co. [Pa.] 63 A. 699.

82. Bond approved but indorsement by court required principal to file new bond. Keefer v. Keefer, 28 Pa. Super. Ct. 256.

83. Where executed as part of same transaction. Question between obligee in bond and one who had assumed payment by pledge of collateral. Ex parte Powell [S. C.] 54 S. E. 236.

84. McGuire v. Gerstley, 26 App. D. C. 193.

85. Rice v. Shealy, 71 S. C. 161, 50 S. E. 868.

86. See 5 C. L. 427.

87. That the statute provided that upon the forfeiture of a bond for the observance of the revenue laws scire facias should be issued thereon by the clerk of the court, did not exclude other remedies or forms of action by the commonwealth to collect the penalty on the bond. Anderson v. Commonwealth [Va.] 54 S. E. 305.

88. Petition not demurrable because did not show breach of condition to pay a judgment on appeal where another condition was broken. Locke v. Skow [Neb.] 106 N. W. 1013.

89. Materialman could not avail himself of bond given solely for benefit of owner. Herpolsheimer v. Hansell-Elcock Co. [Mich.] 12 Det. Leg. N. 485, 104 N. W. 671

90. Contractor rendered impossible performance of condition of bond given by subcontractor. Brock v. Williams [Okl.] 82 P. 922.

91. Spreyne v. Garfield Lodge No. 1, 117 Ill. App. 253.

92. See 5 C. L. 428.

93. Complaint alleging that a bond was conditional in the payment of a sum of money and that there was a breach of condition in failure of the maker of a note to make payment but not stating that the bond was conditional on payment by him, held insufficient. Gansevoort Bank v. Empire State Surety Co., 98 N. Y. S. 382.

94. Petition on appeal bond held subject to demurrer where there was no allegation that the appealing party had not satisfied the judgment. Moriarty v. Cochran [Neb.] 106 N. W. 1011. No allegation of breach of condition that it should be decreed that certain taxes were a lien on property and that the same should be paid. Lancaster County v. Fitzgerald [Neb.] 104 N. W. 875.

95. That all conditions were fulfilled, all things happened, and all times elapsed necessary for recovery, held mere conclusions. Gansevoort Bank v. Empire State Surety Co., 98 N. Y. S. 382. That "there is now due" a certain sum on the undertaking was insufficient to show breach of condition of appeal bond. Moriarty v. Cochran [Neb.] 106 N. W. 1011.

96. Rogers v. Barth, 117 Ill. App. 323.

An action on a bond is not maintained by proof of an unsealed instrument.[97] The usual rules of pleading [98] and evidence [99] obtain.

Judgment and damages.[1]—The judgment may properly order execution against the principal first and thereafter against the sureties.[2]

"Bottle" and "Can" Laws; Bottomry and Respondentia; Bought and Sold Notes, see latest topical index.

BOUNDARIES.

§ 1. Rules for Locating and Identifying (446). Monuments, Courses, Distances, and Quantity (449). Government Surveys (450). Highways, Streets, or Ways as Boundaries (451).
§ 2. Riparian or Littoral Boundaries (453).
§ 3. Establishment by Agreement of Adjoiners (453).
§ 4. Establishment by Acquiescence, Estoppel, or Adverse Possession (454).
§ 5. Establishment by Arbitration, Action or Statutory Mode (455).

§ 1. *Rules for locating and identifying.*[3]—In locating a boundary the lines should be run with the calls in regular order from a known beginning,[4] but may be reversed where necessary because of insurmountable difficulty in running them in their direct order,[5] or when in so doing the quantity of land embraced will more nearly harmonize with that called for in the grant,[6] or when the terminus of a call cannot be ascertained by running it forward but can by running reversely from the next succeeding line.[7] In reversing the calls it is not permissible to disregard natural objects called for either as corners or lines,[8] and the method should be adopted only to the extent necessary.[9] In determining the location of a boundary from a description in a deed, the general rules as to the construction of deeds [10]

97. Gutta Percha & Rubber Mfg. Co. v. Attalia [Ala.] 39 So. 719.

98. That a paragraph of the complaint did not repeat matters of inducement necessary to state a complete cause of action on a county commissioner's bond was not fatal though the paragraph was mistakenly called a cause of action by the pleader. Patterson v. Watson [Colo.] 83 P. 958.

99. A statement of a shortage found against the principal in an accounting between him and the obligee in the presence of the surety was admissible in evidence in an action on the bond where all the parties had concurred in the statement. Keene v. Newark Watch Case Material Co., 98 N. Y. S. 68.

1. See 5 C. L. 429.

2. Held proper in an action on a bond for the payment of a legacy where obligee asserted no claim against the estate. Hummel v. Del Greco [Tex. Civ. App.] 14 Tex. Ct. Rep. 246, 90 S. W. 393.

3. See 5 C. L. 430.

4. Lindsay v. Austin, 139 N. C. 463, 51 S. E. 990.

5. Davis v. Com. Land & Lumber Co., 141 F. 711. In Kentucky intervening lines connecting extant and nonextant corners should be located by running the lines according to the courses called for whenever it is possible to do so unless there is some circumstance bringing to the mind a contrary conclusion. Circumstances held to warrant a departure from this method. Davis v. Com. Land & Lumber Co., 141 F. 740.

6. Morgan v. Lewis [Ky.] 92 S. W. 970. Courses and distances as given in the survey should be followed when reversing the calls will not have that effect. Id.

7. Lindsay v. Austin, 139 N. C. 463, 51 S. E. 990. Where the first two corners could not be found but the last two could be it was permissible to reverse the calls from the last corner. Id. The rule for finding the location of a lost corner where there are two known corners, one preceding and one following the lost one is to run a line from the preceding known corner according to course and distance called for, then reverse the call from the last known corner until the two lines intersect and locate the lost corner at the point of intersection. Chambers v. Thorp [Ky.] 93 S. W. 627. Where the description in a deed if literally read would not close but it gave courses and distances and referred to monuments, if by reversing the survey and applying it to the monuments the land can be located such course should be followed. Calatro v. Chabut [N. J. Err. & App.] 63 A. 272.

8. Davis v. Com. Land & Lumber Co., 141 F. 711.

9. In Kentucky calls may be reversed only when it is necessary to locate such portion of the boundary in accordance with the courses called for and they cannot be otherwise determined and the method should be resorted to only to the extent necessary to accomplish such purpose. Davis v. Com. Land & Lumber Co., 141 F. 740.

10. See Deeds, 5 C. L. 964.

should be applied [11] and the intention of the parties ascertained.[12] A grant by metes and bounds carries lands under water within such bounds.[13] Tide flats pass by a grant of the upland unless excluded by the terms of the grant.[14] The actual location of a disputed boundary is generally a question of fact [15] to be ascertained by the application of established rules,[16] but when certain principles of law are

11. Where a deed divided a house according to certain partitions running through it the land adjoining the house was held to be divided by the same partition that divided the house and extended in a straight course to the end of the boundary lines. Jeffrey v. Winter [Mass.] 76 N. E. 282. Deed held to convey to the grantee that part of a house southerly of the line of partition in each story. Id. Where uncertainty is introduced in the language of a deed by the word "prolongation" it means a continual line though consisting of several angles where such meaning would be consistent with the other words of description, rather than a direct line which would render the next course in the deed inconsistent with the direction and monuments by which it is described. Chapman v. Hamblet, 100 Me. 454, 62 A. 215. The expression in a grant "to the head of the cove thence around the western side of the cove" excludes the cove and flats. Whitmore v. Brown, 100 Me. 410, 61 A. 985. The expression in a grant "to the shore thence the shore around to the first mentioned bounds" or "then follows the shore to the bound first mentioned" means "to the shore, then by the shore" to the point of beginning, unqualified, excludes tide flats between high and low-water mark. Id. This is so though the grant contains the words "together with all the privileges and appurtenances thereto belonging. Id. Where one platted his lands and sold them with reference to where streets pointed out by him would be located, it being impossible to locate the streets from the unrecorded plat, lines pointed out by him govern as to subsequent purchasers. Haynes v. Dallas [Tex. Civ. App.] 94 S. W. 434. A tract bounded by courses and distances and described as "lying on the west side" of a creek does not call for the creek as a boundary. Crane v. Lynch, 27 Pa. Super. Ct. 565.

12. Where a call for a stake was "near" Cumberland Gap whereas if the call had been "in" Cumberland Gap there would have been no difficulty and it is impossible to run the course according to the call as stated, it will be disregarded and the natural object, i. e., Cumberland Gap, taken as the last corner. The word "near" construed "at." Davis v. Farmer, 141 F. 703; Davis' Heirs v. Hinckley, 141 F. 708.

13. Goudert v. Underhill, 107 App. Div. 335, 95 N. Y. S. 134.

14. Whitmore v. Brown, 100 Me. 410, 61 A. 985.

15. Finding of the jury on conflicting evidence as to the location of a boundary will not be reviewed on appeal. Whitridge v. Baltimore [Md.] 63 A. 808. Where there are no monuments at the points in dispute and such points cannot be located by measurements from known corners of the tracts between which the line is, and to render a verdict for either party the descriptions in the deeds must be departed from, a verdict supported by the testimony of witnesses who testifies that he saw the monument called for at the point fixed by the verdict as corners, and evidence of acts of recognition by owners on both sides of the line, will not be disturbed. Stewart v. Doak [W. Va.] 52 S. E. 95. Where the deeds of adjoining owners called for a straight line from corner to corner and there was no evidence that the line was crooked an instruction that if the jury believed that a certain line was marked they should adopt it though it conflicted with course and distances called for was misleading. Nicholson v. Hopper [Ky.] 92 S. W. 979. In an action to establish a controverted section line where the trial was conducted on the theory that the government corner was not a lost corner, it was proper to charge that the location of the original line is to be determined even though evidence was admitted that a corner had been established by a surveyor who proceeded on the theory that the original corner was lost. Stryker v. Meagher [Neb.] 107 N. W. 792. Finding on conflicting evidence as to the location of beginning corner sustained. Combs v. Stacey [Ky.] 93 S. W. 908. Instructions in boundary dispute approved. Smith v. Curtice [Neb.] 106 N. W. 460.

Question for the jury: Evidence as to the location of a line. Moore v. McClain [N. C.] 54 S. E. 382; Haynes v. Dallas [Tex. Civ. App.] 94 S. W. 434. Evidence on an issue as to the length of certain lines. Giddings v. Thompson [Tex. Civ. App.] 92 S. W. 1043. An issue concerning a boundary relative to which there is evidence should be submitted. Clawson v. Wilkins [Tex. Civ. App.] 93 S. W. 1086.

Evidence Sufficient to establish a boundary. Camp v. League [Tex. Civ. App.] 92 S. W. 1062; Spurlin v. Hauser [Iowa] 105 N. W. 373. To sustain a finding as to the location of a boundary. Harris County Irr. Co. v. Hornberger [Tex. Civ. App.] 94 S. W. 145. That a subsequent survey correctly retraced a former one. Christenson v. Simmons [Or.] 82 P. 805. That a line mentioned in the patent of a tract as 294 poles long was in fact only 194 poles long. Morgan v. Lewis [Ky.] 92 S. W. 970. The declaration of a former owner as to the boundary and the general repute for many years is sufficient to sustain a finding as to its location. Goodson v. Fitzgerald [Tex. Civ. App.] 90 S. W. 898.

16. Method of locating lost corners and lines. Davis v. Com. Land & Lumber Co., 141 F. 740. Proper method of determining location of closing line of a boundary where the corners were ascertained, and the calls for courses clear. Cooper v. Henderson County [Ky.] 90 S. W. 576. Where the boundaries of a tract as given in a patent based on a survey made at the instance of the patentee extend beyond the state line that portion which lies within the state should be ascertained by the usual methods

to be enforced with reference to the dispute which when applied will leave no dispute, the question is one of law.[17] An omitted line in a patent may be supplied by reference to the original plat or survey.[18] Where it is manifest that a line has been omitted by mistake and the undisputed calls enable this mistake to be corrected by supplying the line, it is the duty of the court to make the correction.[19] Where more objects are embraced in a call than are possible, that course must be run which includes the majority of them.[20] All evidence tending to show the true location of the line is admissible.[21] Evidence of general repute is admissible[22]

and the tract should not be relocated so as to place it all within the state. Bramblet v. Davis [C. C. A.] 141 F. 776. Where a surveyor runs a line at the instance of one party and testifies unequivocally that it is the true line, and such testimony is not contradicted nor is any other survey made by the adjoining owner, the survey so made will be taken as correct. Liddle v. Blake [Iowa] 105 N. W. 649. The testimony of a surveyor who ran a line at the instance of one party is not conclusive. Id. The reports of a surveyor who surveys at the instance of disputing owners at their respective requests is not binding on the other. Huff v. Woolsey [Ky.] 92 S. W. 572.

17. As to the location of a disputed patent. Kerr v. De Laney [Ky.] 91 S. W. 286.

18, 19, 20. Kerr v. De Laney [Ky.] 91 S. W. 286.

21. See 5 C. L. 434, n. 29.

Held admissible: Where a surveyor who had been ordered to make a survey stated that he could not indicate on the map a party's contention it was not error for the court to direct him to plat it out and later be examined concerning it. Bullard v. Hollingsworth [N. C.] 53 S. E. 441. A surveyor who surveyed a line and to whom another pointed out a cove where he said the line ran may on a question of boundary testify that the line run by him was the line of the survey as pointed out to him. Goodson v. Fitzgerald [Tex. Civ. App.] 90 S. W. 898. An expert surveyor may testify that property described in field notes was embraced within metes and bounds of deeds examined by him. Camp v. League [Tex. Civ. App.] 92 S. W. 1062.

Deeds originating from the same grantor though covering a different tract from that in dispute are admissible as showing what particular parcel of an entire tract formerly held by him was intended to be conveyed by the deed to one of the parties litigant. Lee v. Giles [Ga.] 52 S. E. 806. On an issue as to a disputed boundary, evidence of a deed of adjoining land was admissible in connection with other testimony showing that the land was fenced, for the purpose of showing the identity of fence rows found near the boundary in question. Camp v. League [Tex. Civ. App.] 92 S. W. 1062. Where both sets of meanderings are in evidence, a surveyor who made one may not testify that in his opinion those made by him correspond with the other set. Goodson v. Fitzgerald [Tex. Civ. App.] 90 S. W. 898. On an issue as to the location of a boundary evidence of the location of a division fence is admissible. Ross v. Roy [Ala.] 39 So. 583. Where the location of a county line was uncertain and the line between owners was the county line, it is permissible to show that fences had been built and a line recognized for many years and that the line run between the lands of the parties by processioners was a continuation of the line so recognized. Ivey v. Cowart [Ga.] 52 S. E. 436. On an issue as to a disputed boundary, **a map** made many years before and produced from the proper custody held admissible to establish the line in dispute. Cravath v. Baylis, 99 N. Y. S. 973. The opinion of a surveyor as to a certain supposed monument is a **conclusion.** Clarke v. Case [Mich.] 13 Det. Leg. N. 193, 107 N. W. 893. Where one coterminous owner pleads an agreement fixing a boundary line, evidence of the statements of the other as to the agreed line is competent. Berry v. Evans [Ky.] 89 S. W. 12.

Ante litem mortem declarations of a deceased disinterested witness are admissible as to the location of a corner. Bullard v. Hollingsworth [N. C.] 53 S. E. 441. Declaration as to boundaries made by one since deceased at a time when he was in possession of the land are admissible. Driver v. King [Ala.] 40 So. 315. The declaration of one in possession when pointing out his boundaries at a time when he had no interest in misrepresenting them is admissible on a question as to location of the line. Goodson v. Fitzgerald [Tex. Civ. App.] 90 S. W. 898.

Inadmissible: Field notes of a survey made many years after the location of a survey in question by a surveyor who had no knowledge of the survey are not admissible on the issue of boundary. Goodson v. Fitzgerald [Tex. Civ. App.] 90 S. W. 898. County commissioner's **court records** showing that a road was laid out where a party claimed the boundary to be held inadmissible where it was shown that he was in possession on both sides of the disputed boundary. Camp v. League [Tex. Civ. App.] 92 S. W. 1062. When a boundary was a county line and processioners ran and marked the line and later it was in dispute between the parties it is not permissible to show that at the time of the processioning one of the parties proposed that a line should be started at a point where the county line was not disputed and both sides should abide by it. Ivey v. Cowart [Ga.] 52 S. E. 436. In a proceeding to establish a boundary where plaintiff claimed under a grant one of the calls of which was the line of a senior grant, a surveyor may not testify as to whether the calls of plaintiff's grant, the beginning point being established as it would ever reach any line of the senior grant. Hill v. Dalton [N. C.] 52 S. E. 273. Where a defendant in a suit involving title pleaded a boundary line agreement which was

if the witness is qualified to testify.[23] Regularity of the acts of a surveyor in making a survey is presumed.[24]

Monuments, courses, distances, and quantity.[25]—Inconsistent calls for boundaries are to be given prevailing effect in the following order: Natural objects,[26] or the place where they were located if destroyed;[27] artificial objects;[28] metes and bounds;[29] course;[30] distance;[31] quantity.[32] Quantity can be considered only

traversed it is incompetent to show that the agreement was made under a mistake as to the true line. Berry v. Evans [Ky.] 89 S. W. 12.

22. Evidence of general repute and recognition of a line is admissible to establish it. Goodson v. Fitzgerald [Tex. Civ. App.] 90 S. W. 898.

23. He must know who the landowners are, that they were owners at the time the corner was recognized, or at what date recognition was made by them. Hix v. Gulley [Ga.] 52 S. E. 890.

24. In determining a boundary where there is no evidence as to how the survey was made, it is presumed that the surveyor ran out the lines of the adjoining surveys called for in the survey in question. Steusoff v. Jackson [Tex. Civ. App.] 89 S. W. 445.

25. See 5 C. L. 430.

26. Chambers v. Tharp [Ky.] 93 S. W. 627; Goodson v. Fitzgerald [Tex. Civ. App.] 90 S. W. 898. The call for the line of another grant prevails over a call for an artificial object. Whitaker v. Cover [N. C.] 52 S. E. 581. Monuments control course and distance where there is a discrepancy in the calls. Moore v. McClain [N. C.] 54 S. E. 283; Brockman v. Rose [Ky.] 90 S. W. 539; Thaxton v. Wadsworth [Tex. Civ. App.] 95 S. W. 91. Calls for a certain number of poles to a well known object stop at the object though the distance extends beyond. Bramblette v. Howard [Ky.] 93 S. W. 902. Calls to a water course and thence up the same are construed as stopping at the stream and thence following the meanders of such stream. Id. Whenever a natural boundary is called for in a patent or deed, the line is to terminate at it however wide of the course called for by it may be or however short or beyond the distance specified. Hill v. Dalton [N. C.] 52 S. E. 273. Where a line actually run by a surveyor is marked and the corner made the party claiming under the patent or deed holds accordingly notwithstanding a mistaken description of the land. Id. Where the lines or corners of an adjoining tract are called for the lines shall be extended to them without regard to distance if they be established and no other departure be permitted from the words of the grant than such as necessity enforces or a true construction renders necessary. Call for the corner of an adjoining tract held to prevail over a call for a monument. Fincannon v. Sudderth [N. C.] 52 S. E. 579. Monuments, natural or artificial, prevail over courses and distances. Kendrick v. Burchett [Ky.] 89 S. W. 239. Instruction held not misleading. Giddings v. Thompson [Tex. Civ. App.] 92 S. W. 1043; Morgan v. Lewis [Ky.] 92 S. W. 970.

27. In determining the location of a boundary the best evidence is the monuments or stakes set by the surveyor, or the testimony of eyewitnesses who saw the lines run on the ground. Pereles v. Gross [Wis.] 105 N. W. 217. Next is the occupation commenced by persons having knowledge as to the place of the original location or at a time when the original stakes were still in place. Id.

28. Goodson v. Fitzgerald [Tex. Civ. App.] 90 S. W. 898. A boundary line fixed by a building has no greater dignity than one fixed by a fence. Laughlin v. Francis [Iowa] 105 N. W. 360. A call for a railroad right of way if unexplained will be treated as a call for another tract of land and prevails over a call for distance. Couch v. Texas & P. R. Co. [Tex.] 90 S. W. 860. Where unmarked lines of adjacent surveys are called and can be ascertained with accuracy they are given the dignity of an artificial monument when there arises a question as to whether the course or distance or the unmarked line of another survey shall prevail. Steusoff v. Jackson [Tex. Civ. App.] 89 S. W. 445. A boundary line is a monument and would by the general rule of construction govern the course of a deed unless the intention of the parties would be defeated by its adoption. Chapman v. Hamblet, 100 Me. 454, 62 A. 215. Well known corners prevail over courses and distances. Huff v. Woosley [Ky.] 92 S. W. 572. Map referred to in a description held to have the dignity of an artificial monument. Wilson v. Chicago Lumber & Timber Co. [C. C. A.] 143 F. 705. Addition of "as per survey" of a certain person construed as intended only to identify the map and not to render it impeachable by the field notes of the survey. Id. A corner called for will, if identified, be accorded the dignity of a marked line. Will overcome a call for a course and distance unless shown to be a mistaken call. Goodson v. Fitzgerald [Tex. Civ. App.]90 S. W. 898. That a call for a marked line may overcome a call for course and distance it must be indentified on the ground. If this is done, however, it is immaterial that the marked corner has been destroyed. Id. Call for a marked line held to prevail over a call for beginning corner. Jacoby v. Norton [Tex. Civ. App.] 90 S. W. 524. The lines run by a surveyor who testifies that he started from a point which was not a corner will not control a call for the actual corner. Fincannon v. Sudderth [N. C.] 52 S. E. 579.

29. Whitridge v. Baltimore [Md.] 63 A. 808.

30. Next courses and distances. Goodson v. Fitzgerald [Tex. Civ. App.] 90 S. W. 898. Courses and distances prevail over quantity. Kendrick v. Burchett [Ky.] 89 S. W. 239. Course prevails over distance where one must be sacrificed. Kerr v. De Laney [Ky.] 91 S. W. 286; Chambers v. Tharp [Ky.] 93 S. W. 627. Next is the courses and distances declared in the plat as connecting the point in question with some other point, the actual location of which can be ascertained.

where monuments and courses and distances fail,[33] or where it is necessary in order to close lines to run some of them backward and the number of unlocated corners and lines be such that there are alternative ways of closing.[34] This, however, is only their relative force as evidence and the weakest by the aid of other facts may in a given case overcome a call of the highest dignity.[35] A conflict between calls may be explained by evidence of the intention of the parties,[36] and for this purpose the field notes may be looked to.[37] The question as to which is the controlling call may be one of fact.[38]

Government surveys.[39]—The lines of an original government survey control maps and plats.[40] Corners established by United States surveyors in surveying the public lands,[41] or the places where they were established if they can be determined,[42] are conclusive as to the actual location of the boundary lines of sections and such subdivisions thereof as are authorized by the laws of the United States.[43] Field notes of United States surveys of public lands will control in ascertaining locations, even though the monuments established by the surveyor cannot be found.[44] When a deputy United States surveyor who made an original survey cannot explain a discrepancy between the field notes retained by him and those returned to the sur-

Pereles v. Gross [Wis.] 105 N. W. 217. Though a call for course and distance prevails over one for an unmarked prairie line yet if it appears that the surveyor ascertained such line and intended to include the land thus bounded the distance will be extended. Goodson v. Fitzgerald [Tex. Civ. App.] 90 S. W. 898.

31. Kerr v. De Laney [Ky.] 91 S. W. 286; Chambers v. Tharp [Ky.] 93 S. W. 627.

32. Lines must be run according to the primary calls of a deed though it is in conflict with the quantity of land mentioned. Whitaker v. Cover [N. C.] 52 S. E. 581. A statement in a deed that the land conveyed contains a certain number of acres will not control against a description by metes and bounds. Sherwin v. Bitzer [Minn.] 106 N. W. 1046.

33. Davis v. Com. Land & Lumber Co., 141 F. 711. The statement of quantity will be rejected if it is inconsistent with the actual area when the same is capable of ascertainment by monuments and boundaries. Sherwin v. Bitzer [Minn.] 106 N. W. 1046. Description "running along the center of a wagon road, to be 20 feet wide" is sufficiently definite and quantity need not be resorted to. Whitridge v. Baltimore [Md.] 63 A. 808. Quantity aids in ascertaining the premises when they are not described by known or established boundaries. Morgan v. Lewis [Ky.] 92 S. W. 970.

34. Davis v. Com. Land & Lumber Co., 141 F. 711.

35. Goodson v. Fitzgerald [Tex. Civ. App.] 90 S. W. 898. Where there is conflict between monuments and courses and distances the former prevail but if it appears that there is a mistake in the calls for the former and not in those of the latter, the rule is the reverse. Christenson v. Simmons [Or.] 82 P. 805. Quantity is the least certain element of description but in the absence of some more definite description it may be controlling. O'Brien v. Clark [Md.] 64 A. 53. Evidence sufficient to sustain a finding of fact as to which of two points should control in locating a line. Jacoby v. Norton [Tex. Civ. App.] 90 S. W. 524. A call for a well marked and defined line prevails over a call for a beginning corner evidently not the true line but probably located after the surveys of the land. Deaton v. Feazle [Tex. Civ. App.] 13 Tex. Ct. Rep. 1017, 90 S. W. 534.

36. A conflict between a call for a railroad right of way and a call for distances may be explained to show the intention of the parties. Couch v. Texas & P. R. Co. [Tex.] 90 S. W. 860.

37. Where two calls of a survey are inconsistent and there is nothing on the ground connecting itself with the original survey to explain the variance, the field notes may be looked to. Giddings v. Thompson [Tex. Civ. App.] 92 S. W. 1043.

38. Whether a call for an unmarked prairie line would control course and distance held a question of fact. Clawson v. Wilkins [Tex. Civ. App.] 93 S. W. 1086.

39. See 5 C. L. 432.

40. Liddle v. Blake [Iowa] 105 N. W. 649.

41. Frederitzie v. Boeker, 193 Mo. 228, 92 S. W. 227. The monuments established by the United States surveyor at a corner is the best evidence of its true location and controls field notes or any other class of proof. Stangair v. Roads, 41 Wash. 583, 84 P. 405. A government corner prevails over a monument set to fix the boundary of a lot in the same section. Kitchen v. Chantland [Iowa] 105 N. W. 367.

42. When a government corner, being the corner between adjoining owners, has been obliterated, its location may be established by the testimony of witnesses acquainted therewith. Reed v. Burrell [Neb.] 108 N. W. 155.

43. Frederitzie v. Boeker, 193 Mo. 228, 92 S. W. 227.

44 Bradshaw v. Edelen, 194 Mo. 640, 92 S. W. 691. Where marks of a government surveyor are obliterated and corners cannot be established by witnesses, the field notes of the survey control. Stangair v. Roads, 41 Wash. 583, 84 P. 405. Evidence to show that field notes returned to the land commissioner's office were often changed to conform to the maps in the office held inad-

veyor general, the former do not prevail over the latter which are the official record of the survey.[45] The plat filed with the original survey is of equal dignity with the survey itself, and, where it shows on its face that the surveyor must have made a mistake in putting down the distance of one line, the plat will control.[46] Lines as laid out on the ground govern the field notes of the survey.[47] A prior survey prevails over a subsequent one.[48] The elder grant prevails where there is a lap in lands granted by the state.[49]

Highways, streets, or ways as boundaries.[50]—A boundary on a way includes the fee to the center thereof unless the terms of the grant indicate the limitation of its

missible to show a change in the field notes in question. Clawson v. Wilkins [Tex. Civ. App.] 93 S. W. 1086.

45. Stangair v. Roads, 41 Wash. 583, 84 P. 405.

46. Morgan v. Lewis [Ky.] 92 S. W. 970.

47. Tinnea v. Piel, 122 Ill. App. 304.

48. Atascosa County v. Alderman [Tex. Civ. App.] 91 S. W. 846. Instructions in a suit to determine a boundary should not give undue weight to a subsequent survey. Giddings v. Thompson [Tex. Civ. App.] 92 S. W. 1043. Where a subsequent patent calls for a prior one the lines of the junior one cannot be determined until those of the senior have been. Burt & B. Lumber Co. v. Wilson [Ky.] 93 S. W. 906. Evidence sufficient to establish a boundary according to certain official surveys. Taulbee v. Buckner's Adm'r [Ky.] 91 S. W. 734.

49. Kerr v. De Laney [Ky.] 91 S. W. 286.

50. See 5 C. L. 432.

Note: A conveyance of land as bounded "on" or "by" or as running "along" a highway will convey to the center line of the highway if the grantor owns thereto, unless a contrary intention appears from the conveyance. Paul v. Carver, 26 Pa. 223, 3 Gray's Cas. 356, 67 Am. Dec. 413; White v. Godfrey, 97 Mass. 472, 3 Gray's Case; Hamlin v. Pairpoint Mfg. Co., 141 Mass. 51; Columbus & W. R. Co. v. Witherow, 82 Ala. 190; Kittle v. Pfeiffer, 22 Cal. 484; Silvey v. McCool, 86 Ga 1; City of Dubuque v. Maloney, 9 Iowa, 451, 74 Am. Dec. 358; Thomas v. Hunt, 134 Mo. 392; In re Ladue, 118 N. Y. 213; Elphinstone, Interpret. of Deeds, 179. And so a conveyance of land "south of the road" has been held to convey a part of the highway. Helmer v. Castle, 109 Ill. 664 So, when land abutting on a highway is conveyed by terms of description which make no mention of the highway, as when it is conveyed by a number on a plat, the grantor's interest in the land within the highway limits presumably passes. Berridge v. Ward, 10 C. B. (N. S.) 400, 3 Gray's Cas. 334; Champlin v. Pendleton, 13 Conn. 23, 3 Gray's Cas. 342; Gear v. Barnum, 37 Conn. 229; White's Bank of Buffalo v. Nichols, 64 N. Y. 65, 3 Gray's Cas. 373; Florida Southern R. Co. v. Brown, 23 Fla. 104; Anthony v. City of Providence, 18 R. I. 699; Cox v. Louisville, N. A. & C. R. Co., 48 Ind. 178; City of Dubuque v. Maloney, 9 Iowa, 450, 74 Am. Dec. 358; Kneeland v. Valkenburgh, 46 Wis. 434, 32 Am. Rep. 719. **Contra.** Sutherland v. Jackson, 32 Me. 80; Hanson v. Campbell's Lessee, 20 Md. 223; Grant v. Moon, 128 Mo. 43. Compare Hoboken Land & Improvement Co. v. Kerrigan, 31 N. J. Law, 13.

And this is so, even though the length of the boundary lines running towards the highway, as given, would carry them only so far as the edge of the highway. Oxton v. Groves, 68 Me. 371, 28 Am. Rep. 75; Paul v. Carver, 26 Pa. 223, 3 Gray's Cas. 356; Newhall v. Ireson, 8 Cush. [Mass.] 595, 54 Am. Dec. 790; Gould v. Eastern R. Co., 142 Mass. 85; Moody v. Palmer, 50 Cal. 31. But see, to the contrary, City of Chicago v. Rumsey, 87 Ill. 348. On the other hand, a description of the land as bounded by or on the "side," "margin," or "edge" of the highway is usually regarded as showing an intention to exclude the land within the highway limits from the operation of the conveyance (Buck v. Squires, 22 Vt. 484, 3 Gray's Cas. 345; Jackson v. Hathaway, 15 Johns. [N. Y.] 447; Blackman v. Riley, 138 N. Y. 318; Tyler v. Hammond, 11 Pick. [Mass.] 193; Holmes v. Turner's Falls Co., 142 Mass. 590; Hughes v. Providence & W. R. Co., 2 R. I. 508; Grand Rapids & I. R. Co. v. Heisel, 38 Mich. 62. So in the case of a reference to "the line" of the highway. Hamlin v. Pairpoint Mfg. Co., 141 Mass. 51; Cole v. Haynes, 22 Vt. 588. **Contra.** Kneeland v. Van Valkenburgh, 46 Wis. 434, 32 Am. Rep. 719), though in some states a different view is taken (Paul v. Carver, 26 Pa. 223, 3 Gray's Cas. 356, 67 Am. Dec. 413; Cox v. Freedley, 33 Pa. 124, 3 Gray's Cas. 361; Woodman v. Spencer, 54 N. H. 507; Johnson v. Anderson, 18 Me. 76 (semble); Salter v. Jonas, 39 N. J. Law, 469, 23 Am. Rep. 229; Anthony v. City of Providence, 18 R. I. 699. Compare Hobson v. Philadelphia, 150 Pa. 595). By analogy to the rule applied in the case of boundaries on streams, it would seem that a monument at the side or edge of the highway, when referred to as a starting point for a line running along the highway, should not exclude the soil within the highway limits, but that it might well be regarded as merely showing the point at which the boundary strikes the highway, since it is not usually practicable to place a monument in the center of the highway. This view has been adopted in at least one state (Cottle v. Young, 59 Me. 105; Low v. Tibbetts, 72 Me. 92), but usually the naming of a monument at the side or edge of the highway, from which the line is to run along the highway, has been regarded as sufficient to exclude the land within the highway limits (Sibley v. Holden, 10 Pick. [Mass.] 249, 3 Gray's Cas. 340; King's County Fire Ins. Co. v. Stevens, 87 N. Y. 287, 3 Gray's Cas. 376; Smith v. Slocomb, 9 Gray [Mass.] 36; Peabody Heights Co. v. Sadtler, 63 Md. 533; Hunt v. Brown, 75 Md. 481. And see Chadwick v. Davis, 143 Mass. 7; Peck v. Denniston, 121 Mass. 17; Hoboken Land & Improve-

extent to the exterior line of the way,[51] but a deed which calls for a private road as a boundary but gives the grantee no right to open and use such road does not

ment Co. v. Kerrigan, 31 N. J. Law, 13). Where the latter view prevails, the same result would necessarily follow when, as the starting point of such line, there is named, not a monument on the side of the highway, but an imaginary point such as the intersection of the side line with another line. White's Bank of Buffalo v. Nichols, 64 N. Y. 65, 3 Gray's Cas. 373. Contra, Low v. Tibbetts, 72 Me. 92, 39 Am. Rep. 303. The words "beginning on the southerly side of" the road, or "at a point" on such side, and like expressions, have been in one state construed as merely indicating the side of the road on which the land lies, and not as locating a corner of the land at the edge of the road. O'Connell v. Bryant, 121 Mass. 557, and see Kneeland v. Van Valkenburgh, 46 Wis. 434. And more usually a contrary view is taken. King's County Fire Ins. Co. v. Stevens, 87 N. Y. 287, 3 Gray's Cas. 376; Hoboken Land & Improvement Co. v. Kerrigan, 31 N. J. Law, 13; Walker v. Pearson, 40 Me. 152. In applying the foregoing rules, the highway or street referred to is the highway as opened or defined by use, rather than the highway as platted or recorded. Falls Village Water Power Co. v. Tibbetts, 31 Conn. 165; Cleveland v. Obenchain, 107 Ind. 591; Brown v. Heard, 85 Me. 294; O'Brien v. King, 49 N. J. Law, 79; Blackman v. Riley, 138 N. Y. 318; Winter v. Payne, 33 Fla. 470; Orena v. Santa Barbara, 91 Cal. 621. But see Reid v. Klein, 138 Ind. 484. A change in the location or limits of the highway after the making of the conveyance in no way affects the boundaries of the abutting land. White's Bank of Buffalo v. Nichols, 64 N. Y. 65, 3 Gray's Cas. 373; Brantly v. Huff, 62 Ga. 532. In some jurisdictions a conveyance is not regarded as including land which is merely intended to be dedicated as a highway in the future, or which is merely marked on a plat as such, although the land conveyed is described as bounded on such intended highway as if it actually existed. Leigh v. Jack, 5 Exch. Div. 264, 3 Gray's Cas. 336; Bangor House Proprietary v. Brown, 33 Me. 309, 3 Gray's Cas. 354; Palmer v. Dougherty, 33 Me. 502, 54 Am. Dec. 636; O'Linda v. Lothrop, 21 Pick. [Mass.] 292; Robinson v. Myers, 67 Pa. 9; Spackman v. Steidel, 88 Pa. 453. But as to the Pennsylvania rule see Bliem v. Daubenspreck, 169 Pa. 282; Hancock v. Philadelphia, 175 Pa. 124. In other jurisdictions it is considered that such a reference to land as a highway raises the same presumption of an intention to convey the land to the center of the proposed highway as if the highway actually existed. Bissell v. New York Cent. R. Co., 23 N. Y. 61, 3 Gray's Cas. 367; In re Ladue, 118 N. Y. 213; Anthony v. City of Providence, 18 R. I. 699; Johnson v. Arnold, 91 Ga. 659. See Peck v. Dennison, 121 Mass. 17. If the owner owns the whole of the bed of the highway, and no land on the other side thereof, his conveyance of land on the highway will, it has been held, convey all the land within the highway limits. In re Robbins, 34 Minn. 99, 57 Am. Rep. 40, 3 Gray's Cas. 382; Johnson v. Arnold, 91 Ga. 659. When the land conveyed is described as extending a certain distance from the highway, without other means of determining its location, the line is to be measured, it has been decided, from the center line of the highway. Dodd v. Witt, 139 Mass. 63, 3 Gray's Cas. 380, 52 Am. Rep. 700. Whether, when the land is described as bounded on a private way the same rule applies as in the case of a public way, so as to give to the grantee the land to the center line thereof, in the absence of a contrary intention, it is a question on which the cases are not in accord. In Massachusetts it is held that the same rule applies to private as to public ways. Fisher v. Smith, 9 Gray [Mass.] 441, 3 Gray's Cas. 360; Gould v. Eastern R. Co., 142 Mass. 85. See, also, Witter v. Harvey, 1 McCord [S. C.] 67, 10 Am. Dec. 650. But a contrary intention may, of course, appear from the terms of the conveyance. Codman v. Evans, 1 Allen [Mass.] 443; Crocker v. Cotting, 166 Mass. 183. And see Cushing v. Hathaway, 10 R. I. 514. In Maine the same rule does not apply to private ways. Bangor House Proprietary v. Brown, 33 Me. 309, 3 Gray's Cas. 354; Ames v. Hilton, 70 Me. 36. As to the law in New York, see Mott v. Mott, 68 N. Y. 246.—From Tiffany on Real Property, p. 893.

51. Boundary on street goes to the middle. Barnes v. Philadelphia, etc. R. Co., 27 Pa. Super. Ct. 84. A deed conveying lots **bounded on a street** by legal presumption embraces the street to its center. Young v. Pennsylvania R. Co. [N. J. Law] 62 A. 529. A grantee of land described as situated on the side of a contemplated street takes title to the middle of the street. Everett v. Fall River, 189 Mass. 513, 75 N. E. 946. The owner of a lot bounded by a public street takes title to the center of the street. Lins v. Seeffeld [Wis.] 105 N. W. 917. Where land is conveyed by course and distance without mention of a street by which it is bounded, the fee to the center of the street is deemed included. Van Winkle v. Van Winkle [N. Y.] 77 N. E. 33. A conveyance of lots and blocks in platted property describing them by number only carries the fee to the center of the street and alley on which they abut subject to the easement of the public. Dickinson v. Arkansas City Imp. Co. [Ark.] 92 S. W. 21. Where a lot portrayed upon a map is sold in recognition of the map, and a street is determined thereon but not referred to, the grantee takes a fee to the center thereof, though the road be a private one or an alley used in connection with the premises conveyed. Johnson v. Grenell, 98 N. Y. S. 629. Deed to portion of lot abutting on B. street "aside from B. street vacated," held not to convey any portion of the land constituting half of B. street abutting on the property conveyed. Lins v. Seeffeld [Wis.] 105 N. W. 917. If the intent of a grantor is to make the center of a road the boundary and such intent can be gratified only by adopting the center of the road then existing when the same did not conform to courses and distances set out, courses and distances not conforming to the road should be disregarded, and the center of the road adopted. Whitridge v. Baltimore [Md.] 63 A. 808. A deed of land **bounded by a public road** passes title

pass the fee to any part of the road,[52] and the presumption that the owner of land abutting on a highway owns to the center thereof may be rebutted by the deed to him showing that the fee to the highway was not intended to be conveyed.[53]

§ 2. *Riparian or littoral boundaries.*[54]—As a general rule where land is described as bounding on a nonnavigable stream the boundary is the thread of such stream,[55] but if the stream is a navigable one the boundary is low-water mark.[56] This, however, is only a rule of evidence and may be rebutted.[57] This line changes with the gradual changes of the stream.[58] This is the rule as to a navigable river between states.[59] The rule that where a stream is called the line is the center thereof does not apply where a reservoir is called.[60] When a government lot abuts on a lake, the shifting water line and not the meander line is the boundary of the lot.[61] The transfer of such lot by number according to the government survey, without words of restriction, conveys all the land which has become a part of the lot by recession of the lake,[62] but when a morass or swamp is named as the boundary and the sale is by the acre, the purchaser does not take to a stream lying beyond such swamp.[63] The state holds the title to the body of a natural lake meandered by the government in trust for the public and a grant bounded thereon extends to the water's edge in its natural condition.[64]

§ 3. *Establishment by agreement of adjoiners.*[65]—Agreements between adjoining owners establishing a line where the true one is in dispute are favored by the

to the middle of the road if such title was in the grantor. Neely v. Philadelphia, 212 Pa. 551, 61 A. 1096. A description to an object upon the side of the highway, thence along the highway, carries title to the center of the highway. Van Winkle v. Van Winkle [N. Y.] 77 N. E. 33.

The right of way of a railroad is not a public highway in the sense of a road or street, and the rule of construction of deeds to land bounded by a highway does not apply so as to make a call for a right of way carry the grantor's interest between the boundary of the right of way and the railroad track. Couch v. Texas & P. R. Co. [Tex.] 90 S. W. 860.

52. Clayton v. Gilmer County Court [W. Va.] 52 S. E. 103.

53. Van Winkle v. Van Winkle [N. Y.] 77 N. E. 33.

54. See 5 C. L. 432.

55. Spurrier v. Hodges [Ky.] 90 S. W. 559. When a riparian owner sells lots delineated upon a map, fronting upon a street extending along the bank of a navigable river, the title conveyed reaches across the street to the water's edge transferring all riparian rights. Evidence insufficient to overcome this presumption. Johnson v. Grenell, 98 N. Y. S. 629.

56. A riparian owner on a navigable stream owns to low-water mark only. Frank v. Goddin, 193 Mo. 390, 91 S. W. 1057. Where land between high and low-water mark is held in trust for the public, a conveyance by the trustee bounded on the stream is presumed to carry title only to low-water mark. In re City of New York, 182 N. Y. 361; 75 N. E. 156.

57. When the two ends of a line by the shore are at high-water mark, in the absence of other calls or circumstances showing a contrary intention the boundary will be construed as excluding the shore. Whitmore v. Brown, 100 Me. 410, 61 A. 985.

58. Where a navigable stream forms a boundary it shifts with the water line either by accretion or recession. Frank v. Goddin, 193 Mo. 390, 91 S. W. 1057. When a stream constituting a boundary gradually changes its course, the boundary of the respective tracts changes. Spurrier v. Hodges [Ky.] 90 S. W. 559. A deed conveying land bounded on one side by a river passes title to accretions. Perry v. Sadler [Ark.] 88 S. W. 832. Where a navigable river gradually changes its course, land formed by accretion belongs to the owner of the shore land to which it is added. McBride v. Steinweden [Kan.] 83 P. 822.

59. McBride v. Steinweden [Kan.] 83 P. 822.

60. Where the reservoir is abandoned the grantee does not take to the center thereof. Dillon v. Burke [N. H.] 63 A. 927.

61. Sherwin v. Bitzer [Minn.] 106 N. W. 1046. By force of Colonial Ordinance of Massachusetts of 1841-47 the owner of upland adjoining tide water prima facie owns to low-water mark. Whitmore v. Brown, 100 Me. 410, 61 A. 985.

62. Sherwin v. Bitzer [Minn.] 106 N. W. 1046. One who owns land bounded by a meandered lake takes title to accretions and loses title where his land is gradually encroached upon, but not to lands submerged by sudden change. Schulte v. Warren, 218 Ill. 108, 75 N. E. 783. A surveyor who has made a survey may testify that the meanderings of a stream as shown by a former survey would fit only one particular part of the stream. Camp v. League [Tex. Civ. App.] 92 S. W. 1062.

63. Sale by the state of swamp lands held to pass title only to the meander line. Tolleston Club v. Lindgren [Ind. App.] 77 N. E. 818.

64. Schulte v. Warren, 218 Ill. 108, 75 N. E. 783.

65. See 5 C. L. 433.

courts.[66] Such an agreement may be oral,[67] and if carried into effect and acted upon is binding without other consideration than the settlement of the dispute,[68] especially after a long lapse of time,[69] unless an erroneous line is agreed upon by accident.[70] But it must be immediately executed by taking possession up to it.[71] A parol boundary agreement cannot operate to transfer title of record in one party.[72] A boundary agreement by which a county is divested of school lands must be made by a commissioner's court and recorded.[73]

§ 4. *Establishment by acquiescence, estoppel, or adverse possession.*[74]—The location of a boundary may be established by estoppel,[75] and if recognized for a long period of years may be established by acquiescence;[76] but to establish a line

66. Hollingsworth v. Barrett [Ky.] 89 S. W. 107. To make a valid oral agreement between contiguous owners there must be doubt as to the true line. Wade v. McDougle [W. Va.] 52 S. E. 1026. Contract by which one's predecessor in title conveyed to a contiguous owner the right to use a wall located over the line, held not to constitute an agreement that such wall should constitute the boundary. Crane v. Judge [Utah] 83 P. 566. Recitals in a party wall agreement and evidence showing actual location of the wall acquiescence in such line for sixteen years, held to show that a line was established in the center of a party wall. Roberts v. Fellman Dry Goods Co. [Tex. Civ. App.] 92 S. W. 1060.

67. A disputed line may be established by parol. Kitchen v. Chantland [Iowa] 105 N. W. 367. A boundary agreement between adjacent owners who are in doubt as to the true location of the line may be oral. Berry v. Evans [Ky.] 89 S. W. 12.

68. The settlement of a disputed boundary is a sufficient consideration to sustain the agreement by which it is settled. Kitchen v. Chantland [Iowa] 105 N. W. 367. If there is such doubt and uncertainty, an oral agreement, if carried into execution, is valid without other consideration than the settlement of the dispute. Wade v. McDougle [W. Va.] 52 S. E. 1026. An oral agreement followed by possession in pursuance thereof is binding on the parties. Sonnenmann v. Mertz [Ill.] 77 N. E. 550.

69. Where an oral agreement establishing a boundary is recognized for forty years it will be upheld. Lost Creek Coal Co. v. Napier's Heirs [Ky.] 89 S. W. 264. A parol boundary agreement acquiesced in for many years (twenty) is beyond question, because of the statute of limitations. Kincaid v. Vickers, 217 Ill. 423, 75 N. E. 527. Fifteen years' recognition of a boundary line fixed by oral agreement establishes it beyond dispute. Berry v. Evans [Ky.] 89 S. W. 12. Where adjoining owners established a line which is believed to be the true one and for twenty-four years exercised dominion up to it, it is conclusive upon them though not the true boundary. Lindley v. Johnston [Wash.] 84 P. 822. Parol agreement acquiesced in for sixteen years is not within the statute of frauds. Roberts v. Fellman Dry Goods Co. [Tex. Civ. App.] 92 S. W. 1060.

70. Sonnenmann v. Mertz [Ill.] 77 N. E. 550.

71. Wade v. McDougle [W. Va.] 52 S. E. 1026. A parol agreement establishing a line so as to give one owner land included in the deeds of another unaccompanied by possession up to the agreed line is within the statute of frauds. Clarke v. Clarke [Ky.] 90 S. W. 244. An unexecuted parol agreement is insufficient to establish a boundary. Where not followed by possession or improvements up to or relative to such line. Uker v. Thieman [Iowa] 107 N. W. 167.

72. McMurray v. Dixon [Va.] 54 S. E. 481.

73. Atascosa County v. Alderman [Tex. Civ. App.] 91 S. W. 846.

74. See 5 C. L. 433.

75. When a line had been recognized for forty years and after one owner had notice that it was not the true line permitted extensive improvements to be made with reference to it. Cleveland-Cliffs Iron Co. v. Gauthier [Mich.] 12 Det. Leg. N. 976, 106 N. W. 862. That an abutting owner builds a fence and plants trees on a line claimed by him as the street line does not estop a municipality from establishing the true boundary. City of Eldora v. Edgington [Iowa] 106 N. W. 503.

76. A boundary acquiesced in for ten years prevails over one divergent therefrom established by survey. Laughlin v. Francis [Iowa] 105 N. W. 360. Adjoining owners who recognize a certain line for twenty-five years cannot thereafter question it. Watson v. Hogan [Iowa] 106 N. W. 759. After such period it cannot be shown that the party who set the hedge purposely avoided the true line when the other believed it to be on the correct line. Id. That the description in a deed under which a party claims calls for a straight line does not defeat a line acquiesced in by the owners for ten years. Laughlin v. Francis [Iowa] 105 N. W. 360. A line acquiesced in by adjoining owners for fifteen years cannot be abrogated by a mere oral agreement to have a survey made to establish the true line. Uker v. Thieman [Iowa] 107 N. W. 167. Acquiesence for seven years by acts or declarations of adjoining owners will establish a line. Ivey v. Cowart [Ga.] 52 S. E. 436. Acquiescence by a municipality for forty years in a street line is in the absence of mistake some evidence of the true location of the line. City of Eldora v. Edgington [Iowa] 106 N. W. 503. Where one occupied and claimed property down to a certain line for forty years and his claim was based on a survey made by the county surveyor, a city which claims that it is not the correct line of the street has the burden to establish the correct line by clear evidence. Id. A survey made by a surveyor who accepted as the correct corner a stone found at the corner of a section

by acquiescence and recognition there must be possession up to it for the period prescribed by the statute of limitations acquiesced in by the other party,[77] and general reputation and long acquiescence in a line while tending strongly to show its location is not conclusive unless it amounts to an estoppel or contract.[78] Long acquiescence in a line raises no presumption of law that the line is a properly determined one.[79] Acquiescence by landowners whose lands are bounded by a county line will not bind others not holding under them and whose lands touch the county line at another place.[80] That one assists in constructing a fence along a highway does not estop him to assert that it is in the highway where he subsequently becomes owner of land across the way, a contract for the purchase of which he then had.[81]

Occupancy under a claim of ownership up to a certain line for the period necessary to give title by limitations establishes a boundary by adverse possession.[82]

§ 5. *Establishment by arbitration, action, or statutory mode.*[83]—Chancery has not independent or original jurisdiction to settle disputed boundaries which are obscure or confused,[84] but will assume jurisdiction if some equity is superinduced by the act of the parties or those under whom they claim.[85] In an action to enjoin a trespass the defendant may, as a counterclaim, plead and prove that the alleged claim of trespass rests upon a disputed boundary, and have the true line determined and established by the judgment of the court.[86] Statutory methods for establishing boundaries are prescribed in many states. The procedure in such proceeding is governed by the provisions of the statute.[87] In North Carolina the plaintiff has the burden to establish the line asserted by him to be the correct one.[88] It is generally provided that a boundary so established is prima facie the true one,[89]

which was not a government monument but was pointed out to him by persons living in the vicinity who never saw the original corner, held insufficient to overcome the owner's showing as to the true line. Id.

Evidence sufficient to show a boundary established by acquiescence. Kitchen v. Chantland [Iowa] 105 N. W. 367.

77. Wade v. McDougle [W. Va.] 52 S. E. 1026.

Evidence insufficient to show a boundary established by acquiescence. Erikson v. Slate [Iowa] 106 N. W. 621.

78. Camp v. League [Tex. Civ. App.] 92 S. W. 1062.

79. Atascosa County v. Alderman [Tex. Civ. App.] 91 S. W. 846.

80. Ivey v. Cowart [Ga.] 52 S. E. 436.

81. Christenson v. Simmons [Or.] 82 P. 805.

82. Evidence held admissible on the question of an agreement whereby adjoining owners established a line divergent from the description in their deeds as forming a basis for acquisition of title up to such line by adverse possession. Gray v. Kelley [Mass.] 76 N. E. 724.

Evidence insufficient to show a line established by adverse possession. Chambers v. Tharp [Ky.] 93 S. W. 627.

83. See 5 C. L. 434.

84. Hays v. Bouchelle [Ala.] 41 So. 518. A bill to quiet title will not lie to settle a boundary dispute. Livingston County Bldg. & Loan Ass'n v. Keach, 219 Ill. 9, 76 N. E. 72.

85. Facts held to warrant the assumption of such jurisdiction. Hays v. Bouchelle [Ala.] 41 So. 518.

86. Hackett v. Kanne [Minn.] 107 N. W. 1131. Where an issue as to the location of a boundary arises in an action of trespass and there is no question of boundary established by acquiescence, agreement or adverse possession, the plaintiff has the burden to establish the trespass. Clarke v. Case [Mich.] 13 Det. Leg. N. 193, 107 N. W. 893.

87. Written notice is required by Ky. St. 1903, § 2372, requiring one desiring to have his land processioned to give notice to any person interested. Crouch v. Wainscott [Ky.] 91 S. W. 289. A parol notice, however, is sufficient as to a person who was present and participated in the processioning. Id. Under Acts 1893, p. 44, c. 22, providing for the establishment of a disputed boundary and declaring occupancy of land by the petitioner sufficient evidence of ownership, a denial of his ownership does not entitle the defendant to have the proceeding dismissed because an issue of title was raised which could not be tried in such proceeding. Stanaland v. Rabon [N. C.] 52 S. E. 417. Pub. Acts 1899, p. 388, No. 248, amending Comp. Laws, § 2627, relative to the assessment of cost of making a survey against the property surveyed, does not apply to lands situated within the limits of an incorporated city. Paldi v. Cady [Mich.] 12 Det. Leg. N. 928, 106 N. W. 709.

88. In a proceeding under L. 1893, p. 44, c. 22, to establish a disputed boundary plaintiff may not, where there is a call for course and distance to a natural object, stop in his proof at the end of the course and distance, but must show the location of the natural object or that there never was such object or that at the time his line was surveyed a line was run and another corner marked. Hill v. Dalton [N. C.] 52 S. E. 273.

89. The report of the processioners made pursuant to Ky. St. 1903, § 2374, is prima facie evidence of the boundaries. Crouch v.

and is conclusive unless appealed from.[90] Such statutes often provide for the appointment of commissioners [91] or surveyors.[92] In Kentucky it is a statutory offense to destroy corner monuments.[93]

BOUNTIES

A state may enact a law appropriating money for the recognition of the valuable services of persons who served to its credit during the Civil War, and the money may be paid to such persons or expended for statues, medals, or other badges of honor;[94] but a statute for the mere equalization of the bounties of soldiers with larger amounts received by other soldiers would be unconstitutional, it not being founded upon any difference in the nature of the services or in the merit of the soldiers; and it would be invalid even though it should recite that the payments were made in recognition of valuable services.[95]

Sugar bounties.[96]—A former holding that the Nebraska Act of 1895 for the encouragement of the manufacture of sugar and chicory was invalid as embracing more than one subject has been reversed.[97] The act is, however, unconstitutional as an appropriation or pledge of public money for private purposes,[98] and the legislature not having had the power to expend money for such purposes, the fact that the manufacturers paid larger prices to the producers of beets relying upon this statute for remuneration did not create any obligation against the state in favor of the manufacturers.[99]

Wild animals.[1]—The Pennsylvania act of 1897 providing for the payment of bounties for the destruction of wild cats, foxes, and minks, is unconstitutional in that its title does not state that the bounties are to be paid by the counties as provided in its body,[2] and was not validated by a subsequent statute attempting to re-enact it by amending its title, but the title of which contained no intimation that the duty of paying the bounties was imposed upon the counties.[3] The Montana act of 1895 relating to bounties on stock-destroying animals, and its amendatory act of 1903, are valid.[4] The legislature had authority under the constitution to

Wainscott [Ky.] 91 S. W. 289. In an action under Gen. Laws, 1893, c. 68, p. 185, to determine and establish a boundary line evidence held sufficient to sustain the verdict of the jury establishing the line. Kistner v. Beseke [Minn.] 104 N. W. 759. A boundary established by the county surveyor after due notice to the owners which is accepted and acted upon and not appealed from is prima facie evidence of the correct line. Korporal v. Robinson [Ind. App.] 78 N. E. 84. A party who appeals from a survey regularly made by the county surveyor has the burden to show that it is incorrect. Christ v. Fent [Okl.] 84 P. 1074.

90. Under Burns' Ann. St. 1901, §§ 8024, 8030, a boundary established as therein provided and not appealed from within the statutory period is conclusive and a subsequent survey can be had only to determine the lines previously fixed. Wilson v. Powell [Ind. App.] 75 N. E. 611.

91. The appointment of commissioners provided for in Ball. Ann. Codes & St. § 5668, in proceedings to establish a boundary is in the discretion of the court. Stangair v. Roads, 41 Wash. 583, 84 P. 405.

92. Under Rev. St. art. 5264, authorizing the court to appoint a surveyor in cases involving boundary dispute, allowance of $20 per day to such surveyor held not an abuse of discretion. Harris County Irr. Co. v. Hornberger [Tex. Civ. App.] 94 S. W. 145. Where a surveyor was appointed by the court in a boundary dispute and his report and map used by the parties on the trial, the fact that it was not introduced in evidence does not preclude him from recovering compensation. Id.

93. Indictment under Ky. St. § 1256, for destroying a corner tree in a survey held to state a cause of action. Commonwealth v. Gregory [Ky.] 89 S. W. 477.

94, 95. In re Opinion of the Justices [Mass.] 77 N. E. 820.

96. See 5 C. L. 435, n. 33.

97. Laws 1895, c. 1, p. 57. Oxnard Beet Sugar Co. v. State [Neb.] 105 N. W. 716.

98, 99. Oxnard Beet Sugar Co. v. State [Neb.] 105 N. W. 716.

1. See 5 C. L. 435.

2. Act July 9, 1897 (P. L. 233). Bennett v. Sullivan County, 29 Pa. Super. Ct. 120, dist'g Hays v. Cumberland County, 5 Pa. Super. Ct. 159; 186 Pa. 109.

3. Act April 11, 1899. Bennett v. Sullivan County, 29 Pa. Super. Ct. 120.

4. In re Terrett [Mont.] 86 P. 266. Act Feb. 26, 1895 (Pol. Code, §§ 3070-3080), and Sess. Laws 1903, p. 166, are constitutional as to their titles. In re Terrett [Mont.] 86 P. 266. Act of 1903 not invalid because its

impose upon the district judges the duty of appointing persons to select bounty inspectors,[5] but if this were not so, a person appointed inspector under the act of 1903 and charged with a violation of the bounty law is not entitled to raise the objection that the duties imposed are not judicial in their character.[6]

False claims.[7]—An information charging, substantially, that the accused while acting as bounty inspector issued a bounty certificate to a certain person, and in the certificate certified that skins had been exhibited and marked and the necessary affidavits filed, while in fact such recitals were false and known to be such by the accused, charges a public offense under a statute making it forgery to falsely make, alter, or forge, a certificate, and does not merely charge the making of a false certificate, since the crime is not committed by making the false statements of fact but by making the certificate when the precedent conditions of exhibiting, examining, and marking the hides and filing the necessary affidavits, have not been fulfilled.[8]

BOYCOTT; BRANDS, see latest topical index.

BREACH OF MARRIAGE PROMISE.

The essentials of the right of action are a contract formed by an unconditional offer of marriage,[9] and an acceptance thereof,[10] and a breach or repudiation or failure to perform.[11]

Form of action.[12]—Damages for breach of promise to marry are recoverable in assumpsit.[13]

Evidence and instructions.[14]—In an action for breach of promise of marriage it is permissible to allege and prove circumstances antecedent to the promise tending to show the relations of the parties and the state of feeling existing between them at the time of the alleged promise.[15] Testimony that defendant seduced plaintiff

scope is broader than that of 1895, which it amended, in that it provided for a new set of officers to examine the hides and issue the bounty certificates. Id. Not invalid because Pen. code, § 1124, which it amends, refers to Pol. Code, § 2070, which as numbered in the published volume of the Political Code refers to the militia but as originally passed refers to bounties on wild animals. Id. Not invalid because it amends Pen. Code, § 1124, by prescribing a penalty for violation of Pen. Code, § 3070, which relates to the state reform school, where Pol. Code, § 3070, deals with bounties, and the word "Political" will be substituted for the word "Penal." Id.

5, 6. In re Terrett [Mont.] 86 P. 266.

7. See 5 C. L. 436.

8. In re Terrett [Mont.] 86 P. 266, §§ 3078, 3079, together constitute the penalty clause of Act Feb. 26, 1895, so as to render one liable for forgery under section 3078 for falsely making a certificate. Id.

9. A promise by a defendant to marry "as soon as his mother got well" is not a conditional but an absolute promise to marry at an uncertain time in the future. Not contingent upon recovery of mother. Anderson v. Kirby [Ga.] 54 S. E. 197.

10. Acceptance of an offer of marriage may be implied from the acts of the parties and from the relations assumed by them at the time of and subsequent to the offer. McKee v. Mouser [Iowa] 108 N. W. 228. Evidence that after plaintiff had dismissed defendant as a suitor their differences were disposed of and a marriage was proposed by defendant; that he stated they had had one of their good old times, and had a clear understanding; that she assented and said that everything was straightened up and that there would be no more misunderstanding between them, and that he said he was glad and kissed her good-by at the door, held sufficient to show acceptance. Id.

11. Upon the repudiation of a promise to marry at some future time, the injured party may bring an action for a breach without waiting for the arrival of the time of performance. Renunciation of promise to marry "as soon as defendant's mother got well" entitled plaintiff to sue while the mother was still ill. Anderson v. Kirby [Ga.] 54 S. E. 197.

12. See 5 C. L. 436.

13. Were so recoverable prior to Act of May 25, 1887, P. L. 271, and action is still assumpsit and not trespass. Keim v. Brumbaugh, 29 Pa. Super. Ct. 557. Defendant was entitled to benefit of the $300 exemption allowed by Act of April 9, 1849, P. L. 533. Id.

14. See 5 C. L. 437.

15. That petitioner and her sister cared for defendant's sick mother where defendant lived, etc. Anderson v. Kirby [Ga.] 54 S. E. 197. Where plaintiff relies on a renewal of a previous contract of marriage and defendant denies both the original and the renewal, it is competent for plaintiff to show the former engagement and the relation between the parties prior to the renewal, for the purpose of proving the re-

is not admissible to show a promise of marriage,[16] nor is such evidence admissible to show a breach of the contract of marriage though by consenting the female may invite a repudiation of the promise.[17] Evidence that an invalid ceremony was performed and a further ceremony promised is admissible.[18] The jury being plainly advised that a mutual engagement must be shown, an instruction that in determining whether defendant had made a promise the jury may consider all the facts and circumstances of the case is not objectionable as an intimation that an acceptance is unnecessary.[19]

Damages; aggravation and mitigation.[20]—Both the actual and reputed wealth of the defendant may be considered in determining the amount.[21] The jury may also properly consider the duration of the courtship, renewed promises of marriage, and all other circumstances placing plaintiff in a worse position, or debarring her from other opportunities of marriage, by reason of the contract with defendant.[22] Seduction is usually considered in aggravation of damages,[23] but in Rhode Island such evidence [24] is not admissible. It is within the discretion of the court to strike or retain evidential facts forming no part of the cause of action but pleaded in aggravation of damages even if such facts are redundant and could be proven without being pleaded.[25]

Liability of third person inducing breach.[26]

BREACH OF THE PEACE, see latest topical index.

BRIBERY.

Nature and Elements of Offense (458).
Indictment (459).
Evidence (459).
Trial and Instructions (460).

Nature and elements of offense.[27]—It is necessary that the gift or gratuity be given to influence the action of the officer in some matter wherein he has lawful authority to act,[28] or in which he might or may be required to act officially.[29] It

newal alleged to have been made. McKee v. Mouser [Iowa] 108 N. W. 228.

16, 17. Wrynn v. Downey [R. I.] 63 A. 401.

18. Where the parties had been married in Italy by a religious ceremony which did not bring about a valid marriage, held not error to permit plaintiff to testify that defendant told her that a civil marriage was also necessary on account of the property, and that marriage by church alone was not so strong as marriage by both church and civil authority. Massucco v. Tomassi [Vt.] 62 A. 57. Plaintiff's testimony that defendant asked the priest whether plaintiff could marry and that the priest said she could as she was twenty-one years old, held admissible. Id. Not error to permit plaintiff to testify that no marriage ceremony was ever performed except a foreign one shown to have been invalid. Id. Not error to allow Italian priest to testify that a marriage by religious ceremony alone did not constitute a legal marriage in Italy, witness being qualified. Id. Not error to allow plaintiff to testify on re-examination after having testified that she considered herself defendant's wife, that she did not claim to be his legal wife, having been married only in church. Id.

19. McKee v. Mouser [Iowa] 108 N. W. 228.

20. See 5 C. L. 436.

21. Proper to so authorize jury. McKee v. Mouser [Iowa] 108 N. W. 228. Not error to permit plaintiff to testify that when defendant proposed marriage he stated that he was worth a certain sum. Massucco v. Tomassi [Vt.] 62 A. 57.

22. Sramek v. Sklenar [Kan.] 85 P. 566. Instruction that in determining damages jury could consider the fact that the parties had lived together under an **invalid foreign marriage,** held proper. Massucco v. Tomassi [Vt.] 62 A. 57.

23. Sramek v. Sklenar [Kan.] 85 P. 566; Anderson v. Kirby [Ga.] 54 S. E. 197.

24. Wrynn v. Downey [R. I.] 63 A. 401, reviewing the decisions at length.

25. Sramek v. Sklenar [Kan.] 85 P. 566.

26. See 3 C. L. 527.

27. See 5 C. L. 437.

28. Pen. Code, § 72. A coroner cannot be convicted of asking a bribe, to influence his action in the matter of the death of a person outside of his jurisdiction. People v. Jackson, 47 Misc. 60, 95 N. Y. S. 286. A member of a school board was guilty of bribery under Gen. St. 1901, § 2212, in accepting money to influence him in letting a contract to clean school buildings, although the board had previously let the contract to another, where the member let the contract with such other party's approval. State v. Campbell [Kan.] 85 P. 784.

29. People v. Bunkers [Cal. App.] 84 P.

is a breach of "lawful duty" for an official to disclose what discreet administration of his office holds secret.[30] The guilt of a party receiving a bribe on the understanding that his official action is to be influenced is not lessened by the absence of intent to bribe on the part of the parties furnishing the money given him.[31] A police officer of a city is an "executive officer," within a statute punishing the giving of a gift or gratuity to such an officer to influence his action.[32]

An attempt to bribe is the same as an offer to bribe;[33] but where the defendant in custody of an officer said to him, "How much will you take to turn me loose and let me go?", and the officer replied that he must not talk so, there was no offer to bribe shown.[34]

Solicitation of a bribe is an offense in most states.[35] The office held by the person asking a bribe to influence his official proceedings must be a public one.[36] An investigation by special agents of the government is a "pending proceeding" within the Federal statute before the filing of their report.[37]

Indictment.[38]—Where the act charged is not pleaded as a common-law misdemeanor, but as a statutory felony, every ingredient of the offense required by the statute must be set forth.[39] Different bribes to the same person for the same purpose[40] or to him and a different person pursuant to the same intent[41] may be joined under the Federal statutes. The duty to be violated and the intent may be charged by reference to another count.[42] An offer need not be proved in the exact words charged if the import is exactly the same.[43]

Evidence.[44]—An overt act may be proved by the solicitation made.[45] Intent may be shown by the excessiveness of the consideration in a contract obtained by alleged bribery,[46] the receipt of the bribe by the cashing of a check.[47] It is admissible on a charge for solicitation that a delivery of the bribe was made though but

364. A breach of official duty is involved in a bribe to officers to reveal the contents of a report to the end that a public investigation be defeated, though the report is not in their possession and may never be. Rev. St. § 5451. Investigation as to public land frauds. Benson v. U. S., 27 App. D. C. 331.

30. Though not enjoined by positive law. Benson v. U. S., 27 App. D. C. 331.

31. People v. Bunkers [Cal. App.] 84 P. 364.

32. Code, § 3744. Haynes v. Com. [Va.] 52 S. E. 358.

33. Johnson v. State [Tex. Cr. App.] 92 S. W. 257.

34. Evans v. State [Tex. Cr. App.] 89 S. W. 1080.

35. Under Laws 1901, p. 38, c. 34, making it criminal to advise the commission of or attempt to commit any felony, that fails of commission, the solicitation of a bribe to influence official action is an offense, though the person solicited refuses to give the bribe. Rudolph v. State [Wis.] 107 N. W. 466. Appellant was guilty of a crime when he asked for or offered to receive the bribe, and his acceptance of it neither added to his guilt nor to the penalty already entailed. Pen. Code, § 86. People v. Bunkers [Cal. App.] 84 P. 364.

36. Pen. Code, § 72. People v. Jackson, 47 Misc. 60, 95 N. Y. S. 286.

37. Rev. St. § 5451. Benson v. U. S., 27 App. D. C. 331.

38. See 5 C. L. 438.

39. Indictment failed to allege that the action sought to be influenced was an official one. People v. Jackson, 47 Misc. 60, 95 N. Y. S. 286.

40, 41. Bribery to frustrate an investigation of land fraud investigation. Benson v. U. S., 27 App. D. C. 331.

42. Benson v. U. S., 27 App. D. C. 331.

43. The indictment charged that defendant said to the officer "How much will you take to turn me loose and let me go and get away," and the words proved were "How much will you take to turn me loose and let me go." Held no variance. Evans v. State [Tex. Cr. App.] 89 S. W. 1080.

44. See 5 C. L. 438.

45. Evidence tending to show that defendant asked for $100 as a condition for voting for the allowance of a claim and urged payment of a like sum to other members of council committee before whom the claim was pending, held sufficient to show overt acts. Rudolph v. State [Wis.] 107 N. W. 466.

46. Where it was charged that a member of a board of education had taken money to influence his action in letting a certain contract, evidence that the contractor had taken a similar contract with an individual at a much lower price was admissible to show the intent with which the money was received. State v. Campbell [Kan.] 85 P. 784.

47. A check drawn for the amount charged to have been received as a bribe, by the party charged with giving it, and cashed by the defendant, was competent evidence to show receipt of the money. State v. Campbell [Kan.] 85 P. 784.

a trap.[48] On the issue whether the bribe was to an arresting or detaining officer, it may be shown that defendant had become subject to arrest without warrant [49] and the crime charged may be shown.[50]

Trial and instructions.[51]—Where defendant was charged with asking for and receiving a bribe, and was found guilty as charged, an instruction that asking for or receiving a bribe justified a conviction was not prejudicial.[52] A judgment finding "an offer" conforms to a verdict finding "an attempt."[53]

BRIDGES.

§ 1. Regulation and Control (460).
§ 2. Establishment and Location by Public Agencies 460).
§ 3. Contracts and Construction (461).
§ 4. Public Liability for Costs and Maintenance (462).
§ 5. Establishment, Construction and Maintenance by Private Enterprise (463).
§ 6. Injuries From Defective Bridges (464).
§ 7. Injuries to Bridges (465).

§ 1. *Regulation and control.*[54]—If a bridge is public it is controllable by the public though a public contract to pay its cost is void.[55] Driving over bridges may be regulated within municipal limits by ordinance.[56] Underlying fee ownerships may not be unnecessarily invaded by use of a bridge.[57] The public authorities have the right to restrain by injunction the operation of a free ferry or bridge within the prohibited distance from a public toll bridge prescribed by statute or ordinance,[58] and need not join its co-owner, a municipal corporation, in the injunction proceedings.[59]

§ 2. *Establishment and location by public agencies.*[60]—A bridge may be located by implication from the laying of a highway across a stream.[61] In Louisiana, police juries have plenary powers as to the establishment of public ferries, bridges

48. Since the asking or offering to take a bribe by a public officer is in itself criminal and the subsequent acceptance of the bribe adds nothing to his guilt or punishment, a plan to entrap him by delivering him the bribe is admissible in evidence. People v. Bunkers [Cal. App.] 84 P. 364.

49. Johnson v. State [Tex. Cr. App.] 92 S. W. 257.

50. And where the indictment for offering a bribe to the officer did not show what the prisoner was charged with, but merely alleged that the officer had her in legal custody, the prosecution could show what the prisoner was charged with to show the legal custody. Johnson v. State [Tex. Cr. App.] 92 S. W. 257.

51. See 5 C. L. 439.

52. People v. Bunkers [Cal. App.] 84 P. 364.

53. That the verdict found defendant guilty of "an attempt," instead of "an offer" to bribe as found by the judgment was immaterial. Johnson v. State [Tex. Cr. App.] 92 S. W. 257.

54. See 5 C. L. 439.

55. Where the owner of lands on both sides of the stream opened public roads through his lands and built a bridge, the county paying a portion and contracting with him to maintain the bridge as a public one, though the commissioners could not make such a contract, the bridge was subject to their control and they could discontinue it at any time. Code, c. 17, § 707, subsec. 15. Glenn v. Moore County Com'rs, 139 N. C. 412, 52 S. E. 58.

56. Platt v. Toledo, 6 Ohio C. C. (N. S.) 403.

57. Where the fee to a street is in the abutting lot owners and excavations are made in the street and a bridge erected thereover, such owners may use the surface of the street beneath the bridge in any way not inconsistent with the right of the public. Adair v. Atlanta [Ga.] 52 S. E. 739.

58. Police Jury of Lafourche v. Robichaux [La.] 40 So. 705. A free pontoon bridge, constructed and maintained by individuals, without warrant of law, within a short distance of a public toll bridge, cannot be considered in the light of a private ferry. Police Jury of Lafourche v. Robichaux [La.] 40 So. 705, reaffirming Blanchard v. Abraham, 115 La. 989, 40 So. 379. See, also, Toll Roads and Bridges, 6 C. L. 1698.

59. Police Jury of Lafourche v. Robichaux [La.] 40 So. 705. Act 67, p. 61, Acts 1855, authorizing police jury of Lafourche parish and municipal authorities of town of Thibodaux to construct and maintain a draw bridge across the bayou Lafourche, has never been repealed, directly or by implication. Id.

60. See 5 C. L. 439.

61. Where a highway was duly laid out so as to cross a mill pond, though no reference was made to the erection of a bridge, the construction of one was implied. Andrews v. Wekenman [Mich.] 13 Det. Leg. N. 163, 107 N. W. 870.

62. Police Jury of Lafourche v. Robichaux [La.] 40 So. 705; Blanchard v. Abraham, 115 La. 989, 40 So. 379.

and roads,[62] as well as their abandonment or discontinuance, and may convert a free bridge or road into a toll bridge or road and vice versa, and may operate a toll ferry or road directly or through lessees.[63] When a city erects and maintains a bridge, in the exercise of governmental powers and under legislative authority, it incurs no liability for injuries to others, unless it takes private property therefor, or unless by negligence or lack of care in the performance of the work of construction, or in the maintenance of the bridge, some one is directly injured.[64] The construction and maintenance of a bridge with a terminus almost immediately in front of property and the grading of the street adjacent so as to make it a thoroughfare, furnishing access from such property to the business portions of the city, is a special benefit to be considered in assessing damages to the property.[65] Where a railway company constructed a bridge and graded the street to make the approaches, under the direction, authority and supervision of the city and for the benefit of both city and company, it was the same as if the work was done by the city through a contractor and benefits could be set off against damages.[66]

§ 3. *Contracts and construction.*[67]—The erection of county bridges is regulated by statute, and all the statutory provisions must be strictly complied with in order to make the proceeding effective and place the burden on the county.[68] Where the statute provided for the construction of a bridge, when necessary, at the cost of the county, under contract let by the town supervisors, with concurrence of the county commissioners, and the commissioners had acted in good faith for the erection of a bridge, a taxpayer could not maintain a suit to enjoin its erection;[69] and prohibition does not lie to restrain the commissioners' court from proceeding with the construction of a bridge, after it has let the contract therefor, the allowance of the claim and issue of a warrant therefor being a ministerial act.[70] A city may, in the exercise of its discretionary power as to public improvements, authorize a railroad company to build a bridge for the benefit of the city and give it power to close the street for a reasonable time therefor;[71] but in constructing approaches to a bridge over a canal, according to a contract with a corporation as to use of the canal, they being constructed above the grade while for mere street purposes they might have been constructed at or near grade, a city was not acting under its charter powers.[72] There is no statute in New Jersey limiting the power of the board of freeholders in the letting of contracts for bridge construction, and it is therefore limited only by the rule that its acts must be in good faith and as the result of an honest exercise of discretion.[73] Hence, where expedition in the construction of a bridge was necessary and the original plan was not feasible, it was no abuse of discretion to award a contract on a plan submitted, without competitive bidding.[74]

63. Police Jury of Lafourche v. Robichaux [La.] 40 So. 705, reaffirming Plank Road v. Kline, 106 La. 325, 30 So. 854.

64. Defendant not liable for water and snow, mingled with splinters and pulverized wood, falling from the New York and Brooklyn bridge upon plaintiff's building, the injury being consequential. Sadlier v. New York [N. Y.] 78 N. E. 272, afg., 104 App. Div. 82, 93 N. Y. S. 579. See 5 C. L. 439, n. 4.

65. Spokane Traction Co. v. Granath [Wash.] 85 P. 261.

66. Spokane Traction Co. v. Granath [Wash.] 85 P. 261. As to taking private property for bridges, see Eminent Domain, 5 C. L. 1097.

67. See 5 C. L. 440.

68. In proceedings under Act June 13, 1836 (P. L. 551), for constructing bridges across rivers or creeks, there must be a reasonably continuous concurrence of the grand jury, the court and the county commissioners. Commonwealth v. Baker, 212 Pa. 230, 61 A. 910. After an interval of four years from the filing of the petition to the concurrence of the county commissioners, mandamus to compel the board to construct a bridge was denied. Id.

69. Code, § 2034. Glenn v. Moore County Com'rs, 139 N. C. 412, 52 S. E. 58.

70. Goodwin v. State [Ala.] 40 So. 122.

71. Adair v. Atlanta [Ga.] 52 S. E. 739.

72. Ranson v. Sault Ste. Marie [Mich.] 13 Det. Leg. N. 113, 107 N. W. 439.

73, 74. Bloomfield v. Board of Chosen Freeholders of Middlesex [N. J. Law] 62 A. 116.

A mere citizen and resident of a town and parish cannot maintain an action to compel the authorities to invest the surplus revenues from a toll bridge and use the interest thereof to maintain and operate the structure as a free bridge, it not being even alleged that he had ever used the bridge, or expected to do so, or had been or would be injured by the collection of tolls.[75]

§ 4. *Public liability for costs and maintenance.*[76]—Where it is made by statute the duty of the county commissioners to open and discontinue highways and bridges, and a willful failure of duty is made a misdemeanor and penalties are imposed, a taxpayer of a county cannot maintain mandamus to compel the commissioners to repair a bridge.[77] While it is the duty of county commissioners to keep bridges in reasonably safe condition, they are not justified in ignoring statutory provisions as to repair or new construction.[78] In New York, the town board is not called upon to repair a bridge in an emergency, until a request has been made by the highway commissioner;[79] and the highway commissioner and town board cannot contract for the rebuilding of bridges which have been destroyed or damaged by natural wear.[80] A highway commission cannot be compelled to incur any expense in repairing a bridge when there are no available funds for the purpose.[81] The legislature may impose upon municipalities the duty of maintaining in part bridges not located within their boundaries,[82] and a bridge across a navigable river, on a town road so intersected by a village plat as to include the bridge within the village, may be properly made by law in part a town bridge.[83] Where two municipal corporations are jointly required to maintain a bridge and one unreasonably neglects or refuses to act, the other may carry the whole burden for a time and recover from the delinquent municipality its just share of the expense.[84] The expense of the repair of a bridge over a stream between two towns will be divided equally, where it is jointly usd, the traffic each way is about equal and access is equally important to both.[85] In Iowa, where adjoining counties, acting jointly or concurrently, have provided for the construction of a bridge over a stream forming their boundary line, neither county can withdraw without consent of the other.[86]

75. Laforest v. Thibodaux [La.] 41 So. 568.

76. See 5 C. L. 440.

77. Code, c. 17, § 707, subsec. 15; § 711, and § 1090. Glenn v. Moore County Com'rs, 139 N. C. 412, 52 S. E. 58.

78. Hunt v. Fronizer, 3 Ohio N. P. (N. S.) 303.

79. Under Highway Law, § 10 (Laws 1890, p. 1179, c. 568), providing for the immediate repair or rebuilding of a bridge, where damaged or destroyed, by the highway commissioner with consent of the township board. People v. Early, 106 App. Div. 269, 94 N. Y. S. 640.

80. Under Laws 1890, p. 1179, c. 568, § 10, as amd. Laws 1895, p. 408, c. 606, and Laws 1899, p. 108, c. 84, for immediate repair of bridges destroyed or damaged by the elements. People v. Voorhies, 99 N. Y. S. 918. Where the board contracted for new bridges, in such case, but did not receive or use them, and the contract did not recite facts showing the board's authority, and it did not appear that the seller of the bridges was ignorant of the facts or misled, the board was not estopped to deny the validity of the contract. Id.

81. People v. Early, 106 App. Div. 269, 94 N. Y. S. 640.

82. The maintenance of a bridge across a large stream, requiring a greater expenditure than is just to impose alone on the municipality in which it lies, is not a purely local affair (Village of Bloomer v. Bloomer [Wis.] 107 N. W. 974), and the requiring of other municipalities to assist in maintaining it does not violate the principles of local self-government (Id.). Nor does the maintenance of such a bridge, under the supervision of the officers of the two municipalities pursuant to law, violate the constitutional prohibition of the state's engaging in works of internal improvement. Id.

83. Village of Bloomer v. Bloomer [Wis.] 107 N. W. 974.

84. The proper remedy is an action at law and not mandamus. Village of Bloomer v. Bloomer [Wis.] 107 N. W. 974. Where the delinquent municipality had repudiated all liability for the maintenance of the bridge, it could not escape its liability for its share of the expense, on the ground that the notice given to the town board referred to repairs on the bridge and not to the construction of a new one. Id.

85. Town of East Fishkill v. Wappinger, 107 App. Div. 622, 95 N. Y. S. 92.

86. Code, §§ 424, 1510. Bremer County v. Walstead [Iowa] 106 N. W. 352. Where the first county adopted a resolution for such bridge and appropriated a sum to pay half

In Nebraska, an action of mandamus to compel the repair of a county bridge over a stream forming the boundary between two counties cannot be maintained without notice to both counties.[87] Under the statute of Illinois for the construction of necessary bridges across public highways by the commissioners of drainage districts, the highway commissioners of two towns, between which a drainage ditch is constructed, are not jointly liable for the whole cost of the bridge constructed, and cannot be jointly sued therefor.[88]

§ 5. *Establishment, construction and maintenance by private enterprise*[89] is more fully treated elsewhere.[90] No one has a legal right to construct a pontoon bridge across a navigable water without special legislative authority, state or Federal.[91] A bridge built across a navigable stream under state authority, prior to the enactment of Federal legislation on the subject, is a lawful structure.[92] The right to repair or alter, or to improve a bridge, for the safety of the public, is incident to the power to build it;[93] and also the right to build temporary structures in the stream to prevent the interruption of the operation of a railroad during the repair or rebuilding of the bridge.[94] Where a railroad company was authorized to purchase the franchises and property of a waterway company, on condition of furnishing equal transportation facilities,[95] and its dams were subsequently removed for sanitary reasons, under an express act of the legislature,[96] the railroad company was relieved from liability for damages and was not required to furnish a bridge or other means of transportation across the river.[97] The Union Pacific Railroad company being required, by act of congress, to permit the joint use of its bridge at Omaha, to other railroads terminating there,[98] its successor, by purchase under a foreclosure sale, did not take the property free from that obligation, enacted by con-

the cost, provided the other county would do the same, and the other county adopted a like resolution, providing for paying one-half the cost, although the second resolution did not refer to the first, yet the two constituted concurrent action by the two counties Id.

87. Under Comp. St. 1903, § 116, c. 78 (Cobbey's Ann. St. 1903, § 6134). State v. Smith [Neb.] 108 N. W. 173. Repairs of county bridges contemplated by Comp. St. 1903, §§ 114, 115, c. 78 (Cobbey's Ann. St. 1903, §§ 6132, 6133) are such as may be made at once and without considerable cost. Id.

88. Hurd's Rev. St. 1903, c. 42, § 115. Commissioners of Union Drainage Dist. No. 3 v. Commissioners of Highways [Ill.] 77 N. E. 71.

89. See 5 C. L. 441.

90. See Railroads, 6 C. L. 1194; Toll Roads and Bridges, 6 C. L. 1698.

91. Blanchard v. Abraham, 115 La. 989, 40 So. 379.

92. Rogers Sand Co. v. Pittsburgh, etc. R. Co. [C. C. A.] 139 F. 7. The secretary of war has no authority to order and compel the commissioners of a county to remove an established bridge over a navigable river wholly within the limits of the state, and rebuild it in such a manner as to change the course of the river by straightening the same at the point in question, thereby throwing the channel fifty feet to the east. State v. Ashtabula County Com'rs, 7 Ohio C. C. (N. S.) 469. Nor can he require them to tear down such bridge upon the ground that it is an unreasonable obstruction to the free navigation of such river without tendering compensation therefor. Id. Taxpayer can enjoin county commissioners from carrying out an order of the secretary of war ordering a bridge over a navigable stream reconstructed, the bridge being wholly within the county and having been constructed before congress attempted to confer authority on the secretary. Id.

93. Rogers Sand Co. v. Pittsburgh, etc. R. Co. [C. C. A.] 139 F. 7. A state grant to a railroad company of authority to build and maintain a bridge, without restriction as to time or materials, authorizes the company to renew parts of the bridge, from time to time, without substantial change, with the same or other suitable material. United States v. Cincinnati & M. V. R. Co. [C. C. A.] 134 F. 353. Such "bridge" was not confined to the span or roadway, but included the abutments and piers supporting it; and the replacing of a wooden superstructure by an iron one did not constitute the erection of a new bridge, so as to bring it within Act Cong. April 2, 1888, c. 53, 25 Stats. 74. Id.

94. Rogers Sand Co. v. Pittsburgh, etc., R. Co. [C. C. A.] 139 F. 7.

95 Under Act Feb. 27, 1879. Chesapeake & O. R. Co. v. Com. [Va.] 54 S. E. 331.

96. Act May 20, 1887 (Acts 1887, Ex. Sess. p. 422, c. 329). Chesapeake & O. R. Co. v. Com. [Va.] 54 S. E. 331.

97. Chesapeake & O. R. Co. v. Com. [Va.] 54 S. E. 331.

98. Act Feb. 24, 1872 (16 Stat. at L. 420, c. 67). Union Pac. R. Co. v. Mason City, etc., R. Co., 199 U. S. 160, 50 Law. Ed. ——.

gress under its reserved right to alter the act of incorporation after the execution of the mortgage.[99]

§ 6. *Injuries from defective bridges.*[1]—Municipalities having control of highways and bridges are generally required to keep them reasonably safe for ordinary travel.[2] The authorities in charge must have had at least constructive notice of the defects.[3] Primarily it is the duty of township authorities to maintain a bridge, being part of a public highway,[4] and to recover against a street railway company for injuries from a collision caused by a defect in such a bridge, plaintiff must show that the company and not the township was responsible for the repair of the bridge.[5] The statute of Nebraska pertaining to the liability of counties is still in force.[6] Where the county has exercised reasonable care and prudence in keeping its bridges in repair and suitable for the ordinary necessities of travel, it has fulfilled its duty, and cannot be held responsible;[7] but if persons in the exercise of ordinary care are injured through defects which might have been obviated by reasonable care on the part of the county, then the county is liable.[8] In Iowa the county is liable for damages resulting from negligence in building or failing to repair bridges.[9] The municipal liability imposed by the bridge act of New Jersey, applies only in cases where damage has been sustained through neglect of duties owed to the general public,[10] and not to damage caused by water backing up on private property on account of the smallness of a culvert under a bridge.[11]

Defective construction.[12]—Where the bridge, by whose fall plaintiff was injured, was so defectively constructed as to be essentially and imminently dangerous to the safety of others, the defects being so concealed as not to be disclosed by a reasonably careful inspection and being known to the contractor but not to the commissioners who accepted the bridge, the contractor was liable for negligence, though the bridge did not fall until after acceptance;[13] but where a bridge was ordered and contracted for by the commissioners in the manner provided by law, plaintiff could not recover against the contractor who built it, on the theory that, by reason of its negligent and improper construction it constituted a nuisance.[14]

Proximate cause of injury.[15]

Contributory negligence.[16]—The traveler must exercise only reasonable care in the use of a bridge,[17] and one attempting to cross a bridge which is part of a highway, in the absence of notice to the contrary or of facts sufficient to put him on

99. Union Pac. R. Co. v. Mason City, etc., R. Co., 199 U. S. 160, 50 Law. Ed. ——.

1. See 5 C. L. 442.

2. Brassington v. Mt. Carmel Borough, 24 Pa. Super. Ct. 318. A town is not liable for injuries caused by a horse getting frightened at a hole in a bridge and backing plaintiff's vehicle off the bridge, when the hole does not necessarily interfere with the passage of vehicles. Wallace v. New Albion, 107 App. Div. 172, 94 N. Y. S. 793.

3. Evidence sufficient to sustain a finding of constructive notice of defective condition. Central City v. Morquis [Neb.] 106 N. W. 221.

4, 5. Wagner v. Lehigh Traction Co., 212 Pa. 132, 61 A. 814.

6. Cobbey's Ann. St. 1903, being Laws 1887, c. 72, p. 587, did not operate as a repeal of § 8756, relative to such liability. Central City v. Morquis [Neb.] 106 N. W. 221. The term **"bridges"** in said § 8756 does **not include the approaches** thereto. Id.

7, 8. Clingan v. Dixon County [Neb.] 105 N. W. 710.

9. Under Code, § 422, subd. 18, authorizing the supervisors of each county to provide for the erection of all bridges in the county and to keep them in repair. Wilson v. Wapello County [Iowa] 105 N. W. 363.

10. Supplement of Mar. 15, 1860, to "An act respecting bridges," (Gen. . Stp. 307). Maguth v. Passaic County Chosen Freeholders [N. J. Err. & App.] 62 A. 679.

11. Maguth v. Passaic County Freeholders [N. J. Err. & App.] 62 A. 679.

12. See 5 C. L. 443.

13, 14. Casey v. Wrought Iron Bridge Co., 114 Mo. App. 47, 89 S. W. 330.

15. See 5 C .L. 443.

16. See 5 C. L. 444.

17. Brassington v. Mt. Carmel Borough, 24 Pa. Super. Ct. 318. Where a bridge stood on an embankment nine feet high, much narrower than the highway and narrowing as it approached the bridge, and deceased was a man of intelligence who had lived near the bridge for 25 years and was well acquainted with the surroundings, it **was**

inquiry, has a right to assume that the bridge is reasonably safe.[18] In estimating whether a bridge was overloaded, under the statute of New York, when it broke, the weight of another vehicle attached to the loaded one and partly on the bridge at the time was included.[19]

Remedies.[20]—The statutes of Louisiana give no remedy against a parish for a private injury caused by the neglect of the police jury or highway officers to keep a public bridge in proper repair,[21] and if a highway officer be responsible in such a cas, it is only where he had the requisite funds in hand or under control to make the repairs.[22]

Pleading and evidence.[23]—In some states it must be shown that notice, as prescribed by statute, has been given the municipality.[24]

Questions for jury.[25]—The question of defendant's negligence is one for the jury.[26] It is error to charge on contributory negligence[27] or cause of accident[28] when there is no evidence of such things.

§ 7. *Injuries to bridges.*[29]

BROKERS.

§ 1. Employment and Relation in General (465). Definition (465). A License (466). Creation of Relation (467). Necessity of Contract Being in Writing (467). Termination of the Relation (468). Scope of Broker's Authority (469).
§ 2. Mutual Rights, Duties, and Liabilities (470).
§ 3. Rights and Liabilities as to Third Persons (471).
§ 4. Compensation and Lien (471). Necessity of Contract (471). Substantial Performance of his Contract (472). Lien (473). Broker Must be Efficient Producing Cause of Sale (473). Customer Produced Must be Ready, Willing, and Able to Purchase (474). Broker Must Act in Good Faith Towards Principal (476). Procuring Loan (477). Necessity of Broker's Contract Being in Writing (477). Amount of Commissions and Measure of Recovery for Services (477). Actions to Recover Commissions (477).

§ 1. *Employment and relation in general. Definition.*[30]—A real estate broker is one who negotiates the sale of real property.[31] The difference between a factor or commission merchant and a broker is this: A factor may buy and sell in his own name and he has the goods in his own possession; while a broker, as such, cannot ordinarily buy and sell in his own name and has no possession of the goods.[32]

held that he must have been guilty of contributory negligence. Farrel v. North Elba, 97 N. Y. S. 1110.

18. Central City v. Morquis [Neb.] 106 N. W. 221.

19. Under Highway Law, Laws 1890, p. 1205, c. 568, § 154, relieving the town from responsibility for the breaking of a bridge under a load of 4 tons or more. Evidence held to show such a weight on the bridge when it broke. Kelly v. Saugerties, 110 App. Div. 561, 97 N. Y. S. 177.

20. See 5 C. L. 444.

21, 22. Bankins v. Police Jury of Calcasieu Parish [La.] 40 So. 925.

23. See 5 C. L. 444.

24. Under V. S. 3492, no action can be maintained against a town for injuries resulting from a defective bridge, unless written notice is first given stating how the bridge was insufficient, etc. Skinner v. Weathersfield [Vt.] 63 A. 142. Notice that the bridge was "upon said highway," and giving its location, sufficiently showed it to be part of the highway mentioned and was not insufficient in failing to denominate the highway a "public highway." Id.

25. See 5 C. L. 445.

26. Plaintiff going over highway bridge which was most direct route though not familiar to him stepped into hole caused by plank being allowed to remain defective for three years. Brassington v. Mt. Carmel Borough, 24 Pa. Super. Ct. 318. Verdict for plaintiff sustained. Id.

27. An instruction as to contributory negligence, when there was absolutely no evidence of such negligence on plaintiff's part, held prejudicial error. Clingan v. Dixon County [Neb.] 105 N. W. 710.

28. An instruction as to what caused the horse's fright, which occasioned the precipitation of team, vehicle and plaintiff off of the bridge was properly refused, where there was no evidence from which the jury could determine the cause of the fright. Wilson v. Wapello County [Iowa] 105 N. W. 363.

29. See 5 C. L. 445.

30. See 5 C. L. 445. See, also, **Clark & Skyles, Agency, 1619.**

31. Larson v. O'Hara [Minn.] 107 N. W. 821.

32. Green v. U. S., 25 App. D. C. 549. A person having possession and absolute control of merchandise shipped to him to sell and collect the price is a commission merchant and not a broker. T. M. Sinclair &

One may be both a factor and a broker and may serve his employers in both capacities,[33] and his rights and liabilities are governed by the law applicable to the capacity in which he acts for the time being.[34] Real estate brokers are governed by the same rules of law as other agents.[35]

A license [36] to carry on the business of real estate broker is sometimes required.[37] Where a law requiring a license to carry on the business of a real estate broker is a mere revenue measure, the broker's failure to procure such license is no ground for denying his right to commissions;[38] and where the broker was duly licensed when the negotiations were completed, the fact that he was not so when the

Co. v. National Surety Co. [Iowa] 107 N. W. 184. But where a contract between principals and agents provided that they should have possession of goods as "hrokers or commission merchants," representation of them to a surety company as "brokers" was not a fraud vitiating the bond (Id.), and where the surety company, with knowledge of the capacity in which the agents were employed, described them as "brokers" in their bond, it could not, in a suit on the bond, allege that they were commission merchants and not brokers (Id.).

33. Green v. U. S., 25 App. D. C. 549.

34. One who receives and takes actual possession, or by bill of lading, of farm produce shipped to him as agent of the shipper, to sell, is a factor or commission merchants within the meaning of D. C. Code, § 838, punishing embezzlement, although he has no store and his general business is that of a broker. Green v. U. S., 25 App. D. C. 549.

35. A real estate agent enjoys no exemption from the ordinary rules governing the relationship of principal and agent. Kingsley v. Wheeler [Minn.] 104 N. W. 543. A charge that where a sale is effected through the efforts of a real estate agent "his services are regarded in law as highly meritorious and beneficial" was improper as suggesting to the jury that such agents are more meritorious or entitled to more favors than people in other walks of life. Bowe v. Gage [Wis.] 106 N. W. 1074.

36. See 5 C. L. 449, n. 17.

37. Code Pub. Loc. Laws, art. 4, § 658, provides for such licenses in the city of Baltimore, and § 659 makes it a misdemeanor to carry on such business without a license. Coates v. Locust Point Co., 102 Md. 291, 62 A. 625. The power conferred on cities by 2 Mills' Ann. St. § 4403, subd. 4, "to tax, license and regulate brokers," being general and its mode of exercise not prescribed, the reasonableness and constitutionality of an ordinance passed thereunder is subject to judicial consideration. Munson v. Colorado Springs [Colo.] 84 P. 683. City ordinance, requiring as a condition precedent to license, the presentation of a certificate of membership in some reputable ticket brokers' association, held void for unreasonableness and as an unwarranted abandonment by the city of its delegated power. Id.

38. Code Pub. Loc. Laws, art. 4, § 658. Coates v. Locust Point Co., 102 Md. 291, 62 A. 625.

Note: Where a statute, national or state, or a city ordinance, provides that a broker of any particular class shall not do business without first having taken out a license, and declaring it an offense to engage in such business without the prescribed license, a broker who renders services in violation of such statute is not entitled to recover compensation therefor, although the transaction he in all other respects regularly negotiated by him. Douthart v. Congdon, 197 Ill. 349, 90 Am. St. Rep. 167; Hustis v. Pickands, 27 Ill. App. 270; Whitfield v. Huling, 50 Ill. App. 179; Eckert v. Collot, 46 Ill. App. 361; Richardson v. Brix, 94 Iowa, 626; Young v. Denning, 52 Kan. 629; Pratt v. Burdon, 168 Mass. 596; Buckley v. Humason, 50 Minn. 195, 36 Am. St. Rep. 637; Holt v. Green, 73 Pa. 198, 13 Am. Rep. 737; Johnson v. Hulings, 103 Pa. 498, 49 Am. Rep. 131; Costello v. Goldbeck, 9 Phila. [Pa.] 158; Coles v. Meade, 5 Pa. Super. Ct. 334 (without a contract as to a specific amount); Stevenson v. Ewing, 87 Tenn. 46; Saule v. Ryan [Tenn.] 53 S. W. 977; Stockard v. Morgan, 105 Tenn. 412. But see Amato v. Dreyfus [Tex. Civ. App.] 34 S. W. 450; Houston v. Boagni, 1 McGloin [La.] 164. And if, in such a case, the broker's charges for services form part of the entire consideration for notes given by him by his customer, the notes are not enforceable. Douthart v. Congdon, 197 Ill. 349, 90 Am. St. Rep. 167. But the presumption is that the broker has complied with the statute and has taken out license, and where one alleges the contrary the burden of proof is on him to show it. Shelper v. Scott, 85 Pa. 329; Munson v. Fenno, 87 Ill. App. 655. These statutes, however, ordinarily only apply to those who carry on the business of brokers regularly; and a private individual who conducts negotiations only in a single or occasional sale may recover his commission, agreed upon, although he had no license. O'Neil v. Sinclair, 153 Ill. 525; Johnson v. Williams, 8 Ind. App. 677; Pope v. Beals, 108 Mass. 561; Chadwick v. Collins, 26 Pa. 138; Shepler v. Scott, 85 Pa. 329; Yedinskey v. Strouse, 6 Pa. Super. Ct. 587; Raeder v. Butler, 19 Pa. Super. Ct. 604; Jackson v. Hough, 38 W. Va. 236. One who sells real estate for another under a special contract, without holding himself out as a real estate broker, may recover his commissions although he has not complied with the act requiring real estate brokers to take out a license (Black v. Snook, 204 Pa. 119), nor do they apply to one employed on a salary (Portland v. O'Neill, 1 Or. 218). It has been held that the sole object of these acts being to raise revenue, and not to declare the acts of an unlicensed broker illegal, the fact that a broker has not taken out such a license does not affect his right to recover on an express contract for a fixed commission. Ruckman v. Bergholz, 37 N. J. Law, 437; Woodward v. Stearns, 10 Abb. Pr.

purchaser elected to exercise his option of purchase, was no defense to the claim for commissions.[39]

Creation of relation.[40]—The relation of principal and broker is created by contract,[41] the sufficiency of which is determined by the rules of law applicable to all other contracts,[42] and the usual rules relative to the conflict of laws prevail.[43] A mere promise to pay commissions is lacking in mutuality;[44] but the performance of work by a broker in pursuance of an employment to sell land, when at once brought to the knowledge of the employer, is an acceptance of the contract of employment, and creates mutuality in such contract.[45] Employment as a broker, begun under a formal contract, may be continued after its expiration by act of the parties.[46] A married women may bind herself for the payment of broker's services rendered in the sale of her real estate;[47] and her contract, executed through a broker, to convey her separate real estate will bind the proposing purchaser, though she cannot convey the land without her husband joining in the conveyance.[48]

Necessity of contract being in writing.[49]—In the absence of statute the contract between the broker and his principal need not be in writing.[50] In some jurisdictions the statutes require that the broker's authority to sell land must be in writ-

[N. S.; N. Y.] 395; Fairly v. Wappoo Mills, 44 S. C. 227; Prince v. Eighth St. Baptist Church, 20 Mo. App. 332. But the mere fact that a broker has acted without a license in violation of a city ordinance does not make the contract, which he has negotiated, invalid. He may be prosecuted and fined for so acting, but this does not invalidate his contracts or affect their character as evidence. Murray v. Doud, 167 Ill. 368, 59 Am. St. Rep. 297. Hence, the rule that an action cannot be maintained which is predicated on a transaction prohibited by statute has no application to such contracts. Id. The purchase of a bill of exchange by such a broker is valid, and he may recover thereon, though he may have incurred the penalty prescribed by the statute. Lindsey v. Rutherford, 17 B. Mon. [Ky.] 245.—From Clark & Skyles Agency, 1684.

39. Coates v. Locust Point Co., 102 Md. 291, 62 A. 625. Baltimore City Charter (Acts 1893, pp. 507, 508, c. 123), §§ 695-700, making it a misdemeanor to carry on the business of a real estate broker without a license is a mere revenue measure and a broker who had no license when he contracted to render services was nevertheless entitled to recover on the contract. Walker v. Baldwin [Md.] 63 A. 362.

40. See 5 C. L. 445. See, also, **Clark & Skyles, Agency,** 1624.

41. An option for four months for the sale of real estate at a net price was a contract of employment to find a purchaser and not a sale of real estate to plaintiffs, and was a promise of exclusive agency. Arnold v. National Bank of Waupaca [Wis.] 105 N. W. 828. Where a broker wrote and asked the owner of land if he was still willing to sell on the terms offered two years before, and the owner replied that he did not remember those terms but would sell at a certain price and would try to make terms satisfactory to the purchaser, held that the latter superseded the former contract. De Kremen v. Clothier, 109 App. Div. 481, 96 N. Y. S. 525.

42. Where, with knowledge of its agent's promise to pay plaintiff a commission on the sale of a machine, defendant agreed to do so, the terms of its contract with its agent were immaterial. Nelson v. National Drill Mfg. Co. [S. D.] 105 N. W. 630. Where plaintiff had been engaged in investigating mining properties for a newspaper and defendant offered to pay plaintiff a commission for good prospects looked up by him, in case of purchase, such contract was not unenforceable as founded on a past consideration. Friedman v. Suttle [Ariz.] 85 P. 726. Held that under the articles of association, the vice-president or secretary of an association had no authority to list the association's real estate with brokers for sale. Spotswood v. Morris [Idaho] 85 P. 1094.

43. Such a contract is to be interpreted according to the law of the place where it is made, unless it appears it was to be executed elsewhere, when the law of the place of execution governs. Douglass v. Paine [Mich.] 12 Det. Leg. N. 527, 104 N. W. 781. Contract made in Michigan held to be governed by law of Massachusetts. Id. The validity of a contract affecting the sale of real property is determined by the law of the state where the property is situated, not where the contract is executed. Dal v. Fischer [S. D.] 107 N. W. 534.

44. Jayne v. Drake [Miss.] 41 So. 372.

45. Arnold v. National Bank of Waupaca [Wis.] 105 N. W. 828. And see McCray v. Pfost [Mo. App.] 94 S. W. 998.

46. A contract was made in 1899 for the sale of salt which expired in 1900. The brokers were authorized in 1900 to continue on the same terms. On Dec. 19, 1903, they were notified of a termination of the employment Dec. 31, 1903. Held that they were entitled to commissions on orders already procured to be filled in 1904. Brown v. Retsof Min. Co., 109 App. Div. 150, 95 N. Y. S. 815.

47. Burns' Ann. St. 1901, § 6960. Isphording v. Wolf [Ind. App.] 75 N. E. 598.

48. Isphording v. Wolf [Ind. App.] 75 N. E. 598.

49. See 5 C. L. 446.

50. Friedman v. Suttle [Ariz.] 85 P. 726.

ing,[51] and in such cases, without a written contract, the broker cannot recover on a quantum mruit for services rendered;[52] but in Montana a broker can recover on a quantum meruit, in case of an oral contract completely performed,[53] and the statute of New York cannot be invoked as a defense where the contract has been fully executed and defendant has reaped the benefit thereof and acknowledged in writing plaintiff's agency and performance.[54] No particular form of written contract is required,[55] and such authority may be shown by the correspondence between the principal and broker [56] if specific and certain in its terms.[57]

Termination of the relation.[58]—Authority for a definite time terminates with the expiration thereof.[59] Where no time limit is fixed for the broker's authority to sell real estate, it continues for a time reasonable in view of the circumstances,[60] and

51. Acts 1901, p. 104, c. 67. Isphording v. Wolf [Ind. App.] 75 N. E. 598. Comp. St. 1903, § 74, c. 73 (Cobbey's Ann. St. 1903, § 10,258). Barney v. Lasbury [Neb.] 107 N. W. 989. Under Rev. Civ. Code, § 1238, an agreement for the sale of real estate made by an agent is invalid unless the agent's authority is in writing subscribed by the party sought to be charged. Dal v. Fischer [S. D.] 107 N. W. 534. So also in Montana under Civ. Code, § 2185. Blankenship v. Decker [Mont.] 85 P. 1035. Where a husband, without authority of his wife, employed a broker to procure a purchaser for her land, but gave him no written authority as prescribed by Laws 1901, p. 312, c. 128, and the broker found a purchaser, the husband was not liable for breach of an implied warranty of his authority to employ a broker, since there could have been no recovery against the wife. Bloodgood v. Short, 98 N. Y. S. 775. Where defendant in an action for commissions admitted in his answer the employment of plaintiff as a broker and the contract of exchange was actually signed through his efforts, the case was thus taken out of the purview of Laws 1901, p. 312, c. 128, Pen. Code, § 640d. Hough v. Baldwin, 99 N. Y. S. 545. Laws 1901, p. 312, c. 128, making it a misdemeanor, in first or second class cities, to offer for sale any real property without written authority, etc., has no application to leases for not exceeding three years. Lovejoy v. Weil, 95 N. Y. S. 552. This statute is highly penal and was enacted to protect property owners from the annoyance of having their property hawked about the market without their consent or knowledge. Id.; Cox v. Hawke, 96 N. Y. S. 433.

52. Rodenbrock v. Gress [Neb.] 104 N. W. 758, following and approving Blair v. Austin [Neb.] 98 N. W. 1040; Barney v. Lasbury [Neb.] 107 N. W. 989.

53. Blankenship v. Decker [Mont.] 85 P. 1035.

54. Laws 1901, p. 312, c. 128 (Pen. Code, § 640). Smyth v. Sichel, 97 N. Y. S. 1008.

55. "I hereby authorize H., as broker, to bargain for the sale of 47 acres (known as the Abbey ranch) * * * valued at $10,000—for which I agree to pay H. 5 per cent. on the above mentioned sum or any less amount I may accept," held sufficient under statute of frauds, Civ. Code, § 1624, subd. 6. Hill v. McCoy [Cal. App.] 81 P. 1015. Where, in a broker's contract for sale of land, the premises were referred to as the "Abbey Ranch," parol evidence was admissible to identify it, under Code Civ. Proc., § 1860. Id. A written authority to one member of a firm of brokers, by one who knew of the partnership, was sufficient authority under the statute. Pen. Code, § 640d. Cox v. Hawke, 96 N. Y. S. 433.

56. Isphording v. Wolf [Ind. App.] 75 N. E. 598. The written contract required by Cobbey's Ann. St. 1903, § 10,258, may be evidenced by letters passing between the parties. Holliday v. McWilliams [Neb.] 107 N. E. 578.

57. A mere inquiry by an owner, addressed to a broker as to whether a certain price could be obtained is not sufficient to create the latter an agent of the owner so as to empower him to sell, or make a valid contract for its sale enforceable by specific performance. Fay v. Sullens [Okl.] 81 P. 426. Where such letters contain data from which a description of the land placed with the agent can be ascertained with certainty, the contract may be enforced. Holliday v. McWilliams [Neb.] 107 N. W. 578. A letter from defendant to plaintiff, in reference to a conversation in regard to the purchase of property, requesting plaintiff to call and discuss the matter, was sufficient authority, in connection with evidence that plaintiff had already undertaken to find a purchaser. Getzelsohn v. Donnelly, 98 N. Y. S. 213.

58. See 5 C. L. 446. See, also, **Clark & Skyles, Agency,** 1626.

59. Where an exclusive contract for the sale of land, conditioned to remain in full force for 10 days and "thereafter until withdrawn" in writing, was extended by memorandum thereon to a specific date, such memorandum did not terminate the contract at such date, nor until the property was withdrawn in writing as originally provided. Clark v. Dalziel [Cal. App.] 84 P. 429.

60. Staehlin v. Kramer [Mo. App.] 94 S. W. 785; Grieb v. Koeffler [Wis.] 106 N. W. 113. Where plaintiff alleged a contract to pay for procuring information relating to the prospective purchase of a railroad, in case defendant purchased it or became interested in its purchase, such contract could not be construed to restrain defendant from such purchase for all time, on pain of being liable for the payment, but only for a reasonable time. Mengis v. Fitzgerald, 108 App. Div. 24, 95 N. Y. S. 436. A delay of four months before the completion of the sale, where plaintiff furnished at once the name of the person who finally purchased, did not deprive plaintiff of the right to compensation. Burd v. Webster [Wis.] 107

where the owner conveys the premises to the purchaser pursuant to the arrangement made by the broker, the latter is entitled to his commission, though the transfer was made later than the time originally fixed.[61] The contract cannot be revoked or modified during its term without the consent of the broker.[62] But a contract without consideration, merely giving one the exclusive agency for the sale of land on commission, for one year, may be revoked prior to a sale, being without mutuality.[63] There can be no revocation of a broker's authority after he has procured a customer,[64] and after labor is performed or money expended the authority of the broker becomes a power coupled with an interest and cannot be revoked.[65] Where a power by its terms irrevocable is not coupled with an interest, a revocation terminates the power though it makes the principal liable in damages.[66] The broker's agency may be terminated by his employer for fraud,[67] but where the employer accepts the services of the broker, he cannot rescind his agreement with him, without paying him the value of such services.[68]

Scope of broker's authority.[69]—A broker employed to find a purchaser for land, or with whom land is listed for sale at a specified price, has no implied authority to execute a contract of sale,[70] nor to contract for the annulment of a sale which he has made.[71] A broker, authorized to buy or lease premises, presumptively is not authorized to employ a subbroker or subagent.[72] Stockbrokers are justified, in an emergency, in exercising their best judgment in the sale of stocks held on margins.[73] The principal may ratify the unauthorized acts of one purporting to act for him so as to be bound thereby.[74]

N. W. 23. Where a broker was engaged more than a year in finding a purchaser, with defendant's knowledge and no revocation of his authority, and finally secured a purchaser to whom the land was sold, plaintiff was entitled to his commissions, though the land was sold for less than at first authorized and was sold by defendant or through another agent. Staehlin v. Kramer [Mo. App.] 94 S. W. 785.

61. Southwick v. Swavienski, 99 N. Y. S. 1079.

62. An agreement to pay a certain amount for furnishing a purchaser was not revoked by defendant's statement to plaintiff that he would pay no commission unless a certain price was obtained, plaintiff not having assented to the modification. Burd v. Webster [Wis.] 107 N. W. 23.

63. Jayne v. Drake [Miss.] 41 So. 372. After a broker had made several attempts through the owner's attorney to secure the premises for tenants he had secured, he saw the owner and she said she would do nothing but sell and he might find a customer. Held that the broker's authority to lease was thereby revoked. Cadigan v. Crabtree [Mass.] 78 N. E. 412.

64. Finck v. Schmitt, 48 Misc. 503, 96 N. Y. S. 197. Evidence held insufficient to show revocation prior to sale. Kilpatrick v. Wiley [Mo.] 95 S. W. 213.

65. J. C. McCray & Son v. Pfost [Mo. App.] 94 S. W. 998.

66. Kilpatrick v. Wiley [Mo.] 95 S. W. 213.

67. Agreement for a commission from the other party. Hanna v. Haynes [Wash.] 84 P. 861.

68. Where a broker, employed to purchase lands under an agreement for an equal division of the profits on a resale, was guilty of a constructive fraud because of an agreement with the vendor for a commission on making a sale, and the purchaser accepted the benefits of the broker's services. Hanna v. Haynes [Wash.] 84 P. 861.

69. See 5 C. L. 446. See, also, **Clark & Skyles, Agency,** 1628.

70. Larson v. O'Hara [Minn.] 107 N. W. 821. Provisions in a contract by a broker making time of the essence and binding the seller to pay for examination of the abstract held within broker's authority. Kilpatrick v. Wiley [Mo.] 95 S. W. 213.

71. Jones v. Bloomgarden [Mich.] 12 Det. Leg. N. 1019, 106 N. W. 891.

72. Southack v. Ireland, 109 App. Div. 45, 95 N. Y. S. 621.

73. Stockbrokers held certain stocks for a customer, on margins which became exhausted during a panic in the stock market, and were unable to get a reply to letters, or telephone or telegraph messages sent to his New York and Chicaga offices. Leiter v. Thomas, 97 N. Y. S. 121. An instruction to a cotton broker to "hedge when margin about exhausted" covered not only the particular margin at the time, but any margin in the hands of the brokers at any time before the close of the trades. Winston v. F. A. Longshore & Co. [La.] 40 So. 517.

74. Acquiescence in the accounts and acceptance of the statements, by one who sold short through a broker, was a ratification of his act in buying shares on her account on a rising market, where she made arrangements for the liquidation of the indebtedness shown and ultimately discharged it. Buck v. Houghtaling, 110 App. Div. 52, 96 N. Y. S. 1034. A brother and sister being tenants in common, the brother employed a broker to sell the land. He wrote the terms of the contract to the brother who showed the let-

§ 2. *Mutual rights, duties, and liabilities.*[75]—The relation between a broker and his customer, though it involves a certain amount of trust and confidence in the broker on the part of the customer, is not a fiduciary relation, but a relation as debtor and creditor;[76] and to enable the principal to maintain a bill against a broker for an accounting for the money intrusted to him to purchase stocks, it must appear that there was a fiduciary relation between them,[77] or that the account was so complicated that it could not conveniently be taken at law.[78] The principal can recover any damages which are proximately the result of the broker's breach of contract,[79] or bad faith,[80] or want of ordinary care and skill in transacting the

ter to the sister and notified the agent that the sale was accepted. After the brother's death the sister wrote to the agent with reference to the sale and received and cashed a check given as part payment, afterward orally agreeing to the conveyance of the land. Held that she ratified the contract of sale. Stuart v. Mattern [Mich.] 12 Det. Leg. N. 616, 105 N. W. 35.

75. See 5 C. L. 447. See, also, **Clark & Skyles, Agency,** 1637.

76. Brown v. Corey [Mass.] 77 N. E. 838.

77. Brown v. Corey [Mass.] 77 N. E. 838. Where a client intrusts sums of money to a broker to purchase and sell securities, such a fiduciary relation exists between them as entitles the client to an accounting in equity. Haight v. Haight & Freese Co., 98 N. Y. S. 471.

NOTE. Duty to account: It is the duty of a broker to keep an accurate record of all transactions and proceedings entered into by him in behalf of his principal; and within a reasonable time or on demand, to account for all profits, after deducting his commissions, and charges, made by him in contracts entered into for his principal. Payne v. Waterston, 16 La. Ann. 239; Haas v. Damon, 9 Iowa, 589; Bate v. McDowell, 49 N. Y. Super. Ct. 106. He cannot deal with the subject-matter of his employment to his own advantage, as has been seen heretofore, but must account to his principal for any profit that is made in the transaction. Thus, if he sells for more (Love v. Hoss, 62 Ind. 255; De Bussche v. Alt, 8 Ch. Div. 286; Collins v. McClurg, 1 Colo. App. 348; Lewis v. Denison, 2 App. D. C. 387; Kellogg v. Keeler, 27 Ill. App. 244; Merryman v. David, 31 Ill. 404; Stoner v. Weiser, 24 Iowa, 434; Tilleny v. Wolverton, 46 Minn. 256), or buys for less (Morison v. Thompson, L. R. 9 Q. B. 480; Thompson v. Meade, 7 Times Law R. 698; Cottom v. Holliday, 59 Ill. 179; Stoner v. Weiser, 24 Iowa, 434; Morrison v. Odgensburgh & L. C. R. Co., 52 Barb. [N. Y.] 173) than the stipulated price, he must account to his principal for the difference. And he cannot set up as a defense, to an action for the proceeds, the fact that the transaction in which he was employed was an illegal one (Pearce v. Foote, 113 Ill. 229, 55 Am. Rep. 414; Pointer v. Smith, 7 Heisk [Tenn.] 137; Tenant v. Elliott, 1 Bos. & P. 3). When a stockholder makes entries, in his books, of purchases, of stocks for his customers, and renders to them statements showing that he has bought and holds for them certain stocks, giving names, prices, and the standing of the account, the customers, believing and acting upon such statements, may treat them as true, and the broker is estopped to deny them. In re Pearson's Estate, 19 App. Div. [N. Y.] 478.—From Clark & Skyles' Agency, 1650.

78. Held that the allegations of the bill did not show a fiduciary relation, or such a complication of accounts that they could not be adjusted at law. Brown v. Corey [Mass.] 77 N. E. 838.

79. Where brokers agreed to sell certain securities within a fixed time and that plaintiff should receive therefor a named sum of money, upon breach of such contract plaintiff could not recover the amount agreed that he should receive, but damages for breach of the covenant. Gause v. Commonwealth Trust Co., 100 App. Div. 427, 91 N. Y. S. 847. Complaint demurrable for failure to allege breach of covenant. Id. Where a broker fails to sell stocks by a certain time, at a fixed minimum price as agreed, the measure of damages is the difference between such minimum price and the value of the stocks at the expiration of the time fixed. Gause v. Commonwealth Trust Co., 97 N. Y. S. 1091. And where the contract contained a further stipulation that the agreement should become "null and void" at the expiration of the time limit or on the sale of the stocks and an accounting before, such provision did not relieve the broker from obligation to compensate the owner for failure to sell the stocks as agreed. Id. Where in pursuance of the agreement with his brokers plaintiff usually deposited margins within an hour of the receipt of notification, but the brokers closed out a transaction within a few minutes after notifying plaintiff, they were liable to him for the loss sustained in restoring the contracts. Sanger v. Price, 99 N. Y. S. 513. Where a client entrusted to brokers a sum of money as margin for the purchase and sale of securities, but the broker did no more than to offset orders to purchase and sell against similar orders from other clients, that did not fulfill the plaintiff's orders and he could recover the amount deposited, with interest, although it was provided that any other client might be the purchaser and the broker should not be required to disclose the name of any client. Haight v. Haight & Freese Co., 98 N. Y. S. 471. Brokers purchased stock on margin for a customer, charging him with the price at the time of purchase. This stock was credited on other transactions and when the customer desired to take up his stock, the brokers substituted other similar stock obtained at a smaller price. The customer retained the stock and it did not appear that the stock fluctuated between its purchase and delivery. Held that as he was not entitled to the identical stock pur-

principal's business;[81] but not where the principal ratifies or accepts the broker's fraudulent transaction.[82] The rule that an agent is responsible for profits fraudulently obtained at his principal's expense, applies only when the agency is established.[83]

§ 3. *Rights and liabilities as to third persons.*[84]—Brokers purchasing bonds for customers may transfer an ownership in common in a mass of bonds purchased by them, to their individual customers and treat them as owners and are bound thereby.[85]

§ 4. *Compensation and lien. Necessity of contract.*[86]—A broker is entitled to compensation only when there is a contract of employment, either express or implied.[87] Authority to find a purchaser at a certain net price to the seller is an

chased, he was not damaged by the substitution and could not recover the difference in price. Helm v. Ennis, 109 App. Div. 42, 95 N. Y. S. 1040.

80. If he purchases land from his principal, without disclosing the fact that he has contracted to sell it to a third party at an advanced price, and completes such sale, he renders himself liable to his principal in damages. Kingsley v. Wheeler [Minn.] 104 N. W. 543. Where a broker's agent, authorized to indorse customers' checks to his principal and deposit them in bank for collection, deposited them with another broker as margins in his speculative stock account, the latter broker was responsible to the agent's principal, because he knew of the agent's wrongdoing. Salen v. Bank of State of New York, 110 App. Div. 636, 97 N. Y. S. 361. Where a broker obtained authority to sell timber for $2,000 and did so, but represented that he could get only $1,250 of which he was to retain $50 for his services, and intended by collusion with the purchasers to appropriate the balance of the purchase price, the transaction was a fraud on the owner and he was entitled to equitable relief. Lee v. Patillo [Va.] 52 S. E. 696. In such case, the purchasers having offered to stand by their agreement and to pay the $2,000 as the court might decree, in a suit for rescission of the contract, the court would direct the payment of $1,950 to the principal and of $50 to the broker. Id.

81. A broker who contracted for his principal to purchase land and assume certain incumbrances was guilty of negligence in not discovering certain unpaid taxes and not ascertaining that certain overdue notes drew increased interest, whereby he overpaid the vendor, and was liable for such overpayment. Henricks v. Brady [S. D.] 108 N. W. 332. The taxes being prima facie legal and not disputed by the vendor, plaintiff's failure to prove by the records that the taxes had been legally assessed did not prevent a recovery. Id.

82. Where the principal had reason to suspect the broker's connivance in a resale of the land at an advanced price but refused, while the sale was still executory, to avail himself of easy means of learning the truth, but executed the contract. Bartleson v. Vanderhoff [Minn.] 104 N. W. 820.

83. Bartleson v. Vanderhoff [Minn.] 104 N. W. 820.

84. See 5 C. L. 449. See, also, **Clark & Skyles, Agency,** 1706.

NOTE. Liability of broker to third persons: It is well established that a broker, like all other agents, cannot be held personally liable to a third party, upon an authorized contract made by him for a disclosed principal. Deslandes v. Gregory, 2 El. & El. 602; Gadd v. Houghton, 1 Exch. Div. 357; Damora v. Craig, 48 F. 736; Tiller v. Spradley, 39 Ga. 35; Wright v. Cabot, 89 N. Y. 570; Bailey v. Galbreath, 100 Tenn. 599; Bettle v. Anderson, 98 Wis. 5. If, however, the broker makes the contract in his own name, without disclosing his principal, he thereby becomes personally liable upon such contract, although the principal also may be held liable, when disclosed, and in such case the creditor may elect whether to sue the broker or the principal. Calder v. Dobell, L. R. 6 C. P. 486; Jones v. Littledale, 6 Adol. & E. 486; Fleet v. Murton, L. R. 7 Q. B. 126; Pike v. Ongley; 18 Q. B. Div. 708; Hutcheson v. Eaton, 13 Q. B. Div. 861; York County Bank v. Stein, 24 Md. 447; Cobb v. Knapp, 71 N. Y. 348, 27 Am. Rep. 51; Knapp v. Simon, 96 N. Y. 284; Beebee v. Robert, 12 Wend. [N. Y.] 413, 27 Am. Dec. 132; Beymer v. Bonsall, 79 Pa. 298; Lichten v. Verner, 8 Pa. Dist. R. 218; Falkenburg v. Clark, 11 R. I. 278; Baldwin v. Leonard, 39 Vt. 266, 94 Am. Dec. 324. And the broker will not be relieved from such liability by the fact that the third party supposed that he was acting in a representative capacity if he did not know whom he was representing (Cobb v. Knapp, 71 N. Y. 348, 27 Am. Rep. 51; Wilder v. Cowles, 100 Mass. 487; Thomson v. Davenport, 9 Barn. & C. 78; Baldwin v. Leonard, 39 Vt. 360, 94 Am. Dev. 324), though if the third party actually knew, or had sufficient knowledge to create an inference, that the broker was acting as agent for another, it would be otherwise, although the name of the principal is not disclosed; and the real principal could so assert his rights as to cut off equities which had grown up between such third person and the broker (Wright v. Cabot, 89 N. Y. 570; Baxter v. Duren, 29 Me. 434, 50 Am. Dec. 602; Bliss v. Bliss, 7 Bosw. [N. Y.] 345; Baring v. Corrie, 2 Barn. & Ald. 137, 144).—From Clark & Skyles' Agency, 1700.

85. Defendant, as assignee for the benefit of the creditors of certain brokers, had no claim on any bonds actually belonging to customers, nor in any proceeds arising from their sale. Hunt v. Marquand, 109 App. Div. 729, 96 N. Y. S. 546.

86. See 5 C. L. 449. See, also, **Clark & Skyles, Agency,** 1654.

87. Where the broker sent the owner of real estate a mere form of a purchase option, which the owner executed and under

agreement to pay as commissions all sums secured by the broker above such net price.[88]

Substantial performance[89] *of his contract* by the broker is a condition precedent to his right to recover compensation;[90] performance accepted by the principal

which a sale took place, the broker could not recover commissions as the transaction did not amount to an employment. Davenport v. Corbett, 98 N. Y. S. 403. Where a broker, learning that a party desired to purchase vessels, went to defendant's agent and suggested the sale of defendant's vessel, and the agent stated that he did not know whether defendant wanted to sell, but directed the clerk to furnish the broker with the particulars of the vessel, held that he was not employed to sell the vessel. Burrows v. Standard Oil Co., 109 App. Div. 593, 96 N. Y. S. 370. A contract authorizing a broker to offer certain property for sale and in lieu of the usual brokerage offering 10 per cent. on the excess above $60,000, entitled the broker to 10 per cent. of the amount accepted by the owners in excess of that sum, upon the broker's notifying the defendant of an offer of $80,000 with an intimation that more could be secured. Geoghegan v. Chatterton, 99 N. Y. S. 702. Where a farm was taken in part payment for a ranch sold by a broker, but the owner refused to pay any commission on the value of the farm, and the broker accepted the commissions on the sale of the ranch on an agreement as he claimed, that he should have the further commission on the sale of the farm, held that the refusal to instruct, that if defendant failed to pay all the commissions and there was an agreement for a commission on the sale of the farm, plaintiff could recover, was error. Harrison v. Houston [Tex. Civ. App.] 91 S. W. 647.

88. Arnold v. National Bank of Waupaca [Wis.] 105 N. W. 828.

89. See 5 C. L. 449, n. 24 et seq. See, also, **Clark & Skyles, Agency,** 1656.

90. In an action for services rendered in the purchase of property, where there was a question as to whether plaintiff had performed the services, a charge authorizing a recovery for plaintiff without a finding of his rendition of the services stipulated was erroneous. St. Louis Southwestern R. Co. v. Irvine [Tex. Civ. App.] 13 Tex. Ct. Rep. 822, 89 S. W. 428. Where the broker was to receive all he could get for the sale of property above a certain sum, he was entitled to the commission only in the event of the consummation of a sale and not on procuring a contract of sale that was never performed. Munroe v. Taylor [Mass.] 73 N. E. 106. Where the broker informed the prospective buyer that he could buy the land and presented him to the owner so that the latter understood him to be a buyer and a sale was consummated on the owner's terms, it is immaterial whether the purchaser supposed he was going to meet the owner to talk about drainage across the land instead of buying it. Lewis v. Susmilch [Iowa] 106 N. W. 624. Where the purchaser paid for coal lands, sold by a broker, in corporate stock, from the sale of which the land owner was to pay the broker's commission of $20,000, and after several sales closed out the rest of the stock at reduced rates, held that the broker was entitled to his balance out of the sum paid for the last of the stock so sold. Ryon v. Starr [Pa.] 63 A. 704. Where the contract was that, if the owner himself, or through any other agent, sold the property, immediate notice thereof should be given to plaintiff, it contemplated either an actual sale, a binding agreement by defendant to sell, or the finding of a purchaser by another agent than plaintiff ready, willing and able to buy, of which defendant had notice. Tuffree v. Binford [Iowa] 107 N. W. 425. The immediate notice required by such contract meant notice within a reasonable time, considering all the circumstances surrounding the parties. Id.

Not sufficient performance: A broker employed to sell land or to find a purchaser is not entitled to a commission, where his principal merely gives an option to purchase to the party procured. Keach v. Bunn, 116 Ill. App. 397. Where there was no showing as to the character or business of the tenant secured, or any showing that he was a satisfactory tenant, or that the lease presented was satisfactory to defendant, there was not a sufficient showing of performance to recover commissions. Pescia v. Haims, 99 N. Y. S. 421. Where the purchaser agreed to buy if his conveyancer was satisfied with the note and mortgage offered for sale, but the sale was not consummated because the conveyancer was not so satisfied, the broker could not recover commissions. Wiggin v. Holbrook [Mass.] 76 N. E. 463. Where a broker, on failure to sell property, directs a prospective purchaser to trade with the owner, who sells the property in reliance upon the broker's abandonment of the employment, the broker cannot recover commissions. Enochs v. Paxton [Miss.] 40 So. 14. Persons employed to sell lots at prices named, but only in a certain order mentioned in the written contract could not recover commission for procuring a purchaser of the lots in another order, though the owner's refusal to sell was not based on that ground. Stearns v. Jennings [Wis.] 107 N. W. 327. Paper signed by proposed tenant held to be a mere option and not binding on him, and hence not a compliance with the broker's contract to procure a tenant of the premises and not entitling him to commissions. Benedict v. Pincus, 109 App. Div. 20, 95 N. Y. S. 1042. A showing by plaintiff that he produced a person willing to take the property if plaintiff would furnish or procure the money necessary, and that plaintiff had a promise of loans to enable him to do so, did not show performance by plaintiff. McCune v. Badger [Wis.] 105 N. W. 667. A contract between an owner of property and a broker, for an exchange for other property provided such other property had a net rental value of a specified amount, contemplated a yield of that amount above all liabilities, such as taxes, assessments, etc. McVickar-Gaillard Realty Co. v. Garth, 97 N. Y. S. 640.

being, however, deemed substantial,[91] though deviating from instructions as to inducements offered the purchaser;[92] but where the performance though accepted is substantially variant from the contract, commissions as provided by the contract cannot be recovered.[93] A broker may waive his right to compensation by acquiescence in withdrawal from sale.[94]

Lien.[95]—A broker acquires no lien for his fees upon real property, the sale or exchange of which he has negotiated.[96]

Broker must be efficient producing cause of sale.[97]—The broker takes the risk of bringing the minds of the parties together so as to effect a bargain.[98] He must bring the buyer and seller to an actual agreement and not a prospective or contemplated one,[99] and until that is done his right to commissions does not accrue.[1] If his efforts fail, his employer is not precluded from negotiating with the purchaser secured, even on the same terms.[2] Nor is a broker who makes active efforts to effect a purchase entitled to any commission where another broker first procured a satisfactory offer of sale.[3] The broker must either produce a competent and responsible purchaser or procure from him a valid written contract.[4] But it is not essential that the broker should bring the purchaser bodily to the owner,[5] nor that the purchaser be made known to the owner as the broker's customer, if he is so in fact;[6] nor that the purchaser shall have been in personal communication with the broker, if the sale was effected through the latter's efforts or information.[7] A broker is entitled to his commission, if he was the procuring cause in bringing about the sale.[8] Brokers are not guarantors of deferred payments or covenants,

91. Southwick v. Swavienski, 99 N. Y. S. 1079. Real estate agents employed to effect a sale are entitled to their commissions if they produce a purchaser to whom the owner in fact sells. Bowe v. Gage [Wis.] 106 N. W. 1074. The acceptance by the vendor of land of an offer actually made to a broker and the consummation of a sale on the same terms, is a ratification of the broker's act and entitles him to his commission (Levy v. Holf [Cal. App.] 84 P. 313), although the sale was actually made through another broker (Id.). Where no time limit was imposed for making the sale, and the brokers negotiated a sale which was consummated by the employers, the latter could not object that the sale was not made within a reasonable time. Morgan v. Keller, 194 Mo. 663, 92 S. W. 75.

92. Lewis v. Susmilch [Iowa] 106 N. W. 624.

93. A written contract between the owner and a real estate broker for the "sale" of property does not contemplate an exchange thereof for other property. Lucas v. County Recorder [Neb.] 106 N. W. 217.

94. Where brokers gave a ten-day option and the owner withdrew the farm from sale without objection on their part, they thereby waived their right to compensation. McGonigal v. Raughley [Del.] 63 A. 801.

95. See **Clark & Skyles, Agency,** 1698.

96. A broker who brought about an exchange of property, on an agreement by one party to pay him certain sums on the signing of the contract, the passing of the title and the sale of the land acquired, had no title or interest in either property. M. Lindheim & Co. v. Central Nat. Realty & Const. Co., 97 N. Y. S. 619.

97. See 5 C. L. 450. See, also, **Clark & Skyles, Agency,** 1670.

98. Miller v. Vining, 98 N. Y. S. 466.

99. Shapiro v. Nadler, 99 N. Y. S. 879.

1. No sale consummated because of disagreement as to when the transfer should be made. Haase v. Schneider, 98 N. Y. S. 587.

2. Miller v. Vining, 98 N. Y. S. 466.

3. Freeman v. Polstein, 97 N. Y. S. 1032.

4. J. C. McCray & Son v. Pfost [Mo. App.] 94 S. W. 998.

5. Grieb v. Koeffler [Wis.] 106 N. W. 113; McDonald v. Smith [Minn.] 108 N. W. 291. It will suffice if he authorizes the broker to say to the owner that he will purchase. J. C. McCray & Sons v. Pfost [Mo. App.] 94 S. W. 998.

6. Southwick v. Swavienski, 99 N. Y. S. 1079. Immaterial that principal did not know at time of completing sale that broker had procured the purchaser. Ross v. Moskowitz [Tex. Civ. App.] 95 S. W. 86.

7. Shannon v. Potts, 117 Ill. App. 80. Immaterial that broker did not personally conduct the negotiations. Ross v. Moskowitz [Tex. Civ. App.] 95 S. W. 86.

8. Procuring cause: Evidence warranted finding that the broker was the procuring cause of the sale. Coates v. Locust Point Co. [Md.] 62 A. 625; Grieb v. Koeffler [Wis.] 106 N. W. 113. Evidence showed that the sale was made to the person whose name was furnished by plaintiff. Burd v. Webster [Wis.] 107 N. W. 23. Where it appears that the seller, and buyer were first brought together by the broker and the sale was afterward consummated by the parties independently, the agency being neither abandoned or revoked directly or indirectly, the inference is a reasonable one that the broker was the procuring cause of the sale. Hill v. McCoy [Cal. App.] 81 P. 1015. Where a broker showed property to a prospective purchaser and the owner agreed to sell it at the price

but are entitled to recover their commissions on the entire price, when they have negotiated a sale on terms accepted by their employers, whether the price is all paid or not.[9]

Customer produced must be ready, willing, and able to purchase.[10]—Under a general contract of employment, a broker who produces a purchaser who is ready, willing, and able to purchase on the terms on which the broker was authorized to sell, is entitled to his commission,[11] though the owner refuse to consummate the sale,[12] or be unable to pass a good title,[13] or change his mind as to terms.[14] But

named by the agent if the purchaser would pay the commission, but the purchaser said he would decide in a few days, and meanwhile the owner sold the property to such purchaser at an advance on the original offer, held that the broker was the procuring cause of the sale. Hunton v. Marshall [Ark.] 88 S. W. 963.

Not the procuring cause: Spotswood v. Morris [Idaho] 85 P. 1094. Where the purchaser produced by the broker does not buy but procures for himself a brokerage contract and obtains a purchaser, the first broker is not entitled to a commission. Peek v. Slifer, 122 Ill. App. 21. A retail dealer gave to an agent of a manufacturer an order subject to the latter's approval for a buggy, with intent to resell same to a customer. The order was never forwarded and sale to the customer was made by another agent of the manufacturer. Held that the retailer was not entitled to a commission. N. L. Rood & Sons v. Staver Carriage Co. [Iowa] 108 N. W. 464. Plaintiff, as a question of fact, held not to have been in any way instrumental in bringing about the sale. Macmurdo v. Mason [La.] 41 So. 215. Evidence failed to show what the plaintiff did to aid in making the sale. Heyman v. Singer, 99 N. Y. S. 942. Evidence failed to indicate that plaintiff solicited, promoted, or in any way contributed toward effecting the exchange of property or was of any service to either party in the transaction. Reeves & Co. v. Curlee [Neb.] 107 N. W. 218. Where plaintiff was in the employ of a broker and entitled to share in his commissions, evidence merely that defendant, at the request of one acting as agent between the buyer and seller, pointed out the place to the buyer and drew the deed, was not enough to show that the sale was effected through defendant's agency. Burd v. Webster [Wis.] 107 N. W. 23. Where a shipbroker approached a government agent to sell him defendant's vessel and was told that the government had the vessel on the list and defendant finally sold it to the government agent, the broker was not the procuring cause of the sale. Burrows v. Standard Oil Co., 109 App. Div. 593, 96 N. Y. S. 370. Where plaintiff was employed to sell property and shortly afterward it was agreed that his authority should cease, and three or four years later the property was sold to a purchaser whom plaintiff had introduced but had had no negotiations with him for two years prior to the sale, plaintiff was not entitled to commissions. Staehlin v. Kramer [Mo. App.] 94 S. W. 785.

9. Morgan v. Keller, 194 Mo. 663, 92 S. W. 75. Where defendants wrote authorizing the sale of land at a certain price per acre, plaintiff's commission to be payable out of the first moneys collected, but stating defendant's preference that the commission be taken out of the purchase price proportionately as paid, and plaintiff replied that the sale would be consummated according to the letter, held that commissions were payable out of the first moneys received and there was no contract to take commissions as payments were made. Wallace v. Shapard [Tex. Civ. App.] 94 S. W. 151.

10. See 5 C. L. 451. See, also, **Clark & Skyles, Agency,** 1668.

11. Tebo v. Mitchell [Del.] 63 A. 327; Moore v. Maguire, 98 N. Y. S. 752; Indiana Fruit Co. v. Sandlin [Ga.] 54 S. E. 65; Enochs v. Paxton [Miss.] 40 So. 14; Wood v. Broderson [Idaho] 85 P. 490; Long v. Thompson [Kan.] 84 P. 552; Isphording v. Wolf [Ind. App.] 75 N. E. 598; Lemon v. Carter, 116 Ill. App. 421; Whalen v. Gore, 116 Ill. App. 504; Taylor v. Schofield [Mass.] 77 N. E. 652; Hill v. McCoy [Cal. App.] 81 P. 1015; Yoder v. Randol [Okl.] 83 P. 537; Arnold v. National Bank of Waupaca [Wis.] 105 N. W. 828. The broker must either obtain from a proposed purchaser able to buy a legally binding contract to buy on the authorized terms, or produce to his principal a proposed purchaser able, willing and ready to buy on the authorized terms. McDonald v. Smith [Minn.] 108 N. W. 291. Under a contract to pay a commission as soon as a deal was made or the owner was "sighted" to a buyer, the broker was entitled to his commission on procuring a purchaser willing and able to buy. McDermott v. Mahoney [Iowa] 106 N. W. 925. Where a broker sued for one-half the commissions on a sale, for bringing the property to defendants' notice, and on their agreement to co-operate with him in the sale and to pay him one-half the commissions, the court properly refused to charge that, if the premises were brought to defendants' notice prior to the plaintiff's doing so, then he could not recover. Alden v. Robinson, 98 N. Y. S. 675. In an action for brokers' commissions, an instruction assuming a sale was not error, where it appeared that the brokers procured purchasers able and willing to buy, on terms satisfactory to the employers, whether the sale was actually consummated or not. Morgan v. Keller, 194 Mo. 663, 92 S. W. 75. If the purchaser procured would, on the day fixed to carry out the trade, have been able to carry out its terms, it is sufficient, though he was not able to do so at the time he was procured. Ravenscroft v. Chesmore [Iowa] 108 N. W. 465.

12. Isphording v. Wolf [Ind. App.] 75 N. E. 598. Where the purchaser secured is able and willing to enter into an enforceable contract, the seller cannot defeat the broker's claim to commission by refusing to join in the execution. Seidman v. Rauner, 99 N. Y. S. 862. Where an architect was employed to

where a contract for exchange of property was made subject to inspection of the land, defendant had a right to reject the land in good faith, and the broker could not recover commission on the ground of defendant's refusal to complete the trade,[15] and in the absence of any showing of bad faith, the ground for the rejection could not be inquired into.[16] A broker employed to find a purchaser at a fixed price, or at a price satisfactory to the seller when they meet, is only a middleman whose duty is performed when the buyer and seller are brought together;[17] and where a broker procures a purchaser who offers in good faith to buy at the owner's price, a formal tender of the price is not necessary to entitle the broker to commissions, until the owner evinces some disposition to accept the price.[18] But a broker does not produce purchasers willing to buy on the terms prescribed, where they insist on more onerous terms than those agreed on and refuse to buy on denial thereof.[19] The broker's right to commissions is not affected by direct negotiations between the parties, after he has introduced them,[20] nor by the fact that the deed did not pass till later, where his authority to sell was still in force when the sale took place.[21] The broker's right to compensation may be modified in a given case by the specific agreement of the parties.[22] But whether a written agreement by a broker to wait for his commissions until title closed was signed before or after the contract of exchange, was immaterial where all the terms of the written contract of exchange were agreed on the day before, such subsequent agreement to wait being unsupported by consideration.[23] And the fact that on the day after the oral agreement defendant refused to sign a written agreement for exchange, unless plaintiff would agree to wait for his commissions did not alter the situation.[24] After the rights of the parties are fixed, declarations will not work an estoppel.[25] A broker's right

find capitalists willing to construct a hotel on defendant's land, on the agreement that he should be employed as architect in the construction, and performed his undertaking, but the scheme failed through defendant's refusal to perform his part, held that the architect was entitled to the benefit of the contract. Lucas v. Smith, 98 N. Y. S. 1037. Where the purchaser not only offered to take the land on the terms prescribed, but also offered to let the owner remove the growing crops, but the owner refused to complete the sale, the owner was liable for commissions. Carlin v. Lifur [Cal. App.] 84 P. 292. Where the owner positively refused to make a sale on any terms, it was not necessary for the broker to bring the purchaser he had found into the actual presence of the owner. Getzelsohn v. Donnelly, 98 N. Y. S. 213. Where a memorandum of purchase was made by the principal and the purchaser, evidence of what occurred at the time was admissible to show that the failure to execute the contract was due to the principal. Seidman v. Rauner, 99 N. Y. S. 862.

13. Arnold v. National Bank of Waupaca [Wis.] 105 N. W. 828. One who makes a contract for the sale of property is liable to the broker for his commissions for procuring such a purchaser, whether the land belonged to him in fact or to another. Stanton v. Barnes [Kan.] 84 P. 116. Right to commission not defeated by failure of sale owing to defects in title not made known to broker at the time of his employment. Yoder v. Randol [Okl.] 83 P. 537. Where the principals, being unable to furnish a perfect title to the [illegible] which the broker had found a purchaser, consented to declare the sale off and return the earnest money paid, the broker was entitled to commissions, in the absence of proof of his relinquishment or estoppel to claim them. O'Neil v. Printz, 115 Mo. App. 215, 91 S. W. 174. Sale not consummated through the defendant's inability to convey, on account of a co-tenant's refusal to execute deed (Whalen v. Gore, 116 Ill. App. 504), because the seller's wife refused to join in the deed (Tebo v. Mitchell [Del.] 63 A. 327; Staley v. Hufford [Kan.] 85 P. 763). Where the sale negotiated by plaintiff failed because the record did not show that defendant had acquired certain alleged outstanding interests of heirs, plaintiff's right to recover commissions was not affected by the fact that at the time of the purchaser's refusal to accept title, there was an existing will giving defendant full title, of which will none of the parties had knowledge. Weaver v. Richards [Mich.] 13 Det. Leg. N. 327, 108 N. W. 382.

14. Martin v. Wermann, 107 App. Div. 482, 95 N. Y. S. 284.

15, 16. Slotts v. Miller [Iowa] 105 N. W. 127.

17. Johnson v. Hayward [Neb.] 107 N. W. 384.

18. Carlin v. Lifur [Cal. App.] 84 P. 292.

19. Weiss v. Rubinson, 98 N. Y. S. 429.

20. Hill v. McCoy [Cal. App.] 81 P. 1015; Indiana Fruit Co. v. Sandlin [Ga.] 54 S. E. 65; Southwick v. Swavienski, 99 N. Y. S. 1079.

21. Hill v. McCoy [Cal. App.] 81 P. 1015.

22. Yoder v. Randol [Okl.] 83 P. 537.

23, 24. Hough v. Baldwin, 99 N. Y. S. 545.

25. A letter from defendants to plaintiffs stating that they nad not yet received all

to commissions does not accrue until he notifies his employer that he has procured a purchaser,[26] and the principal is given a full opportunity to make a binding contract with him, on the authorized terms.[27]

Broker must act in good faith towards principal.[28]—To entitle him to compensation, the broker must act in good faith towards his principal,[29] at least as to matters within the scope of his employment.[30] A broker cannot represent both parties to the transaction without their mutual consent,[31] even though no fraud was meditated, it being against the policy of the law that such artifice should be successful,[32] and if he attempts to do so he forfeits all right to compensation or commission from either.[33] But in case of their knowledge and positive consent, or of such knowledge coupled with proof of facts and circumstances from which consent may be reasonably inferred, the broker may recover commissions from both vendor and vendee.[34]

the earnest money, and that they would pay plaintiff's as soon as they received the rest, did not estop defendants to claim that they were not to pay commissions until the contract was fully completed. Tracy Land Co. v. Polk County Land & Loan Co. [Iowa] 107 N. W. 1029. A statement by the broker that he did not claim commission made to induce the principal not to call the sale off does not work an estoppel where it was made after the sale was completed beyond the power of the principal to rescind. Ross v. Moskowitz [Tex. Civ. App.] 95 S. W. 86.

26. Bloodgood v. Short, 98 N. Y. S. 775.

27. McDonald v. Smith [Minn.] 108 N. W. 291.

28. See 5 C. L. 453. See, also, **Clark & Skyles, Agency,** 1640.

29. McAfee v. Bending [Ind. App.] 76 N. E. 412; Keach v. Bunn, 116 Ill. App. 397; Low v. Woodbury, 107 App. Div. 298, 95 N. Y. S. 336. A broker who sells goods for a higher price than he reveals to his principal cannot recover commission. Taylor v. Godbold [Ark.] 88 S. W. 959. Where a broker is guilty of misconduct amounting to treachery or fails to recognize the responsibilities resting upon him he is not entitled to compensation. Hahl v. Kellogg [Tex. Civ. App.] 94 S. W. 389. Land represented by broker as sold for $22,000 net, when it was sold for $29,500. Id. Agreement was to give the broker all over $2,000 for making the sale and he found a purchaser for $2,100, but represented the purchaser as offering only $2,000, and induced the owner to agree to pay him $20 to close the deal. The owner repudiated the contract and sold the property to the purchaser for $2,000. Plaintiff having sued for commissions on the entire transaction, held that it was indivisible and the broker's fraud defeated his right to recover. Braden v. Randles [Iowa] 105 N. W. 195. Where a broker was to receive as compensation all above a minimum sum per acre and a fixed sum besides, and he sold the land for an advance upon the minimum, but reported a sale for the minimum, held that he could not recover the additional sum agreed upon. Fulton v. Walters, 28 Pa. Super. Ct. 269. Where a broker negotiated a sale of land before the details of the sale were fully arranged between him and his principal and then, upon the principal's repudiation of the arrangement, prepared a written contract of sale, signed it as agent and put it on record to annoy his principal and cloud his title, held that he deprived himself of all right of compensation. Lease v. Christy, 28 Pa. Super. Ct. 507.

30. The concealment by an agent of facts which are material to his principal's interests, especially after inquiry made, amounts in law to fraud. Low v. Woodbury, 107 App. Div. 298, 95 N. Y. S. 336. Concealment of the facts that the third party was not the owner of the property proposed to be exchanged with defendant, and was irresponsible, and that the broker had a contract with the real owner for a commission on the exchange showed lack of good faith on the part of the broker, and he was not entitled to commissions. Id. Where the broker, when the prospective purchaser objected that the land should sell for $2.50 per acre less than asked, said that that was enough but the owner's price was as stated, it was not conclusive as showing that the broker was not honestly endeavoring to bring about a sale. Lewis v. Susmilch [Iowa] 106 N. W. 624.

31. Fulton v. Walters, 28 Pa. Super. Ct. 269; Shropshire v. Adams [Tex. Civ. App.] 13 Tex. Ct. Rep. 540, 89 S. W. 448. Real estate brokers are often commissioned by purchasers to buy, but they cannot act for both sides without their consent. Davenport v. Corbett, 98 N. Y. S. 403. Where a broker has acted as agent for both vendor and vendee, in the sale of real estate, he cannot recover commissions from the vendee, without bringing his case within one of the established exceptions to the general rule that an agent cannot recover commissions from both parties. Keach v. Bunn, 116 Ill. App. 397.

32. Fulton v. Walters, 28 Pa. Super. Ct. 269.

33. Where a broker employed to sell on commission receives a commission from the buyer unknown to the seller, he cannot recover his commission from the seller. Rauer's Law & Collection Co. v. Bradbury [Cal. App.] 84 P. 1007. Where a broker employed to sell property arranged with a prospective purchaser for a commission under certain contingencies, while his principal was urging him to sell for a higher price, he could not recover commissions from such purchaser upon consummation of the sale. Tasse v. Kindt, 125 Wis. 631, 104 N. W. 703.

34. Keach v. Bunn, 116 Ill. App. 397; Wasser v. Western Land Securities Co. [Minn.] 107 N. W. 160, citing numerous authorities. A petition in an action on a broker's contract for the sale of land, which alleged that

Where it was apparent that plaintiff was not a mere middleman that only brought the parties together and let them make their own exchange of property, but was an active broker representing the other party, he could not recover commissions from defendant.[35] A broker employed to purchase land, who conceals from his employer the fact that the vendor will pay the broker a commission for making a sale, has the burden of showing perfect fairness in the transaction, and in the absence thereof, equity will treat him as guilty of constructive fraud.[36]

Procuring loan.[37]—The contract of brokerage in the matter of a loan differs from one with respect to real estate in that it is not regarded as fully performed, until the prospective lender actually makes the loan or refuses because of the fault or miscarriage of the principal.[38] Procuring an agreement to loan, subsequently withdrawn, is not sufficient.[39]

Necessity of broker's contract being in writing.[40]—The necessity of the contract between the broker and his principal being in writing, as bearing on his right to recover commissions, is discussed elsewhere.[41]

Amount of commissions and measure of recovery for services.[42]—Where there is no express agreement as to the amount of compensation, the broker can recover only on the quantum meruit;[43] but where the complaint alleged full performance, the plaintiff could not recover on a quantum meruit, when the loan negotiated was not made on account of defects in defendant's title to premises offered as security.[44] For breach of a contract to pay a broker for finding a purchaser for real estate, the measure of damages is the commission agreed to be paid,[45] or a reasonable compensation for his services.[46] Where real estate agents had expended considerable effort in obtaining a possible purchaser and were induced to accept a small sum in settlement of their claim for services, on the representation by the owners that they had withdrawn the property from sale, whereas they had not done so, but afterward sold it to the purchaser procured by the agents, the fraudulent representation were such as to avoid the settlement.[47]

Actions to recover commissions. Parties.[48]—The party technically liable to pay the commissions must be made the party defendant.[49] In an action by a

after undertaking the sale for defendant plaintiff told him he had a purchaser that would pay him $5,000 to bring about the purchase, and that defendant assented to plaintiff's acceptance of the joint employment, was not demurrable as showing a forfeiture of plaintiff's right by acceptance of an inconsistent employment. Shropshire v. Adams [Tex. Civ. App.] 13 Tex. Ct. Rep. 540, 89 S. W. 448.

35. Pinch v. Morford [Mich.] 12 Det. Leg. N. 636, 105 N. W. 22.

36. Hanna v. Haynes [Wash.] 84 P. 861.

37. See 5 C. L. 454.

38. Duckworth v. Rogers, 109 App. Div. 168, 95 N. Y. S. 1089. Plaintiff could not recover commissions on proof that he obtained a person willing to make the loan, but who refused to do so because of defects in defendant's title to the property offered as security. Stone v. Goodstein, 97 N. Y. S. 1035. Where an agent was employed to secure a loan of not less than $220,000, but secured nothing better than $210,000 and abandoned the matter, he was not entitled to commissions when his principal afterward took a loan of $200,000 from the same party. Stone v. Plaut, 96 N. Y. S. 1030. If a loan broker made a contract to obtain a $1,500 loan for a customer upon commission, but failed to do so and so reported, and if he was then notified that the customer needed a loan of $1,600 and a new arrangement for the negotiating of such a loan was made, which the broker also failed to make, and thereupon the customer procured the money elsewhere, the broker could not recover his commission, although he may have then negotiated so as to procure a loan of $1,500 for his customer. Davison v. Herndon [Ga.] 54 S. E. 92.

39. Duckworth v. Rogers, 109 App. Div. 168, 95 N. Y. S. 1089.

40. See 5 C. L. 454.

41. See supra, § 1.

42. See, also, **Clark & Skyles, Agency,** 1652.

43. Prior contract fixing per cent. of commission superseded by a later one naming no fixed compensation. De Kremen v. Clothier, 109 App. Div. 481, 96 N. Y. S. 525.

44. Stone v. Goodstein, 97 N. Y. S. 1035.

45. Tuffree v. Binford [Iowa] 107 N. W. 425; Dol v. Fischer [S. D.] 107 N. W. 534.

46. Dol v. Fischer [S. D.] 107 N. W. 534.

47. Bowe v. Gage [Wis.] 106 N. W. 1074.

48. See 5 C. L. 454.

49. Laws 1866, p. 500, c. 264 (continued in force by Laws 1882, p. 297, c. 410, § 1055, and Laws 1901, p. 484, c. 466, § 1127), organized the College of the City of New York as a

broker for commission on an alleged sale made for defendant, the defendant cannot file an answer in the nature of a bill of interpleader, by alleging that another broker also claimed commission for making the sale.[49] Under a general denial defendants cannot only deny the contract as claimed, but can also prove the contract in fact made and not performed by the plaintiff.[51]

Pleading.[52]—Cases involving the sufficiency of plaintiff's pleadings are cited in the notes.[53] The defense of fraud or collusion to an action for broker's commissions must be specially pleaded,[54] also the defense of invalidity of an oral contract with a broker under the New York statute.[55]

Evidence and burden of proof.[56]—In an action for commissions the broker must prove his employment by preponderating evidence and the performance of service pursuant thereto;[57] and in case of a subagent claiming commisssions of the owner for leasing property, the burden is on him to show the broker's authority to hire him.[58] To charge a purchaser with liability for commissions requires satisfactory proof of a special contract to that effect, for in the usual course of business it is the seller and not the purchaser who pays the commission.[59] In order to recover his commissions when no sale was made a broker must prove that he procured a purchaser ready, able, and willing to buy on the terms fixed,[60] and that the failure

distinct body corporate. Laws 1882, p. 297, c. 410, § 1056, made the members of the board of education and the college president trustees thereof. Laws 1895, p. 200, c. 168, authorized the trustees to acquire a site for new buildings. Held that a broker employed by the trustees to purchase such site could not sue the city for his commissions. Fidelity & Deposit Co. v. New York, 108 App. Div. 263, 95 N. Y. S. 752. The fact that Laws 1895, p. 200, c. 168, provided that on application by the trustees the comptroller of the city should issue city bonds to pay the expenses incurred in securing the site showed that the city could not be sued for the commissions, at least until it had been put in default by failure to issue bonds. Id.

50. Hartsook v. Chrissman, 114 Mo. App. 558, 90 S. W. 116.

51. Tracy Land Co. v. Polk County Land & Loan Co. [Iowa] 107 N. W. 1029.

52. See 5 C. L. 454.

53. Complaint liberally construed and held to show sufficiently a compliance by the broker with the requirements of the contract of sale, to entitle him to commissions. Bowersox v. J. W. Hall & Co. [Kan.] 84 P. 557. Complaint in an action for breach of contract by employer, whereby the broker was deprived of his commission for procuring a purchaser held good after verdict. McAfee v. Bending [Ind. App.] 76 N. E. 412. Where a petition properly alleges a contract of employment to sell real estate, and avers facts showing a full performance of duty to the employer and the accomplishment of all he undertook under the contract, it is sufficient. Yoder v. Randol [Okl.] 83 P. 537. Complaint held bad for failure to allege employment of broker to effect a sale. Morris v. Poundt, 99 N. Y. S. 844.

54. Answer setting forth a collusive and fictitious proposal of purchase on the part of plaintiff and his uncle, held to state a sufficient defense in an action for broker's commissions. McAfee v. Bending [Ind. App.] 76 N. E. 412.

55. The defense of the illegality of an unwritten contract for the sale of land by a broker, in a first or second class city, under Laws 1901, p. 312, c. 128 (Pen. Code, § 640d) must be pleaded and is unavailable under a general denial. Cox v. Hawke, 96 N. Y. S. 433.

56. See 5 C. L. 454.

57. Staehlin v. Kramer [Mo. App.] 94 S. W. 785. Insufficient showing that defendant had placed the property with plaintiff for sale. Lederer v. McElroy, 98 N. Y. S. 247. Held that plaintiff had not established by a preponderance of evidence that a contract existed between him and defendant for the sale of the property. Krug v. Hendricks, 41 Wash. 410, 83 P. 417. Where by plaintiff's own showing it appeared that his services were not only unsolicited but also rendered against the wishes and interests of defendant, plaintiff could not recover commissions. Morris v. Poundt, 99 N. Y. S. 844.

58. Southack v. Ireland, 109 App. Div. 45, 95 N. Y. S. 621.

59. Freeman v. Polstein, 97 N. Y. S. 1032.

60. Clark v. Wilson [Tex. Civ. App.] 91 S. W. 627; Shapiro v. Nadler, 99 N. Y. S. 879. The broker must show that the proposed purchaser was financially able to purchase on the terms proposed. Sherburn Land Co. v. Sexton [Iowa] 106 N. W. 378. Where a broker was employed to sell land at a fixed price, or any other price below that which was consented to by the owner, he had the burden of proving that he produced a purchaser, with whom the owner reached an agreement and who was able and willing to carry out the agreement. Blackledge & Blackledge v. Davis [Iowa] 105 N. W. 1000. And where the purchaser was to exchange other land for that of the broker's employer, the broker was required to show that the purchaser had title or could convey the land, though he were financially able to respond in damages on a failure of title. Id. Broker not entitled to commissions where purchaser unwarrantably refused to complete the purchase on account of a mortgage, when the owner was able to perform the con-

to sell resulted from the owner's fault.[61] A broker employed to procure a loan, to recover his commissions, must show that the loan was actually made.[62] Where the contract was for the exchange of real estate, "subject to inspection of land furnished by each party" within 15 days or the trade to be considered closed, the broker to recover must show a failure of defendant to inspect the land of the third person.[63] Cases discussing the admissibility [64] and sufficiency [65] of evidence in such actions are referred to in the notes.

tract at the time for the passing of the title. Shapiro v. Nadler, 99 N. Y. S. 879. Where the evidence showed that the sale was consummated on the owner's terms, it was not error to omit to charge that plaintiff must show that the purchaser was able, ready and willing to complete the purchase on the terms prescribed. Lewis v. Susmilch [Iowa] 106 N. W. 624.

61. Where the purchaser was unable to pay the cash himself, but relied upon a third person to furnish the money for the first cash payment, it was not necessary for the broker to show that the purchaser himself was able to pay, but if he could have procured the money from the third person and the sale failed through the owner's fault, the commission was earned. Clark v. Wilson [Tex. Civ. App.] 91 S. W. 627. But the broker must show, in addition to the purchaser's readiness and willingness to buy, that the third person was ready, willing, and able to furnish the funds for the cash payment. Id. And it was not necessary for the broker to show that the purchaser was of such financial responsibility that his notes would have been good for the balance, irrespective of the vendor's lien, no such stipulation being contained in the contract of sale. Id.

62. Duckworth v. Rogers, 109 App. Div. 168, 95 N. Y. S. 1089.

63. Stotts v. Miller [Iowa] 105 N. W. 127.

64. Where, on a proposed contract of sale of land, an agreement to pay a further commission "at time and place of passing title," was indorsed, evidence of an oral agreement making it a condition of the payment of such commission that the purchaser should take title was admissible. Hancox v. Appleton, 96 N. Y. S. 1029. Evidence in regard to negotiations with person claiming to act as agent held admissible, not to bind the buyer by the acts of an alleged agent, but to show that through him the parties were brought together and the sale brought about. Indiana Fruit Co. v. Sandlin [Ga.] 54 S. E. 65. In an action for services rendered in the purchase of property, testimony that defendant's agent solicited witness to induce plaintiff to negotiate for the purchase of the property and that witness represented to plaintiff that the agent was authorized to employ him, was admissible to show plaintiff's employment by defendant's agent. St. Louis S. W. R. Co. v. Irvine [Tex. Civ. App.] 89 S. W. 428. In an action by a broker for his commissions, a release by the purchaser procured, of his rights under the owner's receipt binding him to sell the land, was admissible to show that the purchaser was then insisting on his right to complete the sale, but not as a recognition of his right by the owner. Clark v. Wilson [Tex. Civ. App.] 91 S. W. 627. A letter written by plaintiff to defendant, pending plaintiff's negotiations with a prospective purchaser, stating that he had interested such purchaser in the land, was admissible. Lewis v. Susmilch [Iowa] 106 N. W. 624. In an action for a broker's commission, a letter from the purchaser to plaintiff relating to the land involved, was admissible on an issue of an alleged settlement. Wallick v. Lynch [Iowa] 106 N. W. 617. Evidence with reference to the sale of a residence, which was part of the property placed in plaintiff's hands, was admissible to show the conduct of the parties under the agreement between them as to the sale of property. Tuffree v. Binford [Iowa] 107 N. W. 425. Testimony as to a statement made by defendant as to when he thought the sale of his property was complete was also admissible as showing his conduct with reference to what he thought were his contract obligations. Id. Evidence of conversation between the broker and purchaser in negotiating, if the result is communicated to the principal, is admissible. McDonald v. Smith [Minn.] 108 N. W. 291, distinguishing Rutherford v. Selover, 87 Minn. 495, 92 N. W. 413. In an action for commissions, where the broker showed that he had given a receipt for money paid on account of the price of the land sold, such receipt was admissible in evidence. Tebo v. Mitchell [Del.] 63 A. 327. Where plaintiff's complaint showed only that within two years prior thereto defendant became indebted to plaintiff's assignor in a sum for services rendered, it was competent to show that even if the services were rendered, they created no indebtedness against defendant, and defendant's failure to set up as a defense that assignor had received a commission from the other party did not preclude defendant from offering evidence thereof. Rauer's Law & Collection Co. v. Bradbury [Cal. App.] 84 P. 1007. The affirmative answer of the purchaser procured to the question whether he was ready, willing and able to comply with the terms of sale, was not objectionable as the opinion of the witness. Clark v. Wilson [Tex. Civ. App.] 91 S. W. 627.

65. Evidence sufficient to justify finding that plaintiff was agent for the sale of land. Kingsley v. Wheeler [Minn.] 104 N. W. 543. Evidence insufficient to establish the making of a contract to pay plaintiff $1,000,000 for procuring and furnishing data relating to the prospective purchase of the securities and control of a certain railroad. Mengis v. Fitzgerald, 108 App. Div. 24, 95 N. Y. S. 436. Evidence that the purchaser who offered to buy at the price fixed and did not have in his possession at the time sufficient funds to make the cash payment required, could have obtained them the next morning, was sufficient to show the purchaser's ability to buy. McDermott v. Mahoney [Iowa] 106 N. W. 925.

Questions for jury.[66]—Where no exclusive agency has been given and more than one broker has been engaged in leasing property, the question whether a particular broker was the efficient cause of the completed transaction is ordinarily for the jury;[67] and whether the broker had knowledge of a minor's interest in the land, which caused a failure of the sale, before he obtained the purchaser was a question for the jury.[68] Where an action for a broker's commission for procuring a purchaser was defended on the ground that the broker was to receive the commission only if a sale was made to the purchaser, the question of whether such was the agreement was properly submitted to the jury.[69]

Defenses.[70]—Where two brokers are engaged jointly in negotiating a transaction, both are bound by the acts of one of them, and subject to any defense arising therefrom.[71] Where a broker sold property under a contract of lease with an option to purchase, his claim of commissions was not barred until three years from the date of the exercise of the option to purchase.[72]

BUILDING AND CONSTRUCTION CONTRACTS.

§ 1. The Contract; Sufficiency and Interpretation (481).
§ 2. Performance of Contract (482). Impossibility of Performance (485). Destruction of Subject-Matter (485).
§ 3. Modification of Contract, and Changes in Plans and Specifications (485).
§ 4. Extra Work (485).
§ 5. Delay in Performance (486).
§ 6. Termination or Cancellation of Contract (488).
§ 7. Completion by Owner or Third Person (488).
§ 8. Architect's and Other Certificates of Performance, and Arbitration of Disputes (489).
§ 9. Acceptance (491).
§ 10. Payment (492).
§ 11. Subcontracts (492).
§ 12. Bonds (493).
§ 13. Remedies and Procedure (496).

Finding for defendant on testimony which was such as to warrant a finding either way, not disturbed. Neumann v. Welkowitz, 97 N. Y. S. 980. Under the evidence, held that a broker had no reason to complain of the allowance to him of $300 as commission for services in the exchange of properties. Lucas v. County Recorder [Neb.] 106 N. W. 217. Evidence held to show that defendant was not the owner of the property, that the brokers knew it, and had released their claim for commission as against the sellers, because of the receipt of commissions from the buyers. Weiss v. Bleier, 98 N. Y. S. 539. Where it was proved that a broker's services were worth $1 per acre for furnishing a purchaser and they were worth the same for "selling" and, defendant admitting the "selling," the action was tried on the theory that services in "selling" and "furnishing a purchaser" were the same, the court did not err in charging that if the jury found plaintiff entitled to a commission for "selling" they should determine the value thereof. Wallick v. Lynch [Iowa] 106 N. W. 617.

Evidence sufficient to present question: Of the broker's right to recover commissions, though the sale was not completed. Clark v. Wilson [Tex. Civ. App.] 91 S. W. 627. Whether the failure to consummate the sale was owing to default of the principal. Seidman v. Rauner, 99 N. Y. S. 862. Whether the contract was to pay commissions when the last payment was made by the purchasers or when the contract was signed by them. Tracy Land Co. v. Polk County Land & Loan Co. [Iowa] 107 N. W. 1029. Whether commissions were to be paid before title passed. De Kremen v. Clothier, 109 App. Div. 481, 96 N. Y. S. 525. Whether there was a contract by which plaintiff's commission did not become due until there had been a lease signed by the parties. Benedict v. Pincus, 109 App. Div. 20, 95 N. Y. S. 1042. Evidence that defendant was liable for broker's services in making a purchase of property held sufficient to go to the jury, although the contract of purchase and deed were in defendant's wife's name. Bloch v. Lowe, 99 N. Y. S. 951.

66. See 5 C. L. 455.

67. Cadigan v. Crabtree [Mass.] 78 N. E. 412.

68. O'Neil v. Printz, 115 Mo. App. 215, 91 S. W. 174.

69. An instruction that plaintiff, on finding a customer able, ready and willing to buy for the agreed price, was entitled to his commission without reference to whether the sale was completed was not erroneous, as it must have been understood to have been applicable only in case the issue was found for plaintiff. Taylor v. Schofield [Mass.] 77 N. E. 652.

70. See 5 C. L. 455.

71. Where one undertook to show defendant the land to be taken in exchange, subject to inspection, and agreed that defendant might inspect other lands also, both brokers were bound by such agreement and neither could recover commissions if the transaction failed as the result of such inspection. Stotts v. Miller [Iowa] 105 N. W. 127.

72. Coates v. Locust Point Co. [Md.] 62 A. 625.

Matters common to all contracts [73] or peculiar to contracts for public works [74] are treated elsewhere.

§ 1. *The contract; sufficiency and interpretation.*[75]—The usual rules as to the requisites, form, and validity of the contract, apply.[76] The terms of an oral contract,[77] and whether the work was done under an oral or a written contract,[78] are questions of fact. Where the enforceable provisions of the contract can be severed from those unenforceable, the former will be upheld though the latter fall.[79] A contract to perform services as an architect is not invalid because made before obtaining an architect's certificate as required by statute.[80]

Interpretation.[81]—As in the case of all other contracts, the intention of the parties gathered from the entire instrument must control.[82] The ordinary rules of construction apply, and applications thereof will be found in the note.[83] The

73. See Contracts, 5 C. L. 664.

74. See Public Contracts, 6 C. L. 1109.

75. See 5 C. L. 456.

76. Evidence outside of plaintiff's testimony being sufficient to show that architect's services were rendered at the instance and by the direction of decedent, this raised an implied obligation to pay for them. Buckler v. Kneezell [Tex. Civ. App.] 91 S. W. 367. As to a certain item, circumstantial evidence held to show that the services were rendered at decedent's request. Id.

Mutuality: Contract to crush and furnish to the receivers of a railroad 100,000 cubic yards of stone ballast "at the rate of four hundred cubic yards per day until the completion of this contract," held mutual and binding upon the receivers as to the full quantity of 100,000 cubic yards, where the receivers covenanted to furnish the "tracks necessary for the prosecution of the work," to furnish transportation for men, tools, etc., "to be used upon the work," and it was agreed that payment should be made upon monthly estimates "until the completion of the contract." Quigley v. Spencer Stone Co. [C. C. A.] 143 F. 86. Contract not deprived of mutuality by provision that receivers' engineer should be arbiter of controversies and that plaintiffs should have no cause of action except such as might be found to exist under his final certificate. Id.

Public policy: That a member of a firm doing railroad construction work employed the engineer of the railroad company to do certain work not in conflict with his duty to the railroad company when the latter knew of the employment, was not contrary to public policy. Condon v. Callahan, 115 Tenn. 285, 89 S. W. 400.

77. Conflicting evidence as to contract for drilling a well considered and held to support finding that contractor was to be paid for whole distance drilled regardless of whether water was found or not. Irby v. Phillips, 40 Wash. 618, 82 P. 931.

78. Evidence held to sustain a finding that a well was sunk by plaintiff under a verbal contract and not under a certain other written one. Hahl v. Deutsch [Tex. Civ. App.] 94 S. W. 443.

79. Where provisions as to main channel of drainage canal were illegal for failure to advertise and receive bids while those as to collateral channel were not. Sanitary Dist. v. McMahon & Montgomery Co., 110 Ill. App. 510.

80. St. 1901, p. 641, c. 212. Fitzhugh v. Mason [Cal. App.] 83 P. 282.

81. See 5 C. L. 456.

82. Milske v. Sfeiner Mantel Co. [Md.] 63 A. 471. Where possible, due weight should be given to all the provisions. Instruction erroneous which in effect charged owner for delay regardless of diligence and good faith in procuring the right of way for a canal, where, construed as a whole, contract relieved him from liability for unavoidable delay though plaintiff had contracted to complete the work within a certain time. Sanitary Dist. v. McMahon & Montgomery Co., 110 Ill. App. 510.

83. In a contract to furnish and fit doors and screens payment to be made "on satisfactory completion of the work," the owner's satisfaction related to the contractor's manner of executing the contract and not to the owner's dissatisfaction with his own selection. Higgins Mfg. Co. v. Pearson [Ala.] 40 So. 579. Contract held not to require parts of certain buildings to be all "cabinet work." Hart v. Carsley Mfg. Co., 116 Ill. App. 159. Provision of contract that contractor should provide piping for the condenser for an electric light plant, the discharge from the condenser to run to a filter, did not require contractor to furnish the filter. Robertson v. Grand Rapids [Minn.] 104 N. W. 715. Provision requiring contractor to maintain insurance against accidents in connection with the work "embraced in the contract," held to require contractor to maintain the entire insurance at his own expense, where the contract called for extra work as well as for general work. Seretto v. Rockland Ry. Co. [Me.] 63 A. 651. An allusion to five per cent. fees in the letter of an architect with reference to his employment considered and held not to constitute a term of the contract and defendant was bound to pay only the regular fees. Fitzhugh v. Mason [Cal. App.] 83 P. 282. Where contract provided for payment only for material actually used, there can be no recovery for material merely strung along line of canal. Dyer v. Middle Kittitas Irr. Dist., 40 Wash. 238, 82 P 301. Where contractor assigned to his surety such "plant" as he might own in the event of his failure to complete the contract, the word "plant" included lumber and other material intended to be used in the building and horses, carts, etc. Wood v. United States Fidelity & Guaranty Co., 143 F. 424. Contract to furnish and erect all structural

contract proper and the specifications should be considered together where necessary to properly understand them.[84] A bond given for the performance of an absolute and unconditional contract is a mere collateral agreement and cannot add to or change the terms of the original contract.[85]

Fraud, misrepresentations, and mistake,[86] are fully treated elsewhere.

§ 2. *Performance of contract.*[87]—If there is no agreement as to how the work shall be done, it is implied that it be done in a workmanlike manner.[88] The contractor is bound to exercise the ordinary care and skill of the business and is liable in damages for negligent injury to the property with which he deals.[89] So, too, architects engaged to draw plans impliedly represent that they have the necessary skill, and are liable for damages resulting from their failure to possess it, or from negligence in doing the work.[90]

iron, field riveting, drilling, etc., for a warehouse, required the contractor to do only the iron work and did not include stone, brick and cement work, on which it was to rest. Hayes v. Wagner, 220 Ill. 256, 77 N. E. 211. Contract to furnish a steel tank for a school building consisted of two letters specifying the dimensions of the tank, and a part of the specifications for the erection of the building which was made a part thereof by reference in the letters. Specifications provided that the tank should be made up in sections "riveted and caulked." Held, the provision requiring plaintiff to assemble the parts were a part of the contract and were not merely referred to for the purpose of fixing dimensions. New Jersey Boiler Co. v. Concord Const. Co., 99 N. Y. S. 316. Under the customs of the steel structural business, where an iron company contracts to construct a steel building, the steel to be paid for by the ton, the iron company is not required to make a deduction for rivet holes and cuttings in making parts to fit. Commercial Tribune Bldg. Co. v. Potthoff & Frey Iron Co., 7 Ohio C. C. (N. S.) 432. A contract reciting that it was entered into for the purpose of **boring one well,** but stating that plaintiff should receive a certain price per foot "for each and every well when completed," was not an undertaking to sink more than one well. Hahl v. Deutsch [Tex. Civ. App.] 94 S. W. 443. Where contract made its own construction by the owner final, and provided for two coats of plaster and "carpet float for calcimining walls," owner could construe provision as requiring three walls. Sweatt v. Hunt [Wash.] 84 P. 1. Where it was provided that if defects in a well could not be remedied within one year and the well made to do good work, defendant would repay the contract price, it was error, in an action for the price, for the court to add to the contract "and to furnish sufficient water as contemplated and understood by the parties." Pilot Point Waterworks v. Fisher [Tex. Civ. App.] 93 S. W. 529. Where a contract with a city to construct a tunnel provided that no allowance would be made the contractor for **"quicksand, hardpan or boulders,"** but that additional compensation would be made for rock excavation where the tunnel was partly in earth and partly in rock, the contractor was not entitled to allowance for removing boulders under the designation of "rock excavated partly in earth," nor for hardpan under the name of "conglomerate" found in the earth section of the tunnel. City of Chicago v. Duffy, 117 Ill. App. 261. Question of scope of **dredging contract** held one for the jury where contract itself did not specify the extent of the work and evidence was conflicting. Monongahela & W. Dredging Co. v. Jones & Laughlins Steel Co., 144 F. 312. Provision in railroad construction contract that "solid rock" shall include material which in the judgment of the engineer "cannot be moved without blasting" has reference to such material as cannot be so removed without blasting consistent with practical railroad construction, and may include material which can be moved without blasting but only in an impractical way. Fruin-Bambrick Const. Co. v. Ft. Smith & W. R. Co., 140 F. 465. A provision for **stipulated damages** for delay considered and held too indefinite for enforcement and no specific amount was stated on which the percentage of deduction might be computed. Robertson v. Grand Rapids [Minn.] 104 N. W. 715.

84. Where specifications were attached to contract and the two contained references to each other. Central Bitulithic Pav. Co. v. Mt. Clemens [Mich.] 12 Det. Leg. N. 996, 106 N. W. 888.

85. Plaintiff having entered into an absolute and unconditional contract to construct and complete a building within a specified time could not be relieved from the loss caused by the blowing down of the building by an unusual storm because of a provision in the bond that neither principal nor surety should be liable for any damage caused by act of God. Milske v Steiner Mantel Co. [Md.] 63 A. 471.

86. See Fraud and Undue Influence, 5 C. L. 1541; Mistake and Accident, 6 C L. 678.

87. See 5 C. L. 459.

88. Schindler v. Green [Cal. App.] 82 P. 631. Where there was no provision as to how windows should be placed it was implied that they should be placed in a workmanlike manner. Id.

89. Liable for destruction of well. Donnan v. Pennsylvania Torpedo Co., 26 Pa. Super. Ct. 324. Where petition in action for failure to install a heating plant stated a cause of action for injuries to the building and was sustained by proof of expenditure of money for repairing the floor where defendant had cut openings, a motion in arrest of judgment for plaintiff was properly denied. Olson v. Brison [Iowa] 106 N. W. 14.

90. Instruction that certain architects engaged to draw plans for and superintend

Whether the contract has been performed is ordinarily a question of fact.[91] A literal compliance with the terms of the contract is not necessary, but a substantial performance in good faith authorizes a recovery of the contract price[92] less a reasonable allowance for inadvertent and trivial errors and omissions.[93]

A contractor who undertakes to furnish the material and perform the work to the satisfaction of the owner,[94] or the architect,[95] is bound to do so, and an honest, reasonable objection on his part is a good defense to an action for the price.[96] A

plaintiff's building and thereby guaranteed that they had the necessary skill and would use proper care in drawing said plans, and if they did not possess such skill or if they were negligent causing loss to plaintiff in the particulars complained of they were liable, was not vague or uncertain. Dysart-Cook Mule Co. v. Reed, 114 Mo. App. 296, 89 S. W. 591. Not error to fail to present to jury allegation of petition that the architects misrepresented the plans where there was no evidence of that fact. Id.

91. On the evidence held not error to refuse to instruct verdict for defendant in action for boring a well. J. M. Guffey Petroleum Co. v. Hamill [Tex. Civ. App.] 94 S. W. 458.

92. Bergfors v. Caron [Mass.] 76 N. E. 655; Ramstedt v. Brooker, 98 N. Y. S. 1044. Evidence held to show substantial performance of contract for concrete work where defendant contended that the work did not comply with the contract and specification but furnished no copy of either. Camp v. Behlow [Cal. App.] 84 P. 251. Evidence held to justify finding that contractor substantially performed contract so far as related to character of the work. Hart v. Carsley Mfg. Co., 116 Ill. App. 159. Finding that petitioner did not fully perform and that $25 should be deducted from contract price held consistent with finding that petitioner acted in good faith and substantially performed. Bergfors v. Caron [Mass.] 76 N. E. 655. Where an architect contracted to draft plans for a building which could be constructed within the cost of $450,000, but the plans drafted were for a building which would cost nearly $200,000 more, there was no substantial performance. Horgan & Slattery v. New York, 100 N. Y. S. 68. That certain clothes closets did not have three coats of plaster was not as a matter of law such nonperformance as to defeat recovery on the contract, and the question should have been left to the jury. Ramstedt v. Brooker, 98 N. Y. S. 1044. Contract for $1,400; defects could be remedied for $177. Recovery for difference. Burgi v. Rudgers [S. D.] 108 N. W. 253. Rule covers only inconsiderable details and cannot be extended to material parts entering into the substance of the contract. Bush v. Jones [C. C. A.] 144 F. 942. Waterproofing cellar where it was deemed of sufficient importance to require a guaranty. Id. Where contract required screens of bronze wire fitted with "Laramir checks" and such checks were not used and the wire was merely "bronzed," there was no performance allowing recovery on the contract. Higgins Mfg. Co. v. Pearson [Ala.] 40 So. 579. Evidence insufficient to support finding that misplacing windows was a trivial imperfection. Schindler v. Green [Cal. App.] 82 P. 631. Defendant's contention that the interior of certain parts of his buildings were all to be "cabinet work" held not sustained by the contract and evidence. Hart v. Carsley Mfg. Co., 116 Ill. App. 159. Evidence held to show failure to perform items amounting to some 25 per cent. of the work so that a judgment as for substantial performance could not be sustained. Lashinsky v. Silverman, 48 Misc. 501, 96 N. Y. S. 135. Even where there is only a trivial variance the contractor must have acted in good faith and honestly have endeavored to complete the work properly before recovery can be had, if the variance is such as to entitle the owner to recover damages to enable him to complete it. Schindler v. Green [Cal. App.] 82 P. 631. Plaintiff not entitled to a lien where he refused to properly place certain windows and the cost to properly change exceeded $10. Id.

93. Where part of the work which a subcontractor agreed to do consisted in digging a trench, but he did not dig the trench, he could not recover the full contract price though the omission was excusable and though the principal contract made it the duty of the contractor to dig the trench. Scanlon v. Muller, 98 N. Y. S. 662. Instruction that jury should not deduct any sum on account of unfinished work held erroneous where there had been no previous deduction. Wood v. Robertson, 85 N. Y. S. 338. Defendant should have been allowed a deduction from the contract price by reason of contractor's failure to deliver certain vases in a perfect condition. Moore v. Milwaukee Monument Co. [Wis.] 104 N. W. 1013. Where contractor failed to deliver premises free from liens as agreed, but the amount thereof was properly allowed the owner in an action for the contract price, a lien was no longer a bar to a recovery of the balance in the absence of agreement to that effect. Wyman v. Hooker [Cal. App.] 83 P. 79.

94. Meacham v. Gardner, 27 Pa. Super. Ct. 296. It was error for the court to admit evidence of a custom in regard to acceptance of walls where the contract required work and material to be satisfactory to the owner. Id.

95. A provision that if labor or material is not satisfactory to the architect, the contractor will supply others that will be satisfactory to him, binds the contractor to satisfy the architect. Payne v. Roberts [Pa.] 64 A. 86.

96. Owner is bound to exercise good faith and cannot avoid liability for compensation by a mere arbitrary claim of dissatisfaction. Higgins Mfg. Co. v. Pearson [Ala.] 40 So. 579. Held error to affirm the point that if jury believed plaintiff's evidence they should find that owner was satisfied with plaintiff's work at time it was done, as jury should determine from all the evidence whether owner was in fact satisfied. Meacham v. Gardner, 27 Pa. Super. Ct. 296. Court should not have told jury that if owner's words and actions

guarantee of results where the kind of material and manner of construction is prescribed by the owner refers only to a compliance with directions and to work about which the contractor has discretion.[97] Performance according to contract may be waived by the conduct of the parties.[98] An oral notice of defects, to the contractor is not sufficient where the contract requires a written one.[99] The contractor is not liable for errors in plans of the architect not patent on their face, or for errors not easily detected.[1] If he voluntarily abandons the work unfinished, he cannot recover for services performed but not of value to the owner.[2] Neither the contractor nor his surety can escape liability for failure to comply with the terms of the contract by getting possession of a mortgage on the property and bidding it in at foreclosure sale.[3]

The owner cannot predicate rights on nonperformance due to his own default.[4] He is not excused from liability for a breach because of his failure to secure funds under a collateral agreement with a third person, in the absence of a provision to the contrary.[5] The full contract price cannot be recovered for only partial performance, though full performance is prevented by the owner.[6]

at the time indicated that the job was satisfactory he could not in a subsequent year defeat plaintiff's claim by claiming that it was unsatisfactory since owner might have discovered defects later which justified him in deciding against plaintiff. Id.

97. A clause in the specifications with reference to the concrete work and waterproofing of a cellar that the whole should be made "perfectly watertight and guaranteed" was not a guarantee that the cellar should be watertight where the manner of construction and material were prescribed in detail, but a guaranty only of compliance with the specifications and the effectiveness of work about which the contractor had discretion. Bush v. Jones [C. C. A.] 144 F. 942.

98. Where part of a tunnel was constructed with only two rings of brick instead of three as called for by the contract but the city required the contractor to put a third ring inside the others, which he did at his own expense thereby reducing the inside diameter the city could not thereafter require him to rebuild with the required diameter or charge him with the cost to so rebuild. City of Chicago v. Duffy, 117 Ill. App. 261. Provision in a contract for convict labor, allowing plaintiff the use of a certain kiln in process of construction by defendant held waived by failure to complain and by the substitution of an agreement for another kiln. F. H. Mills Co. v. State, 110 App. Div. 843, 97 N. Y. S. 676.

99. Sweatt v. Hunt [Wash.] 84 P. 1.

1. Herbert v. Weil, 115 La. 424, 39 So. 389.

2. Where contract made completion and acceptance of work a condition to payment for digging well. Miller v. Mason City & Ft. D. R. Co. [Iowa] 108 N. W. 302.

3. Mercantile Trust Co. v. Hensey, 27 App. D. C. 210.

4. Instruction that it is implied in all building contracts that owner will keep work which necessarily precedes that covered by the contract so far advanced that the contract work may be done held justified by the evidence. Hart v. Carsley Mfg. Co., 116 Ill. App. 159 Where a contract to drill a well provided that no charge should be made until the well had been tested and found to produce 20 barrels of water daily, required the owner to make a test within 30 days from completion, and plaintiff to "come back and drill deeper" if the well was not accepted, but the owner failed to make the test, he could not avoid liability for the contract price, because the well did not produce 20 barrels. Hagadorn v. McNair, 109 App. Div. 759, 96 N. Y. S. 417. Where a contract to repair a well provided that in case defendant could not make the well do good work within one year he would repay the contract price and there was no evidence that during that time defendant had control of the well, but the evidence tended to show that plaintiff's negligence prevented defendant from remedying the defects it was error to submit to the jury the question whether the well was under the control of defendant. Pilot Point Waterworks v. Fisher [Tex. Civ. App.] 93 S. W. 529. Positive refusal on the part of the owner to pay instalments unless security is furnished, which the contractor is under no obligation to give, relieves the contractor from further performance on his part. Refusal to pay an instalment due on a launch. Michigan Yacht & Power Co. v. Busch [C. C. A.] 143 F. 929. As part of contract to build a launch contractors were to loan plaintiff free of charge another launch until delivery of the one contracted for. Held boat loaned was not security for performance of the contract so that the fact that defendants sold her would justify plaintiff in refusing to pay an instalment until further security was given. Id.

5. The mere fact that the owner was disappointed in securing the money which was to cover the contract price did not avoid his liability on the contract although the contractor knew of the plan by which it was to be secured. Smith v. Kaufman, 30 Pa. Super. Ct. 265.

6. Where thus prevented, plaintiff could not recover full price for only three-fourths of the work there being no proof of the reasonable value of work done or omitted, or of prospective profits lost. Polstein v. Miller, 97 N. Y. S. 211.

In the absence of a stipulation to the contrary, the contractor may employ others to perform a part or all of the work.[7]

Impossibility of performance.[8]—Impossibility of performance does not prevent liability under an absolute contract.[9]

Destruction of subject-matter.[10]—A loss sustained by the destruction of a building before it is completed [11] or accepted, where acceptance is a condition precedent to payment,[12] must be borne by the contractor in the absence of an express provision to the contrary,[13] but in such case the owner is bound to permit the contractor to complete his contract by rebuilding.[14] One undertaking to erect buildings on foundation walls already constructed is entitled to recover the amount earned under the contract upon the collapse of the foundations prior to the completion of the work, where there was nothing to indicate to him, upon a proper inspection, that they were defective.[15] And this is true though the other party was also ignorant of the incompetency of the person who built them.[16]

§ 3. *Modification of contract, and changes in plans and specifications.*[17]—A provision giving the owner's engineer power to direct and superintend the execution of the contract does not give him general power to change its terms or to extend the time for completion.[18] An owner who repudiates the entire contract cannot claim the benefit of a provision therein that changes shall be made without increase in the total cost.[19]

§ 4. *Extra work.*[20]—The contract, plans, and specifications, must control in the absence of fraud or mistake, and the contractor cannot recover extra for labor or material embraced therein.[21] The owner is, however, bound to pay for work per-

7. Contract with member of a firm of architects to construct a house which firm had planned authorized member to employ others so as to entitle the latter to a lien. Vickery v. Richardson, 187 Mass. 53, 75 N. E. 136.

8. See 5 C. L. 461.

9. Where contract was absolute to drill a certain well, owner was not guilty of breach because he refused to allow contractor to drill another. T. E. Law & Co. v. Paxton [Mo. App.] 93 S. W. 354.

10. See 5 C. L. 462.

11. By act of God. Milske v. Steiner Mantel Co. [Md.] 63 A. 471.

12. Destruction of the property before acceptance and before the owner derives any benefit therefrom bars a recovery of compensation under a contract providing for payment upon acceptance. Louisville Foundry & Machine Co. v. Patterson [Ky.] 93 S. W. 22. Where an elevator was to be paid for when accepted by the architect, the fact that the tenants of the building were permitted to use the elevator was not sufficient to show an acceptance by the architect before the building was destroyed by fire. Id.

13. Storm when building nearly completed. Milske v. Steiner Mantel Co. [Md.] 63 A. 471.

14. Where building was blown down by storm. Milske v. Steiner Mantel Co. [Md.] 63 A. 471.

15. In an action by a subcontractor against the contractor, the question whether the collapse of a wall was due to plaintiff's negligence or to defects in the cellar walls built by a third person was for the jury. Colgan v. O'Rourke [Pa.] 64 A. 529.

16. Colgan v. O'Rourke [Pa.] 64 A. 529.

17. See 5 C. L. 462.

18. Sanitary Dist. v. McMahon & Montgomery Co., 110 Ill. App. 510. Statement by president of defendant railroad company that whatever its chief engineer agreed to do with reference to the work under a contract with plaintiff for drilling wells would be satisfactory to the company did not authorize engineer to modify the terms of the written contract which provided that plaintiff should have no compensation for delay. Miller v. Mason City & Ft. D. R. Co. [Iowa] 108 N. W. 302. Modification of a contract to drill wells for a railroad company, made by its engineer to the effect that plaintiff should have compensation for delay, even if authorized, could have reference only to well on which plaintiff was then working. Id.

19. Lien could be maintained. Vickery v. Richardson, 189 Mass. 53, 75 N. E. 136.

20. See 5 C. L. 463.

21. Though contractor failed to notice the marking "granite floor" on the blueprints, he could not recover extra for the granite. Moore v. Milwaukee Monument Co. [Wis.] 104 N. W. 1013. Where the general character of the carving to be done on certain stones was indicated by the blueprints, and the working models and drawings thereafter furnished according to the contract were in accord with the general character of the carving indicated by the blueprints, plaintiff could not recover extra compensation for the elaborateness of the carving required by the models. Id. Where an offer to furnish lumber at a certain price with an additional charge for extras was accepted with the proviso that the price named should include all extras and thereupon the lumber

formed by his consent and accepted by him though not covered by the contract,[22] and for extra work rendered necessary by his acts or omissions[23] or those of his agents.[24] The contractor may ordinarily recover as for a breach of the contract for extra work and materials rendered necessary by erroneous representations in the plans and specifications as to existing conditions, which cannot be ascertained by inspection, where he is not required, or given an opportunity, to make the necessary investigations.[25]

Provisions that no claim shall be made for extra work unless the same shall have been furnished on the written order of the architect or other person in charge of the work[26] are reasonable, and will be enforced. They may be waived by act of the parties,[27] but not by the architect.[28]

§ 5. *Delay in performance.*[29]—Unless delay is waived by act or agreement,[30]

was furnished without objection there could be no charge for extras. Littell v. Saulsberry, 40 Wash. 556, 82 P. 909. Where contractor engaged to plaster a building he was not entitled to extras for a scaffold necessary for that purpose. Gates v. O'Gara [Ala.] 39 So. 729. Architect employed to draw plans and specifications for and superintend the construction of a cold storage house, could not charge extra for making drawings for different styles of insulation after consultation with an expert or for employing an extra superintendent. Espert v. Ahlschlager, 117 Ill. App. 484. Custom to hire extra help at expense of owner could not control express contract. Id. Where the contract required plaintiff to provide all the material and "do all the carpenter work to be done" on alterations of defendant's buildings, plaintiff could not recover for certain extra work. Lashinsky v. Silverman, 48 Misc. 501, 96 N. Y. S. 135. Where plaintiff contracted to furnish the mill work for a certain building it was not entitled to recover extra for mill work in excess of that estimated by it when the contract was made. Otis v. Cottage Grove Mfg. Co., 131 Ill. App. 233.

22. Evidence held to show that certain extra work was performed by consent of owner. Vickory v. Richardson. 189 Mass. 53, 75 N. E. 136. Contractor should have been allowed for certain false work in railroad construction as having been done under separate contract, or as extra work. Fruin-Bambrick Const. Co. v. Ft. Smith & W. R. Co., 140 F. 465.

23. Contractor entitled to recover for work necessary to complete a tunnel after it had caved in, where against his protest the owner required him to use defective material. McConnell v. Corona City Water Co. [Cal.] 85 P. 929.

24. Plaintiff could recover for putting in certain "back masonry" after straightening out a tunnel improperly constructed by reason of erroneous orders of defendant's engineers and inspectors. City of Chicago v. Duffy, 117 Ill. App. 261.

25. Langley v. Rouse [N. Y.] 77 N. E. 1168.

26. A stipulation requiring the contractor to submit estimates of the expense of proposed extra work or alterations and that an order of the architect shall be given therefor in writing. Langley v. Rouss [N. Y.] 77 N. E. 1168. Requirement that extra work in railroad construction should be done on order from engineer and claim made within a certain time Fruin-Bambrick Const. Co. v. Ft. Smith & W. R. Co., 140 F. 465. Claims for extra work should not have been allowed where such work was not ordered by the engineer nor his certificate given as required by the contract. Choctaw & M. R. Co. v. Newton [C. C. A.] 140 F. 225.

27. Error to exclude evidence of certain extra work on ground that contract required orders therefor to be in writing. Greenberg v. Mendelson, 97 N. Y. S. 965. By orally consenting to and countenancing extra work defendant waived a stipulation that a written estimate of such work should be submitted. Wyman v. Hooker [Cal. App.] 83 P. 79. Requirement that extra work be done on written orders held waived by acceptance of all extras without question as to character, quality, or price. Hart v. Carsley Mfg. Co., 116 Ill. App. 159.

28. Architect has no power to waive the provisions as to estimates and written order though he is made the agent of the owner for the purpose of the contract, since he cannot enlarge his own powers by waiving the limitations thereof. Langley v. Rouss [N. Y.] 77 N. E. 1168.

29. See 5 C. L. 464.

30. Waived: Evidence held to show that contractor's work was completed within a reasonable time and that any delay caused by contractor was waived by owner in agreeing to a subletting of part of the work. Hart v. Carsley Mfg. Co., 116 Ill. App. 159. By owner's failure to make payments as required by the contract. City of Chicago v. Duffy, 117 Ill. App. 261. Acceptance of street improvement without claim for delay waived right to stipulated damages where contract provided that such damages should be paid before the work was accepted. Central Bitulithic Pav. Co. v. Mt. Clemens [Mich.] 12 Det. Leg. N. 906, 106 N. W. 888. Contract required completion by a certain date but owner after such date urged contractor to hasten completion by another date or he would be held liable for damages resulting from the delay. Held waiver of defense that work was not finished by the date first agreed upon and owner could not resist payment. Crocker-Wheeler v. Varick Realty Co., 104 App. Div. 568, 94 N. Y. S. 23, 88 N. Y. S. 412. Railroad company by taking possession and running trains on road for commercial purposes, waived right to stipulated damages for time thereafter required by contractors to complete the work. Fruin-Bambrick Const. Co. v. Ft. Smith & W. R. Co., 140 F. 465.

Not waived: Payment by a contractor to

or caused by the claimant himself,[31] the contractor is liable for failure to perform,[32] and the owner for preventing performance [33] within contract time.[34] A provision exempting the contractor from liability for unavoidable delay does not include delay caused by conditions known at the time of contracting and supposedly guarded

a subcontractor on condition that losses sustained by the latter's delay in furnishing material should be adjusted thereafter was not a waiver of a claim for damages for such delay. Modern Steel Structural Co. v. English Const. Co. [Wis.] 108 N. W. 70. Provision for liquidated damages for delay was not waived by failure of owner to answer a letter by contractor explaining a cause of delay where there was no request for any extension or modification of the contract. Stephens v. Essex County Park Commission [C. C. A.] 143 F. 844. That architect testified that upon his visit to a quarry, after the time for completing the contract, he supposed that certain stone could be taken out "within the time required" did not justify a presumption that he had extended the time for performance where he was under an erroneous impression that the contract extended eight days longer than it did. Id. That the architect urged contractor to "hurry up" certain materialmen did not show a consent on his part to a suspension of work upon certain subways so as to defeat a claim for liquidated damages for delay. Id. Where contract provided for stipulated damages for delay after a fixed time, and authorized the owner to deduct such damages from moneys due the contractor, except where work was suspended by order of the architect, the issuance of certificates by the architect for work done after the time fixed did not admit that the delay was by his direction and consent. Id. Payment by owner after such time of orders given to subcontractors was not in itself a waiver of the right to liquidated damages. Id. Error to charge that if architect extended the time for performance there could be no finding for the owner for the days extended, when there was no proof of such extension. Neblett v. McGraw [Tex. Civ. App.] 91 S. W. 309.

31. Contractor not liable for delay caused by owner. Evidence considered and some days allowed and some disallowed as delay caused by the owner. Hebert v. Weil, 115 La. 424, 39 So. 389. Owner not entitled to allowance for delay which architect admitted was due to his fault. Curry v. Olmstead, 26 R. I. 462, 59 A. 392. Where the undisputed evidence showed that a contract to furnish brick was made by the contractors with the brick company and the contract with the owner provided that the contractors were to furnish all the material, and the contractors contended that delay was caused because of the failure of the brick company to furnish the brick it was error to submit to the jury the question whether the brick company was the agent of the owner. Neblett v. McGraw [Tex. Civ. App.] 91 S. W. 309. Where the contractors were to furnish all material, and be liable for delay except that caused by the owner, evidence that the contractors were delayed by failure of a brick company to furnish brick was inadmissible where the undisputed evidence showed that the order for brick was made by the contractors. Id. Charge whether certain delays were not with the approval of the architect, properly refused where there was no evidence as to any such consent. Stephens v. Essex County Park Commission [C. C. A.] 143 F. 844.

32. Failure to deliver building. Hebert v. Weil, 115 La. 424, 39 So. 389. Evidence held to show that building was not wholly completed as required and to entitle owner to $10 per day for delay as per contract, the contractor having remained in possession. Phaneuf v. Corey [Mass.] 76 N. E. 718. On a plea of general issue, and where there was nothing in the record to indicate that defendant did not desire to recoup damages for alleged delay on the part of plaintiff contractor but defendant's instructions fairly inferred that recoupment was sought, an instruction that if plaintiff performed within a reasonable time there could be no recoupment, was not erroneous on the ground that there was no attempt to recoup damages but they were proven only to show good faith on the part of the architect in withholding the certificate. Hart v. Carsley Mfg. Co., 116 Ill. App. 159.

33. It is the duty of the owner to furnish the work to be done so as to enable the contractor to perform and in default thereof he is responsible for the delay. Failure to furnish right of way to enable contractor to dig drainage canal. Sanitary Dist. v. McMahon & Montgomery Co., 110 Ill. App. 510. Evidence as to plaintiff's knowledge of obstacles at time of making contract properly excluded where contract was plain. Id. Error in instruction in permitting plaintiff to recover for his own delay held not so patent that jury could not have been misled. Havens v. Robertson [Neb.] 106 N. W. 335. Instruction directing jury to find damages for material delay held erroneous where it was denied that the delay was material. Id. The owner cannot be charged for delay while waiting for brick because of a refusal to allow the use of unsuitable brick from a place other than that where the contractors first contracted for it. Neblett v. McGraw [Tex. Civ. App.] 91 S. W. 309. Where the contract provided for liquidated damages for delay with an extension of time if delay was caused by the owner, an instruction which required a finding against the owner if delay was caused by him, was erroneous as requiring a finding against him on the whole case while he should be charged only pro tanto for such delay. Id.

34. Question as to when contract was performed was for jury. Fitzgerald v. Benner, 219 Ill. 485, 76 N. E. 709. No time being specified in a contract to furnish material, they must be furnished within a reasonable time. in the course of the contractor's business. Long v. Abeles & Co. [Ark.] 91 S. W. 29.

against.[35] A stipulation requiring the contractor to make written applications for extensions of time must be complied with [36] unless waived.[37]

The contractor cannot recover damages in excess of interest for suspension of the work due to failure of the owner to make prompt payments as required by the contract.[38] The effect of provisions for stipulated damages is treated elsewhere.[39]

§ 6. *Termination or cancellation of contract.*[40]—The contract may, of course, be abandoned by mutual consent.[41] Where the contract provides for its termination by the owner upon certificate of the architect that sufficient grounds exist therefor, the owner is entitled to terminate it absolutely upon the proper certificate being given.[42] If the owner has a statutory right to terminate the contract there can be no recovery as for a breach,[43] but only for such amount as the contract including the statute allows.[44] In the absence of agreement to the contrary, one who employs another to act as architect in the erection of a building may discontinue the employment at his option upon paying for services rendered and expenses incurred.[45] So, too, if the architect fails to properly perform, the owner may terminate the contract with him without being liable for a breach.[46]

§ 7. *Completion by owner or third person.*[47]—The contract usually contains a provision authorizing the owner to take charge of the work upon default of the contractor, and deduct the expense incurred thereby from the contract price.[48] In such case the contractor is entitled to recover the contract price less such expense, especially where the terms of the contract relative to unfinished work are doubtful.[49] Bonds frequently provide that in case of default by the contractor the sureties

35. Where contractor knew that the congested condition of steel market would cause delay and make time for completion much longer than would ordinarily have been required. Link Belt Engineering Co. v. U. S., 142 F. 243.

36. Where building contract provides that no allowance shall be made for delay unless claim therefor is presented in writing, the contractor is not entitled to an allowance for which no such claim is made. Curry v. Olmstead, 26 R. I. 462, 59 A. 392.

37. Error to exclude evidence of waiver where delays were caused by owner and she led contractor to believe that written application would not be insisted upon. Huber v. St. Joseph's Hospital [Idaho] 83 P. 768. Certificate of architect not conclusive in such case. Id.

38. City of Chicago v. Duffy, 117 Ill. App. 261. Such failure, however, excuses delay on the part of the contractor. Id.

39. See Damages, 5 C. L. 904.

40. See 5 C. L. 466.

41. Where contractor's evidence went to show that the original scheme for wiring a theatre had been radically extended since the execution of the written contract so as to increase the cost to three times the original price by consent of the owner, and that all changes had been approved by him, the question of whether the original contract had been abandoned by mutual consent was one for the jury. Reber v. Brownback, 27 Pa. Super. Ct. 471.

42. Davis v. State [Ala.] 41 So. 681.

43. Contractor could not recover for injury to reputation. Art. 2765, Civ. Code, Cusachs & Co. v. Sewerage & Water Board of New Orleans [La.] 40 So. 855.

44. Amount of expenses up to date plus profits if contract had been completed. Art 2765, Civ. Code. Cusachs & Co. v. Sewerage & Water Board of New Orleans [La.] 40 So. 855.

45. Fitzhugh v. Mason [Cal. App.] 83 P. 282.

46. Where an architect failed to furnish plans for a building costing within $450,000 as required by the contract by which he was also to supervise the building, and did not conform to plans already made for one costing within that sum, the employers could terminate the contract, and it was not necessary for them to request that the plans be altered so that the cost would come within the stipulated amount. Horgan & Slattery v. New York, 100 N. Y. S. 68.

47. See 5 C. L. 467.

48. Held nothing due plaintiff at the time of filing his lien, for furnishing material and doing mason work for a church, after deducting amount paid and cost of completion. Condon v. Church of St. Augustine, 98 N. Y. S. 253. Evidence in action for price of constructing a system of machinery for ice making held insufficient to show a new agreement that defendant should make repairs, additions, and changes at plaintiff's expense. Callahan v. O'Rourke, 96 N. Y. S. 1010. Where the obligor of the bond contended that the collapse of a building was due to defective plans, and the owner reconstructed the building at a less cost than the original plans called for an erroneous instruction that the measure of damages was the difference between what it cost to complete it and the original contract price was not harmless. Thompson v. Chaffee [Tex. Civ. App.] 13 Tex. Ct. Rep. 167, 89 S. W. 285.

49. Where owner was slow in making objection and it was doubtful whether contract required three coats of plaster. Sweatt v. Hunt [Wash.] 84 P. 1.

may assume the contract and complete the work.[50] If the contractor's surety directs the owner to complete abandoned work, the owner is entitled to a reasonable compensation for supervising the work of completion.[51]

§ 8. *Architect's and other certificates of performance, and arbitration of disputes.*[52]—The effect of the certificate of the architect or other person in charge of the work as to the completion of the work, or as to the work done or material furnished, is a question of intention to be derived from terms of the contract.[53] Where it is stipulated that payments shall be made only upon his certificate, its production is a condition precedent to the contractor's right of recovery,[54] in the absence of a showing that it is arbitrarily or fraudulently withheld,[55] or unless waived.[56] Pro-

50. Error to exclude testimony of one of the sureties on the bond that if the other sureties had assumed to complete a building abandoned by the contractor, he had no part in such action. Bartley v. Comer [Tex. Civ. App.] 13 Tex. Ct. Rep. 816, 89 S. W. 82. It being contended that the sureties had engaged to pay for certain materials and the bond being introduced for the purpose of showing who the sureties were, it was not reversible error to refuse to charge that the bond was introduced only to show who the sureties were. Id.

51. Donlan v. American Bonding & Trust Co., 139 N. C. 212, 51 S. E. 924. But was not entitled to a preference of his claim against laborers and materialmen, and so could not deduct it from amount in his hands due contractor, before paying for labor and material. Id.

52. See 5 C. L. 467.

53. Where contract for railroad construction provided that progress estimates were only approximate and should not govern the chief engineer's final estimate, and the engineer died before the completion of the contract, his successor had full power to change estimates already made though some of them were marked final. Fruin-Bambrick Const. Co. v. Ft. Smith & W. R. Co., 140 F. 465. The architect's certificate, in the absence of express language, is not conclusive to the extent of precluding the owner from showing that the materials were inferior or the work poorly done or from showing other violations of the contract. Mercantile Trust Co. v. Hensey, 27 App. D. C. 210. Provision that his decision as to meaning of plans and specifications should be final referred only to doubtful terms of contract. Dyer v. Middle Kittitas Irr. Dist., 40 Wash. 238, 82 P. 301. Under contract providing for payment in instalments on the certificate of the architect, but that certificate should not lessen the final responsibility of the contractor nor exempt him from liability to make good defective work, where plaintiff had not substantially performed he could not recover final payment though he had procured the certificate. Olsen v. Schwarzwaelder, 109 App. Div. 282, 95 N. Y. S. 651. In such case certificate is conclusive as to matters within the knowledge of the architect at the time he made it. Hebert v. Dewey [Mass.] 77 N. E. 822.

54. Provision that payments intermediate or final shall be made only upon certificates as to the extent and value of work done or materials furnished is valid and binding. Bush v. Jones [C. C. A.] 144 F. 942. Though certificate should have been given and work was properly done, honest refusal to give bars recovery. Hebert v. Dewey [Mass.] 77 N. E. 822. Action properly dismissed where there was no proof of waiver of certificate or that it was unreasonably refused, but affirmative proof of nonperformance. Greenberg v. Mendelson, 97 N. Y. S. 765.

55. The right of the contractor to recover his final payment cannot be defeated by a mere arbitrary refusal on the part of the owner's architect to furnish the certificate where the contract is fully performed. Wyman v. Hooker [Cal. App.] 83 P. 79. Certificate was not required where architect did not exercise his honest judgment in withholding it from plaintiff. Hart v. Carsley Mfg. Co., 116 Ill. App. 159. Evidence considered and held to show bad faith on part of architect in withholding certificate. Id. Architect may testify as to his intent in withholding a certificate where the question is as to his honest judgment. Id. Owner's instructions in regard to plaintiff's charge of collusion properly refused on the ground that it was not necessary to specially define collusion and that undue prominence was given to certain matters touching the bad faith of the architect to the exclusion of more important evidence on the same question. Id. Instruction as to the right of plaintiff to recover without a certificate if the architect acted in bad faith and withheld the certificate, held not objectionable. Fitzgerald v. Benner, 120 Ill. App. 447. Instruction as to necessity for production of certificate did not assume that owner directed the architect to withhold the certificate; nor tell the jury to disregard the decision of the architect if the work was completed; nor that plaintiff could recover though damages for delay might exceed the balance due. Id. Instruction held not to assume as a fact that defendant directed his architect to withhold the final certificate from plaintiff. Fitzgerald v. Benner, 219 Ill. 485, 76 N. E. 709. Instruction held to inform jury as to what would be bad faith and absence of just cause in failure of architect to deliver certificate to contractor. Id. Recovery may be had without certificate if architect willfully or arbitrarily refuses to give it. Hebert v. Dewey [Mass.] 77 N. E. 822. The fact that when the contractor applied for the certificate the architect required certain additional work as a condition to granting it and that such work was done, but the certificate still refused, was not sufficient as a matter of law to show excuse for not obtaining the certificate, since the architect might have discovered other things in the meantime which

visions making him the final arbiter of questions arising under the contract are generally held to be valid, and make his decision conclusive and binding upon the parties,[57] in the absence of fraud or mistake,[58] but this rule does not, of course, apply where it is subsequently agreed that his decision shall not be relied on.[59] Where it is agreed that instalments shall be determined by a person named but another

justified a refusal. Id. Where certificate was fraudulently withheld interest was allowed contractor from the time it should reasonably have been given. Fruin-Bambrick Const. Co. v. Ft. Smith & W. R. Co., 140 F. 465. Substantial compliance with the contract, while essential to such showing, is not alone sufficient. Would substitute judgment of jury for that of architect. Bush v. Jones [C. C. A.] 144 F. 942. Instruction that honest substantial performance would justify recovery held not subject to objection that it ignored plaintiff's obligation to show excuse for not obtaining a certificate in view of jury's special findings of bad faith on the part of architect and of other instructions. Hart v. Carsley Mfg. Co., 116 Ill. App. 159.

56. A provision requiring a certificate from the architect to be obtained ten days prior to payment for the work, held waived by refusal to pay, on other grounds than failure to obtain the certificate. Andrew Lohr Bottling Co. v. Ferguson, 122 Ill. App. 270.

57. Robertson v. Grand Rapids [Minn.] 104 N. W. 715. Where contract provides that certificate shall be conclusive. Barhee v. Findlay [Ill.] 77 N. E. 590. Contract held to make architects' decision final as to fulfillment of contract so that their acceptance of building as a substantial compliance was binding on owner, and their acceptance would be regarded as his acceptance. Andrew Lohr Bottling Co. v. Ferguson, 122 Ill. App. 270. City engineer's certificate for payment held conclusive as to amount of lumber properly left in a tunnel in absence of evidence that he included material improperly left there. City of Chicago v. Duffy, 117 Ill. App. 261. It was very doubtful whether certain language in the contract in question made the architect the final arbiter of damages for delay. Fitzgerald v. Benner, 120 Ill. App. 447. Where contract provides that instalments of contract price to be paid by defendant shall be determined by its named engineer his estimate and certificate are binding on both parties in absence of fraud while he continues to act in capacity of engineer. Seretto v. Rockland, etc. R. Co. [Me.] 63 A. 651. If the contract gives the owner the right to himself complete the work upon failure of the contractor to make it satisfactory to the architect (Payne v. Roberts [Pa.] 64 A. 86), the decision of the latter that the work is not satisfactory entitles the owner to take charge of the work regardless of mistaken judgment or dishonest purpose on the part of the architect if there is no collusion between him and the owner (Id.). Evidence held not to show collusion. Id. Decision of engineer in railroad construction. Fruin-Bambrick Const. Co. v. Ft. Smith & W. R. Co., 140 F. 465; Choctaw & M. R. Co. v. Newton [C. C. A.] 140 F. 225. Decision of board as to decrease in cost due to change omitting the fireproofing of wood in the construction of a foundry held binding. Conners v. U. S. [C. C. A.] 141 F. 16.. A provision that the engineer of the contractor shall make estimates of work done as a basis for payment of subcontractor and that his decision on disputed questions shall be conclusive is valid and his determination is prima facie conclusive as to matters fairly and honestly decided. Contract with subcontractor. Edwards v. Hartshorn [Kan.] 82 P. 520..

58. In case of fraud or mistake sufficient to imply bad faith, his decision is not binding. Instruction proper. Edwards v. Hartshorn [Kan.] 82 P. 520. Evidence held to show that final estimates by engineer of contractor were not honestly made and discrepancies showed palpable mistake. Id. That the chosen umpire was defendant's employee did not itself weaken the decision, but the law requires of a person so situated the utmost diligence and good faith. Id. Though the engineer was not required to personally do all the work, the mistakes of his subordinates became his if he adopted them in making up his final estimates. Id. Contractor cannot recover any sum in excess of that allowed by the engineer unless the contractor shows that the former was guilty of collusion or fraud or showed such arbitrary and wanton disregard of complainant's plain rights under the contract as to be equivalent to fraud, or committed errors or mistakes to the complainant's prejudice so gross and palpable as to leave no doubt in the mind of the court that grave injustice was done. Fruin-Bambrick Const. Co. v. Ft. Smith & W. R. Co., 140 F. 465; Choctaw & M. R. Co. v. Newton [C. C. A.] 140 F. 225. The evidence must be "overwhelming," "beyond a reasonable doubt" or "free from all doubt and convincing" and a direction to a master that to set aside the award the evidence must be "reasonably convincing" did not give a sufficient measure of proof. Id. Evidence regarding amount and proper classification of work and material for railroad construction held insufficient to show fraud or bad faith on the part of the chief engineer in making final estimates so as to warrant setting aside or increasing such estimates. Id. Evidence held to show bad faith in the examination on which was based a reclassification of certain sections in railroad construction, and that the final estimate should be disregarded as collusive, dishonest, grossly erroneous, and unjust and the first classification restored. Fruin-Bambrick Const Co. v. Ft. Smith & W. R. Co., 140 F. 465. Engineer's disallowance of claim for grubbing, in railroad construction, held grossly unjust and his construction of the contract in this respect palpably wrong. Id.

59. Petition stated cause of action for balance of compensation for railroad work though it stated that the decision of an umpire should be final and that a decision was made, where it also stated that it had been set aside by agreement as incorrect and de-

person is substituted by the owner and the appointment acquiesced in by the parties, his determination is binding, and the owner is estopped from denying his authority.[60] In the absence of a provision to the contrary, no particular form of certificate is necessary.[61]

There is a conflict of authority as to the validity of provisions making final the decision of arbitrators as to disputed questions, some courts holding them to be valid,[62] while others regard them as being contrary to public policy.[63] They are expressly forbidden by statute in some states.[64] What questions are to be submitted depends on the terms of the contract.[65] Such provisions do not make arbitration a condition precedent to suit in the absence of a stipulation to that effect.[66]

§ 9. *Acceptance.*[67]—As a general rule the acceptance and appropriation of the work by the owner,[68] with knowledge of all the facts and circumstances,[69] and in the absence of an agreement to the contrary,[70] is a waiver of defects,[71] though in some states it only operates to render him liable for the contract price, less any damages he may have suffered by reason of a failure to strictly comply with the contract.[72] The owner may show that the acceptance was conditional and that the

fendant had promised to make correct estimates but had failed. Edwards v. Hartshorn [Kan.] 82 P. 520.

60. Substituted engineer in railroad construction. Seretto v. Rockland, etc. R. Co. [Me.] 63 A. 651.

61. Written reports of engineers of their estimates of work done held sufficiently explicit to comply with terms of contract. Seretto v. Rockland, etc. R. Co. [Me.] 63 A. 651. Is sufficient if certificate gives data required by contract. Id.

62. Provision held not ineffectual as depriving the court of jurisdiction over a controversy. Conners v. U. S. [C. C. A.] 141 F. 16.

63. Clause to submit legal question as to duty of defendant to obtain right of way for contractor, held void as depriving a party of his right to appeal to the courts. Sanitary Dist. v. McMahon & Montgomery Co., 110 Ill. App. 510. Provision assuming to make final decision of architect or arbitrator on disputed questions held void. Maitland v. Reed [Ind. App.] 77 N. E. 290. In action by contractor for delay, defense that such claims should be arbitrated was bad, as court would not recognize unexecuted agreements to arbitrate. Havens v. Robertson [Neb.] 106 N. W. 335.

64. Under Rev. St. § 3229, declaring void stipulations disabling a party from enforcing contract rights in ordinary tribunals. Huber v. St. Joseph's Hospital [Idaho] 83 P. 768.

65. Provisions requiring a submission of disputed questions to the architect held to apply only to questions between the contracting parties, and not to affect the rights of the owner and the architect under their contract. Attempt to invoke provision in garnishment of amount due architect. Eastham Bros. v. Blanchette [Tex. Civ. App.] 94 S. W. 441. Clause to submit questions relative to execution of contract did not include question whether owner was liable for delay. Sanitary Dist. v. McMahon & Montgomery Co., 110 Ill. App. 510. Question whether architect was honestly dissatisfied with contractor's work could not be referred to architect with right of appeal to arbitrators. Payne v. Roberts [Pa.] 64 A. 86. Where contract required the wood for a foundry to be fireproofed, but it was decided not to fireproof it, the change was within the provision of the contract requiring a board to decide as to increase or decrease of cost due to changes and the award was binding. Conners v. U. S. [C. C. A.] 141 F. 16.

66. An agreement to submit questions as to damage for delay will not prevent a suit in the first instance for such damages unless it is unequivocably provided that arbitration shall be either a condition precedent to suit, or the only mode of assessing the damages. Adams v. Haigler, 123 Ga. 659, 51 S. E. 638. Where contract provided that disputed questions should be settled by the architect, but that the parties might appeal to an arbitrator in certain cases, an appeal was not a prerequisite to an action. Maitland v. Reed [Ind. App.] 77 N. E. 290. Clause that arbiter should decide all questions arising under the contract was not a condition precedent to an action on the contract. Sanitary Dist. v. McMahon & Montgomery Co., 110 Ill. App. 510.

67. See 5 C. L. 470.

68. Where screens furnished and fitted did not comply with the contract and defendant requested contractor to remove them, defendant's failure to remove them was not an acceptance. Higgins Mfg. Co. v. Pearson [Ala.] 40 So. 579.

69. But settlement and taking possession of a building in excusable ignorance of defects does not preclude recovery for defective construction. Inexperienced widow relying on contractor. Ekstrand v. Barth, 41 Wash. 321, 83 P. 305.

70. Taking possession under agreement that the occupancy shall not waive defects is not an acceptance so as to render the owner liable for the contract price. Eastham Bros. v. Blanchette [Tex. Civ. App.] 94 S. W. 441.

71. Acceptance of system of machinery for ice making shown by use until the end of the season and request for indulgence as to payments though defendant complained of the work. Callahan v. O'Rourke, 96 N. Y. S. 1010.

72. Where the work is accepted and appropriated by the owner he is liable for the

conditions have not been complied with.[73] Whether the work has been accepted is a question of fact.[74] A failure to accept or reject the work within the time fixed by the contract amounts to an acceptance.[75] Mere use is not necessarily an acceptance.[76] An agent of the architect employed to see that the contractor performs his work has no authority to accept the work of the architect.[77]

§ 10. *Payment.*[78]—No time being fixed for payment, the law provides that it be made upon completion of the contract.[79] Where the contract provides for the payment of instalments during the progress of the work, the owner's obligation to pay the sums stated becomes fixed when the building reaches the stage required,[80] and suit may be brought therefor though the contract is entire and has not been fully performed.[81] A demand by the contractor for additional security for the payment of future instalments does not justify a refusal by the owner to pay instalments already due.[82] The contractor may conclude himself by agreement not to request further payment until a part of the work is completed.[83] An order on a fictitious drawee is not payment, and a tender back of the order is not a prerequisite to an action to recover the amount due thereon.[84]

§ 11. *Subcontracts.*[85]—A provision in the principal contract that a superintendent shall determine all damages arising from any cause and that his decision shall be binding on the parties does not bind the subcontractor in the absence of any indication that it shall apply to him.[86] It is sometimes provided that the subcontractors have free transportation for machinery or tools.[87] Where a substitution of work is made by the authorized agent of the contractor, and fully performed

contract price, less any damages he may have suffered by reason of failure on the part of the contractor to strictly comply with the contract. Hart v. Carsley Mfg. Co., 116 Ill. App. 159. The mere fact that he receives the work without objection does not bar his right to damages for failure to properly perform. MaGirl v. Hastings, 120 Ill. App. 276.

73. In an action for the balance due on a building contract, an affidavit of defense which stated that the work had not been completed according to the terms of a conditional acceptance, held sufficient. Rose v. Independent Chevra Kadisho [Pa.] 64 A. 401.

74. Finding that contract was fully completed and accepted by architect that he issued certificate of final payment and that owner took possession held responsive to issue as to performance of contract. Wyman v. Hooker [Cal. App.] 83 P. 79.

75. Under contract providing that no charge was to be made for well unless it produced certain amount of water, that defendant was to test it and accept or reject it within specified time, and that if rejected, plaintiff should have opportunity to dig it deeper. Hagadorn v. McNair, 109 App. Div. 759, 96 N. Y. S. 417.

76. Use of well which was on defendant's land and for which he furnished casing held not to constitute acceptance. Hahl v. Deutsch [Tex. Civ. App.] 94 S. W. 443.

77. Where price for erecting an elevator was to be paid when elevator was accepted by the architect. Louisville Foundry & Machine Co. v. Patterson [Ky.] 93 S. W. 22.

78. See 5 C. L. 471.

79. Gurski v. Doscher, 98 N. Y. S. 588.

80. Milske v. Steiner [Md.] 63 A. 471.

81. Suit for instalment after uncompleted building blown down. Milske v. Steiner [Md.] 63 A. 471.

82. Refusal justified discontinuance of work. Seretto v. Rockland, etc., R. Co. [Md.] 63 A. 651.

83. Plaintiff during the progress of the work signed a memorandum by which he agreed to ask for no more money until all the plastering was completed provided he received $2,000, which he did. Held the plastering never having been completed, plaintiff was not justified in refusing to continue the work because of failure to pay him for extra work. Condon v. Church of St. Augustine, 98 N. Y. S. 253.

84. Where, in awarding a contract for the construction of a factory, the owners specify that the contractors shall accept in part payment an order on a citizens' committee for a sum supposed to have been subscribed to secure the location of the factory at that place and the contractor marks the letter embodying the contract "accepted," but it afterward develops that no citizens' committee was appointed and no money was raised, the order cannot be considered as absolute payment, and the tender back of the order not a prerequisite to the bringing of suit for the amount due thereon. Weller Co. v. Washington, Gordon & Co., 7 Ohio C. C. (N. S.) 303.

85. See 5 C. L. 471.

86. So as to conclude him by superintendent's certificate that the contractor was entitled to recover of him $3,000 for delay in furnishing material. Modern Steel Structural Co. v. English Const. Co. [Wis.] 108 N. W. 70.

87. Where subcontract to do grading provided that plaintiff should have free transportation for his tools to a certain place he was entitled to recover what it cost him to freight the tools to a different point for which the freight was less. Snyder v. Patton & Gibson Co. [Mich.] 12 Det. Leg. N. 1041, 106 N. W. 1106.

by the subcontractor, the latter is entitled to recover the amount certified to be due by such agent as per contract though the work is not completed as originally contemplated.[88] Failure on the part of the contractor to make estimates and payments as required by the contract justifies an abandonment of the work by the subcontractor.[89]

The subcontractor is liable to the contractor for failure to make seasonable delivery of material according to contract, making it impossible for the contractor to proceed with his work,[90] and the fact that the failure to deliver is unavoidable because of delay in manufacturing or forwarding the material is no defense in the absence of a contract stipulation to that effect.[91] That a subcontractor buys materials for the purpose of performing his contract with the principal contractor does not render the latter liable to the seller.[92]

The contractor is entitled to deduct from the subcontract price the value of work not finished by the subcontractor.[93] A provision that the subcontractor shall not be paid until the principal contractor has been paid by the owner is valid and prevents a recovery by the subcontractor before such payment is made.[94] The rights of subcontractors are fixed and determined at the death of the principal contractor, unless the personal representative undertakes to complete the work.[95]

§ 12. *Bonds.*[96]—A private bond given by the contractor for the sole benefit of the owner cannot be enforced for the benefit of materialmen having claims against the contractor.[97] In Louisiana the owner is required to exact a bond for the protection of laborers and materialmen, and in default thereof he becomes personally liable to them.[98] Where a bond is given to secure the owner against suits

88. Where instead of grading, subcontractor by direction of contractor's engineer did work to enable a railroad to run its first train by a given date in order to receive certain taxes. W. O. Johnson & Sons v. Des Moines, etc., R. Co. [Iowa] 105 N. W. 509. It was immaterial whether the subcontractor served notice on the railroad of its claim against the contractor, within thirty days after completing the work, or whether anything was then due, where at the time of bringing suit against the railroad to enforce the lien the railroad was indebted to the contractor in an amount greatly in excess of the subcontractor's claim. Id.

89. Neither subcontractor nor bondsmen liable to original contractor where performance was prevented by such failure. Brock v. Williams [Okl.] 32 P. 922.

90. Subcontractor liable for all valid claims necessarily paid by contractor to employes and other subcontractors by reason of the delay. Modern Steel Structural Co. v. English Const. Co. [Wis.] 108 N. W. 70. Salary of superintendent paid during the delay held proper item. Id. Certain other items considered and allowed. Id. That the contractor paid his employes and subcontractors the amounts they lost by reason of the subcontractor's failure to furnish material in time, without giving notice to the subcontractor, did not preclude recovery by contractor from subcontractor of such losses. Id. Where after the subcontractor's default the principal contract was made to include additional work, the subcontractor was liable only for time shown to have been lost by the contractor in completing the work covered by the original contract. Id.

91. Modern Steel Structural Co. v. English Const. Co. [Wis.] 108 N. W. 70.

92. Kruse v. Wilson [Cal. App.] 84 P. 442.

93. A subcontractor who engaged to do certain work, which included the digging of a trench, but did not in fact dig the trench, could not recover the full contract price though the omission was excusable, and though the principal contract placed upon the contractor the duty of digging the trench, but the item should be deducted from the contract price. Scanlon v. Muller, 98 N. Y. S. 662. In action by subcontractor against contractor for an unpaid balance for doing grading the question whether a certain sum should have been allowed defendant for plaintiff's failure to finish his job was for the jury. Snyder v. Patton & Gibson Co. [Mich.] 12 Det. Leg. N. 1041, 106 N. W. 1106.

94. There is no debt against the contractor until he has been so paid and no recovery can be had by the subcontractor. No claim provable in bankruptcy. Debt did not arise when material was furnished. Provisions did not merely defer payment. In re Ellis [C. C. A.] 143 F. 103. An affidavit of defense that payment to a subcontractor was not to be made until the work had been paid for by the city was sufficient without averment that the contractor had fully performed and that the refusal of the city to pay was unwarranted. Vulcanite Paving Co. v. McNichol [Pa.] 64 A. 325.

95. Bergin v. Braun, 3 Ohio N. P. (N. S.) 150.

96. See 5 C. L. 472.

97. For which neither the owner nor his property is liable. Herpolsheimer v. Hansell-Elcock Co. [Mich.] 12 Det. Leg. N. 485, 104 N. W. 671.

98. Bond payable to owner for faithful performance of contract to satisfaction of owner is not such bond as is required by Act

growing out of the contract, he has a right to retain it until the suits are barred by limitations.[99] There can be no recovery on a bond for the performance of a building contract void as against public policy, by one who had knowledge of its character.[1]

A breach of a covenant by the owner will not release the surety but a breach of a condition will.[2] An unauthorized payment by the owner to the contractor [3] or a material change in the contract or in the plans [4] will release the surety either in toto or pro tanto unless made with his knowledge and consent,[5] or authorized by the terms of his undertaking.[6] Whether the surety is released by the owner's delay in notifying him of the principal's default may depend upon the terms of the

No. 180, p. 223, of 1894. Lhote Lumber Mfg. Co. v. Dugue, 115 La. 669, 39 So. 803; Hughes v. Smith, 114 La. 297, 38 So. 175, reaffirmed. Stipulation binding contractor to complete building "at his own cost and expense for labor, material," etc., simply meant that contractor and not owner was to pay cost of construction. Id. Where an owner sued by a materialman to enforce the personal liability under Act No. 180, p. 223, of 1894. for failure to exact the security required by statute, calls in warranty the surety on the contractor's bond conditioned merely on the faithful performance of the contract, the demand is premature, there having been no settlement between the owner and the contractor. Id.

99. Cusachs & Co. v. Sewerage & Water Board [La.] 40 So. 855. The fact that the owner was indebted to the contractor was no reason for compelling him to give up the bond. Id.

1. Paving contract without competition. National Surety Co. v. Kansas City Hydraulic Press Brick Co. [Kan.] 84 P. 1034.

2. A demurrer to a plea in bar to a declaration on the contractor's bond held properly sustained where the plea was based upon the failure of the contractor to perform certain agreements which were merely covenants and not conditions. Mercantile Trust Co. v. Hensey, 27 App. D. C. 210.

3. Surety released in toto where contractor was permitted to overdraw in considerable amounts without certificates. First Nat. Bank v. Fidelity & Deposit Co. [Ala.] 40 So. 415. Bond construed and held that provision "and to pay claims of mechanics," etc., was an obligation of the surety and did not authorize the owner to pay such claims without regard to certificates or estimates. Id. Where there was only one general account between the owner bank and the contractor, certain transactions considered and held not to be a mere loan of money to the contractor but payments in violation of the provision requiring a reserve and estimates and certificates. Id. Proviso in the bond permitting the owner to retain and pay sums due materialmen if he wished, but stating that the surety obligated itself to save him harmless from such demands and to relieve him from inquiring into them was not a waiver by the surety of the requirement that payments should be made on certificates and estimates of the architect, and that a certain per cent. should be reserved. Id. A provision retaining a certain percentage is not a mere collateral security for the payment of the money so as to release the sureties only pro tanto but is a condition of the contract designed as much to insure completion as to secure payment. First Nat. Bank v. Fidelity & Deposit Co. [Ala.] 40 So. 415. The acceptance by the owner, of an order from the contractor to pay a sum of money after final completion and acceptance of the building does not constitute a payment by the owner prior to the completion of the building or an assignment of the contract so as to release the sureties. Hipwell v. National Surety Co. [Iowa] 105 N. W. 318.

4. Under Civ. Code, § 2819, exonerating a guarantor if by any act of the creditor the original obligation is altered, the surety was released where the contract price was $16,300 and the owner and contractor changed the plans and increased the cost $315. Alcatraz Masonic Hall Ass'n v. United States Fidelity & Guaranty Co. [Cal. App.] 85 P. 156. Sureties on a bond for the construction of a building according to certain plans are released if without their consent the plans are subsequently materially changed. Thompson v. Chaffee [Tex. Civ. App.] 13 Tex. Ct. Rep. 167, 89 S. W. 285. In an action on a bond conditioned on the construction of a building according to certain plans, it being shown that the plans were in fact changed, evidence that the plans exhibited to the sureties by the principal were not the same as those by which the building was erected, though not admissible as binding the owner in his absence or to show a change of plans, was admissible to show that the sureties signed the bond with reference to the first set of plans rather than the second. Id.

5. Rule that sureties are discharged at least pro tanto by premature payment to the contractor from the reserve fund does not apply where payment is made with the knowledge and consent of the sureties. Enterprise Hotel Co. v. Book [Or.] 85 P. 333.

6. Where the bond provided that any change in the time or manner of payments shall not release the sureties they could not complain of such change. Enterprise Hotel Co. v. Book [Or.] 85 P. 333. The premature payment of the cost of extra work did not release the sureties where the bond provided that payments made at other than the stipulated times should not affect their obligation. Id. A provision that alterations may be made upon the owner's written request therefor is intended for the benefit of the contractor, and sureties on the bond are not released because of changes made without a written demand. Where bond also provided that any alterations should not make void the bond. Id. The surety is not discharged because of changes made in the contract between the owner and the contractor

bond.[7] Under a provision that upon default of joint contractors the owner may, on certain conditions, take up the work by a third person, a continuation of the work by one of the contractors after default of the others is not such a novation of the contract as to release the surety for failure on the part of the owner to comply with the conditions prescribed.[8]

A surety who guarantees complete performance is liable to the owner for loss of rent due to nonperformance within the time specified.[9] A surety on a bond conditioned on the faithful performance of a contract which provides that the building shall be delivered free from all liens is liable only for such liens as are valid and enforceable against the building.[10] Where the bond is one of indemnity damages must be sustained before a recovery can be had.[11] A surety agreeing to protect the owner from all loss resulting from nonfulfillment of the covenants of the contract is liable for liquidated damages fixed by the contract for delay, without proof of actual loss.[12]

It is the duty of the owner to satisfy claims out of the sum retained by him from the contract price for the benefit of himself and the sureties for that purpose and ordinarily the surety does not engage to stand any expense or trouble incurred by him in so doing, or in defending unfounded claims.[13] Where the contract provides that the owner retain a certain per cent intended as security for the completion of the work but to be paid on such completion, and the work is completed and the reserve fund paid, the sureties cannot have subrogation on account of judgments against them in favor of laborers and materialmen, nothing remaining due the contractor.[14] Under a statute exempting the owner from liability to laborers and materialmen beyond the balance found due the contractor, where the latter accepts drafts for a greater amount, the surety is not liable for the excess.[15] The

where the contract expressly provides that the changes may be made. Commonwealth Bldg. & Loan Ass'n v. Steele, 23 Pa. Super. Ct. 19.

7. Where a bond conditioned on the completion of certain buildings without unreasonable delay required immediate notice to the surety upon knowledge by the owner of any act of the contractor which would involve a loss to him, mere delay on the part of the principal did not entitle the surety to notice but the bond required notice only when it appeared that the principal had violated his agreement to complete the buildings without unreasonable delay. Burr v. Union Surety & Guaranty Co., 107 App. Div. 315, 95 N. Y. S. 114. Delay held not unreasonable as a matter of law where the contractor who had purchased the property took possession November 13, under agreement to proceed within one week, and the obligee had knowledge of his failure to proceed December 14, and gave notice on the 20th. Id.

8. Risk not increased. Surety liable for breach on the part of the second joint contractor. Adams v. Haigler, 123 Ga. 659, 51 S. E. 638.

9. Donlan v. American Bonding & Trust Co., 139 N. C. 22, 51 S. E. 924.

10. Liable only for enforceable liens. Alcatraz Masonic Hall Ass'n v. U. S. Fidelity & Guaranty Co. [Cal. App.] 85 P. 156.

11. Burr v. Union Surety & Guaranty Co., 107 App. Div. 315, 95 N. Y. S. 114.

12. Where the contractor agreed to complete the work by a given day or pay a fixed sum as liquidated damages and the surety agreed to protect the obligee from all loss resulting from nonfulfilment of the covenants of the contractor and there was delay, the surety was bound to pay the liquidated damages without proof of actual loss. Mercantile Trust Co. v. Hensey, 27 App. D. C. 210.

13. The owner cannot recover from the surety on a bond conditioned on the delivery of a building free from liens sums expended by him in defense of suits to enforce liens where under the contract he retains an amount of the contract price sufficient to pay all valid liens and is given ample time in which to ascertain and discharge them. Alcatraz Masonic Hall Ass'n v. U. S. Fidelity & Guaranty Co. [Cal. App.] 85 P. 156. Where under the contract the owner retained $4,075 after the acceptance of the work, the surety on the bond conditioned on the delivery of the building free from liens was not liable unless the owner was compelled to pay more than $4,075 to free the building from valid liens. Id.

14. Hipwell v. National Surety Co. [Iowa] 105 N. W. 318.

15. Where the statute exempted the owner from liability to laborers and materialmen beyond the balance found due the contractor, the owner who had accepted drafts for a greater amount could not recover the excess from the surety. Donlan v. American Bonding & Trust Co., 139 N. C. 212, 51 S. E. 924.

contractor may assign property to his surety for his protection in the event of the former being unable to complete the contract.[16]

§ 13. *Remedies and procedure.*[17]—In case of a breach or repudiation of the contract, the innocent party may either treat the contract as rescinded and recover upon a quantum meruit so far as he has performed,[18] or treat it as at an end for purposes of performance, and sue for the profits he would have made if he had not been prevented from performing.[19] A renunciation must be a distinct repudiation of the contract obligations in order to justify the other party in treating it as a breach.[20] The owner may recover damages for defective performance,[21] and this is so although he sells the property before commencing his action and without making repairs.[22] An action for a breach cannot be based on a demand made after its commencement.[23]

The contractor may maintain an action against the owner's grantee who has assumed all claims in connection with the building though the former is not a party to the contract.[24] An agreement with the contractor that the owner pay for labor and material to the parties furnishing them inures to the benefit of subcontractors and laborers and they may sue thereon in their own names.[25] A statute authorizing a materialman to intercept money due from the owner to the contractor does not authorize the interception of money due from the contractor to a subcontractor.[26] In an action of assumpsit, the contract though void as against subcontractors and materialmen because not recorded, nevertheless constitutes the test of the right of the contractor to recover,[27] and the measure of his compensation.[28]

16. Where a plant was assigned, the word "plant" included lumber and other material for use in the building together with horses, carts, etc. Wood v. United States Fidelity & Guaranty Co., 143 F. 424. Surety's right to the property attached when agreement was made. Id. The amount of the surety's claim against the contractor in case of his failure to perform was the loss he might sustain in completing the contract by the aid of the plant and not his liability on the bond independently of benefit from the plant and its use. Id.

17. See 5 C. L. 475.

18. Where the contractor elects to rescind the contract he cannot recover prospective profits. Rescission for nonpayment. Contractor could recover only the value of work and material furnished. Meachan v. Gardner, 27 Pa. Super. Ct. 296.

19. Where plaintiff was receiving a certain profit per foot for constructing a tunnel and the number of feet remaining to be dug was shown, the prospective profits were not too speculative. McConnell v. Corona City Water Co. [Cal.] 85 P. 929.

20. National Contracting Co. v. Hudson River Water Power Co., 110 App. Div. 133, 97 N. Y. S. 92. Where defendant maintained and plaintiff denied defendant's right under the contract to make a proposed change in the plans for a dam, but defendant had not yet determined to make the change, but made a reasonable request for time in which to determine the necessity therefor owing to newly discovered conditions, and requested plaintiff to continue work on other portions of the dam, there was not a breach on the part of defendant. Id.

21. May recover costs and expenses reasonably necessary to make work conform to requirements of the contract. Ekstrand v. Barth, 41 Wash. 321, 83 P. 305.

22. Ekstrand v. Barth, 41 Wash, 321, 83 P. 305. And in such case it is not necessary to show that owner was compelled to sell for less than he would otherwise have realized or that there was any loss of rent. Id.

23. Action before demand upon engineer to make estimate for monthly payment. National Contracting Co. v. Hudson River Water Power Co., 110 App. Div. 133, 97 N. Y. S. 92.

24. Where plaintiff contracted to do the plumbing but the general contractor indorsed his contract at a certain price merely to show the proper deduction on the general contract on final settlement, plaintiff could explain this transaction so as to show that his contract was entered into directly with the general contractor. Bruce v. Howley, 29 Pa. Super. Ct. 169.

25. A. E. Shorthill Co. v. Bartlett [Iowa] 108 N. W. 308. Where owner directed architect to order iron columns and assured manufacturer that he would pay for them he was estopped to deny his liability. Id. Claim of misunderstanding as to cost not well founded. Id. Evidence did not show conspiracy between plaintiff and contractor in raising the price. Id.

26. Code Civ. Proc. § 1184. Kruse v. Wilson [Cal. App.] 84 P. 442. To affect interception by materialman of money due by owner to contractor, under Code Civ. Proc. § 1184, notice to the owner must be alleged. Id.

27. He must show substantial compliance with its terms. Camp v. Behlow [Cal. App.] 84 P. 251.

28. The contract being valid as between the parties, the contractor was not restricted to the amounts actually paid by him for the labor and material. Camp v. Behlow [Cal. App.] 84 P. 251. Evidence of reasonable value of concrete work held competent. Id.

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A contract limitation within which to commence action on an indemnity bond does not begin to run until it is determined that the obligee has suffered pecuniary loss.[29]

Form of action.[30]—In order to recover on the common counts a balance due on the contract price, plaintiff must show substantial performance or an excuse for nonperformance. Though the contract is not complied with, quantum meruit will lie for labor and material beneficial to the owner and accepted by him [31] even though a recovery on the contract would not be justified,[32] but where the contract requires acceptance of the work before payment there can be no recovery on a quantum meruit without an acceptance if the owner derives no benefits.[33] Nor will quantum meruit lie if the contract itself provides for the rights of the parties in case of a breach,[34] and hence in such case the burden is upon the contractor to show performance or excuse according to its terms.[35] An owner who himself is guilty of a breach, though he cannot recover on the contract, may recover under the common counts the money paid by him to the extent that such payment was beneficial to the contractor and in excess of damages sustained by the latter by reason of the breach.[36] If the contractor is prevented from completing the work by act of the owner, he may recover ratably the contract price for work actually completed and is not bound to sue on a quantum meruit.[37]

Debt will lie to recover on a quantum meruit or a quantum valebat under an uncompleted contract,[38] and in such case if plaintiff's failure to fulfill the contract is not caused by fault of the owner, any damages resulting therefrom may be set

29. Plaintiff sold unfinished buildings on which he held second mortgages to make good the security of which the vendee gave a bond to complete the buildings without unreasonable delay, which bond required action to be brought thereon within six months from the first breach of the building contract. Default occurred in December, 1901, but no deficiency having resulted from foreclosure of the first mortgage until July, 1902, an action brought in August following was not barred. Burr v. Union Surety & Guaranty Co., 107 App. Div. 315, 95 N. Y. S. 114.

30. See 5 C. L. 475. MaGirl v. Hastings, 120 Ill. App. 276.

31. Where plaintiffs failed to complete a viaduct within the time specified, but full performance was subsequently made and accepted he could maintain an action on a quantum meruit for the work and material furnished under the contract, subject to defendant's right to set up the contract to limit the amount of recovery. Stephens v. Phoenix Bridge Co. [C. C. A.] 139 F. 248. Recovery could be had under the common counts where defendant accepted the work as a substantial compliance with the contract and the architect's certificate was withheld arbitrarily or collusively. Hart v. Carsley Mfg. Co., 116 Ill. App. 159. But where the work done does not amount to performance, there can be no recovery on implied contract unless it is accepted by the owner, though there was no unwarranted abandonment. Not accepted. Higgins Mfg. Co. v. Pearson [Ala.] 40 So. 579.

32. Where architect failed to furnish plans for a building costing within a certain sum but the armory board derived benefits from his work. Horgan & Slattery v. New York, 100 N. Y. S. 68.

33. Building destroyed before completion or acceptance of an elevator. Louisville Foundry & Machine Co. v. Patterson [Ky.] 93 S. W. 22. Where contract required a well to be completed and approved of before payment but the contractor voluntarily abandoned it unfinished and did not procure a certificate from the owner's engineer. Miller v. Mason City, etc., R. Co. [Iowa] 108 N. W. 302.

34. Where contract provided for an extension of time in case of delay caused by the owner. Neblett v. McGraw [Tex. Civ. App.] 91 S. W. 309.

35. Where contract stipulated for liquidated damages in case of delay, but for an extension of time on demand in case of delay caused by the owner, and a general denial was interposed, it was error to require defendant to establish his claim for liquidated damages. Neblett v. McGraw [Tex. Civ. App.] 91 S. W. 309.

36. Plaintiff refused to pay an instalment unless further security was given and thus justified the contractor in refusing to perform on his part a contract to build a launch. Held as above. Michigan Yacht & Power Co. v. Busch [C. C. A.] 143 F. 929.

37. Could recover at contract rate for footage completed in sinking a well. Hahl v. Deutsch [Tex. Civ. App.] 94 S. W. 443

up by way of recoupment;[39] but if performance was prevented by the owner, the contractor is entitled to such sums as had become due at the date of the writ according to his account properly specified.[40] In Louisiana, where the contractor has used material inferior to that contracted for and settlement is made by the owner in ignorance of the substitution, the proper action is one in damages on the contract, and not an action ex quasi contractu or in repetition.[41] In case of fraud or mistake in the estimate of a referee as to work done, a proceeding in equity to set aside his decision is not a condition precedent to recovery of the amount due under the contract.[42] An action of assumpsit by a railroad contractor to recover for construction work will not be enjoined at the instance of the company merely because a number of the contractor's creditors have garnished the company.[43] If the liability of the owner to pay laborers and materialmen is clear under the statute, a bill of interpleader filed by the owner to determine the disposition of the fund due the contractor will be dismissed.[44]

Pleading.[45]—The usual rules of pleading apply,[46] including those relative to the joinder of causes of action[47] and amendments.[48] In an action on the contract,

38, 39. Seretto v. Rockland, etc., R. Co. [Me.] 63 A. 651.

40. Seretto v. Rockland, etc., R. Co. [Me.] 63 A. 651. Could recover for enforced idleness of workmen where included in the contract. Id.

41. Should be brought as provided in Rev. Code La. arts. 1930, 2769, and not under Rev. Code La. art. 2293 et seq. National Contracting Co. v. Sewerage & Water Board of New Orleans [C. C. A.] 141 F. 325.

42. Where work was completed and accepted. Edwards v. Hartshorn [Kan.] 82 P. 520.

43. Deepwater R. Co. v. D. H. Motter & Co. [W. Va.] 53 S. E. 705.

44. Where the contract was filed and notice of claims against the contractor was given the owner as provided by statute and the contractor after notice did not dispute the same it became the duty of the owner to pay the claims there being no doubt about them, and the bill of interpleader was useless. Turner v. Miller [N. J. Eq.] 61 A. 741.

45. See 5 C. L. 477.

46. Complaint held sufficient to show employment of plaintiff as architect. Fitzhugh v. Mason [Cal. App.] 83 P. 282. Petition alleging verbal contract and partial performance by plaintiff and claiming damages for defendant's failure to perform was not demurrable for failure to allege time within which contract was to be performed. Stansbury v. Storer [Neb.] 108 N. W. 162. Where complaint alleged that plaintiff prepared plans for a building "the estimated cost of which was $40,000" the statement as to cost was a mere allegation of the estimate of the cost and not an allegation that the building which plaintiff was employed to make plans for was one that was to cost such sum. Buckler v. Kneezell [Tex. Civ. App.] 91 S. W. 367. Not error to refuse to require contract to be set out in complaint and to make paragraphs more certain where the complaint contained a copy of the specifications in full and set out the substance of the contract. Ekstrand v. Barth, 41 Wash. 321, 83 P. 305. Where in action on the contractor's bond the answer set up the making of the contract and pleaded a breach, there was no issue on the existence of the contract. Enterprise Hotel Co. v. Book [Or.] 85 P. 333. Affidavit of defense admitting that the principal "defaulted on the said contract" but stating that the obligees did not give defendant surety "notice of said default within twenty days" as provided in the bond, had reference to the default mentioned in the complaint and was sufficient. Union Surety Co. v. Stevenson, 27 Pa. Super. Ct. 324. Where defendant pleaded delay, defective material, and unpaid claims, replication to the whole plea that he accepted the material furnished and work performed was no answer thereto. Gates v. O'Gara [Ala.] 39 So. 729. Where plea was failure to perform in workmanlike manner but not failure to complete the building, it was no answer that defendant refused to permit plaintiff to finish a certain portion of the building. Id. Replications admitting that a house was not completed within the time specified but alleging delay caused by defendant held demurrable for failure to allege that plaintiff ever completed the house. Id. Replication that plaintiff's failure to complete a house in time was due to defendant's failure to furnish materials was insufficient for failure to aver that it was defendant's duty to furnish the materials. Id.

47. Count combining cause of action for unpaid instalments and action for damages for refusing to permit performance of contract held bad for duplicity. Milske v. Steiner Mantel Co. [Md.] 63 A. 471. Petition joining cause of action for breach of building contract with cause of action on injunction bond given by owner in effort to restrain performance by plaintiff held not demurrable for misjoinder, the two causes being connected with the same subject-matter. Id.

48. Plaintiff was entitled to amend complaint to correspond with proof of lower contract price for drilling a well than that alleged. Irby v. Phillips, 40 Wash. 618, 82 P. 931. In action on the bond to recover the cost of completing a building, where the complaint showed a breach of the condition that the principals should find all material, labor, etc., and claimed a certain sum as expended by plaintiff for materials, etc., neces-

plaintiff must allege performance [49] but need not plead matters of defense [50] or evidence.[51] The pleading and proof must correspond.[52] Where the architect's certificate is wrongfully withheld after completion of the work it is not necessary for the contractor in an action to recover the balance due to allege any excuse for failure to obtain the certificate, but he may allege and prove full performance and show that the certificate is wrongfully withheld.[53] Upon a refusal by the owner to allow performance, the breach of contract consists not only in such refusal but primarily in the failure to pay the agreed compensation, and nonpayment must, therefore, be alleged and proved.[54]

Evidence.[55]—The ordinary rules of evidence apply.[56] Parol evidence is, of course, inadmissible to vary the terms of a written contract.[57] The written contract when pleaded by either party is admissible.[58] The architect may testify as to his intention in withholding a certificate where the question is as to his honest judgment.[59] In an action on an order by a subcontractor on the contractor in favor of a materialman, consideration for the order may be shown by evidence of material furnished by plaintiff to the houses defendant was engaged in building as contractor.[60]

sary to complete the building, an amendment alleging among other things that such sum was necessarily expended was germane to the petition, did not state a new cause of action, and should have been allowed. Adams v. Haigler, 123 Ga. 659, 51 S. E. 638.

49. In absence of special demurrer, the complaint was not defective for failure to state that the work was performed to the satisfaction of the architect or that the architect gave his final certificate, where it did state that the contract was fully performed and the contract was attached to it as an exhibit. Wyman v. Hooker [Cal. App.] 83 P. 79.

50. Where the contract provided that the contractors should not be liable for delay caused by alterations and additions, the petition was not demurrable for failure to state that the delay was not caused by alterations or additions this being matter of defense. Adams v. Haigler, 123 Ga. 659, 51 S. E. 638.

51. Complaint for boring well held sufficient without details as to size of hole or as to whether it was a cable well. J. M. Guffy Petroleum Co. v. Hamill [Tex. Civ. App.] 94 S. W. 458.

52. Evidence showing lower contract price for digging a well than that alleged was not a fatal variance. Irby v. Phillips, 40 Wash. 618, 82 P. 931. Evidence held to show that architect made two plans so that there was no variance between the pleading and proof. Buckler v. Kneezell [Tex. Civ. App.] 91 S. W. 367. There can be no recovery upon an allegation of full performance of the contract if any material part of it remains unfinished. Instruction proper. Gates v. O'Gara [Ala.] 39 So. 729.

53. Wyman v. Hooker [Cal. App.] 83 P. 79.

54. An action on contract and to enforce lien. McPherson v. Hattich [Ariz.] 85 P. 731. Even if a statement in the notice of lien made a part of the complaint that a certain sum was due be considered as an allegation of the complaint it was insufficient as an allegation of nonpayment it referring only to the time of filing the lien. Id.

55. See 5 C. L. 477.

56. In an action to recover the contract price held not error to allow testimony of contractors as to what the workmen told them about the owner's interferring with the work where the statements were so nearly contemporaneous with the interference as to be a part of the res gestae. Neblett v. McGraw [Tex. Civ. App.] 91 S. W. 309. Where architect testified that a floor in the building was defective, the contractor was properly permitted to testify in rebuttal that he did not pay his subcontractor for the floor until the architect approved and accepted it. Wyman v. Hooker [Cal. App.] 83 P. 79. Where in an action against the contractor it was admitted that the building encroached upon the street, evidence that the plans were filed with the building inspector and that he approved the building was immaterial, the owner being entitled to have the building placed upon her lots. Ekstrand v. Barth, 41 Wash. 321, 83 P. 305. In action by contractor evidence of a suggestion by him to a materialman to go in with him and they would make some money out of the owner was admissible being relevant to the subject-matter of the suit. Gates v. O'Gara [Ala.] 39 So. 729.

57. Where the contract required the contractor to furnish the lumber, evidence that he verbally agreed to furnish it did not contradict the written contract. Gates v. O'Gara [Ala.] 39 So. 729. Held error to admit evidence of custom in regard to acceptance of walls where contract required work to be entirely satisfactory to owner. Meacham v. Gardner, 27 Pa. Super. Ct. 296. Custom of architects to hire extra help in superintending construction of buildings could not control the contract. Espert v. Ahlschlager, 117 Ill. App. 484.

58. Pleaded by appellant and introduced by plaintiff appellee. Neblett v. McGraw [Tex. Civ. App.] 91 S. W. 309.

59. Hart v. Carsley Mfg. Co., 116 Ill. App. 159.

60. Meserole v. Zimmerman, 48 Misc. 636, 96 N. Y. S. 135.

The contractor's bond is admissible against the sureties to show consideration for the purchase by them of materials to complete the building on the default of the contractor.[61]

BUILDING AND LOAN ASSOCIATIONS.

§ 1. Definition and Statutory Regulation (500).
§ 2. Membership and Stock (500). Charters and By-Laws (500). Kinds of Stock (501). Payments of Dues (501). Maturity of Stock and Rights of Holders of Matured Stock (501).
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§ 4. Termination and Insolvency (506).
§ 5. Rights of Withdrawing Shareholders (506).

§ 1. *Definition and statutory regulation.*[62]—An association that issues paid-up stock and receives deposits is not recognized in Illinois as a building and loan association.[63] The business of building and loan associations is very generally regulated by statute, and compliance with statutory requirements is necessary to entitle an association to the special privileges granted. Foreign associations must comply with requirements applicable to foreign corporations generally.[64] Noncompliance with statutory requirements is not usually held to render contracts of an association wholly void.[65] A contract with a foreign association authorized to transact business in the state at the time the contract is made, does not become unenforceable by reason of the failure of the association to renew its authority to do business in the state.[66] In South Carolina, the failure of a foreign association to file the required information in the office of the secretary of state does not render contracts of the association void before conviction of the association.[67]

In Colorado one who makes a false representation as to the financial condition of a building and loan association is guilty of a felony.[68]

§ 2. *Membership and stock.*[69]—One who applies for and receives stock is a member entitled to receive a loan;[70] and one who bids for, and is awarded, a loan, becomes a stockholder and cannot thereafter urge that he was not competent to bid, and that this irregularity taints his loan with usury.[71] The relation of members to each other is like that of partners.[72]

Charters and by-laws.[73]—By-laws may be passed or amended only in the manner allowed by the charter and the statutes.[74] The power in Illinois rests only in the

61. Bartley v. Comer [Tex. Civ. App.] 13 Tex. Ct. Rep. 816, 89 S. W. 82.

62. See 5 C. L. 478.

63. It is a bank or loaning company. Assets Realization Co. v. Heiden, 117 Ill. App. 458.

64. Failure of foreign association to file articles and by-laws as required by Code 1899, c. 54, § 30, held not to deprive it of right to do business in the state but only subject it to statutory penalty. Burkheimer v. National Mut. Bldg. & Loan Ass'n [W. Va.] 53 S. W. 372.

65. A contract for stock in a foreign association which has not complied with Ball. Ann. Codes & St. § 4403, is not void, though § 4417, makes an officer who solicits subscriptions before compliance with § 4403, guilty of a misdemeanor. Horrill v. California, Oregon & Washington Homebuilders' Ass'n, 40 Wash. 531, 82 P. 889. **But see** 5 C. L. 479, n. 97.

66. Eastern Bldg. & L. Ass'n v. Tomkinson [Neb.] 107 N. W. 762.

67. Construing Civ. Code 1902, §§ 1780, 1781, making noncompliance punishable by fine. Gallettey v. Strickland [S. C.] 54 S. E. 576.

68. Johnson v. People [Colo.] 84 P. 819. Variance between indictment and proof held immaterial, on trial of president of an association charged with offense under 3 Mills' Ann. St. Rev. Supp. §§ 12, 13. Id.

69. See 5 C. L. 479.

70. Proof that borrower applied for membership and received 16 shares of stock, sufficient to show him a member at time of securing loan. Beckley v. United States Sav. & L. Co. [Ala.] 40 So. 655.

71. Home Bldg. & L. Ass'n v. McKay, 217 Ill. 551, 75 N. E. 569.

72. Broch v. French, 116 Ill. App. 15.

73. See 5 C. L. 479.

74. Garlick v. Mutual Loan & Bldg. Ass'n, 116 Ill. App. 311.

stockholders.[75] The articles and by-laws are usually made a part of the contract with members.[76]

Kinds of stock.—The issue of "dividend bearing stock" or "prepaid stock" which is not a paid-up stock and not a cloak for usury is legal in Illinois.[77] A statute of Iowa prohibits the issuance of fixed dividend stock.[78] Where an association which had issued such stock prior to the statute fails to retire it within the time required by law but agrees with a stockholder to retire it at a later date, and the stockholder gives notice of withdrawal and deposits his certificate, he is thereafter entitled to interest at the legal rate until payment of the amount due him.[79] By such agreement the association waives a provision of its articles that a certain per cent should be deducted from stockholders' profits for expenses.[80] In Pennsylvania, associations may issue full-paid stock, the dividends of which are not guaranteed, but are limited in amount and payable only out of profits, and the holders of which are entitled to no preference and have no advantage over other stockholders upon distribution in case of loss or insolvency,[81] provided that the issue is incidental to the main business of the association and is intended to provide a fund from which loans may be made to the holders of instalment stock.[82] Shares issued to mature at a fixed period contrary to law are not validated by a subsequent act authorizing the loan of funds on a level premium without bids.[83] A shareholder of reissued shares may not say they were illegally reisssued where not the power but only mode of reissue was challenged.[84]

Payments of dues must be made to the officer authorized to receive them.[85] A subscriber for stock in a savings and loan association is, by the act of subscribing, estopped from defending a suit on the subscription by showing that the company began to do business before its entire capital stock was subscribed, or because of a failure to give notice of a meeting for the election of directors.[88]

Maturity of stock and rights of holders of matured stock.[87]—In the absence of any special agreement, stock matures only when the dues paid and earnings apportioned to it amount to its par value.[88] Where the by-laws provide that shares shall mature when payments, less expense, and earnings bring their value to par, and also provide that not more than a fixed number of payments shall be required, the shares are not necessarily matured when the required number of payments have been made; though further payments need not be made, future earnings may be necessary to bring the shares to par.[89] Where the articles and the provisions of the stock certificate are inconsistent as to the maturity of stock and the time of payment, the provisions of the certificate will prevail.[90] A mere estimate of the timo

75. Not in directors. Garlick v. Mutual Loan & Bldg. Ass'n, 116 Ill. App. 311.

76. Stock certificate recited that it was subject to articles and by-laws printed "on the back hereof" but they did not appear on the back. Held, they were nevertheless a part of the contract. Tautphoeus v. Harbor & Suburban Bldg. & Sav. Ass'n [N. Y.] 78 N. E. 69.

77. Broch v. French, 116 Ill. App. 15.

78. Acts 1900, p. 51, c. 69. The act requires previously issued stock of that character to be retired by Jan. 1, 1901. Kellenberger v. Oskaloosa Nat. Bldg. & Loan Inv. Ass'n [Iowa] 105 N. W. 836.

79, 80. Kellenberger v. Oskaloosa Nat. Bldg. Loan & Inv. Ass'n [Iowa] 105 N. W. 836.

81, 82. Folk v. State Capital Sav. & Loan Ass'n [Pa.] 63 A. 1013.

83. Assets Realization Co. v. Heiden, 117 Ill. App. 458.

84. Foresters' Bldg. & Loan Ass'n v. Quinn, 119 Ill. App. 572

85. Where by-laws provided for payment of dues to the secretary, a payment to the president which included back dues, and with which the president absconded was not payment to the association. Manchester Bldg. & Loan Ass'n v. Geyers [N. J. Eq.] 63 A. 545.

86. Dickason v. Grafton Savings Bank Co., 6 Ohio C. C. (N. S.) 329.

87, 88. See 5 C. L. 479.

89. Le Mars Bldg. & Loan Ass'n v. Burgess [Iowa] 105 N. W. 641. See, also, 5 C. L. 479, n. 16-21.

90. Certificate made principal payable after 72 months, and articles provided for payments in order of application for withdrawal and prohibited payment of more than

within which stock will mature cannot be considered a guaranty of maturity within that time.[91] One claiming that an association, by its agent, guaranteed maturity of stock within a certain period, has the burden of proof of agency and of the making of the guaranty.[92]

Where the law permits the issuance of stock in different series, and provides that the manner of maturity of any series may be designated by the constitution and by-laws of the association,[93] and a given series has been declared mature by the directors in accordance with the association's scheme, the holder of shares of the series so declard mature ceases to be a member and becomes a creditor of the association,[94] and may maintain an action at law to recover the declared value of the matured shares.[95] Where the association has agreed to buy matured stock of a particular series in preference to stock of any subsequent series, the holder of such matured stock becomes a creditor of the association to the extent of payments due him, with interest on the claim from the time it was due.[96] A debt to an association is paid by maturing the stock pledged,[97] and when stock of a borrowing member has matured, and its par value equals the amount of his loan, he is entitled to have a deed of trust given as security, canceled.[98]

§ 3. *Loans and mortgages. A. In general.*[99]—A loan is equivalent to an advance payment of shares on certain conditions of repayment.[1] One who makes a bid and receives a loan is estopped to deny its validity as not having been awarded on competitive bidding.[2] In Illinois an association has no power to issue "borrowers' certificates" whereby a loan is made before the funds are paid in.[3]

Building and loan contracts are to be construed and their validity determined with reference to the law of the place where they are to be performed, and this is usually the place where the home office of the association,[4] or a branch agency, fully authorized to accept payments,[5] is located. The parties may, however, stipulate that the laws of a particular state shall control.[6] A solvent association has no power to transfer a mortgage loan to another association.[7] Mortgages must be

one-half the amount received from dues and stock payments in any one month. Certificate held to constitute enforceable contract. Tautphoeus v. Harbor & Suburban Bldg. & Sav. Ass'n [N. Y.] 78 N. E. 69.

91, 92. Ebersole v. Southern Bldg. & Loan Ass'n [Ala.] 41 So. 150.

93. Rev. St. 1875, p. 64, and P. L. 1887, p. 62, so provided. Cunningham v. Mutual Loan & Bldg. Ass'n [N. J. Err. & App.] 62 A. 307.

94. Cunningham v. Mutual Loan & Bldg. Ass'n [N. J. Err. & App.] 62 A. 307.

95. A suit in equity would be the proper remedy only if an accounting were necessary. Cunningham v. Mut. Loan & Bldg. Ass'n [N. J. Err. & App.] 62 A. 307.

96. Rogers v. Ogden Bldg. & Sav. Ass'n [Utah] 83 P. 754.

97. Butson v. Home Sav. & Trust Co. [Iowa] 105 N. W. 645.

98. A deed of trust by a borrowing member should be canceled when it appears that the stock of nonborrowing members of the same series, has fully matured, and hence the stock of borrowing member has also matured, and the value of the matured stock equals the loan. Whelpley v. Ross, 25 App. D. C. 207.

99. See 5 C. L. 480.

1, 2. Broch v. French, 916 Ill. App. 15.

3. Wineman v. First Mortgage Loan Co., 117 Ill. App. 302.

4. Contract with Maryland association, loan being secured by bond and mortgage on Virginia realty, held a Maryland contract. Middle States Loan, Bldg. & Const. Co. v. Miller's Adm'r [Va.] 51 S. E. 846. Loan in Alabama by Minnesota association held a Minnesota contract. Beckley v. United States Sav. & Loan Co. [Ala.] 40 So. 655.

5. Where a contract is made with a branch association, provided for by the association's by-laws, which collects dues and receives applications for loans and payments thereon, the contract is governed by the laws of the state where the branch is located, though a bond for the loan is made payable at the home office of the association. Gallettey v. Strickland [S. C.] 54 S. E. 576. Contract with foreign association made through Michigan agent who had power to receive payments on loan and on stock, loan being secured by mortgage on Michigan realty, held Michigan contract. Cobe v. Summers [Mich.] 12 Det. Leg. N. 965, 106 N. W. 707.

6. Where bond provided that Georgia laws should govern contract made in South Carolina with Georgia association, it was construed with reference to Georgia laws. Equitable Bldg. & Loan Ass'n v. Corley [S. C.] 52 S. E. 48.

7. Cobe v. Lovan, 193 Mo. 235, 92 S. W. 93.

foreclosed by duly authorized officers of the association.[8] A contract which provides that upon default by the borrower the company may re-enter and repossess the premises, that the sum advanced shall become due and payable, and that the company may sell the premises for the debt, is in the nature of a mortgage and may be foreclosed as such.[9] As to insolvent associations there is a default whenever a borrowing member fails to pay his loan within the time fixed by the court.[10] In Louisiana a proceeding via executiva is the wrong remedy where an adjustment of accounts is necessary and the evidence is not authentic.[11] Where an association purchasing property for a borrowing member assumes a mortgage thereon which bears interest at a lower rate than that charged the borrower on his entire loan, the borrower is not entitled to credit for the excess of interest paid by him.[12]

(§ 3) *B. Applicability of, and exemption from, usury laws.*[13]—In many states building and loan contracts requiring the payment of dues, fines, premiums, and interest, are expressly authorized by law and exempted from the operation of the general interest laws,[14] and the validity of such contracts is to be determined by reference to rules different from those applied to ordinary loans. Thus in determining whether such a contract is usurious, only such payments contracted for as are in the nature of interest and premiums on the loan should be considered,[15] and a loan is not necessarily usurious because a larger sum is reserved to be paid than the principal and legal interest.[16] The usury laws operate as to all contracts save loans made according to the building and loan association statutes.[17] It is held that if the promise to pay the sum above legal interest depends upon a contingency, and not upon the happening of a certain event, the loan is not usurious.[18] In West Virginia, the rule is that the amount of premium to be paid must be definite and certain. In applying this rule, it has been held that a loan contract which, without naming a lump sum of premiums, provides that monthly premiums of fixed sums shall be paid for a fixed number of months, fixes the amount and duration of premium payments with certainty;[19] and that contracts which provide for the pay-

8. By Rev. St. 1889, §2813, foreclosure of mortgages is placed under supervision of directors, and a foreclosure by the president is void. Cobe v. Lovan, 193 Mo. 235, 92 S. W. 93.

9. Preston v. D'Ambrosio, 46 Misc. 523, 95 N. Y. S. 70.

10. Broch v. French, 116 Ill. App. 15.

11. Teutonia Loan & Bldg. Co. v. Cronan [La.] 39 So. 551.

12. Preston v. Rockey [N. Y.] 77 N. E. 1156; Preston v. Reinhart, 109 App. Div. 781, 96 N. Y. S. 851.

13. See 5 C. L. 481.

14. Code, § 1898, excepts building and loan contracts from the operation of general interest laws. Le Mars Bldg. & Loan Ass'n v. Burgess [Iowa] 105 N. W. 641. Building and loan contracts are rendered nonusurious by Acts 27th Gen. Assem. c. 48, p. 32. Co-operative Bang v. Meldrum [Iowa] 105 N. W. 206. An association which has complied with statutory provisions controlling the making of loans may lawfully receive greater compensation, by way of interest and premiums, for the use of its money, than is allowed by the general interest laws. 1 Starr & C. Ann. St. 1896, c. 32, p. 118. Home Bldg. & Loan Ass'n, 217 Ill. 551, 75 N. E. 569. Contract of association organized under Laws 1851, p. 234, c. 122, is not usurious because providing for fines, monthly dues, and premiums. Preston v. Rockey [N. Y.] 77 N. E. 1156. By express provisions of Minn. Gen. St. 1894, § 2794, the fact that a premium is charged for a loan does not make it usurious. Beckley v. United States Sav. & Loan Co. [Ala.] 40 So. 655. A borrowing member paid 6 per cent. on his loan, and taxes and insurance premiums on property conveyed to secure repayment of the loan, in addition to payments made a stockholder to mature his stock. Held, his contract was not usurious, under Maryland decisions. Middle States Loan Bldg. & Const. Co. v. Miller's Adm'r [Va.] 51 S. E. 846. Borrowing member took 27 shares, par value $100 each, to secure loan of $2,700, and agreed to pay, until stock was paid up, quarterly instalments of interest of $40.50, and quarterly dues of $225 each. The contract was held nonusurious under Acts 1893-94, p. 560, c. 516. Bryan v. Augusta Perpetual Bldg. & Loan Co. [Va.] 52 S. E. 357.

15. Eastern Bldg. & Loan Ass'n v. Tomkinson [Neb.] 107 N. W. 762.

16. Whelpley v. Ross, 25 App. D. C. 207.

17. Garlick v. Mutual Loan & Bldg. Ass'n, 116 Ill. App. 311.

18. Whelpley v. Ross, 25 App. D. C. 207.

19. Tahaney v. Washington Nat. Bldg. & Loan Ass'n [W. Va.] 53 S. E. 791. Where a contract stipulates for monthly premiums for a certain number of months, it does not

ment of a fixed monthly premium for a certain stated number of years, or until the earlier maturity of the stock,[20] or which require continuance of payment of lawful interest on the sum advanced after cessation of dues and premiums, until the stock matures, unless it sooner matures,[21] are not usurious.

Where the statute requires competitive bidding, a loan made without an opportunity for such bidding, on which interest at more than the legal rate is charged, is usurious.[22] Statutes requiring competitive bidding do not require that there shall be more than one bidder present at the meeting at which a loan is made,[23] but only that opportunity shall be given for competitive bidding, and that the priority or preference of a loan shall be awarded to the highest bidder.[24] In some jurisdictions the loan need not be awarded to the highest bidder.[25] If the association purchase for the member, a sale to him at a higher rate in consideration of the deferring of payments is not usurious [26] and such a transaction cannot in Pennsylvania be regarded as a mortgage unless there is a written defeasance.[27] If instead of money in the treasury certificates be isssued against future assets, the loan is usurious.[28]

(§ 3) *C. Accounting with borrower while solvent.*[29]—In accounting with a borrowing member while the association is solvent, payments referable to the loan are credited thereon, and payments on the stock are credited thereto in determining its withdrawal value. The amount due the association will then be the amount remaining unpaid on the loan, less the withdrawal value of the stock.[30] In some states it is held that since a debt to an association is paid by maturing the stock pledged,[31] all payments which advance or accelerate the maturing of the stock are to be considered payments on the debt,[32] though credit therefor may not be extended on the note until final settlement, and may then be increased or decreased by profits or losses on the stock.[33] In Pennsylvania payments must be credited on stock un-

violate Code 1896, c. 54, § 30, relating to such contracts. Burkheimer v. National Mut. Bldg. & Loan Ass'n [W. Va.] 53 S. E. 372.

20. Brown v. Rockey [W. Va.] 54 S. E. 343.

21. Tahaney v. Washington Nat. Bldg. & Loan Ass'n [W. Va.] 53 S. E. 791.

22. Cobe v. Summers [Mich.] 12 Det. Leg. N. 975, 106 N. W. 707; Assets Realization Co. v. Heiden, 117 Ill. App. 458. Where borrower was made to believe that he must pay a certain premium to secure a loan, and the secretary bid the premium, and there was no open or competitive bidding, the loan was held usurious, the interest charged being over the legal rate. Bechtel v. Saginaw Bldg. & Loan Ass'n [Mich.] 13 Det. Leg. N. 117, 107 N. W. 695.

Held not usurious: Where an application for a loan on stock makes a bid of premium, and it is accepted, and the deed of trust given as security states that a certain premium was bid for the advance, the loan is not illegal as not being upon a competitive bid. Tahaney v. Washington Nat. Bldg. & Loan Ass'n [W. Va.] 53 S. E. 791.

23, 24. Home Bldg. & Loan Ass'n v. McKay, 217 Ill. 551, 75 N. E. 569.

25. In Minnesota, a loan is not usurious because the money is not put up to the highest bidder. Beckley v. United States Sav. & Loan Co. [Ala.] 40 So. 655, citing Zenith Bldg. Ass'n v. Heimbach, 77 Minn. 97, 79 N. W. 609.

26, 27. Sterck v. Germantown Homestead Co., 27 Pa. Super. Ct. 336.

28. Wineman v. First Mortgage Loan Co., 117 Ill. App. 302.

29. See 5 C. L. 483.

30. On death of a borrowing member the amount of the claim against his estate was held to be the amount of his loan, with six per cent. (contract rate) interest, less payments of principal and interest, and less the withdrawal value of his shares; interest on such balance from his death; and unpaid fines, and taxes paid by company. Middle States Loan, Bldg. & Const. Co. v. Miller's Adm'r [Va.] 51 S. E. 846. In Georgia, payments by a borrowing member are not all credited on the loan and interest, but in part on expenses and premiums due the association, according to the terms of the contract. Equitable Bldg. & Loan Ass'n v. Carley [S. C.] 52 S. E. 48. An association advanced $500 to a member, and agreed to assume his note for $1,500. It took a note for $2,000 with interest at twelve per cent., secured by mortgage. The member made payments amounting to $884.52 and then defaulted, and the association repudiated its assumption of his $1,500 note. Held proper to allow association its $500 advancement, and other payments made by it with interest, and to credit member with monthly payments on amounts due at time of such payments. Cain v. Reeve [Utah] 83 P. 568.

31, 32, 33. Butson v. Home Sav. & Trust Co. [Iowa] 105 N. W. 645.

less a clear assent of both parties to credit them on the loan be shown,[34] and having permitted credit to stock the other cannot be claimed.[35] In South Carolina, all sums paid by a borrowing member are to be applied on the sum borrowed and interest thereon.[36] In Iowa, it is provided by statute that in computing the amount due from a borrowing member, only the amount actually received can be considered,[37] and interest on this amount cannot exceed twelve per cent.[38] Under this statute the value of shares held by the borrower is to be computed in the same manner as if he had voluntarily withdrawn them.[39] The manner of computing the withdrawal value may be fixed by by-laws of the association.[40] This statute is held applicable after as well as before insolvency of the association.[41] The withdrawal value of shares reisssued is not enhanced over others by the payment in of accrued increment in addition to the total of regular dues.[42]

(§ 3) *D. Accounting after insolvency.*[43]—Insolvency of an association works a rescission of its contracts with borrowing members, since the association cannot then perform.[44] An equitable adjustment should be made with borrowing members, as of the date of receivership.[45] After insolvency, all classes of shareholders are to be treated alike.[46] Thus, a member who paid his dues in advance in full, and received a discount, does not upon insolvency of the association, become a creditor, but stands in the same position as other stockholders.[47] Holders of matured stock do not become creditors in case of insolvency, but share equally with holders of unmatured stock.[48] Debts and expenses are to be first paid, and then each shareholder is entitled to a dividend pro rata upon the amount which he has paid upon his stock,[49] but a borrowing member who elects to treat all payments as upon the debt is not entitled to dividends on the stock.[50] Where an association becomes insolvent before it has advanced any money to a member or has performed an agreement to pay off a mortgage on his property, the member does not occupy the posi-

34, 35. Globe Mutual Bldg. & Loan Ass'n v. Schutte, 29 Pa. Super. Ct. 265.

36. Equitable Bldg. & Loan Ass'n v. Corley [S. C.] 52 S. E. 48.

37. Under Code § 1898, the fact that two monthly payments had been exacted in advance should be considered in computing actual amount of loan. Oskaloosa Nat. Bldg., Loan & Inv. Ass'n v. Bailey [Iowa] 105 N. W. 417. A borrower from one association took stock in another which paid the first the difference between the amount due on the first loan and the withdrawal value of the stock. Held, the amount of the loan from the second association was only the amount of cash paid the first; not the entire amount of the original loan. Butson v. Home Sav. & Trust Co. [Iowa] 105 N. W. 645.

38. Code, § 1898. Oskaloosa Nat. Bldg., Loan & Inv. Ass'n v. Bailey [Iowa] 105 N. W. 417. Acts 28th Gen. Assem., p. 51, c. 69, making maximum rate collectible eight per cent. does not affect contracts made prior to its enactment. Twelve per cent. may be recovered under such contracts. Le Mars Bldg. & Loan Ass'n v. Burgess [Iowa] 105 N. W. 641.

39. Code, § 1898. Le Mars Bldg. & Loan Ass'n v. Burgess [Iowa] 105 N. W. 641.

40. Where by-law fixed withdrawal value at amount paid, with interest at not less than eight per cent., less fifty cents withdrawal fee, the withdrawal value was not total amount paid on stock and loan, but amount paid on stock with interest or dividends. Le Mars Bldg. & Loan Ass'n v. Burgess [Iowa] 105 N. W. 641.

41. Butson v. Home Sav. & Trust Co. [Iowa] 105 N. W. 645.

42. Such payment represents the value of the use of the money which would have been required had the dues been paid in the regular way. Foresters' Bldg. & Loan Ass'n v. Quinn, 119 Ill. App. 572.

43. See 5 C. L. 484, and n. 76.

44. Preston v. Rockey [N. Y.] 77 N. E. 1156; People v. New York Bldg. & Loan Banking Co., 110 App. Div. 554, 97 N. Y. S. 81. The winding up should be as near as possible to a rescission paying each member what he put in or his share of the assets and charging each borrower what he got and the value of the use of it. Broch v. French, 116 Ill. App. 15.

45. Preston v. Rockey [N. Y.] 77 N. E. 1156.

46, 47. People v. New York Bldg. & Loan Banking Co., 110 App. Div. 554, 97 N. Y. S. 81.

48. Rogers v. Ogden Bldg. & Sav. Ass'n [Utah] 83 P. 754. When notices of withdrawal are given when an association is insolvent, shareholders giving such notices are not creditors but stand on a parity with other shareholders. Id.

49. People v. New York Bldg. & Loan Banking Co., 110 App. Div. 554, 97 N. Y. S. 81.

50. Norman v. Warsaw Bldg. & Loan Ass'n [Ky.] 91 S. W. 695.

tion of a creditor of the association by reason of having made payments of dues or interest on a bond given the association as security.[51]

Upon settlement with borrowing members, after insolvency, premium payments,[52] and other payments referable to the loan, are credited thereon,[53] and if the contract provides that upon final settlement, only the sum advanced, with interest at a certain rate, would be retained, all payments, including dues, are credited on the debt.[54] Usually stock payments are not credited on the loan, but credit therefor is given only upon the final distribution of assets.[55] So, it has been held in New York that a building and loan association is a membership and not a stock corporation and that each member must perform his contract so long as the corporation manages its own affairs.[56] Hence, in case of insolvency, each member must be held to his contract up to the date of the receivership, and cannot be treated as a mere debtor and given credit on his loan for all sums paid.[57] Thus, a borrowing shareholder must pay all instalments agreed to be paid for premiums down to the date of the receivership,[58] and cannot be credited with such payments upon the amount advanced upon his bond and mortgage.[59]

§ 4. *Termination and insolvency.*[60]

§ 5. *Rights of withdrawing shareholders.*[61]—Where a stock certificate recites that the holder is a stockholder, and provides for withdrawal, upon the giving of due notice, and the repayment of the amount paid in, the holder of such certificate is, prior to notice of withdrawal, a stockholder and not a creditor of the association, even though the certificate also provides for the payment of interest annually on the amount paid in.[62] Suspension of stock payments by members for an unreasonable time, so as to cause a material departure from its general plan of satisfying loans by maturing stock affords ground for dissolution of the contractual relations between the association and a borrowing member,[63] and such member is not estopped to demand such dissolution by having voted for an amendment to the by-laws giving directors power to suspend payments in such manner.[64] A member who thus withdraws is to be charged with the amount of his loan with legal interest from the date of his receipt of the money, and credited with interest and premium paid, and the withdrawal value of his stock at the time his right to withdraw accrued;[65] on the balance thus found due he is to be charged with interest, and credited with all payments of whatever character, thereafter made.[66] In applying credits before, on, and after, the date of accrual of his right to withdraw, the rule governing partial payments is to be followed.[67]

51. People v. New York Bldg. & Loan Banking Co., 110 App. Div. 554, 98 N. Y. S. 898.

52. Where a mortgage became due and payable by reason of the insolvency of the association, the borrowing member was entitled to have all premium payments credited on the loan. Harris v. Nevins [N. J. Err. & App.] 63 A. 172.

53. See 5 C. L. 484, n. 80-83.

54. A bond given by a borrowing member provided that the association would not retain, upon final settlement, a sum greater than that advanced with interest at eight per cent. Held, on settlement with receiver, borrowers would be credited with all payments whether made as dues, interest or premium. Flinn v. Interstate Bldg. & Loan Ass'n, 141 F. 672.

55. See 5 C. L. 484, n. 84-87.

56, 57. Preston v. Reinhart, 109 App. Div. 781, 96 N. Y. S. 851.

58. Preston v. Rockey [N. Y.] 77 N. E. 1156.

59. Dues and interest therein cannot be credited on debt. Preston v. Rockey [N. Y.] 77 N. E. 1156.

60. See 5 C. L. 486.

61. See 5 C. L. 486. Computation of withdrawal values, see, ante, § 3c.

62. Harrison v. Fleischman [N. J. Eq.] 61 A. 1025.

63, 64. Burkheimer v. National Mut. Bldg. & Loan Ass'n [W. Va.] 53 S. E. 372.

65. Making proper deductions for the member's share of expenses and losses. Burkheimer v. National Mut. Bldg. & Loan Ass'n [W. Va.] 53 S. E. 372.

66, 67. Burkheimer v. National Mut. Bldg. & Loan Ass'n [W. Va.] 53 S. E. 372.

Recovery of money paid for shares cannot be had as on an implied contract unless by reason of mistake or the like it is equity and good concience to repay.[68]

BUILDINGS AND BUILDING RESTRICTIONS.

§ 1. Public Regulation (507).
§ 2. Private Regulation (509).
§ 3. Liability for Unsafe Condition of Premises (510).
§ 4. Liability for Negligent Operation of Elevators (511).

§ 1. *Public regulation.*[69]—In the exercise of the police power it is generally provided by statute or ordinance that certain regulations must be complied with in the construction of buildings in cities,[70] and specified precautions must be taken

68. Foresters' Bldg. & Loan Ass'n v. Quinn, 119 Ill. App. 572. See, also, Implied Contracts, 5 C. L. 1756.

69. See 5 C. L. 487.

70. Failure to file specifications of modifications of plans, which had been filed in the building department will not defeat a claim for work performed thereunder, where the modifications were thereafter approved and the defendant enjoyed the benefit of the work done. Zwerdling v. Congregation Adas Le Israel, 46 Misc. 423, 92 N. Y. S. 360. Unless the contrary appears it is presumed that the owner in the erection of a building observed the requirement of filing with the proper officials the necessary plans and that the building was erected with the consent of the city after approval of such plans. Empire Realty Corp. v. Sayre, 107 App. Div. 415, 95 N. Y. S. 371. In the absence of steps by either lessor or lessee to obtain a review, by the board provided for that purpose, of an order by a building inspector of a municipal corporation for the removal of a building on account of its dangerous condition, and his refusal to issue a permit for its repair, are equivalent to a specific order to tear the building down. Liebschutz v. Black, 3 Ohio N. P. (N. S.) 393.

Note: Exercise of the police power in the adoption of rules and regulations with regard to the construction and occupation of buildings is ordinarily sustained. Easton Com'rs v. Covey, 74 Md. 262, 22 A. 266. It is a discretionary power on the part of commissioners having the construction of buildings in charge to refuse a desired permit. The court say: "We think it very clear that under a general power to pass such ordinance as the commissioners may deem necessary and beneficial to the town the commissioners may pass any ordinance which they may judge necessary and beneficial, and it will he valid provided it be reasonable and consonant with the general powers and purposes of the corporation and not inconsistent with the laws and policy of the state." Sprigg v. Town of Garrett Park, 89 Md. 406, 43 A. 813; City of Salem v. Maynes, 123 Mass. 372, holds that such an ordinance applied to one who had already constructed cellar for contemplated building, but see State v. Tenant, 110 N. C. 609, 28 Am. St. Rep. 715, 15 L. R. A. 423. See City of Hudson v. Thorne, 7 Paige [N. Y.] 261, for limitations upon right to prohibit erection of wooden buildings. City of Troy v. Winters, 2 Hun [N. Y.] 63; Hawke v. Brown, 28 App. Div. 37, 50 N. Y. S. 1032; Signell v. Wallace, 38 Misc. 656, 72 N. Y. S. 348, construing New York Laws of 1901, c. 334, known as the tenement house act as amended by Laws of 1901, c. 555; followed and further construed in City of New York v. Herdje, 68 App. Div. 370, 74 N. Y. S. 104.

State v. Tenant, 110 N. C. 609, 28 Am. St. Rep. 715, 15 L. R. A. 423. An ordinance prohibiting th eerection of a building without permit after a contractor had commenced the construction of a building, as to such building, is void.

City of Philadelphia v. Wall, 184 Pa. 557; City of Sioux Falls v. Kirby, 6 S. D. 62, 60 N. W. 156, 25 L. R. A. 621. The legality of an ordinance requiring permit from building inspector considered, with citation of many cases sustaining the position taken. See McQuillin, Mun. Ord., §§ 470, 471, with many cases cited; Horr. & Bemis, Mun. Ord. §§ 222, 223, and Parker & W. Pub. Health, cc. 19, 20.

These regulations have for their direct purpose not only the protection of life, limb, and property, but also the preservation of the public health. The use to which certain buildings can be put may result in a condition exceedingly deleterious to the health and safety not only of the occupants of the buildings themselves but of persons in the immediate vicinity (Inhabitant of Brookline v. Hatch, 167 Mass. 380, 38 L. R. A. 495; People v. Bennett, 83 Mich. 457; Com. v. Charity Hospital of Pittsburg, 198 Pa. 270. See, also, 18 Am. Rep. 407), and the state in such case has the unquestioned right of regulation. Through the cupidity or negligence of property owners, buildings may become unsafe for use, and the proper exercise of the police power by the state includes the passing of regulations remedying such condition (Woodruff v. Bowen, 136 Ind. 431, 34 N. E. 1113, 22 L. R. A. 198; Town of Portsmouth v. Snell, 8 N. H. 338). It also includes the right to control or regulate in the first instance, having as a purpose the protection of life, health and property, either the dimensions (Attorney General v. Williams, 178 Mass. 330, 59 N. E. 812. See, also, Id., 174 Mass. 476, 55 N. E. 77, 47 L. R. A. 314; People v. D'Oench, 111 N. Y. 359; City of Cleveland v. Lenze, 27 Ohio St. 383), the manner (see cases collected in 43 Alb. Law J. 349, note by W. S. Gordon, Hall v. Nixon, L. R. 10 Q. B. 152; United States v. Cole, 7 Mackey [D. C.] 504, and cases cited in opinion; McCulloch v. Ayer, 96 F. 178,—fire escapes; Ex parte White, 67 Cal. 102; Diamond State Iron Co. v. Giles, 7 Houst. [Del.] 11 A. 189; Arms v. Ayer, 192 Ill. 601, 85 Am. St. Rep. 357, 58 L. R. A. 277,—fire escape regulation held valid; Ward v. City of Murphysboro, 77 Ill. App. 549; Inhabitants of Winthrop v. New England Chocolate Co., 180 Mass. 464, 62 N. E. 969; Hubbard v. City of Paterson, 45 N. J. Law, 310; Morford v. Board

against fire.[71] The construction of tenement houses[72] and hotels[73] is subject to

of Health of Asbury Park, 61 N. J. Law, 386, 39 A. 706, construing powers of boards of health as to manner of construction of buildings; Stewart v. Com., 10 Watts [Pa.] 307; Barter v. Com., 3 Pen. & W. [Pa.] 253; Kneedler v. Borough of Norristown, 100 Pa. 368. But in this case it was held that a borough did not have the authority to forbid under penalty the erection of wooden buildings within certain limits. Smith v. Milwaukee Builders' & Traders' Exch., 91 Wis. 360, 51 Am. St. Rep. 912, 30 L. R. A. 504. See, also, McQuillin, Mun. Ord., § 471, with many cases cited), or the place of construction (Phillips v. City of Denver, 19 Colo. 179, 34 P. 902, 41 Am. St. Rep. 230. An ordinance prohibiting the construction of a livery stable in any block in which a school building is situated or adjacent without other conditions held unreasonable and void. Village of Louisville v. Webster, 108 Ill. 414; City of Abilene v. Cowperthwait, 52 Kan. 324, 34 P. 795; City of Monroe v. Hoffman, 29 La. Ann. 651. The power to prohibit the erection of a building composed of combustible materials in densely built part of town an inherent power in municipal corporations. But State v. Schuchardt, 42 La. Ann. 49, 7 So. 67, holds that a municipal corporation in the absence of legislative authority has no such control over the construction of buildings. See, also, Pratt v. Borough of Litchfield, 62 Conn. 112; Easton Com'rs v. Covey, 74 Md. 262, 22 A. 266; City of Baltimore v. Radecke, 49 Md. 228; Hume v. New York, 74 N. Y. 264; City of Buffalo v. Chadeayne, 134 N. Y. 165; Livingston v. Wolf, 136 Pa. 519, 20 Am. St. Rep. 936; Corporation of Knoxville v. Bird, 80 Tenn. [12 Lea] 121, 47 Am. Rep. 326; Beall v. City of Seattle, 28 Wash. 593, 69 P. 12, 92 Am. St. Rep. 892, 61 L. R. A. 583). This right to regulate the construction of buildings extends to repairs (Borough of Stamford v. Studwell, 60 Conn. 85, 21 A. 101; First Nat. Bank of Mt. Vernon v. Sarlls, 129 Ind. 201, 28 Am. St. Rep. 185, 13 L. R. A. 481,—validity of repair ordinance determined; City of Newton v. Belger, 143 Mass. 598—building ordinance held invalid in this case; Donohue v. Kendall, 50 N. Y. Super. Ct. 386; Quigley v. H. W. Johns Mfg. Co., 26 App. Div. 434, 50 N. Y. S. 98,—permit not necessary for minor repairs; Brennan v. Lachat, 14 Daly [N. Y.] 197; Willy v. Mulledy, 78 N. Y. 310; Douglass v. Com., 2 Rawle [Pa.] 262. See article by W. S. Gordon in 43 Alb. Law J. 349), as well as alterations or additions (City Council of Montgomery v. Louisville & N. R. Co., 84 Ala. 127; Tuttle v. State, 4 Conn. 68; Greene v. Darnrell, 175 Mass. 394; Fire Dept. of New York v. Wendell, 13 Daly [N. Y.] 430; City of Philadelphia v. Coulston, 13 Phila. [Pa.] 182; Appeal of Brice, 89 Pa. 85; Carroll v. Lynchburg, 84 Va. 803), and ornaments or appurtenances (State v. Clarke, 69 Conn. 371, 61 Am. St. Rep. 45, 39 L. R. A. 670,—awning; Attorney General v. Williams, 174 Mass. 476, and same case again in 178 Mass. 330, 59 N. E. 812; City of New York v. Wood, 15 Daly, 341, 6 N. Y. S. 657; Bowers v. Coulston, 11 Phila. [Pa.] 182). The exercise of the power in this respect goes further and includes the right of inspection of buildings used for certain purposes or by certain classes of people. The right to exercise the power also carries with it the right to enforce orders or regulations of the state or municipal authorities looking to the demolition or the purification of unwholesome, unsafe or infected premises (Dupree v. City of Brunswick, 82 Ga. 727; O'Rourke v. City of New Orleans, 106 La. 313; City of St. Paul v. Clark, 84 Minn. 138, 86 N. W. 893; Egan v. Health Dept. of City of New York, 9 App. Div. 431, 41 N. Y. S. 352; Health Dept. of City of New York v. Dassori, 21 App. Div. 348, 47 N. Y. Supp. 641. The court here held the fact that buildings were unfit for habitation did not necessarily involve the conclusion that they could not be made so. "If they ceased to be in such a condition as to breed pestilence and spread disease and were rendered innoxious the owner of them had a right to have them remain upon the premises even though he might not be permitted to use them as a tenement house. There are many other uses to which he might lawfully put them, and the undoubted power of the public to refuse him permission to rent them to be used for human habitation did not necessarily involve the right to destroy them if they were not fit for that purpose." Golden v. Health Dept. of City of New York, 21 App. Div. 420, 47 N. Y. S. 623, where the owner's remedy is discussed. Smith v. Irish, 37 App. Div. 220, 55 N. Y. S. 837. See, also, People v. Board of Health of City of Yonkers, 140 N. Y. 1, 37 Am. St. Rep. 522, 23 L. R. A. 481; Health Dept. of City of New York v. Trinity Church, 145 N. Y. 32, 45 Am. St. Rep. 579, 27 L. R. A. 710; Board of Health of City of Yonkers v. Copcutt, 140 N. Y. 12, 35 N. E. 443, 23 L. R. A. 485. But see Earp v. Lee, 71 Ill. 193; Bushnell v. Robeson, 62 Iowa, 540; Brightman v. Inhabitants of Bristol, 65 Me. 426; Brown v. Perkins, 78 Mass. [12 Gray] 89; Welch v. Stowell, 2 Doug. [Mich.] 332; Clark v. City of Syracuse, 13 Barb. [N. Y.] 32, and Miller v. Burch, 32 Tex. 208), and the enforcement of ordinances having for their purpose the exercise of rights enumerated in this and other sections. It has been held that in the exercise of the power possessed, the state or the municipal authorities can pass rules, regulations, ordinances or laws capable of enforcement through the imposition of penalties for their violation (State v. Bright, 38 La. Ann. 4; State v. Zurich, 49 La. Ann. 447) consisting either of a fine or imprisonment, or both (City of New Orleans v. Danneman, 51 La. Ann. 1093; following State v. Zurich, 49 La. Ann. 447).—From Abbott, Mun. Corp. 236.

71. "Interior finish" in New York Building Code, section 105, requiring certain parts of fireproof buildings to be treated with fire proofing process does not include trade fixtures. City of New York v. A. T. Stewart Realty Co., 109 App. Div. 702, 96 N. Y. S. 513. A municipal ordinance requiring certain buildings to be fireproofed in certain respects and prescribing a penalty for violation applies to all buildings whether erected before or after its enactment. Such act is not unconstitutional nor in violation of vested rights of persons who own buildings previously erected. City of Seattle v. Hinckley, 40 Wash. 468, 82 P. 747. Under Greater New

statutory regulation, as is also the maintenance of swinging signs.[74] The action of a city council in refusing a permit to build a house is administrative and no appeal lies therefrom to the circuit court.[75] The legislature may regulate the construction of buildings along pathways.[76] For injury caused thereby to buildings in course of construction, damages may be recovered.[77]

§ 2. *Private regulation. Restrictive covenants.*[78]—The owner of an estate may on conveying it bind it by any reasonable restriction.[79] Such restriction will remain in force according to its terms [80] or unless by reason of change in the neighborhood enforcement becomes inequitable.[81] Building restrictions are incumbrances [82] if they affect the marketable quality of the title [83] or prevent the use of the premises for any lawful purpose.[84] Such covenants run with the land.[85] Building restrictions are construed strictly against the grantor,[86] and nothing is to be regarded as a violation that is not in disregard of express terms.[87]

York Charter Laws 1897, p. 263, c. 378, § 762, relative to providing means for communicating fire alarms, the order of the fire commissioner directing one to adopt "direct means" without specifying the means is insufficient to enable the recovery of a penalty for failure to comply with the orders. Hayes v. Brennan, 45 Misc. 413, 90 N. Y. S. 453.

72. Under the tenement house act of New York, there must be a yard in the rear of every tenement house. People v. Crain, 47 Misc. 281, 95 N. Y. S. 906. Construction of New York tenement house act as to courts and passage ways. Gutting v. Brennan, 97 App. Div. 23, 89 N. Y. S. 574.

73. Laws 1905, p. 1862, c. 697, relative to the examinations of hotels in which a saloon is operated and if it does not comply with the law regulating hotels the liquor tax may be cancelled and the partitions forming bedrooms caused to be removed within thirty days does not authorize the building department to destroy partitions in a building in which the liquor tax certificate has been canceled without a judgment or order of court. Born v. Hopper, 110 App. Div. 218, 96 N. Y. S. 671. Under Greater New York Charter Laws 1901, p. 183, c. 466, § 411, giving the building superintendent authority to pass on questions relative to the construction of buildings does not authorize him to determine that trade fixtures must conform to the requirements of the building code. City of New York v. A. T. Stewart Realty Co., 109 App. Div. 702, 96 N. Y. S. 513.

74. Municipal ordinance prohibiting the placing of signs above the street held violated by an electric sign fourteen feet above the sidewalk extending six feet over the street. Loth v. Columbia Theater Co. [Mo.] 94 S. W. 847.

75. Ex parte Evans [S. C.] 52 S. E. 419.

76. St. 1896, p. 261, c. 313, and St. 1897, p. 363, c. 379, providing for the establishment of a building line and other regulations along a parkway does not apply to a parkway along which no building line has been established. Williams v. Boston [Mass.] 77 N. E. 509.

77. Method of determining measure of compensation to one whose building, in course of construction when the building ordinance was passed was injured. Williams v. Boston [Mass.] 77 N. E. 509. Certain evidence as to rental value before and after the passage of a building ordinance held admissible on the question of damage to a building in course of construction when the ordinance was passed. Id. Violation of a building ordinance when done in good faith and on advice of counsel, held not to preclude the builder from recovering damages occasioned to a building in course of construction when the ordinance was passed. Id.

78. See 5 C. L. 488.

79. A restriction that no structure except dwellings costing not less than $2,500 to be built fifteen feet from the sidewalk, shall be erected on the land is valid. James v. Irvine [Mich.] 12 Det. Leg. N. 454, 104 N. W. 631.

80. A grantee in a deed binding him not to use the premises for any except certain purposes without the consent of the owner or his successors is bound by the restriction so long as the owner or his successors see fit to hold it in force. Island Heights Ass'n v. Island Heights Water Power, Gas & Sewer Co. [N. J. Eq.] 62 A. 773.

81. A restrictive covenant will not be enforced by injunction where it has nearly expired and the character of the neighborhood had so changed that the enforcement of the covenant would have little effect. Covenant against erection of apartment houses. McClure v. Leaycraft, 183 N. Y. 36, 75 N. E. 961. Where there has been no such change in the neighborhood as renders the enforcement of a covenant inequitable, it will be enforced. De Lima v. Mitchell, 49 Misc. 171, 98 N. Y. S. 811.

82. Whelan v. Rosseter [Cal. App.] 82 P. 1082.

83. Ordinary building restrictions applicable to all the property in the neighborhood, of which a proposed purchaser has knowledge, cannot be classed as an incumbrance unless they affect the marketable quality of the title, and the presumption is that they are a benefit rather than a detriment to the property. Egle v. Morrison, 6 Ohio C. C. (N. S.) 609.

84. Restriction against the carrying on of any noxious, offensive, or dangerous trade or business is. Deiterlen v. Miller, 99 N. Y. S. 699.

85. Deiterlen v. Miller, 99 N. Y. S. 699.

86. James v. Irvine [Mich.] 12 Det. Leg. N. 454, 104 N. W. 631.

87. **Not violated:** A restriction that no building costing less than a certain amount

Equitable relief for breach of a restrictive covenant must be promptly sought.[88] Infrequent violations of a restrictive covenant not generally known in the neighborhood nor acquiesced in by the common grantor will not prevent enforcement of such restriction.[89] They must be enforced by the real party in interest.[90] A purchaser by deed from a prior owner is a proper party though he testified that he was a straw man in the transaction and did not know who the real owner was,[91] but a contractor erecting a building on the premises is not.[92] If a structure can be remodeled to conform to the covenant, permission should be given to do so,[93] and where the covenant lapses pending suit for its violation, an alteration of the structure cannot be ordered but damages for violation of the covenant may be recovered.[94]

§ 3. *Liability for unsafe condition of premises.*[95]—The owner of premises must exercise ordinary care to keep them reasonably safe,[96] but he is not, as to the public, an insurer of their safe condition[97] and is liable only for negligence,[98]

shall be erected is not a restriction on the kind of building. A stable may be erected. Peck v. Hartshorn, 189 Mass. 110, 75 N. E. 133. Six story apartment house of dignified appearance and elegantly appointed apartments is not a tenement house within a covenant against the construction of such a building. Marx v. Brogan, 111 App. Div. 480, 98 N. Y. S. 88. A restriction against the erection of anything except a dwelling house held not a restriction against a double house where several had been built. James v. Irvine [Mich.] 12 Det. Leg. N. 454, 104 N. W. 631. A double two story building comprising four flats is not "one dwelling" within such a restrictive covenant. Sanders v. Dixon, 114 Mo. App. 229, 89 S. W. 577. The erection of a house or flat two stories high planned for the occupancy of two families does not violate a restriction against more than "one house." Pank v. Eaton [Mo. App.] 89 S. W. 586.

Violated: A board fence eight or more feet in height, extending the entire length of the grantor's premises to the sidewalk, which shuts off the view from the grantor's remaining ground and dwelling house, diminishes the air and light formerly enjoyed by him, and which is contrary to the intention of the parties as evidenced by the stipulations in the deed and the circumstances and condition of the property at the time of the conveyance is a "building" within the meaning of a deed providing against the erection of certain buildings. MacGregor v. Linney, 6 Ohio C. C. (N. S.) 524. A covenant prohibiting barrooms, saloons or any other business establishment on the premises is violated by the maintenance of a restaurant and saloon. De Lima v. Mitchell, 49 Misc. 171, 98 N. Y. S. 811.

88. A party beneficially interested in the enforcement of a restrictive covenant must come into court promptly in order to obtain equitable relief. One held barred by laches after three years when it did not appear that property owners would be injured. Island Heights Ass'n v. Island Heights Water P., G. & S. Co. [N. J. Eq.] 62 A. 773.

89. De Lima v. Mitchell, 49 Misc. 171, 98 N. Y. S. 811.

90. Where one assumed to act as owner and declared his intention of disregarding the covenant, a finding that he was the real party in interest was justified. Sanders v. Dixon, 114 Mo. App. 229, 89 S. W. 577. Where lots are sold under restrictive covenants by a common grantor, one purchaser is entitled to enforce the covenant as against a subsequent mortgagee of a neighboring lot. De Lima v. Mitchell, 49 Misc. 171, 98 N. Y. S. 811.

91, 92. Sanders v. Dixon, 114 Mo. App. 229, 89 S. W. 577.

93. A structure which violates a restrictive covenant should not be ordered removed without permission given to remodel where it could be remodeled at slight expense to conform to the covenant. Sanders v. Dixon, 114 Mo. App. 229, 89 S. W. 577.

94. Sanders v. Dixon, 114 Mo. App. 229, 89 S. W. 577.

95. See 5 C. L. 491.

96. Where a pedestrian was killed by the fall of a window sill from a building in course of construction, the question of the owner's negligence and of the deceased's contributory negligence were held questions of fact. Riegert v. Thackery, 212 Pa. 86, 61 A. 614. Where a pedestrian was injured by a brick falling to the sidewalk from a building in course of construction evidence of the builder's negligence held for the jury. Decola v. Cowan, 102 Md. 551, 62 A. 1026. The violation of an ordinance requiring sheds to be erected over sidewalks where building operations were going on is not negligence if a reasonably prudent person would not have erected sheds or given warning. Riegert v. Thackery, 212 Pa. 86, 61 A. 614. The maintenance of a stairway leading to a basement the top of which is four and one-half feet from the sidewalk in an alley is not a nuisance. Sheehan v. Bailey Bldg. Co. [Wash.] 85 P. 44.

97. Is held to the exercise of reasonable care and skill only. Connolly v. Des Moines Inv. Co. [Iowa] 105 N. W. 400.

98. Instruction as to the burden of proof to show negligence approved. Connolly v. Des Moines Inv. Co. [Iowa] 105 N. W. 400. Where one was injured while approaching a store by a private passageway by being struck by a bale of oakum let fall from a floor suspended over such passage, the question of negligence in handling the bale was for the jury. Burns v. Dunham, Carrigan & Hayden Co. [Cal.] 82 P. 959. Where an adjacent owner was injured by reason of ice falling from a building, the question of negligence was held for the jury. Richardson v. Nelson [Ill.] 77 N. E. 583.

which is the proximate cause of an injury.[99] He owes no duty to trespassers or mere licensees.[1] The owner of a building so situated as to become a menace to travel on a public street if it become dangerous from faulty construction or other cause is held to a reasonable inspection from time to time only.[2] This duty is an absolute one and if he delegates it to an agent or servant the doctrine of respondeat superior applies.[3]

§ 4. *Liability for negligent operation of elevators.*[4]—Owners and operators of passenger elevators owe to their passengers the duty to exercise the highest degree of care for their safe transportation,[5] and are liable in damages for injuries sustained as a result of their negligence,[6] but they are not strictly common carriers.[7] One operating an elevator must use due care before he starts the car to ascertain whether passengers are in the act of alighting and will be endangered by starting.[8] The operation of an automatic push button electrical passenger elevator is not negligence which is actionable by any person except a child of such tender years that it cannot appreciate the danger of contact with the side of the door or shaft when the car is moving.[9] There is no liability for an injury which is the result of contributory negligence.[10] It is the duty of the owner of a building to properly guard elevator

99. Facts that one entered defective premises and was next found injured by a punctured wound in leg and that there was a hole in floor and signs of blood does not show that injury occurred there. Burke v. Hulett, 216 Ill. 545, 75 N. E. 240. A tenant of one floor of a building is liable for negligence relative to the injury only in case an accident occurs on his floor. Complaint not alleging that the accident occurred on the defendant's floor held demurrable. Detviller v. Rolled Plate Metal Co., 110 App. Div. 773, 97 N. Y. S. 419.

1. A trespasser or mere licensee cannot recover for injuries sustained by falling through an open hatchway. Whether one was on premises by invitation or was a licensee or trespasser held a question of fact. Mallock v. Derby [Mass.] 76 N. E. 721.

2. Not liable for injury caused by a defect not discovered in time to repair it. Connolly v. Des Moines Inv. Co. [Iowa] 105 N. W. 400.

3. Connolly v. Des Moines Inv. Co. [Iowa] 105 N. W. 400.

4. See 5 C. L. 492.

5. Shellaberger v. Fisher [C. C. A.] 143 F. 937; Anderson Art Co. v. Greenburg, 118 Ill. App. 220. Highest degree of care in everything calculated to insure the safety of passengers is required. Becker v. Lincoln Real Estate & Bldg. Co. [Mo. App.] 93 S. W. 291. Highest degree by a merchant who maintains an elevator for the use of his customers. H. B. Phillips Co. v. Pruitt, 26 Ky. L. R. 831, 82 S. W. 628.

6. It cannot be concluded as a matter of law that due diligence has been employed in making an elevator reasonably safe because the elevator is such as is generally used for like purposes. Usage of others not the sole criterion. National Biscuit Co. v. Wilson [Ind. App.] 78 N. E. 251. Evidence of the customary manner of constructing an elevator is admissible on the question of negligence in failing to provide the same with safety devices. Id. The fall of a loaded elevator is prima facie evidence of negligence in the person charged with the duty of operating it. Edwards v. Manufacturers' Bldg. Co. [R. I.] 61 A. 646. Where there was no evidence to show what caused an elevator to fall it was error to exclude evidence that it had previously been working in a spasmodic and uncertain manner. Casterton v. American Blower Co. [Mich.] 12 Det. Leg. N. 751, 106 N. W. 61.

7. A landlord who maintains in his private building an elevator for the use of his tenants and their customers is not a common carrier. Is bound to exercise only reasonable care. Edwards v. Manufacturers' Bldg. Co. [R. I.] 61 A. 646. See 5 C. L. 492, n. 89.

8. Becker v. Lincoln Real Estate & Bldg. Co. [Mo. App.] 93 S. W. 291. Operator's negligence in prematurely starting the car where a passenger following directly after another in leaving the car was injured because of such start, held for the jury. Id. Negligent act of operator in prematurely starting the car held the proximate cause of an injury, and not the act of the operator in pushing the party injured backward after the car had started. Id.

9. One of sufficient maturity would be contributorily negligent if he permitted himself to suffer such risk. Shellaberger v. Fisher [C. C. A.] 143 F. 937. The operation of such an elevator without an operator in an apartment house where several children of tender age used it, a duty to employ an operator being imposed by statute, is sufficient evidence of negligence where a child of tender years was injured while running the elevator and whether it was the proximate cause of the injury to take the case to the jury. Id.

10. Questions of negligence and of contributory negligence where a customer was injured by falling into an elevator shaft in a store building held for the jury. H. B. Phillips Co. v. Pruitt, 26 Ky. L. R. 831, 82 S. W. 628. Question of contributory negligence where servant was injured because his employer had left elevator shaft insufficiently guarded in violation of Laws 1897, p. 468, c. 415, art. 1, § 20, amended by Laws 1899, p. 351, c. 192, held for the jury. Kiernan v. Eidlitz, 109 App. Div. 726, 96 N. Y. S. 387. It

shafts.[11] One suing for injuries sustained by falling through an open elevator shaft has the burden to prove defendant's negligence.[12] The defendant has the burden of proving contributory negligence.[13]

BURDEN OF PROOF, see latest topical index.

BURGLARY.[14]

§ 1. **What Constitutes (512).** Breaking and Entry (512). Accomplices (513). Nature and Situation of Building (513). To Constitute the Offense of Having Burglar's Tools in Possession (513).
§ 2. **Indictment (513).**
§ 3. **Evidence (514).**
§ 4. **Instructions and verdict (515).**

§ 1. *What constitutes.*[15]—Statutes have been enacted in most states extending the common-law definition by punishing as burglary breaking and entry in the day time [16] or by making subject of burglary premises which were not so at common law,[17] and in some cases distinct offenses have been made of acts included within the common-law crime or closely related thereto.[18] In some states it is held that the common law remains in force except as covered by the statutes.[19]

Breaking and entry.[20]—Where the owner of the building consents to the entry thereof there is no burglary; [21] but where the owner is not connected with the original design, but, on discovering the design, joined in it sufficiently to bring about detection, he does not consent so far as to bar a conviction for burglary.[22] Where an employe agreed with a third person that the latter should enter his employer's closed house and take goods therefrom, and was present when such entry was made

has been repeatedly held that as a matter of law an elevator is not a place of danger, and to give a special charge to the contrary would be error. Breuer v. Frank, 3 Ohio N. P. (N. S.) 581. It is not error to leave it to the jury to say whether the facts and circumstances under which the plaintiff stepped into the open elevator shaft were such as to lull him into a sense of security, by leading him to think the cab was there to receive him. Id. One who seeks to enter a moving elevator is guilty of contributory negligence. A. M. Rothschild & Co. v. Levy, 118 Ill. App. 78.

11. B. Shoninger Co. v. Mann, 121 Ill. App. 275.

12. Evidence sufficient to show negligence where the hall leading to the elevator was dark. Fletcher v. Kelly [Ind. App.] 76 N. E. 813. Where it is not shown what caused an elevator to fall, a servant cannot recover from his master for injury sustained. Casterton v. American Blower Co. [Mich.] 12 Det. Leg. N. 751, 106 N. W. 61. The owner of a freight elevator is not guilty of negligence in permitting a small break in the wall of the shaft which caused an injury to a servant who allowed his foot to project over the edge of the elevator platform. McDonald v. Dutton [Mass.] 76 N. E. 1055.

13. Fletcher v. Kelly [Ind. App.] 76 N. E. 813.

14. **See Clark & M. Crimes [2d ed.] 595.**

15. See 5 C. L. 493.

16. Commonwealth v. Woolfolk [Ky.] 89 S. W. 110; State v. Curtis [La.] 41 So. 58.

17. Pen. Code 1895, art. 838, defines burglary; art. 849, provides a penalty for an attempt to commit burglary; art. 851 makes it a penal offense under certain conditions to enter a railroad car, etc., but does not define it as burglary, and makes no provision as to attempts. Summers v. State [Tex. Cr. App.] 90 S. W. 310.

18. The statute of South Carolina defining and punishing safe cracking is not defective for failure to express its subject matter in the title. Act Feb. 19, 1904, 24 St. at Large, p. 396; Const. art. 3, § 17. State v. O'Day [S. C.] 54 S. E. 607. One who enters a dwelling house in the day time with intent to steal is guilty of a distinct and substantive offense, denounced by statute in Louisiana. Rev. St. § 854. It is a distinct offense from that contemplated in Act 107, p. 161, of 1902, which relates to vagabondage, and is not repealed by the latter. State v. Curtis [La.] 41 So. 58.

19. In Kentucky burglary is still a crime and punishable as such according to the provisions of the common law (Commonwealth v. Woolfolk [Ky.] 89 S. W. 110); but the sections of the statute against housebreaking abrogate in large measure the technical rules of the common law, which punished housebreaking only when committed at night and by breaking and entering a dwelling house or church (Id.).

20. See 5 C. L. 493.

21. One who enters a house together with, or having the consent of, another who has, or whom he believes to have, authority to enter, is not guilty of burglary. Bird v. State [Tex. Cr. App.] 90 S. W. 651. Where the owner of the house left the key thereof at a designated place, to enable his confederates to induce accused to enter, an acquittal was authorized. Id.

22. Bird v. State [Tex. Cr. App.] 90 S. W. 651.

and goods stolen therein, he was guilty of an entry by breaking sufficient to constitute burglary.[23]

Accomplices.[24]—One who advises another to commit a burglary, but is himself at another place at the time it is committed, is not a principal, but an accomplice.[25]

Nature and situation of building.[26]—A dwelling house is a building which, by the mode of its construction or reconstruction, is suitable for a habitation.[27] An inhabited dwelling house is such a house used as a habitation,[28] and the ordinary use of a habitation embraces the protection and shelter of household goods and wearing apparel, whether the inhabitants are present or absent.[29] It is not necessary that a dwelling house, to remain such, be continuously occupied; having been designed for and used as a dwelling house, it remains such, though temporarily unoccupied, until converted to some other use.[30] Where a building is divided into apartments, only one of which is occupied by a bank and the others by tenants, the whole building cannot be defined as a banking house;[31] and the breaking into and entering with felonious intent of any portion of the building not occupied by the bank for banking purposes, cannot be said to be the breaking and entering of a banking house.[32] But the word "building" as used in the Ohio statute, defining the crime of burglary, has reference to a structure of some permanence.[33]

To constitute the offense of having burglar's tools in possession it is not essential that they be in the manual custody of accused.[34]

§ 2. *Indictment.*[35]—The indictment must describe the premises broken [36] and lay the ownership thereof,[37] but where larceny of goods therein is not essential ownership of such goods need not be laid.[38] Intent must be charged,[39] but an indict-

23. Alexander v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 936, 89 S. W. 642.

24. See 3 C. L. 579.

25. Holmes v. State [Tex. Cr. App.] 91 S. W. 588.

26. See 5 C. L. 494.

27. State v. Mason [Ohio] 77 N. E 283. A building erected for a dwelling house and occupied as such for some time by a tenant and which after the tenant's removal his son continued to claim as his residence, leaving his wearing apparel, etc., therein, the tenant retaining the keys, was a dwelling house the day after the tenant's removal, within Ky. St. 1903, § 1162, relative to feloniously breaking into any dwelling house, etc. Commonwealth v. Woolfolk [Ky.] 89 S. W. 110.

28. Within the meaning of Rev. St. 1906, § 6835, a dwelling house is inhabited where the family has gone for a vacation, leaving servants in charge, though the servants may be temporarily absent when it is burglariously entered. State v. Mason [Ohio] 77 N. E. 283.

29. State v. Mason [Ohio] 77 N. E. 283.

30. Commonwealth v. Woolfolk [Ky.] 89 S. W. 110.

31, 32. Greenwood v. People [Colo.] 83 P. 646.

33. Entry of movable chicken coop thirty-eight inches square not burglary. Bailey v. State, 7 Ohio C. C. (N. S.) 28.

34. Tools in grip carried by defendant's companion. State v. Layton, 191 Mo. 613, 99 S. W. 724.

35. See 5 C. L. 494.

36. Buildings constructed for a special purpose, and being of a temporary character, must be so described (Lucas v. State [Ala.] 39 So. 821); but a chicken or hen house, being well known in communities where poultry is raised, need not be so specially described (Id.).

37. Davis v. State [Fla.] 40 So. 179; State v. James, 194 Mo. 268, 92 S. W. 679. The reasons for requiring this are: (1) For the purpose of showing that the building alleged to have been broken into was not the property of the accused, inasmuch as one cannot commit the offense of breaking and entering his own building; (2) for the purpose of so identifying the offense as to protect the accused from a second prosecution for the same offense. Davis v. State [Fla.] 40 So. 179. The words "that certain building commonly known as and called the storehouse of one B. F. Pope," are merely descriptive of the building, and do not constitute an allegation of ownership. Id.

38. State v. Goehler, 193 Mo. 177, 91 S. W. 947.

39. Indictment under Rev. St. § 854, held to properly charge that defendant entered with intent to steal. State v. Curtis [La.] 41 So. 58. Charging the breaking "with the intent to commit a felony therein, to wit, grand larceny," was sufficient without setting forth the facts constituting the felony. Radley v. Commonwealth [Ky.] 89 S. W. 519. An indictment does not charge an offense under Rev. St. § 5478 [U. S. Comp. St. 1901, p. 3696], where it charges the breaking into a building used partly as a post office with intent to commit larceny but fails to charge an intent to commit larceny in that part used as a post office, to which part only the statute refers. United States v. Martin, 140 F. 256. In Washington an information for burglary, alleging in the alternative that defendant entered the building with intent to

ment alleging in the language of the statute intent to steal goods, wares, and merchandise kept in the building broken, is sufficient without description of such goods.[40] Where entry in the nighttime is essential, it must be charged.[41] An allegation that the burglary was committed by force, threats, and fraud will support a conviction of either a nighttime or daytime burglary.[42] Burglary and grand larceny may be joined in the same indictment;[43] and several indictments against the same person for grand larceny and burglary may be consolidated by the consent and at the instance and request of the defendant.[44] Where the indictment alleged ownership of the house in "W. F. Y." and the proof showed "F. W. E. Y.," the variance was fatal;[45] and evidence of a breaking into a bank building by way of apartments occupied by the bank's tenants, and not by the bank itself, is a fatal variance from an information for burglariously entering "into the banking house."[46]

§ 3. *Evidence.*[47]—The breaking and entering may be shown by circumstantial evidence,[48] and where the owner of the property is dead at the time of the trial, his want of consent may be so proved;[49] but where the owner of the premises is a witness, his want of consent to the taking of the property must be proved by him.[50] Evidence that witness went to the building the night prior to the burglary, carefully examined the lock and tried the door to see if it was securely fastened,[51] as well as evidence of circumstances and occurrences when defendant was caught almost in the very act of burglary, was admissible;[52] but on the trial of one of three persons for burglary, evidence that on the morning after the night of the burglary two others built a fire in a field, about a quarter of a mile from the place where the stolen goods were found, was inadmissible.[53] The evidence must show the breaking and entry[54] in the nighttime, if that be an essential of the offense,[55] the criminal intent,[56] and the ownership of the premises,[57] and must identify defendant as participant[58] or accessory.[59] While possession of stolen goods unaccompanied by other

commit "a misdemeanor or felony," is sufficient. Under Ballinger's Ann. Codes & St. § 7104, defining burglary; § 7105, making the unlawful entry presumptive of the attempt to commit a misdemeanor or felony unless explained; and §§ 6844, 6851, providing for indictments in the alternative, when a crime may be committed by different means. State v. Lewis [Wash.] 85 P. 668.

40. State v. McGuire, 193 Mo. 215, 91 S. W. 939.

41. An indictment charging the commission of a burglary on a certain day, "in the night time of said day or thereabouts," was not defective because of the phrase "or thereabouts." State v. Lovelace [Nev.] 83 P. 330.

42. True v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 106, 89 S. W. 1066.

43, 44. Lucas v. State [Ala.] 39 So. 821.

45. Williams v. State [Tex. Cr. App.] 90 S. W. 876.

46. Greenwood v. People [Colo.] 83 P. 646.

47. See 5 C. L. 495.

48. Winsky v. State [Wis.] 105 N. W. 480.

49. Jackson v. State [Tex. Cr. App.] 91 S. W. 788.

50. Caddell v. State [Tex. Cr. App.] 90 S. W. 1013.

51. Tally v. State [Tex. Cr. App.] 90 S. W. 1113.

52. Smith v. State [Tex. Cr. App.] 90 S. W. 638.

53. Eaton v. Commonwealth [Ky.] 90 S. W. 972.

54. Evidence of breaking by opening closed door sufficient. Berry v. State [Tex. Cr. App.] 91 S. W. 579.

55. Where defendant testified that he was near the burglarized premises about one o'clock in the morning and picked up the property taken from the building where it was dropped by a person he met carrying it, there was sufficient evidence of the commission of the crime in the night time. Winsky v. State [Wis.] 105 N. W. 480.

56. The prosecution must prove beyond a reasonable doubt that the accused entered the house only with the intent of committing the felony charged. Bird v. State [Tex. Cr. App.] 90 S. W. 651. From the verdict it is implied that the intent was proved under Rev. St. § 854. State v. Curtis [La.] 41 So. 58.

57. Evidence that prosecutor was in actual possession of the henhouse as alleged at the time of the burglary, was a sufficient showing of his ownership. State v. McGuire, 193 Mo. 215, 91 S. W. 939.

58. Appellant seen to enter and leave premises. Smith v. State [Tex. Cr. App.] 90 S. W. 638. Vague identification and admission denied by defendant held insufficient. State v. Hutchings [Utah] 84 P. 893. Identification by eye witnesses of man seen by poor light held insufficient. People v. Mullen, 99 N. Y. S. 227. Evidence that defendant owned burglar's tools in a grip carried by defendant's companion held to sustain a conviction of having such tools in possession. State v. Layton, 191 Mo. 613, 90 S. W.

suspicious circumstances is not sufficient to make a prima facie case,[60] it is sufficient where other facts and circumstances are proved, indicative of guilt,[61] especially when the accused fails to give any satisfactory account of his possession.[62] To be within this rule the property must be clearly identified as that stolen,[63] and it must have been found in defendant's possession or in a place under his exclusive control.[64] In explaining his possession of stolen goods, defendant is not obliged to show that he acquired the goods honestly,[65] it is sufficient to show that they came into his custody in any other way than by burglary.[66] Corroboration of the testimony of an accomplice is required in most states.[67]

§ 4. *Instructions and verdict.*[68]—Instructions must submit all issues raised by the evidence,[69] but need not embrace qualifications as to which there is no proof,[70] nor is it error to define an element of the crime as to which there is no issue,[71] nor need a charge on circumstantial evidence be given where there is direct evidence.[72] Uncontroverted matters may be asssumed.[73] Terms of ordinary usage

724. Flight, confession and injury apparently caused by breaking glass sufficient. Jackson v. State [Tex. Cr. App.] 91 S. W. 788.

59. Evidence that one not present was accessory held insufficient. State v. De Witt, 191 Mo. 51, 90 S. W. 77.

60. Winsky v. State [Wis.] 105 N. W. 480.

61. Winsky v. State [Wis.] 105 N. W. 480. Unexplained possession of stolen money held sufficient. Lamps v. State [Fla.] 40 So. 180. Finding of property on premises not under defendant's exclusive control insufficient. State v. Burke [Idaho] 83 P. 228. Flight, confession, and unexplained possession of goods. Stone v. State [Tex. Cr. App.] 90 S. W. 884. Hiring of buggy under false pretext, feathers near defendant's house and unexplained possession of fowls similar to those stolen held to sustain conviction of burglary of chicken house. State v. McGuire, 193 Mo. 215, 91 S. W. 939.

62. Winsky v. State [Wis.] 105 N. W. 480. The person in whose possession the recently stolen property is found is presumed to have used all means necessary to have secured access to and possession of such property, and if he fails to account for his possession in a manner consistent with innocence, or to overcome the presumption by direct or circumstantial evidence, a verdict of larceny and burglary is authorized. State v. James, 194 Mo. 268, 92 S. W. 679.

63. Money not identified. Eaton v. Commonwealth [Ky.] 90 S. W. 972. Money held identified. Lamps v. State [Fla.] 40 So. 180.

64. Eaton v. Commonwealth [Ky.] 90 So. 972. And see State v. Burke [Idaho] 83 P. 228. It was error to admit evidence of finding several pounds of tobacco between the mattresses of defendant's bed, he being a man that used tobacco and there being no evidence that the tobacco belonged to any of the brands stolen. Caddell v. State [Tex. Cr. App.] 90 S. W. 1013.

65. Williams v. State [Ga.] 54 S. E. 166.

66. The possession being sufficiently explained and there being no other evidence to connect defendant with the burglary, there was not sufficient evidence to authorize a conviction. Williams v. State [Ga.] 54 S. E. 166.

67. The owner of the premises does not become an accomplice within the law of evidence, by merely telling the burglar that he will not prosecute him if he will return the goods, where he makes no promise to testify falsely or conceal or suppress the crime. Holley v. State [Tex. Cr. App.] 92 S. W. 422. Where an accomplice testified that he and defendant burglarized the store, stole a lot of amalgam and buried it, his testimony was sufficiently corroborated by another witness who testified that defendant asked him to assist and told him he would have got the amalgam if something had not happened and that he was trying to dispose of it and asked witness what he was to do about it. State v. Lovelace [Nev.] 83 P. 330. Necessity and sufficiency of corroboration is more fully considered in the topic Indictment and Prosecution, 5 C. L. 1790.

68. See 5 C. L. 496.

69. Evidence that at the time of the burglary defendant's co-defendant was in the house and defendant was on the outside and ran away as the officers approached, was sufficient to authorize an instruction defining a principal. Tally v. State [Tex. Cr. App.] 90 S. W. 1113.

70. Where it appeared that the burglary was committed in the night time, it was not reversible error to insert the general statutory definition of burglary in the charge, without limiting the entry to one at night. Jackson v. State [Tex. Cr. App.] 91 S. W. 788.

71. Where uncontradicted evidence showed a breaking and the defense was an alibi, it was not error to fail to define what constitutes an unlawful breaking. Radley v. Commonwealth [Ky.] 89 S. W. 519. It was not necessary for the court in charging the jury to differentiate between the force used in a daytime and night time burglary. Wright v. State [Tex. Cr. App.] 93 S. W. 548.

72. Where defendant was seen to enter the house, was found in the room alleged to have been burglarized, the door of which had been previously closed, and was seen running out of the room, it was a case of direct evidence and a charge on circumstantial evidence was unnecessary. Smith v. State [Tex. Cr. App.] 90 S. W. 638.

73. Where the fact of the house being the private residence of A., as alleged, was not controverted, the court could assume it to be true, and was not required to charge on it. Wright v. State [Tex. Cr. App.] 93 S. W. 548.

need not be defined.[74] An instruction, so worded as to place the burden of proof on defendant,[75] or so as to permit acquittal only on the conjunction of two facts either of which is sufficient,[76] or which states too narrowly an exculpatory theory,[77] is erroneous.

BURNT RECORDS; BY-LAWS; CALENDARS, see latest topical index.

CANALS.[78]

The United States, having authority to construct a canal in territory over which it is sovereign and has exclusive jurisdiction,[79] derived not from the commerce clause but from its inherent rights as a sovereign,[80] may construct the Panama Canal, since by treaty its right of way over the Isthmus is equivalent to ownership of the soil, and the extent of its control the substance, if not the name of sovereignty;[81] hence, the act of Congress appropriating $50,000,000 in connection with the construction of said canal is constitutional.[82]

The law of Ohio relating to the canals and to the state board of public works is distinct from and independent of the provisions which in the Revised Statutes are grouped under the caption of "Public Buildings," and concerning the letting of contracts for work on the canals there is a discretion which is not allowed under the public building code.[83] The state is liable for the negligence of its employes in discharging surplus water from a canal in a manner necessarily causing damage, even though it have an easement in the stream whose banks were overflowed, for the purpose of discharging waters through it.[84] In North Carolina, damages resulting from the improvement of a canal are barred in three years.[85]

74. "Goods, wares, and merchandise," and "other valuable thing, kept and deposited." State v. McGuire, 193 Mo. 215, 91 S. W. 939.

75. In a prosecution for burglary committed by breaking and entering a house to kidnap a person therein, an instruction that if the jury believed that when defendant broke and entered, if he did do so, he did not intend to kidnap the person there, he would not be guilty, was erroneous as placing the burden of proof on defendant. Cooper v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 115, 89 S. W. 816.

76. In a prosecution for burglarizing a car, an instruction to acquit, if defendant entered the car for the purpose of sleeping therein and not with intent to commit theft, was erroneous, as both contingencies were not necessary to relieve defendant from the charge of burglary. True v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 106, 89 S. W. 1066.

77. An instruction that, if defendant entered the house on the invitation of another only to sleep there, he would not be guilty, was erroneous, as the court should have charged that, if he entered for any other than a fraudulent intent to steal, the jury must acquit. Bird v. State [Tex. Cr. App.] 90 S. W. 651.

78. See 5 C. L. 500. For Irrigation Canals, see Water and Water Supply, 6 C. L. 1840.

79, 80, 81, 82. Wilson v. Shaw, 25 App. D. C. 510.

83. Carmichael & Co. v. McCourt, 6 Ohio C. C. (N. S.) 561.

84. Permitting the canal to become surcharged with water then suddenly opening five or six paddles discharging the surplus into a small stream, overflowing its banks and damaging the plaintiff, where with care the surplus might have been discharged through the stream without such overflow and damage. Adkinson v. State, 99 N. Y. S. 792.

NOTE. Injury by waste weir: The flowage of land by the discharge of water from the waste weir of a canal constructed under and in accordance with legislative authority amounts to a taking of property for public purposes without compensation. Hooker v. New Haven & N. Co., 14 Conn. 146, 36 Am. Dec. 477, reaffirmed in 15 Conn. 312. A prescriptive right to the overflow of water through an opening in a canal, maintained more than twenty years for the purpose of supplying the canal with water as a reserve, into a swamp and from it over the adjoining lands, confers no right to increase such outflow, either intentionally or by negligence, so that it will cause the water to escape from the swamp in such quantity as to submerge the land of an adjacent proprietor, which had not been theretofore overflowed. Savannah & O. Canal Co. v. Bourquin, 51 Ga. 378. Where the water discharged from one of the waste weirs of a canal constructed under and in accordance with legislative authority flowed upon the land of another, the canal company is not relieved from liability for the injury by reason of the fact that the waste weirs had been approved by the canal commissioners, and operated with prudence and care by the canal company. Hooker v. New Haven & N. Co., 14 Conn. 146, 46 Am. Dec. 477, reaffirmed in 15 Conn. 312.—From note to Mullen v. Lake Drummond C. & W. Co. [N. C.] 61 L. R. A. 861.

85. Rev. 1905, § 395, subs. 3. Cherry v. Lake Drummond Canal & Water Co. [N. C.]

CANCELLATION OF INSTRUMENTS.

§ 1. Nature of Remedy (517). Adequacy of Remedy at Law (517). Relief Obtainable and Conditions Precedent Thereto (518). Laches and Limitations (519).

§ 2. Cause of Action and Grounds for Relief (519).

§ 3. Procedure (521). Parties (521). Evidence and Proof (521).

Scope of title.—On the nature of remedy of cancellation, the grounds therefor, and questions of procedure, are here treated. The question, what constitutes mistake, accident, fraud, duress, or undue influence, for which relief may be had in a court of equity, is elsewhere treated.[86] The law relating to conveyances in fraud of creditors is also given separate treatment.[87]

§ 1. *Nature of remedy.*[88]—Cancellation is a purely equitable remedy,[89] and jurisdiction to grant relief by way of cancellation pertains wholly to courts of equity.[90] Courts of law have jurisdiction and power to afford relief in such cases by judgment for money or property, under same circumstances, where a right to rescind exists and has been properly claimed; but the legal remedy is incomplete and inadequate because of lack of power to effect a rescission by a direct adjudication thereof.[91] A court of equity will not entertain a suit which is essentially one to recover for false representations, or for money had and received, though, in form, the suit is for cancellation.[92]

Adequacy of remedy at law.[93]—One who has a good legal defense to a purely legal demand will not be given relief in a court of equity by way of cancellation.[94] even though the instrument is ostensibly valid,[95] unless he can allege and prove some other special ground of equitable intervention, such as that he will suffer irreparable injury without the relief desired,[96] or will be subjected to a multiplicity of suits.[97] A remedy at law is not adequate, within the meaning of this rule, unless it is certain, prompt, and as efficient to the ends of justice as the remedy in equity.[98] Equity may, however, intervene to cancel instruments procured by fraud which, until their invalidity is determined, may annoy and harrass one's business and impair his credit,[99] though a court of law would have concurrent jurisdiction

53 S. E. 138. Rev. 1905, § 394, extending period of limitation to five years applies to railroads only. Id. Although the rule of permanent damages applied to railroads and telegraph companies has been applied to canals, not so in case of period of limitations established by § 394. Id. Evidence considered and held question for jury whether there was permanent injury to premises from throwing of sand and mud upon it in deepening and widening a canal. Id.

86. See Duress, 5 C. L. 1047; Fraud and Undue Influence, 5 C. L. 1541; Mistake and Accident, 6 C. L. 678.

87. See Fraudulent Conveyances, 5 C. L. 1556.

88. See 5 C. L. 501.

89. See 5 C. L. 501, n. 80.

90. Rescission of contracts affecting any estate or interest in land on the ground of fraud in the procurement thereof, or mutual mistake of the parties in effecting the same, belongs to the exclusive jurisdiction of courts of equity. Bruner v. Miller [W. Va.] 52 S. E. 995. Probate court cannot in its incidental chancery powers entertain a suit to cancel an agreement between heirs. Teel v. Mills, 117 Ill. App. 97.

91. Bruner v. Miller [W. Va.] 52 S. E. 995.

92. Suit for cancellation of trust deed and recovery of amount of water fund certificates for alleged misrepresentations. Powell v. Louisville [C. C. A.] 141 F. 960.

93. See 5 C. L. 501.

94. Makers of non-negotiable note procured by fraud have good legal defense and cannot have note canceled. Johnson v. Swanke [Wis.] 107 N. W. 481. Where an action of ejectment has been commenced, a court of equity will not cancel the deed under which plaintiff claims on grounds which could be set up as a defense in the action at law. As on ground that deed and record had been fraudulently altered. Wilson v. Miller, 143 Ala. 264, 39 So. 178.

95. Note, apparently valid, in fact void, and non-negotiable. Johnson v. Swanke [Wis.] 107 N. W. 481.

96. Where non-negotiable note was given for sale of horse procured by fraud, buyers could rescind contract and sell the horse; they could not be injured by a refusal to grant cancellation of note. Johnson v. Swanke [Wis.] 107 N. W. 481.

97. That several makers of a non-negotiable note, to which there was a legal defense, could be sued independently, held not a ground for equitable intervention. Johnson v. Swanke [Wis.] 107 N. W. 481.

98. Brewster v. Lanyon Zinc Co. [C. C. A.] 140 F. 801.

99. Agreement for royalties procured by promoter of corporation, set aside at in-

to give relief as against the fraud.[1] In New York an action at law to set aside a will does not lie until the will has been admitted to probate; hence a suit in equity for such relief lies before probate of the will.[2]

Relief obtainable and conditions precedent thereto.[3]—Where all the heirs make quitclaim deeds of their interests, one of them, claiming that his deed was unlawfully delivered, is not entitled to have the entire transaction with all the heirs canceled, but may proceed only for the protection of his own interests.[4]

On rescinding a contract, the court should, by its decree, put the parties in statu quo by requiring each to restore to the other what he obtained by virtue of the contract.[5] If rights of innocent third parties have intervened, cancellation cannot be had.[6] An offer to do equity, or a tender back of what he has received under the contract, is required of a complainant as a condition precedent to relief.[7] Thus, in the absence of bad faith, fraud, or undue influence on the part of the grantee, a conveyance will be set aside only on return of the consideration,[8] and if the grantee has not received rents from the land, interest on the sum paid should also be allowed.[9] An actual tender of property received is not a condition precedent to the right to maintain a suit for cancellation, where complainant offers, in his petition, to do complete equity,[10] or where the case is such that the equities of the parties can be protected by the chancellor without it.[11] Relief is sometimes granted against one who has been guilty of fraud or bad faith without requiring complete restoration of property received by the party seeking relief,[12] and if no

stance of corporation. Fred Macey Co. v. Macey [Mich.] 12 Det. Leg. N. 948, 106 N. W. 722.

1. Fred Macey Co. v. Macey [Mich.] 12 Det. Leg. N. 948, 106 N. W. 722.

2. Irving v. Bruen, 110 App. Div. 558, 97 N. Y. S. 180.

3. See 5 C. L. 501.

4. Anderson v. Goodwin [Ga.] 54 S. E. 679.

5. Where lease gave right to pay rental of land in lieu of drilling for oil and gas, rental paid may be recovered on rescission of the contract, the lessee not being absolutely required to drill. Bruner v. Miller [W. Va.] 52 S. E. 995. Held proper, in rescinding exchange of lands, to give defendant a lien for money advanced to pay mortgage on land received by him, in order to place parties in statu quo. Smith v. Redmond [Iowa] 108 N. W. 461. Where administrator sold lands for as much as he paid the heir for them, tender by the heir of the amount received was not essential to entitle him to a rescission of the deed. Reeder v. Meredith [Ark.] 93 S. W. 558. Administrator bought lands from heir, falsely representing that the deed would not affect the heir's reversionary interest in the dower and homestead. Without such interest, the heir would have sold for the price received. Held, on setting aside deed as to such reversionary interest, heir was not entitled to recover excess of what administrator received for the land over what he paid the heir. Id.

6. A decree of cancellation of a deed for land for fraud, duress, or want of consideration, cannot be made against a purchaser, for valuable consideration, without notice of the facts tainting the deed with fraud, duress, or want of consideration. Dunfee v. Childs [W. Va.] 53 S. E. 209.

7. Repayment or return or a tender of the consideration received is a condition precedent to relief in equity by cancellation of a contract. Pierson v. Fisher [Or.] 85 P. 621. To rescind a contract for sale of land, and to cancel the deed, plaintiff should have offered to do equity and should have tendered back the amount paid. Cecil v. Henry [Tex. Civ. App.] 93 S. W. 216.

8. Return of consideration required where deed was set aside on ground of grantor's mental incapacity, there being no fraud or bad faith, and grantor not having been judicially declared insane or incompetent. Peck v. Bartelme, 220 Ill. 199, 77 N. E. 216.

9. Peck v. Bartelme, 220 Ill. 199, 77 N. E. 216.

10. If a petition for cancellation of a compromise offers to do equity by asking to have credited to defendant on the judgment all sums paid out by him under the contract, a restoration of the consideration received is not a condition precedent to the right to maintain the suit. Haydon v. St. Louis, etc., R. Co. [Mo. App.] 93 S. W. 833.

11. Thus, no tender or bond was held necessary in a suit to cancel a deed on the ground of fraud, where the land on which plaintiff's vendor's lien note was a lien, afforded ample security. Romine v. Howard [Tex. Civ. App.] 93 S. W. 690.

12. One who purchases land in bad faith is not entitled to the value of improvements when the deed is set aside. Administrator's purchase from heirs set aside. Reeder v. Meredith [Ark.] 93 S. W. 558. Where tract of land was conveyed as part consideration for assignment of a part of a cause of action, and the assignment was fraudulently made to include the entire cause of action, restoration of the land was not a condition precedent to relief by setting aside the part of the assignment not intended to be made. Bush v. Prescott & N. W. R. Co. [Ark.] 89 S. W. 86. A person in whose favor a note

contract is consummated, and there has been no acceptance of any consideration, no tender of property left with plaintiff is necessary in order that cancellation of existing evidence of a contract may be had.[13] A wholly futile cancellation will not be decreed.[14]

Laches and limitations.[15]—A suit for cancellation must be brought within a reasonable time after the discovery of the fraud or other ground relied on for relief.[16] An unreasonable delay will bar relief,[17] especially where there has been a change in the position of the parties or the subject-matter of the contract,[18] or the rights of third persons have intervened.[19]

§ 2. *Cause of action and grounds for relief.*[20]—Relief will be granted where it appears that the instrument or contract sought to be canceled was procured by means of fraudulent misrepresentations,[21] or other fraud,[22] or by duress or undue

and trust deed were executed knew that the person executing them was insane. The money advanced was squandered or lost by the insane person. Held, in suit by conservator of insane person to set aside note and deed, that a return of the money was not necessary. Amos v. American Trust & Sav. Bank [Ill.] 77 N. E. 462.

13. Deed was never in fact delivered, but was obtained by grantee, who left a note and stock with grantor, which was not accepted. Held, return of note and stock not essential to entitle plaintiff to cancellation of deed. Pierson v. Fisher [Or.] 85 P. 621.

14. A bill to set aside a release of an alleged cause of action at law will not be entertained if such cause of action is not valid. Madison Coal Co. v. Caveglia, 122 Ill. App. 415.

15. See 5 C. L. 502.

16. Where defendants procured a transfer of desired property to a third person and then to themselves, by means of certain false representations as to use of property for mill purposes by first grantee, it was held the first grantee and plaintiff were not at fault in not discovering the fraud before making the transfer. McMullen v. Rousseau, 40 Wash. 497, 82 P. 883. Where corporation protested as soon as it discovered fraud of promoter in procuring an agreement for royalties, and then entered negotiations for settlement, which lasted two years, and on their failure filed bill for cancellation, the suit was held not barred by laches. Fred Macey Co. v. Macey [Mich.] 12 Det. Leg. N. 948, 106 N. W. 722.

17. Right to rescind sale for fraud must be exercised as soon as fraud is discovered. Rose v. Merchants' Trust Co., 96 N. Y. S. 946. Petition for cancellation of deed for fraud having been held to show the demand stale, an amendment which did not cure the petition in this respect was properly refused. Cheney v. McWhorter [Ga.] 53 S. E. 1003.

18. Delay of 7 years in bringing suit for cancellation of deed on ground that grantor was intoxicated at the time held unreasonable, where land had meantime increased in value. Spoonheim v. Spoonheim [N. D.] 104 N. W. 845.

19. To set aside a deed for fraud, suit must be brought within a reasonable time, under the particular circumstances, and delay, especially when it affects third persons, will bar relief. Dunfee v. Childs [W. Va.] 53 S. E. 209.

20. See 5 C. L. 503.

21. One induced to buy bonds by fraudulent misrepresentations may rescind without showing damage. Rose v. Merchants' Trust Co., 96 N. Y. S. 946. Fraudulent representations by brother to sister, who was ignorant of effect of deed, that it would not pass present title, but that she could still dispose of it, held ground for cancellation of deed. Busiere v. Reilly, 189 Mass. 518, 75 N. E. 958. Lease of state lands under water canceled on account of false representations by lessee that it owned the shore front, lease being conditioned on such ownership. Grey v. Morris & Cummings Dredging Co. [N. J. Err. & App.] 63 A. 985. Where execution and delivery of deed were procured by improper means and by false and fraudulent representations of the grantees, the grantors, who rescinded as soon as they discovered the fraud, were entitled to have the deed declared void. Reynolds v. Rickgauer [Neb.] 106 N. W. 175. A gross misrepresentation as to the quantity or location of oil or gas in certain lands is ground for rescission of a contract for the sale of a lease of such lands, since it goes to the essence of the contract. Bruner v. Miller [W. Va.] 52 S. E. 995. Plaintiff's land had been prospected for coal but it appeared doubtful if the amount found was sufficient to warrant working for. Her vendee represented to her that coal was not present in workable quantities, but it was afterwards worked. Held, only an expression of opinion by vendee, and not ground for cancellation. Garrett v. Slavens [Iowa] 105 N. W. 369.

22. Contract for exchange of lands rescinded where fraud and misrepresentation were made to appear. Smith v. Redmond [Iowa] 108 N. W. 461. Deed, not voluntarily delivered, but obtained by deception and fraud, set aside when application for such relief was promptly made. Bryson v. Bridges [Fla.] 41 So. 28. Bill seeking cancellation of agreement procured by corporation promoter for payment of royalties to him held to state cause of action for fraud. Fred Macey Co. v. Macey [Mich.] 12 Det. Leg. N. 948, 106 N. W. 722. Fraud consisting in refusal to pay agreed price for land held ground for rescission of sale as against immediate vendee and a subsequent purchaser who had knowledge of the fraud. Cecil v. Henry [Tex. Civ. App.] 93 S. W. 216. Fraud and deceit of attorney whereby an illiterate woman was induced to assign an entire cause of action owned by her, whereas she

influence;[23] or that the grantor or party executing the contract was incompetent at the time.[24] A mutual mistake as to a material matter is also ground for cancellation,[25] and under some circumstances, the relief will be granted where the mistake is unilateral;[26] but, usually, equity will not rescind a contract for a unilateral mistake unless the other party has contributed to or induced the mistake, and will obtain an unconscionable advantage if relief be not granted.[27] Thus, where a grantor gives a warranty deed of land which he does not own under the mistaken belief that he does own it, the deed will not be canceled, when no fraud, falsehood, misrepresentation, or concealment on the part of the frantee is shown.[28] Where a contract is unconscionable and gives one party an unjust advantage which it would be inequitable to enforce, the contract should be set aside[29] even though the party seeking relief has been careless.[30] Mere inadequacy[31] or failure of consideration[32] is not alone ground for cancellation, but may be considered with other causes for equitable intervention.[33] A negotiable instrument, apparently valid but in fact void, may be canceled,[34] and a conveyance, valid on its face but in fact void, may be set aside as a cloud on title.[35] Where there is an entire want of consideration

intended to assign only a portion of it, held ground for setting aside the assignment, so far as it was fraudulent. Bush v. Prescott & N. W. R. Co. [Ark.] 89 S. W. 86. Woman, estranged from husband, and sustaining improper relations with another man, agreed to move to another town and resume marital relations with him if he would transfer certain property to her. She never intended to keep her promise, and did not do so. Held, ground for cancellation. Jennings v. Jennings [Or.] 85 P. 65. Bill alleged that plaintiff employed defendant to buy an outstanding title to land of which he had given a warranty deed, that defendant procured, by fraud, the transfer of the title to a third person, who transfered it to defendant's partner, who in turn transferred to plaintiff at an excessive price. Bill held to allege cause for cancellation of note given by plaintiff for the last transfer. Roberts v. Sholes [Mich.] 13 Det. Leg. N. 225, 107 N. W. 904.

23. Deed procured from grantor while he was very sick and in bed, held not grantor's conscious, intelligent, and free act. Eggert v. Eggert [Mich.] 13 Det. Leg. N. 219, 107 N. W. 920.. Evidence in suit to set aside deed held to show deed was not grantor's voluntary act but was induced by influence of those standing in confidential relations. Horner v. Bell, 102 Md. 435, 62 A. 736. Bill held to state a cause of action for cancellation of deed by showing mental incompetency of grantor as well as physical weakness, and undue influence by grantee. Stohr v. Stohr [Cal.] 82 P. 777.

24. Intoxication of grantor which made him incapable of understanding the nature and effect of deed, held ground for its avoidance by him. Spoonheim v. Spoonheim [N. D.] 104 N. W. 845. Note and trust deed canceled where maker was insane to the knowledge of the payee. Amos v. American Trust & Sav. Bank [Ill.] 77 N. E. 462.

25. Deed which by mutual mistake included land not intended to be conveyed, canceled. Cullison v. Connor [Ill.] 78 N. E. 14. Mutual mistake of law. Dolvin v. American Harrow Co. [Ga.] 54 S. E. 706.

26. Where a release was executed without knowledge of a junior lien which was thereby made a prior lien, the person executing the release was entitled to have it canceled on the ground of mistake. Troll v. Sauerbrun, 114 Mo. App. 323, 89 S. W. 364.

27, 28. Bibber v. Carville [Me.] 63 A. 303.

29. As where contract for sale of land on instalment plan contained provision that vendor should accept similar contracts procured by vendee as cash payments. Stone v. Moody, 41 Wash. 680, 84 P. 617. A deed may be canceled when it would be unconscionable in the grantee to demand delivery and enforcement of its terms. As where deed of lands was executed without knowledge of their value, owing to recent oil discoveries, the grantors residing at a distance. Hyde v. McFaddin [C. C. A.] 140 F. 433.

30. As where party seeking cancellation of contract for sale of realty ought, perhaps, to have known of presence of unjust provision. Stone v. Moody, 41 Wash. 680, 84 P. 617.

31. Mere inadequacy of consideration or other inequality in the terms of a lease does not in itself constitute a ground to avoid it in equity. Brewster v. Lanyon Zinc Co. [C. C. A.] 140 F. 801.

32. Cancellation of deed refused where no undue influence or incapacity of grantor was shown, only failure to pay rent as agreed being made to appear. Parsons v. Crocker [Iowa] 105 N. W. 162.

33. Evidence held insufficient to show **undue influence** and inadequate consideration and deed set aside. Ladensack v. Johnson [Mich.] 13 Det. Leg. N. 63, 107 N. W. 267. Conveyance by aged widow to son and daughter-in-law, upon express promise to support her, canceled where the widow was ejected from the home and compelled to look elsewhere for support. McIntire v. McIntire [Neb.] 106 N. W. 29.

34. Notes given by one township to another were prima facie valid, and where retained by second township, but were in fact invalid. Held, equity would cancel notes. North Allis Tp. v. Allis Tp. [Mich.] 12 Det. Leg. N. 657, 105 N. W. 139.

35. A person agreed, without consideration, to make a deed to be held in escrow by a third person, and executed it and gave it

for a note and mortgage, and the recorded mortgage constitutes a cloud on title, and there is evidence of fraud in the transaction, equity will cancel the note and mortgage [36] irrespective of any question of other remedies at law.[37] The transfer of a note received for land, before the discovery of fraud in the transaction is not a ratification of the fraudulent transaction so as to bar a suit for its rescission.[38] The mere fact that the statute of limitations is available as a defense against the foreclosure of a mortgage is not a ground for cancellation of the mortgage when the debt secured by it has not been paid.[39]

§ 3. *Procedure. Pleading.*[40]—A petition for cancellation should offer to do complete equity or should state all the facts so that the chancellor may do complete equity between the parties.[41] But failure of the petition to contain such a complete offer of equity, does not go to its sufficiency to state a cause of action.[42] Mere general allegations of fraud are insufficient.[43] A petition for cancellation of a note for fraudulent misrepresentations in the procurement of it, containing a general allegation of the materiality of such representations, and also setting out facts from which their materiality may be inferred, is sufficient as against a general demurrer.[44] The defense that there is an adequate remedy at law must be specially pleaded.[45]

A suit to set aside a deed may be joined with a suit to set aside a will before probate where both papers were executed as a part of a single scheme to obtain the property of decedent.[46] A suit to set aside an agreement with a surviving partner and for an accounting is not an improper joinder of causes of action where no accounting can be had until the agreement has been set aside.[47] A complaint for the annulment of a deed alleged to have been fraudulently procured, for the appointment of a receiver, for partition, and for an accounting, states but one cause of action.[48] When a cancellation is sought for fraud on creditors, the fraud may be traversed and as alternative thereto a claim and selection of the land as homestead may be made.[49]

Parties.[50]—Persons interested in the subject-matter, who will be affected by the decree, should be made parties.[51]

Evidence and proof.[52]—The burden is upon the party alleging mistake, fraud,

to the grantee to deliver to the third person. The grantee died with the deed in his possession. Held, the deed should be cancelled. Hobson v. Anderson [Colo.] 83 P. 634. Paragraph in complaint to cancel deed which alleged that the deed was in fact a mortgage given to indemnify certain parties, and was therefore void, being given by a married woman, held to state a cause of action. Warner v. Jennings [Ind. App.] 76 N. E. 1013. Where a bill to quiet title and set aside a deed alleged that the deed under which defendant claimed was forged, and that plaintiff had nothing to do with its execution, it stated a cause of action for cancellation, and was not objectionable as not setting out with fullness facts constituting fraud. Cutler v. Fitzgibbons [Cal.] 83 P. 1075.

36, 37. Garretson v. Witherspoon [Okl.] 83 P. 415.

38. Romine v. Howard [Tex. Civ. App.] 93 S. W. 690.

39. Tracy v. Wheeler [N. D.] 107 N. W. 68. Engerud, J., dissenting.

40. See 5 C. L. 505.

41, 42. Haydon v. St. Louis, etc., R. Co. [Mo. App.] 93 S. W. 833.

43. Anderson v. Goodwin [Ga.] 54 S. E. 679.

44. Karner v. Ross [Tex. Civ. App.] 95 S. W. 46.

45. Rose v. Merchants' Trust Co., 96 N. Y. S. 946; Irving v. Bruen, 110 App. Div. 558, 97 N. Y. S. 180.

46. Irving v. Bruen, 110 App. Div. 558, 97 N. Y. S. 180.

47. Smith v. Irvin, 108 App. Div. 218, 95 N. Y. S. 731.

48. There is but one primary right sought to be protected—plaintiff's ownership of an interest in land. Du Bose v. Kell [S. C.] 51 S. E. 692.

49. Wilks v. Vaughn, 73 Ark. 174, 83 S. W. 913.

50. See 5 C. L. 506.

51. In action by vendor to cancel his deed and the deed by his vendee, such vendee was a proper party. McMullen v. Rousseau, 40 Wash. 497, 82 P. 883. In a suit to set aside an agreement, all the parties who executed it are necessary parties. Smith v. Irvin, 108 App. Div. 218, 95 N. Y. S. 731.

52. See 5 C. L. 506.

or unconscionable conduct, or other cause for equitable intervention, to prove the same as alleged,[53] and such proof must be full, clear, and convincing.[54] But where a confidential relation exists, the burden of proof may shift to the one in whom confidence was reposed to disprove an alleged breach thereof.[55] The rule excluding parol evidence tending to vary, add to, or contradict a written instrument, does not apply in a suit to cancel an instrument procured by means of fraudulent misrepresentations.[56]

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PART V. CARRIERS OF BAGGAGE AND PASSENGERS' EFFECTS (600).

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53. Burden of proving fraud is on party alleging it. Patnode v. Deschenes [N. D.] 106 N. W. 573. One seeking to have a deed set aside on the ground of the grantor's incapacity to execute it, has burden of proving such incapacity. Chadwell v. Reed [Mo.] 95 S. W. 227; Peck v. Bartelme, 220 Ill. 199, 77 N. E. 216.

54. To cancel a note and deed of trust to secure it on the ground that they were given for a contemplated loan which was never made, the proof must be very full, clear, and convincing. Brown v. Click [W. Va.] 53 S. E. 16.

Evidence held insufficient to show fraud warranting cancellation of conveyance. Ladensack v. Johnson [Mich.] 13 Det. Leg. N. 63, 107 N. W. 267. Evidence insufficient to show fraud in contract for assignment of patent so as to warrant cancellation. Marsh v. Cortis, 144 F. 132. Evidence insufficient to prove fraud alleged in suit to cancel deed.

Part I. General Principles.

§ 1. *Definition and distinction.*[58]—A common carrier of goods is one who undertakes to transport chattels for hire for all who may choose to employ him, whether usually or occasionally, as a principal or as an incident and subordinate occupation,[59] and it is immaterial whether such person owns the means of transportation or not.[60] A messenger company which merely undertakes to furnish messengers, who after being furnished are under the control of the person sending the message, is not a common carrier,[61] except in the sense that it must serve the public impartially.[62] A common carrier of packages and parcels generally is not a common carrier in respect to money in the absence of a special undertaking to carry.[63] Persons operating passenger elevators in public buildings are common carriers,[64] but not those operating them in private buildings.[65] A railroad company as a common carrier is a public institution only in a qualified sense.[66]

§ 2. *Public duty, control, and regulation. A. In general.*[67]—The principal object of the interstate commerce act is to secure just and reasonable rates; to prohibit unjust discriminations in the rendition of like service under substantially similar circumstances; to prevent undue or unreasonable preference to persons or localities; to inhibit greater compensation for a shorter than for a longer distance over the same road; and to abolish combinations for the pooling of freight;[68] but not to prevent competition between different roads.[69] Where a violation of the interstate commerce act has been proven, an injunction will issue against further

Patnode v. Deschenes [N. D.] 106 N. W. 573. Evidence insufficient to show that deed, sought to be canceled, was executed by mistake, a power of attorney only being intended. Ziobro v. Bialos [N. J. Eq.] 63 A. 346. In suit to cancel mortgage on ground that it was given for stock which mortgagor was induced to take by false representations pursuant to a conspiracy, evidence held insufficient to show conspiracy or false representations. Smith v. Krueger [N. J. Eq.] 63 A. 850. Evidence insufficient to show conspiracy to defraud plaintiff of land; hence cancellation of deed of sale could not be had. Wood v. Noel [La.] 40 So. 857.

55. In an action by a sister to set aside for want of consideration, fraud and breach of confidential relations, a paper writing wherein she agrees to convey certain property to her brother, the burden of proof is upon the brother. Goodhue v. Goodhue, 3 Ohio N. P. (N. S.) 225.

56. Karner v. Ross [Tex. Civ. App.] 95 S. W. 46.

57. This topic treats only of the laws relating to common carriage of persons or goods. That relating to corporations engaged in carriage (See Railroads, 6 C. L. 1194; Shipping and Water Traffic, 6 C. L. 1465) is pertinent to other topics specificially devoted to it. Likewise the relations between the carrier and its employes are those of Master and Servant, 6 C. L. 521. The rules peculiar to water carriage are treated in shipping and Water Traffic, 6 C. L. 1465.

58. See 5 C. L. 507.

59. Owner of schooner held common carrier. Hahl v. Laux [Tex. Civ. App.] 93 S. W. 1080. A common carrier of goods which transports live stock is as to the latter property a common carrier. Central of Georgia R. Co. v. Hall [Ga.] 52 S. E. 679.

60. Lines over which such service extends may be owned by others. Cownie Glove Co. v. Merchants' Dispatch Transp. Co. [Iowa] 106 N. W. 749.

61. Haskell v. Boston Dist. Messenger Co. [Mass.] 76 N. E. 215.

62. White v. Postal Tel. & Cable Co., 25 App. D. C. 364.

63. Hence where money is sent in a package and its nature is not made known, no liability as carrier exists. Gilman v. Postal Tel. Co., 48 Misc. 372, 95 N. Y. S. 564. The presumption is that a messenger company does not act as a common carrier to carry money (White v. Postal Tel. & Cable Co., 25 App. D. C. 364), and hence one seeking to recover for money loss must prove that it has undertaken to carry money (Id.). Lower court properly directed a verdict, there being no evidence of such undertaking. Id. Entry of service fees in account book and collection thereof with many other items does not amount to a ratification of the undertaking of its messenger to carry money. White v. Postal Tel. & Cable Co., 25 App. D. C. 364.

64. Anderson Art Co. v. Greenburg, 118 Ill. App. 220.

65. Edwards v. Manufacturers' Bldg. Co. [R. I.] 61 A. 646. Liability for negligent operation of elevators is treated in the topic Buildings and Building Restrictions, 7 C. L. 507.

66. Until demand is made for transportation by some member of the public, it is merely a private corporation. Atlantic Terminal Co. v. American Baggage & Transfer Co. [Ga.] 54 S. E. 711.

67. See 5 C. L. 508.

68. Act Feb. 4, 1887, c. 104, 24 Stat. 379 (U. S. Comp. St. 1901, p. 3154). Interstate Commerce Commission v. Chicago Great Western R. Co., 141 F. 1003.

69. Interstate Commerce Commission v. Chicago Great Western R. Co., 141 F. 1003.

like violation, but not against violations generally,[70] and nonobservance of such injunction constitutes contempt[71] to be prosecuted according to the rules relating to contempt proceedings generally.[72] The Federal circuit courts may sustain and enforce an order of the interstate commerce commission on a different ground than that assigned by the commission,[73] but prior to the Elkins Act such courts had no original equitable jurisdiction to restrain violations of the interstate commerce act,[74] nor is the Elkins Law retroactive.[75] Neither have they original jurisdiction to issue a mandamus to compel railroads to give information demanded under the act.[76]

The state statutes usually provide for a more or less limited review of the proceedings and orders of local railroad commissions.[77]

By statute in Georgia common carriers must furnish passengers with pure drinking water.[78] Municipalities have ordinarily no power to make common carriers liable to liquor license regulations.[79]

(§ 2) *B. Duty to undertake and provide carriage.*[80]—In many states statutes have been enacted supplementing the common-law duty of carriers to receive[81] and carry passengers[82] and goods,[83] which may be enforced by any person having a

70. A carrier adjudged guilty of discrimination by contracting to sell and deliver at an insufficient price to yield the published rate after deducting the purchase price may be enjoined from continuing such contracts, but not from discrimination in general. New York, etc. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 50 Law. Ed. —.

71. An order prohibiting rebates on grain; packing-house products, or "any other interstate traffic" under the doctrines of ejusdem generis and noscitur a sociis does not include rebates on salt. United States v. Atchison, etc. R. Co., 142 F. 176.

72. Contempt proceedings for violation of an order enjoining rebates is criminal in character and defendant is entitled to every reasonable doubt as to the obligatory force of the order. United States v. Atchison, etc., R. Co., 142 F. 176.

73. Hence where the commission ordered certain conditioned rates discontinued as constituting a pooling within the interstate commerce act, the court may sustain the order if the rates violate the act in any respect. Southern Pac. Co. v. Interstate Commerce Commission, 200 U. S. 536, 50 Law. Ed. —.

74. United States v. Atchison, etc. R. Co., 142 F. 176. Nor had it jurisdiction on the ground that the acts constitute a monopoly within the Sherman Anti-Trust Act (Act July 2, 1890, c. 647, 26 Stats. 209 [U. S. Comp. St. 1901, p. 3200]). Id.

75. Hence no proceeding for contempt can be maintained for violation of an order issued by the circuit court prior to the act. United States v. Atchison, etc. R. Co., 142 F. 176. Especially where nothing is done to revive the order under the act. Id.

76. Such jurisdiction cannot be inferred from giving of the right to the commission to demand such information nor from the direction to the district attorneys to institute proper proceedings to enforce the orders of the commission. United States v. Lake Shore, etc. R. Co., 197 U. S. 536, 49 Law. Ed.—.

77. The appellate court of Indiana has jurisdiction to entertain appeals from the railroad commission to determine whether a rate fixed is reasonable (Chicago R. Co. v. Railroad Commission [Ind. App.] 78 N. E. 338), also constitutional questions concerning its powers (Id.), but the constitutionality of the statute creating the commission cannot be raised on a motion to dismiss the petition filed before the commission (Id.).

78. Pen. Code 1897, § 522, making it a crime for common carriers to fail to provide pure drinking water for passengers has been held constitutional. The legislature has power to impose a duty upon a carrier and make failure of performance a crime. Southern R. Co. v. State [Ga.] 54 S. E. 160. Nor is such act void as being special in its nature in that a part of the punishment prescribed for its violation is not applicable to corporations. Id.

79. The charter of Lawrenceville, Ga., held not to confer power upon the mayor and council to enact an ordinance prohibiting any common carrier from delivering intoxicating liquors without payment of license. Southern Exp. Co. v. Rose Co. [Ga.] 53 S. E. 185.

80. See 5 C. L. 509.

81. A carrier is liable under Revisal 1905, § 2631, where its agent refused to accept or issue a bill of lading on the ground that he did not have time to look up the rate, although the goods are put in the warehouse. Twitty v. Southern R. Co. [N. C.] 53 S. E. 957.

82. An ordinance requiring omnibus drivers to accept "all" persons offering to become passengers is void only so far as it requires acceptance of passengers not entitled to ride. Atlantic City v. Brown [N. J. Err. & App.] 62 A. 428. No circumstances shown to justify refusal. Id. Under Comp. Laws, § 6235, imposing a penalty for refusing to carry a passenger without legal excuse, a carrier is not liable for failure to carry on a particular train which had been discontinued, providing the mistake in selling a ticket for use on such train is the mistake of the local agent. Geers v. Michigan Cent. R. Co. [Mich.] 12 Det. Leg. N. 795, 106 N. W.

special interest,[84] by mandamus,[85] if the carrier refuses without legal excuse.[86] Such states must prescribe reasonable penalties,[87] and must not impose a burden upon interstate commerce.[88] State railroad commissioners, however, have no power to compel carriers to transport beyond the state line.[89] Pleadings under a statute prohibiting combination among carriers to prevent continuous passage must bring the case within the letter of the statute.[90]

The duty to furnish cars[91] upon demand is imposed in some states by statute under penalty, and such statutes being penal in their nature, are strictly construed.[92] Under such statutes unusual and unexpected pressure of business constitutes a valid excuse for failure to furnish cars.[93] State statutes requiring carriers to furnish cars must not impose a burden upon interstate traffic.[94] An agreement among shippers and carriers as to what shall be an equitable distribution of cars under the Federal statutes[95] may be enforced by mandamus.[96]

(§ 2) *C. Charges.*[97]—The interstate commerce act provides that all charges on interstate shipments shall be reasonable, and in determining whether a rate is reasonable the following factors may be considered, viz: the value of the service to

72. If a change of schedule was actually communicated to the local agent before a sale was made, the company was relieved. Id. Not liable although plaintiff may have been led to believe that such train was still running from information from a working time-table either directly or through defendant's local agent, such table not being intended for the benefit of the public and subject to change at will. Id.

83. In Pennsylvania a mine owner may connect his side track with a carrier's line as a matter of right. Olanta Coal Min. Co. v. Beech Creek R. Co., 144 F. 150. Nor is the right affected by the fact that the coal to be shipped is inferior in quality to the other coal carried on the line. Id.

84. A merchant accustomed to fill orders in a neighboring city and send the goods by express, has a sufficient special interest. Southern Express Co. v. Rose Co. [Ga.] 53 S. E. 185.

85. Civ. Code 1905, § 4869. Southern Express Co. v. Rose Co. [Ga.] 53 S. E. 185.

86. An invalid municipal ordinance prohibiting a carrier from delivering intoxicating liquors does not justify a refusal to accept shipment to that destination. Southern Exp. Co. v. Rose Co. [Ga.] 53 S. E. 185. A common carrier is not obliged to transport goods offered in prosecution of an illegal business. As lottery goods. State v. U. S. Exp. Co. [Minn.] 104 N. W. 556. Nor will mandamus lie to enforce carriage. Id.

87. A penalty of twenty dollars imposed by an ordinance on omnibus drivers for the refusal to carry a passenger is not excessive. Atlantic City v. Brown [N. J. Err. & App.] 62 A. 428.

88. Where there are inadequate train facilities, an order of the railroad commissioners requiring certain interstate mail trains to stop is not void as imposing a burden upon interstate commerce (Railroad Com'rs v. Atlantic Coast Line R. Co. [S. C.] 54 S. E. 224), and a writ of mandamus will lie to compel compliance (Id.).

89. State v. Louisville & N. R. Co. [Fla.] 40 So. 885. No power to impose a penalty for violation of such an order. Id.

90. A petition under Code, §§ 2125, 2129, 2130, failing to allege any combination, contract, or agreement, is insufficient. Clark v. American Exp. Co. [Iowa] 106 N. W. 642.

91. See 5 C. L. 510.

92. Rev. St. 1895, arts. 4498, 4499. Houston & T. C. R. Co. v. Buchanan [Tex. Civ. App.] 94 S. W. 189. Does not require companies to furnish cars to be used beyond their lines, especially where there is no partnership or traffic agreement. Id. Written demand construed to request cars for through shipment. Id. See, also, Texas & P. R. Co. v. Barrow [Tex. Civ. App.] 94 S. W. 176. A demand for cars "as soon as possible," held insufficient. Texas & P. R. Co. v. Hughes [Tex.] 91 S. W. 567.

93. An unprecedented demand for cars is a sufficient excuse for failure to furnish as required by Kirby's Dig. § 6804. St. Louis S. W. R. Co. v. Clay Gin Co. [Ark.] 92 S. W. 531. St. Louis S. W. R. Co. v. Leder Bros. [Ark.] 95 S. W. 170. Where carrier's evidence tended to show an unprecedented demand while that of plaintiff that many of defendant's cars were let out to other roads, it was for the jury to determine whether defendant was properly equipped to meet ordinary demands and whether defendant permitted its cars to be in the service of other roads or it unavoidably so happened. Id. Evidence that the failure to furnish cars was due to an extraordinary acccumulation of freight; that the company had seven cars for each mile of its line, which compared favorably with other carriers in that region, held sufficient to relieve from liability. St. Louis S. W. R. Co. v. Clay Gin Co. [Ark.] 92 S. W. 531.

94. Rev. St. arts. 4497-4500, admitting no excuse except as arise from "strikes or other public calamities" is unconstitutional as applied to interstate commerce as imposing a burden thereon. Houston & T. C. R. Co. v. Mayes, 201 U. S. 321, 50 Law. Ed.—.

95. Act Feb. 4, 1887 (24 Stats. 380, c. 104 [U. S. Comp. St. 1901, p. 3155]).

96. As provided by Act Mar. 2, 1889 (25 Stat. 862, c. 382, § 10 [U. S. Comp. St. 1901, p. 3172]). United States v. Norfolk & W. R. Co. [C. C. A.] 143 F. 266.

97. See 5 C. L. 511.

the shipper,[98] the cost of service to the carrier,[99] the weight, bulk, and convenience of the property to be transported,[1] the amount, the number shipping, and the regularity of shipments,[2] the general public good,[3] and the competition.[4] But none of the above factors alone are necessarily controlling, nor are they all as a matter of law.[5] A carrier may exact the rate duly established under the interstate commerce act notwithstanding a contract with the shipper to carry at a lower rate.[6]

The states have power to regulate charges on intra-state shipments, and this power is not alienated by a general grant to carriers of power to fix rates.[7] State railroad commissioners have only such powers as are expressly or impliedly conferred by statute upon them,[8] and may make general rates but not for particular individuals.[9] Under a penal statute excusing overcharges due to mistake not amounting to gross negligence,[10] a mistake of law will suffice.[11] In South Carolina no penalty for failure to post a schedule of rates established by the commission can be inflicted unless such schedule is valid,[12] and a reasonable notice thereof has been given to the railroad,[13] and the petition must allege all facts necessary to show a duty to post.[14] Such action need not be prosecuted in the name of the state.[15]

By statute [16] and ordinance,[17] reduced rates on street cars for school children

98. Interstate Commerce Com. v. Chicago G. W. R. Co., 141 F. 1003, **citing** Interstate Commerce Com. v. B. & O. R. Co., 43 F. 37, 53; Noyes, Am. R. R. Rates, 53.

99. Interstate Commerce Com. v. Chicago G. W. R. Co., 141 F. 1003, **citing** Interstate Commerce Com. v. B. & O. R. Co., 43 F. 37, 53; Ransome v. Eastern R. Co. [1857] 1 C. B. 437, 26 Law J. C. P. 91; Judson on Interstate Commerce, §§ 148, 149; Western Union Tel. Co. v. Call Pub. Co., 181 U. S. 92, 45 Law. Ed. 765; Interstate Commerce Com. v. Detroit, etc. R. Co., 167 U. S. 633, 42 Law. Ed. 306.

1. Interstate Commerce Com. v. Chicago G. W. R. Co., 141 F. 1003.

2. Interstate Commerce Com. v. Chicago G. W. R. Co., 141 F. 1003, **citing** Interstate Commerce Com. v. B. & O. R. Co., 145 U. S. 263, 36 Law. Ed. 699.

3. Including the good to the shipper, the railroad company and the different localities. Interstate Commerce Com. v. Chicago G. W. R. Co., 141 F. 1003, **citing** Interstate Commerce Com. v. B. & O. R. Co., 145 U. S. 263, 36 Law. Ed. 699.

4. Interstate Commerce Com. v. Chicago G. W. R. Co., 141 F. 1003, **citing** Pickering Phipps v. London & Northwestern R. Co., 2 Q. B. D. (construes § 2 of the English Act of 1854, very similar to § 3 of our act); Interstate Commerce Com. v. B. & O. R. Co., 145 U. S. 263, 36 Law. Ed. 699; Cincinnati, etc., R. Co. v. Interstate Commerce Com., 162 U. S. 184, 40 Law. Ed. 935; Interstate Commerce Com. v. Alabama Midland R. Co., 168 U. S. 144, 42 Law. Ed. 414; Louisville & N. R. Co. v. Behlmer, 175 U. S. 648, 44 Law. Ed. 309; East Tennessee, etc., R. Co. v. Interstate Commerce Com., 181 U. S. 1, 45 Law. Ed. 719; Texas & P. R. Co. v. Interstate Commerce Com., 162 U. S. 197, 40 Law. Ed. 940; Interstate Commerce Com. v. Louisville & N. R. Co., 190 U. S. 273, 47 Law. Ed. 1047.

5. The reasonableness of a rate is a question of fact to be determined by the circumstances of the case. Interstate Commerce Com. v. Chicago G. W. R. Co., 141 F. 1003.

6. Texas & P. R. Co. v. Mugg, 202 U. S. 242, 50 Law. Ed. ——.

7. Legislature may regulate and fix rates notwithstanding Burns' Ann. St. 1901, § 5153, giving to the railroads the right to fix them. Chicago, etc. R. Co. v. Railroad Com. [Ind App.] 78 N. E. 338.

8. State v. Atlantic Coast Line R. Co. [Fla.] 40 So. 875.

9. An order requiring the railroad to give the same rates to the Postal Cable Telegraph Co. as to the Western Union Telegraph Co. is invalid. State v. Atlantic Coast Line R. Co. [Fla.] 40 So. 875. Rates general in their terms are valid though applicable only to one shipper and will be enforced by mandamus. Id.

10. A mistake which an ordinarily prudent person might make excuses under Laws 1890, p. 1095, c. 565, § 37, as amended by Laws 1892, p. 1392, c. 676. Goodspeed v. Ithaca St. R. Co. [N. Y.] 77 N. E. 392.

11. As the misconstruction of a statute. Goodspeed v. Ithaca St. R. Co. [N. Y.] 77 N. E. 392.

12. But it is not necessary under Civ. Code 1902, § 2093, that the commission shall have established a schedule for all roads within the state. Johnson v. Seaboard Air Line R. Co. [S. C.] 52 S. E. 644.

13. Under Civ. Code 1902, § 2093, a notice of 30 days by the railroad commissioners to the railroads of a schedule of rates held reasonable. Johnson v. Seaboard Air Line R. Co. [S. C.] 52 S. E. 644.

14. Johnson v. Seaboard Air Line R. Co. [S. C.] 52 S. S. 644. A prosecution under Civ. Code 1902, §§ 2092, 2093, must allege that the rates are reasonable; that the commission delivered a schedule to defendant; that the schedule included charges for transportation of cars. Id.

15. Not a "prosecution" within the constitution. Johnson v. Seaboard Air Line R. Co. [S. C.] 52 S. E. 644.

16. Tex. Act April 10, 1903, § providing for half fare for school children on street cars, is not void as impairing the obligations of contracts where such contracts have been entered into between a municipality and a company since the adoption of Tex. Const. 1876, making such contracts revocable. San Antonio Traction Co. v. Altgelt, 200 U. S.

have been established in some cities. In New York street railway companies must issue transfers for continuous passage over any portion of their lines,[18] or of lines under their control,[19] under pain of penalty.[20] Under the power of regulation a city cannot compel a street car company to accept transfers from other independent lines.[21] Cities may fix reasonable charges for licensed omnibus drivers.[22]

(§ 2) *D. Discriminations and preferences.*[23]—Under the interstate commerce clause, congress has power to require that freight rates[24] shall be uniform to all shippers,[25] and by the interstate commerce act has prohibited undue preference or advantage[26] to persons, localities, or particular classes of traffic.[27] But inequality of charge does not constitute an undue preference or advantage.[28] and is not pro-

304, 50 Law. Ed.—-. Nor where the contract was made prior thereto if there has been a foreclosure sale since, notwithstanding an ordinance expressly conferring upon the purchaser all "contract rights" of the defunct corporation. Id.

17. An ordinance requiring a street railway company to sell tickets to pupils presenting a certificate of enrollment in some school at the rate of two for five cents includes students going to a business college. Especially in view of the fact that the road was accustomed to issue tickets to them. Northrop v. Richmond [Va.] 53 S. E. 962; Id. [Va.] 53 S. E. 963.

18. A statute making it a penal offense for a street railway company to refuse a transfer for a continuous trip over any portion of its road does not apply to independent lines not intersecting. Immaterial under Laws 1892, p. 1406, c. 676, § 104, that the lines come within thirty feet of each other. Ketchum v. New York City R. Co., 48 Misc. 367, 95 N. Y. S. 553. Under a statute providing that street surface railroads shall issue transfers to its own connecting lines, a carrier cannot make any rule limiting the effect of the statute. As a rule requiring a passenger to ask for transfer at the time of paying fare. Levine v. Nassau Elec. R. Co., 99 N. Y. S. 422. Under a statute compelling street car companies to issue transfers to its own connecting lines under pain of a penalty, a carrier is not liable where it has provided for such transfers and the failure to give was due to misjudgment or negligence of the conductor Laws 1890, p. 1114, c. 565, § 105. Schwartzman v. Brooklyn Heights R. Co., 98 N. Y. S. 941.

19. The word "control" in a statute prohibiting any street railroad to charge more than a specific amount for a continuous ride from one point on its road to another point on any line "under its control" means control of the operation of such line. Not merely control of a majority of its shares of stocks. Railroad Law, Laws 1890, p. 1113, c. 565, § 101, as amended by Laws 1897, p. 776, c. 688. Senior v. New York City R. Co., 97 N. Y. S. 645.

20. Where a passenger actually desired to transfer, it is immaterial that one of the objects of the trip was to recover the penalty, or that she has other suits pending. Fitzmartin v. New York City R. Co., 99 N. Y. S. 765. No liability unless there has been strict proof of a violation of the statute. Proof that plaintiff asked for a transfer to "Amsterdam Ave." and is given one good only one way, does not show such violation. Gasper v. New York City R. Co., 99 N. Y. S. 904.

21. Not a regulation but the taking of property without due process of law. Chicago City R. Co. v. Chicago, 142 F. 844. Nor is it material that the obligation is reciprocal and would not injure the company financially. Id.

22. An ordinance fixing the fare at ten cents for omnibus drivers for points within the city limits is reasonable. Atlantic City v. Brown [N. J. Err. & App.] 62 A. 428.

23. See 5 C. L. 512.

24. The term "freight rates" as so used means the net cost of the transportation of his property, not necessarily the amount originally paid to the carrier. Interstate Commerce Commission v. Reichmann, 145 F. 235.

25. Interstate Commerce Commission v. Reichmann, 145 F. 235. The power of congress to require uniform rates for all shippers applies not only to common carriers but to all persons occupying such relation to transportation that the conduct of their business may affect the uniformity of the rates. Id. As to private car companies leasing cars for a mileage rental. Id.

26. The phrase "undue or unreasonable preference or advantage" as applied to classes of traffic has same meaning as when applied to persons. Interstate Commerce Com. v. Reichmann, 145 F. 235. Hence reduction of rates on dressed meats due to competition need not be followed by reduction of live stock rates. Interstate Commerce Com. v. Chicago G. W. R. Co., 141 F. 1003. A carrier is guilty of giving undue preference if it contracts to sell and transport a commodity at a price insufficient to yield the published rate after deducting the cost of purchase, unless by charter or legislation existing at the time of the adoption of the act, it was authorized to buy and sell, (New York etc., R. Co. v. Interstate Commerce Com., 200 U. S. 361, 50 Law. Ed. ——), and it is immaterial that the contract price may have been sufficient to yield the published rates when made. (Id.) A carrier cannot give one mill operator a lower rate on logs merely because such person ships the finished product over its line. Hilton Lumber Co. v. Atlantic Coast Line R. Co. [N. C.] 53 S. E. 823.

27. Interstate Commerce Com. v. Chicago G. W. R. Co., 141 F. 1003.

28. Railroads are only bound to give the same terms to all persons alike, under the same conditions and circumstances. Interstate Commerce Com. v. Chicago G. W. R. Co., 141 F. 1003, **citing** Interstate Commerce Com. v. B. & O. R. Co., 145 U. S. 272, 36 Law. Ed. 699.

hibited.[29] In determining whether a preference is undue and unreasonable, it is proper to consider various elements, such as the convenience of the public, the fair interest of the carrier, the relative quantity of traffic involved, the relative cost of the services and profit to the company, the situation and circumstances of the respective customers with reference to each other, as competitive or not,[30] and the competition.[31] The adoption of a through rate conditioned that the initial carrier may route the shipment beyond its terminal is not violative of the interstate commerce act.[32] The Elkins Act also prohibits rebates and discrimination,[33] and an action may be brought under it for any discrimination prohibited by law.[34]

Some states have enacted statutes prohibiting discrimination on intra-state traffic.[35] In Mississippi an express company is liable for actual damages for unintentional discrimination,[36] and for double damages if deliberate.[37] In the case of a shortage of facilities, in Arkansas a carrier must distribute such cars as it has without discrimination.[38] But independent of statute a common carrier is bound to serve all members of the public alike who apply under similar conditions.[39]

A petition under the Elkins Act to enjoin the giving and receiving of rebates must show illegal payment and unlawful intent.[40] An action by an individual to

29. Interstate Commerce Com. v. Chicago G. W. R. Co., 141 F. 1003, **citing** Interstate Commerce Com. v. Alabama Midland R. Co., 168 U. S. 144, 42 Law. Ed. 414; Cincinnati, etc., R. Co. v. Interstate Commerce Com., 162 U. S. 184, 40 Law. Ed. 935.

30. Interstate Commerce Com. v. Chicago G. W. R. Co., 141 F. 1003, **citing** Interstate Commerce Com. v. B. & O. R. Co., 43 F. 37, afd. 145 U. S. 263, 36 Law. Ed. 699.

31. Interstate Commerce Com. v. Chicago G. W. R. Co., 141 F. 1003, **citing** East Tennessee, etc., R. Co. v. Interstate Commerce Com., 181 U. S. 1, 45 Law. Ed. 719; Interstate Commerce Com. v. Alabama Midland R. Co., 168 U. S. 144, 42 Law. Ed. 414; Judson on Interstate Commerce Law, §§ 175-183; Interstate Commerce Com. v. Clyde S. S. Co. [C. C. A.] 93 F. 83. And it is immaterial that defendant commenced the competition. Id. But the reduction must have been necessary to successfully compete for the business. Id.

32. As subjecting the shippers to unreasonable prejudice and disadvantage as prohibited by section 3. Southern Pac. Co. v. Interstate Commerce Com., 200 U. S. 536, 50 Law. Ed. ——. As discriminating against the fruit traffic, as prohibited by section 3. Id. As constituting a pooling, within section 5. Id. Nor is it offensive to the clause requiring publication of rates within section 6. Id.

33. Where a corporation is formed and given the right to handle the freight of a shipper and at the same time is given a commission by the carrier for getting freight, the government may look behind the corporate entity to determine whether it is a dummy for receiving rebates. The habitual receipt of rebates by the shipper prior to its incorporation may be shown on the issue of intent. United States v. Milwaukee Refrigerator Transit Co., 142 F. 247. The Elkins Act, making it unlawful for any "person or corporation to offer, grant, or give * * * any rebate, concession, or discrimination in respect to the transportation of property," renders it unlawful for a private car company to furnish cars to carriers for a mileage rental to give rebates to shippers using its cars. Interstate Commerce Com. v. Reichmann, 145 F. 235.

34. Sec. 3 of the Elkins Act (Act Feb. 19, 1903, c. 708, 32 Stat. 848 [U. S. Comp. St. Supp. 1905, p. 600]) authorizes actions for discriminations under interstate commerce act. Interstate Commerce Com. v. Chicago G. W. R. Co., 141 F. 1003.

35. Under Rev. St. 1895, art. 4574, subd. 2, a carrier is guilty of discrimination in routing goods contrary to the contract of shipment. San Antonio & A. P. R. Co. v. Stribling [Tex.] 14 Tex. Ct. Rep. 38, 89 S. W. 963. But not in refusing to allow the shipper to select the route in the first instance. Id. Evidence of discriminatory charges held sufficient to go to the jury. Hilton Lumber Co. v. Atlantic Coast Line R. Co. [N. C.] 53 S. E. 823. Under a statute prohibiting any carrier to charge one shipper a greater compensation for transportation than it receives from another for similar and "contemporaneous" service, the word contemporaneous means a period of time through which shipments are made by plaintiff at the one rate and by other shippers at another. Revisal 1905, § 3749. Id.

36. Ann. Code 1892, § 4291. American Express Co. v. Crawley [Miss.] 41 So. 261.

37. Ann. Code 1892, § 4288. American Exp. Co. v. Crawley [Miss.] 41 So. 261.

38. St. Louis S. W. R. Co. v. Clay Gin Co. [Ark.] 92 S. W. 531. Evidence that defendant furnished plaintiff five cars one month, his rival six; that in another they were each furnished seventeen; and later the plaintiff was given ten while his rival received only seven, shows no discrimination under Kirby's Dig. § 6804, although between certain specific dates the rival company received six to plaintiff's three. Id.

39. State v. Atlantic Coast Line R. Co. [Fla.] 41 So. 529. Where it voluntarily undertakes to distribute poles and men between stations for one telegraph company, it must render like service for all telegraph companies applying. Id.

40. Petition held sufficient. United States v. Milwaukee Refrigerator Transit Co., 142 F. 247.

recover damages for discriminations in violation of the interstate commerce act does not come within the state statutes of limitations,[41] but is controlled by Federal statute.[42] In actions to recover discriminatory overcharges, the failure to allege the exact date of plaintiff's shipment or of the shipments by others at a lower rate is not a ground for dismissal;[43] and in such actions the burden is on plaintiff to prove the charges by a preponderance of the evidence.[44] To establish such discriminatory charges, evidence of rates over other portions of the line under substantially the same conditions is admissible.[45]

§ 3. *Connecting carriers, draymen, and transfermen.*[46]—Ordinarily the initial carrier[47] and each succeeding carrier is liable only for the damages proximately resulting from their respective negligence,[48] and its responsibility termi-

41. Carter v. New Orleans & N. E. R. Co. [C. C. A.] 143 F. 99.

42. Rev. St. § 1047 (U. S. Comp. St. 1901) applies. Carter v. New Orleans & N. E. R. Co. [C. C. A.] 143 F. 99.

43. Especially where no demand for a bill of particulars under Revisal 1905, § 494, is made. Hilton Lumber Co. v. Atlantic Coast Line R. Co. [N. C.] 53 S. E. 823.

44. Hilton Lumber Co. v. Atlantic Coast Line R. Co. [N. C.] 53 S. E. 823.

45. Hilton Lumber Co. v. Atlantic Coast Line R. Co. [N. C.] 53 S. E. 823. Testimony of charges on shipments from without the state is not rendered inadmissible by its interstate character. Id.

46. See 5 C. L. 512.

47. In the absence of evidence to the contrary, it will be presumed that one operating the machinery of a carriage is a servant and not a tenant. Wilson v. Alexander, 115 Tenn. 125, 88 S. W. 935. Evidence held to show that defendant was liable as a ferryman. Id. The initial carrier is not liable for delay after delivery to connecting carrier. Texas & P. R. Co. v. Scoggin [Tex. Civ. App.] 14 Tex. Ct. Rep. 297, 90 S. W. 521. Instruction held erroneous as relieving the initial carrier from liability for injuries occurring on its line. Walter v. Alabama Great Southern R. Co., 142 Ala. 474, 39 So. 87. In an action against connecting carriers for delay in transporting livestock, where contracts were not joint for through carriage, and evidence did not show delay by initial carrier, instruction making latter's liability depend solely upon finding that its agent agreed to ship cattle by special train held proper. Rogers v. Texas & P. R. Co. [Tex. Civ. App.] 94 S. W. 158. Evidence held to justify finding that damage to goods was proximate result of negligence of initial carrier in transporting them. Texas & P. R. Co. v. Warner [Tex. Civ. App.] 93 S. W. 489. Evidence held sufficient to show that the railroads were not separate organizations but that one was simply a division of the other. Southern R. Co. v. Thomas [Ky.] 90 S. W. 1043. A receipt reciting "Received from the National Motor Vehicle Co., by the Panhandle R. R. Co.," etc., is insufficient to show that the receiptor was not the first carrier. Hoye v. Pennsylvania R. Co., 100 N. Y. S. 190. Where defendant sold a ticket for a journey to be made partly by rail and partly by ferry and there was nothing to indicate that the defendant did not operate the ferry, defendant is charged prima facie with operating it. Prethrow v. West Jersey & S. R. Co. [Pa.] 63 A. 415. Initial carrier is not liable for torts of connecting carrier. McDonald v. Central R. Co. [N. J. Err. & App.] 62 A. 405. In an action against initial carrier for delay in transporting live stock, instruction held not erroneous as authorizing jury to find against defendant for damages sustained by stock on line of connecting carrier, particularly in view of the entire charge. Texas & P. R. Co. v. McNairy [Tex. Civ. App.] 94 S. W. 111. A carrier misdirecting a passenger is not liable for delays and injuries due to the negligence of the connecting carrier. St. Louis S. W. R. Co. v. White [Tex.] 14 Tex. Ct. Rep. 168, 89 S. W. 746.

48. Charge taken as a whole held to fairly and correctly state the law, as applicable to the facts, as to the liability of initial and connecting carriers to the shipper and to each other. Texas & P. R. Co. v. Warner [Tex. Civ. App.] 93 S W. 489. Charge held not erroneous as allowing the jury to find against each defendant for the damage caused by their combined negligence. Atchison, etc., R. Co. v. Nation [Tex. Civ. App.] 92 S. W. 823. Neither of two connecting carriers held liable for damages to cattle on line of the other. International & G. N. R. Co. v. Startz [Tex. Civ. App.] 94 S. W. 207. Plaintiff's evidence held to show that the goods were damaged before defendant's connecting line and hence nonsuit was proper. Bell Bros. v. Western & A. R. Co. [Ga.] 54 S. E. 532. In action against connecting carriers for damages due to delay and rough handling, failure to submit to jury question of delay on the part of one, held not error where the only delay proved on its part was of such short duration that it could not have caused the injuries complained of. St. Louis, etc., R. Co. v. Berry [Tex. Civ. App.] 93 S. W. 1107. The terminal carrier cannot be held liable for defaults by previous carriers in the performance of the contract of carriage in the absence of proof that it carried as a connecting carrier under the original contract of affreightment. Berry Coal & Coke Co. v. Chicago, etc., R. Co., 116 Mo. App. 214, 92 S. W. 714. A carrier on whose line an injury occurs is liable for the entire damage in the absence of evidence that the injury was aggravated by the delay on the connecting line. St. Louis S. W. R. Co. v. Buckner [Tex. Civ. App.] 90 S. W. 664. Where goods are shipped over several connecting lines, each carrier is liable for damage occurring on its line. Southern R. Co. v. Waters & Co. [Ga.] 54 S. E. 620. The question whether the goods were damaged on the

nates upon delivery to its connecting line.[49] As to the consignee, there arises a conclusive presumption that the shipment was in good order when received by a connecting carrier if its receipt so recites,[50] a rebuttable presumption if it is silent,[51] and no presumption if it negatives such condition.[52] Where goods are shipped

line of the initial carrier or on that of the connecting carrier was under the facts for the jury. International & G. N. R. Co. v. Bingham [Tex. Civ. App.] 89 S. W. 1113. Where connecting carriers are severally liable for damage occurring on their respective roads, evidence of the amount paid by one in discharge of its liability is not admissible in an action against the other. Atchison, etc., R. Co. v. Nation [Tex. Civ. App.] 92 S. W. 823.

49. Cincinnati, etc., R. Co. v. Stout [Ky.] 90 S. W. 258. An assumption of control of cattle by a connecting carrier operates as a delivery of the cattle to it. Texas & P. R. Co. v. Scoggin [Tex. Civ. App.] 14 Tex. Ct. Rep. 297, 90 S. W. 521. A railway selected as an agency by initial carrier to deliver cattle at yards where connecting carrier receives them is not itself a connecting carrier and delivery to it is not a delivery to a connecting line. Id. Initial carrier is liable for injuries to stock in transfer pens only until delivery to connecting carrier. Texas & P. R. Co. v. Felker [Tex. Civ. App.] 14 Tex. Ct. Rep. 308, 90 S. W. 530. Evidence that the goods were brought to their destination by a steamer of the line designated by the markings as the connecting carrier, held sufficient to show delivery by initial carrier. Fairfield v. Pacific Coast S. S. Co. [Cal. App.] 84 P. 438. Where a bill of lading limits the carrier's liability to its own line, a delivery to the designated connecting carrier or, if none is designated, to a proper carrier on the route "in the usual and proper way," ends the carrier's responsibility. Southern R. Co. v. Goldstein Bros. [Ala.] 41 So. 173. In the absence of a special contract or course of business to the contrary, a carrier is bound to safely carry and deliver to connecting carrier. Gulf, etc., R. Co. v. Jackson [Tex.] 14 Tex. Ct. Rep. 100, 89 S. W. 968.

NOTE. American rule as to liability of initial carrier in absence of special contract: "There seems to be both policy and reason for the English rule (that an initial carrier, accepting goods directed to a place beyond its terminus, without limiting its liability by express contract, becomes liable for their safe delivery at destination), and it has been followed in a number of the American Commonwealths: See the monographic note to Wells v. Thomas, 72 Am. Dec. 234-236; Kansas City, etc., R. Co. v. Washington [Ark.] 85 S. W. 406; Chicago, etc., R. Co. v. Simon, 160 Ill. 648, 43 N. E. 596; Beard v. St. Louis, etc., R. Co., 79 Iowa, 527, 44 N. W. 803; Western Sash, etc., Co. v. Chicago, etc., R. Co., 177 Mo. 641, 76 S. W. 998. The majority of our courts, however, both state and federal, have repudiated the English rule, and have held that where a carrier receives goods consigned to a point beyond the terminus of its own line, it is not liable for their loss or injury caused by the negligence of a connecting carrier, in the absence of a special agreement, express or implied to transport the goods through to their destination. If there is no such contract, the initial carrier is liable only to the extent of its own route and for the safe delivery of the goods to the next carrier in the line of transportation. And the acceptance by a carrier of goods marked for a place beyond its own terminus does not import an undertaking to carry to the destination named: See the monographic note to Wells v. Thomas, 72 Am. Dec. 236; Hewitt v. Chicago, etc., R. Co., 63 Iowa, 611, 19 N. W. 790; Hoffman v. Union Pac. R. Co., 8 Kan. App. 379, 56 P. 331; Louisville, etc., R. R. v. Chestnut, 115 Ky. 43, 24 Ky. L. R. 1846, 72 S. W. 351; Thomas v. Frankfort, etc., R. Co., 25 Ky. L. R. 1051, 76 S. W. 1093; Taylor v. Maine Cent. R. Co., 87 Me. 299, 32 A. 905; Hoffman v. Cumberland, etc., R. Co., 85 Md. 391, 37 A. 214; Rickerson Roller Mill Co. v. Grand Rapids, etc., R. Co., 67 Mich. 110, 34 N. W. 269; Ortt v. Minneapolis, etc. R. Co., 36 Minn. 396, 31 N. W. 519; Crawford v. Southern R. Ass'n, 51 Miss. 222, 24 Am. Rep. 626; Southern R. Co. v. Vaugh [Miss.] 38 So. 500; Hubbard v. Mobile, etc., R. Co. [Mo. App.] 87 S. W. 52; Fremont, etc., R. Co. v. Waters, 50 Neb. 592, 70 N. W. 225; Bishawaiti v. Pennsylvania R. Co., 92 N. Y. Supp. 783; Wilson v. Louisville, etc., R. Co., 103 App. Div. 203, 92 N. Y. Supp. 1091; Knott v. Raleigh, etc. R. Co., 98 N. C. 73, 3 S. E. 735, 2 Am. St. Rep. 321; Meredith v. Seaboard, etc., R. Co. [N. C.] 50 S. E. 1; Knight v. Providence, etc, R. Co., 13 R. I. 572, 43 Am. Rep. 46; Harris v. Grand Trunk R. Co., 15 R. I. 371, 5 A. 307; Hill v. Georgia, etc., R. Co., 43 S. C. 461, 21 S. E. 337; Hunter v. Southern Pac. R. Co., 76 Tex. 195, 13 S. W. 190; McConnell v. Norfolk, etc., R. Co., 86 Va. 248, 9 S. E. 1006; Stewart v. Terre Haute, etc., R. Co., 3 F. 768; Cincinnati, etc., R. Co. v. Fairbanks [C. C. A.] 90 F. 467; Railroad Co. v. Pratt, 22 Wall. [U. S.] 123, 22 Law. Ed. 827; Insurance Co. v. Railroad Co., 104 U. S. 146, 26 Law. Ed. 679. The statutes of some of the states declare that "the liability of a carrier who accepts freight for a place beyond its usual route ceases when it delivers the freight to the connecting carrier, unless there is a stipulation to the contrary: Colfax, etc., Fruit Co. v. Southern Pac. Co. [Cal.] 46 P. 668; Felton v. Central of Georgia R. Co., 114 Ga. 609, 40 S. E. 748; Snton v. Chicago, etc., R. Co., 14 S. D. 111, 84 N. W. 396."—From monographic note "Liability of Initial Carrier," etc., 106 Am. St. Rep. 604.

50. Southern R. Co. v. Waters & Co. [Ga.] 54 S. E. 620. Held **not conclusive,** but evidence of the condition. International, etc., R. Co. v. Shands [Tex. Civ. App.] 93 S. W. 1105. Evidence held to sustain finding that goods were damaged after they were received by connecting carrier. International, etc., R. Co. v. Shands [Tex. Civ. App.] 93 S. W. 1105.

51. Southern R. Co. v. Waters & Co. [Ga.] 54 S. E. 620.

52. Southern R. Co. v. Waters & Co. [Ga.] 54 S. E. 620. A recital that the barrels were leaking negatives the presumption even as to the condition of the contents. Id.

over several lines under a through contract of shipment, each carrier is liable irrespective of where the loss occurs,[53] or if there is a partnership arrangement between them.[54] But, however, a carrier undertaking by special contract to transport goods to their destination beyond its line,[55] must do so, and is liable for the acts of the connecting carriers.[56] An agent's authority to contract for carriage beyond the terminus of his principal's line cannot be implied from his general authority to receive goods for shipment.[57] Where the concurrent negligence of connecting lines results in damage, they are jointly liable,[58] and hence a carrier is liable for the entire damage resulting from its negligence although the loss would not have been so great

53. Evidence held to show that contracts of connecting carriers for transportation of live stock were not joint contracts for through shipment so as to render them liable for delay without regard to question on which line delay occurred. Rogers v. Texas & P. R. Co. [Tex. Civ. App.] 94 S. W. 158. Where the original destination is changed by agreement so as to necessitate shipment over another line the initial carrier is liable under Rev. St. 1899, § 5222, the contract being for through shipment. Hurst v. St. Louis, etc., R. Co. [Mo. App.] 94 S. W. 794. Instruction approved, and another one held in conflict therewith. Id. Sayles' Ann. Civ. St. 1897, arts. 331a, 331b, provides for an action against all the carriers, in the case of domestic shipments, where the shipment is under a through contract of carriage which is acquiesced in and acted upon by all of them. San Antonio & A. P. R. Co. v. Turner [Tex. Civ. App.] 94 S. W. 214. It is not the purpose of this statute to deny the right of one or more of such carriers to execute a separate contract limiting its liability to its own line, but it will be applied where it does not appear that the connecting carrier acted under a separate contract. Id. Where a bill of lading issued by an initial carrier shows a contract for a through shipment, and the property is delivered to, and carried by, a connecting carrier under the original bill, such carrier becomes a party to the contract by adoption and ratification. Chicago & E. I. R. Co. v. Chestnut Bros. [Ky.] 89 S. W. 298.

54. Evidence that two lines maintained a common freight agent and dispatcher at junction and that the two lines are under the supervision of one traveling freight agent is sufficient to go to the jury on the question of partnership. Illinois Cent. R. Co. v. Jones [Miss.] 39 So. 493.

55. Where a bill of lading, following the description of the goods, recites "to be carried to the port of Boston," etc., the initial carrier is liable for losses occurring beyond its line and before reaching Boston. Johnson v. Missouri, K. & T. R. Co., 107 App. Div. 374, 95 N. Y. S. 182. No contract can be implied from the mere receipt of the goods, though marked for a point beyond. Pittsburg, etc., R. Co. v. Bryant [Ind. App.] 75 N. E. 829. The receipt of freight and the issuance of a bill of lading to a destination beyond its line is prima facie an agreement to carry to such point. Lee v. Wabash R. Co. [Mo. App.] 94 S. W. 991; Allen & Gilbert-Ramaker Co. v. Canadian Pac. R. Co. [Wash.] 84 P. 620. Unless it expressly limits its liability to its own line. Southern R. Co. v. Levy [Ala.] 39 So. 95. A mere statement of a receiving clerk that the goods would be sent to the place of destination does not constitute a special contract to carry beyond the company's line. Weis v. St. Louis, etc., R. Co., 97 N. Y. S. 993. A contract of shipment one clause of which undertook to deliver at destination, followed by a clause providing that if the destination was beyond its line it would deliver to connecting carrier, construed as a through shipment contract. Ingwersen v. St. Louis & H. R. Co., 116 Mo. App. 139, 92 S. W. 357. Evidence that defendant's agent collected freight to a point beyond its line and did nothing to indicate that it did not undertake to deliver at that point is sufficient to go to the jury as to whether there was a special contract. Pittsburg, etc., R. Co. v. Bryant [Ind. App.] 75 N. E. 829. Bill of lading construed not to constitute a special contract to carry to destination within Civ. Code, § 2201. Fairfield v. Pacific Coast S. S. Co. [Cal. App.] 84 P. 438. Notice contained in the bill of lading that the consignee was at Nome, Alaska, was sufficient to notify defendant to deliver to connecting carrier. Id.

Evidence held not to sustain finding that initial carrier undertook to transport stock to point beyond its own line. Texas & P. R. Co. v. Arnett [Tex. Civ. App.] 92 S. W. 57. Evidence held sufficient to sustain a finding that defendant only undertook to carry to end of its line. Talcott v. Wabash R. Co., 109 App. Div. 491, 96 N. Y. S. 548. Evidence held to show the intial carrier's relation as carrier ceased with its line of road as it was acting, with plaintiff's knowledge, as agent in selling tickets beyond. McDonald v. Central R. Co. [N. J. Err. & App.] 62 A. 405.

56. Johnson v. Missouri, etc., R. Co., 107 App. Div. 374, 95 N. Y. S. 182; Isham v. Erie R. Co., 98 N. Y. S. 609; Lee v. Wabash R. Co. [Mo. App.] 94 S. W. 991; Allen & Gilbert-Ramaker Co. v. Canadian Pac. R. Co. [Wash.] 84 P. 620. Where a connecting carrier does not recognize the contract of the initial carrier wherein each connecting road's liability is limited to its own line, but makes a new contract whereby it undertakes to carry beyond its terminus, it is liable for negligence of the last connecting carrier. Southern Pac. Co. v. Pruitt [Tex. Civ. App.] 90 S. W. 691.

57. Pittsburg, etc., R. Co. v. Bryant [Ind. App.] 75 N. E. 829.

58. Connecting carriers are jointly liable for the negligence of their common agent. Kansas City Southern R. Co. v. Embrey [Ark.] 90 S. W. 15. Where one connecting carrier's negligence concurred with another's in producing loss, it is liable therefor. Gulf, etc., R. Co. v. Terry [Tex. Civ. App.] 13 Tex. Ct. Rep. 991, 89 S. W. 792.,

had the subsequent carrier used due care.[59] As between connecting carriers, the carrier whose negligence causes the loss is liable to the carriers held liable by the shipper.[60] The delivery of goods by a connecting carrier to a wrong person without requiring the production of the bill of lading constitutes such laches as precludes a recovery over by it from the initial carrier of damages recovered by the party aggrieved.[61]

A railroad company which has made arrangements with a transfer line for ample service to accommodate the public, may exclude other hackmen from its grounds,[62] and may also prevent their congregating and soliciting in front of the depot in such manner as to interfere with the ingress and egress of passengers.[63] A common carrier may contract with a particular transfer line for a claim check service to the exclusion of others;[64] but it must not discriminate in favor of passengers patronizing such line.[65] Other transfer lines, however, cannot complain of such discriminations.[66]

59. Where a connecting carrier negligently permitted cotton to become wet it is liable for the whole damage notwithstanding the damage would have been less if the subsequent carrier had exercised reasonable care. Houston & T. C. R. Co. v. Bath [Tex. Civ. App.] 14 Tex. Ct. Rep. 117, 90 S. W. 55. And hence no defense that the subsequent carrier could have prevented the injury by the exercise of due care. Id.

60. In a suit against connecting carriers an admission by plaintiff that the damages complained of did not occur on the line of one of them does not authorize the direction of a verdict in favor of the latter as between it and the other carrier. Ft. Worth & D. C. R. Co. v. Garlington [Tex. Civ. App.] 92 S. W. 270.

61. Nashville, etc., R. Co. v. Grayson County Nat. Bank [Tex. Civ. App.] 91 S. W. 1106.

62. Donovan v. Pennsylvania Co., 199 U. S. 279, 50 Law. Ed. ——.

Note: "The point decided in the case of Donovan v. Pennsylvania Co. is one to which there is some conflict of authority. In accord with the case are: New York, etc., R. Co. v. Scovill, 71 Conn. 136; Kates v. Alabama Baggage & Cab Co., 107 Ga. 636; Old Colony R. Co. v. Tripp, 147 Mass. 35; Boston, etc., R. Co. v. Brown, 177 Mass. 65; Godbout v. St. Paul Union Depot Co., 79 Minn. 188; Hedding v. Gallagher, 72 N. H. 377; New York Cent., etc., R. Co. v. Flynn, 74 Hun, 124; Brown v. New York Cent, etc., R. Co., 74 Hun [N. Y.] 355; State v. Union Depot Co., 71 Ohio St. 379; New York, etc., R. Co. v. Bork, 23 R. I. 218; Lewis v. Weatherford, etc., R. Co. [Tex. Civ. App.] 81 S. W. 111; Norfolk, etc., R. Co. v. Old Dominion Baggage Transfer Co., 99 Va. 111; St. Louis Drayage Co. v. Louisville, etc., R. Co., 65 F. 39. Opposed to the case are: Indianapolis Union R. Co. v. Dohn, 153 Ind. 10; McConnell v. Pedigo, 92 Ky. 479; Bus Co. v. Sootsma, 84 Mich. 194; Cravens v. Rodgers, 101 Mo. 247; Montana Union R. Co. v. Langlois, 9 Mont. 419. The principal oase and those in agreement adopt the view that such arrangements, though exclusive, are reasonable and proper, provided adequate accommodations are furnished to passengers at a reasonable price; even if the accommodations are inadequate, or the price too high, excluded hackmen do not "represent" the passengers in this regard. The fact that the railway company derives a profit from the arrangement does not render the agreement illegal. According to the opposing view such exclusive arrangements are held void as creating illegal monopolies, or as in violation of the common carrier's duty not to discriminate. It is to be noted that the Illinois Supreme Court showed a strong leaning toward the opposing view in Pennsylvania Co. v. Chicago, 181 Ill. 289, though, as is stated in the principal case, the point was not involved. It would seem that the weight of reason and authority favors the views adopted in the principal case. It is believed that such arrangements generally tend to protect the passenger from extortion and do not, in fact, prevent reasonable competition. It may be worth while to note one or two incidental matters. First it is conceded by all the authorities that the railroad company may not exclude from its station or grounds a hackman or expressman who has been employed by a passenger or prospective passenger to take him from or to the station. In such case the hackman "represents" the passenger. Griswold v. Webb, 16 R. I. 649. Second, it is conceded that as to matters not incidental to the carriage of goods or passengers (as, for instance, for news stands, restaurants, barber shops, etc.) the common carrier may grant, exclusive privileges. Fluke v. Georgia R. & Bkg., 81 Ga. 461."—From 1 Ill. Law. Rev. 48.

63. Donovan v. Pennsylvania Co., 199 U. S. 279, 50 Law. Ed. ——. Injunction will lie to prevent such congregating and soliciting. Id.

64. Atlantic Terminal Co. v. American Baggage & Transfer Co. [Ga.] 54 S. E. 711. Error to issue a temporary injunction restraining the giving of such exclusive service. Id. In an action by another line to compel like privileges, evidence that such privilege is given, that it affects plaintiff's business, that it amounts to a discrimination, that while plaintiff enjoyed such privilege, it greatly facilitates its business, is immaterial. Id.

65. Atlantic Terminal Co. v. American Baggage & Transfer Co. [Ga.] 54 S. E. 711. Cannot check the parcels of those having claim checks upon presentation of such checks at baggage room window together with evidence of right to transportation, and

Part II. Carriage of Goods.

§ 4. *Delivery to carrier and inception of liability.*[67]—A common carrier's liability as such does not begin until there has been a complete delivery of the goods to it for immediate transportation.[68]

§ 5. *Bills of lading and other contracts of carriage.*[69]—A written contract of shipment containing a release of all claims in consideration of a reduced rate, releases the carrier from liability for failure to provide cars as orally agreed.[70] Contracts for the shipment of goods may be oral,[71] and the issuing of a written contract after breach of an oral one does not preclude a recovery on the latter.[72] A bill of lading as a contract of affreightment cannot be varied by prior parol agreements.[73] In some states the written contract need not state the consideration.[74] Upon a constructive delivery of goods to a carrier,[75] it must deliver a receipt to the consignor notwithstanding it has issued one to a person not entitled thereto.[76] Statutes in some states prohibit the issuing of bills of lading until actual receipt of the goods.[77]

A local agent with power to make contracts of affreightment is a general agent within the range of such business and binds the carrier as to all necessary and ordi-

compel other passengers to go outside the building to identify their parcels. Id.

66. No ground for compelling like service to other lines in an action by them. Atlantic Terminal Co. v. American Baggage & Transfer Co. [Ga.] 54 S. E. 711.

67. See 5 C. L. 514.

68. Ames v. Fargo, 99 N. Y. S. 994. Delivery of cotton to a compress company and the issuing of a bill of lading upon the compressor's receipt as required by law does not amount to a delivery to the carrier. Arthur v. Texas & P. R. Co. [C. C. A.] 139 F. 127. The liability of a ferryman for property proposed to be carried attaches as soon as the operator of the ferry directs the entry upon the ferryboat. Wilson v. Alexander, 115 Tenn. 125, 88 S. W. 935. Where by its methods of doing business an express company holds out persons who drive wagons marked with its name, and are uniformed with caps also bearing its name, as authorized to receive goods, a delivery to such person is a delivery to the company. Reel v. Adams Exp. Co., 27 Pa. Super. Ct. 77. Delivery of goods to a man whose cap bore defendant's name is insufficient to show delivery to defendant where it appears that defendant had no office, agent, or servant at that point. Rosenfeld v. Central Vermont R. Co., 97 N. Y. S. 905. A bill of lading reciting receipt of a case of goods, contents unknown, together with an invoice of the clothing purchased, it appearing that only a part was consigned, is insufficient to show delivery to the carrier, of the overcoats alleged. Gulf, etc., R. Co. v. Massenburg-Bankhead Dry Goods Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 180, 90 S. W. 68. In an action against an express company it is error to refuse to allow defendant to ask plaintiff if he had not checked his trunk to another depot, where it was shown that a similar trunk was received. Wells-Fargo & Co. v. Hanson [Tex. Civ. App.] 91 S. W. 321.

69. See 5 C. L. 515.

70. Fountain v. Wabash R. Co., 114 Mo. App. 676, 90 S. W. 393. There must be an actual reduction of rates. Id.

71. Missouri, etc., R. Co. v. Patrick [C. C. A.] 144 F. 632. Where a shipper enters into a verbal contract of shipment whereby the carrier agreed to deliver at destination in time for a particular market, a writing subsequently signed which stipulated for a reasonable delivery, is not binding where its terms were unknown and the shipper had no knowledge when he made the verbal contract that he would be required to make a written one. Gulf, etc., R. Co. v. Funk [Tex. Civ. App.] 92 S. W. 1032. Modification of a written contract by parol so as to allow attendant of shipment to accompany it, is proper. Southern Kansas R. Co. v. Burgess Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 191, 90 S. W. 189.

72. Defendant's liability for failure to furnish cars as per oral contract is not avoided by a written contract subsequently made containing no consideration for a release. Gulf, etc., R. Co. v. House [Tex. Civ. App.] 13 Tex. Ct. Rep., 88 S. W. 1110.

73. The Presque Isle, 140 F. 202.

74. Under Ky. St. 1903, § 470, providing that the consideration in written agreements need not be stated, a carrier is liable for breach of a written contract of shipment though the contract does not state the consideration. Chicago & E. I. R. Co. v. Chestnut Bros. [Ky.] 89 S. W. 298.

75. As where by custom the carrier accepts loaded cars at a non-agency station and issues receipts at the next station. Atlantic & B. R. Co. v. Howard Supply Co. [Ga.] 54 S. E. 530.

76. Atlantic & B. R. Co. v. Howard Supply Co. [Ga.] 54 S. E. 530.

77. Rev. St. 1899, § 5052. Watkins Nat. Bank v. Cleveland, etc., R. Co. [Mo. App. 93 S. W. 846. Bills of lading issued in violation of this statute are void. Id. Liability of carrier is not changed by subsequent receipt of goods after they have been damaged. Id. Nor because the contract is one for through shipment. Id.

nary details,[78] but cannot contract to carry beyond his principal's line,[79] nor to deliver at such destination within a specified time,[80] nor as to the operation of the train.[81]

Interpretation.[82]—Any reasonable doubt as to the proper construction of the printed portions of a bill of lading is resolved against the carrier.[83] It is presumed that a failure to fill blanks in a bill of lading was intentional,[84] and hence it is proper to look elsewhere on the bill to ascertain why they were not filled in.[85] A contract of shipment must be construed according to the laws of the state where issued.[86]

Indorsement and transfer.[87]—The assignment of a bill of lading is a symbolical delivery of the property represented thereby,[88] and passes such title as the assignor may have,[89] and the carrier, upon notice of the assignment, must deliver

78. Gulf, etc. R. Co. v. Jackson [Tex.] 14 Tex. Ct. Rep. 100, 89 S. W. 968.

79. Unless by course of business the carrier is accustomed to so carry. Gulf, etc., R. Co. v. Jackson [Tex.] 14 Tex. Ct. Rep. 100, 89 S. W. 968.

80. In the absence of power to bind his principal for a through shipment. Gulf, etc., R. Co. v. Jackson [Tex.] 14 Tex. Ct. Rep. 100, 89 S. W. 968.

81. Cannot contract to ship direct to destination without switching cars along the line. Gulf, etc., R. Co. v. Jackson [Tex.] 14 Tex. Ct. Rep. 100, 89 S. W. 968. Nor to haul with a single engine. Id.

82. See 5 C. L. 515.

83. Baltimore & O. R. Co. v. Doyle [C. C. A.] 142 F. 669.

84. Nashville, etc., R. Co. v. Grayson County Nat. Bank [Tex.] 93 S. W. 431.

85. Nashville, etc., R. Co. v. Grayson County Nat. Bank [Tex.] 93 S. W. 431. Bill of lading held one for delivery of goods to consignee named in margin, though blanks for consignee's name and address in the body of the instrument were not filled in. Id.

86. Fraiser v. Charleston, etc., R. Co. [S. C.] 52 S. E. 964. Contract made in Missouri whereby carrier agreed to divert shipment to different destination in another state, necessitating transportation over line of connecting carrier, held governed by laws of Missouri. Hurst v. St. Louis & S. F. R. Co. [Mo. App.] 94 S. W. 794.

87. See 5 C. L. 516.

88. Kentucky Refining Co. v. Bank of Morilton [Ky.] 89 S. W. 492. When a bill of lading is assigned to a bank and it undertakes to carry out the assignor's contract of sale, the bank becomes liable for shortage. Haas & Co. v. Citizens' Bank [Ala.] 39 So. 129. Where it was the regular custom to draw drafts with bills of lading attached defendant could not contend that it could not anticipate the issuance by the initial carrier of a bill of lading. Nashville, etc., R. Co. v. Grayson County Nat. Bank [Tex. Civ. App.] 91 S. W. 1106. Where a bill of lading is attached to a discounted draft and held as security, the title to the goods passes to the bank. Fishomingo Sav. Inst. v. Johnson, Nesbitt & Co. [Ala.] 40 So. 503.

89. Haas & Co. v. Citizens' Bank [Ala.] 39 So. 129; Nashville, etc., R. Co. v. Grayson County Nat. Bank [Tex. Civ. App.] 91 S. W. 1106. The assignment of a bill of lading passes only the assignor's title, and where a shipment was tortiously made, an assignment of the bill of lading does not pass title as against the owner. Merchants' Nat. Bank v. Bales [Ala.] 41 So. 516.

NOTE. Assignment of bills of lading when issued in duplicate or triplicate: "Where the bill of lading is drawn in triplicate, the indorsee or transferee of the first set obtains the title as against a subsequent indorsee of the others, and the master is justified in delivering the goods to the first indorsee. Glyn v. East & West India Docks, L. R. 5 Q. B. D. 129; Meyerstein v. Barber, L. R. 2 C. P. 38, L. R. 4 Eng. & Ir. App. 317; The Tigress, Browne & L. 38. And if the holders of one of the other copies obtain possession of the goods and convert them to their own use, they are liable to the prior indorsee in trover. Glyn v. East & West India Docks, L. R. 5 Q. B. D. 129." Monographic note to Chandler v. Sprague, 38 Am. Dec. 421. But where the carrier issues duplicate bills of lading without making them duplicates, the carrier is liable. Wichita Sav. Bank v. Atchison, etc., R. Co., 20 Kan. 519. And where a bill of lading was executed in duplicate, one of the papers being signed by the agent of the carrier and accepted by the shipper, and the other being signed by the shipper and retained by the agent, the two parts are to be treated as one and the same writing. Richmond, etc., Co. v. Shomo, 90 Ga. 496, 16 S. E. 220. But where two bills of lading, one marked "original" and the other "duplicate," are issued by the railroad company for the same goods, they are of equal value and the transfer by indorsement of the one marked "duplicate" by the consignee, who holds the legal title, to a bona fide assignee for value as collateral security, transfers the title to the goods and defeats the seller's right of stoppage in transitu. Missouri Pacific Ry. v. Heidenheimer, 82 Tex. 195, 17 S. W. 608, 27 Am. St. Rep. 861. The first transferee of a bill of lading, though it be only one of a set of three bills, acquires the property, and the subsequent transfers of the bills are subject to the first transfer. First Nat. Bank v. Ege, 109 N. Y. 120, 16 N. E. 317, 4 Am. St. Rep. 431. And in Midland Nat. Bank v. Missouri Pac. Ry., 132 Mo. 492, 33 S. W. 521, 53 Am. St. Rep. 505, it was held that the carrier cannot escape liability to the indorsee of the original bill of lading where it turned over the goods to the consignee on the simple surrender of its duplicate bills, or rebilled the goods to other points without

to the assignee.[90] Bills of lading have been made negotiable by statute in some states,[91] but such negotiability may be destroyed by restrictive statements in the bill.[92] Statutes providing that the indorsee of bills of lading shall be deemed the true owner of the goods represented thereby and making it a criminal offense to deliver to any other person, are not in conflict with the interstate commerce clause of the Federal constitution.[93] A carrier negligently failing to take up a bill of lading upon delivery of the goods, according to the terms thereof, is liable to a bona fide holder,[94] and such party may sue in tort in his own name.[95] But the carrier is not liable to one acquiring such bill of lading after it has been fraudulently altered in a material respect.[96] Nonreceipt of goods is a good defense against a bona fide indorsee of a bill of lading,[97] unless by the usual mode of doing business it has authorized its agents to deliver bills without receiving the goods.[98] Actual notice of a mistake in a bill of lading exists when knowledge is actually brought home to the party to be affected by it, or when he might, by the exercise of reasonable diligence, have informed himself of the existence of the facts.[99]

§ 6. *The duty to furnish cars.*[1]—Carriers must furnish sufficient cars to care for the ordinary traffic [2] within a reasonable time [3] upon proper demand,[4] and are

the production, surrender or cancellation of the original bill of lading, merely on the ground that the assignee did not present its bills in a reasonable time."—From note "Rights and Liabilities of assignees of bills of lading." National Bank v. Baltimore & Ohio R. Co. [Md.] 105 Am. St. Rep. 332.

90. Arkansas Southern R. Co. v. German Nat. Bank [Ark.] 92 S. W. 522.

91. Act No. 150, p. 193, 1868, makes negotiable only bills of lading and receipts issued for goods actually received. Henderson v. Louisville & N. R. Co. [La.] 41 So. 252.

92. A bill of lading with the words "not negotiable" stamped upon it is non-negotiable under art. 14, § 1, Code Pub. Gen. Laws. Merchants' Nat. Bank v. Baltimore, C. & R. Steamboat Co. [Md.] 63 A. 108.

93. Especially in the absence of congressional legislation thereon. Kirby's Dig. § 530. Arkansas Southern R. Co. v. German Nat. Bank [Ark.] 92 S. W. 522.

94. Merchants' Nat. Bank v. Baltimore, C. & R. Steamboat Co. [Md.] 63 A. 108; Chesapeake S. S. Co. v. Merchants' Nat. Bank [Md.] 63 A. 113. Where the bills are pledged, either for loans presently made or in exchange for collaterals previously pledged, there is a sufficient consideration. Chesapeake S. S. Co. v. Merchants' Nat. Bank [Md.] 63 A. 113.

95. Chesapeake S .S. Co. v. Merchants' Nat. Bank [Md.] 63 A. 113.

96. Merchants' Nat. Bank v. Baltimore, C. & R. Steamboat Co. [Md.] 63 A. 108. Any material alteration in a negotiable bill of lading invalidates it, as a change of date. Id. The custom of altering the dates of bills of lading at and prior to the issuance to make them conform to the true date does not authorize a fraudulent alteration of a spent bill Id. And evidence of such custom is inadmissible. Id. A provision in a bill of lading providing that all alterations unless made with the consent of the company are void does not prevent a fraudulent alteration from rendering the bill void. Id.

97. Swedish-American Nat. Bank v. Chicago, B. & Q. R. Co. [Minn.] 105 N. W. 69; Roy v. Northern Pac. R. Co. [Wash.] 85 P. 53; Henderson v. Louisville & N. R. Co. [La.] 41 So. 252. Not affected by Act No. 150, p. 193, of 1868, making it a felony to issue a bill of lading or receipt for property not actually received. Id. May show nonreceipt notwithstanding Ballinger's Ann. Codes & St. § 3598, making bills negotiable. Roy v. Northern Pac. R. Co. [Wash.] 85 P. 53.

Contra: Under Code 1892, § 4299, a carrier cannot show that it never received the full amount recited as against a bona fide holder. Loyd v. Kansas City, M. & B. R. Co. [Miss.] 40 So. 1005.

98. Swedish-American Nat. Bank v. Chicago, B & Q. R. Co. [Minn.] 105 N. W. 69. Evidence insufficient to show that defendant had authorized its agents to issue bills of lading without receiving the goods. Id.

99. Missouri, etc., R. Co. v. Levine [Tex. Civ. App.] 93 S. W. 1095. In action for failure to deliver the number of bales of cotton called for by bill of lading, where defendant claimed that there was a mistake in the number so specified and that plaintiff had knowledge of it, held error to refuse to charge that if plaintiff failed to exercise ordinary care before paying draft attached to bill, and would have discovered mistake had he done so, he had knowledge. Id. Whether the consignee had any information which was sufficient to put a prudent man upon inquiry as to a mistake in a bill of lading, and whether, if so, he used the proper diligence to ascertain the facts, is a question for the jury. Id.

1. See 3 C. L. 596, n. 21-26.

2. Texas & P. R. Co. v. Barrow [Tex. Civ. App.] 94 S. W. 176; Hoffman Heading & Stave Co. v. St. Louis, etc. R. Co. [Mo. App.] 94 S. W. 597. Where carrier fails to furnish facilities for transportation within a reasonable time, the shipper need not tender charges in order to maintain an action. Evans v. Mobile & O. R. Co. [Ky.] 90 S. W. 588.

3. In determining what is a reasonable time, the jury may consider the weather and the unusual rush of business. Pecas & N. T.

liable for the damages proximately resulting [5] if they fail without legal excuse.[6] A carrier undertaking to furnish cars must furnish according to contract.[7] Where a shipper accepts the cars furnished he cannot recover for the deterioration of property which might have been shipped therein.[8]

§ 7. *Forwarding and transporting goods.*[9]—A carrier is bound to route through shipments only over lines with which it has made through traffic arrangements.[10]

Delay in transportation.[11]—It is the duty of a common carrier to transport goods with reasonable promptness,[12] and it is liable for damages proximately caused by negligent [13] and inexcusable delays.[14] While mere proof of delay will not raise

R. Co. v. Evans-Snider-Buel Co. [Tex. Civ. App.] 93 S. W. 1024.

4. In an action for damages for failure to furnish cars, requested instruction that defendant would not be liable unless plaintiff notified its superintendent that logs were ready for shipment held properly refused as ignoring usage, recognized by defendant, to notify train conductors. Hoffman Heading & Stave Co. v. St. Louis, etc., R. Co. [Mo. App.] 94 S. W. 597. In order to recover for failure to furnish cars, plaintiff must show that his goods were offered for shipment to some person having authority to act for the carrier in shipment matters. Id. Evidence held to justify finding that demand made to commercial freight agent was binding on company as within the apparent scope of his authority. Id. There being evidence to prove that the agent had authority, and evidence that requests were also made to others, the only way to question his authority was by an instruction submitting an issue of fact regarding it, since a general direction to find for defendant would have been improper even if such agent had no authority. Id.

5. Hoffman Heading & Stave Co. v. St. Louis, etc., R. Co. [Mo. App.] 94 S. W. 597. Not necessary to give the carrier notice of the probable loss, if it fails without lawful excuse. Id. Question as to whether logs became sour before demand was made for cars held for the jury. Id.

6. Company may allow use of its cars on other lines so as to facilitate through shipments of live-stock, but the fact that it does so does not excuse it from furnishing sufficient cars to meet ordinary and reasonable demand of shippers along its own line. Texas & P. R. Co. v. Barrow [Tex. Civ. App.] 94 S. W. 176. Fact that other companies are derelict in returning defendant's cars held no excuse for delay of twenty days in furnishing stock cars to plaintiff. Id. General allegation of scarcity or famine of stock cars in the southwest, without disclosing the cause thereof held not to state a defense to action for damages for failure to furnish cars. Id. Unusual and sudden press of business is a defense to a claim for punitive damages for failure to furnish cars (Mauldin v. Seaboard Air Line R. Co. [S. C.] 52 S. E. 677), and in the absence of a special contract to furnish, relieves from all liability (Id.).

7. In an action for failure to furnish cars for the shipment of cattle, evidence that cars were ordered at a station from the agent there who stated that the cars could be had through the agent at another place was admissible as showing that the carrier had engaged to furnish the cars. Gulf, etc., R. Co. v. House [Tex. Civ. App.] 13 Tex. Ct. Rep. 752, 88 S. W. 1110.

8. Carrier failed to provide double decked cars and cars furnished would not accommodate entire shipment of sheep. Plaintiff, when he found that all could not be carried, took out from cars furnished 50 more than was necessary to prevent overloading though he knew that they would deteriorate before another car could arrive. Held that he could not recover for such deterioration. Ficklin & Sons v. Wabash R. Co. [Mo. App.] 92 S. W. 347.

9. See 5 C. L. 516.

10. If shipper is informed that there can be no through shipment except by a certain route, he cannot select a different route and exact a through billing when the carrier is not prepared to give it under its traffic agreements with connecting carriers. Houston, etc., R. Co. v. Buchanan [Tex. Civ. App.] 94 S. W. 199. Where a shipper demands a through shipment knowing that it can be given only over a certain route he cannot recover damages for such routing although he requested shipment over a different route. Houston, etc. R. Co. v. Everett [Tex.] 13 Tex. Ct. Rep. 930, 89 S. W. 761, approved Houston, etc, R. Co. v. Scott [Tex.] 13 Tex. Ct. Rep. 1007, 89 S. W. 763.

11. See 5 C. L. 517.

12. Yazoo, etc., R. Co. v. Blum Co. [Miss.] 40 So. 748. A carrier undertaking to return goods under contract is liable for negligent delay. Murray v. New York, etc., R. Co., 99 N. Y. S. 477.

13. Where a carrier negligently delayed shipment, it cannot relieve itself by showing that it could not ship until inspected, that not being the cause of delay. Gulf, etc., R. Co. v. Terry [Tex. Civ. App.] 13 Tex. Ct. Rep. 991, 89 S. W. 792. The carrier is liable for damages due to delay caused by the blocking of the track through its negligence. McFall v. Wabash R. Co. [Mo. App.] 94 S. W. 570. The occurrence of a wreck is prima facie the result of the carrier's negligence and, when it is made to appear that a wreck is the producing cause of delay, the burden is on it to show that it could not have been avoided by the exercise of reasonable care. Id. Whether it is negligence to await a train on another line from which a through stock train is made up, knowing that it will be late, is a question for the jury. Fulbright v. Wabash R. Co. [Mo. App.] 94 S. W. 992. Where carrier makes contract for transportation of goods in refrigerator car it is liable for relay in furnishing it due to its negligence. American Refrigerator Transit Co. v. Chandler [Tex. Civ. App.]

an inference of negligence,[15] yet very slight evidence of negligence will suffice.[16] An extraordinary pressure of business is no excuse for delay where the facilities are insufficient to meet the usual demand,[17] nor will any excuse prevail where the carrier accepts goods with knowledge of its inability to deliver promptly, without notice to the shipper.[18] A carrier is liable for delay due to shipment by a longer route than that designated by the shipper.[19] Negligence of the shipper relieves the carrier.[20] In Mississippi a carrier is liable irrespective of negligence unless the delay is due to an act of God, the public enemy or acts of the shipper.[21] In an action ex contractu for delay, the negligence which is the gravamen of an action ex delicto is not in issue.[22]

93 S. W. 243. Facts held not to show co-partnership between carrier and refrigerator company which merely furnished refrigerator cars to it on order. Id. That delay was due to negligence may be inferred from facts and circumstances in the absence of direct proof. Ficklin v. Wabash R. Co. [Mo. App.] 93 S. W. 861. Inference of negligence held to arise from fact that the usual time of transportation was six hours, where evidence showed that transportation of plaintiff's cattle took twenty hours. Id.

14. A request to hold by the party directed to be notified of the arrival does not excuse a delay where the carrier has notice that he is not the owner nor consignee. Isham v. Erie R. Co., 98 N. Y. S. 609. Where a carrier recognized the transfer of goods and subsequently delivered to the buyer, it cannot excuse delay on the ground that the bill of lading was not assigned. Russell Grain Co. v. Wabash R. Co., 114 Mo. App. 488, 89 S. W. 908.

Evidence of delay: Evidence that another shipper's cattle which entered a certain point with plaintiff's, preceded them to destination is admissible. Texas & P. R. Co. v. Scoggin [Tex. Civ. App.] 14 Tex. Ct. Rep. 297, 90 S. W. 521. A telegram by the local agent at one point to the chief dispatcher at another point, in regard to moving cattle held admissible as res gestae, notwithstanding any want of authority in the local agent or dispatcher, where the yard master at the point to which the telegram was sent saw and acted upon it. Id. Evidence that other stock trains passed plaintiff's train while it was held for 24 hours at an intermediate station is admissible to show condition of the line. Gulf, etc., R. Co. v. House [Tex. Civ. App.] 13 Tex. Ct. Rep. 752, 88 S. W. 1110.

15. Bushnell v. Wabash R. Co. [Mo. App.] 94 S. W. 1001. Mere delay is not evidence of negligence in transportation, yet where the fact of delay is supplemented by evidence of the cause it may show that it was negligence. Wright v. Chicago, etc., R. Co. [Mo. App.] 94 S. W. 555.

16. Bushnell v. Wabash R. Co. [Mo. App.] 94 S. W. 1001. Evidence of various stops to await the arrival of other trains and of trouble with the engine is sufficient to go to the jury. Id.

17. The fact that the quantity of cotton presented for shipment is unusually large does not relieve the carrier where its facilities are inadequate to meet the usual demand. Yazoo, etc., R. Co. v. Blum Co. [Miss.] 40 So. 748. Fact that facilities are ample except during the cotton season does not relieve the carrier. Id.

18. Demoralized condition of traffic in its yards. Russell Grain Co. v. Wabash R. Co., 114 Mo. App. 488, 89 S. W. 908. Unusual pressure of business. Yazoo, etc. R. Co. v. Blum Co. [Miss.] 40 So. 748.

19. Where an agent of a carrier by duress compels a shipper to ship by a longer route than the one designated and loss results therefrom, the carrier and agent are jointly and severally liable. Eastin v. Texas & P. R. Co. [Tex.] 92 S. W. 838. Hence, if joined, prevents removal to Federal court, one being a resident the other a nonresident. Id. If the shipper of live stock requests of the initial carrier a through billing by a shorter route and it is wrongfully denied him, when it has, under its traffic agreements with connecting lines, the right and authority to grant it, the initial carrier is liable for any damages resulting rom the use of a longer route. Houston, etc., R. Co. v. Buchanan [Tex. Civ. App.] 94 S. W. 199. The carrier is not liable if it gives him a through billing over the shortest route possible under its traffic agreements with connecting carriers, and informs him that it cannot give him a shorter one. Instructions approved. Id. Nor if the shipper voluntarily agrees to the shipment by the longer route, or waives his previous demand. Id. An acceptance of a longer route after a demand for a shorter one does not relieve the carrier if the carrier was guilty of false representations. Id.

20. It is the duty of consignees to provide for the prompt reception of the goods on their arrival at destination, especially when they know that prevailing weather conditions subject the corn shipped to risk of injury even when carried with due care. Freeman v. Kansas City Southern R. Co. [Mo. App.] 93 S. W. 302. Carrier is not liable for loss which might have been prevented by due diligence on the part of the consignee, although such damage would not have resulted but for the carrier's delay. Chicago, etc., R. Co. v. Chestnut Bros. [Ky.] 89 S. W. 298. Where cars of stock were delivered at the usual and customary unloading platform, the carrier is not liable for delay of the stockyards company in unloading. Ratliff v. Quincy, etc., R. Co. [Mo. App.] 94 S. W. 1005 Where initial carrier agreed to convey apples to their destination, plaintiff was not bound to take charge of car at point where it was to be transferred to connecting carrier while carriage was still unfinished and to dispose of them in order to avoid loss from delay. Hurst v. St. Louis & S. F. R. Co. [Mo. App.] 94 S. W. 794.

21. Yazoo, etc., R. Co. v. Blum Co. [Miss.] 40 So. 748.

22. Hence not error to refuse to submit

Delivery to succeeding carrier.[23]—In the absence of a statute or commission regulation, the transfer of freight from one carrier to the connecting carrier must be left to the carriers themselves provided the method be reasonable.[24] Where a carrier could only deliver to a connecting carrier through certain joint stock yards, a shipper cannot demand delivery to such carrier and insist upon delivery at the initial carrier's own yards.[25]

§ 8. *Loss or injury to goods.*[26]—At common law,[27] a carrier is liable for loss or injury to goods irrespective of negligence[28] unless directly traceable to an act of God, the public enemy, or the shipper's negligence.[29] An act of God to constitute a defense must be the proximate cause of the loss,[30] and the carrier must be free from contributory negligence.[31] But in some states the loss must have been the probable consequences of the negligent act to defeat the defense.[32] The burden is

to the jury. Chicago, etc., R. Co. v. Chestnut Bros. [Ky.] 89 S. W. 298.

23. See 5 C. L. 517. And see, also, ante, § 3.

24. Hence may transfer stock through the Union Stockyards. Texas & P. R. Co. v. Scott [Tex. Civ. App.] 90 S. W. 532.

25. Texas & P. R. Co. v. Felker [Tex. Civ. App.] 14 Tex. Ct. Rep. 308, 90 S. W. 530.

26. See 5 C. L. 518.

27. The common-law liabilities of carriers apply to interstate shipments. Ficklin v. Wabash R. Co. [Mo. App.] 93 S. W. 847.

28. Evidence that the driver of a cab was competent and had a good reputation as a competent driver is immaterial. Lewark v. Parkinson [Kan.] 85 P. 601. Where the relation of common carrier still continued as to goods placed upon a dock, the carrier is liable for damage to goods due to a collapse of the dock, irrespective of negligence. Rosenstein v. Vogemann [N. Y.] 77 N. E. 625. Unusual rush of business is no defense for failure to transport cattle with care. Texas & P. R. Co. v. Felker [Tex. Civ. App.] 14 Tex. Ct. Rep. 308, 90 S. W. 530. Where a carrier accepts goods and undertakes to deliver them, there is an implied promise to carry safely and to do so without delay. Indiana, etc., R. Co. v. Empire Rubber Mfg. Co., 118 Ill. App. 652.

29. Southern R. Co. v. Levy [Ala.] 39 So. 95; Wabash R. Co. v. Sharpe [Neb.] 107 N. W. 758. Liable for damage to goods while detained by custom-house officials where it had contracted to deliver imported goods in bond at an internal port of entry. Cownie Glove Co. v. Merchants' Dispatch Transp. Co. [Iowa] 106 N. W. 749.

Negligence of shipper: Horse tied too long. Ames v. Fargo, 99 N. Y. S. 994. Overloaded stock cars resulting in suffocation. Ficklin & Son v. Wabash R. Co. [Mo. App.] 92 S. W. 347. Stock negligently confined in pens longer than was necessary. Illinois Cent. R. Co. v. Holt [Ky.] 92 S. W. 540. Where fruit car is iced by shipper it will be presumed that heating was due to his negligence in absence of evidence to the contrary. Chicago, I. & L. R. Co. v. Reyman [Ind.] 76 N. E. 970. In an action for loss of horse by fire, shipper held not negligent in bedding with straw and in leaving the door partially open. Trexler v. Baltimore & O. R. Co., 28 Pa. Super. Ct. 198. An instruction for defendant if stock car was improperly bedded properly refused where evidence did not show that shipper bedded it. Texas & P. R. Co. v. Dishman [Tex. Civ. App.] 91 S. W. 828. Proof of condition of pens is not material where the shipper unnecessarily confined his stock therein. Illinois Cent. R. Co. v. Holt [Ky.] 92 S. W. 540. Burden is on carrier to prove negligence of the shipper. St. Louis, etc., R. Co. v. Berry [Tex. Civ. App.] 93 S. W. 1107. Negligence of shipper is a good defense although the carrier is also negligent. Houston, etc., R. Co. v Burns [Tex. Civ. App.] 14 Tex. Ct. Rep. 181, 90 S. W. 688; Ficklin & Son v. Wabash R. Co. [Mo. App.] 92 S. W. 347. **Contra.** Walter v. Alabama Great So. R. Co., 142 Ala. 474. 39 So. 87.

30. If insanity be regarded as an act of God, yet where it merely rendered the engineer reckless and heedless, it does not relieve the carrier. Central of Georgia R. Co. v. Hall, 124 Ga. 322, 52 S. E. 679.

31. Pinkerton v. Missouri Pac. R. Co. [Mo. App.] 93 S. W. 849. Negligent delay subjected goods to a cyclone. Alabama Great So. R. Co. v. Quarles [Ala.] 40 So. 120. Delayed shipment overtaken by flood. Green-Wheeler Shoe Co. v. Chicago, etc. R. Co. [Iowa] 106 N. W. 498; Wabash R. Co. v. Sharpe [Neb.] 107 N. W. 758. Stock negligently exposed to inclement weather. Atchison, etc., R. Co. v. Nation [Tex. Civ. App.] 92 S. W. 823. Delay is not excused by the freezing of water tanks where carrier was negligent. Rogers v. Texas & P. R. Co. [Tex. Civ. App.] 94 S. W. 158. Where carrier has warning of approaching flood it must exercise care commensurate with the situation. Elam v. St. Louis, etc., R. Co. [Mo. App.] 93 S. W. 851. Evidence held sufficient to take to the jury the question whether defendant was negligent in failing to remove cars containing goods to a place of safety after it knew of the approach of the flood which injured them. Pinkerton v. Missouri Pac. R. Co. [Mo. App.] 93 S. W. 849.

32. If negligence of the carrier mingles with the act as a co-operative cause, the carrier is liable provided the resulting loss is within the probable consequences of the negligent act. Pinkerton v. Missouri Pac. R. Co. [Mo. App.] 93 S. W. 849. Strike held no excuse for failure to remove cars containing goods to a place of safety after defendant learned of the approach of the flood which damaged them. Id. Negligent delay does not render a carrier liable for loss by flood which could not be anticipated. Elam

upon the carrier to show that the loss was due to act of God,[33] and, in the absence of statute,[34] it then devolves upon the plaintiff to show concurrent negligence on the part of the carrier.[35] A carrier is liable for misrouting [36] and for misdelivery.[37] Where goods are shipped by the consignor as an inferior class, without fraudulent intent, recovery can be had as for that class,[38] but if the value be concealed by artifice, no recovery can be had.[39]

§ 9. *Delivery by carrier and storage at destination.*[40]—A carrier's liability does not end upon the arrival of the goods at their destination,[41] but continues until they have been accepted by,[42] or tendered to,[43] the consignee, or have been placed in the usual and convenient place for delivery,[44] and the consignee has had a reasonable time to remove them.[45] In some states the liability continues until notice of arrival has been given,[46] and the consignee has had reasonable time thereafter

v. St. Louis, etc. R. Co. [Mo. App.] 93 S. W. 851.

33. Elam v. St. Louis & S. F. R. Co. [Mo. App.] 93 S. W. 851. Carrier is not required to go further and show affirmatively that it was guilty of no negligence. Id..

34. Under Civ. Code 1895, § 2265, carrier must disprove contributory negligence. Central of Georgia R. Co. v. Hall, 124 Ga. 322, 52 S. E. 679.

35. Elam v. St. Louis, etc., R. Co. [Mo. App.] 93 S. W. 851. Evidence that day before injury to plaintiff's goods by flood the water had reached an abnormal stage held insufficient to authorize finding of negligence. Id.

36. Carrier is liable for damages resulting from deviation from the contract of shipment as where delivered to another carrier instead of transporting by own route. Allen v. Wells, Fargo & Co., 95 N. Y. S. 597.

37. Failure of shipper to accompany and unload as per contract does not relieve a carrier for misdelivery. Southern R. Co. v. Webb, 143 Ala. 304, 39 So. 262. The right of carrier to retain goods until the freight is paid is no defense for misdelivery. Id. An alteration in contract of shipment by an unauthorized agent of shipper is no excuse for misdelivery. Id.

38. Where a box of pictures is billed and rated as glass and shipped with household effects, in the absence of actual fraud, the carrier is liable as for a box of household glass. Bottum v. Charleston, etc., R. Co. [S. C.] 51 S. E. 985. Carrier was under no obligation to inquire further as to the contents. Id. In an action to recover for the loss of a box of pictures shipped as glass, evidence of the actual contents is admissible although recovery can be had only as for glass. Id..

39. Not liable for loss of a package containing money where it is so wrapped in old newspaper as to conceal its value. Gilman v. Postal Tel. Co., 48 Misc. 372, 95 N. Y. S. 564.

40. See 5 C. L. 518.

41. Where contract failed to designate the destination, but preceding the agreement a tender for shipment to a certain place is recited, which place is endorsed on the back as the destination, such point construed as the destination. Lee v. Wabash R. Co. [Mo. App.] 94 S. W. 991 Bushnell v. Wabash R. Co. [Mo. App.] 94 S. W. 1001.

42. Where cars were placed on consignee's spur track and he had assumed dominion over them by removing a part of the contents and placing locks on the cars, there was a delivery, and carrier is not liable as warehouseman. Vaughn v. New York, etc., R. Co. [R. I.] 61 A. 695. An instruction making defendant liable for loss occurring during a reshipment after they had reached destination and been delivered is erroneous. Illinois Cent. R. Co. v. Holt [Ky.] 92 S. W. 540.

43. Upon tender of the goods to the consignee, the relation of carrier ceases. Adler v. Weir, 96 N. Y. S. 736 The fact that the goods are in a damaged condition or some are missing does not justify the consignee in rejecting the entire shipment. Central of Georgia R. Co. v. Montmollen [Ala.] 39 So. 820. But where goods are permitted to remain for nearly a year in possession of the terminal carrier and was greatly damaged, the shipper need not accept an offered return. Cincinnati, etc., P. R. Co. v. Stout [Ky.] 90 S. W. 258. Where an offer to deliver has been proven, the consignee can only recover for damage done or for the goods lost, and must prove such damage or value of the lost goods. Central of Georgia R. Co. v. Montmollen [Ala.] 39 So. 820.

44. It is the duty of the common carrier, not only to safely carry property to its destination, but to take it to the place provided at that point for delivery of similar property and there place it in a position of accessibility. Russell Grain Co. v. Wabash R. Co., 114 Mo. App. 488, 89 S. W. 908. Sale of goods before delivery does not relieve the carrier from the duty to place goods in a position of accessibility. Id. An unqualified refusal by consignee to accept delivery is a waiver of the right to insist on delivery at the usual place of delivery. Central of Georgia R. Co. v. Montmollen [Ala.] 39 So. 820.

45. A carrier's liability as such ceases when the goods arrive at their destination and the consignee has had a reasonable time to remove. Bowdon v. Atlantic Coast Line R. Co. [Ala.] 41 So. 294; Arkansas So. R. Co. v. German Nat. Bank [Ark.] 92 S. W. 522..

46. Whether defendant attempted to give notice to consignee of arrival of goods held immaterial where the goods were destroyed within a few hours after arrival and it appeared the consignee was out of town. Braunton v. Southern Pac. Co. [Cal. App.] 83 P. 265. The duty of a common carrier by water to give notice held not relieved by contract requiring the consignee to imme-

to remove the goods. After which time the carrier becomes liable as warehouseman only.[47] A shipper need not accept a delivery before the shipment reaches its destination to lessen the damages.[48] A wrongful refusal to deliver,[49] or a misdelivery,[50] renders the carrier liable, and hence it may take all necessary and reasonable precaution to protect itself.[51] A vendor as against the carrier may stop the shipment in transitu upon notice, without regard to the solvency of the consignee.[52]

diately take goods from the ship and providing that they might be landed at his risk if he failed. Rosenstein v. Vogemann [N. Y.] 77 N. E. 625. Where a box is addressed "Wm. Wood & Co., New York" and the shipping ticket read "W. Wood, N. Y.," a notice sent to a "W. Wood" selected at random from among forty such names in the directory is insufficient. Wood v. Baltimore & O. R. Co., 48 Misc. 642, 96 N. Y. S. 184.

47. Where goods are to be delivered subject to shipper's order and the legal holder of the bill of lading does not appear, the carrier may store with the designated company with directions to deliver subject to shipper's order. Arkansas Southern R. Co. v. Gilman Nat. Bank [Ark.] 92 S. W. 522. Where the carrier has no depot or warehouse at the place of destination, it may warehouse the freight in cars on the side track. Gratiot St. Warehouse Co. v. St. Louis, etc., R. Co. [Ill.] 77 N. E. 675. Not liable as a common carrier after notice of arrival has been given and the consignee has had reasonable time to remove, but as warehouseman. Becker v. Pennsylvania R. Co., 109 App. Div. 230, 96 N. Y. S. 1.

48. A shipper is not obliged to receive stock before they reach their distination although notified that some are sick. Houston, etc., R. Co. v. Burns [Tex. Civ. App.] 14 Tex. Ct. Rep. 181, 90 S. W. 688.

49. A provision that the carrier should not be liable for damages on account of any demand for greater freight rate than contracted for, but should refund upon notice, does not relieve from liability for damages for wrongful withholding for refusal to pay excessive rate demanded. Southern Kansas R. Co. v. Burgess Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 191, 90 S. W. 189. A carrier failing to deliver goods to the legal holder of a negotiable bill of lading upon the production thereof is liable for the damage sustained. Kirby's Dig. §§ 530, 531. Arkansas So. R. Co. v. German Nat. Bank [Ark.] 92 S. W. 522. The fact that the terminal carrier has not received the way bill from the connecting carrier constitutes no ground for refusing to deliver to consignee. Bowdon v. Atlantic Coast Line R. Co. [Ala.] 41 So. 294.

50. Liable for delivery of goods sent C. O. D. without receiving the money. Golightly v. State [Tex. Cr. App.] 90 S. W. 26. Delivery of goods to a person of the same name as the consignee without notice of the true consignee is not an actionable misdelivery. Singer v. Merchants' Dispatch Transp. Co. [Mass.] 77 N. E. 882. Mere fact that the names of the consignor and consignee are the same does not charge the carrier that they are the same person. Id. An agent delivering goods to one whose name corresponds to that of the consignee is not charged with the knowledge that consignor has been sending goods so addressed to one of a different name. Id. The consignee is presumably the owner of the goods, and the carrier may deliver them to him in the absence of notice of a limitation of his right to them in favor of an adverse claimant. Nashville, etc., R. Co. v. Grayson Co. Nat. Bank [Tex.] 93 S. W. 431. In the absence of a stipulation therein to the contrary, the carrier may deliver the goods to the consignee without requiring him to produce the bill of lading. Id. A carrier is liable to a bona fide holder of the bill of lading where, without the production of the bill, it delivers the goods to one not entitled thereto. Nashville, etc., R. Co. v. Grayson County Nat. Bank [Tex. Civ. App.] 91 S. W. 1106. Where receipt provides for delivery without the production of a receipt or bill of lading, the shipper cannot complain of a delivery so made. Singer v. Merchants' Dispatch Transp. Co. [Mass.] 77 N. E. 882. Where a shipment is under a bill of lading to be delivered "to the order of the shipper" a delivery to the person "notified" without order renders carrier liable. General Elec. Co. v. Southern R. Co. [S. C.] 51 S. E. 695. To constitute an unlawful delivery, the carrier must part with possession, and permitting an unauthorized inspection by a third person does not render the carrier liable in conversion. Dudeey v. Chicago, etc., P. R. Co., 58 W. Va. 604, 62 S. E. 718. A carrier is liable for delivery to one other than the consignee unless such person is the true owner and makes timely demand. Atlantic & B. R. Co. v. Howard Supply Co. [Ga.] 54 S. E. 530. Liable for delivery of hogs contrary to contract of shipment. Southern R. Co. v. Webb [Ala.] 41 So. 420. In an action for delivery of goods without an order from the shipper as provided in bill of lading, a contract between the shipper and the person to whom the goods were delivered whereby such person would have become the owner by accepting the rejected draft is immaterial. General Electric Co. v. Southern R. Co. [S. C.] 51 S. E. 695.

51. May require the production of the bill of lading. Nashville, etc. R. Co. v. Grayson County Nat. Bank [Tex. Civ. App.] 91 S. W. 1106. Where a shipment was consigned to a certain city to be delivered at a port, the carrier, in the absence of special contract, has no right to demand the bill of lading until delivered at the port. George & Co. v. Louisville & N. R. Co. [Miss.] 40 So. 486. Where a bill of lading, providing that unless signed the goods would be carried under common-law liability, was unsigned, a provision therein for surrender of bill of lading, was not binding. Id.

52. Carrier held liable for delivery according to original order. Faust v. Southern R. Co. [S. C.] 54 S. E. 566. Notice to stop goods in transitu given to one authorized to accept freight charges and issue yard orders is sufficient to bind the carrier. Id.

Liability for conversion.[53]—Where there is a refusal to deliver without legal excuse,[54] or a misdelivery, the carrier is liable in conversion.[55] To constitute a misdelivery there must be an actual or constructive delivery to another.[56] Delay is not a conversion.[57] The sale of perishable property upon refusal of the consignee to accept delivery,[58] if made according to statute,[59] is not a conversion. Where a sale has been legally rescinded, a carrier is not liable in conversion to the consignee in returning the goods.[60] In the absence of a tortious dealing with the goods,[61] a carrier is not guilty of conversion until a demand is made and refused.[62] Conversion not being predicated upon the contract of shipment, a provision therein that claims for losses must be presented within a specified time does not control.[63]

§ 10. *Liability of carrier or connecting carrier.*[64]

§ 11. *Limitation of liability.*[65]—A shipper has a right to have his goods carried without any restrictions whatever.[66] But in the absence of constitutional,[67] Federal,[68] or state statutory restrictions,[69] in most states, a carrier may restrict its

53. See 5 C. L. 519.

54. A reasonable qualified refusal to deliver does not constitute conversion. Louisville & N. R. Co. v. Britton [Ala.] 39 So. 585. The reasonableness of a refusal to deliver goods without the production of a bill of lading is for the jury. Id. The failure of a carrier to deliver goods according to contract, in the absence of a lawful excuse, constitutes conversion. Atchison, etc., R. Co. v. Schriver [Kan.] 84 P. 119. The fact that the party notified of its arrival removes the goods without carrier's knowledge, is not a lawful excuse. Id. Nor is an illegal claim to the property by a third party. Id. Nor the representation of such person that he expects to be able to settle with the shipper in a few days. Id. A refusal to deliver without payment of freight charges constitutes conversion where the damages caused by negligent delay exceeds the freight due. Missouri Pac. R. Co. v. Peru-Van Zandt Implement Co. [Kan.] 85 P. 408. Mere proof of failure to deliver does not constitute conversion. Rosenfeld v. Central Vermont R. Co., 97 N. Y. S. 905.

55. A carrier is liable in conversion for misdelivery of goods irrespective of good faith, and it is no defense that the goods were delivered in accordance with way-bill received from connecting carrier. Merchants' & Miners' Transp. Co. v Moore & Co., 124 Ga. 482, 52 S. E. 802. The delivery of goods to one other than an indorsee of the bill of lading is conversion. Fishomingo Sav. Inst. v. Johnson, Nesbitt & Co. [Ala.] 40 So. 503. Where there has been a misdelivery amounting to conversion, an action will lie against the carrier or the party receiving. Id. An interposition of claim in a suit against the seller in which the goods were attached is an election. Id.

56. Evidence insufficient. Conrad Schopp Fruit Co. v. Missouri Pac. R. Co., 115 Mo. App. 353, 91 S. W. 402.

57. Failure of a carrier to deliver goods within the time specified in the contract of carriage does not amount to a conversion. Clark v. American Exp. Co. [Iowa] 106 N. W. 642. A demand and refusal thereof on the day when the goods should have arrived does not constitute a conversion. Id. Where a trunk was lost but later found and tendered plaintiff by an express company there was no conversion and the latter was liable only for delay. Wells, Fargo & Co. v. Hanson [Tex. Civ. App.] 91 S. W. 321. The consignee cannot, by declining to accept a delayed shipment from the carrier, convert him into a tort-feasor, and hold him liable in trover for the value of the property. Illinois Cent. R. Co. v. Johnson [Tenn.] 94 S. W. 600.

58. Where the owner of perishable goods notifies the carrier that he renounces all claim to them and will hold the company for a conversion, a sale by the carrier to prevent a total loss does not constitute a conversion. Dudley v. Chicago, etc., R. Co., 58 W. Va. 604, 52 S. E. 718.

59. Carrier failing to comply with Rev. St. 1895, §§ 328, 331, authorizing sale of perishable property, remaining after its arrival until in danger of depreciation, at public auction after five days' notice is guilty of conversion. Carter & Corey v. International, etc., R. Co. [Tex. Civ. App.] 93 S. W. 681.

60. Stafsky v. Southern R. Co., 143 Ala. 372, 39 So. 132. Especially is the consignee estopped to claim conversion where he refused to accept delivery. Id.

61. In case of misdelivery no demand is necessary. Merchants' & Miners' Transp. Co. v. Moore & Co., 124 Ga. 482, 52 S. E. 802.

62. Louisville & N. R. Co. v. Britton [Ala.] 39 So. 585. Where goods are subject to shipper's order, an order duly accepted by the carrier directing a diversion constitutes a demand. Atchison, etc., R. Co. v. Schriver [Kan.] 84 P. 119.

63. Merchants' & Miners' Transp. Co. v. Moore & Co., 124 Ga. 482, 52 S. E. 802.

64. See ante, § 3.

65. See 5 C. L. 520.

66. Ficklin v. Wabash R. Co. [Mo. App.] 93 S. W. 847.

67. Nebraska constitution forbids limitation of liability. Wabash R. Co. v. Sharpe [Neb.] 107 N. W. 758.

68. A provision in a contract of interstate shipment of stock relieving the company from liability for failure to unload and feed according to Rev. St. U. S. § 4386 [U. S. Comp. St. 1901, p. 2995]. Reynolds v. Great Northern R. Co, 40 Wash. 163, 82 P. 161. A provision in a contract of interstate shipment of stock that the shipper shall unload the stock at his own risk does not relieve the carrier from liability for confining the cattle contrary to

common-law liability by special contract.[70] Generally a carrier is not permitted to contract against losses due to its negligence,[71] although a few states permit contracts except as against "gross" negligence.[72] Such special contract may be contained in the bill of lading [73] or the receipt,[74] and generally such contract, in the absence of

Rev. St. U. S. § 4386 [U. S. Comp. St. 1901, p. 2995]. Id.

69. Under Code, § 2074, carriers cannot relieve themselves from their common-law liability. Powers v. Chicago, etc., R. Co. [Iowa] 105 N. W. 345.

70. Evidence held insufficient to show that plaintiff agreed to the limitation of liability contained in the bill of lading and also to show what the limitation was. Jenkins v. Southern R. Co. [S. C.] 53 S. E. 480. A consignee is not precluded from recovering under common-law liability by a special contract limiting liability made after loss and with the understanding that it was not to affect the consignee. Frazier v. Charleston & W. C. R. Co. [S. C.] 52 S. E. 964.

71. Ficklin v. Wabash R. Co. [Mo. App.] 93 S. W. 861; Jones v. Quincy, etc., R. Co. [Mo. App.] 94 S. W. 735; Jones v. St. Louis & S. F. R. Co., 115 Mo. App. 232, 91 S. W. 158. Hog shipment. Griffin v. Wabash R. Co., 115 Mo. App. 649, 91 S. W. 1015; Ratliff v. Quincy, etc., R. Co. [Mo. App.] 94 S. W. 1005; Southern Kan. R. Co. v. Burgess Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 191, 90 S. W. 189; Louisville & N. R. Co. v. Smitha [Ala.] 40 So. 117; Southern R. Co. v. Levy [Ala.] 39 So. 95; Central of Georgia R. Co. v. Hall, 124 Ga. 322, 52 S. E. 679; Ames v. Fargo, 99 N. Y. S. 994. A carrier liable for the escape of animals beyond the terminus of its line due to failure to furnish sufficient cars notwithstanding a special contract limiting its liability to the end of its road. Jones v. St. Louis & S. F. R. Co., 115 Mo. App. 232, 91 S. W. 158. And though the shipper undertook to inspect the car. Id. A carrier is liable for losses due to negligence in providing a safe car as contracted, although loss occurs beyond the line against which it has limited its liability. Kibby v. Michigan Cent. R. Co. [Mich.] 12 Det. Leg. N. 717, 105 N. W. 769. It is negligence for a carrier to unload coal so near to a shipment of apples as to injure them by the dust. Hurst v. St. Louis & S. F. R. Co. [Mo. App.] 94 S. W. 794. A contract limiting defendant's liability to the value of the goods at the place of shipment is invalid as against negligence. Entitled to recover the value at place of delivery. Rhymer v. Delaware, L. & W. R. Co., 27 Pa. Super. Ct. 345. A contract limiting liability for delay to the extra expense of feeding the stock is void where such delay was caused by negligence. Fulbright v. Wabash R. Co. [Mo. App.] 94 S. W. 992; Bushnell v. Wabash R. Co. [Mo. App.] 94 S. W. 1001. A contract relieving a carrier from liability for delays will be enforced only as to delays not due to negligence. Bushnell v. Wabash R. Co. [Mo. App.] 94 S. W. 1001. Exemption from liability for loss in consequence of escape of stock through doors or openings in cars held not to apply where escape is due to carrier's negligence. McFall v. Wabash R. Co. [Mo. App.] 94 S. W. 570. A provision that carrier will not be liable for damages resulting from the suffocation of animals in transit does not release it from liability where suffocation is directly caused by its own negligence, as where it is due to delay. Id. Held not negligence for the carrier not to furnish an attendant with a valuable horse being shipped. Ames v. Fargo, 99 N. Y. S. 994. Evidence held insufficient to show that the injury was due to defect in car. Yazoo & M. V. R. Co. v. Cox [Miss.] 40 So. 547. Evidence that the car had been jerked, that the horse was injured by a blow on the head and that an overhead hayrack was found down, is sufficient to sustain a finding of negligence. Texas & P. R. Co. v. Lusk [Tex. Civ. App.] 13 Tex. Ct. Rep. 980, 89 S. W. 798. Where injury occurs from an excepted cause, plaintiff may show negligence of carrier. Hurst v. St. Louis & S. F. R. Co. [Mo. App.] 94 S. W. 794.

72. A common carrier of stock in Georgia may limit its liability to gross negligence. Central of Georgia R. Co. v. Hall, 124 Ga. 322, 52 S. E. 679. In West Virginia carriers may by special contract, fairly and reasonably made, fix the value of horses shipped, upon the consideration that the rates be based thereon, except as against gross negligence. Trexler v. Baltimore & O. R. Co., 28 Pa. Super. Ct. 207. And where shipper accepts the benefit of rates, he cannot claim a greater amount. Id. Where, by special contract, a carrier is liable only for gross negligence, sudden insanity which by the exercise of proper care could not have been foreseen, is a defense. Central of Georgia R. Co. v. Hall, 124 Ga. 322, 52 S. E. 679. It is a question for the jury whether the carrier by the exercise of due care could have foreseen the insanity. Id.

73. An acceptance of a bill of lading limiting liability, in consideration of a lower rate, binds the shipper. Trexler v. Baltimore & O. R. Co., 28 Pa. Super. Ct. 207. Immaterial that he did not know that the rate was lower or that the carrier would assume a common-law liability if requested. Arthur v. Texas & P. R. Co. [C. C. A.] 139 F. 127. Where a shipper accepted a bill of lading given to this agent and sued upon it as the contract of shipment he cannot relieve himself from the clause limiting the carrier's liability on the ground that his agent was unable to read. Missouri, etc., R. Co. v. Patrick [C. C. A.] 144 F. 632. A bill of lading not signed by the shipper and not otherwise shown to constitute a contract, cannot limit the carrier's liability. Rev. St. c. 114, § 33. Indiana, etc., R. Co. v. Empire Rubber Mfg. Co., 118 Ill. App. 652. The consignee is bound by valid provisions of the bill of lading limiting the carrier's liability notwithstanding the consignor had no authority to make such provision. Bell Bros. v. Western & A. R. Co. [Ga.] 54 S. E. 532.

74. A receipt, stating that the goods are to be shipped according to the "conditions and exceptions of the company's bill of lading," does not make the company's uniform bill of lading a part of the contract, no bill being executed. Pittsburg, etc., R. Co. v. Bryant [Ind. App.] 75 N. E. 829. A contract

fraud or concealment, is binding notwithstanding the shipper did not read it,[75] although some states require actual knowledge[76] and assent.[77] Contracts limiting liability must be based upon a sufficient consideration,[78] although not necessarily independent of that supporting the general contract of shipment.[79] A carrier may contract against losses occurring on connecting lines,[80] unless it has undertaken to

releasing a carrier from liability in consideration of reduced rates must be accepted by the shipper or his agent. Hallparn v. Joy S. S. Co., 99 N. Y. S. 464. Where the truckman who delivered the goods was only authorized to receive a receipt and the carrier knew he was merely a truckman, he was not an agent to sign a release. Id.

75. Ames v. Fargo, 99 N. Y. S. 994. Immaterial that the shipper did not know of the provision. Atlantic Coast Line R. Co. v. Dexter [Fla.] 39 So. 634. A provision in a bill of lading exempting the initial carrier from liability for negligence of connecting carrier, held not binding where it was in fine print and partly concealed by stamps. Allen & Gilbert-Ramaker Co. v. Canadian Pac. R. Co. [Wash.] 84 P. 620. A limitation of liability contained in a receipt is binding upon the shipper in the absence of fraud, misrepresentation or concealment, irrespective of knowledge. Hoffman v. Metropolitan Exp. Co., 97 N. Y. S. 838. Immaterial whether shipper was not guilty of contributory negligence in not reading. Id.

76. Baltimore & O. R. Co. v. Doyle [C. C. A.] 142 F. 669. Must be specifically brought to the shipper's knowledge unless there are such exceptional circumstances, as type, color, etc., that he must see. Id. Held that where the blank book furnished and used by plaintiff for two years clearly set out the stipulation limiting the liability, he is charged with notice. Gerry v. American Exp. Co., 100 Me. 519, 62 A. 498. Shipper must have knowledge of the stipulations in an accepted voucher limiting the carrier's liability before he is bound thereby. Hayes v. Adams Exp. Co. [N. J. Law] 62 A. 284. The knowledge that the rates depend upon the value does not charge him with knowledge of the limitation. Id.

77. Baltimore & O. R. Co. v. Doyle [C. C. A.] 142 F. 669. Immaterial whether shipper was negligent in not reading. Id. Under Civ. Code 1895, § 2276, a carrier cannot limit liability unless expressly assented to by the shipper. Frasier v. Charleston & W. C. R. Co. [S. C.] 52 S. E. 964. A mere provision in the bill of lading is insufficient. Id. Under Civ. Code 1895, § 2264, a carrier is prohibited from limiting its liability by notice either published or by entry on receipts given. Central of Georgia R. Co. v. Hall, 124 Ga. 322, 52 S. E. 679. Limitation in carrier's receipt is not binding unless assented to. John Hood Co. v. American Pneumatic Service Co. [Mass.] 77 N. E. 638. Such assent may be presumed from the fact that he accepted the receipt without dissenting. Id.

78. Where the recited consideration is reduced rates it will be presumed that that was the consideration which induced the shipper to release. Ficklin v. Wabash R. Co. [Mo. App.] 92 S. W. 347. Where the consideration is reduced rates there must be a different rate for the release and nonrelease contract. Ficklin v. Wabash R. Co. [Mo. App.] 93 S. W. 847; Ficklin v. Wabash R. Co. [Mo. App.] 92 S. W. 347; Jones v. Quincy, etc., R. Co. [Mo. App.] 94 S. W. 735. Although such rates need not be expressly offered to the shipper. Ficklin v. Wabash R. Co. [Mo. App.] 93 S. W. 847. Contract held invalid as the rate was the regular and only one for that class of cattle, although there was a higher rate for greater value. Id. Contract invalid as defendant had only one rate regardless of number and value of animals. Ficklin v. Wabash R. Co. [Mo. App.] 92 S. W. 347. See, also, McFall v. Wabash R. Co. [Mo. App.] 94 S. W. 570. A contract of carriage containing the clause "Tariff rates on this shipment * * * is thirty per cent. higher than the rates herein named if shipment is not made under this contract," is not on its face within the interstate commerce act as not offering a choice of rates. Chicago, etc., R. Co. v. Hare [Ind. App.] 75 N. E. 867. Where no rate is mentioned, the mere recital in contract of carriage of a limitation of liability coupled with the fact that a smaller rate is always charged under such limitation, as published pursuant to the interstate commerce act, raises no presumption that the shipper knew of such reduced rate. Phoenix Powder Mfg. Co. v. Wabash R. Co. [Mo.] 94 S. W. 235. Interstate commerce act held to have nothing to do with action for damages for loss of explosives, and no Federal question involved. Id. A contract limiting a carrier's liability must have a consideration other than the delivery of the goods and the agreement to transport. Chicago, etc., R. Co. v. Hare [Ind. App.] 75 N. E. 867. A clause in a contract of shipment, "Tariff rate on this shipment is thirty per cent. higher than herein named, if shipment is not made under this contract" shows prima facie a consideration. Id. A contract limiting the carrier's liability for loss in consideration of reduced rates is binding. Missouri, etc., R. Co. v. Patrick [C. C. A.] 144 F. 632. Where there is only one posted rate under the interstate commerce act, a contract based on reduced rates is void. Griffin v. Wabash R. Co., 115 Mo. App. 549, 91 S. W. 1015. A rate posted and torn down is not an established rate under the act. Id. A reduced rate is sufficient to support a limitation of liability for delay to the expense of food for stock during such delay. Fulbright v. Wabash R. Co. [Mo. App.] 94 S. W. 992.

79. Hatch v. Minneapolis, etc., R. Co. [N. D.] 107 N. W. 1087. Where the contract limiting the carrier's liability is a part of the general contract of carriage there need be no separate consideration. Arthur v. Texas & P. R. Co. [C. C. A.] 139 F. 127.

80. Pittsburg, etc., R. Co. v. Brayant [Ind. App.] 75 N. E. 829; Kibby v. Michigan Cent. R. Co. [Mich.] 12 Det. Leg. N. 717, 105 N. W. 769. The right of connecting carriers to limit liability to damages occurring on respective lines is not affected by Acts 1899,

carry to destination, in which case it cannot limit its liability for negligence.[81] In some states a carrier may limit the amount of recovery in case of loss,[82] and especially where such limit is a bona fide agreement of value for rating purposes.[83] The case, however, must be brought clearly within the limitation or the common-law liability applies.[84] The limitation of liability may be waived.[85] In Mississippi an express company cannot relieve itself from liability for negligence of the railroad company.[86] The validity of a contract limiting liability is determined by the laws of the state where made,[87] unless the limitation is against the public policy of the

p. 214, § 125, providing that a recovery against carriers severally liable for a part shall be proportioned by the jury. Missouri, K. & T. R. Co. v. Elliott [Tex.] 13 Tex. Ct. Rep. 998, 89 S. W. 767. Where petition failed to allege a through shipment within Rev. St. 1895, art. 331a, and answer denied such contract, it is error to strike out an answer setting up contract limiting its liability to defendant's line, though intrastate shipment. Texas & P. R. Co. v. Arnett [Tex. Civ. App.] 92 S. W. 57. Where the contract of shipment limits the carrier's liability to its own line it is not liable for injuries to horses after their delivery to a connecting carrier. Refusal of requested instruction held error. International & G. N. R. Co. v. Helttner [Tex. Civ. App.] 94 S. W. 189. A shipper is not bound by a bill of lading limiting liability of initial carrier to damages occurring on its own line where such bill was not delivered contemporaneously with the goods. Southern R. Co. v. Levy [Ala.] 39 So. 95. But contemporaneous delivery is presumed in the absence of showing to the contrary. Id.

81. Ratliff .v Quincy, etc., R. Co. [Mo. App.] 94 S. W. 1005; Lee v. Wabash R. Co. [Mo. App.] 94 S. W. 991. In Texas connecting carriers of a through domestic shipment cannot limit their liability to losses on their own lines. Rev. St. 1895, art. 331b. Gulf, etc., R. Co. v. Terry [Tex. Civ. App.] 13 Tex. Ct. Rep. 991, 89 S. W. 792.

82. Especially in respect to live stock. Atlantic Coast Line R. Co. v. Dexter [Fla.] 39 So. 634. The characters "Rel. Val. Lts. [or Ltd.] 5 cwt." in a bill of lading will not be construed as a contract limiting recovery to $5 per cwt., especially where a different value is elsewhere placed on shipment. Norfolk & W. R. Co. v. Harman [Va.] 52 S. E. 368. "Rel. Val. $5.00 Cwt." indorsed on a bill of lading and unexplained will not be presumed as an agreement limiting liability, where another clause stipulates that value at place of shipment shall control in case of loss. Kansas City So. R. Co. v. Embrey [Ark.] 90 S. W. 15. A limitation of liability in a carrier's receipt to the value disclosed is valid. John Hood Co. v. American Pneumatic Service Co. [Mass.] 77 N. E. 638. A stipulation that defendant will not be liable for goods except to the value of $50, unless the shipper discloses the true value, is reasonable and valid. Gerry v. American Exp. Co., 100 Me. 519, 62 A. 498. Especially where stamped "value asked and refused" in the presence of the shipper and is accepted. Royal Costume Co. v. Weir, 48 Misc. 376, 95 N. Y. S. 575.

Contra: A provision in a contract of an express company limiting recovery to $50 irrespective of actual value is void as against public policy. Southern Exp. Co. v. Marks, Rothenberg & Co. [Miss.] 40 So. 65.

83. A common carrier may, as a basis for fixing its charges, make an actual and bona fide agreement as to the value of property to be transported and will be liable only for that value. Central of Georgia R. Co. v. Hall, 124 Ga. 322, 52 S. E. 679. But a mere arbitrary and general limitation of liability in the bill of lading does not amount to such an agreement. Id. Where there is an issue of fact as to whether there was a bona fide valuation or an arbitrary effort to limit liability, the question is for the jury (Id.), but where the written contract shows that it falls within the latter and there is no issue of fact, the court may construe the contract (Id.).

84. Clause releasing carrier from liability for loss or damage on the lines of succeeding carriers held not to cover delays. Johnson v. Missouri, etc., R. Co., 107 App. Div. 374, 95 N. Y. S. 182. Shipper's statement of value of cattle in contract held merely intended to limit the amount of the recoverable damages to the stipulated value, and the fact that they brought more per head than such value did not preclude a recovery for loss due to a decline in their market value while their transportation was delayed because of the carrier's negligence. Ficklin v. Wabash R. Co [Mo. App.] 93 S. W. 861. A provision in a contract of shipment that in case of damage the price at point of shipment should control and limiting the amount of recovery does not apply to damages for misdelivery. Southern R. Co. v. Webb, 143 Ala. 304, 39 So. 262. A carrier accepting hogs under a contract exempting it from liability for injuries to one another, from heat and suffocation and imposing the duty on the shipper to care for them, it is not liable for loss by suffocation due to overcrowding, or for death from eating cockle burs or for injuries inflicted by one another. Illinois Cent. R. Co. v. Holt [Ky.] 92 S. W. 540.

85. Evidence held sufficient to show a waiver by the carrier of its contract limiting its liability. John Hood Co. v. American Pneumatic Service Co. [Mass.] 77 N. E. 638.

86. Stipulation in a contract of an express company that the negligence of the railroad company shall not be imputed to it, is void as against public policy. Southern Exp. Co. v. Marks, Rothenberg & Co. [Miss.] 40 So. 65.

87. In the absence of proof it will be presumed that the laws of the state where a contract limiting liability was made are the same with respect to its validity as those of the state where the action is brought. Southern Kan. R. Co. v. Burgess Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 191, 90 S. W. 189.

state where invoked [88] or relates to the time within which to sue.[89] The effect of a receipt in limiting a carrier's liability is determined by the general commercial law.[90]

Provisions for notice of inquiry.[91]—Unless expressly prohibited,[92] a carrier may contract with the shipper for notice of injuries to shipment within a specified time,[93] and, if reasonable,[94] such contract will be enforced.[95] But the giving of notice [96] or defects therein may be waived.[97] A notice given after expiration of the prescribed time is sufficient if the delay was due to acts of the carrier.[98]

88. If against the public policy of the state where the action is brought, it is immaterial that it is valid where made. Lake Shore & M. S. R. Co. v. Teeters [Ind.] 77 N. E. 599.

89. The validity of a clause in a contract of shipment requiring suit to be brought within a specified time is determined by the lex forum. Southern Kan. R. Co. v. Burgess Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 191, 90 S. W. 189. Provision requiring suit to be brought within six months is void in Texas. Id.

90. Hence a Federal court sitting in Pennsylvania was not bound by the state decisions. Macfarlane v. Adams Exp. Co., 137 F. 982.

91. See 5 C. L. 522.

92. A provision requiring the shipper of live stock to report loss within ten days from the time of unloading is within the prohibition Const. § 4, art. 11. Union Pac. R. Co. v. Thompson [Neb.] 106 N. W. 598.

93. Freeman v. Kansas City So. R. Co. [Mo. App.] 93 S. W. 302. Provision that carriers should not be liable for loss unless claim therefor in writing was made within five days after arrival of goods, held supported by sufficient consideration. Id. Provision that no loss or damage to stock should be allowed unless claim was made within ten days after cattle left cars held to refer only to damage before they left cars so that failure to give it did not preclude recovery for loss of market and expenses consequent upon delay. Wright v. Chicago, etc. R. Co. [Mo. App.] 94 S. W. 555. A provision that the shipper shall give notice of his claim for damages before the stock is removed or intermingled with other stock, does not apply to damages from misdelivery. Southern R. Co. v. Webb, 143 Ala. 304, 39 So. 262. Such provisions should be applied reasonably rather than strictly, where latter would do an injustice to the shipper. Jones v. Quincy, etc., R. Co. [Mo. App.] 94 S. W. 735. Provision requiring notice to be given to a general officer of the company held unreasonable and notice to general claim agent was sufficient. Id. Letters held to contain an admission that due notice was served within the time required. McFall v. Wabash R. Co. [Mo. App.] 94 S. W. 570. The words "place of destination" as used in a stipulation for notice of injury to stock before removal, has reference to the town, village or city to which the shipment is made. Not to the station itself. Hatch v. Minneapolis, etc., R. Co. [N. D.] 107 N. W. 1087. A notice that there was a very heavy shrinkage, that the cattle were knocked down by rough handling and did not reach destination in time for a certain market, is sufficient to allow recovery for shrinkage, injury to quality and decline in market. Ratliff v. Quincy, etc., R. Co. [Mo. App.] 94 S. W. 1005. A claim demanding directly $490 as known loss and stating that there were still thirty-five head of cattle at large, is sufficient to authorize damages for injuries to the latter. Reynolds v. Great Northern R. Co., 40 Wash. 163, 82 P. 161. Evidence held to show that notice of claim of damages for delay was given within the required time. Ratliff v. Quincy, etc., R. Co. [Mo. App.] 94 S. W. 1005.

94. Requirements of contract as to written notice of claim for damages held to be so interdependent as to become inseparable, and as a whole to be unreasonable and void. Pecos & N. T. R. Co. v. Evans-Snider-Buel Co. [Tex. Civ. App.] 93 S. W. 1024. A stipulation requiring written notice of claim within ninety-one days held reasonable. International & G. N. R. Co. v. Heittner [Tex. Civ. App.] 94 S. W 189. Provision requiring written claim within ten days after stock was removed from cars held reasonable and valid, and failure to comply therewith precluded recovery. Bellows v. Wabash R. Co. [Mo. App.] 94 S. W. 557. A stipulation in a contract of shipment requiring the shipper to give notice of injury to stock before removal from place of destination is a reasonable stipulation and binding. Hatch v. Minneapolis, etc., R. Co. [N. D.] 107 N. W. 1087.

95. Such a provision is valid and binding when it is reasonable, necessary to the accomplishment of its object, and affords the shipper under the circumstances of the particular case a fair opportunity, by the exercise of ordinary diligence, to learn of his loss and give the notice within the required time. Freeman v. Kansas City So. R. Co. [Mo. App.] 93 S. W. 302. Will not be enforced if unreasonable or harsh or if its purpose has been fully accomplished by actual notice or otherwise. Id. Fact that plaintiffs informed carrier of loss as soon as they discovered it, held not to excuse failure to comply with provision for written notice within five days after arrival, where it appeared that their own neglect to provide for prompt inspection of corn on its arrival at its destination was the sole cause of failure. Id.

96. In order to establish a waiver, plaintiff must show that carrier or one of its agents did something calculated to induce him to believe that it would not insist on performance. International & G. N. R. Co. v. Heittner [Tex. Civ. App.] 94 S W. 189. Evidence held insufficient to show waiver. Id. Evidence insufficient to show waiver of compliance. Freeman v. Kansas City So. R. Co. [Mo. App.] 93 S. W. 302. Notice held waived by investigating plaintiff's loss, though contract required such waiver to be made in

§ 12. *Public records of traffic.*[98a]

§ 13. *Remedies and procedure.*[99] *Timely notice of suit.*[1]

Persons who may sue.[2]—The owner[3] of a shipment can maintain an action for injury thereto, though shipped in another's name,[4] but where goods are destroyed he cannot subsequently acquire title and sue.[5] A shipper who has sold the goods during transit cannot maintain conversion in his own right,[6] nor as trustee of an express trust for the benefit of the assignee,[7] nor can he sue upon the contract.[8] A consignee who has a special interest,[9] and in some states, no interest, may maintain an action for loss or damage to the shipment.[10] Where the title has passed to the consignee and he contracts for a further shipment, the consignor cannot recover for loss during the shipment.[11]

Particular remedies available.[12]—An action to recover overcharges is for money had and received and not upon contract.[13] In an action of conversion for selling goods for unlawful demurrage charges, a judgment for the surplus may be rendered though the charge was valid.[14]

Venue.[15]—A statute providing that where goods "have been transported" over two or more lines operating within the state, an action may be brought in any county where either line extends, does not apply unless the goods have been actually

writing by a general officer of the company. Jones v. Quincy, etc., R. Co. [Mo. App.] 94 S. W. 735. Conversation between defendant's live stock agent and plaintiffs while attempting to adjust the loss, held admissible as tending to show waiver of notice of loss, though not to prove plaintiffs' loss. Id.

97. A claim for damages accepted without objection to its sufficiency and considered on its merits, constitutes a full performance of the condition. Ratliff v. Quincy, etc., R. Co. [Mo. App.] 94 S. W. 1005. Taking up of case on its merits waives lack of verification and tardiness. Ingwersen v. St. Louis & H. R. Co., 116 Mo. App. 139, 92 S. W. 357; Bushnell v Wabash R. Co. [Mo. App.] 94 S. W. 1001. A failure to give notice of the loss within the specified time is waived by a disallowance of the claim on the merits. Isham v. Erie R. Co., 98 N. Y. S. 609.

98. Where plaintiff went to an agent of defendant and informed him that he wished to make a claim for loss, but was referred to an agent in another city, who, in turn, directed him to write to another, which was done, but after the expiration of the period, held notice sufficient. Reynolds v. Great Northern R. Co., 40 Wash. 163, 82 P. 161.

98a. See 3 C. L. 603, § 12.

99. What goods in the possession of carrier are subject to garnishment, see note Liability of carriers to garnishment, 5 C. L. 1576.

1, 2. See 5 C. L. 522.

3. One may recover for calves lost during shipment although they were thrown in without charge with the cattle sold, and plaintiff was to pay only for such "cattle" as arrived. International & G. N. R. Co. v. Jones [Tex. Civ. App.] 91 S. W. 611. In an action by "E. F. Dawson" for injuries to a shipment of stock, evidence of a shipment by "Dawson & Co." is insufficient to show ownership of the cattle. Atchinson, etc., R. Co. v. Dawson [Tex. Civ App.] 14 Tex. Ct. Rep. 139, 90 S. W. 65. A sale bill reciting purchase of goods by plaintiff together with evidence of its payment is sufficient evidence of title in plaintiff to sustain an action of conversion by the carrier. Louisville & N. R. Co. v. Britton [Ala.] 39 So. 585.

4. Under Rev. St. 1899, § 540, requiring actions to be prosecuted in the name of the real party in interest, the owner may sue, though shipment was made in the name of another. Bushnell v. Wabash R. Co. [Mo. App.] 94 S. W. 1001. No assignment of the contract is necessary. Id. The principal, as the real party in interest, may recover for injury to property shipped in the name of his agent. Griffin v. Wabash R. Co., 115 Mo. App. 549, 91 S. W. 1015.

5. Where goods are shipped under an agreement that title was not to pass until the draft attached to the bill of lading was paid by the consignee, a payment after destruction does not give right to sue. Vaughn v. New York, etc., R. Co. [R. I.] 61 A. 695.

6. Sweeney v. Frank Waterhouse & Co., 39 Wash. 507, 81 P. 1005. Carrier held not estopped to deny shipper's title in view of the fact that a partial delivery had been made to the assignee. Id.

7, 8. Sweeney v. Frank Waterhouse & Co., 39 Wash. 507, 81 P. 1005.

9. As a factor. Missouri Pac. R. Co. v. Peru-Van Zandt Implement Co. [Kan.] 85 P. 408.

10. A husband may maintain an action for injury to household goods consigned to him, though owned in part by the wife. Walter v. Alabama Great So. R. Co., 142 Ala 474, 39 So. 87.

11. Where the title to goods have passed to the consignee and he contracts for a further shipment, the consignor cannot recover for loss during the last shipment. International & G. N. R. Co. v. Bingham [Tex. Civ. App.] 89 S. W. 1113.

12. See 5 C. L. 522.

13. Southwestern Ala. R. Co. v. Maddox & Son [Ala.] 41 So. 9.

14. Spurlock v. Missouri, etc., R. Co. [Tex. Civ. App.] 90 S. W. 1124.

15. See 5 C. L. 523.

transported,[16] nor can a foreign carrier be sued under a statute authorizing suit in any county where one of several defendants resides unless the action is brought at the legal domicile of the domestic corporation.[17] A foreign corporation, operating no line within a state, cannot be sued therein.[18]

Pleading, proofs, and evidence.[19]—A complaint substantially in the code form is sufficient.[20] The petition must show plaintiff's right to sue,[21] and that defendant accepted the shipment as a common carrier,[22] but the declaration need not be based specifically upon the contract of carriage.[23] As in other actions, the pleas must be consistent[24] and free from conclusions of law.[25] Petition need not allege due notice of the jury,[26] nor the specific damage occurring on the respective connecting lines.[27] Foreign law need not be pleaded to prove the invalidity of a contract limiting liability made thereunder.[28] In actions for failure to deliver, defendant may prove offer to deliver under the general issue.[29] Plaintiff need not allege the legality of the contract freight rate in an action for wrongful withholding to enforce additional charges.[30] Failure to allege demand for goods is waived by an answer alleging delivery.[31] Where a written contract of shipment has been pleaded, such contract must be impeached by proper pleading before parol evidence of a different contract is admissible.[32] There must be no variance between the proof and the

10. Laws 1899, p. 214, c. 125. St. Louis S. W. R. Co. v. McKnight [Tex.] 13 Tex. Ct. Rep. 1003, 89 S. W. 755.

17. Rev. St. 1895, art. 1194, subd. 4. St. Louis S. W. R. Co. v. McKnight [Tex.] 13 Tex. Ct. Rep. 1003, 89 S. W. 755. Under Rev. St. 1895, art. 4378, the public office of a domestic railroad is its domicile. Id. Rev. St. 1895, art. 1208, authorizing joinder of necessary or proper parties after commencement of suit, does not permit the joinder of a railroad company which is not subject to suit in that county. Id.

18. American Refrigerator Transit Co. v. Chandler [Tex. Civ. App.] 93 S. W. 243. In an action for damages to shipment of tomatoes brought against initial carrier, plea of privilege by connecting carrier which defendant sought to make a party held properly sustained, no part of its road being within the state. Id.

19. See 5 C. L. 523.

20. Complaint substantially in the form of Code 1896, p. 946, No. 15, held sufficient. Walter v. Alabama Great So. R. Co., 142 Ala. 474, 39 So. 87. A complaint in the Code form for breach of contract of shipment is broad enough to cover bills of lading containing special stipulations. Southern R. Co. v. Webb, 143 Ala. 304, 39 So. 262. **Amended complaint held sufficient** to state a cause of action for failure to deliver stock. Norfolk & W. R. Co. v. Sutherland [Va.] 54 S. E. 465.

21. A complaint alleging that defendant had agreed to safely carry certain "goods and property of plaintiff" sufficiently alleges title in plaintiff as against a motion to dismiss. Zalk v. Great Northern R. Co. [Minn.] 107 N. W. 814.

22. Need not be alleged directly if fairly inferable from other facts alleged, especially where the answer sets out the contract showing the fact. Ficklin v. Wabash R. Co. [Mo. App.] 93 S. W. 861. A complaint alleging that a box was delivered to defendant "to be carried by it as a common carrier of freight," sufficiently alleges that it was delivered to defendant as a common carrier. Kansas City, M. & B. R. Co. v. Spann [Ala.] 40 So. 83.

23. Petition alleging that defendant was a common carrier of freight and fully setting out facts constituting cause of action for injuries to live stock shipped, and charging a breach of duty imposed on the carrier by law, held sufficient without an express declaration upon any bill of lading or contract of carriage. St. Louis, etc., R. Co. v. Berry [Tex. Civ. App.] 93 S. W. 1107.

24. A plea that the shipper's negligence contributed to the injury admits negligence, and hence an amendment alleging that defendant was not guilty of negligence is inconsistent. Walter v. Alabama Great So. R. Co., 142 Ala. 474, 39 So. 87.

25. An allegation that defendant was in possession of certain goods as a "common carrier" is not objectionable as a conclusion of law. Russell Grain Co. v. Wabash R. Co., 114 Mo. App. 488, 89 S. W. 908.

26. The giving of notice of injury is not strictly a condition precedent to the bringing of an action, but the noncompliance is a matter of defense. Hatch v. Minneapolis, etc., R. Co. [N. D.] 107 N. W. 1087. Hence compliance need not be alleged in the complaint. Id.

27. An allegation of the amount against all being sufficiently particular in the absence of special exception. Atchison R. Co. v. Stribling [Tex. Civ. App.] 94 S. W. 436.

28. Frasier v. Charleston & W. Co. R. Co. [S. C.] 52 S. E. 964.

29. Central of Georgia R. Co. v. Montmollen [Ala.] 39 So. 820.

30. The burden is upon the defendant to show an established rate under the interstate commerce act and that the contract rate was illegal. Southern Kansas R. Co. v. J. W. Burgess Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 191, 90 S. W. 189.

31. Zalk v. Great Northern R. Co. [Minn.] 107 N. W. 814.

32. Gulf, etc., R. Co. v. Batte [Tex. Civ. App.] 94 S. W. 345.

allegations.[33] A carrier cannot be awarded property in a judgment against it for the full value thereof, in the absence of proper pleadings.[34] The actual contract of carriage is admissible under a general denial of a complaint pleading the purport of the agreement.[35] Where connecting carriers are only liable for losses occurring on their respective lines, an answer of one denying any loss on its line is sufficient.[36] Facts admitted by the pleadings need not be proven, as the connecting character of the lines.[37] Where complaint alleges the amount of the injury, it need not specify to what class the goods belonged.[38] Where plaintiff pleads a written contract, defendant may allege mistake and pray for reformation.[39] Where a single plea contains two defenses, both must be established.[40]

Proof that the shipment was delivered to the carrier in good condition [41] and is not redelivered,[42] or is not delivered within a reasonable time,[43] or is redelivered in a damaged state,[44] raises a presumption of negligence. Condition of goods when

33. Instructions held erroneous for failure to require jury to find that damage counted on in first and second paragraphs of petition was caused by acts of negligence stated therein. Hurst v. St. Louis & S. F. R. Co. [Mo. App.] 94 S. W. 794. No variance between allegation that logs were at a station for shipment in July, and evidence showing that they remained there until November while plaintiff was vainly requesting cars. Hoffman Heading & Stave Co. v. St. Louis, etc,. R. Co. [Mo. App.] 94 S. W. 597. Date laid in the petition as to when plaintiff had logs at station for shipment and demanded cars held immaterial. Id. In an action predicated upon negligence as a carrier, recovery cannot be had upon negligence as a warehouseman. Gratiot St. Warehouse Co. v. St. Louis, etc., R. Co. [Ill.] 77 N. E. 675. Proof of a special contract under a complaint charging a common carrier's liability is a fatal variance. Braunton & Robertson v. Southern Pac. R. Co. [Cal. App.] 83 P. 265. Where the complaint and bill of particulars base the right of recovery upon a special contract, a recovery cannot be had upon liability as a forwarder. Rosenfeld v. Central Vermont R. Co., 97 N. Y. S. 905. Must recover on the cause of action pleaded, and when based upon delay in furnishing cars such negligence must be established as the proximate cause. Ficklin v. Wabash R. Co. [Mo. App.] 93 S. W. 861. Must establish the particular negligence alleged, and plaintiff cannot plead loss due to rough handling of trains and recover for loss from pens. Ficklin & Sons v. Wabash R. Co. [Mo. App.] 92 S. W. 347. Where plaintiff particularized the negligence, an instruction authorizing recovery if the shipment was not delivered is erroneous. Id.

34. Missouri, etc., R. Co. v. Kahn [Tex. Civ. App.] 91 S. W. 816.

35. Quinn v. Pennsylvania R. Co., 99 N. Y. S. 980.

36. Walter v. Alabama Great So. R. Co., 142 Ala. 474, 39 So. 87.

37. Pleadings held to admit that defendants were connecting carriers and that the goods were delivered by one to the other. Berkowitz v. Chicago, etc., R. Co., 109 App. Div. 878, 96 N. Y. S. 825.

38. Where a shipment consisted of stock of different classes, an allegation that the cattle killed would have been worth $15 per head at destination, is sufficient without specifying to what class they belonged. Texas & P. R. Co. v. Sherrod [Tex.] 14 Tex. Ct. Rep. 216, 89 S. W. 956.

39. Turner v. Wabash R. Co., 114 Mo. App. 539, 90 S. W. 391.

40. Where a carrier alleges contributory negligence of the shipper and also that no loss occurred on its line for which alone it would be liable, being in a single plea, it must sustain both. Walter v. Alabama Great So. R. Co., 142 Ala. 474, 39 So. 87.

41. Evidence held sufficient to show that cabbages were received by carrier in frozen condition. Foley v. Lehigh Valley R. Co., 96 N. Y. S. 182. In action for injuries to cattle, a witness could testify as to their condition before shipment though he did not identify them as plaintiff's cattle where his evidence tended that way. Texas & P. R. Co. v. Coggin [Tex. Civ. App.] 14 Tex. Ct. Rep. 295, 90 S. W. 523. Error in excluding was not cured by fact that witness was not a stockman, where the only objection was that he had not identified the cattle. Id.

42. Evidence held sufficient to sustain a finding that trunk was never delivered. Summers v. Pratt's Exp. [Minn.] 107 N. W. 1135.

43. Where plaintiff proves delivery of stock in good condition and that they were not delivered safely or within reasonable time the burden is on the carrier to excuse itself from negligence. Louisville & N. R. Co. v. Smitha [Ala.] 40 So. 117.

44. Elam v. St. Louis & S. F R. Co. [Mo. App.] 93 S. W. 851. Especially where there was no inherent property likely to produce such result. Rhymer v. Delaware, etc., R. Co., 27 Pa. Super. Ct., 345. Where it was shown that serious injuries were received by horses in transitu, a presumption of negligence arises. Louisville & N. R. Co. v. Brown [Ky.] 90 S. W. 567. And the burden of accounting for the injuries is on the carrier. Id. Where the petition seeks a recovery for certain specific acts of negligence, plaintiff cannot make out a prima facie case by merely proving that the goods were sound when delivered and damaged when redelivered. Hurst v. St. Louis & S. F. R. Co. [Mo. App.] 94 S. W. 794. Evidence that apples were sound when delivered to carrier and damaged when redelivered, and ventilators were open when train started and closed when destination was reached held to make

received may be shown by recitals in the bill of lading [45] or receipt.[46] Where a carrier seeks to relieve itself from liability under a special contract, it has the burden of proving such contract,[47] and that the loss was due to one of the excepted causes,[48] unless by the contract it is only liable for negligence, in which case the plaintiff must prove negligence,[49] except in California.[50] Where goods shipped over the lines of several connecting carriers are injured in transitu, the presumption is that it occurred on the line of the last carrier,[51] unless the shipper accompanies the goods, in which case no presumption arises;[52] and hence, if the shipper sues the initial carrier [53] or any succeeding carrier save the terminal, he must prove that the loss occurred on its line;[54] while if the action be against the last carrier, the burden is upon it to disprove the presumption that the loss occurred on its line.[55] This burden may be discharged by a fair preponderance of the evidence.[56]

prima facie case without proof that ventilators were closed by defendant's employes. Id.

45. A reciting in a bill of lading as to the condition of the goods when received is prima facie evidence of their condition at that time (Rhymer v. Delaware, etc., R. Co., 27 Pa. Super. Ct. 345; The Presque Isle, 140 F. 202; Foley v. Lehigh Valley R. Co., 96 N. Y. S. 182), but may be rebutted by parol evidence (Id.).

46. A freight receipt reciting the condition of the goods signed by stencil is not admissible without proof of execution. Bell Bros. v. Western & A. R. Co. [Ga.] 54 S. E. 532.

47. Jenkins v. Southern R. Co. [S. C.] 53 S. E. 480.

48. The Presque Isle, 140 F. 202; Louisville & N. R. Co. v. Smitha [Ala.] 40 So. 117; Hurst v. St. Louis & S. F. R. Co. [Mo. App.] 94 S. W. 794; Southern R. Co. v. Levy [Ala.] 39 So. 95. Evidence insufficient to show that loss was due to defective car or that the stock escaped through the doors of the car. Kansas City, etc., R. Co. v. Heard [Miss.] 39 So. 1011. Where a carrier seeks to exempt itself from liability under a special contract, the burden is upon it to show that the case comes within the exempting clause and that it was not guilty of negligence. Southern R. Co. v. Levy [Ala.] 39 So. 95. Provisions releasing it from liability for stock escaping through car doors. McFall v. Wabash R. Co. [Mo. App.] 94 S. W. 570. Where a carrier stipulates by express contract that it will not be liable for injuries "by causes beyond its control," the burden is upon it to show that the damage was the result of such a cause. Rhymer v. Delaware, etc., R. Co., 27 Pa. Super. Ct. 345.

49. Where by special contract liability is limited to negligence of the carrier, the burden is on the plaintiff to prove negligence. Ratliff v. Quincy, etc., R. Co. [Mo. App.] 94 S. W. 1005; Fulbright v. Wabash R. Co. [Mo. App.] 94 S. W. 992. Must prove that delay was due to negligence. Bushnell v. Wabash R. Co. [Mo. App.] 94 S. W. 1001. Where facts are shown which raise an inference of negligence the defendant must disprove negligence. Rhymer v. Delaware, etc., R. Co., 27 Pa. Super. Ct. 345. The burden was on defendant to prove due care, where the condition of potatoes shipped clearly indicated rough handling. Id.

50. The burden is on the carrier to disprove negligence. Braunton v. Southern Pac. Co. [Cal. App.] 83 P. 265.

51. Jones v. St. Louis & S. F. R. Co., 115 Mo. App. 232, 91 S. W. 158; Hurst v. St. Louis & S. F. R. Co. [Mo. App.] 94 S. W. 794; Berkowitz v. Chicago, etc., R. Co., 109 App. Div. 878, 96 N. Y. S. 825; Kansas City So. R. Co. v. Embrey [Ark.] 90 S. W. 15. Where the loss occurs at the station maintained in common, presumption arises that it occurred after delivery to terminal carrier. Id. Applicable to live stock shipment as well as to dead freight. St. Louis & S. F. R. Co. v. Byers Bros. [Tex. Civ. App.] 90 S. W. 720. Proof of delivery to the initial carrier in good condition and redelivery in damaged state, makes a prima facie case. Berkowitz v. Chicago, etc., R. Co., 109 App. Div. 878, 96 N. Y. S. 825.

52. Texas & P. R. Co. v. Scoggin [Tex. Civ. App.] 14 Tex. Ct. Rep. 297, 90 S. W. 521. Hence an instruction authorizing recovery against the last carrier if the jury were unable to determine where the injury occurred, is erroneous. Id.

53. Evidence held insufficient to show that goods were damaged while in the possession of the initial carrier. Hirsch v. New York, etc., R. Co., 99 N. Y. S. 431. If the initial carrier is not liable for losses occurring beyond its own line, plaintiff must prove, in order to recover against it, that the goods were damaged on its line. Hurst v. St. Louis & S. F. R. Co. [Mo. App.] 94 S. W. 794. Suit properly dismissed as to the initial carrier where there is not direct proof of negligence. Berkowitz v. Chicago, etc., R. Co., 109 App. Div. 878, 96 N. Y. S. 825.

54. Where plaintiff shows that injury occurred to cotton while in the possession of any one of the connecting carriers, the burden is on that carrier to exempt itself. Houston, etc., R. Co. v. Bath [Tex. Civ. App.] 14 Tex. Ct. Rep. 117, 90 S. W. 55. Evidence insufficient to show that shipment was damaged in possession of defendant connecting carrier. Southern R. Co. v. Waters & Co. [Ga.] 54 S. E. 620.

55. Evidence held sufficient to rebut presumption of liability on part of final carrier on whose road the damage to the goods was first discovered. Texas & P. R. Co. v. Warner [Tex. Civ. App.] 93 S. W. 489. Prima facie case is made by proof that goods were injured during transit. Walter v. Alabama Great So. R. Co., 142 Ala. 474, 39 So. 87. Absence of evidence of negligence on the part

When the terminal carrier has proven that the loss did not occur on its line the burden shifts to the next last carrier.[57] In some jurisdictions the terminal carrier is not relieved from any liability by showing that a part of the damage occurred on a prior line, unless the extent thereof is also proven.[58] In Mississippi if the terminal carrier fails to furnish a copy of all records and memoranda entered on the books of each carrier touching the receipt, transfer and handling of the goods, within thirty days, the damage will be conclusively presumed to have occurred on its line.[59] In the admission of evidence the ordinary rules respecting admissibility of writings,[60] statements of employes,[61] correspondence,[62] hearsay evidence,[63] expert opinions,[64]

of the terminal carrier with evidence which reasonably tended to show negligence on the part of a precedent carrier held sufficient to overcome the presumption against the terminal carrier. Texas & P. R. Co. v. [Tex. Civ. App.] 13 Tex. Ct. Rep. 980, 89 S. W. 798. The presumption that a loss occurring at a common station occurred while in the possession of the terminal carrier, cannot be overcome by proof of a custom to treat goods as delivered when entry is made on books. Kansas City So. R. Co. v. Embrey [Ark.] 90 S. W. 15.

Contra: In Michigan plaintiff must prove that goods came into possession of the terminal carrier in good condition in order to recover. Rolfe v. Lake Shore, etc., R. Co. [Mich.] 12 Det. Leg. N. 235, 107 N. W. 899. Evidence held insufficient. Id.

56. An instruction that the last connecting carrier is liable for the loss unless it "should satisfy" the jury that the damage occurred on a prior line imposes too great a burden. Houston, etc., R. Co. v. Everett [Tex.] 13 Tex Ct. Rep. 930, 89 S. W. 761.

57. Houston, etc., R. Co. v. Bath [Tex. Civ. App.] 14 Tex. Ct. Rep. 117, 90 S. W. 55.

58. Does not apply where exact damage is difficult of proof as the run-down condition of stock from delays. Houston, etc., R. Co. [Tex.] 13 Tex. Ct. Rep. 1007, 89 S. W. 763. Not applicable where no injury occurs on the terminal line. Id.

59. Except in the case of the destruction of perishable goods by reason of their nature and damage not discoverable by outward inspection. Code 1892, § 4301. Russell v. Mobile & O. R. Co. [Miss.] 40 So. 1015.

60. Notation of commission merchant on bill of sale that nine hogs were dead, is not admissible. Illinois Cent. R. Co. v. Holt [Ky.] 92 S. W. 540. The car record made in the usual course of business and under circumstances precluding any motive for misrepresentation is admissible to prove receipt of goods. Swedish-American Nat. Bank v. Chicago, etc., R. Co. [Minn.] 105 N. W. 69. Report of yardmaster as to the quantity of ice in a certain car is admissible upon the issue of negligence in providing ice, where it was made in the regular course of business although the yardmaster did not distinctly state that he had no independent recollection. Maas v. Chicago, etc. R. Co. [Minn.] 104 N. W. 717. A written report of the government inspector of stock, proved by him to be correct, is admissible to show condition of stock on arrival. Illinois Cent. R. Co. v. Holt [Ky.] 92 S. W. 540. An unsigned bill of lading may be admitted in evidence to prove the terms of the contract actually made. Missouri, etc., R. Co. v. Patrick [C. C. A.] 144 F. 632. A paid bill reciting the purchase of goods by plaintiff is admissible to prove ownership although it is not shown what particular agent of the seller executed it Louisville & N. R. Co. v. Britton [Ala.] 39 So. 585.

61. Statements as to the cause of delay are admissible if made voluntarily and spontaneously under the immediate influence of the transaction and so connected with it as to characterize or explain it. Gulf, etc., R. Co. v. Batte [Tex. Civ App.] 94 S. W. 345. In action for damages for delay in transporting and injuries to cattle, admission of testimony of plaintiff that conductor told him that carrier did not want to carry cattle because there was so much other freight and merchandise that paid better, held prejudicial error it not being shown that conductor had authority to make such statement. St. Louis, etc., R. Co. v. Easley, McAdams & Co. [Tex. Civ. App.] 94 S. W. 206. Statements made after delivery by employe that the goods were not in a good condition when delivered are not admissible against master. Hoffman v. Metropolitan Exp. Co., 97 N. Y. S. 838. In an action for unreasonable delay, representation of the carrier's live stock agent as to the time required for shipment is admissible. Missouri, etc., R. Co. v. Stanfield Bros. [Tex. Civ. App.] 14 Tex. Ct. Rep. 301, 90 S. W. 517. Also, the declaration of the conductor while the train was stalled, that it had been over-loaded, is admissible as res gestae in respect to the stalling of the train. Id. A statement made by a carrier's chief freight agent in response to a request by shipper for a missing horse, that it had been caught in a death trap and killed, is admissible upon the issue of delivery. Louisville & N. R. Co. v. Brown [Ky.] 90 S. W. 567.

62. Correspondence with the agent of the initial carrier is admissible as against the terminal carrier, if acting as its agent. Southern Kansas R. Co. v. Burgess Co. [Tex. Civ. App] 14 Tex. Ct. Rep. 191, 90 S. W. 189. In an action for recovery of overcharges, correspondence between the treasurer of the shipper and defendant are admissible after the bill of lading has been put in issue. Southwestern Ala. R. Co. v. Maddox & Son [Ala.] 41 So. 9. Where there was prima facie proof that an agent had authority to act on demands for cars, his letters and conversations with reference to furnishing cars to plaintiff held competent. Hoffman Heading & Stave Co. v. St. Louis, etc., R. Co. [Mo. App.] 94 S. W. 597.

63. Telegraphic correspondence between defendant's agent and train dispatcher held

and conclusions of witnesses,[65] are applicable. Evidence of similar prior contracts by agent is admissible to show authority to execute such contracts.[66] The receipt of the connecting carrier reciting the condition of the goods when received from the initial carrier is not admissible as against the latter where not brought home to him.[67]

Trial and instructions.[68]—Where the petition alleged specific acts of negligence on the part of two carriers and in substance negatived negligence on the part of a third, it was not prejudicial error to refuse to make such third carrier a party.[69] Connecting carriers when sued for injury to shipment cannot make a local belt line which acted as their agent, and which was not a connecting carrier, party defendant.[70] It is not error to refuse to allow immaterial amendments.[71] Where the initial carrier is liable for negligence of the connecting lines, an amendment alleging that the negligence occurred on the connecting line does not state a new cause of action.[72] In California where the facts are undisputed, the question of negligence is one of law.[73] Whether one signed a bill of lading as agent of the carrier when dependent upon intention is a question for the jury.[74] Instructions must conform to the pleadings[75] and evidence,[76] must not assume facts in dispute,[77] be mislead-

hearsay. Pecos & N. T. R. Co. v. Evans-Snider-Buel Co. [Tex. Civ. App.] 93 S. W. 1024. Statement of the engineer that it was his first trip over the road is not admissible on a claim that the unusual jerking was due to the unfamiliarity of the engineer, it being hearsay. Ft. Worth & D. C. R. Co. v. Snyder [Tex. Civ. App.] 89 S. W. 1119. Testimony of a witness as to the schedule time of a train is not objectionable as hearsay in the absence of proof that he does not speak from personal knowledge Gulf, etc., R. Co. v. Funk [Tex. Civ. App.] 92 S. W. 1032.

64. In an action for damages to a shipment experts may testify that in their opinion the cotton was damaged by fresh and not by salt water. Houston & T. C. R. Co. v. Bath [Tex. Civ. App.] 14 Tex. Ct. Rep. 117, 90 S. W. 55.

65. Testimony that claim for damages could not have been made without coming to witness' attention held conclusion. Pecos & N. Co. v. Evans-Snider-Buel Co. [Tex. Civ. App.] 93 S. W. 1024. Testimony that time within which cars were furnished was reasonable held inadmissible as a conclusion to be drawn by the jury from all the facts and circumstances. Id. Testimony that the condition of the cattle was due to improper handling, being tantamount to an opinion that the carrier was negligent, is inadmissible. Texas & P. R. Co. v. Felker [Tex. Civ. App.] 14 Tex. Ct. Rep. 308, 90 S. W. 530.

66. Where driver of an express company contracted to deliver at a specified time, evidence of similar prior contracts is admissible to show authority to make such contracts. Pacific Exp. Co. v. Needham [Tex. Civ. App.] 94 S. W. 1070. Also admissible as res gestae. Id.

67. Hirsch v. New York, etc., R. Co., 99 N. Y. S. 431.

68 See 5 C. L. 524.

69. Especially where the court limited recovery against the two to negligence occurring on their lines. Gulf, etc., R. Co. v. Batte [Tex. Civ. App.] 94 S. W. 345.

70. Texas & Pac. R. Co. v. Scoggin [Tex. Civ. App.] 14 Tex. Ct. Rep. 297, 90 S. W. 521.

71. Not error to refuse to allow defendant to amend answer so as to allege failure to give notice of loss where the evidence of the contract does not show an agreement to notify. Kaplan v. Metropolitan Exp. Co., 98 N. Y. S. 228.

72. Within Rev. St. 1899, § 655. Ingwersen v. St Louis & H. R. Co., 116 Mo. App. 139, 92 S. W. 357.

73. Burning of goods at depot. Braunton v. Southern Pac. R. [Cal. App.] 83 P. 265.

74. Tishomingo Sav. Inst. v. Johnson, Nesbitt & Co. [Ala.] 40 So. 503.

75. Instruction held erroneous as submitting questions of negligence not alleged. Southern R. Co. v. Forgey [Va.] 54 S. E. 477.

76. An instruction submitting the question to the jury whether stock had been confined for more than 28 hours contrary to Rev. St. of U. S. [U. S. Comp. St. 1901, p. 2995], is erroneous where it is admitted that they were only confined for 15 hours. Southern R. Co. v. Forgey [Va.] 54 S. E. 477. An issue being raised as to removal of a part of the goods before the delivery of the car to the initial carrier for shipment, the charge submitting the issue should have been given. International & G. W. R. Co. v. Bingham [Tex. Civ. App.] 89 S. W. 1113. Charge erroneously submitted the issue of damage resulting from feeding at certain point, there being no evidence of any damage. Texas & P. R. Co. v. Scoggin [Tex. Civ. App.] 14 Tex. Ct. Rep. 297, 90 S. W. 521.

77. An instruction that plaintiff may recover for the injury to all the goods, though a part belonged to his wife, properly refused as assuming that all the goods were injured. Walter v. Alabama Great So. R. Co., 142 Ala. 474, 39 So. 87. Refusal to give special charge assuming that cattle were shipped under written contract held proper, that being a question for the jury. Gulf, etc., R. Co. v. Batte [Tex. Civ. App.] 94 S. W. 345. An instruction that if the jury believe that the calves died of pneumonia and that "the neggence or rough handling of defendant contributed thereto," etc., held erroneous as assuming the fact of rough and negligent

ing[78] or argumentative in form,[79] or charge upon the weight of the evidence.[80] An instruction must not ignore any issue of the case.[81] The charges must be considered together.[82]

Damages and penalties.[83]—Where connecting carriers are liable only for damage occurring on their respective lines, it is improper for the jury to find the total damage and apportion it among the carriers on an estimated basis.[84] Notice to any agent of a carrier authorized to execute contracts of shipment that special damages will result from delay in transportation, is sufficient[85]

Penalties.[86]—In North Carolina a carrier is subject to a penalty if it does not refund overcharges within a specified time after claim therefor.[87] The South Carolina statute imposing a penalty for failure to adjust and pay claims within a specified time after notice thereof,[88] providing the consignee recovers the amount claimed in a suit,[89] is not unconstitutional as violating the equality clause of the Federal or state constitution.[90] In an action for damage to freight and for penalty for failure to settle within the statutory time, in which no interest is asked, the magistrate cannot add interest and penalty upon return of a verdict for the amount of the claim.[91]

§ 14. *Freight and other charges.*[92]—A carrier may exact the rate duly established under the interstate commerce act notwithstanding a special contract with the shipper to carry at a lower rate,[93] unless it is a through rate and the shipper was ignorant of its illegality,[94] but cannot acquire any right to impose an unlawful rate from any approving act of the board of railroad and warehouse commissioners.[95]

handling. Houston & T. C. R. Co. v. Burns [Tex. Civ. App.] 14 Tex. Ct. Rep. 181, 90 S. W. 688.

78. An instruction respecting plaintiff's negligence in giving directions over the telephone resulting in a misunderstanding, held correct and the requested one properly refused as misleading. Southern R. Co. v. Forgey [Va.] 54 S. E. 477.

79. Instructions in regard to oral contract to furnish cars held properly refused as argumentative and otherwise sufficiently embraced in main charge. Pecos & N. T. R. Co. v. Evans-Snider-Buel Co. [Tex. Civ. App.] 93 S. W. 1024.

80. An instruction that if they believed that plaintiff delivered fifty-eight and not fifty barrels of syrup to the initial carrier she was entitled to recover, held erroneous as a charge on the weight of the evidence under the facts of the case. International & G. N. R. Co. v. Bingham [Tex. Civ. App.] 89 S. W. 1113. Instruction as to damages held on the weight of evidence in assuming improper handling. International, etc., R. Co. v. Startz [Tex. Civ. App.] 94 S. W. 207.

81. An instruction that carriers are not liable for mistaken judgments of their servants in emergencies properly refused where it ignores their negligence in permitting the emergencies to arise. Lewark v. Parkinson [Kan.] 85 P. 601.

82. In action for damages for injuries to cattle, refusal to give peremptory instruction for defendants held proper in view of other rulings. Gulf, etc., R. Co. v. Batte [Tex. Civ. App.] 94 S. W. 345.

83. See 5 C. L. 525. See, also, Damages, 5 C. L. 904.

84. Atchison, etc., R. Co. v. Nation [Tex. Civ. App.] 92 S. W. 823.

85. Notice to agent at destination that consignee is depending on a shipment for feed is sufficient without notice to the bill of lading clerk at initial point. Illinois Cent. R. Co. v. Mossbarger [Ky.] 91 S. W. 1121.

86. See 5 C. L. 526, n. 95.

87. Revisal 1905, §§ 2642, 2644. Cottrell v. Carolina & N. W. R. Co. [N. C.] 54 S. E. 288.

88. A statement which shows the nature of the claim, the amount of the loss, and on whose behalf it is presented, is sufficient under 24 St. at Large, p. 81. Hawes v. Southern R. Co. [S. C.] 53 S. E. 285. Need not be attested or accompanied with proof of validity. Id. Claimant need not attack the bill of lading or receipt. Id.

89. Act Feb. 23, 1903 (24 St. at Large, p. 81), does not apply to claims settled out of court. Best v. Seaboard Air Line R. Co. [S. C.] 52 S. E. 223.

90. 24 St. at Large, p. 81, § 2, does not violate 14th Amend. U. S. Const. or S. C. Const. art. 1, § 5. Seegers Bros. v. Seaboard Air Line R. Co. [S. C.] 52 S. E. 797; Frasier v. Charleston & W. C. R. Co. [S. C.] 52 S. E. 964.

91. Abrahams v. Columbia, etc., R. Co. [S. C.] 53 S. E. 819.

92. See 5 C. L. 526.

93. Texas & P. R. Co. v. Mugg, 202 U. S. 242, 50 Law. Ed. ——.

94. Southern Kansas R. Co. v. Burgess Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 191, 90 S. W. 189. Terminal carrier cannot demand the difference between the sum of the rates from the initial station to an intermediate and from such point to the destination, there being no fixed through rate, and the rate charged. Id.

95. Commission has no authority to authorize violations of positive law. McGrew v. Missouri Pac. R. Co. [Mo. App.] 94 S. W. 719.

Contracts of shipment are governed by the classification sheets filed with the interstate commerce commission,[96] and in construing such sheets the intention of the framers as to the meaning of words used control, regardless of local usage or custom or construction placed thereon by the shipper.[97] A terminal carrier which has no contractual relations with the initial carrier respecting rates may charge the usual rate notwithstanding a lower through rate was agreed upon by the initial carrier of which it had no knowledge.[98] A carrier may establish a rule fixing a demurrage charge without notice to shippers.[99] In Ohio a carrier may deny a shipper private switching facilities if he refuses to pay demurrage.[1]

A common carrier has a lien for his lawful charges,[2] including demurrage,[3] which continues until payment of the charges,[4] or delivery of the property.[5] Lien exists only for charges on the particular shipment.[6] A final carrier can assert a lien for a prior carrier only when it is for a charge which a carrier may make,[7] and while it must act in good faith towards the consignee,[8] it need not investigate the legality of the particular charge if apparently just.[9] A shipper by boat has a lien

96. Burlap horse covers held properly scheduled as first class freight under the term "blankets" as contained in the classification. Smith v. Great Northern R. Co. [N. D.] 107 N. W. 56.

97. Smith v. Great Northern R. Co. [N. D.] 107 N. W. 56.

98. Goodin v. Southern R. Co. [Ga.] 54 S. E. 720. Nor does it render itself liable for holding such shipment when it subsequently accepts the agreed rate. Id.

99. And it is no defense that the shipper has insufficient facilities to unload the cars within the specified time. Baltimore & O. R. Co. v. Gray's Ferry Abattoir Co., 27 Pa. Super. Ct. 511. Carrier may make a reasonable charge for demurrage **upon the failure of the consignee to remove freight from its cars within a reasonable time** (Thomas Phillips Co. v. Erie R. Co., 6 Ohio C. C. (N. S.) 505), and is justified in refusing to deliver cars of freight upon the private siding of the consignee until he pays the demurrage charged on former cars placed upon his siding (Id.). Evidence held insufficient to show the amount due as demurrage. Clegg Lumber Co. v. Atlantic & B. R. Co., 123 Ga. 603, 51 S. E. 575. A rule requiring the consignee to pay demurrage if the car is kept for more than forty-eight hours while unloading is reasonable. Troy Wagon Works Co. v. C., H. & D. R. Co., 3 Ohio N. P. (N. S.) 421. Consignee cannot be charged demurrage where he is prevented from unloading by the carrier nor swtching facilities be denied for refusal to pay. Id.

1. Where carrier presents a bill for demurrage and demands payment of the whole, a large part of which is bona fidely disputed, a refusal to pay does not justify a discontinuance of the switching facilities. Troy Wagon Works Co. v. C., H. & D. R. Co., 3 Ohio N. P. (N. S.) 421. In an action to compel carrier to deliver cars of freight upon a private siding, an answer alleging plaintiff's refusal to pay demurrage upon cars deliberately detained states a defense. Thomas Phillips Co. v. Erie R. Co., 6 Ohio C. C. (N. S.) 505.

2. A carrier has a lien upon goods shipped by an agent clothed by the principal with apparent authority to so act notwithstanding he has no authority. Hahl v. Laux [Tex. Civ. App.] 93 S. W. 1080.

3. A railroad company has a common-law lien upon the property in a car, for its proper demurrage charges against such car, and may enforce the same by refusing to deliver such property until payment of the demurrage charges has been made. Pittsburgh, etc., R. Co. v. Mooar Lumber Co., 6 Ohio C. C. (N. S.) 638. Lien for demurrage exists independently of any stipulation therefor in the contract of shipment, and, in an action to enforce the same, it is not necessary to aver or prove a special contract with reference thereto. Id.

Contra: A common carrier has no lien upon goods for demurrage. Nicolette Lumber Co. v. People's Coal Co. [Pa.] 62 A. 1060.

4. Payment of freight charges to an agent holding the property for a carrier under its lien discharges the lien. Lembeck v. Jarvis Terminal Cold Storage Co. [N. J. Err. & App.] 63 A. 257.

5. A common carrier's lien for his reasonable charges is inseparably associated with, and dependent upon, the possession of the goods, and hence is lost by their unconditional delivery. Hahl v. Laux [Tex. Civ. App.] 93 S. W. 1080. Not lost where owner takes them from carrier without its consent. Id. Lien lost by delivery to the consignee as agent for the consignor though he agreed to hold the property until charges were paid. Lembeck v. Jarvis Terminal Cold Storage Co. [N. J. Err. & App.] 63 A. 257.

6. No lien for charges due on a prior shipment of the same goods. Atchison, etc. R. Co. v. Bourdett [Kan.] 85 P. 820.

7. Must be connected with the transportation of the property. Berry Coal & Coke Co. v. Chicago, etc., R. Co., 116 Mo. App. 214, 92 S. W. 714.

8. Cannot assert a lien for a known unlawful charge. Berry Coal & Coke Co. v. Chicago, etc., R. Co., 116 Mo. App. 214, 92 S. W. 714.

9. A final carrier directed to hold goods until an average bond is given need not pass upon validity of the claim. Berry Coal & Coke Co. v. Chicago, etc., R. Co., 116 Mo. App. 214, 92 S. W. 714.

upon the vessel for damages growing out of the contract of shipment.[10] A shipper can recover unreasonable overcharges [11] involuntarily paid.[12] In an action to recover overcharges, plaintiff need only prove his case by a fair preponderance of the evidence.[13] Where under a written contract a carrier was to accept and ship freight according to shipper's scale of weights, with the right to inspect the shipper's book from time to time and collect undercharges, the issuing of bills of lading with knowledge of undercharges does not preclude a recovery.[14]

Part III. Carriers of Live Stock.

§ 15. *Duty to carry and contract of carriage generally.*[15]—A shipping contract prepared wholly by the carrier should be construed most strongly against it.[16] A reasonable construction should be adopted.[17]

§ 16. *Care required of carrier.*[18]—It is the duty of a carrier to transport stock with reasonable promptness, according to the usual course of business, considering the connections to be made and the way they are carried,[19] and by contract special

10. True though he in turn is shipping for another. The Presque Isle, 140 F. 202.

11. An opinion of the railroad commission is prima facie evidence as to the reasonableness of charges made subsequent thereto. Code 1896, § 3496, Anniston Mfg. Co. v. Southern R. Co. [Ala.] 40 So. 965. The fact that the complaint contains counts for prior charges does not render it inadmissible. Id. Evidence of rates charged by the same road in another state is not admissible, especially in absence of proof that the conditions are the same. Id. Nor evidence of charges by another road between different points. Id. A question as to what was considered a reasonable rate when not limited to the rate between the points in issue properly refused. Id. Evidence held to support finding for recovery of overcharges of freight on lumber, due to excessive weight. Chicago Lumber & Coal Co. v. Georgia So. & F. R. Co., 114 Mo. App. 327, 89 S. W. 576.

12. Where delivery of goods was made only upon payment of excessive freight, the payment was not voluntary. Southwestern Ala. R. Co. v. Maddox & Son [Ala.] 41 So. 9.

13. An instruction requiring him to prove his case to "a reasonable certainty" erroneous. Anniston Mfg. Co. v. Southern R. Co. [Ala.] 40 So. 965.

14. Belton Oil Co. v. Gulf, etc., R. Co. [Tex. Civ. App.] 92 S. W. 411.

15. See 5 C. L. 526.

16. Pecos & N. T. R. Co. v. Evans-Snider-Buel Co. [Tex. Civ. App.] 93 S. W. 1024.

17. Pecos & N. T. R. Co. v. Evans-Snider-Buel Co. [Tex. Civ. App.] 93 S. W. 1024. Stipulation that company agreed to stop cars at any station for watering and feeding stock where it had facilities for so doing, whenever requested in writing by the owner to do so, held to mean that company should make known to shipper in a reasonable way and time where such facilities were to be had. Id.

18. See 5 C. L. 527.

19. Illinois Cent. R. Co. v. Holt [Ky.] 92 S. W. 540. The carrier must exercise ordinary care to transport the goods within a reasonable time. Live stock. San Antonio & A. P. R. Co. v. Turner [Tex. Civ. App.] 94 S. W. 214. In the absence of a contract requiring it, the carrier is not obliged to delay its regular freight trains to handle shipments of cattle. Id. The carrier is bound to use that degree of care and diligence which a person of ordinary prudence would have used under the same or similar circumstances to transport cattle to their destination without unreasonable delay. Connecting carrier receiving live stock from initial carrier. Rogers v. Texas & P. R. Co. [Tex. Civ. App.] 94 S. W. 158. Charge requiring jury to find that delay was both unreasonable and unnecessary held erroneous, the test being merely whether it was unreasonable. Id. Delay due to unexplained breaking down of passenger engine (Id.), and to freezing of water tanks, where water could have been obtained elsewhere, held unreasonable (Id.). Delay in shipment of cattle by connecting carrier held unreasonable. Id. A common carrier is required to exercise reasonable diligence to transport stock without delays which can be avoided, especially where such stock is shipped for market. Ratliff v. Quincy, etc., R. Co. [Mo. App.] 94 S. W. 1005. Where the carrier knows that cattle offered to it for transportation are fat and marketable, and that loss will follow delay, it is bound to use reasonable diligence to avoid detaining them. Ficklin v. Wabash R. Co. [Mo. App.] 93 S. W. 861. Evidence held to sustain finding that defendant did not exercise reasonable diligence in furnishing cars to transport cattle to market. Id. The duty to transport stock without unreasonable delay imposes the obligation to provide a sufficient number of trains to meet ordinary business demands, and the carrier is liable for delays due to overloaded trains. Ratliff v. Quincy, etc., R. Co. [Mo. App.] 94 S. W. 1005. Evidence that a freight train, leaving the shipping point six hours later than the one carrying the stock, reached the destination first, together with the fact that the latter had to double to make several grades, is sufficient to show negligence. Id. Evidence held sufficient to sustain a finding of negligent delay in shipment. Union Pac.

dispatch may be required.[20] Except that it is not liable for loss or injury caused by the natural vice or propensities of the animals,[21] the carrier of live stock is, as in other cases, an insurer,[22] unless special contract relaxes the liability,[23] and all that is required of the shipper in order to make out a prima facie case is to show delivery to the carrier and its failure to deliver at the destination.[24] Results of the shipper's negligence in packing are not to be attributed to the carrier.[25] While false statements by the shipper may relieve the carrier, mere error in an estimate does not.[26]

Rest, feeding, and watering,[27] are usually required,[28] and to that end suitable pens must be maintained.[29] Unavoidable delay in shipment does not relieve the carrier.[30] A failure of the shipper to accompany and care for stock as agreed does not relieve the carrier from its responsibility to do so, where it proceeds with the shipment knowing the shipper is not on the train.[31]

R. Co. v. Thompson [Neb.] 106 N. W. 598; Union Pac. R. Co. v. Nelson [Neb.] 106 N. W. 1036.

20. Evidence held to support finding that agent of initial carrier did not agree to transport stock by special train so as to catch fast train of connecting carrier. Rogers v. Texas & P. R. Co. [Tex. Civ. App.] 94 S. W. 158.

21. McFall v. Wabash R. Co. [Mo. App.] 94 S. W. 570. A carrier assumes the same responsibility for the carriage and delivery of live stock as in the carriage of other property, except injuries resulting from the nature, habits and propensities of the animals. Louisville & N. R. Co. v. Smitha [Ala.] 40 So. 117. The same standard of care is required of carriers of live stock as of dead freight. But the standard as applied to the differing circumstances requires more care in the carriage of live stock. Waggoner v. Missouri, etc., R. Co. [Tex. Civ. App.] 92 S. W. 1028. Evidence in action for damages for injury to horses due to delay and careless handling held sufficient to support verdict for plaintiff. St. Louis, etc., R. Co. v. Berry [Tex. Civ. App.] 93 S. W. 1107.

22. McFall v. Wabash R. Co. [Mo. App.] 94 S. W. 570. A common carrier of live stock is generally an insurer of their safe delivery without loss or damage. Chicago, etc., R. Co. v. Slattery [Neb.] 107 N. W. 1045.

23. When liable only for negligence, a carrier accepting stock for shipment is bound to use reasonable care in handling and caring for them on the journey according to the usual course of business in such shipments. Illinois Cent. R. Co. v. Holt [Ky.] 92 S. W. 540.

24. McFall v. Wabash R. Co. [Mo. App.] 94 S. W. 570.

25. Cohn v. Platt, 48 Misc. 378, 95 N. Y. S. 535. Evidence held to show that the death of the chickens was due to overcrowding by the shipper rather than to negligence of carrier. Id.

26. "Estimated" weight of cattle as stated in contract held not conclusive on shipper, and fact that their actual weight was greater did not preclude a recovery for shrinkage in weight due to delay. Ficklin v. Wabash R. Co. [Mo. App.] 93 S. W. 861. Evidence held insufficient to show fraud on the part of the shipper in concealing the value of the animals shipped. Central of Georgia R. Co. v. Hall, 124 Ga. 322, 52 S. E. 679.

27. See 5 C. L. 527.

28. The leaving of a horse in a well felted and ventilated car over night is not negligence per se. Fuller v. Atlantic Coast Line R. Co. [N. C.] 53 S. E. 297. Where a cattle shipper did not feed and water cattle while awaiting the arrival of cars because of the carrier's representations that the cars would soon be there, the carrier was liable for the injury resulting from such failure. Gulf, etc., R. Co. v. House [Tex. Civ. App.] 13 Tex. Ct. Rep. 752, 88 S. W. 1110. Where a carrier unlawfully withholds delivery of stock, it must feed, water, and care for the same. Southern Kansas R. Co. v. Burgess Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 191, 90 S. W. 189. No defense that shipper might have done so. Id.

29. It is the duty of a live stock carrier to provide inclosed yards for receiving shipments at destination (Reynolds v. Great Northern R. Co., 40 Wash. 163, 82 P. 161), and it is liable for loss occasioned by straying because of the lack of such facilities although the shipper contract to unload at his own risk, especially where he did not know that there were no yards at the time he contracted (Id.). An initial carrier using stock pens jointly with a connecting one is bound to use ordinary care to maintain them in a suitable condition for delivery of cattle by it to the connecting carrier. Texas & P. R. Co. v. Felker [Tex. Civ. App.] 14 Tex. Ct. Rep. 308, 90 S. W. 530. Facts held insufficient to show that the cattle escaped because of improper and defective pens, but rather because the gates were not properly secured by shipper. Gulf, etc., R. Co. v. Taliaferro [Tex. Civ. App.] 14 Tex. Ct. Rep. 122, 89 S. W. 1120.

30. Sections 4386, 4387, Rev. St. U. S. (U. S. Comp. St. 1901, pp. 2995, 2996), do not relieve a carrier, transporting stock from one state to another, from liability for failure to care for, feed, and water, while delayed through an act of God. Chicago, etc., R. Co. v. Slattery [Neb.] 107 N. W. 1045.

31. Chicago, etc., R. Co. v. Slattery [Neb.] 107 N. W. 1045. Although the contract of shipment provides the shipper shall bear the risk and expense of caring for the stock during transportation, the provision may be waived. An indorsement on the bill of lading, "To be fed and watered at the expense of the shipper. Loaded at 4 p. m. No one in charge," held to constitute a waiver. Norfolk & W. R. Co. v. Sutherland [Va.] 54 S. E.

§ 17. *Delivery.*[32]

§ 18. *Liability of carrier or connecting carrier.*[33]

§ 19. *Limitation of liability.*[34]

§ 20. *Procedure in actions relating to carriage of stock.*[35]—In Georgia in an action ex contractu for failure to deliver stock in good condition, the action may be brought either in the county where the contract was entered into or in the county where delivery was to be made.[36] In an action on a statute, negligence may be averred generally.[37] A petition against several carriers for injuries to cattle which charged negligence in transportation held sufficient without alleging the effect of the negligence of each carrier.[38] A petition alleging negligent delay in shipment between the termini is sustained by proof of delay at any intermediate point.[39] Where stock is injured in transit, the burden is on the carrier to exculpate itself from blame,[40] except when the shipper accompanies the stock under a special contract to care for it,[41] and where the healthy condition of stock is once shown, it is presumed to continue until the contrary is shown.[42] Under a special contract limiting defendant's liability to gross negligence, the burden is on plaintiff to show such negligence.[43] Where the burden is upon plaintiff to prove negligence, it is only necessary to furnish circumstantial evidence from which, if the loss be unexplained, the jury can reasonably infer that the loss was due to defendant's negligence.[44] Delivery of stock may be shown by parol evidence notwithstanding a written receipt was given.[45] Instructions are governed by the rules applicable in other

465. Failure of shipper to accompany stock as agreed is no defense unless the injury sued for was caused by such failure. Louisville & N. R. Co. v. Smitha [Ala.] 40 So. 117. Where a carrier has knowledge that the shipper is not accompanying stock as agreed, it must feed, water, and care for them as if no contract had been entered into. Id.

32. See 3 C. L. 610. See, also, ante, § 9.

33. See 3 C. L. 610. See, also, ante, § 3.

34. See 3 C. L. 610. Application of general rules. See ante, § 11.

35. See 5 C. L. 527.

36. Civ. Code 1895, § 2334. Friedman v. Seaboard Air Line R. Co., 124 Ga. 472, 52 S. E. 763.

37. A complaint alleging that the stock was confined for more than twenty-eight consecutive hours contrary to section 4386, Rev. St. U. S. [U. S. Comp. St. 1901, p. 2995], sufficiently alleges negligence, it being negligence per se to fail to comply with the statute. Reynolds v. Great Northern R. Co., 40 Wash. 163, 82 P. 161.

38. International & G. N. R. Co. v. Jones [Tex. Civ. App.] 91 S. W. 611. Where a contract was made for the shipment of hogs over the lines of connecting carriers, it was not necessary to allege the particular amount of damage caused by each defendant on its line. It was sufficient to allege the damages as being caused by both defendants. Missouri, K. & T. R. Co. v. Phillips [Tex. Civ. App.] 91 S. W 242. It appearing that all damages occurred on the line of one carrier, all the damages were recoverable from it. Id.

39. Union Pac. R. Co. v. Nelson [Neb.] 106 N. W. 1036.

40. Powers v. Chicago, etc., R. Co. [Iowa] 105 N. W. 345. Proof of delivery of stock to carrier in good condition and arrival at place of destination in a damaged condition, makes a prima facie case (Chicago, etc., R. Co. v. Slattery [Neb.] 107 N. W. 1045), and the burden is on the defendant to prove loss due to an exception (Id.).

41. Not sufficient to show delivery to carrier in good condition and redelivery in damaged state. Atlantic Coast Line R. Co. v. Dexter [Fla.] 39 So. 634. Rule not changed by Laws 1891, c. 4071, p. 113. Id. Where a car was in the yards but a shipper was forbidden to load for an unreasonable time, the burden of pleading and proving a legal excuse is on the carrier. Evans v. Mobile & O. R. Co. [Ky.] 90 S. W. 588.

42. Powers v. Chicago, etc., R. Co. [Iowa] 105 N. W. 345. Hence when the condition of horses is shown at a certain point in transit, they will be presumed to have been in the same condition when received by a connecting carrier at a subsequent point. Id. Evidence held sufficient to show that the horses were delivered to the carrier in good condition. Id.

43. Trexler v. Baltimore & O. R. Co., 28 Pa. Super. Ct. 207.

44. Proof that one of defendant's inspectors passed the car with an unguarded torch a few minutes before the fire is sufficient. Trexler v. Baltimore & O. R. Co., 28 Pa. Super. Ct. 198. Though a shipper in order to recover for injury to live stock must show the intervention of some human agency in causing the injury, such intervention may be established by circumstantial evidence. Fourteen out of seventy-nine hogs apparently sound when shipped found dead after short transit. Griffin v. Wabash R. Co., 115 Mo. App. 549, 91 S. W. 1015.

45. Atlantic Coast Line R. Co. v. Dexter [Fla.] 39 So. 634.

cases, as that they must not ignore issues [46] or comment on the weight of the evidence.[47]

§ 21. *Damages.*[48]—The elements and measure of damages and pleading and proof thereof are elsewhere treated.[49]

Part IV. Carriage of Passengers.

§ 22. *Who are passengers.*[50]—The word includes those who for hire are riding on public conveyances.[51] It is said the relation is based upon a contract of carriage, expressed or implied,[52] but neither payment of fare [53] or notice to the conductor and offer to pay is essential,[54] and where children are permitted by custom to ride with parents without payment of fare, such children are passengers.[55] In the absence of a notice to the contrary the stopping of a car at a customary place to receive passengers is an invitation to take passage,[56] and one in good faith attempting to board becomes a passenger.[57] One is not a passenger when voluntarily in an improper or dangerous place,[58] or when attempting to board a car between stops or stations,[59]

46. An instruction that if defendant furnished a safe means of unloading the horse, it is not liable, is erroneous as ignoring negligent use of such means. Frasier v. Charleston & W. C. R. Co. [S. C.] 52 S. E. 964. Where the legality of a special contract limiting liability was in issue, it is not error to refuse an instruction that if plaintiff accepted the reduced rates he ratified the contract. Id. An instruction that defendant was under no duty to guard animals against fever properly refused as exempting the carrier from liability for fever due to negligence. Louisville & N. R. Co. v. Smitha [Ala.] 40 So. 117. An instruction that if the stock was transported without any unnecessary jar or rough handling the defendant is not liable properly refused as carrier may have been negligent in other respects. Id. Where stock was in transit nearly twenty-four hours longer than scheduled, an instruction that the carrier was not bound to transport the stock on its fast train, properly refused as misleading. Id.

47. In an action for delay in shipment of live stock, instruction that it was defendant's duty to unload stock at a certain station to feed and water them, and that it would not be liable for shrinkage in weight caused by stopping them there for a sufficient and reasonable length of time for that purpose "not exceeding five hours," held objectionable as on the weight of the evidence. Fort Worth & D. C. R. Co. v. Hamm [Tex. Civ. App.] 93 S. W. 215. A charge that a higher degree of care is required in the carriage of live stock than in the transportation of dead freight rightfully refused as a charge on the weight of the evidence. Waggoner v. Missouri R. Co. [Tex. Civ. App.] 92 S. W. 1028.

48. See 5 C. L. 528.

49. See Damages, 5 C. L. 904.

50. See 5 C. L. 529.

51. Evidence held sufficient to show that plaintiff boarded the car as a passenger. Chicago Union Traction Co. v. O'Brien, 117 Ill. App. 183.

52. Hence a newsboy, who boards a train to sell papers under a custom which permitted such sale, but did not contemplate continuance upon the train while in motion, is not a passenger (Chicago, etc., R. Co. v. Moran, 117 Ill. App. 42), nor was it material that he had sufficient money to pay his fare to the next stopping place so long as he did not disclose an intention to so pay (Id.).

53. Payment of fare is not essential to make one a passenger. Hall v. Terre Haute Elec. Co. [Ind. App.] 76 N. E. 334. A street car company voluntarily giving a free excursion to a body of delegates sustains the relation of carrier and passenger to them. Indianapolis Traction & Terminal Co. v. Lawson [C. C. A.] 143 F. 834.

54. Continuing beyond destination: One who has paid his fare to a certain point and subsequently determines to continue his journey beyond it is not required in order to maintain his status as a passenger to leave the train at such point and then reenter it, or to expressly notify the conductor of his intention, but may remain in the car and pay his fare to the place of destination when it is demanded of him. Anderson v. Missouri P. R. Co. [Mo.] 93 S. W. 394.

Instruction requiring passenger in such case to notify conductor of his intention held properly refused. Anderson v. Missouri P. R. Co. [Mo.] 93 S. W. 394.

55. Ball v. Mobile Light & R. Co. [Ala.] 39 So. 584.

56. Hall v. Terre Haute Elec. Co. [Ind. App.] 76 N. E. 334.

57. Liable to one who attempts to board although the stop was merely to discharge passengers. Hall v. Terre Haute Elec. Co. [Ind. App.] 76 N. E. 334.

58. One riding in a place not intended for passengers and which is manifestly dangerous is not a passenger, as on the bumper of a street car. Columbus R. Co. v. Muns, 6 Ohio C. C. (N. S.) 236. Where one who intends to take a train boards it as it moves out of the station and is obliged to stand on the steps because the vestibule is closed, he is a trespasser. Graham v. Chicago, etc., R. Co. [Iowa] 107 N. W. 595.

59. Evidence of plaintiff againt five uninterested witnesses that he attempted to board the moving car held insufficient to sustain a finding that he was a passenger. Lehnick v. Metropolitan St. R. Co. [Mo. App.] 94 S. W. 996.

or after it is under way.[60] One on the wrong car by mistake may be a passenger,[61] but where one on a car, upon being told that he was on the wrong car, attempts to leave, he is not a passenger.[62] A contract or permit to ride does not make one a passenger if made with an employe of the carrier having no such authority,[63] or if procured of the carrier by fraud.[64]

The duty owing passengers applies to postal clerks[65] and to railroad employes riding at the master's direction.[66] An employe unnecessarily using a freight elevator in his employer's building in going to and from his work is not a passenger.[67] The construction given by the highest court of a state to a local statute regulating the liability of carriers is binding upon the Federal courts.[68]

Trains other than passenger trains.[69]—A person riding on freight trains as a caretaker for the shipper's goods is a passenger,[70] and he may ride in the engine without losing such character, there being no other place.[71] The company is a common carrier of passengers on freight trains as to one whom it agrees to convey on such trains at any and all times when he may desire to travel thereon, notwithstanding the fact that it refuses to carry on such trains the public generally or any other person.[72]

The relation begins[73] when an intending passenger in reasonable proximity to the time of departure enters or is directed to places of waiting,[74] or when boarding a street car.[75]

60. One who does not come upon the premises until the train is moving out and then attempts to board it without an invitation is not a passenger. Southern R. Co. v. Johnson [Ala.] 39 So. 376.

61. One who has procured a ticket and by mistake attempts to board the wrong train is still a passenger. Chicago Terminal Transfer R. Co. v. Young, 118 Ill. App. 226.

62. Hence, company owes only ordinary care. Robertson v. Boston & N. St. R. Co., 190 Mass. 108, 76 N. E. 513.

63. Brakeman. O'Donnell v. Kansas City, etc., R. Co. [Mo.] 95 S. W. 196. Ticket agent. St. Louis S. W. R. Co. v. Fowler [Tex. Civ. App.] 93 S. W. 484. Conductor. Id.

64. As one riding on a reduced rate ticket procured by false representation that she was a student. Fitzmaurice v. New York, etc., R. Co. [Mass.] 78 N. E. 418.

65. A railway postal clerk in the discharge of his duties on the train is a passenger. Illinois Cent. R. Co. v. Porter [Tenn.] 94 S. W. 666; Southern Pac. Co. v. Cavin [C. C. A.] 144 F. 348.

In Pennsylvania a mail clerk is not a passenger within statute regulating a carrier's liability for injuries to person employed about the road [Act April 4, 1868 (P. L. 58)] (Yarrington v. Delaware & Hudson Co., 143 F. 565), but where the track is used by two companies the mail clerk only sustains the limited liability toward the company on whose train he is riding if such train has the right of way (Id.).

66. A railroad company owes the same degree of care to an employe riding on its train pursuant to its direction and command as to a passenger. Johnson v. Texas Cent. R. Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 807, 93 S. W. 433. An employe on the tracks of a street car company, who travels on the company's car on a laborer's pass to the place where he is ordered to work, is a passenger and not a fellow-servant. Not fellow-servant of motorman so as to defeat recovery for negligence in running car. Haas v. St. Louis & S. R. Co. [Mo. App.] 90 S. W. 1155. Exhaustively collating cases.

67. Employer's duty is ordinary care only. Kappes v. Brown Shoe Co., 116 Mo. App. 154, 90 S. W. 1158.

68. Interpretation of a statute holding a mail clerk not a passenger. Act April 4, 1868 (P. L. 58). Yarrington v. Delaware & Hudson Co., 143 F. 565.

69. See 5 C. L. 529.

70. Southern R. Co. v. Roach [Ind. App.] 77 N. E. 606; Id. [Ind. App.] 78 N. E. 201. Hence a complaint setting out such facts sufficiently alleges the relation of carrier and passenger. Evansville, etc., R. Co. v. Mills [Ind. App.] 77 N. E. 608. A drover traveling on a free pass to care for his stock is a passenger. Lake Shore & M. S. R. Co. v. Teeters [Ind.] 77 N. E. 599. Where a shipper, accompanying stock to care for the same, is in the car feeding them, he is a passenger, although they had substantially reached their destination, but were to be hauled to a point a half mile away for unloading. Ft. Worth & D. C. R. Co. v. Hardin [Tex. Civ. App.] 14 Tex. Ct. Rep. 302, 90 S. W. 679.

71. There was no caboose. Southern R. Co. v. Cullen [Ill.] 77 N. E. 470.

72. As to one having permit. Gardner v. St. Louis & S. F. R. Co. [Mo. App.] 93 S. W. 917.

73. See 5 C. L. 530.

74. Persons directed to take a car on the track to await the train to which it is to be attached are passengers, although the train is not due for several hours. Missouri, etc., R. Co. v. Byrd [Tex. Civ. App.] 14 Tex. Ct. Rep. 65, 89 S. W. 991. One who is upon a carrier's premises with the bona fide intention of taking passage under circumstances sufficient to notify defendant of that purpose is a passenger. Need not have pur-

The relation ceases or is interrupted [76] when destination is reached and a reasonable time has elapsed in which to alight [77] and to get clear of the car [78] and quit the station,[79] unless the passenger continues on the train to a farther point.[80] Where a passenger is sleeping when the train arrives at his destination, which fact is known to the carrier, but he is not awakened, his failure to leave the train immediately does not terminate the relation.[81]

Departure from the station to check baggage [82] or to cross tracks to his train [83] does not interrupt the relation. A passenger transferring from one street car to another continues to be a passenger.[84] It has been held that a passenger who steps off a street car to stop a fight between the conductor and another passenger does not cease to be a passenger.[85]

§ 23. *Duty to receive and carry passengers.*[86]—Passengers must be accommodated in the order of their application,[87] and if the carrying capacity be exhausted the passenger must be notified when purchasing his ticket.[88] A common carrier is not obliged to receive a person physically unfit to travel [89] without an attendant.[90]

chased a ticket. MacFeat v. Philadelphia, etc., R. Co. [Del.] 62 A. 898. One who has purchased a ticket and deposited it in the box provided for that purpose as he passed upon the platform is a passenger. Busch v. Interborough Rapid Transit Co., 96 N. Y. S. 747.

75. H., when about to step upon a car which had stopped for passengers, was injured by the fall from the roof of the car of a broken trolley pole. Held that, so far as the liability of the company was concerned, H. had become a passenger. Cincinnati Traction Co. v. Holzenkamp, 3 Ohio N. P. (N. S.) 537. A person, who had taken hold of a hand rail and placed one foot on the step in attempting to board a car which had stopped to receive passengers held a passenger. Waller v. Wilmington City R. Co. [Del.] 61 A. 874. An attempt to enter a car by placing a foot on the steps in response to an invitation implied by stopping at signal establishes the relation of passenger and carrier (Devoy v. St. Louis Transit Co., 192 Mo. 197, 91 S. W. 140), though the passenger saw no conductor or motorman on the car (Id.). Where plaintiff was in the act of getting on defendant's car, and before she had got entirely into it, she was a passenger, and it was error to charge that negligence was the failure to use ordinary care under the circumstances. Green v. Houston Elec. Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 790, 89 S. W. 442.

76. See 5 C. L. 530.

77. Kaase v. Gulf, etc., R. Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 564, 92 S. W. 444. Error to refuse to instruct that if the train stopped a reasonable time and a passenger delayed in getting off, which fact was unknown to the carrier, the contract relation had ceased. St. Louis S. W. R. Co. v. Bryant [Tex. Civ. App.] 15 Tex. Ct. Rep. 239, 92 S. W. 813.

78. Where a passenger had alighted from a street car and was injured while passing in front of it, held no longer a passenger. Poland v. United Traction Co., 107 App. Div. 561, 95 N. Y. S. 498. Evidence held sufficient to go to the jury as to whether plaintiff had fully left the car at the time of the accident and thus terminated his relation as passenger. Chicago Union Traction Co. v. Rosenthal, 217 Ill. 458, 75 N. E. 578. While as a **rule** the relation of carrier and passenger ends as soon as a passenger on a **street car** steps clear of the car, yet this is not true where he turns immediately to aid an infirm person in his charge to alight, hence a parent who steps from a car and immediately turns to help his four-year-old child to alight is still a passenger. Id., 118 Ill. App. 278.

79. An action based upon the relation of carrier and passenger properly dismissed where it appears that plaintiff loitered for ten or fifteen minutes with friends before receiving the injury. Glenn v. Lake Erie & W. R. Co., 165 Ind. 659, 75 N. E. 282. One leaving the depot after completion of journey held not a passenger. Green v. Baltimore & O. R. Co. [Pa.] 63 A. 603.

80. Anderson v. Missouri Pac. R. Co. [Mo.] 93 S. W. 394.

81. Bass v. Cleveland, etc., R. Co. [Mich.] 12 Det. Leg. N. 694, 105 N. W. 151.

82. One who is about to take a train and is returning along the platform from the freight house where he had been to check baggage is a passenger. Pineus v. Atlantic Coast Line R. Co., 140 N. C. 450, 53 S. E. 297.

83. One crossing from the depot to the platform to take a train is a passenger, though he does not cross by the most direct way. Illinois Cent. R. Co. v. Proctor [Ky.] 89 S. W. 714.

84. Colorado Springs, etc., R. Co. v. Petit [Colo.] 86 P. 121.

85. Zeccardi v. Yonkers R. Co., 99 N. Y. S. 936.

86. See 5 C. L. 531.

87. A common carrier must sell its berths in the order of application and without discrimination. Patterson v. Old Dominion S. S. Co., 140 N. C. 412, 53 S. E. 224.

88. A steamship company is liable for failure to furnish a berth on a night run where it did not notify the passenger of its inability to do so when he applied therefor when purchasing his ticket. Patterson v. Old Dominion S. S. Co., 140 N. C. 412, 53 S. E. 224.

89, 90. Not bound to accept old **blind** man for journey of one hundred and forty miles

This is true as matter of law regardless of the carrier's rules.[91] A carrier of both freight and passengers may use separate trains for each and may exclude freight from one and passengers from the other.[92] It may entirely exclude passengers from its freight trains or permit them to ride thereon only upon condition that they are provided with tickets and prohibit the conductors of such trains from collecting cash fares.[93] In such case, however, it must afford a reasonable opportunity to obtain tickets.[94] A sleeping car company may prescribe reasonable rules as to who shall be accommodated.[95] While a passenger must ascertain whether his ticket is good upon the train he boards, yet he may rely upon a known custom to carry on such ticket in the absence of notice.[96] Where it was the custom to lock the caboose when the train was not going to stop at certain points, to which places it was the custom to accept passengers, one familiar with such custom may rely upon it.[97]

The passengers must obey all reasonable rules for safety, convenience, and comfort of others.[98]

For failure to carry as contracted the carrier is liable, unless the passenger has voluntarily[99] left the car, or has otherwise forfeited or waived[1] his rights, and it has been held that one prevented by the carrier from boarding the street car to which he had transferred may recover for ejection from another car.[2] A passenger who is wrongfully carried beyond his stopping place has no right to remain on the car until it reaches his destination on its return trip.[3] Breach of a contract to furnish sleeping car accommodations is not excused by lack of cars or inconvenience in traffic.[4] A carrier failing to stop its train at a regular stopping place to

involving two or three changes of vehicles. Illinois Cent. R. Co. v. Allen [Ky.] 89 S. W. 150.

91. Hence a rule to refuse blind persons is immaterial in an action by a rejected person. Illinois Cent. R. Co. v. Allen [Ky.] 89 S. W. 150.

92, 93. Gardner v. St. Louis & S. F. R. Co. [Mo. App.] 93 S. W. 917.

94. Ejection of one who was unable to obtain a ticket because the agent had none and who offered to pay cash fare, held wrongful. Gardner v. St. Louis & S. F. R. Co. [Mo. App.] 93 S. W. 917.

95. Pullman Co. v. Krauss [Ala.] 40 So. 398. A rule excluding persons infected with contagious diseases is reasonable. Id. Not liable for ejecting a passenger infected with contagious disease. Id.

96. Delmonte v. Southern Pac. Co. [Cal. App.] 83 P. 269.

97. Welland v. Southern Pac. Co. [Cal. App.] 82 P. 226. Not required to make special inquiries. Id.

98. Smoking in street cars. McQuerry v. Metropolitan St. R. Co. [Mo. App.] 92 S. W. 912. See, also, post, Ejection.

99. A passenger who leaves the car voluntarily cannot recover for breach of contract for failure to carry her therein to her destination. Passenger on sleeping car. Pullman Palace Car Co. v. Hocker [Tex. Civ. App.] 15 Tex. Ct. Rep. 330, 93 S. W. 1009.

If any coercion is applied it cannot be said that one voluntarily quit the train. Evidence that the conductor told plaintiff's wife that it would be dangerous for her and her infant children to remain on the train, thereby inducing her to alight, is evidence of coercion sufficient to go to the jury. Louisville & N. R. Co. v. Quinn [Ala.] 39 So. 616. Employes of Pullman company had a right to approach passenger and try to induce her to leave sleeper, but not to threaten to carry her back unless she did so. Pullman Palace Car Co. v. Hocker [Tex. Civ. App.] 15 Tex. Ct. Rep. 330, 93 S. W. 1009. Instruction that if plaintiff left car to avoid being carried back in the opposite direction her action would not be voluntary, but that if she left it in order to accommodate certain persons in order that they might have a sleeper it would be voluntary, approved. Id. That plaintiff withdrew from the car as ordered and without offering violence does not affect his right of recovery. Golden v. Pittsburg R. Co., 28 Pa. Super. Ct. 313.

1. The fact that the plaintiff demanded his ticket from the conductor upon learning that he could not be given the accommodations for which he had contracted, which demand was refused, does not constitute such a waiver of his rights as will relieve the company from liability. Pullman Co. v. Willett, 7 Ohio C. C. (N. S.) 173.

2. If one is given a transfer entitling him to ride on a certain car, which car he is prevented from taking by the conductor, he may recover for an ejection from a car subsequently taken, though his ticket expressly states that it is not good on such car. Golden v. Pittsburg R. Co., 28 Pa. Super. Ct. 313.

3. Powell v. Wiley [Ga.] 54 S. E. 732.

4. A sleeping car company contracting to furnish sleeping car accommodations to a passenger from one point to another is not relieved from liability for a breach because the railroad company fails to haul the car to the latter point, there being no provision in the contract relieving it under such circumstances, and the passenger not being bound by the contract between the railroad and sleeping car companies. Pullman Palace

take on a passenger is liable for injuries received by him while proceeding to his destination,[5] independent of any knowledge imputable to the carrier as to the immediate urgency of the journey.[6] For a servant's act in misrouting a passenger the carrier must answer.[7]

Through trains.[8]—A regulation that certain trains shall stop only at designated stations is reasonable, providing there are enough trains to serve the local travel.[9] A statute providing that trains shall stop at all stations advertised as a place for receiving passengers has no application to flag stations.[10] Where a passenger without negligence on his part or by the carrier's direction is permitted to board a train not scheduled to stop at the station named in his ticket, the carrier must carry him to [11] and stop at his destination.[12]

Ejection of passenger.[13]—A threat to expel a passenger [14] or his wrongful ejection from the train renders the carrier liable absolutely,[15] the good faith of its

Car Co. v. Hocker [Tex. Civ. App.] 15 Tex. Ct. Rep. 330, 93 S. W. 1009. Railroad company held not relieved from liability because sleeper on one of its trains running in opposite direction had become disabled and car in which plaintiff was riding was needed to transport passengers, some of whom were ill and some of whom intended to ride all night, and that no one in the car was going in plaintiff's direction farther than her destination. Id.

5. Where it fails to stop train at station where train stopped on signal or notification of the agent, and plaintiff informed agent that he desired to take it. International & G. N. R. Co. v. Addison [Tex. Civ. App.] 15 Tex. Ct. Rep. 675, 93 S. W. 1081.

6. Refusal of instruction that company would not be liable unless agent knew that it was necessary for plaintiff to reach his destination that night, held proper. International & G. N. R. Co. v. Addison [Tex. Civ. App.] 15 Tex. Ct. Rep. 675, 93 S. W. 1081. Plaintiff was entitled to choose any reasonable means of transportation if he desired to prosecute his journey that night, and it was not a condition precedent to his right to recover that he should have been compelled to go that night, nor that he should be compelled to go by means of a buggy. Instructions approved. Id.

7. A servant who has authority to sell tickets has authority to furnish information as to the best route, and the carrier is liable for his misrouting. St. Louis & S. W. R. Co. v. White [Tex.] 14 Tex. Ct. Rep. 163, 89 S. W. 746.

8. See 5 C. L. 531.

9. Hutchinson v. Southern R. Co., 140 N. C. 123, 52 S. E. 263.

10. Code of Laws 1902, § 2134. Milhous v. Southern R. Co., 72 S. C. 442, 52 S. E. 41; Rountree v. Atlantic Coast Line R. Co. [S. C.] 53 S. E. 424.

11. Where a passenger boards a through train at the direction of an employe provided for the purpose of directing passengers, held liable for ejecting him at another place. International, etc., R. Co. v. Smith [Tex. Civ. App.] 90 S. W. 709.

12. Hutchinson v. Southern R. Co., 140 N. C. 123, 52 S. E. 263.

13. See 5 C. L. 532.

14. Immaterial that it was done in a gentlemanly manner as far as the right of action is concerned. Georgia R. & Elec. Co. v. Baker [Ga.] 54 S. E. 639.

15. Seaboard Air-Line R. Co. v. O'Quin, 124 Ga. 357, 52 S. E. 427. Immaterial what degree of care the servants used to ascertain whether plaintiff was the party using profane language. Id. In an action for ejection in a wrongful manner it is not necessary to prove that the defendant's servant acted wilfully, it being sufficient that he did what an ordinarily prudent person would not have done under the circumstances. Bettis v. Chicago, etc., R. Co. [Iowa] 108 N. W. 103. Where plaintiff asked the agent if a certain train stopped at Chester, and also consulted a time table, and was informed by both that it did stop, a ticket purchased to such city obligated the defendant to stop there and it is liable for ejecting plaintiff at the preceding station. McDonald v. Central R. Co., 72 N. J. Law, 280, 62 A. 405.

NOTE. Liability of carrier for ejecting passenger through mistaken identity: In the case of Seaboard Air-Line R. Co. v. O'Quin, 124 Ga. 357, 52 S. E. 427, it is held that a carrier determines the identity of a passenger at its risk and is liable for ejecting a person through mistaken identity. "Directly supporting the decision in the above case are Higgins v. Watervliet Turnpike & R. Co., 46 N. Y. 23; Cooley, Torts, 631; Coleman v. N. Y. etc., R. Co., 106 Mass. 160; Cincinnati, etc., R. Co. v. Cole, 29 Ohio (N. S.) 125. A street railway company will be held liable for conductor's wrongful ejection of a passenger from the car under a mistaken idea that the latter was about to violate the rules of the company. Denver Tran. Co. v. Reed, 4 Colo. App. 500. So it is liable, though the conductor actually is forbidden to act as he did. Turner v. North Beach & M. R. Co., 34 Cal. 594. Such acts of ejection are within the scope of his agency. Terre Haute & I. R. Co. v. Fitzgerald, 47 Ind. 791. The reason for these decisions is well stated in Passenger R. Co. v. Young, 21 Ohio St. 518. Goff v. Great Northern R. Co., 30 L. J. Q. 148, states that since the masters must act through servants and they put persons of their own selection in positions requiring the exercise of discretionary authority and with the means of doing the injury, they have really caused it to be done and should be held liable. It is their misfortune that they have trusted servants who have ventured to

servants being material only as bearing upon punitive damages.[16] A passenger may be expelled for failure to produce a ticket or pay fare, or for disorderly conduct despite his paying,[17] or breach of reasonable rules for the safety, convenience, and comfort of other passengers,[18] but no unnecessary force or insults may be used,[19] nor can ejection be made under circumstances likely to cause injury.[20] Such force may be used as is necessary to prevent him from again boarding the train.[21] A person boarding a freight train with knowledge that the custom of carrying passengers has been discontinued may be ejected,[22] and so may one entering a train with the purpose of asserting a right to ride on a ticket which he knows to be invalid and refusing to pay fare when demanded.[23] In such case he cannot again take passage on the same train and compel the carrier to transport him on payment of fare from that point to his destination, but he may be again ejected if he refuses to pay fare from the place he first entered the train.[24] In Ohio, a passenger who accepts without negligence on his part an erroneously punched transfer ticket over the line of the same company is entitled to ride without the payment of another fare.[25] In Connecticut, however, a rule requiring the ejection of passengers who refuse to pay fare or produce a proper transfer ticket is reasonable and valid,[26] and hence a transfer invalidly punched through the negligence of the conductor issuing it does not entitle the holder to a ride on the connecting line.[27] The passenger's remedy then is to sue for breach of contract.[28] The right to tender fare for the purpose of avoiding ejection depends on the passenger's good faith and freedom from fault in being on the train without acceptable tickets or fares,[29] and if the right exists a

disobey instructions, but it ought not also to be the misfortune of others who had no voice in their selection. Again by relegating the responsibility to the master it will tend to make the latter more careful in his selection of servants, thus safeguarding the interests of the passengers. The great weight of authority is in support of these cases, but some few cases hold to the contrary. So it has been held that the company is not liable when the servant exceeds his authority. Hibbard v. N. Y. & E. R. Co., 15 N. Y. 455; Ill. Cent. R. Co. v. Downey, 18 Ill. 259."—From 15 Yale L. Jr. 373.

16. Seaboard Air-Line R. Co. v. O'Quin, 124 Ga. 357, 52 S. E. 427.

17. Though a passenger has paid his fare he cannot recover for ejection and arrest for disturbing the peace if he was guilty of such disturbance. Leonard v. St. Louis Transit Co., 115 Mo. App. 349, 91 S. W. 452. Using vulgar and indecent language. Ejection of an old man in a rough manner. Tri-City R. Co. v. Gould, 118 Ill. App. 602.

18. Prohibition of smoking on a street car is a reasonable rule. McQuerry v. Metropolitan St. R. Co. [Mo. App.] 92 S. W. 912.

19. McQuerry v. Metropolitan St. R. Co. [Mo. App.] 92 S. W. 912. If a conductor believes it to be his duty to reject a ticket because of invalidity, and the passenger fails to pay the fare demanded, there is no tort in expelling him unless he does so with unreasonable or unnecessary force or insult. Southern R. Co. v. Hawkins [Ky.] 89 S. W. 258.

20. As from a moving car. Tri-City R. Co. v. Gould, 118 Ill. App. 602; Hirte v. Eastern Wisconsin R. & Light Co. [Wis.] 106 N. W. 1068.

21. Held justified in striking plaintiff in the face where he attempted to board the moving train. Lindsay v. Wabash R. Co. [Minn.] 12 Det. Leg. N. 430, 104 N. W. 656.

22. Civ. Code, §§ 484, 487. Wieland v. Southern Pac. Co. [Cal. App.] 82 P. 226.

23. Is an intruder. Gulf, etc., R. Co. v. Riney [Tex. Civ. App.] 14 Tex. Ct. Rep. 804, 92 S. W. 54.

24. Plaintiff entered train at G. and tendered special limited ticket, which had expired, for transportation to S. He was ejected at V. Held that conductor was authorized to again eject him where he again boarded train at V., though he tendered fare from V. to S. Gulf, etc., R. Co. v. Riney [Tex. Civ. App.] 14 Tex. Ct. Rep. 804, 92 S. W. 54.

25. Hence can recover for a wrongful ejectment. Cleveland City R. Co. v. Connor [Ohio] 78 N. E. 376. The fact that a passenger who has received an erroneously punched transfer ticket makes no statement or explanation before he is put off does not affect his right of action. Id.

26. Norton v. Consolidated R. Co. [Conn.] 63 A. 1087.

27. Norton v. Consolidated R. Co. [Conn.] 63 A. 1087. Properly ejected upon refusal to pay fare. Id. The ticket as punched is conclusive as between him and the second conductor, and an ample explanation does not affect the right of ejectment. Id.

28. He cannot insist upon riding and sue in tort for wrongful ejection. Norton v. Consolidated R. Co. [Conn.] 63 A. 1087.

29. The weight of authority, however, establishes the principle that where a passenger has been unable to procure, or, after procuring, has been deprived of his ticket through the fault or negligence of the carrier, he has the right at any time before actual eviction to tender and the company must accept his fare, but if one enter a rail-

tender by another passenger is good.[30] If expulsion is unauthorized, or is malicious [31] or needlessly forcible and violent,[32] exemplary or punitive as well as compensatory damages may be given, though expulsion might have been avoided by payment of another fare.[33]

If they unite in forcing a passenger from a sleeping car where he rightfully is, both the carrier and the proprietor of the sleeping car are liable,[34] and this may be though the conductor directs the other's servants.[35]

Delay and misrouting.[36]—A carrier misdirecting a passenger is liable for injuries and inconvenience caused by the increased number of changes and for delay.[37]

§ 24. *Rates and fares, tickets and special contracts.*[38]—A ticket is good only on the line [39] and the trains [40] which it covers. A passenger is bound to know the contents and legal effect of his ticket.[41] The omission to do all the steps necessary to put a rate into legal effect is not destructive of the contract already made at that rate with a passenger.[42] A rule that prepayment will be required before admission

way car without the means of transportation, with the intention of avoiding the payment of fare, and wilfully refuse on proper demand to do so, he may be ejected, and after steps have been taken looking towards his removal, no tender of fare will be sufficient to render the company liable for his eviction. Where, however, a passenger in good faith tenders transportation which is void, and there has been no negligence on the part of the carrier and there is no wilful or captious refusal on the part of the passenger to comply with the lawful demand of the conductor for the payment of fare, the passenger may at any time before actual eviction or some one for him, tender, and the company must accept the fare. Missouri, etc., R. Co. v. Smith [Ind. T.] 89 S. W. 668.

30. Where plaintiff, who had been left at an intervening station at which he had voluntarily alighted, took the next train and in good faith tendered his hat check received on the first train as per advice from the station agent, and upon being told he could not ride on it quietly started to comply with the conductor's demand to leave the train after the bell had been rung for a stop, but a friend tendered his fare before the car had stopped, the refusal of the tender was unjustified and the eviction wrongful. Missouri, etc., R. Co. v. Smith [Ind T.] 89 S. W. 668.

31. Evidence held to warrant finding that conductor was actuated by malice in expelling passenger from freight train so as to entitle latter to exemplary damages. Gardner v. St. Louis & S. F. R. Co. [Mo. App.] 93 S. W. 917.

32. Where the conductor used excessive force in ejecting a passenger and then **followed him** from the car **and assaulted** him again, there was a continuous assault, all of which was included in the exercise of excessive force in ejecting. McQuerry v. Metropolitan St. R. Co. [Mo. App.] 92 S. W. 912.

33. A passenger who is being ejected for refusing to pay a fare wrongfully demanded need not pay such fare to reduce the damage that might result from ejectment. Gulf, etc., R. Co. v. Dyer [Tex. Civ. App.] 15 Tex. Ct. Rep. 632, 95 S. W. 12. Where a conductor refuses a valid ticket, the passenger is under no obligation to pay his fare to avoid ejectment. McGhee & Fink v. Cashin [Ala.] 40 So. 63.

34. Where sleeping car company contracted to furnish plaintiff with sleeping car accommodations to a certain point, but sleeping car was cut off before reaching it, and the employes of both the sleeping car company and the railroad company united in forcing plaintiff to leave the sleeper and to ride in the chair car, held that the two companies were jointly liable. Pullman Palace Car Co. v. Hocker [Tex. Civ. App.] 15 Tex. Ct Rep. 330, 93 S. W. 1009.

35. Sleeping car company held not relieved from liability because its employes acted under orders from train conductor where they did not inform passenger of that fact but assisted such conductor in compelling her to leave sleeping car. Pullman Palace Car Co. v. Hocker [Tex. Civ. App.] 15 Tex. Ct. Rep. 330, 93 S. W 1009.

36. See 5 C. L. 533.

37. But not for delay due to negligence of connecting carrier. St. Louis & S. W. R. Co. v. White [Tex.] 14 Tex. Ct Rep. 163, 89 S W. 746.

38. See 5 C. L. 533.

39. A ticket calling for transportation over a carrier's main line does not entitle a passenger to transportation on branch intersecting lines. Whitham v. Chicago, B. & Q. R. Co. [Wash.] 85 P. 852.

40. Extraneous evidence as to the meaning of an ambiguous ticket held sufficient to sustain a finding that plaintiff was entitled to ride on the train from which he was ejected. Wood v. Delaware, etc., R. Co. [N J. Law] 63 A. 867.

41. That it is a special limited ticket which has expired by its terms. Gulf, etc., R. Co. v. Riney [Tex. Civ. App.] 14 Tex. Ct. Rep. 804, 92 S. W. 54.

42. Where a carrier authorizes its agents to sell tickets with a sixty-day limit, it cannot refuse to accept a ticket sold because it has not filed its acceptance of a rate with the Interstate Commerce Commission and thus bound itself to make such rates. Cherry v. Chicago & A. R. Co., 191 Mo. 489, 90 S. W. 381. Where an association of roads is about to vote upon allowing a sixty-day return limit upon excursion tickets, and defendant au-

to a waiting station may be enforced against one who has paid, passed out, and seeks re-entry.[43] Under a statute authorizing a railroad to collect extra fare from passengers who do not procure tickets, provided the ticket office shall be kept open a specified time before the departure of the train,[44] such fare cannot be collected where the office was not so kept constantly open, although the passenger did not attempt to get a ticket.[45] Under a statute requiring all railroads to "provide for redemption of tickets at the place of purchase," the person in charge of the ticket window must be authorized to redeem.[46] A carrier is bound by the representations of its agents as to the validity of tickets.[47] Where a ticket does not purport to be the complete agreement between the carrier and the passenger, supplementary evidence is competent to show what was the real contract indicated by the ticket.[48] The actual contract, of which the ticket is but evidence, controls.[49] Where a sleeping car company had contracted to carry a passenger, it cannot rescind the contract without returning the purchase price of the ticket.[50]

Conditions and limits,[51] if reasonably brought to the passenger's notice so as to be actually or by implication part of his contract, are binding [52] unless they are unreasonable in their terms.[53] Among the usual ones are time limits,[54] conditions requiring signature of passenger [55] or identification.[56] A passenger who has agreed

thorized the secretary of the association to cast its vote with the majority and the majority voted in favor thereof, the defendant will be deemed to have accepted such terms, notwithstanding it is the usual custom to file an acceptance with the association and with the Interstate Commerce Commission. Id.

43. Where a reasonable rule has been adopted requiring all who passed through a turnstile at an elevated station to pay a fare, one who has passed out must pay on reentering, irrespective of the fact that the servant knows that he has paid one fare. Sickels v. Brooklyn Heights R. Co., 99 N. Y S. 953.

44. Sayles' Ann. Civ. St. 1897, art. 4542, is not complied with where it appears that on two occasions during the prescribed time the agent was out of the office attending to other business. Gulf, etc., R. Co. v. Dyer [Tex. Civ App.] 15 Tex. Ct. Rep. 632, 95 S. W. 12.

45. Gulf, etc., R. Co. v. Dyer [Tex. Civ. App.] 15 Tex. Ct. Rep. 632, 95 S. W. 12.

46. It is no defense in a prosecution under Code Supp. 1902, §§ 2128a, 2128c, that the regular station agent who was not at the window was authorized to make redemption. Rohring v. Chicago, etc., R. Co. [Iowa] 106 N. W. 935.

47. Where defendant's ticket agent sold a ticket to plaintiff's daughter representing that it could be used by plaintiff, and that it was not necessary that plaintiff herself sign it or that it be made to suit her description, defendant was liable for the refusal of its train employes to honor the ticket. Southern Pac. Co. v. Bailey [Tex. Civ. App.] 14 Tex. Ct. Rep. 921, 91 S. W. 820. An agency is sufficiently proved if it be shown that the principal has led the public to believe that it exists by a continued course of business transactions; and authority of a railroad ticket agent to reserve berths of a sleeping car company for passengers on a train may be proved by showing prior ratification of reservations made under similar circumstances by such agent. Pullman Co. v. Willett, 7 Ohio C. C. (N. S.) 173. See, also, post, this section, Conditions.

48. Southern R. Co. v. Hawkins [Ky.] 89 S. W. 253.

49. Where, by the negligence of defendant's agent, plaintiff was unable to procure a ticket on her order from the initial carrier, she was still a passenger on defendant's line and entitled to protection from indignities offered by the conductor. Cincinnati, etc., P. R. Co. v. Harris [Tenn.] 91 S. W. 211.

50. Pullman Co. v. Krauss [Ala.] 40 So. 398.

51. See 5 C. L. 534.

52. Conditions in a ticket are only binding upon a passenger when accepted with knowledge thereof or under circumstances charging knowledge. Condition in small type. Aplington v. Pullman Co., 110 App. Div. 250, 97 N. Y. S. 329.

53. Condition that in case of dispute as to right to ride thereon the passenger must pay his fare and present claim to the general passenger agent is void. Cherry v. Chicago & A. R. Co., 191 Mo. 489, 90 S. W. 381.

54. A passenger accepting a ticket expressly stating when it shall become void is bound thereby, though misled to believe that it was good for a longer period. Maxson v. Pennsylvania R. Co., 97 N. Y. S. 962. One has no right to be transported on a special limited ticket sold to him at a reduced rate after it has expired by its terms. Gulf, etc., R. Co. v. Riney [Tex. Civ. App.] 14 Tex. Ct. Rep. 804, 92 S. W. 54.

55. Evidence held to sustain a finding that the defendant's agent wrongfully refused to validate a return ticket, although there was some dissimilarity in the signatures. Baltimore & O. S. W. R. Co. v. Hudson [Ky.] 92 S. W. 947.

Shipper's ticket: Return ticket issued to shipper without requiring him to sign entitles him to ride, especially where he has no knowledge of the regulation that ship-

to identify himself as the original purchaser of his ticket need only produce evidence reasonably sufficient to satisfy,[57] and must be given a reasonable opportunity to do so.[58] A time limit "going" does not apply to a return trip,[59] and violation of a condition against stop overs on one part of a trip has been held not to forfeit the right to finish the trip.[60] A contract on terms differing from tickets or fares exacted of the public generally is not binding if outside the scope of the agent's or trainman's authority,[61] and by course of dealing it may clothe a connecting line with authority to fix terms,[62] or authorize its agents to waive conditions, even though a rule against so doing be abrogated.[63]

Transfers.—Although a street car company be under no legal obligation to issue transfers, yet if it represents that it will do so and a passenger pays his fare, he becomes entitled thereto and the fare paid becomes a consideration for both rides giving rise to a contract duty.[64] A ticket as made out and punched is evidence of the contract, and if it fails to disclose the true contract the carrier is liable.[65] A street car company can not relieve itself from a penalty for refusing a transfer by a rule controlling the issuance, though reasonable, if no notice of such rule has been given to the public.[66] Reasonable conditions may be put on the granting and use of

per's passes must be signed. Texas & P. R. Co v. Lynch [Tex. Civ. App.] 16 Tex. Ct. Rep. 201, 94 S. W. 1093.

56. A condition in a ticket that the return portion shall not be valid unless the user is identified is reasonable and valid. Pittsburgh, etc., R. Co. v. Coll [Ind. App.] 76 N. E. 876.

57. Brigham v. Southern Pac. Co. [Cal. App.] 84 P. 306. Not error to refuse an instruction that plaintiff must identify himself "to the satisfaction of the train agent." Id. A condition in a ticket requiring the passenger to identify himself as the original purchaser thereof to the satisfaction of the company's agents only requires identification by such proof as would satisfy the mind of a reasonable, conscientious, and prudent man selected by the parties to pass upon the question. Contract, properly construed, does not require him to satisfy conductor. Instruction approved. Southern R. Co. v. Cassell [Ky.] 92 S. W. 281.

58. As where he is not permitted to pass out into the train shed to get an employe who was acquainted. Pittsburgh, etc., R. Co. v. Coll [Ind. App.] 76 N. E. 816.

59. Where a ticket provided for a continuous trip "going," and that the passenger on returning must arrive at place of starting not later than a certain date, does not require a continuous return trip. Cherry v. Chicago & A. R. Co., 191 Mo. 489, 90 S. W 381.

60. Where a passenger's ticket does not require him to make a continuous trip from Philadelphia to California, but does as far as St. Louis, a breach in the latter provision does not forfeit his right to ride from St. Louis to destination. Cherry v. Chicago & A. R. Co., 191 Mo. 489, 90 S. W. 381.

61. One riding on a **freight train** by virtue of an agreement with the **brakeman** to pay his fare by helping is not a passenger, the brakeman having no power to so contract. O'Donnell v. Kansas City, etc., R. Co. [Mo.] 95 S. W. 196. An arrangement made by the **conductor** with respect to the transportation of a person found on his train, or permission given by him to such person to ride upon his train, is within the apparent scope of his authority and is binding on the company and confers upon such person the rights of a passenger. St. Louis S. W. R. Co. v. Fowler [Tex. Civ. App.] 93 S. W. 484. Failure to so charge held not error, there being no request for a special charge on that subject, and charge as given not being affirmatively erroneous. Id. In the absence of direct proof of authority on the part of a **ticket agent** to bind the company, he has no authority to allow one to ride on a train without a ticket or the payment of fare. Id. Under ordinary circumstances a conductor has no implied authority to waive a provision in a passenger's contract requiring him to ride in the caboose and to permit him to ride on the engine. Illinois Cent. R. Co. v. Jennings, 217 Ill. 140, 75 N. E. 457.

62. Where a connecting line had been accustomed to accept tickets and accede to their terms, issued by an agent of another line, and has accepted and retained its portion of the fare for a particular ticket, it was bound by the act of the issuing agent, whether general or special. Cherry v. Chicago & A. R. Co., 191 Mo. 489, 90 S. W. 381

63. Evidence of the custom of stock shippers to ride on the engine is admissible to show the conductor's authority to waive a contract stipulation forbidding it. Where contract made it prima facie negligence for shipper not to remain in the caboose. Missouri, etc., R. Co. v. Avis [Tex. Civ. App.] 14 Tex. Ct. Rep. 519, 91 S. W. 877. Not rendered inadmissible because the court refused a continuance to enable defendant to controvert an allegation that a rule forbidding passengers to ride on the engine was not observed. Id.

64. Georgia R. & Elec. Co. v. Baker [Ga.] 54 S. E. 639.

65. Street car company held liable for not permitting plaintiff to ride according to his ticket. Golden v. Pittsburg R. Co., 28 Pa. Super. Ct. 313. If issued at a time when it was of no use, the company is liable. Id.

66. As by a rule adopting variously colored tickets, some of which are good only one way. Gasper v. New York City R. Co.,

transfers.[67] The fact that one's health and comfort caused him to leave his corner and present his transfer at the wrong corner [68] does not excuse him. A street railway company may refuse a transfer ticket mutilated after delivery.[69] If the transfer be wrong by mistake of the issuing conductor, one may nevertheless ride.[70]

Regulation of sale of tickets; brokerage.[71]—A statute requiring railroads to issue a certificate of authority to their agents authorized to sell tickets, and prohibiting persons not possessed of such certificate from dealing in tickets, prohibits the ticket brokerage business,[72] which as a police power the state may do,[73] and such laws are valid.[74] In a suit by a carrier to enjoin the sale by ticket scalpers of nontransferable reduced rate tickets, the value of the business to be protected determines the amount in controversy for Federal jurisdictional purposes.[75] There being no complete and sufficient remedy at law,[76] an injunction restraining the sale of nontransferable reduced rate tickets by scalpers will issue, and it should be permanent.[77] The Minnesota law regulating the sale and redemption of transportation tickets is constitutional.[78]

§ 25. *General rules of liability for personal injuries. A. Nature and extent of liability.*[79]—Aside from special contract duties and the duty of protection,[80] the basis of liability is negligence [81] in respect of a duty owed to the plaintiff,[82] and it must have been the negligence of defendant or attributable to him.[83] Thus, a common carrier is liable for the torts committed by the lessee of its road,[84] or by its own agents in violation of rules.[85] The liability extends to injuries resulting from concurrent negligent acts, though none of them alone is sufficient to cause the injuries.[86] Where the concurrent negligence of the carrier and another results in in-

99 N. Y. S. 902; McGowan v. New York City R. Co., 99 N. Y. S. 835.

67. Condition that if any dispute arises as to its validity the holder will pay his fare and present his claim is void. Georgia R. & Elec. Co. v. Baker [Ga.] 54 S. E. 639.

68. The passenger walked only one block to get out of the cold, being convalescent. Hanley v. Brooklyn Heights R. Co., 96 N. Y. S. 249.

69. Koch v. New York City R. Co., 95 N. Y. S. 559.

70. Transfer did not on its face entitle the holder to a ride. Georgia R. & Elec. Co. v. Baker [Ga.] 54 S. E. 639.

71. See 5 C. L. 534, n. 12.

72. Laws 1905, p. 422. State v. Thompson [Or.] 84 P. 476.

73. State v. Thompson [Or.] 84 P. 476; In re O'Neill, 41 Wash. 174, 83 P. 104.

74. Not unconstitutional as denying due process of law. State v. Thompson [Or.] 84 P. 476; In re O'Neill, 41 Wash. 174, 83 P. 104. Do not impair obligation of a contract (State v. Thompson [Or.] 84 P. 476), or grant special privileges (Id.), or trench on the commerce clause of the Federal constitution (Id.). A statute permitting only railway companies and their agents to sell tickets is not void as denying to brokers equal protection of the laws. Sess. Laws 1905, p. 376, c. 180. In re O'Neill, 41 Wash. 174, 83 P. 104. Do not put it within the power of the railway companies to create crimes and determine who are criminals. Id.

Title of Sess. Laws 1905, p. 376, c. 180, held to sufficiently **state the object** of the act. In re O'Neill, 41 Wash. 174, 83 P. 104.

75. Not the specific amount that might be recovered in a suit upon the contract. Louisville & N. R. Co. v. Bitterman [C. C. A.] 144 F. 34.

76. The difficulty in detecting the offenses and the annoyances, extra expense and outlays, held to render the remedy at law insufficient. Louisville & N. R. Co. v. Bitterman [C. C. A.] 144 F. 34.

77. Company should not be compelled to secure an injunction to protect it each time that it contemplates issuing such tickets. Louisville & N. R. Co. v. Bitterman [C. C. A.] 144 F. 34.

78. Laws 1893, c. 66, p. 182. State v. Manford [Minn.] 106 N. W. 907.

79. See 5 C. L. 534.

80. See post, § 29.

81. Carrier is not liable for injuries to passenger unless negligent. Sweet v. Birmingham R. & Elec. Co. [Ala.] 39 So. 767; Graf v. West Jersey & S. R. Co. [N. J. Law] 62 A. 333.

82. Immaterial whether the conductor negligently started a car as to another passenger. Weeks v. Boston El. R. Co., 190 Mass. 563, 77 N. E. 654.

83. Testimony of a witness that he was in the employ of defendant and in charge of the car upon a certain run, upon which run plaintiff was injured, is sufficient to sustain a finding that the car was operated by defendant. Indiana Union Traction Co. v. Jacobs [Ind.] 78 N. E. 325.

84. Liable for the indignities inflicted by a fellow passenger. Franklin v. Atlantic & C. Air-Line R. Co. [S. C.] 54 S. E. 578.

85. A carrier cannot relieve itself from liability for acts of the conductor within the legal scope of his duty and power by instructions and prohibitory orders. Schmidt v. New Orleans R. Co. [La.] 40 So. 714.

86. Sproule v. St. Louis & S. F. R. Co.

jury to a passenger, each is liable therefor, and the negligence of one is no excuse for that of the other.[87] So a carrier is liable, although the negligence of a fellow passenger concurs in producing injury,[88] but is not liable for injuries occurring as the direct result of a third person's or another passenger's act which it could not foresee.[89] The relation of a passenger to the carrier does not impute the latter's negligence to him so that he is barred of recovery from another carrier for a negligent collision.[90] A sleeping car company and the carrier are jointly liable to a passenger injured by the negligence of the car company.[91] The carrier is entitled to indemnity against a negligent sleeping car company when it has assumed the sole duty of keeping cars safe.[92]

For effects due to vis major or acts of God there is no liability,[93] since the carrier is not an insurer.[94] The highest, or at least a very high, degree of care is required of the carrier,[95] or care commensurate with the undertaking and the cir-

[Tex. Civ. App.] 15 Tex. Ct. Rep. 16, 91 S. W. 657. Under a pleading that defendant's negligence caused plaintiff's injuries, plaintiff could recover if defendant's negligence contributed with the negligence of a third person, defendant being liable to the same extent as though solely negligent. Bragg v. Metropolitan St. R. Co., 192 Mo. 331, 91 S. W. 527. Evidence held to require a charge that if negligence in operating the train and negligence in failing to furnish a safe road bed both caused the injury, defendant was liable, though each act separately was not the proximate cause. Sproule v. St. Louis, etc., R. Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 16, 91 S. W. 657.

87. Threatened collision between street car and train. Galveston, etc., R. Co. v. Vollrath [Tex. Civ. App.] 13 Tex. Ct. Rep. 777, 89 S. W. 279. Evidence held to show concurrent negligence. Louisville R. Co. v. Blum [Ky.] 89 S. W. 186. In an action for causing the death of an employe while being carried by one company from work on a road constructed by another, it appeared that there was only one train and that the company operating it was employed by the one constructing the road, it was immaterial which of the defendant companies actually owned the work train. Chicago, etc., R. Co. v. Hollis' Adm'r [Ky.] 91 S. W. 258. Carrier must be guilty of negligence either alone or in conjunction with some third person. Bevard v. Lincoln Traction Co. [Neb.] 105 N. W. 635. If defendant's negligence contributed to the injury, it is immaterial that another's negligence also contributed. Where a conductor negligently signaled the motorman to cross the track, the company is not relieved by the fact that the car would have safely crossed had not the flagman signaled to stop after it had started across. Chicago City R. Co. v. Shaw, 220 Ill. 532, 77 N. E. 139.

88. Missouri, etc., R. Co. v. Wolf [Tex. Ct. Rep.] 89 S. W. 778.

89. Where plaintiff was suddenly pushed from the car by a passenger who became angry from being pushed about in a crowded car, company is not liable. Snyder v. Colorado Springs, etc., R. Co. [Colo.] 85 P. 686. Where intending passenger was injured by negligent act of two men in jumping on car which was backing down to receive passengers, evidence held not to show any negligence on part of carrier. Brice v. South Covington & C. St. R. Co. [Ky.] 93 S. W. 37. Held that company was not liable for injuries due to explosives placed on the track by boys. Bevard v. Lincoln Traction Co. [Neb.] 105 N. W. 635.

90. Chicago City R. Co. v. Shaw, 220 Ill. 532, 77 N. E. 139.

91. Fingers caught between edges of vestibules. Pullman Co. v. Norton [Tex. Civ. App.] 14 Tex. Ct. Rep. 869, 91 S. W. 841.

92. Though both are wrongdoers. Pullman Co. v. Norton [Tex. Civ. App.] 14 Tex. Ct. Rep. 869, 91 S. W. 841.

93. Western Maryland R. Co. v. Shivers, 101 Md. 391, 61 A. 618. The wrongful act of employes cannot be considered as a vis major. Id.

94. Western Maryland R. Co. v. Shivers, 101 Md. 391, 61 A. 618; Edwards v. Manufacturers' Bldg. Co. [R. I.] 61 A. 646. A common carrier, though not an insurer of the safety of its passengers, must use the highest degree of care. Hamilton v. Metropolitan St. R. Co., 114 Mo. App. 504, 89 S. W. 893. That degree of care that a very cautious and prudent person would exercise under the same circumstances. Missouri, etc., R. Co. v. Byrd [Tex. Civ. App.] 14 Tex. Ct. Rep. 65, 89 S. W. 991.

Instruction that carrier could not be held liable for consequences of an accident against which it could not have guarded by the exercise of that high degree of care and foresight, which very prudent persons would have exercised under the same circumstances, approved. Davis v. Galveston, etc., R. Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 989, 93 S. W. 222. Carrier by water. Instruction making defendant an insurer held erroneous. Evers v. Wiggins Ferry Co., 116 Mo. App. 130, 92 S. W. 118. Though a **carrier of passengers by elevator** is not an insurer of their safety, he is required to exercise the highest degree of care in everything calculated to insure their safety. Instruction approved. Becker v. Lincoln Real Estate & Bldg. Co. [Mo. App.] 93 S. W. 291.

95. Although, technically, carriers are only required to use "ordinary care," an instruction requiring them to use a "high degree of care" held harmless in view of the meaning of ordinary care as applied to carriers of passengers. Whittacker v. Brooklyn, etc., R. Co., 110 App. Div. 767, 97 N. Y. S. 414. In the performance of the duties imposed by its contracts with passengers, a carrier is held to the exercise of the highest degree of

cumstances [96] and consistent with the practical conduct of the business of carriage.[97] Where not even ordinary care was used the degree is immaterial.[98] Knowledge of the particular danger which caused an accident is not required as a predicate for negligence in suffering a generally defective thing.[99] The violation of regulative statutes is rebuttable evidence but is not negligence per se.[1] The negligence complained of must be the proximate cause of the injury.[2]

care. Laub v. Chicago, B. & Q. R. Co. [Mo. App.] 94 S. W. 550. Applied to passenger elevator. Shellaberger v. Fisher [C. C. A.] 143 F. 937. Extraordinary care. Anderson Art Co. v. Greenburg, 118 Ill. App. 220. Slight negligence is sufficient to render a carrier liable for a personal injury resulting therefrom. Cincinnati, etc., R. Co. v. Bravard [Ind. App.] 76 N. E. 899; Chicago City R. Co. v. Shaw, 220 Ill. 532, 77 N. E. 139; Brod v. St. Louis Transit Co., 115 Mo. App. 202, 91 S. W. 993.

Instruction defining degree of care to which carrier is bound held not objectionable as imposing on defendant a higher duty than law requires. San Antonio Traction Co. v. Parks [Tex. Civ. App.] 15 Tex. Ct. Rep. 171, 93 S. W. 130. An instruction that defendant is liable if it failed to use ordinary care is favorable to defendant and it cannot complain. Indianapolis Traction & Terminal Co. v. Lawson [C. C. A.] 143 F. 834. An instruction that if plaintiff acted as a reasonably prudent man would under the circumstance, and the motorman was heedless, careless, acted so negligently as to injure plaintiff, a verdict should be returned for plaintiff, is not prejudicial to defendant. Fischel v. Metropolitan St. R. Co., 99 N. Y. S. 90.

96. That degree which a very prudent person would exercise under similar circumstances. Gilroy v. St. Louis Transit Co. [Mo. App.] 92 S. W. 1152. That high degree of prudence as against possible dangers as would be used by very cautious, prudent, and competent persons under the same or similar circumstances. St. Louis S. W. R. Co. v. Parks [Tex. Civ. App.] 14 Tex. Ct. Rep. 232, 90 S. W. 343; Green v. Houston Elec. Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 790, 89 S. W. 442. Which a reasonable man would exercise under the circumstances. MacFeat v. Philadelphia, etc., R. Co. [Del.] 62 A. 898.

97. Paul v. Salt Lake City R. Co. [Utah] 83 P. 563; Illinois Cent. R. Co. v. Johnson [Ill.] 77 N. E. 592; Omaha St. R. Co. v. Boesen [Neb.] 105 N. W. 303. Applicable to street cars. Chicago Union Traction Co. v. Mee, 119 Ill. App. 332. Carriers are required to use the highest degree of care consistent with the nature of their undertaking. United R. & Elec. Co. v. Weir, 102 Md. 286, 62 A. 588.

Instruction that defendant was required to do all that human foresight, vigilance, and care could reasonably do, in view of the mode of conveyance adopted to insure safety, imposes an impracticable degree of care. Tri-City R. Co. v. Gould, 217 Ill. 317, 75 N. E. 493. An instruction as to the care required, as "all that human care, diligence and foresight could reasonably do under the circumstances and in view of the character of the mode of conveyance adopted, held to state too high a degree of care, as it might be inconsistent with the practical operation. Tri-City R. Co. v. Wiedenhoeft, 118 Ill. App. 581.

98. Where it was shown that a sleeping car company had not exercised ordinary care, error in imposing upon it too high a degree of care was not prejudicial. Pullman Co. v. Norton [Tex. Civ. App.] 14 Tex. Ct. Rep. 869, 91 S. W. 841.

99. Where a passenger was injured by tripping over a mat, and there was evidence showing that the mat was practically worn out, it is error to instruct that plaintiff must prove that the particular loop had been in a dangerous condition sufficiently long to charge defendant with constructive notice. Spaeth v. Manhattan R. Co., 109 App. Div. 819, 96 N. Y. S. 861.

1. Duty imposed by ordinance. Shellaberger v. Fisher [C. C. A.] 143 F. 937.

2. No liability can be predicated upon the absence of a guard rail where the person injured deliberately stepped off and was injured by an opposite going car. North Chicago St. R. Co. v. Canfield, 118 Ill. App. 353. Crowded condition held not the proximate cause, a third person's act intervening. McVay v. Brooklyn, etc., R. Co., 99 N. Y. S. 136. Where a car is switched by a "kicking" switch, and, the brake bar breaking, collides with a baggage car, the making of the switch was the proximate cause of the accident. Yazoo & M. V. R. Co. v. Roberts [Miss.] 40 So. 481. Failure to furnish a through sleeper as per contract is not the proximate cause of an injury received from a fall on the depot platform while transferring. Pullman Co. v. Stearn [Miss.] 41 So. 383. Failure to provide vestibuled coaches held not the proximate cause of injuries of one thrown from the car where the doors would have been open if vestibuled. Latimer v. St. Louis S. W. R. Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 242, 90 S. W. 665. Omission to use care before starting elevator to ascertain whether passengers are in the act of alighting does not entitle plaintiff to recover unless it is proximate cause of injury. Becker v. Lincoln Real Estate & Bldg. Co. [Mo. App.] 93 S. W. 291. Negligent act of starting elevator held to be proximate cause of injury where it caused plaintiff to be in danger and induced operator to push her backward, though such push may have been immediate cause of her foot getting caught. Id. Submission of issue of negligent starting held proper under the evidence. Id.

Evidence considered: Held insufficient to show that the unevenness of the ground was the proximate cause of plaintiff's injuries. Truesdell v. Erie R. Co., 99 N. Y. S. 694. The starting of the car before plaintiff had time to get into position held not to be the proximate cause. Cumberland & W. Elec. R. Co. v. Thompson, 102 Md. 193, 62 A. 243. Held sufficient to show that injuries were proximate result of defendant's negligence in failing to stop thus compelling passenger to drive, so that refusal to direct verdict for defendant was proper. International & G. N. R. Co. v. Addison [Tex. Civ. App.] 15 Tex. Ct.

In actions in the Federal courts for injuries received through the negligence of a carrier, the law of the supreme court, respecting the degree of care required, controls.[3] Under a statute making a common carrier liable for the death of a passenger because of gross negligence of its servants, the term "gross negligence" is satisfied by proof of willful or reckless disregard of consequences.[4] Under a statute making railroad companies insurers of the safety of passengers while "being transported," they are under the common-law liability until the "act of journeying" begins.[5] The Nebraska statute so providing does not apply to street car companies,[6] nor to one who has neither come under the carrier's control or indicated an intention to do so.[7] In Indiana the carrier cannot relieve itself by contract from liability for negligence of its servants.[8] A person riding with freight on a contract of carriage relieving the company from all liability is bound thereby,[9] but the statutory liability to widow or children is not thus released.[10]

Criminal liability.—Under a statute providing a fine for "gross negligence" resulting in the death of a passenger, there are degrees of negligence,[11] and the term "gross negligence" means a gross failure to exercise the high degree of care required of a carrier.[12]

(§ 25) *B. Contributory negligence.*[13]—The passenger's contributory negligence in failing to use his natural faculties for his own safety absolves the carrier as to injuries proximately caused [14] but not as to those inflicted in wanton or negli-

Rep. 675, 93 S. W. 1081. Leaving a sliding door of a car partly closed held not the proximate cause of plaintiff's injury where, being crowded, he placed his hand upon it to protect himself and it was crushed by sliding open. Maillefert v. Interborough Rapid Transit Co., 98 N. Y. S. 207. Held insufficient to show that plaintiff's condition might have resulted from a previous accident. Nix v. San Antonio Traction Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 592, 94 S. W. 335. Negligence in permitting a passenger to smoke within the car contrary to rules held not the proximate cause of the injury where it appeared that plaintiff was injured by being pushed from the car during a panic resulting from the dress of a passenger becoming ignited by a match carelessly thrown down by the smoker. Franizzi v. New York & Q. C. R. Co., 99 N. Y. S. 281.

Instructions defining proximate and remote cause, approved. International & G. N. R. Co. v. Ellyson [Tex. Civ. App.] 15 Tex. Ct. Rep. 580, 94 S. W. 910. Charge held to debar recovery for suffering due to prior disease. St. Louis S. W. R. Co. v. Haney [Tex. Civ. App.] 16 Tex. Ct. Rep. 19, 94 S. W. 386.

3. Not that of the individual state. Southern Pac. Co. v. Cavin [C. C. A.] 144 F. 348.

4. Rev. Laws, c. 111, § 267. Spooner v. Old Colony St. R. Co., 190 Mass. 132, 76 N. E. 660. Evidence held sufficient to show gross negligence in operating the car. Id.

5. Not insurers under § 10,039, c. 47, p. 2876, Cobbey's Ann. St. 1903, from the time the passenger places himself within the charge of the carrier, as held in former opinion, 101 N. W. 1033. Fremont, E. & M. V. R. Co. v. Hagblad [Neb.] 106 N. W. 1041.

6. Comp. St. 1903, § 3, art. 1, c. 72. Omaha St. R. Co. v. Boesen [Neb.] 105 N. W. 303.

7. Hicke v. Union Pac. R. Co. [Neb.] 107 N. W. 798.

8. Pitteburgh, etc., R. Co. v. Higgs, 165 Ind. 694, 76 N. E. 299.

9. Hodge v. Rurland R. Co., 97 N. Y. S. 1107.

10. A provision in a pass exempting company from liability for injuries due to the negligence of its servants does not affect the statutory act giving the widow and next of kin a cause of action. Tingley v. Long Island R. Co., 109 App. Div. 793, 96 N. Y. S. 865.

11. Rev. Laws, c. 111, § 267. Dolphin v. Worcester Consol. St. R. Co., 189 Mass. 270, 75 N. E. 635.

12. An instruction that any failure to use high degree of care amounts to gross negligence, properly refused. Dolphin v. Worcester Consol. St. R. Co., 189 Mass. 270, 75 N. E. 635.

13. See 5 C. L. 537. Consult general law of Negligence, 6 C. L. 748.

14. Carrier not liable where the passenger could have escaped the injury by using ordinary care. MacFeat v. Philadelphia, etc., R. Co. [Del.] 62 A. 898. Instruction defining negligence approved. St. Louis S. W. R. Co. v. Johnson [Tex. Civ. App.] 15 Tex. Ct. Rep. 813, 94 S. W. 162. Evidence held to sustain finding that passenger was not guilty of contributory negligence while making journey necessitated by failure to stop. International & G. N. R. Co. v. Addison [Tex. Civ. App.] 15 Tex. Ct. Rep. 675, 93 S. W. 1081.

Proximate cause: Riding in cupola of caboose instead of on seats and leaving before train stopped held not proximate to injury resulting from derailment of other cars. Southern R. Co. v. Roach [Ind. App.] 78 N. E. 201. When a passenger on an interurban railway car was thrown therefrom and killed by the derailing of the car while running through the open country, the fact that he was standing on the platform at the time cannot be held to be the proximate cause of his death when the evidence does not disclose that there was available or reasonably convenient room on the inside of the car; that the injury would not have happened had

gent disregard of the peril into which his own negligence has brought the passenger,[15] or as to which his negligence had no efficiency[16] whatsoever.[17] A passenger must exercise ordinary care for his own safety,[18] and may assume that conveyances, stations, and approaches are reasonably safe.[19] He must not assume such fact when reasonable inquiry would set him right,[20] or heedlessly put himself in danger.[21] In riding on freight trains the passenger is said to assume the incidental risks.[22]

The foregoing rules are applied in the cases which follow.

Acts done at direction of employes[23] are not negligent if one of ordinary prudence would rely on such directions under the circumstances.[24]

Acts due to impulse of sudden danger[25] are not negligent unless devoid of the common prudence dictated by the situation.[26] The carrier is liable for injuries to a passenger who is induced to jump from a car by reason of the negligent and terrifying acts of its servants from which he may reasonably infer that a wreck is imminent.[27]

he been on the inside; that he had notice of a sign prohibiting passengers from standing on the platform; or that he was ordered inside the car by the company's servants and refused to go. Cincinnati, etc., R. Co. v. Lohe, 6 Ohio C. C. (N. S.) 144.

NOTE. Assumed risk: The courts of some states use the words "contributory negligence" and "assumed risks" as synonymous, and the words are so used in this article except where noted.

15. Previous negligence of deceased is no defense where defendant could have prevented the injury by exercising reasonable care. MacFeat v. Philadelphia, etc., R. Co. [Del.] 62 A. 898. Though a passenger is negligent in getting into a perilous position, if the direct cause of his injury is the omission of the carrier to use proper care to protect him after becoming aware of his peril, the carrier is liable. Evidence sufficient to go to jury on question of conductor's negligence. Rodgers v. Choctaw, etc., R. Co. [Ark.] 89 S. W. 468. A passenger who has placed himself in a dangerous position may nevertheless recover if the carrier is guilty of gross negligence after discovering his perilous position, hence, not error to refuse to direct a verdict for defendant where it appears that the motorman on the rear car saw plaintiff riding on the bumper considerable time before the collision. Chicago City R. Co. v. Schmidt, 117 Ill. App. 213. The fact that one is negligent in attempting to board a moving car does not license the carrier to either wantonly or negligently injure him, but it must exercise ordinary care to avoid such injury. Instructions in action against street railway held erroneous as precluding recovery if defendant's agents made no effort to avoid injuring plaintiff after discovering him in a position of peril. Coleman v. St. Louis Transit Co. [Mo. App.] 93 S. W. 920.

16. MacFeat v. Philadelphia, etc., R. Co. [Del.] 62 A. 898. Intoxication does not affect a passenger's right of recovery unless he fails to use such care as could be expected of a sober person under similar conditions. Illinois Cent. R. Co. v. Proctor [Ky.] 89 S. W. 714; St. Louis S. W. R. Co. v. Parks [Tex. Civ. App.] 14 Tex. Ct. Rep. 232, 90 S. W. 343.

17. If plaintiff's negligence contributed proximately in the slightest degree to the injury, no recovery can be had. Sweet v. Birmingham Ry. & Elec. Co. [Ala.] 39 So. 767.

18. Pendelton's Adm'r v. Richmond, etc., R. Co., 104 Va. 813, 52 S. E. 574. An instruction that negligence is the failure of a passenger to use ordinary care for his safety—that is, such care as an "ordinarily prudent person" would exercise under similar circumstances, held correct. St. Louis S. W. R. Co. v. Parks [Tex. Civ. App.] 14 Tex. Ct. Rep. 232, 90 S. W. 343.

19. Brettner v. Westchester Elec. R. Co., 98 N. Y. S. 857; Illinois Cent. R. Co. v. Proctor [Ky.] 89 S. W. 714.

20. Van Ostrand v. Delaware & H. Co., 99 N. Y. S. 548; Hunter v. Atlantic Coast Line R. Co., 72 S. C. 336, 51 S. E. 860.

21. Dieckmann v. Chicago & N. W. R. Co. [Iowa] 105 N. W. 526; Illinois Cent. R. Co. v. Proctor [Ky.] 89 S. W. 714; Pendelton's Adm'r v. Richmond, F. & P. R. Co., 104 Va. 813, 52 S. E. 574.

22. See post, § 27.

23. See 5 C. L. 538.

24. See particular cases in succeeding notes.

25. See 5 C. L. 538.

26. Where a person is placed in a position of danger without fault on his part, he will not be held guilty of contributory negligence for failure to use all possible means for his safety, but only for failure to use ordinary prudence. Passenger not necessarily guilty of contributory negligence in not leaving a car immediately upon discovering fire instead of trying to extinguish it. Hess v. Baltimore & O. R. Co., 28 Pa. Super. Ct. 220. One is not guilty of contributory negligence who, in an effort to avoid immediate danger, and without fault, puts himself in the way of another peril, especially where defendant produced the first perilous condition. MacFeat v. Philadelphia, etc., R. Co. [Del.] 62 A. 898.

27. In action for injuries to passenger, who jumped from moving street car because of fear of impending collision with obstruction on track, evidence held to require submission to jury of issue of defendant's negligence, even though obstruction was so located that it would not have endangered car. McManus v. Metropolitan St. R. Co., 116 Mo. App. 110, 92 S. W. 176. Instruction allowing recovery without proof that obstruction was

Going about stations, platforms, tracks, or standing cars.[28]—A passenger going upon an obviously defective platform must use care commensurate with the known or apparent risk.[29] It is negligence to stand too near the track to clear the car.[30] To fail to use hand rails is not of itself negligent.[31] One has as much right to go upon a station platform to signal a train to stop as to board a train.[32] A passenger killed while standing on the track beside a standing car was not guilty of contributory negligence as matter of law.[33] One crossing tracks to reach a station to take a train need not exercise the same degree of care as a traveler upon the highway or a trespasser.[34] Crossing tracks without looking or listening may or may not be negligence, and is a question of fact depending on such circumstances as necessity,[35] invitation,[36] or heedlessness of obvious danger.[37] An intending passenger must act as a person of ordinary prudence would act under the same circumstances to avoid injury by waiting in a cold depot,[38] or where there is no depot.[39]

Boarding the car or vehicle of transit.—The safety of boarding a street car apparently ready may be assumed.[40] It is not negligence to board at the schedule

in plain view of defendant's servants as alleged in petition held harmless, even if erroneous, the uncontradicted evidence being to the effect that they knew of it. Id. Same held true as to issue of plaintiff having seen wreck. Id. Fact that actions of persons on the street giving the alarm and of other passengers added to plaintiff's alarm, held not to excuse negligence of defendant's servants. Requested instruction properly refused. Id. Not error to submit to jury the circumstances which made it reasonably appear to plaintiff that defendant's train would crash into codefendant's street car. Id. Galveston, etc., R. Co. v. Vollrath [Tex. Civ. App.] 13 Tex. Ct. Rep. 777, 89 S. W. 279.

28. See 5 C. L. 537 et seq.

29. Houston, etc., R. Co. v. McCarty [Tex. Civ. App.] 89 S. W. 805. An instruction, that if plaintiff negligently moved about on an obviously defective platform and was injured thereby he cannot recover, erroneously refused. Id. There being no evidence that the platform was so defective as to be dangerous to go upon, an instruction that plaintiff assumed the risk incident thereto properly refused. Id.

30. One is guilty of contributory negligence in standing so near the track as to be struck by the car which he is waiting to take. Neale v. Springfield St. R. Co., 189 Mass. 351, 75 N. E. 702.

31. One going down steps leading to an entrance to a depot is not guilty of contributory negligence as a matter of law in not taking hold of a hand railing. Illinois Cent. R. Co. v. Keegan, 112 Ill. App. 28.

32. Houston, etc., R. Co. v. McCarty [Tex. Civ. App.] 89 S. W. 805.

33. Especially where the car ran by a switch where it was supposed to stop. Abel v. Northampton Traction Co., 212 Pa. 329, 61 A. 915.

34. Cranch v. Brooklyn Heights R. Co., 107 App. Div. 341, 95 N. Y. S. 169.

35. Where tracks are so arranged that a passenger must cross intervening tracks to reach his train, it is not negligence of itself not to look and listen for approaching trains, having a right to assume that it was safe. Illinois Cent. R. Co. v. Proctor [Ky.] 89 S. W. 714. Negligence of a passenger in walking up the track without looking for an approaching train, in crossing from depot to take his train, held for the jury. Id.

36. Instruction that the fact alone that decedent pulled his cape over his head in such manner as only partially to obstruct his ability to see or hear an approaching train did not necessarily render him guilty of contributory negligence, but that the question was one for the jury, held not erroneous when taken in connection with other instructions given for defendant. St. Louis, etc., R. Co. v. Cleere [Ark.] 88 S. W. 995.

37. A young man in full possession of his faculties who attempts to cross the track ahead of an approaching train with full knowledge of its approach is guilty of contributory negligence. Dieckmann v. Chicago & N. W. R. Co. [Iowa] 105 N. W. 526. Evidence that plaintiff, knowing of the approaching train, attempted to cross the tracks in a heedless manner, held sufficient to sustain a finding of contributory negligence. Pendelton's Adm'r v. Richmond, F. & P. R. Co., 104 Va. 813, 52 S. E. 574. Deceased held guilty of contributory negligence in attempting to pass between freight cars in search of his passenger train without making inquiries. Van Ostrand v. Delaware & H. Co., 99 N. Y. S. 548.

38. Gulf, etc., R. Co. v. Turner [Tex. Civ. App.] 15 Tex. Ct. Rep. 224, 93 S. W. 195. Instruction that plaintiff would not be required to use ordinary care to avoid injury by waiting in cold depot, if it was necessary to take train for which he waited in order to avoid loss of his ticket, held erroneous. Id.

39. There could be no recovery for the death of a child from exposure while waiting at a flag station for a night train where those in charge of the child knew that the station was not open in the night time and there were places of shelter near the station. Sandifer's Adm'r v. Louisville & N. R. Co. [Ky.] 89 S. W. 528. Ky. St. 1903, § 784, does not require railroads to maintain depots at flag stations during the night time. Id. Evidence held to sustain finding that plaintiff was not guilty of contributory negligence in protecting himself from cold depot. International & G. N. R. Co. v. Addison [Tex. Civ. App.] 15 Tex. Ct. Rep. 675, 93 S. W. 1081.

40. Boarding an open car on the side next the waiting place and when the step was

time, though before readiness to depart,[41] but loitering in a poised position is negligence.[42] If one who enters a car as a passenger knows or should know from the circumstance, that it is to be attached to other cars, he assumes the risk ordinarily incident to the coupling of the cars.[43] It was not contributory negligence for a driver to go upon a ferry boat at the invitation of the ferryman, though he knew the boat was not fastened to the bank.[44]

Boarding at wrong place is negligent, if voluntary or without inquiry,[45] unless invited.[46]

Boarding moving train or car.[47] It is not negligence per se for a passenger to attempt to board a moving street car.[48]

Riding or being in dangerous position or place.[49]—It is not negligence per se to pass by the first vacant seat in a street car just starting,[50] or to stand without holding,[51] or to ride in a rear facing seat provided for passengers.[52] Where a passenger is in an unauthorized place he is not entitled to the high degree of care due from a carrier to a passenger,[53] if he knows of the danger,[54] otherwise, where under necessity and with the consent of the conductor he places himself in a place more dangerous than usual.[55] Though a caboose be provided for shippers of stock, it is not negligence as a matter of law for them to ride on the engine.[56] When it is stipulated that riding in certain places is prima facie negligence, a mere rule of evidence,

lowered and bar raised, held within the rule as to assuming safety so that carrier was liable for dropping the bar. Brettner v. Westchester Elec. R. Co., 98 N. Y. S. 857.

41. It is not contributory negligence for a passenger to take his train standing at the station, the time of departure having arrived, although as a fact the train was not ready to start. Yazoo & M. V. R. Co. v. Roberts [Miss.] 40 So. 481.

42. Where decedent stood with one foot on the step of the car and the other on the platform conversing for a few minutes, and was suddenly thrown under the car, an instruction that if decedent's position contributed to his death he could not recover "unless defendant discovered, or ought to have discovered, his dangerous position" was prejudicial to defendant. Kansas City Southern R. Co. v. McGinty [Ark.] 88 S. W. 1001.

43. Not error to instruct that he assumed risks "usually" incident to coupling, that word being synonymous with "ordinarily." St. Louis S. W. R. Co. v. Morrow [Tex. Civ. App.] 93 S. W. 162. Facts held not to call for charge on assumed risk. Id. Requested charge properly refused. Id.

44. Wilson v. Alexander, 115 Tenn. 125, 88 S. W. 935.

45. One who attempts to board at an unusual place cannot recover. Smith v. Birmingham R., Light & Power Co. [Ala.] 41 So. 307.

46. One who attempts to board at an unusual place without knowledge or invitation of carrier cannot recover for injuries due to jerk of car. Smith v. Birmingham R., Light & Power Co. [Ala.] 41 So. 307.

47. See 5 C. L. 538.

48. An absolute instruction for defendant, therefore, error where plaintiff has not abandoned the count to which it is applicable. Pope v. Chicago City R. Co., 113 Ill. App. 503. One attempting in the night to board a car running five or six miles per hour while incumbered with a bundle is guilty of contributory negligence. Smith v. Birmingham R., Light & Power Co. [Ala.] 41 So. 307; Schmitt v. St. Louis Transit Co., 115 Mo. App. 445, 90 S. W. 421. An absolute instruction that it is negligence is not prejudicial to defendant. Id.

49. See 5 C. L. 539.

50. The fact that a passenger on a street car passed an empty seat and proceeded up the aisle does not amount to negligence per se so as to preclude a recovery for injuries received from negligently starting the car. Weeks v. Boston El. R. Co., 190 Mass. 563, 77 N. E. 654.

51. Whether a passenger standing in a crowded street car without holding onto a strap is guilty of contributory negligence is question of fact. Error to instruct that he was not guilty as a matter of law. Butler v. New York City R. Co., 109 App. Div. 658, 96 N. Y. S. 254.

52. Spooner v. Old Colony St. R. Co., 190 Mass. 132, 76 N. E. 660.

53. As where walking up the side track to take train instead of crossing directly over. Illinois Cent. R. Co. v. Proctor [Ky.] 89 S. W. 714.

54. Plaintiff held not negligent in remaining on hurricane deck of boat after captain had given verbal orders to passengers to go below, where he did not hear the order or know that it had been given. Instruction held erroneous. Evers v. Wiggins Ferry Co., 116 Mo. App. 130, 92 S. W. 118.

55. Company is liable for injury received by a passenger standing on the footboard coming in contact with a pole, where he was standing there because of the crowded condition of the car and with the conductor's consent. Brennan v. Traction Co., 27 Pa. Super. Ct. 188. A passenger who enters the baggage compartment of a double car at the conductor's invitation to warm, is entitled to the same protection as if riding in the passenger compartment. Wood v. New York, etc., R. Co., 109 App. Div. 770, 96 N. Y. S. 419.

56. Missouri, etc., R. Co. v. Avis [Tex. Civ. App.] 14 Tex. Ct. Rep. 519, 91 S. W. 877.

not of liability, is created.[57] Where the contract of carriage requires the shipper to assume the entire charge of the stock, he is authorized to ride in the car with the stock, unless the contract negatives such right.[58]

Riding on the platform[59] *or on the running board*[60] *of a street car* is not negligence per se but depends on the circumstances. Some states hold that he "assumes the risk,"[61] at least if he knows of a rule against so doing,[62] or needlessly does so.[63] Unusual risks are not assumed.[64] One riding on the running board must exercise reasonable care to avoid known dangers.[65] The fact that there is or is not room in the car may be important.[66] If a carrier accepts a passenger who is obliged to

57. A provision in the contract for shipment of cattle that the person in charge of them will only be carried in accordance with the rules printed on the back thereof, and that a failure to observe such rules shall be prima facie evidence of negligence on his part, does not necessarily preclude a recovery because of such a violation, but merely shifts the burden of proof on the question of contributory negligence. Missouri, etc., R. Co. v. Avis [Tex.] 15 Tex. Ct. Rep. 756, 93 S. W. 424. Rule that such person shall ride only in the caboose. Id.

58. Hence not guilty of negligence in so doing. Lake Shore & M. S. R. Co. v. Teeters [Ind.] 77 N. E. 599. Where the contract of carriage requires a shipper to ride "on the train with the animals," and he is charged with such duties as require him to be in the car with them, he is not precluded from recovery for negligence on the ground of contributory negligence or assumption of risk. Evansville & T. H. R. Co. v. Mills [Ind. App.] 77 N. E. 608.

59. See 5 C. L. 539. Chicago Union Traction Co. v. Lawrence, 113 Ill. App. 269. Evidence that plaintiff went to the platform to see why the car did not stop according to her signal and remained there after the conductor gave another signal is insufficient to authorize a binding instruction. Alton R., Gas & Elec. Co. v. Webb, 219 Ill. 563, 76 N. E. 687. One is not guilty of negligence per se in stepping upon the bumper of a standing street car to make way for alighting passengers, especially where he did not know that another car was following. Chicago City R. Co. v. Schmidt, 217 Ill. 396, 75 N. E. 383, afg. 117 Ill. App. 213. Standing on platform of interurban car when running through the open country not proximate cause of injury resulting from the derailing of the car. Cincinnati, etc., R. Co. v. Lohe, 6 Ohio C. C. (N. S.) 144.

60. See 5 C. L. 539. Mason v. Boston & N. St. R. Co., 190 Mass. 255, 76 N. E. 717. Where it appears that plaintiff was struck by wagon while on the running board, but before he had been given reasonable opportunity to enter the car, he is not guilty of contributory negligence as a matter of law. Walsh v. Interurban St. R. Co., 98 N. Y. S. 656. Evidence held to show contributory negligence in boarding a car so crowded that it was necessary to stand on the running board. Mullane v. New York City R. Co., 99 N. Y. S. 798. A boy, riding on the running board of a street car, and putting one foot to the ground and jerking it up again for amusement, is guilty of negligence if of sufficient discretion to understand the danger. El Paso Elec. R. Co. v. Kitt [Tex. Civ. App.] 14 Tex. Ct. Rep. 344, 90 S. W. 678.

61. Rice v. Philadelphia Rapid Transit Co. [Pa.] 63 A. 419. Hence no recovery, though thrown off by a sudden jerk. Id. A person standing on the platform of a street car assumes the risks ordinarily incident to the position. Keefer v. Brooklyn Heights R. Co., 97 N. Y. S. 841.

62. The fact that a carrier habitually permitted passengers to ride upon the platform did not amount to a waiver of the rule requiring them to assume the risk. McDonough v. Boston El. R. Co. [Mass.] 78 N. E. 141. A passenger riding on the front platform of a street car with knowledge of a rule requiring passengers so riding to assume all risks cannot recover for an injury received while so riding. Id. If a passenger has knowledge of a rule requiring all who ride upon the front platform of the car to assume the risks, it is immaterial whether he saw the sign on the particular car upon which he was injured. Id. A passenger riding on the platform of a car with knowledge of a rule that passengers so riding did so at their risk cannot recover for injuries received, especially if there is room within the car (Pike v. Boston El. R. Co. [Mass.] 78 N. E. 497), unless such rule has been waived by the company (Id.). Proof that passengers frequently ride thereon does not show waiver. Id. Collection of fare without objecting to passenger's presence thereon does not constitute a waiver. Id.

63. A passenger standing on the running board of a street car when there is room inside assumes the risks of the position. Burns v. Johnstown Pass. R. Co., 213 Pa. 143, 62 A. 564.

64. A person standing on a running board of a street car assumes the ordinary risks incident to the position. Does not assume the risks arising from unusual jerking, etc. Verrone v. Rhode Island Suburban R. Co. [R. I.] 62 A. 512.

65. Held that by the exercise of reasonable care plaintiff would not have been hit by the pole. Burns v. Johnstown Pass. R. Co., 213 Pa. 143, 62 A. 564. Care commensurate with the dangers of his position. Depew v. New York City R. Co., 98 N. Y. S. 276.

66. A person standing on the step of a street car when there is room inside the car is guilty of contributory negligence and cannot recover for an injury resulting unless the carrier is guilty of wanton negligence. Chicago City R. Co. v. Albrecht, 114 Ill. App. 474. On running board. No seat within. Horan v. Rockwell, 96 N. Y. S. 973; Abel v. Northampton Traction Co., 212 Pa. 329, 61 A. 915. It is not negligence per se to stand on the platform of a crowded street car, especially where invited to board by the conductor. Alton Light & Traction Co. v. Oliver,

stand on the running board,[67] or knowingly permits a passenger to ride in such places, it must use extraordinary care to protect him,[68] but if such is a place not intended for passengers and manifestly dangerous, it is negligence to ride there,[69] although by custom passengers do so.[70] It may be inferred from a failure to hold or brace one's self.[71]

Riding on platform of railroad train.[72]

Going about on cars or from car to car is negligent when done in a dangerous way and without necessity,[73] but not when invited.[74]

Allowing body to project [75] is negligence if there is no reason or occasion for so doing,[76] and it is projected far enough,[77] or for a time long enough,[78] to be dangerous, it being dependent on the circumstances.[79] Projecting an arm beyond the seat is not necessarily negligent.[80]

Acts attendant on alighting and departing.[81]—A passenger must use reasonable care in alighting [82] doing so with reasonable expedition,[83] and has a right to assume

217 Ill. 15, 75 N. E. 419. Not when the car is crowded. Verrone v. Rhode Island Suburban R. Co. [R. I.] 62 A. 512.

67. Verrone v. Rhode Island Suburban R. Co. [R. I.] 62 A. 512.

68. Horan v. Rockwell, 96 N. Y. S. 973. Liable for permitting trolley poles to be so near the track as to endanger passengers on passing cars. Salmon v. City Elec. R. Co., 124 Ga. 1056, 53 S. E. 575.

69. Columbus R. Co. v. Muns, 6 Ohio C. C. (N. S.) 236.

70. Custom does not excuse where the danger is manifest. Columbus R. Co. v. Muns, 6 Ohio C. C. (N. S.) 236.

71. Evidence held insufficient to show that plaintiff's intestate was free from contributory negligence where it appears that he was on platform, and nothing to show how he was holding or bracing himself. Depew v. New York City R. Co., 98 N. Y. S. 276. Evidence that plaintiff stood upon the platform, knowing the car was about to round a curve, and made no effort to protect himself, held sufficient to show contributory negligence. Keefer v. Brooklyn Heights R. Co., 97 N. Y. S. 841. Passenger thrown from platform of street car held guilty of contributory negligence in releasing his hold on handhold for purpose of paying his fare. South Covington & C. St. R. Co. v. Physioc [Ky.] 92 S. W. 305.

72. See 5 C. L. 539.

73. A passenger is guilty of contributory negligence who deliberately swings out from the step of a car for the purpose of going into one in front while the car is in motion. Court properly directed verdict for defendant. Hewes v. Chicago, etc., R. Co., 217 Ill. 500, 75 N. E. 515, afg. 119 Ill. App. 393. Plaintiff held guilty of contributory negligence in not discovering that there was no car attached before stepping off the rear coach. Hunter v. Atlantic Coast Line R. Co., 72 S. C. 336, 51 S. E. 860.

74. Evidence that plaintiff attempted to cross from the grip car to the trailer at the invitation of the conductor in ignorance that the cars were about to make a turn is sufficient to sustain a finding against contributory negligence. Chicago City R. Co. v. McCaughna, 117 Ill. App. 538.

75. See 5 C. L. 540.

76. Evidence held conclusive of contributory negligence in leaning out of the car, there being no occasion for such act. Wichita R. & Light Co. v. Cummings [Kan.] 84 P. 121.

77. Evidence that plaintiff's arm projected out of the window without proof of the extent does not show contributory negligence as a matter of law. Goller v. Fonda, etc., R. Co., 96 N. Y. S. 483.

78. A passenger smoking on the rear platform of a street car is not guilty of contributory negligence as a matter of law in momentarily projecting his head beyond the car to spit. Salmon v. City Elec. R. Co., 124 Ga. 1056, 53 S. E. 575.

79. Permitting his arm to protrude beyond the edge of the car. George & T. R. Co. v. Smith, 25 App. D. C. 259.

80. A passenger is not guilty of contributory negligence as a matter of law in permitting his arm to project between the slats back of his seat so as to be injured by sliding door. Wood v. New York, etc., R. Co., 109 App. Div 770, 96 N. Y. S. 419.

81. See 5 C. L. 540, n. 68.

82. Truesdell v. Erie R. Co., 99 N. Y. S. 694. Instructions approved, and requested instructions held covered by main charge. St. Louis S. W. R. Co. v. Johnson [Tex. Civ. App.] 15 Tex. Ct. Rep. 813, 94 S. W. 162. It is not negligence to alight from a standing car facing the rear. Birmingham R., Light & Power Co. v. Handy [Ala.] 39 So. 917.

83. In considering whether a passenger used due diligence in alighting, the jury may consider the fact that she was accompanied by three small children and had a heavy valise. St. Louis, etc., R. Co. v. Ross [Tex. Civ. App.] 14 Tex. Ct. Rep. 89, 89 S. W. 1105. An instruction basing plaintiff's right to recover upon whether she told conductor that she had three children and a valise with her properly refused where the fact was known. Id. An allegation of negligence for failure to stop a sufficient length of time to permit plaintiff to alight is not sustained where it appears that after plaintiff reached the steps she returned to the car after her umbrella and the train started in the meantime. Dunning v. Lake Erie & W. R. Co. [Ind. App.] 77 N. E. 1049. Nor by evidence that it did not stop sufficient time to allow others to alight. Id.

that the place to alight is safe, unless it is obviously dangerous,[84] the rule being that the passenger should be careful in stepping to the platform[85] or alighting from a high step[86] and should look where he steps.[87] Notice of intention to alight at a regular station need not be given.[88] Arising from the seat and walking to the steps or door,[89] descending to the lower step,[90] jumping down to the platform,[91] walking around the rear of a street car,[92] or crossing over a standing train,[93] have been held not negligent. Care in alighting is for the jury upon the circumstances.[94] Acts otherwise negligent may be prudent if done pursuant to invitation or direction of the carrier's servants.[95]

84. Mobile Light & R. Co. v. Walsh [Ala.] 40 So. 559. A passenger has a right to assume from the stopping of the car for him to alight that it has been stopped at a place where he can alight safely by using due care. Indiana Union Traction Co. v. Jacobs [Ind.] 78 N. E. 325. Instruction held erroneous as charging an alighting passenger with contributory negligence as a matter of law irrespective of whether the place was obviously dangerous. Mobile Light & R. Co. v. Walsh [Ala.] 40 So. 560. An instruction that if plaintiff alighted on one side and injured could have alighted on the other side in safety, she cannot recover, properly refused as ignoring knowledge that it was dangerous to alight as she did. Id. If an ordinarily prudent person would have alighted where plaintiff alighted she was not guilty of negligence. Id.

85. For jury whether stepping between car and platform in a crowd was negligence. Windels v. Interborough Rapid Transit Co., 98 N. Y. S. 854. Contributory negligence in alighting upon a defective platform held under the evidence for the jury. Crowe v. Michigan Cent. R. Co. [Mich.] 12 Det. Leg. N. 893, 106 N. W. 395. Whether plaintiff was guilty of contributory negligence in alighting at the place where she did, held, under all the facts, to be for the jury. Indiana Union Traction Co. v. Jacobs [Ind.] 78 N. E. 325.

86. Evidence held insufficient to show plaintiff's freedom from negligence in alighting from high step of car without assistance. Truesdell v. Erie R. Co., 99 N. Y. S. 694. Where a passenger knowingly attempts to alight at a place where the street is nearly three feet below the step, or by looking would know, he is guilty of contributory negligence. Indianapolis Traction & T. Co. v. Pressell [Ind. App.] 77 N. E. 357.

87. Plaintiff held guilty of contributory negligence in alighting without looking where she was going to step. Quinlan v. Newton & B. St. R. Co. [Mass.] 77 N. E. 486.

88. A passenger is not guilty of contributory negligence as a matter of law in attempting to get off at a regular station without giving notice. O'Dea v. Michigan Cent. R. Co. [Mich.] 12 Det. Leg. N. 718, 105 N. W. 746.

89. Griffin v. Pacific Elec. R. Co. [Cal. App.] 82 P. 1084. It is not negligence per se to arise from a seat and step to the side of a slowly moving car for the purpose of getting upon the running board to alight when the car stopped. Davis v. Camden, etc., R. Co. [N. J. Law] 63 A. 843.

90. A passenger is not guilty of contributory negligence as a matter of law in descending to the lower step of a car preparatory to alighting. Especially where such person had been standing in the vestibule because of the crowded condition of the car, and where the car is moving slowly. Wabash River Traction Co. v. Baker [Ind.] 78 N. E. 196.

91. An instruction that if the injured person in jumping from the car steps to the platform did what an ordinarily careful and cautious person would not have done, etc., sufficiently submits the question of negligence. Missouri, K. & T. R. Co. v. Wolf [Tex. Civ. App.] 14 Tex. Ct. Rep. 52, 89 S. W. 778. A passenger is not guilty of contributory negligence as a matter of law in jumping instead of stepping from a car. Truesdell v. Erie R. Co., 99 N. Y. S. 694.

92. One who has just alighted from a street car held negligent in passing around the rear end without waiting to see whether there was an approaching car. Hornstein v. United R. Co. [Mo.] 92 S. W. 884.

93. A passenger who on alighting finds her way blocked by another train and followed other passengers who crossed the platform of the standing train is not guilty of contributory negligence as a matter of law, especially where it appears that conductor told her to "come on." O'Brien v. Brooklyn Heights R. Co., 109 App. Div. 833, 96 N. Y. S. 857.

94. Evidence held to warrant submission of issue of contributory negligence in alighting from car to jury. Mix v. San Antonio Traction Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 592, 94 S. W. 335. Evidence held to require the submission of the question of contributory negligence in alighting to the jury. Mobile Light & R. Co. v. Walsh [Ala.] 40 So. 559.

95. See, also, cases cited to paragraph following. An instruction using the words "that defendant did issue such an invitation" to alight held misleading. Mobile Light & R. Co. v. Walsh [Ala.] 40 So. 560. Instruction held erroneous as ignoring right of passenger to rely upon implied assurance of arising from implied invitation to alight. Id. Evidence held to require the submission of the question of invitation to alight to the jury. Id.

Stopping of car at or near place signalled for is an invitation to alight. Mobile Light & R. Co. v. Walsh [Ala.] 40 So. 560. A standing trolley car is an invitation for a passenger to alight and he has a right to assume that the car will not move while he is openly and expeditiously so doing. Davis v. Camden, etc., R. Co. [N. J. Law] 63 A. 843. The **calling** of "Butler Hospital" was an invitation to alight and justified plaintiff in

Leaving moving train or car[96] is not negligence as a matter of law,[97] It depends upon the circumstances of the case,[98] even when done at direction or invitation,[99] or after warning.[1] When done against warning [2] or voluntarily,[3] or heedlessly without common prudence,[4] it is negligence. An invitation to alight or a reasonable appearance of safety warrants an assumption of safety,[5] but a custom not known supports no such assumption,[6] and one must use his own knowledge and judgment.[7] Neither slowing up,[8] nor calling the station and opening the door,[9] is an invitation to alight.

Alighting at wrong station or unusual place.[10] Whether this be negligence depends on the circumstances.[11] It is not the duty of carriers to prevent passengers from alighting at unusual stops.[12] One put down at the wrong station must exercise ordinary care in choose his means of transportation and in the prosecution of a journey to his destination necessitated by failure to stop.[13]

believing she could alight safely. Tilden v. Rhode Island Co. [R. I.] 63 A. 675.

96. See 5 C. L. 540.

97. Southern R. Co. v. Clariday, 124 Ga. 958, 53 S. E. 461; Wabash River Traction Co. v. Baker [Ind.] 78 N. E. 196. Slowly moving train. King v. Yazoo & M. V. R. Co. [Miss.] 39 So. 810; Paul v. Salt Lake City R. Co. [Utah] 83 P. 563.

Contra: A passenger attempting to board or alight from a car must see that the car has stopped, and must use care to avoid danger. Waller v. Wilmington City R. Co. [Del.] 61 A. 874.

98. United R. & Elec. Co. v. Weir, 102 Md. 286, 62 A. 588. Whether plaintiff was guilty of contributory negligence in attempting to alight from a slowly moving car properly left to the jury. Id. Evidence held insufficient to show contributory negligence as a matter of law. Hoyt v. New York, etc., R. Co. [Conn.] 63 A. 393. Evidence held insufficient to show negligence. Margo v. Pennsylvania R. Co., 213 Pa. 463, 62 A. 1079.

99. Whether a boy was guilty of negligence in attempting to alight from a slowly moving train at the order of the conductor is a question of fact for the jury. Court erred in giving a peremptory instruction for defendant. Fore v. Alabama & V. R. Co. [Miss.] 39 So. 493. Whether plaintiff was guilty of contributory negligence in attempting to alight from a slowly moving train, having been invited to do so by a porter and to prevent being carried by, is for the jury. King v. Yazoo, etc., R. Co. [Miss.] 39 So. 810.

1. It is not negligence as a matter of law to step from a slowly moving train in the night time onto a dark platform (Kansas City, etc., R. Co. v. Matthews, 142 Ala. 298, 39 So. 207), nor to step off on the left foot the train moving to the left (Id.), even if warned (Id.).

2. A passenger in stepping from a moving train after warning held guilty of contributory negligence. Harvey v. Chicago & A. R. Co. [Ill.] 77 N. E. 569.

3. A passenger is guilty of negligence in voluntarily alighting from a moving car. Joyce v. Los Angeles R. Co., 147 Cal. 274, 82 P. 204.

4. Where it appears that plaintiff knowingly stepped from a moving train without effort to ascertain its speed and at the same time holding a parcel in one hand and her skirts in the other, she was guilty of contributory negligence as a matter of law. Dunning v. Lake Erie & W. R. Co. [Ind. App.] 77 N. E. 1049. It is negligence for one to step from a moving car upon the track of opposite bound cars without looking for such cars. North Chicago St. R. Co. v. Canfield, 118 Ill. App. 353. A passenger is guilty of contributory negligence in attempting to alight from a moving train at a time when an ordinarily prudent person similarly situated would not attempt to alight. Sweet v. Birmingham R. & Elec. Co. [Ala.] 39 So. 767.

5. Jury may consider the fact that it was dark, that the plaintiff felt no motion and believed it was stopped, that he got off at a point indicated as the depot by the officials. Baltimore, etc., R. Co. v. Mullen, 217 Ill. 203, 75 N. E. 474. It is not negligence per se to alight from a moving train in the darkness at the direction of an official or in the belief that it has stopped. Id.

6. Evidence of a custom for passengers to alight at a particular stop, not a general alighting station, is not admissible where the one injured while alighting knew nothing of the custom and was not misled. Margo v. Pennsylvania R. Co., 213 Pa. 463, 62 A. 1079.

7. One who steps from a moving train is guilty of contributory negligence though he was led to believe that the train had stopped from the calling of the station and the opening of the vestibule door. Mearns v. Central R. Co. [C. C. A.] 139 F. 543.

8. The slowing up of a train for a station is not an invitation to passengers to alight while it is moving or to place themselves in a dangerous position. Sweet v. Birmingham R. & Elec. Co. [Ala.] 39 So. 767.

9. The calling out of the station and the opening of the vestibule door do not constitute an invitation to alight while the train is in motion or an assurance that the train has stopped. Mearns v. Central R. Co. [C. C. A.] 139 F. 543.

10. See 5 C. L. 541.

11. Evidence held sufficient to sustain a verdict that plaintiff was not guilty of contributory negligence in alighting on the side opposite the station. Murphey v. Southern Pac. Co. [Cal. App.] 83 P. 299. Whether passenger, in leaving train at wrong platform and in his subsequent movements in attempting to regain it, exercised reasonable care, held for the jury. Laub v. Chicago, etc., R. Co. [Mo. App.] 94 S. W. 550.

12. Margo v. Pennsylvania R. Co., 213 Pa. 463, 62 A. 1079.

13. Injuries naturally received by him

Leaving train en route.—Ordinarily a passenger's place is in the cars provided for his carriage and the cases in which he may temporarily leave the cars at intermediate points without being guilty of negligence are exceptions to the general rule.[14] When invited by the carrier he may leave the train at a meal station to obtain a meal, and may on such occasion walk along the platform for exercise, and if he is injured while in the exercise of reasonable care, by a negligent defect existing at a place which the carrier should have anticipated would be used for such a purpose, the carrier is liable.[15]

§ 26. *Care and condition of premises.*[16]—Reasonable care in the maintenance of their station and platform is due from the carrier,[17] or, as sometimes said, the same degree of care in providing for their safety, when engaged in proper acts, in the effort to board trains, as when upon the train,[18] to which end it must not omit reasonably safe and comfortable stations,[19] approaches thereto,[20] platforms or places for taking up and setting down passengers,[21] and is not absolved by the fact that it has merely the use of such facilities.[22] The decree of care becomes unimportant

while pursuing such a course are within the contemplation of the parties as a result of the carrier's failure of duty and are the proximate result of such failure. International & G. N. R. Co. v. Addison [Tex. Civ. App.] 15 Tex. Ct. Rep. 675, 93 S. W. 1081. Failure to stop train held proximate cause of injuries to plaintiff resulting from exposure to cold weather while driving to his destination. Id. He did not assume risk by driving to destination. Id.

Question for jury: Under the evidence, the question whether plaintiff, fifteen years old, who walked back after being carried beyond her destination, acted reasonably for her situation and age, was for the jury. Chesapeake & O. R. Co. v. Lynch [Ky.] 89 S. W. 517.

14. Laub v. Chicago, etc., R. Co. [Mo. App.] 94 S. W. 550. A passenger voluntarily and from curiosity or caprice leaving the train at a way station on a dark night, with knowledge that it will pull down to another platform, is guilty of contributory negligence barring a recovery for injuries sustained in attempting to regain it. Instruction held erroneous. Id.

15. Laub v. Chicago, etc., R. Co. [Mo. App.] 94 S. W. 550.

16. See 5 C. L. 541.

17. Due regard being had for the probable dangers arising from the use to which they are put. Crowe v. Michigan Cent. R. Co. [Mich.] 12 Det. Leg. N. 893, 106 N. W. 395. Carrier must use reasonable care in maintaining its station in a safe condition. Scholtz v. Interborough Rapid Transit Co., 95 N. Y. S. 557. An instruction imposing highest degree of care held erroneous. Pittsburg, etc., R. Co. v. Harris [Ind. App.] 77 N. E. 1051.

18. Injured on station platform where he had alighted to procure ticket at direction of conductor. Johnson v. Texas Cent. R. Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 807, 93 S. W. 433.

19. A passenger may recover for injuries sustained by him resulting from the carrier's failure to warm the waiting room, provided he uses reasonable care to protect himself from cold while there. Instruction held not objectionable for failure to require passenger to exercise such care where court charged fully on that subject. International & G. N. R. Co. v. Addison [Tex. Civ. App.] 15 Tex. Ct. Rep. 675, 93 S. W. 1081. Refusal to direct verdict for defendant held proper. Id. A railroad company must furnish a suitable waiting room for passengers and keep it open for all trains which receive passengers. Chicago & A. R. Co. v. Walker, 217 Ill. 605, 75 N. E. 520, 118 Ill. App. 397.

20. Carriers must exercise reasonable care to provide safe approaches to the station. Schlessinger v. Manhattan R. Co., 98 N. Y. S. 840. Whether a carrier has exercised reasonable care in keeping the steps leading to the depot free from ice and snow is for the jury. Illinois Cent. R. Co. v. Keegan, 112 Ill. App. 28. The duty required of a carrier to keep the entrance to its depot free from snow and ice is greater than that of a municipality in regard to the streets, though both are expressed by the term "reasonable diligence." Id.

21. Carrier must provide a safe platform at a flag station as well as at a regular station. Pineus v. Atlantic Coast Line R. Co., 140 N. C. 450, 53 S. E. 297. Question of lights on platform and their sufficiency held, under the evidence, to be for the jury. Laub v. Chicago, etc., R. Co. [Mo. App.] 94 S. W. 550. A hole six inches deep and containing a loose object, in a platform where passengers are obliged to alight is a negligent defect. Crowe v. Michigan Cent. R. Co. [Mich.] 12 Det. Leg. N. 893, 106 N. W. 395. It is not negligence for a street car company to construct a crossing level with its rails where the street is level except for the rails. Sweet v. Detroit United R. Co. [Mich.] 12 Det. Leg. N. 575, 105 N. W. 132.

22. A carrier must use ordinary care to keep and maintain a platform used for receiving and discharging passengers in a reasonably safe condition (Houston, etc., R. Co. v. McCarty [Tex. Civ. App.] 89 S. W. 805), though built and controlled by a stranger (Id.), and this applies to approaches constructed by others if constantly and notoriously used by patrons (Id.). As where built by the city. Schlessinger v. Manhattan R. Co., 98 N. Y. S. 840. Especially where they take no steps to warn passengers. Id.

when there is a breach of an absolute duty.[23] It is not negligence per se to so arrange the railroad station that passengers must cross the tracks to take their train.[24] Where the space between the platform and train is such as requires warning to be given, the warning need not be a personal one but such as would ordinarily be heard by passengers paying ordinary attention to what is going on around them.[25] The mere existence of defects in platforms [26] or passways,[27] or of holes beside a place for alighting,[28] is not negligence. It is a question of fact.[29] The carrier either must or should have known of them.[30]

Penal regulations.—The Georgia statute making it a crime for a carrier to fail to provide pure drinking water for passengers is within the police power.[31] An indictment under a statute for failing to provide a suitable and convenient waiting room is not bad for specifiying the particulars of insufficiency.[32] Conditions remote in time cannot be shown in such a prosecution.[33] The sufficiency of accommodations under such a statute is a question dependent on the magnitude of traffic.[34] But it need not accommodate any but passengers.[35]

§ 27. *Means and facilities of transportation* [36] such as depots,[37] cars [38] and

23. An instruction that if defendant provides a safe means of egress and a convenient place to alight it discharges its duty is not open to the objection that it requires the defendant to use only ordinary care, since if as a fact it is safe no question as to degree of care can arise. Moody v. Boston, etc., R. Co., 189 Mass. 277, 75 N. E. 631.

24. Dieckmann v. Chicago & N. W. R. Co. [Iowa] 105 N. W. 526.

25. Coogan v. Interborough Rapid Transit Co., 99 N. Y. S. 382.

26. The mere existence of a space between a platform, constructed according to law, and the car, such space being reasonably necessary for safe passage of the train, is insufficient to show negligence. Coogan v. Interborough Rapid Transit Co., 99 N. Y. S. 382. Mere presence of an obstruction upon a station platform is insufficient to show negligence. Scholtz v. Interborough Rapid Transit Co., 95 N. Y. S. 557.

27. Evidence of a cuspidor in a passageway to a depot, where it is not shown that the employes knew of its position, is insufficient to establish negligence. Green v. Baltimore & O. R. Co. [Pa.] 63 A. 603.

28. Evidence that defendant was operating an electric railway and that a hole beside the track was for a trolley pole is sufficient to sustain a finding that defendant dug the hole. Colorado Springs, etc., R. Co. v. Petit [Colo.] 86 P. 121.

29. Safe or unsafe is **not a question for expert opinion.** MacFeat v. Philadelphia, etc., R. Co. [Del.] 62 A. 898.

30. Evidence that defendant knew of a hole in the path used by passengers in transferring from one car to another and that it was left unguarded is sufficient to sustain a finding of negligence. Colorado Springs, etc., R. Co. v. Petit [Colo.] 86 P. 121.

31. Southern R. Co. v. State [Ga.] 54 S. E. 160.

32. Although such specifications are unnecessary under Ky. St. 1903, § 722. Illinois Cent. R. Co. v. Com. [Ky.] 90 S. W. 602.

33. In a prosecution under Ky. St. 1903, section 772, evidence as to ventilation and heating should be confined to a period of thirty minutes immediately prior to arrival of trains. Illinois Cent. R. Co. v. Com. [Ky.] 90 S. W. 602.

34. Whether waiting room facilities are sufficient is a question of fact dependent upon the size of city and the number of persons arriving and departing therefrom. Illinois Cent. R. Co. v. Com. [Ky.] 90 S. W. 602.

35. Under an indictment for maintaining insufficient waiting room facilities, an instruction using the words "for the accommodation of the passengers and the public traveling on said road" is misleading as requiring accommodations for those not boarding or alighting at such station. Illinois Cent. R. Co. v. Com. [Ky.] 90 S. W. 602.

36. See 5 C. L. 542.

37. It is the duty of a carrier to keep its depot in a reasonably safe condition. Held liable for permitting a hole to remain in the floor causing a passenger to fall. Chicago & A. R. Co. v. Walker, 118 Ill. App. 397. A passenger who enters a waiting room is not a trespasser, though opened by one not an employe of the company. May recover for an injury received therein. Chicago & A. R. Co. v. Walker, 217 Ill. 605, 75 N. E. 520, afg. 118 Ill. App. 397. Evidence as to the negligence of defendant in the care of its depot, sufficient to go to the jury. Chicago & A. R. Co. v. Walker, 217 Ill. 605, 75 N. E. 520. Charge respecting degree of care required in the construction of the road bed, and when relieved from liability for damages resulting from floods, approved. Cain v. Atlantic Coast Line R. Co. [S. C.] 54 S. E. 244. That a motorman was unable to control a car that ran into the car on which plaintiff was a passenger, on account of the slippery condition of the track, due to leaves thereon, showed negligence in failing to keep the track in a safe condition. Haas v. St. Louis & S. R. Co. [Mo. App.] 90 S. W. 1155. Evidence that the jerk was caused by a piece of a horse shoe becoming wedged in the slot where the plow of the car runs and that the car just ahead had passed safely, held to show that the accident was not due to negligence. Miller v. New York City R. Co., 99 N. Y. S. 867. An instruction that there was no evidence that the road bed was in bad repair properly refused where it was shown that broken rail had

their platforms [39] and appliances,[40] must be maintained at the highest degree of efficiency obtainable by extraordinary diligence.[41] And like rules apply to other than railroad carriers.[42] Where, however, one takes passage on a train not designed for the use of passengers, while the carrier owes him the same degree of care,[43] the acts which will satisfy such requirement are judged by a different standard, the carrier not being liable for any of the inconvenience or danger necessarily attending that mode of travel.[44] A tort of a third party does not relieve the carrier from liability

been in use for a long period and was badly worn. Western Maryland R. Co. v. Shivers, 101 Md. 391, 61 A. 618.

38. A sleeping car company is liable to a passenger for failure to keep cars in repair as required by its contract with the carrier. Vestibule curtain was part of the car within the contract. Pullman Co. v. Norton [Tex. Clv. App.] 14 Tex. Ct. Rep. 869, 91 S. W. 841. And this without reference to the question for whom it acts, though it may be only a servant of the carrier. Id. Question whether it was negligence to operate an open car with a rail in such a position as to render it probable that passengers would allow their arms to protrude, held under the facts for the jury. Georgetown & T. R. Co. v. Smith, 25 App. D. C. 259. It is gross negligence for a street railway company to use cars which come within two and one-half or three inches of each other, especially where the panels are out and the cars pass without one stopping. Id. The question whether an unguarded oiling box on the running board is an improper construction of a car is for the jury. McNerney v. Philadelphia Rapid Transit Co., 27 Pa. Super. Ct. 168. A railroad company is under no legal obligation to provide vestibuled trains. Wagoner v. Wabash R. Co. [Mo. App.] 94 S. W. 293. Not guilty of negligence in leaving space between cars, such space being no greater than necessary and there being no practical way of covering it (Hawes v. Boston El. R. Co. [Mass.] 78 N. E. 480), but, having done so, it thereby impliedly invites its passengers to use the vestibules and to pass to and fro in such portions of the train as they are entitled to occupy. Presence of vestibule is an invitation to passenger to use it as his convenience or necessity may require. Instruction approved (Wagoner v. Wabash R. Co. [Mo. App.] 94 S. W. 293), and is bound to maintain them in a reasonably safe condition (Id.), and is not only answerable for the negligent acts of its servants in opening the vestibule doors and permitting them to remain open after having been opened by them, but is also responsible for its failure to exercise a high degree of care to the end that the same are closed and the vestibule reasonably safe for use, though they are opened by others than its servants (Id.).

39. Evidence held insufficient to show negligence either in the construction of the car or platform or in failing to give warning of the intervening space. Hilborn v. Boston & N. St. R. Co. [Mass.] 77 N. E. 646. The use of an ordinary three-step car such as are in common use upon railroads is not negligence, though some roads use a four-step car, bringing the lower step eight inches nearer the ground. Crowe v. Michigan Cent. R. Co. [Mich.] 12 Det. Leg. N. 893, 106 N. W. 395.

40. Evidence held sufficient to show negligence in inspecting the support to the cash register. Weir v. Union R. Co., 98 N. Y. S. 268. A finding of negligence sustained by evidence that the break in a metallic arm to a seat was rusty, indicating an old crack. Gould v. Boston El. R. Co. [Mass.] 77 N. E. 712. Door slammed shut by a jerk, it having been left open, does not show that it was negligently left unfastened in open position. Weinschenck v. New York, etc., R. Co., 190 Mass. 250, 76 N. E. 662. Evidence held sufficient to sustain a finding that the latch holding open the car door was defective. Missouri, etc., R. Co. v. Perry [Tex. Civ. App.] 15 Tex. Ct. Rep. 715, 95 S. W. 42. Evidence of an unusual explosion in the controller box of a passing car held sufficient evidence of negligence to go to the jury. German v. Brooklyn Heights R. Co., 107 App. Div. 354, 95 N. Y. S. 112. There being evidence that too much power was applied in starting a street car, and that in such case there is more danger of an explosion such as occurred, it was proper to call the jury's attention to the management of the car. Brod v. St. Louis Transit Co., 115 Mo. App. 202, 91 S. W. 993.

41. The carrier is not an insurer of the safety of passengers but is only bound to use toward them that high degree of care which very careful, prudent, and competent persons would use and exercise under the same or similar circumstances. Must use such care to provide safe appliances in the way of the train and its equipment, and a safe and secure track. Davis v. Galveston, etc., R. Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 989, 93 S. W. 222.

42. The same rules of law apply in respect to the equipment a carrier provides for the carriage of its passengers as to its management of that equipment when carrying them. Evers v. Wiggins Ferry Co., 116 Mo. App. 130, 92 S. W. 118. Proprietors of hacks carrying passengers for hire are liable for all injuries caused by failure to provide suitable vehicles, safe horses, and a competent driver. Lewark v. Parkinson [Kan.] 85 P. 601.

43. Mullen v. Galveston, etc., R. Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 963, 92 S. W. 1000. Liable for injuries received in a wreck through the careless operation of the train. Lake Shore, etc., R. Co. v. Teeters [Ind.] 77 N. E. 599.

44. Hedrick v. Missouri Pac. R. Co., 195 Mo. 104, 93 S. W. 268; Lake Shore & M. S. R. Co. v. Teeters [Ind.] 77 N. E. 599. The passenger acquiesces in the usual jerks and jars incident to the management of the train. Mullen v. Galveston, etc.; R. Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 963, 92 S. W. 1000. A carrier is not required to equip a freight train with conveniences for passengers. Rodgers v. Choctaw, etc., R. Co. [Ark.] 89 S. W. 468. The doctrine of assumption of risk by a passenger on a freight train obtains equally in the case of a freight elevator. Em-

for failure to use due care, which gave such person an opportunity to commit such act.[45]

Separate accommodations for white and colored passengers[46] are provided by statute or ordinance in many states, and such acts are valid[47] unless they contain unreasonable exceptions,[48] or confer too broad a discretion on the carrier.[49] Where the legislature has prescribed the maximum penalty to be imposed, any penalty imposed for violation of race separation ordinance within the prescribed limit is reasonable.[50] A carrier which has on its part complied with the act[51] is not liable to a passenger for a mistake in enforcing it.[52]

§ 28. *Operation and management of trains and other vehicles.*[53]—The same degree of care as is imposed in respect to other duties[54] must be observed in all the operations of a train, as in crossing the tracks of another railroad,[55] and in passing platforms where passengers alight or disembark,[56] in preventing collisions,[57] in

ployer not bound to provide safety appliances necessary for passenger elevator. Kappes v. Brown Shoe Co., 116 Mo. App. 154, 90 S. W. 1158.

Instructions as to the risk assumed by a passenger on a freight train held sufficient, and hence not error to refuse a requested charge. Texas & P. R. Co. v. Bump [Tex. Civ. App.] 16 Tex. Ct. Rep. 577, 95 S. W. 29. A failure to instruct that one riding on a freight train assumed only the risks known to him is not prejudicial where it appears that he was familiar with all risks and nothing unusual occurred. Mullen v. Galveston, etc., R. Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 963, 92 S. W. 1000.

45. Liable where it negligently left a switch unlocked which was thrown by a boy. Elgin, A. & S. Traction Co. v. Wilson, 217 Ill. 47, 75 N. E. 436.

46. See 5 C. L. 542.

47. Enactment of ordinances requiring separation of races on street cars comes within the police powers of municipalities (Patterson v. Taylor [Fla.] 40 So. 493), and also within the general welfare clause (Id.). City of Jacksonville held to have authority under clause granting power "to pass all ordinances necessary for the health, convenience and safety of the citizens." Id. A regulation pursuant to an ordinance requiring the negro race to occupy the rear end of a street car and the white race the front end is not an unlawful discrimination between the races. Id.

48. An act requiring white and black persons to occupy the respective compartments on cars assigned to them, but providing that a colored nurse of white children and of white invalid persons may occupy the compartments set aside for white people, is unconstitutional in that it discriminately abridges the privileges and immunities of one class of citizens given to another. Acts 1905, c. 5420, held void under § 1 of 14th amend. U. S. Const. State v. Patterson [Fla.] 39 So. 398.

49. An ordinance leaving it optional with the street car companies to provide separate cars or separate compartments in same car for the white and colored passengers is not void as delegating authority. Patterson v. Taylor [Fla.] 40 So. 493.

50. Penalty of $500 for failure to observe the ordinance, held reasonable. Patterson v. Taylor [Fla.] 40 So. 493.

51. A street car company cannot eject a passenger for failure to occupy compartment set aside for his race unless it has itself complied with the law. Waldauer v. Vicksburg R. & Light Co. [Miss.] 40 So. 751. No right to eject where it had not separated the compartments by partition or screen as required by Laws 1904, p. 140, c. 99. Id. Evidence that by custom the platform was used by both races is admissible where a passenger was ejected for refusing to occupy compartment set aside for his race. Id.

52. Where the law requires separate coaches for the races, a passenger who is required to go into the coach assigned to the other race, because of a bona fide mistake of the carrier as to his race, if not done in an insulting manner, has no cause of action. Southern R. Co. v. Thurman [Ky.] 90 S. W. 240.

53. See 5 C. L. 542.

54. See ante, § 25.

55. Evidence of negligence in failing to ascertain the approach of a train before attempting to run the street car across the track held sufficient to go to the jury. Renders v. Grand Trunk R. Co. [Mich.] 13 Det. Leg. N. 314, 108 N. W. 368. Ordinance requiring street cars to stop before crossing any railroad track includes any track, main or spur. Galveston, etc., R. Co. v. Vollrath [Tex. Civ. App.] 73 Tex. Ct. Rep. 777, 89 S. W. 279. Negligence in the street car company to fail to stop before crossing as required by a city ordinance, where it was also charged that the companies were not liable if the negligence was not the proximate cause of the injury. Galveston, etc., R. Co. v. Vollrath [Tex. Civ. App.] 13 Tex. Ct. Rep. 777, 89 S. W. 279. Statute requiring street car companies to stop cars at railroad crossings and to send an employe forward to look for trains applies, though view is unobstructed and though railroad company maintains gates at crossing. Mulderig v. St. Louis, etc., R. Co., 116 Mo. App. 655, 94 S. W. 801. Instruction held proper in view of the evidence. Id. Evidence of negligence in trying to run a street car across car tracks held sufficient to sustain a verdict. Chicago City R. Co. v. Shaw, 220 Ill. 532, 77 N. E. 139.

56. Instruction withdrawing from the jury the question whether there should have been lights upon the engine was properly refused, there being testimony tending to show that it was dark enough to require lights. St.

avoiding such jerks and jars as will endanger passengers,[58] and in running trains

Louis, etc., R. Co. v. Cleere [Ark.] 88 S. W. 995. Evidence sufficient to sustain a finding of negligence in backing engine between station and train receiving passengers, and also that intestate was not negligent. Id. Evidence insufficient to show negligence in switching a freight train on the tracks in front of the depot, there being no passenger train due at the time. Van Ostrand v. Delaware & H. Co., 99 N. Y. S. 548. Not negligence to pass an approaching car without slacking speed or sounding the gong where there is no reason to anticipate that one is going to step from the moving car onto the track. North Chicago St. R. Co. v. Canfield, 118 Ill. App. 353. Negligent in not allowing for the slippery condition of the rails and in failing to give warning after discovering that the car could not be stopped. Chicago City R. Co. v. Schmidt, 217 Ill. 396, 75 N. E. 383. Allowance must be made for the conditions under which the train is operated. Id. An instruction for defendant if the motorman employed the usual means to stop the car and failed, properly refused, as he was obliged to allow for the slippery condition of the rails. Id., 217 Ill. 396, 75 N. E. 383, afg. 117 Ill. App. 213.

57. A brakeman sent back to flag a following train is a servant engaged with others in the operation of the train within the meaning of Rev. St. 1899, § 2864, providing for the recovery of $5,000 from railroad companies for every passenger who shall die by reason of injuries resulting from negligence, etc., of any officer, agent, servant, or employe, running or managing any train, etc. Anderson v. Missouri Pac. R. Co. [Mo.] 93 S. W. 394. Where petition in action under such section proceeded solely on theory that death was due solely to such negligence and unskillfulness, and evidence showed that injuries resulted from collision, and that brakeman had been sent back to flag following train, but it did not appear that he did so, held that it was proper to confine the recovery to the penalty provided for by that section. Id.

58. Whether the duty imposed upon a carrier about to couple cars required it to use the utmost care to ascertain the presence of a passenger in a car, held, under the circumstances, for the jury. Ft. Worth & D. C R. Co. v. Hardin [Tex. Civ. App.] 14 Tex. Ct. Rep. 302, 90 S. W. 679. A jerk of a street car is not of itself negligence. Testimony that the car started with a "sudden jerk" and a "violent jerk" held insufficient to show negligence (Bollinger v. Interurban St. R. Co., 98 N. Y. S. 641), even if plaintiff was on the running board. Proof that plaintiff was thrown from the running board by a jerk is not sufficient to show negligence. Molloy v. New York City R. Co., 98 N. Y. S. 211. The operatives of a street car are not bound to keep the car stationary until a passenger has seated himself in the absence of conditions making it reasonably apparent that the passenger needs unusual care. That plaintiff was large and fleshy, not such condition. Bennett v. Louisville R. Co. [Ky.] 90 S. W. 1052. In action against a street railway for injuries received in consequence of a sudden jerk of a car, plaintiff is not required to show affirmatively the immediate connection between the injury and the misconduct of the carrier, it appearing that the car was under the control of the carrier or its servants and that the accident was such as, under the ordinary course of things, would not have occurred had those who had the management of the car used proper care. Chadwick v. St. Louis Transit Co., 195 Mo. 517, 93 S. W. 798. Where petition alleged that car was caused and permitted to run upon a curve at an excessive and dangerous rate of speed, and also that it was negligently caused and permitted to strike the curve with sudden violence and unusual force, held that an instruction for plaintiff that she was entitled to recover if car struck curve with sudden, violent, and unusual force was not objectionable because it did not in totidem verbis require a finding that car was being run at a rapid, excessive, and dangerous rate of speed, particularly where they were expressly so required to find in an instruction given for defendant. Id. Evidence of a jerk held not to show negligence in operating train. Flynn v. Interborough Rapid Transit Co., 48 Misc. 529, 96 N. Y. S. 259. Proof that plaintiff while standing in the aisle was thrown by a sudden jerk is insufficient to show negligence. Norminton v. Interborough Rapid Transit Co., 48 Misc. 526, 96 N. Y. S. 261. Proof that the door of the car was slammed shut by a "sudden" jerk as the car was stopping is no proof of negligence. Muller v. Manhattan R. Co., 48 Misc. 524, 96 N. Y. S. 270. Evidence that train came to a "sudden stop" while plaintiff was walking towards the door is no proof of negligence. Needham v. Interborough Rapid Transit Co., 95 N. Y. S. 561. Evidence held sufficient to sustain a finding of negligence in running car at high speed over depressions due to repairing. Depew v. New York City R. Co., 98 N. Y. S. 276. Mere increase of speed in the absence of knowledge that plaintiff had placed himself in a dangerous position is not negligence. Law v. New York City R. Co., 96 N. Y. S. 1019. Where in an action for an injury received by the rear and forward care coming into contact there is no proof of improper construction of the cars or of such happening before or that any accident had occurred from that cause, the mere use of the cars did not justify an imputation of negligence (Gott v. Brooklyn Heights R. Co., 96 N. Y. S. 945), nor justify a finding that the injury was the natural result and should have been foreseen (Id.). Proof of negligence insufficient to sustain a verdict for plaintiff. Id. A carrier is charged with knowledge of the positions of passengers when the means of ascertaining such knowledge lies within its reach. As that a passenger has left his seat preparatory to alighting. Griffin v. Pacific Elec. R. Co. [Cal. App.] 82 P. 1084. Testimony of plaintiff that the car started with a "very strong jerk" and of another witness that "the car jerked" is insufficient to prove negligence. Hirsch v. Union R. Co., 48 Misc. 527, 96 N. Y. S. 333. Proof that the engine was detached from the train, that a violent jar occurred and the engine was found soon after to be attached, is sufficient to sustain a finding that the jar was caused by the engine in attempting to couple. Evansville, etc., R.

at such rate of speed as is under all the circumstances safe and proper.[59] In like manner cars must be kept in a safe condition [60] and properly heated,[61] provided with drinking water,[62] and not so overcrowded as to endanger passengers.[63] Competent

Co. v. Mills [Ind. App.] 77 N. E. 608. As to freight trains, negligence cannot be inferred from the mere fact that a passenger is injured by a jar occasioned by the stopping of the train. Matter of common knowledge that jolting and jarring are necessarily incident to operation of such trains. Hedrick v. Missouri Pac. R. Co., 195 Mo. 104, 93 S. W. 268. Evidence held insufficient to show negligence. Id. Jerk complained of held to be incident to stopping and not negligence. Graf v. West Jersey & S. R. Co. [N. J. Law] 62 A. 333. Evidence held sufficient to support a finding that plaintiff was injured by being thrown from his seat by the sudden stopping of the train. Texas & P. R. Co. v. Bump [Tex. Civ. App.] 16 Tex. Ct. Rep. 577, 95 S. W. 29. Question whether plaintiff was injured by being thrown by sudden stopping of car upon an iron projecting up through the seat, under the evidence, held properly left to the jury. Hebblethwaite v. Old Colony St. R. Co. [Mass.] 78 N. E. 477. Conductor need not notify a passenger walking up the aisle to a seat in the forward part of the car before starting. Weeks v. Boston El. R. Co., 190 Mass. 563, 77 N. E. 654. It is not negligence to start a street car before a passenger walking up the aisle is seated, especially where there is nothing to indicate physical or mental weakness. Id. Evidence that the car was stopped with a sudden jerk, whereby plaintiff was thrown and injured, is sufficient to go to the jury upon the question of negligence. Ball v. Mobile Light & R. Co. [Ala.] 39 So. 584.

59. The protection of a speed ordinance extends only to person lawfully upon the tracks, not to one attempting to board a moving train at a station. Houston & T. C. R. Co. v. Schuttee [Tex. Civ. App.] 14 Tex. Ct. Rep. 725, 91 S. W. 806. Evidence that the speed while rounding a curve was "pretty swift," "about nine miles an hour," and that the movement which threw plaintiff was not "an ordinary jerk," was insufficient to show negligence. Kiefer v. Brooklyn Heights R. Co., 97 N. Y. S. 841. The mere fact that a train is run at a high rate of speed is not negligence (Illinois Cent. R. Co. v. Porter [Tenn.] 94 S. W. 666), but the question is whether the carrier exercised reasonable prudence in operating its train at such a rate of speed at the particular locality where the accident occurred and under the circumstances (Id.). Not negligence if condition of track and road bed, and the character of the engine and equipment are such that speed may be safely maintained. Instruction approved. Id. Evidence held to support finding of negligence. Id. Where overwhelming weight of evidence was that street railway's servants ran it on to a curve at a rapid, dangerous, and excessive rate of speed, and caused it to strike said curve with sudden, violent, and unusual force," whereby plaintiff was injured as alleged in the petition, held that there was no error in overruling demurrers to the evidence. Chadwick v. St. Louis Transit Co., 195 Mo. 517, 93 S. W. 798. A witness who is unfamiliar with the ordinary speed of a car on a particular route is incompetent to testify that the car on a particular occasion was going at an unusual rate. Verrone v. Rhode Island S. R. Co. [R. I.] 62 A. 512. The violation of a speed ordinance is negligence per se. MacFeat v. Philadelphia, etc., R. Co. [Del.] 62 A. 898. Running of a street car at the rate of seven miles per hour between streets at night held not negligence when there was no reason to anticipate that a person was going to step from a moving car on to the track. North Chicago St. R. Co. v. Canfield, 118 Ill. App. 353.

60. Evidence held sufficient to show negligence in lowering the upper rail. Brettner v. Westchester Elec. R. Co., 98 N. Y. S. 857. Carrier is not required to lower the rail on the outside of a car going around a curve at the rate of three miles per hour, such rail being merely to prevent passengers from alighting on the wrong side. Dolphin v. Worcester Consol. St. R. Co., 189 Mass. 270, 75 N. E. 635.

Leaving doors open: Company is not obliged to prevent an open door on a car from closing when the train is in motion. Weinschenck v. New York, etc., R. Co., 190 Mass. 250, 76 N. E. 687. Opening of door by the guard does not show negligence where it does not appear that he had knowledge of plaintiff's position, whereby the opening crushed his hand. Maillefert v. Interborough Rapid Transit Co., 98 N. Y. S. 207. It is not negligence for a carrier to open the doors of a vestibuled coach after announcing the stop. Union Pac. R. Co. v. Brown [Kan.] 84 P. 1026. A common carrier leading a passenger to believe that the doors of the vestibuled car would be kept closed is liable for negligently leaving them open. Crandall v. Minneapolis, etc., R. Co. [Minn.] 105 N. W. 185. Evidence held sufficient to sustain a verdict that defendant was negligent. Id.

61. Where passengers are directed to take a car to await train due several hours later, the carrier is duly bound to use the utmost care of a very prudent person to keep it properly heated. Missouri, etc., R. Co. v. Byrd [Tex. Civ. App.] 14 Tex. Ct. Rep. 65, 89 S. W. 991. Instructions in action for damages for injuries resulting from failure to properly heat cars held not erroneous as permitting recovery without regard to whether exposure occurred on defendant's road or that of a connecting carrier. St. Louis S. W. R. Co. v. Haney [Tex. Civ. App.] 16 Tex. Ct. Rep. 19, 94 S. W. 386.

62. Whether plaintiff, while a passenger, suffered from thirst was for the jury. Peck v. Atchison, etc., R. Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 534, 91 S. W. 323.

63. Overcrowding of a car is not negligence as a matter of law. Failure to so instruct is not cured by reading an excerpt from an opinion which, severed from the text, is calculated to mislead. Schmidt v. Interborough Rapid Transit Co., 97 N. Y. S. 390. Where a carrier permits a car to become so crowded that the conductor must swing around persons standing on the running board in collecting fares, and in so doing is struck by a pole and knocked against a passenger causing injury, the carrier is liable.

employes must be provided [64] who shall give proper orders,[65] warn passengers so far as possible of the dangers of any improper acts,[66] and give such directions and announcements as may be proper.[67] The person in charge of a train has considerable discretion in the control of passengers so as to provide for their safety.[68]

§ 29. *The duty to protect passengers* [69] renders the carrier liable absolutely,[70] on principles of contract rather than by the doctrine of respondeat superior,[71] for all assaults and indignities upon the passenger by its employes [72] or those of any company to which it commits the operation of its train,[73] or persons whom employes call to their assistance,[74] unless justified by the conduct of the passenger; [75] the

Horan v. Rockwell, 96 N. Y. S. 973. Carriers are liable for injuries caused by the overcrowded condition of the cars. Not relieved by the fact that one of the other passengers crowded plaintiff off while attempting to alight. Morris v. Chicago Union Traction Co., 119 Ill. App. 527. In the operation of cars regard must be had for the particular conditions under which the run is being made. Where the aisles and platform of a street car are crowded, the company should regulate the speed accordingly and it may be negligence to run at the usual rate. Alton Light & Traction Co. v. Oliver, 217 Ill. 15, 75 N. E. 419.

64. Carrier is guilty of negligence in hiring incompetent servants. Where the conductor jumped from the car upon certain electrical disturbances taking place in the fore end of the car, the fact may be shown as indicating his incompetency. Blumenthal v. Union Elec. Co. [Iowa] 105 N. W. 588.

65. Evidence that the watchman and switchman gave contradictory orders to a street car approaching a railroad track held, under the circumstances, sufficient to go to the jury upon the issue of negligence. Hamilton v. Metropolitan St. R. Co., 114 Mo. App. 504, 89 S. W. 893.

66. Carrier need not warn a woman about to cross from one car to another of the space between the cars or assist in crossing. Hawes v. Boston El. R. Co. [Mass.] 78 N. E. 480.

67. In making announcements during the transportation that are intended to influence the actions of passengers, care should be observed to make them intelligible to the different classes of people usually to be found in such public conveyances and to guard against possible misunderstanding. Laub v. Chicago, etc., R. Co. [Mo. App.] 94 S. W. 550. Question whether in calling the station in the manner in which it did and leaving passengers to shift for themselves, defendant exhibited care to be expected under the circumstances, held for the jury. Id. If a passenger is induced to leave the train by the negligent direction of the carrier, and is injured while exercising ordinary care in endeavoring to regain it, the carrier is liable, regardless of what other negligent cause cooperates in producing the injury. Id. Negligence of carrier in permitting passenger to leave train at depot platform instead of at eating house, in failing to provide some one to direct him how to proceed to regain the train, held proximate cause of injury resulting from his failing into a dangerous pitfall on land of another carrier while attempting to regain train. Id.

68. Whether a high degree of care authorized defendant's conductor to lock, over night, against the desire of passengers, a car in which were transported seventeen school children in charge of an Indian agent, was for the jury. Peck v. Atchison, etc., R. Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 534, 91 S. W. 323.

69. See 5 C. L. 544. Consult special article, Assaults by Employes, 5 C. L. 275.

70. A carrier is absolutely liable for injuries to passengers caused by the misconduct of its servants (Hayne v. Union St. R. Co., 189 Mass. 551, 76 N. E. 219), and it is immaterial that the particular servant owed no special duty to protect the passenger (Id.). Liable for injuries caused by an object thrown in sport at the motorman by a servant on another car. Id. A carrier is an insurer against assaults of its servants. McQuerry v. Metropolitan St. R. Co. [Mo. App.] 92 S. W. 912.

71. Artherholt v. Erie Elec. Motor Co., 27 Pa. Super. Ct. 141. Irrespective of negligence in employing servant or whether done within the scope of their authority. Negro waitress used abusive and insulting language towards plaintiff. Gulf, etc., R. Co. v. Luther [Tex. Civ. App.] 14 Tex. Ct. Rep. 195, 90 S. W. 44.

72. A carrier is liable civilly for rape committed upon a passenger by a brakeman. Garvik v. Burlington, etc., R. Co. [Iowa] 108 N. W. 327. A carrier is liable for injury to the feelings of a passenger by indecent and insulting language of its employes. Cincinnati, etc., R. Co. v. Harris, 115 Tenn. 501, 91 S. W. 211. Evidence sufficient to sustain verdict for personal indignities to passenger for failure to produce ticket. Id. A passenger may recover punitive damages for a malicious assault by a conductor. Madigan v. St. Louis Transit Co. [Mo. App.] 93 S. W. 316. Cannot recover such damages where conductor ejects plaintiff in good faith, believing that he has not paid his fare and uses no more force than is necessary to eject him. Id. Evidence as to amount of force used by conductor, and amount of resistance offered by passenger held to render it proper to submit question of punitive damages to jury. Id.

73. Where plaintiff was a passenger of defendant, it is liable for assaults of the servants of the operating company. Chicago Terminal Transfer R. Co. v. Young, 118 Ill. App. 226.

74. A carrier is liable for a wrongful assault committed in an attempt to arrest an ejected disorderly passenger. McQuerry v. Metropolitan St. R. Co. [Mo. App.] 92 S. W. 912. A carrier is liable, Civ. Code, art. 2324, for the erroneous arrest of a passenger although made by a police officer, if done at the instance of the conductor. Schmidt v.

most common justification being the refusal to pay fare, which is ordinarily held to warrant ejection.[76] While not an insurer, a carrier of passengers must exercise a high, if not the highest, degree of vigilance to protect his passengers from fellow passengers and strangers,[77] being liable for assaults committed by third persons upon a passenger which by the exercise of such care it could have anticipated and prevented.[78] A sleeping car company, on the other hand, is only required to exercise ordinary and reasonable care and diligence in watching over its passengers to protect them from assault and injury.[79] A carrier is liable for damages done by a dog permitted upon a car for the carriage of passengers.[80]

§ 30. *Taking up and setting down passengers. Generally.*[81]—The duty previously defined in general [82] continues during the acts of taking up and setting down passengers,[83] and due care must be taken not to suddenly stop or start [84] or accelerate after slowing down [85] cars so as to throw the passenger off his equilibrium,

New Orleans R. Co. [La.] 40 So. 714. A street car company is liable for the erroneous arrest of a passenger at the instance of the conductor in the discharge of his duties. Id.

75. The fact that plaintiff negligently pulled the cord registering fares instead of the bell rope, is so disconnected with the assault which followed that it does not amount to contributory negligence. Artherholt v. Erie Elec. Motor Co., 27 Pa. Super. Ct. 141. Where on arriving at the terminus of a line, a passenger remains on the car, sleeping, employes may use all force reasonably necessary to awake him. Kaase v. Gulf, etc., R. Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 564, 92 S. W. 444. Evidence held to justify a finding that only reasonable force was used. Id. When the defense of consent to an assault by an employe has been given to the jury that of contributory negligence, if ever appropriate, should be refused unless there is evidence of it. Garvik v. Burlington, etc., R. Co. [Iowa] 108 N. W. 327.

76. See ante, § 23.

77. St. Louis, etc., R. Co. v. Hatch [Tenn.] 94 S. W. 671; Louisville & N. R. Co. v. Board [Ky.] 90 S. W. 944.

78. Not liable for an injury to a passenger resulting from a stone hurled through the window by an ejected passenger. Brown v. Chicago, etc., R. Co. [C. C. A.] 139 F. 972. A carrier is liable for assault committed by a fellow passenger only when it has knowledge or reason to anticipate such an attack. Franklin v. Atlanta & C. Air Line R. Co. [S. C.] 54 S. E. 578. Evidence in action against railroad company and sleeping car company for damages for assault by outsiders on passenger held sufficient to support verdict for plaintiff, both as to the extent of the outrage, the conditions under which it was perpetrated, and the absence of defendant's employes. St. Louis, etc., R. Co. v. Hatch [Tenn.] 94 S. W. 671. If there is nothing on the part of the passengers or otherwise to create in the minds of any reasonable person any apprehension of danger, the carrier cannot be charged with negligence, or held liable for injuries resulting therefrom. Id. This rule, however, applies only when the carrier is not guilty of negligence. Railroad and sleeping car companies cannot escape liability on that ground for indignities offered passenger, where they have been negligent in leaving the car for a long period and failing to answer bells. Id.

79. St. Louis, etc., R. Co. v. Hatch [Tenn.] 94 S. W. 671. Evidence that plaintiff was injured by being pushed from the car during a panic resulting from the dress of a passenger becoming ignited by a match carelessly thrown away by another passenger, held insufficient to show negligence. Fanizi v. New York, etc., R. Co., 99 N. Y. S. 281.

80. Westcott v. Seattle, etc., R. Co., 41 Wash. 618, 84 P. 588.

81. See 5 C. L. 545.

82. See ante, § 25a.

83. A passenger while alighting from a car is entitled to the degree of care from the carrier as every prudent, careful person would exercise under the circumstance. Missouri, etc., R. Co. v. Wolf [Tex. Civ. App.] 14 Tex. Ct. Rep. 52, 89 S. W. 778. The care owed to an alighting passenger is the same as upon the train, that is the highest degree which is reasonably practicable. Chicago, etc., R. Co. v. Wimmer [Kan.] 84 P. 378. A street railway company is bound to exercise the same high degree of care toward an intending passenger as toward one who has entered a car and paid his fare, where such intending passenger, having taken his place at a point designated for receiving passengers, is injured after coming within the sphere of peril from the car, but before actual contact with it. Cincinnati Traction Co. v. Holzenkamp, 3 Ohio N. P. (N. S.) 537.

84. Carrier is liable for injuries resulting from suddenly starting the car while a passenger is boarding. Waller v. Wilmington City R. Co. [Del. Super.] 61 A. 874. Evidence as to negligence in suddenly starting car while plaintiff was aboard held sufficient to go to the jury. Chicago Union Traction Co. v. May [Ill.] 77 N. E. 933. Where plaintiff's evidence tends to show that the car was started before she had a reasonable opportunity to get on and there is no evidence of contributory negligence, it is error to dismiss. Silber v. New York City R. Co., 99 N. Y. S. 837. Evidence as to whether the sudden starting of the train caused plaintiff to be thrown therefrom held so conflicting as to require submission to the jury. Lattimer v. St. Louis S. W. R. Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 242, 90 S. W. 665.

85. Where the speed of the car has been diminished in response to a passenger's notice to alight to such an extent that it would not be negligence to attempt to alight, company would be liable for an injury resulting

or to subject him to other dangers before he has time to reach a place of safety,[86] provided the carrier knows of the intention to alight.[87] Where a signal to start is given by an unauthorized person and the men in charge could not have prevented the accident by the exercise of reasonable care, there is no liability.[88] The starting of a car without warning after a passenger is upon the car but not seated is not negligence per se.[89] A carrier is not bound to furnish a passenger who is in full possession of his mental facilities and bodily vigor an escort across the tracks,[90] or to assist passengers to alight.[91]

Particular duties.[92]—In the absence of a request for information, a carrier need not inform a passenger of the time of the departure of its trains.[93] It is not negligence for a railroad company to fail to have a ticket agent at the window after the train arrives whereby a passenger became tardy in boarding.[94] Reasonable time to board must be given.[95] As to those attempting to board after the signal is given to start and of which the carrier had no notice, there is no negligence in starting.[96] The law only requires the conductor to use reasonable care to find out who wishes to alight.[97] The carrier must use the highest degree of care to provide a safe place for alighting passengers,[98] and it is his duty to know that the place is reasonably safe,[99]

from a sudden increase of speed. Paul v. Salt Lake City R. Co. [Utah] 83 P. 563. Evidence that the conductor gave the stopping signal as the car was slowly crossing the street and relying thereon plaintiff stepped down onto the step and was thrown off by the increasing speed held sufficient, on the question of negligence in leading a passenger into a place of danger, to go to the jury. Weir v. Seattle Elec. Co., 41 Wash. 657, 84 P. 597. Evidence held sufficient to go to the jury as to whether there was negligence in stopping to permit plaintiff to alight. Gottlob v. North Jersey St. R. Co. [N. J. Law] 62 A. 1003.

86. Evidence that plaintiff was struck by a foot board of a wagon standing near the tracks before he had had time to leave the running board for a safe place within, was sufficient to go to the jury as to negligence in starting the car prematurely. Walsh v. Interurban St. R. Co., 98 N. Y. S. 656.

87. One cannot recover for injuries received by a sudden start of the car while he was attempting to alight where the motorman had no notice that he was attempting to alight while the car was moving slowly. Chicago & J. Elec. R. Co. v. Dice, 113 Ill. App. 74.

88. Moore v. Woonsocket St. Co. [R. I.] 63 A. 313.

89. Metropolitan St. R. Co. v. Warren [Kan.] 86 P. 131.

90. Especially where he is familiar with the station grounds and has knowledge of the approaching train. Dieckmann v. Chicago & N. W. R. Co. [Iowa] 105 N. W. 526. Evidence held sufficient to show that defendant's agent was not escorting plaintiff's intestate. Id.

91. Indianapolis Traction & Terminal Co. v. Pressell [Ind. App.] 77 N. E. 357. The fact that a female passenger is fifty years old and weighs two hundred pounds does not as a matter of law show that she needs assistance. Id.

92. See 5 C. L. 545, 546.

93. Lattimer v. St. Louis S. W. R. Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 242, 90 S. W. 665.

94. Talbert v. Charleston & W. C. R. Co., 72 S. C. 137, 51 S. E. 564.

95. Where a car has stopped to receive passengers, the conductor must see that they are on before starting the car. Kohr v. Metropolitan St. R. Co. [Mo. App.] 92 S. W. 1145.

96. Evidence that plaintiff reached the car after the signal had been given to start and was injured while attempting to board, in the absence of evidence that the conductor should have seen that he intended to take the car is insufficient to show negligence. Woodman v. Seattle Elec. Co. [Wash.] 85 P. 23.

97. An instruction that he must use "great care" held erroneous. Raymond v. Portland R. Co., 100 Me. 529, 62 A. 602.

98. Mobile Light & R. Co. v. Walsh [Ala.] 40 So. 560; Macon R. & Light Co. v. Vining, 123 Ga. 770, 51 S. E. 719. Company held not negligent in omitting to put up a chain to prevent passengers from alighting at a particular point of the running board where the ground was uneven. Mahoney v. Philadelphia Rapid Transit Co. [Pa.] 63 A. 429.

Moving trains through or past stations: An engineer of an approaching train may assume that a passenger crossing the track to take a train will continue to cross and is not required to check speed or give warning until notice to the contrary. Illinois Cent. R. Co. v. Proctor [Ky.] 89 S. W. 714. Negligence in running a freight train in upon a track as passengers were crossing to take a passenger train held under the facts for the jury. Id.

99. Mobile Light & R. Co. v. Walsh [Ala.] 40 So. 559. Not necessary that defendant had knowledge of the condition of the street. Indiana Union Traction Co. v. Jacobs [Ind.] 78 N. E. 325. Where there is evidence to show that the place of alighting was dangerous because of a depression, which fact was known to defendant but was concealed from plaintiff, and was the cause of plaintiff's injury, a directed verdict for defendant is error. Tilden v. Rhode Island Co. [R. I.] 63 A. 675.

or to afford safety by warning and aiding in the alighting.[1] A stop at his station [2] or stopping place of a street car [3] and reasonable time to alight or board or to indicate an intention so to do must be given [4] to passengers exercising due diligence on their part [5] if the carrier knows or should know that the passenger is alighting or boarding or intends to do so.[6] There is no duty to know this with respect to unusual places,[7] but a custom to use a place may establish the duty.[8] It is the duty of a railway company to hold a train at a station a reasonably sufficient length of time to allow a passenger, who has been instructed so to do by its conductor in charge of the train, to procure a ticket and board the train before it is started.[9] Whether the stop was reasonably sufficient is a question for the jury from the circumstances of the particular case.[10] A conductor who undertakes to assist a passenger, who does not need such assistance, to alight, need use only ordinary care.[11]

1. Truesdell v. Erie R. Co., 93 N. Y. S. 694. Where a passenger stepped through a space between the car and platform while alighting, there being such a crowd that he could not see, and no guard or warning, the question of negligence was for the jury. Windels v. Interborough Rapid Transit Co., 98 N. Y. S. 854. An instruction that failure to give warning of the dangers incident to alighting at a certain place was negligence held erroneous. Macon R. & Light Co. v. Vining, 123 Ga. 770, 51 S. E. 719.

2. **Mere inconvenience** or difficulty **will not excuse** a failure to stop at a station where a passenger has a right to have it stop to allow him to alight. Harlan v. Wabash R. Co. [Mo. App.] 94 S. W. 737. A carrier is not free from negligence as a matter of law in making a short stop even though it appears that it had no knowledge that any passenger was about to alight. O'Dea v. Michigan Cent. R. Co. [Mich.] 12 Det. Leg. N. 718, 105 N. W. 746. Instruction held erroneous as assuming that it was negligence to **run** the train **past the depot platform.** Illinois Cent. R. Co. v. Johnson [Ill.] 77 N. E. 592.

3. It is the duty of a **street railway** company, as a common carrier, not only to carry a passenger safely, but to hold the car stationary while he alights at his destination (Nelson v. Metropolitan St. R. Co., 113 Mo. App. 702, 88 S. W. 1119), and however long a stop may be, due care requires a street car conductor to look to his car to see if any one is in the act of alighting before giving the signal to start (Id.). In an action for injuries from starting a street car while plaintiff was alighting, that plaintiff failed to prove the manner of starting was not essential to her cause of action, it being negligent for defendant to make any kind of a start while passengers were leaving the car at the proper place. Id.

4. Time to alight. Baltimore & O. S. W. R. Co. v. Mullen, 217 Ill. 203, 75 N. E. 474. Liable if it does not. United R. & Elec. Co. v. Weir, 102 Md. 286, 62 A. 588. He must use care to ascertain before starting whether or not passengers are in the act of alighting and will be endangered by starting. Becker v. Lincoln Real Estate & Bldg. Co. [Mo. App.] 93 S. W. 291. Defendant is only bound to show that the train stopped a reasonably sufficient time for plaintiff, by the use of ordinary care to have alighted in safety. Instruction requiring it to further show that plaintiff's failure to alight was due to a failure on her part to use reasonable dispatch to so alight, held error. St. Louis S. W. R. Co. v. Rose [Tex. Civ. App.] 15 Tex. Ct. Rep. 604, 93 S. W. 1105. A street car company in taking on passengers must stop its cars at the usual places and wait a reasonable time for passengers to alight, and must exercise reasonable care to secure safety. Waller v. Wilmington City R. Co. [Del. Super.] 61 A. 874. Proof that the usual **signal to stort** a car was given raises a **presumption** that it was **given by** the **conductor.** Kohr v. Metropolitan St. R. Co. [Mo. App.] 92 S. W. 1145. An **elevator** operator is bound to hold the car a reasonable time for passengers to alight or indicate their intention to do so. Instruction held erroneous as imposing too high a duty. Becker v. Lincoln Real Estate & Bldg. Co. [Mo. App.] 93 S. W. 291. Evidence as to negligence in prematurely starting elevator held sufficient to go to the jury. Id.

5. Chicago, etc., R. Co. v. Wimmer [Kan.] 84 P. 378.

6. Under a charge that defendant negligently started the car while plaintiff was alighting, an instruction as to "reasonable opportunity to alight" ignoring negligence in starting with knowledge that she was alighting, properly refused. West Chicago St. R. Co. v. McCafferty, 220 Ill. 476, 77 N. E. 153.

7. Proof of starting of the car while a passenger is alighting at an unusual place, in the absence of proof that the conductor or motorman had knowledge of the fact, does not show negligence. Laverty v. Interurban St. R. Co., 98 N. Y. S. 846.

8. Evidence held sufficient that defendant was guilty of negligence in starting train without looking to see if passengers were alighting on the side opposite the station, passengers being accustomed so to do. Murphey v. Southern Pac. Co. [Cal. App.] 83 P. 299. Where a street car company by custom receive and discharge passengers at a place not designated by ordinance it must use the same degree of care for the safety as at a designated stop. Gilroy v. St. Louis Transit Co. [Mo. App.] 92 S. W. 1152.

9. Johnson v. Texas Cent. R. Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 807, 93 S. W. 433.

10. The fact that the jury found that the train stopped the usual length of time does not conflict with a general finding that the stop was insufficient in the particular case. Chicago, etc., R. Co. v. Wimmer [Kan.] 84 P. 378. Court cannot say as a matter of law that a stop of a minute is sufficient. Id.

11. Moody v. Boston & M. R. Co., 189 Mass. 277, 75 N. E. 631.

A carrier must deliver a passenger at the usual station platform.[12] One compelled to alight elsewhere may recover for injuries if the carrier was negligent.[13] While ordinarily a carrier does not owe a duty to extend personal assistance to a passenger in alighting from a car, such duty may exist under special conditions.[14]

§ 31. *Duty to persons other than passengers.*[15]—These usually fall within the category of employes[16] or licensees, trespassers and strangers.[17] Where one boards the train to assist a passenger with the knowledge of the conductor, the carrier must use ordinary care for his safety,[18] and to allow him a reasonable time to get off,[19] but if his purpose it not known to the men in charge of the train, no duty to hold arises,[20] nor is the carrier required to exercise ordinary care to ascertain such purpose.[21] A carrier owes at least as high a degree of care to an express messenger as to its employes,[22] and a contract between a carrier and an express messenger exempting the former from all liability is void under a statute prohibiting common carriers from contracting against their negligence.[23]

§ 32. *Remedies and procedure.*[24]—A state court has jurisdiction of an action to recover a fare agreed to be refunded if certain shipments were made.[25] Where the basis of plaintiff's cause of action is the violation of the duty imposed by law upon common carriers, the action is in tort.[26] Thus, a passenger wrongfully ejected may recover in tort,[27] though he may also sue on the contract.[28] The action for refusal to carry is not local in Kentucky.[29] A claimant need not demand interest in his claim filed, and where he recovers the amount of his claim excluding interest,

12. A passenger compelled to alight some three hundred yards from the usual alighting platform has a cause of action. Kinney v. Yazoo & M. V. R. Co. [Tenn.] 92 S. W. 1116. Evidence held sufficient to go to the jury upon the issue whether plaintiff wae compelled to alight at an unusual place. Id.

13. Evidence in action for injuries to passenger by being compelled to alight elsewhere than at station held not to support verdict for plaintiff. St. Louis S. W. R. Co. v. Black [Tex. Civ. App.] 15 Tex. Ct. Rep. 553, 93 S. W. 1071. In action for injuries consequent upon being carried beyond plaintiff's destination, evidence of the undisclosed intention of the conductor to hire a conveyance was inadmissible. Chesapeake & O. R. Co. v. Lynch [Ky.] 89 S. W. 517.

14. Wet, muddy, and slippery car platform and steps. Flory v. San Antonio Traction Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 772, 89 S. W. 278.

15. See 5 C. L. 547.

16. See Master and Servant, 6 C. L. 521.

17. See Railroads, 6 C. L. 1194; Street Railways, 6 C. L. 1556.

18. Seaboard Air Line R. Co. v. Bradley [Ga.] 54 S. E. 69. The negligence in starting the train before one who is assisting passengers to board has had time to alight is not the proximate cause of an injury received while subsequently attempting to alight from the moving train. Hill v. Louisville & N. R. Co., 124 Ga. 243, 52 S. E. 651.

19, 20. Seaboard Air Line R. Co. v. Bradley [Ga.] 54 S. E. 69.

21. Seaboard Air Line R. Co. v. Bradley [Ga.] 54 S. E. 69. Instruction imposing such duty held erroneous. Id.

22. Shannon's Adm'r v. Chesapeake & O. R. Co., 104 Va. 645, 52 S. E. 376.

23. As under Code 1904, p. 668, § 1294c (25). Shannon's Adm'r v. Chesapeake & O. R. Co., 104 Va. 645, 52 S. E. 376.

24. See 5 C. L. 548.

25. Action on contract and not an attempt to obtain a remedy for unjust discrimination within the interstate commerce act. St. Louis & S. R. Co. v. Puterbaugh, 117 Ill. App. 569.

26. The fact that he alleges a contract when merely for the purpose of establishing the relation of carrier and passenger does not make it a contract action. Pittsburgh, etc., R. Co. v. Higgs, 165 Ind. 694, 76 N. E. 299.

27. Delmonte v. Southern Pac. Co. [Cal. App.] 83 P. 269. A complaint charging defendant with refusing to permit him to ride on a certain ticket, construed as sounding in tort and not in contract. Pittsburgh, etc., R. Co. v. Coll [Ind. App.] 76 N. E. 876.

28. A complaint alleging payment of fare and a promise by defendant to carry and to treat him properly, following with allegations of facts amounting to an assault, construed to state action on contract. Busch v. Interborough Rapid Transit Co., 96 N. Y. S. 747.

29. Civ. Code Prac. § 73, localizing certain actions against common carriers, does not include actions upon contracts to carry passengers. Southern R. Co. v. Cassell [Ky.] 92 S. W. 281. Civ. Code Prac. § 72, providing that actions against corporations on contract may be brought in the county in which the contract was made, applies to an action against a railroad company for breach of a contract for the carriage of a passenger. Id. Action against connecting carriers for breach of contract, made by initial carrier and subsequently ratified by connecting carrier, to carry passenger over both lines, held properly brought in county in which such contract was made by the initial carrier. Id.

he may recover the penalty under 24 St. at L. p. 1.[30] By statnte in Alabama a consolidated street railway corporation becomes liable for the obligation of the constituent corporations,[31] and if there be no change of name, the consolidation does not affect a pending action.[32]

Pleading.[33]—In South Carolina a plaintiff need not elect between two causes of actions, one for negligence under the common law, and the other for statutory negligence alleged jointly.[34] The relation of carrier and passenger must appear,[35] but the relation being alleged, it need not be averred that defendant owed plaintiff any duty.[36] A complaint must specify in what the negligence of the defendant consisted,[37] but need not specify the negligent acts which caused the injury,[38] nor al-

30. Abrahams v. Columbia, etc., R. Co. [S. C.] 53 S. E. 879.

31. Code 1896, § 1204. Birmingham R., Light & Power Co. v. Enslen [Ala.] 39 So. 74.

32. Birmingham R., Light & Power Co. v. Enslen [Ala.] 39 So. 74. If a different corporate name be assumed, then the pending action must be prosecuted in the new name. Id.

33. See 5 C. L. 548.

34. Rountree v. Atlantic Coast Line R. Co. [S. C.] 53 S. E. 424.

35. A complaint, alleging that plaintiff took passage at a certain place to be carried to another designated point, sufficiently charges the relation of carrier and passenger. Indiana Union Traction Co. v. McKinney [Ind. App.] 78 N. E. 203. A complaint alleging that plaintiff was a passenger on the train at the time of the accident is not bad for failing to state where he was at the time, though probably subject to a motion to make more specific. Southern R. Co. v. Roach [Ind. App.] 78 N. E. 201. A complaint alleging that the injury was received while boarding, but failing to state that it was at a usual or customary place for receiving passengers, or that decedent was invited or knowingly permitted to board, does not show the relation of carrier and passenger. Smith v. Birmingham R., Light & Power Co. [Ala.] 41 So. 307. Sufficient if it alleges facts from which the conclusion that petitioner was a passenger may be drawn. Chicago Union Traction Co. v. O'Brien, 117 Ill. App. 183. An allegation that plaintiff was "a passenger on defendant's railway" sufficiently shows the relation of carrier and passenger. Birmingham R., Light & Power Co. v. Adams [Ala.] 40 So. 385.

36. Properly inferred from the facts alleged. Birmingham R., Light & Power Co. v. Adams [Ala.] 40 So. 385.

37. An allegation that there were certain apertures, projections, and defects in the step, the nature whereof is unknown to plaintiff, etc., amounts merely to a general allegation of negligence and is insufficient. Wilbur v. Rhode Island Co. [R. I.] 61 A. 601.

38. Hamilton v. Metropolitan St. R. Co., 114 Mo. App. 504, 89 S. W. 893. An allegation that defendant negligently "left" a banana peeling on the car floor is sufficient without an allegation that it was negligently permitted to remain for a certain time, as would have been necessary if some one else had thrown it there. Dallas Consol. Elec. St. R. Co. v. Black [Tex. Civ. App.] 13 Tex. Ct. Rep. 897, 89 S. W. 1087. In an action under Rev. St. 1899, § 2864, providing that railroad shall pay $5,000 for every passenger who shall die from any injury resulting from or occasioned by the negligence, etc., of any officer, agent, servant, or employe running or managing any train, etc., it is only necessary to allege generally the collision in which deceased was killed, and that such collision was occasioned by reason of the negligence and unskilfulness of those operating and managing the train, and that the injuries and death were caused thereby, and it is not essential to allege the particular acts of any particular servant or employe which occasioned the collision. Anderson v. Missouri Pac. R. Co. [Mo.] 93 S. W. 394.

Sufficiency of particular averments of negligence: Complaint held insufficient to charge negligence in the **maintenance of the platform** or in the stopping of the car beyond the platform, but the other allegations of negligence held sufficient. Indiana Union Traction Co. v. Jacobs [Ind.] 78 N. E. 325. Allegations that the platform upon which plaintiff attempted to alight "was * * * located too far from the step of * * * the coach" and that "the distance * * * was more than an ordinary step," held mere conclusions. Seaboard Air-Line R. Co. v. Olsen, 123 Ga. 612, 51 S. E. 591. A complaint charging that defendant negligently **approached a switch at a dangerous rate of speed** and negligently ran into such switch at such dangerous rate of speed, whereby the car left the track, sufficiently alleges negligence (Indiana Union Traction Co. v. McKinney [Ind. App.] 78 N. E. 203), and it also sufficiently alleges the negligent derailment of the car (Id.). A complaint charging that defendant kept a **car inspector** at a certain place, whose duty it was to inspect the cars, is not fatally defective in failing to allege that the car was ever at such place. Southern R. Co. v. Roach [Ind. App.] 77 N. E. 606; Id. [Ind. App.] 78 N. E. 201. A complaint alleging wanton negligence in that the **car was suddenly started** while plaintiff was alighting, which fact was known to defendant's agents or some of them, is insufficient in that it does not allege that the agents who started the car had knowledge. Birmingham R., Light & Power Co. v. Bennett [Ala.] 39 So. 565. A complaint in justice court alleging that plaintiff was thrown and injured by reason of the starting of defendant's car while he was attempting to board with intent to become a passenger is sufficient. Barr v. St. Louis & S. R. Co., 114 Mo. App. 425, 90 S. W. 107. A complaint alleging that the conductor bade plaintiff to get upon the train and then, although he knew that plaintiff was a one-armed man, gave the

lege in detail the manner in which the accident happened.[39] A general averment of negligence is usually deemed sufficient,[40] and on the other hand, averment of facts raising a presumption of negligence has been held good without a general averment of negligence,[41] but an averment of facts not amounting to negligence in law is bad without a general averment.[42] Where the negligence charged is the ejection of a helpless passenger in a dangerous place, the complaint need not allege cause of the helpless condition,[43] nor must the motive of the ejectors be alleged.[44] The place of the accident must be alleged,[45] but an amendment in respect thereto does not change the cause of action.[46] The negligent servant need not be particularly designated.[47] A petition seeking to recover for being required to ride in the negro compartment must allege that plaintiff was not a negro.[48] Inconsistent allegations as to cause of accident has been held not fatal where either alleged cause would support the action.[49] A contract limiting the defendant's liability must be specially pleaded unless

signal to start, sufficiently alleges negligence as against a demurrer. Talbert v. Charleston & W. C. R. Co., 72 S. C. 137, 51 S. E. 564. An amendment charging that the car was started with a sudden and violent jerk as plaintiff was transferring is not objectionable as not alleging the cause of the jerk. Georgia R. & Elec. Co. v. Reeves, 123 Ga. 697, 51 S. E. 610. An allegation that "said jerk of said car was caused by defendant's servants and agents in charge of said car" is not objectionable as not connecting defendant with the negligence. Id. A complaint alleging that plaintiff, who had entered the train to assist a passenger, was injured by a sudden jerk while attempting to alight does not charge negligence in absence of an allegation that defendant had knowledge that he was alighting. Hill v. Louisville & N. R. Co., 124 Ga. 243, 52 S. E. 651. Complaint held good as against objections that it failed to allege negligence, that the car was started while plaintiff was alighting, that the car stopped to discharge passengers, that the place was a regular stopping place for discharging passengers, and that defendant's servants had notice that plaintiff was alighting. Birmingham R., Light & Power Co. v. Handy [Ala.] 39 So. 917. A complaint charging **wrongful ejectment** of plaintiff's intestate from a moving train and not wanton and wilful ejectment, need not allege consciousness of results. Louisville & N. R. Co. v. Perkins [Ala.] 39 So. 305. An amendment charging an additional act of negligence, when construed with the amended pleading, held to sufficiently show the **relation of the negligence to the injury.** Georgia R. & Elec. Co. v. Reeves, 123 Ga. 697, 51 S. E. 610.

39. A petition alleging that defendant permitted a live wire to be suspended from the roof, and continuing, "believing such wire to be a rope, plaintiff's hand came in contact therewith," is not defective for failing to allege how and why plaintiff's hand came in touch with it. Hopkins v. Michigan Traction Co. [Mich.] 13 Det. Leg. N. 254, 107 N. W. 909. A declaration alleging that defendant negligently and unskillfully conducted itself in managing the said railroad and the car and train," etc., sufficiently particularizes the negligence, specially in view of Code Pub. Gen. Laws 1904, art. 75, § 24, subd. 36. Philadelphia, B. & W. R. Co. v. Allen, 102 Md. 110, 62 A. 245.

40. Hamilton v. Metropolitan St. R. Co., 114 Mo. App. 504, 89 S. W. 893.

41. A petition alleging facts which warrant the presumption of negligence is sufficient, at least to sustain an amendment inserting a direct charge of negligence. Keeton v. St. Louis, etc., R. Co., 116 Mo. App. 281, 92 S. W. 512.

42. An allegation that the track was a foot higher than the surface of the street is not an allegation that the track was not even with level of the street as required by Burn's Ann. St. 1901, § 5454. Indianapolis Traction & Terminal Co. v. Frazzell [Ind. App.] 77 N. E. 357. An allegation that, although it was three feet from the lower step to the ground, defendant **furnished no extra step** does not allege negligence. Id.

43, 44. Macon, etc., R. Co. v. Moore [Ga.] 54 S. E. 700.

45. A complaint alleging that plaintiff's intestate was ejected "near a trestle and almost in the yards of the said railroad company * * * in or near a swamp in the city of Macon," sufficiently identifies the place of expulsion. Macon, etc., R. Co. v. Moore [Ga.] 54 S. E. 700.

46. An amendment changing the location of the accident to conform to the proof is not objectionable as changing the cause of action. Georgia R. & Elec. Co. v. Reeves, 123 Ga. 697, 51 S. E. 610.

47. An allegation that before entering the train plaintiff asked the employes in charge thereof if it would stop at Buda, sufficiently designates the employes. International & G. N. R. Co. v. Hessler [Tex. Civ. App.] 95 S. W. 40. A complaint alleging that plaintiff's intestate was killed through the negligence of defendant's servants is sufficient without alleging what particular servants were negligent (Kansas City, etc., R. Co. v. Matthews, 142 Ala. 298, 39 So. 207), or what their duties were (Id.).

48. Wolfe v. Georgia R. & Elec. Co., 124 Ga. 693, 53 S. E. 239.

49. An averment that the wreck was caused by defective ties followed by an averment that the train left the track because of a broken wheel, while inconsistent, do not make the complaint bad. Southern R. Co. v.

plaintiff's complaint shows that he assumed the risk.[50] Contributory negligence must be alleged with the same particularity as is required of allegations of negligence.[51]

Issues, proof, and variance.[52]—Where several grounds of negligence are alleged it is not necessary that plaintiff prove them all.[53] As in other cases all material averments of the complaint[54] must be proved substantially as alleged,[55] but slight variance may be disregarded[56] or cured by amendment.[57] The better rule is that the

Roach [Ind. App.] 77 N. E. 606; Id. [Ind. App.] 78 N. E. 201.

50. Pittsburgh, etc., R. Co. v. Higgs, 165 Ind. 694, 76 N. E. 299.

51. In an action for the death of a passenger, a plea that the decedent was guilty of contributory negligence in that he alighted from a moving train in the night time without requesting it to stop is bad as it does not charge negligence. Kansas City, etc., R. Co. v Matthew, 142 Ala. 298, 39 So. 207. Allegation in answer that defendant **"promulgated a rule"** prohibiting passengers from riding on the engine held, in the absence of a special exception, to be equivalent to an allegation that rule was promulgated and was enforced, and hence to raise issue as to whether rule was in existence when accident occurred, rendering admissible evidence tending to show that rule was not in force, in view of Rev. St. 1895, art. 1193, providing that it shall not be necessary for plaintiff to deny special defenses. Missouri, etc., R. Co. v. Avis [Tex.] 15 Tex. Ct. Rep. 756, 93 S. W. 424.

52. See 5 C. L. 549.

53. Cain v. Atlantic Coast Line R. Co. [S. C.] 54 S. E. 244. Proof of the spreading of the rails from any one cause alleged is sufficient. Whipple v. Michigan Cent. R. Co. [Mich.] 12 Det. Leg. N. 905, 106 N. W. 690.

54. One riding on a through ticket need not prove the exact amount received by the road sued for injuries, even though a specific amount is alleged. Pittsburgh, etc., R. Co. v. Higgs, 165 Ind. 694, 76 N. E. 299. Although the petition alleged that plaintiff was injured by cinders negligently emitted from the engine "coming through a door opened by the conductor," the allegation as to the opening of the door is mere inducement and need not be submitted. St. Louis S. W. R. Co. v. Parks [Tex. Civ. App.] 14 Tex. Ct. Rep. 232, 90 S. W. 343. An allegation that the car had stopped when plaintiff attempted to board was mere matter of inducement, the negligence being in starting the car (Forrester v. Metropolitan St. R. Co., 116 Mo. App. 37, 91 S. W. 401).

55. Hamilton v. Metropolitan St. R. Co., 114 Mo. App. 504, 89 S. W. 893; Waller v. Wilmington City R. Co. [Del. Super.] 61 A. 874. Under a complaint pleaded on the theory that plaintiff was injured by the sudden starting of the car after it has come to a stop, recovery cannot be had where the proof shows that she attempted to alight from the moving car. Goldstein v. Metropolitan St. R. Co.; 98 N. Y. S. 862. In action for injuries to passenger who jumped from car to avoid impending collision, held no variance between allegation that wreck was in plain view of plaintiff and of defendant's servants, and proof that they had knowledge of it. McManus v. Metropolitan St. R. Co., 116 Mo. App. 110, 92 S. W. 176. Where plaintiff alleges entry on the train at V. in good faith as a passenger, with the tender of the proper fare, and his subsequent ejection, he cannot recover on the theory that he was a purchaser and holder of a ticket which he in good faith believed entitled him to transportation from an earlier station to his destination. Gulf, etc., R. Co. v. Riney [Tex. Civ. App.] 14 Tex. Ct. Rep. 804, 92 S. W. 54. Proof that plaintiff was injured while attempting to alight constitutes a fatal variance where the complaint alleges that she was hurled from her seat by running the car around a curve at negligent rate of speed. Scheu v. Union R. Co., 98 N. Y. S. 278. Where plaintiff alleges that the car had come to a standstill, and the proof shows that he attempted to board while it was still moving, there is a fatal variance. Wainwright v. Interurban St. R. Co., 48 Misc. 645, 96 N. Y. S. 114. Where the petition alleges negligence in starting the car after it had come to a stop and while plaintiff was alighting, and the proof shows that injury was received while attempting to alight while the car was still in motion, there is a fatal variance. Edelman v. Interurban St. R. Co., 95 N. Y. S. 527. Where in an action the wrong complained of was causing plaintiff to get off before reaching his destination, proof that plaintiff was a passenger and entitled to be carrier to a certain station and was wrongfully put off before reaching his destination, is not a fatal variance. Louisville & N. R. Co. v. Quinn [Ala.] 39 So. 756. Proof of a defective axle will not sustain a verdict where the negligence alleged was a broken wheel. Southern R. Co. v. Roach [Ind. App.] 77 N. E. 606.

56. The proving of a contract in an action sounding in tort is not a variance where its purpose is to establish the relation of carrier and passenger. Lake Shore & M. S. R. Co. v. Teeters [Ind.] 77 N. E. 599. Since a petition, alleging the purchase of a ticket, but that defendant's conductor in violation of plaintiff's rights as a passenger forced him to leave the train, set up a cause of action in contract and not in tort, there was no fatal variance between the pleading and proof that through the negligence of a prior conductor the ticket had been so punched as to render it useless at the time plaintiff was ejected, and tnat the conductor believed it to be his duty to reject the ticket. Southern R. Co. v. Hawkins [Ky.] 89 S. W. 258. There was no material variance where the petition stated the place of an accident to a passenger to be "at or near" a certain point and the evidence showed it to be fifteen or more feet west of that point. McCaffery v. St. Louis & M. R. Co., 192 Mo. 144, 90 S. W. 816. Where the complaint stated that a street car stopped at the east side of a crossing, and that by reason of defendant's negligence plaintiff was injured while attempting to

contract of carriage need not be proved strictly as laid when pleaded in a tort wise action only to show that plaintiff was a passenger, but the contrary has recently been held.[58]

Presumptions and burden of proof.[59]—The burden of proving negligence is on the plaintiff [60] and the burden of proving contributory negligence is generally on defendant. Contributory negligence must be established by a preponderance of the evidence,[61] and such burden does not shift on proof of facts raising a presumption.[62] Proof of an accident raising a presumption of negligence imposes upon the carrier the burden of rebutting it, and he may do so by plaintiff's evidence or by affirmative evidence.[63] Defendant may meet a presumtion with evidence only sufficient to make it equally probable that it was not due to negligence.[64] The burden of proving negligence rests upon plaintiff throughout the trial.[65] By application of the doctrine of res ipsa loquitur a presumption of negligence arises from the fact of collision,[66] or derailment,[67] or from any extraordinary act in the operation of the car,[68]

alight, it was immaterial whether the evidence showed that the car stopped at the east or west side of the crossing. Paris Transit Co. v. Alexander [Tex. Civ. App.] 14 Tex. Ct. Rep. 392, 90 S. W. 1119. There is no fatal variance between a complaint alleging that the decedent was violently thrown from the train and injured, and proof that he voluntarily stepped from the moving train and lost his footing and was thrown down. Kansas City, etc., R. Co. v. Matthews, 142 Ala. 298, 39 So. 207. There is no variance between a declaration charging that the train was operated by servants of defendant and proof that it was controlled by servants of another company, which is an agent of defendant. Chicago Terminal Transfer R. Co. v. Young, 118 Ill. App. 226. Proof held not to make a case within the averments of the complaint. Dolbee v. Detroit, etc., R. Co. [Mich.] 108 N. W. 99. There is no variance between an allegation that after the train had stopped and while plaintiff was alighting it was suddenly and negligently started with a jerk, and proof that the sudden jerk occurred before the train had come to a full stop, the gist of the negligence being the sudden jerking. Hopkins v. Chicago, etc., R. Co. [Wis.] 107 N. W. 330.

57. Where plaintiff alleged negligence in starting the train with a sudden jerk after it had come to a stop, and the proof showed that the jerk occurred before coming to a standstill, plaintiff was entitled to amend to conform to the proof, the latter issue being fully litigated. Hopkins v. Chicago, etc., R. Co. [Wis.] 107 N. W. 330.

58. Allegation of passage on street car between certain streets, and proof that it began and ended one block later, the place of the tort being included in either case. Lake St. El. R. Co. v. Collins, 118 Ill. App. 270.

59. See 5 C. L. 549.

60. The burden of proving negligence rests upon the plaintiff throughout the case. Lincoln Traction Co. v. Shepherd [Neb.] 107 N. W. 764. The fact that the opening of the gate raised a presumption of negligence did not shift the burden from plaintiff to prove negligence. Greer v. Union R. Co., 99 N. Y. S. 428. Plaintiff in personal injury action must make out his case by a preponderance of the evidence. Domenico v. El Paso Elec. R. Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 154, 90 S. W. 60. One relying upon the existence of certain facts to raise a presumption of negligence has the burden of establishing those facts. Lincoln Traction Co. v. Shepherd [Neb.] 107 N. W. 764. Where the issue is whether or not the car was negligently started while plaintiff was alighting, the burden is upon plaintiff. Id. Plaintiff must prove negligence by a preponderance of evidence where the accident does not raise a presumption of negligence. Chicago Union Traction Co. v. Mee, 218 Ill. 9, 75 N. E. 800.

61. El Paso Elec. R. Co. v. Kitt [Tex. Civ. App.] 14 Tex. Ct. Rep. 344, 90 S. W. 678. Not by a "preponderance of the evidence to the satisfaction of the jury" Id.

Note: The rule as to the burden of proving contributory negligence varies in the several states, and this conflict, which is in no manner peculiar to actions against carriers, is more fully illustrated in the cases cited in the topic, Negligence, 6 C. L. 773 [Ed.].

62. Dean v. Tarrytown, etc., R. Co., 99 N. Y. S. 250.

63. Metropolitan St. R. Co. v. Warren [Kan.] 86 P. 131.

64. Omaha St. R. Co. v. Boesen [Neb.] 105 N. W. 303.

65. Does not shift upon proof of derailment. Omaha St. R. Co. v. Boesen [Neb.] 105 N. W. 303. Proof of a derailment raises a presumption of negligence. Id.

66. Proof of a collision raises a presumption of negligence. Elgin, A. & S. Traction Co. v. Wilson, 217 Ill. 47, 75 N. E. 436. That a car was allowed to run into the one on which plaintiff was a passenger, held prima facie proof of negligence. Haas v. St. Louis, etc., R. Co. [Mo. App.] 90 S. W. 1155. One who is killed while riding on the running board may invoke the presumption. Abel v. Northampton Traction Co., 212 Pa. 329, 61 A. 915. Evidence of collision of two cars controlled by defendant casts upon it the burden of disproving negligence. O'Clair v. Rhode Island Co. [R. I.] 63 A. 238.

Collision with vehicle of third person: No presumption of negligence where street car collides with a wagon. Chicago Union Traction Co. v. Mee, 218 Ill. 9, 75 N. E. 800. No presumption where car collided with a fire engine. Wolf v. Chicago Union Traction Co., 119 Ill. App. 481. Proof of collision between

or from any defect in the carrier's facilities [69] when shown to have proximately caused the accident,[70] and, generally, the happening of an injurious accident raises a pre-

street car and truck raises a presumption of negligence on the part of the carrier. Houghton v. Market St. R. Co. [Cal. App.] 82 P. 972.

67. Davis v. Galveston, etc., R. Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 989, 93 S. W. 222; Western Maryland R. Co v Shivers, 101 Md. 391, 61 A. 618. In the absence of any explanation of the cause of a derailment wherein a passenger is injured, it is presumed that it was caused by the negligence of the carrier. Galveston, etc., R. Co. v. Green [Tex. Civ. App.] 14 Tex. Ct. Rep. 611, 91 S. W. 380. A passenger establishes a prima facie case by showing that the injuries sued for were caused by the derailment and overturning of the train in which he was a passenger. Illinois Cent. R. Co. v. Porter [Tenn.] 94 S. W. 666. The presumption of negligence arising from such a showing is not conclusive, but may be rebutted by showing that the injury arose from an unavoidable accident, or an occurrence which could not have been prevented by the highest applicable degree of care and foresight. Id. Proof of derailment raises a presumption of negligence. Indiana Union Traction Co. v. McKinney [Ind. App.] 78 N. E. 203. The happening of a wreck raises a presumption of negligence (Southern Pac. Co. v. Cavin [C. C. A.] 144 F. 348), and places the burden on the defendant to disprove negligence (Id.). Derailment raises a presumption of negligence. Cincinnati, I. & W. R. Co. v. Bravard [Ind. App.] 76 N. E. 899. Proof of derailment makes prima facie case of negligence. Brown v. Yazoo & M. V. R. Co. [Miss.] 41 So. 383.

68. Proof that plaintiff was thrown by a "sudden" jerk raises a presumption of negligence. Lomas v New York City R. Co., 97 N. Y. S. 658. Proof of premature starting of a car raises a presumption of negligence, even though it is not shown that the conductor gave the signal to start. Gregorio v. New York City R. Co., 97 N. Y. S. 373. Proof that the car was started with a jerk while plaintiff was alighting makes a prima facie case and imposes the burden upon defendant to disprove negligence. Joyce v. Los Angeles R. Co., 147 Cal. 274, 82 P. 204. Proof that plaintiff was injured while alighting from the car by a sudden forward jerk is sufficient to raise a presumption of negligence without proof of cause of such jerk. Renfro v. Fresno City R. Co. [Cal. App.] 84 P. 357. Evidence that cinders from the size of a pin head to that of a pea escaped from the engine and injured a passenger on the tenth car makes a prima facie case of negligence, either in not having a suitable spark arrester or in handling the engine. St. Louis S. W. R. Co. v. Parks [Tex. Civ. App.] 14 Tex. Ct. Rep. 232, 90 S. W. 343. Proof of sudden starting of the car while a passenger is alighting, resulting in injury, raises a presumption of negligence. Paul v. Salt Lake City R. Co. [Utah] 83 P. 563. Where a stopping car is started with a sudden jerk throwing a passenger, a presumption of negligence arises. Griffin v. Pacific Elec. R. Co. [Cal. App.] 82 P. 1084. Proof of a premature starting of the car while a passenger is alighting raises a presumption of negligence. Cody v. Market St. R. Co. [Cal.] 82 P. 666. The sudden starting with a jerk of the car will raise a presumption of negligence. Lincoln Traction Co. v. Shepherd [Neb.] 107 N. W. 764. Proof of an unusual explosion in the controller box of a street car raises a presumption of negligence. German v. Brooklyn Heights R. Co., 107 App. Div. 354, 95 N. Y. S. 112. Proof of a sudden jerk of the car does not of itself raise a presumption of negligence. Flynn v. Interborough Rapid Transit Co., 48 Misc. 529, 96 N. Y. S. 259. Mere falling of a window in a street car raises no presumption of negligence. Strembel v. Brooklyn Heights R. Co., 110 App. Div. 23, 96 N. Y. S. 903. The fact that plaintiff was injured by a sudden jolt of the train makes a prima facie case. Evansville & T. H. R. v. Mills [Ind. App.] 77 N. E. 608. Turning out of the lights while a passenger is alighting resulting in an injury, raises the statutory presumption of negligence. As an injury resulting from the running of the cars within Civ. Code 1895, § 2321, and also damage done by an agent within same act. Georgia R. & Elec. Co. v. Reeves, 123 Ga. 697, 51 S. E. 610. Evidence that the car came to a sudden stop and an iron came up through the seat, injuring the plaintiff, raises a presumption of negligence. Hebblethwaite v. Old Colony St. R. Co. [Mass.] 78 N. E. 477.

69. Proof that plaintiff was injured by stepping into an unguarded trolley pole hole in the path used by passengers transferring establishes a prima facie case. Colorado Springs, etc., R. Co. v. Petit [Colo.] 86 P. 121. Failing of a device to register fares raises a presumption of negligence. Weir v. Union R. Co., 98 N. Y. S. 268. Blowing out of the controller of a street car raises a presumption of negligence. Firebaugh v. Seattle Elec. Co., 40 Wash. 658, 82 P. 995. Where the deck of a boat falls while a passenger is rightfully upon it, the law presumes negligence. Instruction approved. Evers v. Wiggins Ferry Co., 116 Mo. App. 130, 92 S. W. 118. Passenger directed by collector of fares to go on hurricane deck, and who finds other passengers there and who is not ordered to go below and does not hear or know of general order to passengers to do so, is rightfully there, though it is not designed for accommodation of passengers (Id.), but this presumption is not conclusive and may be rebutted or explained away by proof that the carrier exercised proper care. Id. Instruction that falling was conclusive, that it was not built with that degree of care and strength which it was defendant's duty to exercise, held erroneous. Id. Proof that the accident was caused by the fender coming loose raises a presumption of negligence. Winter v. Interurban St. R. Co., 96 N. Y. S. 1009. Where an injury to a passenger is caused by a defect in the means of transportation, there is a presumption of negligence. Dougherty v. Pittsburgh R. Co., 213 Pa. 346, 62 A. 926. Not overcome by showing that the defective brake worked on a previous trip while in the same condition. Id.

70. The doctrine of res ipsa loquitur does not raise a presumption of negligence from

sumption of negligence and places the burden upon defendant to disprove negligence.[71] The fact that a passenger's injuries were received as the result of jumping from the car does not deprive him of the benefit of the doctrine of res ipsa loquitur where the circumstances justified him in jumping.[72] One who is on a train used for carrying passengers, in the absence of evidence to the contrary, presumed to be rightfully there as a passenger,[73] but one riding in a place not designed for the use of passengers has the burden of showing that he was rightfully there.[74] Likewise, one paying fare to an employe not ordinarily authorized to accept must prove the latter's authority.[75]

Admissibility of evidence[76] is governed by general rules.[77]

the fact of injury, but only when the facts causing the injury are known. The fact that a passenger caught her heel in the step while alighting and was injured does not come within the rule res ipsa loquitur so as to render it unnecessary to show negligence. Wilbur v. Rhode Island Co. [R. I.] 61 A. 601.

71. North Jersey St. R. Co. v. Purdy [C. C. A.] 142 F. 955. The fact that an unusual accident occurs without the fault of a passenger establishes a prima facie case against the carrier. Street car explosion. Brod v. St. Louis Transit Co., 115 Mo. App. 202, 91 S. W. 993. A showing of injury to a passenger without fault on his part while under the care of the carrier, and under circumstances which unexplained shows failure on its part to fully discharge its duty, raises a presumption of negligence which the carrier must overcome by proof satisfying the jury. That plaintiff, a passenger on a freight train, was thrown therefrom by unknown persons. Louisville & N. R. Co. v. Board [Ky.] 90 S. W. 944. Whether the presumption of negligence on the part of the carrier was overcome by the testimony of the conductor and brakeman on a freight train that they had nothing to do with plaintiff's being thrown off was for the jury. Id. The right of action that accrues to an injured passenger is founded in negligence, but from the character of the relation a presumption of negligence arises from the fact of injury that throws the burden on the carrier to show that it used the high degree of care required. Hamilton v. Metropolitan St. R. Co., 114 Mo. App. 504, 89 S. W. 893.

72. Firebaugh v. Seattle Elec. Co., 40 Wash. 658, 82 P. 995.

73. Anderson v. Missouri Pac. R. Co. [Mo.] 93 S. W. 394. Where it appeared that one killed in a collision, upon reaching the point to which he had purchased a ticket, remained in the coach, and that collision occurred while train was proceeding in direction of his home, held that it was not necessary, in order to justify submission of case to jury, to show by positive or direct evidence that he was a passenger, or that he intended to continue his journey beyond his original destination, but jury was justified in inferring that such was the fact. Id. Instruction held to require jury to find that deceased was a passenger as well as all the essential facts necessary to constitute him one, so that this question having been fairly submitted, it was no error to refuse requested instruction to same effect. Id.

74. The burden is on the shipper to show that the conductor had apparent authority to permit him to ride in the engine, and that he was ignorant that he was exceeding his authority. Illinois Cent. R. Co. v. Jennings, 217 Ill. 140, 75 N. E. 457.

75. Under a statute providing that no collector or conductor without a badge is authorized to accept fares, one paying to a brakeman without such badge must prove his authority to accept fares. Civ. Code, § 488. Wieland v. Southern Pac. Co. [Cal. App.] 82 P. 226.

76. See 5 C. L. 550.

77. Rules and ordinances: Where there is no evidence to show that the conductor of a street car was misled in signaling the motorman to cross railroad tracks by assuming that the train was running at the regulated rate, an ordinance limiting speed of train is immaterial. Chicago City R. Co. v. Shaw, 220 Ill. 532, 77 N. E. 139. On the issue of the negligence of a cross line, a speed ordinance, though repealed, is admissible if otherwise competent (Bragg v. Metropolitan St. R. Co., 192 Mo. 331, 91 S. W. 527), but cannot be invoked if no reliance was placed upon its being observed by the cross line (Id.). A rule of a street car company requiring the motorman "to see that no person is alighting" before starting his car to cross a railroad is admissible as bearing upon negligence in starting a car which had stopped at a crossing while plaintiff was alighting. Chicago City R. Co. v. Lowitz, 218 Ill. 24, 75 N. E. 755. Where defendant denied the happening of the accident and was permitted to prove that the conductor made no report, evidence of a rule requiring conductors to report accidents is admissible to strengthen the conductor's testimony. Field v. New York City R. Co., 109 App. Div. 831, 96 N. Y. S. 457. Where by special orders a freight train was given the right of way over a passenger train, and in passing injured, a passenger, the general rule requiring the freight to take the side track is inadmissible as showing negligence in not doing so. Illinois Cent. R. Co. v. Proctor [Ky.] 89 S. W. 714.

Custom: Where plaintiff was injured while alighting at a stop not intended for that purpose, evidence of a custom for passengers to alight there is admissible to charge defendant with care in regard to plaintiff. Chicago City R. Co. v. Lowitz, 218 Ill. 24, 75 N. E. 755. Evidence of a custom to carry children accompanied by parents free is admissible to establish the relation of carrier and passenger in favor of a child so traveling. Ball v. Mobile Light & R. Co. [Ala.] 39 So. 584. In an action for injuries received while alighting, evidence of a regular custom to stop at

that point for receiving and discharging passengers is material. Birmingham R., Light & Power Co. v. Enslen [Ala.] 39 So. 74. Where a carrier shows a custom of taking up tickets for the purpose of showing that the mistake could not have been made, specific instances of a similar mistake are admissible in rebuttal. Parrott v. Atlantic & N. C. R. Co., 140 N. C. 546, 53 S. E. 432.

Res gestae: In an action for wrongful ejection, a remark by the brakeman that "she was a whore off Dewees street," after the passenger had left the car, is not admissible as res gestae. Southern R. Co. v. Thurman [Ky.] 90 S. W. 240. Where a passenger was insulted by the carrier's servants, an exclamation "Mamma, let's get out of here," made by one of her children at the time, is admissible as a part of the res gestae and as indicative of the acts. Gulf, etc., R. Co. v. Luther [Tex. Civ. App.] 14 Tex. Ct. Rep. 195, 90 S. W. 44. In an action to recover for a refusal to validate a ticket, evidence that plaintiff consulted her kinsman, and the circumstances under which she did so, after the refusal, is admissible. Baltimore, etc., R. Co. v. Hudson [Ky.] 92 S. W. 947. The failure of a passenger, ejected because of an erroneously punched transfer ticket, to make explanation may be considered as res gestae bearing upon his good faith in accepting and using the ticket. Cleveland City R. Co. v. Connor [Ohio] 78 N. E. 376. Evidence of abusive language by the conductor while ejecting a passenger is admissible. McGhee v. Cashin [Ala.] 40 So. 63. It is not error to permit a witness to testify as to the injuries he received in the wreck which caused the death for which suit is brought if such testimony is merely descriptive of the wreck. Neckles v. Seaboard Air Line R. Co. [S. C.] 54 S. E. 255.

Prior and subsequent acts and conditions: In an action for wrongful ejectment before reaching destination, evidence that the engine proceeded to a water tank near the destination is immaterial. Louisville & N. R. Co. v. Quinn [Ala.] 39 So. 756. Where in an action for injuries by cinders, the defendant offers evidence that the engines never worked steam and hence did not emit cinders at the place of accident, evidence that a witness on a similar train caught cinders in his hat was admissible. St. Louis S. W. R. Co. v. Parks [Tex. Civ. App.] 14 Tex. Ct. Rep. 232, 90 S. W. 343. Evidence that defendant has settled with another person for injuries received in the same wreck is admissible as showing that it recognizes its liability. Nickles v. Seaboard Air Line R. Co. [S. C.] 54 S. E. 253. It is not error to admit testimony of a second train running over the trestle into the wrecked train, although not alleged where it is clear that it did not contribute to the injury but was merely to show the effect upon the trestle. Id. In an action for damages for injuries received from exposure to cold while plaintiff was driving to his destination after train had failed to stop for him, plaintiff's testimony that he had been in the habit of driving around at night held admissible. International & G. N. R. Co. v. Addison [Tex. Civ. App.] 15 Tex. Ct. Rep. 675, 93 S. W. 1081. Absence of accidents at similar places is not admissible to disprove that a particular place was dangerous. Mobile Light & R. Co. v. Walsh [Ala.] 40 So. 560 Evidence that people pass and repass at a certain point is irrelevant on the issue whether it was a place for receiving passengers. Smith v. Birmingham R., Light & Power Co. [Ala.] 41 So. 307. In a suit for injuries received while alighting from a car, where the evidence is conflicting as to the cause of the accident, evidence as to regular stopping places and their relation to the rules of the company in stopping and starting is admissible. Moore v. Woonsocket St. R. Co. [R. I.] 63 A. 313. Where in an action for injuries received while alighting defendant has introduced plans showing the distances between certain "white poles," evidence is admissible to show that these poles were regular stopping places. Id. Condition of the cars after the collision may be shown as bearing upon the speed of the train. Elgin, A. & S. Traction Co. v. Wilson, 217 Ill. 47, 75 N. E. 436.

Acts and declarations of passenger: Statements made by plaintiff of the manner in which the accident happened, made several minutes afterwards and after she had walked to her destination some two hundred or three hundred yards, are not admissible as res gestae. McBride v. Georgia R. & Elec. Co. [Ga.] 54 S. E. 674. A statement made by a passenger just injured that her foot slipped is not rendered inadmissible by a subsequent proposal to compromise. Id.

Acts and declarations of carrier's employes: Proof that the mortorman stated immediately after the accident that he was under the impression that plaintiff had previously alighted is admissible in proof of plaintiff's claim that he was thrown off by a jerk of the car. McDonough v. Boston El. R. Co. [Mass.] 78 N. E. 141. Statements of the conductor made the next day as to condition of an ejected passenger and as to payment of fare is not admissible. Weiland v. Southern Pac. R. Co. [Cal. App.] 82 P. 226. Held not harmless. Id. Where, in an action against a carrier for carrying past destination, it is shown that plaintiff boarded a train not scheduled to stop at that point plaintiff may show that he was directed to take such train by an agent of defendant. Trapp v. Southern R. Co., 72 S. C. 343, 51 S. E. 919. In an action for injuries due to the drunken condition of the engineer, a statement by the conductor that it was dangerous to go in the car was not too uncertain as to the source of danger and was admissible. Puett v. Caldwell & N. R. Co. [N. C.] 53 S. E. 852. Evidence that when defendant's inspector ordered plaintiff off he was gruff and insulting, and of certain language used by him to another passenger, held admissible as characterizing the conduct of the inspector and showing that the language was used in the presence of other passengers. Southern Pac. Co. v. Bailey [Tex. Civ. App.] 14 Tex. Ct. Rep. 921, 91 S. W. 820.

Evidence as to ticket or contract: In a suit for wrongful ejectment for failure to identify as the original purchaser of the ticket, evidence of conductor's knowledge that it had been offered for sale is admissible upon the issue whether he ought to have been satisfied with the identification made. Brigham v. Southern Pac. Co. [Cal. App.] 84 P. 306. Although it is indorsed upon a ticket that it is a free pass, parol evidence is admissible to show a valuable consideration. Nickles v. Seaboard Air Line R. Co. [S. C.] 54 S. E. 255. Where a conductor refused to accept a ticket,

Sufficiency of evidence.[78]—Plaintiff's case being usually made out by the presumption arising from the fact of accident,[79] the sufficiency of evidence in actions for injury is usually determined by the adequacy of the proof offered to rebut such presumption,[80] or by a consideration of physical probabilities tending to discredit

evidence that plaintiff showed the ticket to others upon being ejected, and their description thereof when taken with other evidence tending to identify it, is admissible. McGhee v. Cashin [Ala.] 40 So. 63. Evidence as to where a ticket has been since the alleged wrongful ejectment is admissible where its identity is in issue. Id. Evidence that deceased had money with which to pay fare is admissible as tending to show that he had an intention of becoming a passenger. Chicago Union Traction Co. v. Lundahl, 117 Ill. App. 220. Where the question was whether a boy was trying to become a passenger or trying to "flip" a car, it was material to show the possession of car fare. Id.

Opinions and conclusions: Conclusion that a train stopped a sufficient length of time for passengers to board, properly excluded. Houston, etc., R. Co. v. Schuttee [Tex. Civ. App.] 14 Tex. Ct. Rep. 725, 91 S. W. 806. Railway conductor of fourteen years' experience could testify that he had nothing to do with looking after the sleeping cars, where it was sought to hold the sleeping car company liable over to the railroad company for injury to a passenger. Pullman Co. v. Norton [Tex. Civ. App.] 14 Tex. Ct. Rep. 869, 91 S. W. 841. A person who has been in the service as a brakeman and conductor for twelve years was qualified to testify that the jar resulting from the alleged negligent coupling was not unusual. Mullen v. Galveston, etc., R. Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 963, 92 S. W. 1000. Testimony that it was the starting bell and not the gripman's gong that was sounded is not objectionable as being a conclusion, the witness being familiar with the two. Kohr v. Metropolitan St. R. Co. [Mo. App.] 92 S. W. 1145. Whether a waiting room was suitable and convenient is not a subject of opinion evidence. Illinois Cent. R. Co. v. Com. [Ky.] 90 S. W. 602. An expert may testify as to the efficiency of a spark arrester in use at the time of an alleged injury from cinders. St. Louis S. W. R. Co. v. Parks [Tex. Civ. App.] 14 Tex. Ct. Rep. 232, 90 S. W. 343. Evidence of plaintiff's appearance, as to whether he seemed to be suffering and what he was doing is admissible and not objectionable as opinion or conclusion. Mullen v. Galveston, etc., R. Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 963, 92 S. W. 1000. A question whether it was physically possible in the night time for the motorman to see a passenger alighting, as bearing upon negligence in so starting the car, is objectionable as opinion. Chicago City R. Co. v. Lowitz, 218 Ill. 24, 75 N. E. 755. Testimony that deceased was not thrown off by a jerk is not objectionable as a conclusion when following testimony that the car was running smoothly. Smith v. Birmingham R., Light & Power Co. [Ala.] 41 So. 307. When there is evidence that the two passengers on the train were thrown down by a jerk, and a witness had testified that there was no unusual jerk, it is not error to permit a question whether he considered a jerk sufficient to throw all the passengers an ordinary one. Southern R. Co. v. Branyon [Ala.] 39 So. 675. A statement as to speed of a car, "Well, it would be hard to judge that, because it was just started and could not have been running fast," is inadmissible, being vague and a conclusion of fact from another fact. Birmingham R., Light & Power Co. v. Rutledge, 142 Ala. 195, 39 So. 338. Where a wreck was caused by the giving way of a trestle, an expert may testify as to the condition of the trestle but cannot give his opinion as to the cause of the wreck. Nickles v. Seaboard Air Line R. Co. [S. C.] 54 S. E. 255. A conductor may testify as an expert as to how long it would ordinarily take for a passenger to board a train, and questions of a similar nature. Seaboard Air Line R. Co. v. Bradley [Ga.] 54 S. E. 69. The opinion of a nonexpert witness as to the safety of a described embankment is not permissible in an action for injuries due to a wreck caused by caving of a bank. Cain v. Atlantic Coast Line R. Co. [S. C.] 54 S. E. 244.

78. See 5 C. L. 551.

79. See ante this section.

80. Evidence held insufficient to overcome the presumption of negligence arising from the nature of the accident. Cincinnati, I. & W. R. Co. v. Bravord [Ind. App.] 76 N. E. 899. Evidence in an action for personal injuries received while boarding a car held sufficient to sustain a finding of actionable negligence. Schmitt v. St. Louis Transit Co., 115 Mo. App. 445, 90 S. W. 421. Where evidence of defendant failed to explain the cause of explosion of controller, and plaintiffs showed several possible causes which might have been controlled, it is insufficient to overcome presumption of negligence. Firebaugh v. Seattle Elec. Co., 40 Wash. 658, 82 P. 995. Verdict not disturbed as against physical facts because a passenger alleged to have been thrown off a car by a quick curve from north to west was found lying six feet to the east of the track. Neumann v. St. Louis Transit Co., 115 Mo. App. 259, 90 S. W. 1165. Evidence based upon actual measurement held sufficient to show that step of the car was not over fourteen or fifteen inches as against estimates that it was two or two and one-half feet high. Truesdell v. Erie R. Co., 99 N. Y. S. 694. Evidence held insufficient to show that the door of the car closed upon plaintiff through any negligence of defendant. Masesco v. Interborough Rapid Transit Co., 99 N. Y. S. 345. Evidence of negligence in maintaining platform insufficient to sustain the verdict. Crowe v. Michigan Cent. R. Co. [Mich.] 12 Det. Leg. N. 893, 106 N. W. 395. Evidence held to show no negligence in the construction of the car, operation of the train, or in care of the premises. Ware v. Illinois C. R. Co., 119 Ill. App. 456. Evidence held insufficient to show that warning as to space between platform and train was not given. Coogan v. Interborough Rapid Transit Co., 99 N. Y. S. 382. Under the evidence question of whether collision was due to gross negligence of defendant's employes, held for the jury. St. Louis S. W. R. Co. v. Fowler [Tex. Civ. App.] 93 S. W. 484.

Sudden starting of car: Evidence held in-

plaintiff's account of the accident.[81] On issues not raising any presumption, such as ejection of passenger,[82] refusal to cary,[83] failure to heat cars, [84] assaults by employes,[85] or collision with the vehicles of others,[86] sufficiency of evidence is determined according to the presence of a fair preponderance, and a like rule obtains as to proof of contributory negligence.[87] A palpable mistake in plaintiff's testimony will not support a finding of contributory negligence, though if true it showed that the act of the carrier could not have caused the particular injury.[88]

Questions for jury.—Whether, under facts leading to different inference, one was a passenger [89] or had quit that relation [90] is a question of fact, but the evidence

sufficient. Lillienthal v. New York City R. Co., 95 N. Y. S. 593; Southern R. Co. v. Johnson [Ala.] 39 So. 376; Tyrrell v. Metropolitan St. R. Co., 96 N. Y. S. 490; Chicago Union Traction Co. v. Straud, 114 Ill. App. 479; Quick v. Wyandotte & D. R. R. Co. [Mich.] 13 Det. Leg. N. 21, 107 N. W. 104; Greehy v. Metropolitan St. R. Co., 98 N. Y. S. 274; Maurer v. Brooklyn Heights R. Co., 96 N. Y. S. 1065; Gionella v. New York City R. Co., 96 N. Y. S. 1030; Vonderahe v. Metropolitan St. R. Co., 109 App. Div. 28, 95 N. Y. S. 1048; Joyce v. Los Angeles R. Co., 147 Cal. 274, 82 P. 204. Evidence held sufficient. Lincoln Traction Co. v. McCarty [Neb.] 107 N. W. 1021; Kitler v. People's St. R. Co., 27 Pa. Super. Ct. 602.

81. Testimony of plaintiff that he was thrown ten feet by the starting of the standing car held not so physically impossible as to show that he must have been attempting to board the car while moving, especially where other evidence tends to show that he was not thrown ten feet. Schmitt v. St. Louis Transit Co., 115 Mo. App. 445, 90 S. W. 421. Evidence of plaintiff as to the manner in which the injury was received held not so improbable as to authorize the court to direct a verdict. Chicago City R. Co. v. Henry, 218 Ill. 92, 75 N. E. 758. Plaintiff's evidence as to the manner in which he received his injuries held so against physical facts as to be insufficient to sustain a verdict. Peat v. Chicago, etc., R. Co. [Wis.] 107 N. W. 355. Evidence of plaintiff that he was injured by a large stone rolling down the embankment and striking his arm inside the car and bounding out again is not impossible as a matter of law, but is for the jury. Goller v. Tonda, J. & G. R. Co., 96 N. Y. S. 483. Where in an action for injuries to a passenger the evidence was conflicting as to whether plaintiff fell in the same direction the car was moving, the physical facts did not, as a matter of law, disprove plaintiff's contention that she was thrown off by a sudden start. Gharst v. St. Louis Transit Co., 115 Mo. App. 403, 91 S. W. 453. Evidence that plaintiff was injured by sudden stopping of train, contradicted by the physical fact that plaintiff was thrown perpendicular to the line of motion held insufficient. Southern R. Co. v. Hill [Ala.] 39 So. 987.

82. Evidence held sufficient to go to the jury upon the question of whether deceased was ejected or accidentally fell from train. Louisville & N. R. Co. v. Perkins [Ala.] 39 So. 305. Finding for plaintiff upheld. Id. Evidence held sufficient to show that plaintiff was ejected from moving car. Hirte v. Eastern Wis. R. & Light Co. [Wis.] 106 N. W. 1068.

83. Where there is evidence that berths were sold to others after plaintiff was refused, and that he was obliged to sit up all night, it is error to grant a nonsuit. Patterson v. Old Dominion S. S. Co., 140 N. C. 412, 53 S. E. 224.

84. Evidence held sufficient to support a finding that the car was not properly heated and that it was the proximate cause of plaintiff's condition. Missouri, etc., R. Co. v. Byrd [Tex. Civ. App.] 14 Tex. Ct. Rep. 65, 89 S. W. 991.

85. Evidence held sufficient to sustain a finding of rape upon a passenger by brakeman. Garvik v. Burlington, etc., R. Co. [Iowa] 108 N. W. 327.

86. Evidence held sufficient to show negligence in attempting to run car by a truck and colliding therewith. Houghton v. Market St. R. Co. [Cal. App.] 82 P. 972; Cicero & P. St. R. Co. v. Reiser, 115 Ill. App. 146. Evidence held insufficient to show that the collision with the wagon was due to negligent operation of the car. Freeland v. Brooklyn Heights R. Co., 109 App. Div. 651, 96 N. Y. S. 251.

87. Evidence held sufficient to show contributory negligence in alighting from moving car. Vonderahe v. Metropolitan St. R. Co., 109 App. Div. 28, 95 N. Y. S. 1048. Evidence held sufficient to sustain a finding that plaintiff was not guilty of contributory negligence in crossing tracks to reach the station where the approaching train was accustomed to stop before reaching the crossing. Cranch v. Brooklyn Heights R. Co., 107 App. Div. 341, 95 N. Y. S. 169. Evidence held sufficient to sustain a finding that plaintiff was not guilty of contributory negligence in alighting. Lincoln Traction Co. v. McCarty [Neb.] 107 N. W. 1021.

88. Evidence held to show that plaintiff was mistaken in saying that she was not thrown off her balance when the car started, and such testimony could not be relied upon to show contributory negligence in boarding. New v. St. Louis & S. R. Co., 114 Mo. App. 379, 89 S. W. 1043.

89. Question whether or not one claiming to have made arrangements with conductor to be carried free was a passenger, held under the evidence to be one of fact for the jury. St. Louis S. W. R. Co. v. Fowler [Tex. Civ. App.] 93 S. W. 484. Where there is testimony that "there were about seven or eight passengers on the car, and plaintiff was one," it is sufficient to go to the jury whether plaintiff, a child with his mother for whom no fare had been paid, was a passenger. Ball v. Mobile Light & R. Co. [Ala.] 39 So. 584.

90. Court may declare the relation ended **as a matter of law** where it clearly appears

may present a question of law. Whether a rule excluding passengers is reasonable is a question for the court,[91] but whether circumstances existed, such as to authorize the conductor to waive the condition that a passenger must ride on a caboose, was for the jury.[92] The question whether a provision that transfers shall be good only at point of intersection is reasonable is one of law.[93] Questions of negligence dependent on evidence are for the jury,[94] except in cases where there is no conflict and no room for different minds to draw different conclusions.[95] Whether the conductor's words "I am going; you had better get on the train" were a warning or an invitation is a question for the jury.[96]

Instructions [97] must conform to the issues made by the pleadings [98] and be based on the evidence,[99] and must not ignore any issue or theory raised by the pleadings

that plaintiff loitered for ten or fifteen minutes talking with friends. Glenn v. Lake Erie & W. R. Co., 165 Ind. 659, 75 N. E. 282.

91. Pullman Co. v. Krauss [Ala.] 40 So. 398.

92. Error to instruct as a matter of law. Illinois Cent. R. Co. v. Jennings, 217 Ill. 140, 75 N. E. 457.

93. Hanley v. Brooklyn Heights R. Co., 96 N. Y. S. 249. Where it is undisputed that a passenger boarded the car a block from the point of intersection with the line issuing her transfer, it is error to submit the question to the jury whether there was a substantial variation from the rule. Id.; Hanley v. Brooklyn Heights R. Co., 96 N. Y. S. 249.

94. Whether defendant's servants were guilty of negligence in failing to hold train long enough to enable one who had been directed by conductor to obtain a ticket or pass at a certain station to do so, held for the jury. Johnson v. Texas Cent. R. Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 807, 93 S. W. 433. Whether defendant was guilty of negligence in maintaining a platform or walk constructed of loose gravel and stone, held for the jury. Id. Whether the failure to keep a switch locked or guarded is negligence is a question for the jury. Elgin, A. & S. Traction Co. v. Wilson, 217 Ill. 47, 75 N. E. 436. Whether it was negligence for the conductor not to aid a one-armed man aboard the train is a question for the jury. Talbert v. Charleston & W. C. R. Co., 72 S. C. 137, 51 S. E. 564. Where plaintiff's evidence tends to overcome the presumption of negligence on the part of defendant arising from the collision with the bulkhead, negligence becomes a question for the jury. Prethrow v. West Jersey & S. R. Co. [Pa.] 63 A. 415. Where a ticket contained a provision in small type that the local ticket agent should not designate whether the berth sold was upper or lower, but he contracted for a lower, it was for the jury to say whether plaintiff was negligent in not discovering the condition. Aplington v. Pullman Co., 110 App. Div. 250, 97 N. Y. S. 329. In an action for personal injuries from fire, the question whether plaintiff was guilty of contributory negligence in remaining in the car to rescue property is for the jury. Hess v. Baltimore & O. R. Co., 28 Pa. Super. Ct. 220.

95. Johnson v. Texas Cent. R. Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 807, 93 S. W. 433.

96. Talbert v. Charleston & W. C. R. Co., 72 S. C. 137, 51 S. E. 564.

97. See 5 C. L. 553.

98. Where the complaint alleged that the car had fully stopped before plaintiff attempted to board, and the only evidence that it was not stopped was plaintiff's statement on cross-examination that "it might have been moving a little bit," an instruction on contributory negligence was error. Wainwright v. Interurban St. R. Co., 48 Misc. 645, 96 N. Y. S. 114. Where petition charged that no precaution was taken by the street car company to ascertain the coming of a train, it was not error to submit the question whether the company kept a lookout. Galveston, etc., R. Co. v. Vollrath [Tex. Civ. App.] 13 Tex. Ct. Rep. 777, 89 S. W. 279. By submitting the question whether there was reasonable ground for leaving the street car after it had moved off the railroad track, the court did not assume that plaintiff had reasonable ground for leaving the car while on the track. Id. The giving of an instruction that the fact that a common carrier is not an insurer does not relieve it from exercising the highest degree of care, etc., is error when not related to the issues. Chicago Union Traction Co. v. O'Brien, 219 Ill. 303, 76 N. E. 341. Instructions held erroneous as not limiting the findings of negligence to that alleged in the petition. Hamilton v. Metropolitan St. R. Co., 114 Mo. App. 504, 89 S. W. 893. Where the complaint alleges that the conductor was acting within the scope of his authority when he failed to stop for plaintiff, an instruction that it was not his duty to watch for stopping signals is inapplicable. Milhouse v. Southern R. Co., 72 S. C. 442, 52 S. E. 41. An instruction as to the obligation of a passenger to produce a ticket within a reasonable time after demand by the conductor, and the right of the carrier to eject him upon failure so to do, held to be justified by the pleadings and evidence. Terre Haute & I. R. Co. v. Pritchard [Ind. App.] 76 N. E. 1070. Not error to refuse to instruct that failure to stop at a certain street could not be considered the proximate cause of the injury where neither the pleadings or evidence tended to raise such a claim, and other instructions fully cover the point. Cody v. Market St. R. Co. [Cal.] 82 P. 666. Where the petition alleges a continuous assault committed upon him while being ejected, an instruction authorizing a recovery for an independent assault after ejectment is erroneous. McQuerry v. Metropolitan St. R. Co. [Mo. App.] 92 S. W. 912.

99. An instruction that if deceased had frequently passed over the road it would

and evidence.[1] Issues which the evidence excludes should be excluded by an appropriate instruction.[2] Instructions should not be misleading,[3] inconsistent,[4] or argu-

justify an inference that he was aware of the space between the cars held properly refused where there was nothing to show how frequently he had passed. Georgetown & T. R. Co. v. Smith, 25 App. D. C. 259. Evidence that the motorman on an approaching car gave warning to a passenger on the other to withdraw his arm is sufficient to authorize an instruction on liability after discovering the perilous position of another due to his negligence. Id. Witnesses having testified that they saw plaintiff fall from the train, an instruction that if plaintiff fell without fault of either himself or defendant, no recovery can be had, was proper. Harvey v. Chicago & A. R. Co. [Ill.] 77 N. E. 569. Where the petition alleges specifically that plaintiff was thrown from the car, an instruction on the theory that he was compelled to jump is erroneous. Pensacola Elec. T. R. Co. v. Haussman [Fla.] 40 So. 196. Where the evidence shows that the conductor told a passenger that he would rather she would get off at a certain point, an instruction that if the conductor told the wife that he would rather she would get off; and she was induced by the statement to get off, there could be no recovery, is not objectionable as being abstract or as singling out parts of the testimony. Louisville & N. R. Co. v. Quinn [Ala.] 39 So. 616. Where the evidence shows a direct wrong on the part of the conductor, an instruction predicating a recovery upon his negligence is properly refused. Louisville & N. R. Co. v. Quinn [Ala.] 39 So. 617. An instruction respecting liability where a passenger was injured by a fall due to catching her foot in her skirt, properly refused where there was no evidence of such fact. Mobile Light & R. Co. v. Walsh [Ala.] 40 So. 560. An instruction as to negligence in running by the usual place erroneous as ignoring evidence of a request by passenger to back up to the usual place. Id. An instruction that the jury must find for defendant if they believe that intestate was not thrown off by the conductor is properly refused where the evidence tended to show that the ejection was not by conductor alone. Louisville & N. R. Co. v. Perkins [Ala.] 39 So. 305. Evidence that plaintiff was a passenger held sufficient to justify an instruction as to the duty owed a passenger. Chicago Union Traction Co. v. O'Brien, 219 Ill. 303, 76 N. E. 341. Instruction that neither of the companies had a right to tender back the amount paid by plaintiff for her berth and then compel her to transfer to a chair car, held not objectionable on ground that there was no evidence that sleeping car company ever made such a tender, where evidence showed that tender was made by train conductor in presence of Pullman conductor, and that the two were acting in concert. Pullman Palace Car Co. v. Hocker [Tex. Civ. App.] 15 Tex. Ct. Rep. 330, 93 S. W. 1009. When the evidence does not show any physical fact rendering it impossible for the accident to have occurred from defendant's negligence, it is not error to refuse an instruction that the finding must be in accordance with the physical facts. Schmitt v. St. Louis Transit Co., 115 Mo. App. 445, 90 S. W. 421. Not error to instruct as to contributory negligence where the jury might infer it from the plaintiff's evidence. Weaver v. Pennsylvania R. Co., 212 Pa. 632, 61 A. 1117.

1. Where plaintiff was injured by being thrown from an open car and there is evidence of considerable unevenness in track, it is error not to instruct as to the duty of the carrier in respect to roadbed. Ball v. Interurban St. R. Co., 96 N. Y. S. 739. An instruction ignoring a count charging negligent speed properly refused where there is evidence tending to support such count. Alton Light & Traction Co. v. Oller, 217 Ill. 15, 75 N. E. 419. Proper to instruct as to all essential elements of plaintiff's right of recovery. An instruction that plaintiff cannot recover "unless he establishes that he was a passenger by a preponderance of evidence" is erroneous where he might recover without such relation existing. Morris v. Chicago Union Traction Co., 119 Ill. App. 527. Where plaintiff claims that she was injured while boarding a train by a sudden jerking, it is not error to instruct as to the care she should have used, though the only defense is that no accident whatever occurred. Weaver v. Pennsylvania R. Co., 212 Pa. 632, 61 A. 1117. Where a declaration sets out two counts, one charging negligence in running at a high rate of speed, and instruction ignoring such count, properly refused. Alton Light & Traction Co. v. Oller, 119 Ill. App. 181. Instruction held not objectionable as ignoring issue that if plaintiff made arrangement with conductor that he should be carried free, it was induced by false representations. St. Louis S. W. R. Co. v. Fowler [Tex. Civ. App.] 93 S. W. 484. An instruction held not erroneous as precluding defendant from showing that no injury was received, or if received was due to contributory negligence, special when considered with the whole charge. Atlantic & B. R. Co. v. Johnson [Ga.] 54 S. E. 91. Nor as leaving the determination of the issues to the enlightened consciences of the jury. Id. Where defendant's train overshot plaintiff's station half a mile, and he voluntarily left the train and walked back, there was nothing to indicate that plaintiff was humiliated, and an instruction authorizing the jury to award damages for humiliation was erroneous. St. Louis S. W. R. Co. v. Knight [Ark.] 88 S. W. 1035. Evidence held not to raise issue that plaintiff's suffering resulted from a previous injury so as to require special charge on that subject. St. Louis S. W. R. Co. v. Johnson [Tex. Civ. App.] 15 Tex. Ct. Rep. 813, 94 S. W. 162. An instruction as to burden of proof and presumptions of negligence held not erroneous as withdrawing the issue whether plaintiff was injured by starting of car or by attempting to alight from the moving car, especially in view of other instructions given. French v. Pacific Elec. R. Co. [Cal. App.] 82 P. 395.

2. Where the complaint alleges the use of a defective car, but there is no evidence of any defect and the accident was shown to have been caused by a wire overhead, it is error to refuse a charge that there was no evidence of a defective car. Dean v. Tarrytown, etc., R. Co., 99 N. Y. S. 250.

3. An instruction that the fact that a car-

mentative in form,[5] and must not invade the province of the jury [6] or assume the truth of matters in dispute,[7] or single out and give undue prominence to particular matters.[8] The charge is to be construed as a whole, and defects and omissions in

rier is bound to exercise a high degree of care does not "in any degree" relieve a passenger from the duty to use ordinary care, is not objectionable as tending to mislead the jury in believing that a passenger must use a high degree of care. Harvey v. Chicago & A. R. Co. [Ill.] 77 N. E. 569. Instruction that it was the duty of sleeping car company to furnish transportation to point named held not erroneous, the use of the word "transportation" not being misleading. Pullman Palace Car Co. v. Hocker [Tex. Civ. App.] 15 Tex. Ct. Rep. 330, 93 S. W. 1009. An instruction that a passenger carried beyond his destination has no right to remain on the car until its return trip is not misleading as justifying the use of the dangerous weapon employed in ejecting him. Powell v. Wiley [Ga.] 54 S. E. 732. Instruction defining proximate cause held misleading as not being the law applicable to the facts. Gulf, etc., R. Co. v. Turner [Tex. Civ. App.] 15 Tex. Ct. Rep. 224, 93 S. W. 195.

4. A charge declaring valid a contract requiring a shipper of stock to ride in the caboose, and making its violation prima facie negligence in case of injury, and a further charge to find for plaintiff if he acted prudently in riding upon the engine, held not inconsistent. Missouri, etc., R. Co. v. Avis [Tex. Civ. App.] 14 Tex. Ct. Rep. 519, 91 S. W. 877.

5. An instruction that an alighting passenger must be observant, heed what was going on about her, notice whether or not the train was standing, observe when it started and to protect herself by the hand railing, objectionable as argumentative. O'Dea v. Michigan Cent. R. Co. [Mich.] 12 Det. Leg. N. 718, 105 N. W. 746. An instruction that no one has a right to leap from a moving train in the night time at an unlighted place, because he is being carried beyond his destination with expectation of recovering for the injuries received, properly refused as argumentative and abstract. Kansas City, etc., R. Co. v. Matthews, 142 Ala. 298, 39 So. 207. An instruction that if the intestate failed to do what a reasonably prudent man would have done under the circumstance * * * he cannot recover, properly refused as failing to hypothesis that his negligence contributed to his injuries. Id. An instruction that there was no evidence tending to show any negligence on the part of the motorman, which was the proximate cause of plaintiff's injury, properly refused as stating no principle of law and as argumentative. Mobile Light & R. Co. v. Walsh [Ala.] 40 So. 560.

6. Plaintiff's intestate was killed while passing from a coach placed on a side track to the station across from it. Held, an instruction that if defendant backed an engine between the coach and the platform without guard or lookout, and without giving signals or warnings such as would attract the attention of a man of ordinary prudence rightfully passing between the coaches and the platform, defendant would be guilty of negligence, was not erroneous in that the word "guard" was used, though the statute only requires a look out to be kept, nor as assuming that decedent was rightfully on the track, when taken in connection with other instructions. St. Louis, etc., R. Co. v. Cleere [Ark.] 88 S. W. 995. Court should not charge that a specific act is or is not a discharge of the duty imposed by law. An instruction that it was not the duty of the conductor to see that the platforms of the coaches were clear before starting, properly refused. Seaboard Air Line R. Co. v. Bradley [Ga.] 54 S. E. 69. Court should not instruct that certain facts constitute negligence, such facts not constituting negligence per se. Macon R. & L. Co. v. Vining, 123 Ga. 770, 51 S. E. 719. Instructions construed as charging negligence as a matter of law in attempting to alight from a moving car. Paul v. Salt Lake City R. Co. [Utah] 83 P. 563. An instruction that it was the duty of the defendant street car company to provide a reasonably safe place for passengers is not objectionable as taking the question whether the place was reasonably safe from the jury. Macon R. & Light Co. v. Vining, 123 Ga. 770, 51 S. E. 719. Instruction that the conductor had no authority to waive the contract requiring the shipper of stock to remain in the caboose was properly refused where the question was controverted in the evidence. Missouri, etc., R. Co. v. Avis [Tex. Civ. App.] 14 Tex. Ct. Rep. 519, 91 S. W. 877. Requested instruction as to showing necessary to rebut presumption arising from derailment held properly refused as on the weight of the evidence. Davis v. Galveston, etc., R. Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 989, 93 S. W. 222. Instructions in action for injuries received by passenger through negligent coupling of cars held not on the weight of the evidence as leading jury to believe that in court's opinion certain issuable facts had been proved. St. Louis S. W. R. Co. v. Morrow [Tex. Civ. App.] 93 S. W. 162. Circumstances proved not constituting any legal excuse for failure to furnish plaintiff accommodations in sleeper to her destination according to contract, a charge that if north-bound train started without a sleeper intending to get the one on the south-bound train and leave the latter without one, such facts would not justify the breach, held not objectionable as a charge on the facts. Pullman Palace Car Co. v. Hocker [Tex. Civ. App.] 15 Tex. Ct. Rep. 330, 93 S. W. 1009.

7. A series of instructions held erroneous as assuming that carrier failed to provide a step-box for alighting passengers, and that conductor failed to assist them in alighting. Missouri, etc., R. Co. v. Wolf [Tex. Civ. App.] 14 Tex. Ct. Rep. 52, 89 S. W. 778.

8. Under an indictment alleging that a waiting room was too small, improperly ventilated and lighted, an instruction authorizing a conviction if it was too small or insufficiently ventilated or lighted is not objectionable as pointing out the evidence. Illinois Cent. R. Co. v. Com. [Ky.] 90 S. W. 602. An instruction setting out defendant's theory

one instruction may be cured by others.[9] The nature of the care required of both parties [10] and the presumptions in respect thereto should be fully stated.[11]

Part V. Carriers of Baggage and Passengers' Effects.

§ 33. *Rights, duties and liabilities.*[12]—The contract of carriage implies a duty to carry personal effects of the passenger reasonably necessary for use on the jour-

of the cause of the accident held not objectionable as giving undue prominence to such theory. Chicago City R. Co. v. Math, 114 Ill. App. 350. An instruction that if there was sufficient light where plaintiff alighted it was immaterial that the rest of the platform was insufficiently lighted is not erroneous as singling out one of the causes of alleged negligence (Harvey v. Chicago & A. R. Co. [Ill.] 77 N. E. 569), or as charging that if the conductor and brakeman had lanterns the company was relieved from lighting its platform (Id.).

9. A charge that if plaintiff established any of the acts of negligence alleged, one of which was that the train started before she had reached her seat, they should find for plaintiff, is not erroneous as charging that such act was negligence as a matter of law, when considered with subsequent charges. Georgia R. & Banking Co. v. Tice, 124 Ga. 459, 52 S. E. 916. Charge construed as a whole and jury held fairly instructed as to degree of care of a street railway company to a passenger. Cincinnati Traction Co. v. Baron, 3 Ohio N. P. (N. S.) 633. An instruction as to the presumption of negligence not limited to the specific acts charged is not erroneous where the court in its general charge limited the consideration of the jury to two specific acts of alleged negligence. Georgia R. & Elec. Co. v. Reeves, 123 Ga. 697, 51 S. E. 610. In an action for injuries, where the court clearly required the jury to find all the facts going to make up the negligence charged, the failure to use the word "negligently" in an instruction did not render it erroneous. McCaffery v. St. Louis & M. R. Co., 192 Mo. 144, 90 S. W. 816. A certain instruction on contributory negligence held to cover one refused and to correctly state the law. Gharst v. St. Louis Transit Co., 115 Mo. App. 403, 91 S. W. 453. An instruction ignoring the issue of contributory negligence is not error where the jury were clearly and distinctly charged by other instructions that contributory negligence, if found, would be fatal to plaintiff's recovery. Indiana Union Traction Co. v. Jacobs [Ind.] 78 N. E. 325. An instruction that defendant was bound to carry plaintiff "safely" is cured by subsequent instructions specifically stating its duty. Blumenthal v. Union Elec. Co. [Iowa] 105 N. W. 588. An instruction that if the conductor knew that plaintiff was attempting to board the car and started the car before she had a reasonable opportunity to do so the defendant is liable is not erroneous as omitting the theory of contributory negligence where such theory is covered elsewhere. Coles v. Interurban St. R. Co., 97 N. Y. S. 289. Held not error to refuse an instruction as to the burden of proof in view of the instructions given. French v. Pacific Elec. R. Co. [Cal. App.] 82 P. 395. Where the court has given full and explicit charges as to the degree of care required of a carrier, subsequent charges using the term "proper care" are not erroneous as being indefinite. St. Louis S. W. R. Co. v. Parks [Tex. Civ. App.] 14 Tex. Rep. 232, 90 S. W. 343. An instruction charging a carrier's duty to stop a reasonable time to allow passengers to alight need not negative the defenses of the carrier. Alabama & V. R. Co. v. Dear [Miss.] 39 So. 812. An instruction as to defendant's liability, notwithstanding negligence of deceased in allowing his arm to protrude from the car, held not erroneous in view of the binding instruction on contributory negligence. Georgetown & T. R. Co. v. Smith, 25 App. D. C. 259.

10. Instruction that if jury believed that plaintiff was guilty of negligence in alighting from the car "and that such negligence, if any, proximately caused or contributed to" his injuries, they should find for defendant, held not affirmative error as submitting as an issue the question whether plaintiff's negligence, if established, contributed to his injuries, when there was no controversy on that question. If defendant desired a fuller or more pointed instruction he should have asked for it. Parks v. San Antonio Traction Co. [Tex.] 16 Tex. Ct. Rep. 186, 94 S. W. 331. An instruction that "if plaintiff was injured while using due care," etc., is not objectionable as confining his exercise of due care to the precise moment of the accident. Chicago Union Traction Co. v. Lawrence, 113 Ill. App. 269. It is not necessary to characterize the starting of a car as "negligent" if the facts as submitted in the charge constitute negligence in law. Barr v. St. Louis & S. R. Co., 114 Mo. App. 425, 90 S. W. 107. Where negligence was predicated on defective appliances and excessive speed, but the grade of the track and size of the load of passengers were proved to show the degree of care required a reference by the court in its charge to the heavy load and steep grade was proper. Citizens' R. Co. v. Wade [Tex. Civ. App.] 14 Tex. Ct. Rep. 29, 91 S. W. 645. An instruction that defendant was liable if it failed to use ordinary care and that the burden was upon plaintiff to prove negligence was favorable to defendant. Indianapolis Traction & Terminal Co. v. Lawson [C. C. A.] 143 F. 834.

11. An instruction that the occurrence of a collision raises a presumption of negligence, and the burden is on defendant to rebut such presumption, is not objectionable as charging that the happening of the accident is negligence per se. Pittsburgh, etc., R. Co. v. Higgs, 165 Ind. 694, 76 N. E. 299. An instruction as to presumption of negligence from certain proven facts held not erroneous as imposing the burden of disproving negligence on defendant. Cody v. Market St. R. Co. [Cal.] 82 P. 666.

12. See 5 C. L. 553.

ney,[13] including such a sum in money as is reasonably necessary for the journey,[14] and such duty is sometimes declared by statute[15] under penalty.[16] The duty to carry baggage is incidental to and grows out of the contract to carry one as a passenger, and hence does not arise until the person tendering such parcel has procured the right of transportation as a passenger,[17] and not then until the baggage has been properly delivered to the carrier[18] and properly checked, unless the failure to check is by the carrier's fault.[19] A common carrier as a private enterprise may receive and

13. Generally, whatever a passenger takes with him for his personal use and comfort, either with reference to his immediate necessities or the ultimate purpose of his journey, must be considered baggage. Does not include merchandise carried for sale. Kast v. Philadelphia & R. R. Co., 28 Pa. Super. Ct. 107. Watch held reasonably necessary for journey. Knieriem v. New York, etc., R. Co., 109 App. Div. 709, 96 N. Y. S. 602. Articles carried by a passenger for sale are not baggage. Samples of stationery. Rossier v. Wabash R. Co., 115 Mo. App. 515, 91 S. W. 1018.

Note: The rule has been considered flexible enough to embrace valuable laces for personal adornment (Railroad Co. v. Fraloff, 100 U. S. 24, 25 Law. Ed. 531; Saleeby v. Cent. R. Co., 99 App. Div. 163, 90 N. Y. S. 1042); cloth and material intended for use as clothing (Mauritz v. N. Y., etc., R. R. Co., 21 Am. & Eng. R. R. Cas. 286; Id., 23 F. 765); tools, in reasonable quantities, of a mechanic while plying his trade as such (Porter v. Hildebrand, 14 Pa. 129; Kansas City, etc., R. R. Co. v. Morrison, 23 Am. & Eng. R. R. Cas. 481); watches and jewelry of husband and wife when intended to be worn by the passengers (McGill v. Rowand, 3 Pa. 451; Torpey v Williams, 3 Daly [N. Y.] 162; Bomar v. Maxwell, 9 Humph. [Tenn.] 620, 51 Am. Dec. 682); guns and fishing tackle when intended for the personal use of the traveler (Hawkins v. Hoffman, 6 Hill [N. Y.] 586, 41 Am. Dec. 767; Jordan v. Fall River R. Co., 5 Cush. [Mass.] 69, 51 Am. Dec. 44). Bullion, samples of traveling salesmen, papers and documents of employer of traveler, deeds, works of art, plate, merchandise, medicines, presents intended for sale or delivery, have been excluded from the class of personal baggage. Contract Co. v. Cross, 8 Am. Rep. 471; Pennsylvania Co. v. Miller, 35 Ohio St. 541, 35 Am. Rep. 620; 2 Pepper & Lewis Dig. of Dec., cols. 2488, 2489; Mauritz v. N. Y., etc., R. Co., 23 F. 765; Jacobs v. Cent. R. Co., 19 Pa. Super. Ct. 13; Id., 208 Pa. 535; Bullard v. Del. Lack. & W. R. R. Co., 21 Pa. Super. Ct. 583.

14. Whether $1,180 was reasonably necessary for the journey is one fact, taking into consideration the length of the journey, allowing for illness, etc. Knieriem v. New York, etc., R. Co., 109 App. Div. 709, 96 N. Y. S. 602.

NOTE. Liability of carrier for money carried by passenger: "In a case decided in New York in 1850, it was held that carriers were not liable for money carried by passengers in their trunks, even though the amount was only sufficient for traveling expenses. Grant v. Newton, 1 E. D. Smith, 95. Similarly in Doyle v. Kiser, 6 Ind. 242, the passenger was allowed to recover value of clothing lost in a bag, but not money. These cases have generally been overruled and it is held that passengers may recover for money lost to the extent of that which is necessary, etc., for the journey. Johnston v. Stone, 30 Tenn. 419; Missouri Pac. R. Co. v. York, 2 Wilson, Civ. Cas. Ct. App. [Tex.] 639; Merrill v. Grinnell, 30 N. Y. 594. The last case holds that the amount of money to be recovered is to be governed by the requirements of the entire proposed journey and not for a particular portion thereof. In cases of gross negligence even more may be recovered. Jordan v. Fall River R. Co., 59 Mass. 69, 51 Am. Dec. 44. The carrier's liability does not extend to money carried for the purpose of making purchases (Hickox v. Naugatuck R. Co., 31 Conn. 281, 83 Am. Dec. 143); nor to large sums not expressly put in charge with notice (Hutchings v. Western, etc., R. Co., 25 Ga. 61, 71 Am. Dec. 156; Orange Co. Bank v. Brown, 9 Wend. [N. Y.] 85)."—From 15 Yale L. J. 372.

15. In South Carolina, when a carrier issues a ticket to a passenger for a destination beyond its own line, it must check baggage to such point. Code 1902, § 2166. Cannot require the passenger to recheck at the junctional point. Sullivan v. Southern R. Co. [S. C.] 54 S. E. 586.

16. A statute penalizing a refusal to check baggage "taken for transportation" applies only when the baggage is so taken. No taking, but refusal to take because there was an attachment out for the trunk. Mitchell v. Kansas City, etc., R. Co 116 Mo. App. 116, 90 S. W. 1164.

17. Until such right has been procured the carrier is under no duty to receive parcels for transportation as baggage. Atlanta Terminal Co. v. American Baggage & Transfer Co. [Ga.] 54 S. E. 711.

18. The mere placing of a trunk in the entrance to the baggage room without any notice to the servants is not a delivery to the company. Gregory v. Webb [Tex. Civ. App.] 13 Tex. Ct. Rep. 1016, 14 Tex. Ct. Rep. 277, 89 S. W. 1109.

19. Where company receives baggage and undertakes to transport it, and passenger's failure to secure checks is due to carrier's direction, failure to check it is no defense in action for its loss. Texas & P. R. Co. v. Weatherby [Tex. Civ. App.] 14 Tex. Ct. Rep. 809, 92 S. W. 58. Requested instruction properly refused in view of conflicting evidence. Id. Where passenger placed package in hands of company's agent with request that it be checked, and agent informed her that he would not have time to check it before train left but would send it by express the next day, but it was put on train by some one before train left without being checked and was lost, railroad company held liable for its value. Ft. Worth & R. G. R. Co. v. McCarty [Tex. Civ. App.] 16 Tex. Ct. Rep. 44,

store parcels of prospective passengers until checked out as baggage,[20] but such operations must be subordinate to its service to passengers presenting parcels to be checked as baggage, duly accompanied by evidence of right of transportation.[21] Carrier is not obliged to carry a passenger's baggage on the same train as the passenger, provided it is delivered at the time the passenger reaches his destination.[22]

§ 34. *Care of baggage and effects.*[23]—If a carrier knowingly accepts goods and chattels as baggage, it becomes liable therefor as baggage;[24] but it is not liable for statutory penalties.[25] A steamship company is liable for the loss of the personal baggage of a passenger unless the loss was due to the act of God or the public enemy.[26] A carrier is liable without proof of negligence for personal effects and money reasonably necessary for the journey where loss occurs while in the possession of the carrier,[27] but if kept in the possession of the passenger, the carrier is not liable except for negligence.[28] When baggage has arrived at its destination and has been deposited in a suitable place for delivery and kept there a sufficient time to allow a passenger to claim and remove it, its liability as carrier ceases.[29] Where a passenger fails to remove his baggage within a reasonable time, the carrier's duty becomes that of a warehouseman,[30] and requires the carrier to use the care of a person of ordinary prudence in caring for his own property in similar circumstances.[31] By statute in Mississippi the liability of the carrier for baggage continues absolute until the passenger has had a reasonable time within which to remove it,[32] and what constitutes a reasonable time is a question of fact for the jury under the circumstances of the case.[33] A carrier is not liable for loss of baggage occurring beyond its line in the absence of a special undertaking to carry to destination.[34]

§ 35. *Limitation of liability.*[35]—Liability for loss of baggage may be limited by stipulations contained in the ticket as to amount of loss,[36] or to loss occurring on the carrier's own line.[37]

94 S. W. 178. Passenger may testify as to value of goods lost, the strict rule of market value not being applicable. Id.

20, 21. Atlanta Terminal Co. v. American Baggage & Transfer Co. [Ga.] 54 S. E. 711.

22. Sullivan v. Southern R. Co. [S. C.] 54 S. E. 586.

23. See 5 C. L. 554.

24. New Orleans, etc., R. Co. v. Shackleford [Miss.] 40 So. 427; Charlotte Trouser Co. v. Seaboard Air Line R. Co., 139 N. C. 382, 51 S. E. 973; Dahrooge v. Pere Marquette R. Co. [Mich.] 108 N. W. 283. That goods were carried in sample cases was not conclusive that the carrier knew they were merchandise. Rossier v. Wabash R. Co., 115 Mo. App. 515, 91 S. W. 1018.

25. Nor liable for double damage under section 3569, Rev. Code 1892. New Orleans & N. E. R. Co. v. Shackleford [Miss.] 40 So. 427.

26. Hart v. North German Lloyd S. S. Co., 108 App. Div. 279, 95 N. Y. S. 733. A passenger's negligence in leaving the door and porthold of his stateroom open does not relieve the steamship company where the steward knew of the facts and did not close and lock. Id.

27. Knieriem v. New York, etc., R. Co., 109 App. Div. 709, 96 N. Y. S. 602. Where baggage is accepted for shipment and is never delivered, the carrier is liable. Haas v. Louisiana & A. R. Co. [Ark.] 89 S. W. 1001. Evidence held sufficient to show negligence in permitting grease to remain on a gate, thereby soiling a passenger's dress. Driggs v. Interborough Rapid Transit Co., 96 N. Y. S. 1031. Evidence held sufficient to sustain a finding that a sleeping car company was negligent in protecting personal effects of one of its patrons. Pullman Palace Car Co. v. Woods [Neb.] 107 N. W. 858.

28. Knieriem v. New York, etc., R. Co., 109 App. Div. 709, 96 N. Y. S. 602. Where husband and wife are passengers together, possession of wife is possession of husband. Id.

29. Charlotte Trouser Co. v. Seaboard Air Line R. Co., 139 N. C. 382, 51 S. E. 973.

30. Not gratuitous bailee. Rossier v. Wabash R. Co., 115 Mo. App. 515, 91 S. W. 1018.

31. Rossier v. Wabash R. Co., 115 Mo. App. 515, 91 S. W. 1018.

32, 33. Code 1892, §§ 3568, 3569. Zeigler Bros. v. Mobile & O. R. Co. [Miss.] 39 So. 811.

34. Griffith v. Atchison, etc., R. Co., 114 Mo. App. 591, 90 S. W. 408. The issuing of a through ticket does not amount to an undertaking to deliver at destination where there is an express provision limiting liability to own line. Id. Rev. St. 1899, § 5222, rendering the carrier issuing bills of lading liable for negligence of connecting carriers has no application to baggage. Id.

35. See 5 C. L. 554.

36. A stipulation contained in a mileage book that company would be liable only for wearing apparel to the extent of $100 in case of loss of baggage is valid. Kast v. Philadelphia & R. R. Co., 28 Pa. Super. Ct. 107. A condition in a steamship ticket that the company shall not be liable for luggage and personal effects in excess of $100, unless the value thereof is disclosed does not apply to

§ 36. *Damages.*[38]

§ 37. *Remedies and procedure.*[39]—Production of check for baggage and proof that the baggage has not been delivered makes a prima facie case.[40] A parent traveling with a child of such tender years that no fare is required may recover for articles intended for the exclusive use of the child where such articles are packed with his baggage,[41] and husband traveling with his wife may recover on contract for baggage belonging exclusively to the wife.[42] A statute providing a penalty to be recovered by the state for refusing to check baggage does not preclude a passenger from recovering damage caused by such refusal.[43]

Carrying Weapons; Car Trusts, see latest topical index.

CASE, ACTION ON.[44]

Case will lie for damages resulting from breach of a contract,[45] and in that case is barred in the period for ex contractu actions.[46]

Case Agreed; Case Certified; Case Settled; Cash; Catching Bargain, see latest topical index.

CAUSES OF ACTION AND DEFENSES.[47]

Where a statute creates a new right and prescribes an adequate remedy for its violation, such remedy is exclusive,[48] but where the right previously existed and the statute merely provides a new remedy it is cumulative.[49] The gist of an action is the essential ground or principal subject-matter without which the action could not be maintained.[50] To sustain a cause of action, the duty violated must be owed to plaintiff.[51] Where a party is entitled to time in which to make payment on executing a note, a refusal to execute such note gives an immediate cause of action for the money.[52] An action must not be prematurely commenced,[53] but an objection thereto

personal effects directed to be carried to the passenger's state room for personal use. Holmes v. North German Lloyd S. S. Co. [N. Y.] 77 N. E. 21. The fact that the stipulation was printed in small type and partly concealed does not affect its validity where it was followed by a notice in large type specifically referring the purchaser to it. Kast v. Philadelphia & R. R. Co., 28 Pa. Super. Ct. 107.

37. Griffith v. Atchison, etc., R. Co., 114 Mo. App. 591, 90 S. W. 408.

38. See 5 C. L. 555. See, also Damages, 5 C. L. 904.

39. See 5 C. L. 555.

40. Zeigler Bros. v. Mobile & O. R. Co. [Miss.] 39 So. 811. Baggage check is prima facie evidence of receipt of the baggage. Graham & M. Transp. Co. v. Young, 117 Ill. App. 257. A custom of issuing a check for baggage in exchange for a check, issued by a connecting road, without seeing whether the baggage was actually received, cannot be shown to overcome the prima facie receipt established by the check. Id.

41, 42. Withey v. Pere Marquette R. Co. [Mich.] 12 Det. Leg. N. 511, 104 N. W. 773.

43. Code 1902, § 2166. Sullivan v. Southern R. Co. [S. C.] 54 S. E. 586.

44. See 5 C. L. 555.

45, 46. Bates v. Bates Mach. Co., 120 Ill. App. 563.

47. See 5 C. L. 555.

Scope of this title: None except cases defining or illustrating the most general and abstract principles are treated here. Most of the questions involving the terms "cause of action" or "defense" are referable to the identity or the joinder, severance or splitting of them. See Pleading, 6 C. L. 1008; Abatement and Revival, 7 C. L. 1; Former Adjudication, 5 C. L. 1502.

Other topics dealing with kindred abstract principles are Actions, 7 C. L. 28; Forms of Actions, 5 C. L. 1517.

48. Richardson v. People's Life & Acc. Ins. Co. [Ky.] 92 S. W. 284.

49. Richardson v. People's Life & Acc. Ins. Co. [Ky.] 92 S. W. 284. Creditors of an insolvent insurance company being entitled to an appointment of receivers, the enactment of Ky. St. 1903, § 677, authorizing appointment at the instance of the attorney general, did not deprive them of their right. Id.

50. Petition of Mansfield, 120 Ill. App. 511. Malice is not the gist of an action in trover. Id.

51. Immaterial that defendant owed the duty to someone else. Western Union Tel. Co. v. Schriver [C. C. A.] 141 F. 538.

52. Migatz v. Stieglitz [Ind.] 77 N. E. 400.

53. Where a claim against the county was wholly rejected when presented to the board of supervisors, an action may be maintained without another presentation. Millard v.

is waived by pleading to the merits.[54] One cannot bring an action when he has no longer a litigable interest,[55] nor will the courts entertain profitless suits,[56] nor determine abstract propositions of law.[57] No cause of action can exist without a subject-matter.[58] A single cause of action[59] cannot be severed,[60] and if severed, a suit on a part of the cause of action is a bar to a recovery on the remainder.[61] Dissimilar separate causes of action cannot be united at law, especialy where to do so would necessitate violation of some of the rules of pleading or fustrate the rendition of a single judgment in the case.[62] The giving of a statutory or contract notice of claim may be made a prerequisite of the right to sue.[63] An action is at law or in equity, depending in the code states upon the nature of the relief sought.[64] A cause of action may be ex contractu, though a tort action be also alleged.[65] The absence of precedents establishing a liability for a given set of facts raises a presumption that no liability exists.[66]

Defenses.[67]—In the absence of a statute so providing, an equitable defense cannot be interposed in a law action, though the judge has both law and equity jurisdiction,[68] but by statute in many states, such defenses are allowed,[69] and hence a

Kern County, 147 Cal. 682, 82 P. 329. Under Gen. Laws 1896, c. 279, § 16, where an act gives rise to a civil and a criminal liability, no action can be maintained on the former until complaint is made and process is issued on the latter. Brady v. Messler [R. I.] 62 A. 511.

54. A defense that an action to recover possession of land was prematurely brought, because the notice was insumcient to terminate the tenancy, is waived by pleading to the merits. McClung v. McPherson [Or.] 82 P. 13.

55. As for injury to stock which he has sold. Sweeney v. Frank Waterhouse & Co., 39 Wash. 507, 81 P. 1005.

56. Where a trustee leaves all her property to the cestui que trust by will, an action to charge the estate with misappropriation of trust funds will not lie. Sprigg v. Sprigg's Trustee [Ky.] 90 S. W. 985.

57. Hence a court will not consider a petition for a writ of prohibition to prevent a board of election commissioners from selecting election officials after they have been appointed and the election held. Kalbfell v. Wood, 193 Mo. 675, 92 S. W. 230. A court is not deprived of its authority, however, merely because the thing sought to be restrained has been done where it is possible to give relief. Id. See, also, Appeal and Review, 7 C. L. 128, as to appeal involving moot questions.

58. Status of a dental school and its graduates as such is a sufficient subject-matter. State v. Chittenden [Wis.] 107 N. W. 500.

59. Where a collision results in an injury to the person and to personal property, there is but one cause of action. Mobile & O. R. Co. v. Matthews, 115 Tenn. 172, 91 S. W. 194. A complaint alleging fraud and praying for the rescission of a note and mortgage for a return of the money loaned, and for a lien on land purchased with a part of the money, states but a single cause of action. Matteson v. Wagoner, 147 Cal. 739, 82 P. 436. The nonpayment of a debt secured by a mortgage gives rise to a single cause of action, though enforceable by two remedies. Colonial & U. S. Mortg. Co. v. Northwestern Thresher Co. [N. D.] 103 N. W. 915. The double liability of a stockholder is based upon his contract to pay the debts of the corporation, and there is but one cause of action, irrespective of the number of shares owned. Harrison v. Remington Paper Co. [C. C. A.] 140 F. 385.

60. Where plaintiff agreed to sell automobile tops for a year and was to receive all that he got above $50 per top, he cannot sue for each sale made. Howard v. Hunter, 99 N. Y. S. 542.

61. Mobile & O. R. Co. v. Matthews, 115 Tenn. 172, 91 S. W. 194. Where a building contract provided for the compensation to be allowed for extra work, a recovery for the extra work done is a bar to a suit for the compensation on the principle job. Maeder v. Wexler, 98 App. Div. 68, 90 N. Y. S. 598. See, also, Former Adjudication, 5 C. L. 1502.

62. See Pleading, 6 C. L. 1024.

63. See, also, Highways and Streets, 5 C. L. 1683; Municipal Corporations, 6 C. L. 737; Carriers, 5 C. L. 522, 548; Railroads, 6 C. L. 1194, and like topics. Laws 1897, p. 678, c. 304 (Rev. St. 1898, § 4222, subd. 5), requiring a notice to be given within a year from the accrual of a cause of action for personal injuries, held constitutional under 14th Amend. U. S. Const. and under art. 1, § 9, Const. Hoffman v. Milwaukee Elect. R. & Light Co. [Wis.] 106 N. W. 808.

64. The filing of an answer setting up equitable matter in pais, entitling defendant to affirmative equitable relief and praying for such relief, changes the case from one in law to one in equity. Bouton v. Peppin, 192 Mo. 469, 91 S. W. 149.

65. A complaint alleging that defendant, a common carrier, agreed to carry plaintiff safely, followed by an allegation of facts constituting an assault, is an action ex contractu. Busch v. Interborough Rapid Transit Co., 96 N. Y. S. 747.

66. Applied where a telegraph company was sought to be held by an undisclosed principal of the addressee of a fraudulent message. Western Union Tel. Co. v. Shriver [C. C. A.] 141 F. 538.

67. See 5 C. L. 556.

68. B. & C. Comp., section 74, permitting the defendant to plead as many defenses as he has, does not authorize equitable defenses

defendant may allege facts which would formerly have entitled him to an injunction restraining the action at law.[70] It is no defense to one whose wrong has resulted in injury that another was also in the wrong.[71]

CEMETERIES.[72]

Statutes providing for condemnation for the enlargement of public cemeteries, and of lands which have been used as burial grounds, do not contemplate the condemnation of already existing cemeteries platted and used as directed by statute.[73] A religious body, though not entitled to take for graveyard purposes, may acquire title if it enters and holds for the period of adverse possession.[74] Mere cessation of use does not show disuse and abandonment.[75] A cemetery is not per se a nuisance,[76] and municipal authorities cannot, under the guise of police regulation, arbitrarily prohibit the use of cemeteries which have never been and will not become nuisances or detrimental to the public health.[77] To justify the vacation of an injunction restraining the use of property for cemetery purposes on the ground of danger to health, it must be shown that the threatened injury has been overcome, and not that it possibly may be.[78] Alleys and roadways in a cemetery having been dedicated to the public,[79] an heir of a deceased owner of a burying lot adjoining thereon, in which lot are buried members of the family, has a special interest such as will enable him to maintain a bill to remove obstructions therein,[80] and limitations is no defense in such case.[81] Trespass quare clausum cannot be maintained against one hired by plaintiff to prepare a grave for the body of a relative but who, in the course of his employment, injures the body of another relative.[82] To justify an action of trespass

in an action at law (Cohn v. Wemme [Or.] 81 P. 981), hence an award of arbitrators cannot be impeached or set aside in an action for judgment thereon (Id.).

69. Civ. Code Prac. § 113. Davis v. Ferguson [Ky.] 92 S. W. 968.

70. Under Rev. St. 1898, § 2657, in an action against sureties on a treasurer's bond for money illegally expended, the sureties may restrain the action until the remedy against the persons receiving it has been exhausted. Town of Washburn v. Lee [Wis.] 107 N. W. 649.

71. In an action against a railroad company for negligently discharging water upon plaintiff's land, it is no defense that the borough failed to keep open a ditch which might have prevented the damage. Toole v. Delaware, L. & W. R. Co., 27 Pa. Super. Ct. 577.

72. See 5 C. L. 557. See related topic, Corpses and Burial, 5 C. L. 841.

73. Rev. St. 1899, § 5217; Sess. Acts 1901, p. 54, § 5217a. Shiel v. Walker, 114 Mo. App. 521, 90 S. W. 124. In a proceeding to condemn an existing burying ground and adjoining land under Rev. St. 1899, § 5217, and Sess. Acts 1901, p. 54, § 5217a, all persons to whom the original owner has sold lots are necessary parties. Id.

74. Dangerfield v. Williams, 26 App. D. C. 508.

75. Partial use for street. Dangerfield v. Williams, 26 App. D. C. 508.

76. Hume v. Laurel Hill Cemetery, 142 F. 552.

77. An ordinance which arbitrarily prohibits the burial of bodies within an entire county embracing large tracts of land, unoccupied and remote from human habitation, where the public health and safety cannot possibly be endangered, is unreasonable and void. Hume v. Laurel Hill Cemetery, 142 F. 552. Such ordinance is an unjustified restraint upon the lawful use of property. Id. Plaintiff, sole heir, could maintain an action to restrain the enforcement of an ordinance prohibiting interments in a cemetery lot of her ancestor, though there had been no settlement of the estate or decree of distribution. Id.

78. **Evidence** held not to show change of circumstances authorizing order vacating injunction restraining defendants from using certain ground for interment purposes because of danger to plaintiff's wells. Lowe v. Prospect Hill Cemetery Ass'n [Neb.] 106 N. W. 429. Where in a suit to enjoin the use of certain land for interment purposes the vital issue as to whether such land was a part of an established cemetery was determined in the negative, a subsequent resolution by the city council that such ground was a part of the cemetery did not effect the question as litigated and determined or authorize a vacation of the injunction granted. Id. The passage of an ordinance making it discretionary with certain officers to require the cementing of the walls and bottom of graves did not obviate the threatened invasion of plaintiff's rights. Id.

79. Where land was dedicated to city for cemetery and city sold lots according to its own map and plat, which showed the land to be laid off with alleys and roadways. Weiss v Taylor [Ala.] 39 So. 519.

80. Weiss v. Taylor [Ala.] 39 So. 519. Obstruction of public nuisance abateable in equity. Id.

81. Weiss v. Taylor [Ala.] 39 So. 519.

82. Defendant hired to prepare gave for

or for negligence in disturbing a grave, it must appear that plaintiff had an easement in the land as distinguished from a mere license,[83] and a mere receipt for a grave is not sufficient to show an easement.[84] A general devise of an estate does not, upon the death of the testator, pass title to a burial lot owned by him,[85] and the fact that after his death a lot is acquired by his executor with money of the estate does not bring the property within the provisions of the will.[86]

CENSUS AND STATISTICS.[87]

Mere enumeration, although completed and placed in hands of the superintendent of the census, is not the census,[88] but goes into effect as the legal census only on its compilation and publication by the superintendent,[89] until which publication, municipal corporations are governed by the laws applicable to cities of the class in which they are placed by the preceding census.[90]

A certified copy of a certificate of death, duly filed and recorded, is competent to prove the cause of the death of the person therein specified, and its exclusion constitutes reversible error.[91]

CERTIFICATE OF DOUBT; CERTIFICATES OF DEPOSIT, see latest topical index.

CERTIORARI.

§ 1. Nature, Occasion and Propriety of Remedy (606). Ancillary Certiorari (611). Prerogative Writ (611).
§ 2. Right to Certiorari; Parties (612).
§ 3. Procedure for Writ; Writ, Service and Return (614). The Statutory Bond (615). The Writ (615). Notice of the Writ (615). Service of the Writ (616). The Return (616). Objections and Amendments (616). Quashal or Dismissal (616).
§ 4. Hearing and Questions Which May be Raised and Settled (617).
§ 5. Judgment (619).
§ 6. Costs (620).
§ 7. Review of Certiorari (620).

§ 1. *Nature, occasion and propriety of remedy.*[92]—Certiorari,[93] in some states designated by statute as a writ of review,[94] lies from a superior court [95] to review the

body of father injured body of another. Feeley v. Andrews [Mass.] 77 N. E. 766.

83. Feeley v. Andrews [Mass.] 77 N. E. 766.

84. Feeley v. Andrews [Mass.] 77 N. E. 766. Where it was shown that the cemetery was owned and managed by the Roman Catholic Archbishop of Boston, plaintiff did not have such possessory title to a lot as would enable him to maintain trespass, though the lot had been used for the burial of members of the family for forty years. Id.

85. Robertson v. Mt. Olivet Cemetery Co. [Tenn.] 93 S. W. 574. A mere certificate for the purchase of a burial lot taken by executor and showing that the purchase is for the benefit of the estate does not transfer such title to the lot as will pass by a general devise of the estate by the testator. Id.

86. Widow did not acquire title through will such as could descend to her sons by a former marriage, and only testator, his widow, children, and descendants, were entitled to sepulcher. Robertson v. Mt. Olivet Cemetery Co. [Tenn.] 93 S. W. 574.

87. See 5 C. L. 558.

88, 89. Wolfe v. Moorhead [Minn.] 107 N. W. 728.

90. An enumeration completed in July giving city more than four thousand inhabitants, but not officially completed as a census until after a city election, held that such election was governed by provisions for cities with less than four thousand inhabitants as shown by previous census. Wolfe v. Moorhead [Minn.] 107 N. W. 728.

91. In a suit on an insurance policy to prove that deceased misrepresented the cause of the death of a sister. National Council of the Knights & Ladies of Security v. O'Brien, 112 Ill. App. 40.

92. See 5 C. L. 559.

93. An independent proceeding commenced by original writ such as certiorari is an action within Rev. St. 1898, § 2559. State v. Chittenden [Wis.] 107 N. W. 500.

94. State v. Superior Court [Wash.] 86 P. 205; Sweeney v. San Juan County Com'rs [Wash.] 86 P. 200; State v. Superior Court of King County [Wash.] 85 P. 989; Dahlstrom v. Portland Min. Co. [Idaho] 85 P. 916; Armantage v. Superior Court [Cal. App.] 81 P. 1033. A writ of review is an action within 2 Ballingers' Ann. Codes and St., section 4793, providing that there shall be in this state hereafter but one form of action for the enforcement and protection of private rights and the redress of private wrongs which shall be called a civil action. State v. Superior Ct., 40 Wash. 453, 82 P. 878.

95. Circuit and superior courts. Powell v. Bullis [Ill.] 77 N. E. 575. The supreme court

proceedings of inferior courts,[96] tribunals,[97] boards,[98] and public officers [99] exercising judicial [1] or quasi judicial functions [2] where the ordinary methods of review are un-

is justified in taking jurisdiction of original certiorari proceedings upon a petition complaining that the judgment sought to be reviewed deprived the judge of the political party which the petitioners represent of the joint custody of the registration lists and of his share of the official ballots. People v. District Ct. [Colo.] 84 P. 694.

96. In re Leverant, 110 App. Div. 371, 97 N. Y. S. 272; Greenough v. School Committee [R. I.] 62 A. 978; Aetna Life Ins. Co. v. Stryker [Ind. App.] 76 N. E. 822. Court of city recorder. Wong Sing v. Independence [Or.] 83 P. 387. A judgment of a city court not created under the provisions of Const. art. 6, § 2, par. 5, can be reviewed only by certiorari. Crosson v. State, 124 Ga. 651, 52 S. E. 880. On appeal cases in justice's courts, certiorari lies to the verdict of the jury and not to the judgment of the court, but where, upon the trial of a case before a jury in a justice's court, the jury renders a verdict against the defendant and requests the magistrate to decide which party shall bear the costs and no exception is taken to such request, the party against whom the costs are taxed may review the judgment of the magistrate by writ of certiorari. Hewett v. Robertson, 124 Ga. 920, 53 S. E. 456.

97. McKenzie v. Board of Education [Cal. App.] 82 P. 392; Dahlstrom v. Portland Min. Co. [Idaho] 85 P. 916; Bremer County v. Walstead [Iowa] 106 N. W. 352. Civil service commission of city of Chicago. Powell v. Bullis [Ill.] 77 N. E. 575. City council proceeding under its charter power to declare vacant the seat of one of its members. Meachem v. Common Council [N. J. Law] 62 A. 303.

98. McKenzie v. Board of Education [Cal. App.] 82 P. 392; Dahlstrom v. Portland Min. Co. [Idaho] 85 P. 916; Aetna Life Ins. Co. v. Stryker [Ind.] 76 N. E. 822; Bremer County v. Walstead [Iowa] 106 N. W. 352; Greenough v. School Committee [R. I.] 62 A. 978. Board of police commissioners. Tibbs v. Atlanta [Ga.] 53 S. E. 811. Certiorari lies to review the proceedings of the board of supervisors with reference to the reconstruction of a court house. Attorney General v. Montcalm County Sup'rs [Mich.] 12 Det. Leg. N. 562, 104 N. W. 792.

99. McKenzie v. Board of Education [Cal. App.] 82 P. 392; Dahlstrom v. Portland Min. Co. [Idaho] 85 P. 916; Aetna Life Ins. Co. v. Stryker [Ind. App.] 76 N. E. 822; Bremer County v. Walstead [Iowa] 106 N. W. 352; In re Leverant, 110 App. Div. 371, 97 N. Y. S. 272; Greenough v. School Committee [R. I.] 62 A. 978.

1. People v. Woodbury, 99 N. Y. S. 573; People v. McWilliams [N. Y.] 77 N. E. 785; In re Leverant, 110 App. Div. 371, 97 N. Y. S. 272; McKenzie v. Board of Education [Cal. App.] 82 P. 392; Powell v. Bullis [Ill.] 77 N. E. 575; Dahlstrom v. Portland Min. Co. [Idaho] 85 P. 916; Aetna Life Ins. Co. v. Stryker [Ind. App.] 76 N. E. 822; Greenough v. School Committee [R. I.] 62 A. 978; Sweeney v. San Juan County Com'rs [Wash.] 86 P. 200; Wheeling, etc., R. Co. v. Triadelphia, 58 W. Va. 497, 52 S. E. 499. Certiorari does not lie to review ministerial acts (McKenzie v. Board of Education [Cal. App.] 82 P. 392; Carr v. City Council, 124 Ga. 116, 52 S. E. 300; State v. Alexander [Iowa] 105 N. W. 1021; State v. Reynolds, 190 Mo. 578, 89 S. W. 877; In re Leverant, 110 App. Div. 371, 97 N. Y. S. 272; Greenough v. School Committee [R. I.] 62 A. 978), nor to review the exercise of legislative functions (State v. Alexander [Iowa] 105 N. W. 1021; Carr v. City Council, 124 Ga. 116, 52 S. E. 300; State v. Chittenden [Wis.] 107 N. W. 500; People v. Westchester County Sup'rs, 99 N. Y. S. 348; Greenough v. School Committee of Pawtucket [R. I.] 62 A. 978); nor to review executive acts (Carr v. City Council, 124 Ga. 116, 52 S. E. 300). Removal from office by civil service commission. Kusel v. Chicago, 121 Ill. App. 469.

Proceedings of public officers: Action of superintendent of buildings and the special commissioner of excise in revoking a liquor tax, under laws 1905, p. 1862, c. 697, was purely administrative and hence not reviewable by certiorari. In re Leverant, 110 App. Div. 371, 97 N. Y. S. 272.

Proceedings of municipal councils are reviewable by certiorari when such proceedings are judicial (Carr v. City Council, 124 Ga. 116, 52 S. E. 300), and in determining whether the evidence submitted is sufficient to authorize the revocation of a license under an ordinance, the council acts in a judicial capacity (Id.), but when a municipal council acts in a legislative, executive, or ministerial capacity, its action is not subject to review on certiorari (Id.). Thus when the authorities of a municipality have the right to revoke a license to sell liquor granted by them at any time without trial or notice, a revocation of such license thus accomplished is in the exercise of the executive powers of the municipality, and the action is not subject to review on certiorari. Id.

Proceedings of boards and commissioners: Certiorari will not lie to review an order of the board of education of a city and county dismissing the petitioner from his position as teacher in the school department of the public schools of such city and county, the action of the board being ministerial. McKenzie v. Board of Education [Cal. App.] 82 P. 392. Certiorari will not lie to review the action of a school board in creating a school district. State v. Alexander [Iowa] 105 N. W. 1021. The selection of text books by a school committee is not reviewable by certiorari. While, like most administrative duties, the selection of such books involves judgment and discretion, it does not involve a judicial determination of a right or of contested issues such as constitutes a judgment of court. Greenough v. School Committee [R. I.] 62 A. 978. Acts of the board of county supervisors, adopting a resolution reviving the distinction between town and county poor pursuant to Laws 1896, p. 176, c. 225, § 134, and the levy and assessment upon a town of taxes for the support of the poor of such town pursuant to sections 9 and 10, were legislative and not judicial acts. People v. Westchester County Sup'rs, 99 N. Y. S. 348. A judgment of a board of police commissioners discharging a policeman, after a trial in the manner prescribed by the law creating

available or inappropriate,[3] and there is no other adequate remedy;[4] but the mere

the board, is subject to review on certiorari. Tibbs v. Atlanta [Ga.] 53 S. E. 811. Proceedings before the commissioner of street cleaning, under Laws 1901, p. 242, c. 466, § 537, providing that any member of the clerical or uniformed force must be informed of the cause of his proposed removal and given an opportunity to make an explanation, and that if removed the true cause of his removal must be entered upon the records of the commissioner, are not judicial so as to be reviewable by certiorari. People v. Woodbury, 98 N. Y. S 142. The last clause of this section providing that "in the event of the removal of any member of the clerical or uniformed force, he shall have the right to sue out a writ of certiorari or other appropriate remedy for the purposes of reviewing the action of the commissioner or his deputy," does not give the right to certiorari, certiorari not being the appropriate remedy. Id.

Acts of civil service commission: In New York, certiorari will not lie to review the action of the civil service commission in regard to the classification of the position of battalion chief of a fire department (People v. McWilliams [N. Y.] 77 N. E. 785), but in Illinois the writ will lie to review the action of the civil service commission in removing a classified employe without notice (Powell v. Bullis [Ill.] 77 N. E. 575; Kammann v. Chicago [Ill.] 78 N. E. 16).

Habeas corpus proceedings may be reviewed by certiorari. In re Brock [Mich.] 107 N. W. 446.

Discretionary acts, even though judicial, are not reviewable by certiorari. State v. Chittenden [Wis.] 107 N. W. 500. See Appeal and Review, 7 C. L. 128.

2. Powell v. Bullis [Ill.] 77 N. E. 575; People v. McWilliams [N. Y.] 77 N. E. 785; Greenough v. School Committee [R. I.] 62 A. 978. The writ of certiorari on behalf of a proper applicant is a proper means of testing, for jurisdictional error, the decision of a quasi-judicial tribunal having authority, under some circumstances, to deal with the subject involved, or of a tribunal of such dignity that its action in the matter might probably be injurious to such applicant if allowed to stand unchallenged. State v. Chittenden [Wis.] 107 N. W. 500. The authority of the board, under the law regulating dentistry, to pass upon the reputability of colleges, is neither legislative nor judicial, but is quasi-judicial, that species of authority commonly intrusted to individuals, boards or commissions, to determine matters of fact when that is essential to the performance of administrative duties. Id.

3. Certiorari lies and lies only where there is no remedy by appeal. Powell v. Bullis [Ill.] 77 N. E. 575; McKenzie v. Board of Education [Cal. App.] 82 P. 392; Dahlstrom v. Portland Min. Co. [Idaho] 85 P. 916; State v. Ayres, 116 Mo. App. 90, 91 S. W. 398. A circuit court of appeals cannot issue an independent writ of certiorari in a criminal case where error will lie. Whitney v. Dick, 202 U. S. 132, 50 Law. Ed. ——. The legality of the impaneling of the jury in condemnation proceedings is reviewable, under Ballinger's Ann. Codes and St. § 5645, on an appeal from the award of damages, and hence a writ of review will not lie for the purpose of reaching the question of such legality. State v. Superior Ct. [Wash.] 86 P. 205. Will not lie from court of probate to circuit court, on appeal being given and the word "appeal" in the statute not meaning to include appeal by certiorari. Schaeffer v. Burnett, 120 Ill. App. 79. Where the defendant in condemnation proceedings moved to have what purported to be a judgment by default declared void for lack of service of the summons, and the court adjudged the service sufficient and the judgment valid, the defendant's remedy was by appeal and not by certiorari. Ex parte Postal Tel. Cable Co., 72 S. C. 552, 52 S. E. 676. Certiorari will not lie to review the proceedings of a circuit court in special proceedings for the incorporation of a village under Rev. 1898, §§ 854, 866, the remedy being by appeal. In re Salter [Wis.] 106 N. W. 684. Certiorari will not lie to review proceedings to review the action of the lower court in granting a temporary injunction in a liquor nuisance case, an adequate remedy by appeal being provided by statute. See Code, §§ 4101, 4102, 4154. Young v. Preston [Iowa] 108 N. W. 463. Certiorari does not lie to review the action of the board of education of a city coming within the class comprehended by Laws 1902, p. 1543, c. 560, in removing the relator from his position as principal of the high school in such city, the relator having an adequate remedy under Laws 1894, p. 1278, c. 556, and Laws 1904, p. 94, c. 48, by appeal to the commissioner of education, and the case thus being within Code Civ. Proc. § 2122, providing that except as otherwise expressly prescribed by statute, a writ of certiorari cannot be issued where the determination can be adequately reviewed by an appeal to a court or to some body or officer. People v. O'Brien, 97 N. Y. S. 1115. Where, in an action in a county court upon a promissory note for the principal sum of $50, besides interest and ten per cent. attorney's fees, the party carries the cause to the superior court for review by writ of certiorari, complaining of errors involving both questions of law and issues of fact, it is proper for the court to dismiss the writ upon motion of the respondent, appeal, and not certiorari, being the proper procedure. Cook v. Exom [Ga.] 54 S. E. 147. The writ does not lie to review the action of the board of county commissioners in awarding a lease of county property, the remedy being by appeal under Ballinger's Ann. Codes and St. § 359. Sweeney v. San Juan County Com'rs [Wash.] 86 P. 200. Contempt proceedings against a witness in criminal proceedings for refusing to answer questions are reviewable by certiorari. Ex parte Butt [Ark.] 93 S. W. 992. Acts 1899, p. 291, No. 158, entitled "An act to permit defendants in felony cases to give bond after conviction in the circuit court," did not confer the right of appeal but merely regulates the manner in which it shall be taken, and did not change the rule that appeal or error will not lie to review contempt proceedings. Id. An adjudication as to public use and necessity for which property is sought to be taken cannot be reviewed under Ballinger's Ann. Codes and St., § 5645, the remedy being by certiorari, which under the Washing-

fact that there is no other remedy will not alone authorize the issue of the writ of certiorari,[5] and even where there is no other remedy, the writ of certiorari cannot serve the office of an appeal or writ of error,[6] for though the office of the writ has been broadened to some extent in some states,[7] the common-law rule [8] still prevails

ton statutes is called a writ of review. State v. Superior Ct. [Wash.] 86 P. 205. In Illinois the statutory writ does not lie to review the proceedings of a county court sitting in probate. 1 Starr & C. Ann. St. 1896 [2d ed.], c. 3, par. 68, authorizing an "appeal" in the same manner as appeals are taken from justices of the peace by making express provision for an "appeal," impliedly excludes the right to certiorari to review judgments of county courts given by Laws 1849, p. 62, and to review judgments of the probate justices given by the statute of 1849, though 1 Starr & C. Ann. St. 1896, c. 79, pars. 115, 177, provide for both appeals and certiorari to review the judgments of justices of the peace. Schaeffer v. Burnett [Ill.] 77 N. E. 546. Where the board of supervisors of each of two adjoining counties adopted resolutions for a bridge across a river between the two counties, and one of such boards thereafter rescinded its resolution, the remedy of the other county was by certiorari. Bremer County v. Walstead [Iowa] 106 N. W. 352. Condemnation of stock by commissioners, under Acts 1901, p. 283, c. 156, is reviewable by certiorari, no other method of review being provided for by the statute. Lewis v. Shelby County [Tenn.] 92 S. W. 1098. No appeal lies from an order of a circuit court of appeals discharging, on writ of certiorari issued on a petition for habeas corpus and certiorari, a person convicted in a district court of introducing intoxicating liquors into an Indian reservation, there being no amount in controversy, but such an order is reviewable by the supreme court on certiorari. Whitney v. Dick, 202 U. S. 132, 50 Law. Ed. ——. No provision having been made for an appeal from the judgment of the court of a city recorder, a writ of review will lie. Wong Sing v. Independence [Or.] 83 P. 387. Certiorari lies to review an order of the commissioners' court prohibiting stock from running at large, though there is statutory provision for a contest of the election pursuant to which the order was made, no provision having been made for the review of the election. Commissioners' Ct. v. Johnson [Ala.] 39 So. 910. Where a court of appeal erroneously declines jurisdiction of a cause on appeal and orders the cause to be transferred to the supreme court, the remedy is by application to the supreme court for certiorari, under Const. art. 101, since to send the case back to the court of appeal would be in effect the originating of a method of reviewing the judgment of that court for which there is no authority of law. State v. Yazoo & M. V. R. Co. [La.] 40 So. 630.

4. McKenzie v. Board of Education [Cal. App.] 82 P. 392; Dahlstrom v. Portland Min. Co. [Idaho] 85 P. 916; Powell v. Bullis [Ill.] 77 N. E. 575; State v. Ayres, 116 Mo. App. 90, 91 S. W. 398. Certiorari has several offices, among which is that of supplying defects of justice in cases obviously entitled to redress, and yet unprovided for by the ordinary forms of proceedings. Bremer County v. Walstead [Iowa] 106 N. W. 352.

Not where quo warranto lies: Not to review an order under a statutory proceeding, which merely determines the prima facie right to office in awarding custody of books, etc. Murta v. Carr [Mich.] 12 Det. Leg. N. 289, 104 N. W. 27.

5. Ballinger's Ann. Codes and St. § 6500, subd. 3, providing for an appeal from an order vacating a temporary injunction where the defendant is insolvent, does not authorize a review by writ of review where there is no finding as to the defendant's insolvency, but, on the contrary, indicates that the legislature intended an appeal from the final judgment or an action at law for damages an adequate remedy in such cases, and that such order should not be reviewed except on appeal from the final judgment. State v. Superior Ct. [Wash.] 85 P. 989.

6. Armantage v. Superior Ct. [Cal. App.] 81 P. 1033; Wetzel v. Superior Ct. [Cal. App.] 85 P. 858; McKenzie v. Board of Education [Cal. App.] 82 P. 392; State v. Reynolds, 190 Mo. 578, 89 S. W. 877. Its purpose is not to consider errors or irregularities committed in the exercise of an admitted jurisdiction, nor to correct mistakes of law in conducting a proceeding of which the inferior tribunal, board, or officer had jurisdiction (McKenzie v. Board of Education [Cal. App.] 82 P. 392), nor can it be used for the purpose of determining whether or not the evidence was sufficient to support the particular order, resolution, or matter complained of, provided the law and the machinery employed were such as to give the inferior tribunal jurisdiction (Id.; Pool v. Superior Ct. [Cal. App.] 84 P. 53). Erroneous failure to decide plea of res adjudicata. People v. Lawrence, 94 N. Y. S. 820. Error in deciding that an appeal was solely on questions of law. Smith v. Superior Ct. [Cal. App.] 84 P. 54.

7. Where the lower tribunal in reaching its determination violates the rights of the relator to his prejudice, such determination is reviewable by certiorari, under Code Civ. Proc. § 4148. People v. Common Council of Troy, 99 N. Y. S. 1045. The determination of the common council of the city designating official newspapers for such city, pursuant to Laws 1903, p. 435, c. 182, § 1, subsec. 29, is reviewable by certiorari. Id. In Georgia, certiorari is the proper remedy to review a judgment of the county court where questions of law only are presented, and in a suit in a county court, where the amount involved in the case exceeds $50 and there is no conflict of evidence, nor any question involved upon which the judge of the superior court could not direct a verdict one way or the other, a question of law only is presented, and the writ of certiorari is the proper remedy for reviewing the judgment of the court. Harwell v. Marshall [Ga.] 54 S. E. 93.

8. The common-law writ lies to review a judgment nisi against a garnishee where such judgment is void for lack of proof of service. Ex parte Nat. Lumber Mfg. Co. [Ala.] 41 So. 10.

in most of the states, and this rule is that the writ of certiorari will issue only where the lower court or tribunal has acted without jurisdiction [9] or in excess of jurisdiction,[10] or proceeds in a cause after having lost jurisdiction thereof,[11] or has otherwise proceeded in an unlawful manner.[12] But the writ cannot issue to reverse a de-

9. California: See Code Civ. Proc. § 1068. In re Tinn [Cal.] 84 P. 152. The writ will not lie to annul an order of the superior court canceling a previous order of such court admitting the relator as a citizen of the United States, although such order may have been rendered upon insufficient evidence or in some irregular method of procedure not going to the jurisdiction. Id. The writ cannot be extended further than to determine whether the inferior tribunal, board, or officer, has regularly pursued the authority of such tribunal, board, or officer. McKenzie v. Board of Education [Cal. App.] 82 P. 392. Certiorari held not the proper remedy to review the determination of the superior court on appeal from a justice of the peace, although the notice that the case had been set for trial was not served like a summons as required by Code Civ. Proc. section 850, but was served by mail only. Armantage v. Superior Ct. [Cal. App.] 81 P. 1033.

Colorado: Certiorari affords no remedy for irregularities in the proceedings of county commissioners in establishing a highway where the record of such proceedings show a compliance with the statutory requirement conferring jurisdiction upon the board, and there being no provision for an appeal in such case, parties aggrieved by such irregularities are without remedy at law and may invoke the aid of equity. Williams v. Routt County Com'rs [Colo.] 84 P. 1109.

Idaho: Under the provisions of section 4962, Rev. St. 1887, a writ of review will be issued upon proper application when an inferior tribunal, board, or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board, or officer, and there is no appeal nor, in the judgment of the court, any plain, speedy, and adequate remedy. Dahlstrom v. Portland Min. Co. [Idaho] 85 P. 916. Under the provisions of said section 4968, the review upon said writ cannot extend further than to determine whether the inferior tribunal, board, or officer has regularly pursued the authority given such tribunal, board, or officer by the law. If such were done it would amount primarily to an inquiry as to the authority of a tribunal, board, or officer to act under a statute which has all the appearance and semblance of a valid law. McConnell v. State Board of Equalization [Idaho] 83 P. 494. Under a writ of review, errors and mistakes of judgment of a board as to the value of property that it is authorized to assess cannot be reviewed, neither can such writ be invoked for the purpose of reviewing the facts upon which the inferior tribunal, board, or officer acted, except for the purpose of ascertaining the fact of jurisdiction. Id.

Michigan: Public acts 1905, p. 484, § 310, provides that, whenever in any action at law in a circuit court a motion to quash the writ or declaration upon jurisdictional grounds, or the issue raised on demurrer, plea to the jurisdiction or other dilatory plea, shall be decided adversely to the party filing such motion, demurrer, or plea, the decision may be reviewed by writ of certiorari forthwith. Moinet v. Burnham, Stoepel & Co. [Mich.] 13 Det. Leg. N. 38, 106 N. W. 1126. This statute does not apply to contempt proceedings. In re Smith [Mich.] 107 N. W. 724.

Missouri: The office of the writ of certiorari is to give relief to an injured party where the trial court has acted without jurisdiction. State v. Reynolds, 190 Mo. 578, 89 N. W. 877. Sess. Acts 1901, p. 162, § 23, relating to review of acts of political conventions, election officers, etc., did not enlarge the scope of the writ of certiorari beyond its common-law limitations. Id.

West Virginia: The scope of the writ of certiorari is not altered by Code 1899, c. 110, §§ 2, 3, in respect to the nature of the proceedings for the review of which it made issue. In this respect the writ remains the same as at common law. Wheeling, etc., R. Co. v. Triadelphia, 58 W. Va. 487, 52 S. E. 499.

Wisconsin: The writ of certiorari was, by the Constitution, made an appurtenance, as before, to the jurisdiction of superintending control, with its common-law function in that regard and that only. Such functions extend wholly to matters of jurisdiction as regards independent proceedings. State v. Chittenden [Wis.] 107 N. W. 500.

10. Dahlstrom v. Portland Min. Co. [Idaho] 85 P. 916; Powell v. Bullis [Ill.] 77 N. E. 575; State v. Reynolds, 190 Mo. 578, 89 S. W. 877. Certiorari lies to review the decision of a district court on appeal from a justice where the district court exceeds its jurisdiction, and the fact that no appeal lies to the supreme court in such case will not prevent the supreme court from reviewing such decision on certiorari where the district court has exceeded its jurisdiction. Oregon Short Line R. Co. v. District Ct. [Utah] 85 P. 360. The supreme court, in the exercise of its original jurisdiction, has power by certiorari to review the final judgments of inferior courts which are beyond the jurisdiction of those tribunals to render. Martin v. District Ct. [Colo.] 86 P. 82. Where the judgment in habeas corpus proceedings discharging the prisoner is in excess of the court's jurisdiction, such judgment may be reviewed by certiorari. Id.

11. Where the plaintiff, in an action to set aside the probate of a will, dismissed his action as authorized by Code, § 3164, but the court nevertheless proceeded to try the cause, although there was no counterclaim or cross petition. Davis v. Preston [Iowa] 106 N. W. 151. The action of counsel for the plaintiff in remaining in the case and taking exceptions to the final judgment, and waiting until the time for appeal had expired before instituting proceedings by certiorari, did not bar the plaintiff from questioning the jurisdiction of the court to render the judgment. Id.

12. Powell v. Bullis [Ill.] 77 N. E. 575. Where it appears on the face of the record

termination which is strictly a usurpation in that it was pronounced by one having no authority or semblance thereof,[13] nor can it issue until there has been a judgment or decision in the proceedings sought to be reviewed,[14] but the fact that the judgment or order of the lower court has been suspended will not prevent the review of such judgment or order by certiorari.[15] Certiorari is not a proper or adequate remedy where the return would not show the true state of facts.[16] The United States supreme court will on certiorari review a reversal of the grant of a temporary injunction where the records presents the entire case and the merits may be decided.[17] It must appear that wrong and injustice will be done but for the writ.[18]

Ancillary certiorari.[19]—A writ of certiorari may issue in aid of an appeal,[20] but after decision of the questions arising upon alleged errors occurring during or prior to the trial or in the rendition of the judgment by an appellate tribunal, the complaining party has no right to supplement the original record by new matter,[21] or to contradict the agreed statement of facts,[22] and therefore a writ of certiorari will not issue for the purpose of aiding a petition for a rehearing, or for the purpose of correcting the record in any manner or form after decision of appeal.[23] An appellant will not be granted a writ of certiorari to bring up matters which are not in the record through the negligence of his counsel.[24]

Prerogative writ.[25]—In New Jersey the constitutional and prerogative power

proper that a judgment has been rendered which the court had no right to render, certiorari will lie. State v. Reynolds, 190 Mo. 578, 89 S. W. 877. Where the supreme court merely decided that a petition stated a cause of action in mandamus, a decision of the court of appeals that from the facts established mandamus was not the appropriate remedy was not reviewable by certiorari, though erroneous, the error being in the construction of the facts and pleadings and not because the court of appeals was contrary to the previous decision of the supreme court. People v. Court of Appeals [Colo.] 82 P. 483. A default **judgment rendered in fraud** of defendant by persuading him that the case would be held for filing of a bill of particulars, the justice's clerk assisting in the deception, will be reviewed. Fisher v. Pennsylvania Co., 118 Ill. App. 662.

13. State v. Chittenden [Wis.] 107 N. W. 500.

14. Where, in proceedings to review the judgment of a justice upon the report of referees, the record discloses that no judgment was entered upon the report. Ruhl v. Cooper [Del.] 63 A. 575. The rights of the relator must have been finally adjudicated or determined by the inferior tribunal. People v. Cullinan, 97 N. Y. S. 194. When an answer to a petition for certiorari does not verify an allegation in the petition that there was a final judgment rendered, and no steps are taken to perfect the answer, neither the inferior court nor the supreme court can properly undertake to pass on the merits of the assignments of error made in the petition. Brown v. Gainesville [Ga.] 53 S. E. 1002. Certiorari to review a complaint against the applicant, charging him with violation of an ordinance of the board of excise commissioners of a city, dismissed. Almindie v. Camden Com'rs [N. J. Law] 63 A. 867. Certiorari does not lie to review a motion to quash contempt proceedings prior to the final determination of such proceedings in the circuit court. In re Smith [Mich.] 107 N. W. 724.

15. In contempt proceedings. State v. District Court [Mont.] 82 P. 789.

16. Where the process was served on the defendant's daughter, but the return of the constable showed service on the defendant, it was held that certiorari would not have been an appropriate remedy so as to preclude the defendant from equitable relief. Wilcke v. Duross [Mich.] 13 Det. Leg. N. 227, 107 N. Y. 907.

17. Harriman v. Northern Securities Co., 197 U. S. 244, 49 Law. Ed. 739.

18. Guy v. District of Columbia, 25 App. D. C. 117. Denial in case of alleged illegal tax sale had 16 years before a certificate entitling to deed, being outstanding in one not party to the certiorari. Guy v. District of Columbia, 25 App. D. C. 117.

19. See 5 C. L. 560.

20. Burns' Ann. St. § 1901. Aetna Life Ins. Co. v. Stryker [Ind. App.] 76 N. E. 822.

21. Aetna Life Ins. Co. v. Stryker [Ind. App.] 76 N. E. 822.

22. Williams v. Young [Tex. Civ. App.] 14 Tex. Ct. Rep. 563, 90 S. W. 940.

23. Appellants, on motion for rehearing, sought to bring up proceedings on motion for new trial made after appeal but before judgment thereon and determined after such judgment had been rendered. Aetna Life Ins. Co. v. Stryker [Ind. App.] 76 N. E. 822.

24. Where counsel for the defendant in a criminal case prepared a statement of facts and presented the same to the county judge, who promised to sign the same, and some time thereafter counsel took the statement from the judge's desk and had it filed in the cause without ascertaining whether or not it was signed by the judge, certiorari to bring up the statement of facts was refused. Haskell v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 324, 92 S. W. 36.

25. See 3 C. L. 670.

of the supreme court to review the proceedings of all special statutory tribunals cannot be taken away or abridged by the legislature.[26]

§ 2. *Right to certiorari; parties.*[27]—An application for a writ of certiorari must be made by a person affected by the determination to be reviewed.[28] The applicant, however, need not always be a party to the proceedings below,[29] the test of the right to certiorari, so far as parties are concerned, being whether the person seeking the writ was a party in form or in substance, so as to be concluded by the determination of the matters in controversy,[30] and if in the exercise of sound judicial discretion an injured person ought to be accorded an original writ of certiorari, it is an abuse of authority to refuse it;[31] but persons not parties of record in the original proceedings, though interested directly, are not always necessary parties to certiorari to review such proceedings,[32] nor is the party in whose favor the judgment

26. The common council of the city of New Brunswick, in declaring vacant a seat of one of its members under the provision of the charter that the common council shall be the sole judge of election, return, and qualification of its own members, is subject to the supervisory jurisdiction of the supreme court by certiorari. Meachem v. Common Council [N. J. Law] 62 A. 303.

27. See 5 C. L. 561.

28. Code Civ. Proc. § 2127. People v. Common Council of Troy, 99 N. Y. S. 1048. A municipal ordinance which is not entirely void cannot be questioned on certiorari by a person who is not shown to be affected by any of its provisions. Morwitz v. Atlantic City [N. J. Law] 62 A. 996. An official newspaper for a town is interested in having the designation of another newspaper reviewed (People v. Common Council of Troy, 99 N. Y. S. 1045), but a newspaper which is not an official newspaper cannot maintain certiorari to review the determination of a city council designating official newspapers pursuant to Laws 1903, p. 435, c. 182, § 1, subsec. 29, upon an allegation that the relator is one of the two daily papers published in the city having the largest circulation, there being nothing to show that these two papers are of opposite political faith, and an allegation in relator's unverified petition that it was the republican newspaper having the largest circulation was insufficient (Id.). Resident electors and landowners in a precinct affected by a stock law election are sufficiently interested to be entitled to maintain certiorari to review an order of the commissioners' court pursuant to such election prohibiting stock from running at large. Commissioners' Ct. v. Johnson [Ala.] 39 So. 910. Any taxpayer may prosecute certiorari to prevent the unlawful expenditure of public funds, as where a municipal corporation by action ultra vires or otherwise embarks in a scheme which will result in an unlawful expenditure of public funds, any ordinary taxpayer may be admitted to prosecute a certiorari to review such action. Rehill v. East Newark [N. J. Law] 63 A. 81. In such case no special interest, distinct from the interest of other taxpayer, is necessary. Id. In matters affecting a county, as proceedings relating to the reconstruction of a court house, certiorari may be instituted by the attorney general. Attorney General v. Montcalm County Sup'rs [Mich.] 12 Det. Leg. N. 562, 104 N. W. 792.

29. Where a decision by a quasi judicial tribunal affects injuriously and with substantial directness one not a party to the record and having no other efficient remedy, such party may, in the discretion of the court having jurisdiction, maintain certiorari to remedy the wrong as to jurisdictional matters. State v. Chittenden [Wis.] 107 N. W. 500. The rule that no one but a party is entitled to use the remedy of certiorari is to be regarded as using the term "party" in its broad sense, that of including all persons injuriously affected with substantial directness and having no other efficient legal remedy, whether they are parties to the record or might properly be such. Id. When the proceeding to be reviewed was directly against person or property, the personal right being the only one involved or being one coupled with another primary right, such person is a necessary party and, if not brought in by proper citation, a writ of certiorari in his behalf will reach jurisdictional error as to proceeding at all in the matter and excess of jurisdiction as well. Id. A decision as to the status of a dental college, incidental to passing upon an application for a license to practice dentistry, based on a diploma issued thereby, is within the rule stated as regards discretionary authority to permit the use of the writ of certiorari to correct jurisdictional errors upon the application of a person not a party to the original proceedings (Id.). If the status of a dental college is adjudicated in an action in rem, whether the proceeding is solely against the res or one to pass upon an application for a license and against the res as well, such college may properly be accorded certiorari to test the decision for jurisdictional error, either as to the subject-matter or excess of jurisdiction. Id.

Contra: Under Code Civ. Proc. §§ 938, 1069, only a party to the record can sue out certiorari. Elliott v. Superior Ct., 144 Cal. 501, 77 P. 1109.

30. In re Public Ditch in Insanti County [Minn.] 107 N. W. 730.

31. State v. Chittenden [Wis.] 107 N. W. 500.

32. A writ of certiorari sued out by a party against whom a judgment had been obtained in a municipal court, ordering the abatement of a public nuisance alleged to have specially injured the defendant in certiorari, the abatement proceedings having been brought by the latter in his own behalf,

sought to be reviewed was rendered always a necessary party to the certiorari proceedings.[33] Where it appears that interested parties are not before the court, the proceedings may be stayed until such parties are brought in,[34] but the status of the prosecutor must be challenged in due time.[35]

A party may lose his right to a writ of certiorari by delay in applying therefor,[36] or by failure to comply with statutory conditions,[37] but appearance before the lower tribunal and objection to its action is not a condition precedent to the right to assail such action upon jurisdictional grounds,[38] and where the applicant shows a good excuse for failure to apply for the writ within the time required by law, the writ may be allowed, notwithstanding that the time limit has expired.[39] The common-law writ may issue even though only personal rights are involved.[40]

should not be dismissed on the ground that the municipality was not a party respondent to the writ. Trust Co. v. Ray [Ga.] 54 S. E. 145.

33. The party in interest has an opportunity to appear by counsel if he sees fit, and it will be presumed that counsel appearing technically for the defendant judge is in reality representing the real party in interest. Davis v. Preston [Iowa] 106 N. W. 151.

34. Livermore v. Millville, 72 N. J. Law, 221, 62 A. 408. Or the writ may be dismissed. Id See post, § 3, Quashal or Dismissal.

35. Where respondent in certiorari does not challenge the status of the prosecutor until the argument of the cause, matters of fact upon which such status depends will be taken as admitted for purposes of a motion then made for dismissal of the writ. Rehill v. East Newark [N. J. Law] 63 A. 81.

36. Certiorari to review an assessment of the benefits of a street improvement made under P. L. 1897, p. 79, will be dismissed where it is allowed after sixty days from the confirmation of the assessment has elapsed, under § 65 of the act. Tusting v. Ashbury Park [N. J. Law] 62 A. 183. A motion for a new trial will not cut off the movant's right to certiorari where he voluntarily dismisses such motion and applies for the writ within the time prescribed by the statute, but he cannot pursue this remedy after the expiration of thirty days from the date of the judgment against him. Crosson v. State, 124 Ga. 651, 52 S. E. 880.

Statute of limitations: Where the statute does not fix the time within which an application for a writ of review may be made, the courts, by analogy, will apply the limitation fixed by law for the prosecution of an appeal. State v. Superior Ct., 41 Wash. 450, 83 P. 726. Certiorari to review the award of damages in condemnation proceedings refused because not applied for within thirty days, as required in cases of appeal by Ballinger's Ann. Codes & St., § 5645. State v. Superior Ct. [Wash.] 85 P. 673. In appeal cases in justices' courts, the statute runs against certiorari from the date of the verdict and not from the date of the judgment. Hewett v. Robertson, 124 Ga. 920, 53 S. E. 456. Where a city court judge was without power to entertain a motion for a new trial, such a motion was a mere nullity, and the filing thereof could not operate to extend the jurisdiction of the court over the case beyond the date of its final judgment so as to save the right to certiorari from the bar of limitations. Crossen v. State, 124 Ga. 651, 52 S. E. 880.

37. The filing of the affidavit provided for by Pen. Code 1895, § 765, that the accused has not had a fair trial and has been wrongfully and illegally convicted, is a condition precedent to the sanction of a petition for certiorari to review a judgment of conviction in a county court, and failure to comply with this condition is not cured by the sanction of the petition or the answer of the county judge. Blassingame v. State [Ga.] 54 S. E. 180. Code of Civ. Proc. § 2125, is not solely a statute of limitations, but by implication it grants the relator four months in which to procure the writ in cases in which, although the determining body has finally adjourned after disposition made of the matter, it or its successor at its next authorized meeting can obey the order made by the court. Under this rule it was held that certiorari would lie to correct the action of a town board of audit in reducing the compensation of the relator as a health officer, although the claim had passed from the town board of audit to the board of supervisors. People v. Sipple, 109 App. Div. 788, 96 N. Y. S. 897. Certiorari will not lie to correct an assessment complained of as erroneous, as distinguished from void, because made without jurisdiction of the person assessed, unless an application was made "in due time to the proper officers to correct such assessment." And no excuse can take the place of the application, which is a condition of the court's jurisdiction to correct assessments. See Laws 1896, p. 882, c. 908, § 250. See, also, New York City Charter, Laws 1901, p. 831, c. 466, §§ 895, 906, and p. 382, § 897, as amended by Laws 1902, p. 486, c. 192. People v. Wells, 110 App. Div. 336, 97 N. Y. S. 333. Under these statutory provisions, where the board of taxes and assessments refused to act upon an application for reduction of taxes on the ground that it was too late, the remedy was by mandamus to complete such action and not by certiorari, but after the board had been compelled, by mandamus, to act, their decision would then have been reviewable by certiorari. Id.

38. Where an assessment of personal taxes was assailed on the ground that the applicant was a nonresident, his failure to object to the assessment before the commissioners did not preclude him from assailing the assessment by certiorari. People v. O'Donnel, 47 Misc. 226, 95 N. Y. S. 889.

39. Ordinarily the supreme court will not

The writ should be directed to the body which has custody of the record to be examined,[41] and their clerk is not a proper party.[42] One who in any event will be bound is not a proper party to a statutory writ, the respondents to which the statute names.[43]

§ 3. *Procedure for writ; writ, service and return. Application.*[44]—Whenever possible an application for a writ of certiorari will be liberally construed,[45] but the application must disclose some apparent error or lack of jurisdiction in the proceedings below[46] operating to the prejudice of the applicant,[47] and error must be assigned so specifically and distinctly that the reviewing court may understand the grounds relied on.[48] It suffices if facts, that being true constitute fraud in the judgment, are alleged.[49] The applicant, furthermore, must show compliance with statutory conditions and formalities,[50] and the application must be properly verified.[51] Exhibits should not be attached to the petition and treated as the record of the proceedings to be reviewed.[52]

entertain jurisdiction of an application of this kind after the time limited by law for prosecuting an appeal has expired, but where it appeared from the application that the relator was in ill health and was deprived of her property by the order complained of, and was thus without means to give bond or employ counsel to prosecute an appeal, and, in addition to this, the respondent charged and the court found that she was incompetent to manage her affairs, and the respondent who preferred the charge will not be heard to gainsay it, the supreme court will therefore assume, for the purpose of protecting her rights, that the relator was in fact incompetent and that the application was timely made. State v. Superior Ct., 41 Wash. 450, 83 P. 726.

40. Removal of an employee in classified civil service without notice required by civil service act. Hurd's Rev. St. 1903, c. 24, § 457. Powell v. Bullis [Ill.] 77 N. E. 575.

41, 42. In county seat removal proceedings to the county board omitting the auditor who is their clerk. State v. Boyden, 18 S. D. 379, 100 N. W. 761.

43. In certiorari to review the assessment by the state board of tax commissioners the local authorities are bound, though not parties, hence a municipal corporation cannot be made a party. Laws 1900, p. 510, c. 254. People v. Priest, 95 App. Div. 44, 88 N. Y. S. 11.

44. See 5 C. L. 561.

45. On motion to dismiss. In re Public Ditch in Insanti County [Minn.] 107 N. W. 730.

46. It is not sufficient merely to show that there had been an adjudication upon the subject of public use and necessity for the property sought to be taken in order to authorize a writ of review. The relator must allege the distinct ground of claim of error pertaining to the subject. State v. Superior Ct. [Wash.] 86 P. 205. An averment that no personal service was made upon the relator before the adjudication, that he was a resident of another county in the state and had no actual notice prior to the adjudication, but that notice of a hearing was published and the affidavit failed to disclose that there was no affidavit filed in support of the published notice, as provided by Ballinger's Ann. Codes and St., § 5683, it was held that it would be presumed that the necessary affidavit to support the publication was filed and that the affidavit for the writ of review therefore failed to disclose the error or lack of jurisdiction. Id. Neither the supreme court nor any other court than the municipal court can take judicial cognizance of a municipal ordinance, and hence a petition for certiorari to review a conviction for violation of a city ordinance must set out the provisions of the ordinance. Hill v. Atlanta [Ga.] 54 S. E. 354. Certiorari to set aside an order revoking a liquor license dismissed, because the petition did not show the agreement between the county court whereby the license was granted and upon which the jurisdiction of the court to revoke the license depended. Stevenson v. McDonald [Ark.] 91 S. W. 300.

47. Blodgett v. McVey [Iowa] 108 N. W. 239.

48. A petition setting forth all the evidence submitted on trial before a jury in a justice's court, and alleging that the verdict is against the weight of the evidence, sufficiently complies with this rule. Mathews v. Parker, 124 Ga. 144, 52 S. E. 322. In a petition for certiorari, where all the evidence and all the record, including the judgment of the trial court, are set forth, it is a sufficient assignment of error to allege that the plaintiff excepts to the judgment and assigns error upon the same "because the same is contrary to law and the evidence and without either to support it." Harwell v. Marshall [Ga.] 54 S. E. 93. The jurisdictional defects relied on must be averred to the end the court may act advisedly in allowing the writ. Tourville v. Seavey Co., 124 Wis. 56, 102 N. W. 352.

49. Fisher v. Pennsylvania Co., 118 Ill. App. 662.

50. Where the petition alleged that the bond required by law had been filed with the clerk and approved by him, and that said bond was accepted by the clerk, which petition was verified by the affidavit of the petitioner, was sanctioned and the writ was ordered to be issued, it was error to dismiss the writ on the ground that it did not affirmatively appear that a bond approved by the clerk had been filed as required by law. Stallworth v. Macon [Ga.] 54 S. E. 142.

51. A petition for certiorari filed by two persons, one of whom was an attorney at law, was properly verified by the affidavit of

The statutory bond.[53]—The applicant of a writ of certiorari must file a bond [54] conditioned,[55] and in amount fixed by statute.[56]

The writ.[57]—Whenever possible the allegations of a writ of certiorari will be liberally construed,[58] and the command of the writ is not to be limited by the recitals of the writ where it is so definite that no misunderstanding can arise.[59] In Michigan the writ may be allowed by a circuit court commissioner.[60]

Notice of the writ.[61]—Such notice must be given as is required by statute.[62]

the attorney made individually as an attorney for his co-plaintiff. American Bonding & Surety Co. v. Adams, 124 Ga. 510, 52 S. E. 622.

52. Gaston v. Portland [Or.] 84 P. 1040.

53. See 5 C. L. 562.

54. Code, § 482. Giddens & Co. v. Rutledge [Ala.] 40 So. 759. Acts 1902, p. 105, relating to certiorari to municipal courts. Stallworth v. Macon [Ga.] 54 S. E. 142. The filing of the bond or making of the pauper affidavit is a condition precedent to the application for certiorari, and the filing of the bond together with the approval of the clerk or judge, or the making of the pauper affidavit, must affirmatively appear in the application for the writ. Id. In a nonseverable cause of action where two persons individually, as co-plaintiffs, sue and as such, after judgment against them, sue out a writ of certiorari, the bond to be given should be signed by both, either in person or by attorney at law, or by a duly constituted agent, and if it is executed by one as the agent of the other, the power so to sign must expressly appear. Harwell v. Marshall [Ga.] 54 S. E. 93. On certiorari to review the judgment of the county court in a criminal case, the bond required by Pen. Code 1895, section 765, must be approved, and an approval thereof by the county court judge is in conformity with the law, and when the judge sends up, as a part of the proceedings in the case, a bond of this character, this, under the decision in Watson v. State, 11 S. E. 610, 85 Ga. 237, is equivalent to an approval by him. Brown v. State, 124 Ga. 411, 52 S. E. 745. Under Acts 1902, p. 105, relating to writs of certiorari, the filing of the bond is a condition precedent to the application for the writ. Johns v. Tifton, 122 Ga. 734, 50 S. E. 941. Under Acts 1902, p. 105, relating to writs of certiorari, the making of the pauper affidavit, in the absence of a bond, is a condition precedent to the application for the writ. Id.

55. Under Acts 1902, p. 105, the bond on certiorari to a municipal court must be conditioned for the personal appearance of the applicant to abide the final judgment of the court. Stallworth v. Macon [Ga.] 54 S. E. 142. On certiorari to review the judgment of the county court in a criminal case, the bond required by Pen. Code 1895, section 765, unless the applicant makes a pauper affidavit in lieu thereof, must be conditioned for the appearance of the applicant to abide the final judgment of the court. Brown v. State, 124 Ga. 411, 52 S. E. 745. Under Acts 1902, p. 105, relating to writs of certiorari, a bond conditioned to pay the eventual condemnation money is not sufficient. Johns v. Tifton, 122 Ga. 734, 50 S. E. 941.

56. Code, section 482, requires the bond on certiorari to review a justice's judgment to be in double the amount of the judgment, including costs. Giddens & Co. v. Rutledge [Ala.] 40 So. 759. Where the plaintiff had obtained possession of the property sued for, and the only money judgment against the defendant was for $32.35 costs, a bond for $100 was sufficient. Id. Under Acts 1902, on certiorari to a municipal court, the bond must be acceptable to and approved by the clerk or judge of such court. Stallworth v. Macon [Ga.] 54 S. E. 142.

57. See 5 C. L. 562.

58. Where there is no especial occasion for the application of strict technical rules to statements in a petition for certiorari and in the writ issued, and where no prejudice has resulted from informalities, the writ will be liberally construed and not held to the standard of definiteness and precision of formal pleadings in actions at law and suits in equity. In re Public Ditch in Insanti County [Minn.] 107 N. W. 730.

59. The writ recited the refusal of the common pleas to reinstate an appeal, and commanded the common pleas to certify the proceedings on file with all things touching and concerning the same. It was held that this was sufficient to bring up the question of the propriety of the order dismissing the appeal and not merely the refusal to reinstate the appeal. Danenhower v. Lippincott [N. J. Law] 63 A. 868.

60. Attorney General v. Montcalm County Sup'rs [Mich.] 12 Det. Leg. N. 562, 104 N. W. 792.

61. See 5 C. L. 562.

62. A notice that the defendant has applied for and obtained a writ of certiorari in the cause, and that the writ is returnable on a certain date, etc., is not a sufficient compliance with Civ. Code 1895, section 4644, providing that notice of the sanction of the writ must be given. International Text Book Co. v. Fiel [Ga.] 54 S. E. 360. The designation of the district in which was situated the justice's court in which the case was tried, together with the recital that the writ of certiorari was to be heard at the court house "in said county," was sufficient notice to the defendant as to the county in which the writ would be heard. American Bonding & Surety Co. v. Adams, 124 Ga. 510, 52 S. E. 622. The defendant was bound to know when the "next term" of the superior court of his county would be held, and the fact that the notice incorrectly named the date of the term did not render it invalid. Id. If the defendant desired to take advantage of the discrepancy between the copy of the notice attached to the petition and the notice served upon his attorney, he should have traversed the return of the sheriff. This was not a ground for dismissal of the certiorari. Id.

Service of the writ.[63]

The return [64] to the writ of certiorari comprises only the record proceedings in the cause sought to be reviewed.[65] And a voluntary return of matters not called for by the writ form no part of the return,[66] nor will mere conclusions stated in the return constitute a sufficient return to positive allegations of the petition for the writ.[67] The return to the writ is conclusive,[68] but where the relator is not satisfied with the return he may move for a further return.[69] Where it is conceded on the hearing that the return is not consistent with the facts, a further return will be ordered,[70] though it is improper on a suggestion of diminution of the record to order the certification of the alleged omitted matter.[71] Exhibits should not be attached to the petition and treated as the record of the proceedings to be reviewed.[72]

Certiorari cannot prevail upon a doubtful record,[73] but a reasonable presumption will be indulged in favor of the decision under review.[74]

Objections and amendments.[75]

Quashal or dismissal.[76]—Some of the grounds for quashing or dismissing a

63, 64. See 5 C. L. 562.

65. All that is required concerning affidavits, writings, exhibits, and documents, is the production of such as were used upon the trial of the investigation. Where, therefore, on certiorari to review a second trial of a police officer by a commissioner, it appeared by the affidavit of the respondent that the original charges in the first trial were not produced on the second trial and were not offered in evidence therein, it was held that the relator was not entitled to a further return to bring up such charges. People v. McAdoo, 98 N. Y. S. 40.

66. Spencer v. Bartime [N. J. Law] 63 A. 870. Upon certiorari to review a judgment of the court of common pleas, a voluntary statement of facts not a part of the record, though signed and sealed by the judge of the common pleas, forms no part of the return (Id.). If more than the record is required to be certified, the party desiring such additional return must obtain a rule specifying the particulars in respect to which the additional return is required. Id. Where no written finding was made, it appearing by the affidavit read in opposition to the motion for a further return that the finding was oral, the relator was not entitled to a further return in order to bring up a written finding. People v. McAdoo, 98 N. Y. S. 40.

67. On certiorari to review the action of the common council of a city designating official newspapers, pursuant to Laws 1903, p. 435, c. 182, § 1, subsec. 29, where the petition contained positive allegations as to the independent character of one of the appointees, a return alleging generally, upon the information and belief, that the two appointees were of opposite political faith was a mere conclusion and was insufficient. People v. Common Council, 99 N. Y. S. 1045. Where the jurisdiction of the inferior tribunal depends upon the giving of certain notices, the record returned must recite the facts showing the giving of such notices. A mere recital of notice is insufficient to sustain the jurisdiction of the inferior tribunal. Commissioners of Highways v. Smith, 217 Ill. 250, 75 N. E. 396.

68. Williams v. Routt County Com'rs [Colo.] 84 P. 1109.

69. As where the relator attacked the jurisdiction of a police commissioner to dismiss the relator from the police force, and the return showed that the commissioner had jurisdiction to hear and determine the charges upon which the relator was dismissed. People v. Greene, 97 N. Y. S. 748. The right of the relator to a second return is regulated by statute, and is only allowed where the return already made does not comply with the writ. People v. McAdoo, 98 N. Y. S. 40.

70. Under authority of Code Civ. Proc. section 3125. In re Melody, 97 N. Y. S. 790.

71. The remedy is mandamus in aid. State v. Mulvihill, 113 Mo. App. 324, 88 S. W. 773.

72. B. & C. Comp. section 596, clearly does not intend that the petition shall do more than describe with convenient certainty the decision or determination sought to be reviewed, and sets forth the errors alleged to have been committed therein. Section 596 provides that before allowing the writ an undertaking with one or more sureties, to be approved by the court, must be filed by the plaintiff, and the statutory amount of such undertaking is sufficient to protect the defendant in such a proceeding against all reasonable pecuniary expenses, and the following section provides for the return of the writ with a copy of the record or proceedings in question annexed, certified to by the clerk or other person having the custody of such record or proceedings. Gaston v. Portland [Or.] 84 P. 1040.

73. Beam v. Reynolds [Mich.] 13 Det. Leg. N. 257, 108 N. W. 83.

74. See post, section 4, Hearing and Questions Which May be Raised and Settled. Where the return of a justice shows that a second adjournment was against objection, this implies the presence of the defendant at the time of such adjournment. Beam v. Reynolds [Mich.] 13 Det. Leg. N. 257, 108 N. W. 83. It is not error to overrule exceptions to the answer of a justice of the peace to a writ of certiorari where the evidence alleged in such exceptions to have been omitted was immaterial, and where the answer contained substantially all of the evidence introduced on the trial that was favorable to the party excepting. Baird v. Smith, 124 Ga. 251, 52 S. E. 655.

75, 76. See 5 C. L. 563.

writ of certiorari are, that there was no judgment or decision by the lower tribunal,[77] that the relator has mistaken his remedy,[78] that the act sought to be reviewed was not judicial,[79] that the interested parties have not been made parties to the writ,[80] that the application is too late,[81] that the relator can obtain no effective relief,[82] failure to file sufficient briefs,[83] but a writ of certiorari will not be dismissed for formal objections which are raised for the first time in the objector's brief.[84] Discrepancy between the notice of the writ attached to the petition and the notice served is not ground for dismissal.[85] Quashal or dismissal may be on motion,[86] which should be filed on the return day [87] or before,[88] and if postponed is waived.[89] Upon a motion to dismiss, the allegations of the petition are taken as true,[90] and the writ will, if possible, be liberally construed.[91]

§ 4. *Hearing and questions which may be raised and settled.*[92]—The review upon a writ of certiorari is confined to the record [93] as disclosed by the return,[94] and

77. Where, in proceedings to review the judgment of a justice upon the report of referees, the record disclosed that no judgment was entered upon the report of the referees. Ruhl v. Cooper [Del.] 63 A. 575. Certiorari to review a complaint against the applicant charging him with violation of an ordinance of the board of excise commissioners of a city, prematurely brought. Almindie v. Camden Com'rs [N. J. Law] 63 A. 867. Where the answer did not verify the statement in the petition that a verdict had been rendered against the petitioner nor disclose what, if any, disposition had been made of the case, and where no steps were taken to have the answer perfected, it was not reversible error to overrule the petition. Williams v. Bradfield, 124 Ga. 1003, 53 S. E. 312. Enumeration by state commissioner of excise upon which the tax paid by the relators was levied, and a certificate thereof made by the commissioner to the county treasurer, were not such a final determination of the rights of the relators as to entitle them to a common-law writ of certiorari. People v. Cullinan, 97 N. Y. S. 194.

78. Remedy being by appeal. Cook v. Exom [Ga.] 54 S. E. 147; Dahlstrom v. Portland Min. Co. [Idaho] 85 P. 916.

79. In re Leverant, 110 App. Div. 371, 97 N. Y. S. 272.

80. The court may, in its discretion, dismiss the writ where it appears that interested parties have not been made parties to the proceedings. Livermore v. Millville, 72 N. J. Law, 221, 62 A. 408.

81. Crosson v. State, 124 Ga. 651, 52 S. E. 880.

82. Where the only purpose of the writ was that if the relators could get an expression of the court as to the right of the state commissioner of excise to make a certain enumeration of a city so as to make the excise liquor tax exceed that formerly levied for such city, the relators might possibly obtain some legislation by which a claim could be presented against the state for the excess of liquor taxes paid under such enumeration, it was held that the question presented by the writ was purely academic, and hence the writ would be dismissed. People v. Cullinan, 97 N. Y. S. 194.

83. Where the relator files no brief and leaves the court the task of examining the authorities to ascertain whether or not his complaint is well founded, the court may dismiss the writ as having been abandoned, or may, in its discretion, examine the merits, notwithstanding the relator's neglect. State v. Summerlin [La.] 40 So. 792.

84. Objection that a motion to vacate the return of service in the action was not a motion to quash the writ, within Pub. Acts 1905, p. 484, § 310, providing that whenever in any action at law in a circuit court, a motion to quash the writ or declaration upon jurisdictional grounds is decided adversely to the party filing such motion, the decision may be reviewed by writ of certiorari forthwith. Moinet v. Burnham, Stoepel & Co. [Mich.] 13 Det. Leg. N. 38, 106 N. W. 1126.

85. American Bonding & Surety Co. v. Adams, 124 Ga. 510, 52 S. E. 622. See ante, § 3, Notice of the Writ.

86. Cook v. Exom [Ga.] 54 S. E. 147; Dahlstrom v. Portland Min. Co. [Idaho] 85 P. 916. Where there is no return to the writ, demurrers interposed thereto will be treated as motions to dismiss the petition for insufficiency of facts. Gaston v. Portland [Or.] 84 P. 1040.

In Oregon it seems that a motion to quash a writ of certiorari will not be entertained, the practice under B. & C. Comp. section 603, being either to affirm, modify, reverse, or annul the decision under review, or by mandate to the inferior court to proceed in the matter according to the decision of the reviewing court. Gaston v. Portland [Or.] 84 P. 1040.

87. After the return of the writ. Gaston v. Portland [Or.] 84 P. 1040.

88. A motion to quash the writ should be made before return. Kusel v. Chicago, 121 Ill. App. 469.

89. Kusel v. Chicago, 121 Ill. App. 469.

90. Gaston v. Portland [Or.] 84 P. 1040. On a motion to dismiss for want of interest on the part of the prosecutor, matters of fact upon which the status of the prosecutor depends shall be taken as confessed where the status of the prosecutor is not questioned until the argument. Rehill v. East Newark [N. J. Law] 63 A. 81.

91. Such a motion is in effect a general demurrer, and the allegations of the writ need not have the definiteness and certainty of a formal pleading. In re Public Ditch in Insanti County [Minn.] 107 N. W. 730.

92. See 5 C. L. 564.

93. Commissioners of Highway v. Smith, 217 Ill. 250, 75 N. E. 396. On certiorari to re-

only such questions as were raised below will be considered.[95] As has already been stated, certiorari cannot serve the office of an appeal or writ of error,[96] and the only question to be determined thereon is the jurisdiction of the inferior tribunal or its authority to render the decision sought to be reviewed,[97] and allegations of jurisdiction in the return are prima facie true.[98] Questions of fact[99] will not be reviewed where there is legal evidence to support the decision complained of,[1] nor can the constitutionality of the statute under which the proceedings below were had be inquired into.[2] The scope of the review may be circumstanced or limited by the delay

view an order adjudging the relator guilty of contempt. State v. District Ct. [Mont.] 85 P. 870. The writ brings up only the record proper. It does not bring up the evidence. State v. Reynolds, 190 Mo. 578, 89 S. W. 877. Ballot boxes and keys thereto and the report of election officers are not judicial records to be reviewed on certiorari. Id.

94. And not upon the allegations of the petition or upon any issue of fact. Kammann v. Chicago [Ill.] 78 N. E. 16. The determination must proceed upon the return, and allegations in the petition denied by the return cannot be considered. People v. Kelsey, 96 N. Y. S. 745. The reviewing court cannot look back of the return into the petition and the accompanying papers. In re Melody, 97 N. Y. S. 700; Commissioners of Highways v. Smith, 217 Ill. 250, 75 N. E. 396. Points made in a petition for certiorari, not verified by the answer of the trial judge, present nothing for determination, either by the superior or the supreme court. Brown v. Gainesville [Ga.] 53 S. E. 1002. When the answer to a petition for certiorari does not verify an allegation in the petition that there was a final judgment rendered, and no steps are taken to perfect the answer, neither the superior court nor the supreme court can properly undertake to pass on the merits of the assignments of error made in the petition. Id.

In Iowa the reviewing court, in determining questions of jurisdiction, is not limited to the petition and answer, but may consider other evidence. Blodgett v. McVey [Iowa] 108 N. W. 239.

95. Neither the superior nor the supreme court can consider questions raised in a petition for certiorari that were not before the trial judicatory. Duren v. Thomasville [Ga.] 53 S. E. 814.

96. See ante, § 1. Nature, Occasion and Propriety of the Remedy.

97. Wetzel v. Superior Court [Cal. App.] 85 P. 858; Commissioners of Highway v. Smith, 217 Ill. 250, 75 N. E. 396. The judgment of a court will not, on certiorari, be reversed for mere error committed in the exercise of its rightful jurisdiction. Wetzel v. Superior Ct. [Cal. App.] 85 P. 858. Errors of the drainage commissioners in including or excluding lands from the graduated scale, which they were authorized to make, were not reviewable on certiorari. Barnes v. Drainage Com'rs [Ill.] 77 N. E. 1124. When the writ of certiorari is granted to one neither a party to the record nor necessary thereto, the tribunal in the proceeding sought to be reviewed having jurisdiction of the party or parties and of the subject- matter, such writ reaches only jurisdictional errors committed in deciding a matter within its jurisdiction to decide, proceeding properly. State v. Chittenden [Wis.] 107 N. W. 500. The constitutional grant of appellate jurisdiction given to circuit courts does not include authority to review the proceedings of an inferior tribunal on the merits by the use of a writ of certiorari. The use thereof to commence an action relates to judicial authority to supervise inferior courts and jurisdictions. Id. Action of district court in treating allegations and prayer of an answer to a petition to set aside the probate of a will as a counterclaim of cross petition, and in awarding affirmative relief thereon, not considered. Davis v. Preston [Iowa] 106 N. W. 151.

Jurisdictional error as to a court proceeding according to the course of the common law relates to the person or the subject matter. Such error as to other tribunals extends to clear errors of law, such as deciding an issue of fact one way when the reasonable inferences from the evidence so strongly point the other way as to leave no reasonable basis for the decision. State v. Chittenden [Wis.] 107 N. W. 500.

98. If the relator is not satisfied with such allegations, he should not go to hearing thereon, but should move for an additional return. People v. Greene, 97 N. Y. S. 748.

99. The judge should have required the municipal council to file an answer to the allegation in the petition for certiorari that there was no evidence before it as to the conviction of the parties whose licenses were revoked. Upon the coming in of such answer he should have determined whether the evidence before it, if there was such, was sufficient to authorize the passage of the resolution, the resolution being in the nature of a judgment declaring the license forfeited. Carr v. City Council, 124 Ga. 116, 52 S. E. 300.

1. On a certiorari to review a conviction in a municipal court for violation of an ordinance, the supreme court will not disturb the decision of the lower court upon a question of fact when it is supported by legal evidence. Harris v. Atlantic City [N. J. Law] 62 A. 995. Where, in an action for wages, the amount of wages earned by the plaintiff was not disputed by the defendant and there was no evidence to support the defense, the verdict for the plaintiff for the full amount sued for was therefore demanded, and the court, upon the petition for certiorari, erred in disturbing the verdict. Usher v. Seaboard Air-Line R. Co. [Ga.] 54 S. E. 704.

2. Validity of Drainage Act, section 76, as amended by Laws 1901, page 157. Barnes v. Drainage Com'rs [Ill.] 77 N. E. 1124. Where a writ of certiorari is asked for on the ground of failure to comply with the statute relating to the proceedings sought to be reviewed, the question of the validity of the

in applying for the writ.[3] The questions considered upon the hearing of the statutory writ of certiorari or review depends, of course, entirely upon the statute.[4] Questions of venue also depend upon the practice statutes of the various states.[5] Presumptions are indulged in favor of the decision below.[6]

§ 5. *Judgment.*[7]—The cause may be remanded for further proceedings,[8] but the judgment of the inferior tribunal will not be annulled unless it be shown that error complained of was prejudicial to the applicant.[9] The judgment may be for one of two joint applicants and against the other.[10] In Georgia the power of the superior court to remand or to render final judgment depends upon special statute.[11]

statute cannot be considered, being conceded by the allegations of the petition for the writ. Id.

3. When a landowner had notice of the proceedings for making a street improvement in front of his property, for which the law authorized an assessment thereon to be levied, and refrained from applying for a writ of certiorari to review the proceedings until the improvement was completed and an assessment levied, he was allowed to question on certiorari only the legality of the assessment. Tusting v. Ashbury Park [N. J. Law] 62 A. 183.

4. This court cannot inquire into the constitutionality of the revenue law of this state upon a writ of review on the application of a private citizen in a matter involving his private rights. McConnell v. State Board [Idaho] 83 P. 494. Under the provisions of Rev. St. sections 4962, 4968, the supreme court is not authorized by certiorari to pass upon the constitutionality of an act upon the application or petition of a private person to protect his private property rights. Id. The writ is limited to a review of questions of law involved in the matter, and the court must confine its inquiry to the question as to whether or not the action complained of was beyond and in excess of the jurisdiction conferred on the tribunal, board, or officer. On such writ this court cannot review the question of fact as to whether said board in its judgment or opinion has valued the railway, telephone, and telegraph lines at less than their cash value. Id. Upon certiorari to review the proceedings of village trustees in levying an assessment for improving a street, under the limitations prescribed by Code Civ. Proc. section 2140, the point raised that the premises were not benefited at all does not present a question of law, unless the determination of the trustees was without competent proof to support it or was opposed by a decided and strong preponderance of evidence. In re Phelps, 110 App. Div. 69, 96 N. Y. S. 862. Where, upon a certiorari to review the action of the assessing officer, it appears from the record that as a matter of fact the assessment of the relator's property is unequal as compared with the assessment of other similar property similarly situated and is unjust, the supreme court is at liberty to correct such assessment, even though the rule or general principle upon which the assessment was made is not an illegal or erroneous one. Code Civ. Proc. § 2140. People v. Reis, 109 App. Div. 748, 96 N. Y. S. 597. On certiorari to review the actions of political conventions and election committees and officers, under Sess. Acts 1901, p. 162, § 23, the court cannot make a recount or review the entire election proceedings, the remedy being confined to the review of acts denying the right to participate in a primary election or to vote, or any of the specific rights conferred by the statute. State v. Reynolds, 190 Mo. 578, 89 S. W. 877. On certiorari under this statute, the court cannot take the ballot boxes out of the hands of the commissioners of election and turn them over to referees appointed by the court to count the votes and report the result to the end that the court may declare who was elected. Id.

5. A writ of certiorari to review the decision of the police commissioner dismissing the relator from the police force must be heard by the appellate decision of the supreme court held within the judicial department embracing the county where the writ is returnable. People v. Greene, 59 N. Y. S. 679.

6. The result of a trial before a board of police commissioners as expressed in its findings, like a verdict in an ordinary case, is to have a reasonable intendment, and a reasonable construction, and is not to be set aside except for necessity. Tibbs v. Atlanta [Ga.] 53 S. E. 811. Where a petition for certiorari to review the proceedings of the territorial board of equalization disclosed that the board treated patented mines as a distinct class of lands, it was held that the court must assume, in the absence of a contrary averment, that the assessment rolls of the various counties furnished the necessary information, and that the board of supervisors, from the information thus afforded, returned to the territorial board patented mines as a distinct class of real estate. Copper Queen Consol. Min. Co. v. Territorial Board [Ariz.] 84 P. 511.

7. See 5 C. L. 565.

8. When the record of a cause removed from the common pleas to the supreme court by certiorari has been actually remitted by the proceedings, the latter court has authority to proceed therein, even though the formal order to remit has not been filed with its clerk. Stokes v. Hardy [N. J. Law] 62 A. 1002. Where the determination of the state comptroller assessing a franchise tax and license fee against a foreign corporation is reversed on certiorari, the case will be remitted to the comptroller. People v. Miller, 98 N. Y. S. 751.

9. Docketing case for violation of city ordinance in name of state held not prejudicial under the circumstances of the case. Blodgett v. McVey [Iowa] 108 N. W. 239.

10. Walker v. Hillyer, 124 Ga. 857, 53 S. E. 313.

11. The judge of the superior court upon reversing the decision of the ordinary on the

§ 6. *Costs.*[12]—Costs on certiorari are granted or withheld upon the writ and not by virtue of the original trial or hearing.[13] Statutes relating to costs on certiorari are considered in the notes.[14] If costs on certiorari have gone against all defendants, including one improperly sued, he should apply for relief to the court which heard the case.[15]

§ 7. *Review of certiorari.*[16]—One who is not a proper respondent is not aggrieved and cannot appeal.[17] The judgment of the circuit court of appeals in certiorari to a district court on a conviction of carrying liquor into an Indian reservation involves no money value sufficient to support appeal to the supreme court.[18] Where the evidence is conflicting, the grant of the writ will not be reviewed so far as the facts are concerned,[19] but where the court manifestly errs in disturbing the verdict below, its judgment will be reversed.[20] The action of the lower court in refusing the writ because of failure to comply with statutory conditions will not be

facts presented by a petition for certiorari cannot enter final judgment. Weathersby v. Jordan, 124 Ga. 68, 52 S. E. 83. The error complained of in the writ of certiorari being an error of law which governs the case, it was proper for the judge of the superior court to render final judgment thereon. Hewett v. Robertson, 124 Ga. 920, 53 S. E. 456. The power conferred upon the judge of the superior court, upon the hearing of a certiorari from the ruling of a magistrate in a possessory warrant case, to remand the case or give final judgment and direction therein as he may see fit (Civ. Code 1895, § 4807), has no application to a case in which possessory warrant is not the proper remedy. Brown v. Todd, 124 Ga. 939, 53 S. E. 678. Where the superior court upon certiorari reverses the findings ordinary, it is error to render a final judgment. Weathersby v. Jordan, 124 Ga. 68, 52 S. E. 83.

12. See 3 C. L. 676.

13. Where an order dismissing a writ of certiorari was reversed on appeal, the costs to abide the event, the event referred to was the final event of the writ of certiorari. People v. Greene, 99 N. Y. S. 679.

14. In an original proceeding for a writ to review, attorney's fees may be taxed as a part of the cost, and in such case an attorney's fee of $15 is allowable under Code 1881, § 512, subs. 4 and 5 (Hills' Ann. St. and Codes, § 829), where judgment is rendered in the supreme court after argument. State v Superior Court, 40 Wash. 453, 82 P. 878. These subdivisions were omitted when the section was brought forward in Ballinger's Ann. Codes and St. section 5172, but were not affected by 2 Ballingers' Ann. Codes and St. section 6528, relating to appeals to the supreme court, the writ of review being an "action" within section 5, which provides that, in all "actions" where the judgment is rendered in the supreme court after argument, an attorney's fee of $15 shall be allowed. Id. On appeal to the court of appeals from an order dismissing a writ of certiorari, the court may withhold costs from the relator, even though it should be determined that he successfully prosecuted the writ, the costs being discretionary. Code Civ. Proc. § 2143. People v. Greene, 99 N. Y. S. 679. Comp. Laws 1897, section 4329, providing that the judge of probate shall receive a certain fee for making exemplified copies of any proceedings had in the probate court, does not apply to copies of proceedings in the probate court required by law to be set forth by the return to the writ of certiorari, but only to copies furnished prior to the issuance of the writ. Patterson v. Calhoun Circuit Ct. Judge [Mich.] 13 Det. Leg. N. 269, 108 N. W. 351.

15. Appeal not remedy. State v. Boyden, 18 S. D. 379, 100 N. W. 761.

16. See 5 C. L. 565.

17. State v. Boyden, 18 S. D. 379, 100 N. W. 761.

18. Whitney v. Dick, 202 U. S. 132, 50 Law. Ed. ——.

19. The evidence being conflicting as to whether an alleged nuisance was such or not, the judgment of the court below in granting the certiorari and remanding the case for a new trial will not be disturbed. Trust Co. v. Ray [Ga.] 54 S. E. 145. A judge of the superior court, in passing on a certiorari where questions of fact are involved and the evidence is conflicting, has a discretion to sustain the certiorari similar to the discretion allowed him in passing upon a first new trial, and the discretion will not be controlled unless it has been manifestly abused. Weathersby v. Jordan, 124 Ga. 68, 52 S. E. 83. The discretion of the judge of the superior court in reversing the ordinary's finding on the facts presented by the petition for certiorari will not be controlled. Id. The supreme court will not disturb the first grant of a new trial upon certiorari when the verdict was not demanded by the evidence. Mathews v. Parker, 124 Ga. 144, 52 S. E. 322. Evidence on certiorari held sufficient to sustain the action of a board of review of a city in increasing certain assessments of property for taxation. State v. Fisher [Wis.] 108 N. W. 206.

20. Where in an action for wages the amount of wages earned by the plaintiff was not disputed by the defendant, and there was no evidence to support the defense, the verdict for the plaintiff for the full amount sued for was therefore demanded, and the court, upon the petition for certiorari, erred in disturbing the verdict. Usher v. Seaboard Air-Line R. Co. [Ga.] 54 S. E. 704.

disturbed.[21] Questions must be saved [22] and errors must be assigned as in other cases of appellate review.[23]

CHALLENGES; CHAMBERS AND VACATION, see latest topical index.

CHAMPERTY AND MAINTENANCE.[24]

A Grant of Land Held Adversely (621).
Agreements as to Contingent Fees and Payment of Expenses at Trial (622).
of Chose in Action (623).
Champerty as a Defense (624).
Maintenance (624).
Assignment to or Purchase by Attorney

A grant of land held adversely [25] to the grantor is in some states void.[26] Some require actual possession by the disseisor to void such a grant.[27] In Massachusetts a deed to land of which the grantor was disseised, not shown to have been delivered upon the premises, was inoperative prior to 1891.[28] The champerty statute does not operate upon involuntary conveyances made by a party not in possession of land but operating through a commissioner of the court.[29] The fact that the disseisin is

21. For the want of the requisite affidavit this case comes within the ruling in the case of King v. State, 50 S. E. 64, 122 Ga. 153, wherein it was held that "this court will not interfere with the order of the judge of the superior court refusing to sanction a writ of certiorari from a judgment of conviction in a county court, where the record fails to show that the petitioner filed the affidavit required by Pen. Code 1895, section 765." Bennett v. State [Ga.] 53 S. E. 815.

22. The question as to whether the judge of one district may grant certiorari to review the judgment of a justice of another district in the absence of an appointment as provided for by Sayles' Ann. Civ. St. 1897, was not raised by a bill of exceptions showing merely that the writ was issued by a judge of another district, there being nothing to show that the judge was not appointed to try the case as provided by the statute. Seiber v. Johnson Mercantile Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 293, 90 S. W. 516. See Appeal and Review, 7 C. L. 128; Saving Questions for Review, 6 C. L. 1385.

23. An assignment of error on appeal in certiorari proceedings that an interrogatory and answer were objected to by the appellee only on the ground that they were not responsive, and that the objection was not made in writing before announcing ready for trial, and that no notice was given of the objection until the interrogatory and answer were tendered, did not show error, in the absence of any showing as to the length of time the objection had been on file. Seiber v. Johnson Mercantile Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 293, 90 S. W. 516. See Appeal and Review, 7 C. L. 128.

24, 25. See 5 C. L. 565.

26. Anniston City Land Co. v. Edmondson [Ala.] 40 So. 505. In the District of Columbia a conveyance by a disseisee is valid. Chesapeake Beach R. Co. v. Washington, etc., R. Co., 199 U. S. 247, 50 Law. Ed. ——. See 5 C. L. 565, n. 8.

NOTE. As to whom and for what purpose void: While it is sometimes said that such a deed is "absolutely void" (Gilman v. Dolan, 100 N. Y. S. 186, citing Laws 1896, c. 547, p. 603, which uses the exact words as quoted and without qualification as respects third persons. The mass of New York decisions hold such a conveyance to be good as between the parties on contract or estoppel grounds, although the statutes appear always to have had the same wording. See cases cited in Bernstein v. Humes, 60 Ala. 582, 31 Am. Rep. 52, and in 5 Am. & Eng. Enc. Law [2d ed.] 844, n. 2), such words are in a leading case (Bernstein v. Humes, 60 Ala. 582, 31 Am. Rep. 52), rejected as too broad for the reason that the deed may be effective as a contract or by way of estoppel. It must be remembered that it is the conveyance which is avoided. Other things which the deed may effect besides the conveyance may be of full force. Thus one case states that what is meant in saying the deed is void is that it is inoperative to convey legal title, seisin, or right of entry on which the grantee may found an action to assert his right against one who is seised. Farnum v. Peterson, 111 Mass. 148, cited 5 A. & E. Enc. Law [2d ed.] 844.

27. Bridgewater v. Byassee [Ky.] 93 S. W. 35. Real Property Law, § 225. Gilman v. Dolan, 100 N. Y. S. 186. A deed to land in the actual possession of another for more than twenty years under claim of title is champertous. Lost Creek Coal Co. v. Napier's Heirs [Ky.] 89 S. W. 264. The character of the adverse possession, in order to constitute a deed chapertuos, must be an actual, adverse possession, asserting and exercising dominion and control over the premises in such a manner as to exclude all others, as by residence upon, or cultivation, or inclosure of the premises claimed, and so open and notorious that the ousted claimant may have notice thereby that he is disseised. Ky. St. 1903, § 210. Interstate Inv. Co. v. Bailey [Ky.] 93 S. W. 578.

28. Changed by St. 1891, p. 919, c. 354. Joyce v. Dyer, 189 Mass. 64, 75 N. E. 81. A cotenant entering premises under a deed and claim to the whole fee, having long uninterrupted and exclusive possession enjoying the profits of the premises, and making radical changes with the knowledge and without the objection of his co-tenant, was such disseisin as would render the deed of the disseisee inoperative. Id.

29. Woodward v. Johnson [Ky.] 90 S. W. 1076. In Kentucky has not so operated since at least 1824. Id. A sale under order of

of shorter duration than claimed is immaterial.[30] Land owned by the wife and children is not held adversely by them rendering the husband's deed void for champerty when they and he occupy the premises jointly.[31] One cannot obtain adverse possession of lands in the possession of the courts, by an unauthorized and private arrangement with the assignees of a debtor, so as to set in motion the statute of champerty.[32] The right of the grantee under the New York statute to cause ejectment to be begun for his use by and in the name of grantor is founded solely on the conveyance and the interest remaining in the grantor,[33] and if by any means the invalidity of the deed is cured so that legal title comes to the grantee, that statute does not apply,[34] and no title coming to grantee from an extraneous source will avail to support such action.[35] The effect of a champertous deed is for the court,[36] while the existence of an actual possession is for the jury.[37]

Agreements as to contingent fees and payment of expenses of trial.[38]—A contract for a contingent fee is not champertous in Indiana[39] or in most states,[40] but an agreement of attorneys to carry on a litigation for a share of the amount to be

court of a lot with an easement in an alleyway is not champertous because another may claim adverse possession of such alleyway. Cook v. Burton [Ky.] 92 S. W. 322. Where in a suit for the recovery of realty sold under and by direction of a consent decree as the property of the parties to the cause wherein such decree was rendered, the fact that the receiver was not in possession of all of such property does not render such deed inadmissible in evidence in a suit to recover the realty. Phillips v. Collinsville Granite Co., 123 Ga. 830, 51 S. E. 666.

30. Anniston City Land Co. v. Edmondson [Ala.] 40 So. 505. In a county broken by streams and mountain ranges and covered by uninclosed forests, the fact that an adverse claimant, through tenants, occupied and cultivated a part of a tract of land six thousand or seven thousand acres in extent, his cattle in common with other cattle roaming over the remainder, but doing nothing, by clearing it of its forest or fencing it in, upon the particular parcel in dispute to direct anybody's attention to the fact that the adverse claimant was exercising control or dominion over it hostile to the legal title holder, is not such adverse possession as to make a deed by the legal title holder champertous. Id.; Interstate Inv. Co. v. Bailey [Ky.] 93 S. W. 578.

31. Barnes v. F. Weikey Chair Co. [Ky.] 89 S. W. 222.

32. The sale of a parcel of land by an assignee under authority of the court, not directing or authorizing sale of an adjoining alleyway, could give vendee no rights therein under which he could, through private arrangement with assignee, acquire title by adverse possession of such alleyway. Cook v. Burton [Ky.] 92 S. W. 322.

33. Code Civ. Proc. § 1501. Flagler v. Devlin, 109 App. Div. 904, 95 N. Y. S. 801.

34. Grantee purchased at subsequent partition sale, the land grantors having been parties. Flagler v. Devlin, 109 App. Div. 904, 95 N. Y. S. 801.

35. Title of a paramount claimant who was made party in the partition suit mentioned in preceding note. Flagler v. Devlin, 109 App. Div. 904, 95 N. Y. S. 801.

36. Anniston City Land Co. v. Edmondson [Ala.] 40 So. 505. It being in evidence that a grantor had conveyed prior to suit, also without dispute that a stranger was in adverse possession, it is a question of law what title passed, if any, and should not be submitted to the jury to say whether he "conveyed his whole title" at that time. Id.

37. Gilman v. Dolan, 100 N. Y. S. 186.

38. See 5 C. L. 566; 3 C. L. 677.

39. Whinery v. Brown [Ind. App.] 75 N. E. 605.

40. See note in 5 C. L. 566, n. 9.

Note: While the propriety of contracts for contingent fees has been vehemently debated, yet, when such contracts are fairly made between counsel and clients, made in good faith and free from fraud and imposition, they are not illegal and are as obligatory as between other parties. It may and does happen that persons who have rights, but no means to pursue them, are obliged to resort to this means of procuring legal redress. And it is the duty of the courts to carefully scrutinize such contracts to see that no improper advantage is taken either of the ignorance or necessity of those who enter into them, and if it appears that they are obtained by any undue influence of the attorney over the client, or by fraud or imposition, or that the compensation is clearly excessive, the party aggrieved will be protected. The fact that the practice of stipulating beforehand for professional fees, contingent on the result of the litigation, is sometimes abused, and exposes the profession to misapprehension, and illiberal remark is not sufficient excuse for refusing to enforce such a contract when characterized throughout by "all good fidelity to the client." See Taylor v. Bemiss, 110 U. S. 42, 28 Law. Ed. 64; Dockery v. McLellan, 93 Wis. 381, 67 N. W. 733; Perry v. Dicken, 105 Pa. 83, 51 Am. Rep. 181; Stanton v. Embrey, 93 U. S. 548, 23 Law. Ed. 983; 3 Am. & Eng. Ency. L. [2d ed.] 440; Newkirk v. Cook, 17 Ill. 449; Winslow v. Central Iowa R. Co., 71 Iowa, 197, 32 N. W. 330; Christie v. Sawyer, 44 N. H. 303; Clay v. Ballard, 9 Rob. [La.] 308, 41 Am. Dec. 328; Weeks on Attorneys [2d ed.] 726; Tron v. Lewis, 31 Ind. App. 178, 66 N. E. 490.—From Opinion in Whinery v. Brown [Ind. App.] 75 N. E. 605. See, also, notes 3 C. L. 382, 383.

recovered at their own costs and expense is bad.[41] However, it is not champerty if the attorney is to receive of his portion only such as remains after the expenses are paid,[42] especially where the litigant voluntarily solicited such services and made the contract to secure them.[43] A contract between a husband and an attorney and a detective, whereby the latter were to procure a divorce for the former and pay the husband's witnesses out of the fee received, is champertous.[44] No recovery can be had upon the oral negotiations which preceded but were inseverably merged into the champertous written contract,[45] or upon quantum meruit for the services rendered under the illegal agreement.[46]

Assignment to or purchase by attorney of chose in action.[47]—An attorney may buy choses in action for purposes of profit, speculation, or protection of other interests, even though he intends at the time to sue thereon if necessary.[48] However, in suing upon a chose in action legitimately received under the statutory exceptions,[49] the burden rests upon him to bring himself within them.[50] Concerted action, for facilitating the collection of a just claim, by assignment, does not constitute the buying of a thing in action for the purpose of suing thereon.[51] In New York a contract between an attorney and another, whereby the latter procured claims for the former for the purpose of suing thereon and the "proceeds" whether costs or bonuses paid by defendant or percentages paid by the clients on the amounts recovered for them were to be divided equally, is champertous,[52] and an understanding that the attorney is to pay the expenses of litigation would render such a contract illegal.[53] Where the attorney for the defendants in an action to quiet title purchases his clients' interests in the land in litigation and then interposes a defense on

41. Moreland v. Devenney [Kan.] 83 P. 1097.

42. An agreement that in case judgment is obtained the expenses of the case shall be paid out of the share contingently fixed as compensation is not an agreement that the attorney shall champertously "bear" the expense. It is equivalent to fixing compensation at the agreed proportion less the costs. Grant v. Kruse, 114 Ill. App. 488.

43. Fact that attorneys were not to call upon litigant to pay the expense of the proceeding would not make such agreement bad on its face, even though it be fairly inferable that they were to pay them when the legal effect would be that counsel were to have their ten per cent. fee after deducting therefrom expenses incurred. Ransom v. Cutting, 98 N. Y. S. 282.

44. Barngrover v. Pettigrew, 128 Iowa, 533, 104 N. W. 904.

45. Testimony held to show that there were not two contracts, one oral and one written. Moreland v. Devenney [Kan.] 83 P. 1097.

46. Moreland v. Devenney [Kan.] 83 P. 1097.

47. See 3 C. L. 678.

48. Where a lessee was given ample notice that a just claim for rent if not paid by a certain date would be sued on, the alleged purchase of said claim by the attorney of the lessor for mere purposes of profit, and subsequent suit thereon, would not have been champertous under Code Civ. Proc. section 73. Wightman v. Catlin, 98 N. Y. S. 1071.

49. Code Civ. Proc. section 76, providing that an attorney may take a chose in action with the intent of suing in payment for property sold, services rendered, or an antecedent debt. Lieberman v. Mandel, 98 N. Y. S. 201.

50. Suit upon a note taken with evident intent of suing thereon. Lieberman v. Mandel, 98 N. Y. S. 201.

51. Wightman v. Catlin, 98 N. Y. S. 1071. A landlord may not be asked whether attorney for plaintiff had advised him to assign his claim for rent to plaintiff in order to show that such attorney was interested in the claim in violation of Code Civ. Proc. section 73, forbidding attorneys to buy or be interested in buying things in action for the purpose of bringing action thereon, on the ground that even if the advice and concerted action was shown as desired, the defense of champerty would not be established. Id. On same reasoning, a question of an attorney whether an assignment had been made to his client at his request is properly excluded. Id. The fact that the attorney for the assignee of a claim for rent was the same person as the one formerly employed by the assignor is not sufficient to bring the action within the letter or spirit of section 73, Code Civ. Proc. Id. It was not error to exclude a question as to what conversation an assignee had with an assignor prior to an assignment as too general and not material to the issue of champerty and maintenance set up by the defense. Id.

52. In re Clark, 108 App. Div. 150, 95 N. Y. S. 388. Under statutes prohibiting attorneys from being in any manner interested in buying a thing in action for the purpose of bringing action thereon, and from offering a valuable consideration as an inducement for placing demands in his hands for the purpose of bringing an action. Code Civ. Proc. §§ 73, 74, 75. Id.

53. Within Code Civ. Proc. § 73. In re Clark, 109 App. Div. 150, 95 N. Y. S. 388.

his own behalf without their authority or participation, such defense is properly stricken, however meritorious, and the defendants adjudged in default,[54] and an agreement whereby such attorney deposited money under the champertous contract on his own responsibility and for his own benefit, with plaintiffs' attorneys to redeem the title, could not be ratified by the plaintiffs.[55]

Champerty as a defense.[56]—The defense of champerty must be pleaded.[57]

Maintenance.[58]—An agreement between a party to a legal controversy and a third person wholly without interest in the matter, whereby the latter agrees to get up evidence, hire lawyers, and conduct the litigation wholly at his own expense, is maintenance.[59] A contract for a contingent fee is not void for maintenance.[60] A clause that the client shall not settle or compromise the suit without consent of counsel retained on a contingent fee, though itself void, is held in Illinois to be severable from the contract.[61]

CHANGE OF VENUE; CHARACTER EVIDENCE; CHARITABLE AND CORRECTIONAL INSTITUTIONS, see latest topical index.

CHARITABLE GIFTS.

§ 1. Nature and Essentials; Validity (624).
§ 2. Capacity of Donee or Trustee (628).
§ 3. Interpretation and Construction (629).
§ 4. Administration and Enforcement (630).

Scope of topic.—Matters applicable to trusts in general [62] and to religious societies,[63] hospitals,[64] schools,[65] and the care of paupers in particular,[66] and to the taxation of the property of charitable institutions,[67] and their liability for the torts of their agents and servants, are treated elsewhere.[68] Reference should also be had to the topics dealing with the interpretation of deeds [69] and wills.[70]

§ 1. *Nature and essentials; validity.*[71]—A charity in its legal sense is a gift to be applied consistently with existing laws for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government.[72] To give an institution the character of a public charity there must appear to be some benefit

54. Emerson v. McDonnell [Wis.] 107 N. W. 1037. An affidavit by an attorney that he was retained by defense as counsel, that he accepted such employment and had given notice thereof to plaintiff's attorneys, and under it secured an extension of time to answer, held evidence tending to support and sufficiently clear to sustain court's conclusion that said attorney was acting as counsel for the defense at the time he purchased the defendant's interest in the lands in litigation. Id. The fact that the attorney received no compensation for his services is not of controlling significance as showing that his relation to the case was merely formal, and an accommodation to the regular attorneys, where such a claim would naturally be included and discharged in the transactions for the transfer of the land. Id.

55. Emerson v. McDonnell [Wis.] 107 N. W. 1037.

56. See 5 C. L. 566.

57. Set up in an action on contract for sale of timber. Barnes v. F. Welkel Chair Co. [Ky.] 89 S. W. 222.

58. See 5 C. L. 566.

59. Phelps v. Manicko [Mo. App.] 96 S. W. 221.

60. Whinery v. Brown [Ind. App.] 75 N. E. 605.

61. Granat v. Kruse, 114 Ill. App. 488.

62. See Trusts, 6 C. L. 1736.

63. See Religious Societies, 6 C. L. 1289.

64. See Asylums and Hospitals, 7 C. L. 297.

65. See Schools and Education, 6 C. L. 1415.

66. See Paupers, 6 C. L. 985.

67. See Taxes, 6 C. L. 1602.

68. See topics dealing with the particular institutions involved, as Asylums and Hospitals, 7 C. L. 297; Schools and Education, 6 C. L. 1415, etc.

69. See Deeds of Conveyance, 5 C. L. 964.

70. See Wills, 6 C. L. 1880.

71. See 5 C. L. 566.

72. McKenzie v. Trustees of Presbytery, 67 N. J. Eq. 652, 61 A. 1027; Crow v. Clay County [Mo.] 95 S. W. 369. Deeds to church held to create valid charitable trusts. MacKenzie v. Trustees of Presbytery, 67 N. J. Eq. 652, 61 A. 1027.

to be conferred upon, or duty to be performed towards, either the public at large or some part thereof or an indefinite class of persons.[73] No special technical words are necessary to establish a charitable use or trust, but it is sufficient if the words of donation specify some definite or general purpose which the law regards as charitable.[74] Schools [75] and free public libraries are charities.[76] The validity of charitable trusts depends largely on the statutes of the various states.[77] As a rule the purpose of the trust must be wholly charitable.[78] The property donated,[79] the beneficiaries,[80] the object and purposes to be accomplished,[81] and the manner in which

73. Fordyce v. Woman's Christian Nat. Library Ass'n [Ark.] 96 S. W. 155. Where purposes of organization was "to organize a reading room and library for our own benefit" and for that of visitors to the city, held that clause quoted designated an indefinite class of persons, " for our own benefit" not being intended to refer only to original incorporators, but to all persons who might thereafter become members of the association. Id. Devise to trustees of incorporated church "for the benefit and support of the poor, helpless, and dependent members and orphan children of said church," with further provision that land shall never be sold "but that the said church," shall distribute the yearly income of the same" to the beneficiaries, held not to necessarily authorize the members of the church to administer for the trust but to be properly construed as meaning that church trustees should make distribution, it not appearing that church affairs were not managed by trustees as provided by Rev. St. 1895, art. 660, and hence trust was not private one on theory that each member might vote for himself as beneficiary. Banner v. Rolf [Tex. Civ. App.] 15 Tex. Ct. Rep. 636, 94 S. W. 1125. Trust not void on theory that church trustees might declare themselves beneficiaries. Id.

74. Board of Trustees v. Hoboken [N. J. Eq.] 62 A. 1. It is immaterial whether the purpose is called charitable in the gift itself, if it be so described as to show that it is charitable in its nature. MacKenzie v. Trustees of Presbytery, 67 N. J. Eq. 652, 61 A. 1027. Where offer to contribute funds for erection of library building on certain conditions was accepted by city, and donors thereafter purchased a site and conveyed it to the city, held that city took title on the trusts specified in the offer, though the deed was a plain bargain and sale one without conditions or restrictions. Board of Trustees v. Hoboken [N. J. Eq.] 62 A. 1. If from the words employed in a will the sole intention of the testator to establish a charitable trust clearly appears, the form of language used is immaterial. Minot v. Attorney General, 189 Mass. 176, 75 N. E. 149.

75. University chartered by Priv. Laws 1851, p. 20, though it requires its students to pay tuition. Parks v. Northwestern University, 218 Ill. 381, 75 N. E. 991, afg. 121 Ill. App. 512. Provision in will for free education of young men to fit them for admission to U. S. Navel Academy, and making a devise therefor in trust to an unincorporated institution of learning, held to create special charitable trust. Columbian University v. Taylor, 25 App. D. C. 124. Conveyance of lot to named persons and their successors in trust to have and to hold to them "and their successors in office forever, in trust" to build two academies and a church thereon, and providing for filling of vacancies in office of trustee, held to create a continuing trust for educational and religious purposes. Harris v. Brown, 124 Ga. 310, 52 S. E. 610. Bequest for the tuition or education of poor children under sixteen years of age held to create a charity. Crow v. Clay County [Mo.] 95 S. W. 369.

76. Fordyce & McKee v. Woman's Christian Library Ass'n [Ark.] 96 S. W. 155. Gift to city for purpose of erecting building for library and industrial education department. Board of Trustees v. Hoboken [N. J. Eq.] 62 A. 1.

77. Devise and bequest of remainder of testator's estate to executors in trust to use income for establishment of a home for indigent orphans and widows in Oregon and Washington, held valid under laws of both states. Rader v. Stubblefield [Wash.] 86 P. 560.

78. Testamentary trust for charitable purposes. Minot v. Attorney General, 189 Mass. 176, 75 N. E. 149. Bequest to executors to be devoted to charitable and worthy objects, giving them discretionary power to use property for benefit of such persons or corporations as might be selected by them or designated by testator during his lifetime, and providing that it was particularly for purpose of giving to any of testator's relatives whom he might have overlooked without apparent reason such sum as they might think proper, held not to create valid charitable trust. Id.

79. Alternative bequest of sum not to exceed $5,000 to be divided equally between two orphan asylums (Speer v. Colbert, 200 U. S. 130, 50 Law. Ed. —, afg. 24 App. D. C. 187), bequest of " sufficient sum, not to exceed $3,000," for establishment of scholarship (Id.), and legacy to a charitable institution of a sufficient sum to produce an annuity of $50, held not void for uncertainty (Crawford v. Mound Grove Cemetery Ass'n, 218 Ill. 399, 75 N. E. 998).

80. Beneficiaries must be named or so described as to be identified with certainty. Bequest of sum not to exceed $5,000, to be expended under personal supervision of trustees in purchase and erection of chime of bells, etc., in church in District of Columbia to be designated by testator's mother, or if she fails to designate one, then in one to be designated by trustees, held void for uncertainty, no particular church being named and mother having died without naming one. Speer v. Colbert, 200 U. S. 130, 50 Law. Ed. —, afg. 24 App. D. C. 187. Bequest to apply income "to maintain a scholarship in the study of medicine, preferably in Georgetown University; otherise in some medical insti-

the trust is to be executed; must ordinarily be designated with reasonable certainty,[82] though most courts do not require the same degree of definiteness and certainty as is necessary in the creation of private trusts,[83] and will hold the trust valid if possible.[84] Statutes in some states provide that such trusts shall not be deemed invalid because of indefiniteness or uncertainty as to the persons designated as beneficiaries.[85] A mere misnomer of a corporate beneficiary is not an uncertainty.[86]

tution in the District of Columbia," held not void for uncertainty because of discretion to be exercised by trustees in selecting college. Id. Devise to trustees of a certain incorporated church "for the benefit and support of the poor, helpless and dependent members and orphan children of said church," held to sufficiently describe the beneficiaries. Banner v. Rolf [Tex. Civ. App.] 15 Tex. Ct. Rep. 636, 94 S. W. 1125. A bequest to one for the purpose of making distribution among such religious, benevolent, or charitable institutions as he may select is void as being too vague and indefinite to be enforced. Hegman's Ex'rs v. Roome [N. J. Eq.] 62 A. 392. Character of objects which trustee was to select in making distribution held not controlled by other charitable trusts. Id.

NOTE. Description of beneficiaries: From the very nature of a gift for charity, the individuals ultimately to receive the benefit thereof cannot be ascertained or named in the gift (2 Pomeroy Eq. Jur. § 1018; Russell v. Allen, 107 U. S. 163, 27 Law. Ed. 397; Going v. Emery, 16 Pick. [Mass.] 107, 26 Am. Dec. 645; Sowers v. Cyrenius, 39 Ohio St. 29, 48 Am. Rep. 418), and, if the individuals to be benefited are so named, it cannot be supported as a charity (1 Perry, Trusts § 710. See, however, as to cases in which there is an element of definiteness in the beneficiaries of the charity, Gray, Perpetuities, Appendix A). According to the rule more generally prevailing in this country, a gift to a charity is not void because the charitable purposes to be subserved are indefinite, and consequently the beneficiaries cannot be determined from the instrument itself, provided there is a trustee or other person named by the testator who is empowered to designate the beneficiaries or distribute the fund. Hinckley's Estate, 58 Cal. 457; Treat's Appeal, 30 Conn. 116; Guilfoil v. Arthur, 158 Ill. 600; Bartlett v. King, 12 Mass. 536, 7 Am. Dec. 99; Simpson v. Welcome, 72 Me. 496, 39 Am. Rep. 349; Martin v. McCord, 5 Watts [Pa.] 494, 30 Am. Dec. 342. If there is no such person named or he refuses to act, or dies before acting, then the trust fails unless the object is specifically named, as in the case of a gift to a particular institution already in existence. Fontain v. Ravenel, 17 How. [U. S.] 382, 15 Law. Ed. 85; Jackson v. Phillips, 14 Allen [Mass.] 539, 574. In a few states, however, it is held that, even though a trustee is named with power to appoint or distribute, and he is willing to carry out the trust, if the beneficiary is not designated with the same certainty as in the case of a private trust, the gift, if not to a particular institution, is void. Gambell v. Trippe, 75 Md. 252, 32 Am. St. Rep. 388, 15 L. R. A. 235; Trustees for First Soc. of M. E. Church v. Clark, 41 Mich. 730; Little v. Willford, 31 Minn. 173; Bible Soc. v. Pendleton, 7. W. Va. 79. For a criticism of these decisions see an article by Prof. J. B. Ames, in 5 Harv. L. R. 389. In New York a statute was passed in 1893 allowing indefiniteness in the beneficiaries, altering the previous law. Chaplin, Exp. Powers, c. 10; Dammert v. Osborn, 140 N. Y. 43; Allen v. Stevens, 161 N. Y. 122.—From Tiffany on Real Property, p. 249.

81. Devise of property to trustees to establish and maintain school for education in common school branches of poor white children of certain county, and providing for erection of building in certain town, etc., held to create valid charitable trust. In re Murray's Will [N. C.] 54 S. E. 435. Donation for establishment and maintenance of school for education of female children held sufficiently definite and certain to be enforced as a charity, the beneficiaries being distinctly named, a trustee being appointed, and the uses and purposes to which the gift was to be applied being clearly and definitely stated. Inglish v. Johnson [Tex. Civ. App.] 15 Tex. Ct. Rep. 376, 95 S. W. 558.

82. Testator devised land to trustees of certain incorporated church "for the benefit and support of the poor, helpless, and dependent members and orphan children of said church," directed that a certain part of the land should be set aside for use as a building site for school purposes, and gave remainder of his estate to same trustees to be used in maintaining such school. Held that provisions in regard to school were not void for uncertainty, they being intended for the benefit of the orphan children of the church, and a large discretion in regard to its management was properly left to the trustees. Banner v. Rolf [Tex. Civ. App.] 15 Tex. Ct. Rep. 636, 94 S. W. 1125.

83. If the donor of a charitable trust sufficiently shows his intention to create a charity and indicates its general nature and purpose, and describes in general terms the class of the beneficiaries, the trust will be sustained and enforced, though there may be indefiniteness in the declaration and description, and though much may be left to the discretion of the trustees. Columbian University v. Taylor, 25 App. D. C. 124. Where will provided for free education of young men to fit them for admission to U. S. Navel Academy, and made a devise thereof in trust to an unincorporated institution of learning, held that trust was not void for uncertainty or incapacity of execution apparent on its face. Id.

84. Charitable bequests will not be held void for uncertainty unless absolutely necessary. Speer v. Colbert, 200 U. S. 130, 50 Law. Ed. ——, afg. 24 App. D. C. 187.

85. Laws 1893, c. 701, p. 1748, provides that no gift, grant, bequest, or devise to religious, educational, charitable, or benevolent uses, otherwise valid shall be deemed invalid by reason of the indefiniteness or uncertainty of the persons designated as beneficiaries, and that the legal title to the property shall vest in the trustee named, or, if none is

The validity of a trust to acquire lands in a foreign state for charitable purposes depends upon the laws of such state.[87]

By statute in some states, charitable gifts made within a specified time before the death of the grantor or testator are void.[88]

The rule against perpetuities does not apply to charitable gifts.[89]

named, then in the supreme court. Bowman v. Domestic & Foreign Missionary Soc., 182 N. Y. 494, 75 N. E. 535, afg. 100 App. Div. 29, 90 N. Y. S. 898. Testatrix bequeathed certain sum to be divided equally "between the Indian Missions and Domestic Missions of the U. S." Held that clause was too indefinite to be construed as a direct bequest to any beneficiary, even when taken in connection with evidence showing that defendant was the only missionary society connected with Episcopal church of which testatrix was a lifelong and active member, but, her charitable purpose being clearly indicated, supreme court could administer trust through appointment of a trustee and could properly appoint defendant. Bowman v. Domestic & Foreign Missionary Soc., 182 N. Y. 494, 75 N. E. 535. Statute does not authorize courts to modify directions of a testator, and hence gift in trust to erect church buildings to become property of a church which cannot take because not incorporated cannot be enforced by directing trustees to organize corporation and convey property to it. Mount v. Tuttle, 183 N. Y. 358, 76 N. E. 873, afg. 99 App. Div. 433, 91 N. Y. S. 195. Where testatrix devised property to "corporation of the Diocese of Central New York" and there was no such corporation, held that supreme court should administer trust and appoint as trustee corporation known as the "Trustees for the Management and Care of the Fund for the Support of the Episcopate of the Diocese of Central New York," it being the medium best adapted to accomplish the end sought. Kingsbury v. Brandegee, 100 N. Y. S. 353. Statute applies only to gifts in trust for the purposes stated, and not to an absolute gift to an unincorporated religious society. Fralick v. Lyford, 107 App. Div. 543, 95 N. Y. S. 433.

86. Corporation known as "The President and Directors of Georgetown College" held entitled to bequest to "Georgetown University in the District of Columbia," there being no corporation by the latter name and the charter of the former corporation providing that no misnomer shall defeat donations to it. Speer v. Colbert, 200 U. S. 130, 50 Law. Ed. —, afg. 24 App. D. C. 187. Bequest of certain sum "to be equally divided between St. Vincent's and St. Joseph's Catholic Orphan Asylums in the city of Washington" held to belong to corporations known as "St. Vincent's Orphan Asylum" and "St. Joseph's Male Orphan Asylum in the city of Washington." Id. Bequest to trustees of St. Francis Hospital, there being no corporation of that name, held to be intended for the Sisters of the Poor of St. Francis which maintained a St. Francis Hospital. Johnston v. Sisters of the Poor of St. Francis, 98 N. Y. S. 525. Devise of house and lot "to the corporation of the Diocese of Central New York to be used as the bishop's residence of said diocese," and providing that in case diocese should be divided property should remain in the name of the diocese in which it was embraced "whatever the name of such diocese should be," held intended for corporation known as the "Trustees for the Management and Care of the Fund for the Support of the Episcopate of the Diocese of Central New York," created under Laws 1841, p. 109, c. 134, and Laws 1868, p. 853, c. 429, there being no corporation known as the "Diocese of Central New York." Kingsbury v. Brandegee, 100 N. Y. S. 353.

87. Mount v. Tuttle, 183 N. Y. 358, 76 N. E. 873, afg. 99 App. Div. 433, 91 N. Y. S. 195.

88. Under Rev. St. D. C. § 457, and Md. Bill of Rights § 34, gifts and devises for religious purposes are void unless made at least one month before death. Speer v. Colbert, 200 U. S. 130, 50 Law. Ed. —, afg. 24 App. D. C. 187. Fact that a college is or may be under the control of a religious order does not make it a sectarian institution within the meaning of the act where it is not made sectarian by its charter but is an institution of learning for the admission and education of students of all denominations of religious faith. Id. Orphan asylums held not to be sectarian institutions. Id. Under Act April 26, 1855 (P. L. 328), are void unless made at least one calendar month before death of testator or alienor. In re Gregg's Estate, 213 Pa. 260, 62 A. 856. Calendar month within the meaning of this statute is not one of any given number of days throughout the entire year but varies in length according to the Gregorian calendar. Id. Bequest in will executed Oct. 8, 1899, between 3 and 5 o'clock P. M., held void where testator died Nov. 8, between 7 and 8 P. M. Id. Day on which act is done must be excluded. Id.

89. Gift to church in trust, and if conditions of the trust were not complied with, then over to a religious society, held valid. MacKenzie v. Trustees of Presbytery, 67 N. J. Eq. 652, 61 A. 1027.

NOTE. Application of rule against perpetuities: When it is said, as is frequently done, that the rule against perpetuities does not apply to charitable trusts, the word "perpetuity" is used in its primary sense, and the statement merely means that the trust is not invalid, though it is indestructible, and though, since there are usually no definite cestuis que trust to alien it, it is inalienable. Gray, Perpetuities, §§ 589, 590; Brooks v. City of Belfast, 90 Me. 318; See Russell v. Allen, 107 U. S. 163, 27 Law. Ed. 397; Jackson v. Phillips, 14 Allen [Mass.] 539; Hartson v. Elden, 50 N. J. Eq. 522; Alden v. St. Peter's Parish, 158 Ill. 631; Troutman v. De Boissiere Odd Fellows' Orphans' Home & Industrial School Ass'n [Kan.] 64 P. 33; Yeap Cheah Neo v. Ong Cheng Neo, L. R. 6 P. C. 381. A charitable trust may, however, be invalid under the rule against remoteness. If, after a gift to A., there is a limitation over to B. in trust for a charity on a cer-

§ 2. *Capacity of donee or trustee.*[90]—In order that a gift to a charitable corporation may take effect as an absolute one, it must be for some or all of the purposes for which the corporation was created.[91] As a general rule a corporation may execute a trust not expressly forbidden by its charter if its purposes are germane to the objects stated in the act of incorporation.[92] Municipal and public corporations have power to take property for charitable uses unless disenabled by positive legislation.[93] There is a conflict of authority as to the right of voluntary unincor-

tain event, the limitation over is void if this event may occur beyond the statutory period. Gray, Perpetuities §§ 594-596; Attorney General v. Gill, 2 P. Wms. 369; Commissioners of Charitable Donations and Bequests v. De Clifford, 1 Dru. & War. 245, 5 Gray's Cas. 740; Smith v. Townsend, 32 Pa. St. 434; Leonard v. Burr, 18 N. Y. 96; Merritt v. Bucknam, 77 Me. 253; Brattle Square Church v. Grant, 3 Gray [Mass.] 154; Village of Brattleboro v. Mead, 43 Vt. 556. Likewise, if, after a gift in trust for a charity, there is a limitation over to an individual, the limitation over is void if on a remote contingency. Phillips v. Davis [1893] 2 Ch. 491; First Universalist Soc. v. Boland, 155 Mass. 171, Finch's Cas. 525; Society for Promotion of Theological Education v. Attorney General, 135 Mass. 285; Hopkins v. Grimshaw, 165 U. S. 342, 41 Law. Ed. 739; Rolfe & Rumford Asylum v. Lefebre, 69 N. H. 238; In re Bowen [1893] 2 Ch. 491; Palmer v. Union Bank, 17 R. I. 627. If, however, there is a gift to a charity with a limitation over to another charity, the limitation over is not invalid, even though it is to vest at a period beyond that named in the rule. Christ's Hospital v. Grainger, 1 Macn. & G. 460, 5 Gray's Cas. 745; Webster v. Wiggin, 19 R. I. 73; In re John's Will, 30 Or. 494; Lennig's Estate, 154 Pa. 209; Hopkins v. Grimshaw, 165 U. S. 342, 41 Law. Ed. 739; Odell v. Odell, 10 Allen [Mass.] 1; In re Tyler [1891] 3 Ch. 252. See Gray, Perpetuities, §§ 599-602, for a criticism of this rule. In the case of a gift to a charity which is not to take effect until the happening of a contingency which may not occur within the period of the rule, if there is no preceding gift to another donee, the gift is void, as in the case of a gift to an individual. Gray, Perpetuities §§ 605, 606; Cherry v. Mott, 1 Mylne & C. 123; Chamberlayne v. Brockett, 8 Ch. App. 206, 5 Gray's Cas. 751; Jocelyn v. Mott, 44 Conn. 55. But an immediate gift is not regarded as conditional, and so void under the rule, merely because the particular application of the fund may not take place within the period fixed by the rule. Chamberlayne v. Brockett, 8 Ch. App. 206, 5 Gray's Cas. 751; Russell v. Allen, 107 U. S. 163, 27 Law. Ed. 397; Sinnett v. Herbert, 7 Ch. App. 232, 5 Gray's Cas. 749; Odell v. Odell, 10 Allen [Mass.] 1; Almy v. Jones, 17 R. I. 265; Webster v. Wiggin, 19 R. I. 73; Ingraham v. Ingraham, 169 Ill. 432; In re John's Will, 30 Or. 494. This principle is frequently applied in the case of a gift for charitable purposes to a corporation or association not yet formed, in which case the gift is regarded as immediately complete, and so valid, though the corporation or association may not be formed till a period indefinitely remote, the theory being that, if the corporation is never formed, the charitable purpose will be otherwise carried out under the doctrine of cy pres. Gray Perpetuities § 607; Attorney General v. Bowyer, 33 Ves. Jr. 714, 727, 728; Inglis v. Trustees of Sailors' Snug Harbour, 3 Pet. [U. S.] 99, 7 Law. Ed. 617; Ould v. Washington Hospital for Foundlings, 95 U. S. 303, 24 Law. Ed. 450; Russell v. Allen, 107 U. S. 163, 27 Law. Ed. 397; Cumming v. Trustees of Reid Memorial Church, 64 Ga. 105; Swasey v. American Bible Soc., 57 Me. 523. Though gifts to a corporation or association not yet formed are generally supported on the doctrine of cy pres, such gifts are, as shown by Mr. Gray, sustained in a few states in which the cy pres doctrine is repudiated. Gray, Perpetuities §§ 615-625.—From Tiffany on Real Property, § 158.

90. See 5 C. L. 570.

91. Johnston v. Sisters of the Poor of St. Francis, 98 N. Y. S. 525. Bequest to trustees of hospital maintained for the gratuitous care of the sick, aged, infirm and poor, "for the benefit and use of the Blessed Virgin Mary Purgatorial Fund of said hospital," held invalid, there being no such fund and the sole purpose of such a fund being the saying of masses for the souls of the dead, which was not one of the purposes for which the corporation was organized. Id. Gift cannot take effect under supposition that testator intended to create such a fund but must rest upon proposition that bequest would go to appellant absolutely as a general gift, if same was donated for an object within any of its corporate purposes. Id.

92. Scope of act establishing public charity is not to be so constrained by construction of its words as to forbid the action of the corporation in ways germane to those specified in charter. Stearns v. Newport Hospital [R. I.] 62 A. 132. Hospital whose charter authorizes it to care for the sick and hurt held to have authority to take and administer testamentary gift for the benefit of the sick, hurt, injured and infirm. Id. A corporation may hold and execute a trust for charitable objects in accord with or tending to promote the purposes of its creation, although such as it might not, by its charter or by general laws, have authority itself to establish or to spend its corporate funds for. Bequest in trust to be used and held as endowment for prosecution of research in colonial history held germane to objects of Georgetown College so that latter had authority to take it. Speer v. Colbert, 200 U. S. 130, 50 Law. Ed. —, afg. 24 App. D. C. 187.

93. City, board of school trustees, and free library board, held to have capacity to take gift for erection of building to be used for library and industrial school. Board of Trustees v. Hoboken [N. J. Eq.] 62 A. 1. Under Gen. Laws 1896, c. 36, § 2, towns may take, hold and manage realty and personalty

porated religious or charitable associations to take and hold property.[94] The competency of a beneficiary to take, under a trust to acquire lands in a foreign state for charitable purposes, depends upon the laws of such foreign state.[95]

§ 3. *Interpretation and construction.*[96]—Charitable gifts[97] and trusts are highly favored, and a liberal construction will be adopted in order to render them effectual.[98] The law also raises every intendment in favor of a charity against the grantor or those claiming under him.[99] The beneficiaries,[1] and the terms, limitations, conditions,[2] and duration of the trust,[3] depend largely on the terms of the

in trust for any charitable, other than religious, uses. Stearns v. Newport Hospital [R. I.] 62 A. 132.

94. A conveyance to the trustees of an unincorporated religious congregation is not void for want of a grantee but is in the nature of a charitable trust, all the members of the congregation being the beneficiaries. Christian Church of Sand Creek v. Church of Christ of Sand Creek, 219 Ill. 503, 76 N. E. 703. On the incorporation of the congregation the property vests in the corporation. Id. Trusts in aid of religious, charitable, or educational enterprises, which are otherwise valid, will not be held void because of lack of corporate capacity in the beneficiary. Lewis v. Curnutt [Iowa] 106 N. W. 914. Bequest in trust to officer of church to acquire lands and erect buildings thereon, and to convey same to unincorporated church, held void even under doctrine of charitable uses. Mount v. Tuttle, 183 N. Y. 358, 76 N. E. 873, afg. 99 App. Div. 433, 91 N. Y. S. 195. An unincorporated voluntary spiritualistic association or society is incapable of taking a direct bequest either absolutely or as trustee, and this rule is not changed by Laws 1893, c. 701, p. 1748, relating to gifts for religious, charitable, and benevolent uses. Fralick v. Lyford, 107 App. Div. 543, 95 N. Y. S. 433.

95. Bequest to church officer to acquire lands in foreign state for church. Mount v. Tuttle, 183 N. Y. 358, 76 N. E. 873, afg. 99 App. Div. 433, 91 N. Y. S. 195. Where testatrix bequeathed certain sum to bishop of Protestant Episcopal church in Utah and Idaho in his corporate capacity in trust to purchase property in his jurisdiction and to erect church thereon, which was to become the property of such jurisdiction, and there was no such church corporation, held that, there being nothing to show that in Idaho and Utah an unincorporated religious society could hold the property, a finding that grantee had no such capacity was sustained by evidence and presumptions. Id. Where the common law is shown to prevail in such foreign state, the court of the forum will, in the absence of evidence to the contrary, presume that their own interpretation of the common law is correct and that it is accepted in the foreign state. Id.

96. See 5 C. L. 570.

97. Will be sustained if possible, and the courts will favor any legal construction of the instruments creating them leading to the carrying out of the purpose of the grantor or donor. Trenton Soc. for Organizing Charity v. Howell [N. J. Eq.] 63 A. 1110. Testamentary gifts to charitable institutions will be liberally construed. Crawford v. Mound Grove Cemetery Ass'n, 218 Ill. 399, 75 N. E. 998.

98. Crow v. Clay County [Mo.] 95 S. W. 369.

99. Birmingham Public School Dist. v. Sharpless, 27 Pa. Super. Ct. 630. Provision in deed giving right or re-entry for breach of condition subsequent to the grantor, "his heirs or legal representatives if they be so minded and deem the same expedient," held not to give the right to one acquiring grantor's title through sheriff's sale. Id.

1. Gift of library and fund for its maintenance, etc., held to be a gift to the town in its corporate capacity, subject to certain restrictions and limitations as to use of fund. Nelson v. Georgetown, 190 Mass. 225, 76 N. E. 606. Bequest to pay for the education of poor children "at or within two miles of the county seat of" a certain county held to refer to the county seat as it existed territorily at the time of the execution of the will, and not as it might thereafter be constituted. Crow v. Clay County [Mo.] 95 S. W. 369. Bequest "to pay the tuition or education of orphans or poor children" held to refer to orphans without the estate or means to pay for such instruction, and children whose parents are living but are too poor to pay for the same. Id.

2. Legacy to charitable institution of a sufficient sum to produce an annuity of $50 held not a specific legacy, and legatee was not within provision giving property not disposed of to "legatees hereinbefore named." Crawford v. Mound Grove Cem. Ass'n, 218 Ill. 399, 75 N. E. 998. Provision in gift of library building and fund for maintenance, etc., with respect to erection of new building after 20 years on a two-thirds vote of legal voters of the town, held to authorize town by such vote to select site and fix cost of such new building. Nelson v. Georgetown, 190 Mass. 225, 76 N. E. 606. The terms, limitations, and conditions of a charitable trust are to be determined from the instruments creating it and the joint and mutual actions of the parties. "Assembly room" in building erected by city with proceeds of gift held intended to be used by both library board and school trustees, while "class room" was for exclusive use of the latter. Board of Trustees v. Hoboken [N. J. Eq.] 62. A. 1. Bequest to Dorcas Society to apply interest "to relieving the deserving poor of the city of Trenton as they have been accustomed to do," held to give society power to designate or select beneficiaries and decide who were deserving. Trenton Soc. for Organizing Charity v. Howell [N. J. Eq.] 63 A. 1110. Bequest "to the benevolent society of ladies known as the Dorcas Society of Trenton whenever the ladies comprising the same at the time this bequest takes effect become incorporated," held not to require that such corporation should adopt any particular name.

instrument creating it. So, too, whether the gift is absolute or in trust is a question of intention.[4] In order to determine whether a clause in a conveyance creates a covenant, condition, or trust, the whole clause must be considered.[5] Letters written by the grantor named in deeds creating charitable trusts, addressed to the grantee and delivered with the earlier deed, and which do not alter or contradict the terms of the deeds, may be considered in determining the purposes of the trust.[6]

§ 4. *Administration and enforcement.*[7]—A municipal corporation itself, rather than its library board, should build a library building when funds for that purpose are donated to it in its corporate capacity.[8] So, too, the fund should be in its custody.[9] Leases or conveyances contrary to the terms of the instrument creating the trust are, of course, void.[10] Deeds conveying land for charitable purposes frequently provide for re-entry by the grantor or his heirs for breach of condition.[11] An erroneous decision of a matter left to the discretion of the trustee is not a breach of

Id. Use by trustees of hospital of a part of the principal of a charitable bequest for erection of hospital buildings held to be directly in pursuance of the conditions of the trust. Stearns v. Newport Hospital [R. I.] 62 A. 132. Will held not to make it the imperative duty of hospital to maintain hospital for care of persons having contagious diseases, but question whether or not the terms of the will could be best attained by so doing was one for the trustees to decide. Id. Testamentary gift to hospital held to leave it to judgment of the trustees in the first instance whether principal should be used to pay current expenses, and propriety of their action in a particular case would depend on circumstances. Id.

3. The fact that trust empowers the trustees to select the beneficiaries is no indication whatever that the charity was intended to be limited by their lifetime, since such a power appertains to the office of trustee. Woodruff v. Hundley [Ala.] 39 So. 907. Devise to trustees to apply proceeds to maintenance and education of young men preparing for the ministry, to be selected by the trustees or any two of them, held to create a permanent charity. Id. Bequest for the tuition or education of poor children under sixteen years of age in a certain district held to create a perpetual trust so that property could in no event revert to testator's heirs, and hence the latter were not necessary parties to a suit relating to the administration of the trust. Crow v. Clay County [Mo.] 95 S. W. 369.

4. Bequest to an unincorporated spiritualistic society to be used in such manner as it may deem expedient for the development and advancement of spiritualism in a certain city, but not naming any cestuis que trust, held an absolute gift and not a trust. Fralick v. Lyford, 107 App. Div. 543, 95 N. Y. S. 433.

5. Deeds to church "on condition that" it do certain things, held to create trust. MacKenzie v. Trustees of Presbytery, 67 N. J. Eq. 652, 61 A. 1027.

6. MacKenzie v. Trustees of Presbytery, 67 N. J. Eq. 652, 61 A. 1027.

7. See 5 C. L. 571.

8. Where money is given to a city for the purpose of erecting a public library building, and city has authority to erect buildings for such purpose (St. 1883, p. 269, c. 49 as amended by St. 1903, p. 93, c. 86), the city, and not the library trustees, has authority to erect the building unless the gift provides to the contrary. Board of Library Trustees v. Hanford Trustees [Cal. App.] 84 P. 227. St. 1901, p. 557, c. 170, providing for establishment of public libraries and for appointment of library trustees who are authorized to erect and manage library buildings, does not apply to or include library building to be erected with funds donated to a city, or give library trustees control thereof unless the gift so provides. Id.

9. A fund donated to a town in its corporate capacity for the purpose of erecting a library should be in the custody of the town to be drawn upon by the action of the trustees having the library in charge as needed from time to time. Nelson v. Georgetown, 190 Mass. 225, 76 N. E. 606. Action of town at annual meeting in accepting and approving report of trustees with knowledge of facts held a ratification of their unauthorized acts in executing contracts for library building and making payment thereon. Id. Where library trustees in good faith entered into unauthorized contracts for erection of library, which were afterwards ratified by the town, held that, on court ordering library fund to be paid over to the town, it would be impressed with a trust in favor of trustees to the extent necessary to indemnify them against any loss by reason of any personal liability arising from such contracts. Id.

10. Where deed conveyed property in trust for a site for a school house "for the education of freedmen and children irrespective of race," held that trustees had no authority to lease property for 200 years for $20 "to be used as a Baptist church and for the education of the youths of the colored race," and such lease was void. Thornton v. Harris, 140 N. C. 498, 53 S. E. 341.

11. Land was conveyed to school district upon condition that it be used for school purposes only with discretionary right of reentry for condition broken. Held that there was no breach where school board voted to remove school "temporarily" to another school house, but vote was not taken according to law and removal had not been approved by citizens as required by statute. Birmingham Public School Dist. v. Sharpless, 27 Pa. Super. Ct. 630.

trust.[12] In the absence of conditions, breach of trust will not generally work a forfeiture.[13] On the death of one of several trustees, the trust ordinarily devolves on the survivors.[14] A statute authorizing churches to appoint trustees to hold its property and to fill vacancies and remove trustees at will applies only to property held exclusively for church purposes.[15]

Gifts for charitable purposes which either originally or in the course of time cannot be literally executed will, in most states, be administered as nearly as may be according to the donor's purpose under general rules of law,[16] though there is some conflict of authority in this regard.[17] The trust must, however, be adminis-

12. An erroneous decision as to whether the terms of a testamentary trust can be best attained by the maintenance of a ward for contagious diseases in hospitals does not constitute a breach of trust where will does not imperatively require its maintenance. Stearns v. Newport Hospital [R. I.] 62 A. 132. Effect of action of trustees in refusing to do so, on performance by city of its duty to care for persons suffering from such diseases, held immaterial. Id.

13. MacKenzie v. Trustees of Presbytery, 67 N. J. Eq. 652, 61 A. 1027.

14. Where deed conveyed property in trust for site for school house, held that, on death of one or more of the trustees, the trust devolved on the survivors, and on death of last survivor, successors would be appointed by clerk of court under Revisal 1905, § 1037. Thornton v. Harris, 140 N. C. 498, 53 S. E. 341.

15. Revisal of 1905, §§ 2670, 2671, conferring upon any church the right to appoint trustees to hold its property and to fill vacancies and remove trustees at will, applies only to property held exclusively for church purposes, and not to property held in trust "for the Baptist church and for the education of the youths of the colored race," the trustees appointed by the conveyance creating the trust being entitled to hold the property for such purposes. Thornton v. Harris, 140 N. C. 498, 53 S. E. 341.

16. MacKenzie v. Trustees of Presbytery, 67 N. J. Eq. 652, 61 A. 1027. Doctrine does not depend on statute of uses and is not to be rejected because that statute is not in force in the state. Id. If the trust cannot be literally performed, the court itself will apply the property as nearly as possible according to the donor's intentions. Nichols v. Newark Hospital [N. J. Eq.] 63 A. 621. Where testator devised property to hospital association organized for purpose of erecting hospital and caring for the sick and disabled, but which had never done anything but organize and was incapable of doing anything, held that court would effectuate donor's intention under cy pres doctrine and give fund to another hospital having same object. Id. Where devisee's charter provided that there should be no discrimination between patients on account of religion, birthplace, or parentage, held that designated hospital must be in position to comply with such proviso. Id. Where an apparent charitable intention has failed, whether by incomplete disposition at the outset or by subsequent inadequacy of the original object, effect will be given to it by a cy pres or approximation of application. Crow v. Clay County [Mo.] 95 S. W. 369. Authority granted courts by Laws 1901, c. 291, p. 751, when literal compliance with the terms of a gift to charity becomes impracticable or impossible to administer gift in such a manner as will most effectually accomplish the will of the donor, can be exercised only after the lapse of 25 years from the time of the gift. Mount v. Tuttle, 183 N. Y. 358, 76 N. E. 873, afg. 99 App. Div. 433, 91 N. Y. S. 195. Does not apply to testamentary gifts where testator died before its enactment. Id. Where a fund is given to trustees for a specified charitable purpose, lawful and valid in its inception, and no intention is expressed to limit it to a particular institution or mode of application, and after having vested as a charity, the scheme becomes impracticable, the court of chancery will apply the fund as near to the donor's particular intention as possible. Inglish v. Johnson [Tex. Civ. App.] 15 Tex. Ct. Rep. 376, 95 S. W. 558.

NOTE. Cy pres doctrine: By what is known as the cy pres doctrine, which is adopted in quite a number of the states, if the general nature of the charitable purpose is pointed out, and it is lawful and valid at the time of the testator's death, and no intention is expressed to limit it to a particular institution or mode of application, and the scheme of the testator afterwards becomes illegal from a change in the law, or becomes impracticable from a change of circumstances, the fund, having once vested as a charity, will be applied by a court of equity in a way as near to the testator's particular intention as possible. Russell v. Allen, 107 U. S. 163, 27 Law. Ed. 397; Jackson v. Phillips, 14 Allen [Mass.] 539, 580; Hinckley's Estate, 58 Cal. 457; Adams Female Academy v. Adams, 65 N. H. 225; Doyle v. Whalen, 87 Me. 414; Barnard v. Adams, 58 F. 313. So, in the case of a trust for the purpose of promoting a sentiment in favor of slavery and aiding fugitive slaves, the fund was, after the abolition of slavery, applied to the education and support of former slaves. Jackson v. Phillips, 14 Allen [Mass.] 539. And in the case of a trust for establishing beds in a hospital for insane patients, in case arrangements could not be made with the hospital management, the fund should, it was said, be applied in aid of insane persons in some other way. Hayden v. Connecticut Hospital, 64 Conn. 320. In those states where this doctrine does not prevail, the trust will in such case fail and the fund will revert to the donor's heirs or representatives. Tilden v. Green, 130 N. Y. 29, 27 Am. St. Rep. 487, 14 L. R. A. 33; Webster v. Morris, 66 Wis. 366, 57 Am. Rep. 278.—From Tiffany on Real Property, p. 251.

17. The doctrine of cy pres, as recognized and administered by the English court of

tered so as to effectuate, as near as possible, the intent and purpose of the donor, and the court has no right to ignore or violate its controlling purpose or spirit.[18] Thus there is no room for the application of the doctrine if by any means the trusts may be performed with exactness,[19] nor will it be applied so as to substitute an entirely different charity for the one intended by the donor in case it fails.[20] In the absence of any scheme judicially approved, the trustees may not make a cy pres application of the estate on their own authority, even though it be desirable.[21] A testamentary charitable gift lapses where the conditions existing at the time of the testator's death make his actual charitable purpose impossible of performance,[22] and where a testamentary trust, expressly limited to the purposes expressed and no others, fails of its object and thereby comes to an end, a resulting trust at once arises in favor of testator's heirs at law, which is enforceable by a suit in equity for that purpose.[23]

If a charity rests upon a private endowment, the founder and his heirs become, by the donation, the legal visitors.[24] The founder may, however, delegate his powers of visitation either generally or specially,[25] no technical or precise form of words being necessary for that purpose.[26] Where the appointment is made in general terms the whole power of visitation vests in the appointee.[27] In case the functions of a general visitor so appointed become suspended, the power of visitation does not ipso facto return to the founder or his heirs, but is exercised through the courts, properly invoked.[28] The same person cannot be both visitor and visited.[29] The

chancery, being based upon prerogative power of the king, is not recognized in Alabama. Universalist Convention v. May [Ala.] 41 So. 515.

18. Crow v. Clay County [Mo.] 95 S. W. 369. Where testator made bequest for education of poor children under sixteen years of age in a certain district, held that court was not authorized to remove restrictions as to age and residence and permit money to be devoted to collegiate education of older persons. Id. Permitting use of fund bequeathed in trust for education of poor children under the age of sixteen in a certain district to be used in whole or in part for support of public school held not objectionable on ground that it will lessen burdens of taxation upon the sick as well as the poor. Id. Purpose of testator in bequeathing sum for education of poor children under sixteen in a certain district held not so met by state laws for establishment of free public schools as to authorize the court to remove the restrictions as to age and territory. Id. In applying the doctrine the court will read the whole instrument creating the trust for the purpose of ascertaining the donor's or the testator's intention in order to effectuate it as near as possible. Inglish v. Johnson [Tex. Civ. App.] 15 Tex. Ct. Rep. 376, 95 S. W. 558. Conveyance of land for establishment and maintenance of school for education of female children of city held not to express an intention to limit and restrict its use to education of female children exclusively, and the authorization by the court of a mixed school on the land was proper when necessary to prevent a failure of the charity, it appearing that the maintenance of a separate school for females had become impracticable. Id.

19. MacKenzie v. Trustees of Presbytery, 67 N. J. Eq. 652, 61 A. 1027. Courts will not apply doctrine unless intent in the original mode cannot be literally carried out will preserve the substance, though the mode be departed from, and will not presume an intention which the donor or testator has not fairly indicated. Id.

20. Brown v. Condit [N. J. Eq.] 61 A. 1055. Testatrix gave residue of estate to "the hospital fund for sick seamen" at a certain navy yard, "care of W., chaplain." W. was not chaplain of such navy yard and died before testatrix, and there was no fund for the benefit of such seamen. Held that equity could not, under such doctrine, give bequest to another institution conducting religious and charitable work among sailors of a larger scope than that conducted by W. Id.

21. MacKenzie v. Trustees of Presbytery, 67 N. J. Eq. 652, 61 A. 1027.

22. Immaterial whether impossibility existed when will was made or arises subsequently, but before testator's death. Brown v. Condit [N. J. Eq.] 61 A. 1055.

23. Demurrer to bill seeking to avoid testamentary trust on ground of laches held properly overruled, it not appearing with certainty when trust came to an end. Columbian University v. Taylor, 25 App. D. C. 124.

24, 25. MacKenzie v. Trustees of Presbytery, 67 N. J. Eq. 652, 61 A. 1027.

26. Is sufficient if, from nature of the duties to be performed, it can be inferred that founder intended to part with the right of visitation. MacKenzie v. Trustees of Presbytery, 67 N. J. Eq. 652, 61 A. 1027. Deeds to trustees of Scotch Presbyterian church held to have conferred power of visitation on presbytery and its successors. Id.

27. MacKenzie v. Trustees of Presbytery, 67 N. J. Eq. 652, 61 A. 1027.

28. As where rights and powers become so centered in same person that he is both visitor and visited. MacKenzie v. Trustees of Presbytery, 67 N. J. Eq. 652, 61 A. 1027. Heirs of grantor held to have no power to compel administration of trust. Id.

29. MacKenzie v. Trustees of Presbytery, 67 N. J. Eq. 652, 61 A. 1027.

fact that a city has statutory authority to become trustee of charities upon appointment gives it no supervisory jurisdiction over funds intrusted to other trustees, though such funds may be so administered as to help or hinder the performance of the duties of the municipality.[30] The attorney general is the proper party to represent the public in any judicial inquiry into the conduct of the trustee in administering a public charitable trust.[31] Beneficiaries of a trust for educational and religious purposes may institute a proceeding for the appointment of trustees and the protection of the trust.[32] The trustee of a public charity cannot appear in equity as complainant against himself and his co-trustees, seeking their removal for breach of trust.[33]

A charity once inaugurated is always subject to the supervision and direction of a court of equity to render effectual its purpose and object,[34] and it cannot delegate its authority in this regard.[35] Equity has jurisdiction of suits to establish and enforce charitable uses,[36] will restrain by injunction breaches that are shown to be in contemplation,[37] and will give direction for future administration of the trusts.[38] An otherwise valid charitable trust will not be allowed to fail for want of a trustee, but the court will appoint one to take the trust property and carry out the charitable intent of the donor,[39] provided there is nothing to show that the latter reposed

30. Hospital held not accountable to city for its administration of trust fund, and mayor of city, who was ex officio a trustee of the hospital, should exercise his own judgment in the performance of his duties as trustee without dictation from any other branch of the city government. Stearns v. Newport Hospital [R. I.] 62 A. 132.

31. Citizen and taxpayer held to have no standing to maintain suit to correct abuses in administration of trust for benefit of all poor persons by trustees of hospital. Stearns v. Newport Hospital [R. I.] 62 A. 132. Proceedings to compel the due administration of trusts for the benefit of an indefinite or fluctuating body are properly instituted in the name of the attorney general. MacKenzie v. Trustees of Presbytery, 67 N. J. Eq. 652, 61 A. 1027. Where heirs of donor had no standing by right of reverter or as possible beneficiaries or under doctrine of visitation, held that only the attorney general, by way of information, or the beneficiary, by bill exhibited by and through the body charged with the duties of trustee, can properly invoke the superintending power of the courts over the administration of the trust. Id. Bill by charitable corporation to compel payment to it of bequest will not be dismissed for failure to make the attorney general a party where objection to his nonjoinder was first made after all the testimony had been taken, but complainant will be permitted to bring him in and give him an opportunity to be heard, the case being opened to permit the introduction of additional evidence if he deems it necessary. Trenton Soc. for Organizing Charity v. Howell [N. J. Eq.] 63 A. 1110.

32. Harris v. Brown, 124 Ga. 310, 52 S. E. 610. One owning a residence lot abutting on land conveyed in trust for the erection thereon of a church and two academies is not, for that reason, a beneficiary of the trust within this rule (Id.), nor is one merely alleging that he is a citizen and a taxpayer (Id.). A member of the church for the benefit of which the church building was erected, and which used such building, is a beneficiary and may file a bill to have trustees appointed and to enjoin an unauthorized sale of the property by the church authorities. Id.

33. Stearns v. Newport Hospital [R. I.] 62 A. 132.

34. Civ. Code 1895, § 4009. Harris v. Brown, 124 Ga. 310, 52 S. E. 610.

35. Decree authorizing county court to cooperate with school district in administration and management of trust fund held not a delegation of its trust to such district. Crow v. Clay County [Mo.] 95 S. W. 369.

36. To determine rights of library board and school trustees in building erected from proceeds of gift for that purpose. Board of Trustees v. Hoboken [N. J. Eq.] 62 A. 1.

37, 38. MacKenzie v. Trustees of Presbytery, 67 N. J. Eq. 652, 61 A. 1027.

39. Civ. Code 1895, § 3157. Harris v. Brown, 124 Ga. 310, 52 S. E. 610. Continuing trust for educational and religious purposes is the subject of equitable jurisdiction, and where trustees named in deed creating it cease to exist, superior court will appoint their successors upon application of any person authorized to bring the action. Id. The law will not permit a charitable trust, capable of execution, to remain unexecuted for want of a competent trustee. Nichols v. Newark Hospital [N. J. Eq.] 63 A. 621. Will not let a lawful charitable gift fail for want of a trustee, but the court will appoint one to receive the fund and execute the trust. Trenton Soc. for Organizing Charity v. Howell [N. J. Eq.] 63 A. 1110. Testator bequeathed certain sum in remainder "to the benevolent society of ladies known as the Dorcas Society of Trenton whenever the ladies comprising the same at the time this bequest takes effect become incorporated" to use interest for relief of deserving poor. Association disbanded, but thereafter a new corporation was organized for carrying on charitable work along substantially the same lines, four of the incorporators being members of the old association, the other members of the latter being dead. Held that the corporation was en-

special trust and confidence in the persons he himself appointed.[40] Unless such power is conferred by the instrument creating the trust, the court has no jurisdiction to investigate the management of the trust of its own motion, but suit for that purpose must be instituted in the proper manner by some authorized person.[41] While the courts are reluctant to interpose in questions affecting the management of the temporalities of a church, yet, if property is devoted to a specific doctrine or purpose, the courts will prevent it from being diverted from the trust.[42] There being no trustees in existence, trust property cannot be sold except through a court of equity.[43] Where it is sought in equity to avoid a devise creating a charitable trust as void, the rule of the statute of limtiations will be applied by analogy.[44]

CHARTER PARTY, see latest topical index.

CHATTEL MORTGAGES.

§ 1. What Constitutes a Chattel Mortgage (635).
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titled to the bequest. Id. A legal and valid trust will not be allowed to fail for want of a trustee, but the court will appoint one. Where trustee of trust for educational purposes became incapable of carrying it out because of its inability to raise funds for the purpose, owing to changed methods, etc., held proper for court to vest title to land in city and school trustees. Inglish v. Johnson [Tex. Civ. App.] 15 Tex. Ct. Rep. 376, 95 S. W. 558.

40. Death or resignation of trustees directed to pay and see to application of bequest to college to be used as endowment for purposes of colonial research, held not to cause failure of trust, there being no personal trust, but court would appoint successors. Speer v. Colbert, 200 U. S. 130, 50 Law. Ed. ——, afg. 24 App. D. C. 187. The selection of the particular objects of the designated class to be benefited by a charitable trust is a mere administrative detail which belongs to the office of trustee, unless specially otherwise provided (Woodruff v. Hundley [Ala.] 39 So. 907), and when not specially otherwise provided will be exercised by the court or attached to the office of trustee on failure of the particular plan (Id.). Fact that will creating trust leaves selection of beneficiaries to discretion of trustees does not cause trust to terminate on their death on theory that special trust and confidence was reposed in them by testator. Id. Bequest to benevolent society of ladies, known as the Dorcas society whenever ladies comprising same became incorporated, held not to repose special trust and confidence in any particular persons. Trenton Soc. for Organizing Charity v. Howell [N. J. Eq.] 63 A. 1110.

41. Provision in will requiring trustees to make annual reports to court does not authorize a judge thereof to himself arbitrarily institute a proceeding to compel trustee to make annual settlements or proper reports, or in the absence of the bringing of such an action by the proper persons to himself proceed against them and undertake an investigation of their management of the funds intrusted to them. Jenkins v. Berry [Ky.] 92 S. W. 10. Suit for that purpose should be brought by attorney general. Id. Fact that some of the patients received in the hospital, for the maintenance of which the trust was created, are treated and cared for at the expense of a city or other districts of the county does not change the rule. Id.

42. Harris v. Brown, 124 Ga. 310, 52 S. E. 610.

43. Harris v. Brown, 124 Ga. 310, 52 S. E. 610. Neither trustees of church erected on land conveyed, nor trustees of a certain academy having control of school building, held to have been shown to be the successors, lawfully appointed, of the original trustees, and hence neither body had authority to sell property. Id.

44. Relief will be denied when there has been a delay of more than the statutory period in bringing suit. Columbian University v. Taylor, 25 App. D. C. 124. Where, if heirs of testator have any right of action to recover realty which is the subject of a special charitable trust, it is because the trust has been demonstrated to be incapable of execution; demurrer on ground of laches is properly overruled where it does not appear with certainty when trust came to an end. Id.

This topic deals exclusively with chattel mortgages,[45] and does not treat of general trust deeds upon the property of corporations,[46] such as railroads,[47] street railways,[48] and water companies.[49] The effect of the mortgage as a preference or fraudulent transfer is treated elsewhere,[50] as is the operation of limitations upon actions to enforce it.[51] Questions relating to interest are treated elsewhere.[52]

§ 1. *What constitutes a chattel mortgage.*[53]—The essential elements of a chattel mortgage is a transfer of property by a debtor to a creditor to secure the payment of the indebtedness.[54] Every chattel mortgage involves in terms an absolute transfer of title, and in contemplation of law the title does pass to the mortgagee subject to being divested by the performance by the mortgagor of the condition of the mortgage.[55] It is this condition which distinguishes a chattel mortgage from an absolute bill of sale.[56] The intention of the parties governs. Thus, bills of sale[57] and conditional sales[58] have been held chattel mortgages and vice versa.[59] That an instrument absolute on its face is in fact a chattel mortgage may be shown by parol,[60] though the complaint contains no allegation of fraud in the making of the bill of sale,[61] or, as it has been stated, so far as the instrument partakes of the nature of a receipt or is simply declaratory of a fact, it may be explained or contradicted, but to the extent that it expresses the contract between the parties and defines their rights and liabilities, it is subject to the same rule as other contracts.[62]

45. Real estate mortgages, see Mortgages, 6 C. L. 681, and Foreclosure of Mortgages on Land, 5 C. L. 1441.

46. See Corporations, 5 C. L. 764.

47. See Railroads, 6 C. L. 1194.

48. See Street Railways, 6 C. L. 1556.

49. See Waters and Water Supply, 6 C. L. 1840.

50. See Bankruptcy, 7 C. L. 387; Assignments for Benefit of Creditors, 7 C. L. 286; Fraudulent Conveyances, 5 C. L. 1556.

51. See Limitation of Actions, 6 C. L. 465.

52. See Interest, 6 C. L. 157; Usury, 6 C. L. 1774.

53. See 5 C. L. 574.

54. Assignment and transfer of all rents, arising from a certain farm to secure payment of a note, held a mortgage. Thatcher v. Jeffries [Tex. Civ. App.] 14 Tex. Ct. Rep. 33, 91 S. W. 1091. Contract conveying personal property to another for the purpose of securing the payment of a debt is a chattel mortgage. Thompson v. Crosby [Okl.] 82 P. 643.

55, 56. Gore v. Glover, 97 N. Y. S. 969.

57. Bill of sale, absolute in form, given to secure a note, held a mortgage. Greeson v. German Nat. Bank [Ark.] 95 S. W. 439. Value of property largely exceeding indebtedness, evidence that creditor agreed to accept payment and return property held competent to show bill of sale a mortgage. Harris v. Staples [Tex. Civ. App.] 13 Tex. Ct. Rep. 988, 89 S. W. 801. Instrument reciting sale of certain drug stock and retention of vendor's lien, and if notes were not paid vendor might take possession and sell sufficient of the stock to pay the notes, held a chattel mortgage. Fleisher v. Hinde [Mo. App.] 93 S. W. 1126.

58. In Texas: A sale of goods with reservation of title until purchase money is paid constitutes a chattel mortgage to secure the unpaid purchase price. Cameron & Co. v. Jones [Tex. Civ. App.] 90 S. W. 1129. Rev. St. 1895, art. 3327, construed. Wright v. Texas Moline Plow Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 924, 90 S. W. 905. Where buyer failed to comply with condition to pay part in cash and give notes for the balance, but remained in possession for two years, held question whether transaction was a "conditional sale" or whether the seller sold the property and reserved title as security for payment of the price was for the jury. Slayton & Co. v. Horsey [Tex. Civ. App.] 91 S. W. 799.

Note: Court apparently does not mean "conditional sale" as that term is ordinarily used but rather what is more frequently spoken of as "sale upon condition."—Ed.

59. A note reciting that it is for purchase price and providing that title shall remain in the seller, and that on nonpayment he may take and sell the property and apply the proceeds to the price, is a conditional sale, not a mortgage. Tweedie v. Clark, 99 N. Y. S. 856.

60. Smith v. Hope [Fla.] 41 So. 69; Gore v. Glover, 97 N. Y. S. 969. Bill of sale absolute in form held mortgage where given under oral agreement that it was for security. Clark v. Williams, 190 Mass. 219, 76 N. E. 723. Recital in alleged bill of sale that it was given in consideration of the surrender and cancellation of a note of the seller, held not conclusive that it was not intended as a mortgage. Gibbons v. Joseph Gibbons Consol. Min. & Mill. Co. [Colo.] 86 P. 94.

61. Gibbons v. Joseph Gibbons Consol. Min. & Mill. Co. [Colo.] 86 P. 94.

62. Gibbons v. Joseph Gibbons Consol. Min. & Mill. Co. [Colo.] 86 P. 94. In an action to have a bill of sale of shares of stock declared a mortgage, parol evidence is admissible to deny recitals that the plaintiff was afraid that a sale of the stock pursuant to authority given by a previous assignment by him would not produce enough to pay the debt and that he feared a deficiency judgment, and also to deny receipt of a cash consideration recited in the bill of sale. Id.

In this connection, evidence of the value of the property as compared with the amount of the indebtedness is admissible and is frequently a controlling factor.[63]

Kinds.—A mortgage executed for money borrowed to pay a mortgage for the purchase price of the property, and to procure additional material after the property was acquired, is not a purchase-money mortgage,[64]

§ 2. *Subject-matter. What may be mortgaged.*[65]—In many states crops to be grown in the future are mortgageable,[66] providing the parties have in mind the particular land upon which the crops are to be grown.[67] So also, future earnings may be mortgaged.[68] In New York a mortgage of after-acquired property is void[69] in so far as it professes to cover such property,[70] as to general creditors.

Title and interest of mortgagor.[71]—The mortgagor must have some title or interest in the property mortgaged[72] other than that of a mere bailee[73] or lessee.[74] One raising crops upon another's land upon shares has a mortgageable interest in the crop.[75] A married woman may generally mortgage her separate statutory property.[76] A mortgagor may become estopped to deny his title.[77]

63. In determining question of sale or mortgage, evidence of offers of third persons to purchase at a price in excess of that stated in the "bill of sale" is admissible. Gibbons v. Joseph Gibbons Consol. Min. & Mill. Co. [Colo.] 86 P. 94. Where stock worth $27,800 was given in satisfaction of indebtedness of $3,500, held a mortgage. Collins v. Denny Clay Co., 41 Wash. 136, 82 P. 1012. See, also, Harris v. Staples [Tex. Civ. App.] 13 Tex. Ct. Rep. 988, 89 S. W. 801.

64. Nicholson v. Aney, 127 Iowa, 278, 103 N. W. 201.

65. See 5 C. L. 575.

66. Mortgage upon crops to be grown in the future may be valid. Reeves & Co. v. Sheets [Okl.] 82 P. 487. A mortgage on crops to be raised on the mortgagor's lands during a specified year and "each succeeding year," and duly recorded in the county in which the mortgagor resides and where the crops are to be raised, is valid. Winston v. Farrow [Ala.] 40 So. 53.

67. McDavid v. Phillips [Tex.] 15 Tex. Ct. Rep. 962, 94 S. W. 1131; afg. 15 Tex. Ct. Rep. 488, 94 S. W. 1129. Mortgage covering succeeding crops of succeeding years, it being agreed that if the mortgagor failed to cultivate described land, mortgage should cover land cultivated by him, held void as to creditors. Id.

68. Under the Iowa Code the owner of a threshing machine may mortgage the future earnings of the same and the mortgagee may hold such earnings as against the laborers employed in running such machine, provided the intention of the mortgagor to mortgage all the earnings of the machine, including the wages of the employes, is clearly shown by the chattel mortgage, and the description of the machine is sufficiently definite, and the time and place within which the earnings are to accrue are sufficiently specific to give subsequent purchasers or claimants notice that the same are so mortgaged. Flanders v. French [S. D.] 106 N. W. 54.

69. New York law. In re Marine Const. & Dry Docks Co. [C. C. A.] 144 F. 649.

70. A chattel mortgage otherwise valid is not rendered void because it professes to include property that may be subsequently acquired. Skilton v. Codington [N. Y.] 77 N. E. 790, rvg. 105 App. Div. 617, 93 N. Y. S. 460.

71. See 5 C. L. 575.

NOTE. A chattel mortgage may be given to a trustee in trust for beneficiary creditors: Instead of the mortgage being given directly to the beneficiaries, it may be made to a trustee to secure obligations not held by the trustee. Bagg v. Jerome, 7 Mich. 145; Adams v. Niemann, 46 Mich. 135; Walker v. White, 60 Mich. 427; Warner v. Littlefield, 89 Mich. 329; Krements v. Howard, 109 Mich. 466. When each creditor's debt is specified in a mortgage running to a mortgagee trustee, each creditor may enforce his claim under such a mortgage, and the transfer may be treated the same as separate simultaneous mortgages of the different creditors. Walker v. White, 60 Mich. 427. A chattel mortgage given to a trustee for the benefit of several creditors is valid, although the mortgage did not state it was so given, but this was shown by a separate written agreement. Gore v. Ray, 73 Mich. 385.—From Hammon's Mich. Chattel Mortgages, p. 92.

72. A mortgagor cannot create a lien upon property which he does not own at the time and in which he afterwards acquires no interest. Reeves & Co. v. Sheets [Okl.] 82 P. 487. Evidence held sufficient to warrant submission to the jury of question whether original owner made title of sale to mortgagor and whether he authorized mortgage. Carson v. Dewar, 115 Mo. App. 673, 92 S. W. 723.

73. First Nat. Bank v. McIntosh & P. Live Stock & Commission Co. [Kan.] 84 P. 535; Gilbert Book Co. v. Sheridan, 114 Mo. App. 332, 89 S. W. 555.

74. Wetzel v. Deseret Nat. Bank [Utah] 83 P. 570.

75. Bourland v. McKnight & Bro. [Ark.] 96 S. W. 179. The interest of a cropper in his share of the crops, which under the contract should be the property of the landlord until the conditions of the lease were complied with, may be mortgaged. Lyon v. Phillips [S. D.] 108 N. W. 554.

76. So held in Florida where mortgage was given to secure the payment of money used for the benefit of such property and her husband joined in the mortgage and bound himself personally to pay. Mercantile Exch. Bank v. Taylor [Fla.] 41 So. 22.

77. Mortgagor held estopped to deny that he held title at time of execution of mortgage; tried to claim transaction whereby he

Description of property.[78]—If at the time of the execution of the mortgage the parties thereto understood what property it covered,[79] a faulty description can only be taken advantage of by innocent third persons,[80] and even as against them a faulty description is sufficient if the mortgage contains such description as would lead to the identification of the chattels intended to be mortgaged on reasonable inquiry,[81] and a subsequent purchaser attempting to take advantage of a faulty description must prove his good faith.[82] Actual delivery of the chattels to the mortgagee[83] or his agent[84] will cure a defective description as against third parties subsequently acquiring rights in the property.

The question of what is covered by the description is largely one of intent.[85] To be construed to cover after-acquired property, the language of the mortgage must aptly and clearly indicate such a purpose,[86] and being so intended, the mortgagee may waive his rights thereunder.[87]

acquired possession was a conditional sale. American Soda Fountain Co. v. Blue [Ala.] 40 So. 218. See Estoppel, 5 C. L. 1285.

78. See 5 C. L. 575.

79. Rudisell v. Jennings [Ind. App.] 77 N. E. 959, rehearing denied, 78 N. E. 263. Description, "Two Jersey cows, three and five years old; three work horses, age eight and nine years; one farm wagon," sustained. Id. Complaint held to warrant foreclosure sale of work horses. Id. See, also, South Omaha Nat. Bank v. Stewart [Neb.] 106 N. W. 969.

Illustrations: As between parties or as against one having notice of mortgage description: "One bald-faced mare five years old, weight about 1,400 pounds, and one black mare seven years old, weight 1,200 pounds, in possession of the mortgagor, held sufficient. Longerbeam v. Huston [S. D.] 105 N. W. 743. Mortgage on part of herd of cattle held not void between parties, though there had been no selection or delivery. South Omaha Nat. Bank v. McGillin [Neb.] 108 N. W. 257.

80. South Omaha Nat. Bank v. Stewart [Neb.] 106 N. W. 969.

81. South Omaha Nat. Bank v. Stewart [Neb.] 106 N. W. 969. It is sufficient if it contains enough to so direct the mind of the searcher of the record to facts from which he was to ascertain the property with reasonable certainty. Westinghouse Co. v. McGrath [Iowa] 108 N. W. 449. Mortgage must disclose property in existence which is the proper subject of contract, or give a description by which the thing in contemplation of the parties could be identified at that time. McDavid v. Phillips [Tex.] 15 Tex. Ct. Rep. 962, 94 S. W. 1131, afg. 15 Tex. Ct. Rep. 488, 94 S. W. 1129.

Illustrations: Description, "Fifty head of registered Hereford cows and heifers; four head of registered Hereford bulls—all located on my farm about fifteen miles north of Vernon, in Wilbarge County, Texas," held sufficient. Bank of America v. Waggoner [C. C. A.] 143 F. 53. Mortgage of future earnings of threshing machine. Description held sufficiently definite. Flanders v. French [S. D.] 106 N. W. 54. A mortgage on "twelve acres of cotton" held insufficient. Hampton v. State, 124 Ga. 3, 52 S. E. 19. In a prosecution for fraudulent sale by mortgagor in such a mortgage, held demurrer to indictment should have been sustained. Id. As against a third person a description as follows: "Twelve train cars, five tons of train-car rails, six hundred train car ties, one thousand pounds of spikes, five hundred mining timbers, and one tipple," held fatally indefinite. Wood v. West Pratt Coal Co. [Ala.] 40 So. 959. Mortgage on specified number of cattle, describing them by age and brands, and reciting "the above described stock are in my undisputed possession, free from all liens and incumbrances, and kept on my premises," describing them is not void on its face for uncertainty of description. South Omaha Nat. Bank v. McGillin [Neb.] 108 N. W. 257. If it is made to appear, however, that such mortgage was in fact given on a part only of a herd of cattle of the same description, it is void as to third persons, unless there has been a separation or a delivery of the cattle mortgaged to the mortgagee. Id. Mortgage, after reciting that mortgagors resided in a certain county, described property as follows: "Fifteen H. P. traction engine, Westinghouse make; one Woods self-feeder main drive belt wagon box elevator tank pump and hose." Mortgage further provided that if mortgagor attempted to remove it from "said county" the mortgagee might take possession, the mortgage was signed by several persons, held insufficient to impart constructive notice to subsequent purchasers. Westinghouse Co. v. McGrath [Iowa] 108 N. W. 449. Mortgage covering succeeding crop of succeeding years, it being agreed that if mortgagor failed to cultivate described lands mortgage should cover land cultivated by him, held void as to creditors. McDavid v. Phillips [Tex.] 15 Tex. Ct. Rep. 962, 94 S. W. 1131, afg. 15 Tex. Ct. Rep. 488, 94 S. W. 1129.

82. South Omaha Nat. Bank v. Stewart [Neb.] 106 N. W. 969.

83. As against attaching creditors. Ottumwa Nat. Bank v. Totten, 114 Mo. App. 97, 89 S. W. 65. The mortgaged property being in the possession of the mortgagee, a slight misdescription is not prejudicial. Misdescription of brands of cattle. Beaman v. Interstate Nat. Bank [Colo.] 85 P. 426.

84. See Ottumwa Nat. Bank v. Totten, 114 Mo. App. 97, 89 S. W. 65.

85. Mortgage on herd of cattle, description: "Those branded 7X on left side," held to include those branded 7X on left hip. Scott v. Llano County Bank [Tex.] 13 Tex. Ct. Rep. 808, 89 S. W. 749, rvg. [Tex. Civ. App.] 85 S. W. 301.

86. First Nat. Bank v. McIntosh & P. I. Stock & Commission Co. [Kan.] 84 P. 535;

§ 3. *Consideration.*[88]—Like other contracts, a chattel mortgage must be supported by a consideration,[89] and in this connection an extension of the time for the payment of the debt,[90] or a moral obligation,[91] is sufficient. A mortgage is security only for such demands as are in the contemplation of the parties at the time,[92] and to secure future advances it need not specify any particular sum which it is to secure, but it is sufficient if it contains enough to show that it is to stand as security for such indebtedness as may arise from future dealings between the parties.[93] A mortgage to cover future advances includes only such as the parties had in contemplation.[94] It cannot by subsequent agreement be made to cover advances not originally contemplated, unless such agreement amounts to a new mortgage.[95] Where a chattel mortgage is executed as collateral security for a balance due on a prior mortgage, the prior mortgage is competent evidence to show the consideration for the subsequent mortgage.[96]

§ 4. *Fraudulent conveyances.*[97]—In the absence of circumstances raising a presumption of fraud, a fraudulent intent must appear.[98] A mortgage permitting the mortgagor to retain and sell the property in the ordinary course of trade[99] is

Kastner v. Fashion Livery Co. [Ariz.] 85 P. 120. Phrase "all the property now used and hereafter being used in the business," held insufficient to indicate such a purpose. Id. In order that a mortgage securing a note should stand as security for subsequent debts, there must be an unequivocal agreement to that effect. Greeson v. German Nat. Bank [Ark.] 95 S. W. 439. The lien does not cover property not in esse or not owned by the mortgagor at the date of the contract, unless it is clear that at such date the parties anticipated the acquisition by the grantor of the very property upon which the lien is sought to be fixed and foreclosed, and intended that it should be subject thereto. Mortgage upon present and future crops held not to cover crops on lands not owned or held by him at the time of the mortgage and which he did not contemplate cultivating. McDavid v. Phillips [Tex.] 15 Tex. Ct. Rep. 962, 94 S. W. 1131, afg. 15 Tex. Ct. Rep. 488, 94 S. W. 1129.

87. Where a note pledged certain property as security, and provided that, if the note was not paid and the property sold, the payee might at its election apply the surplus over the amount required to pay the note to any other indebtedness. The property was sold by the trustee in bankruptcy of the maker of the note and the purchaser paid the note and received it from the payee marked paid. Held the payee in the note waived any lien it might have otherwise had on the property as security for an indebtedness of the maker contracted after the note was made. Greeson v. German Nat. Bank [Ark.] 95 S. W. 439.

88. See 5 C. L. 576.

89. Mortgage by married woman on separate property held supported by a sufficient consideration, it securing her husband's obligation to pay the debt and the mortgagee being given possession of the property. Mercantile Exch. Bank v. Taylor [Fla.] 41 So. 22.

90. Martin Bros. & Co. v. Lesan [Iowa] 105 N. W. 996.

91. Mortgage given to secure payment of dormant and unenforceable judgment, held valid. Brown v. Akeson [Kan.] 86 P. 299.

92. Winston v. Farrow [Ala.] 40 So. 53.

93. Winston v. Farrow [Ala.] 40 So. 53. Mortgage reciting that it was given to secure a certain sum and "and all other sums due [the mortgagee] prior to the payment hereof," sums due the mortgagee at any time before the payment of the particular debt mentioned will be construed as within the terms and protection of the mortgage, but debts accruing to the mortgagee after the payment of the particular debt are not within the provisions of the mortgage. Id.

94, 95. Wright v. Voorhees [Iowa] 108 N. W. 758.

96. Winston v. Farrow [Ala.] 40 So. 53.

97. See 5 C. L. 576, also Fraudulent Conveyances, 5 C. L. 1556.

98. The fact that a mortgage is made on $18,000 worth of property, to secure a debt of $4,400, is not of itself sufficient to establish a fraudulent intent in the execution of the mortgage. Mercantile Exch. Bank v. Taylor [Fla.] 41 So. 22. Mortgage by married woman of separate property held not fraudulent, it not appearing what was the extent of the indebtedness of the married woman which could be charged in equity upon her separate statutory property, nor how Wright v. Texas Moline Plow Co. [Tex. Civ. App. Div. 617, 93 N. Y. S. 460. Mortgage givtaken subject to rights of first mortgagee,

99. Rev. St. 1895, art. 2548, construed. Wright v. Texas Moline Plow Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 924, 90 S. W. 905; Fleisher v. Hinde [Mo. App.] 93 S. W. 1126; Fourth Nat. Bank v. Camden Lumber Co., 142 F. 257; Locke v. New England Brick Co. [N. H.] 63 A. 178. Rule applies to a mortgage of after-acquired property. Laws 1901, p. 554, c. 66, authorizing a corporation to mortgage after-acquired property, construed. Id. Recital that mortgagor was doing a general manufacturing business and that the mortgage was given to secure money borrowed for the purposes of its business, held not to authorize mortgagor to sell or use property and apply proceeds to its general use. In re Marine Const. & Dry Dock Co. [C. C. A.] 144 F. 649. "Immediate possession" means as soon as may be with reasonable dispatch under the circumstances. Brockhurst v. Cox [N. J. Eq.] 64 A. 182.

generally held to be fraudulent as to creditors, unless the gross proceeds of the sale [1] are to be applied to the payment of the mortgage debt,[2] or some prior lien on the property,[3] or to the acquisition of property to take the place of that sold,[4] and, not being expressed, it would seem that a provision for an accounting might be presumed.[5] A mortgage being void as against the mortgagor's creditors, the latter may compel the mortgagee to account for the value of the goods taken by him under the mortgage, though the goods were taken before the creditors could enforce their claims.[6]

§ 5. *The instrument. Form, execution, and delivery.*[7]—In most states the mortgagor's wife must sign mortgages of exempt property,[8] and failing to do so, a ratification by her will not be allowed to relate back so as to prejudice the rights of intervening creditors, lienholders, or purchasers.[9] A delivery to the party beneficially interested is sufficient, at least in equity, as between the parties.[10] In some states it must appear from the mortgage that a full, true, perfect, and complete copy of the mortgage was delivered to the mortgagor,[11] and the fact of such delivery being stated in the mortgagor's acknowledgment, it is deemed prima facie evidence of such delivery.[12] The facts being undisputed, the question of delivery becomes one of law for the court.[13] Under laws of Arkansas, omission of a seal from a mortgage made by a business corporation is not fatal to its validity.[14] Mortgage claims against an insolvent corporation should be evidenced, not only by acts of mortgage signed by the president, but by proof that such officer was duly authorized by the board of directors to execute the instrument.[15]

Alteration, reformation, and construction.[16]—The general rules as to the reformation and alteration of instruments apply.[17] In construing a mortgage, the intention of the parties as expressed in the mortgage governs, but, in ascertaining that intention, the situation of the parties at the time of the execution of the mortgage

1. Mortgage of retail stock, mortgagor being permitted to sell and use surplus after deducting expenses of carrying on business in replenishing stock, held void. Skilton v. Codington [N. Y.] 77 N. E. 790, rvg. 105 App. Div. 617, 93 N. Y. S. 460. Mortgagor being authorized to sell and account to mortgagee for such part of the sale price as represents purchase price at which stock was sold to mortgagor by mortgagee, which price appears only in an inventory not filed nor attached to the mortgage, is void as to creditors. Pfeiffer v. Roe, 108 App. Div. 54, 95 N. Y. S. 1014.

2. In re Marine Const. & Dry Dock Co. [C. C. A.] 144 F. 649; Pritchard v. Hooker, 114 Mo. App. 605, 90 S. W. 415. Must account for the proceeds. Fleisher v. Hinde [Mo. App.] 93 S. W. 1126. Nor does permission given the mortgagor to sell the mortgaged chattels, the proceeds thereof to be applied in payment of the mortgage, render the mortgage void, because in such case the proceeds of the sales must be treated as reducing the amount due on the mortgage, even though the mortgagor should misapply them or refuse to pay them to the mortgagee. Skilton v. Codington [N. Y.] 77 N. E. 790, rvg. 105 App. Div. 617, 93 N. Y. S. 460. Mortgage giving mortgagor right to use and sell, provision: **"provided always that the security of said bonds shall not thereby be in any wise reduced or impaired,"** held insufficient to render mortgage valid. In re Marine Const. & Dry Dock Co. [C. C. A.] 144 F. 649.

3. In re Marine Const. & Dry Dock Co. [C. C. A.] 144 F. 649.

4. In re Marine Const. & Dry Dock Co. [C. C. A.] 144 F. 649. New York law considered. In re Burnham, 140 F. 926.

5. So held where there was a provision requiring the mortgagor "to keep the stock up to its present standard and not permit the same to run down. Fleisher v. Hinde [Mo. App.] 93 S. W. 1126.

6. Pfeiffer v. Roe, 108 App. Div. 54, 95 N. Y. S. 1014.

7. See 5 C. L. 577.

8, 9. Nicholson v. Aney, 127 Iowa, 278, 103 N. W. 201.

10. Wells v. German Ins. Co., 128 Iowa, 649, 105 N. W. 123. Where mortgage given to secure indebtedness to bank was made out to the cashier's father, but was delivered to the bank, held delivery was sufficient. Id.

11, 12. Foss v. Van Wagenen [S. D.] 104 N. W. 605.

13. Wells v. German Ins. Co., 128 Iowa, 649, 105 N. W. 123.

14. Fourth Nat. Bank v. Camden Lumber Co., 142 F. 257.

15. In re Red River Line, 115 La. 867, 40 So. 250.

16. See 5 C. L. 578.

17. Where second mortgage was advisedly taken subject to rights of first mortgagee, held evidence being conflicting the court would not reform the mortgage so as to make it absolutely subject to first mortgage. Nicholson v. Aney, 127 Iowa, 278, 103 N. W.

and the purpose thereof may be considered if the language is ambiguous.[18] So also, a practical construction placed upon the contract by the parties will be followed.[19] A power to exchange does not embrace a power to sell.[20] Express provisions of the mortgage cannot be altered by parol.[21]

Renewal affidavits.[22]—As a general rule an affidavit by an agent must swear to the fact of his agency.[23] Only creditors holding legal process authorizing a seizure of the debtor's property can take advantage of the failure of the holder of a chattel mortgage to strictly comply with the New York statute requiring statements in renewal to be filed before the expiration of each year.[24] The Illinois statute providing for the extension of chattel mortgages for more than one year applies to mortgages in force at its passage,[25] and under such statute, extensions for more than a year are ineffective even for a year as against third persons.[26]

§ 6. *Filing or recording and notice of title or rights.*[27]—The recording of a chattel mortgage and the effect thereof are governed by the law of the state where the property is situated.[28] Where a mortgage is executed upon personal property between parties residing in one state or territory upon property there situated at the time of the execution of the mortgage and it is executed, filed or recorded according to the laws of such state or territory, so that it becomes a valid lien upon the mortgaged property in that state or territory as against creditors or purchasers, and the property is afterwards removed by the mortgagor, without the knowledge or consent of the mortgagee or the holder of the mortgage, to another state or territory, the mortgage remains a valid lien upon the property which will be enforced against creditors of or purchasers from the mortgagor by the courts of the state or territory to which the property has been removed, although not filed in the latter state or territory, unless the statutes of the latter require foreign mortgages to be filed.[29] But where recordation is required to be made in the county where the property is situated, a recordation there made after the removal of the property to a foreign state is of

201. See Alteration of Instruments, 7 C. L. 115; Reformation of Instruments, 6 C. L. 1279.

18. Winston v. Farrow [Ala.] 40 So. 53.

19. Where chattel mortgagor was to give mortgagee a real estate mortgage, and upon the latter being given on less land than agreed the chattel mortgage was recognized as an existing liability, held real estate mortgage was not in fact substituted for chattel mortgage. Shaw v. Cooke, 97 N. Y. S. 235.

20. Cooper v. McKee [Ky.] 89 S. W. 203.

21. That mortgage was to secure future advances. Davis v. Carlisle [C. C. A.] 142 F. 106, rvg. 5 Ind. T. 83, 82 S. W. 682.

22. See 5 C. L. 578.

23. Under Rev. St. 1898, § 2315, providing that a chattel mortgage shall cease to be valid as against creditors, etc., after the expiration of two years, unless the mortgagee, his agent, or attorney shall make and file an affidavit setting forth the mortgagee's interest in the property, the affiant must swear to the fact of his agency for the mortgagee and a mere averment describing him as "of and for" the mortgagee is insufficient. Chickering-Chase Bros. Co. v. White & Co. [Wis.] 106 N. W. 797.

24. In re Burnham, 140 F. 926.

25, 26. Aultman & T. Mach. Co. v. Fish, 120 Ill. App. 314.

27. See 5 C. L. 578.

28. **Oklahoma:** To be valid as against execution creditors, mortgage must be signed by two witnesses and filed in the office of the register of deeds in the county where the property at the time is situated. Thompson v. Crosby [Okl.] 82 P. 643. Under Sess. Laws Okl. 1897, p. 215, c. 24, § 1, amending St. 1893, c. 51, § 18, the mortgage must be filed in the county in which the property was situated at the time of the execution of the mortgage. Yund v. First Nat. Bank [Wyo.] 82 P. 6.

29. Yund v. First Nat. Bank [Wyo.] 82 P. 6.

Note: The majority of decisions take the view that a chattel mortgage validly executed and recorded according to the requirements of the state where made is valid in every state into which the property may be brought against purchasers or attaching creditors, unless contrary to some rule of statutory or common-law policy. Parr v. Brady, 37 N. J. Law, 201. Against this view it may be urged that a recording statute can have no force outside of the jurisdiction enacting it and that creditors of a foreign state having no access to the record cannot be charged with notice. See Snyder v. Yates, 112 Tenn. 309, 79 S. W. 796. [But see Bank v. Hill, 99 Tenn. 42]; Corbett v. Littlefield, 84 Mich. 30. The answer to this would seem to be that since by the statute of the state having jurisdiction of the res the chattel mortgage passed title good against third parties, and title should be protected wherever found.—18 Harv. L. R. 145.

no effect.[30] As a general rule, except as to between the parties thereto,[31] a mortgage, so long as it remains unrecorded,[32] is invalid as to subsequent bona fide purchasers, creditors, or lienors,[33, 34] unless the mortgagee takes possession of the property.[35] The delivery required is the same as is required in an absolute sale to pass title as against attacking creditors.[36] In some states a change of possession is required in addition to recordation.[37] The New Jersey recording act does not remove the imputation of fraud which the common law attaches to a chattel mortgage unaccompanied by change of possession, and while such mortgage may not be void as to a purchaser with notice, such notice is not chargeable to the purchaser's creditors.[38] It is not essential that the note secured be recorded.[39] There is a conflict as to whether the protection of the statutes extends to simple contract creditors.[40] Within the meaning of the recording acts, a purchaser of the mortgaged property subject to the mortgage becomes a mortgagor.[41] That a creditor did not extend credit on the faith of property covered by a prior mortgage, which was not recorded till after the credit was extended, does not make the chattel mortgage a valid lien as against the creditor.[42] The recordation of the mortgage protects the mortgagee as against sub-

30. Yund v. First Nat. Bank [Wyo.] 82 P. 6.

31. Trustee of bankrupt mortgagor is not a party to the mortgage. Clark v. Williams, 190 Mass. 219, 76 N. E. 723. Purchase-money mortgage. Wm. Cameron & Co. v. Jones [Tex. Civ. App.] 90 S. W. 1129.

32. Rev. Laws, c. 198, § 1, construed. Clark v. Williams, 190 Mass. 219, 76 N. E. 723. Under Gen. St. 1901, § 4244, there being no change in possession, an unrecorded mortgage is void only while withheld from record, and whenever recorded will from and after that time be valid. Youngberg v. Walsh [Kan.] 83 P. 972. First to receive and record a valid mortgage is entitled to priority. Nicholson v. Aney, 127 Iowa, 278, 103 N. W. 201. "Immediate recording" means as soon as may be with reasonable dispatch under the circumstances. Unexplained delay for sixteen days fatal. Brockhurst v. Cox [N. J. Eq.] 64 A. 182.

33, 34. Code 1896, § 1009. Grimmer v. Nolen [Ala.] 40 So. 97. One extending credit to a debtor before the recordation of the mortgage takes prior thereto. American Book Co. v. Baker [Mo. App.] 95 S. W. 957. Garnishment lien held superior to that of unrecorded mortgage. Thatcher v. Jeffries [Tex. Civ. App.] 14 Tex. Ct. Rep. 33, 91 S. W. 1091. Subsequent mortgagee having no notice or knowledge of prior mortgage at time of execution of his mortgage is not liable to prior mortgagee for conversion, though he had knowledge of prior mortgage at the time of taking possession. Grimmer v. Nolen [Ala.] 40 So. 97. Pledgee held to have prior lien over mortgage of which he had neither actual nor constructive notice. Sweeney v. Taylor Bros. [Tex. Civ. App.] 14 Tex. Ct. Rep. 696, 92 S. W. 442. Registration is constructive notice to subsequent purchaser at execution sale. Howard v. Deene, 143 Ala. 423, 39 So. 346.

35. Rev. Laws, c. 198, § 1, construed. Clark v. Williams, 190 Mass. 219, 76 N. E. 723. Missouri law. First Nat. Bank v. Connett [C. C. A.] 142 F. 33. The taking of immediate possession is made a prerequisite to the validation of an unrecorded chattel mortgage. Five months' delay held fatal. Pryor v. Gray [N. J. Eq.] 62 A. 439.

36. Clark v. Williams, 190 Mass. 219, 76 N. E. 723. Where chattels were in the possession of a third person, mere delivery of mortgage without more does not constitute a constructive delivery of the property. Id.

37. There being no change of possession in a purchase of cattle, a mortgage given by the buyer is not, even though recorded, constructive notice to purchaser or subsequent incumbrancers of the cattle covered thereby. Martin Bros. & Co. v. Lesan [Iowa] 105 N. W. 996.

38. Fidelity Trust Co. v. Staten Island Clay Co. [N. J. Eq.] 62 A. 441.

39. A note being secured by a recorded bill of sale, absolute in form, it is not necessary that the note be recorded. Greeson v. German Nat. Bank [Ark.] 95 S. W. 439.

40. Kansas: "Creditors" include only those who have some specific lien upon or right to the mortgaged property and do not embrace mere general creditors. Gen. St. 1901, § 4244, construed. Youngberg v. Walsh [Kan.] 83 P. 972.

Missouri: A chattel mortgage first comes into existence, as a mortgage, as to general creditors when it is recorded or when the mortgagee takes possession. First Nat. Bank v. Connett [C. C. A.] 142 F. 33.

New York: Failure to record renders the mortgage void as to simple contract creditors whose claims accrued prior to recordation. [Laws 1897, p. 536, c. 418, § 90] (Skilton v. Codington [N. Y.] 77 N. E. 790, rvg. 105 App. Div. 617, 93 N. Y. S. 460), though such creditors may not be entitled to attack the mortgage for fraud until they have reduced their claims to judgment (Id.). A creditor whose claim existed at the time the mortgage was given is, on subsequently obtaining judgment, entitled to attack the mortgage for failure to record. Brockhurst v. Cox [N. J. Eq.] 64 A. 182.

41. Provision, providing that unrecorded mortgage shall be void as against creditors of mortgagor, construed. Fidelity Trust Co. v. Staten Island Clay Co. [N. J. Eq.] 62 A. 441.

42. Wardlaw v. Troy Oil Mill [S. C.] 54 S. E. 658.

sequent purchasers, creditors, or lienors.[43] Recordation not being required, it is not negligence not to record, though an opportunity is afforded to so do.[44]

Notice of title or rights.[45]—Valid recordation [46] of a valid mortgage [47] is equivalent to actual notice.[48] In most,[49] but not all,[50] states, actual, open, and notorious possession by the mortgagee is just as efficacious as filing. So also, where there are circumstances sufficient to put one on inquiry, he is bound by the facts which such inquiry would have disclosed.[51] The doctrine of caveat emptor applies to purchasers in open market.[52] A chattel mortgagee relying on actual notice has the burden of proving such notice.[53]

Where issue was whether buyer had notice of mortgage, evidence of statements made by the seller to the buyer at the time of sale, showing that the third person had a mortgage on the property, is admissible,[54] while evidence of statements by the seller to others not in the presence of the buyer are inadmissible.[55]

Failure to renew by filing a copy with statement of mortgagee's present interest does not invalidate between the parties or as to general creditors.[56]

§ 7. *Title and ownership.*[57]—The general rule, following the common law, is that the mortgagee takes the legal title subject to be defeated upon the performance of the conditions,[58] but the courts are not all in harmony with this rule.[59] Upon default of the mortgagor, the legal title to the mortgaged chattels vests absolutely in the mortgagee,[60] and a subsequent tender of the amount due does not operate to revest title in the mortgagor,[61] the latter's sole remedy being a bill in equity to re-

43. Lien of duly recorded mortgage is superior to that of a purchaser at execution sale against the mortgagor, under an execution issued after the registration of the mortgage. Howard v. Deens, 143 Ala. 423, 39 So. 346. Recorded trust deed on crop to be raised on rented farm held superior to a subsequent arrangement between the landlord and the mortgagor's wife, whereby the rent contract was changed without the mortgagee's knowledge, so that part of the land leased to the mortgagor was leased to his wife. Brown v. Matthews [Miss.] 40 So. 66. Chattel mortgage being duly filed, rights of assignee cannot be affected by any subsequent act of the mortgagor or mortgagee or by clerk's failure to make proper entries or keep paper in its proper place. Texas law considered. Bank of America v. Waggoner [C. C. A.] 143 F. 53.

44. First Nat. Bank v. Baird [C. C. A.] 141 F. 862.

45. See 5 C. L. 580.

46. An unauthorized registration of the mortgage is not constructive notice of its existence. So held where affidavit of good faith was not signed and sworn to by mortgagee. Pub. St. 1901, c. 140, § 6, construed. Tisdale v. John H. Pray Sons Co. [N. H.] 62 A. 168.

47. Recordation of mortgage executed by married woman alone held not constructive notice in the absence of a showing of facts authorizing its execution by the wife alone. Sweeney v. Taylor Bros. [Tex. Civ. App.] 14 Tex. Ct. Rep. 696, 92 S. W. 442.

48. Hirsch & Co. v. Beverly [Ga.] 54 S. E. 678.

49. Beaman v. Interstate Nat. Bank [Colo.] 85 P. 426. Where mortgagee of cattle notified owner of pasture that cattle were not to be removed without instructions from the mortgagee, held mortgagee was in actual possession. Id.

50. Under a trust deed to secure creditors, fact that trustee was in possession held insufficient to protect him against creditors of mortgagor. Thompson v. Crosby [Okl.] 82 P. 643.

51. Where mortgagor was equally well known by two names, held recordation of mortgage executed by him in one name was notice to a subsequent mortgagee in a mortgage executed by the mortgagor in his other name. Brayton v. Beall [S. C.] 53 S. E. 641.

52. Schmidt v. Rankin, 193 Mo. 254, 91 S. W. 78. One purchasing in the open market cattle mortgaged by an instrument duly recorded, and describing the cattle only by brand and location in a certain pasture, takes subject to the mortgage, though there were other cattle having the same brand in existence at the time the mortgage was executed, and the mortgagee took no steps to have the mortgaged cattle further branded. Id. The fact that a purchaser of horses subject to a chattel mortgage bought them at a sale stable does not add anything to his title. Cooper v. McKee [Ky.] 89 S. W. 203.

53. Code 1897, § 2906, construed. Martin Bros. & Co. v. Lesan [Iowa] 105 N. W. 996.

54, 55. Ard v. Crittenden [Ala.] 39 So. 675.

56. In re Cutting, 145 F. 388.

57. See 5 C. L. 580.

58. Gore v. Glover, 97 N. Y. S. 969; Schaffer v. Castle [Ind. T.] 91 S. W. 35.

59. In Oklahoma a chattel mortgage does not convey title to the mortgaged property, but only creates a lien thereon. Litz v. Exchange Bank [Okl.] 83 P. 790.

60. Schaffer v. Castle [Ind. T.] 91 S. W. 35; Cartier v. Pabst Brewing Co., 98 N. Y. S. 516.

61. Most of the states hold that a tender after default and possession by the mortgagee is not sufficient to divest title. Schaffer v. Castle [Ind. T.] 91 S. W. 35.

deem,[62] though this rule does not apply in those states where the legal title does not pass to the mortgagee.[63] Where a chattel mortgage creates no lien upon after-acquired property, it may contain an executory contract that title to such after-acquired property shall pass to the mortgagee, and where a mortgage contains such a provision, title passes to the mortgagee when the after-acquired property is delivered to him by the mortgagor, and not until such delivery is made.[64] As a general rule the mortgagee takes the same and no better title than the mortgagor had,[65] and takes subject to prior liens of which he had notice or knowledge.[66]

§ 8. *Right of possession.*[67]—In order to protect his rights after default, mortgagee must take actual possession of the property.[68] A provision authorizing the mortgagee to take possession of the mortgaged property on condition broken sufficiently empowers the mortgagee to enter the mortgagor's premises and take the property, providing that he does so without committing a breach of the peace,[69] and he may, under such a provision, upon condition broken, lawfully enter the mortgagor's home, although he has been forbidden so to do, and remove the property, providing no resistance is made and the entry is peaceable,[70] but, in order to render the entry and taking unlawful, it is not necessary that physical force be used.[71] A mortgagee taking possession of the property under a stipulation making it lawful for him to do so when he shall deem the security unsafe must show that he acted in good faith where that fact is in issue.[72] The mortgagor voluntarily surrendering possession to the mortgagee, taking a receipt reciting that the chattels were taken for storage, cannot obtain repossession without tendering the amount of the indebtedness in an equitable action.[73] It is very generally held that where a mortgagor of a chattel has been left and continues in the possession and control of the chattel, and has done nothing to question or jeopardize the mortgagee's right, a demand is necessary before an action to recover the property can be maintained at the mortgagor's expense.[74] This right to a demand, however, may be waived or forfeited, and is not required where defendant has acted inconsistent with the mortgagee's rights or by his actions shown that a demand would be futile.[75] While property acquired after a mortgage is delivered does not pass to the mortgagee as against attaching creditors and subsequent vendees and mortgagees, yet a provision in a mortgage that it shall cover after-acquired goods operates as an executory agreement that such goods shall be holden by the mortgagee as security, when acquired by the mortgagor, and the mortgagee may take possession before the rights of third persons intervene.[76]

62. Schaffer v. Castle [Ind. T.] 91 S. W. 35.

63. In Oklahoma a mortgagor has the right to pay the indebtedness secured by the mortgage and extinguish the lien at any time before the property is sold by the mortgagee. Litz v. Exchange Bank [Okl.] 83 P. 790.

64. Netzorg v. National Supply Co., 7 Ohio C. C. (N. S.) 461.

65. Bourland v. McKnight & Bro. [Ark.] 96 S. W. 179.

66. See post, § 9, Liens and Priorities.

67. See 5 C. L. 580.

68. Mortgage evidenced by bills of sale duly recorded. After default, mortgagee took possession of room containing mortgaged goods, paid rent, etc., held in actual possession. Sloan v. National Surety Co., 97 N. Y. S. 561.

69, 70. Bordeaux v. Hartman Furniture & Carpet Co., 115 Mo. App. 556, 91 S. W. 1020.

71. Where mortgagor forbade mortgagee to enter, but latter did so while mortgagor was absent and removed the property against the protest of mortgagor's wife, held an unlawful trespass. Bordeaux v. Hartman Furniture & Carpet Co., 115 Mo. App. 556, 91 S. W. 1020.

72. Oppenheimer v. Moore, 107 App. Div. 301, 95 N. Y. S. 138. That the proprietor of a lodging house is about to be ejected for nonpayment of rent warrants the mortgagee of his furniture in deeming himself unsafe. Slyfield v. Willard [Wash.] 86 P. 392.

73. De Luca v. Archer Mfg. Co., 97 N. Y. S. 1026. And consequently, one of which the municipal court of New York City has no jurisdiction. Id.

74. Smith & Co. v. French [N. C.] 53 S. E. 435.

75. Smith & Co. v. French [N. C.] 53 S. E. 435. So held where mortgagee told mortgagor he would have to have some money or the property and the mortgagor replied, "If you get it you will have to get it by the law." Id.

76. Wasserman v. McDonnell, 190 Mass. 326, 76 N. E. 959.

§ 9. *Liens and priorities; waiver.*[77]—Except as between the parties and as against general creditors,[78] the lien of a mortgage upon after-acquired property dates from the taking of possession by the mortgagee.[79] A mortgage on part of a herd of cattle of the same kind and description gives the mortgagee the right of selection,[80] and, when he has exercised that right, the lien of the mortgage attaches and will prevail over all after-acquired interests in the mortgaged property.[81] When two mortgages are executed on parts of the same herd of cattle, the mortgagees have an equal right of selection, and the one first exercising that right is entitled to the possession of the cattle so selected by him to the exclusion of the rights of the other, if need be.[82] If, however, the mortgagee in such mortgage transfers the same to a third party, and afterwards takes a second mortgage on the same description of property, he takes his right of selection subject to the right so transferred to the first assignee.[83]

Duration of the mortgage lien.[84]—Where the mortgaged property remains in the possession of the mortgagor, the latter cannot destroy the mortgagee's lien, as between themselves, by attaching the mortgaged property to real estate.[85] In some states the duration of the mortgage lien is limited by statute.[86]

Conflicting liens.[87]—The mortgagee takes subject to liens given priority by law and of which he has notice or knowledge.[88] The lien of a purchase-money mortgage given by a tenant on property taken onto the leased premises is prior to the landlord's lien for subsequently accruing rent.[89] The mortgagor being permitted to retain possession and use the chattels, authority is impliedly conferred upon him to have necessary repairs done upon the chattels,[90] and the lien of an artificer for repairs

77. See 5 C. L. 581.

78. The mere fact that a person is a creditor is not enough. He must have a claim upon the goods before the mortgagee takes possession, either by attachment or by a seizure upon an execution. Wasserman v. McDonnell, 190 Mass. 326, 76 N. E. 959.

79. Under the law of Ohio. In re Nat. Valve Co., 140 F. 679; First Nat. Bank v. McIntosh & Peters Live Stock Com. Co. [Kan.] 84 P. 535.

80, 81, 82, 83. South Omaha Nat. Bank v. McGillin [Neb.] 108 N. W. 257.

84. See 5 C. L. 581.

85. Wm. Cameron & Co. v. Jones [Tex. Civ. App.] 90 S. W. 1129.

86. Under Civ. Code, § 3865-3867, as against creditors of the mortgagor, the time fixed in an extension affidavit for the maturity of the debt, as required by § 3866, makes the utmost limit for the operation of the mortgage lien, and the mortgagee is not entitled to 60 days thereafter in which to foreclose. Rosenbaum Bros. & Co. v. Ryan Bros. Cattle Co. [Mont.] 84 P. 1120.

87. See 5 C. L. 581.

88. Landlord's lien or the lien of a seller under a contract to sell, the contract providing that if the buyer defaulted he should be deemed a tenant, held superior to lien of mortgagee on crops of tenant, the mortgage being given to secure advances of supplies made during the tenancy. Bedford v. Gartrell [Miss.] 40 So. 801. The fact that the mortgaged property was in the possession of a third person at the time of the execution of the mortgage renders mortgage lien inferior to such possessor's rights. Wood v. West Pratt Coal Co. [Ala.] 40 So. 959. Mortgagee takes subject to rights of pledgee in possession. Ottumwa Nat. Bank v. Totten, 114 Mo. App. 97, 89 S. W. 65. Rights of pledgee not in possession are subordinate to those of a subsequent mortgagee. Cotton v. Arnold [Mo. App.] 95 S. W. 280. See Pledges, 6 C. L. 1065. Where defendant purchased a portion of a cotton crop covered by a chattel mortgage, and the cotton purchased was evidenced by warehouse receipts issued to the mortgagor, such receipts and the registration thereof were sufficient to charge defendant with notice that the cotton had been raised by the mortgagor and his tenants, and was subject to the lien. D. P. Haynes & Bro. v. Gray [Ala.] 41 So. 615. Mortgagee held to take subject to conditional vendor's rights. Rev. St. 1899, § 3412, construed, and words "good faith" held not to apply to subsequent chattel mortgagees. Gilbert Book Co. v. Sheridan, 114 Mo. App. 332, 89 S. W. 555. When, under a mortgage providing for future advances, but leaving it optional with the mortgagee whether he shall make them, they are made after he has been advised that a subsequent mortgage has been given upon the property, his lien for such advances will be postponed to that of the junior incumbrance. Davis v. Carlisle [C. C. A.] 142 F. 106, rvg. 5 Ind. T. 83, 82 S. W. 682. Evidence held sufficient to show that mortgagees had actual notice of prior lien. Agne v. Skewis-Moen Co. [Minn.] 107 N. W. 415. Evidence held sufficient to show that mortgage lien was superior to that of defendant. Bank of America v. Waggoner [C. C. A.] 143 F. 53. Mortgage lien held superior to that of subsequent purchaser. Rose & Co. v. Woods [Ala.] 39 So. 581.

89. Arnold v. Hewitt, 128 Iowa 671, 104 N. W. 843.

done under employment by the mortgagor will have priority over the lien of the mortgage, although the latter be duly recorded.[91] Where a mortgage is taken subject to any rights of a first mortgagee, and the first mortgage is invalid, the second mortgagee is not estopped from asserting its validity.[92] In a dispute between two mortgagees, the statements and recitals in one of the mortgages are not binding upon the holder of the other, nor admissible in evidence against him.[93] In order to invoke the equitable doctrine of marshalling assets, a junior mortgagee's, or those claiming under him, hands must be clean.[94]

Waiver.[95]—A mortgagee consenting to a sale by the mortgagor, the purchaser takes the mortgage divested of the lien of the mortgage,[96] also the mortgagee cannot be heard to claim a lien on the proceeds,[97] consequently, there being no lien, a third party who has received and applied the proceeds of such sale, acting in good faith and in the ordinary course of business, will be protected.[98] A mortgagee does not waive his lien where he consents to a sale of the mortgaged property subject to the mortgage,[99] but a mortgagee authorizing a sale by the mortgagor upon the condition that the mortgagor turn the proceeds over to him, a purchaser, having no knowledge of the conditions, is not responsible if they are not complied with.[1] Where the mortgage has been filed, a purchaser of the property with knowledge of the mortgage and who agrees to pay the mortgage debt is liable therefor.[2] A mortgagee consenting to the removal of chattels from the state where the mortgage was executed and recorded, and where the chattels were situated, waives his mortgage lien as against subsequent lienors.[3] Mere acceptance by the mortgagee of property other than that mortgaged and crediting the same at an agreed price on the mortgage does not show an agreement to release the mortgaged property.[4] The mortgagee may by an agreement based upon a consideration waive his lien,[5] and such an agreement being executed, the mortgagee cannot repudiate it.[6] In California the lien of a mortgage on a growing crop ceases on the removal of the crop from the land on which it grew, unless the removal is tortious.[7] The mortgage lien being lost, the mortgagee has no more claim upon the property than a general creditor.[8]

90, 91. Ruppert v. Zang [N. J. Law] 62 A. 998.

Note: The distinction between the common-law lien for repairs and a statutory or conventional lien for agistment or the like is pointed out in Sullivan v. Clifton, 55 N. J. Law 324, 26 A. 964, 39 Am. St. Rep. 652, 20 L. R. A. 719.—From Ruppert v. Zang [N. J. Law] 62 A. 998.

92. Nicholson v. Aney, 127 Iowa, 278, 103 N. W. 201.

93. Judy v. Buck [Kan.] 82 P. 1104.

94. Purchaser at junior mortgage sale having actual knowledge of prior mortgage, and that junior mortgagee obtained possession by fraud and deceit, held not entitled to invoke doctrine. Youngberg v. Walsh [Kan.] 83 P. 972.

95. See 5 C. L. 581.

96. Farmer v. Graettinger [Iowa] 107 N. W. 170. Mortgage on cattle. Held request that two notes of mortgagor, one of which was secured by mortgage, be sent for collection, that mortgagor was going to ship his cattle about a certain date and would then pay the notes, held not sufficient to charge holder of mortgage that cattle to be shipped were those covered by the mortgage. Id.

97, 98. Farmer v. Graettinger [Iowa] 107 N. W. 170.

99. Trabue v. Wade [Tex. Civ. App.] 15 Tex. Ct. Rep. 591, 95 S. W. 616.

1. Tucker v. Mann, 124 Ga. 1003, 53 S. E. 504.

2. Trabue v. Wade [Tex. Civ. App.] 15 Tex. Ct. Rep. 591, 95 S. W. 616.

3. As against laborer's lien claimants. Jones v. Northern Pacific Fish & Oil Co. [Wash.] 84 P. 1122.

4. Brannen v. Harris [Ala.] 39 So. 721. Where a mortgagee accepted property from the mortgagor and credited the same at an agreed price on the mortgage, proof that a third person, who had delivered the property to the mortgagor in a trade for the mortgaged chattel, informed the mortgagee that if he would turn over the property to him he would surrender the mortgaged chattel and that the mortgagee refused, did not show an agreement to release the mortgaged chattel or to hold the property accepted in lieu thereof. Id.

5. Agreement between mortgagee of house and lienor on oxen to transfer their liens, etc., held mutual promises were a sufficient consideration. Holden & Martin v. Gilfeather [Vt.] 63 A. 144.

6. Executed agreement as to waiver of conflicting claims held not affected by attempted repudiation by one of the parties. Holden v. Gilfeather [Vt.] 63 A. 144.

7. Gates v. Quong [Cal. App.] 85 P. 662. Removal by virtue of a sale by a landlord under a power in a lease made part of the mortgage is not tortious. Id.

§ 10. *Disposal and use of the property by the mortgagor.*[9]—A provision in a mortgage of a stock of goods that the mortgagor might, until condition broken, "use and enjoy" the same does not import permission to sell at retail without leave, particularly where a further provision prohibits sale or removal.[10] Permission to the mortgagor to sell in the ordinary course of retail trade does not of itself invalidate the mortgage as to subsequent creditors but is evidence of fraud.[11] Sale of part of property by mortgagor does not invalidate mortgage, unless it appears that such sale was for the benefit of the mortgagor and was permitted by the mortgagee.[12] The making of a written contract, wherein the mortgagor agrees to sell and deliver the mortgaged chattels at a future time, and in which the mortgage is contemplated and the payment or satisfaction thereof provided, is neither malum in se nor malum in prohibitum.[13] A person receiving the proceeds of a wrongful sale of mortgaged chattels is guilty of conversion, though he acted in good faith,[14] and the holder of the mortgage is not barred from proceeding against him by receiving and retaining a part of such proceeds.[15] In a prosecution against a mortgagor for selling the mortgaged property, the defendant may show the illegality of the mortgage.[16]

§ 11. *Assignment of the mortgage.*[17]—An assignment of the debt carries the mortgage with it,[18] but does not constitute the transferee the owner of the mortgaged property.[19] A second mortgagee assigning his mortgage to the first mortgagee for foreclosure, both mortgages to be paid from the proceeds of the sale, the second mortgagee has the right to a judicial sale before he can be deprived of his security without payment of the amount due him,[20] and the first mortgagee selling the property and taking notes and mortgages for part of the purchase price, he is responsible to the second mortgagee for money had and received,[21] and, as against him, is estopped from saying that such notes and mortgages were not money.[22] An assignee takes only the rights of his assignor,[23] and to be protected must notify the mortgagor of the assignment.[24] An equitable assignee has the right to use the name of the holder of the legal title to enforce the mortgage at law.[25] An equitable assignee obtaining possession of the mortgaged property from the holder of the legal title can set up as a defense to an action of detinue by the mortgagor the outstanding legal title with which it connected itself.[26] The statutes of Wyoming do not require the recordation of an assignment in order that it may be valid against subsequent purchasers or incumbrancers.[27]

8. Attaching creditor held entitled to priority. Gates v. Quong [Cal. App.] 85 P. 662.

9. See 5 C. L. 582. As a fraudulent conveyance see ante, § 4.

10, 11. First Nat. Bank v. Stewart [N. M.] 86 P. 622.

12. In re Cutting, 145 F. 388.

13. Morris v. Persing [Neb.] 107 N. W. 218.

14, 15. Farmer v. Graettinger [Iowa] 107 N. W. 170.

16. May show that although fair on its face, was void by reason of being based in part upon a consideration made illegal by the anti-trust statute. State v. Wilson [Kan.] 84 P. 737.

17. See 5 C. L. 582.

18. An indorsement of unmatured negotiable notes, secured by a duly recorded mortgage, carries the mortgage with it, though no assignment is made. First Nat. Bank v. Baird [C. C. A.] 141 F. 862. The assignment of a note secured by a mortgage operates as an equitable assignment of the mortgage. Dumas v. People's Bank [Ala.] 40 So. 964. Transfer of notes secured passes interest in mortgage without formal assignment thereof. Chandless v. Globe Storage & Carpet Cleaning Co., 98 N. Y. S. 511.

19. Roche v. Dale [Tex. Civ. App.] 15 Tex. Ct. Rep. 832, 95 S. W. 1100.

20, 21, 22. Wagner v. Wedell [Cal. App.] 85 P. 126.

23. Mortgage on part of herd of cattle, right to make selection. South Omaha Nat. Bank v. McGillin [Neb.] 108 N. W. 257. Under a statute providing that a mortgage given to secure notes which do not on the face show the fact of such security is absolutely void, the assignee of such a mortgage acquires no rights by taking possession under it as against mortgagor's assignee in bankruptcy. In re Birck & Co. [C. C. A.] 142 F. 438.

24. Farmer v. Graettinger [Iowa] 107 N. W. 170.

25, 26. Dumas v. People's Bank [Ala.] 40 So. 964.

27. First Nat. Bank v. Baird [C. C. A.]

§ 12. *Payment and discharge.*[28]—As a general rule, a mortgagee seizing the property and failing to properly conduct the sale, it operates as a satisfaction of the debt, but if only a portion of the property is seized, the mortgagor is only entitled to credit on the mortgage debt to the proportion in value that the property taken bears to the entire property mortgaged.[29] The general rule above mentioned does not apply, however, where the mortgagee purchases the property under a written consent of the mortgagor.[30] The mortgagor tendering the amount due, he has a right to demand surrender of the note and mortgage, but the mortgagee has a reasonable time in which to procure them, and, where the mortgagor then gives notice that he will not pay, it is unnecessary for the mortgagee to proceed further.[31] Whether a chattel mortgage given in renewal or substitution of a prior chattel mortgage operates as a payment and satisfaction of the prior mortgage is a question of fact depending on the intention of the parties.[32] A prior mortgage having been extinguished by payment by a subsequent mortgagee, the latter is not entitled to be subrogated to the rights of the prior mortgagee.[33] Where a mortgage given partly to secure future advances is, as to such advances, subordinate to another mortgage, payments made by the mortgagor should be applied on the indebtedness superior to the second mortgage.[34]

§ 13. *Redemption.*[35]—After default, neither the mortgagor nor any of his creditors can maintain an action at law against the mortgagor.[36] All that remains in them is a mere naked equity of redemption which can only be enforced in an equitable action.[37] In order to avail themselves of this right they must allege and prove that they were willing and able to pay such amount, or else must prove facts warranting a direction of such payment as a condition of redemption,[38] or that the mortgagee had by his own act so dealt with the property that it cannot be restored,[39] in which case a personal judgment might be directed against him for the difference between the amount due and its value.[40] All the authorities agree that a mortgagor cannot, through any device, bargain away his right of redemption at the time of giving the mortgage,[41] and while a mortgagor may release his equity of redemption to the mortgagee by a subsequent agreement, yet the courts view such agreements with disfavor, and, if it appear that the mortgagee has taken advantage of the necessities of the mortgagor, or that the consideration is grossly inadequate, the release may be disregarded and the original relation held to continue.[42] In an action to redeem corporate stock the burden was on defendants to account for dividends paid

141 F. 862. Payment to mortgagee without demanding notes, held no protection. Id.

28. See 5 C. L. 582.

29. Green v. Scruggs [S. C.] 53 S. E. 612.

30. Civ. Code 1902, § 3004, construed. Workingmen's Bldg. & Loan Ass'n v. Epstin [S. C.] 53 S. E. 952. A receipt executed by the mortgagor acknowledging payment of a certain sum by the mortgagee on account of the purchase of mortgaged stock as per inventory, held a sufficient consent in writing to such a sale. Id.

31. Spears v. Fields, 72 S. C. 395, 52 S. E. 44.

32. Daniel Bros. v. Jordan [Ala.] 40 So. 940. Evidence held insufficient to show that mortgage on other chattels was taken in satisfaction of other mortgage. Holden v. Gilfeather [Vt.] 63 A. 144.

33. Nicholson v. Aney, 127 Iowa, 278, 103 N. W. 201.

34. Davis v. Carlisle [C. C. A.] 142 F. 106, rvg. 5 Ind. T. 83, 82 S. W. 682.

35. See 5 C. L. 583.

36, 37, 38, 39. Cartier v. Pabst Brewing Co., 98 N. Y. S. 516.

40. Cartier v. Pabst Brewing Co., 98 N. Y. S. 516. Where mortgagee purchased at foreclosure sale for less than value of property, held personal judgment against mortgagee and in favor of a judgment creditor of the mortgagor for the difference between the amount of the mortgage indebtedness and the value of the property was unwarranted. Id.

41. Collins v. Denny Clay Co., 41 Wash. 136, 82 P. 1012.

42. Collins v. Denny Clay Co., 41 Wash. 136, 82 P. 1012. Where stock worth $27,800 was given in satisfaction of an indebtedness of $3,500, and only four months was allowed for redemption, held right of redemption was not lost. Id.

on the stock after the transfer, and to establish any disbursements made on account of it.[43]

§ 14. *Enforcement, foreclosure, sale.*[44]—In the absence of a waiver by the mortgagor, the mortgagee taking possession by virtue of a power of sale, public notice of the sale is generally required,[45] and the fact that at the time of the sale the chattels are in the hands of a receiver does not authorize a sale by him without such notice.[46] The taking and sale under statutes requiring such notice means a hostile taking by virtue of the right to dispossess the mortgagor of his possession and property under the power given in the mortgage.[47] Such statutes when providing for a forfeiture, if not observed, should be strictly construed.[48] Failure of the mortgagee to sell within a reasonable time,[49] and negligence in caring for the property while in possession,[50] does not constitute conversion but merely renders him liable for such damages as result therefrom, but all parties acquiescing in the failure to sell for a reasonable time and the mortgagee finally selling, he is only liable for the amount received at such sale.[51] The mortgagee is not required to sell the mortgaged goods at the place of seizure.[52] A sale by the mortgagee on credit does not constitute a conversion,[53] but only renders him accountable to the mortgagor on the same basis as if he had received cash.[54] A sale under a power of sale is not invalidated as against a purchaser for value by an irregularity in the execution of the power.[55] A valid

43. Collins v. Denny Clay Co., 41 Wash. 136, 82 P. 1012.

44. See 5 C. L. 584.

45. Rev. St. 1898, § 2316a, construed. Bekkedal v. Johnson [Wis.] 107 N. W. 5. Answer alleging sale without public notice held to state a defense, it not showing that the mortgagor had waived the requirement. Id. Rev. St. 1898, § 2316a, construed, and held that clause as to selling without notice was not limited to five day period. Id. That the clause authorizing a recovery of $25 as liquidated damages relates only to sales made within five days after taking possession without the mortgagor's consent. Id.

46. Bekkedal v. Johnson [Wis.] 107 N. W. 5.

47. Voluntary delivery by mortgagor to mortgagee is not a "taking" within the meaning of Laws 1903, p. 172, c. 122. Hammel v. Cairnes [Wis.] 107 N. W. 1089.

48. Laws 1903, p. 172, c. 122, so construed. Hammel v. Cairnes [Wis.] 107 N. W. 1089.

49. Croze v. St. Mary's Canal Mineral Land Co. [Mich.] 13 Det. Leg. N. 47, 107 N. W. 92.

50. Croze v. St. Mary's Canal Mineral Land Co. [Mich.] 13 Det. Leg. N. 47, 107 N. W. 92.

Evidence of damages: Where logs covered by a mortgage were mingled with logs belonging to another, and there was no evidence by which it could be determined what portion of the logs, which were permitted by the mortgage to remain on the railways until they deteriorated in value, were not covered by the mortgage, and no evidence as to the amount of certain liens which existed thereon, the mortgagor's assignee was not entitled to recover for such alleged deterioration. Croze v. St. Mary's Canal Mineral Land Co. [Mich.] 13 Det. Leg. N. 47, 107 N. W. 92.

51. "In the absence of fraud or bad faith, when the holder of a chattel mortgage, after default, takes possession of the mortgaged property, and without any demand for an earlier sale from the mortgagor or subsequent mortgagee, but with the apparent acquiescence of all parties interested, holds it for several months and then sells it in accordance with the provisions of the mortgage, he is accountable for the amount received therefor at such sale, and is not accountable for the market value of the property when taken if such price should prove to be greater than the price obtained." Harrison Nat. Bank v. Leslie [Kan.] 83 P. 984.

Note: The above is copied from the syllabus and is written by the court, the opinion however shows that there was no allegation in the answer that the property was held an unreasonable time, no allegation of fraud or bad faith in holding it and no allegation that the mortgagor, or subsequent mortgagee, ever demanded an earlier sale under Gen. St. 1901, § 4253. The court says: "If defendant" [the subsequent mortgagee], "desired an earlier sale, he could have paid the debt and have been subrogated to all the rights of the plaintiff under the mortgage, including possession of the property." —See Harrison Nat. Bank v. Leslie [Kan.] 83 P. 984.

52. Where mortgaged logs were mingled with logs belonging to another, and it would have been impossible to have sorted the logs at the place of seizure, held the mortgagee was not guilty of conversion in removing the logs to a lake in the direction of the market for the purpose of sorting and selling them. Croze v. St. Mary's Canal Mineral Land Co. [Mich.] 13 Det. Leg. N. 47, 107 N. W. 92.

53, 54. Croze v. St. Mary's Canal Mineral Land Co. [Mich.] 13 Det. Leg. N. 47, 107 N. W. 92.

55. Wasserman v. McDonnell, 190 Mass. 326, 76 N. E. 959.

sale being had, the mortgagor is only entitled to be credited with the net proceeds thereof.[56] In some states, the filing of an affidavit [57] or notice of foreclosure [58] is required. Statutes concerning fraudulent conveyances do not apply to sales under a power in the mortgage.[59] After default the mortgagee may bring replevin instead of foreclosing.[60]

The legal remedy being inadequate one may foreclose in equity,[61] and while one of the recognized limitations upon equitable jurisdiction in such actions is that there can be no litigation of title paramount or hostile to the mortgage,[62] still there may be instances in which the very question to be decided is whether the rights of a defendant are superior or subordinate to those of the mortgagee, and in such cases a court of equity must logically have the right to decide the question upon which its jurisdiction depends.[63] In some states, foreclosure must be by suit in a court of record.[64] The legal title remaining in the mortgagor, the mortgagee upon the mortgagor's death, if he has reasonable grounds to apprehend, and in good faith believes, that the security is about to be lost or materially impaired, has a right to take possession of the property for the purpose of preserving it, but has no right to sell or alienate the same until a special or general administrator has been appointed whose duty it is to protect the interests and rights of the estate.[65] In a suit to enforce the mortgage, the mortgage should be copied in the petition or the effect of the instrument should be set out as in the case of a note.[66] As against a demurrer not directed against this point, it is sufficient if the bill alleges by inference merely that the property was within the jurisdiction of the court at the commencement of the suit.[67] The mortgagor's ownership of the property must be proved.[68] In Florida, where the answer sets up a failure of consideration, the burden of proving the considera-

56. Where in detinue by a mortgagee in a mortgage providing for "holding, recovery and selling" the mortgaged property, as well as for attorney's fees, it was shown that the mortgaged property not sued for had been sold and applied to the debt, the mortgagor was entitled only to be credited with the net proceeds of the sale, under the statutory suggestion as provided by Code 1896, § 1477. McDaniel v. Sullivan [Ala.] 39 So. 355.

57. Laws 1903, p. 172, c. 122, requiring person conducting sale to file in clerk's office an affidavit containing a description of the property, the date of sale, etc., held not retroactive. Bekkedal v. Johnson [Wis.] 107 N. W. 5; Hammel v. Cairnes [Wis.] 107 N. W. 1089.

58. Rev. Laws c. 198, §§ 4-7, requiring a recordation of the notice of foreclosure, has no relation to a foreclosure under a power of sale in the mortgage. Wasserman v. McDonnell, 190 Mass. 326, 76 N. E. 959.

59. St. 1903, p. 389, c. 415, prohibiting the sale of merchandise in bulk in fraud of creditors, has no application to a sale of a stock of goods under a duly recorded mortgage of the stock given for a valuable consideration and free from fraud. Wasserman v. McDonnell, 190 Mass. 326, 76 N. E. 959.

60. Municipal Court Act Laws 1902, p. 1533, c. 580, § 139, does not prohibit this proceeding. Fidelity Loan Ass'n v. Connolly, 95 N. Y. S. 576.

61, 62. Lembeck & B. Eagle Brewing Co. v. Sexton [N. Y.] 77 N. E. 38.

63. Lembeck & B. Eagle Brewing Co. v. Sexton [N. Y.] 77 N. E. 38. Where alleged hostile title was not in fact so, and claimant claimed that part of the chattels claimed by the mortgagee was delivered to him after the mortgage was executed, held, in view of the evidence, complaint should not have been dismissed absolutely; new trial ordered. Id.

64. Rev. St. Ohio § 4155-1, requiring chattel mortgages on household goods, wearing apparel, or mechanics' tools, to be foreclosed by suit in a court of record, does not apply where such property included in a mortgage is insignificant in amount as compared with the value of other property included therein. In re Chadwick, 140 F. 674. The benefits of § 4155-1 of the Revised Statutes, regulating procedure in the foreclosure of a chattel mortgage on the necessary household goods, wearing apparel, and mechanics' tools of any person or family, are not limited to married persons or heads of families. Economy Bldg. & Loan Co. v. Newman, 3 Ohio C. C. (N. S.) 213. Household goods formerly used by the owner, but temporarily stored by him with the intention of resuming their use within a reasonable time, do not lose their character as necessary household goods within the purview of § 4155-1 of the Revised Statutes. Id.

65. Litz v. Exchange Bank [Okl.] 83 P. 790. If he sells the property he is liable under Wilson's Rev. & Am. St. Okl. 1903, for double the value of the property. Id.

66. Cooper v. McKee [Ky.] 89 S. W. 203.

67. Tyler v. Toph [Fla.] 40 So. 624.

68. Proof of a sheep owners customary crop and brand is prima facie sufficient of his ownership of sheep bearing the same and described thereby in the mortgage. Manti City Sav. Bank v. Peterson [Utah]

tion is on the complainant in the bill.[69] Under Arizona practice a mortgagee may, in a foreclosure suit, join as party defendant a grantee of the mortgagor, who has assumed payment of the mortgage debt, and recover a deficiency judgment against him.[70] In many states a stipulation for attorney's fees for foreclosure is invalid,[71] and even in those states, where such a provision is valid, it cannot be taken advantage of by a mortgagee whose own neglect has rendered foreclosure necessary.[72] A finding of the execution of "a mortgage of the personal property described in the complaint" sufficiently indicates that the mortgage referred to is the one alleged.[73] The mortgagor cannot complain of an indefinite description of the mortgaged property in findings which follow the mortgage.[74] Where in foreclosure proceedings the jury find in favor of the mortgagee without specifically stating the amount of the debt secured by the mortgage, but the uncontradicted evidence showed such debt, the court may render judgment for that amount.[75] A claimant interposing in fi. fa. based on foreclosure proceedings has the burden of establishing an affirmative plea that the property had been freed from the mortgage lien.[76] Where property conditionally sold is merged in mortgaged property, and on foreclosure the conditional vendor, intervening, was allowed the amount of the purchase price, payment of the mortgage debt will not, as against such intervenor, stay foreclosure sale.[77]

Where equitable, the foreclosure of a mortgage will be restrained,[78] and, the facts warranting the relief, it may be granted, though the bill fails to contain specific allegations of fraud.[79] The mortgagee dying prior to the foreclosure of the mortgage, the appointment of an administrator or executor is not necessary to the maintenance of a suit to restrain such foreclosure,[80] and the mortgagee's heirs are the only necessary and proper parties to such suit.[81]

A mortgagee seizing the property and refusing to return it or foreclose is guilty of conversion.[82] There is a line of authorities holding that if a chattel mortgage is irregularly foreclosed in good faith and the property sold to another than the mortgagee, the mortgagor may treat the transaction as a conversion of the property by the mortgagee and sue accordingly, and in such case the measure of damages is the difference between the value of the property at the time of the conversion and the

86 P. 414. Evidence held sufficient to identify sheep described in the mortgage by crop and brand. Id.

69. Foreclosure suit in chancery. Braxton v. Liddon [Fla.] 38 So. 717. In such a case judgment for complainant on the pleadings is erroneous. Id.

70. Kastner v. Fashion Livery Co. [Ariz.] 85 P. 120, following Johns v. Wilson, 6 Ariz. 125, 53 P. 583 same case, afd. 180 U. S. 440, 45 Law. Ed. 613.

71. Act Ohio 1902, construed. In re Chadwick, 140 F. 674.

72. The failure of the mortgagee to render an account being the reason for the mortgagor's failure to pay, the mortgagee cannot take advantage of a provision in the mortgage providing for an attorney's fee in case of foreclosure. Peebles v. Yates [Miss.] 40 So. 996.

73. Brenneke v. Smallman [Cal. App.] 83 P. 302.

74. Finding, describing property in language of mortgage, sustained. Brenneke v. Smallman [Cal. App.] 83 P. 302.

75. Roche v. Dale [Tex. Civ. App.] 15 Tex. Ct. Rep. 832, 95 S. W. 1100.

76. Hirsch & Co. v. Beverly [Ga.] 54 S. E. 678.

77. Washington Trust Co. v. Morse Iron Works & Dry Dock Co., 100 N. Y. S. 254.

78. Where, in a suit to restrain foreclosure of a mortgage, complainants offered to pay whatever might be found due, if anything remained unpaid after the account was restated, and the bill charged that it was impossible for complainants to make any further tender because they did not know what amount was due, resulting from defendant's willful refusal to render a statement of the account, no further tender was necessary to entitle complainants to an injunction. Peebles v. Yates [Miss.] 40 So. 996.

79. Where a bill to restrain foreclosure of a mortgage charged that defendants were undertaking to enforce the same and to sell the property embraced therein for an amount largely in excess of what was due thereon, and for an unlawful and usurious debt, complainants were entitled to an injunction without a specific allegation of fraud. Peebles v. Yates [Miss.] 40 So. 996.

80, 81. Peebles v. Yates [Miss.] 40 So. 996.

82. Finding of conversion held supported by evidence that mortgagee, after taking possession of the property, refused to return it to the mortgagor or to foreclose his mort-

amount of the mortgage debt.[88] However, in those states where statutes have changed the common-law rule and substituted for the general issue an answer which must contain a general or specific denial of the material allegations of the complaint intended to be controverted, and a statement of any new matter constituting a defense or counterclaim, the mortgagee cannot invoke this rule unless he pleads the amount due on the mortgage in mitigation of damages.[84] In Georgia, in an affidavit of illegality to the foreclosure of a chattel mortgage, the mortgagor may avail himself of the defense of recoupment, but he cannot plead set-off in such a pleading, nor can he have the foreclosure enjoined in order to avail himself of a set-off in equity, plaintiff being neither insolvent nor a nonresident.[85]

Under the statutes of most states, it appearing that defendant is personally liable for the mortgage debt, personal judgment should be entered against him, the court having jurisdiction to enter such a judgment.[86] In Arizona such a personal judgment may be rendered under a prayer for foreclosure and such further relief as may be meet and proper in the premises.[87] A mortgagor promising in the instrument that if the property fails to satisfy the debt he will pay the deficiency, it constitutes such an assumption of a personal obligation on his part as will support an action against him for the amount of such deficiency.[88] A finding that "defendant assumed the mortgage" is to be construed as meaning that defendant assumed payment of the mortgage.[89] In an action for a deficiency judgment, the mortgage having been given to secure the payment of an unenforceable judgment, such judgment may be looked to for the purpose of ascertaining the amount of the indebtedness so assumed.[90] The defense in an action to recover a deficiency judgment, that it was understood at the time of the execution of the mortgage that it was to have no effect, is one at common law.[91]

§ 15. *Remedies as between the parties.*[92]—In the Code states a mortgagor may counterclaim for the conversion of the goods by the mortgagee when sued upon the note secured by the mortgage.[93] An accounting for any excess in the value of the property over the amount of the debt may be had in an action by the mortgagee to recover possession of the property.[94] In Ohio, where a mortgagor in possession dies, and his administrator proceeds to administer the property in accordance with the statute regulating the administration of estates, the mortgagee cannot maintain an action of replevin against the administrator for the possession of the mortgaged property, even though the condition in the mortgage was broken at the time of the death of the mortgagor. In such case his interest in the property, under his mortgage, is transferred to the fund arising from the sale by the administrator.[95] In Alabama, in detinue by a mortgagee, the court, in ascertaining the amount due, can

gage, but used the property as his own. Hanson v. Skogman [N. D.] 105 N. W. 90.

83. See Springer v. Jenkins [Or.] 84 P. 479 and cases cited.

84. Springer v. Jenkins [Or.] 84 P. 479. Such a defense is in effect a plea of confession and avoidance. Id.

85. Arnold v. Carter [Ga.] 54 S. E. 177.

86. Rev. St. 1901, §§ 3275, 3277, and 1428, considered. Kastner v. Fashion Livery Co. [Ariz.] 85 P. 120. In the absence of a showing of personal liability a personal judgment would be without the issues. Id.

87. Kastner v. Fashion Livery Co. [Ariz.] 85 P. 120.

88. Brown v. Akeson [Kan.] 86 P. 299.

89. Kastner v. Fashion Livery Co. [Ariz.] 85 P. 120.

90. Brown v. Akeson [Kan.] 86 P. 299.

91. Does not call for the exercise of equitable jurisdiction. Koehler & Co. v. Duggan, 96 N. Y. S. 1025.

92. See 5 C. L. 585.

93. So held under Rev. Codes 1899, § 5274, subd. 1, authorizing the use of a cause of action, arising out of the transaction set forth in the complaint as the foundation of plaintiff's claim, as a counterclaim. Hanson v. Skogman [N. D.] 105 N. W. 90.

94. Smith & Co. v. French [N. C.] 53 S. E. 435. Such an issue held tendered by an answer admitting plaintiff's right to possession under a mortgage to secure a debt of $150, but stated that the property seized was worth $700, and that it had been converted and wasted by plaintiff. Id.

95. Linghler v. Kraft, 3 Ohio N. P. (N. S.) 653.

only consider the amount due on the mortgage on which the action is based and cannot include a debt not due on a separate instrument.[96] In such an action the defendant cannot recover an affirmative judgment against the mortgagee.[97]

§ 16. *Remedies against third persons.*[98]—The mortgagor and mortgagee may join in maintaining an action of replevin.[99] In replevin by mortgagee the burden is on him to show that mortgagor had title to mortgaged property,[1] and that the property bought by defendant was covered by the mortgage;[2] and also plaintiff has the further burden of furnishing the jury with evidence of facts from which the jury may determine the exact quantity of the property, covered by the mortgage, that defendant purchased.[3] The petition or complaint should show that at the time of the execution of the mortgage the mortgagor was the owner of the chattels.[4] Any person who converts mortgaged property to his own use, with actual or constructive notice of the lien, is liable to the mortgagee[5] in an action on the case.[6] In a suit by the mortgagee for conversion, the burden is upon plaintiff to establish the facts constituting his cause of action, including the wrongfulness of defendant's possession of the property,[7] and that the mortgaged property was in fact taken.[8] The mortgage authorizing the mortgagor to sell, the mere fact that a third person is in possession of the property claiming ownership does not show that his possession is wrongful, in the absence of proof that he did not acquire possession from the mortgagor or his vendee.[9] In an action by a mortgagee, or those claiming under him, for a conversion of the chattels, the defendant being a stranger to the title, the plaintiff may recover the full value of the property.[10] Where a chattel mortgagee obtained possession of the mortgaged chattels in detinue against a third person, to which suit the mortgagor became a party as claimant, the mortgagee was not a trespasser in possession as against the holder of a subsequent chattel mortgage on the property.[11] The evidence must sufficiently identify the property.[12] A judgment re-

96. McDaniel v. Sullivan [Ala.] 39 So. 355.

97. Under Code 1896, § 1478, defendant in detinue by a mortgagee in a purchase-money mortgage may set up breach of warranty in the sale or false representations made by the mortgagee which induced defendant to buy for the purpose of defeating the action, but he cannot ask for judgment against the mortgagee. McDaniel v. Sullivan [Ala.] 39 So. 355.

98. See 5 C. L. 586.

99. Longerbeam v. Huston [S. D.] 105 N. W. 743.

1. Martin Bros. & Co. v. Lesan [Iowa] 105 N. W. 996.

2, 3. Schmidt v. Rankin, 193 Mo. 254, 91 S. W. 78.

4. A petition in replevin by a mortgagee, alleging that at the time of the wrongful taking plaintiff, by virtue of a chattel mortgage, was in possession and was the absolute owner and lawfully entitled to the possession of the chattels, sufficiently shows that the mortgagor at the time of the execution of the mortgage was the owner of the chattels. Cotton v. Arnold [Mo. App.] 95 S. W. 280.

5. Haynes v. Gray [Ala.] 41 So. 615. An indemnitor is liable to a mortgagee as for a conversion where the mortgaged chattels in the possession of the mortgagee are levied on and sold under execution against the mortgagor, the sheriff requiring an indemnity bond before he would make the levy and another before he would make the sale. Sloan v. National Surety Co., 97 N. Y. S. 561. Where mortgagor's landlord participated in sale of mortgaged property and testified that he considered the mortgagor's chattels practically his own, that he controlled them, and that he considered he had a right to hold them and would not permit them to be sold without his consent, the landlord was liable for the conversion of the chattels, though he applied the proceeds to a debt owing him by the mortgagor. Roche v. Dale [Tex. Civ. App.] 15 Tex. Ct. Rep. 832, 95 S. W. 1100.

6. Haynes v. Gray & Co. [Ala.] 41 So. 615.

7. Pritchard v. Hooker, 115 Mo. App. 605, 90 S. W. 415.

8. Haynes v. Gray & Co. [Ala.] 41 So. 615.

9. Pritchard v. Hooker, 115 Mo. App. 605, 90 S. W. 415.

10. Jones v. Minnesota & M. R. Co. [Minn.] 106 N. W. 1048; Agne v. Skewis-Moen Co. [Minn.] 107 N. W. 415.

Note: If the action is against the mortgagor or those claiming under him, the recovery is limited to the amount due on the mortgage not exceeding the value of the property. Becker v. Dunham, 27 Minn. 32, 6 N. W. 406.

11. Daniel Bros. v. Jordon [Ala.] 40 So. 940.

12. In replevin by mortgagee, evidence held insufficient to identify cattle taken as mortgaged cattle. Martin Bros. & Co. v. Lesan [Iowa] 105 N. W. 996. Action by mortgagee against third person purchasing cattle in open market. Evidence held sufficient to justify submission to the jury

quiring a subsequent purchaser to surrender the property or, if that is impossible, pay its value, the latter being fixed, is not substantially prejudicial to him.[13]

CHATTELS; CHEATS; CHECKS; CHILDREN; CHINESE; CITATIONS, see latest topical index.

CITIZENS.[14]

The one challenging the eligibility to office of another on the ground of his alienage has the burden of proof.[15] One residing in the United States is presumed to be a citizen thereof[16] and of the state wherein he resides.[17] The foreign born son of a resident citizen is a citizen of the United States,[18] the fourteenth amendment not being regarded as an exclusive definition of the right to citizenship,[19] and on naturalization of an alien, his wife and minor children become citizens.[20] A county has no citizen in a legal sense,[21] and the term as used in statutes relating to counties will ordinarily be construed to mean resident.[22] When lands composing an Indian reservation have been allotted and patented in severalty among the members of the tribe occupying them, each allottee becomes a citizen of the state wherein such reservation is located, and subject to the laws thereof.[23]

CIVIL ARREST.

§ 1. Privilege from Arrest (653).
§ 2. Arrest on Mesne Process (653).
§ 3. Execution Against the Body (654).
§ 4. Supersedeas Bail or Discharge from Arrest (655).
§ 5. Liability for False Imprisonment (655).

§ 1. *Privilege from arrest.*[24]—One seeking to avail himself of a statutory exemption must show himself clearly within the statute.[25]

§ 2. *Arrest on mesne process. When allowable.*[26]—The right of arrest in a civil action is a remedial right governed by the lex fori.[27] Abolition of imprisonment for debt does not extend to a putative father for nonsupport of his bastard child,[28] or for nonpayment of fines and costs in criminal actions.[29] In case of fraud within the statute,[30] the right of arrest exists in an action at law between partners.[31]

of the question whether any of the cattle purchased were covered by the mortgage, and, if so, how many. Schmidt v. Rankin, 193 Mo. 254, 91 S. W. 78.

13. Cooper v. McKee [Ky.] 89 S. W. 203.

14. See 5 C. L. 586. This topic deals only with the question of who are citizens. The naturalization of aliens (see Aliens, 7 C. L. 98), and the rights, privileges, and duties of citizens (see Constitutional Law, 5 C. L. 619, and various specific subjects such as Commerce, 5 C. L. 599; Intoxicating Liquors, 6 C. L. 165, etc.), being treated elsewhere.

15. Buckley v. McDonald [Mont.] 84 P. 1114.

16. Buckley v. McDonald [Mont.] 84 P. 1114. Which is strengthened by the fact that such person is captain in the merchant marine service. Rev. St. U. S., § 4131, requires citizenship as qualification of such officer Id.

17. Devanney v. Hanson [W. Va.] 53 S. E. 603.

18. Rev. St. U. S., § 1993. Buckley v. McDonald [Mont.] 84 P. 1114.

19. Buckley v. McDonald [Mont.] 84 P. 114.

20. Citizenship by naturalization of stepfather. United States v. Rodgers, 144 F. 711. See Aliens, 7 C. L. 98.

21. Devanney v. Hanson [W. Va.] 53 S. E. 603.

22. Acts 1905, c. 36, p. 350, § 24, providing that any "citizen" may bring suit to abate as a public nuisance any place where liquors are sold contrary to law, means a resident of a county. Devanney v. Hanson [W. Va.] 53 S. E. 603.

23. 24 Stat. 388, c. 119, § 6. Moore v. Wame-go [Kan.] 83 P. 400.

24. See 5 C. L. 587.

25. Not sufficiently shown by proof of the filing of a petition in bankruptcy where it does not appear when it was filed. Gibson v. Holmes [Vt.] 62 A. 11.

26. See 5 C. L. 588.

27. Arrest in action in California allowed, though cause of action arose in China. Fraudulent acts relied upon to warrant arrest were committed there and neither of the litigants were citizens or residents of California. Ex parte Horwitz [Cal. App.] 84 P. 229.

28. Held imprisonment for failure to perform a public duty. State v. Morgan [N. C.] 53 S. E. 142.

29. State v. Morgan [N. C.] 53 S. E. 142.

30. Fraud in initiation and conduct of joint adventure, culminating in concealment

Procedure to obtain order of arrest.[32]—The affidavit must set forth the facts constituting the ground for arrest [33] specifically,[34] and if possible upon the personal knowledge of the affiant,[35] though an averment in terms of personal knowledge is unnecessary.[36] Where defendant admits the truth of the facts averred contesting only affiant's conclusions, mandamus will not issue to quash the writ because the affidavit does not sufficiently aver the facts as of personal knowledge.[37] Lack of verification of the complaint may be supplied by the affidavits,[38] and on application for mesne process it is not essential that the cause of arrest be alleged in the complaint,[39] though no judgment for arrest can enter unless there be such averments.[40] An affidavit may set forth a cause of action by annexing the complaint with apt words of reference and averments on oath that the allegations therein are true.[41]

Writ and proceedings thereon.—The Vermont statute has changed the rule at common law in civil arrest on mesne process by making the officer's authority only special, notwithstanding the language of the writ remains the same, and accordingly he is bound to commit the defendant to the jail of the county where the arrest was made if there is one,[42] and the commitment of the debtor in accordance with the statute does not put it out of the power of the arresting officer to produce him at the time and place of trial.[43] Although the officer, by taking the defendant out of jail for production in court, would be incapacitated to recommit him on the original writ because that, being returned into court, could not be taken out for that purpose, yet the court, especially as it is a court of record, would have ample authority to order him committed for want of bail, and such commitment would be deemed to be on the original writ.[44]

§ 3. *Execution against the body: Occasion and propriety.*[45]—Where the nature of the action warrants body execution on the cost judgment, such execution may be had when the cost judgment becomes final, though the merits have not been determined,[46] and a cost judgment on reversal of a judgment for defendant is final.[47]

and withholding of profits. Ledford v. Emerson, 140 N. C. 288, 52 S. E. 641.

31. Whether it would exist where the state of firm affairs required a bill for accounting, not decided. Ledford v. Emerson, 140 N. C. 288, 52 S. E. 641.

32. See 5 C. L. 588.

33. General averments of alienation of affections of plaintiff's wife held mere conclusions. Conrad v. Van Buren Circuit Judge [Mich.] 13 Det. Leg. N. 271, 108 N. W. 347.

34. In an action for malicious prosecution, an affidavit for an order of arrest is insufficient which alleges only in general terms the existence of malice and the want of probable cause. Diab v. Shibley, 49 Misc. 315, 99 N. Y. S. 188. An order of arrest not sustained by an affidavit and complaint alleging that defendants maliciously and without probable cause charged plaintiff with a crime, procured his arrest, detention, and trial, that the action was dismissed and that plaintiff was injured. Id.

35. Affidavit charging official misconduct as shown by public records, no one being able to testify personally to the making of them or their truth. Robinson v. Branch Circuit Judge [Mich.] 12 Det. Leg. N. 623, 105 N. W. 25. Affidavit held in compliance with law as to source of information, although stating facts on information and belief. Ex parte Horwitz [Cal. App.] 84 P. 229.

36. Conrad v. Van Buren Circuit Judge [Mich.] 13 Det. Leg. N. 271, 108 N. W. 347.

37. Affidavit by president of village charging defendant and relator with wrongfully executing and cashing a warrant in his own favor while acting as village clerk, as shown by the records, to the damage of the village as affiant believes. Robinson v. Branch Circuit Judge [Mich.] 12 Det. Leg. N. 623, 105 N. W. 25.

38. Vorhees Rubber Mfg. Co. v. McEwen, 97 N. Y. S. 942.

39. An order of arrest is not void because the complaint does not charge the fraud relied on in the affidavit where the jurisdiction to issue the order depends on the statutory affidavit. Ex parte Horwitz [Cal. App.] 84 P. 229.

40. Ex parte Horwitz [Cal. App.] 84 P. 229.

41. Sufficient compliance with Code Civ. Proc. § 481. Ex parte Horwitz [Cal. App.] 84 P. 229. It appearing from affidavit that defendant presented a forged check to plaintiff in China on which he received $6,260, and shortly afterwards took passage under an assumed name for America, sufficiently showed fraud, under Code Civ. Proc. § 479, subd. 4. Id.

42, 43, 44. Gibson v. Holmes [Vt.] 62 A. 11.

45. See 5 C. L. 588.

46, 47. Losaw v. Smith, 109 App. Div. 754, 96 N. Y. S. 191.

The order and writ.[48]—If the facts giving the right to body execution are in issue [49] and proven, plaintiff is entitled to a recital in his judgment that defendant is subject to arrest and imprisonment,[50] but on a motion to set aside an execution against the person, it is competent to show that the theory upon which the action was tried excluded ground for such execution.[51] In Illinois, a creditor electing to issue execution against the goods and chattels of a debtor is not thereafter entitled to a capias.[52]

§ 4. *Supersedeas bail or discharge from arrest.*[53] *Final process.*[54]—Discharge under the Insolvent Debtors Act is not allowed in Illinois where malice was of the gist of the action in which the judgment was had.[55] Upon the default of a judgment debtor for failing to appear at the time to which the hearing had been adjourned the judge did not have jurisdiction to refuse the oath for the relief of poor debtors,[56] therefore a discharge upon a second notice duly issued was valid, and there was no breach of the conditions of the recognizance.[57] An action cannot be maintained on a bond given under an insolvency statute, if the discharge of the debtor under the same statute is null and void on the ground that such statute has been repealed, as then such bond is also void.[58] Sureties on a bond are not released by a casual remark of plaintiff's counsel that defendant need not surrender himself.[59] An appeal from an order of the county court remanding to the custody of the sheriff a debtor, arrested on a capias and seeking to be released under the Insolvent Debtors Act, should be to the appellate and not to the circuit court.[60]

§ 5. *Liability for false imprisonment.*[61]—In an action for false imprisonment, the plaintiff's discharge from custody in habeas corpus proceedings is not res adjudicata against the defendant as to the wrongfulness of the restraint on an execution against the body.[62] There being a legal jail in the county where a debtor is arrested on a capias, his confinement in a jail in another county, without his consent,

48. See 5 C. L. 589.

49. Ex parte Horwitz [Cal. App.] 84 P. 229.

50. Conversion of funds received in fiduciary capacity. Goddin v. Butler, 96 N. Y. S. 839.

51. Booth v. Englert, 105 App. Div. 284, 94 N. Y. S. 700.

52. Schwarzschild & Sulzberger v. Goldstein, 121 Ill. App. 1.

53. See, also, Bail, Civil, 7 C. L. 348.

54. See 5 C. L. 589.

55. Where the verdict and judgment show conclusively that the action in which recovery was had was trover and therefor not an action of which malice was the gist, the judgment debtor is entitled to be released under the Insolvent Debtor's Act. Petition of Wm. H. Mansfield, 120 Ill. App. 511. A verdict in a justice' court, that defendant was "guilty of wrongfully converting to his own use the goods of the plaintiff," amounts to a finding that malice is not the gist of the action and characterizes the tort as trover. Id. Malice as used in the Insolvent Debtor's Act, providing for the release of a judgment debtor from arrest in all civil actions, when malice is not the gist of the action, applies to that class of wrongs which are inflicted with an evil intent, design, or purpose. Id. Admission of evidence to show the presence of malice in a transaction harmless where the petitioner was entitled to a release in any event on the transcript. Id. In a court of a justice of the peace the action is what the evidence makes it. Whether malice was gist of action not determinable from transcript of proceedings in justice' court. Schwarzschild v. Goldstein, 121 Ill. App. 1.

56, 57. Radovsky v. Sperling, 189 Mass. 507, 75 N. E. 949.

58. Where, on a judgment for slander and capias ad sat. issued, defendant was released on a bond given under the Insolvency Law of 1836 and later was discharged from his obligations under the same law, the plaintiff cannot sue on such bond alleging that the Insolvency Law of 1901 repealed the law of 1836 and the decree of discharge was therefore invalid, since in such case the bond sued on would also be invalid. Mankey v. Stocking, 213 Pa. 299, 62 A. 913.

59. Remark that a bond in a capias proceeding conditioned on defendant presenting his petition for benefit of the insolvent laws and his surrender to jail if he failed to secure his discharge, had already been forfeited and defendant need not present himself for arrest in case he failed to obtain his discharge. Irwin v. Hudson, 24 Pa. Super. Ct. 72.

60. Groszglass v. Von Bergen, 121 Ill. App. 212.

61. See 5 C. L. 589.

62. Losaw v. Smith, 109 App. Div. 754, 96 N. Y. S. 191.

constitutes the arresting officer [63] and the creditor, whose attorney orders the improper detention, trespassers ab initio.[64]

CIVIL DAMAGE ACTS; CIVIL DEATH, see latest topical index.

CIVIL RIGHTS.[65]

Separation of races in public schools [66] and in the conveyances of common carriers [67] is elsewhere treated. The civil rights statutes being penal, personal delictum is essential.[68] To warrant recovery under a statute forbidding denial of equal accommodations in eating houses, there must be a refusal not justified on grounds apart from discrimination.[69] The test of what is an eating house within such statutes is whether meals are served to all comers or only in pursuance of previous agreement.[70] Prohibition of discrimination at places of public amusement is not an infringement of the civil rights of the proprietors thereof.[71]

CIVIL SERVICE; CLEARING HOUSES, see latest topical index.

CLERKS OF COURT.

§ 1. The Office, General Powers and Duties (656).
§ 2. Fees and Compensation (657).
§ 3. Liability on Bond (657).

§ 1. *The office, general powers and duties.*[72]—A clerk of court cannot be suspended from office pending trial of a charge of felony against him entirely disconnected with his official duties,[73] but the court may appoint a clerk pro tempore to qualify and act in that particular prosecution, especially where the accused requests it.[74] In Massachusetts, a clerk appointed by the justices to fill a vacancy holds only until the next annual election for which precepts can be seasonably issued.[75] The board controlling the public buildings may assign offices to the clerk and change the assignment at will, and it is the duty of the clerk to conform thereto,[76] and the discretion of such board will not be controlled by injunction,[77] nor will forcible entry lie by a clerk ejected on refusal to obey the order of the board.[78] The file marks of the clerk are part of the record [79] to which he may thereafter certify,[80] and he may,

63. Under U. S. 1701, 1703. Gibson v. Holmes [Vt.] 62 A. 11.

64. Gibson v. Holmes [Vt.] 62 A. 11.

65. See 5 C. L. 589.

66. See Schools and Education, 6 C. L. 1418, 1430.

67. See Carriers, 7 C. L. 522.

68. Evidence that the defendant was absent at the time the plaintiff, a negress, was excluded from his theatre by an employe, that he had not authorized her exclusion, had made rules to the contrary, and customarily permitted negroes to enjoy the privileges and accommodations of his place of amusement, is admissible. Laws 1895, c. 1042, p. 974. Thomas v. Williams, 95 N. Y. S. 592.

69. Instruction authorizing recovery on "failure" to furnish accommodations condemned. Grace v. Moseley, 112 Ill. App. 100.

70. Under a similar law in Iowa. Humburd v. Crawford, 128 Iowa, 743, 105 N. W. 330.

71. Greenberg v. Western Turf Ass'n [Cal.] 82 P. 684.

72. See 5 C. L. 590.

73. Rev. St. 1899, §§ 528, 529, 530, 536, 8853, 8854, providing for removal for "misdemeanor in office," did not authorize suspension by judge for any other than official misconduct or neglect. State v. Sheppard, 192 Mo. 497, 91 S. W. 477.

74. State v. Sheppard, 192 Mo. 497, 91 S. W. 477, discussing at some length the status of the clerk and his relation to the court.

75. The statutes relating to the filling of vacancies apply to the clerk of the superior court of Suffolk county. Attorney General v. Campbell [Mass.] 78 N. E. 133.

76. Watson v. Scarbrough [Ala.] 40 So. 672.

Note: While the original opinion contained some expressions inconsistent with the above statement, and the decision on rehearing went off apparently on the question of remedy, the decision in the cited case of White v. Hewlett [Ala.] 42 So. 78, indicates an entire overruling of the original opinion in Watson v. Scarbrough [Ala.] 40 So. 672.—[Ed.]

77. White v. Hewlett [Ala.] 42 So. 78.

78. Watson v. Scarbrough [Ala.] 40 So. 672.

79, 80. Mansfield v. Johnson [Fla.] 40 So. 196.

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under permission of the court, correct his file marks as to the date.[81] A statutory duty to make and transmit a transcript "immediately" on allowance of a change of venue means in such convenient time as is reasonably necessary, but not instantly.[82]

Deputies.—A deputy should act in his own name as deputy, not in that of the clerk,[83] and general parol authority from the clerk will not authorize signature in the latter's name.[84] The clerks appointed for the several parts of the supreme court of New York are deputies of the county clerk of the county in which the court sits.[85] and hence a filing with the clerk of the court in which the proceeding was had satisfies a requirement of filing with the county clerk.[86]

§ 2. *Fees and compensation.*[87]—Fees may be made to vary with future changes of population,[88] and such changes may be made ascertainable by the Federal rather than the state census.[89] Clerks are entitled to fees per copies furnished and certified by them,[90] but where the litigant furnishes the copy, the clerk is entitled only to fees for comparison and certification.[91]

Duty to account for fees.—While, by agreement between a clerk and a county a suit is being prosecuted to determine the right to certain fees collected by and in the possession of the clerk, a refusal to turn such fees over to the county on demand by the comptroller prior to the conclusion of such suit, does not constitute the crime of failing to pay over public funds, though it is afterwards determined that such fees belong to the county.[92] A county cannot recover of a clerk and his sureties the amount of the illegal and excess fees charged and collected by him as clerk,[93] even though action by the injured parties is barred by the statute of limitations.[94]

United States courts.[95]—The clerk of the circuit court is entitled to tax fifteen cents per folio for a return to a writ of error.[96]

§ 3. *Liability on bond.*[97]

CLOUD ON TITLE; CLUBS; CODICILS; COGNOVIT, see latest topical index.

COLLEGES AND ACADEMIES.[98]

Nature, Establishment, and Public Regulation (658).
Bequests and Private Aid (658).
Public Aid (659).
Consolidation (660).
Actions (660).
Officers and Instructors (661).

81. Newman v. State [Ala.] 39 So. 648.

82. Rev. St. 1899, § 825, prescribing clerk's duty and penalty for delay, is designed to prevent unreasonable delay. Llewellyn v. Spangler, 109 Mo. App. 396, 88 S. W. 1021. Held not such delay to keep transcript at request of attorney of record on representation of pending negotiations for settlement and to turn it over to successor in office in ample time to have been filed at term to which case should have gone. Id. Negligence of successor not ascribable to predecessor. Id.

83, 84. Biggers v. Winkles, 124 Ga. 990, 53 S. E. 397.

85. The Act of 1895, amending Laws 1847, p. 338, c. 280, by giving the power of appointment to the judges of the several parts instead of to the county clerk, did not change their status. Fink v. Wallach, 109 App. Div. 718, 96 N. Y. S. 543.

86. Fink v. Wallach, 109 App. Div. 718, 96 N. Y. S. 543.

87. See 5 C. L. 591.

88. State v. Rogers [Minn.] 106 N. W. 345.

89. Laws 1903, c. 333, regulating fees of clerk of court of Ramsey county, upheld. State v. Rogers [Minn.] 106 N. W. 345.

90. In Montana, the clerk of the supreme court may charge a fee for the opinion attached to the remittitur. Rule 19, requiring an opinion to be attached to the remittitur when judgment or order of trial court is reversed or modified, and Pol. Code, § 873, making it his duty to make copies of papers when demanded by the rules of the court, and section 872, authorizing him to charge a fee therefor. Montana Ore Purchasing Co. v. Boston & M. Consol. Copper & Silver Min. Co. [Mont.] 84 P. 706.

91. Transcript made up of copies of evidence obtained from the stenographer, and copies of the pleadings and findings prepared by a copyist hired by a party. Pol. Code, § 4636. Montana Ore Purchasing Co. v. Boston & M. Consol. Copper & Silver Min. Co. [Mont.] 84 P. 706.

92. Commonwealth v. Shoener, 212 Pa. 527, 61 A. 1093. The mere bringing of the civil suit could not be construed a demand in the criminal prosecution. Id. Act March 31, 1860, § 65, does not apply. Id.

93, 94. State v. Williams [Ind. App.] 77 N. E. 1137.

95. See 5 C. L. 593.

96. Under Rev. St. § 828. Mohrstadt v. Mutual Life Ins. Co., 145 F. 751.

97. See 5 C. L. 593.

98. See 5 C. L. 593.

Nature, establishment, and public regulation.—A university existing solely for disseminating education and professional learning, although a private corporation requiring students to pay tuition, is a charitable institution,[99] and colleges established by the state are usually regarded as public eleemosynary corporations.[1]

A constitutional mandate requiring the legislature to establish not to exceed two normal schools is not violated by the disestablishment of two existing normal schools and providing for a colored normal school, a normal department at the state university, and one at a female seminary.[2] An amendment to the charter of a university permitting the establishment of a college of liberal arts is auxiliary merely, and requires application and consent of only a majority of the trustees.[3] An act creating a state board of control, changing the organization of certain educational and charitable institutions and placing them under the jurisdiction of such board, does not violate a constitutional prohibition of special laws "incorporating" educational institutions,[4] or if so would come within the constitutional exception in favor of "public schools."[5]

The property of a state agricultural college is at the disposal of the legislature.[6] An agricultural college is not "established" by the people because under a constitutional provision, they "locate" it by popular vote,[7] and the act repealing its establishment is not obnoxious to such a provision.[8] The acceptance of a private donation by a public educational institution creates no inviolable contract[9] rendering an act repealing the establishment,[10] or changing the location of an agricultural college, unconstitutional.[11] Authorizing a state board to select the location of a state university is not an unconstitutional delegation of legislative power.[12] The existence of a college may be terminated by abandonment of its franchises,[13] and it is thereby disabled to sue,[14] but consolidation with another similar institution does not amount to such an abandonment.[15]

Bequests and private aid.—The Georgetown College is not a sectarian institution within the Maryland bill of rights.[16] It is within the corporate powers of a college to accept a bequest conditioned on its application to research in colonial his-

99. Not liable for negligence of instructor. Parks v. Northwestern University, 218 Ill. 381, 75 N. E. 991.

1. Medical College v. Rushing, 124 Ga. 239, 52 S. E. 333.

2. State v. Bryan [Fla.] 39 So. 929.

3. Thirteen out of twenty-one trustees applying for the amendment. State v. U. S. Grant University, 115 Tenn. 238, 90 S. W. 294.

4. State v. Bryan [Fla.] 39 So. 929.

5. Legislation concerning the Florida Female College, the Colored Normal School, and other similar institutions. State v. Bryan [Fla.] 39 So. 929.

6. State v. Bryan [Fla.] 39 So. 929.

7. State v. Irvine [Wyo.] 84 P. 90.

8. Repeal of the act establishing Wyoming Agricultural College, located by subsequent popular vote at Lander, was not a removal of location in the constitutional sense (art. 7, § 23), transferring the college to Laramie, the situs of the University of Wyoming, where a department or college of agriculture had previously existed. State v. Irvine [Wyo.] 84 P. 90.

9, 10. State v. Irvine [Wyo.] 84 P. 90.

11. State v. Bryan [Fla.] 39 So. 929. A statute changing its location not void as impairing the obligation of a contract, because $15,000 and 100 acres of land were accepted on condition the college should be permanently located at Lake City. Id. However, if such an agreement is a valid contract, then purely private rights are involved and quo warranto is not the proper remedy. Id.

12. Although a prior statute provided that the Florida Agricultural College shall remain at its present (its former) location, unless the same be changed by statute. Rev. St. 1892, § 289. State v. Bryan [Fla.] 39 So. 929.

13. State v. U. S. Grant University, 115 Tenn. 238, 90 S. W. 294. A university which has transferred its property to a charitable corporation to hold in trust for another university, which trust has been executed, should make the charitable organization a party to a suit for the recovery of the property. Id.

14. See post, this topic, Actions.

15. Central University v. Walter's Ex'rs [Ky.] 90 S. W. 1066. And see post, this topic, Consolidation.

16. Character of institution taken from charter. Speer v. Colbert, 200 U. S. 130, 50 Law Ed. ——. A devise not invalid as being made for religious purposes because made less than a month before death of testator. Id. Held that persons claiming as president and directors of the college are the legal successors of the original incorporators, that there has been no dissolution of the corporation or failure to elect trustees. Id.

tory and obtaining and preserving archives in relation thereto.[17] The use of the word "university" in the designation of a devisee instead of "college," being merely a misnomer,[18] will not invalidate a devise.[19] A bequest for a scholarship at a medical college is not invalid because it is for a "sufficient sum, not to exceed three thousand dollars," as being uncertain in amount,[20] nor because it leaves the selection of the institution to the direction of the trustee.[21] Acceptance of donations does not create a contract with the donors as to continued location which is beyond legislative impairment.[22]

Public aid.—A university may not denude a forest under a deed to land conveyed to promote education in forestry.[23] And the cooperage company with which it may contract in regard thereto has no more rights than had the university,[24] but the state, having paid the consideration and being entitled at the end of thirty years to the fee, retains such a legal or equitable interest therein that it may prevent the improper devastation of the forest.[25] Equitable restrictions on the use of a grant of land from a state to an educational institution cannot be altered by subsequent legislative enactment, to the injury of surrounding property owners, who purchased in reliance on such restrictions.[26] The Congressional grants of 1862 [27] and 1890,[28] appropriating funds to state agricultural colleges, run to the state as such and not merely as a conduit for the college,[29] and it is the right as well as the duty of the state to name the beneficiary.[30] A state treasurer having been directed to pay the fund to one institution is not authorized to pay it to another institution without additional legislation.[31] The University of Wyoming fulfills the prescribed conditions upon which the funds are donated by the government,[32] since it is sufficient if the aided institution maintains a college or department whose "leading object" is instruction in agricultural or mechanic arts and applies the fund exclusively to the support of such college or department.[33] Colleges or universities founded and incorporated by the state to receive aid from the national government in giving instruc-

17. Speer v. Colbert, 200 U. S. 130, 50 Law. Ed. ——.

18. Bequest to "Georgetown University in the District of Columbia," there being no such institution, but there being a "Georgetown College" popularly called "Georgetown University." Speer v. Colbert, 200 U. S. 130, 50 Law. Ed. ——. Evidence held not to show that there were two institutions, one a "Georgetown University" and the other a "Georgetown College." Id.

19. "The President and Directors of Georgetown College" incorporated by Act of Congress, June 10, 1844, which act expressly provides that no misnomer of the corporation shall defeat a donation. Speer v. Colbert, 200 U. S. 130, 50 Law. Ed. ——.

20, 21. Speer v. Colbert, 200 U. S. 130, 50 Law. Ed. ——.

22. State v. Irvine [Wyo.] 84 P. 90.

23. Grant of land for use in connection with a college of forestry, the proceeds from the land to be used for the benefit of such college, will not permit a contract with a cooperage company whereby large quantities of timber are cut without profit to the college, which was suspended for lack of funds, after which the cutting of the timber still continued. People v. Brooklyn Cooperage Co., 100 N. Y. S. 19.

24. Contract to cut and deliver to cooperage company and permit it to cut and use a certain amount of timber in violation of the conditions of the grant of the land to the university. People v. Brooklyn Cooperage Co., 100 N. Y. S. 19.

25. People v. Brooklyn Cooperage Co., 100 N. Y. S. 19.

26. Grant of open space to Massachusetts Institute of Technology on condition that no part of said space shall ever be sold or more than one-third ever built over (St. 1861, p. 492, c. 183, §§ 3, 7), on faith of which surrounding lots were purchased at enhanced prices, not abrogated by St. 1903, p. 456, c. 438, though in terms so intended on objection by adjoining lot owners. Wilson v. Massachusetts Institute of Technology, 188 Mass. 565, 75 N. E. 128.

27. Act July 2, 1862, c. 130.

28. Act Aug. 30, 1890, c. 841.

29. State v. Irvine [Wyo.] 84 P. 90.

30. Mere establishment, location, and commencement of operations do not ipso facto entitle a college to the appropriations. State v. Irvine [Wyo.] 84 P. 90.

31. Although Laws 1890-1891, p. 321, c. 74, and p. 326, c. 75, provided that the University of Wyoming should receive this fund only until an agricultural college was established, it was not provided that upon the establishment of a separate agricultural college it should become the beneficiary. State v. Irvine [Wyo.] 84 P. 90.

32. State v. Irvine [Wyo.] 84 P. 90.

33. State v. Irvine [Wyo.] 84 P. 90. Although as in case of a "university," the "leading object" of the institution as a

tion in agriculture and the mechanic arts are usually considered public corporations,[34] although incidentally receiving private assistance,[35] and although the trustees are required to conform to the will and direction of the donors of any property granted, devised, or bequeathed to the institution.[36] A statute providing proper educational qualifications for admission to an agricultural college is not void as conflicting with the Congressional Act giving national aid to such institutions.[37] An act establishing a state agricultural college and accepting national aid under the Act of Congress is not unconstitutional because it declares that military tactics shall be taught therein only in case the governing board so determines, whereas the Congressional Act makes it mandatory.[38]

A legislative appropriation need not be drawn during the year for which it is made,[39] even though the appropriations are annual and the first payments were directed to be made during the fiscal years named.[40]

Consolidation.—A college and a university may consolidate in Kentucky,[41] working thereby, not the annihilation of the constituent institutions, but merely their continuance in the amalgamated form,[42] and the acquisition of all the property rights of the former schools by the new university subject to the terms on which they had acquired it.[43] Hence a promissory note to a university having been accepted with the condition that it be applied to a particular professorship, which is a sufficient consideration,[44] will not be cancelled for failure of consideration by the consolidation of the donee with a college, either on the ground that the donee has ceased to exist, and is therefore unable to perform,[45] or that there is a diversion of the money to a purpose entirely foreign to the intention of the donor.[46]

Actions.—A university having terminated its existence for more than five years by the transfer of all its corporate property, franchises, and good will, and the payment of its debts, cannot maintain a suit in Tennessee either by common or statutory law,[47] nor can a trustee sue on its behalf,[48] nor can the trustee of an existing

whole is otherwise. Id. Statutes construed as aptly assenting to the prescribed conditions of the appropriations by directing its application solely to the Agricultural College at the University of Wyoming. Id.

34. Wyoming Agricultural College, a public corporation in view of Const. art. 7, § 1, art. 3, § 36, and Laws 1890-1891, p. 373, c. 92. State v. Irvine [Wyo.] 84 P. 90.

35, 36. State v. Irvine [Wyo.] 84 P. 90.

37. An act requiring students to have passed a high school examination and to have passed through the twelfth grade or its equivalent. State v. Bryan [Fla.] 39 So. 929. Not void as violating any contract between the national government and the state in accepting the appropriations under such act. Id. Such a provision even if improper would not render the entire act unconstitutional. Id.

38. State v. Bryan [Fla.] 39 So. 929. Even though unconstitutional, it would not affect the validity of the entire act. Id. But even if the board should exclude military tactics from the curriculum, it is not seen how the state could raise the question, especially in a quo warranto proceeding. Id. The duty of teaching military tactics if existing may be enforced by a prospective student in appropriate proceedings. Id.

39. Sums of $5,000 under Acts 1902, p. 912, c. 625, § 5, 6, and $2,000 under Acts 1904, p. 951, c. 557, § 4, not paid after expiration of fiscal year for which donation was made, construed not to have been forfeited. Maryland Agricultural College v. Atkinson, 102 Md. 557, 62 A. 1035.

40. Maryland Agricultural College v. Atkinson, 102 Md. 557, 62 A. 1035.

41. Two institutions at different cities incorporated by hostile branches of the same church, which later became reconciled. Central University of Kentucky v. Walters' Ex'rs [Ky.] 90 S. W. 1066.

42. Central University of Kentucky v. Walters' Ex'rs [Ky.] 90 S. W. 1066.

43. Donations to be applied to particular professorships acquired with the necessity of continuing the chair. Central University of Kentucky v. Walters' Ex'rs [Ky.] 90 S. W. 1066.

44. Central University of Kentucky v. Walters' Ex'rs [Ky.] 90 S. W. 1066.

45. The new university continuing the chair of mathematics established by the preceding one to which the proceeds of the note were to be applied. Central University of Kentucky v. Walters' Ex'rs [Ky.] 90 S. W. 1066.

46. Even though as a result of the consolidation the fund will be used at a different town and under the auspices of another branch of the same church, contrary to the intention of the donor. Central University of Kentucky v. Walters' Ex'rs [Ky.] 90 S. W. 1066.

47. Shannon's Code §§ 2525, 2070, 2071. State v. U. S. Grant University, 115 Tenn. 238, 90 S. W. 294. Bill held to charge a union or merger of the Grant Memorial University

university sue on its behalf unless he has first asked the corporation to sue and it has refused, or unless such a request would be useless,[49] and in a suit by a trustee without such a request on the ground that it would be useless, the facts showing the uselessness must be set forth.[50]

Officers and instructors.—Requiring certain qualifications as to length and place of residence from members of the board of control of a state university is not unconstitutional.[51] The mode of compensating an instructor in a college cannot affect the character of his employment,[52] hence, although the faculty were to defray the expenses of operating a college, they were not thereby made such officers that service upon the dean was service upon the corporation.[53] Even a private college is not liable for the negligence of its employes.[54]

COLLISION; COLOR OF TITLE, see latest topical index.

COMBINATIONS AND MONOPOLIES.

§ 1. Combinations Violative of the Federal Anti-Trust Act (661).
§ 2. Combinations Violative of State Anti-Trust Acts and of the Sherman Law (663).
§ 3. Grants of Privileges by Statute, Ordinance, and Contracts with Municipalities Tending to Create Monopolies (667).

§ 1. *Combinations violative of the Federal anti-trust act.*[55]—The Sherman anti-trust law declares illegal every contract, combination, or conspiracy in restraint of trade or commerce amongst the several states or with foreign nations.[56] To

and the Chattanooga University into the U. S. Grant University. Id. Bill held to show not a nonuser but a transfer of all its property, franchises, power, etc. Id. Held that general assembly reserved right to amend charters of the East Tennessee Wesleyan University and its successors, and of the Chattanooga University and its successor, the U. S. Grant University. Id. Held that the transfer of its property and franchises by the Grant Memorial University in 1892 was authorized by statute and binding. Id. Held that claim in appellant's brief that property was transferred by the Grant Memorial University to be held in trust for itself and not for the U. S. Grant University is not sustained by appellant's bill. Id.

48, 49, 50. State v. U. S. Grant University, 115 Tenn. 238, 90 S. W. 294.

51. A statute requiring that members be appointed from certain portions of the state after a residence of at least 10 years therein, not violative of Const. art. 3, § 27, or art. 6, § 5. State v. Bryan [Fla.] 39 So. 929. Act held not violative of Const. art. 4, § 15, because it permits governor to remove members of board, as it will presumably be done in the constitutional way. Id.

52. Although compensation of instructors was to be derived out of the tuition fees. Medical College v. Rushing, 124 Ga. 239, 52 S. E. 333.

53. Medical College v. Rushing, 124 Ga. 239, 52 S. E. 333. Neither by its charter or by-laws is a member of its faculty of the Medical College of Georgia or its dean an officer or agent of the corporation for the purposes of service. Id.

54. Exempt as charitable institutions. Parks v. Northwestern University, 218 Ill. 381, 75 N. E. 991.

55. See 5 C. L. 594.

56. Act Cong. July 2, 1890, c. 647. (26 St. 209 [U. S. Comp. St. 1901, p. 3200]). A combination of manufacturers, wholesalers, and retailers, to arbitrarily fix the minimum retail price of drugs and exclude "aggressive cutters" of such prices, and those who deal with them, violated the Sherman act prohibiting restraint of interstate trade. Loder v. Jayne, 142 F. 1010. Evidence sufficient to show that certain of the defendants participated in the combination. Id. The question as to the existence of a conspiracy was for the jury where resolutions, etc., were lawful upon their face, but taken in connection with other matters appeared unlawful. Id. A combination of independent steamship lines for the purpose of monopolizing the traffic between points in different states, and by which earnings are pooled and divided in stated proportions, was unlawful and invalid under the Sherman act. White Star Line v. Star Line of Steamers [Mich.] 12 Det. Leg. N. 586, 105 N. W. 135. That the contract might be valid as to traffic between points in one of the states did not save it from the Federal Statute. Id. Combination of brewing companies to prevent competition and control the price of their products by allotting the business, prohibiting any member from selling to customers allotted to the others, and requiring members not to sell below a certain price, violated § 3 of the Sherman law, and also the common law. Leonard v. Abner-Drury Brewing Co., 25 App. D. C. 161. Complaint for injury to plaintiff's hat trade, in violation of the anti-trust act, because of plaintiff's opposition to the closed-shop policy, held sufficient on motion for its correction. Loewe v. Lawlor, 142 F. 216.

avoid a contract[57] as violative of this act, it must be directly connected with the purpose of restraining trade.[58] A mere partial and incidental restraint is not sufficient.[59] An agreement for the sale of a business and good will cannot be repudiated on the ground that the purchaser acquired the property for the purpose of obtaining a monopoly and in pursuance of an illegal combination in restraint of trade,[60] nor does the act invalidate or prevent a recovery for the breach of a collateral contract for the manufacture and sale of goods by a member of a combination formed for the purpose of restraining interstate trade in such goods.[61]

A combination of manufacturers, obnoxious to the Sherman act, cannot be annuled in equity at the suit of retail dealers doing business with a company sought to be coerced into the association, but having no contract with such company for the purchase of its product;[62] but injunction will lie to prevent the doing or continuing of the unlawful acts where the involuntary entry of the company into the trust would work irreparable injury to the business of the dealers,[63] and the fact that the Sherman act makes the conspiracy a crime does not necessarily impair equity jurisdiction.[64] In a suit by the United States to enjoin a conspiracy violating the Sherman act by creating a general distributing agent, evidence is material which tends to establish the manner in which the agent executed its functions.[65] A defense that a contract is void as violative of this act is not available unless pleaded.[66]

Compulsory testimony and immunity of witnesses is strictly pertinent to another topic.[67] For convenience some of the later cases are here repeated. The privilege of witnesses does not extend to corporations,[68] and a witness cannot claim that his testimony would incriminate the corporation of which he is part.[69] The possibility of state prosecutions does not justify refusal to answer what by grant of immunity has lost its incriminating quality as to Federal crimes,[70] the immunizing of the witness as to Federal crimes being a sufficient satisfaction of the constitutional guaranty.[71] The possible forgetfulness of all grand jurors and of a lack

57. See Contracts, 5 C. L. 664.

58. And not merely collateral thereto. Camors-McConnell Co. v. McConnell, 140 F. 412.

59. A contract for the sale of river craft, whereby the instalments were suspended in case of serious competition in traffic between two ports of a state, and the vendee required to withdraw from such competition for five years, was not a sufficient, if any, restraint of interstate commerce to violate the Sherman act. Cincinnati, P., B. S. & P. Packet Co. v. Bay, 200 U. S. 179, 50 Law. Ed. —. Purchaser could not escape payment by invoking the Sherman act because of a covenant by him to maintain the present rates not declared to enter into the consideration of the sale, especially where the rates related primarily, if not exclusively, to domestic business. Id. An agreement as incidental to the sale of property as a business, that the seller will not enter into a competing business, is valid, though in partial restraint of trade (Camors-McConnell Co. v. McConnell, 140 F. 412), though incidentally it may possibly interfere with interstate commerce (Cincinnati, P., B. S. & P. Packet Co. v. Bay, 200 U. S. 179, 50 Law. Ed. —). A contract obligating one corporation to buy all its raw material from, and to sell all its manufactured products to, another corporation does not violate the Sherman act or the anti-trust law of Illinois. Heimbuecher v. Goff, Horner & Co., 119 Ill. App. 373.

60. Remedy being by direct proceeding against the combination. Camors-McConnell Co. v. McConnell, 140 F. 412.

61. Recovery by member of combination against vendee of glass. Hadley-Dean Plate Glass Co. v. Highland Glass Co. [C. C. A.] 143 F. 242.

62. Can be only at suit of United States. Leonard v. Abner-Drury Brew. Co., 25 App. D. C. 161.

63. Officers of a labor union attempting to procure its members to leave the employ of the company, unless it join the association, are equally within the scope of the remedy. Leonard v. Abner-Drury Brew. Co., 25 App. D. C. 161.

64. Leonard v. Abner-Drury Brew. Co., 25 App. D. C. 161.

65. To the charge of a combination or conspiracy by means of a joint selling agency, the books and papers of the members showing the amount, price, and value of product, and manner of selling the same, is material. Nelson v. U. S., 201 U. S. 92, 50 Law. Ed. —.

66. New York Bank Note Co. v. Kidder Press Mfg. Co. [Mass.] 78 N. E. 463.

67. See Witnesses, 6 C. L. 2007.

68, 69. Hale v. Henkel, 201 U. S. 43, 50 Law. Ed. —.

70. Nelson v. U. S., 201 U. S. 92, 50 Law. Ed. —.

71. Hale v. Henkel, 201 U. S. 43, 50 Law. Ed. —. See the converse stated in Jack v. State of Kansas, 26 S. Ct. 73.

of all memoranda of what incriminating testimony was given does not make the granted immunity insufficient.[72] The immunity bestowed extends to testimony before a grand jury prior to presentment.[73] The immateriality of questions cannot be challenged by witnesses as ground for refusing to answer,[74] nor is non production of papers excused because witness holds them as a corporate functionary.[75] To compel production of books and papers by subpœna duces tecum is not an unreasonable search and seizure,[76] unless more than in reason will probably be necessary are required.[77]

§ 2. *Combinations violative of state anti-trust acts and of the Sherman law.*[78]—Combinations having for their purpose the stifling of general competition and the control of trade and prices are unlawful, both at common law and by some statutes.[79] It is not essential that they do in fact create a monopoly, provided they tend to that end and interfere with free competition,[80] but combinations between firms or individuals for the regulation of prices and of competition in business are not unlawful so long as they are reasonable and do not include all of a commodity or trade, or create such restrictions as to materially affect the freedom of commerce.[81] An organization of employers for the purpose of securing stability in the building trades, by requiring members to exact from employes agreements providing for the arbitration of disputes, is not unlawful as in restraint of trade.[82] Contracts in restraint of trade are treated elsewhere.[83]

Statutes directed against trusts and monopolies are generally held valid as being within the police power of the state, if they do not infringe some of the guaranteed rights or trench on the Federal power,[84] and the fact that they apply to combina-

72, 73. Hale v. Henkel, 201 U. S. 43, 50 Law. Ed. —.

74, 75. Nelson v. U. S., 201 U. S. 92, 50 Law. Ed. —.

76, 77. Hale v. Henkel, 201 U. S. 43, 50 Law. Ed. —.

78. See 5 C. L. 595.

79. Organization of retail coal dealers seeking to compel wholesalers to furnish coal only to designated dealers, and pledging its members not to buy from wholesalers who sold to others except on payment of a penalty, violated the common law, the conspiracy act of 1874 and that of 1891, against trusts, pools, and monopolies. Sanford v. People, 121 Ill. App. 619.

80. No defense that there was only a partial restraint of trade and that outsiders could deal in coal by paying a tribute to the members. Sandford v. People, 121 Ill. App. 619.

81. Contract to buy all sash weights plaintiff might make during a certain period not void at common law. Over v. Byram Foundry Co. [Ind. App.] 77 N. E. 302.

82. Defendant held liable for violating a rule against employing men who refused to sign such agreements. City Trust Safe Deposit & Surety Co. v. Waldhauer, 47 Misc. 7, 95 N. Y. S. 222.

83. See Contracts, 5 C. L. 664.

84. Rev. Laws c. 56, § 1, prohibiting vendors from making it a condition of the sale of goods that purchaser shall not deal in the goods of any other person, is within the police power of the state and not contrary to U. S. Const. Am. 14, or to art. 1, § 8 thereof, as interfering with interstate commerce, or to Mass. Const. art. 1, 10. Commonwealth v. Strauss [Mass.] 78 N. E. 136. Sherman Act did not affect its validity, as that act does not touch contracts affecting interstate commerce only indirectly. Id. Laws 1899, p. 409, No. 255, to prevent trusts, etc., for certain purposes and providing for the revocation of the certificate of any foreign corporation violating the act, does not offend U. S. Const. Am. 14, § 1. Attorney General v. A. Booth & Co. [Mich.] 12 Det. Leg. N. 991, 106 N. W. 868. "The Anti-Trust Statute," Acts 1903, c. 140, p. 268, held valid and constitutional. State v. Witherspoon, 115 Tenn. 138, 90 S. W. 852.

Held void: Penal Code § 321, prohibiting combinations for the purpose of fixing the price or regulating the production of any article of commerce, by reason of § 325, exempting agriculturists, etc., violates U. S. Const. Am. 14, by denying the equal protection of the laws, both sections being interdependent. State v. Cudahy Packing Co. [Mont.] 82 P. 833.

NOTE. Validity, scope, actual restraint: Action was brought by the state against certain corporations charging them with a violation of the state statute declaring null and void all combinations made with a view to lessen, or which tend to lessen, competition in the manufacture or sale, or to control the prices of articles of domestic growth or of domestic raw material. On demurrer, held: (1) That the act is constitutional; (2) That it applies only to unreasonable restraint of trade; (3) That it is unnecessary to allege that the acts charged actually did restrain trade. State v. Virginia-Carolina Chemical Co. et al 71 S. C. 544, 51 S. E. 455.

(1) Where the state anti-trust laws exempt from their operation certain classes of combinations, they have been held invalid as denying the equal protection of the laws. Connolly v. Union Sewer Pipe Co., 184 U. S.

tions formed prior to their enactment does not render them unconstitutional.[85] A state may prohibit the doing of business within its borders by a foreign corporation belonging to any trust or pool entered into outside the state for the purpose of affecting prices outside the state.[86] A statute forbidding combinations or agreements by insurance companies is valid, though the general anti-trust law of a state also applies to such companies.[87]

To constitute a violation of anti-trust laws, it is not essential that there exist between the parties any formal contract.[88] A statute declaring illegal and prohibiting trusts applies to the existence and carrying on of all trusts after it takes affect, including those formed prior thereto.[89] Railroad and express companies are not exempt from the operation of anti-trust laws because of the existence of prior laws empowering the state railroad commission to regulate rates.[90] The provisions of the anti-trust act of Arkansas, directing the institution of proceedings against corporations failing to file the affidavit of freedom from combinations required by the secretary of state, does not create an offense, and failure to file the affidavit does not violate the statute.[91] The validity under various statutes of particular com-

540, 46 Law. Ed. 679. Contra, State v. Schlitz Brewing Co., 104 Tenn. 715, 59 S. W. 1033, 78 Am. St. Rep. 941. But where the statutes are general in their terms, embracing all classes, they are upheld as a valid exercise of the police power. State v. Buckeye Pipe Line Co., 61 Ohio St. 520, 56 N. E. 464; Smiley v. Kansas, 196 U. S. 447, 49 Law. Ed. 546, Houck v. Anheuser-Busch Brewing Ass'n, 88 Tex. 184, 30 S. W. 869; In re Davies, 168 N. Y. 89, 61 N. E. 118. (2) In holding that the act applied only to unreasonable restraints of trade the court adopted the views of Justice Brewer in Northern Securities Co. v. United States, 193 U. S. 197, 48 Law. Ed. 679, declining to follow the decision of Justice Harlan therein. The contrary was directly held in United States v. Trans-Missouri Freight Ass'n, 166 U. S. 290, 41 Law. Ed. 1007; United States v. Coal Dealers' Ass'n, 85 F. 252. (3) The defendants contended that as the only acts charged in the complaint were lawful, and as there was no allegation that they actually did lessen competition, no unlawful intent would be inferred. But the court was of the opinion that a restraint of trade would reasonably be the result of the acts alleged, and therefore the law would presume that such a result was intended. United States v. The Paul Sherman Pet. (C. C.) 98, 27 Fed. Cas. No. 16,012. And where such an intent exists, producing a dangerous probability that the acts contemplated will occcur, there the statute directs itself against that dangerous probability as well as against the completed result. Swift & Co. v. United States, 196 U. S. 375, 49 Law. Ed. 518; Harding v. American Glucose Co., 182 Ill. 551, 55 N. E. 577, 74 Am. St. Rep. 189, 64 L. R. A. 738 and Note Cf. MacGinnis v. Boston & Mont. Consol. Copper & Silver Min. Co., 29 Mont. 428, 75 P. 89, holding that a specific intent or necessary tendency to restrain trade must be shown.—4 Mich. L. R. 226.

85. Acts 1903, p. 119, c. 94, declaring illegal and prohibiting trusts, does not impair the obligation of contract because it includes trusts formed before it went into effect. State v. Missouri R. Co. [Tex.] 14 Tex. Ct. Rep. 906, 91 S. W. 214.

86. Act January 23, 1903, prohibiting any corporation, foreign or domestic, engaged in any trust agreement from doing business within the state, was within the power of the legislature with reference to foreign insurance companies. Hartford Fire Ins. Co. v. State [Ark.] 89 S. W. 42. Act Jan. 23, 1905, to the effect that any corporation connected with any trust agreement made in Arkansas or elsewhere, to regulate in Arkansas or elsewhere, the premiums for insuring property, etc., shall be subject to certain penalties, and prohibiting such corporation from doing business within the state, prohibits the doing of business in Arkansas by a foreign insurance corporation belonging to a trust to fix insurance rates outside of Arkansas. Id.

87. Iowa Code 1897, § 1754, forbidding insurance companies from entering into combinations or agreements concerning rates, agents' commissions, or the manner of transacting business, and presumably intended to insure competition among these companies, does not violate U. S. Const. Am. 14. Carroll v. Greenwich Ins. Co., 199 U. S. 401, 50 Law. Ed. —. Does not forbid the companies from using each other's experience or to employ the same person to work up results. Id.

88. A corporation organized in pursuance of a scheme to combine violated the anti-trust law by carrying out the unlawful arrangement and could not defend on the ground that the wrong was done by the organizers. Attorney General v. A. Booth & Co. [Mich.] 12 Det. Leg. N. 991, 106 N. W. 868.

89. Acts 1903, p. 119, c. 94. State v. Missouri, etc., R. Co. [Tex.] 14 Tex. Ct. Rep. 906, 91 S. W. 214.

90. Acts 1903, p. 119, c. 94, not inapplicable to contract between a railroad company and an express company granting exclusive privileges to the express company. State v. Missouri, etc., R. Co. [Tex.] 14 Tex. Ct. Rep. 906, 91 S. W. 214.

91. Prosecution required is for violation of the other sections prohibiting trusts, etc. Act Jan. 23, 1905 (Acts 1905, p. 6, § 7). State v. International Harvester Co. [Ark.] 96 S. W. 119.

binations,[92] the scope of such statutes,[93] and the effect to be given specific laws in view of other legislation on the subject,[94] depend on the statutes themselves and are not susceptible of reduction to rule.

92. Violated: Rev. St. 1895, art. 4540, requires railroad companies to furnish equal facilities and equal rates to all express companies. Held, a contract between a railroad company and an express company giving the latter "exclusive privileges," binding the railroad not to allow others to do an express business on the road, and giving the express company credit for any sums paid by other express companies in case privileges should be accorded them by legislation or judicial proceedings, violated Acts 1903, p. 119, c. 94, defining a trust as a combination of capital skill, or acts of two or more persons to create or carry out restrictions in the free pursuit of any business authorized by the laws of the state, or to prevent or lessen competition in the transportation of merchandise, and making a trust unlawful. State v. Missouri, etc., R. Co. [Tex.] 14 Tex. Ct. Rep. 906, 91 S. W. 214. Held to be a combination of capital skill and acts of the railroad and the express companies. Id. An association of persons and corporations engaged in the business of buying and selling live stock and practically controlling that business at the place of operation, which has a by-law forbidding its members to buy or sell live stock for others without charging a commission of at least 50 cents a head, is a combination to carry out restrictions in the full and free pursuit of a lawful business, and in virtue of that fact is a trust within the terms of c. 265, p. 481, Laws 1897. State v. Wilson [Kan.] 84 P. 737. The charging of a commission for services in the purchase of live stock for another, by a member of such a trust in pursuance of the by-law referred to is a misdemeanor by that statute, and a contract to pay commissions exacted under such circumstances is void. Id. A contract that a purchaser shall sell the goods of the vendor but not the goods of any other person violates Rev. Laws c. 56, § 1, against making it a condition of the sale of goods that the buyer shall not deal in the goods of any other person, but permitting the making of contracts for the exclusive sale of goods, and is not a contract for the exclusive sale of goods. Commonwealth v. Strauss [Mass.] 78 N. E. 136. A ruling that if defendant named a price at which he would sell his employer's tobacco, and then stated that if the purchaser dealt in no other tobacco defendant would return a rebate of 6 per cent, it would not be a sale on condition that the purchaser would not sell the goods of any other person, was properly refused where the jury might have found that the price and rebate were understood to be a practical refusal to sell except upon the condition which would entitle the purchaser to the rebate. Id.

Not violated: An agreement by a seller of whisky not to sell the same kind of whisky in the places where the buyer was engaged in business until the latter had disposed of the quantity purchased did not violate Acts 1899, p. 246, c. 146, against fixing prices, limiting quantity, refusing to deal with those not members of a combination, etc. Norton v. W. H. Thomas & Sons Co. [Tex.] 15 Tex. Ct. Rep. 126, 91 S. W. 780. Norton v. W. H. Thomas & Sons Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 618, 93 S. W. 711. A contract binding a corporation to purchase all its raw material from another corporation and to sell to it all its manufactured products does not offend the Illinois anti-trust law, nor the Sherman act. Heimbuecher v. Goff, Horner & Co., 119 Ill. App. 373. A live stock exchange established for the mutual benefit of its members and to inculcate and enforce correct principles in business transactions, and providing for the expulsion of members found guilty of misconduct or business dishonesty, and that no member should do business with one expelled, was not an illegal combination in restraint of trade within Rev. St. 1899, § 8978, prohibiting the limiting of competition by refusing to deal with another person because not a member. Gladish v. Kansas City Live Stock Exch., 113 Mo. App. 726, 89 S. W. 77. One expelled could not restrain association or its members from refusing to deal with him on the ground that such refusal was an illegal boycott. Id.

93. The anti-trust statute of Missouri (Rev. St. Mo. 1899, §§ 8965-8970), does not apply to a contract for the sale of goods to be manufactured by the vendor in another state and delivered to the vendee in Missouri, the regulation of interstate commerce being within the exclusive authority of Congress. Hadley-Dean Plate Glass Co. v. Highland Glass Co. [C. C. A.] 143 F. 242. Act Cong. August 27, 1894, was not applicable, being confined to combinations where either of the parties is importing any article from a foreign country. Id. Burn's Ann. St. 1901, § 3312g, declaring void contracts between persons or corporations who control the output of certain articles of merchandise, designed to affect prices, applies only to contracts between parties who control the output, and so a contract for the sale of the entire output of a particular foundry for a certain period was not void. Over v. Byram Foundry Co. [Ind. App.] 77 N. E. 302.

94. Ch. 158, p. 294, Laws 1891 (Gen. St. 1901, §§ 2439-2441) prohibiting combinations to prevent competition among persons engaged in buying and selling live stock, is superseded by the general anti-trust law of 1897 (Laws 1897, p. 481, c. 265; Gen. St. 1901, §§ 7864-7874), and is no longer in force. State v. Wilson [Kan.] 84 P. 737. Act of 1897, constitutional. Id. The "Gondering Act" (Sess. Laws 1897, p. 347, c. 79), was repealed by implication by the "Junkin Act" (Sess. Laws 1905, p. 636, c. 162), except as to the first section defining "trusts." State v. Omaha Elevator Co. [Neb.] 106 N. W. 979. The acts of 1887 (Sess. Laws 1887, p. 675, c. 114), and 1897 (Sess. Laws 1897, p. 352, c. 80), prohibiting combinations by grain dealers and others to fix the price of grain, etc., do not except such dealers from the operation of the later general anti-trust acts of 1897 (Sess. Laws 1897, p. 347, c. 79), and 1905 (Sess. Laws 1905, p. 636, c. 132), applying to illegal combinations to fix prices, etc., and the attorney general was authorized to pro-

Parties to illegal combinations are amenable to the law, though co-contractors cannot be reached.[95] In quo warranto against a foreign corporation for violating the anti-trust law of Michigan, a precedent suit in a lower court is not necessary before proceeding in the supreme court.[96] The consent of the railroad commission is not a condition precedent to a proceeding by the attorney general of Texas against railroad and express companies for violation of the anti-trust act of that state.[97]

The usual rules of pleading apply.[98] While an indictment is sufficient which charges the existence and object of a conspiracy without a statement of the means intended to be used or the evidence tending to prove the unlawful agreement,[99] yet it must be sufficiently specific to apprise the accused of the particular offense intended.[1]

The general statutory power to compel production of books and papers by a party extends to a suit against a corporation for illegally combining or conspiring.[2] The examination provided by the Kansas anti-trust act has no substantial tendency to subject a witness to punishment under the Federal laws.[3] A law providing for an order of the court, requiring the attorney of a corporation prosecuted for violating an anti-trust law to produce nonresident witnesses, is valid as merely providing a means of notifying the corporation through its attorney.[4] A foreign corporation, upon entering a state in which such a law is in force, impliedly agrees that notice to his attorney shall be notice to it,[5] and no unfair burden is placed upon it by requiring it to produce its officers to give testimony at a suitable time and place within the state.[6] On the issue that a pretended competition was fictitious, the ownership of the stock of one of the competing corporations is relevant,[7] and production of its books may be compelled for this purpose.[8] Rulings on evidence by a special commissioner to take and report evidence in an original proceeding against an alleged combination will not be reviewed before his report is heard.[9] The penalty for violating an anti-trust law ceases when the offense ceases.[10]

ceed by injunction under the law of 1905. Id. The General Conspiracy Statute of 1874 did not supersede all common-law offenses in relation to injuring the public trade. Sanford v. People, 121 Ill. App. 619. The act of 1891 did not repeal so much of the Conspiracy Statute of 1874, not repugnant thereto as provided punishment for conspiring to injure the public trade. Id.

95. In quo warranto against a corporation for violating Pub. Acts 1899, p. 409, No. 255, by monopolizing the business of catching and selling fish, defendant was amenable to the law, whether its co-contractors could be reached or not, and could not object that they were not made defendants. Attorney General v. A. Booth & Co. [Mich.] 12 Det. Leg. N. 991, 106 N. W. 868.

96. For violation of Pub. Acts 1899, p. 409, No. 255. Attorney General v. A. Booth & Co. [Mich.] 12 Det. Leg. N. 991, 106 N. W. 868. Quo warranto proper. Id.

97. To recover penalties under Acts 1903, p. 119, c. 94. State v. Missouri, etc., R. Co. [Tex.] 14 Tex. Ct. Rep. 906, 91 S. W. 214.

98. In action to recover penalties for violating the anti-trust act (Acts 1903, p. 119, c. 94), an allegation that after the passage of the act defendants "continued to treat such contract as valid, and executed and carried it out," sufficiently stated that the unlawful features of the contract were carried out after the statute went into effect. State v. Missouri, etc., R. Co. [Tex.] 14 Tex. Ct. Rep. 906, 91 S. W. 214.

99. Indictment under Anti-Trust Act 1903, c. 140, p. 268. State v. Witherspoon, 115 Tenn. 138, 90 S. W. 852.

1. An indictment for violating the Acts 1903, c. 140, p. 268, which fails to state the terms of the agreement or arrangement entered into by the parties, and the particular articles imported or of domestic manufacture or growth,—the price of which such agreement tended to control and lessen or advance, was insufficient. State v. Witherspoon, 115 Tenn. 138, 90 S. W. 852.

2. Rev. St. 1899, § 737. State v. Standard Oil Co., 194 Mo. 124, 91 S. W. 1062.

3. The act being directed to proceedings under state laws would not probably uncover testimony relevant to a Federal indictment. Jack v. Kansas, 199 U. S. 372, 50 Law. Ed. —.

4. Rev. St. 1899, § 8983. State v. Standard Oil Co., 194 Mo. 124, 91 S. W. 1062.

5, 6, 7, 8. State v. Standard Oil Co., 194 Mo. 124, 91 S. W. 1062.

9. Not on motion to vacate an order to attorneys to produce witnesses, books, etc. State v. Standard Oil Co., 194 Mo. 124, 91 S. W. 1062.

10. An agreement between rival gas companies in violation of the anti-trust act of June 11, 1891 (Ill. Laws 1891, p. 206), did not, after they ceased to act under it, de-

§ 3. *Grants of privileges by statute, ordinance, and contracts with municipalities tending to create monopolies.*[11]—Municipal ordinances granting exclusive privileges for a given number of years to dispose of garbage and refuse matter are generally held valid.[12]

COMMERCE.

§ 1. Nature of Commerce, Domestic, Interstate, or Foreign (607).
§ 2. Regulation of Commerce (607).
A. The "Commerce Clause" and Its Application to Particular Regulatory Measures (607). Regulation of Traffic in Intoxicating Liquors (608). Inspection Laws (609). State Burdens on Foreign Commerce (609). Regulation of Railroads and Other Carriers (671). The Safety Appliance Act (671). Discrimination in Rates (672).
B. Regulation of Trade and Commerce Within a State (673).
§ 3. The Interstate Commerce Commission; Its Functions and Proceedings Before It (673).
§ 4. The Department of Commerce and Labor; Its Functions (673).
§ 5. State Railroad and Corporation Commission (673).

§ 1. *Nature of commerce; domestic, interstate, or foreign.*[13] *Original packages.*[14]—The definition[15] of commerce includes a shipment from one state to another by a continuous carriage.[16] A sale of property in one state for delivery in another is interstate commerce,[17] but a contract for work to be done in a state furnishing materials from without is not.[18] Goods shipped from one state into another and sold in original packages in the latter are subjects of interstate commerce and not liable to state legislation, except in case of intoxicating liquors, which under the Wilson act become subject to state authority immediately upon arrival therein.[19] Mere stoppage does not deprive an interstate shipment of its continuity.[20]

§ 2. *Regulation of commerce. A. The "commerce clause" and its application to particular regulatory measures.*[21]—Congress has exclusive power to regulate commerce between the several states.[22] The power of congress to regulate commerce among the several states, when the subject of that power are national in their nature, is exclusive. The failure to exercise this exclusive power is an expression that

prive the companies of the right to invoke the due process of law clause of the Federal Constitution against an ordinance fixing unremunerative rates. Peoria Gas & Elect. Co. v. Peoria, 200 U. S. 48, 50 Law. Ed. —.

11. See 5 C. L. 598. See, also, Franchises, 5 C. L. 1518.

12. Board of supervisors of San Francisco could grant 50 year privilege of cremating refuse matter, etc. California Reduction Co. v. Sanitary Reduction Works, 199 U. S. 306, 50 Law. Ed. —.

13. See 5 C. L. 599.

14. See 5 C. L. 600.

15. See 5 C. L. 599, n. 64.

16. Porter v. St. Louis S. W. R. Co. [Ark.] 95 S. W. 453; Berry Coal & Coke Co. v. Chicago, etc., R. Co., 116 Mo. App. 214, 92 S. W. 714.

17. Globe Elevator Co. v. Andrew, 144 F. 871.

18. Contract contemplated the erection of a building in Michigan and installing therein the articles so purchased, and it was necessary to buy materials and hire men in Michigan. Hastings Industrial Co. v. Moran [Mich.] 13 Det. Leg. N. 131, 107 N. W. 706. A contract by a foreign corporation to construct and equip a factory in Michigan, in the performance of which labor was done, and materials furnished in the state, though all the machinery was shipped into the state, and the corporation had no office or agent therein, did not relate to interstate commerce so that it was not governed by Pub. Acts 1901, p. 317, No. 206, imposing on foreign corporations conditions precedent to the right to sue on contracts made in the state. Id.

19. Hart v. State [Miss.] 29 So. 523. The importation of cigarettes in original packages for personal consumption is a transaction involving interstate commerce and not subject to state legislation. State v. Lowry [Ind.] 77 N. E. 728.

20. Cannot be interrupted inside the state for the sole purpose of evading the interstate rate. Porter v. St. Louis S. W. R. Co. [Ark.] 95 S. W. 453.

21. See 5 C. L. 601.

22. Hadley-Dean Glass Co. v. Highland Glass Co. [C. C. A.] 143 F. 242. A state antitrust statute has no application to a contract for the sale of goods to be manfactured by the vendor in another state and delivered to the vendee in the former. Id. St. Mass. 1903, p. 155, c. 195, § 1, forbidding the use of arms or the great seal of the Commonwealth for advertising or commercial purposes, is not in conflict with the provision of the Federal Constitution investing congress with the power to regulate commerce among the states. Commonwealth v. R. I. Sherman Mfg. Co., 189 Mass. 76, 75 N. E. 71.

the subject shall be free from restrictions or impositions upon it by the states.[23] It includes the power to determine what shall or shall not be deemed in the judgment of the law an obstruction to navigation in any waterway used in carrying on such commerce. Such power is without limitation as to the means[24] and manner in which it shall be exercised, and congress may pass legislation requiring the removal of obstructions and commit the enforcement of such law to one of the administrative departments.[25] The right of the state to preserve the common property, such as water, cannot be destroyed merely because the unlawful obstructer of the water intends to transport it into another state for use therein, and statutes making it unlawful to so transport water are not void as a violation of the interstate commerce clause of the Federal constitution,[26] and may lawfully authorize the building of a structure in the navigable waters within its limits, but the right so granted is held subject to the right of congress at any time to require the removal.[27] In the absence of legislation by congress, a state may improve its lands and promote the general health by authorizing a dam to be built across its interior streams, though they were previously navigable to the sea by vessels engaged in coastwise trade.[28] The act of congress regulating interstate commerce has no application in an action in one state against a railroad company for negligence in causing the death of a servant in another.[29] The Sherman anti-trust law forbids contracts in restraint of interstate commerce, but a contract made as part of the sale of a business and not as a device to control commerce does not fall within the act.[30] The business of insurance is not commerce.[31]

Regulation of traffic in intoxicating liquors.[32]—Under the Wilson act, original packages containing liquor become subject to state authority upon arrival in the state,[33] but in case of an unsolicited shipment, not until delivery by the consignee.[34] The state may exact license for sale of liquor on an interstate ferry,[35] or in original

23. Jewett Bros. & Jewett v. Smail [S. D.] 105 N. W. 738.

24, 25. United States v. Union Bridge Co., 143 F. 377.

26. McCarter v. Hudson County Water Co. [N. J. Eq.] 61 A. 710.

27. United States v. Union Bridge Co., 143 F. 377.

28. Manigault v. Springs, 199 U. S. 473, 50 Law. Ed. ——.

29. McManus v. Oregon Short Line R. Co. [Mo. App.] 94 S. W. 743.

30. Cincinnati, etc., Packet Co. v. Bay, 200 U. S. 179, 50 Law. Ed. ——. The interference, if any, with interstate commerce, contemplated by a contract for the sale of certain river craft, which permits a suspension of payment of instalments of the purchase price in case of serious competition in freight and passenger traffic over a route between two named Ohio points on the Ohio river, and requires the vendors to withdraw from such competition for five years, is too insignificant to render the contract invalid under act of July 2, 1890 (Comp. Stat. 1901, n. 3200), as imposing a restraint upon interstate commerce. Id.

31. State v. Insurance Co. [Neb.] 106 N. W. 767; Commonwealth v. Gregory [Ky.] 89 S. W. 168.

32. See 5 C. L. 603.

33. Hart v. State [Miss.] 39 So. 523.

Note: Under Brown v. Maryland, 12 Wheat. [U. S.] 419, 6 Law. Ed. 678, Federal control of interstate commerce is exclusive until a sale in the original package. By the Wilson Act (1890-26 Stat. 313, c. 728), states have equal police powers over imported and domestic liquors. In re Rahrer, 140 U. S. 545, 35 Law. Ed. 572. As, by its terms, the act effects only the exercise of the police power, the decision in Brown v. Maryland, 12 Wheat. (U. S.) 419, 6 Law. Ed. 678 is, in other respects, still controlling, hence the validity of a statute will depend upon its purpose. If it was designed to tax interstate commerce it obviously is not a police measure, see Postal Tel. v. Taylor, 192 U. S. 64, 48 Law. Ed. 342, but if bona fide a police measure, the revenue, being ancillary to the purpose of the statute, is of no importance, however large it may be. Courts have always distinguished between the direct and indirect regulation of commerce by the state. —5 Columbia L. R. 298, 546.

34. Adams Express Co. v. Com. [Ky.] 92 S. W. 932. Where a liquor dealer outside the state ships by express whisky C. O. D. into the state to one who has not ordered it, and the express company notifies the consignee and he pays them, the transaction comes within the Wilson Act and is not interstate commerce. Id.

35. The exaction by a state of a license fee from a person engaged in selling intoxicating liquors within the state, over a bar, on board a ferry boat engaged in interstate commerce, is authorized by the Wilson Act. Hopplano v. Speed, 199 U. S. 501, 50 Law. Ed. ——.

packages.[36] There is a conflict of authority as to whether under this act a state may regulate the soliciting of orders for liquor to be transported from another state. In South Dakota it has been held that such regulation is proper,[37] while in Alabama [38] and Texas,[39] it is held that it is a violation of the interstate commerce clause of the Federal constitution.

Inspection laws.[40]—A state may lawfully make local regulations and inspection laws, affecting interstate commerce, having for their object the protection of property [41] and protection of the public from fraud and imposition, but a law which directly obstructs commerce between the states is void.[42]

State burdens on foreign commerce.[43] *Such laws must be reasonable.*[44]—Congress can authorize an exercise of police power by a state, which without such authority would be an unconstitutional interference with commerce.[45] The interstate

36. A city ordinance requiring a license of each person or firm selling beer by the barrel, half barrel, or quarter barrel, is not repugnant to the commerce clause of the Constitution of the United States as applied to an individual carrying on an independent domestic business of selling beer by the barrel which has been brought into the state and disposed of by him in the original packages. City of Mobile v. Phillips [Ala.] 40 So. 826.

37. State v. Delamater [S. D.] 104 N. W. 537.

38. Moog v. State [Ala.] 41 So. 166. Statute held to apply only after transportation into state is complete. Id.

39. Donley v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 13, 89 S. W. 553; Ex parte Massey [Tex. Cr. App.] 15 Tex. Ct. Rep. 706, 92 S. W. 1086.

40. See 5 C. L. 603.

41. Law requiring inspection of cattle coming into the state to prevent spread of contagious diseases, held valid. State v. Asbell [Kan.] 86 P. 457.

42. Globe Elevator Co. v. Andrews, 144 F. 871. A matter like fixing the **grades by which grain may be sold** in interstate commerce, and without which it cannot be sold on a large scale, is one which admits of only one uniform system of regulation and is therefore within the exclusive power of congress, and legislation by a state (Id.), which attempts to impose its own inspection on all grain sold, delivered, or stored within its limits to the exclusion of those of other states, imposes a direct burden upon interstate commerce and is unconstitutional and void as a regulation thereof. (Id.).

43. See 5 C. L. 603. A state may not directly tax or impose a burden upon interstate commerce, but it may, under the exercise of its police power, enact laws for the protection of the public within its boundaries indirectly affecting such commerce. Commonwealth v. Strauss [Mass.] 78 N. E. 136.

Exclusive purchase and sale agreements: Rev. Laws (Mass.), c. 568, providing that a person, firm, corporation, or association of persons, doing business in Massachusetts, shall not make it a condition of the sale of goods, wares, or merchandise that the purchaser shall not deal in those of any other person, firm, corporation, or association of persons, is not repugnant to the Federal Constitution as a regulation of interstate commerce, notwithstanding the enactment of the Federal Anti-Trust Law (U. S. Comp. St. 1901, p. 3200), prohibiting contracts directly affecting interstate or foreign commerce by way of restraint of trade or creation of a monopoly. Commonwealth v. Strauss [Mass.] 78 N. E. 136.

Sale or possession of fish and game: Pub. Acts Mich. 1899, No. 88, declaring it unlawful to market or have in possession certain kind of fish, is not, although applied to fish lawfully caught in foreign waters, repugnant to Const. U. S. art. 1, § 8, empowering congress to regulate commerce between the states and with foreign nations. People v. Lassen [Mich.] 12 Det. Leg. N. 857, 106 N. W. 143. Act Cong. May 25, 1900, c. 533, 31 Stat. 187 (U. S. Comp. St. 1901, p. 290), providing that all dead game importation of which is prohibited, or any dead game carried into a state or territory for use, sale, or storage there shall, on its arrival, be subject to the operation of the laws of such state enacted in the exercise of the police powers, to the same extent as if such game had been produced in such state and shall not be exempt therefrom by reason of being introduced therein in original packages, confers on any state the right to enact laws prohibiting the possession of dead game within certain periods, whether taken within or without the state. People v. Hesterberg [N. Y.] 76 N. E. 1032.

Delivery without bill of lading: Kirby's Dig. §§ 530 and 531, providing a penalty for any carrier surrendering any goods in its charge without the surrender of the bill of lading, are not, when applied to interstate commerce and in absence of any congressional legislation on the subject, in conflict with the commerce clause of the Federal constitution. Arkansas Southern Ry. Co. v. German Nat. Bank [Ark.] 92 S. W. 522.

Unclaimed goods: Congress having passed no law regulating the disposition of freight shipped from a point without the state to a consignee within the state, when the consignee refuses to receive the shipment and the consignor refuses to give directions for the disposition of the same, a general state statute providing for the sale of the rejected freight is valid, notwithstanding that the shipment was an interstate one. St. Louis S. W. R. Co. v. Arkansas & T. Grain Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 372, 95 S. W. 656.

44. Jewett Bros. & Jewett v. Small [S. D.] 105 N. W. 738.

45. People v. Hesterberg [N. Y.] 76 N. E. 1032, rvg. 109 App. Div. 295, 96 N. Y. S. 286;

employment of a vessel does not prevent the attachment and enforcement of liens thereon.[46] The gross earning tax law of Texas, imposing a tax computed on the basis of the gross receipts of railways where part of those receipts have been earned by interstate business, has been held not an attempt to regulate interestate commerce.[47] An annual license tax imposed on the business of a foreign corporation engaged in interstate commerce is not a tax on interstate commerce.[48] A state may impose a tax upon different occupations, and so long as there is no discrimination against citizens of another state, such tax is not an interference with interstate commerce,[49] but a tax must not injuriously discriminate against the products of another state or foreign country.[50] A state may tax property employed in interstate commerce the same as all other property.[51] It can tax the privilege of transferring such property, provided it treats nonresidents the same as residents, and subjects all transfers of the same class to the same tax.[52] The franchise or intangible property of one carrying on interstate commerce is liable to taxation in so far as it is operated within the taxing district of the state seeking to subject it.[53] Although the origin of property may be in another state, nevertheless, when it is brought into a state and merged into the mass of general property, there it becomes subject to the tax laws of that state.[54] Thus, credits on bills receivable of a person are taxable as capital invested

State v. Heger [Mo.] 93 S. W. 252; Cameron v. Territory [Okl.] 86 P. 68; Hart v. State [Miss.] 39 So. 523; Wells Fargo Exp. Co. v. State [Ark.] 96 S. W. 189.

46. Although a vessel is enrolled and licensed and engaged in interstate commerce, it can be reached in proceedings brought to enforce liens lawfully created by state authority. Delaney Forge & Iron Co. v. Iroquois Transp. Co. [Mich.] 12 Det. Leg. N. 441, 105 N. W. 527.

47. Galveston, etc., R. Co. v. Davidson [Tex. Civ. App.] 15 Tex. Ct. Rep. 274, 579. 93 S. W. 436; State v. Galveston, etc., R. Co. [Tex.] 97 S. W. 71, rvg. [Tex. Civ App.] 93 S. W. 464.

Note: The tax imposed under this law was in addition to the property tax. This case should not be confused with cases which uphold the doctrine that the state has a right to levy a tax on the property of railroad companies and use the gross earnings of the company derived from state and interstate business in determining the amount of property of the railroad company within the state. [Ed.]

48. American Smelting & Refining Co. v. People [Colo.] 82 P. 531.

49. Tax on local business of foreign meat packing houses. Armour Packing Co. v. Lacy, 200 U. S. 226, 50 Law. Ed. —. Licensing vendors of domestic machinery. Territory v. Russell [N. M.] 86 P. 551. The tax imposed by N. C. Pub. Laws 1903, c. 247, as construed by the state courts, upon such local business of a foreign meat packing house as its sales within the state of products already stored there, on orders received after these products are thus stored, is not invalid as an interference with interstate commerce. Armour Packing Co. v. Lacy, 200 U. S. 226, 50 Law. Ed. —.

50. Commonwealth v. Caldwell, 190 Mass. 355, 76 N. E. 955.

51. People v. Reardon [N. Y.] 77 N. E. 970. A tax imposed by a city on the sleeping cars of a foreign corporation, engaged in interstate commerce to the extent of the value of the average number of cars daily placed in railroad yards in the city for the purpose of preparing them for train service, is valid. City of Covington v. Pullman Co. [Ky.] 89 S. W. 116.

52. People v. Reardon [N. Y.] 77 N. E. 970, afg. 110 App. Div. 821, 97 N. Y. S. 535. Laws 1905 N. Y., pp. 474, 477, c. 241, §§ 315. 324, imposing a tax upon transfers of stock in domestic and foreign corporations, applies only to transfers made within the state and is not in conflict with U. S. Constitution, art. 1, § 8, par. 3, empowering congress to regulate interstate commerce. People v. Reardon [N. Y.] 77 N. E. 970.

53. Covington & C. Bridge Co. v. Covington [Ky.] 89 S. W. 296. A proportional state tax, levied under Sess. Acts 1898, p. 96, c. 38, on the intangible property within the state of a bridge company owning a bridge over a river between the state and another state, is not a tax on interstate commerce, though the bridge is used for interstate commerce by street cars and other vehicles, and though, in arriving at the value, the income is considered, and the income is derived in whole or in part from interstate commerce. Id. Interstate commerce is not interfered with by a franchise tax imposed upon a domestic railway corporation by N. Y. Laws 1896, c. 908, § 182, because no deduction is allowed from the capital stock taken as the basis of the tax, on account of the considerable proportion of its rolling stock, which by familiar course of railway business is always absent from the state. People v. Miller, 202 U. S. 584, 50 Law. Ed. —.

54. Darnell v. Memphis [Tenn.] 95 S. W. 816. A corporation engaged in the sale of oil, which brings its oil from a foreign state into Virginia, and mingles it with the general mass of property in the state, is not, in selling oil in Virginia, either in original barrels or from wagons engaged in interstate commerce in such sense as to preclude a city in Virginia from exacting a license tax from it. Standard Oil Co. v. Fredericksburg [Va.] 52 S. E. 817.

in the state, though the credits are the proceeds of sales of imported goods in original packages, the tax not being on imports.[55] Property in transit from one state to another cannot be properly subjected to local taxation in a taxing district through which it is being transported, but if it be stored for an indefinite time during such transit, at least other than for natural causes or lack of facilities for immediate transportation, it may be lawfully assessed by the local authorities.[56] The fact that an indebtedness due to a nonresident railroad company arose out of the conducting of interstate business does not exempt from garnishment under a foreign attachment.[57]

Regulation of railroads and other carriers.[58]—The purpose of the Interstate Commerce Act is to place all shippers on an absolute equality. Thus railway companies cannot discriminate in furnishing cars to shippers.[59] Under that act, railroads engaged in interstate commerce must file a schedule of rates with the interstate commerce commission and keep copies of its schedule of rates posted in its depots and stations.[60] A state statute requiring carriers under penalty to furnish cars on a prescribed notice excused by nought but "strikes or other public calamity" is void for unreasonableness.[61] A rule by an initial carrier, as part of an agreement for a through rate, reserving to the carrier the right of routing beyond its own line, is not violative of the Interstate Commerce Act requiring joint traffic rates to be filed with the interstate commerce commission, and requiring the commission to prescribe forms of schedules of such rates,[62] neither is it in violation of that part of the act forbidding pooling,[63] especially where such rule serves to break the practice of rebating.[64] Under the act of congress regulating commerce, a carrier, unless authorized by its charter or legislation existing at the time of the adoption of the act, cannot buy a commodity and sell the same to be transported over its lines at a price insufficient to yield its published freight rate after deducting the cost of purchase and delivery.[65] A carrier which has been adjudged to have violated the act to regulate commerce in a specific particular may be restrained from further violations of the act, but cannot be enjoined in general terms from violating the act in the future in any particular.[66] The courts have jurisdiction of actions to recover from the carrier an unjust and unauthorized exaction demanded on an interstate shipment, and collected not only in violation of the Interstate Commerce Act but in violation of the contract made with shipper.[67] An order of a state corporation commission compelling a railway company engaged in interstate commerce to deliver cars containing interstate shipments beyond its right of way to a private siding is an unlawful interference with interstate commerce.[68]

The Safety Appliance Act [69] applies to all cars used in moving interstate commerce.[70]

55. N. Y. Tax Laws 1896, p. 800, c. 908, § 7. People v. Wells, 107 App. Div. 15, 95 N. Y. S. 100.

56. Merchants' Transfer Co. v. Board of Review, 128 Iowa, 732, 105 N. W. 211.

57. Johnson v. Union Pac. R. Co., 145 F. 249.

58. See 5 C. L. 603.

59. United States v. Norfolk & W. R. Co. [C. C. A.] 143 F. 266.

60. Griffin v. Wabash R. Co., 115 Mo. App. 549, 91 S. W. 1015. The posting of copies of such schedule of rates at a railroad station where they were afterward torn down is not a compliance with that act. Id.

61. Houston & T. C. R. Co. v. Mayes, 201 U. S. 321, 50 Law. Ed. —.

62, 63, 64. Southern Pac. Co. v. Interstate Commerce Commission, 200 U. S. 536, 50 Law. Ed. —, rvg. 132 F. 829.

65, 66. New York, etc., R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 50 Law. Ed. —, modifying 128 F. 59.

67. Banner v. Wabash R. Co. [Iowa] 108 N. W. 759.

68. McNeill v. Southern R. Co., 199 U. S. 543, 50 Law. Ed. —.

69. See 5 C. L. 604.

70. A terminal company which receives cars of coal coming from another state, and delivers them within its yards to the engines of a railroad company, is engaged in moving interstate traffic, within safety appliance act (U. S. Comp. St. 1901, p. 3174).

Discrimination in rates.[71]—One purpose of the Interstate Commerce Act was to secure just and reasonable rates without discrimination, favor, preference, or inequity,[72] and to that end to encourage competition.[73] A reduction of rates, whether it originates or is impelled by existing competition,[74] does not lose its involuntary character and become unlawful when necessitated by the competition for business.[75] The reasonableness of rates and the general law respecting discrimination is elsewhere more fully treated.[76] The constitutional power of congress to regulate commerce among the several states includes the power to regulate freight rates, and in construing statutes enacted to that end, freight rates should be construed to mean the net cost to the shipper of the transportation of his property, and such regulations may lawfully apply not only to common carriers, but to all persons and corporations occupying such relation to transportation that the conduct of their business may operate to impair uniformity of rates.[77] A rate for transportation on certain goods made applicable to one person and not to another in the same business is a discrimination, and an order of a state railroad commission making such rate will not be enforced by the courts.[78] Under the Elkins Law, it is unlawful for any person or corporation to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce, whereby such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by the carrier.[79] It may be unlawful rebating to turn back to the shipper through a car line part of the tariff rates without any participation by the railway company.[80] A contract of shipment containing a clause "tariff rate on this shipment is thirty per cent. higher than rates herein named if shipment is not made under this contract" does not show on the face of the contract that it was inhibited by the Interstate Commerce Act.[81] This act applies to all persons interested or affected by the rate, regulation,

United States v. Northern Pac. T. Co., 144 F. 861. A railroad company, which hauls over its line within a state a car of another company employed in moving interstate traffic consigned to a point in another state is engaged in interstate commerce within the meaning of the Safety Appliance Act. United States v. Chicago, etc., R. Co., 143 F. 353. A car received by a railroad company from another railroad company and hauled from one of its yards to another for the purpose of being put in a train and forwarded to its destination in another state is being used in interstate commerce within the meaning of the Safety Appliance Act. United States v. Pittsburgh, etc., R. Co., 143 F. 360.

71. See 5 C. L. 604. See, also, Carriers, 7 C. L. 522.

72, 73, 74, 75. Interstate Commerce Com. v. Chicago G. W. R. Co., 141 F. 1003.

76. See Carriers, 7 C. L. 522.

77. Interstate Commerce Com. v. Reichmann, 145 F. 235.

78. State v. Atlantic Coast Line R. Co. [Fla.] 40 So. 875.

79. U. S. Comp. St. Supp. 1905, p. 599. United States v. Milwaukee Refrigerator Transit Co. 145 F. 1007. Under this act it is unlawful for a corporation, organized to control the interstate transportation of a brewing company, to demand and receive as a consideration for the routing of the brewing company's products over certain lines of railroad a concession equal to one-eighth or one-tenth of the published freight rate. Id. A refrigerator company was incorporated to own and operate a private car line and to have charge of all the interstate transportation of the product of a brewing company. A majority of the brewing company's stock, however, was owned by persons who had no interest in the refrigerator company, and the stock of the latter was bought and paid for by the holders with their own money and in their own interest, none of it being held in trust for the brewing company, though the majority of it was owned by persons who also owned brewing company stock. The brewing company paid its freight in full and received no rebates, nor was it a party to contracts between the refrigerator company and railroad companies by which the refrigerator company received a rebate of one-eighth to one-tenth of all freight moneys on all interstate traffic it controlled. Held, that such facts were insufficient to establish that the brewing company had received rebates in violation of Elkins Act. Id.

80. A private car company, which delivers its cars to railroad companies to be furnished indiscriminately for the use of shippers, receiving pay for such use from the railroad companies on a mileage basis, and rendering money to shippers, is within the provision of U. S. Comp. St. Supp. 1905, p. 599, making it unlawful for any person or corporation to offer, grant, give, or solicit, accept or receive any rebate, etc. Interstate Commerce Com. v. Reichmann, 145 F. 235.

81. Chicago, etc., R. Co. v. Hare [Ind. App.] 75 N. E. 867.

or practice under consideration, and equity has jurisdiction to grant an injunction at the instance of the United States against carriers and other corporations restraining them from giving and receiving rebates.[82]

(§ 2) *B. Regulation of trade and commerce within a state.*[83]—A state may regulate commerce within its borders and may require certain articles thereof to bear certain tags or labels before being sold.[84] The fact that a railroad corporation is engaged in interstate commerce does not exempt it from control by the state in respect to business done therein not directly connected with traffic between the states.[85] Laws wholly invalidating sales of stocks of merchandise in bulk and out of the usual course of business are probably in essence a domestic commerce regulation, but as their real object is to prevent fraudulent conveyances, they are elsewhere treated.[86]

§ 3. *The interstate commerce commission; its functions and proceedings before it.*[87]—Common carriers of freight, having adopted classification sheets fixing transportation charges and having filed the same with the interstate commerce commission, are, as well as the shippers, bound thereby.[88] The enforcement of an order of the interstate commerce commission directing common carriers to desist from maintaining a rule adopted by them may be decreed by a Federal circuit court if it finds that such rule is, for any reason, in violation of the Interstate Commerce Act, although such reason may not be the one relied upon by the commission to invalidate the rule.[89] Under the Elkins Law resort may be had to court without going before the interstate commerce commission for discriminations offensive to either the Elkins Law or the Interstate Commerce Act.[90]

§ 4. *The department of commerce and labor; its functions.*—The primary purpose of Commerce and Labor Act was legislation to enable congress, by information secured through the work of officers charged with the execution of that law, to pass such remedial legislation as might be found necessary.[91] Under this act the commissioner of corporations is required to make investigations into the organization, conduct, and management of the business of all corporations or combinations engaged in interstate or foreign commerce other than common carriers,[92] and is given the same powers in that respect as is conferred on the interstate commerce commission with respect to carriers, including the power to subpœna and compel the attendance of witnesses and to administer oaths and require the production of documentary evidence.[93] This act contemplates that he shall proceed by private hearings, and a person who appears before him on his demand or by his request and gives testimony or produces documents, although not sworn,[94] is entitled to the same privileges and immunities as though his attendance was compelled by subpœna and his testimony given under oath.[95] This immunity is, however, limited to individuals who as witnesses give testimony or produced evidence, and does not extend to the corporation whose officers or agents gave the testimony.[96]

§ 5. *State railroad and corporation commission.*[97]—The railroad commission

82. United States v. Milwaukee Refrigerator Transit Co., 145 F. 1007. The attorney general has authority to institute a proceeding to restrain rebating by interstate carriers of his own motion. Id.

83. See 5 C. L. 605.

84. Alabama Nat. Bank v. C. C. Parker & Co. [Ala.] 40 So. 987; Zipperer v. Doyle, 124 Ga. 895, 53 S. E. 505.

85. Act abolishing fellow-servant rule is valid. McGuire v. Chicago, etc., R. Co. [Iowa] 108 N. W. 902.

86. See Fraudulent Conveyances, 5 C L. 1556.

87. See 5 C. L. 605.

88. Smith v. Great Northern R. Co. [N. D.] 107 N. W. 56.

89. Southern Pac. Co. v. Interstate Commerce Commission, 200 U. S. 536, 50 Law. Ed. —.

90. Interstate Commerce Com. v. Chicago G. W. R. Co., 141 F. 1003.

91. U. S. Comp. St. Supp. 1905, p. 63; United States v. Armour & Co., 142 F. 808.

92. United States v. Armour & Co., 142 F. 809.

93, 94, 95, 96. United States v. Armour & Co., 142 F. 808.

97. See 5 C. L. 607.

of Georgia is not a body corporate but an aggregate body composed of individual commissioners.[98] The railroad commissioners of Florida are statutory officers whose powers are only those conferred upon them by statute, and they are empowered to make rates upon subjects of transportation and not to make rates for particular persons or corporations.[99]

COMMITMENTS; COMMON AND PUBLIC SCHOOLS, see latest topical index.

COMMON LAW.[1]

The common-law rules relating to particular subject matters are treated in the topics appropriate thereto,[2] and the enforcement by one state of the common law of another is also given separate treatment.[3] The common law is assumed in force in another state,[4] and to be the same as the law of the forum.[5] In its entirety it never was in force in Tennessee, having never been adopted by any authority.[6] The common law remains in force in Virginia, except when changed by statute or the constitution, which operate prospectively only, unless an intention to the contrary is clearly expressed.[7]

COMMUNITY PROPERTY; COMPARATIVE NEGLIGENCE; COMPLAINT FOR ARREST; COMPLAINTS IN PLEADING, see latest topical index.

COMPOSITION WITH CREDITORS.[8]

A purchase by a third person of all claims against an insolvent is not a composition,[9] and accordingly is not invalidated by a secret agreement by which one creditor was paid in full by such purchaser.[10] A composition does not bind assignees of whose rights the debtor had notice.[11] An undertaking by one creditor to pay the others their equitable share in consideration of a transfer to him of the debtor's property is an arrangement in the nature of a composition, and a creditor's agreement with the transferee to accept a certain per cent. of his claim, made after receipt by the other creditors of a similar amount, being based, in part at least, upon the composition, is supported by a sufficient consideration.[12]

COMPOUNDING OFFENSES.[13]

Contributions for the purpose of making good a defalcation are not illegal so far as the making good of the civil liability of the defaulter is concerned, and where such contributions are made by members of a building association acting in their individual capacity to make good the shortage of the secretary, such action is not

98. Railroad Commission of Georgia v. Palmer Hardware Co., 124 Ga. 633, 53 S. E. 193.

99. State v. Atlantic Coast Line R. R. Co. [Fla.] 40 So. 875.

1. See 5 C. L. 607.

2. See particularly Criminal Law, 5 C. L. 883, as to the common law of crimes.

3. See Conflict of Laws, 5 C. L. 610.

4. On a question of mortgages. Scholten v. Barber, 217 Ill. 148, 75 N. E. 460.

5. Brennan v. Electrical Installation Co., 120 Ill. App. 461.

6. Common-law marriage. Smith v. North Memphis Sav. Bank [Tenn.] 89 S. W. 392. Obtained in Tennessee only as part of the laws of North Carolina in so far as it had been adopted and was in force in that state when this territory was ceded by it to the Federal government. Id.

7. Swift & Co. v. Newport News [Va.] 52 S. E. 821.

8. See 5 C. L. 608.

9, 10. Harris v. Zier [Wash.] 86 P. 928.

11. Defense that after assignment to plaintiff the assignor had signed a compromise agreement, held insufficient. Kamber v. Becker, 27 Pa. Super. Ct. 266.

12. Williams Shoe Co. v. C. Gotzian & Co. [Iowa] 107 N. W. 807. Evidence showed that transferee did not agree to pay the debtor's indebtedness in full. Id. Promise by transferee not within statute of frauds. Id.

13. See 5 C. L. 608.

in the nature of compounding a felony, in the absence of any promise or agreement on the part of the building association not to institute or cause to be instituted criminal proceedings;[14] and a member so contributing cannot thereafter maintain a suit to set aside the cancellation of his credit on the ground that the contract which he thereby entered into was illegal because compounding a felony.[15]

CONCEALED WEAPONS, see latest topical index.

CONCEALING BIRTH OR DEATH.[16]

CONDEMNATION PROCEEDINGS; CONDITIONAL SALES; CONFESSION AND AVOIDANCE, see latest topical index.

CONFESSION OF JUDGMENT.[17]

Definition and Nature (675).
The Warrant and Authority Conferred (675).
The Judgment (676).

Definition and nature.[18]—A confession of judgment, as ordinarily employed, means the entry of a judgment upon the admission or confession of the debtor without the formality, time, or expense involved in an ordinary proceeding.[19] When the warrant runs generally to any attorney, its acceptance by one to whom it is given serves the office of an appearance [20] without the presence of the debtor in the state.[21] Signing an answer, entering appearance, and confessing judgment upon certain notes before suit was filed, at the solicitation of plaintiff's attorney, is equivalent to the giving of a power of attorney to confess judgment, which is illegal and void in Kentucky.[22]

The warrant and authority conferred must be clear and explicit and must be strictly pursued.[23] The warrant is good during the time its terms intend [24] and need not be executed at term unless so intended.[25] It runs to or in favor of persons only who are clearly described,[26] but when so provided may attach to a renewal or extension of the original obligation.[27] A warrant to appear "at the suit" of the

14, 15. Richter v. Phoenix Bldg. & Loan Co., 7 Ohio C. C. (N. S.) 360.

16. No cases have been found for this subject since the last article. See 5 C. L. 608.

17, 18. See 5 C. L. 608.

19. Cuykendall v. Doe [Iowa] 105 N. W. 698. A warrant that an attorney may appear for the debtor "at the suit" of the creditor upon a note and confess judgment in his favor does not require an action to be begun. Id. Embodying a power of attorney in a note, authorizing an appearance and confession of judgment on failure to pay it at maturity, is a waiver of process. Hutchinson v. Palmer [Ala.] 40 So. 339.

20. On presenting a warrant running generally to any attorney for confession of judgment, its acceptance is, within meaning of the warrant, an appearance at the suit of the holder. Cuykendall v. Doe [Iowa] 105 N. W. 698.

21. Cuykendall v. Doe [Iowa] 105 N. W. 698.

22. Ky. St. 1903, § 416. Aultman & Taylor Co. v. Meade [Ky.] 89 S. W. 137. Judgment rendered thereon without service of process or other appearance was void. Id.

23. Rasmussen v. Hagler [N. D.] 108 N. W. 541.

24. A provision in a warrant for a stay of execution until Jan. 1, 1885, being the date the note is due, merely indicates that if confessed before due no execution should issue, and does not imply that the power to confess if exercised at all must be exercised before the note is due. Cuykendall v. Doe [Iowa] 105 N. W. 698.

25. Confession of judgment during vacation is expressly authorized by a warrant authorizing confession, "as of the last week, or any other subsequent term or time after the date hereof." Cuykendall v. Doe [Iowa] 105 N. W. 698.

26. A warrant of attorney to confess judgment in favor of a specified person gives no authority to confess judgment in favor of another person, hence, a warrant authorizing confession in favor of the Bank of Minot on a note did not authorize a judgment in favor of some subsequent holder. Rasmussen v. Hagler [N. D.] 108 N. W. 541. A cognovit receiting "And the said Max Weber defendant in the above entitled case by Otis King Hutchinson his attorney, comes" etc., being in the usual form, is sufficient as against the objection that the judgment recites that defendant confessed by his attorney in fact, whereas the warrant of attorney ran to an attorney at law. Weber v. Powers, 114 Ill. App. 411.

27. Under a holding over in accordance

creditor does not require the bringing of action.[28] An attorney confessing judgment has no authority to waive the statute of limitations.[29]

The judgment should clearly show the appearance by attorney, the confession, date, amount, interest, if any, and costs, and be officially authenticated.[30] On some classes of debts directions for computation of the amount and interest must be filed,[31] but failure to do so is held not jurisdictional,[32] nor is the officer's failure to enter particulars of the obligation.[33] On a "note" given for money "theretofore had" and "then due" sufficiently states the nature and circumstances of the debt.[34] Judgment by confession is as valid and binding as if rendered on regular service of process,[35] and defects not jurisdictional [36] will be no ground for collateral attack. A judgment regularly confessed according to its terms under a warrant of attorney will be given full faith and credit in another state [37] according to the law where confessed,[38] even though judgments so confessed are invalid by its own laws.[39] Courts exercise an equitable jurisdiction over judgments entered by confession under a power of attorney or cognovit,[40] and such jurisdiction should be exercised liberally to open and let in defenses.[41] Judgment on a judgment may include principal and interest on the original debt from the date when it began, if that was according to proper practice excluded from the judgment sued on.[42]

with the terms of the original lease providing for confession of judgment, such confession may be made. Weber v. Powers, 114 Ill. App. 411.

28, 29. Cuykendall v. Doe [Iowa] 105 N. W. 698.

30. Record entry of judgment by confession, though brief and informal, which shows with clearness the appearance by attorney, the confession by him of judgment, the date thereof, the principal sum for which appellant was indebted, the amount of costs, and the date from which interest was to be computed, and the entry attested by the official signature of the prothonotary, is sufficient. Cuykendall v. Doe [Iowa] 105 N. W. 698.

31. The written direction to the officer showing the debt and time from which interest is to be reckoned, required of an attorney confessing judgment under § 14, p. 391, c. 110, Laws Del. 1852, appears to apply only to cases where confession is made upon a contract providing for a penalty. Cuykendall v. Doe [Iowa] 105 N. W. 698.

32. The failure of an attorney confessing judgment for a penalty under a warrant to file a written direction, setting down the real debt and the time from which interest is to be calculated, is not a jurisdictional matter and does not authorize the opening of the judgment. Surety bond. State v. Donahoe [Del.] 63 A. 643.

33. The real debt and the date of interest. State v. Donahoe [Del.] 63 A. 643.

34. Code Civ. Proc. § 1274, subd. 2, requiring such statement to prevent fraud upon creditors. Anderson v. Shutts, 99 N. Y. S. 893.

35. Hutchinson v. Palmer [Ala.] 40 So. 339. The **same presumptions will be indulged in as** to judgments by confession as **in the case of ordinary judgments** of superior courts of general jurisdiction. Weber v. Powers, 114 Ill. App. 411. A confession for $16.68 costs is not excessive under Code Civ. Prac. § 1275, providing that defendant on confession of judgment shall be liable for $15 costs plus taxable disbursements, although the record showed no formal taxation by the clerk, as it will be assumed that he did tax costs and disbursements. Anderson v. Shutts, 99 N. Y. S. 893. It will be presumed that an attorney confessing judgment against his client on the trial of the case has authority to so act. Harniska v. Dolph [C. C. A.] 133 F. 158.

36. Judgment by confession will not be held invalid because note and warrant of attorney were not placed and kept on file in court where the judgment was entered. Cuykendall v. Doe [Iowa] 105 N. W. 698. Judgment rendered for creditor's assignee without authority and jurisdiction, void. Rasmussen v. Hagler [N. D.] 108 N. D. 541.

On an appeal from a motion to vacate a judgment entered by confession, errors in the judgment, if any, are not reviewable. Weber v. Powers, 114 Ill. App. 411. By the cognovit, warranted by the power of attorney, errors, if any have been released. Id.

37. Cuykendall v. Doe [Iowa] 105 N. W. 698.

38. Though the debt would have been barred in the present forum, yet the judgment is good if it was still actionable when confession was made in the place of contract. Cuykendall v. Doe [Iowa] 105 N. W. 698.

39. Confession by warrant of attorney invalid in Iowa. Cuykendall v. Doe [Iowa] 105 N. W. 698.

40, 41. Hoover v. Holland, 120 Ill. App. 4. Notes payable in 1875, with small payments indorsed thereon after the statute had run as a bar, confessed in 1899, ten years after death of payee, constituted good grounds for opening judgments and allowing defendants to make their plea and defense upon the merits. Id. Court will take notice that a certain attorney s a licensed practicing attorney of the state. Id.

42. Cuykendall v. Doe [Iowa] 105 N. W. 698.

CONFESSIONS; CONFISCATION, see latest topical index.

CONFLICT OF LAWS.

§ 1. Extraterritorial Effect of Laws in General (677).
§ 2. Contracts in General (677).
§ 3. Effect of Status or Domicile (679).
§ 4. Matters Relating to Personal Property (679).
§ 5. Effect of Public Policy (679).
§ 6. Protection of Citizens in State of Forum (679).
§ 7. Contracts Respecting Realty (679).
§ 8. Application of Remedies (679). Presumptions and Judicial Notice and Pleading of Foreign Laws (680).
§ 9. Torts (681).

§ 1. *Extraterritorial effect of laws in general.*[43]—Except as to penal laws[44] the statutes of foreign states will generally be enforced as a matter of comity,[45] subject to considerations of public policy.[46] With respect to lands ceded to the United States by the states, the laws in force when the cession was made continue unaffected by subsequent legislation by the states.[47] The Federal courts follow the state law in matters of local concern,[48] but not in matters of general law or Federal questions,[49] and the binding effect of state decisions is likewise limited.[50]

§ 2. *Contracts in general.*[51]—All matters bearing upon the execution, interpretation, and existence of a contract,[52] and the measure of damages for the breach thereof,[53] are determined by the law of the place where the contract is made; though there are cases holding, in apparent contradiction to the above rule, that if it appears by the terms or nature of the contract that it was to be executed or performed in another country, the law of the place of execution governs.[54] Matters connected

43. See 5 C. L. 610.

44. A statute creating a cause of action for wrongful death is not penal (Denver, etc., R. Co. v. Warring [Colo.] 86 p. 305), but one giving a fixed recovery regardless of damage is so (Raisor v. Chicago & A. R. Co., 117 Ill. App. 488).

45. See post, § 5, Effect of Public Policy.

46. See post, § 5.

47. Repealed act giving recovery for death by wrongful act held to remain in force in Brooklyn navy yard. McCarthy v. Packard Co., App. Div. 436, 94 N. Y. S. 203.

48. Courts of bankruptcy follow the state law in ascertaining the validity and priority of liens against property of bankrupts. Mechanics lien. Morgan v. First Nat. Bank [C. C. A.] 145 F. 466. See many cases applying this rule in bankruptcy, 7 C. L. 387.

49. The general law of commerce, not the local law, controls in Federal courts. Validity of contract limiting liability. Macfarlane v. Adams Exp. Co., 137 F. 982.

50. See Stare Decisis, 6 C. L. 1510.

51. See 5 C. L. 611.

52. Middle States L. Bldg. & Const. Co. v. Miller's Adm'r, 104 Va. 464, 51 S. E. 846. Interpretation. Douglass v. Paine [Mich.] 12 Det. Leg. N. 527, 104 N. W. 781. Existence and validity. Contract to transport freight. Frasier v. Charleston, etc., R. Co. [S. C.] 52 S. E. 964. Validity. Tri-State Amusement Co. v. Forest Park Highlands Amusement Co., 192 Mo. 404, 90 S. W. 1020. Defenses and discharge of contract. Defense of discharge of surety on promissory note because of failure of payee to sue principal debtor. Thomas v. Clarkson [Ga.] 54 S. E. 77. Contract valid where made is valid everywhere. Studebaker Bros. Co. v. Mau [Wyo.] 82 P. 2. Contention tht plaintiffs could not recover a judgment which they could not obtain in the state in which the contract was made is untenable. Hunter v. Wenatchee Land Co., 36 Wash. 541, 79, P. 40. Rights of the parties are to be determined by the law of the place where made. Hall v. Western Union Tel. Co., 139 N. C. 369, 52 S. E. 50. An indorser's liability is governed by the law of the place where the indorsement was made, irrespective of the place where the note was made.. Colonial Nat. Bank v. Duerr, 108 App. Div. 215, 95 N. Y. S. 810. A contract between a carrier and a shipper made in Missouri, by which the carrier agreed to divert the shipment to a different destination in Texas, was govered by the laws of Missouri. Hurst v. St. Louis & S. F. R. Co. [Mo. App.] 94 S. W. 794.

53. A contract made in Illinois for the purchase and sale of cattle then in Montana, and to be there dellvered in the absence of any provision or extrinsic circumstances indicating a different intention, is govered by the law of Montana with respect to the measure of damages for its breach. Home Land & Cattle Co. v. McNamara [C. C. A.] 145 F. 17.

54. Douglass v. Paine [Mich.] 12 Det. Leg. N. 527, 104 N. W. 781. Where offer to buy was made in one state and accepted in another, held to be governed by the laws of the latter, though payment could be made in either state. Id. An option to sell land being made to be performed in the state where the land is located is governed by the law of such state. Kirby-Carpenter Co. v. Burnett [C. C. A.] 144 F. 635. Under Rev. Civ. Code § 1255, negotiability of a note is determined by law of the place of payment. Barry v. Stover [S. D.] 107 N. W. 672.

with the performance and legality of the object of the contract are regulated [55] by the law prevailing at the place of performance, and matters respecting the remedy depend upon the lex fori.[56] These rules are not changed by the taking of foreign security.[57] Where a note or obligation is valid where made and does not there conflict with any usury law, it is valid in any state in which it is sought to be enforced.[58] The intention of the parties governs in all cases, the above rules simply stating the intent which the law presumes in the absence of facts showing a contrary intention.[59] A contract is made where one party, either by himself or his duly authorized agent, unqualifiedly accepts the offer of the other.[60] As a general rule, where an insurance policy must be countersigned, it is deemed to have been made in the state where it is so countersigned.[61] Where a beneficial society depends for its power to do business on the statutes of two states, one where it is organized and the other wherein it is permitted to do business as a foreign corporation, the statute of the latter state controls as to who may be beneficiaries in cases originating in such latter state.[62]

55. Sale of liquor made in foreign state is valid without license in the buyer's state where suit was brought. Shiretzki v. Julius Kessler & Co. [Ala.] 37 So. 422. See, also Intoxicating Liquors 6 C. L. 165.

56. See post, § 7, Application of Remedies.

57. Where a loan by a Maryland building and loan association to a citizen of Virginia was secured by a mortgage on property in the latter state, held valid and construction was to be determined by the laws of Maryland. Middle States L. Bldg. & Const. Co. v. Miller's Adm'r, 104 Va. 464, 51 S. E. 846. Note valid where made is valid everywhere though its payment is secured by a mortgage or other security upon lands situated in another state other than that of its execution. Bank v. Doherty [Wash.] 84 p. 872.

58. Note executed and payable in one state. Bank v. Doherty [Wash.] 84 P. 872. But see 5 C. L. 612, n. 49, and also extensive note on subject on same page.

59. Home Land & Cattle Co. v. McNamara [C. C. A.] 145 F. 17. Other considerations being equal, the presumption is that the law where the performance is to take place is the law under which the performance shall be governed. Id. The law of the state where a note is payable and by which the parties intend its validity and enforceability should be governed controls. Vennum v. Mertens [Mo. App.] 95 S. W. 292.

60. Where offer to buy was transferred by seller's agent to the seller in another state and there accepted by him. Douglass v. Paine [Mich.] 12 Det. Leg. N. 527, 104 N. W. 781. Order given traveling salesman in one state subject to acceptance by salesman's principal in another state when accepted by the principal in such other state, held a contract of the latter. Bowlin Liquor Co. v. Brandenburg [Iowa] 106 N. W. 497. A policy of insurance on property in the state issued by a foreign insurance company, having no agent in the state, at its home office and on application of the insured, held a contract of the state of the domicile of the insurer. Swing v. Brister & Co. [Miss.] 40 So. 146. Loan made by a foreign building and loan association through its Michigan agent, on Michigan real estate and the Michigan agent was authorized to receive payments on the loan and on the stock subscribed for by the borrower, held a Michigan contract. Cobe v. Summers [Mich.] 12 Det. Leg. N. 965, 106 N. W. 707. Where a contract made by an infant for plaintiff's services was executed in New York was expected to be performed there, and a large portion of the services were performed in that state, where the agreement was also ratified by the infant after she became of age, held agreement was governed by New York laws. Parsons v. Teller, 97 N. Y. S. 808. A note dated in Ohio, payable in Ohio, and whose first inception as a legal contract was when it was discounted in Ohio, held an Ohio contract. Colonial Nat. Bank v. Duerr, 108 App. Div. 215, 95 N. Y. S. 810. Rights of parties under insurance policy held governed by laws of Ohio, the policy so stating, and it being executed and issued in Ohio, and it being payable there, and all premiums and assessments being also payable there, though insured and beneficiaries at all times resided in New York. Burns v. Burns, 109 App. Div. 98, 95 N. Y. S. 797. Where foreign building and loan association had a local branch authorized to collect dues, receive applications, and to whose treasurer interest and dues were payable, held a contract entered into though the local office was a local contract, though mortgage was payable in foreign state. Gallettey v. Strickland [S. C.] 54 S. E. 576. Where agreement for the taking up of certain notes was made in Massachusetts, to be completed by the payment in Massachusetts to the Boston correspondent of the holder of the notes, which was a New Hampshire corporation, of a sight draft drawn by it on the plaintiff, in case defendant signed and delivered to plaintiff in Massachusetts the note sued on, which was signed in New Hampshire but dated "Boston," the contract was a Massachusetts contract, though the note was mailed to plaintiff in Boston by defendant in New Hampshire. Jennings v. Moore, 189 Mass. 197, 75 N. E. 214.

See cases in Intoxicating Liquors, 6 C. L. 165, as to where "sale" was made within regulative statutes.

61. Hardiman v. Fire Ass'n, 212 Pa. 383, 61 A. 990.

62. Dennis v. Modern Brotherhood of America [Mo. App.] 95 S. W. 967.

Interest is governed by law of state where contract was made and to be executed.[63] The special applications of these rules to contracts for carriage into other states, or which are sued on in other states, will be found in Carriers.[64]

Whether a trust of realty and personalty created by a trust deed is valid or not should be determined by the law of the state where it is to be held and administered.[65]

§ 3. *Effect of status or domicile.*[66]—The personal estate of a deceased person must be distributed according to the law of his domicile, irrespective of the place of administration,[67] and this governs the right to interest on legacies.[68] The validity of marriage depends on the law of the domicile, not the place of marriage or of former domicile.[69]

§ 4. *Matters relating to personal property.*[70]

§ 5. *Effect of public policy.*[71]—The law of comity is not a law of absolute obligation, and its principles can never be invoked in aid of the enforcement of foreign laws, if such enforcement would contravene the settled policy or positive law [72] of the state of the forum.

§ 6. *Protection of citizens in state of forum.*[73]—Comity will not intervene to enforce the laws of a foreign state when so to do would be prejudicial to the interests of citizens of the state of the forum.[74]

§ 7. *Contracts respecting realty.*[75]—The law of the situs governs in regard to all rights, interests, and titles in and to immovable property.[76]

§ 8. *Application of remedies.*[77]—The lex fori governs as to the enforceability of a contract,[78] including the availability of defenses,[79] and as to all matters of pleading and practice, including limitations [80] and exemptions,[81] hence the validity of stipulations in a contract limiting the time within which an action may be brought thereon is governed by the lex fori.[82] Proceedings antecedent to and creative of the

63. The Mary E. Bourke [C. C. A.] 145 F. 909.

64. See Carriers, 7 C. L. 522.

65. Robb v. Washington & J. College [N. Y.] 78 N. E. 359.

66. See 5 C. L. 614.

67. In re Titterington's Estate [Iowa] 106 N. W. 761.

68. In re Kucielski's Estate, 49 Misc. 404, 99 N. Y. S. 828.

69. Travers v. Reinhardt, 25 App. D. C. 567.

70, 71. See 5 C. L. 614.

72. Swing v. Thomas, 120 Ill. App. 235. Baltimore & O. R. Co. v. Chambers [Ohio] 76 N. E. 91. Studebaker Bros. Co. v. Mau [Wyo.] 82 P. 2. Rev. St. 1899, § 2837, regarding legislation of conditional sales, does not apply to such a sale made in another state of property located in that state and not intended to be removed therefrom, though it is subsequently removed without the consent of the vendor. Id. No action can be maintained in the courts of Ohio upon a cause of action for wrongful death occurring in another state, except where the person wrongfully killed was a citizen of Ohio. Baltimore & O. R. Co. v. Chambers [Ohio] 76 N. E. 91. Exemption of common carrier for liability held not enforceable, though valid under lex loci contractus. Lake Shore & M. S. R. Co. v. Teeters [Ind.] 77 N. E. Where mortgaged chattels are removed to another state without the knowledge or consent of the mortgagee, the mortgage remains a lien and will be enforced in the other state, though not filed there, unless the statutes of such state require the filing of foreign mortgages. Yund v. First Nat. Bank [Wyo.] 82 P. 6. Foreign law giving $5,000 for death by wrongful act regardless of damage. Raisor v. Chicago & A. R. Co., 117 Ill. App. 488.

73. See 5 C. L. 614.

74. Studebaker Bros. Co. v. Mau [Wyo.] 82 P. 2.

75. See 5 C. L. 615.

76. Mortgage and contract affecting land. Morris v. Linton [Neb.] 104 N. W. 927. Trust to acquire lands and erect building. Held validity of trust and competency of donee is to be determined by laws of the state where the trust is to be administered. Mount v. Tuttle, 183 N. Y. 358, 76 N. E. 873. Lex rei sitae controls in the construction of a will executed in another state by a resident thereof devising lands in Ohio. Hosler v. Haines, 7 Ohio C. C. (N. S.) 261.

77. See 5 C. L. 615.

78. Studebaker Bros. Co. v. Mau [Wyo.] 82 P. 2.

79. Suit to foreclose a mortgage securing a note payable in another state. Barry v. Stover [S. D.] 107 N. D. 672.

80. Thomas v. Clarkson [Ga.] 54 S. E. 77.

81. Where a debt due from a foreign corporation, having an office and an agent in this state, for labor performed in another state, is garnished in this state, the exemption laws of the forum apply. Stone v. Drake [Ark.] 96 S. W. 197.

82. Validity of stipulation as to limitations held governed by lex fori the acts of negligence charged against defendant car-

cause of action like those leading up to a foreign judgment,[83] or the notice prerequisite to a liability,[84] are not governed by the lex fori but by the lex loci. A subsequent act cannot deny all remedy for a cause of action of foreign origin recognized in the state.[85] The right of ancillary administrators to costs is procedure governed by the lex fori.[86] In garnishment the law of the forum so far controls that a nonresident casually present in the state may be garnished.[87]

Presumptions and judicial notice and pleading of foreign laws.[88]—When necessary to sustain the cause of action,[89] foreign laws must be pleaded and proved [90] as a matter of fact,[91] and not being proved may, in some cases, be ground for a new trial,[92] unless waived by neglect to enter a timely objection.[93] The written law of a foreign country must be proved by the production, duly authenticated, of the law itself, or by the reports or other authorized publications, duly proved, of such law.[94] Where the foreign statutes go to the validity of the contract in suit, it must be proven that such statutes were in force at the time of the execution of the contract.[95] The construction of foreign laws is for the court,[96] and in determining the law of such foreign state, equal weight must be given to statutory enactments and judicial constructions of the courts of such jurisdiction.[97] Though a court is controlled by the decisions of the courts of a foreign state in determining the law of such state, still it is at liberty to differ from the judgment of the foreign court as to the application of the law to the facts.[98] In the absence of proof to the contrary, the law of a foreign state is presumed to be the same as the lex fori,[99] but this rule does not apply to positive statutory enactments.[1] In the absence of proof it is presumed that the common law exists in a sister state,[2] unless such state was carved out

rier; having occurred after the goods have reached their destination in the state of the forum. Southern Kan. R. Co. v. Burgess Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 191, 90 S. W. 189.

83. Circumstances under which husband may sue wife in forum need not be pleaded in action on foreign judgment for him against her. Splane v. Splane, 29 Pa. Super. Ct. 185.

84. The Pullman Co. v. Woodfolk, 121 Ill. App. 321.

85. Brennan v. Electrical Installation Co., 120 Ill. App. 461.

86. In re Kucielski's Estate, 49 Misc. 404, 99 N. Y. S. 828.

87. Harris v. Balk, 198 U. S. 215, 49 Law. Ed. 1023. This case settles in the negative the doctrine that the debt had situs only at the debtor's domicile, preventing garnishment elsewhere.

88. See 5 C. L. 615.

89. Where, in an action to recover for injury to freight shipped from a foreign state, the carrier sets up a special contract, the consignee may show that the contract was void under the laws of the foreign state without pleading such laws. Frasier v. Charleston & W. C. R. Co. [S. C.] 52 S. E. 964.

90. Brennan v. Electrical Installation Co., 120 Ill. App. 461; Lee v. Missouri Pac. R. Co., 195 Mo. 400, 92 S. W. 614; Electric ireproofing Co. v. Smith, 99 N. Y. S. 37. Must be pleaded. Audley v. Townsend, 96 N. Y. S. 439. Court will not take judicial notice thereof. Code Civ. Proc. §§ 3150, 3452, 3453. McKnight v. Oregon Short Line R. Co. [Mont.] 82 P. 661. That the law of the places of contract governs must be pleaded, else the lex fori governs. Alteration of note by parol held ineffectual by laws of Oklahoma. Nederman v. Bank of Cass County, 14 Okl. 417, 78 P. 382.

91. McKnight v. Oregon Short Line R. Co. [Mont.] 82 P. 661; Lee v. Missouri Pac. R. Co., 195 Mo. 400, 92 S. W. 614; Robb v. Washington & J. College [N. Y.] 78 N. E. 359. Appellate court can only look to evidence offered on the trial. Mercantile Guaranty Co. v. Hilton [Mass.] 77 N. E. 312.

92. Robb v. Washington & J. College [N. Y.] 78 N. E. 359.

93. So held where objection was first made after trial had begun. Lee v. Missouri Pac. R. Co., 195 Mo. 400, 92 S. W. 614. See Pleading, 6 C. L. 1008.

94. Oral statement by counsel when not even under oath held insufficient. People v. Rosenzweig, 47 Misc. 584, 96 N. Y. S. 103.

95. Thomas v. Clarkson [Ga.] 54 S. E. 77.

96. Frasier v. Charleston & W. C. R. Co. [S. C.] 52 S. E. 964.

97. Studebaker Bros. Co. v. Mau [Wyo.] 82 P. 2.

98. Lee v. Missouri Pac. R. Co., 195 Mo. 400, 82 S. W. 614.

99. Campbell v. Campbell [Iowa] 106 N. W. 583; Southern Kansas R. Co. v. Burgess Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 191, 90 S. W. 189. Where defendant pleaded and relied on local law, and there was some evidence of foreign law, held he could not rely on the presumption that, in the absence of evidence to the contrary, foreign laws are presumed to be the same as those of the forum. Bowlin Liquor Co. v. Bradenburg [Iowa] 106 N. W. 497.

1. Robb v. Washington & J. College [N. Y.] 78 N. E. 359; Wilcox v. Bergman [Minn.] 104 N. W. 955.

2. Robb v. Washington & J. College [N.

of territory which was never subject to the laws of England, and in such case the lex fori governs in the absence of proof of the foreign law,[3] or it is sometimes held that identity of law is presumed.[4] In determining what constitutes the common-law rule, the decisions of the courts of the state of the forum control.[5]

§ 9. *Torts.*[6]—A statute creating a cause of action for wrongful death is not penal, and the cause of action being transitory, it may be enforced in any state or country whose public policy is not opposed to the recognition and enforcement thereof,[7] or penal in its nature.[8] In such cases, unless contrary to the public policy of the forum, the right of action[9] and plaintiff's legal capacity to sue[10] depend solely on the statute of the state where the wrongful act is committed. Thus, a liability by statute will be enforced only when prerequisite notices to such liability have been given,[11] and a recovery in a jurisdiction, other than that where the liability arises, will not justify a distribution of the fund not in accordance with the statute creating the right,[12] but such statute cannot follow the fund when once it has been collected into the domicile of the beneficiary and determine whether it shall or shall not be there treated as exempt from the debts of the deceased.[13] Such question is purely one of local law.[14] An action for mental suffering caused by failure to deliver a telegram is ex delicto and is maintainable in the state to which the telegram is sent, though the cause of action is not recognized in the state from which the telegram was sent,[15] and in such cases the lex fori governs the question of damages.[16]

CONFUSION OF GOODS; CONNECTING CARRIERS; CONSIDERATION; CONSOLIDATION, see latest topical index.

CONSPIRACY.

§ 1. Civil Liability (681). § 2. Criminal Liability (685).

§ 1. *Civil liability.*[17]—A conspiracy is defined generally as an agreement by two or more persons to accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful means.[18] Such a conspiracy is actionable if injury is committed pursuant to it.[19] In Wisconsin, in order that a conspiracy create no civil liabil-

Y.] 78 N. E. 359 Mortgages. Sholten v. Barber, 217 Ill. 148, 75 N. E. 460; Mount v. Tuttle, 183 N. Y. 358, 76 N. E. 873; Thomas v. Clarkson [Ga.] 54 S. E. 77. As those states which were carved out of territory formerly subject to the laws of England, presumption is that common law exists. McManus v. Oregon Short Line R. Co. [Mo. App.] 94 S. W. 743.

3. So held as to Idaho. McManus v. Oregon Short Line R. Co. [Mo. App.] 94 S. W. 743.

4. Sholton v. Barber, 119 Ill. App. 241.

5. Thomas v. Clarkson [Ga.] 54 S. E. 77. See, also, Stare Decisis, 6 C. L. 1510. Common law presumed same in all states. Wilcox v. Bergman [Minn.] 104 N. W. 955. In the absence of proof of foreign law, common law of forum governs. Fallon v. Mertz, 110 App. Div. 55, 97 N. Y. S. 417.

6. See 5 C. L. 616.

7. Denver, etc., R. Co. v. Warring [Colo.] 86 P. 305. Action under New Mexico statute may be maintained in Colorado. Id.

8. Missouri act giving $5,000 in all cases is penal. Raisor v. Chicago & A. R. Co., 117 Ill. App. 488.

9. In re Coe's Estate [Iowa] 106 N. W. 743. Governs both as to the merits of the case. Lee v. Missouri Pac. R. Co., 195 Mo. 400, 92 S. W. 614.

10. Lee v. Missouri Pac. R. Co., 195 Mo. 400, 92 S. W. 614. It seems to be the rule in most states that, unless there is some law of the forum which will prevent the action from being maintained by the person designated by the law of the place where the injury occurred, it may be so maintained. Denver, etc., R. Co. v. Warring [Colo.] 86 P 305. Action under New Mexico statute may be maintained in Colorado. Id.

11. Right to recover for act of fellow-servant. The Pullman Co. v. Woodfolk, 121 Ill. App. 321.

12. In re Coe's Estate [Iowa] 106 N. W. 743; Denver, etc., R. Co. v. Warring [Colo.] 86 P. 305.

13, 14. In re William's Estate [Iowa] 107 N. W. 608.

15. Harrison v. Western Union Tel. Co., 71 S. C. 386, 51 S. E. 119.

16. Hughes v. Western Union Tel. Co., 72 S. C. 516, 52 S. E. 107. But see Raisor v. Chicago & A. R. Co., 117 Ill. App. 488.

17. See 5 C. L. 617.

18. Karges Furniture Co. v. Amalgamated Wood Workers' Local Union No. 131, 165 Ind. 421, 75 N. E. 877; Franklin Union No. 4 v. People, 220 Ill. 355, 77 N. E. 176.

19. MacBride v. Gould, 3 Ohio N. P. (N. S.) 469. An assault and battery. Britton v. Young [Ind. App.] 76 N. E. 327. To ob-

ity because the same act by an individual creates none, the conspiracy must not offend the criminal law.[20] Rights which one may exercise singly, many may lawfully agree by voluntary association to exercise jointly,[21] but one man singly or any number of men jointly, having no legitimate interests to protect, may not ruin the business of another by maliciously inducing his patrons and others not to deal with him,[22]

struct and interfere with his business as brick manufacturer. Purington v. Hinchliff, 219 Ill. 159, 76 N. E. 47. No damage by writing "payment stopped" on a valueless check, hence no recovery. Hall v. First Nat. Bank, 120 Ill. App. 441.

20. Malicious alienation of affection. Randall v. Lonstorf, 126 Wis. 147, 105 N. W. 663. A conspiracy to interfere with the marital rights and duties of another being criminal, gives a cause of action. Preventing wife from living with husband, receiving support at his hands, obtaining a divorce in home jurisdiction and reducing her to penury to compel her to allow her husband to obtain a divorce on false and fraudulent grounds in a foreign jurisdiction. Id.

21. Jensen v. Cooks' and Waiters' Union, 39 Wash. 531, 81 P. 1069. Men under no contractual relations to the contrary may lawfully agree to quit the service of another at any time and may lawfully state either publicly or privately the grievances causing their conduct. Cooks and waiters jointly quitting an "unfair" restaurant. Id. Employes under no contractual restraint may combine to quit employment in a body for lawful purposes, though knowing that their action will injure the business of their employer, provided the strike is carried on lawfully. Karges Furniture Co. v. Amalgamated Wood Workers' Local Union, No. 131, 165 Ind. 421, 75 N. E. 877.

22. Jensen v. Cooks' & Waiters' Union, 39 Wash. 531, 81 P. 1069; Seattle Brewing & Malting Co. v. Hansen, 144 F. 1011. The circulation of notices by a labor organization terming a certain make of beer "unfair" and suggesting its avoidance amounts to an intimidation of those dealing in it and a "boycott." Id. Men cannot lawfully jointly congregate about the entrance of another's place of business and there, either by persuasion, coercion, or force, prevent patrons and the public from doing business with him. Striking cooks and waiters congregating about plaintiff's restaurant. Jensen v. Cooks' & Waiters' Union, 39 Wash. 531, 81 P. 1069.

NOTE. Boycotting: The right of workingmen to combine and organize for the purpose of improving their conditions cannot be questioned. They may, in order to compel their employers to accede to their demands, quit the service singly or in a body, persuade other workingmen to unite with them in furtherance of their purpose, and refuse to allow their members to work where nonunion men are employed. They may refuse to have any sort of dealings with employers of nonunion labor. See Clemmitt v. Watson, 14 Ind. App. 38, 42 N. E. 367; National Protective Ass'n v. Cumming, 170 N. Y. 315, 63 N. E. 369, 88 Am. St. Rep. 648, 58 L. R. A. 135. Compare Lucke v. Clothing, etc., Assembly, 77 Md. 396, 26 A. 505, 39 Am. St. Rep. 421, 19 L. R. A. 408; Erdman v. Mitchell, 207 Pa. 79, 56 A. 327, 99 Am. St. Rep. 783.

In carrying out their purpose employes must refrain from violence, intimidation and coercion, and if they do not their action may be enjoined. Jersey City Printing Co. v. Cassidy, 63 N. J. Eq. 759, 53 A. 230; Murdock v. Walker, 152 Pa. 595, 25 A. 492, 34 Am. St. Rep. 678, Allis Chalmers Co. v. Reliable Lodge, 111 F. 264, 59 L. R. A. 107; United States v. Hagerty, 116 F. 510; Knudsen v. Benn, 123 F. 636. We have found no judicial expression of opinion on the practice of some employers in instigating violence with a view to having it charged to the labor unions. The argument and persuasion of employes need not be confined to the members of their organization or to other workmen. They may take proper measures to induce their persons to withhold their patronage from their employer in order to compel him to recognize their demands. See Marx, etc., Clothing Co. v. Watson, 168 Mo. 133, 67 S. W. 391, 90 Am. St. Rep. 440, 56 L. R. A. 951; State v. Van Pelt, 136 N. C. 633, 49 S. E. 177; opinion of Justice Holmes in Plant v. Woods, 176 Mass. 492, 57 N. E. 1011, 79 Am. St. Rep. 330, 51 L. R. A. 339. But if in bringing such influence to bear their conduct amounts to coercion, they may be restrained by injunction. See Martin v. McFall, 65 N. J. Eq. 91, 55 A. 465; Matthews v. Shankland, 25 Misc. 604, 56 N. Y. S. 123; Beattie v. Callanan, 82 App. Div. 7, 81 N. Y. S. 413; Thomas v. Cincinnati, etc., R. Co., 62 F. 803. What amounts to coercion or intimidation must necessarily depend upon the facts of each case as it arises. Actual violence, however, is not essential to constitute coercion. Other means may be quite as effectual to coerce or intimidate as physical force. See Plant v. Woods, 176 Mass. 492, 57 N. E. 1011, 79 Am. St. Rep. 330, 51 L. R. A. 339; Matthews v. Shankland, 25 Misc. 604, 56 N. Y. S. 123; Crump v. Com., 84 Va. 927, 10 Am. St. Rep. 895, 6 S. E. 620; Thomas v. Cincinnati, etc., R. Co., 62 F. 803, 819; American Steel, etc., Co. v. Wire Drawers', etc., Unions, 90 F. 608. "The clear weight of authority undoubtedly is, that a man may be intimidated into doing or refraining from doing by fear of loss of business, property or reputation, as well as by dread of loss of life, or injury to health or limb; and the extent of his fear need not be abject, but only such as to overcome his judgment, or induce him not to do or to do that which otherwise he would have done or left undone." Barr v. Essex Trades Council, 53 N. J. Eq. 101, 122, 30 A. 881.—From Note to Gray v. Building Trades Council [Minn.] 103 Am. St. Rep. 491-496.

Note: Boycotts have been enjoined in the following cases: Casey v. Typographical Union, No. 3, 45 F. 135, 12 L. R. A. 193; Barr v. The Essex Trades Council, 53 N. J. Eq. 101, 30 A. 881; My Maryland lodge, No. 186, I. A. of M. v. Adt, 100 Md. 238, 59 A. 721; Beck v. Railway Teamsters' Protective Union, 118 Mich. 497, 77 N. W. 13, 74 Am. St. Rep. 421, 42 L. R. A. 407. In the following

and a single agreement, although lawful in itself, may become a part of a series of acts and agreements which are unlawful.[23] The constitutional right of free speech cannot be used to infringe upon the rights in property and to happiness of another by threatening and intimidating his customers and employes.[24] The maintaining of pickets for the purpose of persuasion, visitation, and rendering reports under positive instructions to use only peaceful methods which are not departed from, is not unlawful in some states.[25] A combination formed to drive competitors out of business and restrain trade is unlawful,[26] regardless of its form,[27] and although the acts, if done by individuals without co-operation, might be legal.[28] Parties to a conspiracy to commit an assault,[29] or to make fraudulent use of bonds,[30] are liable for all overt acts done pursuant to it, and for the damage caused, whether they were active participants or not. However, a combination innocent in its inception but afterwards perverted to unlawful ends renders only those participating in the perversion liable as conspirators,[31] and a verdict will lie against any one or more of the defendants [32] without proof of a conspiracy among them all where the tort would be actionable if committed by one alone,[33] since in such a case the allegation of conspiracy is

cases the form of action was not for an injunction, but was either a criminal prosecution for conspiracy or an action for damages, but the same principles are involved and the same view of boycotting is taken as in Loewe v. California State Federation of Labor, 139 F. 71; State v. Glidden, 55 Conn. 46, 8 A. 890, 3 Am. St. Rep. 23; Crump v. Com., 84 Va. 927, 6 S. E. 620, 10 Am. St. Rep. 895; State v. Stewart, 59 Vt. 273, 9 A. 559, 59 Am. Rep. 710; State v. Donaldson, 32 N. J. Law 151, 90 Am. Dec. 649; Thomas v. Cincinnati, N. O. & T. P. Ry. Co., 62 F. 803.—From. Note in 4 Mich. L. Rev. 143.

23. Purington v. Hinchliff, 120 Ill. App. 523.

24. Conspiracy to procure a boycott. Jordahl v. Hayda [Cal. App.] 82 P. 1079. Expressions in the findings such as "threats," acts of "intimidation," "interfered with," "driven away" or "prevented," as applied to conduct of defendants toward patrons of plaintiff, do not necessarily imply physical force (Id.), and are sustained by proof of conversations and acts short of actual violence (Id.). An injunction restraining defendants from interfering with plaintiff's business, patrons, or employes, by threats and intimidation, is sufficient without further particularity. Id.

25. Karges Furniture Co. v. Amalgamated Woodworkers' Local Union, No. 131, 165 Ind. 421, 75 N. E. 877.

26. Purington v. Hinchliff, 120 Ill. App. 523. Evidence held to sustain averments that the object of a combination among the brick manufacturers, dealers, and layers, was to control prices, restrain trade, and drive plaintiff out of business. Id. A combination of brewers to raise price of beer and force others into their association or quit, held a conspiracy in restraint of trade violative of § 3 of the Anti-Trust Act (Leonard v. Abner-Drury Brewing Co., 25 App. D. C. 161), and of the common law of the District of Columbia of which the 3d section is declaratory (Id.), and the coercion practiced on a stranger to the combination to compel its co-operation in the conspiracy is a palpable invasion of a private right (Id.).

27. It is the unlawful purpose, the methods it pursues, and the results of its operation, that determine the character of a combination in the eye of the law. Purington v. Hinchliff, 120 Ill. App. 523.

28. Raising price, refusing patronage to competitors, trade discounts in favor of members of association, inducing members not to deal with competitors. Purington v. Hinchliff, 120 Ill. App. 523.

29. Burn's Ann. St. 1901, § 577. Britton v. Young [Ind. App.] 76 N. E. 327.

30. McElroy v. Harnack, 213 Pa. 444, 63 A. 127. Where, pursuant to a conspiracy among four defendants, two of them issued bonds of a corporation greatly in excess of the value of its property, and as stockbrokers by fictitious sales gave the stock an inflated market price, whereby the other two defendants were enabled to borrow large sums of money from plaintiffs on them, judgment against the stockbrokers as coconspirators will be affirmed. Id. Verdict held supported by evidence. Id.

31. Karges Furniture Co. v. Amalgamated Woodworkers' Local Union. No. 131, 165 Ind. 421, 75 N. E. 877. A strike inaugurated by a labor union carried on peacefully, with no violence, threats, or intimidations, except that 14 out of the 600 strikers, while lounging about, committed acts of rowdyism, contrary to express policy of the union, is not sufficient to constitute union guilty of an enjoinable conspiracy. Id.

32. MacBride v. Gould, 3 Ohio N. P. (N. S.) 469.

33. Action by wife for conspiracy to alienate affections of her husband by his brother, father, and mother, proof failing as to father. Harvey v. Harvey [Neb.] 106 N. W. 660.

NOTE. Conspiracy as a cause of action: The theory of a distinct action on the case for damages suffered from a conspiracy has been recognized in England (Gregory v. Duke of Brunswick, 6 Scott (N. S.) 809), and in this country (Brown v. Mortgage Co., 97 Tex. 599; Fisher v. Schuri, 73 Wis. 370; Jones v. Morrison, 31 Minn. 140; Page v. Parker, 43 N. H. 363). The decision of the principal case, overrulnig that doctrine, several times asserted in the lower court (Rourke v. Drug Co., 77 N. Y. S. 373; Green v. Davies,

surplusage except as to the rules of admission of evidence, making admissions and statements of one of the conspirators binding on the rest,[34] and the discharge of one or more defendants will not discharge all, unless the injury could only have been inflicted by a joint act and mutual co-operation of certain defendants, in which case the discharge of one necessary to such joint action, of necessity, discharges all.[35] A verdict against only one of the coconspirators cannot, however, stand where the wrong inflicted was not actionable in the absence of conspiracy,[36] and such a verdict when set aside is set aside as to both the defendants.[37]

Proof that the defendants pursued by their acts the same object by the same means, one performing one part and another another part of the same, in order to complete it and accomplish the object, justifies the jury in the conclusion that they were engaged in a conspiracy to effect that object.[38] Under a conspiracy to defraud plaintiff by a pretended game of cards, it is not necessary to show that each defendant actually won any money from plaintiff, nor was it necessary to establish the respective relations of the defendants.[39] A complaint charging conspiracy to commit slander and malicious prosecution is demurrable for misjoinder.[40] Where the allegations of conspiracy merely amount to allegations of acting jointly, no cause of action exists unless the alleged acts were actionable if done by defendants severally.[41] The right to maintain an action jointly against several defendants, based on allegations of a conspiracy, ceases on failure of proof of the conspiracy.[42] In civil actions there can be no recovery on a mere averment of conspiracy.[43] One is not liable in damages for a conspiracy on failure of proof of his participation therein, although by his individual tort he may have benefited by it.[44] In the discretion of the court, evidence of the acts and declarations of coconspirators made in the absence of some of the defendants may be admitted for the purpose of proving the conspiracy before a prima facie case of conspiracy has been established and before the privity of some of the defendants has been proven.[45] Sufficiency of evidence is considered in the note.[46]

82 N. Y. S. 54; Id., 91 N. Y. S. 470), and disregarding the attitude of the court of appeals in Place v. Minister, 65 N. Y. 89, is not required by the authority it cites. It proceeds upon an improper conclusion drawn from the doctrine that the damage done is the gist of the action of conspiracy. Burdick on Torts, p. 288. See, also, 5 Columbia L. R. 233.—Note in 6 Columbia L. R. 62.

34. Alienation of affection of husband. Harvey v. Harvey [Neb.] 106 N. W. 660. Joint motion for directed verdict properly overruled, although proof against one coconspirator failed. Id.

35. MacBride v. Gould, 3 Ohio N. P. (N. S.) 469.

36, 37. Evans v. Freeman, 140 F. 419.

38. Part of defendants persuading plaintiff to go to a saloon, part of them procuring his intoxication, and part assisting in a pretended poker game, in order to loot plaintiff of his money. Batman v. Cook, 120 Ill. App. 203.

39. What each defendant may have won or lost, immaterial. Batman v. Cook, 120 Ill. App. 203. Defendants conspiring to defraud plaintiff by means of a pretended game are liable jointly and severally for the whole amount lost. Id. Instructions that plaintiff was not limited in amount, that he might recover by amount actually lost and other instructions, that verdict should be for amount lost only, held misleading and inconsistent. Id. Although plaintiff was entitled to damages for defendants' fraudulent and willful acts in furtherance of a conspiracy, where jury was not fully and properly instructed therein, they were not permitted to stand. Id. Evidence held to sustain 1st and 3d count of declaration. Id.

40. Real cause of action held separate torts actually committed and not the conspiracy. Green v. Davies, 182 N. Y. 499, 75 N. E. 536.

41. Bilafsky v. Conveyancers' Title Ins. Co. [Mass.] 78 N. E. 534.

42. Sehon v. Whitt [Ky.] 92 S. W. 280.

43. Mere averment that the defendant conspired with another, no facts of conspiracy being alleged. Hall v. First Nat. Bank, 120 Ill. App. 441.

44. Lupinek v. Woytisek, 110 App. Div. 688, 97 N. Y. S. 471. Alleged conspiracy to procure false arrest and malicious prosecution, defendant not participating therein, but on the trial fraudulently taking money from plaintiff as an attorney for procuring his discharge. Id. Evidence held not to sustain the verdict. Id.

45. Evidence held competent. Loder v. Jayne, 142 F. 1010. On the whole evidence, the combination and privity of defendants were established by proof of facts, personal to each, connecting him therewith. Id. An instruction to a jury that if the combination and conspiracy set forth in the statement

§ 2. *Criminal liability.*[47]—A conspiracy is a confederation to do something unlawful either as a means or as an end,[48] and the unlawfulness may consist in a violation of the civil as well as of the criminal law.[49] At common law, conspiracies to pervert or obstruct justice,[50] to create a riot,[51] to create a monopoly and interfere with free competition,[52] to obtain money from an individual or a corporation, were indictable.[53] The crime of conspiracy still exists in South Carolina.[54] In Illinois, every conspiracy indictable at common law is still so.[55] The common-law rule that a husband and wife cannot conspire does not hold in Texas.[56] Labor unions may not coerce an employer to sign an agreement for a "closed shop" and other business restrictions by threats of a strike,[57] nor while on a strike prevent others from taking their places by means of force, threats, intimidation, and picketing.[58] It has been held that there can be no such thing as peaceful, "polite and gentlemanly" picketing, and its use is unlawful coercion.[59] Theater managers may combine to exclude a dramatic critic from their theaters unless done for the sole purpose of injuring the

existed it was in violation of the Sherman act, and it was for them to say whether or not the plaintiff had proven his case, held correct. Id. Findings of jury that a conspiracy in restraint of trade existed held based on competent evidence. Id. Held proper question for jury and its finding correct as to defendant corporation's connection with the conspiracy from evidence of its co-operation in disciplinary methods with "aggressive cutters." Id. Evidence held to show defendants' participation in the conspiracy. Id.

46. Evidence that certain persons committing an assault and battery were seen in the saloon of the defendants drinking and holding whispered conferences with them, and that the remonstrance of plaintiff to the granting of a liquor license to defendants furnished a motive, was sufficient to go to the jury on the question of a conspiracy. Quist v. American Bonding & Trust Co. [Neb.] 105 N. W. 255. On a charge of conspiracy to foist a water plant upon a town at a fraudulently excessive price, evidence of poor judgment in its purchase by the selectman of the municipality, without proof of a connecting fraudulent conduct or of an unlawful purpose, held not to sustain charge. Revere Water Co. v. Inhabitants of Winthrop [Mass.] 78 N. E. 497.

47. See 5 C. L. 618.

48. State v. Bacon [R. I.] 61 A. 653. As has been said, conspiracy is rather described than defined, and the description which seems to have the widest recognition and the approval of the authorities declares a criminal conspiracy to consist of a combination between two or more persons for the purpose of accomplishing a criminal or unlawful object or an object neither criminal nor unlawful by criminal or unlawful means. State v. Ameker [S. C.] 53 S. E. 484. A conspiracy is the combination of two or more persons to do something unlawful, either as a means or as an ultimate end. Id. Instruction giving general definition of conspiracy followed by illustration and explanation, held sufficient. Id.

49. State v. Bacon [R. I.] 61 A. 653.

50. State v. Bacon [R. I.] 61 A. 653. Statute, 33 Edw. I, de conspiratoribus, held not to be the foundation of the English law of conspiracy. Id. In this connection the word "pleas," used in 33 Edw. I, St. 2, is synonymous with "actions." Id.

51. Defendants attending a picnic and conspiring to start a riot. State v. Ameker [S. C.] 53 S. E. 484. Exceptions to instruction held unsupported. Id.

52. Even though act itself may not be punishable as a crime. Sanford v. People, 121 Ill. App. 619. Combination of coal dealers for regulating and controlling the price and sale of coal held a common law conspiracy indictable in Illinois. Id.

53. State v. Bacon [R. I.] 61 A. 653.

54. Not abrogated by St. 33 Edw. I, nor by Cr. Code 1902, § 233. State v. Ameker [S. C.] 53 S. E. 484.

55. General conspiracy Statute of 1874 did not repeal common law. Sanford v. People, 121 Ill. App. 619. The general statute of 1874 in regard to conspiracies was not repealed by the act of 1891 relating to trusts, pools, and combinations in restraint of trade. Id.

56. Conspiracy to commit murder. Pen. Code 1895, Art. 953-960, inc. Smith v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 939, 89 S. W. 817. A charge that if defendant conspired with either codefendant they might consider the evidence of the acts and declarations of the other coconspirator against him, while subject to criticism, was not injurious under the circumstances and other instructions. Id. Court not required to charge further on the subject of a conspiracy against persons not attempting to take possession. Id.

57. O'Brien v. People, 216 Ill. 354, 75 N. E. 108.

58. May be enjoined. Franklin Union No. 4 v. People, 220 Ill. 355, 77 N. E. 176.

59. An incorporated labor union, being the main factor in ordering and maintaining a strike and in picketing its former employers, may be punished for violating an injunction restraining such picketing by a fine, and its members by fine and imprisonment. Franklin Union No. 4 v. People, 121 Ill. App. 647. Evidence, under the principles controlling in conspiracy cases, held to show that union participated in conspiracy, and that overt acts of picketing were done at its direction through its officers and strike committees. Id.

calling of such critic.[60] Section 5440 of the Revised Federal Statutes covers all conspiracies to commit any offense against the United States.[61] Under it, convictions for conspiracies may be had if in addition to the agreement any of the parties to it do any act to effect its object.[62] A conspiracy to procure by false pretenses, with intent to defraud, a signature to a check in the District of Columbia,[63] and to obstruct the administration of justice in a civil litigation in the Federal courts, are conspiracies to commit an offense against the United States.[64] Any agreement by which the title acquired by an entryman under the Stone and Timber Act inures to the benefit of another in whole or in part is in violation of that act.[65] A conspiracy does not merge in a completed offense when they are both misdemeanors [66] and punished nearly alike,[67] or when the completed offense is committed abroad.[68] When two or more are found acting together with an unlawful intent in the commission of an offense, the common design and acting together makes them ipso facto conspirators.[69] A conspiracy once established, each conspirator becomes responsible for means used and acts done by any conspirator in accomplishing the purpose of the conspiracy.[70] The acts of one pursuant to the unlawful combination are binding on his coconspirator, though absent at the time,[71] but it is not error to refuse to grant one conspirator a new trial and at the same time grant one to another.[72] A conspiracy to defraud whomsoever may be ensnared is in law a conspiracy to defraud the person actually

60. People v. Flynn, 100 N. Y. S. 31, rvg. 49 Misc. 328, 99 N. Y. S. 198. Evidence held to show exclusion was actuated merely by a dislike of complainant and disapproval of his writings, and did not constitute crime of conspiracy. People v. Flynn, 100 N. Y. S. 31.

61. Violations of the Interstate Commerce and Elkins Acts. United States v. Thomas, 145 F. 74. Section 3169 held not to repeal § 5440 of Rev. St., but both stand together and the United States may proceed under either. Grunberg v. U. S. [C. C. A.] 145 F. 81. In an indictment for conspiracy to defraud the United States, individuals may be joined with officers, under Rev. St. §§ 3169 and 5440. Id. Although under a well settled rule of criminal law an indictment for conspiracy will not lie where plurality of agents is logically necessary, this rule does not apply to an indictment charging a conspiracy to violate the national banking laws between officers of a bank and a person having no official connection with one. Chadwick v. U. S. [C. C. A.] 141 F. 225. An indictment charging a conspiracy, with officers of a national bank, unlawfully and willfully to certify a check drawn upon a national bank when defendant had no money on deposit equal to amount of check, was good, although defendant was not an agent or officer of the bank. Id.

62. United States v. Cohn, 142 F. 983. An indictment alleging as part of the conspiracy to conceal from the trustee property belonging to the bankrupt estate, a plan to bring about the filing of petitions in involuntary bankruptcy and adjudications thereon, and that pursuant to the conspiracy property was removed and concealed before the proceedings were taken, was intentionally omitted from the schedule and was kept concealed from the trustee after his appointment and qualification, held to constitute a criminal offense (Id.), under Rev. St. 5440, and § 29b of the bankruptcy act, although the latter does not make any act of the bankrupt before the bankruptcy criminal (Id.). Not necessary to establish every overt act alleged or that the ultimate object was accomplished. Olson v. U. S. [C. C. A.] 133 F. 849.

63. Geist v. U. S., 26 App. D. C. 594.

64. Rev. St. §§ 5399 and 5440. Wilder v. U. S. [C. C. A.] 143 F. 433.

65. Not necessary to allege or show an agreement good under the Statute of Frauds. Olson v. U. S. [C. C. A.] 133 F. 849.

66. United States v. Scott, 139 F. 697. Violations of the Interstate Commerce Act of 1887 and the Elkins Act of 1903, and of Rev. St. § 5440. United States v. Thomas, 145 F. 74. Although certain overt acts charged were completed offenses under the statutes sought to be circumvented, liability for the conspiracy was not extinguished thereby. Id.

67. Indictment for conspiracy to violate the revenue laws as to distilled liquors. United States v. Scott, 139 F. 697.

68. An offense of conspiracy committed in New York does not merge in the offense of grand larceny committed pursuant thereto in Paris. People v. Murray, 95 N. Y. S. 107; same case reported as People v. Summerfield, 48 Misc. 242, 96 N. Y. S. 502. The crime of conspiracy and certain overt acts having been committed in a certain county, the grand jury of that county may inquire into the crime and find the indictment, although consummated and accomplished elsewhere. Id.

69. Principals in the crime for which defendant was tried, held conspirators under above rule. Smith v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 939, 89 S. W. 817.

70. Franklin Union No. 4 v. People, 121 Ill. App. 647.

71. People v. Murray, 95 N. Y. S. 107; same case reported as People v. Summerfield, 48 Misc. 242, 96 N. Y. S. 502.

72. Browne v. U. S. [C. C. A.] 145 F. 1.

ensnared.[73] The insufficiency of the means intended to be adopted do not render the offense incomplete.[74] Prosecutions for conspiracy to obtain money by a fraudulent action being preventive rather than curative, it is unnecessary to await the determination of the action at law before charging conspiracy.[75] A conspiracy to do an unlawful act may be punished by a sentence not exceeding in severity the statutory penalty for the consummated offense.[76] A labor union guilty of complicity in an unlawful conspiracy may be punished therefor.[77]

Indictment.[78]—An indictment charging conspiracy in a large number of counts, each of which must be taken to charge a distinct conspiracy, with the same means and object against the same defendant, is not bad on demurrer [79] as it lies in the discretion of the trial court, on motion, to compel election by prosecutor of the counts he intends to rely on, if it appears that the defendant will be embarrassed by the multiplicity of counts; [80] but it has also been held that an indictment charging a conspiracy in each of several counts, without averments to show that the unlawful purpose sprang from one unlawful agreement, charges more than one offense,[81] and the state should be compelled to elect on which it will proceed,[82] but indictments, charging a defendant with conspiracy with several others, which might have been joined in one indictment under separate counts, may be consolidated for the purpose of trial.[83] An indictment so plain that the nature of the offense charged can be easily understood by the jury and the defendants is all that the law requires.[84] An indictment for conspiracy to defraud the United States of public lands need not be any more definite and precise than the proof of the crime.[85] When the charge is of conspiracy to commit an offense, it is not required that the offense be described with the same precision as would be required on indictment for such offense.[86] To allege that the evidence of witnesses spirited away by the conspirators is material,[87] or an averment that the crime of conspiracy is against the form of the statute in such

73. Proof that conspiracy was to defraud anyone who might be entrapped not a fatal variance from an indictment charging a conspiracy to defraud the victim. State v. Hillman [Wash.] 85 P. 63.

74, 75. State v. Bacon [R. I.] 61 A. 653.

76. Commonwealth v. Haun, 27 Pa. Super. Ct. 33. Instructions held proper. Id.

77. Franklin Union No. 4 v. People, 220 Ill. 355, 77 N. E. 176. Where evidence shows labor union inaugurated and promoted a strike by moral and financial and social support, it is not excused from participating in an unlawful conspiracy because its officers advised the members not to use unlawful means, some of whom nevertheless used force, threats, and intimidation. Id., afg., 121 Ill. App. 647.

78. See 5 C. L. 618.

79. An indictment containing forty-two counts, charging conspiracy to defraud the United States out of large tracts of land. Hyde v. U. S., 27 App. D. C. 362.

80. Hyde v. U. S., 27 App. D. C. 362. Subsequent counts of an indictment held to contain sufficient words of reference to incorporate the allegations of the first count. Id.

81. One count charging conspiracy to inflict personal injury, and another, to injure business and property of a corporation. State v. Caine [Iowa] 105 N. W. 1018.

82. State v. Caine [Iowa] 105 N. W. 1018.

83. Indictments charging defendant with conspiring with several persons to make fraudulent entries of land, under the stone and timber act, for the benefit of persons other than themselves were of the same class of crimes and offenses, might have been joined in one indictment under separate counts, and it was not error to consolidate them for the purposes of trial. Olson v. U. S. [C. C. A.] 133 F. 849.

84. Indictment charging conspiracy to obstruct and hinder the administration of justice, though not in the exact words of the statute, substantially correct. Tedford v. People, 219 Ill. 23, 76 N. E. 60.

85. Indictment need not set forth particular lands out of which the United States is to be defrauded, since it is not essential to the crime that, in the minds of the conspirators, the precise lands had already been identified. Hyde v. U. S., 27 App. D. C. 362. On objection that the counts of an indictment are fatally vague, uncertain, and indefinite in stating the charge, held that the object is sufficiently stated in alleging a conspiracy to defraud the United States out of "divers large tracts of land," it not appearing that the conspirators had any particular tracts in mind, and that the means are sufficiently set forth in alleging that such frauds were to be accomplished through the names of "fictitious persons" and "real persons not qualified to purchase" and other details. Id. Indictment not defective in failing to set out the particulars of the alleged conspiracy. Id.

86. Geist v. U. S., 26 App. D. C. 594. Indictment held sufficient to give both accused and the court all needed information. Id.

87. Tedford v. People, 219 Ill. 23, 76 N. E. 60.

case made and provided, when in fact there is none, is mere surplusage.[88] It is unnecessary to aver that a conspirator maliciously and with malice aforethought entered into an agreement to bring a fraudulent suit,[89] to allege or prove that a conspirator was to be benefited by the conspiracy,[90] to set forth the means by which the conspiracy was to be accomplished, where its object in itself is unlawful,[91] to charge criminal means in an unexecuted conspiracy to cheat and defraud at common law,[92] to allege that the evidence suppressed by the conspirators is true,[93] or to set forth overt acts in a count alleging an unexecuted conspiracy.[94] Indictments passed on are collected in the note.[95]

88. State v. Bacon [R. I.] 61 A. 653. Words not necessary to an indictment for conspiracy would be treated as immaterial and need not be stricken out. State v. Ameker [S. C.] 53 S. E. 484.

89, 90. State v. Bacon [R. I.] 61 A. 653.

91. State v. Messner [Wash.] 86 P. 636. Conspiracy to procure an abortion. Means not material ingredients of the offense. Commonwealth v. Haun, 27 Pa. Super. Ct. 33. Means are only matters of evidence to prove conspiracy, and it is not necessary to set forth the evidence. State v. Witherspoon, 115 Tenn. 138, 90 S. W. 852. Applied in a prosecution for violation of Anti-Trust Law, Acts 1903, p. 268, c. 140. Id. Law held valid and constitutional. Id. Stating existence and object of conspiracy so as to give the defendant notice of the particular crime and its nature with which he is charged is sufficient. Id.

92. State v. Bacon [R. I.] 61 A. 653.

93. That certain trees are in truth corner trees. Wilder v. U. S. [C. C. A.] 143 F. 433.

94. State v. Bacon [R. I.] 61 A. 653.

95. An indictment for conspiracy to defraud the United States, charging an examiner with fraudulently passing invoices containing false statements as to the weight of the imported merchandise, is not insufficient on the ground that as the weighing is done by weighers, it was impossible for the examiner to have "passed" the documents. Browne v. U. S. [C. C. A.] 145 F. 1. Where the first part of a sentence charges a conspiracy to defraud and another part begins "to be effected in the following manner, that is to say," setting forth with fullness the necessary details, the entire sentence may be construed as one charge rather than construing the latter part as a videlicet. Id. Subsequent counts in an indictment are not bad because alleging overt acts without repeating the presentment as to conspiracy, but containing the statement, "The grand jurors do further present that in further pursuance of said unlawful conspiracy in the first count of this indictment mentioned and described and to effect the object thereof," etc., etc., although omitting the words, "which is hereby made a part of this count." Id. An indictment charging defendants with conspiring in New York county to defraud by false representations a person in Paris, and that one of the defendants from said county sent fraudulent cablegrams and messages to Paris pursuant to such conspiracy, charges a crime committed in New York county. People v. Murray, 95 N. Y. S. 107; same case reported as, People v. Summerfield, 48 Misc. 242, 96 N. Y. S. 502. An indictment setting forth that a conspiracy was formed "to the end that" less duty should be collected by the government than was legally due to it sufficiently charged a fraudulent intent. Browne v. U. S. [C. C. A.] 145 F. 1. In indictment for conspiracy to procure money from a corporation by a fraudulent action sufficiently negatives the claim that the complainant in the action at law had a good cause of action by denying it in the manner and form in which it was set forth in the action at law. State v. Bacon [R. I.] 61 A. 653. An indictment under Tennessee Anti-Trust Act failing to state terms of the agreement or conspiracy, the particular article affected, and how it affected the same, is fatally defective. State v. Witherspoon, 115 Tenn. 138, 90 S. W. 852.

Indictment sufficient: An indictment charging defendants with knowingly, wickedly, and corruptly conspiring to defraud the United States out of certain public lands, and then setting forth overt acts but not specifying that the defendants knew the acts to be based on false and fraudulent entries of land, was sufficient against a general demurrer as informing defendants that they are charged with conspiracy to defraud and with certain overt acts done to effect its object. United States v. Mitchell, 141 F. 666. Indictment charging defendants with a conspiracy to defraud the United States out of title to lands by means of false, fraudulent, feigned, untrue, and illegal entries, followed by charges of overt acts, is sufficient. Olson v. U. S. [C. C. A.] 133 F. 849. An indictment charging that defendant and his confederates with force and arms, being persons of evil minds and dispositions, unlawfully and wickedly did conspire to make an assault with wicked intent upon the body of a certain pregnant female to procure an abortion, held sufficient. Commonwealth v. Haun, 27 Pa. Super. Ct. 33. An indictment which, after formally accusing defendants of the conspiracy to defraud, states that defendants with the intention to defraud did unlawfully conspire to get by false pretenses a sum of money from prosecuting witness, followed by allegations of particular acts done for the purpose and in the carrying out of the conspiracy, is sufficient, under liberal rules of construction. State v. Hillman [Wash.] 85 P. 63. Indictment for obstructing justice charging that witnesses were induced to "absent, keep and secrete themselves out of and away from the jurisdiction of the criminal court," etc., sufficient, the word "jurisdiction" here being synonymous with "state." Tedford v. People, 219 Ill. 23, 76 N. E. 60. An indictment charging that one Frank Cantwell and others conspired to induce himself, and another, being witnesses, to secrete themselves, thus obstructing the administration of justice, is sufficient as

Variance.[98]—Proof that a customs broker as intermediate consignee nominally paid the duties on imported goods is not inconsistent with an indictment charging the ultimate consignee with conspiracy to defraud the United States of revenue.[97] Under an indictment charging a conspiracy for the benefit of all the defendants, proof of benefit to a part only is not a fatal variance.[98]

Evidence.[99]—A conspiracy may be proved by circumstantial evidence.[1] It may be proved to have been committed on any day prior to the finding of the bill within the period of limitations.[2] In order to show fact of conspiracy between defendant and another it is not necessary that the other be joined in the information.[3] After the formation of a conspiracy, the acts and declarations of each coconspirator, during its progress in furtherance of its object, are admissible in evidence against all the others.[4] Generally, the fact of the conspiracy must first be established by a prima facie case,[5] to set the preceding rule in operation,[6] but it lies within the discretion of the court to admit the acts or declarations of a conspirator in evidence before sufficient proof is given of the conspiracy.[7] In that case a prima facie showing of a conspiracy between all must subsequently be made before such evidence will be permitted to go to the jury.[8] Knowledge that the object of conspiracy is unlawful is imputed and need not be proven, under an indictment for a statutory conspiracy to violate a penal law of the United States.[9] Evidence of how a general paper company executed its functions is material under an indictment charging a conspiracy in restraint of trade among its several constituents.[10] In a prosecution for conspiracy in restraint of trade, under the Anti-Trust Act, a witness cannot claim his constitutional privilege against self-incrimination, even though the Congressional Immunity Act does not protect him against prosecution in the state courts for the offense his

showing Cantwell's act of conspiracy as to the other person secreted. Id. An indictment charging a conspiracy to prevent, hinder, and deter persons by violence, threats, and intimidation from further engaging and continuing in a business specified, charges a conspiracy to do an act unlawful at common law and is good. State v. Duncan [Vt.] 63 A. 225. Indictment held well drawn. Wilder v. U. S. [C. C. A.] 143 F. 433. Indictment held not repugnant. Grunberg v. U. S. [C. C. A.] 145 F. 81.

96. See 5 C. L. 619.

97. Grunberg v. U. S. [C. C. A.] 145 F. 81.

98. Conspiracy to defraud United States out of title to lands. Olson v. U. S. [C. C. A.] 133 F. 849.

99. See 5 C. L. 619.

1. Tedford v. People, 219 Ill. 23, 76 N. E. 60. Evidence examined and held not so insufficient to warrant setting aside verdict and judgment. Id. By facts and circumstances from which it may be inferred. State v. Sykes, 191 Mo. 62, 89 S. W. 851. By showing the declarations, acts, and conduct of the conspirators. Circumstantial evidence usually necessary owing to difficulty of showing a direct agreement. State v. Ryan [Or.] 82 P. 703; Chapline v. State [Ark.] 95 S. W. 477. Evidence held sufficient to sustain verdict. Id.

2. Indictment found June 15, 1905, charging conspiracy on April 18, 1904, and proof showed defendants entrance in conspiracy in October, 1902, not barred by three years' limitation in Rev. St. § 1004. United States v. Francis, 144, 520.

3. State v. Sykes, 191 Mo. 62, 89 S. W. 851.

4. Lawrence v. State [Md.] 63 A. 96; Smith v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 939, 89 S. W. 817; State v. Ryan [Or.] 82 P. 703; Chapline v. State [Ark.] 95 S. W. 477.

5. Lawrence v. State [Md.] 63 A. 96; Chapline v. State [Ark.] 95 S. W. 477.

6. Smith v. State [Tex. Cr. App.]] 13 Tex. Ct. Rep. 939, 89 S. W. 817. Conspiracy to use mails for fraudulent purposes. United States v. Francis, 144 F. 520. Evidence held admissible under above rule. Id. Objections to charge not sustained. Id.

7. Acts and declarations of a conspirator in Portland leading to a meeting of prosecutor and the other conspirators in Salem and the execution of the conspiracy. State v. Ryan [Or.] 82 P. 703. It is not error to admit evidence relevant as to one conspirator, though not as to others, prior to the making of a prima facie case under the proviso that such evidence should not affect the other alleged conspirators unless followed up by proof of their connection with the alleged conspiracy. Lawrence v. State [Md.] 63 A. 96; Chapline v. State [Ark.] 95 S. W. 477.

8. Proof of subsequent meetings and acts implicating all conspirators in furtherance of the original acts and statements of one conspirator. State v. Ryan [Or.] 82 P. 703.

9. Fraudulent certification of check on national bank. Chadwick v. U. S. [C. C. A.] 141 F. 225.

10. Contempt proceedings for refusing to produce books and papers or answering questions thereto in a prosecution under the Anti-Trust Act for a conspiracy in restraint of trade. Nelson v. U. S., 201 U. S. 92, 50 Law. Ed. —.

evidence may disclose.[11] Under an indictment for a conspiracy to defraud one, evidence is not admissible to show a conspiracy to defraud another,[12] nor is it proper to admit the remarks of a conspirator after the consummation of the conspiracy charged against coconspirators, even though they were admissible against the party making them.[13] On attempts to show by circumstantial evidence the existence of an unlawful agreement and an unlawful motive, both may be rebutted by the direct denial of the party accused.[14] The motive and intent of each of the principals in a conspiracy to commit a homicide is competent evidence.[15] Admissibility [16] and sufficiency of evidence appears in the notes.[17]

Instructions should present defendant's theory of the case.[18]

11. Nelson v. U. S., 201 U. S. 92, 50 Law. Ed. —.

12. Testimony offered "to prove the conspiracy to unload stocks on the people here," in an action for conspiring to obtain money from plaintiff by sale of worthless stock. Lawrence v. State [Md.] 63 A. 96.

13. Lawrence v. State [Md.] 63 A. 96. Especially when admitted unqualifiedly under objection and when not admissible under either count of an indictment. Id.

14. Conspiracy to make fraudulent entries of land. Olson v. U. S. [C. C. A.] 133 F. 849.

15. Smith v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 939, 89 S. W. 817.

16. Admissible: Evidence of threats made by coconspirators of deceased and communicated to accused before the assault is competent. State v. Clifford [W. Va.] 52 S. E. 981. Under a conspiracy to defraud the United States out of a large tract of land, evidence tending to establish other related acts of the same character done at or about the same time were admissible to show the motive and intent. Olson v. U. S. [C. C. A.] 133 F. 849. Hence, after the indictments were consolidated and evidence had, it was not prejudicial to defendant to dismiss two of them. Id. Evidence of importation of merchandise other than that charged in the indictment and its entry at the custom house at an undervaluation held to relate entirely to intent and knowledge of parties charged (Grunberg v. U. S. [C. C. A.] 145 F. 81), and admissible for that purpose (Id.). Under an indictment charging defendants with conspiracy to defraud the government of revenue by false invoices "before and on July 30th, 1901," invoices dated after July 30th are admissible to show the guilty knowledge of defendants. Browne v. U. S. [C. C. A.] 145 F. 1. On a question of conspiracy to make entries of land for benefit of another, evidence as to value of land is admissible as bearing on question of good faith. Olson v. U. S. [C. C. A.] 133 F. 849. Letters tending to implicate the writer in a conspiracy are admissible, though never actually sent, if from other evidence the jury is satisfied that a conspiracy exists (Chadwick v. U. S. [C. C. A.] 141 F. 225). Evidence of subpacker and superintendent of packing as to the character, number, price, and weight of goods shipped, as far as lay within their personal knowledge, was admissible. Grunberg v. U. S. [C. C. A.] 145 F. 81. Under an indictment charging falsification of weight in invoices of imported goods, calculation by experts based on samples is admissible. Browne v. U. S. [C. C. A.] 145 F. 1. Evidence showing receipt of numerous false invoices and rendering of false reports by an examiner, it was proper to leave question of his participation in the conspiracy to the jury. Id. On a charge of conspiracy to bribe, evidence of a witness that he refused to go on as the meeting threatened to become a corruption meeting held admissible as a link in the conspiracy. Chapline v. State [Ark.] 95 S. W. 477.

Inadmissible: In an action for conspiracy in inducing witnesses in a burglary case to absent themselves from state, it is incompetent to show guilt of defendant in burglary charge. Tedford v. People, 219 Ill. 23, 76 N. E. 60. Evidence as to what has become of a coconspirator since the perpetration of the crime for which defendant is tried is irrelevant and immaterial. Evidence of his flight and that he has not been heard from. State v. Sykes, 191 Mo. 62, 89 S. W. 851. But not prejudicial in this instance. Id. Evidence in prosecution for conspiracy to defraud customs laws that examination of goods was as thorough as customary held immaterial. Grunberg v. U. S. [C. C. A.] 145 F. 81.

17. Sufficient: Evidence of conspiracy to rape. State v. Sykes, 191 Mo. 62, 89 S. W. 851. Evidence of conspiracy to resist execution of writ of possession even to the extent of killing. Smith v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 939, 89 S. W. 817. Evidence that alleged coconspirators knew of and participated in unlawful transactions. United States v. Scott, 139 F. 697. Evidence that employes had such an understanding and agreement with their employer as to amount to a conspiracy. Franklin Union, No. 4, v. People, 220 Ill. 355, 77 N. E. 176. Evidence, although circumstantial, held sufficient to warrant jury in finding defendant guilty. Olson v. U. S. [C. C. A.] 133 F. 849. Held enough in the record to charge defendant with knowledge of the pending conspiracy and its purpose. Smith v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 939, 89 S W. 817.

18. Requested instruction should have been given. State v. Messner [Wash.] 86 P. 636. An instruction that if a conspiracy as alleged was shown between any two of the accused all the defendants are to be found guilty is erroneous.

CONSTABLE, see latest topical index.

CONSTITUTIONAL LAW.

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§ 8. Freedom of Speech and of the Press Cannot be Abridged, Neither Can It be Abused Without Liability (710).
§ 9. Personal and Religious Liberty (710).
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§ 12. Grants of Special Privileges and Immunities; Class Legislation (715).
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§ 14. Retroactive Legislation; Vested Rights (721).
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§ 16. Compensation for Taking Property (733).
§ 17. Right to Justice and Guaranty of Remedies (734).
§ 18. Jury Trials Preserved (735).
§ 19. Regulation of Criminal Procedure; Rights Secured to Persons Accused of Crime (735).
§ 20. Searches and Seizures (737).
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§ 22. Frame and Organization of Government, Courts, Officers (737).
§ 23. Taxation and Fiscal Affairs (739).
§ 24. Schools and Education; School Funds (743).
§ 25. The Enactment of Statutes (743).
§ 26. Miscellaneous Provisions Other Than the Foregoing (744).

This topic treats of the organic law of the nation and the states and of the distribution of power between them. Several of the clauses which relate to a specific and indivisible subject-matter like "Commerce,"[1] "Jury,"[2] and "Rights of Persons Accused of Crime,"[3] are treated in topics which are specifically devoted to such subjects.[4]

§ 1. *Adoption and amendment of constitutions.*[5]—The right to propose amendments to the constitution is not the exercise of legislative power, but exists only by the constitutional grant and must be exercised within the terms thereof.[6] Whether a constitutional amendment has been properly adopted is a judicial question.[7] If an amendment is adopted by the requisite popular vote,[8] failure to comply with mere formal regulations will not invalidate it.[9] A constitutional amendment repeals inconsistent provisions.[10] The prohibition of the proposition of amendments to more than one article of the Illinois constitution, at the same session, was intended to apply to express amendments only,[11] and does not prevent implied amend-

1. See Commerce, 5 C. L. 599.
2. See Jury, 6 C. L. 316.
3, 4. See Criminal Law, 5 C. L. 883; Indictment and Prosecution, 5 C. L. 1790; Search and Seizure, 6 C. L. 1437; Witnesses, 6 C. L. 1975.
5. See 5 C. L. 620.
6. City of Chicago v. Reeves, 220 Ill. 274, 77 N. E. 237.
7. The determination as to the adoption of a constitutional amendment, in the house of representatives of Arkansas, as provided by law (Kirby's Dig. §§ 716, 717, 718, 2852), does not constitute a determination by a specially constituted tribunal, but such determination is a judicial question reviewable by the courts. Rice v. Palmer [Ark.] 96 S. W. 396.
8. Kirby's Dig. § 718, with reference to the adoption of a constitutional amendment, requires a vote of a majority of the electors voting at the election, and not merely a majority of the electors voting on the proposition. Rice v. Palmer [Ark.] 96 S. W. 396. Kirby's Dig. §§ 716-718, in confining the evidence as to the adoption of an amendment to the constitution by a majority of all the electors voting, as required by Const. art. 19, § 22, to the returns for governor and other executive officers, sent to the speaker of the house of representatives, is reasonable and therefore constitutional. St. Louis S. W. R. Co. v. Kavanaugh [Ark.] 96 S. W. 409.
9. Where a proposed amendment receives the requisite vote in each house and is submitted to the people and receives a majority vote, it becomes a part of the organic law, notwithstanding a failure to enter the same at length on the journals. West v. State [Fla.] 39 So. 412.
10. City of Chicago v. Reeves, 220 Ill. 274, 77 N. E. 237.
11. Const. art. 14, § 2. City of Chicago v. Reeves, 220 Ill. 274, 77 N. E. 237.

ments or changes which are necessarily worked in other articles by express amendments of a particular amendment.[12]

§ 2. *Operative force and effect.*[13]—Constitutions, like statutes, operate prospectively only, unless there is a clearly expressed intention otherwise.[14] Statutes existing when a constitution is adopted, inconsistent with its provisions, are nullified by the constitution;[15] but under the provisions of the Idaho constitution, all existing laws, not repugnant thereto, were continued in force,[16] and the existing city governments, under special charters, were not abolished, but were continued.[17]

Self-executing provisions.[18]—Constitutional provisions are self-executing when there is a manifest intention that they should go into immediate effect, and no ancillary legislation is necessary to the enjoyment of a right or the enforcement of a duty given.[19] In the case of provisions not self-executing there is always some indication that something is left for the legislature to do, or there is something in the nature of the provision that renders such legislation necessary,[20] but a constitu-

12. All the provisions of the amendment of 1904 to Const. art. 4, known as § 34, were germane to the general purpose, the establishment of local municipal government in Chicago, and not violative of Const. art, 14, § 2. City of Chicago v. Reeves, 220 Ill. 274, 77 N. E. 237.

13. See 5 C. L. 620.

14. Swift & Co. v. Newport News [Va.] 52 S. E. 821. The amendment now designated as article 17, making the judge of probate's term of office 4 years, is not retroactive, and terms existing at or before its adoption are not restricted or abolished by it. State v. Pattison [Ohio] 76 N. E. 946.

15. Swift & Co. v. Newport News [Va.] 52 S. E. 821.

16. Const. art. 21, § 2. Butler v. Lewiston [Idaho] 83 P. 234.

17. Const. art. 12, § 1. Butler v. Lewiston [Idaho] 83 P. 234.

18. See 5 C. L. 620.

19. Taylor v. Hutchinson [Ala.] 40 So. 108. The constitution, with regard to declaring what property is liable for taxation, is self-executing. Georgia R. & Banking Co. v. Wright, 124 Ga. 596, 53 S. E. 251.

Self-executing: Const. § 250, giving a preference to holders of bank notes and depositors who have not stipulated for interest, in case of a bank's insolvency. Taylor v. Hutchinson [Ala.] 40 So. 108. Const. Kan. art. 12, § 2, providing that dues from corporations shall be secured by the individual liability of stockholders to an amount equal to their stock. Harrison v. Remington Paper Co. [C. C. A.] 140 F. 385. The amendment of Const. art. 2, § 28, adopted Nov. 8, 1900, authorizing a verdict by 9 jurors, was self-executing and went into effect on the official canvass of the vote. Kelly-Goodfellow Shoe Co. v. Sally, 114 Mo. App. 222, 89 S. W. 889. Const. art. 8, § 117 (Va. Code 1904, p. ccxxxviii), requiring the enactment of general laws for municipal organization and prohibiting special laws therefor, etc., is self-executing so far as it prohibits special legislation and amends existing municipal charters. Campbell v. Bryant, 104 Va. 509, 52 S. E. 638. Const. § 164, providing that before granting a franchise to use city streets for a term of years the municipality shall first advertise and receive bids therefor, is self-executing and required no ordinance of the council to make it obligatory. Merchant's Police & District Tel. Co. v. Citizens' Tel. Co. [Ky.] 93 S. W. 642. Hence, a franchise granted to a telegraph company without limit as to term, for the purpose of avoiding Const. § 164, was void. Id. A constitutional provision giving the legislature full power to correct abuses and prevent unjust discriminations and excessive charges, so far as it expressed a power of the legislature, went into effect as soon as adopted, and contracts subsequently made were subject to the possibility of its exercise. Const. Fla. art. 16, § 30; Act app. May 31, 1901, c. 5070. Tampa Waterworks Co. v. Tampa, 199 U. S. 241, 50 Law. Ed. —. While the appellate jurisdiction of courts is granted by the constitution, the right of appeal is a mere legislative creation, hence the appellate power of courts must remain in abeyance, except so far as it has been, or shall be, given vitality by legislative authority. State v. Chittenden [Wis.] 107 N. W. 500.

20. Taylor v. Hutchinson [Ala.] 40 So. 108.

Not self-executing: Const. art. 9, § 8, providing that the general assembly may provide for township organization by general law, under which a county may organize when a majority of the voters thereof may so determine, is not self-executing, but requires legislation to put it in operation. State v. Gibson [Mo.] 94 S. W. 513. Const. art. 12, § 17, providing that every railroad company may "intersect, connect with or cross any other railroad," is not self-executing in the sense that a company may cross the tracks of another without regard to the power granted in its articles of incorporation. Boca & L. R. Co. v. Sierra Valleys R. Co. [Cal. App.] 84 P. 298. Const. art. 15, § 14, giving the right to maintain telephone lines and enjoining the legislature to enact regulations to give effect to the section, is not self-executing and the placing of telephones in the highway, in the absence of legislation permitting it, is an obstruction. State v. Helena [Mont.] 85 P. 744. Legislation on the subject must be general so as to give effect to the constitutional grant. Id. Henee, Sess. Laws 1905, p. 122, c. 55, is invalid as it provides for the maintenance of telephone lines only outside of incorporat-

tional provision should never be construed as dependent for its efficacy and operation upon legislative will, though legislation may be desirable and valuable to define a right and aid in its enforcement.[21]

§ 3. *Interpretation and exposition.* *A. When called for.*[22]—Courts refuse to pass on the constitutionality of a statute unless absolutely necessary to a decision of the case,[23] or when the case can be decided on other grounds;[24] and they will not pass upon the constitutionality of a statute that has been repealed and under which nothing was accomplished,[25] nor will the constitutionality of an act be determined in advance of any operation under it,[26] but a decision sustaining the validity of an assessment of a drainage tax necessarily involves the constitutionality of the statute authorizing it.[27] The statute of another state will not be declared unconstitutional, in the absence of any such construction by the courts of that state, where there is no question of public policy or general right involved, unless the court is forced to such conclusion.[28] The validity of a statute cannot be questioned by one to whom it has no application,[29] or who is not injured by it,[30] or is holding office under it,[31] or has voluntarily complied with it,[32] or has invoked its provisions;[33] and where the alleged unconstitutional provisions of a penal statute are not so connected with the others as to render the whole invalid, and the party prosecuted has not been affected by such provisions, he cannot question their constitutionality.[34]

ed cities and makes no provision for the conduct of the business in cities (Id.), and Pol. Code § 4800, subd. 43, as amd. by Sess. Laws 1897, p. 203, empowering city councils to regulate the erection of poles and the stringing of wires within city limits, does not remedy the defect (Id.), but after the legislature has complied with Const. art. 15, § 14, in making reasonable regulations to give effect to the section, it may then authorize cities to make such reasonable rules for the regulation of the business as may be necessary (Id.).

21. Swift & Co. v. Newport News [Va.] 52 S. E. 821.

22. See 5 C. L. 621.

23. Mills Novelty Co. v. Dunbar [Idaho] 83 P. 932.

24. Martin v. State [Ark.] 96 S. W. 372.

25. Doss v. Mermentau Levee Com'rs [La.] 41 So. 720.

26. The validity of Laws 1905, p. 1550, c. 631, designating the board of estimate and apportionment as the local authority to consent to the construction of railways in streets, and making certain provisions conflicting with the charter of Greater New York passed contemporaneously therewith, could only be determined after a consent or refusal had been made and not in a suit to restrain the board from acting on applications. Wilcox v. McClellan, 110 App. Div. 378, 97 N. Y. S. 311.

27. Cheney v. Beverly, 188 Mass. 81, 74 N. E. 306.

28. McDowell v. Lindsay, 213 Pa. 591, 63 A. 130.

29. An officer not subject to the civil service act (Laws 1905, p. 570, c. 363) cannot question the constitutionality thereof, he not being affected by its enforcement. State v. Sparling [Wis.] 107 N. W. 1040.

30. A person not convicted of violating the liquor laws by the sale of either cider or wines could not question the validity of the license act of 1902, under which he was convicted, on the ground of its discriminations as to those liquors. State v. Barr [Vt.] 62 A. 43.

31. An inspector appointed pursuant to Act Mar. 6, 1903 (Laws 1903, p. 166), amending act Feb. 26, 1895, providing for a bounty for killing stock-destroying animals, could not object that requiring district judges to appoint inspectors was imposing nonjudicial duties upon them. In re Terrett [Mont.] 86 P. 266.

32. An appellant who files his bill of exceptions separately from the transcript of evidence prepared by the stenographer, under Laws 1905, p. 219, c. 112, cannot raise the question of the constitutionality of the act in respect to that matter. Routledge v. Rambler Automobile Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 386, 95 S. W. 749. A concrete question as to the constitutionality of the provision in that act, regarding the stenographers' transcript being made in certain cases the only statement of facts that can be sent up, was not presented where appellant had a statement prepared as formerly. Id.

33. Where a city treated a statute as valid, and under its provisions profited by the deduction of benefits from a property owner's damages suffered by the regrading of a street, the city could not question the constitutionality of the statute later in the proceedings. Smith v. Seattle, 41 Wash. 60, 82 P. 1098. A corporation availing itself of the special privileges conferred by the law of eminent domain is estopped from questioning the constitutionality of such parts of the law as impose special burdens upon it. Wiler v. Logan Natural Gas & Fuel Co., 6 Ohio C. C. (N. S.) 206.

34. The search and seizure clauses of Acts 1902, p. 92, No. 90, in connection with prosecutions for illegal sales of liquor, could not be questioned by one not affected by them, they not being so connected with the other

Since the revocation of a liquor license is not a punishment within the meaning of the law, and the right to sell liquor is not a personal or property right, a liquor seller cannot question the constitutionality of an act, as local or special legislation, authorizing the revocation of a license for violation of the liquor laws.[35] A foreign corporation, in quo warranto proceedings, cannot urge the unconstitutionality of a statute which provides that a corporation failing to pay its license tax shall forfeit its right to do business in the state until the tax is paid.[36] A person charged with violation of an ordinance prohibiting the business of barbering on Sunday could not attack its constitutionality as class legislation, when by violating its provisions he also violated the law of the state;[37] but a wholesale grocer residing in the state, engaged in purchasing and selling goods in that and other states, can attack the validity of the act to prevent the adulteration, etc., of foods,[38] and one who failed to challenge the array of the grand jury that indicted him may nevertheless move to quash the indictment on the ground of discrimination against his race in the formation of the jury.[39] An agreement between gas companies to fix the price of gas, in violation of the Illinois anti-trust law, does not, after they cease to act under it, defeat their right to claim due process of law under the fourteenth amendment as against an ordinance fixing rates so low as to take private property for public use without compensation.[40]

One who asserts the unconstitutionality of a statute must point out some specific provision of the constitution which prohibits it, either expressly or by implication,[41] and show how it has been violated.[42] When a certain section of a statute is charged in a bill to be unconstitutional on specified grounds, if such section is not found subject to the objection, the constitutionality of another section to which the objection might have applied is not presented.[43] The constitutionality of a statute defining the duty sought to be enforced may be raised by defendants in mandamus,[44] but the constitutionality of the law organizing the State Agricultural Society of Minnesota is not open to attack in a private action for damages.[45]

provisions of the act as to render the whole invalid. State v. Paige [Vt.] 62 A. 1017. One who has never received a license to practice dentistry, as required by Act July 1, 1905 (Laws 1905, p. 319), cannot raise the question of the constitutionality of § 7 (p. 321), when its alleged unconstitutionality would not affect the rest of the act. Kettles v. People [Ill.] 77 N. E. 472. The objection that due process of law is not afforded an owner of property used for gaming purposes, under Ohio Rev. St. § 4275, making such property subject to a judgment for money lost there, cannot be raised by the owner. Marvin v. Trout, 199 U. S. 212, 50 Law. Ed. —.

35. Rev. St. 1899, § 3021. State v. Seebold, 192 Mo. 720, 91 S. W. 491.

36. Alleged invalidity of Sess. Laws 1902, p. 73, c. 3, § 65, under Const. art. 2, § 6, providing that courts of justice shall be open to every person and a speedy remedy afforded for every injury. American Smelting & Refining Co. v. People [Colo.] 82 P. 531.

37. Mills' Ann. St. § 1370, and Laws 1893, p. 125, c. 73. McClelland v. Denver [Colo.] 86 P. 126.

38. Laws 1905, p. 161, c. 114. Jewett Bros. v. Small [S. D.] 105 N. W. 738.

39. Thomas v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 535, 95 S. W. 1069.

40. Peoria Gas & Elec. Co. v. Peoria, 200 U. S. 48, 50 Law. Ed. —.

41. Prudential Ins. Co. v. Hummer [Colo.] 84 P. 61; Ex parte Allison [Tex. Cr. App.] 14 Tex. Ct. Rep. 409, 90 S. W. 492. Sess. Laws 1899, p. 171, c. 91, authorizing county judges to exchange duties, is not unconstitutional because Const. art. 6, § 12, expressly provides that district court judges may do so, but § 22 grants no such privilege to county judges. Prudential Ins. Co. v. Hummer [Colo.] 84 P. 61.

42. One who questions the sufficiency of the vote on the passage of a bill must show by the legislative journals noncompliance with the requirements of Const. art. 5, § 22. Anderson v. Grand Valley Irr. Dist. [Colo.] 85 P. 313. He must present proper journal evidence of the facts upon which he relies and the court will not consider the admissions of parties or stipulations of counsel as to the contents of such journals to impeach the validity of an act. Id.

43. Roberts v. Evanston, 218 Ill. 296, 75 N. E. 923.

44. Hindman v. Boyd [Wash.] 84 P. 609.

45. Berman v. Cosgrove, 95 Minn. 353, 104 N. W. 534.

(§ 3) *B. General rules of interpretation. Constitutions.*[46]—The established rules of construction applicable to statutes also apply to constitutions.[47] Their words must be regarded as being used in their natural sense,[48] unless the subject indicates or the text suggests that they have been used in a technical sense,[49] but less regard is to be paid to the words used than to the policy which dictated the section of the constitution.[50] All parts relating to the same subject must be construed together, and every part, if possible, rendered effective,[51] and effect is to be given to the policy established by the constitution.[52] Where the constitution schedules powers, giving or taking away, it must be presumed to have scheduled all, and it only must be looked to, with its necessary implications, for the limit of authority or restriction.[53] While the proceedings of a constitutional convention are sometimes resorted to by the courts in order to find reasons for a particular action of the convention,[54] they are not resorted to for the purpose of construing away any express language of the constitution, or even for the purpose of construing what may be doubtful.[55] In construing an amendment to the constitution it is proper to consider the circumstances which led to its adoption.[56] In case of any fair doubt as to the constitutionality of a statute, a practical construction given it by the departments of the state government, including its legal department,[57] and especially a legislative construction long acquiesced in, is entitled to great weight,[58] but the practice of state officials is not binding upon the courts as a construction of a constitutional provision.[59]

Federal courts usually follow the state courts' interpretation of the state constitution,[60] and it is decisive in the absence of any question of general or commer-

46. See 5 C. L. 622.

47. State v. Bryan [Fla.] 39 So. 929.

48. Davenport v. Elrod [S. D.] 107 N. W. 833; Swift & Co. v. Newport News [Va.] 52 S. E. 821. Const. art. 17, § 3, providing that lands "suitable for cultivation" shall be granted only to actual settlers, applies to land originally unfit for cultivation, but which were fit for cultivation at the time of purchase. Boggs v. Ganeard [Cal.] 84 P. 195. A constitutional provision (§ 222), empowering the legislature to pass general "laws" authorizing municipalities to issue bonds, does not require the passage of more than one law to fully confer the authority. Blakey v. City Council of Montgomery [Ala.] 39 So. 745.

49. Davenport v. Elrod [S. D.] 107 N. W. 833; Swift & Co. v. Newport News [Va.] 52 S. E. 821. The term "taken" is used in the Louisiana constitutions of 1879 and 1898 in the sense of "expropriation," and that is its proper signification in eminent domain legislation. Amet v. Texas & P. R. Co. [La.] 41 So. 721.

50, 51. State v. Bryan [Fla.] 39 So. 929.

52. Swift & Co. v. Newport News [Va.] 52 S. E. 821.

53. State v. Henry [Miss.] 40 So. 152.

54, 55. Starne v. People [Ill.] 78 N. E. 61.

56. State v. Bryan [Fla.] 39 So. 929.

57. State v. Evans [Minn.] 108 N. W. 958; State v. Bryan [Fla.] 39 So 929. The opinions of the officers of the legislative and executive departments, upon the proper interpretation of the laws relating to their departments, while not controlling upon the courts, are entitled to great deference and consideration (Buster v. Wright [C. C. A.] 135 F. 947), and should not be disregarded or overruled, unless it clearly appears that they are erroneous (Id.).

58. Wallace v. Board of Equalization [Or.] 86 P. 365; Victoria Lumber Co. v. Rives [La.] 40 So. 382; State v. New Orleans R. & Light Co. [La.] 40 So. 597. A practical construction of a constitutional provision by the legislature, acquiesced in by the courts and the profession generally for many years, should not be departed from but accepted as correct beyond question. State v. Stimpson [Vt.] 62 A. 14.

59. The practice of the officials of the state prison in permitting contracts to be let for the manufacture of brooms and whisks in the prison is not binding on the courts as a contemporaneous and practical construction of Const. art. 18, § 3, prohibiting the teaching of mechanical trades in the prison. Manthey v. Vincent [Mich.] 13 Det. Leg. N. 465, 108 N. W. 667.

60. Powers v. Detroit, etc., R. Co., 201 U. S. 543, 50 Law. Ed. —-; Jack v. State of Kansas, 199 U. S. 372, 50 Law. Ed. —-; Michigan Cent. R. Co. v. Powers 201 U. S. 245, 50 Law. Ed.—-. Questions of state constitutional law are, in a very important sense, peculiarly local, and in every jurisdiction the court of last resort must decide for itself the meaning of the constitution under which it exists and the validity of laws enacted by the legislative branch of the government. Wright v. Cunningham, 115 Tenn. 445, 91 S. W. 293. The decision of a state court that a tax is uniform within the meaning of the state constitution is not open to review upon writ of error from the supreme

cial law or of right under the Federal constitution;[61] but the decision of the supreme court of a state that a prisoner is not held in violation of individual rights guaranteed by the Federal constitution is not conclusive upon a Federal court,[62] and the supreme court of the United States will determine for itself whether a contract exists, when it is claimed that state legislation impairs the obligation of one, notwithstanding the fact that the state court rests its conclusion of the nonexistence of the contract upon a construction of the state constitution and laws.[63] The state courts are bound to follow the supreme court of the United States in the interpretation of the Federal constitution.[64]

Statutes violative of the constitution[65] are unenforceable[66] and can be the basis of no rights;[67] but where rights under an unconstitutional law cannot be enforced, equity will endeavor to restore everybody to his rights and his former status quo;[68] and a court of equity can restrain the enforcement of an unconstitutional statute to avoid a multiplicity of suits and because the plaintiff has no adequate remedy at law,[69] but the legislature has no power to declare that things done and created under unconstitutional acts "shall continue to be and remain recognized and regarded as legal."[70] A statute will not be declared unconstitutional unless in plain violation of some provision of the constitution,[71] and such conflict with the constitution will not be implied.[72] The courts cannot inquire into the wisdom[73] or policy[74] of a law, or the motives of the legislature,[75] they being bound to assume that the legislature acted in good faith in enacting a statute.[76]

Every presumption favors the validity of a statute,[77] a reasonable doubt as to

court of the United States to the state court. Armour Packing Co. v. Lacy, 200 U. S. 226, 50 Law. Ed. —. The decision of a state court, construing a state statute so as to remove any question of its repugnancy to the Federal constitution, cannot be reviewed by the United States supreme court on writ of error to the state court. Tampa Waterworks Co. v. Tampa, 199 U. S. 241, 50 Law. Ed. —. A Federal court cannot inquire into the legality of the detention of a state prisoner, on habeas corpus, on the ground that it is in violation of the state constitution. Ex parte Brown, 140 F. 461. The fact that a person convicted and sentenced in a state court was not given a jury trial and was not entitled to one under the state statute will not entitle him to a discharge on habeas corpus by a Federal court, on the ground that his conviction was without due process of law. Id.

61. Harrison v. Remington Paper Co. [C. C. A.] 140 F. 385.

62. Brown v. Urquhart, 139 F. 846.

63. Attorney General v. Lowrey, 199 U. S. 233, 50 Law. Ed. —.

64. State v. Cudahy Packing Co. [Mont.] 82 P. 833.

65. See 5 C. L. 623.

66. Swift & Co. v. Newport News [Va.] 52 S. E. 821. An unconstitutional statute purporting to incorporate a town is absolutely inoperative. Campbell v. Bryant, 104 Va. 509, 52 S. E. 638. An unconstitutional act of the legislature is not a sufficient basis for a corporation de facto. Huber v. Martin [Wis.] 105 N. W. 1031.

67. Town authorities connot levy or collect taxes under an unconstitutional act purporting to incorporate a town. Campbell v. Bryant, 104 Va. 509, 52 S. E. 638.

68. Venable v. Schafer, 7 Ohio C. C. (N. S.) 337.

69. Jewett Bros. v. Small [S. D.] 105 N. W. 738.

70. Rev. St. 1892, § 3891, and §§ 3891, 3928, as amd. and supplemented by Act passed Apr. 25, 1904 (97 Ohio Laws, p. 334), are void so far as they attempt to validate school districts created under special acts. Bartlett v. State [Ohio] 75 N. E. 939.

71. Brady v. Mattern, 125 Iowa, 158, 100 N. W. 358; Stillwell v. Jackson [Ark.] 93 S. W. 71; State v. Bryan [Fla.] 39 So. 929; Harvey Coal & Coke Co. v. Dillon [W. Va.] 53 S. E. 928; McGuire v. Chicago, etc., R. Co. [Iowa] 108 N. W. 902; Brown v. Tharpe [S. C.] 54 S. E. 363. Code 1892, § 1604, making it a misdemeanor to act as agent of either party in effecting an unlawful sale of liquor in any territory where prohibited, does not violate any provision of the constitution. Hart v. State [Miss.] 39 So. 523. Code Civ. Proc. § 204, for the selection of jurors in counties of 100,000 population and over, does not contravene Const. art. 4. § 25, prohibiting special laws regulating courts, in view of its being older than the constitution and the provision of art. 22, § 11, making existing laws relating to the judicial system applicable until changed by legislation. People v. Richards [Cal. App.] 82 P. 691.

72. Hart v. State [Miss.] 39 So. 523; Thomas v. Williamson [Fla.] 40 So. 831.

73. Brown v. Tharpe [S. C.] 54 S. E. 363; State v. Bryan [Fla.] 39 So. 929.

74. Rice v. Ionia Probate Judge [Mich.] 12 Det. Leg. N. 645, 105 N. W. 17.

75. People v. Gardner [Mich.] 12 Det. Leg. N. 936, 106 N. W. 541.

76. Naganab v. Hitchcock, 25 App. D. C. 200.

its constitutionality being sufficient to sustain it.[78] Statutes are so construed if possible as to harmonize them with the constitution.[79] If an act be capable of two constructions, one of which is not consistent with the constitution, while the other is, the latter must prevail.[80]

A statute containing invalid provisions yields only to the extent of its repugnancy to the constitution,[81] and a part may be unconstitutional without rendering the whole statute bad,[82] if the invalid part is so independent of the remainder that it may be eliminated without rendering the whole ineffective,[83] unless the invalid

77. See 5 C. L. 623. Naganab v. Hitchcock, 25 App. D. C. 200; People v. Reardon, 110 App. Div. 821, 97 N. Y. S. 535. The legislature is presumed to have had the constitution in mind when passing an act (People v. Richards [Cal. App.] 82 P. 691; Webb v. Ritter [W. Va.] 54 S. E. 484; Chicago & N. W. R. Co. v. State [Wis.] 108 N. W. 557), and courts cannot impute to the legislature an intention to disturb or impede the operation of a constitutional principle (Webb v. Ritter [W. Va.] 54 S. E. 484). The constitutionality of a statute is presumed until a judicial determination to the contrary. Richman v. Consolidated Gas Co., 100 N. Y. S. 81; Harvey Coal & Coke Co. v. Dillon [W. Va.] 53 S. E. 928; Prudential Ins. Co. v. Hummer [Colo.] 84 P. 61.

78. People v. Richards [Cal. App.] 82 P. 691; State v. Chittenden [Wis.] 107 N. W. 500; State v. Bryan [Fla.] 39 So. 929; Daniels v. Homer, 139 N. C. 219, 51 S. E. 992; Noble v. Bragaw [Idaho] 85 P. 903; People v. Reardon, 110 App. Div. 821, 97 N. Y. S. 535; Mobile Docks Co. v. Mobile [Ala.] 40 So. 205; State v. Henry [Miss.] 40 So. 152; Naganab v. Hitchcock, 25 App. D. C. 200.

79. Albert v. Gibson [Mich.] 12 Det. Leg. N. 642, 105 N. W. 19; Banks v. State, 124 Ga. 15, 52 S. E. 74; Chicago & N. W. R. Co. v. State [Wis.] 108 N. W. 557. The legislature is the exponent of the popular will and its acts must be treated with respect, reconciled and sustained if possible. People v. Richards [Cal. App.] 82 P. 691. It is obligatory upon the courts to sustain an act if there is any tenable ground for it. Iowa Mut. Tornado Ins. Ass'n v. Gilbertson [Iowa] 106 N. W. 153. A legislative act, if constitutional, declares in terms the policy of the state and is final so far as the court is concerned. Board of Park Com'rs of Des Moines v. Diamond Ice Co. [Iowa] 105 N. W. 203. Laws 1905, p. 60, c. 21, for the organization of towns as construed, does not attempt to vest in the courts the legislative discretion in determining the policy of creating a new town. Nash v. Fries [Wis.] 108 N. W. 210. Laws 1890, p. 318, c. 150, § 3, making the possession of a tax receipt conclusive evidence of payment of prior taxes, etc., as construed, does not conflict with Const. art. 11, § 7, prohibiting laws exempting property from taxation. Harris v. Stearns [S. D.] 108 N. W. 247, rvg. 17 S. D. 439, 97 N. W. 361. Pub. St. 1882, c. 50, § 7 (Rev. Laws c. 49, § 5), so construed as to require assessments of drain taxes to be proportional to benefits and held constitutional. Cheney v. Beverly, 188 Mass. 81, 74 N. E. 306. Laws 1889, c. 22, p. 68, and amendments thereto, providing for the issue of mineral leases and contracts as construed, are constitutional. State v. Evans [Minn.] 108 N. W. 958. Acts 1891, p. 57, c. 51, § 3 (Rev. St. 1895, art. 4562), for the correction of abuses and unjust discriminations in rates by the railroad commission, sustained by restricted construction of title. International & G. N. R. Co. v. Railroad Commission [Tex.] 14 Tex. Ct. Rep. 42, 89 S. W. 961. Act of May 9, 1889, P. L. 173, relative to unused streets, etc., in plats, will not be construed so as to vacate such streets automatically and vest them in the abutting owners, as that would deprive the landowner of his property in such streets without due process of law. Barnes v. Philadelphia, etc., R. Co. 27 Pa. Super. Ct. 84.

80. In re Burnett [Kan.] 85 P. 575; Lowery v. Kernersville School Trustees, 140 N. C. 33, 52 S. E. 267.

81. See 5 C. L. 624. Lowery v. Kernersville School Trustees, 140 N. C. 33, 52 S. E. 267.

82. Lowery v. Kernersville School Trustees, 140 N. C. 33, 52 S. E. 267; State v. Paige [Vt.] 62 A. 1017. A statute found to impair the obligation of a particular contract may be declared unconstitutional as to such contract without being held unconstitutional in other respects. Brady v. Mattern, 125 Iowa, 158, 100 N. W. 358.

83. Lowery v. Kernersville School Trustees, 140 N. C. 33, 52 S. E. 267; State v. Bryan [Fla.] 39 So. 929; In re O'Neill, 41 Wash. 174, 83 P. 104; Commonwealth v. Caldwell, 190 Mass. 355, 76 N. E. 955. The invalidity of provisions in Laws N. M. 1903, p. 51, c. 33, § 1, does not affect § 2 (p. 52). Buttron v. El Paso Northeastern R. Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 339, 93 S. W. 676. The unconstitutionality of the provision of Act 1903, p. 632, c. 258, § 25, which in effect exempts from taxation registered Tennessee state bonds, does not affect the validity of the other provisions of the act. State Nat. Bank v. Memphis [Tenn.] 94 S. W. 606. Invalid part of § 5, Laws 1905, pp. 360-365, c. 175, amending the Drainage Law, does not affect the rest of the act. State v. Superior Ct. [Wash.] 85 P. 1264. Acts 1902, p. 98, No. 90, regulating the liquor traffic, is not entirely void because of the discrimination in § 21 in favor of manufacturers of cider within the state, but the same privileges will be accorded to manufacturers within and without the state alike. State v. Hazelton [Vt.] 63 A. 305. Act Feb. 22, 1905 (24 St. at Large, p. 918), fixing salaries of county officers, is not wholly void because of the unconstitutional local provisions of § 33, p. 927, relative to salaries of Oconee county officers. State v. Burns [S. C.] 52 S. E. 960. The invalidity of a provision of Act Mar. 16, 1893 (Acts 1893, p. 102), creating a

portion was manifestly the inducement for the passage of the remainder.[84] But where the unconstitutional portion is essentially and inseparably connected in substance with that which is constitutional,[85] or where the obnoxious part is of such import that the other parts of the statute without it would cause results not contemplated or desired by the legislature,[86] then the entire statute must be held inoperative. Invalid provisions of an act, not operating to avoid the whole, cannot be relied upon to excuse the performance of a duty enjoined by the valid parts of the act.[87]

Scope of Federal and state power.[88]—The government of the United States exercises only granted powers,[89] while the state legislatures exercise all powers not expressly prohibited by the Federal[90] or state constitution.[91] The Federal courts

levee district, which authorizes the taking of private property without compensation, contrary to Const. art. 2, § 22, does not invalidate the act as a whole where it is not necessary to take private property. Porter v. Waterman [Ark.] 91 S. W. 754. The unconstitutionality of the provision of Pub. Acts 1899, No. 237, p. 372, § 3, subd. 6, that the board of registration shall refuse registration to any person guilty of grossly unprofessional and dishonest conduct, etc., does not affect the validity of the provision for revocation of certificate for certain objectionable advertising. Kennedy v. State Board of Registration [Mich.] 13 Det. Leg. N. 431, 108 N. W. 730. Even if § 3 of Pub. St. 1901, c. 124 (amd. by Laws 1905, p. 484, c. 76), is unconstitutional as authorizing unreasonable searches and seizures (Bill of Rights, art. 190), and compelling persons to furnish evidence against themselves (Id. art. 15), it is so disconnected from the rest of the act as not to affect its validity. State v. Cohen [N. H.] 63 A. 928. Inasmuch as the primary purpose of § 3968, providing for the designation of an official depository for school funds, is to obtain a revenue from the idle moneys of school boards, the provision of the act that the depository shall give a good and sufficient bond "of some approved surety company" is incidental merely, and indicates a purpose to require a good and sufficient lawful bond and nothing more. State v. Rehfuss, 7 Ohio C. C. (N. S.) 179. It follows, therefore, that the objectionable provision of the act is directory only, and that the act is constitutional. Id.

84. Commonwealth v. Caldwell, 190 Mass. 355, 76 N. E. 955; State v. Bryan [Fla.] 39 So. 929. Acts 1904, p. 283, c. 167 (Va. Code 1904, p. 484), purporting to incorporate a town and to exempt its residents from county taxes, is entirely void, as the unconstitutional exemption from taxation was one of the chief inducements held out to procure votes for the charter when submitted to the people. Campbell v. Bryant, 104 Va. 509, 52 S. E. 638. In case of a scheme of legislation for a particular purpose, created by a law specially enacted therefor, referring to other laws required to complete the plan, if the special act is the inducing consideration and is unconstitutional, the whole is inefficient. Huber v. Martin [Wis.] 105 N. W. 1031. Even though the provisions of Sess. Laws 1905, p. 200, c. 16, §§ 12, 13, relating to the election of police judge, are invalid, the rest of the act is not affected thereby, those provisions not having been an inducement to the passage of the act. State v. Malone [Neb.] 105 N. W. 893.

85. The invalidity of the provisions of Acts 1905, No. 70, for the appointment of an associate judge of the Battle Creek municipal court, renders the entire act invalid. Attorney General v. Loomis [Mich.] 12 Det. Leg. N. 553, 105 N. W. 4. Pen. Code, § 321, prohibiting trade combinations, is inseparably connected with § 325, which denies equal protection of the laws by exempting persons engaged in horticulture or agriculture, and both are invalid. State v. Cudahy Packing Co. [Mont.] 82 P. 833. Sess. Laws 1905, p. 336, c. 141, imposing a tax on the gross receipts of railroads and not separating state and interstate business, is not divisible and is wholly void on account of the taxation of receipts from interstate commerce. Galveston, etc., R. Co. v. Davidson [Tex. Civ. App.] 15 Tex. Ct. Rep. 274, 579, 93 S. W. 436. The invalidity of Const. Amd. 1900 (Laws Mo. 1899, p. 381), for the levy in several counties of additional road and bridge taxes, involved in the exemption of several cities, cannot be expunged and the remainder sustained, and hence it is entirely void. State v. Chicago, etc., R. Co., 195 Mo. 228, 93 S. W. 784. That part of Pub. Acts 1905, No. 214, p. 311, which is unconstitutional because of providing for a suspension of imposition of license tax on any transient trader by a municipality, cannot be deemed unessential and the rest of the act given effect. Brown v. Stuart [Mich.] 108 N. W. 717.

86. State v. Patterson [Fla.] 39 So. 398.

87. State v. Malone [Neb.] 105 N. W. 893.

88. See 5 C. L. 624.

89. Kenneweg v. Allegany County Com'rs, 102 Md. 119, 62 A. 249.

90. Kenneweg v. Allegany County Com'rs, 102 Md. 119, 62 A. 249. The state retained all the power of legislation that it did not part with in adopting the Federal constitution or consenting to the amendment thereof, and, subject to that exception, it is as supreme as the British parliament, which is restrained only by the custom of the realm and the conservatism of the people. People v. Reardon [N. Y.] 77 N. E. 970. The sovereignty of a state embraces the power to execute its laws and the right to exercise supreme dominion and authority within the fundamental law. People v. Tool [Colo.] 86 P. 224. The state through its attorney general can maintain a bill in its sovereign capacity to enjoin a conspiracy to commit

are charged with responsibility in the protection of individual rights according to the principles adopted as fundamental in our government and incorporated into the national constitution,[92] and it is only where such rights, specially secured by the Federal constitution, are invalid, that interference by the Federal courts by habeas corpus with state administration of criminal law is warranted.[93] State courts are required to give United States statutes the same force and effect as those of the state.[94] The first ten amendments to the Federal constitution operate on the national government only and do not limit the powers of the states in respect to their own people,[95] and the supreme court of the nation has not made the fourteenth amendment a weapon for assailing state power on a subject in which the state power is as wide as that of taxation to support its own existence.[96]

The court cannot consider evidence aliunde.[97]

Where the words of a statute are plain,[98] no construction is necessary, and it must be enforced to whatever evil it may apparently lead.[99] Every word must be given its due force and effect,[1] and all parts construed together and harmonized[2] with all other statutes in pari materia if possible.[3] It is necessary to keep the constitution constantly in view in the interpretation of statutes,[4] and it is always presumed that an officer will exercise a power conferred in a constitutional manner.[5]

§ 4. *Executive, legislative, and judicial functions.*[6]—Under the three-phased form of government common to American constitutions, each branch is supreme in its particular division,[7] and persons exercising the powers of one department are usually prohibited from exercising those of another,[8] nor can the functions of one

illegal and fraudulent acts, which would pollute the ballot box and pervert an election, although the acts charged are criminal offenses. Id.

91. Kenneweg v. Allegany County Com'rs, 102 Md. 119, 62 A. 249; People v. Tool [Colo.] 86 P. 224.

92. Brown v. Urquhart, 139 F. 846.

93. Ex parte Rogers, 138 F. 961. Federal courts will not, by writs of habeas corpus, undertake to reverse the proceedings of state courts while acting within their jurisdiction, under statutes not conflicting with the Federal constitution. Rogers v. Peck, 199 U. S. 425, 50 Law. Ed.—.

94. Tandy v. Elmore-Cooper Live Stock Commission Co., 113 Mo. App. 409, 87 S. W. 614.

95. Jack v. State of Kansas, 199 U. S. 372, 50 Law. Ed. —.

96. Harvey Coal & Coke Co. v. Dillon [W. Va.] 53 S. E. 928.

97, 98. See 5 C. L. 625.

99. State v. Henry [Miss.] 40 So. 152.

1. State v. Bryan [Fla.] 39 So. 929.

2. State v. Bryan [Fla.] 39 So. 929; Goode v. State [Fla.] 39 So. 461.

3. Since by the constitution, the subjects of land titles and taxation are united somewhat in one scheme or plan (Const. art. 13), all statutes relating to either subject must be interpreted and construed together and made to harmonize with the constitutional plan. Webb v. Ritter [W. Va.] 54 S. E. 484.

4. Webb v. Ritter [W. Va.] 54 S. E. 484; Lowery v. Kernersville School Trustees, 140 N. C. 33, 52 S. E. 267. Priv. Acts 1905, c. 204, p 584, § 12, does not confer upon the trustees of the school district created an arbitrary discretion as to the disposition of school funds, but they must be used as directed and required by the constitution. Smith v. Robersonville Graded School Trustees [N. C.] 53 S. E. 524, approving Lowery v. Kernersville School Trustees, 140 N. C. 33, 52 S. E. 267.

5. If the governor should find occasion to remove a member of the state board of control of educational institutions established by Laws 1905, c. 5384, it is presumed that he will do so conformably to Const. art. 4, § 15. State v. Bryan [Fla.] 39 So. 929.

6. See 5 C. L. 626.

7. The governor's declaration under the constitution that a state of insurrection exists in a county, preliminary to calling out the militia to suppress it, is not subject to review by the courts. Const. art. 4, §§ 2, 5; Laws 1897, p. 204, c. 63, § 2. In re Moyer [Colo.] 85 P. 190. While it is not within the power of the judiciary to enjoin the general assembly from passing a law or to compel it by mandamus to do so, because of the independence of the three departments [Const. art. 3] (State v. Gates, 190 Mo. 540, 89 S. W. 881), yet a common council is not an essential part of the legislative department of the state, and is free from judicial control only when exercising legislative power conferred upon it and then only in respect to the exercise of such power (Id.). And a council, when granting the right to use streets for the laying of pipes and the construction of works necessary to supply natural gas, exercises only ministerial or administrative powers and is subject to judicial control. Id.

8. Const. art. 3, § 1. But nothing therein affects the validity of St. 1889, p. 358, c. 247, permitting territory to be annexed to towns at the discretion of the inhabitants. People v. Ontario [Cal.] 84 P. 205.

department be exercised by another,[9] and an act of the legislature, so far as it attempts to impose upon a department powers not constitutionally belonging to it, is void.[10] When the constitution does not distinctly define and distribute judicial powers, and it is not clear whether an act is wholly the exercise of legislative, executive, or judicial power, the legislature can determine by what department it shall be exercised.[11] A grant of general powers to any department constitutes of itself an implied exclusion of all other departments from the exercise of such powers,[12] but the fact that a statute confers powers or imposes duties upon a judicial or executive officer which are not strictly judicial or executive, or which are of an ambiguous or mixed character, does not render the statute void.[13] Each branch represents the people, and is the people by the intendment of the organic law, and must be presumed to act within its powers under the constitution unless the contrary plainly appears.[14]

(§ 4) *A. Executive functions.*[15]—Any inherent power that a governor may have at common law to sue in the name of the state is superseded by the constitutional provisions defining executive powers.[16] The general structure of our government imposes the duty of enforcing the laws primarily upon its executive officers,[17] and

9. The incapacity of the legislature to execute a judicial power, or of the judiciary to execute a legislative power, is fundamental to the very existence of constitutional government as established in the United States. Appeal of Spencer [Conn.] 61 A. 1010. The legislative branch cannot exercise judicial powers except as expressly conferred in the constitution. Incorporated Village of Fairview v. Giffee [Ohio] 76 N. E. 865. The legislature cannot pass laws declaring what the law was at any prior time without infringing on the power of the judiciary. Weisberg v. Weisberg, 98 N. Y. S. 260. Where the supreme court has finally declared a tax to be invalid, the legislature cannot validate it and make it collectible. Chicago & E. I. R. Co. v. People, 219 Ill. 408, 76 N. E. 571. Act July 6, 1905 (Pub. Acts 1905, p. 413, c. 217), limiting the recovery in pending actions against administrators in certain cases, was a proper exercise of legislative power and not an encroachment on the judiciary. Atwood v. Buckingham [Conn.] 62 A. 616. Cr. Code 1896, § 4730, amd. by Acts 1903, p. 345, providing that the failure or refusal of any person entering into a contract of service, for money previously advanced, to perform the service or refund the money without just cause shall be prima facie evidence of an intent to defraud, was not an invasion of the province of the judiciary. State v. Thomas [Ala.] 40 So. 271. The penalty provided by Laws 1903, c. 338, p. 524, for violation of injunctions in liquor cases, is a part of the prohibitory liquor law, and the legislature did not trench upon the inherent power of the courts to punish contempts in fixing such penalty. State v. Thomas [Kan.] 86 P. 499. The provision found in § 550, for the filing in certain cases of affidavits of bias and prejudice against a common pleas judge, is not an abridgment by the legislature of the powers and rights of the judiciary, nor an interference with the proper administration of justice, and is constitutional. State v. Dirlam, 7 Ohio C. C. (N. S.) 457. Act Apr. 1904, for the relief of county treasurers and commissioners, does not infringe Const. § 16, art. 1, § 32, art. 2, or § 1, art. 4, as legislative interference with the judgment of a court. State of Ohio v. Gibson, 4 Ohio C. C. (N. S.) 433.

10. To empower the supreme court to supplant a district judge when disqualified, and appoint another, invades legislative and executive provinces. In re Weston, 28 Mont. 207, 72 P. 512. Gen. St. 1902, §§ 3718, 3747, so far as they attempt to confer upon the superior court power to set aside the action of the board of railroad commissioners in abolishing a grade crossing, being purely an administrative act, is unconstitutional. Appeal of Spencer [Conn.] 61 A. 1010. Laws 1905, p. 60, c. 21, for the organization of towns, as construed, does not attempt to vest in the courts the legislative discretion as to the formation of new towns. Nash v. Fries [Wis.] 108 N. W. 210.

11. The act to provide for detaching unplatted farm lands from cities and villages, etc (Act Apr. 23, 1902; 95 Ohio Laws, p. 259; Rev. St. 1905, §§ 1536-60, 1536-61), does not confer legislative power on the court of common pleas or a judge thereof. Incorporated Village of Fairview v. Giffee [Ohio] 76 N. E. 865.

12. Incorporated Village of Fairview v. Giffee [Ohio] 76 N. E. 865.

13. As within the inhibition of Const. art. 3, § 1, prohibiting officers of one department from exercising the functions of another. State v. Bates [Minn.] 104 N. W. 709. Gen. Laws 1905, c. 346, p. 626, relative to the liquor traffic, when properly construed, does not violate this provision of the constitution. Id.

14. State v. Henry [Miss.] 40 So. 152. While the senate and assembly are separate bodies, they constitute the legislature, and their united action becomes the act of the legislature. People v. Reardon [N. Y.] 77 N. E. 970.

15. See 5 C. L. 626.

16. Const. art. 5. Henry v. State [Miss.] 39 So. 856.

17. The levy and collection of license

officers charged with the enforcement of injunctive laws may lawfully interpose to prevent their violation, without special writ or process, where interposition infringes no personal or property right of those who seek to break them.[18] In Montana the legislature can impose on district judges the duty of appointing bounty inspectors, charged with the duty of carrying out the provisions of the laws relative to destruction of wild animals.[19]

(§ 4) *B. Legislative functions.*[20]—The legislative power in the constitution is vested in the legislature,[21] and when not restrained by the constitution, it can make law and provide remedies for its enforcement.[22] Where the legislature had powers precedent to the constitution, it will continue to enjoy them to the full extent as before, up to the point of restriction by that instrument,[23] but where the constitution deals with a subject, it is preclusive of legislative action thereon, except where it permits expressly or by necessary implication.[24] Under the constitution of Indiana, the applicability of a general law or the necessity of a local one is a legislative question.[25] State legislatures have all the powers not expressly or by necessary implication withheld by the state or Federal constitution.[26]

fees and taxes are ministerial acts ordinarily intrusted to executive officers. Buster v. Wright [C. C. A.] 135 F. 947.

18. Buster v. Wright [C. C. A.] 135 F. 947.

19. Under Const. art. 7, § 7, authorizing the governor to appoint all officers not otherwise provided for, and Act Mar. 6, 1903 (Laws 1903, p. 166), for the appointment of bounty inspectors by district judges, is valid. In re Terrett [Mont.] 86 P. 266.

20. See 5 C. L. 626.

21. State v. Budge [N. D.] 105 N. W. 724. The **power to tax** is within the grant of legislative authority (School City v. Forrest [Ind.] 78 N. E. 187; People v. Ronner [N. Y.] 77 N. E. 1061; Wallapai Min. & Development Co. v. Territory [Ariz.] 84 P. 85), and all the incidents thereof are within the control of the legislature (People v. Reardon [N. Y.] 77 N. E. 970). The purposes for which a tax shall be levied, the extent of taxation, the apportionment of the tax, upon what property or what class of persons the tax shall operate, whether the tax shall be general or limited to a particular locality, and in the latter case, the fixing of a district of assessment, the method of collection, and whether a tax shall be a charge upon both person and property or only on the land, are matters within the discretion of the legislature and in respect to which its determination is final. Id. The authority to exact **license fees and taxes** is a legislative power (Buster v. Wright [C. C. A.] 135 F. 947), and the legislature is also vested with the power to designate the officers who shall collect them (Id.). The regulation of the matter of **appeals** is for the legislature alone. City of Paducah v. Ragsdale [Ky.] 92 S. W. 13. It is a legislative prerogative to deal with and dispose of the **property of the state** without the aid of the courts. State v. Bryan [Fla.] 39 So. 929. Laws 1905, c. 5384, prescribing new methods for the government of the state educational institutions, sustained. Id. The **disposition of lands** granted by congress to the state for public buildings at the capital is exclusively with the legislature, and its action is final, unless clearly in violation of some constitutional principle or contrary to the terms of the grant. State v. Budge [N. D.] 105 N. W. 724. The power of the legislature to regulate the **appointment to statutory offices** is absolute, unless restrained by some constitutional provision. State v. Bryan [Fla.] 39 So. 929. Laws 1905, c. 5384, does not violate Const. art. 3, § 27, or art. 6, § 5, by its provisions for the appointment of the members of the state board of control of the educational institutions. Id.

22. Ex parte Allison [Tex.] 14 Tex. Ct. Rep. 687, 90 S. W. 870, afg. [Tex. Cr. App.] 14 Tex. Ct. Rep. 409, 90 S. W. 492. A state has the fundamental right, when not acting in contravention of its own or the Federal constitution, to modify the common law. Greenberg v. Western Turf Ass'n [Cal.] 82 P. 684. A large portion of legislation is injunctive, it forbids and prescribes a penalty for the violation of the inhibition. Buster v. Wright [C. C. A.] 135 F. 947.

23, 24. State v. Henry [Miss.] 40 So. 152.

25. Acts 1903, p. 193, c. 102 (Burns' Ann. St. Supp. 1905, § 4983h et seq.), creating library boards in certain cities, enacted under the educational provisions of Const. art. 1, § 8, is not a local act, but comes within art. 4, § 23, making the applicability of a general law a question for the legislature. School City v. Forrest [Ind.] 78 N. E. 187.

26. Ratcliff v. Wichita Union Stock Yards Co. [Kan.] 86 P. 150; Ensley Development Co. v. Powell [Ala.] 40 So. 137; McGuire v. Chicago, etc., R. Co. [Iowa] 108 N. W. 902; Wright v. Cunningham, 115 Tenn. 445, 91 S. W. 293; State v. Sheppard, 192 Mo. 497, 91 S. W. 477. A legislature is free from any restriction not found in the state or Federal constitution. State v. Henry [Miss.] 40 So. 152. A state constitution is a restraining instrument and the legislature possesses all legislative power not prohibited thereby. Whitlock v. Hawkins [Va.] 53 S. E. 401. The constitution of Florida is a limitation upon power. Thomas v. Williamson [Fla.] 40 So. 831. In Idaho, the power of the legislature to grant, extend, change, or amend charters of incorporation is restricted to such municipal, charitable, educational, penal, or re-

While constitutional prohibitions upon the legislature may be either express or implied, yet the implied prohibition must result from the insertion of some express provision, as the mere silence of the constitution cannot be construed as a prohibition,[27] and the principle of "expressio unius est exclusio alterius" must be applied with great caution to the provisions of the organic law relative to the legislative department.[28] Public policy, of itself and without having its foundation in some constitutional provision, can neither circumscribe nor restrain the legislative authority.[29] The question of whether the public interests will best be served by conferring authority upon towns to supply its inhabitants with water is for the exclusive determination of the legislature.[30] A legislature cannot fetter a subsequent one,[31] nor can a common council.[32]

Legislative power cannot be delegated,[33] not even to the people,[34] but only in

formatory corporations as are under control of the state. Butler v. Lewiston [Idaho] 83 P. 234. The power to charter a street railway was not withdrawn from the legislature by Tex. Const. 1876. art. 10, § 7, but such power exists, provided the consent of the local authorities be first acquired. San Antonio Traction Co. v. Altgelt, 200 U. S. 304, 50 Law. Ed. —.

27, 28. State v. Bryan [Fla.] 39 So. 929.

29. Kenneweg v. Allegany County Com'rs, 102 Md. 119, 62 A. 249.

30. St. 1905, p. 488, c. 477, held valid. Revere Water Co. v. Winthrop [Mass.] 78 N. E. 497.

31. Horton v. City Council of Newport [R. I.] 61 A. 759.

32. Board of aldermen of the city of Wilmington. City of Wilmington v. Bryan [N. C.] 54 S. E. 543.

33. School City v. Forrest [Ind.] 78 N. E. 187; State v. Chittenden [Wis.] 107 N. W. 500.

Void for delegation: Primary election law, § 6 (Laws 1905, p. 213), providing that the county central committee shall determine whether county officers shall be nominated at the primary election or by delegates there chosen, and whether by a majority or plurality vote, is invalid, as a delegation of legislative power. People v. Chicago Election Com'rs [Ill.] 77 N. E. 321. Loc. Acts 1903, p. 667, authorizing a dispensary in the town of Georgiana and delegating to the commissioners the power to suspend the dispensary whenever they see fit, is an unconstitutional delegation of legislative power. Rose v. Sims [Ala.] 40 So. 951. Act Feb. 25, 1903 (Acts 1903, p. 87), creating a board of dispensary commissioners in Abbeville, is unconstitutional as a delegation of legislative powers to such commissioners. Newman v. State [Ala.] 39 So. 648, afg. State v. Oates [Ala.] 38 So. 1038; Town of Elba v. Rhodes, 142 Ala. 689, 38 So. 807; Mitchell v. State, 134 Ala. 392, 32 So. 687.

Not void for delegation: Laws 1905, c. 5384, is not invalid as delegating legislative powers to the board of control of the state educational institutions. State v. Bryan [Fla.] 39 So. 929. Code § 2573, making neglect or refusal to comply with rules and regulations of the state board of health a misdemeanor and punishable as provided in § 4906, does not delegate to the board the legislative power of determining what acts shall constitute a punishable offense. Pierce v. Doolittle [Iowa] 106 N. W. 751. Acts 29th Gen. Assem. p. 45, c. 77, regulating the conduct of building and loan business by unincorporated associations, etc., is not a delegation of legislative functions to the auditor of state and executive council, in violation of Const. art. 3, § 1. Brady v. Mattern, 125 Iowa, 158, 100 N. W. 358. The provisions of Act Apr. 4, 1905 (Acts 1905, p. 321, c. 150), for the separation of white and colored passengers in street cars, authorizing the conductor to change the line of division and assign seats accordingly, is not an unconstitutional delegation of the police power. Morrison v. State [Tenn.] 95 S. W. 494. Legislative functions are not unlawfully delegated by Mich. Pub. Acts 1901, act No. 173, for the taxation of railroad and other corporate property, because the rate of taxation is to be ascertained by a state board of assessors. Michigan Cent. R. Co. v. Powers, 201 U. S. 245, 50 Law. Ed. —. Drainage Law, § 12 (Laws 1895, p. 287, c. 115), leaving to the superior court the finding that a system of drainage is practicable and conducive to the public welfare and will increase the value of the lands to be drained, does not delegate legislative authority, as the court does not propose the system but acts on the system adopted by the commissioners. State v. Superior Ct. [Wash.] 85 P. 264. And the act does not violate Const. art. 7, § 9, authorizing the legislature to vest in municipal authorities the power to make assessments for improvements, by requiring the jury in drainage proceedings to ascertain the damages and benefits, and the value of the land to be taken, etc. Id. Laws 1905, p. 275, c. 161, creating a board known as the "State Capitol Commission" for the erection of a state capitol building, etc., is not an unconstitutional delegation of legislative power (Davenport v. Elrod [S. D.] 107 N. W. 833), nor is it an unconstitutional delegation of municipal functions to a special commission in conflict with Const. art. 3, § 26 (Id.). Acts 1905, p. 873, c. 410, prohibiting the sale of nontransferable tickets by unauthorized agents, is not an unconstitutional delegation of legislative power to common carriers (Samuelson v. State [Tenn.] 95 S. W. 1012), nor is Sess. Laws, p. 376, c. 180, for a similar purpose, subject to that objection (In re O'Neill, 41 Wash. 174, 83 P. 104).

34. Acts 1905, p. 670, c. 316, amending small stock law (Acts 1903, p. 408, c. 177), making it effective only in such counties as

those special instances where the constitution itself authorizes such delegation,[35] or in cases sanctioned by immemorial usage originating anterior to the constitution and continuing unquestioned thereunder.[36] The legislature in delegating legislative power upon supervisors may interpose any limitations that may seem desirable.[37] Where an option is given a certain class of corporations to pay a specific tax in lieu of an ad valorem tax, it does not constitute a delegation of legislative power.[38] The legislature cannot by contract invest any municipal corporation with an irrevocable franchise of government over any part of its territory,[39] nor can it alienate any part of the legislative power which the constitution vests in it,[40] and the same rule applies to a municipality as to the legislative or governmental power vested in it,[41] but the legislature may delegate the power to determine some facts or state of things upon which a statute makes or intends to make its own action depend.[42] Powers of an administrative character can be delegated to boards, commissions, or similar agencies.[43] The mere making of reasonable rules to be followed in performing adminis-

may adopt it by a majority vote of the electors, is unconstitutional. Wright v. Cunningham, 115 Tenn. 445, 91 S. W. 293. In California the legislature being prohibited by Const. art. 11, § 16, from creating or providing for the organization of municipal corporations otherwise than by general laws (People v. Ontario [Cal.] 84 P. 205), the fixing of boundaries of towns is not a legislative function (Id.), and hence leaving the determination of the annexation of territory to a town, to a vote of the inhabitants thereof, is not invalid as a delegation of legislative power (Id.). St. 1889, p. 358, c. 247, for annexing new territory to a town upon a favorable vote of the people, is valid, notwithstanding the prohibition of delegation of municipal functions in Const. art. 11, § 13. Id. Loc. Acts 1905, p. 1071, No. 627, § 9, to annex territory to Detroit city, providing the act be approved by a majority vote of the electors, was not an unconstitutional delegation of legislative power to the electors. Attorney General v. Springwells Tp. [Mich.] 13 Det. Leg. N. 30, 107 N. W. 87.

35. Wright v. Cunningham, 115 Tenn. 445, 91 S. W. 293. Under Const. art. 4, § 38, authorizing the delegation of local legislative and administrative powers upon boards of supervisors, Pub. Acts 1903, No. 237, p. 390, delegating to such boards power to fix and determine additional conditions of contracts for the construction or improvement of drains, is valid. Albert v. Gibson [Mich.] 12 Det. Leg. N. 642, 105 N. W. 19.

36. The immemorial usage referred to has found expression in only two forms: 1. In the powers conferred upon municipal corporations in their several charters and by general statutes applying thereto and pertaining to the ordering and administration of local affairs. 2. In the powers conferred upon the quarterly county courts for the management of local matters. Wright v. Cunningham, 115 Tenn. 445, 91 S. W. 293. The legislature can create a **school district,** incorporate its controlling authorities and confer upon them certain governmental powers. Smith v. Robersonville Graded School Trustees [N. C.] 53 S. E. 524. Chapter 204, p. 581, Priv. Acts 1905, creating a graded school district and authorizing the trustees to levy a tax and issue bonds, when approved by the qualified voters, as required by Const. art. 7, § 7, is a valid exercise of legislative authority. Id. A portion of the **power of taxation** may be so delegated. School City v. Forrest [Ind.] 78 N. E. 187. The legislature may delegate to local administrative or legislative boards its power of **control over streets** of a city. Wilcox v. McClellan, 47 Misc. 465, 95 N. Y. S. 941. Laws 1892, p. 1753, c. 686, §§ 31, 32, amd. by Laws 1899, p. 272, c. 133, conferring authority on supervisors to **remove county seats** on certain conditions, is not an unlawful delegation of legislative power. Stanton v. Essex County Sup'rs, 48 Misc. 415, 96 N. Y. S. 840.

37. The power to remove a county seat may be conditioned upon the approval of the people interested. Stanton v. Essex County Sup'rs, 48 Misc. 415, 96 N. Y. S. 840.

38. Pub. Acts 1883, p. 34, No. 39, § 14, as amd. by Pub. Acts 1899, p. 262, No. 231, which, as construed, grants such an option, is not objectionable as a delegation of legislative power. Bird v. Arnott [Mich.] 108 N. W. 646.

39, 40. Horton v. City Council of Newport [R. I.] 61 A. 759.

41. A common council cannot delegate to the city clerk the power to levy and assess the cost of street improvements which has been vested in it. City of Sedalia v. Donohue, 190 Mo. 407, 89 S. W. 386. A city cannot, by the grant of a franchise to a street railway company, divest itself of the governmental power delegated to it to make such reasonable changes in the grades and lines of its streets as are necessary to protect and promote the interests of the public. People v. Geneva, etc., Traction Co., 98 N. Y. S. 719.

42. State v. Southern R. Co. [N. C.] 54 S. E. 294.

43. The true distinction between delegation of power to make law and delegation to administer law is this: The former contemplates exercise of discretion as to what the law shall be; the other, exercise of discretion in the administration of law. State v. Chittenden [Wis.] 107 N. W. 500. The Wisconsin law governing the board of dental examiners does not confer power to do more than to execute the legislative will along lines expressed by it with reasonable definiteness (Id.), but the power to determine the manner of the use of the land granted by § 17 of the enabling act of North Dakota (25 Stat. 681, c. 180), for public buildings, is purely

trative duties is not the exercise of legislative authority.[44] The power to equalize taxes is a quasi judicial and not a legislative power in such a sense that it cannot be delegated to a board.[45] Extensive powers of investigation are sometimes lawfully conferred upon administrative boards,[46] and authority to determine questions of fact essential to the application of legislative discretion involves only administrative discretion and may be left to some other agency.[47]

(§ 4) *C. Judicial functions.*[48]—Judicial duties cannot be imposed on nonjudicial officers,[49] nor nonjudicial duties on the judiciary.[50] The judicial authority of the constitution has power to administer remedies for remedial rights, formerly exercisable exclusively by courts, to make judicial decisions strictly so called, in actions or special proceedings, and to enforce the same.[51] To the courts only is given the authority to determine whether the departments act within the limits of their constitutional powers,[52] and great caution should be and always is exercised by them in such delicate inquiries,[53] the duty to keep within the constitutional limits of their jurisdiction being no less binding upon the courts than upon the legislature.[54] Courts cannot pass on the policy, wisdom, or justice of a statute, or on the expediency of its enactment,[55] and when the purpose to be subserved by an act of congress is a public one, the courts should not be swift to find defects in it.[56] Courts have no power to control or review the exercise of the discretion reposed by law in

legislative and cannot be delegated to a commission (State v. Budge [N. D.] 105 N. W. 724). Laws 1905, c. 166, p. 297, providing for the appointment of a capitol commission to remodel and reconstruct the capitol building, etc., was invalid as a delegation of legislative power. Id.

44. State v. Chittenden [Wis.] 107 N. W. 500. The railroad commissioners of Florida have the power under the constitution and laws to make just and reasonable rules and regulations to prevent unjust discriminations. Const. art. 16, § 30; Acts 1899, c. 4700, p. 76. State v. Atlantic Coast Line R. Co. [Fla.] 41 So. 705. Laws 1901, p. 662, c. 479, § 4, subsec. b, authorizing the commissioner of agriculture, with consent of the board, to establish and maintain quarantine lines, etc., is not an unwarranted delegation of legislative power to the board, which is a branch of the executive department. State v. Southern R. Co. [N. C.] 54 S. E. 294.

45. Hence Rev. St. 1898, §§ 1077a, 1077b, for the equalization of taxes by a board of equalization commissioners, are not unconstitutional. Foster v. Rowe [Wis.] 107 N. W. 635.

46. Laws 1899, p. 797, c. 370, § 6, granting certain powers of investigation to the state civil service commission, is valid, although the investigation authorized might relate to acts constituting a crime and ground for dismissal from public service. People v. Milliken, 110 App. Div. 579, 97 N. Y. S. 223.

47. State v. Chittenden [Wis.] 107 N. W. 500.

48. See 5 C. L. 627.

49. Acts 1897, p. 166, regulating the practice of dentistry, is not unconstitutional as investing the board of examiners with judicial functions. State v. Doerring, 194 Mo. 398, 92 S. W. 489. Rev. St. 1898, § 4944c, as amended by Laws 1899, p. 33, c. 28, authorizing the board of control to transfer convicts from the reformatory to the penitentiary in certain cases, is not an unconstitutional delegation of judicial power to the board. In re Harrington [Wis.] 106 N. W. 851. Pub. Acts 1899, No. 237, p. 372, § 3, subd. 6, providing for the revocation of a certificate of registration as a practitioner of medicine, for the publication of certain objectionable advertisements, is not unconstitutional as conferring judicial power on the board of registration. Kennedy v. State Board of Registration [Mich.] 13 Det. Leg. N. 431, 108 N. W. 730.

50. Rev. St. 1898, § 1077a, providing for the appointment of equalization commissioners by a circuit judge, is not unconstitutional as imposing nonjudicial duties on such judge. Foster v. Rowe [Wis.] 107 N. W. 635. Const. art. 5, § 21, exempting judges from the imposition of nonjudicial duties, applies only to judges of the supreme court. Commonwealth v. Collier, 213 Pa. 138, 62 A. 567.

51. State v. Chittenden [Wis.] 107 N. W. 500.

52, 53. State v. Henry [Miss.] 40 So. 152.

54. McGuire v. Chicago, etc., R. Co., [Iowa] 108 N. W. 902.

55. McGuire v. Chicago, etc., R. Co., [Iowa] 108 N. W. 902. The policy, wisdom, expediency and adequacy of a statute are legislative questions. Brown v. Tharpe [S. C.] 54 S. E. 363. Its decision as to the necessity, reasonableness, and expediency of the provisions of a statute to regulate the business of junk dealers is not subject to revision. Pub. St. 1901, c. 124, § 1, as amd. by Laws 1905, p. 484, c. 76. State v. Cohen [N. H.] 63 A. 928.

56. Act Cong. June 28, 1902, 32 Stat. at L. 481, c. 1302, U. S. Comp. Stat. 1903, p. 431, authorizing the payment of $50,000,000 to the New Panama Canal Co., for a strip of land across the Isthmus of Panama for the construction of a canal, is constitutional. Wilson v. Shaw, 25 App. D. C. 510.

the legislature,[57] nor will they interfere with its discretion in the exercise of its power to provide for the public welfare so long as it keeps within the fair and reasonable scope of its powers.[58] Courts cannot review the exercise of the discretionary powers reposed by law in administrative boards.[59] The exercise of the police power is subject to the supervision of the courts,[60] but police regulations may not be declared void merely because deemed contrary to natural justice and equity,[61] but only because they violate some constitutional right.[62] The question whether an ordinance is a reasonable and proper exercise of the police power, or an unreasonable and arbitrary interference with the right to hold and enjoy property, is a judicial one[63] and the courts can determine it, notwithstanding the fact that a municipal body has expressed its judgment thereon.[64] Whether existing or prescribed rates chargeable by a public service corporation afford reasonable compensation is a judicial question determinable by the courts, but the power to establish and fix rates for service in the future is a legislative prerogative which the courts cannot exercise.[65] Under the constitution of Washington, the determination of whether the proposed use of land sought to be taken is public is a judicial question.[66] The granting or refusing of a license to practice medicine, or the revocation thereof, by the examining board, is not an exercise of judicial power.[67] The power of the superior courts to punish for contempt is derived from their very constitution without express statutory aid,[68] and the legislature cannot restrict such power as it existed at common law.[69]

§ 5. *Relative powers of Federal and state or other subordinate governments.*[70] —The congress of the United States cannot exercise the police power, except when legislating for the District of Columbia and the territories, but the states must exercise it.[71] The power to prohibit the use of the national flag does not belong ex-

57. State v. Bryan [Fla.] 39 So. 929; Ex parte Weber [Cal.] 86 P. 809; In re Newell [Cal. App.] 84 P. 226.

58. Brady v. Mattern, 125 Iowa, 158, 100 N. W. 358.

59. The board of railroad commissioners of Connecticut is an administrative body, and acts purely in an administrative capacity in abolishing a grade crossing, and so far as Gen. St. 1902, §§ 3718, 3747, attempt to authorize the superior court to set aside the board's decision, on appeal, they are unconstitutional. Appeal of Spencer [Conn.] 61 A. 1010. The action of the board of control of the penitentiary, relative to the working of the convicts, where there is no charge of corruption or misconduct, and it is within the scope of the authority legally conferred, is not reviewable by the courts. Henry v. State [Miss.] 39 So. 856. Rev. Code 1892, § 3201, providing for the working of convicts on a farm, do not violate Const. §§ 223, 224, prohibiting the leasing of convicts, etc. Id.

60. Whether legislation is calculated to promote the health, comfort, safety, and welfare of society, is a question for the courts, when its constitutionality is assailed on account of its restriction of the liberty of citizens of the United States. Halter v. State [Nsb.] 105 N. W. 298.

61. State v. Richcreek [Ind.] 77 N. E. 1085.

62. Acts 1905, p. 182, c. 109, regulating banks and banking, etc., does not violate any of the constitutional guaranties. State v. Richcreek [Ind.] 77 N. E. 1085.

63. Hume v. Laurel Hill Cemetery, 142 F. 552.

64. An ordinance which arbitrarily prohibits the burial of bodies within an entire county, including lands unoccupied and remote from habitations, where the public health and safety could not possibly be endangered, is unreasonable and void. Hume v. Laurel Hill Cemetery, 142 F. 552.

65. City of Madison v. Madison Gas & Elec. Co. [Wis.] 108 N. W. 65.

66. Const. art. 1, § 16. State v. Superior Ct. [Wash.] 85 P. 264. Drainage Law, § 12 (Laws 1895, p. 287, c. 115), in leaving to the superior court the finding of the practicability and conduciveness to public health of a proposed drain, is valid. Id.

67. Spurgeon v. Rhodes [Ind.] 78 N. E. 228.

68. Ex parte McCown, 139 N. C. 95, 51 S. E. 957.

69. Ex parte McCown, 139 N. C. 95, 51 S. E. 957. When an attorney is charged with a contempt because of misbehavior in the presence of the court, the judge in whose presence the misbehavior took place has an inherent right to try the case. The general assembly cannot abridge this right, and the statute giving a party the privilege of filing an affidavit of prejudice on the part of the judge was not intended by the legislature to enable a defendant in a case of contempt in the presence of the court to take the trial of that case before another judge. State v. Shay, 3 Ohio N. P. (N. S.) 657.

70. See 5 C. L. 628.

clusively to the Federal congress, but may be exercised by the states.[72] The construction of highways is the special function and even the duty of the state, but that function cannot be denied to the United States in the places where it is sovereign and has exclusive jurisdiction.[73] Federal courts cannot interfere by habeas corpus with state imprisonment on a criminal conviction, where the state court had jurisdiction over the subject-matter and person and did not lose it during the trial.[74]

§ 6. *Police power in general.*[75]—The police power is one of the inherent, sovereign powers of the state.[76] It is essential to the full accomplishment of the purposes of civil government,[77] and it may be paraphrased as society's natural right of self-defense.[78] Hence, neither the state nor a municipality can by contract, by affirmative action or by inaction, permanently divest itself of the authority to exercise its police powers.[79] Police legislation, like all other exercise of the lawmaking power, must bear the test of constitutional limitations,[80] but the fourteenth amendment was not intended to limit or hamper the states in the exercise of their police powers,[81] since all property and personal rights are held subject to that power,[82] hence any statute or ordinance, the sole object and general tendency of which is to protect the public health,[83] safety,[84] or morals,[85] or promote the welfare of the

71. Morrison v. State [Tenn.] 95 S. W. 494.

72. Laws 1903, c. 139, p. 644 (Cobbey's Ann. St. 1903, § 2375g et seq.), to prevent and punish the desecration of the United States flag, is constitutional. Halter v. State [Neb.] 105 N. W. 298.

73. Act Cong. June 28, 1902, 32 Stat. at L. 481, c. 1302, U. S. Comp. St. 1903, p. 431, for the purchase of a strip for the Panama Canal, is constitutional. Wilson v. Shaw, 25 App. D. C. 510.

74. Jurisdiction was not lost by the mere failure to have the testimony read or repeated to the accused, who was unable on account of almost total deafness to hear the same, when he was aware of all the proceedings and made no objections. Felts v. Murphy, 201 U. S. 123, 50 Law. Ed. —.

75. See 5 C. L. 628.

76. Morrison v. State [Tenn.] 95 S. W. 494.

77. State v. Chittenden [Wis.] 107 N. W. 500.

78. McGuire v. Chicago, etc., R. Co. [Iowa] 108 N. W. 902.

79. State v. St. Paul, etc., R. Co. [Minn.] 108 N. W. 261.

80. State v. Chittenden [Wis.] 107 N. W. 500; McGuire v. Chicago, etc., R. Co. [Iowa] 108 N. W. 902.

81. McGuire v. Chicago, etc., R. Co. [Iowa] 108 N. W. 902; Darnell v. Memphis [Tenn.] 95 S. W. 816; Morrison v. State [Tenn.] 95 S. W. 494; Halter v. State [Neb.] 105 N. W. 298; In re Newell [Cal. App.] 84 P. 226.

82. Mumford v. Chicago, etc., R. Co., 128 Iowa, 685, 104 N. W. 1135; In re Newell [Cal. App.] 84 P. 226; California Reduction Co. v. Sanitary Reduction Works, 199 U. S. 306, 50 Law. Ed. —; Williams v. Fourth Nat. Bank [Okl.] 82 P. 496; California Reduction Co. v. Sanitary Reduction Works, 199 U. S. 306, 50 Law. Ed. —. The **right of contract** is subject to the proper exercise of the police power. People v. Marcus [N. Y.] 77 N. E. 1073. Acts 27th Gen. Assem. p. 33, c. 49, amending Code, § 2071, making railroad companies liable for injuries to servants caused by negligence of fellow-servants, regardless of contracts of indemnity, etc., is a proper exercise of police power. McGuire v. Chicago, etc., R. Co. [Iowa] 108 N. W. 902. Rev. Laws, c. 56, § 1, prohibiting the imposing, as a condition of sale, that the purchaser shall not deal in the goods, etc., of any other person, etc., but not prohibiting the appointment of sole agents or the making of exclusive contracts of sale, is within the police power of the state. Commonwealth v. Strauss [Mass.] 78 N. E. 136. The **hours of work,** in employments detrimental to health, may be regulated by the legislature. State v. Muller [Or.] 85 P. 855. Laws 1903, p. 148, prohibiting the employment of any female in any factory, etc., for more than 10 hours a day, is valid. Id. The right of the legislature to prescribe a maximum **rate of interest** for the forbearance, use, or loan of money has long been recognized. State v. Cary, 126 Wis. 135, 105 N. W. 792.

83. Commonwealth v. Strauss [Mass.] 78 N. E. 136; State v. Richcreek [Ind.] 77 N. E. 1085; People v. Warden of Prison of New York, 183 N. Y. 223, 76 N. E. 11; Ex parte Hayden, 147 Cal. 649, 82 P. 315; California Reduction Co. v. Sanitary Reduction Works, 199 U. S. 306, 50 Law. Ed. —; State v. Chittenden [Wis.] 107 N. W. 500; McGuire v. Chicago, etc., R. Co. [Iowa] 108 N. W. 902. An ordinance prohibiting the sale of milk containing a preservative may be passed, even though a preservative not injurious to health might be used. City of St. Louis v. Schuler, 190 Mo. 524, 89 S. W. 621. Laws 1905, p. 161, c. 114, to create a food and dairy department to prevent the adulteration of foods, etc., was within the police power of the state, except so far as it unreasonably interfered with interstate commerce. Jewett Bros. v. Smail [S. D.] 105 N. W. 738. A constitutional provision that all navigable waters shall forever remain public highways does not prevent the legislature, under its power of drainage of low lands, from authorizing the building of a dam across such a stream. Manigault v. Springs, 199 U. S. 473, 50 Law. Ed. —. Laws 1903, p. 185, c. 159, § 13, prohibiting the discharge of sewage into a stream used for a

community at large,[86] as well as the public peace, quiet, and good order,[87] or public convenience or general prosperity,[88] is valid and enforceable, though it may inci-

public drinking supply, without reference to distance from the intake, is a proper exercise of the police power. City of Durham v. Eno Cotton Mills [N. C.] 54 S. E. 453. Laws 1905, p. 130, c. 66, for licensing plumbers, etc., does not bear such relation to the public health as to render it a police or sanitary measure justifiable under the police power. State v. Smith [Wash.] 84 P. 851. The legislature can regulate trade and business in drugs and poisons. State v. Kumpfert, 115 La. 950, 40 So. 365.

Sunday laws: The Sunday law is justified as a sanitary measure and as a legitimate exercise of police power. State v. Weiss [Minn.] 105 N. W. 1127. Laws 1903, c. 362, p. 652, prohibiting public traffic on Sunday, is constitutional. Id., following State v. Justus 91 Minn. 447, 98 N. W. 325, 103 Am. St. Rep. 521, 64 L. R. A. 510. Pen. Code §§ 263, 264, prohibiting servile labor or work on Sunday, does not conflict with the state or Federal constitution. People v. Zimmerman, 48 Misc. 203, 95 N. Y. S. 136.

Practice of medicine, etc.: The legislature can regulate the practice of medicine and surgery. State v. Davis, 194 Mo. 485, 92 S. W. 484. Statutes prescribing the qualifications of medical practitioners and regulating the practice of medicine are within the police power of the state and infringe no constitutional provision. Spurgeon v. Rhodes [Ind.] 78 N. E. 228. The police power of the state warrants the requirement of the possession of all reasonable qualifications by those who seek to engage in the public practice of medicine (Czarra v. Medical Sup'rs, 25 App. D. C. 443), and the extension of a wide discretion to those agencies charged with the duty of inquiry and determination (Id.). But so much of Act Cong. June 3, 1896 (29 Stat. at L. 198, c. 313), as authorizes the board of medical supervisors to revoke a license upon conviction of "unprofessional or dishonorable conduct," independently of other offenses, is void for uncertainty, it being a mere matter of opinion as to whether an act constitutes such conduct. Id. Legislation prescribing regulations for the practice of dentistry is within the police power. Kettles v. People [Ill.] 77 N. E. 472.

84. Commonwealth v. Strauss [Mass.] 78 N. E. 136; State v. Richcreek [Ind.] 77 N. E. 1085; People v. Warden of Prison of New York, 183 N. Y. 223, 76 N. E. 11; McGuire v. Chicago, etc., R. Co. [Iowa] 108 N. W. 902; State v. Chittenden [Wis.] 107 N. W. 500. When a large number of persons are employed in an extrahazardous business, it is within the police power to regulate, or require the owner to regulate, conditions so as to safeguard their lives and health. Andricus' Adm'r v. Pineville Coal Co. [Ky.] 90 S. W. 233. A city, under Const. art. 11, § 11, authorizing the enforcement of police regulations not in conflict with general laws, can declare it unlawful to erect or maintain any tent or movable structure within the **fire limits.** In re Newell [Cal. App.] 84 P. 226. Under its police power the state can impose upon railroad companies the uncompensated duty of constructing and maintaining all necessary **safety devices at highway crossings** laid out after the construction of the railroad, and such requirement is not a taking of private property for public use in violation of the constitution. State v. St. Paul, etc., R. Co. [Minn.] 108 N. W. 261.

85. Commonwealth v. Strauss [Mass.] 78 N. E. 136; People v. Warden of Prison of New York, 183 N. Y. 223, 76 N. E. 11; State v. Richcreek [Ind.] 77 N. E. 1085; Ex parte Hayden, 147 Cal. 649, 82 P. 315; McGuire v. Chicago, etc., R. Co. [Iowa] 108 N. W. 902; State v. Chittenden [Wis.] 107 N. W. 500.

Places of amusement: The state, in the exercise of its police power, has the unquestioned right to regulate places of amusement, such as public race tracks. Greenburg v. Western Turf Ass'n [Cal.] 82 P. 684.

Suppression of gambling: The power of the state to enact laws to suppress gambling cannot be doubted. Marvin v. Trout, 199 U. S. 212, 50 Law. Ed. —. Ohio Rev. St. § 4275, subjecting a building knowingly permitted to be used for gambling purposes, to an action to pay a judgment for the recovery of money lost there, sustained. Id. Under the police power of the state the legislature can authorize the prevention by injunction of the habitual use of any premises for the purpose of gaming. Ex parte Allison [Tex. Cr. App.] 14 Tex. Ct. Rep. 409, 90 S. W. 492, afd. 14 Tex. Ct. Rep. 687, 90 S. W. 870. Gen. Laws 29th Leg. p. 372, c. 153, sustained. Id.

Sale of liquors: No one has a natural right to sell intoxicating liquor, because the tendency of its use is to deprave public morals. State v. Seebold, 192 Mo. 720, 91 S. W. 491. It is neither a "natural, essential and inherent," inalienable right, nor a constitutional one. State v. Corron [N. H.] 62 A. 1044. It is within the police power of the state to regulate, or to absolutely prohibit, the sale of liquors (Borck v. State [Ala.] 39 So. 580) without violation of the fourteenth amendment to the Federal constitution (State v. Frederickson [Me.] 63 A. 535), and hence it may be prohibited as to a class that the state does not deem fit to engage in the business (Borck v. State [Ala.] 39 So. 580). A liquor license may be revoked for violations of the liquor laws. Id. An ordinance making it a misdemeanor for the proprietor of a saloon to permit any person other than himself and family to enter such place while it is required to be kept closed infringes no constitutional right, privilege, or immunity. State v. Galloway [Idaho] 84 P. 27. The legislature may provide for the seizure and condemnation, judicially determined, of intoxicating liquors kept for sale in violation of law, without a deprivation of property without due process of law. Beavers v. Goodwin [Tex. Civ. App.] 14 Tex. Ct. Rep. 429, 90 S. W. 930. Pen. Code 1895, art. 402, amd. by Acts 28th Leg. (Gen. Laws p. 55, c. 40), providing for a search of the place where liquors are alleged to be sold, is a deprivation of property without due process of law, for failure to provide for any judicial determination, etc. Id. An ordinance requiring the procuring of a license to sell liquors and

dentally interfere with liberty[89] or property;[90] but personal or property rights cannot be arbitrarily invaded under the guise of regulation.[91] Regulations preventive

the payment of $500 therefor, adopted under charter authority, is a valid police regulation and not a revenue measure. Wells v. Torrey [Mich.] 13 Det. Leg. N. 378, 108 N. W. 423. Restrictions which may be lawfully imposed might be obnoxious as an illegal restraint of trade when applied to other pursuits or avocations. State v. Galloway [Idaho] 84 P. 27. The power to prohibit the sale of intoxicating liquors during certain periods is no longer an open question. Id. Loc. Acts 1905, p. 1157, No. 663, prohibiting the keeping of a saloon near any public school in a certain county, is valid. White v. Bracelin [Mich.] 13 Det. Leg. N. 156, 107 N. W. 1055.

Junk dealers: The temptation to children to procure junk and sell it to junk dealers is a moral detriment which the legislature can remove by requiring junk dealers to be licensed and by prohibiting their purchasing from young children. People v. McGuire, 99 N. Y. S. 91. Pen. Code § 290, subd. 6, though construed to prevent junk dealers from purchasing goods from children under 16, regardless of whether the goods were stolen, is not unconstitutional. Id. Pub. St. 1901, c. 124, § 1, as amd. by Laws 1905, p. 484, c. 76, for licensing junk dealers, is constitutional. State v. Cohen [N. H.] 63 A. 928.

86. Commonwealth v. Strauss [Mass.] 78 N. E. 136; State v. Richcreek [Ind.] 77 N. E. 1085; People v. Warden of Prison of New York, 183 N. Y. 223, 76 N. E. 11; Ex parte Hayden, 147 Cal. 649, 82 P. 315; California Reduction Co. v. Sanitary Reduction Works, 199 U. S. 306, 50 Law. Ed. —. The police power includes legislative authority to make all regulations reasonably necessary or conducive to the public welfare. State v. Chittenden [Wis.] 107 N. W. 500. An act calculated to foster **sentiments of patriotism** is not open to the objection that it is not calculated to promote the welfare of society. Halter v. State [Neb.] 105 N. W. 298.

87. Carty's Adm'r v. Winooski [Vt.] 62 A. 45; State v. Chittenden [Wis.] 107 N. W. 500.

88. Chicago, B. & Q. R. Co. v. People, 200 U. S. 561, 50 Law. Ed. —.

89. People v. Warden of Prison of New York, 183 N. Y. 223, 76 N. E. 11; Halter v. State [Neb.] 105 N. W. 298; People v. Marcus [N. Y.] 77 N. E. 1073. If it be competent for the legislature to prescribe police regulations for a particular locality, any inconvenience resulting to those living near the boundary line because of such proximity must be borne as the natural consequence of the valid legislation. Brown v. Tharpe [S. C.] 54 S. E. 363. The provisions for statements by the owner, **registration and license of motor vehicles,** are within the exercise of the police power for the purpose of securing the safety of the public. Unwen v. State [N. J. Law] 64 A. 163. Code Pub. Gen. Laws, art. 72, § 8, prohibiting the having or **taking of oysters** under a certain size, etc., is a proper police regulation. Windsor v. State [Md.] 64 A. 288. The granting of **licenses to nonresident hunters** to kill deer within the state is within the proper exercise of the police power of the state, if there is no discrimination in their favor and against residents without classification. State v. Niles [Vt.] 62 A. 795.

Separation of races: Act Apr. 4, 1905 (Acts 1905, p. 321, c. 150), requiring the separation of white and colored passengers on street cars, is valid. Morrison v. State [Tenn.] 95 S. W. 494. Act Mar. 22, 1904, p. 181, c. 85, prohibiting and punishing the maintenance of an institution of learning for the joint teaching of white and colored persons, is within the police power and valid (Berea College v. Com. [Ky.] 94 S. W. 623), but in so far as it prohibits the maintenance by institutions of learning of separate branches for white and colored persons less than 25 miles distant from each other, is unreasonable and not within the police power (Id.).

90. The provisions declaring that property shall not be taken without due process of law have no application to statutes passed in the exercise of the police power. In re Newell [Cal. App.] 84 P. 226. In the exercise of the police power the legislature is not restricted to indictment, but may proceed by the summary process of abatement of the nuisance and imposing as a penalty the forfeiture or destruction of the article illegally used. Daniels v. Homer, 139 N. C. 219, 51 S. E. 992. As a person whose nets are seized for alleged violation of Acts Gen. Assem. 1905, c. 292, regulating fishing in Albemarle and Pamlico Sounds, etc., can contest the question in replevin, by injunction or by action to recover the proceeds of sale and damages, § 9 is not unconstitutional as depriving him of property without due process. Id. The right of the public to be protected from damage by **estrays** is included within the police power inherent in government. City of Paducah v. Ragsdale [Ky.] 92 S. W. 13. A **franchise granted to a street railway company,** though a contract between the city and the company, is nevertheless subject to the police power of the city to regulate the manner of the use of the streets. People v. Geneva, etc., Traction Co., 98 N. Y. S. 719. The **banking business,** because of its quasi public nature and the intimate relation it bears to the fiscal affairs of the people and the revenues of the state, is within the police power. State v. Richcreek [Ind.] 77 N. E. 1085. A municipal ordinance requiring a specified kind of **fire escapes** is not an interference with vested rights, in case of an owner of a building previously erected and equipped with the fire escapes there prescribed. City of Seattle v. Hinckley, 40 Wash. 468, 82 P. 747.

Disposition of garbage: A municipal ordinance requiring all garbage, etc., to be delivered at a crematory to be destroyed at the expense of the party delivering it, does not deprive him of property without due process of law, though some of the refuse destroyed may have some value. California Reduction Co. v. Sanitary Reduction Co., 199 U. S. 306, 50 Law. Ed. —. A city ordinance, limiting the use of the streets for the collection and distribution of garbage to the duly authorized contractor of the city, is a valid exercise of the police power, if passed

of fraud especially are within the scope of the police power.[92] The clear weight of authority sustains the right of the legislature to control the constabulary.[93] The legislature may designate any agency it sees fit within the state, reasonably calculated to act justly in the matter, to nominate persons for appointment to administer its mere police regulations.[94] The police power may be delegated to municipalities,[95] or in the exercise of the police power, the legislature may divide the state into as many political divisions as it sees fit, whether counties, cities, towns, or plantations, and impose upon them the care and support of paupers in any manner it desires.[96]

§ 7. *Liberty of contract and right of property cannot be invaded,*[97] *except as reasonably necessary for the public welfare.*[98]—To labor and employ labor are inherent and inalienable rights and cannot be taken away in whole or in part, unless upon the broad ground of public good,[99] but the power of a legislature to regulate a

in good faith to safeguard the public health. Atlantic City v. Abbott [N. J. Law] 62 A. 999.

91. While a creek into which the offal of a slaughter house, as well as sewage from private residences, was discharged might be abated as a nuisance, the slaughter house which was kept in a sanitary condition, and plaintiff's franchise to keep it, could not be abolished by the United States military governor of Cuba. O'Reilly De Camara v. Brooke, 142 F. 858. A statute which prohibits an act which is innocent in character and which has no tendency to affect, injure, or endanger the public health, morals, or safety, is not a valid exercise of the police power. Ex parte Quarg [Cal.] 84 P. 766. Act Cal. Mar. 18, 1905 (St. 1905, p. 140, c. 140), prohibiting the sale of theater tickets, etc., for a higher price than originally charged therefor by the management. Id. If a cemetery never has been and will not become a nuisance and is not dangerous to life or health, a municipality cannot constitutionally prohibit its use. Hume v. Laurel Hill Cemetery, 142 F. 552.

92. State v. Richcreek [Ind.] 77 N. E. 1085; People v. Warden of Prison of New York, 183 N. Y. 223, 76 N. E. 11. Laws 1904, c. 432, regulating the keeping of **employment agencies** in first and second class cities, is a proper police regulation to prevent fraud and imposition on ignorant people seeking employment. Id. The legislature, under its police power, can adopt reasonable measures for the regulation of **sales of merchandise in bulk** so as to prevent fraud. In re Paulis, 144 F. 472. Conn. Pub. Acts 1905, p. 408, c. 211, regulates such sales, and is reasonable. Id. Sess. Laws 1903, c. 30, § 1, p. 240, regulating such sales, does not conflict with organic act § 6, conserving property rights. Williams v. Fourth Nat. Bank [Okl.] 82 P. 496. Act Oct. 10, 1903 (Acts 1903, p. 438), prohibiting the **changing of names,** except as provided by law, with intent to defraud, etc., was a proper exercise of the police power. Morris v. State [Ala.] 39 So. 973.

Ticket brokerage: Laws 1905, p. 422, in effect prohibiting railroad ticket brokerage, is a lawful exercise of the police power of the state. State v. Thompson [Or.] 84 P. 476. Sess. Laws 1905, p. 376, c. 180, prohibiting any but regularly authorized agents from selling railroad tickets, is a valid enactment in prevention of frauds on the public. In re O'Neill, 41 Wash. 174, 83 P. 104. Acts 1905, p. 873, c. 410, prohibiting the sale of nontransferable tickets by unauthorized agents, is valid. Samuelson v. State [Tenn.] 95 S. W. 1012.

93. The right of a city to the sole control of its police force has not been so reserved as to bring it within Const. art. 1, § 23, or art. 4, § 10 (Horton v. City Council of Newport [R. I.] 61 A. 759), and the provisions of Laws 1900-1901, p. 110, c. 804, for the appointment of police commissioners for the city of Newport, and the payment of their salaries (§ 9) by the city, are valid (Id.),

94. State v. Chittenden [Wis.] 107 N. W. 500.

95. Carty's Adm'r v. Winooski [Vt.] 62 A. 45. In California the police power of a city is derived from the constitution. Const. art. 11, § 11. In re Newell [Cal. App.] 84 P. 226.

96. Rev. St. c. 144, § 42, relative to the expense of the care of pauper insane, held constitutional. Inhabitants of Rockport v. Searsmont [Me.] 63 A. 820.

97. See 5 C. L. 631. The free and untrammeled right to contract is a part of the liberty guaranteed to every citizen by the Federal and state constitutions. People v. Marcus [N. Y.] 77 N. E. 1073. The constitutional provisions guaranteeing liberty (Const. U. S. amdt. 14; Const. Cal. art. 1) prohibit the legislature from interfering with the right to make contracts touching the acquisition, protection, management, and enjoyment of property, when not wrongfully affecting the rights of others or the public safety, health, or morals. Ex parte Drexel, 147 Cal. 763, 82 P. 429. A **trading stamp** given by a merchant to a customer on the purchase of goods is not a lottery or gambling device, but a contract, and the antitrade stamp or coupon act (St. 1905, p. 67), attempting to prohibit it, is void. Id. Pen. Code § 171a, prohibiting any person from making the employment of another conditional on the employe not joining or becoming a member of a **labor organization,** is unconstitutional as an interference with freedom of contract. People v. Marcus [N. Y.] 77 N. E. 1073.

98. See 5 C. L. 631. Liberty of contract, like all other rights, is held subject to such reasonable restrictions and regulations as may be imposed for the general good. McGuire v. Chicago, etc., R. Co. [Iowa] 108 N. W. 902.

99. Heydecker's Gen. Laws, p. 2619, c. 32,

business for the protection of the public carries with it the power to control and regulate the right of contract in relation thereto.[1]

§ 8. *Freedom of speech and of the press cannot be abridged, neither can it be abused without liability.*[2]—The right of free speech does not justify members of a labor union in inducing, by threats, intimidation, etc., prospective customers of a person to refrain from patronizing him.[3]

§ 9. *Personal and religious liberty, including the right to choose employment, cannot be infringed.*[4] *Right to choose employment.*[5]—The right to pursue any lawful calling in a lawful way is a fundamental right,[6] but the right does not extend to the pursuit of professions or avocations of such a nature as to require peculiar skill or supervision for the public welfare.[7]

art. 6, § 77, prohibiting females from being employed in factories before 6 o'clock a. m. or after 9 p. m., is an unconstitutional infringement on their liberty to contract for their own labor guaranteed by Const. 1894, art. 1, § 6. People v. Williams, 100 N. Y. S. 337.

1. State v. Cary, 126 Wis. 135, 105 N. W. 792. While the legislature cannot constitutionally declare that void which in its nature is, and under all circumstances must be, entirely harmless, yet it may place such reasonable restrictions on the right of an owner in relation to his property as becomes necessary to conserve the interests of the public and to prevent frauds among individuals. Williams v. Fourth Nat. Bank [Okl.] 82 P. 496. Laws 1905, p. 419, c. 278, amending Rev. St. 1898, § 1691, so as to regulate the loaning of money on **chattel mortgages,** is not an unconstitutional interference with the right of contract. Id. Acts 1887, p. 13, § 1 (Burns' Ann. St. 1901, § 7065), requiring **payment of employes** at least once every two weeks and in lawful money, does not abridge the right of contract, except as to payment in money, and that restriction is valid. Seeleyville Coal & Min. Co. v. McGlosson [Ind.] 77 N. E. 1044. The **mechanic's lien** law (P. L. 1898, p. 538) does not interfere with the owner's right to acquire, possess, and protect property. Gardner & Meeks Co. v. New York, etc., R. Co., 72 N. J. Law, 257, 62 A. 416. Code § 2071, providing that railroad companies shall be liable for damages caused by neglect of its agents, and forbidding **contracts restricting liability,** is not an unconstitutional interference with the liberty of contract. Mumford v. Chicago, etc., R. Co., 128 Iowa, 685, 104 N. W. 1135. Acts 27th Gen. Assem. p. 33, c. 49, amending Code § 2071, making railroad companies liable for injuries to servants caused by negligence of fellow-servants, regardless of **contracts of indemnity,** is not an unlawful restriction of the right of contract. McGuire v. Chicago, etc., R. Co. [Iowa] 108 N. W. 902. Act No. 66, p. 74, 1888, known as the **"Pharmacy Law,"** does not prohiblt the freedom of contract. State v. Kumpfert, 115 La. 950, 40 So. 365. Acts 1905, c. 39, p. 401, in requiring specified corporations to appoint the auditor as **attorney to accept service** of process and notice, does not deny freedom of contract. State v. St. Mary's Franco-American Petroleum Co., 58 W. Va. 108, 51 S. E. 865. Laws 1905, p. 2079, c. 729, § 309, making **mortgage obligations,** which bind the mortgagor to pay any of the mortgage tax, usurious, does not conflict with the freedom of contract. People v. Ronner, 95 N. Y. S. 518.

2. See 5 C. L. 632.

3. Jordahl v. Hayda [Cal. App.] 82 P. 1079.

4. See 5 C. L. 632.

Involuntary servitude: Act Aug. 15, 1903 (Laws 1903, p. 90), punishing the procuring of money, etc., by fraudulent means, does not violate Const. art 1, § 1, par. 17, prohibiting involuntary servitude, etc. Townsend v. State, 124 Ga. 69, 52 S. E. 293. To punish an offender by confining him at hard labor under municipal control does not violate the prohibition. Pearson v. Wimbish, 124 Ga. 701, 52 S. E. 751. One who imposes upon another and obtains a sum of money on the representation that he will stay and work, but immediately leaves, if punished criminally therefor, cannot complain of involuntary servitude. He falls within the terms of Act No. 50, 1892, p. 71. State v. Murray [La.] 40 So. 930.

Religious liberty: A condition in a will that the legatee attend a certain church regularly did not conflict with Const. art. 1, § 18, guarantying religious freedom and prohibiting compulsory attendance upon any place of worship. In re Paulson's Will [Wis.] 107 N. W. 484. The fact that a person is of the Hebrew race and observes the seventh day of the week as a day of worship does not affect the constitutionality of the Sunday laws. State v. Weiss [Minn.] 105 N. W. 1127. Gen. St. 1894, § 6514, providing that it shall be a sufficient defense to a prosecution for servile labor on Sunday that the accused keeps another day as holy time and does not labor then, does not apply to a prosecution for publicly selling groceries on Sunday. Id.

5. See 5 C. L. 632, n. 26.

6. Shaw v. City Council of Marshalltown [Iowa] 104 N. W. 1121.

7. The refusal of a county bar to recommend to the state bar examining committee an applicant for **admission to the bar,** as authorized by Act 1855 (Gen. St. 1902, § 458), does not take away either liberty or property. In re O'Brien's Petition [Conn.] 63 A. 777. Laws 1904, c. 432, regulating the keeping of **employment agencies** in certain cities, does not infringe the constitutional right of a citizen to carry on a lawful business without legislative interference. People v. Warden of Prison of New York, 183 N. Y. 223, 76 N. E. 11. Pub. St. 1901, c. 124, § 1, as amd. by Laws 1905, p. 484, c. 76, for licensing **junk dealers,** is not void as granting to the mayor, aldermen and selectmen power to grant or

"Imprisonment for debt," except in case of fraud or other wrong, is prohibited.[8]

§ 10. *Equal protection of the law, as guaranteed by the state and Federal constitutions, merely requires that the law shall have equality of operation on all persons of the same class.*[9]—Within this rule are statutes imposing licenses,[10] and providing for taxation,[11] regulations of business, trades, and professions,[12] and the operation

refuse licenses to applicants fully qualified to transact business thereunder. State v. Cohen [N. H.] 63 A. 928. Laws 1905, p. 422, in effect prohibiting **railroad ticket brokerage,** does not unconstitutionally prohibit a lawful calling. State v. Thompson [Or.] 84 P. 476.

8. See 5 C. L. 633. Where a **bankrupt** has been ordered to pay over money or surrender property forming part of his estate and is committed for refusing to obey the order, such commitment does not constitute imprisonment for debt. Samel v. Dodd [C. C. A.] 142 F. 68. Revisal 1905, § 262, providing for the sentence to the house of correction, etc., of the putative **father of a bastard,** who has been charged with costs or payment for support of the child, is not objectionable as authorizing it. State v. Morgan [N. C.] 53 S. E. 142. Acts 1903, p. 90, to punish the **illegal getting of money,** etc., by fraudulent means, is not an attempt to enforce it. Banks v. State, 124 Ga. 15, 52 S. E. 74. Act Oct. 10, 1903 (Acts 1903, p. 438), prohibiting the **change of names** otherwise than as provided by law, with intent to defraud or avoid the payment of debts, etc., violates the prohibition. Morris v. State [Ala.] 39 So. 973.

9. See 5 C. L. 633. Brown v. Tharpe [S. C.] 54 S. E. 363; Kenneweg v. Allegany County Com'rs, 102 Md. 119, 62 A. 249. Acts 1904, p. 870, c. 580, for **primary elections,** does not by its provisions relative to nominations and time of holding the primaries, deny to one party equal protection of the laws in violation of the fourteenth amendment. Kenneweg v. Allegany County Com'rs, 102 Md. 119, 62 A. 249. Act Dec. 22, 1892 (21 St. at Large, p. 360), exempting a certain portion of a county from the general **stock law,** does not violate Const. art. 1, § 5, and Const. U. S. amd. 14, by denying equal protection of the laws, in that it requires citizens in the exempt portion to fence cultivated lands, when other citizens of the county are not so required. Brown v. Tharpe [S. C.] 54 S. E. 363. Pen. Code § 171a, prohibiting any employer from compelling an employe to agree not to join any labor organization as a **condition of employment,** denies equal protection of the laws, in violation of Const. U. S. amd. 14, and Const. N. Y. art. 1, §§ 1, 6. People v. Marcus, 110 App. Div. 255, 97 N. Y. S. 322. Laws 1905, pp. 474, 477, c. 241, §§ 315, 324, imposing a tax on **transfers of stock** in domestic and foreign corporations, operates equally and uniformly upon all transfers of the class named, when made by any person within the state. People v. Reardon [N. Y.] 77 N. E. 970.

White and colored races: Act Mar. 22, 1904, p. 181, c. 85, prohibiting the maintenance of institutions where whites and negroes are to be jointly taught (Berea College v. Commonwealth [Ky.] 94 S. W. 623), and Act Apr. 4, 1905 (Acts 1905, p. 321, c. 150), requiring separation of white and colored passengers on street cars (Morrison v. State [Tenn.] 95 S. W. 494), are valid police regulations and do not deny equal protection of the laws. Id. But Act May 19, 1905, requiring separate compartments in street cars for the Caucasian and African races, but not applying to "colored nurses having the care of white children or sick white persons," violates Const. U. S. amd. 14 (State v. Patterson [Fla.] 39 So. 398), and whenever, by any action of a state, through its legislature, courts, or executive or administrative officers, all persons of the African race are excluded as grand jurors in the prosecution of one of that race, equal protection of the laws is denied him (Martin v. State, 200 U. S. 316, 50 Law. Ed. ——).

10. Pub. Acts 1905, No. 214, p. 311, licensing **transient merchants,** but permitting suspension of the provisions of the act by municipalities in specific instances, denies equal protection of the laws, in conflict with Const. U. S. amd. 14. Brown v. Stuart [Mich.] 13 Det. Leg. N. 507, 108 N. W. 717. Statutes requiring foreign companies only to take out licenses for **insurance agents** do not deny any person equal protection of the laws. Commonwealth v. Gregory [Ky.] 89 S. W. 168. Acts 1903, p. 344, imposing a license tax on **emigration agents,** does not violate Const. U. S. amd. 14. Kendrick v. State, 142 Ala. 43, 39 So. 203. Sess. Laws 1902, p. 74, c. 3, § 66, providing for the forfeiture of the right to do business in the state by a **foreign corporation** failing to pay the license tax, does not conflict with Const. U. S. amd. 14, by denying equal protection of the laws. American Smelting & Refining Co. v. People [Colo.] 82 P. 531.

11. Code Supp. 1902, § 1333d, imposing a tax on certain **insurance companies,** does not deny equal protection of the laws. Iowa Mut. Tornado Ins. Ass'n v. Gilbertson [Iowa] 106 N. W. 153. Rev. St. 1898, §§ 1077a, 1077b, for the **equalization of taxes** by a board of commissioners, do not deny the equal protection of the laws. Foster v. Rowe [Wis.] 107 N. W. 635. Acts 1905, c. 35, p. 285, in its taxation of **chattels real,** does not deny equal protection of the laws. Harvey Coal & Coke Co. v. Dillon [W. Va.] 53 S. E. 928. Laws 1905, p. 2059, c. 729, **taxing mortgages,** does not deny the equal protection of the law, because it is applicable only to mortgages subsequently recorded, and makes no distinction among persons in the same class or condition. People v. Ronner, 95 N. Y. S. 518. Const. amd. 1900 (Laws Mo. 1899, p. 381), authorizing the county courts in several counties to levy additional **road and bridge taxes,** but exempting the cities of St. Louis, Kansas City, and St. Joseph, violates, by such exemption, Const. U. S. amd. 14, by denying the equal protection of the laws. State v. Chicago, etc., R. Co., 195 Mo. 228, 93 S. W. 784. Brothers and sisters of a decedent are not denied equal protection of the laws by subjection to the burden of the **inheritance**

of railroads,[13] are sustained. Criminal laws and procedure,[14] and civil remedies and proceedings,[15] are unassailable, unless unequally oppressive as to particular persons.

tax imposed by Cal. Stat. 1893, p. 193, amd. by Cal. Stat. 1899, p. 10, although no tax is imposed on strangers to the blood. Campbell v. California, 200 U. S. 87, 50 Law. Ed. —. Though Const. art. 2, §§ 29, 30, and Acts 1903, p. 632, c. 258, exempt from taxation the direct products of the soil in the hands of the producer and his immediate vendee, as articles manufactured therefrom, yet a **tax on logs** purchased and brought from another state and the lumber manufactured therefrom is not a denial of the equal protection of the laws. Darnell & Son Co. v. Memphis [Tenn.] 95 S. W. 816. Tax Law, Laws 1905, pp. 474-477, c. 241, §§ 315-324, **taxing transfers of stock** in corporations, does not deny equal protection of the laws, contrary to Const. U. S. amd. 14. People v. Reardon, 110 App. Div. 821, 97 N. Y. S. 535.

12. Rev. St. 1899, § 2358, prohibiting the receiving of more than 2 per cent per month **interest,** whereas the general statute allows only 8 per cent, does not violate Const. U. S. amd. 14, § 1, guarantying equal protection of the laws. Ex parte Berger, 193 Mo. 16, 90 S. W. 759. Singling out the **milk business** in the city of New York as a proper subject for special regulation does not deny equal protection of the laws, where all milk dealers in the city are treated alike. People v. Van de Carr, 199 U. S. 552, 50 Law. Ed. —. Laws 1902, p. 1249, c. 528, making the **sale of merchandise** otherwise than in the regular course of business, without notice, fraudulent as to creditors, etc., conflicts with Const. art. 1, §§ 1, 6, and Const. U. S. amd. 14, § 1, guarantying equal protection of the laws. Wright v. Hart, 182 N. Y. 330, 75 N. E. 404. Pen. Code §§ 321, 325, prohibiting **trade combinations,** denies equal protection of the laws by exempting persons engaged in horticulture or agriculture. State v. Cudahy Packing Co. [Mont.] 82 P. 833. Considering the peculiar situation of the city of Superior and the peculiar conditions of the grain trade and commerce there, placing it in a distinct class by itself, Laws Wis. 1905, p. 37, c. 19, as amd. by Laws Sp. Sess. 1905, p. 19, c. 12, creating the Superior Grain and Warehouse Commission and providing for **inspection and grading grain** there, though applicable to that city alone, does not deny equal protection of the laws. Globe Elevator Co. v. Andrew, 144 F. 871. Act No. 66, p. 74, 1888, known as the **"Pharmacy Law,"** does not deny equal protection of the laws. State v. Kumpfert, 115 La. 950, 40 So. 365. Act July 1, 1905 (Laws 1905, p. 320, § 4), does not confer arbitrary powers on the board of **dental examiners** to establish unreasonable rules and regulations. Kettles v. People [Ill.] 77 N. E. 472.

Sale of intoxicants: Loc. Acts 1905, p. 1157, No. 663, prohibiting the keeping of a saloon near any public school in a certain county, is not a violation of the right of equal protection of the laws, under Const. U. S. amd. 14. White v. Bracelin [Mich.] 13 Det. Leg. N. 156, 107 N. W. 1055. Liquor sellers are not denied equal protection of the laws, because producers of domestic wines are exempted by Tex. Rev. Civ. Stat. 1895, art. 5060 l, while such wines are in their hands, from the tax and bond required by the articles regulating the sale of intoxicating liquors. Cox v. Texas, 202 U. S. 446, 50 Law. Ed. —. State statutes imposing a tax on distilled spirits in bonded warehouse do not deny equal protection of the law. Thompson v. Com. [Ky.] 94 S. W. 654. Gen. Laws 29th Leg. p. 91, c. 64, regulating the storage of liquors in local option districts, does not deny equal protection of the laws. Ex parte Massey [Tex. Cr. App.] 15 Tex. Ct. Rep. 703, 92 S. W. 1083.

13. Equal protection of the laws is not denied by requiring a railway company to meet the entire expense of removing and **rebuilding a bridge and culvert,** made necessary by the widening and deepening of a creek by drainage commissioners under the Illinois farm drainage act of July 1, 1885, so as to drain low lands. Chicago, etc., R. Co. v. People, 200 U. S. 561, 50 Law. Ed. —. The proviso to Minn. Gen. Stat. 1894, § 2701, **abrogating the fellow-servant rule,** is construed to exempt only incomplete roads and hence does not deny equal protection of the laws. Minnesota Iron Co. v. Kline, 199 U. S. 593, 50 Law. Ed. —. 24 St. at Large, p. 81, § 2, providing that **claims for loss or damage of property** in possession of common carriers shall be adjusted and paid within a specified time, under penalty, does not violate the equality clauses of Const. U. S. amd. 14 and Const. S. C. art. 1, § 5. Seegers Bros. v. Seaboard Air Line R. Co. [S. C.] 52 S. E. 797; Frasier v. Charleston & W. C. R. Co. [S. C.] 52 S. E. 964.

Sale of tickets: Sess. Laws 1905, p. 376, c. 180, prohibiting sale of tickets by any one but an authorized agent, does not deny equal protection of the laws to a broker previously established in business, by granting special privileges to railroad companies. In re O'Neill, 41 Wash. 174, 83 P. 104. Nor is Acts 1905, p. 873, c. 410, prohibiting the sale of nontransferable tickets in the same way, open to that constitutional objection. Samuelson v. State [Tenn.] 95 S. W. 1012.

14. Equal protection of the laws is not denied to **nonproducing venders of milk,** because they are not given the privilege accorded to producing venders of defending against prosecutions for selling adulterated milk, by showing that the milk sold was in the same condition as when it left the herd. St. John v. People, 201 U. S. 633, 50 Law. Ed. —. Litigants and persons accused of crime are not denied the equal protection of the laws, because the **jury lists** of Wayne county are returned by a board of commissioners appointed by the governor and confirmed by the senate, and may include persons not on the assessment roll, while by the general laws the returning officers are elected and the jurors must be of those on the assessment roll. Gardner v. People, 199 U. S. 325, 50 Law. Ed. —. Equal protection of the laws, under the 14th amendment, was not denied by the decision of the Kentucky court of appeals that a reversal of a conviction for the error, if any, in **discharging a juror,** was precluded by Ky. Crim. Code, § 281. Howard

The fourteenth amendment to the Federal constitution, prohibiting the denial of the equal protection of the laws, entitles every person charged with crime in the state courts to a trial by an impartial jury of persons having the statutory qualifications, selected without discrimination.[16] While a negro is not entitled to a negro jury or to a mixed jury, when tried for a crime, the Federal constitution guaranties him against any discrimination against his race in the selection of the jury.[17] The equality contemplated in that amendment does not necessarily include a territorial equality and legislation which, though limited in the sphere of its operations, affects alike all similarly situated within its sphere, is valid.[18] That provision of the Georgia constitution which declares that protection to property shall be impartial and complete is the equivalent of a guaranty of the equal protection of the laws.[19] A corporation is a "person" within the meaning of the fourteenth amendment and cannot rightfully be denied the equal protection of the laws.[20] The rules and regu-

v. Com., 200 U. S. 164, 50 Law. Ed. —. Pen. Code § 246, inflicting the **death penalty for assaults** with a dangerous weapon, etc., by life convicts, does not deny equal protection of the laws. Ex parte Finley [Cal. App.] 81 P. 1041.

15. The right to the equal protection of the laws is not denied by a state when the same law or course of proceedings would be applied to other persons under similar circumstances and conditions. Harvey Coal & Coke Co. v. Dillon [W. Va.] 53 S. E. 928. In general, direct **lien laws** have been held constitutional, although certain extreme laws or provisions, seeking to protect mechanics and materialmen, have been held unconstitutional. Prince v. Neal-Millard Co., 124 Ga. 884, 53 S. E. 761. Civ. Code 1895, § 2801, subsec. 2, as amd. by Acts 1897, p. 30, and Acts 1899, p. 33, creating a lien for materialmen, does not deny impartial and complete protection to property. Id. The requirement of a bond from a plaintiff seeking to restrain **condemnation proceedings,** before granting the injunction, while requiring none from the defendant, does not deny to the plaintiff equal protection of the laws. Columbia Water Power Co. v. Nunamaker [S. C.] 53 S. E. 996. Code § 2485, making a mine operator, who takes coal from adjoining land without permission, liable in **double damages,** does not deny equal protection of the laws. Mier v. Phillips Fuel Co. [Iowa] 107 N. W. 621. Rev. St. 1899, § 8012, giving **additional damages and attorney fee,** in case of vexatious refusal by an insurance company to pay a loss, does not deny equal protection of the laws. Keller v. Home Life Ins. Co. [Mo.] 95 S. W. 903: Williamson v. Liverpool & London & Globe Ins. Co. [C. C. A.] 141 F. 54. New actions to recover penalties against administrators in certain cases being rendered impossible by the repeal of Gen. St. 1902, § 324, Act July 6, 1905 (Pub. Acts 1905, p. 413, c. 217), **limiting the recovery** therein, did not deprive, of equal protection of the laws, plaintiffs in pending suits under § 324. Atwood v. Buckingham [Conn.] 62 A. 616. Laws N. M. 1903, p. 51, c. 33, making certain restrictions on **actions for personal injuries or death,** does not deprive any one of the equal protection of the laws, as it affects all alike, except in cases where the wrongdoers cannot be reached by process within the territory. Buttron v. El Paso Northeastern R. Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 339, 93 S. W. 676. Municipal Court Act of New York City (Laws 1902, p. 1494, c. 580, § 12 [7]), as amd. by Laws 1904, p. 1429, c. 598, providing for **rotation of the justices** of the court, etc., does not deny equal protection of the laws. Sakolski v. Schenkel, 98 N. Y. S. 190.

16. Commonwealth of Kentucky v. Powers, 139 F. 452.

17. Held that the provisions of Code Cr. Proc. 1895, art. 378, for the impaneling of grand jurors, and the proceedings thereunder in this case, did not show discrimination. Thomas v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 535, 95 S. W. 1069.

18. Laws 1904, c. 432, regulating the keeping of employment agencies in first and second class cities, does not violate Const. U. S. amd. 14, guarantying equal protection of the laws, because it applies only to cities of the classes specified. People v. Warden of Prison of New York, 183 N. Y. 223, 76 N. E. 11.

19. Georgia R. & Banking Co. v. Wright [Ga.] 54 S. E. 52. The General Assembly not being required by the constitution to tax shares of stock in domestic corporations, where the property of such corporations is taxed, the failure to tax such shares while taxing those of foreign corporations is not a denial of impartial and complete protection of property or of equal protection of the laws. Id.

20. McGuire v. Chicago, etc., R. Co. [Iowa] 108 N. W. 902. Equal protection of the laws is not denied a foreign meat packing house by the tax imposed on its local business under N. C. Pub. Laws 1903, c. 247, although persons selling meat packing house products, but not doing a meat packing business at the same local points, are not taxed (Armour Packing Co. v. Lacy, 200 U. S. 226, 50 Law. Ed. —) nor are such meat packing houses denied equal protection because houses packing vegetables and the like are not included in the same classification and subjected to the same tax (Id.). The failure to directly tax shares of stock in domestic corporations whose property is located in the state, while levying a direct tax upon shares of stock in foreign corporations whose property is outside of the state, belonging to citizens of the state, is not a denial to the holder of the foreign shares of the equal protection of the laws (Georgia R. & Banking Co. v. Wright, 124 Ga. 596, 53 S. E. 251), nor is the policy of the state, in the administration of the law taxing corporations, such as to deny the plaintiff the equal protection of the laws (Id.). Laws 1898, c. 23, § 13, p. 69 (§ 3580, Gen. St. 1901), limiting to 60 days the time within which fraternal beneficiary associa-

lations made by the railroad commissioners of Florida to prevent unjust discriminations, being deemed prima facie reasonable and just, in the absence of any showing to the contrary, their enforcement will not, of itself, deprive any railroad company of the equal protection of the laws.[21]

§ 11. *Privileges and immunities of citizens.*[22]—Those sections and amendments of the Federal constitution, guaranteeing the civil rights of the citizens of the several states and the United States, operate only on discriminations by the states in their sovereign capacity, and not upon the acts of individuals,[23] but the mere fact that state officials fail to do their duty and do not apply an act to some persons subject to its provisions does not make it unconstitutional as to others;[24] and the rights, privileges, and immunities, which the fourteenth amendment and statutes for its enforcement were designed to protect, are such as belong to citizens of the United States as such, and not as citizens of the state.[25] The right of suffrage was not conferred by the fourteenth amendment.[26] The legislature can raise the age of competency to contract marriage, though such enactment might deprive persons of a privilege or right which they enjoyed before,[27] and a divorce may be legally declared to constitute a disqualification to the right to receive a license and contract a second marriage within a reasonable time.[28] A corporation is not a citizen within this section, and a state may discriminate against foreign, and in favor of domestic, corporations, in the imposition of license taxes.[29] The sale of intoxicating liquors as a beverage is not a privilege guaranteed to citizens of the United States,[30]

tions may appeal from a judgment, construed and held not to deny such associations equal protection of the laws. Sons & Daughters of Justice v. Swift [Kan.] 84 P. 984. Hence the property of a mutual insurance company and the equitable interests of its members are within the constitutional guaranty. Huber v. Martin [Wis.] 105 N. W. 1031.

21. State v. Atlantic Coast Line R. Co. [Fla.] 41 So. 705.

22. See 5 C. L. 635.

23. Georgia R. & Banking Co. v. Wright, 124 Ga. 596, 53 S. E. 251.

Do not abridge privileges, etc.: Act Apr. 4, 1905 (Acts 1905, p. 321, c. 150), requiring the **separation of white and colored passengers** on street cars, is a proper police regulation. Morrison v. State [Tenn.] 95 S. W. 494. Laws 1903, c. 139, p. 644 (Cobbey's Ann. St. 1903, § 2375g et seq.), to prevent and punish the **desecration of the United States flag.** Halter v. State [Neb.] 105 N. W. 298. The refusal to appoint an applicant named **executor** in a will to act as such is not a denial of a privilege or immunity in violation of Const. U. S. art. 4, § 2. In re Mulford, 217 Ill. 242, 75 N. E. 345. A statute making it unlawful to refuse admission to a **place of public amusement** to persons of full age presenting admission tickets is not a deprivation of civil rights under Const. U. S. amd. 14, or Const. Cal. § 1. Greenburg v. Western Turf Ass'n [Cal.] 82 P. 684.

Abridgement of privileges, etc.: Laws 1905, p. 130, c. 66, for licensing plumbers, violates Const. U. S. art. 14, § 1, as affecting the privileges and immunities of citizens. State v. Smith [Wash.] 84 P. 851. Laws 1905, pp. 372, 373, requiring a license tax for peddling goods "after shipment to the state," discriminates against goods manufactured in other states, impairing the privileges and immunities of citizens of the several states, contrary to Const. U. S. art. 4, § 2. Bacon v. Locke [Wash.] 83 P. 721.

24. Iowa Mut. Tornado Ins. Ass'n v. Gilbertson [Iowa] 106 N. W. 153.

25. Laws 1904, p. 8, c. 9, giving preference in appointments in the public service to honorably discharged soldiers, etc., is not violative of the fourteenth amendment. Shaw v. City Council of Marshalltown [Iowa] 104 N. W. 1121.

26. The provisions of Const. art. 7, § 1, as amended in 1895 (Gen. Laws 1895, p. 7, c. 3), limiting the right of suffrage as respects naturalized citizens, is not in conflict with Const. U. S. amd. 14, prohibiting the abridgment of the privileges or immunities of citizens of the United States. State v. Webber [Minn.] 105 N. W. 490.

27. Olsen v. People, 219 Ill. 40, 76 N. E. 89.

28. May 15, 1905 (Laws 1905, p. 194), prohibiting remarriage of divorcees within a certain time, infringes no constitutional right. Olsen v. People, 219 Ill. 40, 76 N. E. 89.

29. American Smelting & Refining Co. v. People [Colo.] 82 P. 531. Statutes requiring foreign insurance companies only to take out licenses for their agents to do business in the state do not controvene Const. U. S. art. 4, § 2, entitling citizens of one state to all the privileges and immunities of the several states. Commonwealth v. Gregory [Ky.] 89 S. W. 168. Laws 1899, p. 409, No. 255, to prevent trusts, monopolies, and combinations, and providing for the revocation of the certificate of any foreign corporation violating the act, does not abridge the privileges and immunities of citizens. Attorney General v. A. Booth & Co. [Mich.] 12 Det. Leg. N. 991, 106 N. W. 868.

30. State v. Richardson [Or.] 85 P. 225. Tex. Rev. Civ. Stat. 1895, art. 5060, 1, does not deny liquor sellers the privileges and immunities of citizens, because producers of

and the right to hold a public office or to be employed by the state in any capacity is not a privilege.[31]

§ 12. *Grants of special privileges and immunities; class legislation.*[32]—Whether or not express classifications are reasonable, or unjust and arbitrary, generally arises with reference to whether statutes infringe the provisions against local and special laws. This question is elsewhere treated.[33] Classification is essential to discrimination.[34] In enacting police regulation, if a classification made is usual, practical, and reasonable, that is sufficient.[35] The fourteenth amendment or any similar provision in a state constitution, is satisfied if all persons similarly situated are treated alike,[36] and there is no manifest intent to discriminate in favor of a particular class to the exclusion of others similarly circumstanced,[37] and the provisions

domestic wines are exempted from the tax and bond while such wines are in their hands. Cox v. Texas, 202 U. S. 446, 50 Law. Ed. —. Code 1892, § 1604, making it a misdemeanor to act as agent for either party in effecting an unlawful sale of liquor in any territory where prohibited, does not discriminate between citizens of the state and of any other. Hart v. State [Miss.] 39 So. 523.

31. Shaw v. City Council of Marshalltown [Iowa] 104 N. W. 1121.

32. See 5 C. L. 636.

33. See Statutes, 6 C. L. 1520.

34. State v. Niles [Vt.] 62 A. 795. The discrimination in favor of nonresident hunters, by Acts 1896, p. 74, No. 94, as amd. by Acts 1898, p. 84, No. 108, in requiring licenses of them for killing deer, is justified by the fact that they acquire a qualified property in the carcass, while the resident hunter who kills without a license acquires no property. Id. Acts 1902, p. 98, No. 90, § 21, prohibiting the sale of intoxicating liquors except as prescribed, but permitting the sale of cider by farmers by the barrel, does not violate Const. U. S. Amd. art. 14, nor Const. Vt. c. 1, art. 7, prohibiting advantages to any particular class. State v. Hazelton [Vt.] 63 A. 305. 2 Acts 1871-72, p. 496, c. 976, § 11, providing that no person except certain tavern keepers in the district of Highlands should sell liquor without a license, did not confer special rights, the exception being to protect tavern keepers operating under existing licenses. Commonwealth v. Petri [Ky.] 90 S. W. 987. Laws 1905, vol. 23, p. 256, c. 149, for licensing persons to make small loans and charge interest in excess of legal rate, is not unconstitutional because it discriminates in favor of persons making loans not exceeding $100 and against those making larger loans (State v. Wickenhoefer [Del.] 64 A. 273), nor because § 8 provides that the act shall not apply to any national or state bank, or to any trust company organized under the state laws (Id.).

35. State v. Calloway [Idaho] 84 P. 27. Rev. St. 1899, § 2358, making it a misdemeanor to receive more than 2 per cent per month interest, whereas the general statute allows only 8 per cent per annum, does not arbitrarily divide usurers into criminal and noncriminal classes, violative of Const. art. 4, § 53, prohibiting special privileges, etc. Ex parte Berger, 193 Mo. 16, 90 S. W. 759.

36. Acts 1887, p. 13, § 1 (Burns' Ann. St. 1901, § 7065), requiring employers engaged in manufacturing iron, steel, lumber, etc., to pay its employes in money once in two weeks, operates upon all persons within the class named, and does not violate Bill of Rights, § 23, prohibiting special privileges, etc. Seeleyville Coal & Min. Co. v. McGlosson [Ind.] 77 N. E. 1044. There is no warrant in the legislation providing for intra and extra urban railways for the theory of classification of municipal and interurban passengers on any basis which would discriminate in favor of one as against the other with respect to rights of transfer on railways within the city limits; on the contrary, within the city limits urban and interurban passengers have precisely the same rights as to transportation. City of Cincinnati v. Cincinnati St. R. Co., 3 Ohio N. P. (N. S.) 489. Act Ark. Apr. 23, 1891 (Sand. & H. Dig. §§ 493-496), which provides that notes given in payment for any patented article be executed upon a certain printed form to be valid, is an unconstitutional discrimination. Ozan Lumber Co. v. Union County Nat. Bank [C. C. A.] 145 F. 344. A municipal ordinance which prohibits the admission of any person, other than the proprietor or his family, into a place where liquors are sold, during the time when it is required to be kept closed, which applies to all such places alike, is not class legislation. State v. Calloway [Idaho] 84 P. 27.

37. State v. Richcreek [Ind.] 77 N. E. 1085. Act 1905, to establish a graded school in Kernersville (Laws 1905, p. 30, c. 11), construed as directing the construction of one school, in which the children of the different races are to be taught in separate buildings and by separate teachers, and hence does not discriminate, contrary to Const. art. 9, § 2 (Lowery v. Kernersville School Trustees, 140 N. C. 33, 52 S. E. 267), and the erection of a necessary school building for a large number of white children is not a discrimination against the much smaller number of colored children, for whom an ample building has been supplied (Id.); but so far as it is the purpose of the act to empower the use of all public school funds for the white school, it violates Const. art. 9, § 2, prohibiting discrimination between the races (Id.). Pen. Code § 272 (St. 1905, p. 759, c. 568), making it a misdemeanor to employ, or permit the use of, any child under 16, in singing, playing musical instruments, rope walking, etc., but excepting their employment as singers in churches, schools, etc., is not objectionable for nonuniformity and discrimina-

of a restrictive act are open alike to all citizens who bring themselves within its terms.[38]

Licenses, and privilege and occupation taxes[39] are unassailable unless raising invidious distinctions.[40]

tion between children over and above that age (Ex parte Weber [Cal.] 86 P. 809), nor does it make an unfair discrimination in favor of their employment as singers or musicians in churches, schools, etc. (Id.). Act July 1, 1905 (Laws 1905, p. 320), § 3, requiring certain qualifications to take a dental examination, does not violate Const. 1870, art. 4, § 22, prohibiting special privileges or immunities (Kettles v. People [Ill.] 77 N. E. 472), nor does § 5 confer special privileges or immunities in providing that regular physicians or surgeons may extract teeth, and dental students may perform operations under the supervision of competent instructors in a dental school (Id.). Acts 1903, p. 255, c. 145, for the improvement of highways at the cost of the property benefited, as construed, does not grant special privileges to any citizen or class. Spaulding v. Mott [Ind.] 76 N. E. 620. Code § 2485, making a mine operator, who takes coal from adjoining land without permission, liable in double damages, does not violate Const. art. 1, § 6, prohibiting special privileges or immunities. Mier v. Phillips Fuel Co. [Iowa] 107 N. W. 621. Laws 1899, c. 4730, p. 119, regulating the descent of homesteads and the widow's interest therein, does not conflict with the state constitution or the fourteenth amendment by abridging the privileges and immunities of one class for the benefit of another. Saxon v. Rawls [Fla.] 41 So. 594. Laws Or. 1905, pp. 41, 47, c. 2 (local option law), as it does not grant any special privileges or immunities, though when put into operation it may deny some persons the right to sell liquors formerly enjoyed, does not violate Const. art. 1, § 20, prohibiting such privileges, etc. State v. Richardson [Or.] 85 P. 225. Acts 1905, p. 873, c. 410, prohibiting the sale of nontransferable railroad tickets by unauthorized agents, is not a special privilege to railroad companies, contrary to Const. art. 11, § 8 (Samuelson v. State [Tenn.] 95 S. W. 1012), nor is Sess. Laws 1905, p. 376, c. 180, for a similar purpose, open to that objection (In re O'Neill, 41 Wash. 174, 83 P. 104).

Class legislation: Laws 1905, p. 285, subjecting the salaries and wages of officers of counties, cities, etc., to garnishment, is class legislation, as it discriminates against certain municipalities and officers of the same class. Badenoch v. Chicago [Ill.] 78 N. E. 31. The tax imposed on the gross receipts of railroad companies by Sess. Laws 1905, p. 336, c. 141, if regarded as an income tax, is invalid as class legislation. Galveston, etc., R. Co. v. Davidson [Tex. Civ. App.] 15 Tex. Ct. Rep. 274, 579, 93 S. W. 436. Laws 1905, c. 62, § 124, p. 122, so far as it requires the county treasurer to pay over to cities organized under the general law interest and penalties on school taxes, is an unjust and arbitrary discrimination in favor of the tax payers in such cities and against those of other taxing districts, and invalid as class legislation. State v. Mayo [N. D.] 108 N. W. 36.

Not class legislation: Act Apr. 23, 1903 (P. L. 274), for the control and treatment of dependent and delinquent children. Commonwealth v. Fisher, 213 Pa. 48, 62 A. 198. Act Apr. 23, 1903, P. L. 274, relative to trial of juvenile offenders. Commonwealth v. Fisher, 27 Pa. Super. Ct. 175. Sess. Laws 1903, c. 16, p. 27, forbidding the sale by an itinerant vendor without license, excepting certain articles, and making no distinction between domestic and foreign made articles. Territory v. Russell [N. M.] 86 P. 551. Gen. Acts 1903, p. 320, § 9, authorizing an entry on land to make a preliminary survey of a proposed railway line, etc. State v. Simons [Ala.] 40 So. 662. Laws 1903, c. 139, p. 644 (Cobbey's Ann. St. 1903, § 2375g et seq.), to prevent the desecration of the United States flag. Halter v. State [Neb.] 105 N. W. 298. Municipal Court Act of New York City (Laws 1902, p. 1494, c. 580, § 12 [7]), as amd. by Laws 1904, p. 1429, c. 598, in providing for rotation of the justices, does not operate as class legislation. Sakolski v. Schenkel, 98 N. Y. S. 190. Pub. Acts 1883, p. 31, No. 39, as amd. by Acts 1887, p. 102, No. 93, and Pub. Acts 1899, p. 262, No. 231, for the organization of water power companies, is not void as class legislation, because § 14 imposes a specific tax on such corporations, though such a privilege is not offered other similar corporations. Bird v. Arnott [Mich.] 108 N. W. 646. Section 6601, providing that judgments either before a justice of the peace or in the court of common pleas under the forcible entry and detainer chapter "shall not be a bar to any further action brought by either party," is not class legislation and unconstitutional because in the interest of landlords, and should be liberally construed. Laver v. Canfield, 7 Ohio C. C. (N. S.) 389. Act Apr. 4, 1905 (Acts 1905, p. 321, c. 150), requiring the separation of white and colored passengers on street cars, is a valid police regulation and not arbitrary class legislation, in violation of Const. art. 11, § 8. Morrison v. State [Tenn.] 95 S. W. 494. Acts 29th Leg. p. 128, c. 90, authorizing confiscation of fish and oysters unlawfully sold and held, is not void as class legislation because takers of shrimps are not included in the forfeiture clause. Raymond v. Kibbe [Tex. Civ. App.] 15 Tex. Ct. Rep. 988, 95 S. W. 727.

38. The provisions of Acts 1905, p. 182, c. 109, § 2, providing that the real estate, furniture and fixtures of a bank shall not constitute more than one-third of its capital, does not conflict with Const. art. 1, § 23, prohibiting privileges or immunities. State v. Richcreek [Ind.] 77 N. E. 1085.

39. See 5 C. L. 636.

40. Acts 1904, p. 71, c. 76, and an ordinance enacted in pursuance thereof, imposing privilege taxes upon persons loaning money upon personal securities, etc., is class legislation. Rodge v. Kelly [Miss.] 40 So. 552. Acts 1904, p. 58, c. 76, imposing a privilege tax on money lending on personal securities of certain kinds, deprives of property without due process of law in arbitra-

Taxation.[41]—The subjects of taxation may be classified so long as the classification is reasonable.[42]

Regulations of business, trades, and professions,[43] are upheld, unless unfairly oppressive of particular individuals or classes.[44] In the exercise of the police power the legislature may regulate and control the carrying on of business which may be injurious to the public if not properly conducted, or may prohibit business essentially injurious,[45] and may discriminate between classes of business, when the discrimination is based on a reasonable distinction involving the public welfare, and the statute is made applicable to all who come within the limits of the classification.[46] Conditions may be imposed upon unincorporated associations which are not imposed upon corporations engaged in the same business, unless the distinction made is unreasonable.[47] The absolute prohibition of unincorporated associations and individuals from engaging in the building and loan business does not create a monopoly, so long as the business is open to all corporations complying with reasonable regulations.[48]

Railroad companies[49] may be burdened with special duties and liabilities.[50]

rily fixing the basis of the tax on the kind of securities. Hyland v. Sharp [Miss.] 41 So. 264.

41. See 5 C. L. 636.

42. Darnell v. Memphis [Tenn.] 95 S. W. 816. The fourteenth amendment was not designed to prevent the classification of property for purposes of taxation. Michigan Cent. R. Co. v. Powers, 201 U. S. 302, 50 Law. Ed. —; Darnell v. Memphis [Tenn.] 95 S. W. 816. The legislature may classify and subclassify property for direct taxation, to the extent of distinguishing differences reasonably requiring special treatment to promote the requirement of uniformity. Chicago & N. W. R. Co. v. State [Wis.] 108 N. W. 557. Where shares in domestic corporations are indirectly taxed through the taxation of their property, and the shares of stock in foreign corporations, whose property cannot be reached, are taxed directly, there is no arbitrary classification of shares in a foreign corporation for taxation in the state. Georgia R. & Banking Co. v. Wright, 124 Ga. 596, 53 S. E. 251. The discrimination made in Sess. Laws 1902, p. 73, c. 3, § 65, whereby some foreign corporations are required to pay a higher rate per share of stock as an annual license tax, is not invalid, the classification being reasonable. American Smelting & Refining Co. v. People [Colo.] 82 P. 531.

43. See 5 C. L. 636.

44. Where the legislature has power to regulate a business, it can provide against the injurious consequences inherent in the conduct thereof, may determine the necessary means thereto, and its action is final, unless it imposes such arbitrary restrictions as are foreign to the legitimate purposes sought to be accomplished (State v. Cary, 126 Wis. 135, 105 N. W. 792), and a large discretion is vested in the legislature for these purposes (Id.). The legislature has the right to prescribe the charge to be made for a public service if it be a sum sufficient to afford a reasonable compensation. City of Madison v. Madison Gas & Elec. Co. [Wis.] 108 N. W. 65. The state may regulate and restrain the right to conduct a banking business. State v. Richcreek [Ind.] 77 N. E. 1085. Congress can regulate the practice of medicine and surgery in the District of Columbia, and Act Cong. June 3, 1896, 29 Stat. at L. 198, c. 313, creating a special tribunal and investing it with power of revocation of licenses for sufficient cause, is valid. Czarra v. Medical Sup'rs, 25 App. D. C. 443. The employment of fraud or deception in passing the examinations, chronic inebriety, practice of criminal abortion, or conviction involving moral turpitude, is sufficient cause. Id. A municipal ordinance, prescribing that the rate of wages for laborers on work done by contract for the city in street improvement shall not be less than a fixed sum for a day's work of eight hours, is constitutional. Gies v. Broad, 41 Wash. 448, 83 P. 1025. Laws 1903, p. 68, c. 55, prohibiting the business of barbering on Sunday, does not violate Const. art. 1, § 12, or the fourteenth amendment, prohibiting the granting to any citizen, etc., of privileges or immunities. State v. Bergfeldt, 41 Wash. 234, 83 P. 177. An ordinance prohibiting the running of any street car not provided with an automatic fender, made by a certain company, or some other equally as good approved by the common council, was void for nonuniformity and arbitrary discrimination in favor of some manufacturers and against others. City of Elkhart v. Murray, 165 Ind. 304, 75 N. E. 593.

45, 46. Brady v. Mattern, 125 Iowa, 158, 100 N. W. 358.

47. The provisions of Acts 29th Gen. Assem. p. 45, c. 77, regulating the conduct of unincorporated building and loan associations, and requiring a deposit with the auditor of state, etc., are not unreasonable and do not render the act repugnant as class legislation (Brady v. Mattern, 125 Iowa, 158, 100 N. W. 358), nor does the fact that it is impossible for some persons or associations to engage in the business, under the conditions, render the act unconstitutional as conferring a monopoly (Id.).

48. Brady v. Mattern, 125 Iowa, 158, 100 N. W. 358.

49. See 5 C. L. 636.

50. Acts 27th Gen. Assem. p. 33, c. 49, amending Code § 2071, making every railway

Insurance.[51]

Liquor traffic.[52]—Liquor laws must not discriminate.[53]

Relations of master and servant.[54]

Criminal laws and procedure.[55]—The legislature may classify crimes and penalties according to terms of imprisonment.[56]

Civil remedies and proceedings[57] may be regulated if arbitrary classes are not created.[58]

§ 13. *Laws impairing the obligations of contracts, including state or municipal contracts,*[59] *corporate charters or franchises,*[60] *and public service franchises,*[61]

corporation liable for injuries to a servant caused by the negligence of a fellow-servant, etc., operates uniformly on all such corporations, which constitute a proper subject of classification. McGuire v. Chicago, etc., R. Co. [Iowa] 108 N. W. 902.

51. See 3 C. L. 764, n. 4-8.

52. See 5 C. L. 637.

53. Acts 1902, p. 98, No. 90, § 21, discriminating against farmers and manufacturers of other states as to the sale of cider, is unconstitutional as to such provisions. State v. Hazelton [Vt.] 63 A. 305.

54. See 5 C. L. 637.

55. See 3 C. L. 765, n. 17-21.

56. Pen. Code § 246, inflicting the death penalty for assaults with a deadly weapon, etc., by life convicts, is based upon a valid classification and does not deny equality to such convicts. Ex parte Finley [Cal. App.] 81 P. 1041.

57. See 5 C. L. 637.

58. The allowance of a reasonable attorney fee in a statute for the foreclosure of a lien against real estate for an assessment for street improvement is valid. Acts 1901, p. 534, c. 231, sustained in that respect. Shirk v. Hupp [Ind.] 78 N. E. 242, afg. Dowell v. Talbot Paving Co., 138 Ind. 675, 688, 38 N. E. 389; Railroad Co. v. Fish, 158 Ind. 533, 535, 60 N. E. 270.

59. See 5 C. L. 637.

State contracts: An **exemption from execution** is not a contract between the state and the judgment debtor, which the state is prohiblted from impairing by subsequent legislation. Myers v. Moran, 99 N. Y. S. 269. Act May 3, 1901 (Laws 1901, p. 262), providing for a **call for outstanding state bonds** for payment and making them invalid if not presented within a limited time, did not impair the obligation of contracts, though there was no authority for a peremptory call when the bonds were issued. Tipton v. Smythe [Ark.] 94 S. W. 678. Laws 1905, c. 5384, prescribing the powers and duties of the board of control of the **state educational institutions**, etc., does not impair the obligation of the contract of Laws 1870, c. 1766, p. 45, and amendatory acts, in accepting congressional grants for educational purposes. State v. Bryan [Fla.] 39 So. 929. The charter of a public educational institution is not such a contract as the state cannot impair by a subsequent repeal of the statute under which it was organized. State v. Irvine [Wyo.] 84 P. 90. Act No. 315, L. A. 1901, incorporating the public school of the village of Jerome, etc., does not impair the obligation of any contract, by transferring to the new district some of the property of the old ones from which it was formed. Attorney General v. Lowrey, 199 U. S. 233, 50 Law. Ed. —. The Wyoming Agricultural College was incorporated by Act Jan. 10, 1891 (Acts 1890-91, p. 373, c. 92), and the legislature could repeal that act by Act Feb. 7, 1905 (Laws 1905, p. 8, c. 10). State v. Irvine [Wyo.] 84 P. 90. Act July 6, 1905 (Pub. Acts 1905, p. 413, c. 217), limiting the amount recoverable in an action to enforce a **penalty against an administrator** under Gen. St. 1902, § 324, does not impair any contract, as no one had any contract relation with the state under that general law. Atwood v. Buckingham [Conn.] 62 A. 616. A statute providing for the payment in cash of past due **state bonds** which were made receivable in payment of the purchase price of real estate bank lands, does not impair the obligation of contracts, since there can be no higher method of discharging a past due obligation than by payment in money. Tipton v. Smythe [Ark.] 94 S. W. 678. Act May 3, 1901 (Laws 1901, p. 262), calling in for payment bonds made receivable by Kirby's Dig. § 4866, in payment of such lands, held valid. Id. Act 27th Leg. p. 6, c. 4, § 11, providing for suits to recover certain lands held under **Spanish or Mexican government claims**, does not impair the obligation of contracts as evidenced by the confirmation act of Feb. 10, 1852. Sullivan v. State [Tex. Civ. App.] 15 Tex. Ct. Rep. 234, 95 S. W. 645. A contract between the state and a railway company was created by Mich. Laws 1855, p. 305, § 9, that the company should **pay a certain tax** in lieu of all other taxes except penalties, when accepted by the company, which made large expenditures and completed its road under the terms of the act. Powers v. Detroit, etc., R. Co., 201 U. S. 543, 50 Law. Ed. —. The obligation of such contract could not be impaired by the imposition of any other tax. Id.

Municipal contracts: The power of the state to alter or destroy subordinate municipalities cannot be so exercised as to impair the obligation of a contract of such municipal corporations. Smith v. Walker [S. C.] 54 S. E. 779; Graham v. Folsom, 200 U. S. 248, 50 Law. Ed. —. Const. 1895, art. 7, § 11, as amended Feb. 23, 1903 (24 St. at Large, p. 3), abolishing certain townships, is void as against bonded debts previously created, and Act Feb. 21, 1906 (25 St. at Large, p. 309), for the adjustment and payment of such debts, is constitutional. Smith v. Walker [S. C.] 54 S. E. 779. An act which impairs the obligation of a county contract is void. Fremont, etc., R. Co. v. Pennington County [S. D.] 105 N. W. 929. Laws 1899, p. 44, c. 41, § 3, by fixing the total county

are void.[62]—The existence of a contract is essential to its obligation, and if there is no contract there can be no impairment.[63] The constitutional limitations which prevent the legislature from impairing the obligation of a contract do not debar it

tax rate at 8 mills on the dollar, and authorizing taxes in excess of that rate for particular purposes, makes it impossible to raise anything for the sinking fund to pay its bonded indebtedness, thereby avoiding its obligation. Id. Contract rights to use a city street or extension thereof for wharfage purposes, such as are protected from impairment, held not to have been conferred by municipal grants to construct wharves, as against legislative change of street grades. Mead v. Portland, 200 U. S. 148, 50 Law. Ed. —. The establishment of municipal waterworks is not an impairment of the obligation by a municipality to give a water company an exclusive franchise as against "any other person or corporation." Knoxville Water Co. v. Knoxville, 200 U. S. 22, 50 Law. Ed. —.

60. See 5 C. L. 637. Sess. Laws 1902, p. 73, c. 3, § 65, imposing an annual state license on the stock of a foreign corporation, does not violate Const. U. S. art. 1, § 10, par. 1, by impairing the obligation of contracts. American Smelting & Refining Co. v. People [Colo.] 82 P. 531. The repeal of an exemption from taxation, granted in a special charter, does not impair the obligation of a contract, as Const. 1846, art. 8, § 1, Const. 1895, art. 8, § 1, and Rev. St. p. 600, pt. 1, c. 18, tit. 3, § 8, provide for the repeal or alteration of any general or special act creating a corporation. Pratt Institute v. New York, 183 N. Y. 151, 75 N. E. 1119.

61. See 5 C. L. 637. Contract obligations held not to be impaired by compelling a street railway company to lower, at its own expense, a tunnel under a river, where there was no municipal stipulation to the contrary, but there was a statute at the time of the construction of the tunnel, providing that navigation should not be unnecessarily interrupted by such tunnel. West Chicago St. R. Co. v. People, 201 U. S. 506, 50 Law. Ed. —. An act conferring power upon a city to change the grade and line of its streets in making necessary improvements does not impair the obligation of the contract between the city and a traction company having a franchise therein. People v. Geneva, etc., Traction Co., 98 N. Y. S. 719. The reserved right to alter, amend, or repeal corporate charters, given by Miss. Const. 1890, § 178, does not authorize the impairment of contract rights acquired by a corporation. City of Vicksburg v. Vicksburg Waterworks Co., 202 U. S. 453, 50 Law. Ed. —. The legislature could not authorize a city to erect and maintain a system of waterworks during the term of an exclusive franchise granted by it to a private corporation. Id. Under an act permitting a gas company to organize by consolidating other companies and issuing stock to the amount of the aggregate value of the property, franchises and rights of the consolidated companies, such company has no contract right to charge a rate for gas sufficient to pay in perpetuity a profit on the original capitallzation, regardless of a depreciation in value of the property. In re Rehecchi, 100 N. Y. S. 335. An act regulating the price a gas company may charge is not unconstitutional as impairing the right of contract, providing the rate prescribed is not so low as to deprive stockholders of a reasonable profit. Richman v. Consolidated Gas Co., 100 N. Y. S. 81. A water company, organized under state law, has no right under its franchise to transport the water from any river in the state to another state (McCarter v. Hudson County Water Co. [N. J. Eq.] 61 A. 710); and hence an act (P. L. 1905, p. 461) passed subsequently to its organization, making it unlawful to do so, does not impair the obligation of a contract (Id). A franchise granted to maintain pipes in a city's streets to supply the city and its inhabitants with water for a term of years is a contract which is protected from impairment. Farmers' Loan & Trust Co. v. Meridian Waterworks Co., 139 F. 661. A requirement that street railway companies shall issue half-fare tickets to school children, made by Tex. Act Apr. 10, 1903, § 2, does not impair the obligation of any contract with a municipality as to rates, which was made after the adoption of Tex. Const. 1876, Bill of Rights, § 17, making franchises subject to legislative control. San Antonio Traction Co. v. Altgelt, 200 U. S. 304, 50 Law. Ed. —. Contract exemption from legislative regulation of rates lost by foreclosure sale, and acquisition by another company, incorporated since the adoption of Tex. Const. 1876, Bill of Rights, § 17, making all franchises and privileges subject to legislative regulation. Id.

62. See 5 C. L. 637. The property of a mutual insurance company and the equitable interests of its members are within the constitutional guaranty of nonimpairment of contracts. Huber v. Martin [Wis.] 105 N. W. 1031.

63. Even if the trustees of the Florida Agricultural College made an agreement with the municipality of Lake City or with the donors of lands and money, for the location of the college there, that would not preclude the legislature from removing it in their discretion. Laws 1905, c. 5384, therefore valid. State v. Bryan [Fla.] 39 So. 929.

What is a contract: Mere "understandings" cannot stand in the way of the exercise of legislative authority in regulating municipal affairs, so as to substantiate a claim of impairment of contract School City v. Forrest [Ind.] 78 N. E. 187. Acts 1903, p. 193, c. 102 (Burns' Ann St. Supp. 1905, § 4983h et seq.), creating a library board in certain cities, is constitutional. Id. A **license** is a mere permit to do something which would be unlawful without it, and is not a contract and conveys no vested right (Littleton v. Burgess [Wyo.] 82 P. 864; Borck v. State [Ala.] 39 So. 580), hence statutes, under which licenses have been granted, may be repealed without the impairment of contract rights (Littleton v.

from annulling obligations due to the public.[64] Where a valid act is passed by the legislature, it is no defense that prior to its taking effect contracts have been entered into with which the law interferes.[65] To come within the provisions of the Federal constitution, not only must the obligation of the contract be impaired, but it must have been impaired by some act of the legislature and not by a decision of the judicial department only,[66] a judicial decision not being a law, but merely the evidence of what the law is.[67]

Burgess [Wyo.] 82 P. 864), and a license to sell liquors may be revoked for repeated violations of the liquor law (Borck v. State [Ala.] 39 So. 580; State v. Seebold, 192 Mo. 720, 91 S. W. 491). The board of aldermen of a city cannot make a **contract for legal services** binding for an unlimited time and irrevocable by their successors. City of Wilmington v. Bryan [N. C.] 54 S. E. 543. An assistant selected by a city attorney in the collection of arrearages of taxes, under Laws 1895, p. 264, c. 182, had no contract that was impaired by the repeal of that act by Laws 1897, p. 700, c. 517, ratified Mar. 9, 1897. Id. The mortgagee has no vested right in the **rule of equity, pleading, and practice** that a borrower, seeking relief in equity against a usurious mortgage, must offer to pay legal interest in addition to the principal debt (Barclift v. Fields [Ala.] 41 So. 84), and an act providing that no borrower at usurious rates shall be required to pay more than the principal does not impair the obligation of existing contracts [Const. 1901, § 95; Gen. Acts 1900-01, p. 164, amending Code 1896, § 2630] (Id).

Exemption from taxation is a mere gratuity which the state may recall at any time without impairing the obligation of any contract. Baltimore, etc., R. Co. v. Wicomico County Com'rs (Md.] 63 A. 678. Where a railroad corporation organized under the general law was exempted from taxation (Acts 1876, p. 385, c. 242), and Code 1888, art. 23, §§ 187, 188, provided that the purchaser of a railroad at mortgage might organize a new corporation possessing all the immunities and privileges of the former corporation, those acts constituted no contract with the state which was impaired by the passage of Gen. Assessment Law 1896, p. 151, c. 120 (Code Pub. Gen. Laws, art. 81, § 2), including such property. Id. The act of 1869 and Acts 1899, p. 221, c. 134, annexing territory to Memphis, but exempting it from liability for the existing debts of the city, were revocable at any time by the general assembly. Galloway v. Memphis [Tenn.] 94 S. W. 75. Held that it was the intention of the legislature to revoke such privileges by Acts 1905, p. 740, c. 345, known as the "Boyle Act," providing for uniform taxation. Id. A drain commissioner has no such contractual relations or vested rights under the law that his duties may not at any time be suspended, restricted, or enlarged. Rice v. Ionia Probate Judge [Mich.] 12 Det. Leg. N. 645, 105 N. W. 17. Local Acts 1905, No. 364, for the locating and establishing of drains in Ionia county, which provides that it shall not apply to any case where a contract has been made, does not impair the obligation of any contract. Id.

64. Cortelyou v. Anderson [N. J. Law] 63 A. 1095.

65. In a prosecution for violation of St. 1903, p. 155, c. 195, § 1, forbidding the use of the arms or great seal of the commonwealth for private advertising or commercial purposes, the fact that when the act went into effect the defendant had contracts for the manufacture, sale, and delivery of goods bearing the prohibited device as a trade mark, was no defense. Commonwealth v. Sherman Mfg. Co., 189 Mass. 76, 75 N. E. 71.

66. The decision of a court changing a prior construction of a statute does not impair the obligation of a contract, contrary to Const. U. S. art. 1, § 10. King v. Phoenix Ins. Co. [Mo.] 92 S. W. 892. Where tax bills were issued by a city clerk relying upon a decision of the Kansas City Court of Appeals that such tax bills under Rev. St. 1889, § 1498, were valid, they did not constitute contracts which were impaired by a subsequent decision of the supreme court holding them invalid. City of Sedalia v. Donohue, 190 Mo. 407, 89 S. W. 386.

67. Swanson v. Ottumwa [Iowa] 106 N. W. 9.

No impairment: Acts 1903, p. 119, c. 94, making trusts unlawful, etc., does not impair the obligation of a contract, though applied to one formed before the enactment of the statute, since it makes unlawful the existence of trusts, regardless of when formed. State v. Missouri, etc., R. Co. [Tex.] 14 Tex. Ct. Rep. 906, 91 S. W. 214. Laws 1897, p. 132, exempting beneficiary associations from the general insurance laws, did not, as to the beneficiary of a certificate issued prior thereto, violate Const. art. 2, § 15, prohibiting the impairment of contract obligations. Westerman v. Supreme Lodge K. P. [Mo.] 94 S. W. 470. Where a mutual benefit certificate provided that the insured should be subject to the laws of the association subsequently adopted, a change in the by-laws relative to payment in case of suicide was held no impairment of contract. Fraternal Union of America v. Zeigler [Ala.] 39 So. 751. Laws 1905, p. 162, § 18, prohibiting the sale of game, does not conflict with Const. art. 2, § 15, prohibiting the impairment of contract obligations. State v. Heger [Mo.] 93 S. W. 252. Contract obligations not impaired by so much of Act of Congress Apr. 12, 1900 (31 Stat. at L. 77, 80, c. 191), § 11, as requires United States currency at a fixed rate of exchange to be accepted in the discharge of a certain obligation. Serralles' Succession v. Esbri, 200 U. S. 103, 50 Law. Ed. —. The obligations of an agreement to remove a dam from a navigable stream and to allow it to remain open and unobstructed are not impaired by

Regulations of remedies, merely, are enforceable,[68] provided they do not materially impair vested rights,[69] but the remedies for the enforcement of a contract are a part of its obligation,[70] and any repeal or change therein, which substantially obstructs or retards the enforcement or lessens the value of the agreement, impairs its obligation.[71] Granting a new or enlarged remedy does not impair the obligation of the contract.[72]

§ 14. *Retroactive legislation; vested rights.*[73]—Save under those constitutions

a statute, enacted under the police powers to promote drainage and authorizing the construction of a dam by the very persons making the agreement of removal. Manigault v. Springs, 199 U. S. 473, 50 Law. Ed. —.

Obligation impaired: Where bonds for the construction of a subway pledged, as required by St. 1897, p. 498, c. 500, the tolls for persons passing through the subway for the payment of principal and interest, a contract was created, the obligation of which could not be impaired by a subsequent act reducing the tolls without violating Const. U. S. art. 1, § 10. In re Opinion of the Justices, 190 Mass. 605, 77 N. E. 1038.

68. See 5 C. L. 638. Ky. St. 1903, § 2358, requiring the filing of **notice of an attachment** lien, is not an impairment of the obligation of a contract, when applied to the enforcement by attachment of a contract previously made. Boltz v. Boain [Ky.] 90 S. W. 593. Code 1896, § 2038, amd. by Act Feb. 23, 1899 (Acts 1898-99, p. 37), **exempting wages from garnishment** to a certain extent, is not an impairment of the obligation of contracts made after its enactment. Richardson v. Kaufman, 143 Ala. 243, 39 So. 368. Rev. Codes 1895, § 5848, reducing the time for publication of notice in foreclosure sales, applied to all subsequent foreclosures, although the mortgage was executed before its enactment, and did not violate the obligation of any contract. Orvik v. Casselman [N. D.] 105 N. W. 1105. The ex parte remedy provided by Rev. Codes 1899, § 5845, to enjoin the foreclosure of a mortgage, did not impair the obligation of the contract power of sale contained in a mortgage executed before its enactment. Scott v. District Ct. of Fifth Judicial Dist. [N. D.] 107 N. W. 61.

69. That the remedy may be changed at the will of the legislature, provided the obligation of contract is not impaired, is elementary. Gaffney v. Jones, 39 Wash. 587, 81 P. 1058; Richardson v. Kaufman, 143 Ala. 243, 39 So. 368. A repeal or change of remedies which does not substantially diminish the value of the agreement or seriously retard its enforcement does not come within the constitutional inhibition. Harrison v. Remington Paper Co. [C. C. A.] 140 F. 385.

Limitations: Art. 186, Const. 1898, for the lapse of tax liens, privileges and mortgages, securing the payment of certain taxes, does not violate Const. U. S. art. 1, § 10, by impairment of contract obligations. Rousset v. New Orleans, 115 La. 551, 39 So. 596. Laws 1897, p. 52, c. 39, providing that after 6 years a judgment shall cease to be a lien or charge against the estate or person of the judgment debtor, is not, as to a judgment in tort, rendered before its passage, an impairment of the obligation of a contract. Gaffney v. Jones, 39 Wash. 587, 81 P. 1058. Act Ark. Mar. 18, 1899 (Acts 1899, p. 117, Kirby's Dig. § 5057), providing that unimproved and uninclosed lands shall be deemed to be in the possession of the person paying taxes for at least 7 years, not less than three of such payments to be subsequent to the act, is a constitutional statute of limitation and not objectionable as impairing the obligation of contracts. Arbuckle v. Kelley, 144 F. 276.

70. Harrison v. Remington Paper Co. [C. C. A.] 140 F. 385.

71. Gen. St. Kan. 1889, §§ 1200, 1204, granted a creditor of a corporation an individual action against a stockholder on suspension of business more than a year. Laws Kan. 1898, c. 10, p. 27, repealed those sections and substituted in place of that action a suit in equity, which lessened the value of contracts and rights accrued prior thereto and tended to postpone their enforcement. Held an impairment of the obligation of such contracts. Harrison v. Remington Paper Co. [C. C. A.] 140 F. 385. The amendment by Laws 1901, p. 1326, c. 538, of Gen. Corporation Law § 15, by extending the provision, prohibiting a foreign corporation not complying with the statute from suing on a claim, to the assignee thereof, will not apply to any action by an assignee, where it would operate to impair the obligation of a contract. McNamara v. Keene, 98 N. Y. S. 860. Acts Md. 1904, p. 179, c. 101, and Acts 1904, p. 597, c. 337, which undertake to substitute a suit in equity in favor of all creditors and against all stockholders for the double liability imposed on stockholders by Acts Md. 1892, p. 153, c. 109, and giving a direct action against a stockholder, impair the obligations of contracts. Knickerbocker Trust Co. v. Cremen, 140 F. 973.

72. Act Mar. 2, 1903 (St. 1903, p. 67, c. 61), amending Pol. Code § 3443, so as to provide an additional method for contesting the right to purchase land, though retroactive, impairs no obligation of contract, as it merely gives a new remedy. Boggs v. Ganeard [Cal.] 84 P. 195. Code Civ. Proc. § 1391, authorizing an execution against a judgment debtor's wages, relates to the remedy and may apply in case of debts contracted before its passage. Myers v. Moran, 99 N. Y. S. 269. To enlarge the remedies of the creditors of a corporation, or its shareholders, impairs the obligation of no contract. Converse v. Aetna Nat. Bank [Conn.] 64 A. 341.

73. See 5 C. L. 638. Interpretation of laws to determine their retroactive character when considered apart from questions of validity, is treated in Statutes, 6 C. L. 1520.

which forbid retroactive laws,[74] so long as other constitutional limitations are untouched,[75] they may be passed.[76] The power to make laws recognizing the moral claim involved in past transactions has always been recognized by the highest tribunals and never held to be retroactive in the sense of constitutional inhibitions.[77]

Vested rights cannot be diminished.[78]—There can be no such thing as a vested right in the practice of medicine,[79] and statutes authorizing a state board of medical examiners to revoke a license to practice for felony or gross immorality violate no constitutional provisions.[80] A curative act can be effectual only to do that which the legislature might have provided for and required to be done by prospective legislation.[81]

Taxes, licenses, and public rights.[82]—The license to sell intoxicating liquors is not a contract or vested right, but a permission which may be withdrawn at any time.[83] The secretary of war has no authority to order and compel the commissioners of a county to remove an established bridge over a navigable river wholly

74. Act July 6, 1905 (Pub. Acts 1905, p. 413, c. 217), providing the amount recoverable in certain actions was not unconstitutional because retroactive, there being no inhibition of retroactive legislation in the Connecticut constitution. Atwood v. Buckingham [Conn.] 62 A. 616. Laws 1905, p. 162, § 18, prohibiting the sale of game, does not conflict with Const. art. 2, § 15, prohibiting retrospective legislation. State v. Heger [Mo.] 93 S. W. 252.

75. They must not partake of the nature of ex post facto laws, or impair the obligation of contracts, or deprive a citizen of property without due process of law. Whitlock v. Hawkins [Va.] 53 S. E. 401. As the payment by a foreign corporation of the fees required by Sess. Laws 1897, p. 157, c. 51, and Sess. Laws 1901, p. 116, c. 52, is merely the bonus for the privilege of existing as a corporation in the state, it does not relieve it from subsequent taxes levied on its business, and hence Sess. Laws 1902, p. 73, c. 3, § 65, imposing an annual tax, is not an ex post facto law within Const. art. 2, § 11. American Smelting & Refining Co. v. People [Colo.] 82 P. 531. Where, at the death of the owner of real estate, the law gave the widow only a life estate in the homestead, the legislature could not afterward pass an act giving the widow the homestead in fee. Bailes v. Daly [Ala.] 40 So. 420. If the by-law of a corporation, intended to operate retrospectively, has the effect to annul or impair an existing obligation on the part of the corporation, it will be held unreasonable and in contravention of law. A by-law, attempting to scale the amount agreed to be paid to the beneficiary without the member's consent, was void. Bornstein v. District Grand Lodge No. 4 [Cal. App.] 84 P. 271.

76. Act 1906, providing for a general county tax to pay bonds for the benefit of a turnpike taxing district created under Act 1890 (Acts 1889-90, p. 674, c. 1491), is not invalid, though retrospective. Durrett v. Davidson [Ky.] 93 S. W. 25. Under the Act of 1890 no vested rights were acquired that were violated by the act of 1896. Id.

77. Act Apr. 1904, for the relief of county treasurers and commissioners, is not retroactive in violation of Const. § 28, art. 2. State v. Gibson, 4 Ohio C. C. (N. S.) 433.

78. See 5 C. L. 639. Where a right or title has once become vested by limitation, neither a change fixing the period of time necessary to fix the bar, nor the repeal of the law, can affect the rights thus vested (Williams v. Galveston [Tex. Civ. App.] 14 Tex. Ct. Rep. 178, 90 S. W. 505), but if the law is repealed, or the period of time lengthened before the bar becomes complete, the change in the rule does not invade the property right (Id.). Laws 1905, p. 359, curing certain tax levies, which were defective for not stating the purposes of the levies, does not interfere with the vested rights of the taxpayers, but is a valid exercise of legislative power. People v. Wisconsin Cent. R. Co., 219 Ill. 94, 76 N. E. 80. A license granted by a board of health under Rev. Laws c. 102, §§ 69, 72, to permit one to use a building for a stable, confers no vested right of property, and its lawful revocation does not deprive him of any constitutional privilege. Lowell v. Archambault, 189 Mass. 70, 75 N. E. 65. Laws 1893, p 1387, c. 601, as amd. by Laws 1896, p. 215, c. 272, prohibiting marriage between uncles and nieces, was not retroactive so as to invalidate a prior marriage of the kind. Weisberg v. Weisberg, 98 N. Y. S. 260.

79. A physician, not shown to have been registered in Missouri, did not acquire a vested right to practice there so as to render him immune from punishment for violating Acts 1901, pp. 207, 208, by merely practicing there for a number of years before removal to another state. State v. Davis, 194 Mo. 485, 92 S. W. 484.

80. Burns' Ann. St. 1901, § 7322, is valid. Spurgeon v. Rhodes [Ind.] 78 N. E. 228.

81. So much of Act Mar. 17, 1906, as amends Code, § 444, operates prospectively only. Whitlock v. Hawkins [Va.] 53 S. E. 401. Act Apr. 18, 1899 (P. L. 57), known as the "Curative act," and providing that where a street has been improved by a municipality under an invalid law or ordinance, such improvements shall be valid, is constitutional. In re Marshall Ave., 213 Pa. 516, 62 A. 1085.

82. See 5 C. L. 639.

83. State v. Corron [N. H.] 62 A. 1044.

within the limits of the state, and rebuild it in such a manner as to change the course of the river by straightening the same at the point in question, thereby throwing the channel fifty feet to the east.[84]

Laws affecting corporations.[85]—The internal management of corporations, with reference to the public and the policy of the state, may be regulated within the reserved power to alter and repeal charters,[86] although such regulations may add to the stockholder's burden by an increase of liability, diminishing the value of the stock, or changing the name, office, or proportion in the management of the corporation.[87] In Kentucky, a university corporation organized in 1873 took its powers subject to the right of the state, reserved under the general statute of 1856, to alter, amend, or repeal its charter.[88] In the absence of any forfeiture of a railway company's rights, by any act or omission, congress could not derogate from its rights in lands granted for railroad purposes after the filing of the map of definite location.[89]

Regulations of procedure.[90]—There is no vested right in a rule of evidence,[91] and the legislature can establish rules of evidence when not in conflict with the constitution or rights guaranteed by it.[92] Statutes imposing on the defendant the burden of proving a license are constitutional.[93] Acts making changes in procedure are not generally objectionable as retroactive legislation.[94] A party's right

84. State v. Ashtabula County Com'rs, 7 Ohio C. C. (N. S.) 469. A taxpayer can enjoin the county commissioners from carrying out such order, the bridge being wholly within the county and having been constructed before congress attempted to confer authority on the secretary. Id. Such secretary cannot require the commissioners to tear down such bridge upon the ground that it is an unreasonable obstruction to the free navigation of such river without tendering compensation therefor. Id.

85. See 5 C. L. 639.

86. Hinckley v. Schwarzschild & Sulzberger Co., 107 App. Div. 470, 95 N. Y. S. 357.

87. Laws 1901, p. 969, c. 354, authorizing domestic corporations to issue preferred stock by consent of two-thirds of the capital stock, is valid, although when the particular corporation was organized, authority was given by Laws 1892, p. 1837, c. 688, § 47, to issue such stock by unanimous consent of the stockholders. Hinckley v. Schwarzschild & Sulzberger Co., 107 App. Div. 470, 95 N. Y. S. 357. Since corporations have only such powers as are conferred upon them by the law-making power, and the right to create necessarily implies the power of regulation, the state can pass regulatory legislation binding on both foreign and domestic corporations, regardless of whether the right of charter amendment was reserved or not. McGuire v. Chicago, etc. R. Co. [Iowa] 108 N. W. 902. A water company organized under St. 1882, p. 101, c. 142, enjoyed no vested rights which gave it immunity from competition by a municipal system established under St. 1905, p. 488, c. 477. Revere Water Co. v. Winthrop [Mass.] 78 N. E. 497.

88. Carroll's Ky. St. 1903, § 555, enacted in 1893, authorizing the consolidation of corporations, became, as it were, a part of the charter of Central University as if written therein originally. Central University of Kentucky v. Walter's Ex'rs [Ky.] 90 S. W. 1066.

89. Walbridge v. Russell County Com'rs [Kan.] 86 P. 473.

90. See 5 C. L. 640.

91. The legislature did not exceed its prerogative in passing Acts 1900, p. 34, § 9, requiring proof of occupancy of settlers on vacant public land, with the intention of acquiring it as a homestead donation to be filed in the land office on or before Jan. 1, 1902, as a prerequisite to the issue of a patent. Haney v. Atwood [Tex. Civ. App.] 15 Tex. Ct. Rep. 597, 93 S. W. 1093.

92. Banks v. State, 124 Ga. 15, 52 S. E. 74. Statutes giving presumptive or prima facie weight to facts or official certificates are valid and constitutional. Chicago Terminal Transfer R. Co. v. Chicago, 217 Ill. 343, 75 N. E. 499. A statute providing that the records of a county clerk's office shall be prima facie evidence of the existence or nonexistence of a license to practice medicine is not unconstitutional as creating an arbitrary or illogical rule of evidence. State v. Lawson, 40 Wash. 455, 82 P. 750. The provision of Acts 1903, p. 90, making certain acts presumptive evidence of a fraudulent intent in procuring money, is not an assumption of judicial functions by the legislature. Banks v. State, 124 Ga. 15, 52 S. E. 74.

93. State v. Lawson, 40 Wash. 455, 82 P. 750. The legislature may place the burden of proof, by making official determinations or certificates prima facie proof of the facts determined or certified to, and such legislation is not a disposition of property or other rights without a hearing. Andricus' Adm'r v. Pineville Coal Co. [Ky.] 90 S. W. 233. Ky. St. 1903, § 2725, makes a certified copy of the mine inspector's report prima facie evidence of the truth of recitals therein. Id.

94. An act making broader the right of joinder may be made applicable to pending

to a new trial because of the death of the presiding judge without signing a bill of exceptions, under the law as it then stood, was not a vested right,[95] and hence an act authorizing any judge of the court to allow or amend exceptions in a case tried by the deceased judge, applied to causes pending when it took effect.[96]

Statutes of limitation affecting existing rights are not invalid if a reasonable time is given for the commencement of an action before the bar takes effect.[97]

§ 15. *Deprivation without due process of law, or contrary to law of the land.*[98] —The fifth amendment to the Federal constitution is merely restrictive of Federal powers, and does not apply to state legislation.[99] The fourteenth amendment was not intended to bring within Federal control everything done by the state or its instrumentalities that is simply illegal under the state laws, but only such acts as are violative of rights secured by the Federal constitution.[1] Errors of a state court

actions in which judgment has not yet been rendered. Gibson v. Miller, 7 Ohio C. C. (N. S.) 96. Act Sept. 26, 1903 (Acts 1903, p. 273), extending the time for registration of judgments or decrees so as to make them liens on defendant's property, did not change the rights of the parties, but gave a remedy by execution to enforce the lien, which he already had, and hence is not invalid as retrospective legislation. Jefferson County Sav. Bank v. Miller [Ala.] 40 So. 513. Laws 1903, p. 148, No. 92, providing a remedy and procedure for collection of taxes due, even if retrospective, is so only in validating proceedings that might have been authorized in advance, and does not deprive any one of property without due process of law. Wallapal Min. & Development Co. v. Territory [Ariz.] 84 P. 85.

95. Johnson v. Smith [Vt.] 62 A. 9.

96. Acts 1902, p. 44, No. 35. Johnson v. Smith [Vt.] 62 A. 9. See 19 Harv. L. R. 465.

97. See 5 C. L. 640. Act Ark. Mar. 18, 1899 (Acts 1899, p. 117, Kirby's Dig. § 5057), providing that unimproved and unlnclosed lands shall be deemed to be in the possession of the person paying taxes for at least 7 years, not less than 3 of such payments to be subsequent to the act, is a constitutional statute of limitation and not objectionable as retroactive. Arbuckle v. Kelley, 144 F. 276.

98. See 5 C. L. 640.

99. Barton v. Kimmerley, 165 Ind. 609, 76 N. E. 250.

1. Owensboro Waterworks Co. v. Owensboro, 200 U. S. 38, 50 Law. Ed. —. The acts of a municipal corporation cannot be lacking in the due process of law guaranteed by the 14th amendment, if such acts would not be inconsistent with such amendment. Id. A municipal ordinance authorizing, upon the payment of a certain fee, the issue of permits for the construction of ornamental projections from buildings into streets, conflicts with Const. art. 1, § 6, as it deprives adjoining property owners of their easements in the streets without due process of law. McMillan v. Klaw & Erlanger Const. Co., 107 App. Div. 407, 95 N. Y. S. 365. While the legislature may alter or amend the charter of a corporation, it cannot appropriate its property, without the consent of all its members, either to its own or to the use of another party, even though it be a successor corporation, in the absence of some reserved right to do so. Huber v. Martin [Wis.] 105 N. W. 1031. A statute enacted during the life of a mutual insurance company for the distribution of its assets, without consent of its members and without any reserved authority therefor, would offend against constitutional limitations. Id.

Denial of due process: Tax Law (Laws 1897, p. 297, No. 229), § 143, as amended by Pub. Acts 1901, p. 175, Act No. 128, as an attempt to compel one in possession to resort to a court to restrain another from asserting an unwarranted claim. O'Connor v. Carpenter [Mich.] 13 Det. Leg. N. 231, 107 N. W. 913. The act of May 9, 1889, P. L. 173, relative to unused streets, etc., if construed as operating to vacate streets and vest them in the abutting owners. Barnes v. Philadelphia, etc., R. Co., 27 Pa. Super. Ct. 84. Laws 1896, p. 434, c. 246, giving the orphans' court jurisdiction to appoint an administrator of the estate of a person absent and unheard of for more than 7 years. Savings Bank of Baltimore v. Weeks [Md.] 64 A. 295. Laws 1902, p. 1249, c. 528, making fraudulent the sale of merchandise otherwise than in the regular course of business, without notice, etc. Wright v. Hart, 182 N. Y. 330, 75 N. E. 404. Laws 1902, p. 1775, c. 608, authorizing a warehouseman to refuse to deliver goods to the holder of the receipt, when they are claimed by another, and exempting him from action for conversion or in replevin, unless he claims further interest than a storage lien. Lissner v. Cohen, 97 N. Y. S. 227. Code 1887, § 3373 (Va. Code 1904, p. 1786), making absence for 7 years presumptive of death, etc., if construed with §§ 2253, 2639 of the Code (Va. Code 1904, pp. 1160, 1352), so as to authorize administration of the absentee's estate in his lifetime, without his knowledge and consent and without his being a party. Selden's Ex'r v. Kennedy, 104 Va. 826, 52 S. E. 635. Laws 1905, p. 285, authorizing the garnishment of salaries, if construed as authorizing a judgment against an officer in favor of a person to whom he is not personally indebted for the use of another, or as requiring the treasurer to deposit in court the amount found due as wages, etc. Badenoch v. Chicago [Ill.] 78 N. E. 31. Where a person had been sentenced to death and was placed in solitary confinement for 3 months previous to execution under V. S. §§ 4886, 2007, but was reprieved, and a petition for a new trial under §§ 1997,

in the interpretation and application of the laws of the state furnish no basis for a claim of denial of due process of law in violation of the fourteenth amendment,[2] but the constitutional prohibition of the use of despotic power to deprive any person of liberty without due process of law applies to the state and restrains all its departments.[3] While mere rights and privileges guaranteed by the constitution may be waived to some extent at least,[4] constitutional requirements as to the mode and manner of instituting prosecutions involving the deprivation of life and liberty, it would seem, cannot be dispensed with by the legislature, nor waived by the accused with consent of the legislature.[5] The words "liberty" and "property" have naturally and properly been given their most comprehensive signification so as to embrace every form and phase of individual right not necessarily taken away by some valid law for the general good.[6] A citizen cannot be deprived of his right to

1998 was refused without the fixing of a new time other than the reprieve for execution (§ 1999), the continuance of solitary confinement subsequent to the time first fixed for execution was a separate severe punishment to which she had not been sentenced, and a deprivation of liberty without due process of law. Ex parte Rogers, 138 F. 961. Pierce's Wash. Code § 2208 (2 Ballinger's Ann. Codes & St. § 6959), providing for the imprisonment of a dangerous insane person acquitted of crime, is valid when construed in harmony with the provisions of the Criminal Code requiring a due conviction before judgment, but imprisonment after acquittal on the ground of insanity, without a new arraignment and opportunity for defense, is without due process of law. Brown v. Urquhart, 139 F. 846. Mortgage Tax Law, Laws 1905, p. 2059, c. 729, § 309, making void any contract by which a mortgagor shall agree to pay the tax, contrary to Const. art. 1, § 6, as it interferes with the liberty to contract. People v. Ronner, 110 App. Div. 816, 97 N. Y. S. 550. But it does not violate that provision merely because it applies to mortgages recorded after July 1, 1905, since all persons presenting mortgages for record thereafter are taxed. Id.

Not unconstitutional deprivation, etc.: Burns' Ann. St. 1901, §§ 2385-2390, for the sale of property of residents who have absented themselves. Barton v. Kimmerley, 165 Ind. 609, 76 N. E. 250. Laws 1897, p. 1, amending § 18, Act 1872 (4 Starr & C. Ann. St. Supp. 1902, p. 32), prohibiting the appointment of any nonresident as executor. In re Mulford 217 Ill. 242, 75 N. E. 345. St. 1903, p. 155, c. 195, § 1, prohibiting the use of the arms or great seal of the commonwealth for private advertising or commercial purposes. Commonwealth v. Sherman Mfg. Co., 189 Mass. 76, 75 N. E. 71. Conn. Pub. Acts 1905, p. 408, c. 211, regulating the sale of stocks of merchandise in bulk. In re Paulis, 144 F. 472. Laws 1900-01, p. 110, c. 804, § 9, requiring payment of the salaries of the Newport city police commissioners out of the city funds. Horton v. City Council of Newport [R. I.] 61 A. 759. Gen. Acts 1903, p. 320, § 9, authorizing an entry on land to make a preliminary survey of a proposed railway line. State v. Simons [Ala.] 40 So. 662. Laws 1901, Local Acts Mich. No. 315, forming a new school district, did not take the property of old districts, transferred to it, without due process of law. Attorney General v. Lowrey, 199 U. S. 233, 50 Law. Ed.——. Laws 1900, p. 131, c. 179, giving the park commissioners of Des Moines jurisdiction for park purposes over the Des Moines river at places when city property abuts on the stream, etc., does not deprive other riparian owners of property without due process of law, contrary to Const. U. S. Amd. 14, or Const. Iowa, art. 1, § 18. Board of Park Com'rs of Des Moines v. Diamond Ice Co. [Iowa] 105 N. W. 203. Laws 1890, p. 318, c. 150, § 3, re-enacted in 1891, 1897 (Rev. Pol. Code, § 2149), providing that possession of a tax receipt shall be conclusive evidence of payment of all prior taxes, construed in connection with the entire act, places the consequences of a treasurer's failure to perform his duty on him and does not deprive the county of property without due process of law (Const. art. 6, § 2). Harris v. Stearns [S. D.] 108 N. W. 247; rvg. 17 S. D. 439, 97 N. W. 361. The construction and operation of waterworks by a city in competition with a company that constructed its works under a franchise granted by the city is not a taking of the company's property without due process of law. City of Meridian v. Farmers' Loan & Trust Co., [C. C. A.] 143 F. 67. St. 1905, p. 488, c. 477, establishing municipal waterworks systems in towns already supplied by private corporations because of the resulting depreciation in value thereof. Revere Water Co. v. Winthrop [Mass.] 78 N. E. 497. The provisions of §§ 12, 13, pp. 492, 494, that in case of the organization of an independent system the supplying corporation may continue in business or sell to the town, which is required to purchase, are constitutional. Id.

2. Accused not denied due process of law by the holding of a state court that he could waive his right to be present at the trial, to the extent of consenting, through counsel, to the private examination and discharge of a juror. Howard v. Com., 200 U. S. 164, 50 Law. Ed.——.

3. Brown v. Urquhart, 139 F. 846. Where a witness who has refused to answer, on the ground that he might thereby incriminate himself, is committed as contumacious, the burden is upon the sheriff to show that the commitment was legal. In re Avery C. Lowe, 3 Ohio N. P. (N. S.) 641.

4, 5. State v. Stimpson [Vt.] 62 A. 14.

6. Wright v. Hart, 182 N. Y. 330, 75 N. E. 404.

acquire, possess, and protect property, and possess and obtain safety and happiness, by members of a labor union inducing under claim of right of free speech, through threats and intimidation, his customers to refrain from patronizing him.[7]

Due process of law.[8]—The fourteenth amendment to the Federal constitution was not designed to disturb settled judicial institutions by setting up any new criterion of what is due process of law.[9] That is found in any kind of procedure which is suitable and proper to the nature of the case, and sanctioned by the established customs and usages of the courts.[10] The constitutional provision avoids all decrees operating on the rights of parties who are not given their day in court.[11] The rules and regulations of an executive department to which the enforcement of a law is intrusted may constitute due process of law.[12] One whose liberty or property is interfered with in the reasonable exercise of the police power is not deprived without due process of law.[13] The powers conferred on courts of quarter sessions

7. Jordahl v. Hayda [Cal. App.] 82 P. 1079.

8. See 5 C. L. 640.

9. In re O'Brien's Petition [Conn.] 63 A. 777. As to the meaning of "law of the land" and "due process of law," all authorities agree that they mean the same thing, and that if they were combined to read "due process of the law of the land," the meaning would not be changed. State v. Stimpson [Vt.] 62 A. 14.

10. In re O'Brien's Petition [Conn.] 63 A. 777. Due process of law does not mean merely according to the will of the legislature, or of some judicial or quasi judicial body, upon whom it may confer authority, but it means according to the law of the land, including the constitution, and legislative enactments and rules made by its authority, so far as they are consistent with constitutional limitations, and excluding all mere arbitrary dealings with persons or property. State v. Chittenden [Wis.] 107 N. W. 500. Acts 1905, c. 39, p. 401, in requiring the appointment of the auditor by certain corporations as attorney to accept service of process and notice, does not deny due process of law. State v. St. Mary's Franco-American Petroleum Co., 58 W. Va. 108, 51 S. E. 865. Service by publication upon a domestic corporation which has failed to provide officers or agents upon whom other service may be had constitutes "due process of law." Clearwater Mercantile Co. v. Roberts-Johnson-Rand Shoe Co. [Fla.] 40 So. 436. Code Civ. Proc. § 1119, providing for serving notice of a contested election, by a copy left at the house where the party last resided, if he cannot be found, is valid, such service being due process of law. Chatham v. Mansfield [Cal. App.] 82 P. 343. V. S. 1099, authorizing a judgment binding on all the members of an unincorporated association after service on an officer, does not violate Const. U. S. Amdt. 14, as a taking of property without due process of law. Patch Mfg. Co. v. Capeless [Vt.] 63 A. 938.

11. Farmers' Loan & Trust Co. v. Meridian Waterworks Co., 139 F. 661. One of the most familiar of the established principles of justice involved in due process of law is the right and opportunity for a hearing to meet opposing evidence and oppose with evidence, according to the established principles of fair investigation. State v. Chittenden [Wis.] 107 N. W. 500. Where the subject-matter involved in a judicial or quasi-judicial proceeding is the intangible thing denominated status, the proceedings in respect thereto, requisite to a legitimate determination, are the same as in a case where the subject-matter is of a tangible character (Id.), and in such cases the rule applies that no one shall be condemned in his person or property without first having had his day in court (Id.). The implied grant to the Wisconsin dental board to determine the status of a dental college, without any reference to notice and opportunity to be heard, does not suggest power to proceed without notice, but implies action in accordance with the fundamental principles of justice. Id.

12. The regulation of the department of the interior that the Indian agent should collect, under the supervision of the Indian inspector of the Indian Territory, the permits and taxes due to the Creek Nation under its laws, constituted due process of law for receiving the taxes and closing the unlawful business of such as refused to pay them. Buster v. Wright [C. C. A.] 135 F. 947.

13. Gen. Laws 29th Leg. p. 372, c. 153, authorizing the prevention by injunction of the habitual use of premises for gambling purposes. Ex parte Allison [Tex. Cr. App.] 14 Tex. Ct. Rep. 409, 90 S. W. 492. Laws 1900, p. 22, c. 20, amd. by Laws 1902, p. 487, c. 194, Laws 1902, p. 879, c. 317, and Laws 1904, p. 1413, c. 588, prohibiting the possession of game coming from without the state during the close season. People v. Hesterberg [N. Y.] 76 N. E. 1032. Laws 1905, p. 162, § 18, prohibiting the sale of game. State v. Heger [Mo.] 93 S. W. 252. Code Pub. Gen. Laws art. 72, § 8, prohibiting the having of oysters under a certain size, etc., though applying to private beds. Windsor v. State [Md.] 64 A. 288. Acts 29th Leg. p. 128, c. 90, authorizing the summary seizure and sale of fish sold and held without the required permit. Raymond v. Kibbe [Tex. Civ. App.] 15 Tex. Ct. Rep. 988, 95 S. W. 727. Acts 29th Leg. p. 128, c. 90, authorizing the confiscation of fish sold and held without a permit, is not void on the ground that the fish, when reduced to possession, are private property. Id. Act Apr. 4, 1905 (Acts 1905, p. 321, c. 150), requiring the separation

of the peace for the disposition and care of dependent and incorrigible children cannot be regarded as undue processes for depriving a child of its liberty.[14] The substitution of one public use to the exclusion of other public uses is not an invasion of the right of property.[15]

Property.[16]—Dominion is enjoyment, and dominion is a part of the property right that the fourteenth amendment was intended to protect.[17] A patent right is an "exclusive right" secured by the constitution which gives it the character of property.[18] No man has any personal or property right to violate a valid law,[19] and there can be no property rights in things which cannot be put to a lawful use.[20] The right to teach white and negro children together in a private school is not a property right.[21] A license is in no sense property. It is a mere temporary permit to do what otherwise would be illegal,[22] but in New York, a liquor tax certificate issued for the purpose of carrying on the liquor traffic in connection with a hotel, confers property rights.[23] A theater ticket is a mere license, subject to any conditions appearing on the face of it, and is revocable for a violation of such condition.[24] Under the California statute making a ticket of admission, when sold, an irrevocable license to occupy a place in a place of amusement,[25] such ticket represents a right of property and is transferable in the absence of stipulations to the contrary;[26] and an act prohibiting the sale thereof for a price higher than that originally charged therefor is void as an infringement on the right of property.[27] The right to practice the profession of medicine, once regularly obtained by compliance with the law, becomes a valuable privilege or right in the nature of property, and is safeguarded by the principles that apply in the protection

of white and colored passengers on street cars. Morrison v. State [Tenn.] 95 S. W. 494. Sess. Laws 1905, p. 376, c. 180, prohibiting any one but a regularly authorized agent to sell railroad tickets, does not deprive a ticket broker, previously established in business, of property without due process of law, but is a legitimate exercise of the police power in prevention of frauds on the public. In re O'Neill, 41 Wash. 174, 83 P. 104. Laws 1903, p. 185, c. 159, § 13, prohibiting the discharge of sewage into a stream used for a public drinking supply, without reference to distance from the intake, is a proper exercise of the police power. City of Durham v. Eno Cotton Mills [N. C.] 54 S. E. 453. Inferential and consequential damage to private property arising out of health laws do not violate the Federal constitution. Logan v. Childs [Fla.] 41 So. 197.

14. Act Apr. 23, 1903 (P. L. 274), for that purpose, is valid. Commonwealth v. Fisher, 213 Pa. 48, 62 A. 198.

15. Board of Park Com'rs of Des Moines v. Diamond Ice Co. [Iowa] 105 N. W. 203.

16. See 5 C. L. 641.

17. Chicago City R. Co. v. Chicago, 142 F. 844.

18. Const. U. S. art. 1, § 8. Brook's Case, 39 Ct. Cl. 494.

19. The permit tax of the Creek Nation, prior to the Creek agreement of Mar. 1. 1901, was valid, and the secretary of the interior, the Indian inspector and the Indian agent had authority to enforce the laws providing for it, without depriving the law breakers of life, liberty, or property without due process of law. Buster v. Wright [C. C. A.] 135 F. 947.

20. Beavers v. Goodwin [Tex. Civ. App.] 14 Tex. Ct. Rep. 429, 90 S. W. 930.

21. Act Mar. 22, 1904, p. 181, c. 85, prohibiting the maintenance of institutions for such joint education, is not a deprivation of property without due process. Berea College v. Com. [Ky.] 94 S. W. 623.

22. State v. Seebold, 192 Mo. 720, 91 S. W. 491.

23. Laws 1905, p 1862, c. 697, in so far as it authorizes the revocation of such a certificate, without giving the holder an opportunity to be heard, is a deprivation of property without due process of law. People v. Flynn, 96 N. Y. S. 655, overruling 48 Misc. 159, 96 N. Y. S. 653.

24. A clause in a ticket, that, if sold by the purchaser at the sidewalk, it would be refused at the door, is valid and enforceable, where the purpose of such condition is to prevent the traffic in such tickets by speculators. Collister v. Hayman, 183 N. Y. 250, 76 N. E. 20. The liberty of a purchaser to sell his property is not involved in such a condition, as the ticket may be sold in any other place than that prohibited by the condition, and to any other person. Id. Laws 1895, p. 974, c. 1042, to protect all citizens in their civil and legal rights, does not apply to such a conditional sale of a theater ticket. Id.

25. Act 1893 (St. 1893, p. 220, c. 185). Ex parte Quarg [Cal.] 84 P. 766.

26. Ex parte Quarg [Cal.] 84 P. 766.

27. Act Cal. Mar. 18, 1905 (St. 1905, p. 140, c. 140). Ex parte Quarg [Cal.] 84 P. 766.

of property lawfully acquired.[28] The property of a mutual insurance company and the equitable interests of its members are within the constitutional guaranty of due process of law.[29] One who acquired no title to property, purporting to be conveyed to him, cannot be considered as deprived of his property without due process of law by a judgment or decision declaring that he had no title.[30]

Liberty[31] means the right not only of freedom from actual servitude, imprisonment, or restraint,[32] but the right to use one's faculties in all lawful ways,[33] to live and work when he will,[34] to earn his livelihood in any lawful calling,[35] and to pursue any lawful trade or avocation.[36] The right to sell liquor is not an inherent right of a citizen,[37] and hence to require the keeping of a saloon closed during certain hours and days does not deprive the proprietor of property without due process of law.[38]

Reasonableness of regulations.[39]

Regulations of business and occupations[40] do not generally deprive of liberty or property without due process of law,[41] but may be so restrictive of the right to

28. Czarra v. Medical Sup'rs, 25 App. D. C. 443.

29. Huber v. Martin [Wis.] 105 N. W. 1031.

30. Studebaker Bros. Co. v. Mau [Wyo.] 82 P. 2.

31. See 5 C. L. 642.

32. State v. Smith [Wash.] 84 P. 851; MacMullen v. Middletown, 98 N. Y. S. 145; Wright v. Hart, 182 N. Y. 330, 75 N. E. 404. Act No. 50, p. 71, 1892, which punishes criminally the getting of money by any one in advance, upon the representation that he will stay and work, and leaving immediately thereafter, does not violate the provision against involuntary servitude. Const. U. S. amdt. 13. State v. Murray [La.] 40 So. 930. Section 7, c. 82, p. 388, Laws 1905 (§§ 9650a-9650h, Cobbey's Supp. 1905), known as the "Dipsomaniac Law," imposing conditions upon the discharge of a patient when cured, is an unconstitutional restraint upon personal liberty. Ex parte Schwarting [Neb.] 108 N. W. 125. A person confined under that act until cured cannot be subjected to further restraint without new cause. Id. A child on whom an assault has been committed, when held in a charitable institution as a witness, under Pen. Code § 291, is not deprived of her constitutional liberty. People v. Society for Prevention of Cruelty to Children, 48 Misc. 175, 95 N. Y. S. 250. Under Kan. Laws 1897, c. 265, § 10, the witness can be asked only questions material relating to transactions within the state, violative of the law, and is granted full immunity from prosecution in state courts; hence, imprisonment for contempt for refusal to answer on the ground that it might incriminate him as a violator of the Federal anti-trust laws, was not deprivation of liberty without due process of law. Jack v. Kansas, 199 U. S. 372, 50 Law. Ed.——.

33. State v. Smith [Wash.] 84 P. 851; MacMullen v. Middletown, 98 N. Y. S. 145; Wright v. Hart, 182 N. Y. 330, 75 N. E. 404. One may be deprived of his liberty, and his constitutional rights thereto may be violated, without the actual imprisonment or restraint of his person. State v. Smith [Wash.] 84 P. 851.

34. State v. Smith [Wash.] 84 P. 851. Laws 1903, p. 148, prohibiting the employment of any female in any factory, etc., more than 10 hours a day, does not deprive any one of liberty or property without due process of law. State v. Muller [Or.] 85 P. 855. Act Feb. 23, 1903 (St. 1903, p. 33, c. 10), regulating the hours of labor in mines and ore mills, does not deprive the miner of liberty and property without due process of law. Ex parte Kair [Nev.] 82 P. 453.

35. State v. Smith [Wash.] 84 P. 851. Acts 1905, p. 873, c. 410, prohibiting the sale of nontransferable railroad tickets by unauthorized agents, is not a deprivation of property without due process of law. Samuelson v. State [Tenn.] 95 S. W. 1012.

36. State v. Smith [Wash.] 84 P. 851. St. 1903, p. 338, c. 251, § 1, requiring under penalties all packages of fruits for shipment to be stamped with a designation of the county and immediate locality where the fruit was grown, was not a proper exercise of the state's police power, but an unlawful invasion of personal liberty. Ex parte Hayden, 147 Cal. 649, 82 P. 315.

37, 38. State v. Calloway [Idaho] 84 P. 27.

39, 40. See 5 C. L. 642.

41. Act No. 66, p. 74, 1888, known as the **"Pharmacy Law."** State v. Kumpfert, 115 La. 950, 40 So. 365. Acts 1897, p. 166, regulating the practice of **dentistry,** etc. State v. Doerring, 194 Mo. 398, 92 S. W. 489. Acts 1905, p. 182, c. 109, regulating **banks and banking,** etc. State v. Richcreek [Ind.] 77 N. E. 1085. Rev. St. 1899, § 2358, making it a misdemeanor to receive a greater **rate of interest** than 2 per cent per month. Ex parte Berger, 193 Mo. 16, 90 S. W. 759. Laws 1905, vol. 23, p. 256, c. 149, for licensing persons to make **small loans** at a rate of interest in excess of the legal rate, etc., but not beyond a certain rate. State v. Wickenhoefer [Del.] 64 A. 273. Rev. Laws, c. 56, § 1, prohibiting the imposing, as a **condition of sale** that the purchaser shall not deal in the goods, etc., of any other person, etc. Commonwealth v. Strauss [Mass.] 78 N. E. 136. Laws 1905, p. 422, in effect prohibiting railroad **ticket brokerage.** State v. Thompson [Or.] 84 P. 476. Laws 1893, c. 66, p. 182, to regulate the sale and redemption of **transportation tickets.** State v. Manford [Minn.]

contract as to amount to a denial.[42] The state may license or absolutely forbid the sale of intoxicating liquors.[43] A city ordinance requiring street railroad companies to receive for transportation transfers issued by other companies is void as depriving them of property without due process of law,[44] and the mere fact that the requirement is reciprocal and might so increase business that there would be no loss is immaterial.[45]

Statutes creating a liability may be valid.[46]

Eminent domain proceedings,[47] which properly conserve the owner's rights,[48] including the right of due notice,[49] the right to be heard,[50] and just compensation,[51]

106 N. W. 907, following State v. Corbett, 57 Minn. 345, 59 N. W. 317, 24 L. R. A. 408. Laws 1903, c. 155, p. 218, § 9, forbidding the **sale of any cream** containing less than 20 per cent of fat. State v. Tetu [Minn.] 107 N. W. 953, following State v. Crescent Creamery Co., 83 Minn. 284, 86 N. W. 107, 54 L. R. A. 466, 85 Am. St. Rep. 464. Laws 1903, c. 487, p. 735, defining and regulating charges of **public stockyards,** not shown to amount to the taking of private property without due process of law. Ratcliff v. Wichita Union Stock Yards Co. [Kan.] 86 P. 150.

42. Pen. Code § 171a, prohibiting any employer from coercing any employe to agree not to join any labor organization as a **condition of employment.** People v. Marcus, 110 App. Div. 255, 97 N. Y. S. 322. A bill to enjoin the enforcement of a city ordinance fixing rates of **telephone charges,** alleging that if the ordinance is enforced the company cannot make any net earnings nor sufficient to pay expenses, and the company will be deprived of its property without due process of law, states a case under the fourteenth amendment. Ozark-Bell Tel. Co. v. Springfield, 140 F. 666. Code 1880, § 1073, and Laws 1890, pp. 15, 16, c. 4, prescribing the conditions for the doing of business by **foreign insurance companies,** if construed to prohibit their suing in the state to recover premiums for insurance made on property in their own state, without compliance with such laws, deny due process of law. Swing v. Brister & Co. [Miss.] 40 So. 146. An act regulating the **price of gas** does not impair the right of contract and deny due process, provided the rates prescribed afford the stockholders a reasonable profit. Richman v. Consolidated Gas Co., 100 N. Y. S. 81. Insurance companies in Iowa are deprived of no rights under Const. U. S. amd. 14, by Code 1897, § 1754, prohibiting **combinations** or agreements by its agents, etc., as to rates, etc. Carroll v. Greenwich Ins. Co., 199 U. S. 401, 50 Law. Ed.——. An ordinance conferring the exclusive right to collect and dispose of **garbage** is not, as to the refuse from hotels a denial of due process of law in depriving the owner of his property, under Const. U S. amd. 14, although such refuse may be valuable as food for swine, or for the manufacture of certain merchantable products. Gardner v. People of Michigan, 199 U. S. 325, 50 Law. Ed.——. The rules and regulations to prevent **unjust discrimination,** made by the railroad commissioners of Florida, being prima facie reasonable and just, their enforcement does not, in the absence of showing of unreasonableness, deprive any company of property without due process of law. State v. Atlantic Coast Line R. Co. [Fla.] 41 So. 705. A provision in the sanitary code of New York City, construed by the state courts to confer reasonable discretionary power on the board of health to grant or withhold **permits to sell milk,** does not deny due process of law in the absence of any showing of arbitrary or oppressive action. People v. Van de Carr, 199 U. S. 552, 50 Law. Ed.——. See 6 Columbia L. R. 278.

43. State v. Corron [N. H.] 62 A. 1044.

44, 45. Chicago City R. Co. v. Chicago, 142 F. 844.

46. See 5 C. L. 642. Sess. Laws 1901, p. 161, rendering employers liable for damages to an employe resulting from the negligence of a co-employe, is not unconstitutional as depriving employers of property without due process of law. Vindicator Consol. Gold Min. Co. v. Firstbrook [Colo.] 86 P. 313. The owner of premises, which he knowingly permits to be used for gaming purposes, is not deprived of property without due process of law by Ohio Rev. St. § 4275, subjecting such premises to the payment of a judgment obtained for the recovery of money lost there. Marvin v. Trout, 199 U. S. 212, 50 Law. Ed.——. Code § 2485, making a mine operator, who takes coal from adjoining land without permission, liable in double damages, does not deny due process of law. Mier v. Phillips Fuel Co. [Iowa] 107 N. W. 621. Laws 1895, c. 8, p. 113, §§ 291, 293, making the owner of premises liable for water and light furnished by a municipality to a tenant, are not unconstitutional as a taking of property without due process of law by requiring one person to pay the debts of another. City of East Grand Forks v. Luck [Minn.] 107 N. W. 393. The owner, by connecting his premises with the city system, binds himself by implied contract to pay for the service, and the regulations are reasonable and such as may be conferred by the state upon municipalities. Id.

47. See 5 C. L. 642.

48. The act of the board of estimate and apportionment in directing the taking of land for a street, etc., constitutes merely an authority to institute proceedings for the condemnation of land, and the act is not reviewable on certiorari on the ground that it is a taking of property without due process of law. People v. McClellan, 107 App. Div. 272, 94 N. Y. S. 1107.

49. Where the requirement of notice to the landowner is plainly implied in eminent domain proceedings (Creedmore charter, Priv. Acts 1905, p. 1006, c. 398, § 17), and such no-

are valid.[52] Where the act of taking private property for public use is done by legislative authority, it is clearly an exercise of the right of eminent domain.[53]

Local assessments for improvements.[54]—It is not a deprivation of property without due process of law, within the meaning of the 14th amendment, to assess a portion or all of the costs of street improvement against the lands abutting, or in the immediate vicinity,[55] but they must be proportional to special benefits received.[56]

Drainage acts[57] providing proper safeguards are sustained.[58]

Taxation.[59]—Illegal taxation is a deprivation of property without due process of law.[60] Taxes properly assessed under authority of law,[61] after notice, actual or

tice is in fact given, there is no deprivation of property without due process of law. State v. Jones, 139 N. C. 613, 52 S. E. 240. St. 1861, p. 358, c. 352, § 16, for the condemnation of lands for levies, though not specifically requiring notice to the property owners, directs the appointment of appraisers to examine the land, and the order of appointment directed them to give notice of the time of hearing, etc. Held that such notice was sufficient and no one was deprived of property without due process of law (McCarty v. Southern Pac. Co. [Cal.] 82 P. 615); but Rev. St. 1899, §§ 897-900, for the condemnation of land for irrigation ditches, contains no express provision for notice to the landowner of the time and place of hearing and is therefore void, under Const. art. 1, § 6, guarantying due process of law, although he is required to be notified of the appointment of appraisers (Sterritt v. Young [Wyo.] 82 P. 946).

50. Act Feb. 27, 1905 (Acts 1905, p. 59, c. 48; 4 Burns' Supp. 1905, § 893, et seq.), provides for a hearing and determination of all objections to the right of condemnation, etc., and does not deprive of property without due process of law. Morrison v. Indianapolis & W. R. Co. [Ind.] 76 N. E. 961.

51. Rev. St. 1899, §§ 897-900, for the condemnation of land for irrigation ditches, violates Const. art. 1, § 32, providing for due compensation for private property taken for public use without consent of the owner. Sterritt v. Young [Wyo.] 82 P. 946. The fact that a city, after taking a portion of certain lots for widening a street and awarding compensation therefor, then assessed the rest for benefits, did not constitute a taking without due process of law or without just compensation. In re City of Seattle [Wash.] 85 P. 45.

52. Act of Congress, July 22, 1892, as amended by Act Aug. 24, 1894, authorizing proceedings in the District of Columbia to condemn lands for alleys and minor streets, etc., is constitutional. Brandenburg v. District of Columbia, 26 App. D. C. 140. Proceedings under Laws 1904, p. 141, c. 87, known as the "Burnt District Act," to condemn property for additions and alterations to the public wharves and docks, held not to be a taking of property without due process of law. Dyer v. Baltimore, 140 F. 880. The irrigation district law (Laws 1901, p. 198, c. 87), in its provisions for the construction of ditches and canals, does not take property without due process of law. Anderson v. Grand Valley Irr. Dist. [Colo.] 85 P. 313.

53. Brooks' Case, 39 Ct. Cl. 494.

54. See 5 C. L. 643.

55. The provisions of the Avondale City Charter (Acts 1894-95, p. 139), relative to special assessments against abutting owners, held valid under Const. 1901, § 223, limiting such assessments. Harton v. Avondale [Ala.] 41 So. 934. Burns' Ann. St. 1901, § 3977, for the assessment of the cost of sidewalks on abutting owners, does not deprive them of property without due process of law. Dyer v. Woods [Ind.] 76 N. E. 624.

56. Pub. St. 1882, c. 50, § 7 (Rev. Laws c. 49, § 5), construed with the rest of the statute, shows an intention that the assessment shall be proportional to the special benefit received and is constitutional. Cheney v. Beverly, 188 Mass. 81, 74 N. E. 306. Acts 1905, p. 585, c. 278, authorizing levy of special assessments for municipal improvements, is not a deprivation of landowners' property without due process of law. Arnold v. Knoxville, 115 Tenn. 195, 90 S. W. 469. Laws 1905, p. 340, authorizing every board of public park commissioners, after submission of the question to the voters, to issue bonds to establish, improve, or maintain parks, does not authorize the taking of property without due process of law. Kucera v. West Chicago Park Com'rs [Ill.] 77 N. E. 912.

57. See 5 C. L. 643.

58. Act Apr. 23, 1903 (Kirby's Dig. §§ 1414-1450), for the establishment of drainage districts, etc., does not take property without due process, because of insufficiency of notice required. Ritter v. Drainage Dist. No. 1, Poinsett County [Ark.] 94 S. W. 711.

59. See 5 C. L. 643.

60. The taxation within the domicile of the owner of property which lies wholly within the taxing power of another state, to which it owes allegiance and looks for protection, partakes rather of the nature of an extortion than a tax, and is a taking of property without due process of law. Union Refrigerator Transit Co. v. Com., 199 U. S. 194, 50 Law. Ed. —. Due process of law is denied a Kentucky corporation by a tax assessed under Ky. St. § 4020, upon its rolling stock permanently located and employed in other states. Id.

61. State statutes taxing distilled spirits in bonded warehouses do not take property without due process of law. Thompson v. Com. [Ky.] 94 S. W. 654. Acts 1904, p. 71, c. 76, and an ordinance enacted in pursuance thereof, imposing a privilege tax on persons loaning money on personal securities, are violative of Const. U. S. amd. 14, § 1, as depriving persons of property without due process of law. Rodge v. Kelly [Miss.] 40 So. 552. Code Supp. 1902, § 1333d, imposing a tax on certain insurance companies, does not deprive of property without due process of law. Iowa Mut. Tornado Ins. Ass'n v. Gilbertson [Iowa] 106 N. W. 153. Acts 1905, c. 35, p. 285, in its taxation of chattels real,

constructive,[62] and opportunity to be heard,[63] and proceedings to enforce collection,[64] constitute due process,[65] notwithstanding exemptions and inequalities.[66] Equity has jurisdiction to entertain a bill to enjoin town officers from undertaking to collect taxes on the ground of the unconstitutionality of the act purporting to incorporate the town.[67]

Civil remedies and proceedings.[68]—Statutes of limitation are valid unless unreasonably restrictive.[69] Statutes providing remedies and regulating procedure,[70]

does not deny due process of law. Harvey Coal & Coke Co. v. Dillon [W. Va.] 53 S. E. 928.

62. Notice of the assessment and the amount due. Thompson v. Com. [Ky.] 94 S. W. 654. The notice required to be given by the purchaser at a tax sale complied with Laws 1897, p. 294, No. 229, § 140, but did not refer to § 134, p. 297, as amended by Pub. Acts 1901, p. 175, act 128, and was ineffective for the purpose intended. O'Connor v. Carpenter [Mich.] 13 Det. Leg. N. 231, 107 N. W. 913.

Notice not required: The duty of the state board under Laws 1903, c. 315, p. 491, as to determining the average rate of taxation on general property, to be applied in railroad taxation, is wholly ministerial, and due process of law requires no notice to be given to the owners of railroad property. Chicago & N. W. R. Co. v. State [Wis.] 108 N. W. 557. Rev. St. 1898, §§ 1077a, 1077b, for the equalization of taxes by a board of commissioners, does not deny due process of law because no notice to the taxpayer is provided for. Foster v. Rowe [Wis.] 107 N. W. 635.

63. Laws 1905, p. 2059, c. 729, taxing real estate mortgages, does not deprive of property without due process of law, the tax being based on a fixed rate on the amount actually due on the mortgage, and provision being made for a correction of the list as to the amount due. People v. Ronner [N. Y.] 77 N. E. 1061. So much of Act Mar. 17, 1906, as amends Code § 444, operates prospectively only, and one aggrieved by an assessment under Act Dec. 10, 1903, has the right to have it corrected as authorized by the law in force prior to the act of 1906, and hence the latter does not deprive any one of property without due process of law. Whitlock v. Hawkins [Va.] 53 S. E. 401. Since Const. W. Va. art. 13, §§ 3, 6, do not attempt to declare an absolute and conclusive forfeiture of title for nonpayment of taxes, except by adjudication after hearing, they do not deny due process of law. Webb v. Ritter [W. Va.] 54 S. E. 484. Laws 1905, p. 2059, c. 729, taxing mortgages, does not deprive citizens of their property without due process of law, because of lack of provisions for notice or opportunity to be heard as to the tax when mortgages are offered for record for the first time, or for ascertaining their actual value. People v. Ronner, 95 N. Y. S. 518.

64. The assessment of property and the subsequent distraint for taxes is not a taking without due process if the owner has had notice of the assessment and the amount due. Thompson v. Com. [Ky.] 94 S. W. 654.

65. It cannot be claimed that tax laws are not due process of law. Harvey Coal & Coke Co. v. Dillon [W. Va.] 53 S. E. 928.

66. Laws 1905, pp. 474, 477, c. 241, §§ 315, 324, imposing a tax on transfers of stock in domestic and foreign corporations, is not a denial of equal protection of the laws in that it takes only one variety of property. People v. Reardon [N. Y.] 77 N. E. 970. A domestic railroad corporation is not deprived of its property without due process of law because it is allowed no deduction from its capital stock taken as the basis of the franchise tax imposed by N. Y. Laws 1896, c. 908, § 182, on account of much of its rolling stock being always outside of the state. People of New York v. Miller, 202 U. S. 584, 50 Law. Ed. —.

67. Campbell v. Bryant, 104 Va. 509, 52 S. E. 638.

68. See 5 C. L. 643.

69. The enactment of laws prescribing the time within which suit shall be brought is an exercise of sovereign power, demanded by public policy and sanctioned by the practice of nations and the consent of mankind, and, when the time and opportunity allowed are reasonably sufficient, there can be no just cause of complaint that a debarred litigant is deprived of his property without due process of law. Terry v. Heisen, 115 La. 1070, 40 So. 461. There is no denial of due process of law in so much of Me. Pub. Laws 1895, c. 162, as provides that certain overt acts shall constitute disseisin, which if continued for 20 years shall bar action for the land. Soper v. Lawrence Bros. Co., 201 U. S. 359, 50 Law. Ed. —. Property held not to have been taken without due process of law by construing said act as barring certain actions. Id. Act May 3, 1901 (Laws 1901, p. 262), providing for a call by the state treasurer for state bonds for payment, and making them invalid if not presented within the prescribed time, does not deprive of property without due process, although he is required to pass upon their validity, since his decision is not conclusive, but the holder has relief in the courts. Tipton v. Smythe [Ark.] 94 S. W. 678. The statute, when applied to bonds issued Jan. 1, 1870, due in 30 years, merely prescribes a period of limitation of 6 months, which is not unreasonable as to length. Id. The notice prescribed to be given for the presentation of the bonds was not so inadequate as to amount to a deprival of property without due process, though the holder did not live in the United States. Id. Laws 1892, p. 1207, c. 651, § 9, providing for the payment to the state treasurer of any sum of money paid into court and remaining in the county treasurer's hands for 20 years, does not deprive beneficiaries interested in such money of their property without due process of law. People v. Keenan, 110 App. Div. 537, 97 N. Y. S. 77.

70. The proceedings to distribute the estate of a decedent being essentially in rem,

are sustained, unless violative of property rights,[71] but a party cannot be deprived of his cause of action[72] or all remedy for his wrong.[73] The citizen has no property right in a mere rule of law and he cannot complain of the change of such a rule, so that no rights can accrue, which is made before any rights become vested.[74] The right of appeal is not an essential part of the due process of law, it being merely statutory.[75]

Criminal offenses and procedure.[76]—Statutes defining and punishing crimes,[77] and regulating criminal procedure,[78] unless violative of fundamental rights,[79] are

constructive notice may be resorted to, and the posting of notices 10 days before hearing is not unreasonably short and constitutes due process of law, without regard to the place of residence of parties interested. Goodrich v. Ferris, 145 F. 844. Code Civ. Proc. § 1303, providing for the probate of a will on 10 days' notice, does not deprive a nonresident, who is unable to appear and oppose the probate on the day of hearing, of his property without due process. In re Davis' Estate [Cal.] 86 P. 183. Where it appears on the face of the record that parties are not entitled to resist a petition, they are not denied a hearing by the striking out of their pleading, when they have been heard on the only question involved, viz., their interest in the estate. Id. Local Improvement Act 1897, § 23 (Starr & C. Ann. St. Supp. 1904, c. 24, par. 59), making the commissioners' report in street condemnation prima facie evidence, being a mere rule of procedure, is not unconstitutional. Chicago Terminal Transfer R. Co. v. Chicago, 217 Ill. 343, 75 N. E. 499. Code Cr. Proc. § 392, authorizing the admission in evidence of the statement of a child under 12 years of age in a criminal case, under certain conditions and precautions, was not a deprivation of life or liberty without due process of law. People v. Johnson [N. Y.] 77 N. E. 1164. Allowing plaintiff in an action on an insurance policy to prove a waiver of terms, without alleging such waiver, does not deprive defendant of due process of law, contrary to Const. art. 2, § 30, and Const. U. S. amd. 14. Suess v. Imperial Life Ins. Co., 193 Mo. 564, 91 S. W. 1041. The exclusion of lawyers, ministers, doctors, dentists, railway engineers, and firemen from jury service did not deny a person convicted of crime in a state court the due process of law guaranteed by the 14th amendment. Rawlins v. Georgia, 201 U. S. 638, 50 Law. Ed. —.

71. The appointment of a receiver for the property of an alleged bankrupt, under Act July 1, 1898, c. 541, § 2 (3), 30 Stat. 545 (U. S. Comp. St. 1901, p. 3420), either with or without notice, does not deprive defendant of his property without due process of law. Latimer v. McNeal [C. C. A.] 142 F. 451. The law creating a lien for materialmen, found in § 2801, subsec. 2, Civ. Code 1895, as amd. by Acts 1897, p. 30, and Acts 1899, p. 33, does not deprive anyone of property without due process of law or deny impartial and complete protection to property.. Prince v. Neal-Millard Co., 124 Ga. 884, 53 S. E. 761. The mechanic's lien law (P. L. 1898, p. 538) does not deprive the owner of his property without due process of law. Gardner & Meeks Co. v. New York, etc., R. Co., 72 N. J. Law, 257, 62 A. 416. An act authorizing the taxation of costs on a memorandum filed without any notice to the party liable for them would be depriving him of property without due process of law, contrary to Const. art. 3, § 27. State v. District Ct. of Second Judicial Dist. [Mont.] 85 P. 367. A provision, in an ordinance against allowing cattle to run at large, for proceedings in rem against the property itself, does not deprive the owner of property without due process of law where he is given a day in court and a judicial trial is provided for. City of Paducah v. Ragsdale [Ky.] 92 S. W. 13.

72. Laws N. M. 1903, p. 51, c. 33, making certain restrictions on actions for personal injuries or death, does not deprive a party of his cause of action without due process of law, as it provides a forum, and for reasonable notice and ample opportunity to be heard. Buttron v. El Paso N. E. R. Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 339, 93 S. W. 676.

73. MacMullen v. Middletown, 98 N. Y. S. 145.

74. The provision of the Galveston city charter exempting the city from liability for injuries resulting from defective streets, etc., does not conflict with Const. art. 1, §§ 13, 19, guarantying due course of law, etc. Williams v. Galveston [Tex. Civ. App.] 14 Tex. Ct. Rep. 178, 90 S. W. 505.

75. Local improvement law, § 84 (Hurd's Rev. St. 1903, c. 24, § 590), affords due process of law, although it provides for a conclusive finding and gives no right of appeal. People v. Cohen, 219 Ill. 200, 76 N. E. 388.

76. See 5 C. L. 644.

77. Gen. Laws 1895, c. 163, p. 349, declaring certain trespasses on state lands a crime, as construed, held not obnoxious to constitutional principles. State v. Shevlin-Carpenter Co. [Minn.] 108 N. W. 935. Laws 1903, c. 139, p. 644 (Cobbey's Ann. St. 1903, § 2375g et seq.), to punish the desecration of the United States flag, does not deprive one of property without due process of law. Halter v. State [Neb.] 105 N. W. 298. Pen. Code, § 246, inflicting the death penalty for assaults with a deadly weapon, etc., by life convicts, does not deprive of life or liberty without due process of law. Ex parte Finley [Cal. App.] 81 P. 1041.

78. The legislature may simplify and mold the forms of indictments at pleasure, if it does not contravene constitutional provisions. State v. Webber [Vt.] 62 A. 1018. V. S. 1867, amd. by Acts 1898, p. 34, No. 46, and Acts 1904, No. 64, providing for prosecution by information of all except capital crimes and those punished by life imprisonment, did not deprive persons of liberty otherwise than by the laws of the land. State v. Stimpson [Vt.] 62 A. 14.

79. Pen. Code 1895, art. 402, amd. Acts 28th

sustained.[80] Due process of law does not require the state to adopt a particular form of procedure,[81] so long as it appears that the accused has had sufficient notice of the accusation and an adequate opportunity to defend himself in the prosecution;[82] but a provision in a municipal charter which authorizes a summary trial by the recorder, without a jury, and a sentence to the chain gang along with the violators of the state laws, deprives a person of liberty without due process of law and is unconstitutional.[83] Due process of law would seem to require the presence of the prisoner and an opportunity to be heard at the time of imposing sentence, and that the time of execution be fixed by the authorized tribunal,[84] but the failure of a court in a criminal case to see that the testimony was read or repeated to the accused who was almost totally deaf did not deprive him of his liberty without due process of law.[85]

§ 16. *Compensation for taking property*[86] for public use is guaranteed by all constitutions,[87] and this guaranty is invariably construed to mean that private property shall be taken for private use under no circumstances;[88] but these pro-

Leg. (Gen. Laws, p. 55, c. 40), providing for search and seizure of intoxicating liquors, denies due process of law in failing to provide for judicial determination, etc. Beavers v. Goodwin [Tex. Civ. App.] 14 Tex. Ct. Rep. 429, 90 S. W. 930. A person committed to the New Jersey Reformatory, under Act approved Mar. 21, 1901 (P. L. 1901, p. 231), for the management of that institution, cannot be held until the costs are paid beyond the maximum term prescribed. Perry v. Martin [N. J. Law] 62 A. 1001.

80. It is within the exclusive power of the legislature to declare what acts shall constitute a crime, to define the same and provide such punishment therefor as may be deemed appropriate. State v. Shevlin-Carpenter Co. [Minn.] 108 N. W. 935. Solitary confinement by the state authorities, pending the execution of a death sentence, after the day originally fixed has passed, even if unwarranted, is not a denial of the due process of law guaranteed by the fourteenth amendment (Rogers v. Peck, 199 U. S. 425, 50 Law. Ed. —-), nor was there such a denial in the execution of a death sentence, where the highest state court in denying a motion for new trial failed to fix a day for the execution, where the governor in his reprieve had previously fixed it at a date not yet passed (Id.).

81. Rogers v. Peck, 199 U. S. 425, 50 Law. Ed. —-. The state has the right to provide the method of trial for its citizens. Ex parte Brown, 140 F. 461.

82. Appellant had a right to review in the supreme court (Vt. Stat. § 1961), but whether the court should be held in each county, or at the capital for all the counties, was purely a question of state procedure. Rogers v. Peck, 199 U. S. 425, 50 Law. Ed. —-.

83. Pearson v. Wimbish, 124 Ga. 701, 52 S. E. 751.

84. Ex parte Rogers, 138 F. 961.

85. Felts v. Murphy, 201 U. S. 123, 50 Law. Ed. —-.

86. See 5 C. L. 645. This subject is treated at more length in the topic Eminent Domain, 5 C. L. 1097.

87. Requiring a street railway company to lower at its own expense a tunnel under a river, which has become an obstruction to navigation, held not to have been a taking of private property for public use without compensation. West Chicago St. R. Co. v. People, 201 U. S. 506, 50 Law. Ed. —-. Acts 1901, p. 109, c. 71, authorizing an order for the inspection of books to determine whether all property has been returned for taxation, does not conflict with Const. U. S. amd. 5, prohibiting the taking of private property for public use without compensation, because it authorizes the inspection, without compensation, of the books of a bank. Washington Nat. Bank v. Daily [Ind.] 77 N. E. 53. Act Apr. 12, 1899 (Laws 1899, p. 78), authorizing second class cities to improve streets, etc., without petition of the owners and to issue special tax bills therefor, is not a taking of private property for public use without compensation. Hund v. Rackliffe, 192 Mo. 312, 91 S. W. 500. The due process of law guaranteed by the 14th amendment is not denied an upper riparian owner where adequate compensation is secured to such owner for the resulting injury to his lands. Otis Co. v. Ludlow Mfg. Co., 201 U. S. 140, 50 Law, Ed. —-. Compensation held to be sufficiently secured to satisfy the 14th amendment by the provisions of Mass. Pub. Stat. c. 190, giving mill owners the right to flowage to develop water power. Id.

88. Where an officer of the government, having authority to act, takes or appropriates property to public use, admitting it to be private property, an implied contract will arise to make compensation. Brooks' Case, 39 Ct. Cl. 494. The reservation of "wharves and wharfing privileges," in the dedication of land for an addition to a city, does not give the right to take for wharfage purposes a street, or an extension thereof, without compensation, which would be a denial of the due process of law guaranteed by the fourteenth amendment. Mead v. Portland, 200 U. S. 148, 50 Law. Ed.—-. In Louisiana the short prescription of 2 years applies only where there has been a judgment of expropriation and the corporation has taken possession of the lands before payment of compensation awarded. Amet v. Texas & P. R. Co. [La.] 41 So. 721. The term "taking," as used in Act No. 96 of

visions are no restraint upon the exercise of the police power for the public welfare,[89] whereby a particular use of property, once lawful, may be forbidden, or property wholly destroyed without compensation and without the owner's fault.[90] The fact that the competition of a city waterworks plant with a private plant, erected by a company under a franchise from the city, lessens the value of the company's plant, does not constitute a taking of its property without just compensation.[91] One whose property is damaged for a public use, in the absence of any statutory or constitutional remedy, may maintain an appropriate action at common law for redress.[92] The gist of an action for such damages is a recovery of substantial damages and not an invasion of a legal right, and hence nominal damages, as such, are not recoverable.[93]

§ 17. *Right to justice and guaranty of remedies.*[94]—Depriving a person of all remedy for injuries already sustained would be the taking of property,[95] and acts which have such effect are invalid,[96] but an act which denies the right of action for damages for personal injury, unless written notice is given within a year, allows a reasonable time and does not deprive any one of a remedy.[97]

1896, amending the general expropriation statutes, must be construed to mean "expropriation," as the power of the legislature to make an unlawful appropriation of lands the basis of a special short prescription is more than doubtful, the constitution requiring just and adequate compensation. Id.

89. Const. art. 1, § 21. State v. Richcreek [Ind.] 77 N. E. 1085. Laws 1903, c. 487, p. 735, defining and regulating charges of public stockyards not shown to amount to the taking of private property without just compensation. Ratcliff v. Wichita Union Stock Yards Co. [Kan.] 86 P. 150. Act Dec. 22, 1892 (21 St. at Large, p. 360), exempting part of a county from the general stock law, does not violate Const. 1868, art. 1, § 23, and Const. 1895, art. 1, § 17, in taking private property for public use without consent of the owner and without compensation. Brown v. Tharpe [S. C.] 54 S. E. 363. Laws 1905, p. 162, § 18, prohibiting the sale of game, does not violate Const. U. S. amd. 5, and Const. art. 2, § 30, by taking private property for public use without just compensation. State v. Heger [Mo.] 93 S. W. 252. The flooding of lands by the erection of a dam authorized by the legislature to subserve the drainage of low lands is not such a taking as requires compensation to afford due process of law under Const. U. S. amdt. 14, when the flooding can be prevented by raising the dikes around the lands. Manigault v. Springs, 199 U. S. 473, 50 Law. Ed. ——), nor are the interruption of access to such lands and the impairment of the rights of navigation, consequent upon the erection of such dam, such a taking as requires compensation (Id.).

90. The provision of Acts 1905, p. 182, c. 109, § 2, that the real estate, bank furniture, and fixtures of a bank shall not constitute more than one-third of its entire capital, does not conflict with Const. art. 1, § 21, providing for just compensation for property taken. State v. Richcreek [Ind.] 77 N. E. 1085. Requiring a railway company to meet the entire cost of removing and rebuilding a bridge and culvert, made necessary by the widening and deepening of the channel of a creek by drainage commissioners under the Illinois farm drainage act of July 1, 1885, is not a taking of private property for public use that requires compensation (Chicago, etc., R. Co. v. People 200 U. S. 561, 50 Law. Ed. ——), but the expense of removing the soil attendant upon the widening and deepening of such channel could not be imposed upon the railway company without denying that due process of law which requires compensation for taking private property for public use (Id.). A requirement that a railroad company shall construct and maintain without compensation all necessary safety devices at highway crossings laid out after the construction of the railroad is not a taking of private property for public use in violation of the constitution. State v. St. Paul, etc., R. Co. [Minn.] 108 N. W. 261.

91. City of Meridian v. Farmers' Loan & Trust Co. [C. C. A.] 143 F. 67.

92. Swift & Co. v. Newport News [Va.] 52 S. E. 821.

93. Under Const. art. 1, § 6, and art. 4, § 58 (Va. Code 1904, pp. 209, 222), providing for "just compensation" for private property taken or damaged for public use, Swift & Co. v. Newport News [Va.] 52 S. E. 821.

94. See 5 C. L. 645.

95. MacMullen v. Middletown, 98 N. Y. S. 145.

96. Section 30, charter of Middletown (Laws 1902, p. 1367), providing that no action shall be maintained for injuries from snow and ice on a sidewalk, etc., unless written notice was actually given the common council and the snow or ice was not removed within a reasonable time thereafter, held invalid. MacMullen v. Middletown, 98 N. Y. S. 145.

97. Laws 1897, p. 678, c. 304 (Rev. St. 1898, § 4222, subd. 5), does not deprive any one of a remedy contrary to the fourteenth amendment or Const. art. 1, § 9. Hoffmann v. Milwaukee Elec. R. & Light Co. [Wis.] 106 N. W. 808.

§ 18. *Jury trials preserved.*[98]—The right of trial by jury as it existed at common law[99] has been almost universally preserved,[1] but some constitutions dispense with unanimity,[2] and in some states juries may be dispensed with in certain cases.[3] The provisions of the Federal constitution relative to trial of criminal charges by jury apply only to the Federal courts and laws enacted by congress.[4]

§ 19. *Regulation of criminal procedure; rights secured to persons accused of crime.*[5]—Under American constitutions, persons accused of crime are entitled to a speedy and public trial,[6] to be informed of the nature of the accusation against them,[7] to confront the witnesses against them,[8] to have compulsory process for the

98. See 5 C. L. 646. This subject is more fully treated in the topic Jury, 6 C. L. 316.

99. The right of trial by jury which is preserved inviolate is that which existed prior to the adoption of the constitution (Meriden Sav. Bank v. McCormack [Conn.] 64 A. 338), and does not apply to issues of fact in equity, since they were determined by the court long before such adoption (Id.). The issues in a case being purely equitable, it is properly tried without a jury under Rev. Codes 1899, § 5630. Blakemore v. Cooper [N. D.] 106 N. W. 566. Acts 1905 (29th Leg), p. 372, c. 153, authorizing the injunction of the habitual use of premises for gambling purposes, does not violate the right of trial by jury. Ex parte Allison [Tex.] 14 Tex. Ct. Rep. 687, 90 S. W. 870, afg. [Tex. Cr. App.] 14 Tex. Ct. Rep. 409, 90 S. W. 492. A person charged with violation of an injunction under the prohibitory liquor law is not entitled to a jury trial, as guaranteed in § 10, Bill of Rights. State v. Thomas [Kan.] 86 P. 499.

1. If the right of trial by jury in proceedings to condemn lands is guaranteed by the constitution, it is protected by the Creedmore charter (Priv. Acts 1905, p. 1006, c. 398, § 17), authorizing an appeal from the award of damages to the superior court, where all issues of fact are triable by jury. State v. Jones, 139 N. C. 613, 52 S. E. 240. Act Apr. 23, 1903 (P. L. 274), relating to the care of dependent and incorrigible children, does not deny the right of trial by jury to a child, for there is no trial for crime under the act, which operates only when there is no trial and whose object is to prevent a trial. Commonwealth v. Fisher, 213 Pa. 48, 62 A. 198, afg. 27 Pa. Super. Ct. 175.

2. After the amendment of Const. art. 2, § 28, adopted Nov. 8, 1900, authorizing a verdict by nine jurors, a verdict by that number, signed only by the foreman, was good. Kelly-Goodfellow Shoe Co. v. Gally, 114 Mo. App. 222, 89 S. W. 889.

3. The reason why jury trials may be dispensed with before justices of the peace in Mississippi is because § 27 of the constitution so provides. Telheard v. Bay St. Louis [Miss.] 40 So. 326. The constitution of Georgia does not guaranty trial by jury for the violation of a valid municipal ordinance (Pearson v. Wimbish, 124 Ga. 701, 52 S. E. 751), but he may be summarily tried and convicted, without a jury, in a police court having jurisdiction to try petty offenders against the peace, good order and security of the municipality (Id.). Upon a review of the conditions prevailing in Rhode Island, held that Gen. Laws 1896, c. 251, § 11, authorizing the supreme court to direct judgment without any further trial by jury, is not unconstitutional. Gunn v. Union R. Co. [R. I.] 62 A. 118. Const. art. 4, § 10, authorizing the general assembly to exercise the powers heretofore exercised, and art. 14, § 3, providing that the supreme court shall have the same jurisdiction as the former supreme judicial court, authorize the enactment of a law empowering the appellate court to direct judgment without further jury trial, in accordance with the former procedure. McDowell v. Lindsay, 213 Pa. 591, 63 A. 130.

4. Const. U. S. art. 3, § 2. Spurgeon v. Rhodes [Ind.] 78 N. E. 228; Ex parte Brown, 140 F. 461. A trial by jury in suits at common law, in the state courts, is not a privilege or immunity belonging to a person as a citizen of the United States and protected by the fourteenth amendment. Gunn v. Union R. Co. [R. I.] 62 A. 118. A judgment founded upon a state statute is not wanting in due process of law under the Federal constitution, because the statute does not provide for or permit a trial by jury. Marvin v. Trout, 199 U. S. 212, 50 Law. Ed. —.

5. See 5 C. L. 646.

6. Where a party accused of crime was subjected to only such delay, in habeas corpus proceedings, as was necessary by reason of an appeal by the state, authorized by Code 1896, § 4314, his constitutional right (Const. § 14) to have justice "administered without sale, denial or delay" was not infringed. State v. Towery, 143 Ala. 48, 39 So. 309.

7. An indictment for perjury alleged to have been committed before the grand jury, and which does not specify the subject-matter of the investigation then being made, violates Const. art. 10, guarantying the right to demand the cause and nature of the accusation made. State v. Webber [Vt.] 62 A. 1018. Const. § 26, giving the accused in all criminal prosecutions the right to demand the nature of the accusation, applies to all prosecutions before inferior courts. Telheard v. Bay St. Louis [Miss.] 40 So. 326. An affidavit which alleges that accused, on or about a certain date, violated an ordinance designated by number and section within the limits of a city, is insufficient to inform the accused of the nature of the charge against him (Id.), but it is not contemplated that a petty offender, who may be tried summarily without a jury, shall be furnished with a formal accusation or written statement of the charge (Pearson v. Wimbish, 124 Ga. 701, 52 S. E. 751), and it is enough if he be given timely information

attendance of witnesses in their favor,[9] are protected from giving evidence against themselves,[10] from ex post facto laws,[11] from being placed twice in jeopardy for the same offense,[12] and from cruel or unusual punishment.[13] The provisions of the Federal constitution relative to the rights of persons accused of crime apply

of the nature of the charge and be afforded full opportunity to present his defense (Id.).

8. Persons jointly charged with crime cannot, by demanding separate trials, deprive the state of the right to introduce competent evidence to prove the guilt of the one on trial, because such evidence also tends to show the guilt of the other, he not being present at the trial. Krens v. State [Neb.] 106 N. W. 27.

9. Laws 1903, c. 5132, p. 71, prescribing certain requisites in applications by the accused for the procurement of witnesses at the expense of the county, does not violate Const. 1885, Dec. of Rights, §§ 11, 14. Pittman v. State [Fla.] 41 So. 385.

10. The privilege against self-incrimination afforded by U. S. Const. amd. 5, is purely personal to the witness, and he cannot claim the privilege of another person, or of a corporation of which he is an officer or employe. Hale v. Henkel, 201 U. S. 43, 50 Law. Ed. —-; McAlister v. Henkel, 201 U. S. 90, 50 Law. Ed. —-. It is not declared that a witness may not be compelled to testify to facts which may impair his reputation for probity, or even tend to disgrace him, but the line is drawn at testimony that may expose him to prosecution. Hale v. Henkel, 201 U. S. 43, 50 Law. Ed. —-. Hence if the testimony relates to criminal acts barred by limitation, or for which he has been pardoned or guaranteed an immunity, the constitutional guaranty does not apply. Id. The rule in Ohio that a witness, refusing to answer on the ground that the disclosure will incriminate him, is himself the sole judge as to whether such is the fact, is subject only to the further rule that the party aggrieved may prove, if he can, in an action for damages, that the reason given was false and the refusal to testify willful. In re Avery C. Lowe, 3 Ohio N. P. [N. S.] 641. The compulsion does not arise until the party has been summoned and sworn, and his rights are not infringed on his being required to appear before the grand jury by subpoena and be sworn (People v. Hummel, 96 N. Y. S. 878), nor can he claim his constitutional privilege until he is sworn, so that his claim shall be made under the sanction of an oath (Id.).

Immunity from prosecution: The right of a witness to claim his privilege may be taken away by immunity from prosecution guaranteed to him. Nelson v. U. S., 201 U. S. 92, 50 Law. Ed. —-. The right of a witness to claim such privilege, under Const. U. S. amd. 5, is taken away by the proviso to Act Feb. 25, 1903 (32 Stat. at L. 904, c. 775, U. S. Comp. Stat. Supp. 1905, p. 602), that no one shall be prosecuted on account of any transaction, etc., testified to in proceedings under the anti-trust laws. Id.; Hale v. Henkel, 201 U. S. 43, 50 Law. Ed. —-. And such guaranty is sufficient to satisfy the fifth amendment, even though it may afford no immunity from prosecution in the state courts for the offense disclosed. Id. The examination of witnesses before a grand jury concerning an alleged violation of the anti-trust act of July 2, 1890 (26 Stat. at L. 209, c. 647, U. S. Comp. Stat. 1901, p. 3200), is a proceeding within the proviso of Act Feb. 25, 1903 (32 Stat. at L. 854-904, c. 755, U. S. Comp. Stat. Supp. 1905, p. 602), that no person shall be prosecuted for any transaction as to which he may testify, etc. Hale v. Henkel, 201 U. S. 43, 50 Law. Ed. —-.

Waiver of privilege: When a witness voluntarily takes the stand in his own behalf, he waives his constitutional privilege in so far as concerns all matters legal and pertinent to the case before the court. Miller v. State [Ala.] 40 So. 342.

11. Laws altering the legal rules of evidence and receiving less or different testimony to convict than required at the time of the commission of the offense, are ex post facto. Goode v. State [Fla.] 39 So. 461. Where the license of a physician is revoked for violation of the medical practice act, based upon causes arising subsequent to the act and not for the violation of regulations made by the board, it cannot be claimed that he was convicted under an ex post facto law. Czarra v. Medical Sup'rs, 25 App. D. C. 443.

12. This guaranty applies only to criminal prosecutions. State v. Shevlin-Carpenter Co. [Minn.] 108 N. W. 935. Gen. Laws 1895, c. 163, p. 349, subjecting certain trespassers on state lands to both criminal prosecution and double or treble civil damages, does not put them twice in jeopardy. Id. Where a decision of the board of medical examiners of the District of Columbia revoking a license was reversed by the court, because of insufficient complaint, a new and effective complaint could be filed based on the same acts, without placing him twice in jeopardy, as the first conviction was not final. Czarra v. Medical Sup'rs, 25 App. D. C. 443.

13. Act Feb. 23, 1903 (Act 1903, p. 64), punishing a person convicted twice for offenses against the liquor law, with forfeiture of his license and debarment from engaging in the liquor business for two years, does not impose cruel or unusual punishment. Borck v. State [Ala.] 39 So. 580. Pen. Code § 246, inflicting the death penalty upon any life convict who with malice aforethought commits an assault on another with a deadly weapon, etc., does not inflict cruel and unusual punishment. Ex parte Finley [Cal. App.] 81 P. 1041. It is not so much the extent as the nature of the punishment that makes it cruel and unusual. Raymond v. U. S., 25 App. D. C. 555. To be given the full extent of the law in any particular case may be an act of severity, but it is not such punishment as is prohibited by the fundamental law. Id. A sentence for 5 years with hard labor for criminal libel, the maximum penalty prescribed by D. C. Code, § 815, 31 Stat. at L. 1323, c.

only to the Federal courts and laws enacted by congress.[14] The statute permitting amendments of indictments, when the name of the person injured is misstated, if the court considers that the defendant cannot be prejudiced thereby, does not violate the provision that no one shall be held to answer for any crime except on the presentment or indictment of a grand jury.[15]

§ 20. *Searches and seizures.*[16]—Unreasonable searches and seizures are prohibited.[17]

§ 21. *Suffrage and elections.*[18]—The right of suffrage arises and exists under the constitution and laws of the several states,[19] and was not conferred by the fourteenth amendment.[20] The legislature can pass laws for the preservation of the purity of elections,[21] and it is its duty to make reasonable regulations to insure free and equal elections, to guard against fraud, undue influence, or oppression, and preserve the equal rights of all.[22] The constitutional provision that the general assembly shall provide by law the mode of contesting elections, in cases not specially provided for, has no application to elections for nominations but only to elections for office,[23] but, in the absence of constitutional restrictions, the legislature can pass laws regulating primary elections,[24] and can pass laws regulating the primaries of the numerically stronger parties only and excluding the smaller parties from its provisions.[25]

§ 22. *Frame and organization of government, courts, officers.*[26]—Assistant

854, is not a cruel and unusual punishment. Id.

14. Const. U. S. art. 2, § 2; Amdts. 5, 6. Spurgeon v. Rhodes [Ind.] 78 N. E. 228. The sixth amendment to Const. U. S. has no application to the powers exercised by the state, but only to those of the Federal government. Pittman v. State [Fla.] 41 So. 385.

15. State v. Tolla, 72 N. J. Law, 515, 62 A. 675.

16. See 5 C. L. 647.

17. The protection against unreasonable searches and seizures, guaranteed by Const. U. S. Amd. 4, cannot ordinarily be claimed to justify a refusal by an officer of a corporation to produce its books and papers in obedience to a subpoena duces tecum, in an investigation by a grand jury of an alleged violation of the anti-trust act of July 2, 1890, by such corporation (Hale v. Henkel, 201 U. S. 43, 50 Law. Ed. ——), but a corporation charged with a violation of that act is entitled to immunity from such an unreasonable search and seizure as the compulsory production of all understandings or correspondence with six other companies, together with all reports, accounts, and correspondence, from the date of its organization, from more than a dozen different companies in seven different states (Id.). Acts 1901, p. 109, c. 71, authorizing an order for the inspection by the county assessor of a person's books to determine whether all property has been returned for taxation, does not violate the constitutional guaranty against unreasonable search. Washington Nat. Bank v. Daily [Ind.] 77 N. E. 53.

18. See 5 C. L. 647. See, also, the topic Elections, 5 C. L. 1065.

19, 20. State v. Webber [Minn.] 105 N. W. 490.

21. Const. art. 3, § 42, providing for the passage of such laws, does not confer legislative power, but is a mandate to execute a power existing independently thereof. Kenneweg v. Allegany County Com'rs, 102 Md. 119, 62 A. 249.

22. Bill of Rights, § 18. People v. Chicago Election Com'rs [Ill.] 77 N. E. 321. Laws 1905, p. 47, c. 2 (local option law), does not violate Organic Act, art. 2, § 3, providing for free and equal elections, since no qualified voter is prevented from freely voting to adopt or reject the local option law, or deprived of having his vote counted. State v. Richardson [Or.] 85 P. 225.

23. Hester v. Bourland [Ark.] 95 S. W. 992.

24. Kenneweg v. Allegany County Com'rs, 102 Md. 119, 62 A. 249. Laws 1905, p. 211, regulating primary elections, is within Bill of Rights, § 18, providing that elections shall be free and equal (People v. Chicago Election Com'rs [Ill.] 77 N. E. 321), but primary election law, § 58 (Laws 1905, p. 231), providing that no more than one candidate for senator and one for representative of the same political party shall be nominated from the same county in a district, adds a new qualification and restriction on candidates and conflicts with Const. art. 4, § 3, fixing the eligibility of senators and representatives (Id.).

25. Kenneweg v. Allegany County Com'rs, 102 Md. 119, 62 A. 249. And the special provisions relative to primary elections in Cook county, contained in the primary election law (Laws 1905, p. 211), are invalid as an interference with the equality of rights and freedom of voters in the different counties. People v. Chicago Election Com'rs [Ill.] 77 N. E. 321.

26. See 5 C. L. 647. See, also, such topics as Courts, 5 C. L. 870; Officers and Public Employes, 6 C. L. 841.

prosecuting attorneys are not officers in the sense in which the word is used in the state constitution, but are persons authoritatively appointed to assist an officer in an office provided by law.[27] In Pennsylvania, the members of the boards for the assessment and revision of taxes are not county officers within the meaning of the constitution requiring their election at the general elections,[28] hence, the legislature may provide for their appointment.[29] The legislature cannot vary the qualifications for holding public office as defined in the constitution.[30]

The right to local self government[31] is guarantied in terms in some constitutions,[32] and by implication in others,[33] but the legislature creates the subjects of local legislation and defines the powers and duties of the local legislatures in relation thereto,[34] and the reserved power of the legislature to modify or take away these delegated powers and duties, in whole or in part, is established by abundant authority.[35] All power committed to a city or borough, usually in the first instance, is confined to its own limits,[36] and without some special provision it does not possess any control or right over lands lying within any other municipality.[37]

27. State v. Taylor, 3 Ohio N. P. (N. S.) 505.

28. Const. art. 14, § 2. Commonwealth v. Collier, 213 Pa. 138, 62 A. 567.

29. Act Mar. 24, 1905 (P. L. 47), for their appointment by the courts of common pleas in certain counties, is valid. Commonwealth v. Collier, 213 Pa. 138, 62 A. 567.

30. Acts 1904, p. 870, c. 580, for holding primary elections, in requiring candidates to pay a fee to be used in defraying the expenses of the election, does not add a property qualification for holding public office not contained in the constitution. Kenneweg v. Allegany County Com'rs, 102 Md. 119, 62 A. 249.

31. See 5 C. L. 647.

32. Laws 1905, p. 2059, c. 729, taxing mortgages, does not violate the principle of home rule embodied in Const. art. 10, § 2, by withdrawing rights and power from local assessors. People v. Ronner, 95 N. Y. S. 518. Laws 1905, cc. 629-631, pp. 1533, 1548, 1550, committing the control of streets in New York City and the power to grant street railway franchises therein to the board of estimate and apportionment and taking such power from the board of aldermen, does not violate the home rule provision of Const. art. 10, § 2 (Wilcox v. McClellan, 47 Misc. 465, 95 N. Y. S. 941); nor does it constitute a legislative appointment to office, in violation of Const. art. 10, § 2, providing for the election of city officers, when construed with Const. art. 8, § 1, authorizing the legislature to enact special laws for municipalities (Wilcox v. McClellan, 110 App. Div. 378, 97 N. Y. S. 311); nor does it conflict with Const. art. 3, § 18, authorizing the legislature to pass general laws for the construction and operation of street railroads with consent of the local authorities, as the legislature can prescribe what authorities may consent (Id.); nor does it violate Const. art. 3, §§ 26, 27, providing for devolving the powers and duties of boards of supervisors upon boards of aldermen, where a city includes an entire county, and for conferring upon boards of supervisors powers of local legislation (Wilcox v. McClellan, 47 Misc. 465, 95 N. Y. S. 941); nor are the statutes void under Const. art. 3, §§ 26, 27, authorizing transfer of the powers of the supervisors in the counties comprising Greater New York to the "municipal assembly, common council, board of aldermen or legislative body of the city," etc., for the supervisors of New York county never had control of the streets in the city and their consent was not required (Wilcox v. McClellan, 47 Misc. 465, 95 N. Y. S. 941; Id. 110 App. Div. 378, 97 N. Y. S. 311).

33. Laws 1900-01, p. 110, c. 804, authorizing the governor to appoint police commissioners for the city of Newport, and § 9, declaring that the annual salary of each commissioner shall be payable monthly, do not infringe the right of local self-government. Horton v. City Council [R. I.] 61 A. 759. It has been declared in Michigan that the municipal corporations of the state are required to be organized in such a way as to preserve to the inhabitants full means of local self-government. Attorney General v. Loomis [Mich.] 12 Det. Leg. N. 553, 105 N. W. 4. Loc. Acts 1905, p. 1071, No. 627, for the annexation of territory to Detroit City, did not deprive the people of the territory of their right of local self-government in village and school matters (Attorney-General v. Springwells Tp. [Mich.] 13 Det. Leg. N. 30, 107 N. W. 87), and the exercise of the judicial power is one means of government (Id.). Acts 1905, No. 70, for the appointment of an associate judge of a municipal court, to act in case of vacancy or in case of inability of the judge, and making him ex officio a justice, cannot be sustained as a provision for the appointment of a justice. Attorney General v. Loomis [Mich.] 12 Det. Leg. N. 553, 105 N. W. 4. Const. art. 15, § 3, conferring supervision of public health matters upon the state board, subject to legislative control, has no application, when it is shown that the board declines to interfere with a municipal ordinance. Logan v. Childs [Fla.] 41 So. 197.

34, 35. Wilcox v. McClellan, 47 Misc. 465, 95 N. Y. S. 941.

36. City of Allentown v. Wagner, 27 Pa. Super. Ct. 485.

37. Act Mar. 30, 1903, P. L. 115, amending Act May 23, 1889, P. L. 277, authorizing a third-class city to take land in an adjacent township for a hospital for contagious dis-

Courts[38] and their jurisdiction are generally placed beyond control of the legislature,[39] except to a limited extent,[40] but the legislature of Ohio is expressly empowered to define the jurisdiction of the courts.[41] The legislature cannot enlarge the scope of the original jurisdiction of the supreme court, either directly by authorizing the primary consideration of cases not specified in the constitution, or indirectly by including them within its review power on appeal;[42] nor can its appellate jurisdiction, conferred by the constitution, be enlarged or divested by the legislature,[43] but the legislature can enlarge the powers of courts of equity to grant injunctions, the effect of which is to restrain the commission of a crime.[44]

Creation of offices.[45]—When there is no inhibition in the constitution as to the creation of offices, the legislature can create them.[46]

§ 23. *Taxation and fiscal affairs.*[47]—The right to tax is not granted by the constitution, but of necessity underlies it. While it may be regulated and limited by the fundamental law, it exists independently of it and as a necessary attribute of sovereignty;[48] and the power of the state in its sovereign capacity to impose taxes is unlimited in extent, so far as no constitutional guaranty is infringed upon.[49]

eases, etc., is a proper exercise of legislative power. City of Allentown v. Wagner, 27 Pa. Super. Ct. 485.

38. See 5 C. L. 647.

39. Acts 1905, p. 782, attempting to vest in chancery courts jurisdiction to hear and determine contested elections for nominations, violates Const. art. 7, § 1, making the jurisdiction of such courts consist of matters of purely equitable cognizance. Hester v. Bourland [Ark.] 95 S. W. 992. Acts 1905, No. 70, amending a city charter and establishing a court whose jurisdiction is not limited by the boundaries of the city, cannot be sustained as an establishment of a municipal court, though such name is given it in the act. Attorney General v. Loomis [Mich.] 12 Det. Leg. N. 553, 105 N. W 4.

40. The municipal court of New York City being in effect a district court, municipal court act, Laws 1902, p. 1494, c. 580, § 12 (7), amd. by Laws 1904, p. 1429 c. 598, providing for the justices holding court in districts other than where elected, is authorized by Const. art. 6, § 17, permitting the election of district court justices in cities as may be prescribed by law. Sakolski v. Schenkel, 98 N. Y. S. 190. In view of Const. 1875, art. 5, § 6; Const. 1901, § 148, and the history of the provisions of Const. 1819, art. 5, §§ 1, 6, 8; Const. 1861, art. 5, §§ 1, 5, 7; Consts. 1865, 1868, art. 6, § 1; Acts 1894-95, p. 881, conferring chancery jurisdiction on the circuit court of Jefferson county, is not unconstitutional. Ensley Development Co. v. Powell [Ala.] 40 So. 137. Laws 1892, p. 1207, c. 651, § 9, which provides for payment to the state treasurer of sums of money paid into court and remaining in the county treasurer's hands for 20 years, is not invalid as devesting the courts of their general jurisdiction. People v. Keenan, 110 App. Div. 537, 97 N. Y. S. 77. Act Apr. 23, 1903 (P. L. 274), defining the powers of courts of quarter sessions in respect to incorrigible children, is not unconstitutional as creating a new court, but confers additional powers on a court recognized by the constitution but whose jurisdiction is not defined. Commonwealth v. Fisher, 213 Pa. 48, 62 A. 198, afg. 27 Pa. Super. Ct. 175. Const. art. 6, § 18, prescribing the jurisdiction of justices of the peace, does not prohibit the legislature from giving the jurisdiction of justices to municipal courts (Attorney General v. Loomis [Mich.] 12 Det. Leg. N. 553, 105 N. W. 4), and Const. art. 6, § 19, providing that judges and justices shall be conservators of the peace, does not prevent the legislature from making other officers conservators of the peace (Id.).

41. Incorporated Village of Fairview v. Giffee [Ohio] 76 N. E. 865.

42. In re Burnett [Kan.] 85 P. 575.

43. Kirby's Dig. § 6217, authorizing the circuit judge, on motion for a new trial, in certain cases, to indicate that he deems the verdict excessive, and providing for a setting aside of the verdict if the losing party offers to file a release of errors and the prevailing party refuses to remit the excess, is binding both on the circuit and supreme courts, and is an unconstitutional limitation of the latter's appellate jurisdiction under Const. art. 7, § 4. St. Louis, etc., R. Co. v. Mathis [Ark.] 91 S. W. 763.

44. Gen. Laws (29th Leg.), p. 372, c. 153, sustained. Ex parte Allison [Tex.] 14 Tex. Ct. Rep. 687, 90 S. W. 870, afg. [Tex. Cr. App.] 14 Tex. Ct. Rep. 409, 90 S. W. 492.

45. See 5 C. L. 648.

46. State v. Bryan [Fla.] 39 So. 929.

47. See 5 C. L. 648. See, also, the topic Taxes, 6 C. L. 1602.

48. People v. Reardon [N. Y.] 77 N. E. 970.

49. People v. Ronner [N. Y.] 77 N. E. 1061. The Georgia scheme of taxation sustained as constitutional. Georgia R. & Banking Co. v. Wright, 124 Ga. 596, 53 S. E. 251. When the different acts relating to the method of collecting state, county, and municipal taxes upon the property of railroad companies are construed together, they are exhaustive as to the collection of such taxes, and do not violate the constitutional injunction that all taxes "shall be levied and collected under general laws." Georgia R. & Banking Co. v. Wright [Ga.] 54 S. E. 52. Gen. Laws 1905,

In Washington, the constitutional provision that the legislature may not impose taxes on municipal corporations for municipal purposes, but may vest in the corporate authorities the power to assess taxes for such purposes,[50] relates only to the imposition of taxes for ordinary corporate affairs incidental to the existence of the corporation,[51] and hence is not impaired by an act requiring the corporation to submit to vote of the people a proposed amendment to its charter, though that would occasion expense to the corporation.[52]

Equality and uniformity.[53]—The fourteenth amendment to the Federal constitution does not require equality in the levying of taxes by the state,[54] nor was it designed to prevent a state from changing its system of taxation in all proper and reasonable ways.[55] How a state shall levy its taxation is a matter solely for its legislature, subject to such restraints as the state constitution throws around legislative action.[56] The limitation upon the taxing power as to equality and uniformity has its foundation in state constitutions.[57] It has reference to uniformity of burden and not necessarily to uniformity of methods of imposing burdens and realizing thereon,[58] and it applies to ad valorem taxes only,[59] and not to taxes upon privileges or occupations.[60] The rule does not require that there be one fixed and unvarying rule for all purposes of taxation throughout the state, but only that taxes rest uniformly on the state or political division to which their purpose applies.[61] While absolute equality in laying the burdens of taxation is impossible of attainment, and perfection in taxation is a speculative and frivolous idea,[62] yet

c. 288, p. 427, imposing a tax upon certain devises, bequests, inheritances, and gifts, held constitutional. State v. Bazille [Minn.] 106 N. W. 93, following Drew v. Tifft, 79 Minn. 175, 81 N. W. 839, 47 L. R. A. 525, 79 Am. St. Rep. 446, construing Const. art. 9, § 1, as modified by the inheritance tax amendment. Act No. 158, p. 305, § 14, of 1898, charter of city of Shreveport, providing for 2 per cent per month penalty on unpaid taxes, does not violate Const. 1898, § 233, relative to nonforfeiture for delinquent taxes. Victoria Lumber Co. v. Rives, 115 La. 996, 40 So. 382.

50. Const. art. 11, § 12. Hindman v. Boyd [Wash.] 84 P. 609.

51. Hindman v. Boyd [Wash.] 84 P. 609.

52. Acts 1903, p. 393, c. 186, for that purpose, sustained. Hindman v. Boyd [Wash.] 84 P. 609.

53. See 5 C. L. 648.

54. State v. Wheeler [N. C.] 53 S. E. 358; Darnell v. Memphis [Tenn.] 96 S. W. 816. There is nothing in that amendment to compel the state to adopt an iron rule of equality. Michigan Cent. R. Co. v. Powers, 201 U. S. 245, 50 Law. Ed. —.

55. Michigan Cent. R. Co. v. Powers, 201 U. S. 245, 50 Law. Ed. —.

56. State v. Wheeler [N. C.] 53 S. E. 358.

57. The rule of uniformity for direct taxation is the rule ordained by the constitution itself, vitalized by legislative essentials necessary to its execution. Chicago, etc., R. Co. v. State [Wis.] 108 N. W. 557. The principle of uniformity is established and required by Const. art. 7, § 9. Smith v. Robersonville Graded School Trustees [N. C.] 53 S. E. 524. Laws 1905, pp. 372, 373, requiring a license tax for peddling goods "after shipment to the state," discriminates against goods shipped from other states and is unconstitutional for nonuniformity, under Const. art. 1, § 12. Bacon v. Locke [Wash.] 83 P. 721. Laws 1905, p. 130, c. 66, for licensing plumbers, is in conflict with Const. art. 1, §§ 3, 12, relating to uniformity of taxation. State v. Smith [Wash.] 84 P. 851.

58. Chicago & N. W. R. Co. v. State [Wis.] 108 N. W. 557.

59. The first clause of Const. art. 8, § 1, requiring uniformity of taxation, relates only to property taxed directly. Chicago & N. W. R. Co. v. State [Wis.] 108 N. W. 557. Acts 29th Leg. p. 128, c. 90, imposing a tax on fishing boats and on fish taken for market, is not void as an ad valorem tax, violating the requirement of equality and uniformity. Raymond v. Kibbe [Tex. Civ. App.] 15 Tex. Ct. Rep. 988, 95 S. W. 727. The annual license tax imposed on foreign corporations by Sess. Laws 1902, p. 73, c. 3, § 65, is levied for state revenue and is not a property tax, and hence does not conflict with Const. art. 10, § 3, providing for uniformity on the same class of subjects. American Smelting & Refining Co. v. People [Colo.] 82 P. 531. The tax imposed on insurance companies by Code Supp. 1902, § 1333d, is a license and not a property tax, and hence does not violate Const. art. 8, § 2, providing for the taxation of corporations for pecuniary profit the same as individuals. Iowa Mut. Tornado Ins. Ass'n v. Gilbertson [Iowa] 106 N. W. 153.

60. American Smelting & Refining Co. v. People [Colo.] 82 P. 531. Laws 1904, p. 69, c. 76, § 49, imposing a privilege tax, does not violate that clause. Clarksdale Ins. Ag. v. Cole [Miss.] 40 So. 228.

61. State v. Chicago, etc., R. Co., 195 Mo. 228, 93 S. W. 784.

62. People v. Ronner [N. Y.] 77 N. E. 1061.

taxes must not be so nonuniform as to violate the fourteenth amendment,[63] but there must be a willful and intentional misadministration of the laws, by the state authorities, to amount to a denial of equal protection of the laws.[64] The fourteenth amendment was not intended to prevent the classification of property for purposes of taxation or the imposition of different rates upon different classes,[65] and the legislature may classify as it sees fit,[66] the remedy for injudicious action being in the hands of the people, not of the courts,[67] so long as its attempted classification is not clearly arbitrary and unreasonable.[68] The power to levy taxes, and to prescribe such regulations as shall secure a just valuation of property for taxation, grants the legislature the right to adopt regulations to make the taxes uniform and equal.[69] Special assessments are not taxes within the provisions requiring equal and uniform taxation according to value,[70] hence, acts authorizing such assessments for municipal improvements, on abutting property benefited thereby, do not violate these constitutional requirements.[71]

Double taxation.[72]—Wherever a tax is imposed upon one who holds the tangible article of inherent value, as well as upon another who holds merely the symbol which derives its value solely from the tangible article, the same property is twice taxed,[73] but not all double taxation is void.[74] There is no constitutional prohibi-

63. The first section of the fourteenth amendment to the Federal constitution places a limit upon all the powers of the state, including that of taxation. Georgia R. & Banking Co. v. Wright [Ga.] 54 S. E. 52. It is enough that there is no discrimination in favor of one as against another of the same class, and the method for the assessment and collection of the tax is not inconsistent with natural justice. Michigan Cent. R. Co. v. Powers, 201 U. S. 245, 50 Law. Ed. —. Code Supp. 1902, § 1333d, imposing a tax on insurance companies, except mutual companies not organized for pecuniary profit and certain others, operates equally on all corporations in the same situation and is not repugnant to the 14th amendment for inequality. Iowa Mut. Tornado Ins. Ass'n v. Gilbertson [Iowa] 106 N. W. 153.

64. A custom among taxpayers to return their property for taxation at less than required by law, especially when the custom was adopted without the authority and against the protest of the state tax officers, does not amount to such denial, as to one who has been called upon to pay the full amount of his assessment. Georgia R. & Banking Co. v. Wright [Ga.] 54 S. E. 52.

65. Michigan Cent. R. Co. v. Powers, 201 U. S. 245, 50 Law. Ed. —; Darnell v. Memphis [Tenn.] 95 S. W. 816; People v. Reardon [N. Y.] 77 N. E. 970. The various vocations may be divided into classes for levying occupation taxes, and varying amounts may be levied, provided there is uniformity among the members of the same class and provided the tax does not amount to a prohibition on any useful and legal occupation. Kendrick v. State, 142 Ala. 43, 39 So. 203. Acts 1903, p. 344, does not impose a license tax on emigration agents so excessive or unreasonable as to render it invalid. Id.

66. People v. Reardon [N. Y.] 77 N. E. 970; Harvey Coal & Coke Co. v. Dilion [W. Va.] 53 S. E. 928. The state may adjust its system of taxation and may impose specific taxes upon different trades, business, or professions, without regard to the fourteenth amendment. Iowa Mut. Tornado Ins. Ass'n v. Gilbertson [Iowa] 106 N. W. 153. The classified and progressive features of Gen. Laws 1905, c. 288, p. 427, imposing a tax upon inheritances, etc., are constitutional. State v. Bazille [Minn.] 106 N. W. 93.

67. People v. Reardon [N. Y.] 77 N. E. 970.

68. Darnell v. Memphis [Tenn.] 95 S. W. 816. Tax Law, Laws 1905, pp. 474-477, c. 241, §§ 315-324, taxing transfers of stock in domestic or foreign corporations, is uniform and its selection of transfers of corporation stock as a subject of taxation is not arbitrary. People v. Reardon, 110 App. Div. 821, 97 N. Y. S. 535. The distinction between county mutual insurance companies not organized for pecuniary profit and other insurance concerns is sufficient to justify the taxing of the latter and not the former, and Code Supp. 1902, § 1333d, for that purpose, is not class legislation. Iowa Mut. Tornado Ins. Ass'n v. Gilbertson [Iowa] 106 N. W. 153.

69. Const. art. 10, § 1. Washington Nat. Bank v. Daily [Ind.] 77 N. E. 53.

70. Arnold v. Knoxville, 115 Tenn. 195, 90 S. W. 469.

71. Acts 1905, p. 585, c. 278, authorizing special assessments for municipal improvements, sustained. Arnold v. Knoxville, 115 Tenn. 195, 90 S. W. 469.

72. See 3 C. L. 788.

73. Georgia R. & Banking Co. v. Wright [Ga.] 54 S. E. 52.

74. When a tax is levied upon a corporation's property and also upon the value of the shares of stock, that which gives value to the holdings of the corporation and to its shares is subjected to a double burden. It is double taxation in a sense, but not such as would be void. Georgia R. & Banking Co. v. Wright [Ga.] 54 S. E. 52. It exists in many instances, as the taxation of mortgages and indebtedness in the hands of a

tion of double taxation.[75] If the legislature has a discretion in reference to double taxation, where the state receives the benefit of both taxes, it must certainly have a discretion where the state cannot impose more than one tax, as in case of shares of foreign stock held in the state.[76] A tax law will not be construed to tax the same property twice, unless such conclusion is constrained, either by the express provision of the law or by necessary implication.[77]

Exemption clauses.[78]—In the absence of a constitutional inhibition, the right to make reasonable exemptions from taxation rests with the legislature,[79] and the supreme court of the United States has repeatedly recognized the power of the state to foster industries by providing exemptions from taxation, both to persons and certain classes of property within its borders.[80] Nevertheless, exemptions from taxation are not favored,[81] but must be clearly established or found in the contract or enactment under which they are claimed, either by express words or by implication so strong as to be irresistible.[82] Exemption clauses are strictly construed,[83] and doubt is fatal in such cases.[84] In some states, statutes exempting from taxation are held violative of the constitutional injunction of uniformity and equality.[85] The constitution of Georgia imperatively requires that all property of every na-

creditor, and taxation at the same time of mortgaged property, and of the real and personal property of a debtor, without reduction by reason of the mortgage or other indebtedness, the taxation of the tangible property of a corporation and also of its capital stock and of its franchises, and also of the certificates of shares in the hands of shareholders. State v. Wheeler [N. C.] 53 S. E. 358. Laws 1903, p. 931, c. 551, amd. by Laws 1905, p. 815, c. 667, requiring improvement of highways by labor of citizens supplemented by taxes levied on property, is not objectionable as double taxation. Id. Nor do those acts discriminate in favor of dwellers in towns and against dwellers in the country, the town dwellers being at greater expense in the care of their streets than the value of the statutory labor required on the country roads. Id. Laws 1904, p. 69, c. 76, § 49, imposing a privilege tax of $50 on insurance agencies, and a tax of $15 on each insurance agent, is not objectionable as double taxation, as discriminating against corporations. Clarksdale Ins. Ag. v. Cole [Miss.] 40 So. 228.

75. State v. Wheeler [N. C.] 53 S. E. 358. Acts 1905, c. 35, p. 285, in its taxation of chattels real, is not in violation of the constitution, as double taxation or otherwise. Harvey Coal & Coke Co. v. Dillon [W. Va.] 53 S. E. 928.

76. The Act of 1885 (Acts 1884-85, p. 30), taxing foreign shares of stock, is still in force as to such shares. Georgia R. & Banking Co. v. Wright [Ga.] 54 S. E. 52.

77. Georgia R. & Banking Co. v. Wright [Ga.] 54 S. E. 52.

78. See 5 C. L. 648.

79. Wallace v. Board of Equalization [Or.] 86 P. 365.

80. Darnell v. Memphis [Tenn.] 95 S. W. 816.

81. American Smelting & Refining Co. v. People [Colo.] 82 P. 531.

82. Sess. Laws 1897, p. 157, c. 51, and Sess. Laws 1901, p. 116, c. 52, requiring of foreign corporations a filing fee, do not impliedly exempt them from further taxation, and no constitutional provision is violated by the imposition subsequently of an occupation tax. American Smelting & Refining Co. v. People [Colo.] 82 P. 531. Under Const. art. 10, § 9, declaring that the power to tax corporations shall never be relinquished, a foreign corporation cannot escape the license tax imposed by Sess. Laws 1902, p. 73, c. 3, § 65, even though Sess. Laws 1897, p. 157, c. 51, and Sess. Laws 1901, p. 116, c. 52, expressly grant exemption from such taxation. Id.

83. Wallace v. Board of Equalization [Or.] 86 P. 365; State v. New Orleans R. & Light Co. [La.] 40 So. 597. An electric light company is not a "manufacturer" in the sense of the exemption clause of article 229, Const. 1898, relative to license taxes. State v. New Orleans R. & Light Co. [La.] 40 So. 597.

84. State v. New Orleans R. & Light Co. [La.] 40 So. 597. Const. art. 2, § 28, provides that the legislature may exempt certain specified kinds of property from taxation, and shall exempt certain other kinds, but is silent as to state bonds, hence Act 1903, p. 632, c. 258, § 25, providing in effect for an exemption of Tennessee registered state bonds, is invalid. State Nat. Bank v. Memphis [Tenn.] 94 S. W. 606.

85. Laws Sp. Sess. 1903, p. 28, providing that enumerated property of a householder to be selected by him of the value of $300 shall be exempt from taxation, conflicts with Const. art. 9, § 1, requiring a uniform and equal rate of taxation. Wallace v. Board of Equalization [Or.] 56 P. 365. Acts 1904, p. 283, c. 167 (Va. Code 1904, p. 484), purporting to incorporate a town and to exempt its residents from certain county taxes, violates Const. art. 13, § 168 (Va. Code 1904, p. cclxii.), providing for uniformity. Campbell v. Bryant, 104 Va. 509, 52 S. E. 638. Act 1903, p. 632, c. 258, § 25, providing, in the assessment of corporation stock, for the deduction of the assessed value of registered Tennessee state bonds, is an attempt to create an express exemption of the bonds from taxation and violates Const. art. 2, § 28, for equal and uni-

ture be taxed, except that which it in terms declares the legislature may in its discretion exempt.[86]

Public improvements.[87]

Debt limit, and limit of levy.[88]—In Idaho, the constitutional limitations of taxation do not apply to the ordinary and necessary expenses of a city authorized by the general laws of the state.[89]

Submission of question of indebtedness.[90]—Mere infirmities in an election held on the question of issuing bonds, which do not affect the result, will not invalidate the bonds.[91] In North Carolina, school districts are included in the term "municipal corporations," within the constitutional requirement of submission to the voters of the question of taxes to be levied.[92]

Provision for payment of debts.[93]

Public aid, donations, and loans of credit.[94]—The appropriation of public money for private use is unlawful.[95]

§ 24. *Schools and education; school funds.*[96]—State constitutions usually contain provisions relative to education and free schools.[97] Legislative creation and alteration of school districts is not incompatible with the republican form of government guaranteed by the Federal constitution.[98] Laws creating library boards, considered in connection with statutes authorizing taxation for school purposes, come within a constitutional injunction to encourage education and common schools.[99] The trustees of a school district are not given arbitrary discretion in the disposition of school funds but one that must be used as directed by the constitution.[1]

§ 25. *The enactment of statutes*[2] is hedged about with various inhibitions,[3] such as those against local and special laws, laws addressed to a plurality of subjects and not reciting their subjects in their titles, and amendatory acts not setting

form taxation. State Nat. Bank v. Memphis [Tenn.] 94 S. W. 606.

86. Even if the constitution does not imperatively require the taxation of shares of foreign stock, the legislature has exercised its discretion relative thereto and has made them taxable by the Act of 1885 (Acts 1884-85, p. 30). Georgia R. & Banking Co, v. Wright [Ga.] 54 S. E. 52.

87, 88. See 5 C. L. 649.

89. Proviso to Const. art. 8, § 3, so construed. Butler v. Lewiston [Idaho] 83 P. 234.

90. See 3 C. L. 791.

91. Election held under Acts 1903, p. 59, on a collateral attack and in the absence of contest, presumed to have been legal and not invalidated because no returning officer for the various precincts were appointed. Blakey v. City Council [Ala.] 39 So. 745.

92. Const. art. 7, § 7, so construed. Smith v. Robersonville Graded School Trustees [N. C.] 53 S. E. 524.

93. See 3 C. L. 791.

94. See 5 C. L. 649.

95. Acts Cong. Feb. 12, 1901, 31 Stat. at L. 774, c. 354, and Feb. 28, 1903, 32 Stat. at L. 909, c. 856, relating to the elimination of grade crossings and the erection of a union station in the district, is not an appropriation of public money for private use, but the appropriation is compensation for rights and privileges surrendered by railroad companies and for the extensive work they agree to perform. Millard v. Roberts, 25 App. D. C. 221.

96. See 5 C. L. 649.

97. Laws 1905, c. 5384, sufficiently complies with Const. art. 12, § 14, enjoining the establishment, maintenance and management of normal schools. State v. Bryan [Fla.] 39 So. 929. The provisions of Laws 1905, c. 5384, relating to the Institute for the Blind, Deaf and Dumb, does not violate Const. art. 13, or art. 4, § 17, such institute being properly classed in a system with "schools of higher grades" and being "subject to such regulations as may be prescribed by law." Id.

98. Const. U. S. art. 4, § 4. Attorney General v. Lowrey, 199 U. S. 233, 50 Law. Ed. —. Act No. 315, Loc. Acts Mich. 1901, incorporating the public schools of village of Jerome, etc., is a valid exercise of legislative authority. Id.

99. Acts 1903, p. 193, c. 102 (Burns' Ann. St. Supp. 1905, § 4983h et seq.), creating such boards in certain cities, held to come within the injunction of Const. art. 8, § 1. School City v. Forrest [Ind.] 78 N. E. 187.

1. Smith v. Robersonville Graded School Trustees [N. C.] 53 S. E. 524.

2. See 5 C. L. 649. For a further treatment of this subject see Statutes, 6 C. L. 1520.

3. Noncompliance with statutory formalities prescribed by the general laws for the introduction of private bills does not nullify

out that amended.[4] The powers of special sessions are usually limited, but courts will not investigate the question whether an act passed at a special session was legislation recommended by the governor;[5] and there are provisions regulating legislative procedure,[6] and some relating to interpretation and effect of statutes.[7] All the formalities prescribed for the enactment of statutes must be observed.[8] While all bills in congress for raising revenue must originate in the house of representatives,[9] a bill which only incidentally carries an appropriation in order to give it effect is not constitutionally barred from originating in the senate.[10]

§ 26. *Miscellaneous provisions other than the foregoing,*[11] chiefly matters more properly belonging within the domain of legislation, are to be found in the more recent state constitutions. Among them are provisions respecting claims against the state,[12] inviolability of representative districts,[13] location of public institutions,[14] township and county organization,[15] poll or capitation taxes,[16] compensation of

an act passed in disregard of them. Manigault v. Springs, 199 U. S. 473, 50 Law. Ed. —.

4. Laws 1905, p. 285, subjecting salaries and wages of officers to garnishment, etc., conflicts with Const. art. 4, § 13, permitting the amendment of no law by reference to its title only, and without setting forth the new law. Badenoch v. Chicago [Ill.] 78 N. E. 31.

5. State v. Larkin [Tex. Civ. App.] 14 Tex. Ct. Rep. 582, 90 S. W. 912.

6. Under Const. 1901, § 64, prescribing that amendments to bills and the votes therefor be entered at length on the journal, the concurrence of the senate in a house amendment was sufficiently entered on the senate journal by a record of those voting thereon, though the amendment was not set out on that journal. State v. Porter [Ala.] 40 So. 144. A provision (Const. art. 3, § 15) that no bill shall be passed, unless it shall have been printed and upon the desk of the members in its final form at least three calendar legislative days prior to its final passage, is sufficiently complied with where a bill orginating in one house is printed and placed on the desk of each member of both houses, with every amendment made thereto, as printed and placed on the desks of the members of the house where it originated (People v. Reardon, 110 App. Div. 821, 97 N. Y. S. 535), and the constitution means the members of the legislature and not of the senate and assembly as such, and means three days when the legislature is in session (People v. Reardon [N. Y.] 77 N. E. 970). Laws 1905, p. 2076, c. 729, § 307, providing for the transmission of half the tax imposed on debts secured by real estate mortgages to the state treasurer and the holding of the rest subject to the order of the board of supervisors, does not appropriate public money for local purposes, so as to require a two-thirds vote for its passage. People v. Ronner [N. Y.] 77 N. E. 1061, afg. 110 App. Div. 816, 97 N. Y. S. 550. The constitution of Florida does not mandatorily require the legislative journals expressly to show the adoption of amendments to bills (West v. State [Fla.] 39 So. 412), and it is only where the constitution mandatorily requires the journals expressly to show the action taken that they are affirmative evidence that such action was or was not had, as the entry of the ayes and noes on the final passage of a bill (Id.).

7. See 6 C. L. 1520.

8. Under the constitution of Connecticut, a bill sent to the governor by mistake before actual passage did not become a law, although approved by him and filed with the secretary of state. Const. art. 3, § 1, and art. 4, § 12. State v. Savings Bank [Conn.] 64 A. 5.

9. Millard v. Roberts, 25 App. D. C. 221.

10. Millard v. Roberts, 25 App. D. C. 221. A similar provision in the Texas constitution is not violated by Acts 29th Leg. p. 128, c. 99, imposing a tax on fishing boats and fish taken for market, as a revenue measure originating in the senate instead of the house. Raymond v. Kibbe [Tex. Civ. App.] 15 Tex. Ct. Rep. 988, 95 S. W. 727.

11. See 5 C L. 650.

12. Constitutional provisions against gifts of public moneys, or gratuities, do not prevent the legislature from providing for the payment of claims against a municipality that are founded in equity and justice, and which could have been authorized originally. Laws 1892, p. 1761, c. 686, § 69, authorizing a town to improve highways but making no provision for damages for change of grade, does not render Laws 1903, p. 1396, c. 510, making such provision, unconstitutional as a gift of money by the town. In re Borup, 182 N. Y. 222, 74 N. E. 838.

13. Loc. Acts 1905, p. 1071, No. 627, for the annexation of territory to Detroit City, does not violate Const. art. 4, § 4, which provides that representative districts as established by the boards of supervisors shall remain unaltered until the return of another enumeration. Attorney General v. Springwells Tp. [Mich.] 13 Det. Leg. N. 30, 107 N. W. 87.

14. Act Feb. 7, 1905 (Laws 1905, p. 8, c. 10), purporting to repeal Act June 10, 1891 (Acts 1890-91, p. 373, § 92) and all laws establishing the Wyoming Agricultural College established by legislation, though located by vote of the people, did not contravene Const. art. 7, § 23, prohibiting the legislature from locating public institutions except by general law and by vote of the people. State v. Irvine [Wyo.] 84 P. 90.

15. Rev. St. 1889, § 8427, providing for township organization of a county, upon a majority vote of the voters on the question, conflicts with Const. art. 9, § 8, which pro-

public officers,[17] the creation of corporations,[18] the number of justices of the peace,[19] emigration,[20] and waters.[21] The governor, in the employment of the militia to suppress an insurrection, acts in a civil capacity as the chief civil magistrate,[22] so that the arrest of an insurrectionist by the military and its refusal to surrender him to the civil authorities for trial before the suppression of the insurrection was not in contravention of the Bill of Rights providing for the strict subjection of the military to the civil power.[23] The provisions of the Illinois constitution, requiring the passage of laws for the protection and safety of miners, embrace only the reasonably necessary mechanical appliances to secure the end in view,[24] and do not include other kinds of health regulations.[25]

A judgment or confession on warrant of attorney, which is valid in the state where taken, is valid in Missouri, under the provision of the Federal constitution requiring full faith and credit to judgments of sister states.[26]

Right to acquire information by compulsion.[27]

The right to bear arms.[28]—Constitutional provisions declaratory of the right of the people "to bear arms for their defense and security" are limitations on legislative power to prohibit the bearing of arms in the militia,[29] but not limitations on the legislative power to prohibit and punish the promiscuous carrying of arms or other deadly weapons.[30]

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vides for a vote of a majority of all the electors voting at a general election. State v. Gibson, 195 Mo. 251, 94 S. W. 513. Const. Ala. § 40, prohibits the location of county lines in the creation of new counties within 7 miles of a court house, and § 41 prohibits the moving of a county seat or court house, except by vote of the electors. The former section refers to county lines only, and a court house, under § 41, may be located anywhere in the county. State v. Porter [Ala.] 40 So. 144.

16. The labor on country highways required by Laws 1903, p. 931, c. 551, amd. by Laws 1905, p. 815, c. 667, does not impose a poll or capitation tax which Const. art. 5, §§ 1, 2, requires to be applied to purposes of education and support of the poor. State v. Wheeler [N. C.] 53 S. E. 358.

17. The constitutional inhibition against the increase or diminution of the salary of an officer during his existing term does not render it incompetent for him to accept compensation, fixed by the general assembly after he entered upon the discharge of the duties of his office and before the expiration of his term, where no compensation was theretofore provided. State v. Carlisle, 3 Ohio N. P. (N. S.) 544. County commissioners, whose salaries are fixed by statutes declared unconstitutional during their term of office, were left in the position of an officer for whom no compensation had been provided, and cannot be enjoined from receiving the pay provided by the act of April 21, 1904, notwithstanding the rate is higher than they previously received under the unconstitutional statutes in existence at the time they came into office. Id.

18. A library board created under Acts 1903, p. 193, c. 102 (Burns' Ann. St. Supp. 1905, § 4983h et seq.) is not a corporation within Const. art. 11, § 13, prohibiting the creation of corporations by special act. School City v. Forrest [Ind.] 78 N. E. 187.

19. Const. art. 6, § 17, providing for not exceeding four justices of the peace in a township and that the legislature may increase the number in cities, does not fix the minimum number in cities. Attorney General v. Loomis [Mich.] 12 Det. Leg. N. 553, 105 N. W. 4.

20. Acts 1903, p. 344, imposing a license tax on emigration agents, does not conflict with Const. Ala. providing that "emigration shall not be prohibited." Kendrick v. State, 142 Ala. 43, 39 So. 203.

21. The irrigation district law (Laws 1901, p. 198, c. 87) is not repugnant to Const. art. 16, which declares the water of natural streams the property of the public and dedicates the same to the use of the people, subject to appropriation. Anderson v. Grand Valley Irr. Dist. [Colo.] 85 P. 313.

22, 23. In re Moyer [Colo.] 85 P. 190.

24. Const. art. 4, § 29. Starne v. People [Ill.] 78 N. E. 61.

25. Hence, Hurd's Rev. St. 1903, c. 93, § 37, making it the duty of coal mine operators to provide a washroom, so arranged that the miners may hang their clothes there to dry, is not within those provisions and is unconstitutional as special legislation. Starne v. People [Ill.] 78 N. E. 61.

26. Const. U. S. art. 4, § 1. Vennum v. Mertens [Mo. App.] 95 S. W. 292.

27, 28. See 5 C. L. 650.

29. Bill of Rights, § 4. City of Salina v. Blaksley [Kan.] 83 P. 619.

30. City of Salina v. Blaksley [Kan.] 83 P. 619.

CONTEMPT.

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§ 8. Discharge or Pardon (756).
§ 9. Review of Proceedings (756).

§ 1. *Nature of contempt and what constitutes. A. Elements of contempt and nature of proceedings; civil or criminal.*[31]—Direct contempts are those committed in facie curiae.[32] Constructive contempts are those committed outside the presence of the court but tending by their operation to embarrass or prevent due administration of justice.[33] When brought for the purpose of vindicating the power and authority of the court and maintaining its dignity, contempt proceedings are criminal.[34] When brought for the purpose of collecting an indemnity for damages sustained by a party to an action because of the misconduct of the other party, they are civil.[35] In Michigan, when execution may issue to collect a decree for the payment of money, the proceeding by contempt to enforce a civil remedy cannot be resorted to.[36]

(§ 1) *B. Disrespect to the court in general.*[37]—Misbehavior of an attorney in presence of the court and interference with the business of the court,[38] or referring to the court in disrespectful language,[39] constitutes contempt.

(§ 1) *C. Acts in disobedience of court.*[40]—Failure to comply with an order of the court constitutes contempt,[41] if the order is a valid one and within the juris-

31. See 5 C. L. 651.

32. In re Smith [Mich.] 107 N. W. 724. Where a judge of a superior court, after having sentenced a person convicted of an offence before him, adjourned his court to meet again at his call, and then retired to his living apartments, where petitioner went and complained to the judge in an angry manner for not having imposed a more severe sentence, and in addition committed an assault upon the judge, such acts constituted a direct contempt. Ex parte McCown, 139 N. C. 95, 51 S. E. 957. An attempt to improperly influence a juror in a pending cause is a contempt of court within the meaning of U. S. Rev. Stat. § 725, restricting the power of U. S. courts to punish for contempt to cases of misbehavior in the presence of the court, "or so near thereto as to obstruct the administration of justice," although the corrupt solicitation occurs half a mile away from the courthouse at the place of business of the accused. McCaully v. U. S., 25 App. D. C. 404.

33. In re Smith [Mich.] 107 N. W. 724.

34. O'Brien v. People, 216 Ill. 354, 75 N. E. 108. A proceeding for contempt to compel a woman to comply with a portion of a divorce decree, requiring her to pay a certain portion of a trust fund to her husband, is criminal and not civil, within Comp. Laws § 10,342, providing that no female shall be imprisoned on any process in any civil action. Carnahan v. Carnahan [Mich.] 12 Det. Leg. N. 1023, 107 N. W. 73.

35. O'Brien v. People, 216 Ill. 354, 75 N. E. 108; Emerson v. Huss [Wis.] 106 N. W. 518.

36. Comp. Laws, § 10,891, subd. 3, authorizes every court to punish for contempt for nonpayment of any sum of money ordered by the court to be paid in cases where by law execution cannot be awarded for collection of such sum, or for any disobedience to any lawful order, decree, or process of the court. Held that, where in a divorce proceeding the court decreed that the wife should pay over to the husband a particular portion of a trust fund which she had on deposit beyond the jurisdiction of the court, such decree was not "for the payment of money" in the ordinary sense, so as to be enforceable by execution, and was therefore enforceable by contempt proceedings under such section. Carnahan v. Carnahan [Mich.] 12 Det. Leg. N. 1023, 107 N. W. 73.

37. See 5 C. L. 651.

38. The abandonment of a defendant in a criminal case on the day of trial by an attorney who has agreed to undertake the defense, when there is no cause for such abandonment except that the fee was not all paid, and the work of the court is thereby interfered with, is misbehavior which amounts to a contempt of court. State v. Shay, 3 Ohio N. P. (N. S.) 657.

39. In re Chartz [Nev.] 85 P. 352.

40. See 5 C. L. 651.

41. In re Contempt of the Gloucester Pleas [N. J. Law.] 64 A. 170. The failure or refusal of a district board to permit a person to vote upon presentation to it by

diction of the court.[42] Injunctional orders are generally held binding on all who have knowledge thereof, whether they are parties to the proceeding or not,[43] and whether they have been legally served with the same or not.[44]

such person of a certificate of the court of common pleas that he is legally entitled to vote in said district constitutes, under act 1905 (P. L. N. J. 1005, p. 262), a contempt of that court. Id. A Federal court having acquired possession through its receiver of the property of a railroad company, has a right to enter such orders as it deems within its power in respect to the property and to execute such orders without actual and physical interference by others, and any one forcibly interfering with their execution is guilty of contempt, under whatever authority he may assume to act, but the institution of a suit in a state court to enjoin such receiver from enforcing the order of the Federal court, does not constitute an act of contempt against the Federal court. Royal Trust Co. v. Washburn, etc., R. Co. [C. C. A.] 139 F. 865. Under N. Y. statutes, an executor or administrator who fails to obey a decree directing the payment of money by him is guilty of contempt, unless he can clearly show that he is unable to pay the same. In re Strong, 97 N. Y. S. 459. Where the supreme court issued mandamus proceeding directing the trial judge of the superior court to secure the services of another judge in a certain action, and upon hearing the mandamus was denied, but before the remittitur had been filed in the superior court, the judge thereof proceeded to set certain motions in the action for hearing, held that such order constituted a technical contempt. In re Smith [Cal. App.] 83 P. 167. One who continues to exercise the functions of a public office after he has been ousted by quo warranto proceedings or forbidden by the court is guilty of contempt. State v. Cahill [Iowa] 108 N. W. 453; People v. Horan [Colo.] 86 P. 263.

Failure to pay alimony. McAtee v. McAtee, 116 Ill. App. 511. A defendant in divorce, who failed to contribute to plaintiff for her support and for support of their child, as required by the judgment, can be proceeded against by plaintiff as for a contempt. Compton v. Compton, 97 N. Y. S. 618. The supreme court of the District of Columbia has power to compel obedience to an order awarding alimony by committing the party to jail if he refuses to obey. Lane v. Lane, 27 App. D. C. 171. Though an order, requiring defendant in divorce to make weekly payments to plaintiff for support of the children, made the allowance a lien on defendant's real estate, the court was not without authority to punish him for contempt in failing to make the payments. Renner v. Renner [Wis.] 106 N. W. 846. Every reasonable presumption will be indulged in support of an order to commit a respondent for contempt for failure to pay alimony when such order recites that the court heard the evidence and the transcript of evidence appears to have been made per praecipe and does not contain a certificate of evidence. Poppers v. Poppers, 117 Ill. App. 498. Where an order to show cause why a decree for alimony should not be modified was served on plaintiff, and restrained her from enforcing the decree, defendant was not punishable for contempt in neglecting to pay alimony after the making of said order. Comstock v. Comstock, 49 Misc. 599, 99 N. Y. S. 1057. The collection of counsel fees awarded in a decree for alimony can be enforced by contempt proceedings. Van Dyke v. Van Dyke [Ga.] 54 S. E. 537. Commitment of plaintiff in a divorce suit for contempt, for failure to pay alimony provided by a judgment, is not authorized on evidence merely that the attorney who had represented defendant therein demanded the payment of him, the attorney's power to represent defendant having ceased on entry of the judgment, and it not appearing that he had, or exhibited to plaintiff, authority to receive the alimony on behalf of defendant. Kalmanowitz v. Kalmanowitz, 108 App. Div. 296, 95 N. Y. S. 627. In proceedings by plaintiff in divorce against defendant for a contempt for failure to contribute to support of plaintiff and their child, as required by the judgment, an order discontinuing future payments for support of plaintiff can be made on plaintiff's motion to that effect. Compton v. Compton, 97 N. Y. S. 618.

42. Ex parte Robinson [C. C. A.] 144 F. 835; Early v. People, 117 Ill. App. 608. A party is not punishable for contempt for disregarding a void order of injunction, but when an injunction is legally granted in a case where the court has jurisdiction of the subject-matter and of the parties it must be respected until it is set aside by the court allowing it or is reversed in the appellate court by some appropriate mode of direct review. Miles v. State [Neb.] 105 N. W. 301. United States courts have no power to punish for contempt for disobeying an order made without jurisdiction. Drew v. Hogan, 26 App. D. C. 55. An attorney who disregards an order of court upon the ground that it was not technically correct in its terms is guilty of contempt. State v. Shay, 3 Ohio N. P. (N. S.) 657. Where, after hearing of an application to punish for contempt for failure to pay over money to a trust company as ordered, the company was dissolved, the proceeding abated and a subsequent order for punishment was coram non judice. In re Skelly, 109 App. Div. 58, 95 N. Y. S. 1076. Where a partner in a suit for an accounting disobeyed an order of the court requiring him to file an account, and disregarded orders of the court with reference to interference with copartnership matters after the appointment of a receiver of the firm's property, the court was justified in finding him guilty of contempt. Cox v. Clarke, 108 App. Div. 363, 95 N. Y. S. 707. Code Civ. Proc. § 2555, authorizing the surrogate's court to punish as for contempt the refusal to obey an order directing the payment of money in cases therein enumerated, when read in connection with section 15, forbidding the imprisonment for debt for nonpayment of costs, except when an attorney is ordered to pay costs for misconduct or a witness is ordered to

pay costs for nonattendance, does not authorize a surrogate's court to punish for contempt an administrator failing to obey a decree directing him personally to pay certain costs. In re Banning, 108 App. Div. 12, 95 N. Y. S. 467. By Code § 2384, either the selling of intoxicants in violation of law, or the keeping thereof with intent to sell, renders the place where the same is permitted or carried on a nuisance, and by section 2427, the discovery of intoxicants on the premises is presumption evidence that they were kept for illegal sale. Held that, where a decree enjoined defendants from selling intoxicating liquors, the mere fact that they were found upon defendant's premises did not warrant punishment for contempt in violating the injunction order. State v. Thompson [Iowa] 106 N. W. 515. An interlocutory judgment in an action on contract, which directs judgment for plaintiff for a specified sum due under contract, though not enforceable by execution until rendition of the final judgment containing the provisions of the interlocutory judgment, is not enforceable by contempt proceedings. Potter v. Rossiter, 109 App. Div. 35, 95 N. Y. S. 1036. Where the parents of an illegitimate child voluntarily submitted themselves to the jurisdiction of the court and united in asking it to make an order for its maintenance at the expense of the father, which the court did, the father had no right to disobey the order. People v. Stringer, 110 App. Div. 364, 97 N. Y. S. 42. The court, pursuant to the stipulation of the parents of an illegitimate child, ordered that the expenses of maintaining the child at a designated institution, or some other institution selected by the court, should be paid by the father, and he should pay to the mother's counsel a specified sum. Held that, until the mother complied with the order by delivering the custody of the child to the proper institution, she could not compel the father to pay the amount specified, or in default thereof punish him for contempt. People v. Stringer, 110 App. Div. 364, 97 N. Y. S. 42. Under Code Civ. Proc. § 2266, providing that one may be punished for contempt for any violation of duty defeating, impairing, or prejudicing the rights of a party to an action, where an injunction restrained defendant from prosecuting certain proceedings against plaintiff and defendant instituted them, but before an order to show cause why he should not be punished for contempt was served the proceedings were withdrawn, there was no ground for punishing defendant for contempt. Jones v. Burgess, 109 App. Div. 888, 96 N. Y. S. 873. A county officer claiming the right to hold possession of a room in the court house is not guilty of contempt in refusing to vacate pursuant to the order of the county commissioner's court. Watson v. Scarbrough [Ala.] 40 So. 672.

Refusal to obey a subpoena or to testify: Refusal of a witness to appear and give his deposition before a notary or other person authorized to take it constitutes contempt. Gay v. Thorpe [Cal. App.] 82 P. 221. The refusal of corporate officers to obey orders of a Federal court requiring them to produce certain documentary evidence on their examination before a special examiner, cannot be justified on the theory that such evidence was not in their possession or under their control, because their possession was not personal, but was that of the corporation. Nelson v. U. S., 201 U. S. 92, 50 Law. Ed. —. Comp. Laws §§ 198-203, and circuit court rules 50-57, providing for the discovery of books and papers, did not abrogate the usual proceedings for a contempt in courts of chancery on the failure of a party to obey an order for the production of books. Metheany v. Perkins [Mich.] 12 Det. Leg. N. 851, 106 N. W. 147. Where a party to a suit in chancery was proceeded against for a contempt for failing to obey an order requiring the production of books, he did not, by insisting that Comp. Laws §§ 198-203, and circuit court rules 50-57, controlled the proceedings, waive his right to have them subsequently conducted under section 10,-909, requiring the filing of interrogatories to the defendant, etc. Id. A commitment for contempt is proper in aid of a bill seeking discovery in aid of an action at law where it appears that the remedy awarded by section 97, chapter 51, of Illinois statutes, providing for the production of books, etc., would not have been adequate in aid of such action. Garden City Sand Co. v. People, 118 Ill. App. 372. By statute the report of the master is made the basis of the order of attachment against one willfully neglecting to obey a subpoena issued by such master, and such report must, therefore, contain the necessary elements to warrant the court in ordering the attachment. Hollister v. People, 116 Ill. App. 338. As a general rule a witness will not be punished for contempt in failing to obey a subpoena in a civil action unless his fees have been paid or tendered. Id.; In re Depue [N. Y.] 77 N. E. 798. A court will not punish for contempt for failure to obey a subpoena duces tecum requiring the production of a large list of books and papers, many of which apparently can have no bearing on the issues raised by the pleadings, but the party applying will be required to take out separate subpoenas, each of which may then be considered on its merits. Miller v. Mutual Reserve Fund Life Ass'n, 139 F. 864. Refusal to testify. Rogers v. State [Miss.] 40 So. 744.

Refusal to answer improper questions: A witness is guilty of contempt for failure to answer questions, notwithstanding the same are irrelevant (Ex parte Butt [Ark.] 93 S. W. 992), or immaterial (Nelson v. U. S., 201 U. S. 92, 50 Law. Ed. —), but witness should not be compelled to answer questions which would incriminate him (Ex parte Butt [Ark.] 93 S. W. 992). A witness cannot be punished for contempt for refusal to answer a question or produce a document not pertinent to the issues involved. Ex parte Schoepf [Ohio] 77 N. E. 276.

43. Employers' Teaming Co. v. Teamsters' Joint Council, 141 F. 679. Rev. St. § 725 (U. S. Comp. St. 1901, p. 583), which gives to Federal courts power to punish as contempts disobedience or resistance by officers, "or by any party, juror, witness or other person, to any lawful writ, process, rule, decree or command of said courts," extends the power of such court to enforce its decrees to persons other than those made parties by name. Evidence held sufficient to charge respondents with notice of order of the court. Id. While parties who are not parties to

(§ 1) *D. Official misconduct and obstruction or perversion of justice.*[45]—Presenting false affidavits,[46] attempt to bribe a witness,[47] disclosure by a grand juror of the proceedings before that body,[48] publication of charges designed to affect the event of pending actions,[49] interference with judicial proceedings,[50] attempt to corruptly influence a juror,[51] and similar acts tending to the obstruction of justice, are contempt.

§ 2. *Defense, excuse, or purgation.*[52]—While intent to contemn has been deemed essential,[53] it is generally held that neither ignorance of the law[54] nor advice of counsel[55] is an excuse. Neither can one charged with criminal contempt in publishing articles, charging the court with corrupt motives, plead good intent,[56] or the truth of the charges,[57] nor the fact that the court was not influenced by the same[58] in defense. Inability to comply with an order will ordinarily prevent a commitment for noncompliance,[59] though the party is at fault in being unable to comply.[60] Compliance with a lawful order of the Federal court having jurisdiction of the parties has been held a valid defense for the violation of an injunction issued by a state court.[61]

a suit in which an injunction was issued cannot be punished for contempt for violation of the injunction, they may be punished for contempt in knowingly aiding and abetting its violation by parties who are bound thereby or conspiring with them for its violation. Huttig Sash & Door Co. v. Fuelle, 143 F. 363. Though a decree determining the rights in water of the parties to the action in terms enjoins only the parties from interfering with the rights of others, a successor in right to one of such parties by asserting rights under it, in effect makes himself a party to it and so subject to its injunctive feature, and liable for contempt proceeding for violation of it. State v. District Ct. [Mont.] 86 P. 798.

44. Seattle Brewing & Malting Co. v. Hansen, 144 F. 1011; O'Brien v. People, 216 Ill. 354, 75 N. E. 108.

45. See 5 C. L. 652.

46. Seastream v. New Jersey Exhibition Co. [N. J. Eq.] 61 A. 1041. Attempts to improperly influence the administration of justice in an injunction suit by coercing complaintant to make affidavits contradictory to his original affidavit and destructive of the effect thereof, constitutes contempt. Id.

47. White v. White [N. J. Eq.] 62 A. 430.

48. In re Atwell, 140 F. 368.

49. The publication of charges to the effect that certain indictments returned by a grand jury were procured through fraud, blackmail, and bribery, does not become privileged matter by reason of the fact that the charges relate to past acts as distinguished from those which are prospective. State v. Ellsperman, 3 Ohio N. P. (N. S.) 593. The grand jury is a component part of the court and the publication of such charges without evidence upon which to base them is calculated to impede the administration of justice, and is contempt of court for which summary punishment may be visited on the guilty parties. Id. A publication charging the supreme court and certain of its judges with having been influenced by corrupt motives in their rulings in causes which were still pending for rehearing, and that they were so influenced in their final disposition of them and of another cause not yet heard, constitutes criminal constructive contempt. People v. News-Times Pub. Co. [Colo.] 84 P. 912. Where a case had been finally decided not only in the trial, but in the appellate, court, and a person representing the defendant in satisfying the judgment, writes the counsel for the plaintiff a letter enclosing a check, and at the same time intemperately criticising the judgment, such criticism, having no tendency to impede or embarrass the court in the disposition of any pending case, cannot be made the basis of a proceeding for contempt. Fellman v. Mercantile Fire & Marine Ins. Co. [La.] 41 So. 49.

50. Threatening an officer with violence and secreting property which said officer was required to take under a writ of replevin. State v. District Ct. of Second Judicial Dist., 31 Mont. 645, 83 P. 641.

51. McCaully v. U. S., 25 App. D. C. 404.

52. See 5 C. L. 653.

53. One acting in good faith and meaning no disrespect to the court should not be punished for contempt. Public Service Corp. v. De Grote [N. J. Eq.] 62 A. 65.

54. Ignorance of law and legal effects of his acts does not excuse contemnor or purge him of the charge of contempt, but is a mitigating circumstance in determining the degree of his culpability. Seastream v. New Jersey Exhibition Co. [N. J. Eq.] 61 A. 1041.

55. State v. Cahill [Iowa] 108 N. W. 453.

56. People v. News-Times Pub. Co. [Colo.] 84 P. 912.

57. Hughes v. Territory [Ariz.] 85 P. 1058. Const. art. 2, § 10, providing that in actions for libel the truth of the publication may be given in evidence, does not apply to proceedings for criminal contempt. People v. News-Times Pub. Co. [Colo.] 84 P. 912.

58. People v. News-Times Pub. Co. [Colo.] 84 P. 912.

59. In re Davison, 143 F. 673.

60. Order in bankruptcy to pay over to

§ 3. *Power to punish or redress; contempt or other remedy.*[62]—Courts of record have an inherent right to punish contempts committed in their presence, and the legislature cannot abridge this right,[63] but it has been held that they cannot punish more than once for the same contempt.[64] A court is without power to punish the violation of a decree of another court.[65] Power to punish contemptuous publications does not violate the right of free speech or freedom of the press.[66] That the act complained of as contemptuous is also a misdemeanor does not abridge the power of the court to punish for contempt.[67] The power of state courts to punish in regard to matters within the jurisdiction of the Federal courts may be stayed or controlled by the latter.[68]

§ 4. *Pleadings and other proceedings before hearing.*[69]—Contempt in facie curiae may in the absence of statute be summarily tried,[70] but in all other cases, reasonably specific,[71] verified,[72] charges must be filed and served,[73] unless the con-

trustee money found to have been fraudulently withheld. In re Davison, 143 F. 673.

61. Board of Com'rs of Onslow County v. Tollman [C. C. A.] 145 F. 753.

62. See 5 C. L. 653.

63. The statute giving a party the privilege of filing an affidavit of prejudice on the part of the judge was not intended by the legislature to enable a defendant in a case of contempt in the presence of the court to take the trial of that case before another judge. State v. Shay, 3 Ohio N. P. (N. S.) 657; Ex parte McCown, 139 N. C. 95, 51 S. E. 957. A court having jurisdiction to issue an injunction has inherent power to punish for contempt those who violate its mandates. People v. Tool [Colo.] 86 P. 224. The power to enforce a decree for permanent alimony by attachment for contempt, for failing to comply therewith, belongs inherently to a court having jurisdiction of divorce suits. Van Dyke v. Van Dyke [Ga.] 54 S. E. 537. The supreme court has inherent power to punish criminal constructive contempt as to pending causes. People v. News-Times Pub. Co. [Colo.] 84 P. 912; State v. Rose [Kan.] 85 P. 803. The jurisdiction of courts of equity having been given to the superior court by the constitution, a justice of the peace before whom a witness' disposition was sought to be taken in a case pending in the superior court had no jurisdiction to punish a witness for contempt in refusing to appear and testify. Gay v. Thorpe [Cal. App.] 82 P. 221. A vice-chancellor to whom a complaint for injunction was presented and who issued the preliminary injunction has jurisdiction to entertain contempt proceedings against parties attempting to improperly influence the administration of justice in an injunction suit by coercing complainant to make affidavits contradictory to his original affidavit and destructive of the effect thereof. Seastream v. New Jersey Exhibition Co. [N. J. Eq.] 61 A. 1041. The supreme court of the District of Columbia is a court of the United States, within the meaning of U. S. Rev. Stat. § 725, conferring upon the courts of the United States the power to punish by fine or imprisonment, at the discretion of the court, contempts of their authority. Moss v. U. S., 23 App. D. C. 475.

64 People v. Kavanagh, 220 Ill. 49, 77 N. E. 107.

65. Jarvis Adams Co. v. Knapp, 213 Pa. 567, 62 A. 1112.

66. People v. News-Times Pub. Co. [Colo.] 84 P. 912. The status of contempts as to pending causes, as to what constitutes such contempts, and as to the procedure relating thereto, is not affected by Const. art. 2, § 10, guarantying to every person freedom to speak or publish whatever he will, being responsible for the abuse of the liberty. Id.

67. Hughes v. Territory [Ariz.] 85 P. 1058.

68. Under Bankr. Act July 1, 1898, c. 541, §§ 9, 11, 30 Stat. 549 [U. S. Comp. St. 1901, pp. 3425, 3426], it is the duty of a court of bankruptcy to stay contempt proceedings against a bankrupt, in a civil suit against him in a state court on a debt or claim from which his discharge would be a release for twelve months, or until his right to a discharge has been determined. In re Adler [C. C. A.] 144 F. 659.

69. See 5 C. L. 654.

70. Proceedings for criminal contempt as provided by Rev. St. 1898, §§ 2565-2568, are to be prosecuted in the name of the state in a summary manner or on notice or inquiry. Emerson v. Huss [Wis.] 106 N. W. 518. Where pending an adjournment petitioner resorted to the dwelling house of a judge of the superior court, and there committed an assault on him because of the judge's official action, petitioner was properly punished for contempt by attachment in summary proceedings. Ex parte McCown, 139 N. C. 95, 51 S. E. 957; Otis v. Superior Ct. [Cal.] 82 P. 853; Early v. People, 117 Ill. App. 608.

71. Early v. People, 117 Ill. App. 608. When a contempt for which petitioners were convicted consisted in the publication of certain articles criticising the proceedings of a grand jury in a newspaper published by a corporation, and the affidavit merely alleged that the petitioners were president and general manager, and vice-president and assistant general manager of the corporation at all times mentioned therein, it was fatally defective for failure to charge that they personally caused, or, being in control, at least permitted, the publication of the articles in question. Otis v. Superior Ct.

temnor voluntarily appears.[74] Under Kentucky statute, a rule upon one to show cause why he should not be punished for contempt cannot be awarded in vacation.[75]

[Cal.] 82 P. 853. A petition for an attachment is the commencement of contempt proceedings and should show facts which, if proven, establish the contempt alleged, and when based merely upon belief of the petitioner, it is insufficient. Early v. People, 117 Ill. App. 608. An order committing petitioner for contempt in failing to appear as a witness in supplementary proceedings adjudged her in contempt for failure to appear on a certain day "or at the time or times to which such proceedings were adjourned." Held that such order did not set forth the particular circumstances of petitioner's offense, as required by Code Civ. Proc. § 11, and was too indefinite to authorize her incarceration. In re Depue [N. Y.] 77 N. E. 798. The fact that the affidavits on which a warrant is issued in contempt proceedings state conclusions upon information and belief will not warrant the setting aside of the warrant when the affidavits state positively the facts from which the conclusions are drawn. State v. Harris [N. D.] 105 N. W. 621. The court has no jurisdiction to proceed with the hearing of one arrested by a commissioner appointed to divide water among persons declared by decrees of court to be entitled thereto, as authorized by Sess. Laws 1905, p. 144, c. 64, conferring on the commissioners the power of a sheriff to arrest persons interfering with the distribution made, and charged with interfering with the commissioner's distribution, unless a written charge is made as required by Code Civ. Proc. 2172, et seq., regulating proceedings for contempt. State v. District Ct. of Fifth Judicial Dist. [Mont.] 82 P. 450. Under Comp. Laws § 10,909, requiring that, when a defendant has been brought into court in a contempt proceeding, interrogatories shall be filed specifying the facts and circumstances alleged against defendant, and requiring his answer thereto, a failure to file such interrogatories is error. Metheany v. Perkins [Mich.] 12 Det. Leg. N. 851, 106 N. W. 147. Where one was served with an order to show cause why he should not be punished for contempt, and he appeared and was found guilty after a full investigation of the facts, and the order when served was accompanied by copies of the affidavits setting forth the facts constituting the charge, an objection that order to show cause was not sufficiently specific in designating the particular contempt charged was without merit. State v. District Ct. of Second Judicial Dist., 31 Mont. 645, 83 P. 641. An affidavit in contempt proceedings, which alleges that defendant was restrained by the court from obstructing a public highway and that he obstructed the same, charges a contempt. State v. Reilly, 40 Wash. 217, 82 P. 287. A petition for a rule to show cause why the respondent named therein should not be adjudged guilty of contempt in violating an injunctional order made in a cause to which respondent is not a party is sufficient to advise respondent of the charge against him where it sets out specifically the acts which he is charged as having committed, although such acts bring the case within the criminal and punitive, rather than civil and remedial class of contempts. Employers' Teaming Co. v. Teamsters' Joint Council, 141 F. 679. In contempt proceedings for violating an injunction, no petition is necessary, but it is sufficient to file an affidavit setting forth the particular respects in which the injunction is being violated. Franklin Union No. 4 v. People, 220 Ill. 355, 77 N. E. 176. Under Gen. St. 1901, § 1983, providing that the return of an officer on process on an affidavit showing a person guilty of indirect contempt, a writ of attachment or other lawful process may issue, and such person be arrested and brought before the court, and thereupon a written accusation setting forth the facts alleged to constitute the contempt shall be filed, it is not necessary that an attachment issue and arrest be made to bring a person into court on contempt proceedings, but a citation is sufficient process. State v. Rose [Kan.] 85 P. 803. Under Code Cr. Proc. 1895, §§ 516-519, authorizing the punishment of a witness who fails to obey a subpoena, and providing that when a fine is entered against a witness for failure to appear the judgment shall be conditional, and a citation shall issue to show cause at the term of court at which the fine is entered, or at the first term thereafter, why the same should not be final, etc., the court has no authority to render a final judgment for contempt against a witness for disobedience of a subpoena at the term for which the witness was summoned, and without hearing evidence or issuing a citation. Ex parte Terrell [Tex. Cr. App.] 95 S. W. 536.

72. That an information by the attorney general for contempt was not verified is not fatal to the jurisdiction of the court to proceed thereon where the respondent made a general appearance to the citation by moving to quash the citation and dismiss the information on the ground, among others, that the information did not state facts sufficient to constitute a contempt. People v News-Times Pub. Co. [Colo.] 84 P. 912

73. An order to show cause why an attorney of record for a party should not be punished for contempt must be personally served on the attorney, and a service on one who had appeared as counsel for the attorney on a motion in the action, but who had ceased to act as counsel, is insufficient. Weeks v. Coe, 97 N. Y. S. 704. An order to show cause may properly be served on the attorney of the party sought to be charged with contempt. Lederer v. Lederer, 47 Misc. 471, 95 N. Y. S. 934. Service of an order on an attorney for a witness who is not a party to the action is not sufficient service to render the witness liable for contempt for failure to obey the same. In re Depue [N. Y.] 77 N. E. 798. Failure to serve with a rule to show cause in contempt proceedings a copy of the order alleged to have been disobeyed is immaterial, where a copy of the order was served immediately after its issuance. State v. Cape Fear Lumber Co., 72 S. C. 322, 51 S. E. 873.

74. The fact that on proceedings to

When an answer is required, it should be certain and specific,[76] and the court may allow the relator additional time to reply to the answer and file additional affidavits.[77] Constructive contempts in equity are properly punishable in a proceeding in the original suit.[78] Under South Carolina statute, providing that orders made out of court without notice may be made by the judge of the court in any part of the state, a circuit judge has jurisdiction to issue a rule for contempt proceedings in a county in which he resides in chambers against a party residing in another county, the return to be made in such other county.[79]

§ 5. *Hearing; evidence; trial.*[80]—A proceeding to punish for contempt is a special proceeding, independent of the action or special proceeding in which it may be taken.[81] Contempt proceedings are summary, and the extent of the hearing as to questions of law in the discretion of the court, though one charged with contempt has a right to be heard in his defense.[82] They are said to be criminal in their nature and require clear and convincing proof,[83] and the weight of authority seems to hold that the guilt of the party charged should be established beyond a reasonable doubt,[84] but this statement has never been applied to the extent of importing into

punish for a contempt, in violation of an injunction order, the court did not issue a warrant for defendants' arrest, but called them into court by notice or citation, was no ground for a reversal of an order discharging defendants. State v. Thompson [Iowa] 106 N. W. 515. Where, in proceedings for contempt for violating an order restraining a city, its mayor and council, from holding an election, an affidavit charging a violation of the order was filed, and the city attorney admitted in open court that the order had been violated under his advice, there was no error in joining the city attorney as a party and adjudging him guilty without first filing an affidavit charging him with a violation of the order, though the statute provided that a contempt can only be prosecuted by affidavit setting forth the facts constituting the contempt. State v. Nicoll, 40 Wash. 517, 82 P. 895.

75. Dupoyster v. Clarke [Ky.] 90 S. W. 1.

76. A defendant who had failed to comply with an order to produce the books of a corporation of which he was president, on an order to show cause in contempt proceedings, filed an affidavit stating that since the making of the order he had not had possession or control of any of the books, that he had endeavored to comply with the order, but had been unable to do so, and that he was informed that whatever books were in existence were in the hand of a specified person. Held that the affidavit was too indefinite and evasive to require consideration by the court. Metheany v. Perkins [Mich.] 12 Det. Leg. N. 851, 106 N. W. 47. A defendant's answer to an order to show cause why he should not be adjudged in contempt for refusing to obey an order to pay $25 a month alimony, alleging in vague and general terms his inability to make payment, is insufficient, when it appears that defendant is in receipt of $100 per month. Lane v. Lane, 27 App. D. C. 171.

77. State v. Cape Fear Lumber Co., 72 S. C. 322, 51 S. E. 873.

78. Where contempt proceedings for violating an injunction are instituted against a person not a party to the suit in which the injunction was issued, the proper practice is to entitle the application for a rule to show cause in such suit, and if the respondent is found guilty thereafter all orders should be entitled as in a suit by the government. Employers' Teaming Co. v. Teamsters' Joint Council, 141 F. 679. On the trial before the court of an accusation by a citizen as prosecutor, charging a person with violation of an injunction under the prohibitory liquor law, the state is not required to show that the prosecutor had personal knowledge of the violation of the injunction, nor to offer evidence to prove that the injunction was granted. The contempt proceedings are part of the original case and the court will take judicial notice of the previous steps taken therein. State v. Thomas [Kan.] 86 P. 499.

79. Code Civ. Proc. 1902, § 402, subd. 3. State v. Cape Fear Lumber Co., 72 S. C. 322, 51 S. E. 873.

80. See 5 C. L. 655.

81. In re Depue [N. Y.] 77 N. E. 798.

82. State v. Nicoll, 40 Wash. 517, 82 P. 895.

83. General Elec. Co. v. McLaren, 140 F. 876. Evidence held sufficient to warrant conviction of contempt for attempting to improperly influence juror. McCaully v. U. S., 25 App. D. C. 404. In a proceeding for contempt of court for failure of defendant and his attorney, in a suit for the settlement of firm accounts, to produce firm books as directed by an order of the court, plaintiff averred that he believed and was morally certain that defendant took some of the books. Defendant and his attorney denied ever having had possession of any of the books. Defendant was sustained by the affidavit of his wife. Held improper to convict defendant and his attorney of contempt. Cox v. Clarke, 108 App. Div. 363, 95 N. Y. S. 707.

84. General Elec. Co. v. McLaren, 140 F. 876. To justify an order requiring a bankrupt to turn over money or property under a penalty of imprisonment for contempt, the court must be satisfied beyond a reasonable doubt that he has such money or property

contempt proceedings the formalities of procedure guaranteed to persons accused of crime, such as trial by jury,[85] confrontation of witnesses,[86] or to have the charges set forth with the degree of certainty required in an indictment,[87] or requiring probable cause for issuance of warrant,[88] nor does it come within the constitutional provision providing that no person shall be compelled in a criminal case to give evidence against himself.[89] Contempt proceedings are not within the Pennsylvania statute providing that costs may be assessed against a defendant in criminal proceedings in certain cases, even though he be acquitted.[90] At common law, a party charged with criminal contempt is entitled to a discharge upon his sworn answer denying the acts charged in the petition,[91] but this practice has never obtained in equity,[92] but where the answer to a rule to show cause why a party should not be attached for contempt is verified, and no evidence is offered to show that the return is false, the rule will be discharged.[93] One charged with contempt for violating an order of the court cannot attack such order collaterally in contempt proceeding if the court issuing it had jurisdiction of the subject-matter.[94] The affidavits on which

in his possession or under his control. In re Switzer, 140 F. 976; Samel v. Dodd [C. C. A.] 142 F. 68. The imposition of a fine or the sentencing to prison for contempt is the rendering of a judgment in a criminal case, and respondent's guilt should be established beyond a reasonable doubt. Hollister v. People, 116 Ill. App. 338. **Contra.** State v. Harris [N. D.] 105 N. W. 621.

85. O'Brien v. People, 216 Ill. 354, 75 N. E. 108

86. On the hearing before a judge in a proceeding for contempt for the violation of a restraining order granted on application for injunction, affidavits are admissible in evidence to prove the fact of violation. Warner v. Martin, 124 Ga. 387, 52 S. E. 446; Ex parte Allison [Tex. Cr. App.] 14 Tex. Ct. Rep 409, 90 S. W. 492; State v. Thomas [Kan.] 86 P. 499; People v. Tool [Colo.] 86 P. 224. Laws 1893, p. 96, providing for a trial by jury in all cases where a judgment is to be satisfied by imprisonment, does not apply so as to entitle defendants, in a proceeding to punish them for contempt, to a jury trial. O'Brien v. People, 216 Ill. 354, 75 N. E. 108.

87. In contempt proceedings for violation of a strike injunction, defendants were not entitled to a bill of particulars specifying the acts charged to constitute the contempt. O'Brien v. People, 216 Ill. 354, 75 N. E. 108.

88. Art. 2, § 8, Constitution, requiring prosecution of offenses by indictment or information, and article 2, § 7, providing that no warrant to seize any person shall issue without probable cause, supported by oath or affirmation reduced to writing, do not apply to contempt proceedings. People v. News-Times Pub. Co. [Colo.] 84 P. 912.

89. State v. Reilly, 40 Wash. 217, 82 P. 287. Where a witness who has refused to answer, on the ground that she might thereby incriminate himself, is committed as contumacious, the burden is upon the sheriff to show that the commitment was legal. In re Avery C. Lowe, 3 Ohio N. P. (N. S.) 641.

90. P. L. 984, § 23. Crilly v. Hemm, 27 Pa. Super. Ct. 635.

91. Early v. People, 117 Ill. App. 608.

92. Employers' Teaming Co. v. Teamsters' Joint Council, 141 F. 679; State v. Cape Fear Lumber Co., 72 S. C. 322, 51 S. E. 873. Where a strike injunction was issued to protect private rights, proceedings to punish certain strikers for contempt thereunder were not criminal, and hence defendants' sworn answers were insufficient to purge them of contempt. O'Brien v. People, 216 Ill. 354, 75 N. E. 108.

93. State v. Farnum [S. C.] 53 S. E. 85.

94. O'Brien v. People, 216 Ill. 354, 75 N. E. 108; Lytle v. Galveston, etc., R. Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 344, 90 S. W. 316. An appellate court will not interfere with a judgment punishing for contempt in violating an injunction, unless the lower court was without jurisdiction either of the subject-matter or of the person, or had no authority to render the particular judgment, but this latter objection may arise where the evidence discloses an entire want of power to treat the matter complained of as a contempt. Ex parte Garza [Tex. Cr. App.] 16 Tex. Ct. Rep. 533, 95 S. W. 1059. Where one knowingly disobeys an injunction which is not void, he is liable to punishment for contempt, although he would have been entitled to a vacation of the order upon motion to dissolve it upon a trial of the merits of the bill. Miles v. State [Neb.] 105 N. W. 301. On motion to punish defendant for contempt in violating an injunction, defendant could not have a vacation of the injunction order where he had served no notice that he would ask for such vacation. Jones v. Burgess, 109 App. Div. 888, 96 N. Y. S. 873. An injunction to restrain the enforcement of a judgment granted by a district judge of a county other than that in which the judgment was rendered, and made returnable before such judge in his own county, in violation of Sayles' Rev. Civ. St. art. 2996, though irregular, was not void and the court had authority to punish for contempt the violation thereof. Ex parte Breeding [Tex. Cr. App.] 90 S. W. 634. On proceedings to punish for a contempt in the violation of an injunction order, the court will not consider whether the order was erroneous. Smith v. Miller [Ky.] 91 S. W. 1140. A defendant in contempt proceedings for violating an injunction cannot purge himself of contempt by going into the merits of the case to determine whether or not

a warrant is issued in contempt proceedings are admissible in evidence on the hearing.[95]

§ 6. *Findings and judgment.*[96]—To support a conviction for contempt there must be findings reciting the conviction and facts on which it is based,[96a] and the judgment must show on its face that the matters charged were within the court's jurisdiction.[97]

§ 7. *Punishment; fine and commitment; further proceedings.*[98]—Punishment is usually regulated by statute and may be by fine or imprisonment or both,[99] but

the discretion of the court was properly exercised in granting the injunction. Blake v. Nesbet, 144 F. 279; Franklin Union No. 4 v. People, 220 Ill. 355, 77 N. E. 176, afg. 121 Ill. App. 647. That the terms of a strike injunction were broader than the allegations of the bill was no defense in a proceeding to punish for contempt in violating the injunction. O'Brien v. People, 216 Ill. 354, 75 N. E. 108. A judgment directing the issuance of a peremptory writ of mandamus, commanding the doing of some act within the jurisdiction of the court to command, cannot be collaterally impeached in proceedings to punish a disobedience of the writ. If facts arising subsequent to the judgment render its modification proper, the exclusive remedy is by motion in the original action. State v. Giddings [Minn.] 107 N. W. 1048. In contempt proceeding for a violation of an order restraining defendant from obstructing a highway, the question whether the order is void on the ground that no highway existed is not open for determination, the judgment of the trial court in the case not having been appealed from. State v. Reilly, 40 Wash. 217, 82 P. 287.

95. State v. Harris [N. D.] 105 N. W. 621.

96. See 5 C. L. 656.

96a. Franklin Union No. 4 v. People, 220 Ill. 355, 77 N. E. 176. An order of conviction of contempt for violating an injunction, which refers to the petition and the affidavits filed in its support, and in apt terms adjudges the respondent guilty of a violation of the injunction, setting out the manner of its violation, adjudging it to be in contempt, and imposing on it a fine of a certain sum, is sufficient. Id.; State v. District Ct. [Mont.] 85 P. 870; Crites v. State [Neb.] 105 N. W. 469. Inasmuch as there are crimes in which proof of agency is necessary to conviction, a court will not hold that a witness has been legally committed for contempt in refusing to answer a question as to whether he was the agent of a certain bridge company during a certain period, where there is nothing in the record showing the nature of the action in which the witness is being examined. In re Avery C. Lowe, 3 Ohio N. P. (N. S.) 641. In a proceeding for civil contempt under Rev. St. 1898, c. 150, authorizing the imposition of a fine for indemnity of the person injured, where contemnor was ordered to show cause why he should not be punished, and made default, a judgment merely declaring him guilty without a determination by the court as to whether the misconduct was calculated to or actually did impede or prejudice the rights or remedies of any party to an action or proceeding as declared by such chapter, and whether or not actual loss resulted from such misconduct, was invalid. Emerson v. Huss [Wis.] 106 N. W. 518. An order adjudging an executor in contempt for failing to pay money which he is directed to pay need not contain a finding as to his ability to pay the sum required. In re Strong, 97 N. Y. S. 459. Where a debtor is convicted of contempt arising out of proceedings supplementary to execution, an order sustaining the regularity of the contempt proceedings, but assessing only a nominal fine, having no relation to the injury done the judgment creditor, is irregular and unauthorized. Mitchell v. Loderman, 97 N. Y. S. 1006. In a proceeding for contempt against a corporation and its agents, finding return of the rule on the agents to show cause to be sufficient, and discharging the rule as to them, is not prejudicial as to the corporation, and it may be adjudged in contempt without specifications as to the agents or the place or time when the order was violated. State v. Cape Fear Lumber Co., 72 S. C. 322, 51 S. E. 873.

97. Otis v. Superior Ct. [Cal.] 82 P. 853.

98. See 5 C. L. 657.

99. State v. District Ct. [Neb.] 107 N. W. 963. The county commissioner's court cannot, in adjudging a county officer guilty of contempt for refusing to vacate a room in the court house pursuant to its orders, impose on him the punishment of putting him and the property out of the room, such punishment not being mentioned in the statute. Watson v. Scarbrough [Ala.] 40 So. 672. In a prosecution for criminal contempt as provided by Rev. St. 1898, §§ 2565-2568, defendant, if adjudged guilty, may be punished by fine or imprisonment or both. Emerson v. Huss [Wis.] 106 N. W. 518. Under Code 1895, § 5717, providing that "superior courts have authority to punish contempt by fines not exceeding $200 and by imprisonment not exceeding twenty days," a judge of the superior court has no power to impose a fine of more than $200 for contempt in violating a temporary restraining order, when the violation was treated by the judge as a single act. Warner v. Martin, 124 Ga. 387, 52 S. E. 446. Comp. Laws, § 10,913, provides that when misconduct complained of in contempt proceedings consists in the omission to perform some act or duty which is yet in the power of defendant to perform, he shall be imprisoned until he shall have performed such act or duty and paid such fine as shall have been imposed and the costs, etc. Section 10,915 declares that in other cases where no special provision is otherwise made by law, if the imprisonment is ordered, it shall be for a reasonable time, not exceeding six months, etc. Held, that section 10,915 did not apply to a proceeding for contempt to compel a divorced wife to com-

where the statute is in the alternative the courts cannot impose both.[1] Costs of the proceedings are sometimes imposed in addition to the fine.[2] Where civil contempt results in injury to a party, the fine may take the form of a mulct for his benefit,[3] but the fine may be imposed, whether any injury resulted to the party to the action or not,[4] and by statute in Wisconsin, such fine is payable to the common school fund.[5] A corporation as well as a natural person may be committed for contempt and may be punished by a fine.[6] Where a contemnor is punished by imprisonment, the

ply with a portion of a decree requiring her to pay over to her husband a certain portion of a trust fund, but that she was properly committed under the former section "until further order of the court." Carnahan v. Carnahan [Mich.] 12 Det. Leg. N. 1023, 107 N. W. 73. When a witness fails to attend before a notary in obedience to a subpoena issued by that officer, he may be punished as for a contempt, but such punishment cannot exceed a fine of $50, and the notary is not authorized by statute to commit the witness to the county jail therefor. In re Butler [Neb.] 107 N. W. 572. An attorney can only be suspended from practice by a nisi prius court, in proceedings for that purpose under Hurd's Rev. St. 1903, c. 13, and such a court had no authority to suspend an attorney as a punishment for a contempt in the presence of the court. People v. Kavanagh, 220 Ill. 49, 77 N. E. 107.

1. As U. S. Rev. St. § 725 limits the power of the courts of the United States to punish contempt of their authority to fine or imprisonment, the supreme court of the District of Columbia has no authority to impose both fine and imprisonment upon a party found guilty of contempt. Moss v. U. S., 23 App. D. C. 475.

2. Warner v. Martin, 124 Ga. 387, 52 S. E. 446.

3. When in a prosecution for civil contempt, loss or injury results to party to an action or proceeding pending before the court, the court is only authorized to impose a fine by way of money indemnity for such injury, as provided by Rev. St. 1898, § 3490, and cannot impose a fine or imprisonment or both as provided by section 3489. Emerson v. Huss [Wis.] 106 N. W. 518. The power of a court to punish for a constructive contempt is limited by Rev. Laws 1905, § 4640, to a fine not exceeding $50, unless it expressly appears that the right of a party to an action or special proceeding was defeated or prejudiced thereby. State v. Miesen [Minn.] 108 N. W. 513. No misconduct is punishable under Rev. St. 1898, c. 150, providing for the punishment of civil contempts, unless the rights or remedies of a party to an action or proceeding pending or triable in a court or before one of its commissioners may thereby be defeated, impaired, or prejudiced. Emerson v. Huss [Wis.] 106 N. W. 518. Where a creditor in supplementary proceedings had the right to recover all the damages he sustained against a witness for failure to appear before a referee and testify in an action for that purpose, as authorized by Code Civ. Proc. §§ 852-854, the court had no power, in a proceeding against the witness for contempt, to impose a fine equal to the amount of the creditor's judgment and costs, and direct the same to be paid to the creditor, the power to make such order being limited by § 2284 to a case where the complaining party could not maintain an action for damages for the injury sustained by reason of the failure of the offender to obey the process. In re Depue [N. Y.] 77 N. E. 798.

4. Rev. St. 1898, c. 150, authorizing punishment of civil contempt, confers power on the court to punish by fine and imprisonment all acts of misconduct constituting such contempts, though the misconduct may pertain to the performance of a duty still within the power of the contemnor to perform, and though it may produce no actual loss or injury. Emerson v. Huss [Wis.] 106 N. W. 518. Under 2 Ballinger's Ann. Codes & St. § 5799, authorizing the punishment for contempt by fine or imprisonment or both, and declaring that the fine shall not exceed $300, nor the imprisonment 6 months, and, when the contempt does not consist of disorderly behavior toward the court or misconduct interrupting the course of a trial, it must appear that a party's rights are prejudiced before the contempt can be punished otherwise than by a fine not exceeding $100, a person adjudged guilty of contempt in violating an order restraining him from obstructing a public highway cannot be punished by a fine of $100 and 30 days imprisonment, in the absence of a showing that the rights of a party were prejudiced by the act constituting the contempt. State v. Reilly, 40 Wash. 217, 82 P. 287.

5. Where a fine is imposed as a punishment for a civil contempt, no pecuniary loss having been suffered by the party whose rights have been impeded or prejudiced, such fine is properly payable to the common school fund of the state as provided by Rev. St. 1898, §§ 3495, 3496. Emerson v. Huss [Wis.] 106 N. W. 518. Const. art. 6, § 33, provides that no person shall be imprisoned for debt arising out of or founded on contract express or implied, etc. Comp. Laws, § 9553, declares that no person shall be arrested or imprisoned under civil process issued out of a court of law or on execution issued out of a court of equity in any suit or proceeding for the recovery of money, and section 9554 provides that the preceding section shall not extend to proceedings as for contempt to enforce civil remedies. Held that such section did not prevent the enforcement of a portion of a divorce decree, requiring the wife to deliver a portion of a trust fund to her husband, by proceedings as for criminal contempt. Carnahan v. Carnahan [Mich.] 12 Det. Leg. N. 1023, 107 N. W. 73.

6. Franklin Union No. 4 v. People, 220 Ill. 355, 77 N. E. 176. A labor union, which ordered a strike and which through its officers and members engaged in picketing and intimidating and threatening nonunion em-

commitment must specify the particular circumstances of the offense.[7] The courts will not inflict perpetual imprisonment upon a contemnor by ordering his imprisonment till he perform some act which is out of his power to perform.[8] A fine of $1,000 is not an excessive punishment for flagrant violation of order of court.[9]

§ 8. *Discharge or pardon.*[10]

§ 9. *Review of proceedings.*[11]—Every court is the exclusive judge of its own contempts, and its judgment is subject to review only on the point of jurisdiction.[12] The judgment rendered by the court on a hearing in contempt will not be disturbed on appeal unless the lower court grossly abused his discretion.[13] The court will not consider the merits of the action in which the contempt was punished on an appeal from an order adjudging one in contempt.[14] The reviewing court will not go outside of the record to determine whether there is matter other than that contained therein.[15] Under Michigan statute, contempt proceedings are not "actions at law" within the provision thereof, providing for the review of "actions at law" by certiorari in certain cases.[16] An application for review by certiorari may be made, although the execution of an order adjudging one guilty of contempt has been suspended to a future day.[17] A judgment adjudging a witness guilty of contempt in

ployes, was properly adjudged guilty of contempt in violating an injunction restraining it from interfering with the business of their employers, etc. Id. Under N. Y. statute it has been held that a municipal corporation may be fined for contempt for violating an injunction. Marson v. Rochester, 97 N. Y. S. 881.

7. Emerson v. Huss [Wis.] 106 N. W. 518.

8. In re Scarborough's Will, 139 N. C. 423, 51 S. E. 931.

9. A fine of $1,000 imposed upon a labor union for flagrant and repeated violations of an injunction, restraining it from interfering with nonunion employes and their employers, is not excessive. Franklin Union No. 4 v. People, 220 Ill. 355, 77 N. E. 176.

10, 11. See 5 C. L. 658.

12. Otis v. Superior Ct. [Cal.] 82 P. 853. On a writ of habeas corpus to determine the legality of petitioner's confinement for contempt, the only question presented for consideration is the jurisdiction or power of the court to proceed as he did, since such writ cannot be made to perform the office of a writ of error or an appeal. Ex parte McCown, 139 N. C. 95, 51 S. E. 957. The statute conferring jurisdiction on the supreme court to issue writs of habeas corpus in certain cases does not give it power to review the evidence upon which the court of civil appeals adjudged relators guilty of contempt. Ex parte Reid [Tex.] 14 Tex. Ct. Rep. 347, 89 S. W. 956.

13. Warner v. Martin, 124 Ga. 387, 52 S. E. 446.

14. Assignment of errors attacking sufficiency of petition for divorce will not be considered upon an appeal from an order adjudging appellant guilty of contempt for failure to pay alimony. Lane v. Lane, 27 App. D. C. 171. When a complaint and affidavit for a preliminary injunction made a prima facie case for the issuance thereof, and no appeal was taken from an order denying defendant's motion to dissolve the injunction, which defendant deliberately disobeyed, defendant was not entitled to review an order committing him for contempt in violating the injunction on the ground that the injunction was void. Saginaw Lumber & Salt Co. v. Griffore [Mich.] 13 Det. Leg. N. 505, 108 N. W. 681. Objections to the materiality of the testimony are not open to consideration on a writ of error sued out by witnesses to review a judgment for contempt, entered against them for disobeying an order to testify. Nelson v. U. S., 201 U. S. 92, 50 Law. Ed. —.

15. When, on appeal from a judgment of conviction for contempt, there is no certificate of the clerk that appellants have filed a complete record, appellants cannot raise the question that the recitals found in the orders appealed from are not sufficient to authorize a judgment of conviction. Franklin Union No. 4 v. People, 220 Ill. 355, 77 N. E. 176. Where the evidence introduced on the trial of one charged with constructive contempt for the violation of an order of injunction is not preserved and authenticated by a proper bill of exceptions, the only question which can be considered by the reviewing court is whether the pleadings contained in the transcript support the judgment, and, if they are found sufficient, the judgment will be affirmed. Miles v. State [Neb.] 105 N. W. 301. The supreme court, on certiorari to review an order adjudging one guilty of a direct contempt, may not look beyond the contents of the order adjudging him guilty. State v. District Ct. [Mont.] 85 P. 870.

16. Pub. Acts 1905, p. 484, act No. 310, provides that whenever, in any action at law in the circuit court, a motion to quash the "writ or declaration" on jurisdictional grounds shall be decided adversely to the party filing such motion, the decision may be reviewed by certiorari forthwith. Held that certiorari was not the proper remedy to review a motion to quash contempt proceedings prior to the final determination thereof in the circuit court, either under such section or independent thereof. In re Smith [Mich.] 107 N. W. 724.

refusing to answer questions put to him is reviewable on certiorari and not on appeal.[18] A judgment in a summary proceeding for contempt in facie curiae, where no complaint is filed, no evidence taken, and no trial had, may be reviewed on the record made therein without filing of a motion for a new trial.[19] The action of the court in contempt proceedings in reserving for future consideration the disposition of the fine assessed against respondent is not subject to review on appeal from the judgment of conviction.[20]

CONTINUANCE AND POSTPONEMENT.

§ 1. Power and Duty of Court (757).
§ 2. Occasion for or Propriety of Continuance or Postponement (758).
A. In General (758).
B. Absence or Disability of Party or Counsel (758).
C. Absence of Witness or Inability to Procure Evidence (759). Admission of Testimony to Avoid Continuance (760).
D. Surprise (760).
§ 3. Proceedings to Procure Continuance or Postponement (761).
§ 4. Appellate Procedure (761).

Postponement of criminal trials,[21] and of hearing in appellate courts,[22] are elsewhere treated, as is the adjournment of terms of court.[23]

§ 1. *Power and duty of court.*[24]—The grant of a continuance rests largely in discretion[25] and will not be disturbed except on a showing of abuse,[26] and the court in granting a continuance may impose terms in its discretion,[27] but on setting aside a continuance, to set a case for trial without giving sufficient time to prepare, is an abuse of discretion.[28] After one or more continuances have been granted, appellate

17. State v. District Ct. [Mont.] 82 P. 789.
18. Ex parte Butt [Ark.] 93 S. W. 992.
19. Crites v. State [Neb.] 105 N. W. 469.
20. Franklin Union No. 4 v. People, 220 Ill. 355, 77 N. E. 176.
21. See Indictment and Prosecution, 5 C. L. 1790.
22. See Appeal and Review, 7 C. L. 128.
23. See Courts, 5 C. L. 870.
24. See 5 C. L. 659.
25. City of Spokane v. Costello [Wash.] 84 P. 652. Denial of continuance not revised on the evidence that was before trial court. Massucco v. Tomassi [Vt.] 62 A. 57. Addressed to the sound legal discretion of the trial judge. City of Lincoln v. Lincoln St. R. Co. [Neb.] 106 N. W. 317; Johnson v. Thrower, 123 Ga. 706, 51 S. E. 636.
26. Corporation of Members of Church of Jesus Christ v. Watson [Utah] 83 P. 731; Myers v. Kessler [C. C. A.] 142 F. 730; Copper River Min. Co. v. McClellan [C. C. A.] 138 F. 333; Reynolds v. Smith [Fla.] 38 So. 903; Supreme Lodge K. P. v. Lipscomb [Fla.] 39 So. 637; Wilson v. Johnson [Fla.] 41 So. 395; Johnson v. Thrower, 123 Ga. 706, 51 S. E. 636; Percival-Porter Co. v. Oaks [Iowa] 106 N. W. 626; City of Paducah v. Johnson [Ky.] 93 S. W. 1035; Dorais v. Doll [Mont.] 83 P. 884; Brown v. Blaine, 41 Wash. 287, 83 P. 310; Levy v. Scottish Union & N. Ins. Co., 58 W. Va. 546, 52 S. E. 449; Miller v. Mitchell, 58 W. Va. 431, 52 S. E. 478; Yokum v. Stalnaker [W. Va.] 53 S. E. 862. Unless a palpable abuse of judicial discretion is clearly and affirmatively shown by the record. Absence of a party. Peacock v. Feaster [Fla.] 40 So. 74. Unless it clearly appears that there has been an abuse of such discretion. City of Lincoln v. Lincoln St. R. Co. [Neb.] 106 N. W. 317. The refusal of an application for continuance on the ground of the illness of the party, when it appears that such party was in court at the time of the application and her condition was passed upon by the court as by inspection, will not be disturbed unless it appears that there has been a manifest abuse of discretion. Carter v. Pitts [Ga.] 54 S. E. 695.
27. In New York the court may allow an adjournment upon payment of costs to the opposite party, under Mun. Court Act § 195. Poland v. Minshall, 96 N. Y. S. 200. If the terms upon which the withdrawing of a juror, operating as a postponement, are unsatisfactory, he should not accept the order on the conditions imposed and proceed with the trial. Rawson v. Silo, 105 App Div. 278, 93 N. Y. S. 416. In South Dakota, a statute permitting the imposition of costs as a condition of granting a continuance does not authorize the further condition of judgment for opposite party on default in payment of costs. Rev. Code Civ. Proc. § 425. Schlachter v. St. Bernard's Roman Catholic Church [S. D.] 105 N. W. 279. Rev. Code Civ. Proc. § 550, providing that a movant whose motion has been denied may, in the discretion of the court, be denied the right to proceed in the action until costs have been paid, does not apply. Id.
28. Witnesses being in distant parts of the state and the defendant detained by illness in another state, it was error to set aside a continuance two days after it was granted and set case for trial within four

courts are even less disposed to disturb a denial of further continuance.[29] The power to grant a continuance may be exercised in favor of the real defendant, though not a party to the record.[30]

It is not incumbent on the court sua sponte to offer a continuance on permitting an amendment to a bill of particulars during trial.[31]

§ 2. *Occasion for or propriety of continuance or postponement. A. In general.*[32]—A misunderstanding as to time of trial may entitle a party to a continuance.[33] Defendants by announcing ready for trial with knowledge that a portion of the regular jury for the week had been excused by the court until the next day, and were not then in attendance on the court, waived any right they may have had to have the case postponed.[34]

(§ 2) *B. Absence or disability of party or counsel.*[35]—A party is entitled to a continuance on a showing of inability to attend court because of sickness, regardless of the grounds of previous continuances,[36] and if he or his witnesses live at a great distance from the place of trial, he is entitled to ample time to reach such place or send the depositions of himself and his witnesses,[37] but mere voluntary absence is not ground for a continuance.[38]

Continuance for absence of counsel will be denied where such absence was without excuse,[39] or due to professional engagements,[40] or to illness known to the party at the time of engaging him,[41] or where the movant was represented by other competent counsel,[42] or where the movant was negligent in procuring counsel,[43] or is not, except for the absence of counsel, ready to go to trial.[44]

days thereafter. McDonald v. McDonald, 115 Mo. App. 617, 92 S. W. 351.

29. Puget Sound Machinery Co. v. Brown Alaska Co. [Wash.] 85 P. 671.

30. No error for court in instructing jury to assume that in another action ordinary rules of continuance would have applied. City of Spokane v. Costello [Wash.] 84 P. 652.

31. Rea v. Grubb [Miss.] 39 So. 808.

32. See 5 C. L. 660.

33. Crocker v. Haley [Ky.] 92 S. W. 574. An infant should not have been forced to trial in the absence of his leading counsel and main witnesses who thought the trial occurred at a later date. Id.

34. Rice v. Dewberry [Tex. Civ. App.] 15 Tex. Ct. Rep. 193, 93 S. W. 715. Under the circumstances, not error to refuse postponement until the regular venire could be had. Id.

35. See 5 C. L. 661.

36. Case having been on docket four years and frequently continued for appellant. Hollis v. Watson [Ky.] 89 S. W. 548.

37. Hill v. Hill [Wash.] 84 P. 829. A defendant living in Manila, in a divorce case, entitled to a continuance, in view of the facts. Id.

38. After case was set and 20 days before trial defendant left for New York to negotiate sale of city bonds of Los Angeles without any showing of necessity or peculiar benefits to the city therefrom, with no personal affidavit but only by his attorney and a telegram from himself, no abuse of discretion to deny continuance. McConnell v. Fox [Cal. App.] 83 P. 259.

39. Six days between setting and calling case for trial, although local counsel stated he had no time to notify him after issues were made up (United States Fidelity & Guaranty Co. v. Boyd [Ky.] 94 S. W. 35), especially where no special benefit would have resulted from his presence (Id.).

40. Not an abuse of discretion to refuse a continuance based on this sole ground. Berentz v. Belmont Oil Co. [Cal.] 84 P. 47. It should have been made to appear that other professional advice was unavailable, and that there was a meritorious defense to the action which only the absent attorney could effectively present. Id.

41. Especially where defendant was represented by several able and intelligent counsel and lost the case apparently because of the weakness of the defense. Trimble v. Southwest Missouri Light Co., 115 Mo. App. 605, 92 S. W. 346.

42. Trimble v. Southwest Missouri Light Co., 115 Mo. App. 605, 92 S. W. 346. Having participated in two previous trials and in motions for new trials and being of recognized ability. Wheaton v. Liverpool & London & Globe Ins. Co. [S. D.] 104 N. W. 850. Not an abuse of discretion to deny continuance on death of one of defendant's attorneys. Crabtree Coal Min. Co. v. Hamby's Adm'r [Ky.] 90 S. W. 226. All of plaintiff's witnesses but two or three having been examined, a continuance entailing great expense upon him and substantial justice appearing to have been done in view of the number of witnesses and great length of the trial. Id.

43. Failure to discharge an attorney known to be unfavorable to his client's cause until the eve of trial, and then engaging an attorney known to be disabled by sickness. Trimble v. Southwest Mo. Light Co., 115 Mo. App. 605, 92 S. W. 346.

44. Dornan v. Buckley, 119 Ill. App. 523.

(§ 2) *C. Absence of witness or inability to procure evidence.*[45]—A continuance because of the absence of a witness may be denied when the movant does not show due diligence in procuring the presence of the witness,[46] or that the testimony of such witness is material,[47] or does not give a reasonable explanation of his failure to have witness present,[48] or unreasonably delays asking for a continuance without sufficient excuse.[49] A reasonable explanation must also be given to warrant a continuance for procuring evidence.[50] It has been held that due diligence requires serving of process,[51] or the taking of a deposition,[52] especially if beyond the jurisdiction of the court,[53] and the orders of litigants to their employes or visits to the houses of witnesses is insufficient.[54]

An error, if any, in refusing a continuance because of an absent witness, is waived by a failure to offer the affidavit containing his statements as evidence on the trial of the case,[55] or by the supplying of the testimony in some other way.[56]

On the suppression of depositions arriving in a defective condition without fault of the party offering them, he is entitled to a continuance.[57] Where one party is granted an adjournment to procure certain evidence, which is the only evidence on

45. See 5 C. L. 661.

46. No process served on witness and no attempt to take his deposition. Illinois Cent. R. Co. v. Belt [Ky.] 93 S. W. 601. Serving subpoena only on morning of day case was called for trial, although it had been set for several weeks and affiant knew that absent witness would be required, the latter having testified at a prior trial, was not a sufficient showing of due diligence within Rev. St. Utah, 1898, § 3133. Corporation of Members of Church of Jesus Christ v. Watson [Utah] 83 P. 731. Application, although the first, failing to show when a citation was served or how long before trial local attorney received papers from defendant, and permitting a possible neglect of two or three months in procuring evidence, did not show diligence. Chicago, etc., R. Co. v. Calvert [Tex. Civ. App.] 14 Tex. Ct. Rep. 642, 91 S. W. 825. Want of diligence in learning the whereabouts of an absent witness, where it appears that in a very brief time and with a slight effort the party was able to obtain such information. San Antonio Machine & Supply Co. v. Josey [Tex. Civ. App.] 15 Tex. Ct. Rep. 176, 91 S. W. 598. Failure to show due diligence under the first continuance. No explanation why deposition of a nonresident was not taken in accordance with prayer in first application. Continental Casualty Co. v. Hagarty [Ky.] 90 S. W. 561. Not error to refuse to allow affidavit to be read as deposition. Id.

47. Not error to refuse motion where the testimony of such witness would have been immaterial. Kellyville Coal Co. v. Strine, 117 Ill. App. 115.

48. No allegations of surprise, but merely suggesting that being unsuccessful in introducing incompetent evidence to show contents of a receipt they wished to procure attendance of a witness who knew. Kann v. Weir, 95 N. Y. S. 584.

49. McCarthy v. Metropolitan St. R. Co., 96 N. Y. S. 140. Delay until the close of plaintiff's case is unreasonable. Id.

50. Length of sewer in a proceeding to confirm a special assessment. No suggestion before commencement of trial that such evidence had not been obtained, and no reason for delinquency in obtaining it being given. Sheedy v. Chicago [Ill.] 77 N. E. 539.

51. Witness promising to attend at a trial but detained at home by illness of his child, no process having been served. Illinois Cent. R. Co. v. Belt [Ky.] 93 S. W. 601.

52. Illinois Cent. R. Co. v. Belt [Ky.] 93 S. W. 601. Denial of a third continuance for the illness of a witness who was not so ill but that his deposition might be taken is not an abuse of discretion. Puget Sound Machinery Depot v. Brown Alaska Co. [Wash.] 85 P. 671.

53. Failure to take the deposition of a witness beyond the jurisdiction of a court may constitute want of due diligence. Appellant having ample time to procure deposition, and evidence as shown by affidavit being such as could properly be submitted by deposition, but appellant relying on oral promise of witness to come. Louisville & N. R. Co. v. Bishop [Ky.] 89 S. W. 221. Not excused by counsel's opinion that the importance and just effect of the testimony require the personal attendance of witness unless the court concur therein. Id. Civ. Code Prac. § 556, authorizing court to order attendance of witness without a disclosure of his evidence, whose deposition otherwise might be read, inapplicable where witness is beyond jurisdiction of court. Id. In such a case it becomes a question of reviewable discretion. Id.

54. Application for a continuance because of absence of witnesses, some of whom had been ordered to appear and refused, and others of whom had not been found by movant's agent at their houses. Gulf, etc., R. Co. v. Hays [Tex. Civ. App.] 13 Tex. Ct. Rep. 762, 89 S. W. 29.

55. United States Fidelity & Guaranty Co. v. Boyd [Ky.] 94 S. W. 35.

56. Introduction of a former bill of exceptions containing evidence in full. Carp v. Queen Ins. Co., 116 Mo. App. 528, 92 S. W. 1137.

57. Motion for continuance being made in compliance with Code Civ. Proc. § 317. Order of United Commercial Travelers of America v. Barnes [Kan.] 82 P. 1099.

a material point, the opposite party is entitled to an adjournment to meet such testimony.[58]

Admission of testimony to avoid continuance.[59]—It is not error to refuse a continuance after the affidavit for it is admitted by the opposite party,[60] in the absence of any showing that the presence of the witness is important,[61] or could be procured,[62] or in the absence of any showing of diligence.[63] In Texas, the facts to which it is alleged an absent witness would testify must be admitted as true to avoid a continuance,[64] and may not afterwards be contradicted.[65] A statement in an affidavit for a continuance of what a witness if present would testify to, which the opposite party has admitted, raises no issue which it is the court's duty to submit to the jury, unless such statement is read in evidence.[66] An agreement that the testimony, which an absent witness was to rebut, might be disregarded, authorizes denial of a continuance.[67]

(§ 2) *D. Surprise.*[68]—Surprise as to a material matter of evidence may be ground for a continuance.[69] Amending a pleading does not entitle the opposite party to a postponement as a matter of course,[70] but it must be made to appear that by the amendment said party is prevented from being ready for trial at the appointed time,[71] or is surprised.[72] Amendments, immediately withdrawn in part and the truth of facts to be established by absent testimony in rebuttal of the remainder admitted,[73] unnecessary,[74] not affecting the admissibility of the evidence,[75] or merely conforming to evidence already in and raising no new issues,[76] are not cause for con-

58. That a certain person acted as broker in negotiating a sale. Heyman v. Singer, 99 N. Y. S. 942.

59. See 5 C. L. 662.

60. That a certain person was proprietor of a specified bank, was regarded solvent and wealthy, and custom of bank to pay interest. Murph v. McCullough [Tex. Civ. App.] 14 Tex. Ct. Rep. 176, 90 S. W. 69.

61. Judson v. Schlee, 120 Ill. App. 367. Witness being absent from state and no subpoena was served on him. Louisville & N. R. Co. v. Molloy's Adm'x [Ky.] 91 S. W. 685.

62. Judson v. Schlee, 120 Ill. App. 367.

63. Such testimony as to one of the witnesses absent admitted as true. Gulf, etc., R. Co. v. Hays [Tex. Civ. App.] 13 Tex. Ct. Rep. 762, 89 S. W. 29.

64. St. Louis S. W. R. Co. v. Hall [Tex. Civ. App.] 15 Tex. Ct. Rep. 869, 92 S. W. 1079. Consent that facts to be proved by absent witness "might be assumed" will avoid a continuance. Loring v. Jackson [Tex. Civ. App.] 95 S. W. 19.

65. That an engine was running slowly. St. Louis S. W. R. Co. v. Hall [Tex. Civ. App.] 15 Tex. Ct. Rep. 869, 92 S. W. 1079.

66. Michel v. Boxholm Co-operative Creamery, 128 Iowa, 706, 105 N. W. 323.

67. Loring v. Jackson [Tex. Civ. App.] 95 S. W. 19.

68. See 5 C. L. 662.

69. Where plaintiff in an action against defendant street railway company failed to cross-examine motorman while giving a deposition for defendant as to admission he made at the time of the accident that the gong and brake were out of order, which admissions plaintiffs afterwards introduced in evidence, defendant should have been given an opportunity to rebut such evidence. Lexington St. R. Co. v. Strader [Ky.] 89 S. W. 158.

70. Keeton v. St. Louis, etc., R. Co., 116 Mo. App. 281, 92 S. W. 512.

71. Not abuse of discretion to deny a continuance for permitting the amending of a pleading by allegations of negligence where not essential. Keeton v. St. Louis, etc., R. Co., 116 Mo. App. 281, 92 S. W. 512.

72. In an action against railroad company for negligence in not keeping a waiting room warm, an amended petition alleging death of plaintiff's wife presented nothing new other than a result of negligence previously alleged probable, and hence no surprise. Chicago, etc., R. Co. v. Groner [Tex. Civ. App.] 16 Tex. Ct. Rep. 507, 95 S. W. 1118. Application held addressed to sound discretion of court and no abuse was shown. Id. The refusal of a continuance on the ground of surprise, caused by an amendment to the complaint, is not reversible error in the absence of an affirmative showing of abuse of discretion. Court granting a continuance to the afternoon session but denying a motion for a continuance for twenty days, and counsel refusing at the request of the court to state wherein he was surprised, and it not appearing that defendant was surprised by any new issues he could not meet, or that he did not meet it with all the evidence available in any event. Dorais v. Doll [Mont.] 83 P. 884.

73. Missouri, etc., R. Co. v. Avis [Tex. Civ. App.] 14 Tex. Ct. Rep. 519, 91 S. W. 877.

74. Amended petition in no way changing cause of action or character of proof necessary to defend. Hess v. Hymson [Ky.] 93 S. W. 9.

75. Same evidence introduced which was admissible under the original declaration. Shoninger Co. v. Mann [Ill.] 76 N. E. 354.

76. Wabash R. Co. v. Campbell, 219 Ill. 312, 76 N. E. 346.

tinuance on the ground of surprise. Where to prevent a continuance the deposition of two witnesses has been withdrawn, the opposite party is not entitled to a continuance on the appearance of these witnesses in the court room at the trial.[77]

§ 3. *Proceedings to procure continuance or postponement.*[78]—Continuance must be timely applied for[79] in open court.[80] An affidavit for a continuance because of an absent witness should state that there is no one else who can testify to the alleged facts, that the alleged facts are true, and that such testimony could be procured if the case were continued.[81] It should show diligence in attempting to secure the testimony of witnesses named in the affidavit or their depositions[82] and be made positively[83] but in some jurisdictions it need disclose neither the name of the witness nor what is proposed to be proved by him.[84]

§ 4. *Appellate procedure.*[85]

CONTRACT LABOR LAW, see latest topical index.

CONTRACTS.

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Scope of topic.—This article treats only of the general principles applicable to all express contracts. Questions relating to implied contracts,[86] building and construction contracts,[87] and public contracts,[88] are treated elsewhere.

77. Failure to file an affidavit of surprise or to show that if given time he could get rebuttal evidence, or to ask for a continuance at his own expense. Craft v. Barron [Ky.] 88 S. W. 1099.

78. See 5 C. L. 663.

79. McCarthy v. Metropolitan St. R. Co., 96 N. Y. S. 140.

80. The only occasion on which a party to a suit can properly apply for a continuance of his case is in open court in the presence of his adversary. Improper for an attorney by private telegram to notify court of his detention at home by illness and request a postponement of a trial. Trimble v. Southwest Missouri Light Co., 115 Mo. App. 605, 92 S. W. 346. Counsel cannot complain on the refusal of a continuance that he was misled by a representation from the judge out of court that a continuance would be granted on a certain showing being made. That counsel was ill. Id.

81. Not error to refuse a continuance on an affidavit lacking in these respects, nor to refuse to permit it to be read in evidence, especially where the facts deposed are immaterial. Rau v. Baker, 118 Ill. App. 150.

82. A mere statement "that this defendant has not been able to procure his wit-

§ 1. *Nature and formal requisites. A. Definition and kinds of contracts.*[89]—A contract or promise need not be evidenced by any precise words or any particular formula of expression.[90]

Contracts are either express or implied. An express contract is one in which the terms are openly and fully uttered and avowed at the time of making.[91] A contract implied in fact arises where the intention to contract is inferred from the acts or conduct of either or both of the parties.[92] A quasi contract, or a contract implied in law, exists independently of the intention of the parties, and is founded on the doctrine of unjust enrichment.[93] Proof of an express contract necessarily excludes a cotemporaneous implied one in relation to the same matter.[94]

It is not necessary in order to make a written contract that the terms thereof be reduced to writing in a formal way on one piece of paper, but it is sufficient if a written offer by one party is accepted by the other, and the language used shows a meeting of the minds on some particular subject-matter.[95]

nesses to go to trial" is not sufficient. Deer & Webber Co. v. Hinckley [S. D.] 106 N. W. 138.

83. Affidavits not showing diligence, nor being made positively, and it appearing that affiant was actually not diligent, the trial court was not on such a showing required to grant a continuance. City of Lincoln v. Lincoln St. R. Co. [Neb.] 106 N. W. 317.

84. Where under the rules of the court issues from the register of wills have been regularly placed upon the trial list 20 days before the convening of the court, an affidavit for a continuance at the first term on account of the absence of a material witness is sufficient without disclosing name of witness or what was proposed to be proved by him. Boyd v. Cloud [Del.] 62 A. 294.

85. See 5 C. L. 664.

86. See Implied Contracts, 5 C. L. 1756.

87. See Building and Construction Contracts, 7 C. L. 480.

88. See Public Contracts, 6 C. L. 1109.

89. See 5 C. L. 665.

90. No precise form of words is necessary to create a bond or obligation, and hence any memorandum in writing under seal, whereby a debt is acknowledged to be owing, will obligate the party to pay it. Sharp v. Bates, 102 Md. 344, 62 A. 747. Understanding of both parties sufficient, though no express words. Stobie v. Earp, 110 Mo. App. 73, 83 S. W. 1097. Evidence held to show that order or due bill reciting that plaintiff was to have certain vehicles on payment of a certain part of the list price was regarded by both parties as expressing the contract between them, and was furnished in compliance with agreement. Newburn v. Hyde [Iowa] 107 N. W. 604.

91. Turner v. Owen, 122 Ill. App. 501. Letter offering to install grates and blowers and telegram accepting offer, held to constitute express contract. Beggs v. James Hanley Brewing Co. [R. I.] 62 A. 373. Evidence held to show an express contract so that objection that evidence showed an implied contract, while complaint alleged an express one, was untenable. Ragley v. Godley [Tex. Civ. App.] 14 Tex. Ct. Rep. 153, 90 S. W. 66. Contract set out in complaint, whereby plaintiff agreed to secure to defendant a certain contract between plaintiff and a third person, who did not wish to continue it, and to procure such third person to convey to defendant land acquired in his name under original contract, held an express one, so that amended complaint declaring on an express contract did not set up new cause of action. Id.

92. See, also, Implied Contracts, 5 C. L. 1756. Where services are rendered at the request of another, the law will imply a promise to pay therefor in the absence of an express promise. Cusick v. Boyne [Cal. App.] 82 P. 985. An implied contract, in fact, arises where there is no express contract, but there is circumstantial evidence showing that the parties did intend to make a contract. Turner v. Owen, 122 Ill. App. 501. An instruction limiting the right of recovery for board furnished to relations to an express contract is error, as it may be predicated upon an implied contract in fact. Id. Proof that plans were made at instance and request of decedent, and were at his disposal, held to raise implied promise to pay therefor. Buckler v. Kneezell [Tex. Civ. App.] 14 Tex. Ct. Rep. 800, 91 S. W. 367. Where a person advances money for the use of another, the acceptance of the advance imposes a personal liability on the person receiving it, and the law implies a promise to repay it, unless it is expressly agreed that it is not to be repaid. Carrera v. Dibrell [Tex. Civ. App.] 15 Tex. Ct. Rep. 587, 95 S. W. 628.

93. See Implied Contracts, 5 C. L. 1756, for a full discussion of quasi contracts.

94. See, also, § 9 B, post, for right to sue on common counts for services rendered or goods furnished under an express contract. Ecker v. Isaacs [Minn.] 107 N. W. 1053; Beggs v. James Hanley Brewing Co. [R. I.] 62 A. 373. Where nothing was said in contract for stenographer's services in taking depositions as to expenses, and place where depositions were to be taken was agreed on, there was no implied contract to pay expenses, and instruction placing burden of showing that there was no contract to pay them on defendant was erroneous. Hall v. Luckman [Iowa] 107 N. W. 932.

95. Valid contract may be entered into by correspondence.. Warner v. Marshall

An executed contract is one in which all the parties thereto have performed all the obligations assumed by them, and an executory contract, one in which something remains to be done by one or more of the parties.[96]

Parties.[97]—One may become a party to a contract by entering into it himself, either directly[98] or by his duly authorized agent,[99] or by accepting a stipulation made in his favor by the contracting parties,[1] or by adopting as his own a contract entered into by third persons.[2] The same person cannot be both obligor and obligee.[3] In the absence of anything in the instrument or the evidence to the contrary, it will be presumed that a contract is made for the personal benefit of the obligee therein named.[4] As a general rule, one not a party to a contract cannot be included in the rights or liabilities which the engagement creates.[5] In most jurisdictions, however,

[Ind.] 75 N. E. 582. An offer to sell cement was accepted subject to a contract to be agreed on later. The seller subsequently submitted a form of contract with directions to the buyers to sign and return the same if satisfactory, and promised by letter to forward its copy to the buyers on receipt thereof. The buyers did as directed but the seller failed to forward its copy as per its promise. Held a valid contract of sale. Noel Const. Co. v. Atlas Portland Cement Co. [Md.] 63 A. 384. Where it is sought to establish a contract by letters, there must be evidence tending to prove that they are in defendant's handwriting, or that they came from him, or his authorized agent, or were received in due course of mail, in answer to letters duly mailed to the address of the party sought to be bound. Foundation held to have been laid for introduction of letters. Peycke v. Shinn [Neb.] 107 N. W. 386. No written contract proved where defendant wrote plaintiff expressing opinion that defendant could sell certain land for certain sum, plaintiff wired acceptance, and defendant thereupon wrote him enclosing blank contract to be signed and returned without delay, and such contract was never signed. Ecker v. Isaacs [Minn.] 107 N. W. 1053. No written contract where one of the parties refused to sign or assent to proposed contract. Libby v. Barry [N. D.] 107 N. W. 972.

96. A contract of sale is not executed where title to the property is to pass upon payment of the entire purchase price and one installment is yet due. Ryan v. Kimberly, 118 Ill. App. 361.

97. See 5 C. L. 667.

98. Evidence held to show that a contract for a right of way was executed by plaintiff. Baltimore, etc., R. Co. v. Brubaker, 217 Ill. 462, 75 N. E. 523. Where advertisement is run for the benefit of and upon the credit of a party, but for his convenience in the name of an association, he is liable therefor as for an original undertaking. Chicago Chronicle Co. v. Franklin, 119 Ill. App. 384. Where plaintiff signed a petition for a franchise to a telephone company on condition that service should be furnished at a certain rate, and the franchise was granted and accepted pursuant thereto, plaintiff was a party to the contract and could sue to enforce its provisions as to rates. Wright v. Glen Tel. Co., 48 Misc. 192, 95 N. Y. S. 101. Evidence held to show that defendant's contract to pay for setting up a printing press was made with a machinist and not with plaintiff who sent him to defendant's place. Brower v. New York Mailing & Advertising Co., 92 N. Y. S. 61.

99. See Agency, 7 C. L. 61.

1. The bringing of a suit for specific performance by the party whose name has not been appended to the contract establishes its acceptance by him. Egle v. Morrison, 6 Ohio C. C. (N. S.) 609.

2. If contract as originally signed did not bind defendants, allegations of petition held to show that same had been adopted by them, and that partial payments thereunder had been made to plaintiff so that they were bound thereby. Charles Lippincott & Co. v. Behre, 122 Ga. 543, 50 S. E. 467. Where a tenant agreed in his lease to assume an unperformed contract, but made default, and the lessor paid a judgment recovered against him for the breach, he could recover against the lessee. Pocono Spring Water Ice Co. v. American Ice Co. [Pa.] 64 A. 398. An offer was accepted by B. on a letter head of B. Company. Later B. notified plaintiff to change the account to B. Company, which was done. Subsequent transactions were carried on indifferently with B. and the company. Held company had adopted the contract. Vulcan Ironworks v. Burrell Const. Co., 39 Wash. 319, 81 P. 836. Ratification of a contract implies knowledge of the material facts and must be made by persons having power to perform the act which is the subject of ratification. Evidence insufficient to show ratification by a religious corporation of a contract for the purchase of a portrait. Sword v. Reformed Congregation, 29 Pa. Super. Ct. 626.

3. Fact that corporation owning stock in another corporation bound itself to distribute it among purchasers of bonds of latter corporation, held not to preclude it from itself becoming a subscriber to such bonds and joining in underwriting agreement, and hence assignment of subscription to it did not release other subscribers, their liability being neither increased nor diminished thereby. Eastern Tube Co. v. Harrison, 140 F. 519.

4. A note payable to Coyle & Guss or order upon completion of a certain railroad to a named city will be presumed for their benefit and not for the benefit of the road, there being nothing in the note or the evidence to show a contrary intention. McGuffin v. Coyle [Okl.] 85 P. 954.

one may enforce a contract made for his benefit, even if he is not a party thereto, though there seems to be some conflict of authority in this regard.[6] Some courts

5. Evidence held insufficient to show that defendant corporation purchased land from plaintiff and executed the notes sued on, or that defendant had assumed the obligation of another corporation of similar name to whom the sale was alleged to have been made. Bonanza Mining & Smelter Co. v. Ware [Ark.] 95 S. W. 765. A. purchased land from S. Co. giving notes for purchase price and going into possession. After maturity of notes A. paid them with money loaned to him by plaintiff for that purpose, and to secure loan transferred notes and his interest in the land to plaintiff. Subsequently defendant purchased land from the S. Co. with notice of A.'s purchase, but without his knowledge. Held that plaintiff was not entitled to recover from defendant the money loaned to A., defendant being in no way connected with the transaction between A. and the company, or that between A. and the plaintiff, and this was true even though defendant knew of the latter transaction when he purchased the land. Tye v. Gaissert, 124 Ga. 733, 52 S. E. 813. Where credit is extended to tenant upon faith of letter of landlord, wherein latter promises to join with former in execution of a guano note, a suit based on refusal of landlord to sign such note after guano had been furnished, or to pay tenant's note at maturity, can be maintained only by the person extending the credit, or by someone to whom he has assigned in writing the claim giving rise to the cause of action. Adams v. Williams [Ga.] 54 S. E. 99. An agreement by a beneficiary in a benefit certificate, reciting that she was a beneficiary and was desirous of seeing certain children of her deceased husband, the insured, receive a portion of the insurance money, and that she agreed to divide the proceeds of the certificate when received, etc., among certain children, was not an assignment, either legal or equitable, but merely an executory contract to assign. Banholzer v. Grand Lodge, A. O. U. W. [Mo. App.] 95 S. W. 953. No one can be sued for breach of contract who has not contracted either in person or by agent. One who had not authorized or ratified the employment of an attorney. Wolff v. Wilson, 28 Pa. Super. Ct. 511. Express company held not relieved from liability for injuries to employe due to defective platform by contract between it and railroad company under which latter was charged with duty of keeping it in repair. Pacific Exp. Co. v. Shivers [Tex. Civ. App.] 14 Tex. Ct. Rep. 807, 92 S. W. 46. Two parties to an agreement cannot contract for the disposition of property belonging to or thereafter acquired by a third person who is in no wise a party to the agreement. Bunting v. Dobson [Ga.] 54 S. E. 102. Agreement by defendant's intestate, in consideration of services to be performed in taking care of his mother, "that petitioner would share a child's interest in whatever was accumulated by the three" during the life of decedent and his mother, held unenforceable as to mother's property, she not being a party to the contract. Id.

6. See Hammon on Contracts, p. 711, et seq., for a full discussion of this question.

California: A contract of the vendee of land to pay a part of the purchase price to a third person is enforceable by the latter under Civ. Code § 1559. Peters v. George [Cal. App.] 81 P. 1117.

Colorado: Where a vendee of land as a part of the consideration agrees to pay a certain note which is secured by a lien upon the land, he is bound by contract to pay such note irrespective of the vendor's liability on the note. Hastings v. Pringle [Colo.] 86 P. 93.

Illinois: Where a purchaser of a store agreed to pay the debts of the seller as a part of the consideration, such promise inures to the benefit of the creditors, which they may enforce. Mackay-Nisbet Co. v. Kuhlman, 119 Ill. App. 144. Where a contract does not show on its face that it is for the benefit of a third party, he cannot maintain an action thereon unless he shows a special beneficial interest. Where a railroad company contracts with a levee company to repair a levee and neglects so to do, an adjoining landowner cannot recover for damages resulting by showing that the contract was for the benefit of the landowners generally. Rodhouse v. Chicago & A. R. Co., 122 Ill. App. 642. That a contract was made for the benefit and protection of plaintiff and other owners of land in a drainage district did not show privity of contract or any special duty owing by defendant to plaintiff, where it was not averred that plaintiff would be called upon to pay for benefits. Rodhouse v. Chicago & A. R. Co., 219 Ill. 596, 76 N. E. 836.

In Missouri may do so, though he is not named therein. Van Meter v. Poole [Mo. App.] 95 S. W. 960.

Nebraska: When vendee of personalty assumes and agrees to pay as the purchase price, or a part of it, an indebtedness of the vendor to a third person, the creditor may enforce the obligation by an action at law against both parties to the agreement. Butler v. E. E. Bruce & Co. [Neb.] 106 N. W. 445.

In New Jersey may do so in his own name, though consideration did not move from him. People's Bank & Trust Co. v. Weidinger [N. J. Law] 64 A. 179.

New York: To entitle one to enforce a contract to which he is not a party, but from the performance of which he may derive a benefit, there must be an intent by the promisee to secure some benefit to the third person and also a legal or equitable obligation or duty on the part of the promisee to the third person for whose benefit the promise was made. Rochester Dry Goods Co. v. Fahey, 97 N. Y. S. 1013. Where a vendor of stock guaranteed to the vendee, for his protection, that certain accounts receivable should be paid to the corporation and agreed with him to reimburse the corporation in case a certain claim should be enforced against it, such agreement could not be enforced by the corporation. Id. A city issued bonds in aid of a railroad com-

hold that a contract based purely on mutual promises for the benefit of a third person is revocable until acted upon.[7] The fact that one person executes a contract is not conclusive that it is not made in the interest of another.[8]

pany which issued stock in return and agreed that the stock should pay a certain dividend. The lessee of the road guaranteed to the lessor the payment of the dividends, on the faith of which guaranty the city bonds were issued. Held the city could enforce the guaranty. Marklove v. Utica, etc., R. Co., 48 Misc. 258, 96 N. Y. S. 795. Where a corporation sued a stockholder on the theory that a contract for the sale of stock by him was made for its benefit, evidence of the assignment of the contract to the corporation by the purchaser was inadmissible. Rochester Dry Goods Co. v. Fahey, 97 N. Y. S. 1013. Where in consideration of a deed a grantee of land agrees to pay notes made by the grantor, the grantee becomes primarily liable for the indebtedness. Greenley v. Greenley, 100 N. Y. S. 114.

Pennsylvania: One to whom a business is transferred in consideration that he pay the debts is liable to a creditor of the assignor, though such creditor was not a party to the contract. Cox v. Philadelphia Pottery Co. [Pa.] 63 A. 749. A contractor may maintain an action against the owner's grantee who, in consideration of the grant, has assumed all claims in connection with the building. Bruce v. Howley, 29 Pa. Super. Ct. 169. Plaintiff should have been permitted to show that his contract was directly with the owner and not with the principal contractor. Id.

Virginia: Code § 2415, providing that if covenant or promise be made for the sole benefit of a person with whom it is not made, or with whom it is made jointly with others, such person may maintain action thereon in his own name, applies only when promise or covenant sued on was made for the sole benefit of the plaintiff, and not when such benefit is merely incidental. McIlvane v. Big Stony Lumber Co. [Va.] 54 S. E. 473. Covenant by grantee of realty and personalty to pay a debt of the grantor as part of the consideration for the conveyance cannot be enforced by the creditor of the grantor by action at law in his own name against grantee by virtue of this statute. Id. Corporation transferred all of its assets to a trustee, a part of the consideration being an assumption by the latter of and an agreement to pay certain of the corporate debts. Trustee thereafter conveyed the property to a lumber company, which as a part of the consideration of the transfer, also assumed and agreed to pay such debts. Held that, there being no consideration passing from a creditor of the corporation to the lumber company or the trustee, and no privity between them, he was not authorized to sue them and the original debtor at law on their covenants to assume his debt. Id. Creditor is not authorized to maintain action by Code 1904, § 2860, authorizing the assignee or beneficial owner of a bond or any other chose in action to maintain in his own name any action which the original obligee, payee, or contracting party might have brought, since he is neither assignee nor beneficial owner. Id. Code 1904, § 2840, providing that certain actions cannot be maintained unless the contract or undertaking is in writing and signed by the party to be charged therewith, cannot be invoked to sustain a right of action, and benefit of it cannot be claimed by one not a party to the contract and not sought to be charged thereby (Id.), nor was action maintainable under Code 1904, § 3528a, providing that in case of a misjoinder of parties court may order action or suit to abate as to those improperly joined, since that section does not confer jurisdiction of an action which did not otherwise exist (Id.). If covenantors be regarded as principals and the original debtor as surety, plaintiff would be entitled to enforce covenants only on the principle of equitable subrogation, for which purpose they would be required to go into a court of equity. Id. After death of member of fraternal benefit society defendant insurance company, in consideration of transfer to it of society's assets, assumed and agreed to pay all its indebtedness, including that on the deceased member's certificate, which it also later specifically agreed to pay. Held that the beneficiary under such certificate was entitled to sue defendant thereon, though not a party to its agreement with the society. Cosmopolitan Life Ins. Co. v. Koegel, 104 Va. 619, 52 S. E. 166.

In Wisconsin he may enforce it at law regardless of his relations with the promisor, or whether he had any knowledge of the transaction when it took place, and regardless of any formal assent thereto on his part prior to the commencement of the action. Contract whereby one sold goods to another who agreed to pay purchase price to certain specified creditors of the former may be enforced by creditors. Smith v. Pfluger, 126 Wis. 253, 105 N. W. 476. If a person for a consideration moving to him from another agrees to pay latter's or any other's debt to a third person, the law, at once, operating upon the acts of the immediate parties to the transaction, supplies the essentials of privity between such person and such third person, establishing a binding contractual relation between them, even though such third person was a stranger to and had no knowledge of the transaction. Fanning v. Murphy, 126 Wis. 538, 105 N. W. 1056. Such contractual relations cannot be subsequently varied by any agreement between the immediate parties to the transaction not consented to by the third person. Rule applies where one takes a conveyance of realty, agreeing as part consideration therefor to pay the debt of the grantor or that of some other person to a third person. Id. The new promisor becomes the principal debtor as regards both his immediate promisee and the third person, so that any agreement between the second promisor and the original promisee, prejudicial to the original promisor, operates to discharge the latter. Id.

Federal Courts: Where two persons

Execution of contract.[9]—It is immaterial whether the signature to a contract is at the beginning, in the middle, or at the end of the writing or printing, provided it is affixed with the intention that all the written or printed portions of the instrument shall constitute a part of the contract.[10] As a general rule, one who signs and delivers an instrument is bound by the obligations he therein assumes, although it is not executed by all the parties for whose signatures it was prepared.[11]

Delivery.[12]—The delivery of a written instrument is a question of intention,[13] and to constitute a complete delivery, it must be made in a manner evincing an intention to part presently with all control over it, and thereby give it effect.[14] The possession of a written contract is prima facie evidence of its delivery,[15] but such presumption may be rebutted by oral evidence.[16] A contract may be delivered upon an oral condition that it shall not take effect until a future time, or until something else has been done that the parties have agreed upon, in which case it will have no operation until the condition has been performed.[17]

(§ 1) *B. Offer and acceptance.*[18]—Since no contract is complete without the mutual assent of the parties, their minds must meet as to all its essential terms.[19]

make a contract for the benefit of a third, the latter may maintain an action thereon. Addressee of telegram showing on its face that it was sent for his benefit may recover damages for delay in delivery. Whitehill v. Western Union Tel. Co., 136 F. 499. He is, in such case, bound by provision that claim must be presented in writing within sixty days. Id.

7. A mother, who had not acted upon an agreement with the father for the support of their illegitimate children, had no cause of action for the father's repudiation of the contract. People's Bank & Trust Co. v. Weidinger [N. J. Law] 64 A. 179. The contract stood upon the same legal footing as voluntary subscription agreements, and the death of the father operated as a revocation, so that the children had no cause of action against the father's executor for the father's devise of his property contrary thereto. Id.

8. Instruction that if contract was made by a third person personally, defendant was not liable, properly refused. Union Foundry & Mach. Co. v. Lankford [Ala.] 39 So. 765.

9. See 5 C. L. 670.

10. Bonewell & Co. v. Jacobson [Iowa] 106 N. W. 614. Indorsement on back of contract for purchase of fruit trees, required by the purchaser before he would sign, and made before he did sign, held a part of the contract, though contract provided on its face that any change or modification must be in writing and signed by both parties. Id.

11. Where there is no testimony of an intention to the contrary on his part brought home to the obligee therein, no express agreement to such effect, and no loss of remedy by way of indemnity or contribution by failure of the other parties to sign. Naylor v. Stene [Minn.] 104 N. W. 685.

12. See 5 C. L. 670. The necessity of delivery generally arises in connection with deeds or promissory notes, and reference should be had to the topics dealing with those contracts. See Deeds of Conveyance, 5 C. L. 964; Negotiable Instruments, 6 C. L. 777.

13, 14, 15, 16, 17. Dodd v. Kemnitz [Neb.] 104 N. W. 1069.

18. See 5 C. L. 670.

19. Hauber v. Leibold [Neb.] 107 N. W. 1042; Lord v. Meader [N. H.] 60 A. 434. Must assent to same thing in same way. Wilentshik v. Messler, 48 Misc. 362, 95 N. Y. S. 500. Assent must comprehend whole proposition and must be exactly equal as to its extent and provisions, and if one party intends to make contract on one set of terms and the other on a different one, there is no contract in the absence of an estoppel. Hubbard City Cotton Oil & Gin Co. v. Nichols [Tex. Civ. App.] 14 Tex. Ct. Rep. 1, 89 S. W. 795. Requested instruction that minds of parties must have met as to terms of verbal contract held improperly refused in view of conflicting evidence, as to whether it was ever made. Id. In order to find the existence of a parol contract, it must appear that the minds of the parties met on the same proposition, but it is not necessary that they meet on express words clearly expressed. Instruction held erroneous. Zitske v. Grohn [Wis.] 107 N. W. 20. Where defendant's order as given to plaintiff's salesman contained a guarantee of profits, while the order sent in and accepted by the plaintiff omitted such guarantee, there was no meeting of the minds and hence no contract. Barton-Parker Mfg. Co. v. Taylor [Ark.] 94 S. W. 713. Order or due bill reciting that there was due plaintiff a certain sum in vehicles in storage at a certain place, and that if was understood that before any of them could be removed a certain per cent. of the list price should be paid, held a contract when accepted by plaintiff, though not signed by him. Newburn v. Hyde [Iowa] 107 N. W. 604. No meeting of minds and hence no valid contract of sale where seller was led into believing that purchaser was a corporation when in fact it was not. Flfer v. Clearfield & Cambria Coal & Coke Co. [Md.] 62 A. 1122.

Evidence held to show contract: Leasing a certain patented cloth cutting machine and not a contract "to lease." Warth v. Loewenstein & Sons, 121 Ill. App. 71. Whereby de-

There must in every case be an offer by one party[20] and an acceptance by the other.[21] An offer imposes no obligation until it is accepted,[22] and hence may be withdrawn

fendant was to have decedent's deposits in banks in consideration of his supporting her during her lifetime. Drefahl v. Security Sav. Bank [Iowa] 107 N. W. 179. To store goods where they would not freeze. Phenix Nerve Beverage Co. v. Dennis & Lovejoy Wharf & Wharfage Co., 189 Mass. 82, 75 N. E. 258. Between grantee of property who insured buildings thereon, and mortgagee to whom loss was payable as his interest might appear, that amount of mortgage debt was to be paid out of judgment recovered in action by owner on the policy, and that attorney was to see it paid, so that proceeds of judgment in hands of attorney was impressed with equitable trust in favor of plaintiff for amount of his claim. Beistle v. Connell [Mich.] 12 Det. Leg. N. 505, 104 N. W. 729. Whereby, when defendant became plaintiff's tenant for a share of the crop, defendant agreed to repay plaintiff the sum previously paid defendant for such crop. Stobie v. Earp, 110 Mo. App. 73, 83 S. W. 1097. By husband to pay wife for board of his daughter by a former marriage. Effray v. Effray, 110 App. Div. 545, 97 N. Y. S. 286. Second order to plaintiff to manufacture certain goods. Gerli v. Louis Metzger & Co., 99 N. Y. S. 858. Oral contract to ship goods in time for the sailing of a steamer. Frey v. New York Cent., etc., R. Co., 100 N. Y. S. 225. To pay for board furnished by son to his father and grandfather. Shadle's Estate, 30 Pa. Super. Ct. 151. By defendants to be individually liable for any deficit in amount necessary to pay plaintiff's claim after sale of stock of goods and settlement with other creditors. Baines v. Taylor Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 313, 91 S. W. 871. By one surety with his cosureties that, if principal failed to pay note given for purchase price of horse, he would take the horse, pay the note, and save the cosureties harmless. Hall v. Taylor [Tex. Civ. App.] 16 Tex. Ct. Rep. 374, 95 S. W. 755. Circumstantial evidence held to show employment of plaintiff to prepare plans and the rendition by him of services at decedent's request. Buckler v. Kneezell [Tex. Civ. App.] 14 Tex. Ct. Rep. 800, 91 S. W. 367. Evidence held to sustain a finding that the agreement to buy plaintiff's oranges was in consideration of the right to handle oranges grown in certain other groves. Sterling v. Gregory [Cal.] 85 P. 305. Verdict for plaintiff, on claim for money loaned deceased, supported by evidence. Kinney v. McFaul, 122 Iowa, 452, 98 N. W. 276. Evidence held to support finding that plaintiff was employed to make plans for cottages, that no price was agreed upon, that work was done, and that $12 each was a reasonable price. Fairfield v. Hart, 139 Mich. 136, 102 N. W. 641. Evidence held to support finding that defendant, in his capacity as trustee for the sale of railroad lands, hired plaintiff to perform services in regard to them, and that such services were not within a contract whereby plaintiff was hired at a monthly salary to look after defendant's personal affairs. Rand v. Sage, 94 Minn. 344, 102 N. W. 864. Evidence held to justify a finding that defendant agreed to re-exchange personal property and accepted delivery of the boat he had exchanged to plaintiff. Dougherty v. Neville, 108 App. Div. 89, 95 N. Y. S. 806. Where money deposited in bank by plaintiff to secure performance of contract with decedent was withdrawn by mutual consent and loaned to latter, it constituted valid claim against his estate. Eckhout v. Cole, 135 N. C. 583, 47 S. E. 655.

Evidence insufficient to show contract: By creditor, to whom debtor conveyed his property, to pay plaintiff's claim against such debtor in full. Williams Shoe Co. v. C. Gotzian & Co. [Iowa] 107 N. W. 807. Parol contract to pay for board and attendance. Kane v. Smith, 109 App. Div. 163, 95 N. Y. S. 818. Employing plaintiff for the period claimed by him. Zahler v. Arkin, 98 N. Y. S. 544. By which a telegraph company maintaining a staff of messenger boys undertook to carry a package of money so as to render the company liable for failure of a boy to deliver it. Hirsch v. American Dist. Tel. Co., 98 N. Y. S. 371, rvg. 48 Misc. 370, 95 N. Y. S. 562. Verbal contract in regard to sale of cotton seed. Hubbard City Cotton Oil & Gin Co. v. Nichols [Tex. Civ. App.] 14 Tex. Ct. Rep. 1, 89 S. W. 795. To boom logs, on basis of original draft of contract and certain letters passing between the parties. Nester v. Diamond Match Co. [C. C. A.] 143 F. 72. A statement by one of two alleged joint promisors that plaintiff ought to be paid for certain services rendered the estate of which the promisor was trustee, and the use by him of the papers prepared by such services after they had been turned over to the other promisor on a promise to pay, does not show a contract, express or implied, as to the first promisor. Boogher v. Roach, 25 App. D. C. 324. Evidence held to show that plaintiff was employed only to estimate and appraise a fire loss, and not to adjust the loss with the insurance companies. McCormack v. Herboth, 115 Mo. App. 193, 91 S. W. 164. Expectation of compensation for nursing in addition to wages for housekeeping, based upon general declarations of a decedent, held insufficient to establish a claim against the estate in the absence of express contract. Piersol's Estate, 27 Pa. Super. Ct. 204. Evidence insufficient to support a claim against a decedent's estate for services rendered on a farm. Riemensberger's Estate, 29 Pa. Super. Ct. 596. Contract for sale of brand held to have left ownership of horses previously branded therewith in defendant. Belknap v. Belknap [S. D.] 107 N. W. 692. A telegram "Ship hundred at once, eggs," and a reply by letter stating that addressee was shipping the hundred and that they were good eggs, did not amount to a contract, nothing being said as to quantity, quality, or price. Potomac Bottling Works v. Barber & Co. [Md.] 63 A. 1068.

20. In determining whether a letter contains a proposal, it is to be considered whether the terms in which the alleged proposal is made are such, in view of the circumstances connected therewith, as to war-

at any time before acceptance,[23] but when accepted, becomes a binding contract.[24] An offer made by letter is presumed to be constantly held out until the time for closing the contract by acceptance.[25] In order to convert an offer into a contract, the acceptance must be absolute and unconditional.[26] A proposal to accept, or an acceptance, upon terms varying from those offered, is a rejection of the offer and puts an end to the negotiations, unless the party making the original offer renews it or assents to the modification suggested.[27] It is a new proposal which must, in its turn, be accepted by the party making the original offer.[28] Acceptance may be implied from the acts and conduct of the party to whom the offer is made.[29]

rant the other party in acting on it as a real and intentional offer. Warner v. Marshall [Ind.] 75 N. E. 582. Evidence held to show a valid offer to convey or devise real property to complainant in consideration that she care for the promisor during the remainder of her life. Id.

21. To establish as a contract a proposition made by letter, proof of its acceptance is necessary. Evidence held not to show acceptance of offer to sell realty. Sennett v. Melville [Neb.] 107 N. W. 991. Evidence held to show acceptance of an offer to convey or devise realty to complainant provided she cared for promisor during the remainder of the latter's life. Warner v. Marshall [Ind.] 75 N. E. 582. Evidence held to sustain finding that plaintiff's bid for erection of building was accepted by defendant's agent, who had authority to do so. Cameron v. Booth & Co. [Minn.] 108 N. W. 514. Evidence held insufficient to show an acceptance of plaintiff's order for goods. Wilentshik v. Messler, 48 Misc. 362, 95 N. Y. S. 500. Where note with date of payment left blank was returned by payees with statement that they could not accept it in that shape, and requesting maker to fill in blank, and maker returned it to them in a letter in which he stated that he did not know when he could pay it, but would do so as soon as he was able, held that note was not accepted or finally delivered to payees until it was returned to them in last named letter. Glass v. Adoue [Tex. Civ. App.] 86 S. W. 798.

22. Order for machinery held not a binding contract, but an order subject to the approval of the principal of the agent who solicited it. Bialy v. Krause [Mich.] 12 Det. Leg. N. 702, 105 N. W. 149.

23. Where a paper was addressed to plaintiff requesting him to deliver, as directed, 60 days' use of a horse and driver, a request by the sender for a return of the order, sent before the performance or tender of any work under it, was a complete revocation thereof. Durkin v. New York, 96 N. Y. S. 1059. The revocation of an offer does not become effectual until the letter or telegram revoking it is actually received by the offeree. Price v. Atkinson [Mo. App.] 94 S. W. 816.

24. Offer reasonably accepted and acted upon. Warner v. Marshall [Ind.] 75 N. E. 582. Letter written by seller of oil and accepted in writing by buyer held to constitute contract. Midland Linseed Co. v. Remington Drug Co. [Wis.] 106 N. W. 115.

25. That deceased made a will pending acceptance of an offer to deed land in consideration that offeree care for her in her old age did not affect the offer where the will was unknown to offeree until after acceptance. Warner v. Marshall [Ind.] 75 N. E. 582.

26. Wilentshik v. Messler, 48 Misc. 362, 95 N. Y. S. 500. Must be in exact conformity with offer. Swing v. Walker, 27 Pa. Super. Ct. 366. Acceptance must be unequivocal, unconditional, and without the least variance. Acceptance of order for lumber held not to constitute contract. H. Gaus & Sons Mfg. Co. v. Chicago Lumber & Coal Co., 115 Mo. App. 114, 92 S. W. 121. Where plaintiff sent contract which he had signed to defendant, who inserted modifications therein before signing it, held that there was no meeting of the minds and hence no contract. Bewick v. Hanika [Mich.] 12 Det. Leg. N. 672, 106 N. W. 63. Act of plaintiff in subsequently signing contract with builder in accordance with previous oral contract between himself and defendant, held not a ratification of changes. Id. Acceptance of offer to sell "timber" held conditional where plaintiff stipulated that he should have all the "growth" on the land, it not appearing that the two words were used synonymously, and the right to use defendant's land for the operation of a mill. Lord v. Meader [N. H.] 60 A. 434. Plaintiff agreed to purchase timber from defendant on terms differing from offer, and sent check for part of purchase price. Held that retention of check for purpose of consulting with third person, it later being returned, and letter acknowledging its receipt, was not an acceptance of plaintiff's offer. Id. Defendant offered two car loads of potatoes for shipment "next week," and plaintiff accepted and directed shipment "one car next week and the other the following week." Held that there was no new condition inserted in the answer, especially as defendant so understood. Ennis Brown Co. v. Hurst [Cal. App.] 82 P. 1056. An acceptance in the exact language of the offer is not necessary as any expression showing an acceptance on the terms offered is sufficient. Id. There is no variance between an offer of "choice" potatoes and an acceptance requiring "strictly choice" potatoes, being of the same grade. Id. A very slight and unimportant difference between the offer and the acceptance does not vitiate. Provision in acceptance of offer to sell pilings that they be "practically straight." Elliott v. Howison [Ala.] 40 So. 1018.

27. Correspondence held not to consti-

If the parties have adopted the mail as a means of communication, the mailing of a letter accepting an offer makes a complete and binding contract dating from the moment of the deposit of the letter, properly addressed and stamped, in the post-office.[30] So, too, an acceptance by telegraph takes effect the moment the telegram is paid for and delivered to the telegraph company.[31]

Mere negotiations for a contract do not, as a rule, vest any right in the negotiator.[32] Where the parties make the reduction of the contract to writing and its

tute a contract with plaintiff to clear up title to defendant's land, defendants not having accepted plaintiff's proposition and he not having accepted their counter proposition. Franck v. McGilvray [Mich.] 13 Det. Leg. N. 154, 107 N. W. 886.

28. Where an offer is accepted upon certain conditions, to which the offerer assented if the offeree would sign a certain contract, which contained still other provisions, and nothing further was done, there is no contract. Philip Wolf & Co. v. King [Cal. App.] 82 P. 1055. Acceptance of bid departing from bid as submitted is tantamount to a new proposition. Sundmacher v. Lloyd, 114 Mo. App. 317, 89 S. W. 368. Cannot recover for failure to furnish lumber in absence of finding that modified acceptance of order was in turn accepted. Gaus & Sons Mfg. Co. v. Chicago Lumber & Coal Co., 115 Mo. App. 114, 92 S. W. 121. Where plaintiff's bid in writing was accepted by defendant in writing with the added provision that work should be done according to the plans and specifications, and plaintiffs accepted the modification by starting the work without objection, held that the two writings and the plans and specifications constituted the complete contract, and parol evidence was inadmissible to show that certain things required to be done by the specifications were not included in the contract. Sundmacher v. Lloyd, 114 Mo. App. 317, 89 S. W. 368. An offer to sell on certain terms accepted with a request that the seller fix a date when the transaction may be consummated, and followed by the fixing of such date by the seller constitutes a binding contract of sale. Certain correspondence held to bind defendant to purchase bonds. Baker v. Packard, 98 N. Y. S. 804.

29. Where a college offered in writing to establish a scholarship for the benefit of the offeree and her heirs to be issued at her death if she would execute a note for $1,000 in its favor, and the offeree executed a memorandum whereby she agreed to pay $1,000 at her decease for such purpose, there was an offer and acceptance. Buchtel College v. Chamberlin [Cal. App.] 84 P. 1000. Promisor may be estopped from raising any question as to the meeting of the minds where the promisee has fully performed on his part. Where promisee had cared for deceased in reliance on her promise to convey land. Warner v. Marshall [Ind.] 75 N. E. 582. A party may assent to modifications of his offer contained in the other party's acceptance by acts and conduct showing an intention to do so. By acceptance of lumber after modified and conditional acceptance of order, and requesting further deliveries. Gaus & Sons Mfg. Co. v. Chicago Lumber & Coal Co., 115 Mo. App. 114, 92 S. W. 121. Whether he has done so is a question of fact. Id. Where defendant's acceptance of plaintiff's bid departed from the terms of the bid, and hence amounted to a new proposition, and plaintiff made no reply to such proposition but went to work under it, held that he would be deemed to have agreed to do the work specified or named in the acceptance for the amount of his bid. Sundmacher v. Lloyd, 114 Mo. App. 317, 89 S. W. 368. Acceptance by plaintiff of defendant's counter proposition could not be implied from fact that he performed services in clearing up title, where he expressly notified them that services were not rendered on terms proposed by them but on those proposed by him. Franck v. McGilvray [Mich.] 13 Det. Leg. N. 154, 107 N. W. 886.

30. Order for goods. Price v. Atkinson [Mo. App.] 94 S. W. 816.

31. Price v. Atkinson [Mo. App.] 94 S. W. 816. A contract is concluded when the offer is accepted by a telegram sent in the ordinary way, or by the posting of a letter of acceptance. Where an offer was accepted by telegram sent from St. Louis to the proposer at Washington, and also followed by a letter of acceptance posted at St. Louis, the contract was concluded at St. Louis. Burton v. U. S., 202 U. S. 344, 50 Law. Ed. —.

32. See 5 C. L. 666, n. 75. Hence he has nothing to sell, and promise based upon consideration that promisor shall be admitted into the negotiations at that stage is a nudum pactum. Allen v. Powell [Ga.] 54 S. E. 137. Petition alleging that "while negotiations were still pending" between plaintiff and another and the owner of certain land for its purchase, defendants made a proposition to let them into the purchase, agreeing to pay plaintiff a certain sum therefor provided they were allowed to take a certain interest in the land and that this was agreed to, but that deed to entire tract was subsequently made to defendants and certain others and land was sold by them, and seeking to recover plaintiff's proportionate share of profits, etc., held subject to special demurrer for failure to allege with distinctness the character of the negotiations pending at time of alleged contract between plaintiff and defendants, so that it was impossible to determine whether they had reached a stage where plaintiff had acquired an interest in the property which could be made the subject of a transfer. Id. Evidence held not to establish contract for three years for interchange of traffic between railroad and steamship owner, but only negotiations therefor and a temporary arrangement. Graham v. Oregon R. & Nav. Co., 145 F. 718. Draft of contract held not enforceable as parol contract, where it was not agreed to

signature by them a condition precedent to its completion, it will not be a contract until it is reduced to writing and signed,[33] but where they assent to all of its terms, the mere reference to a future contract in writing will not negative the existence of a present and completed one.[34] The question is largely one of intention.[35]

A contract to take effect upon condition does not become binding until the condition happens.[36] A paper embodying the several and distinct obligation of each of the signatories to pay a definite and ascertained sum at a specified time, upon the happening of a named condition, requires no acceptance under seal on the part of the payee to give it legal sufficiency, but becomes operative on the happening of the condition.[37]

An option[38] is a mere continuing offer which may be withdrawn at any time before acceptance,[39] unless it is based on a valuable consideration.[40] An election to exercise it converts it into an executory contract.[41]

as such a contract presently enforceable, but was only a preparation for a contract and was not intended to be operative until signed. Fourchy v. Ellis, 140 F. 149.

33. See 5 C. L. 666, n. 76, 77. Where parties are negotiating for the purpose of making a valid written contract, either party may withdraw any oral proposition made, though accepted. Where parties have come to an oral agreement for an option on real estate, which agreement was to be reduced to a valid written option, a refusal of the owner to sign the writing does not render him liable for commissions to his broker. Fox v. Denargo Land Co. [Colo.] 86 P. 344. Where the understanding of the parties is that their contract shall be reduced to writing, the reduction to writing stands as a condition precedent to the perfection of the contract, and either party is at liberty to retire from it so long as the reduction to writing has not taken place. Kaplan v. Whitworth [La.] 40 So. 723. Where in a preliminary agreement for the lease of real estate, whether such agreement be verbal or in writing, it is stipulated that the lease shall be reduced to writing. In re Woodville, 115 La. 810, 40 So. 174. Where the acceptance of an offer to sell cement was made subject to a future contract, but did not stipulate for a contract under seal, the contract was not invalid because, though it concluded with the words "witness our hands and seals," it was only signed and not sealed by the buyers. Noel Const. Co. v. Atlas Portland Cement Co. [Md.] 63 A. 384.

34. A binding oral contract may be made between parties, though there is an understanding that it shall subsequently be reduced to writing, which writing is not completed by the signature of all the parties. Rankin v. Mitchem [N. C.] 53 S. E. 854. Where parties orally agree upon the terms of a contract, and there is a complete assent thereto, the suggestion to put it in writing at a subsequent time is not of itself sufficient to show that they did not mean the oral contract to be complete and binding without being put in writing. Id. Where all the terms are agreed upon and reduction to writing is provided for merely for facility of proof as to its terms, the contract becomes effective without the writing, especially where the things to be done are provided for in written plans and specifications and there is evidence of intention to proceed at once under the contract. Smith v. Kaufman, 30 Pa. Super. Ct. 265. Where an agreement on all the terms of a contract has been reached by the parties, and nothing remains except to reduce the terms to writing, the contract is complete in the absence of evidence that it was not to become effective until reduced to writing, and a breach of it by either party supports an action. International Harvester Co. v. Campbell [Tex. Civ. App.] 96 S. W. 93.

35. Rankin v. Mitchem [N. C.] 53 S. E. 854.

36. An oral agreement is not superseded by a mere proposed written agreement covering the same subject-matter, which is to take effect only upon the approval of all the parties thereto, and is not signed, approved, or acted upon by one of them. Contract for attorney's services. Libby v. Barry [N. D.] 107 N. W. 972. When, in an action for material for the construction of a building, there was evidence that the material was ordered on condition that it would not be shipped until plaintiff was notified, and that plaintiff was notified within a reasonable time not to ship the material, instructions presenting the law, based on the contention that the contract was conditional, and never became a complete contract, were proper. Stainback, Crawford & Co. v. Henderson [Ark.] 95 S. W. 786.

37. Sharp v. Bates, 102 Md. 344, 62 A. 747. Where indorsers of note by sealed writing requested plaintiff to pay it at maturity and agreed to refund the money, each to pay his respective share within thirty days, held that obligation became binding and liability of signers fixed when plaintiff made the payment. Id.

38. See 5 C. L. 674.

39. Instrument reciting receipt of earnest money by owner of land and wherein owner agreed to sell on specified terms, held an enforceable agreement on his part to sell on terms stated, but not enforceable against vendee. Clark v. Wilson [Tex. Civ. App.] 14 Tex. Ct. Rep. 770, 91 S. W. 627.

40. In such case it cannot be withdrawn before the time therein specified. Watkins v. Robertson [Va.] 54 S. E. 33.

41. An offer in the form of a unilateral agreement becomes a complete contract when accepted and acted upon by the parties. Agreement to hire a hall. Buffington v. Mc-

(§ 1) *C. Reality of consent.*[42]—Since the mutual assent of the parties is necessary,[43] there is no valid contract where either party was induced to enter into it through mistake,[44] duress,[45] misrepresentation, fraud, or undue influence,[46] or where either party is mentally incapacitated.[47] So, too, neither party is bound by a contract made in jest,[48] or as a mere pretense to conceal the real relation of the parties.[49]

§ 2. *Consideration.*[50]—A legal consideration is essential to the validity of every contract.[51]

At common law, and except where the rule has been changed by statute, a contract under seal imports a consideration.[52] Promissory notes,[53] and in some states all written contracts, import a consideration whether under seal or not.[54]

Nally [Mass.] 78 N. E. 309. Option for the sale of growing timber ripens into a valid contract when accepted. De Camp v. Wallace, 45 Misc. 436, 92 N. Y. S. 746. If option under seal is exercised by acceptance of offer within time specified, agreement will be specifically enforced or damages awarded for its breach. Watkins v. Robertson [Va.] 54 S. E. 33.

42. See 5 C. L. 675.

43. See ante, § 1 B.

44. See Mistake and Accident, 6 C. L. 678.

45. See Duress, 5 C. L. 1047.

46. See Fraud and Undue Influence, 5 C. L. 1541.

47. See Incompetency, 5 C. L. 1775; Insane Persons, 6 C. L. 34.

48. Evidence held to sustain finding that conversation relied on to constitute contract for purchase of potatoes was had in jest, and hence that there was no contract. Olsen v. Collins [Neb.] 106 N. W. 784.

49. In an action to recover for work done and materials furnished under a contract with the builder, evidence held insufficient to show that the contract between the owner and builder was a mere pretense and did not in fact make the latter an independent contractor. Rheam v. Martin, 26 App. D. C. 181.

50. See 5 C. L. 675.

51. Promise by vendor of farm, after completion of sale, to make repairs, held unenforceable where no consideration was shown. Riley v. Stevenson [Mo. App.] 94 S. W. 781. Want of consideration is a good defense to a claim under a contract. Defendant as assignee of a life policy was entitled to show that plaintiff was married at the time of a subsequent assignment to her in consideration of her promise to marry the insured. Howe v. Hagan, 110 App. Div. 392, 97 N. Y. S. 86. Defendant's promise to pay another's workmen in order to recover his own goods held void where there was no consideration therefor. Engel v. Gordon, 97 N. Y. S. 981. A mere voluntary promise by a person during negotiations relative to becoming manager of a corporation, that he would construct a model for a machine and turn it over to the corporation in case he became manager, was without consideration and not enforceable on failure of the negotiations. New York Automobile Co. v. Franklin, 49 Misc. 8, 97 N. Y. S. 781. Railroad company having breached its oral contract to furnish cars, and damage having resulted to plaintiffs by reason thereof, held that it could not avoid liability for such breach by a subsequent written contract of shipment, where no consideration inured to plaintiffs when it was made as compensation for such damages. Gulf, etc., R. Co. v. House [Tex. Civ. App.] 13 Tex. Ct. Rep. 752, 88 S. W. 1110. Provisions in shipping contract waiving damages to cattle already accrued before it was entered into, held void because without consideration. Pecos, etc., R. Co. v. Evans-Snider-Buel Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 199, 93 S. W. 1024. Where a part of a note is supported by a valuable consideration and the balance is not, and the sum for the payment of which there is a consideration is paid and the payment indorsed on the note, the payee cannot collect the balance. Littlefield v. Perkins, 100 Me. 96, 60 A. 707. Evidence held to show consideration for a note. Dunk v. Dunk, 95 App. Div. 617, 88 N. Y. S. 419; In re Bradbury, 105 App. Div. 250, 93 N. Y. S. 418. No consideration shown for defendant's promise to pay the debt of another. Brush & Stephens Co. v. Ross, 99 N. Y. S. 796.

52. Gray v. Bloomington & N. R. Co., 120 Ill. App. 159. A seal upon an assignment of a chose in action. Chamberlain v. Fernbach, 118 Ill. App. 145. It is not essential to a sealed instrument that it contain a recital that it is under seal. Id. Widow's individual assumption of decedent's notes. Fletcher v. Fletcher [Mass.] 77 N. E. 758. Consideration presumed where recited and instrument was under seal. Walter v. Rafalsky, 98 N. Y. S. 915. In states where a seal imports a consideration, a recited consideration in a sealed instrument cannot be questioned or contradicted for the purpose of defeating the instrument by showing that it was not founded on a valuable consideration. Particularly where right of third party to enforce contract is involved. Watkins v. Robertson [Va.] 54 S. E. 33. No proof is to be admitted, either at law or in equity, to overcome presumption that consideration named was actually paid. Id. Owner of stock giving option to purchase under seal and reciting consideration of $1, held estopped to deny, in suit for specific performance by assignee, that it was based on valuable consideration. Id. Under B. & C. Comp. § 765, a seal prima facie imports a consideration. Dickey v. Jackson [Or.] 84 P. 701.

53. See Negotiable Instruments, 6 C. L. 777, for a full discussion of this question. Note is prima facie evidence of a consideration and the burden is on defendant to show that there was no consideration. Gates v. Morton Hardware Co. [Ala.] 40 So. 509. Note

What constitutes in general.[55]—It is not necessary that the consideration be a thing of pecuniary value or reducible to such value,[56] but any benefit accruing to one party or any loss, trouble, or disadvantage undergone by, or any charge imposed upon, the other, is sufficient.[57] Thus, the surrender of an existing obligation or

reciting "value received" acknowledges a valid indebtness for a sufficient consideration. Chicago Title & Trust Co. v. Ward, 113 Ill. App. 327. The presumption may be destroyed by affirmative proof on the part of plaintiff of a consideration which is insufficient. In re Pinkerton's Estate, 49 Misc. 363, 99 N. Y. S. 492. If claimant gives affirmative proof to establish a consideration, no other consideration than that shown by the evidence will be presumed, and if this is insufficient, the presumption of consideration will not supply the defect. Id.

54. Under Civ. Code, § 1614, a written instrument imports a consideration, and the burden is on the party alleging lack of consideration to disprove it. Kennedy v. Lee, 147 Cal. 596, 82 P. 257. Order spread on minutes of commissioners' court reducing rate of interest on note given for school lands, made because purchaser stated that if it was not done he would not complete the purchase, held a written contract importing a consideration. Delta County v. Blackburn [Tex. Civ. App.] 90 S. W. 902.

55. See 5 C. L. 677.

56. Brown v. Jennett [Iowa] 106 N. W. 747.

57. Valuable consideration, in the sense of the law, may consist in some right, interest, profit, or benefit accruing to one party or some forbearance, detriment, loss, or responsibility given, suffered or undertaken by the other. White v. C. & G. Cooper Co., 7 Ohio C. C. (N. S.) 114. A promise to do something which the promisor is under no legal obligation to do will support a contract, although the doing of such act could not be specifically enforced. Norris v. Lilly, 147 Cal. 754, 82 P. 425. A promise to suffer a detriment is sufficient. McKinley v. Wilson [Tex. Civ. App.] 96 S. W. 112.

Contracts held to be supported by a sufficient consideration: Deed, by undertaking to support an old man every alternate two months of his life and to pay his debts. Norris v. Lilly, 147 Cal. 754, 82 P. 425. Making of new contract before expiration of previous one for conditional sale of stock where vendee was given longer time in which to comply with conditions, etc. Kennedy v. Lee, 147 Cal. 596, 82 P. 257. Note, by assignment of one's interest in capital stock of corporation, though no certificate has been issued. McGue v. Rommel [Cal.] 83 P. 1000. Although a government concession prohibits transfer without previous consent of the government, a transfer subject to the contingency that the government may refuse its consent is such an equitable interest as to constitute a consideration for a note. Id. A contract for the sale of land reciting the receipt of $500, which was to be forfeited if vendee did not perform. Winch v. Edmunds [Colo.] 83 P. 632. Surrender of sealed instrument, by payment of money and execution of promissory note. Brettmann v. Fischer, 216 Ill. 142, 74 N. E. 777. In a contract of conditional sale, the possession and use of the property by the buyer, while title remains in the seller, is a sufficient consideration for the buyer's absolute promise to pay the agreed price. Kilmer v. Moneyweight Scale Co. [Ind. App.] 76 N. E. 271. Contract whereby the owner of a life estate agreed to hold and invest a part of the income for the benefit of his children, and the latter conveyed to the wife of the former a certain homestead in which they were interested. Case v. Collins [Ind. App.] 76 N. E. 781. Agreement by administrator to pay plaintiff's claim against the estate himself if he would not press it, where administrator thereby secured advantages personal to himself and plaintiff by reason thereof, did not file his claim in time to make it one of the third class, and hence did not realize anything thereon as he otherwise would have done. Blake v. Robinson [Iowa] 105 N. W. 401. Detriment to broker held to support agreement whereby purchaser of realty under contract made on Sunday promised brokers to pay their commission for negotiating sale, and that contract should be canceled and that owner of realty should be released from liability for the commission. Brown v. Jennett [Iowa] 106 N. W. 747. Note, where amount thereof was received by maker through his duly authorized agent and used by latter for maker's benefit, though money was given to the maker by a third person who delivered note to payee in exchange for one previously executed by himself in favor of such payee. Hale v. Harris [Ky.] 91 S. W. 660. Sale of personalty by the giving of notes and undertaking to pay accounts. Pierce v. O'Brien, 189 Mass. 58, 75 N. E. 61.

Performance on the part of an agent for an undisclosed principal is a sufficient consideration for a promise by the other party. Performance by a lessor. Buffington v. McNally [Mass.] 78 N. E. 309. Agreement to pay mortgage debt out of judgment in action on insurance policy by owner, where mortgagee became security for costs, paid jury fee, and employed attorney to assist at trial. Beistle v. McConnell [Mich.] 12 Det. Leg. N. 505, 104 N. W. 729. Agreement by corporation and two of its officers to make cash payment on a debt of the corporation then due, and to give a note indorsed by one of such officers for the balance. Illinois Roofing & Supply Co. v. Cribbs [Mich.] 12 Det. Leg. N. 901, 106 N. W. 274. Promise by lessor, in a lease not assignable unless consented to in writing, to give such consent if the lessee finds a satisfactory tenant, by time and money spent by lessee in securing tenant. Underwood Typewriter Co. v. Century Realty Co. [Mo. App.] 94 S. W. 787. Contract by which a city granted to a telephone company rights in addition to those given the company by the transportation law. Wright v. Glen Tel. Co., 48 Misc. 192, 95 N. Y. S. 101. Where plaintiff refused to abide by his agreement to purchase land subject to a mortgage because of a building restriction contained in the deed to defendant,

right,[58] the discontinuance of a suit,[59] indulgence or extension of time for payment of a debt,[60] or the change of one's residence at another's request,[61] have been held sufficient.

agreement by the latter that if plaintiff would accept a deed he would secure an extension of time on the mortgage. Hoch v. Braxmar, 109 App. Div. 209, 95 N. Y. S. 647. In an action by a materialman against a contractor to recover money due a subcontractor consideration for the order upon which the action was based was shown by evidence of materials furnished by plaintiff to the houses in the construction of which defendant was engaged as contractor. Meserole v. Zimmerman, 48 Misc. 636, 96 N. Y. S. 135. Contract to pay for services, by services performed by plaintiff, the receipt of $1, and the fact that the contract was under seal. Parsons v. Teller, 97 N. Y. S. 808. Where a payee of a demand note signed by three persons agreed to accept in payment a 30 days' note signed by only one of them. Brink v. Stratton, 98 N. Y. S. 421. Contract by which plaintiff agreed to sell property to a corporation to be organized by defendants in consideration of stock of the corporation. Electric Fireproofing Co. v. Smith, 99 N. Y. S. 37. Consideration for contract for sale of land in vendee's favor is the title to be conveyed after performance. Miller v. Shelburn [N. D.] 107 N. W. 51. Defendant's entering into partnership with plaintiff held sufficient consideration for plaintiff's agreement that advances made by him should be repaid only out of the partnership profits. Creery v. Thompson, 26 Pa. Super. Ct. 511. Commission on sale of machinery by agents held to support their personal promise to the purchaser to keep on hand and furnish extras for repairs. Tyson v. Jackson Bros. [Tex. Civ. App.] 14 Tex. Ct. Rep. 431, 90 S. W. 930. An agreement by one surety to pay a note in case the principal fails to pay it made as an inducement to the other sureties to sign. Hall v. Taylor [Tex. Civ. App.] 16 Tex. Ct. Rep. 374, 95 S. W. 755. Where the owner of a vendor's lien upon land agreed with plaintiff, who contemplated purchasing a portion of the land, to release the vendor's lien as to the land purchased by plaintiff on payment of a certain sum by plaintiff's grantor, and plaintiff's grantor paid such sum, the agreement with plaintiff to release the lien was not without consideration on the theory that plaintiff's grantor had only done what it had been obliged to do, as the payment of the purchase price by plaintiff was a consideration. McKinley v. Wilson [Tex. Civ. App.] 96 S. W. 112. Agreement for the release of a mortgage lien on a horse in consideration of the release of a lien claimed on certain oxen. Holden v. Gilfeather [Vt.] 63 A. 144. Contract whereby a jobber agreed to sell only goods of a certain manufacturer and thus build up a market, and the manufacturer was to furnish all goods needed. Federal Iron & Brass Bed Co. v. Hock [Wash.] 85 P. 418. Corporation sold treasury stock to plaintiff which it and its president individually agreed to repurchase if he was not satisfied. Held that consideration moving between corporation and plaintiff was sufficient to support the joint obligation, and recovery could be had against president when indebtedness became due. Ophir Consol. Mines Co. v. Brynteson [C. C. A.] 143 F. 829. Firm notes given by one partner to sureties on his official bond as postmaster to reimburse them for money embezzled by him from the government, which they had been compelled to pay, where he used money to pay firm debts. In re Speer Bros., 144 F. 910.

Contracts held to be without consideration. Where one partner pays a partnership note and takes an assignment, and then employs an attorney to act in the name of the original creditor and secure a new note from the partner for his share, which is assigned to him, there is no consideration for such note. Gillespie v. Salmon [Cal. App.] 84 P. 310. Where a substantial part of certain notes is interest at 10% per annum, compounded monthly on accounts drawing interest at 7%, there is no consideration for the excess interest. Reed v. Bank of Ukiah [Cal.] 82 P. 845. Contract whereby one having title to certain lots as security for a debt agrees with the debtor to execute a deed to such lots and place it in escrow to be delivered on payment. Hobson v. Anderson [Colo.] 83 P. 634. An oral acceptance of written order to pay money, if there are no funds in the hands of the acceptor to pay the order, and the holder has in no way changed his position. Miller v. Chicago Heights Lumber Co., 117 Ill. App. 468. The fact that the acceptor retains the order, the physical evidence of the indebtedness, does not constitute a consideration. Id. Where a mother gave money to her son as an advancement, a note afterwards given by the son to evidence the advancement. Baum v. Palmer, 165 Ind. 513, 76 N. E. 108. Note given by widow to pay debt of her deceased husband, where husband's estate was hopelessly insolvent and he left nothing for her, or his children, or his creditors. Grimes v. Grimes [Ky.] 89 S. W. 548. Fact that creditor destroyed note given him by decedent in reliance on widow's note held immaterial, since he did not thereby destroy his cause of action against the estate. Id. Plaintiff's wife had insurance policy on her life, of which plaintiff inherited half and the wife's father and mother the other half. Mother gave plaintiff a note for the amount received by her, deceased having expressed a wish that he should have the whole, but it did not appear that plaintiff did or omitted to do anything in consequence of her promise to pay him her share, or in any way suffered thereby. Held that there was no consideration for the note. Littlefield v. Perkins, 100 Me. 96, 60 A. 707. A mere promise to share with a brother property received under a will. Chase v. Chase [Mass.] 78 N. E. 115. Contract whereby defendant agreed that, if he purchased plaintiff's land at a judicial sale, he would share it with plaintiff. Gloeckner v. Kittlaus, 192 Mo. 477, 91 S. W. 126. Agreement by a father that property left by his deceased son should belong to his daughter if

Mutual promises operate as a consideration each for the other, provided both parties are bound thereby.[62]

she would refrain from establishing a gift of it to her from the son, it not appearing that the father had any title to the property, and the contract was not enforceable as a family settlement. Graham v. Spence [N. J. Eq.] 63 A. 344. Note given by a stranger for the debt of another. Tyler v. Jaeger, 47 Misc. 84, 93 N. Y. S. 558. Personal promise by the manager of an insurance agency to pay renewal commissions on all policies placed in the company through the agency, where the manager derived no benefit from the insurance so placed. Anderson v. English, 105 App. Div. 400, 94 N. Y. S. 200. Oral promise by an owner to pay a subcontractor for going on and completing his contract with the contractor. Snyder v. Monroe Eckstein Brewing Co., 107 App. Div. 328, 95 N. Y. S. 144. Promises of a landlord to cut lawn, trim hedges, etc., made after the execution of the lease. Leeming v. Duryea, 97 N. Y. S. 355. Agreement by lessor to purchase a building already her own. Precht v. Howard, 110 App. Div. 680, 97 N. Y. S. 462. Promise by contractor, on undertaking to complete contract of subcontractor, who had defaulted, that he would pay one who had furnished material to the latter. Martin v. Flahive, 98 N. Y. S. 577. Voluntary services rendered without expectation of remuneration are an insufficient consideration for a promise to pay therefor, since they raised no legal liability in the first instance. Insufficient to support a note. In re Pinkerton's Estate, 49 Misc. 363, 99 N. Y. S. 492. Notes, to amount of payments not credited on account in settlement of which they were given, and to extent of discounts improperly charged to defendant. Newell Booth Co. v. Sheldrake, 23 Pa. Super. Ct. 528.

58. A promise by a husband to pay his wife $2.50 per week for the support of their child, in consideration that she release certain claims, was a sufficient consideration to sustain an action against the husband although he only agreed to discharge a legal duty. Ward v. Goodrich [Colo.] 82 P. 701. Immaterial that custody of the child was within the discretion of the court. Id. Relinquishment of right to pay full amount of note given for school land at once, and agreement to continue to pay interest thereon, held to support agreement to accept interest at reduced rate. Delta County v. Blackburn [Tex. Civ. App.] 90 S. W. 902. Surrender to defendant by plaintiffs of their legal privilege of running and controlling their own logs in river on basis of an equal right with defendant, held to support contract by defendant to boom and sort plaintiff's logs. Nester v. Diamond Match Co. [C. C. A.] 143 F. 72. The release of a claim made in good faith is a sufficient consideration for a promise, though the claim may be doubtful. Transfer by children of their interest in property which they claimed to have acquired upon the death of their mother held sufficient consideration for the father's promise that all the property he might own at his death should go to them. Lewallen's Estate, 27 Pa. Super. Ct. 320.

The cancellation of a prior agreement is a sufficient consideration for a new one. The cancellation of a prior agreement to pay plaintiff $1,800 a year until the promisor became of age, in consideration of services rendered, held a sufficient consideration for a more formal one to pay that sum during plaintiff's life. Parsons v. Teller, 97 N. Y. S. 808. Abandonment of original contract, and acting upon modification, held sufficient to uphold modification. Cannon Weiner Elevator Co. v. Boswell [Mo. App.] 93 S. W. 355. A release of an option will support a contract to deed a particular lot and pay a specified sum. Great Western Oil Co. v. Carpenter [Tex. Civ. App.] 15 Tex. Ct. Rep. 970, 95 S. W. 57. The release of a binding lease and the surrender of a part of the property will support a new lease of the remainder under different terms. Id.

The surrender of a void agreement is not a valid consideration. Phelps v. Manicko [Mo. App.] 96 S. W. 221. Defendant, after liberally watering his stock of whiskey, traded his saloon to W. for a farm, after which plaintiff, who was not an attorney and had no connection with the trade, agreed with W. to secure a rescission for $1,000, but before doing anything plaintiff contracted with defendant to refrain from taking up W.'s cause for $625, for $325 of which he accepted defendant's note. Held that plaintiff's agreement with W., being void for maintenance, the surrender thereof was no consideration for the execution of defendant's note. Id. Promise to pay money to release void contract, as a contract by husband to convey homestead in which wife does not join, is without consideration. Silander v. Gronna [N. D.] 108 N. W. 544.

59. Will support promise to pay part of the costs. Littlefield v. Perkins, 100 Me. 96, 60 A. 707.

60. For contract to deliver and delivery of lien bonds. Virginia-Carolina Chemical Co. v. McNair, 139 N. C. 326, 51 S. E. 949. Will support chattel mortgage given to secure it. Martin Bros. & Co. v. Lesan [Iowa] 105 N. W. 996.

61. Will support promise to pay money. Burgesser v. Wendel [N. J. Law] 62 A. 994.

62. See, also, § 3 C, post. Where mutual promises are relied on to support a contract, the obligations of the contract must be mutually binding on both parties. If one assumes under such an agreement to do a special act beneficial to another, and latter, under terms of contract, is under no obligation to perform any act of advantage to the former, there is no consideration which will support the promise of the party assuming to perform. Cooley v. Moss, 123 Ga. 707, 51 S. E. 625. Contract to sell land to another at a given price, deed to be made when vendor shall have sold certain other lots, held unilateral and not binding on vendor, where vendee did not agree to purchase or to pay the consideration and there were no mutual obligations and no other consideration. Id. Bringing of action for damages by vendee for breach held not an acceptance and agreement to be bound on his part, where vendor had already put it beyond his power to per-

Forbearance to sue,[63] when one has the right to sue, will support a contract.[64]

The compromise of a doubtful right[65] is a sufficient consideration to support a promise, though the claim could not have been supported in whole or in part.[66]

form when suit was brought. Id. Attorneys entered into contract with client whereby they were to have half of land recovered for the latter in consideration for their services. Later they made a subsequent agreement providing that they might purchase the other half for a specified sum. Held that latter contract was unenforceable for want of a consideration, attorneys being under no obligation to purchase. Lipscomb v. Adams, 193 Mo. 530, 91 S. W. 1046.

Contracts held supported by sufficient consideration: An agreement to establish a scholarship in one's name and for the benefit of her and her heirs, held to support promise to pay $1,000 at her death. Buchtel College v. Chamberlain [Cal. App.] 84 P. 1000. Antenuptial contract, by the subsequent marriage of the parties and by mutual covenants waiving and releasing the rights of each in the property of the other. Kroell v. Kroell, 219 Ill. 105, 76 N. E. 63. A contract wherein one party agrees to dismiss a pending action for separate maintenance in consideration that the other pay a monthly allowance. McKenna v. McKenna, 118 Ill. App. 240. Mutual promises pledging personal credit for the payment of funds raised for financing an undertaking will support a contract. Gray v. Bloomington & Normal R. Co., 120 Ill. App. 159. Where payee of a note promises, in consideration of its payment according to its terms, to do something that he was not otherwise bound to do, the undertaking is mutual, and this mutuality is a sufficient basis for enforcing the obligation against either party who may be derelict. Central University v. Walter's Ex'rs [Ky.] 90 S. W. 1066. Note for subscription for endowment of certain professorship in university held supported by sufficient consideration, where, under its charter, university was bound by its acceptance of note to use it for the specified purpose and to maintain chair of specified name perpetually. Id. Mutual understanding and intention that future services were to be rendered by clerk held to support agreement to pay his salary during a vacation allowed him. Birch v. Glasgow Sav. Bank, 114 Mo. App. 711, 90 S. W. 746. A contract between plaintiff and a landowner, whereby the landowner agreed to sell land to any buyer found by plaintiff, on specified terms, plaintiff to have as commission all that he could obtain from the land above a specified sum, was not without consideration moving to the landowner, plaintiff's agreement to perform the service being sufficient. Young v. Ruhwedel [Mo. App.] 96 S. W. 228. Contract reciting that defendant had sold to plaintiff 1,000 to 1,500 tons of coal at certain price to be shipped between specified date. Smokeless Fuel Co. v. Seaton [Va.] 52 S. E. 829. Contract whereby officers of a corporation agreed that if plaintiff would accept its bonds in part payment of purchase price of machinery sold to it they would purchase them at par at any time within six months, plaintiff's consent to sell being presumed. Erie City Iron Works v. Thomas, 139 F. 995.

63. See 5 C. L. 679. Where an agent, holding a power of attorney, illegally placed a mortgage upon property and appropriated the money, forbearance of legal prosecution held to support an undertaking to discharge the mortgage. Parsons v. Silva [Cal. App.] 82 P. 685. Where upon renewal of two notes it was agreed that two new notes should be given but that suit thereon should not be brought until a certain event occurred, there was sufficient consideration to support the agreement of delay. Daniels v. Daniels [Cal. App.] 85 P. 134. Delay in bringing action against person in possession of leased premises held a sufficient consideration to support his promise to vacate at the end of that time and to remove rubbish. Heineman v. Gans [Mich.] 12 Det. Leg. N. 722, 105 N. W. 763. Written surrender and authority given to lessors of building by lessees authorizing them, for purpose of facilitating repairs, to eject wreekage company in possession for purpose of removing stock damaged by fire, and which had been turned over to insurance company, so that the contractor might have possession "from and after ten days from this date," held to authorize lessor to take immediate possession and not to require him to wait ten days. Id.

64. Forbearance to execute threats to bring attachment suits will not support a promise where there is no lien or grounds for attachment. Wierman v. Bay City-Michigan Sugar Co. [Mich.] 12 Det. Leg. N. 833, 106 N. W. 75. Where one not liable on a note signs it upon the condition that she be not sued until the maker has realized a certain amount from a construction contract, and then only in the event of nonpayment by him, the forbearance to sue is no consideration. Bank of Ontario v. Hoskins [Mont.] 83 P. 493.

65. See 5 C. L. 680.

66. The giving up by way of compromise of an apparently good claim, whether the claim is actually good or not. Gaynor v. Quinn, 212 Pa. 362, 61 A. 944. The relinquishment of a right to litigate the question of law or fact as to another's liability on a contract, whether such contract is in fact valid or invalid. Agreement to discharge defendant from liability on contract to purchase realty made on Sunday, held to support contract by defendant to pay commissions of agent who negotiated the sale. Brown v. Jennett [Iowa] 106 N. W. 747. Debtor conveyed his property to one of its creditors, who was to settle with other creditors and settled with all others except plaintiff for fifty cents on dollar. Held that subsequent agreement with plaintiff to pay him at the same rate was based on composition, and hence was supported by sufficient consideration. Williams Shoe Co. v. Gotzian & Co. [Iowa] 107 N. W. 807. A settlement of claims asserted in good faith is based on sufficient consideration, notwithstanding the validity of the claims may be doubtful. Dickey v.

Marriage,[67] or a promise to marry, is a valuable consideration.[68]

Legal duty.[69]—The agreement to do that which one is already legally bound to do will not support a promise.[70] Thus, where a contract has been fully performed by one party, an offer of part performance by the other is no consideration for the waiver of full performance.[71] The same is true of an agreement by a creditor to accept less than is due in full payment of a matured debt,[72] but an immediate payment of a part of a debt not yet due is a sufficient consideration for the release of the balance,[73] or for the extension of the time of payment.[74] An agreement to continue the payment of interest at the same or a reduced rate does not constitute a consideration for the extension of the time of payment of the principal,[75] but the payment of interest in advance does.[76]

A mere moral obligation[77] is not ordinarily a sufficient consideration to support a contract,[78] but this rule does not apply where such obligation is based upon a pre-existing legal one which has been barred by the statute of limitations and the like.[79]

Jacksen [Or.] 84 P. 701. The settlement of a dispute in good faith between the parties as to representations made with regard to the contents of a written agreement at the time of its execution, and the affirmance of the other provisions of such agreement, will support a parol modification as to the time of payment. Whitehill v. Schwartz, 27 Pa. Super. Ct. 526. Compromise of bona fide dispute as to whether negotiations constituted contract for sale of stock so as to obligate plaintiff to take it held to support agreement to repurchase stock subsequently sold at a less price if plaintiff was not satisfied with the investment. Ophir Consol. Mines Co. v. Brynteson [C. C. A.] 143 F. 829. Must be a dispute between them as to some question. Finding held not to show dispute as to rights of parties under contract to convey land. Silander v. Grenna [N. D.] 108 N. W. 544.

67. See 5 C. L. 680. Subsequent marriage of the parties held consideration for antenuptial contract, waiving property rights. Kreell v. Kreell, 219 Ill. 105, 76 N. E. 63. Will support a conveyance from husband to wife. Welch v. Mann, 193 Mo. 304, 92 S. W. 98. Will support deed of trust made as a marriage settlement. Savage v. Savage [C. C. A.] 141 F. 346. An existing marriage relation is a valuable and sufficient consideration to support an assignment by the husband to the wife, if it does not affect the claims of existing creditors. Indiana Match Co. v. Kirk, 118 Ill. App. 102.

68. A woman's agreement to marry a man held to support his antenuptial contract to convey land to her. Pierce v. Vansell, 35 Ind. App. 525, 74 N. E. 554. Assignment of a life policy in consideration of the assignee agreeing to become the wife of the assignor held supported by a sufficient consideration, except as against prior creditors or assignees for value. Howe v. Hagan, 110 App. Div. 392, 97 N. Y. S. 86.

69. See 5 C. L. 680.

70. Payment of interest already accrued but not yet payable will not support an extension of time for payment of principal. Higgins v. McPherson, 118 Ill. App. 464.

71. Where contract for exchange of land required vendor to furnish clear title except for certain incumbrance, which vendee was to assume, provision in deed requiring assumption of additional incumbrance held void where not supported by additional consideration. Wilson v. Wilson, 115 Mo. App. 641, 92 S. W. 145.

72. Services which attorneys were bound to render under first contract with client held not a consideration for subsequent contract, since attorneys had already obligated themselves to render them for specified compensation. Lipscomb v. Adams, 193 Mo. 530, 91 S. W. 1046. Agreement by owner of a ground rent to reduce the rent in the future from six to five per cent held without consideration. Fidelity Trust Co. v. Carsen, 28 Pa. Super. Ct. 418. Where the facts show clearly a certain sum to be due from one person to another, a release of the entire sum upon payment of a part is without consideration, and the creditor may still recover the residue. Ophir Consol. Mines Co. v. Brynteson [C. C. A.] 143 F. 829. Negotiations for sale of stock and its delivery held not to constitute a sale so as to render invalid a subsequent sale for less price and agreement to repurchase if buyer was not satisfied. Ophir Consol. Mines Co. v. Brynteson [C. C. A.] 143 F. 829.

73. Baldwin v. Daly, 41 Wash. 416, 83 P. 724.

74. Brewere v. Carpenter, 99 N. Y. S. 531.

75. Fanning v. Murphy, 126 Wis. 538, 105 N. W. 1056.

76. Higgins v. McPherson, 118 Ill. App. 464.

77. See 5 C. L. 682.

78. Will not support a promise by a third person to discharge it. Note given by wife for debt of husband discharged in insolvency. Widger v. Baxter, 190 Mass. 130, 76 N. E. 509.

79. The moral duty of a debtor to pay a dormant judgment is sufficient consideration to support a promise so to do. A chattel mortgage pledging certain personal property to the payment of a debt therein declared to be owing is valid, notwithstanding it describes such debt as a dormant judgment. Brown v. Akeson [Kan.] 86 P. 299. A promise of the mortgagor made in the mortgage that if the property fails to satisfy the dormant judgment he will pay the de-

A past consideration[80] will not ordinarily support a promise,[81] but an antecedent debt of the maker is a sufficient consideration for a note,[82] or for an order on a third person for the payment of money.[83]

Adequacy.[84]—Mere inadequacy of consideration is not alone ground for avoiding a contract,[85] unless so gross as to shock the conscience and to amount to proof of fraud,[86] but it may be considered in connection with other circumstances tending to show fraud.[87] It has been held that a mere nominal consideration is insufficient.[88]

A failure of consideration[89] in whole or in part precludes a recovery on the contract pro tanto.[90]

ficiency is such an assumption of personal obligation as to support an action thereon. Id.

80. See 5 C. L. 682.

81. A wife's note given in payment of her husband's debt is upported by a valid consideration, but her note given merely as security for such debt previously existing is not valid without a new consideration. Widger v. Baxter, 190 Mass. 130, 76 N. E. 509. A promise by the manager of an insurance agency to pay renewal commissions on policies already placed with the company through the agency was not supported by a sufficient consideration. Anderson v. English, 105 App. Div. 400, 94 N. Y. S. 200. A promise by an owner that he would not make further payments to the contractor until the latter had paid for all labor was without consideration where made to a subcontractor after he had completed his work for the principal contractor. Smith v. Burditt, 107 App. Div. 628, 95 N. Y. S. 188. Promise of one as surety or guarantor to pay executed contract of indebtedness to third person is not binding unless supported by some additional consideration. Bluff Springs Mercantile Co. v. White [Tex. Civ. App.] 13 Tex. Ct. Rep. 905, 90 S. W. 710.

82. Gates v. Morton Hardware Co. [Ala.] 40 So. 509.

83. A pre-existing debt is a sufficient consideration for an assignment of commissions or profits from certain charters of vessels. Bank of Yolo v. Bank of Woodland [Cal. App.] 86 P. 820. Where a bank accepts an assignment of commissions not yet ascertainable as part payment of a debt, the fact that the bank must wait until the commissions are ascertainable before collecting the balance of the debt is such a detriment as to constitute a consideration. Id.

84. See 5 C. L. 682.

85. Where parties are dealing with each other on equal footing. Cook v. Bagnell Timber Co. [Ark.] 94 S. W. 695. Neither courts of equity nor of law will consider whether bargains of one not under disability are wise, discreet, and profitable, or otherwise. Deepwater Council No. 40, O. U. A. M. v. Renick [W. Va.] 53 S. E. 552. Any bona fide consideration, however slight, which works any benefit to the one party or injury to the other, is sufficient where there is no element of fraud. White v. C. & G. Cooper Co., 7 Ohio C. C. (N. S.) 114. Contract for support of feeble, old person for remainder of her life in consideration of transfer of bank deposits held not open to objection that consideration was out of proportion to services, though she lived but a few months. Drefahl v. Security Sav. Bank [Iowa] 107 N. W. 179. Contract to pay for services rendered deceased during her infancy not invalid because $1,800 a year during plaintiff's life was an amount in excess of the value of the services. Parsons v. Teller, 97 N. Y. S. 808. Notes for $1,000 each, given to nephews of deceased for carrying her about while she visited them. In re Simmon Estate, 48 Misc. 484, 96 N. Y. S. 1103. In the absence of fraud an existing legal obligation will sustain a promise to pay an amount far in excess of its real value. In re Bradbury, 105 App. Div. 250, 93 N. Y. S. 418. The performance of services in the expectation of being compensated is a sufficient consideration for a note for an amount in excess of the real value of the services. Id. Lease in consideration of one dollar and of "covenants and agreements hereinafter contained" held supported by sufficient consideration. Brewster v. Lanyon Zinc Co. [C. C. A.] 140 F. 801.

86. Deepwater Council No. 40, O. U. A. M. v. Renick [W. Va.] 53 S E. 552. Services actually rendered by attorneys in recovery of land held not so little in proportion to contract price as to render contract unenforceable in equity. Lipscomb v. Adams, 193 Mo. 530, 91 S. W. 1046.

87. Though not itself amounting to fraud. Deepwater Council No. 40, O. U. A. M. v. Renick [W. Va.] 53 S. E. 552.

88. A consideration of one dollar recited in an oil lease as paid, and which in fact was paid, held a mere nominal consideration and insufficient to support the contract. Great Western Oil Co. v. Carpenter [Tex. Civ. App.] 15 Tex. Ct. Rep. 970, 95 S. W. 57.

89. See 5 C. L. 683.

90. Where the consideration of a note was the transfer of certain government concessions, a forfeiture of such concessions by the government, subsequent to the time for transfer and tender thereof, does not make a failure of consideration. McGue v. Rommel [Cal.] 83 P. 1000. Pleas of want of, and failure of, consideration, held improperly stricken. Whitt v. Blount, 124 Ga. 671, 53 S. E. 205. Failure of consideration may be pleaded to a suit based on a promissory note under seal, regardless of whether want of consideration may be. Slaton v. Fowler, 124 Ga. 955, 53 S. E. 567. Provision in contract for settlement of estate that it should be void if plaintiff ever made any further claim against estate held not a dependent condition or promise constituting the sole consideration for the contract, which was an entire one, so that its breach did not constitute a failure of consideration pre-

§ 3. *Validity of contract. A. General principles.*[91]—The validity of a written contract is to be determined from the whole instrument.[92] Matters relating to the contracts of domestic[93] and foreign corporations,[94] aliens,[95] infants,[96] and married women,[97] and to usurious[98] and gambling contracts,[99] and contracts made on Sunday,[1] are treated elsewhere.

(§ 3) *B. Subject-matter or consideration.*[2]—An agreement to enter into a future contract is valid if the terms of the latter are fixed,[3] but not otherwise.[4]

Contracts which involve the doing of a thing prohibited by statute under penalty are generally held to be void, even though the statute does not expressly so provide.[5] Some courts, however, hold that the penalty imposed excludes all others and that such contracts are valid, unless it clearly appears that the legislature intended otherwise.[6]

venting a recovery on the contract. Galt v. Provan [Iowa] 108 N. W. 760. Consideration for note for subscription for endowment of certain professorship in a university held not to have failed by reason of consolidation of university with another one under a new name and in a different city, where there was nothing in note to the contrary, and professorship was continued in new institution under same name, real consideration being propagation of christian education. Central University v. Walter's Ex'rs [Ky.] 90 S. W. 1066. Where, pursuant to agreement, plaintiff advertised whiskey for defendant by a certain name until notified by defendant to stop because the name had been previously adopted by another dealer, there was no failure of consideration excusing defendant from paying for advertising already done. Lund v. Smith [Mass.] 77 N. E. 893. Where a party agreed to release certain claims for $300 and a certain farm when the title to such farm should be cleared, which was not done, there was such a failure of consideration as to permit suit on the original claim. Bull v. Payne [Or.] 84 P. 697. Where two tracts of land were sold, fact that vendor's title to largest tract failed did not render notes given for entire purchase price totally without consideration, or prevent relation of vendor and vendee from arising. Williams v. Finley [Tex.] 14 Tex. Ct. Rep. 762, 90 S. W. 1087.

91. See 5 C. L. 684.

92. Woodruff v. Woodruff [Ky.] 90 S. W. 266.

93. See Corporations, 5 C. L. 764.

94. See Foreign Corporations, 5 C. L. 1470.

95. See Aliens, 7 C. L. 98.

96. See Infants, 6 C. L. 1.

97. See Husband and Wife, 5 C. L. 1731.

98. See Usury, 6 C. L. 1774.

99. See Gambling Contracts, 5 C. L. 1571; Lotteries, 6 C. L. 487.

1. See Sunday, 6 C. L. 1584.

2. See 5 C. L. 684.

3. To execute bond for title. Kaplan v. Whitworth [La.] 40 So. 723.

4. Agreement to execute bond for title held void where rate of interest was not fixed. Kaplan v. Whitworth [La.] 40 So. 723.

5. Contracts held void: Contracts in violation of Burns' Ann. St. 1901, § 2136, forbidding county commissioners or their appointees from being interested in any contract for the construction of any work for the township under penalty. Cheney v. Unroe [Ind.] 77 N. E. 1041. Contract for sale of liquor license in violation of statute prohibiting transfer of licenses held void as between the parties. Sawyer v. Sanderson, 113 Mo. App. 233, 88 S. W. 151. One cannot recover on contract for threshing with steam threshing machine without furnishing bond required by Rev. Pol. Code § 3145. Johnson v. Berry [S. D.] 104 N. W. 1114. Contracts of a foreign corporation, which has failed to comply with regulations prerequisite to doing business in the state, held void. Booth & Co. v. Weigand, 28 Utah, 372, 79 P. 570. A contract by a nonlicensed physician to give medical treatment. Deaton v. Lawson, 40 Wash. 486, 82 P. 879. Where the owner of a medical institution was a nonlicensed physician and employed a licensed physician who had nothing to do with charging or contracting, a contract with the institution held a contract with the owner. Id.; Urwan v. Northwestern Nat. Life Ins. Co., 125 Wis. 349, 103 N. W. 1102. Contract in violation of Rev. St. 1898, § 1955, prohibiting discrimination as to amount of premiums between persons insured. Urwan v. Northwestern Nat. Life Ins. Co., 125 Wis. 349, 103 N. W. 1102.

6. The fact that an architect has not obtained a certificate, as required by statute, entitling him to practice within the state, does not invalidate his contract for architectural services. Fitzhugh v. Mason [Cal. App.] 83 P. 282. The Criminal Code (1 Starr & C. Ann. St. 1896, p. 1332, par. 368), prohibiting the unauthorized assumption of a corporate name for the purpose of soliciting business, does not invalidate contracts made by the violators thereof but subjects them only to the penalty therein prescribed. People v. Rose, 219 Ill. 46, 76 N. E. 42. But see People v. Board of Sup'rs, 122 Ill. App. 40. Failure of foreign corporation to comply with Code 1899, c. 54, § 30, before doing business in state, does not render its contracts absolutely void, since statute does not expressly so declare and imposes penalty for violation. Thompson v. National Mut. Bldg. & Loan Ass'n, 57 W. Va. 551, 50 S. E. 756. Whether a contract to do something prohibited by a Federal statute, which does not expressly declare such contracts void, is enforceable, depends upon the Federal construction of such statute. People

A contract expressly declared by statute to be void cannot be validated by subsequent ratification or by acts of the parties recognizing its existence.[7]

Definiteness and certainty of terms.[8]—In order to be enforceable the contract must be reasonably definite and certain in its terms,[9] or capable of being made so.[10]

(§ 3) *C. Mutuality.*[11]—As a general rule the obligations of the contract must be mutual; that is, it must be capable of enforcement by either party against the other.[12] The rule, however, does not apply to contracts which have been executed in whole or in part.[13]

v. Board of Sup'rs, 122 Ill. App. 40. Contract of a county to furnish its share of the funds necessary to construct a joint bridge is enforceable, notwithstanding failure to comply with section 9, Act of Congress, March 3, 1899. Id.

7. A contract in violation of Civ. Code art. 1497, prohibiting donations of all one's property, can acquire no validity either by lapse of time or by ratification, and the action of the donor to annul it and to recover his property is not barred by prescription, contrary to Civ. Code art. 1497. Ackerman v. Larner [La.] 40 So. 581.

8. See 5 C. L. 685.

9. Contracts held sufficiently definite: Agreement of corporation and certain of its officers to make a good cash payment of between $100 and $200 on a debt, and to furnish a note for balance indorsed by one of such officers. Illinois Roofing & Supply Co. v. Cribbs [Mich.] 12 Det. Leg. N. 901, 106 N. W. 274. Contract for the exchange of plaintiff's business for stock of a corporation to be organized by defendants and requiring the latter to purchase certain other stock from plaintiff in case of their failure to perform. Electric Fireproofing Co. v. Smith, 99 N. Y. S. 37. Provision in lease giving lessee preference right to purchase property at any bona fide offer made and acceptable to lessor by any responsible party. Gave lessee a valid option. Slaughter v. Mallet Land & Cattle Co. [C. C. A.] 141 F. 282. Provision in fidelity bond requiring "frequent audits and examinations" held not so indefinite and insensible as to be unintelligible and void. Sinclair & Co. v. National Surety Co. [Iowa] 107 N. W. 184. Bid for construction of building, taken in connection with plans and specifications, held sufficiently definite and complete to form basis of contract. Cameron v. Booth & Co. [Minn.] 108 N. W. 514. Contract to convey land, provided grantee would abandon purpose of going to Cuba and remain in certain city and induce her husband to do so, held supported by sufficiently definite consideration, grantee being required to remain a reasonable time, having in view the nature of the contract. White v. Poole [N. H.] 62 A. 494. A valid contract may be made determinable upon a contingency or event, although its happening depends wholly upon an act to be done by one of the parties. Agreement to deliver cattle on certain day or within a few days thereafter, on day to be designated by buyer, held not void for indefiniteness. Bell v. Hatfield [Ky.] 89 S. W. 544. A contract to pay for services or boarding may be binding though the amount is not fixed. If the sum is not expressed it will be implied to be the value. Shadle's Estate, 30 Pa. Super. Ct. 151. Agreement between two brothers under which one of them took their father into his family and the other agreed to "stand my share of the expense" of maintenance held valid, though the amount to be paid was not fixed at any definite sum. Compton's Estate, 30 Pa. Super. Ct. 605.

Contracts held void for uncertainty: Deed of personalty, where description of property sold is so general that it cannot be distinguished from the general mass of articles of a similar nature. Ferguson v. McCowan, 124 Ga. 669, 52 S. E. 886. A paper requesting plaintiff to deliver 60 days' use of a horse, cart and driver, at $3.50 per day, "as directed," did not constitute a contract where no directions had ever been given before its revocation by the signer. Durkin v. New York, 96 N. Y. S. 1059. An agreement to execute a bond for title, imposing no obligation upon the other party but which failed to fix the rate of interest, held not enforceable as a unilateral contract. Kaplan v. Whitworth [La.] 40 So. 723. An acceptance of an indefinite offer does not create a contract. An order of "Belt buckles or pins from 15 cents to $2.00 each, charms and lockets from 15 cents to $2.50 each," etc., not specifying the quantity, quality, or price of anything, except that the entire order is to amount to a certain sum, is too indefinite. Price v. Atkinson [Mo. App.] 94 S. W. 816. An acceptance of such order and selection of goods by the offeree does not render the contract definite. Id.

10. An assignment of commissions not yet ascertained is not void because no particular amount is specified where the method of ascertainment is clear. Bank of Yolo v. Bank of Woodland [Cal. App.] 86 P. 820. Contract for sale of "a certain lot of timber situate on Rhodes Branch, about three miles from Williamsburg" held not void for vagueness, the parties having effectuated it by the delivery and acceptance of a large quantity of timber. Bradford v. Huffman [Ky.] 88 S. W. 1057. A contract is sufficiently definite and certain if the amount of work to be done or goods to be furnished is to be regulated by the wants of an established business. Contract whereby common carrier agreed to pay for handling all its business at a specified point at specified rates. Eastern R. Co. v. Tuteur [Wis.] 105 N. W. 1067.

11. See 5 C. L. 686.

12. See, also, § 2, ante, Mutual Promises. Where a contract is optional on one side and not mutual, it is not binding for want of a

sufficient consideration. Emerson v. Pacific Coast & Norway Packing Co. [Minn.] 104 N. W. 573. Where the consideration for the promise of one party is the promise of the other, there must be absolute mutuality of engagement, so that each party has the right to hold the other to a positive agreement. Both must be bound or neither will be. Smokeless Fuel Co. v. Seaton [Va.] 52 S. E. 829. An executory contract in which the promises are all on one side is unilateral and unenforceable. Eastern R. Co. v. Tuteur [Wis.] 105 N. W. 1067.

Contracts held mutual: A contract for the sale of real estate reciting the receipt of $500, deed to be delivered within 30 days, at which time the remaining purchase money was to be paid or a mortgage given therefor, the $500 to be forfeited if purchaser failed. Winch v. Edmunds [Colo.] 83 P. 632. Contract whereby owner of land consented to change of location of railroad across it, and agreed to convey additional land for right of way on payment of specified sum per acre, subject to same conditions as to fencing, etc., as were contained in original deed. Detroit United R. Co. v. Smith [Mich.] 13 Det. Leg. N. 228, 107 N. W. 922. Contract for the sale of corporate stock to be paid for out of dividends and earnings and from other sources at option of buyer. White v. Cooper Co., 7 Ohio C. C. (N. S.) 114. Contract leasing mineral lands which unconditionally obligates the lessee to sink a well within a specific time. Great Western Oil Co. v. Carpenter [Tex. Civ. App.] 15 Tex. Ct. Rep. 970, 95 S. W. 57. Immaterial that failure to sink the well gives the lessor the option of canceling the lease unless the lessee elects to pay an annual rent. Id. Also immaterial that the thing to be done is of such a nature that specific performance can be invoked or damages for breach ascertained. Id. A contract by which plaintiffs agreed to print, bind, and deliver to defendants the current volumes of Texas Reports, and defendants in consideration thereof, promised to pay plaintiffs certain amounts at stated times. Jones & Co. v. Gammel-Statesman Pub. Co. [Tex. Civ. App.] 94 S. W. 191. Contract reciting that defendant had sold to plaintiff 1,000 to 1,500 tons of coal at a certain price to be shipped as ordered between specified dates, seller being bound to deliver and buyer to receive coal or pay the price therefor. Smokeless Fuel Co. v. Seaton [Va.] 52 S. E. 829. Contract whereby jobber agreed to sell only goods of a certain manufacturer and thus build up a market, the manufacturer to furnish all that he needed, though jobber did not agree to take any definite amount. Federal Iron & Brass Bed Co. v. Hock [Wash.] 85 P. 418. Contract whereby defendant agreed to do all common carrier's freight handling at certain terminal, and latter agreed to pay therefor at certain rates at fixed intervals, and gave defendant a right to a renewal of the contract if his performance was satisfactory, a promise on the carrier's part to furnish freight being implied. Eastern R. Co. v. Tuteur [Wis.] 105 N. W. 1067. Statement in preamble of bond given to secure performance that defendant had contracted to handle the freight which plaintiff "requests him to handle," held not to show that plaintiff was not obligated to furnish freight, but to refer to contingency that certain lake carriers might elect to handle freight themselves as they had a right to do. Id. Contract whereby officers of a corporation agreed that if plaintiff would accept its bonds in part payment of purchase price of machinery sold to it they would purchase them at par at any time within six months, plaintiff's consent to sell the bonds being presumed. Erie City Iron Works v. Thomas, 139 F. 995. Oil and gas lease resting upon executed and valid consideration, viz., one dollar, the receipt of which was acknowledged, held not wanting in mutuality because reserving to lessee the option to terminate it without giving similar option to lessor. Brewster v. Lanyon Zinc Co. [C. C. A.] 140 F. 801.

Contracts held lacking in mutuality: A contract by a married woman during her husband's life to convey, on request, land owned by the husband, though the husband's will gave her an estate in the land. Sayer v. Humphrey, 216 Ill. 426, 75 N. E. 170. Contract binding one party to buy but not obligating the other to sell. Joseph Schlitz Brewing Co. v. Komp, 118 Ill. App. 566. An agreement whereby one of the parties binds himself to make to the other a bond for title, but the language of which imposes no obligation upon the other party. Kaplan v. Whitworth [La.] 40 So. 723. Contract obligating client to sell interest in land to attorneys, but not obligating latter to purchase. Lipscomb v. Adams, 193 Mo. 530, 91 S. W. 1046. Contract under which one is to cut and deliver logs at a specific price, but which does not bind him to cut any definite amount and leaves him free to cease cutting at any time. Campbell v. American Handle Co. [Mo. App.] 94 S. W. 815. A paper merely asking plaintiff to deliver a horse and driver did not impose any obligation on plaintiff and was unilateral and devoid of consideration. Durkin v. New York, 96 N. Y. S. 1059. Provision in contract for sale of cotton that seller would take cotton off of buyer's hands on day of delivery at market price. Rankin v. Mitchem [N. C.] 53 S. E. 854. An agreement by the owner of a ground rent to reduce the rate of rent in consideration that the tenant should permit the ground rent to remain upon the property, where no term was agreed upon during which the rent was to remain. Fidelity Trust Co. v. Carson, 28 Pa. Super. Ct. 418. An order to ship trees, containing no agreements on plaintiff's part, held not a contract, though called such and stating that it was not subject to countermand, and the same could be countermanded before accepted. Mayo v. Koller, 28 Pa. Super. Ct. 91. Provision in contract for the publication of current law reports that plaintiffs further agreed to print, bind, finish, and make electrotype plates for such back numbers of the reports as defendants "might direct," on the same basis as the current volumes, when the conditions were the same. Jones & Co. v. Gammel-Statesman Pub. Co. [Tex. Civ. App.] 94 S. W. 191. Contract whereby plaintiff agreed to prepare designs and advertising matter for defendant, and defendant agreed that, if he approved such designs, approval was to constitute an order for work in certain specified quantities and at specified prices, un-

(§ 3) *D. Public policy in general.*[14]—A contract belonging to a class reprobated by public policy will be declared illegal, though no actual injury may have resulted to the public in the particular instance, the test being the evil tendency of the contract and not its actual result.[15] The presumption is that a party is not restricted by public policy in contracting with respect to a particular matter.[16] There is no public policy or public interest to which courts may give precedence over a valid statute.[17]

A contract valid elsewhere will not be enforced if condemned by positive law or inconsistent with the public policy of the state, the aid of whose tribunals is invoked for the purpose of giving it effect.[18] Neither will the courts of a state enforce a contract of sale made in another state, and valid where made, if the purpose of both parties was to violate the laws of the forum, and the vendor has done some act in furtherance of such purpose.[19]

Agreements between holders of lottery tickets to divide their winnings,[20] a contract whereby the prosecution or abandonment of proceedings for the appointment of a guardian for an alleged incompetent is made a source of profit to the person instituting them,[21] contracts necessarily tending to require agents to serve two principals of antagonistic interests,[22] or prohibiting a common carrier from transporting a particular class of goods except for a designated person,[23] or giving di-

less he should exercise his privilege of increasing or decreasing said quantities at a proportional increase or decrease of price, held unilateral and not binding on defendant until he approved designs. American Fine Art Co. v. Simon [C. C. A.] 140 F. 529.

13. Where a lessor agrees to give his written consent to an assignment of the lease if the lessee finds an acceptable tenant, money and time spent in securing such a tenant imports a mutuality which relates back to beginning. Underwood Typewriter Co. v. Century Realty Co. [Mo. App.] 94 S. W. 787. Where defendant agreed to sell such quantity of 10,000 sets of wheels as plaintiff might need, the minimum quantity to be 5,000 sets, each order given defendant above the minimum quantity constituted an acceptance pro tanto so as to render defendant liable for failure to deliver. Connersville Wagon Co. v. McFarlan Carriage Co. [Ind.] 6 N. E. 294. Written contract signed by both parties whereby defendant appointed plaintiffs its exclusive agents for a definite term to sell a certain per cent of its pack of fish at an agreed commission, and plaintiffs obligated themselves to use their best efforts to sell the same, in pursuance of which they performed services and incurred expenses. Emerson v. Pacific Coast & N. Packing Co. [Minn.] 104 N. W. 573. Contract for the sale of corporate stock, to be paid for out of dividends and earnings and from other sources at option of buyer, held to show an executed contract, and it could not be rescinded at the option of one of the parties without the other's consent. White v. Cooper Co., 7 Ohio C. C. (N. S.) 114.

14. See 5 C. L. 688.

15. Edwards v. Goldsboro [N. C.] 53 S. E. 652. The legality of the contract is to be determined from its character and not by what the parties do or attempt to do in carrying it out. Instruction that, before jury could find contract void as against public policy as intended to deceive people into buying inferior coal, there must be evidence that such was the object of making the contract, and that there was some effort to carry out the fraud, held erroneous. Luhrig Coal Co. v. Jones & Adams Co. [C. C. A.] 141 F. 617.

16. Presumption is that a mortgagor may mortgage the rents accruing during the period of redemption. Schaeppi v. Bartholomae, 118 Ill. App. 316.

17. Enforcement of contract whereby railroad has located general offices, etc., in certain city in consideration of receiving lands, etc., from city and citizens, not contrary to public policy, in view of Rev. St. 1895, art. 4367, requiring railroad to keep and maintain shops, etc., at place where it has contracted to keep them for a valuable consideration received. City of Tyler v. St. Louis S. W. R. Co. [Tex.] 14 Tex. Ct. Rep. 839, 91 S. W. 1.

18, 19. See Conflict of Laws, 5 C. L. 610.

20. In view of statute condemning lotteries and forbidding sale of lottery tickets. Crutchfield v. Rambo [Tex. Civ. App.] 86 S. W. 950. Even if parties be regarded as partners, court will not decree an accounting between them. Id.

21. The dismissal by a child of proceedings instituted by her for the appointment of a guardian for her mother, on the ground of the incompetency of the latter, is not a valid consideration for a promise made by the mother to such child. Simmons v. Kelsey [Neb.] 107 N. W. 122.

22. Employment by firm of contractors doing work for railroad company of latter's engineer held not contrary to public policy, it appearing that the work which he was employed to do and did do was not in conflict with his work for and duty to the company, and that no effort was made to conceal his employment from the company and that it knew of it. Condon v. Callahan, 115 Tenn. 285, 89 S. W. 400.

23. Agreement by partnership, on obtain-

rectors of a corporation a part of the profits of contracts awarded by them for the corporation,[24] or necessarily contemplating that the directors of a corporation to be formed will be deprived of the judgment and discretion in matters coming within the scope of their duty,[25] or delegating corporate powers,[26] or tending to deceive the public and minority stockholders as to the value of corporate stock,[27] or to otherwise deprive them of their rights,[28] or against the policy and spirit of particular statutes,[29] or involving the use of public money for private purposes,[30] or for collusive bidding on private works and for a division of the profits,[31] have been held void as contrary to public policy. Contracts which have a tendency to destroy free competition in the bidding at judicial sales are contrary to public policy when they are made for that purpose,[32] but this rule is limited and controlled by the facts of the particular case, and the contract is valid if the rights of the beneficiaries of the sale are not trespassed upon by an unlawful conspiracy which has the effect, or tends to have the effect, of permitting the acquisition of the property below its market value.[33] A contract between a debtor and one to whom he conveys property in trust for creditors, which tenders to the trustee an inducement to injure the rights of the creditors, is void.[34] By statute in Louisiana, a contract whereby one gives away his property without reserving enough for his own subsistence, subject to the condition or charge

ing right of way for railroad, to ship no bark over such road, except to him, unless he refused to pay the market price therefor, held invalid where it appeared that he knew when contract was made that road was to operate as a common carrier, even though there was no agreement that it was to be so operated. Merriman v. Cover, 104 Va. 428, 51 S. E. 817.

24. Contract whereby defendant, who had entered into contract with railroad company to construct road for a certain per cent of the cost, agreed to pay five out of the seven directors of the company two-thirds of such per cent. Stanton v. Sturgis, 140 F. 789.

25. Agreement by defendants to organize a corporation and that a part of its stock should be transferred to plaintiff, and the balance distributed in a certain manner, held not invalid as depriving the board of directors of a voice as to the propriety of the transaction. Electric Fireproofing Co. v. Smith, 99 N. Y. S. 37.

26. Contract whereby partnership was to cause or procure a corporation to purchase certain properties and to issue its bonds and stock therefor, etc., held not void as against public policy as empowering plaintiff to sell charter of a corporation and delegating corporate powers to partnership, it not appearing that rights of third persons would be injuriously affected, or that the use of illegal means was contemplated. Borland v. Prindle, Weeden & Co., 144 F. 713.

27. Contract whereby a bank advanced money for the purchase, by a corporation, of its own stock, so as to deceive the public as to its value, held void as against public policy, and the bank could not recover the money. Maryland Trust Co. v. National Mechanics' Bank, 102 Md. 608, 63 A. 70.

28. Contract whereby defendants agreed to purchase all the stock of a private corporation, the shares to remain in escrow for 15 months until payment was made, defendants to take possession of the management of the company and operate the property in the meantime, held not contrary to public policy, there being no question of the rights of minority stockholders and no third persons being injuriously affected. Borland v. Prindle, Weeden & Co., 144 F. 713.

29. A contract by a homesteader to convey the homestead as soon as he acquired title from the government is illegal and void as against the policy and spirit of the homestead law. Jackson v. Baker [Or.] 85 P. 512.

30. By a city to donate money to a corporation if it would maintain a factory there. No recovery on the corporation bond. Collier Shovel & Stamping Co. v. Washington [Ind. App.] 76 N. E. 122. Though in fact it has no bad effect. Bolton v. Amsler, 95 N. Y. S. 481, 482.

31. A contract whereby two firms agreed to create a false impression of competitive bidding for dredging contract, the successful bidder to divide profits with the other. Pittsburgh Dredging & Const. Co. v. Monongahela & W. Dredging Co., 139 F. 780.

32. Mallon v. Buster [Ky.] 89 S. W. 257.

33. Agreement between bidders, who each wished to buy but a part of the tract offered, after bidding up the price above the actual value of the property, to stop bidding against each other and buy the land together, each taking the part he desired, held valid. Mallon v. Buster [Ky.] 89 S. W. 257. An agreement between several persons, whereby one agrees to buy in property at a foreclosure sale for the benefit of all, is not against public policy unless entered into for the purpose of stifling competitive bids. Starkweather v. Jenner, 27 App. D. C. 348. Will not be presumed for the purpose of destroying competition. Id.

34. Haswell v. Blake [Tex. Civ. App.] 14 Tex. Ct. Rep. 394, 90 S. W. 1125. Any contract whereby a trustee for the benefit of creditors is placed under direct inducement to violate the trust and confidence which

that the donee shall thereafter maintain him, is void.[35] An agreement to use one's influence to induce a person negotiating for the purchase of real estate to complete the purchase,[36] a provision in the constitution of a mutual benefit society that no will shall be permitted to control the appointment or distribution of, or rights of any person to, any benefit payable by the order,[37] a contract between stockholders to vote as a unit for the purpose of controlling the management of a corporation,[38] a contract to pay experts for services rendered in familiarizing themselves with certain properties and their values so as to be able to testify in a pending case,[39] an agreement between the parties to a suit for the infringement of a patent as to terms of settlement in case the patent is sustained by the court,[40] contracts between individuals having for their direct object the acquisition of public lands in a lawful manner,[41] and contracts to employ only union labor,[42] have been held to be valid. A contract is not invalid because not to be performed until after the death of the promisor.[43]

Contracts to submit disputed questions to the arbitrament of persons or tribunals other than the regularly organized courts are generally held to be valid and enforceable,[44] though they are made void by statute in some states if the award is to be final.[45] Such provisions are generally found in building contracts,[46] or contracts of insurance,[47] and reference should be had to the topics dealing with those subjects.

There is a conflict of authority as to the validity of provisions limiting the time within which an action may be brought on the contract. Some courts hold

they are authorized to repose in him, and which places him under wrongful influence and offers to him a temptation which may injuriously affect the rights of creditors. Agreement between solvent debtor and one to whom he conveys property in trust for creditors that trustee will settle indebtedness as cheaply as he can and give debtor the benefit of the discounts. Id.

35. Civ. Code art. 1497. Ackerman v. Larner [La.] 40 So. 581. A manual gift, omnium bonorum, on condition that the donee maintain the donor, will be dealt with as an onerous donation, and not as a commutative contract. Id.

36. Plaintiff could recover compensation. Fitzsimmons v. Hand, 27 Pa. Super. Ct. 598. Whether such agreement had been made was for the jury and its finding was conclusive on appeal, Id.

37. Thomas v. Covert, 126 Wis. 593, 105 N. W. 922.

38. Is enforceable so long as the parties retain their original interest and no other rights intervene. Gray v. Bloomington & N. R. Co., 120 Ill. App. 159.

39. Does not tend to prevent or obstruct public justice. Lincoln Mountain Gold Min. Co. v. Williams [Colo.] 85 P. 844.

40. Prior agreement by which parties to suit for infringement of patent mutually agree upon terms of settlement on condition that the patent is sustained by the court cannot operate to deprive court of equity of jurisdiction to hear and determine suit for injunction and for damages for infringement. Victor Talking Mach. Co. v. American Graphophone Co., 140 F. 860.

41. Fact that parties contract in regard to land which they suppose belongs to the vendor, but which in fact belongs to state, does not vitiate contract. Williams v. Finley [Tex.] 14 Tex. Ct. Rep. 762, 90 S. W. 1087.

42. A contract requiring work to be done by union laborers is not void as a matter of law. Court will not take judicial notice of principles binding those belonging to a labor union. Plea that plaintiff failed to use such laborers not demurrable. Birmingham Paint & Roofing Co. v. Crampton [Ala.] 39 So. 1020. Contract whereby an employer agrees not to employ persons who are not members of a certain labor union and to abide by the rules of the union. Note given as collateral, held enforceable. Jacobs v. Cohen, 183 N. Y. 207, 76 N. E. 5, rvg. 99 App. Div. 481, 90 N. Y. S. 854.

43. An agreement to establish a scholarship at one's death in consideration of promise of $1,000 at such time. Buchtel College v. Chamberlin [Cal. App.] 84 P. 1000. An agreement by a father to hold and invest for the benefit of his children a part of the income from a life estate owned by him in consideration of a conveyance of land by the children, to his second wife, created a continuing trust from its date and was not objectionable as not taking effect until after the death of the father. Case v. Collins [Ind. App.] 76 N. E. 781.

44. Complainants held bound by a board of trade rule for the settlement of disputes as to who was entitled to margins. Pacaud v. Waite, 218 Ill. 138, 75 N. E. 779.

45. Under the provisions of section 3229, Rev. St., a provision in a contract to submit disputes arising thereunder to arbitration, the award to be final, is void. Huber v. St. Joseph's Hospital [Idaho] 83 P. 768.

46. See Building and Construction Contracts, 7 C. L. 480.

47. See Insurance, 6 C. L. 69; Fraternal Mutual Benefit Associations, 5 C. L. 1523.

them invalid as attempts to vary the statute of limitations,[48] while others hold them to be valid if the limitation is reasonable.[49] They are forbidden by statute in some states.[50]

Provisions requiring notice to be given of any claim for damages for breach of contract as a condition precedent to the right to sue thereon are generally held to be valid if reasonable.[51] The matter is regulated by statute in some states.[52]

(§ 3) *E. Limitations of liability.*[53]—Contracts between master and servant relieving the former from liability for the negligent injury of the latter are void.[54] So too, common carriers cannot by contract relieve themselves from liability for their own negligence, though they may, for a valuable consideration, limit their common law liability.[55] Irrigation companies authorized to exercise the power of eminent domain are quasi public corporations, and cannot limit their liability to the public by contract.[56]

(§ 3) *F. Relating to marriage or divorce.*[57]—Any agreement conditioned on the obtainment of divorce, or intended or calculated to facilitate its obtainment,[58]

48. A man may not by contract deprive himself of the right to apply to the courts for the protection of his person, property, or liberty, in the manner or within the time prescribed by public law. Contract limitation in insurance policy held void. Grand View Bldg. Ass'n v. Northern Assur. Co. [Neb.] 102 N. W. 246.

49. See 5 C. L. 689, n. 64.

50. See 5 C. L. 689, n. 62.

51. A provision in a contract for transmission of a telegram, requiring the presentation of any claim for damages in writing within 60 days after the message was filed, is reasonable and valid. Thorp v. Western Union Tel. Co. [Mo. App.] 94 S. W. 554.

52. Provision in contract hiring brakeman that railroad shall not be liable for personal injuries unless it is notified thereof within 30 days held in violation of Code § 2071, providing that railroads shall be liable for damages sustained by employes and others in consequence of negligence, etc., of agents or other employes, and that no contract restricting such liability shall be legal. Mumford v. Chicago, etc., R. Co., 128 Iowa, 685, 104 N. W. 1135. By statute in Texas, no stipulation in any contract requiring notice to be given of any claim for damages as a condition precedent to the right to sue thereon is valid unless it is reasonable, and any stipulation fixing the time within which such notice shall be given at a less period than ninety days is void. Rev. St. 1895, art. 3379. Chicago, etc., R. Co. v. Thompson [Tex. Civ. App.] 15 Tex. Ct. Rep. 229, 93 S. W. 702. Such stipulations refer to the remedy and will be enforced only when shown to be reasonable, and not violative of the statute, regardless of the law of the place where the contract was made. Chicago, etc., R. Co. v. Thompson [Tex. Civ. App.] 15 Tex. Ct. Rep. 229, 93 S. W. 702. Provisions in contract for shipment of live stock requiring giving notice of damages, to file claim therefor, etc., held so interdependent as to be inseparable, and as a whole to be unreasonable and void. Pecos, etc., R. Co. v. Evans-Snider-Buel Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 199, 93 S. W. 1024.

53. See 5 C. L. 690.

54. See Master and Servant, 6 C L. 521.

55. See Carriers, 7 C. L. 522. Code § 2071, making railroads liable for injuries to employes, etc., due to negligence of other employes, and providing that no contract limitation of such liability shall be valid, is not unconstitutional as interfering with the right to contract. Mumford v. Chicago, etc., R. Co., 128 Iowa, 685, 104 N. W. 1135.

56. Colorado Canal Co. v. McFarland [Tex. Civ. App.] 15 Tex. Ct. Rep. 848, 94 S. W. 400.

57. See 5 C. L. 690.

58. Barngrover v. Pettigrew, 128 Iowa, 533, 104 N. W. 904. Contract between husband, whose wife was suing for divorce, and attorney and detective, whereby in consideration of a specified sum the latter were to procure evidence and secure a divorce for the husband. Id. Agreement whereby wife gave husband note executed by third party to induce him not to interpose a defense to her suit for divorce. Johnson v. Johnson's Committee [Ky.] 90 S. W. 964. An agreement by a wife to compensate an attorney for services in an action by her against her husband for separation by giving the attorney a percentage of what she may recover for her support and maintenance. In re Brackett, 99 N. Y. S. 802. The fact that a separation agreement makes provision for the contingency of a possible future divorce does not of itself make it unlawful, provided no premium is placed upon the procuring of such divorce. Trust Co. v. Nash, 98 N. Y. S. 734. Separation agreement to pay the wife a certain sum per month, so long as she did not remarry, to continue though the wife should obtain an absolute divorce provided she was not awarded more than $150 per month alimony terminable on remarriage, held valid. Trust Co. v. Nash, 98 N. Y. S. 734. A husband who, by written agreement, receives $4,000 from his wife, and agrees that she may take the children, leave and obtain a divorce at her pleasure, cannot maintain an action against those whom he charges with carrying out said agreement and procuring such divorce. MacBride v. Gould, 3 Ohio N. P. (N. S.) 469.

or tending to procure a separation of husband and wife, are void,[59] but a contract by the husband looking to the support of the wife after separation is valid.[60]

(§ 3) *G. Contracts tending to promote immorality*[61] are void.[62]

(§ 3) *H. Litigious agreements.*[63]—Contracts tending to prevent the settlement of cases are void.[64] Stipulations for attorney's fees for foreclosure of a mortgage are valid but will be enforced only to reimburse the creditor.[65] The validity of contracts making the fees of attorneys contingent on the successful outcome of litigation is treated elsewhere.[66]

(§ 3) *I. Compounding offenses.*[67]—Contracts having for their object the compounding of felonies, or the stifling of public prosecutions of any kind, are void.[68]

(§ 3) *J. Interfering with public service.*[69]—Agreements which tend to injure the public service are opposed to the policy of the law and will not be enforced.[70] Thus, contracts to use one's influence to secure the election or appointment of a person to a public office,[71] or tending to restrain or control the unbiased judgment of public officers,[72] or imposing upon them duties inconsistent with those

59. Antenuptial agreement attempting to fix the husband's liability for alimony in case of separation. Watson v. Watson [Ind. App.] 77 N. E. 355. Contract between husband and wife, who were living apart, whereby former agreed that, in consideration of wife's dismissing a suit for divorce and alimony previously instituted against him, and for purpose of settling difficulties between them, if she should at any time thereafter leave him, or be unable to live with him for any good cause, she should receive out of his estate a specified sum per month in full discharge of her contingent right of dower, and in full for her support, and that of her minor children, held valid, particularly since code allowed action for alimony without a suit for divorce, and grounds of separation were sufficient to warrant allowance independent of the contract, and the amount fixed by the contract was no greater than would be allowed if there had been no contract. Woodruff v. Woodruff [Ky.] 90 S. W. 266.

60. Where separation has actually taken place, an agreement thereafter made between a husband and a wife whereby the former engages to pay the latter a certain sum for the maintenance of herself and children. Effray v. Effray, 110 App. Div. 545, 97 N. Y. S. 286. Contract between husband and wife pending a divorce suit, providing that the husband shall pay a weekly sum for support of their child in consideration that she release certain claims, and which contract is not to affect their right to a divorce. Ward v. Goodrich [Colo.] 82 P. 701.

61. See 5 C. L. 691.

62. See Hammon on Contracts, § 226, p 389.

63. See 5 C. L. 691.

64. See, also, Champerty and Maintenance, 7 C. L. 621. Contract prohibiting client from settling or compromising claim without the attorney's consent, held void. Papineau v. White, 117 Ill. App. 51. Provision that client should not settle or dismiss the case prior to the rendition of judgment when the attorney's lien attaches, held void. Jackson v. Stearns [Or.] 84 P. 798. Whether an agreement between an attorney and his client that the latter will not compromise without the consent of the former is valid depends on the circumstances of each particular case. Provision in contract whereby attorneys were to have half the land for services in suit to recover it, held valid. Lipscomb v. Adams, 193 Mo. 530, 91 S. W. 1046.

65. In mortgages and other securities. Scott v. Cart, 24 Pa. Super. Ct. 460.

66. See Attorneys and Counselors, 7 C. L. 319.

67. See 5 C. L. 691.

68. A mortgage is not invalidated because given to stop a threatened criminal prosecution of the mortgagor's husband where it is not shown that the mortgagee or his counsel agreed to abandon or suppress the prosecution if the mortgage was given. Moyer v. Dodson, 212 Pa. 344, 61 A. 937. Check given in pursuance of contract not to prosecute maker's son, held void. McNeese v. Carver [Tex. Civ. App.] 13 Tex. Ct. Rep. 820, 89 S. W. 430. Request to charge held sufficient to require presentation of issue as to whether agreement to dismiss criminal prosecution was part of consideration. Id. Where a member of a building association, at the solicitation of other members of the association and acting in common with them, cancels the credit which he has in the association with the direction that the amount thereof be used to make good the shortage of the secretary of the association, he cannot thereafter maintain a suit to set aside the cancellation of his credit on the ground that the contract which he thereby entered into was illegal because compounding a felony. Richter v. Phoenix Bldg. & Loan Co., 7 Ohio C. C. (N. S.) 360. Agreements to pay for the return of stolen property are valid, provided they do not compound a felony. Plaintiff could recover from the owner an amount advanced in order to obtain a watch believed to have been stolen. Schirm v. Wieman [Md.] 63 A. 1056.

69. See 5 C. L. 692.

70, 71. Schneider v. Local Union No. 60, United Ass'n Journeymen Plumbers, etc. [La.] 40 So. 700.

72. Contract to locate public buildings

which they owe to the public,[73] or restricting competition by limiting bidders for public service to those of a special class,[74] have been held to be void. Lobbying contracts are void,[75] but contracts for the preparing and presenting of arguments to legislative committees or other proper authority are not.[76] An agreement by one of several persons elected aldermen to take the short term in consideration of his being elected president of the board is valid.[77]

Contracts materially limiting the right of railroads to locate and relocate their stations as the necessities and convenience of the public may require,[78] or contracts with officers of a railroad company, for their personal benefit, tending to induce them to select a particular location for the road, are void,[79] but a subscription contract whereby one agrees to pay a railroad company a specified sum on condition that it constructs its line to a given point within a given time, and locates and maintains a depot there, is valid.[80] An agreement by the proprietor of a hotel not to perform a duty imposed on him by law is void.[81]

near certain property in consideration of payments made by the owner thereof, particularly in view of Revisal 1905, § 2916, requiring authorities of a town to make such orders for disposition or use of its property as the interest of the town may require. Edwards v. Goldsboro [N. C.] 53 S. E. 652. It is against public policy that an officer having the power of appointment to office should be deprived of his best judgment by a contract previously made or an obligation previously assumed. Expulsion of members from plumbers' union because, as a board of examiners of plumbers, they failed to appoint as inspector a member recommended by the union, held unlawful. Schneider v. Local Union No. 60, United Ass'n Journeymen Plumbers, etc. [La.] 40 So. 700.

73. Plaintiff could not recover for labor performed for defendant contractors in the construction of a road while he was acting as highway superintendent. Burns' Ann. St. 1901, § 2136. Cheney v. Unroe [Ind.] 77 N. E. 1041. The question of actual prejudice to the public is immaterial. Id.

74. Provision in contract with county board for publication of its journal that the printer's union label should be used, held void. People v. Edgcomb, 98 N. Y. S. 965.

75. A note supported by a consideration of a loan of money to enable the promisor to engage in "lobbying." Le Tourneux v. Gilliss [Cal. App.] 82 P. 627. Immaterial that the lobbying was not carried on in such a manner as to constitute a crime under the statute. Id. Contract for services in bringing certain land to the attention of congress as a suitable place for proposed building. Hazelton v. Miller, 202 U. S. 71, 50 Law. Ed. —. Immaterial that the contract was contingent upon the rendering of services and that the services actually rendered were legitimate. Id. Where by contract a party is to receive 25% of certain fees after deducting clerk hire, expenditures for lobbying services cannot be allowed. Waggaman v. Earle, 25 App. D. C. 582.

76. Agreement for purely professional services, such as collecting facts, preparing and submitting to Indians and proper authorities of the government arguments upon the merits of the claims of those holding Indian lands purchased from government for a reduction, and upon the justice and advisability of a reduction of purchase price of such lands as may be necessary and proper to secure such reduction is valid. Stroemer v. Van Orsdel [Neb.] 107 N. W. 125. Fact that agent or attorney, in carrying out his agreement and as incidental thereto, appears before committee of both houses of congress and explains bill prepared by secretary of the interior, authorizing him to grant reduction in price of Indian lands, does not render contract void, or preclude his recovery of compensation fixed in contract for his services. Id.

77. Five members of a board of aldermen having been elected without designating which of them was to fill a short term. Hobbs v. Uppington [Ky.] 89 S. W. 128.

78. A note given in consideration that a depot be located at a particular place is against public policy. Enid Right of Way & Townsite Co. v. Lile [Okl.] 82 P. 810. Immaterial that it does not prohibit the locating of other depots nearby. Id. Also immaterial that the note was not given to the railroad, but to one supposed to have influence in the selection of location. Id. Held that equity would not enjoin prosecution of action to eject railroad companies from right of way for alleged breach of condition in deed requiring it to stop certain trains on ground that condition was contrary to public policy as being a burden on the public, where it was not shown to be such a burden, and company sought relief solely on ground that it had not violated the condition. Gray v. Chicago, etc., R. Co. [C. C. A.] 140 F. 337.

79. A note payable to a director or officer of a railroad for his personal benefit conditioned that the road be built to a certain city within a given time. McGuffin v. Coyle [Okl.] 85 P. 954.

80. Piper v. Choctaw Northern Townsite & Imp. Co. [Okl.] 85 P. 965.

81. Contract between two competing proprietors of hotels in a town, whereby one of them agreed to keep his hotel closed for three years, reserving the right to rent the same for offices and to roomers, and whereby the other agreed to pay a specified sum monthly to the former during the three years, is in restraint of trade and illegal,

(§ 3) *K. Restraint of trade.*[82]—Contracts, whereby one, for a valuable consideration, agrees not to engage in a particular business or trade for a limited time and within a limited territory, are generally held to be valid if reasonable,[83] the test of reasonableness being whether the restraint imposed is such only as to afford a fair protection to the interests of the promisee, and is not so large as to interfere with the interests of the public,[84] each case being considered in the light of its own facts and circumstances.[85] The motive of the covenantee is immaterial.[86] Statutes

since a hotel is a quasi public institution. Clemons v. Meadows [Ky.] 94 S. W. 13.

82. See 5 C. L. 693.

83. The validity of such contracts depends upon their reasonableness as between the parties. Camors-McConnell Co. v. McConnell, 140 F. 412; Hartman v. Parks & Sons Co., 145 F. 358. Are valid if reasonable and designed merely to protect the good will of the business. Turner v. Abbott [Tenn.] 94 S. W. 64. Where the restraint is limited and there is a valuable consideration to support it, the contract is valid if the restraint is reasonable as between the parties and not injurious to the public by reason of its effect upon trade. Merriman v. Cover, 104 Va. 428, 51 S. E. 817.

84. Agreement by partnership, on obtaining right of way for railroad from plaintiff, to ship no bark over such road except to him, unless he refused to pay market price therefor, held not invalid on its face, since it did not appear that the road was to be a common carrier. Merriman v. Cover, 104 Va. 428, 51 S. E. 817. Restraint will be held valid where it appears to have been for just and honest purpose, for protection of legitimate interests of party in whose favor it is imposed, reasonable as between them, and not specially injurious to the public. Cottington v. Swan [Wis.] 107 N. W. 336.

85. Hence facts and circumstances, in so far as they do not add to, vary, or otherwise alter the writing sued on, may be proved, and hence may be averred in the declaration, and when so averred may be considered in determining the validity of the contract pleaded on demurrer. Merriman v. Cover, 104 Va. 428, 51 S. E. 817. Each case is decided upon its own facts, the test being whether the contract is inimical to the public interest. Over v. Byram Foundry Co. [Ind. App.] 77 N. E. 302. The question whether a given contract is in restraint of trade depends as much upon the nature of the business said to be restrained as upon the elements of time and place. American Brake Beam Co. v. Pungs [C. C. A.] 141 F. 923.

Contracts held valid: A contract providing that the licensee of a patent might terminate his obligation to pay royalty upon certain conditions, one of which was that he should not use a similar machine in his business until the patent expired. Warth v. Loewenstein, 121 Ill. App. 71. Contract by the vendor of a printing press not to sell similar presses to others to be used in the same way. New York Bank Note Co. v. Kidder Press Mfg. Co. [Mass.] 78 N. E. 463. An agreement, as incidental to the sale of property, as a business, that the seller will not enter into a competing business. Camors-McConnell Co. v. McConnell, 140 F. 412. Collateral agreement reciting sale of patent and whereby inventor agreed not to become connected with any company selling brake beams in the U. S. for the life of the patent, and giving him right to terminate such agreement on repaying consideration, held not unlawful as in restraint of trade or illegally restricting competition or creating a monopoly, and hence inventor could recover purchase price even if collateral agreement was real consideration for sale. American Brake Beam Co. v. Pungs [C. C. A.] 141 F. 923. The good will of a trade or business of a partnership and its beneficial interests under an agreement not to engage in a like business in the same community may be assigned by retiring partner to the one remaining in the business. Dissolution of firm and transfer of business and good will to one member held not to relieve defendant from injunction restraining him from violating contract not to engage in similar business in same city so long as firm continued in the business in certain building. Markert & Co. v. Jefferson, 122 Ga. 471, 50 S. E. 398. An agreement by vendors of a bank to quit the banking business and to not start another bank in the same town so long as plaintiff owned the bank sold, held broken by one of the vendors subscribing to stock in a new bank in the same town and actively participating in the business so as to render both the vendors liable. Merica v. Burgett [Ind. App.] 75 N. E. 1083. Contract for sale of business of insurance agent providing that latter will not again engage in same business in same town. Wolverton v. Bruce [Ind. T.] 89 S. W. 1018. Where one leases storehouse for five years and agrees not to engage in competing business for that length of time, five years period begins to run from date of contract. Long v. O'Bryan [Ky.] 91 S. W. 659. Agreement by vendor of lumber business not to engage in such business within radius of 25 miles for 25 years. Broadbrooks v. Tolles, 99 N. Y. S. 996. Contract not to engage in furniture business in certain city for three years. Bradford v. Montgomery Furniture Co., 115 Tenn. 610, 92 S. W. 1104. Good will sold to defendants by plaintiffs and accompanying absolute contract not to engage in furniture business held to be valuable property rights which were assignable, and plaintiffs were not released from contract because defendants subsequently made over their entire business to a corporation in which they became largely interested, particularly where they subsequently withdrew from corporation and thereafter conducted their business as formerly. Id. A contract by a dentist entering the employ of another dentist that he would not enter into business at the termination of his employment

in some states make all such contracts void unless accompanied by a sale of the good will of a business.[87]

A contract to manufacture articles exclusively for one person for a limited period,[88] and a contract by a corporation to buy all its raw material from, and to sell all its finished product to, another corporation, have been held valid.[89] Mutual agreements of associates to be penalized for disobedience of rules to be made for the prevention of strikes and for arbitration are valid as to a rule requiring the associates to employ none who would not bind themselves to arbitrate.[90] So too, an agreement between a builder's association and a bricklayer's union, whereby the former agrees that its members will take contracts for mason work only where such contracts include the installation of fireproofing, and that they will not sublet the same but will use their own men for such installation, and whereby the bricklayers agree that they will work only for those who comply with this agreement, is not necessarily unlawful.[91] The fact that the plaintiff is one of an association or combination of corporations which constitutes a monopoly, and that its general business is illegal as being in restraint of trade, cannot be invoked collaterally to affect in any manner its independent contract obligations or rights.[92] Contracts in violation of the various anti-trust acts are made void by statute in some states.[93]

In order to render a contract void as tending to restrain interstate or international trade, its enforcement must lead directly or necessarily to such result.[94]

Persons selling articles manufactured under trade secrets or by secret processes of which they are the sole owners may, by contract, reserve control of future trade therein as to the prices of resale and the persons to whom they may be sold.[95]

in competition with his employer, although the employe had not previously had any business or good will in that place. Turner v. Abbott [Tenn.] 94 S. W. 64. Contract whereby defendant sold his livery business and its good will, and agreed not to engage in that business in the village, either directly or indirectly, while purchasers, or either of them, or their heirs, executors or administrators, should be engaged in such business in said village. Cottington v. Swan [Wis.] 107 N. W. 336.

Contracts held void: Contract whereby one who contemplates engaging in a lawful business binds himself for a pecuniary consideration not to do so, in favor of another with whom he had no previous business relations and who is about engaging in the same business at the same place. Webb Press Co. v. Bierce [La.] 41 So. 203. A fortiori such contract is unenforceable when also violative of the law of the place where made and is to be executed. Violative of Oklahoma statute. Id.

86. The sale and transfer by a person of his property and good will to another cannot be repudiated on the ground that the property was acquired by the purchaser for the purpose of obtaining a monopoly and in pursuance of an illegal combination in restraint of trade. Camors-McConnell Co. v. McConnell, 140 F. 412. Remedy in such case is by a direct proceeding. Id.

87. Contract which violates Oklahoma statute and which was made and was to be executed in Oklahoma, held void by Louisiana court. Webb Press Co. v. Bierce [La.] 41 So. 203.

88. Over v. Byram Foundry Co. [Ind. App.] 77 N. E. 302.

89. Heimbuecher v. Goff, Horner & Co., 119 Ill. App. 373.

90. City Trust, Safe Deposit & Surety Co. v. Waldhauer, 47 Misc. 7, 95 N. Y. S. 222.

91. National Fireproofing Co. v. Mason Builders' Ass'n, 145 F. 260. Not when entered into for the mutual advantage of the parties to avoid strikes, etc., though it is if the contract is a conspiracy for the purpose of creating a monopoly or of preventing others from obtaining contracts and employing workmen on the same terms and to coerce those not parties to it. Id. Plaintiff held not entitled to preliminary injunction, since questions presented depended upon existence or nonexistence of disputed facts. Id.

92. Camors-McConnell Co. v. McConnell, 140 F. 412. Agreement not to engage in fruit business held collateral to combination. Id.

93. See, also, Combinations and Monopolies, 7 C. L. 661. An association of persons engaged in buying and selling live stock for others having a by-law prohibiting its members from buying or selling for others without charging at least a certain specified commission being a trust under Laws 1897, c. 265, p. 48, a contract to pay such commissions is void under the express provisions of that act. State v. Wilson [Kan.] 84 P. 737.

94. Fact that trade might be indirectly affected is not sufficient. Camors-McConnell Co. v. McConnell, 140 F. 412. Agreement not to engage in fruit business in competition with plaintiff held valid. Id. For full discussion of this question see Commerce, 7 C. L. 667.

95. The manufacturers of products made

(§ 3) *L. Effect of invalidity.*[96]—Neither a court of law nor a court of equity will lend its aid to the enforcement of contracts which are illegal, immoral, or contrary to public policy.[97] If executory, neither party can enforce them[98] or recover damages for their breach.[99] If executed in whole or in part and the parties are in pari delicto, the court will generally leave them where it finds them.[1] Some courts, however, permit a party who has paid out money in pursuance of a void contract to recover it if nothing further has been done toward execution.[2] So too, money paid under a void contract may be recovered back where the contract itself is not prohibited by law, but is void because not made or evidenced in the manner pre-

under trade secrets of which they are the exclusive owners may withhold them entirely from sale, sell them on such terms as they please, withhold them from one person while selling them to others, or fix any price in their sole and exclusive discretion. Contract, serial number, and card system of selling medicine held valid. Dr. Miles Medical Co. v. Platt, 142 F. 606. Fact that manufacturers have entered into unlawful conspiracy or combination with others to maintain price of medicine manufactured under secret formula of which they are sole proprietors is no defense to suit for an injunction to restrain third person from inducing dealers to sell to him in violation of their contracts with manufacturers, since alleged conspiracy is collateral to right sought to be enforced. Id. System of contracts made by manufacturer of medicine under unpatented secret process, whereby goods are sold to wholesaler under an agreement not to resell except to retailers designated by him and at certain prices, and designated retailers contract with him not to resell to customers except at certain prices, held not unlawful as in restraint of trade, but a reasonable provision for protection of manufacturer's trade. Hartman v. Park & Sons Co., 145 F. 358.

96. See 5 C. L. 695.

97. Pittsburgh Dredging & Const. Co. v. Monongahela & W. Dredging Co., 139 F. 780. Contracts compounding a felony. Richter v. Phoenix Bldg. & Loan Co., 7 Ohio C. C. (N. S.) 360. The law gives no action to a party under an illegal contract, either to enforce it directly or to recover back money paid on it after it has been executed. Edwards v. Goldsboro [N. C.] 53 S. E. 652.

98. Contract contrary to public policy. Stanton v. Sturgis, 140 F. 789. Promise to pay money under void contract not enforceable. Silander v. Gronna [N. D.] 108 N. W. 544.

99. Repudiation of invalid agreement to execute a bond for title to land. Unilateral and too indefinite. Kaplan v. Whitworth [La.] 40 So. 723. Contract void under statute of frauds. Todd v. Bettingen [Minn.] 107 N. W. 1049. Contract by husband to convey homestead in which wife does not join. Silander v. Gronna [N. D.] 108 N. W. 544.

1. Agreement whereby wife gave husband a note executed by third party for money loaned him by her, to induce husband not to interpose a defense to her suit for divorce, being void, the parties are left with rights as fixed by law, and, under statute fixing rights of divorced persons, held that wife could recover note or the amount of it. Johnson v. Johnson's Committee [Ky.] 90 S. W. 964. On contract for threshing which is void because thresher has not given bond required by Rev. Pol. Code § 3145, where evidence did not show that other party was aware of violation of statute, though statute does not expressly provide that contract shall be void, and though other party accepted benefits of contract. Johnson v. Berry [S. D.] 104 N. W. 1114. Where money has been paid or goods delivered in pursuance of a contract that is immoral, or illegal, and the parties are in pari delicto, the court will leave them where it finds them. Plaintiff held not entitled to recover payments made, in pursuance of an agreement, for use of card or license issued to another person at another location and for defendant's services in procuring police protection, they having been made as a part of the illegal agreement while he was violating the law. Walthier v. Weber [Mich.] 12 Det. Leg. N. 728, 105 N. W. 772. To prevent the recovery back of money paid under an illegal contract it is not necessary that the illegal contract shall have been fully executed, but it is sufficient if there has been a partial fulfillment of the illegal undertaking by the party from whom the money is sought to be recovered (Edwards v. Goldsboro [N. C.] 53 S. E. 652), and this is particularly true where the latter cannot be put in statu quo (Id.). Property owners held not entitled to recover sums paid by them to secure location of two public buildings near their property, where one was built and the other was not. Id. Where defendant agreed, for a consideration paid, to deed his homestead upon acquiring title from the government, such contract is void and the parties in pari delicto, so that the consideration cannot be recovered. Jackson v. Baker [Or.] 85 P. 512.

2. While the contract remains executory, either party may rescind and recover back money advanced under it. Money paid in consideration of issuance of insurance policy void because in conflict with statute prohibiting discrimination between persons insured. Urwan v. Northwestern Nat. Life Ins. Co., 125 Wis. 349, 103 N. W. 1102. Where an accounting is allowed in cases where an unlawful contract has been fully or partially executed by one party, it is not based on the contract but on a quantum meruit, disaffirming the contract and holding the defendant liable for benefits actually received. White Star Line v. Star Line of Steamers [Mich.] 12 Det. Leg. N. 586, 105 N. W. 135. An agreement to render medical services by one not a licensed physician is no considera-

scribed, or where the contract is declared void by law as to one party in order to protect the other against injustice and oppression.[3]

A party rendering services under an illegal contract cannot recover on a quantum meruit where the services rendered are themselves illegal,[4] but may do so if they are not.[5] So too, one may not reap the fruits of a contract expressly forbidden by statute by invoking the doctrine of estoppel.[6]

If the contract is an entire one, the illegality of a part of it renders the whole void.[7] If severable, the illegal portion may be rejected and the legal portion retained and enforced.[8] So too, where an entire contract is voidable in part, it is voidable as a whole.[9] The test of whether a demand connected with an illegal act can be enforced is whether plaintiff requires any aid from the illegal demand to establish his case.[10] The fact that the proceeds of a note are used for an unlawful

tion for money paid for such services, and the money so paid may be recovered so long as the contract remains executory. Deaton v. Lawson, 40 Wash. 486, 82 P. 879.

3. Urwan v. Northwestern Nat. Life Ins. Co., 125 Wis. 349, 103 N. W. 1102. Policy holder held entitled to recover money paid in consideration of issuance of policy void as in conflict with statute prohibiting discrimination. Id.

4. As where services have for their object the procuring of a divorce. Barngrover v. Pettigrew, 128 Iowa, 533, 104 N. W. 904. A tenant in common cannot recover for services rendered in leasing the premises for immoral purposes and collecting the rents, in view of Pen. Code § 1076, making such leasing a misdemeanor. Ballerino v. Ballerino, 147 Cal. 544, 82 P. 199.

5. Where a contract between an attorney and client for a contingent fee is void because limiting the client's right to settle, recovery quantum meruit may be had. Papineau v. White, 117 Ill. App. 51.

6. Acceptance by a mutual benefit association of contracts of insurance procured by a paid agent in violation of Code § 1833, held not to estop it from setting up illegality of contract whereby agent was employed. First Nat. Bank v. Church Federation of America [Iowa] 105 N. W. 578.

7. For distinction between entire and severable contracts, see § 4 C, post. Todd v. Bettingen [Minn.] 107 N. W. 1049. Where every part of a consideration goes equally to the whole promise, if any part of it is contrary to public policy, the whole promise falls. A contract to convey land in consideration of a specific sum of money and services in bringing the land to the attention of congress as suitable for a proposed building fails, where the services are against public policy. Hazelton v. Miller, 202 U. S. 71, 50 Law. Ed. —. If an entire contract is made in part on an illegal consideration, the whole contract is void. Contract for sale of saloon and fixtures held to be rendered invalid by inclusion of liquor license, where law did not permit transfer of licenses. Sawyer v. Sanderson, 113 Mo. App. 233, 88 S. W. 151. If any part of the consideration is illegal, the whole consideration is void. No recovery could be had on check given in pursuance of contract, a part of the consideration for which was dismissal of criminal prosecution against maker's son regardless of terms of contract or whether provision for dismissal was left out through mistake or with intention of concealing real nature of transaction. McNeese v. Carver [Tex. Civ. App.] 13 Tex. Ct. Rep. 820, 89 S. W. 430. If one of two considerations is illegal, the entire contract is void. Where two notes secured by a mortgage are given for a consideration in part unlawful, although the unlawful part is less than either note both notes and mortgage are void. State v. Wilson [Kan.] 84 P. 737.

8. Haswell v. Blake [Tex. Civ. App.] 14 Tex. Ct. Rep. 394, 90 S. W. 1125. Defendants held not entitled to escape responsibility for breach of contract by asserting invalidity of an alternative provision inserted for their benefit which could be disregarded without affecting rest of contract. Borland v. Prindle, Weeden & Co., 144 F. 713. A trackage contract between railroad companies, whose tracks are parallel for a distance of fifteen miles, and thereafter separate widely, is within the enumerated powers of railroads and does not destroy but rather creates competition between them, and where in a contract of this character an ultra vires feature is found, which can be eliminated, the remaining portion of the contract is not rendered invalid thereby, nor is ground afforded for forfeiture of the company's charter. Dayton & U. R. Co. v. Pittsburg, etc., R. Co., 6 Ohio C. C. (N. S.) 537.

9. Conveyance of land to administrator, a part of which belonged to estate of his decedent. Reeder v. Meredith [Ark.] 93 S. W. 558.

10. Haswell v. Blake [Tex. Civ. App.] 14 Tex. Ct. Rep. 394, 90 S. W. 1125. Void agreement between debtor and trustee for creditors to settle indebtedness as cheaply as he could and account to debtor for balance held not to preclude her from enforcing implied agreement of trustee to turn over to her any money remaining in her hands after payment of debts. Id. As a general rule, neither party to an illegal contract can recover upon a cause of action based on or traceable through it. Both in pari delicto. Urwan v. Northwestern Nat. Life Ins. Co., 125 Wis. 349, 103 N. W. 1102. In case any action is brought in which it is necessary to prove the illegal contract in order to maintain the action, courts will not enforce it, nor will they enforce any alleged right directly springing from such contract. Pittsburgh Dredging & Const. Co. v. Monongahela & W. Dredging Co., 139 F. 780. One cannot recover on a demand connected with an illegal act if he

purpose will not prevent the enforcement of a mortgage given to secure it in the absence of evidence that the payee knew that such use was contemplated.[11] A sale of boats is not vitiated by a wholly collateral agreement not to lower traffic rates,[12] or by a temporary forbearance as to part of the price in case of severe competition.[13] Where a contract not unlawful in itself is executed and the parties have enjoyed its benefits, the fact that one of them has violated a penal statute preparatory to carrying it out does not prevent a court from enforcing payment.[14] The fact that a contract is void as to certain third persons because not recorded does not prevent it from being the measure and test of the right to recover as between the parties.[15]

§ 4. *Interpretation. A. General rules.*[16]—The rights of the parties arise at the time and place of the making of the contract,[17] and it must be construed according to its legal effect on the day it was executed and not according to subsequent changes.[18] If the contract is in writing, the expressed[19] intention of the parties[20]

requires any aid from the illegal transaction to establish his case. Agreement between holders of lottery tickets to divide their winnings. Crutchfield v. Rambo [Tex. Civ. App.] 86 S. W. 950. Rule that court will not lend its aid to enforce a claim based upon an illegal or immoral contract does not apply where the party complaining can exhibit his case without relying upon the illegal transaction. Packard v. Byrd [S. C.] 51 S. E. 678. Fact that contract to purchase shoes with understanding that defendant should have exclusive sale of defendant's goods in certain town was contrary to public policy, held not to preclude plaintiff from recovering on implied contract for shoes subsequently delivered to defendant at his request. Id. Where a bank in good faith advanced money to plaintiff and defendant, who used it in an illegal joint speculation, and defendant thereafter gave his note to plaintiff in consideration that the latter assume the entire debt to the bank, the note was valid as being supported by an independent valuable consideration. Stewart v. Hutchinson [Mo. App.] 96 S. W. 253. One cannot avoid written obligation to pay for coal previously delivered by showing the invalidity of previous independent sales, forming no part of the consideration for the instrument sued on. Keiser v. Jarrett, 119 Ill. App. 472. One selling goods cannot recover the purchase price if he knows that vendee designs to use them for an illegal or immoral purpose, and in any way aids or participates in that design, or if the contract of sale is so connected with the illegal or immoral purpose or transaction of the vendee as to be inseparable from it. Sawyer v. Sanderson, 113 Mo. App. 233, 88 S. W. 151. Unlawful transfer of liquor license held to have entered as an ingredient into the sale of a saloon, etc., and evidence held to show that seller knew that defendant intended to use license in violation of law and aided him in such unlawful purpose. Id. A shipping contract which provided that stock should be unloaded at an intermediate point was not rendered invalid because the shipper had an agreement with dealers at that point to sell the stock there and allow the purchaser to ship other stock on the same contract to the point of destination for a consideration to the original shipper, the carrier not being a party to the agreement, even if violative of the Interstate Commerce Act. Southern Kansas R. Co. v. Cox [Tex. Civ. App.] 95 S. W. 1124.

11. Fact that proceeds of note and mortgage were used to corrupt voters held not to preclude their enforcement by the payee in the absence of evidence that he knew that it was to be so used. Hale v. Harris [Ky.] 91 S. W. 660. Will not be presumed, in the absence of proof, that money used for one's benefit as a candidate was illegally used. Id.

12, 13. Cincinnati, etc., Packet Co. v. Bay, 200 U. S. 179, 50 Law. Ed. —.

14. Offering realty for sale without written authority. Plaintiffs could recover compensation as brokers. Haynes v. Abrahamson, 97 N. Y. S. 371.

15. Where a building contract is void as to laborers and materialmen because not recorded, it determines the rights of the parties, and contractor must show substantial performance. Camp v. Behlow [Cal. App.] 84 P. 251. And where extra work was to be paid for according to contract price for regular work, the contractor is not limited to actual cost. Id.

16. See 5 C. L. 698.

17. Mangum v. Lane City Rice Mill. Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 739, 95 S. W. 605.

18. Conveyance in 1891 "of all the pine trees growing and being upon 4,900 acres of land, for sawmill and turpentine purposes," includes only those which were then suitable, and not those which by growth subsequently came within the description of the original grant. Allison v. Wall, 121 Ga. 822, 49 S. E. 831.

19. Intention as collected from words of instrument and facts and circumstances that gave it birth. Wilson v. Wilson, 115 Mo. App. 641, 92 S. W. 145. Instruction adding to language of contract to repair well held improper. Pilot Point Waterworks v. Fisher [Tex. Civ. App.] 93 S. W. 529. Though, in decreeing specific performance, court should, if necessary, determine by construction the legal effect of the agreement to be enforced, and enforce it according to its true meaning and intent, it cannot add to the contract a promise not made by the party. Lone Star Salt Co. v. Texas Short Line R. Co. [Tex.] 14 Tex. Ct. Rep. 630, 90 S. W. 863. Though inducements leading up to the contract may be considered in determining the meaning of the language

to be derived from the entire instrument[21] controls, and technical rules of construction must yield to it.[22] Careless recitals and inapt expressions inconsistent with the

used, what they agreed to do in order to bring about the desired results must be determined from the language actually used, and court cannot extend or restrict their promises to make them contribute to the attainment of such results more fully than as expressed they might do. Id. Duty of court to construe contracts as they are made by parties, and to give full force and effect to language used, when it is clear, plain, simple, and unambiguous. Griffin v. Fairmont Coal Co. [W. Va.] 53 S. E. 24. Construction is to be determined, not by what either one of the parties may have understood, but by what they both agreed. Orion Knitting Mills v. United States F. & G. Co., 137 N. C. 565, 50 S. E. 304. Where the language is unambiguous, the court must construe according to the words used, though they express a different meaning than was intended. Immaterial that a subsequently arising contingency is not covered thereby. Ballard v. Shea, 121 Ill. App. 135. Intention is to be ascertained from the writing alone if possible, and not from the subsequent acts of the parties. A contract for street improvement being clearly joint and several, it could not be made joint by subsequent notices of the contractor to the individuals of the amount due according to frontage. Moreing v. Weber [Cal. App.] 84 P. 220.

20. Barker & S. L. Co. v. Edward Hines L. Co., 137 F. 300; United States Fidelity & G. Co. v. Woodson County Com'rs [C. C. A.] 145 F. 144; Arthur Jordan Co. v. Caylor [Ind. App.] 76 N. E. 419; Security Trust Co. v. Joesting [Minn.] 104 N. W. 830; Sager v. Gonnermann, 100 N. Y. S. 406; True v. Rocky Ford Canal, Reservoir & Land Co. [Colo.] 85 P. 842; Virginia-Carolina Chemical Co. v. McNair, 139 N. C. 326, 51 S. E. 949; Griffin v. Fairmont Coal Co. [W. Va.] 53 S. E. 24; Atlanta, etc., R. Co. v. McKinney, 124 Ga. 929, 53 S. E. 701; Licking Rolling Mill Co. v. Snyder & Co. [Ky.] 89 S. W. 249; Interurban Const. Co. v. Hayes, 191 Mo. 248, 89 S. W. 927; Bradford & Carson v. Montgomery Furniture Co., 115 Tenn. 610, 92 S. W. 1104; San Jacinto Oil Co. v. Ft. Worth Light & Power Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 82, 93 S. W. 173. Construction should be accorded which is most in consonance with the paramount purpose of parties at the time of executing the same (Adams v. Washington Brick, Lime & Mfg. Co., 38 Wash. 243, 80 P. 446), and if susceptible of two or more constructions, it should be given that which would best adapt the agreement to facilitate the accomplishment of the ends evidently sought to be attained. Contract held not a lease with the right to use clay for the manufacture of brick as a mere incident but that such right was the subject-matter, and hence the exhaustion of the clay relieved the defendant from payment of minimum royalty (Id.).

Building contracts, contracts for repairing structures, etc. (See, also, Building and Construction Contracts, 7 C. L. 480): A contract to "furnish and erect all structural iron, cast and ornamental iron, including field riveting," etc., for a warehouse, held to require the contractor to do the iron work only and not the stone work upon which it was to rest. Hayes v. Wagner, 220 Ill. 256, 77 N. E. 211. Where by the terms of a building contract plaintiff was required to maintain insurance against accidents in connection with the work "embraced in the contract," and the contract called for "extra work" as well as general work, plaintiff was bound to maintain the insurance as to "extra work." Seretto v. Rockland, etc., R. Co. [Me.] 63 A. 651. Where a party represents that his shop is properly equipped to repair engines, and agrees to keep the cost down as low as possible and charge only a fair margin of profit, he cannot recover for extra labor required because of poor equipment. Jonesboro, etc., R. Co. v. United Iron Works Co. [Mo. App.] 94 S. W. 726. Agreement to "renovate" the entire brick work of a building, "guarantying to have a job like new," bound plaintiff to remove magnesium stains, though they were ineradicable and also found in new brick work. Finney v. Bennett, 97 N. Y. S. 291.

Contracts for boring wells, etc. (See, also, Building and Construction Contracts, 7 C. L. 480): Where a written contract between plaintiff and defendant recites that it was entered into for the purpose of boring one well by plaintiff and that plaintiff should receive a certain price per foot "for each and every well when completed," and that plaintiff would test the well, etc., it was not an undertaking to sink more than one well. Hahl v. Deutsch [Tex. Civ. App.] 14 Tex. Ct. Rep. 901, 94 S. W. 443. Evidence held sufficient to show that an oil well was sunk under a verbal and not under a certain written contract. Id.

Relating to estates of decedents (See, also, Estates of Decedents, 5 C. L. 1183): Agreement by one party that the other shall not be liable for the cost of the appointment of an administrator will not sustain a claim against the estate of the former by attorneys employed by the latter in resisting the annulment of the previous appointment of an administrator. Elrod v. Elrod [Ala.] 41 So. 290. Under contract between decedent and his heirs, held that the latter should not be charged, in the distribution of his estate, with the principal of sums given to them by decedent during his lifetime, but should be charged with interest thereon unpaid at the time of his death. Fiscus v. Wilson [Neb.] 104 N. W. 856.

Leases (See, also, Landlord and Tenant, 6 C. L. 345): Lease of rails and track materials wherein lessee agreed to pay taxes, etc., and to reimburse lessor for any expense incurred in executing and recording lease, "or the retaking or recovering possession of said property" at the expiration of the lease or upon any default in payment of rent, held not to require lessee to pay attorney's fees paid by lessor on his intervention in a suit brought by a mortgagee to foreclose a mortgage on the property of the lessee. White River, etc., R. Co. v. Star Ranch & Land Co. [Ark.] 91 S. W. 14. Nor did it contemplate repayment of attorney's fees incurred by lessor in suit by him against the lessee to recover possession

intention of the parties will be disregarded.[23] The form of the instrument should be considered, but when form and substance conflict, the latter controls.[24] So too,

of the property on the termination of the lease, or upon default in the payment of rent. Id. Where a contract between a lessor and his lessees authorized latter to sell their stock and transfer to the vendee the obligations of the contract, the lessees were entitled to sell to whom they pleased, regardless of the wishes of the lessor provided they acted in good faith. Harris v. Sheffel [Mo. App.] 94 S. W. 738. A contract providing that, if defendant secured certain lease, plaintiff should "share equally with him in the profits and losses that may accrue from the mutual use that they make of the premises," and providing for the undertaking of a hotel business therein, does not give plaintiff an interest in the lease itself. Stein v. Phillips [Or.] 84 P. 793.

Mining contracts, oil leases, etc. (See, also, Mines and Minerals, 6 C. L. 644): A contract of sale of mines provided that the proceeds of the mine should be applied to the purchase price, allowing the purchaser $12 per ton for ore milled and concentrated or leached on the ground, and a further allowance to the extent of shipping and smelting charges where the ore was sent to a smelter, held not to allow purchaser $12 per ton on ore sent to smelter. Powers v. World's Fair Min. Co. [Ariz.] 86 P. 15. Contract to furnish oil, providing that it should be voidable in case of "failure of oil wells," held to refer to failure of wells owned and operated by defendant when contract was made, and not to require it to bore additional wells or to purchase oil in the market for plaintiff. San Jacinto Oil Co. v. Ft. Worth Light & Power Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 82, 93 S. W. 173. Quoted words held to mean failure of wells to flow by natural force, and defendant was not required to use pumping machinery. Id. Substantial failure held to authorize termination of contract. Id. Contract held not to obligate defendant after the "Beaumont" wells in general ceased to flow. North Texas Const. Co. v. San Jacinto Oil Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 45, 95 S. W. 706.

Pledges (See, also, Pledges, 6 C. L. 1065): A contract pledging certain notes as security for "demands against the undersigned," there being two signers, held not to pledge them for demands against one of them. First Nat. Bank v. Southworth, 117 Ill. App. 143.

Contracts relating to public works (See, also, Public Contracts, 6 C. L. 1109; Public Works and Improvements, 6 C. L. 1143): Where certain parties agreed that "they would together enter into contracts for municipal and government work," etc., the profits to be divided, the fact that one of the parties took such contracts in his own name did not deprive the other of his share of the profits. Stitzer v. Fonder [Pa.] 63 A. 421. An agreement to enter into contracts for "municipal and government work," etc., was not limited to contracts for sewers and drains, but included contracts for general municipal and government work. Id.

Contracts relating to railroads (See, also, Railroads, 6 C. L. 1194): Contract in deed of right of way, requiring railroad company to reconstruct fences, held to contemplate that they would be broken down so as to preclude recovery of damages resulting therefrom. White River R. Co. v. Hamilton [Ark.] 88 S. W. 978. In an action for damages to crops by stock resulting from breach of a contract in deed granting right of way, providing that railroad company was to "reconstruct fences when same are on right of way," an instruction that if jury should find from the evidence that in accepting the deed the company agreed to fence its right of way, and in consequence of its failure, crop was exposed to inroads of cattle, etc., the company was liable, held erroneous, since deed, which alone evidenced contract, did not require fencing of right of way. Id. A concession by the republic of Mexico to construct a railroad "for his account or that of the company or companies which he is at present organizing," and providing that the "contract may not be transferred without previous consent" of the government, prohibits the transfer of the contract as a whole, but does not prevent an assignment of interests in the organizing of the company. McGue v. Rommel [Cal.] 83 P. 1000. Contract between contractor for construction of railroad and subcontractor held to permit pledging of railroad bonds only for purpose of securing funds for labor and material for the construction of the road, and the application of the funds so received to payment for such labor and material. Interurban Const. Co. v. Hayes, 191 Mo. 248, 89 S. W. 927. Contract whereby plaintiff agreed to construct railroad to town where defendant's salt works were located, and defendant agreed to furnish plaintiff for transportation "66 per cent of all the tonnage moved by rail incident to the operation of its said works," held not to require defendant to deliver the specified tonnage as it accrued. Lone Star Salt Co. v. Texas Short Line R. Co. [Tex.] 14 Tex. Ct. Rep. 630, 90 S. W. 863. Contract to deliver specified quantity of coal on cars at mine held to require defendant, in case of a shortage of cars, to deliver each customer its proportionate share of coal without discrimination. Luhrig Coal Co. v. Jones & Adams Co. [C. C. A.] 141 F. 617. Contract between two railroads for joint use of terminal facilities held to require apportionment of expense of maintenance on the basis of the use by one party of any part of the property, whether owned by it or not, all parts of the property, whensoever acquired and by whomsoever owned, being regarded as one whole. Columbus, etc., R. Co. v. Pennsylvania Co. [C. C. A.] 143 F. 757. Contracts between railroad companies in regard to joint use of terminal facilities held to require cost of maintenance to be apportioned upon the basis of "wheelage" rather than "mileage," that being the construction put upon it by the parties. Id. Provision in railroad construction contract held to give company right to pay claims of laborers and deduct them from contract price, and not to obligate it to pay them. Norfolk & W. R. Co. v. Graham [C. C. A.] 145 F. 809.

the name given to the instrument by the parties is not necessarily conclusive as to its character.[25] Words are to be given their usual and ordinary meaning.[26] "Or" may be read "and" when necessary to effectuate the intention.[27]

Sales of personalty (See, also, Sales, 6 C. L. 1320): Where in a sale to a firm a term of credit was to expire immediately upon the discontinuance of business by "the purchasers," there was such discontinuance where one of the partners sold his interest, though the other and a new one continued the business. Warren v. Cash, 143 Ala. 158, 39 So. 124. Contract held a conditional sale notwithstanding words appropriate to an absolute sale. Kennedy v. Lee, 147 Cal. 596, 82 P. 257. A contract to furnish another's "requirements" in stove bolts means to furnish such amount as may be needed in the regular course of business and not what such party may order. Russell v. Excelsior Stove & Mfg. Co., 120 Ill. App. 23. Where a contract provides for delivery of goods f. o. b. cars, and is silent as to by whom the cars are to be furnished, the purchaser must furnish them. Consolidated Coal Co. v. Jones & Adams Co., 120 Ill. App. 139. A contract of sale providing that the goods are "guaranteed to be perfect in material and manufacture, and should it be otherwise, it will be replaced without cost," does not require the purchaser to return them before maintaining action on the contract. Jewell Belting Co. v. Hamilton Rubber Mfg. Co., 121 Ill. App. 13. Words "same as last" in contract for sale of steel bars at a specified price, "cash on receipt of each invoice, same as last," held to be intended to make terms same as that of uncompleted contract in existence when sale was made and not to a previous contract. Licking Rolling Mill Co. v. Snyder & Co. [Ky.] 89 S. W. 249. Correspondence, etc., held to show an independent contract by defendant to furnish paper to enable plaintiff to fill his contract with the government, and not an agreement whereby plaintiff was to contract with the government for defendant. Dexter Sulphite Pulp & Paper Co. v. McDonald [Md.] 63 A. 958. Contract for the purchase of street railway mortgage bonds, when read in the light of the circumstances under which it was made, held not to bind defendant to purchase certain stocks and bonds of allied companies or to foreclose the mortgage or bid if others foreclosed it. Hayden v. Shaw & Co. [Mass.] 78 N. E. 110. Contract whereby one of the defendants purchased the interest of another of them in a certain business held not to constitute an assumption by the former of the latter's liability on a contract with plaintiff. Gammel Book Co. v. Paine [Neb.] 106 N. W. 777. Contract entered into by defendant on selling his stock in plaintiff corporation to plaintiff held to require him to disclose to plaintiff the formula for a material for making of resistance wire invented by him and to permit plaintiff to manufacture the same, and offering material in a state ready to be drawn into wire was not a compliance. Driver-Harris Wire Co. v. Driver [N. J. Eq.] 62 A. 461. Where plaintiff contracted to furnish electrical power but required defendant to have motors guaranteed by the manufacturer to have a "power factor" and the transformers to have "an efficiency as high as any obtainable in the market," a guarantee that the apparatus was "of our highest standard manufacture, both mechanically and electrically," was not sufficient. Hudson River Water Power Co. v. Glens Falls Portland Cement Co., 107 App. Div. 548, 95 N. Y. S. 421. Contract for delivery of bicycles "by April 1st or as soon as possible," bound the vendor to deliver by April 1st or within a reasonable time thereafter. Williams v. Gridley, 96 N. Y. S. 978. Contract of sale construed not to guaranty plaintiff any particular rate per cent of profit on the goods on resale. Heywood Bros. & Wakefield Co. v. Doernbecher Mfg. Co. [Or.] 86 P. 357. Strike provision in contract for sale of coal held to relieve defendant from performance only if there occurred a strike which was so far beyond its control as to make performance impossible. Smokeless Fuel Co. v. Seaton [Va.] 52 S. E. 829. Where a contract required one party thereto to furnish a duplex pump "of ample daily capacity" to supply a city with water, the fact that a pump of 500,000 gallons per day was instituted and used for four years may be considered as a practical construction of the contract. Hubbard City v. Bounds [Tex. Civ. App.] 16 Tex. Ct. Rep. 304, 95 S. W. 69. Plaintiff contracted to furnish government with turning lathes "to swing 22 inches in diameter" at a specified price. Being apparently in doubt as to the size meant he wrote government naval constructor, who replied, stating his idea of the meaning of the words quoted, and plaintiff then furnished lathes in compliance therewith and later signed voucher for specified price without objection. Held that he was bound by construction put on contract and could not thereafter sue for larger sum on ground that constructor's letter was modification of original contract. Walker v. U. S., 143 F. 685.

Sales of realty (See, also, Vendors and Purchasers, 6 C. L. 1781): A contract to transfer seller's "right, title, and interest" in certain government concessions does not call for a perfect title to some undivided portion of the concessions. McGue v. Rommel [Cal.] 83 P. 1000. Plaintiff held liable under the terms of the contract for payment of cost of securing patent to the land sold. Hunt v. Capital State Bank [Idaho] 86 P. 786 [Advance sheets only]. Where by contract one party was to deliver a deed in escrow to be delivered to the other contractee if purchase price was paid on a certain day, the grantor also agreeing to secure a patent for the land, held that a payment of the money on the day named, coupled with an order that it should not be delivered until grantor produced a receiver's final receipt, was an absolute one complying with the terms. Id. Evidence held to show that mother applied money received from sale of her homestead on purchase price of farm which was conveyed to her sons under written agreement that she was to have a home there as long as she lived, and that, on her voluntarily leaving and remaining away from

the place, she was not entitled to recover for the use of her homestead interest or to be adjudged the possession of it, but was entitled to a judgment giving her a right to live there and to return there when she wished for as long as she pleased. Deacon v. Kulmer [Ky.] 89 S. W. 146. Contract between plaintiff and defendant for purchase of plaintiff's land at a judicial sale held to give defendant a right to bid for it on his own account, where plaintiff did not bid as he was required to do and third persons did bid. Gloeckner v. Kittlaus, 192 Mo. 477, 91 S. W. 126. Contract between plaintiff and defendant in regard to purchase of plaintiff's land at a judicial sale held to contemplate that defendant should be repaid a certain sum advanced by him and should also receive a conveyance of a specified interest in the land. Id. Where contract for sale of land provided for assumption of incumbrance by vendee, who was to pay interest from consummation of sale, agent's commission for securing loan for which incumbrance was given, secured by a separate incumbrance on the land, was not interest which vendee was required to pay, though computed on basis of annual charge of two per cent on the amount of the loan. Wilson v. Wilson, 115 Mo. App. 641, 92 S. W. 145. Where, pending a partition suit, and by a contract contemplating a partition, defendants agreed to convey their interest in the property to plaintiffs for a net sum, defendants were not liable for the costs of the partition or for the inheritance or other taxes and trustee's fees accrued up to the date of the partition, but were liable for trustee's fees and fees of his attorney accruing after defendants repudiated the contract. Evans v. Evans [Mo.] 93 S. W. 969. A promise by a vendor that if the farm was not all right he would make it so does not render him liable for injuries committed by stray animals on the day following the completion of the sale. Riley v. Stevenson [Mo. App.] 94 S. W. 781. Where a grantee in a deed given to secure a note agreed to deed any lot or lots "during the life of the agreement" to any purchaser that the grantor might find upon payment of $50 per lot, held that after note became due grantee was not bound to deed except upon payment in full. Bartels v. Davis [Mont.] 85 P. 1027. Where an assignment of a contract to buy realty was made subject to the assignee assuming the expense of searching the title, the assignee engaged to pay this item to the title company and not to the assignor. Gordon v. Stern, 98 N. Y. S. 229. Where a contract provided that plaintiff was to receive one-half of what defendant received for a lot over $250, and defendant thereafter built a house on the lot and then sold the premises, it was incumbent upon plaintiff to show that defendant received more than $250 for the lot in addition to the cost of the house. Seymour v. Thompson, 99 N. Y. S. 916. Deed held not demandable, under contract for sale of land, until purchase price had been fully paid. Annis v. Burnham [N. D.] 108 N. W. 549. In an action to recover on a contract by which plaintiff was to use his influence to induce a person negotiating with defendant for the purchase of realty to complete the purchase, it was not necessary that plaintiff should have been the actual cause of the sale. An honest, conscious effort on his part was sufficient. Fitzsimmons v. Hand, 27 Pa. Super. Ct. 598. Contract construed as an agreement to transfer certain tide lands on acquiring title thereto from the government and not an absolute deed. Ames v. Kinnear [Wash.] 84 P. 629. In an action for partition, defendants may show failure of consideration. Id.

Contracts for services (See, also, Attorneys and Counselors, 7 C. L. 319; Master and Servant, 6 C. L. 521, and other like titles): An architect, after stating several conditions upon which he would accept employment, wrote: "You are doubtless posted on regular fees for architectural services. Full services 5 per cent. Drawings and specifications 3 per cent." Held that the allusion to fees was not one of the conditions of the contract. Fitzhugh v. Mason [Cal. App.] 83 P. 282. Contract by defendant's intestate that, in consideration of services to be performed in caring for his mother, petitioner should "share a child's interest in whatever was accumulated by the three" during lifetime of mother and son, held not breached by reason of son's death without doing more than expressing desire during his last illness that plaintiff should share as an heir in his estate, in absence of undertaking on his part to take appropriate steps to legally adopt her, or to make provision for her by will or otherwise. Bunting v. Dobson [Ga.] 54 S. E. 102. Agreement held to require defendant to pay plaintiff balance due on purchase price of land when defendant collected it as commissions due on insurance business, which had been written but not then paid, and not from commissions on business secured by plaintiff for defendant. Nelson v. Crawford [Ky.] 93 S. W. 644. Contract whereby attorneys were to receive half interest in certain lands in consideration for their services, held to include unoccupied tract within the description. Lipscomb v. Adams, 193 Mo. 530, 91 S. W. 1046. Where plaintiff undertook to continue a third person in service "so long as * * * the contract remains in force," this did not have reference to a possible breach, but meant so long as the contract should continue in force if performed according to its terms. Magnolia Metal Co. v. Gale, 189 Mass. 124, 75 N. E. 219. Contract between school board and architect held only to cover plans for buildings, the erection or repair of which he should supervise, so that he was entitled to extra compensation for preparing plans for building which was not to be erected until after period covered by contract. School Dist. v. Davis [Neb.] 107 N. W. 842. That a contract by which defendant agreed to sell stock by a certain date was to be "null and void" on that date did not destroy defendant's liability for failure to perform. Gause v. Commonwealth Trust Co., 97 N. Y. S. 1091. Contract, by which plaintiff was to inspect the electric installation in defendant's place of business, held to require proof only of the inspection and the presentation of the certificate to entitle plaintiff to demand payment. Electrical Equipment & Inspecting Co. v. Scheelenberg, 98 N. Y. S. 225. Contract entrusting land to a son for sale construed to call for an accounting as soon

as any proceeds were received or at least as soon as any disposition of the land was undertaken. Rohrer v. Rohrer, 40 Wash. 259, 82 P. 289.

Timber contracts (See, also, Forestry and Timber, 5 C. L. 1489): Supplemental contract making contract for sawing logs applicable to timber subsequently purchased, held not to entitle defendant to himself saw timber of second purchase while specified amount was being delivered to plaintiff under original contract, on theory that it was "excess" within meaning of original contract. Barker & S. L. Co. v. Edward Hines L. Co., 137 F. 300. Provision in contract to saw and deliver logs to plaintiff at a certain price, that plaintiff would meet defendant's pay roll twice a month while the work was being done, such pay roll not to exceed the sum of $4 per thousand feet, held not to mean that each $4 would be paid as each 1,000 feet was cut, but that all payments on pay rolls should not exceed $4 on all lumber sawed. Nicola Bros. Co. v. Hurst [Ky.] 88 S. W. 1081. Agreement to sell a certain lot of timber of specified sizes situated at a certain place, the seller "agreeing to deliver not less than" a specified number of feet, held a sale of all the specified timber on the tract, the statement as to the number of feet being practically a guaranty that there would be at least that amount. Bradford v. Huffman [Ky.] 88 S. W. 1057. Instruction held not objectionable as requiring mill to be run to its full capacity while contract provided that it should be run steadily. Vale v. Suiter, 58 W. Va. 353, 52 S. E. 313. Provision that the measurement of timber should be made "on the full length of the log" referred merely to the manner of measurement and did not require a contractor to deliver the trees at full length or to cut them at the "deadening circle." Des Allemands Lumber Co. v. Morgan City Timber Co. [La.] 41 So. 332. A provision in a lumbering contract that defendant would cut, etc., the timber on certain lakes "and such bayou or bayous tributary thereto as may be designated by the party of the second part," held to relate exclusively to the identification of the tracts on which defendant was to operate and not to give plaintiff the right to instruct as to what part of the land defendant was to operate on first. Id.

Water rights (See, also, Waters and Water Supply, 6 C. L. 1840): Where plaintiff conveyed a right of way to a canal company in consideration of the right to use water in an amount equal to 20 shares, held that the amount of water to which he was entitled was the amount allowable on 20 shares at the time of executing the contract, and he was not entitled to share in water from priorities subsequently purchased. True v. Rocky Ford Canal Reservoir & Land Co. [Colo.] 85 P. 842. Pond rentals held part of the expenses of harvesting ice, which defendant was required by his contract to pay. Chariton Ice Co. v. Spring Lake Ice Co. [Iowa] 105 N. W. 1014. Contract held to give defendant the right to discharge water into plaintiff's pond without returning it into a stream from which it was taken so that plaintiff could use it, notwithstanding a clause that "neither party waives any rights as riparian owners." New England Cotton Yarn Co. v. Laurel Lake Mills, 190 Mass. 48, 76 N. E. 231. Where in consideration of furnishing water for a field plaintiff was to have one-fifth of the rice raised thereon sewed in new sacks and to become his absolute property as soon as it left the threshing machine, plaintiff had no title to the rice until it was threshed and sacked and plaintiff's portion set apart. Gravity Canal Co. v. Sisk [Tex. Civ. App.] 15 Tex. Ct. Rep. 984, 95 S. W. 724.

Miscellaneous contracts: Under two instruments the assignee held to have authority to **fill in blanks** so as to assign salary due February 1st, 1902, but not salary becoming due thereafter. Wabash R. Co. v. Papin, 119 Ill. App. 99. Pending an appeal by toll road company from judgment ousting it from its franchises, it issued receipts to persons paying toll agreeing to return same "in the event of such judgment being affirmed." Held that judgment referred to was the one which should finally be affirmed and terminate the litigation, and fact that judgment appealed from was reversed did not preclude a recovery where final judgment of ouster was subsequently affirmed. Van Duyn v. Detroit & S. Plank Road Co. [Mich.] 12 Det. Leg. N. 522, 104 N. W. 612. In a contract for the **storage** of apples, at a fixed charge per barrel till a certain time, an agreement to keep them insured while in storage does not show an understanding that the warehouseman might earn the agreed charge by paying the insurance to the owners on destruction of the apples by fire. Clough v. Stillwell Meat Co., 112 Mo. App. 177, 86 S. W. 580. A provision for the **arbitration of all disputes** between the parties to a contract does not require the arbitration of the right to recover an amount provided by the contract to be paid in case of a breach. Grant v. Pratt, 97 N. Y. S. 29. Agreement for establishment of a **creamery** held to mean that the liability of subscribers thereto was conditioned on the procuring of signers owning a certain number of cows or financially responsible to actually represent such number. Sager v. Gonnermann, 100 N. Y. S. 406. Contract for **collection of back taxes** held one with the city attorney holding office when it was made and not one with associates whom he was authorized to employ, and hence it terminated at expiration of his term of office. City of Wilmington v. Bryan [N. C.] 54 S. E. 543. Agreement with a brother to stand **"my share of the expense"** of maintaining a father held to mean one-half of the expense. Compton's Estate, 30 Pa. Super. Ct. 605. Contract between two companies whereby each bound itself to pay the debt of any of its employes who had left the service of the other indebted to it, held to apply only to employes at the time of executing the contract. Chicago Portrait Co. v. Chicago Crayon Co., 118 Ill. App. 98. Agreement "to quit the business and not to start another bank," etc., held a promise to quit the banking business at the time mentioned and not thereafter engage in such business in the town while plaintiff owned the bank sold him. Merica v. Burgett [Ind. App.] 75 N. E. 1083. Contract to furnish certain person with newspapers to sell as long as a certain company published them held to have been intended as simply the

Words of doubtful meaning should be construed most strongly against the party using them,[28] and one will be bound by that meaning which he knew the other

company's obligation, which ceased when the company went out of business and sold out to another, so that it was not binding on the latter. Fox v. Commercial Press Co. [Ky.] 88 S. W. 1063. Agreement by defendant to pay "$150 per year for each and every rotary press on which it was using aluminum in any way," held, in view of other provisions, to include only two presses specifically mentioned, so that, under the contract, defendant could terminate it on payment therefor, notwithstanding any liability to plaintiff for the unautnorized use of the inventions on other presses. United States Aluminum Co. v. Calvert Lithographing Co., 97 N. Y. S. 1042. Boat loaned by defendants to plaintiff while they were building another for him held not intended as security for performance of contract by them, so that its sale did not justify him in refusing to pay instalment of purchase price. Michigan Yacht & Power Co. v. Busch [C. C. A.] 143 F. 929. Certain citizens advanced money to defendant in consideration of his equipping and operating manufacturing plant, and he gave to one of them a note for the amount, accompanied by a contract providing that certain part of sum expended by him annually was to be credited on note until same was paid. It was further provided that "in the event of the permanent stopping of the operation of said plant" or the "abandonment" of the plant as a manufactory in the meantime, the balance of the amount of the note should be repaid. Held that voluntary stopping of operation of plant for nearly two years authorized recovery of such balance. Castle v. Logan [C. C. A.] 140 F. 707.

21. Uinta Tunnel, M. & T. Co. v. Ajax Gold Min. Co. [C. C. A.] 141 F. 563; United States Fidelity & G. Co. v. Woodson County Com'rs [C. C. A.] 145 F. 144; Reeves & Co. v. Chandler, 113 Ill. App. 167; New England Cotton Yarn Co. v. Laurel Lake Mills, 190 Mass. 48, 76 N. E. 231; Security Trust Co. v. Joesting [Minn.] 104 N. W. 830; Kennedy v. Lee, 147 Cal. 596, 82 P. 257; Ehrsam & Sons Mfg. Co. v. Jackman [Kan.] 85 P. 559; Gray Lumber Co. v. Gaskin, 122 Ga. 342, 50 S. E. 164; Griffin v. Fairmont Coal Co. [W. Va.] 53 S. E. 24; Atlanta, etc., R. Co. v. McKinney, 124 Ga. 923, 53 S. E. 701; Interurban Const. Co. v. Hayes, 191 Mo. 248, 89 S. W. 927. Whole contract must be brought into view and interpreted with reference to the nature of the obligations between the parties and the intention which they have manifested in forming them. Luhrig Coal Co. v. Jones & Adams Co. [C. C. A.] 141 F. 617.

22. Whenever parties themselves define the limits of their rights and obligations, such compact controls, and there is no room for the legal theory that might govern in the absence of an express agreement. Contract held a bailment and not a sale. First Nat. Bank v. McIntosh & P. Live Stock & Commission Co. [Kan.] 84 P. 535. Technical rules of construction are not favored and are not to be applied to defeat the intention of the parties. Sole office is to arrive at and effectuate intention. Security Trust Co. v. Joesting [Minn.] 104 N. W. 830. The use of technical words and phrases in a written instrument, such as "devise," "release," "mine-let," and "royalty," will not be allowed to defeat the manifest intention of the parties as otherwise expressed in the instrument, or to modify the agreement the parties have by the words used actually made. Cleveland Trust Co. v. Columbus & Hocking Coal & Iron Co., 3 Ohio N. P. (N. S.) 424. Is only where language is ambiguous and uncertain and susceptible of more than one construction that court may, under the well established rules of construction, interfere to reach a proper construction and make certain that which is uncertain. Griffin v. Fairmont Coal Co. [W. Va.] 53 S. E. 24.

23. Indemnity bond held intended to indemnify plaintiff against defalcations of bank designated by board of county commissioners, whether bank was private one or corporate institution, statements in bond as to corporate character of institution being careless recitals and inapt expressions inconsistent with the intention of the parties. United States Fidelity & G. Co. v. Woodson County Com'rs [C. C. A.] 145 F. 144. Contract described plaintiff as Farmers' Co-operative Shipping Association of Alma, Neb., while its true name was Farmers' Co-operative Shipping Association, and it was a Kansas corporation. Held that, if a misnomer, it was immaterial where record and circumstances under which contract was made conclusively showed that defendants knew the corporate body with which they contracted and did business. Kannow v. Farmers' Co-op. Shipping Ass'n [Neb.] 107 N. W. 563.

24. Wilson v. Wilson, 115 Mo. App. 641, 92 S. W. 145.

25. Character must be determined by the law from the nature of the dealing between the parties and the language used. Whether letter created an option or an agency. Winders v. Hill [N. C.] 54 S. E. 440. Courts of equity will not be controlled by the name given to a transaction or document, but will scrutinize the transaction or document and the contract of the parties with reference thereto to ascertain what it was intended to be. Fact that deed is referred to as collateral security will not conclusively stamp transaction as a security transaction. Wisner v. Field [N. D.] 106 N. W. 38.

26. "Timber suitable for saw-mill purposes." Gray Lumber Co. v. Gaskin, 122 Ga. 342, 50 S. E. 164. Nontechnical words given ordinary meaning unless contrary intent. Griffin v. Fairmont Coal Co. [W. Va.] 53 S. E. 24. The ordinary use of its terms is to be applied but this rule yields to a contrary intention. San Jacinto Oil Co. v. Ft. Worth Light & Power Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 82, 93 S. W. 173. The word **"satisfactory"** in a sale of a threshing outfit construed to mean to the satisfaction of purchaser without qualification, and his reasons for rejecting are not open to consideration. Reeves Co. v. Chandler, 113 Ill. App. 167.

27. Where a gas and oil lease gave to the

party supposed them to bear.[29] By statute in some states, in the absence of proof to the contrary, it is presumed that ambiguities were caused by the promisor.[30]

Of two repugnant clauses, the first will stand and the last be rejected.[31] Written words prevail over printed ones.[32]

If possible, the contract should be given a reasonable construction,[33] and one which will give force and effect to every part of it.[34] A construction upholding the

lessee certain rights for a term of 12 years "and so long thereafter as petroleum, etc., can be procured in paying quantities or the payments hereinafter provided for are made," the word "or" should be read "and" so that the term was limited to 12 years, unless the granted product was procured. American Window Glass Co. v. Indiana Natural Gas & Oil Co. [Ind. App.] 76 N. E. 1006.

28. Civ. Code 1895, § 3675, par. 4. Word "timber" in conveyance held not to include manufactured cross-ties. Johnson v. Truitt, 122 Ga. 327, 50 S. E. 135. Lease most strongly construed against party executing lease and those claiming under him. Gray Lumber Co. v. Gaskin, 122 Ga. 342, 50 S. E. 164. Provisions inserted by one party for his own benefit will be construed most strongly against him (Sinclair & Co. v. National Surety Co. [Iowa] 107 N. W. 184), but this rule cannot be used to refine away the terms of the contract or to destroy its validity as an enforceable obligation (Id.). In construing conditions in a contract inserted for the benefit of the maker, in case of ambiguity, the construction least favorable to such party should be adopted. Richmond v. Brandt, 118 Ill. App. 624. Contract construed to give the maker the right to terminate his contract to supply milk upon notice only in case he disposed of his dairy or sold to condensing factory. Id. Deed must receive construction most favorable to grantee. Chapman v. Hamblet, 100 Me. 454, 62 A. 215. When attorney sues to enforce specific performance of contract made by him with his client and which he himself wrote, if there is a reasonable doubt as to the meaning of the language, it should be construed, as to him, contra proferentem. Lipscomb v. Adams, 193 Mo. 530, 91 S. W. 1046. Contract whereby toll road company agreed to return toll paid if judgment ousting it of its franchise was affirmed, having been prepared by the company, and users of the road being compelled to accept it or turn back, every intendment should be taken against company in construing it. Van Duyn v. Detroit & S. Plank Road Co. [Mich.] 12 Det. Leg. N. 522, 104 N. W. 612.

29. San Jacinto Oil Co. v. Ft. Worth Light & Power Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 82, 93 S. W. 173.

30. In the absence of proof, under Civ. Code § 2219, the promisor is presumed to have caused the ambiguity, but when it is shown that the promisee wrote the agreement and selected the words, the burden is upon him to remove the uncertainty. Blankenship v. Decker [Mont.] 85 P. 1035. Civ. Code § 2219, declaring that in the absence of proof to the contrary it is presumed that the promisor caused any ambiguity appearing in a written contract, is declaratory of the common law. Id. Under Civ. Code § 2214, providing that if the terms of a promise are ambiguous they must be interpreted in the sense in which the promisor believed the promisee understood it, when the facts and circumstances are resorted to in aid of construction, the promisor need only show by a preponderance of the evidence what he believed the promisee understood. Id.

31. Particularly where instrument is carelessly and unsystematically drawn. Insurance contract construed. Employers' Liability Assur. Corp. v. Morrow [C. C. A.] 143 F. 750. Provisions in government contract for forfeiture of percentages due contractor in case of failure to complete contract as specified and giving government additional right to recover compensatory damages, held not to be inconsistent. United States v. Perkins, 143 F. 688.

32. On face of shipping receipt over printed condition on back. Frey v. New York, etc., R. Co., 100 N. Y. S. 225. Should be considered together if not contradictory. Ehrsam & Sons Mfg. Co. v. Jackman [Kan.] 85 P. 559.

33. Eastern R. Co. v. Tuteur [Wis.] 105 N. W. 1067. If one interpretation, looking at the contract as a whole, would lead to an absurd conclusion, it must be abandoned and that adopted which will be more consistent with reason and probability. Deed. Jacobs v. Parodi [Fla.] 39 So. 833. In case of uncertainty or doubt as to the meaning of words or phrases, the fact that a construction contended for would make the contract unreasonable, and place one of the parties entirely at the mercy of the other, may properly be considered in seeking the intent of the parties as evidenced by the words used. Sager v. Gonnermann, 100 N. Y. S. 406. Trade restrictions must receive a reasonable construction with a view to their purpose and the surrounding circumstances. Agreement by vendor of a lumber business not to engage in such business and sell certain articles did not include such articles carried by him in an independent hardware business. Broadbrooks v. Tolles, 99 N. Y. S. 996. A single sale in three years held not "engaging in business." Id. In the absence of clear words to the contrary it will not be presumed that a railroad company intended to barter away its right to condemn additional land along its right of way for improvements. Lilley v. Pittsburg, etc., R. Co., 213 Pa. 247, 62 A. 852. Agreement reciting that defendant was indebted to plaintiff in a "certain amount," for which defendant was to repair certain roads, held not to refer to the liquidation of a note held by plaintiff against defendant and given at the same time. Roy v. Roy [Ala.] 39 So. 986.

34. Uinta Tunnel, M. & T. Co. v. Ajax Gold Min. Co. [C. C. A.] 141 F. 563; Reeves & Co. v. Chandler, 113 Ill. App. 167; Richmond v. Brandt, 118 Ill. App. 624; American

contract should be preferred to one rendering it inoperative.[35] A construction which will prevent a forfeiture will be adopted if possible,[36] and the terms of the contract will not be extended to sustain forfeitures on other grounds than those specified.[37] Other contracts having reference to or bearing upon the one in suit should be taken into consideration, especially when the latter has reference to the same subject-matter and is the means whereby the former was carried out.[38] Commercial contracts must be interpreted in the light of commercial usages, and their performance must be such as business men would naturally contemplate.[39] The law enters into and becomes an inseparable part of every contract.[40]

A condition precedent is one which must be performed before the agreement of the parties becomes a valid contract.[41] Stipulations should not be construed as

Window Glass Co. v. Indiana Natural Gas & Oil Co. [Ind. App.] 76 N. E. 1006; Williams v. Gridley, 96 N. Y. S. 978; Ehrsam & Sons Mfg. Co. v. Jackman [Kan.] 85 P. 559; Griffin v. Fairmont Coal Co. [W. Va.] 53 S. E. 24; Mayo, Hysore & Co. v. Philadelphia Textile Mach. Co. [Va.] 53 S. E. 967; Jacobs v. Parodi [Fla.] 39 So. 833; Licking Rolling Co. v. Snyder & Co. [Ky.] 89 S. W. 249. It is with great reluctance that courts reject any agreement as insensible or unintelligible. Sinclair & Co. v. National Surety Co. [Iowa] 107 N. W. 184. Construction will not be adopted which would render part of contract nugatory. Barker & Stewart L. Co. v. Edward Hines L. Co., 137 F. 300.

35. United States Fidelity & Guaranty Co. v. Woodson County Com'rs [C. C. A.] 145 F. 144. As between two reasonable constructions, one which will accomplish the intention of the parties and make the contract enforceable should be preferred to one making it unenforceable and meaningless. Sinclair & Co. v. National Surety Co. [Iowa] 107 N. W. 184. Illegality will not be presumed. Contract to transfer stock of a corporation to be organized not presumed to have been made with intention of depriving board of directors of right to pass thereon. Electric Fireproofing Co. v. Smith, 99 N. Y. S. 37. Presumption is in favor of legality, and agreement will not be adjudged illegal when susceptible of a construction which will uphold it and make it valid. Id. Courts will not construe a contract so as to render it void as against public policy. Since a contract to insure against the legal execution for crime would be void as against public policy, a life policy containing no applicable provisions could not be construed as insuring against such risk. Collins v. Metropolitan Life Ins. Co., 27 Pa. Super. Ct. 353. Where two constructions possible, one rendering contract valid, if reasonable, will be adopted rather than one rendering it void. Merriman v. Cover, 104 Va. 428, 51 S. E. 817. Agreement by partnership to ship no bark over railroad, for which it obtained right of way from plaintiff, except to him, unless he refused to pay market price therefor, and in which there was language from which it could be inferred that road was or was not to be operated as common carrier, held not to show on its face that it was to be so operated and hence not to be invalid on its face. Id.

36. Since the law does not favor forfeitures. Letchworth v. Vaughan [Ark.] 90 S. W. 1001. Where vendee retained part of purchase price of land under agreement reciting that title was irregular and that vendor agreed within a specified time to "perfect a perfect or satisfactory title," or forfeit the amount retained, held that vendor was only bound to furnish a title which vendee would be willing to accept as satisfactory, and when he did so vendee was not entitled to enforce forfeiture because of defects therein, but would be relegated to action for damages for breach of covenants in deed. Id.

37. Fraud in inducing execution of contract held not a ground for forfeiture. Bennett v. Glaspell [N. D.] 107 N. W. 45.

38. Sinclair & Co. v. National Surety Co. [Iowa] 107 N. W. 184. Natural gas company held not under any obligation to furnish gas at higher pressure than the standard at which it furnished gas to similar works and had previously furnished it to plaintiff, there being nothing in the contract and nothing shown outside of it from which an intention to furnish a higher pressure could be inferred. Flaccus v. West Penn Gas Co., 213 Pa. 561, 62 A. 1111. See, also, § 4 B, post.

39. Eastern Tube Co. v. Harrison, 140 F. 519. Subscription agreement entered into for purpose of underwriting bonds of corporation, and assigned as collateral for a loan as provided for therein and contemplated, held not to be rendered unenforceable by assignee by insolvency of the corporation before subscription became payable. Id. Provision that assignee should be subrogated to all the rights of the corporation held to mean rights existing when assignment was made so that subscriber was not entitled to set off claim against corporation arising after assignment. Id. The regular and established method of conducting a business is of significance in construing a contract relating to it. Luhrig Coal Co. v. Jones & Adams Co. [C. C. A.] 141 F. 617.

40. Grand View Bldg. Ass'n v. Northern Assur. Co. [Neb.] 102 N. W. 246. Existing laws giving rights to the parties or limiting their rights. Recovery of deficiency could not be had on bond secured by mortgage given and foreclosed in a state where in case such action is brought the mortgagor is entitled to redeem. Hutchinson v. Ward, 99 N. Y. S. 708.

41. Provision that contract looking to settlement of estate should be void if plaintiff should at any time make any further

conditions precedent, unless that construction is made necessary by the terms of the contract.[42] The ordinary office of an exception or proviso is to take special cases out of a general class or to guard against misinterpretation.[43] Where, therefore, it would be equivocal upon the general language whether a particular thing was embraced, the exception of another thing of a similar kind will show that the first was intended to be included,[44] but where the general language could not possibly have applied to the case mentioned in the exception, this rule does not apply.[45] Courts strongly favor a construction making covenants dependent rather than independent.[46] When an enumeration of specific things is followed by general words or phrases accompanied by the word "other," the latter are held to refer only to things of the same kind or class as those specified.[47]

Stipulations which are necessary to make the contract reasonable and conformable to usage will be implied with respect to matters concerning which no contrary intention is manifested,[48] and when so implied are as much a part of the contract as if it had been plainly expressed.[49]

If the contract is ambiguous, the court should put itself as nearly as possible in the position of the parties when it was made, and to that end may take into consideration the subject-matter, the purpose, situation, and conduct of the parties, and all the surrounding circumstances.[50] In such case the practical construction adopted

claim against the estate held not a condition precedent. Galt v. Provan [Iowa] 108 N. W. 760. Whether stipulations in a contract are conditions precedent to the right to enforce performance is to be determined by the intention of the parties, derived from the contract itself by application of common sense to each particular case rather than by technical rules of construction. Walker v. Stimmel [N. D.] 107 N. W. 1081.

42. Provision for weighing and testing grain at certain station held not a condition precedent. Walker v. Stimmel [N. D.] 107 N. W. 1081. Provision that contract looking to settlement of estate should be void if plaintiff should ever make any further claim against the estate held condition subsequent. Galt v. Provan [Iowa] 108 N. W. 760. An agreement to do something not going to the whole consideration, and not expressly made a condition, will be regarded as a stipulation, a breach of which can be compensated in damages, and not as a condition precedent. Barker & S. Lumber Co. v. Edward Hines Lumber Co., 137 F. 300.

43, 44. Employers' Liability Assur. Corp. v. Morrow [C. C. A.] 143 F. 750.

45. Rule applied to insurance contract. Employers' Liability Assur. Corp. v. Morrow [C. C. A.] 143 F. 750.

46. Michigan Home Colony v. Tabor [C. C. A.] 141 F. 332.

47. Words "other legitimate causes" following provision that temporary suspension of operation of plant due to "strikes, fire," etc., held to refer to causes of similar character to those emmerated. Castle v. Logan [C. C. A.] 140 F. 707.

48. Contract whereby plaintiff agreed to keep defendant's property insured, held to raise an implied obligation on its part to make proofs of loss, etc. Avil Printing Co. v. Kaiser Pub. Co. [Mo. App.] 89 S. W. 900. Transferee of guaranteed stock held entitled to have it marked for identification, though there was no express provision therefor. Marklove v. Utica, etc., R. Co. 48 Misc. 258, 96 N. Y. S. 795. Where defendant orally agreed to furnish pasturage for a certain number of cattle and that he would put no other cattle in the pasture except a few of his own, held that law would imply condition that he would not overstock pasture and would keep fences in reasonably safe condition. Wallis & Co. v. Wallace [Tex. Civ. App.] 14 Tex. Ct. Rep. 359, 92 S. W. 43. Where a party agrees to pay for material, the law will not imply the relation of surety. Smyser v. Fair [Kan.] 5 P. 408. A contract must be interpreted in view of the conditions existing at the time it was entered into, and if the continuance of those conditions is necessary to a proper performance, a provision will be implied that neither party will voluntarily change them to the prejudice of the other. Hearn v. Stevens & Bro., 97 N. Y. S. 566. Where plaintiff was to receive a certain percentage of the profits for managing a department of defendant's store, and defendant transferred part of the goods to another department, plaintiff was entitled to the contract percentage of the profits of the new department as well as of the old. Id.

49. Provision that failure to comply with "any of the above conditions" in oil and gas lease shall render it null and void held to apply equally to implied condition requiring reasonable effort to develop premises. Brewster v. Lanyon Zinc Co. [C. C. A.] 140 F. 801.

50. Chapman v. Hamblet, 100 Me. 454, 62 A. 215; Eastern Tube Co. v. Harrison, 140 F. 519; Uinta Tunnel, Min. & Transp. Co. v. Ajax Gold Min. Co. [C. C. A.] 141 F. 563; United States Fidelity & G. Co. v. Woodson County Com'rs [C. C. A.] 145 F. 144; Reeves & Co. v. Chandler, 113 Ill. App. 167; Rubens v. Hill, 115 Ill. App. 565; Brockmeyer v. Sanitary Dist., 118 Ill. App. 49; Merica v. Burgett [Ind. App.] 75 N. E. 1083; Van Duyn

by the parties themselves, while engaged in its execution and before any controversy has arisen, may be looked to to determine their intention,[51] but such construction cannot control the clear meaning of the terms used.[52]

v. Detroit & S. Plank Road Co. [Mich.] 12 Det. Leg. N. 522, 104 N. W. 612; Fiscus v. Wilson [Neb.] 104 N. W. 856; Sinclair & Co. v. National Surety Co. [Iowa] 107 N. W. 184; True v. Rocky Ford Canal. Reservoir & Land Co. [Colo.] 85 P. 842; Atlanta, etc., R. Co. v. McKinney, 124 Ga. 929, 53 S. E. 701. The situation of the parties and the subject-matter at the time and the acts and declarations of the parties may be looked to, though such terms are not in themselves ambiguous. San Jacinto Oil Co. v. Ft. Worth Light & Power Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 82, 93 S. W. 173.

51. Dexter Sulphite Pulp & Paper Co. v. McDonald [Md.] 63 A. 958; Uinta Tunnel, M. & T. Co. v. Ajax Gold Min. Co. [C. C. A.] 141 F. 563; Luhrig Coal Co. v. Jones & Adams Co. [C. C. A.] 141 F. 617; Columbus, etc., R. Co. v. Pennsylvania Co. [C. C. A.] 143 F. 757; Walker v. U. S., 143 F. 685; Arthur Jordan Co. v. Caylor [Ind. App.] 76 N. E. 419; Fiscus v. Wilson [Neb.] 104 N. W. 856; Eastern R. Co. v. Tuteur [Wis.] 105 N. W. 1067; City Deposit Bank v. Green [Iowa] 106 N. W. 942; School Dist. of South Omaha v. Davis [Neb.] 107 N. W. 842; Kennedy v. Lee, 147 Cal. 596, 82 P. 257; Ehrsam & Sons Mfg. Co. v. Jackman [Kan.] 85 P. 559; Licking Rolling Mill Co. v. Snyder & Co. [Ky.] 89 S. W. 249; Interurban Const. Co. v. Hayes, 191 Mo. 248, 89 S. W. 927; Hubbard City v. Bounds [Tex. Civ. App.] 16 Tex. Ct Rep. 304, 95 S. W. 69. The fact that a practical construction of a contract by the parties did not occur until seven months after its execution does not affect its value as an aid to a judicial construction. Powers v. World's Fair Min. Co. [Ariz.] 86 P. 15. Where it is not clear whether the contract gave plaintiff the right to inspect hops on defendant's premises before selecting the picking, the construction placed thereon by the parties by so doing, followed by the court. Mitau v. Roddan [Cal.] 84 P. 145. Hence, admission of evidence of a custom giving the right to the buyer of hops to inspect on the premises was harmless. Id. Where a contract does not specify whether the seller or purchaser shall furnish the cars, a practical interpretation by the acts of the parties, whereby the seller has undertaken the duty, estops him from claiming a different construction to the injury of the purchaser. Consolidated Coal Co. v. Jones & Adams Co., 120 Ill. App. 139. Contract by which plaintiff was to receive one-half the "net profits" for managing a business, held to require that the expense of caring for horses and repairing wagons be charged to the business, in view of construction placed by the parties upon a prior and similar contract. Arthur Jordan Co. v. Caylor [Ind. App.] 76 N. E. 419. Performance of contract between mutual benefit association and commercial association, whereby the latter agreed to obtain a certain amount of insurance for the former in consideration of its agreement to locate in the city, held not to constitute a satisfaction of claim of one employed by one of the promoters of the benefit association under which he was to have a commission on the insurance written by him, the former agreement not covering the latter. First Nat. Bank v. Church Federation of America [Iowa] 105 N. W. 578. Fact that none of the compensation paid to one working for both parties was charged to one of them on settlement, held to show that contract was that he should not be so charged. Trapp v. Conley [Ky.] 89 S. W. 514. Settlements based on payment by cubic yard determined from weight of stone, to which no objection was made, held to show intention that stone was to be so paid for rather than by the perch as contended by plaintiff. Id. Evidence held to show that both parties relied on employe of one of them to keep account of team work done by one for the other, and that his account was best evidence of the amount due therefor, there being no specific objections thereto. Id. Parties to contract of employment having treated it as divisible, employe could recover, though he left before the end of the term. Powell v. Russell [Miss.] 41 So. 5. Contract entered into pending partition proceedings and contemplating a partition, whereby defendants agreed to convey all their interest in the premises to plaintiff for a "net sum," held not to require plaintiff to pay defendants attorney's fees, and where fees allowed attorneys in partition suit were charged against interest of defendants in the lands, the amount so charged was properly deducted from the consideration for the contract in a suit for specific performance. Evans v. Evans [Mo.] 93 S. W. 969. A provision in a contract, otherwise one of absolute sale, that "good purchasers' notes indorsed by agents will be accepted in settlement," did not, under the circumstances, change the contract, as a matter of law, to one for shipment on commission. American Seeding Mach. Co. v. Stearns, 109 App Div. 192, 95 N. Y. S. 830. Acceptance of advantages through many years of acquiescence was a construction by the parties themselves of a guaranty by the lessee of a railroad of the payment of a certain dividend on the stock. Marklove v. Utica, etc., R. Co., 48 Misc. 258, 96 N. Y. S. 795. Contract for sale of land held to require vendor to tender deed conveying good title before he could recover purchase price. Michigan Home Colony Co. v. Tabor [C. C. A.] 141 F. 332. Submission of claim for damages for delay to engineer held construction of contract by parties that such question was within terms of contract providing for submission of disputed questions. Roberts, J. & R. Shoe Co. v. Westinghouse Elec. & Mfg. Co. [C. C. A.] 143 F. 218.

52. Arthur Jordan Co. v. Caylor [Ind. App.] 76 N. E. 419. Contract construed a sale, notwithstanding the parties acted upon it as creating an agency. Heywood Bros. & Wakefield Co. v. Doernbecher Mfg. Co. [Or.] 86 P. 357. Unless a third party has been misled and has changed his position, he cannot set up mere words of a party to a contract as conclusive of its construc-

The foregoing rules are equally applicable to the interpretation of oral contracts, but in such case the question is usually what the terms of the contract were, rather than what the parties meant by what they said,[53] which is a question of fact.[54]

The rules for the construction of contracts do not apply with the same force in determining the criminality of acts accomplished by means of a contract.[55]

(§ 4) *B. What is part of contract.*[56]—Where a contract consists of several different instruments, each will be construed with reference to the others, and the contract will, if possible, be given effect as a whole.[57] So too, several agreements between the same parties referring to the same subject-matter will be construed together as though constituting a single instrument.[58] Other contracts between different parties without which the one in suit would be incomplete and which are incomplete become a part of it in so far as they supplement it and are not inconsistent with its terms.[59] Another writing referred to for a specific purpose becomes a part of the contract for that purpose alone.[60]

tion. Heimbuecher v. Goff, Horner & Co., 119 Ill. App. 373. Statement by one of the parties to a contract that it was the sale agent of the other held not conclusive. Id. Agents of the parties to a contract cannot by words give a construction thereto not warranted by its terms. Id.

53. See ante, § 1 B.

54. See post, § 9 F.

55. Rules of law governing the construction of contracts have little place in prosecutions of penal actions, where a transaction, in itself an offense, is so shaped by the criminal action as to make it conform in appearance to the letter of law but it violates it in fact and spirit. Sale of liquor. Commonwealth v. Adair [Ky.] 89 S. W. 1130. See, also, Intoxicating Liquors, 6 C. L. 165.

56. See 5 C. L. 709.

57. Where several writings constitute one contract they must be construed together. Hunt v. Capital State Bank [Idaho] 86 P. 786 [Advance sheets only]. Contracts for sale and sawing of certain timber held to be read together as evidencing the entire agreement. Mills v. Stillwell [Ky.] 89 S. W. 112. Promise to furnish certain vehicles at wholesale prices held part of agreement for sale of realty. Newburn v. Hyde [Iowa] 107 N. W. 604.

58. Contract for a right of way and a deed executed in accordance therewith held one agreement, though several months elapsed between the execution of the two instruments. Baltimore, etc., R. Co. v. Brubaker, 217 Ill. 462, 75 N. E. 523. An assignment of wages and a contract relating thereto and a part of the same transaction. Wabash R. Co. v. Papin, 119 Ill. App. 99. Guaranty contract making special reference to another proposition which became a binding contract. Bogardus v. Phoenix Mfg. Co., 120 Ill. App. 46. Held that a note containing stipulations as to collaterals and the receipt given for the collaterals constituted one contract. First Nat. Bank v. Southworth, 117 Ill. App. 143. Where the owner of land executes a warranty deed to another and at the same time such person executes a writing purporting to convey back all gas and oil in the land, the whole transaction construed as a deed excepting the gas and oil. Kurt v. Lanyon [Kan.] 82 P. 459. Note, deed, and a defeasance were all given at the same time as a part of the same transaction. Civ. Code, § 2207. Bartels v. Davis [Mont.] 85 P. 1027. Several contracts and leases under which a city issued bonds for the benefit of a railroad company in return for stock guaranteed to yield a certain dividend to be secured by rent under a lease of the road to another company, and the lessee guaranteed the dividend to the lessor. Marklove v. Utica, etc., R. Co., 48 Misc. 258, 96 N. Y. S. 795. Where debtor gave note to creditor, who as a part of the same transaction entered into a written contract to employ the maker until the note became due six months thereafter, and for a further period of six months if the note was not paid at maturity, held that the two papers would be construed together as a contract whereby the maker was to be employed until enabled to pay the note with his wages, and that his wages should be applied on the note, and not that he should be permitted to draw his wages as they became due and pay the note at maturity. Minzey v. Marcy Mfg. Co., 6 Ohio C. C. (N. S.) 593. Note with time of payment left blank and letter stating that maker did not know when he could pay it, but would do so as soon as he was able, held to form a single transaction, and to evidence an obligation to pay note as soon as he was able. Glass v. Adoue [Tex. Civ. App.] 86 S. W. 798. Two contracts agreed upon at the same time as one transaction, though separate in form. Policy of insurance and special agent's contract. Urwan v. Northwestern Nat. Life Ins. Co., 125 Wis. 349, 103 N. W. 1102. Contract with railroad company for construction of road for which defendant was to be paid a certain per cent. on the cost of construction, and contract on same day whereby defendant agreed to pay five of the seven directors of the company two-thirds of such per cent, held to be in pari materia and to be treated as one contract. Stanton v. Sturgis, 140 F. 789.

59. Vale v. Suiter, 58 W. Va. 353, 52 S. E. 313.

60. Where frontage owners' contract with a contractor for street grading referred to certain specifications for the purpose of indicating the manner of grading, etc., such

(§ 4) *C. Character; joint and several, entire or divisible, etc.*[61]—Whether the contract is joint, several, or joint and several, is generally a question of intention.[62] The matter is regulated by statute in many states.[63]

A contract is entire when by its terms, nature, and purpose it contemplates and intends that each and all of its parts, material provisions, and the consideration, shall be common each to the other, and interdependent.[64] A severable contract is one in its nature and purpose susceptible of division and apportionment, having two or more parts, in respect to matters and things contemplated and embraced by it, not necessarily dependent upon each other, and not intended to be.[65] The test is the intention of the parties as gleaned from the language employed and the subject-

specification is immaterial as bearing upon the character of the contract, as whether joint and several. Moreing v. Weber [Cal. App.] 84 P. 220. As between a contractor for the construction of a building according to certain plans and specifications and his subcontractor, who furnishes a part of the material, reference may be had to the specifications without adopting them as a whole; and, in the absence of an express agreement to that effect, it will not be inferred that all the provisions of the specifications should have application. Noyes v. Butler Bros. [Minn.] 108 N. W. 839. Reference held to be for no other purpose than to determine amount and sizes of glass to be furnished by subcontractor. Id.

61. See 5 C. L. 710.

62. Contract for grading of street held joint and several as against the contracting property holders. Moreing v. Weber [Cal. App.] 84 P. 220. The payment of a gross sum to several persons in satisfaction of their individual claims for injuries sustained in an accident does not necessarily make the contract under which it is made joint, for the payees may make their own division. Hoerger v. Citizens' St. R. Co. [Ind. App.] 76 N. E. 328. A certain contract held to impose upon several defendants a joint obligation that one of them should purchase certain stock from plaintiff, in consideration of a release of reciprocal obligations imposed upon all the parties by previous agreements. Walter v. Rafalsky, 98 N. Y. S. 915.

63. Under Civ. Code § 1659, where the several promisors have each received benefits, the obligation is joint and several. McKee v. Cunningham [Cal. App.] 84 P. 266.

64. Packard v. Byrd [S. C.] 51 S. E. 678. One in which the consideration is entire on both sides, and which does not, either by its terms or the implied intention of the parties, contemplate or admit of apportionment upon a partial failure on either side, but requires the complete fulfillment of the contract by either as a condition precedent to the fulfillment of any part of it by the other. Bradford & Carson v. Montgomery Furniture Co., 115 Tenn. 610, 92 S. W. 1104. If it reasonably appears from the language of the contract that the parties intended that a full and complete performance should be made with respect to the subject-matter of the contract by one party in consideration of the obligation of the other party to the contract. Jones & Co. v. Gammel-Statesman Pub. Co. [Tex. Civ. App.] 94 S. W. 191.

Contracts held entire: Deed to several tracts of land based upon same consideration held entire contract. Reeder v. Meredith [Ark.] 93 S. W. 558. Contract whereby defendant agreed to purchase all the oranges grown by plaintiff in a certain grove only on condition that he have the handling of the oranges grown in another grove. Sterling v. Gregory [Cal.] 85 P. 305. Contract providing that in consideration of agreement by defendants that plaintiff should receive a certain interest in an estate, and the relinquishment to him of certain personalty, plaintiff would relinquish all claims upon the estate and deed to defendants his interest in certain realty, and that contract should be void if he should make any further claim against the estate. Galt v. Provan [Iowa] 108 N. W. 760. Contract to transfer stock in elevator company in consideration of transfer of stock in different elevator company, and also of certain elevator on railroad right of way with its site, under agreement with railroad company by virtue of which that elevator was constructed and operated. Todd v. Bettingen [Minn.] 107 N. W. 1049. Contract for sale of saloon, fixtures, good will, and liquor license. Sawyer v. Sanderson, 113 Mo. App. 233, 88 S. W. 151. Contract for potatoes in carload lots at an agreed price per bushel for all that may be loaded during the week, under which seller has loaded and shipped four cars, is entire in sense that either party has the right to a full performance. Peycke v. Shinn [Neb.] 107 N. W. 386. Lumbering contract providing for the treatment of portions of the timber in a different manner held entire, and all provisions should have been considered in determining plaintiff's rights on account of a breach. Snell v. Remington Paper Co., 102 App. Div. 138, 92 N. Y. S. 343. Contract to bind, print, and deliver law reports. Jones Co. v. Gammel-Statesman Pub. Co. [Tex. Civ. App.] 94 S. W. 191.

65. Packard v. Byrd [S. C.] 51 S. E. 678. One, the consideration for which is, by its terms, susceptible of division and apportionment, there being no entirety of consideration on either side constituting a condition of the agreement, and neither party having a right to claim more than an equivalent for the actual consideration on his part. Bradford v. Montgomery Furniture Co., 115 Tenn. 610, 92 S. W. 1104.

Contracts held severable: Contract whereby defendant assumes and agrees to pay notes made by plaintiff maturing at different dates. Thomas v. Richards, 124 Ga.

matter of the agreement.[66] The divisibility of the subject-matter,[67] or the consideration,[68] is not necessarily conclusive, though of aid in arriving at the intention.

(§ 4) *D. Custom and usage.*[69]—Contracts are presumed to have been made with reference to the known and established customs and usages of the business or trade to which they relate, and hence proof of such customs and usages is admissible to annex terms which the parties may be presumed to have tacitly adopted, or to explain ambiguities or technical terms, but not to vary or contradict the plain meaning of the language used.[70]

(§ 4) *E. As to place, time, and compensation.*[71] *Place.*—In the absence of an agreement to the contrary, the place of delivery of personal property sold is the place where it was at the time of sale.[72]

Time.[73]—When no time is specified for the performance of an act or the doing of a thing, the law implies that it may be done or performed within a reasonable time,[74] what is a reasonable time being ordinarily a question of fact.[75]

942, 53 S. E. 400. A contract gave a subscriber the use of the first edition of an encyclopedia for $21 during the publication of the second edition for which he subscribed and agreed to pay $7.50 per volume upon delivery. An indorsement showed delivery of certain volumes and provided for payments in instalments until all deliveries were paid. Held not an entire contract but one providing for the payment of $7.50 per volume of the second edition as delivered. Edward Thompson Co. v. Washburn [Mass.] 77 N. E. 483. Contract for the painting and papering of a house, requiring the work to be "completed" in a workmanlike manner, and "finished as soon as possible," and the acts of the parties prior and subsequent to a destruction of the house by fire before fully completed, held not entire so as to preclude plaintiff's recovery for the labor and material furnished. Ganong v. Brown [Miss.] 40 So. 556. Agreement whereby landowner conveyed right of way to railroad and also, in consideration of a sum of money and the erection of cattle guards and the construction of crossings over its tracks, released it from liability for damages which might result to farm outside of right of way, so that company could thereafter condemn crossings. Lilley v. Pittsburg, etc., R. Co., 213 Pa. 247, 62 A. 852. Contract of sale of shoes to defendant held separable from illegal agreement that defendant should have exclusive right to sell plaintiff's shoes in certain town. Packard v. Byrd [S. C.] 51 S. E. 678. Contract for sale of good will of business and not to engage in same business, so that breach of latter agreement did not defeat seller's right of action on note covering consideration for both, but only entitled buyer to recoup damages resulting from breach. Bradford & Carson v. Montgomery Furniture Co., 115 Tenn. 610, 92 S. W. 1104. Agreement whereby all the stockholders in a corporation turned over their stock to a trustee and authorized him to sell it and all the corporate assets to highest bidder, held a joint one only in so far as it bound each stockholder to place his certificates with the trustee to be sold, and to abide by the sale, and was several in so far as it entitled each stockholder to receive the price per share bid on the whole number of shares turned over to the trustee, so that an individual stockholder was entitled to sue a purchaser for breach of contract on latter's failure to pay price agreed upon. Dowling v. Wheeler [Mo. App.] 93 S. W. 924.

66. Sterling v. Gregory [Cal.] 85 P. 305; Packard v. Byrd [S. C.] 51 S. E. 678; Ganong v. Brown [Miss.] 40 So. 556; Clough v. Stillwell Meat Co., 112 Mo. App. 177, 86 S. W. 580.

67. Packard v. Byrd [S. C.] 51 S. E. 678. Contract otherwise entire not rendered severable because it provides that different things shall be done with different portions of the property constituting the subject-matter. Snell v. Remington Paper Co., 102 App. Div. 138, 92 N. Y. S. 343.

68. Will be regarded as severable if intention that it should be otherwise appears. Clough v. Stillwell Meat Co., 112 Mo. App. 177, 86 S. W. 580.

69. See 5 C. L. 710.

70. For a full discussion of this subject see Customs and Usages, 5 C. L. 894.

71. See 5 C. L. 711.

72. Place of delivery of portrait was at artist's studio. Scott v. Miller, 99 N. Y. S. 609.

73. See 5 C. L. 711.

74. Winders v. Hill [N. C.] 54 S. E. 440. Buyer should have given seller a reasonable time to perform after buyer's notice of rescission. Elliot v. Howison [Ala.] 40 So. 1018. Bond as security for performance of a contract not filed within a reasonable time. Equitable Mfg. Co. v. Howard [Ala.] 41 So. 628. Where no time is fixed for delivery of building materials. Long v. Abeles & Co. [Ark.] 91 S. W. 29. Where a contract granting the privilege to fill in the rear of a lot did not specify the time of performance. Johnston v. O'Shea [Mo. App.] 94 S. W. 783. Five weeks held not a reasonable time as a matter of law. Id. One contracting to convey land has reasonable time in which to give deed where no time for doing so is fixed. White v. Poole [N. H.] 62 A. 494. No time being specified in agreement to sell land as to when sale shall be consummated. Clark v. Wilson [Tex. Civ. App.] 14 Tex. Ct. Rep. 770, 91 S. W. 627. Where contract did not fix time within which plain-

As a general rule, time is not regarded as of the essence of the contract unless the parties expressly so stipulate, or the subject-matter or surrounding circumstances render it probable that such was the intention.[76] A contract of employment without limitation as to time is terminable at the will of either party.[77] Where a contract is of a continuing character, each party is entitled to treat it as alive until apprised to the contrary.[78] The fact that no time is fixed for its duration does not preclude a recovery for breaches occurring while both parties are treating it as continuing.[79] Cases construing particular provisions as to time will be found in the note.[80]

Compensation.[81]—Where no compensation for services is agreed upon, the person rendering them is entitled to recover their reasonable value.[82] Extra compensa-

tiff was to notify defendant how much of the bark to be shipped over its road he desired. Merriman v. Cover, 104 Va. 428, 51 S. E. 817. Oil and gas lease held to contain implied agreement to reasonably develop lands. Brewster v. Lanyon Zinc Co. [C. C. A.] 140 F. 801.

75. See post, § 9 F.

76. Plaintiff could not rescind a contract to purchase first mortgage bonds because there had been no technical release of a prior mortgage at the time of delivery, where a fund had been set aside to cover a small balance of the debt. Nes v. Union Trust Co. [Md.] 64 A. 310. Where option contract provided for payment of specified sum when signed, another payment in 30 days from that date, and the payment of the balance in 60 days from said date, and that if option was not accepted and second payment made at the end of the 30 days the amount of the first payment should be forfeited, held that the optional feature of the contract was eliminated by second payment and it then stood as a binding contract of sale and purchase, and that time was of the essence of the first two payments but not of the final one, so that vendor, in case of breach after first two were made, had no right to retain first two payments on theory that they had been forfeited, but was only entitled to be reimbursed for damages sustained by reason of the breach. Davis v. Barada-Ghio Real Estate Co., 115 Mo. App. 327, 92 S. W. 113. Where plaintiff had no direct interest in a bridge which defendant city proposed to construct, and his only compensation for executing to the city a conveyance of land abutting on a street connecting with the proposed bridge being the incidental benefit which he would derive from the enhancement of his adjoining property, time was of the essence of the contract whereby defendant stipulated to build the bridge within a certain time in consideration of the conveyance, and defendant having in no way procured the construction of the bridge, the mere fact that such bridge was constructed did not constitute part performance of the contract by defendant so as to raise an equity in its favor entitling it to a further extension of time in which to perform. City of Houston v. Kapner [Tex. Civ. App.] 16 Tex. Ct. Rep. 331, 95 S. W. 1103. Time held of essence of contract for sale of land. Michigan Home Colony v. Tabor [C. C. A.] 141 F. 332.

77. Contract by city employing attorney to assist in collecting back taxes. City of Wilmington v. Bryan [N. C.] 54 S. E. 543. Contract employing architect. Fitzhugh v. Mason [Cal. App.] 83 P. 282.

78. Where a husband agreed to pay his wife for the board of his daughter by a former marriage, the wife could recover though the daughter became of age during the period for which compensation was claimed, defendant not having notified plaintiff of the termination of the contract. Effray v. Effray, 110 App. Div. 545, 97 N. Y. S. 236.

79. Fact that no time was fixed for duration of oral contract to pasture cattle held not to preclude recovery for damages to cattle while parties were treating contract as continuing by permitting cattle to remain in pasture. Wallis & Co. v. Wallace [Tex. Civ. App.] 14 Tex. Ct. Rep. 359, 92 S. W. 43.

80. Where a buyer contended that the seller had broken the contract by failure to file a bond within a reasonable time as required, instructions that it was the seller's duty to file the bond within a reasonable time, and that the buyer's failure to advise the seller that the bond had not been filed would be no excuse for not filing it, held not prejudicial. Equitable Mfg. Co. v. Howard [Ala.] 41 So. 628. Contract requiring delivery on specified day "with a few days to play on" held to expire within a reasonable time thereafter. Bell v. Hatfield [Ky.] 89 S. W. 544. An order by plaintiff to defendant to manufacture and ship an engine "as soon as possible, abou 30 days," and reciting that it was "subject to the approval" of defendant, did not state any definite time for the performance of the contract, and the petition for delay was defective for failure to show such time. Perkins v. Maurepas Milling Co. [Miss.] 40 So. 993. Contract providing that it should continue for period of 18 months from date on which it took effect, "and thereafter until six months shall have elapsed after written notice shall have been received by either party of the intention of the other party to withdraw from this agreement," held not to create an absolute and unconditional contract for two years which neither party could terminate by notice short of that period, but that, if either party gave notice of withdrawal at any time within a year from the date of the contract, it would terminate at the expiration of the 18 months mentioned therein. Mayo, Hysore & Co. v. Philadelphia Textile Machinery Co. [Va.] 53 S. E. 967.

81. See 5 C. L. 712.

82. Where there is no contract fixing

tion may ordinarily be recovered for services, materials, or expenses not contemplated by the parties when the contract was made.[83] Where an obligation is to be paid from a certain fund, the right of recovery is limited to the amount of such fund.[84] No time for payment being specified, it is presumed to be made when the contract is performed.[85] Cases dealing with particular provisions as to payment will be found in the note.[86]

(§ 4) *F. What law governs.*[87]—As a general rule the lex loci contractus governs in determining the validity and effect of the contract, and the lex fori determines the course of procedure in giving redress thereon.[88]

§ 5. *Modification and merger.*[89]—The parties to an executory contract may at pleasure, and by mutual assent,[90] alter or modify it,[91] or substitute a new one

the amount to be paid for personal services, plaintiff is entitled to recover their reasonable value and not the amount which will reasonably compensate him for the services rendered. Instruction held erroneous. McGrew's Ex'r v. O'Donnell [Ky.] 92 S. W. 301. Evidence held not to support finding that defendant agreed to pay plaintiff the usual commission for plans. Fairfield v. Hart [Mich.] 102 N. W. 641. Where plaintiff was employed as cook in defendant's hotel at $3.50 per week until there were more in defendant's hotel to cook for and thereafter notified defendants that she should expect $10 per week for services thereafter, to which defendants neither agreed nor disagreed, held plaintiff was entitled to recover the reasonable value of her services. Sexton v. Snyder [Mo. App.] 94 S. W. 562. Instruction that if plaintiff sawed larger ties than those specified in contract without notice to defendants that he would charge for them at a higher rate than that fixed by the contract for the sawing of ties therein specified he could not recover at a higher rate, held properly refused because ties differed from those specified in contract, were larger, and were not sawed under it. Vale v. Suiter, 58 W. Va. 353, 52 S. E. 313. Custody of mining properties by defendant held that of the plaintiffs, and the amount of his compensation not having been agreed upon, he was entitled to such amount as his services were reasonably worth. Andrews v. Connolly, 145 F. 43.

83. For discussion of right of building contractors to recover for extras, see Building and Construction Contracts, 7 C. L. 480. In action for stenographer's services, where only conflict in evidence was as to the price to be paid per folio for depositions, each party claiming that the work was to be done for a different price but both that a carbon copy was to be furnished free, and the evidence not showing a conditional promise on either side as to the copy, held that judgment including compensation for copy was erroneous. Hall v. Luckman [Iowa] 107 N. W. 932. Statement of plaintiff who had arranged to chaperon defendant's daughter on a European trip that a certain sum would cover her extra expenses above the agreed compensation, held not to prevent plaintiff from recovering additional extra expenses which she was required to incur, which were not contemplated by the parties and were rendered necessary through daughter's conduct in leaving the party, etc. Leonard's Adm'r v. Cowling [Ky.] 93 S. W. 909. Letter written by plaintiff to defendant, while arranging to take latter's daughter on a European trip, by mistake fixed the expense of the trip at a certain sum for 6 months' trip. Later, however, defendant, in a personal interview, was given to understand that the sum named would only cover a 3 months' trip. Trip actually lasted three months and three weeks. Held that statement in letter did not preclude plaintiff from recovering extra compensation for the additional three weeks. Id.

84. To be paid from the proceeds of a sale of concentrates. Farrell v. Gold Flint Min. Co., 32 Mont. 416, 80 P. 1027. Cannot recover in the absence of evidence showing a sale and a sum sufficient to reimburse him received therefrom. Id. Parties may contract for the payment of an obligation out of a particular fund and in a particular manner. Agreement that money advanced by plaintiff should be repaid out of the profits of a partnership to be entered into by plaintiff and defendant. Defense good. Creery v. Thompson, 26 Pa. Super. Ct. 511.

85. Building. Gurski v. Doscher, 98 N. Y. S. 588. Where land is sold to one who agrees to pay a part of the consideration to a creditor of the vendor, and no time is specified for payment, it is payable immediately, under Civ. Code § 1657. Peters v. George [Cal. App.] 81 P. 1117.

86. Where plaintiff agreed to buy advertising space and sell it to defendant, held the contract with defendant as well as the conduct of the parties negatived any obligation on the part of defendant to pay "short rates," which plaintiff had been compelled to pay a newspaper with which he had contracted in order to carry out his contract with defendant. Hampton Co. v. Schlesinger, 99 N. Y. S. 522.

87. See 5 C. L. 713.

88. For a full discussion of this question see Conflict of Laws, 7 C. L. 677.

89. See 5 C. L. 713.

90. Where a seller wrote to a buyer that he could not afford to ship the goods under the terms of the contract and suggesting new terms, the mere fact that the buyer ordered the goods after receipt of the seller's letter was not an acquiescence in the new terms suggested by the seller. Brennan v. Dansby [Tex. Civ. App.] 95 S. W. 700. Where it appeared that if oral contract was entered into it amounted to a novation

therefor,[92] and cannot limit their right to do so.[93] As a general rule, no further consideration is necessary than the mutual assent of the parties.[94] The draft of a written contract may be changed by either party before signature.[95] A provision that no agent shall have a right to change or modify the terms of a written contract does not preclude a party from showing that he was induced to enter into it through an agent's fraudulent representations.[96]

It is generally held that a written contract not under seal may be modified[97] or discharged by a subsequent parol agreement,[98] and the same is true in regard to

and necessarily involved an abrogation of a previous written one, giving of an instruction as to necessity of meeting of minds on terms of oral contract held to render unnecessary instruction that jury could not find that the written agreement was set aside, unless evidence showed that it was mutually agreed that it should be abrogated. Hubbard City Cotton Oil & Gin Co. v. Nichols [Tex. Civ. App.] 14 Tex. Ct. Rep. 1, 89 S. W. 795. Defendant's agreement to pay plaintiff a certain sum for furnishing the name of a purchaser for farm held not revoked by defendant's statement, after name had been furnished, that he would not pay commission unless farm was sold for a certain sum, plaintiff not having assented to the modification. Burd v. Webster [Wis.] 107 N. W. 23. Where a written contract exists, and one of the parties sets up an arrangement of a different nature, alleging conduct on the other side amounting to a substitution of this arrangement for the written contract, he must clearly show not only his understanding, but that the other party had the same understanding. Stephens v. Essex County Park Commission [C. C. A.] 143 F. 844. Failure of defendant to reply to contractor's letter held not to entitle latter to assume that defendant intended to release him from obligation to have work completed within a specified time. Id.

91. Payment of interest in advance is of itself prima facie evidence of an extension of time for the payment of the principal. Higgins v. McPherson, 118 Ill. App. 464. Substituted or modified agreement for purchase of plaintiff's land at a judicial sale held inapplicable since contingencies which it was designed to cover never arose. Gloeckner v. Kittlaus, 192 Mo. 477, 91 S. W. 126. Withdrawal by mutual consent of money deposited in bank by plaintiff to secure his performance of contract with decedent, and which was to be forfeited to latter in case of nonperformance, and loan thereof to decedent held not to conclusively show abrogation of provision for forfeiture, but question whether abrogation was intended was for jury. Eekhout v. Cole, 135 N. C. 583, 47 S. E. 655. Contract for sale of school land under which deed was delivered to purchaser, who gave note therefor secured by vendor's lien, held executory, so that commissioners' court could modify it by reducing rate of interest. Delta County v. Blackburn [Tex. Civ. App.] 90 S. W. 902. Where during the performance of a construction contract plaintiff for a consideration agreed to ask for no more payments until certain work was finished, he was not justified in abandoning the work before it was completed because he was not paid for extra work. Condon v. Church of St. Augustine, 98 N. Y. S. 253.

Evidence held not to show modification: Of contract of employment. Schulze v. Shea [Colo.] 86 P. 117. Parol modification of a lumbering contract as to the manner and place of cutting and moving the timber. Des Allemands Lumber Co. v. Morgan City Timber Co. [La.] 41 So. 332. Of contract for construction of electric railway. Tennis Bros. Co. v. Wetzel & T. R. Co., 140 F. 193. Where contract provided that vendor was to furnish a clear abstract of title "except an incumbrance of $4,000," which vendee assumed, provision in deed that sale was made "subject to an incumbrance of $4,000 and unpaid commissions on such loan" held not a modification of the contract so as to require vendee to pay such commissions. Wilson v. Wilson, 115 Mo. App. 641, 92 S. W. 145.

Evidence held to show modification: Extending time for delivery of cotton. Rankin v. Mitchem [N. C.] 53 S. E. 854.

92. Discharge of contract may be effected by a change in the terms whereby a new contract is in effect substituted for the old. American Fine Art Co. v. Simon [C. C. A.] 140 F. 529. Whether there has been such a rescission or discharge is a question of intention. Id. Evidence held to show oral agreement which operated to rescind written contract to purchase advertising matter. Id. A paper signed by one of the parties stating that the other party's rights under the contract were not to be affected by delay in performance, held not a new contract. Landvoigt v. Paul, 27 App. D. C. 423.

93. May, by a subsequent agreement based on a sufficient consideration, modify it in any manner they see fit, notwithstanding a provision therein that it shall only be modified in a particular manner. Provision in insurance policy restricting exercise of right to obtain other insurance. Polk v. Western Assur. Co., 114 Mo. App. 514, 90 S. W. 397.

94. Addition of interest to note. Wellden v. Witt [Ala.] 40 So. 126; Elliott v. Howison [Ala.] 40 So. 1018.

95. Draft of written contract may be changed at any time before signature. Where parol contract void under statute of frauds was subsequently reduced to writing by plaintiff, he was entitled to insert new conditions therein before sending it to defendant for signature. Bewick v. Hanika [Mich.] 12 Det. Leg. N. 672, 106 N. W. 63.

96. Contract for sale of fruit trees. Bonewell & Co. v. Jacobson [Iowa] 106 N. W. 614.

97. Elliott v. Howison [Ala.] 40 So. 1018.

specialties, provided the subsequent agreement has been executed.[99] By statute in some states the foregoing rule as to specialties is made applicable to all written contracts.[1]

In so far as the new and the old contracts are consistent, they should be construed together.[2]

No rights can be based on a contract which has been entirely abrogated by the substitution of a new one.[3]

Merger.[4]—Before one contract is merged in another and superseded thereby, the last one must be between the same parties as the first and must embrace the same subject-matter, and must have been so intended by the parties.[5]

§ 6. *Discharge by performance or breach. A. General rules.*[6]—A breach arises on the unexcused[7] failure or refusal of one party to carry out his part of an entire contract,[8] or where he voluntarily puts it out of his power to perform,[9] or

98. By substitution of inconsistent oral agreement. American Fine Art Co. v. Simon [C. C. A.] 140 F. 529.

99. A parol agreement on sufficient consideration extending the time of payment under a mortgage is valid. Moody v. Atkins [Ala.] 40 So. 305. Oral executed agreement reducing the rent called for in a sealed lease. Snow v. Griesheimer, 220 Ill. 106, 77 N. E. 110. Salesman could prove subsequent parol agreement relieving him from responsibility for the collection of accounts for sales where by virtue of performance thereof the accounts could no longer be collected by him because the title thereto had vested in his employer. American Food Co. v. Halstead, 165 Ind. 633, 76 N. E. 251.

1. Under Civ. Code § 1698, a verbal agreement, whereby the tenant was to have free pasturage for certain stock when fully executed by pasturing without demand for charge, is a valid modification of the written contract reserving the pasture to the landlord. Hanse v. Phillips [Cal. App.] 82 P. 1127. Under Rev. Civ. Code § 1287. Barton v. Koon [S. D.] 104 N. W. 521. Evidence held to support finding that written contract for purchase and sale of realty and personalty was modified by parol. Id. Under Rev. Codes 1899, § 3996, providing that a contract in writing may be altered by a contract in writing or an executed oral agreement and not otherwise, oral alteration of written contract is not binding unless contract as changed has been executed. Annis v. Burnham [N. D.] 108 N. W. 549. Rule applies to all written contracts, whether attempted alteration pertains to performance or other provisions. Id. A contract for the sale of realty may be abandoned or waived by the vendee by parol. Wisner v. Field [N. D.] 106 N. W. 38.

2. An agreement for an additional sum, to substitute a different style of corners for a building which plaintiff had contracted to plaster, became a part of the original contract and defendant was entitled to set off against plaintiff's claim for a balance due the amount necessarily spent in completing abandoned work. Conroy v. Carlin, 96 N. Y. S. 141. Where modification of written contract of bailment affected only the time for the payment of rental, failure to pay rental entailed all the consequences stipulated for in the written agreement. Whitehill v. Schwartz, 27 Pa. Super. Ct. 526.

3. Where it was agreed, on plaintiff becoming unable to carry out contract for purchase of merry-go-round, that amount already paid on purchase price should be used in purchasing a shooting gallery, and that original contract should be canceled, held that such original contract could not be made basis of cross-bill by defendant in suit to set aside sale of shooting gallery for fraud. Parker v. Anderson [Tex. Civ. App.] 85 S. W. 856. Where a note was executed for services rendered, there could be no recovery on account for the services without producing the note or accounting for its nonproduction. Dawdy v. Dawdy's Estate [Mo. App.] 94 S. W. 767.

4. See 5 C. L. 714.

5. Evidence held to sustain finding that new contract was not intended to supersede old one. Walsh v. Lunney [Neb.] 106 N. W. 447. Contract to convey right of way to railroad in consideration of its establishing station and stopping accommodation trains thereat held merged in subsequent deed conveying land on condition that it do so, and providing for reverter for breach, and rights of parties were to be determined by terms of such deed. Gray v. Chicago, etc., R. Co. [C. C. A.] 140 F. 337. Contract to enter into possession of and operate certain railway held superseded by subsequent lease in so far as the two were inconsistent. Grand Trunk W. R. Co. v. Chicago, etc., R. Co [C. C. A.] 141 F. 785.

6. See 5 C. L. 714.

7. See § 6 C, post.

8. Where party totally or partially fails to perform what he has promised. McGure v. Neils Lumber Co. [Minn.] 107 N. W. 130. Where a contract provides for a series of acts, a nonperformance of one accompanied with a refusal to perform the rest constitutes a breach of the entire contract. As where one is to deed several lots at stated periods and fails to deed one lot, stating that he will not deed any more at the agreed price. Landvoigt v. Paul, 27 App. D. C. 423. To ascertain whether or not there has been a breach of an express contract, the contract itself must be looked to in order to determine whether the party declared against has failed or refused to perform

prevents performance by the other party.[10] A breach of an independent part of a severable contract does not put an end to the whole contract, or excuse performance of other independent provisions by the other party.[11]

an undertaking according to the terms of the agreement between the parties. Bunting v. Dobson [Ga.] 54 S. E. 102. Where the seller of property agreed to take it back if unsatisfactory and to refund the purchase price, under Civ. Code § 1440, the contract was broken when the seller refused to receive back the property and refund the money. Sierra Land & Cattle Co. v. Bricker [Cal. App.] 85 P. 665. Complaint held sufficient to show breach of contract to convey land in consideration of services performed by defendant's son. Grau v. Grau [Ind. App.] 77 N. E. 816. Evidence in action on contract whereby plaintiffs were appointed defendant's agents to sell fish held to require submission of question of breach to the jury. Emerson v. Pacific Coast & Norway Packing Co. [Minn.] 104 N. W. 573. Where plaintiff had a right to remove oyster shells under a contract with defendant, and defendant refused to permit him to take them, it was not necessary in an action on contract for the value of the sheils to show that defendant converted them to his own use. Pass Packing Co. v. Torsch [Miss.] 40 So. 228. Where, in an action to recover the agreed consideration for the privilege of filling in a lot, defendant asserts a breach by plaintiff in stopping him, evidence that several months later defendant attempted to fill in some more is not conclusive that plaintiff had not broken the contract. Johnston v. O'Shea [Mo. App.] 94 S. W. 783. Evidence held not to show any breach of the conditions of bond contract. Grindrod v. Anglo-American Bond Co. [Mont.] 85 P. 891. Contract by which defendant's testator agreed to pay plaintiff a certain sum per year in reparation of wrongs done to her and her sister, held not breached by plaintiff's advising with testator with reference to a suit against her involving their relations, so as to forfeit plaintiff's rights thereunder. Wakley v. King, 98 N. Y. S. 957. Evidence held sufficient to sustain a finding that the breach of a contract to manufacture varnishes according to plaintiff's formula occurred more than two years after the making of the contract. Grant v. Pratt, 97 N. Y. S. 29. In action on note payable when defendant was able to pay it, evidence held insufficient to show that he was able to pay it at a certain time. Glass v. Adoue [Tex. Civ. App.] 86 S. W. 798.

9. Absolute destruction of the subject-matter by voluntary act of party is a breach. Barker & S. Lumber Co. v. Edward Hines Lumber Co., 137 F. 300. Where one agrees to sell certain lot to another under contract providing that he shall not make deed until he has sold certain other lots, and before selling such other lots puts it out of his power to perform by selling lot covered by the contract, he is guilty of a breach, and vendee may sue at once without waiting for sale of other lots and without tendering purchase price. Cooley v. Moss, 123 Ga. 707, 51 S. E. 625. Purchase by defendant of logs with which his logs were commingled held not to render impossible of performance contract whereby defendant was to sort and drive defendant's logs. McGuire v. Neils Lumber Co. [Minn.] 107 N. W. 130. Where one purchasing a mine agrees to pay $850 out of the first "net profits" as a part of the purchase price, he cannot pile up the ore mined and then sell it with the mine and escape payment. Teachenor v. Tibbals [Utah] 86 P. 483. Evidence held sufficient to show that enough ore had been mined to net $850 profit if it had been sold. Id. One may not escape liability on a contract by destroying the condition upon which it was to have been performed. Agreement by the parties to jointly endeavor to secure control of a corporation, and if successful endeavor to make plaintiff manager. Control lost by defendant's contracting with another. Lloyd v. Dickson [La.] 40 So. 542. Petition alleging that the parties agreed to jointly endeavor to secure control of a corporation, and, if successful, make plaintiff manager, and that defendant thereafter contracted with another party by which the same position was to be secured to him, held to show breach. Id.

10. Where two promoters of a proposed corporation agreed to finance it and failed because certain other promoters failed to execute certain deeds according to agreement for incorporation, the latter cannot complain. Miser Gold Min. & Mill. Co. v. Moody [Colo.] 86 P. 335. Where defendant's breach of contract to boom and sort plaintiff's logs lay in their failure to run logs down river to point where they could be put into plaintiff's boom, due to defendant's use of river above sorting gaps as storage pond for its own logs instead of maintaining river as navigable waterway, and not in failure to put logs into the boom below the sorting gaps, defendant could not excuse itself on ground that performance was physically impossible because plaintiff's boom into which logs were to be delivered was not large enough to contain logs which they put into the river. Nester v. Diamond Match Co. [C. C. A.] 143 F. 72. A party cannot stop performance to prevent anticipated loss without becoming accountable for the damage caused by the interruption. Defendant held not entitled to stop plaintiff from cutting more logs until those already cut were hauled for fear more would be cut than could be hauled and that the excess would be injured by lying in the woods, where there was nothing in the contract authorizing him to regulate the matter and defendant was entitled to retain a certain part of the contract price until the work was completed. Morgan v. Tucker [Vt.] 61 A. 863.

11. If the renunciation of part performance does not go to the whole consideration and does not render full performance impossible, or render the main object of the contract unattainable, and was not intended to excuse performance of the other provisions, no breach occurs, and no right of action arises. Barker & S. Lumber Co. v. Ed-

If a party to an entire executory contract,[12] before the time for performance arrives, distinctly and unequivocally[13] renounces or repudiates it, the other party may, at his election,[14] treat his action as a breach.[15]

(§ 6) *B. Acceptance and waiver.*[16]—Performance of the contract according to its terms may be waived by a party having knowledge of the facts,[17] or his duly authorized agent,[18] either expressly[19] or by acts or conduct showing an intention not

ward Hines Lumber Co., 137 F. 300. Performance of balance of contract not excused because a party voluntarily disables himself from performing a severable portion thereof. Id. Supplemental agreement extending contract for sawing logs to timber subsequently purchased held an independent provision, so that its unintentional breach by having timber cut and sawed elsewhere did not excuse plaintiff from further performance. Id. Breach of provision in compromise agreement that switch which defendant was to be allowed to maintain in front of plaintiff's premises should be kept open and free of cars, except when in actual use, held no ground for cancellation in equity, but innocent party would be relegated to action at law for damages. Haydon v. St. Louis, etc., R. Co. [Mo. App.] 93 S. W. 833. Contract for sale of good will of business and not to engage in same business held severable, so that breach of latter agreement did not preclude recovery on note given covering consideration for both, but only entitled defendant to recoup damages resulting from breach. Bradford v. Montgomery Furniture Co., 115 Tenn. 610, 92 S. W. 1104.

12. It is essential to the repudiation of a contract that there be something still to be performed by the repudiating party. Could be no repudiation of a mutual release of liens. Holden v. Gilfeather [Vt.] 63 A. 144.

13. Letters held to amount to a refusal to abide the terms of the contract. Russell v. Excelsior Stove & Mfg. Co., 120 Ill. App. 23. Evidence insufficient to show breach by defendant of contract by which plaintiff was to construct a dam. National Contracting Co. v. Hudson River Water Power Co., 110 App. Div. 133, 97 N. Y. S. 92. Must be both intention to abandon it and the external action to do so. McGuire v. Neils Lumber Co. [Minn.] 107 N. W. 130. Purchase by defendant of all logs lying along banks of stream held not to amount to repudiation of contract whereby defendant was to sort and drive logs commingled with them which originally belong to defendant. Id.

14. A mere statement of a promisor that he will not perform his contract does not constitute a breach until the other party acts upon it. Landvoigt v. Paul, 127 App. D. C. 423. The other party may accept the statement as a breach and sue thereon or may stand by the contract and wait the time of performance. Id. Although renunciation goes to the whole contract, or to a vital, dependent, provision, yet, if the other party does not promptly accept it as a breach, the contract will be regarded as still alive for all purposes. Barker & S. Lumber Co. v. Edward Hines Lumber Co., 137 F. 300.

15. Landvoigt v. Paul, 27 App. D. C. 423; McGuire v. Neils Lumber Co. [Minn.] 107 N. W. 130; Alger-Fowler Co. v. Tracy [Minn.] 107 N. W. 1124. May sue at once. Seymour v. Warren, 100 N. Y. S. 267. May treat the contract as rescinded and sue for the amount paid by him thereunder. Where one, who has agreed to teach another until latter becomes proficient in certain line, abandons contract after being paid in full and refuses to teach him longer. Timmerman v. Stanley, 123 Ga. 850, 51 S. E. 760. Express repudiation and denial of oral contract to divide profits of purchase and sale of land by person having title gives rise to cause of action against him for damages. Rice v. Parrott [Neb.] 107 N. W. 840. Where a party expressly repudiated contract and notified the other that it would receive no more iron under it, in an action for breach no advantage can be taken of the other party's failure to perform thereafter. Whiting Foundry Equipment Co. v. Hirsch, 121 Ill. App. 373.

16. See 5 C. L. 715.

17. Where a planter in consideration of advances made by a factor agreed to ship his cotton crop to him or to some one designated by him, but thereafter sold the crop to another person without the knowledge of the factor, the fact that the latter had failed to designate a consignee and, after being informed of the partial shipment already made, received the promise of the planter to ship the balance of the crop according to contract, did not constitute a waiver of the breach. National Bank of Commerce v. Sullivan [La.] 41 So. 480. Where the planter kept deposits with the factor of other funds than those advanced, the fact that the factor collected the proceeds of a draft drawn by the planter on the purchaser and credited the same to the planter's account did not give notice of the wrongful sale so as to constitute a waiver. Id. Where the liability of a subscriber to an agreement was conditioned on the securing of a certain number of responsible signers, the fact of his signing at a time when the signatures of insolvent persons were on the paper was not a waiver of the condition, he being ignorant of the insolvency. Sager v. Gonnermann, 100 N. Y. S. 406.

18. A change or waiver must be made by one having authority. It was not shown that plaintiff's bookkeeper had authority to change or waive a contract binding defendant to store goods where they would not freeze, and defendant could not show the acts and declarations of the bookkeeper. Phenix Nerve Beverage Co. v. Dennis & L. Wharf & Wharfage Co., 189 Mass. 82, 75 N. E. 258.

19. Hilton v. Hanson [Me.] 62 A. 797. Where a party has expressly waived a notice of the default of one whose debt he has agreed to pay, he can not complain that such notice was not given. Smyser v. Fair [Kan.] 85 P. 408.

to require it.[20] Thus, the absolute and unconditional acceptance of an article contracted for, with knowledge of all the facts, is a waiver of any defects therein.[21]

20. By acts and declarations manifesting an intent not to claim the supposed advantage, or by a course of acts or conduct, or by so neglecting and failing to act as to induce a belief that it was the intention and purpose to waive. Hilton v. Hanson [Me.] 62 A. 797. Must not remain silent after learning of breach of conditions for which forfeiture is imposed as a penalty. Insurance policy. Polk v. Western Assur. Co., 114 Mo. App. 514, 90 S. W. 397. Where a lessor waived his right to declare a forfeiture of a gas and oil lease at the end of a 12 year period, the lessee was entitled to a reasonable time thereafter in which to develop the territory. American Window Glass Co. v. Indiana Natural Gas & Oil Co. [Ind. App.] 76 N. E. 1006. What was a reasonable time was a question of fact. Id. Damage due to omission of tying of brick work called for by specifications for installing boiler held chargeable to default of defendant in failing to furnish proper superintendent in absence of proof that plaintiff acquiesced in variance, which was question for the jury. Arkwright Mills v. Aultman & T. Mach. Co. [C. C. A.] 145 F. 783.

Evidence held to show waiver: Where the wife of a teacher taught for him while he was sick, without being employed by the school, it was open to the jury to find that the school accepted the wife's services in place of those of her husband and that he was to receive compensation therefor as though he had rendered the services himself. Southern Industrial Inst. v. Hellier, 142 Ala. 686, 39 So. 163. Where lease of rails and track material required lessee, on termination of lease or lessee's failure to keep the conditions of the same, to redeliver them to the lessor at a certain place, acceptance of them by lessor at a different place held to put an end to the contract and to relieve the lessor and his sureties from liability for future rent, or for expense of removing them to place of delivery named in the contract. White River, etc., R. Co. v. Star Ranch & Land Co. [Ark.] 91 S. W. 14. Acceptance did not, however, release them from liability for rent previously accrued. Id. Acts of architect and owner held a waiver of the provision in a construction contract that no extension of time could be granted except upon written demand. Huber v. St. Joseph's Hospital [Idaho] 83 P. 768. Error to exclude evidence showing acts by the owner or architect waiving the provision requiring written application for extension of time. Id. Where a party rejected a tender of an agreed nominal consideration for an option, saying "If I want anything I will take it all at once," can not assert in equity nonpayment of consideration. Seyferth v. Groves & S. R. Co., 119 Ill. App. 275. Failure to furnish scrap iron of the grade called for by the contract cannot be made the ground of rescission where the purchaser rejected the iron and allowed substitution. Whiting Foundry Equipment Co. v. Hirsch, 121 Ill. App. 373. The acceptance of annual rental and execution of a receipt after the expiration of a 12-year period provided for in a gas and oil lease was a waiver of the right to claim a forfeiture at the end of the 12-year period. American Window Glass Co. v. Indiana Natural Gas & Oil Co. [Ind. App.] 76 N. E. 1006. Of written contract for cutting wood and timber, etc. Hilton v. Hanson [Me.] 62 A. 797. Where owners consummated sale brought about by brokers, held that they could not contend that it was not brought about within a reasonable time. Morgan v. Keller, 194 Mo. 663, 92 S. W. 75. Vendor may waive provision of contract for sale of realty that title shall be clear of incumbrances before he makes payment, and does so if he makes no objection to making payment on that ground but is willing to pay and let incumbrances be lifted. afterwards. Davis v. Barada-Ghio Real Estate Co., 115 Mo. App. 327, 92 S. W. 113. Where vendee is willing and able to pay purchase money and offers to do so, and vendor makes no objection to the offer because the cash is not proffered, latter thereby waives tender of cash. Id. Two of three persons who agreed that their salaries as officers of a proposed corporation should be paid out of the profits could not recover from the third a salary received by him out of the capital where they assented to such payment. Mills v. Hendershot [N. J. Eq.] 62 A. 542. Where it was agreed that neither dividends nor salaries to stockholders or officers of a proposed corporation should be paid except from the profits, salaries paid after it was known that there were no profits could not have been considered by the parties as controlled by the dividend clause of the agreement and were not paid in violation thereof. Id. A navigation company notified defendant that it could not carry out its contract to purchase 2,000 tickets daily at 45 cents each. Defendant then wrote that thereafter the charge would be 50 cents per ticket as the 45-cent rate was given on the theory that the navigation company would carry out its agreement. Held a waiver of the stipulation for the purchase of 2,000 tickets daily, though the letter further stated that there was no time in which to modify the contract. Kirkland v. Niagara Gorge R. Co., 109 App. Div. 201, 95 N. Y. S. 657. The waiver was supported by a sufficient consideration, to wit, the payment of an additional sum for tickets. Id. An entire contract for purchase of yarn called for its delivery in instalments. Defendants objected to yarn delivered as not being in accordance with the contract but accepted and used it. Held that they could not thereafter rescind and refuse to accept future deliveries, since they had put it out of their power to restore the consideration. Harding, Whitman & Co. v. York Knitting Mills, 142 F. 228. Plaintiff's conduct in allowing time conceded in which to arrange for freight rates to elapse without notifying other party to proceed with logging operations, held a waiver of contract provision requiring logging operations the first year. Mueller v. Cook, 126 Wis. 504, 105 N. W. 1054. Plaintiff held also to be estopped by conduct from claiming breach. Id.

Evidence held not to show waiver: Of

Mere knowledge of or assent to the breach of a contract is not a waiver thereof,[22] nor is the right to recover for a breach waived by performance by the other party with knowledge thereof,[23] nor the right to recover liquidated damages for delay by permitting a completion of the contract without objection.[24] Acts of performance after the happening of the contingency on which the contract is to terminate by its terms do not necessarily prevent reliance on such termination.[25]

Waiver of the provisions of a written contract may be shown by parol, even though it is under seal.[26]

right to liquidated damages for delay in completion of construction contract. Stevens v. Essex Co. Park Com. [C. C. A.] 143 F. 844.

21. Performance according to a contract of sale is presumed where acceptance is made after an inspection or an opportunity for inspection of the goods. Field v. Schuster, 26 Pa. Super. Ct. 82. The acceptance of an article contracted for is the receipt thereof by the appropriate party to a contract with the intent of retaining the same, indicated by some act or work sufficient for that purpose. McGuire v. Neils Lumber Co. [Minn.] 107 N. W. 130. Receiving and paying for goods raises a rebuttable presumption of acceptance, and throws the burden on the party receiving them to prove the contrary. Instruction approved. Goodwin Mfg. Co. v. Arthur Fritsch Foundry & Mach. Co. [Mo. App.] 89 S. W. 911. Evidence held not to show waiver of provision that piles should be according to government specifications. Carlin & Co. v. Fraser [Va.] 53 S. E. 145.

Acts held to be an acceptance: Plaintiff contracted to sort and deliver for defendant certain logs which were commingled with logs belonging to other persons. Later defendant bought whole mass of logs and notified plaintiff to discontinue sorting after logs had been driven and delivered as required. Held that notice tended to show acceptance rather than waiver of nonperformance. McGuire v. Neils Lumber Co. [Minn.] 107 N. W. 130. Vendee of sugar cane by making it into sugar and selling the sugar waived requirement of contract that the cane should test a certain per cent. Gilmore v. Meeker, 115 La. 849, 40 So. 244. Defendant held liable to plaintiff for drilling a well where he failed to make a test within 30 days, as required by the contract, though the well did not produce. Hagadorn v. McNair, 109 App. Div. 759, 96 N. Y. S. 417. Where defendant expressed her satisfaction with a portrait and requested the artist to keep it temporarily for exhibition, there was a constructive delivery and acceptance. Scott v. Miller, 99 N. Y. S. 609.

Acts held not to amount to acceptance: Defendant's failure to remove unsatisfactory screens furnished by plaintiff. Higgins Mfg. Co. v. Pearson [Ala.] 40 So. 579. Where plaintiff agreed to sink a well on defendant's land, defendant to furnish the casting for the well, and plaintiff did not properly discharge his contract, the fact that defendant subsequently used the well. Hahl v. Deutsch [Tex. Civ. App.] 14 Tex. Ct. Rep. 901, 94 S. W. 443. Plaintiff bought materials in shoe factory of R., in which were certain machines belonging to defendant for which royalty was paid. He then wrote defendant stating that he would pay arrears of royalty due from R. if defendant would give him leases of the machines and assign its claim against R. Defendant wrote that it had forwarded leases and assignment to be delivered on plaintiff making a satisfactory financial showing, but they were never delivered and R. was credited with amount of plaintiff's check. Held that defendant was not authorized to use check without complying with conditions on which it was sent, which were not waived by plaintiff's use of the machines in the meantime, for which he paid. Goodspeed v. United Shoe Machinery Co. [Mich.] 12 Det. Leg. N. 596, 104 N. W. 982. A 30-day test of a tank held not waived by the owner getting ready to use the tank in case it met the test. Logan v. Consolidated Gas Co., 107 App. Div. 384, 95 N. Y. S. 163. Where plaintiff agreed to cut logs and deliver them at a certain place, the fact that before delivery defendant marked them and contracted to sell them when delivered would not be a waiver of delivery. Norris v. Clark, 29 Pa. Super. Ct. 562.

22. There must be a release, consideration, or such conduct on the part of the assenting person as creates a condition to the detriment of the other party. Pope Mfg. Co. v. Rubber Goods Mfg. Co., 110 App. Div. 341, 97 N. Y. S. 73.

23. Party aggrieved may strictly perform on his part and hold the other. Pope Mfg. Co. v. Rubber Goods Mfg. Co., 110 App. Div. 341, 97 N. Y. S. 73. Where plaintiff's contract for the performance of services for defendant stipulated for a forfeiture of part of the compensation in case of failure to fulfill the contract, and, pending performance, a dispute arose as to the amount of compensation to which plaintiff was entitled, plaintiff did not waive his right to recover full payment by accepting payments according to defendant's claims and fully completing the contract on his part. Hearn v. Stevens & Bro., 97 N. Y. S. 566. That plaintiff performed and waited until the end of the term before bringing suit did not show waiver of the breach under the circumstances. Id.

24. Couch v. Newtown Council Bldg. Ass'n, 109 App. Div. 856, 96 N. Y. S. 441.

25. After termination of a contract whereby defendant was to furnish plaintiff with oil as long as the "Beaumont" wells were flowing, by the wells ceasing to flow, the fact that after a new well began to flow defendant resumed shipments under the contract did not create a new liability or prevent it from relying on the termination of the contract. North Texas Const. Co. v. San Jacinto Oil Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 45, 95 S. W. 706.

(§ 6) *C. Excuses for failure to perform.*[27]—An unexcused[28] breach of an entire contract by one party excuses further performance by the other.[29] So too, one cannot predicate any rights on a breach for which he is himself responsible.[30] A party to an executory contract based on mutual promises may, when called on to perform his part, show that performance by the other party is impossible.[31]

As a general rule, one who unqualifiedly undertakes to do a particular thing is not excused because performance is prevented by the act of God or a vis major,[32] or is rendered impossible by some unforeseen contingency,[33] which should have been

26. Hilton v. Hanson [Me.] 62 A. 797.

27. See 5 C. L. 718.

28. Excusable delay does not dispense with proof of ultimate performance. Gates v. O'Gara [Ala.] 39 So. 729. Replication excusing delay in completing a building but failing to state that the building was ever completed, held demurrable. Id.

29. Wasser v. Western Land Securities Co. [Minn.] 107 N. W. 160. On violation of agreement by two companies to sell phosphate rock, one of the companies for itself and as assignee of the other could not recover for refusal to accept the rock. Alachua Phosphate Co. v. Anglo-Continental Guano Works [Fla.] 40 So. 71. Where the maker of a note payable in services is discharged for justifiable cause, the payee is released from his obligation to receive payment in services or to grant an extension of the note, and a suit on the note is not prematurely brought when begun within six months after maturity. Minzey v. Marcy Mfg. Co., 6 Ohio C. C. (N. S.) 593. A total breach by some act making performance impossible puts an end to the contract. Barker & Stewart Lumber Co. v. Edward Hines L. Co., 137 F. 300. Where one party repudiates contract, the other need not perform useless acts to keep it alive so as to recover for breach. Where one repudiates contract to furnish bolts as ordered for a specific period, the other party need not continue to order as a condition of recovery for breach of contract as an entirety. Russell v. Excelsior Stove & Mfg. Co., 120 Ill. App. 23. Where defendant repudiated her agreement to pay the reasonable value of a painting, plaintiff was not bound thereafter to make a delivery before suing for the price. Scott v. Miller, 99 N. Y. S. 609. Where it is sought to excuse nonperformance by failure of the other party to do certain things on his part, it must be shown that he was under obligation to so perform. Replication insufficient which failed to aver that it was defendant's duty to furnish materials. Gates v. O'Gara [Ala.] 39 So. 729.

30. Where the seller of bank stock agreed to reimburse the purchaser for any loss which he might sustain from the bank's failure to recover misappropriated moneys, the release of security against the defaulting officer, with purchaser's consent, precludes a recovery on the contract. Robinson v. Pierce [Colo.] 83 P. 624. Where plaintiff was responsible for loss of dam because he directed contractors who were constructing it to turn on water before it was completed, held that he thereby relieved defendant from duty to rebuild it imposed by contract, and defendant's failure did not authorize rescission and recovery of purchase price. Williams v. Walden, 124 Ga. 913, 53 S. E. 564. Evidence held not to warrant verdict for plaintiff. Id. Evidence held to sustain finding that plaintiffs' loss of sugar cane by frost was due to their inability through scarcity of labor to deliver daily the number of tons required by the contract with defendant, and not to defendant's failure to unload cars. Gilmore v. Meeker, 115 La. 849, 40 So. 244. Evidence held to show that defendant was not guilty of breach of a contract to cut, pull, or float timber for plaintiff, but that plaintiff was guilty of such breach by making demands not justified by the contract and by breaking up defendant's preparations and arrangements. Des Allemands Lumber Co. v. Morgan City Timber Co. [La.] 41 So. 332. Evidence held to show that failure of plaintiff to build house on land was due to defendant's own acts, so that he was not entitled to have deed canceled on that account. Graham v. Strawsburg [Ky.] 91 S. W. 737. Failure of plaintiff to complete contract to cut and deliver all the sawlogs on certain land before a certain date held no defense to action on contract where it was due to defendant's refusal to permit more logs to be cut until those cut had been removed, and it did not appear that previous mismanagement had put it out of his power to complete the contract in time. Morgan v. Tucker [Vt.] 61 A. 863. Fact that parties employed by defendants to haul timber to mills had 15 months in which to do so, held not to excuse plaintiff for delay in carrying out contract to saw such timber, unless delay was caused by failure of defendants or their employes to furnish timber to be sawed, in which case they would not be liable for delay so caused. Vale v. Suiter, 58 W. Va. 353, 52 S. E. 313.

31. German-American Security Co.'s Assignee v. McCulloch [Ky.] 89 S. W. 5.

32. That a water company was unable to maintain the usual pressure because of excessively cold weather was no defense to an action for failure to furnish water. Whitehouse v. Staten Island Water Supply Co., 101 App. Div. 112, 91 N. Y. S. 544.

33. Where a party by his own contract creates a duty or charge upon himself, his undertaking must be substantially complied with under any and all circumstances. To excuse performance his contract must provide for it. Vale v. Suiter, 58 W. Va. 353, 52 S. E. 313. One who, by his voluntary contract, absolutely engages to do a thing, is bound to do it or be liable in damages, notwithstanding it is beyond his power to perform it or becomes impossible by inevitable accident or other contingency, not foreseen and not within his control. Law & Co. v.

anticipated and guarded against in the contract,[34] nor because he is disappointed as to the means whereby he expected to perform.[35] This rule does not, however, apply where the parties have expressly stipulated to the contrary,[36] nor where performance is rendered impossible by operation of,[37] or a change in,[38] the law. The

Paxton [Mo. App.] 93 S. W. 354. Plaintiffs contracted to bore well for defendant, at a place to be selected by him, which would produce not less than a specified quantity of water, defendant to board plaintiff's employes. Drill became fastened in well in such a way that they could not pull it out, and they were forced to abandon the work. Held that defendant's refusal to allow them to drill another well elsewhere was not a breach of the contract, and plaintiffs were not entitled to damages on theory that performance had been prevented by defendant. Id. Warehouseman, where goods are destroyed by fire. Clough v. Stillwell Meat Co., 112 Mo. App. 177, 86 S. W. 580. Undertaking to construct and deliver gas holder and tank complete, and collapse of tank during a test. Logan v. Consolidated Gas Co., 107 App. Div. 384, 95 N. Y. S. 163. Where a contract for the drilling of an oil well provided that the well should be sunk to a depth of 500 feet if necessary, and the drillers were compelled by difficulties in the work to abandon the well before they reached the depth of 500 feet, and were then prevented by the landowner from drilling another well, the drillers were not entitled to recover for the well partially drilled, though they might have been entitled to recover for breach of contract in wrongfully preventing them from drilling the second well. Fuller v. Kaminsky [Tex. Civ. App.] 16 Tex. Ct. Rep. 357, 95 S. W. 655.

34. Where lease contained covenant that premises should be used only for saloon purposes, the lessee was held not relieved from liability for rent by reason of the adoption of prohibition by popular vote, under a local option statute in existence when the lease was made. Houston Ice & Brewing Co. v. Keenan [Tex.] 13 Tex. Ct. Rep. 251, 88 S. W. 197. Nonperformance of a contract is not to be excused because one of the parties is prevented from performing his obligations in the premises by rains which are naturally or reasonably to be expected. Contracts are made subject to be performed under ordinary conditions which may be reasonably anticipated with reference to the localities and seasons. Tasker v. Baugh, 124 Ga. 846, 53 S. E. 266. Charge as to effect of act of God as excusing performance of contract for manufacturing lumber held inapplicable and erroneous, where it appeared that rains, claimed to have caused damage, were not unusual. Id. That it was impossible to remove magnesium stains was no excuse for failure to perform an absolute contract to renovate brickwork and "have a job like new" where the contractor had reason to anticipate the impossibility but the same was unknown to the owner. Finney v. Bennett, 97 N. Y. S. 291.

35. That an owner expected to pay a contractor out of funds to be derived from a collateral contract with another party, though the contractor knew of the owner's plan. Smith v. Kaufman, 30 Pa. Super. Ct. 265.

36. Where defendant undertook to deliver wheels, unless prevented by "unavoidable cause," the giving way of the foundation of the engine, delay of plaintiff in giving orders, and extraordinary demand for material necessary to manufacture, did not constitute a bar to plaintiff's action. Connersville Wagon Co. v. McFarlan Carriage Co. [Ind.] 76 N. E. 294. Where contract required plaintiff to run sawmill steadily except when prevented by unavoidable accident, he was not excused from performance by reason of the fact that his men quit his employment because of a smallpox scare if by due diligence he could have procured other help and continued the work. Various instructions and requests for instructions considered. Vale v. Suiter, 58 W. Va. 353, 52 S. E. 313. Conversations held not equivalent of written notice of unavoidable delays where contract provided that no verbal statement of anyone should modify its terms. Link Belt Engineering Co. v. U. S., 142 F. 243. Delay due to failure to receive materials held not "unavoidable" within meaning of contract for government work, where contractor knew of congested condition of steel market when contract was made, and supposedly guarded against it by providing for a longer time for completing work than would otherwise have been necessary, and hence he was liable for stipulated damages. Id.

37. An injunction issued at the instance of a third party enjoining work upon streets is not an act of law within Civ. Code § 1511, so as to extend the time of performance of contract. Union Contracting & Paving Co. v. Campbell [Cal. App.] 84 P. 305. Two insurance companies entered into agreement whereby business and policies of one were taken over by the other. Agent of former company took service with latter under agreement whereby it was to guaranty his commissions on renewal premiums. Before any such premiums were collected, transfer agreement was declared invalid by court at suit of stockholders, the statu quo was reestablished, the transferee was enjoined from collecting renewal premiums, and agent was enjoined from paying same except to transferror company. Held that performance of agent's contract was rendered impossible of performance by vis major. Kansas Union Life Ins. Co. v. Burman [C. C. A.] 141 F. 835. Appointment of receiver for corporation in involuntary proceedings renders its executory contracts not adopted by the receiver nugatory, and the other party to such a contract cannot recover damages for its breach but is only entitled to just compensation for his actual expenditure of labor and money. Tennis Bros. Co. v. Wetzel & T. R. Co., 140 F. 193.

38. Adoption of prohibition by popular vote held not such a change in the law as would release defendant from liability for rent under a lease in which he covenanted to use premises for saloon purposes, where local option statute was in existence when lease was made. Houston Ice & Brewing Co.

subsequent destruction of a specific thing whose continued existence is necessary to performance,[39] or the death or disability of one contracting to render personal services, will excuse performance.[40] One may, notwithstanding the destruction of the subject-matter, recover on a quantum meruit for services rendered pursuant to an entire contract if they were accepted by and were beneficial to the obligee, and if the language of the contract and the circumstances permit the implication of a promise to pay.[41] One can never escape liability on the ground that performance was prevented by inevitable accident where he could have prevented the happening of the event relied on by the exercise of ordinary care and foresight.[42]

One who promises absolutely to do a particular thing cannot make performance depend on the happening of contingencies.[43]

(§ 6) *D. Sufficiency of performance.*[44]—Performance is such thorough fulfillment of a duty as puts an end to the obligations by leaving nothing more to be done.[45] A party is ordinarily bound to perform his contract according to its terms,[46]

v. Keenan [Tex.] 13 Tex. Ct. Rep. 251, 88 S. W. 197.

39. Agreement of company issuing investment bonds as to their payment held impossible of performance within the time specified or within a reasonable time, if ever, so that defendant was relieved from liability on notes given for monthly instalments of purchase price on the ground of failure of consideration. German-American Security Co.'s Assignee v. McCulloch [Ky.] 89 S. W. 5. Rule does not apply where the thing destroyed is that which one of the parties has expressly contracted to construct and deliver. Contract to construct and deliver gas holder and tank complete and destruction of tank during test. Logan v. Consolidated Gas Co., 107 App. Div. 384, 95 N. Y. S. 163.

40. See Hammon on Contracts, p. 831.

41. Clough v. Stillwell Meat Co., 112 Mo. App. 177, 86 S. W. 580. Where warehouseman agreed to store apples until a stipulated date at a specified price, to unload them from cars and reload them, to keep them insured, etc., and on their destruction by fire before period of storage expired collected the insurance at the request of the owner, held that facts raised an implication that he was to be paid what his services were reasonably worth and he was entitled to that amount. Id. Where plaintiff contracted to furnish and erect an elevator in defendant's building within a specified time, to be paid for when accepted by defendant's architects, and before the elevator was completed or accepted the building was destroyed, held that he could not recover on a quantum meruit, the defendant having derived no benefit from it. Louisville Foundry & Mach. Co. v. Patterson [Ky.] 93 S. W. 22. Fact that tenants of building were permitted to use elevator for some days before the fire held not to show that it was accepted by the architects, particularly as it did not appear that latter or the owner authorized such use. Id. Agent of architects alleged to have accepted elevator held to have had no authority to do so. Id. Tenant's use held not to have resulted in any advantage or profit to owner where they were bound to pay rent whether elevator was completed or not. Id.

42. An irrigation company can excuse its failure to furnish water for irrigation according to contract only by proof that its failure was due to inevitable accident, or to a cause which the company could not, by the exercise of ordinary care and foresight, have prevented. Colorado Canal Co. v. McFarland [Tex. Civ. App.] 15 Tex. Ct. Rep. 848, 94 S. W. 400.

43. Agents held not relieved from absolute promise to purchasers of machinery to keep on hand extras for repairs because breaks for repair of which extras were wanted may not have been due to negligence or innate defects, promise being unconditional. Tyson v. Jackson Bros. [Tex. Civ. App.] 14 Tex. Ct. Rep. 431, 90 S. W. 930.

44. See 5 C. L. 720.

45. McGuire v. Neils Lumber Co. [Minn.] 107 N. W. 130. A landowner employed plaintiff to find a purchaser on terms whereby a certain cash payment was to be made and a mortgage given, and on the production of the purchaser plaintiff offered to pay the whole of the purchase money if the landowner was not satisfied as to the purchaser's ability to meet deferred payments when they fell due. Held, that such offer did not remove an objection as to the ability of the purchaser to perform the contract, as it amounted to a proposal to vary the terms of the sale. Young v. Ruhwedel [Mo. App.] 96 S. W. 228. Evidence of a breach of a contract to furnish and maintain a pump "of ample daily capacity" to supply a waterworks system held to present a question for the jury. Hubbard City v. Bounds [Tex. Civ. App.] 16 Tex. Ct. Rep. 304, 95 S. W. 69.

Evidence held to show performance: By complainant of her part of a contract by which her aunt promised to deed or devise realty to her in consideration that the latter care for the aunt during the remainder of her life. Warner v. Marshall [Ind.] 75 N. E. 582. By defendant of contract whereby he was to have decedent's deposits in certain banks in consideration of his support of her during her lifetime. Drefahl v. Security Sav. Bank [Iowa] 107 N. W. 179. Of agreement by defendant to deliver first mortgage bonds, though at the time of delivery there had been no technical release of a prior mortgage, and plaintiff was not entitled to rescind. Nes v. Union Trust Co. [Md.] 64 A. 310.

Evidence held insufficient to show per-

and cannot accept those terms which are favorable to him and reject those which are onerous, but must accept or reject it in its entirety.[47] In the case of building contracts, a literal compliance is not necessary, but a substantial performance in good faith authorizes a recovery of the contract price, less a reasonable allowance for inadvertent and trivial errors and omissions,[48] and this rule has been held applicable to undertakings of a different character, under appropriate circumstances.[49]

Where no element of special trust or confidence is involved,[50] the promisor is ordinarily not bound to perform the contract in person, but may do so through the medium of a third person.[51]

formance: Of contract to search a title, "the work to be done and completed in about two weeks." Griffin v. Arlt, 96 N. Y. S. 1033. A certificate filed pending an adjournment by a witness who had been called by defendant and stating that plaintiff's excavation of certain premises complied with the contract between plaintiff and defendant was insufficient to prove performance. Ryan v. Brown, 96 N. Y. S. 188. Contract to move shoe manufacturing business and factory to a certain city and continuously operate factory to full capacity of specified buildings for 10 years is not performed by using a part of the building for such purpose and leasing the balance for other manufacturing purposes. Havre De Grace Real Estate & Power Co. v. Havre De Grace, 102 Md. 33, 61 A. 662.

46. In an action for failure to furnish paper, it was immaterial whether defendant was unable to comply with the samples and specifications, since defendant should have determined whether it was able to comply with the contract before entering into it. Dexter Sulphite Pulp & Paper Co. v. McDonald [Md.] 63 A. 958. The fact that defendant did not know that the paper would be subjected to a certain test to determine whether it corresponded to the sample was no defense. Id. Contract for sale of land cannot be avoided by vendee, in the absence of fraud or mistake, unless vendor abandons it or fails to comply with its terms. Annis v. Burnham [N. D.] 108 N. W. 549. Where railroad has for a valuable consideration located its shops, offices, etc., in place required by its charter, it cannot by amendment of charter remove them to another city, in view of Rev. St. 1895, art. 4367, requiring railroads to keep general offices at place named in charter, or if no place is so named, to keep offices, shops, etc., at place where they have contracted to keep them for a valuable consideration received. City of Tyler v. St. Louis S. W. R. Co. [Tex.] 14 Tex. Ct. Rep. 839, 91 S. W. 1.

47. Where vendee borrowed money from bank to pay purchase price of land and gave his note therefor, and it was agreed by the vendor, the vendee, and the bank that upon payment of the note title to the land was to be conveyed to the vendee, but in default thereof it should be conveyed to the bank and deed was delivered to bank with blank left for grantee's name, held that vendee and those claiming under him took land subject to an equitable lien in favor of the holder of the note for the amount due thereon, since they never could compel performance of the agreement until note had been paid. Beer v. Wisner [Neb.] 104 N. W. 757.

48. See Building and Construction Contracts, 7 C. L. 480.

49. Clough v. Stillwell Meat Co., 112 Mo. App. 177, 86 S. W. 580. Evidence held sufficient to show a substantial performance of a contract to prepare a tract of ground and to plant it to vines according to specifications. Nishkian v. Chisholm [Cal. App.] 84 P. 312. Substantial, as well as complete performance, means performance according to the terms of the contract, not the doing of something else equally advantageous to the promisee. Clough v. Stillwell Meat Co., 112 Mo. App. 177, 86 S. W. 580. An agreement to keep property in a warehouse until a certain date, unless previously called for, and to keep it insured, is not substantially performed by paying the insurance money to the bailor in case the property is destroyed by fire. Id.

50. See, also, Assignments, 7 C. L. 277. Executory contracts which stipulate solely for special personal service, skill or knowledge, are not assignable. Petition held not demurrable because of allegation that contract for subscription to book had been assigned, it not appearing that editing was to be done by any person other than the one named in the contract, and if there was any reason of a personal nature why defendant was induced to subscribe on assurance that book was to be bound by assignor, that fact should be made to appear by answer. Harris v. Paine [Neb.] 107 N. W. 748. Printing and binding not personal in character. Id. Agreement by mother to care for father's illegitimate children held not assignable. People's Bank & Trust Co. v. Weidinger [N. J. Law] 64 A. 179.

51. An ordinary contract to do certain work entitles the party for whom the work is to be done only to full beneficial performance through the other party, and not to personal performance by him when no question as to unpaid charges arises. McGuire v. Neils Lumber Co. [Minn.] 107 N. W. 130. Contract for sale of timber providing that, if it is not measured and inspected right, and if buyer does not furnish man who shall fairly comply with contract, buyer may resell, and also providing that all the lumber is to be measured, inspected, and settled for by a certain company, cannot be avoided because such company fails or refuses to measure, inspect, and pay for lumber where buyer offers to have same fairly measured and inspected and to pay for it. Mills v. Stillwell [Ky.] 89 S. W. 112. Under a contract to pay a certain sum of money to a railroad company or its successors or assigns upon completion of a certain line, a completion by the company under its

Where the promisor undertakes to perform to the satisfaction of the promisee[52] or his agent,[53] an honest and reasonable objection by the latter precludes a recovery.

If one having an option to perform in either of two ways voluntarily deprives himself of power to perform in one of them, his obligation to perform in the other becomes absolute.[54] Gratuitous assistance in the performance of the contract incidentally rendered by the collateral act of the party for whom the work is to be done, which renders it unnecessary for the other party to incur certain expense and perform certain labor, does not constitute a breach of the contract nor compel the party performing to resort to an action for damages, nor deprive him of the right to recover the entire contract price.[55] So too, one entitled to compensation for a collateral act may recover not to exceed the agreed compensation for an equivalent act equally serving his interest.[56]

A fraudulent performance which defeats the object of the contract bars recovery thereon.[57]

(§ 6) *E. Demand or tender necessary to fix performance or breach.*—Where the contract provides for the delivery of goods as ordered, a demand is necessary to put the seller in default.[58] No demand is necessary where the contract is executed and one party wrongfully holds property belonging to the other.[59] By statute in Iowa, no action can be maintained on a contract for labor or the payment or delivery of property other than money where the time of performance is not fixed until a demand of performance has been made upon the maker and refused, or a reasonable time for performance thereafter allowed.[60] An action for a breach cannot be based on a demand made after its commencement.[61]

changed name is sufficient. Piper v. Choctaw Northern Townsite & Imp. Co. [Okl.] 85 P. 965.

52. Where a machine is sold to defendant under a guaranty that it will be satisfactory to him, no recovery can be had unless he is satisfied. Instructions approved. Bialy v. Krause [Mich.] 12 Det. Leg. N. 702, 105 N. W. 149. Action for work performed up to time of plaintiff's rescission and for prospective profits. Meachem v. Gardner, 27 Pa. Super. Ct. 296. He must be in good faith dissatisfied. Building contract. Higgins Mfg. Co. v. Pearson [Ala.] 40 So. 579. Provision in contract for sale of brand that defendant was to have his horses on the range but that plaintiff was to be the judge, held not to give plaintiff right to arbitrarily say that horses were his which in fact belonged to defendant. Belknap v. Belknap [S. D.] 107 N. W. 692. In action on contract whereby defendant agreed to pay plaintiff a certain sum for settling him on public land if the land suited him, held that the question whether it suited him was for the jury, though he testified that it did not, where it appeared that he had settled on it and obtained awards from the state for the same. Stanford v. Wright [Tex. Civ. App.] 14 Tex. Ct. Rep. 741, 92 S. W. 269.

53. For interpretation and effect of provisions in building contract requiring performance to the satisfaction of architects, engineers, etc., see Building and Construction Contracts, 7 C. L. 480.

54. Where one who has an option to pay the contract price in money or by a conveyance of property voluntarily deprives himself of power to make the conveyance by conveying the property to a third person, his obligation to pay cash becomes absolute. Must pay full contract price, though property is worth less. Irving v. Bond [Neb.] 107 N. W. 585.

55. McGuire v. Neils Lumber Co. [Minn.] 107 N. W. 130. Defendant cannot complain that plaintiff failed to do certain work which would have been necessary had it not been for defendant's own conduct. Id. Plaintiff contracted to drive and deliver logs clean and separate from logs of other parties and by a second contract to float, drive, and sort in separate booms other logs bearing certain marks. Thereafter defendant bought all the logs with which those so marked were commingled, and after plaintiff had floated and driven contract logs and had started to sort them notified him not to proceed with sorting. Held that defendant was entitled to recover the full contract price. Id.

56. Where contract to do grading for railroad provided that contractor should be entitled to transportation for his tools to a certain place, he was entitled to recover cost of transportation to a different place to which freight was less. Snyder v. Patton & Gibson Co. [Mich.] 12 Det. Leg. N. 1041, 106 N. W. 1106.

57. Delegation of investigation as to the thickness of coal strata to one who fabricated a false core, thus rendering the information unreliable. Hoover v. Beech Creek Coal & Coke Co., 29 Pa. Super. Ct. 615.

58. See 5 C. L. 729, n. 29. Smokeless Fuel Co. v. Seaton [Va.] 52 S. E. 829.

59. Where an agreement to retrade boats had become executed by defendant's acceptance of the boat exchanged to plaintiff, no demand was necessary to entitle plaintiff to

If there be mutual covenants or undertakings to be performed at the same time, either of the parties, to sustain an action, must show a tender.[62] If both covenants are to be performed simultaneously, but the first act is to be performed by one of the parties, the other may sustain his action by showing readiness.[63] An absolute refusal by one party to perform renders a tender by the other party unnecessary.[64] By statute in some states the thing to be delivered need not be actually produced on an offer of performance unless the offer is accepted.[65]

(§ 6) *F. Rights after default.*[66]—Default in performance by one party generally excuses further performance by the other[67] and entitles him to rescind the contract,[68] or to sue in equity for specific performance,[69] or at law for his resulting damages.[70] The fact that a contract is not enforceable does not preclude recovery for a fraudulent repudiation thereof.[71]

By statute in some states, one who has subjected himself to a forfeiture by

recover the boat he exchanged to defendant. Dougherty v. Neville, 108 App. Div. 89, 95 N. Y. S. 806.

60. Code, § 3056. Newburn v. Hyde [Iowa] 107 N. W. 604. Demand held a condition precedent to action on contract whereby plaintiff was entitled to a certain sum in vehicles to be selected from stock "now in storage" on payment of certain per cent of list price. Id. Demand on manager of company with whom vehicles were stored held insufficient, it not being a demand on the maker. Id. In any event, such a demand for vehicles not in the possession of the storage company was insufficient. Id. Demand also held insufficient because of failure to tender percentage of list price of vehicles in possession of such company. Id. Statement of manager of company that he would not deliver vehicles even if he had them held not to excuse demand, since defendant was under no obligation to procure vehicles he did not have. Id.

61. Payment demanded after action brought. National Contracting Co. v. Hudson River Water Power Co., 110 App. Div. 133, 97 N. Y. S. 92.

62. Bell v. Hatfield [Ky.] 89 S. W. 544. Vendee's promise to pay for land and vendor's agreement to convey a clear title held to be dependent and concurrent conditions, so that performance or an offer to perform by either party was essential to put the other in default and lay the foundation for an action for damages or to enforce the contract. Davis v. Barada-Ghio Real Estate Co., 115 Mo. App. 327, 92 S. W. 113. Where vendor agreed to convey clear title on payment of purchase price, he had no right to insist on payment until he had discharged incumbrances. Id. Where contract for sale of land provides for delivery of deed on payment of purchase price, there must be an actual tender of price, a willingness or readiness to pay being insufficient. Annis v. Burnham [N. D.] 108 N. W. 549. Covenants for payment of purchase money and for delivery of deed conveying good title held mutual and dependent, so that neither party could demand performance without first tendering performance on his part. Michigan Home Colony v. Tabor [C. C. A.] 141 F. 332.

63. Bell v. Hatfield [Ky.] 89 S. W. 544. Tender not necessary where buyer was absent from place of delivery on every day when tender could have been made under its terms. Id. Tender not necessary where buyer of cattle did not designate a day for delivery as required by contract. Id. Must show ability to perform. Evidence held to support finding that plaintiffs were ready, able, and willing to deliver cotton at time agreed upon. Rankin v. Mitchem [N. C.] 53 S. E. 854. A vendor seeking to enforce a forfeiture of a deposit made as security for performance by vendee must prove ability to perform his part, notwithstanding an express repudiation of the contract by vendee. Wells Fargo & Co. v. Page [Or.] 82 P. 856. But need not make a formal tender or offer to perform. Id.

64. Landvoight v. Paul, 27 App. D. C. 423. Where vendor repudiated contract for sale of land before date when vendee was required to pay part of purchase price, held that latter could sue for breach, though he did not make a tender on or before such date and though he waited until the time fixed by the contract for performance before bringing suit. Kuhlman v. Wieben [Iowa] 105 N. W. 445. Defendant having notified plaintiff of his inability to perform his contract and having expressly repudiated it, plaintiff was not required to make tender of performance on his part in order to maintain action for breach. Ennis Brown Co. v. Hurst [Cal. App.] 82 P. 1056. Defendant's refusal to accept goods before expiration of time fixed by contract for delivery held a breach excusing plaintiffs from making tender and delivery, and they were entitled to recover price if they were ready, willing, and able to deliver and otherwise to comply with their contract. Wilson & Co. v. Levi Cotton Mills, 140 N. C. 52, 52 S. E. 250. Defendants could not complain of an unnecessary delivery. Id.

65. Civ. Code § 1496. Where purchaser is authorized to return property if unsatisfactory, the property need not be actually produced when the offer of return is made unless it is accepted. Sierra Land & Cattle Co. v. Bricker [Cal. App.] 85 P. 665.

66. See 5 C. L. 722.

67. See § 6 C, ante.

68. See § 8 B, post.

69. See Specific Performance, 6 C. L. 1498.

70. See § 9, post.

71. Repudiation of nonenforceable agreement to execute bond for title. Kaplan v. Whitworth [La.] 40 So. 723.

breach of a contract may be relieved therefrom by making compensation, if the breach is not grossly negligent, willful, or fraudulent.[72]

§ 7. *Damages for breach.*[73]—The subject of damages is fully treated elsewhere.[74]

§ 8. *Rescission and abandonment. A. By agreement or under special provisions of the contract.*[75]—The contract may itself provide for its discharge or annulment and fix the resulting rights of the parties.[76] Such discharge may be shown by acts and conduct evidencing an intention to be no longer bound thereby.[77]

Rescission is the act of canceling the contract by restoring the conditions existing immediately before it was made, and is effected by each party returning to the other what has been received pursuant to the contract, or its equivalent.[78] A contract may be rescinded by mutual consent[79] without any new consideration.[80]

(§ 8) *B. Occasion and right to rescind or abandon without consent.*[81]—One may rescind a contract which he was induced to make through fraud, misrepresentation, or undue influence,[82] accident or mistake,[83] or duress,[84] unless by waiver there

72. Rev. Codes 1899, § 4970. Bennett v. Glaspell [N. D.] 107 N. W. 45. Plaintiff held entitled to be relieved from forfeiture of contract to convey land to him on crop payment plan for failure to account for part of crop. Id.

73. See 5 C. L. 722.

74. See Damages, 5 C. L. 904.

75. See 5 C. L. 722.

76. Where a contract provides that the licensee of a patent may terminate the payment of royalty by returning the machine and paying the royalty due to date, and upon the further condition that the licensee agrees not to use similar machines until the patent expires, a return of the machine and payment of the royalty due terminates the obligation to pay royalty notwithstanding a breach of the latter condition. Warth v. Loewenstein, 121 Ill. App. 71. Where defendant guaranteed to sell stock for plaintiff prior to a certain date, a further provision that contract should become null and void on such date held not to prevent liability for failure to make the sale. Gause v. Commonwealth Trust Co., 97 N. Y. S. 1091.

77. Where one seeks to absolve himself from a terminable contract by acts, such acts must be so inconsistent with the contract as to leave no doubt of intention. Resigning from the position of secretary and the acceptance of another office, together with defendant's general conduct, held insufficient to absolve him from his contract to give all his inventions to the corporation. Bates v. Bates Mach. Co., 120 Ill. App. 563. Letter held a rescission of contract for sale of lumber. Gaus & Sons Mfg. Co. v. Chicago Lumber & Coal Co., 115 Mo. App. 114, 92 S. W. 121. Action of city in demanding tax books held a termination of contract employing certain attorneys to collect back taxes. City of Wilmington v. Bryan [N. C.] 54 S. E. 543.

78. Raymond v. Edelbrock [N. D.] 107 N. W. 194.

79. American Fine Art Co. v. Simon [C. C. A.] 140 F. 529. Contract entered into pending negotiations for settlement for breach of another held to merely suspend claim for damages and not a contract of abandonment. Jewell Belting Co. v. Hamilton Rubber Mfg. Co., 121 Ill. App. 13. Where a contract was entered into which expressly cancelled a prior one and relieved the parties from further liability thereunder, the second contract was not a continuation of the first. Magnolia Metal Co. v. Gale, 189 Mass. 124, 75 N. E. 219. The unconditional acceptance by a vendor of property returned to him for alleged breach of warranty or fraud constitutes a rescission of the contract of sale and renders the vendor liable for the price paid. Dougherty v. Neville, 108 App. Div. 89, 95 N. Y. S. 806. An answer, in an action on contract, alleging that the parties mutually agreed that the contract "should be annulled, rescinded and held for naught" and that a new contract "should cover * * * the subject-matter" of the original contract, alleges an express rescission. Nels v. Whitaker [Or.] 84 P. 699.

80. Contract of sale. Wellden v. Witt [Ala.] 40 So. 126.

81. See 5 C. L. 724.

82. See Fraud and Undue Influence, 5 C. L. 1541. Bennett v. Glaspell [N. D.] 107 N. W. 45. Where a circular advertising certain bonds for sale distinctly requires the purchaser to read the bond and the bond provides that the entire contract is contained therein, and that no one has authority to alter or modify, a purchaser by keeping the bond, making payments thereon, and securing the agency therefor, estopped himself from rescinding on the grounds of fraud. Grindrod v. Anglo-American Bond Co. [Mont.] 85 P. 891. Part performance consisting of appropriation by defendant of large portion of plaintiff's estate does not stand in the way of a cancellation of the contract because procured by undue means and without consideration. Simmons v. Kelsey [Neb.] 107 N. W. 122. Statement of the number of rooms in building on realty covered by written contract of sale held so material that its falsity justified rescission of contract by vendee because he did not get what he bargained for, though the vendor may be able to make the building answer the description before the day of performance. Davis v. Scher [N. J. Law] 62 A. 193. Plaintiff failed to show fraud so as to entitle him to rescind the purchase by him

be an affirmance of the contract,[85] or a contract which he made while mentally incompetent.[86]

A total,[87] and, in some states, a partial failure of consideration for an entire contract,[88] or an unexcused[89] failure or refusal of one party to perform, ordinarily authorizes a rescission by the innocent party,[90] but mere technical and unsubstantial departures from the terms of the contract,[91] or a partial neglect or refusal to com-

of a business. Muehlhof v. Boltz [Pa.] 64 A. 427.

83. See Mistake and Accident, 6 C. L. 678.

84. See Duress, 5 C. L. 1047.

85. Cannot have relief from contract which he ratified after discovering fraud. Wilkinson v. Sweet [Tex. Civ. App.] 14 Tex. Ct. Rep. 529, 93 S. W. 702. An acceptance of interest on a contract prior to the discovery of fraud, or subsequently without knowledge of its legal effect as waiving the fraud, does not prevent a rescission of the contract. Matteson v. Wagoner, 147 Cal. 739, 82 P. 436. Where defendant, after discovering fraud, attempted to repudiate contract but plaintiff refused to accede to repudiation, and defendant thereafter accepted the consideration for the completion of the contract, he was bound thereby. Urbansky v. Shirmer, 97 N. Y. S. 577. One who voluntarily takes benefits under a contract with full knowledge of facts entitling him to rescind it thereby affirms it and cannot thereafter assail its validity. Fraud. Rev. Codes 1899, §§ 3842, 3843, 3864, 3865. Bennett v. Glaspell [N. D.] 107 N. W. 45. Mere delay in rescinding and the acceptance of benefits under the contract is not a waiver of the right to rescind where such delay resulted from ignorance and inexperience in business matters. Landis v. Wintermute, 40 Wash. 673, 82 P. 1000. Where an investing agent has sold some of his own mining stocks to his principal, participation in the affairs of the company after a rescission and rejected offer to return does not waive the right to rescind. Id.

86. See, also, Incompetency, 5 C. L. 1775; Insane Persons, 6 C. L. 34. A maker of a note who is not entirely without understanding, but who is so mentally deficient as to be unable to comprehend the nature of his act and the liability incurred, may rescind under the Code of California. Dunlap v. Plummer [Cal. App.] 82 P. 445.

87. Evidence in action to cancel deed held to show that grantee never paid consideration named in the deed or any other consideration, for land. Allison's Ex'r v. Orndorff [Ky.] 92 S. W. 287. In case vendor refuses to perform contract for conveyance of land after full performance or offer to perform by the vendee, consideration for contract wholly fails and is ground for rescission by vendee. Miller v. Shelburn [N. D.] 107 N. W. 51.

88. Inadequency of consideration, mistake in law, or partial failure of consideration, is insufficient, in the absence of fraud, to authorize the cancellation of a contract. Stephenson v. Atlas Coal Co. [Ala.] 41 So. 301. Under Civ. Code § 1689, a partial failure of consideration of an entire contract gives the other party the right to rescind. Sterling v. Gregory [Cal.] 85 P. 305.

89. See § 6 C, ante.

99. Where a vendor failed to comply with the contract as to the goods furnished and it was clear that the remainder of the goods which he intended to deliver were also defective. Elliott v. Howison [Ala.] 40 So. 1018. An instruction in an action for work done, that plaintiff could not recover if he wrongfully abandoned the contract before completion held not erroneous as submitting the question to the jury as to what was a wrongful abandonment, where the court had instructed that a breach by defendant justified an abandonment. Fletcher v. Verser [Ark.] 96 S. W. 384. Where defendant contracted to keep a sufficient supply of logs out to employ plaintiff's teams, a failure so to do justified plaintiff in abandoning his contract to haul them. Id. Rule that one party may rescind for nonperformance by the other only when both parties can be restored to the condition in which they were when contract was made (Civ. Code 1895, § 3712), applies only where party claiming right to rescind establishes breach. Failure to charge statute held harmless when breach was not proved. Williams v. Walden, 124 Ga. 913, 53 S. E. 564. Where the seller of scrap iron to a foundry failed to furnish the grade called for and the contract was rescinded by the foundry company, the manner in which the seller obtained and shipped the iron is material not to relieve him from his obligation to furnish, but as bearing on the right of rescission. Whiting Foundry Equipment Co. v. Hirsch, 121 Ill. App. 373. Complainant held justified in assuming that defendant had abandoned contract whereby complainant had agreed to sell him land and to advance him money for the erection of a house thereon, and hence was not bound to perform the same but was entitled to have it set aside on repayment to defendant of the sums paid by him thersunder. Bewick v. Hanika [Mich.] 12 Det. Leg. N. 672, 106 N. W. 63. Evidence held to show compliance by purchaser of threshing machine with provision requiring him to give notice of defects so that he was entitled to rescind for breach of warranty. Case Threshing Mach. Co. v. Balke [N. D.] 107 N. W. 57. A letter by defendant notifying plaintiff that defendant would employ new contractors to do the work rendered necessary by the fall of a wall held practically a rescission of the contract with plaintiff. Colgan v. O'Rourke [Pa.] 64 A. 529. Where a quarry owner agreed with another to lease his quarry and not to engage in the stone business for three years in consideration of a royalty on all stone quarried, a violation of the provision to abstain from business is a ground for rescission and relieves from liability for royalty on stone quarried from his own quarry. Dishman v. Huetter, 41 Wash. 626, 84 P. 590.

91. Plaintiff could not rescind an agree-

ply with a term not going to the subject-matter,[92] or defects in performance which are corrected before the time for performance expires,[93] do not. A substantial breach of a divisible contract not wholly executory, which may readily be compensated for in money damages, does not give an absolute right of rescission to the other party.[94]

(§ 8) *C. Time and mode of rescission or abandonment.*[95]—Since the remedy is largely equitable,[96] a party having the right to rescind must elect to do so within a reasonable time after the discovery of the facts giving him the right,[97] and must restore,[98] or offer to restore,[99] everything of value received by him from the other

ment to buy first mortgage bonds because of an improper acknowledgment of the deed to the mortgagor, which was cured by a confirmatory deed upon attention being called to the error. Nes v. Union Trust Co. [Md.] 64 A. 310.

92. Failure of a foreign agent to render a monthly statement of his expense account held insufficient to justify an abandonment. Anglo-Wyoming Oil Fields v. Miller, 117 Ill. App. 552.

93. Where the seller of certain goods was to furnish a bond guaranteeing a profit, a failure to send a validly executed bond did not give the purchaser a right to rescind the contract, especially where no time for furnishing the bond was specified and a valid bond was tendered upon notice. Standard Manufacturing Co. v. Slaughter, 122 Ill. App. 479.

94. Where plaintiff paid defendant a certain sum for land and the timber thereon, and a certain part of the consideration was for defendant's services in logging the timber, held that the contract for handling the timber was not wholly executory. Mueller v. Cook, 126 Wis. 504, 105 N. W. 1054.

95. See 5 C. L. 726.

96. For procedure in suits to rescind see Cancellation of Instruments, 7 C. L. 517.

97. Elliott v. Howison [Ala.] 40 So. 1018. Rev. Codes 1899, § 3934. Annis v. Burnham [N. D.] 108 N. W. 549. He must act promptly and, in case he elects to rescind, notify the other party without delay. Contract of sale. Armour v. Produce Co., 28 Pa. Super. Ct. 524. Bailment for hire with right to purchase. Moneyweight Scale Co. v. Woodward, 29 Pa. Super. Ct. 142. Prompt rescission is not required where the rescinding party has been misled by the other party into believing that such rescission would not be insisted upon. Where vendor advised vendee to suspend judgment on a filter sold and sent men to try and make it work. Rheinstrom v. Elk Brewing Co., 28 Pa. Super. Ct. 519. One undertaking to rescind for a breach must do so within a reasonable time after defects in commodities delivered are brought home to him by opportunity for inspection. Harding, Whitman & Co. v. York Knitting Mills, 142 F. 228. One accepting and acting upon indemnity bond cannot afterwards contend that it does not cover risks contemplated by him. Orion Knitting Mills v. United States F. & G. Co., 137 N. C. 565, 50 S. E. 304. When chattel is delivered to buyer, he must reject it within a reasonable time thereafter, if it is not in accordance with the contract of sale, or he will be denied the right to rescind. Goodwin Mfg. Co. v. Arthur Fritsch Foundry & Mach. Co. [Mo. App.] 89 S. W. 911. Evidence of acceptance held not to require directed verdict for plaintiff. Id. Omission to rescind within a reasonable time may be conclusive evidence of an election to affirm. Bailment with right to purchase. Moneyweight Scale Co. v. Woodward, 29 Pa. Super. Ct. 142. Unreasonable delay, especially if accompanied by acts recognizing the contract as valid, will be construed as a waiver of fraud and an election to abide by the contract. Waiver cannot be afterwards revoked and contract rescinded. Harms v. Wolf, 114 Mo. App. 387, 89 S. W. 1037. Waiver a question of intention. Id. Plaintiff, by acts and conduct, held to have waived right to rescind loan agreement for fraud. Id. Plaintiff in suit to set aside deed for fraud held not to have been guilty of laches. Cason v. Cason [Tenn.] 93 S. W. 89. By not rescinding promptly for fraud, right to do so is waived, though no prejudice or injury to the other party is shown. Annis v. Burnham [N. D.] 108 N. W. 549. Where plaintiff knew that business of corporation, to which he and certain others had transferred their laundry, in consideration of stock, was to proceed without regard to fact that all its stock had not been issued, and thereafter proceeded to consummate sale, held that he could not thereafter rescind even if effect was to perpetrate fraud on him. French v. Northwestern Laundry [Iowa] 107 N. W. 430. Where rescission of the sale of a business was not applied for promptly, and the parties could not be placed in statu quo and there was no attempt to do so, the bill was properly dismissed. Muehlhof v. Boltz [Pa.] 64 A. 427. To rescind on the ground of mistake under Civ. Code § 1691, the party must promptly notify the other party upon discovering the mistake and offer to return the consideration. McGue v. Rommel [Cal.] 83 P. 1000. What is reasonable time depends on facts of each case. Annis v. Burnham [N. D.] 108 N. W. 549. Where an action for rescission of a mortgage was begun within five months from date of execution, and it is alleged that considerable time elapsed before the fraud was discovered and no affirmative injury to defendant appears, a demurrer to the complaint on the ground of laches properly overruled. Matteson v. Wagoner, 147 Cal. 739, 82 P. 436. Plaintiffs held not to have moved with speed and fairness entitling them to rescind. Evans v. Evans [Mo.] 93 S. W. 969. Finding as to time when machine was returned for breach held not supported by evidence. Case Threshing Mach. Co. v. Balke [N. D.] 107 N. W. 57.

98. Elliott v. Howison [Ala.] 40 So. 1018.

party,[1] unless it is of such a nature as to render its restoration impossible,[2] or nothing is due the other party on final adjustment.[3]

Parties to a written contract may rescind it by parol or abandon it by matter in pais.[4] A mere failure of the innocent party to perform after a breach is not a rescission.[5] If time is not of the essence of the contract, one desiring to rescind it for a breach must, in some states, give notice of his intention to the other party and allow him a reasonable time thereafter in which to perform, unless he has repudiated the contract.[6]

A contract will be treated as abandoned where the acts of one party, inconsistent with its existence, are acquiesced in by the other.[7] There is no termination of a contract so long as each party insists upon performance by the other.[8]

So as to restore parties to condition in which they were before contract was made. Timmerman v. Stanley, 123 Ga. 850, 51 S. E. 760. One cannot avoid payment of note on ground that it was made on Sunday unless he restores consideration received by him. Hale v. Harris [Ky.] 91 S. W. 660. A rescission of a contract for sale of land may be effected by act of a party thereto when consideration has wholly or partially failed through fault of the other party, and in such case a notice that the vendee rescinds and disaffirms the contract is sufficient where there is nothing to be returned under the same. Miller v. Shelburn [N. D.] 107 N. W. 51. Under written executory contract for sale of land, vendee derives in law no interest in the land or the title and may rescind in a proper case without a reconveyance. Id.

99. In an action to rescind a contract and recover money loaned, plaintiff need not tender interest received as a condition precedent to his right to rescind. Matteson v. Wagoner, 147 Cal. 739, 82 P. 436. In rescinding a sale, an offer to return a note received as consideration is sufficient if made on the trial, especially where almost certain that offer to restore before commencing suit would have been fruitless. Wellden v. Witt [Ala.] 40 So. 126. Restoration of consideration is not a prerequisite of an equitable action to rescind and for damages, but it is sufficient if plaintiff in his petition offers to do equity by asking that the consideration paid by defendant be regarded as part payment of the damages. Haydon v. St. Louis, etc., R. Co. [Mo. App.] 93 S. W. 833. For cases dealing with the duty of the vendor to compensate the vendee for improvements in case of the rescission of a sale of realty see Vendors and Purchasers, 6 C. L. 1781.

1. If nothing has been received under the contract by the party seeking to avoid it, there is nothing for him to do as a condition precedent to exercising his election to treat it as a nullity except to assert its invalidity whenever the guilty party seeks to assert some right under it. Raymond v. Edelbrock [N. D.] 107 N. W. 194. Defrauded party is not required to give notice of disaffirmance, provided he does not, after knowledge of the fraud, retain the fruits of the fraudulent transaction, or tacitly, or by affirmative action, lead the other party to change his position by reason of apparent ratification. Id.

2. Rule does not apply where a party agreeing to teach a person a certain thing or fit him for a certain position refuses to complete the contract after giving him some instruction. Timmerman v. Stanley, 123 Ga. 850, 51 S. E. 760.

3. Where administrator, on purchasing interest of an heir in the lands of the estate, falsely represented that conveyance would not include her reversionary interest in the lands allotted to the widow as dower and homestead, held that it was not necessary for the heir to offer to return the consideration received by her before suing to rescind as to such reversionary interest, where it appeared that the administrator realized more than the purchase price from a sale of the land which she intended to convey to him. Reeder v. Meredith [Ark.] 93 S. W. 558. It appearing that she was willing to sell, and would have sold, her interest, aside from the reversion, for the price paid, she was not entitled to recover from the administrator his profits growing out of the resale. Id.

4. May v. Getty, 140 N. C. 310, 53 S. E. 75. Where a mortgagee certifies that the mortgage has been fully satisfied and discharged, a covenant therein to perform another contract, a part of the same transaction, is also discharged. Joseph Schlitz Brewing Co. v. Komp, 118 Ill. App. 566. Where one party repudiates it, the other may assent to the abandonment and thereby rescind the contract. McKenna v. McKenna, 118 Ill. App. 240. Where in consideration of monthly payments an alleged wife agrees to release all claims, but the payments are not made, the bringing of an action for separate maintenance is an election to treat the contract as rescinded. Id.

5. Defendant having broken contract to manage plaintiff's premises, the act of plaintiff in taking possession was not a rescission so as to preclude recovery for a breach. Seymour v. Warren, 100 N. Y. S. 267.

6. Reasonable time not given vendor to perform after notice of rescission by vendee. Elliott v. Howison [Ala.] 40 So. 1018.

7. Acts and conduct relied on to constitute an abandonment should be clearly proved, and must be positive, unequivocal, and inconsistent with the existence of a contract. May v. Getty, 140 N. C. 310, 53 S. E. 75. Evidence held to sustain findings of rescission and abandonment of contract to sell land. Id. Lease held abandoned by mutual consent where return of notes given for rent was demanded and demand was complied with. Herpolsheimer v. Christopher

(§ 8) *D. Remedies.*[9]—The rescission or abandonment of a contract ordinarily puts an end to it for all purposes,[10] discharges both parties from any further liability thereunder,[11] and precludes a recovery on quantum meruit for services thereafter rendered under it.[12] It will not, however, operate to destroy previously vested rights where a contrary intention is apparent.[13] One rescinding a contract because of a breach may recover the consideration paid by him to the other party,[14] and the reasonable value of his services actually performed by him before the rescission.[15]

§ 9. *Remedies for breach. A. The right and its accrual.*[16]—No right of action for a breach accrues until performance is due under the terms of the contract.[17] Damages may be recovered presently for breach of an agreement to deliver an obligation payable in the future.[18]

As a general rule, one cannot recover on an entire contract unless he shows full performance on his own part[19] of all the obligations imposed upon him,[20] or an

[Neb.] 107 N. W. 382. Where defendant accepted a re-delivery of a boat exchanged to plaintiff under an agreement to retrade, he could not contend that he took the boat under an agreement by which he retained title as security for the purchase price so as to defeat plaintiff's recovery of the boat he exchanged. Dougherty v. Neville, 108 App. Div. 89, 95 N. Y. S. 806. Evidence held sufficient to warrant submission to jury of question whether written contract for wiring a theatre had been annulled by mutual consent. Reber v. Brownback, 27 Pa. Super. Ct. 471. Delay between time when plaintiff furnished name of person who bought defendant's land and time when sale was consummated held not to amount to abandonment of contract to pay plaintiff a certain sum for procuring a purchaser, there being no express limitation of time. Burd v. Webster [Wis.] 107 N. W. 23.

8. Though both in default where plaintiff contended that an assignment was invalid and demanded performance by the assignor, and the assignee insisted upon performance by plaintiff. Hudson River Water Power Co. v. Glens Falls Portland Cement Co., 107 App. Div. 548, 95 N. Y. S. 421.

9. See 5 C. L. 727.

10. Abandonment bars the right to specific performance. May v. Getty, 140 N. C. 310, 53 S. E. 75.

11. Cancellation by mutual consent. Alabama Oil & Pipe Line Co. v. Sun Co. [Tex.] 15 Tex. Ct. Rep. 301, 92 S. W. 253, rvg. 13 Tex. Ct. Rep. 973, 90 S. W. 202.

12. Defendant who was one of several attorneys employed under a contract terminable at will to collect back taxes for a certain per cent of the amount collected, held not entitled to recover on quantum meruit for services in preparing claims for suit after contract had been rightfully terminated by the city. City of Wilmington v. Bryan [N. C.] 54 S. E. 543. A plaintiff in an action on the contract for the price of stone quarried can not recover quantum meruit for stone removed by mistake after rescission of the contract. Dishman v. Huetter, 41 Wash. 626, 84 P. 590.

13. Question is one of intention to be derived from language used and surrounding facts and circumstances. Alabama Oil & Pipe Line Co. v. Sun Co. [Tex.] 15 Tex. Ct. Rep. 301, 92 S. W. 253, rvg. 13 Tex. Ct. Rep. 973, 90 S. W. 202. Use of word "rescind" or "cancel" does not necessarily show an intention that cancellation shall have retroactive effect. Id. Evidence held sufficient to authorize a finding that agreement to cancel was not intended to release defendant from liability for previous breach of contract to receive certain oil. Id.

14. Where vendor refuses to perform contract to convey land after full performance or offer to perform by vendee, and contract has been fully rescinded by the latter, vendee may recover money paid vendor in action for money had and received. Miller v. Shelburn [N. D.] 107 N. W. 51.

15. Cannot recover prospective profits. Meacham v. Gardner, 27 Pa. Super. Ct. 296.

16. See 5 C. L. 727.

17. A promise conditioned when money should "become due" is not matured when it is paid before it is due. Pohlman v. Wilcox, 146 Cal. 440, 80 P. 625. Indorsers on note by sealed writing requested plaintiff to pay same at maturity and agreed to refund money, each to pay his respective share within thirty days after maturity. If any indorser failed to pay, his share was to be apportioned among the others and paid within ten days after the expiration of the thirty days. Held that action brought against indorser for his share after expiration of thirty days but before expiration of additional ten days was not premature. Sharp v. Bates, 102 Md. 344, 62 A. 747. An action for the price of goods brought after October 1st was not premature where, according to the contract, spring sales should be settled for before October 1st and the goods were shipped in February and came into defendant's possession in June or July. American Seeding Mach. Co. v. Stearns, 109 App. Div. 192, 95 N. Y. S. 830. Where money is to be paid out of the proceeds of a sale of land, no action will lie for its recovery until such sale. Great Western Oil Co. v. Carpenter [Tex. Civ. App.] 15 Tex. Ct. Rep. 970, 95 S. W. 57.

18. Wasser v. Western Land Securities Co. [Minn.] 107 N. W. 160.

19. Clough v. A. J. Stillwell Meat Co., 112 Mo. App. 177, 86 S. W. 580. Where, because of delay in shipment, the vendee is obliged to buy upon the market at a higher price and the vendor admits its liability for part of the difference, a failure to pay for the belated shipments as per contract, in the absence of a demand therefor, does not preclude recovery. Russell v. Excelsior

excuse for failure to perform,[21] or a waiver of full performance.[22] So too, one seeking the aid of a court of equity to enforce a contract must show full performance on his part or a readiness to perform.[23]

If the obligation of one party is made to depend upon the performance of a condition precedent by the other, strict compliance therewith by the latter must be shown.[24] If it is dependent upon the happening of a contingency, it must be shown

Stove & Mfg. Co., 120 Ill. App. 23. Where stockholders enter into a contract whereby it is agreed that if any one of them should wish to dispose of his shares a certain procedure should be followed, an outright sale from one to several amounts to a "rescission" of the contract by them. Gray v. Bloomington & N. R. Co., 120 Ill. App. 159. Plaintiff cannot recover on a contract whereby he was to care for his father during life in consideration of the farm where it appears that he did not perform the contract on his part. Seitman v. Seitman, 122 Ill. App. 361. Held error to direct verdict for plaintiff in action to recover contract price of certain fruit trees where contract provided that they were to be delivered at a certain place on a day to be fixed by the seller by notice to the buyer, and there was a conflict in the evidence as to the giving of the notice and no evidence that plaintiff had the trees at the place specified at any time. B. F. Bonewell & Co. v. Jacobson [Iowa] 106 N. W. 614. Where an electrical company agreed to furnish electrical power during a term to begin when it should be able to deliver the same, the power to be paid for in instalments during the term, it could not recover for failure to pay instalments when it was not able to deliver the power at any time while the contract was in force. Hudson River Water Power Co. v. Glens Falls Portland Cement Co., 107 App. Div. 548, 95 N. Y. S. 421. Evidence held to show that plaintiff delivered certain goods, manufactured for defendant, "as quickly as possible," as required by the contract. Gerli v. Louis Metzger & Co., 99 N. Y. S. 858. Evidence held not to support finding of performance of contract for services. Tussey v. Owen, 139 N. C. 457, 52 S. E. 128. Affidavit of defense to an action for the balance due on a building contract held sufficient which stated that the work had not been performed according to the terms of a conditional acceptance of the building. Rose v. Independent Chevra Kadisho [Pa.] 64 A. 401. Entire contract to cut and deliver logs. Delivery as well as cutting must be shown. Norris v. Clark, 29 Pa. Super. Ct. 562. Evidence held insufficient to show that plaintiff performed contract for construction of electric railway so negligently and inefficiently as to forfeit its right of recovery thereunder and to render itself liable for damages. Tennis Bros. Co. v. Wetzel & T. R. Co., 140 F. 193. Where two contracts are made between two parties at same time, the latter of which was demanded of plaintiff as a condition for executing the first, so as to make the observance of both obligatory, and plaintiff breaches the first, he cannot sue defendant for a breach of the second. Kansas Union Life Ins. Co. v. Burman [C. C. A.] 141 F. 835.

20. Where one purchasing land from the sole heir of a deceased person, who agrees to pay a part of the purchase money to a creditor of the estate, is sued upon his agreement, it is immaterial whether such creditor has given the estate a release. Peters v. Georgo [Cal. App.] 81 P. 1117. Defendant held to have no right to demand indemnity bond as condition of performance of contract to deliver coal where contract did not provide for one, and hence plaintiff's failure to furnish it on demand did not prevent recovery. Smokeless Fuel Co. v. W. E. Seaton & Sons [Va.] 52 S. E. 829. When in an action for breach of a contract for the publication of law reports there was no evidence that it was part of the contract that plaintiffs should sign the bond of one of the defendants to the state, plaintiffs' subsequent demand to be released from such bond did not constitute a breach of the contract on their part. Ben C. Jones & Co. v. Gammel-Statesman Pub. Co. [Tex. Civ. App.] 94 S. W. 191. Refusal of plaintiff to pay instalment of purchase price of yacht until defendant furnished security, which he was under no obligation to furnish, held a breach which relieved defendants from further performance. Michigan Yacht & Power Co. v. Busch [C. C. A.] 143 F. 929.

21. See § 6 C, ante.

22. See, also, § 6 B, ante. Recovery may be had for substantial performance of an entire and subsisting contract where the plaintiff at all times manifested an intention to fully perform the contract and made every reasonable effort to do so, but the defendant by conduct or otherwise waived a strict performance. Williamson v. Bennett, 6 Ohio C. C. (N. S.) 618.

23. Suit for injunction to prevent threatened violation. Havre de Grace Real Estate & Power Co. v. Havre de Grace, 102 Md. 33, 61 A. 662. Company held not entitled to injunction to prevent violation of contract with city whereby it was to be exempted from taxation where it did not comply with requirement that it should give indemnity mortgage or explain its failure to do so, and violated contract in other respects. Id. In a suit by a client against his attorney to enforce an alleged contract by which plaintiff's property had been sold and bought in by the attorney to be restored to plaintiff later, it was not necessary to allege a tender of the amount disbursed by defendant for the purposes of the sale, it being sufficient to provide for such disbursements in the judgment restoring the property. Richardson v. Johnson [La.] 39 So. 449. [Advance sheets only.]

24. Where a lessor agrees to release a lessee if he will find a house with a barn suitable for his horse, lessee cannot show a contract of release without proving compliance with the condition. Brasher v. McCaskrin, 120 Ill. App. 343. Lack of good title in vendor is no excuse for nonpayment

to have happened.[25] Payment of a debt assumed by another is not a condition precedent to the right to sue the latter for a breach where the contract is not one of indemnity.[26] The necessity for a demand and tender is treated in a previous section.[27]

If the contract is severable, an action will lie for each breach, but all breaches occurring up to the commencement of the action must be included therein.[28] On the breach of a severable contract, by an act of one of the parties making further performance impossible, the other party may sue at once if he has performed his part of the contract to which such formal breach relates,[29] but if the time of performance of such part has not arrived, he must perform the balance and must await such time before bringing suit.[30]

Ordinarily there can be but one recovery for a total breach of an entire contract,[31] but if work is to be performed and paid for in instalments, an action will lie for each instalment as it matures or for as many as are due at the institution of the suit or the date of the trial.[32]

(§ 9) *B. Particular remedies and election between them.*[33]—The remedy of one induced to enter into a contract through fraud is by a rescission of the contract

of instalments where the vendor was not to convey a good title until full payment. Thompson v. Hoppert, 120 Ill. App. 588. Where plaintiff failed to show that responsible signers representing a certain number of cows had been procured to an agreement for the establishment of a creamery, he could not recover assessments against a subscriber. Sager v. Gonnermann, 100 N. Y. S. 406. Agreement by vendor of stock to repurchase on condition that plaintiff pay a certain note could not be enforced against the vendor or his guarantor where plaintiff failed to pay the note. Haines v. Barber, 100 N. Y. S. 75. Where a contract to irrigate defendant's land required five days' notice to plaintiff when water was desired, there could be no liability for failure to furnish water prior to five days after notice. Gravity Canal Co. v. Sisk [Tex. Civ. App.] 15 Tex. Ct. Rep. 984, 95 S. W. 724. Before anyone will be deprived of his right to resort to the courts it must appear from clear and unequivocal language in the contract that such was the intention of the parties. Provision in building contract that amount of damages for breach shall be fixed by arbitration does not make arbitration a condition precedent to suit, unless contract so provides or arbitration is made only mode for ascertaining damages. Adams v. Haigler, 123 Ga. 659, 51 S. E. 638.

25. In an action for breach of contract for failure to deliver manuscript within a reasonable time after the same was received from the state, it was necessary to prove that the same was received from the state. Ben C. Jones & Co. v. Gammel-Statesman Pub. Co. [Tex. Civ. App.] 94 S. W. 191.

26. Where defendant assumed and agreed to pay notes made by plaintiff, payment by plaintiff held not a condition precedent to action for breach, the contract not being one of indemnity. Thomas v. Richarde, 124 Ga. 942, 53 S. E. 400.

27. See § 6 E, ante. See, also, 5 C. L. 729, n. 29, et seq.

28. Under Civ. Code 1895, § 3793, if contract is severable or breaches occur at different times. Thomas v. Richards, 124 Ga. 942, 53 S. E. 400. Where defendant assumed and agreed to pay certain notes made by plaintiffs maturing at different dates, a failure to pay one of them was a breach authorizing suit for amount of notes matured. Id.

29. Barker & Stewart Lumber Co. v. Edward Hines Lumber Co., 137 F. 300.

30. Barker & Stewart Lumber Co. v. Edward Hines Lumber Co., 137 F. 300. Supplemental agreement extending contract for sawing logs to timber subsequently acquired held an independent provision so that its unintentional breach, through misinterpretation of contract, by having timber sawed elsewhere, did not excuse further performance, and plaintiff had no right of action until it had performed up to the time when defendant was bound to deliver the additional logs and breach became actual and effectual. Id.

31. Where a certain quantity of goods was sold, to be delivered and paid for in instalments, the contract was entire and failure to deliver one instalment was a total breach, recovery for which barred a subsequent action for failure to deliver subsequent instalments. Pakas v. Hollingshead [N. Y.] 77 N. E. 40.

32. Where plaintiffs had an entire contract for the publication of current law reports, deliverable and payable in instalments, a judgment in plaintiff's favor in an action for instalments due under such contract barred plaintiff's right to subsequently recover for breaches of the contract which had occurred prior to the institution and trial of the former action. Ben C. Jones & Co. v. Gammel-Statesman Pub. Co. [Tex. Civ. App.] 94 S. W. 191. It was plaintiff's duty to exercise reasonable diligence to ascertain when their cause of action arose, and to include by amendment all instalments due on the contract up to date of the trial. Id. When an entire contract for the manufacture of law reports contained subsidiary provisions relating to the performance and payment in instalments, an action for breach of stipulations with respect to certain instalments did not necessarily establish an elec-

or by setting up the fraud as a defense to an action for its enforcement.[34] One compelled by duress to sign a contract whereby he parts with his property may proceed in equity for a rescission by the court, rescind by his own act and sue at law, or allow the contract to stand and sue at law for damages.[35]

On the breach of a contract the party not in fault may either treat the contract as rescinded and recover on a quantum meruit so far as he has performed,[36] or treat the contract as at an end for all purposes of performance and sue for his resulting damages,[37] or treat it as still in force for the benefit of both parties until the expiration of the time for performance and then sue on the contract.[38] He must, however, elect between these remedies,[39] and must do so within a reasonable time,[40] what is a reasonable time being ordinarily a question of fact.[41] A party may not, however, proceed with performance after a repudiation by the other party and thereby enhance his damages.[42]

tion of remedies barring a subsequent action for other instalments. Id.

33. See 5 C. L. 731.

34. Not by forfeiture of the contract. Bennett v. Glaspell [N. D.] 107 N. W. 45.

35. Neibuhr v. Gage [Minn.] 108 N. W. 884.

36. Where one party repudiates contract. Anglo-Wyoming Oil Fields v. Miller, 117 Ill. App. 552. Where under a contract plaintiff advertised whiskey for defendant until notified to stop because the name furnished by plaintiff had been previously adopted by another dealer, it was immaterial in an action on an account annexed for work already done whether the name adopted by the other dealer was valid, or whether defendant made a blunder in registering a label instead of a trade mark. Lund v. Smith [Mass.] 77 N. E. 893.

37. For profits he would have realized if he had not been prevented from performing. Anglo-Wyoming Oil Fields v. Miller, 117 Ill. App. 552. Petition held to state cause of action for breach of contract of employment and not one on quantum meruit. McCormick v. United States F. & G. Co., 114 Mo. App. 460, 89 S. W. 905. Where one party to an executory contract before performance is due, expressly renounces it and gives notice that he will not perform it. Contract whereby plaintiffs employed defendant as broker to sell wheat. Alger-Fowler Co. v. Tracy [Minn.] 107 N. W. 1124. The promisor may, before the time for performance arrives, renounce the contract in part, performance of the whole being still possible. Barker & Stewart Lumber Co. v. Edward Hines Lumber Co., 137 F. 300. If the part so renounced be a dependent provision, or go to the whole consideration and scope of the contract, this is a breach, and the other party may accept it as such and sue at once for the difference between the contract price and the cost of performance. Id. Party with whom another has contracted not to engage in a specified business may maintain an action at law for damages for breach of contract. Must in such case prove such damages as the law recognizes or he can recover only nominal ones. Bradford & Carson v. Montgomery Furniture Co., 115 Tenn. 610, 92 S. W. 1104.

38. On renunciation of dependent provision, or he may defer suit until the time for performance arrives, being ready to perform in the meantime, unless the promisor has so changed his position as to create an estoppel. Barker & Stewart Lumber Co. v. Edward Hines Lumber Co., 137 F. 300.

39. One who claims that other party has breached contract cannot in same action both treat contract as rescinded and sue for amount paid by him thereunder, and at same time rely on contract as existing. Timmerman v. Stanley, 123 Ga. 850, 51 S. E. 760. Where declaration treats contract as rescinded, further allegations treating it as in force should be stricken. Id. One who after knowledge of claimed breach, sets up contract and succeeds in thereby defeating an action by the other party, cannot, in a subsequent action between the parties, contend that the contract is not in force. Galt v. Provan [Iowa] 108 N. W. 760. When one of the parties breaks the contract the other party must elect between demanding a dissolution of the contract and exacting a continued performance. He cannot have both and the choice is made once for all. Insisting on performance is waiver of any previous breach. Des Allemands Lumber Co. v. Morgan City Timber Co. [La.] 41 So. 332. Where servant is wrongfully discharged, he may sue for breach of contract or may elect to treat contract as rescinded and recover on quantum meruit for services rendered, but cannot do both. McCormick v. United States F. & G. Co., 114 Mo. App. 460, 89 S. W. 905.

40. Alger-Fowler Co. v. Tracy [Minn.] 107 N. W. 1124.

41. Delay of one day after repudiation of contract whereby plaintiff employed brokers to buy wheat held not unreasonable as matter of law. Alger-Fowler Co. v. Tracy [Minn.] 107 N. W. 1124.

42. One party to an executory contract has always the right, subject to the obligation to pay damages to the other, to stop the performance of the contract whenever for any reason he deems it to his interest to terminate it, and the other party is not at liberty to proceed thereafter with the performance in order to enhance the damages to be paid. Theo. Ollenheimer & Bro. v. Foley [Tex. Civ. App.] 95 S. W. 688. Where the contract requires manufacture or delivery of articles of merchandise, the manufacturer or vendor cannot insist on continued per-

The remedy in case inferior materials are substituted for those called for is an action on the contract for the resulting damage.[43] The remedy for breach of a contract to repurchase property is by a suit for specific performance or by an action at law for the purchase price.[44] Where one fails to perform a contract to make another his heir, the remedy of the latter is to sue his estate for the value of services rendered in pursuance thereof.[45]

Where one has performed work according to the terms of his employment, he is entitled to the stipulated compensation, or, in its absence, the reasonable value of the work.[46] Since an express contract excludes an implied one on the same subject,[47] one cannot ordinarily recover the reasonable value of work or materials furnished under an express contract, but is limited to the contract price.[48] Where the contract is fully executed, however, and nothing remains to be done but to pay the price in money, plaintiff may declare generally on the common counts or specially upon the original contract at his election.[49] In case the declaration contains both a special count on the contract and the common counts, plaintiff may recover the reasonable value of his services under the latter, though he fails to prove an express contract.[50] One may recover money paid out in reliance on the other party's performance where a breach occurs without his fault,[51] and may recover on a quantum meruit for work actually done when he is prevented by the wrongful act of the other party from complying with the terms of the contract,[52] or on disaffirmance of a voidable contract,[53] or when performance of the written contract between the parties

formance, unless the other party retracts his repudiation and accepts continued performance, but must in any reasonable way minimize the damages suffered by him from such repudiation. Barker & Stewart Lumber Co. v. Edward Hines Lumber Co., 137 F. 300.

43. Contract required use of certain kind and quality of cement and was one for the completed work, no particular quantity of cement being contracted for and there being no contract that it should be furnished or paid for at any particular price. Held that, where the contractor used a different kind of cement which was less expensive and the work was paid for without knowledge of the substitution, plaintiff's remedy was not an action ex quasi contractu or in repetition under La. Rev. Civ. Code, art. 2293, et seq., to recover profit made by the contractor by substitution, but an action on the contract under arts. 1930, 2769, for damages suffered by plaintiff by reason of the substitution. National Contracting Co. v. Sewerage & Water Board [C. C. A.] 141 F. 325.

44. Where defendants refused to repurchase bonds according to contract. Erie City Iron Works v. Thomas, 139 F. 995. Action held one at law, though prayer of complaint was that defendant be compelled to accept bonds and pay purchase price. Id.

45. Contract by defendant's intestate that, in consideration of services to be performed in caring for his mother, plaintiff should "share a child's interest in whatever was accumulated by the three" during lifetime of mother and son, held not to authorize court to grant plaintiff's prayer "that she be found to be an heir of said estate, and awarded an amount equal to a child's part thereof," but that her remedy was to sue in assumpsit for the value of the services performed by her. Bunting v. Dobson [Ga.] 54 S. E. 102.

46 Sale of realty by broker. Tebo v. Mitchell [Del.] 63 A. 327.

47. See § 1 A, ante.

48. One suing for a balance due under a contract of sale fixing the purchase price cannot show market value of goods at time of purchase. Riggins v. Boyd Mfg. Co., 123 Ga. 232, 51 S. E. 434. Evidence held to show that the amount of compensation for services was fixed by contract and plaintiff could not recover greater sum, though it was reasonable value. In re Mosher's Estate, 103 App. Div. 459, 93 N. Y. S. 123. Where goods are sold and delivered under a valid written contract, the seller is generally required to sue on the contract for the price and cannot recover on a quantum valebat. Where according to the contract the vendor exercised his option to discontinue furnishing goods, there was no breach so as to entitle him to recover the reasonable value. Over v. Byram Foundry Co. [Ind. App.] 77 N. E. 302.

49. Rubens v. Hill, 115 Ill. App. 565. One who has fully performed a contract for the rendition of services may recover under the common counts. Richards v. Richman [Del.] 64 A. 238.

50. Action for services. Richards v. Richman [Del.] 64 A. 238.

51. Case Threshing Mach. Co. v. Balke [N. D.] 107 N. W. 57.

52. When plaintiff contracted to sink a well for defendant at a certain price per foot, when his work was interfered with by defendant so that performance was not completed, plaintiff was entitled to recover the specified price for the number of feet completed. Hahl v. Deutsch [Tex. Civ. App.] 14 Tex. Ct. Rep. 901, 94 S. W. 443.

53. Avoidance by an infant of a contract of employment for a given time is not a bar

has been waived,[54] but cannot recover on an implied contract for services rendered under an entire indivisible express contract under which, by express provision or the nature of the agreement, nothing is to be paid until all is performed.[55] One who has himself broken the contract may recover under the common counts money paid by him in part performance to the extent that his payments were beneficial to the other party and in excess of the damages sustained by the latter by reason of the breach.[56] By counting in debt, a plaintiff's right to recover is limited to the sums alleged to be due by the terms of the contract.[57] The right to recover on a quantum meruit for services rendered in pursuance of an illegal contract is treated in a previous section.[58]

Where the contract itself fixes the rights of the parties in case of a breach,[59] or its termination,[60] the remedy so provided is exclusive.

A court of equity will not enforce a forfeiture by reason of the breach of a condition subsequent,[61] the proper remedy being an action for damages.[62] A party who has received a part of the consideration for a contract will not, in a court of equity, be allowed to retain what he has received and insist upon the forfeiture for breach of a condition subsequent which did not constitute the entire consideration for the engagement.[63] The parties to a contract, which, if proven, would give rise to a purely legal liability, are entitled to have it established in a court of law.[64] The right to specific performance is treated elsewhere.[65]

Equity will enjoin the violation of a valid agreement in restraint of trade,[66] and will enjoin third persons from inducing a violation by a party to a contract.[67]

against recovery on a quantum merult for the services rendered. Fisher v. Kissinger, 6 Ohio C. C. (N. S.) 218, 27 Ohio C. C. 13.

54. Hilton v. Hanson [Me.] 62 A. 797.

55. Breach of contract whereby child was to remain witb and work for her father until his death, in consideration of his leaving her part of his property by will, held to preclude recovery for services actually rendered. Tussey v. Owen, 139 N. C. 457, 52 S. E. 128.

56. Michigan Yacht & Power Co. v. Busch [C. C. A.] 143 F. 929.

57. Damages for breach not recoverable. Seretto v. Rockland, etc., R. Co. [Me.] 63 A. 651.

58. See § 3 L, ante.

59. Building contractor is not entitled to recover on quantum meruit for work performed on theory that he was prevented from performing in specified time where contract itself provides for rights of parties in case of delay caused by the owner. Neblett v. McGraw [Tex. Civ. App.] 14 Tex. Ct. Rep. 496, 91 S. W. 309.

60. Plaintiff had contract with insurance company as its agent which provided that, if contract should end for any cause, company would pay him commissions on renewed policies as the same were paid to it. Company sold its business to another company which assumed and guaranteed performance of plaintiff's contract, but before any renewal commissions were received transfer was declared invalid by courts and parties placed in statu quo. Held that plaintiff's rights were limited by his contract and he could not sue transferee for estimated value of renewal policies on ground that it had wrongfully rendered contract impossible of performance. Kansas Union Life Ins. Co. v. Burman [C. C. A.] 141 F. 835.

61, 62, 63. Galt v. Provan [Iowa] 108 N. W. 760.

64. An agreement between officers of an insolvent corporation, whereby two of them agreed to pay the balance of a certain note, established a purely legal liability and could not be enforced by a defendant in an equitable proceeding by the receiver to recover assets to pay debts. Mills v. Hendershot [N. J. Eq.] 62 A. 542.

65. See Specific Performance, 6 C. L. 1498.

66. Injunction proper remedy where seller of business breaches agreement not to again engage in same business in same town. W. S. Wolverton & Son v. Bruce [Ind. T.] 89 S. W. 1018. Evidence of violation of contract not to engage in manufacture of certain specialties held to warrant injunction. S. Jarvis Adams Co. v. Knapp, 213 Pa. 567, 62 A. 1112. Where nonresident, who had been enjoined by Federal court from manufacturing certain specialties in violation of a contract, moved into state and continued their manufacture, held that state court of equity would enjoin him from doing so under its general powers, though it could not enjoin the violation of the Federal decree, or declare it to be binding or punish its violation. Id. Agreement, incidental to sale of business, not to engage in competing business Camors-McConnell Co. v. McConnell, 140 F. 412.

67. One will be enjoined from inducing dealers to sell him medicines manufactured under secret process in violation of their contracts with the manufacturers. Dr. Miles Medical Co. v. Platt, 142 F. 606. Equity will restrain third person from inducing parties to contract with manufacturer of medicine under secret process whereby they agree to

Mandamus will not lie to compel a private corporation to perform its contract with an individual.[68]

(§ 9) *C. Defenses and counter rights.*[69]—Where time is not of the essence of the contract,[70] performance at any time before suit is a good defense to an action for a breach.[71] When one party sues to recover on a contract or under the common counts for work and labor done or money paid to or for his benefit, the defendant may show that the plaintiff has himself broken the agreement and prove his damages for such breach, thus cutting down or wholly extinguishing plaintiff's claim.[72] The fact that the vendee of land has mortgaged it is no defense to an action against the vendor for liquidated damages for breach of a contract to repurchase, where it does not stand in the way of a resale.[73] A provision for the arbitration of disputes is not a defense to an action on the contract in the absence of a showing that before the commencement of the action the party asserting it insisted upon, or took steps toward arbitration.[74] Mental incapacity,[75] or fraud in procuring the contract, is a good defense to an action to enforce it.[76] A defense predicated upon an obligation on the part of plaintiff to contribute toward the consequences of a joint tort is insufficient.[77]

A valid defense as to one of two joint obligors inures to the benefit of both,[78] except that when the defense is infancy the infant may be discharged and a recovery had as to his co-obligor.[79]

(§ 9) *D. Procedure before trial.*[80] *Venue.*—The maker of one contract cannot be sued in a county other than that in which he resides, together with the maker of a separate and independent contract to which the former never became a party.[81]

sell only to certain persons and for certain prices. Hartman v. John D. Park & Sons Co., 145 F. 358.

68. Not to compel college to issue diploma according to contract, since student could compel specific performance if action for damages was not adequate. State v. Milwaukee Medical College [Wis.] 106 N. W. 116.

69. See 5 C. L. 735.

70. See § 4 E, ante.

71. Where seller of bank stock agreed to refund to the purchaser any loss which might result to him owing to the bank's failure to recover misappropriated money, recovery any time before suit is a defense, notwithstanding a provision that the loss should be deemed to have been sustained if not recovered within a year. Robinson v. Pierce [Colo.] 83 P. 624.

72. Michigan Yacht & Power Co. v. Busch [C. C. A.] 143 F. 929. Breach by plaintiff of agreement to repurchase store sold to defendant held not to preclude him from recovering on judgment note given by defendant as part of purchase price, defendant being merely entitled to set off damages sustained by reason of breach. Cover v. Hoffman, 213 Pa. 213, 62 A. 836.

73. Mortgage placed on land by purchaser held no defense to action for liquidated damages for breach of contract by vendor to resell it where it did not stand in the way of such resale. Ahlers v. Harrison [Iowa] 108 N. W. 331.

74. Grant v. Pratt, 97 N. Y. S. 29.

75. Where no prejudice has resulted from delay, right to rescind for mental incapacity may be asserted as a defense to an action on a note. Dunlap v. Plummer [Cal. App.] 82 P. 445.

76. Fraud is available as a ground for rescission or as a defense in a suit to enforce contract. Bennett v. Glaspell [N. D.] 107 N. W. 45. In action on promissory notes given for certain plumbing work where defendant pleaded an agreement to supply fixtures at cost and to put them in for the lowest price, and claimed that bill had been made out on that basis for $217 and paid, and that notes were procured through duress and fraud, held that instruction that if jury found that the "agreed price" of the whole job was $217, which had been paid, and that notes were obtained through fraud, their verdict should be for defendant, was proper. McNamara v. Douglas [Conn.] 61 A. 368.

77. That the party from whom defendant had purchased stock under agreement to transfer part of it to plaintiff had recovered judgment against defendant for fraud in the purchase to which plaintiff was a party. Noval v. Haug, 48 Misc. 198, 96 N. Y. S. 708.

78. Cole v. Manners [Neb.] 107 N. W. 777.

79. Exception applies, though obligee knew of the infancy when he took the obligation. Cole v. Manners [Neb.] 107 N. W. 777.

80. See 5 C. L. 735.

81. Where credit was extended to tenant upon faith of letter of landlord wherein latter promises to join former in execution of a guano note, but landlord does not in fact sign the note, he cannot be properly joined as a codefendant in a suit brought in a county other than that of his residence, against the tenant on a note executed by the latter. Adams v. Williams [Ga.] 54 S. E. 99.

(§ 9) *E. Parties, pleading, evidence, etc. Time of commencing action.*[82]—Contract actions must of course be brought within the time fixed by the statute of limitations.[83]

Parties.[84]—One who is not a party to a contract and disclaims any interest in it is not a necessary party plaintiff to an action to enforce it.[85] Where the contract is for the benefit of several, all must be joined as plaintiffs.[86] Where a contract not under seal is made by an agent in his own name for an undisclosed principal, either may sue thereon.[87] The rule of the common law that only parties to a sealed instrument, or those in privity with them, can sue thereon has no application in equity.[88] The right of one not a party thereto to enforce a contract made for his benefit is treated in a previous section.[89]

In a suit to enforce a contract to pay the debts of a third person, the latter is a proper party defendant,[90] but one who has, with the consent of the other party, transferred all his rights under a contract to a third person, is not a necessary or proper party defendant to an action thereon against such third person.[91]

In the absence of a statute to the contrary,[92] all persons jointly liable must be

82. See 5 C. L. 735. See, also, Limitation of Actions, 6 C. L. 465.

83. In an action to rescind a contract and to recover money loaned and also to have a lien declared on a piece of land cleared of a mortgage with a part of the money, action against the purchaser of such land held barred by Code Civ. Proc. §§ 343, 338, subd. 4, after four years. Matteson v. Wagoner, 147 Cal. 739, 82 P. 436. Doctrine of laches has no application where contract voidable for duress is ratified and plaintiff sues at law for damages, but action may be brought at any time within period fixed by statute of limitations. Nelbuhr v. Gage [Minn.] 108 N. W. 884.

84. See 5 C. L. 736. See, also, Parties, 6 C. L. 888.

85. Bennett v. Glaspell [N. D.] 107 N. W. 45.

86. In a suit to enforce a contract made with M. "and his associates," one alleged by the bill to have been the only associate of M. was properly made a party. City of Gadsden v. Mitchell [Ala.] 40 So. 557. Where contract to purchase land is made with a syndicate, one of the members composing it cannot sue alone for its enforcement, though he alone is named in the contract and his associates are referred to as "others," but all must be joined. Winders v. Hill [N. C.] 54 S. E. 440. Is not to be regarded as a trustee of an express trust within meaning of Revisal 1905, § 404. Id.

87. A buyer of cement could sue on the contract, though the seller was without knowledge that certain individuals who executed it were plaintiff's agents. Noel Const. Co. v. Atlas Portland Cement Co. [Md.] 63 A. 384. Lessee's evidence of undisclosed principal held immaterial. Buffington v. McNally [Mass.] 78 N. E. 309. That plaintiff described himself as agent might be treated as a designation only. Id. Under Code Civ. Prac. § 21, one in whose name contract to purchase timber is made may sue thereon, though he is acting as agent for an undisclosed principal. Mills v. Stillwell [Ky.] 89 S. W. 112.

88. An undisclosed principal may sue for the cancellation of a bond and trust deed of his property. Whelpley v. Ross, 25 App. D. C. 207.

89. See § 1, ante.

90. Where a grantee of land agreed to pay notes made by the grantor, the latter was a proper party defendant in an action by a creditor against the former to enforce the agreement. Greenley v. Greenley, 100 N. Y. S. 114.

91. In action on contract whereby plaintiff agreed to, and did, secure to defendant a certain contract previously entered into between plaintiff and a third person which the latter did not wish to continue, and to procure such third person to convey to defendant land and options acquired in his name under the original contract, in consideration of which defendant promised to pay plaintiff a certain sum, held that such third person was not a necessary or proper party. Ragley v. Godley [Tex. Civ. App.] 14 Tex. Ct. Rep. 153, 90 S. W. 66.

92. Where several frontage owners are jointly and severally liable to a contractor for street improvements, acceptance by him of part due from some does not prevent a suit against others jointly for balance. Code Civ. Proc. § 383. Moreing v. Weber [Cal. App.] 84 P. 220. In an action against two defendants jointly, a finding that only one is liable is not outside the issues and judgment will lie. McKee v. Cunningham [Cal. App.] 84 P. 260. Plaintiff cannot sue some of the contracting parties where all are liable as a unit, except as provided by Civ. Code 1895, §§ 5009, 5015 (Chas. Lippincott & Co. v. Behre, 122 Ga. 543, 50 S. E. 467), but where suit is brought against two or more alleged to be jointly liable, and the proof of pleadings show that some are not liable at all, plaintiff may dismiss as to the latter (Id.). Under Rev. St. 1899, §§ 889, 892, joint contractors or promisors may be sued jointly or separately. Morgan v. Keller, 194 Mo. 663, 92 S. W. 75. V. S. 2440 making the estate of a deceased joint obligor liable for the debt, does not affect the common law liability of the survivor for the entire debt. Hogan v. Sullivan [Vt.] 64 A. 234.

made defendants, and judgment cannot be rendered against less than all,[93] but this rule does not apply in the case of a defense personal to only some of them.[94] If the contract is several, each promisor must be sued separately on his individual promise.[95] If joint and several, each may be sued separately.[96]

The rights of persons not made parties cannot be adjudicated.[97]

Pleading.[98]—Allegations should be definite and certain,[99] and facts rather than conclusions should be pleaded.[1] The performance of conditions precedent must be alleged,[2] but this may be done generally in most states.[3] When assailed on demurrer, pleadings will be liberally construed.[4]

93. Wolff v. Wilson, 28 Pa. Super. Ct. 511.

94. Where one defendant was released because the other had made the contract sued on without authority from him. Wolff v. Wilson, 28 Pa. Super. Ct. 511.

95. Morgan v. Keller, 194 Mo. 663, 92 S. W. 75. Conversations with each of several defendants singly held admissible, though action was against them jointly, where such conversations had some connection with or reference to other conversations previously had with the other defendants regarding the employment, and on one occasion defendants employed plaintiffs while together. Id. The joinder of two or more defendants in an action on contract can only be upheld if they are jointly liable. Boogher v. Roach, 25 App. D. C. 324.

96. An executor may be sued severally on an obligation which is joint and several as to the obligors and their legal representatives. Bond where obligors "bind ourselves, our heirs, etc., and each and every one of them," held joint and several and single executor could be sued. Lehigh County v. Gossler, 24 Pa. Super. Ct. 406.

97. In suit to rescind for fraud, transaction whereby plaintiff turned over business to corporation for stock therein under consolidation agreement, held that court could not give consideration to issue of stock in excess of amount agreed upon to persons not made parties to the suit. French v. Northwestern Laundry [Iowa] 107 N. W. 430.

98. See 5 C. L. 736. See, also, Pleading, 6 C. L. 1008.

99. In an action for breach of contract, it is not necessary that the complaint should allege in express terms that the claim is due and unpaid, it being sufficient if it appears from the pleading as a whole that the claim is due and unpaid. Grau v. Grau [Ind. App.] 77 N. E. 816. Averment that contract was made "for a valuable consideration" held sufficiently definite where written contract imported a consideration. Delta County v. Blackburn [Tex. Civ. App.] 90 S. W. 902.

1. A plea of breach must set out facts sufficient to show the breach. In an action on a building contract, a plea alleging a breach, and that the building erected was smaller than that contracted for, held defective for failure to allege the size of the building contracted for. Alabama Jail & Bridge Co. v. Marion County [Ala.] 40 So. 100. Complaint stating that "thereupon said agreement was mutually rescinded by the parties" sufficiently presented the issue of mutual rescission, especially in view of the fact that defendant permitted plaintiff to testify to the facts connected with the rescission. Dougherty v. Neville, 108 App. Div. 89, 95 N. Y. S. 806. A declaration that "On towit, the 1st day of November, 1901, furnished the said articles of machinery as described in said proposition and in conformity with the provisions of said proposition," pleads a conclusion of law. Bogardus v. Phoenix Mfg. Co., 120 Ill. App. 46. Allegation that order for book was accepted held not obnoxious to general demurrer because of failure to allege that book was prepared and reserved for defendant. Harris v. Paine [Neb.] 107 N. W. 748. If consideration had entirely failed because of refusal or neglect so to do, such fact should have been pleaded by answer. Id. Where a waiver of a breach is relied upon, the facts constituting it must be alleged. Not sufficient to allege that the other party had knowledge of and fully assented to the manner of performance. Pope Mfg. Co. v. Rubber Goods Mfg. Co., 110 App. Div. 341, 97 N. Y. S. 73. Rescission held properly pleaded in action to recover money paid under contract for sale of land, which was rescinded by vendee for failure of vendor to perform. Miller v. Shelburn [N. D.] 107 N. W. 51. Plea of want of consideration for promise to pay debt of third person held sufficient in absence of demurrer. Bluff Springs Mercantile Co. v. White [Tex. Civ. App.] 13 Tex. Ct. Rep. 905, 90 S. W. 710. Allegations of breach of contract to boom and sort plaintiff's logs held sufficient. Nester v. Diamond Match Co. [C. C. A.] 143 F. 72. Allegation that draft of contract and letters constituted a binding contract held a conclusion of law, which should be disregarded. Id. Allegation in affidavit of defense of assent in writing to cancellation of contract held a mere conclusion, and ineffectual where copy of writing was not exhibited and terms were not stated with such particularity as would enable court to determine its effect. Harding, Whitman & Co. v. York Knitting Mills, 142 F. 228.

2. In an action for breach of contract based on a written order by plaintiff to defendant reciting that the order was taken subject to the approval of defendant, the complaint must show that the order has been so approved. Perkins v. Maurepas Milling Co. [Miss.] 40 So. 998. Where contract for construction of railroad provided that it should be void after a certain date unless satisfactory progress had been made by plaintiff in sale of bonds and stock by plaintiff, held that complaint in action for damages for failure to build road was demurrable for failure to allege that such progress had been made. Stanton v. Sturgis, 140 F. 789.

The complaint must allege all facts necessary to show a cause of action against the defendant.[5] Plaintiff must plead consideration unless the contract imports one,[6] but it has been held unnecessary to allege a consideration for the modification of an executory contract.[7] Both the inducement for and the terms of the contract should be set out.[8] It may be set out in haec verba,[9] or pleaded according to its legal effect.[10] A contract not under seal cannot be made a part of the declaration by oyer.[11] Several counts in contract may be joined.[12] A cause of action for specific performance may be joined with one for damages for a breach, or from delayed performance, or for any other damages growing out of the transaction to which plaintiff may show himself entitled.[13] A complaint stating facts entitling plaintiff to nominal damages is not demurrable.[14] Where it is not averred whether the contract was written or oral, recovery may be had on proof that it was either.[15] In such case, if a writing is necessary to the validity[16] or enforceability of the contract, it will be presumed to have been written,[17] but a demurrer on the ground that a

3. Under Code Civ. Proc, § 533. Sager v. Gonnermann, 100 N. Y. S. 406. Averment of performance of conditions precedent in an insurance policy held sufficient. Home Ins. Co. v. Gagen [Ind. App.] 76 N. E. 927. Where a contract provided for the payment of money when a certain road was constructed and a depot built and maintained, an allegation in a complaint on the contract that the contract "has been and is being performed" sufficiently alleges performance, the words "is being performed" relating to the maintenance of the depot. Piper v. Choctaw Northern Townsite & Imp. Co. [Okl.] 85 P. 965.

4. Complaint in action for damages for breach of contract to pave streets held not demurrable on ground that it was apparent that minds of parties did not meet upon anything definite and certain. Warren Bros. Co. v. King [Minn.] 104 N. W. 816.

5. Petition in action to recover balance due on purchase price of land, which defendant had agreed to pay in a certain manner, held sufficient, since it set forth the sale, the consideration, the promise to pay, and the default. Nelson v. Crawford [Ky.] 93 S. W. 644. Where a contract provided that its performance was subject to strikes, accidents, etc., a complaint for delay was defective which failed to negative the existence of these causes of delay. Perkins v. Maurepas Milling Co. [Miss.] 40 So. 993. Complaint in an action on contract held not to allege an agreement for an allowance by defendant to plaintiff of certain sums as freight on shipments. Heywood Bros. & Wakefield Co. v. Doerbecher Mfg. Co. [Or.] 86 P. 357. Complaint alleging that after a breach of contract to transport plaintiff and his goods in a certain vessel it was agreed that transportation should be by another vessel admittedly not owned by defendant, and that latter vessel would reach destination at about the same time the one first designated would, held not to state a cause of action for damages due to delay in transportation, there being nothing alleged which showed that defendant contracted to become or became responsible for such delay, and no consideration for such a contract. Johanson v. Sondheim [C. C. A.] 145 F. 620.

6. Cooley v. Moss, 123 Ga. 707, 51 S. E. 625.

7. As to necessity of consideration see § 5, ante. Warren & Lanier v. Cash, 143 Ala. 158, 39 So. 124.

8. Judgment in action for services and expenses incurred in logging operations under alleged contract that defendant was to take work where plaintiff left it and pay his debts for labor, and for his services and expenses, not reversed for failure to so plead where defendant was not surprised. Howe v. Morey [Mich.] 12 Det. Leg. N. 450, 104 N. W. 643.

9. Provided the contract shows on its face all facts which would be necessary to allege in pleading its legal effect. Hill v. McCoy [Cal. App.] 81 P. 1015. Where a complaint sets out in haec verba a contract for the sale of land, spoken of as the "Abbey Ranch," a further avermept alleging the location of such tract is not a variance. Id.

10. Hill v. McCoy [Cal. App.] 81 P. 1015. It is sufficient if it substantially states the contract and alleges wherein it was breached. Armour Packing Co. v. Vietch-Young Produce Co. [Ala.] 39 So. 680.

11. Norfolk & W. Co. v. Sutherland [Va.] 54 S. E. 465.

12. Armour Packing Co. v. Vietch-Young Produce Co. [Ala.] 39 So. 680. Where all the counts in a complaint were in contract, it was not error to permit, by amendment, the addition of another count declaring on special contract. Id.

13. Winders v. Hill [N. C.] 54 S. E. 440.

14. Action on contract to sell securities by a certain date. Gause v. Commonwealth Trust Co., 97 N. Y. S. 1091. Breach of contract to convey land. Grau v. Grau [Ind. App.] 77 N. E. 816.

15. Newburn v. Hyde [Iowa] 107 N. W. 604.

16. Failure to allege that agreement required to be in writing was written held to raise no presumption that it was in parol, and hence did not make pleading demurrable. Anderson v. Hilton & Dodge Lumber Co., 121 Ga. 688, 49 S. E. 725. On demurrer it will be presumed that it was in writing, unless averments of petition distinctly show to the contrary. Allen & Holmes v. Powell [Ga.] 54 S. E. 137. Pleading alleging promise to answer for debt, default, or miscarriage of another, is not demurrable for failure

copy of the contract is not attached to the complaint as an exhibit will not be sustained where it does not appear that the contract was in writing.[18]

The answer must be responsive to the complaint.[19] Each plea must stand or fall by itself.[20] Inconsistent pleas are not permissible unless allowed by statute.[21] A plea of set off of an amount necessarily paid for completing work required by a contract sued on need not itemize the payments, nor affirmatively state that defendant claims of plaintiff any damages.[22] Failure of consideration,[23] unless apparent on the face of the complaint,[24] fraud,[25] modification of the contract,[26] collateral agreements relied on as a defense,[27] waiver,[28] and estoppel,[29] must be pleaded. Illegality must ordinarily be pleaded when relied on as a defense,[30] unless apparent on the face of the contract,[31] though there seems to be some conflict of authority in this regard.[32]

to allege that it was in writing. Tyson v. Jackson Bros. [Tex. Civ. App.] 14 Tex. Ct. Rep. 431, 90 S. W. 930.

17. Statute of limitations in regard to written contracts applied where petition did not allege that contract was written. Van Meter v. Poole [Mo. App.] 95 S. W. 960.

18. Timmerman v. Stanley, 123 Ga. 850, 51 S. E. 760.

19. Plea properly stricken where did not relate to contract declared on. Armour Packing Co. v. Vietch-Young Produce Co. [Ala.] 39 So. 680. Answer held responsive to complaint alleging cutting and removal of more timber than that covered by contract of sale. Doell v. Schrier [Ind. App.] 75 N. E. 600. A plea of payment must respond to the claim made. Where plea averred payment of contract price but not payment for extra work sued for, but sought to defend against same by averring that it was included in the contract price. Alabama Jail & Bridge Co. v. Marion County [Ala.] 40 So. 100.

20. Implied admission of execution of contract sued on in separate plea alleging fraud cannot be taken advantage of to disprove issue raised by other pleas as to authority of agents to execute contract on defendant's behalf. Fifer v. Clearfield & Cambria Coal & Coke Co. [Md.] 62 A. 1122.

21. Where defendant admits the contract alleged and pleads performance, under Mills' Ann. Code § 59, permitting inconsistent pleas, he may allege a new contract modifying the terms and performance thereof. Conrey v. Nichols [Colo.] 84 P. 470. The second answer alleging a new contract to sink the well to a greater depth after it had been drilled according to the original contract, held to allege a complete contract and not to be inconsistent in itself. Id.

22. Plea of noncompletion of work sued for and set off, held not demurrable for failure to set up any item to the count for which it was claimed defendant paid for completing the contract, or for failure to aver that defendant, either by liquidated or unliquidated demand, claimed damages, or failure to show what material or labor was paid for by defendant. Birmingham Paint & Roofing Co. v. Crampton [Ala.] 39 So. 1020.

23, 24. Miller v. Donovan [Idaho] 83 P. 608.

25. Where in an action to determine the validity of a judgment the only issue was whether defendant had backed out of a bargain to exchange real estate, evidence of false representations as the inducement for the contract of exchange was irrelevant. Blumberg v. Pecarsky, 23 Pa. Super. Ct. 568.

26. Schenectady R. Co. v. United Traction Co., 101 App. Div. 277, 91 N. Y. S. 651.

27. Answer held to show that certain alleged collateral agreements on the part of a landlord to make repairs, etc., were merely parts of the one agreement of leasing, and the same could not be shown by parol. Leeming v. Duryea, 97 N. Y. S. 355.

28, 29. Schenectady R. Co. v. United Traction Co., 101 App. Div. 277, 91 N. Y. S. 651.

30. Miller v. Donovan [Idaho] 83 P. 608; Mitchell v. Branham [Mo. App.] 95 S. W. 939. Under the statute providing that the answer shall state each fact intended to be relied on in avoidance of the action, a defense that the contract sued on is void as violative of the Sherman act is not available unless pleaded. New York Bank Note Co. v. Kidder Press Mfg. Co. [Mass.] 78 N. E. 463. The defense of illegality of a contract under Pen. Code § 640d, prohibiting the offering for sale of real property without written authority. Haynes v. Abrahamson, 97 N. Y. S. 371. Where a cause of action is based alone on a promissory note, and the note together with the evidence shows that it was given against public policy, a demurrer to the evidence should be sustained, notwithstanding there is no allegation of illegality in the pleadings. McGuffin v. Coyle [Okl.] 85 P. 954. Where both parties to an action declare on a contract as valid, and which is valid on its face, the defense of illegality cannot prevail unless it is so against public policy as to call for intervention by the court. Cox v. Cameron Lumber Co., 39 Wash. 562, 82 P. 116. A contract to cut timber on "defendant's land," which however was still public land, is not so against public policy as to be void ab initio, although plaintiff knew that the land was unsurveyed and that defendant had scripped it, which could not be legally done. Id. Plaintiff was not called upon to investigate defendant's title. Id.

31. Miller v. Donovan [Idaho] 83 P. 608. Where the illegality of a contract appears on the face of the complaint in an action thereon, the court will dismiss the action, notwithstanding such illegality is not pleaded as a defense. Jackson v. Baker [Or.] 85 P. 512.

32. Defendant held not to be precluded

Under a plea of the general issue, all facts are admissible which directly tend to disprove one or more of the allegations of the complaint, or to show that plaintiff never had a cause of action.[33]

Admissions in a pleading are conclusive on the party making them.[34]

Variance.[35]—Since a party must recover, if at all, on the cause of action set up in his pleadings, his allegations and proofs must substantially correspond.[36] One is not entitled to equitable relief where his complaint states only a cause of action at law for damages.[37]

Evidence. Presumptions and burden of proof.[38]—Where defendant, in an ac-

from claiming that contract was void because made on Sunday by reason of the fact that he did not plead such invalidity. Jacobson v. Bentzler [Wis.] 107 N. W. 7.

33. That plaintiff assented to the abandonment of the contract. McKenna v. McKenna, 118 Ill. App. 240. In an action for work and labor may prove the illegality of the contract of employment under a plea of general denial and payment. Cheney v. Unroe [Ind.] 77 N. E. 1041. May prove that conversation relied on as constituting contract was had in jest. Olsen v. Collins [Neb.] 106 N. W. 784. Payment. Cunningham v. Springer [N. M.] 82 P. 232.

34. Where the complaint for breach of contract to deliver a certain quantity of hops credited a delivery and defendant answered alleging that such delivery was under another contract, and the court so found, a finding of a total breach of the contract pleaded is not erroneous as contrary to the complaint. Mitau v. Roddan [Cal.] 84 P. 145. Where one party unreservedly admits in his pleadings that he assumed an obligation not set forth or referred to in the written contract, the other party may prove by parol the accompanying assertion that this obligation was fully met. Williams v. Walden, 124 Ga. 913, 53 S. E. 564.

35. See 5 C. L. 747. See, also, Pleading, 6 C. L. 1008.

36. There can be no recovery on the theory of complete performance unless such performance is shown. Buellesbach v. Henderson, 98 N. Y. S. 36. A contractor is not entitled to recover on an allegation of full performance of the contract if any material part thereof remains unfinished. Gates v. O'Gara [Ala.] 39 So. 729. Proof of facts justifying nonperformance is not admissible under an allegation of performance. Thompson v. Hoppert, 120 Ill. App. 588. Under a complaint for performance of a building contract, plaintiff is entitled to recover for substantial performance. Substantial performance held performance. Rowe v. Gerry, 98 N. Y. S. 380. One declaring on an express contract cannot recover on proof of an implied one. Ecker v. Isaacs [Minn.] 107 N. W. 1053. In a suit on contract plaintiff cannot recover on a quantum meruit. McCormick v. United States Fidelity & Guaranty Co., 114 Mo. App. 460, 89 S. W. 905; Wade v. Nelson [Mo. App.] 95 S. W. 956. One suing for breach of contract alone cannot recover for a tort. In action for damages for destruction of crops by cattle, owing to breach of contract in deed of right of way to railroad, whereby the latter agreed "to reconstruct fences when same are on right of way," held that instruction authorizing recovery, if defendant caused the loss by breaking or throwing down plaintiff's fences, whereby cattle broke in, was erroneous. White River R. Co. v. Hamilton [Ark.] 88 S. W. 978. Instruction authorizing recovery for damages due to breaking down fences held erroneous, particularly as contract contemplated such breaking. Id. Counterclaim held to state cause of action on implied contract to make proofs of loss, etc., growing out of express contract to keep defendant's property insured, and not one for negligence in breach of implied duty. Avil Printing Co. v. Kaiser Pub. Co. [Mo. App.] 89 S. W. 900. Where the complaint alleged that defendant promised to pay plaintiff if a third person failed to do so, there could be no recovery on the theory that the defendant became the principal debtor. Smith v. Burdett, 107 App. Div. 628, 95 N. Y. S. 188. Plaintiffs having alleged that work was to be done according to plans and specifications, and also that it was to be performed to satisfaction of defendant's foreman, and that they had performed work as agreed, and having proved by the written contract that it was to be done according to the plans and specifications, could not recover on theory that it was to be performed to foreman's satisfaction. Sundmacher v. Lloyd, 114 Mo. App. 317, 89 S. W. 368. There is no fatal variance between an allegation on contract and proof of an account for personal property sold which does not show any contractual relation. Riley v. Stevenson [Mo. App.] 94 S. W. 781. In an action for a refusal to permit plaintiff to carry out a contract for grading and cleaning at a specified price, the petition alleged that there was no specified time as to when the work was to be completed. There was evidence claimed by defendant to show that it was a part of the contract that the work should be done as quickly as plaintiff could do it. Held, if true, not to constitute a variance. Jefferson & N. W. R. Co. v. Dreeson [Tex. Civ. App.] 96 S. W. 63. Allegation as to cost of building for which plaintiff was employed to draw plans held merely one as to the estimated cost and not to preclude recovery on basis of less sum. Buckler v. Kneezell [Tex. Civ. App.] 14 Tex. Ct. Rep. 800, 91 S. W. 367. In an action on contract to recover contract price, evidence of a lower price than alleged does not constitute a fatal variance. Irby v. Phillips, 40 Wash. 618, 82 P. 931. No material variance between an allegation of sale to the Burrell Company and proof of contract

tion on contract, pleads a general denial and payment, the burden is on plaintiff to prove the contract alleged.[39] The burden is on plaintiff to prove consideration,[40] unless the contract itself imports one,[41] and the same is true though it prima facie imports a consideration where the evidence is in conflict as to whether or not there was one.[42] He also has the burden of showing performance on his part,[43] or a tender of performance,[44] and damages.[45] The burden of showing a failure of consideration is on the party alleging it.[46] The burden is on defendant to plead and prove breaches of conditions.[47] The burden of proving a modification is on the party claiming under the alleged modified contract.[48] Where plaintiff proves the rendition of services at defendant's request and the reasonable value thereof, the burden is on defendant to prove a special contract as to compensation.[49] So too, where plaintiff sues on an oral contract, defendant has the burden of proving that the work was done under a written contract, and that all claims thereunder were subsequently released.[50] As a general rule, one seeking to enforce a contract in restraint of trade has the burden of proving that such restraint is reasonable,[51] but if the contract is reasonable on its face, the burden is on one seeking to avoid it because of some extrinsic matter rendering it illegal to establish such illegality by clear and satisfactory evidence.[52]

Admissibility.[53]—The contract itself is ordinarily admissible when in writing,[54]

with Burrell, and subsequent adoption by Burrell Company. Vulcan Ironworks v. Burrell Const. Co., 39 Wash. 319, 81 P. 836.

37. Todd v. Bettingen [Minn.] 107 N. W. 1049.

38. See 5 C. L. 740. See, also, Evidence, 5 C. L. 1301.

39. Cunningham v. Springer [N. M.] 82 P. 232.

40. Cooley v. Moss, 123 Ga. 707, 51 S. E. 625.

41. As to what contracts import a consideration, see § 2, ante. Where suit upon a promissory note is brought against an administrator, the burden is upon the defendant to prove lack of consideration. Chicago Title & Trust Co. v. Ward, 113 Ill. App. 327. Evidence held insufficient to disprove consideration for a promissory note. Id. Where the defendant in an action on a promissory note attacks the consideration, he has the burden of proving the true consideration. Holmes v. Horn, 120 Ill. App. 359.

42. Where there is evidence pro and con as to whether there was a consideration for a note, the burden is on the plaintiff to show a consideration. Best v. Rocky Mountain Nat. Bank [Colo.] 85 P. 1124.

43. See, also, § 6 D, ante. In action for balance due on building contract, must show that they completed building within the time specified, or that delay was excused by some of the terms thereof for which an extension was allowed in the manner provided for, where general denial is interposed. Neblett v. McGraw [Tex. Civ. App.] 14 Tex. Ct. Rep. 496, 91 S. W. 309.

44. See, also, § 6 E, ante. In an action for breach of contract to purchase eggs, the eggs to be of a specified quality determined by the time of storage, the burden was on plaintiffs to show that they tendered eggs of the description called for by the contract, and not upon defendant to show the contrary. Armour v. Produce Co., 28 Pa. Super. Ct. 524.

45. Judgment for plaintiff in an action for damages for breach of contract to account for mortgaged cattle sold to third persons, reversed, there being no evidence of the number or value of the cattle sold. Sherman v. Ward [Ariz.] 83 P. 356. Where discharged employe is offered same or like employment for same period and upon same terms, and before he has sustained any injury by reason of his discharge, no damages are recoverable by him for such discharge. Wolf Cigar Stores Co. v. Kramer [Tex. Civ. App.] 14 Tex. Ct. Rep. 46, 89 S. W. 995.

46. Masterson v. F. W. Heitmann & Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 8, 87 S. W. 227.

47. Fidelity bond. Sinclair & Co. v. National Surety Co. [Iowa] 107 N. W. 184.

48. Schulze v. Shea [Colo.] 86 P. 117; Tennis Bros. Co. v. Wetzel & T. R. Co., 140 F. 193.

49. Cusick v. Boyne [Cal. App.] 82 P. 985.

50. In action for breach of oral contract to develop certain mining claims, where defendant claimed that work was covered by written contract and relied on a written release of liability under such written contract, instruction that burden was on plaintiff to show that written contract did not include work covered by oral one and that oral contract was in fact made, and that defendant must show that written contract was only one between the parties, and that release was release of all claims under it, held proper, particularly in view of other instructions. Lindblom v. Fallet [C. C. A.] 145 F. 805.

51. Merriman v. Cover, 104 Va. 428, 51 S. E. 817.

52. Instruction approved. Merriman v. Cover, 104 Va. 428, 51 S. E. 817.

53. See 5 C. L. 740, n 27, et seq.

and is the best evidence of its contents.[55] In some states its execution need not be proven unless denied under oath.[56] A written contract between other parties than those to the suit, which is referred to in the one sued on and to any extent supplements the same, is admissible.[57] Expert testimony is inadmissible to show the meaning of nontechnical terms.[58] Evidence of the conduct of the parties is admissible to show the practical construction adopted by them.[59] Verbal admissions are regarded with suspicion, especially when the exact language cannot be given and it is sought to put a particular interpretation upon a written contract.[60] Where the contract sued on is shown to have been rescinded, evidence of what was done pursuant to a new contract subsequently entered into is immaterial except for the purpose of rebutting the contention of a recognition of the original contract.[61]

Cases dealing with the admissibility of evidence to show whether or not an oral contract was in fact made, and what were its terms,[62] to show fraud,[63] considera-

54. Where a special contract has been fully performed and action is brought on the common counts for money due, the contract is admissible to prove the amount of the claim. Rubens v. Hill, 115 Ill. App. 565. Written contract held admissible where specially pleaded. Neblett v. McGraw [Tex. Civ. App.] 14 Tex. Ct. Rep. 496, 91 S. W. 309.

55. Witnesses cannot testify as to its contents or give a construction thereof. Vale v. Suiter, 58 W. Va. 353, 52 S. E. 313. Objection that the contract is the best evidence is not tenable until it is shown that the contract is in writing. Union Foundry & Mach. Co. v. Lankford [Ala.] 39 So. 765. Exclusion of parol evidence of unrecorded contract for sale of realty executed in duplicate held proper, though one of the duplicate copies was shown to have been lost, where no effort was made to account for the other duplicate. Bryson & Hartgrove v. Boyce [Tex. Civ. App.] 14 Tex. Ct. Rep. 651, 92 S. W. 820.

56. A promissory note sued on was properly admitted in evidence without proving its execution by the attesting witnesses, where the only pleas were general issue and no consideration, under Code 1896, § 1801, providing that an instrument, the foundation of a suit, purporting to be signed by defendant, must be admitted in evidence without proof of its execution, unless the execution is denied by verified plea. Gates v. Morton Hardware Co. [Ala.] 40 So. 509. Under Code Pub. Gen. Laws 1888, art. 75, § 23, subsec. 108, providing that when the execution of any written instrument filed in the cause is alleged in the pleadings, it shall be taken as admitted unless denied in the next successive pleading, held that failure to deny execution of contract for sale of coal relieved plaintiff from proving it. Fifer v. Clearfield & Cambria Coal & Coke Co. [Md.] 62 A. 1122. Such failure held not an admission that persons alleged to have executed contract as defendant's agents were in fact his agents, or had authority to bind him. Id.

57. Vale v. Suiter, 58 W. Va. 353, 52 S. E. 313.

58. The opinions of university professors as to the meaning of the terms of a contract are not admissible in aid of construction. Chicago Portrait Co. v. Chicago Crayon Co., 118 Ill. App. 98. Question as to whose duty it was to see that plans were followed held properly excluded, the question of the construction of the contract being for the court. Arkwright Mills v. Aultman & Taylor Mach. Co. [C. C. A.] 145 F. 783.

59. See, also, § 4 A, ante. Kennedy v. Lee, 147 Cal. 596, 82 P. 257. Where there was a dispute as to whether a parol contract required defendant to store goods where they would not freeze, the jury could consider not only what was said or written, but what was done by the parties in pursuance of the talk and letters. Phenix Nerve Beverage Co. v. Dennis & Lovejoy Wharf & Warehouse Co., 189 Mass. 82, 75 N. E. 258.

60. Contract for cutting and moving timber. Des Allemands Lumber Co. v. Morgan City Timber Co. [La.] 41 So. 332.

61. Where a contract to deliver hops was rescinded by express agreement, evidence of a new contract for hops is immaterial unless introduced to rebut a contention that the delivery was a recognition of the continuity of the old contract. Neis v. Whitaker [Or.] 84 P. 699.

62. In an action against a foreign corporation to recover an alleged addition to plaintiff's salary, plaintiff testified that on a certain date he wrote a letter notifying defendant that he would demand an addition to his salary because of his services as state agent, and that he received a reply that defendant's treasurer would visit plaintiff and take the matter up personally with him. Held, plaintiff was entitled to make proof of his letter to defendant as a preliminary negotiation for increase of salary. Leidigh & Havens Lumber Co. v. Clark [Ark.] 94 S. W. 686. Where plaintiff sues to recover money loaned under an alleged contract to repay without qualification, while defendant claims that it was to be repaid only from commissions on insurance secured, evidence of loans to other agents who had not been sued, notwithstanding their commissions had not equalled the loans, is admissible as tending to prove defendant's claim. Perrin v. Carbone [Cal. App.] 82 P. 222. In action on note given for services in fitting up bathroom, where defendant claimed that plaintiff agreed to fit up bathroom supplied with water, ready for use, held that plaintiff was entitled to show in rebuttal that

tion,[64] performance[65] within a reasonable time,[66] or excuses for nonperformance,[67] breach,[68] and damages,[69] will be found in the notes.

at time such agreement was alleged to have been made it was impossible to put in apparatus which could supply the water. McNamara v. Douglas [Conn.] 61 A. 368. Letter held admissible to prove promise to redeem stock purchased if it was not satisfactory, and to show price of stock and date of delivery. Crandell v. Classen, 25 App. D. C. 5. On issue of whether defendant entered into contract declared on, plaintiff may not prove implied admissions of liability thereunder made by defendant pending negotiations for a compromise, nor show, as an independent fact, that immediately after their conference defendant stated to a third person that a compromise had been agreed upon but that he was not going to pay plaintiff anything, but was going to keep the money to fight him with. Wall v. Moulton [Ga.] 53 S. E. 591. On issue as to whether deceased made a contract with defendant, and whether she was induced to do so by unfair means, whereby latter was to have her deposits in consideration of his caring for her during her lifetime, her declarations that defendant was after her money and that she did not want him to have it held inadmissible, they not being against her interest. Drefahl v. Security Sav. Bank [Iowa] 107 N. W. 179. Not admissible as res gestae, it not appearing that they were made near the time of or in connection with the alleged agreement (Id.), nor on theory that deceased was in possession, declarations being in no way explanatory thereof (Id.). In proceedings to recover an alleged loan to deceased, question and answer as to the nature of the business dealings between claimant and deceased held admissible as tending to show the relations of the parties. Kinney v. McFaul, 122 Iowa, 452, 98 N. W. 276. Instruction allowing jury to consider habits and business methods of deceased held not error, it having been requested by executors, and evidence in relation thereto having been admitted without objection. Id. Question as to whether deceased was methodical in his business habits and had written evidence of everything he did held inadmissible. Id. Evidence as to references required of claimant by executor held not objectionable as going to claimant's character and, having no bearing on the case, its admission was not prejudicial. Id. In a suit upon a specialty, evidence of uniform custom of transacting business with the public with reference to the matter in dispute is admissible when introduced for the purpose of showing an agent's authority to make the contract in question on behalf of his principal. Pullman Co. v. Tilie, 7 Ohio C. C. (N. S.) 173. Where the assignee of a business undertakes to pay its debts, a creditor of the assignor may show the assumption of his claim by evidence that the assignee has paid other debts of the assignor, made payments on account of the debt sued on, and entered it upon his books. Cox v. Philadelphia Pottery Co. [Pa.] 63 A. 749. On the issue of whether a contract had in fact been made, evidence as to whether defendant would have entered into a contract held properly excluded. Swing v. Walker, 27 Pa. Super. Ct. 366. Where contract for sale of brand provided that ownership of horses previously branded therewith should remain in defendant, evidence as to age of horse held admissible to show that it was of sufficient age to have been branded prior to the sale. Beiknap v. Beiknap [S. D.] 107 N. W. 692. In action on contract, evidence of negotiations looking to an increase of plaintiff's compensation held inadmissible, increase being refused. Streeter v. Sanitary Dist. [C. C. A.] 143 F. 476. On issue as to making of contract to pay certain commission for services, evidence as to worth of such services held admissible as bearing on the reasonableness of the alleged rate to be paid and the probability that such a contract was made. Bromley v. Standard-Plunger Elevator Co., 144 F. 713.

63. Letter of defendant's attorney held admissible in action on note for services of plumber in fitting up bathroom as tending to show that when it was written defendant made no claim of fraud or that the work and materials were of no value. McNamara v. Douglas [Conn.] 61 A. 368.

64. Where subsequent to the furnishing of goods to a third person defendant gave his note for the price, evidence that an account for the goods was never presented to the third person but only to defendant was admissible on the question of consideration. Gates v. Morton Hardware Co. [Ala.] 40 So. 509. The testimony of the third person as to whether he had ever offered to pay the payee for the goods was admissible as tending to show whether he was to pay for them or looked to defendant. Id. Where defendant testified that he denied liability for the debt of the third person at the time he made the note, and that he gave the note for the account of such third person, evidence was admissible to show when he first denied liability and that he gave the note for his own account. Id. In action on check, alleged to have been given in pursuance of contract to dismiss criminal prosecution, one to whom defendant had delegated authority to settle such prosecution and a civil suit held properly permitted to testify that, after he had told plaintiff that he would pay him if he would give him a writing not to prosecute, plaintiff stated that he would not give a written agreement, but that he would not prosecute or do anything that he was not forced to do, particularly where statement was part of one previously introduced. McNeese v. Carver [Tex. Civ. App.] 13 Tex. Ct. Rep. 820, 89 S. W. 430.

65. Time slips made out by workmen and O. K'd by the foreman are admissible in evidence to show the amount of labor spent under a contract, where it appears that each workman was required to make out such slips as a memorandum of his time. Jonesboro, etc., R. Co. v. United Iron Works Co. [Mo. App.] 94 S. W. 726. In an action to recover purchase price of horses sold under an agreement whereby seller was to take them back and refund the money if

In the absence of proof of fraud, accident, or mistake, it is conclusively presumed that an unambiguous written contract, complete in itself, contains the final agreement of the parties, and all prior or contemporaneous negotiations are deemed to have been merged therein.[70] Hence, as between the parties,[71] extrinsic evidence

unsatisfactory, evidence of unsoundness of one of the horses is admissible to show the reasonableness of plaintiff's claim of dissatisfaction. Sierra Land & Cattle Co. v. Brecker [Cal. App.] 85 P. 665. In an action against a builder for failure to build the house on the lot according to contract, such fact being admitted, evidence of approval by city building inspector of the specifications properly refused. Ekstrand v. Barth, 41 Wash. 321, 83 P. 305.

66. On the issue of whether a seller had filed a bond within a reasonable time, where it was shown that letters had passed between the parties, through the mail, by which the bond was claimed by the seller to have been sent, evidence as to the time required for a letter to pass between the buyer and seller was admissible. Equitable Mfg. Co. v. Howard [Ala.] 41 So. 628.

67. Where building contract provided for extension of time if delay was caused by acts of owner or architect, admission of evidence that it was caused by failure of certain company to furnish brick held error, where undisputed evidence showed that contract with such company was made by the contractor and not the owner. Neblett v. McGraw [Tex. Civ. App.] 14 Tex. Ct. Rep. 496, 91 S. W. 309. Instruction submitting question whether company was agent of plaintiff or defendant also erroneous under such circumstances. Id. Delay held not chargeable to contractor because of refusal of architect to permit brick to be purchased elsewhere, where refusal appeared to be justifiable because change of brick would have resulted in injury to walls and appearance of building. Id.

68. In an action for breach of agreement to sell eggs, whether defendant notified its agent that it could not deliver any more eggs under the contract, and evidence as to what amounts the agent had been credited with was irrelevant. Armour Packing Co. v. Vietch-Young Produce Co. [Ala.] 39 So. 680. Immaterial how many cases of eggs defendant's agent bought or how many he sold to other persons. Id. On the issue of plaintiff's eviction from defendant's premises upon which plaintiff had a right to enter under a contract, evidence that plaintiff was notified to keep off the premises was material but it was not admissible where it was not shown that the person who gave the notice had authority from defendant. Union Foundry & Mach. Co. v. Lankford [Ala.] 39 So. 765. Where plaintiff's intestate contracted with one who was employed to clear a railway company's right of way to do a portion of the work according to plans and specifications, which were never furnished, such plans are not admissible to show noncompliance, especially where the work has been accepted by the company's engineer. St. Louis, etc., R. Co. v. Bogan [Ark.] 95 S. W. 448. In action against corporation and its officers for breach of agreement to give note indorsed by one of such officers for a debt of the corporation then due, letter calling defendants' attention to fact that agreement had been ignored, and that, unless it was complied with, suit would be commenced, held admissible. Illinois Roofing & Supply Co. v. Cribbs [Mich.] 12 Det. Leg. N. 901, 106 N. W. 274. Held proper to permit plaintiff to prove, on cross-examination of one of the defendants, that plaintiff demanded a note indorsed according to agreement after one not so indorsed had been returned. Id. Where defendant in an action to recover rental under a lease of personalty set up an alleged defect in the property, circulars and advertisements issued by the bailor were inadmissible in the absence of evidence that they influenced the bailee in making the contract. Moneyweight Scale Co. v. Woodward, 29 Pa. Super. Ct. 142. In action on contract for sawing lumber, testimony of plaintiff as to what other mills he was running or had in operation elsewhere held irrelevant. Vale v. Suiter, 58 W. Va. 353, 52 S. E. 313. Question whether plaintiff had sufficient number of men to operate mill in accordance with his contract held proper. Id. In a cross action for breach of a contract to furnish water to irrigate rice fields, evidence as to amount of the depletion of the water in the rice fields in question by evaporation was admissible as bearing on the amount of water required to be furnished under the contract. Colorado Canal Co. v. McFarland [Tex. Civ. App.] 15 Tex. Ct. Rep. 848, 94 S. W. 400. Where plaintiff had contracted to give defendant an exclusive agency in a certain territory, a breach of the contract could be shown by the admission of a contract made by plaintiff with a third person assigning to him a part of the territory, though nothing was done under it, the latter fact going only to the damages. Grout v. Moulton [Vt.] 64 A. 453. In action on contract where it appeared that defendant had employed others to complete plaintiff's contract for them, as it had a right to do, for a less price, exclusion of reports of defendant's engineer showing amount saved and stating that it was a credit in plaintiff's favor held not error, the duty of defendant in such employment being one of law, and defendant's action on contract was in consonance with court's interpretation. Streeter v. Sanitary Dist. [C. C. A.] 143 F. 476. In action on contract where defendant counterclaimed for damages for failure to do work according to contract, evidence as to whether other contractors on same job did work in way which defendant claimed was violation of plaintiff's contract, held immaterial. Id.

69. See, also, Damages, 5 C. L. 904. In an action against a newspaper for breach of a contract to insert 1248 inches of advertising in one year in such portions and at such times as plaintiff might desire, rate cards showing rates for advertisements of a

is ordinarily inadmissible to vary, contradict, or add to it.[72] Parol evidence is, however, admissible to show that an offer was never accepted,[73] or that the writing was

given length for a given number of times were not admissible in evidence to show the "market value" of the contract. Boston Outfitting Co. v. People & Patriot Co. [N. H.] 63 A. 229.

70. Fox v. Denargo Land Co. [Colo.] 86 P. 344. Cannot refer to contract in pursuance of which joint and several notes were subsequently given to show that liability thereon was a several one, where notes are unambiguous and contract was not executed at same time as notes and was not part of same transaction. City Deposit Bank v. Green [Iowa] 106 N. W. 942. A certain oral promise on the part of the purchaser of mortgage bonds to buy other bonds and allied stocks or foreclose the mortgage held merged in the written contract. Hayden v. James F. Shaw & Co. [Mass.] 78 N. E. 110. As a general rule, the acceptance of a deed completes the execution of a contract for the sale of realty, and all prior verbal or written agreements are merged therein. Wilson v. Wilson, 115 Mo. App. 641, 92 S. W. 145. But this rule does not apply when the executory contract embraces other agreements, undertakings, and obligations, in addition to those relating to the conveyance of realty, and imposes upon both parties the duty of performing executory acts. Where contract provided for sale of land which was to be paid for by a stock of goods, and required vendee to place himself in the position of a creditor of the vendor to the extent of the value of the merchandise delivered before the vendor was bound to discharge the purchase price of the goods by delivery of title at its agreed value and payment of remainder in money, held that execution and delivery of deed did not extinguish the contract, in absence of special provisions in deed changing or abrogating those of the contract. Id. Written contract for purchase of goods held to control previous oral order for less quantity. Paris Mfg. & Importing Co. v. Carle, 116 Mo. App. 581, 92 S. W. 748. When an undertaking is reduced to writing by the parties thereto, it is conclusively presumed, in the absence of fraud, mistake, or accident, that such writing embodies the entire agreement. Dexter v. Macdonald [Mo.] 95 S. W. 359. Preliminary written agreement between parties as to sale of livery business held merged in subsequent final written contract, so that no further consideration was necessary to support provision in latter that seller was not to engage in same business, which was not in preliminary agreement. Walker v. Brosius [Tex. Civ. App.] 14 Tex. Ct. Rep. 384, 90 S. W. 655.

71. Parol evidence rule does not apply to strangers to the contract. Where contract for sale of cattle provided that buyer was to pay for those delivered and that loss resulting from death of any en route should be borne by seller, held, in action by buyer for injuries to those delivered, parol evidence was admissible to show circumstances surrounding agreement whereby seller compromised his claim for damages against railroad company for death of cattle not delivered, and that same did not relate to buyer's claim. International, etc., R. Co. v. Jones [Tex. Civ. App.] 14 Tex. Ct. Rep. 530, 91 S. W. 611.

72. First Nat. Bank v. Southworth, 117 Ill. App. 143; Deming Inv. Co. v. Shawnee Fire Ins. Co. [Okl.] 83 P. 918; Clark v. Emery, 58 W. Va. 637, 52 S. E. 770; Carlin & Co. v. Fraser [Va.] 53 S. E. 145; Licking Rolling Mill Co. v. W. P. Snyder & Co. [Ky.] 89 S. W. 249; Avil Printing Co. v. Kaiser Pub. Co. [Mo. App.] 89 S. W. 900. An absolute acceptance of a written proposal in the form of a unilateral agreement becomes a valid written contract to which the ordinary rule as to the admissibility of parol evidence applies. Buffington v. McNally [Mass.] 78 N. E. 309. A simple receipt is not a contract and may be varied and controlled by parol. Interurban Const. Co. v. Hayes, 191 Mo. 248, 89 S. W. 927. In so far as a receipt is evidence of the contract, it stands on the same footing as other contracts in writing and cannot be contradicted or varied by parol. Receipt for bonds, reciting how they were to be held, etc., held a contract of pledging, so that parol evidence was inadmissible to show that bonds were actually deposited with a third person. Id. Where parol evidence is improperly admitted, the adverse party is entitled to cross-examine for the purpose of testing the recollection of the witness. Main v. Radney [Ala.] 39 So. 981.

Evidence held inadmissible to show: Contemporaneous parol agreement by vendor of goods not to sell to others. Main v. Radney [Ala.] 39 So. 981. That contract in form of lease for a term of years giving defendants option to purchase was intended as contract of sale. Smith v. Caldwell [Ark.] 95 S. W. 467; Thomas v. Johnson [Ark.] 95 S. W. 468. Parol agreement to return a note upon certain conditions and to negotiate it only within a prescribed territory. Rule prevails in equity as well as in law. Hutchins v. Langley, 27 App. D. C. 234. Secret intention of one of the parties inconsistent with that fairly expressed by the language used and the acts and declarations at the time. Warner v. Marshall [Ind.] 75 N. E. 582. What the parties might have intended by unambiguous lease. Willis v. Weeks [Iowa] 105 N. W. 1012. That contract whereby defendant was to pay all expenses of harvesting certain ice did not include pond rentals which were a part of such expenses. Chariton Ice Co. v. Spring Lake Ice Co. [Iowa] 105 N. W. 1014. Understanding that contract should be considered as providing for liquidated damages. Long v. Furnas [Iowa] 107 N. W. 432. What occurred when nonwaiver agreement was signed by insured. Weddington v. Piedmont Fire Ins. Co. [N. C.] 54 S. E. 271. Custom as to acceptance of work where contract required the work to be satisfactory to the owner. Meacham v. Gardner, 27 Pa. Super Ct. 296. Parol agreement that payment was to be made only out of the profits of a business. Appleby v. Barrett, 28 Pa. Super. Ct. 349. That duties of one employed as general manager of the

not intended as a contract or understood by either party to be binding as such,[74] or that a party to whom the instrument is delivered is attempting to use it for a purpose not contemplated by either party when delivery was made,[75] or that it was conditionally delivered,[76] that a deed or bill of sale absolute in form was intended as a mortgage,[77] fraud,[78] a contemporaneous oral agreement which induced the execu-

Dallas stores of a concern, "with headquarters at Dallas," were to be performed in a particular store. Wolf Cigar Stores Co. v. Kramer [Tex. Civ. App.] 14 Tex. Ct. Rep. 46, 89 S. W. 995. That written agreement to sell stock to a certain person or his assigns was made for purpose of authorizing latter to sell to a certain other person only at a specified price. Watkins v. Robertson [Va.] 54 S. E. 33. To vary unambiguous contract for sale of oil by showing contemporaneous agreement of seller to resell part of the oil. Midland Linseed Co. v. Remington Drug Co. [Wis.] 106 N. W. 115. Where size and grade of yarn was indicated by numbers given to it in written order, which with acceptance constituted contract, to show agreement that it was to be of same quality as yarn previously furnished. Harding, Whitman & Co. v. York Knitting Mills, 142 F. 228. To limit liability on joint and several notes to a several one. City Deposit Bank v. Green [Iowa] 106 N. W. 942. To explain the phrase "as soon as possible" in contract to furnish bicycles. Williams v. Gridley, 96 N. Y. S. 978. To contradict a lease. Leeming v. Duryea, 97 N. Y. S. 355. Of prior negotiations to show right to deliver piles not in accordance with government specifications, though government should refuse to accept them, where contract provided that piles should comply with such specifications and be subject to inspection and approval of government representative. Carlin & Co. v. Fraser [Va.] 53 S. E. 145. Where negotiations are merged into a written option to purchase which is not carried out, a broker can not show an oral option agreed upon during the negotiations and recover thereon. Fox v. Denargo Land Co. [Colo.] 86 P. 344. Where a contract is complete in itself and has no reference to any other instrument, parol evidence that another agreement was a part of the contract is inadmissible, especially in the absence of an allegation that it was omitted through fraud, accident or mistake. McGuire v. Gerstley, 26 App. D. C. 193. Sureties on a bond complete in itself cannot show by parol that an agreement between the principals and the obligee was a part of the bond, and relieve themselves by showing a breach thereof. Id. Where by a written contract the entire property is vested in one party and the other worked for him at a fixed consideration, the latter will not be permitted to show that the property was bought in trust for him and he was entitled to the profits. Kerting v. Hatcher, 117 Ill. App. 647. In an action for breach of a written contract to purchase goods, a defense that plaintiff had agreed orally to furnish forms of contracts to be supplied to purchasers, and to do certain advertising, was invalid. Alexander v. Ferguson [N. J. Law] 63 A. 998. An instrument for the purchase of automobiles, containing mutual promises and signed by both parties, held dispositive and not merely evidentiary, and parol evidence to show what the parties intended by the word "demonstration" was inadmissible. Grout v. Moulton [Vt.] 64 A. 453. Legal effect of bond cannot be modified by proof of preliminary negotiations or agreements, nor can it be shown how parties understood transaction in order to explain or qualify terms of writing, in absence of fraud or mistake or ambiguity. Orion Knitting Mills v. United States Fidelity & Guaranty Co., 137 N. C. 565, 50 S. E. 304. Letter and statement inadmissible to vary terms of bond. Id. Where part of note was paid by delivery of cotton and renewal note given for balance, held that maker could not go behind renewal note for purpose of showing market value of such cotton, such note being a distinct recognition of the amount still due. Riggins v. Boyd Mfg. Co., 123 Ga. 232, 51 S. E. 434. Where the words "satisfactory demonstration" were not shown to be equivocal, parol evidence as to what the parties understood them to mean was inadmissible, though the other party had testified as to their meaning as understood in the automobile trade. Grout v. Moulton [Vt.] 64 A. 453. In suit to enjoin breach of written contract not to engage in livery business in certain town for specified time, evidence as to whether anything was said during the negotiations leading up to sale in regard to defendant binding himself not to go into business again held inadmissible. Walker v. Brosius [Tex. Civ. App.] 14 Tex. Ct. Rep. 384, 90 S. W. 655. Provisions in contract for preparation of designs and purchase of advertising matter held not conflicting so as to render parol evidence admissible to show conditions imposed and intent of parties at time of subsequent approval of designs. American Fine Arts Co. v. Simon [C. C. A.] 140 F. 529.

73. Barton-Parker Mfg. Co. v. Taylor [Ark.] 94 S. W. 713.

74. That a mortgage was understood to have no efficacy as a contract. H. Koehler & Co. v. Duggan, 96 N. Y. S. 1025. As between the parties. American Fine Art Co. v. Simon [C. C. A.] 140 F. 529.

75. American Fine Art Co. v. Simon [C. C. A.] 140 F. 529. To show that defendant affixed his signature to certain designs and delivered them to plaintiff for purpose of procuring copyright thereon, and for no other purpose. Id.

76. Dodd v. Kemnitz [Neb.] 104 N. W. 1069; American Fine Art Co. v. Simon [C. C. A.] 140 F. 529. To show that agreement for establishment of creamery was not to become effective until plaintiff had obtained from signers a written pledge to furnish milk from certain number of cows, though contract itself provided that it should not be effective until signed by a certain number of persons. Golden v. Meier [Wis.] 107 N. W. 27.

tion of the written contract,[79] independent collateral agreements not inconsistent with the writing,[80] the true consideration,[81] or failure of consideration.[82] If the writing does not purport to disclose the whole agreement,[83] or is incomplete,[84] parol evidence is admissible to supply the omitted portions, provided they are not inconsistent with or repugnant to the written contract.[85] It is also admissible to explain

77. Deed or bill of sale absolute in form may be shown to be a mortgage in action at law, on theory that there is an ambiguity in applying writing to subject-matter, and that reduction of part of an entire contract to writing does not preclude proof of balance of it by parol. Smith v. Pfluger, 126 Wis. 253, 105 N. W. 476.

78. Lilienthal v. Herren [Wash.] 84 P. 829. Evidence of conversations and representations prior to the execution of a written contract. State Life Ins. Co. v. Johnson [Kan.] 85 P. 597. To show that articles of association were a fraud and that defendant's signature thereto was obtained by fraud. Metropolitan Lead & Zinc Min. Co. v. Webster, 193 Mo. 351, 92 S. W. 79. That its execution was obtained solely by the false statement of a nonexistent fact. Sheldon Co. v. Harleigh Cemetery Ass'n [N. J. Law] 62 A. 189.

79. Though it may vary, change, or reform the written instrument. That tenant was induced to sign amendment to a lease by agreement by which landlord was to put in heat radiators. Yinger v. Youngman, 30 Pa. Super. Ct. 139.

80. Where a building contract required the contractor to furnish material evidence that he verbally agreed to furnish lumber did not contradict the written contract. Gates v. O'Gara [Ala.] 39 So. 729. Where written contract employing plaintiff as real estate broker contained no statement as to whether its terms were intended to apply to past or future services, and plaintiff in suit for commissions alleged that he was employed before such contract was entered into, and under a general denial defendant claimed that there was no other contract than the written one and that in performing services before that contract was made plaintiff was a volunteer, held that plaintiff could prove by parol the making of a previous verbal contract, and the rendition of services thereunder resulting in a sale after the making of the written one. Levin v. New Britain Knitting Co. [Conn.] 61 A. 1073. In order to prove oral agreements collateral to a written one, the writing must not appear to be a complete contract in itself and evidence must not contradict the writing. Parol evidence held inadmissible to show agreement on part of a landlord to furnish the house, mow the lawn, etc., when lease was complete. Leeming v. Duryea, 97 N. Y. S. 355.

81. Holmes v. Horn, 120 Ill. App. 359. Rule that true consideration for contract may be shown to be other than that stated therein does not authorize plaintiff to show a different consideration than that alleged in the petition, though same consideration is alleged as that recited in note. Ditto v. Slaughter [Ky.] 92 S. W. 2. May show that written contract is based on consideration, though none is recited therein. Delta County v. Blackburn [Tex. Civ. App.] 90 S. W. 902.

82. To show that notes sued on were given for certain investment bonds, which, while nominally bonds, were actually the undertaking of the plaintiff and had no value apart from plaintiff's ability to perform its contract, and that plaintiff could not perform by reason of its insolvency and because the contract was impossible of performance within the time specified or within a reasonable time. German-American Security Co.'s Assignee v. McCulloch [Ky.] 89 S. W. 5.

83. Facts held to sustain a finding that the parties did not intend to merge an oral agreement for the sale of realty and personalty in a subsequent written one for the sale of the realty only, and parol evidence was admissible to show a sale of the personalty. Brosty v. Thompson [Conn.] 64 A. 1. Whether the parties intended to merge their entire oral agreement in a written one was for the court to determine from the conduct of the parties and the circumstances. Id. Parol evidence rule does not apply where the verbal contract was entire and only a part of it was reduced to writing. Letter written after making oral contract for printing and binding books held merely a memorandum of the contract, and not to prevent the admission of oral evidence to show that plaintiff contracted to insure the property, though it contained a statement that, while plaintiff carried a blanket policy, it would advise defendant to carry insurance. Avil Printing Co. v. Kaiser Pub. Co. [Mo. App.] 89 S. W. 900. Where persons permit a part of an entire verbal contract to rest in parol, reducing the residue to writing, the part not so reduced may be established aliunde the writing. Permissible to show that part of consideration named in deed of timber land was paid for logging timber. Mueller v. Cook, 126 Wis. 504, 105 N. W. 1054. If the written contract does not purport to disclose a complete contract, or if in reading it in the light of the situation of the parties and the facts and circumstances it appears not to contain all the stipulations of the parties on the subject, parol evidence is admissible to show what the rest of the agreement was. Clark v. Emery, 58 W. Va. 637, 52 S. E. 770.

84. Where the written contract is incomplete, oral testimony is competent to prove terms not mentioned and consistent with those which were mentioned. Where letters in regard to sale of machines do not purport to be a complete expression of terms of contract, but contain no specifications in regard to kind of machines and are indefinite as to price. Goodwin Mfg. Co. v. Arthur Fritsch Foundry & Machine Co. [Mo. App.] 89 S. W. 911. Where a written contract for the sale of lots and the erection of buildings thereon is silent as to the price and

ambiguous and uncertain provisions,[86] to show the relation of the language to the subject-matter, or to identify any person or thing mentioned,[87] and, if the contract is ambiguous, to show the situation of the parties when the contract was made and all the surrounding circumstances for the purpose of arriving at the intention.[88] Where one does not sign a contract but can only be bound by reason of his acceptance thereof, he may show the circumstances attending such acceptance.[89]

Failure of proof.—In an action on several contracts it is error to dismiss the complaint for want of proof if plaintiff makes a prima facie case as to any of them.[90]

(§ 9) *F. Procedure at trial; verdict and judgment. Questions of law and fact.*[91]—The construction of a written contract is generally a question of law for the court,[92] but where the meaning can be understood only from extrinsic facts, it is a question of fact for the jury,[93] unless there is no conflict in the evidence.[94]

the character of the buildings to be erected, deeds of trust, checks, plans, and parol evidence is admissible to establish those facts. Landvoigt v. Paul, 27 App. D. C. 423. Parol evidence held admissible to show that an indorsement on a proposed contract of sale of land to the effect that the broker should be paid upon "passing title" to the property, made payment dependent upon a purchase by the person named as vendee in the proposed contract. Hancox v. Appleton, 96 N. Y. S. 1029. Oral agreement to ship goods in time for a vessel, considered in connection with shipping receipt not inconsistent therewith. Frey v. New York, etc., R. Co., 100 N. Y. S. 225. Parol evidence admissible to show terms of a contract of sale where a letter referred mainly to the price only. Rheinstrom v. Elk Brewing Co., 28 Pa. Super. Ct. 519.

85. Written part of contract partly written and partly oral cannot be contradicted. Clark v. Emery, 58 W. Va. 637, 52 S. E. 770.

86. Where pending negotiations for the purchase of scrap iron, plaintiff, by appointment, visited defendant's place and found out what was for sale, and thereafter made a written bid for all the old material "which you have for sale" in the building, parol evidence was admissible to show what was included in the sale. United R. & Electric Co. v. H. Wehr & Co. [Md.] 63 A. 475. Where plaintiff contended that a sale to him of scrap iron included certain structural iron in the walls of a building, and that the owner had agreed to tear down the building at his own expense, but the written contract was silent on the subject, it was error to exclude the owner's oral testimony that he had not so agreed, and leave standing the buyer's oral testimony to the contrary. Id. That a letting was for the season held admissible to identify the time it was intended to cover. Buffington v. McNally [Mass.] 78 N. E. 309. Explanation of "season" held also admissible. Id. Contract whereby plaintiff was employed to develop certain mining property held ambiguous so that parol evidence was admissible to show what claims were meant. Lindblom v. Fallet [C. C. A.] 145 F. 805. The rule admitting extrinsic evidence to explain doubtful terms of a written contract confines such evidence to the clause of obscure meaning, and never lets it overthrow other terms which are in themselves plain and certain. Licking Rolling Mill Co. v. W. P. Snyder & Co. [Ky.] 89 S. W. 249.

87. To explain the words "Terms: Dryer, net 60 days," in a written contract for the sale of a laundry dryer. Hagen Co. v. Greenwood, 27 Pa. Super. Ct. 239. To apply words of general description to the subject-matter of a written contract by evidence of the situation and circumstances of the parties. Parol evidence and prior correspondence held admissible to show that the words "the lots" referred to property mentioned in previous letters. Warner v. Marshall [Ind.] 75 N. E. 582.

88. See, also, § 4 A. ante. Brockmeyer v. Sanitary Dist., 118 Ill. App. 49; Security Trust Co. v. Joesting [Minn.] 104 N. W. 830. To show meaning of word "improvements" used in a deed. Jacobs v. Parodi [Fla.] 39 So. 833. Evidence that plaintiff's failure to furnish water for defendant's rice fields was due to the failure of defendant's landlord to keep in repair a lateral which it was understood was to be used, did not vary the written contract. Gravity Canal Co. v. Sisk [Tex. Civ. App.] 15 Tex. Ct. Rep. 984, 95 S. W. 724. Parol evidence of previous transactions held admissible to explain the nature of an order for goods not a definite contract of sale and purporting to be a part of a continuous transaction. Weir v. Long [Ala.] 39 So. 974.

89. Evidence of what toll collector told traveler on his acceptance of receipt, reciting that money would be returned if judgment ousting corporation of its franchise was affirmed. Van Duyn v. Detroit & S. Plank Road Co. [Mich.] 12 Det. Leg. N. 522, 104 N. W. 612.

90. Prima facie case as to work done at defendant's office, though failure of proof as to most of services alleged. Worm v. McKinley Realty & Const. Co., 97 N. Y. S. 374.

91. See 5 C. L. 748. See, also, Questions of Law and Fact, 6 C. L. 1177.

92. Thomas v. Johnson [Ark.] 95 S. W. 468; McDonough v. Williams [Ark.] 92 S. W. 783; Rheam v. Martin, 26 App. D. C. 181. When unambiguous. Storm v. Montgomery [Ark.] 95 S. W. 149. When the meaning is to be ascertained from the document itself. Levin v. New Britain Knitting Co. [Conn.] 61 A. 1073. Where terms are explicit and meaning of parties unmistakable. R. T. Wilson & Co. v. Levi Cotton Mills, 140 N. C. 52, 52 S. E. 250.

93. Levin v. New Britain Knitting Co. [Conn.] 61 A. 1073; Weir v. Long [Ala.] 39 So. 974. Where a writing depended upon whether there had been a prior agreement of sale, in regard to which the evidence was

So too, where its terms are definitely known, the interpretation of an oral contract is for the court,[95] but on conflicting evidence, it is for the jury to determine both the existence of the agreement[96] and what its terms really were.[97]

Whether there was any consideration for the contract,[98] whether payment was accepted in full or on account,[99] whether there was a demand for performance,[1] whether performance was prevented by one of the excepted causes,[2] whether the contract has been performed,[3] whether the contract was rescinded,[4] or modified,[5] whether there should be an allowance for deficiencies in performance,[6] and the amount thereof,[7] and what is a reasonable time for performance,[8] are questions for the jury where the evidence is conflicting.

conflicting, it was not error to submit the question of sale to the jury. Johnson v. Smothers [Ark.] 96 S. W. 386. Where parol evidence was admissible to explain a written contract, it was for the court, sitting as a jury, to determine whether all its terms were contained in certain letters, and not to so determine as a matter of law. United R. & Electric Co. v. H. Wehr & Co. [Md.] 63 A. 475.

94. Meaning of quoted words in contract for sale of steel bars providing for cash payments on receipt of invoice "same as last," held for court. Licking Rolling Mill Co. v. W. P. Snyder & Co. [Ky.] 89 S. W. 249.

95. Douglass v. Paine [Mich.] 12 Det. Leg. N. 527. 104 N. W. 781.

96. Whether oral contract had been proven was for the jury. Richards v. Richman [Del.] 64 A. 238. Whether oral contract was made between the parties as alleged before the written evidence of it was drawn up. Rankin v. Mitchem [N. C.] 53 S. E. 854. Instruction leaving to jury question of existence of contract for installation of heating plant, held proper. Swing v. Walker, 27 Pa. Super. Ct. 366. Instruction held not objectionable as assuming the making of an alleged oral contract to develop mining claims. Lindblom v. Fallet [C. C. A.] 145 F. 805.

97. Belknap v. Belknap [S. D.] 107 N. W. 692. Instruction assuming that all the cost of preparing scrap iron for delivery was to be paid by plaintiff, the buyer, held properly refused where there was oral conflicting evidence on the subject. United R. & Electric Co. v. H. Wehr & Co. [Md.] 63 A. 475. Where defendant did not admit that an oral contract was as claimed by plaintiff, the case was properly submitted to the jury. Phenix Nerve Beverage Co. v. Dennis & Lovejoy Wharf & Warehouse Co., 189 Mass. 82, 75 N. E. 258. Where contract to cut, haul, and deliver logs provided that scale was to be made at time logs were loaded on cars, and such contract was modified by a provision for delivery on skidways, and there was a conflict as to whether or not it was agreed at the time of the modification that the scaling should be conclusive or not, held it was for the jury to determine what was the actual agreement. Nelson v. Mashek Lumber Co., 95 Minn. 217, 103 N. W. 1027. Question whether promise that pasture should not be overstocked was part of an oral contract of pasturage. J. B. Wallis & Co. v. Wallace [Tex. Civ. App.] 92 S. W. 43.

98. For promise to pay debt of third person, for which defendant gave chattel mortgage as additional security. Bluff Springs Mercantile Co. v. White [Tex. Civ. App.] 13 Tex. Ct. Rep. 905, 90 S. W. 710.

99. Snyder v. Patton & Gibson Co. [Mich.] 12 Det. Leg. N. 1041, 106 N. W. 1106.

1. Contract to ship coal as ordered. Smokeless Fuel Co. v. W. E. Seaton & Sons [Va.] 52 S. E. 829.

2. Whether defendant was prevented from performing contract for delivery of coal by strike. Smokeless Fuel Co. v. W. E. Seaton & Sons [Va.] 52 S. E. 829.

3. Where a bank claimed not to have received a bond which a seller had agreed to file as security for the performance of its contract with the buyer, and the evidence offered by the seller tended to show that it had mailed the bond, question whether it had been received by the bank. Equitable Mfg. Co. v Howard [Ala.] 41 So. 628. In an action on a bond to maintain and support plaintiff, question whether plaintiff was sufficiently cared for. Crosby v. Waters, 28 Pa. Super. Ct. 559. Whether defendants had sold certain pianos through information given by plaintiff or without her intervention. Jacobs v. Heppe, 29 Pa. Super. Ct. 406. Where in replevin for goods bailed to defendant there was evidence which would have warranted a finding that defendant had not paid the rental in accordance with the terms of a modified agreement to which she testified, an instruction withdrawing this question from the jury was erroneous. Whitehill v. Schwartz, 27 Pa. Super. Ct. 526. Defendant in an action for work done contended that plaintiff was notified to quit work but chose to continue, that he employed an incompetent assistant, and also that there had been a settlement, all of which was denied. Held the case was for the jury. Pagan v. Fort Pitt Gas Co., 27 Pa. Super. Ct. 75.

4. Conditional sale. Wellden v. Witt [Ala.] 40 So. 126. Whether a redelivery of property exchanged by defendant with plaintiff was absolute so as to operate as a legal rescission. Dougherty v. Neville, 108 App. Div. 89, 95 N. Y. S. 806

5. Tennis Bros. Co. v. Wetzel & T. R. Co., 140 F. 193.

6. In action on an account for labor, whether defendant was entitled to an allowance because of plaintiff's failure to properly finish the work. Snyder v. Patton & Gibson Co. [Mich.] 12 Det. Leg. N. 1041, 106 N. W. 1106.

7. Whether defendant was entitled to the sum claimed by reason of plaintiff's failure

Whether written negotiations constitute an offer and an unqualified acceptance,[9] what constitutes a contract,[10] or a material part of it,[11] and what will amount to an abandonment, are questions of law.[12] So is the question of what is a reasonable time where the facts are undisputed.[13]

Instructions[14] should not be inconsistent,[15] and should not submit questions of law[16] or issues not raised by the evidence.[17]

Verdict.[18]—Where there is no evidence from which the jury can determine the amount for which they should find, a verdict for any amount is unauthorized.[19]

CONTRACTS OF AFFREIGHTMENT; CONTRACTS OF HIRE, see latest topical index.

CONTRIBUTION.

§ 1. General Principles (844).
§ 2. The Right and Defenses as Between Joint Tort Feasors and Persons in Particular Relations (845).
§ 3. Proceedings to Enforce (845).

§ 1. *General principles.*[20]—Contribution is an equitable remedy[21] to which the statutory provisions are merely supplementary, unless a clear intention to supersede the former is manifested.[22] Payment[23] under compulsion[24] is essential to recovery, but it need not be under coercion[25] and may take the form of a purchase.[26]

to complete a building according to specifications. Barbee v. Findlay [Ill.] 77 N. E. 590.

8. Clark v. Wilson [Tex. Civ. App.] 14 Tex. Ct. Rep. 770, 91 S. W. 627.

9. Ennis Brown Co. v. Hurst [Cal. App.] 82 P. 1056.

10. Error to submit it to the jury. Turner v. Owen, 122 Ill. App. 501.

11. Elliott v. Howison [Ala.] 40 So. 1018.

12. May v. Getty, 140 N. C. 310, 53 S. E. 75.

13. For performance. Electric Fireproofing Co. v. Smith, 99 N. Y. S. 37. What is a reasonable time within which to rescind. Moneyweight Scale Co. v. Woodward, 29 Pa. Super. Ct. 142.

14. See, also, Instructions, 6 C. L. 43.

15. Instructions held inconsistent, one treating the rescission as having been effected by express agreement, and the other by implication resulting from the making of a new contract. Neis v. Whitaker [Or.] 84 P. 699.

16. Where plaintiff had failed to file a bond required by its contract with defendant within a reasonable time, an instruction that if the bond was filed within such time as to afford defendant all the protection he was entitled to under the contract, plaintiff should recover, was properly refused as submitting a question of law to the jury. Equitable Mfg. Co. v. Howard [Ala.] 41 So. 628.

17. Where in an action for building machines the evidence failed to show that defendant accepted and used the machines, an instruction was erroneous which authorized a verdict for the reasonable value of the work if defendant accepted and used the machines, though the work was not done according to contract. Union Foundry & Mach. Co. v. Lankford [Ala.] 39 So. 765. Where contract to repair well provided that if it could not be made to do good work within a specified time defendant would sink a new one or return the price paid for the work, and, in action to recover such sum, there was evidence to show that plaintiff negligently deposited ashes, etc., around the well, thus rendering it impossible for defendant to fix it, but no evidence that defendant had exclusive control of the well during the period covered by the contract, held that instruction making plaintiff's right of recovery depend upon whether he or defendant had control of the well was erroneous. Pilot Point Waterworks v. Fisher [Tex. Civ. App.] 93 S. W. 529. Instruction authorizing recovery on quantum meruit for services held erroneous where evidence showed only an express contract. Stanford v. Wright [Tex. Civ. App.] 14 Tex. Ct. Rep. 741, 92 S. W. 269.

18. See 5 C. L. 750. See Verdicts and Findings, 6 C. L. 1814.

19. In suit by keeper of boarding house on express contract for board and lodging of defendant and others, where defendant claims that entertainment was, by express agreement, to be furnished free, verdict for plaintiff is not authorized unless evidence shows that defendant promised to pay an agreed price, or that entertainment was reasonably worth the amount found therefor, or that such amount was in accordance with the usual and customary rates charged by plaintiff. Baldwin v. Webb, 121 Ga. 416, 49 S. E. 265.

20. See 5 C. L. 751.

21, 22. Comstock v. Keating, 115 Mo. App. 372, 91 S. W. 416.

23. **Extinguishing a joint obligation by the execution of individual notes is such a payment** as entitles the maker of the latter to contribution from his co-obligors, even before maturity of the notes. Fitch v. Fraser, 109 App. Div. 440, 96 N. Y. S. 85. Defendant held a co-obligor and not a surety. Id.

Where one co-obligor succeeds in estate to the obligation and sues thereon, it is not regarded as a suit for contribution for the reason that the succession to the obligation is **not** such a **payment** or transfer as would discharge it. Enscoe v. Fletcher [Cal. App.] 82 P. 1075. If a payment, it was such in equity only and for plaintiff's share only. Id. See, also, Payment and Tender, 6 C. L. 987.

§ 2. *The right and defenses as between joint tort feasors and persons in particular relations.*[27]—Contribution will be denied to one who to make out his case must show that he was a wrongdoer with defendant,[28] but this rule does not apply where the wrongdoer who was compelled to respond for the injury was not, as between the wrongdoers themselves, a wrongdoer at all, and recovery by the injured party from such a party is not a bar to an action by the latter against the other parties to the wrong.[29] A contractor is, in the absence of personal participation in the work, entitled to indemnity from a subcontractor for losses sustained by the latter's negligence.[30] A defense is bad which depends on payment of damages for a joint fraud.[31] Contribution lies between co-sureties,[32] and if the cause of action matures after the distribution of the estate of a deceased co-surety, it will lie against his distributees.[33] The owner of a part of the land subject to a street assessment bond may pay the full amount of the bond and compel contribution from the owners of the other parts.[34] An administrator who, in his official capacity, pays a note on which his decedent was secondarily liable, has a right of action against the maker for the amount so paid, irrespective of whether the funds used for that purpose were assets of the estate or were contributed by the heirs.[35] As between surviving partners and the successor in estate of a deceased partner, an accounting is not prerequisite.[36] A judgment in an action against sureties discharging one and holding the other liable is not a bar to a subsequent action between them for contribution.[37]

§ 3. *Proceedings to enforce.*[38]—The liability for contribution among co-sureties of a note is an implied one arising out of a written agreement,[39] and hence in Washington the six-year statute of limitations applies to such an action.[40] The total amount claimed and not the amount due from each defendant determines the jurisdictional amount.[41] When two jointly pay a debt owing by them with another,

24. Payment on default of the principal debtor is in legal effect compulsory without waiting until creditor extorts payment. Fanning v. Murphy, 126 Wis. 538, 105 N. W. 1056.

25. A co-obligor need not wait until creditor extorts the money. Fanning v. Murphy, 126 Wis., 538, 105 N. W. 1056.

26. A surety purchasing note and mortgage on which principal debtor has defaulted, thereby extinguishing his cosureties' obligation on the original debt. Fanning v. Murphy, 126 Wis. 538, 105 N. W. 1056.

27. See 5 C. L. 751. Between debt paying stockholder and corporation, see Clark & M. Corp. § 830. Contribution between cotenants see Tiffany Real Property, 396.

28. Suit respecting money paid under Act Cong. June 3, 1878, to compound the unlawful cutting of timber. Cox v. Cameron Lumber Co., 39 Wash. 562. 82 P. 116.

29. Plaintiff in this action having been defendant in a previous action by a third person, and mulcted in damages for injury done by the breakage of a part of his millrace caused by this defendant's improper and negligent obstruction of the water therein. Northern Ohio R. Co. v. Akron Canal & Hydraulic Co., 7 Ohio C. C. (N. S.) 69.

30. Phoenix Bridge Co. v. Creem, 102 App. Div. 354, 92 N. Y. S. 855.

31. One in possession of property for joint account cannot defend an action by the other joint owner for his share because defendant has been held answerable for their joint fraud on the seller. Noval v. Haug, 48 Misc. 198, 96 N. Y. S. 708.

32. Persons signing a note for the purpose of giving additional security to the payee are liable to each other for contribution as cosureties, and they are not accommodation indorsers, the note having been executed prior to the enactment of the Negotiable Instrument Law. Caldwell v. Hurley, 41 Wash. 296, 83 P. 318. Sureties having become liable on a note by protest and notice, may pay the note and recover contribution from a co-surety not joining in the payment. Adams v. De Frehn, 27 Pa. Super. Ct. 184. Whether plaintiff paid note was a question for the jury under the evidence. Id. Any surety may at all times after the maturity of an indebtedness pay off the same and enforce his right of contribution from co-sureties. Fanning v. Murphy, 126 Wis. 538, 105 N. W. 1056.

33. Comstock v. Keating, 115 Mo. App. 372, 91 S. W. 416.

34. With perhaps a lien in equity on the other land as security. Ellis v. Witmer [Cal.] 83 P. 800.

35. Harris v. Harris, 116 Ill. App. 537.

36. In the settlement of obligations, a note was given and signed by the defendant as co-obligor, he being the residuary legatee of a deceased member of the firm. Fitch v. Fraser, 109 App. Div. 440, 96 N. Y. S. 85.

37. Action on a notary's bond, co-sureties not being adversaries and proof as to one failing. Comstock v. Keating, 115 Mo. App. 372, 91 S. W. 416.

38. See 5 C. L. 752.

39, 40. Caldwell v. Hurley, 41 Wash. 296, 83 P. 318.

those who have paid may maintain a joint action against their cosurety to enforce contribution,[42] and similarly, all of the plaintiff's co-obligors may be made parties defendant.[43] A general statement of a cause of action for money paid out and expended may be amended by alleging facts showing it arose out of a right to contribution.[44] Proof that plaintiff purchased notes overdue from holder at their face value and part of interest is not a fatal variance from an allegation that plaintiff paid certain notes where judgment is for only one-half the amount paid.[45] The burden is upon plaintiff to show payment of the joint obligation for which contribution is sought.[46]

CONTRIBUTORY NEGLIGENCE, see latest topical index.

CONVERSION AS TORT.

§ 1. **What Constitutes (846).**
§ 2. **Property Subject to Conversion (848).**
§ 3. **Elements Necessary to Maintain the Action (848).** Demand and Refusal (849). Who May Maintain and Persons Liable (850).
§ 4. **Defenses (851).**
§ 5. **Practice and Procedure (851).** Parties (852). The Complaint (852). The Answer or Plea (852). Evidence, Issues, Proof, Variance (853). Verdict and Judgment (854). Damages (854).

§ 1. *What constitutes.*[47]—Any illegal and unauthorized act of dominion over property inconsistent with and detrimental to the property rights of another constitutes conversion,[48] such as a wrongful seizure[49] or detention,[50] and excessive[51] or unauthorized sale[52] or delivery.[53] A sale by a cotenant of the entire property in

41. Jarvis v. Matson [Tex. Civ. App.] 16 Tex. Ct. Rep. 314, 94 S. W. 1079.

42. Adams v DeFrehn, 27 Pa. Super. Ct. 184.

43. Jarvis v. Matson [Tex. Civ. App.] 16 Tex. Ct. Rep. 314, 94 S. W. 1079.

44. That plaintiff and defendant indorsed notes under an agreement to become jointly and equally liable. Pratt v. Rhodes [Conn.] 61 A. 1009.

45. Pratt v. Rhodes [Conn.] 61 A. 1009.

46. Note. Adams v. DeFrehn, 27 Pa. Super. Ct. 184. In an action for contribution for payment of a note of a corporation signed by plaintiffs and defendant as cosureties, evidence that a few days after protest of the note the corporation executed a new note payable to plaintiffs, who procured its discount by the payee of the first note and with the proceeds paid the first note, it was for the jury to determine whether the protested note had been paid by the corporation or by the plaintiffs, whether the new note was merely collateral or whether it was payment. Id.

47. See 5 C. L. 753.

48. Ivers & P. Piano Co. v. Allen [Me.] 63 A. 735.

49. A wrongful seizure of goods by attachment. Davidson v. Oberthier [Tex. Civ. App.] 15 Tex. Ct. Rep. 467, 93 S. W. 478. The seizure and sale of property under an attachment against one in possession but without title, defendant's attachment debtor being in possession for purpose of selling goods and entitled to share in net profits. National Cotton Oil Co. v. Ray [Tex. Civ. App.] 14 Tex. Ct. Rep. 799, 91 S. W. 322. The seizure by a stranger, without right, of goods in the possession of the owner creates a good cause of action in favor of owner and in favor of his assignee. Peru Plow & Implement Co. v. Harker [C. C. A.] 144 F. 673. Taking property under bill of sale intended as a mortgage but void for fraud. Instructions to that effect held correct and responsive to pleadings. Harris v. Staples [Tex. Civ. App.] 13 Tex. Ct. Rep. 988, 89 S. W. 801.

50. Unreasonable relay by warehouseman in complying with demand for the property by the owner. Evidence that plaintiff informed defendants that property left with them by sheriff belonged to him was unlawfully taken by sheriff, and that he wanted it and that defendants promised, on his leaving his name and address, that they would communicate with him and that no one else should get the goods, and that he received no communication from defendants but found his goods on an auctioneer's stand six weeks later. Lissner v. Cohen, 97 N. Y. S. 227. Withholding property under an unlawful claim for freight charges. Beasley v. Baltimore & P. R. Co., 27 App. D. C. 595. Admitting defendant's right to detain horses to determine the amount of charges, where there is a conflict in the waybill and bill of lading, it could detain them for a reasonable time only, which, six days cannot, as a matter of law, be said to be. Id.

51. A warehouseman, willfully selling more of stored property, which might be sold separately, than is reasonably necessary to satisfy his claim, converts all that he sells. Selling separable property, several hundred dollars in value, for $20 in bulk. Ward v. Morr Transfer & Storage Co. [Mo. App.] 95 S. W. 964.

52. Sale of a customer's securities, without notice, by a broker in the absence of a waiver of notice, although the broker advanced the whole purchase money instead of merely the margin. Content v. Banner [N.

common goods,[54] the diversion by a bailee or agent to a purpose not contemplated,[55] or the misuse of it by one who is merely in possession,[56] or who has a qualified ownership,[57] have been held conversion.

Where either actual or constructive absence of dominion, wrongfulness thereof, or legal damage therefrom, is absent, it is not a conversion. Thus, mere asportation without anything further,[58] retention under agreement,[59] or for security,[60] a sale under authority,[61] although on credit,[62] or ratification by owner,[63] a liberation of animals according to the owner's direction, though they be lost in consequence,[64] unreasonable delay by mortgagee in selling mortgaged property after seizure,[65] or negligence in caring for same,[66] the refusal by a tenant in common of the exclusive

Y.] 76 N. E. 913. A notice of sale not stating time or place thereof is defective. Id. An order to brokers to sell within a certain time, which they disregard, is not a waiver of notice by a customer on subsequent sale by broker. Id. Evidence held to show rightful sale under mortgage and not under execution at or about the same time. Lester v. Addison, 139 Mich. 232, 102 N. W. 643.

53. To wrong person by carrier. Southern R. Co. v. Webb, 143 Ala. 304, 39 So. 262. To an unlawful claimant, by a stockholder. An oil company delivering oil stored in tanks. Trammell & Lane v. Guffey Petroleum Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 492, 94 S. W. 104.

54. Sale of hops by a part owner. Benjamin Schwartz & Sons v. Kennedy, 142 F. 1027.

55. Obtaining money under a promise to invest it but instead appropriating it to one's own use. Sinclair v. Higgins, 97 N. Y. S. 415. Question whether transaction was or was not a loan did not depend on form of the papers only, and was a question for the jury, on conflicting claims and evidence. Id.

56. Exercising dominion over a tenant's personal property on premises seized by a landlord under a writ of dispossession. Doctrine of abandonment applies only to fixtures. As to ordinary chattels, it is the duty of the landlord to notify tenant to remove them or remove them himself. Reich v. Cochran, 99 N. Y. S. 755. Evidence that deceased landlord after evicting tenant used supplies of tenant left on premises for hotel purposes, against wishes of tenant, held sufficient for reinstatement of vacated verdict. Id. Under allegations that defendant converted goods on the 17th of March, and on that day instructed the steward of a hotel from which the tenant had been evicted that such tenant was not to be permitted to remove any of his goods, wines, supplies, and so forth, evidence of a conversation between defendant, landlord, and the steward on the following day, instructing the latter in the use of these supplies, etc., was admissible. Id. Held a proper case for jury was made by plaintiff. Id.

57. Mortgaging the entire property in a chattel bought on a conditional sale, although without manual transfer or removal of it. Piano. Conditional sale not recorded, subsequent mortgage recorded (Ivers & P. Piano Co. v. Allen [Me.] 63 A. 735), or the continued use of property as his own by a mortgagee in possession after default. Evidence that a mortgagee after default continued using horses as his own, refusing to return them and not selling them under the mortgage, held to sustain verdict. Hanson v. Skogman [N. D.] 105 N. W. 90.

58. Defendants under a claim of permission from owner of premises moved a refreshment stand and supplies off such premises and left them in the highway, not destroying them or otherwise interfering with plaintiff's use or title to them, amounting only to a trespass. Hammond v. Sullivan, 99 N. Y. S. 472.

59. A refusal to deliver before being paid by one in possession of property, under an agreement that he might hold and use it until paid his claim against plaintiff. Jackson v. Fuller, 97 N. Y. S. 975.

60. Retaining as security property redeemed from pledge at the instance of the authorized agent of the owner. The one redeeming becoming subrogated to rights of original pledgee. Lesser v. Steindler, 110 App. Div. 262, 97 N. Y. S. 255. Pleading and evidence held to present question of subrogation to rights of pawnbroker, though not pleaded as a legal conclusion in answer. Id.

61. Sale by agent. Woods Mach. Co. v. Woodcock [Wash.] 86 P. 570. Evidence held sufficient to establish agency and authority. Id. The sale of corporate stock assigned with a general power of attorney, although assigned merely for the purpose of hypothecation, and although defendant gave receipts for the stock by which he agreed to return it on demand. Stock sold and proceeds lost in speculation. Martin v. Megargee, 212 Pa. 558, 61 A. 1023.

62. Selling chattels, seized under a mortgage, on credit, renders mortgagee liable for damages only. Croze v. St. Mary's Canal Mineral Land Co. [Mich.] 13 Det. Leg. N. 47, 107 N. W. 92.

63. By retaining part of proceeds. Woods Mach. Co. v. Woodcock [Wash.] 86 P. 570. Evidence held sufficient to establish ratification. Id.

64. Evidence that defendant impounded plaintiff's cow trespassing on his fields, but his damages having been settled, turned her loose on plaintiff's order. Stout v. Fultz [Mo. App.] 93 S. W. 919.

65. Croze v. St. Mary's Canal Mineral Land Co. [Mich.] 13 Det. Leg. N. 47, 107 N. W. 92.

66. Removal of logs at an improper time. Leaving other logs an unreasonable length of time at place of seizure. Croze v. St. Mary's Canal Mineral Land Co. [Mich.] 13 Det. Leg. N. 47, 107 N. W. 92.

control of the common property,[67] the harvesting of crops neglected by the cropper, by the landowner,[68] mere misapplication of proceeds of a sale or disobedience of instructions by an agent,[69] or a violation of the terms of a bailment not amounting to a denial of the bailor's title or evincing an intention of the bailee to appropriate the property to his own use,[70] have been held not to be conversion. Removal of mortgaged chattels from place of seizure before sale is not necessarily conversion.[71] The lease of a building subject to the rights of existing tenants, without notice to a tenant at will, does not constitute conversion of his property stored therein.[72] Improper foreclosure of mortgage covering only property owned by the mortgagor is not a conversion of other property on the premises.[73]

§ 2. *Property subject to conversion.*[74]—Grass and stalks, though attached to soil, may be converted.[75] The recipient of stolen money is liable therefor in conversion, although he received it in good faith,[76] and although the identical money converted cannot be traced into his hands.[77] Personal property of a tenant is not abandoned by leaving it as in the case of fixtures.[78]

§ 3. *Elements necessary to maintain the action.*[79] *Ownership and possession.*[80]—Ownership,[81] actual possession,[82] or the immediate right to possession, are

67. Parke v. Nixon [Mich.] 12 Det. Leg. N. 413, 104 N. W. 597.

68. Being a cotenant. Rector v. Anderson [Minn.] 104 N. W. 884. Evidence held not sufficient to sustain conviction for conversion. Id.

69. Charging for drayage, freight, insurance, and commissions, so as to reduce principal's share very materially. Woods Mach. Co. v. Woodcock [Wash.] 86 P. 570.

70. Changing range of cattle contrary to terms of contract. Austin v. Van Loon [Colo.] 85 P. 183.

71. Removal of logs toward market, circumstances forbidding sale at place of seizure. Croze v. St. Mary's Canal Mineral Land Co. [Mich.] 13 Det. Leg. N. 47, 107 N. W. 92.

72. Plaintiff was entitled to keep his goods in a loft of a certain building until notice was given to remove them. Without any notice to him defendant leased entire premises to another, who put plaintiff's goods out on sidewalk. No cause of action in conversion. Huntington v. Herrman, 98 N. Y. S. 48.

73. Plaintiff improperly foreclosed a chattel mortgage which gave a lien only to such property on certain premises as defendants owned, and a sale pursuant thereto, where defendants owned no property and hence none was sold under the unlawful foreclosure. McEchrone v. Martine, 97 N. Y. S. 951.

74. See 5 C. L. 754.

75. Tenant sold to plaintiff right to graze stock on grass and stalks on farm with proper precautions to prevent damage to the freehold by the stock, and the landlord turned such stock off the farm and locked the gates. Leidy v. Carson, 115 Mo. App. 1, 90 S. W. 754.

76. Received in discharge of promissory notes without knowledge that the money was converted. Porter v. Roseman, 165 Ind. 255, 74 N. E. 1105.

77. Having been paid to his agent, the collecting bank. Porter v. Roseman, 165 Ind. 255, 74 N. E. 1105.

78. Reich v. Cochran. 99 N. Y. S. 755.

79, 80. See 5 C. L. 754.

81. Martin v. Megargee, 212 Pa. 558, 61 A. 1023. It is not error to nonsuit plaintiff at conclusion of his evidence, which shows that prior to institution of the suit he parted with the title to the property involved. Hall v. Simmons [Ga.] 54 S. E. 751.

Evidence of ownership: Defendant claiming farm produce in possession of a tenant under a lease must prove his title. Wilson v. Griswold [Conn.] 63 A. 659.

Held sufficient: Danvers Farmers' Elevator Co. v. Johnson [Minn.] 104 N. W. 899. That plaintiff's assignor bought certain property on defendant's representation that a "model" typewriter was included, which without explanation stood uncontradicted by defendant, and that now defendant refuses to deliver said "model." Scharndorf v. Alten, 96 N. Y. S. 452. To show that plaintiff's assignor prior to the assignment of the claim in controversy had disposed of a large part of the property to another. Lawrence v. Wilson, 107 App. Div. 365, 95 N. Y. S. 147. On question of a seller's acceptance of a buyer's offer to hold as consignee after rescission of sale. Fuller Buggy Co. v. Waldron, 99 N. Y. S. 920. To show relation of principal and agent between plaintiff and a third party in possession so as to give title to plaintiff of property converted by defendants. Nicholls v. Mapes [Cal. App.] 82 P. 265. Evidence for plaintiff as to identification marks, number, and commercial history of converted sheep, being direct and positive, and for defendant uncertain and vague. Rich v. Utah Commercial & Sav. Bank [Utah] 84 P. 1105. On proof that defendant's vendor in selling goods in controversy was guilty of larceny, without anything to show that defendant was warranted in believing his vendor clothed with authority to sell, it was error to hold that as a matter of law plaintiff had not established his cause of action. Goodwin v. Sommer, 97 N. Y. S. 960. On a question of whether defendant had received all the goods

necessary to recovery.[88] A mortgagee's right of recovery is measured by the amount of his lien.[84]

Demand and refusal[85] are necessary if defendant came into possession of the goods lawfully,[86] in the absence of any otherwise tortious conduct,[87] such as an illegal sale by warehouseman,[88] or a misdelivery by a carrier,[89] and having been shown, they establish a prima facie case.[90] Demand is not required when it would be un-

involved, credibility of witness was for jury. Id. On an issue of title where plaintiff claims through tenant, evidence that the latter trafficked in the property as his own overcomes the mere fact that defendant claimed as lessor. Wilson v. Griswold [Conn.] 63 A. 659.

Instructions on defendant's claim of title should be made applicable only to the property in issue. Instructions held bad because susceptible of application to other property. Wilson v. Griswold [Conn.] 63 A. 659.

82. Martin v. Megargee, 212 Pa. 558, 61 A. 1023; Croze v. St. Mary's Canal Mineral Land Co. [Mich.] 13 Det. Leg. N. 47, 107 N. W. 92. The right of a possessor to sue a third person, who does not connect himself with legal title, for conversion of property is well established. McEchrone v. Martine, 97 N. Y. S. 951. The special property in logs seized under a chattel mortgage is not destroyed by negligence in towing logs, by several months' delay in selling them, and delay in moving a portion of them, so as to render mortgagee liable in conversion. Croze v. St. Mary's Canal Mineral Land Co. [Mich.] 13 Det. Leg. N. 47, 107 N. W. 92. A person having actual possession of chattels has a sufficient title thereto to enable him to maintain trover against a stranger for their conversion. Marcy v. Parker [Vt.] 62 A. 19. Evidence held to show plaintiff's possession. Id. Undisputed evidence that plaintiff took a quitclaim deed to a lumber yard, put his men in charge of it, and that soon thereafter the former owner left, held to warrant the instruction that plaintiff was in full and actual possession of the lumber. Id. Evidence examined and held to establish plaintiff's claim as to time and amount of delivery of lumber. Id. Evidence that foreman and bookkeeper were in plaintiff's employ and that former owner had left, tended to show plaintiff's possession of converted lumber. Id. A plan showing location of converted piles of lumber is not objectionable because it omits two piles of lumber not in controversy. Id. Contract of purchase, two leases, and a quitclaim deed, held material in view of all the circumstances to establish plaintiff's possession and ownership. Id. The grantee of the mortgage, in possession after an invalid chattel mortgage foreclosure sale, may recover the full value of the property even in excess of his debt, in an action against a stranger who shows no right to the property. Jones v. Minnesota & M. R. Co. [Minn.] 106 N. W. 1048. Evidence being conflicting, question was properly left for jury whose finding is sustained by the evidence. Id. On an issue of title in plaintiff to railroad ties, evidence as to relinquishment of control over them by vendor, waiving of inspection by vendee, and compliance with terms of contract, being conflicting question of delivery, was properly submitted to the jury. Id. Evidence sufficient to sustain finding of jury that inspection was not waived, that none took place, and hence that title was in plaintiff. Id.

83. Martin v. Megargee, 212 Pa. 558, 61 A. 1023. Plaintiff must show a right of immediate actual possession in an action for conversion based on detinet. Securities. Byrne v. Weidenfeld, 99 N. Y. S. 412.

84. May sue one converting the mortgaged property to the extent of the value of the property not exceeding the mortgage debt. American Nat. Bank v. First Nat. Bank [Tex. Civ. App.] 14 Tex. Ct. Rep. 569, 92 S. W. 439.

85. See 5 C. L. 754.

86. Rosenkranz v. Jacobowitz, 99 N. Y. S. 469. If defendant came into possession of the property lawfully, conversion upon a theory of demand and refusal, as well as title and right to possession, must appear to make out a case of trover. Bill for goods with evidence of its payment held to show title in plaintiff and right to immediate possession in the absence of anything to the contrary. Louisville & N. R. Co. v. Britton [Ala.] 39 So. 585. Evidence that plaintiff on being notified to get his cattle from defendant's pasture did so, and on finding that 14 head were missing notified defendant, who promised to report to him on discovering them, which discovery and report was never made, is sufficient evidence to establish demand. Glassey v. Sligo Furnace Co. [Mo. App.] 96 S. W. 310.

87. Louisville & N. R. Co. v. Britton [Ala.] 39 So. 585.

88. Demand unnecessary, being evidential merely and not creative. Ward v. Morr Transfer & Storage Co. [Mo. App.] 95 S. W. 964.

89. Actual conversion being shown, demand is unnecessary. Evidence of demand and refusal are required only as evidence of conversion. Merchants' & Miners' Transp. Co. v. Moore & Co., 124 Ga. 432, 52 S. E. 802. Stipulation in a bill of lading that a demand for loss or damages must be presented within a specified time to hold carrier liable, inapplicable to an action for trover. Id.

90. A demand by the owner of horses with a tender of the contract price for their carriage, and a refusal to deliver them except upon payment of a sum in excess thereof, is prima facie evidence of conversion. Beasley v. Baltimore & P. R. Co., 27 App. D. C. 595. Two packages came into possession of drayman, who delivered but one and had a different package in place of the other, and did not account for disappearance of the right package. Not necessary for plaintiff to show what became of it. Suesskind-Schatz Co. v. Loria, 99 N. Y. S. 427 So the uncontradicted evidence of a

availing,[91] or the original taking was unlawful,[92] and acts necessary to revest title in plaintiff are needless when they would be futile.[93] Demand when necessary must be made within a reasonable time.[94] The reasonableness of a refusal to deliver property on demand,[95] even when so qualified as not to raise a presumption of conversion,[96] is for the jury.[97]

Who may maintain and persons liable.[98]—The presumptive legal owner,[99] or the holder of any special property in the goods, may sue,[1] and a lienor's right is not defeated by a deficient tender.[2] In Nebraska a woman may sue for the conversion of the proceeds realized from the sale of her real estate.[3] Any person participating in the asportation or sale of another's property,[4] though not present[5] or sharing the fruits of the conversion,[6] is answerable. Hence an agent is liable though acting in good faith according to the instructions of his principal.[7] The owner of

refusal to return a note delivered in the course of negotiations for a contract of insurance, which had not yet become binding on either party, entitles plaintiff to a directed verdict. Hubbard v. State Life Ins. Co. [Iowa] 105 N. W. 332.

91. Defendants claiming absolute right to property, under a chattel mortgage. More v. Burger [N. D.] 107 N. W. 200. Where defendant admits possession and justifies on the ground of superior title in his lessor. McSwegan v. Hankinson, 95 N. Y. S. 548.

92. Stranger unlawfully taking goods from possession of owner. Peru Plow & Implement Co. v. Harker [C. C. A.] 144 F. 673.

93. A pledgee selling the pledge, although a tender of payment of the debt secured has not been made. Conversion of pledge by pledgee. Austin v. Vanderbilt [Or.] 85 P. 519.

94. By analogy to statute of limitations, held to be six years. Conversion of wheat by warehouseman. Freeman v. Ingerson [Mich.] 12 Det. Leg. N. 866, 106 N. W. 278. See, also, Austin v. Van Loon [Colo.] 85 P. 183.

Note: "We think that the rule supported by the greater weight of authority is that, where a demand is necessary to create a cause of action, such demand must be made within a reasonable time, which, by analogy to the statute of limitations, will be deemed to be [six] years. Kimball v. Kimball, 16 Mich. 220; Palmer v. Palmer, 36 Mich. 493, 24 Am. Rep. 605; Smith v. Smith's Estate, 91 Mich. 10, 51 N. W. 694; Jewell v. Jewell's Estate, 139 Mich. 578, 102 N. W. 1059; In re Estate of Emmons (opinion filed Dec. 15, 1905) 105 N. W. 758; Atchison, etc., R. Co. v. Burlingame Tp., 36 Kan. 628, 14 P. 271, 59 Am. Rep. 578; Codman v. Rogers, 10 Pick. [Mass.] 119; Pittsburgh, etc., R. Co. v. Byers, 32 Pa. 22, 72 Am. Dec. 770; Ball v. Keokuk, 62 Iowa, 753, 16 N. W. 592; 9 Am. & Eng. Enc. of Law [2d Ed.] 214; 19 Am. & Eng. Enc. of Law [2d Ed.] 193, 194, 196, 211; 13 Cyc. 808."—From Freeman v. Ingerson [Mich.] 12 Det. Leg. N. 866, 106 N. W. 278.

95. Where bill of lading specified through rate of freight for two horses at $130.10, which was also mentioned on waybill but the latter further specified the items on each separate road making a total of $201.60 for freight, it was a question for jury whether defendant railroad had a reasonable cause for refusal to deliver the horses. Beasley v. Baltimore & P. R. Co., 27 App. D. C. 595.

96. Carrier demanding bill of lading as proof of title before delivery to consignee. Louisville & N. R. Co. v. Britton [Ala.] 39 So. 585.

97. Louisville & N. R. Co. v. Britton [Ala.] 39 So. 585. Possession by defendant at time of demand being material and in dispute should have been hypothesized to jury in the **instruction** as to demand and refusal to make it unassailable. Id.

98. See 5 C. L. 755.

99. A corporation's right to sue as assignor cannot be collaterally attacked by a defendant in an action for conversion. Defense not maintainable that corporation could not accept assignment. Peru Plow & Implement Co. v. Harker [C. C. A.] 144 F. 673.

1. Holder of a bill of lading given as a security against a carrier for misdelivery. Tishomingo Sav. Inst. v. Johnson, Nesbitt & Co. [Ala.] 40 So. 503. Mere delivery of bill for purposes of security sufficient without an indorsement over. Id.

2. A mortgagee's right to recovery is not affected by an offer from a third person of payment of an amount less than due. Peterman v. Henderson [Ala.] 40 So. 756.

3. On a question of conversion of money received for sale of real estate, an instruction that a married woman has the same rights as a feme sole in Nebraska was correct in view of the evidence. Fike v. Ott [Neb.] 107 N. W. 774.

4. Landlord participating with his tenant in sale of a mortgaged crop is liable in conversion. Although landlord applied proceeds of sale to debt owed him by tenant. Roche v. Dale [Tex. Civ. App.] 15 Tex. Ct. Rep. 832, 95 S. W. 1100.

5. One advising, aiding, and encouraging the removal of mortgaged property from the county in which it is mortgaged, though he was absent at the exact time of the removal. American Nat. Bank v. First Nat. Bank [Tex. Civ. App.] 14 Tex. Ct. Rep. 569, 92 S. W. 439.

6. Evidence that defendant was a member of a firm which bought and slaughtered converted cattle, though for the most part indirect and vague, sufficient to support conclusion of the jury. Morris v. Third Nat. Bank [C. C. A.] 142 F. 25.

converted property may recover against both the converting seller and his vendee.[8] A licensor is not liable in conversion for mere failure to notify his licensee, converting timber on adjoining land, of the boundaries of his timber land, when such licensee had information thereof from other sources.[9] An administrator cannot be held liable for conversion by his decedent where none of the property converted came into his possession.[10]

§ 4. *Defenses.*[11]—Nonexistence or nonacquisition of the title claimed by plaintiff,[12] or estoppel against the plaintiff's assertion of title,[13] or a consent by the apparent owner to the acts of dominion by defendant,[14] are good defenses. However, a plaintiff is not estopped from suing in trover because in a former action in replevin for the same goods he failed on account of owning an undivided interest only therein.[15] The immediate right to possession in a third person in an action for conversion based on detinet is a defense.[16]

It is immaterial that defendant acted in good faith,[17] and it is no defense that the title was incumbered.[18] Conversion by a bailee is not excused by the bailor's breach of a collateral promise.[19] A demand for proceeds of a conversion[20] or a retention, without knowledge, of part of them,[21] does not waive the tort. The statute of limitations runs in favor of a bailee in possession from the time of lawful demand and refusal.[22] It runs in favor of one converting the property of a deceased person from the time of the appointment of an administrator of the latter's estate.[23]

§ 5. *Practice and procedure.*[24]—Trover lies only to recover damages, not possession,[25] and is not designed to adjust equities.[26] A principal may be sued for

7. A transportation company delivering property to another than consignee under a waybill from a previous connecting carrier. Merchants' & Miners' Transp Co. v. Moore & Co., 124 Ga. 482, 52 S. E. 802.

8. Posey v. Gamble [Ala.] 41 So. 416.

9. In an action by adjoining landowner for conversion of timber, instructions assuming contrary held improper. Messer v. Walton [Tex. Civ. App.] 15 Tex. Ct. Rep. 396, 92 S. W. 1037.

10. Proper remedy is allowance of demands against decedent's estate in probate court. White v. Blankenbeckler, 115 Mo. App. 722, 92 S. W. 503.

11. See 5 C. L. 756.

12. Action by vendee against vendor for nondelivery of goods sold. Flynn v. Smith, 98 N. Y. S. 56. That in the sale of a claim for debt neither vendee nor vendor had in mind stocks held as securities of the existence of which neither could have known. Id.

13. A seller, making statements authorizing or inducing a mortgagee to make advances on the faith of a mortgage to a supposed vendee, may be estopped from recovery in conversion, though he had no intention to deceive and though he actually owned the property. Telling an inquiring mortgagee that it was all right. Slayton & Co. v. Horsey [Tex. Civ. App.] 91 S. W. 799. Estoppel held to require reliance upon a husband's ostensible authority. Fike v. Ott [Neb.] 107 N. W. 774.

14. Consent of original mortgagee to sale without notice to defendant of rights of assignee. Action against bank receiving proceeds of sale of mortgaged cattle sold under direction of original mortgagee. Farmer v. Graettinger [Iowa] 107 N. W. 170. Notice that a mortgagor, being a cattle feeder, is about to ship "his cattle," is not notice of an intended sale by the feeder of mortgaged cattle, as implying knowledge and consent by assignee of mortgage. Id.

15. Benjamin Schwarz & Sons v. Kennedy, 142 F. 1027.

16. Securities. May be shown by defendant. Byrne v. Weidenfeldt, 99 N. Y. S. 412. In an action for the conversion of securities based on detinet, it was prejudicial error not to permit defendant to show that such securities were in the hands of pledgees by the consent of and in pursuance to a joint venture for profit with the plaintiff. Id.

17. Receiving proceeds of converted cattle without knowledge of the wrongfulness of the sale. Farmer v. Graettinger [Iowa] 107 N. W. 170.

18. That a third party had a right to possession of the property as security for a debt for a small percentage of its value. Owner having given a bill of sale of a $3,000 stock to another to secure an $800 debt the day before the conversion by defendant. Peru Plow & Implement Co. v. Harker [C. C. A.] 144 F. 673.

19. Shipper failed to accompany live stock as he had agreed to do, resulting in misdelivery by carrier. Duty to see that goods were properly delivered not shifted from carrier to shipper thereby. Southern R. Co. v. Webb, 143 Ala. 304, 39 So. 262.

20. Baker v. Hutchinson [Ala.] 41 So. 809.

21. Action for the remainder of proceeds. Farmer v. Graettinger [Iowa] 107 N. W. 170.

22. Austin v. Van Loon [Colo.] 85 P. 183.

23. White v. Blankenbeckler, 115 Mo. App. 722, 92 S. W. 503.

conversion by his agent where the tort was committed.[27] Conversion of the mortgaged property may be set up as a counterclaim in an action on the debt secured.[28] In a suit to quiet title by a mortgagee, the plaintiff may be charged with conversion of property on the premises, not fixtures, by a cross bill.[29]

Parties.[30]

The complaint.[31]—The allegations need not particularize the title,[32] possession, or lien[33] on which plaintiff relies, nor the particular acts constituting a conversion averred as a fact,[34] nor the precise day when it was done,[35] but merely averring a refusal to deliver a certificate of stock on demand is insufficient to charge conversion of the stock.[36] An averment that plaintiff's decedent at the time of his death was "seised and possessed" of certain property is a sufficient averment of ownership.[37] On the unlawful seizure of goods by an attaching creditor, stoppage in transitu may be shown by the forwarding agent suing for conversion, without averring it.[38] A complaint for claim and delivery may by amendment be changed into one for conversion,[39] but to declare both in trover and in replevin is improper,[40] which cannot be obviated by a subsequent abandonment of the count in replevin,[41] and a general demurrer to such a declaration, for misjoinder of causes, is good.[42]

The answer or plea.[43]—An averment of fraud, pleaded as a defense, must state the facts out of which it arises,[44] and a plea failing to show that the mortgage relied on by defendant is superior to the one relied on by plaintiff,[45] or failing by proper averment to connect goods in controversy with an agreement for a release of part of

24. See 5 C. L. 756.

25. A special charge instructing jury to find for the property or its market value is properly refused. Harris v. Staples [Tex. Civ. App.] 13 Tex. Ct. Rep. 988, 89 S. W. 801.

26. Cannot set up his equities to assets in the hands of an administrator in an action against the latter for conversion by his decedent. Action by administrator of husband setting equities of husband's heirs against administrator of wife for conversion by wife of property left by husband on his death, under an agreement with his heirs that she should have management of his property until her death, when it was to go to his heirs. White v. Blankenbeckler, 115 Mo. App. 722, 92 S. W. 503.

27. Bank may be sued for conversion of cattle by its president in county where conversion occurred. American Nat. Bank v. First Nat. Bank [Tex. Civ. App.] 14 Tex. Ct. Rep. 569, 92 S. W. 439.

28. Under Rev. Codes 1899, § 5274, subd. 1. Hanson v. Skogman [N. D.] 105 N. W. 90. Answer alleging note in suit secured by chattel mortgage on horses, and conversion by mortgagee of horses to his own use, sets up a counterclaim good on demurrer. Id.

29. Action by purchaser at foreclosure sale of saw-mill premises against junior mortgagee who files cross bill for conversion. Humes v. Higman [Ala.] 40 So. 128.

30. See 3 C. L. 872. See, also, ante, § 3, Who May Maintain, etc.

31. See 5 C. L. 756.

32. Need not show the consideration passing to a third person who left money with the defendant for use of plaintiff and converted it Complaint not bad on demurrer for failing to allege that plaintiff was owner of land sold to third person, who paid money into defendant's hands to be delivered to plaintiff. Fike v. Ott [Neb.] 107 N. W. 774.

33. A complaint need not allege the particulars of a lien. Baker v. Hutchinson [Ala.] 41 So. 809.

34. Not necessary to set out contract under which plaintiff pledged diamonds to defendant and wherein it was violated. Austin v. Vanderbilt [Or.] 85 P. 519.

35. Reciting conversion as having taken place "on the ——— day of March, 1904." Peacock v. Feaster [Fla.] 40 So. 74.

36. Richardson v. Busch [Mo.] 95 S. W. 894.

37. Action for conversion brought by an administrator. Grant v. Hathaway [Mo. App.] 96 S. W. 417.

38. Liquor in hands of forwarding warehouseman obtained by a creditor by fraudulent representations of an order from the consignee and sold under execution, and warehouseman being compelled to reimburse sellers after notification of stoppage in transitu. Frame v. Oregon Liquor Co. [Or.] 85 P. 1009. Defendant having wrongfully obtained possession of goods, plaintiff may show demand on himself by consignor as tending to show stoppage of goods in transitu and that plaintiff had to settle for the goods. Id. On an issue of defendant's right to possession of goods, a letter from plaintiff questioning same is admissible in evidence, being on the footing of a conversation between the parties. Id.

39. Where under the original complaint damages were recoverable in case of inability to deliver the property, especially when allowed nearly sixty days before trial, thus excluding all prejudice by surprise. More v. Burger [N. D.] 107 N. W. 200.

40, 41, 42. King v. Morris [N. J. Law] 62 A. 1006.

43. See 5 C. L. 757.

certain goods by plaintiff is bad on demurrer.[46] In a suit for conversion of proceeds of goods by purchaser, who gave notes for the price and agreed to hold the proceeds of the goods in trust for original seller, denial by defendant of the trust agreement does not raise nontender of the notes by the plaintiff.[47]

Evidence, issues, proof, variance.[48]—Plaintiff must show an exercise of dominion over property by defendant,[49] and when suing as mortgagee, the burden is on him to prove that the converted goods were those of the mortgagor,[50] but, having made a prima facie case, burden is on defendant to justify his taking by title.[51] So after plaintiff has established actual possession of the property at the time of conversion, the burden is on the defendant to show a better title in another and his connection with such other person,[52] and title in plaintiff at a time prior to conversion having been conceded, the defendant has the burden of showing transfer of title to himself.[53] The burden is upon a railroad corporation to show that it is not chargeable with the act of contractors in taking ties, and that in taking over a completed road from the contractors it had no notice of the conversion, where from the evidence a presumption of notice arises.[54] To support an averment of a lien, and the amount due, a mortgagee may introduce the mortgage and notes secured.[55] To show title, a purchaser may introduce the bill for goods received from seller, though not showing who made it out.[56] To overcome the defense that attached goods were property of debtor, it is competent to show that they were still in transit at time defendants wrongfully obtained possession and had been stopped by the sellers.[57] Evidence of an immediate right to possession in a third person was admissible on behalf of defendant in an action for conversion based on detinet, and in any event under a general denial.[58] Two defendants, each denying plaintiff's title, are each entitled to benefit of evidence introduced by other derogatory of plaintiff's title,[59] and if sued as copartners under a plea of not guilty interposed by both, either defendant may introduce any competent evidence at the trial tending to show his nonliability,[60] but on a joint plea of not guilty, a former judgment adjudging title

44, 45. Baker v. Hutchinson [Ala.] 41 So. 809.

46. Plaintiff having agreed to release part of crop of cotton to pay for crop supplies, but plea failing to aver that the bales of cotton taken were the cotton released by said agreement. Baker v. Hutchinson [Ala.] 41 So. 809.

47. Corbett Buggy Co. v. Dukes, 140 N. C. 393, 52 S. E. 931.

48. See 5 C. L. 757.

49. Huntington v. Herrman, 98 N. Y. S. 48.

50. Haynes & Bro. v. Gray & Co. [Ala.] 41 So. 615. Defendants, purchasing mortgaged cotton evidenced by warehouse receipts issued to mortgagor and with the mortgage on file, will be deemed to have had notice of mortgagor's relation to the crop and the mortgagee's lien. Id.

51. Plaintiffs proving ownership and nonconsent to defendant's removal of 20 cords of wood, burden was on latter to show payment therefor. Nashville, etc., R. Co. v. Walley [Ala.] 41 So. 134. There being evidence to support the claim that wood taken had been paid for, defendant was entitled to an instruction that in such a case plaintiff could not recover. Id.

52. Marcy v. Parker [Vt.] 62 A. 19.

53. Mossteller v. Holborn [S. D.] 108 N. W. 13. Evidence that plaintiff was owner of converted property at a period prior to conversion, and that she never sold same, held sufficient to sustain verdict in her favor. Id.

54. In the absence of such proof, instruction that contractors were representatives of defendant was without prejudice and justified an instruction that plaintiffs were entitled to recover if the contractors had not acquired title. Jones v. Minnesota & M. R. Co. [Minn.] 106 N. W. 1048.

55. Baker v. Hutchinson [Ala.] 41 So. 809. Evidence that a mortgagor lived on land in 1903, sold him by plaintiff and raised crop in controversy for which a mortgage was executed in 1902, sufficiently shows that mortgagor owned the land in the absence of any evidence to contrary. Id. Validity of mortgage as security for husband's obligation not destroyed because wife's name does not appear on notes as the mortgage recited. Id.

56. In an action against a carrier for conversion of the goods bought and paid for. Louisville & N. R. Co. v. Britton [Ala.] 39 So. 585.

57. Frame v. Oregon Liquor Co. [Or.] 85 P. 1009.

58. Byrne v. Weidenfeld, 99 N. Y. S. 412.

59. Trammell v. Guffey Petroleum Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 492, 94 S. W. 104. Action for conversion of oil by

to converted property to be in plaintiff as against one of the defendants did not affect other defendant.[61] If plaintiff's title does not depend on indebtedness of a third person to it, evidence thereof is properly excluded.[62] Demand, sufficient to sustain a verdict of conversion, may be proven indirectly.[63] An issue as to the appropriation of the property by defendants being established by their own evidence,[64] or a plea not substantiated by the evidence, need not be submitted to the jury.[65]

Plaintiff suing in conversion cannot recover by proof of a cause ex contractu,[66] but on establishing by his proof another and different cause of action, should be nonsuited for failure of proof.[67] Likewise, proof of a conversion several weeks prior to the time alleged in the complaint has been held a fatal variance,[68] but in an action by an administrator, deriving his authority from the probate court, failure to sustain by proof an allegation that deceased died testate is not fatal.[69] A party failing to establish his entire ownership may recover to the extent of his proof.[70]

Verdict and judgment.—Until judgment on a verdict, there is no estoppel to prove on the inquest of damages the loss of things specially found to have been nonexistent when sold to plaintiff.[71] One or more of several defendants may be absolved and a verdict and judgment taken against the remainder.[72]

Damages.[73]

CONVERSION IN EQUITY.

§ 1. Definition and Nature of Doctrine (854).
§ 2. How Effected (854). By Will (854). By Conveyance or Contract (856).
§ 3. Reconversion (856).
§ 4. Effect of Conversion (857).

§ 1. *Definition and nature of doctrine.*[74]—Equitable conversion is the constructive change in equity of realty into personalty or personalty into realty. The doctrine is based upon the maxim that equity regards that as done which ought to be done.[75]

§ 2. *How effected. By will.*[76]—This doctrine is most commonly applied in the case of a will where the testator manifests an intention that the form of property be altered. Equity will then regard the change as having taken place, though there is no change in fact. The intention is the controlling consideration,

delivery thereof by one defendant company to the other Id.

60. Peacock v. Feaster [Fla.] 40 So. 74.

61. A general charge in favor of plaintiff against other defendant rightly refused. Posey v. Gamble [Ala.] 41 So. 416.

62. Mining machinery, possessory title to which is claimed under a lease. Wood v. West Pratt Coal Co. [Ala.] 40 So. 959.

63. Plaintiff, trustee in bankruptcy, asserting title to property for purpose of appraising, and defendant, wife of bankrupt, claiming title thereto under a void transfer and denying that she has any property belonging to trustee. Semon v. Adams [Conn.] 63 A. 661.

64. Evidence that one defendant had sold mules in controversy to the other, who in turn had disposed of them. Huey v. Hammett [Tex. Civ. App.] 93 S. W. 531.

65. Plea of estoppel to an action in conversion. Huey v. Hammett [Tex. Civ. App.] 93 S. W. 531.

66. Huntington v. Herrman, 98 N. Y. S. 48.

67. Proof establishing misapplication of proceeds of an authorized sale by an agent. Woods Mach. Co. v. Woodcock [Wash.] 86 P. 570.

68. Proof that defendant bought mortgaged cotton on the 16th of October, 1903, and shipped it the next day, whereas complaint alleges a conversion of the cotton on the 31st of October, 1903. Plott v. Robertson [Ala.] 39 So. 771. See **contra** 5 C. L. 757, n. 72.

69. Grant v. Hathaway [Mo. App.] 96 S. W. 417.

70. Proof of an undivided interest in bales of hops. Benjamin Schwarz & Sons v. Kennedy, 142 F. 1027.

71. Hart v. Brierley, 189 Mass. 598, 76 N. E. 286.

72. Peacock v. Feaster [Fla.] 40 So. 74.

73. See 3 C. L. 874. See, also, Damages, 5 C. L. 904.

74. See 5 C. L. 758.

75. Nelson v. Nelson [Ind. App.] 75 N. E. 679.

76. See 5 C. L. 758.

and this may be shown by either a positive direction to sell or invest,[77] by an absolute necessity for a change in order to execute the will,[78] or by such a blending of real and personal estate by the testator in his will as to clearly show that he intended to create a fund out of both the real and the personal property and to bequeath such fund as money.[79]

The direction to convert must be imperative,[80] though it need not be express.[81]

77. Where a testator makes a positive direction for the sale of realty, the same will be treated as personalty. Will construed as a direction to sell the testator's real estate not later than seven years after his death and to operate as a conversion. In re Tasker's Estate [Pa.] 64 A. 527. Held a conversion where testatrix directed her executor to sell her interest in real estate as soon as convenient after her death and divide the proceeds among certain beneficiaries. Hendrick v. Probate Court of East Greenwich, 25 R. I. 361, 55 A. 881. Direction for sale and division of proceeds operates as conversion. Burbach v. Burbach, 217 Ill. 547, 75 N. E. 519.

78. When in order to carry out the intention of the testator as shown by his will it is necessary to sell real estate, a conversion takes place, though the testator gave the executor only a power of sale and did not in express terms direct it. Conversion of all the realty where necessary to sell part of it to pay debts and a pecuniary legacy, and the remainder could not be divided in kind among the children. Stake v. Mobley, 102 Md. 408, 62 A. 963.

79. Will construed as creating a common fund. In re Tasker's Estate [Pa.] 64 A. 527.

80. The direction that the form of the property be changed must be absolute and imperative. No conversion where widow was authorized to divide up or sell the property in her lifetime, though there was a direction for the sale of whatever property might remain at her death. Bennett v. Gallaher, 115 Tenn. 568, 92 S. W. 66. No conversion though executor had power to sell and did sell realty for the purpose of executing the will where there was ample personalty for such purpose. White v. Crossman [N. J. Eq.] 64 A. 168. Where trustees or executors are vested with a mere discretionary power of sale and a change is not necessary to carry out the intention of the testator, the property will not be deemed to be equitably converted. Where trustees could postpone sale as long as they saw fit. Partition decreed. Hayden v. Sugden, 48 Misc. 108, 96 N. Y. S. 681. Distinctive requisite is that the power is compulsory, though the time of its exercise may be left to discretion. Where will showed that testator contemplated that there might be real estate undisposed of at termination of a trust, and directions to sell were not mandatory. In re Bruchaeser's Estate, 49 Misc. 194, 98 N. Y. S. 937. Where trustees are given power to sell real estate and change investments but there is no direction that real estate shall be converted into personalty, the proceeds of the real estate orlginally a part of the trust are to be treated as real estate in making distribution of the trust fund until the final vesting of them in the parties ultimately entitled thereto. Gray v. Whittemore [Mass.] 78 N. E. 422.

81. Where a testator conferred upon his executors **discretionary power** to sell any and all of his real estate if necessary for the purposes of the estate, administration, distribution, or otherwise, and it became necessary to sell realty to pay the pecuniary legatees, a conversion was thereby effected the same as though there had been a positive direction to sell. In re Vanuxem's Estate, 212 Pa. 315, 61 A. 876.

NOTE. Direction to convert may be necessarily implied: "In 2 Am. & Eng. Dec. in Eq. 86, in the notes to Ingersoll's Estate, there is an excellent discussion of the subject of equitable conversion by will, and a large number of authorities are cited, including many of our own decisions. After discussing this subject under various heads, and speaking of a discretionary power of sale, it is said (on page 90): 'The discretion, however, to prevent conversion, must be as to the fact of sale so that it is optional with the executor or trustee whether he will sell or not. If a sale is contemplated at all events, there will be a conversion, though the time and manner of sale are left entirely to the pleasure of the executor.' And, after citing authorities for that, the anotator adds: 'And, if a will contains only a discretionary power of sale, but its provisions cannot be carried out without a sale, the direction to sell will be held to be absolute, and will work an out and out conversion of the realty, at the time of the testator's death.' So, in 9 Cyc. 832, it is said: 'The intention to convert may be implied, as where a testator authorized his executors to sell his real estate, and it is apparent from the general provisions of the will that he intended such estate to be sold, although the power of sale is not in terms imperative.' And this court in Paisley v. Holzshu, 83 Md. 325, 34 A. 832, quoted with approval from 3 Pomeroy's Eq. Jur. § 1160, where the principle is thus stated: 'It is not essential, however, that the direction should be express in order to be imperative. It may be necessarily implied. In fact, the whole result depends upon the intention. If by express language or by a reasonable construction of all its terms, the instrument shows an intention that the original form of the property shall be changed, then a conversion necessarily takes place.' In 7 Am. & Eng. Ency. of Law 466, after having stated that the question of conversion is to be determined from the intention of the testator as manifested by the provisions in the will, it is said: 'Such intention may be shown by either (1) a positive direction for a conversion; or (2) an absolute necessity to sell in order to carry out the provisions of the will, the conversion arising on the theory that the testator must

As a general rule, conversion takes place from the death of the testator,[82] and it is not postponed by the fact that a sale is not to be made until after the death of a life tenant.[83]

By conveyance or contract.[84]—Under an enforceable contract to convey real estate, the vendor's interest is considered in equity as personalty and the vendee's interest as realty.[85] Conversion will likewise take place under a valid contract to devise so that the interest of the devisor loses its character as realty.[86] The proceeds of a foreclosure of a real estate mortgage are regarded as realty, but not for jurisdictional purposes.[87]

§ 3. *Reconversion.*[88]—This arises from the principle that equity will not compel the execution of a trust against the interests of persons beneficially concerned,[89] and so where land is directed to be turned into money to be paid over to parties capable of receiving it, the beneficiaries may ordinarily elect to take the land and thereby extinguish the trustee's power for conversion,[90] and the bringing of an

have intended that everything essential to his scheme should be done; or (3) such a blending of the real and personal estate by the testator in his will as clearly to show that he intended to create a fund out of both real and personal estate and to bequeath the fund as money.' "—Stake v. Mobley [Md.] 62 A. 965.

82. Bennett v. Gallaher, 115 Tenn. 568, 92 S. W. 66; Vogt v. Vogt, 26 App. D. C. 46. Where there is an express direction or its equivalent, unless the time is qualified. Stake v. Mobley, 102 Md. 408, 62 A. 963.

83. Express direction to sell after death of widow and divide proceeds among children. Nelson v. Nelson [Ind. App.] 75 N. E. 679. An express direction in a will that the testator's real estate shall be sold on the death of life tenants and the income from the proceeds used for a given purpose, operates to convert the property into personalty from the time of the death of the testator. Iglehart v. Iglehart, 26 App. D. C. 209.

84. See 3 C. L. 877. The doctrine that partnership realty is in equity regarded as personalty is treated in Partnership, 6 C. L. 911.

85. In re Strang's Estate [Iowa] 106 N. W. 631. Where a testator placed his children in possession of land under an agreement by which they were to pay interest upon its value up to the time of the testator's death, the land then to become an advancement to them upon their paying any excess of its value over their proportionate interest in the estate, such contract operated as a conversion of the land into personalty, so that the excess paid by the children was not affected by provisions in the will relative to realty. Id.

86. In re Strang's Estate [Iowa] 106 N. W. 631.

87. Eubank v. Finnell [Mo. App.] 94 S. W. 591.

88. See 5 C. L. 759.

89. Train v. Davis, 49 Misc. 162, 98 N. Y. S. 816.

90. Train v. Davis, 49 Misc. 162, 98 N. Y. S. 816.

NOTE. Election against conversion: Though there be such a trust or direction for conversion that the doctrine of equitable conversion may apply, a person absolutely entitled to the equitable interest in the property, if sui juris, may elect to take the property in its actual state, the theory being that, since such person could "reconvert" the property, after an actual conversion, equity will, upon a manifestation of his desire in this respect, consider the reconversion as effected. 3 Pomeroy Eq. Jur. § 1175; notes to Fletcher v. Ashburner, 1 White & T. Lead. Cas. Eq. 1151, 1168; Meek v. Devenish, 6 Ch. Div. 566, 6 Gray's Cas. 543; In re Cotton's Trustees, 19 Ch. Div. 624; Craig v. Leslie, 3 Wheat. [U. S.] 564, 4 Law. Ed. 460; Morrow v. Brenizer, 2 Rawle [Pa.] 185; Baker v. Copenbarger, 15 Ill. 103, 58 Am. Dec. 600; Mellen v. Mellen, 139 N. Y. 210, 220; Harcum's Adm'r v. Hudnall, 14 Grat. [Va.] 369. But a person entitled to a share only in money to be derived from a sale directed to be made of land cannot, without the concurrence of the other persons interested, elect to take his share in land, since this would affect disadvantageously the sale of the balance. Holloway v. Radcliffe, 23 Beav. [N. C.] 163; McDonald v. O'Hara. 144 N. Y. 566; Baker v. Copenbarger, 15 Ill. 103, 58 Am. Dec. 600; Evans' Appeal. 63 Pa. 183: DeVaughn v. McLeroy, 82 Ga. 687. But it has been decided that one entitled to a share in land to be purchased under directions to a trustee may elect to take his share in money. Seeley v. Jago, 1 P. Wms. 389, 6 Gray's Cas. 510. The election must, of course, be before the actual conversion of the property. Cropley v. Cooper, 7 D. C. 226, afd. 19 Wall. [U. S.] 167, 22 Law. Ed. 109; Allison v. Wilson's Ex'rs, 13 Serg. & R. [Pa.] 330. The question whether there has been an election in this regard is one of intention to be determined by the acts and declarations of the party or parties entitled to elect. 3 Pomeroy Eq. Jur. § 1177; Craig v. Leslie, 3 Wheat. [U. S.] 563, 4 Law. Ed. 460; Harcum's Adm'r v. Hudnall, 14 Grat. [Va.] 369. Accordingly, a conveyance of land, directed to be sold, by the persons entitled to the proceeds, is considered to show an election in favor of reconversion of the proceeds of sale into land (Ridgeway v. Underwood, 67 Ill. 419; Swan v. Goodwin, 2 Duv. [Ky.] 298; Beal v. Stehley, 21 Pa. 376), and the same effect has been given to an action brought to recover the land as such (De Vaughn v. McLeroy, 82 Ga. 687).—From Tiffany, Real Property, § 107.

action for partition by the parties interested is a sufficient election.[91] All the beneficiaries must, however, concur.[92]

§ 4. *Effect of conversion.*[93]—Upon the conversion of realty, the property must be considered as personalty in determining the rights of the parties under the instrument by which the constructive change is effected.[94] Rents collected before sale belong to the beneficiaries,[95] and lands located in other states may become subject to appraisement as personalty for the purposes of taxation.[96] After a conversion, a mortgage given by the beneficiary on the land as such creates no lien thereon.[97] Though in case of a direction to sell realty after the termination of a life estate the conversion takes place from the time of the testator's death, the beneficiaries have a vested interest from the time of such death, which is subject to disposition by them.[98]

CONVICTS.[1]

A convict may be tried and convicted of a crime committed while in prison.[2] A sentence of imprisonment for conviction of a crime committed while the convict is imprisoned, under a previous conviction, begins when the first sentence ends.[3] A convict imprisoned for a term less than life can neither sue nor be sued in Kansas,[4] hence, an action for the recovery of such a convict's property can be maintained only by a trustee,[5] and allegations in the complaint attempting to make the convict a party plaintiff will be regarded as surplusage.[6] On habeas corpus proceedings by a convict, his status at the time of the hearing determines his rights.[7] The congressional act providing for the commutation of sentences for good conduct does not apply to convicts sentenced prior to its passage.[8] In New York the committee of the estate of a convict is appointed under the laws of 1889,[9] and the jurisdictional

91. Train v. Davis, 49 Misc. 162, 98 N. Y. S. 816.

92. All the devisees must consent to a reconversion of money into land by electing to take the land instead of the money. Starr v. Willoughby, 218 Ill. 485, 75 N. E. 1029.

93. See 5 C. L. 760.

94. Will. Nelson v. Nelson [Ind. App.] 75 N. E. 679.

95. Not chargeable to administrator. Hendrick v. Probate Ct. of East Greenwich, 25 R. I. 361, 55 A. 881.

96. Where in order to pay pecuniary legacies it would be necessary to sell such lands, they were held properly appraised for the purpose of determining the amount of the collateral inheritance tax, under Act May 6, 1887 (P. L. 79). In re Vanuxem's Estate, 212 Pa. 315, 61 A. 876.

97. Where under a will there was a conversion of realty into personalty at the time of the testator's death, a subsequent mortgage given by one of the heirs on all his interest in certain of such realty created no lien. Stake v. Mobley, 102 Md. 408, 62 A. 963.

98. Daughter could devise prior to death of mother who was life tenant. Nelson v. Nelson [Ind. App.] 75 N. E. 679.

1. See 5 C. L. 760. Management and discipline of penal institutions, see Prisons, Jails and Reformatories, 6 C. L. 1076.

2. One serving a life and a 99-year sentence for previous murder convicted of the homicide of a fellow convict. Brown v. State [Tex. Cr. App.] 95 S. W. 1039. County in which crime is committed has jurisdiction. Conviction of an attempt at jail delivery while detained under conviction for another crime. Allen v. Hall [Mo.] 95 S. W. 415.

3. Second sentence was to begin the "12th of June, 1907, when his former sentence ends," but such former sentence ending sooner through the exemplary conduct of the convict, the second sentence began sooner, namely, at the actual expiration of the first term. Allen v. Hall [Mo.] 95 S. W. 415.

4, 5, 6. New v. Smith [Kan.] 84 P. 1030.

7. Evidence of orders annulling a contract of hiring though made after filing of petition, is admissible. Ossie v. State [Ala.] 41 So. 945. Insufficiency of bond, no matter when or how arising, ground for annulling a contract of hiring and releasing convict from custody of hirer. Id.

8. Section 1 of Act June 21, 1902, c. 1140, declaring "each prisoner who has been or shall be hereafter convicted of any offense against the laws of the United States and is confined" thereupon shall be entitled to the benefit of the act, refers to persons convicted before its passage but not sentenced until after. United States v. Jackson [C. C. A.] 143 F. 783.

9. Laws 1899, c. 401, p. 550. Even though insane he has become insane since his confinement. Trust Co. of America v. State Safe Deposit Co., 109 App. Div. 665, 96 N. Y. S. 585. This law not repealed by Laws 1895, c. 824, p. 650, as amended by Laws 1897, c. 149, p. 58,

facts being stated in the petition with no one appearing to object to the appointment of the committee asked for, the petition will be granted without further proof as a matter of course.[10] One treated with indignities while imprisoned on a valid conviction under an ordinance must bring his action, if he has any, against the offending officials and not against the city.[11] One imprisoned to enforce a fine or costs or a bastardy liability can not be put to other labor than the statute provides.[12] A convict unlawfully at large can lawfully be arrested and returned to imprisonment even by a private person without warrant,[13] but on being reimprisoned as an escaped convict is entitled to process enabling him to try the question of his identity.[14] However, his refusal to try such issue on habeas corpus proceedings operates as an admission of it.[15]

Convict labor contracts.[16]—In Mississippi, the state may lease land to be used as farms on which to employ convicts.[17] Such farms are "state farms" and not "private farms."[18] A board of control having charge of convicts is not subject to the regulations of the courts while in the exercise of discretion committed to it by the legislature,[19] even though corruption be charged.[20] In Georgia the fund arising from the hire of misdemeanor convicts shall first be applied to the payment of the fees of the officers of court.[21] In Alabama a judge of probate may annul a contract of hire of a convict for insufficiency of the bond or for inhuman treatment of the criminal without an order from the governor, whether hired to work within or without the county,[22] on which annulment the custody of the convict is no longer in

and Laws 1904, c. 509, p. 1278, constituting § 2323a of Code Civ. Proc., providing for the appointment of a committee of the estate of an incompetent person committed to a state institution. Id.

10. Averments that petitioner and certain other persons were the only next of kin and heirs of convict and that due notice of petition had been given to all such persons, and it appearing that on the hearing none of them made objection, petitioner entitled to have his petition granted. Trust Co. of America v. State Safe Deposit Co., 109 App. Div. 665, 96 N. Y. S. 585.

11. Bartlett v. Paducah [Ky.] 91 S. W. 264.

12. In North Carolina one sentenced to the house of correction, or failing to give a bond for maintenance of a bastard, or failing to pay costs except in criminal cases, cannot be put to work upon the public roads. Revisal 1905, §§ 1352, 1355. State v. Morgan [N. C.] 53 S. E. 142. A bastardy proceeding not a criminal proceeding. Under an ordinance providing that in all convictions in the police court the defendant shall work out his fine and costs if not paid, the judgment need not recite that the prisoner is to be put at labor, to permit such action. Action by plaintiff for improper treatment while imprisoned in being put to work and having indignities heaped upon him. Bartlett v. Paducah [Ky.] 91 S. W. 264. In North Carolina one convicted of a crime may be imprisoned and put to hard labor for nonpayment of fine and costs. Bastardy proceeding not criminal. State v. Morgan [N. C.] 53 S. E. 142.

13. In re Moebus [N. H.] 62 A. 170.

14. In the absence of any previous adjudication thereon. In re Moebus [N. H.] 62 A. 170.

15. In re Moebus [N. H.] 62 A. 170.

16. See 5 C. L. 760.

17. Const. art. 10, §§ 223-226, construed as not requiring the purchase of land for state farm purposes, nor the employment of all convicts on such farms. State v. Henry [Miss.] 40 So. 152. A contract whereby a state agrees to work a farm with convicts wholly under its control, keeping $25,000 out of the proceeds of the crop for its own share and turning over the surplus to the renter, is a lease of the farm, not a lease of convicts. Id. Rev. Code 1892, § 3201, permitting the working of convicts on farm leased for that purpose, is not repealed by Acts 1894, p. 65, c. 75, providing that the board of control may work such convicts as cannot be employed on the penitentiary farm as it sees fit, nor by Acts 1900, p. 63, c. 56, providing for the preparation and working of a penitentiary farm by convicts as soon as practicable but also providing that no existing lease shall be affected or impaired. Id

18, 19. State v. Henry [Miss.] 40 So. 152.

20. State v. Henry [Miss.] 40 So. 152. Averments that the board of control is not having timbered land "opened as rapidly as practicable" and that all convicts could be "easily and profitably employed" thereon are not statements of facts but conclusions of the pleader in matters subject to the unrevisable discretion and judgment of the board of control. Id.

21. By first taking from the hire the costs in the particular cases, including the fees of witnesses, then discharging the orders of the officers of court for insolvent costs in other cases, and paying into the county treasury whatever balance may remain. Barron v. Terrell, 124 Ga. 1077, 53 S. E. 181.

22. Code 1896, § 4525. Ossle v. State [Ala.] 41 So. 945. The insufficiency of the bond need not be one due to a change since it was originally made. Id.

the hirer but in the county jailer.[23]. The real party to a convict labor contract on behalf of the public is not the "people" but the board of managers of the prison or reformatory, or the state as a body politic,[24] hence the state was not liable in damages for the breach of such a contract necessitated by constitutional and legislative enactments, where the contract provided that the state should be free from claim for damages in case by "legislation or other authoritative ruling beyond the reasonable control of the" contracting party on behalf of the state, the execution of the contract was rendered impossible.[25] Payment of monthly statements due under a convict labor contract to prevent execution of a threat to withhold the convicts, if not more promptly made, is not payment under duress,[26] nor can payment made voluntarily and without fraud, even though on an illegal basis, be claimed to be excessive in a suit to recover for overpayment.[27] On failure of proof that a fire was caused by lack of discipline among the convicts, a contractor cannot recover for loss by fire upon allegations of negligence in maintaining discipline resulting in the fire.[28] Under a contract providing for payment by piece work, as fixed by mutual agreement or by arbitration, evidence as to the fair value of convict labor was inadmissible.[29]

COPYRIGHTS.

Acquisition, extent, and loss of copyright.[30]—A publishing house with which a musical composition is placed for publication and sale has implied authority to copyright it,[31] and by the author's ratification of a copyright in the publisher's name, the latter becomes vested with legal title to the copyright.[32] A publisher with exclusive right of American publication and bound by contract to take such steps under the copyright law as will protect his rights and those of the author is authorized to take out copyright in his own name.[33] The assignee of a foreign copyright on a painting, though not the owner of the painting, is an "assign" of the owner so as to be entitled to take out American copyright.[34] Copyright of a periodical protects each article therein.[35] The notice of copyright of a painting need not be inscribed on the original but only on the several copies thereof.[36] Where the American copyright is in the name of a publisher having all American rights, publication in America by a foreign publisher with the consent of the author is not a free publication affecting the American copyright.[37] One who has in violation of the statute imported a foreign edition printed with type not set in the United States can acquire no right as against the holder of the American copyright to reproduce such books from the fact that they bear no notice of the American copyright.[38]

23. Habeas corpus proceedings by convict. Ossie v. State [Ala.] 41 So. 945.

24, 25, 26. Mills & Co. v. State, 110 App. Div. 843, 97 N. Y. S. 676.

27. Payments made on a per diem basis instead of the piece price system, as required by statute, covering a number of years during which time no complaint was made of overcharges. Mills Co. v. State, 110 App. Div. 843, 97 N. Y. S. 676. Evidence held to show that payments made under such contract were not under tentative agreements but were final. Id.

28. Mills Co. v. State, 110 App. Div. 843, 97 N. Y. S. 676. Evidence held not to establish any connection between fire and lack of discipline. Id.

29. Mills Co. v. State, 110 App. Div. 843, 97 N. Y. S. 676. Evidence held to show that damages for noncompletion of dry kiln as per contract had been waived by the contractor, declaring that if it were finished it would be useless and by making arrangements for the construction of another kiln, more conveniently situated. Id.

30. See 5 C. L. 761.

31, 32. White-Smith Music Pub. Co. v. Apollo Co., 139 F. 427.

33. Harper & Bros. v. Donahue, 144 F. 491.

34. Werckmeister v. American Lithographic Co., 142 F. 827.

35. Harper & Bros. v. Donahue, 144 F. 491.

36. Act June 18, 1874, c. 301. Werckmeister v. American Lithographic Co., 142 F. 827.

37, 38. Harper & Bros. v. Donahue, 144 F. 491.

Where a copyrighted book is reproduced by the publisher in a foreign country from the American type and without notice of the American copyright, it will free the publication as against one who reproduces the book in America from the foreign publication.[39] The interim copyright act protecting foreign books exhibited at the Louisiana Purchase Exposition does not apply to books previously published in the United States without copyright.[40]

Infringement.[41]—Preparation of directory by verification of names and addresses cut from competing directory is unfair use,[42] but checking for omissions against a rival compilation, all information being verified by independent investigation, is not.[43] A perforated sheet adapted for a mechanical reproduction of music is not a violation of the copyright of the musical composition.[44]

Remedies and procedure.[45]—In a suit for infringement of a continuing series of books, the complainant may be allowed to set up by supplemental bill infringement of other volumes of the same series committed since the filing of the bill.[46] Where the original bill alleges title by assignment in the complainant, a supplemental bill is not bad because it sets up another and confirmatory assignment.[47] The statutory remedies of proceedings to forfeit copies of infringing maps and to enjoin future infringements do not exclude the remedy by action for damages for past infringements.[48] Replevin will not lie for copies of an infringing lithograph desired only for the purposes of a suit to recover penalties for the infringement.[49] Where the infringing matter is separable, the decree should be against the sale of defendant's book while it contains such matter,[50] and a book containing but a small percentage of possible infringement and a great amount of matter obtained by original research will not be enjoined but complainant will be left to his remedy at law.[51]

CORAM NOBIS AND CORAM VOBIS, see latest topical index.

CORONERS.[52]

The coroner is a judicial officer when investigating the causes of sudden or violent deaths,[53] of whose jurisdiction judicial notice may be taken, where the facts upon which it rests are laid within the territorial limits of his jurisdiction,[54] but being an officer of inferior and limited jurisdiction, no presumption can arise in his favor, but every fact necessary to give him jurisdiction must be alleged and proved.[55] In the absence of the body from his territorial jurisdiction, a coroner can perform no official act in regard to the death of a person.[56] The authority of a coroner is not to be exercised arbitrarily but with reason and upon sufficient cause.[57] It becomes his duty to hold an inquest, to secure information and develop evidence,[58] where there is reasonable ground to suspect that death resulted from felony or criminal negligence,[59] but if he act in a case not surrounded by suspicious circum-

39. Merriam Co. v. United Dictionary Co., 140 F. 768.
40. Encyclopaedia Britannica Co. v. American Newspaper Ass'n [C. C. A.] 142 F. 966.
41. See 5 C. L. 762.
42. Sampson & Murdock Co. v. Seaver-Radford Co. [C. C. A.] 140 F. 539.
43. Credit rating book. Dun v. Lumbermen's Credit Ass'n [C. C. A.] 144 F. 83.
44. White-Smith Music Co. v. Apollo Co., 139 F. 427.
45. See 5 C. L. 763.
46, 47. Banks' Law Pub. Co. v. Lawyers' Co-op. Pub. Co., 139 F. 701.
48. Rev. St. §§ 4965, 4970. Walker v. Globe Newspaper Co. [C. C. A.] 140 F. 305.
49. Hills & Co. v. Hoover, 142 F. 904.
50. Directory. Sampson & Murdock Co. v. Seaver-Radford Co. [C. C. A.] 140 F. 539.
51. Dun v. Lumberman's Credit Ass'n [C. C. A.] 144 F. 83.
52. See 5 C. L. 763.
53, 54, 55. People v. Jackson, 47 Misc. 60, 95 N. Y. S. 286.
56. Coroner in borough of Manhattan, New York, cannot try a physician for causing death of a person whose body is in New Jersey. People v. Jackson, 47 Misc. 60, 95 N. Y. S. 286.

stances pointing to criminal misconduct,[60] or where it is apparent that death was caused by disease or by the negligence of the deceased or was purely accidental,[61] he cannot recover fees.[62] However, it has been held that the supposition of death by unlawful means, upon which the jurisdiction of the coroner to act rests, must arise exclusively in his own mind.[63]

One inquest duly and lawfully held upon a body is sufficient and he who undertakes to hold a second inquest has the burden of showing that the first inquest for some reason was not lawful.[64] Where there are laws providing for a deputy to perform all duties incumbent on the sheriff, and others directing the coroner to act in case of death, disability, etc., the coroner will act if there is no deputy.[65]

In Alabama a coroner's claim for fees for holding an inquest must be presented to the county board of revenues for auditing and allowance before the county treasurer can be called upon to pay it.[66] A physician summoned by a coroner in the apparent exercise of his lawful jurisdiction according to statutory forms to make an autopsy is entitled to recover compensation of the county without waiting until the latter's authority is satisfactorily established.[67] A coroner can not be guilty of asking a bribe to influence his official action in a case wherein he has no jurisdiction owing to the absence of the body of the deceased,[68] since the indictment must allege that the bribe was asked in an official character to influence official action.[69]

In a prosecution against a coroner for obtaining money from the state by false pretenses that a person over whom an inquest was held was a stranger under a law providing that the expense of holding an inquest over a stranger shall be borne by the state instead of the county, it cannot be urged as a defense that as the account of the coroner was audited and allowed by the circuit court before presentation to the state, the money was paid in reliance upon the certificate of the court rather than the representations of the coroner,[70] nor is the action of the court in allowing such an account a judgment.[71] The prosecution may introduce in evidence a city directory wherein appeared deceased's name and place of business in connection with other evidence showing that the deceased had for years lived and done business at the place indicated in the directory.[72] It may be

57, 58, 59. Miller v. Cambria County, 29 Pa. Super. Ct. 166.

60. Miller v. Cambria County, 29 Pa. Super. Ct. 166. In Pennsylvania the "violence and undue means" which gives jurisdiction to a coroner refers to unlawful conduct of another from which death results, in the absence of which unlawful conduct neither inquest nor view of the body is necessary. Id. To warrant the holding of an inquest, the killing should be shown to have been sudden and unusual and of such a nature as to indicate a possibility of death by the hand of the deceased or through the instrumentality of some other person. Evidence held to justify the taking of an inquest in thirteen cases, but not in a fourteenth. Morgan v. San Diego County [Cal. App.] 86 P. 720.

61, 62. Miller v. Cambria County, 29 Pa, Super. Ct. 166.

63. Finarty v. Marion County, 127 Iowa, 543, 103 N. W. 772. An answer in an action for coroner's fees alleging that no supposition or suspicion of death by unlawful means existed, but not alleging that the mind of the coroner was devoid of suspicion or that he was corrupt, ignorant, or stupid, is bad on demurrer as being a mere conclusion and immaterial. Id.

64. First inquest by a justice and later another by the coroner, the latter not justified. Morgan v. San Diego County [Cal. App.] 86 P. 720.

65. Act April 14, 1834 (P. L. 333), not repealed by Act May 24, 1887 (P. L. 185). Commonwealth v. Mallini [Pa.] 63 A. 414.

66. The general law requiring all claims to be so audited (Code 1896, § 958, subd. 3, §§ 1416, 1417, and 1429, subd. 4, and local act Feb. 18, 1899), and the special law of Feb. 10, 1899 (Acts 1898-99, p. 815), providing that the board have no discretion in allowing coroner's fees, held not inconsistent. Miller v. State [Ala.] 39 So. 658.

67. Finarty v. Marion County, 127 Iowa, 543, 103 N. W. 772.

68. The mere asking for money not being in itself unlawful. People v. Jackson, 47 Misc. 60, 95 N. Y. S. 286.

69. Indictment held defective in failing to allege that defendant had jurisdiction of the case and was in the exercise of his official functions thereto. People v. Jackson, 47 Misc. 60, 95 N. Y. S. 286.

70. People v. Hoffmann [Mich.] 12 Det. Leg. N. 805, 105 N. W. 838. Held proper to permit deputy auditor general to testify that he relied upon coroner's certificate in making out warrant. Id.

further shown that the coroner's clerk in order to make a claim against the state out of the case obtained the attending physician's statements that the deceased was a stranger,[73] and such physician may testify that in signing the coroner's statement, as presented to him, that deceased was a "stranger," she meant a stranger to herself and not a stranger to the state,[74] or that no fees were received as per coroner's account for making a post mortem examination.[75] Evidence may be introduced showing previous similar falsification of accounts in other cases as shown by the public records to support an inference of dishonesty.[76] In such collateral cases it may be shown that the deceased person in one instance was not a stranger, but for five years a member of a union in the county where he died,[77] and in another that the coroner held no inquest as per charge in the account.[78]

The verdict of a coroner's jury is not admissible in evidence on an issue of the sanity of a testatrix who died by suicide.[79]

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§ 1. *Definition and nature of corporations.*[2]—As a general rule, a corporation will be looked upon as a legal entity,[3] but only until a sufficient reason for the contrary appears, for when the notion of legal entity is used to defeat public convenience, justify a wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons.[4] A corporation is sometimes expressly declared to be a person within the meaning of this word as used in statutes.[5] A joint stock company is not a corporation.[6] A corporation owes its existence to a creative franchise, which is entirely different and distinct from other special franchises which the corporation may be endowed with at the time of its incorporation or may subsequently acquire.[7]

§ 2. *Classification of corporations.*[8]—In determining the character of a corporation, reference must be had to that portion of its articles of association expressing the nature and scope of its business,[9] and the fact that a corporation is

71, 72, 73, 74. People v. Hoffmann [Mich.] 12 Det. Leg. N. 805, 105 N. W. 838.

75. Testimony as to reasonableness of a $30 fee immaterial but unprejudicial. People v. Hoffmann [Mich.] 12 Det. Leg. N. 805, 105 N. W. 838.

76, 77, 78. People v. Hoffmann [Mich.] 12 Det. Leg. N. 805, 105 N. W. 838.

79. Both the testatrix and her mother having committed suicide. In re Dolbeer's Estate [Cal.] 86 P. 695.

1. This article treats generally of domestic private corporations. Foreign corporations is made the subject of a separate article (see 5 C. L. 1470), and taxation of corporations is treated in the article on Taxes (see 6 C. L. 1602). Consult for questions peculiar to corporations for particular purposes, Banking and Finance, 7 C. L. 358; Building and Loan Associations, 7 C. L. 500; Fraternal Mutual Benefit Associations, 5 C. L. 1523; Exchanges and Boards of Trade, 5 C. L. 1383; Insurance, 6 C. L. 69; Religious Societies, 6 C. L. 1289; Street Railways, 6 C. L. 1556; Telegraphs and Telephones, 6 C. L. 1665; Waters and Water Supply, 6 C. L. 1840. Related topics are Associations and Societies, 7 C. L. 294; Franchises, 5 C. L. 1518, and Joint Stock Companies, 6 C. L. 209.

The analysis here adopted is embraced in that of Clark and Marshall on Corporations. The searcher may thus readily find the earlier cases by using this and preceding articles in connection with Clark and Marshall.

2. See 5 C. L. 765.

3. United States v. Milwaukee Refrigerator Transit Co., 142 F. 247.

4. A transit company organized for the purpose of enabling a brewing company to evade the provisions of the Elkins Act, Feb. 19, 1903, c. 708 (32 Stat. 847), relating to rebates, held sufficiently identified with the brewing company to render commissions paid the transit company by railroads equivalent to rebates given to the brewing company. United States v. Milwaukee Refrigerator Transit Co., 142 F. 247.

5. Code W. Va. 1899, c. 13, § 17, subd. 9. Tennis Bros. Co. v. Wetzel & T. R. Co., 140 F. 193; Wetzel & T. R. Co. v. Tennis Bros. Co. [C. C. A.] 145 F. 458.

6. Although it has many of the characteristics of a corporation, the distinction being that a corporation proper owes its existence to the sovereign power, while a joint stock company owes its existence to the contract between its members. People v. Rose, 219 Ill. 46, 76 N. E. 42.

7. San Joaquin & K. R. Canal & Irrigation Co. v. Merced County [Cal. App.] 84 P. 285. See Taxes, 6 C. L. 1602.

8. See 5 C. L. 765.

9. International Boom Co. v. Rainy Lake

incorporated under an act relating to private corporations will not prevent it from being a quasi public corporation if the purposes for which it is organized bring it within the latter class.[10] A public service corporation is one which undertakes, independently of its contract duties, to furnish the public, both as a whole and as individuals, with some service or commodity.[11] A distinction is made between business corporations and others, in that the former are required to comply with certain formalities before engaging in business in foreign states.[12] For the purposes of taxation, the legislature of a state may classify corporations in any way it may choose, so long as the taxation of those of the same class is equal.[13] A mutual insurance company cannot be classed as a corporation organized not for pecuniary profit,[14] nor is an incorporated athletic club, sustained by membership dues, within the reason of the rule which limits the liabilities of hospitals and other corporations of like nature.[15]

§ 3. *Creation, name and existence of corporations, and the amendment, extension, and revival of charters.*[16]—A sovereign grant is necessary to confer the powers and privileges of a corporation,[17] and the acts and formalities necessary to bring the corporation into being are prescribed by statute.[18] Failure to comply with mandatory provisions relating to incorporation will prevent the proposed corporation from becoming such de jure,[19] but failure to comply with directory provisions will not have this effect.[20]

Where the laws relating to incorporation have been complied with, mandamus lies to compel the filing of the articles by the officer whose duty it is to file them,[21] but it will not issue to compel the secretary of state to file articles of association which are not entitled to be filed.[22]

River Boom Corp. [Minn.] 107 N. W. 735. And it cannot be made another kind of corporation merely by being labeled as such, if its declared objects show it to be something else. Id.

10. A natural gas company incorporated under Burns' Ann. St. Ind. 1901, c. 38, relating to the organization of manufacturing and mining companies, may nevertheless be a quasi public corporation. Quinby v. Consumers' Gas Trust Co., 140 F. 362. See, also, City of Indianapolis v. Consumers' Gas Trust Co. [C. C. A.] 144 F. 641. The investing of natural gas companies with the power to use city streets was a declaration and establishment of the fact that such companies were engaged in performing public services. Id.

11. Such, for example, as water. Robbins v. Bangor R. & Elec. Co., 100 Me. 496, 62 A. 136. From the existence of the public duty the law will imply a contract, if necessary, with each citizen served. Id. See post § 7, subd. A, In general.

12. St. 1903, p. 437, § 58, requiring foreign corporations to file a certain power of attorney or certificate with the secretary of state, not applicable to a foreign university corporation. Tulane University v. O'Connor [Mass.] 78 N. E. 494. Rev. Civ. Code § 883. Bishop & Babcock Co. v. Schleuning [S. D.] 104 N. W. 854; Thompson v. Scroyer [S. D.] 104 N. W. 854.

13. License taxes imposed by Code Supp. 1902, § 1333d, on insurance companies. Iowa Mut. Tornado Ins. Ass'n v. Gilbertson [Iowa] 106 N. W. 153.

14. Neither under Code, § 1642, relating to the organization of corporations not for pecuniary profit, nor under section 1304, exempting religious, charitable, and educational corporations from taxation, nor within the exceptions stated in Code Supp. 1902, § 1333d, relating to license taxes. Iowa Mut. Tornado Ins. Ass'n v. Gilbertson [Iowa] 106 N. W. 153.

15. Athletic club liable for injuries to members through negligence of its servants. Beecroft v. New York Athletic Culb, 97 N. Y. S. 831.

16. See 5 C. L. 766.

17. Unincorporated joint stock company does not possess such powers and privileges. Spotswood v. Morris [Idaho] 85 P. 1094.

18. Under Ky. St. 1903, § 539, subd. 7, requiring the articles of incorporation to show the place when the officers are to be elected, a statement of the principal place of transacting business is sufficient, the election of officers being a part of the business of the corporation, which, unless otherwise specified, must be transacted at its principal place of business. McChesney v. Batman [Ky.] 89 S. W. 198.

19. Butler Paper Co. v. Cleveland, 220 Ill. 128, 77 N. E. 99.

20. Requirement of notice to stockholders of first meeting to be given in certain way, by Hurd's Rev. St. 1903, c. 32, § 3. Butler Paper Co. v. Cleveland, 220 Ill. 128, 77 N. E. 99.

21. Secretary of state. McChesney v. Batman [Ky.] 89 S. W. 198.

22. In Washington, trust companies cannot be incorporated under the general incorporation laws, but must be incorporated un-

In the absence of a reservation of power to amend, change or alter the charter of a corporation, the legislature cannot, by subsequent legislation, deprive a corporation of its charter powers upon the strength of which the corporation was organized,[23] and an intention to interfere with such rights will not be presumed;[24] nor, in the absence of such a reservation, can the state amend a charter in any material way without the consent of the corporation,[25] and this exemption may be claimed not only by the corporation which made the contract but by any legal successor thereof;[26] but a corporation organized under general incorporation laws holds its franchises subject to the right of the state to change those laws in any manner it may deem proper, except that vested rights must not be interfered with,[27] and as statutory and constitutional reservations of the right to amend or repeal charters constitute a part of all charters granted while such provisions are in force,[28] all who become members of a corporation, as well as those who bestow benefactions upon it, being thus charged with notice of the reserved power of the state to amend,[29] an amendment of a charter pursuant to such a reservation does not impair any contract between the corporation and the state.[30] Under a reservation of power to alter or repeal corporate charters, the state may regulate the internal affairs of the corporation, where the regulating law is general and exhibits the public policy of the state,[31] though the effect of the alteration is to add to the burdens of the stockholders by increasing their liability, or to decrease the value of their stock, or to change the name, offices, or proportion in the management and control of the corporation,[32] but such regulation must not interfere with the contracts or vested rights of corporations existing prior to its adoption.[33] A reserved right to amend or alter the charter of a corporation, sub-

der Laws 1903, p. 367, c. 176, and the secretary of state will not be compelled to file the articles of a trust company not organized pursuant to this statute. State v. Nichols, 40 Wash. 437, 82 P. 741. Where the applicant has no right to use the name under which it seeks to be incorporated. People v. Rose, 219 Ill. 46, 76 N. E. 42. See post this section, subd. Corporate Name.

23. Power to lay gas pipes in streets of township. Public Service Corp. v. De Grote [N. J. Eq.] 62 A. 65.

24. Charter right to lay gas pipes in streets of township not repealed or modified by subsequent act subdividing such township into several townships. Public Service Corp. v. De Grote [N. J. Eq.] 62 A. 65.

25. Such an amendment would be violative of the constitutional prohibition against impairment of contracts. State v. Chicago & N. W. R. Co. [Wis.] 108 N. W. 594.

26. Corporate purchaser of city waterworks plant from a corporation held to be protected from violation of a contract between the old company and the city which passed to the new corporation under its purchase, though the new corporation was not organized until after the adoption of the statutory or constitutional provision reserving the right to amend or alter the charters of all corporations. City of Vicksburg v. Vicksburg Waterworks Co., 202 U. S. 453, 50 Law. Ed. —.

27. This is true whether there be a statutory reservation of the right to change or not. Converse v. Aetna Nat. Bank [Conn.] 64 A. 341.

28. Under Rev. St. pt. 1, c. 18, tit. 3, § 8, the charters of all corporations are subject to alteration, suspension, or repeal, in the discretion of the legislature. Lord v. Equitable Life Assur. Soc., 109 App. Div. 252, 96 N. Y. S. 10. Under this statute the charter of a life insurance company may be altered, suspended, or repealed, notwithstanding section 11 of the Laws of 1853, c. 463, under which the company was organized, provides that companies organized thereunder shall be subject to the general corporation law "except as hereinafter specially provided for," and section 20 provides that the charters of such companies shall continue for twenty years. Id.

29. Amendment by passage of general law relating to consolidation. Central University v. Walter's Ex'rs [Ky.] 90 S. W. 1066.

30. State v. Chicago & N. W. R. Co. [Wis.] 108 N. W. 594.

31. Hinckley v. Schwarzschild & Sulzberger Co., 107 App. Div. 470, 95 N. Y. S. 357; Lord v. Equitable Life Assur. Soc., 109 App. Div. 252, 96 N. Y. S. 10.

32. Hinckley v. Schwarzschild & Sulzberger Co., 107 App. Div. 470, 95 N. Y. S. 357. Applied to life insurance company. Lord v. Equitable Life Assur. Soc., 109 App. Div. 252, 96 N. Y. S. 10.

33. Lord v. Equitable Life Assur. Soc., 109 App. Div. 252, 96 N. Y. S. 10. An amendment authorizing the issue of preferred stock upon the vote of two-thirds of the stockholders, and the consequent subordination of the rights of the stockholders whose stock is already issued, is within the reserved power of the legislature under Const. art. 8, § 1, though additional burdens are there-

ject to the condition that no injustice shall be done to the interests of the stockholders, cannot be exercised to the impairment of the contracts of the corporation;[34] nor can the state use its right to amend for the purpose of appropriating the corporation's property without the consent of its members,[35] and an amendment to the charter of a corporation will, if possible, be construed so as not to interfere with the contractual obligations of the corporation already incurred.[36] The reserved right to amend the charter of a corporation cannot be destroyed by a mortgage and sale thereunder.[37]

The right to amend or alter their charters is sometimes delegated to the corporations themselves.[38]

An amendment to articles of incorporation need not be acknowledged unless an acknowledgment is required by the statute authorizing the amendment,[39] but where amendments are required to be filed with the secretary of state, no rights can be claimed under amendments which have not been filed.[40] The exercise of powers not conferred by the articles of incorporation cannot be justified by amendments thereto subsequently filed.[41]

An act extending the period of existence of a corporation is a grant of corporate power,[42] but it does not follow from this that such an act as applied to corporations existing under special acts is itself a special act.[43]

Corporate name.[44]—A corporate name, or the right to use it, is, in a sense,

by imposed upon the shareholders. Hinckley v. Schwarzschild & Sulzberger Co., 107 App. Div. 470, 95 N. Y. S. 357.

34. Miss. Const. 1890, § 178. City of Vicksburg v. Vicksburg Waterworks Co., 202 U. S. 453, 50 Law. Ed. —. Authorizing a city to construct its own waterworks, held an impairment of an exclusive contract between the city and a corporation already having the right to maintain such works. Id.

35. The property of a mutual insurance company and the equitable interests of the members in such property are within the state constitutional guaranty against impairment of the obligation of a contract, and within the inhibition of the national constitution as regards equal protection of the laws and deprivation of property without due process of law. Huber v. Martin [Wis.] 105 N. W. 1031. A law enacted during the life of a mutual insurance company, providing for the distribution of its assets or the bestowal thereof upon another without the consent of all of its members, is, in the absence of charter authority therefor, unconstitutional. Id.

36. Supplement of 1867 to the charter of the Jersey City & Bergen Railroad Company (P. L. 1867, p. 53), in enacting that the company should not be hindered by any city or town in constructing and running its railroads, provided the same should be constructed and run according to the provisions of said act, did not discharge the company from its obligation to Jersey City to pay licenses which the company had undertaken by contract to pay. Jersey City v. North Jersey St. R. Co., 72 N. J. Law, 383, 61 A. 95.

37. The Union Pacific Railroad Company being originally a quasi public enterprise fostered by the Federal government, and there being a reservation of the right to amend its charter as public interests might require, where an amendment to its charter giving it the right to issue bonds to construct a bridge provided that the bridge should be open to use by other roads, such proviso was not defeated by a mortgage foreclosure sale of the road, though the amendment was enacted after the execution of the mortgage under which the foreclosure sale was had. Union Pacific R. Co. v. Mason City, etc., R. Co., 199 U. S. 160, 50 Law. Ed. —.

38. See Act March 20, 1903, amending Code § 1283. Montgomery Amusement Co. v. Montgomery Traction Co., 139 F. 353. The saving clause of Act Oct. 2, 1903, preserved to a street railroad company existing prior to the enactment of such act the right to amend its charter pursuant to the authority conferred by Act March 20, 1903, notwithstanding § 47 of the Act of Oct. 2, 1903, providing a method for amendment of the charters of street railroad companies. Id.

39. No acknowledgment of amendments of articles of railroad corporation is required by Civ. Code § 362. Boca & L. R. Co. v. Sierra Valleys R. Co. [Cal. App.] 84 P. 298.

40. Right to condemn property along certain right of way. Boca & L. R. Co. v. Sierra Valleys R. Co. [Cal. App.] 84 P. 298.

41. Right to condemn property along certain route. Boca & L. R. Co. v. Sierra Valleys R. Co. [Cal. App.] 84 P. 298.

42. Jersey City v. North Jersey St. R. Co. [N. J. Law] 63 A. 906.

43. Act April 21, 1876 (P. L. 1876, p. 235, Gen. St. p. 972), providing a method for the extension to corporate existence, was not intended to extend the duration of special privileges or franchises, and hence, though it applied to corporations holding such privileges, it was not contrary to Const. art. 4, § 7, par. 11, prohibiting special acts conferring corporate powers. Jersey City v.

property, and may be assigned[45] and protected by injunction,[46] and a certificate of incorporation will not be issued under a name already appropriated by another corporation or association,[47] or where the right to the name is doubtful.[48] The mere change of name of a corporation will not change the identity of the corporation or relieve it of any of its liabilities.[49] The use of a name importing that the user is a corporation is not conclusive,[50] and the use of a corporate name for the purpose of soliciting business, when the persons or company so using such name are not in fact incorporated, is sometimes prohibited by statute,[51] but the bare fact of the use of a corporate name by persons unincorporated will not bring them within such a statute,[52] nor render the contracts of such persons invalid.[53] Where a voluntary association is incorporated, the name of the corporation need not be the same as that of the voluntary association.[54] The misnomer of a corporation will be regarded as immaterial where the identity of the corporation intended can be ascertained from the name used.[55]

Purposes.[56]

Fees.[57]—Fees paid voluntarily but under a misapprehension of law cannot be recovered back.[58]

North Jersey St. R. Co. [N. J. Law] 63 A. 906.

44. See 5 C. L. 768.

45. So as to give a purchaser from the corporation's assignee for creditors the right to use such name as a designation of publications formerly issued under its name. Lothrop Pub. Co. v. Lothrop, Lee & Shepard Co. [Mass.] 77 N. E. 841.

46. Injunction to restrain use of corporate name of plaintiff by another corporation engaged in a competitive business. People v. Rose, 219 Ill. 46, 76 N. E. 42.

47. Mandamus will not lie to compel the issue of a certificate of incorporation under a name to which the applicants have no right, as where another corporation would have the right to enjoin the use of the name by the new corporation. People v. Rose, 219 Ill. 46, 76 N. E. 42. The use by a partnership or joint stock company of a corporate name in violation of 1 Starr & C. Ann. St. 1896 [2nd Ed.], p. 1332, par. 368, will not give a corporation the right to use the name of such company, so as to entitle it to mandamus to compel the issue of a certificate of incorporation to it under such name. Id. Under Cobbey's Ann. St. 1903, the auditor is not authorized to issue a certificate of organization to a corporation whose name or title resembles one already in use in the state to such an extent as to have a tendency to mislead the public. Knights of Maccabees of the World v. Searle [Neb.] 106 N. W. 448. A benevolent society is prohibited by Rev. St. 1899, § 1394, from being incorporated under a name already assumed by another such society. Young Women's Christian Ass'n v. St. Louis Women's Christian Ass'n, 115 Mo. App. 228. 91 S. W. 171. But this statute does not give one benevolent association the right to become a party to proceedings by another such society for incorporation for the purpose of objecting that the name of the latter has already been appropriated by the former. Id.

48. As where it appeared that a foreign company, which had not complied with the statutory conditions precedent to the right of a corporation to do business in the state, was doing business in the state, but it did not appear whether such company was a corporation within the statute imposing such conditions or was a partnership belonging to that class of partnerships called joint stock companies. People v. Rose, 219 Ill. 46, 76 N. E. 42.

49. Wright-Caesar Tobacco Co. v. Hoen & Co. [Va.] 54 S. E. 309.

50. Concern using name importing that it was a corporation, held to have used such name only as a trade name under which a partnership was conducted (Whitt v. Blount, 124 Ga. 671, 53 S. E. 205), but in the absence of a contrary showing a concern using a corporate name will be presumed to be incorporated (Turner's Chapel African M. E. Church v. Lord Lumber Co., 121 Ga. 376, 49 S. E. 272).

51. 1 Starr & C. Ann. St. 1896 [2nd Ed.] p. 1332, par. 368. People v. Rose, 219 Ill. 46, 76 N. E. 42. See, also, Trade Marks and Trade Names, 6 C. L. 1713, for discussion of these and similar statutes relating to use of partnership names.

52. The purpose of 1 Starr & C. Ann. St. 1896 [2nd Ed.] p. 1332, par. 368, is to prevent the fraudulent use of a corporate name for the purpose of securing business, etc. People v. Rose, 219 Ill. 46, 76 N. E. 42.

53. The penalty imposed by 1 Starr & C. Ann. St. 1896 [2nd Ed.] c. 1332, par. 368, for unauthorized use of corporate name, is exclusive. People v. Rose, 219 Ill. 46, 76 N. E. 42.

54. See Rev. St. 1898, § 1991. Spiritual & Philosophical Temple v. Vincent [Wis.] 105 N. W. 1026.

55. In pleading. Clifford v. Thun [Neb.] 104 N. W. 1052; Nisbet v. Clio Min. Co. [Cal. App.] 83 P. 1077; Grafton Grocery Co. v. Home Brewing Co. [W. Va.] 54 S. E. 349; Western Bank & Trust Co. v. Ogden [Tex. Civ. App.] 15 Tex. Ct. Rep. 594, 93 S. W. 1102. See post, § 10, Actions by and against corporations. The misnomer of a corporation in a devise or bequest will not

Proof of incorporation.[59]—The corporate existence of a litigant suing or sued as a corporation need not be proved unless put in issue by the pleadings,[60] but when the existence of a corporation is properly assailed, the burden of proof is upon it to show that it is either a de jure or a de facto corporation.[61] This burden may be supported by presumption arising from the use of a corporate name,[62] by inference from facts connected with its business,[63] by its articles of incorporation,[64] or certified copy thereof.[65]

§ 4. *Effect of irregularities in organization, and of failure to incorporate.*[66]—A corporation cannot legally carry on business until it has complied with all the formalities required by law;[67] but there is a clear distinction between acts required to be done as conditions precedent to the existence of the corporation and those which are ground for forfeiture of charter rights after they have been legally acquired,[68] and failure to perform acts coming within the latter class does not ipso facto cause a forfeiture of the corporation's charter,[69] the question of forfeiture in such case being solely between the corporation and the state.[70] Only the state can complain of purely formal defects in the organization of a corporation.[71]

A conveyance of corporate property after amendment of its charter but before the recording of the amendment is not necessarily invalid.[72]

defeat the devise or bequest where the identity of the corporation is otherwise sufficiently certain. Doan v. Vestry of Parish of Ascension [Md.] 64 A. 314.

56. See 5 C. L. 768.

57. See 5 C. L. 769.

58. Alton Light & T. Co. v. Rose, 117 Ill. App. 83.

59. See 5 C. L. 769.

60. Where an allegation of the corporate existence of the defendant is not denied, it need not be proved. Simon v. Calfee [Ark.] 95 S. W. 1011. Where a corporation is sued as such, a general denial does not put its corporate existence in issue. Montgomery v. Seaboard Air Line R. Co. [S. C.] 53 S. E. 987. Where a corporation is sued as such, an appearance and answer to the merits admits its corporate existence. Faust v. Southern R. Co. [S. C.] 54 S. E. 566.

61. Morrison v. Indianapolis & W. R. Co. [Ind.] 76 N. E. 961. Plea nul tiel corporation puts the burden of proof on the corporation plaintiff. Spreyne v. Garfield Lodge No. 1, 117 Ill. App. 253.

62. Where the name of a party to an action imports that it is a corporation, it will be presumed to be such until the contrary appears. Name of party was "P. A. Lord Company." Turner's Chapel African M. E. Church v. Lord Lumber Co., 121 Ga. 376, 49 S. E. 272. But the use of a corporate name is not conclusive that the user is a corporation. Whitt v. Blount, 124 Ga. 671, 53 S. E. 205.

63. A written receipt showing that a party contracted with a corporation in its corporate name, and received money from such corporation, is sufficient evidence of incorporation in a suit by the corporation on such contract. Sierra Land & Cattle Co. v. Bricker [Cal. App.] 85 P. 665.

64. The articles of incorporation, with the filing marks thereon, constitute evidence both of the filing and of due incorporation. Sierra Land & Cattle Co. v. Bricker [Cal. App.] 85 P. 665. Charter does not prove corporate existence where there is a material discrepancy of name. Charter to "United Slavonians Benevolent Society" does not prove corporate existence of Garfield Lodge No. 1 of the United Slavonians Benevolent Society. Spreyne v. Garfield Lodge No. 1, 117 Ill. App. 253.

65. But where there is no provision for the recording of a charter, a certified copy of such charter from the records where it is recorded is not admissible in evidence. There is no provision for the record of charters of consolidated railroad companies, issued under Civ. Code 1902, § 2050. Montgomery v. Seaboard Air Line R. Co. [S. C.] 53 S. E. 987.

66. See 5 C. L. 769.

67. Payment of bonus tax required by Acts 1900, p. 411, c. 272. Murphy v. Wheatley [Md.] 63 A. 62.

68. Murphy v. Wheatley [Md.] 63 A. 62.

69. Failure of a corporation to pay the bonus tax required by Acts 1900, p. 411, c. 272, did not ipso facto cause a forfeiture of its charter, where the corporation did not organize within two years from the granting of its charter and the tax was not assessed against it, though § 85a provides that the failure to pay the tax in such case shall raise a conclusive presumption that the corporation has surrendered its charter rights. Murphy v. Wheatley [Md.] 63 A. 62. See post § 16, subd. F, Personal Liability of Stockholders for Debts of Corporation and Remedies.

70. Murphy v. Wheatley [Md.] 63 A. 62.

71. The defendant in condemnation proceedings by a railroad company cannot take advantage of the amended certificate of the plaintiff's incorporation not being acknowledged or proved before the proper officer. Philadelphia & C. Ferry Co. v. Intercity Link R. Co. [N. J. Law] 62 A. 184.

72. Amendment authorized increase of capital stock and of number of directors from three to five, and the five directors chosen under the amendment acted, without

Stockholder as partner or agent.[73]—Incorporators who transact business upon the strength of an organization which is materially defective under the enabling statute are personally liable as partners to those dealing with them without knowledge of the incorporation,[74] and under this rule officers and stockholders of a foreign corporation which is engaged in a business which it is not authorized to conduct may be held liable as partners to a party dealing with the employees of the corporation;[75] but the incorporators cannot be held liable as partners on the ground of irregularities in the organization of the corporation,[76] nor on account of false statements in the articles of association,[77] nor on account of fraudulent concealment from the secretary of state, on the application for the certificate of incorporation, of the failure to comply with the statutory provisions relative to incorporation.[78]

De facto corporation.[79]—A law under which a corporation may be created de jure is essential to the existence of a corporation de facto,[80] but given the necessary legal basis for a de facto corporation, its existence is a matter of fact to be established by evidence,[81] and its powers,[82] and the validity of its acts, depend to a great extent upon the doctrines of collateral attack[83] and estoppel.[84]

Collateral attack.[85]—As a general rule, corporate integrity cannot be collaterally attacked,[86] or, in other words, the legality of the organization of a corporation can only be attacked by a direct proceeding by quo warranto,[87] but this rule does

objection, as directors, and pursuant to authority given by stockholders. Werle v. Northwestern Flint & Sandpaper Co., 125 Wis. 534, 104 N. W. 743.

73. See 5 C. L. 769.

74. Mandeville v. Courtright [C. C. A.] 142 F. 97.

75. Stockholders and officers of New Jersey Corporation illegally conducting the practice of dentistry in Pennsylvania held liable to a patient for an injury inflicted by an unlicensed employee who attempted to operate upon plaintiff. Mandeville v. Courtright [C. C. A.] 142 F. 97.

76. Party accepting corporation's note could not hold the incorporators liable as partners on account of their failure to elect directors, as required by Ky. St. § 551. Drake v. Herndon [Ky.] 91 S. W. 674. Stockholders are not rendered liable as partners on account of failure to acknowledge the articles of association. First Nat. Bank v. Rockefeller, 195 Mo. 15, 93 S. W. 761.

77. False statements as to amount of subscriptions paid in. Webb v. Rockefeller, 195 Mo. 57, 93 S. W. 772; First Nat. Bank v. Rockefeller, 195 Mo. 15, 93 S. W. 761.

78. Concealment that stock was fictitiously paid up. Webb v. Rockefeller, 195 Mo. 57, 93 S. W. 772. Concealment of fact that stock was fictitiously paid up and that articles were not acknowledged. First Nat. Bank v. Rockefeller, 195 Mo. 15, 93 S. W. 761.

79. See 5 C. L. 770.

80. An unconstitutional statute is not a sufficient basis for a de facto corporation. Huber v. Martin [Wis.] 105 N. W. 1031.

81. Evidence held to show the existence of a de facto corporation. McCarter v. Ketcham, 72 N. J. Law, 247, 62 A. 693.

82. A de facto corporation may maintain condemnation proceedings. Morrison v. Indianapolis & W. R. Co. [Ind.] 76 N. E. 961.

83. See post this section, subd. Collateral Attack.

84. See post this section, subd. Estoppel to Deny Incorporation.

85. See 5 C. L. 770.

86. Clifford Banking Co. v. Donovan Commission Co., 195 Mo. 262, 94 S. W. 527. Fact that an amended certificate of incorporation was not acknowledged or proved befors the proper officer is immaterial in proceedings by the corporation to condemn property. Philadelphia & C. Ferry Co. v. Intercity Link R. Co. [N. J. Law] 62 A. 184. Defects in the certificate of incorporation issued by the secretary of state, such as failure of certificate to contain names of incorporators, cannot be taken advantage of collaterally. Central of Georgia R. Co. v. Union Springs & N. R. Co. [Ala.] 39 So. 473. Condemnation proceedings. Eddleman v. Union County Traction & Power Co., 217 Ill. 409, 75 N. E. 510. Mere irregularities in organization are unavailable as a defense in condemnation proceedings instituted by the corporation. Central of Georgia R. Co. v. Union Springs & N. R. Co. [Ala.] 39 So. 473. Under Code § 1636, providing that one who is sued for a wrong done to a corporation's property or for injury to its interests cannot set up want of organization of the corporation as a defense, such defense cannot be set up in a suit to enjoin the removal of fixtures from the corporation plaintiff's property. State Security Bank v. Hoskins [Iowa] 106 N. W. 764. Failure of a street railroad company to conform to the Act of March 20, 1903, p. 116, to amend Code Ala. § 1283, in enlarging its powers, held not available on collateral attack to invalidate the proceedings whereby such powers were enlarged. Montgomery Amusement Co. v. Montgomery Traction Co., 139 F. 353. Want of legal organization cannot be set up as a defense in an action by a corporation upon a contract. Cobbey's Ann. St. 1903, § 4136.

not apply to a pretended but not even de facto corporation,[88] nor to the right of a corporation, whether de jure or de facto, to exercise a certain power.[89]

Estoppel to deny incorporation.[90]—One who has voluntarily[91] dealt with a corporation as such, cannot escape his liability or obligation to the corporation arising out of the transaction by asserting that the corporation was not legally organized[92] or reorganized;[93] nor can a stockholder who participates in proceedings to extend the life of the corporation, and thereafter recognizes the validity of such extension, deny the validity of the extension;[94] but it is not every attempt at incorporation that precludes persons dealing with the purported corporation from denying its corporate existence,[95] and there can be no estoppel to deny incorporation where there is no semblance of even a de facto corporation,[96] or there has been no bona fide attempt to organize as a corporation.[97]

Lincoln Butter Co. v. Edwards-Bradford Lumber Co. [Neb.] 107 N. W. 797.

87. Eddleman v. Union County Traction & Power Co., 217 Ill. 409, 75 N. E. 510.

88. Huber v. Martin [Wis.] 105 N. W. 1031.

89. Boca & L. R. Co. v. Sierra Valleys R. Co. [Cal. App.] 84 P. 298. See post § 7 A. In General.

90. See 5 C. L. 770.

91. When shipments will only be received when billed in the name of a through freight line, shippers are not thereby estopped to question its corporate existence. Fish v. Kanawha Dispatch, 118 Ill. App. 284.

92. Palatine Ins. Co. v. Santa Fe Mercantile Co. [N. M.] 82 P. 363; Rannels v. Rowe [C. C. A.] 145 F. 296. Ky. St. 1903, § 566. Failure to elect directors, as required by Ky. St. 1903, § 551. Drake v. Herndon [Ky.] 91 S. W. 674. It does not lie in the mouth of one who has borrowed money from a de facto bank to set up, in defense to an action to recover that money, that the bank had no right to exist. Campbell v. Perth Amboy Shipbuilding & Engineering Co. [N. J. Eq.] 62 A. 319. Persons who give bond to a corporation as such cannot when sued thereon set up incapacity to sue. Thompson v. Commercial Union Assur. Co., 20 Colo. App. 331, 78 P. 1073. Dealing with a corporation so as to recognize its corporate existence and so as to cause the corporation to change its position prevents a denial. Sureties on an employe's bond, which recognizes the corporate existence and under which employe received corporate funds, are estopped. Spreyne v. Garfield Lodge No. 1, 117 Ill. App. 253. A person who contracts with a corporation as such is estopped to deny its legal corporate existence at the time of his contract, but such estoppel does not preclude a showing that corporate existence ceased subsequent to the contract. Clark v. American Cannel Coal Co., 35 Ind. App. 65, 73 N. E. 727.

93. Where a corporation, though having notice that articles of reincorporation had been filed in the county clerk's office and with the secretary of state, yet failed to take any steps for seven years to disavow the action of its officers, it could not evade the organization tax imposed by Ky. St. 1903, § 4225, on the ground that the reorganization was unauthorized. Licking Valley Bldg. Ass'n No. 3 v. Com. [Ky.] 89 S. W. 682.

94. Stockholder was represented and voted by proxy at meeting held pursuant to 3 Mills' Ann. St. Rev. Supp. § 567b, extending the life of the corporation, and thereafter voted by proxy at a meeting at which an assessment was levied upon the stockholders. Callahan v. Chilcott Ditch Co. [Colo.] 86 P. 123.

95. A petition which alleges that defendants were engaged as partners in a commercial business under the name of a limited corporation, and in such name contracted the indebtedness sued on, does not show an estoppel upon the plaintiff, though it further alleges that the defendants attempted to organize as a corporation but in doing so violated the law, or did not comply with it in many particulars, especially in not recording the original subscriptions and in not publishing the charter as required by law. Louisiana Nat. Bank v. Henderson [La.] 40 So. 779. Allegations that there was a notarial charter, and that the same was recorded in the proper mortgage book, did not show such an attempt at organization as would estop a creditor from denying the incorporation, where it did not appear that any of the stock was subscribed, or if any, what amount. Id. Where the allegations of a petition disclose that the defendants were conducting business as commercial partners in the name of a limited corporation, and falsely claimed to be a corporation, which the petition alleges was pretended to be organized under a defective charter and without complying with several requirements of the statute, and when it further alleges that none of the capital stock had been subscribed or paid or intended to be subscribed or paid, and it is not alleged that the charter was recorded in the mortgage book of the parish, such petition does not show such an organization as will estop the plaintiff from denying the corporate existence of the defendant. Provident Bank & Trust Co. v. Saxon [La.] 40 So. 778.

96. Where a company was merely a name used by a number of carriers in shipping through freight, a shipper who dealt with such company or agency in making shipments was not estopped to deny its incorporation. Kanawha Dispatch v. Fish, 219 Ill. 236, 76 N. E. 352.

97. In a suit by a creditor against the members of a commercial partnership, the defendant could not claim an estoppel against the plaintiff under Acts 1904, p. 281, No. 120, the facts being insufficient to disclose such an organization or operation as

The burden of proof is upon the party asserting the estoppel.[98]

§ 5. *Promotion of corporations; acts prior to incorporation.*[99]—Promoters are the persons who bring about the incorporation and organization of the corporation.[1] They act as voluntary trustees[2] and stand in the relation of fiduciaries to the corporation and the subscribers to its stock,[3] but they are not the agents of the corporation in such a sense as to bind it by their acts and engagements when it comes into existence.[4] The corporation, however, may either accept and ratify the acts and engagements of its promoters, and thus make them its own,[5] or may make a new contract concerning the same subject-matter with the parties to the original agreement,[6] but a corporation cannot be bound by and cannot ratify agreements made by its promoters which it is forbidden by law to make.[7]

A contract between promoters, which contemplates and provides for the control of the corporation independently of the judgment and discretion of the di-

is contemplated by this statute, to validate the charters of corporations irregularly organized. Provident Bank & Trust Co. v. Saxon [La.] 40 So. 778.

98. Where a petition alleges that the defendants are partners, the burden is on the defendants to allege and prove that they constitute a corporation or that the plaintiff is estopped to deny their corporate existence. Louisiana Nat. Bank v. Henderson [La.] 40 So. 779.

99. See 5 C. L. 771.

1. Hinkley v. Sac Oil & Pipe Line Co. [Iowa] 107 N. W. 629.

2. See v. Heppenheimer [N. J. Eq.] 61 A. 843; Camden Land Co. v. Lewis [Me.] 63 A. 523. See post this section, Fraud of Promoters.

3. Hinkley v. Sac Oil & Pipe Line Co. [Iowa] 107 N. W. 629.

4. State v. People's United States Bank [Mo.] 94 S. W. 953; Miser Gold Min. & Mill. Co. v. Moody [Colo.] 86 P. 335. And hence the failure of some of the promoters to keep an agreement between them did not justify the others in destroying a deed from them to the corporation which had been returned to them for the correction of the certificate of acknowledgment. Id. Especially where the breach of the agreement was caused by the failure to return the deed. Id. In the absence of an additional and sufficient consideration, a corporation is not liable for property transferred to it by an individual purchaser thereof before the corporation was organized, even though the purchase was made with a view of transferring the property to the corporation, the credit, however, having been extended to the individual. Koppel v. Massachusetts Brick Co. [Mass.] 78 N. E. 128.

5. Wasser v. Western Land Securities Co. [Minn.] 107 N. W. 160; State v. People's United States Bank [Mo.] 94 S. W. 953. If a corporation adopts, expressly or impliedly, a contract made by its promoters, and receives the benefits thereof, it thereby also assumes its obligations. Robbins v. Bangor R. & Elec. Co., 100 Me. 496, 62 A. 136. Agreement for issue of stock to corporators. Turner v. Fidelity Loan Concern [Cal. App.] 83 P. 62. Contract, that owner of street railroad franchise, which he assigned to another promoter for the benefit of the corporation which was to be formed, should receive a certain interest in the corporation and its properties, held to have been accepted by the corporation and to be binding upon it. Mulvihill v. Vicksburg R. Power & Mfg. Co. [Miss.] 40 So. 647. A corporation is liable for property purchased by its promoters and received and used by it. Streator Independent Tel. Co. v. Continental Tel. Const. Co., 217 Ill. 577, 75 N. E. 546. Corporation which received deed to land from promoters held bound by an agreement of the promoters to reconvey a portion back to their grantor. Carter v. Gray [Ark.] 96 S. W. 377. Evidence held not to show ratification. Tuttle v. Tuttle Co. [Me.] 64 A. 496.

Contract construed: Contract between owner of street railroad franchise and party agreeing to construct road, held to mean that the owner of the franchise should receive a certain interest in the road or corporation organized to construct it after the payment of expenses of construction. Mulvihill v. Vicksburg R., Power & Mfg. Co. [Miss.] 40 So. 647.

Consideration: A contract whereby a party agrees with promoters to sell property to the corporation when organized, is not without consideration moving to the promoters. Electric Fireproofing Co. v. Smith, 99 N. Y. S. 37.

Deed to corporation before organization: Under Rev. St. 1895, §§ 642, 643, which requires a certain organization of the corporation before the application for a charter can be filed, the promoters of a corporation who have come together and begun the preliminary steps for the organization of a corporation under a certain name will be considered as a partnership, and a deed to the proposed corporation in its corporate name will be considered as a deed to the partnership. Smith v. First Nat. Bank [Tex. Civ. App.] 16 Tex. Ct. Rep. 729, 95 S. W. 1111. Where the deed was delivered to one of the promoters, who had it recorded, this was a sufficient delivery. Id.

6. Wasser v. Western Land Securities Co. [Minn.] 107 N. W. 160.

7. Agreement by promoter of benefit association to pay commissions on insurance written before the organization of the association, such agreement being forbidden by Code, tit. 9, c. 9, § 1833, prohibiting such associations from employing paid agents ex-

rectors when the latter have been elected, is void,[8] but a contract vesting the control in the promoters for a specified period is not against public policy, at least as long as they retain their original interest and no rights of third persons intervene.[9] Promoters are not entitled to be reimbursed for services and expenses which were not rendered and incurred with a view to reimbursement by the corporation.[10]

Questions relating to the promotion of consolidated corporations are treated elsewhere.[11]

Incorporation of partnerships.[12]—Where an existing partnership is transformed into a corporation, the latter may become liable for the obligations of the former, either because of the property transferred from the one to the other,[13] or by reason of an assumption of such obligations.[14] The law as to incorporation of voluntary associations, which exists at the time such an association is formed, becomes a part of the association agreement so as to preclude any subsequent objection to the incorporation of the association pursuant to such law.[15]

Fraud of promoters.[16]—When a promoter makes secret profits at the expense of the corporation, he will be liable therefor to the corporation[17] and its stockholders,[18] and while as a rule the remedy of a defrauded subscriber is against the promoters,[19] where the corporation is owned and controlled by the promoters guilty of the fraud, the defrauded subscriber may have his remedy against the corporation, provided there are no intervening rights to be protected.[20]

cept for certain purposes. First Nat. Bank v. Church Federation [Iowa] 105 N. W. 578.

8. Electric Fireproofing Co. v. Smith, 99 N. Y. S. 37. But no such intention on the part of the promoters will be presumed, and therefore a contract by which promoters agree to purchase certain property at a certain price and to pay therefor in stock of the corporation to be organized is not necessarily or presumptively invalid. Id.

9. Gray v. Bloomington & N. R. Co., 120 Ill. App. 159.

10. Hinkley v. Sac Oil & Pipe Line Co. [Iowa] 107 N. W. 629.

11. Post § 13, Succession of Corporations; Reorganization; Consolidation.

12. See 5 C. L. 771.

13. Where a corporation takes over the entire business and assets of a partnership, it will be liable for the debts of the partnership to the extent of such assets. Baker Furniture Co. v. Hall [Neb.] 107 N. W. 117. **Priorities:** Where the transfer of the partnership assets to the corporation is in good faith, the corporate creditors are entitled to preference over the partnership creditors. Though Gen. Laws 1899, p. 357, c. 291, requiring certain things to be done upon the sale of a stock of goods, was not complied with. Thorpe v. Pennock Mercantile Co. [Minn.] 108 N. W. 940.

14. Where a corporation formed from a partnership assumes a contract of the partnership, without inquiring as to its terms and extent, it cannot thereafter repudiate such contract for want of knowledge of such terms and extent. Contract of service. Baker v. Appleton & Co., 107 App. Div. 358, 95 N. Y. S. 125.

15. Spiritual & Philosophical Temple v. Vincent [Wis.] 105 N. W. 1026.

16. See 5 C. L. 772.

17. Groel v. United Elec. Co. [N. J. Eq.] 61 A. 1061. Secret profits of sale by promoters to corporation (Camden Land Co. v. Lewis [Me.] 63 A. 523), and where they transfer property upon which they have obtained an option, it is their duty to disclose to a competent board of directors all the material facts in regard to the properties so transferred, and an overvaluation of such property is a fraud upon the corporation and its creditors, and will not protect them from their liability for the excess of valuation as upon unpaid subscriptions (See v. Heppenheimer [N. J. Eq.] 61 A. 843). See post § 16, subd. E, Liability of Stockholders on Account of Unpaid Subscriptions and Remedies. Issuing to themselves large proportion of stock without payment, such transaction not being revealed to subsequent subscribers. Hinkley v. Sac Oil & Pipe Line Co. [Iowa] 107 N. W. 629. The fact that promoters believe that the stock of the corporation will eventually be worth par will not justify an issue of stock to themselves without payment. Id. Secret contract by which a promoter, who afterwards became the treasurer of the corporation, was to receive and did receive royalties from the corporation, held fraudulent and invalid. Fred Macey Co. v. Macey [Mich.] 12 Det. Leg. N. 948, 106 N. W. 722.

18. A stockholder may sue for such profits where the corporation wrongfully refuses to sue. Groel v. United Elec. Co. [N. J. Eq.] 61 A. 1061. See post § 14 D, Stockholders Suing for Corporation.

19. Cranor Co v. Miller [Ala.] 41 So. 678.

20. Sale of property in exchange for stock, cancelled on ground that the other incorporators put nothing into the corporation, and that the corporation was only a scheme to get control of plaintiff's property. Cranor Co. v. Miller [Ala.] 41 So. 678. Subscriptions to stock fraudulently obtained by promoters

Equity has jurisdiction of a suit by a corporation to cancel a secret contract between promoters,[21] or to enjoin them from violating their contract to the injury of the corporation.[22]

§ 6. *Citizenship and residence or domicile of corporation.*[23]—A corporation is a resident of the state of its creation,[24] but a corporation may be incorporated under the laws of two states, in which case it is a resident of both,[25] but the fact that a foreign corporation has complied with the statutory formalities required as a condition to its right to do business in the state does not make it a domestic corporation for all purposes.[26] A corporation organized in one state cannot have a residence in another state, within the meaning of the Bankrupt Act,[27] but it may have its principal place of business in such other state, and thus be subject to an adjudication in bankruptcy there.[28]

§ 7. *Powers of corporations. A. In general.*[29]—A corporation can exercise no other powers than those specifically granted or those necessary to carry into effect those specifically granted,[30] and every person dealing with a corporation or in its obligations is bound to take notice of its powers and the purpose for which it was created.[31] An incidental or implied power is one that is necessary to the enjoyment or exercise of an express power,[32] and includes the adoption of any proper and convenient means of exercising its express powers.[33] A corporation cannot

may be cancelled at the instance of the subscribers, as where the promoters have made secret profits. Hinkley v. Sac Oil & Pipe Line Co. [Iowa] 107 N. W. 629. See post § 14 C, Subscriptions to Capital Stock, etc.

21. Fred Macey Co. v. Macey [Mich.] 12 Det. Leg. N. 948, 106 N. W. 722. And having assumed jurisdiction for this purpose, may also compel an accounting for the profits of such agreement. Id. Delay incident to negotiations looking to a settlement with the fraudulent promoter will not constitute such laches as will bar a suit by the corporation against such promoter. Id.

22. Promoters enjoined from selling stock issued to them in payment for their services, such sale being injurious to sale of treasury stock, and the promoters having agreed to pay all expenses of the incorporation and to use their efforts to sell treasury stock. Brown v. Bracking [Idaho] 83 P. 950.

23. See 5 C. L. 772.

24. Jameson v. Simonds Saw Co. [Cal. App.] 84 P. 289.

Within acts conferring Federal jurisdiction, corporations are citizens of the states which created them, and Act Aug. 13th, 1888, 25 Stat. at L. 433, 434, c. 866, providing that a suit cannot be maintained in a circuit court on a note which has been assigned unless the suit might have been maintained if the assignment had not been made, does not apply to a case where a note for money lent by one corporation to another is executed to the treasurer of the lender and by him indorsed to the lender. Blair v. Chicago, 201 U. S. 400, 50 Law. Ed. —.

A railroad company incorporated by act of congress is not a foreign corporation within a statute relating to venue of actions against foreign corporations. Texas & P. R. Co. v. Weatherby [Tex. Civ. App.] 14 Tex. Ct. Rep. 809, 92 S. W. 58.

25. Corporation incorporated under act of congress acquired property and franchises of state corporations with express legislative consent. Texas & P. R. Co. v. Weatherby [Tex. Civ. App.] 14 Tex. Ct. Rep. 809, 92 S. W. 58.

26. Designation of an agent upon whom process may be served, as required by Laws p. 824, c. 395, does not deprive a creditor of the corporation of his right to a foreign attachment against the corporation. Albright v. United Clay Production Co. [Del.] 62 A. 726.

27. In re Matthews Consol. Slate Co., 144 F. 724.

28. See Bankruptcy Act July 1, 1898, c. 541, § 2, cl. 1 (30 St. 545). In re Matthews Consol. Slate Co., 144 F. 724; Burdick v. Dillon [C. C. A.], 144 F. 737.

29. See 5 C. L. 773.

30. Boca & L. R. Co. v. Sierra Valleys R. Co. [Cal. App.] 84 P. 298. Beneficial association. Scott v. Banker's Union [Kan.] 85 P. 604.

31. Scott v. Banker's Union [Kan.] 85 P. 604.

32. Power to guaranty the stock of another corporation is not implied from an express power to buy such stock. Greene v. Middleborough Town & Lands Co. [Ky.] 89 S. W. 228. Where a corporation is authorized to operate a cotton oil mill, it will have the implied power to operate cotton gins as feeders to the cotton oil mill. Comanche Cotton Oil Co. v. Browne [Tex.] 15 Tex. Ct. Rep. 641, 92 S. W. 450, rvg. [Tex. Civ. App.] 14 Tex. Ct. Rep. 306, 90 S. W. 528.

33. Brewing company may lend money to a party to establish a saloon in which the beer manufactured by the company is to be sold, and may take a mortgage to secure such loan. Kraft v. West Side Brewery Co., 219 Ill. 205, 76 N. E. 372. A corporation authorized to build and operate a dry dock and to build and repair vessels, held to have power to build a breakwater and bulkhead, in order to carry into effect the powers expressly given. Newport News Shipbuilding & Dry Dock Co. v. Jones [Va.] 54 S. E. 314.

limit its own powers by mere rules as to how such powers are to be exercised.[34] The validity of the acts of a corporation may sometimes depend upon the ownership of its stock.[35] It has been held that a corporation cannot enter into copartnership with another corporation,[36] nor engage in professional business.[37] There is no such thing as the exercise of a de facto power by a de jure corporation.[38]

Quo warranto cannot be employed to test a corporation's power to act in a purely private affair.[39]

Quasi public corporations.[40]—The charter of a public service corporation is the measure of its powers, and the enumeration of its powers implies the exclusion of powers not enumerated.[41] A public service corporation not only may but must exercise its powers,[42] but it may adopt reasonable rules for the conduct of its business.[43]

(§ 7) *B. Power to take and hold property.*[44]—A corporation may purchase the property and franchises of another corporation when so authorized by law.[45] A corporation may hold property in trust for a particular purpose or person.[46]

(§ 7) *C. Power to transfer or incumber property and franchises.*[47]—A corporation, unless restricted by statute, may sell its property without resort to a court,[48] but a corporation which is doing a profitable business owes the public some duty to continue the exercise of the functions conferred upon it,[49] and a totally insolvent corporation must wind up its affairs in the manner provided by law, and cannot sell all of its property,[50] but where a corporation is not insolvent, but is

34. A rule that all applications for employment must come through a certain officer will not prevent the corporation from employing a person in violation of such rule. International Harvester Co. v. Campbell [Tex. Civ. App.] 96 S. W. 93.

35. In re New York Car Wheel Works, 141 F. 430. Where all the stock of a corporation was owned by one person and his family, the corporation had power to purchase a horse for such person's daughter. American Fruit Product Co. v. Ward, 99 N. Y. S. 717.

36. Members of a combination of several corporations engaged in passenger traffic not liable to contribution towards expense of defending and paying judgment against one member for injuries to passenger sustained on the line of such member. White Star Line v. Star Line of Steamers [Mich.] 12 Det. Leg. N. 586, 105 N. W. 135.

37. In Ohio, a corporation cannot engage in professional business. Rev. St. 1903, § 3235. State v. Laylin [Ohio] N. E. 567, afg. 3 Ohio N. P. (N. S.) 185. Contracting to defend physicians and surgeons against civil prosecutions for malpractice, but without agreeing to pay any judgment that may be rendered in such prosecutions, is not insurance business, but is professional business within Rev St. 1903, prohibiting corporation from engaging in professional business. Id.

38. A de jure railroad corporation cannot justify the exercise of the right of eminent domain over a route not covered by its articles of incorporation, on the ground that it is exercising a de facto power, or acting as a de facto corporation, as regards the unauthorized route. Boca & L. R. Co. v. Sierra Valleys R. Co. [Cal. App.] 84 P. 298.

39. As the right to act as trustee. State v. Higby Co. [Iowa] 106 N. W. 382.

40. See 5 C. L. 773.

41. Quinby v. Consumers' Gas Trust Co., 140 F. 362.

42. Mandamus lies to compel a public service company to supply the relator with the service or commodity which the corporation has undertaken to supply. Quinby v. Consumers' Gas Trust Co., 140 F. 362; Robbins v. Bangor R. & Elec. Co., 100 Me. 496, 62 A. 136.

43. Subject to the duty of serving the public and the individuals composing the same at reasonable rates and without discrimination, a public service corporation may adopt such reasonable rules and regulations as it may deem expedient for the conduct of its business. Public service of supplying water. Robbins v. Bangor R. & Elec. Co., 100 Me. 496, 62 A. 136.

44. See 5 C. L. 774.

45. Comp. Laws 8572, 8573, authorizing such a purchase, does not authorize the purchase of the property and franchises of a foreign corporation. Dieterle v. Ann Arbor Paint & Enamel Co. [Mich.] 13 Det. Leg. N. 1, 107 N. W. 79.

46. The common law rule that a corporation could not hold property as trustee was based on extremely technical reasons, and since the statute of uses, St. 27 Hen. VIII, c. 10, corporations may hold as trustees, and the general rule in this country is that a corporation may hold either real or personal property in trust when the purpose of the trust is not foreign to its authorized business, especially where no relations of a personal character are involved. State v. Higby Co. [Iowa] 106 N. W. 382.

47. See 5 C. L. 775.

48. A corporation organized under Code 1899, c. 55, may sell its real estate held in its corporate name without resort to the proceedings provided for by chapter 57, section nine, relating to sales by trustees of certain

doing a losing business and is unable to continue without further loss, it may sell out to another corporation and cease doing business.[51] In West Virginia a corporation may, upon a certain vote of its stockholders, transfer all of its property.[52] The franchises of a corporation are not assignable.[53]

A public service corporation cannot make such a disposition of its property as will deprive it of power to perform its obligations to the public.[54]

(§ 7) *D Power to contract and incur debts*[55]—An express power to contract to the same extent as individuals must be construed in connection with the objects and purposes of the corporation.[56] A corporation cannot execute promissory notes unless the power to do so is expressly granted or is necessary to carry its express powers into effect,[57] and where a corporation has no power to execute such a note, even a bona fide purchaser for value is not protected,[58] but a joint maker may be liable to the innocent holder, even though no recovery can be had against the corporation.[59] A trading corporation has implied power to purchase and indorse bills and notes,[60] but cannot indorse for accommodation.[61] A corporation may contract for the defense of its officers when charged with illegal conduct in the transaction of its business.[62] A brewery company has implied power to loan money for the erection of a building in which it is agreed that only beer made by such company shall be sold.[63] In an action on a contract with a corporation, it is not necessary to allege the charter powers of the corporation so as to show the authority to make the contract.[64]

kinds of corporations. Deepwater Council No. 40, O. U. A. M. of Mt. Carbon v. Renick [W. Va.] 53 S. E. 552.

49, 50. Raymond v. Security Trust & Life Ins. Co., 97 N. Y. S. 557.

51. A contract to this effect, made in good faith and for the best interests of the creditors and stockholders, is valid and binding. Raymond v. Security Trust & Life Ins. Co., 97 N. Y. S. 557.

52. Under the West Virginia statutes, as amended and reenacted by Acts 1901, p. 93, c. 35, a corporation may, on the affirmative vote in person or by proxy of the holders of at least sixty per centum of the outstanding stock, sell, transfer or assign all of its property in good faith, and may accept in payment therefor the stock, bonds, or other securities of any joint stock company. Germer v. Triple-State Natural Gas & Oil Co. [W. Va.] 54 S. E. 509. This statute applies alike to all corporations which are subject to the provisions of Code 1899, cc. 52, 53, 54, whether incorporated prior or subsequently to such statute. Id.

53. See Rev. St. Me., c. 47, § 56. Lothrop Pub. Co. v. Lothrop, Lee & Shepard Co. [Mass.] 77 N. E. 841.

54. A natural gas company had no power to dispose of all its property even to the city for the supply of which it was organized. Quinby v. Consumers' Gas Trust Co., 140 F. 362. But see City of Indianapolis v. Consumers' Gas Trust Co. [C. C. A.] 144 F. 640, where it was held that the rule stated in the text does not apply where the transfer is to the public for the servioe of which the corporation's franchises were granted. Legislation which authorizes a municipal corporation to purchase the property of a puhlic service corporation also authorizes the latter to sell such property to the former. Connor v. Marshfield [Wis.] 107 N. W. 639.

55. See 5 C. L. 776.

56. A corporation incorporated to deal in lands and to purchase, survey, plat and locate town sites, had no authority to guaranty the stock of another corporation, though it was expressly authorized to buy such stock and to contract and to acquire and transfer property "possessing the same powers in such respects as private individuals." Greene v. Middlesborough Town & Lands Co. [Ky.] 89 S. W. 228.

57. Beneficial association could not execute promissory notes. Scott v. Banker's Union [Kan.] 85 P. 604.

58, 59. Scott v. Banker's Union [Kan.] 85 P. 604.

60. Jamieson v. Heim [Wash.] 86 P. 165. A corporation may indorse for discount a note given it in payment of a debt. Lloyd & Co. v. Matthews, 119 Ill. App. 546.

61. Brill Co. v. Norton, etc., R. Co., 189 Mass. 431, 75 N. E. 1090. But where one corporation owns all the stock of another corporation, an indorsement by the former of the notes of the latter is a guaranty upon a sufficient consideration, and not a mere accommodation indorsement. In re New York Car Wheel Works, 141 F. 430. Accommodation notes are invalid as against creditors and dissenting stockholders. Perkins v. Times Realty Co. [N. J. Eq.] 61 A. 167. See 15 Yale L. J. 98.

62. Officers charged with sending through the mails fraudulent statements as to the value of the corporation's properties, and company employed experts to examine the property and testify as to its value. Lincoln Mountain Gold Min. Co. v. Williams [Colo.] 85 P. 844. Such an agreement did not tend to pervert or obstruct justice (Id.), nor was it within the statute of frauds as being a promise to answer for the debt of another (Id.).

The authority to issue bonds depends upon statutory or charter provisions.[65]

Mode of execution of contracts.[66]—Where an instrument is not under the seal of the corporation, the authority of the officer who executed it must be proved,[67] but the mere fact that the record of the board of directors does not show the authority to fix the seal of the corporation to its contract is not conclusive of want of authority to fix the seal,[68] nor will the fact that the seal of a corporation to a corporate bond is not opposite the president's signature, but is on some other part of the paper, prevent the bond from being a sealed instrument;[69] and where a corporation contract is under its seal, the burden of showing that the contract was unauthorized is upon the party asserting such want of authority.[70] Where the distinction between sealed and unsealed instruments executed by private individuals has been abolished, a corporate mortgage or deed of trust may be valid in equity, though not executed under the corporate seal.[71]

(§ 7) *E. Power to take and hold stock.*[72]—In some states it is held that, in the absence of statutory prohibition, a corporation may purchase its own stock.[73] In the absence of any statutory or charter prohibition, a corporation may agree to repurchase its own stock from a subscriber,[74] especially where the very business of the corporation contemplates a repurchase, as in the case of building and loan associations, while in others such a purchase is held to be a fraud upon its creditors,[75] or an unwarranted reduction of the capital stock.[76] The inability of a corporation

63. Kraft v. West Side Brewery Co., 121 Ill. App. 371.

64. San Antonio Mach. & Supply Co., v. Josey [Tex. Civ. App.] 15 Tex. Ct. Rep. 176, 91 S. W. 598.

65. Bond issue in violation of Const. § 234, and Code 1896, § 1270, providing that no corporation shall issue bonds except for money, labor done, or property received, enjoined. American Ice & Industries Co. v. Crane, 142 Ala. 620, 39 So. 233. Where a resolution for a bond issue, in violation of these provisions, was adopted, an injunction was granted, though the defendants answered that no immediate issue was contemplated. Id.

66. See 5 C. L. 776.

67. Assignment of claim. Allen v Als'on [Ala.] 41 So. 159.

68. A general custom of business, or the authority of the board not entered of record, would be sufficient to authorize the secretary of the corporation to affix its seal to its contract. McKee v. Cunningham [Cal. App.] 84 P. 260.

69. United States v. Mercantile Trust Co., 213 Pa. 411, 62 A. 1062.

70. Assignment of claim under corporate seal. McKee v. Cunningham [Cal. App.] 84 P. 260. Where a deed of a corporation is regular on its face, it will be presumed that the officers who executed it had authority to do so and to affix the corporate seal thereto. Deepwater Council No. 40, O. U. A. M. of Mt. Carbon v. Renick [W. Va.] 53 S. E. 552. A written contract under the corporate seal of a corporation is prima facie its contract. Emerson v Pacific Coast & Norway Packing Co. [Minn.] 104 N. W. 573. Whether or not corporation ever entered into contract held for the jury, in view of conflicting evidence as to whether its execution was without previous authority of the board of directors, and evidence of ratification. Id.

71. In Arkansas, though business corporations are authorized to have a common seal, there is no provision requiring them to use a seal, and hence, the distinction between sealed and unsealed instruments having been abolished, a mortgage or trust deed executed by such a corporation will be sustained in equity, though not under seal. Fourth Nat. Bank v. Camden Lumber Co., 142 F. 257.

72. See 5 C. L. 777.

73. May hold its own stock in trust, especially where its articles expressly authorize it to do so. State v. Higby Co [Iowa] 106 N. W. 382. In New York a corporation is not absolutely forbidden to hold or purchase its own stock. Heydecker's Gen. Laws p. 2906, c. 36, § 23, forbidding the payment of dividends except from surplus profits and prohibiting the division, withdrawal, or reduction of capital stock except as provided by law, or the payment of any part of the stock to the stockholders, does not broadly prohibit a corporation from purchasing its own stocks. In re Castle Braid, 145 F. 224. A claim filed against a bankrupt corporation for balances due to stockholders for the purchase of their stock by the corporation is prima facie valid, where it appears that the stock was taken by the corporation in good faith in order to terminate certain disputes between the stockholders, and there is nothing to show bad faith or that the corporation was insolvent when the purchase was made. Id.

74. Rogers v. Ogden Bldg. & Sav. Ass'n [Utah] 83 P. 754. And when the time arrives for the repurchase, as in case of maturity of building and loan stock, the stockholder ceases to be such and becomes a creditor Id.

75. Hall v. Alabama T. & Imp. Co., 143 Ala. 464, 39 So. 285. The creditors may maintain a bill in chancery to recover the money or assets paid for such stock as being property fraudulently transferred. Id.

to purchase its own stock will not prevent it from making a conditional sale of such stock, whereby it agrees to take the stock back if the purchaser is not satisfied.[77]

When authorized by charter or statute, a corporation may purchase and hold the stock of another corporation.[78] A corporation will not be allowed to use this privilege for the formation of a trust to prevent competition,[79] but the negotiable obligations of such a corporation given for the purchase of the stock of another corporation are valid in the hands of a bona fide holder for value without notice, even though the object of the corporation in purchasing the stock was to form a trust.[80]

§ 8. *Effect of ultra vires and illegal transactions.*[81]—Ultra vires and illegality are totally different,[82] ultra vires contracts being only those which are beyond the power of the corporation,[83] but it is not uncommon for illegal contracts to be designated as ultra vires.[84] Failure to comply with acts required to be done before the performance of other acts does not render the latter ultra vires, where the statute requiring the former is merely directory.[85]

Ultra vires contracts are not necessarily unenforceable,[86] but the doctrine that where an ultra vires contract has been fully or partially performed by one of the parties equity will decree a proper accounting, cannot be extended so as to justify the granting of any relief based upon the validity of the contract, the doctrine being based upon a disaffirmance of the contract and a quantum meruit.[87] The right of a corporation to exercise a certain power may be attacked collaterally,[88] but a party who is not affected by contracts made or entered into by a corporation cannot assert that such contract is ultra vires,[89] nor is an executed contract or conveyance to which a corporation is a party open to collateral attack by a stranger on the

76. Maryland Trust Company v. National Mechanics' Bank, 102 Md. 608, 63 A. 70. The purchase by a trust company of its own shares, though merely for a temporary purpose, was in violation of Code Pub. Gen. Laws, art. 23, §§ 82-87, providing the method by which the capital of a corporation may be reduced, and hence a trust company which was subject to the provisions of Acts 1892, p. 156, c. 190, § 851, making the stockholders in trust companies liable to creditors for double the par value of their stock, could not purchase its own stock, such purchase being in effect a reduction of the capital stock and thus a reduction of the assets liable to creditors. Id.

77. Ophir Consol. Mines Co. v. Brynteson [C. C. A.] 143 F. 829.

78. The purchase of the stock of one corporation by another corporation which was authorized to make such purchase, but which was bankrupt at the time, held valid, and the notes given by the bankrupt corporation for such stock also held valid. In re New York Car Wheel Works, 141 F. 430. See Bankruptcy, 7 C. L. 387.

79. National Salt Co. v. Ingraham [C. C. A.] 143 F. 805.

80. Mere knowledge that the obligations were given for stock of another corporation was not notice of the unlawful purpose to form a trust. National Salt Co. v. Ingraham [C. C. A.] 143 F. 805. The holder of such obligations was not precluded from asserting his remedy against the maker corporation by a decree in a suit by such corporation against the selling stockholders and their corporation, the trustee in the trust agreement and the holders of the obligations given for the stock annulling the trust. Id.

81. See 5 C. L. 778.

82. Maryland Trust Co. v. National Mechanics' Bank, 102 Md. 608, 63 A. 70.

83. Maryland Trust Co. v. National Mechanics' Bank, 102 Md. 608, 63 A. 70. A bond issue considered and held not ultra vires. Redwood v. Rogers [Va.] 53 S. E. 6.

84. A contract between corporations held to be ultra vires as being in restraint of trade or as creating a monopoly. See Sherman Act. White Star Line v. Star Line of Steamers [Mich.] 12 Det. Leg. N. 586, 105 N. W. 135.

85. Requirement of West Virginia statute that no stock shall be sold by a corporation at less than par until notice of the intention to present a resolution authorizing such sale has been published for two weeks, etc. McDowell v. Lindsay, 213 Pa. 591, 63 A. 130.

86. Maryland Trust Co. v. National Mechanics' Bank, 102 Md. 608, 63 A. 70. See post this section, Estoppel to Assert Ultra Vires.

87. Performance by one member of an unlawful combination between corporations engaged in passenger traffic, held not to entitle such member to enforce the combination agreement so as to compel contribution from the other members to the payment of the expenses and judgment in a suit by a passenger against such member for injuries. White Star Line v. Star Line of Steamers [Mich.] 12 Det. Leg. N. 586, 105 N. W. 135.

88. Boca & L. R. Co. v. Sierra Valleys R. Co. [Cal. App.] 84 P. 298.

89. Transfers and leases between street railroad companies could not be attacked by the city in which the railroads lay, in pro-

ground that its making or acceptance on the part of the corporation was ultra vires.[90]

Where a corporation seeks to avoid as ultra vires a contract made by its authorized agent, the burden is upon it to show that the contract is ultra vires.[91]

Estoppel to assert ultra vires.[92]—A corporation engaged in purely private business may be estopped to deny that its contracts are ultra vires,[93] even though it is engaged in performing some service for the public, where the performance of the contract does not affect the corporation's duty to the public;[94] but a public service corporation cannot be estopped to repudiate a contract the performance of which involves the violation of a statute or a declared rule of public policy;[95] nor in any case can the doctrine of estoppel be invoked to validate acts positively forbidden by statute;[96] nor will the corporation be estopped where the other party can ascertain that the contract is ultra vires by an examination of the corporation's charter, though it received valuable consideration therefor,[97] but the consideration received, if of any value, must be returned.[98] Stockholders may also be estopped to assert that the acts of their corporations are ultra vires.[99]

A party who has contracted with a corporation cannot dispute its power to contract,[1] and parties who have acted upon and received the benefit of ultra vires

ceedings by receivers in whom all the franchises and property of the companies had become vested, and to which proceedings all the companies were parties. Blair v. Chicago, 201 U. S. 400, 50 Law. Ed. ——.

90. Peru Plow & Imp. Co. v. Harker [C. C. A.] 144 F. 673.

91. Walnut Ridge Mercantile Co. v. Cohn [Ark.] 96 S. W. 413.

92. See 5 C. L. 780.

93. Quinby v. Consumers' Gas Trust Co., 140 F. 362. Corporation estopped by receipt of benefits under contract to repudiate the contract to the injury of the other party. New York Bank Note Co. v. Kidder Press Mfg. Co. [Mass.] 78 N. E. 463; Presbyterian Board of Relief for Disabled Ministers, etc. v. Gilbee, 212 Pa. 310, 61 A. 925. Railroad company cannot repudiate bonds when it has received the proceeds of their sale, but this is true only to the extent to which it actually received such proceeds. Shellenberger v. Altoona & P. Connecting R. Co., 212 Pa. 413, 61 A. 1000. Where a corporation lent its credit to a manufacturer by becoming the latter's guarantor, in order to enable the latter to procure materials to be manufactured for the corporation, such corporation was estopped, after receiving the benefit of the guaranty, from repudiating the same as ultra vires. Whitehead v. American Lamp & Brass Co. [N. J. Eq.] 62 A. 554. Where an officer in charge of a branch business executes a note in the name of the corporation, and the latter receives the benefit of the proceeds thereof in its branch business, it will be bound, regardless of whether it had charter power to carry on the branch business. Dreehen v. First Nat. Bank [Tex. Civ. App.] 15 Tex. Ct. Rep. 917, 93 S. W. 510. The corporation is estopped to plead ultra vires against accommodation notes given with the consent of all the stockholders. Perkins v. Times Realty Co. [N. J. Eq.] 61 A. 167.

94. Quinby v. Consumers' Gas Trust Co., 140 F. 362.

95. Natural gas company not estopped to repudiate a contract to sell all its property. Quinby v. Consumers' Gas Trust Co., 140 F. 362. See, also, City of Indianapolis v. Consumers' Gas & Trust Co. [C. C. A.] 144 F. 640. Upon the winding up of such a corporation, the stockholders may avail themselves of the corporation's right to repudiate a sale of its property. Id.

96. Agreement by benefit association to pay agent for other services than those of procuring members of subordinate bodies. See Code, tit. 9, c. 9, § 1833. First Nat. Bank v. Church Federation [Iowa] 105 N. W. 578. Sale of property by religious corporation without complying with Laws 1895, p. 277, c. 723, § 11, as amended by Laws 1896, p. 277, c. 336, and Laws 1901, p. 527, c. 222. Associate Presbyterian Congregation of Hebron v. Hanna, 98 N. Y. S. 1082.

97. Guaranty of stock of another corporation, for which the guarantor received stock in such other corporation, did not estop the guarantor from repudiating the guaranty as against a holder of the guaranteed stock. Greene v. Middlesborough Town & Lands Co. [Ky.] 89 S. W. 228.

98. Stock of one corporation issued to another corporation in consideration of the guaranty of the stock of the former by the latter, held without value. Greene v. Middleborough Town & Lands Co. [Ky.] 89 S. W. 228.

99. Where the objection to the acts of a corporation is that they are ultra vires, without being either mala prohibita or mala in se, a stockholder cannot maintain an action in his own behalf based on such objection, where he himself, with knowledge of the character of the acts, has acquired and accepted pecuniary benefits thereunder. Wormser v. Metropolitan St. R. Co. [N. Y.] 76 N. E. 1036. Stockholder was not allowed to attack a transfer of corporate assets to another corporation and a resulting consolidation after ten years had elapsed, the stockholder having known of the transfer for

acts of a corporation are estopped to assert the invalidity of such acts.[2] Where a corporation acquires realty from a trustee, the cestui que trust will be estopped to assert that the acquisition is ultra vires the corporation.[3]

§ 9. *Torts, penalties, and crimes.*[4]—The liability of a corporation for the torts of its agents or servants may rest not only upon the relationship between the corporation and its agent or servant,[5] but also upon the relation between the corporation and the person injured,[6] and its liability, whether arising out of one of these relations or both, is not confined to negligent injuries but extends also to those involving malice, such as slander or libel.[7] Officers of corporations are not liable for its torts merely because they are such officers,[8] nor are stockholders liable as such for the torts of the corporation.[9] Charitable[10] and public[11] corporations are not ordinarily liable for the torts of their officers.

A corporation is liable to indictment and prosecution,[12] and may be fined for contempt,[13] but a statute imposing any other criminal penalty upon the corporation than a fine for the violation of a criminal statute will be inoperative because unenforceable.[14] Where a corporation appears to an indictment, it thereby waives service of process.[15] Stockholders are not criminally liable for the acts of their corporation from the mere fact that they are stockholders.[16] The indictment must

two years before suit, and the rights of third parties having intervened. Cole v. Birmingham Union R. Co., 143 Ala. 427, 39 So. 403.

1. White River, etc., R. Co. v. Star Ranch & Land Co. [Ark.] 91 S. W. 14.

2. Railroad company estopped to assert the illegality of a license imposed by a city where the company had agreed to pay such licenses as a condition to the right to construct its road in the city, and had acted upon the consent of the city as thus conditioned. Jersey City v. North Jersey St. R. Co., 72 N. J. Law, 383, 61 A. 95. Purchaser of good will and list of policies of insurance company estopped to assert ultra vires on part of the selling company. Bowers v. Ocean Accident & Guarantee Corp., 110 App. Div. 691, 97 N. Y. S. 485.

3. State Security Bank v. Hoskins [Iowa] 106 N. W. 764.

4. See 5 C. L. 782.

5, 6. Sawyer v. Norfolk & S. R. Co. [N. C.] 54 S. E. 793.

7. Where a party applying, of his own accord, to a railroad superintendent for work, was slandered by such superintendent, the company was not liable, there being neither any such relation between the applicant and the company as required the latter to protect him from the slander nor any such connection between the act of the superintendent and his duties to the company as would bring the case within either one of the rules mentioned in the text. Sawyer v. Norfolk & S. R. Co. [N. C.] 54 S. E. 793. Corporation operating a factory held liable for a publication to the effect that a factory girl was discharged, not for violation of the rules, but for matters which the manager preferred not to disclose, but such that she could not be retained in the factory. Pattison v. Gulf Bag Co. [La.] 41 So. 224.

8. President of corporation not necessarily liable for libel published in paper owned by the corporation. Folwell v. Miller [C. C. A.] 145 F. 495. Even where the president of the corporation is the editor in chief of the corporation's paper in which the libel is published, he is not liable in the absence of personal participation in the publication. Id. Where the president of a corporation, who was also the chief stockholder, was sued for a libel published in a paper owned by the corporation, of which paper he was also editor in chief, an answer setting up as partial defense the truth of the publication did not render the defendant liable, there having been no cause of action against the defendant at the time the action was commenced. Id.

9. Libel. Folwell v. Miller [C. C. A.] 145 F. 495.

10. See Asylums and Hospitals, 7 C. L. 297; Colleges and Academies, 7 C. L. 657, and like topics. Liability of charitable corporations for wrongful acts of officers and agents. Woman's Christian Nat. Library Ass'n v. Fordyce, 73 Ark. 625, 86 S. W. 417.

11. See Municipal Corporations, 6 C. L. 714; States, 6 C. L. 1515, and like topics.

12. Failure of railroad company to keep pure drinking water in passenger cars, as required by Pen. Code 1895, § 522. Southern R. Co. v. State [Ga.] 54 S. E. 160. This statute is not unconstitutional. Id.

13. Violation of injunction. Franklin Union, No. 4, v. People, 220 Ill. 355, 77 N. E. 176. In contempt proceedings against a corporation and its agents, the agents may be discharged upon their return and the corporation found guilty, without any specification as to the time and place where and the person or persons, agent or agents, by whom the corporation violated the order the violation of which constituted the contempt. State v. Cape Fear Lumber Co., 72 S. C. 322, 51 S. E. 873.

14. Corporation cannot be imprisoned. Southern R. Co. v. State [Ga.] 54 S. E. 160. A corporation cannot be guilty of a felony. State v. Delmar Jockey Club [Mo.] 92 S. W. 185.

15. Appearance by demurrer to indictment. Southern R. Co. v. State [Ga.] 54 S. E. 160.

aver that accused is a corporation,[17] and the defendant's corporate existence must be proved,[18] but the articles of incorporation need not be introduced in evidence,[19] for the de facto existence of the corporation may be proved by evidence tending to show that it acted and was accepted as a corporation under the name alleged in the indictment.[20] A corporation may be compelled to produce its books as evidence against itself,[21] and an officer of a corporation cannot escape liability for a contempt in refusing to comply with an order of court to produce papers, to be used in a criminal proceeding against the corporation, on the ground that, though he had possession of them, his possession was that of the corporation and not his own,[22] nor on the ground that such production would be an unreasonable search or seizure within the fourth amendment of the Federal constitution;[23] but a corporation is nevertheless entitled to the protection of this amendment against unreasonable search, though what may be unreasonable in the case of an individual may not be such as to a corporation.[24] An officer of a corporation cannot refuse to testify or to produce papers in a criminal proceeding against his corporation, on the ground that such testimony or papers will incriminate the corporation.[25]

§ 10. *Actions by and against corporations.*[26]—Federal courts have jurisdiction of actions between a corporation and citizens of another state than that in which the corporation was organized,[27] and of a suit to which a Federal corporation is a party.[28] Demand by nonresident stockholders that the corporation sue in the Federal court of the state of which the corporation and the defendant were citizens does not authorize a suit by the stockholders in the Federal court.[29]

A foreign corporation may maintain a suit[30] and may be sued in domestic courts.[31] The fact that the internal management of a foreign corporation may be indirectly affected will not prevent the court from taking jurisdiction.[32]

In California a corporation cannot maintain an action concerning its property unless it has filed a copy of its articles with the clerk of the county where such property is situated, but this requirement does not apply to the county where the original articles are filed.[33]

16. Liability for penalty imposed by Elkins Act Feb. 19, 1903, 32 St. 847, c. 708. United States v. Wood, 145 F. 405.

17, 18, 19. Standard Oil Co. v. Com. [Ky.] 91 S. W. 1128.

20. Existence of a corporation indicted for transporting and retailing oil by means of a wagon without a license proved by receipt given for payment for oil reciting that the defendant was "incorporated." Standard Oil Co. v. Com. [Ky.] 91 S. W. 1128. See ante § 3, Proof of Incorporation.

21. Under Rev. St. 1899, § 737, a corporation, in a prosecution against it for the violation of the state anti-trust laws, may be compelled to produce its stock books. See Rev. St. 1899, §§ 8965, 8966, relating to trusts. State v. Standard Oil Co., 194 Mo. 124, 91 S. W. 1062.

22. Proceedings under anti-trust law. Nelson v. U. S., 201 U. S. 92, 50 Law. Ed. —.

23. Hale v. Henkel, 201 U. S. 43, 50 Law. Ed. —.

24. An order for the production of certain papers of a corporation in proceedings against it under the Federal anti-trust law held, by reason of its scope, to call for an unreasonable search or seizure. Hale v. Henkel, 201 U. S. 43, 50 Law. Ed. —.

25. Proceedings against corporation for violation of Federal anti-trust law. Hale v. Henkel, 201 U. S. 43, 50 Law. Ed. —.

26. See 5 C. L. 782.

27. A transfer of partnership property to a corporation in exchange for stock held not a sham transfer merely to give the Federal courts jurisdiction of a controversy concerning such property. Slaughter v. Mallet Land & Cattle Co. [C. C. A.] 141 F. 282.

28. Upon an application for the removal of a cause to a Federal court, such court will take judicial notice that the defendant is a Federal corporation, though the plaintiff merely describes it by name and nothing more. Heffelfinger v. Choctaw, etc., R. Co., 140 F. 75.

29. Kemmerer v. Haggerty, 139 F. 693. See 4 Mich. L. R. 395.

30. Westminster Nat. Bank v. New England Electrical Co. [N. H.] 62 A. 971.

31. A corporation cannot escape liability upon its contract on the ground that it is a foreign corporation where the court had obtained jurisdiction. Westminster Nat. Bank v. New England Electrical Co. [N. H.] 62 A. 971. See Foreign Corporations, 5 C. L. 1470.

32. The courts of one state may entertain a suit to compel a corporation chartered by another state to transfer upon its books

A corporation may be sued, according to various statutory provisions, in the county where its principal office is located,[34] or where the cause of action or some part thereof arose,[35] or where the corporation has an agency,[36] and, within the statutes relating to venue, a corporation may be situated in one county, have its principal place of business in another, and its officers reside in still another.[37] The use of the word "may" in statutes providing in what counties actions against corporations "may" be brought is mandatory.[38] Where an action is properly brought in a certain county against an individual defendant, a corporation jointly liable with such defendant may be joined as a codefendant, regardless of the rules as to venue in actions against a corporation as sole defendant.[39] A railroad company incorporated by act of congress is not a foreign corporation within state statutes relating to the venue of actions against foreign corporations.[40] The petition in an action against a corporation need not allege the facts showing that the venue of the action is correctly laid,[41] and if the defendant relies upon its privilege to be sued in another county it must plead the facts necessary to show such privilege,[42] and the burden of proving the facts so alleged is upon the defendant.[43]

A corporation cannot be controlled in its actions by a suit against the individuals in control of it,[44] but it is reached and brought into court by service on its

shares of its stock to a purchaser thereof. Westminster Nat. Bank. v. New England Electrical Co. [N. H.] 62 A. 971.

33. Civ. Code § 299. San Diego Gas Co. v. Frame [Cal.] 82 P. 1049.

34. Where the statute provides that the action may be brought in the county where the corporation had its principal office, the use of the word "principal" precludes the possibility of there being more than one office, the location of which may be considered in laying the venue. Kirby's Dig. § 6067. Spratley v. Louisiana & A. R. Co. [Ark.] 95 S. W. 776. The fact that an agent is temporarily employed in transacting the business of a domestic corporation in a county other than the one in which the corporation has its principal place of business does not, under Code Civ. Proc. § 55, subject the corporation to the jurisdiction of the courts of such county. Security Mut. Life Ins. Co. v. Ress [Neb.] 106 N. W. 1037. The residence of a person who is employed as the agent of a domestic corporation is personal, and is immaterial in an inquiry as to whether such a corporation is situated in a certain county within this section. Id.

35. Rev. St. 1895, art. 1194, § 23. Under this rule, a contract made with the traveling buyer or solicitor of a corporation may be sued on in the county where it is made, though the corporation resides in another county where the contract is to be performed. Mangum v. Lane City Rice Mill Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 739, 95 S. W. 605. Action against foreign corporation for deceit. Western Cottage Piano & Organ Co. v. Griffin [Tex. Civ. App.] 14 Tex. Ct. Rep. 332, 90 S. W. 884.

36. Rev. St. 1895, art. 1194, § 23. Under this rule, a corporation cannot be said to have an agency in a county because its buying agent or solicitor is usually in such county for a certain time every year but has no permanent office there. Mangum v. Lane City Rice Mill. Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 739, 95 S. W. 605.

37. Hence where such a condition exists, the corporation may, under Kirby's Dig. § 6067, be sued in any one of such counties. Spratley v. Louisiana & A. R. Co. [Ark.] 95 S. W. 776.

38. Spratley v. Louisiana & A. R. Co. [Ark.] 95 S. W. 776.

39. Notwithstanding Rev. St. 1899, § 3500, providing that actions against a corporation may be brought in the county in which it is situated or has its principal place of business. See §§ 3505, 3510, 3480. Harrison v. Carbon Timber Co. [Wyo.] 83 P. 215.

40. The court will take judicial notice that a railroad company was incorporated under act of congress. Texas & P. R. Co. v. Weatherby [Tex. Civ. App.] 14 Tex. Ct. Rep 809, 92 S. W. 58. See ante § 6, Citizenship and Residence or Domicile of Corporation. Where a corporation organized under an act of congress acquires the property and franchises of a domestic corporation with express legislative consent, the consolidated corporation might be considered as incorporated under the state law as well as under the Federal. Id.

41. That cause of action arose in county where suit is brought, thus conferring jurisdiction under Rev. St. 1895, art. 1194, § 23. Mangum v. Lane City Rice Mill. Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 739, 95 S. W. 605.

42. A plea of privilege must negative all supposable facts which, if alleged on the opposite side, would defeat the plea, but it need not negative matters which are negatived by the petition. Mangum v. Lane City Rice Mill. Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 739, 95 S. W. 605.

43. Mangum v. Lane City Rice Mill. Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 739, 95 S. W. 605.

44. Suit against individual to restrain violation of contract with corporation, defendant being in control of the corporation, but it not appearing he owned all the stock or even the majority thereof. Aberthaw Const. Co. v. Ransome [Mass.] 78 N. E. 485.

officers or agents, as designated by statute.[45] Service on an officer may be valid even though the officer is not such at the time of the service.[46] Service may be made on domestic corporations by publication.[47] A corporation cannot be reached by process from a foreign state so long as it confines the exercise of its powers to the state of its creation,[48] but it may be subjected to liability to suit and service of process as a condition of its right to do business in a state other than that of its creation.[49] When the service is by leaving a copy with the person in charge of the defendant's office, the return must show that the service was at such office.[50] A misnomer in the return of service on a corporation is not fatal where it is evident that the defendant corporation is referred to.[51] A defective return is waived by a general appearance,[52] but a corporation does not waive lack of service by appearing to the merits, where it previously objects to the court's jurisdiction and maintains such objection in all of its pleadings thereafter filed.[53]

A complaint by a corporation must be verified by an officer of the corporation.[54]

45. In Kentucky: Under Civ. Code Prac. § 51, subd. 3, service may be made on the defendant's chief officer or agent that may be found in the county, but under subdivision 4, where the defendant is a common carrier, the service must be on a chief officer or agent who resided in the county in which the suit is brought, and in neither case is a service sufficient when made on the chief officer or agent who is neither found nor resides in the county in which the action is brought. Cincinnati, etc., Packet Co. v. Thomas Malone & Co. [Ky.] 92 S. W. 306. Under Rev. St. 1906, § 571, providing for service on an agent at the corporation's place of business, the agent need not be at such place of business at all times but is required to be there at all reasonable times and hours. Paducah Cooperage Co. v. Com. [Ky.] 93 S. W. 12. This statute was not intended to supersede Civ. Code Prac. § 51, designating the officers of the corporation upon whom process may be served, but to provide an additional method of service. Id.

In Michigan: Under Comp. Laws 1897, § 10,468, service may be made upon a domestic corporation by service on its agent, whether such agent is in charge of the corporation or not, notwithstanding Pub. Acts 1903, p. 378, No. 232, § 30, and Pub. Acts 1885, p. 343, No. 232. Moinet v. Burnham Stoepel & Co. [Mich.] 13 Det. Leg. N. 38, 106 N. W. 1126.

In Missouri: In the absence of the president or other chief officer, service may be made by leaving a copy of the writ at the company's chief office with anyone in charge thereof. Rev. St. 1899, § 995. Under this statute, which also provides that where proper service cannot be obtained in the county in which the suit is brought the summons may be directed to another county where the president or chief officer may reside or where the corporation has an office, service in the county in which the suit is brought on the agent in charge of the company's office in another county is insufficient. Bente v. Remington Typewriter Co., 116 Mo. App. 77, 91 S. W. 397.

In New Jersey: P. L. 1896, p. 291, § 43, does not require service upon a domestic corporation to be made at its registered office, and service on its registered agent is sufficient, though not made at the corporation's registered office, the corporation having removed therefrom. Philadelphia & C. Ferry Co. v. Intercity Link R. Co. [N. J. Law] 62 A. 184.

In Wyoming: Under Rev. St. 1899, § 3516, providing that service may be made on a corporation by service on its president or other chief officer, if he be found in the "county" or if the chief officer be not found in the county, then upon certain other officers, and if none of them can be found, then by leaving a copy at the office or usual place of business of the corporation, the county referred to is the county in which the corporation has its office or principal place of business, and not the county in which it may be sued as a joint defendant, and the summons in the latter case must be issued to and be served in the county where its office or principal place of business is, unless service be made upon the agent appointed for that purpose as provided by Sess. Laws 1903, p. 62, c. 53. Harrison v. Carbon Lumber Co. [Wyo.] 83 P. 215.

46. Where officer of foreign corporation acted as such after he had resigned, and the stockholders knew or were charged with knowledge of such acts. Wm. Cameron & Co. v. Jones [Tex. Civ. App.] 90 S. W. 1129.

47. Such service is authorized by Rev. St. 1892, § 1024, where there are no officers of the corporation, or they are absent from the state for six months prior to the issue of the writ, or are unknown, is valid and constitutes due process of law. Clearwater Mercantile Co. v. Roberts-Johnson-Rand Shoe Co. [Fla.] 40 So. 436.

48. Jameson v. Simonds Saw Co. [Cal. App.] 84 P. 289.

49. Code Civ. Proc. § 411. Jameson v. Simonds Saw Co. [Cal. App.] 84 P. 289. See post § 11, Legislative Control over Corporations. And see Foreign Corporations, 5 C. L. 1470.

50. Little Rock Trust Co. v. Southern Missouri & A. R. Co., 195 Mo. 669, 93 S. W. 944.

51. A return on a writ directed to the "Ellis-Young Company," a corporation, that service was made on the president of "the within named defendant corporation, to-wit, the Ellis & Young Company," was sufficient as to the name of the corporation. Putnam Lumber Co. v. Ellis-Young Co. [Fla.] 39 So. 193.

52. Failure of return to show that service

A general allegation that the plaintiff or defendant is a corporation is usually sufficient.[55] Misnomer of a corporation in a pleading has the same effect as the misnomer of a private individual,[56] and is not fatal where it is evident what corporation is intended,[57] and the court may, in the furtherance of justice, allow an amendment to cure such misnomer,[58] and where the defendant, in an action by a corporation, wishes to take advantage of a misnomer of the corporation, he must plead it in his answer in unequivocal language.[59] No question of misnomer arises where service is made upon an entirely different corporation from the one sued, and one which has no connection with the suit.[60] Where a corporation changes its name after making a contract, in a suit on such contract the change of name must be alleged,[61] and an amendment to a petition by a corporation, setting out that since the institution of the suit the corporation has changed its name, must be substantiated by proof.[62]

Questions of pleading and practice in special and particular proceedings by and against corporations are considered in the notes.[63] A general denial does not

on president was at office of corporation. Meyer v. Ruby Trust Min. & Mill. Co., 192 Mo. 162, 90 S. W. 821.

53. Spratley v. Louisiana & A. R. Co. [Ark.] 95 S. W. 776.

54. The complaint may be verified by the manager of the corporation. Stockton Lumber Co. v. Blodget [Cal. App.] 84 P. 441.

55. An allegation in a bill by a corporation that the complainant is a corporation duly incorporated in accordance with the laws of a certain state is a sufficient allegation of the complainant's corporate existence, in the absence of any denial in the answer or any evidence in relation thereto. Fox v. Knickerbocker Engraving Co., 140 F. 714. As against a demurrer, a declaration in an action against a corporation need not set out the steps whereby the corporation became incorporated, where it alleged that the corporation was duly incorporated. Swing v. Consolidated Fruit Jar Co. [N. J. Law] 63 A. 899.

56. Nisbet v. Clio Min. Co. [Cal. App.] 83 P. 1077.

57. Mechanic's lien filed against "Home Brewing Company," held good against "Home Brewing Company, of Grafton." Grafton Grocery Co. v. Home Brewing Co. [W. Va.] 54 S. E. 349. The prefixing of the definite article to the name of a corporation does not create a misnomer and is immaterial. Western Bank & Trust Co. v. Ogden [Tex. Civ. App.] 15 Tex. Ct. Rep. 594, 93 S. W. 1102. Where a notice of publication was directed to "The Globe Investment Co.," whereas the true name of the corporation was "Globe Investment Co.," the variance was immaterial. Clifford v. Thun [Neb.] 104 N. W. 1052.

58. Code Civ. Proc. § 473. Nisbet v. Clio Min. Co. [Cal. App.] 83 P. 1077. Misnomer of defendant corporation in attachment proceedings, cured by amendment, no one having been misled by the misnomer. Id.

59. Allegation in answer that the correct name of the plaintiff was as given in a deed to the property sued for was insufficient to raise question of misnomer, under Code Civ. Proc, § 1777. Associate Presbyterian Congregation of Hebron v. Hanna, 98 N. Y. S. 1082.

60. Little Rock Trust Co. v. Southern Missouri & A. R. Co., 195 Mo. 669, 93 S. W. 944. In such case the corporation sued may appear and move to set aside a judgment against it for lack of jurisdiction, and may appeal from the denial of such motion without joining the corporation served. Id.

61. The right of a corporation which had changed its name to sue on a contract made with the corporation under its former name was sufficiently shown where the petition alleged the change of name, and that the plaintiff succeeded to all the rights, liabilities, and contracts of the corporation known by the former name. French, Finch & Co. v. Hicks [Tex. Civ. App.] 15 Tex. Ct. Rep. 609, 92 S. W. 1034.

62. Atlantic Coast Line R. Co. v. Waycross Elec. Light & Power Co., 123 Ga. 613, 51 S. E. 621.

63. Rev. St. 1895, art. 219, prescribing the requisites of an affidavit for garnishment against a corporation, only requires that the affidavit shall state that the garnishee is an incorporated company, and it is not necessary to state that it is duly incorporated. First Nat. Bank v. Brown [Tex. Civ. App.] 15 Tex. Ct. Rep. 627, 92 S. W. 1052. A recital in a motion to set aside an order in attachment proceedings against a corporation for the payment of the amount admitted by the garnishee into court and for the discharge of the garnishee, on the ground that at the time of such order the attachment had been dissolved pursuant to a statute relating to foreign corporations, that the attachment was against a foreign defendant, was sufficient, together with the name of the defendant which imported that it was a corporation, to show that the defendant was a foreign corporation. Dissolution of attachment under Civ. Code 1895, § 4568. Turners' Chapel African M. E. Church v. Lord Co., 121 Ga. 376, 49 S. E. 272. A corporation is entitled to the benefit of acts conferring mechanics' liens in West Virginia, where a corporation is expressly declared to be a person within the meaning of statutes using the word "person." Tennis Bros. Co. v. Wetzel & T. R. Co., 140 F. 193; Wetzel & T. R. Co. v. Tennis Bros. Co. [C. C. A.] 145 F. 458. A bill by a corporation seeking to establish a trust in real estate on the ground that it was purchased for the corporation and with its funds, and also charging that

put in issue the incorporation of a plaintiff corporation. The incorporation need not be established by proof under such a pleading and the issue can only be raised by a special pleading.[64] Nul tiel corporation is a plea in bar, not in abatement,[65] and bars a suit in a corporate name, though corporate existence is not alleged.[66]

Failure of a judgment to state that it is against a corporation is not necessarily fatal to the validity of the judgment,[67] and an objection that an action in which a judgment is rendered against a corporation is nominally against an officer thereof cannot be raised after appearance by the corporation to the merits.[68] So also, where a corporation allows a suit to be prosecuted in its name with its knowledge, and decree is rendered therein after it has acquired such knowledge and without objection on its part, it will be bound by such decree.[69] A judgment by default against a corporation must be sustained by proof of service upon a duly authorized officer.[70]

Upon a proper showing a receiver will be appointed for a corporation pendente lite.[71] The effect of dissolution of a corporation upon pending suits and upon its right to sue and liability to sue is treated elsewhere.[72]

§ 11. *Legislative control over corporations.*[73]—The legislature has power to examine into the affairs of corporations organized under the general laws,[74] and may likewise impose privilege or license taxes,[75] pass laws for the prevention of trusts and monopolies by unlawful combination by corporations,[76] and control the

part of the defendants had unlawfully received stock which they would not account for, and that another defendant had unlawfully received and sold other stock and would not account for it, was multifarious. Camden Land Co. v. Lewis [Me.] 63 A. 523.

64. Minzey v. Marcy Mfg. Co., 6 Ohio C. C. (N. S.) 593.

65, 66. Fish v. Kanawha Dispatch, 118 Ill. App. 284.

67. Judgment against "C. M. Carrier & Son" was good against the corporation of that name which was the defendant in the suit in which the judgment was rendered, where it appeared in the declaration that the defendant was a corporation. Carrier v. Poulas [Miss.] 40 So. 164.

68. Suit was against certain party as superintendent of the corporation, but the claim was against the corporation, and the corporation took a change of venue, the only question litigated was as to whether the corporation or another was liable, and the case went to the jury upon instructions requested by the attorney for the corporation, and no question as to whether the corporation was the real party defendant was raised until after verdict. Shorter University v. Franklin Bros. [Ark.] 88 S. W. 974.

69. Thompson v. Hemenway, 218 Ill. 46, 75 N. E. 791.

70. Ex parte National Lumber Mfg. Co. [Ala.] 41 So. 10.

71. Hall v. Nieukirk [Idaho] 85 P. 485. See post § 14 D, Receivers and Injunctions; post, § 16 B, Winding up Proceedings, Assignments, Receivership. Under Rev. St. 1887, § 4329, subds. 5, 6, a receiver will be appointed where it is shown that the corporation is insolvent or in imminent danger of insolvency, and in all cases where receivers are appointed according to the usages of courts of equity. Id. The appointment of a receiver does not necessarily effect a dissolution of the corporation, and the receiver may be appointed simply to manage the affairs of the corporation pending the litigation. Hall v. Nieukirk [Idaho] 85 P. 485.

72. See post § 12, How corporations may be dissolved; forfeiture of charter; effect of dissolution; winding up under statutory provisions.

73. See 5 C. L. 785.

74. Under Const. art. 12, § 1, and Civ. Code § 383, the committee on commissions and retrenchment held to have authority to examine into the affairs of certain loan associations. Ex parte Bunkers [Cal. App.] 81 P. 748.

75. Clarksdale Ins. Ag. v. Cole [Miss.] 40 So. 228. License tax imposed on insurance companies by Code Supp. 1902, § 1333d. Iowa Mut. Tornado Ins. Ass'n v. Gilbertson [Iowa] 106 N. W. 153.

Foreign corporations may be required to pay privilege or license taxes. Clarksdale Ins. Ag. v. Cole [Miss.] 40 So. 228. See Foreign Corporations, 5 C. L. 1470. Code 1904, p. 2214, § 37. Standard Oil Co. v. Com., 104 Va. 683, 52 S. E. 390; American Smelting & Refining Co. v. People [Colo.] 82 P. 531.

Failure to pay a license tax is a matter exclusively between the corporation and the state, and will not affect the rights of the corporation as against other parties. License fee required by Laws 1897, p. 135, c. 70, § 5. State v. Superior Ct. [Wash.] 85 P. 669.

76. Pub. Acts 1899, p. 409, No. 255. Attorney General v. A. Booth & Co. [Mich.] 12 Det. Leg. N. 991, 106 N. W. 868. See Trusts, 6 C. L. 1736. Where a stockholder is a party to a conspiracy to establish a trust, he cannot recover from another stockholder his proportion of the consideration for the corporate property received by such other stockholder. Erpelding v. McKearnan [Mich.] 13 Det. Leg. N. 4, 107 N. W. 107.

rates for services charged by public service corporations.[77] The right to amend corporate charters and articles of incorporation is considered elsewhere.[78]

Except as to business coming under the head of interstate commerce,[79] a state may impose upon foreign corporations conditions precedent to the right to transact business in the state,[80] or in order to have right to maintain actions in the state,[81] and may provide as to the venue of actions against such corporations,[82] and as to the method of obtaining service on them.[83]

§ 12. *How corporations may be dissolved; forfeiture of charter; effect of dissolution; winding up under statutory provisions.*[84]—Forfeiture does not result ipso facto from an illegal act,[85] nor can it be collaterally asserted.[86] A court of equity, independent of statutory authority, cannot decree the dissolution of a corporation.[87] A Federal court, therefore, though authorized to administer the assets of an insolvent corporation, cannot decree a dissolution where the authority to do so is not conferred by any statute of the state creating the corporation.[88]

77. May control railroad rates, notwithstanding Burns' Ann. St. 1901, § 5153, giving railroads authority to regulate such rates. Chicago, etc., R. Co. v. Railroad Commission [Ind. App.] 78 N. E. 338.

78. See ante § 3, Creation, Name, and Existence of Corporations, and the Amendment, Extension, and Revival of Charters.

79. Contract held not interstate commerce. Hastings Industrial Co. v. Moran [Mich.] 13 Det. Leg. N. 131, 107 N. W. 706. The mere fact that a corporation is engaged in interstate commerce does not bar the right of the state to regulate it as to transactions wholly within the state. McGuire v. Chicago, etc., R. Co., [Iowa] 108 N. W. 902.

80. Kirby's Dig. §§ 832, 833. Woolfort v. Dixie Cotton Oil Co. [Ark.] 91 S. W. 306. Civ. Code § 299. Ward Land & Stock Co. v. Mapes, 147 Cal. 747, 82 P. 426. Mills' Ann. St. §§ 499, 500, 1868. Roseberry v. Valley Bldg. & L. Ass'n [Colo.] 83 P. 637. Code § 1637, requiring foreign insurance companies to obtain permits. Prudential Ins. Co. v. Cushman [Iowa] 106 N. W. 934. Rev. St. 1899, § 1025. Chicago Mill & Lumber Co. v. Sims [Mo.] 95 S. W. 344; State v. Standard Oil Co., 194 Mo. 124, 91 S. W. 1062. Pub. Acts 1901, p. 317, No. 206. Hastings Industrial Co. v. Moran [Mich.] 13 Det. Leg. N. 131, 107 N. W. 706. Laws 1892, p. 1805, c. 687, § 15, as amended by Laws 1901, p. 1326, c. 538. Wood v. Ball, 100 N. Y. S. 119. Rev. St. 1895, §§ 745, 746. King v. Monitor Drill Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 315, 92 S. W. 1046; Western Supply & Mfg. Co. v. United States & Mexican Trust Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 948, 92 S. W. 986; Norton v. Thomas & Sons Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 618, 93 S. W. 711. Rev. St. 1898, § 1770b, requiring foreign corporations to file authenticated copy of articles with secretary of state. Chickering-Chase Bros. Co. v. White & Co. [Wis.] 106 N. W. 797; Allen v. Milwaukee [Wis.] 106 N. W. 1099. See Foreign Corporations, 5 C. L. 1470.

The Federal courts uphold reasonable requirements by state laws of foreign corporations as conditions precedent to doing business in such states, and in construing such statutes will be governed by the construction given them by the local courts of last resort. Tennis Bros. Co. v. Wetzel & T. R. Co., 140 F. 193; Wetzel & T. R. Co. v. Tennis Bros. Co. [C. C. A.] 145 F. 458. In West Virginia the failure of a foreign corporation to comply with Code 1899, c. 54, § 30, must be pleaded in abatement. See Code 1899, c. 125, § 16. Id.

81. Appointment of attorney upon whom service may be made. Act April 1, 1872 (St. 1871-72, p 826, c. 566), as amended by Act 1899, p. 111, c. 94. Black v. Vermont Marble Co. [Cal. App.] 82 P. 1060. Rev. Civ. Code § 883, requiring filing of copy of charter with secretary of the state. Bishop & Babcock Co. v. Schleuning [S. D.] 104 N. W. 854. A foreign corporation which has failed to comply with this statute cannot intervene in an action pending in the state courts. Thompson v. Scroyer [S. D.] 104 N. W. 854.

82. Rev. St. 1895, art. 1194, subd. 25. Bay City Iron Works v. Reeves & Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 329, 95 S. W. 739.

83. Acts 1905, p. 401, c. 39, requiring nonresident domestic corporations and foreign corporations to appoint the state auditor as attorney to accept service, is not unconstitutional. State v. St. Mary's Franco-American Petroleum Co., 58 W. Va. 108, 51 S. E. 865. Rev. St. 1895, art. 1223. Cameron & Co. v. Jones [Tex. Civ. App.] 90 S. W. 1129; Bay City Iron Works v. Reeves & Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 329, 95 S. W. 739.

84. See 5 C. L. 786.

85. A de jure railroad corporation does not by entering into an ultra vires contract with a connecting line become a corporation de facto. Dayton & U. R. Co. v. Pittsburg, etc., R. Co., 6 Ohio C. C. (N. S.) 537. A mere intention on the part of a railroad company to violate its public duties does not change the legal status of the company nor afford ground for the forfeiture of its charter. Id.

86. Not in condemnation proceedings by the corporation. Thomas v. South Side El. R. Co., 218 Ill. 571, 75 N. E. 1058. The defense of ultra vires cannot be interposed by one railroad company against another, which has been recognized as binding upon them and acted upon for thirty-seven years, and the history of the arrangement and circumstances of the companies are as in this case. Dayton & U. R. Co. v. Pittsburg, etc., R. Co., 6 Ohio C. C. (N. S.) 537.

87. Conklin v. United States Shipbuilding Co., 140 F. 219.

88. New Jersey Corporation Act 1896, § 69,

A corporation organized not for profit is dissolved by the conveyance of all its property to another corporation of the same kind.[89]

The supposed common law rule that upon the termination of the existence of a corporation its debts were extinguished and its realty reverted to the grantors and its personal property went to the sovereign, if it ever really existed, is now wholly obsolete, except as to purely public corporations,[90] specially as it is generally provided by statute that a dissolved corporation continues as a legal entity for certain purposes.[91] In the absence of statutory authority, however, a dissolved corporation cannot maintain a suit,[92] but a suit in equity by a corporation does not abate absolutely upon the dissolution of the corporation[93] and may be revived by the representatives of the corporation,[94] and this rule has been extended to other actions by statutory provisions.[95]

Questions of pleading,[96] practice,[97] and evidence,[98] are considered in the notes.

Dissolution by consent of stockholders or directors.[99]—Where rights of third persons have arisen by acts of the corporation, such corporation cannot be dissolved by any agreements or acts of the incorporators so as to affect such rights.[1]

Forfeiture of charter in proceedings by the state.[2]—Quo warranto is the proper

authorizing the New Jersey Court of Chancery to decree the dissolution of a corporation, creates no right enforceable in a Federal court. Conklin v. United States Shipbuilding Co., 140 F. 219.

89. Conveyance by one college corporation to another. State v. U. S. Grant University, 115 Tenn. 238, 90 S. W. 294. This was the common law rule and is also the rule under the express provisions of Code § 2525. Id.

90. Huber v. Martin [Wis.] 105 N. W. 1031. The voluntary dissolution of a corporation does not necessarily relieve it from liability on its contracts or for breaches thereof, and the corporation will not be released where the dissolution is not necessary or is for the purpose of avoiding its obligations. Stannard v. Reid & Co., 99 N. Y. S. 567. Where, in proceedings for voluntary dissolution, a receiver was appointed with power to continue the contracts of the corporation, and after about a year he was discharged and the property returned to the corporation, the latter was not relieved from a contract repudiated by it and by the receiver. Id.

91. A corporation organized for the purpose of erecting a dam, and cutting, storing, and selling ice, was a trading corporation, within Act May 21, 1881, P. L. 30, providing that corporations organized for trading purposes shall continue to exist after the expiration of their charters for the purpose of winding up their affairs. Pocono Spring Water Ice Co. v. American Ice Co. [Pa.] 64 A. 398. This statute applies to any of the corporations mentioned therein whose business has ceased from any cause whatever, and not merely to those whose charters have expired by limitation. Id.

Right to sue: A corporation which has been dissolved may sue upon a cause of action which has already accrued or which would have accrued to it but for such dissolution. Cobbey's Ann. St. 1903, § 4111. Lincoln Butter Co. v. Edwards-Bradford Lumber Co. [Neb.] 107 N. W. 797.

92. A university corporation which had been dissolved by conveyance of all its property to another such corporation could not, after all its debts had been provided for and after the expiration of more than five years, maintain a suit upon the contracts whereby the transfer of its property was made. See Code §§ 2525, 2070, 2071. State v. U. S. Grant University, 115 Tenn. 238, 90 S. W. 294.

93. Kelly v. Rochelle [Tex. Civ. App.] 14 Tex. Ct. Rep. 939, 93 S. W. 164.

94. May be revived by the assignee of the officers acting as statutory trustees pursuant to Rev. St. 1895, § 1246. Kelly v. Rochelle [Tex. Civ. App.] 14 Tex. Ct. Rep. 939, 93 S. W. 164. And so a judgment rendered in favor of the corporation plaintiff after its dissolution was not void, but only voidable; and when it was questioned by proceedings by the judgment defendant, the assignee of the statutory trustees of the corporation could intervene, have the suit revived, and proceed to judgment against the defendant. Id.

95. A suit against a Delaware corporation does not abate by reason of the dissolution of the corporation, no matter where the suit is brought, since 21 Del. Laws p. 456, c. 273, continues the existence of all Delaware corporations for three years after dissolution. Scott v. Stockholders' Oil Co., 142 F. 287.

96. Where the parties to proceedings to wind up a corporation do not demur to the pleadings, and agree that the court may sell the property and distribute the proceeds, they cannot thereafter object that the complaint did not state sufficient facts. Bank of Visalia v. Dillonwood Lumber Co. [Cal.] 82 P. 374.

97. Questions relating to forfeiture of franchises are waived by appealing to the appellate court and cannot be considered on a further appeal to the supreme court. Cratty v. Peoria Law Library Ass'n, 219 Ill. 516, 76 N. E. 707.

98. Parol evidence is not admissible to show that a corporation has gone into liquidation. Pattison v. Gulf Bag Co. [La.] 41 So. 224.

99. See 5 C. L. 786.

1. McCarter v. Ketcham, 72 N. J. Law, 247, 62 A. 693.

2. See 5 C. L. 786.

remedy to declare a forfeiture of franchises,[3] and, according to statutory provision, the remedy may be invoked by the attorney general of the state,[4] or by the commonwealth's attorney for the proper county,[5] or, where the attorney general or commonwealth's attorney refuses, upon the application of a person interested, to institute the proceeding, by such interested person,[6] but the remedy cannot be invoked directly by a person who is not interested in the corporation.[7] A corporation may be ousted of its powers by quo warranto proceedings on the ground of misuse and perversion of its franchises,[8] and the fact that such misuse constitutes a felony for which the officers of the corporation may be indicted will not bar quo warranto proceedings to dissolve the corporation.[9]

Custody and sale of property.[10]—Statutory trustees of a corporation to wind up its affairs[11] will be recognized as such in a foreign state where their appointment or acts do not contravene the policy and laws of such state.[12] Such trustees will not be allowed to use their trust for their personal benefit, and a purchase by them of the corporation's property from their cotrustees is invalid,[13] and they will be held accountable to the stockholders for any profit they may make by a resale of such property,[14] but innocent purchasers from him will be protected.[15]

A receiver will not be appointed as of right upon the application of a stockholder pending the winding up of the corporation's affairs by its directors acting under the direction of the stockholders,[16] or as statutory trustees.[17]

3. And also to declare a forfeiture of the right to exercise such franchises in city streets under an ordinance. People v. Chicago Tel. Co., 220 Ill. 238, 77 N. E. 245.

A demurrer to the information in quo warranto proceedings to oust a corporation of its powers admits all the material allegations of the information. State v. Delmar Jockey Club [Mo.] 92 S. W. 185.

4, 5. Code 1904, p. 1611, § 3023. South & W. R. Co. v. Com., 104 Va. 314, 51 S. E. 824.

6. Code 1904, p. 1611, § 3023. South & W. R. Co. v. Com., 104 Va. 314, 51 S. E. 824. But notwithstanding Code 1904, p. 1611, § 3023, authorizing private persons, under certain conditions, to apply for quo warranto to dissolve a corporation, the writ will issue to dissolve an internal improvement company upon the application of the state alone, the dissolution of such companies by quo warranto proceedings being controlled by section 1313a, cl. 58, of the Code. Id.

7. Under Code 1881, § 703, Ballinger's Ann. Codes & St. § 5781, quo warranto to dissolve a corporation must be upon the relation of the prosecuting attorney or of someone interested in the corporation, but persons not having a sufficient interest to maintain the writ upon their own relation may petition the court to direct the prosecuting attorney to institute the proceedings, and an appeal will lie from the refusal of the court to make such direction, upon which appeal the sufficiency of the petitioner's complaint will be considered. State v. Point Roberts Reef Fish Co. [Wash.] 85 P. 22.

8. Where corporation organized for the purpose of maintaining agricultural and stock fairs used its franchises only for the purpose of maintaining a race track for the purpose of gaming. State v. Delmar Jockey Club [Mo.] 92 S. W. 185.

9. The conviction of the officers for the felony would not bar the quo warranto proceedings against the corporation (State v. Delmar Jockey Club [Mo.] 92 S. W. 185), nor will the conviction of the officers be a condition precedent to the quo warranto proceedings against the corporation (Id.).

10. See 5 C. L. 787.

11. See Rev. St. Fla. § 2157.

12. Directors who, under Rev. St. Fla. § 2157, became the trustees to wind up the affairs of a Florida corporation upon the voluntary dissolution thereof, recognized in Alabama. Black v. Sullivan Timber Co. [Ala.] 40 So. 667. A creditor cannot object to the statutory trustees to wind up the affairs of a foreign corporation, and have a receiver appointed, where the corporation is not insolvent, unless by reason of the mismanagement of such trustees the creditor is in danger of losing his debt. Id. A stockholder who, as a director of a foreign corporation, participated in voluntary dissolution proceedings, cannot have the statutory trustees ousted and a receiver appointed, on the ground that the trustees are mismanaging so that the ultimate dividends from the distribution of the assets will be lessened. Id.

13. Noe v. Headley [Mo. App.] 96 S. W. 309.

14. Noe v. Headley [Mo. App.] 96 S. W. 309. Where a sale of the property of a dissolved corporation was made to one of its trustees by the others, and the purchasing trustee made a profit by a resale, he alone, being solvent, was accountable to the stockholders for such profit. Id.

15. Noe v. Headley [Mo. App.] 96 S. W. 309.

16. Where the directors of a corporation are winding up its affairs pursuant to the direction of the stockholders, a receiver will not be appointed upon the application of a stockholder, in the absence of fraud or mismanagement on the part of the directors.

Statutory proceedings.[18]—Statutes providing for voluntary dissolution authorize the proceedings upon the application of a certain proportion of the stockholders.[19] Such a dissolution is treated as voluntary.[20] A majority of the stockholders may surrender their charter, even against the protest of the minority, where the stockholders will not be injured except by loss of future prospects, and the interests of the minority are not sacrificed to those of the majority.[21] Some of the grounds upon which stockholders may invoke the statutory proceedings to dissolve are impossibility of execution of the purposes for which the corporation was organized,[22] insolvency for more than a year,[23] and suspension of business for a year.[24] A prior voluntary dissolution according to statutory provisions is a defense to a suit by a stockholder for involuntary dissolution.[25]

§ 13. *Succession of corporations; reorganization; consolidation.*[26]—The liability of a corporation which succeeds by purchase to the assets of another corporation for the debts of the latter depends upon the circumstances of the transfer.[27]

Brookshire v. Farmers' Alliance Exch. [S. C.] 52 S. E. 867.

17. Mere fact that a stockholder's share upon the eventual distribution of assets will be lessened by the management of the trustees will not, in the absence of fraud, authorize the appointment of a receiver. Black v. Sullivan Timber Co. [Ala.] 40 So. 667.

18. See 5 C. L. 787.

19. In a proceeding under Code 1899, c. 53, p. 57, for the dissolution or winding up of the affairs of a corporation, it is a condition precedent to the right to maintain the proceeding that it be alleged and proved that the applicants constitute not less than one-third in interest of the stockholders. Rainey v. Freeport Smokeless Coal & Coking Co., 58 W. Va. 424, 52 S. E. 528. Equity has jurisdiction of voluntary dissolution proceedings. Id.

20. Within Rev. St. Fla. § 2157, providing that on voluntary dissolution of a corporation its directors shall become its trustees. Black v. Sullivan Timber Co. [Ala.] 40 So. 667.

21. Shannon's Code, §§ 5165, 5181, relating to applications in the name of the state for dissolution of corporations, is broad enough to cover a case of voluntary surrender of a charter by the majority of the stockholders. State v. Chilhowee Woolen Mills, 115 Tenn. 266, 89 S. W. 741.

22. Such impossibility as a ground for voluntary dissolution, must appear as a certainty, and not by mere weight of evidence. Mere failure to succeed within a reasonable time, losses, and mismanagement short of fraud or bad faith, are not ground for dissolution at the instance of minority stockholders. Manufacturers' L. & Imp. Co. v. Cleary [Ky.] 89 S. W. 248.

23. See Comp. Laws §§ 9762, 9950, 9961. Attorney General v. Grand Rapids Sticky Fly Paper Co. [Mich.] 13 Det. Leg. N. 210, 107 N. W. 1119.

24. Code Civ. Proc. § 1785. Knickerbocker v. Groton Bridge & Mfg. Co., 97 N. Y. S. 595. A stockholder, who has applied to the attorney general to institute such proceedings on this ground, may, upon the refusal and failure of the attorney general to institute such proceedings and sixty days thereafter, institute the proceedings himself. Id.

25. Voluntary dissolution under Laws 1896, c. 932, p. 994, § 57, as amended by Laws 1900, p. 1621, c. 760. Knickerbocker v. Groton Bridge & Mfg. Co., 97 N. Y. S. 595. Where the petition for involuntary dissolution discloses that the corporation has already been voluntarily dissolved under Laws 1900, a demurrer will be sustained. Id. The voluntary dissolution cannot be avoided by mere allegation that no notice was given to the minority stockholders, there being no specific allegation that notice was not published and mailed as provided by the statute, or by allegations of the motives of the directors in procuring the voluntary dissolution, it not appearing that the statutory steps for such dissolution were not taken. Id.

26. See 5 C. L. 787.

27. When the trustees of a corporation which has been dissolved by decree of court makes a bona fide cash sale of its property to another corporation, the latter takes the same free from any claims of the creditors of the old corporation which are not assumed by the purchaser in its contract with the trustees. Houston Ice & Brew. Co. v. Nicolini [Tex. Civ. App.] 96 S. W. 84. Employee of the old company who was continued in service by the trustees held to have a claim only against the trustees and not against the new corporation to whom the property of the old was sold. Id. Where a corporation enters into a contract of employment, and shortly thereafter a new corporation is organized under the laws of a different state, and this new company takes over the business and property of the old company and retains the same officers, and permits the party with whom the contract of employment was made to proceed with his work for several months, the knowledge of the president as to the terms of the contract becomes the knowledge of the new company, and its action in continuing the other party to the contract in its employment is a ratification of the contract. Paul v. Caldwell Furnace Foundry Co., 7 Ohio C. C. (N. S.) 272. Notice to the president of a corporation concerning a matter within the scope of his authority is notice to the corporation. Id.

Personal judgment: Whatever may be the remedies of a creditor of a corporation which sells out to another corporation, he cannot obtain a personal judgment against the lat-

The rights of the new corporation likewise depend upon the contract of purchase[28] and it cannot complain of transactions consummated by the old corporation before the execution of such contract.[29] In case of succession of corporations, equity will, at the instance of creditors of the old corporation, follow its assets into the hands of the new to subject them to the debts, though there was no formal transfer.[30] The purchaser or successor does not ordinarily succeed to the fiduciary relations of the old corporation with third parties.[31] The corporate integrity of a corporation which has succeeded to the property of another corporation cannot be questioned collaterally.[32] Succession of a railroad corporation by legislation will be judicially noticed.[33]

A reorganization of a corporation may be effected upon the basis of an increased capitalization effected by taking over the business and properties of individuals to whom stock is issued in payment therefor.[34] Parties to an agreement to reorganize a corporation are bound by the plans of reorganization adopted pursuant to the agreement,[35] and are liable to reasonable assessments necessary for the preservation of the property,[36] nor can a bondholder who has not objected to the reorganization object to the management of the new corporation pursuant to

ter upon the original obligation where the purchaser has not assumed the obligations of the seller. Abilene Cotton Oil Co. v. Anderson [Tex. Civ. App.] 15 Tex. Ct. Rep. 91, 91 S. W. 607.

An equitable lien of a creditor of a dissolved corporation upon its assets in the hands of its successor cannot be enforced by execution issued on a judgment against the former and levied upon property acquired by the latter with such assets. Houston Ice & Brewing Co. v. Stratton [Tex. Civ. App.] 13 Tex. Ct. Rep. 887, 89 S. W. 1111. Such an equitable lien is barred by the running of the statute of limitations against the debt to which the lien is an incident. Id.

Pleading: Where a creditor of a corporation whose property has been purchased by another corporation seeks to hold the latter liable on the ground that it has received such property, he must allege and prove what property the latter received. Houston Ice & Brewing Co. v. Nicolini [Tex. Civ. App.] 96 S. W. 84.

Parties: Where one corporation purchases all the assets of another and assumes all its obligations, an obligee of the corporation thus absorbed may sue the assorbing corporation in equity, without using the name of or joining the corporation absorbed. Dancel v. Goodyear Shoe Machinery Co. [C. C. A.] 144 F. 679.

28. Meyer v. Page, 98 N. Y. S. 739.

29. As the manner in which the old corporation settled its debts. Meyer v. Page, 98 N. Y. S. 739. In an action by a stockholder in the new corporation for an accounting for the benefit of the corporation from the organizer of the new corporation, a judgment for an accounting based partly upon the theory that the defendant failed to turn over all the property of the old corporation to the new, and partly upon the theory that he misrepresented the value of the property he was turning over, cannot be sustained. Id.

30. Loughlin v. U. S. School Furniture Co., 118 Ill. App. 36.

31. Without a special stipulation to that effect and without the consent of the other party, a corporation cannot transfer to its successor fiduciary relations existing between itself and such party under a contract, though the contract itself passes to the successor. New York Bank Note Co. v. Kidder Press Mfg. Co. [Mass.] 78 N. E. 463.

32. By debtor of old corporation when called upon by the new corporation to pay his debt. Clifford Banking Co. v. Donovan Commission Co., 195 Mo. 262, 94 S. W. 527.

33. Atlanta & W. P. R. Co. v. Atlanta, B. & A. R. Co. [Ga.] 54 S. E. 736.

34. Individual who sold his business to corporation for stock held estopped to rescind the agreement on the ground of misrepresentations by officers of the original corporation who promoted the reorganization, plaintiff having participated in the reorganization with knowledge of the facts. French v. Northwestern Laundry [Iowa] 107 N. W. 430. The other parties to whom stock of the new company was issued were necessary parties to a suit to rescind on the ground that such parties received more stock than they were entitled to. Id.

35. Agreement provided that plans submitted by committee should be binding unless a majority of the bondholders dissented within a certain time, and there was no such dissent. Cowell v. City Water Supply Co. [Iowa] 105 N. W. 1016; Id. [Iowa] 108 N. W. 116.

Compensation of committee: Objections of single bondholder to allowances of committee's compensation on the ground of fraud and failure to conform to the reorganization agreement, not sustained. Mills v. Potter, 189 Mass. 238, 75 N. E. 627. Agreements between bondholders for the reorganization of a corporation will be strictly construed as to the power and authority of the committee to which the reorganization is committed (Id.), but where the committee acts within the agreement and the authority thereby conferred, their acts will be upheld, especially after their acts have been ratified by the bondholders by payment of as-

the plans of reorganization.[37] A corporation cannot ordinarily escape its liabilities by reorganization,[38] but the reorganization ordinarily extinguishes the claims of the parties thereto against the old corporation.[39] The new corporation is liable for such debts and obligations of the old corporation as it assumes.[40] A reorganization for fraudulent purposes will not be upheld.[41] It is no ground of objection to the reorganization that it is made in a state whose laws of incorporation are different from those of the old corporation's domicile,[42] or that the corporate powers have been enlarged.[43] When the reorganization is illegal, the business of the new corporation will be regarded as a continuation of that of the old.[44]

Corporations may be consolidated when authorized by law,[45] and the consolidat-

sessments upon them made by the committee in order to carry out the committee's plans (Id.).

36. Whether such assessments are specifically provided for in the agreement or not. Cowell v. City Water Supply Co. [Iowa] 105 N. W. 1016; Id. [Iowa] 108 N. W. 116.

37. Pooling of stock by new corporation. Cowell v. City Water Supply Co. [Iowa] 105 N. W. 1016; Id. [Iowa] 108 N. W. 116.

38. Greene v. Middlesborough Town & Lands Co. [Ky.] 89 S. W. 228. A corporation cannot escape its liabilities by the organization of a new corporation and transferring its property to the same where the two corporations are practically identical, as where a corporation operating a petroleum lease attempted to escape payment of royalties by organization of new corporation. Higgins v. California Petroleum & Asphalt Co., 147 Cal. 363, 81 P. 1070.

39. Where the creditors of a bankrupt corporation enter into a trust agreement whereby they surrender their claims to a trustee to whom the assets of the corporation are also transferred, with the view to the formation of a new corporation, upon a stipulation that the claims of the creditors are to be paid in the notes and stock of the new corporation, the creditors will have no further claim upon the old corporation or its assets, but will be confined to their claim to the notes and stock of the new; but where one of the creditors held property of the corporation as a pledge, and it was expressly agreed that the pledge should be retained to a certain amount, the creditor not to receive any stock of the new corporation for such amount, such pledge was not waived by the trust agreement. Love v. Export Storage Co. [C. C. A.] 143 F. 1. Bond or certificate holders who, pursuant to the agreement, surrender their holdings and receive stock in the new corporation in exchange therefor, become stockholders in the new corporation. Cowell v. City Water Supply Co. [Iowa] 108 N. W. 116.

40. New corporation purchased property from receiver of old, but was liable for a contract for services between plaintiff and the old corporation. Baker v. Appleton & Co., 107 App. Div. 358, 95 N. Y. S. 125. The fact that the sale was made by the receiver to a committee and by the committee to the reorganized corporation did not relieve the latter from a liability of the receiver assumed in the deed to the reorganized company, the real parties to the transaction being the receiver on the one hand and the new company on the other. Baer v. Erie R. Co., 95 N. Y. S. 486.

Limitations: Where a suit was instituted in proper time against a corporation receiver for a liability incurred by him in the conduct of the receivership, a reorganized corporation which assumed the liability of the receiver and the conduct of the suit could not plead the statute of limitations. Baer v. Erie R. Co., 95 N. Y. S. 486.

41. Where corporate stock is held by assignment and delivery, as security for a debt, and the assignor, being the president of the corporation, procures a reissue of the stock to himself, and thereafter assigns the reissued stock to a third person, and by a vote of such reissued stock the corporation is reorganized under a different name, and the property and franchises of the old corporation are sought to be invested in the new corporation, the original assignee is not required to reduce his demand against his assignor to judgment before he may sue to have the original corporation reinvested with its corporate power and franchises. First Nat. Bank v. Stribling [Okl.] 86 P. 512.

42. Cowell v. City Water Supply Co. [Iowa] 105 N. W. 1016; Id. [Iowa] 108 N. W. 116.

43. Bondholder who was party to the reorganization agreement could not object. Cowell v. City Water Supply Co. [Iowa] 105 N. W. 1016; Id. [Iowa] 108 N. W. 116.

44. Illegality by reason of the invalidity of the enabling act. Huber v. Martin [Wis.] 105 N. W. 1031.

45. Under Act May 29, 1901, P. L. 349, a gas light company, a gas heating company, and an electric company may be consolidated. Motter v. Kennett Tp. Electric Co., 212 Pa. 613, 62 A. 104. What may and must be done to effect a merger of corporations organized under the Act of 1874, P. L. 73, and its supplements, as authorized by the Act of 1901, is the execution of a joint agreement by the directors of the corporations intended to consolidate, which must contain the matters prescribed by the act and must be submitted to the stockholders of each company at separate meetings to be held for the consideration of the agreement and its adoption or rejection by ballot. A vote by a majority in amount of the entire capital stock of the companies intending to merge, and the required certification, authorize the agreement to be taken as the act of consolidation. Id. In Illinois, a domestic corporation cannot be consolidated with a foreign one. Bill held to show not

ed corporation succeeds to all the property and franchises of the constituent companies.[46] A stockholder cannot complain of or avoid a consolidation of his corporation with another or others where the consolidation is effected according to law,[47] but may attack it for fraud.[48] A stockholder in one of the constituent companies cannot, in his own right and alone, sue the trustee with whom such company's share of the stock in the consolidated company is deposited for distribution to recover such stockholder's share,[49] nor can an individual stockholder, in his own right, sue the trustee for any of the assets in the latter's hands.[50] The rule prohibiting promoters from making secret profits does not prohibit the organizers of a consolidated corporation from buying the stock of the proposed constituent companies and selling it at an advanced price to the consolidated corporation.[51]

Some courts make a distinction between consolidation and merger,[52] and where consolidation is forbidden, the distinction between consolidation and succession becomes important.[53]

a consolidation but a succession. Loughlin v. U. S. School Furniture Co., 118 Ill. App. 36. Under Ky. St. 1903, § 555, educational corporations may be consolidated. Central University v. Walters' Ex'rs [Ky.] 90 S. W. 1066.

Diversion of purposes: The consolidation of two corporations organized for the same general purposes does not constitute a diversion of either from the purposes for which it was organized, and hence there was no such diversion where a university under the control of the Southern Presbyterian Church was consolidated with a college controlled by the Northern Presbyterian Church. Central University v. Walters' Ex'rs [Ky.] 90 S. W. 1066.

46. Title to note given for endowment of a chair in a university passed to a university formed by the consolidation of the one endowed with a college. Central University v. Walters' Ex'rs [Ky.] 90 S. W. 1066.

Fiduciary relations: The consolidated corporation will not succeed to a trust held by one of the constituent companies where the powers and liabilities of the consolidated company are radically different from those of the original trustee company, and hence a trust company in which a banking corporation was merged did not succeed the banking company as executor of a decedent's estate. In re Stikeman's Will, 48 Misc. 156, 96 N. Y. S. 460.

47. Where the law or the statutes empower the directors and the holders of three-fifths of the stock of a corporation to consolidate with another corporation, a consolidation thus effected is neither void nor voidable at the option of the holder of the minority stock. Jones v. Missouri-Edison Elec. Co. [C. C. A.] 144 F. 765.

48. Where the majority stockholders take advantage of their power and fraudulently bring about a consolidation detrimental to the interests of the minority, the latter may appeal to equity to annul the consolidation and rehabilitate the original corporation. Jones v. Missouri-Edison Elec. Co. [C. C. A.] 144 F. 765. Such a suit is not barred by the rule that the state alone may question the existence of a corporation (Id.), nor is the identity of the original corporations extinguished to the extent of precluding them and their minority stockholders from suing to avoid the consolidation (Id.). The joinder, in such a suit, of the majority stockholders and the directors as defendants, will not make the bill multifarious. Id. The directors are necessary if not indispensable parties. Id.

49. The suit should be brought in behalf of the complainant and all other stockholders similarly situated. Knickerbocker v. Conger, 110 App. Div. 125, 97 N. Y. S. 127. The trust, if any be created by such a transaction, is in favor of the stockholders of the constituent companies collectively, and an action to enforce the same should be by all the stockholders (Id.), and the constituent companies should also be made parties (Id.).

50. Whether such assets be composed of assets not taken over by the new corporation or of the amount paid by the latter for the assets taken over, the title to the assets in the hands of the trustee being in the constituent companies. Knickerbocker v. Conger, 110 App. Div. 125, 97 N. Y. S. 127.

51. Such a transaction is solely between the stockholders of the constituent companies and the organizers as between themselves, selling as individuals and buying as a corporation, and if fraud is practiced it is a matter wholly between themselves and gives no cause of action to the consolidated corporation or its stockholders as such. Blum v. Whitney [N. Y.] 77 N. E. 1159.

52. But in Kentucky, where the merging corporation succeeds to all the property and franchises of the one merged, there is no distinction between consolidation and merger. Central University v. Walters' Ex'rs [Ky.] 90 S. W. 1066.

Parol evidence is not admissible to show that one corporation has been merged in another. Pattison v. Gulf Bag Co. [La.] 41 So. 224.

Estoppel to assert merger: Where a corporation is merged in another, but the business is conducted at the same place, in the same name, and under the same manager, it cannot deny its continued existence as against the public and employees not aware of any change in the corporate ownership or control. Pattison v. Gulf Bag Co. [La.] 41 So. 224.

53. Transfer by one corporation to another of its tangible property and good will is a sale and not a consolidation, where the

§ 14. *Stock and membership.*[54]—This section is confined to the rights and relations of the corporation and its members inter se.[55]

(§ 14) *A. Membership in corporations in general.*[56]—The relation of a stockholder to his corporation, its officers, and his fellow stockholders, is one of contract in which the pertinent statutes and the settled law are embodied.[57] The issue of shares of stock is not absolutely essential to membership in a corporation,[58] and a party equitably entitled to an interest in a corporation will not be denied equitable relief merely on the ground that he is not technically a stockholder.[59]

(§ 14) *B. Capital stock and shares of stock.*[60]—Mandatory provisions as to the manner in which capital stock of a corporation may be increased cannot be waived;[61] but when the statutory provisions have been complied with, mandamus lies to compel the secretary of state to issue a certificate showing an increase of capital stock.[62] Stockholders have the right to participate in the issue of new stock in proportion to their holdings and on the same terms given to other parties.[63] If a corporation wishes to reduce its stock, it must take the steps required by law to effect this purpose,[64] but remedies for impairment of capital stock provided by statute do not preclude the corporation and its stockholders from remedying such impairment at any time before the statutory remedies have been invoked.[65] The authority to reduce capital stock cannot be used for the purpose of creating a basis for favoring the majority of the stockholders at the expense of the minority.[66]

franchise and a considerable part of the assets are retained and full consideration for the transfer is received. Hiles v. Hiles, 120 Ill. App. 617. One corporation may purchase the good will and entire tangible assets of another (Id.), and that part of the capital stock of the purchasing corporation is given therefor does not affect the validity of the transaction (Id.), nor does the fact that the corporations have a common director (Id.) In the case it did not appear that the directorate passed on the transaction. Id. An agreement by which one is to purchase all the stock of a private corporation and is to have control of the corporation before the price of such stock is paid is not against public policy. Borland v. Prindle, Weeden & Co., 144 F. 713.

54. See 5 C. L. 789.

55. As to rights of creditors, see post § 16, Rights and Remedies of Creditors of Corporations.

56. See 5 C. L. 789.

57. Jones v. Missouri-Edison Elec. Co. [C. C. A.] 144 F. 765.

58. A contract with a promoter, which was accepted by the corporation, held to entitle the promoter to a certain interest in the entire plant of the corporation, and not merely to a certain proportion of the stock actually issued. Mulvihill v. Vicksburg R., Power & Mfg. Co. [Miss.] 40 So. 647.

59. Mulvihill v. Vicksburg R., Power & Mfg. Co. [Miss.] 40 So. 647. Corporation and parties to a fraudulent sale of its assets held estopped to deny the right of a minority stockholder to sue on the ground that he was not technically a stockholder, where the corporation had utterly disregarded the constitutional inhibition against issuing stock for anything except money, labor, or property. Id.

60. See 5 C. L. 789.

61. Notice required by Const. art. 12, § 11, and Civ. Code § 359, all constitutional provisions being, under Const. art. 1, § 22, mandatory or prohibitory, unless otherwise provided. Navajo Min. & Development Co. v. Curry, 147 Cal. 581, 82 P. 247.

62. Where all the requirements of the law relative to such increase have been complied with by a corporation, the secretary of state cannot refuse to issue the certificate on the ground that he has already issued a certificate, where such certificate was issued upon an insufficient compliance with the statutory requisites and was therefore ineffective under Sess. Acts 1903, § 123. State v. Swanger, 195 Mo. 539, 93 S. W. 932.

63. A corporation, therefore, cannot issue bonds convertible into new stock at the option of the bondholder. Wall v. Utah Copper Co. [N. J. Eq.] 62 A. 533.

64. See Code Pub. Gen. Laws, art. 23, §§ 82-87. Maryland Trust Co. v. National Mechanics' Bank, 102 Md. 608, 63 A. 70.

65. Under Code §§ 1731, 1732, an insurance company which has received a notice from the state auditor that it shall make good an impairment of its stock cannot enforce assessments made for that purpose as a personal liability of a stockholder, but the company may, before such notice is given, make such an assessment and the stockholder may pay it, and thus avoid the giving of the notice. Iowa Nat. Bank v. Cooper [Iowa] 107 N. W. 625. Where a bank holding stock of an insurance company as collateral paid an assessment thereon made with a view to avoid the notice of impairment of capital provided for by Code, §§ 1731, 1732, directors who participated in the assessment and who requested the bank to pay it could not, in an action by the bank against them as parties to the note secured by such collateral, contest the bank's right to pay such assessment or its right to apply the proceeds of the stock to the repayment of the amount so paid. Id.

Treasury stock issued to trustees whose duty it is to immediately return it to the corporation is still treasury stock.[67] Treasury stock will not be considered upon an accounting between stockholders.[68] The situs of stock is in the state wherein the corporation resides.[69] Shares of stock are personal property.[70] Certificates of stock are not necessarily invalid by reason of irregularity in the form,[71] or as to the time of their issue.[72] Stock issued without the payment of any consideration is fictitious,[73] and may be declared void by a court of equity,[74] but as against an innocent purchaser for value, without notice, a corporation is estopped to deny the validity of its stock,[75] and stockholders may likewise be precluded from attacking the validity of an issue of stock by estoppel[76] or ratification.[77] A corporation may take such precautions as it may see fit to guard against the forgery or simulation of signatures to its certificates of stock,[78] and it is the duty of a party accepting a certificate of stock to use due diligence to verify the signatures thereto.[79]

In a proper case a corporation may maintain a suit to determine who are its stockholders.[80]

66. Majority attempted to reduce stock and thus release themselves from a portion of their subscriptions, whereas the minority stockholders had fully paid their subscriptions. Theis v. Durr, 125 Wis. 651, 104 N. W. 985. In a suit to prevent such reduction, an order declaring the whole proceeding for reduction void was not improper. Id.

67. Camden Land Co. v. Lewis [Me.] 63 A. 523. Where treasury stock is wrongfully issued to the president of the corporation in payment of a debt due by the corporation to him he holds such stock in trust for the corporation and it may be traced into his estate as long as it is distinguishable. Id.

68. Gustin v. Merrill [Mich.] 108 N. W. 408.

69. Within Act March 3rd, 1875, c. 137, § 8, 18 Stat. 472, relating to the venue of suits to enforce liens, etc., upon property. Jones v. Gould, 141 F. 698.

70. First Nat. Bank v. Stribling [Okl.] 86 P. 512,

71. Where the situation of the parties and their knowledge of the transaction would not have been changed by compliance with Code § 1627, requiring certificates of stock to contain endorsements of payments thereon, failure to comply with such section did not invalidate the certificates. French v. Northwestern Laundry [Iowa] 107 N. W. 430.

72. When stock certificates are issued in contemplation of incorporation, the issue of stock thus made may, after incorporation, be adopted by the corporation without the formal issue of new certificates. Thorpe v. Pennock Mercantile Co. [Minn.] 108 N. W. 940.

73. Stock issued in consideration of a fictitious credit given to the party to whom the stock is issued is within the prohibition of Const. § 234, providing that stock shall be issued only for money, labor done, or property received by the corporation. Crow v. Florence Ice & Coal Co., 143 Ala. 541, 39 So. 401. See post § 16 E, Fictitiously Paid up Stock.

74. At the suit of a stockholder suing for the corporation. Crow v. Florence Ice & Coal Co., 143 Ala. 541, 39 So. 401.

75. Corporation estopped to assert that the stock was void because not paid for by seller. Westminster Nat. Bank v. New England Electrical Works [N. H.] 62 A. 971.

76. Irregularity of meeting at which stock is allotted to the various subscribers will not affect the validity of the allotment where all the stockholders are present and participating. Irregularity in failure to write up minutes. Sheldon Canal Co. v. Miller [Tex. Civ. App.] 14 Tex. Ct. Rep. 279, 90 S. W. 206.

77. Parties accepting stock thereby ratify the resolution of the directors providing for the issue of the stock. Turner v. Fidelity Loan Concern [Cal. App.] 83 P. 62.

78. Act June 24, 1895, P. L. 258, providing that certificates of stock shall be signed by the president or vice president, or other officer designated by the board of directors, and countersigned by the treasurer and sealed with the corporate seal, does not prevent the corporation from requiring in addition to the statutory signatures the signature of a registrar of transfers. Dollar Sav. Fund & Trust Co. v. Pittsburg Plate Glass Co., 213 Pa. 307, 62 A. 916.

79. Dollar Sav. Fund & Trust Co. v. Pittsburg Plate Glass Co., 213 Pa. 307, 62 A. 916. Where a necessary signature is forged, the party taking the certificate without exercising proper diligence to verify the signatures cannot hold the corporation liable on account of its negligence in leaving the certificate where it could be obtained and the forged signature affixed, as where the certificate was executed as required by statute but did not have the signature of a transfer agent, as required by the rules of the corporation, which requirement was shown on the face of the certificate, and an ordinary clerk took it from the place where the corporate officers had left it, forged the signature of the transfer agent, and transferred it to a party who pledged it to the plaintiff. Id.

80. Stock books having been lost, suit was brought to ascertain who were stockholders entitled to a distribution of assets. Geneva Mineral Spring Co. v. Steele, 97 N. Y. S. 996. Objections to judgment awarding stock to a certain party held well taken. Id. The omission to find as to the title of parties who were before the court to certain shares was a mistrial as to those shares. Id. The

(§ 14) *C. Subscriptions to capital stock, and other agreements to take stock.*[81]—There is a distinction between a contract of subscription and a purchase of stock,[82] subscribers to stock being those who, upon the formation of the corporation, mutually agree to take and pay for the stock.[83] No particular form of subscription is necessary in order to render the subscription binding,[84] except where the method or form of subscription is prescribed by statute,[85] and even then the method or form prescribed by the statute is not essential to the validity of the subscription, unless the statute is mandatory.[86] A condition attached to a subscription of stock must be specific and certain.[87]

In the absence of any special agreement, subscribers agree to pay for their stock at par value,[88] and it is sometimes provided by statute that stock shall not be sold to subscribers at less than par,[89] but after the formation of the corporation a party may make any agreement for the purchase of stock at a stipulated price that the parties may desire.[90] The issue of stock gratuitously is violative of the rights of existing holders of nonassessable stock, and is a fraud upon subsequent subscribers and creditors,[91] but it is not essential that the subscription should be paid in money.[92] Payment to a subscription agent is payment to the corporation.[93]

An action upon a stock subscription is properly brought in the name of the corporation,[94] and the liability of the defendant will be determined by the law of

stock transfer book having been lost, a new one made by the president by pasting original certificates which had been returned in the stock certificate book, memoranda of transfers being endorsed on the back of such certificates by the president, was not admissible in evidence under Laws 1875, c. 611, p. 759, § 17, making stock transfer books so admissible. Id. Indorsements on the back of an original certificate, made by the president for his own benefit and not in the course of his official duties, showing assignment to himself, was inadmissible. Id. The entire certificate book having been offered in evidence and objected to, the book containing objectionable statements indorsed upon the certificates pasted therein, the whole book was inadmissible. Id.

81. See 5 C. L. 791.

82, 83. McDowell v. Lindsay, 213 Pa. 591, 63 A. 130.

84, 85. Planters' & Merchants' Independent Packet Co. v. Webb [Ala.] 39 So. 562.

86. Acts 1903, p. 310, is not mandatory. Planters' & Merchants' Independent Packet Co. v. Webb [Ala.] 39 So. 562.

87. A mere statement by a subscriber in a letter in which he sent in a remittance that he understood that certain persons were chiefly interested in the proposed corporation did not render the subscription conditional upon such persons being so interested. Smith v. First Nat. Bank [Tex. Civ. App.] 16 Tex. Ct. Rep. 729, 95 S. W. 1111.

88. McDowell v. Lindsay, 213 Pa. 591, 63 A. 130.

89. The courts of Pennsylvania will not declare unconstitutional the West Virginia statute prohibiting the sale of stock to subscribers at less than par, except upon two weeks' published notice of intention to present a resolution authorizing the sale, such statute having been treated as constitutional by the legislative and executive departments of West Virginia for several years. McDowell v. Lindsay, 213 Pa. 591, 63 A. 130. Sale below par void as to creditors. McConey v. Belton Oil & Gas Co. [Minn.] 106 N. W. 900.

90. McDowell v. Lindsay, 213 Pa. 591, 63 A. 130. An innocent purchaser of stock from a West Virginia corporation after the formation of the same, for less than par value, obtained a full and complete title to the stock, without any further obligation to the company or its creditors for the difference between the par value and the purchase price, notwithstanding that the notice required by the West Virginia statute to be given where stock is to be sold at less than par value was not given. Id.

91. Such an issue will render the directors responsible therefor liable in damages, and make the subscriptions of subsequent stockholders voidable. Hinkley v. Sac Oil & Pipe Line Co. [Iowa] 107 N. W. 629.

92. Where a stockholder is given full credit for property given in exchange for stock, he will have to account for a subsequent credit on account of a portion of the same property. Essex v. Essex [Mich.] 12 Det. Leg. N. 439, 104 N. W. 622. As to payment for stock with property or labor, see post § 16 .E, Fictitiously Paid up Stock. Where a stockholder assumes a debt of the corporation as part payment for his stock, he cannot be held to account for the credit thus given him pending an action by the creditor against the corporation. Essex v. Essex [Mich.] 12 Det. Leg. N. 439, 104 N. W. 622.

93. Where a corporation receives and accepts payments upon stock made to its subscription agent, and delivers the stock certificates through such agent, such payments constitute payments to the corporation. Kellenberger v. Oskaloosa Nat. Bldg., Loan & Investment Ass'n [Iowa] 105 N. W. 836.

94. Hastings Lumber Co. v. Edwards, 188 Mass. 587, 75 N. E. 57. In considering the rights of the defendant in such an action, the distinction must not be forgotten between such an action and one to recover an

the corporation's domicile.[95] As a general rule, the liability of one subscriber is not dependent upon the performance of their contracts by the others.[96]

A stock subscription cannot be released either by the board of directors[97] or by a majority of the stockholders,[98] but where a subscription is rejected and abrogated, the subscriber is released from liability thereon,[99] and, likewise, a material departure in the charter from the terms of the subscription as to the object and powers of the corporation releases the subscriber.[1] A corporation may, before it has contracted debts, call in partly paid stock and issue in lieu thereof fully paid stock to an amount equal to that paid in on the original issue.[2] A corporation may make a conditional sale of its stock, whereby it undertakes to take back the stock if the purchaser is not satisfied with it.[3]

unpaid assessment on capital stock, the former action being based upon the agreement to take and pay for the shares, treated as a contract at common law, to recover the balance due on such contract. Id.

95. Hastings Lumber Co. v. Edwards, 188 Mass. 587, 75 N. E. 57.

96. Even where the subscriptions are all on the same list, each subscriber agreeing to take the amount set opposite his name. Hastings Lumber Co. v. Edwards, 188 Mass. 587, 75 N. E. 57.

97. Theis v. Durr, 125 Wis. 651, 104 N. W. 985. In absence of statute, charter, by-law, or vote of the corporation expressly permitting it. Hastings Lumber Co. v. Edwards, 188 Mass. 587, 75 N. E. 57. A by-law authorizing the directors of a corporation to control the business of the corporation and to take such steps as in their judgment are best for the interests of the corporation, and to issue and dispose of such part of the treasury stock as they deem for the best interests of the corporation, will not authorize them to convert shares which have been subscribed but not paid for into treasury stock and thus relieve the subscriber. Id.

98. Theis v. Durr, 125 Wis. 651, 104 N. W. 985.

99. Where the evidence was uncontradicted that a subscription had been rejected, an instruction that there was no evidence of such subscription was harmless, though there was such evidence. Sheldon Canal Co. v. Miller [Tex. Civ. App.] 14 Tex. Ct. Rep. 279, 90 S. W. 206. Where the evidence was uncontradicted that a subscription had been abrogated before the institution of a suit involving such subscription, there was no error in excluding evidence of notice, after the institution of such suit, to the subscriber to pay such subscription. Id.

1. Subscriber to stock in corporation to be organized to operate a cotton seed oil mill not bound where the charter also conferred power to operate cotton gins. Comanche Cotton Oil Co. v. Browne [Tex. Civ. App.] 14 Tex. Ct. Rep. 306, 90 S. W. 528. But this case was reversed on appeal on the ground that the power given by the charter of the company to operate cotton gins only as accessories and feeders to the cotton oil mills was not a variance from the terms of the subscription, which were to a corporation which was to operate a cotton oil mill, the expressed power in the charter to operate the cotton gins being held to be merely the expression of a power which was implied from the power to operate the cotton oil mill. Comanche Cotton Oil Co. v. Browne [Tex.] 15 Tex. Ct. Rep. 641, 92 S. W. 450. The authority given by statute to corporations to amend their charters does not authorize a variance between the terms of the original subscriptions to stock and the articles of incorporation. Comanche Cotton Oil Co. v. Browne [Tex. Civ. App.] 14 Tex. Ct. Rep. 306, 90 S. W. 528. Where a subscriber told another subscriber that she could not attend the meeting at which the organization was to be effected, and that whatever the others did would be all right with her, this did not justify or authorize a departure in the articles of incorporation from the terms of the subscriptions. Id.

2. Vrooman v. Vansant Lumber Co. [Pa.] 64 A. 394. Such a change in the subscription to stock is not a reduction of the capital stock where the balance of the stock remaining after the issue of the fully paid shares is retained by the corporation. Id.

Notice of intention to change the subscription must be given to the stockholders. Id. Notice of intention to change the subscriptions in this way may be waived, as where all the stockholders except one attended the meeting which authorized the reduction of the subscription and the one that was not present ratified the change by accepting the fully paid stock and surrendered his partly paid stock. Id. Failure to file annual reports required by statute, and thus to give notice of the change in the subscription, will not operate to render the change invalid as to a subsequent creditor who had actual notice of the change before extending credit to the corporation. Annual reports required by Act April 29, 1874, § 39, cl. 8. Id.

3. And may agree to pay interest on the purchase money if the stock is returned. Ophir Consol. Mines Co. v. Brynteson [C. C. A.] 143 F. 829. Such an agreement does not come within the prohibition against relieving subscribers from their subscriptions. Id. Previous negotiations between the corporation and the purchaser looking to an absolute sale of the stock will not render the subsequent conditional sale invalid as being without consideration, where such negotiations do not amount to a contract, or where, if they amount to a contract, a subsequent bona fide dispute arises between the purchaser and the corporation which is settled by the conditional sale. Id. Where

Subscriptions procured by fraud are invalid,[4] and the money paid thereon may be recovered back,[5] and where, on the other hand, the consideration paid to a corporation for its stock wholly fails, the shares so issued may be cancelled at the instance of the corporation.[6]

the agreement for such a sale is signed by the corporation and its president jointly, the consideration moving between the corporation and the purchaser is sufficient to support the liability of the president for the return of the money. Id.

4. A paper corporation, whose subscriptions to stock were never paid and which never acquired any property and never carried on any business, and which had no creditors, was itself a fraud, and had no standing in court to recover subscriptions for its fictitious stock. Metropolitan Lead & Zinc Min. Co. v. Webster, 193 Mo. 351, 92 S. W. 79. A subscriber to stock has the right to assume that other subscribers have paid the same for their stock as he pays for his, and a discrimination in this regard will render the subscription voidable. Hinkley v. Sac Oil & Pipe Line Co. [Iowa] 107 N. W. 629. Misrepresentations of president of corporation as to its solvency. Collins v. Chipman [Tex. Civ. App.] 15 Tex. Ct. Rep. 411, 95 S. W. 666. The misrepresentations having been made within the scope of the officer's authority, knowledge on the part of the corporation of such representations was not essential to its liability. Id.

Fraud of the promoters in securing a stock subscription is ground for cancellation, as where the promoters make fraudulent representations as to the indebtedness of the corporation. Tinker v. Kier, 195 Mo. 183, 94 S. W. 501. A party who has been induced to subscribe to stock through the fraud of the promoters and directors may sue for the cancellation of his contract and the recovery of the amount paid by him. Hinkley v. Sac Oil & Pipe Line Co. [Iowa] 107 N. W. 629.

5. Collins v. Chipman [Tex. Civ. App.] 15 Tex. Ct. Rep. 411, 95 S. W. 666; Hinkley v. Sac Oil & Pipe Line Co. [Iowa] 107 N. W. 629.

Insolvency of the corporation will not bar the right to sue for the cancellation of a stock subscription for fraud, provided the suit be instituted before some overt step indicative of insolvency has been taken by or against it. Hinkley v. Sac Oil & Pipe Line Co. [Iowa] 107 N. W. 629.

Pleading: In such a suit, where the plaintiff alleged that he relied on the representations of the defendant's president made individually and also as president, the petition was not subject to a demurrer because it did not allege that plaintiff relied solely upon the representations made by the defendant's president as such. Collins v. Chipman [Tex. Civ. App.] 15 Tex. Ct. Rep. 411, 95 S. W. 666.

Evidence: The rule against contradiction of written instruments by parol evidence will not prevent the establishment of the fraud by parol evidence. Metropolitan Lead & Zinc Min. Co. v. Webster, 193 Mo. 351, 92 S. W. 79; Collins v. Chipman [Tex. Civ. App.] 15 Tex. Ct. Rep. 411, 95 S. W. 666. Where the defendant's president represented to the plaintiff that the defendant was in good financial condition, evidence of the condition of the defendant three years after such representations was admissible. Collins v. Chipman [Tex. Civ. App.] 15 Tex. Ct. Rep. 411, 95 S. W. 666. A representation of the defendant's president that the purchase of the stock was a "splendid investment" was not, when taken in connection with representations as to the facts upon which such statement was based, a mere expression of opinion which should have been excluded from the testimony. Id. Where the defendant's bookkeeper, secretary, and treasurer testified that the company had earned net profits during a certain period, it was competent to ask him on cross-examination whether during all that period the earnings had been sufficient to pay off a debt due the president for the property on which the business was conducted. Id. Testimony of the defendant's general manager, that a few weeks before the purchase of the stock by the plaintiff in reliance upon representations as to the solvency of the defendant, the defendant owed its officers and employees over $7,000, was admissible. Id. Hypothetical questions bearing upon the condition of the defendant at the time it was represented as solvent to the plaintiff held proper and supported sufficiently by the evidence. Id. The testimony of the defendant's bookkeeper, secretary, and treasurer, that it would have taken practically all of the defendant's assets to pay its debts at the time favorable representations of its condition were made to the plaintiff, was admissible. Id. Where the representations complained of as fraudulent related to the condition and prospects of the defendant, it was competent to ask the defendant's president on cross-examination as to the management of the corporation, amount of salaries paid to officers, etc. Id. Exclusion of defendant's evidence as to the reasonable value of the stock was harmless where it was admitted at another point in the case. Id. A variance between the evidence and allegations as to some of the representations upon which plaintiff relied in purchasing his stock was immaterial, where the allegations as to the other misrepresentations were proved as alleged. Id.

Instructions: An instruction that if the plaintiff at the end of a year knew no dividends were declared, he was thereby put upon inquiry as to the misrepresentations complained of by him, was properly refused, as being upon the weight of the evidence. Collins v. Chipman [Tex. Civ. App.] 15 Tex. Ct. Rep. 411, 95 S. W. 666.

Laches may estop a subscriber from rescinding his subscription for fraud, but the relation between a corporation and its shareholders, whose subscriptions have been obtained by the fraud of its agent, are somewhat different from the relations between a shareholder seeking to cancel his subscription and subsequent subscribers and creditors. Plaintiff held not barred by

Calls and assessments.[7]—In the absence of statutory restrictions, subscribers to stock may agree among themselves to pay the amount of their subscriptions either in a single instalment or in such sums and at such times as the same may be called for,[8] and that the corporation shall have a lien on the stock for unpaid subscriptions.[9] A call for unpaid subscriptions may be enforced by action against the subscriber.[10] A notice by mail a reasonable time before suit against the stockholder is sufficient.[11]

At common law a corporation cannot assess the holders of fully paid shares for any purpose,[12] but such holders may be assessed where it is so provided by statute,[13] and by becoming a stockholder a party contracts with the corporation to pay all lawful assessments upon his stock.[14] A stockholder is entitled to notice of meetings at which assessments are made,[15] but failure to give such notice may be cured by ratification of the assessment,[16] and a stockholder may be precluded generally from asserting the invalidity of an assessment either by estoppel[17] or by ratification.[18] A provision of a by-law that notice of assessments must be given in a particular way may be waived by the stockholders.[19] In the absence of a contrary showing, it will be presumed that an assessment was made by a quorum of directors.[20]

laches. Collins v. Chipman [Tex. Civ. App.] 15 Tex. Ct. Rep. 411, 95 S. W. 666.

6. Evidence held to sustain finding that consideration wholly failed. Hillside Cemetery Ass'n v. Holmes [Minn.] 105 N. W. 965.

7. See 5 C. L. 793.

8. Such a contract is a waiver of the right to insist that the corporation shall levy assessments therefor as provided by the Civil Code, and may be enforced against them by the corporation according to its terms. People's Home Sav. Bank v. Sadler [Cal. App.] 81 P. 1029.

9. The right to adopt such a by-law is not cnrtailed by Civ. Code § 303, enumerating certain matters upon which by-laws may be adopted. People's Home Sav. Bank v. Sadler [Cal. App.] 81 P. 1029.

10. Notwithstanding a by-law giving the corporation a lien on the stock for such subscription, and Code Civ. Proc. § 726, providing that the only remedy upon a mortgage is by foreclosure, such lien not being a mortgage. People's Home Sav. Bank v. Sadler [Cal. App.] 81 P. 1029.

Authority of attorney: In the absence of a contrary showing, it will be presumed that the attorney who institutes a suit for a corporation to collect assessments or calls upon stock was duly authorized, and hence the validity of a resolution authorizing the attorney to bring the suit was immaterial, as the board may thereafter have directed the attorney, in a proper manner, to bring the suit. People's Home Sav. Bank v. Rauer [Cal. App.] 84 P. 329.

11. People's Home Sav. Bank v. Rauer [Cal. App.] 84 P. 329.

12. Carter, Rice & Co. v. Hano Co. [N. H.] 64 A. 201.

13. In New Hampshire a corporation may assess the holders of fully paid shares to satisfy corporate claims for which the shareholders are individually liable, whether such liability arises because the full amount of capital fixed by the corporation has not been paid in or because the corporation or its officers have failed in some other respects to comply with the statute limiting the liability of shareholders to the loss of their stock. Carter, Rice & Co. v. Hano Co. [N. H.] 64 A. 201.

14. Callahan v. Chilcott Ditch Co. [Colo.] 86 P. 123.

A stockholder is presumed to have notice of by-laws relating to assessments. Callahan v. Chilcott Ditch Co. [Colo.] 86 P. 122.

15. Proper notice under the by-laws of an irrigation company and Mills' Ann. St. Rev. Supp. § 481, held to have been given of a meeting at which assessments under 1 Mills' Ann. St. § 569 were made upon fully paid stock. Callahan v. Chilcott Ditch Co. [Colo.] 86 P. 123.

16. A party who has ratified a meeting at which an assessment is made by paying the assessment cannot deny the validity of an adjourned meeting at which another assessment is made on the ground that no notice was given of the adjournment. Callahan v. Chilcott Ditch Co. [Colo.] 86 P. 123.

17. A stockholder who participates in a meeting at which an assessment is levied is estopped to deny the validity of the assessment. Callahan v. Chilcott Ditch Co. [Colo.] 86 P. 123.

18. Payment of an assessment is a ratification of the validity of the meeting at which the assessment was made. Callahan v. Chilcott Ditch Co. [Colo.] 86 P. 123. A stockholder in an irrigation company who had ratified assessments upon fully paid stock could not thereafter repudiate such assessments on the ground that 1 Mills' Ann. St. § 569 authorized such assessments only when all the stock was fully subscribed and paid up and that this had not been done at the time of the assessments in question. Id.

19. Requirement of by-law that notice be given by publication could not be set up as ground for setting aside an assessment where it was the custom of the company

Where a certificate of stock shows on its face that it is liable to an assessment and call, a transferee thereof becomes liable by way of novation.[21]

A sale of stock for nonpayment of a call or assessment after the stockholder has made a proper tender is void,[22] and the stockholder may either sue for damages[23] or sue to have his stock reissued to him.[24]

An injunction against an assessment, so far as it was made for an illegal purpose, does not necessarily determine the validity of the assessment for other purposes.[25]

(§ 14) *D. Miscellaneous rights of stockholders.*[26]—A subscriber to stock has no lien upon the amount subscribed by him or upon the property purchased therewith.[27]

The right to dividends.[28]—Dividends cannot be paid out of the capital stock,[29] and when so paid may be recovered back.[30]

to give only personal notice and the complaining stockholder received personal notice. Grand Valley Irr. Co. v. Fruita Imp. Co. [Colo.] 86 P. 324.

20. A complaint to enjoin a sale of corporate stock delinquent on account of nonpayment of an assessment is fatally defective, where it fails to aver that the defendant corporation was organized for profit and therefore restricted by Civ. Code § 290, subd. 5, in the manner of diminishing the number of its directors, otherwise than through an amendment of its articles, it not appearing therein what number of directors had been provided in its original articles, or that three, the number that acted on the assessment, did not constitute a quorum. Humphry v. Buena Vista Water Co. [Cal. App.] 84 P. 296. Notice of an assessment is not essential to the validity of the assessment, but is intended to afford an opportunity to pay and thus lay the basis for suit or sale of the stock in the event of failure to pay. Id.

21. See Civ. Code § 1531, subd. 2, defining a novation. People's Home Sav. Bank v. Sadler [Cal. App.] 81 P. 1029. Where a transferee of such stock was admitted to the privileges of membership in the corporation, this was a sufficient consideration for his agreement to pay such assessments as might be legally made upon the stock. Id. Where a transferee has the stock placed in his name on the books of the corporation, a call or assessment may be made either against the owner or against the transferee, though the latter holds only as a pledgee. Civ. Code § 322, providing that a party holding stock as collateral security, or as trustee or in any representative capacity, is not a stockholder, applies only to the statutory liability of stockholders. People's Home Sav. Bank v. Raner [Cal. App.] 84 P. 329.

22. Wilson v. Duplin Tel. Co., 139 N. C. 395, 52 S. E. 62.

23. Wilson v. Duplin Tel. Co., 139 N. C. 395, 52 S. E. 62. Where the stockholder is the purchaser at a sale of his stock for nonpayment of an assessment, and the price paid is only the amount of the assessment, the stockholder sustains no damages by reason of the sale, and hence where the stockholder is a corporation, evidence that the purchaser at the delinquent sale was a party who owned nearly all the stock in the corporation whose stock was sold was admissible. Grand Valley Irr. Co. v. Fruita Imp. Co. [Colo.] 86 P. 324.

24. Notwithstanding that he may save himself from damage by purchasing the stock at the delinquent sale. Wilson v. Duplin Tel. Co., 139 N. C. 395, 52 S. E. 62.

25. Injunction against performance by irrigation company of a contract for the construction of a ditch at its own expense for the benefit of a stockholder when the by-laws required the stockholder to pay for such construction, and injunction against assessment so far as same was to be applied to such construction. Grand Valley Irr. Co. v. Fruita Imp. Co. [Colo.] 86 P. 324. Where, in a suit by a stockholder for damages for sale of his stock under an alleged illegal assessment, it appeared that the assessment had been enjoined in a former suit so far as it was intended to be applied to a certain purpose, but it did not appear whether the validity of the assessment for other purposes was determined, the defendant should have been allowed to show that this issue was not determined in the former suit, and that the assessment for which the stock was sold was not applied or intended to be applied to the purpose contemplated by the injunction. Id. Where an assessment is enjoined so far as its application to a particular purpose is concerned, a subsequent reduction of the assessment is equivalent to a new assessment, without reference to and unaffected by the injunction against the first assessment. Id.

26. See 5 C. L. 794.

27. A subscriber to a syndicate fund, which is placed in the hands of certain parties as managers to be invested in certain properties which are to be sold and the profits divided or to be capitalized and the stock divided among the subscribers, has no lien, legal or equitable, upon the amount subscribed by him or the property purchased therewith. The fact, therefore, that some of the property so purchased has a situs in a certain state, does not give a Federal court for such state jurisdiction, under Act March 3, 1875, § 8, 18 Stat. 492, of a suit by the subscriber to the syndicate against the managers of the syndicate. Jones v. Gould, 141 F. 698.

28. See 5 C. L. 794.

29. P. L. 1896, p. 286, § 30. Siegman v.

The accumulated profits of a corporation belong to it and do not become the property of the stockholders until a dividend has been declared,[31] and generally the question of declaring a dividend is entrusted to the sound discretion of the directors,[32] but where a by-law provides for the payment of a certain dividend upon a certain class of stock, such by-law constitutes a contract between the corporation and the holders of such stock.[33] And so also, where dividends have been regularly declared on common stock, they become the absolute property of the stockholders,[34]

Kissel [N. J. Eq.] 62 A. 941; Siegman v. Electric Vehicle Co., 140 F. 117. A by-law providing for the payment of dividends before the payment of necessary expenses is invalid as being an agreement to pay dividends to the impairment of the capital stock. Cratty v. Peoria Law Library Ass'n, 219 Ill. 516, 76 N. E. 707. Where dividends are paid out of the surplus, the presumption is that they are paid out of the profits. Thus, where the funds out of which dividends on bank stock held in trust were paid could not be traced to their source, and after such payment the bank's capital remained unimpaired, it was held that such dividends did not belong to the corpus of the trust estate. Boardman v. Boardman [Conn.] 62 A. 339.

30. So far as necessary for payment of debts. Mills v. Hendershot [N. J. Eq.] 62 A. 542.

Limitations: Where such dividends are received without notice of their source or that the corporation is insolvent, an implied trust is created as to which a court of equity will apply the statute of limitations (Mills v. Hendershot [N. J. Eq.] 62 A. 542), but where the stockholder receives the dividends with knowledge that they are being paid out of the capital, equity will not recognize the statute of limitations, and the fact that under Laws 1896, p. 286, c. 185, § 30, directors are not liable after six years for dividends paid out of the capital, will not affect their liability as stockholders for amounts received in fraud of the company (Id.).

As to liability of directors voting for such dividends, see post, § 15, Statutory Liabilities. As to right of stockholder to sue in such case, see post, this section, Stockholders Suing for Corporation.

31. Trustee in bankruptcy of a stockholder takes no title to accumulated profits. Bryan v. Sturgis Nat. Bank [Tex. Civ. App.] 90 S. W. 704.

32. Cratty v. Peoria Law Library Ass'n, 219 Ill. 516, 76 N. E. 707, afg. 120 Ill. App. 596. The declaration of dividends rests with the directors or other governing body, and this discretion will not, in the absence of fraud, be controlled by the courts. Bryan v. Sturgis Nat. Bank [Tex. Civ. App.] 90 S. W. 704. As to common stock, such discretion will not be interfered with by a court of equity in the absence of bad faith or unjustifiable conduct. Id.

33. The fact that the performance of the contract may lead to the insolvency of the company will not invalidate the contract. Cratty v. Peoria Law Library Ass'n, 219 Ill. 516, 76 N. E. 707, afg. 120 Ill. App. 596. But a contract to pay dividends before expenses is invalid. Id. A by-law providing that certain special stock should be entitled to an annual dividend for a certain period in preference to the other stock held to mean that special stock should receive a certain per cent of the profits, though not earned within the period specified. Gardner Sav. Bank v. Taber-Prang Art Co., 189 Mass. 363, 75 N. E. 705. Charter provisions for certain dividends on preferred stock constitute a contract with the holders of such stock, which is not affected as to dividends in arrears by a reduction of the stock of the corporation, under Laws 1902, p. 1836, c. 688, § 44, and such dividends constitute a lien upon surplus profits accumulating after such reduction, but are not payable out of the surplus created by such reduction. Laws 1892, p. 1836, c. 688, § 46, providing for reduction of stock, requires the surplus thereby created to be distributed ratably among the stockholders. Roberts v. Roberts-Wicks Co. [N. Y.] 77 N. E. 13.

A guaranty of dividends is assignable and inures to the benefit of a purchaser of such stock from the party to whom it was issued. Guaranteed stock of railroad company issued to city in exchange for city bonds in aid of the railroad. Marklove v. Utica, etc., R. Co., 48 Misc. 258, 96 N. Y. S. 795.

Stockholders may sue in equity to compel directors to declare dividends which have been guaranteed. Cratty v. Peoria Law Library Ass'n, 219 Ill. 516, 76 N. E. 707. Equity may compel the corporation to identify the stock guaranteed by indorsement or otherwise, so as to render the guarantee of some value upon a sale of the stock, where the corporation is attempting to repudiate its guarantee and thus render it worthless except to the original stockholder. Marklove v. Utica, etc., R. Co., 48 Misc. 258, 96 N. Y. S. 795. In an action by a preferred stockholder against the corporation, it is not sufficient to merely state that the plaintiff is a preferred stockholder, but the character of his certificate and the relative rights established thereby must be alleged. Hackett v. Northern Pac. R. Co., 140 F. 717.

Laches: Several years' delay on the part of a preferred stockholder in suing for the enforcement of the corporation's agreement to pay certain dividends on such stock is not necessarily such laches as will bar the suit, as where the stockholder never otherwise acquiesced in the denial of his rights and no one was injured by his delay. Cratty v. Peoria Law Library Ass'n, 219 Ill. 516, 76 N. E. 707.

34. Cratty v. Peoria Law Library Ass'n, 219 Ill. 516, 76 N. E. 707; Steel v. Island City Mercantile & Mill. Co. [Or.] 83 P. 783; McLaren v. Crescent Planing Mill Co. [Mo. App.] 93 S. W. 819. Although no fund is set aside at the time out of which the dividend is to be paid. Id.

and a dividend once declared cannot, therefore, be revoked by the corporation without the consent of the stockholders.[35] Dividends among stockholders of the same class must always be equal.[36]

If the corporation pay the dividend to the apparent owners of the stock, as shown by its books, without notice of any assignment, it will be discharged of its obligation for such dividend,[37] but if the corporation has notice of an assignment of stock, it must pay the dividend due such stock to the assignee thereof.[38]

A corporation may have the right to offset claims against a stockholder against the latter's claim for dividends.[39]

Right to inspect the books and papers of the corporation.[40]—A stockholder has a right to inspect the books of his corporation,[41] not only under statutory or constitutional provisions,[42] but also at common law,[43] and in a proper case such right is enforceable by mandamus,[44] and officers refusing to allow inspection in a proper case are subjected to statutory penalties.[45]

A stockholder may sue at law to recover his share of a declared dividend. Cratty v. Peoria Law Library Ass'n, 219 Ill. 516, 76 N. E. 707.

35. This is true of a stock dividend as well as a cash dividend. McLaren v. Crescent Planing Mill Co. [Mo. App.] 93 S. W. 819. Nor can the corporation indirectly revoke the dividend by making an assessment expressly and confessedly for that purpose and payable on the same day as is the previously declared dividend. Id.

36. Equity has jurisdiction to prevent a discrimination between stockholders of the same class. Cratty v. Peoria Law Library Ass'n, 219 Ill. 516, 76 N. E. 707.

37. Steel v. Island City Mercantile & Mill. Co. [Or.] 83 P. 783.

Dividends on stock covered by an option to purchase belong to the original owner, where they are declared before the sale contemplated by the option is consummated, and an antedated transfer of the stock on the books of the corporation, made without the original owner's knowledge or consent, was unavailable to give the purchaser the right to dividends declared before the sale was completed. Rowe v. White, 98 N. Y. S. 729.

38. Though the assignment was not made until after the dividend was declared, it having been made, however, before payment. Steel v. Island City Mercantile & Mill. Co. [Or.] 83 P. 783.

39. Where a corporation has the right to pay the taxes upon its stock and to deduct the same from dividends, no resolution of the directors is necessary in order to authorize the exercise of such power. Kennedy v. Citizens' Nat. Bank, 128 Iowa, 561, 104 N. W. 1021. Where a corporation sued one of its officers for an accounting, and, it appearing that the plaintiff's claim was unfounded, the defendant was allowed, in the same suit, to recover dividends with which he had been credited by the corporation on its claim, though defendant, in his answer, made no demand for affirmative relief, and had acquiesced in the retention of the dividend by the corporation. Consolidated Fruit Jar Co. v. Wisner, 110 App. Div. 99, 97 N. Y. S. 52. The plaintiff, in such case, having itself brought the question as to the dividends into the suit, could not avoid a judgment against it therefor on the ground that a part of the dividends was payable to the defendant as a trustee. Id.

40. See 5 C. L. 795. See, also, special article, 5 C. L. 834.

41. A stockholder suing to set aside as fraudulent a conveyance of the corporation's property is entitled to an inspection of the books of the corporation containing evidences of the transfer, and the order for a discovery in such case should not be entered against a defendant who is not an officer or director. Snyder v. De Forrest Wireless Tel. Co., 99 N. Y. S. 644. A stockholder's right to inspect the books of the corporation is not dependent upon the amount of his holdings. In re O'Neill, 47 Misc. 495, 95 N. Y. S. 964.

42. Const. art. 12, § 14, affirming the right of inspection with exception of books of religious, educational, and benevolent corporations. Gavin v. Pacific Coast Marine Firemen's Union [Cal. App.] 84 P. 270.

Foreign corporations: A statute imposing a greater penalty upon foreign corporations for failure to provide for and allow inspection of its books by stockholders, is not unconstitutional. Laws 1892, p. 1840, c. 688, § 53, as amended by Laws 1897, p. 314, c. 384. See section 29 as to penalty on domestic corporations. Pelletreau v. Greene Consol. Gold Min. Co., 97 N. Y. S. 391. A demand for inspection, upon the person apparently in charge of the office of a foreign corporation, is sufficient to lay the foundation for the recovery of the statutory penalty for refusing to allow inspection, without showing that such person bears any particular relation to the company. Under Laws 1892, p. 1840, c. 688, as amended by Laws 1897, p. 314, c. 384. Id.

43. Guthrie v. Harkness, 199 U. S. 148, 50 Law. Ed. —. The right of stockholders to inspect the stock books is a common law right, and hence the statutory right is not exclusive, and the common law right may be enforced as to corporations not within Laws 1892, p. 1831, c. 688, § 29. People v. New York Life Ins. Co., 97 N. Y. S. 465.

44. Gavin v. Pacific Coast Marine Firemen's Union [Cal. App.] 84 P. 270; Guthrie v. Harkness, 199 U. S. 148, 50 Law. Ed. —. Where petitioner had been a stockholder since the formation of the corporation, having been induced to purchase his stock by

Remedies for injuries to stockholders or to the corporation.[46]—A stockholder cannot sue individually for injuries affecting the corporate or collective rights,[47] nor can a stockholder sue his corporation on account of the failure of the latter to collect its assets,[48] but, though the internal management of a corporation will not ordinarily be interfered with at the suit of a stockholder,[49] courts of equity are jealous in protecting the rights of minority stockholders from invasion by the acts of the majority,[50] and where there is bad faith or fraud, equity will interfere.[51] The interest of a minority stockholder cannot be destroyed by a fraudulent transfer of the assets of the corporation,[52] and where such a transfer is made with such in-

the president of the corporation, and it appeared that though the corporation was three years old no report had ever been made by it and no dividends had been paid, and petitioner had been unable to ascertain the condition of the company, which, as claimed by petitioner, was not doing any business, mandamus was proper to enforce petitioner's right to inspect the books, though the president stated that he had told petitioner that the corporation had lost money and that petitioner knew the particulars and that he, the president, had answered all reasonable inquiries, and that petitioner was hostile to the president and wished the inspection merely to force the president to buy petitioner's stock. In re O'Neill, 47 Misc. 495, 95 N. Y. S. 964.

Where certain corporations are exempted by statute from the right of inspection, a corporation claiming the benefit of such exemption must, by proper proof, bring itself within the class of exempted corporations, and, in the absence of such proof, mandamus will issue to enforce the right of inspection. Gavin v. Pacific Coast Marine Firemen's Union [Cal. App.] 84 P. 279.

Distinction between statutory and common law right: A stockholder is entitled as a matter of right to mandamus to compel the allowance of the statutory right to inspect stock books. People v. New York Life Ins. Co., 97 N. Y. S. 465. But mandamus to enforce the common law right is discretionary with the court. Writ denied to compel allowance of inspection of records of mutual life insurance company in order to get list of policy holders. Id.

45. See Laws 1892, p. 1840, c. 688, § 83. Gould v Olympia Min. Co., 96 N. Y. S. 455. See post § 15 H, Penalties for Refusal of Inspection of Stock Book.

46. See 5 C. L. 796.

47. Injuries affecting value of stock, Wells v. Dane [Me.] 63 A. 324. The existence of specific design and malicious and fraudulent intent will not entitle the stockholder to sue where he has sustained no loss other than that sustained by the corporation. Id. Stockholders as such have no cause of action, either collectively or individually, against an officer who has wrongfully acquired the corporate property, the cause of action being one in favor of the corporation. Michel v. Betz, 108 App. Div. 241, 95 N. Y. S. 844. A stockholder, as such, cannot maintain an action against a third person for breach of a contract with the corporation or for injuries to its property. All such wrongs must be redressed in the corporate name. Ninneman v. Fox [Wash.] 86 P. 213. Personal damages resulting to a stockholder or officer of a corporation from breach by a third person of a contract with the corporation or from injuries by such person to the corporate property are too remote to be recovered, such as damages resulting from dismissal of plaintiff from office of manager on account of losses caused by fraudulent conduct of defendants in connection with a contract between them and the corporation. Id.

48. Stockholder of banking corporation cannot sue the bank for his share of the money paid by the bank upon the taxes on stock of other stockholders. Kennedy v. Citizens' Nat. Bank, 128 Iowa, 561, 104 N. W. 1021.

49. And it is immaterial that the visible and tangible property of the corporation is within the state, and thus within the jurisdiction of the court. McCloskey v. Snowden, 212 Pa. 249, 61 A. 796. A minority stockholder has no standing in equity to attack the valid transactions of the corporation, which have been approved by a majority of the stockholders. Pledge of corporate property and sale thereof by pledgee. Mercer, etc., R. Co. v. Shailer [C. C. A.] 141 F. 585. A court of equity will not interfere with the control of the members of a corporation over its actions within the scope of its power where there is no bad faith but only error of judgment. Theis v. Durr, 125 Wis. 651, 104 N. W. 985.

50. Mulvihill v. Vicksburg R., Power & Mfg. Co. [Miss.] 40 So. 647. A sale of unissued stock for a grossly inadequate price, made for the purpose of enabling a portion of the stockholders to gain control of the corporation, will be set aside at the instance of the other stockholders. The purchaser, in such case, will not be protected as an innocent purchaser, where he has notice of such facts, as for instance that the price was grossly inadequate, as should put him upon inquiry as to the purpose of the sale. Essex v. Essex [Mich.] 12 Det. Leg. N. 439, 104 N. W. 622.

51. A member of a corporation may invoke the aid of equity for protection from acts of the other stockholders designed to accomplish some illegitimate and injurious purpose, though the acts themselves are lawful. Theis v. Durr, 125 Wis. 651, 104 N. W. 985.

52. In such case a purchase at execution sale by the fraudulent purchaser will not strengthen his title, nor will he or a new corporation organized to take over the property acquire any right as against the defrauded stockholder. Mulvihill v. Vicksburg

tent, it may be set aside or other appropriate relief may be granted,[53] though the corporation was financially hopelessly embarrassed at the time of the sale.[54] Directors are estopped to question as stockholders their acts as directors, and accordingly, when the directors adopting a resolution hold a majority of the stock, the corporation cannot assail it in behalf of minority stockholders.[55] In the notes are collated cases involving questions of parties,[56] pleading,[57] practice,[58] and jurisdiction.[59]

R., Power & Mfg. Co. [Miss.] 40 So. 647. Where corporation made fraudulent sale of assets in order to cut out a party who was equitably entitled under a contract between promoters which was adopted by the corporation, to a certain interest in the corporation. Id. A committee appointed by the owners of pooled stock to negotiate a sale thereof held to have had power to make a certain sale. Weitze v. Burrage, 190 Mass. 267, 76 N. E. 508.

53. Where the interests of the public and of innocent parties will be affected by setting the sale aside, the stockholder will be given a judgment for the value of his interests instead of setting the sale aside. Mulvihill v. Vicksburg R., Power & Mfg. Co. [Miss.] 40 So. 647.

54. Where, on execution sale at which the purchaser fraudulently purchased the property which he had already purchased from the corporation, there was a bid of $40,000 for the property and the franchises of the corporation subject to all liabilities, this did not indicate insolvency. Mulvihill v. Vicksburg R., Power & Mfg. Co. [Miss.] 40 So. 647. In the ascertainment of the worth of a street railway corporation over and above its debts, the court and commissioner should consider not only the value of the railroad and electric light plants and properties in the light of their cost, earning capacity, and probable enhancement of value and earnings, but also the railway and lighting franchises and the good will of the company. Id. The values of shares in a street railway corporation are not necessarily or usually measured by present earning capacity because they are frequently dependent on future earning capacity and enhancement of values. Id. Current revenues cannot be applied to the construction debt of a street railroad for the purpose of showing the road to be insolvent. Id.

55. Rosehill Cemetery Co. v. Dempster, 121 Ill. App. 143.

56. Where, in a stockholder's action against the corporation and others, relief is prayed for against directors who are not parties, such prayer may be disregarded as surplusage where the failure to join them in no way affects the defendants sued. O'Connor v. Virginia Passenger & Power Co. [N. Y.] 76 N. E. 1082. In an action to set aside a sale of stock by a committee appointed for the purpose of negotiating such sale, only such parties can be joined as defendants as colluded or acted together in bringing about or making the sale. A director, who was also the acting manager, of a corporation, could not be joined as a defendant in an action to set aside a sale of stock made by a committee appointed by the owners of the stock, on the ground that such director mismanaged the business of the corporation so as to reduce the value of the stock and thus induce the committee to make the sale. Weitze v. Burrage, 190 Mass. 267, 76 N. E. 508. Stockholders holding their stock in severalty cannot join in an action against the corporation for damages sustained by them as stockholders, there being no unity of interest in the subject-matter. An action so instituted cannot be severed. Hackett v. Northern Pac. R. Co., 140 F. 717.

57. Where the complaint in a stockholder's action alleged a cause of action against one of the defendants for the cancellation of certain stock of the corporation held by such defendant, and also purported to set out another cause of action against another defendant for the cancellation of bonds of the corporation held by such defendant, but there was nothing to show that the transactions had any connection with each other, there was a misjoinder under Code Civ. Proc. § 484, though the allegations were not sufficient to constitute a cause of action against the second defendant. O'Connor v. Virginia Passenger & Power Co. [N. Y.] 76 N. E. 1082.

58. A suit by a stockholder for the corporation for an accounting is not abated by the bankruptcy of the corporation pending such suit, the only effect being that the accounting must be to the trustee in bankruptcy instead of to the corporation Meyer v. Page, 98 N. Y. S. 739. In a suit by stockholder to recover proceeds of sale of property from directors, a finding that an agreement between the corporation and a stockholder as to the disposition of the proceeds of certain property was rescinded held to be an adjudication that all the rights of the parties under the agreement were abrogated, notwithstanding another finding that the parties did not so construe their rescission. Steinfeld v. Zeckendorf [Ariz.] 86 P. 7. A judgment disposing of the proceeds of certain property could not be sustained by a finding that an agreement between a stockholder and the corporation in regard to such disposition had been rescinded where there were no findings as to the ownership of such proceeds. Id.

59. Suit to recover diverted assets may be brought in a foreign state where all the parties to be affected by the judgment are within the jurisdiction of the courts of such state, and there are no assets or parties in the state of the corporation's domicile through which jurisdiction might be obtained there to secure the relief sought. Weber v. Wallerstein, 97 N. Y. S. 846. Bankruptcy proceedings by creditors in the state of the corporation's domicile afforded complainant no chance for relief where the debts were settled and the proceedings dismissed. Id.

Stockholders suing for corporation.[60]—Prima facie the proper party to seek redress for wrongs against a corporation or to assert rights in its favor is the corporation itself,[61] and the right of an individual stockholder to act for the corporation in such case is exceptional, and arises only upon a clear showing of special circumstances, among which is the inability of the corporation itself or its unwillingness to act, and the refusal of the regular management, after due demand, to act in the premises.[62] The stockholder must establish his right to sue,[63] and the facts authorizing the suit by him must be alleged in the complaint,[64] which must also allege substantially the same facts which would be pertinent in an action by the corporation itself.[65] Where it is alleged and proved that a proper demand has been made upon the regular management to sue and that it has wrongfully refused, the right of the stockholder to sue is unquestionable,[66] the practice being to

60. See 5 C. L. 797.

61. McCloskey v. Snowden, 212 Pa. 249, 61 A. 796.

62. The refusal of the corporate management to act must appear affirmatively to be a disregard of duty and not a mere error of judgment. McCloskey v. Snowden, 212 Pa. 249, 61 A. 796. To enable a stockholder to sue in equity in his own name upon a cause of action in favor of the corporation, there must be some action or contemplated action by the directors or other acting managers, or by a majority of the stockholders, which is beyond their lawful power or is subversive of the interests of the corporation itself or of the other stockholders. Clark v. Apex Gold Min. Co. [N. M.] 85 P. 968. Stockholder cannot sue to remedy wrong to corporation without having first demanded that the directors sue. Crow v. Florence Ice & Coal Co., 143 Ala. 541, 39 So. 401. Suit to cancel contract of purchase and to recover the purchase money. Polhemus v. Polhemus, 108 App. Div. 353, 95 N. Y. S. 325.

63. Young v. Equitable Life Assur. Soc., 49 Misc. 347, 99 N. Y. S. 446.

Status as stockholder: A party holding stock certificates and who is also a policy holder in a mutual life insurance company has a status to sue, for the corporation, for an accounting from directors for property and funds of the corporation wasted by them, and where it appeared that plaintiff was both a certificate and a policy holder, it did not matter in which capacity he sued, being entitled to do so in one capacity or the other, or both, and the allegation of this double capacity did not constitute a misjoinder of causes, the cause of action belonging to the corporation and being unaffected by the capacity in which the plaintiff sued. Young v. Equitable Life Assur. Soc., 49 Misc. 347, 99 N. Y. S. 446. Such an action is not prohibited by Laws 1892, p. 1958, c. 690, § 56, prohibiting the granting of any order or decree for an accounting from or any injunction against domestic insurance companies, or appointing a receiver therefor, except upon application to the attorney general, etc., an action for an accounting from directors not being an action against the corporation and in no way interfering with the prosecution of its business. Id. A merely nominal transferee of stock, who really represents the interests of a rival corporation, will not be allowed to maintain a suit to set aside as fraudulent a sale of corporate property. Breeze v. Lone Pine-Surprise Consol. Min. Co., 39 Wash. 602, 81 P. 1050. Where a stockholder owning only $25 worth of stock institutes proceedings to enjoin the action of the owners of 93% of the stock, such a suit will be countenanced only upon a very satisfactory showing. Pitcher v. Lone Pine-Surprise Consol. Min. Co., 39 Wash. 608, 81 P. 1047. A stockholder may lose his right to sue for injuries to the corporate rights by assignment of his stock. As where the stock is not directly injured by the acts complained of but only indirectly by reason of injury to the corporate rights. Wells v. Dane [Me.] 63 A. 324.

64. O'Connor v. Virginia Passenger & Power Co. [N. Y.] 76 N. E. 1082. Under Equity Rule No. 94, a stockholder, suing to vindicate the rights of the corporation, must not only allege a proper application to the managing directors to sue, or some valid excuse for not so applying, but also must show that the shareholders were appealed to or some valid excuse for not making such appeal. Macon, etc., R. Co. v. Shailer [C. C. A.] 141 F. 585.

65. Action to recover assets fraudulently diverted by directors, etc. Weber v. Wallerstein, 97 N. Y. S. 846; Young v. Equitable Life Assur. Soc., 49 Misc. 347, 99 N. Y. S. 446.

66. Groel v. United Elec. Co. [N. J. Eq.] 61 A. 1061. Refusal of the corporation to bring a suit against a promoter to recover secret profits made by the promoter in connection with the incorporation of the company is such a disregard of duty as entitles the stockholder to sue. Id. Where the regular officers of a corporation are unable or unwilling to take the necessary steps to protect the corporate rights, a stockholder may proceed in equity, in behalf of himself and other stockholders, to protect such rights. Wells v. Dane [Me.] 63 A. 324. Where the acts of the majority of the stockholders or of the board of directors, though lawful in themselves, are designed to accomplish some illegitimate object, and the result, if permitted to operate, will be injurious to the corporation or members not concerned in the transaction, such a member may successfully invoke the aid of equity for the protection of the corporation where the proper officers will not do it. Theis v. Durr, 125 Wis. 651, 104 N. W. 985. Any member of a mutual insurance company, suing for himself and others similarly situated,

make the corporation a formal defendant,[67] and any parties who are implicated in a conspiracy to divert corporate assets may be joined as defendants, whether they are stockholders or not,[68] but the other stockholders are not proper parties to an action by a stockholder suing for the corporation where no relief is claimed against them.[69] The actual defendant may always question the right of the stockholder to sue,[70] but, while the courts may always inquire into the propriety of the corporation's refusal to sue,[71] it is a matter of discretion with the court whether the stockholder will be allowed to maintain the suit,[72] and this being the only matter which should ever be permitted to be litigated between the complainant and the corporation or formal defendant,[73] it should be raised in such manner as not to interfere with the merits of the cause [74] which are really in issue between the formal

may invoke equity jurisdiction to redress or prevent any wrong injuriously affecting the property rights of the corporation, where its officers will not move appropriately to that end. Huber v. Martin [Wis.] 105 N. W. 1031. The duty of the succeeding board of directors to sue the prior directors upon their statutory liability for paying dividends out of stock is imperative, and when they wrongfully refuse to perform such duty, a stockholder may sue in the name of the corporation. Siegman v. Electric Vehicle Co 140 F. 117. A plea filed by the succeeding directors in a suit by a stockholder against the prior directors to recover dividends paid by them out of capital stock, which relies upon the good faith of the succeeding directors in refusing to sue, must set out the facts showing such good faith, and likewise, where the plea relies upon the good faith of the prior directors in making the payments, the facts showing such good faith must be set out. Id. Where a director voted for the payment of dividends out of the capital stock, the right of a stockholder to maintain a suit upon the statutory liability of such director, after proper demand upon the corporation to sue and its refusal, was not affected by the fact that after the declaration of the dividends a new board of directors was elected, which adopted a resolution that the company should not sue unless a majority in interest of the stockholders would deem it advisable, and such majority, by resolution, declared that there was no just ground for suit and that the suit was inexpedient. Siegman v. Kissel [N. J. Eq.] 62 A. 941.

Limitations: A suit by a stockholder in behalf of his corporation against an officer to compel the restoration of assets lost through the mismanagement of the corporation by its officers is not barred by the statute of limitations or by laches, where it is brought within the statutory period or within a reasonable time after the discovery of the mismanagement, the directors being presumed to manage the business of the corporation properly, and the stockholders being entitled to rely upon such presumption. Brinckerhoff v. Roosevelt [C. C. A.] 143 F. 478.

67. The actual defendant being the party from whom the recovery is sought. Groel v. United Elec. Co. [N. J. Eq.] 61 A. 1061. In suit to recover assets fraudulently diverted. Weber v. Wallerstein, 97 N. Y. S. 846. The corporation is a necessary party defendant to an action by a stockholder in behalf of the corporation to recover assets fraudulently appropriated by directors, and if there be an exception to this rule, the mere allegation that the corporation was organized under the laws of another state, and that service cannot be had upon it in the state where the action is brought, and that the corporation refuses to appear in the action, is not a sufficient allegation of facts to constitute such an exception, even in an equitable action. Deming v. Beatty Oil Co., [Kan.] 84 P. 385. Nor does a prayer that a trustee be appointed to represent the corporation obviate the necessity of the corporation being a party defendant. Id. In a suit by a stockholder for his corporation, the latter is a necessary party, either plaintiff or defendant. Suit against director for an accounting for property improperly acquired. Michel v. Betz, 108 App. Div. 241, 95 N. Y. S. 844.

Where the corporation has been dissolved and a receiver has been appointed, the latter is a necessary party, although he has accounted and been discharged, no order, however, having been made divesting him of title to the corporation's property. Michel v. Betz, 108 App. Div. 241, 95 N. Y. S. 844.

68. Weber v. Wallerstein, 97 N. Y. S. 846. A trustee for creditors who obtained plaintiff's stock through the fraudulent representations of the conspirators, including such trustee, pursuant to their scheme to defraud the corporation, was a proper party defendant. Id.

69. Action against president for accounting. McCrea v. McClenahan, 99 N. Y. S. 689. Code Civ. Proc. § 447, authorizing parties to be made defendants who have claims adverse to that of the plaintiff, does not authorize the joinder of the stockholders as defendants, their interests not being adverse to that of the plaintiff. Id.

70. Groel v. United Elec. Co. [N. J. Eq.] 61 A. 1061.

71. Groel v. United Elec. Co. [N. J. Eq.] 61 A. 1061. A plea interposed by the corporation or formal defendant, alleging that the corporation did not deem it expedient to bring the suit, did not raise the question of the propriety of the corporation's refusal to sue, but merely raised the question whether the directors had the right to prohibit the stockholder from suing. Id.

72, 73. Groel v. United Elec. Co. [N. J. Eq.] 61 A. 1061.

74. The formal defendant should not be

defendant and the actual defendant, although the machinery for bringing the case into court is set in motion by the complainant.[75]

The principal limitation upon the rule ordinarily applicable, as stated above, where a stockholder seeks to sue for his corporation, is that no demand upon the regular management is necessary where such demand will be futile,[76] and no allegation of demand is necessary in such case.[77]

In the absence of ultra vires, fraudulent or other illegal acts, individual or minority stockholders cannot, apart from the corporation itself, defend a litigation involving the powers and duties of the company,[78] but where there is no board of directors, a stockholder will be allowed to defend an action involving the corporate property.[79]

Costs and allowances.[80]—A stockholder who assumes the burden of recovering property and funds of his corporation, which have been taken from it through the fraud of its officers, should be allowed, out of the recovery, his reasonable attorney's fees, costs and expenses, but the stockholders who resist the recovery, though in the name of the corporation, should not be allowed these items of compensation.[81]

Receivers and injunctions.[82]—A single stockholder may sometimes apply for a receiver.[83] Insolvency is not alone ground for a receiver upon the application of

allowed to question the complainant's right to sue by plea, answer, or demurrer, but may, it seems, raise the point by petition, as in the English practice. Groel v. United Elec. Co [N. J. Eq.] 61 A. 1061.

75. Groel v. United Elec. Co. [N. J. Eq.] 61 A. 1061.

76. Where all the defendants, the directors, were the parties charged with the wrong, and were the directors at the time of the suit. Young v. Equitable Life Assur. Soc., 49 Misc. 347, 99 N. Y. S. 446; Polhemus v. Polhemus, 100 N. Y. S. 263. Where suit is to cancel fictitious stock issued by the directors incumbent at the time of the suit. Crow v. Florence Ice & Coal Co., 143 Ala. 541, 39 So. 401. A demand upon the corporation to sue is not necessary where the defendants against whom the wrong is charged are the executive officers of the corporation and also constitute a majority of the acting board of directors. Jacobson v. Brooklyn Lumber Co. [N. Y.] 76 N. E. 1075. But the demand must be made where the acts complained of were not committed by the incumbent directors but by their predecessors. Id.

77. As where all the directors, officers, and stockholders, who were known to plaintiff, were implicated in the fraud constituting the basis of the action. Weber v Wallerstein, 97 N. Y. S. 846.

78. Minority stockholders of a mortgagor corporation held to have no standing to contest a sale under the mortgage where the majority of the stockholders were represented at the sale and were satisfied with the mode and manner thereof. Bond v. Gray Imp. Co., 102 Md. 426, 62 A. 827.

79. May make motion to vacate foreclosure decree entered upon the stipulation of the president of the corporation. Frederick Milling Co. v. Frederick Farmers' Alliance Co. [S. D.] 106 N. W. 298. While possibly it might have been more formal to have vacated the decree and then permitted the stockholder to answer by way of intervention, the order of the court permitting the stockholder to act for and represent the corporation was not open to serious objection, and no appeal having been taken from such order, it could not be reviewed upon an appeal from an order denying plaintiff's preliminary motion to vacate the order to show cause why the stipulation, judgment, etc., should not be set aside. Id.

80. See 5 C. L. 799.

81. McCourt v. Singers-Bigger [C. C. A.] 145 F. 103.

82. See 5 C. L. 799.

83. Code 1899, c. 53, § 58. Rainey v. Freeport Smokeless Coal & Coking Co., 58 W. Va. 424, 52 S. E. 528. Under Code W. Va. 1899, c. 53, § 58, authorizing the appointment of a receiver upon the application of a stockholder "upon sufficient cause being shown therefor," a single stockholder may apply for a receiver on the ground that the business of the company has been conducted for some time at a loss, that the company is largely indebted, and that it has not, for more than a year, been operated or conducted as a corporation. Briggs v. Traders' Co., 145 F. 254. Such an application does not come within Federal Equity Rule No. 94, requiring demand to sue to be made upon the management and stockholders before a single stockholder can sue. Id. A stockholder held barred by laches from intervening in a suit by another stockholder for a receiver in order to urge an objection to the jurisdiction of the court on the ground that the applicant was not a bona fide holder of stock, where the petitioner for intervention waited sixteen months after obtaining his judgment against the corporation before attempting to intervene, and it did not appear but that he had, during all that time, the same knowledge of the alleged fraud on the court's jurisdiction that he had when his petition was filed. Id.

Status of applicant: A party asking for a receiver and injunction against a corporation must have the proper status as a stockholder

a stockholder as such,[84] nor will a receiver be appointed solely on the ground of diversion[85] or threatened diversion of assets;[86] but a receiver may be appointed on the ground of internal dissensions.[87] A receiver will not be appointed where the public and innocent parties might thereby suffer, and the stockholder may be com-

or creditor. Thus, one who transferred all his stock in a corporation to another corporation, receiving stock of the latter in exchange for the stock transferred, and then received back a single share of the par value of $10, merely to qualify him as a director in the first corporation, was not such a stockholder as to entitle him to maintain a suit for an injunction and receiver against such corporation. Hoopes v. Basic Co. [N. J. Eq.] 61 A. 979. The status of the complainant may be raised by plea or answer. When the suit is commenced by bill, the status of the complainant may be tested by plea, and when the suit is commenced by petition, such status may be tested by answer. Id. The fact that stock stands in the name of a stockbroker by whom it was purchased for the real owner will not deprive such owner of his status as a stockholder to maintain a suit for a receiver. Reinhardt v. Interstate Tel. Co. [N. J. Eq.] 63 A. 1097. As where complainants subscribed to stock under an agreement with the holder of the majority of the stock, who thereafter repudiated the agreement after the complainants had indorsed notes for the company and made payments thereon out of their individual funds, the complainants were creditors to the extent of such payments, and also stockholders, and were entitled to maintain a bill for a receiver, the company not being in a condition to keep its business going. Wood & Nathan Co. v. American Mach. & Mfg. Co. [N. J. Eq.] 62 A. 768.

Parties: In such case stockholders alleged to be unknown by the applicant need not be made parties to the proceedings. Briggs v. Traders' Co., 145 F. 254.

Jurisdiction: A Federal court may take jurisdiction of a suit by a stockholder for a receiver for the corporation on the ground of diverse citizenship. Briggs v. Traders' Co., 145 F. 254.

Notice: A receiver for a corporation should not be appointed in ex parte proceedings by a stockholder, except in cases of great emergency otherwise allowed by law. Pub. Acts 1903, p. 338, § 50, does not give the absolute right to appoint a receiver for a corporation without notice. See Id. § 49, p. 337, and Code 1896, § 799. Ensley Development Co. v. Powell [Ala.] 40 So. 137. A letter to an attorney from the vice president of a corporation, but not signed in his official capacity, stating that the appointment of a certain person as receiver for the corporation would be satisfactory to the corporation, was not sufficient to show notice to the corporation, where it did not appear whether the letter was written before or after the appointment of the receiver. Id.

Pleading: The allegations and proof of the necessity of appointing a receiver must be clear and positive. Black v. Sullivan Timber Co. [Ala.] 40 So. 667. When the ground relied on is a diversion of assets, something more than the unsupported statement of the plaintiff, on information and belief, in the general allegation of the complaint, is necessary, where the allegations are explicitly denied. Weber v. Wallerstein, 97 N. Y. S. 852.

84. But a policyholder in an assessment insurance company is also a creditor, and hence may apply for a receiver on the ground of insolvency of the corporation. Commonwealth v. Richardson [Ky.] 94 S. W. 639, afg. Richardson v. People's Life & Acc. Ins. Co. [Ky.] 92 S. W. 284. But upon the application of one suing in the double capacity of a stockholder and a creditor, insolvency is a sufficient ground. Wood & Nathan Co. v. American Mach. & Mfg. Co. [N. J. Eq.] 62 A. 768. See post § 16 B, Winding up Proceedings, Assignments, Receivership.

85. Weber v. Wallerstein, 97 N. Y. S. 852. That the directors and officers are fraudulently misappropriating the assets of the corporation will not alone and of itself constitute ground for the appointment of a receiver. If they are solvent, they can be brought to an accounting, which will be an adequate remedy. Hayes v. Jasper Land Co. [Ala.] 41 So. 909. So where the president of the company purchased stock therein with its funds, a suit for an accounting was an adequate remedy for a minority stockholder, and such breach of trust, therefore, was not ground for a receiver. Id. Misapplication of funds and commission of ultra vires acts by the officers of a corporation will not necessarily require the appointment of a receiver where such acts are done for the benefit of the corporation, under a statute providing for receiver when the officers are jeopardizing the rights of stockholders and creditors or are guilty of gross mismanagement. Stendell v. Longshoremen's Protective Union Benev. Ass'n [La.] 41 So. 228. Upon the application of a stockholder, where it is shown that the directors and officers of a corporation are mismanaging its affairs for their own personal advantage and gain, and where it is shown that the profits of the business of the corporation are being absorbed by such mismanagement in paying the salaries of favorite employes, whose services are not necessary to the proper conduct of the business, and where gross mismanagement is shown, which, if continued, will necessarily result in the insolvency of the corporation, a receiver should be appointed. Hall v. Nieukirk [Idaho] 85 P. 485.

86. Threatened fraudulent disposition of the assets of a corporation is not alone sufficient to warrant the appointment of a receiver where such disposition may be enjoined until the stockholders may express their wishes, either at a special meeting or at the next regular meeting, by resolution or by the election of a new board of directors. Stokes v. Knickerbocker Inv. Co. [N. J. Eq.] 61 A. 736.

87. Evidence held not to show such internal dissensions as to warrant the appointment of a receiver. Stokes v. Knickerbocker

pensated in damages or by a monetary recovery;[88] nor will a receiver be appointed for a foreign corporation which is solvent and seemingly without debts, where no receivership or dissolution proceedings have been instituted in the state where the corporation resides.[89]

Where the stockholders of a corporation procure and accept the services of a receiver, the corporation will be liable for the value of his services, though the receivership is invalid.[90]

A receiver appointed at the instance of a stockholder will not be removed for matters pertaining to the interests of creditors where the creditors do not complain and it does not appear that the stockholders have been injured,[91] but upon a proper showing, a receiver appointed at the instance of stockholders may be discharged and the property of the corporation returned to the stockholders.[92]

Contribution between stockholders.[93]—A stockholder who has been compelled to pay more than his proportion of a corporate debt is entitled to contribution from his fellow stockholders.[94] A resident stockholder may sue for contribution from foreign stockholders in the courts of the foreign state.[95]

(§ 14) *E. Transfer of shares.*[96]—One of the incidents pertaining to the ownership of corporate stock is the right to freely dispose of the same,[97] and this right is strictly maintained by the courts as opposed to by-laws restricting the right to sell,[98] though reasonable by-laws regulating the mode of transfer are upheld.[99]

Inv. Co. [N. J. Eq.] 61 A. 736. Where a receiver is asked for on the ground of internal dissensions, the fact that less than one-fourth of the par value of the stock is represented by complainants, the rest of the stockholders having failed to intervene, is important evidence against the necessity of a receiver, the presumption being that the holders of the stock not represented are satisfied with the management. Id.

88. Suit by stockholder to set aside fraudulent sale of corporate assets made with intent to destroy plaintiff's rights. Plaintiff was given a judgment for value of his interest in the corporation. Mulvihill v. Vicksburg R., Power & Mfg. Co. [Miss.] 40 So. 647.

89. After the appointment of a receiver in the state where the corporation resides, an ancillary receiver may be appointed to conserve any property within the state. Parks v. United States Bankers' Corp., 140 F. 160.

90. Tabor v. Bank of Leadville [Colo.] 83 P. 1060.

91. Loss in conducting the business is not ground for removal, but must be considered in the adjustment of the receiver's account and the allowance of his expenses, where there has been no bad faith. Jordan v. Electrical Supply Co. [Iowa] 105 N. W. 160.

92. As where the receiver was appointed on account of mismanagement and fraud on the part of the officers, but such officers had been deprived of control, the corporation was solvent, no decree had been rendered for winding it up, and a large majority of the stockholders were in favor of reorganization. Tolman v. Ubero Plantation Co., 142 F. 270.

93. See 5 C. L. 799.

94. Putnam v. Misochi, 189 Mass. 421, 75 N. E. 956. Each shareholder occupies as to his fellow shareholders the position of a cosurety, and if one is compelled to pay a creditor the entire balance due upon his shares, he will have the right of contribution as against his fellow shareholders. Lewisohn v. Stoddard [Conn.] 63 A. 621.

95. Though he has not pursued his remedy, given by statute, against the corporation. See Rev. St. Me. c. 46, § 49, giving stockholders who have been compelled to pay debts of the corporation a right of action against the corporation. Putnam v. Misochi, 189 Mass. 421, 75 N. E. 956.

96. See 5 C. L. 799.

97. Senn v. Union Premium & Mercantile Co., 115 Mo. App. 685, 92 S. W. 507.

An interest in the capital stock of a corporation is property and may be transferred, though no certificates of stock have been issued. McGue v. Rommel [Cal.] 83 P. 1000.

98. Senn v. Union Premium & Mercantile Co., 115 Mo. App. 685, 92 S. W. 507. Stockholders may, by mutual agreement and for the purpose of maintaining the relative holdings of the various stockholders, limit the right of one stockholder to transfer his shares. Thus, under an agreement between stockholders, if any stockholder desires to sell his stock, he must first offer it to the holders of the balance at a price to be determined by the holders of the majority of the stock, the said stock when so purchased to be distributed in proportion to the respective holdings of the various stockholders. A stockholder had no right to sell his shares either to other stockholders or to an outsider in such manner as to deprive the other stockholders of their right to their proportionate share of such stock, and upon a division of the stock sold between the stockholders, the seller was also entitled to his proportionate share. Boswell v. Buhl, 213 Pa. 450, 63 A. 56.

99. Senn v. Union Premium & Mercantile Co., 115 Mo. App. 685, 92 S. W. 507. See post this section, Mode of Transfer, etc.

Transfers of stock may be by way of pledge or conditional sale,[1] or absolute sale.[2] Stock may be pooled for sale.[3] An assignee of stock takes it subject to all the burdens thereon as to which he has notice.[4] A bill in equity will lie to enforce the specific performance of a contract for the sale of stock.[5] On the other hand, a transfer of stock may be rescinded for fraud[6] or mistake,[7] but a sale of stock by a stockholder cannot be set aside at the instance of the corporation on account of the fraud of the seller.[8]

1. See post this section, subdivision Pledge or Mortgage of Shares. In either case the pledgor or vendor is entitled to a retransfer upon the payment of the amount secured by the pledge or sale. Eichbaum v. Sample, 213 Pa. 216, 62 A. 837. And where stock pledged or sold conditionally cannot be duplicated in the market and has no quoted or ascertainable value, a bill in equity will lie to compel a retransfer. Id. Where stock is sold conditionally, the title remains in the seller until the performance of the conditions. Kennedy v. Lee, 147 Cal. 596, 82 P. 257. The extension of the time for the performance or fulfillment of the conditions is a sufficient consideration for a renewal of the contract. Id. A sale on condition that the purchaser shall obtain control of the corporation is not invalid, and the seller is not affected by the means used by the buyer in obtaining such control where the rights of third persons are not involved. Id.

2. A sale of stock to joint purchasers is consummated by delivery to one of the purchasers. Fuehrman v. McCord, 107 App. Div. 12, 95 N. Y. S. 489. Where a party agreed to take back any stock which another person might purchase from him if the purchaser, at the end of a year, were not satisfied with the purchase, and the person to whom the offer was made thereafter accepted it by making a purchase, the contract was not within the statute of frauds as being a contract not to be performed within a year, the date of the contract being the date of the purchase and not the date of the offer. Gurwell v. Morris [Cal. App.] 83 P. 578.

3. Agreement whereby all the stockholders placed their stock in the hands of a trustee to be sold, held joint as to the authority of the trustee to sell, but several as to the obligations of the purchaser to pay each stockholder for his shares sold, though the stock was purchased jointly by one bid for the whole lot at so much per share. Dowling v. Wheeler [Mo. App.] 93 S. W. 924.

4. As where the assignor has bound his stock by an agreement for a consolidation with another company. Senn v. Union Premium & Mercantile Co., 115 Mo. App. 685, 92 S. W. 507. But an assignee of stock with notice of an agreement, whereby it is bound in favor of a consolidation with another company, is not obliged, as a condition to the right to have the stock transferred to him on the company's books, to sign the original agreement, especially where he was not fully advised as to its contents when he purchased the stock. Id. Where a stockholder sold his stock to a party who already held possession thereof as security for a loan made by him to the corporation, the seller was not obliged, in the absence of an agreement to that effect, to discharge the lien upon the stock. Fuehrman v. McCord, 107 App. Div. 12, 95 N. Y. S. 489.

5. Lucas v. Milliken, 139 F. 816. Where there was no allegation of the insolvency of the party who contracted to sell the stock to the complainant, and no allegation that he was about to transfer the stock, or anything to show that the corporation was a necessary party in order that complainant might realize the fruition of any judgment he might obtain, the corporation was not a necessary party, and the fact, therefore, that it was a citizen of the same state with complainant did not render the removal of the cause to the Federal court, on the ground of diverse citizenship of the other parties, improper. Id.

6. Gustin v. Merrill [Mich.] 13 Det. Leg. N. 282, 108 N. W. 408. Attorney employed to make investment sold client stock owned by him at higher price than that charged by the corporation. Landis v. Wintermute, 40 Wash. 673, 82 P. 1000.

Waiver and estoppel: Participation in a stockholders' meeting after the institution of an action to rescind will not estop the purchaser from insisting on his right to rescind, where he had made a proper demand for rescission and tendered the return of the stock before the suit was brought, which was refused by the defendant. Landis v. Wintermute, 40 Wash. 673, 82 P. 1000. Purchasers held to have waived right to rescind by going ahead and retaining and managing the business after they had discovered the fraud of the sellers of the stock. Speicher v. Thompson [Mich.] 12 Det. Leg. N. 579, 104 N. W. 1104. In an action to recover back the purchase price of stock, the questions whether there was a sale, whether the sale had been affirmed by the plaintiff with knowledge of the fraud, and whether the plaintiff had rescinded with due promptness after the discovery of the fraud, held to be disputable questions for the decision of the jury. Shreve v. Crosby, 72 N. J. Law, 491, 63 A. 333.

Limitations: An action upon promissory notes and incidentally to foreclose a lien upon corporate stock is not an action based upon fraud, within 2 Mills' Ann. St. § 2911, fixing the limitations upon actions based on fraud. Equitable Securities Co. v. Johnson [Colo.] 85 P. 840.

7. Evidence held insufficient to authorize a rescission of a purchase of stock on the ground that the purchase was made under a misapprehension of the value of the assets of the corporation. Dowling v. Wheeler [Mo. App.] 93 S. W. 924.

8. Representations that stock issued for

To constitute an estoppel to reclaim stock that has been fraudulently transferred by a person not the owner, it must appear that the owner conferred upon such person the indicia of ownership, or an apparent authority to transfer the stock.[9]

Taxes on transfers of stock are upheld.[10]

Mode of transferring shares, registration, new certificates.[11]—Stock may be transferred by indorsement and delivery of the certificate,[12] but it is not essential to the validity of the transfer that the assignment be made upon the certificates themselves and need not be accompanied by delivery of the certificates.[13] As between the parties the full title to stock passes upon and by the sale or transfer from one to the other,[14] but so far as the corporation and innocent third parties without notice are concerned, the ownership of the stock does not ordinarily pass until the transfer is entered upon the corporate records.[15] A provision on shares of stock that they are transferable on the books of the company only upon surrender of the certificate is binding on the corporation,[16] and where a corporation has notice that a party holds stock in trust for a particular purpose, it is bound to refuse to register a transfer of such stock in violation of the trust.[17] An assignee of stock ordinarily has the right to have it transferred to his name on the corporation's books and to have new certificates issued to him,[18] and such right may be enforced by suit[19] or by mandamus.[20]

services was treasury stock, the proceeds of which would be used for development. Chilkat Gold & Copper Min. Co. v. Fos [Wash.] 84 P. 827.

9. Where the owner of stock transferred it to stockbrokers in order that they might collect the dividends, etc., and she borrowed money from such brokers upon the security of the stock, and thereafter sent a messenger to the brokers with a check in payment of the loan, having previously notified the brokers that she would send for the stock, and the brokers delivered the stock certificates to the messenger, with power of attorney to transfer same, the owner was not estopped from reclaiming the stock from a transferee of the messenger. Hall v. Wagner, 97 N. Y. S. 570. Where, in a suit to recover the value of stock alleged to have been transferred to the defendants by one having no title or right to transfer, the defense was that the transferror had the title to the stock and the right to transfer it, it was error to permit the transferror to testify to personal transactions with plaintiff's testatrix, to whom the stock originally belonged, to show that the transferror had the title. See Code Civ. Proc. § 829. Id. The transferror having testified that he showed plaintiff's husband, who was acting for her, the paper upon which the defendants based their claim to title, and that he acquiesced in the same, it was not error to allow the husband to contradict the witness on this point. Id. See post this section, subdivision Pledge or Mortgage of Shares.

10. Tax imposed by Laws 1905, pp. 474, 477, §§ 315, 324. People v. Reardon [N. Y.] 77 N. E. 970. This tax applies only to transfers within the state. Id. Laws 1905, pp. 474-477, c. 241, §§ 315-324, is valid, and does not violate state Const. art. 1, § 6, providing that no person shall be deprived of property without due process of law, nor does it violate the 14th amendment of the Federal constitution, nor does it violate U. S. Const. art. 1, § 8, relating to interstate commerce, since it applies only to transfers made within the state. People v. Reardon, 110 App. Div. 821, 97 N. Y. S. 535.

11. See 5 C. L. 800.

12. First Nat. Bank v. Stribling [Okl.] 86 P. 512. The indorsement of a certificate of stock in blank and the delivery thereof passes the legal title to the stock, but does not necessarily pass all of the assignor's interest therein to the assignee. Whether such a transaction is a pledge or an absolute transfer of all the assignor's interests will depend upon the intention of the parties. Davis v. Hardwick [Tex. Civ. App.] 15 Tex. Ct. Rep. 947, 94 S. W. 359.

13. Equitable Securities Co. v. Johnson [Colo.] 85 P. 840.

14, 15. Westminster Nat. Bank v. New England Electrical Works [N. H.] 62 A. 971.

16. Where stock is transferable on the books of the company only upon the surrender of the certificates, the corporation cannot reissue such stock to the person in whose name it stands on the books without surrender of the original certificate and thus escape liability to one who holds the stock by assignment and delivery of the certificate. First Nat. Bank v. Stribling [Okl.] 86 P. 512.

17. Pledgee purchased the pledged stock at assessment sale, with understanding with pledgor and corporation that he would hold it merely as pledgee, but thereafter sold it, and the corporation refused to register the stock in the name of the transferee. Young v. New Standard Concentrator Co. [Cal.] 83 P. 28.

18. And this right is not affected by the inadequacy or even entire absence of con-

The effect of a transfer upon the liabilities of the parties as stockholders is treated in other sections.[21]

Pledge or mortgage of shares.[22]—Stock may be pledged[23] in such manner as to deprive the owner of the right of possession as between him and the pledgee,[24] but ordinarily a pledgor who is able to obtain possession of the certificate and to deliver it to the purchaser may make a valid sale of his stock.[25] The pledgee, on the other hand, cannot pass a valid title to a transferee except by sale pursuant to the terms of the pledge,[26] unless the pledgor has clothed the pledgee with the indicia of title.[27] Where a certificate of stock is indorsed in blank and delivered to a pledgee, the latter may fill in the blanks and have the stock transferred to him on the books of the corporation and a new certificate issued,[28] and this alone will not constitute a conversion of the stock,[29] repudiation of the pledgor's rights being essential to a conversion,[30] but the owner of stock which has been wrongfully transferred or converted may maintain a suit therefor against the transferee.[31]

sideration, or by the motives of the transfer, unless the motives be iniquitous or inequitable. Senn v. Union Premium & Mercantile Co., 115 Mo. App. 685, 92 S. W. 507. A memorandum of an assignment of shares of stock, entered on the books of the corporation, is a sufficient compliance with a statute requiring assignments of stock to be entered on the company's books. 1 Mills' Ann. St. § 508. Equitable Securities Co. v. Johnson [Colo.] 85 P. 840. Where the assignee has done all in his power to secure the entry of the assignment on the corporation's books, he will not be affected by the failure of the corporation's officer to make a proper transfer. Id.

19. Statutes providing that no transfers of stock shall be valid except between the parties thereto, until the same shall have been regularly entered upon the books of the corporation (Civ. Code S. C. 1892, § 1894), are not intended to limit the power of the corporation to agree with a bona fide purchaser of its stock to enter the transfer on its books, and hence do not prevent a suit by such a purchaser to compel such entry. Westminster Nat. Bank v. New England Electrical Works [N. H.] 62 A. 971. In such case equity has jurisdiction, the remedy at law being inadequate. Id.

Laches: A transferee of stock will not be denied the right to sue to compel a transfer on the books of the corporation, on the ground of laches, where it does not appear that the plaintiff's delay was unreasonable or that the defendant was injured thereby. Westminster Nat. Bank v. New England Electrical Works [N. H.] 62 A. 971.

Mandamus will lie in a proper case to compel the transfer of stock on the books of the corporation and the issuance of a proper certificate to the transferee, as where there is no real dispute as to the ownership, and the transfer between the parties is according to the conditions of the act of incorporation. State v. Consumers' Brewing Co., 115 La. 782, 40 So. 45.

As to jurisdiction of proceedings to compel transfer, see ante § 10, Suits By and Against Corporations.

20. Smith v. Automatic Photographic Co., 118 Ill. App. 649.

21. See ante, this section, subsection C, Calls and Assessments, and post § 16 E, Liability of Stockholders on Account of Unpaid Subscriptions, etc., and subsec. F, Personal Liability of Stockholders, etc.

22. See 5 C. L. 801.

23. A pledge of all the pledgor's stock in a corporation already issued or to be issued in the future will cover stock in a reorganized corporation issued to the pledgor in lieu of his stock in the old corporation, and such a pledge will take precedence over an assignment of the stock in the new corporation intervening between the reorganization and the actual pledging of the new stock. Dexter Horton & Co. v. McCafferty [Wash.] 84 P. 733. Where a bank, at the time of a renewal of a note secured by individual and syndicate stock, knew that the owner of the individual stock was the principal and the other parties to the note were sureties, it had no right to apply the proceeds of the individual stock to the repayment of an assessment paid by it upon the syndicate stock. Iowa Nat. Bank v. Cooper [Iowa] 107 N. W. 625. A bank held justified in believing that certain parties to a note discounted by it were the owners of stock pledged as collateral so as to entitle it to the benefit of an estoppel against such parties asserting that the bank had no right to apply the proceeds of the stock first to the repayment of an assessment thereon paid by the bank. Id.

24. Where the owner assigned shares of stock as collateral security in order to enable the assignee to speculate in stock for their joint benefit, and the assignee lost the stock in such speculations, the owner could not sue him in trover. Martin v. Megargee, 212 Pa. 558, 61 A. 1023.

25. Hershey v. Welch [Minn.] 104 N. W. 821.

26. Treadwell v. Clark, 100 N. Y. S. 1.

27. Mere transfer of possession is not sufficient where there is no assignment of the stock. Treadwell v. Clark, 100 N. Y. S. 1. Filling in the blank in the power of attorney on the certificate with the owner's name, but without execution of the power by the owner's signature at the end of the power, was not such an indicia of title as to give the transferee of a pledgee a good title as against the owner. Id.

§ 15. *Management of corporations. A. Control of corporation by the stockholders or members.*[32]—A stockholder, as such, cannot bind the corporation by his acts,[33] and the title to corporate property being in the corporation,[34] a stockholder, even though he owns practically all the corporate stock, cannot, as such, make a valid disposition of the corporate property.[35] The equitable interests in the corporation's property, however, are in the stockholders.[36]

Power of the majority.[37]—Where each share of stock gives the owner the right to one vote, the owner or owners of a majority of the stock have the right to control the corporation.[38] The relation of the majority stockholders and the directors to the minority stockholders is fiduciary.[39] A disposition, therefore, by the majority stockholders of the corporate property for their own benefit and at the expense of the minority is a breach of trust.[40]

(§ 15) *B. Dealings between a corporation and its stockholders.*[41]—A sale of corporate property to a stockholder is not void,[42] but where a stockholder purchases stock in his corporation with corporate funds, it will be treated as treasury stock.[43]

(§ 15) *C. By-laws.*[44]—A by-law of a private corporation is a rule or law adopted by it for its internal management or government, and to regulate the conduct and to prescribe the rights and duties of its members towards itself and among themselves in reference to the management of its affairs.[45] Although the authority to enact by-laws is frequently declared in the charter of the corporation or by some general law,[46] the authority to enact them does not depend upon such a declaration but is a right, which, in the absence of some legislative restriction, is inherent

28, 29. Davis v. Hardwick [Tex. Civ. App.] 15 Tex. Ct. Rep. 947, 94 S. W. 359.

30. Davis v. Hardwick [Tex. Civ. App.] 15 Tex. Ct. Rep. 947, 94 S. W. 359.

The statute of limitations does not begin to run against a conversion of stock by a pledgee until the pledgor has notice of the repudiation of his rights by the pledgor. Davis v. Hardwick [Tex. Civ. App.] 15 Tex. Ct. Rep. 947, 94 S. W. 359.

31. Treadwell v. Clark, 100 N. Y. S. 1. Where the transferee refuses to surrender the stock, the owner may recover its value as of the time of the trial. Id.

Tender is not necessary as a condition precedent to the suit by the owner against the transferee, even though the transferee should be entitled to reimbursement. Treadwell v. Clark, 100 N. Y. S. 1. Even were a tender necessary, it is waived by the transferee indicating his intention to contest the owner's right to the stock. Id.

Burden of proof: Where the owner shows a wrongful transfer, the burden of proof is upon the transferee to show that he is a bona fide purchaser for value without notice. Treadwell v. Clark, 100 N. Y. S. 1.

32. See 5 C. L. 802.

33. Banking corporation not bound by stipulation of attorney employed by stockholders. Tabor v. Bank of Leadville [Colo.] 83 P. 1060.

34. Huber v. Martin [Wis.] 105 N. W. 1031.

35. Palmer v. Ring, 99 N. Y. S. 290.

36. Huber v. Martin [Wis.] 105 N. W. 1031. The property of a corporation, except for corporate purposes, belongs to the members of the corporation. Id.

37. See 5 C. L. 802.

38. Lucas v. Milliken, 139 F. 816.

39. The corporation being a trustee for its stockholders, where the majority stockholders combine, and elect and control its directors, to carry out a preconceived plan and use the powers of the corporation to carry out such plan, they put themselves in the place of the corporation and become trustees for the minority stockholders. Jones v. Missouri-Edison Elec. Co. [C. C. A.] 144 F. 765.

40. Any such sale or disposition of the property of the corporation by the majority stockholders is voidable at the suit of the corporation or a minority stockholder in his own and its behalf. Jones v. Missouri-Edison Elec. Co. [C. C. A.] 144 F. 765. The fact that the minority stockholders may maintain an action at law for the value of their stock is no bar to their suit in equity to avoid such contract or transaction. They have the option to avoid the transaction and sue in equity for the property, or to affirm the transaction and sue at law for the value of their stock. Id.

41. See 5 C. L. 802.

42. Sale of all of corporation's property, as authorized by Rev. St. 1898, § 1775, to one of the stockholders, who thereafter conveyed it to another corporation organized by him in which other stockholders of the old company were stockholders. Werle v. Northwestern Flint & Sandpaper Co., 125 Wis. 534, 104 N. W. 743.

43. Gustin v. Merrill [Mich.] 13 Det. Leg. N. 282, 108 N. W. 408.

44. See 5 C. L. 803. **See, also, Boisot on By-Laws.**

45. Peoples' Home Sav. Bank v. Sadler [Cal. App.] 81 P. 1029; Bornstein v. District Grand Lodge No. 4 [Cal. App.] 84 P. 271.

46. See Civ. Code §§ 303, 354. Peoples' Home Sav. Bank v. Sadler [Cal. App.] 81 P. 1029.

in every corporation.[47] At common law the right to make by-laws rested with the stockholders,[48] but under charters and incorporating acts this right may be delegated to directors,[49] but a statute providing that the directors may adopt by-laws does not impair the inherent power of the stockholders to repeal or amend them.[50] The only limitations upon the right to make by-laws are that they must be reasonable,[51] and must not contravene or be contrary to the corporation's charter[52] or any existing law.[53] A retrospective by-law, the effect of which is to impair existing obligations, is unreasonable and contrary to law as impairing the obligation of contract,[54] but a stockholder may agree, on becoming a member of the corporation, to be bound by subsequent by-laws, and in such case will be so bound by all reasonable by-laws thereafter adopted.[55] A corporation cannot divest itself of the power to amend its by-laws,[56] but it may make reasonable regulations as to the manner in which such power shall be exercised.[57]

(§ 15) *D. Corporate meetings and elections.*[58]—In the absence of charter or statutory provision to the contrary, stockholders may be represented at meetings and may vote by proxy.[59] A stockholder who is present at and participates in a corporate meeting is estopped to deny the validity thereof.[60]

Notice.[61]—Notice must be given, as required by law, of a meeting for the election of directors,[62] but where the by-laws so provide, such an election may be held at an adjourned meeting without further notice.[63] The notice of a meeting at which extraordinary business is expected to be transacted should specify particularly the purposes and objects of the meeting.[64] Failure to give notice of the election of directors of a savings and loan association is not a defense against payment of stock subscriptions.[65] A subscriber for stock in a savings and loan association is by the act of subscribing estopped from defending a suit on the subscription by showing

47. Peoples' Home Sav. Bank v. Sadler [Cal. App.] 81 P. 1029; Bornstein v. District Grand Lodge No. 4 [Cal. App.] 84 P. 271. Civ. Code § 303, enumerating certain matters that may be made the subject of by-laws, was not intended to limit the authority of a corporation to make such by-laws as it would have the inherent right to make in the absence of such section. Id.

48. Manufacturers' Exhibition Bldg. Co. v. Landay, 219 Ill. 168, 76 N. E. 146.

49. And where it is so delegated, the stockholders have no right either to make or to amend by-laws, or to require by-laws or amendments thereof to be ratified by the stockholders. Manufacturers' Exhibition Bldg. Co. v. Landay, 219 Ill. 168, 76 N. E. 146. The word "may" as used in Hurd's Rev. St. 1903, § 6, p. 473, providing that the directors of a corporation "may adopt by-laws," is mandatory, and delegates the right to make by-laws exclusively to the directors. Id. But under such a statute, where all the stockholders are directors, a by-law adopted at a stockholders' meeting will be valid where all the stockholders are present and participate in such adoption. Id.

50. Manufacturers' Exhibition Bldg. Co. v. Landay, 121 Ill. App. 96.

51. Peoples' Home Sav. Bank v. Sadler [Cal. App.] 81 P. 1029; Bornstein v. District Grand Lodge No. 4 [Cal. App.] 84 P. 271.

52. Peoples' Home Sav. Bank v. Sadler [Cal. App.] 81 P. 1029.

53. Peoples' Home Sav. Bank v. Sadler [Cal. App.] 81 P. 1029; Bornstein v. District Grand Lodge No. 4 [Cal. App.] 84 P. 271.

Under Laws 1892, p. 1829, c. 687, § 11, providing that a majority of the stockholders may increase or decrease the number of directors, a by-law providing that an increase can be made only upon the vote of a certain per centum of the stockholders, such per centum being greater than a majority, is invalid. Katz v. H. & H. Mfg. Co., 109 App. Div. 49, 95 N. Y. S. 663.

54. By-law of beneficial association scaling death loss. Bornstein v. District Grand Lodge No. 4 [Cal. App.] 84 P. 271. In mutual benefit association. Van Atten v. Modern Brotherhood [Iowa] 108 N. W. 313.

55. By-laws of beneficial association as to who may be beneficiary. State v. Nichols, 40 Wash. 437, 82 P. 741.

56. Manufacturers' Exhibition Bldg. Co. v. Landay, 121 Ill. App. 96.

57. Provision for amendment by majority of stockholders or two-thirds of directors, reasonable. Manufacturers' Exhibition Bldg. Co. v. Landay, 121 Ill. App. 96.

58. See 5 C. L. 804.

59. Vote by proxy for dissolution and surrender of charter. State v. Chilhowee Woolen Mills, 115 Tenn. 266, 89 S. W. 741.

60. Germer v. Triple-State Natural Gas & Oil Co. [W. Va.] 54 S. E. 509.

61. See 5 C. L. 804.

62. See New York Stock Corporation Law, § 20. In re Hammond, 139 F. 898.

63. In re Hammond, 139 F. 898.

64. Meeting to authorize issue of new stock, under P. L. 1896. Wall v. Utah Copper Co. [N. J. Eq.] 62 A. 533.

that the company began to do business before its entire capital stock was subscribed, or because of a failure to give notice of a meeting for the election of directors.[65] Subscribing stockholders may waive the statutory notice of the first stockholders' meeting,[67] and a stockholders' meeting pursuant to signed waivers of notice is valid.[68] A stockholder who attends and votes cannot question the regularity of the calling of the meeting.[69]

Elections.[70]

(§ 15) *E. The right to vote.*[71]—Subject to the right of a corporation to issue stock on condition that it cannot be voted,[72] the right to vote stock is an incident to the ownership of the stock,[73] and as a general rule the right to vote stock is confined to the owners thereof.[74] A mere option or executory contract for the sale of stock will not ordinarily deprive the owner of his right to vote it,[75] but the real owner of stock, though it has not been transferred to him on the books of the company, may maintain a suit to prevent the illegal voting thereof.[76] A court of equity will not, however, on the eve of an election, enjoin the voting of stock upon an ex parte application of minority stockholders, so as to give such minority the power to control the election,[77] nor will stockholders be enjoined from voting their stock on the ground that the persons they will vote for will abuse their trust,[78] and the fact that the holders of a majority of the stock will not re-elect the president to his office cannot be urged as a ground for enjoining, at the instance of such president, the voting of such stock.[79] Where one of two parties claiming the right to vote the majority of the stock of a corporation is enjoined from doing so at the instance of the other, the latter may also be enjoined at the instance of the minority stockholder until the settlement of the dispute between the claimants to the right to vote the majority;[80] but an injunction against the majority holders will not be allowed to operate so as to give the minority the right or power to control the corporation.[81]

A corporation cannot vote its own stock,[82] and where one corporation purchases

65, 66. Dickason v. Grafton Sav. Bank Co., 6 Ohio C. C. [N. S.] 329.

67. Butler Paper Co. v. Cleveland, 121 Ill. App. 491.

68. Gray v. Bloomington & N. R. Co., 120 Ill. App. 159.

69. Hiles v. Hiles & Co., 120 Ill. App. 617.

70, 71. See 5 C. L. 805.

72. Preferred stock could be thus issued at common law, and Rev. St. 1899, p. 91, §§ 1312, 1332, 1333, as amended by Laws 1901, pp. 91, 92, expressly confer the right of a corporation to determine the preferences, priorities, classification, and character of preferred stock, and under these provisions preferred stock may be issued subject to the condition that it may not be voted, notwithstanding Const. art. 12, §§ 6, 8, 12, and Rev. St. 1899, § 953, relating to the voting of stock. State v. Swanger, 190 Mo. 561, 89 S. W. 872.

73. The right to vote one's stock is a property right and should be as sacred as any other property right. Lucas v. Milliken, 139 F. 816.

74. But see Corporation Act, p. 290, § 37, providing that a pledgee of hypothecated stock may vote it when expressly so empowered by the owner. O'Connor v. International Silver Co., 68 N. J. Eq. 680, 62 A. 408.

75. Lucas v. Milliken, 139 F. 816.

76. O'Connor v. International Silver Co., 68 N. J. Eq. 680, 62 A. 408. Where a party has purchased and paid for stock, he may enjoin the holder from exercising the right to vote it. Lucas v. Milliken, 139 F. 816.

77. Lucas v. Milliken, 139 F. 816.

78. As by making a contract which will be detrimental to the interests of the corporation. Lucas v. Milliken, 139 F. 816.

79. In such case the plaintiff has an adequate remedy at law by action for damages, if it should turn out that he is entitled to a sufficient amount of the stock sought to be enjoined from voting to give him control of the corporation. Lucas v. Milliken, 139 F. 816.

80. Villamil v. Hirsch, 143 F. 654.

81. Where, therefore, one of two claimants to the right to vote the majority stock is enjoined at the instance of the other, and the latter is enjoined at the instance of the minority holder, the stockholders' meeting will be enjoined until the settlement of the dispute between the claimants to the right to vote the majority. Villamil v. Hirsch, 143 F. 654.

82. P. L. 1896, p. 290, c. 185, § 38. O'Connor v. International Silver Co., 68 N. J. Eq. 680, 62 A. 408. Where, therefore, a corporation acquires all the stock of another corporation, stock of the former owned by the

all the stock of another corporation, stock of the former held by the latter cannot be voted at all.[83]

(§ 15) *F. Appointment, election, and tenure of officers.*[84]—Only such officers can be legally appointed or elected as are designated by law.[85] The majority stockholders have the right, without or with reason, to re-elect or refuse to re-elect the officers already holding office.[86] Directors may be removed by the stockholders,[87] and the board of directors is ipso facto ousted when its members cease to own stock in their corporation,[88] and other officers may be ousted in the same manner.[89] Statutory power of directors to remove officers does not authorize a removal of one of their number,[90] and a by-law providing for such removal is invalid.[91] Where a by-law requires officers to be elected by the board of directors, an appointment by any other method is invalid,[92] unless it is ratified by the board.[93]

The number of directors may be reduced when and in the manner authorized by law.[94]

Quo warranto is the remedy to determine which of two sets of officers is duly elected.[95] A court of equity will inquire into the regularity of an election of the right of a person to a corporate office only when the question arises incidentally and collaterally in a suit of which the court has jurisdiction on other grounds.[96] Equity has power to enjoin the wrongful removal of a director.[97] The costs and expenses of a suit to remove officers are chargeable to the corporation and not to the officers.[98]

(§ 15) *G. Salary or other compensation of officers.*[99]—The law does not im-

latter cannot be voted at a stockholders' meeting of the former on the ground that the purchase by the fermer of all the stock of the latter rendered the fermer corporation the owner of its stock held by the latter, even admitting that such would be the effect of the transaction. Id.

83. For the reason that such purchase leaves no one to cast the vote upen such stock, all the directors and the nresident of the corporation owning such stock being disqualified by the purchase of all of its stock by the other corporation. See Corporation Act, p. 231, § 13, and P. L. 1896, p. 290, § 39. O'Connor v. International Silver Co., 68 N. J. Eq. 680, 62 A. 408. And for the further reason that if the purchase by the one corporation of all the stock of the ether rendered the former the owner of its own stock formerly owned by the latter, the statute forbidding a corporation to vote its own stock would prevent the voting of the stock in question, and if the purchase did not have this effect, then the voting of such stock would be prevented by the statute providing that only the owner of stock has the right to vote it. Id.

84. See 5 C. L. 805.

85. Under Kirby's Dig. § 843, providing that a corporation shall choose a president, secretary, and treasurer, and "such other officers as the by-laws may prescribe," a provision in the articles of incerporation for the election of a vice-president is a by-law within the meaning of the statute. Myar v. Poe [Ark.] 95 S. W. 1005.

86. Lucas v. Milliken, 139 F. 816.

87. Injunction against removal of plaintiff from office of a director refused, in absence of allegation that defendants had no right to remove plaintiff, or that the meeting called for that purpose was not legally called, and there was nothing to show that plaintiff or any codirectors would suffer from the election of a new board of directors. Shulman v. Star Suburban Realty Co., 99 N. Y. S. 419.

88. As where all of the stock is purchased by another corporation. See P. L. 1896, p. 290, § 39. O'Connor v. International Silver Co., 68 N. J. Eq. 680, 62 A. 408.

89. President. See Corperation Act, p. 231, § 13. O'Connor v. International Silver Co., 68 N. J. Eq. 680, 62 A. 408.

90, 91. Laughlin v. Geer, 121 Ill. App. 534.

92. Appointment of superintendent by manager. Colpe v. Jubilee Min. Co. [Cal. App.] 84 P. 324.

93. Appointment of superintendent by manager ratified by acceptance of services of former with knewledge of facts. See Civ. Code §§ 1589, 2310. Colpe v. Jubilee Min. Co. [Cal. App.] 84 P. 324.

94. The filing of the transcript of proceedings to reduce the number ef directors, as required by Laws 1892, p. 1829, c. 688, § 21, relates back to the meeting at which such proceedings were had, and an election held between such meeting and the filing is valid. In re Westchester Trust Co., 100 N. Y. S. 249.

95. Hence, in the absence of statutory authority, a bill in equity will not lie in such case. Barna v. Kirczow [N. J. Eq.] 63 A. 611.

96. Where it is shown in a bill to cancel fictitious stock that such stock was issued prior to an election of officers which is also attacked, the validity of the election will not be considered, though such validity may be affected by the decision as to the cancellation of the stock. Crow v. Florence Ice & Coal Co., 143 Ala. 541, 39 So. 401.

ply a promise by a corporation to pay its officers for usual and ordinary services,[1] but the directors have power to establish reasonable salaries for officers provided for in the charter or law of incorporation,[2] and there is no presumption against the right to the salaries so fixed.[3] Officers cannot vote themselves salaries[4] or any increase thereof,[5] nor can directors employed in the business of the corporation, agree to pay themselves a stipulated sum,[6] but the directors may, in such case, recover upon a quantum meruit.[7] Money wrongfully appropriated by officers as salaries may be recovered back,[8] as may also excessive salaries,[9] but reasonable salaries are expenses to be deducted before the payment of dividends or profits,[10] and the mere fact that a corporation is insolvent will not render an officer receiving a

97. Laughlin v. Geer, 121 Ill. App. 534.

98. Stendell v. Longshoremen's Protective Union Benev. Ass'n [La.] 41 So. 228.

99. See 5 C. L. 806.

1. Hence, in order for one to legally recover of a corporation for services as president, it must appear that, in the articles of incorporation or in some by-law or resolution of the board of directors, provision was made for the payment of such compensation. Home Mixture Guano Co. v. Tillman [Ga.] 53 S. E. 1019. The action being based entirely upon a quantum meruit should have been dismissed, though there was an allegation that the plaintiff served as president for two weeks after the passage of a resolution providing that the president should be paid a salary, there being, however, no separate count upon the liability created by such resolution. Id. Where pending the term of the president of a corporation, whose business he conducted as general manager, the corporation sold its property, the purchaser assuming all the liabilities of the corporation, the purchaser was not liable for the president's salary after the sale, there being nothing to show that the corporation had agreed to carry on business throughout his term or to retain him as manager upon a salary after it had ceased to have anything to manage. Busell Trimmer Co. v. Coburn, 188 Mass. 254, 74 N. E. 334.

2. Fillebrown v. Hayward, 190 Mass. 472, 77 N. E. 45. Evidence held sufficient to take the case from the jury upon the issue whether the defendant corporation promised to pay plaintiff a certain sum per year as salary for services as president. Williams v. Little Falls Water Power Co. [Minn.] 108 N. W. 289. Ratification by board of directors of appointment of superintendent by manager held not a ratification of the contract as to the salary of the superintendent, notwithstanding Civ. Code § 2311, providing that an indivisible transaction cannot be partially ratified. Colpe v. Jubilee Min. Co. [Cal. App.] 84 P. 324.

3. Salaries so fixed not presumably wrongful or fraudulent so as to entitle trustee in bankruptcy of corporation to recover them back in absence of any showing of fraud or wrong. Fillebrown v. Hayward, 190 Mass. 472, 77 N. E. 45.

4. A corporation will not be bound by a resolution fixing the salary for a certain office, where such resolution is adopted through the influence and vote of one of the directors with the expectation that he will be elected to such office. Greathouse v. Martin [Tex. Civ. App.] 14 Tex. Ct. Rep. 492, 91 S. W. 385; Id. [Tex.] 16 Tex. Ct. Rep. 89, 94 S. W. 322. See post, this section, subsection H, Dealings Between Corporations and the Directors, etc.

5. Even though such increase is only commensurate with an increase of profits. Jacobson v. Brooklyn Lumber Co. [N. Y.] 76 N. E. 1075.

6. Porch v. Agnew Co. [N. J. Eq.] 61 A. 721.

7. But to support such a recovery it must appear that the claimant was employed to do certain work, that he did it, and that he deserves to be paid therefor the sum which in the judgment should be awarded him. Porch v. Agnew Co. [N. J. Eq.] 61 A. 721. Evidence held insufficient to authorize a director to recover upon a quantum meruit. Id.

8. By trustee in bankruptcy of corporation. Fillebrown v. Hayward, 190 Mass. 472, 77 N. E. 45. By corporation. Greathouse v. Martin [Tex. Civ. App.] 14 Tex. Ct. Rep. 492, 91 S. W. 385; Id., 16 Tex. Ct. Rep. 89, 94 S. W. 322.

9. In a suit by a receiver to recover salaries paid to the defendants as officers, an agreement made between the defendants as promoters, as to the amount of their salaries and the payment of the same, such agreement, however, not having been incorporated in the articles of association, was not available as a ground of recovery, though such agreement was filed with a resolution adopted by such officers as directors, relating to their salaries. Mills v. Hendershot [N. J. Eq.] 62 A. 542. So far as the parties to the agreement were concerned, a stipulation in such agreement to the effect that salaries should not be paid until after dividends was waived by the payment of a salary to one of the parties as manager, with the full knowledge and consent of the other parties. Id. Where the petition in an action to recover back salary paid pursuant to such a resolution alleged that the salary paid was unreasonable, and the defendant answered by a general denial and a plea of quantum meruit, it was held that the defendant might introduce evidence of the reasonable value of his services and might, upon proper evidence, recover such value, but that the burden of proof was on the defendant to show such value, and in the absence of any evidence on the subject he could recover nothing. Greathouse v. Martin [Tex.] 16 Tex. Ct. Rep. 89, 94 S. W. 322.

10. And a receiver representing creditors is not entitled to the benefit of a contract between the individual stockholders who managed the business, providing that no salaries

salary for running the business liable to return such salary where there is no fraud.[11] An agreement whereby a corporation grants a clerk a vacation with pay is not without consideration.[12] The abolition of a fund by by-law cannot deprive an agent of his compensation payable out of such fund.[13]

(§ 15) *H. How directors must act; directors' meetings, records, and stock books.*[14]—As a general rule, directors can act in regard to matters outside of mere routine and regular business only when acting together as a board,[15] but where there are no directors, or those in office are inactive, the president of the company being invested by the stockholders with all the powers of a board of directors, the acts of the president, though such as ordinarily can be done only by the directors, will be valid for most intents and purposes.[16] The rule that all the directors of a corporation must have an opportunity to participate in the transaction of its business is for the benefit of the stockholders.[17] Where the record of a directors' meeting recites that notice was given to the directors, this is prima facie sufficient to sustain the validity of the proceedings at such meeting.[18]

Evidence.[19]—The records of the meetings of directors constitute the best evidence of what takes place at such meetings.[20] A resolution of the board of directors may constitute a sufficient memorandum to take a contract out of the operation of the statute of frauds.[21]

Penalties for refusal of inspection of stock book.[22]—Officers refusing to allow inspection are subjected by statute to penalties.[23]

(§ 15) *I. Powers of the directors or trustees.*[24]—The powers of the directors depend upon the articles of association.[25] When so authorized by statute, the stock-

shall be paid until after the payment of dividends and profits. Mills v. Hendershot [N. J. Eq.] 62 A. 542.

11. Mills v. Hendershot [N. J. Eq.] 62 A. 542.

12. The understanding that the clerk is to return and resume his duties is a sufficient consideration, though the employment is from month to month and the corporation has the right to discharge the clerk at any time. Birch v. Glasgow Sav. Bank, 114 Mo. App. 711, 90 S. W. 746. Where a bank clerk was discharged during a vacation which had been granted him with pay, he was entitled to recover for such pay, though his employment was from month to month and though the corporation had the right to discharge him at any time. Id.

13. By-law abolishing expense fund of mutual loan association held not to affect a previous contract whereby it agreed to pay a certain part of such fund to its agent for his services. Rollins v. Co-operative Bldg. Bank, 98 App. Div. 606, 90 N. Y. S. 631.

14. See 5 C. L. 807.

15. As, for example, in executing a mortgage. Garmany v. Lawton, 124 Ga. 876, 53 S. E. 669. The acts of directors acting separately cannot be validated by the execution of a paper reciting that the act was done at a duly constituted meeting. Brinkerhoff Zinc Co. v. Boyd, 192 Mo. 597, 91 S. W. 523.

16. Mortgage on personal property executed by president to secure note given in behalf of the corporation, valid as against the corporation and a creditor claiming a lien under a distress warrant, issued and levied after the record of the mortgage, for rent accruing after such date, though such mortgage was not authorized by any formal vote of the stockholders or directors. Garmany v. Lawton, 124 Ga. 876, 53 S. E. 669.

17. And hence, where all the directors except one were present at a meeting at which a mortgage was authorized, such mortgage was not invalid because no notice of the meeting was given to the absent director, where he was only a nominal stockholder and director, and the only other persons interested in the corporation were the directors who were present. Stiewell v. Webb Press Co. [Ark.] 94 S. W. 915.

18. Turner v. Fidelity Loan Concern [Cal. App.] 83 P. 62.

19. See 5 C. L. 807.

20. Nixon v. Goodwin [Cal. App.] 85 P. 169. Extracts from the records of meetings of directors of a foreign corporation are not admissible in evidence unless authenticated, as provided by Code Civ. Proc. § 1918, subds. 6, 7. Id.

21. Resolution for sale of property, signed by president and secretary, and delivered to purchaser. Western Timber Co. v. Kalama River Lumber Co. [Wash.] 85 P. 338.

22. See 5 C. L. 807.

23. Under Stock Corporation Law, Laws 1892, p. 1840, c. 688, § 53, imposing a penalty for refusal to allow inspection of the corporate books, an officer is not liable for refusing to exhibit books which are not in his possession. Gould v. Olympic Min. Co., 96 N. Y. S. 455. An action for the penalty imposed by this statute is no bar to a subsequent action under the statute for refusal to allow inspection of the books, where such refusal occurs after the institution of the first action. Id.

24. See 5 C. L. 807.

holders may delegate to the directors the exclusive control of the corporation so as to deprive the stockholders of any voice in the management of the corporation.[26] Purely discretionary powers of the directors concerning the internal affairs of the corporation will not, if fairly and honestly exercised, be controlled by either a court of law or equity.[27] This rule, however, is not without exceptions, one exception being where the corporate enterprise is impossible,[28] and another being where fraud is committed or threatened against the corporation or against the minority stockholders.[29] Directors have no power to dispose of the corporation's property without consideration.[30] A corporation is bound by the acts of de facto directors,[31] and where directors are, for the time being, clothed with all the usual powers of directors, their authority to act for the corporation is not affected by an agreement with another corporation whereby only such directors shall be chosen for the former as the latter may desire.[32] Questions relating to the power of directors to bind their corporation by their declarations and admissions,[33] and their power to act in matters in which they are interested,[34] are treated in other subdivisions of this section.

A trustee of a corporation has no right to sue for such corporation where the latter cannot maintain the suit,[35] nor, even where the status of the corporation is such that the suit may be maintained, can the trustee sue until after demand upon the corporation to do so,[36] unless such demand would be futile.[37]

(§ 15) *J. Powers of officers and agents other than directors or trustees.*[38] —A corporation is bound by the acts of its officers and agents in the conduct of its business and within the scope of their authority,[39] but subject to the operation of

25. Power of directors of beneficial association to make or amend by-laws. Van Atten v. Modern Brotherhood [Iowa] 108 N. W. 313.

26. Acts Ex. Sess. 1902-3-4, p. 437, c. 270, authorizing the stockholders to insert in their charter any provision they may deem proper for the management of the business of the corporation, authorized a provision committing the management of a corporation to the directors to the exclusion of the stockholders for a certain period. Union Trust Co. v. Carter, 139 F. 717. The provision of the act relating to the management of the corporation by the stockholders, etc., was intended to apply only to those corporations whose charters contain no provision delegating the exclusive management to the directors. Id. Directors to whom the affairs of a corporation were so committed had the power to sell the properties of the corporation, the original object of the corporation being, not to hold or develop such properties, but to sell them as soon as practicable. Id. Where such a provision was inserted in the charter of a corporation, and also in the certificates of stock, and there was, furthermore, an agreement to the same effect entered into by all the subscribers to stock, a meeting of stockholders and election of new directors before the expiration of the time for which the management of the corporation was committed to the original directors was illegal and without any effect whatever. Id.

27. Siegman v. Electric Vehicle Co., 140 F. 117; Manufacturers' Land & Imp. Co. v. Cleary [Ky.] 89 S. W. 248

28. Manufacturers' Land & Imp. Co. v. Cleary [Ky.] 89 S. W. 248. See ante § 12, How Corporations May be Dissolved.

29. Manufacturers' Land & Imp. Co. v. Cleary [Ky.] 89 S. W. 248. See ante § 14 D, Remedies for Injuries to Stockholders or to Corporation.

30. Brinkerhoff Zinc Co. v. Boyd, 192 Mo. 597, 91 S. W. 523.

31. Acts of de facto directors of fire insurance company in paying part of a loss and voting for payment of balance. Gleason v. Canterbury Mut. Fire Ins. Co. [N. H.] 64 A. 187.

32. Massachusetts Const. Co. v. Kidd, 142 F. 285.

33. See post this section, subsection N, Admissions, Declarations, and Representations of Officers and Agents.

34. See post this section, subsection R, Dealings Between a Corporation and the Directors, etc.; ante this section, subsection G, Salary or Other Compensation of Officers.

35, 36. State v. U. S. Grant University, 115 Tenn. 238, 90 S. W. 294.

37. Allegations that the directors of the corporation are determined to do the thing sought to be prevented by the suit, and that a demand upon them to sue would be futile, are sufficient to excuse the failure to make such demand. State v. U. S. Grant University, 115 Tenn. 238, 90 S. W. 294.

38. See 5 C. L. 808.

39. Execution of a note by an officer in the conduct of a branch business of the corporation will bind the corporation. Dreeben v. First Nat. Bank [Tex. Civ. App.] 15 Tex. Ct. Rep. 917, 93 S. W. 510.

Fraud: A corporation is liable for the fraud of its agents acting within their authority and in the due course of its business, and cannot shield itself by showing that the agent also failed in his duty to the corporation. Vulcan Detinning Co. v. American Can Co. [N. J. Eq.] 62 A. 881.

the doctrines of estoppel[40] and ratification,[41] not otherwise.[42] A corporation may be bound by the acts of its de facto officers,[43] but a corporation will not be bound by a contract made for its benefit where it is not a privy to the contract.[44]

An officer of a corporation may, at the same time, be the officer of another corporation,[45] and in such case the rights, duties, and liabilities are the same as if different persons filled the offices of the respective corporations,[46] and one of the corporations is not liable to the other for the misconduct or malfeasance of such officer in the conduct of the business of the latter,[47] nor can an officer or agent of a corporation, without notice to his corporation, deal with himself as an officer or agent of another corporation.[48] Where an officer of a corporation is employed as the agent of a private person, his acts as such agent will not bind the corporation and are unavailable in favor of such person as against the corporation.[49]

The president.[50]—The powers of the president of a corporation are strictly those of an agent delegated to him by the directors.[51] He may, without any special authority from the directors, perform all acts of an ordinary nature, which, by usage and custom, or necessity, are incident to his office,[52] but beyond this he has

40. See post, this section, subsection K, Apparent Authority, etc.

41. See post this section, subsection L, Ratification of Unauthorized Acts.

42. The officers of a corporation have no authority as such to sell its property. Parmele v. Heenan [Neb.] 106 N. W. 662. The officers of corporate landowners, unless specially authorized by the board of directors, have not power to sign and file a remonstrance, under Laws 1902-1903, p. 92, § 110, against the improvement of a street at the expense of the property owners. City of Sedalia v. Montgomery, 109 Mo. App. 197, 88 S. W. 1014. A corporation is not bound by the unauthorized indorsement of its name by one of its agents upon negotiable notes. Wickersham Banking Co. v. Nicholas [Cal. App.] 82 P. 1124.

43. See Wm. Cameron & Co. v. Jones [Tex. Civ. App.] 90 S. W. 1129, where it was held that service on an officer who was acting as such, to the knowledge of the stockholders, was service on the corporation. De facto directors. Gleason v. Canterbury Mut. Fire Ins. Co. [N. H.] 64 A. 187. See ante this section, subsection I, and see post, this section, subsection K, Apparent Authority, etc.

44. Where a corporation which could not purchase stock of another corporation arranged with an individual that he should purchase the stock and hold it in trust for the corporation, such corporation was not liable under the contract of purchase, the sellers having notice of its lack of authority to purchase. O'Brien v. Dunn Iron Min. Co. [Mich.] 12 Det. Leg. N. 583, 105 N. W. 133. The mere fact that notes given by the officers of a corporation are for the benefit of the corporation does not render the corporation liable on the notes, where the manifest intention is that the notes are to be the individual obligations of the makers. Maryland Trust Co. v. National Mechanics' Bank, 102 Md. 608, 63 A. 70.

45, 46. Elk Brewing Co. v. Neubert, 213 Pa. 171, 62 A. 782.

47. Where the treasurer of a brewing company was also the treasurer of a trust company, and as the treasurer of the former kept its accounts in the latter, and intermingled the funds of the brewing company with those of the trust company so as to render it impossible for the brewing company to tell how much money was in his hands as treasurer, and also misappropriated such funds, the trust company was not thereby rendered liable to the brewing company for such funds (Elk Brewing Co. v. Neubert, 213 Pa. 171, 62 A. 782), nor was the trust company rendered liable because such treasurer was also the president of the brewing company and a director of the trust company (Id.). If the trust company was liable to the brewing company at all, it was on account of the former having received funds of the latter for which it had not accounted, in which case a bill in equity would not lie, there being an adequate remedy at law. Id. The liability of the trust company, if such company were liable at all, and that of its treasurer, who was also the treasurer of the brewing company, being based upon different rights and not being joint, a bill against the trust company and its treasurer jointly was defective for misjoinder. Id. The brewing company having no equitable rights against the trust company, jurisdiction would not be retained on account of a prayer for a discovery. Id.

48. The supervising manager of a company owning a gas well had no right to turn the well over to another company of which he was the president. McCullough v. Ford Natural Gas Co., 213 Pa. 110, 62 A. 521.

49. Lessee of corporation's property employed the corporation's president to manage the property, and then sought to hold the corporation responsible for the acts of the president in connection with such management. Brinkerhoff Zinc Co. v. Boyd, 192 Mo. 597, 91 S. W. 523.

50. See 5 C. L. 809.

51. Mausert v. Christian Feigenspan, 68 N. J. Eq. 671, 63 A. 610.

52. Mausert v. Christian Feigenspan, 68 N. J. Eq. 671, 63 A. 610. Where the president of a mining corporation was acting as its managing agent in securing patents for their mining ground, he was authorized to make contracts necessary for the purpose of ex-

no more control over the business, property, or funds of the corporation than any other director,[53] and any act done by him outside the scope of the powers which inhere in his office will not bind the corporation, unless it is shown that the authority to do such act was specially conferred upon him by the directors.[54] Where the president performs for the corporation an act within the corporate power, his authority will be presumed.[55]

The vice-president.[56]

The secretary.[57]—The secretary of a corporation cannot, ordinarily, without special authority, make contracts which will bind the company.[58]

The treasurer.[59]—The treasurer of a corporation has no inherent power to borrow money for his corporation.[60]

Business managers, salesmen, etc.[61]—In the absence of evidence to the contrary, it will not be presumed that a contract made by the general manager of a corporation was made without authority.[62] The manager of a railroad company has authority to offer rewards for the arrest and conviction of persons placing obstructions on the track,[63] but the managing agent of a mining corporation has no power, in the absence of a special authorization, to pledge the credit of his corporation by drawing and cashing bills of exchange.[64] The general manager of a corporation has no implied power to purchase another business for the corporation, though of

pediting the obtaining of the patents and securing the claims of his company, as against adverse claims that might be made in contesting the company's applications for their patents. Wood v. Saginaw Gold Min. & Mill. Co. [S. D.] 105 N. W. 101. Where the president of a corporation, who had received its corporate bonds for the purpose of selling them, turned over a portion of them to the vice-president, who sold them, the president was not liable to an account for the bonds thus sold by the vice-president. Owego Gas Light Co. v. Boyer, 96 N. Y. S. 486.

53. Mausert v. Christian Feigenspan, 68 N. J. Eq. 671, 63 A. 610.

54. Modification of contract, under corporate seal, between brewing company and retail dealer, by the president of the brewing company, held unauthorized, in absence of proof of special authority. Mausert v. Christian Feigenspan, 68 N. J. Eq. 671, 63 A. 610. The president has no power as such to foreclose corporate mortgage. New England Mut. Life Ins. Co. v. Wing [Mass.] 77 N. E. 376. The president has no power to confess or stipulate for judgment against his corporation, as a judgment in foreclosure proceedings which deprived the corporation of all of its property. Frederick Milling Co. v. Frederick Farmers' Alliance Co. [S. D.] 106 N. W. 298. Where the property of a corporation was sold under a mortgage, it was not bound by the act of its president in accepting the notes for which the mortgage bonds were pledged and the mortgage bonds in lieu of the portion of the proceeds of the sale due the corporation. Brinkerhoff Zinc Co. v. Boyd, 192 Mo. 597, 91 S. W. 523. Cannot enter into a partnership in behalf of the corporation. Dixie Cotton Oil Co. v. Morris [Ark.] 94 S. W. 933 [Advance sheets only]. Where a corporation, pursuant to an agreement with one of its promoters and officers, paid such promoter and officer in stock, the corporation was not bound by an agreement between such promoter and officer and the president of the corporation, whereby the former transferred to the latter a portion of his stock, and it was agreed between them that the promoter and officer should be paid a salary for his future services, such services having already been paid for with stock. Porch v. Agnew Co. [N. J. Eq.] 61 A. 721. The president of a corporation has no implied power to sell treasury stock, nor, in the absence of a valid vote by a quorum of disinterested directors, can he cause such stock to be issued to him in payment of a debt due by the corporation to him. Camden Land Co. v. Lewis [Me.] 63 A. 523. The president has no implied power to appropriate property of the corporation. Statement of president that he owned certain corporate property held not to bind the corporation so as to subject it to his debts. Collins Ice Cream Co. v. Normandie, 121 Ill. App. 140.

55. Endorsement of note to corporation. Lloyd v. Matthews, 119 Ill. App. 546.

56, 57. See 5 C. L. 810.

58. Ross Oil & Gas Co. v. Eastham [Kan.] 85 P. 531. The secretary of a corporation, in charge of the erection of a building for the corporation, has authority to bind the corporation for such equipments as are adapted to the use for which the building is intended. Porch v. Agnew Co. [N. J. Eq.] 61 A. 721.

59. See 5 C. L. 810.

60. Power of treasurer to borrow money for his corporation and to give its note therefor held a question of fact. First Nat. Bank v. Commercial Travellers' Home Ass'n, 108 App. Div. 78, 95 N. Y. S. 454.

61. See 5 C. L. 811.

62. Walnut Ridge Mercantile Co. v. Cohn [Ark.] 96 S. W. 413. A contract signed by the manager of a corporation will bind the corporation where it appears from the contract itself that the signer is its manager and has authority to execute the contract. Kessel v. Austin Min. Co., 144 F. 859.

63. Arkansas S. W. R. Co. v. Dickinson [Ark.] 95 S. W. 802.

64. One who discounts such bills of ex-

the same kind as that operated by the corporation.[65] A mere selling agent has no power to sell, for his principal, goods which his principal does not deal in,[66] nor to give a warranty, unless the sale is of a class ordinarily accompanied by a warranty.[67]

Pleading and evidence of authority.[68]—In an action against a corporation upon a contract made with its agent, it is sufficient to allege that the contract was made with the defendant's duly authorized agent,[69] but the petition should show who the agent was.[70] Where a corporation relies upon lack of authority in its agents or officers, it must plead it.[71]

The burden of proof is upon a party claiming under a contract made by the agents or officers of a corporation to show the authority of such agents or officers.[72] Authority need not be proved by formal resolution of board of directors,[73] but may be proved by acts of agent acquiesced in.[74] Hearsay and inferences of the witness are inadmissible.[75] Evidence that the agent of the corporation had authority to execute the contract sued on may be rebutted by evidence tending to show that the agent had no such authority.[76] Cases involving the sufficiency of evidence are collected in the notes.[77]

A certificate of acknowledgment by a corporation must show that the officer assuming to act for it in executing the instrument acknowledged that the corporation executed it.[78]

(§ 15) *K. Apparent authority of officers and agents and estoppel of the corporation and of others. Implied permission to act.*[79]—Certain officers of a corporation are clothed with certain powers, which, either from the nature of the of-

change does so at his own peril. Bank of Commerce v. Baird Min. Co. [N. M.] 85 P. 970.

65. Where he has neither actual nor implied power to purchase such business, he has no implied power to bind the corporation by notes given in its name for the purchase price. Manhattan Liquor Co. v. Magnus & Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 785, 94 S. W. 1117.

66, 67. Reid v. Alaska Packing Co. [Or.] 83 P. 139.

68. See 5 C. L. 811.

69. It is not necessary to allege the character of the defendant's authorized business, in order that the pleadings may show that the acts of the agent were consistent with the authorized powers of the corporation. San Antonio Mach. & Supply Co. v. Josey [Tex. Civ. App.] 15 Tex. Ct. Rep. 176, 91 S. W. 598. A petition alleging that a contract of a corporation was made, executed, and delivered by its officer and agent, naming him, is not demurrable on the ground that the authority of the agent does not sufficiently appear. Johnson County v. Chamberlain Banking House [Neb.] 104 N. W. 1061.

70. Tres Palacios Rice & Irrigation Co. v. Eidman [Tex. Civ. App.] 14 Tex. Ct. Rep. 852, 93 S. W. 698.

71. Simon v. Calfee [Ark.] 95 S. W. 1011.

72. In suit for specific performance of contract to sell realty. Parmele v. Heenan [Neb.] 106 N. W. 662.

73. Authority of secretary to employ attorney. Kelly v. Ning Yung Benev. Ass'n [Cal. App.] 84 P. 321. Where it does not appear that there is any record evidence of the employment of an officer, such employment may be proved by parol evidence of what took place at a directors' meeting. Braxmar v. Stanton, 110 App. Div. 167, 96 N. Y. S. 1096.

74. Arkansas S. W. R. Co. v. Dickinson [Ark.] 95 S. W. 802.

75. As where a witness testifies that a certain officer had no power to employ a certain person, and the basis of such testimony is information received from others or his own knowledge of the character of the officer's office and duties. International Harvester Co. v. Campbell [Tex. Civ. App.] 96 S. W. 93.

76. The testimony of the agent himself and the by-laws of the corporation were admissible in rebuttal. Tres Palacios Rice & Irrigation Co. v. Eidman [Tex. Civ. App.] 14 Tex. Ct. Rep. 852, 93 S. W. 698.

77. Evidence held to show that the party who executed a deed of trust and mortgage as the president of a corporation was in fact president. Fourth Nat. Bank v. Camden Lumber Co., 142 F. 257. The president of a corporation held to have been authorized to pledge the corporation's property to secure notes discounted by a bank. Love v. Export Storage Co. [C. C. A.] 143 F. 1. Evidence held insufficient to sustain a verdict based on the ground that a certain party was the agent of the defendant as its salesman and authorized to bind the company for advertising and stationery. Blanke Tea & Coffee Co. v. Eager [Neb.] 106 N. W. 603. Evidence held insufficient to show authority of engineer in charge of a corporation's work to modify the contract so as to allow the contractor damages for delay occasioned by the corporation. Miller v. Mason City, etc., R. Co. [Iowa] 108 N. W. 302.

78. Gessner v. Minneapolis, etc., R. Co. [N. D.] 108 N. W. 786.

fice or by long established and universal custom, are necessary incidents to their office, and in such case proof of the character of the corporation and the office and the official act establishes prima facie that the act is that of the corporation,[80] and hence, where a party has actual knowledge of a limitation upon the apparent authority of an officer, it necessarily follows that he cannot hold the corporation liable for acts of the officer which are within the limitation,[81] but if, notwithstanding the apparent authority of an officer, there is an actual lack of authority to do a certain thing, the liability of the corporation will depend upon the principle of estoppel.[82] Powers may also be implied from powers expressly conferred.[83]

Acceptance of benefits.[84]—A corporation is bound by the transactions of its officers, the benefit of which it has accepted,[85] and no formal action of the board of directors is necessary to constitute such acceptance,[86] but where the corporation, in receiving the benefit of the unauthorized transaction, does not know and is not charged with knowledge of the unauthorized nature of the transaction, it will not be estopped.[86a] Estoppel by acceptance of benefits is often considered as a ratification.[87]

79. See 5 C. L. 811.

80. Tres Palacios Rice & Irrigation Co. v. Eidman [Tex. Civ. App.] 14 Tex. Ct. Rep. 852, 93 S. W. 698; Cleghon v. Barstow Irr. Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 221, 93 S. W. 1020.

81. Where a party knows that a corporation has not begun upon the business for which it was formed, not having finished the construction of its plant, a party who, with knowledge of such facts, deals with its general manager, is charged with knowledge that the latter's authority is confined to the matters immediately in hand, and that he has not the usual authority incident to the office of general manager of a going concern. Tres Palacios Rice & Irrigation Co. v. Eidman [Tex. Civ. App.] 14 Tex. Ct. Rep. 852, 93 S. W. 698. In such case, evidence of the agent's lack of authority was admissible, notwithstanding that the act was within his apparent authority. Id. Amusement company not bound by contract made by agent with third party for cigar license, subject to approval of board of directors, where the board did not approve the contract, though the agent represented to the licensee that if he did not hear from the board by a certain time the contract would be effective. Berlin v. Belle Isle Scenic R. Co. [Mich.] 12 Det. Leg. N. 573, 105 N. W. 130.

82. Tres Palacios Rice & Irrigation Co. v. Eidman [Tex. Civ. App.] 14 Tex. Ct. Rep. 852, 93 S. W. 698. A corporation cannot act upon an agreement of arbitration made by its president until final decision and then repudiate the agreement. White Star Min. Co. v. Hultberg [Ill.] 77 N. E. 327.

Pleading: Where the right of a party to hold a corporation upon a contract with its agent rests upon an estoppel, the estoppel must be pleaded. Tres Palacios Rice & Irrigation Co. v. Eidman [Tex. Civ. App.] 14 Tex. Ct. Rep. 852, 93 S. W. 698.

Evidence: Where the authority of the agent is denied, proof of lack of power is admissible as a predicate to the issue of estoppel, though the act is within the apparent powers of the agent. Tres Palacios Rice & Irrigation Co. v. Eidman [Tex. Civ. App.] 14 Tex. Ct. Rep. 852, 93 S. W. 698.

83. Where the manager of a saloon owned by a corporation is authorized to purchase another saloon, notes given and indorsed by him in the name of the corporation will be binding upon it. Manhattan Liquor Co. v. Joseph A. Magnus & Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 785, 94 S. W. 1117. See ante this section, subsec. Business Managers, Salesmen, etc.

84. See 5 C. L. 812.

85. Porch v. Agnew Co. [N. J. Eq.] 61 A. 721. Civ. Code §§ 1589, 2310. Colpe v. Jubilee Min. Co. [Cal. App.] 84 P. 324. Corporation estopped to question authority of general manager to make an agreement for the extension of the time of payment of a corporate note. Lyndon Sav. Bank v. International Co. [Vt.] 62 A. 50. Corporation estopped to repudiate the transfer of bonds as collateral security for a loan, where the bonds were placed in the hands of trustees, in whose names they were registered, to be delivered to the order of the directors, and were actually delivered by the trustees upon the order of three of the directors, one of whom was the secretary, one the treasurer, and one the general manager, one of the trustees being also a director, although the trustees had not transferred the bonds or executed a power of attorney for that purpose. Presbyterian Board of Relief for Disabled Ministers, etc., v. Gilbee, 212 Pa. 310, 61 A. 925. A corporation cannot accept the services of an attorney employed by its secretary, and then escape liability on the ground that the employment was unauthorized. Kelly v. Ning Yung Benev. Ass'n [Cal. App.] 84 P. 321.

86. Porch v. Agnew Co. [N. J. Eq.] 61 A. 721.

86a. Receipt of proceeds of note indorsed by agent and discounted. Wickersham Banking Co. v. Nicholas [Cal. App.] 82 P. 1124. The fact that part of the proceeds of notes discounted upon the unauthorized indorsement of the corporation's name by an agent were paid by a draft, which the corporation collected, did not necessarily charge the corporation with knowledge of the unauthorized indorsement. Id.

87. See post, this section, subsec. L, Ratification of Unauthorized Acts.

Acquiescence in similar acts.[88]—Acquiescence by the corporation in similar acts will be considered in determining the question of the agent's power and the right of the company to repudiate his acts.[89]

(§ 15) *L. Ratification of unauthorized acts.*[90]—A corporation may ratify the unauthorized acts of its officers or agents[91] so as to give such acts all the force of an original transaction.[92] The ratification may be by formal approval,[93] by the stockholders[94] or directors,[95] or by acquiescence,[96] payments,[97] or acceptance of benefits.[98] An unauthorized contract may be partly ratified and partly disaffirmed,

88. See 5 C. L. 812.

89. Johnson v. Des Moines, etc., R. Co. [Iowa] 105 N. W. 509. Where the manager of a branch factory was accustomed to employ all the parties employed there, and had for several years made a contract with a travelling salesman, a renewal of such contract was within his apparent power. Thomas v. International Silver Co., 48 Misc. 509, 96 N. Y. S. 218. Issue of warehouse receipt by secretary of corporation to himself. Riley v. Loma Vista Ranch Co. [Cal. App.] 82 P. 686.

90. See 5 C. L. 812.

91. Lyndon Sav. Bank v. International Co. [Vt.] 62 A. 50. The stockholders may ratify unauthorized acts of the corporate officers, as an act of treasurer in giving note of corporation to its president for money loaned by the latter to the corporation. First Nat. Bank v. Commercial Travellers' Home Ass'n, 108 App. Div. 78, 95 N. Y. S. 454.

92. New England Mut. Life Ins. Co. v. Wing [Mass.] 77 N. E. 376. A ratification by the corporation renders immaterial any question of the original authority of the officer or agent who made the contract. Lincoln Mountain Gold Min. Co. v. Williams [Colo.] 85 P. 844.

93. A confirmation of a report of an officer ratifies all the transactions stated therein, especially where all the acts of the officer are thereafter ratified generally, and the particular transaction is represented to the party claiming thereunder as having been performed by the officers. Riley v. Loma Vista Ranch Co. [Cal. App.] 82 P. 686.

94. First Nat. Bank v. Commercial Travellers' Home Ass'n, 108 App. Div. 78, 95 N. Y. S. 454. Sale of corporation's property to a new corporation, of which some of the trustees were also trustees and creditors of the old corporation, ratified by stockholders. Pitcher v. Lone Pine-Surprise Consol. Min. Co., 39 Wash. 608, 81 P. 1047. A stockholder who was not a member of the old corporation at the time of the ratification, and who purchased stock which was not voted at the meeting at which the sale was ratified, was not entitled to have the sale set aside. Id.

95. The authorization of an attorney to bring a suit for a corporation may be ratified by the board of directors, even after the authority of the attorney has been challenged. Massachusetts Const. Co. v. Kidd, 142 F. 285. Where the suit was instituted by an assignee corporation in the name of the assignor corporation, the ratification of the assignor was not necessary. Id. The ratification by the real plaintiff of the authority of the attorney to bring the suit was not rendered ineffective because it was made by a board of directors who were chosen subject to the approval of another corporation which controlled the plaintiff, such directors, however, being clothed, for the time being, with all the usual powers of directors. Id.

96. Construction corporation held to have ratified contract made by its president as manager, the directors having knowledge of the contract, and the company having acquiesced in the assumption of power by the president to make the contract. Johnson v. Des Moines, etc., R. Co. [Iowa] 105 N. W. 509. Failure to repudiate them within a reasonable time after knowledge thereof. First Nat. Bank v. Commercial Travellers' Home Ass'n, 108 App. Div. 78, 95 N. Y. S. 454. A general principle of the law of agency, applicable to corporate agencies, is that when an agent, in contracting for his principal, exceeds his authority, the principal, upon being fully informed of the facts, must, within a reasonable time, disaffirm the acts of his agent, especially in cases where his silence might operate to the prejudice of innocent parties, or he will be held to have ratified the unauthorized acts. Reid v. Alaska Packing Co. [Or.] 83 P. 139. Where manager of railroad company posted offer of reward in all the stations, and the president passed over the road every ten days, it was held that the company was bound by the offer, regardless of the manager's original authority to post the offers (Arkansas S. W. R. Co. v. Dickinson [Ark.] 95 S. W. 802), but one dealing with the agent of a corporation is chargeable with knowledge of the extent of the agent's authority, and where, therefore, the agent exceeds his authority, the corporation will not be estopped by its mere failure to promptly notify the other party to the transaction of the limitations of the agent's authority. Reid v. Alaska Packing Co. [Or.] 83 P. 139. It will be sufficient if the corporation promptly disaffirms the contract and refuses to be bound thereby. Id.

97. Fourth Nat. Bank v. Camden Lumber Co., 142 F. 257. Agreement by general manager for extension of time for payment of corporate note ratified by payment of interest on note for five years after such agreement was made. Lyndon Sav. Bank v. International Co. [Vt.] 62 A. 50. Where the salary of a bank clerk was paid two weeks after he had gone off on a vacation, without any deduction for the time of his absence, this constituted a ratification of the act of the president in granting the vacation with pay, and authorized a recovery for the balance of the term of the vacation. Birch v. Glasgow Sav. Bank, 114 Mo. App. 711, 90 S. W. 746. Where a corporation executed notes and provided for the cash payment constituting the price of property purchased by its agent, it thereby ratified the action of the agent in mak-

subject, of course, to the acceptance of the other party,[99] but an indivisible transaction cannot be partially ratified.[1]

Aside from the acts which may constitute a ratification, the essential elements of a ratification are authority to ratify,[2] privity of contract,[3] and knowledge of the facts and circumstances.[4] Knowledge of the facts and circumstances will not be presumed.[5]

(§ 15) *M. Notice to or knowledge of officers or agents as notice to or knowledge of corporation.*[6]—Where an officer or agent of a corporation is acting for his corporation, notice to him as to matters connected with the transaction is notice to the corporation.[7] The knowledge of the officer or agent, in order to be notice

ing the purchase. Western Timber Co. v. Kalama River Lumber Co. [Wash.] 85 P. 338.

98. Unauthorized foreclosure of corporate mortgage by president ratified by suit by the corporation for possession under deed from its agent who was purchaser at sale. New England Mut. Life Ins. Co. v. Wing [Mass.] 77 N. E. 376. Land company held to have ratified the appointment of trustees to whom its property was conveyed for the benefit of creditors so as to be estopped to repudiate a sale of such property by the trustees. Kessler & Co. v. Ensley Co., 141 F. 130. A corporation held to have ratified a mortgage and deed of trust given to secure the payment of money with which property was purchased for the corporation and to secure another just debt, the corporation having received the benefits of the transaction and having, furthermore, made payments on the debts with full knowledge of the facts. Fourth Nat. Bank v. Camden Lumber Co., 142 F. 257. Corporation, by receiving and using proceeds of note discounted by bank at the instance of the corporation's president, who was also its treasurer, ratified the transaction whereby such president and treasurer pledged to the bank as security for the note warehouse receipts representing property of the corporation. Love v. Export Storage Co. [C. C. A.] 143 F. 1. Purchase of goods by superintendent ratified by receipt and use by the corporation. Braxmar v. Stanton, 110 App. Div. 167, 96 N. Y. S. 1096. Mortgage irregular because the meeting at which it was authorized was held without notice to one of the directors, ratified and validated by receipt by the corporation of the notes and benefits under the mortgage. Stiewell v. Webb Press Co. [Ark.] 94 S. W. 915.

99. Where a corporation had repudiated a warranty given by its salesman but had not repudiated the sale, the sending of samples to the buyer was not a ratification of the warranty. Reid v. Alaska Packing Co. [Or.] 83 P. 139.

1. Civ. Code § 2311. This section held inapplicable to a ratification of an appointment of a superintendent by the manager, and failure to ratify the contract as to the former's salary. Colpe v. Jubilee Min. Co. [Cal. App.] 84 P. 324.

2. An officer who has no power to make a certain contract cannot ratify the unauthorized act of another officer or agent in making it. Secretary of salmon packing corporation held not to have authority to ratify an unauthorized sale and warranty made by a salesman. Reid v. Alaska Packing Co. [Or.] 83 P. 139. Where a corporation authorizes two officers to bind it by their joint action, one of them may ratify the acts of the other acting alone with the same effect as if the two had originally acted together. Peach River Lumber Co. v. Ayers [Tex. Civ. App.] 14 Tex. Ct. Rep. 684, 91 S. W. 387. Upon an issue as to such a ratification, evidence as to the acts of one of the officers acting alone was admissible as a basis for the ratification by the other. Id.

3. A corporation cannot, by ratification, obtain the right to sue a stockholder upon a contract made by him with a third person and for his own benefit, even though the corporation is incidentally benefited by the contract. Contract by stockholder for sale of stock in which he guaranteed that certain bills receivable by the corporation would be paid. Rochester Dry Goods Co. v. Fahey, 97 N. Y. S. 1013. Suit having been brought upon the theory that the corporation was entitled to sue as a party for whose benefit the contract was made, evidence of an assignment of the contract by the third person to the corporation was inadmissible. Id.

4. A vote of stockholders "that all acts of the directors and officers be hereby ratified and approved" did not render legal and effective the unauthorized voting of salaries by the directors to themselves, or the unauthorized issue of treasury stock by the president to himself, where it did not appear that the stockholders generally had any knowledge of such transactions. Camden Land Co. v. Lewis [Me.] 63 A. 523. A resolution of a stockholders' meeting ratifying generally all the acts of the directors and officers will not validate wrongful and fraudulent acts of such officers and directors which are not disclosed at the meeting, such as fictitious loan and wrongful sale of corporate stock by officers to corporation. Bowers v. Male, 97 N. Y. S. 722.

5. Camden Land Co. v. Lewis [Me.] 63 A. 523.

6. See 5 C. L. 813.

7. Where the supervising manager of a company owning a gas well attempted to turn the well over to himself as president of another company, the latter company was charged with knowledge of the authority of such agent, its president. McCullough v. Ford Natural Gas Co., 213 Pa. 110, 62 A. 521. Where an agent was employed by a corporation to purchase a secret process for detinning, the corporation was chargeable with the knowledge of the agent that the parties from whom he purchased the process had obtained it fraudulently. Vulcan Detinning Co. v. American Can Co. [N. J. Eq.] 62 A. 881.

to the corporation, must ordinarily be to an officer or agent who is acting within the scope of his authority,[8] and must concern some matter which it is his duty to communicate to his principal.[9] A corporation is not, therefore, chargeable with the knowledge of its agent while the latter is engaged in committing an independent fraudulent act on his own account, and the facts to be imputed relate to such act;[10] but though the knowledge is acquired by the agent independently, it will be imputed to the corporation where it acts through the agent in a matter to which the information is pertinent,[11] and where an officer of a corporation commits a fraud upon a third person, the corporation is chargeable with notice of the fraud, though the fraud is perpetrated for the officer's benefit, where he also represents the corporation in the transaction.[12] Notice to one officer is not notice to the corporation with reference to a transaction by another officer.[13]

The knowledge of the president of a corporation is the knowledge of the corporation that a certain party is acting as agent or officer of the company in a certain capacity.[14]

Where an officer or agent of a corporation is also an officer or agent of another corporation, his knowledge while acting for one of such corporations in a transaction with the other will not be imputed to the latter,[15] nor is a corporation chargeable with the knowledge of another corporation because the attorney of the latter is the attorney of the former, where the attorney has no knowledge of the matter himself.[16]

(§ 15) *N. Admissions, declarations, and representations of officers and agents.*[17]—There is no presumption of law that an officer of a corporation is authorized to bind the corporation by his admissions,[18] and a corporation will not be estopped by the unauthorized declarations of its president as to a matter under the control of the directors,[19] but a corporation will be bound by the declarations of its

Knowledge of officer of bank that money advanced by the bank to officers of a trust company was to be used for the illegal purpose of purchasing stock of the trust company for the trust company. Maryland Trust Co. v. National Mechanics' Bank, 102 Md. 608, 63 A. 70. Knowledge of local officers of beneficial union that a member had changed his occupation. Brotherhood of Painters, Decorators & Paperhangers v. Moore [Ind. App.] 76 N. E. 262. Notice to the agent of a loan company, who made the loan and whose duty it was to make loans and to pass upon the sufficiency of the security of the fictitious character of a loan, was notice to the company, so as to start the running of the statute of limitations. Flynt v. Taylor [Tex. Civ. App.] 14 Tex. Ct. Rep. 648, 91 S. W. 864.

Election of remedies: Where the officers of a corporation knew, at the time an attachment was issued to recover the price of goods sold by the corporation, that the buyer had been guilty of such fraud as would have warranted a rescission of the sale, the corporation was bound by the election of remedies, though the attorney who sued out the attachment was ignorant of the fraud. Baker v. Brown Shoe Co. [Ark.] 95 S. W. 808.

8, 9. Robertson Lumber Co. v. Anderson [Minn.] 105 N. W. 972.

10. Treasurer of corporation who was allowed to use the corporation's bank account for his individual purposes, deposited in such account certificates of deposit drawn to him as guardian and representing guardianship funds, and thereafter checked out and appropriated such funds. Corporation held not liable. Brookhouse v. Union Pub. Co. [N. H.] 62 A. 219.

11. Vulcan Detinning Co. v. American Can Co. [N. J. Eq.] 62 A. 881.

12. Fraud of president in causing reissue of stock which had been assigned by him, thus attempting to defeat the rights of the assignee. First Nat. Bank v. Stribling [Okl.] 86 P. 512.

13. Notice as to the consideration of municipal bonds purchased by a bank. Thompson v. Mecosta [Mich.] 12 Det. Leg. N. 474, 104 N. W. 694.

14. Arkansas S. W. R. Co. v. Dickinson [Ark.] 95 S. W. 802.

15. Knowledge of president of a mill company as to lien on property owned by such company could not be imputed to a bank from which such president procured a loan for his company, though he was also a director of the bank and a member of its loan committee. Wardlaw v. Troy Oil Mill [S. C.] 54 S. E. 658.

16. Wardlaw v. Troy Oil Mill [S. C.] 54 S. E. 658.

17. See 5 C. L. 814.

18. Director or president. Westminster Nat. Bank v. New England Electrical Works [N. H.] 62 A. 971.

19. Corporation not estopped to enforce a condition subsequent in a deed by the unauthorized declarations of its president that such condition would not be enforced. Lew-

officers within the scope of their duties.[20] The declarations of an officer that he is such, while not alone sufficient to prove that he is the officer he represents himself to be, are admissible, upon such question, in connection with other evidence.[21]

(§ 15) *O. Delegation of authority by directors.*[22]—There is some question as to whether a board of directors may delegate their duties and authority to an executive committee, even with the consent of the stockholders,[23] but it has been held that they may delegate the performance of purely ministerial duties to a committee of their own members or to an individual.[24] Where the authority of such a committee is not questioned, a majority of the committee may act in the absence of the other member or members, at least as to matters of ordinary business of the corporation.[25]

(§ 15) *P. Personal liability of officers and agents.*[26]—An officer of a corporation cannot use it and its name for the transaction of his own business, and then repudiate his obligations thus incurred on the ground that the corporation and not he himself is the party liable.[27] Intentional participation by the officers of a corporation in fraudulent and wrongful acts perpetrated by the corporation will render such officers jointly liable with the corporation.[28] And so also, where a corporation is engaged in the violation of the law, all the officers and shareholders concerned are liable personally to a party injured.[29]

Officers of corporations are personally liable to the corporation for all acts of spoliation whereby the company is deprived of or loses its property.[30] A sale of their offices by the officers of a corporation is a flagrant breach of trust, entitling the corporation or its representatives to sue for an accounting as to the proceeds of the sale.[31]

The personal liability of officers for mismanagement,[32] and to creditors,[33] is considered elsewhere.

iston Water & Power Co. v. Brown [Wash.] 85 P. 47.

20. Corporation held bound by declaration of president in connection with sale of lots. Marshall v. Columbia, etc., R. Co. [S. C.] 53 S. E. 417. Misrepresentation of manager of irrigation company as to location of water rights. Cleghon v. Barstow Irr. Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 221, 93 S. W. 1020. The liability of the corporation in such case is not dependent upon the corporation's being a party to the contract which the party to whom the misrepresentation is made enters into, in reliance upon such misrepresentation and on account of which he sustains his loss, nor is it necessary that the corporation be benefited by the misrepresentation. Id.

21. Kelly v. Ning Yung Benev. Ass'n [Cal. App.] 84 P. 321.

22. See 1 C. L. 777.

23. Canada-Atlantic & Plant S. S. Co. v. Flanders [C. C. A.] 145 F. 875.

24. Giving note for existing obligation. First Nat. Bank v. Commercial Travellers' Home Ass'n, 108 App. Div. 78, 95 N. Y. S. 454.

25. Canada-Atlantic & Plant S. S. Co. v. Flanders [C. C. A.] 145 F. 875.

26. See 5 C. L. 814.

27. Officer of corporation held liable in assumpsit for money obtained through the medium of a corporation managed and controlled by him. Donovan v. Purtell, 216 Ill. 629, 75 N. E. 334. A verbal promise by the officer to pay a debt thus contracted in the name of his corporation is not within the statute of frauds. Id.

28. Infringement of trade mark. Saxlehner v. Eisner, 140 F. 938.

29. Officers and stockholders of New Jersey corporation illegally practising dentistry in Pennsylvania held liable to patient for injury inflicted by an unlicensed employee while operating upon plaintiff. Mandeville v. Courtright [C. C. A.] 142 F. 97.

30. Officer of building association sold all of its assets, and then procured the cancellation of the mortgage given to secure the purchase price, leaving the association with no assets except unavailable and discredited securities. Brinckerhoff v. Roosevelt [C. C. A.] 143 F. 478. Where a director of a corporation wrongfully acquires the property of the corporation, he will be held to hold it in trust for the corporation and its creditors, as where a director, by promising creditors to pay their debts, induces them not to bid at a judicial sale of the corporate property, and thus acquires such property at an unfair price. Lilienthal v. Betz [N. Y.] 77 N. E. 1002. It is not necessary in such an action by a creditor to allege that the sale was fraudulent or to ask to have it set aside. Id. The discharged receiver in voluntary dissolution proceedings in which the sale was made was not a necessary party to such an action. Id.

31. Resignation of officers of beneficial association pursuant to an agreement to use

Statutory liabilities.[34]—Directors voting for the payment of dividends out of the capital stock are liable to the corporation for the dividends so paid,[35] but they are not liable as such for a wrongful declaration of a dividend unless such declaration amounts to either an actual or constructive tort.[36] Statutory liability for misapplication of funds depends upon the provisions of the statute.[37] To make one personally liable under the Illinois statute for acting as officer of a pretended corporation, he must have actively participated in the transaction out of which the indebtedness arose.[38]

(§ 15) *Q. Liability of officers for mismanagement.*[39]—Actionable mismanagement may consist of omission of duties as well as violation thereof.[40] Where a stockholder's injuries from the mismanagement of the corporation is derivative from the injury done the corporation, his remedy is by a bill for that purpose, to which the corporation and all the directors should be made parties.[41] A director of a corporation cannot be held liable for mismanagement of the corporation in an action to set aside a sale of pooled stock where he was not connected with the sale, though his mismanagement may have reduced the value of the stock so as to bring about the sale.[42] The success of the corporation's business, notwithstanding mismanagement, is no defense to an action for losses caused by such mismanagement.[43] The receiver of an insolvent corporation may maintain a suit in equity against the

their influence with the trustees to secure the offices for the other parties. Heineman v. Marshall [Mo. App.] 92 S. W. 1131. A creditor whose claim accrued after such breach of trust could not sue therefor. Quere, whether any creditor could sue. Id.

32. See post, this section, subsection Q, Liability of Officers for Mismanagement.

33. See post § 16 G, Rights and Remedies of Creditors Against Directors and Other Officers.

34. See 5 C. L. 815.

35. P. L. 1896, p. 286, § 30. Siegman v. Kissel [N. J. Eq.] 62 A. 941; Siegman v. Electric Vehicle Co., 140 F. 117.

How director may exonerate himself: The only way in which a director, who is present at a meeting where such an illegal act is done, or by which a director absent from the meeting, may exonerate himself from the statutory liability, is by causing his dissent to be entered at large on the minutes of the directors at the time the act is done, or forthwith after he shall have notice of the same, and by causing a true copy of said dissent to be published within two weeks after the same shall have been so entered, in a newspaper published in the county where the corporation has its principal office. Siegman v. Electric Vehicle Co., 140 F. 117.

36. Ebelhar v. German-American Security Co.'s Assignee [Ky.] 91 S. W. 262. Where dividends are paid in good faith, after a proper examination of the financial condition of the company, a sudden decline of the value of the corporate assets, even below the point of solvency, will not render the directors liable. The payment of dividends out of stock cannot, however, be justified by a fictitious surplus created by an inflated valuation of the assets. Siegman v. Electric Vehicle Co., 140 F. 117. Where directors act in good faith in declaring dividends from a fund which is not subject to distribution in this manner, they will not be jointly liable for the whole amount thus distributed, but only for such amounts as they, as stockholders, receive, as where dividends were declared by directors of investment company from expense fund by giving stockholders checks for their respective dividends, which checks were indorsed and turned back to the corporation and credited to the redemption fund. Ebelhar v. German-American Security Co.'s Assignee [Ky.] 91 S. W. 262.

37. Complaint held not to state a cause of action under Code Civ. Proc. § 1781, against directors for misapplication of funds. Shulman v. Star Suburban Realty Co., 99 N. Y. S. 419.

38. Churchill v. Thompson Elec. Co., 119 Ill. App. 430.

39. See 5 C. L. 816.

40. Young v. Equitable Life Assur. Soc., 49 Misc. 347, 99 N. Y. S. 446. A cause of action against a part of the directors for active wrongdoing may be joined with a cause of action against other directors for omission of duties, especially where the action is by a stockholder suing for the corporation, such an action being derivative and equitable in its nature. Id.

Pleading: Acts of omission may be charged generally. Young v. Equitable Life Assur. Soc., 49 Misc. 347, 99 N. Y. S. 446.

41. No recovery can be had for such injuries in an action by a stockholder against members of a voting trust where the mismanagement charged as committed was done by a portion of the defendants as directors, the other defendants not being directors, and those who were directors constituted only a minority of the board. Lawrence v. Curtis [Mass.] 77 N. E. 314.

42. Weitze v. Burrage, 190 Mass. 267, 76 N. E. 508.

43. Where the officers of a corporation have illegally or wrongfully occasioned a loss to a corporation, it is neither a defense nor a mitigating circumstance that despite such illegal or wrongful acts the corporation is solvent, or that the stock has in-

directors for misfeasance and negligence in the conduct of their offices.[44] A director, though in a sense a trustee, may nevertheless plead the statute of limitations against his liability for negligence and misfeasance in office.[45]

Statutory actions against directors.[46]

(§ 15) *R. Dealings between a corporation and the directors or other officers and personal interest in transactions.*[47]—Directors occupy a fiduciary relation with respect to the stockholders and are bound to the utmost good faith,[48] and other officers, such as president, manager, etc., occupy a similar relation towards the stockholders.[49] Directors cannot act for the corporation in matters in which they are interested,[50] and neither directors nor other officers can use their official positions for private gain at the expense of the stockholders,[50a] and where such a gain is attempted, they will be held to an accounting at the suit of a stockholder in behalf of the corporation;[51] but directors and officers of a corporation are not precluded abso-

creased in value during the period covered by such acts. Jacobson v. Brooklyn Lumber Co. [N. Y.] 76 N. E. 1075.

44. Emerson v. Gaither [Md.] 64 A. 26. Bill by receiver against directors held multifarious in that the specifications and charges of negligence and malfeasance did not apply to all the defendants, but a defendant to whom all the charges applied could not demur because of the multifariousness as to the other defendants. Id. A bill by a receiver against the distributees of a deceased director, which failed to show that deceased left any estate, or, if he did, that the distributees had received anything from it, was fatally defective upon demurrer. Id. An action may be brought by a receiver of a corporation jointly against former directors to recover money lost to the corporation through the alleged misconduct of such officers. See Banking and Finance, 7 C. L. 358. Suit by receiver of National Bank. Allen v. Luke, 141 F. 694. Such a bill must allege the acts constituting the misconduct charged, and not merely that the defendants failed to perform their official duties or were negligent in the performance thereof. Id.

45. A director may rely upon the statute of limitations when the action is not brought within the statutory period from the time when he ceases to be a director. Emerson v. Gaither [Md.] 64 A. 26.

46, 47. See 5 C. L. 817.

48. Directors liable for fraudulent issue of stock to themselves without paying for same. Hinkley v. Sac Oil Pipe Line Co. [Iowa] 107 N. W. 629. Directors are trustees for the stockholders and are bound to the utmost good faith, and are accountable to them upon the principles governing fiduciary relations. McCourt v. Singers-Bigger [C. C. A.] 145 F. 103.

49. McCourt v. Singers-Bigger [C. C. A.] 145 F. 103.

50. Camden Land Co. v. Lewis [Me.] 63 A. 523; Mobile Land Imp. Co. v. Gass, 142 Ala. 520, 39 So. 229. And cannot be counted to make up a quorum. Wall v. Utah Copper Co. [N. J. Eq.] 62 A. 533. Where the directors of a corporation are its sole beneficiaries, a resolution for the issue of stock to the directors is not invalid. Turner v. Fidelity Loan Concern [Cal. App.] 83 P. 62.

50a. Where the president and manager of a corporation operating theatres under leases secured renewals for a new corporation organized by him to operate the theatres, the new corporations held the leases in trust for the old. McCourt v. Singers-Bigger [C. C. A.] 145 F. 103. Where an officer of a corporation attempts to make a secret profit on stock placed in his hands by the corporation for sale, the whole amount of the proceeds of such a sale belongs to the corporation and may be traced as trust funds. Camden Land Co. v. Lewis [Me.] 63 A. 523. Agreement between officers for increase of salaries. Jacobson v. Brooklyn Lumber Co. [N. Y.] 76 N. E. 1075.

51. Where one of the defendants, who was the president and manager of a corporation operating theatres under leases, secured renewals of the leases for a new corporation organized by him and which operated the theatres under such renewals, such defendant, the new corporation, and its officers and agents, were liable to the old corporation in an accounting at the suit of a stockholder suing in behalf of the corporation. McCourt v. Singers-Bigger [C. C. A.] 145 F. 103. In a suit by a stockholder in behalf of his corporation to recover property held by an officer and another corporation as trustees ex maleficio and for an accounting, the defendants were entitled to allowances for losses incurred in bona fide ventures in connection with such property which were within the scope of the business of the corporation. Id. In such a suit the former president of the old corporation was not entitled to the allowance of an increased salary allowed to him by the new corporation. Id. But the defendants were entitled to an allowance for losses incurred in the operation of a theatre in the summer, though no such theatre had been operated by the old company. Id. Interest on the fund recovered was not allowable where it did not appear when the fund was ready for distribution. Id. Where the officers of a corporation procure the purchase by the corporation of property for themselves for their own benefit and at the expense of the interests of the corporation, they will be liable to the corporation for the loss thereby occasioned to it, as when officers of an insurance company sold worthless stock owned by them in a corporation organized to assist the first corporation to maintain a certain reserve. Bowers v. Male, 97 N. Y. S. 722.

lutely from dealing or contracting with the corporation,[52] and such dealings are not presumably fraudulent,[53] but they are regarded with such suspicion that it will take only slight evidence to impeach them.[54] Where one officer or agent of a corporation undertakes to bind his company by a contract with another officer or agent, the authority of the officer or agent representing the company to enter into the contract must be clear and unquestionable.[55] The president of a corporation may buy property and sell it to the corporation,[56] but a mere intention to convey the property so purchased to the corporation will not establish a trust in favor of the corporation.[57] There is no rule which prohibits a director from engaging in an independent business competitive with that conducted by his corporation.[58]

Purchase of corporate property.[59]—A director may purchase the property of the corporation.[60] Such a transaction, while of evil tendency, is not absolutely forbidden or regarded as carrying such weight of adverse presumption as to render it constructively fraudulent,[61] but when assailed it will not be upheld unless it be shown that it was not affected by fraud,[62] and when a director proposes, while in office, to buy the property of the company, the fact that the deal is not consummated until after he has ceased to be a director will not necessarily take the transaction out of the operation of this rule.[63] The fact that the property is not acquired by direct purchase from the corporation, but at a sheriff's or other judicial

52. Directors. In re Castle Braid, 145 F. 224; Kessler & Co. v. Ensley Co., 141 F. 130. If such contracts are fair and free from fraud, and in the interest of and for the benefit of the corporation, they will be upheld, as where officers paid debts of corporation and took latter's note for same. Savage v. Madelia Farmers' Warehouse Co. [Minn.] 108 N. W. 296. Directors and officers may contract with their corporation. Id. The president of a corporation may, in the absence of bad faith, take obligations or securities from his corporation for an actual indebtedness to him. First Nat. Bank v. Commercial Travellers' Home Ass'n, 103 App. Div. 78, 95 N. Y. S. 454.

53. In re Castle Braid Co., 145 F. 224; Kessler & Co. v. Ensley Co., 141 F. 130. The mere fact that the trustee will be benefited does not estop him, as trustee, or the board of trustees of which he is a member, from doing acts for the benefit of the corporation which honest business judgment would call for. Pitcher v. Lone Pine-Surprise Consol. Min. Co., 39 Wash. 608, 81 P. 1047. The fact that a claim presented against a bankrupt corporation showed that it was upon a note given to an officer of the corporation for money lent to the corporation by such officer was not sufficient to rebut the presumption attaching to claims filed in bankruptcy that they are valid. In re Castle Braid, 145 F. 224.

54. Kessler & Co. v. Ensley Co., 141 F. 130; In re Castle Braid, 145 F. 224. The conduct of officers and directors in dealing or contracting with their corporation will be tested by those rules of fairness and good faith which equity imposes upon trustees. Savage v. Madelia Farmers' Warehouse Co. [Minn.] 108 N. W. 296. Where the trustees of a corporation enter into a contract beneficial especially to themselves, and the transaction becomes the subject of judicial inquiry, it will be most closely scrutinized and the trustees will be held to the utmost good faith. Pitcher v. Lone Pine-Surprise Consol. Min. Co., 39 Wash. 608, 81 P. 1047.

55. Evidence held insufficient to establish the authority of a party acting as secretary, treasurer, and general manager of a corporation, engaged in selling the stock of another corporation, to enter into an agreement with the vice-president of the selling corporation whereby the latter should receive one-half of the commissions on all sales of stock made by either party. Waters v. American Finance Co., 102 Md. 212, 62 A. 357.

56, 57. Camden Land Co. v. Lewis [Me.] 63 A. 523.

58. New York Automobile Co. v. Franklin, 49 Misc. 8, 97 N. Y. S. 781.

59. See 5 C. L. 819.

60. The sale, however, will be closely scrutinized and the burden of proving good faith is upon the purchaser. Union Trust Co. v. Carter, 139 F. 717. A director, acting openly, may purchase for himself from the board of which he is a member, the rest of such board not being interested, if he does not assume to act for the corporation and his colleagues do not rely upon him. Kessler & Co. v. Ensley Co., 141 F. 130.

61. Kessler & Co. v. Ensley Co., 141 F. 130; In re Castle Braid, 145 F. 224. There is no presumption of fraud as to the actions of directors in selling corporate property to another director. Polhemus v. Polhemus, 100 N. Y. S. 263. A sale of the corporate property to another corporation of which trustees of the seller, owning claims against it, are trustees, is not necessarily or presumptively fraudulent. Pitcher v. Lone Pine-Surprise Consol. Min. Co., 39 Wash. 608, 81 P. 1047.

62. Kessler & Co. v. Ensley Co., 141 F. 130. But the rule does not apply to a purchase by a director from trustees whose selection he did not influence or control, and who were chosen by stockholders to hold the corporate property in trust to sell for the benefit of creditors. Id.

sale, will not validate the purchaser's title where it is tainted with fraud and violation of his duty as a director or officer of the corporation;[64] but even where a sale of corporate property to a director is resolved upon at a directors' meeting at which the presence of the purchaser is necessary to make up a quorum, and is voted for by such purchaser, the sale, in the absence of fraud, is not void, but is voidable at the election of the corporation,[65] and being voidable only, such a sale may be ratified by the corporation,[66] or the corporation may be estopped to rescind it.[67] A stockholder may likewise be estopped to repudiate a sale of corporate property to a director.[68] A trust created by the wrongful purchase of the corporation's property by one of its officers may be discharged by a subsequent conveyance to such officer of the company's equity in the property.[69] A tender may not be necessary as a condition precedent to the corporation's right to recover its property which has been fraudulently acquired by a director.[70] The measure of damages in such a suit is

63. Kessler & Co. v. Ensley Co., 141 F. 130. Purchase by former director from trustees held valid. Id.

64. A director of a corporation, who is also its secretary and treasurer and its agent in procuring a loan to save its property from sheriff's sale, cannot, at such sale, acquire interests in the property adverse to the corporation. Fricker v. Americus Mfg. & Imp. Co., 124 Ga. 165, 52 S. E. 65. Where an officer and agent of a corporation, while purporting to act for itself in securing a loan to save its property from sheriff's sale, procured a loan and bought the property in his own name, he was not entitled, upon a petition by the corporation to recover the property and for an accounting, to his expenses incurred in an effort to reorganize the corporation without its knowledge or consent, but only to his reasonable expenses in procuring the loan. Id. The bringing of an equitable action to recover the property did not ratify the defendant's effort to effect a reorganization. Id. The defendant having claimed credit for his expenses in procuring the loan, the plaintiff should have been allowed to amend its petition by charging collusion between the defendant and the broker through whom the loan was procured, and that he had given the broker a mortgage on the property sued for by the plaintiff to secure not only the amount loaned for the corporation but also charges which were not legitimate, and praying that the broker might be made a party and the mortgage cancelled, etc. Id. The fact that the property of a corporation is acquired by its directors and officers through the medium of the foreclosure of a corporate mortgage will not protect the purchasers from an accounting to a stockholder who is thereby defrauded, as where officers and directors of corporation formed new corporation which acquired the property of the old by purchase at mortgage sale. Sparrow v. Bement [Mich.] 12 Det. Leg. N. 798, 105 N. W. 881. The new corporation having for a while recognized the complaining stockholder as a member of the new corporation, and then having repudiated his rights, the court decreed that such stockholder was entitled to the value of the same number of shares in the corporation as he held in the old, with such dividends thereon as had been actually paid by the new corporation on that class of stock. Id. The stockholders of the new company were not necessary parties to the action by the defrauded stockholder against the new company. Id. The objection that the stockholders of the new company were necessary parties could not be made for the first time on appeal where, since the decree below, the new company had been dissolved and its property placed in the hands of receivers. Id.

65. Mobile Land Imp. Co. v. Gass, 142 Ala. 520, 39 So. 229.

66. Failure, for equitable reasons, to claim a cancellation of the sale as to lots sold by the purchaser to innocent third persons, and as to a lot improved by the purchaser, did not constitute such a partial ratification as would prevent the rescission of the sale as to the rest of the property. Mobile Land Imp. Co. v. Gass, 142 Ala. 520, 39 So. 229.

67. The consideration of a voidable sale of lots by a corporation to one of its directors being that he would improve a portion of the lots, the fact that houses were erected by the purchaser on a part of the property on a street where the directors and stockholders might have seen them, or that the purchaser told one of the directors that some of the lots had been conveyed to him, or that the deeds were recorded in a county where the minority stockholders resided, was not sufficient to charge the company with such notice as would bind it by way of estoppel. Mobile Land Imp. Co. v. Gass, 142 Ala. 520, 39 So. 229.

68. A stockholder may lose the right to repudiate a sale to a director or former director by delaying to object or sue until the property has been improved by the purchaser and great expense incurred by the latter in regard thereto. Kessler & Co. v. Ensley Co., 141 F. 130.

69. Where a creditor of a land company was induced by directors and officers of the company to sell its property under execution, and thereafter to convey the property to another corporation, which, in turn, conveyed it to one of such officers and another, the resulting trust in such property in favor of the land company was extinguished by a subsequent conveyance to such parties of the land company's equity of redemption and other interests in the property, in trust for the benefit of the creditors of such company, and hence purchasers of the property from such trustees obtained a title free

not the rents and profits actually received by the defendant, but the reasonable rental value of the property during such time as it was wrongfully withheld by the defendant from the corporation.[71]

Purchase of corporate obligations.[72]—Where a director of a corporation becomes obligated for the corporate debts, he is entitled to reimbursement from the corporation.[73]

§ 16. *Rights and remedies of creditors of corporations. A. The relation of creditors.*[74]

(§ 16) *B. Rights and remedies of creditors against the corporation.*[75] *Voluntary preferences.*[76]—In the absence of statutory provision, a corporation may prefer a creditor,[77] but by statutes corporations have been brought within the insolvency laws,[78] and under these laws an insolvent corporation[79] cannot make a preferential transfer of its property,[80] and an assignment of transfer of property made in contemplation of insolvency is likewise void,[81] except as to bona fide purchasers for value and without notice.[82] A statutory prohibition of preferences by

from any equities in favor of the land company. Kessler & Co. v. Ensley Co., 141 F. 130.

70. Where an officer fraudulently acquires the company's property, and an accounting is necessary in order to determine what, if anything, is due him from the corporation by reason of expenses incurred by him in acquiring the property, no tender is necessary as a condition precedent to a suit by the corporation to recover the property, provided the corporation is ready to pay whatever may be found due. Fricker v. Americus Mfg. & Imp. Co., 124 Ga. 165, 52 S. E. 65.

71. Fricker v. Americus Mfg. & Imp. Co., 124 Ga. 165, 52 S. E. 65.

72. See 5 C. L. 819.

73. Evidence held sufficient to sustain finding that directors of a corporation became obligated for and paid certain obligations of the corporation and were entitled to reimbursement. Savage v. Madelia Farmers' Warehouse Co. [Minn.] 108 N. W. 296. And evidence held not conclusive that the debts so paid arose from unlawful transactions sanctioned by the directors as such, nor that the payment was voluntary within the rules applicable to such payments. Id.

74. See 5 C. L. 819.

75, 76. See 5 C. L. 820.

77. Mowen v. Nitsch [Md.] 62 A. 582.

78. Code Pub. Gen. Laws 1904, art. 22, § 377. Mowen v. Nitsch [Md.] 62 A. 582.

79. A corporation which owed, apart from the preferential mortgage attacked, $32,500, while its assets amounted to only $26,200, and it was wholly unable to meet and pay its debts as they matured, and was without sufficient credit to borrow money with which to continue its business, was insolvent. Mowen v. Nitsch [Md.] 62 A. 582. Insolvency, within the meaning of P. L. 1896, p. 298, § 164, means a general inability to meet liabilities as they accrue, by means of either available assets or of an honest use of the company's credit. Russell & E. Mfg. Co. v. Faitoute Hardware Co. [N. J. Eq.] 62 A. 421. Where most of the corporation's assets had been assigned as collateral security for its debts, and the equity of redemption in such assets was worth far less than the unsecured debts, and suits had been brought against the company, and it had little or no cash or credit, it was held that the company was insolvent, though its book valuation of its assets exceeded its liabilities and the assignee believed such valuation to be correct. Id.

80. Pub. Laws 1896, p. 298. Porch v. Agnew Co. [N. J. Eq.] 61 A. 721. A transfer of corporate bonds to a director, who was also the president of the corporation, to secure advances made by such president, held invalid under this statute. Id. Where the property of a corporation was transferred to two of its directors, who agreed to pay certain debts of the corporation, this amounted to a preferential transfer in favor of the debts agreed to be paid. Mills v. Hendershot [N. J. Eq.] 62 A. 542.

In California a trust for the benefit of creditors may prefer claims for running expenses. Bank of Visalia v. Dillonwood Lumber Co. [Cal.] 82 P. 374.

81. P. L. 1896, p. 298, § 164. Russell & E. Mfg. Co. v. Faitoute Hardware Co. [N. J. Eq.] 62 A. 421; Mills v. Hendershot [N. J. Eq.] 62 A. 542.

82. P. L. 1896, p. 298, § 164. Russell & E. Mfg. Co. v. Faitoute Hardware Co. [N. J. Eq.] 62 A. 421. The purchaser must not only pay value but must have purchased without notice. Id. Under this statute, even a bona fide purchaser for value without notice is not protected where the assignment or transfer is made after the company has actually suspended its ordinary business. Id. Under this rule, an assignment or transfer of book accounts will be deemed to have been made at the time of the delivery of the papers and not at the time of the execution thereof. Id. And the fact that the suspension is involuntary does not change the rule so as to give the purchaser a good title where the transfer is made after actual suspension of business. Id.

For value: Antecedent indebtedness is not a valuable consideration, within the rule that protects a bona fide purchaser for value without notice from the operation of the rule that transfers made by an insolvent corporation are invalid Russell & E. Mfg. Co.

an insolvent corporation will not prevent a corporation in failing circumstances from making bona fide settlements of its debts,[83] and, a fortiori, a corporation in good circumstances may make such a transfer,[84] but a transfer by an insolvent corporation of its property, with intent to hinder, delay, or defraud its creditors, is invalid without regard to the insolvency laws.[85]

Priorities between claims.[86]—The statutes generally provide for preferences in favor of claims for wages[87] and services,[88] but creditors can bind only themselves by agreements as to priorities.[89] A creditor of an insolvent corporation cannot obtain a preference through the unauthorized acts of the officers of the corporation, such acts not being ratified by the corporation,[90] nor can a mortgagee in trust for bondholders, under a mortgage covering after-acquired property, acquire equities in such property superior to those of the bondholders,[91] nor can a pledgee of such property acquire an equity superior to that of mortgage bondholders by reason of lack of notice that the property pledged was covered by the mortgage.[92] A trust estate has a preferred claim against an insolvent corporation for funds invested in the stock thereof, where the corporation had notice, at the time of such investment, that such funds were trust funds,[93] provided the funds can be traced into the hands of the corporation at the time it became insolvent or was adjudicated as such.[94] A corporation which has been placed in the hands of receivers has no

v. E. C. Faitoute Hardware Co. [N. J. Eq.] 62 A. 421; Mills v. Hendershot [N. J. Eq.] 62 A. 542.

Notice: Where an assignee of corporate assets knew, at the time of the assignment, that a mortgage upon nearly all the company's property had been foreclosed, this was sufficient to put him upon such inquiry as to prevent him from claiming to be a bona fide purchaser without notice. Russell & E. Mfg. Co. v. Faitoute Hardware Co. [N. J. Eq.] 62 A. 421.

83. Transfer of property in settlement of debt sustained. Gordon v. Southgate Bldg. Co., 109 App. Div. 838, 96 N. Y. S. 717.

84. Assignment of claims for fire insurance losses in settlement of a bona fide debt, without any intention to prefer, and while the corporation was solvent, was valid as against the claim of a receiver thereafter appointed. Voss v. Smith, 110 App. Div. 104, 97 N. Y. S. 3.

85. A mortgage given to secure the individual indebtedness of an officer of the corporation, held invalid. Mowen v. Nitsch [Md.] 62 A. 582. A false statement as to what constituted the major portion of the consideration of the mortgage, held to stamp the mortgage as fraudulent. Id. The fact that the consideration was money lent to the officer of the corporation, which was used by him in the business of the corporation, did not validate the mortgage as against subsisting creditors. Id.

86. See 5 C. L. 820.

87. Code Civ. Proc. § 1204, giving laborers a preference as to claims for wages, applies to all assignments by corporations, whether assignments for creditors under Civ. Code § 3449 or not. Bank of Visalia v. Dillonwood Lumber Co. [Cal.] 82 P. 374.

88. Stockholders are entitled to the benefit of a preference in favor of claims for services, given by Ballinger's Ann. Codes & St., §§ 5919-5923. Cors v. Ballard Iron Works, 41 Wash. 390, 83 P. 900. Resolution of stockholders that stockholders should receive nothing for their services, held abandoned. Id.

89. Claimants for materials and labor not bound by agreement of principal creditors allowing the trustee preference as to his claim for services. Bank of Visalia v. Dillonwood Lumber Co. [Cal.] 82 P. 374.

90. Unauthorized act of officers in turning over to creditor a bill of lading to property belonging to the corporation, and seizure of the property by the creditor, gave the latter no priority. Jones v. Northern Pacific Fish & Oil Co. [Wash.] 84 P. 1122.

91. The mortgagee is charged with notice as to the property covered by the mortgage. Guaranty Trust Co. v. Atlantic Coast Elec. R. Co. [C. C. A.] 138 F. 517.

92. Where a railroad company purchased the property and assets of another company, and then conveyed the same to a new corporation, the beneficial and equitable ownership of such assets and property, however, being retained by the purchasing company, and all the stock of the new company was delivered to such purchasing company, a pledgee of such stock from such company did not acquire any equity in such assets and property superior to the equities of the holders of bonds secured by a mortgage which, by virtue of a clause covering after-acquired property, covered the beneficial ownership or interest in such property and assets. Guaranty Trust Co. v. Atlantic Coast Elec. R. Co. [C. C. A.] 138 F. 517.

93. Where an executor purchased two certificates of stock, one being issued to him as executor and one individually, the corporation was charged with notice that the former was purchased with trust funds, but not that the latter was so purchased, although the latter was purchased partly with such funds. Harrison v. Fleischman [N. J. Eq.] 61 A. 1025.

94. Funds invested by an executor in stock of a building and loan association held

standing to raise any question as to the priorities between liens upon its property.[95] Priorities between mortgagees and bondholders and other claimants are considered elsewhere.[96]

Assets for creditors.[97]—When an assessment upon stockholders has been made it becomes a corporate asset, and as such the right to collect it vests in a receiver of the corporation.[98] The liabilities of stockholders for unpaid subscriptions,[99] and their statutory liabilities[1] as assets for the benefit of creditors, is treated elsewhere.

Winding up proceedings, assignment, receivership.[2]—An assignment of all the property of a corporation for the benefit of creditors includes the good will of the business of the corporation,[3] the right to use the corporate name as the designation of articles of commerce previously so designated,[4] and the books and records of the corporation,[5] and where property exempt by law from attachment or execution is excepted from the assignment, such exception includes only such property as is expressly exempt by statute.[6]

A creditor may apply for a receiver for a corporation[7] on the ground that the corporation is insolvent.[8] The title to the corporate assets vests in the receiver, whose right and duty it is to collect them.[9] Claims against a corporation which is in the hands of a receiver must be presented to[10] and proved before the receiver[11]

not sufficiently traced and identified. Harrison v. Fleischman [N. J. Eq.] 61 A. 1025.

95. Wetzel & T. R. Co. v. Tennis Bros. Co. [C. C. A.] 145 F. 458.

96. See post, this section, subsec. C.

97. See 5 C. L. 821.

98. Carter, Rice & Co. v. Samuel Hano Co. [N. H.] 64 A. 201.

99. See post, this section, subsection E.

1. See post this section, subsection F.

2. See 5 C. L. 822.

3. Lothrop Pub. Co. v. Lothrop, Lee & Sheppard Co. [Mass.] 77 N. E. 841.

4. Name of publications. Lothrop Pub. Co. v. Lothrop, Lee & Sheppard Co. [Mass.] 77 N. E. 841.

5. Lothrop Pub. Co. v. Williams [Mass.] 77 N. E. 844.

6. Lothrop Pub. Co. v. Lothrop, Lee & Sheppard Co. [Mass.] 77 N. E. 841; Lothrop Pub. Co. v. Williams [Mass.] 77 N. E. 844.

7. Code 1899, c. 53, § 58. Rainey v. Freeport Smokeless Coal & Coking Co., 58 W. Va. 424, 52 S. E. 528. Where complainants subscribed to stock under an agreement with the holder of the majority of stock, who thereafter repudiated the agreement after complainants had endorsed notes for the corporation and made payments thereon out of their individual funds, they were creditors. Wood & Nathan Co. v. American Mach. & Mfg. Co. [N. J. Eq.] 62 A. 768. A suit to declare a corporation insolvent and for a receiver may be maintained by the holder of mortgage coupons. Reinhardt v. Interstate Tel. Co. [N. J. Eq.] 63 A. 1097. Such a suit was not a remedy under the mortgage, within a provision of the mortgage forbidding the holder or holders of less than 25% of the outstanding bonds or coupons from instituting any proceedings to foreclose the mortgage, or for the appointment of a receiver, or for any other remedy "under this mortgage." Id.

8. Policy holder in assessment insurance company is a creditor within this rule. Commonwealth v. Richardson [Ky.] 94 S. W. 639, afg. 92 S. W. 284. Absolute insolvency is not necessary in order to justify the appointment of a receiver. It is sufficient if the corporation cannot keep its business going. Wood & Nathan Co. v. American Mach. & Mfg. Co. [N. J. Eq.] 62 A. 768. Corporation held insolvent within Corporation Act, § 65, P. L. 1896, p. 298, so as to be subject to a suit by a bondholder for a receiver. Reinhardt v. Interstate Tel. Co. [N. J. Eq.] 63 A. 1097.

9. Carter, Rice & Co. v. Samuel Hano Co. [N. H.] 64 A. 201. A receiver of an insolvent corporation may sue for an accounting from persons illegally in possession of the property or funds of the corporation. Suit against mortgagee alleged to be holding under an invalid chattel mortgage. Pryor v. Gray [N. J. Eq.] 62 A. 439. In a suit by a receiver of an insolvent corporation for an accounting from a chattel mortgagee alleged to be holding under an invalid mortgage, the bill held sufficiently definite. Id. In such a suit the receiver is not confined, in challenging the defendant's wrongful acts, to those acts committed after the receiver's appointment, and hence may rely on the fact that the mortgage was not legally recorded and that there was no such delivery as would render an unrecorded mortgage valid, though there was a complete delivery before the appointment of the receiver. Id.

Stockholders' liabilities may be enforced by a receiver. See post, this section, subsections E, F. And in the exercise of his right to enforce the liability of a stockholder, a receiver may file a bill to ascertain who are stockholders. McMaster v. Drew [N. J. Eq.] 62 A. 559.

Jurisdiction of suit by receiver: A receiver of an insolvent corporation appointed by a Federal circuit court for the Southern District of Iowa had not authority to institute a suit in the Federal circuit court for the district of Colorado to recover a fund for the benefit of creditors, though authorized to sue in such court both by that court and by the court which appointed him. Fowler v. Osgood [C. C. A.] 141 F. 20.

by the owner thereof.[12] In New Jersey a receiver of an insolvent corporation may adjudicate claims against the corporation, and from his decision an appeal lies to the court of chancery.[13] Where the same receivers are appointed by the Federal courts of several states, a claim for services rendered them may be adjudicated in the court of original jurisdiction where it is convenient to do so, though most of the property of the corporation lies in another state and the contract was made in such state.[14] Where a creditor holding the vast majority of claims in amount, and probably in number as well, requests that the receiver sell the property in bulk, it will be so ordered.[15] The costs of proceedings, instituted in behalf of creditors, to wind up the affairs of a corporation, must be borne by the creditors in proportion to the amount realized by them.[16] Such costs may include a reasonable attorney's fee.[17]

(§ 16) *C. Rights of corporate mortgagees and bondholders.*[18]—Where a party has a right to a mortgage on corporate property, equity will enforce his equitable lien by compelling the execution of the mortgage,[19] but a valid corporation bond can be issued only in the manner provided by law, and a court of equity will not recognize a party as an equitable bondholder by reason of an agreement which does not make him a legal bondholder, where the effect would be to nullify the statutory provisions relating to the issue of bonds.[20] Some of the limitations upon the power to issue bonds are that they may be issued only for money, labor, or property,[21] and that a corporation cannot issue bonds convertible into new stock.[22] The validity of

10. Where the judgment appointing a receiver for a corporation in an action under Code Civ. Proc. §§ 1784, 1793, providing for the sequestration and distribution of a corporation's property among its creditors, provides for the presentation of claims before the receiver, a creditor of the corporation will not, without showing special reason therefor, be allowed to be made a party defendant with leave to answer. Trowbridge v. Troy & N. E. R. Co., 99 N. Y. S. 435.

11. A claim by a promoter and officer for services was not sufficiently proved where it did not appear what the services were, nor when they were performed, nor at whose request, nor that the company had accepted or ratified them. Porch v. Agnew Co. [N. J. Eq.] 61 A. 721.

12. The holder or owner of a note, the payment of which has been assumed by a corporation, and not the maker, is the creditor of the corporation, so as to be entitled to present the same to the receiver of the corporation, and, upon disallowance by him, to an appeal to the court of chancery under Laws N. J. 1896, p. 302, c. 185, § 78. Conklin v. U. S. Shipbuilding Co., 143 F. 631.

13. Laws 1896, pp. 301, 302, c. 185, §§ 75-78. Conklin v. U. S. Shipbuilding Co., 143 F. 631. But this provision does not extend to claims for services rendered to the receiver. Such claims must be adjudicated by the court in the first instance. Laws 1896, p. 304, § 85. Id.

14. Colonial Trust Co. v. Pacific Packing & Navigation Co., 142 F. 298.

15. Wenar v. Schwartz [La.] 41 So. 360.

16. Under Sand. & H. Dig. § 1426, forbidding preferences by insolvent corporations, and providing that a single creditor may institute proceedings to wind up the affairs of a corporation, a suit by a single creditor is for the benefit of all the creditors, and the costs of such suit must be borne as indicated in the text. Bradshaw v. Bank of Little Rock [Ark.] 89 S. W. 316.

17. The allowance of the attorney's fee does not come out of the corporation, but from the creditors, in proportion to the amounts realized by them. Bradshaw v. Bank of Little Rock [Ark.] 89 S. W. 316. The application for an attorney's fee may be made by either the plaintiff or by the attorney. Id. Where the corporation admits insolvency, and a receiver is appointed, and here the services of the attorney end, the amount of his fee is determined by what would be a reasonable charge against his clients for the services performed. Id.

18. See 5 C. L. 826.

19. As where a contract with a corporation calls for a mortgage by the corporation to secure certain notes, under the rule that equity will consider that as done which ought to have been done, a court of equity will require the mortgage to be executed, or, where one has already been irregularly executed, it will be sustained. Stiewell v. Webb Press Co. [Ark.] 94 S. W. 915.

20. Since in Massachusetts a street railroad company cannot issue bonds without the approval of the board of railroad commissioners, the holder of an agreement, whereby such a company agrees to deliver to him a certain amount of first mortgage bonds as soon as the issue of such bonds is authorized by the railroad commission, acquires no right, legal or equitable, to any of such bonds until their issue is authorized by the railroad commissioners. Augusta Trust Co. v. Federal Trust Co., 140 F. 930.

21. Const. art. 12, § 6, providing that no corporation shall issue bonds except for money, labor, or property, does not require that the corporation shall receive a dollar

corporate bonds as dependent upon the affixing of the corporate seal thereto has already been considered.[23] A bond issue may be attacked as fraudulent,[24] but the title of bona fide holders of coupon mortgage bonds issued by a corporation and payable to bearer, which are taken before maturity, is, like the title to commercial paper so taken, good against all secret equities claimed by the corporation or third parties,[25] but in proceedings by mortgage bondholders to foreclose, the defendant corporation may defend by showing that the bondholders are not bona fide holders for value without notice,[26] and where such defense is established, the amount of the recovery should be limited to the actual amount expended in the purchase of the bonds, with interest.[27] One holding corporate bonds as collateral security is entitled to a distribution in proportion to the amount of the bonds held, and not in proportion to the debt secured,[28] and the assignee of the pledgee acquires no greater rights than those possessed by the pledgee.[29] The delivery of corporate bonds as collateral security for a loan is an equitable assignment of the bonds.[30] The rights of mortgagees are subject to such priorities as may be given to other claimants by statute.[31] Mortgage bonds acquired after a mechanic's lien has attached to the property of the corporation, and with notice of such lien, are subject to the lien.[32]

in money for each dollar of indebtedness, but that the amount received shall bear some reasonable approximation to the indebtedness. Western Supply & Mfg. Co. v. U. S. & Mexican Trust Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 948, 92 S. W. 986. Authority to issue bonds for money or property implies authority to issue bonds and pledge them for money. Id.

22. The reason being that this might deprive the existing stockholders of their right to participate in the issue of new stock. Wall v. Utah Copper Co. [N. J. Eq.] 62 A. 533. See ante § 14 B, Capital Stock and Shares of Stock.

23. See ante § 6, subsec. D, subd. Mode of Execution of Contracts.

24. A bond issue which was attacked as fraudulent and ultra vires by the holders of a previous issue, considered and held valid. Redwood v. Rogers [Va.] 53 S. E. 6.

25. Bona fide holder for value without notice of corporate bonds not affected by prior agreement by the corporation to sell some of such bonds to a third party. Lembeck v. Jarvis Terminal Cold Storage Co. [N. J. Err. & App.] 64 A. 126.

26. As where the holders purchased the bonds for less than their face value, with notice of irregularity in their issue, and that they had only been pledged for collateral security, and that the sum paid was substantially the amount required for their redemption. Shellenberger v. Altoona & P. Connecting R. Co., 212 Pa. 413, 61 A. 1000.

27. Shellenberger v. Altoona & P. Connecting R. Co., 212 Pa. 413, 61 A. 1000.

28. Western Supply & Mfg. Co. v. U. S. & Mexican Trust Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 948, 92 S. W. 986.

29. Lessee of mining corporation's property paid debt for which its bonds were pledged and took assignment of the bonds, and then, through an invalid act of the directors, sought to acquire the company's equity of redemption, and foreclosed the mortgage securing the bonds and appropriated all the proceeds. Held that he was liable to the corporation for the excess of the proceeds above the amount of the debt for which the bonds were pledged, with interest and costs, and amounts paid on a second mortgage. Brinkerhoff Zinc Co. v. Boyd, 192 Mo. 597, 91 S. W. 523.

30. Such assignment may be enforced to protect the consideration therefor, though there was no transfer from the registered owners and no power of attorney executed by them other than the blank power on the bonds. Presbyterian Board of Relief for Disabled Ministers, etc. v. Gilbee, 212 Pa. 310, 61 A. 925. Such assignment was good even against the trustee in bankruptcy of the corporation, the assignment being upon a present consideration. Id.

31. Under N. C. Code 1883, § 1255, a judgment against a corporation for a tort takes priority over the mortgage, and a judgment against a waterworks company for damages caused by the company's failure to furnish a sufficient water supply to extinguish a fire comes within this provision. Guardian Trust & Deposit Co. v. Fisher, 200 U. S. 57, 50 Law. Ed. —. Under N. C. Code 1883, § 1883, giving judgments for torts priority over mortgages, where a corporation purchased waterworks subject to a mortgage, not only the interests of the purchaser, but also the absolute title to the property, was subject to a judgment against the purchaser for a tort, to the exclusion of the lien of the mortgage. Id.

32. Especially where the bonds are not taken in open market but are taken direct from the corporation by an officer thereof as security for advances, at a time when he knew that the corporation was insolvent. Porch v. Agnew Co. [N. J. Eq.] 61 A. 721. Pub. Laws 1898, p. 550, § 28, furthermore, provides that the mechanic's lien shall be subject to any mortgage given under the circumstances contemplated by and in conformity with § 15, which provides that any mortgage recorded before a lien claim is filed shall have priority to the extent of the money actually advanced by the mortgagee and applied to the erection of any new building on the mortgaged premises, thus ren-

A junior mortgagee can set up no defense that the mortgagor could not set up.[33] In the notes will be found decisions relating to exceptions to the report of the master in foreclosure proceedings,[34] and as to findings therein upon the validity of the bonds and the title of the holders.[35]

One of the methods of subscription to mortgage bonds is by an underwriting agreement, and decisions relating thereto are collated in the notes.[36]

Mortgage claims against an insolvent corporation should be evidenced not only by acts of mortgage signed by the proper officer but also by proof that the officer was duly authorized by the directors to execute the instruments.[37] Corporate mortgages cover all renewals of the obligations originally secured,[38] and may

dering the lien superior to other mortgages. Id. See Liens, 6 C. L. 451; Mechanics' Liens, 6 C. L. 611; Mortgages, 6 C. L. 681.

33. Hence, junior mortgagee of corporation property could not set up usury. See P. L. 1902, p. 459. Lembeck v. Jarvis Terminal Cold Storage Co. [N. J. Err. & App.] 64 A. 126.

34. Exceptions to master's report in foreclosure proceedings, as to the value of stock sold by complainant to the company, overruled. Oliver v. Rahway Ice Co. [N. J. Eq.] 61 A. 901.

35. In proceedings to establish the validity of corporate bonds and to foreclose a mortgage securing them, it was proper for the court to find that the bonds had been issued and negotiated and had been acquired for value and in good faith, without determining either the amount due on the bonds or who held them, especially where the right was reserved to allow the bondholders to come in afterwards and prove their claims. Western Supply & Mfg. Co. v. U. S. & Mexican Trust Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 948, 92 S. W. 986. It was not necessary, in such proceedings, to find the number of certificates held by a bondholder whose claim was adjudicated, and a clerical error in a finding as to such number was immaterial where the finding as to the amount of the claim was correct. Id. Where the decree in proceedings to determine the validity of corporate bonds and to foreclose a mortgage securing them showed that the bonds were valid, and that the owners acquired them for value and in good faith, it will be inferred, in the absence of a statement of the facts, that the trial judge had before him evidence to sustain such findings. Id.

36. Nature of liability: Where the subscriptions by the several members of the syndicate were several, the liability of any one of its members on his subscription was not dependent upon the obtaining of the requisite number and amount of subscriptions to take all the bonds of the issue for the sale of which the syndicate was formed, there being no such provision in the syndicate agreement. Knickerbocker Trust Co. v. Davis, 143 F. 587.

Right to subscribe: The fact that a party is a large holder of the stock of a corporation and is largely interested in its success, and as an inducement to others to subscribe to the bonds of the company, offers a bonus of such stock to subscribers to the bonds, cannot affect such party's right to join with other subscribers in creating an underwriting syndicate to take the bonds. Eastern Tube Co. v. Harrison, 140 F. 519.

Effect of insolvency of corporation: Where, in an agreement between a corporation and an underwriting syndicate organized to take the bonds of the corporation, it was agreed that the members of the syndicate should not have to pay for the bonds until the expiration of a certain time, but that the corporation might use their subscriptions as collateral to raise funds, the members of the syndicate were liable to a pledgee of their subscriptions, though the corporation became insolvent before the date upon which the syndicate was to pay for the bonds. Eastern Tube Co. v. Harrison, 140 F. 519. A member of the syndicate could not, in an action against him by the pledgee of his subscription, set off claims against the corporation acquired after the assignment of the subscription. Id.

Fraud: Subscriptions to bonds under an underwriting agreement may be rescinded where they are induced by fraudulent representations, as when fraudulent representations were made by company promoting the syndicate for the underwriting, as to the title to the bonds and the purposes to which the proceeds would be applied, such company having a claim against the bonds as pledgee, which it concealed, and the proceeds being used to pay its debt instead of for development of the company issuing the bonds, as represented by the syndicate promoter. Rose v. Merchants' Trust Co., 96 N. Y. S. 946. Damage is not essential to rescind for fraud (Id.), but this rule seems to prevail only in the case of subscriptions to corporate stock (Id.). Where the bonds underwritten were placed with a company as syndicate manager, and such company, upon the security of the subscriptions of the members of the underwriting syndicate, made a loan to the corporation issuing the bonds, a member of the syndicate did not waive his right to rescind his subscription by paying the syndicate manager for the bonds subscribed by him and taking possession of them for the purpose of tendering them to the syndicate promoter and demanding a rescission on account of the fraud of such promoter. Id. The suit to rescind a subscription to bonds under an underwriting agreement might be brought against the syndicate promoter without joining either the corporation issuing the bonds or the syndicate manager, where such promoter was practically the owner of the bonds and had received the proceeds of their sale. Id.

37. In re Red River Line, 115 La. 867, 40 So. 250.

38. Sureties on note of corporation paid the note and took corporation's notes for

cover after-acquired as well as property presently owned.[39] Where a corporation is authorized to mortgage its franchises and rights, these may be sold under a mortgage thereon and the purchaser will acquire them, though the corporate right to exist cannot be sold.[40] The powers of the trustee in a corporate mortgage depend upon the provisions of the mortgage,[41] and the liabilities of the trustee to the bondholders for mismanagement may also be thus limited,[42] but a court of equity cannot be deprived of its jurisdiction to supervise the conduct of trustees in the execution of their trusts by stipulations in the mortgage.[43] A trustee in a mortgage securing corporate bonds is liable for a diversion of the proceeds of a foreclosure sale.[44] A bondholder should not be appointed trustee in a mortgage securing the bonds.[45]

(§ 16) *D. Officers and stockholders as creditors.*[46]—The relation between a corporation and its directors, or other officers, does not preclude transactions whereby the former may become the debtor of the latter,[47] but such transactions by stockholders and directors in control of the corporation should be carefully scrutinized, since their interest as creditors may conflict with their duty to the corporation.[48] A stockholder is not necessarily rendered a creditor by a stipulation in his certificate of stock for withdrawal after a certain length of time[49] and for interest.[50] An

amount paid by each surety, each note being also signed by all the sureties except the one to which it was given. Pollard v. Pittman [Ind. App.] 77 N. E. 293.

39. Mortgage construed as to what after-acquired property was covered by it. Guaranty Trust Co. v. Atlantic Coast Elec. R. Co. [C. C. A.] 138 F. 517. Where a mortgage is antedated, property acquired between the date of the mortgage and the date of its execution and delivery is after-acquired. Id. Where a railroad company, all of whose property, present and after-acquired, was covered by a mortgage to secure bondholders, purchased the property of another company and then conveyed the same to a new company in trust for the use and benefit of the mortgagor company, all of the stock of the new company being delivered to the mortgagor company, which thereafter pledged the same to the mortgage trustee as security for a loan, such trustee was charged with notice of the lien of the mortgage upon the property so acquired and could not assert any equity superior to those of the mortgage bondholders. Id.

40. Mortgage sale held to pass rights of waterworks company under contract with city. City of Vicksburg v. Vicksburg Waterworks Co., 202 U. S. 453, 50 Law. Ed. —.

41. Trustee held to have power to release certain portions of the mortgaged property from the lien of the mortgage. Fidelity Trust Co. v. National Coal & Iron Co. [Ky.] 89 S. W. 718. An authority to a trustee of corporate property to mortgage it to pay debts will not authorize a mortgage to secure debts. Bank of Visalia v. Dillonwood Lumber Co. [Cal.] 82 P. 374.

Right to compensation: A party is not a trustee entitled to salary as such merely because he is designated as "trustee" in an agreement whereby he is placed in the management of the corporation's business. Bank of Visalia v. Dillonwood Lumber Co. [Cal.] 82 P. 374.

42. Where the mortgage stipulated that the trustee was to be liable only for willful or intentional breaches of the trust, he could not be held liable for mistakes or misconceptions of duty. Black v. Wiedersheim, 143 F. 359.

43. Reinhardt v. Interstate Tel. Co. [N. J. Eq.] 63 A. 1097.

44. Where trustee had notice that corporation claimed portion of proceeds, but nevertheless paid all the proceeds to the bondholder. Brinkerhoff Zinc Co. v. Boyd, 192 Mo. 597, 91 S. W. 523.

45. And an order making such an appointment will be reversed upon the appeal of the corporation. In re Bostwick, 110 App. Div. 329, 97 N. Y. S. 76.

46. See 5 C. L. 827.

47. The mere fact that a director or officer of a corporation is its principal creditor will not prevent him, as such creditor, from taking the necessary steps to secure the payment of his claim, such as foreclosure of mortgage, where the corporation has no funds to pay the debt secured thereby. Michel v. Betz, 108 App. Div. 241, 95 N. Y. S. 844. Where directors took a transfer of corporate property in consideration of their undertaking to pay a corporate debt, the director who actually paid the debt of the corporation was entitled to be subrogated to the extent of such debt (Mills v. Hendershot [N. J. Eq.] 62 A. 542), but in a suit by a receiver of the corporation against the directors between whom the property was divided, the receiver could not rely upon the contract pursuant to which the division was made, nor could such contract be indirectly enforced by compelling the directors who did not keep their agreement to pay corporate debts in consideration of the assets received by them to pay such debts (Id.).

48. Mulvihill v. Vicksburg R., Power & Mfg. Co. [Miss.] 40 So. 647.

49. Building and loan stock. Harrison v. Fleischman [N. J. Eq.] 61 A. 1025. In such case the stockholder does not become a creditor until he has complied with the conditions of the withdrawal. Id.

officer of an insolvent corporation cannot recover from its receiver any salary beyond that for the term for which he was legally chosen and during which the receiver was appointed.[51]

Preferences.[52]—As between themselves, one stockholder may have a preferred claim over the others for money advanced for the benefit of the corporation,[53] but an insolvent corporation cannot prefer a stockholder creditor to other creditors,[54] and a deed executed by an insolvent corporation conveying its property to one of its officers in settlement of or as security for a debt due such officer is fraudulent as to creditors.[55]

(§ 16) *E. Liability of stockholders on account of unpaid subscriptions and remedies.*[56]—The unpaid subscriptions of subscribers to stock constitute a trust fund for the benefit of creditors,[57] and while, of course, the holders of fully paid stock are not liable for unpaid subscriptions,[58] where stock is issued without the payment of

50. Building and loan stock. Harrison v. Fleischman [N. J. Eq.] 61 A. 1025.

51. In New Jersey the president of a corporation cannot recover from its receiver any salary beyond that for the presidential year current at the time of the appointment of the receiver (Conklin v. United States Shipbuilding Co., 143 F. 631), and a contract for a longer employment is unavailable (Id.).

52. See 5 C. L. 827.

53. Where two parties purchased stock under an agreement with the holder of the majority of the stock that they were to have the practical control of the business, and thereafter the holder of the majority of the stock repudiated the agreement and attempted to deprive such parties of their control and to take possession of all the assets, such parties were entitled to hold themselves as creditors of the corporation to the extent of the amount paid by them on the notes of the corporation indorsed by them, and to apply such portion of the proceeds of such notes as remained in bank to the payment of the notes. Wood & Nathan Co. v. American Mach. & Mfg. Co. [N. J. Eq.] 62 A. 768.

54. Evidence held to show that creditor to whom property was transferred was a stockholder. Howell v. Crawford [Ark.] 89 S. W. 1046.

Failure of creditor to object: A creditor could not complain that a stockholder is allowed a preference over his claim on the ground that the stockholder is liable as such for the debts of the corporation, where the creditor, who was a defendant in the proceedings to wind up the corporation, filed no cross complaint asking for any such relief. Bank of Visalia v. Dillonwood Lumber Co. [Cal.] 82 P. 374.

55. President of corporation, to whom corporation was indebted, resigned in order to take a deed to its property in settlement of or as security for a debt due by the corporation to him. Deed held fraudulent as to creditors. Nixon v. Goodwin [Cal. App.] 85 P. 169. In an action to set aside such a deed, a judgment obtained by a creditor against the corporation subsequently to the execution of the deed was inadmissible. Id. Where the president to whom the corporation's property was conveyed attempted to show that the conveyance was for the benefit of creditors, evidence of conveyances of the property by the president for his own benefit was admissible to disprove his contention. Id. In a suit to set aside a conveyance to the corporation's president as fraudulent, it was not improper to allow a witness to merely state the amount of the corporation's indebtedness to a certain creditor. Id. In a suit to set aside as fraudulent a conveyance by a corporation to its president, notes purporting to have been executed by the corporation were inadmissible, in the absence of proof that the execution of the notes was authorized by the directors. Id. In a suit to set aside as fraudulent a conveyance from a corporation to its president, evidence that the corporation had borrowed money from the president was inadmissible, in the absence of any showing that the borrowing was duly authorized by the corporation. Id. In such a suit, evidence as to who were present at a certain meeting of directors was rendered immaterial by failure to show what took place at such meeting. Id. In such a suit, evidence as to the value of the corporation's property a year prior to the conveyance was immaterial. Id.

56. See 5 C. L. 827.

57. In re Remington Automobile & Motor Co., 139 F. 766; Miller v. Higginbotham's Adm'r [Ky.] 93 S. W. 655; Meyer v. Ruby-Trust Min. & Mill. Co., 192 Mo. App. 162, 90 S. W. 821. At common law, unpaid subscriptions to capital stock form a trust fund for the benefit of creditors. See v. Heppenheimer [N. J. Eq.] 61 A. 843. And by statute it is generally provided that where the capital paid in is insufficient to pay the debts of the corporation, the stockholders shall be liable to pay such proportions of their unpaid subscriptions as may be necessary to pay the debts of the corporation. 1 Gen. St. p. 910. Id. This statute is a simple expression of the rule of common law that the unpaid subscriptions form an asset for the payment of the debts of the corporation. Id. Where the property of a corporation proves insufficient to satisfy its debts, each stockholder is liable for the amount of his unpaid subscription, or such portion thereof as may be required to satisfy the debts of the corporation. In re Remington Automobile & Motor Co., 139 F. 766.

58. Stock held to be paid up stock, especially as any other construction of the resolution under which it was issued would

any value therefor, the holders thereof stand in the position of subscribers who have not paid for their stock.[59] Payment may be made by transferring property to the corporation,[60] or in exchange for services,[61] but an overvaluation of the property so transferred will not protect the holders of the stock received in exchange therefor from liability to the extent of the overvaluation.[62] The knowledge of the creditor as to the amount of stock subscribed or the amount paid thereon is gen-

have rendered the stock illegal. See Const. art. 12, § 11, and Civ. Code §§ 323, 359. Turner v. Fidelity Loan Concern [Cal. App.] 83 P. 62.

59. See v. Heppenheimer [N. J. Eq.] 61 A. 843. In equity the acceptance of stock without paying for it places the acceptor in the position of a subscriber, and a formal subscription is unnecessary, except in an action at law by the corporation, based upon an express contract. Id.

60. Turner v. Fidelity Loan Concern [Cal. App.] 83 P. 62. Gen. St. p. 952, § 213. See v. Heppenheimer [N. J. Eq.] 61 A. 843. N. J. Laws 1896, c. 185, p. 293, § 49. In re Remington Automobile & Motor Co., 139 F. 766. 22 Del. Laws, 1901, pt. 1, p. 292, c. 167, § 14, expressly confers this right. Hobgood v. Ehlen [N. C.] 53 S. E. 857.

What constitutes property: Patents or licenses thereunder may be taken in exchange for stock. See Act April 29, 1874, § 17, P. L. 81. Finletter v. Acetylene Light, Heat & Power Co. [Pa.] 64 A. 429; Marles Carved Moulding Co. v. Stulb [Pa.] 64 A. 431. Where the corporate records of a new or reorganized corporation does not show how stock purporting to be paid for was paid for, the holders of such stock will not be relieved from their liability to creditors by payment in the stock of the old company, or by payment by assignment of their interests in the old corporation, the latter being insolvent. Dieterle v. Ann Arbor Paint & Enamel Co. [Mich.] 13 Det. Leg. N. 1, 107 N. W. 79. Evidence held insufficient to show that stock was paid for by transfer of property to corporation. McConly v. Belton Oil & Gas Co. [Minn.] 106 N. W. 900.

61. Turner v. Fidelity Loan Concern [Cal. App.] 83 P. 62.

62. See v. Heppenheimer [N. J. Eq.] 61 A. 843. See Laws 1896, pp. 284, 293, §§ 21, 49, making stockholders liable to creditors for unpaid balances on stock. In re Remington Automobile & Motor Co., 139 F. 766. Where property is taken in exchange for stock at an excessive valuation, parties taking such stock, with knowledge of the facts, are liable to creditors for the difference. Meyer v. Ruby-Trust Min. & Mill. Co., 192 Mo. App. 162, 90 S. W. 821. Where incorporators conveyed property to their corporation for eighty thousand dollars, to be paid for by fifty thousand dollars worth of stock and thirty thousand worth of bonds, the bonds to be secured by a mortgage on the property, but the property was worth only fifty thousand dollars, and twenty-five thousand dollars in bonds were issued to the incorporators, it was held that the conveyance of the property constituted a payment of only fifty per centum of the stock subscription, though the bonds were not issued until some time after the organization of the company. Montgomery Iron Works v. Roman [Ala.] 41 So. 811.

Good faith in making estimate of valuation: Under Laws N. J. 1896, c. 185, p. 293, § 49, providing that in the absence of actual fraud the judgment of the board of directors as to the value of property received in exchange for stock shall be conclusive, when a certificate of stock shows that it was issued in exchange for property, but does not show the value of the property, such value will be presumed to be sufficient to pay for the stock. In re Remington Automobile & Motor Co., 139 F. 766. But it was held, in a case not directly involving this provision, that while the judgment of those entrusted by law with the power to issue stock as to the amount or value of property taken in exchange therefor is entitled to considerable weight, it is not conclusive upon the courts, notwithstanding the provision above referred to. See v. Heppenheimer [N. J. Eq.] 61 A. 843. That where the directors who made the valuation were mere figureheads, holding only a nominal amount of stock in order to qualify them, and represented the interests of the promoters, an overvaluation made by them of property sold by the promoters to the corporation in exchange for stock was wholly ineffectual to protect such promoters from liability as to the excess of valuation. Id. That it is not necessary that conscious overvaluation or any other form of fraud be shown in order to justify judicial intervention. Id. That where the promoters of a corporate enterprise and the directors who assisted them consciously included in the valuation of property taken in exchange for stock estimates of matters which were not property, there was a conscious overvaluation, which amounted to a fraud upon the act authorizing stock to be issued in exchange for property. Id. And that the fact that stock shows on its face that it was issued in exchange for property will not preclude an investigation, on behalf of the creditors, as to whether the property was overvalued. Id. The faith of parties purchasing stock in a corporation in the success of the enterprise, and the belief that the eventual outcome will justify the overvaluation of the property given in exchange for the stock, is not the sort of good faith that may legalize the transaction and protect the purchasers from liability for the excess of valuation as for unpaid subscriptions. Id. But the fact that patents or licenses received in exchange for stock thereafter prove to be valueless will not convert the fully paid stock given in exchange therefor into unpaid stock, where the exchange was made at a bona fide valuation of the patents or licenses. The value of the patents or licenses must be taken as of the date of their exchange for stock. Finletter v. Acetylene Light, Heat & Power Co. [Pa.] 64 A. 429.

Elements of value: Probable or expected

erally immaterial to the liability of the stockholders for their unpaid subscriptions,[63] but a party who extends credit to or deals with a corporation, with knowledge that shares which are not actually paid up and nonassessable are, according to the terms of the subscriptions, to be regarded as such, cannot hold the subscribers for the amount of their unpaid subscriptions.[64] An agreement between a corporation and a subscriber to stock whereby stock is sold for less than par, with the understanding that the subscriber will never be called upon for any further payments, is valid as against the corporation,[65] but invalid as against creditors.[66] Stock issued as a bonus to induce the purchase of corporate bonds will be considered as unpaid stock,[67] but a subscription to capital stock is not invalid because a bonus of stock is given with such subscription by a stockholder who has purchased and paid for the stock given as a bonus.[68] In the absence of proof on the subject, creditors are presumed to have relied on the certificate as to the amount of capital paid in, where such certificate is recorded as provided by statute.[69] Stockholder's liability for unpaid

profits from the tangible property taken in exchange for the stock cannot be considered in making a valuation of the property, nor added to the present actual value of such property. See v. Heppenheimer [N. J. Eq.] 61 A. 843. Nor is the good will of the business of another corporation which is absorbed by the corporation issuing the stock always an element of valuation in arriving at the value of the property transferred by the absorbed corporation in exchange for such stock, as where one corporation absorbs several others with a view of establishing a trust. In such case the very object of the new corporation necessarily involves a destruction of the good will of the business of the corporations absorbed. Id. Promoters of a consolidated corporation who obtained options on the properties and business of the corporations to be consolidated, including the good will of such business, acquired no such good will of the business as would justify them in including the same in the valuation which was the basis of the issue of stock to them in exchange for the properties. Id. Promoters who obtain an option upon property at its real value, for the benefit of the corporation, acquire no such interest in the property as will justify them in increasing its valuation, except to the extent of the value of their services, as a basis for the exchange of the property for stock of the corporation, and where the promoters of a consolidated corporation exchanged the properties of corporations upon which they had obtained options for stock in the consolidated corporation at a valuation nearly twice that specified in the options, the promoters were liable for the excess of valuation as tor unpaid subscriptions. Id.

Bona fide purchasers of such stock, without notice, are not so liable. Meyer v. Ruby-Trust Min. & Mill. Co., 192 Mo. App. 162, 90 S. W. 821.

63. Williams' Ex'r v. Chamberlain [Ky.] 94 S. W. 29.

64. Miller v. Higginbotham's Adm'r [Ky.] 93 S. W. 655. A promoter who participated in the transaction whereby stock was issued in exchange for property at an excessive valuation, and who thereafter becomes a creditor, is not entitled to hold the parties holding such stock for the difference between the par value and the amount actually paid. Meyer v. Ruby-Trust Min. & Mill. Co., 192 Mo. App. 162, 90 S. W. 821.

65. Where, therefore, creditors or one representing them seek to recover from a subscriber under such an agreement the difference between the amount paid and the par value, not only must the complaint show the amount actually required to discharge the claims of the creditor, but the agreement between the corporation and the subscriber must be set aside as in fraud of creditors. Felker v. Sullivan [Colo.] 83 P. 213.

66. Where stock is purchased from a corporation at less than par, a court of bankruptcy may assess the purchaser with the difference between the price paid and the par value, notwithstanding an agreement between the purchaser and the corporation that the purchaser would not be called upon for such difference. In re Remington Automobile & Motor Co., 139 F. 766. A stockholder cannot avoid his liability upon his subscription by proof of representations of the agent who sold him the stock that he would never be called upon to pay anything upon the subscription. Marles Carved Moulding Co. v. Stulb [Pa.] 64 A. 431.

67. The party primarily liable upon such stock is the party to whom it was issued, and parties who take such stock from such person, with knowledge that it was issued as such a bonus, will be secondarily liable. See v. Heppenheimer [N. J. Eq.] 61 A. 843. Where the directors of a consolidated corporation knew that a bonus of sixty per cent in stock was offered as inducement to persons to advance cash at par on the bonds of the corporation, such knowledge was notice of an inflated value of the properties of the corporations to be consolidated, which constituted the sole capital stock of the consolidated corporation, and which were exchanged for the stock of such corporation. Id. Persons holding bonus stock acquired before the organization of the corporation do not occupy the same position of advantage of persons who purchase stock and bonds in open market after the organization of the corporation. Id.

68. Marles Carved Moulding Co. v. Stulb [Pa.] 64 A. 431.

69. See Rev. St. 1877, p. 182, as amended by Gen. St. p. 965, § 272, P. L. 1893, p. 447. See v. Heppenheimer [N. J. Eq.] 61 A. 843.

subscriptions ceases with transfer of stock, unless transfer is for purpose of defrauding creditors.[70]

Any person who receives and holds a certificate of stock will be held liable to creditors for the amount due thereon,[71] but a party is not liable as a subscriber where he buys his stock in open market from other stockholders,[72] unless he is rendered liable by a novation releasing the original subscriber.[73] Such a novation, however, cannot be effected by a transfer to an insolvent party, with intent to evade liability to creditors for unpaid subscriptions.[74] Directors may be liable as stockholders, notwithstanding that they hold the legal title to the corporation's claim for unpaid subscriptions.[75] A statute relieving preferred stockholders from liability for the debts of the corporation will not relieve them from liability for their unpaid subscriptions.[76] Fraud which vitiates a subscription will relieve the subscriber from liability to creditors.[77] Various other defenses which may or may not be made by stockholders are considered in the notes.[78]

70. Statutes of Arizona do not change this rule. McConey v. Belton Oil & Gas Co. [Minn.] 106 N. W. 900.

71. In such case the law implies a promise from the stockholder to pay any unpaid instalments. Williams' Ex'r v. Chamberlain [Ky.] 94 S. W. 29.

Evidence held to show that deceased was a stockholder, as claimed by the corporation receiver in proceedings instituted in the probate court for assessment against the estate of the deceased. Neff v. Lamm [Minn.] 108 N. W. 849.

72. Evidence held not to show that defendants bought their stock from original subscribers, but that they themselves were original subscribers. Dieterle v. Ann Arbor Paint & Enamel Co. [Mich.] 13 Det. Leg. N. 1, 107 N. W. 79.

73. Where an original subscriber has paid all instalments thereon at the time of a transfer thereof, and the transferee has been accepted by the company as a stockholder, the original subscriber is no longer liable to creditors for instalments falling due after the transfer. Finletter v. Acetylene Light, Heat & Power Co. [Pa.] 64 A. 429.

74. As where corporation makes such transfer in order to release a solvent subscriber. Hall v. Alabama T. & Imp. Co., 143 Ala. 464, 39 So. 285.

75. Lewisohn v. Stoddard [Conn.] 63 A. 621.

76. P. L. 1896, p. 283, c. 185, § 18, does not relieve preferred stockholders from liability under P. L. 1896, p. 284, §§ 21, 22. Kirkpatrick v. American Alkali Co., 140 F. 186.

77. Evidence held to show such fraudulent representations as vitiated defendant's subscription. Dieterle v. Ann Arbor Paint & Enamel Co. [Mich.] 13 Det. Leg. N. 1, 107 N. W. 79. But mere representations of a favorable opinion as to the business outlook of the corporation will not vitiate a subscription made in reliance thereon. Id.

Estoppel: Where the name of a subscriber did not appear among the names of the original subscribers and never appeared on the list of stockholders, and he did not participate in any of the meetings except one in which he repudiated his liability, he was not estopped to question his liability. Dieterle v. Ann Arbor Paint & Enamel Co. [Mich.] 13 Det. Leg. N. 1, 107 N. W. 79.

78. Cancellation of subscription: A stockholder, when sued for his unpaid subscription, may defend on the ground that his subscription was cancelled before the incorporation of the company. Elliott v. Ashby, 104 Va. 716, 52 S. E. 383.

Set-off: A stockholder may set off a claim against the corporation for services. Turner v. Fidelity Loan Concern [Cal. App.] 83 P. 62. In a suit by a receiver of an insolvent corporation to enforce the liability of stockholders for unpaid subscriptions, a stockholder cannot set off the bonds of the corporation held by him but which he has failed to present to the receiver for allowance, unless the court, for good cause shown, sees fit to open the decree barring the further presentations of claims, but such remedy would be ineffective, since the amount of the debts would thus be increased, and likewise the percentage which each defendant would be called upon to pay would be increased proportionately, especially where the amount of stock issued as a bonus in connection with the bonds would have to be deducted from the amount of the bonds. See v. Heppenheimer [N. J. Eq.] 61 A. 843.

In suit by receiver: A stockholder cannot defend in an action by a receiver of the corporation to recover an assessment, on the ground that the receiver was substituted by the court for the original receiver without notice (Nichol v. Murphy [Mich.] 13 Det. Leg. N. 499, 108 N. W. 704), or that a previous assessment by the receiver had been set aside and a new assessment had been made by the substituted receiver, it not appearing that defendant was injured thereby. Assessment against member of mutual insurance company (Id.), or that there has been a change of venue without notice to the stockholders, when there were 9,000 stockholders (Id.; Nichol v. Murphy [Mich.] 13 Det. Leg. N. 499, 108 N. W. 704). The objection that the stock assessed at the instance of a receiver is not assessable cannot be raised for the first time on appeal in proceedings by receiver in probate court for assessment against estate of deceased stockholder. Neff v. Lamm [Minn.] 108 N. W. 849.

In Virginia the common law courts are given jurisdiction of all suits or motions for the recovery of unpaid subscriptions to

The liability of stockholders for unpaid subscriptions is contractual,[79] and is governed by law of state of corporation's creation,[80] but may be enforced in any state where jurisdiction can be obtained of the stockholder,[81] provided the liability under the law of the corporation's domicile is not in conflict with the laws of the state where the suit is brought.[82] Where creditors whose claims against the corporation are large enough to give a court jurisdiction, institute a suit against stockholders to enforce their subscription liability, other creditors may come in and have their claims adjudicated, though they are not large enough in themselves to confer jurisdiction.[83]

The subscription liability of stockholders in a solvent corporation is enforceable only by the corporation according to its by-laws,[84] but upon the insolvency of the corporation, the courts have the right to enforce such liability at the instance of creditors,[85] or a receiver of the corporation,[86] or a trustee in bankruptcy for

stock. Code 1904, p. 519, § 1103a. Elliott v. Ashby, 104 Va. 716, 52 S. E. 383. And the defendant in such a suit may make any defense which involves the validity of his subscription. Id. Though the court of chancery in making the assessment assumed that the defendant in the subsequent action at law was a stockholder, this did not determine his liability, and under the statute the defendant might defend on the ground that his subscription was canceled before the incorporation of the company. Id.

79. Stocker v. Davidson [Kan.] 86 P. 136.

80. Hobgood v. Ehlen [N. C.] 53 S. E. 857; Williams' Ex'r v. Chamberlain [Ky.] 94 S. W. 29; Lewisohn v. Stoddard [Conn.] 63 A. 621. Liability of stockholders in banking corporation in Nebraska. Hazlett v. Woodhead [R. I.] 63 A. 952. The liability of stockholders to a trustee in bankruptcy for unpaid subscriptions is governed by the statutes of the state in which the corporation was organized, and the decisions of the highest courts of such state, and of the supreme court of the United States, in connection with the charter of the bankrupt corporation. In re Remington Automobile & Motor Co., 139 F. 766.

81. Williams' Ex'r v. Chamberlain [Ky.] 94 S. W. 29.

82. Liability of stockholder in Arizona corporation may be enforced in Kentucky. Williams' Ex'r v. Chamberlain [Ky.] 94 S. W. 29.

83. This is on the theory that the subscription liability of stockholders is a trust fund for the benefit of creditors. Williams' Ex'r v. Chamberlain [Ky.] 94 S. W. 29.

84. Covell v. Fowler, 144 F. 535.

85. Lewisohn v. Stoddard [Conn.] 63 A. 729; Williams' Ex'r v. Chamberlain [Ky.] 94 S. W. 29. A suit may be maintained by a creditor of a corporation in his own behalf and that of other creditors against the corporation to subject its assets to the creditors' lien, and the unpaid subscriptions of stockholders being a part of such assets the court may either compel the corporation to make a proper assessment, or may itself make the assessment. Turner v. Fidelity Loan Concern [Cal. App.] 83 P. 62.

Where the corporation refuses to sue, though it is a going concern the creditors may sue, making the corporation a party defendant. Lewisohn v. Stoddard [Conn.] 63 A. 621.

86. A receiver of an insolvent corporation may sue in equity to enforce the liability of stockholders on unpaid subscriptions. See v. Heppenheimer [N. J. Eq.] 61 A. 843. Proceedings by a receiver in the probate court for an assessment against the estate of a deceased stockholder are within Laws 1899, p. 317, c. 272, § 6, making it the duty of a corporate receiver to maintain "actions" against stockholders who have failed to pay assessments against their stock. Neff v. Lamm [Minn.] 108 N. W. 849.

In ascertaining the amount for which the defendant stockholders, in a suit by a receiver, will be liable, the total amount in dollars of the shares for which the defendants are primarily liable will be allowed, with interest, and this sum will be the limit of the total liability of the defendants. See v. Heppenheimer [N. J. Eq.] 61 A. 843. And in ascertaining the amount to be raised, interest must be computed upon the several claims allowed and added thereto. Id. And to this sum will be added the costs of the solicitors for the creditors, both in the proceedings to wind up the corporation and in the court in which the suit by the receiver is pending (Id.), and a reasonable counsel free to the complainant, to be fixed by the court on motion (Id.), and a round sum to cover the receiver's compensation (Id.), and any further expenses which he may incur in enforcing the decree, such sum to be liable to reduction according to the conduct of the defendants in resisting enforcement (Id.).

Procedure: It is not unusual to have the question as to whether there is a liability on the part of stockholders, which should be enforced by a suit to be instituted by the receiver, finally passed upon by an auditor, under an intervention filed with him, before actual suit by the receiver or by the parties, and without prayer for judgment against any special person, and to have the court thus decree that a liability exists, but where the auditor, upon such an intervention, found that no liability existed, creditors who neither invoked an amendment to the order of reference nor asked for an order construing it, nor made any exception to the auditor's report, could not complain of the court's refusal to find that a liability existed. Sterling Elec. Co. v. Augusta Tel. & Elec. Co., 124 Ga. 371, 52 S. E. 541.

the corporation,[87] or an assignee for the benefit of creditors;[88] but in Missouri, upon the dissolution of a corporation, the right to enforce stockholders' subscriptions devolves upon the directors as statutory trustees of the company.[89] Except where there are statutory provisions making the stockholders directly liable to the creditors or providing other remedies,[90] a suit in equity against the corporation in the nature of a creditor's bill is the only method of enforcing the subscription liability of stockholders.[91] All the stockholders may be joined as parties defendant to such a suit,[92] but unless a personal judgment against the stockholders be sought, it will be unnecessary to make them all parties,[93] nor in any case is it necessary to make any of the stockholders parties except the ones against whom judgment is sought,[94] nor is the corporation always a necessary party.[95] Except where there is a statute requiring a judgment against the corporation as a condition precedent to the right of creditors to pursue stockholders on account of their subscription liability,[96] a judgment at law against the corporation is not usually a con-

A foreign receiver of a corporation is a proper party plaintiff to an action to enforce the liability of resident stockholders. Childs v. Blethen, 40 Wash. 340, 82 P. 405.

87. In re Remington Automobile & Motor Co., 139 F. 766; Stocker v. Davidson [Kan.] 86 P. 136.

88. In such case the jurisdiction of equity is not dependent upon an accounting, and may attach even where it appears that no accounting is necessary, the remedy by separate actions against the stockholders being not as efficient as the remedy in equity against all the stockholders. Cook v. Carpenter, 212 Pa. 165, 61 A. 799.

89. Lewisohn v. Stoddard [Conn.] 63 A. 621. But upon the refusal of the directors to bring the suit, the creditors may sue in equity, making the directors parties defendant. Id.

90. In California the right of a creditor to maintain a suit directly against a stockholder is denied by Civ. Code § 322, relating to the statutory liability of stockholders. Turner v. Fidelity Loan Concern [Cal. App.] 83 P. 62.

In Virginia the common law courts are given jurisdiction of all suits or motions for the recovery of unpaid subscriptions on stock. Code 1904, p. 519, § 1103a. Elliott v. Ashby, 104 Va. 716, 52 S. E. 383.

In Alabama, creditors, after having obtained judgment against the corporation and the return of an execution thereon nulla bona, may enforce their claims against the stockholders by garnishment (Code 1896, § 2182), and an adjudication or discharge of stockholders in the garnishment proceedings will bar a subsequent suit in equity against them under Code 1896, § 823. Montgomery Iron Works v. Roman [Ala.] 41 So. 811.

In Missouri the special remedy in favor of creditors was not intended to preclude the creditors from maintaining a suit in equity against all the stockholders who had not paid their subscriptions. Lewisohn v. Stoddard [Conn.] 63 A. 621.

91. Turner v. Fidelity Loan Concern [Cal. App.] 83 P. 62.

92. Lewisohn v. Stoddard [Conn.] 63 A. 621.

The administrator of a deceased stockholder may be made a party defendant to a creditor's bill against stockholders, but the bill cannot be maintained against such administrator for the recovery of a money judgment against the estate where no such claim has been presented against the estate. Lewisohn v. Stoddard [Conn.] 63 A. 621.

93. Turner v. Fidelity Loan Concern [Cal. App.] 83 P. 62.

94. A creditor may proceed against one or more stockholders to enforce their liability for unpaid subscriptions without joining or taking any account of the other stockholders. Williams' Ex'r v. Chamberlain [Ky.] 94 S. W. 29. The liability of stockholders for unpaid subscriptions is several, and as many suits may be brought to enforce the same as there are defaulting stockholders. Lewisohn v. Stoddard [Conn.] 63 A. 621. Where the stockholders are jointly and severally liable, a suit in equity to enforce the liability for unpaid subscriptions may be maintained by a creditor against one or more of the stockholders without joining the others. Suit to enforce liability of stockholders in Illinois corporation. Meyer v. Ruby-Trust Min. & Mill. Co., 192 Mo. App. 162, 90 S. W. 821. In such case, the failure to revive the suit against stockholders who die pending suit against them will not affect the right to recover against the others who were sued jointly with the decedents. Id. It was held that where a suit is allowable by the creditors directly against the stockholders, all the stockholders should be parties. But see Turner v. Fidelity Loan Concern [Cal. App.] 83 P. 62.

95. The nonjoinder of the corporation, and the failure to have a receiver appointed in the state where the corporation resided, were not grounds for demurrer, where no useful purpose could have been accomplished by the appointment of the receiver, and the corporation was dissolved and hence could not be made a party. Turner v. Fidelity Loan Concern [Cal. App.] 83 P. 62; Lewisohn v. Stoddard [Conn.] 63 A. 621.

96. Under Code 1896, § 823, only judgment creditors may sue in equity to enforce their claims against stockholders who have not paid their subscriptions. Dickinson v. Traphagan [Ala.] 41 So. 272. Acts 1903, p. 388, relating to marshalling of assets of insolvent corporations, has no application to a suit to enforce the liability of stockholders for un-

dition precedent to a creditors' bill against the stockholders;[97] and when the corporation is insolvent and a judgment and execution against it would be futile, neither is necessary as a condition to the suit against the stockholders,[98] but when such a judgment is obtained, it is conclusive upon the stockholders as to the right of the creditor to payment out of the corporate assets, including unpaid subscriptions.[99]

paid subscriptions. Id. The mere insolvency of the corporation will not excuse failure to obtain judgment against the corporation and the return of an execution thereon nulla bona. Id. Where the creditor seeks to excuse failure to obtain judgment against the corporation on the ground that the corporation was a foreign one upon which no service could be obtained, he must allege noncompliance by the corporation with Code 1896, c. 28, art. 16, since service can be obtained if the corporation has complied with the statute. Id. Judgment at the corporation's principal place of business is sufficient without obtaining judgment in the state where it was incorporated, where it appears that it has no assets there. McConey v. Belton Oil & Gas Co. [Minn.] 106 N. W. 900.

97. No judgment against the corporation necessary. Lewisohn v. Stoddard [Conn.] 63 A. 621; See v. Heppenheimer [N. J. Eq.] 61 A. 843. A trustee in bankruptcy of a corporation may sue to enforce the statutory liability of a stockholder in the bankrupt corporation without judgment having been obtained by the creditors and execution returned unsatisfied, and without the appointment of a receiver by the state court. This results from the doctrine that the liability, upon insolvency of the corporation, is an asset arising out of contract which passes to the trustee under the bankruptcy laws. Stocker v. Davidson [Kan.] 86 P. 136.

98. An action by a creditor to enforce the subscription liability of a stockholder is in the nature of a creditor's bill, and a prior judgment against the corporation is unnecessary where it is shown that it would be futile, as where the corporation has disposed of all its property and is insolvent. Chilberg v. Siebenbaum, 41 Wash. 663, 84 P. 598. A defense that at the time of the judgment against the corporation it was solvent, and that the judgment could have been collected by execution against certain property, held not sustained where it appeared that in suits by other creditors the property had been determined not to belong to the corporation. Meyer v. Ruby-Trust Min. & Mill. Co., 192 Mo. App. 162, 90 S. W. 821. Where the corporation is insolvent, a judgment and execution and return of nulla bona is not necessary as a condition to the right of a creditor to pursue his remedy against stockholders for unpaid subscriptions. Williams' Ex'r v. Chamberlain [Ky.] 94 S. W. 29. As where the corporation is insolvent, has ceased business, and is in the hands of a receiver. Id. Or where other creditors have obtained judgment and execution thereon has been returned nulla bona. Id.

99. Wheatley v. Glover [Ga.] 54 S. E. 626.

Note: It is a well settled rule that a judgment rendered by a court of competent jurisdiction is conclusive, in the absence of fraud or collusion, against the parties to the suit, and against all persons represented by the parties, and it is also well settled that a corporation represents its stockholders in all matters within the scope of its corporate powers transacted in good faith by its officer. In an action against a corporation by a creditor, the stockholders are represented by the corporation, within this principle, and it follows that the judgment rendered against the corporation therein, if the court has jurisdiction, is conclusive upon the stockholders, in the absence of fraud or collusion, in any collateral suits or proceedings against them, in equity or at law, to compel payment of the balance due on their stock. They cannot attack the judgment, for example, in the absence of fraud or collusion, on the ground that the corporation was not indebted to the creditor in whose favor it has been rendered.

United States: Marsh v. Burroughs, 1 Woods 463, Fed. Cas. No. 9,112; Bisset v. Kentucky River Navigation Co., 15 F. 353; Glenn v. Springs, 26 F. 494; Hendrickson v. Bradley [C. C. A.] 85 F. 508.

Alabama: Lehman, Durr & Co. v. Glenn, 87 Ala. 618; Semple v. Glenn, 91 Ala. 245, 24 Am. St. Rep. 894.

California: Tatum v. Rosenthal, 95 Cal. 129, 29 Am. St. Rep. 97; Baines v. Babcock, 95 Cal. 581, 29 Am. St. Rep. 158.

Illinois: Singer v. Hutchinson, 183 Ill. 606, 75 Am. St. Rep. 133, afg. 83 Ill. App. 675.

Kansas: Ball v. Reese, 58 Kan. 614.

Maine: Barron v. Paine, 83 Me. 312.

Maryland: Glenn v. Williams, 60 Md. 93; Hambleton v. Glenn, 72 Md. 351.

Michigan: Mutual Fire Ins. Co. v. Phoenix Furniture Co., 108 Mich. 170, 62 Am. St. Rep. 693.

Minnesota: Holland v. Duluth Iron Mining & Development Co., 65 Minn. 324, 60 Am. St. Rep. 480.

Missouri: Nichols v. Stevens, 123 Mo. 96, 45 Am. St. Rep. 514.

New York: Stephens v. Fox, 83 N. Y. 313. And see Beardsley v. Johnson, 121 N. Y. 224. Compare Hastings v. Drew, 76 N. Y. 9.

Ohio: Bank of Wooster v. Stevens, 1 Ohio St. 233; Henry v. Vermillion & Ashland R. Co., 17 Ohio 187.

Compare, however, Doak v. Stahlman [Tenn. Ch. App.] 58 S. W. 741. As to the conclusiveness of a judgment against the corporation in a suit against stockholders to enforce their statutory liability, see post, § 824, or on the ground that the alleged indebtedness arose out of an ultra vires transaction, etc. Baines v. Babcock, 95 Cal. 581, 29 Am. St. Rep. 158. This principle applies to stockholders who are residents of other states. Hawkins v. Glenn, 131 U. S. 319, 33 Law. Ed. 184; Glenn v. Liggett, 135 U. S. 533; Mutual Fire Ins. Co. v. Phoenix Furniture Co., 108 Mich. 170, 62 Am. St. Rep. 693; Semple v. Glenn, 91 Ala. 245, 24 Am. St. Rep. 894, and other cases in the notes preceding. The judg-

An action in behalf of creditors to enforce the liability of stockholders for unpaid subscriptions, being predicated upon a showing that the funds sought to be collected are needed to pay corporate debts,[1] before making an order to enforce such liability, there must be a judicial determination of the proportion of unpaid subscriptions probably needed to pay the debts of the corporation, and the assessment must be confined to such proportion,[2] and the practice is, first to ascertain the whole amount of the unpaid debts,[3] second, to determine the amount of unpaid stock and the holders thereof,[4] third, to make an assessment against the stockholders,[5] and fourth, in a proper case, the court may proceed to direct the collection of such assessments by the ordinary processes of law, without remitting the creditors to their right of action at law upon the assessments so made.[6] The court has no jurisdiction to render a binding decree of liability upon stockholders who have not been brought within its jurisdiction,[7] but this inability to reach all the stockholders will not prevent the enforcement of the full liability of those of whom jurisdiction is obtained, however hard it may be upon the latter.[8] The decree of a foreign tribunal is binding upon resident stockholders, as to the necessity of an assessment, the amount to be raised, and the pro rata to be collected from each stockholder,[9] and where creditors and stockholders are impleaded in receivership proceedings judgment against such stockholders is a judgment in favor of the creditors, and may be enforced in another state,[10] but the judgment of a foreign court is binding

ment may be attacked by stockholders for want of jurisdiction, or for fraud or collusion between the officers of the corporation and the creditor. Bissit v. Kentucky River Navigation Co., 15 F. 353; Wilson v. Kiesel, 9 Utah, 397. Compare Nichols v. Stevens, 123 Mo. 96, 45 Am. St. Rep. 514; Hambleton v. Glenn, 72 Md. 351.—From Clark & Marshall, Corp. § 800.

1. Lewisohn v. Stoddard [Conn.] 63 A. 621.

2. Kirkpatrick v. American Alkali Co., 140 F. 186.

3, 4. See v. Heppenheimer [N. J. Eq.] 61 A. 843.

5. Which, in an action at law based thereon, is conclusive upon the stockholders. See v. Heppenheimer [N. J. Eq.] 61 A. 843. The assessment, whether by corporation or court, binding upon stockholders, though not parties. Turner v. Fidelity Loan Concern [Cal. App.] 83 P. 62. A court of chancery has power to make assessments upon stockholders for unpaid subscriptions, in a suit for the benefit of creditors. See v. Heppenheimer [N. J. Eq.] 61 A. 843. The stockholders cannot be pursued by suit until such an assessment has been made. Covell v. Fowler, 144 F. 535. Where notice by mail was given to nonresident stockholders, who were not served and who did not appear, of proceedings to ascertain the debts due by an insolvent corporation, it was highly probable, if not certain, that the ascertainment of the debts was binding upon all the defendants, the other defendants having been duly served or having appeared. Id.; See v. Heppenheimer [N. J. Eq.] 61 A. 843. Authority given to a receiver to sue for unpaid subscriptions implies an authority to fix the assessments against the stockholders, as where a foreign court authorized a receiver appointed by it to sue and fixed the percentage of the assessments. Swing v. Consolidated Fruit Jar Co. [N. J. Law] 63 A. 899.

6. In this case, however, nearly all the defendants were nonresidents, so that it was necessary to resort to a foreign court to enforce the decree. See v. Heppenheimer [N. J. Eq.] 61 A. 843.

7. See v. Heppenheimer [N. J. Eq.] 61 A. 843. Where foreign stockholders appear in such proceedings and litigate their rights, they thereby submit to the jurisdiction of the court to make the proper assessment against them. Id.

8. The liability of stockholders being analogous to that of several joint guarantors. See v. Heppenheimer [N. J. Eq.] 61 A. 843. But it is the duty of the court in such case to relieve the stockholders of which it has jurisdiction, so far as it can by enabling them to have the use of its officers and proceedings to enable them to recover, as far as possible, against the absent defendants. Id. The fact that some of the stockholders reside in another state and that they have not appeared will not prevent the court from taking jurisdiction as to the stockholders of whom jurisdiction has been acquired, as where suit was brought in Connecticut to enforce subscription liability of stockholders in Missouri corporation, some of the stockholders residing in Missouri, but most of them residing in Connecticut. Lewisohn v. Stoddard [Conn.] 63 A. 621.

9. Suit by receiver of foreign mutual insurance company against resident policyholders. Swing v. Consolidated Fruit Jar Co. [N. J. Law] 63 A. 899. A resident stockholder, when sued by a foreign receiver, cannot contest the truth of record recitals of the foreign court that the corporation was represented by attorney or contend that the attorney was unauthorized to appear. Converse v. Aetna Nat. Bank [Conn.] 64 A. 341.

upon resident stockholders only to the extent that it conforms to the contractual obligations assumed by the resident stockholders when they took their stock.[11]

In the notes are collated cases relating to pleading[12] and evidence.[13]

Fictitiously paid up stock.[14]—A recital in a certificate of stock that is fully paid is not conclusive upon the creditors,[15] there being no distinction in equity between a party who makes a formal subscription for stock and fails to pay for it and one who accepts a full paid certificate without paying for it,[16] and any device by which a corporation seeks to release subscribers to stock from the payment of the amounts justly due by them is fraudulent as to creditors, and ineffective to discharge the subscribers from liability for such amounts.[17] Where the property is taken at a fictitious valuation, the stock will be treated as fictitiously paid up, and the stockholders will be liable to creditors to the extent of their actually unpaid subscriptions,[18] but stockholders are not liable as partners because the stock of the corporation is falsely stated in the articles as paid up.[19]

10. Childs v. Blethen, 40 Wash. 340, 82 P. 405.

11. In a suit by a foreign receiver of a foreign corporation to enforce an assessment made by the foreign court against a resident stockholder, the defendant is bound by the judgment of the foreign court only to the extent that such judgment conforms to and does not depart from the contractual obligations assumed by the defendant when he took his stock. A judgment of a Minnesota court including in its assessments against stockholders the probable expenses of future suits to collect such assessments, as authorized by the Act of 1899, was not binding upon a Connecticut stockholder who took his stock before the enactment of such statute, and the corporation could not represent such stockholder in the proceedings in Minnesota to such an extent as to make the judgment binding on him. Converse v. Aetna Nat. Bank [Conn.] 64 A. 341. The adjudication of the supreme court of Minnesota that such order or judgment was valid and binding was not conclusive upon the Connecticut court, in so far as it concerned the power of the Minnesota Legislature to impose, by the Act of 1899, an obligation upon the Connecticut stockholder which he did not assume by his contract of subscription. Id. No offer to waive the objection that the assessment was an entirety and to submit to judgment for the defendant's share of whatever was properly assessed upon the shareholders, evidence as to the expenses of making the collections from the stockholders was properly excluded. Id.

12. Petition by receiver for an assessment of stockholders held sufficient. Kirkpatrick v. American Alkali Co., 140 F. 186. In an action by creditors against stockholders, the plaintiff may state any number of transactions tending to establish a duty on the part of the defendants to the plaintiff with respect to the latter's claim against the corporation. Lewisohn v. Stoddard [Conn.] 63 A. 621. An action by creditors of a Missouri corporation to recover balances on stock subscriptions, and one claiming the same balances by virtue of a Missouri statute, and one to compel the defendants to refund assets fraudulently converted by them, all may be joined where all of the defendants are directly affected by each of the causes so joined. Id. Complaint to enforce liability of stockholder in stock corporation must show that defendant was indebted to the company at the time of judgment and execution against the corporation and the return of the execution unsatisfied. Dyer v. Drucker, 108 App. Div. 238, 95 N. Y. S. 749. In suit against stockholder in stock corporation, complaint must show that the corporation is a stock corporation. The mere name of the corporation and an allegation that goods were sold to it were not sufficient to show that it was not a moneyed corporation. Id. The complaint must show that the defendant has not fully paid for his stock, either in cash or its equivalent in property. Id.

13. The contract of the incorporators relating to subscriptions to stock by them is admissible in a suit to enforce their liability upon the question of the construction and validity of resolutions of the directors relating to the issue of such stock. Turner v. Fidelity Loan Concern [Cal. App.] 83 P. 62. In a suit to enforce the subscription liability of a decedent, the creditor may testify as to the justness and validity of his claim against the corporation. Williams' Ex'r v. Chamberlain [Ky.] 94 S. W. 29.

14. See 5 C. L. 829.

15. As where stock shows on its face that it was issued in exchange for property, but as a matter of fact the property was overvalued. See v. Heppenheimer [N. J. Eq.] 61 A. 843.

16. See v. Heppenheimer [N. J. Eq.] 61 A. 843.

17. Taking notes of subscribers and surrendering them as canceled. Hall v. Alabama T. & Imp. Co., 143 Ala. 464, 39 So. 285. Giving subscriber credit for only colorable claim against corporation. Id.

18. Hobgood v. Ehlen [N. C.] 53 S. E. 857. See ante this section and subsection. But where shares are sold for less than par value and full paid certificates are issued to the purchaser, a subsequent conveyance of property by the purchaser to the corporation, which is accepted in payment of the difference between the original price and the par value, will render the stock fully paid. In re Remington Automobile & Motor Co., 139 F. 766.

19. Webb v. Rockefeller, 195 Mo. 57, 93

Limitations.[20]—It has been held, on the one hand, that the statute of limitations does not begin to run upon a stock subscription which is payable only upon calls to be made from time to time, until the call or calls have been made,[21] while, on the other hand, it has been held that the liability of a stockholder to a creditor for unpaid subscriptions accrues when the corporation ceases to be a going concern and becomes insolvent, without the necessity of an assessment or call.[22] When a judgment and execution against the corporation is required as a condition to the right to sue, the statute begins to run only from the time of the return of nulla bona.[23] Where creditors have the right to inspect the books of the corporation, ignorance of who are stockholders will not arrest the running of the statute of limitations.[24]

(§ 16) *F. Personal liability of stockholder for debts of corporation, and remedies.*[25]—A stockholder is not primarily liable for the debts of the corporation, and no action can be maintained against him upon a contract with the corporation,[26] but upon the insolvency of a corporation,[27] and when so declared by statute,[28] the statutory liability of stockholders becomes a corporate asset, and may be enforced by the receiver,[29] assignee,[30] or any other officer having the right to collect, marshal, and distribute the assets of the insolvent corporation.[31] The plaintiff may recover interest on the amount due by each stockholder from the time of the filing of the suit.[32]

S. W. 772. Const. art. 12, § 8, and Rev. St. 1899, § 962, prohibiting the issue of stock except for money, labor, or property, do not render the stockholders liable as partners where the original stock is fictitiously paid up. First Nat. Bank v. Rockefeller, 195 Mo. 15, 93 S. W. 761.

20. See 5 C. L. 829.

21. Cook v. Carpenter, 212 Pa. 165, 61 A. 799. The statute does not begin to run until after a call and assessment (McCarter v. Ketcham, 72 N. J. Law, 247, 62 A. 693), nor is it necessary in such case that the call be made within the statutory period of limitation upon the cause of action which will accrue after the call (Cook v. Carpenter, 212 Pa. 165, 61 A. 799).

22. The rules applicable when the corporation is a going concern and is solvent, under which the liability does not accrue until there is an assessment or call, have no application to such a case. Chilberg v. Siebenbaum, 41 Wash. 663, 84 P. 598.

23. Montgomery Iron Works v. Roman [Ala.] 41 So. 811.

24. Ballinger's Ann. Codes & St. § 4269, gives the right of inspection. Chilberg v. Siebenbaum, 41 Wash. 663, 84 P. 598. A limitation in the contract of stockholders in a mutual fire insurance company will not relieve them from liability for their proportionate share of losses and expenses during the period for which they were members, when the company's affairs are being closed up by a receiver. Nichol v. Murphy [Mich.] 13 Det. Leg. N. 499, 108 N. W. 704.

25. See 5 C. L. 829.

26. Action for loss of trunk by depot company. Gregory v. Webb [Tex. Civ. App.] 13 Tex. Ct. Rep. 1016, 14 Tex. Ct. Rep. 277, 89 S. W. 1109.

27. Stocker v. Davidson [Kan.] 86 P. 136.

28. Civ. Code 1895, § 1890. Wheatley v. Glover [Ga.] 54 S. E. 626. The act of 1894, Civ. Code 1895, § 1890, declaring the statutory or charter liability of stockholders to be a corporate asset, is remedial, and does not affect any vested right of the creditor, and is applicable where the liability arose prior to the enactment of the statute. Id. Prior to the Act of 1893 (Civ. Code 1895, §§ 1903-1911), there was no general law in Georgia regulating the individual liability of stockholders in corporations, and whether such liability existed depended upon the provisions of the bank's charter in each case. Id.

29. Wheatley v. Glover [Ga.] 54 S. E. 626. In a suit by a receiver, it is only necessary to allege that the receiver was directed to sue by the court by which he was appointed. It is not necessary to allege that the creditors authorized the suit. Id. Nor is it necessary to exhibit the petition upon which the receiver was appointed. Allegations which fully describe the proceedings under which he was appointed are sufficient to show his authority to sue. Id.

A suit by a foreign receiver of a bank to enforce stockholders' subscription liability, if maintainable at all, can be maintained only when an assessment has been duly made by the court in the original proceedings as will do away with an assessment. The action would then ordinarily be one at common law. Covell v. Fowler, 144 F. 535. A nonresident receiver of a foreign bank, having no title to the assets of the bank other than that derived from the order of the court appointing him, cannot maintain a suit to enforce the liability of a resident stockholder (Id.), but a foreign receiver may sue jointly with creditors to enforce a judgment of the foreign court against the resident stockholders (Childs v. Blethen, 40 Wash. 340, 82 P. 405).

30, 31, 32. Wheatley v. Glover [Ga.] 54 S. E. 626.

A stockholder, in becoming such, assumes such contractual obligations as are attached to the ownership of stock by the laws of the state in which the corporation was organized,[33] and these obligations cannot be enlarged by subsequent legislation.[34] The remedies of creditors against stockholders may be enlarged without impairing the obligations of any contract,[35] but any change of the creditors' remedies which substantially diminishes the value of such contract or obstructs or retards its enforcement is unconstitutional as impairing the obligation of a contract.[36] Failure of a corporation to perform statutory conditions precedent to the right to do business will not relieve the stockholders from their statutory liability for the debts of the corporation.[37] Statutes imposing additional liability upon stockholders are in derogation of the common law and must be strictly construed.[38]

Persons liable as stockholders.[39]—The rights of the creditors are fixed by the insolvency of the corporation,[40] and the books of the corporation are not only recognized in all cases as the best evidence of the responsible ownership of the stock at

33. Converse v. Aetna Nat. Bank [Conn.] 64 A. 341. A stockholder, by his subscription or by his acceptance of his stock, agrees with the corporation and its creditors that he will perform the obligations and discharge the duties imposed upon stockholders by constitution, statutes, and law then in force, and his liability to creditors springs from this contract. Harrison v. Remington Paper Co. [C. C. A.] 140 F. 385. The statutory liability is determined by the construction of the statute creating such liability by the courts of the corporation's domicile. Covell v. Fowler, 144 F. 535. A cause of action to enforce the double liability of a stockholder in a Kansas corporation by motion in the event of an unsatisfied execution upon a judgment against the corporation, under Gen. St. 1889, § 1192, is not the same as one between the same parties to enforce such liability on the ground that the corporation has suspended business for a year, under sections 1200, 1204, since the facts of a judgment and unsatisfied execution are essential to the former, and immaterial to the latter, and the fact of suspension of business is essential to the latter and immaterial to the former. Harrison v. Remington Paper Co. [C. C. A.] 140 F. 385. Under the decisions of the supreme court of Kansas, an action under one of these statutory provisions is a bar to an action between the same parties and upon the same liability under the other section. Id. A denial of the motion for execution and the dismissal of the action under Gen. St. 1889, § 1192, in which the defense of a prior action under §§ 1200, 1204, was pleaded and sustained, raises no estoppel against the plaintiff from litigating the issues presented in an action under the latter section, where the record does not disclose that the judgment upon the motion was based upon a decision of any of the issues in the latter case. Id. In Minnesota, the contractual obligation imposed by statute upon corporate stockholders to pay the debts of the company to the extent of the par value of their shares is not an obligation to the company, but only the obligation of a surety and due only to the creditors of the corporation and to such representatives of their interest as the law may designate. Converse v. Aetna Nat. Bank [Conn.] 64 A. 341.

34. The Minnesota Act of 1899, authorizing the court to include in assessments against stockholders the probable expense of future actions to collect such assessments, held invalid as impairing the obligation of a contract. Converse v. Aetna Nat. Bank [Conn.] 64 A. 341. Minn. Act 1899, held not to impair any contract in so far as it authorized the expenses of a receivership under a creditor's bill to be included in the assessment against the stockholders, since prior to the Act of 1899 it had already been held by the Minnesota courts that such expenses might be charged against the equitable assets of the corporation. Id.

35. Converse v. Aetna Nat. Bank [Conn.] 64 A. 341. Act 1894, Civ. Code 1895, § 1890, declaring the statutory liability of stockholders to be a corporate asset. Wheatley v. Glover [Ga.] 54 S. E. 626.

36. Laws Kan. 1898, p. 27, c. 10, repealing Gen. St. 1889, §§ 1200, 1204, and substituting for the action there authorized a suit in equity by a receiver, held unconstitutional. Harrison v. Remington Paper Co. [C. C. A.] 140 F. 385. Act Md. 1904, p. 179, c. 101, and Act 1904, p. 597, c. 337 (p. 601, c. 339), substituting a bill in equity in the nature of a creditors' bill for the remedy provided by Acts 1902, c. 109, which allowed the creditor to sue the stockholder at law, held unconstitutional so far as it affects creditors whose claims accrued prior to the passage of the act. Knickerbocker Trust Co. v. Cremen, 140 F. 973.

37. Stockholders in banking corporation. Murphy v. Wheatley [Md.] 63 A. 62. Stockholders of a corporation who became such before the payment of the bonus tax required by Acts 1900, p. 411, c. 272, but who accepted dividends after the payment of the tax, could not escape their statutory liability for the debts of the corporation on the ground that the corporation had no authority to issue their stock. Id. See Banking and Finance, 7 C. L. 358.

38. Charter of bank imposing additional liability. Wheatley v. Glover [Ga.] 54 S. E. 626.

39. See 5 C. L. 831.

that time,[41] but the tendency is to treat such books as conclusive upon this point.[42] The books and records of a private corporation are not competent, however, against third persons, in the absence of proof of their assent to or knowledge of such books, to establish the relation of such persons as stockholders,[43] but admissions of a party against his interest inscribed upon the books of the corporation and signed by him are competent.[44] The additional or individual statutory liability of a stockholder ceases upon the transfer of his stock, where it is so provided by statute, and upon compliance with the statutory provisions,[45] but the transfer, in order to fix the liability of the transferee and release the transferror, must be complete and in accordance with the by-laws of the corporation.[46] Where a stockholder is liable, under the laws creating such liability, for the debts of his corporation existing during his ownership of stock, a subsequent transfer, either in good or bad faith, will not relieve him from such liability.[47] A legatee of the earnings of corporate stock is not subject to the statutory liability of a stockholder where the bequest does not segregate the stock from the general estate.[48] A receiver of an insolvent corporation may be allowed to file a bill to ascertain who are stockholders.[49]

Ascertainment of corporate liability and exhaustion of remedy against it.[50]—The ordinary assets of the corporation should be first exhausted.[51] A judgment

40, 41, 42. Cook v. Carpenter, 212 Pa. 177, 61 A. 804.

43. Harrison v. Remington Paper Co. [C. C. A.] 140 F. 385. The entry of a party's name on the books as a stockholder, without his knowledge and consent, or contrary to his direction, will not make him a stockholder liable for the debts of the corporation. Pledgee entered as stockholder. Welch v. Gillelen, 147 Cal. 571, 82 P. 248. Civ. Code, § 322, providing that one is a stockholder whose name appears on the books as such, does not apply to a case where a party is entered as a stockholder without his consent. Id.

Ratification of the unauthorized entry of one as a stockholder will not result from delay in applying for a correction of the error where the party does not know of the entry, or from retaining the certificate after it is issued to him pending negotiations looking to the correction of the error, the holder of the certificate demanding the correction and the corporation refusing to make it. Welch v. Gillelen, 147 Cal. 571, 82 P. 248.

44. As signed receipts for stock or assignments thereof. Harrison v. Remington Paper Co. [C. C. A.] 140 F. 385.

45. See Act 1838, Code 1882, § 1496; Act 1892, p. 55; Acts 1894, Civ. Code 1895, § 1888. These statutes do not impose any additional liability on stockholders, but simply provide methods by which stockholders may be relieved from such individual liabilities as may be imposed by the charter of their corporation. Wheatley v. Glover [Ga.] 54 S. E. 626. Where the charter of a bank provided that the individual property of a stockholder at the time of suit should be liable for the ultimate payment of the debts of the corporation in proportion to the amount of stock held by him, a stockholder who had disposed of his stock and transferred it on the books of the corporation before any suit was brought against the corporation was not liable. Id.

46. Where a by-law provided that no transfer of stock should be made while the books of the corporation were closed, a sale of stock at auction while the books were closed did not release the seller from liability upon the subsequent insolvency of the corporation, although such insolvency was unknown at the time of the sale. Cook v. Carpenter, 212 Pa. 177, 61 A. 804.

47. Where the complaint stated facts sufficient to establish defendant's liability as a stockholder by reason of his ownership of stock at the time the corporation was in debt and insolvent, such issue is not waived by an allegation that the stock was transferred subsequently in bad faith and without consideration. Tiffany v. Giesen [Minn.] 105 N. W. 901. If the defendant was misled by the allegations as to the transfer of the stock, and thus inadvertently assumed that the only issue tendered was as to the validity of the transfer, and had a good defense to his constitutional liability, he should have applied for a continuance in order to have time to prepare such defense, but he was not entitled to a dismissal of the action. Id.

Parties: In an action to enforce a stockholder's liability by reason of his having held his stock at the time the debt sued for existed, a subsequent transferee of such stock is not a necessary party. Tiffany v. Giesen [Minn.] 105 N. W. 901.

48. Potter v. Mortimer, 114 Ill. App. 422.

49. As where the consideration for stock has wholly failed and the party to whom the stock was issued has transferred it. McMaster v. Drew [N. J. Eq.] 62 A. 559. In a bill by a receiver to determine who are stockholders, it is not necessary to allege whether the assets already reached will or will not be sufficient to satisfy the creditors (Id.), nor can it be considered upon a demurrer to such bill whether it has been made to appear in the original cause that there are no sufficient assets to satisfy creditors (Id.).

50. See 5 C. L. 832.

51. Const. Neb. 1875, art. 11b, § 4. Hazlett v. Woodhead [R. I.] 63 A. 952. Service

against a corporation is not conclusive upon a stockholder in proceedings to enforce the additional or individual liability of the stockholder, where the stockholder had no notice of the suit in which the judgment was obtained or opportunity to defend the same,[52] and such a judgment establishes the amount and validity of the creditor's

of process upon the stockholders prior to the accrual of the cause of action, as determined by Const. Neb. 1875, art. 11b, § 4, was premature. Id. In New York the individual liability of a stockholder cannot be enforced until judgment has been recovered against the corporation and an execution thereon has been returned nulla bona. See Laws 1892, p. 1841, c. 668, § 55. This statute is a portion of the general stock corporation law but applies to banking corporations, notwithstanding Laws 1892, p. 1913, c. 689, § 162, imposing a broader liability upon a stockholder in banking corporations. These two acts and Laws 1896, p. 1813, c. 687, § 2, subd. 4, defining stock corporations so as to include banking corporations, and § 33 making the provisions of the general corporation law applicable to stock corporations, must all be construed together. Gause v. Boldt, 49 Misc. 340, 99 N. Y. S. 442.

52. Wheatley v. Glover [Ga.] 54 S. E. 626.

Note: A judgment recovered by a creditor against a corporation is conclusive as against stockholders, unless they show collusion or want of jurisdiction, in a suit to reach and subject unpaid subscriptions. See note, ante this section, p. 253. Whether the same rule applies when it is sought to enforce the statutory liability of stockholders is not so clear, and there is some conflict and confusion in the decisions on the question. Some of the courts have held that a judgment against a corporation is not even prima facie evidence of the indebtedness in an action or other proceeding against stockholders to enforce their statutory liability, when the stockholders themselves were not parties to the action in which the judgment was recovered. Union Bank v. Wando Min. & Mfg. Co., 17 S. C. 339; Moss v. McCullough, 5 Hill [N. Y.] 131; Strong v. Wheaton, 38 Barb. [N. Y.] 616. Other courts have held that it is prima facie evidence (Grund v. Tucker, 5 Kan. 70; In re Warren's Estate, 52 Mich. 557; Hoagland v. Bell, 36 Barb. [N. Y.] 57; Moss v. Averell, 10 N. Y. 449; Belmont v. Coleman, 1 Bosw. 188, 21 N. Y. 96; Hastings v. Drew, 76 N. Y. 9; Moss v. McCullough, 7 Barb. [N. Y.] 279; Squires v. Brown, 22 How. Pr. [N. Y.] 35; Lawyer v. Rosebrook, 48 Hun [N. Y.] 453. See, also, Schaeffer v. Missouri Home Ins. Co., 46 Mo. 248), but not conclusive (Whitman v. Cox, 26 Me. 335). Neither of these positions, however, is supported by the weight of authority. On the contrary, it is held in most jurisdictions that, in an action against a corporation to recover a judgment for a corporate debt, the stockholders, as stockholders, are represented by the corporation, and that a judgment in such an action, therefore, is conclusive against the stockholders, unless it can be attacked for collusion or want of jurisdiction. The judgment may be attacked for fraud or collusion or for want of jurisdiction. Town of Hinckley v. Kettle River R. Co., 80 Minn. 32; Warrington v. Ball [C. C. A.] 90 F. 464; Choat v. Boyd, 59 Kan. 682.

United States: Hancock Nat. Bank v. Farnum, 176 U. S. 640, 44 Law, Ed. 619; Powell v. Oregonian R. Co., 38 F. 187, 3 L. R. A. 201; Hale v. Hardon [C. C. A.] 95 F. 747; Hendrickson v. Bradley [C. C. A.] 85 F. 508; Dexter v. Edmands, 89 F. 467; Brown v. Trail, 89 F. 641.

Illinois: Coalfield Co. v. Peck, 98 Ill. 139; Schertz v. First Nat. Bank of Chester, 47 Ill. App. 124.

Iowa: Donworth v. Coolbaugh, 5 Iowa, 300; Corse v. Sanford, 14 Iowa, 235.

Kansas: Ball v. Reese, 58 Kan. 614, 62 Am. St. Rep. 638; Steffins v. Gurney, 61 Kan. 292.

Maine: Came v. Brigham, 39 Me. 35; Cole v. Butler, 43 Me. 401; Milliken v. Whitehouse, 49 Me. 527; Chaffin v. Cummings, 37 Me. 76; Barron v. Paine, 83 Me. 312.

Massachusetts: Holyoke Bank v. Goodman Paper Mfg. Co., 9 Cush. [Mass.] 576; Farnum v. Balard Vale Machine Shop, 12 Cush. [Mass.] 507; Gaskill v. Dudley, 6 Met. [Mass.] 546, 39 Am. Dec. 750; Hawes v. Anglo-Saxon Petroleum Co., 101 Mass. 385; Thayer v. New England Lithographic Steam Print. Co., 108 Mass. 523.

Michigan: Mutual Fire Ins. Co. v. Phoenix Furniture Co., 108 Mich. 170, 62 Am. St. Rep. 693, 34 L. R. A. 694.

Minnesota: Holland v. Duluth Iron Min. & Development Co., 65 Minn. 324, 60 Am. St. Rep. 480; Oswald v. Minneapolis Time Co., 65 Minn. 249; Town of Hinckley v. Kettle River R. Co., 80 Minn. 32.

Missouri: Nichols v. Stevens, 123 Mo. 96, 45 Am. St. Rep. 514.

New York: Slee v. Bloom, 19 Johns. [N. Y.] 456, 10 Am. Dec. 273; Id., 20 Johns. [N. Y.] 669; Moss v. Oakley, 2 Hill [N. Y.] 265; Moss v. Averell, 10 N. Y. 449; Conklin v. Furman, 57 Barb. [N. Y.] 484, 8 Abb. Pr. (N. S.) 161; Hovey v. Ten Broeck, 3 Rob. [N. Y.] 316; Stephens v. Fox, 17 Hun, 435; Id., 83 N. Y. 313.

North Carolina: Heggie v. People's Bldg. & Loan Ass'n, 107 N. C. 581.

Pennsylvania: Wilson v. Pittsburgh & Youghiogheny Coal Co., 43 Pa. 424.

Wisconsin: Cleveland v. Marine Bank of Milwaukee, 17 Wis. 545; Merchants' Bank v. Chandler, 19 Wis. 434.

When a judgment against a corporation is conclusive against the stockholders in the home state, it will be so regarded in other states in which it may be sought to enforce the statutory liability against a stockholder. See post, § 825. And this rule has been applied to a judgment against the corporation by default. Holyoke Bank v. Goodman Paper Mfg. Co., 9 Cush. [Mass.] 576; Holland v. Duluth Iron Mining & Development Co., 65 Minn. 324, 60 Am. St. Rep. 480; Nichols v. Stevens, 123 Mo. 96, 45 Am. St. Rep. 514. Compare, however, Irons v. Manufacturers' Nat. Bank, 36 F. 343. The rule does not apply when the liability imposed

claim only prima facie,[53] but in a suit to enforce such judgment against a stockholder, the petition need not set out the character of the debt upon which the judgment was obtained.[54] The judgment of another state as to the indebtedness of a corporation for services rendered, after the placing of the bank in the hands of a receiver, is conclusive of the liability of the corporation but not of the stockholders.[55]

Limitations.[56]—The law of the forum controls in applying the statute of limitations to stockholders' statutory liability, though the liability itself arises under the laws of another state.[57] The statutes of various states on this subject are considered in the notes.[58]

Parties.[59]—An allegation that some of the stockholders are dead and that their

upon stockholders is penal in its nature. Miller v. White, 50 N. Y. 137; McMahon v. Macy, 51 N. Y. 155. See post, § 833m. And in New York, it has been held that it does not apply when the liability of the stockholders is solely upon the original cause of action against the corporation, and the recovery of a judgment against the corporation is required by the statute merely as a condition precedent to an action by the creditor against a stockholder on the original cause of action. In such a case, a stockholder may make any defense against the action which the corporation could have made, and the judgment against the corporation has no effect as against him except to show the performance of the condition precedent to the right to sue him. Moss v. McCullough, 5 Hill [N. Y.] 131; Kincaid v. Dwinelle, 59 N. Y. 548, 2 Keener's Cas. 1806; Strong v. Wheaton, 38 Barb. [N. Y.] 616. A judgment recovered against a corporation after its dissolution, being void, is clearly not even prima facie evidence against stockholder (Bonaffe v. Fowler, 7 Paige [N. Y.] 576. And see Merrill v. Suffolk Bank, 31 Me. 57, 50 Am. Dec. 649. See, also, ante, § 329), and it has been held that a judgment is not conclusive where it was rendered against the corporation after it had gone into liquidation under the statute. A judgment against a national bank, rendered after it had become insolvent and gone into liquidation, is not conclusive as against stockholders. Schrader v. Manufacturers' Nat. Bank, 133 U. S. 67, 33 Law. Ed. 564. A stockholder, of course, may show that a judgment recovered against the corporation was on an indebtedness or liability for which the statute does not render stockholders liable. See Bohn v. Brown, 33 Mich. 257; Wilson v. Pittsburgh & Y. Coal Co., 43 Pa. 424; Conant v. Van Schaick, 24 Barb. [N. Y.] 87; Ward v. Joslin [C. C. A.] 105 F. 224. In a late Federal case, under a statute making stockholders liable only for "dues from the corporation," it was held that there was no liability on the part of the stockholders for claims against the corporation based upon an ultra vires contract, although the corporation may be estopped, by having received the benefits of the contract, from setting up such defense, and therefore that a judgment recovered against the corporation on such a contract was not conclusive against the stockholders to such an extent as to prevent them from showing that the liability arose out of an ultra vires contract, and was therefore one for which the statute did not make them liable. Ward v. Joslin [C. C. A.] 105 F. 224.—From Clark & Marshall Corp., § 824.

53. The stockholder who has had no notice of or opportunity to defend the suit against the corporation may set up, in proceedings to enforce his statutory liability, not only facts which would absolve him from liability under the charter of the corporation, but also facts tending to establish that the corporation was not liable to the creditor. Wheatley v. Glover [Ga.] 54 S. E. 626.

54. If the stockholder wishes to defend on the ground that the corporation does not owe the debt, he must set up such defense by plea, and in such plea he may set up any matter showing that he is not liable for such debt, or any matter which the corporation might have pleaded. Wheatley v. Glover [Ga.] 54 S. E. 626.

55. Covell v. Fowler, 144 F. 535.

56. See 5 C. L. 832.

57. Ramsden v. Gately, 142 F. 912.

58. Georgia: In a suit against stockholders of a banking corporation to enforce their individual liability, imposed by the charter of the bank, the period of limitations is twenty years, after the accrual of the right of action, the suit being one under a statute or act of incorporation within Code 1895, § 3766. Wheatley v. Glover [Ga.] 54 S. E. 626. Where the charter provides that the stockholders shall be liable "at the time of suits" against the corporation, the creditor's cause of action accrues only when a suit is commenced by a creditor, though it may be that the right of action does not accrue until the actual insolvency of the corporation. Id.

Kansas: The statute of limitations begins to run against the liability of stockholders in a Kansas corporation one year after the dissolution of the corporation. Ramsden v. Gately, 142 F. 912.

New York: Laws 1892, p. 1841, c. 688, § 55, providing that no stockholder in a stock corporation shall be personally liable for any debt of the corporation not payable within two years from the time it is contracted, operates as a limitation upon Laws 1892, p. 2044, c. 691, § 6, making stockholders in a full liability corporation liable for its debts and liabilities, the former being in the nature of a statute of limitations, and not in conflict with the latter within Laws 1890, p. 1060, c. 563, § 33, as amended by Laws 1892, p. 1813, c. 687, providing that corporate law provisions in conflict with provisions of the general or stock corporation law shall nevertheless prevail. Sanford v. Rhoads, 99 N. Y. S. 407. A liability under a lease for rents payable quarterly in advance did not become a debt within Laws 1892, p. 1841, c. 688, §

estates are unrepresented, while others are defunct corporations, and others are beyond the jurisdiction of the court, sets forth a sufficient reason for not joining them as parties defendant.[60]

Defenses.[61]—Individual liability imposed upon stockholders by the charter of the corporation is not extinguished by the expiration of the charter.[62] Where a corporation is sued as a stockholder in another corporation, it may plead its lack of power to be such a stockholder.[63]

Procedure.[64]—The remedy for enforcing the personal liability of stockholders must conform to the procedure of the forum whose aid is invoked,[65] but where the foreign law creating the liability provides no remedy, but the courts of the foreign state have so construed the law as to render the stockholder liable directly to the creditor in a common law action, such an action may be maintained against a resident stockholder.[66] It seems, however, that the statutory liability of stockholders, not being based on contract, must be enforced primarily at the home of the corporation and in the state creating the obligation.[67] A suit in equity is the only remedy for enforcing the statutory liability of stockholders in a Nebraska banking corporation,[68] and all the stockholders must have notice of or be parties to the proceedings.[69] On the other hand, it has been held that the statutory liability of stockholders is several and not joint,[70] and hence a bill by the creditors of a corporation against all the stockholders is multifarious,[71] and, in a state where the distinction between law and equity still obtains, is also bad for want of equity.[72] A judgment in receivership proceedings, ascertaining the indebtedness of the corporation, the amounts due to the several creditors and from the several stockholders, is several, and may be enforced against a single stockholder as to his proportion.[73] A judgment in receivership proceedings against a stockholder in favor of creditors may be sued upon in another state by the receiver and creditors suing jointly.[74] The court may, after appointing a receiver, allow a creditor to establish his claim in a separate suit.[75]

55, so as to come within the two years' limitation therein specified, until the rent became due. Id.

59. See 5 C. L. 833.

60. Wheatley v. Glover [Ga.] 54 S. E. 626. See, also, post this section and subsection, subdivision Procedure.

61. See 5 C. L. 833.

62. Wheatley v. Glover [Ga.] 54 S. E. 626.

63. Action against National Bank as stockholder in a corporation organized for speculative purposes. First Nat. Bank v. Converse, 200 U. S. 425, 50 Law. Ed. —.

64. See 5 C. L. 833.

65. Covell v. Fowler, 144 F. 535.

66. An action may be maintained in New York by a creditor of a Maryland corporation against a stockholder residing in New York to enforce the latter's double liability under the Maryland statute. Knickerbocker Trust Co. v. Iselin, 109 App. Div. 688, 96 N. Y. S. 588.

67. In any event a single creditor of a Maryland corporation cannot enforce the statutory liability of a stockholder therein in the state of New York. See Laws Md. 1904, p. 597, c. 337, p. 179, c. 101, and Laws N. Y. 1890, p. 1078, c. 564, § 57, as amended by Laws N. Y. 1901, p. 971, c. 354. Knickerbocker Trust Co. v. Iselin [N. Y.] 77 N. E. 877.

68. Under Const. 187a, art. 11b, § 7. Hazlett v. Woodhead [R. I.] 63 A. 952.

69. Where the declaration in a suit by a Nebraska receiver for a Nebraska bank to enforce the liability of resident stockholders in such bank failed to allege that all the stockholders had notice of or were parties to the proceedings in the Nebraska court in which the liability of the stockholders was determined, such declaration was subject to demurrer. Hazlett v. Woodhead [R. I.] 63 A. 952. Notice to the corporation in such case was insufficient. Id.

70. Liability of bank stockholders in Colorado. Miller v. Willett [N. J. Eq.] 62 A. 178.

71. Miller v. Willett [N. J. Eq.] 62 A. 178.

72. The courts of New Jersey, in a suit by creditors of a corporation to enforce the statutory liability of stockholders in a Colorado corporation, will not follow the practice of the Colorado courts in allowing the creditors to maintain such a bill against the stockholders, in the absence of other grounds of equitable jurisdiction. Miller v. Willett [N. J. Eq.] 62 A. 178. Where a bill by creditors against stockholders to enforce the statutory liability of the latter claimed judgment for the full amount of the liability of each stockholder, though the aggregate of such judgments would have greatly exceeded the total amount of the corporation's indebtedness, the bill was bad for want of equity. Id.

73. Childs v. Blethen, 40 Wash. 340, 82 P. 405.

In the notes are collated cases relating to pleading.[78]

(§ 16) *G. Rights and remedies of creditors against directors and other officers.*[77]—Some of the acts and omissions which will render directors and other officers liable to creditors are fraudulent acquisition or appropriation of the corporation's property,[78] assuming to act as officers of a corporation when no corporation really exists,[79] voting for the payment of dividends out of capital stock,[80] declaring dividends when the corporation is insolvent or which renders it insolvent,[81] issue

74. Judgment in receivership proceedings in which creditors intervened and impleaded stockholders held a judgment in favor of the creditors, though the receiver was authorized to sue. Childs v. Blethen, 40 Wash. 340, 82 P. 405. Such a suit is not by the receiver as such, but is really a suit by the creditors, and is thus distinguished from the cases holding that a receiver cannot sue in a foreign court. Id.

75. And after judgment in such suit has been reported, may appoint a special receiver to enforce the same. Covell v. Fowler, 144 F. 535.

76. The petition need not pray for the recovery of a specific sum from each of the defendant stockholders. It will be sufficient if the averments show the sum for which each defendant would be liable. Wheatley v. Glover [Ga.] 54 S. E. 626. A stockholder cannot complain if the amount of recovery demanded is less than the plaintiff might have recovered under the provisions of the charter. Id. Where the charter provides that the individual property of the stockholders shall be liable for the debts of the corporation, it is not necessary to allege what property the defendant stockholder owns. Id. Where a receiver of a foreign bank attempts to enforce the liability of a resident stockholder upon a claim created after the bank went into liquidation, the bill should allege the nature of the debt, and especially is this true with regard to the enforcement of the double liability of a stockholder. Covell v. Fowler, 144 F. 535. A demurrer to the complaint in an action against a resident stockholder in a foreign corporation does not admit the statutory liability of the defendant, though such liability is alleged in the complaint. Knickerbocker Trust Co. v. Iselin [N. Y.] 77 N. E. 877.

77. See 5 C. L. 833.

78. Where the directors of a corporation, in contemplation of the insolvency of such corporation, divide the assets between them, each of such directors is primarily liable for the amounts received by him, and secondarily liable for the amounts received by the other directors, to the extent that may be necessary to pay the debts of the corporation. Mills v. Hendershot [N. J. Eq.] 62 A. 542. Where a corporation has been dissolved, and those upon whom the law devolves the duty of collecting its assets refuse to do so, the creditors may sue in equity to recover assets fraudulently converted by the directors. Lewisohn v. Stoddard [Conn.] 63 A. 621. Although it does not appear in such a suit that any of the assets came into the hands of the defendant directors as statutory trustees, reference to the Missouri statute making the directors of a dissolved corporation responsible for such assets, and to the statute relating to when dividends may be declared, was not the statement of a new cause of action. Id. A statute making directors liable to creditors for money or property of the corporation acquired by them in violation of their duties, renders the directors liable only in case of violation of official duties. Code Civ. Proc. § 1781, subd. 2, and section 1782. Lilienthal v. Betz [N. Y.] 77 N. E. 1002. This statute does not apply where a director, by promising the creditors to pay their debts, induced them not to bid against him at a judicial sale. Id. But see ante this section, subd. P, Personal Liability of Officers and Agents. Under Code Civ. Proc. § 1781, subd. 2, and § 1782, a creditor of a corporation may sue a director thereof to recover property wrongfully acquired by the latter by means of foreclosure proceedings and dissolution of the corporation. Lilienthal v. Betz, 108 App. Div. 222, 95 N. Y. S. 849. The corporation having been dissolved, no previous action against it is necessary as a condition of the creditor's right to sue the director. Id. The receiver, though discharged, is a necessary party to the action. Id. A creditor whose claim accrues after a breach of trust by the officers of a corporation has no cause of action on account thereof. Quere, whether creditor whose claim accrued prior to such breach would have a cause of action. Heineman v. Marshall [Mo. App.] 92 S. W. 1131.

Parties: A director who did not participate in the fraudulent conversion of the capital by his fellow directors, but who has presumably been enriched by such fraud, is a proper party to an action in equity to recover the capital so converted. And so also the administrator of the nonparticipating director. Lewisohn v. Stoddard [Conn.] 63 A. 621.

An attachment will not lie against officers of a corporation for misappropriation of corporate assets where there is no finding of fraud. First Nat. Bank v. McKinley Coal Co., 213 Pa. 413, 62 A. 1067. A decree in a suit against officers of a corporation for misappropriation of corporate assets, which specify the amount of the complainant's judgment, is too indefinite to support an attachment against the defendants. Id.

79. Under Hurd's Rev. St. 1903, c. 32, § 18, making persons assuming to act as officers or agents of a corporation liable for the debts of the corporation where the provisions of the act have not been complied with, mere failure to give notice of the first meeting, as required by § 3, will not render the directors personally liable. Butler Paper Co. v. Cleveland, 220 Ill. 128, 77 N. E. 99.

80. P. L. 1896, p. 286, § 30. Siegman v. Kissel [N. J. Eq.] 62 A. 941. As to right of stockholder to sue, see ante § 14 D, Stockholders Suing for Corporation.

81. Under Rev. Laws, c. 110, § 58, making

of stock in exchange for property at a fictitious valuation,[82] and failure to file statements of the corporation's affairs.[83]

CORPSES AND BURIAL.[84]

A complaint alleging the unauthorized mutilation of a corpse of plaintiff's wife by the defendants, to the great pain and anguish of the plaintiff, sets up a good cause of action[85] to which an alleged prior operation during life is no defense.[86]

the officers of a corporation liable to creditors for making or consenting to a dividend if the corporation is, or is thereby rendered, insolvent, to the amount thereof, officers are not liable for making a dividend while their corporation is solvent, though the making thereof indirectly operates, in connection with other causes, to render the corporation insolvent sometime thereafter. Ellis v. French-Canadian Co-op. Ass'n, 189 Mass. 566, 76 N. E. 207. Rev. Laws, c. 110, § 58, expressly provides that officers of corporations shall not be liable for its debts except as provided in such section and those immediately following it, and hence such officers are not rendered liable to creditors by violation, without fraud, of Rev. Laws, c. 110, § 69, forbidding distribution of earnings until a certain sinking fund has been established. Id. The distribution of the proceeds of the sale of all of a corporation's property is a dividend within Rev. Laws, c. 110, § 58, cl. 1, rendering the president and officers of a corporation liable for making a dividend which renders the corporation insolvent. Pennsylvania Iron Works Co. v. Mackenzie, 190 Mass. 61, 76 N. E. 228. In such case the fact that the purchaser owns all the capital stock of the corporation and retains in his hands enough of the property to pay all the corporate debts will not relieve the directors. Id. The duty of the directors under this statute cannot be delegated, and where they distribute the proceeds of the sale of all the corporation's property, they cannot escape their liability on the ground that the president, in making the sale, disregarded a proviso in the resolution authorizing the sale that enough property should be reserved to meet the liabilities of the corporation. Id. Where, in an action under this statute, it appeared that the admitted debts of the corporation exceeded its assets after the payment of the dividend, the question as to whether other debts had been paid was immaterial. Id. In such an action the fact that the stockholders had authorized the property to be sold at a certain price did not constitute a defense, since this did not authorize the directors to distribute the proceeds of the sale. Id.

82. In Massachusetts the officers of a foreign corporation, who participated in a conveyance of property to the corporation in exchange for stock, upon an unfair valuation of such property, are personally liable for the debts and contracts of the corporation. See Rev. Laws, c. 126, § 18. Anthony & Scovill Co. v. Metropolitan Art Co., 190 Mass. 35, 76 N. E. 289. Under this statute it is not necessary to prove fraud on the part of the officers, or even actual knowledge of the unfair valuation. Id.

83. A married woman who is a stockholder in a corporation and the president thereof may be held liable by a creditor for failure to file the annual statement of the corporation's affairs as required by Kirby's Dig. § 848. See § 5214, as to separate estates of married women. Arkansas Stables v. Samstag [Ark.] 94 S. W. 699. In an action under Kirby's Dig. § 849, against a married woman who is the president of a corporation and who has become liable to the plaintiff as a creditor of the corporation by reason of failure to file the annual statement required by § 848, the husband of the defendant need not be joined as a codefendant. See Kirby's Dig. § 5214, relating to the separate estates of married women. Id. Under Kirby's Dig. §§ 848, 849, requiring the president and secretary of a corporation to file an annual statement, and rendering them liable for the debts of the corporation contracted during the period of their neglect to file such statement, the president is not liable, where, during his absence, the report is filed by the vice-president and secretary. Myar v. Poe [Ark.] 95 S. W. 1005. Laws 1892, p. 1832, c. 688, requiring the directors of a corporation to make an annual report as to its stock, debts, and assets, during the month of January in each year and as of the first day of each month, must be construed strictly against the party asserting liability against the directors for failure to make the report (Winthrop Press v. Perkins, 47 Misc. 460, 95 N. Y. S. 931), but where the report is not in the words of the statute, the sense and substance thereof must appear (Id.). Where the report does not show that it is made as of the first day of January, the directors will be liable as for a failure to comply with the statute. Id. Under Laws 1892, p. 1832, c. 688, § 30, three things must concur in order to render a director liable for the debts of the corporation: Directorship, failure to make and file the required report, and a debt against the corporation existing during such directorship and at the time of the failure. Hill v. Weidinger, 110 App. Div. 683, 97 N. Y. S. 473. The debt must be one existing in fact, and a director cannot be held liable for unliquidated damages arising out of breach of contract. Id. Where the complaint alleged a breach of contract, it was error to allow a recovery upon the theory and proof of a rescission of the contract. Id. The trustees of a manufacturing corporation were not liable for failure to file the report required by Laws 1892, p. 1832, c. 688, § 30, where the corporation had been sold out under execution, and had entirely ceased to do business or be conducted as a corporation, and there was no intention on the part of the corporation or its stockholders to resume the business. Costello v. Outterson, 98 N. Y. S. 880.

84. See 5 C. L. 841. See, also, Cemeteries, 7 C. L. 605.

Physicians making an unauthorized autopsy on a corpse are liable in damages unless it was made in good faith for the purpose of discovering the cause of death and obtaining a permit for burial and without unnecessary mutilation.[87] So also, is the undertaker who has the body in charge at the request of persons entitled to its custody and who voluntarily consents to such unauthorized autopsy,[88] and in such a case the measure of damages is such a sum as will fairly compensate the person entitled to the corpse for suffering caused by such mutilation.[89] The parents of an infant child are not entitled under the law to recover damages for mental pain and anguish occasioned by the mutilation of the dead body of such infant.[90] An injury to a buried coffin and corpse is a trespass quare clausum fregit[91] which can be main-

85. Jackson v. Savage, 109 App. Div. 556, 96 N. Y. S. 366.

NOTE. Nature of rights in a dead body: The question of the right in a dead body has recently been considered by the supreme court of Georgia. A widow was allowed substantial damages for the mutilation of the dead body of her husband, caused by the negligence of the defendant carrier on the theory of an infringement of a quasi property right. Louisville & N. R. Co. v. Wilson, 123 Ga. 62, 51 S. E. 24. The discussion of the nature of this right is of comparatively recent origin. In England such questions were formerly under the exclusive jurisdiction of the Ecclesiastical Courts. This accounts for the lack of ancient authority. Early dicta deny any property right in a corpse at common law. Haynes's Case, 12 Coke, 113. And this is now the law in England. Regina v. Sharpe, Dea & Bell. C. C. 160; Williams v. Williams, 20 Ch. Div. 659. The American courts also have refused to recognize a purely proprietary right. Griffith v. C. C. & A. R. Co., 28 S. C. 25. Thus a man may not dispose of his own body by will (Enos v. Snyder, 131 Cal. 68, 82 Am. St. Rep. 330, 53 L. R. A. 22), nor bring replevin for another's body (Keyes v. Konkel, 119 Mich. 550, 75 Am. St. Rep. 423). Yet our courts, with a single exception, have everywhere recognized the existence of some right in the wife or nearest relative to an undisturbed possession of the body until burial. Various theories for this right have been advanced. The indefinite and unsatisfactory term of a quasi property right is suggested. Pierce v. Cemetery, 10 R. I. 227, 14 Am. Rep. 667. Another court, disregarding the nature of the right, has given damages as for mental suffering alone. Hale v. Bonner, 82 Tex. 33, 27 Am. St. Rep. 850, 14 L. R. A. 336. A more satisfactory theory is found in a decision of the New York court; since burial is a duty required by the law, it will be protected by the law. Foley v. Phelps, 1 App. Div. 551. The idea of any property right is rejected. This recognition of a purely personal right is not anomalous. It would belong to that class of rights such as a married woman's right to her husband's consortium, or the right to one's fair name and reputation, the infringement of which is an injury neither to property nor to the physical person. The principal injury consists in outraged feelings, and to the Texas court, this alone is sufficient ground for awarding damages. But according to the weight of authority, damages for mental suffering alone are not recoverable. Sutherland, Damages, 3rd Ed. § 977. The New York case proceeds on the theory that a legal right has been infringed for which the plaintiff is entitled to nominal damages at least. He may then set up his injured feelings as a ground for further damages. Larson v. Chase, 47 Minn. 307, 28 Am. St. Rep. 370, 14 L. R. A. 85. Compensatory damages will be awarded where it can be shown that the mental suffering was the direct and proximate result of the legal wrong. Koerber v. Patek, 123 Wis. 453, 102 N. W. 40. While money cannot be adequate compensation for the mutilation of a dead body, an award of monetary damages is the only remedy under the circumstances that the law can give. And by analogy to that class of torts suggested above, there is ample authority for awarding substantial damages.—From 5 Columbia L. R. 543.

The question as to whether a husband or wife has a right of action for the mutilation of the remains of the deceased has been much discussed. It resolves itself into a question of property in a dead body. There was at common law no such right of property. Lord Coke is reported as saying: "Cadaver nullius ni bonis." Blackstone says: "Though the heir has a property in the monument and escutcheons of his ancestor, he has none in his dead body or ashes." 2 Bl. Com. 249. Wharton says: "Corpus humanum non recepit estimationem." In support of this view, Griffith v. Charlotte, etc., R. Co., 23 S. C. 25, 55 Am. Rep. 1, held that an administrator of a deceased person had no right of action for the mutilation of the body of his intestate. However, today the great weight of authority is to the effect that there is such property, quasi property, or interest in the dead body of a human being as to sustain a civil action for its willful mutilation. Larson v. Chase, 47 Minn. 317, held that a widow has a right of action for the unlawful mutilation of the remains of her dead husband. This ruling seems to be more in consonance with our enlightened and humane views.—From 15 Yale L. J. 375.

86. Proof that condition of corpse on its receipt by the plaintiff may be shown to be due to an operation performed under authority during life, without averring such in the answer, as it goes to the destruction of plaintiff's case. Jackson v. Savage, 109 App. Div. 556, 96 N. Y. S. 366.

87, 88, 89. Meyers v. Clarke [Ky.] 90 S. W. 1049.

90. Long v. Chicago, etc., R. Co. [Okl.] 86 P. 289, extensively discussing the rules for the allowance of damages for mental suffering. See, also, in this connection Special Article, 6 C. L. 629.

tained only by the owner of the lot,[92] and an action for which will be defeated by proof that plaintiffs hired defendant through their undertaker to prepare the grave for the reception of another corpse, pursuant to which the injury occurred.[93]

Although a man cannot by will dispose of his dead body, for there is no property in it, and it does not form a part of his estate,[94] there is no universal rule as to the burial of the dead applicable alike to all cases, but each must be considered in equity on its own merits, having due regard to the interests of the public, the wishes of the decedent, and the rights and feelings of those entitled to be heard by reason of relationship or association.[95] The paramount right of burial of a dead body is in the surviving spouse, and if the parties were living in the normal relations of marriage, it will require a very strong case to justify a court in interfering with the wish of the survivor.[96] Still, the expressed wishes of the decedent should be considered by the court, together with all the other circumstances of the case, but such wishes are not absolutely controlling upon the court.[97] Where a deceased wife was buried as directed in her will by her husband's consent and remained so interred for over a year, her grave was located at the point of burial, although after the filing of a petition by the executor to permit a sale of land to procure funds with which to erect a monument over the grave of the testatrix, the husband had the body exhumed and cremated and did not return the ashes to the former burial place.[98]

Under a statute authorizing a general council to establish quarantine laws and regulations to prevent the spread of contagious diseases, to regulate hospitals and infirmaries, etc., and so secure the general health of the city, it had power to pass an ordinance to the effect that no person dying in the city should be interred in the city cemetery without a burial permit from the board of health.[99] It is not an unreasonable regulation for the issuance of burial permits to require the certificate of the attending physician as to the cause of the patient's death.[1]

A testatrix may in her will set aside a sum of money out of her own estate with which to erect a monument over her grave,[2] since without such testamentary direction the courts will allow a reasonable sum to be paid out of the funds of an estate for such a purpose as part of the funeral expenses,[3] but a provision in a will

91. Injury thereto in digging open the former grave to receive a second coffin. Feeley v. Andrews [Mass.] 77 N. E. 766.

92. Held proof failed to show ownership of lot. Feeley v. Andrews [Mass.] 77 N. E. 766.

93. Feeley v. Andrews [Mass.] 77 N. E. 766.

94, 95, 96. Herold v. Herold, 3 Ohio N. P. (N. S.) 405.

97. Herold v. Herold, 3 Ohio N. P. (N. S.) 405. Where the evidence shows that husband and wife were upon good terms at the time of the death of the husband, and that the wife was discharging her full duty to him, her right to dictate the place of burial will be sustained by the court, even against the expressed wishes of the husband, especially where a child of the parties resides, with her surviving mother, at a place distant from that where the husband desired to be buried, and where there is not sufficient room upon the lot in the cemetery designated by the husband as his burial place to thereafter hold the bodies of the said widow and said child. Id.

98. Action by executor to procure right to sell real estate to erect a monument over testatrix's grave according to her testamentary directions. In re Koppikus' Estate [Cal. App.] 81 P. 732.

Note: There is considerable conflict in the United States over the validity of an attempt to dispose of one's body by will. The weight of authority seems to be that such disposal is valid, even against the wishes of the surviving relatives. Weld v. Walker, 130 Mass. 422, 39 Am. Rep. 465; In re Widening Beekman St., 4 Brad. [N. Y.] 503; Scott v. Riley, 16 Phila. [Pa.] 156. California, however, after considerable vacillation, holds in its latest decision (Enos v. Snyder, 131 Cal. 68, 63 P. 170, 82 Am. St. Rep. 330, 53 L. R. A. 221) that there is no property in a dead body and consequently an attempt to dispose of it by will is void, following the English rule as laid down in Williams v. Williams, L. R. 20 Ch. D. 659. For a recent criticism of these two cases, see Pettigrew v. Pettigrew, 207 Pa. 313, 99 Am. St. Rep. 795, 64 L. R. A. 179; also 17 Green Bag, p. 345, where the cases are collected and discussed. The principal case is important as an excellent illustration

setting aside a sum of money to be expended in caring for the grave of the testatrix for "twenty" is too indefinite to be enforceable.[4] One burying the corpse of a stranger without consulting the board of supervisors and without authority from any member thereof, although within reach, cannot assert a legal claim for services.[5]

CORPUS DELICTI; CORROBORATIVE EVIDENCE, see latest topical index.

COSTS.

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§ 9. Procedure to Tax Costs; Correction and Review (973).
§ 10. Enforcement and Payment (975).

§ 1. *Scope, nature, and definition.*[6]—As here used the term costs includes not only costs proper but also disbursements and allowances made to litigants as part of or incident to the judgment by way of compensation to the successful party and against the other. Costs in criminal cases are treated elsewhere.[7]

§ 2. *Power to award costs.*[8]—The right to costs and disbursements is purely statutory,[9] and no presumptions can be allowed in favor of a party claiming them.[10] Statutes allowing them should not, however, be so strictly construed as to deny compensation evidently intended.[11] Rules of court inconsistent with the statute are void.[12]

§ 3. *Prepayment or security, and suits in forma pauperis.*[13]—In civil cases the grounds for exacting security, though not wholly derived from statute, are now generally so enumerated. Nonresidence is one of the most common grounds.[14] The

of the ingenious, if disreputable, devices to which heirs will sometimes resort to prevent the carrying out of the terms of a will which affect their pecuniary interests.—From 4 Mich. L. R. 172.

99, 1. Meyers v. Duddenhauser [Ky.] 93 S. W. 43.

2, 3, 4. In re Koppikus' Estate [Cal. App.] 81 P. 732.

5. Three strangers killed in a railroad wreck were buried by the sheriff at the solicitation of the railroad company which paid him and to whose use the sheriff now sues. Marshall County v. Rivers [Miss.] 40 So 1007.

6. See 5 C. L. 842.

7. See Indictment and Prosecution, 5 C. L. 1790.

8. See 5 C. L. 843.

9. Williams v. Hughes, 139 N. C. 17, 51 S. E. 790. Costs are allowed strictly in pursuance of the statutes, and no costs at all can be allowed unless there is statutory authority therefor. Clark v. Eltinge, 39 Wash. 696, 83 P. 901. Costs, as costs, are allowable only by statute. State v. District Ct. [Mont.] 85 P. 367. No item of disbursements may be recovered which does not come within the statute. Montana Ore Purchasing Co. v. Boston & M. Consol. C. & S. Min. Co. [Mont.] 84 P. 706. Disbursements on appeals to the supreme court between adverse parties in actions at law. Hess v. Great Northern R. Co. [Minn.] 108 N. W. 803.

10. Clark v. Eltinge, 39 Wash. 696, 83 P. 901.

11. Kivel v. Murray Cone Shoe Co. [N. H.] 63 A. 673.

12. Rule of county court providing for dismissal of appeal from justice for nonpayment of docket fee of $4 held void, there being no statute authorizing clerk to charge such a fee. Dille v. Rice, 120 Ill. App. 353.

13. See 5 C. L. 843.

14. By statute in New Jersey a defendant in an action brought in the circuit court may demand security for costs from a nonresident plaintiff, but this statute does not apply to actions brought in the district court. Kienzle v. Gardner [N. J. Law] 63 A. 10. A court of original jurisdiction possesses the discretionary power to require a nonresident plaintiff to give security for costs already accrued or entered on a judgment appealed from, as well as those which shall thereafter accrue. Bender v. Paulus, 109 App. Div. 148, 95 N. Y. S. 670. Additional security provided for by Code Civ. Proc. § 3276 is not limited to cases in which judgment has not yet been entered by reason of the fact that the only penalty prescribed for failure to obey an order to give security is a dismissal of

failure to give the required security before the issue of summons is not ordinarily jurisdictional, the remedy being by motion to set aside the process.[15] A finding of nonresidence on a motion to require security for costs in a pending action is not res judicata in another action between the same parties, since the proceeding is a collateral one, not reaching the merits of the case.[16] On a motion by defendant to require plaintiff to give security on the ground that he has been adjudged a bankrupt after issue joined, he is not obliged to show affirmatively diligence in discovering such bankruptcy.[17] As a general rule security may be waived and is waived by pleading to the merits when no security is filed.[18] Defects in the security given by the relator in quo warranto proceedings are immaterial, where it is in the form of the required security and is filed before the action is commenced, and additional security, concededly sufficient, is subsequently filed.[19] The court may, in its discretion, extend the time for filing the defense bond required by the North Carolina statute in actions of ejectment.[20] An order extending the time, being discretionary, is not appealable.[21]

In forma pauperis.[22]—The allowance of an application to sue in forma pauperis is generally discretionary.[23] In the Federal courts the right is limited to courts of original jurisdiction.[24] Leave to renew a motion to vacate an order permitting plaintiff to sue in forma pauperis ordinarily authorizes its renewal only during the pendency of the action.[25] The right to appeal in forma pauperis depends wholly on statute.[26] The right extends to a trustee in bankruptcy on a proper showing

the complaint under § 3277. Id. Order requiring additional security to be given by nonresident plaintiff on appeal from judgment dismissing complaint, and staying proceedings until order was complied with, held not an abuse of discretion. Id. A nonresident plaintiff may be required to give security for costs in a proceeding in error, and in default thereof, his petition may be dismissed. Sterwerf v. Smith [Ohio] 75 N. E. 944. The county court has inherent power to require that security be given for costs. United States v. U. S. Fidelity & Guaranty Co. [Vt.] 63 A. 581. Under rule 35 of circuit court for the Southern District of New York, a nonresident plaintiff, although joined with a resident, is required to give security for costs. Electric Vehicle Co. v. Gallagher, 145 F. 394.

15. Where a motion to require a nonresident plaintiff in an action before a justice of the peace to give security for costs was denied, and thereafter the case was tried on the merits and appealed to the circuit court, the proper procedure to raise the question as to the giving of security was by motion for such security in the circuit court. Lacomb v. Godkin [Mich.] 12 Det. Leg. N. 971, 106 N. W. 702. Under § 4773, Wilson's Rev. & Ann. St. Okl. 1903, which provides that plaintiff must give security for costs before the clerk shall issue a summons, if the clerk issues a summon without such security being given, the proper remedy is by motion to quash the summons, and the court may in its discretion permit a bond to be filed after the issuance of summons. Fowler v. Fowler [Okl.] 82 P. 923.

16. Brown v. Beckwith, 58 W. Va. 140, 51 S. E. 977.

17. Donnelly v. Third Ave. R. Co., 98 N. Y. S. 387.

18. Sciutti v. Union Pac. Coal Co. [Utah] 85 P. 1011. By pleading to the merits and going to trial thereon in action before justice of the peace. Lacomb v. Godkin [Mich.] 12 Det. Leg. N. 971, 106 N. W. 702.

19. Additional security properly allowed to be filed. Code 1896, § 3331. Lee v. State [Ala.] 39 So. 720.

20. Revisal 1905, § 512, applies to filing bond required by § 453. Dunn v. Marks [N. C.] 53 S. E. 845.

21. Dunn v. Marks [N. C.] 53 S. E. 845.

22. See 5 C. L. 844.

23. Osiel v. Osiel [N. J. Eq.] 63 A. 549.

24. In re Bradford's Petition [C. C. A.] 139 F. 518.

25. Motion to vacate order permitting plaintiff to sue in forma pauperis was denied with permission to renew it on proof that he had no meritorious cause of action, or was financially able to prosecute action. No advantage was taken of this permission until after plaintiff, by failure to comply with the terms of an order opening a subsequent default on his part, had placed defendants in a position to enter judgment. Held that it was then too late to renew the motion, since the action was, to all intents and purposes, ended. Cohen v. Meryesh, 48 Misc. 628, 96 N. Y. S. 264.

26. Under Rev. St. 1895, art. 1401, providing that one unable to pay costs of appeal or give security therefor may yet appeal upon making strict proof of his inability to pay the costs or any part of them, he is not required to show his inability to give security. Murray v. Robuck [Tex. Civ. App.] 13 Tex. Ct. Rep. 915, 89 S. W. 781. Proof of inability to pay costs held sufficient. Id. Homestead, which is exempt under constitution and statutes, is not to be considered in determining ability to pay or give security for costs. Kruegel v. Johnson [Tex. Civ. App.] 15 Tex. Ct. Rep. 552, 93 S. W. 483. Evidence held

of his inability, in his representative capacity, to pay the costs.[27] An order denying the right to so appeal to one who has made the statutory proof of inability to pay costs is appealable.[28]

§ 4. *Parties entitled to or liable for costs in general.*[29]—Costs are not ordinarily assessed personally against one suing or sued in a representative capacity unless he has been in some respect delinquent.[30] As a general rule, the state is liable for costs only when the statute so provides.[31] They will be allowed in a suit between states in the Federal courts.[32] In order to entitle the corporation counsel of a city of the second class to receive to his own use, under the New York statute, costs and allowances collected from the adverse party in actions and proceedings in which the city is successful, he must establish not only that the city was successful but that the costs have actually been collected from the adverse party.[33] The right to costs on dismissal of an action is frequently fixed by agreement of the parties.[34]

§ 5. *Right dependent on event of action or proceeding. A. Prevailing party in general.*[35]—Except as affected by the qualified interest of a party,[36] or rules applicable to particular courts or proceedings,[37] the prevailing party is ordinarily entitled of right to recover costs[38] on the whole case.[39] The right is not ordinarily

insufficient to support judgment that plaintiff in error was able to pay or give security. Id.

27. On filing an affidavit which discloses his inability, as the representative of the bankrupt estate, to pay the costs, Civ. Code, 1895, § 5553, is applicable. Affidavit held sufficient. Hawes v. Bank of Elberton, 124 Ga. 567, 52 S. E. 922.

28. Denial by county judge of right to appeal to one making strict proof by affidavit of his inability to pay costs, held reviewable by appellate court. Murray v. Robuck [Tex. Civ. App.] 13 Tex. Ct. Rep. 915, 89 S. W. 781.

29. See 5 C. L. 845.

30. Held an abuse of discretion for surrogate to allow costs of proceedings for settlement of accounts to an administratrix found guilty of long continued misconduct. In re Gall, 107 App. Div. 310, 95 N. Y. S. 124. Failure to impose all the costs of a proceeding to compel an accounting by an administrator on the accountant held not error, where it could not be successfully asserted that they were incurred solely by reason of his dereliction. Shadle's Estate, 30 Pa. Super. Ct. 160. Where auditor is appointed in pursuance of a contest raised by a guardian against an administrator's account, the fact that the guardian in good faith refused the accountant's offer to compromise does not alone warrant the court in putting the costs on him, though minors got less under the auditor's report than they would have under the compromise. Id. In the absence of an order making the executor or administrator personally liable for the same, the costs and disbursements of a suit for the settlement of the estate of a decedent are payable out of the funds of the estate. Code Civ. Proc. 1902, § 330. Lockwood v. Lockwood [S. C.] 52 S. E. 735.

31. By statute in Minnesota, where the state brings an action and compels defendant to litigate a controversy with it, costs are taxable against the state, but this rule does not apply where the state is not the moving party and is only incidentally and nominally a party to the litigation. National Bond & Security Co. v. King [Minn.] 104 N. W. 816.

32. Costs held properly allowed to defendants on dismissal, by U. S. supreme court, of bill by one state against another and a sanitary district to restrain discharge of sewage into a river. State of Missouri v. Illinois, 202 U. S. 598, 50 Law. Ed. —.

33. Laws 1898, p. 435, c. 182, § 418. Sutherland v. Rochester, 98 N. Y. S. 970. Mere fact that city bid in the property against which it had enforced lien for taxes by action held not to entitle counsel to costs, where it did not appear that property was worth claim for taxes. Id. Counsel has no lien on judgment in favor of city for taxes for such costs. Id.

34. Agreement discontinuing action for attorney's fees, providing that plaintiff was to be paid, out of the proceeds of certain property, "all costs, allowances, and compensation," which might be awarded him either in a certain partition suit or in any action by him to determine the amount thereof, held not to entitle him to taxable costs and extra allowance in partition suit in addition to compensation. Valentine v. Stevens, 109 App. Div. 284, 96 N. Y. S. 299.

35. See 5 C. L. 846.

36. See § 4, ante.

37. See § 7 post.

38. Costs follow the judgment and are to be taxed against the defeated party. Williams v. Hughes, 139 N. C. 17, 51 S. E. 790. Party entitled to judgment for some amount is also entitled to judgment for costs. Ky. St. 1903, § 889. Harrodsburg Water Co. v. Harrodsburg [Ky.] 89 S. W. 729. Under Code 1896, § 1325, providing that successful party in all civil actions is entitled to costs, defendant procuring dismissal for want of jurisdiction is entitled to costs. Pritchard v. Fowler [Ala.] 40 So. 955. Where case of forcible entry and detainer in inferior civil court was removed to circuit court by defendants by certiorari, under Code 1896, § 2147, and there dismissed for want of jurisdiction because lower court was unconstitutional, and circuit court had no original jurisdiction

confined to the costs of a single trial, but includes all the costs of the action,[40] except that the party ultimately successful is not entitled to a trial fee or his disbursements for a previous mistrial for which he was himself to blame.[41] Where a new trial is granted upon appeal with costs to abide the event, the event contemplated is one which determines that the successful party is by law entitled to costs,[42] and the party ultimately successful is entitled to the costs of the appeal.[43] In the absence of a statute to the contrary,[44] he is ordinarily deemed the prevailing party who recovers generally, though his recovery be but partial.[45] As a general rule, where

of the subject-matter. Id. Defendants held entitled to costs as a matter of right on final judgment in their favor in an action for malicious prosecution, though represented at the trial by the corporation counsel of the city, who received no compensation except his salary for his services in the matter. Code Civ. Proc. § 3229. Stearns v. Titus, 99 N. Y. S. 667. In a suit by the trustee of a husband to enforce a claim against the separate estate of the bankrupt's wife for the amount of community funds expended in improving the wife's separate property, where she unsuccessfully contests the suit, the costs are taxable against her interest in improvements. Collins v. Bryan [Tex. Civ. App.] 13 Tex. Ct. Rep. 237, 88 S. W. 432. Under a statute providing that the prevailing party shall recover costs, he is entitled to all costs which he has made, which, by a fiction of law, are treated as paid. In action on cost bond. Downs v. Growney [Mo. App.] 90 S. W. 119. In action on bond for costs, petition reciting action in which bond was given and the giving of the bond, and alleging that trial resulted in judgment for plaintiff, which judgment for damages and costs is final and still in force, and that no part of the same has been paid, held sufficient. Id.

39. Is entitled to a judgment for costs on the whole case and not merely on one count of the petition. Under Rev. St. 1899, § 1547. Sheridan v. Forsee, 114 Mo. App. 588, 90 S. W. 120. Jury found for plaintiff separately on each count and judgment was rendered on each count separately, there being no formal general judgment for sum of all the findings. A judgment for costs was only incorporated in the fifth count, and on appeal it was determined that plaintiff was not entitled to recover under that count. Held that the recitation in the judgment for costs was intended to and did include all the costs of the case, and judgment of reversal only affected the damages assessed on the fifth count and not the costs. Id.

40. Rev. St. 1898, § 2918, provides that costs shall be allowed of course to the plaintiff in the action upon a recovery by him. Held that the statute does not confine the costs of an action to a single trial, but covers the costs of the action and includes the costs of former trials where they were not paid as a condition on the granting of new trials. Hughes v. Chicago, etc., R. Co., 126 Wis. 525, 106 N. W. 526. Where a judgment for defendant is reversed on appeal and a new trial granted on which defendant is again successful, plaintiff is properly taxed with all the costs of the defendant in the action, except the costs of the appeal. Code §§ 525-527, 540, construed. Williams v. Hughes, 139 N. C. 17, 51 S. E. 790.

41. Where plaintiff's motion to place case on short cause calendar was granted over defendant's objection, but case was sent back to the general calendar by the justice after the trial had commenced, where it was ultimately reached in its regular order and plaintiff recovered, held that he was not entitled to tax trial fee and jury fee for unfinished trial. Browning v. Brokaw, 99 N. Y. S. 599.

42. People v. Greene, 99 N. Y. S. 679. Where, on appeal from order of supreme court dismissing writ of certiorari, obtained to review action of police commissioner in removing police officer, such order of dismissal was reversed as well as the determination of the commissioner, and a new trial was granted relator "with costs to abide the event," the event referred to held to be the final event of the writ of certiorari evidenced by some order of the court, since commissioner has no power to award costs. Id.

43. Where on appeal by defendant a judgment for plaintiff is reversed and a new trial ordered with costs to abide the event, and plaintiff is successful on the second trial, he is entitled to tax the costs of the appeal against defendant. Davis v. Reflex Camera Co., 100 N. Y. S. 172.

44. Under Rev. St. 1895, § 5270, providing that, in suits in trespass to try title, where defendant claims the whole premises and plaintiff shows himself entitled to recover a part, plaintiff shall recover such part and costs, held that, where defendants by plea of not guilty admitted their claim of title to or possession of the entire tract sued for, and emphasized such claim by plea of limitations wherein they set up possession, and plaintiffs recovered a part of the tract, it was error to adjudge all the costs against plaintiffs on the ground that the only dispute was as to the part recovered by defendants. Brown v. Humphrey [Tex. Civ. App.] 15 Tex. Ct. Rep. 742, 95 S. W. 23. Fact that defendants abandoned upon the trial their claim to all except the land recovered by them, and made no attempt to defeat plaintiffs' claim to it, did not justify judgment against plaintiffs for all the costs under Rev. St. 1895, § 1438, authorizing court for good cause shown to adjudge costs to other than the successful party, even if latter section was applicable. Id.

45. In action of ejectment, where plaintiff recovered judgment for most of the land sued for, held that it was proper to render judgment for all the costs against defendant, though he filed a disclaimer as to a small

there are several unsuccessful defendants, the whole of the costs should be taxed against each and all of them,[46] though where the rights claimed are distinct and separable, each will be taxed only with the costs peculiar to the litigation between plaintiff and himself.[47] Costs should not ordinarily be taxed against parties improperly joined,[48] or against defendants who disclaim all interest in the subject-matter of the action.[49] In Alabama, where an action is brought against two or more persons, and recovery had only against one of them, the others are entitled to judgment for their aliquot part of the costs.[50] In a revocatory action coupled with an attachment, the defendant in the revocatory action is liable in solido with the principal defendant for the costs of the attachment, the suit being a unity and having been made necessary by his acts.[51] In some states the trial court may apportion the costs in any case if good cause for not following the ordinary rule exists, provided the reason for so doing is stated in the record.[52] In Kansas a failure to present claims against a city for allowance within a specified time prevents the recovery of costs in suits thereon.[53]

(§ 5) *B. Waiver of right and effect of tender or offer of judgment.*[54]—In many states a tender before suit of the amount found due,[55] or such a tender followed by a subsequent payment of the money into court, prevents the recovery of costs by a successful party,[56] and the payment into court of such an amount pending suit, the recovery of costs subsequently accruing.[57]

portion of the land. Lawrence v. Alabama State Land Co. [Ala.] 41 So. 612. Where defendant was liable to plaintiff for a part of the amount sued for, but made no tender of or offer to confess judgment for such amount, the costs were properly taxed to defendant, though plaintiff did not recover the full amount sued for. Williams Shoe Co. v. Gotzian & Co. [Iowa] 107 N. W. 807. Promise of defendant to pay half of plaintiff's claim against third person in full settlement thereof. Id. In action to quiet title, where plaintiff recovered two out of three tracts of land to which defendant claimed title, held error to charge him with any part of the costs. Vanderbilt v. Johnson [N. C.] 54 S. E. 298.

46. Where there are several unsuccessful defendants, the whole of the costs should be taxed against each and all of them, in the absence of a rule for taxing against each defendant those costs which he has incurred himself. Braun & Ferguson Co. v. Paulson [Tex. Civ. App.] 15 Tex. Ct. Rep. 564, 95 S. W. 617.

47. In action against railroad companies and their lessees to enjoin use of lands for other than railroad purposes and to recover rental value of land used for other purposes, where decree was rendered for plaintiffs enjoining such use and that they recover the rental value from the lessees, held that the railroads were liable for the costs of the filing of the decree, but not the costs of subsequent litigation between plaintiff and the lessees as to the rents. Gaffney v. Wood [S. C.] 54 S. E. 573. Where vendor of land sues to recover it on ground of vendee's fraud and joins a grantee of the vendee and recovers the property claimed by such grantee, only the costs incident to the litigation in regard to the property claimed by the grantee should be adjudged against him, excluding costs peculiar to the litigation between plaintiff and his immediate vendee. Dashiell v. Johnson [Tex.] 14 Tex. Ct. Rep. 989, 91 S. W. 1085.

48. It is error to tax the interests of remaindermen, improperly joined as parties to a partition suit between life tenants, with any part of the costs. Lawson v. Bonner [Miss.] 40 So. 488.

49. Under provisions of Gen. St. 1902, § 4053, authorizing a suit to quiet title under certain circumstances, costs cannot be adjudged against a defendant who by his answer disclaims all estate or interest in or incumbrance on the property. Foote v. Brown [Conn.] 62 A. 667.

50. Code 1896, § 1331. Crew v. Heard [Ala.] 40 So. 337. Statute can have no application where action abated as to two of three defendants by the death of one of them during its pendency, and there was no revivor against him. Id. In any event, remaining defendant could not object to judgment against him for all the costs, other defendants being alone concerned and having right to have judgment corrected on appeal. Id.

51. Bank of Patterson v. Urban Co. [La.] 41 So. 244.

52. Under Rev. St. 1895, art. 1438. City of Houston v. Stewart [Tex. Civ. App.] 13 Tex. Ct. Rep. 981, 90 S. W. 49.

53. Statute providing that all claims against cities shall be presented for allowance within a certain time, or no costs shall be allowed in actions on such claims, construed as not applying to claims against a township. Morrill Tp. v. Fletchall [Kan.] 85 P. 753.

54. See 5 C. L. 847.

55. Where the owner of land sold for delinquent taxes offered to pay to the holder of the void tax title the taxes subsequently paid by him, and the offer was refused and the holder of the tax title sued to recover the same, the owner was properly awarded

§ 6. *Right dependent on minimum amount of demand or recovery.*[58]—In some courts the right to costs depends on the amount demanded[59] or recovered.[60]

§ 7. *Right affected by nature of action or proceeding, or character of tribunal. A. In general.*[61]—Costs in admiralty are discretionary,[62] and the same is true of costs in a proceeding under the New York statute to determine the validity or invalidity of a will.[63]

(§ 7) *B. In equity and equitable code actions.*[64]—In equity, except in so far as the rule has been changed by statute,[65] the allowance, denial,[66] or apportion-

his costs. Wheeler Co. v. Pates [Wash.] 86 P. 625.

56. Costs held properly taxed against successful plaintiff where tender of amount found against defendant was made before suit, and was rejected because insufficient in amount, no objection being made to its form, and there was no evidence that plaintiff at any time desired to accept it, and during trial money was again tendered and refused, after which it remained with clerk until trial was concluded. Warth v. Loewenstein, 121 Ill. App. 71. Where defendant makes a tender and pays the money into court, judgment should be rendered in favor of defendant for costs if plaintiff fails to prove that he is entitled to more than the amount of the tender. Lackner v. American Clothing Co., 98 N. Y. S. 376. A plaintiff who recovers judgment for part of his demand, the defense being the general issue, and no tender as to the part of the demand recovered being pleaded, though tender was made before suit, is entitled to costs. Warth v. Loewenstein, 219 Ill. 222, 76 N. E. 379. Under express provisions of Hurd's Rev. St. 1899, c. 135, § 4, a tender after suit brought in avoidance of further accruing costs must include the amount conceded to be due and "costs of suit incurred up to time of tender." Id. Where defendant was sued by shipper for loss of goods and pleaded a limitation of its liability in defense, but did not pay or tender the amount due under its own construction of the contract, and relying on another defense contested the case and carried it through several courts on the final decision sustaining its contention as to the limitation, it was not entitled to costs. Missouri, etc., R. Co. v. Patrick [C. C. A.] 144 F. 632.

57. Payment into court of amount subsequently found due stops costs. Civ. Code Prac. § 640. Harrodsburg Water Co. v. Harrodsburg [Ky.] 89 S. W. 729.

58. See 5 C. L. 848.

59. Under Municipal Court Act, Laws 1902, pp. 1585, 1586, c. 580, § 332, subds. 3, 6, where the summons demands between $200 and $300, and the action is discontinued, defendant is entitled to $10 costs. Whitman Co. v. Travers Bailey Co., 96 N. Y. S. 172.

60. A plaintiff, in an action brought in the city court which could have been brought in the municipal court, is not entitled to costs unless he recovers $250 or more. Code Civ. Proc. § 3228, subd. 5. Hill v. Kahn, 98 N. Y. S. 682. It is the recovery and not the amount claimed which determines the question, and a sum accepted pending suit is not a recovery. Right to costs is lost where plaintiff, pending trial, accepted payment of amount claimed upon his first cause of action and it was eliminated by consent. Id. The right or duty of the circuit court to penalize a plaintiff recovering less than $500, by requiring the payment of defendant's costs, under Rev. St. § 98, should not be imposed unless it appears to the satisfaction of the court that the damages were laid in the declaration at a sum in excess of $2,000 for the mere purpose of giving colorable jurisdiction to the court and without any expectation of recovering more than such sum. McCarthy v. American Thread Co., 143 F. 678.

61. See 5 C. L. 848.

62. Held error to require libelant of vessel for salvage to pay costs, where it was not offered any sum in settlement of its claim, and was forced to file libel or surrender a clear right. Clark Co. v. Ferryboat Columbia, 26 App. D. C. 85.

63. Proceeding under Code Civ. Proc. § 2653a is not one to recover an interest in realty or one in which a claim of title to realty arises upon the pleadings within meaning of § 3228, though title to realty is incidentally involved, since only issue is the validity or invalidity of the will, and hence prevailing party is not entitled to costs as of right, but they are in discretion under § 3230. Larkin v. McNamee, 109 App. Div. 884, 96 N. Y. S. 827.

64. See 5 C. L. 849.

65. Discretion must be confined to the fees allowed by statute. Bortree v. Macon, 121 Ill. App. 111. Under Code § 4260, providing that costs in partition proceedings shall be paid by the parties in proportion to their interests, a charge of one-third the amount of the costs on a widow's dower interest in the estate, and two-thirds on the interest of the children, will not be disturbed. McGuire v. Luckey [Iowa] 105 N. W. 1004.

66. When defendant in an equity case has disclaimed all interest and may procure a dismissal on his own motion, but still insists upon remaining a party and making costs in order to hinder and delay the proceedings, he is properly chargeable with costs. Glos v. Shedd, 218 Ill. 209, 75 N. E. 887. In a suit to reform a lease and for other relief, where the bill did not allege that any request was made that the lease be corrected, and other relief was denied, complainants were properly required to pay the costs, though the court reformed the lease. Braithwaite v. Henneberry [Ill.] 78 N. E. 34. Where certain parties are found not guilty in contempt proceedings for violation of an injunction for the reason that there was no intent shown, but their acts in violation of the injunction showed very rash and imprudent conduct, they are not entitled to costs. Public Service Corp. v. De Grote [N. J. Eq.] 62 A. 65. Under P. L. 1902, pp.

ment[67] of costs rests in the sound discretion of the trial court,[68] though the legal rule of awarding them to the successful party is ordinarily followed.[69] The court will take into consideration the fact that a successful complainant has voluntarily chosen a remedy designed to impose, or necessarily resulting in the imposition of, large costs upon his adversary, when a simple and inexpensive remedy was open to him.[70] Extraordinary costs, such as allowances of expenses and compensation of receivers, may, in proper case, be provisionally allowed out of the fund, and ultimately be decreed to be paid to the party entitled to the fund by his adversary.[71] Costs

508, 509, §§ 20, 21, authorizing suit by a wife for separate maintenance, and making it lawful to order a bond for such costs as may be awarded to defendant, where there were no circumstances tending to justify such a suit, costs may be decreed against the wife. Harris v. Harris [N. J. Eq.] 62 A. 703. Under the discretion as to the matter of costs in an original suit in equity, vested in the court by Rev. Codes § 5580, commissioners appointed under a statute to execute its provisions, and who are in good faith attempting to perform their duties, will not be taxed with costs on being enjoined because of the invalidity of the statute. State v. Budge [N. D.] 106 N. W. 293. Where a bill was filed to rescind a contract because of fraud and the bill as a whole failed, but a part of it might have been sustained as a bill for discovery, had it been filed for that purpose only, and the information sought has been furnished by the evidence in the suit, a decree dismissing the bill, but at the costs of the defendant, was proper. Muehlhof v. Boltz [Pa.] 64 A. 427. Held proper in suit for partition to deduct cost of so much of the litigation as was brought about by contentions set up in answer of one of the defendants from her share of the proceeds of the sale of the land. Williams v. Jones [S. C.] 54 S. E. 558. Where both parties have taken proofs without objection in a suit which is subsequently dismissed for want of jurisdiction appearing on the face of the bill, defendant will not be allowed costs. Allen v. Consolidated Fruit Jar Co., 145 F. 948.

67. Apportionment of costs by circuit court on appeal from order disallowing items of executor's account, held not an abuse of discretion. United States Rubber Co. v. Peterman, 119 Ill. App. 610. Where court found for defendant on one of the issues raised by the pleadings, held that it was no abuse of discretion to tax one-fourth of the costs to plaintiff. Thompson v. Normanden [Iowa] 108 N. W. 315. Where each party partially succeeds, no costs will be allowed either. Lengyel v. Meyer [N. J. Eq.] 62 A. 548.

68. Whether costs shall be awarded to either or neither party. Allan v. Allan [Me.] 63 A. 654. The trial court's exercise of discretion is plenary over costs in equitable actions, within the limits fixed by statutory cost bill. Rosenheimer v. Krenn, 126 Wis. 617, 106 N. W. 20. On bill to redeem lands from execution sale. Francis v. White, 142 Ala. 590, 39 So. 174. Awarding of costs and counsel fees in divorce cases. Harris v. Harris [N. J. Eq.] 62 A. 703. Orphans' court, being court of equity, has wide discretion in matter of costs, and its decrees on the subject will not be disturbed except for clear error. Shadle's Estate, 30 Pa. Super. Ct. 160.

69. In the absence of an order to the contrary, the same rule as to costs prevails in equity as at law. Code Civ. Proc. 1902, § 323. Lockwood v. Lockwood [S. C.] 52 S. E. 735. In suit to quiet title to lands acquired at tax sale, where plaintiff prayed for judgment for taxes and costs in the alternative and recovered the latter, held that he was entitled to costs of chancery court. Bonner v. St. Francis Levee Dist. Directors [Ark.] 92 S. W. 1124. In possessory action coupled with an injunction, in which both parties claimed actual possession under titles of certain oil land, judgment was rendered for defendant dismissing suit and dissolving injunction, and reserving defendant's right to sue for damages. Pending a suspensive appeal by plaintiff, oil was struck on the premises by his lessees, and district court, on motion of defendant, ordered a judicial sequestration of the oil as produced. Later the judgment appealed from was affirmed. Held that judgment concluded all possessory rights claimed by plaintiff and affirmed those of defendant to a sufficient extent to maintain the sequestration of the oil and throw the costs of the execution of the writ on the party cast in the suit. Jennings-Heywood Oil Syndicate v. Housier-Laterville Oil Co. [La.] 41 So. 255. Where fraternal benevolent association filed petition in equity to require rival claimants to interplead for proceeds of benefit certificate, held not an abuse of discretion to assess costs against losing party, thus following the rule at law. Sovereign Camp, Woodmen of the World v. Wood, 114 Mo. App. 471, 89 S. W. 891. In action to enjoin payment of claims audited by board of county supervisors, where fraud and collusion on part of board was alleged, where court found that allowance of claims was illegal but not fraudulent, held that board should not be charged with costs. Fitch v. Hay, 98 N. Y. S. 1090.

70. Wilcke v. Duross [Mich.] 13 Det. Leg. N. 227, 107 N. W. 907. Process in action at law was, by mistake, served on defendant's daughter instead of defendant, but latter made no objection, though she knew of the fact on the same day. After execution had been levied on her realty defendant sued in equity to set aside judgment. Held that, though entitled to relief, she would not be allowed costs of trial court, and would only be allowed actual disbursements, exclusive of a solicitor's fee, in appellate court. Id.

71. Properly taxed against defendant where litigation was occasioned by act of fraud on his part in procurement of a deed which made it necessary for plaintiff to bring suit in which receiver was appointed, and there was no community of interest,

out of the fund may be allowed parties interpleading.[72] A mortgagee, who is made a defendant in an action brought for the purpose of placing the mortgagor's property in the hands of a receiver, is liable for his pro rata share of the costs and expenses of the litigation where he voluntarily recognizes the necessity for the receiver and uses the equitable method of securing payment.[73] Where by statute a party recovering on a usurious contract is not entitled to costs, a court of equity may make him liable for them as the mover of the litigation.[74]

(§ 7) *C. In inferior courts.*[75]—As a general rule, costs are allowed to the prevailing party on appeal to an intermediate court from a judgment of a justice of the peace,[76] though in some states they will not be allowed to appellant unless he recovers a greater sum than below.[77] In Michigan the apportionment of costs in such case is discretionary.[78] In New York, where an action in justice's court is dis-

the whole fund in receiver's hands belonging absolutely to one party or the other. Nutter v. Brown, 58 W. Va. 237, 52 S. E. 88. Where, in suit in equity involving title to personalty, court appointed receiver to sell it, and subsequently adjudged the property, of which one defendant claimed five-sixths and two others the balance, to belong to plaintiff, and gave ordinary costs against all the defendants, reserving its decision as to extraordinary costs, and finally decreed that they be paid by the defendant claiming the five-sixths interest, held that costs would not be disturbed on appeal in absence of showing that such defendant had been required to pay more than his due proportion of the entire cost. Id.

72. Where it was sought to subject proceeds of insurance policies, in which beneficiaries had been changed, to payment of certain claims against defendant's estate, which was the original beneficiary under the policies, and the insurance companies were made parties and filed interpleading answers offering to pay the money into court, held that if companies acted in good faith in changing beneficiaries they were entitled to reasonable attorney's fees and all costs incurred in interpleaders to be paid out of funds in their hands. Nixon v. Malone [Tex. Civ. App.] 16 Tex. Ct. Rep. 715, 95 S. W. 577.

73. Where chattel mortgagee applied for and obtained order for sale of property through instrumentality of receiver, and later filed answer and intervention praying, not only to have amount arising from sale of mortgaged property paid to him, but also to share in any other funds in receiver's hands. Garmany v. Lawton, 124 Ga. 876, 53 S. E. 669.

74. Where plaintiff sues on a usurious contract. Earle v. Owings, 72 S. C. 362, 51 S. E. 980.

75. See 5 C. L. 849.

76. In Nebraska, when a plaintiff in an action in a justice court, in which no set-off is pleaded, recovers a judgment from which defendant appeals, and the plaintiff has judgment also in the district court, he is entitled to recover costs in the latter court without regard to the amount of his judgment therein. Though judgment in district court is less than that recovered below by more than $20. Miller v. Henderson [Neb.] 107 N. W. 586. Code § 986, providing that on appeal by plaintiff from judgment in his favor in justice court he shall pay all costs in district court if he does not recover a larger sum than $20, and that defendant shall pay them if he shall demand a set-off greater than $20 and appeals from a judgment in his favor and recovers less than $20, has no application in such case, since successful plaintiff did not appeal, and no set-off was pleaded. Id. Code § 1013, providing that one appealing from a judgment in his favor shall pay costs of appeal unless he recovers a greater sum than the judgment, also has no application, since appeal was by defendant. Id. In Wisconsin, under Rev. St. 1898, § 2925, authorizing the allowance of costs on appeal in favor of respondents if a justice's judgment appealed from be affirmed or the appeal be dismissed, and in favor of the appellant if the judgment be reversed, the circuit court, on appeal from a justice's judgment in favor of plaintiff, properly awarded costs against plaintiff on dismissal "of the action," because the justice had no jurisdiction. Miltimore v. Hoffman, 125 Wis. 558, 104 N. W. 841.

77. In Texas, under Rev. St. 1895, art. 1437, providing that an appellant from justice court, who recovers a greater sum than below, is entitled to recover costs of both courts, and art. 1438, providing that court may, for good cause shown, adjudge the costs otherwise, held that it was proper to award costs of appeal to defendant where, at plaintiff's own instance, judgment was rendered for plaintiff below for a less sum than he was entitled to, and he recovered the full amount to which he was entitled on appeal. Texas & P. R. Co. v. Wheeler [Tex.] 14 Tex. Ct. Rep. 502, 90 S. W. 481. Under Sayles' Ann. Civ. St. 1897, arts. 1436, 1438, providing that one appealing from a judgment of a justice of the peace shall recover costs of the court above if he obtains a more favorable judgment than below, except where, for good cause to be stated on the record, the court adjudges otherwise, held that where amount of judgment was reduced on appeal to county court, a judgment taxing costs against appellant would be reformed on appeal to the court of appeals, in the absence of a statement in the record showing why they were so taxed. American Exp. Co. v. Adams [Tex. Civ. App.] 15 Tex. Ct. Rep. 605, 92 S. W. 1039.

78. Under Comp. Laws § 930, where plaintiff recovered a judgment in justice court

continued upon the delivery of an answer showing that the title to realty will come in question, and a new action is instituted, the party in whose favor final judgment is rendered in the latter action is entitled to costs, except that where final judgment is rendered therein for defendant, upon the trial of an issue of fact, the plaintiff is entitled to costs, unless it is certified that the title to realty came in question on the trial.[79] A successful defendant in the municipal court of that state is not entitled to costs where no verified pleading or written notice of appearance was filed.[80] A successful defendant in an action in that court, in which a free summons has been erroneously issued, is entitled to have statutory costs included in the judgment the same as if a paid summons had been issued.[81] The police commissioner of the city of New York has no power to award costs in a proceeding before him.[82]

(§ 7) *D. In interlocutory or special proceedings, or proceedings other than actions.*[83]—The allowance of costs in special proceedings,[84] or the imposition of costs as a condition of granting favors,[85] ordinarily rests in the sound discretion of the trial court. Costs and disbursements actually paid as a condition precedent to amending cannot be again taxed.[86] In Washington a garnishee is entitled to costs

which was reversed, and a second trial resulted in a verdict and judgment for defendant of no cause of action, held that lower court, on authorizing the entry of judgment for defendant for costs, had authority to require a reduction of $75 from the amount taxable. Fowles v. Rupert [Mich.] 12 Det. Leg. N. 946, 106 N. W. 873.

79. Code Civ. Proc. § 3235. Shaffer v. Shaffer, 110 App. Div. 487, 97 N. Y. S. 411. Where action for trespass in justice court was discontinued, and another subsequently commenced in proper court in which defendants answered setting up title in themselves, and plaintiff failed to show any trespass and motion for nonsuit was granted, held that defendant was entitled to costs, no question of fact being involved. Id.

80. Under Municipal Court Act (Laws 1902, p. 1585, c. 580, § 332). Goldman v. Messing, 48 Misc. 651, 96 N. Y. S. 171.

81. Where demand exceeded $50. Laws 1902, p. 1504, c. 580, § 44. People v. Lang, 109 App. Div. 706, 96 N. Y. S. 555.

82. People v. Greene, 99 N. Y. S. 679.

83. See 5 C. L. 850.

84. Costs may, in the discretion of the court, be allowed in special proceedings at the rates allowed for similar services in an action. O'Neil v. Mansfield, 47 Misc. 516, 95 N. Y. S. 1009. Appeals from orders of mayor removing city officers, held special proceedings. Id. Costs held properly awarded defendants in a special proceeding by a trustee of a school district to acquire land for a schoolhouse site, where the award of the commission exceeded the amount offered defendants for the land prior to the institution of the proceeding. Mead v. Conger, 97 N. Y. S. 526.

85. Action of trial court in taxing half the costs against appellees as a condition of exercise of their statutory right to amend declaration held not an abuse of discretion. Summerville v. Penn Drilling Co., 119 Ill. App. 152. Where a party asks to be allowed to withdraw a juror after the trial has commenced, for purpose of procuring a continuance, it is not an abuse of discretion to require, as a condition of granting the request, that the party making it pay to the other a term fee, a trial fee, and the witnesses' fees of the term to be taxed. Rawson v. Silo, 105 App. Div. 278, 93 N. Y. S. 416. Under Municipal Court Act (Laws 1902, p. 1548, c. 580, § 195), court may allow adjournment of trial upon payment of costs to the adverse party. Poland v. Minshall, 96 N. Y. S. 200. May impose costs as the condition of granting a favor to a litigant, even though he is suing in forma pauperis. As condition of opening default. Cohen v. Meryesh, 48 Misc. 628, 96 N. Y. S. 264. Where plaintiff's default is opened on condition that he pay certain costs within a specified time, his failure to do so entitles defendant to enter judgment on the previous dismissal. Id. An order granting a motion for discontinuance and imposing costs on the moving party should not be absolute, but should only impose the costs as a condition of granting the discontinuance. Should leave plaintiff free to pay costs and discontinue or to go on with the action. Hyde v. Anderson, 98 N. Y. S. 62. In New York an order setting aside a verdict as against the weight of the evidence should only be granted upon condition that the moving party pay the costs. Casner v. New York City R. Co., 48 Misc. 630, 96 N. Y. S. 257.

86. Grant v. Pratt, 110 App. Div. 149, 97 N. Y. S. 38. Judgment against plaintiffs was reversed on appeal and defendant was then allowed to amend his answer so as to set up new issues on payment of plaintiff's taxable costs to date, which he did. Held that, on subsequently recovering judgment, plaintiffs were entitled to tax the costs before and after notice of trial, with the term fee and the costs for all subsequent proceedings, but not the costs of the prior appeals, or disbursements previously paid by defendant. Id. Judgment for plaintiffs in action by building contractors to foreclose mechanic's liens was reversed and a new trial ordered "with costs to abide the final award of costs." Motion for leave to amend complaint by setting up substantial performance of con-

and attorney's fees in all cases when discharged from liability, whether on the answer alone or on a hearing.[87] In Utah the rules relative to costs in civil actions apply in condemnation proceedings.[88]

Costs in certiorari are discretionary,[89] and are granted or withheld upon the writ, and not by virtue of the original trial or hearing.[90]

(§ 7) *E. On appeal or error.*[91]—On affirmance or reversal, costs are ordinarily allowed to the prevailing party,[92] but appellant will not be allowed costs, though a reversal is ordered, where he failed to apply below for the correction of an error or inadvertence,[93] or prevails on a point not raised below.[94] On appeal in equity cases, costs are discretionary.[95] The costs will be taxed against a defendant

tract instead of complete performance was granted upon condition that plaintiffs pay all costs and disbursements subsequent to the service of the complaint, including those of the appeal. The amendment was made and plaintiffs recovered judgment on trial of new issue thereby raised. Held that they were entitled to the costs of a retrial but not to costs and disbursements of original trial and appeal. Rowe v. Gerry, 109 App. Div. 156, 95 N. Y. S. 859.

87. Under Bal. Ann. Codes & St. § 5413. Whitehouse v. Nelson [Wash.] 86 P. 174.

88. Under Rev. St. 1898, § 3606, providing that the provisions of the Code relative to civil actions shall be applicable to proceedings to condemn land, the rule governing the allowance and taxation of costs in civil actions must control in proceedings to condemn land. McCready v. Rio Grande Western R. Co. [Utah] 83 P. 331. The word "costs" as used in Rev. St. 1898, § 3181, authorizing plaintiff to dismiss an action on payment of costs, and in § 3190, providing that upon dismissal of an action within the jurisdiction of the court judgment for costs may be rendered, and in § 3605, declaring that in condemnation suits costs may be allowed, etc., in the discretion of the court, includes only costs that are taxable under the statute in an action or proceeding. Id.

89. Code Civ. Proc. § 2143. People v. Greene, 99 N. Y. S. 679. Where, on appeal from order of supreme court dismissing writ of certiorari obtained to review action of police commissioner removing relator from the police force, relator was granted a new trial "with costs to abide the event," held that on charges against relator being dismissed by commissioner, he was not entitled to tax costs until they were awarded to him upon the writ of certiorari, which event might never occur because they could be entirely withheld. Id.

90. People v. Greene, 99 N. Y. S. 679.

91. See 5 C. L. 850. See, also, Special Article, Costs in Circuit Court of Appeals, 3 C. L. 954.

92. On appeal in an action at law, the losing party is required by statute to pay the disbursements necessarily incurred by the prevailing party. Court has no discretion in the allowance, disallowance, or apportionment of the same. Hess v. Great Northern R. Co. [Minn.] 108 N. W. 803. On reversal of a judgment in his favor, costs will be imposed absolutely on a defendant who insisted on a misreading of his answer and in moving for judgment on a frivolous ground. Manhattan Leasing Co. v. Weill, 98 N. Y. S. 686. Judgment of supreme court decreeing that defendants in certain suit pay all costs, held to refer only to costs incurred up to its rendition, and to leave the question of future costs as between the parties open to be passed upon by the district court on determination of the issues for which case was remanded. Martel v. Jennings-Heywood Oil Syndicate, 115 La. 622, 39 So. 708.

93. When reversible error in a decree was merely clerical so that it might have been corrected on application, the reversal will be without costs. Nessler v. Industrial Land Development Co. [N. J. Err. & App.] 64 A. 109. Where only error in judgment appealed from was taxing of costs of county court against one appealing from justice court and obtaining a more favorable judgment without stating a reason therefor, contrary to the statute, held that the costs of an appeal to the court of appeals would be taxed against appellant, where judgment could have been corrected in trial court but appellant failed to point out error in motion for new trial and record did not show that trial court's attention was called to it. American Express Co. v. Adams [Tex. Civ. App.] 15 Tex. Ct. Rep. 605, 92 S. W. 1039. On an appeal from a decree granting an injunction restraining a nuisance, appellant held not entitled to costs though injunction was found to have been granted for a block farther than the nuisance was found to exist, and was modified to that extent where appellant failed to call trial court's attention to that fact. Galveston, etc., R. Co. v. Miller [Tex. Civ. App.] 15 Tex. Ct. Rep. 47, 93 S. W. 177.

94. Where surety asserted defense of limitations in supreme court for first time, held that he would not be allowed to recover costs of that court though claim against him was barred, and it was held that he would be allowed to plead that defense by amending his answer on remand of the case. Murphy v. Cady [Mich.] 13 Det. Leg. N. 412, 108 N. W. 493. Though an order enjoining the cutting down of a street and changing its condition, procured by plaintiff, is modified on appeal so as to allow completion of the work on a previously established grade, costs of appeal will be allowed neither party, defendants not having specially requested the trial court to eliminate the feature of total stoppage of work but having resisted the injunction. Hart v. Seattle [Wash.] 84 P. 640.

95. Costs of appeal in equity divided

in error where he concedes error in the judgment of the court below by offering to remit a part of it.[96] On reversal costs will be taxed against parties entering their appearance in the appellate court in support of the decree appealed from, though they took no part in procuring it below.[97] On substantial modification the appellant is usually deemed the prevailing party,[98] unless it is the result of changed conditions,[99] but the allowance or apportionment of costs in such cases is generally discretionary.[1] On dismissal, respondent is ordinarily entitled to costs.[2] The appellant may, however, in some states have the appeal dismissed without costs if none have been incurred by respondent.[3] On dismissal of an appeal by plaintiff in an action against the city by reason of the passage of an ordinance for the payment of his claim, he is entitled to the costs incurred by him up to the time when the ordinance became effective.[4] An appeal from an unappealable order will be dismissed without costs where the question of its appealability was not raised by the parties.[5] Costs may be imposed as a penalty for failure to file briefs on time.[6] Where a suit abates by the death of the appellant pending an appeal, no judgment can be rendered and each party must pay his own costs.[7] On affirmance of a final decree giving no costs in the court below, the appellate court will give the appellee his costs in both courts where there is no necessity for remanding the cause.[8]

where case is reversed and remanded because necessary party was not properly served. Bryan v. Curtis, 26 App. D. C. 95.

96. Houston & T. C. R. Co. v. Craig [Tex. Civ. App.] 92 S. W. 1033.

97. On reversal of a decree dismissing a bill on a demurrer by a part of the defendants, costs will be taxed both against the defendants entering the demurrer and other defendants who entered their appearance in the appellate court in support of the decree appealed from. Leonard v. Abner-Drury Brewing Co., 25 App. D. C. 161. On reversal of a judgment awarding substantial relief to a defendant who did not appear or take part in the trial, he will be charged with the costs of an appeal in which he appeared as a respondent and sought to retain the benefits of the judgment. McWhirter v. Bowen, 99 N. Y. S. 560.

98. Where plaintiff is given judgment for alternative relief prayed for in suit to quiet title but costs are taxed against him, and on appeal the decree of the chancery court is affirmed except as to costs and is reversed as to them, plaintiff is entitled to costs of supreme court. Bonner v. St. Francis Levee Dist. Directors [Ark.] 92 S. W. 1124. Where the judgment was affirmed except as to a modification consisting of a substantial reduction in the amount thereof, appellant was entitled to recover costs. Wheeler Co. v. Pates [Wash.] 86 P. 625.

99. Where modification in judgment is not the result of error, but of changed conditions, plaintiff in error is not entitled to recover his costs on appeal. Diefenderfer v. State [Wyo.] 83 P. 591.

1. Modification of a decree may be allowed without costs to respondents. South Side Imp. Co. v. Burson, 147 Cal. 401, 81 P. 1107. Town supervisor sued to enjoin payment of claims against town alleged to have been fraudulently audited by board of county supervisors. Court enjoined payment on ground that allowance was illegal, but found that there was no fraud and taxed costs against board. Board appealed from whole judgment, which was modified by striking out provision charging board with costs. Held that neither party was entitled to costs of appeal. Fitch v. Hay, 98 N. Y. S. 1090.

2. Appellant from an interlocutory judgment from which no appeal will lie will be required to pay all costs occasioned by such appeal. Chicago Portrait Co. v. Chicago Crayon Co., 217 Ill. 200, 75 N. E. 473. An appellant who dismisses his appeal after bringing the cause to the appellate court and causing the same to be placed on its dockets, on procuring a settlement out of court from the appellee, is the "losing party," within Burns' Ann. St. 1901, § 1337, imposing a docket fee of $10 on the losing party. Stafford v. Conwell [Ind. App.] 75 N. E. 600.

3. An appellant desiring to dismiss an appeal, may apply to the supreme court and have the appeal dismissed without costs, if no costs in the prosecution of the appeal have been incurred by respondent and no rights of his will be affected by dismissal. But if appellant does not procure a dismissal at his own costs respondent may have appeal formally dismissed and recover his costs as an incident. In re City of Seattle, 40 Wash. 450, 82 P. 740.

4. Where pending an appeal from a judgment dismissing a proceeding by mandamus to compel a city to repay to plaintiff his pro rata share of part of a special assessment levied for paving streets not necessary to pay the cost of the improvement, the city adopted an ordinance providing for the refund and the court on motion of the city dismissed the appeal. Miller v. Seattle, 41 Wash. 599, 84 P. 583.

5. In re Lowenguth's Estate, 100 N. Y. S. 422.

6. Where appellant fails to file his brief on time but subsequently files it, he will be required to pay the costs of the appeal up to the time of such filing, though appeal might be dismissed under rule 3. Louisville

§ 8. *Amount and items.*[9] *After trial.*[10]—Except where discretionary,[11] only such items as the statute allows may be taxed.[12] A term fee is allowed in some states.[13] In equity, costs for travel and attendance do not depend on the terms of court but only upon hearings, whether they be held during the term or otherwise.[14] The successful party is entitled to his necessary disbursements.[15] Among the items generally allowed are the fees and mileage of witnesses,[16] subpoenaed[17] or actually called,[18] sheriff's,[19] master's,[20] stenographer's,[21] and clerk's fees necessarily incurred,[22] the cost of taking depositions,[23] and necessary charges for the storage of

Home Tel. Co. v. Gasper [Ky.] 90 S. W. 1071.

7. Appeal from judgment of interdiction. In re Jones [La.] 41 So. 431.

8. Frum v. Fox, 58 W. Va. 334, 52 S. E. 178.

9, 10. See 5 C. L. 851.

11. Where the right to costs is in discretion, the items allowable are likewise discretionary. Equity. Allan v. Allan [Me.] 63 A. 654.

12. State v. Wilder [Mo.] 94 S. W. 499.

13. Term fee held improperly taxed for term at which case was not tried because not at issue, plaintiff having served an amended complaint after notice of trial, it not appearing in the proof before the clerk that plaintiff noticed the cause for trial. Fuller Buggy Co. v. Waldron, 97 N. Y. S. 730. Costs held to have been taxed as costs of new trial, and cause to have been on calendar for one term only, so that it was error to tax $30 for three term fees. Koeppel v. Koeppel, 99 N. Y. S. 872.

14. Allan v. Allan [Me.] 63 A. 654.

15. Disbursements for personally serving the answer, amended answer, and an order on the opposing attorney, will not be allowed in the absence of a showing of any peculiar necessity for personal service. Fuller Buggy Co. v. Waldron, 97 N. Y. S. 730.

16. If attendance of witnesses be procured in good faith for the purpose of giving testimony upon questions that might come in issue under the pleadings and not for the purpose of "swelling the bill of costs," their fees are taxable, even though the testimony offered is held by the court to be immaterial or inadmissible. Merchants' State Bank v. St. Anthony & D. Elev. Co. [Minn.] 104 N. W. 713. Under Rev. St. 1887, § 6039, a party in whose favor a judgment is recovered is entitled to have costs taxed for mileage of a witness who resides in an adjoining county and more than 30 miles from place of trial, although under the statute the witness had a right to disobey the subpoena. Anderson v. Ferguson-Bach Sheep Co. [Idaho] 86 P. 41. The wife of a litigant is entitled to mileage and per diem the same as any other witness would be for travel and attendance. Id. Under a statute providing that only two witnesses as to one and the same fact shall be entitled to witness fees, the burden is on the party complaining of the taxation of such fees as costs to show that the witnesses subpoenaed and in attendance were for the purpose of testifying to the same facts. Wallis & Co. v. Wallace [Tex. Civ. App.] 92 S. W. 43.

17. Under Code §§ 4661, 3862, 3853, requiring the allowance of the prevailing party's witnesses to be taxed against the losing party, the allowance of witnesses who attended in response to a subpoena, though they did not testify. Parsons Band Cutter & Shelf Feeder Co. v. Sciscoe [Iowa] 106 N. W. 164. Witness' fees may be taxed for the attendance of party to the action if he is subpoenaed, but not otherwise. Fuller Buggy Co. v. Waldron, 97 N. Y. S. 730. Since he may have attended as a party and not as a witness, the contrary not appearing. Id.

18. Guardian should not be charged with witness' fees of persons making repairs who were summoned by one excepting to his account on ground that such repairs were not necessary, where it was admitted that repairs were made, and witnesses were not called, but such fees should be paid by exceptants. Savage's Estate, 27 Pa. Super. Ct. 292. Under Code Civ. Proc. §§ 3304, 3342, a witness who attends the trial is entitled to mileage and costs and may be taxed for the same, although under the statute his deposition might have been taken. Great Falls Meat Co. v. Jenkins [Mont.] 84 P. 74.

19. Pub. St. 1901, c. 289, § 16, designating certain services of a sheriff for which specific costs may be taxed, does not preclude the allowance as taxable costs of reasonable compensation for other services or expenses attending the legal execution of his precept. Kivel v. Murray Cone Shoe Co. [N. H.] 63 A. 673.

20. Held that action of chancellor in taxing against losing party the master's fees in earlier hearing resulting in a decree which was reversed on appeal was not an abuse of discretion where master's service consisted largely in the taking of evidence which was used upon the subsequent hearing. Miller v. Calumet Lumber & Mfg. Co., 121 Ill. App. 56. Allowance of fee to master for examining questions submitted to him in foreclosure suit and reporting his conclusions thereon, held proper. Touhy v. McCagg, 121 Ill. App. 93.

21. There being nothing to show that stenographer's minutes taken on first trial, when the jury were discharged, were ordered for use at the subsequent trial, or that they were there used by plaintiff, held that they were not a necessary disbursement. Grant v. Pratt, 110 App. Div. 149, 97 N. Y. S. 38.

22. An item for clerk's fees for filing defendant's notice of motion to dismiss the action is properly stricken out of defendant's cost bill as having been unnecessarily incurred, the notice having been filed after defendant had dismissed the action, as might have been ascertained by an examination of the clerk's register. Gaffey v. Mann [Cal. App.] 84 P. 424.

23. An expenditure for depositions forms

goods levied on.[24] Expenses of surveying the land are allowed in some states in actions for damages for unlawfully cutting timber.[25] In Wisconsin a party may tax costs for the drawing of findings when directed to do so by the trial judge,[26] but no costs will be allowed where the findings as drawn fail to conform to the direction and decision of the trial court.[27]

Attorney's fees cannot ordinarily be allowed unless the statute,[28] or the contract

no part of the damages as such, but should be allowed in the cost bill. Nicholls v. Mapes [Cal. App.] 82 P. 265.

24. A charge for the necessary storage of corn, levied on by the sheriff under a distress warrant, during the pendency of the case, is properly taxed as costs. Coates v. Hill, 120 Ill. App. 1. What is a necessary and proper charge is to be determined by the court. Id.

25. Under § 2922, Rev. St. Wis. 1898, providing that in actions brought for damages for cutting timber on land of another that when the amount recovered exceeds $50 the plaintiff shall recover full costs, including therein "any actual reasonable expense of one surveyor and the ascertainment of the quantity of timber so cut," etc., the allowance by the clerk to plaintiff of $100 only for surveying expenses was proper when three competent woodsmen testified that a survey could be made for that amount. Dunbar v. Montreal River Lumber Co. [Wis.] 106 N. W. 389.

26. Responsibility for correctness of findings is placed on judge by statute, and practice of allowing attorneys to draw them is not commendable. Fish Co. v. Young [Wis.] 106 N. W. 795.

27. In such case are not "necessary" papers or proceedings in a cause. Fish Co. v. Young [Wis.] 106 N. W. 795.

28. Unless statute so provides, cannot be taxed either at law or in equity. Hering v. Simon [Neb.] 108 N. W. 154. There is no statutory authority in Nebraska for the taxing of attorney's fees as costs against the successful litigant in any case. Id. Under Libel and Slander Act, St. 1871-72, p. 533, c. 377, § 6, providing that if plaintiff's bond for costs be not filed within five days after the order therefor the action shall be dismissed, and § 7 (page 534), providing that if the action is dismissed defendant shall be allowed $100 to cover counsel fees in addition to other costs, the right to counsel fees obtains, not in case of a dismissal for failure to file a bond for costs, but where the dismissal is had under Code Civ. Proc. § 581, for failure to issue the summons within a year from the filing of the complaint. Gaffey v. Mann [Cal. App.] 84 P. 424. In a proceeding to condemn land for an irrigating ditch, plaintiff, in the absence of statute, cannot be compelled to pay defendant's attorney fees. Schneider v. Schneider [Colo.] 86 P. 347. Code D. C. § 473, providing for the allowance of a reasonable counsel fee in garnishment proceedings against an alleged fraudulent assignee or transferee, when an issue as to the validity of the transfer is found in his favor, is valid. Morimura v. Samaha, 25 App. D. C. 189. What is a reasonable fee is within discretion of trial court, and exercise of discretion will not be reviewed unless palpably abused. Id. R. S. c. 33, §§ 10, 18, do not authorize attorney's fees to be taxed except when statute so provides. Bortree v. Macon, 121 Ill. App. 111. Allowance of solicitor's fee on overruling demurrer to bill for foreclosure of trust deed, held error. Id. Where neither the will nor statute provides for the allowance of solicitor's fees a court of chancery in the exercise of its equitable jurisdiction cannot tax, as part of the costs in the case, the allowance of a reasonable solicitor's fee to the complainant's solicitor who brought and prosecuted the suit, where it also appears that the complainant was not a trustee but simply a beneficiary under the will in question. Clayburgh v. Wilson, 118 Ill. App. 193. The taxation of complainant's solicitor's fees as costs in a partition suit is improper, where the allegations of the bill are not all sustained by the proof, and a substantial and successful defense has been interposed by one of the defendants. Berger v. Neville, 117 Ill. App. 72. Decree requiring payment out of proceeds of sale held improper. Id. Solicitor's fees of the complainant are properly apportioned among parties to a partition proceeding where there was no substantial defense interposed, and the examination and approval by defendant's counsel of the various steps taken in the cause, together with the interrogatories of the widow concerning her dower right, none of which were in hostility to the relief sought, does not constitute such a defense. Searl v. Searl, 122 Ill. App. 129. Solicitor's fees will not be allowed in a suit to foreclose a trust deed where the trustee, or a member of the law firm to which he belongs, acts as complainant's solicitor. Touhy v. McCagg, 121 Ill. App. 93. Action by wife to enforce contract whereby husband agreed that, in consideration of her dismissing a divorce suit previously instituted against him and for the settlement of the differences between them, she should receive a certain sum monthly out of his estate in full of her right of dower and for her support and that of the children if she should thereafter leave him for good cause, held an action on contract, and not one for divorce or alimony, so that she was not entitled to attorney's fees. Woodruff v. Woodruff [Ky.] 91 S. E. 265. Rev. Chancery Act 1902, § 91, authorizing an allowance of counsel fees to complainants in equity cases, is not invalid because it gives the court power to impose a counsel fee on one class of litigants and not on another, and because it leaves the amount of the counsel fee to the discretion of the chancellor. Buttlar v. Buttlar [N. J. Err. & App.] 64 A. 110. Testimony given before an examiner may be treated as a deposition within meaning of U. S. Rev. St. § 824, providing for solicitors' fees. State of Missouri v. Illinois, 202 U. S. 598, 50 Law. Ed.

sued on,[29] so provides. They are allowed in some states as a penalty in cases of stubborn litigiousness,[30] or where a party acts in bad faith.[31] In partition proceedings, where such proceedings are adversary, counsel fees may not be taxed against the entire estate.[32] The provisions of the bankruptcy act for the allowance of costs, counsel fees, expenses, and damages to the respondent on dismissal of an involuntary petition, apply only to cases where an application to seize and hold the property of the alleged bankrupt pending the hearing was granted and a bond given as provided by the act.[33] Where no seizure of the property of the alleged bankrupt was made, and no bond ordered or given, the fact that a temporary injunction was granted restraining the sale of the debtor's goods pending the proceedings, under the general equity powers of the court, does not justify an allowance for counsel fees and expenses on a dismissal of the petition.[34]

Interlocutory proceedings.[35]—As a general rule, on the affirmance of an order sustaining a demurrer, the appellant is only entitled to the costs of the appeal.[36] In Alabama one succeeding on a special plea is only entitled to costs subsequent to its filing.[37] In New York where a demurrer to an entire complaint in a common law action is sustained with leave to amend, the defendant, on entering the interlocutory judgment, is entitled to tax full costs to that time as a matter of right,[38] and the same is true of the successful party on a motion for a new trial made on the case made and settled.[39] In Missouri if a third petition, answer, or reply is filed and adjudged insufficient, or the whole or some part thereof is stricken out, the party filing it must pay treble costs.[40] In Iowa if an action is brought in the wrong

29. A solicitor's fee in a foreclosure proceeding cannot be included in the costs unless it is authorized by the contract of the parties. Johnson v. Clegg, 121 Ill. App. 550. Where deed of trust provides for allowance of percentage of principal as solicitor's fee, but amount of percentage is left blank, it is equivalent to no provision, and specific provision having failed, fees cannot be allowed under general provision for all expenses. Id. Where a note and mortgage given by a debtor to secure his creditor includes items of solicitor's fees incurred by the creditor in the prosecution of his claim and an item of interest on an open account, such solicitor's fees and interest should be allowed to the creditor on foreclosure of the mortgage. Pitzele v. Cohn, 217 Ill. 30, 75 N. E. 392. Where an infant, not made a party to a foreclosure suit, brought an action for possession and partition alleging ownership of an undivided interest in the premises and the mortgagee in possession set up his mortgage in defense and asked for a judgment of foreclosure of the same, he was entitled to a reasonable allowance for attorney's fees as provided by the mortgage, upon the entry of judgment foreclosing the same. Gravelle v. Canadian & American Mortg. & Trust Co. [Wash.] 85 P. 36.

30. Mere failure of a railroad company to settle a claim for damages, even after the party holding it has been invited to discuss the matter of settlement, is not stubborn litigiousness, rendering the company liable for attorney's fees in an action brought on the claim. Macon, etc., R. Co. v. Stewart [Ga.] 54 S. E. 197. Evidence held not to authorize jury to find attorney's fees against defendant. Id.

31. Bad faith of defendant held not proven so that judgment would not be amended on appeal to allow attorney's fees. Richards v. Perrodin [La.] 40 So. 789.

32. Fiscus v. Wilson [Neb.] 104 N. W. 856.

33. 30 St. L. 547, § 3e, 1 Fed. St. Ann. 545, construed. In re Hines, 144 F. 147.

34. Where pending the sale of debtor's stock of goods under execution, certain creditors filed a petition in bankruptcy against him, and obtained an injunction restraining the sale of goods pending adjudication, which was subsequently denied, the alleged bankrupt was not entitled to recover on the injunction bond either attorney's or keeper's fees, damages or expenses for attending court, but could recover only a docket or attorney's fee of $20, under Chancery rule 34, and costs of taking certain depositions. In re Hines, 144 F. 147.

35. See 5 C. L. 852.

36. When an appeal is prosecuted from a judgment on an order sustaining a demurrer to the complaint. Hill v. Standard Min. Co. [Idaho] 85 P. 907.

37. Where court overruled demurrer to plea "since the last continuance," and plaintiff declined to plead further, held that all costs accruing in the case prior to the filing of the plea since the last continuance should have been adjudged against the defendant. McCoy v. Louisville & N. R. Co. [Ala.] 40 So. 106.

38. Code Civ. Proc. § 3232, construed. De Turckheim v. Thomas, 99 N. Y. S. 104. Court has no discretion in the matter. Id. May include costs after notice of trial and before trial. Id. If leave to amend is not accepted, would, on entering final judgment, only be entitled to tax costs of so doing. Id.

39. Printed case held to show that mo-

county and defendant demands a change to the proper one, the court may award him a reasonable compensation for his trouble and expense in attending at the wrong county.[41] The amount to be allowed is largely within the discretion of the trial court.[42]

Extra allowances.[43]—Statutes in some states authorize the trial court, in its discretion, to award an extra allowance of costs to the prevailing party[44] in difficult and extraordinary cases,[45] which is usually based on the amount recovered or claimed, or the value of the subject-matter involved.[46] No allowance will be made in special proceedings.[47]

On appeal or error.[48]—Disbursements necessarily made to secure a review of a case are a part of the costs necessarily incurred.[49] No items except those provided for by statute may be taxed.[50] Among those generally included are the cost of preparing, certifying, and sending up the record,[51] and the fees of the clerk of the ap-

tion was made upon the case. Koeppel v. Koeppel, 98 N. Y. S. 215.

40. Rev. St. 1899, § 623. Sidway v. Missouri Land & Live Stock Co. [Mo.] 94 S. W. 855. It is not necessary that the judgment of insufficiency be in the trial court, but pleading is "adjudged insufficient" within the meaning of this section where supreme court upon appeal from judgment holds that petition was insufficient and that the order overruling a motion to strike it was erroneous, and reverses and remands the case. Id. In such case it is immaterial that, upon the remanding of the case, the trial court fails to make a formal entry sustaining the motion to strike, where, upon the filing of the mandate and copy of the opinion in the trial court, the plaintiff filed an amended petition. Id.

41. Code, § 3504. Moyers v. Council Bluffs Nursery Co. [Iowa] 107 N. W. 924. Statute contemplates only that defendant shall recover for his trouble and expense in moving for change of venue, and not that he shall recover compensation for time, trouble, and expense in defending case on its merits when change of venue is denied, or of an appeal, though judgment is reversed on ground that change should have been granted. Id.

42. Allowance held proper. Moyers v. Council Bluffs Nursery Co. [Iowa] 107 N. W. 924.

43. See 5 C. L. 852.

44. Where amount sued for was $48,200, and complaint was dismissed, defendant's right to an allowance was not affected by the fact that referee should have awarded plaintiff judgment for $35, where defendant would still have been entitled to full costs. American Fruit Product Co. v. Ward, 99 N. Y. S. 717.

45. Code Civ. Proc. § 3253. Statute to be strictly construed, and case must be both difficult and extraordinary. Frey v. New York, etc., R. Co., 100 N. Y. S. 229. Allowance does not depend upon whether difficult questions of law are involved, but case may be difficult and extraordinary because of questions of fact involved. Allowance held proper. American Fruit Product Co. v. Ward, 99 N. Y. S. 717. In an action to foreclose a mortgage, the burden is on a plaintiff claiming an extra allowance in excess of $200 to show that the action is difficult and extraordinary. Code Civ. Proc. § 3253, construed. Riesgo v. Glengariffe Realty Co., 99 N. Y. S. 592.

Allowed: In action insolving right of plaintiffs to have unobstructed flow of stream. Henderson Estate Co. v. Carroll Elec. Co., 99 N. Y. S. 365.

Not allowed: In action of negligence which is neither difficult nor extraordinary, though close questions are presented for determination. Walker v. Newton Falls Paper Co., 97 N. Y. S. 521. In action for death due to negligence of driver of wagon belonging to club while carrying deceased to clubhouse. Beecroft v. New York Athletic Club of New York, 97 N. Y. S. 831. In action by shipper against carrier for damages for failure to properly transport fruit. Frey v. New York, etc., R. Co., 100 N. Y. S. 229. In action by brokers for commissions where only question was liability of defendant for commissions on goods sold by plaintiffs during the continuation of contract between them and defendant, but not delivered until after its termination. Brown v. Retsof Min. Co., 109 App. Div. 150, 95 N. Y. S. 815. Where all that had been done by defendant in action by city to enjoin placing of material which was not fire proof in a building was to interpose an answer, move to vacate a temporary injunction, and argue an appeal from an order denying the motion. City of New York v. Stewart Realty Co., 98 N. Y. S. 889.

46. No extra allowance can be made on discontinuance of the case where no facts are stated from which court can determine value of subject-matter. City of New York v. Stewart Realty Co., 98 N. Y. S. 889. Value of subject-matter involved held sufficiently proven to warrant allowance. Henderson Estate Co. v. Carroll Elec. Co., 99 N. Y. S. 365.

47. Code Civ. Proc. § 3240, allowing the granting of costs in a special proceeding, does not permit the granting of an extra allowance. In re Mankowski, 49 Misc. 606, 99 N. Y. S. 1058.

48. See 5 C. L. 853.

49. Montana Ore Purchasing Co. v. Boston & M. Consol. C. & S. Min. Co. [Mont.] 84 P. 706.

50. Hess v. Great Northern R. Co. [Minn.] 108 N. W. 803. Items for express charges disallowed, there being no provision in the statute or rules for their recovery. Clark v. Eltinge, 39 Wash. 696, 83 P. 901.

pellate court.[52] A party is also entitled to tax costs necessarily incurred in printing the record[53] and briefs,[54] but charges for preparing[55] or printing matter not necessary to a determination of the case,[56] or for printing unauthorized briefs,[57] will not be

51. Where the parties do not agree as to the correctness of a bill of exceptions taken down by a reporter employed by one of the parties, the trial judge may order a transcript of the official reporter's notes to be made and tax the charge therefor as costs. People v. Chetlain, 219 Ill. 248, 76 N. E. 364. Clerk of district court is entitled to 10 cents per folio for typewritten transcript filed with clerk of supreme court, but where it is made up of copies of the evidence obtained from the stenographer, and of the pleadings and findings prepared by a copyist employed by defendant, he is not entitled to charge anything except for comparing the copy with the original and for his certificate. Pol. Code § 4636. Items held excessive. Montana Ore Purchasing Co. v. Boston & M. Consol. C. & S. Min. Co. [Mont.] 84 P. 706. Under rules of supreme court of Nevada providing that the expense of printed transcripts on appeal in civil cases, and papers constituting the record in original proceedings to be printed, shall be allowed as costs, the reporter's fee for transcribing notes or the record on appeal and the cost of typewriting briefs are properly taxable to the successful party. Brandon v. West [Nev.] 83 P. 327. Gen. Laws 1903, p. 85, does not contemplate that stenographer's fee for transcript of evidence shall be taxed as costs, but it must be paid for by party demanding it. Flory v. San Antonio Traction Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 772, 89 S. W. 278. Expense of obtaining transcript, where defendant obtained order requiring it to be filed on ground that plaintiff's statement of facts was defective, and that plaintiff refused to furnish transcript, and that defendant was unable to make a correct statement without it. Id. Under Bal. Ann. Codes & St. § 6528, prevailing party held entitled to tax ten cents a folio for stenographer's fees for making transcript of oral testimony of witnesses, but not for copies of documents received as exhibits and filed in the case. Clark v. Eltinge, 39 Wash. 696, 83 P. 901. Where it does not appear from the cost bill or the affidavit thereto that the amount therein charged for the transcript constituted the clerk's fees for preparing, certifying and sending up the record, only 5 cents per folio will be allowed therefor. Bal. Ann. Codes & St. § 6528, supreme court rule 14. Id. Under Rev. St. 1899, § 4266, providing that when a judgment is reversed the plaintiff in error is entitled to recover his costs, and there shall be taxed as part of the costs the cost of making the transcript of evidence in the case, when the evidence in the action was taken before a commissioner and he transcribed all the evidence, and costs were taxed therefor in the court below and no further transcript was made, plaintiff in error was not entitled to costs for making the transcript. Lewis v. England [Wyo.] 85 P. 1049. Plaintiff held entitled to cost of procuring copy of stenographer's minutes for purpose of preparing amendments to the case on appeal, though copy was obtained before decision was rendered and before briefs were submitted, and was used by counsel in preparing his brief. Bremer v. Manhattan R. Co., 99 N. Y. S. 746. Respondent is entitled to cost of procuring stenographer's minutes to enable him to propose amendments to appellants' proposed case, though he never requested appellants to loan him their copies or prepare amendments. Starkweather v. Sundstrom, 98 N. Y. S. 1086. Case held not to have exceeded 50 folios so that it was error to tax $10 on ground that it did. Koeppel v. Koeppel, 99 N. Y. S. 872. Under Code Civ. Proc. § 1866, a party may tax costs for copies of stenographer's notes of the testimony actually and necessarily used in the preparation of bills of exceptions, though they were ordered during the trial and prior to a final decision. Montana Ore Purchasing Co. v. Boston & M. Consol. C. & S. Min. Co. [Mont.] 84 P. 706. Legal fee for such copies is 5 cents per folio when they are verbatim transcripts. Code Civ. Proc. § 373. Id.

52. Fees of clerk of supreme court at rate of 15 cents per folio for copy of opinion on appeal attached to remittitur, held taxable as costs. Pol. Code §§ 872, 873, and supreme court rule 19. Montana Ore Purchasing Co. v. Boston & M. Consol. C. & S. Min. Co. [Mont.] 84 P. 706.

53. Amount paid for cuts used in transcript, properly disallowed. Montana Ore Purchasing Co. v. Boston & M. Consol. C. & S. Min. Co. [Mont.] 84 P. 706. Where transcript is printed under contract, contract price alone can be charged. Id.

54. Under Bal. Ann. Codes & St. § 6528, affidavit to cost bill must show that amount charged for printing briefs was necessarily paid for that purpose, and if it does not, 75 cents per page will be allowed, as provided by supreme court rule 14, when no cost bill is filed and served. Clark v. Eltinge, 39 Wash. 696, 83 P. 901.

55. Where on appeal no error was found in the main judgment, the only error being an order made after trial refusing to retax costs, and transcript contained much unnecessary matter, held that only so much of the cost of the transcript would be assessed against appellee as court deemed would have been sufficient to have brought up such order for review. Wall v. Melton [Tex. Civ. App.] 16 Tex. Ct. Rep. 112, 94 S. W. 358. A party should not be allowed for unnecessary matter in an abstract, under supreme court rule 12, requiring preservation in abstract of everything material to the case and the omission of everything else. McVay v. Tousley [S. D.] 107 N. W. 828.

56. Cannot recover for printing unnecessary matter in transcript. In re Pease's Estate [Cal.] 85 P. 149. The cost of printing an unnecessary additional abstract filed by appellee and of appellant's denial of the same, and the cost of certifying the record in such case, will be taxed to appellee, although the judgment is affirmed. Blumenthal v. Union Elec. Co. [Iowa] 105 N. W. 588. Items for printing record and brief cut down. Merritt Tp. v. Harp [Mich.] 13 Det.

allowed, the appellate court being the sole judge of what is necessary.[58] Where appeals by several parties are dismissed on motion of the respondent for abandonment, he is entitled to only one bill of costs, including one statutory attorney fee.[59] In many states the court is authorized to award a penalty by way of damages for needless or frivolous appeals.[60] Where both parties appeal and the order of the

Leg. N. 487, 108 N. W. 746. Where a party causes unnecessary parts of the record to be printed, the supreme court will, on motion, make a special order in regard to the payment of the costs of such printing and refuse to allow the party causing such unnecessary matter to be printed to tax the same as costs, though he be the prevailing party. Wisner v. Field [N. D.] 106 N. W. 38. In case of duplication or failure to properly abridge the record, the court may limit appellant's taxation of costs. St. Paul Boom Co. v. Kemp, 125 Wis. 138, 103 N. W. 259. Order requiring defendant husband in divorce suit to pay certain sum for printing record on wife's appeal should have required him to pay cost of printing such record when the amount should be ascertained and the record printed, fact that the cost of printing all the record would be the specified sum not justifying a presumption that such sum would be necessary to print case as finally settled by trial court. Sternberger v. Sternberger, 98 N. Y. S. 946. Plaintiff held not entitled to costs for making case and exceptions on appeal from order granting a new trial, where all he did was to print the papers enumerated in the order appealed from, which included the case and exceptions already made by defendants. Koeppel v. Koeppel, 99 N. Y. S. 872. Under Laws 1905, p. 589, c. 365, § 1, limiting the amount to be allowed for printing on appeal to 150 pages, where appellant's case contained more than that number of pages the infraction of supreme court rule 9 (59 N. W. v.), prohibiting the reprinting of evidence in the brief, was immaterial. More v. Milwaukee Monument Co., 126 Wis. 41, 104 N. W. 1013. Where appellee printed an argument consisting of 156 pages, and 120 pages were largely made up of a reprint of the abstract of testimony of witnesses in the case, the cost of printing that part of the brief will be taxed to him. Steele v. Crabtree [Iowa] 106 N. W. 753.

57. The printing of an unauthorized brief will be taxed against the party filing the same. Anundsen v. Standard Printing Co. [Iowa] 105 N. W. 424.

58. On appeal from clerk's taxation of costs of printing alleged unnecessary matter, the appellate court will exercise its independent judgment as to what the record should contain to present a case for review. District court has no power to say that any part of transcript should have been omitted as unnecessary, the supreme court being the exclusive judge, within the limitations of the statute, as to what the record should contain. Montana Ore Purchasing Co. v. Boston & M. Consol. C. & S. Min. Co. [Mont.] 84 P. 706. Lower court has no right to disallow an item charged for a supplemental brief filed after the appeal was argued and submitted, the supreme court being the judge as to its necessity. Objections must be made in supreme court. Id. Where no application is made for the elimination of unnecessary matter from the abstract, the clerk has no authority to reduce the amount claimed therefor on the ground that it contains unnecessary matter, but it is the duty of the appellate court on appeal from the taxation of costs to determine what, if any, portion is unnecessary or improper. McVay v. Tousley [N. D.] 107 N. W. 828.

59. Where many parties owning separate and distinct parcels of land merely give notice of appeal from an order confirming an assessment roll and a bond. In re Seattle, 40 Wash. 450, 82 P. 740.

60. Hebert v. Hebert [S. D.] 104 N. W. 911. Where in an action on a note defendant appealed from a judgment in plaintiff's favor, but confessed the appeal was without merit, plaintiff having been deprived of the amount of his judgment for upwards of two years, and caused expenses for costs, attorney's fees, and printing a brief, was entitled to an affirmance with damages. Goff v. Healey [Cal. App.] 83 P. 89. Code 1892, § 4360, providing for 5 per cent damages on affirmance in certain cases, applies as well to actions arising ex contractu as to actions ex delicto. Howie Bros. v. Bonds [Miss.] 40 So. 227. Can be allowed only when there is an unconditional affirmance, and not when affirmance is conditioned on entering a remittitur, Id. Judgment affirmed with 10 per cent damages where plaintiff in error failed to file brief or to bring up statement of facts in the record, and charge complained of appeared to be applicable to his pleadings. Granberry v. Mussman [Tex. Civ. App.] 90 S. W. 533. Held that it appeared from record that writ of error was sued out for purpose of delay and without sufficient cause, and judgment affirmed with 10 per cent damages. Ellis v. National City Bank [Tex. Civ. App.] 14 Tex. Ct. Rep. 892, 94 S. W. 437. Judgment was excessive owing to an error in calculation, and defendant filed petition and supersedeas bond for writ of error. After citation was had, but before transcript was taken out, judgment was corrected in lower court on motion of plaintiff, of which defendant had notice. Transcript was then procured and brought to appellate court and writ of error prosecuted. Held that plaintiff was entitled to an affirmance with damages. Blain v. Park Bank & Trust Co. [Tex. Civ. App.] 94 S. W. 1091. Under Hurd's Rev. St. 1897, c. 33, § 23, giving the supreme court power on affirmance of an appeal prosecuted for delay to award damages to appellee, and § 10, providing that the practice in appellate courts shall be the same so far as applicable as that in the supreme court, the appellate court has power to assess damages when an appeal is prosecuted for delay, and the supreme court will not review the exercise of this power in absence of any showing that it has been abused. McCarthy v.

trial court is affirmed on both appeals, no part of the expense rendered necessary solely and only by reason of the appeal of one party can be charged against the other.[61]

§ 9. *Procedure to tax costs; correction and review.*[62]—The court is not required to embody in its decree the amount or the particular items of cost, but the rule is to pronounce a general judgment in favor of one or the other of the litigants and to leave their taxation to the clerk, and when the costs are legally taxed and the amount ascertained, the judgment for costs is a judgment for that amount.[63] Costs are usually taxed on motion, or by application on notice,[64] within a specified time after judgment is rendered,[65] the other party being given a specified time within which to file objections.[66] A verified cost bill is required in some states.[67] The burden of proof is upon parties filing exceptions to cost bills with the clerk of the supreme court.[68] The Tennessee statute requiring costs against a county to be certified to by the judge or district attorney, or the attorney general, applies only to

Alphons Custodis Chimney Const. Co., 219 Ill. 616, 76 N. E. 850.

61. Where expense of printing record and causing proper returns to be made, in case in which both parties appealed, was rendered necessary solely and only by reason of defendant's appeal, and its appeal could not have been heard otherwise, held that no part of it could be taxed against plaintiff, and it was error for clerk to require each party to pay half of it. Hess v. Great Northern R. Co. [Minn.] 108 N. W. 803. Fact that plaintiff was permitted to submit his appeal on defendant's printed record held immaterial, there being no statutory provision for a division of the expense of printing the same in such case, and this was particularly true where a full record was not necessary to the presentation of plaintiff's appeal. Id.

62. See 5 C. L. 854.

63. State v. Alexander, 115 Tenn. 156, 90 S. W. 20. Failure of decree for costs in proceedings to recover taxes improperly assessed to recite that it was pronounced in favor of the clerk and master, and its omission to specify in detail the items of cost and their apportionment between the state and county, held not to vitiate the decree. Id. Where defendant is adjudged entitled to treble costs under Rev. St. 1899, § 623, on third petition being adjudged insufficient, judgment need not contain itemized statement of such costs. Sidway v. Missouri Land & Live Stock Co. [Mo.] 94 S. W. 855.

64. A party against whom costs are to be taxed is entitled to notice of the taxation of the same, and any statute providing for taxation without notice would violate the constitutional provisions in depriving one of property without due process of law. State v. District Ct. [Mont.] 85 P. 367. Code Civ. Proc. § 1867, points out the mode to be pursued for the enforcement of costs in original proceedings and provides that a memorandum of the items of costs shall be served on the adverse party. Section 1869 provides that, whenever costs are awarded to a party by an appellate court, if he claims such costs, he must within a certain time deliver to the clerk below a memorandum of his costs verified, as provided by Sec. 1867, and thereafter he may have execution therefor. No provision in the latter section is made for notice to the adverse party. Held that the provisions for notice in former section are applicable to proceedings under the latter. Id.

65. Fact that costs were taxed more than five days after day when judgment was rendered in municipal court held not an irregularity, since Laws 1902, p. 1589, c. 580, §§ 341, 342, contemplate that the judgment is not complete until the costs are inserted, and no limit of time is fixed for the taxation after judgment is "rendered." Allen v. Wells, Fargo & Co., 95 N. Y. S. 597. Review provided for by § 342, within five days after "entry" of judgment, may be had within that period when computed from time when "entry" is completed by the insertion of costs. Id.

66. Under Sess. Laws 1903, p. 209, has five days after the filing of the statement of costs to file his objections thereto. Basim v. Wade [Or.] 84 P. 387.

67. Under Supreme Court rule 6, a party desiring to recover costs on appeal for printing transcript, affidavits, etc., must file with the clerk and serve on the opposite party a verified cost bill, but the other costs, including costs in the lower court, may be taxed without a bill of costs, according to the fee bill. Candler v. Washoe Lake Reservoir & Galena Creek Ditch Co. [Nev.] 82 P. 458. The affidavit of counsel for defendant in a slander suit to the cost bill, supported by evidence that he had served on plaintiff's attorney, the day before plaintiff dismissed the action, a notice of motion to dismiss, in the absence of evidence to the contrary, proves the incurring of the expense for counsel fees. Gaffey v. Mann [Cal. App.] 84 P. 424. Where the affidavit to a bill of costs, taxed without notice to the opposite party, is not made by the party or his attorney, or some person having such relation to the case that it may be presumed that he had knowledge of the essential facts, it must affirmatively show the source of the knowledge of the affiant in order to cast on the exceptant the burden of proving its inaccuracy. Hartley v. Weideman, 28 Pa. Super. Ct. 50.

68. Clark v. Eltinge, 39 Wash. 696, 83 P. 901. An exception to the transcript as containing irrelevant, redundant, and immaterial matter, not necessary nor used by the court in determining the issues, will be overruled where the matter is not pointed out. Clerk will not go over entire case to find it. Id.

costs in criminal cases.[69] The costs and expenses of maintaining sequestration should not be taxed until the respective liability of the parties therefor has been determined.[70] The taxation of costs is in the nature of an adjudication, which, though it be the immediate act of the officer, is in contemplation of law the act of the court,[71] and an officer who has settled with the county upon the basis of a taxation procured or assented to by him is precluded from maintaining an action in another court for a larger sum.[72]

The remedy to review a taxation by the clerk is by motion to retax,[73] made on notice to the adverse party.[74] The function of the court in reviewing the taxation of costs by the clerk is not to try the question de novo but simply to examine his conclusions,[75] and only such objections as have been presented to the clerk can be considered.[76] Failure to assert the total invalidity of the taxation before the taxing officer does not, however, preclude a subsequent motion to vacate it.[77]

As a general rule, in a chancery case, no appeal lies from a decree for such costs as are in the discretion of the chancellor,[78] but a decree for costs not discretionary is appealable if the jurisdictional amount is involved.[79] Where an appeal lies, the usual rules as to parties entitled to appeal apply.[80] The amount claimed in the complaint, and not the amount of costs claimed, governs the question of jurisdiction.[81]

An appellate court will not review a taxation of costs by the lower court where

69. Shannon's Code, § 672, and Acts 1897, p. 155, c. 29, § 1, do not require certification of costs against county in suit to recover taxes improperly assessed. State v. Alexander, 115 Tenn. 156, 90 S. W. 20.

70. Application for writ of mandamus to compel taxation of costs and expenses to be incurred by sheriff in maintaining sequestration, pending an accounting between the parties, held premature before an accounting had been had between the parties and their respective liability for such costs and expenses determined. Martel v. Jennings-Heywood Oil Syndicate, 115 La. 622, 39 So. 708.

71. Kottcamp v. York County, 28 Pa. Super. Ct. 100.

72. Constable who has been paid for serving subpoenas on basis of bills made out and sworn to by him, and regularly taxed by clerk of quarter sessions court, in cases in which fees were earned, cannot sue county in common pleas for larger sum. Kottcamp v. York County, 28 Pa. Super. Ct. 100.

73. If on the taxation of costs pursuant to a judgment items are included to which the party in whose favor they are taxed is not entitled, the remedy of the other party is by motion to retax, the action of the court on such motion being reviewable by appeal. Taxation of treble costs under Rev. St. 1899, § 623, where third petition is adjudged insufficient. Sidway v. Missouri Land & Live Stock Co. [Mo.] 94 S. W. 855. Appeal from judgment reciting that defendant recover treble costs held not to bring up objection that items not contemplated by statute were included therein. Id. The remedy in case the clerk of the municipal court refuses to include any costs in the judgment is by application to a justice for a review of the taxation, and mandamus to compel him to include them will not lie. Refusal is a taxation within meaning of Municipal Court Act § 342, providing for review. People v. Lang, 109 App. Div. 706, 96 N. Y. S. 555. Before relief can be had under Code 1896, § 1344, providing for retaxation of costs on motion of the aggrieved party if taxation is excessive, it must appear that the costs complained of have been actually taxed against the movant. James v. Vickers [Ala.] 40 So. 657. It is not enough that judgment has been rendered for costs, but it must appear that they have been improperly taxed. Id.

74. Notice of a motion to retax costs need only be given to the adverse party or parties. No exception to this rule in case of motion to retax the costs as to witness fees, and witnesses need not be notified. Wall v. Melton [Tex. Civ. App.] 16 Tex. Ct. Rep. 112, 94 S. W. 358.

75. Dunbar v. Montreal River Lumber Co. [Wis.] 106 N. W. 389.

76. Patterson v. Calhoun Circuit Judge [Mich.] 13 Det. Leg. N. 269, 108 N. W. 351.

77. Question is one for the court and not for the clerk. Hill v. Kahn, 98 N. Y. S. 682.

78. Nutter v. Brown, 58 W. Va. 237, 52 S. E. 88.

79. If amount is in excess of $100. Nutter v. Brown, 58 W. Va. 237, 52 S. E. 88. Extraordinary costs, such as allowances of expenses and compensation of receivers, either as between the receiver and the fund in court and parties, or as between party and party, are not discretionary, and a decree respecting them is appealable. Id. Such costs may, in proper case, be provisionally allowed to the officer out of the fund, and ultimately be decreed to be paid to the party entitled to the fund by his adversary, but in either case a decree of such character is appealable. Id.

80. Though board of county supervisors have no such interest in the matter as to entitle it to appeal on merits from judgment against it in action to enjoin payment of claims audited by it, it may appeal from so much of the judgment as charges it with costs. Fitch v. Hay, 98 N. Y. S. 1090.

81. Gaffey v. Mann [Cal. App.] 94 P. 424.

the adjudication complained of relates to questions of fact,[82] or mistakes not called to the attention of the trial court,[83] though it will review errors of law apparent on the face of the record.[84] So too, where the allowance of costs is discretionary with the trial court, its action will not be reviewed unless an abuse is clearly shown.[85] The usual rules as to what matters are reviewable apply in actions on cost bonds.[86]

§ 10. *Enforcement and payment.*[87]—Costs can be collected only by the method pointed out in the statute.[88] Payment of accrued costs is often made a condition of the right to proceed further,[89] but this rule is intended to prevent the party in default from taking any affirmative proceeding in the action, and cannot be used to prevent him from defending himself from attack.[90] So too, where a judgment for plaintiff is reversed on appeal and remanded for a new trial and a judgment rendered against him for the costs of the appeal, the proceedings below will not be stayed until he pays such costs, or the suit dismissed if he fails to do so within a reasonable time.[91] Judgment may not be entered for costs allowed on a motion.[92] The costs

82. Not where it relates to number and materiality of the witnesses in attendance, the number of miles traveled by them, or by the officer serving the subpoena, and similar matters of fact, since evidence on which it is based is not brought up by the record. Hartley v. Weideman, 28 Pa. Super. Ct. 50.

83. A mistake with reference to adjudicating costs, where the record does not show that anything was done to remedy it in the trial court. Error is not taxing plaintiff with all costs after date of original judgment. Blain v. Park Bank & Trust Co. [Tex. Civ. App.] 94 S. W. 1091.

84. Hartley v. Weideman, 28 Pa. Super. Ct. 50.

85. Allowance on change of venue. Moyers v. Council Bluffs Nursery Co. [Iowa] 107 N. W. 924. By court of equity. Thompson v. Normanden [Iowa] 108 N. W. 315; United States Rubber Co. v. Peterman, 119 Ill. App. 610. The discretion of a court of equity in taxing costs is subject to review when arbitrarily or unreasonably exercised. Judgment awarding entire costs and attorney's fees against defendant held unjust and inequitable, and each party required to pay his own costs. Hering v. Simon [Neb.] 108 N. W. 154.

86. Attachment plaintiff held not entitled to contend on appeal that court erred in rendering judgment for costs against surety on attachment bond where surety did not appeal. Thompson v. Baxter [Ark.] 88 S. W. 985. Fact that some items of cost were included in judgment for plaintiffs, in action on cost bond, which did not go to them, held not open to consideration on appeal where they were not put in issue by the pleadings. Downs v. Growney [Mo. App.] 90 S. W. 119.

87. See 5 C. L. 856.

88. State v. District Ct. [Mont.] 85 P. 367.

89. As a general rule the costs imposed upon the termination of an action at law must be paid before another action can be maintained by the same litigant for the same cause. Muratore v. Pirkl, 109 App. Div. 146, 95 N. Y. S. 855. Where trial resulted in judgment of nonsuit with costs, and plaintiff thereafter obtained an order permitting him to prosecute a new action for the same cause as a poor person, which order was subsequently set aside with leave to renew, held that plaintiff's proceedings should have been stayed until he paid costs of first action. Id. Actions for personal injuries held for same cause, though first was brought under employer's liability act and second was at common law. Id. Proceedings in the second action will be stayed on motion until they are paid. Loftus v. Straight Line Engine Co., 97 N. Y. S. 790. The right is absolute, and the application for the stay may be made at any time while the cause is in the course of litigation. Right not waived by failure to make application until after filing answer. Id. An order requiring plaintiff to pay the costs of a prior action before he could prosecute a second action, which did not fix the time within which payment was to be made, at least required the plaintiff to pay the costs within a reasonable time if he desired to prosecute the second action. Arthur v. Washington Water Power Co. [Wash.] 85 P. 28. In Nebraska the common law rule making the payment of costs in the action dismissed a prerequisite to the prosecution of another is one which the trial court, in the exercise of sonud discretion, may or may not apply. Yates v. Jones Nat. Bank [Neb.] 105 N. W. 287. Interlocutory costs awarded upon an issue of law, where an issue of fact remains indisposed of, stay all proceedings on the part of the party required to pay the same, except to review or vacate the order or judgment, without further direction of the court, until the payment thereof, the same as costs of a motion. Code Civ. Proc. §§ 3232, 3233, 779, construed. Bigelow v. Drummond, 109 App. Div. 132, 95 N. Y. S. 1027.

90. Defendant held entitled to defend action upon issues raised by general denial, though in default. Code Civ. Proc. § 779, construed. Goldberg v. Wood, 98 N. Y. S. 200. Where the trial justice determined that defendant would not be heard unless he paid the costs of a certain motion, and that in default of payment before a specified day an inquest would he taken, it was not necessary for defendant to appear on the day fixed for the inquest, but his remedy was to permit the inquest to be taken and then move to set it aside. Id. An inquest because of defendant's failure to pay the costs of a motion cannot be justified by the ab-

and expenses of opposing a motion made upon an order to show cause why an injunction pendente lite should not be granted, where the temporary restraining order is limited to expire upon the hearing of the motion, are not recoverable as damages because of the preliminary injunction.[93] A party in whose favor a judgment for costs is entered is entitled to judgment against the sureties on his adversary's cost bond.[94] In Iowa, all costs accrued at the instance of the successful party, which cannot be collected of the other party, may be recovered on motion by the person entitled to them against the successful party.[95] A proceeding under the New York code to charge the assignor of a claim, as the person beneficially interested, with costs recovered against the plaintiff in an action thereon by the assignee, is a special statutory proceeding, summary in its nature, and properly commenced by notice or order to show cause.[96] It is a proceeding to enforce the judgment for costs,[97] and hence, when such a judgment rendered in the municipal court is docketed in the county clerk's office, the supreme court has jurisdiction.[98] The moving papers must fully set forth the facts necessary to confer jurisdiction on the municipal court to render the judgment, or state that such judgment was duly given or made.[99] In New York the surrogate has no authority to punish an administrator for contempt for failure to pay costs assessed against him personally.[100]

COUNTERFEITING.[1]

Scienter is an essential element of the offense of passing forged national bank notes.[2]

COUNTIES.

§ 1. **Creation and Organization (977).** Boundaries (978). County Buildings (978). Removal of County Seats (978).
§ 2. **Officers; Personal Rights and Liabilities (979).**
§ 3. **Public Powers, Duties, and Liabilities (983).**
A. General Powers and Duties (983).
B. Public Powers and Duties of Officers (984). County Boards (984). Powers and Duties of Other County Officers (987).
C. Suits and Demands (988).
D. Contracts, Debts, and Expenditures (989). Debts and Expenditures (991). Bonds (992).
E. Torts (994).
F. Property and Funds (994). Depositories (995).
G. Presentation, Allowance, Enforcement, and Payment of Claims (995).
H. Warrants; Issuance and Enforcement (997).

Scope of title.—Matter peculiarly applicable to counties only is treated here.

sence of an affidavit of merits because the answer was verified. Id.

91. Ex parte Mathews [Ala.] 40 So. 78.

92. Code Civ. Proc. § 779, construed. Hyde v. Anderson, 98 N. Y. S. 62.

93. Sargent v. St. Mary's Orphan Boys' Asylum, 98 N. Y. S. 632.

94. Where case is determined and judgment for damages and costs entered in favor of plaintiffs, sureties on cost bond are liable for such costs and plaintiffs are entitled to judgment against them. Downs v. Growney [Mo. App.] 90 S. W. 119.

95. Code § 3855. Cole v. Gates Lumber Co. [Iowa] 108 N. W. 235. Claims of referee and reporter selected by the parties held to come within the statute, where equity case was referred by agreement. Id. Where court ordered that each party should pay half the costs, held that successful party was not liable, under this statute, for more than half of the claims of the referee and reporter. Id.

96. Proceeding under Code Civ. Proc. § 3247. Friedman v. Metropolitan S. S. Co., 109 App. Div. 600, 96 N. Y. S. 331.

97. Friedman v. Metropolitan S. S. Co., 109 App. Div. 600, 96 N. Y. S. 331.

98. Under Laws 1902, p. 1565, c. 580, § 261, relating to docketing of municipal court judgments in supreme court. Friedman v. Metropolitan S. S. Co., 109 App. Div. 600, 96 N. Y. S. 331.

99. Under Code Civ Proc. § 532, as to pleading judgments of courts of limited jurisdiction. Friedman v. Metropolitan S. S. Co., 109 App. Div. 600, 96 N. Y. S. 331.

100. Code Civ. Proc. § 2555, even if broad enough to include remedy invoked, must be construed in connection with § 15, which forbids imprisonment for nonpayment of costs except in cases therein specified. In re Banning, 108 App. Div. 12, 95 N. Y. S. 467.

1. See 5 C. L. 857.

2. Rev. St. § 5415. Gallagher v. U. S. [C. C. A.] 144 F. 87.

Matters relating to public corporations generally,[3] to public securities,[4] contracts,[5] facilities,[6] and officers,[7] are given separate treatment. Taxation also is treated in a separate article.[8]

§ 1. *Creation and organization.*[9]—Within its constitutional limits,[10] the power of the legislature to create new counties is not abridged because the change may shorten the terms of officers,[11] or will entail additional expense on the taxpayers.[12] The proceedings necessary for the formation of a new county, and the determination of their sufficiency.[13] is regulated by law. Illegal proceedings may be enjoined by citizens of the county affected[14] without the counties, out of which the new county was to be formed, being made parties plaintiff,[15] but nonjudicial proceedings in conformity to the constitution are not subject to judicial control.[16] Counties or portions of counties are not for all purposes the successors of those which preceded them.[17]

Counties may be classified according to population,[18] although but one comes within the classification,[19] and the mode of determining the population when not specified is the one provided for similar purposes in other parts of the constitution,[20] which being provided, a dissimilar mode provided by statute is void.[21]

3. Municipal Corporations, 6 C. L. 714.
The scope of this title is relatively the same as that of Municipal Corporations wherein excluded matters are enumerated. See 6 C. L. 714.
4. See Municipal Bonds, 6 C. L. 704.
5. See Public Contracts, 6 C. L. 1109.
6. See Public Works and Improvements, 6 C. L. 1143; Bridges, 5 C. L. 439; Highways and Streets, 5 C. L. 1645; Sewers and Drains, 6 C. L. 1448; Toll Roads and Bridges, 6 C. L. 1698.
7. See Officers and Public Employes, 6 C. L. 841.
8. See Taxes, 6 C. L. 1602.
9. See 5 C. L. 857.
10. Act of Sept. 30, 1903, taking territory from Cleburne county and thereby reducing it to less than 600 square miles, violates Const. 1901, § 39, forbidding the **reduction of the area** of counties to less than that amount. Kline v. State [Ala.] 41 So. 952.
11. Conner v. Gray [Miss.] 41 So. 186, Neither the members of the board of supervisors nor the justice of the peace has any right to complain of the exercise by the legislature of its constitutional power in the creation of a county until they become directly affected by it. Mere fear of an invasion of their rights as officers not sufficient ground. Id.
12. Because a legislative act providing for the formation of a new county will entail additional expenses gives the taxpayer no right to complain. Conner v. Gray [Miss.] 41 So. 186.
13. In South Carolina, the constitution places the duty of determining whether there has been a compliance with the requirements of the constitution, preparatory to ordering an election in the matter of forming a new county, exclusively on the governor. Lamar v. Croft [S. C.] 53 S. E. 540.
14. Citizens of a county may sue to enjoin commissioners, appointed by the governor pursuant to illegal proceedings to create a new county, from acting under such appointment. Lamar v. Croft [S. C.] 53 S. E. 540.
15. Counties not necessary parties plaintiff. Lamar v. Croft [S. C.] 53 S. E. 540.
16. It is not within the power of a chancery court to stop an election held in conformity to the constitution for the creation of a new county, nor to prevent the election commissioners from making their returns to the secretary of state. Conner v. Gray [Miss.] 41 So. 186. When the governor has determined that the acts prerequisite to ordering an election on the question of forming a new county have been done and has ordered one, the courts cannot interfere. Lamar v. Croft [S. C.] 53 S. E. 540.
17. Original county note liable for debts of de facto county since dissolved. Barnard & Co. v. Polk County Com'rs [Minn.] 108 N. W. 294. Original county does not succeed to the number of senators which two counties would have had. Heitman v. Gooding [Idaho] 86 P. 785. As to debts and property of old county and new one, see post, § 3.
18. A classification of counties by population is proper in an act providing for the construction of viaducts and the issuance of county bonds therefor. Bingham v. Milwaukee County Sup'rs [Wis.] 106 N. W. 1071.
19. Milwaukee county alone coming within the class. Bingham v. Milwaukee County Sup'rs [Wis.] 106 N. W. 1071.
20. Under a constitutional provision giving a county with a population of over 8,000 both a county clerk and a district clerk, the method of determining the population, not being specified, is the same as provided in other parts of the constitution for similar purposes; as, the apportionment of representatives and the addition of a tax collector to the sheriff as determined by the population. Brooke v. Dulaney [Tex.] 16 Tex. Ct. Rep. 9, 93 S. W. 997.
21. The constitution providing for classification by population as determined by the last preceding census, a legislative provision for determining the population, based on the number of votes cast for governor multiplied by five, held void. Brooke v. Dulaney [Tex.] 16 Tex. Ct. Rep. 9, 93 S. W. 997.

Boundaries.[22]—Ordinary low water mark determines the limits of a county bounded by the low water mark of a river.[23]

County buildings must be located at the county seat in Louisiana.[24]

Removal of county seats[25] is generally provided for by legislation[26] under constitutional restrictions.[27] Provisions for holding court in places other than the county seat a part of the time does not change the county seat.[28] A legislature may confer authority to remove county seats upon boards of supervisors,[29] and condition its exercise by the board on a referendum.[30] The power of special commissioners may be conditioned on a finding by them of the financial practicability of a removal.[31] The governor of Alabama may deny a petition for a change of county seat, even though signed by a majority of the voters, if he has reason to believe it was not made in good faith.[32] The notice of a petition to remove should show clearly at what meeting of the county board it will be presented.[33] The petition must be filed officially,[34] and publication, if required of both petition and notice, must be proved of both.[35] In describing place the words "site" and "location" have been held synonymous.[36] A resolution to submit to an election is not a legislative act of the county board requiring a formal entitling clause.[37] The call for an election must

22. See 5 C. L. 857.

23. Not the "lowest low water mark." Appeal of York Haven Water & Power Co. [Pa.] 62 A. 97.

24. If a court house is established in a town the corporate limits of which are thereafter enlarged, a change in the location of the building to the center of the town as enlarged is not a removal of the court house from the county seat such as to require a special election to be held. Dupuy v. Police Jury of Parish of Iberville, 115 La. 579, 39 So. 627.

25. See 5 C. L. 858.

26. Gen. Acts 1903, p. 117, relative to the change of county seats, is a general law and is not repugnant to Const. § 106, because no notice of its intended passage was given. State v. Porter [Ala.] 40 So. 144.

27. In Alabama a county seat or court house may be removed to any point in the county regardless of **nearness to boundaries,** under Const. § 41, since Const. § 40, forbidding the running of a county line within seven miles of the county court house, relates only to changing of county lines or creation of new counties. State v. Porter [Ala.] 40 So. 144.

28. In Kentucky, in all counties having a city larger than the county seat over seventeen miles from it, circuit court may be held in both places alternately. Johnson v. Fulton [Ky.] 89 S. W. 672. Not special legislation, though but one county falls within its provisions. Id.

29. Not an unconstitutional delegation of legislative power to the people. Stanton v. Essex County Sup'rs, 48 Misc. 415, 96 N. Y. S. 840, afd. 98 N. Y. S. 1059.

30. Stanton v. Essex County Sup'rs, 48 Misc. 415, 96 N. Y. S. 840, afd. 98 N. Y. S. 1059.

31. Act of Feb. 5, 1901, authorizing the removal of the county seat of Baldwin County, Alabama, required that the court house commissioners were to ascertain what the new court house building would cost, whether they could so arrange the payments for the same that portion of the money could be paid in yearly instalments, then, by conference with the county commissioners, what amounts they could contribute annually without necessitating an increase of tax rate, and if by utilizing those payments, with other funds on hand, the building could be erected, they were to proceed with the erection of the same. Hand v. Stapleton [Ala.] 39 So. 651.

32. State v. Porter [Ala.] 40 So. 144.

33. A notice was correct in designating the next annual meeting as the meeting at which the petition would be presented where the publication immediately preceded such annual meeting, although the petition was presented at a session nearly a month after first assembly of the board. Stanton v. Essex County Sup'rs, 48 Misc. 415, 96 N. Y. S. 840, afd. 98 N. Y. S. 1059.

34. In Alabama a petition for the removal of a county seat must be lodged with the governor or his official force in a formal manner so as to become an official document. State v. Porter [Ala.] 40 So. 144.

35. Board justified in finding that both notice and petition had been published from an affidavit which specified only that the notice had been published, where the notice and petition were one document. Stanton v. Essex County Sup'rs, 48 Misc. 415, 96 N. Y. S. 840, afd. 98 N. Y. S. 1059.

36. The use of the word "site" instead of the word "location," in the notice of election in respect to both buildings and offices, is not an available error. Stanton v. Essex County Sup'rs, 48 Misc. 415, 96 N. Y. S. 840, afd. 98 N. Y. S. 1059.

37. A resolution of the board of supervisors for submitting to the voters the question of the removal of a county seat, not being final and binding, does not come under Laws 1892, p. 1753, c. 686, § 17, requiring acts or resolutions of the board of supervisors in the exercise of its legislative powers to be prefixed with an appropriate title, reference to the authority under which the act is passed and the number of votes cast for and against it. Stanton v. Essex County Sup'rs, 98 N. Y. S. 1059.

purport to be by the proper officer.[38] Signers of a petition for the removal of a county seat may withdraw at any time before final action,[39] and if in a sufficient number, may thereby defeat the original petition,[40] but it requires the same formality as was required of the original petition.[41]

§ 2. *Officers; personal rights and liabilities.*[42]—County offices, while creatures of the law existing independently of the actual election of an incumbent,[43] do not exist until the means of filling them are determined,[44] and an election to an office not legally existing is void.[45] In respect of legislative representation a county is not by succession entitled to the number of representatives apportioned to the counties it succeeds.[46] Eligibility,[47] appointment or election,[48] the mode of qualifying,[49] the beginning,[50] the length,[51] and the extension of the term of office,[52] the right to

38. Under a statute requiring that a notice of election for change of county seat be published by the board of supervisors, its publication by the county clerk instead of the clerk of the board is no objection, as it will be presumed from the resolution of the board directing the publication that he acted under their direction. Stanton v. Essex County Sup'rs, 48 Misc. 415, 96 N. Y. S. 840, afd. 98 N. Y. S. 1059.

39. Error for county court to refuse to receive petitions of withdrawal. County Court of De Kalb County v. Pogue, 115 Ill. App. 391. Signers of petitions for the removal of county seats may withdraw their names at any time before a valid order granting the petition is filed. State v. Boyden [S. D.] 108 N. W. 897. Held that a certain petition, owing to withdrawals, did not contain the number of names constitutionally requisite for granting it. Id.

40. If the withdrawals reduce the petition so that it does not contain enough signers to authorize the action which the petition seeks, then that action cannot be taken. County Court of De Kalb County v. Pogue, 115 Ill App. 391. County held without jurisdiction to call election owing to withdrawals. Id.

41. In order to withdraw they must do so with a degree of formality corresponding with that contemplated by the law in presenting the original petition. Held that the withdrawal petition in question was never filed officially. State v. Porter [Ala.] 40 So. 144.

42. See 5 C. L. 859. See, also, **Officers and Public Employes,** 6 C. L. 841, for the general law.

43. Acts 1879, p. 65, c. 46, created office of entry taker throughout the state, regardless of whether the counties elected to fill the office or not. Heard v. Elliott [Tenn.] 92 S. W. 764.

44. A constitutional provision declaring there shall be elected at a specified time a county attorney who may be elected or appointed as the legislature may provide, whose term of office shall be extended for a fixed period, is not sufficient to create the office of county attorney until the legal means of filling it is determined. People v. Lindsley [Colo.] 86 P. 352. It does not have the effect of making attorneys employed by the county commissioners county officials (Id.), nor extend their terms of office (Id.).

45. People v. Lindsley [Colo.] 86 P. 352.

46. Heitman v. Gooding [Idaho] 86 P. 785.

47. The **deputy clerk** of a county need not be a qualified voter and may be a **woman.** Delaney v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 580, 90 S. W. 642.

48. In Nebraska the legislature cannot appoint county officers. State v. Plasters [Neb.] 105 N. W. 1092. Since Local Acts 1903, p. 625, providing for the selection of **county solicitors,** was constitutionally enacted, the appointment by the governor was valid. State v. Tunstall [Ala.] 40 So. 135. Const. art. 20, § 3, providing that the **district attorney** shall be ex officio attorney of the city and **county of Denver,** and shall hold office until his successor is duly elected, when construed in connection with § 2, that officers of the class of county attorney may be elected or appointed as the charter of the city and county of Denver may provide, does not render invalid the section of the charter providing for the appointment of such attorney, and the district attorney is entitled to hold office only until the attorney of the city and county of Denver has been appointed under such a provision. People v. Lindsley [Colo.] 86 P. 352.

49. In **Arkansas** a **county assessor** to be entitled to office must, within 60 days after his election, apply for his commission to the governor, pay the fee thereof, and file his duplicate oath of office within 15 days after the receipt of the commission. Bayett v. Cowling [Ark.] 94 S. W. 682. Kirby's Digest §§ 647, 648, imposing such requirements, not repealed by Acts March 14, 1881, and March 2, 1883, nor by §§ 6955, 6956, and 6958. Id. A statute requiring a county assessor to pay a fee for his commission is not unconstitutional. Bayett v. Cowling [Ark.] 94 S. W. 682.

50. In the absence of any statutory time fixed for the election of a **counsel** by a board of freeholders, he holds office from the time of election. Wright v. Campbell [N. J. Law] 64 A. 171. Act April 2, 1906, § 2, providing for the commencement of the terms of office of **county commissioners** on December 1st, next after their election, held void as in irreconcilable conflict with § 1 of same act **extending term** of certain commissioners to the 3d Monday in Sept. of the odd numbered years next succeeding the time when they would otherwise expire, and as the latter more nearly conforms to the obvious intent of the legislature it will be enforced. State v. Mulhern [Ohio] 78 N. E. 507.

51. The election of a **counsel** for the board at a meeting in May, 1905, was for a term of two years, which was not changed by

deputies,[53] and the compensation,[54] are entirely regulated by legislation. The general rules as to holding over and as to de facto officers apply.[55] Laws fixing compen-

the statute to Jan. 1, 1906, as it did not apply to office of such counsel. Van Emburgh v. Trall [N. J. Law] 64 A. 173.

52. The legislature in Nebraska cannot, by an act solely for that purpose, extend the terms of county officers. Laws 1905, c. 47, p. 292, held unconstitutional. State v. Plasters [Neb.] 105 N. W. 1092. The Act of Feb. 15, 1905, although extending term of office of other municipal officers, did not include county officials. Van Emburgh v. Trall [N. J. Law] 64 A. 173. The successor to a commissioner elected in the year 1903 will be chosen at the November elections in 1906. State v. Mulhern [Ohio] 78 N. E. 507.

53. **County clerks** entitled to one deputy at a salary of $1,000 in counties of more than 25,000 inhabitants. State v. Drexel [Neb.] 106 N. W. 791.

54. Scranton v. Lackawanna County [Pa.] 63 A. 968. County commissioners, whose salaries are fixed by statutes declared unconstitutional during their term of office, were left in the position of an officer for whom no compensation had been provided, and cannot be enjoined from receiving the pay provided by the act of April 21, 1904, notwithstanding the rate is higher than they previously received under the unconstitutional statutes in existence at the time they came into office. State v. Carlisle, 3 Ohio N. P. (N. S.) 544. Under a statute providing that the compensation of county treasurers shall be fixed from time to time by county commissioners with the approval of the county controller, they may properly regulate such compensation on an annual basis (Id.), and having fixed a certain rate of compensation for a year, that rate does not continue in a subsequent year, unless further action is taken (Id.). A rate fixed by the county commissioners without the approval of the controller does not bind the county. Id.

Compensation of a county officer is purely statutory and is not the creature of contract, nor dependent upon the fact or value of services rendered, and **no recovery** can be had **on quantum meruit.** Sanderson v. Pike County, 195 Mo. 598, 93 S. W. 942. In counties of more than 25,000 inhabitants, the salary of the **county clerk** is fixed at $2,500 per annum by c. 72, p. 371, Laws 1905. State v. Drexel [Neb.] 106 N. W. 791. In **Pennsylvania** the **Directors of the Poor** and the House of Employment of the County of Lancaster are not county officers (Nissley v. Lancaster County, 27 Pa. Super. Ct. 405), hence the measure of their compensation is fixed by Act of April 14, 1864, P. L. 422, as modified by later general law, and not by Act of July 2, 1895, P. L. 424 (Id.).

Legislative power to fix salary: In California the County Government act of 1897, as amended in 1901, is unconstitutional as violating the constitutional provision requiring the compensation of officers to be regulated in proportion to duties. Millard v. Kern County, 147 Cal. 682, 82 P. 329. A statute making an exception of certain counties should be distinguished from one which limits the operation of the law throughout the state, and the statutory exceptions which have been made relative to the compensation of prosecuting attorneys in different counties, the provision for the appointment of assistants in certain counties, and the further provision that in counties not having a county solicitor the prosecuting attorney shall act as the legal adviser of the county commissioners, who shall fix his compensation, are not unconstitutional. State v. Taylor, 3 Ohio N. P. (N. S.) 505.

Commissions on receipts and disbursements: Under Rev. St. 1899, § 9849, the county treasurer is not entitled to ½ of one per cent on all school moneys disbursed, but only such an amount as the county saw fit to grant him, not to exceed ½ of one per cent. Sanderson v. Pike County, 195 Mo. 598, 93 S. W. 942. Held that a transaction whereby a judgment creditor of a county assigned his judgment to a bank for a cash consideration, for which the bank was subsequently reimbursed by the county, constituted a purchase of the judgment, not a loan to the county, so as not to entitle the then incumbent of the county treasurer's office to a commission thereon. Benefield v. Marion County [Tex. Civ. App.] 15 Tex. Ct. Rep. 777, 95 S. W. 713. In Arkansas, under Kirby's Dig. § 3508, the county treasurer's fees are, 4% on the first $1,000 received on each separate fund, and not over 2% on all sums above $1,000 in each fund, each fund to pay its own proportion of the total and in its own kind, for which purpose "the county road tax" is a single fund, although divided up into separate road district funds. Hodges v. Prairie County [Ark.] 95 S. W. 988. A county treasurer was not entitled to a commission upon moneys collected for gaming and liquor licenses during the period intervening between the act of March 9, 1901, and the passage of Laws 1905, p. 115, c. 60, § 11. Hubbell v. Bernalillo County Com'rs [N. M.] 86 P. 430. Under § 1069, Rev. St. 1892, which provides for the compensation of county auditors, they are entitled to the graded per cent therein specified calculated on the entire grand duplicate of the county, including moneys collected on levies made by school boards and also to 1% on the latter. State v. Lewis [Ohio] 76 N. E. 564. Where the county commissioners enter into a contract with the prosecuting attorney for the bringing of suits for the collection of taxes on property theretofore treated as exempt from taxation, and by agreement a test case is tried, the defendants in other similar cases agreeing to abide the result, the percentage the attorney is to receive in the event of his securing a judgment is not limited by either law, justice or equity, to the amount involved in the test case. State v. Taylor, 3 Ohio N. P. (N. S.) 505.

Remedy to fix or enforce salary: The statutory remedy provided to secure a county treasurer his salary when the county commissioners and controller fail to fix such rate, by an appeal to common pleas, is exclusive. People v. Steuben County, 183 N. Y. 114, 75 N. E. 1108. The compensation of the county treasurer for his general serv-

sation of county officers are usually required to be uniform in all counties.[56] An officer cannot claim both the statutory and a contractual compensation.[57] The legislature may within reasonable limits change the duties and diminish the emoluments of a county office, though a constitutional one, if the public welfare requires it.[58] A county officer is not entitled to do the remunerated work that might come within the purview of his office, but not enumerated in the statute fixing his duties.[59] Extra compensation can not be given save in pursuance of authority thereto,[60] even for work not strictly pertaining to the county,[61] or for work outside of official hours,[62] but may be allowed for services not within the scope of his official duty or contemplated in a special contract.[63] A county officer's right to reimbursement for expenses involved in defending an action against him for an "official act" applies only to those in which the public has a concern.[64] In Iowa an officer of a county purchasing a de-

ices and for his services in handling the school funds of the county lies in the discretion of the county court, not subject to judicial control. Sanderson v. Pike County, 195 Mo. 598, 93 S. W. 942.

55. A hold-over county assessor is entitled to hold his office until his successor is legally elected and may bring an action to try the title to the office of an appointee of the governor. Boyett v. Cowling [Ark.] 94 S. W. 682. One holding himself out as entry taker for many years, having possession of the books of such office and being recognized as such officer by the public, is entry taker de facto. Entry made while acting in such de facto character good as to third persons. Heard v. Elliott [Tenn.] 92 S. W. 764. Appointment by a de facto board of health is sufficient to entitle a physician to compensation for services rendered pursuant to such appointment. Center's Adm'r v. Breathitt County [Ky.] 90 S. W. 1054.

56. Act Feb. 22, 1905, § 33, held unconstitutional in providing for a fixed salary in Oconee County without making similar provisions for all counties, in violation of Const. art. 3, § 34 (State v. Burns [S. C.] 52 S. E. 960), but the entire act is not rendered thereby unconstitutional, as this particular section is severable (Id.).

57. A tax collector entitled by statute to a 5% commission, but appointed under a contract specifying a different commission which was to be in full from the county, cannot claim both the statutory and the contract commission (Massie v. Harrison County [Iowa] 105 N. W. 507), and though the contract with the supervisors is invalid so far as it authorizes a greater compensation than the statute allows to tax collectors (Id.), payment on such contract satisfies the claim for the statutory compensation (Id.), leaving the collector liable to the county for the excess (Id.).

58. Transferring duties formerly resting on register of deeds onto auditor, thereby reducing the fees receivable by the register of deeds. Fortune v. Buncombe County Com'rs, 140 N. C. 322, 52 S. E. 950. Laws 1905, p. 856, c. 703, put upon the office of auditor created by the act the duty of computing the taxes and making out the tax lists. Id.

59. County surveyor not entitled to resurvey and replat the turnpike road districts merely by virtue of his office and receive compensation therefor. Kennedy v. Kenton County [Ky.] 90 S. W. 969. Fiscal court may engage any competent surveyor or engineer. Id.

60. In South Dakota a county treasurer can receive as compensation only the salary stipulated in the statute, Laws 1891, p. 175, c. 65, and hence the allowance of an additional claim is unauthorized and the warrants issued therefor invalid. Campbell County v. Overby [S. D.] 108 N. W. 247.

61. In New York, such county treasurers as are salaried under Laws 1892, p. 1746, c. 686, § 12, subd. 5, are not entitled in addition to their salary to fees for handling state school and court funds. People v. Steuben County, 183 N. Y. 114, 75 N. E. 1108.

62. The performance of work connected with his office by an officer outside of official hours does not entitle him to extra compensation, especially in the absence of any showing that it might not have been done during official hours (Rouse v. Pima County [Ariz.] 85 P. 1075), and where there is no showing of any statute authorizing or any contract promising extra compensation (Id.).

63. A district attorney, under an agreement to act as attorney in actions brought against the board of supervisors or county treasurer, may recover extra compensation for services in a suit by the county against the state whereby the county recovered a large amount of money. The fact that claimant's predecessor had performed such services under such an agreement without extra compensation was not authority for rejecting the claim. People v. Delaware County Sup'rs, 108 App. Div. 83, 95 N. Y. S. 458. A district attorney accepting a stipulated annual retainer for his services in litigation by or against a county, pending or thereafter to be brought, cannot recover extra compensation for services performed in litigation pending at the time the contract was made. Id.

64. A sheriff's return of an execution is not an official act in which the public is concerned, so that his expense in defending an action against him by an individual for a wrongful return cannot be made a legitimate charge upon the county. Construing Laws 1892, p. 1793, c. 686, § 230, subd. 18, in connection with Const. art. 8, § 10. Wey v. O'Hara, 48 Misc. 82, 95 N. Y. S. 81.

mand against the county for less than its face value in violation of the statute cannot collect the same.[65]

County officers are liable for misspending[66] and for diverting funds from their statutory purpose,[67] for compensation received in excess of the statutory amount,[68] and the allowance of an illegal claim by the county board does not justify its retention.[69] A settlement with a defaulting officer which is inadequate,[70] or is made in ignorance of all the facts,[71] or allows a special remuneration for a legal duty,[72] will not discharge such an officer's liability, and the efficacy of an improper settlement is not increased by a consequent dismissal of a suit brought by the commissioners against such officer on such settled claim.[73] Interest should be added to a claim for withholding county funds.[74] The statute of limitations barring action on an officer's official bond does not apply to a claim for the illegal detention of county funds.[75] Failure to comply with the statute in executing a public contract renders the officers in some instances liable both criminally and civilly.[76] Officers acting in good faith, though erroneously, are not liable in damages.[77] In New York an official bond of a county treasurer running to the county may be prosecuted as if it ran to the people,[78] giving the town injured by his default the right to sue thereon by leave of court.[79]

65. Purchase of warrants for labor performed at a discount. Held within Code § 596. Harrison County v. Ogden [Iowa] 108 N. W. 451.

66. Where a contract for the improvement of a county road, executed in good faith by the contractor, cost greatly in excess of the estimate, the remedy, if any, lay not in enjoining the payment of the contractor's claim against the county, but in pursuing the county commissioners. Le Moyne v. Washington County, 213 Pa. 123, 62 A. 516.

67. A county treasurer paying town taxes derived from railroads to a town supervisor instead of investing them as directed by law is liable to the town, and Laws 1903, p. 1182, c. 515, legalizing such payments made in good faith passed after the commencement of the action, does not relieve the defendant. Town of Walton v. Adair, 97 N. Y. S. 868. The defense that the town received the benefit of the money is not sustained by a showing that no allowance was made in 1899 for setting aside this fund, the full amount of which was necessary to pay the town's liabilities, that such liabilities had been paid and that the town had no income but from taxation. Id.

68. Compensation allowed in excess of the statutory amount is void and can be recovered. A tax collector appointed under a contract specifying a much larger commission than that provided by statute. Massie v. Harrison County [Iowa] 105 N. W. 507.

69. Zuelly v. Casper [Ind. App.] 76 N. E. 646.

70. An auditor is not released from the repayment of funds illegally withheld by him by an inadequate settlement with the county commissioners. Zuelly v. Casper [Ind. App.] 76 N. E. 646.

71. A defaulting supervisor, suing upon warrants purchased at a discount in violation of the statutes, is estopped from collecting the same, although in the matter of his default a settlement was made purporting to be in full for all claims of the county against him, but in ignorance of his claims against the county. Harrison County v. Ogden [Iowa] 108 N. W. 451.

72. Allowing a county auditor a special sum for the performance of a legal duty in settling a claim against him by the county commissioners for the illegal withholding of county funds tends strongly to overthrow the presumption accorded public officers and establishes the right of the county to sue for the amount retained. Zuelly v. Casper [Ind. App.] 76 N. E. 646.

73. Zuelly v. Casper [Ind. App.] 76 N. E. 646. In the absence of fraud or prejudice to the auditor the settlement and dismissal by county commissioners of a suit against a county auditor to recover money illegally detained by him does not estop the county from subsequently suing to recover money with which the auditor was wrongfully credited in the settlement. Id.

74, 75. Zuelly v. Casper [Ind. App.] 76 N. E. 646.

76. A committee appointed by the county court to negotiate a contract for the construction of a court house, subject to the approval of the county court, are public officers and parties to the contract so that their failure to require the statutory bond of the contractor renders them guilty of a misdemeanor (Hardison & Co. v. Yeaman, 115 Tenn. 639, 91 S. W. 1111), and liable civilly to those who would have been entitled to sue on the bond (Id.).

77. Health officers acting in good faith, though erroneously, in quarantining a person for small-pox. Beeks v. Dickinson County [Iowa] 108 N. W. 311.

78. The statute providing that any person injured by the misconduct or delinquency of an official may sue upon his bond after procuring leave. Town of Ulysses v. Ingersoll, 182 N. Y. 369, 75 N. E. 225.

79. Town of Ulysses v. Ingersoll, 182 N. Y. 369, 75 N. E. 225.

A county trustee to be relieved from liability for loss of funds deposited in a bank must thoroughly investigate the condition of said bank by all available means so long as the deposit remains in it.[80] Good faith alone is not sufficient to exonerate an officer from a loss sustained by the failure of the bank selected as depository.[81]

§ 3. *Public powers, duties, and liabilities.*[82] *A. General powers and duties.*— Counties can exercise such powers only as, first, are granted by express words; second, are necessarily or fairly implied in or incident to the powers expressed; and, third, are essential to the declared objects and purposes of the corporation.[83] Generally speaking, a county is known in law only by its board of commissioners and acts as a county through its board.[84] It acts by and is bound by authorized acts of its officers,[85] but there can be no ratification by a county of an act done in direct violation of the constitution.[86] A void act cannot be regarded as valid merely because the county had power to validate it.[87] Some action thereon must be taken.[88]

When a county undertakes to keep a tract index not a part of the regular records and to make and sell abstracts for compensation under statutory authority, it acts in a private and not in a governmental function[89] and may restrict private noninterested persons' access to it.[90]

The levy and collection of taxes,[91] establishment and maintenance of roads,[92] bridges,[93] drainage works,[94] and the regulation of health[95] and analogous matters, are committed in greater or less extent to counties. Appropriate titles treat of such specific matters.

Among usual county liabilities are expenses incurred for health and sanitation,[96] the keeping of criminals under arrest,[97] the transportation of prisoners,[98] the fees of grand and petit juries,[99] and witness fees in criminal cases.[1] The county is liable to

80. State v. Reed [Tenn.] 95 S. W. 809. The failure of a county trustee to examine the books of a bank selected as the depository of county funds, to which he had access as one of its directors, and thereby discovering its insolvency, constituted negligence. Id. Mere inquiry of the general public, or of the business men of the community where the bank does business, of its solvency and fitness, not sufficient. Id. The want of business capacity or familiarity and experience in business affairs and with banks is also unavailing as a defense for not making a more thorough investigation. Id.

81. State v. Reed [Tenn.] 95 S. W. 809.

82. See 5 C. L. 861.

83. Stevens v. Henry County, 218 Ill. 468, 75 N. E. 1024.

84. Board of Com'rs of Newton County v. Wild [Ind. App.] 76 N. E. 256.

85. See kindred titles, Municipal Corporations, 6 C. L. 714, and the like. Also title Officers and Public Employes, 6 C. L. 841. Not for unauthorized promises. Beeks v. Dickinson County [Iowa] 108 N. W. 311.

86. Incurring a debt void as in excess of a constitutional limit not ratified by issuance of bonds sufficient to pay it. McNutt v. Lemhi County [Idaho] 84 P. 1054.

87, 88. An indebtedness invalid because in excess of an applicable special fund which might have been validated by being made payable out of a general fund is invalid still where such provision was not taken advantage of by the county commissioners. Construing Rev. St. § 946, as amended by Act Feb. 7, 1899. McNutt v. Lemhi County [Idaho] 84 P. 1054.

89, 90. Davis v. Abstract Const. Co., 121 Ill. App. 121.

91. See Taxes, 6 C. L. 1602.

92. See Highways and Streets, 5 C. L. 1645.

93. See Bridges, 7 C. L. 460.

94. See Sewers and Drains, 6 C. L. 1448.

95. See Health, 5 C. L. 1641.

96. City of Bardstown v. Nelson County [Ky.] 90 S. W. 246. No liability on county. Martin v. Fond du Lac County [Wis.] 106 N. W. 1095.

97. The cost of keeping and maintaining a prisoner for the time between his first conviction, appeal thereon, remand by the supreme court on reversal and acquittal on the second trial, rests upon the county where the offense is alleged to have been committed and not upon the state. Brown County v. Lampert [Neb.] 107 N. W. 746.

98. Mileage allowed a sheriff in transporting prisoners to the penitentiary will be allowed for the number of miles necessarily and actually travelled each day. Peeling v. York County, 212 Pa. 245, 61 A. 911. A sheriff may recover for hack hire necessary to convey prisoners, but burden is on him to establish that the expense therefor was actually incurred and was necessary. Id.

Must be authorized expenses: Sheriff expending money for transporting prisoner arrested on a warrant issued by a justice of the peace not entitled to reimbursement. Petrie v. Hubbard County Com'rs [Minn.] 104 N. W. 680.

99. The fees of grand jurors and of petit jurors sitting in criminal cases, following an immemorial rule, may properly be made

officers for expenses only when lawfully and authoritatively made.[2] Costs and fees in criminal[3] and other cases to which the public is a party[4] are sometimes made a charge on the county.

(§ 3) *B. Public powers and duties of officers.*[5]—*County boards*[6] of commissioners, sometimes called supervisors, or county courts or police juries, are the general representatives of counties and have only such jurisdiction or powers as are expressly conferred by statute,[7] or are necessarily implied to permit the proper execution of the express grants of power,[8] within constitutional limitations,[9] and these powers are subject to legislative change within the constitutionally defined limits.[10] They usually combine executive and legislative functions[11] but their proper powers

a charge against the county wherein the crime was committed. State v. Davies, 6 Ohio C. C. (N. S.) 621.

1. Under the Florida Constitution providing for the payment by the county of fees of witnesses for persons acquitted of crime, the cost judgment on acquittal does not bind the county commissioners, hence they may be compelled to audit defendant's claim for witness' fees but not to allow a particular sum, the remedy in such case being by action. The accused not being liable for costs after acquittal, he has no remedy against the county unless he has paid such costs and seeks reimbursement. De Soto County Com'rs v. Howell [Fla.] 40 So. 192.

2. A county is not liable for money expended by a county treasurer for clerk hire in excess of the amount fixed by the county commissioners. Jacobson v. Ransom County [N. D.] 105 N. W. 1107. Not for the expenses of a county attorney illegally hired on an annual salary, except as connected with actual litigation which could authorize his employment. Vincent v. Nassau County, 96 N. Y. S. 446.

3. The county is liable for the costs of a prosecution in a criminal case in which a defective indictment has been returned by the grand jury, "ignoramus, prosecutor to pay costs," although neither the prosecutor nor any witnesses had been called before it. Conniff v. Luzerne County, 30 Pa. Super. Ct. 383. Not liable for attorney's fees in a criminal case to the county to which a change of venue has been taken. A county to which a criminal case has been transferred for trial is not entitled to reimbursement for prosecuting attorney's fees, the county attorney being disqualified and fees to the extent of $600 having been allowed by the trial court to the substitute attorney. State v. Lewis & Clark Co. [Mont.] 86 P. 419. The mere **certification of the costs** of a trial by the trial judge to the board of county commissioners does **not** operate as **a judgment** against the county from which the case was transferred by change of venue. Id.

4. A county is not liable to an attorney employed by the state tax commissioner to represent the county and state in the trial of contests of assessments by a county tax commissioner before the board of revenue. Construing Act Feb. 21, 1899, § 17. John v. Dallas County [Ala.] 40 So. 962.

5. See titles Clerks of Courts, 7 C. L. 656; Attorneys and Counselors (public attorneys), 7 C. L. 345; Coroners, 7 C. L. 860; Sheriffs and Constables, 6 C. L. 1459, and like titles.

6. See 5 C. L. 863, n. 24 et seq.

7. State v. True [Tenn.] 95 S. W. 1028. When the power or jurisdiction exercised by it is called in question the party relying upon the action of the court must be able to point out the statute conferring the jurisdiction. Id. In Montana the board of county commissioners has no authority to build detention hospitals under its power to build **"hospitals"** for the indigent sick, construing Pol. Code § 4230. Yegen v. Yellowstone County Com'rs [Mont.] 85 P. 740. Commissioners of accounts were without authority to **investigate alleged deficits** in the accounts of an ex-circuit clerk. Greenwood Dist. v. Heartsill [Ark.] 95 S. W. 153. The police juries of the several parishes are vested by statute with the exclusive right to establish, lease, and regulate **ferries and bridges** within their respective limits. Blanchard v. Abraham, 115 La. 989, 40 So. 379. The police jury of the parish has the power to prohibit by ordinance the operation of unlicensed free ferries and bridges within competitive distance. Id.

Criminal and penal ordinances. State v. Denoist, 115 La. 949, 40 So. 365.

8. Chase v. Boulder County Com'rs [Colo.] 86 P. 1011. In California the board of supervisors has implied power to appoint and fix the salary of a health officer. Under Const. art. 11, § 11. Valle v. Shaffer [Cal. App.] 81 P. 1028.

9. Act No. 202, p. 391, of 1902, relative to the powers of police juries throughout the state, except the parish of Orleans, is not a local or special law in the sense of article 48 of the state constitution. Blanchard v. Abraham, 115 La. 989, 40 So. 379. County commissioners even under legislative authority may not expend funds contrary to constitutional prescription. Laws 1905, c. 167, p. 234, § 3, must be interpreted as authorizing county commissioners of Gove county to use a part of the general revenue fund for the extraordinary purpose of building a court house, in violation of Const. art. 11, § 4, and is therefore void. Smith v. Haney [Kan.] 85 P. 550. The unconstitutionality of a law expressly granting a power to a board of supervisors is immaterial where under the constitution the board has the same power by implication. Power to appoint a health officer. Valle v. Shaffer [Cal. App.] 81 P. 1028.

10. Const. art 5, § 18, authorized legislature to make the jurisdiction of commission-

are distinct from those of other bodies which include the county board ex officio.[12] Their legislative powers must be exercised as limited by law.[13] The passage of a regulation, inconsistent with a prior regulation, repeals the latter.[14] Whether a rule of the county board is unreasonable and therefore void is a question for the court.[15] The duties imposed on county courts relative to elections for the relocation of county seats are purely ministerial in West Virginia.[16] A fiscal court may entrust its presiding officer with the ministerial duties involved in executing its orders.[17]

The meetings[18] and power of adjournment[19] of these boards or courts are also regulated by statute, and when adjourned improperly may be reconvened by order of the court.[20] The board's proceedings need not be formal[21] unless prescribed by statute, but minutes of all its transactions must be kept.[22] The acts and proceedings of such a body can be known only by its record,[23] which the board has power to amend

ers' court over claims depend on approval of the auditor. Anderson v. Ashe [Tex.] 14 Tex. Ct. Rep. 637, 90 S. W. 872.

11. In Mississippi the jurisdiction of a board of supervisors is mixed, being in part judicial, in part legislative, and in part executive. Ex parte Fritz, 86 Miss. 210, 38 So. 722. Although classified under the "judiciary" in the constitution, it was not unconstitutional to confer on it the legislative function of regulating the taking of fish. Id.

12. The powers given to county boards of health and county boards of commissioners, though closely associated, are nevertheless separate and distinct in Montana. Yegen v. Yellowstone County Com'rs [Mont.] 85 P. 740.

13. An ordinance of the board of supervisors in general terms, regulating the taking of fish applicable to all the lakes and rivers of the county, is not objectionable as special legislation. Ex parte Fritz, 86 Miss. 210, 38 So. 722.

14. An ordinance declaring that a court house shall be built upon a certain lot at the parish seat repeals by implication a previous ordinance locating it upon another lot. Dupuy v. Police Jury of Iberville, 115 La. 579, 39 So. 627.

15. That a physician is to receive $1 per visit for attending poor persons within the limits of an incorporated city or village. Dieffenbacher v. County of Mason, 117 Ill. App. 103. Such rule held unreasonable. Id.

16. By § 15, c. 39, Code 1899, as amended by c. 95, p. 206, Acts 1901. Mann v. Mercer County Court, 58 W. Va. 651, 52 S. E. 776.

17. The fiscal court having determined to subscribe for railroad stock, the validity of the bonds issued in payment was not affected because subscription was made by the county judge. Estill County v. Embry [C. C. A.] 144 F. 913.

18. Special meetings require such notice as is provided by statute to validate the proceedings had at them. In an action to test validity of bonds issued pursuant to proceedings had at a special meeting of the board, held the notice of such meeting was sufficient to comply with the statute. Shoshone County v. Rollins [Idaho] 82 P. 105. A police jury may meet in special session whenever deemed necessary at the call of the president, or otherwise, upon notice being given to the members. Dupuy v. Police Jury of Iberville, 115 La. 579, 39 So. 627. The Act of Feb. 15, 1905, of Pennsylvania, extending the term of office of the chosen freeholders then in office, did not thereby abolish the annual stated meeting of the board of freeholders in May, 1905. Van Emburgh v. Trall [N. J. Law] 64 A. 173. Commissioners of accounts have no authority to meet Aug. 3, and thereafter continue in session, individually and collectively to investigate certain accounts. Greenwood Dist. of Sebastian County v. Heartsill [Ark.] 95 S. W. 153.

19. In West Virginia the county court may adjourn from time to time provided the day fixed be not beyond the time to which the term could legally continue. Code 1899, c. 114, § 2. Mann v. Mercer County Ct., 58 W. Va. 651, 52 S. E. 776. Section 10, c. 114, Code 1899, does not limit the period over which a county court may adjourn. Id.

20. A county court which adjourns a term without having performed a duty mandatory upon it at that term may by mandamus be reconvened and compelled to perform such duty, and the act when so done will be deemed to have been performed at the term or session at which the law required it to be done. Mann v. Mercer County Ct., 58 W. Va. 651, 52 S. E. 776. County courts cannot prevent action upon a petition for an election on the matter of relocating the county seat by adjourning the term at which it is filed. Id.

21. A motion formally made, seconded and voted upon, is not necessary to the legality of the action of the board of commissioners in accepting a bid. Le Moyne v. Washington County, 213 Pa. 123, 62 A. 516.

22. County commissioners should keep written minutes of their meetings at which contracts to improve county roads are awarded. Le Moyne v. Washington County, 213 Pa. 123, 62 A. 516.

23. Sanderson v. Pike County, 195 Mo. 598, 93 S. W. 942. When sitting as a court. Brooks v. Morgan [Ind. App.] 76 N. E. 331. The board of county commissioners is a court of record and its acts can be proven only by its record. Id. A contract with such court cannot be established by parol evidence. Sanderson v. Pike County, 195 Mo. 598, 93 S. W. 942. The election of an entry taker by the county court cannot be proved by parol. Heard v. Elliott [Tenn.] 92 S. W. 764. Parol evidence of the proceedings of the county court is inadmissible. State v. True [Tenn.] 95 S. W. 1028. The record of a meeting of a board of supervisors, not showing how many

according to the truth,[24] and which imports absolute verity as against collateral attack.[25] Since its record is the sole witness of its proceedings, acts not spread upon the record avail nothing,[26] and invoked acts must be gauged by the basis apparent in the record.[27] In the absence of statutory requirements a majority of the quorum rules,[28] and usually it requires the same parliamentary vote to reconsider the adoption of a resolution as was required to carry it.[29]

An exercise of unauthorized power may be enjoined,[30] and mandamus will lie to compel them to act where a statutory duty exists,[31] but their decisions, involving discretion, are not generally subject to judicial review,[32] nor are their acts in their

were present except by the number of votes cast, cannot be varied by parol evidence to show that others not voting were present. In quo warranto to test the title of relator to office of school examiner to which he claimed to have been elected by the board of supervisors by a majority of the quorum present (Howland v. Prentice [Mich.] 12 Det. Leg. N. 1031, 106 N. W. 1105), but the refusal of board of commissioners to concur in the building of a county bridge may be established by parol dehors the record. Admitting allegations in answer of refusal to concur in building of bridge by county commissioners is fatal to petition for mandamus to compel county commissioners to erect a bridge. Commonwealth v. Baker, 212 Pa. 230, 61 A. 910.

24. Bennett v. Wellesley, 189 Mass. 308, 75 N. E. 717.

25. Brooks v. Morgan [Ind. App.] 76 N. E. 331.

26. Order of county court approving the employment of an attorney by its chairman to prevent misappropriation of school funds. State v. True [Tenn.] 95 S. W. 1028.

27. County courts must base their action on the record made in the proceeding and not upon personal knowledge of their own members not in any way made part of such record. Mann v. Mercer County Ct., 58 W. Va. 651, 52 S. E. 776. Knowledge and belief of the members of such court to the effect that the petition for removal of county seat is not signed by the requisite number of legal voters constitutes no defense upon an application for mandamus to compel action thereon when the petition bears the requisite number of signatures and is properly verified, and no other evidence bearing on the question appears in the record of the proceeding as it remains in said court. Id.

28. The election of a school examiner comes within the ordinary business of the board of supervisors, under Comp. Laws § 2476 (Howland v. Prentice [Mich.] 12 Det. Leg. N. 1031, 106 N. W. 1105), and hence requires only a majority of the quorum present to elect (Id.), and does not require announcement by the chair (Id.).

29. A motion to grant a claim requiring a majority of all members elect, the same vote is necessary to carry a motion to reconsider. Beach v. Kent [Mich.] 12 Det. Leg. N. 747, 105 N. W. 867.

30. A board of county commissioners will be enjoined from expending county funds in building a detention hospital not authorized by a valid law. Laws 1901, p. 80, authorizing county boards to build detention hospitals, unconstitutional for insufficiency of title. Yegen v. Yellowstone County Com'rs [Mont.] 85 P. 740.

31. Mandamus will lie to compel a board of supervisors to reconvene and apportion a county into assembly districts as directed by the constitution, the prior apportionment being invalid because of inequality of population, lack of compactness, and the omission of a city. In re Timmerman, 100 N. Y. S. 57. In an action for mandamus to compel county commissioners to establish a ditch fund, and make a special assessment to pay warrants issued in payment of work done in the construction of ditch, which has been abandoned before its completion, the court on proper proof may direct the county commissioners to complete the same and then levy an assessment as provided by statute, or apportion the cost of such ditch to the adjacent property according to the statute. Espy Estate Co. v. Pacific County Com'rs, 40 Wash. 67, 82 P. 129.

32. In the absence of fraud, corruption, or unfair dealing, it lies exclusively within the power and authority of a court of county commissioners to determine the necessity of a new county court house, which discretion is not subject to judicial control. Speculations to the effect that the court house might be constructed at $10,000 less than the contract price, not sufficient to sustain fraud. Tally v. Com'rs Ct. [Ala.] 39 So. 167. County commissioners in their discretion may determine whether bids shall be taken for a fixed sum for a completed work or for a schedule of prices for piece work (Le Moyne v. Washington County, 213 Pa. 123, 62 A. 516), and to what bidder the contract shall be awarded, rejecting the lowest bidder if he is not deemed responsible (Id.). Held no evidence of fraud or abuse of discretion in rejecting the lowest bidder. Id. The wisdom or expediency of abandoning an old court house lies in the discretion of the police jury and is not subject to judicial control. Dupuy v. Police Jury of Iberville [La.] 41 So. 91. The discretion of a police jury exercised in undertaking to build a new court house is not subject to judicial control, although it may at some future time involve the building of a new jail. Id., 115 La. 579, 39 So. 627, reaffirmed [La.] 41 So. 91. In an action to recover excess payments for clerk hire, the courts will not review the discretion lawfully exercised by the commissioners in determining the necessity for and the compensation of such clerk. Jacobson v. Ransom County [N. D.] 105 N. W. 1107. The discretion lodged with county commissioners in the matter of fixing fees to be paid for the collection of taxes in certain cases

governmental capacity subject to judicial control,[33] nor their orders, unless void for want of jurisdiction, subject to collateral attack.[34] An injunction against an illegal act will not restrict subsequent regular action.[35] The determination of the board of county commissioners in a matter in which it acts judicially and has jurisdiction of the subject-matter and the parties is as binding as the adjudications of any other court,[36] but no presumptions will be indulged in favor of the board's jurisdiction, and its judgment will be void unless it be affirmatively shown that jurisdiction was acquired.[37]

Powers and duties of other county officers.—The official powers and duties of the various county officers other than the county board are dependent on statute. Some recent cases are catalogued below.[38] Substituting one county officer for another confers the powers and duties of the latter upon the former, except where the

will not be interfered with by a court, where the fee is made contingent and is fixed at five per cent; and where two separate contracts have been entered into, and the parties refuse to treat the second as superseding the first, a court will not under the circumstances of this case decree differently. State v. Taylor, 3 Ohio N. P. (N. S.) 505. Discretion of county court in fixing salary of county treasurer not subject to judicial control. Sanderson v. Pike County, 195 Mo. 598, 93 S. W. 942.

33. The function performed by a county court in ordering an election under the statute is legislative or governmental (Mann v. Mercer County Court, 58 W. Va. 651, 52 S. E. 776), with which a court of equity cannot interfere by an injunction (Id.).

34. The determination of the board in passing on a claim against the county cannot be collaterally assailed. Riverside County v. Yawman & E. Mfg. Co. [Cal. App.] 86 P. 900. Negligent, unwise, or harmful conduct by a board of commissioners will not, in the absence of fraud, oust its jurisdiction or impeach its integrity in a collateral proceeding. A mere finding of unwise or greatly erroneous conduct not ground for restraining commissioners from accepting a public work performed pursuant to an alleged fraudulent contract. Board of Com'rs of La Porte County v. Wolff [Ind.] 76 N. E. 247. The decision of the board on facts determinative of its jurisdiction is not subject to collateral attack. Sufficiency of a notice of the construction of a drain. Brooks v. Morgan [Ind. App.] 76 N. E. 331. An action to restrain the construction of a drain, being a collateral attack upon the action of the board of commissioners, cannot be maintained unless such action was void for want of jurisdiction. Id.

35. A judgment restraining acts of county officers because of noncompliance with the statute would not affect subsequent acts in due conformity thereto. In the matter of issuing bonds and constructing a county court house. State v. Newton County Com'rs [Ind. App.] 76 N. E. 308.

36. Brooks v. Morgan [Ind. App.] 76 N. E. 331.

37. Brooks v. Morgan Ind. App.] 76 N. E. 331. Like other courts of inferior and limited jurisdiction, its records must show the jurisdictional facts to make its acts valid. Id.

38. County attorney: Under Wilson's Rev. & Ann. St. 1903. § 1289, the county attorney is authorized to appear for and bind the county in any litigation in which the county is a party, and he need not regard the orders or directions of the board of commissioners to him in such litigation. Board of Com'rs of Logan County v. State Capital Co. [Okl.] 86 P. 518.

Superintendent of health: Held authorized to hire immune person to attend an insolvent person afflicted with small-pox. Copple v. Davis County Com'rs, 138 N. C. 127, 50 S. E. 574.

Treasurer: Under Wilson's Rev. & Ann. St. 1903, c. 75, § 101, it is the duty of the county treasurer to select the newspaper in which the delinquent tax list is to be published, and in performing such duty he is not governed by any order or direction of the board of county commissioners in relation thereto. Board of Com'rs of Logan County v. State Capital Co. [Okl.] 86 P. 518.

Comptroller: Comptrollers are generally placed under the duty of enforcing the payment of all money due the public treasury. Commonwealth v. Shoener, 25 Pa. Super. Ct. 526. Under Act June 27, 1895, P. L. 403, the county comptroller in counties containing 150,000 inhabitants or over is the proper official to require all officers who receive public money of the county to pay over the same at the time and in the manner provided by law. Id.

Auditor: In Indiana must publish in two newspapers the list of allowances, under Acts 1903, p. 360, c. 207, construing the word "notices" as including statements or allowances. Cheney v. State, 165 Ind. 121, 74 N. E. 892. In Pennsylvania, under § 8 of Act of June 27, 1895, P. L. 403, a county auditor should not refuse to approve and certify a bill, claim, or demand until after he has investigated the matter as indicated by the statute. Douglas v. McLean, 25 Pa. Super. Ct. 9.

Clerk: The county clerk must record a deed when lodged in his office for record, acknowledged and certified according to law, although by his predecessor's deputy with whom it was not lodged for record. Such deed not disentitled to record because acknowledged and certified to by the deputy of the predecessor of the county clerk by whom it was recorded. Hunt v. Nance [Ky.] 92 S. W. 6.

See, also, Attorneys and Counselors, 7 C. L. 345; Clerks of Courts, 7 C. L. 656, and like titles.

statute provides otherwise.[39] Special boards with special powers are regulated by statute.[40]

(§ 3) *C. Suits and demands.*[41]—A county in its corporate capacity is a competent and proper party to sue for the enforcement of all contracts and obligations in its behalf, unless otherwise provided by statute,[42] which is not impaired by the fact that the obligation is required to be discharged by payment of a liquidated sum to the treasurer on demand.[43] The board may compromise a litigation[44] or a claim even though some invalid items be included,[45] may expend county funds in its defense, when sued in its corporate capacity,[46] and it is its duty to defend such actions in the interests of taxpayers.[47] Appeals from adverse judgments may be taken by the board only and not by individual members of it.[48] The successors of the members of the fiscal court in office at the time a rule nisi was made may be brought into court and such rule made absolute, or other proper order entered.[49] A county cannot maintain an action for an accounting against one of its own officers, in the absence of mutuality of accounts or of complications that cannot be expediently ascertained in a court of law.[50] The power of taxpayers to sue on the bonds of county officials is controlled by law,[51] but their mere representation by an attorney in a suit against the county does not give them the right to control the appeal from the judgment.[52] A suit brought by a person at the instance of a county to have certain of its warrants declared void and to enjoin the holder from procuring payment of them and the county from paying them will be treated as having been brought by the county itself;[53] the part of the decree restraining the county will then be ineffectual, as in such a case the county would not be enjoined, and the part restraining the holder of the warrants may be waived by the county.[54] The statute of limitations

39. By substituting controller for auditor, duty of approving compensation for county treasurer as fixed by county commissioners devolved upon the former. Scranton v. Lackawanna County [Pa.] 63 A. 968.

40. Under St. 1896, p. 497, c. 500, the special board provided for had supervision over all contracts relating to the structure therein contemplated, whether original or additional or a new one, to replace the original which the contractor had abandoned. Cutter v. Middlesex County, 189 Mass. 451, 75 N. E. 954. Contract construed as coming under the statute. Id.

41. See 5 C. L. 863, n. 28 et seq.

42. Johnson County v. Chamberlain Banking House [Neb.] 104 N. W. 1061. In Tennessee the power to **bring suits** for counties and **employ counsel** for that purpose is vested solely in the justices of the county in quarterly court duly assembled. Chairman of county court without authority except to employ attorney where county is sued, and in such case the fee of counsel is to be fixed by the court trying the case. State v. True [Tenn.] 95 S. W. 1028.

43. Johnson County v. Chamberlain Banking House [Neb.] 104 N. W. 1061.

44. Under its general authority to sue and be sued. Board of Com'rs of Onslow County v. Tollman [C. C. A.] 145 F. 753.

45. Although a large part of certain county warrants were declared invalid by decree of court, the county might compromise the holder's claim by giving tax certificates in exchange. Multnomah County v. First Nat. Bank [Or.] 82 P. 23. But see Multnomah County v. White [Or.] 85 P. 78.

46. Although they are the sole defendants. Board of Com'rs of Jackson County v. Branaman [Ind.] 76 N. E. 1030.

47. Board of Com'rs of Jackson County v. Branaman [Ind.] 76 N. E. 1030.

48. An appeal from a judgment against a board of county commissioners, rendered in an action involving its official powers and duties, can be taken or authorized by the action of the board only, not by individual members thereof. State v. Sweaas [Minn.] 107 N. W. 404.

49. Rule nisi that fiscal court erect a court house. Fiscal Ct. of Marion County v. Marion Circuit Ct. [Ky.] 89 S. W. 704.

50. Hulsey v. Walker County [Ala.] 40 So. 311. A mere averment that it is difficult to determine the amounts due is insufficient. Id.

51. The Colorado act empowering taxpayers to sue on the bonds of county officers having first given security for costs is valid. Title of act held sufficient. Construing amended Gen. St. § 50, c. 23. Paterson v. Watson [Colo.] 83 P. 958.

52. Taxpayers, not made parties to a suit against a county, but permitted on petition to have an attorney "represent them in the action," cannot control the appeal from a judgment in such action against the county. Action for proceeds of bonds declared illegal. Board of Com'rs of Newton County v. Wild [Ind. App.] 76 N. E. 256.

53. Multnomah County v. First Nat. Bank [Or.] 82 P. 23.

54. Multnomah County v. First Nat. Bank [Or.] 82 P. 23; Multnomah County v. White [Or.] 85 P. 78.

does not run against counties in personal actions when suing in their governmental capacity.[55]

(§ 3) *D. Contracts,*[56] *debts,*[57] *and expenditures.*—Counties may enter into contracts only in the manner,[58] on the terms,[59] for the purposes,[60] and for the amount allowable for the particular purposes[61] warranted by law; and acceptance of a contract objectionable only because it omitted an illegal stipulation may be compelled.[62] The board of supervisors of a county, in the absence of statutory restrictions, may purchase personal property in the open market[63] and lawfully issue warrants in payment therefor.[64] A board of supervisors under its authority to employ counsel in actual litigations cannot engage an attorney on a general retainer.[65] A committee appointed by a board of supervisors to investigate and prosecute a claim of the county has power to employ an attorney.[66] Authority to relet a contract "not completed within the time specified" includes contracts never begun.[67] Promises made

55. Suit to recover interest on note given for sale of school lands belonging to county. Delta County v. Blackburn [Tex.] 15 Tex. Ct. Rep. 908, 93 S. W. 419.

56. See 5 C. L. 864.

57. See 5 C. L. 862.

58. Contract void for failure to comply with statute by having specifications written into a book open to public inspection four weeks before opening of bids, and by having the contract and sureties approved by a judge of the court of common pleas of the county. Venango County v. Penn Bridge Co. [Pa.] 64 A. 445. The validity of a lease contract executed by a county judge pursuant to an order of the commissioner's court, is not affected by the failure to enter the order on the minutes. Slaughter v. Mallet Land & Cattle Co. [C. C. A.] 141 F. 282.

59. The board of supervisors may not make the use of a union label one of the conditions of letting a contract for work, as requiring that "Allied Printing Trades Council" label be used in printing the journal of the board. People v. Edgcomb, 98 N. Y. S. 965.

60. The board of supervisors cannot withdraw from a county officer a portion of the duties pertaining to his office and contract with a third person for their performance, payment therefor to be made from the county treasury. Hence a contract for making a delinquent tax list is not within the authority of the board of supervisors, such duty belonging to office of county treasurer (Massie v. Harrison County [Iowa] 105 N. W. 507), although it may authorize employment of additional clerical help (Id.). A contract by which county officials authorize the collection of forfeited taxes does not create an obligation which is enforceable against the county. State v. Gibson, 2 Ohio N. P. (N. S.) 221.

Tax ferreting contracts: A county cannot make a contract engaging a person to discover, for purposes of assessment, hidden and untaxed property. Stevens v. Henry County, 218 Ill. 468, 75 N. E. 1024, rvg. 120 Ill. App. 344. The board of commissioners in Colorado has no powers, express or implied to make a contract for the assessment of omitted property and the collection of the taxes thereon (Chase v. Boulder County Com'rs [Colo.] 86 P. 1011), and such a contract may be further rendered unenforceable by the refusal of the county assessor to assess or the county treasurer to collect taxes on such property discovered pursuant to the contract, thereby rendering a computation of plaintiff's damages impossible (Id.). A contract for publication of list of personal property as returned by assessor and for mailing a copy of the paper to each person whose name appears therein, held ultra vires. Brown v. State [Kan.] 84 P. 549.

Allowances to officers: The board of county commissioners has no authority to incur expenses for the convenience of the grand jury, even if for necessary services. May not engage a stenographer for grand jury to be paid out of county funds. Ballinger's Ann. Codes & St. § 6810. Mather v. King County, 39 Wash. 693, 82 P. 121. The power of a board of supervisors to regulate the additional salary of circuit judges attaches to the office of judge, not the man. A resolution granting a particular circuit judge of Saginaw county extra compensation for extra work during the illness of his associate is unauthorized. Beach v. Kent [Mich.] 12 Det. Leg. N. 747, 105 N. W. 867.

61. A contract authorizing compensation to an officer in excess of the statutory amount is void. Massie v. Harrison County [Iowa] 105 N. W. 507. An allowance of $1,250 per annum, made by county commissioners to a prosecuting attorney, whereas § 845 limits the allowance to $250 for each case in which counsel is employed, will be upheld by a court only in the event the number of cases exceeds five in a given year. State v. Taylor, 3 Ohio N. P. (N. S.) 505.

62. Mandamus will lie to compel approval of a contractor's bond rejected for the sole reason that it omitted the illegal stipulation, his bid having been accepted and no objection to it being raised (People v. Edgcomb, 98 N. Y. S. 965), and the county cannot urge estoppel on the ground that the bid was made with knowledge of the unlawful requirement (Id.).

63, 64. Riverside County v. Yawman & E. Mfg. Co. [Cal. App.] 86 P. 900.

65. On an annual salary. Vincent v. Nassau County, 96 N. Y. S. 446.

66. People v. Delaware County Sup'rs, 108 App. Div. 83, 95 N. Y. S. 458.

67. Within Cobbey's Ann. St. 1903, § 5519.

by officers having no authority cannot bind the county.[68] Neither of two counties acting concurrently in the construction of a bridge across a stream forming a boundary line between them can subsequently withdraw from the undertaking without the consent of the other.[69]

In some states, contracts whose payment is not provided for are invalid,[70] but the possibility that a tax to meet the cost may be invalid does not invalidate the contract.[71]

Members of county boards,[72] or their appointees,[73] are frequently prohibited from having a pecuniary interest in a contract with the county to render services or furnish supplies, even though the contract is without fraud or prejudice to the county.[74]

A contract of the county may be ratified by part allowance of a claim for services rendered under it,[75] or by receiving proceeds of it and recognizing it in subsequent transactions,[76] or the drawing and paying of a warrant issued pursuant to it,[77] but there can be no ratification of a contract ultra vires.[78]

Gutschow v. Washington County [Neb.] 104 N. W. 602.

68. A county is not liable for promises made by them beyond their statutory power to bind the county. One quarantined for a month by health officers for small-pox, though in fact no case existed, with promises that his crop would be taken care of, which were broken and the crop lost. Beeks v. Dickinson County [Iowa] 108 N. W. 311. A local board of health can create no liability upon the county not imposed by law, although acting under the directions of the board of supervisors. Promise to care for crop of one quarantined. Id.

69. Code § 1510, providing that neither county without the consent of the other can vacate a road across county lines, held applicable to bridges. Bremer County v. Walstead [Iowa] 106 N. W. 352. In adopting resolutions whereby each county agreed to pay one-half of a proposed joint bridge, the counties acted concurrently, although the resolution of the defendant county did not in terms refer to the prior resolution passed by plaintiff county. Id.

70. An ordinance providing for the dedication of a part of the authorized parish tax to the payment of public improvement contracted for is a sufficient provision for the payment of the debt to be incurred. Dupuy v. Police Jury of Iberville, 115 La. 579, 39 So. 627. The dedication of a portion of a tax to the payment of a new court house is not affected by a subsequent increase in the estimate of the cost of the improvement (Id., reaffirmed [La.] 41 So. 91), nor by a subsequent change in its site (Id.), and such dedication, when the ordinance does not specify the length of time it shall run, must by statute run ten years if necessary for the payment of the debt, but cannot run longer, under Rev. St. § 2449, and Act No. 32, p. 39, of 1902 (Id.). A contract for a public improvement, for which it is necessary to incur a debt payable from the estimated surplus of the parish revenues, may be made upon the basis of cash realized or to be realized from certificates of parish indebtedness, to the payment of which the surplus is dedicated (Id.).

71. A contract for the erection of a court house is not rendered invalid and its execution enjoinable because the levy of a special tax in payment of the debt beyond the current year may be invalid. Tally v. Com'rs Ct. [Ala.] 39 So. 167.

72. A member of the county court cannot contract with the county to render services or furnish materials or supplies for compensation. Sale of supplies to superintendent of workhouse by a member of county court, invalid. Madison County v. Alexander [Tenn.] 94 S. W. 604.

73. A contract between the appointee of the county commissioners for superintendent of a public improvement and the contractors, whereby the former agreed to work for the latter at a daily wage as a laborer on the improvement, is void, under Burns' Ann. St. 1901, § 2136. Cheney v. Unroe [Ind.] 77 N. E. 1041.

74. Cheney v. Unroe [Ind.] 77 N. E. 1041.

75. Evidence of a part allowance of a physician's claim for services in attending poor persons is competent to show ratification of his acts by county board. Such evidence not merely showing an offer to compromise the claim. Dieffenbacher v. County of Mason, 117 Ill. App. 103. Rule not affected by withdrawal of such claim and the substitution of a larger one for the same services, which was wholly rejected. Id.

76. The commissioner's court recognized a lease by receiving rentals thereunder, and ratified it by making subsequent contracts involving the leased lands subject to it. Slaughter v. Mallet Land & Cattle Co. [C. C. A.] 141 F. 282.

77. The drawing and paying of a warrant in connection with a purchase by a county judge on behalf of a county is sufficient to show ratification by the commissioner's court and to convey title to a safe given in part payment by the county, although no bill of sale was ever given and no order embodying the sale was ever spread on the minutes of the commissioner's court. Woodward v. San Antonio Traction Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 364, 95 S. W. 76.

78. The quarterly court, having no power to employ counsel and procure a suit to be

A county may be liable on an implied contract,[79] but not for a purpose for which an express contract would be invalid.[80] The performance of a contract will not be enjoined for mere illegality in the absence of injury to the public revenues,[81] but payment of a contract ultra vires may be, although entered into and executed in good faith.[82] Acceptance of a public improvement and payment therefor will not be enjoined in the absence of fraud.[83]

Debts and expenditures.[84]—Special constitutional or legislative provisions are usually made for especial or extraordinary expenditures.[85]

The original county, upon the dissolution of a de facto county created out of its territory, although placed in statu quo, is not the successor of the de facto corporation so as to be liable for its debts.[86] In Idaho the detached portion of a county

brought to prevent a misappropriation of the public school funds in the hands of the trustee of the county, could not ratify the act of its chairman in doing so. State v. True [Tenn.] 95 S. W. 1028. Held facts upon which finding of ratification is made are insufficient, and are based on incompetent evidence. Id.

79. In order to hold a county liable on an implied contract for medical services for poor persons, it must be shown that the overseer had notice of the necessity of the services and that he refused or neglected to act in the premises. Dieffenbacher v. County of Mason, 117 Ill. App. 103. Evidence conflicting, verdict of jury that no notice was given, conclusive. Id.

80. In the absence of any authority to make an express contract of employment on the part of a county court, there can be no implied promise to pay. State v. True [Tenn.] 95 S. W. 1028.

81. The performance of a contract between a county and an individual to discover unassessed property will not be enjoined merely because it is illegal without any averment that it will injuriously affect the public revenues. County of Henry v. Stevens, 120 Ill. App. 344. An arrangement whereby a police jury was able to make a contract for a public improvement on a cash basis furnishes no ground for complaint by taxpayers in the absence of any showing of injury to them by the transaction, though statute contemplates payments in futuro. Dupuy v. Police Jury of Iberville [La.] 41 So. 91.

82. Publication of assessor's list of personal property, not authorized by statute. Brown v. State [Kan.] 84 P. 549.

83. A board of commissioners will not be restrained from accepting a public work and paying therefor pursuant to a contract without proof of fraud in the execution of the same. Board of Com'rs of La Porte County v. Wolff [Ind.] 76 N. E. 247. Proof of fraud not sustained by a finding that the acts of the board in relation to the matter were so far erroneous as to amount in law to a fraud upon the taxpayers. Id.

84. See 5 C. L. 861.

85. An indebtedness for a road, being an extraordinary expense, and in excess of the revenues provided for that year and not having been authorized by a two-thirds vote of the people at an election held for that purpose, was in violation of Const. art. 8, § 3. McNutt v. Lemhi County [Idaho] 84 P. 1054. Expending funds for building a court house, bridge, or wagon road, is not an ordinary expense within the general authority usually conferred upon county commissioners. Id.

86. Barnard & Co. v. Polk County Com'rs [Minn.] 108 N. W. 294.

NOTE. Liability for debts of predecessor county: In view of the many unsuccessful attempts to organize new counties from portions of the territory of existing counties, it is somewhat remarkable that there are so few authorities upon the direct question involved. Where an existing corporation is dissolved and its territory annexed to another corporation, the latter succeeds to the obligations as well as to the property of the dissolved corporation. It takes the burdens with the benefits. The same result follows when a public corporation is dissolved and subsequently reincorporated, or a new corporation is created embracing substantially the same territory and inhabitants as the old. The effect of such a procedure is merely to give new form to the old corporation, and the new corporation is regarded as the successor of the old. The liability for the debts of the old corporation then rests upon the theory that the one corporation is the successor of the other, or upon the general principle that the corporation which receives the territory of the old and the benefits resulting therefrom must also assume the debts. Broughton v. Pensacola, 93 U. S. 266, 23 Law. Ed. 896; Mobile v. Watson, 116 U. S. 289, 29 Law. Ed. 620; Mount Pleasant v. Beckwith, 100 U. S. 514, 25 Law. Ed. 699; Riley v. Township of Garfield, 54 Kan. 463, 38 P. 560; Ranken v. McCallum, 26 Tex. Civ. App. 83, 60 S. W. 975; Folsom v. Greenwood Co., 130 F. 730; Id. [C. C. A.] 137 F. 449; Ruohs v. Athens, 91 Tenn. 20, 18 S. W. 400, 30 Am. St. Rep. 858; Hill v. Kahokia, 35 F. 32; Devereaux v. Brownsville, 29 F. 742; Brewis v. Duluth, 13 F. 334; O'Connor v. Memphis, 6 Lea [Tenn.] 730; People v. Board, 94 N. Y. 263; Schriber v. Langlade, 66 Wis. 629, 29 N. W. 547, 554; Ross v. Wimberly, 60 Miss. 345; Amy v. Selma, 77 Ala. 103; City of Brownwood v. Noel [Tex. Civ. App.] 43 S. W. 890; Broadfoot v. Fayetteville, 124 N. C. 478, 32 S. E. 804, 70 Am. St. Rep. 610; Board of Com'rs v. Clarke, 12 Okl. 197, 70 P. 206; Shapleigh v. San Angelo, 167 U. S. 646, 42 Law. Ed. 310.—From opinion in Barnard & Co. v. Polk County Com'rs [Minn.] 108 N. W. 294.

annexed to another county continues to be liable for its ratable proportion of the debts of the county from which it was severed,[87] which the annexing county by its warrants must pay to the county diminished;[88] but such warrants are to be paid only out of taxes collected from the annexed territory in the statutory manner,[89] and not out of the sums received by the annexing county from the original county to maintain government in the annexed territory during the time for which taxes could not be levied and collected from it.[90]

Bonds.[91]—Which officers may issue[92] or execute county bonds,[93] and what formalities are necessary,[94] is prescribed by law. The more general aspects of this part of the law are reserved to a separate title.[95] The issuance by the authority of the commissioners' court of interest bearing warrants payable at stated times in the future for the amount of a debt contracted for the building of a court house is not an issuance of county bonds requiring a special election.[96] Provisions as to what a notice of a special election shall contain are directory in so far as it is adequately provided by other laws.[97] The same has been held respecting provisions as to which officer shall deliver the bonds,[98] as to the manner of payment of interest.[99] An issue of less than the statutory amount of aid bonds in consequence of a compromise with their beneficiary is valid.[1] They are not necessarily void because of their de-

87. Construing Const. art. 18, § 3, Shoshone County v. Profit [Idaho] 84 P. 712. Prohibits saddling debt on annexing county as well as leaving it on former county. Id. Act March 10, 1903, providing for annexation of a part of Shoshone County to Nez Perce county, held constitutional. Id.

88. The legislature may properly provide that the county annexing a portion of another county shall, by its warrants, pay the latter the ratable proportion of the debts to be borne by the detached territory. Shoshone County v. Profit [Idaho] 84 P. 712.

89. Shoshone County v. Profit [Idaho] 84 P. 712. Warrants drawn by a county annexing a portion of another county in favor of the latter for the proportionate part of the indebtedness to be borne by the detached territory are payable out of a special fund to be raised by taxation only. Shoshone County v. Schuldt [Idaho] 86 P. 418.

90. The cash received by the annexing county from the county, a part of whose territory has been detached, is intended and available to compensate the annexing county for current expenses in maintaining government in the annexed territory during the time for which it could not levy and collect taxes from it. Shoshone County v. Schuldt [Idaho] 86 P. 418.

91. See 5 C. L. 866.

92. The county officers of counties in Nebraska are invested with authority to issue county bonds for precinct indebtedness and to make the customary recitals therein. Platt v. Hitchcock County [C. C. A.] 139 F. 929.

93. A statutory direction that county bonds be "issued" by the board of trustees does not require the bonds to be "executed" by the trustees. Laws N. C. 1885, p. 439, c. 233, being silent as to the execution of the bonds in question, hold that it was intended that the bonds should be executed by the board of commissioners of Onslow County. Board of Com'rs of Onslow County v. Tollman [C. C. A.] 145 F. 753.

94. Although no formal resolution to the effect that the board execute certain bonds was ever put and carried, the execution of the bonds in the presence of a majority of the board, with the full approval of the entire board and intended as its act, is equivalent thereto. Board of Com'rs of Onslow County v. Tollman [C. C. A.] 145 F. 753. County bonds issued in payment of county debts incurred prior to the adoption of the Constitution of 1891 are valid, although the question of their issuance was not submitted to the voters, under Const. §§ 157, 158. Hawkins v. Nicholas County [Ky.] 89 S. W. 484. Allegations that the bonds were issued in 1894 not equivalent to alleging that the indebtedness was created since Sept. 28th, 1891, when the constitution was adopted. Id.

95. See Municipal Bonds, 6 C. L. 704.

96. Construing Const. § 222, Tally v. Commissioner's Ct. of Jackson County [Ala.] 39 So. 167.

97. A provision in a law requiring a special notice of an election to authorize an issue of county bonds to prescribe the place of the election is directory merely, since the law fixes the place of the election and the voters are charged with notice of the place independent of any special notice. Construing Acts 1903, p. 90, §§ 2, 4, and 5. Wilson v. Pike County [Ala.] 39 So. 370.

98. A provision that county railroad aid bonds be delivered by the board of trustees is directory merely, and their delivery by the board of commissioners would not invalidate the bonds. Board of Com'rs of Onslow County v. Tollman [C. C. A.] 145 F. 753.

99. County railroad aid bonds are not invalidated by providing for annual interest payments instead of semi-annual as prescribed by statute, as such provision was for the benefit of the recipient of the bonds who might waive it. Board of Com'rs of Onslow County v. Tollman [C. C. A.] 145 F. 753.

livery prior to the performance of a statutory condition precedent,[2] or because of a mere clerical omission in recording the vote on the bill authorizing the issue.[3] The issue will not be enjoined because not made in all the denominations provided by law,[4] or for mere delay in the filing of a special bond required of a county treasurer.[5] A county may be estopped to deny recitals in its bonds giving them validity.[6] Although a legislative act requiring a county to issue bonds might not have been enforceable, if the county does make the issue, it cannot defend on the ground of compulsion, nor of lack of statutory authority.[7] Although in an action in a state court, to which the holder of interest coupons was not a party, county bonds were declared invalid, he may sue in the Federal courts[8] to have the funds arising from a special levy applied to the payment of interest coupons,[9] such funds being impressed with a trust in his favor,[10] and the order of the Federal court will supersede the order of the state court.[11] Parol testimony to show the facts concerning the execution of county bonds is admissible in an action on them.[12]

1. A board of county commissioners has authority to compromise a litigation to compel the issuance of railroad aid bonds by a release of the county's claim on railroad stock in consideration of an acceptance in full of a less than the statutory amount of bonds by the railroad corporation, and no valid objection can be raised thereon. Board of Com'rs of Onslow County v. Tollman [C. C. A.] 145 F. 753.

2. The delivery of county railroad aid bonds prior to the performance of the statutory proviso on which delivery was conditioned does not necessarily render them void, their validity depending on facts to be determined in a suit brought to enforce them, as whether they had passed into hands of innocent purchasers or not. Estill County v. Embry [C. C. A.] 144 P. 913.

3. A county bond issue is not rendered invalid because the clerk, in recording the vote on the bill authorizing the issue, left a blank after the word "Nays," such blank sufficiently indicating that there were no Nays, under Const. N. C. art. 2, § 14, requiring that in the case of law imposing a tax or allowing a county to impose a tax the clerk shall enter on the journal the ayes and nays on the second and third readings, the entry in this case being "Ayes 94, Nays ——; total ——." Board of Com'rs of Onslow County v. Tollman [C. C. A.] 145 F. 753, afg. 140 F. 89. Interest coupons on such bonds, valid obligations of the county. Id.

4. A law providing that bonds issued by the county shall be in denominations of $1,000, $500, and $100, does not require an issuance of bonds to contain each of the three denominations, and the omission of the $100 denomination is not a ground for enjoining the issue. Bingham v. Milwaukee County Sup'rs [Wis.] 106 N. W. 1071.

5. An issue of county bonds will not be enjoined because of the failure of the county treasurer to file a required bond within the period provided by statute, where he did file it before receiving any bonds or money. Bingham v. Milwaukee County Sup'rs [Wis.] 106 N. W. 1071.

6. A bond issue of July 1st, 1890, was illegal if conditioned on the assessment of 1890, but legal if based on assessment of 1889. The board of commissioners completed the assessment for 1890 on June 12, 1890, but had until July 10th in which to alter it. Held that, inasmuch as it lay within the power of the county officers issuing such bonds to validate them by making the assessment of 1889 the last preceding assessment rather than that of June 12, 1890, the county is estopped from denying the recital of its officers that this had been done as against innocent purchasers of the bonds or coupons. Platt v. Hitchcock County [C. C. A.] 139 F. 929.

7. Mandamus to county to compel tax levies and assessments to pay interest on bonds. Territory v. Vail [Ariz.] 85 P. 652.

8. The validity of county railroad aid bonds may be passed on in a suit by the assignee of the original holder suing for interest thereon in the Federal courts, although subsequent to their issuance the state court has declared them invalid. Board of Com'rs of Onslow County v. Tollman [C. C. A.] 145 F. 753.

9. The owner of interest coupons on county bonds may sue in equity to have the funds arising from a special levy applied to their payment where the county has instituted proceedings to have such bonds declared invalid and restrain the payment of interest on them. Board of Com'rs of Onslow County v. Tollman [C. C. A.] 145 F. 753.

10. A fund in the hands of a county treasurer arising from taxes levied and collected to pay certain interest coupons is impressed with a trust in favor of the owners of the coupons. Board of Com'rs v. Tollman [C. C. A.] 145 F. 753, afg. 140 F. 89.

11. A county treasurer enjoined from payment of interest coupons of county bonds by a state court, and subsequently ordered to pay the same by a Federal court, must comply with the latter order and will not thereby be in contempt of the former, the action of the state court being between the county and its treasurer, and in the Federal court between the county and the holder of the interest coupons. Board of Com'rs of Onslow County v. Tollman [C. C. A.] 145 F. 753, afg. 140 F. 89. But in case of doubt his remedy is to apply to the state court for a modification of its order. Id.

12. Board of Com'rs of Onslow County v. Tollman [C. C. A.] 145 F. 753.

(§ 3) *E. Torts.*[13]—A county is not liable for the negligence[14] or the breach of a public duty by its officers,[15] unless made so by statute,[16] nor for their delinquencies, unless acting in the capacity of its agents.[17] Thus, if the county is free from fault it is not liable for loss of state funds in a county officer's hands.[18] In Minnesota a county sued in tort by failing to disavow the ultra vires acts of its commissioners is liable for damages caused thereby to the same extent as though originally authorized by it.[19]

(§ 3) *F. Property and funds.*—Property in the hands of county officers for the use of a distinct public purpose, like schools, is not county property.[20] The power to acquire property to the end of carrying out the purposes of the county's functions is implied.[21] Power of disposal of property is limited and legislative sanction is sometimes requisite,[22] and no rights may be released on a benefit solely pertaining to private persons,[23] or property alienated by mere nonaction or acquiescence;[24] hence property unlawfully sequestered, though voluntarily and with full knowledge of the facts, may be recovered,[25] but a county cannot recover money irregularly paid out while at the same time retaining the property purchased therewith.[26] The power to repair county property cannot be stretched to cover its replacement.[27] The state alone may question whether a certain conveyance to a coun-

13. See 5 C. L. 864.

14. Not liable to an individual landholder for the negligent diversion of surface water in the improvement and construction of its public highways. Hopper v. Douglas County [Neb.] 106 N. W. 330. A county is not liable for injuries resulting from negligence in the construction of a ditch. Siewerssen v. Harris County [Tex. Civ. App.] 91 S. W. 333. Improper quarantine and failure to care for quarantined farmer's crop. Beeks v. Dickinson County [Iowa] 108 N. W. 311.

15. No action will lie in favor of a person, although specially damnified, for breach of a public duty by county officers, in the absence of a statutory provision. Action against county for criminal negligence of board of freeholders in improperly caring for an incarcerated witness. Watkins v. Atlantic County Chosen Freeholders [N. J. Law] 62 A. 1134.

16. Hopper v. Douglas County [Neb.] 106 N. W. 330.

17. The county treasurer in the collection of taxes for townships and incorporated towns is not the agent of the county (State v. Spinney [Ind.] 76 N. E. 971), and the county in the absence of an express statute making it liable, is not answerable for his delinquencies, if any (Id.).

18. Loss of funds in hands of county treasurer. Lancaster County v. State [Neb.] 107 N. W. 388. If the county treasurer uses county money to repay the state for state funds deposited by him in a bank designated as the depository of county funds, and lost through failure of the bank, the county may recover the same from the state. Id.

19. Maintaining a bridge to the special damage of the plaintiff. Viebahn v. Crow Wing County Com'rs [Minn.] 104 N. W. 1089.

20. State v. True [Tenn.] 95 S. W. 1028.

21. The right of a police jury to purchase a site for a court house is implied in the right given by law to provide a good and sufficient court house. Dupuy v. Police Jury of Iberville [La.] 41 So. 91. The power to erect a court house and issue bonds in payment therefor includes the necessary and indispensable power to purchase fixtures and permanent furnishings for the completion of such court house, to place the same in fit condition to be used for the transaction of public business, and to issue bonds in payment therefor. Territory v. Baxter [Okl.] 83 P. 709. The express power to erect a jail and issue bonds in payment therefor includes the implied power to purchase a site on which to erect such jail and to issue bonds in payment therefor. Id.

22. The police jury of a parish has no authority to sell or exchange a court house and grounds without legislative sanction for the purpose of requiring another site for a new court house. Dupuy v. Police jury of Iberville [La.] 41 So. 91.

23. County commissioners have no authority to release a purchaser of school lands from paying the full amount of interest agreed upon at the sale, and to accept, without any further consideration, a lesser rate. Accepting 3% interest on a debt for school lands in the place of 7% to prevent a threatened abandonment of the purchase. Delta County v. Blackburn [Tex.] 15 Tex. Ct. Rep. 908, 93 S. W. 419.

24. A county cannot dispose of the fee of its school lands except by sale made by the commissioner's court, which would be a matter of record. County cannot divest itself of lands by acquiescence in boundaries so operating. Atascosa County v. Alderman [Tex. Civ. App.] 14 Tex. Ct. Rep. 925, 91 S. W. 846.

25. Tax certificates exchanged for void warrants by county officials with knowledge of the fact that they were void may, with their proceeds, be recovered by the county. Multnomah County v. White [Or.] 85 P. 78.

26. Riverside County v. Yawman & Erbe Mfg. Co. [Cal. App.] 86 P. 900.

27. A county board cannot build a new court house under the guise of repairing the old, destroyed by fire. Attorney Gen-

ty exceeded the county's statutory power to take real property.[28] It is not ordinarily essential that any precise form of operative words of grant to a county be used.[29] Revenues, like taxes,[30] and convict earnings,[31] are often allotted by statute to specific purposes.

Depositories.—A statutory provision requiring banks bidding for the deposit of county funds to file bonds with their bids is mandatory,[32] and an indemnity bond executed to induce a county treasurer to deposit county funds in a certain bank is valid and enforceable on the failure of the bank.[33] A depository of county funds not being a party to any fraud in making an award is entitled to receive them notwithstanding such fraud,[34] and the deposit having been duly made, the relation of creditor and debtor is created between the county and the bank.[35] It is not essential in Texas that all funds be allotted to one bidder.[36]

(§ 3) *G. Presentation, allowance, enforcement, and payment of claims.*[37]—The authority[38] and necessity for auditing a claim,[39] and the manner[40] and the time within which it must be presented, are fixed by statute.[41] A determination of the amount to be paid for an improvement erected according to certain plans and specifications within a certain time is a sufficient exercise of a county court's power and duty of auditing.[42] An order allowing a claim need not be in any particular form,[43] merely crediting the claimant therewith on a bill against him being sufficient,[44] but

eral v. Montcalm County Sup'rs [Mich.] 12 Det. Leg. N. 562, 104 N. W. 792. By statute the insurance money derived from the destruction of public improvements may be used to repair them if so voted by two-thirds of the board of supervisors. Id.

28. Ejectment by successor in interest of county's grantor not maintainable on ground that conveyance was for other than a statutory purpose. Barnes v. Multnomah County, 145 F. 695.

29. A conveyance to county commissioners as such and their assigns operates as a conveyance to the county, as the provision in § 2519, B. & C. Comp. declaring property conveyed to persons "for the use of the county" shall be deemed county property, did not make such words essential as operative words, but a conveyance intended and designed for the use of the county was sufficient to make it county property. Barnes v. Multnomah County, 145 F. 695.

30. See Taxes, 6 C. L. 1602.

31. In Georgia, funds derived from the hire of misdemeanor convicts is applied, first, to the payment of the fees of the officers of court in the particular cases, then the fees for insolvent costs in other cases, and the surplus is to be paid into the county treasury. Under Pen. Code 1895, § 1097. Barron v. Terrell, 124 Ga. 1077, 53 S. E. 181.

32. Bonds filed subsequent to the order accepting the bids not sufficient under the law. An action on treasurer's official bond for failure to make the deposit. Martin v. State [Ark.] 96 S. W. 372.

33. Weddington v. Jones [Tex. Civ. App.] 91 S. W. 818.

34. Warsham v. Dyer [Tex. Civ. App.] 16 Tex. Ct. Rep. 208, 94 S. W. 1080.

35. County has right to sue. Johnson County v. Chamberlain Banking House [Neb.] 104 N. W. 1061. Treasurer no longer the custodian of such money. Id.

36. The commissioners' court may select a depository of county funds for less than the whole of them where there is but one bid for such funds and for a part of them only. Worsham v. Dyer [Tex. Civ. App.] 16 Tex. Ct. Rep. 208, 94 S. W. 1080.

37. See 5 C. L. 866.

38. The order of a commissioner's court allowing a claim previously rejected by the county auditor is void under Laws 1905, p. 381, c. 161, requiring approval of a claim by the auditor as a condition precedent for the exercise of jurisdiction over the claim by the commissioners. Law mandatory. Anderson v. Ashe [Tex.] 14 Tex. Ct. Rep. 637, 90 S. W. 872.

39. Claims of a county attorney for disbursements, although connected with actual litigation, are contingent expenses depending on the audit of the board of supervisors. Vincent v. Nassau County, 96 N. Y. S. 446.

40. In Iowa a subcontractor's claim for materials used in constructing a county improvement must be properly itemized, and the fact that it was furnished for a lump sum and no account was kept of the separate items furnishes no valid excuse. Griffin v. Walworth County Com'rs [S. D.] 104 N. W. 1117.

41. The board of supervisors has no authority in California to grant a claim not presented within a year after it accrues. Murphy v. Bondshu [Cal. App.] 83 P. 278.

42. A county court sufficiently audited a contractor's claim in considering and determining what the county should pay for the erection of certain materials, according to certain plans and within a certain time, with the usual provisions for supervision during construction and final inspection before full payment and acceptance of the building. Such a contract was not an abdication of the power to audit. Tally v. Commissioner's Ct. of Jackson County [Ala.] 39 So. 167.

the mere acceptance and entry of a contract on the minutes does not amount to an allowance of the claim for compensation thereunder.[45] A claim rejected on its merits cannot be considered by a subsequent board of supervisors.[46] The rejection of a claim may consist in a complete denial of all relief sought in a petition to have a claim audited,[47] or putting it out of the power of a board of commissioners to act on a claim through its rejection by the county auditor,[48] or merely a continued postponement of its consideration.[49] However, to be effective, an order of disallowance must be entered on the minutes.[50]

Mandamus will lie to compel county commissioners to act on a claim,[51] but not to compel allowance[52] nor to collect it,[53] the remedy for disallowing a claim being an action at law against the county;[54] and it is provided in some states that a claimant is not entitled to sue until after due presentation and rejection of his claim,[55] which need be but once,[56] but a defense based on a failure to present a claim to the board of commissioners must be pleaded to be available,[57] and the complaint must set forth the claim sued on, how accrued, how and when presented for allowance and filing.[58] In an action for the balance due on an improvement, failure to allege its acceptance by the county renders the complaint demurrable.[59] An alle-

43, 44. Denman v. Coffee [Tex. Civ. App.] 14 Tex. Ct. Rep. 29, 888, 91 S. W. 800.

45. The acceptance, approval, and entry on the minutes of a contract for service by the court of county commissioners does not amount to an auditing and allowance of the claim for compensation. Mandamus would not lie. Smith v. McCutchen [Ala.] 41 So. 619.

46. Wey v. O'Hara, 48 Misc. 82, 95 N. Y. S. 81.

47. An entry upon the minutes of the court of complete denial of the relief sought in a petition to audit and pass upon a claim is a disallowance of the claim. Commissioners Ct. of Chilton County v. State [Ala.] 41 So. 463.

48. The rejection of a claim by the county auditor putting it out of the power of the commissioner's court to act thereon amounts to a rejection by the latter so as to entitle the claimant to sue the county under the statute. Art. 790, Rev. St. 1895, requiring presentation to commissioner's court and neglect or refusal to allow claim before county can be sued by claimant. Anderson v. Ashe [Tex.] 14 Tex. Ct. Rep. 637, 90 S. W. 872.

49. The postponement of the consideration of a petition requesting that provision be made for the payment of warrants of long standing may be deemed a neglect or refusal to make such provision, in the absence of any showing that grounds for the postponement existed, or that at a subsequent meeting any further action was taken. Espy Estate Co. v. Pacific County Com'rs, 40 Wash. 67, 82 P. 129.

50. The disallowance of a claim by a court of county commissioners, indorsed upon the claim, but not entered upon the minutes of the court, is wholly ineffectual as an audit thereof. Amounts to no action by court upon claim. Commissioners Ct. of Chilton County v. State [Ala.] 41 So. 463.

51. De Soto County Com'rs v. Howell [Fla.] 40 So. 192; Commissioners' Ct. of Chilton County v. State [Ala.] 41 So. 463.

52. Remedy in such case being by action. De Soto County Com'rs v. Howell [Fla.] 40 So. 192.

53. Commissioners' Ct. of Chilton County v. State [Ala.] 41 So. 463.

54. If the court of commissioners audit a claim by disallowing it, the remedy is by an action at law against the county. Commissioners' Ct. of Chilton County v. State [Ala.] 41 So. 463.

55. Bell County v. Flint [Tex. Civ. App.] 14 Tex. Ct. Rep. 256, 91 S. W. 329. Alleging presentation to commissioners' court of a claim for $1,000 damages for lack of two stock gaps across a road, and its rejection is not sufficient to warrant the bringing of a suit on a number of items of damage amounting in the aggregate to $1,960. Id. Mandamus will not issue to compel payment of a coroner's claim for fees for holding an inquest before it has been audited and allowed by the board of revenue, notwithstanding the board may have no discretion in allowing such claim. Miller v. State [Ala.] 39 So. 658. Act Feb. 10, 1899, § 2, requiring a coroner to itemize and verify his accounts of claims for fees and holding inquests, not in conflict with general laws requiring all claims to be audited and allowed by the board of revenue. Id.

56. A claim need not be presented twice to the board of supervisors if wholly rejected on its first presentation. Millard v. Kern County, 147 Cal. 682, 82 P. 329.

57. Board of Com'rs of Hendricks County v. Eaton [Ind. App.] 77 N. E. 958.

58. Such complaint states a cause of action. Millard v. Kern County, 147 Cal. 682, 82 P. 329. Held that steps taken by plaintiff in presenting claim to board were sufficiently set forth. Id.

59. A complaint in an action for the balance due on a road construction contract is demurrable for failing to allege that the completed road was received by the county commissioners. Board of Com'rs of Jackson County v. Branaman [Ind.] 76 N. E. 1030.

gation in a complaint that the board had passed upon and allowed a bill is an allegation that the board acting in a judicial capacity had determined its correctness.[60] Under the rule that demurrers do not lie to claims presented to a county court for allowance, proof may be introduced to show a claim, improper on its face, to be a correct charge.[61] In Michigan, claims arising out of obligations involuntarily assumed by the claimant entitle him to recover, although rejected by the county supervisors.[62] A county treasurer is without authority to pay a claim unless presented as prescribed by statute.[63]

It is no defense to a claim for services that the improvement on which they were rendered was abandoned before its completion,[64] nor may the county urge laches when the delay in enforcing the claim is due to the tardy prosecution of the work by the county,[65] but absence of the statutory authorization of a contract is a good defense to a claim for compensation under it.[66] To establish an accord and satisfaction, the allowance of a part of a claim must have been made and accepted in full,[67] as by the allowance, drawing, and retention of a lump sum, less than the whole, on an itemized account.[68] Fees of office duly allowed cannot be appropriated to a claim of the county against the officer.[69] Illegal claims allowed may be recovered.[70]

(§ 3) *H. Warrants; issuance and enforcement.*[71]—In some states warrants must specify the liability for which they are drawn and when it accrued,[72] and cannot be drawn unless an appropriation has first been duly made.[73] Being merely a ministerial act, mandamus lies to compel the issuance of warrants on a claim allowed[74] in a definite sum as shown by the record,[75] but a county auditor may refuse to

60. Riverside County v. Yawman & E. Mfg. Co. [Cal. App.] 86 P. 900.

61. Matter left open for determination of court on evidence. Hempstead County v. Phillips [Ark.] 95 S. W. 133.

62. Plaintiff county paying necessary expenses in care of small-pox patient belonging to defendant county, were involuntary payments. Board of Sup'rs of Arenac County v. Iosco County Sup'rs [Mich.] 13 Det. Leg. N. 121, 107 N. W. 725. Such claims not within the contemplation of Const. art. 10, § 10, making the audit by the board of claims for services against the county final. Id.

63. The county treasurer of Ramsey County, Minn., is not, by § 646, Gen. St. 1894, authorized without an order or warrant of the county auditor to pay the amount of a judgment against the county upon presentation to him of a certified copy of the judgment and a voucher for the payment thereof. State v. Foot [Minn.] 108 N. W. 932.

64. Persons employed in constructing a ditch are entitled to compensation, although the project is abandoned by the county before its completion. Espy Estate Co. v. Pacific County Com'rs, 40 Wash. 67, 82 P. 129.

65. Suit on warrants over eleven years old for work on ditch where county was slow in condemning land therefor and finally abandoned the work six months prior to bringing of suit. Espy Estate Co. v. Pacific County Com'rs, 40 Wash. 67, 82 P. 129.

66. Absence of approval of contract by special board as required by St. 1896, p. 497, c. 500. Cutter v. Middlesex County, 189 Mass. 451, 75 N. E. 954.

67. Claimant demanding $650, of which $200 had been allowed, was credited with $200 on his claim in the circuit court. Held not sufficient to establish an accord and satisfaction. Center's Adm'r v. Breathitt County [Ky.] 90 S. W. 1054.

68. Action for remainder will not lie. Hunt v. Franklin County Com'rs, 100 Me. 445, 62 A. 213.

69. A sheriff's claim for fees of office having been allowed, cannot be appropriated by the commissioner's court to the payment of an indebtedness of the sheriff to the county by crediting amount of claims allowed the sheriff on a claim alleged to have been illegally paid to him. Denman v. Coffee [Tex. Civ. App.] 14 Tex. Ct. Rep. 29, 888, 91 S. W. 800.

70. Though voluntarily allowed by county commissioners. Campbell County v. Overby [S. D.] 108 N. W. 247.

71. See 5 C. L. 868.

72. Rev. St. 1887, § 2006, mandatory. McNutt v. Lemhi County [Idaho] 84 P. 1054. Warrants held defective under the statute. Id.

73. The chairman of the county court cannot draw a warrant to be paid out of county funds without an appropriation having first been made by the justices of the county in quarterly court assembled. State v. True [Tenn.] 95 S. W. 1028.

74. A commissioner's court having allowed a claim may be compelled by mandamus to direct draft to be drawn on the treasurer for the amount. Denman v. Coffee [Tex. Civ. App.] 14 Tex. Ct. Rep. 29, 888, 91 S. W. 800.

75. Before mandamus will lie to compel a judge of probate in Alabama to draw a warrant, the sum for which the warrant

issue[76] or countersign a warrant pursuant to a void order of allowance.[77] County warrants are generally receivable in payment of county taxes.[78] This is not true in Arkansas as to those levied to pay the indebtedness, and interest thereon, existing at the time of the adoption of its constitution.[79] Warrants merely showing an apportionment of funds collected by a county treasurer do not represent a debt payable out of county funds.[80] The payment of warrants illegally issued may be resisted by the county, although the order directing their issuance was never appealed,[81] but in an action to enjoin the payment of warrants by the county treasurer, the holders and owners of them should be made parties defendant.[82] In Indiana a treasurer may set off against and retain from the payment of a warrant the amount due the county in taxes from the owner of such warrant.[83] An action to recover a money judgment on a county warrant may be maintained when the money for the payment of such warrant has been collected and wrongfully applied by the county authorities to the payment of other claims against the county.[84]

(§ 3) *I. Appeals from orders of county boards.*[85]—Certiorari will lie to review proceedings of a county board[86] in excess of its jurisdiction,[87] in the absence of the right of appeal or other adequate remedy,[88] but not to review its acts in its legislative capacity,[89] and may be instituted by whomsoever the statute specifies.[90] An appeal can be taken only from a final decision,[91] is not exclusive of other remedies

should be drawn must be a definite and fixed sum, and it must be shown by the record to have been allowed. Smith v. McCutchen [Ala.] 41 So. 619. Petition and exhibits held not to show that petitioner's claim had been audited and allowed by the court of county commissioners. Id.

76. The county auditor is justified in refusing to draw a warrant for the amount of a claim the board had no authority to allow. Murphy v. Bondshu [Cal. App.] 83 P. 278.

77. Anderson v. Ashe [Tex.] 14 Tex. Ct. Rep. 637, 90 S. W. 872.

78. Const. art. 16, § 10, and Kirby's Dig. §§ 1466, 1174, and 7056. Warrants receivable in payment of a special tax for construction of a court house. Stillwell v. Jackson [Ark.] 93 S. W. 71. Statutes permitting payment of county taxes with county warrants, constitutional. Id.

79. Stillwell v. Jackson [Ark.] 93 S. W. 71.

80. A warrant by a county auditor upon a county treasurer in favor of a township treasurer for the payment of town taxes collected by the county treasurer, even if authorized by law and necessary to entitle the town treasurer to demand and receive the town funds from the county treasurer, represent no debt or liability or obligation of the county to the town payable out of the county's funds. State v. Spinney [Ind.] 76 N. E. 971. Section 7998, Burns' Ann. St. 1901, requiring county treasurers, when there are no funds to pay an order, to indorse thereon "not paid for want of funds," entitling such order thereby to draw interest, does not apply to warrants as above merely showing apportionment of funds. Id.

81. The county itself, through its board of commissioners, may resist the payment of a warrant which has been wrongfully and unlawfully issued, although no appeal was ever taken by any one from the order directing its issuance. Rev. St. 1887, § 1776, as amended by Act Feb. 14, 1899, providing for an appeal by taxpayers and persons did not contemplate an appeal by the county. McNutt v. Lemhi County [Idaho] 84 P. 1054.

82. State v. Gormley, 40 Wash. 601, 82 P. 929.

83. Claimant not having paid taxes for ten years. Funk v. State [Ind.] 77 N. E. 854. Answers alleging the amount due for taxes from claimant under warrant held good on demurrer. Id.

84. Thurston County v. McIntyre [Neb.] 106 N. W. 217.

85. See 5 C. L. 869.

86. Writ properly granted by circuit court commissioner. Attorney General v. Montcalm County Sup'rs [Mich.] 12 Det. Leg. N. 562, 104 N. W. 792.

87. Certiorari will lie to review proceedings of the county court under the County Seat Removal Act alleged to be illegal and without jurisdiction, although the act declares that the decision of the county court shall be final. County Ct. of De Kalb County v. Pogue, 3 Ill. App. 391.

88. No right of appeal or other adequate remedy existing as to acts by a board of supervisors in excess of their rightful power. Certiorari will lie to review their acts. Bremer County v. Walstead [Iowa] 106 N. W. 352.

89. Certiorari will not lie to review acts of the board of supervisors of a legislative nature. People v. Westchester County Sup'rs, 99 N. Y. S. 348. Passage of a resolution reviving distinction between town and county poor and the levy and assessment upon the town of Cortland of taxes for the support of the town poor. Id.

90. By attorney general. Attorney General v. Montcalm County Sup'rs [Mich.] 12 Det. Leg. N. 562, 104 N. W. 792.

91. Good v. Burk [Ind.] 77 N. E. 1084. An appeal from an order of the board pro-

in the case of illegal allowance of a claim,[92] opens up the entire report for investigation,[93] and the claimant must establish a prima facie case.[94] In Oklahoma the appellate court has power to finally determine the controversy or to remand it to the county board.[95] Injunction will not ordinarily control the action of the county board as to which appeal is given,[96] and allegations to avoid this rule that they purposed a corrupt and collusive action are not sustained by proof of negligence and willful disregard of duty.[97]

COUNTS AND PARAGRAPHS; COUNTY COMMISSIONERS OR SUPERVISORS; COUNTY SEAT; COUPLING CARS; COUPONS; COURT COMMISSIONERS, see latest topical index.

COURTS.

§ 1. Creation, Change, and Alteration (999).
§ 2. Officers and Instrumentalities of Courts (1000).
§ 3. Places, Terms, and Sessions of Courts (1000).
§ 4. Conduct and Regulation of Business (1002).

The jurisdiction of courts[1] and the effect of decisions as precedents[2] are elsewhere treated.

§ 1. *Creation, change, and alteration.*[3]—A court is a judicial tribunal[4] primarily for the adjudication of controversies, and it cannot exercise, nor can it be endowed with, nonjudicial powers,[5] but in several of the states the courts are required to give legal advice to the other co-ordinate branches of the government[6] upon pending matters.[7] Within the constitutional limitations[8] the legislature may

viding for an election on the issue of appropriating money to aid an interurban railway was dismissed as being from an interlocutory order. Id.

92. The county's remedy by appeal from the improper allowance of an illegal claim is not exclusive, and the county may sue the claimant for the amount illegally obtained. Campbell County v. Overby [S. D.] 108 N. W. 247.

93. On an appeal by the county commissioners from the audit of their accounts by the county auditors, the entire report may be investigated (Horning's Case, 26 Pa. Super. Ct. 282), and is not confined to the items mentioned by the commissioners in their specification of errors (Id.), but intervening taxpayers may demand reinvestigation of credit items claimed by the commissioners other than those mentioned in the latter's appeal (Id.).

94. An irregularity in the court below is not subject to review in the absence of an exception or of any injury to appellant. Peeling v. York County, 212 Pa. 245, 61 A. 911.

95. Board of Com'rs of Logan County v. State Capitol Co. [Okl.] 86 P. 518.

96, 97. Board of Com'rs of La Porte County v. Wolff [Ind.] 76 N. E. 247.

1. See Jurisdiction, 6 C. L. 267; Appeal and Review, 7 C. L. 128.

2. See Stare Decisis, 6 C. L. 1510.

3. See 5 C. L. 870.

4. The State Corporation Commission, while hearing and deciding the necessity for a crossing by one railroad over the tracks of another, is acting as a court of record (Norfolk & W. R. Co. v. Tidewater R. Co. [Va.] 52 S. E. 852), and by § 1313a, cl. 23, should observe the common law and statutory rules of evidence (Id.). Error to admit testimony not under oath. Id.

5. See Constitutional Law, 7 C. L. 704.

6. Section 13 of art. 4 of the Const. of Florida only authorizes the supreme court to interpret portions of the constitution relative to the governor's duties and powers upon request, and not to pass upon the constitutionality of statutes affecting his duties. Advisory Opinion to Governor [Fla.] 39 So. 187.

7. In Massachusetts, opinions should be given upon request only when sought on matters pending before the department seeking the information. In re Opinion of the Justices, 190 Mass. 611, 77 N. E. 820. Under Const. art. 74, requiring the supreme court to advise the governor and council upon legal questions "pending in that body," it is the duty of the court to answer questions upon the solution of which depends the call of a special session of the legislature. In re Opinion of the Justices [N. H.] 63 A. 505.

8. Act of April 23, 1903 (P. L. 274), defining the powers of the quarter sessions over incorrigible and delinquent children, does not create a new court and hence is not within the constitutional prohibition. Commonwealth v. Fisher, 213 Pa. 48, 63 A. 198, afg. 27 Pa. Super. Ct. 175. And see also Hunt v. Wayne Circuit Judges [Mich.] 12 Det. Leg. N. 672, 105 N. W. 531. Priv. Laws 1905, p. 110, c. 36, § 13, establishing a police court for the city of Raleigh and conferring upon it exclusive jurisdiction of misdemeanors committed within the corporate limits, held valid under section 14, Const. art. 4, modifying section 27. State v. Baskerville [N. C.] 53 S. E. 742. In **Alabama** a **local court** can be created or abolished only upon

create,[9] reorganize,[10] and abolish courts,[11] and while the inferior Federal courts can be created only by an act of congress, no specific creative words are necessary if the intent be manifest.[12] An act creating a court must also locate it.[13] Courts of several members act by majority,[14] which majority is reckoned by the number of judges when the judgment is rendered, not when informally decided.[15]

§ 2. *Officers and instrumentalities of courts.*[16]—The legislature, subject to constitutional restrictions,[17] may regulate and empower a judge of one district to sit in another.[18]

§ 3. *Places, terms, and sessions of courts.*[19]—A court must be held at the place designated by statute.[20] The date of the beginning of a term is usually regu-

due **notice** under Const. § 6. Notice of intention to enact Local Acts 1903, p. 379, creating an inferior court in certain precincts of the county, held sufficient. State v. Abernathy [Ala.] 40 So. 353. Held constitutional in regard to its title. Id. Also notice to enact Local Acts 1903, p. 40, creating the Geneva county court. Ex parte Black [Ala.] 40 So. 133. Proof of publication held sufficient. Id. Notice of the Act of March 6, 1903 (Local Acts 1903, p. 101), repealing the act creating the Walker county law and equity court, held insufficient. Norvell v. State, 143 Ala. 561, 39 So. 357. Act Dec. 5, 1900 (Acts 1900-01, p. 107), creating the Walker county law and equity court, held not unconstitutional as including provisions not germane to the subject stated in its title (Id), and if the abolition of the prior county court be regarded as not germane, it does not affect the constitutionallty of that part of the statute creating the new court (Id.). As it was passed under the old constitution, it will be presumed that the proper notice of intent to enact was given, nothing appearing to the contrary. Id.

9. Act 1905, No. 70, establishing a court whose jurisdiction extends beyond the territorial limits of the municipality, can not be sustained as a municipal court, although called by such name in the creative statute (Attorney General v. Loomis [Mich.] 12 Det. Leg. N. 553, 105 N. W. 4), nor can it be sustained as creating a single justice of the peace in view of the provision for an associate justice (Id), nor as authorizing two justices of the peace, since the associate justice was only to act on certain occasions (Id.). The city court of Sylvester was not, by the act of August 11, 1904 (Laws 1904, p. 207), regularly established as a constitutional city court, and hence judgments thereof can only be reviewed by certiorari. Crosson v. State, 124 Ga. 651, 52 S. E. 880.

10. Act April 18, 1905 (P. L. 208), authorizing judges of the separate orphans' courts to hear equity proceedings at the request of judges of the common pleas, is a reorganization of the courts of common pleas, and not violative of § 15, art. 5, Const., requiring judges to be elected by the electors in their respective districts. Morgan v. Reel, 213 Pa. 81, 62 A. 253.

11. Act March 2, 1905, c. 1305, 33 Stat. 824 [U. S. Comp. St. Supp. 1905, p. 126], dividing the state of Washington into two judicial districts, did not abolish the then existing courts, but restricted them merely in regard to territory. Seattle Elec. Co. v. Hartless [C. C. A.] 144 F. 379; Tacoma R. & Power Co. v. Geiger [C. C. A.] 145 F. 504. But see Geiger v. Tacoma R. & Power Co., 141 F. 169.

12. Act of March 2, 1905, c. 1305, pt. 1, 33 Stat. 824, dividing the state of Washington into two judicial districts, while it does not in express words ordain and establish any courts nor define their jurisdiction, nor assign the district to any of the nine circuits, it clearly shows the intent in regard to these matters, and by implication the courts are duly established. Geiger v. Tacoma R. & Power Co., 141 F. 169.

13. A provision in the act that the sessions shall be held "in the court house of Worth county, in said city of Sylvester, or at some other place in said city," is a sufficient location notwithstanding that Sylvester was a town and not a city. Crosson v. Sumner [Ga.] 54 S. E. 181.

14. See Appeal and Review, 7 C. L. 238; Judgments, 6 C. L. 214.

15. Although a case was argued at a time when the court was composed of but three judges, a decision rendered after an increase to seven, concurred in by but two, is void. Denver, etc., R. Co. v. Burchard [Colo.] 86 P. 749.

16. See 5 C. L. 871. See, also, Clerks of Court, 7 C. L. 656; Sheriffs and Constables, 6 C. L. 1459; Stenographers, 6 C. L. 1552.

17. A constitutional provision that inferior judges may hold court for each other is exclusive and avoids an act empowering the supreme court to direct them when to do so. In re Weston, 28 Mont. 207, 72 P. 512; Ryan v. Weston, 28 Mont. 207, 72 P. 512. Municipal court act of the city of New York, Laws 1902, p. 1494, c. 580, § 12, as amended by Laws 1904, p. 1429, c. 598, providing for the rotation of judges, is authorized by Const. art. 6, § 17 (Sakolski v. Schenkel, 98 N. Y. S. 190), and such act is not unconstitutional as denying equal protection of the law (Id.).

18. As to special and substitute judges, see the topic Judges, 6 C. L. 209.

19. See 5 C. L. 871.

20. Acts 1904, p. 43, c. 11, providing for holding sessions of the circuit court in certain towns other than the county seat, is not unconstitutional as special legislation, as moving the county seat without proper vote, nor does its title include more than one subject. Johnson v. Fulton [Ky.] 89 S. W. 672. The court being always in session, an order signed by the judge in his chambers adjoining the court room, an open door connecting the two, is signed in open court.

lated by statute,[21] and the court must be opened by a duly authorized judge.[22] When the court has been duly convened, the term continues until legally adjourned,[23] or until the commencement of the next regular term.[24] The common-law right of a court to adjourn to a distant day still exists in West Virginia.[25] Where the general term in one county is a special term for the other counties of the circuit, the duration of the special term is coextensive with that of the general.[26] An adjournment to chambers is an adjournment to the chambers of the judge at the court house.[27] Where the statute authorizes special judges to hold regular terms of court, the regular judge may hold a special term while the regular term is in session.[27a] In Washington there may be as many concurrent sessions of the superior court in any county as there are presiding judges and judges assigned thereto.[28] There are no terms of court in equity proceedings.[29] The statutes of many states authorize the convening of special terms under certain conditions[30] upon due notice.[31] The proceedings of a court not legally in session are void,[32] and the ap-

San Luis Obispo County v. Simas [Cal. App.] 81 P. 972.

21. The fact that the statute designated June 5th as the opening day of a term will not render a writ issued on the 6th and returnable on the "first day" of the term void when court was in fact opened on the 7th, which day was understood as the first. Mays v. Newlin, 143 F. 574.

22. Where a court was organized by the supernumerary judge, who was directed so to act by the governor, it will be presumed that the regular judge notified the governor of his inability to act, in which case the direction was proper under Act Feb. 20, 1899 (Acts 1898-99, p. 237), § 3. Peel v. State [Ala.] 39 So. 251. Not necessary that the minute entry showing the organization by the supernumerary judge should show why the regular judge was absent. Id.

23. Where the courts are always in session except for certain purposes, an order for adjournment of the term must particularly so state. Henry v. Lincoln Lucky & Lee Min. Co. [N. M.] 85 P. 1043. An order "It is ordered that the court do now adjourn until court in course," construed as adjourning the court and not the term. Id. Under Rev. St. 1898, § 2572, providing that no omission to adjourn any court from day to day previous to the final adjournment shall vitiate the proceedings, adjournments subject to the order of the court do not terminate the term. Cooper v. Granger [Wis.] 108 N. W. 193. Where both criminal and civil jurisdiction is vested in one court, an adjournment thereof from day to day adjourns the criminal branch. People v. Cox, 106 App. Div. 299, 94 N. Y. S. 526.

24. An adjournment to chambers leaves the regular term in full force until the actual convening of the next term of court. In re Wood, 107 App. Div. 514, 95 N. Y. S. 260. In Wisconsin a term does not end until the commencement of a new term, unless terminated by affirmative official act. Cooper v. Granger [Wis.] 108 N. W. 193. Section 50, D. C. Code (31 Stat. at L. 1198, chap. 854), providing that the police court shall hold a term on the first Monday of each month and continue the same "from day to day," etc., suggests that a term cannot be continued beyond the period of the next term. Harris v. Nixon, 27 App. D. C. 94.

25. Section 2 of chapter 114 of the Code of 1899, authorizing circuit and county courts to adjourn from day to day until their business is dispatched or until the ends of their terms, does not limit the common-law power to adjourn to a distant day (Mann v. Mercer County Court, 58 W. Va. 651, 52 S. E. 776), nor does section 10 of chapter 114 of the Code of 1899 (Id.).

26. Rev. St. 1898, § 2424, as amended by Laws 1905, p. 8, c. 6. Emerson v. Huss [Wis.] 106 N. W. 518.

27. Proceedings held at the judge's chambers in another city are void. In re Wood, 107 App. Div. 514, 95 N. Y. S. 260.

27a. Code 1896, §§ 928, 930, authorizing the supernumerary judge and special judges appointed by the court to hold the regular term, by implication authorizes the regular judge to hold a special term at the same time. Williams v. State [Ala.] 41 So. 992.

28. Sections 5 and 7 of art. 4, Const., being construed together, it is immaterial whether a judge be assigned by the governor or by request of a local judge. Hindman v. Boyd [Wash.] 84 P. 609.

29. Hence costs are assessed upon the basis of hearings and not terms as in law cases. Allan v. Allan [Me.] 63 A. 654.

30. Under Acts 29th Leg. (Gen. Laws 1905), p. 116, c. 83, § 1, the judge of the district court may call a special session for the sole purpose of passing sentence upon one previously convicted. Not necessary that the business should be unfinished business. Ex parte Young [Tex. Cr. App.] 15 Tex. Ct. Rep. 852, 95 S. W. 98. Act held not unconstitutional as being ex post facto. Id. A recital in an order that defendant is "held in custody charged with a capital offense" sufficiently alleges that defendant is "confined in jail" so as to authorize the calling of a special term, under Kirby's Dig. § 1532. Beard v. State [Ark.] 95 S. W. 995. Where a special term is called under Rev. St. 1899, § 1606, upon the notice of the sheriff of Clay county that defendant was in jail awaiting trial, held that the record was insufficient to impeach the recital that he was in jail in Clay county. State v. Myers [Mo.] 94 S. W. 242.

31. In Alabama a circuit judge can convene a special term only upon notice. Code 1896, §§ 914, 915. McMillan v. Gadsden [Ala.] 39 So. 569. In the absence of an agreement,

pellate court will take judicial notice of the time for sessions of lower courts.[33] A motion for a new trial can not be considered at a subsequent term unless duly continued.[33a] A jury, however, may return its verdict at a later term.[34]

§ 4. *Conduct and regulation of business.*[35]—Courts of record have the inherent power to make all reasonable and necessary rules for the transaction and regulation of their business,[36] provided they do not contravene positive law,[37] which rules are binding upon the court as well as upon the litigants,[38] and can be waived only by the beneficiary.[39] In a general way, rules of court are construed as statutes are construed,[40] except that the word "may" will not ordinarily be given the force of "shall," as is often done in the interpretation of statutes.[41] While the rules of the Indiana appellate court and the supreme court are the same in so far as they are applicable, yet in a particular case pending in either, the rules of that court alone apply.[42]

Under the Conformity Act, the practice and procedure in civil actions in the inferior Federal courts must conform as near as may be to that of the state wherein the action is brought,[43] unless otherwise expressly provided by act of congress.[44]

a special session can be held only upon notice pursuant to Gen. St. 1902, § 452. O'Keefe v. Scoville Mfg. Co. [Conn.] 61 A. 961. Held under the facts and in view of the judgment file describing the session as "special," that it was a special session and not an additional session. Id. Judge should have ascertained whether the required notice had been given or an agreement of the parties made. Id. The filing of written objections to the trial, specifically stating that the required notice had not been given, is sufficient to prevent a waiver of the irregularity. Id.

32. Walker v. State, 142 Ala. 32, 38 So. 241. Judgment rendered when court was not legally in session. McMillan v. Gadsden [Ala.] 39 So. 569; Mattox Cigar & Tobacco Co. v. Gato Cigar Co. [Ala.] 39 So. 777. Under the provisions of Acts 1900-01, p. 646, the 23d day of September, 1903, was a time authorized for holding court. Kansas City, etc., R. Co. v. Randolph [Ala.] 39 So. 920.

33. Especially when fixed by statute. Edwards v. State, 123 Ga. 542, 51 S. E. 630; McMullen v. Long [Ala.] 39 So. 777.

33a. A general order continuing all cases, actions, motions, and proceedings pending, and not otherwise disposed of, to the next term, held not to continue a motion for a new trial. Southern R. Co. v. Jones, 143 Ala. 328, 39 So. 118.

34. Where the jury retires at one term, it may return its verdict at the succeeding one. Weske v. Chicago Union Traction Co., 117 Ill. App. 298.

35. See 5 C. L. 873. Conduct of proceedings at trial. see Trial, 6 C. L. 1731.

36. Dille v. Rice, 120 Ill. App. 353. A recital in an ex parte motion of a prevailing practice to give notice to the opposing party before filing an order is insufficient to show a rule of court in respect thereto. Oltman v. Schoenbeck, 120 Ill. App. 351.

37. Dille v. Rice, 120 Ill. App. 353. Where the statute establishes the clerk's fees, the court cannot make a rule dismissing appeals from the justice court upon nonpayment of a docket fee not authorized. Id. A rule of court in conflict with a statute is invalid in so far as it conflicts. Hunt v. State, 5 Ohio C. C. (N. S.) 621.

38. Florida Land Rock Phosphate Co. v. Anderson [Fla.] 39 So. 392; Hoodless v. Jernigan [Fla.] 41 So. 194. Rule 42, requiring an undertaking as a condition precedent to the granting of an injunction, is binding on the court (Drew v. Hogan, 26 App. D. C. 55), and if waived, the party suffering may seek redress in the appellate court (Id.).

39. A rule requiring an undertaking as a condition precedent to the issuance of an injunction, being for benefit of the defendant, the court cannot waive it (Drew v. Hogan, 26 App. D. C. 55), and while such requirement might be waived by defendant appearing and defending on the merits does not have that effect, especially where it does not affirmatively appear that he knew that no undertaking had been required (Id.).

40. Florida Land Rock Phosphate Co. v. Anderson [Fla.] 39 So. 392; Hoodless v. Jernigan [Fla.] 41 So. 194.

41. Gassenheimer v. U. S., 26 App. D. C. 432. Common-law rule 53 of the supreme court, providing that where the jury has disagreed the trial justice may transfer the case to another justice, is not mandatory. Id.

42. Hence when a case is in the wrong court, the sufficiency of the record to comply with the rules will not be passed upon, though the same in each. Hood v. Baker [Ind. App.] 75 N. E. 608.

43. The United States district court, when exercising the functions of the circuit court in Porto Rico, under act of April 12, 1900 (31 Stat. at L. 77, chap. 191), § 34, must conform to the local procedure. Perez v. Fernandez, 202 U. S. 80, 50 Law. Ed. —. The conformity act does not require the

The courts have an inherent power to correct clerical errors in their records,[45] and to supply omissions,[46] especially where the proceedings are still in fieri[47] and

Federal court to give effect to the Missouri rule of practice that the filing of an amended pleading, pursuant to an erroneous order striking out portions of the original, waives the error. Williamson v. Liverpool & London & Globe Ins. Co. [C. C. A.] 141 F. 54. Suit commenced by complaint as authorized by the North Carolina Code of Procedure as distinguished from a formal declaration. Swift & Co. v. Jones [C. C. A.] 145 F. 489. The state practice acts and the construction given them by the state courts are binding on the Federal courts in actions at law. Iowa practice act relative to dismissal of action by plaintiff. Duffy v. Glucose Sugar Refining Co., 141 F. 206.

NOTE. Meaning and application of words "as near as may be": "These words have the effect to leave the Federal courts some degree of discretion in conforming entirely to the state procedure, and were intended to qualify what would otherwise have been a mandatory provision. 'These words imply that, in certain cases, it would not be practicable, without injustice or inconvenience, to conform literally to the entire practice prescribed for its own courts by a state in which federal courts might be sitting.' Mexican-Cent. R. Co. v. Pinkney, 149 U. S. 207, 37 Law. Ed. 699. See, also, Senior v. Pierce, 31 F. 625.

'The conformity is required to be as near as may be—not as near as may be possible, or as near as may be practicable. This indefiniteness may have been suggested by a purpose; it devolved upon the judges to be affected the duty of construing and deciding, and gave them the power to reject, as Congress doubtless expected they would do, any subordinate provision in such state statutes which, in their judgment, would unwisely incumber the administration of the law, or tend to defeat the ends of justice, in their tribunals.' Indianapolis, etc., R. Co. v. Horst, 93 U. S. 291, 23 Law. Ed. 898. See, also, Shepard v. Adams, 168 U. S. 618, 42 Law. Ed. 602; Chappell v. U. S., 160 U. S. 499, 40 Law. Ed. 510; Mexican Cent. R. Co. v. Pinkney, 149 U. S. 194, 37 Law. Ed. 699; Southern Pac. R. Co. v. Denton, 146 U. S. 202, 36 Law. Ed. 943; Virginia Coupon Cases, 114 U. S. 270, 29 Law. Ed. 185; Johnson v. Healey, 9 Ben. [U. S.] 321; Palmer v. Allen, 7 Cranch [U. S.] 550, 3 Law. Ed. 436; Sanford v. Portsmouth, 2 Flipp. [U. S.] 109; Fulton v. Gilmore, 2 Flipp. [U. S.] 260; Bradford v. Bradford, 2 Flipp. [U. S.] 280; Piquignot v. Pennsylvania R. Co., 16 How. [U. S.] 104, 14 Law. Ed. 863; Reeside v. Walker, 11 How. [U. S.] 272, 13 Law. Ed. 693; Duncan v. Darst, 1 How. [U. S.] 301, 11 Law. Ed. 139; Lange v. Union Pac. R. Co. [C. C. A.] 126 F. 338; North Chicago St. R. Co. v. Burnham [C. C. A.] 102 F. 671; Missouri, etc., R. Co. v. Elliott [C. C. A.] 102 F. 96; Chicago, etc., R. Co. v. Metalstaff [C. C. A.] 101 F. 770; Times Pub. Co. v. Carlisle [C. C. A.] 94 F. 771; Kent v. Bay State Gas Co., 93 F. 887; Van Doren v. Pennsylvania R. Co. [C. C. A.] 93 F. 260; Edmunds v. Illinois Cent. R. Co., 80 F. 85; Hughey v. Sullivan, 80 F. 75; Ewing v. Burnham, 74 F. 384; Hale v. Wharton, 73 F. 739; Sherry v. Oceanic Steam Nav. Co., 72 F. 566; Mack v. Porter [C. C. A.] 72 F. 236; Walker v. Collins [C. C. A.] 59 F. 70; Phenix Ins. Co. v. Charleston Bridge Co. [C. C. A.] 65 F. 628; Theroux v. Northern Pac. R. Co. [C. C. A.] 64 F. 84; O'Connell v. Reed [C. C. A.] 56 F. 531; Texas, etc., R. Co. v. Nelson [C. C. A.] 50 F. 814; In re Secretary of Treasury, 45 F. 398; Lowry v. Story, 31 F. 769; U. S. v. Brawner, 7 F. 90.

But in Amy v. Watertown, 130 U. S. 301, 32 Law. Ed. 946, the court said that the statute 'is peremptory, and whatever belongs to the three categories of practice, pleading, and forms and modes of proceeding, must conform to the state law and the practice of the state courts, except where Congress itself has legislated upon a particular subject and prescribed a rule. Then, of course, the Act of Congress is to be followed in preference to the laws of the State.' See, also, U. S. v. Davis, 103 F. 465; Chicago, etc., R. Co. v. Metalstaff [C. C. A.] 101 F. 770; Nederland L. Ins. Co. v. Hall [C. C. A.] 84 F. 278; Edmunds v. Illinois Cent. R. Co., 80 F. 85; Chamberlain v. Mensing, 47 F. 426; U. S. v. Inlots, Fed. Cas. No. 15,441; Laird v. De Soto, 25 F. 77; Cottier v. Stimson, 18 F. 689; U. S. v. Treadwell, 15 F. 533; Republic Ins. Co. v. Williams, 3 Biss. [U. S.] 370; Oscanyan v. Winchester Repeating Arms Co., 15 Blatchf. [U. S.] 87; Lewis v. Gould, 13 Blatchf. [U. S.] 216; Sears v. Eastburn, 10 How. [U. S.] 187, 13 Law. Ed. 381; Mutual Bldg. Fund, etc., Sav. Bank v. Bossieux, 1 Hughes [U. S.] 386; Fullerton v. U. S. Bank, 1 Pet. [U. S.] 604, 7 Law. Ed. 280.

The qualification contained in this phrase is not to be construed to subvert the command of the statute, but allows only necessary variations from the state methods, growing out of the different organization of the courts, and other similar matters. Lewis v. Gould, 13 Blatchf. [U. S.] 216.

'Certainly it was not intended that these statutes were to be adopted with the effect of defeating the jurisdiction of the courts of the United States once lawfully attached under an Act of Congress.' After the removal of causes from a state court the jurisdiction is not ousted by admitting as a party under the state law, a citizen of the same state. Phelps v. Oaks, 117 U. S. 236, 29 Law. Ed. 888. See, also, Stewart v. Dunham, 115 U. S. 61, 29 Law. Ed. 329."—From 4 Fed. Stat. Ann. 565.

44. Held error to submit issues to a master for determination as provided by the North Carolina Code of Procedure in view of §§ 648, 649, 700, Rev. St. (U. S. Comp. St. 1901, pp. 525, 570), providing for trial by jury. Swift & Co. v. Jones [C. C. A.] 145 F. 489. Rule 22 of the Federal circuit respecting special appearances is authorized by Rev. St. § 918 [U. S. Comp. St. 1901, p. 685], notwithstanding the conformity act, and especially where the state has no special rules relative thereto. Mahr v. Union Pac. R. Co., 140 F. 921.

45. Erroneous date of filing indorsed on a paper. Newman v. State [Ala.] 39 So. 648. And see the topic Records and Files, 6 C. L. 1269.

46. Records amended at the subsequent

the correction is upon clear and definite proof;[48] but as a general rule, a court of appeals cannot amend the records of the inferior court.[49]

COVENANT, ACTION OF.[50]

COVENANTS, see latest topical index.

COVENANTS FOR TITLE.[51]

§ 1. Making of Covenants; Persons and Estate Benefited or Bound (1004).
§ 2. Performance or Breach (1005). The Covenants of Seisin and Right to Convey (1005). The Covenant of Warranty (1006). The Covenant for Quiet Enjoyment (1006).
§ 3. Enforcement of Covenants (1006).

Scope of title.—This topic treats only of the usual covenants contained in deeds of conveyance. Covenants in a lease,[52] restrictive covenants as to the use of land,[53] covenants relative to affirmative burdens not pertaining to the title,[54] and warranties in the sale of personal property,[55] are elsewhere treated.

§ 1. *Making of covenants; persons and estate benefited or bound.*[56]—The consideration supporting the deed is sufficient to sustain the covenants of all the cograntors, though some may have received no personal consideration.[57] In Nebraska a married woman who joins in a deed to release her dower interest in her husband's property is not bound by the covenants therein.[58] A mere recital in a deed of the number of acres which it purports to convey is not a warranty that the described tract contains that number.[59] Knowledge by the covenantee of an existing easement does not limit an express covenant against easements,[60] but in Tennessee, knowledge that the land is in the adverse possession of a third party defeats recovery on the covenants.[61] In Missouri the implied statutory covenants raised by the use of certain words are not restricted by a covenant of special warranty, unless so connected therewith as to show a clear intention to limit.[62] The rule that covenants are taken most strongly against the covenantor is reversed in the case of covenants implied of law from the use of certain words.[63] The covenant of warranty extends only to land actually embraced in the deed.[64] The covenant of quiet enjoyment and

term to show upon what ground the demurrer was sustained. Martindale v. Battey [Kan.] 84 P. 527.

47. Corrected to show overruling of defendant's motion for separate trials. Boonville Nat. Bank v. Blakey [Ind.] 76 N. E. 529. Where a motion for a new trial is necessary to preserve an error in refusing separate trials, the proceedings are still in fieri, so that a motion to amend the records to show the overruling of the motion is proper, although a decree has been entered. Id.

48. Martindale v. Battey [Kan.] 84 P. 527. Need not be based on some record or memorandum, oral proof being sufficient. Id.

49. See Appeal and Review, 7 C. L. 192. Where the judgment of a justice of the peace is against defendant and wife, without naming the latter, the court of common pleas on appeal cannot amend the records so as to include the wife. Doerr v. Graybill, 24 Pa. Super. Ct. 321.

50. No cases have been found for this subject since the last article. See 5 C. L. 875.

51. See Tiffany, Real Property, § 899.

52. See Landlord and Tenant, 6 C. L. 345.

53. See Buildings and Building Restrictions, 7 C. L. 507.

54. See Real Property, 6 C. L. 1248.

55. See Sales, 6 C. L. 1320.

56. See 5 C. L. 876.

57. An answer alleging consideration to one of the grantors and cowarrantors, but that there was no consideration as to the answering defendants, held inconsistent. Tucker v. Butterweck [Fla.] 39 So. 480.

58. Comp. St. 1903, § 4806. Pochin v. Conley [Neb.] 104 N. W. 878.

59. Rich v. Scales [Tenn.] 91 S. W. 50.

60. Patterson v. Freihofer [Pa.] 64 A. 326.

61. Part of the described land in the adverse possession of a railroad of which the covenantee had knowledge. Rich v. Scales [Tenn.] 91 S. W. 50.

62. Miller v. Bayless, 194 Mo. 630, 92 S. W. 482. In determining the intention the entire deed must be construed together. Id. The general covenant arising under Rev. St. 1899, § 907, from the use of the words "grant, bargain, and sell," held so connected with the special warranty as to be limited thereby. Id.

63. Miller v. Bayless, 194 Mo. 630, 92 S. W. 482.

64. No action for breach of the covenant of warranty will lie for land not embraced in the deed, though fraudulently represented

of warranty runs with the land,[65] and the assignee or heir in possession at the time of breach may sue thereon,[66] but for a covenant to run with the land there must be privity of estate between the covenanting parties, and the covenant must have relation to an interest created or conveyed.[67] The covenant of a grantee to assume and pay an existing lien does not run with the land.[68] A conveyance by the covenantee does not operate as an assignment of his right of action for covenant broken.[69]

§ 2. *Performance or breach. Against incumbrances.*[70]—The covenant against incumbrances is broken, if at all, as soon as made.[71] An existing lien for street improvement is an incumbrance within this covenant,[72] but not an outstanding paramount title.[73] A covenant against incumbrances existing "by, from, through or under" the grantor, when contained in a deed purporting to convey only the grantor's interest, does not include an existing tax lien.[74]

The covenants of seisin and right to convey.[75]—The covenant of seisin is broken, if at all, at the time of the delivery of the deed.[76] The failure of title to any part of the land conveyed constitutes a breach of the covenant of seisin.[77] A disseisin of the covenantor, which is void as to the covenantee, does not give rise to a cause of action under this covenant.[78]

to be within the boundaries. Lainhart v. Gabbard [Ky.] 89 S. W. 10. Description by physical boundaries controls that made by calls for distances. Rich v. Scales [Tenn.] 91 S. W. 50.

65, 66. Deason v. Findley [Ala.] 40 So. 220.

67. Deason v. Findley [Ala.] 40 So. 220. Though one has been in possession for a sufficient time to raise a presumption of a conveyance from the covenantee, no such privity is shown as will sustain an action for breach of the covenant of quiet enjoyment. Id.

68. Scholten v. Barber, 217 Ill. 148, 75 N. E. 460.

69. In an action to foreclose a purchase price mortgage on land sold under a covenant of warranty of the right to cut and use timber thereon, such covenant being broken as soon as made, a subsequent grantee cannot offset the damage. Turner v. Lawson [Ala.] 39 So. 755; Pinckard v. American Freehold Land Mortg. Co., 143 Ala. 568, 39 So. 350.

Note: "As a general proposition a breach of a covenant does not run with the land. Ladd v. Noyes, 137 Mass. 151; Provident Co. v. Fiss, 147 Pa. 232; Clement v. Bank, 61 Vt. 298; Mygatt v. Coe, 124 N. Y. 212; Wesco v. Kern, 36 Or. 433. A few of the United States, however, follow the English doctrine and hold that even such covenants as are technically broken upon execution and delivery of the deed may be sued on by a remote assignee where the substantial damage occurs during his tenure. See Mascal's Case, 1 Leon, 62; King v. Jones, 1 Marsh. 107, 5 Taunt. 418; Kingdom v. Nottle, I. M. & S. 355. For American cases see Richard v. Pent, 59 Ill. 38, 74 Am. Rep. 1; Coleman v. Lyman, 42 Ind. 289; Martin v. Baker, 5 Blackf. [Ind.] 232; Kimball v. Bryant, 25 Minn. 496; Chambers v. Smith, 23 Mo. 174; Dickson v. Desire, 23 Mo. 151, 66 Am. Dec. 661; Lawless v. Colliers, 19 Mo. 480; Winningham v. Pennock, 36 Mo. App. 688; Betz v. Bryan, 39 Ohio St. 320; Devore v. Sunderland, 17 Ohio 52, 49 Am. Dec. 442; Backus v. McCoy, 3 Ohio 211, 17 Am. Dec. 585; Hall v. Plain, 14 Ohio St. 417; Brisbane v. McCrady, 1 Nott. & M. [S. C.] 104, 9 Am. Dec. 676. This latter doctrine seems to work out more substantial justice since a covenant is not really broken until damages have been suffered."—From 4 Mich. L. R. 555.

70. See 5 C. L. 877.

71. Bailey v. Agawam National Bank, 190 Mass. 20, 76 N. E. 449; Maloy v. Holl, 190 Mass. 277, 76 N. E. 452.

72. In Massachusetts the passage of an order laying out or altering a highway creates a lien upon the assessable property, though the amount due is uncertain until completion of the work and the making of the assessment (Maloy v. Holl, 190 Mass. 277, 76 N. E. 452), and this notwithstanding the assessment subsequently made is technically invalid if it may be corrected by a reassessment (Id.), but if no valid assessment can be made, no lien exists (Id.). Where no valid assessment for street improvement could be made at the time of the delivery of the deed, a back lien established under a subsequent act is not a breach of the covenant. Id.

73. A count based on a breach of the covenant against incumbrances and alleging an outstanding paramount title states no cause of action. Henderson v. Berry Co. [Ala.] 39 So. 662.

74. Fountain Square Theater Co. v. Pendery, 6 Ohio C. C. (N. S.) 78.

75. See 5 C. L. 877.

76. Foster v. Byrd [Mo. App.] 96 S. W. 224.

77. A covenant of an indefeasible seisin of an entire quarter section of land is broken where three acres thereof has been conveyed to a railroad corporation, notwithstanding a recital that the tract contains 160 acres more or less. Foster v. Byrd [Mo. App.] 96 S. W. 224. Not affected by the fact that a trust deed executed at the time of delivery of the deed excepted the strip conveyed to the railroad. Id.

The covenant of warranty[79] is not broken unless there is an eviction, actual[80] or constructive,[81] not resulting from the covenantee's own wrong.[82] It seems, however, in Alabama, that if the grantor has no title whatever to the land described, the breach is instantaneous,[83] unless the description is inserted through mutual mistake, in which case there is no breach.[84] The covenant extends to fixtures as well as to the land itself.[85] Where a grantor, called upon under his covenant of warranty to discharge an existing tax lien, calls in his grantor, an undertaking by the latter to pay the same does not relieve the former.[86]

The covenant for quiet enjoyment[87] is broken by an eviction, total or partial.[88] A covenant to defend title against the claims of the grantor, his heirs, and all persons lawfully claiming under him, is not a covenant to defend against a paramount title.[89]

§ 3. *Enforcement of covenants.*[90]—Upon a partial failure of title the covenantor can not, as a matter of right, tender the purchase price and demand a reconveyance of the entire tract.[91] A declaration negativing the words of a covenant of seisin or good right to convey is a sufficient allegation of a breach,[92] but a declaration on the covenant against incumbrances must show the nature of the incumbrance, and on warranty, an eviction by a paramount title.[93] Where, however, one declaring on the covenants of seisin and good right to convey specifically alleges the facts relied on to show a breach, he will be restricted to those grounds.[94] Under a statute providing that a copy of a writing annexed to a pleading shall cure defects therein in case of a variance between the declaration and the annexed deed as to what the covenants are, the deed controls.[95] In Louisiana a plaintiff in a petitory action cannot make his warrantor a party to the suit upon denial of his title where the warrantor is not within the jurisdiction.[96] Proof that the land was in the adverse possession of a third party at the time of conveyance establishes a prima

78. As a prior unrecorded deed which is valid as to the covenantor but void as to the covenantee. Glover v. O'Brien, 100 Me. 551, 62 A. 656.

79. See 5 C. L. 877.

80. A general covenant of warranty is broken where the property is taken to satisfy a prior vendor's lien, notwithstanding the covenantee had assumed such debt but at a lower interest than that exacted. Delta County v. Blackburn [Tex.] 15 Tex. Ct. Rep. 908, 93 S. W. 419. A prior unrecorded deed which is void as to the covenantee does not amount to a breach of the covenant of warranty. Glover v. O'Brien, 100 Me. 551, 62 A. 656.

81. A discharge of a mortgage by the covenantee to save the property is such constructive eviction as to give rise to an action on the covenant of warranty. Scoggin v. Hudgins [Ark.] 94 S. W. 684.

82. Eviction resulting from failure to pay a special improvement assessment assumed by the covenantee. Mullen v. Clifford [Ind. App.] 76 N. E. 1009. Special improvement assessments held assumed by the covenantee. Id.

83, 84. Pinckard v. American Freehold Land Mortg. Co., 143 Ala. 568, 39 So. 350.

85. Where trade fixtures are so attached as to become a part of the realty and the covenantee purchases without notice, he may recover on the warranty for subsequent loss. Bullard v. Hopkins, 128 Iowa 703, 105 N. W. 197.

86. Bigelow v. Stearns, 137 Mich. 26, 100 N. W. 125.

87. See 5 C. L. 877.

88. Eviction from an easement by the foreclosure of a prior mortgage on the servient estate constitutes a partial eviction. Sweet v. Howell, 96 App. Div. 45, 89 N. Y. S. 21.

89. A declaration alleging eviction by one asserting right to possession, under a decree adjudging the covenantor's title void, held not to state a cause of action. Dick v. McPherson, 72 N. J. Law, 332, 62 A. 383.

90. See 5 C. L. 878.

91. Olmstead v. Rawson, 110 App. Div. 809, 97 N. Y. S. 239.

92. Glover v. O'Brien, 100 Me. 551, 62 A. 656.

93. Glover v. O'Brien, 100 Me. 551, 62 A. 656. An allegation of eviction under a paramount title, existing and outstanding at the time the deed was executed, excludes the conclusion that such title may have emanated from plaintiff. Henderson v. Berry Co. [Ala.] 39 So. 662.

94. As alleging disseisin of the covenantor by a specifically named conveyance. Glover v. O'Brien, 100 Me. 551, 62 A. 656.

95. Prac. Act § 119 (P. L. 1903, p. 570). Dick v. McPherson, 72 N. J. Law, 332, 62 A. 383.

96. Writ of prohibition granted to restrain the lower court from further proceedings against the warrantor. Foote v. Pharr, 115 La. 35, 38 So. 885.

facie breach of the covenant of seisin.[97] In an action on the covenant of warranty, plaintiff must prove eviction by a paramount title.[98] Where a warrantor has appeared or has been duly served with notice to defend[99] his covenantee in an action by one claiming a paramount title, he is conclusively bound by the result of such suit.[1] It has been held that the breach of a covenant may be set up as a defense to an action for the purchase money.[2] The fact that the covenantee may have estopped himself from asserting a deficiency in quantity of land as against the assignees of the purchase money bonds is no defense to the covenantor upon the warranty.[3]

Damages for breach.[4]

COVERTURE; CREDIT INSURANCE, see latest topical index.

CREDITORS' SUIT.

§ 1. Nature and Grounds of Remedy (1007).
§ 2. Property Which May be Reached (1009).
§ 3. Pleading and Procedure (1009).

§ 1. *Nature and grounds of remedy.*[5]—A creditors' bill is maintainable in aid of execution to have applied, in satisfaction of a judgment, the proceeds of property which has been attached, and to have the rights of other claimants determined.[6] The bill will not lie where there is a complete and adequate remedy at law,[7] and hence it is ordinarily essential that complainant have reduced his claim to judgment[8] and that execution has been returned unsatisfied,[9] in order that it may appear that the legal remedies have been exhausted; but the return of execution unsatisfied is not a condition precedent to the maintenance of an action in the nature of a creditors' suit by which it is sought to remove fraudulent obstructions to the

97. Covenantor has the burden of showing that the title of such adverse holder is invalid. Prestwood v. McGowin [Ala.] 41 So. 779. Not necessary that the adverse holder had filed notice, as prescribed by Code 1896, §§ 1541, 1545, such sections being applicable only to actions for the recovery of real estate. Id.

98. The introduction of a judgment rendered against the covenantee, which is not binding upon the covenantor for lack of proper notice to defend, is insufficient. Baumgarten v. Chipman [Utah] 86 P. 411.

99. Where the notice to the warrantor to defend contains a description of the land involved, no part of which was covered by the warranty, the judgment does not bind him notwithstanding the complaint is amended so as to include the land warranted, the covenantor having no notice. Baumgarten v. Chipman [Utah] 86 P. 411.

1. Samson v. Zimmerman [Kan.] 85 P. 757. Especially in the absence of bad faith on the part of the covenantee. Olmstead v. Rawson, 110 App. Div. 809, 97 N. Y. S. 239. Hence covenantor is liable, although such third person's title may not have been paramount in fact. Samson v. Zimmerman [Kan.] 85 P. 757.

2. An affidavit of defense alleging a covenant in the sale agreement that the premises were to be free "of all easements," and the existence of a joint right of way, held sufficient. Paterson v. Freihofer [Pa.] 64 A. 326. See, also, Vendors and Purchasers, 6 C. L. 1781.

3. Berry's Ex'x v. Fishburne, 104 Va. 459, 51 S. E. 827.

4. See 5 C. L. 879. See Damages, 5 C. L. 904.

5. See 5 C. L. 880.

6. Gavazzi v. Dryfoos, 47 Misc. 15, 95 N. Y. S. 199.

7. Hyde v. Baker, 212 Pa. 224, 61 A. 823. Not to set aside fraudulent deeds, obtain reconveyance and injunction against alienation. Proper legal remedy in such case is purchase at execution and ejectment. Id.

8. Not sufficient to aver that he has no adequate remedy at law. Prayer that defendant be decreed to be owner of an interest in realty and that same be sold. Brockway v. Kizer, 122 Ill. App. 567. A simple contract creditor ordinarily has no standing in a court of equity to enforce payment or subject equities until after he has reduced his demand to judgment and exhausted his remedy at law (Davidson-Wesson Implement Co. v. Parlin & Orendorff Co. [C. C. A.] 141 F. 37), and a state statute authorizing such actions cannot confer jurisdiction upon a Federal court in which defendant has the constitutional right of a trial by jury (Id.). Seeking judgment, injunction, receiver and liquidation of defendant corporation. Id.

9. An action to satisfy a judgment out of the proceeds of a life insurance policy issued to defendant could not be regarded as a creditors' suit where execution was still outstanding. Marks v. Equitable Life Assur. Soc., 109 App. Div. 675, 96 N. Y. S. 551. The creditor has not exhausted his legal remedies so as to entitle him to file a creditors' bill under Chancery Code § 49, until an **execution issued to the county in which the debtor resides** has been returned no property

collection of a judgment,[10] and a creditor who has a trust in his favor or a lien upon property may file his bill without exhausting his legal remedies.[11] Laches defeats the bill.[12]

A statute empowering the court to decree satisfaction of a judgment out of any property belonging to the debtor and discovered in chancery proceedings does not authorize the turning over of all the property of the debtor to a single creditor, as receiver, to be used in continuing his business for the benefit of such creditor and to the exclusion of other creditors.[13] Under the Federal statute, a creditor of a national bank which has gone into voluntary liquidation may file a bill in the nature of a creditors' bill to enforce the individual liability of the shareholders, and the Federal circuit court has jurisdiction of such suit without reference to diversity of citizenship.[14]

General creditors' suits.[15]—Under a statute authorizing creditors without liens or judgments to file a bill for the discovery of assets, the fact that the claims of some of the complainants contain a waiver of exemptions does not deprive the court of power to grant the relief prayed.[16] One not a party to the suit is not entitled to share in the amount recovered unless the suit was brought for the benefit of all the creditors.[17]

Intervention.[18]

Limitations.[19]—Since a party cannot maintain an action in the nature of a creditors' suit to reach property fraudulently conveyed until his claim has been reduced to judgment, limitations will not ordinarily commence to run against such suit until that time.[20]

The decree.[21]—The judgment is not merged in the decree,[22] nor, in the case of a judgment against several defendants, will the creditor's rights or the efficacy of his judgment be affected by an adjudication in the decree as to the liabilities of de-

found. Aultman, Miller & Co. v. Jackson, 122 Ill. App. 639.

10. Placing in wife's name title to land purchased with complainant's money, fraudulent dispositions and incumbrances. Anderson v. Hultberg, 117 Ill. App. 231. In this regard there is no distinction between a fraudulent conveyance before judgment and the purchase of land by the debtor when insolvent, and taking title in another, as in this case. Id. Bill to subject to execution property fraudulently conveyed could be filed while executions were outstanding. Andrews v. Scott, 113 Ill. App. 581.

11. Bill to apply assets of a national bank and enforce stockholders' liability under the Federal statute. No judgment on the note was necessary. Wyman v. Wallace, 201 U. S. 230, 50 Law. Ed. —.

12. For seven years no execution issued to proper county. Aultman Miller & Co. v. Jackson, 122 Ill. App. 639.

13. Comp. L. § 437. Campau v. Detroit Driving Club [Mich.] 13 Det. Leg. N. 200, 107 N. W. 1063. Where this is done and the receiver finds no property and had no expectation of finding any when he filed the bill the fund derived from the continuance of the business by him will be distributed among all the creditors as though the same had been accumulated by the debtor. Id. All disbursements necessary to conducting the business should be allowed. Id. Certain items of expense, including taxes, repairs, etc., considered and allowed or disallowed the receiver against the fund derived from continuing the business according as they did or did not enhance that fund. Id. Such receiver was not entitled to any compensation, though he accumulated a fund for the creditors in general where he was not appointed for that purpose. Id.

14. Act June 30, 1876 (19 St. at L. 63, c. 156, U. S. Comp. St. 1901, p. 3509), § 2. By holder of nonnegotiable note. Wyman v. Wallace, 201 U. S. 230, 50 Law. Ed. —.

15. See 5 C. L. 881.

16. Code 1896, §§ 819, 820. Etheridge Bros. v. Swann, Abrams Hat Co. [Ala.] 41 So. 465.

17. Where suit was brought only for plaintiff and such other creditors "as would join with him," and it did not appear prior to recovery that there were any creditors who did not join. Niccolls v. Rice, 147 Cal. 633, 82 P. 321.

18, 19. See 5 C. L. 882.

20. Gillespie v. Cooper, 36 Neb. 775, 55 N. W. 302, disapproved. Ainsworth v. Roubal [Neb.] 105 N. W. 248.

21. See 5 C. L. 882.

22. The suit is only a method of enforcing the judgment and the decree has no effect upon the operative character of the judgment further than to satisfy it to the extent to which assets are realized. Davis v. Sanders, 25 App. D. C. 26. A determination that the judgment is valid and that complainant is entitled to recover the full amount thereof is not a new judgment but a recognition of the existing one. Id.

fendants as between themselves where the decree expressly affirms his right to enforce his judgment against all the defendants.[23]

§ 2. *Property which may be reached.*[24]—A creditors' bill is often resorted to for the purpose of subjecting to the payment of a judgment property fraudulently conveyed.[25] A vested future interest in a trust fund may be reached,[26] though contingent as to the right to take in person.[27] Property already in the custody of the court may be reached in certain cases.[28]

§ 3. *Pleading and procedure.*[29]—Where property has been fraudulently conveyed a creditor may, if he chooses, before reducing his claim to judgment, commence an action aided by attachment, seize the land conveyed, and after judgment in the attachment suit, enforce his lien by an action in the nature of a creditors' suit,[30] and this course may be pursued whether the debtor is a resident of the state or a nonresident.[31] The return of execution unsatisfied is sufficient to support the bill where the sheriff has made proper and unavailing efforts to collect it, though he may not have held it during the entire term of its life.[32]

All persons claiming any interest in the subject-matter and whose presence is essential to the granting of complete relief, are necessary parties,[33] whether their claims are prior or subsequent,[34]

23. Davis v. Sanders, 25 App. D. C. 26.

24. See 5 C. L. 882.

NOTE. Claim of damages for a tort: A mere right of action for a personal tort, as for assault, slander, or malicious prosecution, cannot be reached by creditors' suit, but a right of action for injury to the estate, whereby property to which the creditor was entitled to resort for the payment of his debt is destroyed or diminished in value, may be. Hudson v. Plets, 11 Paige [N. Y.] 180. And so a cause of action against a city in favor of the debtor for damage to her land from acts of the city government [Ohio St. § 5464] (Cincinnati v. Hafer, 49 Ohio St. 60, 30 N. E. 197), or one for the conversion of a horse and buggy, may be reached and applied after return of execution unsatisfied (Denning v. Nelson, 1 Ohio Dec. Reprint 503).—From note Hall v. Henderson [Ala.] 63 L. R. A. 703.

25. See Fraudulent Conveyances, 5 C. L. 1556. Evidence held to show that a grantee of land did not purchase in good faith relying on the record, and to sustain judgment on a creditors' bill subjecting the land to the payment of a judgment. City of Red Cloud v. Farmers' & Merchants' Banking Co. [Neb.] 106 N. W. 475. Certain land held to have been purchased by the debtor's wife in good faith and held by her as sole owner so as not to be subject to the payment of a judgment against the husband. Aultman, Miller & Co. v. Jackson, 122 Ill. App. 639.

26. The words "in trust for a judgment debtor" in Code Civ. Proc. § 1879, prohibiting the maintenance of a creditors' suit to reach any property held in trust for a judgment debtor, where the trust has been created by a person other than the debtor, refer to trusts in which the debtor's interest is that of a beneficiary as distinguished from an interest in remainder. Bergmann v. Leavitt, 99 N. Y. S. 748. A testator gave a specified sum to a trustee to apply the income to the use of the widow for life and on her death divide the capital between his two children. Held a creditor of one of the children could maintain a creditors' suit during the lifetime of the widow to reach his interest in the fund. Code Civ. Proc. §§ 1871, 1872, 1879. Id. The court had jurisdiction where the debtor died testate in a sister state and no ancillary letters were issued in New York. Id.

27. The right of a son under his father's will to take as his own, after the death of his mother, and provided he survived her, one-third of a fund set apart to her for life; his right to have it administered by his own legal representatives if he died before his mother leaving no issue living; and his right to have another fund so administered if he died leaving no issue, held reachable under Rev. L. c. 159, § 3, cl. 7, providing that legal or equitable property may be reached, though it cannot be applied until a future time, etc. Alexander v. McPeck, 189 Mass. 34, 75 N. E. 88. Not of too uncertain value under the provision of this statute allowing property to be reached though of uncertain value if the same can be ascertained by sale, appraisal, or by any means within the ordinary procedure of the court. Id.

28. That property not reachable at law was already in charge of the court at the suit of other creditors did not prevent plaintiff who had a similar claim from having it satisfied from the same property, provided there was enough for all. Adamian v. Hassanoff, 189 Mass. 194, 75 N. E. 126.

29. See 5 C. L. 883.

30, 31. Ainsworth v. Roubal [Neb.] 105 N. W. 248.

32. Where defendant had also left the state to evade a demand. Anderson v. Hultberg, 117 Ill. App. 231. Bill did not show that return was collusive or improper. Id.

33. Complaint sufficient where above facts appeared, through it contained legal conclusions as to validity of the claim of the party made defendant. Gavazzi v. Dryfoos, 47 Misc. 15, 95 N. Y. S. 199. Where a testator gave a sum of money to his widow for life remainder to his two children and it appeared, in a creditors' suit to reach the interest

Where a good cause of action is stated against one of several defendants, a good cause is stated against the others also if they are necessary parties.[35] A statement in a bill that complainant recovered against defendant a judgment at law upon which execution was issued and returned wholly unsatisfied is a sufficient allegation of an unsatisfied judgment whereon the legal remedy has been exhausted.[36] Allegations stated on information and belief are immaterial on demurrer where the bill contains other statements which, if true, would entitle complainant to the relief sought.[37] A creditors' bill filed under the Federal statute by a creditor, to enforce the individual liability of the shareholders of a national bank gone into liquidation, is not multifarious because it also seeks to apply the assets of the bank to the payment of claims.[38] It is not essential that any specific relief be asked against a necessary party defendant.[39]

Resort may be had to injunction[40] or the appointment of a receiver[41] or both, upon a clear showing of necessity for such procedure.[42] A creditors' bill praying for the appointment of a receiver must comply strictly with the statute prescribing the conditions warranting the institution of such proceedings,[43] but where the bill is formally sufficient, the court has power to make the appointment despite denials of the debtor that any property reachable by the bill exists.[44]

Plaintiff's cause of action depending entirely upon the fact that it is sought to reach property not subject to legal process, the allegations as to the existence of such property are jurisdictional and must be proved as laid,[45] unless such proof is waived.[46]

CRIMINAL CONVERSATION, see latest topical index.

CRIMINAL LAW.

§ 1. **Elements of Crime (1011).** Sources of the Criminal Law (1011). Attempts (1011). Felonies and Misdemeanors (1011).
§ 2. **Defenses (1012).**
§ 3. **Capacity to Commit Crime (1013).**
§ 4. **Parties in Crime (1013).**
§ 5. **Former Adjudication and Second Jeopardy (1013).**
§ 6. **Punishment of Crime (1015).** Extent of Punishment (1015). Place of Imprisonment (1015). Second Offenses (1015).
§ 7. **Rights in Property the Subject of Crime (1015).**

This topic includes only the general rules of the substantive law of crimes; criminal procedure[47] and matters peculiar to particular crimes[48] being elsewhere treated.

of one of the children, that the fund had been kept in a certain form by agreement to which the other child was a party, and that there were accretions which should be apportioned in order that the debtor's interest might be determined for a sale, the other child was a proper party. Bergmann v. Leavitt, 99 N. Y. S. 748.

34. In suit in aid of execution, held immaterial that it did not appear that demurring defendants were subsequent incumbrancers. Gavazzi v. Dryfoos, 47 Misc. 15, 95 N. Y. S. 199.

35. Held necessary parties where they claimed an adverse interest in the proceeds of property attached. Gavazzi v. Dryfoos, 47 Misc. 15, 95 N. Y. S. 199.

36. Manning v. Jagels [N. J. Eq.] 63 A. 492.

37. Showing that one defendant merely held title to land for the other. Manning v. Jagels [N. J. Eq.] 63 A. 492.

38. Act June 30, 1876, § 2 (19 Stat. at L. 63, c. 156, U. S. Comp. St. 1901, p. 3509). Wyman v. Wallace, 201 U. S. 230, 50 Law. Ed. —.

39. Suit in aid of execution. Gavazzi v. Dryfoos, 47 Misc. 15, 95 N. Y. S. 199.

40. See Injunction, 6 C. L. 6.

41. See Receivers, 6 C. L. 1250.

42. Bill held sufficient to justify order granting injunction and appointing receiver: Anderson v. Hultberg, 117 Ill. App. 231.

43. Comp. L. §§ 436, 437. Campau v. Detroit Driving Club [Mich.] 13 Det. Leg. N. 200, 107 N. W. 1063.

44. Campau v. Detroit Driving Club [Mich.] 13 Det. Leg. N. 200, 107 N. W. 1063.

45. No recovery where plaintiff failed to prove them. Hoshor-Platt Co. v. Miller, 190 Mass. 285, 76 N. E. 650.

46. Not waived where defendant offered to show that no such property existed but

§ 1. *Elements of crime.*[49]—Proceedings under town ordinances are civil though a fine enforceable by imprisonment may be imposed.[50] While criminal intent is an essential of most crimes,[51] motive is no part of the crime.[52]

Sources of the criminal law.[53]—In a few jurisdictions the common law of crimes remains in force except as modified by statute.[54] Within constitutional limitations[55] the legislative power is plenary. The power to define and punish petty crimes may be delegated to municipalities,[56] and the violation of the regulations of official boards may be made criminal.[57] Offenses may be created eo nomine without definition when the terms used have acquired definite significance,[58] and where a common-law offense is so adopted, the common law definition thereof obtains.[59] Provision for punishment is not essential to a statute creating a crime, if another statute provides for punishment in case none is specifically provided.[60] Where the same act violates two or more statutes the state may elect under which it will prosecute.[61] Criminal statutes will not be so strictly construed as to thwart the manifest intention of the legislature.[62] Pending prosecutions may be saved by a clause of the repealing act[63] or by a general statute,[64] but repeal without saving clause, after conviction but before judgment, prevents sentence.[65]

Attempts.[66]—If there be guilty intent and an act designed to effectuate it, it is an attempt,[67] though the offense was not possible of consummation,[68] but mere acts of preparation do not constitute an attempt.[69] The indictment may be directly for the attempt.[70]

Felonies and misdemeanors.[71]—The nature of the punishment determines the grade of the offense, those offenses punishable by imprisonment[72] in the state prison[73] being regarded as felonies.

was precluded. Hoshor-Platt Co. v. Miller, 190 Mass. 285, 76 N. E. 650.

47. See Arrest and Binding Over, 7 C. L. 265; Indictment and Prosecution, 5 C. L. 1790.

48. See topic dealing with the particular crime in question, as Homicide, 5 C. L. 1702; Larceny, 6 C. L. 402, etc.

49. See 5 C. L. 884.

50. Fortune v. Incorporated Town of Wilburton [C. C. A.] 142 F. 114.

51. See titles of particular crimes, as Larceny, 6 C. L. 402, etc.

52. Campbell v. State, 124 Ga. 432, 52 S. E. 914.

53. See 5 C. L. 884.

54. In force in District of Columbia. Hamilton v. U. S., 26 App. D. C. 382.

55. See Constitutional Law, 7 C. L. 691, as to validity of criminal statutes attacked as ex post facto as denying due process, etc.

56. See Municipal Corporations, 6 C. L. 714. Under a charter power to punish vagrancy, a municipality cannot declare to be vagrancy acts not within the ordinary acceptation of the term. Inclusion in definition of persons found trespassing on private property unauthorized. State v. McFarland [Minn.] 105 N. W. 187.

57. State board of health. Pierce v. Doolittle [Iowa] 106 N. W. 751. Congress may make criminal the violation of regulations of Federal departments. United States v. Sandefuhr, 145 F. 49.

58. "Unprofessional or dishonorable conduct" of attorney too indefinite. Czarra v. Board of Medical Supervisors, 25 App. D. C. 443.

An ordinance by a police jury making it an indictable offense to "give or hold or participate at a 'collation'" is unauthorized and null in the absence of anything to show that the word is used in any other than its ordinary sense, or has reference to such power of regulating public houses and resorts as is confided to the police jury. State v. Denoist, 115 La. 949, 40 So. 365.

59. U. S. Comp. St. 1901, p. 362, construed. United States v. Cardish, 143 F. 640.

60. Commonwealth v. Sherman Mfg. Co., 189 Mass. 76, 75 N. E. 71.

61. Commonwealth v. Barbour [Ky.] 89 S. W. 479.

62. State v. Kiley [Ind. App.] 76 N. E. 184.

63. Miller v. State, 165 Ind. 566, 76 N. E. 245.

64. Rev. St. 1905, § 79. State v. Lawrence [Ohio] 77 N. E. 266.

65. State v. Perkins [N. C.] 53 S. E. 735.

66. See 5 C. L. 886.

67. Furnishing implements to accomplice and paying him money to induce him to commit crime sufficient overt act to constitute attempt. Arson. State v. Taylor [Or.] 84 P. 82.

68. Receiving with guilty intent goods believed to have been stolen but which were not. People v. Jaffe, 98 N. Y. S. 486.

69. Prisoner procuring tools to break jail. State v. Hurley [Vt.] 64 A. 78.

70. Bradford v. State [Ala.] 41 So. 471.

71. See 5 C. L. 886.

72. The offense of driving automobile at excessive speed being punishable by fine only, under St. 1903, p. 510, c. 473, § 9, is a misdemeanor. Commonwealth v. Sherman [Mass.] 78 N. E. 98.

73. Felonies are offenses punishable by death or imprisonment in the state prison.

§ 2. *Defenses.*[74]—Except in crimes which involve want of consent,[75] or the taking of property,[76] consent or entrapment is no defense,[77] nor is it a defense that others have violated the same law with impunity,[78] or that a particeps criminis is not prosecuted.[79] An agreement by the prosecuting attorney, not sanctioned by the court, not to prosecute one who turns state's evidence is no defense.[80] One brought before the grand jury under promise of immunity for testifying fully as to games in which he has participated, and who testifies as to any essential fact in regard to a game, or which might be used to make out a case against him, is exempt from prosecution as to such game.[81] Participation by a wife in crimes of her husband is presumed to be by his coercion.[82] Restitution is no defense,[83] nor is contributory negligence of the injured person.[84] An assault is not justified in the recaption of property from the peaceful possession of another.[85] One serving a sentence of imprisonment may be put on trial for a crime committed before such sentence.[86]

§ 3. *Capacity to commit crime.*[87]—At common law and by statute in most states, a child under 7 years of age is conclusively presumed incapable of crime, while between the ages of 7 and 14 the burden is on the prosecution to show capacity.[88] By statute in Georgia the presumption is conclusive under the age of 10 years,[89] while between 10 and 14 it is rebuttable.[90] Incapacity of a child to commit a crime extends likewise to an attempt thereto.[91] An infant capax dolens may be convicted of an offense an essential element of which is the making of a contract, though it is not civilly enforceable against him.[92]

If a man has reason sufficient to distinguish between right and wrong in relation to the act about to be committed, he is criminally responsible,[93] neither irresistible

Walden v. State [Fla.] 39 So. 151. Where a statute providing for imprisonment does not designate the place of confinement, only imprisonment in the county jail is authorized and accordingly the offense is a misdemeanor. Id.

74. See 5 C. L. 886.

75. See, also, Rape, 6 C. L. 1237.

76. Consent of the owner is a defense to crimes against property (Bird v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 560, 90 S. W. 651), but if the owner did not participate in the original design and entered into it only to detect the perpetrators, it is not a consent (Id.).

77. Where the offense is not against an individual, that accused was procured to commit the same for the purpose of prosecuting him is no defense. Sale of liquor on Sunday to police officer. Borck v. State [Ala.] 39 So. 580. Acts of entrapment after the offense is completed and designed merely to obtain evidence are no defense. Entrapment into reception of bribe no defense to indictment for soliciting it. People v. Bunkers [Cal. App.] 84 P. 364.

78. Barnes v. District of Columbia, 27 App. D. C. 101.

79. Failure to prosecute the particeps criminis is no defense to an indictment, though the guilty co-operation of two persons was essential to the offense. Incest. State v. Learned [Kan.] 85 P. 293.

80. Reagan v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 239, 93 S. W. 733.

81. Taylor v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 580, 95 S. W. 119.

82. State v. Harvey [Iowa] 106 N. W. 938.

83. Embezzlement. Robinson v. Com., 104 Va. 888, 52 S. E. 690.

84. Negligent homicide. State v. Moore [Iowa] 106 N. W. 16.

85. Winter v. Beebe, 126 Wis. 379, 105 N. W. 953.

86. Rigor v. State, 101 Md. 465, 61 A. 631; Brown v. State [Tex. Cr. App.] 95 S. W. 1039.

87. See 5 C. L. 887.

88. To authorize conviction of one under 13 in Texas, proof of ability to distinguish between right and wrong is insufficient, but it must be shown that he had discretion to understand the nature and illegality of the act. Price v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 545, 94 S. W. 901. Under the age of 7 years the presumption of incapacity is conclusive; between the ages of 7 and 14 it is rebuttable. State v. Fisk [N. D.] 108 N. W. 485.

89, 90. Singleton v. State, 124 Ga. 136, 52 S. E. 156.

91. Child under 14 cannot be convicted of assault with intent to rape unless capacity is proven. State v. Fisk [N. D.] 108 N. W. 485.

92. Fraudulently procuring advances on contract of employment without intent to perform. Vinson v. State, 124 Ga. 19, 52 S. E. 79.

93. Allams v. State, 123 Ga. 500, 51 S. E. 506. Where a man has reason sufficient to distinguish between right and wrong as to a particular act about to be committed, yet, in consequence of some delusion his will is overmastered, and there is no criminal intent, he is not criminally responsible, provided the act itself is connected with the peculiar delusion under which accused is laboring. Id. Following instruction held inaccurate: "The insanity which the law recognizes as an excuse for crime must be such as dethrones reason and incapacitates

impulse[94] nor emotional insanity[95] being recognized as a defense if there be capacity to distinguish between right and wrong. Intoxication is no defense,[96] except where a specific intent is essential and the intoxication renders accused incapable of entertaining such an intent.[97] If intoxicated person is capable of premeditation, intoxication is no mitigation,[98] and if the crime was resolved on before defendant became intoxicated, intoxication at the time it was committed does not reduce the degree.[99] A statute providing that drunkenness is no excuse for crime is simply declaratory of the common law and accordingly does not abrogate the rule that drunkenness may be considered on the question of intent.[1]

A corporation[2] is liable to indictment for offenses not involving personal malice or intent.[3]

§ 4. *Parties in crime.*[4]—All parties to a misdemeanor are principals.[5] Where the common law distinction obtains, one who incites to crime but is not present at its commission is an accessory,[6] while one present aiding and abetting is a principal in the second degree,[7] but the distinction between principals and accessories is abolished by statute in many states,[8] and that between principals in the first and second degree is often ignored.[9]

§ 5. *Former adjudication and second jeopardy.*[10]—The prohibition of second jeopardy applies only to criminal prosecutions[11] for offenses against the same sovereignty. Where the same act is a violation of both state and municipal regulations, a conviction of violating one does not bar a prosecution under the other.[12] Jeopardy begins when the jury is impaneled and sworn[13] for the trial of a valid indictment[14] in a court of competent jurisdiction,[15] and if the trial be thereafter terminated without verdict,[16] by the discharge of the jury in an improper man-

an individual from distinguishing between right and wrong as to the particular act in question, and of being mentally incapable of choosing to do or not to do the alleged act and governing his conduct in accordance therewith." Id.

94. Irresistible impulse does not excuse as long as there is capacity to distinguish between right and wrong. Turner v. Territory [Okl.] 82 P. 650; People v. Trebilcox [Cal.] 86 P. 684.

95. Jealousy amounting to emotional insanity no defense. Barnett v. State [Ala.] 39 So. 778.

96. State v. Woodward, 191 Mo. 617, 90 S. W. 90. Simple assault. State v. Truitt [Del.] 62 A. 790.

97. Ryan v. U. S., 26 App. D. C. 74; State v. Truitt [Del.] 62 A. 790. Intoxication no defense but may be considered in determining purpose, motive, or intent. Pen. Code § 22. People v. Pekarz [N. Y.] 78 N. E. 294.

98, 99. State v. Truitt [Del.] 62 A. 790.

1. Brennan v. People [Colo.] 86 P. 79.

2. See 5 C. L. 887, with note on liability of corporations to indictment.

3. Failure to furnish drinking water on trains. Southern R. Co. v. State [Ga.] 54 S. E. 160.

4. See 5 C. L. 888. Who are accomplices within the rule requiring corroboration is discussed in Indictment and Prosecution, 5 C. L. 1790.

5. Commonwealth v. Sherman [Mass.] 78 N. E. 98.

6. One who advises a crime but is not present at its commission is an accessory, not a principal. Holmes v. State [Tex. Cr. App.] 91 S. W. 588.

7. To constitute aiding and abetting there must be either previous incitement or conspiracy or else assistance by word or act at the time of the offense. Morris v. State [Ala.] 41 So. 274.

8. Under a statute abolishing the distinction between principals and accessories, all co-conspirators are principals in a crime committed pursuant to the conspiracy. Code 1896, § 4808. Morris v. State [Ala.] 41 So. 274.

9. All persons concerned, whether directly committing or aiding and abetting, are principals. People v. Bunkers [Cal. App.] 84 P. 364.

10. See 5 C. L. 889. Necessity and requisites of plea and mode of trial thereof, see Indictment and Prosecution, 5 C. L. 1790.

11. Commitment for contempt in violating an injunction is no bar to prosecution for the same act as a crime. Ex parte Allison [Tex.] 14 Tex. Ct. Rep. 687, 90 S. W. 870. Recovery of treble damages for trespass on state lands does not bar criminal prosecution. State v. Shevlin-Carpenter Co. [Minn.] 108 N. W. 935.

12. State v. Lytle, 136 N. C. 738, 51 S. E. 66; Black v. State [Ala.] 40 So. 611. Act Feb. 18, 1895, changing this rule, is invalid because the subject is not expressed in the title. Black v. State [Ala.] 40 So. 611.

13. State v. Pointdexter [La.] 41 So. 688; Allen v. State [Fla.] 41 So. 593. Discharge without having been put on trial no bar. Montgomery v. State [Wis.] 107 N. W. 14.

14. No jeopardy where indictment insufficient to support a conviction. Sims v. State [Ala.] 41 So. 413.

15. Where the venue is in doubt and accused submits to the jurisdiction, an ac-

ner,[17] or otherwise than for manifest necessity,[18] accused cannot be again put on trial for the same offense. Failure to object to illegal discharge of jury does not prevent accused from availing himself of the jeopardy.[19] Where the court erroneously directed an acquittal because of a supposed variance as to the description of the alleged stolen goods, prosecution on an indictment more correctly describing them is barred.[20] Dismissal of an information for misdemeanor to permit the filing of another does not bar the second information under the California statute, if the second information is for a felony which does not include the misdemeanor.[21] Suspension of a prosecution for seduction before verdict at defendant's instance because of his marriage to prosecutrix does not bar a subsequent prosecution for the same offense on his desertion of her.[22] Where a conviction is set aside or judgment arrested at defendant's instance, there is no jeopardy, and the indictment may be set aside and another brought for the same offense,[23] but the authorities are in conflict as to whether on a retrial conviction may be had of a higher degree than was found on the first trial.[24] One is not placed twice in jeopardy by a conviction by the appellate court of a higher degree than the conviction below, under the act for the government of the Philippines,[25] but the provision for immunity from second prosecution in such act prevents appeal by the government from an acquittal.[26] Identity of offenses is necessary to sustain the plea and it is not sufficient that both arose from the same transaction.[27] The test of identity is whether the

quittal is a bar. Ex parte Davis [Tex. Cr. App.] 14 Tex. Ct. Rep. 109, 89 S. W. 978.

16. If the indictment was sufficient and the court had jurisdiction, defendant is placed in jeopardy, though the verdict is void for defect of form. People v. Small [Cal. App.] 82 P. 87. After a trial for misdemeanor is begun, if the court suspend the trial and order defendant committed for trial for a felony based on the same acts as the misdemeanor charge, he has been in jeopardy. Ingram v. State, 124 Ga. 448, 52 S. E. 759.

17. Discharge of the jury in the absence of defendant is illegal and operates as an acquittal. Discharge for failure to agree. Vela v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 388, 95 S. W. 529.

18. Discharge of jury during trial except for manifest necessity amounts to an acquittal. Allen v. State [Fla.] 41 So. 593. Rightful discharge of jury for failure to agree, no bar. State v. Trueman [Mont.] 85 P. 1024.

19. Allen v. State [Fla.] 41 So. 593.

20. Nordlinger v. U. S., 24 App. D. C. 406.

21. 2 Ball. Ann. Codes & St. § 6916. Exhibiting weapon in threatening manner not included in assault with intent to kill. State v. Campbell, 40 Wash. 480, 82 P. 752.

22. Burnett v. State [Ark.] 88 S. W. 956.

23. Where accused makes a motion in arrest of judgment upon the ground that the indictment is defective, and his motion is sustained, he cannot assert thereafter that the indictment was good and that he was in jeopardy thereunder. This is true whether the indictment was good or bad. Hill v. Nelms, 122 Ga. 572, 50 S. E. 344. Where a conviction is set aside on defendant's motion and a nolle pros. is then entered, it is no bar. Floyd v. State [Ark.] 96 S. W. 125. Dismissal of information after conviction and new trial granted, not an acquittal. State v. Williams [Wash.] 86 P. 847.

24. Conviction of higher degree may be had. State v. Gillis [S. C.] 53 S. E. 487; Turner v. Territory [Okl.] 82 P. 650.

25. Act July 1, 1902. Trono v. U. S., 199 U. S. 521, 50 Law. Ed. —.

26. Kepner v. U. S., 195 U. S. 100, 49 Law. Ed. 114. See 4 Mich. L. R. 284.

27. **Held identical:** Acquittal of a charge of keeping liquor for illegal sale bars a proceeding to confiscate the liquor as kept for illegal sale. State v. Cobb, 123 Iowa, 626, 99 N. W. 299. Conviction for sale of liquor in violation of the local option law bars a prosecution for sale to a minor, both prosecutions being based on the same sale. Tompkins v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 766, 90 S. W. 1019. A conviction of petit larceny bars a prosecution for robbery based on the same taking. Floyd v. State [Ark.] 96 S. W. 125. A conviction of affray bars a prosecution on the same transaction for simple assault, but not one for aggravated assault. Dumas v. State [Tex. Cr. App.] 85 S. W. 1058.

Held not identical: Where a prosecution for a continuing offense is limited on the trial to a particular period, conviction does not bar a prosecution covering a different period. Sale without license. Standard Oil Co. v. Com., 27 Ky. L. R. 1131, 87 S. W. 1092. Acquittal of statutory rape does not bar a prosecution for incest committed with the same woman. State v. Learned [Kan.] 85 P. 293. An acquittal of assault with intent to kill with a pistol is no bar to a prosecution for unlawfully carrying such pistol. Woodroe v. State [Tex. Cr. App.] 96 S. W. 30. Shooting one person and immediately attempting to shoot another are separate offenses. State v. Temple, 194 Mo. 228, 92 S. W. 494. Conviction of gaming will not bar prosecution for setting up the gambling device with which the gaming was done. City of Mexico v. Harris, 115 Mo. App. 707, 92 S. W. 505. A conviction for being drunk is no bar to a prosecution for disturbing the peace by profane swearing, though such disturb-

facts necessary to conviction under the last indictment would have warranted a conviction on the first.[28]

§ 6. *Punishment of crime.*[29]—Sentences for separate offenses may be made cumulative.[30] One sentenced to imprisonment for a crime cannot under such sentence be held beyond the maximum period provided by law until the costs are paid.[31]

Extent of punishment.[32]—It is not so much the extent as the nature of the penalty which makes it cruel and unusual, and accordingly, imposition of the maximum sentence in a case not aggravated is not within the constitution.[33] To forfeit the license of one twice convicted of violating the liquor laws and debar him for two years from engaging in the sale of liquor is not a cruel and unusual punishment.[34] Within the limits fixed by the statute the extent of punishment rests in the discretion of the trial judge.[35]

Place of imprisonment[36] depends wholly on statute.[37] Where the statute provides the penalty as imprisonment in the penitentiary or a money fine, imprisonment in the county jail cannot be imposed as a primary sentence but only as an alternative in case of failure to pay the fine,[38] and where the primary penalty imposed is a fine, an alternative of imprisonment in the penitentiary is unauthorized.[39]

Second offenses.[40]—Statutes providing for increased punishment for second offenses are not inconsistent with the statutes providing punishment for crimes generally, and a sentence to the increased punishment is valid though it exceeds the penalty for the crime charged.[41] Identity of name is not sufficient proof of identity of defendant with the person named in judgments of prior conviction.[42]

§ 7. *Rights in property the subject of crime.*[43]

CRIMINAL PROCEDURE; CROPS; CROSS BILLS AND COMPLAINTS; CROSSINGS; CRUEL AND UNUSUAL PUNISHMENTS; CRUELTY; CUMULATIVE EVIDENCE; CUMULATIVE PUNISHMENTS; CUMULATIVE VOTES; CURATIVE ACTS, see latest topical index.

ance was committed while accused was drunk. Mitchell v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 938, 89 S. W. 645. A conviction for false swearing to accused's qualification as a voter is no bar to a prosecution for illegal voting. Arrington v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 934, 89 S. W. 643. Acquittal of larceny and embezzlement no bar to prosecution for forgery and uttering based on same transaction. Spears v. People, 220 Ill. 72, 77 N. E. 112. Acquittal of murder of one person no bar to prosecution for killing another at same time and place, unless both were killed by same act. State v. Rosa, 72 N. J. Law, 462, 62 A. 695. Acquittal of a public officer on a charge of receiving compensation from a certain person as agent of a corporation will not bar a prosecution for receiving compensation from the corporation. Burton v. U. S., 202 U. S. 344, 50 Law. Ed. —.

28. Nordlinger v. U. S., 24 App. D. C. 406.

29. See 5 C. L. 891.

30. State v. Mahaney [N. J. Law] 62 A. 265; Chadwick v. U. S. [C. C. A.] 141 F. 225. Sentence may be imposed of imprisonment to commence on the expiration of a prior sentence by another court. Rigor v. State, 101 Md. 465, 61 A. 631.

31. One arrested for larceny cannot, under P. L. 1901, p. 231, be held bevond three years for costs. Perry v. Martin [N. J. Law] 62 A. 1001.

32. See 5 C. L. 891.

33. Raymond v. U. S., 25 App. D. C. 555. Under Mansf. Dig. § 1628, a sentence of two years in the penitentiary at hard labor on conviction of the larceny of a calf is not an imposition of a cruel and unusual punishment. Clampitt v. U. S. [Ind. T.] 89 S. W. 666. Where no term is fixed by statute, a sentence of two years' imprisonment for selling liquor without a license is not cruel and unusual. State v. Farrington [N. C.] 53 S. E. 954.

34. Borck v. State [Ala.] 39 So. 580.

35. State v. Wyckoff [Iowa] 107 N. W. 420. The sentence to be imposed is a matter for the discretion of the court, subject only to the limitation imposed by the statute regulating the crime. In legal contemplation no sentence is excessive which is not greater than the maximum sentence fixed by law. Godwin v. State, 123 Ga. 569, 51 S. E. 598. Life imprisonment for rape on young child held not excessive. State v. Andrews [Iowa] 105 N. W. 215.

36. See 5 C. L. 892.

37. One convicted of selling liquor without license in North Carolina may be imprisoned in the county jail with direction that he be worked on the public roads. State v. Farrington [N. C.] 53 S. E. 954.

38. Irvin v. State [Fla.] 41 So. 785.

39. Thompson v. State [Fla.] 41 So. 899.

40. See 5 C. L. 893.

41. State v. Bush, 41 Wash. 13, 82 P. 1024.

CURTESY.[44]

At common law, curtesy attaches only to lands of which the wife was actually seised during coverture, and hence no curtesy exists in an estate in remainder unless the particular intervening estate terminates during her life.[45] By statute in some states seisin in possession is not necessary.[46] The curtesy is an estate by descent rather than by purchase,[47] and hence, under statutes authorizing aliens to take by descent, an alien is entitled to curtesy.[48] A statute providing that wilful desertion and failure to support shall bar curtesy does not apply where the husband is legally justified in abandoning the wife,[49] but, desertion being shown, the husband has the burden of showing justification.[50] In Wisconsin a husband is not entitled to the statutory curtesy in lands conveyed to the wife by a deed negativing such right.[51] Under the homestead law of Wisconsin, a husband may acquire a homestead in land of which he is a tenant by the curtesy.[52] Where a wife devises her real estate to two persons for life and then over, the husband is not estopped to assert his right of curtesy by the fact that he permitted the life tenants to enjoy their estates, provided the remainderman has not been misled to his injury.[53]

CUSTOMS AND USAGES.

§ 1. Definition and Elements (1016).
§ 2. Application to Contracts and Other Dealings (1016).
§ 3. Pleading and Proof (1018).

§ 1. *Definition and elements.*[54]—Usage furnishes a standard for the measurement of many of the rights and acts of men,[55] resting upon the presumption that parties intended to contract with reference to known usages which were to be regarded as part of their contract.[56] It must be certain, uniform, and known, or so notorious that knowledge will be presumed.[57]

§ 2. *Application to contracts and other dealings.*[58]—Written or oral contracts, especially those relating to trade or mercantile affairs, are presumed to have been

42. State v. Smith [Iowa] 106 N. W. 187.
43. See 5 C. L. 893.
44. See 5 C. L. 893. See Tiffany, Real Property, 487.
45. Collins v. Russell [N. Y.] 76 N. E. 731. Where by will an estate in fee was to vest immediately in the remainderman upon the termination of a life estate held in trust, and the remainderman survived the particular estate, her husband became a tenant by the curtesy, notwithstanding the trustee had not actually conveyed the estate to the wife. Potts v. Shirley [Ky.] 90 S. W. 590.
46. Under Code 1896, § 2534, a husband is entitled to curtesy in an inherited estate of his wife, though she did not come into possession before death. Dake v. Sewell [Ala.] 39 So. 819.
47. Cooke v. Doron [Pa.] 64 A. 595.
48. Act Feb. 23, 1791, (3 Smith's Laws, p. 4). Cooke v. Doron [Pa.] 64 A. 595. If it be regarded as an estate by purchase under Act May 1, 1861 (P. L. 433), enabling aliens to purchase and hold real estate in a limited amount, an alien is entitled to curtesy. Id.
49. Act of May 4, 1855, P. L. 430. Hayes' Estate, 23 Pa. Super. Ct. 570. Must show such excuse as would entitle the husband to a divorce. Id.
50. Weller v. Weller, 213 Pa. 265, 62 A. 859; Hayes' Estate, 23 Pa. Super. Ct. 570. Evidence held sufficient to show adultery on the part of the wife, thus justifying the husband in deserting her. Id. Evidence that the husband made frequent attempts at reconciliation which were rejected by the wife, held sufficient to show that there was no wilful and malicious desertion within Act May 4, 1855. Weller v. Weller, 213 Pa. 265, 62 A. 859.
51. The fact that a husband deeded property to the wife by warranty deed held insufficient to preclude him from claiming curtesy under Rev. St. Wis. 1898, § 2180. In re Kaufmann, 142 F. 898.
52. Under Laws 1901, chap. 269, p. 365, which provides that "such exemption," speaking of the homestead, "shall extend * * * to any estate less than a fee held by any person by lease, contract, or otherwise," held that a husband may have a homestead interest in lands held as a tenant by the curtesy. In re Kaufmann, 142 F. 898.
53. Davis v. Fenner, 30 Pa. Super. Ct. 389.
54. See 5 C. L. 894.
55. Chicago, etc., R. Co. v. Lindeman [C. C. A.] 143 F. 946.
56. Merchants' Nat. Bank v. Baltimore, C. & R. Steamboat Co., 102 Md. 573, 63 A. 108.
57. Chicago, etc., R. Co. v. Lindeman [C. C. A.] 143 F. 946.
58. See 5 C. L. 894.

made with reference to known and established customs and usages prevailing in respect to such agreements.[59] One who deals in a particular market must be taken to deal according to the custom of that market,[60] and one who directs another to make a contract at a particular place is taken as intending that the contract shall be made according to the usages at such place,[61] for, in the absence of stipulation to the contrary, it is supposed the minds of the parties met on the incorporation thereof into the contract;[62] but where the contract itself expressly denies a right claimed under an alleged custom, the writing prevails and the custom goes for naught.[63] Hence, proof of such a general custom or usage is admissible to explain what is ambiguous or uncertain in the contract,[64] but where the terms of a contract are full, clear, and unambiguous, they cannot be varied or contradicted by proof of custom.[65] Articles of partnership may be enlarged by a general usage or habit of conducting the affairs of the firm acquiesced in by all the members;[66] but, before a custom or business usage would become binding upon a partner who did not expressly sanction or authorize it, the circumstances would have to indicate that he not only knew of it but contemplated and tacitly assented to a regular course of dealing, in accordance therewith, with the public rather than with a few customers;[67] but a custom to change dates on bills of lading when necessary to make them conform to the true dates of issue cannot be shown when its effect would be to alter the date of the true instrument, instead of to make it conform to the date of issue,[68] and such a custom is ineffective to sustain a fraudulent alteration of a "spent and exhausted" bill for other purposes than to make them conform to the date of issue.[69]

59. Under the customs and usages of the steel structural business, where an iron company contracts to construct a steel building, the steel to be paid for by the ton, the iron company is not required to make a deduction for rivet holes and cuttings in making parts to fit. Commercial Tribune Bldg. Co. v. Potthoff & Frey Iron Co., 7 Ohio C. C. (N. S.) 432. Custom of millers to mix in one common mass with their own wheat delivered to it and to ship or grind any of such common mass, etc. Savage v. Salem Mills Co. [Or.] 85 P. 69. Advances having been made by a cotton factor to a shipper, who gave his note with sureties therefor, subsequent advances which absorbed the proceeds of the cotton did not release the sureties, if there was a general custom to make such further advances and the sureties had knowledge of it. Kempner v. Patrick [Tex. Civ. App.] 95 S. W. 51. Where a contract of transportation was silent as to that point, parol evidence was admissible to show a custom of furnishing an independent train, when demanded, for stock amounting to 10 cars or more. Northern Pac. R. Co. v. Kempton [C. C. A.] 138 F. 992.

60. Biggs & Co. v. E. Langhammer & Son [Md.] 63 A. 198.

61. A person who permits his vessel to be chartered by brokers, at a port where the usage prevails for shipbrokers to execute charters without reference to the masters of vessels is bound by such custom. Richard J. Biggs & Co. v. Langhammer & Son [Md.] 63 A. 198.

62. Vardeman v. Penn Mut. Life Ins. Co. [Ga.] 54 S. E. 66.

63. A contract of insurance would not be reformed by the insertion of a clause, alleged to be based on the agent's assurance that "it was the general custom of their business and was universal" to extend insurance and date of payment of premium 30 days, when the agent had no authority to make such agreement. Vardeman v. Penn Mut. Life Ins. Co. [Ga.] 54 S. E. 66.

64. Merchants' Nat. Bank v. Baltimore, C. & R. Steamboat Co., 102 Md. 573, 63 A. 108; Denton Bros. v. Gill, 102 Md. 386, 62 A. 627.

65. Merchants' Nat. Bank v. Baltimore, C. & R. Steamboat Co., 102 Md. 573, 63 A. 108; Savage v. Salem Mills Co. [Or.] 85 P. 69. A contract for the sale of corn, which provided that any deficiency on bill of lading should be paid for by the seller, could not be varied by evidence of a custom that, in sales and purchases of corn, the shipping weights at point of shipment, as stated in the bill of lading, were final. Denton Bros. v. Gill, 102 Md. 386, 62 A. 627. Parol evidence of a custom that contracts to furnish coal were subject to strikes at mines and other hindrances beyond the seller's control, held inadmissible under the terms of the contract. City of Covington v. Kanawha Coal & Coke Co. [Ky.] 89 S. W. 1126. Where defendant introduced evidence of an express warranty, it was error to permit plaintiff to prove a warranty which it was accustomed to give in its sales of roofing. Florence Wagon Works v. Trinidad Asphalt Mfg. Co. [Ala.] 40 So. 49.

66. Eady v. Newton Coal & Lumber Co., 123 Ga. 557, 51 S. E. 661.

67. Evidence as to custom of firm with reference to settlements with its customers holding accounts against individual members of the firm, held admissible. Eady v. Newton Coal & Lumber Co., 123 Ga. 557, 51 S. E. 661.

68, 69. Merchants' Nat. Bank v. Baltimore,

A custom, to be controlling, so as to affect the rights and liabilities of persons arising from their dealings with one another, must be certain[70] and uniform,[71] reasonable,[72] not in opposition to well settled principles of law,[73] consistent with the contract,[74] and either known to the party sought to be charged thereby,[75] or so general and notorious that knowledge and adoption of it may be presumed;[76] but a manufacturer domiciled in North Carolina cannot be presumed to have knowledge of a custom prevailing only in Alabama.[77] A trade usage giving words an unusual or arbitrary significance in a particular line of business generally, or in the locality where the parties reside, must be shown to be of such definite character and such general acceptance that knowledge may be reasonably inferred;[78] and the mere private custom of a person doing business must be brought home to one dealing with him to be binding.[79]

A custom cannot vary the terms of, or operate to abrogate or repeal, a general statute.[80]

§ 3. *Pleading and proof.*[81]—A particular custom must be alleged in the dec-

C. & R. Steamboat Co., 102 Md. 573, 63 A. 108.

70. Prigg v. Preston, 28 Pa. Super. Ct. 272.

71. Chicago, etc., R. Co. v. Lindeman [C. C. A.] 143 F. 946; Prigg v. Preston, 28 Pa. Super. Ct. 272.

72. Theo. Ollenheimer & Bro. v. Foley [Tex. Civ. App.] 95 S. W. 688. The bank or party who is to pay the paper is not the proper person to whom it should be sent for collection, and a custom to that effect is unreasonable and bad. Farley Nat. Bank v. Pollock [Ala.] 39 So. 612.

73. A trade custom that an import order for goods to be manufactured abroad cannot be countermanded will not avail as against the legal right of a party to an executory contract to stop performance at his election, subject to obligation to pay damages. Ollenheimer & Bro. v. Foley [Tex. Civ. App.] 95 S. W. 688. A custom by which, when a single dwelling is rented to a tenant at will, the landlord retains control of the outside, including yard, roof, and gutters, would contradict both the agreement of the parties and the rule of the law, and would be a bad custom. Shute v. Bills [Mass.] 78 N. E. 96.

74. Denton Bros. v. Gill, 102 Md. 386, 62 A. 627. A custom or usage known to the shipper, as to the manner or method of transportation, will be binding as a part of the contract when not contrary to its terms. Northern Pac. R. Co. v. Kempton [C. C. A.] 138 F. 992. Proof of custom prevailing in Philadelphia as to acceptance of walls as they are built, held inadmissible as against terms of contract. Meacham v. Gardner, 27 Pa. Super. Ct. 296. Manifest error to permit the jury to be misled by evidence of custom said to prevail in a certain locality but not referred to in the contract. Id.

75. Chicago, etc., R. Co. v. Lindeman [C. C. A.] 143 F. 946; Denton Bros. v. Gill, 102 Md. 386, 62 A. 627. In an action for wrongful death, evidence is inadmissible to show that the railroad company was accustomed to stop its train at the place of the accident, and that passengers frequently got off and on there, in the absence of an offer to show that deceased had knowledge of such custom. Margo v. Pennsylvania R. Co., 213 Pa. 463, 62 A. 1079. Knowledge of an alleged usage of the coal trade, that unless a buyer rescinds before the coal is shipped he cannot rescind afterward, not brought home to buyer. McGinnis v. Johnson Co. [Neb.] 104 N. W. 869.

76. Denton Bros. v. Gill, 102 Md. 386, 62 A. 627; Prigg v. Preston, 28 Pa. Super. Ct. 272; Chicago, etc., R. Co. v. Lindeman [C. C. A.] 143 F. 946. In the absence of an express warranty, a customary one, to be enforceable, must be so general and known as to justify the presumption that the parties knew it and contracted with reference to it. Florence Wagon Works v. Trinidad Asphalt Mfg. Co. [Ala.] 40 So. 49. Proof of a custom prevailing only among traveling salesmen is not admissible to affect the principals of such salesmen. Gould v. Cates Chair Co. [Ala.] 41 So. 675. Evidence that it was customary for workmen to ride on a hod elevator, rented to a contractor by a third party, held not to show a general custom binding on the owner of the elevator. McDonough v. Pelham Hod Elevator Co., 111 App. Div. 585, 98 N. Y. S. 90. Evidence of acceptance of coal ordered by purchasers, where the dealers ordered a railroad company to deliver it, was not proof of a custom among coal dealers that such order constitutes delivery and acceptance; it is but a legal conclusion. Calvert v. Schultz [Mich.] 13 Det. Leg. N. 14, 106 N. W. 1123.

77. Gould v. Cates Chair Co. [Ala.] 41 So. 675.

78. Citizens' State Bank v. Chambers [Iowa] 105 N. W. 692.

79. Where in a foreclosure suit no custom was pleaded except the customary method of the persons to whom application for loan was made, evidence as to their private custom to use the words "at five and one per cent per annum," as meaning five per cent interest and one per cent commission, was inadmissible in the absence of proof of defendant's knowledge thereof. Citizens' State Bank v. Chambers [Iowa] 105 N. W. 692.

80. An alleged custom among coal dealers that an order to a railroad company to turn over coal to a purchaser constitutes delivery cannot be allowed to override the express terms of the statute of frauds as to sales of chattels of over a certain value. Calvert v. Schultz [Mich.] 13 Det. Leg. N. 14, 106 N. W. 1123.

81. See 5 C. L. 898.

laration or plea.[82] Parties are presumed to know general usage and custom.[83] Proof of a custom must be clear, cogent, and convincing,[84] and its generality and uniformity must be shown.[85] Testimony of a witness as to what he always did was not admissible to prove a custom.[86] If the evidence is uncertain and contradictory the custom is not established.[87] The usual rules as to competency, materiality, and admissibility, prevail.[88]

CUSTOMS LAWS.

§ 1. Interpretation and Operation of Customs Laws in General (1019).
§ 2. Dutiable Articles and Classification of the Same (1020).
§ 3. Administration of Customs Laws (1024). Entry (1027). Liquidation (1027). Enforcement of Duties (1027). Refund for Salvage (1027). Protests and Appeals (1027). Procedure (1027).
§ 4. Violations of Customs Laws and Consequences Thereof (1028).

§ 1. *Interpretation and operation of customs laws in general.*[89]—The provisions of a tariff act are designed for the future as well as for the present, and cover all importations which the definitions fit.[90] The intention of congress must be ascertained from the ordinary meaning of the words used, unless a different commercial meaning is explicitly given to the language employed.[91] The treaty

82. Proof of a custom relative to the furnishing of cars by mine owners or operators held inadmissible in the absence of any averment thereof in the declaration. Consolidated Coal Co. v. Jones & Adams Co., 120 Ill. App. 139.

83. A pleading alleging that, by general custom prevailing at the time of the execution of a timber contract, burr oak was classed as white oak, was not bad for failure to allege that the custom was known to both parties to the contract. Doell v. Schrier [Ind. App.] 75 N. E. 600.

84. To establish a custom in an oil producing locality, permitting the erection by a lessee of a dwelling on the land for the occupancy of his employes, it must be shown what locality is meant, when the custom began, and to whom and where such custom was known. Prigg v. Preston, 28 Pa. Super. Ct. 272.

85. Where it is not contended that the alleged custom has become the recognized law of the land, the opposing party may show that neither he nor other residents in the vicinity ever heard of the alleged custom and that there was no such general custom there. Prigg v. Preston, 28 Pa. Super. Ct. 272. Where, in an action for ejecting a passenger, defendant showed its conductor's custom of taking tickets and checking passengers to prove that he could not have overlooked taking up plaintiff's ticket, plaintiff could rebut by showing that it was not an infallible custom, by showing instances of its failure, if there was such a custom Parrott v. Atlantic & N. C. R. Co., 140 N. C. 546, 53 S. E. 432.

86. The fact that he always stopped a car before going down a hill would not establish a custom of doing so. Sloss-Sheffield Steel & Iron Co. v. Smith [Ala.] 40 So. 91.

87. Conflicting evidence as to a custom practiced in switching cars held insufficient to establish it. Chicago, etc., R. Co. v. Lindeman [C. C. A.] 143 F. 946.

88. Evidence of a custom or usage in Boston, by which when houses are entirely let without written lease, to a single tenant at will, the owner makes the outside repairs, such as roof, gutters and conductors, held competent. Shute v. Bills [Mass.] 78 N. E. 96. Where the issue was whether baggage was delivered to a carrier, evidence that it was not customary, when exchanging checks from one transportation company to another to examine and see whether they have the baggage on hand or not was wholly immaterial. Graham & M. Transp. Co. v. Young, 117 Ill. App. 257. In an action for wrongful death, questions asked witness to show the company's custom of standing a shifting engine and cars in front of the station as a barrier to keep people back from a dangerous place about the time of the approach of the passenger train, held inadmissible. MacFeat v. Philadelphia, etc., R. Co. [Del.] 62 A. 898. Evidence of a custom with business houses, in selling rope, never to make guarantees of any kind, held not admissible to show an agent's lack of authority to make representations as to the rope, no evidence that the custom was general, established, and notorious being offered. San Antonio Mach. & Supply Co. v. Josey [Tex. Civ. App.] 15 Tex. Ct. Rep. 176, 91 S. W. 598. Held not error to refuse to permit defendant to answer as to the commercial custom with reference to consigning hops and paying commissions, for the purpose of showing plaintiff's alleged contract to be unusual and improbable, where defendant had made such contract as to some of the hops and the only question was whether it applied to all of them. Horst v. Lovdal, 98 N. Y. S. 996.

89. See 5 C. L. 898.

90. Klots v. United States [C. C. A.] 139 F. 606.

91. Paper cut into shapes and sizes, ready to fold and gummed as envelopes, and commercially known as "flat envelopes" at the time of the passage of the tariff act, held

providing for a reduction of twenty per cent of the duties on Cuban products was put into effect by the President's proclamation on December 27, 1903.[92] The reciprocal commercial agreement with France, allowing a reduction of duty on brandies and other spirits, superseded the provision of a different rate on the alcohol in excess of ten per cent found in fruit preserved in spirits.[93] The order of the president of July 12, 1898, for the collection of duties on imports to Manila, was a war measure, and the right to levy duties thereunder ceased on the exchange of ratifications of the treaty with Spain,[94] and collections thereunder after such ratification were not ratified by the act ratifying such order and the actions taken thereunder.[95] Merchandise imported before, but entered after, the act of 1897 became operative,[96] and merchandise imported at New York and entered for immediate transportation to Philadelphia, a few hours before the tariff act of 1897 went into effect, but not reaching Philadelphia before that act became operative,[97] was subject to the provisions of that act.[98]

§ 2. *Dutiable articles and classification of the same.*[99]—The general rule is that the trade understanding should govern the determination to which class an article of merchandise pertains, before recourse may be had to the common designation,[1] but the evidence to establish such understanding must be definite, uniform, and general, and not practical or local.[2] A commercial designation must have been the result of trade usage prior to the passage of the tariff law;[3] and neither the importer nor the collector can bring within a paragraph of a tariff act a novel article of merchandise, which was not the article described therein, because the same trade name was given it after the act was passed.[4] Where denominative language is used without any qualification, it indicates an intention to include simply the commercial article then so known.[5] Articles commercially known and designated by

dutiable as "paper envelopes, plain." Hunter v. U. S., 143 F. 914.

92. Retrospective operation will not be given to Act Dec. 17, 1903, providing that the treaty should become effective on the tenth day after exchange of ratifications, because such ratifications had been exchanged before the act passed. United States v. American Sugar Refining Co., 202 U. S. 563, 50 Law. Ed. —-, rvg. 136 F. 508. See 5 C. L. 898, n. 12. Franklin Sugar Refining Co. v. U. S., 202 U. S. 580, 50 Law. Ed. —-, afg. 144 F. 563. Imports from Cuba were not entitled to the reduction until Dec. 27, 1903. United States v. American Sugar Refining Co., 202 U. S. 563, 50 Law. Ed. —-; Franklin Sugar Refining Co. v. U. S., 202 U. S. 580, 50 Law. Ed. —-.

93. La Manna v. U. S. [C. C. A.] 144 F. 688.

94. Lincoln v. U. S., 202 U. S. 484, 50 Law. Ed. —-.

95. Act July 1, 1902 (32 St. at L. 691, 692, c. 1369, U. S. Comp. St. Supp. 1905, p. 391), § 2. Lincoln v. U. S., 202 U. S. 484, 50 Law. Ed. —-.

96. The allowance of 15 days for entry (Rev. St. § 2785, 2 Fed. Stat. Ann. 641, U. S. Comp. St. 1901, p. 1867) did not have the effect of permitting entry under the old act. United States v. Hartwell Lumber Co. [C. C. A.] 142 F. 432.

97. Ellison v. U. S. [C. C. A.] 142 F. 732.

98. Under the express provisions of § 33 (2 Fed. Stat. Ann. 514), subjecting merchandise previously imported but not entered to the provisions of the act. United States v. Hartwell Lumber Co. [C. C. A.] 142 F. 432; Ellison & Sons v. U. S. [C. C. A.] 142 F. 732.

99. See 5 C. L. 898.

1. Frame & Co. v. U. S., 143 F. 692. Featherstitch braids, though produced by a process of weaving instead of braiding, but commercially known as braids, fall within the provision for "braids." Vom Baur v. U. S., 141 F. 439. As to fruit in "brine," in the absence of a commercial meaning of brine, the dictionary definition of it as water highly impregnated with salt was adopted. Causse Mfg. Co. v. U. S., 143 F. 690. Fruit in a solution containing .0402 per cent or less of salt is not fruit in brine. Id.

2. Evidence held insufficient to establish "pepper shells" as a trade name for the inner cuticle of pepper berries removed in decortication. Frame & Co. v. U. S., 143 F. 692. The testimony of a clerk of the importers in their behalf, who had never bought or sold embroideries, as to the designation of goods in the trade, held insufficient to prove that goods coming within the description of embroideries were not such in the commercial sense. Neuss, Hesslein & Co. v. U. S., 142 F. 281.

3. Smith Co. v. U. S., 143 F. 691.

4. So called fans made for decorative purposes could not be included in the tariff provisions for "fans of all kinds." Downing & Co. v. U. S., 141 F. 490.

5. The provision as to "sponges" does not include rubber sponges which are not within the dictionary definition of the term. Smith Co. v. U. S., 143 F. 691.

a particular term prior to the passage of a tariff act are deemed to be included within such term in the act,[6] but the manufacturing use of an article must prevail over the scientific or commercial nomenclature.[7] A long settled practice of the treasury department in construing tariff acts affords a rule of construction of the highest authority,[8] and a practical construction given any provision in a tariff act may be construed as accepted by congress and re-enacted in subsequent acts having the same wording.[9] The provision that unusual coverings shall be dutiable at the rate to which they would be subjected if separately imported, does not contemplate the imposition of cumulative duties, and their value should not be included in the value of their contents in addition.[10] It is immaterial, in the classification of imported articles, that they were put in an unfinished condition to escape a higher rate of duty.[11]

Articles are not dutiable under general terms when a duty is imposed in specific language,[12] and the expression "not otherwise provided for," or "not specially provided for," does not deprive this rule of its ordinary application.[13] While an article may be bought and sold by a specific name which indicates it particularly, yet a group of such articles may be known to trade and commerce by a commercial term which includes them all.[14] Where there is a specific enumeration, the similitude clause cannot apply.[15] The countervailing duty imposed on merchandise imported, upon which an export duty has been levied, is imposed only on the quantity imported, and the cause of any loss or shrinkage is immaterial.[16] The imposition by the province of Quebec of a license fee for cutting wood on public lands, which is reduced when the wood is manufactured into pulp in Canada, is the imposition of an export duty within the provisions for a countervailing duty to the amount

6. Books or albums for preserving collections of postal cards were commercially known as "scrap books," prior to the passage of the tariff act of 1897, and are dutiable as such. American News Co. v. U. S., 142 F. 786.

7. Edward Hill's Sons Co. v. U. S., 143 F. 361. The provision for "fans of all kinds" does not include unsubstantial paper novelties in the shape of fans, of a variety of sizes, not commercially known or used as fans, but intended for decoration. Downing & Co. v. U. S., 141 F. 490.

8, 9. United States v. Proctor & Co. [C. C. A.] 145 F. 126.

10. United States v. Park, 142 F. 202.

11. Hunter v. U. S., 143 F. 914.

12. Toys made of celluloid, a compound of pyroxylin, are less specifically designated in the provision for all compounds of pyroxylin and articles of which any compound thereof is the component material of chief value than in the provision for toys not specially provided for. United States v. Schwarz, 140 F. 302. As to braids of ramie, the provision for "braids of vegetable fiber" is more specific than the provision for "all manufactures of ramie," the latter being intended to include manufactures of vegetable fiber omitted elsewhere. United States v. Rosenberg [C. C. A.] 145 F. 343. The provision relating to "articles composed wholly or in part of spangles made of gelatin" is more specific than that relating to manufactures of gelatin. Louis Metzger & Co. v. U. S., 141 F. 381. Industrial diamonds known as "bort," which have been pierced by drilling or cutting, are not dutiable as diamonds advanced by cutting or other process, but are free of duty as "bort." United States v. American Exp. Co., 140 F. 967. As to embroidered hosiery, the provision for "wearing apparel, embroidered, etc., composed wholly or in chief of flax, cotton, or other vegetable fiber, and not elsewhere specially provided for," is less specific than the provision for "stockings, hose and half-hose, composed of cotton or other vegetable fiber." Carter, Webster & Co. v. U. S. [C. C. A.] 143 F. 256. Monuments in sections, or pieces of dressed granite intended to be assembled and erected as monuments without further preparation, held dutiable as dressed granite and not as articles composed of mineral substances. Austin Baldwin & Co. v. U. S., 144 F. 702. While paste is a kind of glass, it is distinguished elsewhere in the tariff act under its own peculiar name, and rhinestone buttons composed of paste are not embraced within the provision for buttons of "glass." Blumenthal & Co. v. U. S. [C. C. A.] 144 F. 384.

13. United States v. Schwarz, 140 F. 302.

14. The term acetic acid is not limited to the article scientifically known by that name, but is a general commercial designation of a class of articles and includes "acetic acid anhydrid." George Lueders & Co. v. U. S., 140 F. 970.

15. Flax noils dutiable as waste and not as "tow of flax" by similitude. Ritchie & Co. v. U. S., 141 F. 664.

16. Sugar invoiced at 9,536,348 pounds weighed 235,042 pounds less at the port of entry. Held that the countervailing duty was wrongfully levied on the invoice weight. Franklin Sugar Refining Co. v. U. S. [C. C. A.] 142 F. 376.

of the export duty imposed;[17] and if the pulp imported from Canada is made from wood of which a part is subject to an export duty, the countervailing duty should be assessed on the basis of the percentage of such wood used, when established by satisfactory evidence.[18] Other cases in which the classification of particular imports is decided or discussed are grouped in the foot notes.[19]

17. Tariff Act July 24, 1897, c. 11, § 1, Sched. M., par. 393, 30 Stat. 187, U. S. Comp. St. 1901, p. 1671, 2 Fed. Stat. Ann. 466. Myers v. U. S., 140 F. 648. Pulp produced in Canada from wood cut on public lands in Quebec is subject to the countervailing duty, whether manufactured in that province or not. Id.

18. Myers v. U. S., 140 F. 648.

19. **Agricultural and vegetable products and provisions:** Sesame oil includes ground sesame seed in the form of pulp from which the oil has not been removed. Zaloom v. U. S., 140 F. 31. So called casein industrielle, produced by drying the substance left after drawing off the whey from soured skimmed milk, held to be "lactarene." Ducas Co. v. U. S., 143 F. 362. Cherries prepared by removing the stems and pits and washing away dirt, natural acid, etc., to prevent decay in transportation, and putting them in a very weak saline solution, are dutiable as fruits in their own juices. Causse Mfg. Co. v. U. S., 143 F. 690. Eggs of domesticated ducks not included in "eggs of birds," but dutiable as "eggs not specially provided for." Sun Kwong On v. U. S., 143 F. 115. Pineapples put up in their own juice with about 3 per cent of sugar extrinsically added, principally to improve their flavor and not to preserve them, held dutiable as "preserved in their own juice" and not as "fruits preserved in sugar." Johnson & Co. v. U. S., 143 F. 915. "Green or ripe" fruits indicates the condition of the fruit as taken from the tree, and fruits "dried, desiccated, evaporated or prepared in any manner" indicates those that have undergone a drying process. Causse Mfg. Co. v. U. S., 143 F. 551. The hewing and sawing contemplated in the provision relating to "flocks or sticks * * * rough-hewn, sawed," etc., mean a new shaping and something more than merely sawing the blocks or sticks off from longer pieces. United States v. Pierce, 140 F. 962. The residuum from decorticating pepper berries, consisting of the inner cuticle in the form of powder and used as an adulterant without further grinding, is not within the provision for pepper "unground" (Frame & Co. v. U. S., 143 F. 692), it being sufficient if the pepper reaches the ground condition by decortication or other process equivalent to grinding, to exclude it as "unground" (Id.). Fruit in water but slightly impregnated with salt is not "fruit in brine." Causse Mfg. Co. v. U. S., 143 F. 690. The provision "silk, raw or as reeled from the cacoon, but not advanced in manufacture in any way," does not cover any form of raw silk advanced beyond the condition of skeins (Klots v. U. S. [C. C. A.] 139 F. 606), but silk known as "singles" or "silk on tubes" is advanced a stage in preparation for final use and is silk "advanced in manufacture" (Id.). Dutiable as "silk not further advanced or manufactured than carded or combed silk." Id.

Animals and animal products: Smoked herring, although salted before smoking, is a distinct commodity from "herrings, pickled or salted," and not dutiable as such. Mattlage v. U. S., 139 F. 704. The coat on so called mocha whitehead sheepskins held dutiable as wools on the skin and not free under provisions relating to raw skins, etc. Goat & S. Import Co. v. U. S., 141 F. 493. Cabretta skins held to be "sheepskins," within the meaning of the provision relating to raw skins "except sheepskins with the wool on." Lawrence Johnson & Co. v. U. S., 140 F. 116. Soluble grease, a preparation of tallow used in dying cotton cloth, not dutiable as an alizarin assistant, but as an unenumerated manufactured article. Abram De Ronde & Co. v. U. S., 140 F. 92. In the provisions as to hides and skins, pieces of more than twelve pounds in weight are known as "hides," and those of less weight as "skins." Where the separation of skins, weighing less than 12 pounds and entitled to entry free of duty, was made from a mixed importation of hides and skins by experienced weighers who weighed only such skins as were doubtful, the results of their work were sufficient to show the amount entitled to free entry. United States v. Helmrath [C. C. A.] 145 F. 36.

Art goods, toys, and ornaments: Pen and ink drawings of a proposed building, made by an architect, are within the provision relative to "works of art, the production of American artists." Young v. Bohn, 141 F. 471. "Works of art," intended for presentation to religious societies, held to include certain marble altars imported for such purpose, carved by a professional sculptor and worth $1,800. United States v. Ecclesiastical Art Works, 139 F. 798. "Articles commonly known as jewelry" held not to include "millinery ornaments" for trimming hats, which are flimsy articles, for temporary use and not made by jewelers. United States v. Schiff & Co. [C. C. A.] 139 F. 549. Thread or yarn chiefly used for machine embroidering held to be within the provision for "embroidery cottons." Loeb v. U. S., 143 F. 698. "Beads of all kinds, not threaded or strung," does not include beads strung or threaded temporarily. Frankenberg Co. v. U. S., 144 F. 704. The provision for gloves, "stitched or embroidered with more than three single strands or cords," held not to include those having three rows of embroidery, but produced by the needle with only one cord or strand. Trefousse, Goguenheim & Co. v. U. S., 144 F. 708. Gelatin spangles strung on cord for trimmings or ornaments for wearing apparel are ejusdem generis with articles mentioned in the provision for "ornaments, trimmings and other articles" composed of gelatin spangles, and are dutiable accordingly, rather than as "manufactures of gelatin" (G. Hirsch's Sons v. U. S., 141 F. 380), and spangled hat crowns are dutiable in the same way (Louis Metzger & Co. v. U. S., 141 F. 381). Celluloid toys are dutiable as "toys," not as articles of which a compound of py-

roxylin is the component material of chief value. United States v. Schwarz, 140 F. 302.

Books and paper: "Books printed exclusively in languages other than English" includes architectural portfolios containing 18 or 20 pages of illustrations and a 15-line preface in German. Downing & Co. v. U. S., 140 F. 92. An imitation parchment paper, known as grease-proof paper, which, though it can be printed on, is not suitable for such use, but is used for wrapping paper, is not dutiable as printing paper but as paper not specially provided for. Germania Importing Co. v. U. S., 142 F. 215.

Chemicals and medicines: Chrysarobin dutiable as a drug advanced in value and not as a medicinal preparation. Levi v. U. S., 140 F. 126. Extract of nutgalls not dutiable as tannin or tannic acid, nor as a chemical compound, but either directly or by similitude, as "drugs advanced in value or condition," etc. Proctor & Co. v. United States, 139 F. 586, afd. [C. C. A.] 145 F. 126. Red oil or oleic acid, used otherwise than as soap stock, held not to be free within the provision of "oils commonly used in soap making and fit only for such uses," but is dutiable as an acid not specially provided for. Edward Hill's Sons Co. v. U. S., 143 F. 361. Opium, though powdered by grinding and sifting lump opium after artificial evaporation, is "crude" in the sense that it is not refined, and not in the sense that it is not manufactured. Powdered opium so produced held to be "opium crude or unmanufactured" and not a "drug." Merck & Co. v. U. S., 143 F. 694. The term "acetic acid" includes "acetic acid anhydrid." George Lueders & Co. v. U. S., 140 F. 970.

Minerals, metals, and manufactures thereof: The principle of ejusdem generis does not exclude metal thread fabrics in the piece from the provision for "articles made wholly or in chief value of metal threads," following the mention of metal thread laces, etc. Rosenberg v. U. S., 141 F. 379. A steel table, 12 feet by 4 feet 6 inches, engraved, weighing about 6 tons, and mounted like a table top on a frame, held dutiable as "plates and steel in all forms and shapes." Morris v. U. S., 140 F. 774. Nickel-plated zinc sheets not dutiable as "zinc in sheets" but as articles or wares not specially provided for, composed wholly or in part of nickel, zinc, or other metal. Eckstein v. U. S., 140 F. 94. An alloy in pigs, used chiefly in hardening manganese bronze, and which must be melted and mixed with other metals, is dutiable as metal in a crude and unwrought state, rather than as articles composed of metal, or by similitude to "ferro-manganese." Thomas v. William Cramp & Sons Ship & Engine Bldg. Co. [C. C. A.] 142 F. 734. Bronze ornaments, being manufactured and advanced beyond the condition of "old copper," "clipping" and "composition metal," are not dutiable as such, but as manufactures of metal. Tiffany v. U. S., 142 F. 282. Steel wool, produced by passing toothed knives over steel wire, held dutiable as "steel in all forms and shapes," rather than as articles composed of steel "not specially provided for." Buehne v. U. S., 140 F. 772. "Plate iron or steel sheared" was intended to cover stock plates of a general commercial shape and for general use, while "sheared * * * shapes" meant something not in general stock, but sheared to a particular shape. Sheets of steel cut, according to a sketch, for a special purpose and in a specific shape varying slightly from a rectangle, are within the latter provision. In re Vandergrift & Co., 139 F. 790, afd. [C. C. A.] 142 F. 448. Granite monuments in sections ready for assembling are dutiable as "dressed granite," not as "articles composed of mineral substances." Austin Baldwin & Co. v. U. S., 144 F. 702.

Miscellaneous manufactures: Parts of buttons are not dutiable as buttons, nor are they liable to the additional rate on "all the foregoing articles" in the same paragraph, but are dutiable as manufactures of the component material of chief value. Hormann, Schutte & Co. v. U. S., 144 F. 707. Veneers of wood of so exceeding thinness that they are pasted on paper to keep them in shape, though the paper may be the component material of chief value, are still within the provision as to veneers of wood. American Trading Co. v. U. S., 142 F. 214. "Marasque water" or "eau de marasque," produced by distilling the juice of crushed cherries and diluted with water, not dutiable as cherry juice but as an unenumerated manufactured article. Leerburger Bros. v. U. S., 141 F. 1023. Certain cut glass thermometers, whose cutting was not shown to ornament or decorate them, held not to be within the provisions as to cut glass, etc. United States v. Hesse & Bro., 141 F. 492. Lenses must be both ground and polished to be brought within the provision for "lenses ground and polished to a spherical, cylindrical or prismatic form," and where brought to such form by molding they are not within that provision. United States v. Robinson, 140 F. 968. The provision as to "models of inventions, etc.," is not limited to "model patterns" intended to show the working of the thing illustrated, but includes also molders' patterns for making castings. Hoe & Co. v. U. S., 141 F. 488. Rubber recoil pads, intended to reduce the shock of the discharge of a gun, not being a necessary attachment, are not dutiable as parts or fittings of guns, but as manufactures of india rubber. Schoverling v. U. S., 142 F. 302. An automobile which, just prior to importation, was materially improved by upholstering and repairs, held not included in the provision for free admission of household effects actually used for more than one year. Hillhouse v. U. S., 142 F. 303. Fireproofed lumber, produced by subjecting sawed lumber to a certain process, held no longer dutiable as sawed lumber, but as "a manufacture of wood." United States v. Myers & Co., 139 F. 344. Powder made from raw silk, used in the manufacture of wall paper and artificial flowers, dutiable as manufactures of silk, or is at least so dutiable by similitude. Thomas & Co. v. U. S., 140 F. 93. Carbon sticks which must undergo a slight preparation to fit them for use in arc lamps, not dutiable as such because unfinished, nor as articles of carbon not specially provided for, decorated or not, because not susceptible of decoration, but under the similitude clause at the rate on the finished product. United States v. Downing, 201 U. S. 354, 50 Law. Ed. —. "Muguet pomade," produced by combining several kinds of enfleurage grease and about ½ of 1 per cent of essential oils to

§ 3. *Administration of customs laws. In general.*[20]—The right of the government to duties does not accrue while goods are at sea, even if the vessel has reached American waters and a collection district.[21] Duties can be levied only upon such articles as are made dutiable by congress and are actually imported into

fortify the article and to produce a certain odor, held free of duty as enfleurage grease. Leuders v. U. S., 143 F. 918. Rubber sponges are not included within the term "sponges" but are dutiable as manufactures of india rubber. Smith Co. v. U. S., 143 F. 691. Rhinestone buttons composed of paste are not dutiable as "buttons of glass." Blumenthal & Co. v. U. S., 144 F. 384.

Textiles and manufactures thereof; wearing apparel: Goods of silk and wool, the latter being the lesser component, held to be within the provision deferring until Jan 1, 1895, the reduction in duties on "manufactures of wool." Robinson v. U. S., 143 F. 919. Figures made of bleached threads, covering about ⅛ of the surface of the fabric, do not make cotton cloth "bleached" goods within the provisions for such goods. United States v. Beer, 143 F. 918. So called "remanit," in the form of ropes, braids, and mats, manufactured from silk produced by carbonizing rags containing silk, held to be a manufacture of silk. Frank v. U. S., 143 F. 702. A fabric of two colors, one produced by threads introduced to form figures and not extending across the cloth, such threads not being a part of the filling, was not within the provision for Jacquard figured silks with two or more colors "in the filling." Wimpfheimer v. U. S., 142 F. 849. Wide braids or plaits of straw not dutiable as hats partly manufactured, but as straw braids or plaits "suitable for making or ornamenting hats," etc.; and a small amount of cotton thread used for temporarily fastening the ends of the braid does not affect the classification. Samuel Schiff & Co. v. U. S., 140 F. 63. The provision for "hair press cloth" is not limited to fabrics composed of horsehair, the same as other articles mentioned, but a hair press cloth is so dutiable though made of camel's hair. Caldwell v. U. S., 141 F. 487. Beaver strips, composed partly of wool but chiefly of rabbit fur, and used in the manufacture of hats, dutiable as manufactures in chief value of fur. Hermann v. U. S., 141 F. 486; Id., 145 F. 843. Stuffed skins of domestic chicks and ducklings, used by confectioners and dealers in Easter goods, are not "toys" but "birds, stuffed," and free of duty. Morimura Bros. v. U. S., 141 F. 383. Openwork articles, having ornamental designs stitched thereon by hand with needle and thread, are embroideries. Neuss, Hesslein & Co. v. U. S., 142 F. 281. The proviso that no embroidered apparel shall pay a less duty than is imposed in any schedule upon any of the materials of which it is composed is not restricted to the articles previously enumerated in the same paragraph. Par. 339, Sched. J, § 1, Tariff Act July 24, 1897, c. 11, 30 Stat. 181, U. S. Comp. St. 1901, p. 1662, 2 Fed. St. Ann. 451. Carter, Webster & Co. v. U. S. [C. C. A.] 143 F. 256. Silk-embroidered cotton hosiery dutiable at the rate applicable to silk embroideries, when such rate exceeds that provided for cotton hosiery. Id. A pearl necklace is "wearing apparel." United States v. One Pearl Chain [C. C. A.] 139 F. 513, afg. 139 F. 510. Garters are wearing apparel. United States v. Steinhardt & Bro., 141 F. 494. As to the provision for "labels, for garments, etc., composed of cotton," labels are not to be excluded therefrom because in the piece and requiring to be cut apart before using (United States v. Herzog [C. C. A.] 145 F. 622), nor because they are cotton and silk labels, where cotton is the chief component (Id.). Featherstitched braids are "braids," though produced by weaving instead of binding. Vom Bauer v. U. S., 141 F. 439. Embroidered hosiery is dutiable as stockings, hose, and half hose," not as "wearing apparel, embroidered," etc. Carter, Webster & Co. v. U. S., 143 F. 256. Braid of ramie is dutiable as "braid," not as "manufactures of ramie." United States v. Rosenberg [C. C. A.] 145 F. 343.

Pearls and precious stones: Paste cameos, in imitation of shell cameos, being in imitation of certain kinds of precious stones, are dutiable as imitation precious stones. United States v. Goldberg, 139 F. 706. Pierced opal balls and pierced rock-crystal rondelles held dutiable as "precious stones" rather than as "beads," they not being commercially known as beads. United States v. American Gem & Pearl Co., 142 F. 283. Rock crystals are commercially known as precious stones. Rock-crystal intaglios, expensively produced by engraving and then painted, dutiable as "precious stones advanced in condition or value by cutting," etc., regardless of their advancement by painting. United States v. Benedict [C. C. A.] 145 F. 914. Pierced rock-crystal rondelles dutiable as precious stones rather than as manufactures of rock crystal. United States v. American Gem & Pearl Co., 142 F. 283. The provision for imitations of precious stones covers imitation whole and half pearls, including those strung on wire for manufacturing purposes (United States v. Weinberg, 139 F. 1006), but pierced imitation pearls are dutiable as "beads of all kinds, not threaded or strung," rather than as imitations of precious stones (Id.). Industrial diamonds known as "bort," though cut, are free as bort, not dutiable as diamonds advanced by cutting. United States v. American Exp. Co., 140 F. 967.

Rags and waste: "Rags" includes coarse pieces of jute bagging, as torn from cotton bales and not sufficiently large and suitable for other use than as mere rags. Train-Smith Co. v. U. S., 140 F. 113. Certain waste, consisting of mill sweepings, fit only for paper stock, etc., not dutiable as waste in part of wool, but as "paper stock, fit only to be converted into paper." In re Downing & Co., 139 F. 590. Flax noils dutiable as waste. Ritchie & Co. v. U. S., 141 F. 664. Small pieces of cork, produced by grinding the refuse of cork bark for convenience in handling, but which need further treatment before use in the manufacture of linoleum, held dutiable as waste and not as a manufacture of cork. Gudewill v. U. S., 142 F. 214.

the United States,[22] and nothing is imported till it comes within the limits of a port.[23] If there be a material loss, it can make no difference whether it happened by natural or artificial causes. In either case the article, to that extent, is not here to be assessed, nor to be of any value to the owner,[24] but no allowance should be made for impurities not shown to be abnormal nor to vary from the ordinary wholesale condition;[25] nor can any allowance be made for leakage of wine while in transit to this country, but duty must be assessed on the quantity shipped from abroad.[26] The provision that duty shall not be assessed on less than the invoice or entered value does not prevent assessment on less than the pro forma invoice value on which entry was made, where a certified invoice of less value is afterward produced.[27] Though part of an importation may be subject to a lower rate of duty than the rest, such differentiation cannot be made where its identity is not proved, but the importation must be treated as a whole.[28] The mere diminution in units of weight or measure of a commodity usually measured by such units is not such a change of condition, "by manufacture or otherwise," as to authorize a resort to other than the usual means of ascertaining the amount of the additional duty.[29] The certificate of the appraising officer is the legal evidence of appraisement and without it the appraisement is not legal.[30] The regulations of the secretary of the treasury, to be followed by appraisers in advancing the invoice value of imported merchandise, are not mandatory,[31] and a departure therefrom does not invalidate an appraisement.[32] An appraising officer having no knowledge as to the value of imported articles can send samples thereof to the appraiser at the port of New York for information.[33] If the local appraiser proceeds upon a wrong principle or contrary to law in ascertaining the market value of imported merchandise his action is void.[34] The seizure of goods for undervaluation does not deprive the consignee

20. See 5 C. L. 900.

21. United States v. Hartwell Lumber Co. [C. C. A.] 142 F. 432.

22, 23. Stone v. Shallus [C. C. A.] 143 F. 486.

24. The provision forbidding an allowance for damage, unless it exceeds 10 per cent of the invoice, does not apply to decayed fruit, which is wholly worthless, but such fruit may be culled out and duty assessed on the rest, regardless of the percentage (Stone v. Shallus [C. C. A.] 143 F. 486), and this rule applies as well to fruit in packages as to that in bulk (Id.), even though the decayed portion is not separated, but, after removal for estimation of its quantity, is replaced in the package and sold with the good fruit (Courtin, Golden & Co. v. U. S., 143 F. 551). Where at least one package of fruit in ten was opened to ascertain the percentage of decay, and the estimate thus made was assumed to prevail throughout the lot and accepted by the bidders at the auction sale on the dock, held that such estimate was reasonable and sufficient. Id.

25. Shelled nuts dutiable by the pound. Spencer & Co. v. U. S., 143 F. 916.

26. United States v. Shaw & Co. [C. C. A.] 144 F. 329, rvg. 141 F. 469.

27. Pro forma invoice of telegraph instruments, valued at £342, shown by certified invoice to have a foreign market value of £315. 3s. 1d. United States v. Commercial Cable Co., 141 F. 473.

28. Ellison v. U. S. [C. C. A.] 142 F. 732.

29. Franklin Sugar Refining Co. v. U. S. [C. C. A.] 142 F. 376.

30. Under Rev. St. § 2950, U. S. Comp. St. 1901, p. 1940, 2 Fed. St. Ann. 693, and customs Adm. Act June 10, 1890, c. 407, § 13, 26 Stat. 136, 2 Fed. Stat. Ann. 622, U. S. Comp. St. 1901, p. 1932, it is intended that the appraisement shall be reduced to writing. The Lace House v. U. S. [C. C. A.] 141 F. 869.

31. Meyer, Ebeling & Co. v. U. S., 140 F. 334; The Lace House v. U. S. [C. C. A.] 141 F. 869.

32. The Lace House v. U. S. [C. C. A.] 141 F. 869. In advancing an invoice value the appraiser totaled the invoice price and disallowed certain discounts to which the importers were entitled, instead of adding a specific sum to the invoice value of each item, as required by the regulations. Held that the appraisement was not invalidated, but the importers, if dissatisfied, should request a reappraisement. Meyer, Ebeling & Co. v. U. S., 140 F. 334.

33. Under Customs Administration Act June 10, 1890, c. 407, § 10, 26 Stat. 136, U. S. Comp. St. 1901, p. 1922, 2 Fed. Stat. Ann. 620, authorizing the use of all reasonable ways and means of ascertaining the value of merchandise. The Lace House v. U. S. [C. C. A.] 141 F. 869.

34. An importer received two lots of the same kind of merchandise. The first was advanced in price, was reappraised and the advance affirmed, whereupon further reappraisement was waived. The appraiser advanced the value of the second shipment without any examination of the merchandise or samples. Held void. United States v. Beer, 142 F. 199.

or owner of the right of reappraisement.[35] Where an appraiser who advances the value of importations fails to give notice thereof to the importer, the latter is deprived of the right of appeal for reappraisement, and the appraisement is invalid and cannot afford a proper basis for forfeiture for undervaluation.[36] Duty was correctly assessed on onions, at a specific rate "per bushel," on the long established practice of customs authorities to consider 57 pounds as a bushel, in the absence of evidence justifying a different basis of measurement.[37] The assessment of duty on olives in casks should be based on measurement by the wine gallon and not by the dry gallon.[38] There is no repugnancy in the sections of the tariff laws relating to withdrawal of merchandise from bonded warehouses, for neither section is general in its application but restricted to merchandise previously inported, for which no entry has been made.[39] Merchandise withdrawn from bonded warehouse, when dutiable by weight, should be assessed without allowance for loss of weight in warehouse.[40] Imported merchandise is, by the express terms of the customs administrative act of 1890, subjected to the rate of duty in force at the time of its withdrawal from the bonded warehouse.[41] Where an importer procured permits for the delivery of merchandise in a bonded warehouse, filing them with the storekeeper but not actually withdrawing the goods until later, the former action constituted a constructive withdrawal;[42] and the goods were subject to the duties then applicable rather than to those applicable at the time of actual withdrawal.[43] There is no regulation which empowers the secretary of the treasury to abridge the right of free entry of articles under the provision relating to regalia;[44] but to entitle an importation to free entry, when made free under certain conditions, the burden rests upon the importer to bring it within the conditions.[45] The phrase "entitled to debenture" refers to imported goods upon which the duties have been paid or secured, which have been entered for export, and therefore, having the benefit of drawback, become entitled to debenture.[46] The right to transfer such merchandise into new packages, when necessary for its preservation, with the permission of the collector, does not apply to imported merchandise remaining in bond and intended for sale and consumption in this country.[47] The collector, under his authority to

35. Given by Customs Adm. Act June 10, 1890, c. 407, § 13, 26 Stat. 136, U. S. Comp. St. 1901, p. 1932, 2 Fed. Stat. Ann. 622. The Lace House v. U. S. [C. C. A.] 141 F. 869.

36. The Lace House v. U. S. [C. C. A.] 141 F. 869.

37. Hills Bros. Co. v. U. S., 143 F. 695.

38. Ceballos & Co. v. U. S., 139 F. 705.

39. Acts July 24, 1897, c. 11, § 33, 30 Stat. 213, 2 Fed. Stat. Ann. 514, U. S. Comp. St. 1901, p. 1701, and Oct. 1, 1890, c. 1244, § 50, 26 Stat. 624. Falk v. U. S., 145 F. 574.

40. The section forbidding allowance for injury or loss sustained by merchandise while in warehouse (Rev. St. § 2983, U. S. Comp. St. 1901, p. 1958, 2 Fed. Stat. Ann. 704), was not repealed by the customs administration act, subjecting merchandise withdrawn from warehouse to the duties applicable at the time (Act June 10, 1890, c. 407, 26 Stat. 140, U. S. Comp. St. 1901, p. 1950, 2 Fed. Stat. Ann. 611, as amended by Act Dec. 15, 1902, c. 1, 32 Stat. 753, U. S. Comp. St. Supp. 1905, p. 419), since § 20 of the administration act, providing for withdrawal upon payment of such duties, refers to the rate of duty rather than to the weight of the merchandise. Falk v. U. S., 145 F. 574.

41. Franklin Sugar Refining Co. v. U. S., 202 U. S. 580, 50 Law. Ed. —, afg. 144 F. 563. Merchandise imported while Tariff Act Oct. 1, 1890, c. 1244, 26 Stat. 567, was in effect, but not withdrawn from warehouse until after Tariff Act Aug. 28, 1894, c. 349, 28 Stat. 509, became effective, was subject to the latter act. United States v. Amsinck & Co., 140 F 96.

42. Franklin Sugar Refining Co. v. U. S., 144 F. 563, afd. 202 U. S. 580, 50 Law. Ed. —.

43. Importations constructively withdrawn before the reciprocal commercial convention with Cuba went into effect, but not actually withdrawn until afterward. Franklin Sugar Refining Co. v. U. S., 144 F. 563, afd. 202 U. S. 580, 50 Law. Ed. —.

44. Though the oaths necessary to establish the right of free entry of certain church regalia were not before the collector at the time of entry, they were at the time of liquidation, and duty should not have been assessed. Siegman v. U. S., 141 F. 491.

45. Oils commonly used in soap making and fit only for such uses. Edward Hill's Sons Co. v. U. S., 143 F. 361.

46. Rev. St. § 3030, 2 Fed. Stat. Ann. 734. Thomas & Son Co. v. Barnett [C. C. A.] 144 F. 338.

require a bond for double the value of merchandise imported, to be forfeited for the nonreturn unopened of any package on demand, may take a less stringent bond for such return or the payment of double value as a condition of discharge from the full penalty of the bond.[48] The enforcement of the penalty of such a redelivery bond is not precluded by the provision that where a forfeiture, breach, or nonperformance appears by defendant's default or confession, or upon demurrer, judgment shall be rendered for only so much as is equitably due.[49]

Entry.[50]—The whole scheme of the tariff laws and the general statutes for the collection of duties contemplate importation before entry, and a collector may refuse an entry tendered before the importation is complete;[51] and where there is no existing right of entry at the time of the tender, or any duty on the part of the collector to accept, his refusal, though based on erroneous grounds and misleading the importers, creates no estoppel against the government.[52] Personal effects do not cease to be baggage because they are worn on the person so as to be covered from view by the passenger's dress, the crucial questions being, has such a declaration been made as to be a sufficient disclosure as to the dutiable character of articles purchased abroad? and, has the passenger followed that disclosure by production for inspection?[53] A declaration may be sufficient as a disclosure, though defective or incomplete as an entry, and it is then claimant's duty to complete the entry afterward at such time as may suit the customs officers' convenience.[54] A clerical error in an entry may be corrected after liquidation.[55]

Liquidation.[56]—Within one year after entry, duties may be reliquidated at a higher rate, although they have been paid and the merchandise withdrawn for consumption.[57] A reliquidation has all the validity of the original liquidation, supersedes it, and must be treated as the liquidation.[58]

Enforcement of duties.[59]—Duties are a personal debt or obligation of the importer.[60]

Refund for salvage.[61]

Protests and appeals.[62]—The jurisdiction of the Federal circuit courts in regard to customs duties, before the enactment of the customs administrative act, was concurrent with that given to the Board of General Appraisers by that act.[63]

Procedure.[64]—The importer may seek his remedy for erroneous assessment only

47. Thomas & Son Co. v. Barnett [C. C. A.] 144 F. 338.

48. Under U. S. Rev. Stat. § 2899, U. S. Comp. Stat. 1901, p. 1921, 2 Fed. Stat. Ann. 679. United States v. Dieckerhoff, 202 U. S. 302, 50 Law. Ed. —.

49. Double the value of the package ordered to be returned, and not merely actual damages, is the measure of recovery for breach of the obligation of such a redelivery bond. United States v. Dieckerhoff, 202 U. S. 302, 50 Law. Ed. —.

50. See 5 C. L. 901.

51. Importers tendered an entry of an importation not yet completed, shortly before the tariff act of 1897 went into effect, which was received. Entry was not renewed until after that act went into effect. Held that under § 33 the importation was subject to the act of 1897. United States v. Hartwell Lumber Co. [C. C. A.] 142 F. 432.

52. United States v. Hartwell Lumber Co. [C. C. A.] 142 F. 432.

53, 54. United States v. One Pearl Chain [C. C. A.] 139 F. 513.

55. Certain nondutiable charges were not specified through clerical error by the importers until, after liquidation, demand was made for increased duties assessed on account of the error. Held that the importers should have been allowed to correct the error. Wilmerding v. U. S., 139 F. 1004.

56. See 5 C. L. 901.

57. Under Act June 22, 1874, c. 391, § 21, 18 Stat. 190, U. S. Comp. St. 1901, p. 1986, 2 Fed. Stat. Ann. 760, providing that liquidation and payment shall, after the expiration of one year from entry, be conclusive on all parties. Louisville Pillow Co. v. U. S. [C. C. A.] 144 F. 386.

58. Within the meaning of Const. Adm. Act June 10, 1890, c. 407, § 14, 26 Stat. 137, U. S. Comp. St. 1901, p. 1933, 2 Fed. Stat. Ann. 624, providing that protests must be filed within 10 days after "liquidation." Louisville Pillow Co. v. U. S. [C. C. A.] 144 F. 386.

59. See 5 C. L. 902.

60. Thomas & Son Co. v. Barnett [C. C. A.] 144 F. 338.

61, 62. See 5 C. L. 902.

63. Act June 10, 1890, c. 407, 26 Stat. 131,

through the method prescribed in the statute.[65] The statute requires protests to state the reasons for objections to decisions of the collector distinctly and specifically.[66] The contention that the findings of fact of the Board of General Appraisers are not reviewable by the courts on appeal, and are final when there is evidence to sustain them, is not supported by the authorities;[67] but a finding of the Board of General Appraisers, based upon legitimate evidence, will not be overthrown because of an informal acknowledgment made by a merchant in Scotland.[68] The presence and absence of different members of the Board of General Appraisers at various times during the taking of testimony is a matter within their own discretion and is not reviewable in dealing only with their conclusions, which must be such as are reached in their own way.[69] After a verdict for the importers as to a part, and against them for the remainder, of a claim for excessive duties paid, judgment being rendered and satisfied, the entire matter was res adjudicata, barring subsequent proceedings before the Board of General Appraisers.[70]

A collector.[71]

§ 4. *Violations of customs laws and consequences thereof.*[72]—Officers in the revenue service conspiring with others to defraud the United States may be prosecuted therefor as officers,[73] or they may be joined with the others in an indictment for conspiracy.[74] An indictment of a customs examiner for knowingly passing invoices containing false statements as to weight will not be held insufficient on the theory that the law provides for the weighing being done by weighers, and hence he could not legally pass the invoices.[75] An allegation in such an indictment that certain acts were done "to the end that" less than the legal amount of duties might be collected was a sufficient allegation of corrupt and fraudulent intent.[76] Failure to enter imported goods renders them liable to forfeiture,[77] but the government cannot seize goods as forfeited until the time has come when the person importing them has had an opportunity to declare them and has not done so,[78] and where a passenger, in entering his baggage, omits to mention dutiable articles contained

U. S. Comp. St. 1901, p. 1886, 2 Fed. Stat. Ann. 611. United States v. Johnson & Co., 145 F. 1018.

64. See 5 C. L. 902.

65. In an action by a collector against an importer for a balance of duties found due on reliquidation, the importer could not defend on the ground of an incorrect assessment, as the collector's decision is made conclusive against the importer, unless reviewed by the Board of General Appraisers, Louisville Pillow Co. v. U. S. [C. C. A.] 144 F. 386.

66. Adm. Act, § 14, 2 Fed. Stat. Ann. 624. Hermann Boker & Co. v. U. S., 140 F. 115. A protest, claiming a "refund of duty on * * * skins," contained a sufficient reference to the provision in the free list for "skins of all kinds." United States v. Helmrath [C. C. A.] 145 F. 36. In case of protest against the assessment of duty under an alleged application of the similitude clause, the protest, to be sufficiently specific, must contain a reference to such provision. United States v. Dearberg Bros. [C. C. A.] 143 F. 472. A protest against the assessment of duty, which does not distinctly and specifically point out the proper rate, is not sufficient. Fuld & Co. v. U. S., 143 F. 920. Protest held insufficient for failure to state grounds of objection or rate of duty claimed. Hermann Boker & Co. v. U. S., 140 F. 115. Where imported merchandise in three invoices was all subjected to the same rate of duty, which was excessive as to part, and the importer in protesting specified one of the two invoices on which the duty was incorrectly assessed, held that the protest must be restricted to the invoice specified. United States v. Hartley, 140 F. 969.

67. United States v. Proctor & Co. [C. C. A.] 145 F. 126. Testimony that thread used in machine embroidery was not "embroidery cottons" held insufficient, where it appeared that the witness had never seen the thread so used and had no familiarity with the article in question. Loeb v. U. S., 143 F. 698.

68. Austin Baldwin & Co. v. U. S., 139 F. 1005.

69. United States v. Pierce, 140 F. 962.

70. United States v. Johnson & Co., 145 F. 1018.

71, 72. See 5 C. L. 903.

73. Under Rev. St. § 3169, U. S. Comp. St. 1901, p. 2059. Grunberg v. U. S. [C. C. A.] 145 F. 81.

74. Under § 5440, U. S. Comp. St. 1901, p. 3676, 2 Fed. Stat. Ann. 247. Grunberg v. U. S. [C. C. A.] 145 F. 81. Where an indictment charged conspiracy to defraud the United States of moneys due from a certain firm as customs duties, proof that the goods were shipped to customs brokers, who paid the duties, was no variance, the goods being

therein, he is subject to the statutory penalty of treble their value,[79] whether or not there was any intent to defraud the government.[80] But if, instead of requiring a passenger to make due entry, an officer elects to seize goods, the passenger is not responsible for failure to complete the entry, if he mentioned the articles as required by law when he first made his entry.[81] The exemption from duty of $100 worth of articles in the personal effects of residents of the United States cannot be claimed where the provisions regarding the entry of baggage are not complied with, and in case of forfeiture for noncompliance the exemption is lost.[82] The provision for the forfeiture of merchandise, whose appraised value exceeds its entered value more than 50 per cent, does not apply unless there has been a legal appraisement.[83] The false statements in making entries of importations, denounced by act of congress, do not constitute an offense thereunder, unless they deprive the government of some of its lawful duties,[84] but such false statements must be more than merely incorrect or erroneous ones, statements knowingly, or intentionally, or negligently false.[85] Boxes containing lemons, which are subject to a separate classification from the lemons themselves, are within the provisions relative to undervaluation and are subject to the penalties prescribed therefor.[86]

DAMAGES.[87]

§ 1. Kinds of Damages and Their Characteristics (1029.) Damnum Absque Injuria (1029). Special Damages (1030). Nominal Damages (1030). Liquidated Damages (1031). Exemplary Damages (1032.) Statutory, Double, and Treble Damages (1035).

§ 2. General Principles for Ascertaining (1035). Rule of Strictness as Between Contracts and Torts (1035). Limitation to Natural and Proximate Consequences (1035). Speculative and Prospective Damages (1036). Loss of Profits (1036). Difficulty or Uncertainty of Proof of Amount as Bar (1038). Mitigation and Aggravation of Damages (1038). Avoidable Consequences (1038). Mental Suffering (1039). Interest (1041). Attorney's Fees (1041).

§ 3. Recovery as Affected by Status of Plaintiff or Limited Interest in Property Affected (1041).

§ 4. Measure of Damages for Breach of Contract (1042).

- A. In General; Miscellaneous Contracts (1042).
- B. Contracts for Sale or Purchase of Land (1045).
- C. Breach of Covenant as to Title (1045).
- D. Contracts to Give Lease and Liabilities as Between Lessor or Lessee (1045).
- E. Contracts for Sale or Purchase of Chattels (1046).
- F. Liability of Bailees, Carriers, and Telegraph Companies (1047).
- G. Contracts for Services (1053).
- H. Promise of Marriage (1054).

§ 5. Measure and Elements of Damages for Torts (1054).

- A. In General; Miscellaneous Torts (1054). Alienation of Affections (1054). Fraud and Deceit (1054). Malicious Prosecution and Abuse of Process (1055). False Imprisonment (1055).
- B. Loss of, or Injury to, Property (1055).
- C. Maintaining Nuisance (1057).
- D. Trespass on Lands (1058).
- E. Conversion (1058).
- F. Wrongful Taking or Detention of Property (1059).
- G. Libel and Slander (1059).
- H. Personal Injuries (1060).

§ 6. Inadequate and Excessive Damages (1063).

§ 7. Pleading, Evidence, and Procedure (1068).

- A. Pleading (1068).
- B. Evidence as to Damages (1072). Burden of Proof and Sufficiency of Evidence (1072). Admissibility in General (1073). Personal Injury Actions (1075). Proof of Life Expectancy (1076). Physical Examination and Exhibition of Injuries (1076).
- C. Instructions (1077).
- D. Trial (1081).
- E. Verdicts and Findings (1082).

§ 1. *Kinds of damages and their characteristics. Damnum absque injuria.*[88]

owned by the firm but so shipped for convenience of entry. Id. In a prosecution for securing an undervaluation of goods, through a conspiracy, the testimony of a witness who assisted in selecting and packing the goods by the foreign seller was admissible, although he did not witness all the steps taken, but his testimony was considered in connection with that of other witnesses and the course of business in the establishment. Id.

75, 76. Browne v. U. S. [C. C. A.] 145 F. 1.

77. United States v. One Pearl Chain [C. C. A.] 139 F. 513.

78. United States v. One Pearl Chain, 139

—There can be no recovery for consequential damages of a lawful act;[89] it is only the infraction of a legal right which warrants a recovery.[90]

Special damages[91] are such as arise naturally but not necessarily from the wrong complained of.[92]

Nominal damages[93] are awarded, not as compensation for the injury, but merely in recognition of plaintiff's right and its technical infraction by defendant.[94] Such damages are therefore recoverable where plaintiff proves a breach of a duty owed him but fails to prove any substantial damage,[95] or fails to prove the amount of the damage suffered.[96]

F. 510, afd. [C. C. A.] 139 F. 513. It is immaterial that a person intended to smuggle goods. If, before the time has passed, he changes his mind and makes the necessary declaration, the goods are not subject to forfeiture under § 3082, Rev. St., U. S. Comp. St 1901, p. 2014, 2 Fed. Stat. Ann. 748. United States v. One Pearl Chain [C. C. A.] 139 F. 513, afg. 139 F. 510.

79. Rev. St. § 2802, U. S. Comp. St. 1901, p. 1873, 2 Fed. Stat. Ann. 645. Harts v. U. S. [C. C. A] 140 F. 843. This section, however, is not applicable to articles in passengers' baggage brought from the Philippine Islands. Id.

80. In filling out the printed form of statement furnished by the customs officers, a passenger struck out the clause referring to an itemized description and inserted a description of the pieces of baggage, but did not mention the contents. Held not a sufficient "mention" of the dutiable articles under Rev. St. § 2802, U. S. Comp. St. 1901, p. 1873, 2 Fed. Stat. Ann. 645. Harts v. U. S [C. C. A.] 140 F. 843.

81. Where a party had made a declaration of "wearing apparel, value not known," and was awaiting opportunity to give the information to complete the entry, but before such opportunity was given a pearl chain was seized, the phrase "wearing apparel" was a sufficient declaration and the seizure was illegal. United States v. One Pearl Chain [C. C. A.] 139 F. 513, afg. 139 F. 510.

82. Harts v. U. S. [C. C. A.] 140 F. 843.

83. Tariff Act July 24, 1897, c. 11, § 32, 30 Stat. 211, U. S. Comp. St. 1901, p. 1924, 2 Fed. Stat. Ann. 512. Appraisement of laces, etc., illegal because not reduced to writing. The Lace House v. U. S. [C. C. A.] 141 F. 869.

84. One who had the right of possession and a lien upon imported goods having in good faith, in making an entry, declared himself to be the owner and the government not being deprived of any lawful duties, he was not punishable under Act June 10, 1890, c. 407, § 9, 26 Stat. 135, U. S. Comp. St. 1901, p. 1895, 2 Fed. Stat. Ann. 618. United States v. Ninety-Nine Diamonds [C. C. A.] 139 F. 961.

85. United States v. Ninety-Nine Diamonds [C. C. A.] 139 F. 961. The fact that three lace dresses in a package by themselves were found in a case of laces, etc., but not mentioned in the invoice, did not of itself warrant the infliction of the penalty of forfeiture and condemnation of goods for entry under a false and fraudulent invoice. The Lace House v. U. S. [C. C. A.] 141 F. 869.

86. Const. Adm. Act June 10, 1890, c. 407, § 7, 26 Stat. 134, U. S. Comp. St. 1901, p. 1892, 2 Fed. Stat. Ann. 615. Phelps Bros. & Co. v. U. S., 142 F. 213.

87. **This topic excludes** measure of compensation for taking of property for public use (See Eminent Domain, 5 C. L. 1097), and damages for death by wrongful act (See Death by Wrongful Act, 5 C. L. 945).

88. See 5 C. L. 904.

89. Where no negligence in construction of public bridge was shown, the falling of water and snow and pulverized wood from the bridge on the roof of a building some distance away constituted consequential damages for which there could be no recovery. Sadlier v. New York [N. Y.] 78 N. E. 272. Where a right of way is acquired under the power of eminent domain, damages cannot thereafter be recovered for personal inconvenience resulting naturally and without negligence in the operation of cars. Oklahoma City & T. R. Co. v. Scarborough [Tex. Civ. App.] 16 Tex. Ct. Rep. 506, 95 S. W. 1089. One who brings an action for injuries to his property by reason of railroad facilities being located in the vicinity can, in the absence of proof that use of a street which the company had a right to use, constituted a nuisance, recover for only such injury as resulted from the operation of the railroad facilities on land not embraced within the street. Oklahoma City & T. R. Co. v. Dunham [Tex. Civ. App.] 13 Tex. Ct. Rep. 644, 88 S. W. 849.

90. A female cannot recover damages because of an indecent proposal made to her where it was unaccompanied by physical injury. Davis v. Richardson [Ark.] 89 S. W. 318.

91. See 5 C. L. 904.

92. See post § 4 A, § 4 F, and, as to pleading special damages, § 7 A.

93. See 5 C. L. 904.

94. Blackburn v. Alabama Great Southern R. Co., 143 Ala. 346, 39 So. 345.

95. Passenger carried by destination. Blackburn v. Alabama Great Southern R. Co., 143 Ala. 346, 39 So. 345. Failure to furnish registration papers with cattle sold, as agreed. Miller v. Mosely [Tex. Civ. App.] 14 Tex. Ct. Rep. 666, 91 S. W. 648. Extension of a flash board one inch over the divisional line in the erection of a building. Puroto v. Chieppa [Conn.] 62 A. 664. Where defendant in an action for assault testified that he had pleaded guilty to a criminal complaint, and though plaintiff struck the first blow, defendant continued to fight long after necessity for self-defense ceased for the purpose of punishing plaintiff, the plaintiff was entitled to a verdict for nominal damages at least. Hetrick v. Crouch [Mich.] 12 Det. Leg. N. 578, 105 N. W. 131.

96. Where negligent killing of cattle was proved, nominal damages could be recover-

Liquidated damages[97] are those the amount of which has been determined by anticipatory agreement between the parties. There are no absolute rules by which to determine whether a sum stipulated to be paid upon breach of a contract is to be regarded as a penalty or as liquidated damages.[98] The intention of the parties, as gathered from the whole contract, with the aid of a few general principles, controls.[99] That the contract designates the sum named as one or the other is not conclusive.[1] Where the damages for breach of the contract are uncertain and difficult to ascertain,[2] as in the case of a contract to sell,[3] a contract to complete a building or other improvement within a certain time,[4] or a contract not to engage in a particular profession or business within prescribed limits as to time or place,[5] the sum stipulated is usually held liquidated damages and not a penalty,[6] and such contracts will be enforced according to their terms if a breach is made to appear,[7] unless the breach and the provision for stipulated damages have been

ed, even though the amount of actual damages was not proved. Western Ry. v. Stone [Ala.] 39 So. 723; Bradford v. Montgomery Furniture Co., 115 Tenn. 610, 92 S. W. 1104. Action by retail dealer erroneously reported delinquent by member of association of wholesale dealers. Woodhouse v. Powles [Wash.] 86 P. 1063. Action against a railroad company for constructing an insufficient culvert, thereby backing the surface water up on the land of an adjacent owner. Harvey v. Mason City & Ft. D. R. Co. [Iowa] 105 N. W. 958. In the absence of proof of actual damages, the consignee can recover only nominal damages for a negligent failure of a shipper to deliver the goods within a reasonable time. Chicago, etc., R. Co. v. Broe [Okl.] 86 P. 441; Clark v. American Exp. Co. [Iowa] 106 N. W. 642. Only nominal damages recoverable for construction of railroad in street, unless actual damage was proved. Romano v. Yazoo & M. V. R. Co. [Miss.] 40 So. 150.

97. See 5 C. L. 905.

98, 99, 1. Merica v. Burgett [Ind. App.] 75 N. E. 1083.

2. Merica v. Burgett [Ind. App.] 75 N. E. 1083. Where a liquor dealer's bond is conditioned that he will adhere to the terms of his license and the provisions of the laws under which it is granted, the amount of the bond is regarded as liquidated damages and not as a penalty. State v. Corron [N. H.] 62 A. 1044. Where contract for electric sign provided that on default in rent payments plaintiff could remove sign and defendant should then pay $75 as cost of installing the sign, in addition to the agreed rental, the provision for the $75 payment was one for liquidated damages and not for a penalty. Federal Sign System Electric v. Epps, 98 N. Y. S. 855.

3. Merica v. Burgett [Ind. App.] 75 N. E. 1083.

4. Where damages caused by delay in completing a building were incapable or extremely difficult of computation, a provision for $20 per day deduction for each day the building remained unfinished after a certain date was construed as liquidated damages. Neblett v. McGraw [Tex. Civ. App.] 14 Tex. Ct. Rep. 496, 91 S. W. 309. Stipulation in a construction contract construed as providing for liquidated damages and not a forfeiture, although the words "shall forfeit" were used. Western Gas Const. Co. v. Dowaglac Gas & Fuel Co. [Mich.] 13 Det. Leg. N. 689, 109 N. W. 29. Where building contract provided for payment of $10 a day for noncompletion of building as stipulated damages, and the amount due thereunder as damages was not disproportionate to the probable loss as contemplated by the parties in case of failure to perform as agreed, the agreement was held to provide for stipulated damages and not for a penalty. Couch v. Newton Council Bldg. Ass'n, 109 App. Div. 856, 96 N. Y. S. 441. A provision in a building contract authorizing the owner to deduct a stipulated amount for each day's delay, as liquidated damages, is valid, and conclusively furnishes the measure of the owner's damage. Stephens v. Essex County Park Commission [C. C. A.] 143 F. 844. A provision for stipulated damages for delay in a contract for street improvement is binding on the contractor. Central Bitulithic Paving Co. v. Mt. Clemens [Mich.] 12 Det. Leg. N. 996, 106 N. W. 888. Provision that, owing to difficulty of estimating damages for delay in completion of building, contractor should pay a stated sum per day for each day's delay, held a provision for liquidated damages. Chapman Decorative Co. v. Security Mut. Life Ins. Co., 145 F. 434.

5. Canady v. Knox [Wash.] 86 P. 930; Shafer v. Sloan [Cal. App.] 85 P. 162. If the sum stipulated is not manifestly disproportionate to the damage suffered. Broadbrooks v. Tolles, 99 N. Y. S. 996. Contract for sale of banking business provided for forfeiture of $1,000 if vendor engaged in banking business in the town while vendee continued in the business. Held, an agreement for liquidated damages. Merica v. Burgett [Ind. App.] 75 N. E. 1083.

6. Merica v. Burgett [Ind. App.] 75 N. E. 1083.

7. A sale of three veranda columns within three years held not such a breach of a covenant not to engage in the lumber business as to warrant recovery of $5,000 stipulated damages. Broadbrooks v. Tolles, 99 N. Y. S. 996. Where one purchased land from a vendor who agreed to sell it for him within one year at a certain price or pay liquidated damages, the fact that the purchaser mortgaged the land is no defense to an action for such damages where such mortgage did not prevent a sale. Ahlers v. Harrison [Iowa] 108 N. W. 331. Plaintiff agreed to have himself appointed trustee of certain

waived,[8] and unless the amount agreed upon is wholly disproportionate to the actual damage suffered,[9] or the provision therefor is inserted merely as security for the payment of actual damages;[10] but where damages can be accurately ascertained, a stipulated sum will, as a rule, be regarded as a penalty, regardless of expressions in, or the nature of, the contract.[11] If a contract contains various stipulations, for the breach of some of which the damages would be uncertain, and as to others certain and easily shown, the stipulated sum will be regarded as a penalty and not as liquidated damages.[12] Whenever it is doubtful whether the sum mentioned was intended as stipulated damages or a penalty to cover actual damages, the law, which always favors the latter as against the former, will declare the sum to be a penalty.[13] Where a contract provides that the party who fails to comply therewith shall pay to the other a stated sum as liquidated damages for the breach, such stipulation will be construed to refer to a total breach and not to a breach in some minor particular, unless the language is explicit to the contrary.[14] A provision for liquidated damages may be enforced without proof of actual damages,[15] but such a provision is not enforceable unless definite and certain.[16]

Exemplary damages.[17]—Exemplary, punitive, or vindictive damages are those awarded not as compensation, but as punishment, and are ordinarily recoverable only in actions ex delicto.[18] Where the wrongful act was done willfully, maliciously,[19] or

mining property and defendants agreed to take immediate possession and accept a lease when plaintiff should procure it. Defendants agreed to pay $2,000 liquidated damages if they failed to take possession or refused the lease. Held, where defendants notified plaintiff that they would not take a lease in any event, the notification being prior to plaintiff's appointment as trustee, plaintiff could not recover the $2,000 under the contract. Menzies v. Fairburn, 99 N. Y. S. 3. A contract provided that upon breach the party at fault should become indebted to the other in the sum of $500, and that if that sum were not paid without suit, suit might be instituted for double the amount. Held the $500 was liquidated damages, the $1,000 was a penalty recoverable only upon proof of special damage and breach of the condition rendering it payable. Carruthers v. Gay [Tex. Civ. App.] 15 Tex. Ct. Rep. 169, 91 S. W. 593.

8. A provision in a building contract for liquidated damages for each day's delay is not waived by failure of the owner to answer a letter written by the contractor explaining a cause which would delay the completion of the work, where extension of time or modification of the contract was not asked. Stephens v. Essex County Park commission [C. C. A.] 143 F. 844. That an owner pays orders given to subcontractors after the time for the completion of the contract does not constitute a waiver of a provision in such contract for liquidated damages for failure to complete the work within the time specified. Id. Where a sum as liquidated damages is stipulated for delay beyond the time fixed for the completion of a railroad by the contractor, the company, by taking possession of the road and running trains over it before its completion, waived the penalty accruing thereafter. Fruin-Bambrick Const. Co. v. Ft. Smith & W. R. Co., 140 F. 465. Where a contract for street improvement provided that stipulated damages for delay in completion of the work should be paid before the work was accepted, an acceptance of such work without demand for damages for delay constitutes a waiver of a right to such damages. Central Bitulithic Pav. Co. v. Mt. Clemens [Mich.] 12 Det. Leg. N. 996, 106 N. W. 888.

9. If an agreement fixes the same sum as liquidated damages for a partial as for a total breach, regardless of the lesser amount of detriment apt to ensue from such partial breach as compared to the loss from a total breach, the stipulation will be construed as one for a penalty, and void. Raymond v. Edelbrock [N. D.] 107 N. W. 194.

10. Where it is not clearly apparent that a sum agreed to be paid for breach of a contract is not inserted as security for the payment of actual damages, the court will regard the amount as liquidated damages. Shafer v. Sloan [Cal. App.] 85 P. 162.

11. Merica v. Burgett [Ind. App.] 75 N. E. 1083. A stipulation in a contract for the sale of beef cattle providing for the payment by the seller of a stipulated sum per head for each head short of the number contracted to be delivered, held void, it being not impracticable or extremely difficult to fix the actual damages. Mont. Civ. Code, 1895, §§ 2243, 2244. Home Land & Cattle Co. v. McNamara [C. C. A.] 145 F. 17.

12, 13. Merica v. Burgett [Ind. App.] 75 N. E. 1083.

14. Raymond v. Edelbrock [N. D.] 107 N. W. 194.

15. Where one traded land to another at a certain price and agreed to sell it for him at such price within one year or pay $1,000 as liquidated damages. Ahlers v. Harrison [Iowa] 108 N. W. 331.

16. Provision held too indefinite. Robertson v. Grand Rapids [Minn.] 104 N. W. 715.

17. See 5 C. L. 906.

18. Punitive damages cannot be recovered in an action on the bond of a town marshal for false arrest and assault and battery.

wantonly, violently or under other circumstances of aggravation,[20, 21] or in conscious disregard of another's rights,[22] or where there has been such a want of care as to

Scott v. Commonwealth [Ky.] 93 S. W. 668. Punitive damages are not recoverable in an action for claim and delivery. Brayton v. Beall [S. C.] 53 S. E. 641.

19. Punitive or exemplary damages are always properly allowed where the wrongful act complained of was maliciously, wantonly, willfully, or capriciously committed. Yazoo, etc., R. Co. v. Williams [Miss.] 39 So. 489. The act constituting the tort complained of must be both unlawful and wanton or malicious, in order to warrant a recovery of punitive damages. Gardner v. St. Louis, etc., R. Co. [Mo. App.] 93 S. W. 917. Evidence held to show malice in ejecting a passenger. Id. Charge relative to punitive damages authorized by the evidence. Southern R. Co. v. Hill [Ga.] 54 S. E. 113. Punitive damages recoverable where railroad company refused to remove dead animals killed by a locomotive near plaintiff's house, though requested so to do, whereby the odor made it almost impossible for plaintiff to remain in her house. Yazoo, etc., R. Co. v. Sanders [Miss.] 40 So. 163. A willful and wanton sale of liquor to one who is intoxicated or an habitual drunkard warrants a recovery of punitive damages by one injured, under the dramshop act. Earp v. Lilly, 217 Ill. 582, 75 N. E. 552; afg. Earp v. Lilly, 120 Ill. App. 123. Exemplary damages may be recovered where the evidence shows a willful fraud perpetrated as the result of a comspiracy. Batman v. Cook, 120 Ill. App. 203.

20. Snedecor v. Pope, 143 Ala. 275, 39 So. 318. Where the defendant's act, which is the subject-matter of the action, is shown to have been wanton, malicious, or oppressive, or of such a character as to indicate disregard of plaintiff's rights, the jury may in their discretion award punitive damages. Berg v. St. Paul City R. Co. [Minn.] 105 N. W. 191. An instruction authorizing punitive damages should be predicated on the condition that the alleged wrongs were inflicted maliciously or wantonly or with circumstances of contumely or indignity. Bernheimer Bros. v. Becker, 102 Md. 250, 62 A. 526. Punitive damages may not be awarded unless the jury conclude from the evidence that the wrongful act was accompanied by fraud, malice, oppression, or other willful and wrongful aggravation. Hayes v. Southern R. Co. [N. C.] 53 S. E. 847.

Assault: For violent, unprovoked, and malicious assault, punitive damages may be recovered. Hanna v. Sweeney [Conn.] 62 A. 785; Kitteringham v. McClutchie [Miss.] 41 So. 65. One entered the home of another, drew a pistol, used threatening language, and considerable violence in seizing property belonging to the plaintiff. Pagan v. Drake Furniture Co. [S. C.] 53 S. E. 542. Assault under Rev. Codes 1899, § 4977. Shoemaker v. Sonju [N. D.] 108 N. W. 42. Hatred and spite are not essential ingredients. Pratt v. Davis, 118 Ill. App. 161.

Unlawful arrest and malicious prosecution: Exemplary damages allowed for unlawful arrest and malicious prosecution of children on a charge of malicious mischief. Sperier v. Ott [La.] 41 So. 323. Plaintiff was assaulted and taken by force to the county seat. Crocker v. Haley [Ky.] 92 S. W. 574.

Liability of carriers: Under Code § 1963, providing that carriers shall be liable for neglect or refusal to put off a passenger at his destination, a passenger, recklessly and willfully and against her protest, carried beyond her destination may recover punitive damages. Hutchison v. Southern R. Co., 140 N. C. 123, 52 S. E. 263. Willfully and intentionally carrying passenger beyond his destination. Harlan v. Wabash R. Co. [Mo. App.] 94 S. W. 737. A passenger who, under the direction of the station agent, boards a train which does not stop at his destination, and after his station is passed the conductor takes up his ticket and offers to take him on and return him by the next train, but he prefers to get off and walk back, cannot recover punitive damages. Trapp v. Southern R. Co., 72 S. C. 343, 51 S. E. 919. Willful failure to stop for passenger. Milhouse v. Southern R. Co., 72 S. C. 442, 52 S. E. 41. Assault by a conductor on a passenger. Williams v. St. Louis, etc., R. Co. [Mo. App.] 96 S. W. 307; Little Rock R. & Elec. Co. v. Dobbins [Ark.] 95 S. W. 788. Evidence sufficient to show that the act was wanton, willful, and malicious. Id. Forcibly expelled from a train. Seaboard Air Line R. Co. v. O'Quin, 124 Ga. 357, 52 S. E. 427. Conductor in ejecting a passenger used excessive force. Madigan v. St. Louis Transit Co. [Mo. App.] 93 S. W. 316. Trespasser is wantonly and violently ejected. Hayes v. Southern R. Co. [N. C.] 53 S. E. 847. Brakeman ejecting a trespasser. Id. Punitive damages cannot be recovered in an action for expulsion of a passenger because of apparent invalidity of his ticket when the conductor does not act in a rough or unkind manner, nor place his hand on the passenger except to assist him to alight. Southern R. Co. in Kentucky v. Hawkins [Ky.] 89 S. W. 258. Evidence of plaintiff that he was ejected in a rude, stern, and harsh manner is sufficient to warrant punitive damages. Parrott v. Atlantic & N. C. R. Co., 140 N. C. 546, 53 S. E. 432. Common carrier refuses to check baggage. Sullivan v. Southern R. Co. [S. C.] 54 S. E. 586. Punitive damages held not allowable for **ejection of plaintiff from theatre** where it appeared that he was drunk and disorderly, that no more force than was necessary was used, and there was no proof of the unfitness or bad character of defendant's servants of which defendant had any notice. Walsh v. Hyde & Behman Amusement Co., 98 N. Y. S. 960.

21. Trespass attended with aggravated circumstances of wantonness or malice, the jury may give exemplary damages. W. U. Tel. Co. v. Dickens [Ala.] 41 So. 469. For a persistent and predetermined effort to prevent an owner from using his property, exemplary damages may be recovered. Even though wrongdoer offered to buy property at more than its value. Waggoner v. Wyatt [Tex. Civ. App.] 16 Tex. Ct. Rep. 196, 94 S. W. 1076.

Malicious prosecution: If procured to be

amount to a reckless and conscious disregard of consequences,[23] exemplary damages may be allowed. If actual damages be not shown, exemplary damages cannot be allowed[24] but it is not essential that the amount of actual damage suffered be shown.[25] A plaintiff is not entitled to exemplary damages as a matter of right in any case; whether such damages shall be awarded[26] and the amount thereof[27] are matters wholly discretionary with the jury, and courts will interfere only in extreme cases.[28] Whether there is any evidence in a given case to justify the assessment of punitive damages is, however, a question of law.[29] In Connecticut there can be no greater recovery as exemplary damages than the amount of the expenses of litigation, less taxable costs.[30] In Washington, punitive damages cannot be recovered unless their recovery is specially provided for by statute.[31]

A principal must respond in compensatory damages for an injury wantonly caused by his agent in the line of his employment.[32] It is the rule in the Federal courts that a corporation is not liable for exemplary damages,[33] unless the wrongful act was authorized or ratified,[34] but there is considerable conflict of authority on this point.[35] Sureties on an attachment bond can in no event be liable for other

issued maliciously and without probable cause, the plaintiff in the writ would be subject to the imposition of exemplary damages, whether issued rightfully or wrongfully. Faraux v. Cornwell [Tex. Civ. App.] 13 Tex. Ct. Rep. 977, 90 S. W. 537. If the levy is made by one and participated in by the other, under circumstances of oppression and aggravation, both would be subject to exemplary damages. Id. Malice and want of probable cause must concur to authorize a recovery for exemplary damages. Id.

Alienation of wife's affections: Where the actionable offense is not punishable by criminal procedure, exemplary damages may be awarded in the discretion of the jury. Gregg v. Gregg [Ind. App.] 75 N. E. 674; Leavell v. Leavell, 114 Mo. App. 24, 89 S. W. 55.

22. Execution levy made under circumstances showing a conscious disregard of owner's rights. Sparks v. Ponder [Tex. Civ. App.] 15 Tex. Ct. Rep. 380, 94 S. W. 428. Willful appropriation of property of another. Jackson v. Poteet [Tex. Civ. App.] 14 Tex. Ct. Rep. 45, 89 S. W. 980. Unauthorized performance of a surgical operation. Pratt v. Davis, 118 Ill. App. 161.

23. Gross negligence almost to the point of wantoness. Louisville, etc., R. Co. v. Eaden [Ky.] 93 S. W. 7. For overflow, if defendant was guilty of gross negligence or wantonness in maintaining sewer. Central of Georgia R. Co. v. Keyton [Ala.] 41 So. 918. Evidence that a train was run over a trestle at 50 miles per hour when the schedule was 33 may support punitive damages where an accident resulted. Nickles v. Seaboard Air Line R. Co. [S. C.] 54 S. E. 255. Negligence, however gross, will not justify a verdict for exemplary damages unless the negligent party is guilty of willfulness, wantonness or conscious indifference to consequences from which malice will be inferred. Exemplary damages held not recoverable for failure to deliver telegram. Arkansas & L. R. Co. v. Stroude [Ark.] 91 S. W. 18. A shipper injured by falling into a ditch on the railroad premises while loading cars is not entitled to recover punitive damages. Southern R. Co. v. Goddard [Ky.] 89 S. W. 675. 22 hours' delay in delivering a telegram standing unexplained authorizes a recovery of punitive damages. Willis v. Western Union Tel. Co. [S. C.] 53 S. E. 639.

24. So held in action for wrongful levy of attachment on real estate. New Sharon Creamery Co. v. Knowlton [Iowa] 108 N. W. 770.

25. Where in a civil action for assault actual damage is shown, it is not necessary to show its amount in money to sustain a judgment for exemplary damages. McConathy v. Deck [Colo.] 83 P. 135.

26. Berg v. St. Paul City R. Co. [Minn.] 105 N. W. 191.

27. Instruction that jury could assess such punitive damages as they "saw fit" if they found they were allowable at all, approved. Yazoo, etc., R. Co. v. Williams [Miss.] 39 So. 489.

28. Yazoo, etc., R. Co. v. Williams [Miss.] 39 So. 489.

29. Southern R. Co. v. Hawkins [Ky.] 89 S. W. 258; Southern R. Co. v. Goddard [Ky.] 89 S. W. 675.

30. Hull v. Douglass [Conn.] 64 A. 351; Hanna v. Sweeney [Conn.] 62 A. 785.

31. Punitive damages not recoverable in libel action where retail dealer sues for damages for being reported delinquent by an association of wholesale dealers, when he was not in fact delinquent. Hence, malice was immaterial. Woodhouse v. Powles [Wash.] 86 P. 1063.

32. Toledo, etc., R. Co. v. Gordon [C. C. A.] 143 F. 95.

33. Not when a conductor wrongfully ejected a trespasser from a moving train in a dangerous place. Toledo, etc., R. Co. v. Gordon [C. C. A.] 143 F. 95.

34. That a conductor who ejected a trespasser from a moving train in a dangerous place was retained in the employ of the railroad company after the commission of the act does not show ratification. Toledo, etc., R. Co. v. Gordon [C. C. A.] 143 F. 95.

35. In order to recover punitive damages from a carrier for the act of an employe in ejecting a passenger, it must be proven that the employe was acting within the line of his duty. Illinois Cent. R. Co. v. Black, 122 Ill. App. 439.

than actual damages,[36] nor can punitive damages be recovered against the personal representative of a tort feasor.[37]

Statutory, double, and treble damages.[38]—Statutes commonly provide for the recovery of double or treble damages in certain cases.[39] Though valid,[40] such statutes are penal and must be strictly construed.[41] The New York statute authorizing recovery of treble damages for trespass on timber lands provides for a distinct and independent action, and is not available to fix the measure of damages in an equitable action for an injunction and incidental relief by way of damages,[42] nor does the statute give a defendant in such an equitable action the right to a trial by jury.[43]

§ 2. *General principles for ascertaining.*[44] *Rule of strictness as between contracts and torts.*[45]—The damages recoverable for breach of a contract are those which result directly and proximately therefrom,[46] or such as may be reasonably supposed to have been in contemplation of the parties at the time of making the contract as the probable result of a breach of it.[47] In actions for tort, all damages naturally and proximately resulting from the injury complained of are recoverable.[48]

Limitation to natural and proximate consequences.[49]—Only such damages as result naturally and proximately from the wrongful act complained of may be recovered.[50] The question what is the proximate cause of actual damage is usually one of fact.[51]

36. Faroux v. Cornwell [Tex. Civ. App.] 13 Tex. Ct. Rep. 977, 90 S. W. 537.

37. Morris v. Duncan [Ga.] 54 S. E. 1045. Damages for wounded feelings are not punitive but compensatory. Id.

38. See 5 C. L. 908.

39. Pub. Laws 1903, p. 409, No. 249, relative to the prevention of forest fires, does not repeal Comp. Laws § 11653, authorizing double damages for property destroyed by fire set by another. Allen v. Bainbridge [Mich.] 108 N. W. 732.

40. A statute allowing double damages where one negligently sets out a fire and allows it to escape to the premises of another is not void because it inflicts unusual punishment. Allen v. Bainbridge [Mich.] 108 N. W. 732. Comp. Laws § 11653, making one who negligently sets out fire and allows it to escape liable in double damages, does not allow the taking of property of one person and giving it to another without compensation. Id.

41. Clark v. American Exp. Co. [Iowa] 106 N. W. 642.

42. Construing Code §§ 1667, 1668. Page v. Herkimer Lumber Co., 109 App. Div. 391, 96 N. Y. S. 272.

43. Page v. Herkimer Lumber Co., 109 App. Div. 391, 96 N. Y. S. 272.

44, 45. See 5 C. L. 908.

46. Illinois Cent. R. Co. v. Johnson [Tenn.] 94 S. W. 600.

47. Illinois Cent. R. Co. v. Johnson [Tenn.] 94 S. W. 600. See, also, post, § 4 A.

48. Currier v. McKee, 99 Me. 364, 59 A. 442. See, also, post, § 5 A.

49. See 5 C. L. 908.

50. Kagy v. Western Union Tel. Co. [Ind. App.] 76 N. E. 792. By reason of failure to deliver message, a service message having been returned asking guaranty of delivery charges, plaintiff's father, a nurse, failed to arrive when expected to attend him in sickness. It was held that a rupture of plaintiff's intestine, as a result of his anxiety, could not be deemed a proximate result of the failure to deliver the message. Id. Recoverable damages are confined to those which flow from injuries traceable directly to the negligence charged as the immediate and proximate cause. Southern R Co. v. Sittasen [Ind.] 76 N. E. 973. Where malpractice in care of broken bone caused loss of the foot, the surgeon was liable, though the original injury to the foot was caused by another. Froman v. Ayers [Wash.] 85 P. 14. In action for diversion of water from a stream, plaintiff could not recover for sickness of his wife resulting from the use of water from his well in which the supply of water had been reduced. Woodstock Iron Works v. Stockdale, 143 Ala. 550, 39 So. 335. In suit to recover for damage to land caused by overflow, there could be a recovery only for the land flowed, and plaintiff's reasons for abandoning the remainder of the land were immaterial. Eastern Texas R. Co. v. Moore [Tex. Civ. App.] 16 Tex. Ct. Rep. 29, 94 S. W. 394. In an action for damages caused by an overflow, it may be shown that a stench was left in plaintiff's house when the water receded, since this would be a proximate result of the overflow and would reduce the rental value of the house. Central of Georgia R. Co. v. Keyton [Ala.] 41 So. 918. Both at common law and under Rev. Codes 1899, §§ 4973, 4997, one who suffers injury through the wrongful act of another may recover compensation for all detriment proximately caused thereby, not only for past detriment but for detriment resulting after commencement of the action, or certain to result in the future, and whether damages alleged are general or special in character. Shoemaker v. Sonju [N. D.] 108 N. W. 42. The aggravation of the consequences of an injury by the use of opiates taken under the direction of a reputable physician is not a defensive fact in an action to recover for such injuries. The necessity for the use of the opiate in such

Speculative and prospective damages.[52]—Remote, conjectural, or speculative damages are not recoverable.[53] Future damages constitute a proper element of recovery only when it is made to appear that they are reasonably certain to result.[54]

Loss of profits.[55]—Uncertain and contingent profits cannot be recovered as

case arises from the negligent act causing the injury and not from negligence of the injured person. Pyke v. Jamestown [N. D.] 107 N. W. 359. In an action for wrongful expulsion from a beneficial order, plaintiff could prove the value of an insurance policy, of a traveling card good on railroads, and of sick benefits, but he could not prove his earnings as an engineer, having not been employed as such for 2 years. Thompson v. Grand International Brotherhood of Locomotive Engineers [Tex. Civ. App.] 14 Tex. Ct. Rep. 467, 91 S. W. 834. It is error to permit a physician to testify as to permanency of impairment of hearing, with no foundation for the assumption that the impairment was proximately caused by the accident, when he also testifies that he did not know the condition of hearing of the plaintiff, a man over 80, prior to the accident; that he had not examined his ears, and that it was not unusual to find the hearing impaired in old men. Lamm v. Metropolitan St. R. Co., 47 Misc. 625, 94 N. Y. S. 584.

51. Whether plaintiff's condition was due to injury complained of or to a previous malady, held for jury. Dunphy v. St. Joseph Stock Yards Co. [Mo. App.] 95 S. W. 301. Where injuries sustained consisted of a bruise to the knee, slivers in the hand, and rupture of the navel, and, some days later, paralysis in the side, pains in the back, difficulty of articulation, and trouble with the kidneys, bowels, and vision, appeared, whether the injuries caused the ailments was held a question of fact. Proulx v. Bay City [Mich.] 13 Det. Leg. N. 56, 107 N. W. 273. Whether injuries were sustained as the direct consequence of the acts of a railroad company in allowing its engines to emit large volumes of smoke and quantities of cinders, held a question of fact. Baltimore Belt R. Co. v. Sattler, 102 Md. 595, 62 A. 1125. Evidence insufficient to prove plaintiff's impaired physical condition to be the result of a former injury, and not the result of the one received through defendant's negligence. Nix v. San Antonio Traction Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 592, 94 S. W. 335. Where there is evidence from which the jury may find an unbroken connection and continuous operation between a disease and an injury, it is for them to say whether the wrongful act causing the injury is the proximate cause of the disease. Sallie v. New York City R. Co., 110 App. Div. 665, 97 N. Y. S. 491. Evidence sufficient to show that illness of a passenger was due to negligence of a carrier in requiring her to sit in an insufficiently heated waiting room. International, etc., R. Co. v. Johnson [Tex. Civ. App.] 15 Tex. Ct. Rep. 982, 95 S. W. 595. In action for injuries from a fall on a defective sidewalk, evidence that plaintiff had been afflicted with falling of the womb since her injury, and that she had had no such trouble prior thereto, was admissible. Hines v. Kansas City [Mo. App.] 96 S. W. 672.

52. See 5 C. L. 910.

53. Kagy v. Western Union Tel. Co. [Ind. App.] 76 N. E. 792; Currie v. Kansas City Southern R. Co. [La.] 40 So. 542. A promise of promotion cannot be shown on the question of damages for injuries incapacitating a workman. Mississippi Cent. R. Co. v. Hardy [Miss.] 41 So. 505. In an action against attorneys for negligence by reason of which a cause of action for slander is lost, the damages are not too remote to support the cause of action, though a portion of the judgment which might have been recovered might have been for exemplary damages. Patterson v. Frazer [Tex. Civ. App.] 16 Tex. Ct. Rep. 78, 93 S. W. 146. In an action for interference with plaintiff's business by a crowd gathering, throwing missiles, etc., on a certain day, no damages could be recovered for a decline of business after that day. Botkin v. Miller, 190 Mass. 411, 77 N. E. 49. A petition alleging a contract to sell registered cattle and furnish registration papers, and a breach by failure to furnish such papers, and that the cattle were worth more with than without such papers, is not objectionable as alleging only contingent damages. Miller v. Mosely [Tex. Civ. App.] 14 Tex. Ct. Rep. 666, 91 S. W. 648.

54. Instruction permitting recovery for pain suffered, and which plaintiff "may" suffer in the future, condemned because ignoring bounds of reasonable certainty. Haas v. St. Louis & S. R. Co. [Mo. App.] 90 S. W. 1155. Where railway mail clerk was incapacitated, he could show that he was working under civil service rules and had passed his principal examination, and could prove the compensation he would have received as he was promoted into the higher classes of the service. Williams v. Spokane Falls & N. R. Co. [Wash.] 84 P. 1129.

55. See 5 C. L. 910.

NOTE. Profits as damages: "The authorities both in the United States and England are agreed that as a general rule, subject to certain well-established qualifications, the anticipated profits prevented by the breach of a contract are not recoverable in the way of damages for such breach; but in the application of this principle the same uniformity in the decisions does not exist. In some cases of almost exact analogy in the facts, the adjudications of the courts in the different states are directly opposite. The grounds upon which the general rule of excluding profits in estimating damages rests are: (1) That in the greater number of cases such expected profits are too dependent upon numerous, uncertain and changing contingencies to constitute a definite and trustworthy measure of actual damages; (2) because such loss of profits is ordinarily remote, and not, as a matter of course, the direct and immediate result of the nonfulfillment of the contract; (3) and because most frequently the engagement to pay such loss of profits, in case of default in the performance, is not a part of the contract itself, nor can it be implied from its nature and terms. 1 Sedgwick on Damages (7th Ed.)

damages,[56] but where prospective profits are not too speculative and remote, and where they arise directly and as a natural consequence out of the injury alleged, they are always allowed as an element of damage,[57] though the amount is uncertain.[58] Thus, where the sole object of a contract is the accumulation of profits, profits lost by the breach are recoverable.[59] The burden is upon him who seeks to recover profits to show that he would have made them.[60]

p. 108; The Schooner Lively, 1 Gall. 315, 325, Fed. Cas. No. 8,403, per Mr. Justice Story; The Anna Maria, 2 Wheat. [U. S.] 546, 4 Law. Ed. 252; The Amiable Nancy, 3 Wheat. [U. S.] 546, 4 Law. Ed. 456; Smith v. Condry, 1 How. [U. S.] 28, 11 Law. Ed. 35; Parish v. U. S., 100 U. S. 500, 25 Law. Ed. 763; Bulkley v. U. S., 19 Wall. [U. S.] 37, 22 Law. Ed. 62. But it is equally well settled that the profits which would have been realized had the contract been performed, and which have been prevented by its breach, are included in the damages to be included in every case where such profits are not open to the objection of uncertainty or remoteness, or where by the express or implied terms of the contract itself or the special circumstances under which it was made it may be reasonably presumed that they were within the intent and mutual understanding of both parties at the time it was entered into. U. S. v. Behan, 110 U. S. 338, 28 Law. Ed. 168; W. U. Tel. Co. v. Hall, 124 U. S. 444, 31 Law. Ed. 479; Philadelphia, W. & B. R. Co. v. Howard, 13 How. [U. S.] 307, 14 Law. Ed. 157."—Quotation from opinion in Howard v. Stillwell & Bierce Mfg. Co., 139 U. S. 199, 35 Law. Ed. 147 (per Mr. Justice Lamar), taken from Choctaw, etc., R. Co. v. Jacobs [Okl.] 82 P. 504.

See also for authorities and discussion of this subject the late case of Connersville Wagon Co. v. McFarlan Carriage Co. [Ind.] 76 N. E. 294, 299, where it is said: "Both because of the uncertainty of future profits and because the risks of the business should rest upon the owner thereof, the value of the use should be regarded as the basis of recovery, where a case is made for the allowance of special damages growing out of a deprivation of the use of the property. Mining Syndicate v. Fraser, 130 U. S. 611, 32 Law. Ed. 1031; Howard v. Stillwell, 139 U. S. 199, 35 Law. Ed. 147; Griffin v. Colver, 16 N. Y. 489, 69 Am. Dec. 718; Cassidy v. Le Fevre, 45 N. Y. 562; Brownell v. Chapman, 84 Iowa 504, 51 N. W. 249, 35 Am. St. Rep. 326; Novelty Iron Works v. Capital City Oatmeal Co., 88 Iowa 524, 55 N. W. 518; Pennypacker v. Jones, 106 Pa. 237, 242."

56. No recovery for loss of profits on account of closing of factory because wheels were not delivered as agreed. Connersville Wagon Co. v. McFarlan Carriage Co. [Ind.] 76 N. E. 294. Merely speculative, or conjectural, or remote profits cannot be recovered. Ramsay v. Meade [Colo.] 86 P. 1018. As a general rule, subject to well-established qualifications, anticipated profits, prevented by the breach of a contract, are not recoverable as damages for such breach. Choctaw, etc., R. Co. v. Jacobs [Okl.] 82 P. 502. In an action for loss of a huckster's wagon by fire while in a livery stable keeper's care, there could be no recovery for loss of profits by reason of plaintiff's having no wagon for a time thereafter. Welck v. Dougherty [Ky.] 90 S. W. 966. Admission of evidence of loss of business profits, and of other claims not pleaded or proved material, in action for injuries held erroneous. Schramm v. Interurban St. R. Co., 96 N. Y. S. 176. Where a manufacturer of a machine for making cigarettes contracted with another to exhibit it at an exposition, a breach of such contract does not entitle the manufacturer to recover estimated profits to accrue from the exhibition, in the absence of proof that loss of profits was sustained, and the probable amount thereof. Winston Cigarette Machine Co. v. Wells-Whitehead Tobacco Co. [N. C.] 53 S. E. 885.

57. McConnell v. Corona City Water Co. [Cal.] 85 P. 929. Profits which it is reasonably certain would have been made but for breach of a contract to furnish goods to be sold may be recovered. Federal Iron & Brass Bed Co. v. Hock [Wash.] 85 P. 418. Where contractor working on tunnel was prevented from completing his contract, and showed the profit per foot on work done and number of feet remaining undone, he could recover lost profits. McConnell v. Corona City Water Co. [Cal.] 85 P. 929. A claim for loss of receipts for rental of a dancing hall and loss of engagements, already made, for dancing classes, caused by injury to building used, is not a claim for lost profits. Kramer v. Los Angeles, 147 Cal. 668, 82 P. 334. Loss of profits in business are recoverable as damages in actions of tort when they are capable of being estimated with reasonable certainty. Bartow v. Erie R. Co. [N. J. Law] 62 A. 489. Where a factory is burned as the result of negligence of another, definite prospective profits may be recovered. Evidence of contracts calling for a certain output at a certain profit is admissible. A. F. Johnson & Son v. Atlantic Coast Line R. Co. [N. C.] 53 S. E. 362. For failure to sell securities as agreed within a certain time, at a fixed minimum price, the measure of damages is the difference between the price agreed to be secured and the value of the securities at the end of the time. Gause v. Commonwealth Trust Co., 97 N. Y. S. 1091.

58. For breach of partnership agreement, profits, which evidence shows with reasonable certainty would have been made, may be recovered. Ramsay v. Meade [Colo.] 86 P. 1018.

59. Profits held recoverable for breach of contract of partnership to carry on a mercantile business. Ramsay v. Meade [Colo.] 86 P. 1018. Profits lost by breach of contract under which plaintiff was to get out certain timber, held recoverable. Des Allemands Lumber Co. v. Morgan City Timber Co. [La.] 41 So. 332.

60. Where 5 year contract is terminated after 2 years, the results of the 2 years form no criterion for loss for the next 3,

Difficulty or uncertainty of proof of amount as bar.[61]—One who would recover damages must show with reasonable certainty the nature and extent thereof.[62] Absolute certainty is not however required; in some cases, the facts being shown, the reasonable deductions therefrom must be left to the jury.[63]

Mitigation and aggravation of damages.[64]—Circumstances that tend to excuse or palliate the wrong done may be shown in mitigation of damages,[65] especially exemplary damages;[66] but circumstances not amounting to a complete justification or bar cannot be considered in mitigation of actual damages.[67] In actions for personal injuries, damages are not mitigated by insurance paid to plaintiff under a contract to which the tort feasor was a stranger.[68]

Avoidable consequences.[69]—A plaintiff may recover only for such damage as an exercise of reasonable care by him would not have prevented.[70] Thus, a person

where heavy preparatory expense is incurred. Des Allemands Lumber Co. v. Morgan City Timber Co. [La.] 41 So. 332.

61. See 5 C. L. 911.

62. Connersville Wagon Co. v. McFarlan Carriage Co. [Ind.] 76 N. E. 294. Damages, which may be recovered for breach of contract, are such only as are by the evidence made reasonably certain. Lake Drummond Canal & Water Co. v. West End Trust & Safe Deposit Co. [C. C. A.] 142 F. 41. In action for breach of contract to organize a corporation and issue paid-up stock to plaintiff, the value of the stock, if issued, was not proved, and there could be no recovery for such stock. Eisenmayer v. Leonardt [Cal.] 84 P. 43. General and indefinite evidence, consisting largely of guesses and reasons therefor, concerning loss of rentals, held not to support recovery of damages for lost rentals. Johnson v. Levy [Cal. App.] 86 P. 810.

63. Connersville Wagon Co. v. McFarlan Carriage Co. [Ind.] 76 N. E. 294. But to justify a finding of loss of profits as part of the verdict, the proof must be such as will show the jury with reasonable certainty what the profits alleged to have been lost would have been. Bartow v. Erie R. Co. [N. J. Law.] 62 A. 489. They cannot be estimated by the jury without data to justify their finding. Id.

64. See 5 C. L. 913.

65. Held, in action under dramshop act, that letter from plaintiff to defendant, saying she would not object to her husband taking an occasional drink, if he would drink and go about his business, could be considered in mitigation of damages, but not in bar of the action. Earp v. Lilly, 217 Ill. 582, 75 N. E. 552. Matters of provocation may be shown in mitigation of damages in assault cases, as that prosecutor had been abusing defendant's horse, especially where it was so recent that defendant had not had time to cool. Leachman v. Cohen [Tex. Civ. App.] 14 Tex. Ct. Rep. 727, 91 S. W. 809. But one who has deliberately decided to assault another can not show provocation in mitigation of damages. Shoemaker v. Jackson, 128 Iowa 488, 104 N. W. 503.

66. Evidence that a person assaulted admitted at that time having made slanderous statements concerning a female under the protection of his assailant is admissible in mitigation of exemplary damages sought to be recovered for the assault. Parham v. Langford [Tex. Civ. App.] 15 Tex. Ct. Rep. 950, 93 S. W. 525. In an action for assault and battery, it cannot be shown as a defense to punitive damages that the defendant had been acquitted in a criminal prosecution for the alleged assault. Powell v. Wiley [Ga.] 54 S. E. 732.

67. In an action for assault, evidence that the person assaulted acknowledged making slanderous statements relative to a female does not show justification, and may not be considered in mitigation of damages. Parham v. Langford [Tex. Civ. App.] 15 Tex. Ct. Rep. 950, 93 S. W. 525.

68. Corish v. North Jersey St. R. Co. [N. J. Law] 62 A. 1004.

69. See 5 C. L. 911.

70. Where plaintiff's fences were let down and cattle injured his crops, he could recover only for such damages as he could not have prevented by the use of ordinary care. Ft. Smith Suburban R. Co. v. Maledon [Ark.] 95 S. W. 472. Failure of owner to use ordinary care to keep in repair fence torn down by another prevents recovery of damage which could have been prevented by such care. Gulf, etc., R. Co. v. McMurrough [Tex. Civ. App.] 14 Tex. Ct. Rep. 476, 91 S. W. 320. The consignee of feed cannot recover for damage to cattle caused by delay in delivery of feed, unless he used diligence to obtain other feed so as to prevent the damage. Illinois Cent. R. Co. v. Mossbarger [Ky.] 91 S. W. 1121. Where tenant of building could have provided heat at small expense, his loss of earnings because he could not or would not work in the building because it was cold was not the proximate result of the landlord's breach of a covenant to provide heat. Ireland v. Gauley, 95 N. Y. S. 521. One who makes a mistake in publishing a summons, which is discovered after three publications by the attorneys for plaintiff, is not liable for expenses and counsel fees in the second action, since the attorneys should have discontinued and commenced de novo. Only the cost of three publications is recoverable. Hillquit v. Sun Printing & Pub. Ass'n, 97 N. Y. S. 388. In an action for trespass, plaintiff cannot recover for any damage which, by the exercise of ordinary care, he could have prevented. Linn v. Hagan's Adm'r [Ky.] 92 S. W. 11. Where a carrier delayed the transportation of goods, but part of the injury was occasioned by delay of the shipper after arrival, such damages as accrued after

injured is under the duty of using ordinary care to obtain proper medical attention and treatment, and if he fails to do so, cannot recover for the aggravation of the injury caused thereby.[71] If a vendee refuses to receive the property purchased, it is the duty of the vendor to mitigate his damages so far as he reasonably can by reselling at the best price obtainable;[72] and a vendee who seeks to recover lost profits on goods which the vendor agreed but failed to furnish must show that he could not supply himself with other like goods at the time.[73] A reasonable outlay by plaintiff to prevent further loss is recoverable as damages.[74] One who has broken a contract cannot, however, avoid the consequences by setting up that the plaintiff could have obtained elsewhere that which defendant was bound to furnish,[75] and plaintiff is under no duty to anticipate, and try to prevent, a loss, before the defendant has had full opportunity to perform.[76]

Mental suffering.[77]—It is usually held that mental suffering accompanying or resulting from bodily injury or suffering is a proper element of damages.[78] Many courts hold that there can be no recovery for mere mental anguish[79] or fright,[80] unaccompanied by physical injury, nor for physical injuries solely caused by fright[81]

delivery by the carrier were not chargeable to it, though they would not have occurred except for the carrier's original negligence. Chicago, etc., R. Co. v. Chestnut Bros. [Ky.] 89 S. W. 298. The rule that it is the duty of one injured to protect himself from the consequences of the wrongful act of another, when it can be done by slight effort and trivial expense, held not applicable, where a railroad in crossing one's land negligently tears down his fence, fails to repair it, diverts water from a creek and floods his land, and fails to furnish him a crossing. Kendall v. Chicago, etc., R. Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 309, 95 S. W. 757. Where a railroad company fails to furnish drawing room as per contract, the passenger cannot reject an offered drawing room in another car and recover for ill health caused by sitting up all night. Ingraham v. Pullman Co., 190 Mass. 33, 76 N. E. 237.

71. St. Louis S. W. R. Co. v. Johnson [Tex. Civ. App.] 15 Tex. Ct. Rep. 813, 94 S. W. 162; Glasgow v. Metropolitan St. R. Co., 191 Mo. 347, 89 S. W. 915; Chicago City R. Co. v. Henry, 218 Ill. 92, 75 N. E. 758; Louisville & N. R. Co. v. Eaden [Ky.] 93 S. W. 7; Missouri, etc., R. Co. v. Hagan [Tex. Civ. App.] 15 Tex. Ct. Rep. 325, 93 S. W. 1014. Servant could not recover for suffering caused by delay in transporting him to hospital, as the master was bound by contract to do when he was injured, when he could have paid his fare and avoided the delay. St. Louis S. W. R. Co. v. Reagan [Ark.] 96 S. W. 168.

72. Penn Plate Glass Co. v. James H. Rice Co., 216 Ill. 567, 75 N. E. 246.

73. Edgeworth v. Talerica [Tex. Civ. App.] 15 Tex. Ct. Rep. 405, 95 S. W. 677.

74. In an action of trespass for breaking a log boom and taking some of the logs, the expense to which plaintiff was put in watching and taking care of the logs remaining, to prevent further loss, was a proper element of damage. W. K. Syson Timber Co. v. Dickens [Ala.] 40 So. 753. In an action for loss of cattle by reason of cutting a pasture fence, the cost of making such search as a reasonably prudent person would make may be recovered, and it must appear that the search made was reasonable. Southwestern Tel. & T. Co. v. Krause [Tex. Civ. App.] 92 S. W. 431.

75. One who breaks an agreement to furnish registration papers with cattle sold cannot avoid consequences by setting up that the buyer could have obtained such papers elsewhere. Miller v. Mosely [Tex. Civ. App.] 14 Tex. Ct. Rep. 666, 91 S. W. 648.

76. Where car of apples was diverted by the first carrier, the plaintiff was not bound to try to dispose of the apples at the point of diversion, before the shipment was completed, in order to prevent loss. Hurst v. St. Louis, etc., R. Co. [Mo. App.] 94 S. W. 794.

77. See note 5 C. L. 921; also post, § 4 F (liability of telegraph companies); also two special articles, 6 C. L. 629, 1678.

78. Western Union Tel. Co. v. Wells [Fla.] 39 So. 838; McDermott v. Severe, 202 U. S. 600, 50 Law. Ed. —. In Kansas, damages may be recovered for mental anguish and suffering resulting from physical pain arising from an injury. Missouri, etc., R. Co. v. Wade [Kan.] 85 P. 415. Where owing to the tortious refusal of telegraph company to pay over money, a passenger was required to travel for 24 hours without enough money to pay for necessities for his wife and family, he could recover for both bodily and mental suffering. Western Union Tel. Co. v. Wells [Fla.] 39 So. 838.

79. Negligent failure to deliver telegram. Kagy v. Western Union Tel. Co. [Ind. App.] 76 N. E. 792. In Missouri it is not sufficient that it is "connected with" bodily injury; must "result therefrom." Shellabarger v. Morris, 115 Mo. App. 566, 91 S. W. 1005.

80. Elgin A. & S. Traction Co. v. Wilson, 217 Ill. 47, 75 N. E. 436. Where one who was recovering from sickness was so affected by the shock of an explosion of dynamite used in repairing a street that she died, there can be no recovery. Huston v. Freemansburg Borough, 212 Pa. 548, 61 A. 1022.

81. Porter v. Delaware, etc., R. Co. [N. J. Law] 63 A. 860.

or mental anguish;[82] but there may be a recovery for the consequences of fright or terror where physical injuries are shown to have been received contemporaneously therewith,[83] or where the injury suffered as the result of fright ought reasonably to have been foreseen under the circumstances.[84] In some states, proof of accompanying pecuniary damages warrants recovery for mental anguish,[85] but as a general rule there may be no recovery for mental anguish in cases of torts to property, as such anguish is not usually a natural and probable consequence of a tort to property.[86] Where, however, the manner of commission of a tort to property is such as naturally to cause mental suffering, there may be a recovery therefor.[87] In many jurisdictions mental anguish alone is a proper element of recovery,[88] when shown to have resulted proximately from the wrong complained of.[89] The right to recover for mental suffering is usually restricted to the person who is wronged,[90] or who receives the bodily hurt,[91] but mental anguish caused by witnessing the suffering of plaintiff's child, traveling with her, has been held a proper element of damages against the carrier.[92] It has been held that parents of an infant child are not entitled to recover damages for mental pain and anguish occasioned by the mutilation of the dead body of such infant,[93] but there is considerable authority to the contrary.[94] There may be a recovery for a well grounded fear of death resulting from the negligent act of another,[95] but not for a vague fear of possible future injury, after the person injured has recovered from the immediate effects of the negligent act.[96] It is held in Washington that damages for humiliation and mental agony are not recoverable in an action for breach of warranty of the character of a rooming house sold to plaintiff.[97]

82. Kagy v. Western Union Tel. Co. [Ind. App.] 76 N. E. 792.

83. Elgin A. & S. Traction Co. v. Wilson, 217 Ill. 47, 75 N. E. 436; Porter v. Delaware, etc., R. Co. [N. J. Law] 63 A. 860.

84. Where the operatives of a railroad train saw a woman on a bridge in front of the train and did not stop or slacken their speed, and the woman had barely time to escape from the bridge before the train reached her. Hendrix v. Texas & P. R. Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 895, 89 S. W. 461.

85. Financial loss from nondelivery of telegram. Western Union Tel. Co. v. Krichbaum [Ala.] 41 So. 16. Even though financial loss nominal. Western Union Tel. Co. v. Manker [Ala.] 41 So. 850.

86. McClure v. Campbell [Wash.] 84 P. 825.

87. Where plaintiffs were evicted from leased premises and part of their furniture thrown out and destroyed, and the wife was pregnant and they suffered mental anguish because of having no place to go, a recovery for mental suffering was allowable. McClure v. Campbell [Wash.] 84 P. 825.

88. See, also, post, § 4 F (liability of telegraph companies). Failure to deliver a telegram concerning one's domestic or social affairs. Dayvis v. Western Union Tel. Co., 139 N. C. 79, 51 S. E. 898. Damages allowed where colored female servant of railway company abused and threatened a female passenger. Gulf, etc., R. Co. v. Luther [Tex. Civ. App.] 14 Tex. Ct. Rep. 195, 90 S. W. 44.

89. Mental distress arising from having to borrow money to pay fare, not a consequence which conductor could have foreseen as the result of his failure to give check, evidencing payment of fare. Missouri, etc., R. Co. v. Welch [Tex.] 16 Tex. Ct. Rep. 211, 94 S. W. 333.

90. A parent cannot recover damages for mental suffering and shock on account of the unlawful arrest and prosecution of minor children on a charge of malicious mischief. Sperier v. Ott [La.] 41 So. 323. One suing to recover for mental anguish as to the whereabouts and condition of his wife and children, resulting from failure of a telegraph company to deliver a message, cannot recover for privation and suffering of wife and children. Dayvis v. Western Union Tel. Co., 139 N. C. 79, 51 S. E. 898.

91. Husband could not recover for mental suffering caused by wife's sickness. Woodstock Iron Works v. Stockdale, 143 Ala. 550, 39 So. 335.

92. Mother's mental suffering caused by seeing sick daughter's suffering on account of acts of carrier's servants, held an element of recovery by the mother. Gulf, etc., R. Co. v. Coopwood [Tex. Civ. App.] 96 S. W. 102.

93. Remains were negligently handled, whereby casket fell and body was mutilated. Recovery only for actual damage to casket, etc., allowed. Long v. Chicago, etc., R. Co. [Okl.] 86 P. 289.

94. See Corpses and Burial, 7 C. L. 953, and the authorities cited in the recent case of Koerber v. Patek, 123 Wis. 453, 102 N. W. 40.

95. One who through negligence of another swallows pieces of glass which are subsequently removed from his stomach may recover for suffering caused by the fear of death while the glass was in his stomach. Watson v. Augusta Brew. Co., 124 Ga. 121, 52 S. E. 152.

96. After glass had been removed from stomach, and plaintiff had been restored to health, he could not recover for fear of fu-

Where damages for mental anguish are allowable, the amount thereof is for the jury,[98] whose verdict will be interfered with only for palpable error.[99]

Interest[1] is recoverable in actions for breach of contract where the damages are capable of being definitely ascertained,[2] but not otherwise.[3] There seems to be a conflict on the question whether interest is recoverable as such in tort actions.[4] It is sometimes held that the jury may consider the length of time damages have been withheld, the character of the tort, and all other circumstances of the transaction, and, in their discretion, add a sum equal to interest and return it as damages.[5] In appropriation cases interest may be allowed on the amount of damages assessed from the time of the demand for redress.[6] Interest is, ordinarily, the sole measure of damages for failure to pay money when due.[7]

Attorney's fees are not ordinarily recoverable as damages.[8]

§ 3. *Recovery as affected by status of plaintiff or limited interest in property affected.*[9]—Recovery is allowed only to the extent of plaintiff's ownership of the cause of action or subject-matter.[10] A third party cannot maintain an action for

ture consequences. Watson v. Augusta Brew. Co., 124 Ga. 121, 52 S. E. 152.

97. Walsh v. Meyer, 40 Wash. 660, 82 P. 938.

98. Gulf, etc., R. Co. v. Luther [Tex. Civ. App.] 14 Tex. Ct. Rep. 195, 90 S. W. 44.

99. Gulf, etc., R. Co. v. Luther [Tex. Civ. App.] 14 Tex. Ct. Rep. 195, 90 S. W. 44. See post, § 6.

1. See 5 C. L. 916. See, also, the topic Interest, 6 C. L. 157.

2. Parkins v. Missouri Pac. R. Co. [Neb.] 107 N. W. 26. From the date of the breach. New York Bank Note Co. v. Kidder Press Mfg. Co. [Mass.] 78 N. E. 463.

3. Damages for failure of tenant to make repairs as agreed held not ascertainable by mere computation. Markham v. David Stevenson Brew. Co., 97 N. Y. S. 604. Damages for breach of contract to sell land held not so definite and certain that interest was allowable without a verdict of the jury. Dady v. Condit, 209 Ill. 488, 70 N. E. 1088.

4. Where action is brought for damages arising from the destruction of property, and there is a basis of calculation as to value, interest is not recoverable as such. Central of Georgia R. Co. v. Hall, 124 Ga. 322, 52 S. E. 679. Interest may be recovered on damages suffered by loss of a mare killed by defendant from the date of the killing to the time of trial, though such interest is not claimed in the complaint. Nashville, etc., R. Co. v. Allen [Ala.] 41 So. 633.

5. Central of Georgia R. Co. v. Hall, 124 Ga. 322, 52 S. E. 679. In an action for tort, where there is some fixed rule for measuring damages, the jury may, under proper circumstances, increase the amount by adding interest, but the verdict should be for an aggregate sum. Maryland Casualty Co. v. Lanham, 124 Ga. 859, 53 S. E. 395.

6. Where a jury find in a case involving a species of appropriation that the plaintiff's land was substantially taken from him, it is consonant with right and justice for the court to charge and the jury to award interest on the amount of damages assessed in his favor, at least from the time he demanded redress. Upson Coal & Min. Co. v. Williams, 7 Ohio C. C. (N. S.) 293.

7. City of Chicago v. Duffy, 117 Ill. App. 261.

8. Suit for breach of contract. White River, etc., R. Co. v. Star Ranch & Land Co. [Ark.] 91 S. W. 14; Jackson v. Poteet [Tex. Civ. App.] 14 Tex. Ct. Rep. 45, 89 S. W. 980. Plaintiff in injunction is not entitled to attorney's fees as damages in case of a trespass on wild land. Iberia Cypress Co. v. Thorgeson [La.] 40 So. 682. The statutory attorney's fee in actions for title to land is exclusive, and fees actually paid cannot be recovered as damages. Smith's Guardian v. Holtheide, 27 Ky. L. R. 51, 84 S. W. 346. Under Civ. Code § 2336, allowing as damages in conversion fair compensation for time and money properly expended in pursuit of the property, neither attorney's fees nor expenditures recoverable as costs in the action may be recovered. W. & P. Nicholls v. Mapes [Cal. App.] 82 P. 265. Where a hearing is had upon a suggestion of damages after dissolution of a collusive injunction, the specific attorney's fee agreed upon for obtaining the dissolution should be proved. Mossman v. Thorson, 118 Ill. App. 574.

9. See 5 C. L. 913. See, also, Infants, 6 C. L. 1; Husband and Wife, 5 C. L. 1731, and similar topics.

10. Where petitioner in action for damages to crops claimed damages only for his own interest, he could not recover for another's interest, though he showed that the other had authorized him to put in a claim for it. Gulf, etc., R. Co. v. McMurrough [Tex. Civ. App.] 14 Tex. Ct. Rep. 476, 91 S. W. 320. An abutter on a highway who does not own the fee thereof may not recover damages in case of the construction of a railroad on the highway. Keyser v. Lake Shore & M. S. R. Co. [Mich.] 12 Det. Leg. N. 653, 105 N. W. 143. B. owned some horses and mules which he delivered to A. for sale, A. to have half the profits for his compensation. Defendant seized and sold the property under execution against A. Held B.'s damages were the market value of the property when and where seized, A. having no interest therein. National Cotton Oil Co. v. Ray [Tex. Civ. App.] 14 Tex. Ct. Rep. 799, 91 S. W. 322. Where a landlord is sued for damages for permitting waste water to run from his to adjoining premises, there can be no recovery for injuries sustained during the period a tenant was in possession, where the prem-

damages resulting from a breach of a contract between the contracting parties.[11] If the acts complained of amount to a tort against one of the contracting parties by the other, the same rule applies.[12] Lost earnings of an infant during his minority may be recovered only by the parent.[13] An infant may recover only for loss of time and earnings after reaching his majority.[14] Though a parent's right of action for the abduction or enticing and detention of a child rests upon the right to the child's services, yet there may be a recovery for injury to the feelings and loss of companionship, though no loss of services is shown.[15] A husband suing for a personal injury to his wife may recover the value of his services as nurse during the wife's illness,[16] and a father may recover for time lost while nursing an injured son.[17]

§ 4. *Measure of damages for breach of contract. A. In general; miscellaneous contracts.*[18]—The damages recoverable for breach of a contract are such as may be fairly and reasonably considered to arise naturally from the breach,[19] or such as may reasonably be supposed to have been in contemplation of the parties at the time they made the contract, as the probable result of a breach.[20] Special damages

ises were in repair when he entered, it being the duty of the tenant to repair. Mylander v. Beimschla, 102 Md. 689, 62 A. 1038.

11. One who was manager of a corporation and was discharged could not, as a stockholder, recover loss in depreciation of value of his stock caused by his discharge and by other acts of the corporation. Ninneman v. Fox [Wash.] 86 P. 213.

12. Ninneman v. Fox [Wash.] 86 P. 213.

13. A minor plaintiff cannot recover for diminished earning capacity during minority. Chicago City R. Co. v. Schaefer, 121 Ill. App. 334. A father suing for injuries to his minor child may recover his full earning capacity and not merely the "net result" of such earnings. Galligan v. Woonsocket St. R. Co. [R. I.] 62 A. 376. In an action by a mother to recover for injuries to her minor son, she may recover only for the diminution in value of the minor son's services during minority. Evidence that mother depended on her work for a living and that another son contributed to her support, held inadmissible. Gulf, etc., R. Co. v. Johnson [Tex.] 14 Tex. Ct. Rep. 97, 90 S. W. 164. In an action by a father suing as next friend of his child, an instruction allowing a recovery for permanent impairment of ability to earn and for medical expenses is not erroneous, as the father is thereby estopped from asserting a claim for loss of services during infancy of the child and for medical expenses. Louisville R. Co. v. Esselman [Ky.] 93 S. W. 50.

14. Richardson v. Nelson [Ill.] 77 N. E. 583. A minor suing for damages for injuries may not recover because of disability to earn money during minority, because during such period his parent is entitled to his earnings. Instruction held erroneous. Hayes v. Southern R. Co. [N. C.] 53 S. E. 847. Charge given held to have properly limited recovery by infant for injuries for time lost and impairment of ability after reaching his majority, and requested charge properly refused. Gulf, etc., R. Co. v. Archambault. [Tex. Civ. App.] 16 Tex. Ct. Rep. 293, 94 S. W. 1108. Where a child of seven is injured, the future pecuniary loss to him from his injuries may be considered. The question is one for the common experience of the jury, and the uncertainty should be borne by the wrongdoer rather than the victim. McDermott v. Severe, 25 App. D. C. 276.

15. But petition should allege loss of services and that plaintiff was entitled thereto. Washburn v. Abram [Ky.] 90 S. W. 997.

16. Louisville & N. R. Co. v. Quinn [Ala.] 39 So. 616.

17. Western Coal & Min. Co. v. Honaker [Ark.] 96 S. W. 361.

18. See 5 C. L. 914.

19. Matt v. Chew, 137 F. 197; Choctaw, etc., R. Co. v. Jacobs [Okl.] 82 P. 502. Resulting from the breach in the usual course of things. Illinois Cent. R. Co. v. Johnson [Tenn.] 94 S. W. 600. Contract not to engage in competing business. Bradford & Carson v. Montgomery Furniture Co., 115 Tenn. 610, 92 S. W. 1104. Loss of collateral, whereby an independent business is lost by contractor, held not direct result of breach of contract to build sewers. Cusachs & Co. v. Sewerage & Water Board [La.] 40 So. 855. Where time for performance of a contract has expired, all damages for its breach accruing up to the time of trial may be recovered. Russell, Burdsall & Ward v. Excelsior Stove & Mfg. Co., 120 Ill. App. 23.

20. Mott v. Chew, 137 F. 197; Choctaw, etc., R. Co. v. Jacobs [Okl.] 82 P. 502; New York Market Gardeners' Ass'n v. Adams Dry Goods Co., 100 N. Y. S. 596; Illinois Cent. R. Co. v. Johnson [Tenn.] 94 S. W. 600. Where it appears that drawing rooms on a sleeper were largely used by invalids, damages for injury to health may be recovered for failure to furnish as per contract. Ingraham v. Pullman Co., 190 Mass. 33, 76 N. E. 237. Land was sold subject to a mortgage, the vendor agreeing as a part of the consideration to secure an extension of time on the mortgage. The measure of damages for breach of this agreement was all the expense incident to the securing of another loan to pay the mortgage. Hoch v. Braxmar, 109 App. Div. 209, 95 N. Y. S. 647. When a contractor paid claims to his subcontractors and employes for amounts lost because of delay of a subcontractor in furnishing material without notice to such subcontractor, he was not precluded from recovering such losses from the subcontractor. Modern Steel Structural Co. v. English Const. Co. [Wis.]

are recoverable only when it is made to appear that the person against whom a recovery is sought had notice of the special circumstances out of which such damages naturally arose.[21] The rule of damages for breach of contract is not affected by the motive of the party breaking it, nor by his want of a sufficient excuse for failing to perform,[22] nor does the fact that a breach has happened through an honest mistake prevent the recovery of actual damages.[23] Where there has been a breach of a contract by one of the parties, the other is entitled to recover at least nominal damages;[24] and the party who voluntarily and wrongfully puts an end to a contract and prevents the other party from performing it, cannot assert that reasonable outlay made by the injured party to keep down damages was not within the contemplation of the parties.[25] Profits, which it is reasonably certain would have been realized but for a breach of the contract,[26] and the making of which constituted the sole inducement for entering into the contract,[27] are recoverable, as has already been said.[28]

108 N. W. 70. Where a contract stipulated that a tug boat should leave a certain place at a certain time, but the departure was delayed and it did not reach its destination in time to tow enough stone to protect a bulkhead from a storm which occurred a day or so later, the failure to send the tug as agreed was held the proximate cause of the injury to such bulkhead. Mott v. Chew, 137 F. 197. Expenditures in raising a crop for fall trade held to be within the contemplation of parties making a contract for floor space for a horticultural department in a large store. New York Market Gardeners' Ass'n v. Adams Dry Goods Co., 100 N. Y. S. 596.

21. To recover special damages the party against whom a recovery is sought must have had such notice as would lead him to understand that such special damages would probably result from a breach. Illinois Cent. R. Co. v. Johnson [Tenn.] 94 S. W. 600. Applied to action for breach of contract of carriage. Choctaw, etc., R. Co. v. Jacobs [Okl.] 82 P. 502. Breach of contract to furnish fertilizer resulting in inability to cultivate certain land. Spears v. Fields, 72 S. C. 395, 52 S. E. 44. One who agrees to furnish materials for the construction of a railroad is not liable for amounts paid by the railroad company to the contractors for delay in supplying the materials, unless the seller knew of the special contract between the company and the contractors. Gorham v. Dallas, etc., R. Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 365, 95 S. W. 551. Where by reason of failure of a railroad company to construct a crossing pursuant to contract, one was precluded from hauling wood which the company had notice he intended to haul, it is liable for loss of profits on the wood. Kendall v. Chicago, etc., R. Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 309, 95 S. W. 757. Where seller of brick knew that the buyer was to use them on a city sewer and that the work was required to be completed within a certain time, he was liable to the buyer, upon failing to furnish brick when called for as agreed, for the extra expense and the penalty for the delay exacted by the city. Shurter v. Butler [Tex. Civ. App.] 16 Tex. Ct. Rep. 267, 94 S. W. 1084. Where a purchaser sold goods to a third person who refused to accept them when delivered because not of the quality stipulated, the first seller was not liable for his buyer's loss of profits on the second sale, unless he had notice of the second contract. Madill Oil & Cotton Co. v. Sanger [Tex. Civ. App.] 16 Tex. Ct. Rep. 181, 95 S. W. 36. In an action to recover for the detention of tents let by plaintiff to defendant, plaintiff could not recover profits lost upon other contracts for letting the tents, where knowledge of those contracts by defendant was not shown. Baker & Lockwood Mfg. Co. v. Clayton [Tex. Civ. App.] 14 Tex. Ct. Rep. 299, 90 S. W. 519. Where the seller has knowledge of the liability of the buyer to penalties for failure to deliver to a third person by specified dates the seller is liable for penalties incurred through his failure to deliver on time, such damages being within the contemplation of the parties. Sutton v. Wanamaker, 95 N. Y. S. 525.

22. Magnolia Metal Co. v. Gale, 189 Mass. 124, 75 N. E. 219. Only damages immediately and directly resulting from the breach are recoverable, regardless of bad faith or ill will of party breaking the contract. Cussachs & Co. v. Sewerage & Water Board [La.] 40 So. 855.

23. $75 proper for breach of contract to allow use of picnic grounds, where party on arriving found ground occupied by another party. O'Meallie v. Moreau [La.] 41 So. 243.

24. Grau v. Grau [Ind. App.] 77 N. E. 816.

25. Terrace Water Co. v. San Antonio Light & Power Co. [Cal. App.] 82 P. 562.

26. Breach of contract to make ties. Horn v. Carroll [Ky.] 90 S. W. 559. Breach of contract to purchase wagons to be manufactured. Gardner v. Deeds [Tenn.] 92 S. W. 518. Breach of contract by which one person appoints another his agent to sell its pack of fish at an agreed commission. Emerson v. Pacific Coast & Norway Packing Co. [Minn.] 104 N. W. 573. Breach of a contract whereby plaintiff was to do certain grading. Jefferson, etc., R. Co. v. Dreeson [Tex. Civ. App.] 96 S. W. 63. For breach of contract to purchase a herd of cattle and sell a certain number during a term of years, and at the expiration of the period to divide the herd or proceeds from a sale thereof, the measure of damages is the amount of the plaintiff's interest in the cattle at the time they were to be purchased and the value

By profits is meant, of course, the net profits,[29] and these are ascertained by deducting from the gross profits, or the contract price or compensation, the cost of performance.[30] That expenses which would have been incurred under a contract are difficult of estimation is no reason why they should not be considered in reduction of profits.[31] The application of these general principles to contracts of different kinds is further illustrated by the cases cited in the note.[32] Expenses incurred in provid-

at the end of the contract period. Shropshire v. Adams [Tex. Civ. App.] 13 Tex. Ct. Rep. 540, 89 S. W. 448.

27. Contractor for getting out timber may recover difference between contract price and cost of getting out timber. Des Allemands Lumber Co. v. Morgan City Timber Co. [La.] 41 So. 332. Measure of damages for breach of partnership agreement held loss of profits which would have been made. Ramsay v. Meade [Colo.] 86 P. 1018.

28. See supra, § 2, Loss of Profits.

29. Magnolia Metal Co. v. Gale, 189 Mass. 124, 75 N. E. 219.

30. Rosenbloom v. Maas, 97 N. Y. S. 210. Damages recoverable for cancellation of a contract are the expense incurred and the loss of profits which would with reasonable certainty have been made had the contract been performed. Cusachs & Co. v. Sewerage & Water Board [La.] 40 So. 855. Salaries of officers and interest on money invested in working plant used to get out timber held part of cost of getting out timber to be deducted in arriving at recoverable net profits. Des Allemands Lumber Co. v. Morgan City Timber Co. [La.] 41 So. 332. Certain office expenses which plaintiff was bound to pay under the contract, deducted from gross profits. Magnolia Metal Co. v. Gale, 189 Mass. 124, 75 N. E. 219. Measure of damages for breach of agreement to take $35 worth of advertising in a newspaper is difference between contract price and cost of carrying the advertisement. These damages need not be reduced by reason of plaintiff's use of space with other matter, where no particular space was contracted for by defendant, and the other matter would have been inserted in any case. Stumpf v. Merz, 99 N. Y. S. 337. Where one contracts to purchase lumber and make advance to pay the seller's hands for sawing it, the measure of damages for breach of such contract is the difference between the contract price and the cost of sawing, hauling, and loading the lumber, plus the payment already made. Nicola Bros. Co. v. Hurst [Ky.] 88 S. W. 1081.

31. Magnolia Metal Co. v. Gale, 189 Mass. 124, 75 N. E. 219.

32. Where a **building contract** is not performed according to its terms, the rule of damages is the cost of making the work conform to the contract (Ekstrand v. Barth, 41 Wash. 321, 83 P. 305), regardless of whether plaintiff has made expenditures to repair defects or has sold the property at a less price than would have been received had the contract been properly performed (Id.).

Contra: The measure of damages for **failure of a contractor to place a house** with reference to lot lines as indicated by the plans is not the cost of moving the house but the difference between the value of the house as located and its value if placed according to the plans. Olsen v. Henderson, 99 N. Y. S. 917. The measure of damages for **failure to supply building materials** within a time specified, or within a reasonable time, is the rental value of the building for the period of the delay. Long v. Abeles & Co. [Ark.] 91 S. W. 29. That city rented other rooms during delay in completing a library building and paid a reasonable sum therefor did not show what the value of the use of the library building would have been. Hipwell v. National Surety Co. [Iowa] 105 N. W. 318. Where by reason of a subcontractor's failure to deliver material according to the terms of his contract, the contractor was required to enter into a contract to do other work and pay the building superintendent in lieu of paying damages specified in the original contract, he may recover from the subcontractor only for time lost in performing the original contract, the amount of which he has the burden to establish. Modern Steel Structural Co. v. English Const. Co. [Wis.] 108 N. W. 70. Where a contractor was unable to complete the work within the time specified because of a subcontractor's failure to supply material according to the terms of his contract, and was required to pay the building superintendent's salary beyond the date for the completion of the contract, the amount of such salary was a proper counterclaim against the subcontractor. Id. The measure of damages for breach of a **contract of partnership** is the same whether the contract is executed or executory. Ramsay v. Meade [Colo.] 86 P. 1018. Measure of **damages recoverable by broker for refusal of vendor to sell** after broker has found a purchaser, according to his contract, is the commission earned and lost by the broker. Young v. Ruhwedel [Mo. App.] 96 S. W. 228. For breach of **contract to furnish water for irrigation** purposes, damage to crops planted and damages for crops lost by reason of inability to plant may be recovered. Barstow Irr. Co. v. Cleghon [Tex. Civ. App.] 15 Tex. Ct. Rep. 218, 93 S. W. 1023. For breach of contract to furnish water for irrigation of land in the possession of tenants, where the owner is chargeable with the expense of horses' feed, etc., such expense should be deducted from his share of the probable crop. Id. For breach of contract to furnish water for the irrigation of a crop, the measure of damages is the value of the probable crop. Tres Palacios Rice & Irrigation Co. v. Eidman [Tex. Civ. App.] 14 Tex. Ct. Rep. 852, 93 S. W. 698. An irrigation company which negligently or willfully fails to furnish water to a consumer in accordance with its contract is liable to the consumer for the resulting loss of or injury to crops. Colorado Canal Co. v. McFarland [Tex. Civ. App.] 15 Tex. Ct. Rep. 848, 94 S. W. 400.

ing a working plant for the execution of a contract cannot be recovered upon a breach of the contract.[33] In an action on a severable contract to pay money in instalments, only the sums due and unpaid at the time of bringing the action are recoverable.[34]

(§ 4) *B. Contracts for sale or purchase of land.*[35]—In South Dakota the measure of recovery in such cases is fixed by statute.[36] Ordinarily, the measure of damages for breach of an agreement to convey is the value of the promised contract on the date when it should have been executed.[37] Where a contract for a conveyance of land is made in consideration of the erection of a building of a certain kind thereon, and a deed is refused after the building has been erected, the measure of damages is the value of the property at the time of the breach, less liens thereon.[38]

(§ 4) *C. Breach of covenant as to title.*[39]

(§ 4) *D. Contracts to give lease and liabilities as between lessor and lessee.*[40] —For failure of a lessor to give possession of leased premises, the measure of damages is the difference between the actual value and the rent reserved.[41] The measure of damages for a breach by a tenant of a covenant to repair is the amount expended by the landlord for repairs, upon proof that such amount was the fair and reasonable cost of the work.[42] The measure of damages for breach of an agreement by a lessor not to engage in business in competition with the lessee for a certain period is the loss of profits on sales made by the lessor which it is reasonably certain the lessee would have made but for the breach.[43] The measure of damages for the unreasonable detention of leased property is the reasonable rental value of the property for

Where lessee is to raise a crop and give one-half to the lessor for rent and water, and the lessor fails to furnish water to irrigate as agreed, the lessee's damages are the market value of his share of the additional crop which would have been raised with water, less the extra expense of raising such crop. Dunlap v. Raywood Rice Canal & Milling Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 86. 95 S. W. 43. For breach of **pasturage contract** by overstocking the pasture, the measure of damages is the difference in the market value immediately prior to the depreciation in value of the cattle, considering their then condition, and their market value at the time they were removed. J. B. Wallis & Co. v. Wallace [Tex. Civ. App.] 92 S. W. 43.

Failure to give notes: For the unexcused failure for an unreasonable time by a party to a contract to give promissory notes to the other party, the amount for which the notes were to have been given is prima facie the measure of damages. Wasser v. Western Land Securities Co. [Minn.] 107 N. W. 160. Where a **contractor on a public work** uses a cheaper material than is called for by the contract, the city after paying for the work without knowledge of the substitution has a remedy by action on contract, under Civ. Code La. arts. 1930, 2769, and the measure of recovery is the amount of damages sustained by reason of the breach. National Contracting Co. v. Sewerage & Water Board [C. C. A.] 141 F. 325.

33. Des Allemands Lumber Co. v. Morgan City Timber Co. [La.] 41 So. 332.

Pledge: Where a pledgee wrongfully repledges the articles pledged to secure funds beyond the scope of the original contract, and the original pledgor redeems, he may recover the difference between the amount he was required to pay to redeem and what was used for the purpose for which the original pledge was made. Interurban Const. Co. v. Hayes, 191 Mo. 248, 89 S. W. 927.

34. Where a contract provides for the payment of a sum annually, on failure to pay an instalment, the person entitled thereto may recover all instalments due and unpaid, but not the entire sum due; for instalments falling due after the action is commenced, he may maintain subsequent actions. Recknagel v. Steinway [N. Y.] 77 N. E. 801. A contract to pay notes of a third person, maturing at different dates, is severable, and in an action for its breach, the measure of recovery is the amount of the notes matured and unpaid at the time of bringing the action. Thomas v. Richards, 124 Ga. 942, 53 S. E. 400.

35. See 5 C. L. 916.

36. Rev. Civ. Code § 2298. Dal v. Fischer [S. D.] 107 N. W. 534.

37. Berider v. Shatzkin, 48 Misc. 637, 96 N. Y. S. 208.

38. Not the cost of labor and materials entering into the building. Jennings v. Oregon Land Co. [Or.] 86 P. 367.

39, 40. See 5 C. L. 917.

41. Jarrait v. Peters [Mich.] 13 Det. Leg. N. 415, 108 N. W. 482. Where a lessor prior to the commencement of the term permitted the lessee to bring some of his goods to the premises and to hire the lessor's horse, such fact does not bring the case within the rule that where a lessee's business has been interrupted he may recover prospective profits. Id.

42. Markham v. David Stevenson Brew. Co., 97 N. Y. S. 604.

43. Long v. O'Bryan [Ky.] 91 S. W. 659.

the time it is detained.[44] In an action of trespass against the landlord, the tenant may recover only for the damage to the leasehold and such damages as he personally may sustain, and not for damage to the freehold.[45] In such action the tenant may recover compensation for personal injuries, suffering, and inconvenience proximately caused by the landlord's wrongful act.[46] For wrongful eviction of a tenant, the expense incurred in moving and time lost thereby are proper elements of damage.[47]

(§ 4) *E. Contracts for sale or purchase of chattels.*[48]—The measure of damages for breach of a contract for the sale of chattels is the difference between the contract price and the market value at the time and place of delivery,[49] and if there is no market price for the article at the place of delivery, the value at the nearest market governs with the increased cost, if any, of transportation thereby caused.[50] Where the vendee refuses to receive personal property purchased, the vendor may resell the same and recover the difference between the contract price and the amount received upon the resale,[51] less the cost of getting it to the market where the resale could be made.[52] Upon breach of an agreement by the seller of a machine not to

44. Baker & Lockwood Mfg. Co. v. Clayton [Tex. Civ. App.] 14 Tex. Ct. Rep. 299, 90 S. W. 519.

45. Snedecor v. Pope, 143 Ala. 275, 39 So. 318.

46. In action by tenant against her landlord for removing a part of the house, the court properly instructed the jury to allow such damages as would compensate plaintiff for her inconvenience, physical pain and mental suffering proximately caused by defendant's act, and to consider, in estimating damages, the weather, the character of the premises, any exposure or disease suffered as proximate results of the wrong complained of. Snedecor v. Pope, 143 Ala. 275, 39 So. 318.

47. Wade v. Herndl [Wis.] 107 N. W. 4.

48. See 5 C. L. 917.

49. Failure to deliver. National Coal Tar Co. v. Malden & Melrose Gaslight Co., 189 Mass. 625, 75 N. E. 625; Alger-Fowler Co. v. Tracy [Minn.] 107 N. W. 1124; Connersville Wagon Co. v. McFarlan Carriage Co. [Ind.] 76 N. E. 294. Failure to deliver cattle. McKay v. Elder [Tex. Civ. App.] 92 S. W. 268. Contract for sale of potatoes. J. D. Belote & Son v. Wilcox [Ala.] 41 So. 673. Difference between contract price and market value, and not difference between price contracted for and price purchaser had agreed to deliver to a third person for. Potomac Bottling Works v. A. H. Barber & Co. [Md.] 63 A. 1068. Where a seller contracts to deliver goods at a certain date, which date is postponed at the request of the seller for forbearance, on his refusal to deliver the measure is the difference between the market and contract price at the date of such refusal. Crescent Hosiery Co. v. Mobile Cotton Mills, 140 N. C. 452, 53 S. E. 140. Where a seller fails to supply a buyer with goods pursuant to contract, the measure is the difference between the contract price and the price he was obliged to pay to get the goods, plus net profits lost during delay. Edgeworth v. Talerico [Tex. Civ. App.] 15 Tex. Ct. Rep. 405, 95 S. W. 677. Where seller refused to perform, and buyer then bought in the market, damages consisted of difference between contract price and market price when buyer learned of seller's breach. Walnut Ridge Mercantile Co. v. Cohn [Ark.] 96 S. W. 413. In an action for breach of a contract to sell cotton, if there was no market for the purchase of similar cotton at the place where defendants were to deliver the measure of damages was the excess in the cost of replacing the cotton in the next nearest market. McCleskey v. Howell Cotton Co. [Ala.] 42 So. 67. For breach of contract to deliver goods in instalments, the measure is the difference between the contract and market price at the time of the failure to deliver. Sagola Lumber Co. v. Chicago Title & Trust Co., 121 Ill. App. 292. A contract for the delivery of electricity is one for the sale and delivery of personal property under Code § 3308, hence the measure of damages for a breach is the difference between the contract price and what it would cost to procure it from another. Terrace Water Co. v. San Antonio L. & P. Co. [Cal. App.] 82 P. 562.

50. For nondelivery of tar which had no market value at place of delivery, the measure of damages was contract price at place of delivery, plus freight to place where it had market value, less market value. National Coal Tar Co. v. Malden & Melrose Gaslight Co., 189 Mass. 625, 75 N. E. 625.

51. Penn Plate Glass Co. v. James H. Rice Co., 216 Ill. 567, 75 N. E. 246; afg. James H. Rice Co. v. Penn Plate Glass Co., 117 Ill. App. 356; Parkins v. Missouri Pac. R. Co. [Neb.] 107 N. W. 260. If the market price of the article has declined after the making of the contract, and it is manifest that the buyer will not accept the goods sold, the proper measure of damages, after legal notice, is the difference between the contract price and the market price. Woodstock Iron Works v. Standard Pully Mfg. Co., 115 La. 829, 40 So. 236.

52. The value of fruit in estimating damages for breach of contract to purchase is the price at the nearest market to place where buyer was to receive it, at such time as would allow plaintiff a reasonable time in which to resell. Code § 3353. Willson v. Gregory [Cal. App.] 84 P. 356. If the seller has not effected a resale under Code § 3049, his damages for a breach by the buyer is the excess of the contract price

sell similar machines to others, the measure of damages is the difference between the ordinary market value of the machines and their value as protected by the restrictive agreement.[53] For breach of warranty as to quality or fitness, the measure of damages is the difference between the actual value of the chattels as delivered and their value if they had been as represented.[54] Where an article sold is warranted to be suitable for a particular use, any damage naturally and proximately resulting from a breach thereof may be recovered.[55] The measure of damages for breach of warranty as to the quality or variety of seeds sold for planting is the difference between the value of the crop produced and the value of the crop which would have been produced had there been no breach of warranty.[56]

(§ 4) *F. Liability of bailees, carriers, and telegraph companies.*[57]—For nondelivery of goods, a carrier is liable for their value at the time and place they should have been delivered.[58] For a delay in delivery,[59] or for injury to goods in transit,[60]

over the value of the property to him, together with the excess of the expense of getting it to the nearest market over the expense of getting it to the buyer. Id.

53. Printing presses of a particular kind and for particular use. New York Bank Note Co. v. Kidder Press Mfg. Co. [Mass.] 78 N. E. 463.

54. Swartz v. Atchison, 120 Ill. App. 119; Dooley v. Hasenwinkle Grain Co., 120 Ill. App. 43. Damages for breach of warranty of fire hose for a year, where the hose was used for some time, is the difference between the value of the hose had it been as represented and used for a year, and its actual value. Macrea v. Gotham Rubber Co., 99 N. Y. S. 373. Measure of damages for breach of agreement to furnish registration papers with cattle sold is difference in market value of cattle with and without such papers. An instruction to that effect is not erroneous because referring to all the cattle, though evidence shows papers were furnished for 3. Miller v. Mosely [Tex. Civ. App.] 14 Tex. Ct. Rep. 666, 91 S. W. 648.

55. Cable for drilling well was warranted suitable for the purpose, but broke. Loss of time, rental for machine, and expense of recovering tools dropped in the well, were held proper elements of damage for breach of warranty. San Antonio Machine & Supply Co. v. Josey [Tex. Civ. App.] 15 Tex. Ct. Rep. 176, 91 S. W. 598. For breach of the implied warranty of the manufacturer of the fitness of a boiler built for a tug, the measure is the cost of making it fit for the purposes for which it was intended and compensation for loss of the use of a tug while the work was being done. The Nimrod, 141 F. 215.

56. Moody v. Peirano [Cal. App.] 84 P. 783.

57. See 5 C. L. 919.

58. Isham v. Erie R. Co., 98 N. Y. S. 609; Turner v. Southern R. Co. [S. C.] 54 S. E. 825. The common-law rule as to recovery for loss of goods is not changed by Acts 1903, p. 81, providing that a carrier shall, in case of loss of freight, be liable for the amount, together with interest from the time of presenting the claim until payment. Brown v. Northwestern R. Co. [S. C.] 54 S. E. 829. For loss of shipment of flour carrier was liable for its value at the time and place of delivery, and not for the credit price which the consignee was to pay. Id. Where a carrier converted potatoes shipped, the measure of damages was the market value at the time of conversion, with interest, less freight. Carter v. International & G. N. R. Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 358, 93 S. W. 681. Where carriers sold potatoes without giving the buyers a chance to inspect them, the amount received was not the market value showing the loss to which plaintiff was entitled. Id.

59. Isham v. Erie R. Co., 98 N. Y. S. 609; Chicago, etc., R. Co. v. Broe [Okl.] 86 P. 441; Clark v. American Exp. Co. [Iowa] 106 N. W. 642. Where a railroad company negligently refuses to receive and transport freight intended for immediate sale upon the market, such as live stock, it is liable for the expense of keeping such stock caused by the delay, and for the difference between the price of the stock when it should have been received and the price when it was received. Chicago, B. & Q. R. Co. v. Todd [Neb.] 105 N. W. 83. Where there was no market value for calves in the condition in which they arrived at S., and they were therefore shipped to W. and sold at C., the measure of damages was the difference between the market value at S. in the condition and at the time they should have reached S., by the exercise of ordinary care, and what they sold for at C. after deducting transportation to C. Texas & P. R. Co. v. Coggin [Tex. Civ. App.] 14 Tex. Ct. Rep. 295, 90 S. W. 523. Evidence held to authorize finding that rental value of a saw mill delayed in transportation was $10 per day. St. Louis S. W. R. Co. v. Burke [Tex. Civ. App.] 14 Tex. Ct. Rep. 683, 91 S. W. 812.

60. The measure of damages for a carrier's delay in transporting property is the difference between the market value of the property at the point of destination, in the condition in which it would have been received if delivered in a reasonable time, and its value at that point in the condition in which it was at the time of its arrival. Hardin v. Missouri Pac. R. Co. [Mo. App.] 96 S. W. 681. Stipulation in bill of lading that value at point of shipment should govern referred only to a loss of the property. Id. In an action for delay in transporting cattle, the damages should not be determined from what the cattle actually sold for at destination, but from their market value in their condi-

the measure of damages is the depreciation in market value, if the goods, when delivered, have a market value; otherwise the depreciation in actual value,[61] or the cost of making repairs.[62] The principle in each case is indemnity to the shipper.[63] Where a contract for a shipment of stock limits the liability to fifty dollars per head, the carrier is liable for the actual damage to each animal not exceeding the amount specified.[64] The expense necessarily incurred in putting damaged property in a marketable condition,[65] or in transporting it to the nearest market, if it has no market value at the place of delivery,[66] may also be recovered. Unpaid freight charges should of course be deducted in determining the amount recoverable.[67] Market value within the meaning of the rule just given is the value at which the article shipped would sell in the open market in the quantities as carried; and where the articles shipped are merchandise and shipped in large quantities, it is error to measure the damages sustained by the market value of such merchandise when sold at retail.[68] A carrier cannot be held liable for special damages resulting from a delay in transporting property, or for other breach of its contract, unless it had notice of the special use to which the property was to be put or of other circumstances out

tion at the time of sale. San Antonio & A. P. R. Co. v. Turner [Tex. Civ. App.] 15 Tex. Ct. Rep. 457, 94 S. W. 214; Chicago, etc., R. Co. v. Calvert [Tex. Civ. App.] 14 Tex. Ct. Rep. 642, 91 S. W. 825; Carpenter v. Baltimore & O. R. Co. [Del.] 64 A. 252. Batteries were packed in excelsior in open crates and marked, "Handle with care. Batteries. This side up." Damages were claimed caused by turning the crates over. Whether such damage was within the contemplation of the parties was held a question for the jury. Hoye v. Pennsylvania R. Co., 100 N. Y. S. 190. Where live stock, injured while being transported, is shown to have a market value at its destination, the measure of damages is the difference between the market value in the injured and uninjured condition. Texas & P. R. Co. v. Dishman [Tex. Civ. App.] 14 Tex. Ct. Rep. 656, 91 S. W. 828; Illinois Cent. R. Co. v. Holt [Ky.] 92 S. W. 540; Gulf, etc., R. Co. v. Batte [Tex. Civ. App.] 15 Tex. Ct. Rep. 581, 94 S. W. 345; Wabash R. Co. v. Campbell, 117 Ill. App. 630; Cincinnati, etc., R. Co. v. Pendleton [Ky.] 96 S. W. 434. Where cars are erroneously placarded "Southern Cattle,' thereby indicating that they were diseased, the measure of damages is the difference between the market value of such cattle under the existing condition and the market value of other cattle of like kind and quality. Wabash R. Co. v. Campbell, 219 Ill. 312, 76 N. E. 346. Evidence of what they subsequently sold for held immaterial. Id. The measure of damages for injury to horses by rough handling and delay in transportation is the difference between the reasonable market value at destination, when and in the condition they arrived, and what it would have been had there been no negligence. St. Louis, etc., R. Co. v. Berry [Tex. Civ. App.] 15 Tex. Ct. Rep. 660, 93 S. W. 1107.

61. Where household goods in use are injured or lost while being transported, the measure of damages is the difference in their actual value just prior to and just subsequent to their injury or loss, not the difference in market value at second hand stores at or nearest their destination. Benedict v. Chicago, etc., R. Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 935, 91 S. W. 811. Exclusion of evidence of "actual" value of such goods on ground that witnesses were not competent to testify to "market value," held error. Id. Where only a part of a shipment is damaged but the entire shipment is sold as damaged goods, the sale price does not constitute evidence of the value of the goods in the damaged state. D'Olier v. New York, etc., R. Co., 98 N. Y. S. 649. Where a carrier negligently delays a shipment of a threshing machine until a sale thereof is lost, and subsequently converts the same, the measure of damages is the sale price. Missouri Pac. R. Co. v. Peru-Van Sandt Imp. Co. [Kan.] 85 P. 408.

62. Where it does not appear that machinery shipped has a market value at its destination, the cost of repairing injuries caused while being transported may be shown. Chicago, etc., R. Co. v. Calvert [Tex. Civ. App.] 14 Tex. Ct. Rep. 642, 91 S. W. 825.

63. Isham v. Erie R. Co., 98 N. Y. S. 609.

64. The measure of liability is not the difference between what the shipment brought and the aggregate value at $50 per head. Lee v. Wabash R. Co. [Mo. App.] 94 S. W. 991.

65. Damaged cotton which had to be repicked to make it marketable. Houston, etc., R. Co. v. Bath [Tex. Civ. App.] 14 Tex. Ct. Rep. 117, 90 S. W. 55. For injuries to animals in transit, the owner, after expending labor and money in treating them, can recover only the difference in their value in the condition they should have reached their destination and their value after such labor and money had been expended, plus reasonable expenditures. St. Louis, etc., R. Co. v. Foster [Tex. Civ. App.] 13 Tex. Ct. Rep. 911, 89 S. W. 450.

66. Atchison, etc., R. Co. v. Nation [Tex. Civ. App.] 14 Tex. Ct. Rep. 956, 92 S. W. 823.

67. Atlantic, etc., R. Co. v. Howard Supply Co. [Ga.] 54 S. E. 530.

68. Chicago, etc., R. Co. v. Broe [Okl.] 86 P. 441.

of which the special damages arose.[69] The notice must have been such that the special damages claimed ought reasonably to have been in contemplation of the parties at the time the contract for shipment was made.[70] Such notice must have been given at the time the contract for transportation was made. Notice after property has been shipped of circumstances which render special damages a probable consequence of delay does not affect the original contract so as to render the carrier liable for such damages, although the subsequent delay is unreasonable.[71] Damages accruing after a delivery or tender of the goods to the consignee are not recoverable.[72] A consignee cannot, by declining to receive a delayed shipment, convert

69. Illinois Cent. R. Co. v. Johnson [Tenn.] 94 S. W. 600. Where a railroad failed to deliver goods within the time agreed, loss of business, worry, and anxiety, expense in preparing for prompt arrival, etc., cannot be recovered for where it does not appear that the carrier had notice of such facts at the time of the shipment. Guess v. Southern R. Co. [S. C.] 53 S. E. 421. For delay in delivering a part of well boring machinery, a carrier is liable only for the rental value of the machinery it had in its possession, not for the rental value of the entire outfit. Illinois Cent. R. Co. v. Johnson [Tenn.] 94 S. W. 600. Profits which would have accrued upon a contract for the sale of goods may not be recovered from a carrier in an action for delay in transporting the goods, where it does not appear that such contract was in the contemplation of the parties at the time the carrier received the goods. Goodin v. Southern R. Co. [Ga.] 54 S. E. 720. Where a railroad company damaged the wedding trousseau of a bride to be, the mental anguish of the prospective groom is too remote to constitute an element of damage where the company did not know of the intended marriage. Eller v. Carolina & N. W. R. Co., 140 N. C. 140, 52 S. E. 305. Damages recoverable from a carrier for delay in transporting theatrical scenery and property, where the carrier had notice that such property was to be used at a widely advertised exhibition, and also that the shipper was under a great expense in the use of the property, are the ordinary gross receipts from the use of such property, less expense saved by not using it. Weston v. Boston, etc., R. Co., 190 Mass. 298, 76 N. E. 1050. Where a threshing outfit was shipped to a certain point to perform contracts for threshing, and the railroad company's agent was informed of this fact prior to the shipment, the shipper could recover for profits lost on contracts which he had made and could not perform because of delay necessitated by repairs to the injured outfit. Chicago, etc., R. Co. v. Calvert [Tex. Civ. App.] 14 Tex. Ct. Rep. 642, 91 S. W. 825. Where carrier had notice that feed shipped was for certain cattle, and that the shipper was depending on it, the carrier was liable for depreciation in the value of the cattle directly and proximately caused by delay in delivering the feed. Illinois Cent. R. Co. v. Mossbarger [Ky.] 91 S. W. 1121. Where carrier agreed to transport fruit to New York in time for sailing of a certain vessel, on which refrigerated space had been reserved, but failed to do so, the damage recoverable was the difference between the value of the fruit at New York when it should have been delivered, and its value at the time it was delivered, together with the amount paid for space on the vessel. Frey v. New York, etc., R. Co., 100 N. Y. S. 225. Where a consignee, after the arrival of feed at its destination, stated to the carrier's agent that he was out of feed and that failure to get it would mean a great loss, and solely through fault of the agent delivery was not made, the consignee was entitled to special damages, though notice of the facts was not given at the time of making the contract of carriage. Bourland v. Choctaw, etc., R. Co. [Tex.] 14 Tex. Ct. Rep. 503, 90 S. W. 483. In view of the evidence, instruction that plaintiff could recover special damages for nondelivery of feed after arrival at destination, if defendant's agent was notified of the circumstances "before or at the time of the arrival of the feed," held not prejudicial to defendant. Id. In action for delay in shipping cattle, held error to allow plaintiff to prove the price at which he had contracted to sell the cattle, defendant not having had notice of the contract. Fort Worth & D. C. R. Co. v. Hamm [Tex. Civ. App.] 15 Tex. Ct. Rep. 202, 93 S. W. 215. Where delay in shipment caused loss of one sale, and a sale was made to another, damage recoverable was the difference between price obtainable in first sale and price obtained in second. Texas & P. R. Co. v. Stewart [Tex. Civ. App.] 96 S. W. 106. For breach of a contract by a carrier to unload stock at an intermediate point, where it was known to the agent of the carrier that it was the shipper's intention to sell at such point, the carrier is liable for all damages resulting. Evidence is admissible to show that the shipper had made arrangements to handle the stock at such point; that he could have secured a rebate from such point to destination; that the stock had contracted a disease at the point to which they were erroneously shipped and expenses were incurred in reshipping them. Southern Kan. R. Co. v. Cox [Tex. Civ. App.] 95 S. W. 1124.

70. Where agent was only told that certain pipe was badly needed, the carrier was not put on notice that a delay in delivery would result in loss of a contract for boring a well, and necessitate purchase of new boring machinery. Illinois Cent. R. Co. v. Johnson [Tenn.] 94 S. W. 600.

71. Illinois Cent. R. Co. v. Johnson [Tenn.] 94 S. W. 600.

72. In an action for injuries to hogs in transit, a carrier is not liable for any loss occurring after delivery of the hogs at destination and reshipment by the owner over another road to a different market.

the carrier into a tort feasor and hold him liable in trover for the value of the property.[73] Only damages proximately caused by the carrier's negligence may be recovered.[74]

For a breach of a carrier's duty owed to passengers, the damages recoverable include compensation for mental suffering and humiliation, bodily injury, discomfort and inconvenience, as well as for pecuniary loss.[75] Punitive damages are recovera-

Illinois Cent. R. Co. v. Holt [Ky.] 92 S. W. 540. Where goods are injured in transit by the negligence of the carrier, there is no liability for injury or depreciation in value after their arrival and the consignee's refusal to accept them. Carpenter v. Baltimore & O. R. Co. [Del.] 64 A. 252. Where a carrier fails to deliver goods on the date agreed but notifies the consignee of their arrival a few days later, and offers to return the goods to the consignor within ten days but receives an evasive reply, the consignor is not entitled to remain dumb awaiting an actual return of the goods for the purpose of increasing his damages. Clark v. American Exp. Co. [Iowa] 106 N. W. 642. Where shipper of fruit, which was delayed in transportation to New York, arriving too late to be sent on a vessel on which the shipper had engaged refrigerated space, sent it to England on a later vessel which had no refrigerated space, instead of selling in New York, and the fruit arrived in Liverpool in a damaged condition, the shipper could not recover for the depreciated market value at Liverpool. Frey v. New York, etc., R. Co., 100 N. Y. S. 225.

73. Hence, consignee, who bought new machinery, could not refuse to receive old machinery delayed in shipment, and recover difference between those shipped and what he paid for the new. Illinois Cent. R. Co. v. Johnson [Tenn.] 94 S. W. 600. Where express company lost a trunk and could not deliver it when demanded, but later found and tendered it, it was liable only for damages caused by the delay, and not as for conversion. Wells, Fargo & Co. v. Hanson [Tex. Civ. App.] 14 Tex. Ct. Rep. 495, 91 S. W. 321.

74. Where in an action against a carrier for failure to furnish cars to transport sheep as per its agreement it appeared that the plaintiff, an experienced shipper, took out of the car furnished more sheep than was necessary to relieve the crowded condition of the car furnished, knowing that they would deteriorate while waiting for other cars, he could not recover for such deterioration. Ficklin v. Wabash R. Co. [Mo. App.] 92 S. W. 347. A common carrier is not responsible for injury occasioned by bad or imperfect packing or other negligence of the shipper, nor for ordinary wear and tear of goods in course of transportation nor for ordinary loss or deterioration in quality or quantity, nor any inherent infirmity or tendency to depreciate or damage. Carpenter v. Baltimore & O. R. Co. [Del.] 64 A. 252.

75. Mental distress caused by having to borrow money on a train from a stranger, the passenger's ticket having been refused, is a proper element of damage. Missouri, etc., R. Co. v. Welch [Tex. Civ. App.] 15 Tex. Ct. Rep. 139, 91 S. W. 621. Inconvenience and discomfort resulting from inability to secure a berth on a train, owing to lack of funds caused by cash fare being demanded, the passenger's ticket being refused, held a proper element of recovery. Id. A passenger who is negligently carried beyond his destination may recover for injuries sustained in walking back if walking was reasonable under the circumstances, otherwise only the reasonable cost of a carriage, and compensation for delay. Chesapeake & O. R. Co. v. Lynch [Ky.] 89 S. W. 517. Compensatory damages may be recovered for physical inconvenience, discomfort, and pain resulting from a breach of contract to reserve a drawing room in a sleeping car for a man and his wife, who in consequence are compelled to sit up the greater part of the night and to change cars twice, and a verdict of $125 recovered therefor is not excessive. Pullman Co. v. Willett, 7 Ohio C. C. (N. S.) 173. For failure of a train to stop at a flag station for a passenger, inconvenience resulting directly from the negligence is an element of damages. Milhous v. Southern R. Co., 72 S. C. 442, 52 S. E. 41. Where a railroad station agent misrepresents, to persons desiring to purchase tickets, the best route to take, and his advice is acted upon, and because of such misrepresentation the passengers are on the road longer than was necessary, and were required to make several unnecessary changes, during one of which the passenger was injured, he may recover for such injuries and for being required to make the greater number of changes as well as for delay. St. Louis, etc., R. Co. v. White [Tex.] 14 Tex. Ct. Rep. 168, 89 S. W. 746. In an action for mistreatment of plaintiff and her sick daughter, while passengers, the carrier's servants refusing them assistance in getting off the train, whereby they were delayed and caused much trouble in getting hotel accommodations, such delay and trouble, and plaintiff's consequent mental suffering, were elements of damage. Gulf, etc., R. Co. v. Coopwood [Tex. Civ. App.] 96 S. W. 102. For **wrongful ejection** from a train a passenger may recover compensation for loss of time, humiliation, inconvenience, and suffering in mind and body. Missouri, etc., R. Co. v. Smith [Ind. T.] 89 S. W. 668. A passenger wrongfully ejected may recover just compensation, including time lost, physical inconvenience, and mental suffering or humiliation, and is not limited to his mere pecuniary loss. Ammons v. Southern R. Co., 140 N. C. 196, 52 S. E. 731. Held error to refuse to charge that, if plaintiff had a contagious disease when he presented himself for passage on defendant's cars, he could recover only the sum paid for the sleeping car space with interest. Pullman Co. v. Krauss [Ala.] 40 So. 398. In an action against a carrier for failure to stop and receive a passenger, the price of the ticket

ble when the breach of duty is attended by aggravating circumstances.[76] For loss of a passenger's baggage, the carrier is liable only for the value, not necessarily the market value, but the value for the use of the owner.[77] In the absence of notice of special circumstances there can be no recovery for the expense or trouble incurred in the effort to recover it or for being deprived of its use, or for the cost of other apparel.[78]

Actions for failure to deliver telegrams or for erroneous transmission or delayed delivery are usually considered actions ex contractu, and the measure of damages is the rule applied in other actions based upon breach of contract.[79] There is a conflict of authority on the question whether the measure of damages is governed by the law of the place where a telegram is filed for transmission or the place of delivery.[80] In many jurisdictions recovery may in such case be had for mental anguish[81] as well as for pecuniary loss. In either case the damages claimed must be

is an element of damage. Caldwell v. Atlantic Coast Line R. Co. [S. C.] 55 S. E. 131. Instruction held not to encourage jury to find punitive damages. Id. Where a sleeping car passenger was compelled to leave the car by threats and arguments beyond the limit of persuasion, attracting the attention of others to her and causing humiliation, the question of mental suffering was properly submitted. Pullman Palace Car Co. v. Hocker [Tex. Civ. App.] 15 Tex. Ct. Rep. 330, 93 S. W. 1009. If by mistake a common carrier through its agents ejects from its train a passenger who has not forfeited his rights it is liable in damages, the good faith of the agents being only available in defeating a recovery of punitive damages. Seaboard Air Line R. Co. v. O'Quin, 124 Ga. 357, 52 S. E. 427. Where a passenger was wrongfully required by the brakeman to leave the car but was immediately given permission to return, she could recover compensation for leaving and returning. If the brakeman insulted her the jury might in their discretion award punitive damages not exceeding the amount claimed in the petition. Southern R. Co. v. Thurman [Ky.] 90 S. W. 240. Compensatory damages for the manner of ejecting a passenger, there being no question of the right to eject, is compensation for any loss of time and any pain and suffering by reason of any unnecessary force used in ejecting her, and for any humiliation suffered by reason of abusive language used toward her. Louisville & N. R. Co. v. Fowler [Ky.] 96 S. W. 568.

76. See, also, supra § 1, Exemplary Damages. To entitle a passenger to punitive damages for wrongful expulsion from a train, the expulsion must be attended by such circumstances as show rudeness, insult, or circumstances calculated to humiliate him. Such damages are not warranted where the passenger is merely told that he must get off unless he pays his fare, and on his refusal the train is stopped and he alights without anything further being said. Ammons v. Southern R. Co., 140 N. C. 196, 52 S. E. 731. Code 1902, c. 2139, covers all damages for willful failure of a railroad to give signals as required by § 2132, and punitive damages may be recovered thereunder in a proper case. Cole v. Blue Ridge R. Co. [S. C.] 55 S. E. 126. Though the words "willful" and "wanton" were not included in the complaint, the word "reckless" was sufficient to authorize a recovery of punitive damages under Code 1902, § 2139, for failure to give signals at a railroad crossing. Id. In an action for failure to transport a passenger, instruction that to warrant punitive damages there must be willfulness, wantonness, recklessness, and an utter disregard of the rights of the person injured, held not erroneous on the ground that any one of the elements is sufficient. Tucker v. Southern R. Co. [S. C.] 55 S. E. 154.

77, 78. Turner v. Southern R. Co. [S. C.] 54 S. E. 825.

79. See supra § 4 A.

80. A statute authorizing recovery from telegraph companies doing business in the state for mental anguish resulting from negligence in receiving, sending, or delivering messages, authorizes such recovery, though such element cannot be considered in the state where the telegram was sent. Western Union Tel. Co. v. Ford [Ark.] 92 S. W. 528. The measure of damages for delay in delivering a telegram is not governed by the laws of the state from which the telegram was sent. Hughes v. Western Union Tel. Co., 72 S. C. 516, 52 S. E. 107. For contra view, see 4 C. L. 1665.

81. The sender of a telegram can recover for mental anguish suffered as a proximate consequence of a failure to deliver his message. Western Union Tel. Co. v. Long [Ala.] 41 So. 965. Kirby's Dig. § 7947, authorizing recovery for mental anguish resulting from negligence in delivery of telegrams, applies to railroads operating telegraph lines, as well as to telegraph companies. Arkansas & L. R. Co. v. Stroude [Ark.] 91 S. W. 18. There may be a recovery for mental anguish for failure to deliver a telephone message as well as for nondelivery of a telegram. Cumberland Tel. & T. Co. v. Atherton [Ky.] 91 S. W. 257. Refusal of a telegraph company to transmit a message from a wife to a husband announcing death of one child and sickness of another, and requesting him to attend the funeral, authorizes a recovery for mental anguish suffered by the sender. Western Union Tel. Co. v. Simmons [Tex. Civ. App.] 15 Tex. Ct. Rep. 349, 93 S. W. 686. In Indiana, damages are not recoverable for mental anguish alone. Kagy v. Western Union Tel. Co. [Ind. App.] 76 N. E. 792. Rev. St. 1899, § 1259, providing for liability for

such as arise naturally and directly from the wrongful act or negligence of the telegraph company,[82] or such as may reasonably be supposed to have been in the contemplation of the parties, as the probable result of a breach of the company's contract to transmit correctly and within a reasonable time.[83] Hence, the message must on its face apprise the company of its importance,[84] unless notice of its importance and the probable consequence of a failure to deliver promptly is otherwise given.[85] It must be made to appear that the damage complained of would have been prevented by a prompt and correct transmission and delivery,[86] and that the

negligence in transmission of telephone and telegraph messages, is held not to apply to foreign companies doing business in Missouri. McCarty v. Western Union Tel. Co., 116 Mo. App. 441, 91 S. W. 976. Plaintiff held not entitled to recover for mental anguish for failure to deliver a telegram where defendant company did not have notice of her interest in the telegram. Poteet v. Western Union Tel. Co. [S. C.] 55 S. E. 113.

82. McCarty v. Western Union Tel. Co., 116 Mo. App. 441, 91 S. W. 976. For delay in delivery of a message to an agent telling him not to pay more than $3 per barrel for rice where he had been paying $3.25, and no rice was sold at such latter price the day he should have received the telegram except to him, the sender was held entitled to recover an amount equal to 25 cents per barrel on the rice purchased at that price as a result of its negligence. Western Union Tel. Co. v. Houston Rice Mill. Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 652, 93 S. W. 1084. Where company failed to deliver telegram to sender's brother asking him to send money to sender's son who was sick, the sender's loss caused by selling furniture and tools at a sacrifice to raise money for the son and his mental suffering caused by the son's sickness and death were too remote to be recoverable elements of damage. Gooch v. Western Union Tel. Co. [Ky.] 90 S. W. 587. There can be no recovery for mental anguish for failure to deliver a telegram which is a mere continuance of a state of mind existing at the time the message is sent. Western Union Tel. Co. v. Craven [Tex. Civ. App.] 14 Tex. Ct. Rep. 819, 95 S. W. 633. In an action for failure to deliver a telegram which informed the telegraph company that the addressee's wife was sick in child birth, damages for mental suffering resulting from inability to attend at the death or burial of the child cannot be recovered unless the death occurred during parturition. Id.

83. The rule that where special damages are sought to be recovered for breach of a contract it must be made to appear that the person against whom a recovery is sought had notice of the special circumstances out of which the damages claimed arose, is held applicable in actions for negligence in the delivery of telegrams, whether the particular action is ex contractu or ex delicto, or whether the damages sought are for mental suffering or pecuniary loss. Western Union Tel. Co. v. Hogue [Ark.] 94 S. W. 924.

84. Where the character of the message is such as to indicate that unless an answer was received the sender would undertake a journey, in an action for negligent failure to deliver such telegram, the journey having been made, the cost thereof is an element of damage. Hall v. Western Union Tel. Co., 139 N. C. 369, 52 S. E. 50. Where a message shows on its face that a business transaction is contemplated and that negligence in its transmission may reasonably be attended with loss, the actual damages resulting from a mistake in transmission may be recovered. Owing to mistake in telegram, parties to a sale misunderstood each other as to price offered and seller lost on the deal. McCarty v. Western Union Tel. Co., 116 Mo. App. 441, 91 S. W. 976. A telegram reading "I will be there on the evening train" held not to give notice to company of its importance so as to warrant recovery for mental anguish for its nondelivery, where the sender and person to whom it was sent were engaged, and the message related to the time of the marriage. Western Union Tel. Co. v. Hogue [Ark.] 94 S. W. 924. Following telegram held to give notice of its importance and to warrant recovery for mental anguish of sender caused by nondelivery: "My baby is dead. 'Phone Mr. Green also H. M. Long at Dr. Sherman's at Lathomville. I will be at your place tonight. Meet us with conveyance." Western Union Tel. Co. v. Long [Ala.] 41 So. 965. Where an agent of a telegraph company can see from the message to be sent that the wife of the addressee is sick, it is charged with notice of the character of the sickness. Western Union Tel. Co. v. Craven [Tex. Civ. App.] 14 Tex. Ct. Rep. 819, 95 S. W. 633.

85. Where a telegraph company refuses to send a telegram announcing death and requesting the husband of the sender to attend the funeral, and all the circumstances are explained to the agent, the company is chargeable with notice that the funeral could be postponed until the arrival of the sender, and is liable for mental anguish resulting from his nonattendance. Western Union Tel. Co. v. Simmons [Tex. Civ. App.] 15 Tex. Ct. Rep. 949, 93 S. W. 686. Where a wife who missed a train writes out a telegram to her husband and informs the operator that if it is not delivered her husband will be worried, the company is charged with notice that if the telegram is not delivered actionable suffering and mental anguish may result. Davis v. Western Union Tel. Co., 139 N. C. 79, 51 S. E. 898. Where message read: "Bob fatally shot. Want Minnie at once," and sender told operator the persons mentioned were brother and sister, the company had notice of the importance of the message, and that the sister would suffer if the message were not promptly delivered. Western Union Tel. Co. v. Campbell [Tex. Civ. App.] 14 Tex. Ct. Rep. 484, 91 S. W. 812.

86. Where an agent is in the office outside

party complaining was free from contributory negligence.[87] Mental anguish will be presumed as a consequence of the nondelivery of an important social message only when a close relationship between the complaining party and the person whom the message concerns is shown.[88] Nominal damages at least may be recovered for nondelivery of a message,[89] and if the default of the company is made mischievous to a party only by some other intervening cause, only such damages may be had.[90]

(§ 4) *G. Contracts for services.*[91]—The measure of recovery for wrongful discharge is the compensation for the remainder of the term,[92] less what the employe has, or could, by reasonable diligence, have earned.[93] For refusal to accept services, the agreed compensation, or reasonable compensation,[94] less the cost of performance,[95] may be recovered. For failure to furnish agreed services the cost of procuring such services, above the agreed compensation, may be recovered.[96]

of office hours and receives a message announcing serious illness, and death occurs before succeeding office hours, the company is not liable for mental anguish caused by absence from deceased while yet alive. Roberts v. Western Union Tel. Co. [S. C.] 53 S. E. 985. Where the only mental anguish that could have been suffered for delay in delivering a telegram was from inability to attend a funeral, it was proper to instruct that if the recipient had no intention to attend she could not recover. Id. Where delay in delivery of a telegram announcing death makes it impossible for the recipient to attend the funeral, but it appears that he probably would have had time but for the delay, he may recover for anxiety caused by the delay, though as a matter of fact the funeral had been fixed at a time at which he could not arrive. Hughes v. Western Union Tel. Co., 72 S. C. 516, 52 S. E. 107. Where a telegraph company fails to deliver a message announcing a death until it is too late for the recipient to attend the funeral, he cannot recover for deprivation of the consolation of attending the funeral, but he may recover for pain caused by being deprived of such privilege. Id. Damages for mental suffering caused by failure to deliver a telegram held not recoverable unless physician summoned could have reached the sender's sister before her death, had the message been promptly delivered. Western Union Tel. Co. v. Haley, 143 Ala. 586, 39 So. 386.

87. Where in an action against a telegraph company for delay in delivering a message it appears that no degree of diligence or the use of other means of communication could have relieved plaintiff from the consequences of the company's default, it was not error to refuse to charge that, if mental anguish could have been prevented by using other means of communication, there could be no recovery. Willis v. Western Union Tel. Co. [S. C.] 53 S. E. 639.

88. A brother may recover damages for mental suffering caused by failure to deliver his telegram summoning the family physician to attend his sick sister, if the physician did not attend her by reason of the failure to deliver the message. Western Union Tel. Co. v. Haley, 143 Ala. 586, 39 So. 386. Mental anguish is not presumable in an action against a telegraph company for delay in delivering a message which prevented one from attending the funeral of his brother-in-law, but must be proved. Alexander v. Western Union Tel. Co. [N. C.] 53 S. E. 657. It was proper for the plaintiff to show that he and his relative were intimate friends, that affectionate relations existed between them, and that they felt toward each other as brothers. Id.

89. For a negligent failure to deliver a telegram, plaintiff is at least entitled to nominal damages. Western Union Tel. Co. v. Haley, 143 Ala. 586, 39 So. 386.

90. Failure to deliver telegram asking price of fruit to proper party held not proximate cause of sender's loss where he himself was negligent and another party's act also intervened to cause his loss on a car purchased. Western Union Tel. Co. v. Barlow [Fla.] 40 So. 491.

91. See 5 C. L. 922; also Master and Servant, 6 C. L. 521.

92. Contract for services provided that salesman should receive $10 a week when traveling and $20 when at home. Upon his wrongful discharge he was entitled to receive as damage $20 for the remainder of the term, his traveling being in the discretion of his employer. Schreiber v. Klingenstein, 95 N. Y. S. 549.

93. See Master and Servant, 6 C. L. 521.

94. For breach of contract to pay a real estate broker a certain amount as commission for procuring a purchaser, the measure is the amount of the commission. Tuffree v. Binford [Iowa] 107 N. W. 425. For breach of contract employing a broker to procure a purchaser for real estate, the measure is either the commission provided for in the contract or reasonable compensation. Dal v. Fischer [S. D.] 107 N. W. 534.

95. The measure of damages for refusal to allow a building contractor to do the work contracted for is the difference between the contract price and what the work would have cost if done according to the terms of the contract. Hayes v. Wagner, 220 Ill. 256, 77 N. E. 211. Instruction held to cover proposition that in estimating damages for breach of contract a reasonable reduction should be made for the expense and time which a completion of the contract according to its terms would have involved. Magnolia Metal Co. v. Gale [Mass.] 78 N. E. 128. In an action by an architect for failure to allow performance of a contract for services, the architect was not entitled to a certain percentage of the actual cost of the building erected by defendant, less his

(§ 4) *H. Promise of marriage.*[97]—For breach of marriage promise both the actual and reputed wealth of the defendant are to be considered in estimating damages.[98]

§ 5. *Measure and elements of damages for torts. A. In general; miscellaneous torts.*[99]—Generally speaking, in actions ex delicto, damages may be recovered for all the natural and probable consequences of the wrongful act.

Alienation of affections.[1]—Loss of services may constitute an element of damages, but is not necessary to the maintenance of the action[2] since the husband may recover for loss of consortium, though no other damage be claimed.[3] Similarly, the wife, in a suit for alienation of the husband's affections, may recover for the loss of consortium, and any other losses consequent upon the wrongful act, if of such a character that damages therefor are ascertainable.[4] In determining her pecuniary loss and loss of support,[5] the husband's earning capacity and financial condition may be considered.[6] Where two defendants are sued jointly, the reputed wealth of one cannot be shown as an aid in the measure of damages.[7] Evidence tending to show unhappy relations and want of affection between the spouses prior to defendant's interference is admissible in mitigation of damages.[8]

Fraud and deceit.[9]—To support an action at law for deceit, actual damages must have resulted.[10] In some jurisdictions, the measure of damages for fraud inducing a purchase of property is the difference between the actual and the represented value;[11] in others it is the difference between the contract price and the fair market value.[12] When a vendor selling by the acre misrepresents the number of acres in the tract he is liable to the vendee at the specified price per acre for the difference between the actual acreage and the acreage represented.[13] Where one is

earnings and probable expenses, where there was no finding as to the last two items. Fitzhugh v. Mason [Cal. App.] 83 P. 282.

96. Where one who contracts to handle a railroad company's freight at a terminal point at so much per ton breaks the contract, the company may recover the difference between the contract price and the reasonable cost of doing the work, it having assumed further performance but not amounts paid by it for Sunday labor, nor the amount paid the contractor after the breach. Eastern R. Co. v. Tuteur [Wis.] 105 N. W. 1067.

97. See 3 C. L. 1013.

98. McKee v. Mouser [Iowa] 108 N. W. 228.

99, 1. See 5 C. L. 923.

2, 3. Gregg v. Gregg [Ind. App.] 75 N. E. 674.

4. Gregg v. Gregg [Ind. App.] 75 N. E. 674. In fixing the amount of damages for alienation of affections of a husband, the loss of his affection, society, support, and protection, and the injury to the wife's feelings, may be considered. Noxon v. Remington [Conn.] 61 A. 963.

5. Harvey v. Harvey [Neb.] 106 N. W. 660.

6. Harvey v. Harvey [Neb.] 106 N. W. 660. Evidence of the financial ability of the defendant should be limited to his reputed wealth in the community. Leavell v. Leavell, 114 Mo. App. 24, 89 S. W. 55. Defendant may prove that plaintiff has a separate income which had been applied to the family expenses. Dunham v. McMichael [Pa.] 63 A. 1007.

7. Leavell v. Leavell, 114 Mo. App. 24, 89 S. W. 55.

8. Humphrey v. Pope [Cal. App.] 82 P. 223.

9. See 5 C. L. 924.

10. Where farm was worth $20,000, there could be no recovery by purchasers at that price, though seller represented that he had paid $20,000, whereas he had in fact only paid $16,000. Thompson v. Newell [Mo. App.] 94 S. W. 557.

11. The measure of damages for fraudulent misrepresentations as to the character of a rooming house sold is the difference between the real and represented value of the house. Walsh v. Meyer, 40 Wash. 650, 82 P. 938. In an action by a vendee to recover for fraudulent misrepresentations as to the rent received by the vendor, the measure of damages is the difference between the market value of the property if it had brought in the rent represented and its actual market value. Ettlinger v. Weil [N. Y.] 77 N. E. 31. Value of property if it had been as represented, regardless of the price at which it was sold, is the criterion is determining the damages sustained. McCabe v. Desnoyers [S. D.] 108 N. W. 341.

12. Where vendor said he would sell at cost, $20,000, but the land only cost him $16,000, there could be no recovery, the land being proved to be worth $20,000. Thompson v. Newell [Mo. App.] 94 S. W. 557. The measure of damages for fraudulent misrepresentation that there was a gusher on land sold is not the difference in value of the land with and without a gusher, but the difference between the consideration paid and the real value of the land. George v. Hesse [Tex.

induced by false representations to take out life insurance, the damages recoverable are the amount of premiums paid with interest from date of payment.[14]

Malicious prosecution and abuse of process.[15]—The fact that a person arrested does not secure his release upon his own recognizance does not as a matter of law indicate that he attached small importance to his arrest or imprisonment or deprive him of the right to damages on the ground that he does not consider himself injured.[16] For the issuance and levy of a writ of attachment in the absence of statutory grounds, the plaintiff in the writ is liable for actual damages.[17] If levied upon exempt property by order of the plaintiff, both he and the levying officer would be liable in any event for actual damages.[18] In the case of attachment of personal property, the measure of damages is the difference in value of the attached property when seized and when restored, with the loss of its use meanwhile.[19] The same rule applies where corporate stock is attached, and if the stock attached was bought for a resale, which was prevented, the loss so occasioned may also be recovered.[20] The wrong done by the mere issuance of a writ of attachment upon real estate, without other evidence of actual injury, will not sustain a recovery of substantial damages.[21] Where property is mistakenly levied upon, the measure of damage is the injury suffered[22] by plaintiff.[23]

False imprisonment.[24]

(§ 5) *B. Loss of, or injury to, property.*[25]—If an injury to land is temporary, the measure of recovery is the depreciation in the reasonable rental value of the land from the time of injury,[26] together with the cost of repairs.[27] If an injury to land is permanent, the measure of recovery is generally the depreciation in the market value of the land directly caused by the injury;[28] but the depreciation in value for

Civ. App.] 16 Tex. Ct. Rep. 359, 94 S. W. 1122; Id. [Tex.] 15 Tex. Ct. Rep. 824, 93 S. W. 107.

13. Lang v. Merbach [Minn.] 105 N. W. 415.

14. Caldwell v. Life Ins. Co., 140 N. C. 100, 52 S. E. 252.

15. See 5 C. L. 924.

16. Reynolds v. Dunlap [Kan.] 84 P. 720.

17, 18. Faroux v. Cornwell [Tex. Civ. App.] 13 Tex. Ct. Rep. 977, 90 S. W. 537.

19. McCarthy Co. v. Boothe [Cal. App.] 83 P. 175.

20. So held in action on undertaking for attachment in the statutory form. McCarthy Co. v. Boothe [Cal. App.] 83 P. 175.

21. New Sharon Creamery Co. v. Knowlton [Iowa] 108 N. W. 770.

22. Error to give an instruction to award the rental value of the property during the period held where it appeared that it was in storage at the time. Shearer v. Taylor [Va.] 55 S. E. 7. The rental value should be determined as of the place of levy and evidence of rental value in another city is inadmissible. Id.

23. Where the mother and sister of plaintiff testified that "we" wanted to go housekeeping and "we" couldn't get the furniture and it was not certain that "we" included plaintiff, a specific instruction limiting recovery to damages of plaintiff should have been given. Shearer v. Taylor [Va.] 55 S. E. 7.

24, 25. See 5 C. L. 924.

26. Crabtree Coal Min. Co. v. Hamby's Adm'r [Ky.] 90 S. W. 226. In action for damages from overflow, rental and market value prior to overflow could be shown. Central of Georgia R. Co. v. Keyton [Ala.] 41 So. 918.

27. Cost of repairing the injury to the premises, together with the value of the use of the premises during the time it was not possible to repair. City of Chicago v. Rust, 117 Ill. App. 427. Where loss of spring was supplied by piping water from another, the measure so far as that spring is concerned is the cost of piping. Rabe v. Schoenberger, 213 Pa. 252, 62 A. 854. For flooding land, the sum necessary to put it in the condition it was in prior to the overflow. Chicago, etc., R. Co. v. Seale [Tex. Civ. App.] 14 Tex. Ct. Rep. 48, 89 S. W. 997. But expenditures must be proved to have been reasonable. Id.

28. Crabtree Coal Min. Co. v. Hamby's Adm'r [Ky.] 90 S. W. 226. Where a miner fails to leave sufficient support for the surface, causing destruction of springs, damages are depreciation in value. Rabe v. Schoenberger Coal Co., 213 Pa. 252, 62 A. 854. Pollution of stream. Carpenter v. Lancaster, 212 Pa. 581, 61 A. 1113. Where a common carrier maintains an unauthorized business in the street, an abutter may recover damages for a permanent injury. Rockford & I. R. Co. v. Keyt, 117 Ill. App. 32. For breach of contract not to pasture cattle on certain lands during the wet season, whereby the land was cut up and the turf and forage destroyed, the measure of damages was held the difference in market value of the land immediately before and immediately after the acts complained of. Nuckoils v. Powell [Tex. Civ. App.] 14 Tex. Ct. Rep. 438, 90 S. W. 933. For injuries to land caused by the exercise of the power of eminent domain the measure is the difference in value immediately before and immediately

the special use to which it is put by the owner may be considered.[29] An injury to land is permanent as distinguished from a continuing one when it is done at once by the unlawful act or negligent omission, from which the loss results without repetition of the act, there being but one act and one damage, though the latter may be composed of several items.[30] Injury to crops may be considered in connection with a permanent injury caused by the wrong complained of[31] if there is proof of such injury.[32] The measure of damages for injuries to crops is the difference in market value before and after the injury.[33] If the injury is to a growing crop, the measure is the difference between the probable value of the matured crop and the cost of cultivating, gathering, and placing it on the market.[34] It is held in Texas that, where growing trees are destroyed, the owner of the land may ordinarily sue for the injury to the land or for the value of the trees,[35] the measure of damages in the first case being the diminished value of the land to the owner for the use to which he was devoting it,[36] and in the second case the value of the trees detached from the soil.[37] But where the trees destroyed have no value when detached from the soil, damages can be recovered only in an action for injury to the land.[38] In Nebraska, the measure of damages to growing trees having no value for purposes of transplanting, is held to be the value of the trees with reference to the land in the situation in which they stood prior to the damage, less their value for practical purposes afterwards.[39] The measure of damages for the negligent destruction of fruit trees on land leased by plaintiff is the difference between the value of the fruit crop before and after the injury,[40] and recovery under this rule is not prevented by the fact that at the time of

after the exercise of the power. Brown v. Weaver Power Co., 140 N. C. 333, 52 S. E. 954. Where one landowner constructs on his land an insufficient culvert for the drainage of surface water, thereby injuring the land of an adjacent proprietor, the measure of damages is the depreciation in the value of the land. Harvey v. Mason City & Ft. D. R. Co. [Iowa] 105 N. W. 958. The measure of damages to a riparian owner, caused by the wash from mines poured into the stream above him, is the difference in the value of the land before and after the injury occurred, and not the depreciated rental value from the date of the occurrence of the injury. Upson Coal & Min. Co. v. Williams, 7 Ohio C. C. (N. S.) 293.

29. Rockford & I. R. Co. v. Keyt, 117 Ill. App. 32. One whose wrongful act causes the destruction of trees cannot say that the land will produce as much revenue if used for other purposes. Galveston, etc., R. Co. v. Warnecke [Tex. Civ. App.] 15 Tex. Ct. Rep. 746, 95 S. W. 600.

30. Mast v. Sapp, 140 N. C. 533, 53 S. E. 350. Damages arising from the occasional flooding of land by reason of an insufficient culvert on the land of an adjacent proprietor are not original but continuous. Harvey v. Mason City & Ft. D. R. Co. [Iowa] 105 N. W. 958.

31. Harvey v. Mason City & Ft. D. R. Co. [Iowa] 105 N. W. 958. For injuries to crops by flooding, the measure is the difference between what the land would otherwise have produced and what it did produce less the difference in the cost of harvesting a full crop and the crop actually raised. St. Louis S. W. R. Co. v. Morris [Ark.] 89 S. W. 846. Where a fire killed timothy roots and prevented a crop next season, the damage was to the inheritance, and the rule of damages was the difference in market value before and after the injury. Wiggins v. St. Louis, etc., R. Co. [Mo. App.] 95 S. W. 311.

32. Where there is no proof of loss of crops but only of permanent injury to the land, damages should be based on such permanent injury alone. Tutwiler Coal, Coke & Iron Co. v. Nichols [Ala.] 39 So. 762.

33. Rule of damages for injury to rice crop by overflow is difference between market value before and after injury. Colorado Canal Co. v. Sims [Tex. Civ. App.] 15 Tex. Ct. Rep. 944, 94 S. W. 365. In an action for injuries to a crop of cotton by flooding land, the value of the seed and lint are elements of damage, hence evidence of such value is admissible. St. Louis S. W. R. Co. v. Jenkins [Tex. Civ. App.] 14 Tex. Ct. Rep. 77, 89 S. W. 1106.

34. City of Paris v. Tucker [Tex. Civ. App.] 15 Tex. Ct. Rep. 240, 93 S. W. 233. Evidence as to the value of grass burned held inadmissible as not tending to prove market value, but only special value to owner. Texas & P. R. Co. v. Pemberton [Tex. Civ. App.] 95 S. W. 1089. For injury to a crop by diverting the natural flow of water, the measure is the value of the crop destroyed, and not the cost of removing the obstruction to the stream where to remove such obstruction the owner of the crop would have been required to commit a trespass. Cincinnati, etc., R. Co. v. Ward, 120 Ill. App. 212.

35, 36, 37, 38. Galveston, etc., R. Co. v. Warnecke [Tex. Civ. App.] 15 Tex. Ct. Rep. 746, 95 S. W. 600.

39. Union Pac. R. Co. v. Murphy [Neb.] 107 N. W. 757.

40. Ascertained by deducting cost of

the destruction of the trees the fruit had not appeared.[41] The measure of damages for loss of lateral support is the difference between the value of the property before and after the landslide, or the cost of repairing the damages, whichever is the less.[42] The mere fact that land is more valuable after an injury than it was before does not prevent a recovery, since the owner may recover the difference between the value of the land and what it would have been worth if uninjured.[43] One injuring a way appurtenant to lands is not liable to a subsequent purchaser of the lands for damage sustained before his purchase.[44]

For loss or destruction of personal property or fixtures, the actual value of the property when lost or destroyed may be recovered.[45] For injuries to personal property, the difference between the value before and after the injury,[46] or the value of the use[47] and the cost of repairs,[48] may be recovered though the efforts to repair prove futile.[49] The measure of damages for waste committed on mortgaged premises is the diminution of the mortgage security caused thereby.[50]

(§ 5) *C. Maintaining nuisance.*[51]—For maintenance of a nuisance, damages may be recovered for interference with the reasonable use and enjoyment of the property,[52] for material injury to the property caused by the nuisance,[53] and for loss

growing and marketing crop from its market value. Putnam v. St. Louis S. W. R. Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 651, 94 S. W. 1102.

41. Putnam v. St. Louis, etc., R. Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 651, 94 S. W. 1102.

42. Verdict for plaintiff held not against the weight of the evidence. Riley v. Continuous Rail Joint Co., 110 App. Div. 787, 97 N. Y. S. 283.

43. This is the rule where there has been a general increase in land values. Crabtree Coal Min. Co. v. Hamby's Adm'r [Ky.] 90 S. W. 226.

44. Question regarding injury to culverts objectionable because not confined to time after purchase. Couson v. Wilson [Cal. App.] 83 P. 262.

45. In action for destruction of fence by fire, the measure of damages was actual value of fence as it stood, ascertained by finding cost of replacing it. Wiggins v. St. Louis, etc., R. Co. [Mo. App.] 95 S. W. 311. Where an animal killed on a railroad has no market value, its intrinsic value may be shown and recovered. International, etc., R. Co. v. Carr [Tex. Civ. App.] 14 Tex. Ct. Rep. 864, 91 S. W. 858; Gulf, etc., R. Co. v. Blake [Tex. Civ. App.] 16 Tex. Ct. Rep. 264, 95 S. W. 593. For killing a dog, the measure is the value of the dog. Loss of the dog's company and deprivation of the pleasure and amusement he afforded are not elements. Klein v. St. Louis Transit Co. [Mo. App.] 93 S. W. 281. Rule of damages for destruction of rice in shock is market value at the time and place of destruction less the expense of threshing and sacking. Colorado Canal Co. v. Sims [Tex. Civ. App.] 15 Tex. Ct. Rep. 944, 94 S. W. 365. For loss of graded milch cows, the measure of damages is the value of the cows as milch cows and not their value for beef, though they are dry at the time of injury. Southwestern Tel. & T. Co. v. Krause [Tex. Civ. App.] 92 S. W. 431. The value of household goods which have been used is not limited by the market value of such goods as second-hand articles, although such value, if there is one, should be submitted to the jury. The owner should also be permitted to show what he considers them worth based upon his knowledge of what they cost, the character of the goods, and the usee to which he applied them. Economy Bldg. & Loan Co. v. Newman, 3 Ohio C. C. (N. S.) 213.

46. Automobile. Garrett v. People's R. Co. [Del.] 64 A. 254. Difference in the value; not the original cost of the goods. City of McCook v. McAdams [Neb.] 106 N. W. 988. Evidence of peculiar value of picture as a design is inadmissible. Wade v. Herndl [Wis.] 107 N. W. 4. Where waste consisted of the removal of fixtures neither the cost of replacing nor the amount received for the removed fixtures is the measure. Prudential Ins. Co. v. Guild [N. J. Eq.] 64 A. 694.

47. Evidence of usable value of horse during time plaintiff was deprived of its use was admissible. Buchanan's Sons v. Cranford Co., 98 N. Y. S. 378. In action for injuries to horse, it is error to allow damages for hire of another horse where it does not appear that anything was paid for the use of the other horse. Kaniuk v. Dry Dock, etc., R. Co., 96 N. Y. S. 129.

48. Cost of making repairs together with the value of the use of the property while repairs are being made. Berry v. Campbell, 118 Ill. App. 646.

49. For injuries to a horse, the cost of attempting to effect a cure, as well as its value if it becomes necessary to kill it as useless, is admissible on the question of damages. Hey v. Hawkins, 120 Ill. App. 483.

50. The diminution is the difference in the value of the premises at time of foreclosure sale and what would have been their value had waste not been committed. Prudential Ins. Co. v. Guild [N. J. Eq.] 64 A. 694.

51. See 5 C. L. 925.

52. Baltimore Belt R. Co. v. Sattler, 102 Md. 595, 62 A. 1125. Railroad company maintained an embankment destroying a crossing. Speer v. Erie R. Co. [N. J. Eq.] 62 A. 943. Railroad company occupies a

of sales or rental.[54] If a nuisance is temporary, the measure is the depreciation in rental value, or if occupied by the owner the damage to its use and occupation.[55] If a nuisance is permanent, the measure of damages is the depreciation in the market value of the property,[56] diminution in rental value being in such case merely incidental.[57] Damage to a lessee of premises caused by maintenance of a nuisance is the decrease in the usable value to the tenant, as distinguished from the rental reserved in the lease.[58]

(§ 5) *D. Trespass on lands.*[59]—The ordinary rule of damages in cases of trespass limits recovery to the value of the use and occupation to the owner,[60] or the damage to the freehold;[61] but where there is no damage of this kind, the trespasser is required to respond in damage for the value of the use to him.[62] This latter rule was applied where a telephone company was sued for attaching its wires to the roof of plaintiff's building and maintaining them there without a license.[63] In an action for trespasses on land, there can be no recovery for damages caused by trespasses committed after the filing of the declaration.[64]

(§ 5) *E. Conversion.*[65]—The measure of damages in actions of trover and conversion, where the property is not restored to the owner, is the market value of the property,[66] and the jury may assess the highest market value at any time from the date of the conversion to the time of trial.[67] The market value is the price at which the property can be replaced in the market.[68] For conversion and negotiation of a note before maturity the measure of damages is the face value of the note with interest.[69] Where, in conversion, the plaintiff's title is based on a mortgage, the measure of damages is the amount of the mortgage debt and interest, not to exceed the value of the property.[70] Where property

street with an embankment, preventing access to abutting property. Coats v. Atchison, etc., R. Co. [Cal. App.] 82 P. 640. Where one sues for injuries to property caused by smoke and cinders it is improper to charge that there could be no recovery, if, after institution of the action, the drawing of engines over the track had ceased. Baltimore Belt R. Co. v. Sattler, 102 Md. 595, 62 A. 1125.

53. Baltimore Belt R. Co. v. Sattler, 102 Md. 595, 62 A. 1125.

54. To prove the extent of loss of sales or rental, evidence of the market value of the property before and after the injury is the best evidence. Baltimore Belt R. Co. v. Sattler, 102 Md. 595, 62 A. 1125.

55. City of Madisonville v. Hardman [Ky.] 92 S. W. 930. For flooding a mining claim and preventing work thereon by lessees, the measure is the value of the use of the claim during the time they were prevented from working it, not the amount expended by them for equipment for prosecuting the work. Dalton v. Moore [C. C. A.] 141 F. 311.

56. City of Madisonville v. Hardman [Ky.] 92 S. W. 930. In action for damages for construction of railroad in street, evidence of the enhanced value of plaintiff's property "for warehouse purposes" should have been excluded, as it might induce the jury to believe they could award damages for any enhanced value. Romano v. Yazoo, etc., R. Co. [Miss.] 40 So. 150. A common carrier of passengers which departs from the business authorized by its charter and undertakes the freight business is liable to an abutting owner on a street over which it operates its cars for the depreciation in the value of his land as a result of carrying on the freight business. Rockford & I. R. Co. v. Keyt, 117 Ill. App. 32.

57. Central Consumers' Co. v. Pinkert [Ky.] 92 S. W. 957.

58. Bly v. Edison Elec. Illuminating Co., 97 N. Y. S. 592.

59. See 5 C. L. 926.

60, 61, 62, 63. Bunke v. New York Tel. Co., 110 App. Div. 241, 97 N. Y. S. 66.

64. Gulf & C. R. Co. v. Hartley [Miss.] 41 So. 382.

65. See 5 C. L. 926.

66. Posey v. Gamble [Ala.] 41 So. 416; Ryan v. Young [Ala.] 41 So. 954; Rosenkranz v. Jacobowitz, 99 N. Y. S. 469. Hence evidence that under a contract plaintiff could buy the goods for less than the market price was inadmissible, defendant not being entitled to the benefit of plaintiff's bargain. Hart v. Brierley, 189 Mass. 598, 76 N. E. 286. In an action in conversion by the owner against the warehouseman, the actual value of the goods is the measure of damages and not the price that they might sell for as second hand goods. Head v. Becklenberg, 116 Ill. App. 576.

67. Posey v. Gamble [Ala.] 41 So. 416; Gregg v. Bank of Columbia, 72 S. C. 458, 52 S. E. 195; Ryan v. Young [Ala.] 41 So. 954.

68. Rosenkranz v. Jacobowitz, 99 N. Y. S. 469.

69. Hubbard v. State Life Ins. Co. [Iowa] 105 N. W. 332. In an action for conversion of a note, the judgment may award interest from its date to judgment rendered whether the note provides for interest or not. Id.

70. Ryan v. Young [Ala.] 41 So. 954.

intended for sale at its destination is converted while in transit, the measure of damages is the market price at the place of destination at the time it would have arrived, less the expense of transportation and sale.[71] But if part of the property is bid in for plaintiff at sheriff's sale, the measure of damages for such portion is the amount of the bid.[72] In an action of trover, where the trespass is unintentional and innocent, there should be no deduction in the trespasser's favor from the value of the property at the time and place of conversion for the cost of any value-enhancing labor bestowed thereon prior to the time that conversion became complete by actual removal from the owner's possession.[73]

(§ 5) *F. Wrongful taking or detention of property.*[74]—Damages for detention in an action of detinue cover the loss by deterioration in the value of perishable property while wrongfully detained from the owner,[75] as well as the value of the use.[76] In an action of trover to recover specific property, the measure of damages is the value of the property at the time and place when taken under the order of delivery, including any enhancement in value of the property caused by defendant.[77] Damages for the withholding of real property cannot include speculative profits which might accrue from the joint use of real property, the possession of which is withheld, and of personal property which has no relation to the real property or to the controversy.[78]

(§ 5) *G. Libel or slander.*[79]—For slander and libel the damages recoverable and both compensatory and punitive,[80] and the amount to be allowed is peculiarly within the province of the jury.[81] The rank and condition of the plaintiff[82] as well as the means and wealth of the defendant[83] may be considered. It is not essential that plaintiff, to recover damages for libels actionable per se, should show actual pecuniary loss or that his injuries are capable of some definite money valuation.[84] There may in such cases be a recovery for injuries to feelings, and mental suffering, and for injuries to character and reputation and similar injuries incapable of definite money valuation, when proven.[85] It has been held that in a

71. Wrongful attachment. Wallingford v. Kaiser, 96 N. Y. S. 981.

72. Wallingford v. Kaiser, 96 N. Y. S. 981.

73. Peacock v. Feaster [Fla.] 40 So. 74.

74. See 5 C. L. 927.

75. Merchants' Nat. Bank v. Bales [Ala.] 41 So. 516.

76. In an action by the purchaser of a wagon and harness for detention thereof by the seller, evidence of the rental value per day computed for a long period of time is inadmissible. Parlin & Orendorff Co. v. Kittrell [Tex. Civ. App.] 16 Tex. Ct. Rep. 103, 95 S. W. 703.

77. Where logs were taken and hauled nearer the market and there taken under order of delivery, the enhanced value by reason of having been hauled nearer the market was recoverable. Little v. Cornett [Ky.] 91 S. W. 272.

78. Damages for withholding real property used in livery business cannot include profits which might have been made had plaintiff obtained teams, robes, etc., with which to conduct the business. Johnson v. Levy [Cal. App.] 86 P. 810.

79. See 5 C. L. 927.

80. The measure of damages for slander is such as will compensate the plaintiff and punish the defendant. Cairnes v. Pelton [Md.] 63 A. 105. Exemplary damages may be awarded where there is evidence of actual malice. Evidence held to show actual malice where there was reiteration of the statements and refusal to retract. Kloths v. Hess, 126 Wis. 587, 106 N. W. 251. Punitive damages for libel may not be recovered from a corporation which publishes a newspaper where it is not shown that the managing editor or other person entitled to represent the corporation had knowledge of the publication and where on request a retraction was published. Neafie v. Hoboken Print. & Pub. Co., 72 N. J. Law 340, 62 A. 1129.

81. The award of the jury will not be disturbed on appeal unless the amount is so excessive as to show prejudice, partiality, or corruption. Jacobs v. Glucose Sugar Refining Co., 140 F. 766.

82. In aggravation of actual damages, plaintiff may prove that he has a family of children and that by his own efforts he has built up a business. Smith v. Hubbell [Mich.] 12 Det. Leg. N. 860, 106 N. W. 547.

83. Cairnes v. Pelton [Md.] 63 A. 105.

84. Woodhouse v. Powles [Wash.] 86 P. 1063.

85. Woodhouse v. Powles [Wash.] 86 P. 1063. For slander consisting of words slanderous per se, the amount depends in part on the effect of the malice on the plaintiff's mind. Gendron v. St. Pierre [N. H.] 62 A. 966.

case of an article libelous per se some damage is presumed;[86] but actual damages will not usually be inferred from the mere proof of the libel; a claim therefor must be supported by some evidence.[87] When in an action for libel for the publication of statements libelous per se, the plaintiff waives any claim for punitive damages, it is the effect which the libel has on the minds of readers and not the intent on the part of the defendant to defame that is material in the consideration of damages.[88] Damages cannot be assessed for physical sickness alleged to have been caused by the libel and slander.[89] Where a libel is published concerning a business firm which is of such a character that it affects the members of the firm personally,[90] while the firm can recover only for damage to the business,[91] each member of the firm may maintain a personal action for damages.[92] Where an association of wholesale dealers report as delinquent a retailer who is not in fact delinquent, the latter may recover all actual damages suffered by him as a consequence.[93]

(§ 5) *H. Personal injuries.*[94]—For personal injuries there may be a recovery for mental and physical pain and suffering,[95] for physical inconvenience[96] and for permanent impairment of the mental and physical powers,[97] for necessary and reasonable[98] expenditures[99] for medical care and attention, and medicines,[1] for loss

86. Bohan v. Record Pub. Co. [Cal. App.] 82 P. 634.

87. Where there is no evidence of pecuniary loss, the plaintiff may not recover for injuries to his business. Smith v. Hubbell [Mich.] 12 Det. Leg. N. 860, 106 N. W. 547. Proof held not to warrant recovery of actual damages for alleged libel of credit. Woodhouse v. Powles [Wash.] 86 P. 1063.

88. Butler v. Every Evening Print. Co., 140 F. 934.

89. Butler v. Hoboken Print. & Pub. Co. [N. J. Law] 62 A. 272.

90. As a published statement concerning three fires, saying that the firm's explanation of them was not satisfactory and that the proprietor would be arrested if there was another. Bohan v. Record Pub. Co. [Cal. App.] 82 P. 634.

91, 92. Bohan v. Record Pub. Co. [Cal. App.] 82 P. 634.

93. Woodhouse v. Powles [Wash.] 86 P. 1063.

94. See 5 C. L. 927.

95. Bourke v. Butte Elec. & Power Co. [Mont.] 83 P. 470; Southern Cotton Oil Co. v. Skipper [Ga.] 54 S. E. 110; Colorado Springs & C. C. Dist. R. Co. v. Petit [Colo.] 86 P. 121. Evidence held to warrant instruction covering both bodily and mental pain and suffering. St. Louis S. W. R. Co. v. Dixon [Tex. Civ. App.] 14 Tex. Ct. Rep. 782, 91 S. W. 626. Evidence sufficient to show that an ulcer from which plaintiff was suffering was caused by his injuries. Hirte v. Eastern Wisconsin R. & Light Co. [Wis.] 106 N. W. 1068. In action for personal injuries instruction allowing compensation for pain and mental anguish and for the nervous shock held erroneous. Such sum should be allowed as would reasonably compensate for physical and mental suffering endured or which she would probably endure in the future, for loss of time, reasonable expenses and permanent impairment of earning capacity, that may have been caused by defendant's negligence. South Covington & C. St. R. Co. v. Core [Ky.] 96 S. W. 562. "Mental anguish" and "nervous shock" are not independent elements of damage. Id.

96. An instruction warranting such recovery is not objectionable as allowing recovery for loss of time from household duties. Costello v. St. Louis Transit Co. [Mo. App.] 96 S. W. 425.

97. Where there is satisfactory evidence showing an unbroken connection and continuous operation between a wrongful act causing an injury and a disease, there may be a recovery for damages suffered from the disease. Sallie v. New York City R. Co., 110 App. Div. 665, 97 N. Y. S. 491. For physical injuries all the resultant effects to the system due to the injury are elements. Porter v. Delaware, etc., R. Co. [N. J. Law] 63 A. 860. An injured person is entitled to recover for such injurious effects on her health as was caused by the negligence of the defendant. San Antonio & A. P. R. Co. v. Kivlin [Tex. Civ. App.] 16 Tex. Ct. Rep. 115, 93 S. W. 709. Testimony that injuries are permanent and that earning capacity is diminished if not destroyed, the injured person being before the jury, is sufficient upon which to predicate a finding as to permanent injuries. Id.

98. It is proper to limit the sum recoverable for medical attendance and medicines to sums necessarily expended. Mullen v. Galveston, etc., R. Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 963, 92 S. W. 1000. Physicians' charges cannot be recovered in the absence of proof that they were reasonable. Metropolitan St. R. Co. v. Wishert [Tex. Civ. App.] 13 Tex. Ct. Rep. 799, 89 S. W. 460. Medical and surgical expense in treating the injury cannot be allowed in the absence of proof that it is reasonable. Houston, etc., R. Co. v. McCarty [Tex. Civ. App.] 89 S. W. 805. The expense of medicines should not be submitted to the jury as a basis of recovery where the reasonableness of the charges therefor is not shown. Dallas Consol. Elec. St. R. Co. v. McAllister [Tex. Civ. App.] 14 Tex. Ct. Rep. 388, 90 S. W. 933. Expenses for compensation to nurses are recoverable though such services were per-

of time and wages,[2] and, where injuries are permanent, loss resulting from impairment of earning power.[3] In short, the damages recoverable are those which will compensate the injured person.[4] Compensation for future pain and suffering[5] or

formed by a member of plaintiff's family, if the services were necessary and the charges reasonable. Lewark v. Parkinson [Kan.] 85 P. 601.

99. In a personal injury action by a married woman, where there is no proof that credit for medical attendance was extended to her, presumption is that it was extended to the husband, and she cannot recover therefor. Montgomery St. R. Co. v. Smith [Ala.] 39 So. 757.

1. Chicago City R. Co. v. Henry, 218 Ill. 92, 75 N. E. 758. Where a seaman was injured and was taken to a hospital from which he was later discharged but injuries received other than those treated prevented him from working and required him to obtain board and medical attendance for some time, held that he was entitled to recover for the expense so incurred. The Henry B. Fiske, 141 F. 188.

2. Wages lost from time of injury to time of trial may be recovered. Bourke v. Butte Elec. & Power Co. [Mont.] 83 P. 470. From the mere fact that certain wages per week were received at the time of an accident it will not be inferred that the amount of the wage for the time an injured person is incapacitated is the measure of damages for the loss of time. Anderson v. Young [Minn.] 108 N. W. 298. In an action for personal injuries it is error to instruct the jury to consider plaintiff's loss of time without evidence of its value. Boyce v. Chicago & A. R. Co. [Mo. App.] 96 S. W. 670.

3. Bourke v. Butte Elec. & Power Co [Mont.] 83 P. 470. Earning capacity in any employment for which the injured person is fitted may be considered. Pecos & N. T. R. Co. v. Blasengame [Tex. Civ. App.] 15 Tex. Ct. Rep. 203, 93 S. W. 187. The fact that an action by a parent to recover wages for his child until he was of age was pending does not render inadmissible evidence of the child's earning capacity in an action by himself for the same injury. McMahon v. Bangs [Del.] 62 A. 1098. Where there is nothing in the evidence to indicate that either prior or subsequent to the injury the injured person was able to earn money otherwise than by manual labor, his ability to perform such labor is properly made the criterion in determining the damages recoverable. Bettis v. Chicago, etc., R. Co. [Iowa] 108 N. W. 103. In an action for permanent injuries, where plaintiff is entitled to recover full damages, fair and reasonable compensation for what he would otherwise have earned is an element. Southern Cotton Oil Co. v. Skipper [Ga.] 54 S. E. 110. Evidence of injuries to boy held to take to jury the issue whether they were permanent and would impair his earning capacity after reaching his majority. Western Coal & Min. Co. v. Honaker [Ark.] 96 S. W. 361. Impairment of earning capacity after majority may be considered where a boy seven years of age had a leg broken, which became crooked as a result, and sustained a concussion of the brain, which affected his nervous system. Wise v. St. Louis Transit Co. [Mo.] 95 S. W. 898.

4. Southern Cotton Oil Co. v. Skipper [Ga.] 54 S. E. 110; Waller v. Wilmington City R. Co. [Del.] 61 A. 874; San Antonio & A. P. R. Co. v. Wood [Tex. Civ. App.] 14 Tex. Ct. Rep. 489, 92 S. W. 259; Galveston, etc., R. Co. v. Vollrath [Tex. Civ. App.] 13 Tex. Ct. Rep. 777, 89 S. W. 279; Schmidt v. Interborough Rapid Transit Co., 97 N. Y. S. 390. Rev. Civ. Code §§ 2287, 2312, provides that the measure of damages for personal injuries is the amount that will compensate the injured person for all loss or harm suffered in person or property. Davis v. Holy Terror Min. Co. [S. D.] 107 N. W. 374.

General rule stated: For personal injuries the measure is such an amount as will compensate the injured party for expenses incurred in treating his injuries, for his bodily pain and suffering, loss of wages incurred in the past and for such permanent disability to earn a living in the future as may be the result of injuries sustained. Green v. Council of Newark [Del.] 62 A. 792; Hannigan v. Wright [Del.] 63 A. 234; Robinson v. Huber [Del.] 63 A. 873; White v. Wilmington City R. Co. [Del.] 63 A. 931; Jemnienski v. Lobdell Car Wheel Co. [Del.] 63 A. 935; Graboski v. New Castle Leather Co. [Del.] 64 A. 74; Garrett v. People's R. Co. [Del.] 64 A. 254. Instruction held to properly state the elements of damage in an action for personal injuries. Fisher v. St. Louis Transit Co. [Mo.] 95 S. W. 917. Reasonable compensation for physical and mental suffering, loss of time, medical expense, and impairment of earning ability is the measure of damages. South Covington, etc., R. Co. v. Nelson [Ky.] 89 S. W. 200; Louisville & N. R. Co. v. Sights [Ky.] 89 S. W. 132; Louisville R. Co. v. Bium [Ky.] 89 S. W. 186; Southern R. Co. v. Goddard [Ky.] 89 S. W. 675; Louisville Gas Co. v. Fuller [Ky.] 92 S. W. 566. Instruction allowing the jury to consider anything they might deem proper elements of damages, is erroneous. Id. The injured person's age, condition in life, physical injury inflicted, bodily pain and mental anguish, medical expenses incurred, reduced earning capacity, and any and all damages sustained as a result of the injury, are to be considered. Davis v. Holy Terror Min. Co. [S. D.] 107 N. W. 374. In estimating compensation, diminished capacity to labor, physical and mental suffering, past and future, are to be considered. Missouri, etc., R. Co. v. Box [Tex. Civ. App.] 14 Tex. Ct. Rep. 998, 93 S. W. 134. In an action for personal injuries where death does not ensue, the plaintiff is entitled only to such sum as will fairly compensate him for time lost, reasonable expenses incurred, physical and mental suffering caused by the injury, and for any reduction in earning capacity. Instruction that plaintiff was entitled to fair compensation for the loss of her foot held erroneous. Lexington R. Co. v. Herring [Ky.] 96 S. W. 558.

5. Evidence held to authorize an instruction as to damage for future pain and re-

future loss or expense[6] may be recovered, provided it is shown with reasonable certainty that such pain and suffering[7] or financial loss[8] will result from the injury. It has also been held that in the case of a serious and permanent physical injury, the lost usefulness and enjoyment out of the injured person's prospective life are elements of damage.[9] Damages cannot be allowed the person injured for the shortening of his life, but an apprehended shortening of life may be considered in determining the extent of the injury.[10] While there can be no recovery for pain or suffering or disability resulting from preexisting disease[11] there may be for aggravation thereof.[12] One cannot recover for aggravation of an injury occasioned by his own negligence in obtaining medical attendance,[13] but the wrongdoer is liable for all the natural consequences of his act though the method of treatment adopted is not the best possible,[14] and neither the fact that injuries have been aggravated by

duced earning capacity. Southern R. Co. v. Hill [Ga.] 54 S. E. 113; Southern Cotton Oil Co. v. Skipper [Ga.] 54 S. E. 110. Where an injured person has not completely recovered at the time of the trial, he is entitled to such damages as he is likely to sustain from the injury in the future. Vohs v. Shorthill & Co. [Iowa] 107 N. W. 417; Nelson v. Metropolitan St. R. Co., 113 Mo. App. 702, 88 S. W. 1119; Galveston, etc., R. Co. v. Smith [Tex. Civ. Rep.] 15 Tex. Ct. Rep. 150, 93 S. W. 184. Damages for pain and suffering to be endured by a necessary surgical operation may be recovered. Missouri, etc., R. Co. v. Hogan [Tex. Civ. App.] 15 Tex. Ct. Rep. 325, 93 S. W. 1014. A verdict in an action for personal injuries may include damages for mental and physical pain which is "reasonably certain" to result in the future but not for such suffering as plaintiff is "liable" to endure. Green v. Catawba Power Co. [S. C.] 55 S. E. 125.

6. If it is proved that further expenses for a surgical operation or medical attention will necessarily be required, the jury may consider that fact. Chicago City R. Co. v. Henry, 218 Ill. 92, 75 N. E. 758. In awarding present damages for loss of future earnings, the present worth should be ascertained. Instruction allowing full recovery held erroneous. Wilkinson v. Northeast Borough [Pa.] 64 A. 734.

7. Testimony that the injured person's arm pained him all the time raises the issue of present and future physical and mental suffering. Missouri, etc., R. Co. v. Box [Tex. Civ. App.] 14 Tex. Ct. Rep. 998, 93 S. W. 134. Present damages for future loss as a result of the injury must be limited to the loss reasonably certain to occur. Caplin v. St. Louis Transit Co., 114 Mo. App. 256, 89 S. W. 338; Chicago, etc., R. Co. v. Lindeman [C. C. A.] 143 F. 946; Howard v. Beldenville Lumber Co. [Wis.] 108 N. W. 48. Instruction for damages for pain which "may" result criticised. Muncie Pulp Co. v. Hacker [Ind. App.] 76 N. E. 770. It is proper to authorize recovery for future mental and physical suffering such as is "probable" to result as distinguished from such as is "reasonably certain" to result. Galveston, etc., R. Co. v. Paschall [Tex. Civ. App.] 14 Tex. Ct. Rep. 709, 92 S. W. 446. Possible, even probable, future effects are too remote and speculative to form the basis for a legal recovery. Chicago, etc., R. Co. v. Lindeman [C. C. A.] 143 F. 946.

8. Evidence as to cost of future operation inadmissible when necessity for such operation was not shown. Chicago City R. Co. v. Henry, 218 Ill. 92, 75 N. E. 758. To recover for loss of probable future earnings, the plaintiff must furnish some basis for their estimation. Southern Cotton Oil Co. v. Skipper [Ga.] 54 S. E. 110.

9. Loss of earning power is not the extent of the damage suffered. Haynes v. Waterville, etc., R. Co. [Me.] 64 A. 614.

10. Instruction approved. Muncie Pulp Co. v. Hacker [Ind. App.] 76 N. E. 770.

11. St. Louis S. W. R. Co. v. Hall [Tex. Civ. App.] 15 Tex. Ct. Rep. 869, 92 S. W. 1079.

12. Chicago Union Traction Co. v. May [Ill.] 77 N. E. 933; Southern Pac. Co. v. Cavin [C. C. A.] 144 F. 348; Green v. Houston Elec. Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 790, 89 S. W. 442. That plaintiff was in such condition as to predispose her to dangerous consequences from being exposed to cold, does not relieve the carrier from liability. Missouri, etc., R. Co. v. Byrd [Tex. Civ. App.] 14 Tex. Ct. Rep. 65, 89 S. W. 991.

13. Glasgow v. Metropolitan St. R. Co., 191 Mo. 347, 89 S. W. 915. Person injured is bound to use ordinary care to obtain proper medical treatment and attention and cannot recover for aggravation of injury caused by failure to use such care. St. Louis S. W. R. Co. v. Johnson [Tex. Civ. App.] 15 Tex. Ct. Rep. 813, 94 S. W. 162; Missouri, etc., R. Co. v. Hagan [Tex. Civ. App.] 15 Tex. Ct. Rep. 325, 93 S. W. 1014; Chicago City R. Co. v. Henry, 218 Ill. 92, 75 N. E. 758. Where one's eyes are injured but there is nothing to show that they might not be soon cured if properly treated, the mere fact that the injured person has chronic sore eyes does not warrant a recovery predicated on permanent injury. Louisville & N. R. Co. v. Eaden [Ky.] 93 S. W. 7. Whether an injured party was guilty of negligence in obtaining medical care for the injury, thereby aggravating it, held a question for the jury. Glasgow v. Metropolitan St. R. Co., 191 Mo. 347, 89 S. W. 915. Where injured servant could have avoided delay in getting to hospital by paying his fare, he could not recover for suffering during delay, though employer was bound by contract to furnish transportation in such case. St. Louis S. W. R. Co. v. Reagan [Ark.] 96 S. W. 168.

negligence of attending physicians,[15] nor the fact that before suit brought the injured party settled a claim against his attending physician for malpractice[16] will relieve the original wrongdoer from liability. A person injured by the fault of another may recover for his loss of time even though he has received full pay from his employer during the period of his disability.[17] Where there are no rules by which to measure the value of services or lost time, the jury may allow such damages or compensation as they may deem reasonable in view of the facts proven and in accordance with their common knowledge and experience.[18] In some states, the measure of damages for impaired capacity to earn money is the difference between the wages the injured person was capable of earning before and after the injury,[19] regardless of deductions from the wages by the employer, not incident to the employment or a necessary expense connected therewith;[20] in others, it is the amount which would purchase an annuity equal to the difference between the annual wages or salary before and after the injury.[21]

The rules governing recovery where injuries result in death are elsewhere treated.[22]

§ 6. *Inadequate and excessive damages.*[23]—Verdicts for damages will be interfered with by the appellate courts only when they show a willful disregard of the evidence,[24] or are so grossly disproportionate to the actual damage shown[25] as to indicate clearly that they are the result of passion or prejudice.[26] An excessive verdict

14. Graboski v. New Castle Leather Co. [Del.] 64 A. 74.

15, 16. Vlou v. Brooks-Scanlon Lumber Co. [Minn.] 108 N. W. 891.

17. Injured railway mail clerk may prove loss of time though government, as a matter of grace, continues his salary. Illinois Cent. R. Co. v. Porter [Tenn.] 94 S. W. 666.

18. Proof that person injured was a farmer working a farm on shares authorized instruction permitting recovery for value of time and services. International, etc., R. Co. v. Edwards [Tex. Civ. App.] 14 Tex. Ct. Rep. 92, 91 S. W. 640.

19. Missouri, etc., R. Co. v. Dickson [Tex. Civ. App.] 14 Tex. Ct. Rep. 229, 90 S. W. 507.

Contra: Only the reasonable present value of diminished earning capacity in the future, and not the difference between what he would earn had the injury not occurred and what he would earn in his present condition, can be recovered. Galveston, etc., R. Co. v. Paschall [Tex. Civ. App.] 14 Tex. Ct. Rep. 709, 92 S. W. 446.

20. Evidence that employer made deductions from wages for hospital fees, insurance, etc., inadmissible on question of earning power. Missouri, etc., R. Co. v. Dickson [Tex. Civ. App.] 14 Tex. Ct. Rep. 229, 90 S. W. 507.

21. Bourke v. Butte Elec. & Power Co. [Mont.] 83 P. 470.

22. See Death by Wrongful Act, 5 C. L. 945.

23. See 5 C. L. 929.

24. An appellate court will not set aside a verdict on the ground that it is excessive, unless it is not supported by any evidence. Brown v. Weaver Power Co., 140 N. C. 333, 52 S. E. 954. The amount to be awarded for assault is largely within the discretion of the jury and their finding will be interfered with only in extreme cases. Lake St. El. R. Co. v. Collins, 118 Ill. App. 270.

25. Southern Pac. R. Co. v. Bailey [Tex. Civ. App.] 14 Tex. Ct. Rep. 921, 91 S. W. 820. That a verdict for $400 is $1.50 in excess of damages proven is not ground for a new trial. Galligan v. Woonsocket St. R. Co. [R. I.] 62 A. 376. Where damages awarded by the jury are slightly in excess of those claimed in the complaint, the excess may be referred to interest. Southern R. Co. v. Webb [Ala.] 41 So. 420. Court will not interfere with verdict unless clearly insufficient or excessive. Parriconi v. Greco, 115 La. 558, 39 So. 599.

26. On appeal a verdict will not be reversed on the ground that it is excessive unless clearly the result of passion or prejudice. Board of Councilmen of Frankfort v. Chinn [Ky.] 89 S. W. 188. Verdict not the result of passion or prejudice under the evidence. South Covington & C. St. R. Co. v. Nelson [Ky.] 89 S. W. 200. Held that verdict for city in suit for damages for change of grade was not, considering the evidence, objectionable as the result of passion and prejudice. Widman Inv. Co. v. St. Joseph, 191 Mo. 459, 90 S. W. 763. Rev. Civ. Code Proc. § 301, subd. 5, expressly provides that a new trial may be awarded if the verdict is so excessive as to indicate passion or prejudice. Davis v. Holy Terror Min. Co. [S. D.] 107 N. W. 374. Where evidence warranted damages for mental and physical suffering, loss of time, expense, and permanent injury, but the jury, in answer to special questions put to them, say they allow the entire amount of the verdict for mental pain and anguish, the verdict will not on that account be set aside as excessive and as showing passion and prejudice. Missouri, etc., R. Co. v. Wade [Kan.] 85 P. 415. Verdict will not be disturbed unless unreasonable, or plainly the result of passion or prejudice. Chicago City R. Co. v. Schmidt, 117 Ill. App. 213. An appellate court will not set aside a verdict not clearly the re-

may be cured by a remittitur.[27] In Illinois the question whether the verdict is excessive is one of fact, and is conclusively settled by a finding of the court of appeals.[28] Holdings as to the excessiveness of verdicts are grouped in the note.[29]

sult of passion or prejudice. Western Underwriters Ass'n v. Hankins, 122 Ill. App. 600.

27. Where excessive damages are allowed, the judgment may be affirmed on appeal on condition that the plaintiff remit the excess. St. Louis & S. W. R. Co. v. Foster [Tex. Civ. App.] 13 Tex. Ct. Rep. 911, 89 S. W. 450; Houston, etc., R. Co. v. McCarty [Tex. Civ. App.] 89 S. W. 805. A verdict, excessive because including an item of expense not recoverable, may be affirmed on appeal on condition that the greatest sum the jury could have found for such item be remitted. Chicago, etc., R. Co. v. Seale [Tex. Civ. App.] 14 Tex. Ct. Rep. 48, 89 S. W. 997. A verdict in excess of what is prayed for in the complaint may be cured by remittitur if the excess can be reasonably estimated. Smoot v. Kansas City, 194 Mo. 513, 92 S. W. 363. Where, in action for injuries to child, brought by father, medical expense was $500 and loss of services $800, a verdict of $1,372 was allowed to stand on plaintiff's remitting $31 to make the verdict correspond to proof. Lange v. Missouri Pac. R. Co., 115 Mo. App. 582, 91 S. W. 989. Where in conversion the jury returns a verdict in excess of the amount claimed in the complaint, the court may properly reduce the amount instead of granting a new trial. Mossteller v. Holborn [S. D.] 108 N. W. 13.

28. Chicago & J. Elec. R. Co. v. Patton, 219 Ill. 214, 76 N. E. 381; Hancheft v. Haas, 219 Ill. 546, 76 N. E. 845. Appellate court has power to assess damages in case of an appeal for delay, and supreme court will not interfere with its exercise of this power. McCarthy v. Alphons Custodis Chimney Const. Co., 219 Ill. 616, 76 N. E. 850.

29. Recoveries held not excessive. Breach of contract: $1,260 for breach of contract of employment, plaintiff having earned very little, contract salary being much more. Mobile, etc., R. Co. v. Hayden [Tenn.] 94 S. W. 940.

Torts in general: $3,000 for **alienation of a husband's affections.** Harvey v. Harvey [Neb.] 106 N. W. 660. $1,500 for alienation of wife's affections. Korby v. Chesser [Minn.] 108 N. W. 620. $550 for **malicious prosecution.** Martin v. Corscadden [Mont.] 86 P. 33. $800 against a policeman and a like amount against his bondsmen for **false arrest and assault and battery** in a public street. Scott v. Com. [Ky.] 93 S. W. 668. $300 as compensatory damages for **slander,** consisting of charging a respectable woman who assisted at the birth of a child with having murdered it. Kloths v. Hess, 126 Wis. 587, 106 N. W. 251. $50 where one spoke slanderous words of and concerning another imputing criminal neglect of his wife contributing to her death. Gendron v. St. Pierre [N. H.] 62 A. 966. $4,000 for **maintenance of nuisance** near boarding house. Bly v. Edison Elec. Illuminating Co., 97 N. Y. S. 592. $500 for permanent nuisance. Central Consumers' Co. v. Pinkert [Ky.] 92 S. W. 957. $500 for nuisance. The owner became sick as a consequence of odors arising from the nuisance. City of Madisonville v. Hardman [Ky.] 92 S. W. 930.

Injuries to property or animals: $1,625.41 for flooding land. Chicago, etc., R. Co. v. Reuter, 119 Ill. App. 232. $250 where fire, negligently set out, destroyed 200 fence posts, injured 1,000 pounds of wire, and injured grass and turf on 125 acres of land. Paraffine Oil Co. v. Berry [Tex. Civ. App.] 15 Tex. Ct. Rep. 715, 93 S. W. 1089. $235 for injury to horses. Louisville & N. R. Co. v. Rhoads [Ky.] 90 S. W. 219. $4,000 for **interference with power right,** where plaintiff had to close his mill 167 days and the rental value of the mill was $25 to $30 a day. Elkhart Paper Co. v. Fulkerson [Ind. App.] 75 N. E. 283.

Breach of duty owed passenger: $5 for being carried by station and having to wait 3 or 4 hours for a train back. Harlan v. Wabash R. Co. [Mo. App.] 94 S. W. 737. $500 compensatory and $250 punitive for ejection of a passenger from a street car with rude and insulting language and causing his arrest for alleged disorderly conduct. Little Rock R. & Elec. Co. v. Dobbins [Ark.] 95 S. W. 788. $500 for ejection of passenger who walked 3 miles in the rain and caught cold, which developed into pneumonia. Delmonte v. Southern Pac. Co. [Cal. App.] 83 P. 269. $800 where a cripple compelled to walk with a crutch was ejected from a train and compelled to walk six or seven miles at night. Missouri, etc., R. Co. v. Smith [Ind. T.] 89 S. W. 668. $1,000 for ejection of a passenger in an insolent manner. Southern R. Co. v. Cassell [Ky.] 92 S. W. 281. $250 where a girl 15 years of age was carried past her destination and the conductor of the train, on being informed, refused to take her back but left her at the next station without money or acquaintance or means of getting back. Chesapeake & O. R. Co. v. Lynch [Ky.] 89 S. W. 517. $1,497 where female passenger was threatened and abused by conductors. Cincinnati, etc., R. Co. v. Harris, 115 Tenn. 501, 91 S. W. 211. $2,500 where female passenger was abused and threatened by colored servant of railroad company. Gulf, etc., R. Co. v. Luther [Tex. Civ. App.] 14 Tex. Ct. Rep. 195, 90 S. W. 44. $400 where a sleeping car passenger was compelled to leave her berth and complete her journey in a chair car. Pullman Palace Car Co. v. Hocker [Tex. Civ. App.] 15 Tex. Ct. Rep. 330, 93 S. W. 1009. Verdict of $600 and $400 in favor of a mother and daughter against a railroad company on account of insulting conduct of the defendant's agent. Southern Pac. Co. v. Bailey [Tex. Civ. App.] 14 Tex. Ct. Rep. 921, 91 S. W. 820. $500 where a passenger was ejected at midnight. Gulf, etc., R. Co. v. Bunn [Tex. Civ. App.] 14 Tex. Ct. Rep. 721, 95 S. W. 640. $300 where sickness resulted to a passenger from being obliged to sit in a cold waiting room. International & G. N. R. Co. v. Johnson [Tex. Civ. App.] 15 Tex. Ct. Rep. 982, 95 S. W. 595.

Personal injuries: $1,750 for serious and

probably permanent injuries to a stevedore. The City of San Antonio [C. C. A.] 143 F. 955. $1,500 for injury to a teamster. Goodloe v. Metropolitan St. R. Co. [Mo. App.] 96 S. W. 482. $1,000 for general injuries. Macon R. & Light Co. v. Streyer, 123 Ga. 279, 51 S. E. 342. $631.25 for general injury. Southern R. Co. v. Hill [Ga.] 54 S. E. 113. $10,000 where a miner 26 years old in good health, earning $3.50 per day, was injured so that he was unconscious for several hours, confined to his bed for five weeks, suffered intense bodily and mental pain, lost 25 pounds in weight, hearing seriously impaired, one leg badly injured. Davis v. Holy Terror Min. Co. [S. D.] 107 N. W. 374. $500 where plaintiff was bitten by a dog, suffered pain several weeks, and incurred expense of $200. Bentz v. Page, 115 La. 560, 39 So. 599. $8,500 for permanent injury to the urinary organs and bladder. De Blois v. Great Northern R. Co. [Minn.] 108 N. W. 293. $8,500 where the injured party settled a claim against his attending physician for malpractice, but malpractice was not conclusively shown: hip dislocated and reset twice, extreme agony accompanying such operation. Injuries permanent. Viou v. Brooks-Scanlon Lumber Co. [Minn.] 108 N. W. 891. $9,000 is not excessive in the case of injury to the side, uterus, ankle, spine, and nerves, where there is a probability that the plaintiff will never fully recover. Latson v. St. Louis Transit Co., 192 Mo. 449, 91 S. W. 109. $18,000 where man of 39, earning $150 per month, was confined to bed 4 months and to house 7 or 8 months, one shoulder being left lower than the other, hearing affected, spine injured, one arm partially paralyzed, and bladder deranged. Galveston, etc., R. Co. v. King [Tex. Civ. App.] 15 Tex. Ct. Rep. 75, 91 S. W. 622. $500 for severe injury to boy of 10. St. Louis S. W. R. Co. v. Dixon [Tex. Civ. App.] 14 Tex. Ct. Rep. 782, 91 S. W. 626. $3,000 for injuries to a boy 16 years of age, a hatch tender on vessels, who fell 30 feet, suffered ill effects three months after the injury, and expert testimony as to whether the injury was permanent was conflicting. Johnson v. St. Paul & W. Coal Co., 126 Wis. 492, 105 N. W. 1048.

Temporary pain and disability: $2,000 for injuries to passenger where she was cut and bruised and suffered severe pains for a year afterwards. Wood v. Los Angeles Traction Co. [Cal. App.] 82 P. 547. $500 for injury to plaintiff's back, confining him a month, causing great pain and permanent injury. St. Louis S. W. R. Co. v. Bryson [Tex. Civ. App.] 14 Tex. Ct. Rep. 656, 91 S. W. 829. $400 for severe, though not permanent, injuries sustained by a person 50 years old through the negligence of another. Louisville & A. R. Co. v. Davis [Ky.] 96 S. W. 533. $1,000 for severe injury to knee in some respects permanent, causing great pain and suffering, making use of crutches necessary for 60 days, and keeping plaintiff from work 33 days. Colorado Springs & C. C. Dist. R. Co. v. Petit [Colo.] 86 P. 121. $600 where one's life was imperiled, medical and surgical attendance required, and disability for some time. Hull v. Douglass [Conn.] 64 A. 351. $400 where one was bitten by a dog, required medical treatment for 10 days. Friedman v. Goodman, 124 Ga. 532, 52 S. E. 892. $2,500 where the injured person suffered as a result of the injury two and one-half years after it occurred. Alton R., Gas & Elec. Co. v. Webb, 119 Ill. App. 75. $1,000 for injury to stenographer earning $50 a month, where loss of 4 months' time resulted, and she suffered much pain and was partly incapacitated. Halley v. St. Joseph St. R., Light, Heat & Power Co., 115 Mo. App. 652, 91 S. W. 163.

Permanent disability from following vocation: $20,000 where man of 45, earning $3.50 per day, had lost his earning power. Bourke v. Butte Elec. & Power Co. [Mont.] 83 P. 470. $4,000 where a man 60 years of age was rendered incapable of following his usual vocation. Little Rock, etc., R. Co. v. McQueeney [Ark.] 92 S. W. 1120. $3,000 where vigorous young man earning $75 per month was probably permanently unfitted for following his vocation. Little Rock, etc., R. Co. v. Cross [Ark.] 93 S. W. 981. $3,500 for permanent injury and much pain and suffering, plaintiff being incapacitated for manual work in his calling. First Nat. Bank v. Chandler [Ala.] 39 So. 822. $15,000 for injuries resulting in insanity and permanent physical disability of a man 33 years of age earning $65 per month. Central of Georgia R. Co. v. Harper, 124 Ga. 836, 53 S. E. 391. $3,150 where a formerly strong, able-bodied man is rendered permanently disabled. Chicago Union Traction Co. v. Jacobson, 118 Ill. App. 383. $3,000, permanent injuries which materially diminish earning capacity. Coal Belt Elec. R. Co. v. Kays, 119 Ill. App. 23. $3,500 for wrecked and permanently impaired health. Illinois Cent. R. Co. v. Coley [Ky.] 89 S. W. 234. $10,000 for injuries to a 16 year old boy which rendered him an invalid for life and destroyed his future. Shoninger Co. v. Mann, 121 Ill. App. 275. $5,500 where one was probably permanently injured and rendered an invalid. Chadwick v. St. Louis Transit Co., 195 Mo. 517, 93 S. W. 798.

Sight and hearing: $1,641 for painful injuries to head, back, face, and eyes, the injury to the eyes being probably permanent. Illinois Cent. R. Co. v. Morris [Ky.] 90 S. W. 979. $6,500 for injury to eyesight and hearing, permanent, and injury causing impotency. Galveston, etc., R. Co. v. Fitzpatrick [Tex. Civ. App.] 14 Tex. Ct. Rep. 790, 91 S. W. 355. $2,000 where a miner 31 years of age earning $2.50 to $3 per day lost sight of one eye, is partially paralyzed, is incapacitated for manual labor, and his condition is permanent. Kellyville Coal Co. v. Strine, 117 Ill. App. 115. $9,000 where railroad man lost the use of an ear, rendering him unfit to follow his vocation, was bruised and suffered great physical and mental pain. Missouri, etc., R. Co. v. Houlihan [Tex. Civ. App.] 15 Tex. Ct. Rep. 559, 93 S. W. 495. $2,000 for injury to an eye which destroyed its sight, causing much pain and inconvenience, which inconvenience if not pain would be permanent. Vohs v. Shorthill & Co. [Iowa] 107 N. W. 417. $3,650 for injury to eyes and nervous system. Cumberland Tel. & T. Co. v. Harp [Ky.] 90 S. W. 980.

Injuries to head: $1,205 for hand broken and otherwise injured, face cut, teeth loosened. Lane Bros. & Co. v. Bott, 104 Va. 615, 52 S. E. 258. $15,000 for injury to skull of boy 11 years old, impairing mental capacity

and threatening insanity. St. Louis, etc., R. Co. v. Tomlinson [Ark.] 94 S. W. 613. $5,000 where a 12 year old boy sustained a fractured skull resulting in temporary paralysis and permanent injury. Solomon v. Buechele, 119 Ill. App. 595. $550 for injury to head. Williams v. St. Louis, etc., R. Co. [Mo. App.] 96 S. W. 307.

Spinal and nervous injuries: $2,000 for painful and partly permanent injury to back. Citizens' R. Co. v. Wade [Tex. Civ. App.] 14 Tex. Ct. Rep. 29, 91 S. W. 645. $20,000 where locomotive engineer, 32 years old, sustained a double hernia, his nervous system was shattered, back, kidneys, and bladder injured. Galveston, etc., R. Co. v. Stevens [Tex. Civ. App.] 15 Tex. Ct. Rep. 977, 94 S. W. 395. $5,000 for permanent, painful, and incapacitating injury to back. St. Louis S. W. R. Co. v. Johnson [Tex. Civ. App.] 15 Tex. Ct. Rep. 813, 94 S. W. 162. $7,500 for injuries to back, spine, hips, and muscles, necessitating use of crutches, great physical and mental pain suffered. Sexual power lost. St. Louis S. W. R. Co. v. Morrow [Tex. Civ. App.] 93 S. W. 162. $1,100 for injury to back and hip where plaintiff became lame, suffered pain, required medical treatment, and was to some extent incapacitated from pursuing his occupation. Tri-City Ry. Co. v. Gould, 118 Ill. App. 602. $7,500 for injuries to spine and hip of healthy, unmarried woman 44 years of age, incapacitated for doing housework, nervous and irritable, has intense headaches, unable to sleep without use of narcotics. West Chicago St. R. Co. v. Vale, 117 Ill. App. 155. $5,000 for concussion of the spinal cord, but the doctors did not testify positively; no evidence as to permanence. Costello v. Frankman [Minn.] 107 N. W. 739. $7,500 for nervous shock and paralysis, probably permanent. McCord v. Minneapolis, etc., R. Co. [Minn.] 105 N. W. 190. $2,500 for injury to spine causing great pain, confined to bed four weeks, treated by physician 35 times, injury probably permanent. Keeton v. St. Louis & M. R. Co., 116 Mo. App. 281, 92 S. W. 512.

Burns and scalds: $350 where woman was scalded by steam from locomotive and was injured by collision with post in trying to escape from steam. Gulf, etc., R. Co. v. Tullis [Tex. Civ. App.] 14 Tex. Ct. Rep. 478, 91 S. W. 317.

Fractures, dislocations, and injuries to and loss of limbs: $850 for fractured arm, causing much pain and dislocated hip. Southern R. Co. v. Burgess [Ala.] 42 So. 35. $2,500 for loss of two fingers of right hand. Choctaw, etc., R. Co. v. Craig [Ark.] 95 S. W. 168. $4,000 for a probably permanent injury to a foot. Chicago & A. R. Co. v. Walker, 118 Ill. App. 397. $4,750, broken bone which never will unite. Chicago City R. Co. v. Lowitz, 119 Ill. App. 360. $1,000 for bruises and permanent injury to the arm of a contractor earning from $60 to $80 per week. Jacksonville & St. L. R. Co. v. Laming, 117 Ill. App. 61. $1,000 not excessive for fracture of femur, serious and probably permanent injury to hip joint. City of Mattoon v. Faller, 117 Ill. App. 65. $10,000 where healthy boy 14 years of age was crushed under a car, right thigh bone broken, and leg made shorter than the other. Chicago Union Traction Co. v. O'Brien, 117 Ill. App. 183. $6,000 for fracture of hip. Chicago & J. Elec. R. Co. v. Patton, 122 Ill. App. 174. $2,000 for injury to foot and ankle of man 28 years of age, which incapacitated him for work for 38 days and the use of his foot was to some extent permanently impaired. Consolidated Coal Co. v. Shepherd, 122 Ill. App. 323. $20,000 where bright boy 8 years old lost one leg at thigh and other at knee. Pittsburgh, etc., R. Co. v. Simons [Ind. App.] 76 N. E. 883. $3,000 for a fracture of the neck of one of the femurs which permanently shortened the limb. Wright v. Davenport [Iowa] 104 N. W. 1022. $11,000 where railroad fireman, 33 years old had his head split, arm broken, spine injured, and sustained other injuries, and was rendered unable to perform manual labor. Cincinnati, etc., R. Co. v. Curd [Ky.] 89 S. W. 140. $2,500 for twisted ankle, nervous system injured, intense pain suffered, injuries probably permanent. Board of Councilmen of Frankfort v. Chinn [Ky.] 89 S. W. 188. $7,000 where fireman 22 years of age was considerably burned and scalded, four ribs broken, lungs permanently injured, in hospital for six months. Illinois Cent. R. Co. v. Quirey [Ky.] 89 S. W. 217. $1,000 where a tobacco stemmer earning $1.25 per day had fingers permanently injured. Covington & C. Bridge Co. v. Smith [Ky.] 89 S. W. 674. $5,000 for loss of leg and suffering attending amputation. Louisville & N. R. Co. v. Helm [Ky.] 89 S. W. 709. $7,000 where healthy man 42 years of age was so injured that he could not walk without a cane, suffered great and continuous pain, and was prevented from following his usual occupation. Stagg Co. v. Brightwell [Ky.] 92 S. W. 8. $1,500 for permanent injury to hand, destroying its use one-half. Chesapeake & O. R. Co. v. Wiley [Ky.] 90 S. W. 557. $350 for loss of two fingers and painful injury to third, rendering it permanently stiff and misshapen. Merganthaler-Horton Basket Co. v. Taylor [Ky.] 90 S. W. 968. $616 where woman of 53 injured her leg and was confined 12 weeks, suffering much pain. City of Bowling Green v. Duncan [Ky.] 91 S. W. 268. $800 for injury to ankle. City of Louisville v. Hall [Ky.] 91 S. W. 1133. $4,000 for broken ankle, dislocated hip. Injuries probably permanent. City of Paducah v. Johnson [Ky.] 93 S. W. 1035. $1,500 for serious and permanent injury to right hand. Antletz v. Smith [Minn.] 106 N. W. 517. $7,500 for badly crushed and deformed hand, rendered permanently useless. Woman 22 years of age. Carlin v. Kennedy [Minn.] 106 N. W. 340. $2,100 for injury to leg, rendering the person unable to walk for four months, general health seriously affected, and a future surgical operation probable. New v. St. Louis & S. R. Co., 114 Mo. App. 379, 89 S. W. 1043. $1,500 where the injured party lost $300 in wages, free use of one leg permanently impaired, and was the permanent source of occasional pain. Orendorff v. Terminal R. Ass'n, 116 Mo. App. 348, 92 S. W. 148. $5,000 for elbow permanently injured, incapacitating plaintiff from labor. Lindsay v. Kansas City, 195 Mo. 166, 93 S. W. 273. $5,000 where woman of 54 was cut and bruised, one limb fractured near hip joint, and nervous system permanently injured. McCaffery v. St. Louis & M. R. Co., 192 Mo. 144, 90 S. W. 816. $10,000 where locomotive fire-

man had his leg and foot crushed, so that one leg was permanently shorter than the other. Mississippi Cent. R. Co. v. Hardy [Miss.] 41 So. 505. $1,500 for serious and painful injuries to foot. City of Lexington v. Fleharty [Neb.] 104 N. W. 1056. $1,500 where plaintiff had arm broken in three places, receiving permanent injuries, and also other bruises. McGahie v. Sproat, 97 N. Y. S. 751. $1,200 for fractured knee cap. Galligan v. Woonsocket St. R. Co. [R. I.] 62 A. 376. $9,300 where a young man earning $90 per month sustained a permanent injury to his knee. Galveston, etc., R. Co. v. Cade [Tex. Civ. App.] 15 Tex. Ct. Rep. 66, 93 S. W. 124. $8,416.22 where a railroad switchman had his hand amputated. Missouri, etc., R. Co. v. Box [Tex. Civ. App.] 14 Tex. Ct. Rep. 998, 93 S. W. 134. $9,000 where man 24 years old earning $1.75 per day lost three fingers of his right hand. Rice v. Dewberry [Tex. Civ. App.] 15 Tex. Ct. Rep. 193, 93 S. W. 715. $6,000 for injury to ankle resulting in stiff joint and permanent anchylosis. Whelan v. Washington Lumber Co., 41 Wash. 153, 83 P. 98. $5,000 for loss of foot by man of 44, though earning capacity is only that of a common laborer. Froman v. Ayars [Wash.] 85 P. 14. $8,000 where an engineer 31 years old, earning $2.50 to $3 per day, was injured so as to partially paralyze his right shoulder and wholly paralyze the arm. Howard v. Beldenville Lumber Co. [Wis.] 108 N. W. 48.

Recoveries held excessive. Breach of contract: $1,000 held excessive by $350 where a vendor of a business breached his contract not to engage in the same line of business in the locality for a limited period. Mitchell v. Barnham [Mo. App.] 95 S. W. 939.

Torts in general: Verdict of $1,500 for **conversion** of parts of "model" typewriter excessive, where it appeared the machine would be worth $50, though it would cost $2,000 or $3,000 to build such a model, and it also appeared that an identical machine had been bought for $3. Scharndorf v. Alten, 96 N. Y. S. 452. $2,000 for **eviction** of plaintiffs **from leased premises** and destruction of furniture worth $740, and for mental anguish suffered on account of the wife's pregnancy and having no place to go, held excessive by $1,000. McClure v. Campbell [Wash.] 84 P. 825. $4,000 for **malicious prosecution** for obtaining property under false pretenses held excessive, where it appeared that plaintiff retained property which he obtained by means of representation, which, though not proven to be false, had led defendant to believe a falsehood. Davis v. McMillan [Mich.] 12 Det. Leg. N. 763, 105 N. W. 862.

Injury to property: $22,000 held excessive by $7,000 in an action for injuries to property and business through a conspiracy in restraint of trade. Purington v. Hinchliff, 120 Ill. App. 523. Where plaintiff claimed only $100 as depreciation in value of injured horse, and no other expenditure, a verdict of $190 was excessive. Curtis Blaisdell Co. v. Ross, 98 N. Y. S. 759. Damage claimed was value of coat, waist, and skirt, valued at $150, but plaintiff admitted on trial that coat was not damaged. Verdict for $150 was excessive by the value of the coat. Cassasa v. New York, etc., R. Co., 109 App. Div. 170, 95 N. Y. S. 648.

Breach of duty owed passenger: $400 for ejection from train where no force was used, and plaintiff suffered no personal injury, but missed an engagement with music pupils and had to walk 9 blocks. Dayton & W. Traction Co. v. Marshall [Ind. App.] 75 N. E. 824. $2,000 where validation of return ticket was refused and plaintiff was ejected from train shed and had to buy a ticket, but the amount paid was tendered back later, no injury having resulted and no publicity being given the ejection. Pittsburgh, etc., R. Co. v. Coll [Ind. App.] 76 N. E. 816. $8,000 reduced to $3,000 where a railroad brakeman raped a passenger which resulted in pregnancy, but where it did not appear that the mental anguish of the plaintiff was great or lasting. Garvik v. Burlington, etc., R. Co. [Iowa] 108 N. W. 327. $1,000 for ejection of a passenger from a train because of apparent invalidity of his ticket held excessive where the conductor did not act roughly or unkindly and the passenger only had to walk back about one mile to where the ticket was purchased and lay over until next day. Southern R. Co. v. Hawkins [Ky.] 89 S. W. 258.

Personal injuries: $9,000 for injuries to a laborer held excessive and reduced by $2,000. Bulduzzi v. James Ramage Paper Co., 140 F. 95. $2,000 excessive by $1,000 where the only injury relied upon is a diseased condition almost conclusively shown to be such that it could not have been produced by the injury, and there was no evidence of serious external injury. Heinmiller v. Winston Bros. [Iowa] 107 N. W. 1102. $10,500 where the evidence was very uncertain as to the extent of the injuries, and there was a conflict of expert testimony as to whether the injuries were permanent. Illinois Cent. R. Co. v. Houchins [Ky.] 89 S. W. 530. $7,500 verdict reduced to $5,000 where laborer earning $480 a year was injured, but evidence that injury was permanent was unsatisfactory. Bragg v. Metropolitan St. R. Co., 192 Mo. 331, 91 S. W. 527. Where there was no evidence of a pecuniary loss or loss of wages, no allegation of permanent injury or inability to work, or continuing pains, a motion granted by the trial judge to set aside a verdict of $5,000 will not be reversed on appeal. Ross v. Metropolitan St. R. Co., 104 App. Div. 378, 93 N. Y. S. 679.

Fractures, dislocations, and injuries to and loss of limbs: $5,000 reduced to $3,500 where injury resulted in loss of ends of three fingers and split thumb, leaving free use of only little finger. Kirby v. Wheeler-Osgood Co. [Wash.] 85 P. 62. $15,000 to young locomotive fireman earning $1,000 per year for loss of left hand, held excessive by $5,000. Scheu v. Pennsylvania R. R., 141 F. 495. $12,000 where a conductor had his leg crushed, held excessive by $2,000. Chicago Union Traction Co. v. Sawusch, 119 Ill. App. 349. $500 is excessive for slight green stick fracture of arm above elbow, slight bruises about head, all objective symptoms of injury disappearing in three weeks. Village of Westville v. Horn, 117 Ill. App. 89. $15,000 reduced to $10,000 where lawyer 70 years old had thigh bone fractured, was laid up several months, had to use crutches, and the injury was likely to make him permanently lame. Devoy v. St. Louis Transit Co., 192 Mo. 197, 91 S. W. 140. $12,000 reduced to $9,000 for loss of hand of switchman earning $90 per month. Phippin v. Missouri Pac. R. Co. [Mo.] 93 S. W. 410. $1,600 excessive by $600 where

§ 7. *Pleading, evidence, and procedure. A. Pleading.*[30]—All damages that necessarily flow from the wrongful act complained of may be recovered under the ad damnum clause, without special averment,[31] but damages which result naturally and proximately but not necessarily or by implication of law from the alleged wrongful act, must be specially pleaded.[32] Thus, the law will not imply from the injury alone the damages peculiar to, and resulting in, each individual case;[33] hence, there

plaintiff had one toe amputated and his foot somewhat impaired, and suffered some pain, but his expenses and loss of time amounted to only $400. Smith v. Dow [Wash.] 86 P. 555. Longshoreman 39 years old, earning from $50 to $75 per month, besides other injuries, had to have left leg amputated below knee. $20,000 held excessive by $6,000. Melse v. Alaska Commercial Co. [Wash.] 84 P. 1127. $15,000 for loss of anterior portion of a foot and stiffening of a thumb reduced to $12,000. International & G. N. R. Co. v. Brice [Tex. Civ. App.] 15 Tex. Ct. Rep. 408, 95 S. W. 660. $16,000 reduced to $14,000 where prior to the injury the injured party, 34 years of age, was healthy and robust and weighed 175 pounds, and afterwards was a nervous wreck suffering from insomnia, pleurisy, neuralgia, and irregular menstruation. Galveston, etc., R. Co. v. Vollrath [Tex. Civ. App.] 89 S. W. 279.

Sight and hearing: $12,000 for injuries to unmarried female resulting in loss of an eye after surgical operation causing great pain, and diminishing to some extent her vision from the other eye. Reduced to $6,000. Olwell v. Skobis, 126 Wis. 308, 105 N. W. 777. $23,000 held excessive by $13,000 where young railway mail clerk of good habits lost an eye and was partially paralyzed so that he could not walk. Williams v. Spokane Falls & N. R. Co. [Wash.] 84 P. 1129.

Bruises and shock: $3,000 excessive for temporary injuries consisting of bruises, cut on eyelid, insomnia, headache, and nervousness. Chicago City R. Co. v. McCaughna, 117 Ill. App. 538. $2,013 for scraping of skin from arm to knee, some bruises and pain. Evidence as to permanence of injuries unsatisfactory. Tri-City R. Co. v. Widenhoeft, 118 Ill. App. 581. $4,500 for general physical injuries and nervous shock. Probably temporary. Illinois C. R. Co. v. Downs, 122 Ill. App. 545. $5,000 for injuries to child of 5 struck by locomotive, where only a few scratches and bruises were found when she was picked up. Serano v. New York, etc., R. Co., 99 N. Y. S. 1103.

Internal injury: $5,500 reduced to $3,500 where only injury was hernia, which did not disable plaintiff, and which could probably be cured by operation costing $200 or $300 and six weeks' time. Leeson v. Sawmill Phoenix, 41 Wash. 423, 83 P. 891.

Adequacy of recovery: $1,000 for broken arm, mutilated hands, part of one ear cut off, and permanently deaf in the other, besides other injuries, held inadequate and increased to $4,500. The San Rafael [C. C. A.] 141 F. 270. $5,000 for death of man who left an insane wife and seven minor children dependent on him, held inadequate and increased to $7,500. Id. Verdict covering doctor's bill only, inadequate where proof showed that plaintiff suffered some pain and was interrupted in his work. De Yaulus v. New York City R. Co., 97 N. Y. S. 995. Appellate court refused to increase recovery of $1,000 when injuries consisted in two broken ribs, a punctured lung, and other bruises and suffering. Stoker v. Hodge Fence & Lumber Co. [La.] 41 So. 211. An award of nominal damages in a personal injury action held so inadequate under the facts as to authorize the court to grant a new trial. Ford v. Minneapolis St. R. Co. [Minn.] 107 N. W. 817.

30. See 5 C. L. 932.

31. Terrace Water Co. v. San Antonio Light & Power Co. [Cal. App.] 82 P. 562; Union Traction Co. v. Sullivan [Ind. App.] 76 N. E. 116. In actions for torts, where the law necessarily implies damage from the act complained of, it is not necessary to allege special damages. Smith v. Whittlesey [Conn.] 63 A. 1085. When the wrongful act complained of consists in inflicting a severe bodily injury, the consequent pain and loss of time are a necessary direct result of the injury and constitute a damage which the law implies. Id. Such damage may be shown under the general allegation and need not be specially pleaded. Id. Inability to follow one's ordinary vocation may be proved to characterize the extent of such injury. Id.

32. Special damages cannot be proved unless alleged. Jewett v. Buck [Vt.] 63 A. 136; Smith v. Whittlesey [Conn] 63 A. 1085. Where petition for damages for delay in delivering message announcing brother's fatal illness only claimed damages for anguish suffered while waiting for her train, her delay being caused by the delayed delivery of the message, plaintiff could not recover for anguish suffered because she failed to reach her brother before his death. Western Union Tel. Co. v. Campbell [Tex. Civ. App.] 14 Tex. Ct. Rep. 484, 91 S. W. 312. Damages for aggravation of one's mental disorder are not recoverable under a complaint for assault alleging that because of such assault plaintiff was injured, became sick and disordered for a month, during which time he was deprived of social enjoyment and suffered bodily pain and was obliged to undergo medical treatment. Lindsay v. Wabash R. Co. [Mich.] 12 Det. Leg. N. 430, 104 N. W. 656. Allegation of facts held insufficient to show notice to carrier of the special damages resulting from a failure to forward baggage as per contract. Wehman v. Southern R. Co. [S. C.] 54 S. E. 360. In a suit for damages for personal injuries, there can be no recovery on account of epilepsy from which the patient claims to be suffering, but no mention of which is made in the petition, unless the jury find that epilepsy is a natural and ordinary result of the injuries averred, and also that the epilepsy, if any, from which plaintiff suffers is a result of the injuries sustained. Cleveland & S. W. Traction Co. v. Hamner, 7 Ohio C. C. (N. S.) 133. In an action on the case for false warranty

can be a recovery for loss of time and earnings[34] and for expenditures on account of the injury alleged[35] only to the extent that such special damages are alleged.[36] The damages for which recovery is sought must be set out with sufficient particularity to enable the defendant to prepare the defense.[37] Under a general allegation of bodily injuries, plaintiff may prove any injury to his person.[38] But where the

of a horse, special damages for feeding, care, etc., may be recovered where alleged and proven. Wallace v. Tanner, 118 Ill. App. 639.

33. Union Traction Co. v. Sullivan [Ind. App.] 76 N. E. 116.

34. Union Traction Co. v. Sullivan [Ind. App.] 76 N. E. 116; Smith v. Whittlesey [Conn.] 63 A. 1085; Southern R. Co. v. Hawkins [Ky.] 89 S. W. 258; Stafford v. Adams, 113 Mo. App. 717, 88 S. W. 1130. An allegation that plaintiff was prevented from attending his ordinary business serves to characterize the injury and its extent in a general way but does not lay foundation for proof of special damage. Smith v. Whittlesey [Conn.] 63 A. 1085. Complaint alleging that plaintiff was permanently disabled from following his usual vocation and has lost or will lose the earnings of his labor or business sufficiently pleads loss of earnings. Wellmeyer v. St. Louis Transit Co. [Mo.] 95 S. W. 925.

35. Baltimore, etc., R. Co. v. Schell, 122 Ill. App. 346; Smoot v. Kansas City, 194 Mo. 513, 92 S. W. 363.

36. Allegations held sufficient to entitle a recovery for time lost because of injuries sustained. San Antonio & A. P. R. Co. v. Wood [Tex. Civ. App.] 14 Tex. Ct. Rep. 489, 92 S. W. 259. Allegation that plaintiff was prevented from transacting and attending to her business and deprived of gains and profits which she would have made but for the injury held to admit proof that she had made $300 a year by dressmaking prior to her injury. Chicago Union Traction Co. v. May [Ill.] 77 N. E. 933. Order for bill of particulars held proper in so far as it required plaintiff to show loss of earnings in detail, character and value of her usual employment, etc., but improper in requiring statement as to money paid out for medical services, the complaint containing no allegation of such payments but only alleging that such expenditure would be necessary. Levy v. New York City R. Co., 96 N. Y. S. 399.

37. Eastern Tex. R. Co. v. Moore [Tex. Civ. App.] 16 Tex. Ct. Rep. 29, 94 S. W. 394. Complaint which alleged that defendant deposited earth and built culverts on plaintiff's land, but did not allege the amount of damage done warranted recovery of nominal damages only. Hubenthal v. Spokane & I. R. Co. [Wash.] 86 P. 955. A plea of recoupment being a cross action by the defendant against the plaintiff its allegations as to damages must be as specific and certain as if made in the petition. Whitt v. Blount, 124 Ga. 671, 53 S. E. 205. Where a declaration alleged damage for the maintenance of a nuisance on special demurrer the plaintiff should be required to allege for what length of time the nuisance had been maintained during his ownership of the property. City Council of Augusta v. Marks, 124 Ga. 365, 52 S. E. 539. A declaration alleging that the market value of a lot had been depreciated in value a certain sum by reason of a nuisance created and maintained by defendant is subject to special demurrer in that it did not state the value of the lot before the injury. Id. In action against landlord for trespass during the term, a complaint alleged in one count that plaintiff and his family suffered great physical pain and mental anguish, and were made sore and sick, and exposed to inclement weather by defendant's acts. The count was construed as one charging financial damage, and not as one claiming damages for pain and suffering by the family. Snedecor v. Pope, 143 Ala. 275, 39 So. 318. Complaint in action for breach of contract to sell securities which alleges that the securities which defendant failed to sell became valueless is a sufficient allegation of damage as against a demurrer. Gause v. Com. Trust Co., 97 N. Y. S. 1091. Petition alleging permanent injuries and impairment of earning capacity held sufficient to present the issue of plaintiff's total disability to earn money in the future as a result of an injury while a passenger on defendant's street car. Goodloe v. Metropolitan St. R. Co. [Mo. App.] 96 S. W. 482.

38. Defendant should move for more particular statement if he desires it. Rudomin v. Interurban St. R. Co., 111 App. Div. 548, 98 N. Y. S. 506. Complaint alleging several injuries and also that such injuries caused diseases and impairment of plaintiff's physical and mental abilities, admits proof of impairment of eyesight and of diseases caused by injuries alleged. Id. Where the complaint alleges that plaintiff was made sick by his injuries, proof of the specific diseases which directly resulted from his injury was admissible without a more specific allegation thereof. Proof of pleurisy admissible though not particularly alleged. Lauder v. Currier [Cal. App.] 84 P. 217. No variance where proof showed fracture of tibia of left leg and injury to right elbow, and declaration alleged that plaintiff was greatly bruised, hurt and wounded, and divers bones of her body were broken, and she became sick. Elgin, A. & S. Traction Co. v. Wilson, 217 Ill. 47, 75 N. E. 436. Complaint that plaintiff was struck in the abdomen, and bruised, blackened and injured there and internally, is broad enough to admit proof of eruptions on the abdomen caused by internal pains. Hynds v. Brooklyn Heights R. Co., 97 N. Y. S. 705. Allegation that plaintiff was greatly bruised about the head, face and body admits proof of injuries to head and face and to sight and hearing. Terre Haute & I. R. Co. v. Pritchard [Ind. App.] 76 N. E. 1070. Allegation that plaintiff was "permanently injured," held broad enough to admit proof of diabetes as result of injury received. Shoninger Co. v. Mann [Ill.] 76 N. E. 354. A complaint for injuries to one's back, legs, and body but not precisely describing the parts claimed to be injured is broad enough to admit evidence of the condition of the plaintiff's ankle. Lewes v. Crane [Vt.] 62 A. 60. Under a complaint setting forth injuries received and

complaint specifies the injuries received, proof cannot be given of any other injuries unless they necessarily and immediately flow from those named.[39] The actual known facts of injury and their consequences should be set out with such reasonable certainty as their character and nature permit.[40] If the nature and extent of injuries cannot for any reason be stated, the complaint should so state.[41] Aggravation of an existing condition is not special damage which must be specially pleaded.[42] There is a conflict as to the necessity of specially pleading mental suffering.[43] An allegation that plaintiff has suffered and will continue to suffer great physical and mental pain is sufficient to admit proof of present and future suffering.[44]

Where special damages are sought to be recovered for breach of contract, all the facts upon which the right to recovery depends must be alleged and proved.[45]

results arising therefrom where a physician testified that fainting spells resulted from such injury, such fainting spells may be proved as an element of damages though not specifically alleged. Renders v. Grand Trunk R. Co. [Mich.] 13 Det. Leg. N. 314, 108 N. W. 368. Under an allegation that by reason of bruises received plaintiff became sick, sore, lame, and disordered, she may testify as to the condition of her memory and nerves as a result of such injury. Hannigan v. Wright [Del.] 63 A. 234. Under a complaint alleging that plaintiff was injured about the head, shoulders, and legs, his arm broken and wrist sprained the plaintiff may testify that he was badly bruised up. City of Dallas v. McCullough [Tex. Civ. App.] 16 Tex. Ct. Rep. 348, 95 S. W. 1121. Under a complaint alleging a broken arm it is proper to admit evidence that while the arm was in a cast the muscles decreased in size, as against an objection that such injury was not alleged. Id.

39. Rudomin v. Interurban St. R. Co., 111 App. Div. 548, 98 N. Y. S. 506. Where a complaint did not allege injuries to the neck but the evidence showed such injury it was error to authorize recovery for all injuries sustained. Dallas Consol. Elec. St. R. Co. v. English [Tex. Civ. App.] 15 Tex. Ct. Rep. 606, 93 S. W. 1096.

40. Complaint held demurrable for lack of definiteness. Dallas Consol. Elec. St. R. Co. v. McAllister [Tex. Civ. App.] 14 Tex. Ct. Rep. 388, 90 S. W. 933. Complaint alleging that "plaintiff was thrown with great force and violence to the ground, knocked down, and two ribs of his right side broken or fractured, his left knee dislocated, his right arm strained, and the right side of his back just above his right kidney bruised," held sufficiently definite. City of Garnett v. Smith [Kan.] 83 P. 615. Where the injury alleged is internal, and on motion to make more definite, plaintiff alleges the general location and effects of his injury and that he is unable to describe the locality and nature of the injury or the names of the parts affected with more definiteness, a second motion to make more definite is properly denied. City of Iola v. Farmer [Kan.] 84 P. 386. A complaint in an action for personal injuries must set forth specifically the nature and character of the injuries. Complaint held sufficient. City of Dallas v. McCullough [Tex. Civ. App.] 16 Tex. Ct. Rep. 348, 95 S. W. 1121.

41. Dallas Consol Elec. St. R. Co. v. McAllister [Tex. Civ. App.] 14 Tex. Ct. Rep. 388, 90 S. W. 933. Injuries should be more specifically alleged than as injuries to the head, heart, nervous system, etc., or it should appear that they could not be more specifically described. Dallas Consolidated Elec. St. R. Co. v. Black [Tex. Civ. App.] 13 Tex. Ct. Rep. 897, 89 S. W. 1087.

42. Where allegations of injury were full, proof of aggravation of ruptured condition resulting from injury was admissible without a special allegation. Indiana Union Traction Co. v. Jacobs [Ind.] 78 N. E. 325.

43. A complaint praying for actual damages includes damages for wounded feelings and mental suffering. McGhee v. Cashin [Ala.] 40 So. 63. Where the complaint did not allege mental suffering or claim damages therefor it was error to instruct the jury to consider it, in a personal injury case. City of Rockwall v. Heath [Tex. Civ. App.] 14 Tex. Ct. Rep. 230, 90 S. W. 514. A complaint for personal injuries alleging that plaintiff suffered great bodily pain and was confined to her bed for a long time on account of the injury authorizes a recovery for mental anguish though not alleged. Ousley v. Hampe, 128 Iowa, 675, 105 N. W. 122. Mental suffering not set up as a separate cause of action, but as an element of damage, cannot be reached by demurrer to the entire complaint. Hall v. Western Union Tel. Co., 139 N. C. 369, 52 S. E. 50.

44. Missouri, etc., R. Co. v. Box [Tex. Civ. App.] 14 Tex. Ct. Rep. 998, 93 S. W. 134.

45. In an action against a carrier for delay in delivering threshing machines, where special damages because of loss of threshing contracts were claimed, the names of the persons with whom it is claimed such contracts were had should be alleged. Missouri, etc., R. Co. v. Sproles [Tex. Civ. App.] 92 S. W. 40. Damages recoverable for breach of contract by a purchaser in refusing to accept goods which the seller procures from another and is to deliver to the purchaser are limited to such as are established by data furnished by the pleadings and evidence and if no such data is supplied nothing but punitive damages may be recovered. Parkins v. Missouri Pac. R. Co. [Neb.] 107 N. W. 260. Where one sues to recover special damages he must allege and prove that the defendant had notice that such loss was probable if the contract was not complied with, and the rule of constructive notice does not apply to such case. Missouri, etc., R. Co. v. Sproles [Tex. Civ. App.] 92 S. W. 40. Allegations of

In an action for liquidated damages for breach of a contract, the plaintiff is not required to plead and prove specific injury, in addition to the breach,[46] nor is it necessary to allege and prove the impracticability of fixing the damages.[47] Ordinarily a claim for damages for breach of contract is an entirety and cannot be split up and recovered in separate actions.[48]

Punitive damages need not be claimed eo nomine; all that is necessary is that the pleading shall state a cause of action which if proved will entitle the plaintiff to such damages.[49] Where punitive damages are sought for a particular wrongful act, and plaintiff relies, as evidencing the animus with which that act was committed, upon the commission of a wholly independent act, done at a different time and place, defendant should be advised by plaintiff's pleadings of the case he is expected to meet.[50, 51] A complaint which states a cause of action for nominal damages is not demurrable, though no actual damages are alleged.[52] A complaint need not set out or disclose a proper legal measure of damages.[53] It is unnecessary in most actions, when the demand is unliquidated and sounds wholly in damages, and where there is but a single cause of action, to state specifically and in amounts the different elements which go to make up the sum total. It is sufficient to claim a gross sum.[54] If, however, a pleader elects to claim a specific sum for any one or more of the items, he is restricted in his recovery on such items to the amount claimed.[55] An improper claim of damages in a complaint cannot be reached by a demurrer.[56] Where the action is based on a statute, facts must be alleged bringing the action within the terms of the particular statute relied upon.[57]

a complaint for special damages against a carrier for delay in the shipment of threshing machines held sufficiently specific. Id.

46. Long v. Furnas [Iowa] 107 N. W. 432.

47. Action for liquidated damages for breach of a contract not to engage in a business similar to one sold. Shafer v. Sloan [Cal. App.] 85 P. 162.

48. City of Chicago v. Duffy, 117 Ill. App. 261.

49. Martin v. Corscadden [Mont.] 86 P. 33. Where the complaint alleges and the proof shows facts such as will warrant a recovery of exemplary damages they need not be claimed by name and as such but may be recovered under a claim for damages generally. Shoemaker v. Sonju [N. D.] 108 N. W. 42. Exemplary damages may be recovered under a complaint alleging that plaintiff was injured by a vicious bull which the defendant knowing of its vicious character allowed to trespass on plaintiff's premises. Hull v. Douglass [Conn.] 64 A. 351. Though a complaint contains a prayer for punitive damages if it contains no allegations warranting such relief, it cannot be granted. Board of Directors of St. Francis Levee Dist. v. Redditt [Ark.] 95 S. W. 482. A complaint in an action against attorneys for negligence by which a cause of action for slander was lost, which alleges that $5,000 actual and $5,000 punitive damages might have been recovered and demanding judgment for $10,000 does not demand punitive damages against the attorneys. Patterson v. Frazer [Tex. Civ. App.] 16 Tex. Ct. Rep. 78, 93 S. W. 146.

50, 51. Central of Georgia R. Co. v. Augusta Brokerage Co., 122 Ga. 646, 50 S. E. 473.

In an action for damages for flooding land, and for plaintiff's arrest, which grew out of the controversy regarding the flooding of the land, it was held to claim only exemplary damages for the arrest. Cody v. Lowry [Tex. Civ. App.] 14 Tex. Ct. Rep. 788, 91 S. W. 1109.

52. That a declaration or count thereof sets up elements of damages that are not recoverable, or claims greater damages than the case made entitles plaintiff to recover, does not render the declaration demurrable if any damages, even nominal, are recoverable. Western Union Tel. Co. v. Barlow [Fla.] 40 So. 491. Where a contract and breach thereof are alleged, plaintiff is at least entitled to nominal damages and the complaint is not demurrable though it fails to allege damages. Gause v. Com. Trust Co., 97 N. Y. S. 1091. In an action for a breach of contract, a complaint which states facts entitling plaintiff to nominal damages is sufficient against a demurrer. Grau v. Grau [Ind. App.] 77 N. E. 816. The violation of a person's legal rights through a tort gives rise to a right of action and to a verdict for at least nominal damages without specification as to the particular amount of damage resulting. Davis v. Arkansas So. R. Co. [La.] 41 So. 587. Complaint in action for breach of warranty as to variety of seeds that alleged an inferior crop of hay was produced, and that plaintiff was damaged in the sum of $1,000, was not demurrable. Moody v. Peirano [Cal. App.] 84 P. 783.

53. St. Louis S. W. R. Co. v. Jenkins [Tex. Civ. App.] 14 Tex. Ct. Rep. 77, 89 S. W. 1106. A complaint otherwise good is not subject to general demurrer because of failure to allege a specific measure of damages or because praying for the application of an improper measure. Shropshire v. Adams [Tex. Civ. App.] 13 Tex. Ct. Rep. 540, 89 S. W. 448.

A petition by a parent for damages for the abduction and detention of a child should allege loss of the child's services and that the parent is entitled thereto.[58] Facts which do not justify a trespass but which would go in mitigation of damages need not be specially pleaded.[59]

(§ 7) *B. Evidence as to damages.*[60] *Burden of proof and sufficiency of evidence.*—The burden is upon the plaintiff to prove that he has sustained actual damages[61] as the proximate result of the wrongful act of defendant complained of[62] and the amount of each item of damages claimed.[63] Mental suffering may be im-

54, 55. Habig v. Parker [Neb.] 107 N. W. 127.

56. Central of Georgia R. Co. v. Keyton [Ala.] 41 So. 918.

57. Complaint for treble damages under Code §§ 2125, 2130, forbidding any contract combination or agreement to prevent the carriage of freight from being continuous from place of shipment to destination, must allege facts bringing the case within the express terms of the statute. Clark v. American Express Co. [Iowa] 106 N. W. 642. Complaint held insufficient. Id. Where an administrator proceeds under B. & C. Comp. § 1152, for double damages against a person who has converted property of a decedent, he must allege that he seeks double damages or the complaint will be construed as one under § 385 for actual damages only. Springer v. Jenkins [Or.] 84 P. 479. A complaint under a statute providing for multifold damages which prays for the actual amount of damage sustained and for other proper relief under the statute authorizes the court to enter judgment for double damages as allowed by the statute. Carpenter v. Chicago & A. R. Co. [Mo. App.] 95 S. W. 935.

58. Even though no recovery is in fact sought for loss of services. Washburn v. Abram [Ky.] 90 S. W. 997.

59. Western Union Tel. Co. v. Dickens [Ala.] 41 So. 469.

60. See 5 C. L. 937.

61. One who sues for damages from fire set by another has the burden to prove damages sustained. Allen v. Bainbridge [Mich.] 13 Det. Leg. N. 471, 108 N. W. 732. Damages for impairment of ability to earn money cannot be recovered where there is no evidence to show that the injured person has any vocation or business by which she could earn money or that she ever did earn anything. Becker v. Lincoln Real Estate & Bldg. Co. [Mo. App.] 93 S. W. 291. Where on the issue of damages in an action for the seller's breach of contract for the sale of cattle, the buyer proved the contract and market price, no further burden rested upon him. McKay v. Elder [Tex. Civ. App.] 92 S. W. 268. An allegation that prior to the injury plaintiff was sound and healthy need not be proved in order to recover for the injury sustained. Green v. Houston Elec. Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 790, 89 S. W. 442.

62. One who sues to recover damages for fire set by another has the burden to prove that the fire was negligently allowed to escape. Allen v. Bainbridge [Mich.] 13 Det. Leg. N. 471, 108 N. W. 732. Proof that horses limped after collision with car insufficient to prove accident cause of injury, where condition of horses before accident was not shown. Goodman v. New York City R. Co., 95 N. Y. S. 544.

63. The amount paid for medical services cannot be awarded unless established by the evidence. Smith v. Whittlesey [Conn.] 63 A. 1085. Without evidence as to amount of doctors' bills and cost of medicines, there can be no recovery therefor, though it is proved that doctors attended the injured plaintiff. Houston & T. C. R. Co. v. Garcia [Tex. Civ. App.] 13 Tex. Ct. Rep. 969, 90 S. W. 713. Where damage is claimed for the destruction or injury of personal property the value of the property destroyed or the extent of the damage or injury should be proved, in order to enable the jury to render an intelligent verdict. Snedecor v. Pope, 143 Ala. 275, 39 So. 318. Finding that purchaser had suffered a loss of $150 by injuries to a way appurtenant to his lands subsequent to his purchase held not sustained by evidence. Couson v. Wilson [Cal. App.] 83 P. 262. Where a company which insured plate glass windows, which were broken by the tortious act of a third person, by agreement with the insured expended a certain amount in replacing the glass, and claimed to be subrogated to the rights of the insured against the wrongdoer and sued him, as between them, the amount of damages was not liquidated, and, under Civ. Code 1895 § 5073, though the case was in default, it was necessary to establish the amount of such damages. Maryland Casualty Co. v. Lanham, 124 Ga. 859, 53 S. E. 395. The class and condition of the stock are material matters in determining their market price, and in the absence of evidence as to such matters, and of what the market price of live stock of the class in question was, damages cannot be awarded for a claimed decline in price of stock of the general description of that which the carrier refused to accept and transport. Chicago, etc., R. Co. v. Todd [Neb.] 105 N. W. 83. In an action for injuries to plaintiff's son, where there was no evidence that plaintiff lost the benefit of his son's services, except as measured by his earnings, nor that the future earnings of the son would in reasonable probability be lessened as a result of the accident, and no expenses other than for medical services were proven, the only damage recoverable was for loss of earnings and medical expenses. Devine v. New York City R. Co., 96 N. Y. S. 1058. Evidence of conversion of 3 bales of cotton, and its value per pound, without proof of weight of each bale, authorizes verdict for more than nominal damages. Baker v. Hutchinson [Ala.] 41 So. 809. Where the evidence shows that the injured person was a farmer and prior to the injury had performed ordinary farm

plied from physical injury and pain; no further proof is required.[64] If punitive damages are claimed, he must establish facts warranting recovery of damages of that character.[65] If the measure of damages is fixed by the contract for breach of which the action is brought, no other proof of damages is necessary.[66] Proof must separate legal from illegal damages.[67] In an action for wrongful breach of a contract for personal services, that plaintiff might have obtained other remunerative employment is matter of defense.[68]

Admissibility in general.[69]—Proof should be confined to the issues raised by the pleadings.[70] Opinion evidence is incompetent as to the amount of damage, this being a question solely for the jury,[71] but is competent on the various elements of damage claimed[72] where the witness is shown to be qualified.[73] In an action for

work, but there is no evidence as to the value of his time, it is proper to instruct that he may be allowed for any time that he was incapacitated. Definite proof of actual value could not be made. Wood v. Chicago, etc., R. Co. [Mo. App.] 95 S. W. 946. Where an injured person does not testify directly as to the value of his earnings but the evidence shows that he was required to employ a man at a certain salary it can be inferred that plaintiff was incapacitated for work and his loss is the amount of salary paid his servant. Wellmeyer v. St. Louis Transit Co. [Mo.] 95 S. W. 925.

64. International & G. N. R. Co. v. Johnson [Tex. Civ. App.] 15 Tex. Ct. Rep. 982, 95 S. W. 595.

65. In an action for libel, the burden is upon plaintiff to prove malice as a basis for exemplary damages (Carpenter v. New York Journal Pub. Co., 97 N. Y. S. 478), and where defendant introduces proof of want of malice, plaintiff, to recover exemplary damages, must show by a fair preponderance of the evidence that the publication was made maliciously or recklessly or wantonly or carelessly (Id.).

66. Under a contract for the sale of breeding cattle providing that if the animal proved barren the purchase price with interest would be refunded, the measure for breach of such contract is such amount independent of depreciation in value of the animal. White v. Miller [Iowa] 105 N. W. 993.

67. Evidence from which the jury cannot determine legal damages from those too remote to be recovered will not sustain a verdict for more than nominal damages. Western Union Tel. Co. v. Totten [C. C. A.] 141 F. 533.

68. Jefferson & N. W. R. Co. v. Dreeson [Tex. Civ. App.] 96 S. W. 63.

69. See Evidence, 5 C. L. 1301.

70. Where it is alleged that a particular loss was occasioned by a particular fault, the proof should be confined to the scope of the allegations. Missouri, etc., R. Co. v. Sproles [Tex. Civ. App.] 92 S. W. 40. Proof of distressing character of injuries, though not to be considered as an element of damages, is not error when necessary to prove the allegations of the complaint. Coney Island Co. v. Mitsch, 3 Ohio N. P. (N. S.) 81. Where petition was broad enough to admit proof of injury to soil by sediment deposited by overflow but plaintiff did not claim such damage, defendant could not prove that the soil had been enhanced in value by the deposit. Gulf, etc., R. Co. v. Harbison [Tex.] 14 Tex. Ct. Rep. 895, 90 S. W. 1097. Where petition in action for delay in delivery of message announcing fatal illness of brother alleged the unusual attachment between the brother and sister, such fondness for each other could be shown as a circumstance showing the extent of the sister's suffering. Western Union Tel. Co. v. Campbell [Tex. Civ. App.] 14 Tex. Ct. Rep. 484, 91 S. W. 312. An allegation that a horse, killed by the negligence of another, was of a certain market value, does not authorize proof that the horse had no market value but had an intrinsic value for special purposes. Gulf, etc., R. Co. v. Cooper [Tex. Civ. App.] 89 S. W. 1001. In an action for deceit in the sale of land based on misrepresentations as to the ownership of certain land, evidence of misrepresentations as to the amount of timber on the lands is inadmissible on the question of damages. Jewett v. Buck [Vt.] 63 A. 136. In action for damages caused by overflow, plaintiff cannot recover for the consequences of other overflows, not pleaded, and evidence thereof is inadmissible. Central of Georgia R. Co. v. Keyton [Ala.] 41 So. 918.

71. Wiggins v. St. Louis, etc., R. Co. [Mo. App.] 95 S. W. 311. Damages cannot be proved by asking the injured person if he sustained any damage as a result of the defendant's refusal to perform his contract. Richmond v. Brandt, 118 Ill. App. 624. In trespass for cutting trees a witness may not testify as to his estimate or judgment of the damage in exact figures. The amount is the province of the jury. Western Union Tel. Co. v. Ring, 102 Md. 677, 62 A. 801. The opinion of a witness as to the amount of damage resulting from a wrong, where there are no facts upon which to base an estimate, is incompetent. Raymond v. Edelbrock [N. D.] 107 N. W. 194. Witness may not testify to his conclusion as to the amount, but only facts from which it is for the jury to determine the amount. City of McCook v. McAdams [Neb.] 106 N. W. 988.

72. Where land is injured by reason of a nuisance, an expert may not testify as to the fact or the amount of damage but may give his opinion as to the value of the property before and after the commission of the alleged tort. Baltimore Belt R. Co. v. Sattler, 102 Md. 595, 62 A. 1125. In giving such testimony he may state the reasons upon which his opinion is based, so that the jury may judge as to the value of his opinion.

negligence it is incompetent to show that the defendant is insured against loss in case of a recovery.[74] Holdings as to the admissibility of evidence to show the value of property injured, destroyed, or converted,[75] the amount of lost profits,[76] the damage sustained by breach of an irrigation contract,[77] and as to the admissibility of evidence to aid the jury in assessing punitive damages[78] are given in the notes.

Id. Witnesses called to show the depreciation in the rental value of land may support their opinions by stating what crops were raised before and after the land was injured. Where the court instructs that there can be no recovery for loss of crops. Crabtree Coal Min. Co. v. Hamby's Adm'r [Ky.] 90 S. W. 226.

73. Witnesses shown to be familiar with surroundings may give estimate of damages to land caused by construction of telegraph line across it. Mason v. Postal Tel. Cable Co. [S. C.] 54 S. E. 763. Where one sues for injuries to real property caused by smoke and cinders, a witness familiar with the property may describe the effects thereon of smoke, gas, vapors, etc. Baltimore Belt R. Co. v. Sattler, 102 Md. 595, 62 A. 1125. In an action for injuries to property caused by the discharge of smoke and cinders from passing engines, persons acquainted with the property and who had observed the injurious effects may testify as to the fact of damage. Id. In trespass for cutting trees a witness may not testify as to the value of trees like those injured, for wood or timber, after stating that he knows something about the value of such trees without further showing as to his knowledge of the subject. Western Union Tel. Co. v. Ring, 102 Md. 677, 62 A. 801. Where land is flooded a witness familiar with its productiveness, and who knew the kind of year that the year of the overflow was for raising cotton, may testify as to the amount of cotton land like the land in question would produce in a season like the one in question. Chicago, etc., R. Co. v. Seale [Tex. Civ. App.] 14 Tex. Ct. Rep. 48, 89 S. W. 997. An expert could testify as to the difference in the value of cattle on account of shrinkage, it having been shown what the amount of shrinkage was for every 24 hours of transportation. Gulf, etc., R. Co. v. House [Tex. Civ. App.] 13 Tex. Ct. Rep. 752, 88 S. W. 1110. Witnesses could testify as to market value of cattle at destination if shipped with reasonable dispatch and care though they had not seen the cattle before shipment. Texas & P. R. Co. v. Felker [Tex. Civ. App.] 14 Tex. Ct. Rep. 308, 90 S. W. 530.

74. Prewitt-Spurr Mfg. Co. v. Woodall, 115 Tenn. 605, 90 S. W. 623.

75. Where property injured or destroyed has no market value, recourse must be had to its cost, utility, and use, and to the opinions of witnesses who may possess such information as will give weight to their opinions. Rule applied to dredging machine. California Development Co. v. Yuma Valley Union Land & Water Co. [Ariz.] 84 P. 88. In action to recover value of wheat burned in fire started by spark from defendant's engine, market value of wheat at time of fire could be shown, where it appeared that if it had not been burned, it would have been ready for the market in a short time. Quint v. Dimond, 147 Cal. 707, 82 P. 310. To ascertain the value of converted property at the time of its conversion, its value a reasonable time prior and subsequent to its conversion may be shown. Austin v. Vanderbilt [Or.] 85 P. 519. Where a claim is for damages to real property, accrued at the time of the institution of the action, a witness may not testify as to the present condition of the property. Baltimore Belt R. Co. v. Sattler, 102 Md. 595, 62 A. 1125. Estimates of damages to land caused by construction of telegraph line should be based on depreciation of present market value of land, not on any future conjectural value. Mason v. Postal Tel. Cable Co. [S. C.] 54 S. E. 763. An appraisement made two years prior in a bankrupt's inventory held insufficient to overcome the value as fixed by the sale. Id. Sale price at foreclosure suit will be deemed its value in the absence of clear proof to the contrary, especially where the defendant was previously notified that he would be held liable for any deficiency. Id. In an action for injuries to a horse it is not permissible to show that the owner had tried to sell it for a certain price and had not found a purchaser. Howard v. Fabj [Tex. Civ. App.] 14 Tex. Ct. Rep. 1004, 93 S. W. 225. In an action against a carrier for the loss of a package of baggage containing boots, shoes, comforts, etc., held proper to permit the passenger to testify to the value of the articles; the strict rule of market value not being applicable. Ft. Worth, etc., R. Co. v. McCarty [Tex. Civ. App.] 15 Tex. Ct. Rep. 810, 94 S. W. 178.

76. Potatoes, delayed in transit, were frozen. Fact of sale through commission house and price received, after delivery, was admissible on issue of shipper's damage. Isham v. Erie R. Co., 98 N. Y. S. 609. Evidence of sales made subsequently to the breach and during the pendency of the contract term, though made by the principal through other agents, is admissible, to be considered in estimating disputed gains. Emerson v. Pacific Coast & Norway Packing Co. [Minn.] 104 N. W. 573. Evidence as to past profits in the same business, and as to the prosperity and growth of the community where the business was to be carried on, and as to plaintiff's skill and ability, is admissible in an action to recover lost profits upon breach of a contract for a partnership. Ramsay v. Meade [Colo.] 86 P. 1018.

77. In an action to recover losses sustained by breach of contract to supply water for irrigation, proof of what other lands similarly situated, and irrigated as defendant had agreed to irrigate plaintiff's land, had produced in other years, is admissible. Colorado Canal Co. v. McFarland [Tex. Civ. App.] 15 Tex. Ct. Rep. 848, 94 S. W. 400.

Personal injury actions.[79]—Miscellaneous holdings on admissibility of evidence to show the nature and extent of injuries,[80] the cause of the physical condition complained of,[81] and the extent of impairment of earning power,[82] are given in the

78. In an action for trespass to the person where damages for indignity or punitive damages are claimed, the provocation, conduct, and acts of the parties, which give character and color to the transaction, and are clearly a part of it, may be shown though not transpiring at the precise moment of the assault. Lenfest v. Robbins [Me.] 63 A. 729. Evidence of the wealth of the wrongdoer is admissible in a case where punitive damages are allowable, not as tending even remotely to sustain the plaintiff's case, but to assist the jury in fixing the punishment. Yazoo & M. V. R. Co. v. Williams [Miss.] 39 So. 489. In an action for libel, the jury may consider the financial condition of the defendant at a time reasonably close to the publication of the libel. Geringer v. Novak, 117 Ill. App. 160.

79. See 5 C. L. 939.

80. In an action for personal injuries, plaintiff may prove what she weighed prior to the injury. O'Dea v. Michigan Cent. R. Co. [Mich.] 12 Det. Leg. N. 718, 105 N. W. 746. In personal injury action evidence of physical condition and appearance of plaintiff previous to her injury is admissible. Brown v. Blaine, 41 Wash. 287, 83 P. 310. In personal injury actions it is proper to allow plaintiff to show the condition of her health prior to the injury, and her condition thereafter, and to leave the question of the cause of her subsequent condition to the jury. Chicago Union Traction Co. v. May [Ill.] 77 N. E. 933. Where it was shown that a varicose vein was discovered in plaintiff's leg after his injury which had not been observed before, physician could testify that there was such a varicose vein though he could not assign the injury as its cause. Field v. New York City R. Co., 109 App. Div. 831, 96 N. Y. S. 457. Error in action for injuries to admit expert evidence of plaintiff's condition after accident where his previous condition was not shown. Kunstler v. Interurban St. R. Co., 48 Misc. 655, 96 N. Y. S. 296. A physician who examined and treated an injury is competent to express an opinion as to future consequences reasonably certain to be expected from the injury. Vohs v. Shorthill & Co. [Iowa] 107 N. W. 417. In an action for injuries causing loss of an eye, plaintiff's attending oculist may testify as to the details of his treatment tending to prove pain and suffering. Olwell v. Skobis, 126 Wis. 308, 105 N. W. 777. It is competent to show that a surgical operation was performed on the injured person after the action for the injury was commenced. City of Gibson v. Murray, 120 Ill. App. 296.

81. Where in an action for injuries, evidence was introduced to show that the injured person was previously troubled with a certain disease, it was proper to permit her physician to testify that she had never complained to him of such trouble and that he had never treated her for it. St. Louis & S. F. R. Co. v. Ross [Tex. Civ. App.] 14 Tex. Ct. Rep. 89, 89 S. W. 1105. It is proper to permit the injured person's medical witness to testify on cross-examination as to what effect confinement in a school room for a number of years would have had upon the plaintiff in producing her then condition. Dallas Consol. Elec. St. R. Co. v. Black [Tex. Civ. App.] 13 Tex. Ct. Rep. 897, 89 S. W. 1087. Evidence of indications of disease in the injured person prior to the injury is inadmissible where it is not shown that evidence will be introduced to connect such condition with the trouble which it claimed resulted from the injury. Glasgow v. Metropolitan St. R. Co., 191 Mo. 347, 89 S. W. 915. Evidence of the injured person's use of intoxicating liquor five or six years prior to the injury is not admissible where it is not shown to have had any affect upon his physical condition at the time of trial. Houston, etc., R. Co. v. McCarty [Tex. Civ. App.] 89 S. W. 805. Evidence of habits of intoxication of the injured party is not admissible where it is not shown that proof will be introduced to connect such habits with the deceased's condition which it is claimed resulted from the injury. Glasgow v. Metropolitan St. R. Co., 191 Mo. 347, 89 S. W. 915. One who sues for an injury which might have existed from birth may show that prior to the injury he had stated in an application for insurance that he had never sustained such injury which statement had been attested as true by his examining physician. San Antonio Traction Co. v. Parks [Tex. Civ. App.] 15 Tex. Ct. Rep. 171, 93 S. W. 130.

82. Wages plaintiff received a year previous to his injury held provable as bearing on his earning capacity. Bourke v. Butte Elec. & Power Co. [Mont.] 83 P. 470. In an action for personal injuries, the plaintiff may introduce evidence as to his wages at times shortly before the occurrence of the injury. Lewes v. Crane [Vt.] 62 A. 60. Earning capacity at the time of the injury may be shown by evidence of an offer of wages made at or about such time. Montgomery v. Seaboard Air Line R. Co. [S. C.] 53 S. E. 987. Where injuries to a minor were claimed to be permanent, evidence of his earning capacity prior to the accident may be considered in assessing compensation for impairment of earning capacity after maturity. Andrews v. Chicago & G. W. R. Co. [Iowa] 105 N. W. 404. Where in personal injury action plaintiff claims he was incapacitated and that his business suffered, defendant may introduce proof tending to show that plaintiff's business continued, was of considerable volume, and was attended to regularly by plaintiff. Burns v. Dunham, Carrigan & Hayden Co. [Cal.] 82 P. 959. It is competent to prove the market value of services in a particular vocation in which plaintiff is specially skilled, and for which it may be presumed that there is a demand at a salary or wage compensation. Lake Shore & M. S. R. Co. v. Teeters [Ind.] 77 N. E. 599. It may be shown on the issue of diminution of earning power that plaintiff was, before the injury, a man of sober and industrious habits, the evidence being re-

notes. The plaintiff is competent to testify as to his injuries[83] or their effect on his earning capacity.[84] Complaints of present pain or suffering, or natural expressions thereof, may be shown,[85] but the injured person's description or narrative of his injuries is hearsay and incompetent.[86] Evidence of the plaintiff's rank or condition of life is inadmissible on the question of damages.[87] The right to recover for a prior injury is not material.[88]

Proof of life expectancy[89] is admissible, where permanent injury or loss of earning power is shown,[90] and for this purpose mortality or life expectancy tables are competent,[91] though probable duration of life may be found from evidence of age and physical condition without the introduction of mortality tables.[92] The age at which the injured person's ancestors died may be shown on this issue.[93]

Physical examination and exhibition of injuries.[94]—There is no inherent power in a court to direct a physical examination of the plaintiff,[95] this power existing

stricted to this issue (Louisville & N. R. Co. v. Daniel [Ky.] 91 S. W. 691); but proof tending to prove the moral character of plaintiff should be excluded (Id.).

83. Plaintiff in a personal injury action may testify fully as to her condition, pain, and suffering and its duration. O'Dea v. Michigan Cent. R. Co. [Mich.] 12 Det. Leg. N. 718, 105 N. W. 746. On the second trial of an action for personal injuries, plaintiff may testify as to the condition of his health as the result of his injuries subsequent to the first and up to the time of the second trial. Kircher v. Larchwood [Iowa] 105 N. W. 834. The injured person may state "I have been a nervous wreck ever since;" this is not a mere conclusion. Chicago & J. Elec. R. Co. v. Patton, 122 Ill. App. 174.

84. A plaintiff may testify to what extent, in his opinion, his earning capacity has deteriorated by reason of his injury. Houston & T. C. R. Co. v. Fanning [Tex. Civ. App.] 91 S. W. 344. The plaintiff in an action for personal injuries may give an opinion as to the amount of damages he has sustained. Roundtree v. Charleston, etc., R. Co., 72 S. C. 474, 52 S. E. 231.

85. In an action for personal injuries, persons who hear the plaintiff complain of pain and suffering may testify to the fact that she complained, but not to the language used by her in so complaining. O'Dea v. Michigan Cent. R. Co. [Mich.] 12 Det. Leg. N. 718, 105 N. W. 746. Complaints of pain made within an hour of the injury may be testified to by a person who heard them. Chicago City R. Co. v. Lowitz, 119 Ill. App 360. Non medical witnesses may testify that after the accident the injured person uttered exclamations of pain. Village of Gardner v. Paulson, 117 Ill. App. 17.

86. Where one injured in alighting from a train sent for the railroad company's physician in order to substantiate her claim for injuries, her complaints to him of present sufferings were not mere natural expressions, but hearsay and inadmissible. O'Dea v. Michigan Cent. R. Co. [Mich.] 12 Det. Leg. N. 718, 105 N. W. 746.

87. In personal injury action, evidence that plaintiff was married and had two children was inadmissible. Purcell v. Duncan Co., 107 App. Div. 501, 95 N. Y. S. 278.

88. Evidence regarding consultation with a lawyer regarding a prior injury held immaterial. City of Dallas v. Muncton [Tex. Civ. App.] 83 S. W. 431.

89. See 5 C. L. 940.

90. Evidence of plaintiff's expectancy of life is admissible where it is shown that his ability to earn money is impaired. Illinois Cent. R. Co. v. Houchins [Ky.] 89 S. W. 530. Life expectancy is to be considered where injuries are permanent. Haynes v. Waterville & O. St. R. Co. [Me.] 64 A. 614.

91. Life expectancy tables competent where there was proof authorizing finding that injury to eyesight was permanent. Illinois Cent. R. Co. v. Morris [Ky.] 90 S. W. 979. Where personal injuries are shown to be permanent, mortality tables based on the experience of healthy lives insured are admissible to show life expectancy though plaintiff is present in court. Messing v. Wilmington City R. Co. [Del.] 64 A. 247. Expectancy life tables are admissible in an action for breaking the leg of a boy 15 years of age. McMahon v. Bangs [Del.] 62 A. 1098. Where damages for loss of ability to earn money are sought, mortality tables are admissible. Louisville Belt & Iron Co. v. Hart [Ky.] 92 S. W. 951. The American mortality tables are competent. Illinois Cent. R. Co. v. Houchins [Ky.] 89 S. W. 530. Where there is evidence tending to show a permanent injury, mortality tables are admissible to show life expectancy. Brown v. Blaine, 41 Wash. 287, 83 P. 310. Life insurance man held properly allowed to tell what plaintiff's life expectancy was from the American tables. Southern Pac. Co. v. Cavin [C. C. A.] 144 F. 348.

92. Galveston, etc., R. Co. v. Paschall [Tex. Civ. App.] 14 Tex. Ct. Rep. 709, 92 S. W. 446.

93. On issue of life expectancy it is proper to show the age at which the injured person's father and grandfather died, descent from long lived stock being material. Haynes v. Waterville & O. St. R. Co. [Me.] 64 A. 614. In an action for injuries to a child it is competent to show that his ancestors were long lived as bearing on his life expectancy. Sterling v. Union Carbide Co. [Mich.] 12 Det. Leg. N. 712, 105 N. W. 755.

94. See 5 C. L. 940.

95. Goldenberg v. Zirinsky, 100 N. Y. S. 251. A court has no power to compel a plaintiff suing for damages for personal injuries to submit to a physical examination

only when conferred by statute.[96] It should not be extended beyond the statutory limits,[97] and, in the exercise of it, the statutory requirements must be strictly complied with.[98] On the question of the right to show unwillingness to submit to an examination, there is a conflict.[99] It is not error, when the injured person is permitted to exhibit his injuries, to allow a juror to examine the party and handle him to ascertain for himself the extent of the injuries.[1] Where a plaintiff exhibits his person to the jury, he may be compelled to exhibit it again for the purpose of showing by the physician who examined him at the time of the injury that the same condition which existed at the time of trial existed prior to the injury.[2]

(§ 7) *C. Instructions.*[3]—Instructions should furnish the jury a measure of damages[4] applicable to the case in hand,[5] and should properly and clearly submit

by disinterested medical experts. Richardson v. Nelson [Ill.] 77 N. E. 583. An injured person may not be compelled to submit his person to an examination by a physician of the defendant. Kellyville Coal Co. v. Moreland, 121 Ill. App. 410. In the Federal jurisdiction, in an action for personal injuries, in the absence of some enabling statute of the state, the plaintiff cannot, by order of court, be required to submit to a personal examination by a surgeon. All the defendant can do is to request such examination, and in case of refusal may comment upon it to the jury. Denver City Tramway Co. v. Norton [C. C. A.] 141 F. 599.

96. Code Civ. Proc. §§ 873, 881 confers power. Goldenberg v. Zirinsky, 100 N. Y. S. 251. In Kansas the court has power to require a physical examination of plaintiff in a personal injury action by a commission of physicians appointed by it. Dickinson v. Kansas City El. R. Co. [Kan.] 86 P. 150. Where judge made order for physical examination of plaintiff, on showing required by § 872, subd. 4 of Code, and afterwards set his order aside upon an affidavit that an examination had already been made at defendant's request, his action was not erroneous, no showing being made by defendant that second examination was necessary, or that first had not in fact been made. Orlando v. Syracuse Rapid Transit R. Co., 109 App. Div. 356, 95 N. Y. S. 898.

97. In New York, a court has no power to allow the parties to be represented by physicians of their own choosing at the physical examination. Goldenberg v. Zirinsky, 100 N. Y. S. 251.

98. Service of order directing examination on attorney of nonresident plaintiff held unauthorized and void. Goldenberg v. Zirinsky, 100 N. Y. S. 251.

99. It is proper to inquire of plaintiff on his cross-examination if he would be willing to submit to a physical examination by physicians appointed by the court. Missouri, etc., R. Co. v. Mitchell [Tex. Civ. App.] 14 Tex. Ct. Rep. 90, 90 S. W. 716. It is not competent to show that the injured person refused to submit to a medical examination, as affecting the claim of injury. Illinois C. R. R. Co. v. Downs, 122 Ill. App. 545.

1. American Brake Shoe & Foundry Co. v. Jankus, 121 Ill. App. 267.

2. Houston & T. C. R. Co. v. Anglin [Tex.] 14 Tex. Ct. Rep. 104, 89 S. W. 966.

3. See 5 C. L. 941.

4. The jury should be instructed as to the measure of damages in an action against a carrier for delay in delivery. Chicago & E. I. R. Co. v. Chestnut Bros. [Ky.] 89 S. W. 298. An instruction that the jury were themselves to estimate the damages, in a personal injury action, and that it was not essential that an opinion thereon should have been given, held not erroneous as not giving a measure of damages, or as telling the jury that there is no rule for such damages. Richardson v. Nelson [Ill.] 77 N. E. 583. In an action for personal injuries the measure should not be left to the unlimited discretion of the jury. Chicago, etc., R. Co. v. Kuck, 112 Ill. App. 620. The jury should not be left to consider anything they deem to be proper elements of damage. An instruction that the jury should award such actual damages as the proof shows to have been sustained and should consider physical pain and mental suffering, loss of time, and impairment of earning ability is erroneous. Louisville & N. R. Co. v. Cleaver [Ky.] 89 S. W. 494. Requested instruction that there was no measure of damages for physical and mental pain and suffering, but they were matter of inference from the manner and carelessness of the wrong, properly refused. Huggins v. Southern R. Co. [Ala.] 41 So. 856. In cases of negligence, it is the duty of the court to instruct of its own motion as to the measure of damages Wilkinson v. Northeast Borough [Pa.] 64 A. 734.

5. In an action for value of lost time, pain and suffering, doctor's bills, permanent physical impairment and diminished earning capacity, it is error to charge Civ. Code 1895, § 3907, "In some torts the entire injury is to the peace, happiness or feelings of plaintiff; in such case no measure of damages can be prescribed except the enlightened conscience of impartial jurors." Atlantic & B. R. Co. v. Bowen [Ga.] 54 S. E. 105. In trespass action there was no issue raised or proof made of any damage except that suffered by plaintiff. Held an instruction allowing a recovery "for all the consequences" of defendant's acts was not objectionable as permitting a recovery for damages suffered by others than plaintiff. Snedecor v. Pope, 143 Ala. 275, 39 So. 318. Where under the allegations of a complaint and the evidence a verdict for general damages could have been legally found, it was error to instruct in a way calculated to impress the jury that plaintiff could not recover unless special damages were proved.

the various issues raised.[6] They should be clear[7] and consistent,[8] should not invade the province of the jury,[9] should limit the recovery to the items or elements of damages pleaded[10] and supported by proof,[11] and to the amount prayed for in

In an action for libel. Flanders v. Daley, 124 Ga. 714, 52 S. E. 687.

6. It is error to instruct the jury to award such damages as directly resulted from the negligence without further reference to the issues in the case, leaving the jury to determine them. Kohr v. Metropolitan St. R. Co. [Mo. App.] 92 S. W. 1145. In instructing as to the damages recoverable for injuries to land by smoke and cinders, the items for which damages may be recovered should be specifically pointed out. Instruction held too general and indefinite. Baltimore Belt R. Co. v. Sattler, 102 Md. 595, 62 A. 1125. An instruction should not segregate injuries which should be considered under the head of physical and mental suffering into special items and permit each to be considered separate from the others, South Covington, etc., R. Co. v. Nelson [Ky.] 89 S. W. 200. Under a complaint claiming damages for which the defendant is not liable, the jury should not be left to form their own conclusions as to the injuries complained of but the issues should be submitted to them. Fisher v. St. Louis Transit Co. [Mo.] 95 S. W. 917.

7. Held misleading in an action against a carrier for delay where some of the injury was occasioned by the shipper after arrival of the goods. Chicago & E. I. R. Co. v. Chestnut Bros. [Ky.] 89 S. W. 298. Instruction, in an action for injuries to cattle in transit, that the measure of damages is the difference in their value at destination in the condition in which they arrived and what it would have been except for the injury is not misleading because not confining the amount to difference in "market value," where the evidence was all directed to the question of market value. Gulf, etc., R. Co. v. Terry [Tex. Civ. App.] 13 Tex. Ct. Rep. 991, 89 S. W. 792.

8. Instructions on the question of damages held inconsistent. Glasgow v. Metropolitan St. R. Co., 191 Mo. 347, 89 S. W. 915.

9. Instruction on the question of punitive damages held misleading as tending to impress the jury that the court was of the opinion that punishment should be great. Southern R. Co. v. Scanlon's Adm'r [Ky.] 92 S. W. 927. An instruction in a personal injury case that the jury may give "such damages, not to exceed the amount claimed in the declaration," as they believe from the evidence plaintiff has sustained by reason of his injury, is not erroneous as inviting the jury to award large damages. Kellyville Coal Co. v. Strine, 217 Ill. 516, 75 N. E. 375. It is erroneous to instruct that the measure of damages for breach of contract of sale of goods is the difference between the contract price and the market value on a certain date, where the question as to such date, being date of delivery, is in dispute. Thomas v. Burks, 120 Ill. App. 222.

10. In an action for unlawful arrest and false imprisonment, where punitive damages are not claimed in the complaint, it is error to instruct the jury to allow such sum as they believe from the evidence plaintiff ought to recover, not exceeding the sum claimed; damages should be limited to such as will compensate plaintiff. Pandjiris v. Hartman [Mo.] 94 S. W. 270. Instruction on an element of damages not within the pleadings is erroneous. Kendall v. Chicago, etc., R. Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 309, 95 S. W. 757. Where suit against a carrier was to recover special damages for loss of profits on sales of the horses shipped, an instruction authorizing a recovery for depreciation in market value was erroneous. Texas & P. R. Co. v. Stewart [Tex. Civ. App.] 96 S. W. 106. An instruction in a personal injury action to award such damages as "will fully compensate" plaintiff is not erroneous when specifically limited to enumerated elements. Sorensen v. Case Threshing Mach. Co. [Wis.] 109 N. W. 84. An instruction in a personal injury case giving the different elements of damages but stating that plaintiff could recover only for such actual suffering of body and mind as were the immediate and necessary consequences of the injury, because there was no evidence as to the other elements, was not objectionable because the court stated that it gave the rule as laid down in a supreme court decision, and did not apply the law to the facts, but it stated a correct rule of damages. Ruffin v. Atlantic & N. C. R. Co. [N. C.] 55 S. E. 86.

11. Instruction held not erroneous as leaving jury to assess damages without referring them to the evidence, such reference being made. Fitzgerald v. Benner, 219 Ill. 485, 76 N. E. 709. Instruction telling jury to consider nature and permanency of injuries, etc., "together with all the facts and circumstances shown by the evidence," held erroneous. Monongahela River Consol. Coal & Coke Co. v. Hardsaw [Ind. App.] 77 N. E. 363. An instruction that the jury are the sole judges of the damages to be awarded is not improper. It is to be presumed that the jury will look to the evidence of injury in assessing damages. Birmingham R., Light & Power Co. v. Rutledge, 142 Ala. 195, 39 So. 338. It is error to charge relative to an element of damages having no foundation in the evidence. Davis v. Richardson [Ark.] 89 S. W. 318. Evidence sufficient to authorize an instruction on the subject of permanent injury. Southern R. Co. v. Clariday, 124 Ga. 958, 53 S. E. 461. Evidence held insufficient to warrant a recovery as for permanent injuries. Steinmann v. St. Louis Transit Co. [Mo. App.] 94 S. W. 799. Held error to submit to jury reasonableness of expenditures to prevent injury to rice crop by overflow, there being no evidence to show the reasonableness of such expenditures. Colorado Canal Co. v. Sims [Tex. Civ. App.] 15 Tex. Ct. Rep. 944, 94 S. W. 365. In action for ejection, evidence that plaintiff told the inspector that she did not have money enough to get home could be considered by jury as showing extent of her anxiety. Southern Pac. Co. v. Bailey [Tex. Civ. App.] 14 Tex. Ct. Rep. 921, 91 S. W. 820. Making a passenger nervous almost to sickness amounts to physical injury and discomfort, and proof

the complaint,[12] and should not allow double damages.[13] When vindictive damages are not recoverable, the jury should be instructed to award only compensatory

of it warrants an instruction on physical pain as basis of recovery Id. Where evidence showed that a severe blow on the head resulted in nervousness and pains in the head, and had affected the eyesight and threatened paralysis, an instruction warranting a recovery as for permanent injuries was proper. Gharst v. St. Louis Transit Co., 115 Mo. App. 403, 91 S. W. 453. In action for killing of cattle, an instruction that jury should deduct from their value while alive the value of the carcasses was properly refused when there was no evidence of the value of the carcasses. Western R. Co. v. Stone [Ala.] 39 So. 723. Evidence held to warrant an instruction allowing jury to give damages for impairment of plaintiff's mental faculties. Cole v. Seattle, etc., R. Co. [Wash.] 85 P. 3. Proof that plaintiff had employed physicians warrants inference that expense was incurred, and proof that he would suffer in the future warrants inference that medical expense would be incurred in the future; hence such proof supports an instruction allowing recovery of future expense for medical attendance. Webster v. Seattle, etc., R. Co. [Wash.] 85 P. 2; Cole v. Seattle, etc., R. Co. [Wash.] 85 P. 3. Submission of the issue of impairment of future earning capacity is justified by allegations that the injured person was rendered an invalid, unable to perform physical labor, and testimony of his physician that his capacity for physical labor was impaired. Galveston, etc., R. Co. v. Parish [Tex. Civ. App.] 15 Tex. Ct. Rep. 334, 93 S. W. 682. An allegation that plaintiff lost time on account of his injury, where there is no evidence showing the value of such time, does not authorize an instruction that the jury may assess damages in such amount as they deem reasonable for loss of time. Smith v. Whittlesey [Conn.] 63 A. 1085. Where in an action for injuries to a mule there was no evidence that permanent injuries were sustained, the measure of damages resulting from permanent injury should not be instructed upon. St. Louis S. W. R. Co. v. Elledge [Tex. Civ. App.] 15 Tex. Ct. Rep. 545, 93 S. W. 499. Testimony by the owner in an action for flooding growing crops that he could not state the value of the crops when destroyed, as they had only a prospective value, does not authorize an instruction to award the reasonable value of such crops. City of Paris v. Tucker [Tex. Civ. App.] 15 Tex. Ct. Rep. 240, 93 S. W. 233. Though there is no direct or positive evidence that injuries would be permanent, instructions on the subject of permanent injuries are proper, the jury being at liberty to draw their own inferences from the evidence. Macon R. & Light Co. v. Streyer, 123 Ga. 279, 51 S. E. 342. Evidence sufficient to authorize an instruction as to future pain and suffering where the injured party lost a leg and testified that he had suffered great pain and still suffered. Southern Cotton Oil Co. v. Skipper [Ga.] 54 S. E. 110. Evidence held to warrant an instruction for punitive damages in action under dramshop act. Earp v. Lilly, 217 Ill. 582, 75 N. E. 552. That certain items of a doctor's bill were not recoverable did not warrant an instruction that the whole bill must be disregarded. Birmingham R. Light & Power Co. v. Rutledge, 142 Ala. 195, 39 So. 338. It is erroneous to give an instruction which permits the recovery of punitive damages in an action where no question concerning such damages was raised. Illinois Cent. R. Co. v. Becker, 119 Ill. App. 221. Where the extent of the injury is shown and is of such a character as to necessarily have caused pain, it is proper to authorize a recovery for pain suffered. Coal Belt Elec. R. Co. v. Kays, 119 Ill. App. 23. It is error to authorize recovery for future suffering where there is no evidence that such suffering is likely to occur. Peoria & P. Terminal R. Co. v. Hoerr, 120 Ill. App. 65. It is erroneous to instruct the jury to allow damages for future pain and suffering and permanent injury where there is no evidence that there would be future suffering or that the injuries were permanent. Springfield Consol. R. Co. v. Farrant, 121 Ill. App. 416. Where the evidence shows that a licensee on a railroad train was kicked and cursed by the conductor, it is proper to authorize the jury to consider insult and indignity though the plaintiff admits that he was not humiliated. Gulf, etc., R. Co. v. Bates [Tex. Civ. App.] 15 Tex. Ct. Rep. 319, 95 S. W. 738.

12. An instruction in an action against a carrier for injuries to cattle in transit that the verdict should not exceed the amount claimed in the petition was not error where the jury found a much smaller amount. Gulf, etc., R. Co. v. Funk [Tex. Civ. App.] 15 Tex. Ct. Rep. 393, 92 S. W. 1032. Instruction held not erroneous as allowing a recovery beyond the amount prayed for. Lindsay v. Kansas City, 195 Mo. 166, 93 S. W. 273. It is not improper to instruct in an action for personal injuries, after stating the elements of damages, that in no event must the verdict exceed the sum demanded. St. Louis, etc., R. Co. v. Boyles [Ark.] 95 S. W. 783. It is proper to instruct that no greater amount can be allowed than is demanded in the complaint, where the evidence would warrant a verdict for a greater sum. International, etc., R. Co. v. Slusher [Tex. Civ. App.] 15 Tex. Ct. Rep. 518, 95 S. W. 717. An instruction not to allow a greater sum than is demanded in the complaint is not ground for reversal under a statute authorizing the appellate court to require a remittitur of excessive verdicts. Gulf, etc., R. Co. v. Bates [Tex. Civ. App.] 15 Tex. Ct. Rep. 319, 95 S. W. 738.

Contra: In the instructions it is improper to call the attention of the jury to the amount claimed in the petition. Illinois Cent. R. Co. v. Hicks, 122 Ill. App. 349. The practice of referring the jury to the amount of damages claimed in the petition is condemned, but is not reversible error. Kellyville Coal Co. v. Strine, 117 Ill. App. 115. It is erroneous to refer in the instructions to the amount of damages claimed in the petition where the jury might be mis-

damages.[14] Holdings on various instructions complained of are collected in the note.[15] An erroneous instruction on the measure of damages is not ground for

led by such reference. Illinois Cent. R. Co. v. Becker, 119 Ill. App. 221.

13. Instruction not erroneous as permitting double recovery. Atchison, etc., R. Co. v. Nation [Tex. Civ. App.] 14 Tex. Ct. Rep. 956, 92 S. W. 823. Instruction in an action for delay in transporting threshing machines held objectionable as allowing double damages. Missouri, etc., R. Co. v. Sproles [Tex. Civ. App.] 92 S. W. 40. An instruction in an action against a carrier for permitting a car to become and remain cold, that permits recovery for cold and suffering undergone in the car, and one authorizing recovery for physical and mental suffering to accrue as a consequence of such experience, do not authorize double damages. Missouri, etc., R. Co. v. Byrd [Tex. Civ. App.] 14 Tex. Ct. Rep. 65, 89 S. W. 991. Instructions on the question of damages held proper and not open to the objection of permitting recovery of double damages. Missouri, etc., R. Co. v. Hogan [Tex. Civ. App.] 15 Tex. Ct. Rep. 325, 93 S. W. 1014. Instruction in personal injury case condemned as tending to induce jury to allow double damages. Texas & N. O. R. Co. v. McCraw [Tex. Civ. App.] 16 Tex. Ct. Rep. 368, 95 S. W. 82. Where a general measure of damages is charged, it is improper to so frame an instruction as to authorize an additional recovery for items included in the general measure. Where in an action against a carrier for injuries to live stock a recovery of the difference in the market value before and after the injury was authorized, it was improper to permit recovery for veterinary bills and cost of caring for them after delivery. St. Louis & S. W. R. Co. v. Foster [Tex. Civ. App.] 13 Tex. Ct. Rep. 911, 89 S. W. 450. An instruction, in a personal injury case, to consider "time lost, if any, the impairment of his capacity to labor and earn money in the future, if any, his mental and physical suffering, present and future, if any," and further allowing them to award such a sum as in their judgment would compensate him, held not objectionable as allowing double damages. International & G. N. R. Co. v. Wray [Tex. Civ. App.] 96 S. W. 74.

14. Baltimore Belt R. Co. v. Sattler, 102 Md. 595, 62 A. 1125.

15. Where the trial judge states to the jury what elements may enter into the ascertainment of damages to the exclusion of all others, he is not required, even upon request, to particularize certain of the elements and matters which are necessarily excluded from the consideration of the jury by the clear import of the charge as delivered. Gottlieb v. North Jersey St. R. Co., 72 N. J. Law, 480, 63 A. 339. The term "abused" in an instruction is broad enough to include personal violence. In an action by a licensee on a railroad train, who admits that he was not humiliated by being cursed at and kicked, it is proper to refuse to instruct that there can be no recovery for being cursed and abused. Gulf, etc., R. Co. v. Bates [Tex. Civ. App.] 16 Tex. Ct. Rep. 319, 95 S. W. 738. Where because of delay in delivering a telegram one was prevented from attending the funeral of her sister, and testified as to her desire to attend such funeral, there could be no doubt as to mental anguish. Failure to instruct that the jury should determine whether or not there was mental anguish under the circumstances was not error. Roberts v. Western Union Tel. Co. [S. C.] 53 S. E. 985. An instruction in an action for **libel** should state that the jury should find for such sum as plaintiff ought to recover, rather than for such sum as defendant ought to pay. Geringer v. Novak, 117 Ill. App. 160. In action for **alienation of affections** of plaintiff's husband, an instruction is proper which confines damages recoverable to "what shall fairly seem the pecuniary loss of plaintiff." Humphrey v. Pope [Cal. App.] 82 P. 223. Instructions in **action for injuries** to passenger caused by failure to heat coach held to properly limit recovery to injuries caused while passenger was being transported between two certain points on the road owned by the company sued. St. Louis S. W. R. Co. v. Haney [Tex. Civ. App.] 16 Tex. Ct. Rep. 19, 94 S. W. 386. It is error to use "all injuries" in an instruction where it would authorize a verdict based in part on mental suffering, not the direct result of physical pain, but caused by bodily defects resulting from the injury. Chicago City R. Co. v. Schaefer, 121 Ill. App. 334. An instruction that physical and mental suffering found by the evidence to result from the injury may be considered is sufficient in the absence of a request to charge that only such suffering as "naturally and directly" resulted should be considered. Galveston, etc., R. Co. v. Paschall [Tex. Civ. App.] 14 Tex. Ct. Rep. 709, 92 S. W. 446. Though an instruction does not, with technical accuracy, limit the right of recovery for pain and suffering to that which is the result of the injury complained of, yet if such inference follows from all the instructions, reversal will not follow. City of Gibson v. Murray, 120 Ill. App. 296. In an action by a husband for injuries to his wife for the loss of future services, an instruction that such sum may be awarded as the jury may find from the evidence to be the reasonable value to the husband because of the wife's injuries directs the finding of present and not future value of future services. Clark v. Cedar Rapids [Iowa] 105 N. W. 651.

Future suffering and loss: Instruction to allow plaintiff to recover for mental pain and anguish which he had already suffered and which "he may hereafter suffer," held not erroneous. Robertson v. Hammond Packing Co., 115 Mo. App. 520, 91 S. W. 161. Instruction allowing recovery for bodily pain and mental suffering "as you may believe such injuries may hereafter cause her," upheld. Halley v. St. Joseph R., Light, Heat & Power Co., 115 Mo. App. 652, 91 S. W. 163. Where mortality tables are introduced, the court should on request charge that they only show the probable duration of life and not of earning ability, and should be considered with other evidence in determining the probable duration of ability to earn money. Illinois Cent. R. Co. v. Houchins [Ky.] 89 S. W. 530. The expectancy of life of an ordinary

reversal where the amount of the verdict was justified by the pleadings and evidence.[16]

(§ 7) *D. Trial.*[17]—The jury should always be allowed to assess the damages[18] where substantial damages are proved, but where the sole object of the recovery is damages, a failure to prove substantial damages entitles defendant to a judgment of nonsuit, or a judgment that plaintiff take nothing by his action.[19] It is only where the verdict of the jury will determine some property or permanent personal right that the verdict must be taken, regardless of the question whether the amount returned is substantial or nominal.[20] The amount of damages to which a party is entitled is a question of fact on which the finding of a lower court is conclusive, but the measure of damages adopted is a question of law, reviewable on appeal.[21] Procedure for the assessment of damages where judgment is entered upon default is statutory.[22] An inquest of damages cannot be held without notice to a defendant who has appeared in the case.[23]

person as shown by mortality tables is properly made conclusive in determining the length of time one would be able to earn money, who has never been sick and always performed hard work, where no further instruction as to his ability to earn full wages during the whole of such period was requested. Bettis v. Chicago, etc., R. Co. [Iowa] 108 N. W. 103.

Loss of earnings: Where as a result of an injury one was wholly disabled from performing the work in which he was then engaged, it is proper to instruct that he may recover compensation for loss of time he "may" hereafter lose. "May" means "shall." Caplin v. St. Louis Transit Co., 114 Mo. App. 256, 89 S. W. 338. "Permanent inability to labor" is not the precise equivalent of "permanent reduction in his power to earn money;" and to allow the jury to remunerate for the "inconvenience" suffered is too broad. Louisville & N. R. Co. v. Sights [Ky.] 89 S. W. 132. An instruction to compensate plaintiff for his "impaired ability" to earn money instead of for the "impairment of his ability," held not to have misled or confused the jury. Dallas Consol. Elec. St. R. Co. v. Ely [Tex. Civ. App.] 14 Tex. Ct. Rep. 605, 91 S. W. 887. It is improper to instruct, in an action for injuries, to allow such sum as will compensate for loss of time in endeavoring to be cured, etc. Village of Westville v. Horn, 117 Ill. App. 89. An instruction, in a personal injury action, that plaintiff could recover what his services were proven to be worth from the time of his injury to the time he may reasonably expect to live, less what he could earn in his present condition, was properly refused. Huggins v. Southern R. Co. [Ala.] 41 So. 856.

Punitive damages: Instruction on the subject of punitive damage held not open to the objection that they might be awarded for wrong, though unaccompanied by wantonness, willfulness, or highhanded conduct. Pagan v. Drake Furniture Co. [S. C.] 53 S. E. 542. In instructing as to punitive damages, the court should clearly tell the jury that the awarding of such damages rests in their discretion. Illinois Cent. R. Co. v. Houchins [Ky.] 89 S. W. 530. In a case where punitive damages could not be recovered, but only compensatory damages, an instruction "there is no legal limit to the damages the jury may award * * * and that they are the sole judges of damages which from the evidence could be recovered," is misleading. Newport News Pub. Co. v. Beaumeister, 104 Va. 744, 52 S. E. 627. Instruction relative to damages authorizing a consideration of the financial condition of the defendant in estimating punitive damages, held not open to the objection of authorizing a consideration of such fact in assessing actual damages. Davis v. Richardson [Ark.] 89 S. W. 318. Where one is entitled in addition to his actual damages to an amount equal to his expenses in the action, it is not error in instructing the jury to refer to such an amount as exemplary damages. Hull v. Douglass [Conn.] 64 A. 351. Instructions as to contributory negligence held to properly cover negligence in the treatment of the injury. St. Louis S. W. R. Co. v. Parks [Tex. Civ. App.] 14 Tex. Ct. Rep. 232, 90 S. W. 343.

16. Berry v. Campbell, 118 Ill. App. 646.

17. See 5 C. L. 943.

18. Where the damages are shown by expert or opinion evidence, the court should allow the jury to assess the damages, even though plaintiff's evidence is uncontradicted. Pritchard v. Hooker, 114 Mo. App. 605, 90 S. W. 415. Error to direct verdict for certain items of damage claimed for breach of contract, ignoring others which should have been presented to jury. Fox v. Woods, 94 N. Y. S. 344. The value of an injured minor's services during his minority cannot be proved with certainty, and must be ascertained by the jury from their own judgment, common sense, and sound discretion. Instruction to that effect approved. El Paso Elec. R. Co. v. Kitt [Tex. Civ. App.] 14 Tex. Ct. Rep. 344, 90 S. W. 678. Where plaintiff in action for destruction of cotton proved market price of cotton, but not the grade of the cotton destroyed, whether the cotton was of average or lower grade was for the jury, Alabama Great So. R. Co. v. Clark [Ala.] 39 So. 816.

19. Woodhouse v. Powles [Wash.] 86 P. 1063.

20. Not error to refuse to submit question of amount of damages to jury where there was no proof of substantial damages. Woodhouse v. Powles [Wash.] 86 P. 1063.

21. Penn Plate Glass Co. v. Rice Co., 216 Ill. 567, 75 N. E. 246.

(§ 7) *E. Verdicts and findings.*[24]—The verdict must respond to the declaration.[25] That the verdict of the jury is plainly based on an erroneous theory as to the measure of damages,[26] or is in excess of the amount claimed in the pleadings,[27] is reversible error. Where an action for breach of contract is tried by the court without a jury, only nominal damages can be had unless there is a finding as to the amount of actual damages sustained.[28]

DAMNUM ABSQUE INJURIA; DAMS; DATE; DAYS; DEAD BODIES, see latest topical index.

DEAF MUTES.[29]

DEATH AND SURVIVORSHIP.[30]

At common law a rebuttable presumption of death arises from continuous unexplained absence from home or place of residence for seven years without being heard of.[31] But there is no presumption that death occurs at any particular time within the period.[32] In many states a statutory presumption for particular pur-

22. Under Gen. St. 1902, § 742, providing that in a hearing in damages on default the only burden laid upon the plaintiff is to prove damages resulting from his injuries, he has the burden to prove only the amount of damages, and the defendant has the burden as to proof in everything else, including plaintiff's contributory negligence, and, unless he gives statutory notice, he may not prove matter of defense nor deny plaintiff's right to maintain the action. Hoyt v. New York, etc., R. Co. [Conn.] 63 A. 393. Under Pub. Acts 1903, p. 134, c. 175, authorizing the entry of a default judgment after filing notice of intention to suffer a default, defendant, in an action of tort, may, on the same day he files his notice of intention to suffer a default, file notice of issues to be contested on the hearing in damages, though the default judgment has not then been rendered. O'Keefe v. Scoville Mfg. Co. [Conn.] 61 A. 961. Rules of Court, p. 35, § 105, requiring the filing of notice of hearing in damages upon default within ten days after notice to defendant from the clerk that judgment has been entered, does not apply to a default in an action of tort. Id. A notice of issues to be so heard puts in issue the allegations of the complaint as to which notice of contest is given, and the hearing in damages becomes a trial of such issues. Id. Where a declaration in an action of assumpsit contains the common counts and one or more special counts on promissory notes, and office judgment by default is entered at rules, the necessity of an order for inquiry of damages in the action is not avoided by Code 1899, c. 125, § 45. Federation Window Glass Co. v. Cameron Glass Co., 58 W. Va. 477, 52 S. E. 518. Such office judgment does not become final on the last day of the next succeeding term of court, not having been previously set aside so as to bar a defense thereafter but the defendants may plead to issue at any time before the order for inquiry of damages is executed. Id. A defendant in default has, with respect to the assessment of damages, the right to a jury trial to introduce evidence and cross examine the plaintiff's witnesses. Loellke v. Grant, 120 Ill. App. 74. Where defendant is in default, the mere statement of a witness on behalf of the plaintiff as to the amount due is sufficient to sustain the assessment. Scottish Nat. Ins. Co. v. Adams, 122 Ill. App. 471.

23. American Mail Order Co. v. Marsh, 118 Ill. App. 248.

24. See 5 C. L. 944.

25. In an action for conspiracy, where there was no allegation that plaintiff had been deprived of any one's services or of compensation for his own, a verdict for a certain amount for loss of services is not responsive. Murray v. Moore, 104 Va. 707, 52 S. E. 381.

26. Sanders, Swan & Co. v. Allen, 124 Ga. 684, 52 S. E. 884.

27. Houston & T. C. R. Co. v. Shults [Tex. Civ. App.] 90 S. W. 506.

28. Sproul v. Huston [Wash.] 84 P. 631.

29. No cases have been found for this subject since the last article. See 5 C. L. 944.

30. See 5 C. L. 944.

31. Spahr v. Mutual Life Ins. Co. [Minn.] 108 N. W. 4; Chapman v. Kullman, 191 Mo. 237, 89 S. W. 924. Presumption does not arise where there is reliable information that he was alive any time during the period. Spiltoir v. Spiltoir [N. J. Eq.] 64 A. 96. There must be lack of information among all who would be likely to hear from the absentee if living, whether members of his family or not. Modern Woodmen of America v. Gerdom [Kan.] 82 P. 1100. Evidence of the father of the absentee that he had not heard of his son for seven years, held insufficient to raise a presumption of death where his mother and sister and others likely to hear from him were not called. Id.

32. Chapman v. Kullman, 191 Mo. 237, 89 S. W. 924. And hence where it becomes necessary to establish death before a particular date within the period, the party asserting must prove it as any other material fact. Spahr v. Mutual Life Ins. Co. [Minn.] 108 N. W. 4. There being no presumption that an absent heir is dead until the end of the peri-

poses arises from absence.[33] Death may be inferred from disappearance at the time and place of a disaster in which the absentee must have been.[34] Death and the time thereof are questions of fact,[35] and may be proved by circumstantial evidence.[36] Ordinarily hearsay evidence, if not subservient, is admissible to establish the fact of death,[37] but the contrary rule seems to prevail in Louisiana.[38] One relying upon the death of a particular person as a part of his case has the burden of establishing it,[39] and the failure to call the family of such person as witnesses raises a presumption that their testimony would not aid.[40] The presumption of death arising from absence does not preclude the other spouse from obtaining a divorce, on the ground that courts will not entertain actions against deceased persons.[41]

Where two persons perish in a common disaster, the question of survivorship is one of fact,[42] and a party claiming through the survivorship of either has the burden of establishing it.[43]

DEATH BY WRONGFUL ACT.

§ 1. Nature and Elements of Liability and Release or Bar Thereof (1083).
§ 2. Who May Bring Action (1085).
§ 3. Beneficiaries of the Right of Action (1085).
§ 4. Damages (1086).
§ 5. Remedies and Procedure (1090).
§ 6. Distributive Rights in Amount Recovered (1092).

The scope of this topic is limited to the nature and extent of the liability, including damages for tortiously causing another's death. It excludes the general law of negligence or tort on which such liability is based and also all questions of practice, evidence, and pleading in negligence or tort cases except such as are peculiar to the action for death.[44]

§ 1. *Nature and elements of liability and release or bar thereof.*[45]—The right of action for death by wrongful act is purely statutory,[46] and hence the law of the

od, no portion of his interest passes under deeds of common property executed on behalf of the other heirs during the period. Chapman v. Kullman, 191 Mo. 237, 89 S. W. 924.

33. 1 Gen. St. p. 1187, creating a presumption of death from seven years' absence, is applicable only in cases involving property rights (Spiltoir v. Spiltoir [N. J. Eq.] 64 A. 96), and hence error to dismiss a petition for divorce on the ground that a presumption of death has arisen thereunder (Id.). Where a woman's former husband has been absent and unheard of for more than seven years prior to her second marriage, under Rev. St. 1899, § 3144, a presumption of death exists as to the first husband. Gilroy v. Brady, 195 Mo. 205, 93 S. W. 279.

34. Evidence held sufficient to sustain a finding of death in a boat collision. The San Rafael [C. C. A.] 141 F. 270.

35. Spahr v. Mutual Life Ins. Co. [Minn.] 108 N. W. 4.

36. Testimony of a single witness as to a rumor that an absentee was drowned by the sinking of a swamp boat, held insufficient to establish the fact of death. Iberia Cypress Co. v. Thorgeson [La.] 40 So. 682. The fact that one steady in habits, successful in business, with pleasant domestic relations, suddenly disappears, may warrant a finding that death occurred at or about the time of disappearance. Spahr v. Mutual Life Ins. Co. [Minn.] 108 N. W. 4. Evidence held insufficient to warrant a finding of death within 57 days after leaving home, in view of evidence tending to show that the absentee was of low moral character and had left the state with another woman. Id.

37. York v. Hilger [Tex. Civ. App.] 84 S. W. 1117.

38. Evidence of a rumor that the absentee was drowned by the sinking of a swamp boat held inadmissible. Iberia Cypress Co. v. Thorgeson [La.] 40 So. 682.

39. As one asserting invalidity of a tax assessment because of the prior death of the tax debtor. Iberia Cypress Co. v. Thorgeson [La.] 40 So. 682.

40. Iberia Cypress Co. v. Thorgeson [La.] 40 So. 682.

41. Spiltoir v. Spiltoir [N. J. Eq.] 64 A. 96.

42. In re Gerdes' Estate, 100 N. Y. S. 440.

43. In re Gerdes' Estate, 100 N. Y. S. 440. Evidence held insufficient to show that the wife, whose husband perished in the same shipwreck, predeceased him. Id.

44. See Carriers, 7 C. L. 522; Master and Servant, 6 C. L. 521; Negligence, 6 C. L. 748; Railroads, 6 C. L. 1194; and like topics.

45. See 5 C. L. 946.

46. Duncan v. St. Luke's Hospital, 98 N. Y. S. 867.

state where the wrongful act occurs determines whether such right exists.[47] Such statutes, being remedial in their nature, are liberally construed.[48] Under some statutes, the liability is dependent on the character[49] or degree[50] of the negligence causing death, and, as in tort actions generally, defendant's negligence must be the proximate cause of the death,[51] but it need not be the sole cause.[52] Generally any act of decedent which would have precluded recovery by him, had he survived, will defeat recovery for his death,[53] and especially where the statute gives a right of action only in the event one would have existed in favor of deceased.[54] Contributory negligence of the beneficiaries in some states is a defense.[55] False representations in procuring employment will not defeat recovery.[56] In New York the right of action for personal injuries survives unless the statute giving it is penal in character.[57] A right of action exists for the death of aliens,[58] but in Louisiana no recovery can be had for the wrongful death of illegitimate children.[59] An act

47. Lee v. Missouri Pac. R. Co., 195 Mo. 400, 92 S. W. 614; Runt v. Illinois Cent. R. Co. [Miss.] 41 So. 1.

48. Gottlieb v. North Jersey St. R. Co., 72 N. J. Law, 480, 63 A. 339.

49. An intentional turning of a compressed air hose on one in fun resulting in death, is an act of "negligence or carelessness" within Rev. St. 1895, § 3017. Galveston, etc., R. Co. v. Currie [Tex. Civ. App.] 15 Tex. Ct. Rep. 18, 91 S. W. 1100. A brakeman sent back to flag an approaching train is a servant engaged in operating a train within Rev. St. 1899, § 2864. Anderson v. Missouri Pac. R. Co. [Mo.] 93 S. W. 394. Rev. St. 1899, § 2864, rendering an employer liable for death due to negligence of a servant while running any "locomotive, car, or train of cars," is applicable to electric street cars. Higgins v. St. Louis & S. R. Co. [Mo.] 95 S. W. 863. Comp. Laws, New Mexico, § 3216, held applicable to death due to an insufficient number of competent men, as well as to injuries due to incompetent men. Denver & R. G. R. Co. v. Warring [Colo.] 86 P. 305. Under the Alabama Employers' Liability Act an employer is liable for the negligence of his superintendent in failing to personally superintend the work although he selected competent workmen and gave proper instructions. Held liable under Code 1896, § 1749, subd. 2, for failure to erect a safe scaffold notwithstanding the superintendent had pointed out to the workmen suitable material. Sloss-Sheffield Steel & Iron Co. v. Holloway [Ala.] 40 So. 211.

50. There are degrees of negligence under the Massachusetts act relating to common carriers (Dolphin v. Worcester Consol. St. R. Co., 189 Mass. 270, 75 N. E. 635), and the word "gross" as there used is not a mere expletive but means gross failure to exercise the highest care. Rev. Laws c. 111, § 267, giving a right of action for death by "gross negligence" of servants (Id.).

51. Evidence that the tuberculosis which caused death was the proximate result of the injuries held sufficient to go to the jury. Sallie v. New York City R. Co., 110 App. Div. 665, 97 N. Y. S. 491. One whose negligence proximately results in a disease from which death results, or hastens death from an exlsting disease, is liable. Chicago, etc., R. Co. v. Groner [Tex. Civ. App.] 16 Tex. Ct. Rep. 507, 95 S. W. 1118; Strode v. St. Louis Transit Co. [Mo.] 95 S. W. 851. Evidence held sufficient to show that death was the proximate result of defendant's negligence in permitting illuminating gas to escape while making repairs. Flaherty v. Scranton Gas & Water Co., 30 Pa. Super. Ct. 446.

52. Defendant's negligence need not be the sole cause of the death to create a liability under Rev. Laws c. 171, § 2. Oulighan v. Butler, 189 Mass. 287, 75 N. E. 726.

53. Compromise and settlement by decedent before death for the injuries received. Strode v. St. Louis Transit Co. [Mo.] 95 S. W. 851.

54. V. S. 5302-5304, giving a right of action only where decedent would have had one had he survived, no recovery can be had where he was killed by defendant's negligence in discharging governmental duty. Carty's Adm'r v. Winooski [Vt.] 62 A. 45. A provision in a pass upon which decedent was riding when killed exempting the carrier from liability is a good defense to an action for death under Code Civ. Proc. 1902. Hodge v. Rurland R. Co., 97 N. Y. S. 1107. **Contra.** Tingley v. Long Island R. Co., 109 App. Div. 793, 96 N. Y. S. 865.

55. Action by parents for death of infant child. Mills' Adm'r v. Cavanaugh [Ky.] 94 S. W. 651. Evidence of plaintiff's contributory negligence in failing to close the door so as to exclude the escaping gas from the room of the deceased infant held under the facts for the jury. Flaherty v. Scranton Gas & Water Co., 30 Pa. Super. Ct. 446. For general treatment of imputed negligence, see 6 C. L. 765.

56. As that he was of age, especially where the defendant would have been liable under the circumstances for the death of a man. Matlock v. Williamsville, etc., R. Co. [Mo.] 95 S. W. 849.

57. Gen. St. Conn. 1902, § 2020, giving a person injured through a defective road or bridge a right of action against the municipality, is not a penal statute, and the right of action survives the death of the person injured. Elson v. Town of Waterford, 140 F. 800.

58. Const. § 241, and Ky. St. 1903, § 6, is applicable to an alien friend. Trotta's Adm'r v. Johnson [Ky.] 90 S. W. 540.

59. Rev. Civ. Code La. 1900, art. 2315, gives no right of action for death of an il-

giving a right of action generally for wrongful death includes an action for the death of a married woman.[60]

§ 2. *Who may bring action.*[61]—Most of the statutes giving a right of action for death by wrongful act designate the person or persons who may bring the action,[62] and when particular persons are named they alone can maintain the suit,[63] and in the capacity designated.[64] Legal capacity to sue is determined by the law of the state where the wrongful act occurred,[65] unless the statute merely designates the beneficiaries, in which case the lex fori controls.[66] An administrator of the forum may maintain an action arising under the laws of another state where the personal representative is the proper plaintiff.[67] In Texas suit may be brought by one or more of the persons to whom the right of action is given, but it must be for the benefit of all,[68] and fraud on the part of the one prosecuting the suit does not affect the validity of the judgment unless collusive with the defendant.[69]

§ 3. *Beneficiaries of the right of action.*[70]—The action can be maintained only for the benefit of those designated by the statute, and a husband is not "next of kin" of his wife within these statutes.[71] Under a statute giving a cause of ac-

legitimate child either to the mother or personal representative. Runt v. Illinois Cent. R. Co. [Miss.] 41 So. 1.

60. Act of March 3, 1848 (1 Gen. St. p. 1188, § 11), giving a right of action in cases where the death of a "person" is caused by the wrongful act, etc., includes a right of action for the death of a married woman. Gottlieb v. North Jersey St. R. Co., 72 N. J. Law, 480, 63 A. 339.

61. See 5 C. L. 946.

62. An action under Rev. St. 1898, § 4256, must be brought by the **personal representative** notwithstanding it is for the exclusive benefit of particular persons. Nemecek v. Filer & Stowell Co., 126 Wis. 71, 105 N. W. 225. Under Rev. St. 1892, §§ 2342, 2343, an administrator of a deceased minor is the proper party plaintiff in the absence of a widow, minor children, or persons dependent upon the decedent for support. Bowden v. Jacksonville Elec. Co. [Fla.] 41 So. 400. In the absence of a personal representative, an action under Kirby's Dig. §§ 6289, 6290, must be brought by the widow and heirs at law of the decedent. McBride v. Berman [Ark.] 94 S. W. 913. In Louisiana a widow's right of action for the death of her husband is not dependent upon the non-existence of minor issue, hence not necessary to allege non-existence. Davis v. Arkansas So. R. Co. [La.] 41 So. 587. In Oklahoma a widow may sue in her own name where her deceased husband was a resident of the state and no personal representative has been appointed (Oklahoma Gas & Elec. Co. v. Lukert [Okl.] 84 P. 1076), and it seems unnecessary to join the minor children as plaintiffs (Id.).

63. A father cannot maintain an action for the death of his minor daughter under a statute giving a right of action to the personal representative. Dancy v. Walz, 98 N. Y. S. 407. Under Kirby's Dig. § 6290, a father cannot maintain an action for the death of a son who has a personal representative. St. Louis, etc., R. Co. v. Garner [Ark.] 89 S. W. 550. An action under Burns' Ann. St. 1901, §§ 7466, 7472, 7473, must be brought by the widow, children, or other persons designated, and cannot be maintained by the personal representative. Collins Coal Co. v. Hadley [Ind. App.] 75 N. E. 832. Section 7473 designating who shall bring an action under the Mining Act is not repealed by Burns' Ann. St. 1901, § 285, conferring upon the personal representative a right of action for death by wrongful act generally. Id.

64. Under Rev. St. Okl. 1893, §§ 4313, 4314, the widow of deceased resident cannot sue in such capacity after her appointment as administratrix, the statute authorizing suit by the personal representative. Casey v. Hoover [Mo.] 94 S. W. 982.

65. Lee v. Missouri Pac. R. Co., 195 Mo. 400, 92 S. W. 614. A widow having the right to sue in Kansas for the death of her husband, where there is no personal representative appointed, may bring action in Missouri. Id. Where the action was brought in Colorado for death resulting in New Mexico, the personal representative, being the proper party plaintiff in the latter state, must bring the action. Denver & R. G. R. Co. v. Warring [Colo.] 86 P. 305.

66. Code Ga. 1895, § 3828, being remedial, a personal representative in South Carolina may sue, notwithstanding the death occurred in Georgia where the widow was the proper person. Bussey v. Charleston & W. C. R. Co. [S. C.] 53 S. E. 165.

67. Action brought in Colorado for death occurring in New Mexico. Denver & R. G. R. Co. v. Warring [Colo.] 86 P. 305. An administrator appointed in Utah may enforce a cause of action accruing in Wyoming where decedent was domiciled and injured. In re Lowham's Estate [Utah] 85 P. 445.

68. De Garcia v. San Antonio & A. P. R. Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 336, 90 S. W. 670.

69. Under Rev. St. 1895, art. 3022, a judgment recovered by a widow for herself and children of the decedent by former wife held binding notwithstanding the children were fraudulently represented. Taylor v. San Antonio Gas & Elec. Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 344, 93 S. W. 674.

70. See 5 C. L. 947.

71. A husband is not "next of kin" of his wife under Act March 3, 1848 (1 Gen. St.

tion to one dependent upon the decedent for support, partial dependence is sufficient,[72] and it is not necessary that the decedent be under any legal duty to render pecuniary aid to the beneficiary.[73] Under a statute giving a right of action to children of a deceased, neither minority[74] nor dependence[75] is essential. Where a penal statute gives a right of action for a fixed sum to a parent for the death of a child, it is immaterial that such child has been emancipated,[76] or is not living in the family as a member thereof.[77] In Texas minor children awarded to the custody of a divorced mother can recover for the death of the father.[78] Steps toward a divorce never secured does not affect a widow's right of recovery for the death of her husband.[79] Under statutes giving a right of action to the "next of kin" generally, recovery may be had in favor of nonresident alien next of kin.[80]

§ 4. *Damages.*[81]—The damages recoverable for death by wrongful act depend somewhat upon the statute creating the right of action, but generally they are strictly compensatory and limited to the pecuniary loss of the beneficiaries[82] reasonably[83] and proximately[84] resulting. In determining the pecuniary loss sustained, the decedent's health and habits,[85] age and expectancy of life,[86] his capacity to earn

p. 1188, § 11), giving a cause of action for the benefit of the next of kin. Gottlieb v. North Jersey St. R. Co., 72 N. J. Law, 480, 63 A. 339.

72. Under Civ. Code 1895, § 3828, a mother's right of action for the death of a son is not defeated by proof of a tract of land charged with her support, where such tract is insufficient. Savannah Elec. Co. v. Bell, 124 Ga. 663, 53 S. E. 109. Partial dependence for support held sufficient under Rev. Laws, c. 106, § 73. Mehan v. Lowell Elec. Light Corp. [Mass.] 78 N. E. 385. Evidence held sufficient to show that the parents were partially dependent upon the deceased. Id.

73. The fact of contribution is sufficient. Savannah Elec. Co. v. Bell, 124 Ga. 663, 53 S. E. 109. Minor sister. Louisville & N. R. Co. v. Jones [Fla.] 39 So. 485. Instruction as to rights of a minor sister of the deceased held proper under the evidence. Id.

74, 75. Beaumont Traction Co. v. Dilworth [Tex. Civ. App.] 16 Tex. Ct. Rep. 257, 94 S. W. 352.

76. Matlock v. Williamsville, etc., R. Co. [Mo.] 95 S. W. 849.

77. Act of June 2, 1891. Gulla v. Lehigh Valley Coal Co., 28 Pa. Super. Ct. 11.

78. Notwithstanding he has contributed nothing to their support since the divorce. Taylor v. San Antonio Gas & Elec. Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 344, 93 S. W. 674.

79. Had consulted counsel as to right to divorce. Abel v. Northampton Traction Co., 212 Pa. 329, 61 A. 916.

80. Rietveld v. Wabash R. Co. [Iowa] 105 N. W. 515; Pittsburgh, etc., R. Co. v. Naylor [Ohio] 76 N. E. 505; Baltimore & O. R. Co. v. Baldwin [C. C. A.] 144 F. 53; Alfson v. Bush Co., 182 N. Y. 393, 75 N. E. 230; Atchison, etc., R. Co. v. Fajardo [Kan.] 86 P. 301.

81. See 5 C. L. 948.

82. Central of Georgia R. Co. v. Alexander [Ala.] 40 So. 424; St. Louis, etc., R. Co. v. Garner [Ark.] 89 S. W. 650; Illinois C. R. R. Co. v. Whiteaker, 122 Ill. App. 333. An instruction to assess damages at "such reasonable sum as plaintiff might be entitled to recover under the facts and circumstances proved in the case" held erroneous. Illinois Cent. R. Co. v. Johnson [Ill.] 77 N. E. 592. An instruction to assess such damages as would compensate plaintiffs for their "pecuniary loss," held not objectionable as failing to specify the elements of damage, and that grief, loss of society, and companionship could not be considered. Galveston, etc., R. Co. v. Heard [Tex. Civ. App.] 14 Tex. Ct. Rep. 617, 91 S. W. 371. In an action for the death of a wife, the husband may testify as to the estimated value of his wife's services, and such evidence is not irrelevant or hearsay. Chicago, etc., R. Co. v. Groner [Tex. Civ. App.] 16 Tex. Ct. Rep. 507, 96 S. W. 1118. Under Code Civ. Proc. § 377, allowing such damages as may be just under the circumstances of the case, pecuniary damages alone are recoverable, but the fact that it is not shown that the deceased husband was in good bodily health and was in receipt of a monthly wage does not limit recovery to nominal damages. Ruppel v. United Railroads [Cal. App.] 82 P. 1073.

83. The damages must be assessed upon the "reasonable" expectation of benefit from the continuance of life. Consolidated Coal Co. v. Stein, 122 Ill. App. 310.

84. Loss of home because of nonpayment of instalments since death of the father is too remote to be allowed as damages. Beaumont Traction Co. v. Dilworth [Tex. Civ. App.] 16 Tex. Ct. Rep. 257, 94 S. W. 352.

85. Carter v. North Carolina R. Co., 139 N. C. 499, 52 S. E. 642; Beamont Traction Co. v. Dilworth [Tex. Civ. App.] 16 Tex. Ct. Rep. 257, 94 S. W. 352.

86. Ward v. Dampskibsselskabet Kjoebenhavn, 144 F. 524. Mortality tables admissible. Norfolk & W. R. Co. v. Spencer's Adm'x, 104 Va. 657, 52 S. E. 310; Illinois Cent. R. Co. v. Cane's Adm'x [Ky.] 90 S. W. 1061. Admissible where the deceased comes within the class of selected lives tabulated, but such tables are not conclusive. Ward v. Dampskibsselskabet Kjoebenhavn, 144 F. 524. Mortality tables are of little value where the deceased was colored. The Saginaw & Hamilton, 139 F. 906. Expectancy of

money,[87] as shown by present wages,[88] and the prospective increase thereof,[89] his disposition to labor,[90] his habits of economy,[91] and financial aid to the beneficiaries,[92] may be considered, but not his means,[93] or the physical condition of the plaintiff.[94] As a general rule, loss of society and grief cannot be considered.[95] In some states damages are based upon the probable estate which decedent would have left at death,[96] or the present worth thereof,[97] and in others, are assessed according to fixed rules.[98]

life of deceased may be testified to by actuaries. Austin v. Metropolitan St. R. Co., 108 App. Div. 249, 95 N. Y. S. 740.

87. Earning capacity is not conclusive of loss. Evarts v. Santa Barbara Consol. R. Co. [Cal. App.] 86 P. 830. Where capacity to earn money is, by statute, an element of damages, as under Pub. St. 1891, c. 191, § 12, the fact that the capacity is purely speculative does not give the jury the right to ignore it. Dillon v. Hudson, etc., R. Co. [N. H.] 62 A. 93. Under Pub. St. 1891, c. 191, § 12, making decedent's earning capacity an element of damage, any evidence tending to show such capacity is admissible. Id. Evidence that decedent had never earned money, and from her station in life probably never would, is competent, but is not conclusive of the nonexistence of such capacity. Id Question whether the deceased "was or was not a careful man" held too general to show earning capacity. MacFeat v. Philadelphia, etc., R. Co. [Del.] 62 A. 898. The administrator's inventory of decedent's personal property and the annual account is not admissible to show the deceased's earning capacity. Cooper v. North Carolina R. Co., 140 N. C. 209, 52 S. E. 932.

88. Reiter-Conley Mfg. Co. v. Hamlin [Ala.] 40 So. 280; Central of Georgia R. Co. v. Alexander [Ala.] 40 So. 424. May be shown without producing the contract of employment. Id. Wage per week for six months prior to death is admissible. Austin v. Metropolitan St. R. Co., 108 App. Div. 249, 95 N. Y. S. 740.

89. Central Foundry Co. v. Bennett [Ala.] 39 So. 574. Wages paid in employment of the character in which decedent was engaged may be considered in ascertaining the value of a minor's life to a parent, but are not conclusive of his earning capacity. Gulla v. Lehigh Valley Coal Co., 28 Pa. Super. Ct. 11. Evidence of wages paid a skilled machinist is inadmissible where the decedent was only an apprentice of a couple of weeks' experience, it being too remote. Central Foundry Co. v. Bennett [Ala.] 39 So. 574. An instruction that in order to recover it is "necessary for the administrator to show by affirmative evidence that the net earnings of the deceased exceeded his expenditures," is erroneous as limiting the jury to the consideration of conditions existing at the time of death. Carter v. North Carolina R. Co., 139 N. C. 499, 52 S. E. 642. Evidence that decedent had been charged with embezzlement is inadmissible to lessen damages based on prospective advancement. Kirby Lumber Co. v. Chambers [Tex. Civ. App.] 14 Tex. Ct. Rep. 913, 95 S. W. 607.

90. Ward v. Dampskibsselskabet Kjoebenhavn, 144 F. 524.

91. Ward v. Dampskibsselskabet Kjoebenhavn, 144 F. 524; Central of Georgia R. Co. v. Alexander [Ala.] 40 So. 424.

92. Proof of happy domestic relations raises a presumption that the deceased husband supported the family. Evarts v. Santa Barbara Consol. R. Co. [Cal. App.] 86 P. 830. Evidence that decedent appropriated a part of his earnings to the support of one not a distributee is not detrimental to defendant. Central of Georgia R. Co. v. Alexander [Ala.] 40 So. 424. The fact that decedent had saved some money which went to his wife upon his death cannot reduce the amount recoverable upon his death, under Code 1896, § 1749, subd. 2. Sloss-Sheffield Steel & Iron Co. v. Holloway [Ala.] 40 So. 211.

93. Chicago, B. & Q. R. Co. v. Weber, 121 Ill. App. 455.

94. Under Ballinger's Ann. Codes & St. § 4828, authorizing the jury to award such damages, pecuniary or exemplary, as may seem just, physical helplessness of the beneficiaries cannot be considered. Seattle Elec. Co. v. Hartless [C. C. A.] 144 F. 379.

Contra: Helplessness and dependency of the wife upon her husband may be considered in an action for latter's death. Evarts v. Santa Barbara Consol. R. Co. [Cal. App.] 86 P. 830.

95. Texas & N. O. R. Co. v. Green [Tex. Civ. App.] 15 Tex. Ct. Rep. 133, 95 S. W. 694. The words "necessary injury" as used in Rev. St. 1899, § 2866, mean "pecuniary injury." Marshall v. Consolidated Jack Mines Co. [Mo. App.] 95 S. W. 972. A father suing as administrator of his deceased son under Code § 1498 cannot recover for mental anguish nor for loss of services. Byrd v. Southern Exp. Co., 139 N. C. 273, 51 S. E. 851. An instruction to assess damages at such sum as would compensate plaintiffs for their "pecuniary loss" does not permit the jury to include damages for loss of society and grief. Texarkana & Ft. S. R. Co. v. Frugia [Tex. Civ. App.] 16 Tex. Ct. Rep. 724, 95 S. W. 563.

Contra: Loss of society considered in action by widow. Evarts v. Santa Barbara Consol. R. Co. [Cal. App.] 86 P. 830. Widow and children suing for death of husband and father may recover for mental anguish and loss of society. Brickman v. Southern R. Co. [S. C.] 54 S. E. 553. Parent recovering for death of son. Parker v. Crowell & S. Lumber Co., 115 La. 463, 39 So. 445. Where the statute gives unlimited discretion to the jury within a maximum limit in assessing damages, they may award compensation for the sorrow and grief resulting from the death. Kelley v. Ohio River R. Co., 58 W. Va. 216, 52 S. E 520.

96. The measure of damages is such sum as the deceased would probably have earned

In determining the pecuniary loss to a child by the death of a parent, compensation for loss of care, support, education, and moral training may be allowed.[99] In Mississippi a parent may recover for the death of a minor child the value of his services until majority, for prospective gratuities thereafter, damages for son's physical and mental suffering and the present value of his expectancy.[1]

The Federal courts in assessing damages are controlled by the law of the state where the injury occurred.[2]

Exemplary[3] damages are allowed under the statutes of some states.[4]

The amount of recovery.[5]—The tortious killing in some states gives rise to nominal damages, irrespective of actual pecuniary loss,[6] but where actual damages are shown, it is error to award only nominal,[7] and in all cases the assessment of

in his business during life, and have left as his estate at the time of his death, considering his age, his ability, and disposition to work, and his habits of living and expenditure. MacFeat v. Philadelphia, etc., R. Co. [Del.] 62 A. 898; Ward v. Dampskibsselskabet Kjoebenhavn, 144 F. 524. Where the loss is to be ascertained by determining the gross earnings of the deceased and deducting therefrom his expenses, the expenses must be limited to those of the deceased himself, and not of the family. Carter v. North Carolina R. Co. [N. C.] 52 S. E. 642.

97. The measure of damages is the present worth of the amount which the deceased would have accumulated and saved during natural life, and the jury may consider his age, occupation, health, ability to earn money, habits of industry and economy. Hamner v. Janowitz [Iowa] 108 N. W. 109. North Carolina statute prescribing the method of determining the present worth of an "annuity" is not applicable in an action for wrongful death. Poe v. Raleigh & Air Line R. Co. [N. C.] 54 S. E. 406.

98. In Alabama the measure of damages is that which gives such sum as, put at interest, will each year, by taking a part of the principal and adding it to the interest, yield the amount of deceased's yearly contribution to his family, less his personal expenses, and so that the whole remaining principal at the end of his expectancy of life, added to the interest on the balance for that year, will equal the amount of his yearly contribution to his family, less personal expenses. Reiter-Conley Mfg. Co. v. Hamlin [Ala.] 40 So. 280.

99. Gamache v. Johnson Tin Foil & Metal Co., 116 Mo. App. 596, 92 S. W. 918; Beaumont Traction Co. v. Dilworth [Tex. Civ. App.] 16 Tex. Ct. Rep. 257, 94 S. W. 352; Texas & N. O. R. Co. v. Green [Tex. Civ. App.] 15 Tex. Ct. Rep. 133, 95 S. W. 694. In an action by children for death of their father, evidence of abandonment is admissible. Beaumont Traction Co. v. Dilworth [Tex. Civ. App.] 16 Tex. Ct. Rep. 257, 94 S. W. 352. The parent's industry, moral character, and solicitude as to the mental and moral training of his children, may be considered. St. Louis & N. A. R. Co. v. Mathis [Ark.] 91 S. W. 763.

1. Act 1898, p. 82, c. 65. Cumberland Tel. & T. Co. v. Anderson [Miss.] 41 So. 263. No recovery can be had for prospective gratuities unless there is a reasonable expectation based upon evidence of past gratuities. Id. For the death of a minor son the parents are entitled to recover for expenses incurred as a result of the negligence and the net value of his life until majority, but not thereafter. Esher v. Mineral R. & Min. Co., 28 Pa. Super. Ct. 393. In an action for damages on account of the wrongful death of a minor child, the testimony of the father as to what the child would probably have been worth to himself and family is competent, after a recital as to the health and capacity of the child, his own resources, etc. Cincinnati Traction Co. v. Stephens, 7 Ohio C. C. (N. S.) 454.

2. The Saginaw & Hamilton, 139 F. 906. Rule does not mean that verdicts rendered by juries in state courts shall be binding or influential on the court in reaching amount to be awarded, but merely the measure of damages shall be ascertained according to law of the place. Id. Courts must determine amounts in same way as juries would, that is they must follow rules which they would instruct jury to follow. Id. Federal court cannot allow recovery for pain and suffering in an action arising in Iowa. Jacobs v. Glucose Sugar Refining Co., 140 F. 766.

3. See 5 C. L. 949.

4. Civ. Code 1895, § 3828, being punitive as well as compensatory in its nature, a verdict held not excessive because the expectancy of the plaintiff was less than that of the decedent, which was taken as the basis of computation. Savannah Elec. Co. v. Bell, 124 Ga. 663, 53 S. E. 109. Under Civ. Code 1902, §§ 2851, 2852, punitive damages are assessable as a matter of right, only the amount being discretionary with the jury. Brickman v. Southern R. Co. [S. C.] 54 S. E. 553. Evidence as to the mangled condition of decedent's body is admissible as bearing upon the issue of punitive damages. Id. Under Code 1896, § 27, allowing punitive damages only, decedent's age is immaterial. Smith v. Birmingham R., Light & Power Co. [Ala.] 41 So. 307.

5. See 5 C. L. 949.

6. Widow may recover nominal damages for death of her husband without proof of pecuniary loss. Davis v. Arkansas Southern R. Co. [La.] 41 So. 587. In an action brought under §§ 6134 and 6135, Revised Statutes, for causing the death of plaintiff's decedent by neglect or wrongful act, the petition need not allege that the next of kin of the deceased have sustained pecuniary damage by his death. Jackson Knife & Shear Co. v. Hathaway, 7 Ohio C. C. (N. S.) 242.

damages must be founded upon the adduced evidence.[8] No maximum limit is prescribed in some states.[9] It is not error to set aside a substantial but inadequate verdict.[10] The burden of proving the damages is on the plaintiff.[11]

7. Where there is evidence that decedent was earning $50 or $60 per month and spent $20 to $30, it is proper to refuse an instruction limiting recovery to nominal damages. Cahaba So. Min. Co. v. Pratt [Ala.] 40 So. 943. Deceased's earning capacity and expectance of life being shown, it is error to direct a verdict for nominal damages. Austin v. Metropolitan St. R. Co., 108 App. Div. 249, 95 N. Y. S. 740.

8. An instruction permitting the jury to assess damages at such sum as "in their opinion" the beneficiaries may be entitled to, while open to criticism, is not a ground for reversal when they are told that such opinion must be formed "under the evidence of the case." Schneider & Co. v. Carlin, 120 Ill. App. 538. An instruction in action by husband alone to award such damages as would compensate the "husband and next of kin," held not reversible error, there being no evidence of any next of kin. Pittsburgh, etc., R. Co. v. O'Donnell, 118 Ill. App. 335.

Excessive damages. Adults: $8,000 for a young lighthouse keeper, earning $450 a year, but in line for promotion under civil service rules. Reduced to $5,000. King v. Ann Arbor R. Co. [Mich.] 13 Det. Leg. N. 145, 107 N. W. 868. $15,000 for a truckman thirty-two years old earning $12 per week. Alternative judgment of $7,500 ordered. Walsh v. Reisenberg, 97 N. Y. S. 328. $3,000 for death of son who furnished occasional pecuniary aid to his aged father. Cut to $2,000. Bremer v. Minneapolis, etc., R. Co. [Minn.] 105 N. W. 494. $13,500 for laborer forty-eight years old earning $3.50 per day, who had abandoned his family for a time. Reduced to $8,000. Creamer v. Moran Bros. Co., 41 Wash. 636, 84 P. 592. $7,000 for death of a farmer sixty-six years old, with small means, living on leased premises, leaving only adult nephews and nieces who received casual gifts. Missouri, etc., R. Co. v. McLaughlin [Kan.] 84 P. 989. $6,000 for the death of a farmer, sixty-two years old. Reversal or alternative judgment for $2,000 ordered. Chicago, etc., R. Co. v. Weber, 121 Ill. App. 455. $8,000 for the death of a brakeman earning $75 per month, but no proof that he spent more than $18 per month for the family. Cut to $5,000. Allowed an additional $2,000 for pain and suffering of the decedent. St. Louis, etc., R. Co. v. Caraway [Ark.] 91 S. W. 749. $10,000 for a railroad section hand spending about $350 per annum on his family. Reduced to $8,000. St. Louis & N. A. R. Co. v. Mathis [Ark.] 91 S. W. 763. $5,000 held excessive under the mathematical rule prevailing in Alabama for the death of a man having an expectancy of 40 years and sending home from $15 to $20 per month. Reiter-Conley Mfg. Co. v. Hamlin [Ala.] 40 So. 280.

Reasonable. Adults: $6,141.96 for woman thirty-four years old earning about $45 to $50 per month. Savannah Elec. Co. v. Bell, 124 Ga. 663, 53 S. E. 109. $2,500 for a competent seaman twenty-six years old, who was earning $20 per month. The Luckenbach, 144 F. 980. $40,000 for death of a dentist thirty-seven years old earning $17,000 to $20,000 a year. Morhard v. Richmond Light & R. Co., 111 App. Div. 353, 98 N. Y. S. 124. $5,000 for death of a laborer twenty-seven years old earning $40 per month and board, leaving a child two years old, wholly dependent, held not so excessive as to althorize setting aside the verdict as rendered under passion and prejudice. Bowen v. Sierra Lumber Co. [Cal. App.] 84 P. 1010. $12,000 for death of a practicing physician forty-four years old. Evarts v. Santa Barbara Consol. R. Co. [Cal. App.] 86 P. 830. $5,000 for the death of a mining engineer twenty-seven years old earning $100 per month, the measure being damage to his estate. Southern Pac. Co. v. Wilson [Ariz.] 85 P. 401. $5,000 for man forty-nine years old, in vigorous health, earning $8 to $8.50 per week. Louisville Water Co. v. Phillips' Adm'r [Ky.] 89 S. W. 700. $4,200 in an action by a thirteen year old child for loss of father. Gamache v. Johnston Tin Foil & Metal Co., 116 Mo. App. 596, 92 S. W. 918. $12,500 for death of a fireman twenty-seven years old earning $75 to $85 per month and in line for promotion. Choctaw, etc., R. Co. v. Doughty [Ark.] 91 S. W. 768. $12,960 for death of a machinist. Galveston, etc., R. Co. v. Currie [Tex. Civ. App.] 15 Tex. Ct. Rep. 18, 91 S. W. 1100. $2,000 for death of a farmer fifty-six years old supporting a family, earning capacity of $400 to $500 per annum. Choctaw, O. & G. R. Co. v. Baskins [Ark.] 93 S. W. 757. $572 where decedent was accustomed to contribute $5 to $10 per month toward the support of his mother, the plaintiff, who had an expectancy of life of 17.4 years. St. Louis, etc., R. Co. v. Block [Ark.] 95 S. W. 155. $360 for pain and suffering of decedent. St. Louis, etc., R. Co. v. Block [Ark.] 95 S. W. 155. $25,000 allowed for the death of a physician thirty-nine years old, and who was earning $2,000 per year above his personal expenses. Ward v. Dampskibsselskabet Kjoebenhavn, 144 F. 524.

Inadequate. Adults: $5,000 damages in admiralty held inadequate and increased to $7,500 for the death of a man leaving an insane wife and seven dependent minor children. The San Rafael [C. C. A.] 141 F. 270. $500 for a fireman earning $90 per month, forty-nine years old. McCarty v. St. Louis Transit Co., 192 Mo. 396, 91 S. W. 132.

Reasonable. Children: $2,950 for death of a bright, well educated boy, seventeen years old, contributing to the support of his parents. Jackson Knife v. Shear Co. v. Hathaway, 7 Ohio C. C. (N. S.) 242. A verdict of $2,160.20 for the death of a one year old child held not so excessive as to indicate passion or prejudice. Abby v. Wood [Wash.] 86 P. 558. $4,000 for death of a Porto Rican student sixteen years old, under the circumstances of the case. Atchison, etc., R. Co. v. Fajardo [Kan.] 86 P. 301. $5,000 for the death of a seventeen year old boy. Parker v. Crowell & S. Lumber Co., 115 La. 463, 39 So. 445.

9. Under Code Civ. Proc. § 377, there is no

§ 5. *Remedies and procedure.*[12]—A right of action for death by wrongful act arising under the law of one state may be enforced in another unless the statute is penal[13] or contrary to the public policy of the state in which enforcement is sought.[14]

While the cause of action may not be a general asset of the estate of the decedent, it is sufficient to authorize an appointment of a personal representative.[15]

The action must be brought within the time limited by the statute[16] in force at the time of the suit.[17] An action for death by wrongful act is one for personal injuries and must be brought within the time prescribed for such actions.[18] There seems to be a conflict of authority as to whether the statute of limitation is tolled by delay in the appointment of the personal representative.[19]

A personal representative may join causes of action against two or more persons whose concurrent negligence caused the death,[20] and he may also join causes of action for wrongful death and for personal injuries to decedent where he sues in the same capacity in each case.[21] By statute in Texas all persons entitled to sue must be made parties to the action.[22] Where a personal injury suit commenced by decedent is revived by his administrator, the petition must be amended so as to show the time of his death and whether the result of the injuries.[23]

Where there is a general act and an Employers' Liability Act in the same state, an election is presented in the case of the death of employe.[24] The com-

limit, except that the damages must be just under the circumstances of the case. Bowen v. Sierra Lumber Co. [Cal. App.] 84 P. 1010.

10. Although it subjects the defendant to the danger of a maximum recovery. McCarthy v. St. Louis Transit Co., 192 Mo. 396, 91 S. W. 132.

11. Hupfer v. National Distilling Co. [Wis.] 106 N. W. 831. Erroneous instruction placing it on defendant held not cured by specific instructions as to measure. Id.

12. See 5 C. L. 950. Admissibility of evidence as to damages is treated in the preceding section.

13. Missouri Rev. St. 1899, § 2864, is penal and nonenforceable in Illinois. Raisor v. Chicago & A. R. Co., 117 Ill. App. 488.

14. Recovery for wrongful death being restricted to pecuniary loss in Illinois, a penal statute of Missouri will not be enforced as against public policy. Raisor v. Chicago & A. R. Co., 117 Ill. App. 488. Cannot be considered against public policy simply because the manner of distribution is dissimilar. Denver & R. G. R. Co. v. Warring [Colo.] 86 P. 305. No action will lie in Ohio upon a cause of action for wrongful death occurring in another state, except where the person killed was a citizen of Ohio. Baltimore & O. R. Co. v. Chambers [Ohio] 76 N. E. 91.

15. In re Lowham's Estate [Utah] 85 P. 445; Reiter-Conley Mfg. Co. v. Hamlin [Ala.] 40 So. 280; Young's Adm'r v. Louisville & N. R. Co. [Ky.] 89 S. W. 475.

16. An action under the Illinois Injury Act, chap. 70, R. S., must be brought within one year. Staunton Coal Co. v. Fischer, 119 Ill. App. 284.

17. Not the statute of the time of death. Dare v. Wabash, C. & W. R. Co., 119 Ill. App. 256.

18. An action under Code Civ. Proc. § 1902, to recover for death is within Laws 1886, p. 801, c. 572, requiring notice to certain municipalities to be given within six months and action to be brought within one year in suits for personal injuries. Crapo v. Syracuse, 183 N. Y. 395, 76 N. E. 465. In New York actions against municipalities of 50,000 or more must be brought within the time prescribed by Laws 1886, p. 801, c. 572, and within Code, § 1902. Id.

19. In New York the action does not accrue until the appointment of the personal representative. Crapo v. Syracuse, 183 N. Y. 395, 76 N. E. 465. Notice held timely given and the action seasonably brought. Id.

Contra: Where completion of the appointment is delayed by failure of the administrator to give bond for more than two years, the right of action is abated by the statute, which runs against the beneficiaries without interruption from the date of the decedent's death. Archdeacon v. Cincinnati Gas & Electric Co., 3 Ohio N. P. (N. S.) 606.

20. Mangan v. Hudson River Tel. Co., 100 N. Y. S. 539. Such parties being joint tort feasors may be sued jointly or severally. Id.

21. As where both are prosecuted by the administrator. Nemecek v. Filer & Stowell Co., 126 Wis. 71, 105 N. W. 225.

22. An allegation by one plaintiff that she sues for her own benefit and the benefit of the mother of decedent, and that the latter had no interest in the life of the deceased held to make the latter a party. International & G. N. R. Co. v. Ploeger [Tex. Civ. App.] 14 Tex. Ct. Rep. 474, 16 Tex. Ct. Rep. 183, 93 S. W. 226.

23. Fancher v. Cleveland & S. W. Traction Co., 3 Ohio N. P. (N. S.) 559.

24. In Massachusetts an election is presented between St. 1887, p. 899, c. 270, as amended by Laws 1892, p. 226, c. 260, § 1,

plaint must show plaintiff's capacity to sue,[25] must allege a duty owed by defendant to the decedent,[26] the existence of the class of persons designated by the statute as beneficiaries,[27] unless it is for the benefit of decedent's estate,[28] but need not negative knowledge by decedent of the existing danger[29] or plead legal conclusions.[30] In an action by the personal representative, an answer to the merits admits the representative character of the plaintiff.[31] Under statutes making railway companies liable for the death of passengers through the negligence of their servants, it is not necessary to allege that particular acts of a particular servant were negligent.[32] While the sufficiency of a pleading to state a cause of action depends upon the law of the state where the wrongful act occurs, in the absence of specific allegations, the law will be presumed to be the same as that of the state where the action is brought.[33] A mother seeking to recover for the death of her son need not allege his legitimacy.[34] One pleading under a penal statute[35] must bring the case strictly within the terms thereof.[36]

While contributory negligence on the part of decedent is an affirmative defense in most states,[37] in a few the burden of disproving it rests upon the plaintiff.[38]

and Rev. Laws, c. 171, § 2. Oulighan v. Butler, 189 Mass. 287, 75 N. E. 726. A petition charging defendant with negligence in failing to keep a railroad track and the engine thereon in proper repair states a cause of action within Rev. St. 1895, art. 3017, subd. 2, the general act. Kirby Lumber Co. v. Chambers [Tex. Civ. App.] 14 Tex. Ct. Rep. 913, 95 S. W. 607.

25. Where plaintiff is only secondarily entitled to bring the action, the complaint must allege the facts which authorize him to sue. Martin v. Butte [Mont.] 86 P. 264. Under Code Civ. Proc. § 578, enabling the mother to sue for the death of a minor child only when the father is dead or has deserted, the complaint must allege death or desertion. Id.

26. In an action by an administratrix, an allegation that "plaintiff" was a passenger on defendant's train alleges no duty to plaintiff's "intestate." Trott v. Birmingham R., Light & Power Co. [Ala.] 39 So. 716.

27. Under Rev. Laws, c. 171, § 2, authorizing a recovery in favor of the deceased's widow, children, or next of kin, a declaration failing to allege that deceased left either widow, children, or next of kin is demurrable. Oulighan v. Butler, 189 Mass. 287, 75 N. E. 726. Failure to so allege is a defect of substance and may be raised by a request for a ruling that the proof of all the allegations pleaded will not entitle plaintiff to recover. Id. In an action brought for the benefit of decedent's widow, the petition may be amended, substituting the proper beneficiary, it appearing that the supposed widow was never his legal wife. St. Louis, etc., R. Co. v. Block [Ark.] 95 S. W. 155.

28. Rev. St. 1901, pars. 2764-2766, construed as authorizing an action for the benefit of decedent's estate. Southern Pac. Co. v. Wilson [Ariz.] 85 P. 401. Hence not necessary to allege the existence of beneficiaries or damage to them. Id.

29. Defense to be pleaded by the defendant. Brown's Adm'r v. Cincinnati, etc., R. Co. [Ky.] 92 S. W. 583.

30. It is not necessary that a widow suing for the death of her husband should allege that a right of action survived to her, such being the legal consequence of the facts. Davis v. Arkansas So. R. Co. [La.] 41 So. 587.

31. Notwithstanding the right of action is one arising after death of testator. Hanley v. West Virginia, etc., R. Co. [W. Va.] 53 S. E. 625.

32. Petition held sufficient under Rev. St. 1899, § 2864. Anderson v. Missouri Pac. R. Co. [Mo.] 93 S. W. 394.

33. Petition held sufficient in Missouri though omitting to plead the law of the state where the injury occurred where objection was raised after commencement of trial. Lee v. Missouri Pac. R. Co., 195 Mo. 400, 92 S. W. 614.

34. Illegitimacy is a defense to be averred and proven by the defendant. Louisville & N. R. Co. v. Thomas [Miss.] 40 So. 257.

35. Rev. St. 1899, § 2864, providing for the forfeit of the fixed sum of $5,000 for wrongful death, is penal. Casey v. St. Louis Transit Co., 116 Mo. App. 235, 91 S. W. 419.

36. A petition demanding a smaller amount than that fixed by a penal statute does not state a cause of action. Casey v. St. Louis Transit Co., 116 Mo. App. 235, 91 S. W. 419.

37. Proof of the absence of contributory negligence on the part of deceased is not essential to the right to recover for wrongful death. Contributory negligence in such a case is an affirmative defense and the burden of proving it rests on the defendant. Jackson Knife & Shear Co. v. Hathaway, 7 Ohio C. C. (N. S.) 242. An instruction placing the burden of disproving contributory negligence on the plaintiff properly refused. Texas & P. R. Co. v. Huber [Tex. Civ. App.] 16 Tex. Ct. Rep. 154, 95 S. W. 568.

38. Under Rev. Laws, c. 171, § 2, plaintiff must prove due care on the part of the decedent. Manning v. Conway [Mass.] 78 N. E. 401. Allegations of facts set out in the complaint held not to show decedent's freedom from contributory negligence in coming in contact with a live electric wire. Mangan v. Hudson River Tel. Co., 100 N. Y. S. 539.

But in such cases the strict proof demanded in personal injury actions is not required of the personal representative.[39] Under a statute making a street railway liable for death due to corporate negligence[40] or the gross negligence of its servants, plaintiff has the burden of proving the negligence relied on,[41] and where both are made the basis of recovery, they should be separately submitted.[42] Where in direct examination it is shown that the earning capacity of the deceased was small, it is not error to permit on cross-examination evidence that plaintiff, the wife, was partly supported by deceased's father.[43] A statement in an affidavit made in compliance with the conditions of an accident insurance policy as to when and where the injury occurred is not conclusive.[44]

§ 6. *Distributive rights in amount recovered.*[45]—The damages for wrongful death are distributed according to the law of the state where the wrongful act was committed,[46] and where they are for the benefit of particular designated persons, they are not a part of decedent's estate,[47] and hence are not subject to his debts.[48] Where such funds become a part of the estate of the decedent, the law of the domicile of the beneficiary determines whether they are exempt from the deceased's debts.[49]

DEATH CERTIFICATES; DEBENTURES; DEBT, see latest topical index.

DEBT, ACTION OF.[50]

As a general rule, debt lies wherever indebitatus assumpsit will lie.[51] While generally used for the recovery of a precise sum due under a simple or special contract, yet the action of debt may be maintained for a quantum meruit or a quantum valebat.[52] By counting in debt, a plaintiff's right to recover is restricted to the sums alleged to be due by the terms of the contract.[53] The plea of the general issue is improper in an action of debt,[54] but if a plaintiff in such action joins issue

39. Charters v. Palmer, 98 N. Y. S. 887. Evidence held insufficient to show due care on the part of intestate in crossing the tracks. Axelrod v. New York City R. Co., 109 App. Div. 87, 95 N. Y. S. 1072. Evidence held not to show contributory negligence as a matter of law on the part of the decedent in attempting to cross in front of a team. Charters v. Palmer, 98 N. Y. S. 887. The habits and care exercised by the intestate are competent where there are no eye-witnesses to the accident. Chicago & A. R. Co. v. Seevers, 122 Ill. App. 558; Illinois Cent. R. Co. v. Whiteaker, 122 Ill. App. 333.

40. Failure of the motorman to keep a vigilant watch for teams as required by ordinance does not imply corporate negligence within Rev. Laws, c. 111, § 267. Caswell v. Boston El. R. Co., 190 Mass. 527, 77 N. E. 389.

41. Manning v. Conway [Mass.] 78 N. E. 401. Evidence held insufficient to show gross negligence within Rev. Laws, c. 171, § 2, in handling the team which ran over deceased. Evidence held insufficient to show gross negligence of the motorman under Rev. Laws, c. 111, § 267. Caswell v. Boston El. R. Co., 190 Mass. 527, 77 N. E. 380.

42. Rev. Laws, c. 171, § 2. Oulighan v. Butler, 189 Mass. 287, 75 N. E. 726.

43. Abel v. Northampton Traction Co., 212 Pa. 329, 61 A. 915.

44. Beecroft v. New York Athletic Club, 97 N. Y. S. 831.

45. See 5 C. L. 953.

46. Damages recovered for the death of a resident of Iowa killed in Illinois are distributed under the laws of the latter state. In re Coe's Estate [Iowa] 106 N. W. 743. Where the action arose in New Mexico, the laws of that state control notwithstanding the action is brought in Colorado. Denver & R. G. R. Co. v. Warring [Colo.] 86 P. 305.

47. Funds recovered under Act March 3, 1848 (Gen. St. p. 1188), by an administrator are held in trust for the next of kin. Gottlieb v. North Jersey St. R. Co., 72 N. J. Law, 480, 63 A. 339.

48. In re Williams' Estate [Iowa] 107 N. W. 608. Funds recovered under the death act of Michigan are not a part of decedent's estate and not subject to his debts. Id. Funds recovered under Code 1896, § 27, for the death of an engineer, not being subject to his debts, the company cannot offset damages to its cars due to decedent's negligence. Western R. Co. v. Russell [Ala.] 39 So. 311.

49. In re Williams' Estate [Iowa] 107 N. W. 608.

50. See 5 C. L. 953.

51, 52, 53. Seretto v. Rockland, etc., R Co. [Me.] 63 A. 651.

54. Loellke v. Grant, 120 Ill. App. 74.

upon a plea of nil debet, he is bound to prove every necessary allegation of his declaration.[55]

DEBTS OF DECEDENTS, see latest topical index.

DECEIT.[56]

§ 1. Nature and Elements (1093). | § 2. Action and Procedure (1096).

Scope of topic.—This topic embraces fraud as a ground of action for damages, whether the action be in the common law form for deceit or an equivalent action under the code. Fraud as a ground for relief other than damages is elsewhere treated.[57]

§ 1. *Nature and elements.*[58]—The essential elements of an action for deceit are representation, falsity, scienter, deception, and damage,[59] or it may consist in any deception or artifice used to circumvent, cheat, or deceive another,[60] as where possession of one's money is obtained from him by trick.[61, 62] Fraud which would entitle one to rescind a contract induced by it gives a cause of action for damages,[63] but deceit will not lie for mere negligence[64] or breach of a promise.[65]

55. Foster v. People, 121 Ill. App. 165.

56. See special article, 1 C. L. 953.

57. See Fraud and Undue Influence, 5 C. L. 1541; Reformation of Instruments, 6 C. L. 1279; Wills, 6 C. L. 1880.

58. See 5 C. L. 953.

59. False representations as to a material matter which induces one to enter into a transaction to his damage. Crockett v. Burleson [W. Va.] 54 S. E. 341. Where one partner falsely represents that certain book accounts are due the firm, when in fact some of them are false and some have been collected, and induces the other partner to dissolve and take over such accounts, the latter may upon discovery of the fraud sue for damages occasioned by it. Id. Evidence which discloses false representations of material facts, willfully made to induce a sale, reasonably relied upon by the opposite party to his damage, shows actionable fraud. May v. Loomis, 140 N. C. 350, 52 S. E. 728. Evidence held to show fraud in a sale of bank stock where dividends for two years were declared from the sale of assets charged off the books of the bank. Stewart v. Smith [Kan.] 82 P. 482. Where one who owed another a debt of gratitude procured him to purchase an interest in a note by falsely representing that it was secured by a mechanic's lien, evidence held to show that the transaction was induced by fraud. Thompson v. Randall [Ky.] 90 S. W. 251. Where by contract a party is obligated to assign an invention to a corporation but fraudulently assigns the same to another and independent corporation, which successfully defends its title thereto upon the ground of its innocence in acquisition, he is liable in an action of deceit to such first named corporation in the sum received by him for the invention so wrongfully conveyed, with interest from the date of the receipt thereof. Bates v. Bates Mach. Co., 120 Ill. App. 563. Instructions held to properly set forth the law in an action for falsely representing that there was a well on land sold. George v. Hesse [Tex. Civ. App.] 16 Tex. Ct. Rep. 359, 94 S. W. 1122. Instructions, though long, held to correctly state the law as to deceit and burden of proof. McKibbin v. Day [Neb.] 104 N. W. 752.

60. Evidence held to show actionable fraud where the brother of an infirm and ignorant woman conspired with others to appropriate her crops so that she lost her property for taxes, and then by fraudulent practices induced the tax purchaser to deed the property to him, and he subsequently conveyed to his co-conspirators, who committed trespasses on the premises. Lindley v. Kemp [Ind. App.] 76 N. E. 798. One who is enticed to bet on a foot race by false representations that the race is "fixed" has a cause of action for fraud. Hobbs v. Boatright, 195 Mo. 693, 93 S. W. 934. A bank which aids in a scheme by which one is induced to bet on a foot race by representations that the race is "fixed," by allowing the bank to be used to give an air of respectability to the transaction, is liable, with the conspirators. Id.

61, 62. Where auctioneers agreed with one that if he would purchase certain goods at the sale and take them to another town they would sell them at an advanced price, and after the goods were purchased and a large deposit made the auctioneers refused to perform their contract. Rawson v. Silo, 99 N. Y. S. 934.

63. Crockett v. Burleson [W. Va.] 54 S. E. 341.

64. One who makes a fraudulent promissory note with intent to defraud and deceive any one into whose hands it might come is not liable in deceit for mere negligence in allowing the note to pass into circulation. Where one executed what purported to be the note of a town and signed to it the names of the town officers, and it was put into circulation by the act of a third person which the maker was not required to guard against. Costelo v. Barnard, 190 Mass. 260, 76 N. E. 599.

There must be some representation,[66] but it is not essential that it shall have been made directly to the person injured,[67] nor that it be made by one sought to be held liable personally.[68] It is sufficient upon which to base an action against a principal if made by an authorized agent.[69] In some states it is provided by statute that, to render one liable for certain false representations, they must be in writing.[70]

The representation must be of a fact,[71] past or existing,[72] and not mere expression of opinion,[73] but under some circumstances a statement, though in form an opinion, may be construed as one of fact.[74]

The representation must be false.[75]

65. Love v. McElroy, 118 Ill. App. 412.

66. See 5 C. L. 954.

A concealed intention by a purchaser not to pay for goods purchased is a misrepresentation of a material fact. Upchurch v. Mizell [Fla.] 40 So. 29.

67. Keeler v. Seaman, 47 Misc. 292, 95 N. Y. S. 920. Prospectus of corporation. Id.; Keeler v. Dunham, 99 N. Y. S. 669.

68. It is sufficient if he authorized it. Keeler v. Seaman, 47 Misc. 292, 95 N. Y. S. 920.

A third person who by fraudulent representations induces one person to purchase a note from another is guilty of actionable deceit. Thompson v. Randall [Ky.] 90 S. W. 251.

69. See, also, Agency, 7 C. L. 61. Where a principal and agent are engaged in buying and selling real estate, the agent not furnishing any money, not taking title but sharing in the profits, the agent is not a necessary party to an action for deceit in one of the transactions. Judd v. Walker, 114 Mo. App. 128, 89 S. W. 558. As to acreage. Id. As to title. John Gund Brew. Co. v. Peterson [Iowa] 106 N. W. 741. As to boundaries and area. Kell v. Trenchard [C. C. A.] 142 F. 16. Where the general manager of an irrigation company falsely represents the location of a water right, it is not essential to the liability of the company that the purpose for which the information was sought should have been made known. It is sufficient that they were made with authority and acted upon. Cleghon v. Barstow Irr. Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 221, 93 S. W. 1020. An agent who makes false representations in a sale of corporate stock and directly derives a profit from the sale induced is personally liable for damages caused by his deceit. Getchell v. Dusenbury [Mich.] 108 N. W. 723.

70. Under Comp. Laws § 9518, representations concerning the conduct, trade, or credit of another. Getchell v. Dusenbury [Mich.] 108 N. W. 723.

71. See 5 C. L. 954. Statement of an intention may constitute deceit. Schrafft v. Fidelity Trust Co. [N. J. Law] 62 A. 933.

Held statements of facts: False statements by a vendor as of his own knowledge as to the **number of acres** in a tract which is being negotiated for sale by the acre. Judd v. Walker, 114 Mo. App. 128, 89 S. W. 558. Representations by sellers of timber that they had had it carefully estimated and that such estimates showed certain quantities are more than mere expressions of opinion. May v. Loomis, 140 N. C. 350, 52 S. E. 728. A false statement **as to value** made to one ignorant of the quality or value, and who has no opportunity to examine it, made under circumstances indicating that such statements are to be relied upon, is one of fact. Pinch v. Hotaling [Mich.] 12 Det. Leg. N. 841, 106 N. W. 69. A representation by a third person that a land owner who offered to sell for $500 demanded $1,000 is one of fact. Hughes v. Lockington [Ill.] 77 N. E. 1105. False representations in the sale of a mine that it was owned and controlled by the company issuing the stock, that it comprised a certain number of acres, that pipe lines were run, that the company had paid dividends, that there was gold enough in the dump ore to pay for running the mines, etc., are more than mere expressions of opinion. Krause v. Cook [Mich.] 108 N. W. 81. False representations by one that he was a member of a certain law firm, had sold a mine, was a rich man, and that his mother had made out checks for the amount she was to contribute to the enterprise, held statements of fact. Damers v. Sternberger, 95 N. Y. S. 532.

Not statements of fact: One who repeats information received from another stating that he has no personal knowledge is not guilty of fraud. Krause v. Cook [Mich.] 108 N. W. 81. Statements by one of facts represented to him do not give a cause of action. Jewett v. Buck [Vt.] 63 A. 136.

72. Hughes v. Lockington [Ill.] 77 N. E. 1105.

73. That bad accounts had been charged off and that those remaining were better than the ordinary. Pittsburg Life & Trust Co. v. Northern Cent. Life Ins. Co., 140 F. 888.

Held matter of opinion: As to the value of land. Eise v. Freeman [Kan.] 83 P. 409. That the fences on land are good. Id. As to the acreage under and that could be put under cultivation, and as to the acreage of waste land. Van Horn v. O'Connor [Wash.] 85 P. 260. That a body of ore through which a drill hole has been made is pay ore. Brown v. South Joplin Lead & Zinc Min. Co., 194 Mo. 681, 92 S. W. 699. A representation concerning affairs not susceptible of exact knowledge is to be taken as meaning no more than strong belief founded upon what appears to be reasonable grounds, and in such case the question is wholly one of good faith. Krause v. Cook [Mich.] 108 N. W. 81.

74. Scott v. Burnight [Iowa] 107 N. W. 422.

75. See 5 C. L. 954. Pittsburg Life & Trust Co. v. Northern Cent. Life Ins. Co., 140

The maker must know it to be false[76] or be in duty bound to know its truth or falsity,[77] or make it so recklessly and without concern as to its truthfulness as to be equivalent to actual fraud.[78]

The falsity must be willful and have been made with intent to deceive,[79] but it is not essential that the person who makes the false representations should derive a benefit therefrom or be in collusion with the person who does.[80]

The representation must be material.[81]

The representation must be relied upon,[82] and the person injured thereby be deceived.[83]

It must be such that the defrauded person is entitled to rely upon,[84] and such

F. 888. A complaint alleging that the defendant, for the purpose of inducing plaintiff to sell corporate stock at a certain price falsely stated that he desired to buy all the outstanding stock and would pay plaintiff the difference between such price and the highest price it should pay for any stock, that defendant was only desirous of purchasing such stock as it could buy for that price or less, that defendant had purchased stock for a greater price, **does not state a cause of action.** Schrafft v. Fidelity Trust Co. [N. J. Law] 62 A. 933. In an action by a consignor against a commission merchant for inducing a transfer of the bill of lading by false representation that he had sold the car of fruit, the defendant may show that he had had such negotiations as to lead him to believe that he had sold the fruit. Serrano v. Miller & T. Commission Co. [Mo. App.] 93 S. W. 810. Evidence insufficient to show grounds for believing that he had made a sale. Id. Representations that there is a flowing well on premises are not inconsistent with a provision in the deed that the vendee should pay part of the cost of a well then being bored. George v. Hesse [Tex. Civ. App.] 16 Tex. Ct. Rep. 359, 94 S. W. 1122.

76. See 5 C. L. 954. An error of judgment of an executor in failing to appreciate the advancement in value of real estate and in making a misstatement relative to such value to one of the beneficiaries does not constitute deceit. In re Cunningham's Estate, 212 Pa. 441, 61 A. 993. Evidence held insufficient to show scienter in representation by landlord that roof did not leak. Bayles v. Clark, 100 N. Y. S. 586.

77. Under Rev. Civ. Code § 1201, providing that one who positively asserts as true that which is untrue is guilty of fraud, a seller of a horse who falsely represents his pedigree is liable, though he believed his representations to be true. He is bound to know their truth. McCabe v. Desnoyers [S. D.] 108 N. W. 341. In an action for deceit which induced the sale of goods, the plaintiff need not prove that the defendant knew or should have known the falsity of his representations. Palmer v. Goldberg [Wis.] 107 N. W. 478. One who in reliance on false representations purchases property may recover, whether the representations were made in good or bad faith. Krause v. Cook [Mich.] 108 N. W. 81.

78. Pittsburg Life & Trust Co. v. Northern Cent. Life Ins. Co., 140 F. 888. And see John Gund Brew. Co. v. Peterson [Iowa] 106 N. W. 741.

79. See 5 C. L. 955. Instructions as to scienter held correct. Upchurch v. Mizell [Fla.] 40 So. 29.

Fraud is not shown where one who represents himself as the owner of land does not know that his agent to whom he had intrusted his deed to be recorded had procured and had recorded a deed running to himself. Buchall v. Higgins, 109 App. Div. 607, 96 N. Y. S. 241. Evidence insufficient to show an intent to deceive in the sale of the property of an insurance company. Pittsburg Life & Trust Co. v. Northern Cent. Life Ins. Co., 140 F. 888.

80. Cleghon v. Barstow Irr. Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 221, 93 S. W. 1020.

81. See 5 C. L. 955. Representations in the sale of bonds that they were good and constituted a first lien on corporate property gives a cause of action for falsity of the last representation, though the bonds were considered good when sold. Wickham v. Roberts, 98 N. Y. S. 1092.

82. See 5 C. L. 956. Else v. Freeman [Kan.] 83 P. 409. Whether one who employed another to locate him on a homestead relied upon representations by such other that land pointed out was in a certain section, held a question of fact. Kabat v. Moore [Or.] 85 P. 506. Where there is evidence warranting submission of the question whether a person making representations as to rental value was a conspirator with the defendant, it is proper to permit the plaintiff to testify that he relied on such representation. Pinch v. Hotaling [Mich.] 12 Det. Leg. N. 841, 106 N. W. 69.

83. One who purchases mining stock after examining the mine and exercising his own judgment, and buying additional stock and selling it on commission, exhibiting samples of ore, cannot rely on false representations. Irby v. Tilsley, 41 Wash. 211, 83 P. 97.

84. See 5 C. L. 956. Marshall-McCartney Co. v. Halloran [N. D.] 106 N. W. 293. A prospective purchaser who is allowed to and does make a full investigation, not being prevented by the seller from making it as exhaustive as he desires, cannot be heard to say that false representations were made to him. Pittsburg Life & Trust Co. v. Northern Cent. Life Ins. Co., 140 F. 888.

A contracting party has a right to rely on the express statement of an existing fact, the truth of which is known to the opposite party and is not known to him. Farley v. Wiess [Neb.] 107 N. W. 561. Representations by a vendor that land is worth a certain price per acre, that it rented for a certain amount, and that the vendor would lease it at such rental, where it is shown that the

as to mislead a reasonably prudent man,[85] unless the parties occupy fiduciary relations toward each other.[86] That the defrauded party should have discovered the fraud and protested against it at the time is no defense,[87] especially if artifice was resorted to to induce the opposite party to forego investigation.[88]

It is essential that damage result.[89]—The damages sustained must be actual.[90]

§ 2. *Action and procedure.*[91]—The action lies if the transaction induced is voidable and not void.[92] An election of remedies may exist.[93] One induced by fraud to enter into a contract may affirm and take its benefits, so far as obtainable, and recover damages sustained,[94] or rescind and recover what he has parted with,[95] but one who discovers fraud while the contract is yet executory may not execute and then sue for the fraud.[96] The cause of action may be assignable.[97] The venue of

land has no such value, the vendor being familiar with the land and the vendee not, held to raise a question of fact as to whether deceit was proven. Scott v. Burnight [Iowa] 107 N. W. 422. It is not the duty of a purchaser, residing in Iowa, of land in Dakota to go to Dakota and ascertain whether the vendor's representations are true. Id. A vendee may rely on statements of fact by the vendor not palpable to the former. Judd v. Walker, 114 Mo. App. 128, 89 S. W. 558. Where a vendor in negotiating a sale of land makes false representations as to the acreage, the vendee is not required to survey and measure the land. Id.

85. One who allows himself to be speculated upon in the purchase of an option cannot recover from the vendor the cost of the option. Kell v. Trenchard [C. C. A.] 142 F. 16.

86. Where one who owes a debt of gratitude to another makes to him false representations concerning facts which he professes to and is in a position to know, the latter is not required to investigate the truth of the statements. Thompson v. Randall [Ky.] 90 S. W. 251.

87. Turner v. Kuehnle [N. J. Eq.] 62 A. 327. One who makes false statements for the purpose of inducing a transaction cannot set up that the defrauded person failed to exercise ordinary care to ascertain the truth or falsity of such statements. Rahm v. Bunger [Ky.] 90 S. W. 257. One who procures another to execute a deed prepared by himself, falsely representing that it is drawn pursuant to a previous contract, cannot assert that plaintiff was negligent in signing the deed without reading it. Griffin v. Roanoke R. & Lumber Co., 140 N. C. 514, 53 S. E. 307.

88. May v. Loomis, 140 N. C. 350, 52 S. E. 728.

89. See 5 C. L. 957. Sonnesyn v. Akin [N. D.] 104 N. W. 1026. Where different kinds of property were transferred in a single transaction, there can be no recovery unless the entire property is worth less than the price paid. Pittsburg Life & Trust Co. v. Northern Cent. Life Ins. Co., 140 F. 888. Where one who purchased corporate stock and was made a director and participated in its affairs seeks to recover for fraudulent representations inducing the sale, he must show that the transactions of the concern after he subscribed were not the cause of the corporation's disaster. Getchell v. Dusenbury [Mich.] 108 N. W. 723. Where a third person who knew that a landowner offered his land for sale for $500 represented to one who had confidence in him that $1,000 was demanded, and such person purchased for $1,000, paying the landowner $500, part of which he borrowed from the person who made the false representations, and also gave him a mortgage for $500, which was subsequently foreclosed, a pecuniary loss sufficient to sustain a claim for damages was suffered. Hughes v. Lockington [Ill.] 77 N. E. 1105. Where representations as to condition of premises were made after verbal lease and before written lease merely confirmatory thereof, the tenant sustained no damage. Bayles v. Clark, 100 N. Y. S. 586.

90. Thompson v. Newell [Mo. App.] 94 S. W. 557. Nominal damages cannot be recovered if no actual damage was suffered. Id.

91. See 5 C. L. 957. Duress and deceit are simply different methods by which fraud is consummated. The same remedies are available to the injured party. Neibuhr v. Gage [Minn.] 108 N. W. 884.

92. Where one is by fraud induced to sign a deed omitting stipulations it should contain, the deed is not absolutely void but only voidable and an action may be maintained for the fraud. Griffin v. Roanoke R. & Lumber Co., 140 N. C. 514, 53 S. E. 307.

93. If a vendor, by fraud practiced on his vendee, sells what he at the same time warrants, the vendee may sue upon the warranty or for the deceit. Crockett v. Burleson [W. Va.] 54 S. E. 341. Where an action for deceit is brought, charging defendant with having fraudulently induced plaintiff to purchase a note and mortgage, it is not essential that plaintiff tender to defendant the note and mortgage. Smith v. Hoffman, 122 Ill. App. 198.

94, 95. Sonnesyn v. Akin [N. D.] 104 N. W. 1026.

96. An owner of land which his agent has sold cannot recover from the agent for fraud, where, knowing of a resale by the vendee at an advanced price and suspecting his agent of connivance in such resale, he falls to avail himself of easy means of ascertaining the truth while the contract is yet executory. Bartleson v. Vanderhoff [Minn.] 104 N. W. 820. One who executes a contract after discovery of fraud cannot maintain an action for damages. McDonough v. Williams [Ark.] 92 S. W. 783. Purchasers of timber who have made payments, manufactured and sold the timber, cannot plead fraud in an

the action depends on the practice in the several states.[98] The action at law may be brought at any time within the limitation period[99] after the fraud is or should have been discovered.[1] Servants of the person who perpetrated the fraud are not necessary parties.[2]

Pleading.[3]—Misrepresentations relied upon must be specifically alleged.[4] The complaint must show that the damage was the proximate effect of the misrepresentations,[5] and if special damages are sought they must be pleaded.[6]

Evidence.[7]—Good faith in business transactions is presumed,[8] and one who alleges deceit has the burden of proving all the essential elements of the tort,[9] but one who alleges false representations as to various independent facts is not required to establish all the false representations alleged.[10] Ordinarily proof of scienter is essential,[11] but an assertion as a fact of that which the maker does not know to be untrue renders him liable.[12] Fraud is to be determined from all the circumstances of the case and inferences to be drawn therefrom,[13] and a liberal range of investigation is permitted.[14] Any evidence which throws light on the issues involved is admissible,[15] but evidence which does not support the allegations is not.[16]

action for the purchase price but may set it up by counterclaim. May v. Loomis, 140 N. C. 350, 52 S. E. 728.

97. Under Code Civ. Proc. § 1910, and 2 Rev. St. p. 447, pt. 3, ch. 8, tit. 3, § 1, a right of action for false representations made to a decedent is assignable by his administrator. Wickham v. Roberts, 98 N. Y. S. 1092; Keeler v. Dunham, 99 N. Y. S. 669, overruling Wickham v. Roberts, 98 N. Y. S. 1092.

98. A corporation may be sued for deceit in the county where the tort was committed though its principal place of business is in another county. Western Cottage Piano & Organ Co. v. Griffin [Tex. Civ. App.] 14 Tex. Ct. Rep. 332, 90 S. W. 884.

99. Neibuhr v. Gage [Minn.] 108 N. W. 884. The equitable doctrine of laches has no application to such action. Id. One who sells timber on his land and is thereafter induced to sign a deed drawn by the purchaser who falsely represents that it is drawn in accordance with the contract has a cause of action for fraud on discovery thereof. Such cause is not postponed until removal of the timber. Griffin v. Roanoke R. & Lumber Co., 140 N. C. 514, 53 S. E. 307.

1. By the exercise of ordinary diligence. Western Cottage Piano & Organ Co. v. Griffin [Tex. Civ. App.] 14 Tex. Ct. Rep. 332, 90 S. W. 884.

2. In an action against one who was employed to locate another on homestead land for falsely representing land pointed out to be in a certain section, the persons who assisted defendant in running the lines are not necessary parties. Kabat v. Moore [Or.] 85 P. 506.

3. See 5 C. L. 958.

4. Marshall-McCartney Co. v. Halloran [N. D.] 106 N. W. 293. A complaint must allege with certainty what the false intention consists in. Schrafft v. Fidelity Trust Co. [N. J. Law] 62 A. 933. Acts constituting the fraud must be definitely alleged. Allegations held too general. Ramoneda Bros. v. Loggins [Miss.] 39 So. 1007. False representations must be set out in the complaint. Walker v. Parry [Fla.] 40 So. 69. Complaint in an action against an irrigation company for false representations as to the location of a water right **held good as against general demurrer.** Cleghon v. Barstow Irr. Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 662, 93 S. W. 1020. Held sufficient to show that the general manager had authority or apparent authority to make the statement. Id. Complaint in an action for deceit in inducing the purchase of corporate stock by false representations made in a prospectus held to state a cause of action. Keeler v. Seaman, 47 Misc. 292, 95 N. Y. S. 920.

5. Marshall-McCartney Co. v. Halloran [N. D.] 106 N. W. 293.

6. Evidence of special damage is not admissible unless such damage is pleaded. Jewett v. Buck [Vt.] 63 A. 136.

7. See 5 C. L. 958.

8. Breaux v. Broussard [La.] 40 So. 629.

9. Serrano v. Miller & T. Commission Co. [Mo. App.] 93 S. W. 810. The representation, its falsity, intent to deceive, reliance, and damage. Buchall v. Higgins, 109 App. Div. 607, 96 N. Y. S. 241. The false representations, reliance thereon, and that they induced the transaction. Hutchason v. Spinks [Cal. App.] 85 P. 132.

Evidence sufficient to show a conspiracy to defraud in the sale of horses, and that false representations were made pursuant to such conspiracy. Palmer v. Goldberg [Wis.] 107 N. W. 478.

Evidence insufficient to show fraud. Western Cottage Piano & Organ Co. v. Griffin [Tex. Civ. App.] 14 Tex. Ct. Rep. 332, 90 S. W. 884. Evidence as to whether fraud was perpetrated in the sale of corporation stock held to raise a **question of fact.** McDonough v. Williams [Ark.] 92 S. W. 783.

10. Pinch v. Hotaling [Mich.] 12 Det. Leg. N. 841, 106 N. W. 69.

11. John Gund Brew. Co. v. Peterson [Iowa] 106 N. W. 741; Bayles v. Clark, 100 N. Y. S. 586.

12. John Gund Brew. Co. v. Peterson [Iowa] 106 N. W. 741.

13. Kabat v. Moore [Or.] 85 P. 506.

14. Discretion of trial judge not abused. McKibbin v. Day [Neb.] 104 N. W. 752.

15. In an action for fraudulent representations in the sale of a mill, a statement by the vendee at the time of delivering the deed,

Instructions[17] in actions for deceit are governed by the rules which control in other forms of action.[18]

The measure of damages[19] is the actual loss sustained[20] together with outlays directly attributable to the fraud.[21]

DECLARATIONS; DECOY LETTERS, see latest topical index.

DEDICATION.

§ 1. **What Is Dedication (1098).**
§ 2. **The Right to Dedicate (1098).**
§ 3. **The Purposes of Dedication (1099).**
§ 4. **Mode of Dedication (1099).** In General (1099). An intention (1100). Acceptance (1100). A Sale of Lots with Reference to a Plat (1101). Plats and Maps (1101). Evidence of Dedication and Questions of Law and Fact (1101).
§ 5. **Effect of Dedication (1102).**
§ 6. **Remedies (1103).**

§ 1. *What is dedication.*[22]—Dedication is an appropriation of land to some public use made by the owner and accepted for such use by or on behalf of the public.[23]

§ 2. *The right to dedicate.*[24]—Any estate or interest in land may be dedicated,[25] but only the fee owner can make an absolute and final dedication.[26] It is not

"now one-half of everything that is here is yours" is admissible. Rahm v. Bunger [Ky.] 90 S. W. 257. A plaintiff who testifies fully as to representations made in an exchange of properties and to his reliance thereon may be permitted to state why he made the exchange. Pinch v. Hotaling [Mich.] 12 Det. Leg. N. 841, 106 N. W. 69. Evidence that property which vendor represented to be part of that sold was taken by a third person under claim of right without objection from vendor is admissible to show falsity of the representation. Campbell v. Park [Iowa] 104 N. W. 799, modifying 128 Iowa, 181, 101 N. W. 861.

16. In an action based on false representations as to the ownership of a certain tract included, evidence of declarations as to the amount of timber on all the land is inadmissible. Jewett v. Buck [Vt.] 63 A. 136.

17. See 5 C. L. 958.

18. See Instructions, 6 C. L. 43. An instruction that a transaction capable of two constructions will be so construed as to give effect to the honest construction is not rendered defective by adding "unless proven by the preponderance of evidence to be otherwise." Hughes v. Lockington [Ill.] 77 N. E. 1105. An instruction that one alleging fraud must prove it by clear, cogent, and convincing evidence, is not rendered misleading by an instruction that the burden of all the issues is on the plaintiff and the jury cannot find in his favor unless on the greater weight of testimony. Griffin v. Roanoke R. & Lumber Co., 140 N. C. 514, 53 S. E. 307. Instructions held to sufficiently submit the issues in an action for deceit in the sale of corporate stock. Drake v. Holbrook [Ky.] 92 S. W. 297.

19. See 5 C. L. 958. See, also, Damages, 7 C. L. 1054.

20. Thompson v. Newell [Mo. App.] 94 S. W. 557.

For false representations that there was a well on land sold, the measure is the difference between the price paid and the value of the land, not the difference between the value of the land with the well and its value without it. George v. Hesse [Tex.] 15 Tex. Ct. Rep. 824, 93 S. W. 107; Id. [Tex. Civ. App.] 16 Tex. Ct. Rep. 359, 94 S. W. 1122.

In inducing the sale of real estate the measure is the difference between the contract price and the market value. Thompson v. Newell [Mo. App.] 94 S. W. 557. For deceit by the vendor in the sale of land, the damages recoverable by the vendee is the difference between the value of what the vendee parted with and what he received. Kell v. Trenchard [C. C. A.] 142 F. 16. For deceit in the sale of property, the damages recoverable is the actual loss sustained, measured by the difference between the actual value and the price paid. Pittsburg Life & Trust Co. v. Northern Cent Life Ins. Co., 140 F. 888.

In the sale of corporation stock evidence of the value of the stock at the time of the sale is admissible. McDonough v. Williams [Ark.] 92 S. W. 783. For deceit in the sale of corporate stock the measure is the difference between the actual value of the stock and its value if it had been as represented. Drake v. Holbrook [Ky.] 92 S. W. 297. Where the measure of damages recoverable was the value of certain timber at the date a deed was executed, it was proper to instruct that while market value should be considered it was not controlling. Griffin v. Roanoke R. & Lumber Co., 140 N. C. 514, 53 S. E. 307. One induced by false representations to **purchase a horse** may recover the value of the horse though it exceeds the price paid. McCabe v. Desnoyers [S. D.] 108 N. W. 341. Evidence sufficient to support a finding as to value in an action for deceit in the sale of horses. Palmer v. Goldberg [Wis.] 107 N. W. 478.

21. Kell v. Trenchard [C. C. A.] 142 F. 16.

22. See 5 C. L. 959.

23. See Cyc. Law Dict. "Dedication."

24. See 5 C. L. 959.

25. An easement. Milliken v. Denny [N. C.] 53 S. E. 867.

essential to the valid dedication of land as a street that it be within the limits of the city to which the dedication is made at the time of the dedication.[27]

§ 3. *The purposes of dedication.*[28]—Land may be dedicated to a restricted public use, and if accepted must be taken for the limited purpose only.[29]

§ 4. *Mode of dedication. In general.*[30]—Dedication is either statutory or common law. To constitute the former, statutory requirements must be complied with,[31] but noncompliance may be cured by lapse of time,[32] or a common-law dedication may result from an attempted statutory dedication;[33] but no conduct of the dedicator or the public short of the requirements of the statute will make it effective as a statutory dedication.[34] To constitute a common-law dedication no particular formality is essential,[35] and it is not affected by the statute of frauds,[36] but the requisites of intention,[37] offer[38] and acceptance[39] must exist. Dedication may re-

26. Bruce v. Seaboard Air Line R., Co. [Fla.] 41 So. 883. One claiming title to land in the adverse possession of another cannot, as against such adverse occupant, make an absolute and final dedication of it by filing a plat and selling lots not held adversely by reference to such plat. Id.

27. City of Meridian v. Poole [Miss.] 40 So. 548.

28. See 5 C. L. 959.

29. Young v. Landis Tp. [N. J. Law] 62 A. 1133. A dedication of land to use for laying pipes to convey water from a pond to the city reservoir does not give the city a right after the reservoir has been abandoned to maintain pipes as part of the city's distributing system. Birge v. Centralia, 218 Ill. 503, 75 N. E. 1035.

30. See 5 C. L. 959.

31. Wilder v. Aurora, D. & R. Elec. Traction Co., 216 Ill. 493, 75 N. E. 194. A plat acknowledged before an Illinois commissioner of deeds in the state of New York is not a good statutory plat. Birge v. Centralia, 218 Ill. 503, 75 N. E. 1035.

32. Where an owner of land executes a plat under oath, but fails to make the formal statutory acknowledgment, and the execution is defective, 20 years' recordation of the plat operates to cure defects under Rev. St. 1898, § 2216b. Lins v. Seefeld, 126 Wis. 610, 105 N. W. 917.

33. Where Gen. Laws 1877, c. 100, § 7, relative to the execution and filing of plats, is not complied with, no statutory dedication vesting the fee of streets in the municipality results, but merely a common-law dedication which gives the city an easement. City of Leadville v. Coronado Min. Co. [Colo.] 86 P. 1034.

34. But where statutory requirements are not in fact complied with, the indorsement on the plat to the effect that they have is without authority and effect (City of Leadville v. Coronado Min. Co. [Colo.] 86 P. 1034), and subsequent conduct of the donor and municipal authorities will not operate by way of estoppel to make such dedication effective as vesting the fee in the city (Id.).

35. Terrell v. Hart [Ky.] 90 S. W. 953. A dedication may be either by express language, reservation, or conduct showing an intention to dedicate. Milliken v. Denny [N. C.] 53 S. E. 867. Evidence of user and of surveying, platting and otherwise improving by public authorities, held to show dedication of a highway. Eldridge v. Collins [Neb.] 105 N. W. 1085. Dedication is shown where an owner petitions a city to construct a street through his premises and has his petition complied with, though he erase his name from the petition after enactment of the improvement ordinance, and remonstrates against the improvement but does not withdraw his offer of dedication. Terrell v. Hart [Ky.] 90 S. W. 953. Occasional use of river front by the public for landing with consent of railroad company, which uses land along the front for depot purposes, does not show dedication of a use inconsistent with the railroad company's use, though the land was conveyed to it solely for railroad purposes. Sioux City v. Chicago & N. W. R. Co. [Iowa] 106 N. W. 183. Where adjacent owners build fences and plant trees along their line so as to leave a space between for public travel with the intention that it be used for that purpose and it is so used for 20 years, it will be regarded as dedicated. Cassidy v. Sullivan [Neb.] 106 N. W. 1027. Evidence sufficient to show dedication of a highway. Id. Evidence held sufficient to show implied dedication of alley to public use. Chapman v. Sault Ste. Marie [Mich.] 13 Det. Leg. N. 676, 109 N. W. 53. The mere recording of a private conveyance of an alley after it is in use by the public does not withdraw if from public use so as to stop the running of limitations. Id.

36. May be oral. Terrell v. Hart [Ky.] 90 S. W. 953.

37. The word "convey" endorsed on the plat by the owner of the land does not have the effect of conveying to the municipality the fee of streets there designated, in the absence of an effective statutory dedication. City of Leadville v. Coronado Min. Co. [Colo.] 86 P. 1034. A deed of land abutting on an alley held not of itself to operate as a dedication of such alley. Milliken v. Denny [N. C.] 53 S. E. 867. Where a grantor, neither expressly nor by implication, dedicates a strip of land referred to in the deed as an alley to the use of a lot conveyed, nothing thereafter said or done could impose a burden on the property. Id.

38. Subdividing, and recording a plat of a tract showing streets, reserved and laid out for purchasers, does not constitute an offer of general dedication to the public. McLean v. Llewellyn Iron Works [Cal. App.] 83 P. 1082. In every case of implied dedication it must appear that the property has

sult from an estoppel,[40] especially where an owner allows his land to be used by the public for a period to give a right to such user by prescription.[41]

An intention[42] to dedicate is essential,[43] but it may be inferred from acts,[44] or presumed from circumstances.[45]

Acceptance[46] before the offer is withdrawn[47] is essential.[48] It may be by formal action of public authorities,[49] or may be inferred from long public use,[50] and it may be implied from circumstances;[51] but the fact that a tract of land shown

been in the exclusive control of the public for a period long enough to raise the presumption of a gift. Healey v. Atlanta [Ga.] 54 S. E. 749. That an individual has a right to demand a way of necessity confers no right on the public to claim such way as a public way. Town of Como v. Pointer [Miss.] 40 So. 260.

39. See post this section.

40. Where a married woman owns certain property and knows that a portion thereof had been donated for a street by her husband and was so used for 25 years, during which time it was exempt from taxation, her heirs were held estopped to deny dedication. Dulaney v. Figg [Ky.] 94 S. W. 658. An owner who allows the public for a long time to use a strip of land as a highway is estopped to deny dedication. Ray v. Nally [Ky.] 89 S. W. 486.

41. This is so though the church at the end of the road and for which it was opened to afford access to has been moved to another locality. Ray v. Nally [Ky.] 89 S. W. 486. May be implied from adverse possession by the public for the period necessary to give title by adverse possession. City of Victoria v. Victoria County [Tex. Civ. App.] 15 Tex. Ct. Rep. 873, 94 S. W. 368. Public use of an alley for ten years after it has been legally vacated by ordinance, with the knowledge of the city, constitutes it a public alley. Mitchell v. St. Louis, etc., R. Co., 116 Mo. App. 81, 92 S. W. 111.

42. See 5 C. L. 961.

43. Healey v. Atlanta [Ga.] 54 S. E. 749. The intention to dedicate should be considered in determining the existence and character of a dedication. McGourin v. De Funiak Springs [Fla.] 41 So. 541. Where land is claimed by the public and is not shown to have been dedicated by a plat with reference to which lots have been sold, the fact that the land was never used as a street and has for a long period been enclosed by the owner, who made the plat, is inconsistent with an intention to dedicate. Id. That a street appears on a map which is referred to in some of several deeds to lands in the vicinity does not show dedication. City of Mobile v. Fowler [Ala.] 41 So. 468.

44. Where an owner surveys and plats land, files his plat and sells lots with reference thereto, an intention to dedicate streets shown on such plat is evidenced, and after selling a number of lots he cannot claim title to the streets. Flournoy v. Breard [La.] 40 So. 684. It is sufficient that the streets were marked on the plat by dotted instead of solid lines. Id.

45. Where a plat of land on a lake shore and other circumstances raised a presumption of dedication of the water front between a parallel street and the shore, recitals in a deed that the lake was the front line of a lot conveyed held insufficient to overcome the presumption of intention to dedicate the water front. Davies v. Epstein [Ark.] 92 S. W. 19.

46. See 5 C. L. 961.

47. Where a proprietor of a platted tract conveys land represented thereon by a blank space prior to acceptance by the city, it constitutes a withdrawal of any offer of dedication implied from leaving such space blank, and the city acquires no title by subsequent acceptance. Birge v. Centralia, 218 Ill. 503, 75 N. E. 1035.

48. City of Mobile v. Fowler [Ala.] 41 So. 468; Healey v. Atlanta [Ga.] 54 S. E. 749. There must be an acceptance of a street by the public. McLean v. Llewellyn Iron Works [Cal. App.] 83 P. 1082.

49. City of Mobile v. Fowler [Ala.] 41 So. 468.

50. City of Mobile v. Fowler [Ala.] 41 So. 468. The offer to dedicate a highway need not be accepted by public authorities; it may be accepted by the public, Cassidy v. Sullivan [Neb.] 106 N. W. 1027. Acceptance by the public is shown where it enters upon the land and enjoys the privileges offered by the dedicator. Id. Dedication of a highway may be accepted by long continued user by the public. Ray v. Nally [Ky.] 89 S. W. 486. Ky. St. 1903, § 2832, providing that no ground within territory "heretofore or hereafter annexed," to the city shall become a public highway till the dedication is accepted, does not apply where the dedication was made prior to annexation of the territory. City of Louisville v. Hall [Ky.] 91 S. W. 1133. Mere use by the general public without maintenance by the municipality is an insufficient acceptance of an implied dedication. Evidence insufficient to show acceptance. Chapman v. Sault Ste. Marie [Mich.] 13 Det. Leg. N. 676, 109 N. W. 53. The mere fact of user by the public does not show dedication. Healey v. Atlanta [Ga.] 54 S. E. 749. Mere testimony that land formed part of a street before it was fenced does not show that it was used for such length of time as to become a public highway. City of Mobile v. Fowler [Ala.] 41 So. 468. Dedication by the filing of a plat showing streets is inchoate until such streets are opened. Town of Glasgow v. Mathews [Va.] 54 S. E. 991.

51. Dedication may be accepted by a city taking control of the land and permitting the public to use it as a street. City of Paducah v. Johnson [Ky.] 93 S. W. 1035. The purchase of lots with reference to a plat constitutes acceptance of dedication by the public of a park designated on the plat. Sanborn v. Amarillo [Tex. Civ. App.] 15 Tex. Ct. Rep. 438, 93 S. W. 473. Where a plat is duly made, recorded, and approved by the

on a statutory plat is within the corporate limits of a municipality is insufficient.[52] Acceptance of a statutory dedication in the manner prescribed[53] is essential in order to vest title to streets in a municipality.[54]

A sale of lots with reference to a plat,[55] or filing a map of property showing streets laid out thereon,[56] operates as a dedication of parks,[57] streets, and alleys shown.[58] Where land owned in common is platted and the cotenants each take certain lots and blocks, a dedication of streets and alleys is as effectively made as if lots had been sold to third persons.[59] The fact that the streets do not appear on the maps of the municipality,[60] or that no statutory dedication results,[61] is immaterial as between the parties. Statutes penalizing failure to record a plat before selling lots are to be strictly construed,[62] and have no retroactive operation on existing plats.[63]

Plats and maps.[64]—The rules applicable to the construction of deeds apply to the construction of plats.[65]

Evidence of dedication and questions of law and fact.[66]—Dedication is a question of intention[67] and of fact[68] to be determined from the circumstances of the

board of public works, an acceptance is shown where men employed by the city worked at improving the street. People v. Wolverine Mfg. Co. [Mich.] 12 Det. Leg. N. 491, 104 N. W. 725. As between an owner who recognizes the public right in deeds by him to a third person and the public authority claiming dedication, an acceptance may be implied from the actual appropriation and use of such land by such authority for the purpose of the dedication. Town of Harper's Ferry v. Kaplon & Bro., 58 W. Va. 482, 52 S. E. 492. Where the council of a city upon the recommendation of the board of public works, by ordinance, directs the improvement of a thoroughfare as a street, a sufficient acceptance is shown under Ky. St. 1903, § 2832. Steinacker v. Gast [Ky.] 89 S. W. 481.

52. Reichert Mill. Co. v. Freeburg, 217 Ill. 384, 75 N. E. 544.

53. A road dedicated to the public must be accepted by the county court upon its records before it can become a public road. Terry v. McClung, 104 Va. 599, 52 S. E. 355.

54. Reichert Mill Co. v. Freeburg, 217 Ill. 384, 75 N. E. 544. By accepting part of a street shown on a statutory plat a municipality does not accept the entire street, nor by accepting one entire street does it accept others. Id.

55. See 5 C. L. 962, and as to right of way in grantee from conveyance with reference to platted street, see Estoppel, 5 C. L. 1285.

56. Van Duyne v. Knox Hat Mfg. Co. [N. J. Eq.] 64 A. 149.

57. The filing of a plat upon which is designated a park and selling lots by reference thereto constitutes dedication of the land as a park. Sanborn v. Amarillo [Tex. Civ. App.] 15 Tex. Ct. Rep. 438, 93 S. W. 473.

58. Where a street is laid out over private lands but is not opened, a conveyance calling for such street as a boundary does not operate as a dedication to the public. Carroll v. Asbury, 28 Pa. Super. Ct. 354. A sale of lots according to a plan which shows them to abut on streets operates as a dedication of such streets to public use. Garvey v. Harbison-Walker Refractories Co., 213 Pa. 177, 62 A. 778; In re Southwestern State Normal School, 213 Pa. 244, 62 A. 908. Thereby evinces an intention to dedicate streets shown thereon. McGourin v. De Funiak Springs [Fla.] 41 So. 541. Platting land and selling lots with reference to the plat constitutes dedication of streets and alleys shown on the plat. City of Mobile v. Fowler [Ala.] 41 So. 468. When lots are sold with reference to a recorded plat, a dedication of the streets and alleys shown on such plat is perfected. Weiss v. Taylor [Ala.] 39 So. 519. The recording of a plat constitutes a dedication of the streets marked thereon, including their entire width as indicated. Lins v. Seefeld, 126 Wis. 610, 105 N. W. 917. A landowner who sells lots with reference to a plat is estopped to revoke the dedication of streets shown thereon. Thorpe v. Clanton [Ariz.] 85 P. 1061. Where lands were conveyed with right of re-entry if they ceased to be used for school purposes, an ineffective vote to remove the school does not warrant re-entry. Birmingham Public School Dist. v. Sharpless, 27 Pa. Super. Ct. 630.

59. Any of the dedicators might object to revocation of the dedication if objection was made in apt time. Dickinson v. Arkansas City Imp. Co. [Ark.] 92 S. W. 21.

60. Garvey v. Harbison-Walker Refractories Co., 213 Pa. 177, 62 A. 778.

61. Where an owner plats land and sells lots with reference to the plat, he and his grantees are estopped to deny the existence of such streets, though there is no sufficient statutory dedication. Lins v. Seefeld, 126 Wis. 610, 105 N. W. 917.

62, 63. Wellborn v. Muller, 84 Miss. 726, 36 So. 544.

64. See 5 C. L. 963.

65. Most strongly against the dedicator. City of Chicago v. Hogberg, 217 Ill. 180, 75 N. E. 542. Dotted lines used as a continuation of lot lines crossing a space at the rear of lots, marked "private alley," held to show an intent to pass to the purchasers of corresponding lots the space between the dotted lines, and not an intention to reserve to the dedicator the fee of the strip. Id.

66. See 5 C. L. 963.

case. Dedication for street purposes and acceptance thereof is not negatived by the fact that the streets are not presently opened.[69] A municipality claiming under a dedication has the burden of showing its acceptance thereof.[70] The evidence admissible on the question of dedication is governed by the general rules.[71]

§ 5. *Effect of dedication.*[72]—As a general rule a dedication vests no greater estate in the public than is necessary for the purposes for which the dedication is made.[73] The legislature alone has power to release land from its public servitude.[74] Where an owner plats land and sells lots with reference to the plat, the fact that he renders for taxation and pays taxes on a plot designated on the plat as a park does not interfere with the dedication.[75] Dedicated land may be abandoned[76] or vacat-

67. Terrell v. Hart [Ky.] 90 S. W. 953. Whether one has dedicated land is a question of intention. Milliken v. Denny [N. C.] 53 S. E. 867.

Evidence sufficient to show dedication of a street. City of Meridian v. Poole [Miss.] 40 So. 548. To show dedication of an alley. Milliken v. Denny [N. C.] 53 S. E. 867.

Evidence insufficient to show dedication or acceptance. Healey v. Atlanta [Ga.] 54 S. E. 749. To show an intention to dedicate land as a highway. Bosque County v. Alexander [Tex. Civ. App.] 15 Tex. Ct. Rep. 227, 93 S. W. 238. To show dedication where the land claimed was not included in any plat and there was no sale by reference to a plat, and the public had always been excluded from the land by a fence. Town of Como v. Pointer [Miss.] 40 So. 260. That a blank space is left in a plat without indication that it is dedicated does not show a dedication in the absence of other evidence, intention of the grantor to dedicate and acceptance thereof. Birge v. Centralia, 218 Ill. 503, 75 N. E. 1035.

68. Terrell v. Hart [Ky.] 90 S. W. 953. Evidence as to whether a wharf had been dedicated held to raise a question of fact. Palen v. Ocean City, 72 N. J. Law, 15, 62 A. 947. Whether or not land has been dedicated for a street by user is a question of fact to be determined from the evidence. City of Cheney v. Anderson [Kan.] 84 P. 137. Where a plat shows a street parallel with a lake but shows no meander line, or intervening space between the street and lake, a presumption of dedication of the right of public access to the lake is raised. Davies v. Epstein [Ark.] 92 S. W. 19.

69. Opening may be postponed until rendered essential by increased population and advancing improvements. City of Meridian v. Poole [Miss.] 40 So. 548.

70. Chapman v. Sault Ste Marie [Mich.] 13 Det. Leg. N. 676, 109 N. W. 53.

71. The declaration of a landowner that he has dedicated certain land is admissible as a **declaration against interest.** Davies v. Epstein [Ark.] 92 S. W. 19. Where one plats land and sells lots with reference to such plat, the **map or plat is evidence** of dedication of streets shown thereon, but is not evidence of dedication of land not clearly indicated by such plat as a street. McGourin v. De Funiak Springs [Fla.] 41 So. 541. A dedication by the owner for a public street may be established by **evidence contained in a deed** made by such owner to a private person in which the rights of the public are recognized. Town of Harper's Ferry v. Kaplon & Bro., 58 W. Va. 482, 52 S. E. 492. Evidence on the issue of dedication as to the understanding of the public 11 years after the dedication is alleged to have taken place is **inadmissible.** Milliken v. Denny [N. C.] 53 S. E. 867. On an issue of dedication of an alley where a witness testifies regarding the termini of the alley that it is from one street to another and he does not know how much farther, his testimony is properly excluded. Id. One who asserts a right to use an alley by virtue of dedication thereof by a remote grantor cannot prove such dedication by a map executed long after his deed, where it is not shown that such grantor was connected with or knew anything about the map. Id.

72. See 5 C. L. 963.

73. In New Jersey the fee of a highway remains in the dedicator subject to the rights of the public. Van Duyne v. Knox Hat Mfg. Co. [N. J. Eq.] 64 A. 149. Under Gen. Laws 1877, c. 100, § 6, a city has the fee to lands dedicated according to statutory form to the depth necessary for street purposes, but has no interest in ores thereunder. City of Leadville v. Bohn Min. Co. [Colo.] 86 P. 1038. Upon vacation or abandonment of streets upon which abut lots which have been sold by number, the street reverts to the owners of abutting lots. Dickinson v. Arkansas City Imp. Co. [Ark.] 92 S. W. 21. Where a plat is insufficient to constitute dedication of the streets shown thereon, the fee to such streets remains in the dedicator until he sells lots by reference thereto, and title then passes to his grantees. Wilder v. Aurora, De K. & R. Elec. Traction Co., 216 Ill. 493, 75 N. E. 194.

74. No such power exists in a municipality unless it has been delegated to it by the legislature. Palen v. Ocean City, 72 N. J. Law, 15, 62 A. 947. Power in a municipality to release a highway from public servitude is not power to release a wharf. Id. The Act of July 10, 1901 (P. L. 632), authorizing the condemnation of land for normal schools, does not authorize the condemnation of dedicated streets for campus purposes. In re Southwestern State Normal School, 213 Pa. 244, 62 A. 908. Abutting owners cannot be deprived of their property rights in an alley by an ordinance declaring such alley vacated. Mitchell v. St. Louis, etc., R. Co., 116 Mo. App. 81, 92 S. W. 111.

75. Sanborn v. Amarillo [Tex. Civ. App.] 15 Tex. Ct. Rep. 433, 93 S. W. 473.

76. After fifty years' occupancy of a street shown by a plat by the owner of the tract covered by the plat, a municipality is es-

ed,[77] and a dedication may be revoked if public interests will not be prejudiced,[78] but not otherwise.[79] The question of abandonment is one of fact.[80] It does not result from mere nonuser by the public.[81] Dedicated land may be leased for private purposes when not needed by the public.[82] A property owner who dedicates a strip for a street which is accepted by the city and the street improved is liable for the cost of improvement,[83] but a city which improves as a street property which has not been dedicated is liable for the cost of improvement.[84]

§ 6. *Remedies.*[85]—An owner of land abutting on land dedicated to public use may enjoin the diversion of such land from the use to which it was dedicated, if he sustains some practical damage different from that sustained by the public at large,[86] but one who dedicates land for a specified purpose may enjoin the diversion of the land to some other purpose, irrespective of the question of damage.[87]

DEEDS OF CONVEYANCE.

§ 1. Nature, Form, and Requisites (1103). Deeds Distinguished from Other Instruments (1103). Requisites (1105). Delivery (1107). Acceptance (1109). Validity of Assent (1109). Consideration (1109).
§ 2. Recordation (1110).
§ 3. Interpretation and Effect (1110). General Rules (1110). Covenants (1113). Alterations and Interlineations (1113). Designation of Parties (1113). Description of Property Conveyed (1114). Quantum of Estate Conveyed (1114). A Reservation (1118). Conditions and Restrictions (1119). Restrictions (1121). Extinguishment of Rights (1121).

§ 1. *Nature, form, and requisites. Deeds distinguished from other instruments.*[88]—An instrument, in form a deed and passing a present interest, is what it purports to be and not a testamentary disposition,[89] though enjoyment of the

topped to demand that the street be opened. Reichert Mill. Co. v. Freeburg, 217 Ill. 384, 75 N. E. 544. A dedication by filing a plat containing streets is abrogated where no need of such streets appears and the same are never opened. Town of Glasgow v. Mathews [Va.] 54 S. E. 991.

77. A deed of vacation of certain platted blocks by one who does not own all the land purported to be vacated is void. Reichert Mill. Co. v. Freeburg, 217 Ill. 384, 75 N. E. 544.

78. Revocation may be accomplished by affirmative act or abandonment. Dickinson v. Arkansas City Imp. Co. [Ark.] 92 S. W. 21. Evidence held to show revocation where streets shown by a plat were never improved, no lots sold, nor streets thrown open to the public, and for 20 years the land was enclosed and cultivated as a farm, though one of the owners testified that he expected at some future time to sell lots and have the territory added to the town. Id.

79. Where an owner opened a road to a church and cemetery, it could not be closed by a subsequent owner on the ground of removal of the church where the cemetery still remained in use. Ray v. Nally [Ky.] 89 S. W. 486.

80. Occurs where the objects of the use for which the dedication was made wholly fails. Dickinson v. Arkansas City Imp. Co. [Ark.] 92 S. W. 21. An ordinance providing for a wharfmaster for a wharf dedicated to public use and requiring him to repair damage and collect from the owners of a vessel which injured the wharf does not operate as an abandonment of the public user of the wharf. Palen v. Ocean City, 72 N. J. Law, 15, 62 A. 947.

81. Lins v. Seefeld, 126 Wis. 610, 105 N. W. 917.

82. Union R. Co. v. Chickasaw Cooperage Co. [Tenn.] 95 S. W. 171. A lease of such land is valid until emergency necessitates use thereof of the public. Id. Where a city leased dedicated land for a private purpose and thereafter granted the right to construct railroad tracks and terminal facilities on it, its occupation for railroad purposes was not a public use terminating the prior lease, hence the railroad company could not dispossess the lessee without compensation. Id.

83. Terrell v. Hart [Ky.] 90 S. W. 953.

84. Terrell v. Hart [Ky.] 90 S. W. 953. No lien can be asserted against abutting property for improvement of a street which has not been dedicated. Dulaney v. Figg [Ky.] 94 S. W. 658.

85. See 5 C. L. 964.

86. He may not however enjoin the construction of a street railway through a park on the ground that the unsightly poles and appearances offend his artistic sensibilities. Bayard v. Bancroft [Del.] 62 A. 6. Where dedication is effected by a sale of lots with reference to a plat, only persons who may be injured in a special manner by the obstruction of such streets may enforce the dedication. Thorpe v. Clanton [Ariz.] 85 P. 1061.

87. Bayard v. Bancroft [Del.] 62 A. 6.

88. See 5 C. L. 964.

89. After disposing of all his property by will, a testator executed a deed to a

estate conveyed is postponed until after the grantor's death,[90] and parol evidence is not admissible to show that it was so intended.[91] An instrument which shows that further conveyancing is contemplated by the parties is a contract to convey and not a deed.[92]

A trust may be engrafted on a deed by a contemporaneous parol agreement,[93] but the evidence must be clear and satisfactory.[94]

A deed absolute on its face may be shown to be in fact a mortgage[95] if it was so intended at the time of its inception[96] as evinced by the circumstances of the case[97] and there is a subsisting debt after its execution.[98] The fact that it is a mortgage may be established by parol evidence,[99] but he who asserts it has the

sister of a tract of land, reserving a life estate, and providing that the consideration should be deducted from the grantee's share of his estate. Held that the deed passed a present interest and was not a testamentary disposition. Seaton v. Lee [Ill.] 77 N. E. 446. A voluntary deed delivered by the grantor to a depositary to be delivered to the grantee after the grantor's death passes an immediate interest subject to the life use of the grantor (Grilley v. Atkins [Conn.] 62 A. 337), and cannot be revoked by him (Id.). That a deed, not to become effective until the grantor's death, was placed on record by the depositary after the death of one of the grantors does not make it effective to pass a present interest. Leonard v. Leonard [Mich.] 13 Det. Leg. N. 612, 108 N. W. 985.

90. Under Rev. St. 1895, art. 632, authorizing creation of estates in futuro by deed, an instrument in form a deed, conveying to the grantor, his heirs and assigns, as trustee, with power to manage, control, and dispose, but providing that the premises shall not be sold during the life of the grantor, is a deed and not a testamentary disposition. Freeman v. Jones [Tex. Civ. App.] 16 Tex. Ct. Rep. 158, 94 S. W. 1072.

91. Dodson v. Dodson [Mich.] 12 Det. Leg. N. 831, 105 N. W. 1110.

92. A contract to make title under penalty to certain land when it should be surveyed and divided is a bond for title and not a deed. Abercromble v. Shapira [Tex. Civ. App.] 15 Tex. Ct. Rep. 864, 94 S. W. 392.

93. Insurance Co. v. Waller [Tenn.] 95 S. W. 811. It may be shown by parol that a deed was made to enable the grantee to sell the land and use the proceeds in paying the debts of the grantor. Diffie v. Thompson [Tex. Civ. App.] 90 S. W. 193.

94. Evidence sufficient to show that a deed from father to son was not a conveyance in trust for the father. Seed v. Jennings [Or.] 83 P. 872.

95. See 5 C. L. 965. See, also, Mortgages, 6 C. L. 681. Deed in form may be shown to be mortgage. In re Schmidt, 114 La. 78, 38 So. 26. May be shown in an action at law where reformation is not necessary. Barchent v. Snyder [Wis.] 107 N. W. 329. A deed intended as a mortgage to secure past and future advances passes no title. DeLeonis v. Hammel [Cal. App.] 82 P. 349. A convevance absolute in form is not given as security because of a mere option to the grantor to redeem at any time on payment of his debt to grantee. Caraway v. Sly [Ill.] 78 N. E. 588. Act June 8, 1881 (P. L. 84), provides that a deed cannot be declared a mortgage in the absence of a defeasance made, acknowledged, and recorded, and in the absence of such defeasance a grantee cannot be declared a trustee ex maleficio unless fraud is alleged. O'Donnell v. Vandersaal, 213 Pa. 551, 63 A. 60. Under the recording laws of North Dakota, an absolute deed may be declared a mortgage as against general creditors though a defeasance was not recorded. Vallely v. First Nat. Bank [N. D.] 106 N. W. 127.

Held mortgages: An instrument in form a warranty deed but containing a provision that should the grantee pay a certain sum of money on a certain date, the instrument shall be void, otherwise of full force and effect. Scott v. Hughes, 124 Ga. 1000, 53 S. E. 453. A conveyance of property to be held by the grantee until it could be sold, a debt to be paid out of the proceeds, and the balance turned over to the grantor. Robinson v. Gassoway [Ala.] 39 So. 1023. Where a mortgage is executed to secure a debt and as part of the same transaction a deed is executed and placed in escrow to be delivered on default in payment of the debt to save costs of foreclosure. Plummer v. Ilse, 41 Wash. 5, 82 P. 1009.

96. The intention of the parties at the time the instrument was executed is controlling. Fridley v. Somerville [W. Va.] 54 S. E. 502.

97. Deed absolute accompanied by a contract for resale separately executed. Keeline v. Clark [Iowa] 106 N. W. 257. In a suit to have an absolute deed declared to be in trust, statements made by the grantor both prior and subsequent to the execution of the deed respecting why and for what purpose it was made, when not res gestae nor introduced to show mental incapacity or duress, are inadmissible. Kennedy v. Bates [C. C. A.] 142 F. 51. It is for the court to determine from all the evidence whether the instrument was intended as a mortgage or an absolute conveyance. Fridley v. Somerville [W. Va.] 54 S. E. 502.

98. Instrument reciting that it was given to secure a debt, held a mortgage. In re Moore, 146 F. 187. Evidence sufficient to show that a deed was what it purported to be. Jones v. Jones [S. D.] 108 N. W. 23. If no debt existed after its execution it is a deed. Fridley v. Somerville [W. Va.] 54 S. E. 502.

99. Reynolds v. Blanks [Ark.] 94 S. W. 694; Alexander v. Cleland [N. M.] 86 P. 425.

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burden of proving such fact[1] by clear and convincing evidence.[2] The presence of what are termed "indicia of a mortgage" is not conclusive.[3]

Requisites.[4]—A deed must be executed by one who has some estate in the premises conveyed[5] and who is competent to execute a deed[6] with intent to pass title.[7] It must be in writing[8] but authority to fill a blank may be by parol.[9] It must contain a definite and certain description[10] or one capable of being made certain.[11] If the boundaries are ascertainable from the description given[12] or if the land can be ascertained and identified,[13] or if the description is such that a surveyor, by applying the rules of surveying, can locate the land,[14] it is sufficient. It must specify a

1. Fridley v. Somerville [W. Va.] 54 S. E. 502.

2. Jones v. Jones [S. D.] 108 N. W. 23. Evidence sufficient. Reynolds v. Blanks [Ark.] 94 S. W. 694; Patnode v. Deschenes [N. D.] 106 N. W. 573. Evidence insufficient. Betts v. Betts [Iowa] 106 N. W. 928; Wilson v. Terry [N. J. Eq.] 62 A. 310. Where a mortgagor on maturity of the debt executed a deed and at the same time an instrument reciting that if the debt was paid the land should be reconveyed, but the land was not worth more than the debt and the grantee assumed ownership and for several years improved it and paid the taxes and the mortgagor claimed no interest, evidence held to show that the deed was what it purported to be. Hesser v. Brown, 40 Wash. 688, 82 P. 934.

3. Fridley v. Somerville [W. Va.] 54 S. E. 502.

4. See 5 C. L. 966.

5. Where a statutory assignment to a widow out of her husband's estate was void, a deed by the widow passed nothing but her unassigned dower right. Calhoun v. Moore [Ark.] 94 S. W. 931. Evidence sufficient to support a finding that the identity of a grantor in a deed was not established. Morrison v. Turnbaugh, 192 Mo. 427, 91 S. W. 152. A deed from one not shown to have any interest in the land is inadmissible as evidence of title. McBride v. Steinweden [Kan.] 83 P. 822.

6. Infant disaffirmed within a reasonable time after attaining majority. Robinson v. Allison, 192 Mo. 366, 91 S. W. 115.

7. Where a trustee in bankruptcy executed a deed to the bankrupt and also one to the bankrupt's attorney, which latter deed was never recorded and no claim asserted under it for 10 years, it was held under the circumstances that the deed to the attorney was not intended to and did not transfer title. Beall v. Chatham [Tex. Civ. App.] 16 Tex. Ct. Rep. 325, 94 S. W. 1086. Where a wife conveyed certain property to her husband, the fact that her husband's partner charged taxes paid on the property to her, after the deed was executed, does not show that the deed was not intended to pass title. Tyler v. Currier, 147 Cal. 31, 81 P. 319. Nor does the fact that a policy of insurance subsequently taken out on the premises was by oversight taken out in her name. Id.

8. See Frauds, Statute of, 5 C. L. 1550.

9. Burk v. Johnson [C. C. A.] 146 F. 209.

10. See post, § 3. Description of premises conveyed. Deed on sale on execution. Veatch v. Gray [Tex. Civ. App.] 14 Tex. Ct. Rep. 316, 91 S. W. 324. An instrument purporting to convey land in which the description is so vague and uncertain as to be meaningless, and there is nothing in the deed by which the premises can be identified, is void. McBride v. Steinweden [Kan.] 83 P. 822. A deed failing to describe any land is not made valid by a statute which provides that parol evidence is admissible to identify land in real actions. Act 1891, p. 524, c. 465. Moore v. Fowle, 139 N. C. 51, 51 S. E. 796.

11. A deed to a railroad company of land for a right of way must contain a description sufficient to identify the land, or if not in itself so certain, it must be such as with the aid of extrinsic evidence, not contradictory to the deed, the land may be located and identified. Hoard v. Huntington, etc., R. Co. [W. Va.] 53 S. E. 278. A description which calls for other deeds which contain a sufficient description is not invalid for want of a description. Moore v. Fowle, 139 N. C. 51, 51 S. E. 796.

12. Atlanta & W. P. R. Co. v. Atlanta, B. & A. R. Co. [Ga.] 54 S. E. 736.

13. The description must be so vague, indefinite, and uncertain as to render it nugatory and void on its face. Walker v. Lee [Fla.] 40 So. 881. If considered in connection with plats to which it refers, it identifies land. Chesapeake Beach R. Co. v. Washington, etc., R. Co., 199 U. S. 247, 50 Law. Ed. —.

14. Walker v. Lee [Fla.] 40 So. 881.

Description held sufficient: A description of a tract triangular in form, where two sides are given and the angle shown, and providing that if the tract contained more than 10 acres the excess should be taken off the north side. Hayes v. Martin [Ala.] 40 So. 204. A description "all that certain tract or parcel of land situate in McDowell county, West Virginia; on Rings Branch, Peggy's Fork and Laurel Creek, all tributaries of the Dry Fork of Tug River, supposed by estimation to contain one hundred acres, be the same more or less." Webb v. Ritter [W. Va.] 54 S. E. 484. A deed reciting that it is made between certain persons residing in a given city, county, and state, and purporting to convey certain land in an addition to such city, is not void for failure of the description to state in what state and county the premises were located. Wilder v. Aurora, DeKalb & R. Elec. Traction Co., 216 Ill. 493,

grantee[15] competent to take,[16] be duly signed[17] by one with authority to convey;[18] but if otherwise complete it is not fatally defective because of omission of the grantor's name from the operative part of it,[19] nor is it rendered invalid by a mere clerical omission.[20] Statutory requisites must be present.[21] Ordinarily a seal is not required,[22] and, as between the parties, acknowledgment is not necessary.[23] Even when seal is required, conveyance without seal is good in equity and accordingly is validated by a curative act.[24] Attestation as prescribed by law is essential.[25]

75 N. E. 194. Where a deed definitely describes the land sold and further describes it as the unsold portion of a survey, it is not necessary to show what portion of the survey had been sold in order to determine what land was conveyed by the deed. Kane v. Sholars [Tex. Civ. App.] 14 Tex. Ct. Rep. 480, 90 S. W. 937. 147 acres more or less, on a river around the improvements where the grantee lived, the boundaries to be further designated as described by the survey made by L. Veatch v. Gray [Tex. Civ. App.] 14 Tex. Ct. Rep. 316, 91 S. W. 324. A description 60 acres on Mill Pond Road, being the same as was set over to the grantor in the division of his father's estate, and the partition proceedings disclosed that a certain lot was awarded to the grantor and contained a plat showing the metes and bounds of such lot. Hinton v. Moore, 139 N. C. 44, 51 S. E. 787. A deed of one's "location or right of location on Bear Creek" does not disclose a patent ambiguity where the grantor had but one location in that section of the country. Arthur v. Ridge [Tex. Civ. App.] 13 Tex. Ct. Rep. 449, 89 S. W. 15. Such a description is sufficiently definite. Id.

Insufficient: A deed conveying a certain number of acres out of a larger tract without giving data from which it can be determined what particular portion was intended to be conveyed. Smith v. Proctor, 139 N. C. 314, 51 S. E. 889.

15. Where several were conducting business under a partnership name and one of them bought land for the partnership, the fact that the deed ran to such person and to the firm name which was incorrectly designated did not render it void. Stith v. Moore [Tex. Civ. App.] 15 Tex. Ct. Rep. 462, 95 S. W. 587. Proof of the identity of the name of a certain person with that of the grantee establishes a prima facie case. Dorsey v. Olive Sternenberg & Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 860, 94 S. W. 413. Evidence sufficient to establish the identity of a patentee. Id. Evidence sufficient to show that one who resided at a certain place and claimed land in controversy was the grantee in a deed running to such person or such place. Gage v. Cantwell, 191 Mo. 698, 91 S. W. 119. Vendee may fill in name of grantee when intentionally left blank for that purpose. Burk v. Johnson [C. C. A.] 146 F. 209.

16. A deed to an unorganized corporation conveys title to the incorporators as partners, and does not fail for want of a grantee. Smith v. First Nat. Bank [Tex. Civ. App.] 16 Tex. Ct. Rep. 729, 95 S. W. 1111. Where a deed was executed to a corporation after a meeting preliminary to organization. Id.

17. One who executes a deed individually and as survivor of a community need not sign in his capacity as survivor as well as in his individual capacity. Kane v. Sholars [Tex. Civ. App.] 14 Tex. Ct. Rep. 480, 90 S. W. 937. A wife with the authority and assent of her husband can make a valid deed of community property, though the husband does not join. Roos v. Basham [Tex. Civ. App.] 14 Tex. Ct. Rep. 851, 91 S. W. 656.

18. A deed executed under a power of attorney describing the land in the same manner as it is described in the power renders sufficiently definite the identity of the land conveyed with that authorized to be conveyed, though the description in the deed is not in exactly the same terms as that in the power. Kane v. Sholars [Tex. Civ. App.] 14 Tex. Ct. Rep. 480, 90 S. W. 937. Where a power of attorney authorized the execution of a quitclaim deed, a deed of special warranty executed by virtue of such power is not void. Id. Executors held to have power to sell the real estate of their testator where partition in kind could not be had though the provision of the will authorizing sale had been revoked. O'Donaghue v. Smith [N. Y.] 77 N. E. 621. Power to convey reserved by the grantor held to give him power to convey the premises if deemed beneficial to him or his estate. Lewis v. Lewis [Cal. App.] 86 P. 994. An owner cannot be divested of his title by a forged deed. Where a deed of land of which an intestate died seised was forged and the grantee in such deed conveyed the premises, an heir of the intestate could follow the land. Darragh v. Rowe. 109 App. Div. 560, 96 N. Y. S. 666. One of the grantees in a deed "to him and the survivor of them, their heirs and assigns, forever," cannot convey an interest so as to shut off the right of survivorship of the other. Finch v. Haynes [Mich.] 13 Det. Leg. N. 255, 107 N. W. 910.

19. Insurance Co. v. Waller [Tenn.] 95 S. W. 811.

20. Deed conveying "all their ——— in said lands," word "interest" omitted. Burt & B. Lumber Co. v. Wilson [Ky.] 93 S. W. 906.

21. Rev. St. 1901 par. 725, requires a deed to be signed by the grantor, acknowledged and certified for registration. Lewis v. Herrera [Ariz.] 85 P. 245.

22. Not essential under Civ. Code 1895, § 3599. Atlanta, etc., R. Co. v. McKinney, 124 Ga. 929, 53 S. E. 701. Where pursuant to an antenuptial promise a husband in consideration of marriage gave his wife a certain house, she was held entitled after his death to recover it by suit in equity. Cowdrey v. Cowdrey [N. J. Eq.] 64 A. 98.

23. Deed of a homestead. Martin v. Martin [Neb.] 107 N. W. 580. If there be an actual consideration, the omission of a seal so far as it is necessary to import consideration is immaterial. Barnes v. Multnomah County, 145 F. 695.

24. B. & C. Comp. Or. § 5377, held to cure

A deed in trust must designate the trust.[26] If a duty is imposed on the grantee to see that the grantor fulfills conditions subsequent of his power of sale, such duty must be discharged.[27] The presumption of grant arising from long continued adverse possession, does not give a cause of action against the presumptive grantor on the covenants of warranty.[28]

A deed duly executed is presumed to have been executed by the proper parties[29] and to be genuine,[30] but execution[31] and genuineness[32] are questions of fact.

Delivery[33] to the grantee, or to some person for him,[34] with intent to pass title,[35]

defect. Barnes v. Multnomah County, 145 F. 695.

25. One witness sufficient under Code 1896, § 982, where the grantor signs his own name. McCreary v. Jackson Lumber Co. [Ala.] 41 So. 822. As between the parties it is not essential that it be witnessed. Bently v. Jun [Neb.] 107 N. W. 865.

26. A deed reciting that the land conveyed was to be sold by the grantee to a certain corporation in consideration of such amount of the capital stock of such corporation as the grantee might deem proper sufficiently designates the trust. Stith v. Moore [Tex. Civ. App.] 15 Tex. Ct. Rep. 462, 95 S. W. 587.

27. Where a grantor holds under an instrument which provides that if the premises are sold the proceeds must be reinvested in land to be held by such grantor and requiring the purchaser to see to such reinvestment before title should pass, a deed by such person and her husband passes no title where the consideration was paid to the husband and not reinvested. Bell v. Bair [Ky.] 89 S. W. 732.

28. Long possession may raise a presumption of grant but it does not entitle the person in possession to sue the presumptive grantor for breach of covenant of warranty or quiet enjoyment. Deason v. Findley [Ala.] 40 So. 220.

29. A purchaser for value has a right to act on the faith that a deed has been signed, sealed, acknowledged, and delivered as it purports to be and it is presumed to have been so executed by proper parties. Dempwolf v. Greybill, 213 Pa. 163, 62 A. 645.

30. Properly acknowledged instruments are presumptively genuine. Metropolitan Lumber Co. v. McColeman [Mich.] 12 Det. Leg. N. 172, 103 N. W. 809.

31. Beardsley v. Hill [Ark.] 91 S. W. 757. Secondary evidence of execution is not admissible until foundation is laid therefor. Id. Evidence held sufficient to show execution. Interstate Inv. Co. v. Bailey [Ky.] 93 S. W. 578; Patnode v. Deschenes [N. D.] 106 N. W. 573. Evidence insufficient to show execution. Veatch v. Gray [Tex. Civ. App.] 14 Tex. Ct. Rep. 316, 91 S. W. 324.

32. Evidence sufficient to show that a deed was a forgery. Loring v. Jackson [Tex. Civ. App.] 95 S. W. 19. Where one asserts title under a deed claimed to be a forgery, evidence of his reputation in the county in which he lived about the date such deed was executed as a forger of land titles is admissible. Id. Evidence held to show that a deed from wife to husband was not a forgery but was in fact executed by the wife. Miller v. Davis [Mich.] 12 Det. Leg. N. 649, 105 N. W. 141.

33. See 5 C. L. 968. Delivery is essential. Russell v. May [Ark.] 90 S. W. 617. Evidence held insufficient to show that deeds running between members of the same household were deeds in form only and insufficient to pass title. Reynolds v. Condon, 110 App. Div. 542, 97 N. Y. S. 1. Where a deed was fatally defective for want of a sufficient description and was returned for correction and never redelivered, no title passed. Williams v. Husky, 192 Mo. 533, 90 S. W. 425. Where grantee had never seen deed and did not know when he reconveyed the property according to a previous agreement that it contained a mortgage assumption clause, he did not thereby ratify such clause. Merriman v. Schmitt, 211 Ill. 263, 71 N. E. 986. Where none of the parties in interest had acted on such clause, grantee held not estopped to claim that he was not bound because deed was never delivered to or accepted by him. Id.

Evidence sufficient to show delivery. Foreman v. Archer [Iowa] 106 N. W. 372. Evidence insufficient to support a finding that a deed had never been delivered. Calkins v. Calkins, 220 Ill. 111, 77 N. E. 102. Where a deed was placed in the grantee's bank box though construed as a conditional delivery, it was held to constitute a sufficient delivery to vest the grantee with title on the grantor's death. Hutton v. Cramer [Ariz.] 85 P. 483. Where a father made a deed to his daughter, reserving a life use, had it recorded, had the property insured in her name, and the daughter testified that the deed was handed to her, and she expressed her appreciation and returned it to him for safekeeping. Gilman v. Gilman [Mich.] 12 Det. Leg. N. 969, 106 N. W. 859. A deed deposited by the grantor in the hands of a third person to be delivered to the grantee or recorded only upon the grantor's death is delivered. Foreman v. Archer [Iowa] 106 N. W. 372. Where a deed containing an erroneous description was delivered and the grantee returned it for correction, whereupon a new deed containing a correction was made and delivered to the register of deeds, who recorded it and returned it to the grantor, evidence held to show delivery. Whiting v. Hoglund [Wis.] 106 N. W. 391.

Evidence insufficient to show delivery. Weisiger v. Mills [Ky.] 91 S. W. 689; Davis v. Hall, 128 Iowa, 647, 105 N. W. 122. Delivery is not shown where after the contract of sale the vendee contracted for an extension of time for giving notes and security for the purchase price and the contract recited that the deed was in escrow awaiting compliance with the terms of such contract. Allison v. Williams [Tex. Civ. App.] 14 Tex. Ct. Rep. 535, 91 S. W. 249. Where one deed refers to certain property as having been previously conveyed, the delivery of the deed

and in such manner as to terminate the grantor's control over the instrument,[36] is essential. The question of delivery is one of intent,[37] no particular form or ceremony being necessary,[38] but what is said and done must manifest an intention that the deed is to become presently operative.[39] Manual delivery is not essential[40] but is strong evidence of intention to pass title.[41] A presumption of delivery arises from possession of the instrument by the grantee,[42] and one of nondelivery from finding

of such property is not shown. Noble v. Tiptin, 219 Ill. 182, 76 N. E. 151. Evidence held to show no delivery but that the grantor intended the deed to take effect upon his death. Konser v. Konser, 219 Ill. 466, 76 N. E. 846. Evidence to show that certain deeds to an heir's share of his ancestor's estate were not delivered until after the ancestor's death. Rendlen v. Edwards, 116 Mo. App. 390, 92 S. W. 731. Where the subscribing witness testifies that he would not have signed the deed as "signed, sealed, and delivered" unless he knew such to be the fact and the deed has been properly executed the question of delivery was held one **for the jury.** Brucke v. Hubbard [S. C.] 54 S. E. 249. Question of delivery of deed from one member of family to another held for the jury where a deed was deposited in a safe used as a depository of papers by the family. Chase v. Clearfield Lumber Co., 213 Pa. 46, 62 A. 172.

34. Shetler v. Stewart [Iowa] 107 N. W. 310. A delivery to a third person for the grantee with directions to deliver it to the grantee is sufficient. Martin v. Martin [Neb.] 107 N. W. 580. A grantor cannot deliver to himself as agent of the grantee. Rendlen v. Edwards, 116 Mo. App. 390, 92 S. W. 731.

35. Where a deed was signed and acknowledged by the grantor and by him given to the scrivener to fill in the description and return it, but the grantor died before it was returned and the scrivener had it recorded and sent to the grantee's son, there was no delivery. Daneri v. Gazzola [Cal. App.] 83 P. 455. The fact that the deed ran to the wife of the grantor and that her son was her agent and that it was generally understood that the property had been conveyed to the wife is immaterial. Id. Where a deed was never voluntarily delivered but the grantee took it without the grantor's consent, and left as a consideration a note and certain stock which the grantor had never agreed to accept as consideration. Pierson v. Fisher [Or.] 85 P. 621.

A manual delivery by a mother to son of a deed which was never recorded and which was not intended to pass title, and which was returned to her to secure her support, does not constitute delivery. Rausch v. Michel, 192 Mo. 293, 91 S. W. 99.

36. Sufficient delivery: Deed delivered to depositary to be by him delivered to the grantee at the grantor's death. Grilley v. Atkins [Conn.] 62 A. 337. Delivery to a third person, not for safe keeping but to be delivered to the grantee after the grantor's death on payment of a certain sum of money to a third person, and the grantee died before the grantor. McCurry v. McCurry [Tex. Civ. App.] 16 Tex. Ct. Rep. 182, 95 S. W. 35. Deeds with a testamentary purpose, and delivered to grantor's wife to keep until he is done with them and then "deliver them to the girls." Wissel v. Pierson, 7 Ohio C. C. (N. S.) 428.

Not sufficient: Delivery by depositary of an escrow without performance of the condition. Anderson v. Goodwin [Ga.] 54 S. E. 679. Handing to custodian to be delivered after grantor's death unless recalled. Noble v. Tipton, 219 Ill. 182, 76 N. E. 151; Cole v. Cole [Mich.] 13 Det. Leg. N. 316, 108 N. W. 101; Keyes v. Meyers, 147 Cal. 702, 82 P. 304. Deed given to scrivener to hold for the grantor and by him given to the grantee to be returned to the grantor. Koger v. Koger [Ky.] 92 S. W. 961. Where a deed was deposited in escrow to be delivered only in case of the grantor's death, and at a time of the sickness of both grantor and grantee the grantee requested a deed of the property and the depositary brought it, but the grantor directed him to keep it until he and his wife recovered when they would attend to the matter. Conner v. Rivard [Mich.] 13 Det. Leg. N. 171, 107 N. W. 897.

37. Foreman v. Archer [Iowa] 106 N. W. 372. Where two conveyances to different persons are on one piece of paper, a delivery to one of the grantees is sufficient as to the other, if it was delivered with intention to pass the title. Interstate Inv. Co. v. Bailey [Ky.] 93 S. W. 578. Contemporaneous declarations of grantor admissible. Napier v. Elliott [Ala.] 40 So. 752. The fact that a deed delivered by a husband to a wife is subsequently returned to him for keeping does not affect the delivery. Cowdrey v. Cowdrey [N. J. Eq.] 64 A. 98.

38. Creighton v. Roe, 218 Ill. 619, 75 N. E. 1073. Any disposal of the deed, accompanied by acts, words, or circumstances clearly indicating that the grantor intends it to take effect, constitutes delivery. Russell v. May [Ark.] 90 S. W. 617.

Delivery is accomplished by the grantor voluntarily passing the deed to the grantee or to some person for him (Pierson v. Fisher [Or.] 85 P. 621), or by the grantor doing or saying something which evinces an intention to part with all control over the instrument (Id.).

39. Creighton v. Roe, 218 Ill. 619, 75 N. E. 1073. Where a deed is handed to the grantee to be by him given to a depositary until the performance of a condition, there is no delivery. Hobson v. Anderson [Colo.] 83 P. 634.

40, 41. Moss v. Smith [S. C.] 53 S. E. 284.

42. Webb v. Ritter [W. Va.] 54 S. E. 481; Larsh v. Boyle [Colo.] 86 P. 1000; Wilbur v. Grover [Mich.] 12 Det. Leg. N. 99, 103 N. W. 583; McCarthy v. Colton [Iowa] 108 N. W. 217. One alleging otherwise has the burden to prove it. Pierson v. Fisher [Or.] 85 P. 621. Retained by grantee two years until his death. Hild v. Hild [Iowa] 106 N. W. 159. Evidence sufficient to show delivery where a deed was placed in the grantee's box in the bank, where the grantee had access to it, the

the instrument among the grantor's effects after his death,[43] except where he has reserved an interest in the property,[44] but such presumptions are not conclusive.[45] A presumption of delivery arises from the fact of recordation,[46] but such presumption is not conclusive[47] and may be rebutted by clear evidence.[48] In case of voluntary settlements a stronger presumption in favor of delivery is indulged than in the ordinary case of bargain and sale.[49] A deed is presumed to have been delivered on the day it bears date,[50] but this presumption may be rebutted.[51]

Acceptance[52] is essential,[53] but, when a deed is beneficial to the grantee and imposes no burdens upon him, acceptance is presumed.[54] A grantee may be estopped to assert acceptance.[55] After acceptance the grantee is bound by the covenants contained in the deed.[56]

Validity of assent.[57]—A deed may be invalid because of fraud or undue influence[58] or of mutual mistake or accident[59] or incapacity of the parties[60] which prevents any real assent.

Consideration.[61]—Like other contracts a deed should be based on a consideration,[62] and, while recitals as to the consideration are not conclusive,[63] they cannot

deed to be recorded after the grantor's death. Hutton v. Cramer [Ariz.] 85 P. 483.

43. Shetler v. Stewart [Iowa] 107 N. W. 310; Ligon v. Barton [Miss.] 40 So. 555.

44. Cribbs v. Walker [Ark.] 85 S. W. 244.

45. Evidence insufficient to show that a deed in possession of the grantee was delivered by the grantor with intent to pass title. Pierson v. Fisher [Or.] 85 P. 621.

46. Collings v. Collings [Ky.] 92 S. W. 577; Konser v. Konser, 219 Ill. 466, 76 N. E. 846; Calkins v. Calkins, 220 Ill. 111, 77 N. E. 102; Russell v. May [Ark.] 90 S. W. 617. Delivery for record sufficient. Whiting v. Hoglund [Wis.] 106 N. W. 391; Collings v. Collings [Ky.] 92 S. W. 577.

47. Napier v. Elliott [Ala.] 40 So. 752. Grantor not estopped to deny delivery by knowledge of record, and failure to take steps to have it annulled. Gulf Coal & Coke Co. v. Alabama Coal & Coke Co. [Ala.] 40 So. 397.

48. Davis v. Hall, 128 Iowa, 647, 105 N. W. 122. Not overcome by the fact that the grantor had the deeds returned to him after they were recorded. Russell v. May [Ark.] 90 S. W. 617. Evidence insufficient to show that a deed was recorded by a depositary at the request of the grantor. Leonard v. Leonard [Mich.] 13 Det. Leg. N. 612, 108 N. W. 985.

49. Where such a deed is recorded, the presumption of delivery is not overcome by the fact that the grantor retained possession of the property and deed. Creighton v. Roe, 218 Ill. 619, 75 N. E. 1073.

50. McBrayer v. Walker, 122 Ga. 245, 50 S. E. 95. Notwithstanding subsequent acknowledgment. Ewers v. Smith, 98 App. Div. 289, 90 N. Y. S. 575.

51. By Civ. Code § 1055, the presumption that a deed duly executed was delivered at its date not being conclusive, it may under Code Civ. Proc. § 1961, be rebutted by either direct or indirect evidence to the contrary. Daneri v. Gazzola [Cal. App.] 83 P. 455.

52. See 5 C. L. 971.

53. Russell v. May [Ark.] 90 S. W. 617. If the grantee refuse to accept it when tendered, it passes no title. Reel v. Reel [W. Va.] 52 S. E. 1023.

54. Russell v. May [Ark.] 90 S. W. 617; Whitlng v. Hoglund [Wis.] 106 N. W. 391; Collings v. Collings [Ky.] 92 S. W. 577.

55. Where a grantee returned to his grantor stating that the deed was not as he thought it, and that he had not accepted it, and that he had destroyed it and induced the grantor to deed the land to another, the prior grantee is estopped to assert as against the latter that his deed was accepted. Ames v. Ames [Ark.] 96 S. W. 144.

56. Evidence insufficient to show acceptance of a deed by a city so as to render covenants therein binding upon it. Whitcomb v. Boston [Mass.] 78 N. E. 407. Though a grantee does not sign the deed yet if he enter upon the land and accept the deed in other matters, he is bound by the covenants. Atlanta, etc., R. Co. v. McKinney, 124 Ga. 929, 53 S. E. 701.

57. See 5 C. L. 972.

58. See Fraud and Undue Influence, 5 C. L. 1541.

59. See Mistake and Accident, 6 C. L. 678.

60. See Incompetency, 5 C. L. 1775. Mental capacity sufficient to execute a deed is a degree sufficient to understand what property he is disposing of, the person to whom he is selling it and the purpose for which he is disposing of it. Bond v. Branning Mfg. Co., 140 N. C. 381, 52 S. E. 929.

61. See 5 C. L. 971.

62. Consideration held sufficient: Payment of taxes, keeping up repairs and promise to support the grantor for life is sufficient where the expense of the support may equal the value of the land if the grantor lives out her expectancy. Freeman v. Jones [Tex. Civ. App.] 16 Tex. Ct. Rep. 158, 94 S. W. 1072. Support and maintenance is sufficient consideration. Kleckner v. Kleckner, 212 Pa. 515, 61 A. 1019; Barnes v. Multnomah County, 145 F. 695. One dollar is a sufficient consideration to support a conveyance directly from husband to wife. Cowdrey v. Cowdrey [N. J. Eq.] 64 A. 98. Marriage is a good consideration. Jackson v. Jackson [Ill.] 78 N. E. 19. Where a deed is made in consideration of future support and the payment of debts of the grantor, and the grantee renders support for a considerable period and pays debts. Norris v. Lilly, 147 Cal. 754, 82 P. 425. Delivery

be contradicted for the purpose of invalidating the instrument.[64] A partial failure of consideration does not warrant rescission where the parties cannot be put in statu quo,[65] and failure to pay the consideration expressed is not ground for setting aside a deed in the absence of fraud.[66]

§ 2. *Recordation*[67] is not essential to the validity of a deed.[68] The rules of law relative to the registration of instruments[69] and the doctrine of bona fide purchaser[70] are elsewhere treated.

§ 3. *Interpretation and effect. General rules.*[71]—A deed supersedes and extinguishes the contract of which it is the consummation,[72] its function being to evidence the obligations, if any, assumed by the grantor with respect to the estate or title conveyed.[73] A deed voidable in part is wholly voidable if it results from one transaction and is based on a single consideration.[74] A deed is to be construed as a whole,[75] in view of the laws in force at the date of its execution,[76] for the purpose

of stock pursuant to a contract to give it for land which took the place of an unexecuted contract to give it for a lease of the land. Clint v. Eureka Crude Oil Co. [Cal. App.] 86 P. 817.

Insufficient: A promise by a debtor of the grantor to pay the debt is no consideration. Hobson v. Anderson [Colo.] 83 P. 634.

63. The mere fact that a deed recites a certain consideration does not of itself give rise to any implied obligation to pay the grantor the difference between the amount agreed to be paid and the amount named as consideration. McGiverin v. Keefe [Iowa] 106 N. W. 369. Evidence insufficient to show any obligation to pay such difference. Id. Where a deed makes no mention of a mortgage on the land but acknowledges full payment of the purchase price, a finding that the mortgage was part of the consideration is conclusive on appeal. In re McPherran's Estate, 212 Pa. 425, 61 A. 954. Acknowledgment in a deed of payment of the purchase money is only prima facie evidence of such fact. Id. Evidence sufficient to show that the consideration recited in the deed as paid was not in fact paid. Allison's Ex'r v. Orndorff [Ky.] 92 S. W. 287.

64. An acknowledgment in a deed of payment of consideration cannot be contradicted by parol for the purpose of invalidating the deed or impairing its legal effect. Stannard v. Aurora, etc., R. Co., 220 Ill. 469, 77 N. E. 254. Recitals of consideration in a deed from husband to wife of one dollar and other valuable considerations cannot be relied upon to show want of consideration. Wadleigh v. Wadleigh, 97 N. Y. S. 1063. When the consideration stated in a deed for land made by a father to a daughter is one dollar, the daughter takes the land as purchaser, and parol evidence is not admissible to show that the consideration was not paid, and that in fact the consideration was natural love and affection. Cowden v. Cowden, 7 Ohio C. C. (N. S.) 277.

65. Where marriage and the promise to be a kind and dutiful wife was the consideration, and the wife failed to be kind and dutiful. Jackson v. Jackson [Ill.] 78 N. E. 19.

66. Calkins v. Calkins, 220 Ill. 111, 77 N. E. 102. That a promissory consideration is not paid is not ground for setting the deed aside. Parsons v. Crocker, 128 Iowa, 641, 105 N. W. 162. That a grantee who as part of the consideration agrees to support the grantors for life dies before they do is not ground for setting aside the deed. Calkins v. Calkins, 220 Ill. 111, 77 N. E. 102. That a grantee who agrees to pay a mortgage as part of the consideration dies before it is paid is not ground for setting aside the deed. Id.

67. See 5 C. L. 973.

68. That a deed from wife to husband was not recorded because of the fact that the husband believed that if he died first the deed could be destroyed and title revested in the wife did not affect the validity of the conveyance. Tyler v. Currier, 147 Cal. 31, 81 P. 319. Evidence of such fact is inadmissible on the question of whether delivery was made with intent to pass title. Id.

69, 70. See Notice and Record of Title, 6 C. L. 814.

71. See 5 C. L. 973.

72. Hampe v. Higgins [Kan.] 85 P. 1019.

73. Alsterberg v. Bennett [N. D.] 106 N. W. 49. Deed without covenants conclusively presumed to show that the grantor assumed no obligations. Id. Oral covenant to pay tax contemporaneous with quitclaim unenforceable. Id.

74. Deed of several tracts. Reeder v. Meredith [Ark.] 93 S. W. 558.

75. To determine whether it conveys a fee simple to the grantee and his heirs or a life estate to the grantee, remainder to his children, the deed being intended as a gift, not only the language of every part but the relationship of the parties and especially the purpose of the donor should be considered. Vawter v. Newman [Kan.] 86 P. 135. Deed reciting a valuable consideration and that the grantor bargained and sold his right, title, and interest in the premises described and warranted the title, held not a mere quitclaim, but a deed of the land. Wynne v. Ward [Tex. Civ. App.] 14 Tex. Ct. Rep. 462, 91 S. W. 237. A deed reciting a consideration paid and that the grantor has sold and conveyed, and by the deed sells and conveys to the grantee, and binds himself to "quitclaim, assign, sell and transfer," operates as a conveyance of the premises and is more than a quitclaim. Grantee is a bona fide purchaser. Allen v. Anderson [Tex. Civ. App.] 96 S. W. 54.

76. Who were "heirs" entitled to take a remainder determined by law in force when deed was made. Train v. Davis, 49 Misc. 162, 98 N. Y. S. 816; Gilliam v. Guaranty Trust Co., 97 N. Y. S. 758.

of ascertaining and giving effect to the intention of the parties[77] as evinced by the language employed;[78] but a supposed intent, however fortified, cannot be permitted to overcome express terms.[79] All parts of the deed must be given effect if possible.[80] The habendum may explain or qualify the granting clause,[81] but under the rule that the first part of a deed prevails[82] it cannot limit the estate plainly granted,[83] and in case of clear repugnance, the granting clause prevails,[84] but if the clauses can be reconciled by limiting the estate, that construction should be given in order to give effect to both.[85] The rule that an habendum clause which is repugnant to the granting clause is void does not apply to a statutory deed.[86] Where executed contemporaneously with other instruments, they are to be construed together,[87] but in case of repugnance between a deed and collateral instrument executed at the same time, the former prevails.[88] The practical construction given by the parties is to be considered,[89] but such interpretation is never permitted to overcome language which is definite and certain, nor to violate settled rules of construction.[90]

77. In construing a building restriction. Mitchell v. Packham [Md.] 63 A. 219. Deed of trust held to create contingent remainders. Train v. Davis, 49 Misc. 162, 98 N. Y. S. 816. The sole office of rules of construction is to ascertain and declare such intention as is made apparent by the language of the instrument. Security Trust Co. v. Joesting [Minn.] 104 N. W. 830.

78. Vawter v. Newman [Kan.] 86 P. 135; Shartenberg v. Ellbey [R. I.] 62 A. 979.

79. Whitmore v. Brown, 100 Me. 410, 61 A. 985.

80. A deed to one and his heirs to have and to hold for life only creates an estate for the life of the grantor only, because if construed for the life of the grantee the word "heirs" could have no effect. Whetstone v. Hunt [Ark.] 93 S. W. 979. For the purpose of harmonizing all parts of a deed it may be assumed that a recital of a certain number of acres meant an undivided half interest in a tract. Reynolds v. Lawrence [Ala.] 40 So. 576.

81. A deed to a grantee, "during her life, grantee, and to her heirs and assigns, forever," where the habendum was to the grantee, her heirs and assigns, gives the first taker a fee. Meacham v. Blaess [Mich.] 12 Det. Leg. N. 412, 104 N. W. 579. Where the premises was in general terms and conveyed a fee, but the habendum provided for the conveyance of only a life estate, only a life estate passed. Evans v. Dunlap [Ind. App.] 75 N. E. 297. Clauses as construed together, held to bring deed within rule in Shelley's Case. Kepler v. Larson [Iowa] 108 N. W. 1033.

82. A grantor may not by a subsequent clause restrict the grant made. Pritchett v. Jackson [Md.] 63 A. 965. A deed in fee simple after the covenant of warranty provided that after the death of the grantee and his wife the land should descend to their heirs. Held that such clause was repugnant to the granting clause and habendum and void. Wilkins v. Norman, 139 N. C. 40, 51 S. E. 797. Under Civ. Code §§ 711, 1636, 1641, 1642, where on consideration of a deed and contemporaneous instruments it appears that it was the intent of the grantor to limit the effect of the granting clause so as to transfer a limited estate only, the rule that repugnant clauses restraining alienation are void does not apply unless such clauses refer to the limited estate intended to be conveyed. Burnett v. Piercy [Cal.] 86 P. 603.

83. Where a deed granted the fee to certain premises, a subsequent clause by which the grantee requested that under certain circumstances the property should go to another was repugnant to the granting clause and void. Wolverton v. Hoffman, 104 Va. 605, 52 S. E. 176.

84. Where a deed to a trustee gave him power to sell, exchange, convey, or in any manner dispose of, a subsequent clause reserving to the grantor the right to dispose of the property by will, and declaring that the conveyance should not affect any prior or subsequent will, is void. Pritchett v. Jackson [Md.] 63 A. 965.

85. Grant to one and his heirs to have and to hold for life held to convey an estate for the life of the grantor. Whetstone v. Hunt [Ark.] 93 S. W. 979.

86. Adams v. Fisher [Mich.] 13 Det. Leg. N. 82, 107 N. W. 705. A provision in a statutory deed which quitclaimed certain property, providing that after the death of the grantor and grantee the premises should be divided between their named sons, is not an habendum, but a part of the granting clause. Id. Under such a deed the grantee takes a life estate only. Id.

87. Where a deed is executed pursuant to a recorded contract, both instruments are to be considered as constituting one agreement, though several months elapse between the execution of the instruments. Baltimore, etc., R. Co. v. Brubaker, 217 Ill. 462, 75 N. E. 523. The fact that a warranty deed of premises covers more land than is contained within the description of a trust deed given to secure the purchase price does not show inconsistency or mistake in the warranty deed. Foster v. Byrd [Mo. App.] 96 S. W. 224. Warranty deed and contract construed and held to constitute a deed of certain land, excepting the oil and gas found therein. Kurt v. Lanyon [Kan.] 82 P. 459.

88. Such collateral instrument may explain, lessen, enlarge, or qualify the estate granted, but cannot destroy it. Lewis v. Curnutt [Iowa] 106 N. W. 914.

89. Oakland Woolen Co. v. Union Gas & Elec. Co. [Me.] 63 A. 915; Haniel v. Minneapolis, etc., R. Co. [Minn.] 107 N. W. 139.

A deed is to be construed against the grantor and favorably to the grantee,[91] unless it be a grant by the public.[92] Words which are repugnant to and irreconcilable with other terms clearly applicable to admitted and established facts recited must be rejected, and all other words must be given some effect.[93] A liberal construction is to be given to deeds inartificially and untechnically drawn.[94] Technical rules of construction are not favored and are not to be so applied as to defeat the intention of the parties.[95] Technical words are presumed to have been used technically, unless the contrary appears on the face of the instrument.[96] A recital as to the acreage is not conclusive,[97] nor is it a warranty that the tract contains that number of acres,[98] unless it amounts to an express covenant.[99] In case of ambiguity, resort may be had to parol evidence of attending circumstances,[1] and parol evidence is admissible to show the consideration,[2] but not for the purpose of contradicting the terms of the instrument.[3] While parol evidence is not admissible to make certain a patent ambiguity, the court in construing the instrument is entitled to the light

90. In the grant of a water right. Oakland Woolen Co. v. Union Gas & Elec. Co. [Me.] 63 A. 915.

91. In case of doubt as to whether a conveyance was intended to pass title to the center of an adjoining highway, it will be presumed that it was so intended. Van Winkle v. Van Winkle [N. Y.] 77 N. E. 33. Partition deeds held to pass title to the center of a highway. Id. A deed of "all of a" certain tract cannot be limited by references in the description to the source of the grantor's title made for the purpose of assisting in tracing the title. Clark v. Roller, 104 Va. 472, 51 S. E. 816.

92. Grant by a city of a right to build a street railway track in the street. Blockl v. People, 220 Ill. 444, 77 N. E. 172. A grant by the public of the right to operate a street railway in the street is a mere franchise to be exercised upon the conditions imposed by the grant. Id.

93. Clayton v. Gilmer County Ct., 58 W. Va. 253, 52 S. E. 103.

94. Shartenberg v. Ellbey [R. I.] 62 A. 979.

95. Security Trust Co. v. Joesting [Minn.] 104 N. W. 830.

96. Roberson v. Wampler, 104 Va. 380, 51 S. E. 835.

97. In determining whether a sale was by the acre, recitals in the deed are not conclusive, but the contract of which the deed is but an expression may be proved. Rich v. Scales [Tenn.] 91 S. W. 50. The recital in a deed that the tract conveyed contains a certain number of acres, more or less, is a representation of the opinion of the grantor, and not a covenant to convey such acreage or restrict the grant to such quantity. Foster v. Byrd [Mo. App.] 96 S. W. 224. A deed ambiguous as to whether a sale was by the acre or in gross, and as to whether an implied warranty of quantity was intended, is prima facie a sale in gross without such warranty. Winton v. McGraw [W. Va.] 54 S. E. 506.

98. Rich v. Scales [Tenn.] 91 S. W. 50. A deed of several tracts reciting that some of the tracts contained a certain number of acres, more or less, and reciting a bulk sum as the consideration, does not show a sale of a certain acreage as so much per acre, nor warrant any certain quantity. Hendricks v. Vivion [Mo. App.] 94 S. W. 318.

99. Rich v. Scales [Tenn.] 91 S. W. 50. A positive affirmation of the quantity of land conveyed is a representation upon which the grantee is presumed to have relied. Parol evidence is admissible to show that the statement was not relied upon, but not to show that it was not made. Winton v. McGraw [W. Va.] 54 S. E. 506.

1. Chapman v. Hamblet, 100 Me. 454, 62 A. 215; Shartenberg v. Ellbey [R. I.] 62 A. 979; Hart v. Saunders [Neb.] 105 N. W. 709. Where there is a latent ambiguity as to a boundary occasioned by disagreement between monuments on the one hand and magnetic courses on the other, specified in the description. Casto v. Baker [W. Va.] 53 S. E. 600. Parol evidence of circumstances attending the transaction is admissible, where a deed is ambiguous as to where land was sold by the acre, or in gross, to aid in construing the deed, but not to prove in point of fact a sale by the acre. Winton v. McGraw [W. Va.] 54 S. E. 506. A witness to a deed bearing a certain date may testify that a deed bearing a later date is the same one witnessed by her, the date having been changed, consideration increased, and other property included. City of St. Joseph v. Baker, 113 Mo. App. 691, 88 S. W. 1122. Where a deed is ambiguous to to whether a warranty of quantity was intended, because of a positive affirmation of the quantity, parol evidence of the circumstances attending the transaction is admissible in determining by construction whether such implied warranty was intended. Winton v. McGraw [W. Va.] 54 S. E. 506. Evidence insufficient to show that failure to except a right of way previously granted was not due to mutual mistake. Foster v. Byrd [Mo. App.] 96 S. W. 224.

2. See ante § 1, A consideration. It is competent to show a parol reservation of rents for the current year as explaining the consideration. Such evidence does not contradict the deed, though no such reservation is contained. Applegate v. Kilgore [Tex. Civ. App.] 15 Tex. Ct. Rep. 17, 91 S. W. 238.

3. Where the consideration is stated as a certain sum and the tract is described by metes and bounds, it is not permissible to show by parol that the sale was by the acre, and that the tract contained a less number of acres than was paid for. Hendricks v. Vivion [Mo. App.] 94 S. W. 318.

evidence of surrounding circumstances will throw on the transaction.[4] Parties to a deed are presumed to have been influenced and controlled by facts of which they had knowledge, rather than by things of which they knew not.[5]

Covenants[6] are to be so construed as to carry into effect the intentions of the parties, which is to be collected from the entire instrument and the circumstances surrounding its execution.[7] General covenants, whether expressed or implied from the use of statutory terms, are not restricted in their operation by special covenants, unless they are irreconcilable, or unless the limited covenant refers to or is connected with the general one in such manner as to show an intention to restrain the force of the general covenants.[8]

Alterations and interlineations[9] made after execution and delivery, but prior to recordation, with the consent of the parties, does not affect the validity of the deed as between them.[10]

Designation of parties.[11]—Descriptive words after the name of a party will not operate to diminish the estate conveyed to him.[12] The word "children" is a word of purchase and not of limitation,[13] and may be construed to include or exclude grandchildren.[14] In a deed to a living person "and his heirs," the clause "and his heirs" may be rejected as surplusage,[15] unless a statutory construction has been placed upon such term,[16] or it may be construed to mean "children."[17] "Legatee" may be construed as "devisee."[18]

4. Though a patent ambiguity cannot be made certain by parol evidence as to the intention of the parties, yet in construing the deed the court is entitled to the light evidence of surrounding circumstances will throw on the transaction in order to determine what property was intended to be conveyed. Reynolds v. Lawrence [Ala.] 40 So. 576.

5. Casto v. Baker [W. Va.] 53 S. E. 600.

6. See 5 C. L. 974. See, also, Covenants for Title, 7 C. L. 1004.

7. Applying this rule to the construction of the instrument in the present case, the covenant was that the water to be supplied by the covenantor was to be water derived from water rights which were the subject-matter of the agreement between the parties. Atlanta, K. & N. R. Co. v. McKinney, 124 Ga. 929, 53 S. E. 701. The purchaser of water rights upon a parcel of land covenanted with the vendor, who was the owner of adjacent land, to carry sufficient water to the residence of the covenantee for its ample use, held a covenant running with the land and binding on a successor in title of the covenantor. Id.

8. A covenant to warrant and defend the title against specified persons limits the general covenant of warranty. Miller v. Bayless, 194 Mo. 630, 92 S. W. 482.

9. See 5 C. L. 974. See, also, Alteration of Instruments, 7 C. L. 115.

10. Made for the purpose of altering the estate conveyed. Hunt v. Nance [Ky.] 92 S. W. 6. Where a second deed was executed to take the place of a prior quitclaim deed, and a warranty deed blank form was used, the erasure of words necessary to make it conform to the quitclaim deed was immaterial. Wilder v. Aurora DeKalb & R. Elec. Traction Co., 216 Ill. 493, 75 N. E. 194. As between the parties a deed may be corrected to cover premises intended to be conveyed. Austin v. Brown [Neb.] 106 N. W. 30.

11. See 5 C. L. 974. A deed to one, his wife and their heirs, including children of the wife by a former marriage, sufficiently designates as grantees the wife's children, so designated, living at the time the deed was made. Darden v. Timberlake, 139 N. C. 181, 51 S. E. 895.

12. The word "administrator" in a deed to a person as such is descriptive only. Love v. Love [Kan.] 83 P. 201.

13. A deed to one, to have and to hold to himself "and his children," gives the grantee named a life estate, remainder to his children, born and unborn. Brumley v. Brumley [Ky.] 89 S. W. 182.

14. "Children" in a deed of trust giving to a second life tenant's children a fund, held not to mean grandchildren. Train v. Davis, 49 Misc. 162, 98 N. Y. S. 816.

15. A living person cannot have heirs. Darden v. Timberlake, 139 N. C. 181, 51 S. E. 895. In a deed of trust to one or his survivors, empowering the trustee to deed to the heirs of G. if H. had no issue, and if he did to the heirs of H., the word "heirs" was held not to be used in connection with the trustee's estate, and he was held to have a fee. Smith v. Proctor, 139 N. C. 314, 51 S. E. 889.

16. Under Code § 1329, providing that any limitation to the heirs of a living person shall be construed to his children, a deed to the heirs of a living person is a valid deed to his children. Campbell v. Everhart, 139 N. C. 503, 52 S. E. 201. "Limitation" means creation of an estate. Id. A deed to the heirs of a living person carries title to the grantee's children as tenants in common, including an unborn child. Code § 1328, provides that a child en ventre sa mere is capable of taking by deed. Id.

17. "Heirs" construed as children where the children of a living person are referred to, and from the language of the deed and

Description of property conveyed.[19]—The description is to be interpreted by a reference to all the calls and every call is to be answered if it can be consistently done.[20] Where any part of the description is false and must be rejected as an error, the general rule of construction is that the particular or special description will control the general one.[21] A description with reference to a map or plat,[22] or to another deed,[23] will be construed as embodying such other instrument. Well known abbreviations are to be given effect.[24] Inadvertent misuse of terms is to be ignored.[25] Parol evidence is admissible to identify the property[26] or to fit the description to the premises,[27] but not to correct a call.[28] The fact that two descriptions of the property are contained therein does not avoid the deed.[29] A false statement in a description otherwise complete and accurate will not frustrate the grant.[30]

Quantum of estate conveyed.[31]—A deed passes title to all it purports to convey,[32] but conveys no greater estate[33] and no more land[34] than it purports to con-

other circumstances it is apparent that "children" was intended. Roberson v. Wampler, 104 Va. 380, 51 S. E. 835.

18. The word legatee in a deed describing the grantor as the only heir and legatee of a certain person. Weigel v. Green, 218 Ill. 227, 75 N. E. 913.

19. See 5 C. L. 976, and as to invalidity of deed for insufficient description, see ante, § 1. See, also, Boundaries, 7 C. L. 446.

20. Chapman v. Hamblet, 100 Me. 454, 62 A. 215.

21. Where quantity conflicts with boundaries, the recital as to quantity will be rejected. Kendrick v. Burchett [Ky.] 89 S. W. 239. Where there is a description by metes and bounds, and a reference to some other writing for a further description, the latter cannot be looked to to enlarge the former. Schaffer v. Heidenheimer [Tex. Civ. App.] 96 S. W. 61.

22. Board of Park Com'rs v. Taylor [Iowa] 108 N. W. 927. Deed containing a partial description and referring to another deed of the same premises when taken together, held to describe the land with sufficient definiteness. Gudger v. White [N. C.] 54 S. E. 386. A provision that the description shall be according to a certain plat is sufficient. Bucher v. Overlees [Ind. T.] 89 S. W. 1021. Evidence sufficient to show that it was intended that a government plat and not a sketch made by the grantor should control the description. Id. Map and field notes referred to in a grant may be considered in aid of the description and to supply words omitted therefrom. Goodson v. Fitzgerald [Tex. Civ. App.] 14 Tex. Ct. Rep. 424, 90 S. W. 898. A plat referred to, as attached to the deed and made a part of it, but not actually attached and subsequently discredited by language of the deed by reason of its being unreliable, not having been recorded, and its whereabouts being unknown, is controlled by language in the deed describing specific property, especially as against third persons who have acquired property on faith of recorded titles. Wilson v. Hoffman, 115 La. 903, 40 So. 328.

23. Deed containing a partial description recited that a deed to the same tract had been made by a certain other person, held not to constitute title nor color of title beyond the boundaries defined in the deed referred to. Gudger v. White [N. C.] 54 S. E. 386.

24. The abbreviations in a tax deed "S. E. 4" will be interpreted as meaning "southeast quarter" where it is explicitly used in another part of the same instrument as the equivalent of these words. Kennedy v. Scott [Kan.] 83 P. 971.

25. Inadvertent use of "diameters" for "varas" in the description does not render the deed void where an entire league is intended to be conveyed, which is designated by name. Goodson v. Fitzgerald [Tex. Civ. App.] 14 Tex. Ct. Rep. 424, 90 S. W. 898.

26. A description as a tract on "Mill Pond road of 60 acres more or less," and referring to another instrument containing a description, is sufficient to authorize the admission of parol evidence to identify the premises. Hinton v. Moore, 139 N. C. 44, 51 S. E. 787. Where a description by quantity, location, and ownership, viewed in the light of admissible extraneous evidence, makes clear the intent of the grantor to convey only the land so described, and the other terms in the description are equivocal and uncertain as to the identity of the land, the deed is not void for uncertainty, but will be given effect according to the manifest intent as gathered from the instrument. Barbour v. Tompkins, 58 W. Va. 572, 52 S. E. 707.

27. Parol evidence is admissible to show that the S. ½ and N. E. ¼ of the N. W. ¼, section 29, was intended to be the S. ½ of the N. W. ¼, and the N. E. ¼ of the N. W. ¼ of the section. Reynolds v. Lawrence [Ala.] 40 So. 576.

28. Parol evidence is not admissible to correct a call except in actions to correct a mistake. This rule does not apply however to evidence in aid of a call, the purpose of which is to remove an ambiguity. Hamilton v. Blackburn [Tex. Civ. App.] 15 Tex. Ct. Rep. 721, 95 S. W. 1094.

29. The fact that a deed contains two descriptions of the land conveyed is immaterial and does not warrant a suit in equity for reformation. Wilson v. Legro' [N. H.] 63 A. 399.

30. Where a street "vacated" was reserved, it is immaterial that a portion of such street had never been vacated. Lins v. Seefeld, 126 Wis. 610, 105 N. W. 917.

31. See 5 C. L. 977.

32. A deed to mineral and timber on a tract of land described as beginning at a certain point, thence to a stake "on the top of Log Mountain, thence with the top of

vey. A deed can convey no greater estate than the grantor has,[35] though it purports to convey a fee.[36] A general clause in a conveyance of all lands owned by the grantor passes title to all the real estate the grantor owns at the time.[37] A deed of a freehold passes all appurtenant rights,[38] accretions,[39] and fixtures.[40] Land can-

Log Mountain," carries such rights in the tract to the top of such mountain. Browning v. Cumberland Gap Cannel Coal Co. [Ky.] 89 S. W. 267. Where an owner conveyed an undivided one-fourth of certain land to a person and subsequently conveyed an undivided three-fourths to him by a deed which was not recorded until after the grantee quitclaimed the entire premises to another, which deed was immediately recorded, held that the quitclaim deed conveyed the entire premises. Lang v. Osceola Consol. Min. Co. [Mich.] 13 Det. Leg. N. 474, 108 N. W. 678. A conveyance of all of an addition to a city except designated lots conveys a certain lot not designated as excepted. Wilder v. Aurora DeKalb & R. Elec. Traction Co., 216 Ill. 493, 75 N. E. 194.

33. A deed of a life estate passes no greater interest, though there is no reservation in favor of the grantor. Evans v. Dunlap [Ind. App.] 75 N. E. 297. A deed of a right of way over certain land for constructing and maintaining any and all levees that may be built thereon gives only one right of way, and where one levee has been constructed the grantee may not construct another on a different line. Board of Directors of St. Francis Levee Dist. v. Bowen [Ark.] 95 S. W. 993.

34. A description calling for "a point opposite the canal which is the dividing line between Mrs. R.'s homestead and the tract hereby conveyed, thence the course of said canal, and with said homestead line of Mrs. R. to" a creek named, covers no part of Mrs. R.'s homestead. Dixon v. Jones, 139 N. C. 75, 51 S. E. 903. Where the owner of land, a part of which has been submerged, conveys the upland, retaining the remainder, the purchaser upon reappearance of the submerged portion can include it within his boundary only by the processes of accretion and reliction. Fowler v. Wood [Kan.] 85 P. 763. Where a strip off a certain tract was conveyed for railroad purposes, and the tract was subsequently acquired by one who conveyed fifty acres of the end upon which the railroad track was maintained, and later conveyed the entire tract, excepting the fifty acres off the south end previously conveyed, it was held that the conveyance of the fifty acres included the right of way. Korporal v. Robinson [Ind. App.] 78 N. E. 84.

35. A deed can convey no greater interest than the grantor has. Real Property Laws 1896, p. 593, c. 547, § 210. Perkins v. Storrs, 99 N. Y. S. 849. Under a deed from a grantor, who holds by deed to her for life remainder to the heirs of her body and three of her children, the grantee takes a life estate and a remainder in fee of the interests of the children signing the deed who survive their mother. Clark v. Sires, 193 Mo. 502, 92 S. W. 224. Where one cotenant quitclaims his interest to another, a voluntory deed from the other cotenants in partition did not invest him with any new right or divest his grantee of rights under the quitclaim. Foster v. Hobson [Iowa] 107 N. W. 1101. Where one who has no interest in land joins with his wife who has a life estate in a warranty deed thereof, the possession delivered under the deed is that of the wife only, and the husband is not liable to a subsequent grantee for breach of the covenant of warranty. Iowa Loan & Trust Co. v. Fullen, 114 Mo. App. 633, 91 S. W. 58.

36. A deed by a life tenant conveys an estate for the life of the grantor only, though it purports to convey a fee. Weigel v. Green, 218 Ill. 227, 75 N. E. 913. A grantee relies at his peril on recitals in his deed that his grantor is sole heir and legatee of a former owner, and where it appears that such grantor is but a life tenant, such recitals cannot be invoked to estop persons entitled to the remainder. Id.

37. Chemung Min. Co. v. Hanley [Idaho] 81 P. 619. A deed of all a grantor's property passes title to a vested remainder held by him. Roberts v. Roberts, 102 Md. 131, 62 A. 161. A deed in the form prescribed by section 1, c. 72, Code 1899, containing the words "do grant," though it contains a covenant of only special warranty, will pass the very land itself, and all estate, right, title, and interest of the grantor therein. Dunfee v. Childs [W. Va.] 53 S. E. 209.

38. Easements of light, air, and access, appurtenant to land abutting on a street, pass with a conveyance of such land. McKenna v. Brooklyn Union El. R. Co. [N. Y.] 77 N. E. 615. Where at the time land was sold an irrigation ditch was pointed out and an extra price charged for the land as a consideration of the right to use the ditch, the right to use it was a quasi easement, and passed under the provision of the deed conveying privileges and appurtenances. Fayter v. North [Utah] 83 P. 742. Whatever is in use for the land as an incident or appurtenance passes with a conveyance of it, whether mentioned or not. Ray v. Nally [Ky.] 89 S. W. 486. A way of necessity passes though not mentioned in the deed. Graham v. Olson, 116 Mo. App. 272, 92 S. W. 728. Evidence held to show that an alley was an appurtenance to several lots, and the right to use it passed with a conveyance of the lots. Cook v. Burton [Ky.] 92 S. W. 322.

39. A transfer by member of a government lot abutting on a lake without words of restriction conveys all land which has become a part of such lot by recession of the lake. Sherwin v. Bitzer [Minn.] 106 N. W. 1046.

40. Attached gas ranges, though movable, may by agreement of the parties be treated as fixtures and pass as an appurtenant without special mention. Wynne v. Friedman, 96 N. Y. S. 838. A contract of sale including full covenants of warranty for conveying certain premises "with gas fixtures," etc., does not merge in the conveyance which does not mention the fixtures, and the vendor

not pass as appurtenant to land.[41] A grant with appurtenances does not convey a mere incidental right of the grantor not appurtenant at the time of the grant.[42] Flats pass by a grant of the upland unless excluded by the terms of the grant.[43] The principle that a grant carries all rights of the grantor necessary to the enjoyment of the granted premises includes only such rights as are essential and necessarily incident.[44] A warranty deed passes title subsequently acquired by the grantor,[45] but ordinarily a quitclaim deed passes only a present existing interest and the grantee gets nothing except what his grantor in fact owns at the time it is executed,[46] except in partition cases.[47] A conveyance of land bounded by a public way passes the fee to the center thereof,[48] if such fee was in the grantor[49] and not excluded by the terms of the grant;[50] but a deed which calls for the line of a private road and gives the grantee the right to open and use such road does not pass title in fee to any part of such road.[51] Under a deed to a railroad company for right of way purposes, the railroad company acquires no greater rights than it would have had it acquired the land by condemnation proceedings.[52] Where a mortgage passes the legal title, a deed by the mortgagee operates as a conveyance of it as well as an assignment of the mortgage debt.[53] Where a deed operates only as an assignment of a mortgage, subsequent deeds of the property have the same effect.[54] A fee may pass though the word "heirs" is not used.[55] A deed to one and her bodily heirs passes all the estate of the grantor.[56] A deed to a certain person "and her bodily

is bound to make good their loss where removed by a third person. Id.

41. Moss v. Chappell [Ga.] 54 S. E. 968. Flats do not pass as appurtenant to the upland where they are outside the express boundaries of the grant, even though the grant contain "together with all the privileges and appurtenances thereto belonging." Whitmore v. Brown, 100 Me. 410, 61 A. 985.

42. Muscogee Mfg. Co. v. Eagle & P. Mills [Ga.] 54 S. E. 1028.

43. Whitmore v. Brown, 100 Me. 410, 61 A. 985.

44. Right of grantor to use water power, necessary only on occasions of drouth, held not to pass. Muscogee Mfg. Co. v. Eagle & P. Mills [Ga.] 54 S. E. 1028.

45. Where a deed antedated a patent of the land executed to the grantor by the United States. Wood v. Smith, 193 Mo. 484, 91 S. W. 85.

46. Knight v. Dalton [Kan.] 83 P. 124. Evidence held to show that it was not intended that a quitclaim deed should pass a possibility of inheritance. Id. A purchaser in a quitclaim deed takes subject to all existing equities. Byron Reed Co. v. Klabunde [Neb.] 108 N. W. 133. A grantee in a quitclaim deed from an owner whose title was extinguished by a tax deed acquires no title as against the grantee in the tax deed. Williams v. Conroy [Colo.] 83 P. 959. Where a deed contains no warranty, a title subsequently acquired by the grantor does not pass by estoppel. Caldwell v. New York & H. R. Co., 97 N. Y. S. 588.

47. Quitclaim deed passes after-acquired title in partition cases. Chambers v. Wilcox, 3 Ohio N. P. (N. S.) 269.

48. A description to an object upon the side of a highway, thence along the highway, passes title to the center of such highway. Van Winkle v. Van Winkle [N. Y.] 77 N. E. 33. Description construed and held to include a part of a street subject to a public easement. Lins v. Seefeld, 126 Wis. 610, 105 N. W. 917. A deed by one who has title to the middle of a public road carries title up to such boundary. Neely v. Philadelphia, 212 Pa. 551, 61 A. 1096.

49. Where a street was laid out as 60 feet wide and conveyed to the city, but on a later map was shown to be improved 76 feet wide, a deed by number of a lot abutting on such street purporting to convey a certain number of square feet does not pass title to the eight feet, but at most but an easement over it. Weiss v. Schweitzer, 47 Misc. 297, 95 N. Y. S. 923.

50. A conveyance of a lot according to a plat describing it as the south 53 feet of the lot, "aside from B. street vacated," passes no title to any portion of B. street abutting on the property conveyed. Lins v. Seefeld, 126 Wis. 610, 105 N. W. 917. Where prior to the execution of a deed the parties measured the tract from the side of a road, and it was understood that no part of the road was to be conveyed, the grantor is not estopped to assert that no part of the road was transferred by the fact that the deed included a portion of it. Graham v. Olson, 116 Mo. App. 272, 92 S. W. 728.

51. Clayton v. Gilmer County Ct., 58 W. Va. 253, 52 S. E. 103.

52. Shepard v. Suffolk & C. R. Co., 140 N. C. 391, 53 S. E. 137.

53. Sadler v. Jefferson, 143 Ala. 669, 39 So. 380.

54. Nash v. Northwest Land Co. [N. D.] 108 N. W. 792.

55. Under the rule that the word "heirs" is not essential to the conveyance of a fee, a writing by a husband stating that for a consideration of one dollar he gave his wife a house and lot is sufficient to entitle her to the fee. Cowdrey v. Cowdrey [N. J. Eq.] 64 A. 98.

56. Hence, where the grantor was ordered by decree of court to convey to another.

heirs" conveys to the first taker a life estate and the fee to her issue when born.[57] "Heirs" is a word of inheritance and not of purchase,[58] unless it is construed as "children."[59] It is generally provided by statute that fee tail estates are converted into fee simple.[60] In determining the nature of the estate created, the rule of construction that the intention of the grantor controls, applies.[61] When a deed on its face purports to be an absolute grant, parol evidence is not admissible to show that the grantor reserved an easement or that the grantee agreed to convey one to him,[62] but parol evidence is admissible to show what is meant by "privileges

on the ground that the words "bodily heirs" was improperly incorporated in the deed, the latter deed could not operate to divest such bodily heirs of their title. Teel v. Dunnihoo [Ill.] 77 N. E. 906.

57. Teel v. Dunnihoo [Ill.] 77 N. E. 906. A conveyance by husband to wife and such children as she might have by the grantor at the time of her death, or the descendants of any such, gives the wife a life estate and the children a defeasible fee subject to be defeated by their death prior to their mother's. McCready v. Morris [Ky.] 94 S. W. 24. A deed from father to a son for life remainder to his descendants, where the son was an only heir and died after his father without issue, the land went to the son's heirs at law and not to his father's. Baxter v. Bryan [Ky.] 94 S. W. 633. Under Rev. Codes 1905, § 1578, where an estate in fee tail is created, the grantee takes a fee. A deed to a married woman and her heirs by her then husband gives her a fee. Jones v. Ragsdale [N. C.] 53 S. E. 842.

58. A deed by husband to wife of a life estate reversion to the grantor if living, or to his heirs if dead, does not create a remainder in the children of the grantor so as to deprive them of power to convey a fee of the property. Dooley v. Goodwin [Ky.] 93 S. W. 47. A deed to one for life, remainder to the grantor should he survive the grantee, otherwise to the grantor's heirs, creates an estate in reversion in the grantor, and his heirs take nothing by purchase. Robinson v. Blankinship [Tenn.] 92 S. W. 854.

59. In a deed of trust to one to hold for the benefit of another during his life, and if the beneficiary did not leave lawful issue to his heirs, but if he did the trustee to deed to the "heirs of H.," H. does not take a fee. "Heirs of H." means "children" living at his death. Smith v. Proctor, 139 N. C. 314, 51 S. E. 889.

60. Rev. Code 1905, § 1583, providing that a limitation to the heirs of a living person shall be deemed to be to his children, applies only where there is no precedent estate granted to a living person, and where a fee tail special is created which under § 1578 is converted into a fee, the first taker takes the fee. Jones v. Ragsdale [N. C.] 53 S. E. 842.

61. A deed to a husband and wife and their heirs, including children of the wife by a former marriage, creates an estate in common in the grantees. Darden v. Timberlake, 139 N. C. 181, 51 S. E. 895. An absolute conveyance to one subject to a life estate in the grantor, but providing that if the grantee die without issue the deed should be void, conveys a vested remainder, defeasible on the death of the grantee without issue during the existence of the life estate, but if the grantor die first, he takes a fee not defeasible by his death without issue. Morgan v. Long [Ky.] 90 S. W. 1042. A deed of a perpetual easement "over and upon" certain premises, and also certain other premises, transfers an easement over the last mentioned as well as over the first mentioned lots; words "over and upon" preceding the first mentioned premises being supplied by intendment immediately preceding the description of the last mentioned premises. Security Trust Co. v. Joesting [Minn.] 104 N. W. 830. Under a deed to a husband and wife, where the wife was to control the property during her life but without power to convey unless the deed was joined in by her husband, it being intended that if the property was not disposed of during her life it should vest in the children of the grantees, it is held that on the death of the husband the wife had only a life estate. Burnett v. Piercy [Cal.] 86 P. 603. A deed to a mother "for and during her natural life, and at her death to be and remain the property of her children," creates a trust in favor of the children and gives them a remainder in fee. Sears v. Palmer, 109 App. Div. 126, 95 N. Y. S. 1023. Where a deed gives as an appurtenance to land conveyed the right to open and use a private road along one side of the tract, it is presumed that the grantor did not intend to retain a very long and narrow strip between the tract conveyed and the road; and where such road is described as intended to run between the tract and adjacent land of a third person, it is presumed, in the absence of circumstances indicating the contrary, that the grantor did not intend to retain a strip between the road and such adjacent lands so narrow as to be of no practical use to him. Clayton v. Gilmer County Court, 58 W. Va. 253, 52 S. E. 103. A conveyance to a municipality for "market purposes" is not one for the maintenance of a slaughter house. Bird v. Grout, 106 App. Div. 159, 94 N. Y. S. 127. "Convey," in an indorsement on a plat by the owner "I hereby dedicate and convey," does not convey the fee of streets, in the absence of an effective statutory dedication. City of Leadville v. Coronado Min. Co. [Colo.] 86 P. 1034. A contract by which a landowner grants a railroad right of way over his lands and covenants to execute a deed in fee simple, where required to do so, vests in the railroad company an easement only. South Penn. Oil Co. v. Calf Creek Oil & Gas Co., 140 F. 507.

and appurtenances."[63] A deed of standing timber specifying no time within which to remove it gives a reasonable time.[64] What is a reasonable time depends on the circumstances of each case.[65] The execution and delivery of a trust deed passes a present interest to the beneficiary, though enjoyment of the estate be postponed.[66] That a grantor reserves the right to revoke the trust created by his deed does not prevent the passing of a present interest.[67]

A reservation[68] is limited to some part of the estate which would otherwise pass,[69] and an exception is a part excepted from that which is granted.[70] Whether language used constitutes a reservation or exception depends on the intention of the parties as evinced by a construction of the entire instrument in the light of surrounding circumstances.[71] An attempted reservation of inseparable appurtenances, or right of action for their destruction or invasion, is without effect;[72] but though such reservation is ineffectual to create a trust, it does create a resulting trust by virtue of which the grantee becomes trustee for his grantor for money received or judgment recovered for invasion of such easements,[73] and such grantee is the only person who can sue for damages thus caused or execute a release in satisfaction thereof.[74] In order that property included may be excepted, the intention

62. Hubenthal v. Spokane & I. R. Co. [Wash.] 86 P. 955.

63. Where a deed included privileges and appurtenances, etc., and it was admitted that a right to water from a certain ditch for irrigation purposes passed and the grantee claimed the right to use water from another ditch, parol evidence of the acts and declarations of the grantor with reference to such additional ditch, both prior and subsequent to the conveyance, was admissible to explain what was intended to pass. Fayter v. North [Utah] 83 P. 742.

64. What is a reasonable time depends on the circumstances of the case. Liston v. Chapman & D. Lumber Co. [Ark.] 91 S. W. 27. Where after conveying standing timber the grantor conveys the land subject to the conveyance of the timber, only the time subsequent to the execution of the second deed is to be considered in determining what is a reasonable time as between the two grantees. Id.; Carson v. Three States Lumber Co. [Tenn.] 91 S. W. 53.

65. The condition of the land, its accessibility, whether subject to overflow, and the effect of such overflow as hindering removal of the timber, the amount of timber and facilities of the grantee for removing it. Carson v. Three States Lumber Co. [Tenn.] 91 S. W. 53. 10 years held not unreasonable in this case. Id. A deed to standing timber "where the same is cut," the grantee to have 15 years to remove it after they commence to cut, conveys a present interest in such timber, defeasible as to all timber not removed within 15 years. Hawkins v. Goldsboro Lumber Co., 139 N. C. 160, 51 S. E. 852.

66, 67. Lewis v. Curnutt [Iowa] 106 N. W. 914.

68. See 5 C. L. 979. Under a reservation "said first party J. M. A. reserves and still owns all timber," etc., and requiring the same to be removed within a specified time the grantor does not hold absolute title, but such timber as remains unsevered at the expiration of the period limited is the property of the owner of the land. Adkins v. Huff, 58 W. Va. 645, 52 S. E. 773.

69. Under a reservation of timber and a provision that the grantor should pay all taxes on the land until he should give a release of such timber, the grantor under Rev. St. 1898, § 1081, is required to pay only such taxes as had become a lien prior to the release. Sniveley v. Keystone Lumber Co. [Wis.] 108 N. W. 215. A reservation of a right to connect wash lines from the yard on the property conveyed to the yard on other property owned by the grantor reserves an easement in favor of the occupants of the lot conveyed to maintain wash lines between the points designated. Steiner v. Peterman [N. J. Eq.] 63 A. 1102. A partition deed from a widow and several children to one child of a fee, except a life claim in the widow, reserves a life estate in the premises to the widow. Senterfeit v. Shealy, 71 S. C. 259, 51 S. E. 142.

70. A deed of an entire lot with the exception of one-half of a double house carries title to everything except one-half the double house. Hads v. Tiernan, 213 Pa. 44, 62 A. 172.

71. Gill v. Fletcher [Ohio] 78 N. E. 433. Where a fee owner conveys the fee reserving a half interest in the minerals in the land declaring that the grantee, his heirs and assigns shall hold the land and its appurtenances "the half of the mineral only excepted," an exception of the fee of the minerals is created. Id. Deed to one "excepting and reserving" a strip for a right of way, the grantee however to have the right to fence the strip leaving gates for the use of the grantor, his heirs and assigns, held an exception in view of the fact that the grantor deeded this strip away the same day. Pritchard v. Lewis, 125 Wis. 604, 104 N. W. 989. A provision reserving to parties of the first part all rights, privileges, and benefits secured by an oil lease previously executed, with power to renew, change, or modify the same, constitutes an exception and not a reservation. Moore v. Griffin [Kan.] 83 P. 395.

72. Light, air, and access to land abutting on a street. McKenna v. Brooklyn Union El. R. Co. [N. Y.] 77 N. E. 615.

to except must be expressed in clear and certain terms.[75] A reservation of standing timber converts it into personal property and the title of the grantor is absolute.[76] Under a reservation of standing timber and a right of way to and from the same, the grantor has a reasonable time within which to remove it,[77] but no longer.[78] A reservation is to be construed so as to give effect to the intent of the parties.[79] A reservation couched in ambiguous language is controlled by the granting clause which requires no explanation.[80] Though an estate in favor of a third person cannot be created by reservation, yet, when the grantor owns only a remainder after the life of a third person, his deed may properly except the life estate.[81]

Conditions and restrictions.[82]—Whether a condition is precedent or subsequent is a question of intention.[83] Conditions subsequent[84] are not favored,[85] and must be created by express terms,[86] and if it is doubtful whether terms used create a condition or a covenant, they will be construed as creating a covenant.[87] The fact

73, 74. McKenna v. Brooklyn Union El. R. Co. [N. Y.] 77 N. E. 615.

75. Where one who promised to deed certain land to a railroad company upon certain conditions, but subsequently included such land in a deed to another subject to the promise, and included a reversionary right to a portion of the land used by the railroad in case it gave up its rights, the strip promised to the railroad was not excepted. Littlejohn v. Chicago, etc., R. Co., 219 Ind. 584, 76 N. E. 840.

76. A time limitation within which to remove it renders unlawful its continuance on the land after expiration of such time. Dyer v. Hartshorn [N. H.] 63 A. 231.

77. Decker v. Hunt, 98 N. Y. S. 174.

78. The grantee may refuse to permit the exercise of the right after 20 years, though it has been exercised during such period. Decker v. Hunt, 98 N. Y. S. 174.

79. A reservation of minerals does not reserve natural gas. Silver v. Bush, 213 Pa, 195, 62 A. 832.

80. Under a deed declaring the grantor's intention to be to convey all his property except such as is reserved, a clause specifically conveying a certain tract controls a reservation of a plantation to which it is sought to attach such tract. Wilson v. Hoffman, 115 La. 903, 40 So. 328.

81. Redding v. Vogt, 140 N. C. 562, 53 S. E. 337.

82. See 5 C. L. 980.

83. Covenant to complete railroad in specified time held condition subsequent. Rannels v. Rowe [C. C. A.] 145 F. 296.

84. Held conditions subsequent: A conveyance in consideration of support and maintenance and a home on the premises conveys an estate upon condition subsequent. Gall v. Gall, 126 Wis. 390, 105 N. W. 953. A provision "upon the express agreement," and as part of the consideration for the deed that the grantee should within six months build on the premises a dwelling house to cost not less than a specified amount is a covenant and not a condition subsequent. Hawley v. Kaftz [Cal.] 83 P. 248. A provision in a deed to a railroad company "provided that should said strips of land cease to be used for railroad purposes, it shall revert" creates a condition subsequent. Moss v. Chappell [Ga.] 54 S. E. 968. A provision in a deed for right of way purposes "if said * * * strips be not used for station purposes for the period of one year at any one time, the same and said first strip shall revert to and revest in the party of the first part," creates a condition subsequent. Hamel v. Minneapolis, etc., R. Co. [Minn.] 107 N. W. 139. Words "station purposes," intended to mean and refer to a regularly operated railroad station at which business might be conducted by the railroad company as at its other stations. Id. A provision in a deed creating a defeasible fee that no sale shall be ordered for reinvestment is not invalid as restraining alienation, under Civ. Code Prac. § 492, providing that sale for reinvestment by the owner of a freehold, where there is a remainder or reversion, shall not be ordered, if forbidden by the instrument under which the property is held. Chenault v. Burgess [Ky.] 93 S. W. 664.

85. Conditions subsequent leading to forfeitures are not favored, and if possible a deed will be so construed as to save the estate and remit the obligee to an action for damages. Union Stock Yards Co. v. Nashville Packing Co. [C. C. A.] 140 F. 701.

86. In order to create a condition subsequent, the words of the deed must be clear and not admit of any other reasonable interpretation. Bain v. Parker [Ark.] 90 S. W. 1000.

87. Where words can be construed as a condition, reservation, or covenant, the latter construction is favored. Dempwolf v. Greybill, 213 Pa. 163, 62 A. 645. Where a clause providing for the erection of a building on the premises was not ambiguous, and whether it created a covenant or condition subsequent was a question of legal interpretation, parol evidence is not admissible to show that the parties intended a condition subsequent. Hawley v. Kaftz [Cal.] 83 P. 248.

Held covenants: A deed to a railroad company forever for "railroad and depot purposes" passes the fee and right to possession, and where the premises are used for other purposes, grantor can recover for injuries naturally resulting but not the rental value. Gaffney v. Wood [S. C.] 54 S. E. 573. A provision in a deed, reciting a valuable consideration, that the grantee should hold

that the language of the deed expressly states that it is upon condition is not conclusive if upon other considerations it appears that such was not the intention of the parties.[88] Conditions subsequent are not liberally construed in favor of the grantor.[89] The rule that conditions subsequent will be strictly construed against the grantor applies more particularly in interpreting the contract and in ascertaining whether the proper construction of the language creates a condition subsequent or a mere covenant,[90] and when the intent of the parties is clear, their rights and liabilities in respect to such conditions are determined and enforced precisely as in other contracts.[91] Where a deed is made in consideration of future support, and discord thereafter arises between the parties, courts are inclined to restore the property to the grantor if it can be done without manifest injustice,[92] but the deed is not to be overthrown without good reason therefor.[93] If breach of the condition is caused by the act of the grantor, he cannot assert a right to forfeiture.[94] A breach of condition may be waived[95] by acts as well as by express release.[96] An election of

the premises for a burial place and for no other purpose, creates a covenant and not a condition subsequent. Thornton v. Natchez [Miss.] 41 So. 498. A deed to a railroad company in consideration of the construction of a railroad "to be completed by" a certain date creates a covenant and not a condition subsequent. Bain v. Parker [Ark.] 90 S. W. 1000. A conveyance pursuant to an agreement that the grantee should build a packing house and do his buying and weighing through the grantor's stock yards. The deed recited that it was made upon condition of due performance of the contract. Held such provision was a covenant and not a condition subsequent. Union Stock Yards Co. v. Nashville Packing Co. [C. C. A.] 140 F. 701. On cessation of use as a burial ground of land conveyed for such purpose and no other, the remedy of the grantor is at law for damages and not in equity for injunction or reconveyance. Thornton v. Natchez [Miss.] 41 So. 498.

88. Union Stock Yards Co. v. Nashville Packing Co. [C. C. A.] 140 F. 701. Words seemingly appropriate to a condition may introduce a covenant, a condition, or declaration of trust, and the entire clause must be considered in order to determine within which class it should fall. MacKenzie v. Trustees of Presbytery, 67 N. J. Eq. 652, 61 A. 1027. Clause held to constitute a declaration of trust. Id.

89. Under a deed providing that if the grantee failed to operate a cotton gin on the premises the deed should be void and the grantee have one year to remove improvements, where one year after the gin had ceased to be operated the grantor notified a mortgagee of the improvements that he would not recognize any rights of his in the land, and that he should remove the machinery, and about the time the grantor made entry the grantee conveyed to the mortgagee, it was held that the mortgagee had one year from the time of entry to remove, the grantee not having been notified of the claim of forfeiture. Norris v. Coffmann [Tex. Civ. App.] 95 S. W. 1088.

90. Hamel v. Minneapolis, etc., R. Co. [Minn.] 107 N. W. 139.

91. Hamel v. Minneapolis, etc., R. Co. [Minn.] 107 N. W. 139. A grantee in a deed containing a condition subsequent cannot, by dividing the land and breaking the condition as to a portion of it, defeat the grantor's right of entry on the ground that the condition did not provide that the land should revert if any portion should cease to be used for the purposes specified. The segregation of the property divided the condition. Moss v. Chappell [Ga.] 54 S. E. 968. A grantor in a deed upon condition subsequent may submit to a sale of the premises by the grantee without jeopardizing his right to rescind for breach of condition. Gall v. Gall, 126 Wis. 390, 105 N. W. 953.

92. Lewis v. Wilcox [Iowa] 108 N. W. 536. Where a parent conveyed all her property to her child in consideration of support, and within two months after the conveyance was ejected from their home, a decree cancelling the conveyance is proper. McIntire v. McIntire [Neb.] 106 N. W. 29.

93. Especially where the grantee has abandoned another home and has entered on and for a period of years has discharged the obligations of the contract with reasonable fidelity. Lewis v. Wilcox [Iowa] 108 N. W. 536. Where a deed was made in consideration of future support, and prospective heirs of the grantor prevented the grantee from carrying out his obligation, they could not, after the grantor's death, insist on a forfeiture because of nonperformance of the covenant. Harwood v. Shoe [N. C.] 53 S. E. 616.

94. Evidence held to show that failure of the grantee to build a house on the land in compliance with a condition was due to the acts of the grantor. Graham v. Strawsburg [Ky.] 91 S. W. 737.

95. A condition in a deed to a railroad company in consideration of the construction of a railway within a specified time is waived where at the time the deed was executed it was known that the line could not be completed within such time, and the grantor permitted the depositary to hold the deed and deliver it 10 months after the date specified for completion of the line. Bain v. Parker [Ark.] 90 S. W. 1000. A waiver of a forfeiture resulting from breach of condition subsequent in favor of a named person and for a stated purpose is

remedies may exist on breach of the condition.[97] Entry on breach of condition subsequent is essential to revest title in the grantor.[98] The action to recover the premises must be brought within the statutory period after the breach occurs.[99] In Washington, demand for possession prior to commencement of an action to recover the property for breach of condition subsequent is not essential.[1]

A deed upon condition precedent passes no title until the condition is performed.[2]

Restrictions.[3]—A restrictive covenant preventing any lawful use is an incumbrance[4] and runs with the land.[5] A restrictive covenant is to be strictly construed,[6] but in ascertaining the intention of the parties it should be construed as any other contract, and when determined the rights of the parties should be strictly enforced.[7]

Extinguishment of rights.[8]—Title cannot be divested by the destruction of a deed,[9] nor by abandonment[10] or estoppel,[11] or alteration of the instrument.[12] A deed of a fee may be rescinded and replaced by a subsequent one conveying the same

limited to the terms of the waiver and does not destroy the condition altogether. Moss v. Chappell [Ga.] 54 S. E. 968.

96. Any acts inconsistent with a claim of forfeiture are evidence of release. Bain v. Parker [Ark.] 90 S. W. 1000. A corporation which executes a deed containing a condition subsequent cannot be estopped from enforcing such condition by the mere act of its president without action by the board of directors. Lewiston Water & Power Co. v. Brown [Wash.] 85 P. 47.

97. Where on breach of a condition subsequent the grantor proceeds to act with his own property, which was also subject to the condition, as though the contract relative to such condition had been rescinded, he was held to be thereafter precluded from enforcing the condition. Tower v. Compton Hill Imp. Co., 192 Mo. 379, 91 S. W. 104. Where land was conveyed on condition subsequent, an action for breach of such condition does not constitute an election of remedies and defeat an action to rescind for subsequent breaches. Gall v. Gall, 126 Wis. 390, 105 N. W. 953.

98. The grantor may enter peaceably, if he can, or maintain a possessory action. Moss v. Chappell [Ga.] 54 S. E. 968. Deeding to third person not re-entry. S. & H. Dig. Ark. § 701, construed. Rannels v. Rowe [C. C. A.] 145 F. 296.

99. Tower v. Compton Hill Imp. Co., 192 Mo. 379, 91 S. W. 104. Under Rev. St. 1899, § 4263, an action by the grantor to recover land on breach of condition subsequent must be brought within 10 years after the right to enter accrued. Hoke v. Central Tp. Farmers' Club, 194 Mo. 576, 91 S. W. 394.

1. Under Ball. Ann. Codes & St. § 5500, providing that one having a valid interest in land may maintain an action to recover it. Lewiston Water & Power Co. v. Brown [Wash.] 85 P. 47.

2. Where a deed by one child to his mother was not to become effective until executed by other children, it was ineffective until the performance of the condition, though delivered. Haviland v. Haviland [Iowa] 105 N. W. 354. Where one agrees to convey land to a railroad provided it should construct and operate its road through a certain village within a certain time, the conditions of the conveyance were conditions precedent. Littlejohn v. Chicago, etc., R. Co., 219 Ill. 584, 76 N. E. 840.

3. See 5 C. L. 981. See, also, Buildings and Building Restrictions, 7 C. L. 507.

4. Prohibiting carrying on of any noxious, offensive, or dangerous trade or occupation. Dieterlen v. Miller, 99 N. Y. S. 699.

5. Dieterlen v. Miller, 99 N. Y. S. 669.

6. Silberman v. Mayer, 48 Misc. 468, 96 N. Y. S. 928.

7. Restrictive covenant as to land bordering on water held to apply to submerged land as to which there were riparian rights lying beyond highwater mark. Silberman v. Mayer, 48 Misc. 468, 96 N. Y. S. 928.

8. See 5 C. L. 981.

9. Destruction cannot operate to divest the grantee of title nor reinvest the grantor with title. Miser Gold Min. & Mill. Co. v. Moody [Colo.] 86 P. 335. Where a deed is returned to the grantor to redate, insert additional property, and redeliver, it constitutes a destruction of the original deed and the substitution of another, the title to the property described in the original deed remaining all the time in the grantee. City of St. Joseph v. Baker, 113 Mo. App. 691, 88 S. W. 1122. Where an unrecorded deed is destroyed the grantor may be required to execute a new deed. Miser Gold Min. & Mill. Co. v. Moody [Colo.] 86 P. 335. Where a delivery to a third person constitutes a delivery to all the grantees, one of them cannot, by returning the deed, divest the estate of his cograntees. Allen v. Powell [Ga.] 54 S. E. 137.

10. The abandonment of land for railroad purposes by a railroad company which holds the fee does not operate to divest it of the fee. Enfield Mfg. Co. v. Ward, 190 Mass. 314, 76 N. E. 1053.

11. One who owns property cannot be divested of her title by the fact that in an action against her husband, in which it is asserted that he is the owner, she makes no objection or claim. Foster v. Hobson [Iowa] 107 N. W. 1101.

12. A grantee cannot be divested of his title by alteration of the deed after full execution, though such alteration is by consent of the parties. Gibbs v. Potter [Ind.] 77 N. E. 942.

land subject to a life estate when the grantee takes possession and claims under the latter deed.[13]

DEFAULTS.

§ 1. Elements and Indicia of Default (1122).
§ 2. Procedure on Default, Taking Judgment (1123).
§ 3. Opening Defaults (1124).
§ 4. Operation and Effect of Default and Proof of Damages (1128).

§ 1. *Elements and indicia of default.*[14]—A default is the failure of a party to take a step required by law in the progress of a legal action,[15] and a judgment by default is a judgment rendered in consequence of such failure.[16] Strictly speaking, the latter can be entered only where the defendant fails to appear in the case,[17] but the phrase is now used, generally as a result of statutory enactments, as including judgments entered on failure to plead or to appear at the trial.[18] The process must be valid[19] and legally served;[20] but service having in fact been made, the court has jurisdiction to render a valid default judgment though the record proof of service is insufficient,[21] and may afterwards permit an amendment to the record to conform to the facts.[22] The claimant's pleadings must authorize a recovery.[23] Under a stat-

13. Redding v. Vogt, 140 N. C. 562, 53 S.,E. 337.

14. See 5 C. L. 982.

15, 16. 6 Enc. Pl. Pr. 10.

17. "What constitutes a default," see 5 C. L. 982, n. 15.

18. Under Kirby's Dig. §§ 6111, 6188, the court is not bound to enter judgment by default on the fourth day of the term in actions where no defense has been filed within the time required, but may grant further time for cause shown. Ozark Ins. Co. v. Leatherwood [Ark.] 96 S. W. 374.

19. Where in a suit for taxes, notice by publication is addressed to defendant by the initials of his christian name only when the record is in his full name, judgment by default on such notice is void. Burkham v. Manewal, 195 Mo. 500, 94 S. W. 520. A personal judgment against a nonresident, rendered by default on constructive service, is void. Could be attacked collaterally where recited that citation had been made by publication. Lutcher v. Allen [Tex. Civ. App.] 16 Tex. Ct. Rep. 149, 95 S. W. 572. A notice of entry of an interlocutory judgment allowing plaintiff 10 days in which to withdraw his demurrer, that the same had been "duly entered in the office of the clerk of the supreme court," held insufficient to set running plaintiff's 10 days. Tudor v. Ebner, 109 App. Div. 521. 96 N. Y. S. 392.

20. Default set aside where summons by publication was not served two days before the return day, as required by statute. Quigley v. Ellenwood [Cal. App.] 82 P. 974. Entry of default found to have been duly made presupposes due service. Twigg v. James, 37 Wash. 434, 79 P. 959. Parol evidence of plaintiff in an action to restrain the enforcement of a default judgment, that he was not served with summons held not sufficient to overcome the presumption in favor of jurisdiction arising from recitals of personal service in the judgment and in the return of the officer. Mosher v. McDonald & Co., 128 Iowa, 68, 102 N. W. 837. Return of officer should be upheld unless opposed by clear proof. Evidence insufficient to show that defendant had not been served, the motion to set aside for want of service not having been addressed to the court's discretion. Matchett v. Leibig [S. D.] 105 N. W. 170. Evidence held to show that the person served was defendant's agent within the meaning of the statute so that service was binding on defendant. Southern Bell Tel. & T. Co. v. Parker, 119 Ga. 721, 47 S. E. 194. Return of service legally sufficient. Id.

21, 22. Schmidt v. Stolowski, 126 Wis. 55, 105 N. W. 44.

23. In South Dakota the fact that a sworn complaint in a money action is verified by counsel instead of by plaintiff does not prevent the taking of a default judgment. Gordon v. Gordon [S. D.] 105 N. W. 244. Under §§ 95, 96, 97 Prac. Act 1903 (P. L. 1903 p. 537) authorizing the entry of a default judgment in case of defendant's failure to plead or demur within 20 days after service upon him of a copy of the declaration, the service of a copy of the declaration containing the common counts only, or common counts on which a recovery is sought in addition to any special count, will not justify a judgment by default for want of an affidavit of merits unless the declaration be accompanied by a bill of particulars showing the amount for which judgment will be claimed. Coursen v. Snell [N. J. Err. & App.] 64 A. 118. A statute permitting a party to treat as a nullity an insufficiently verified pleading applies only to a defectively verified pleading and not to one not verified at all but good as a pleading. Code Civ. Proc. § 528. Beglin v. People's Trust Co., 95 N. Y. S. 910. The statute of Idaho makes a distinction between a cross complaint and a counterclaim as regards the right of a defendant to judgment for default of plaintiff. Western Loan & Sav. Co. v. Smith [Idaho] 85 P. 1084. Cross complaint held to set out facts entitling defendant to affirmative relief, and prayer held sufficient, so as

ute requiring plaintiff to file with the complaint the instrument sued on as a condition to the granting of a default, the filing of a copy is not sufficient.[24] There must be a failure to appear[25] or to answer,[26] or other sufficient ground for default.[27] The time for answer[28] must have expired,[29] and the default must exist at the time of the entry of the default judgment though judgment might have been entered earlier while the default existed.[30]

§ 2. *Procedure on default; taking judgment.*[31]—Proof of facts showing the default must be made,[32] but where the application is to the court it is not essential that proof of service or default be filed with the clerk as a condition precedent.[33]

to justify entry of default for failure to answer. Id. Cross complaint sufficient though contained in same instrument as answer. Id.

24. The filing of a copy of a note is not sufficient under Code Pub. Loc. L. art. 3, § 18f, providing for a judgment by default in an action on contract where the same is filed by plaintiff. Councilman v. Towson Nat. Bank [Md.] 64 A. 358. But where in such case no default is made, plaintiff may recover on any evidence admissible under the declaration, and is not confined to recovery on the instrument filed. Code Pub. Loc. L. art. 3, § 18f (Acts 1894, p. 993, c. 631). Councilman v. Towson Nat. Bank [Md.] 64 A. 358.

25. The appearance of a party being on file, it is error to enter an order of default for failure to appear. Defendant not in default under rule of court providing that no motion will be heard without notice after appearance except when the party is in default or a cause is reached on the call of the calendar. American Mail Order Co. v. Marsh, 118 Ill. App. 248.

26. Default judgment in ejectment rendered when defendant had a good defense and bond on file held irregular and could be set aside after one year from rendition. Becton v. Dunn, 137 N. C. 559, 50 S. E. 289. Default cannot be ordered where defendant appears and answers in due time. Marion v. City Council, 72 S. C. 576, 52 S. E. 418. Judgment by default cannot be rendered against one of several defendants for failure to answer where his codefendants have interposed a good defense common to all defendants. Replevin. Carpenter v. Ingram [Ark.] 91 S. W. 24. A rule of court preventing the judge from enlarging the time to file an affidavit of defense does not authorize the entry of judgment for want of such affidavit after it has been filed. Bordentown Banking Co. v. Restein [Pa.] 63 A. 451. Where defendant failed to answer a supplemental complaint within statute time and failed to obtain additional time to plead held proper to render decree for want of answer. United States v. Rio Grande Dam & Irrigation Co. [N. M.] 85 P. 393.

27. Failure of defendant to justify ejectment bond where no action had been taken by the court on plaintiff's exception noted on the bond held insufficient to justify judgment by default, the statute not requiring justification in the first instance. Becton v. Dunn, 137 N. C. 559, 50 S. E. 289. The court had power, and it was proper, to proceed as upon default where defendant who had failed to appear and answer and had disregarded an order of court requiring him to pay temporary alimony, applied to the court on the day set for trial for leave to defend but refused to comply with condition that he comply with the order for alimony within seven days. Bennett v. Bennett [Okl.] 83 P. 550.

28. An affidavit of defense may be filed as of right at any time before judgment. Procedure Act May 25, 1887 (P. L. 271) §§ 5, 6, authorizing motion for judgment for want of affidavit unless defendant file the same within 15 days and making it the duty of defendant to file his affidavit within such time, did not change the practice. Bordentown Banking Co. v. Restein [Pa.] 63 A. 451.

29. "The service of an amended complaint" as required by Code Civ. Proc. §§ 432, 472, implies filing and a default entered before the expiration of ten days from the filing is premature though entered after ten days from delivery to defendant. Billings v. Palmer [Cal. App.] 83 P. 1077.

30. Where an affidavit of defense is filed after the time fixed by statute, judgment for plaintiff cannot be entered for want of it if no motion for judgment was made before the affidavit was filed. Refusal to accept defendant's answer held error. Bordentown Banking Co. v. Restein [Pa.] 63 A. 451.

31. See 5 C. L. 983.

32. Statements in the affidavit of default from which a conclusion might be drawn that plaintiff's time to withdraw his demurrer had expired were not equivalent to proof of service of a valid notice of entry of the interlocutory judgment and default on the part of plaintiff. Tudor v. Ebner, 109 App. Div. 521, 96 N. Y. S. 392. Recital in default judgment held to show compliance with Code Civ. Proc. § 594, requiring proof of five days' notice of trial to entitle one to proceed in the case in the absence of the adverse party. Johnston v. Callahan, 142 Cal. 212, 79 P. 870. Where the court expressly found that there was no appearance and judgment recited that summons had been served but no answer within the statutory time, such finding and recital showed that the court passed upon the question of default, and were conclusive so far as the record was concerned. Schmidt v. Stolowski, 126 Wis. 55, 105 N. W. 44.

33. Rev. St. 1898, § 2891, subd. 1, authorizes the clerk to enter default judgments upon applicant "filing proof of default" with him, and subd. 2, provides for application to the court where defendant has made default, "upon like proof." Held, where application is made to the court under subd. 2, it is not necessary that proof of default or service of process be filed before rendition of judgment, it being sufficient if such proof is submitted to the court before judgment.

Where the statute requires plaintiff to prove his case[34] or to file a refunding bond,[35] such conditions must be complied with. The default may be entered in the final judgment without any separate prior order,[36] and where a cross complaint is filed for distinct and separate relief a default judgment for failure to answer it may be rendered independently of the main action.[37] Judgments by default are based upon an implied confession by defendant of the allegations of the complaint and the court should proceed upon that theory,[38] and the relief granted should therefore not differ from that demanded in the complaint.[39] Under the West Virginia practice, a plaintiff may waive his right to have an office judgment become final by operation of statute.[40] The supreme court of South Carolina cannot, in its appellate jurisdiction, order a judgment by default.[41]

§ 3. *Opening defaults. Grounds.*[42]—In the absence of a waiver,[43] the court should, in the exercise of its judicial discretion,[44] set aside a default and allow a defense upon a sufficient excuse being shown by the party defaulted;[45] but one who seeks to avoid making any defense cannot invoke this rule.[46] A statute conferring

Schmidt v. Stolowski, 126 Wis. 55, 105 N. W. 44.

34. Municipal Court Act L. 1902, p. 1537, c. 580, § 147, provides that upon defendant's failure to appear and answer, plaintiff must prove his case except where, in an action on contract, a copy of a verified complaint was served on defendant at the time of serving the summons. Section 83 which provides for substituted service in attachment contains no provision for the service of a complaint as is prescribed for the service of a summons. Held on substituted service only, judgment against defendant without proof of plaintiff's claim was error. Dixon v. Carrucci, 97 N. Y. S. 380. Under Sess. Laws 1893, p. 238, § 5, providing that no default for want of appearance shall be allowed in an action for divorce, failure of defendant to deny the charge of repeated acts of cruelty did not authorize entry of judgment by default. It was necessary for plaintiff to prove his case. Geisseman v. Geisseman [Colo.] 83 P. 635.

35. Held error to order sale of homestead to satisfy liens without refunding bond under Code Civ. Proc. § 410, requiring bond for restoration of the property in case judgment should be vacated where defendant is constructively served and does not appear. Stephens v. Stephens, 27 Ky. L. R. 555, 85 S. W. 1093.

36. Not necessary to enter default in separate order. Warner v. Miner, 41 Wash. 98, 82 P. 1033.

37. Western Loan & Sav. Co. v. Smith [Idaho] 85 P. 1084.

38. Where on the last day for answering, the parties compromised by plaintiff's agreement to accept $250, and on a subsequent day defendant answered, the court, on defendant's refusal to pay the $250, was not justified in striking the answer and rendering judgment by default for $400, the amount sued for. Ozark Ins. Co. v. Leatherwood [Ark.] 96 S. W. 374.

39. Under Code Civ. Proc. § 1207, providing that where there is no answer the judgment shall not be more favorable than that demanded in the complaint where plaintiff sought a lien on property, and there was no answer he was not entitled to a money judgment. Mathot v. Triebel, 102 App. Div. 426, 92 N. Y. S. 512.

40. Agreement for a continuance entered of record before office judgment becomes final by operation of statute prevents finality until subsequent entry as the judgment of the court. James' Sons & Co. v. Gott [W. Va.] 47 S. E. 649. And before the judgment becomes final by such entry defendant may have the same set aside by filing his counter affidavit and pleading to issue. Id.

41. In an action to cancel a deed for fraud, the relief to be afforded plaintiff in case of default must be ascertained either by a jury or the judge under Code Civ. Proc. § 267. Marion v. City Council, 72 S. C. 576, 52 S. E. 418.

42. On the opening of judgments for fraud, accident, mistake, etc., see Judgments, 6 C. L. 214.

43. A stipulation not in writing, as required by court rule 27, by defendant's attorney, that he would try and settle or make an appearance did not deprive defendant of right to set aside the default where no penalty was contemplated for failure to fulfill the promise. Stretch v. Montezuma Min. Co. [Nev.] 86 P. 445.

44. Application to vacate is addressed to sound legal discretion of trial court. Holzman & Co. v. Henneberry [Idaho] 83 P. 497. Upon setting aside a default and allowing answer upon grounds within § 5298 Rev. Codes 1899, the court is vested with a wide discretion which will not be disturbed except in case of abuse. Olson v. Sargent County [N. D.] 107 N. W. 43.

45. Default judgment should be set aside when sufficient reason is shown for defendant's failure to appear and answer. Where defendant was ill though he failed to notify court or opposing counsel. Mistrot Bros. & Co. v. Wilson [Tex. Civ. App.] 14 Tex. Ct. Rep. 314, 91 S. W. 870.

46. A defendant who moves to vacate a default judgment on the ground of insufficient service of process and thus seeks to avoid making any defense cannot invoke the rule that a default will be set aside and defendant allowed to try the case on its merits when there is reasonable ground for such

power to open a default is not retroactive.[47] Since a motion to open a default may be granted upon terms it is not barred by the denial of a previous motion to adjourn.[48] Applicant must show a clear case of diligence in preparing for trial[49] and in moving to set aside the judgment, and failure to do so is ground for refusing relief regardless of merits.[50] He must also show a meritorious defense[51] and that he was prevented from making it by fraud,[52] accident, mistake,[53] inadvertence, surprise, or excusable neglect.[54] Negligence of an agent[55] or of counsel[56] is gen-

action. Olender v. Crystalline Mln. Co. [Cal.] 86 P. 1082.

47. The act of 1902 (Acts 1902, p. 117), authorizing the judge of the city court of Atlanta to open defaults, did not authorize the opening of a judgment by default entered prior to the passage of the act. Morris v. Duncan [Ga.] 54 S. E. 1045.

48. Motion at special term to open inquest could not be denied on ground that it was a renewal of a motion to adjourn the case made at the trial term. Marchesini v. Scaccianoce, 110 App. Div. 130, 96 N. Y. S. 1095.

49. Refusal proper where affidavits clearly show negligence. Scottish Nat. Ins. Co. v. Adams, 122 Ill. App. 471. In such case the court will not consider the merits. Gordon v. Gordon [S. D.] 105 N. W. 244. Gross neglect in relying on clerk to send copy of declaration and consequent failure to plead. Mutual Ins. Co. v. Carnahan, 122 Ill. App. 540.

50. Lewis v. Cunningham [Ariz.] 85 P. 244. Defendant permitted five weeks to elapse from entry of judgment before applying to have it reopened. Bass v. Carley, 96 N. Y. S. 1023. That defendant was extremely busy and entirely overlooked the necessity for answering does not excuse three months' delay. Id.

51. Affidavits on motion to set aside a default judgment under § 4229 Rev. St. 1887, must show that the default occurred through mistake, inadvertence, surprise, or excusable neglect, and also that defendant has a meritorious defense. Holzman & Co. v. Henneberry [Idaho] 83 P. 497. Mere affidavit of defendant's attorney that defendant had good defense as shown by the answer which was only a general denial held insufficient to justify vacation. Clews v. Peper, 98 N. Y. S. 404. A default will not be vacated merely to allow a demurrer to the complaint. Defendant must present an affidavit of merits. Bowen v. Webb [Mont.] 85 P. 739. Held improper for chancellor to set aside order pro confesso without good cause shown and without requiring filing of answer showing merits. Shannon's Code § 6185. Bashaw v. Temple, 115 Tenn. 596, 91 S. W. 202. But to restrain the enforcement of a default judgment on the ground that it is void for want of service, it is **not necessary** for plaintiff to allege or prove a valid defense to the action. Mosher v. McDonald & Co., 128 Iowa, 68, 102 N. W. 837.

52. That defendant had been induced by plaintiff's attorney to waive service of summons was no ground for setting aside the judgment on the ground of fraud where plaintiff had opportunity to defend but failed to do so. Divorce. Williamson v. Williamson [Okl.] 83 P. 718.

53. On motion to set aside default and vacate judgment entered for plaintiff's failure to answer a cross complaint, showing held insufficient to authorize relief on ground of inadvertence or mistake on part of plaintiff's attorney in demurring to answer only and not to cross complaint. Western Loan & Sav. Co. v. Smith [Idaho] 85 P. 1084.

54. Affidavits on motion to set aside a default judgment under § 4229 Rev. St. 1887, must show that the default occurred through mistake, inadvertence, surprise, or excusable neglect. Western Loan & Sav. Co. v. Smith [Idaho] 85 P. 1084. To justify the vacation of a default, defendant must show that he proceeded with diligence; that the default occurred through his excusable neglect; that the judgment will affect him injuriously; and that he has a defense on the merits. Bowen v. Webb [Mont.] 85 P. 739.

Motion granted: On claim that defendant's neglect was due to plaintiff's promise to notify defendant before taking further steps, evidence held not to show abuse of discretion in relieving from the default. Menasha Wooden Ware Co. v. Michelstetter, 126 Wis. 427, 105 N. W. 927. Circumstances under which the attendance of an important witness could not be secured held to require setting aside of default. Richard v. National Distilling Co., 95 N. Y. S. 547. Where defendant's attorney was actually engaged in another case and had been denied adjournment, default should be set aside. Catalano v. North British & Mercantile Ins. Co., 99 N. Y. S. 524. Where defendants who had answered to the merits were granted a commission to take testimony in Europe but the same was not executed because defendant's attorney intended to make a trip to Europe and could thus obtain the evidence without a commission, but the attorney was unexpectedly delayed in Europe and did not return until after inquest taken, the inquest should be set aside on terms. Marchesini v. Scaccianoce, 110 App. Div. 130, 96 N. Y. S. 1095. A foreign corporation held not guilty of inexcusable delay where though it had knowledge of the pendency of the suit, service was made on its state agent who sent the papers to the supposed address of defendant's manager, but because the latter had absconded, defendant did not have notice of service until 10 days after it was made and defendant then promptly acted. Stretch v. Montezuma Min. Co. [Nev.] 86 P. 445. Grant of default held abuse of discretion where defendant's counsel had no notice of denial of his motion to make complaint more specific. Douglas v. Badger State Mine, 41 Wash. 266, 83 P. 178.

Motion denied: Where plaintiff's attorney was denied an adjournment for the purpose of enabling him to try another case in the supreme court and default was entered because of his absence, but it appeared on motion to vacate that the supreme court case was not on the calendar until a later day. Turtel v. Greenwald, 96 N. Y. S. 1074. No

erally chargeable to the principal; but a default will be set aside in a clear case where an attorney abandons the defense or prosecution without notice to his client.[57] Mere clerical errors,[58] or an immaterial amendment to the complaint,[59] is no ground for vacation; and the fact that after a default by one defendant and before the severance of the action an amended complaint is served upon his codefendant is no ground for setting aside a default against the former on the original complaint stating a good cause of action.[60] The grantee of a defendant in an action to determine adverse claims to realty wherein judgment has been rendered by default may move the court to vacate the judgment and for leave to defend,[61] but his right to that relief depends upon whether the defendant, to whose rights he succeeded, would on the facts disclosed be entitled to it.[62]

Procedure.[63]—In New York, a motion will no longer lie in the appellate term of the supreme court to open a default judgment entered in the municipal court.[64] The time within which the motion must be brought is variously regulated by statute.[65] In West Virginia pleading to issue operates to set aside an office judgment and no formal entry setting it aside is required.[66] The affidavit of merits must be made, as in other cases, by the person having personal knowledge of the facts stated.[67] Under the present New York practice permitting an inquest where the answer is unverified and there is no affidavit of merits,[68] upon plaintiff's application

abuse of discretion in refusing to open default because defendant did not suppose that service could be made on its agent at a certain place and because the agent failed to notify defendant. Southern Bell Tel. & T. Co. v. Parker, 119 Ga. 721, 47 S. E. 194. Mere **press of business** of defendant's attorney whereby he made mistake as to day required for appearance held not to show excusable neglect. Bowen v. Webb [Mont.] 85 P. 739. Showing held insufficient to authorize setting aside of default judgment on ground of inadvertence, surprise, or excusable neglect. Holzman & Co. v. Henneberry [Idaho] 83 P. 497.

55. Failure of agent to pay taxes no ground for setting aside default tax judgment. Warner v. Miner, 41 Wash. 98, 82 P. 1033. Corporation relieved from default where agent under advice of counsel ignored process. Roberts v. Wilson [Cal. App.] 84 P. 216.

56. Where defendant failed to answer, he could not plead the negligence of his attorneys as a ground for setting aside the judgment. United States v. Rio Grande Dam & Irrigation Co. [N. M.] 85 P. 393.

57. Where defendant's attorney promised to notify defendant when the case would be tried but defendant heard nothing until after judgment was entered, it was an abuse of discretion not to open the default where defendant had a good defense. Evans v. Terrell [Tex. Civ. App.] 15 Tex. Ct. Rep. 445, 95 S. W. 684.

58. Not where judgment was filed on August 13th, but clerk by mistake filled in blank at its beginning so as to make it appear that it was signed on the 19th. Warner v. Miner, 41 Wash. 98, 82 P. 1033.

59. Where after defendant's default plaintiff's petition was amended but the amendment did not materially change the cause of action, it did not open the petition to demurrer or plea. Southern Bell Tel. & T. Co. v. Parker, 119 Ga. 721, 47 S. E. 194.

60. Fuller Buggy Co. v. Ramsey, 98 N. Y. S. 1085.

61. Kipp v. Clinger [Minn.] 106 N. W. 108.

62. When addressed to court's discretion under Gen. St. 1894, § 5267, it must appear that motion was made with diligence and within one year from actual notice of judgment. Kipp v. Clinger [Minn.] 106 N. W. 108. An affidavit by such grantee stating generally that defendant, his grantor, had no actual notice or knowledge of the judgment is hearsay and insufficient to show want of notice in defendant. Id.

63. See 5 C. L. 986.

64. Will not lie under Code Civ. Proc. § 3064, applicable to justice courts since by § 363 of the Municipal Court Act (Laws 1902, c. 580), § 3064 Code Civ. Proc. does not apply to municipal courts. Catalano v. North British Mercantile Ins. Co., 99 N. Y. S. 524.

65. Code § 274 limiting to one year the time for setting aside judgments for surprise or excusable neglect does not apply to a judgment which is irregular and hence a default judgment entered when defendant had a valid answer on file can be set aside after one year. Becton v. Dunn, 137 N. C. 559, 50 S. E. 289. Motion to set aside default judgment rendered for plaintiff on appeal from the justice to the circuit court, made at a subsequent term, held too late under Rev. St. 1899, § 777. Bader v. Jones [Mo. App.] 96 S. W. 305. Under Code Civ. Proc. § 134, filing and service of notice of motion to set aside judgment rendered out of term must be made within ten days after rendition. United States v. Rio Grande Dam & Irrigation Co. [N. M.] 85 P. 393.

66. Hi Williamson & Co. v. Nigh, 58 W. Va. 629, 53 S. E. 124.

67. That affiant had difficulty in making his counsel understand his defense held mere hearsay as it was for counsel to say how well he understood his client. Moody v. Reichow, 38 Wash. 303, 80 P. 461. See, also,

for inquest, defendant may file his affidavit of merits forthwith,[69] and defendant will thereupon be allowed to defend the action.[70] An affidavit of merits is not required where a default is obtained through misapprehension or mistake, occasioned by act of the other party or his attorney.[71] Counter affidavits are permissible on the question of defendant's diligence,[72] but not on the merits.[73] The right to a jury trial is waived if not asserted at the time of filing the petition.[74] Except in certain cases[75] the court may, on setting aside a default, impose such terms as will reimburse plaintiff such expenses incurred in obtaining the default as will be rendered futile on its vacation, together with reasonable motion costs;[76] but under a statute authorizing the court to set aside judgments "upon such terms as may be just" it is not essential that terms of some kind be imposed in all cases,[77] and failure to impose any terms is not necessarily an abuse of discretion.[78] Terms should be imposed, however, where the default is willful and is set aside only for the protection of the client from misconduct on the part of his attorney.[79]

Appeal.[80]—Ordinarily a default judgment is not appealable,[81] the remedy being by motion to open in the lower court and appeal from the order refusing to vacate;[82] but a judgment rendered for failure to answer over after the overruling

Affidavits of Merits of Claim or Defense, 7 C. L. 59.

68. The practice of permitting an inquest for want of an affidavit of merits whether the answer was verified or not was changed by Code Civ. Proc. § 980 (Laws 1876, p. 451, c. 431), so as to permit inquests only in case of unverified answers and failure to file affidavits of merits. Beglin v. People's Trust Co., 95 N. Y. S. 910.

69. The affidavit of merits required to prevent the taking of an inquest when the answer is unverified need not accompany the answer but may be served and filed at any time before actual inquest taken. Beglin v. People's Trust Co., 95 N. Y. S. 910.

70. Where defendant's attorney on plaintiff's application for inquest appeared and offered, if the practice so required, to serve and file an affidavit of merits and to defend, the application should be allowed especially where the practice was uncertain. Beglin v. People's Trust Co., 95 N. Y. S. 910.

71. Not necessary where plaintiff's attorney sent notice of trial by mail in registered package marked "personal delivery only" and defendant could not reach the postoffice on account of illness. Sears v. Tenhagen, 100 N. Y. S. 469.

72. Failure to plead. Mutual Ins. Co. v. Carnahan, 122 Ill. App. 340.

73. Error to permit such filing. American Mail Order Co. v. Marsh, 118 Ill. App. 248. Sufficient if answer states a valid defense. Olson v. Sargent County [N. D.] 107 N. W. 43.

74. Petition under Code 1896, § 3342. Right waived under Acts 1888-89 p. 997. Baker v. Jackson [Ala.] 40 So. 348.

75. Where under the circumstances defendant should have had a reasonable adjournment, his motion to open the default should be granted without the imposition of terms. McCormick v. Shea, 97 N. Y. S. 358. On setting aside a default by an intermediate lienor in a surplus proceeding he should not be conditioned to pay costs incurred by others in no way attributable to his act. Irving Sav. Inst. v. Smith, 100 App. Div. 460, 91 N. Y. S. 446. See, also, Costs, 7 C. L. 956.

76. Menasha Wooden Ware Co. v. Michelstetter, 126 Wis. 427, 105 N. W. 927. Where a default was opened without legal right defendant could not complain of the imposition of costs entered in the judgment against him and of the motion. Fuller Buggy Co. v. Ramsey, 98 N. Y. S. 1085.

77. Not necessary under Rev. Codes 1899, § 5298 authorizing setting aside of judgments rendered against parties through surprise, etc., "upon such terms as may be just." Olson v. Sargent County [N. D.] 107 N. W. 43.

78. Default set aside under Rev. Codes 1899, § 5298. Olson v. Sargent County [N. D.] 107 N. W. 43. Where settlement had been made with plaintiff personally without the knowledge of his attorney, the fact that defendant did not notify plaintiff's attorney who thereafter continued proceedings did not entitle the latter to terms. Id. That plaintiff had filed notice of attorney's lien for costs and disbursements did not necessarily entitle him to reimbursement for money expended in procuring the judgment. Id.

79. Where for three consecutive days defendant's counsel answered "ready" to the call of the calendar when in fact he was not ready but absented himself when the case was reached and permitted an inquest to be taken, the default should have been opened only on defendant's paying all of plaintiff's costs and disbursements after notice of trial, and attorney's fee, and giving a bond. Herbert Land Co. v. Lorenzen, 99 N. Y. S. 937.

80. See 5 C. L. 987.

81. See Appeal and Review, 7 C. L. 138. The rule regarding default judgments in the municipal court is now the same as in courts of record, and an appeal from such judgments does not lie in the first instance. Catalano v. North British & Mercantile Ins. Co., 99 N. Y. S. 524.

82. Where a default has been rendered in the municipal court, defendant's remedy is by motion to open, and appeal as provided by Municipal Court Act, Laws 1902, p. 1563, c. 580, § 257. Catalano v. North British & Mercantile Ins. Co., 99 N. Y. S. 524.

of a demurrer is not such a default as will preclude the right of appeal.[88] When the court upon opening a default requires the judgment to stand as security for whatever judgment plaintiff may finally recover against defendant, such security extends to a judgment on appeal.[84] An appellate court will not disturb the ruling of the trial court unless an abuse of discretion is clearly shown.[85] All things are presumed in favor of the ruling.[86] The sufficiency of the complaint will be tested as upon demurrer.[87] Findings of fact may be waived by failure to appear at the trial.[88]

§ 4. *Operation and effect of default and proof of damages.*[89]—A party in default is precluded from pleading further in the case without permission of the court.[90] After appearance defendant is entitled to notice of inquest,[91] but a statute providing that after appearance, a defendant is entitled to notice of subsequent proceedings in the cause, does not apply where defendant has been adjudged to be in default.[92] Where service is personal,[93] though a default does not admit conclusions of law,[94] it confesses every material allegation of the petition well pleaded.[95] Hence, the admission in evidence of the contract sued on[96] or a mere statement by plaintiff's witness as to the amount due from defendant is sufficient to sustain an assessment of damages.[97] Where under a statute defendant gives notice of his intention to deny any of plaintiff's allegations upon the hearing, the burden devolves upon him to prove his denials.[98] Under a statute imposing upon the court the duty of assessing damages with or without a jury, the court may allow more or less than the jury awarded.[99] In many states, by statute, the clerk is au-

83. Judgment taken without notice after overruling defendant's demurrer to complaint. Mathot v. Triebel, 102 App. Div. 426, 92 N. Y. S. 512.

84. Defendant's motion to cancel judgment while plaintiff's appeal from judgment for defendant was pending, denied. Fuller Buggy Co. v. Cudney, 100 N. Y. S. 282.

85. See Appeal and Review, 7 C. L. 226. Discretion must be exercised within the established rules of law. Holzman & Co. v. Henneberry [Idaho] 83 P. 497. Refusal to set aside will be reviewed where discretion is abused. Evans v. Terrell [Tex. Civ. App.] 15 Tex. Ct. Rep. 445, 95 S. W. 684.

86. Conceding that a proffered answer in a motion to vacate a default may perform the office of an affidavit of merits, the appellate court will not presume that it was offered as such. Bowen v. Webb [Mont.] 85 P. 739. Relief for "inadvertence, etc.," should be applied for in the lower court under Code Civ. Proc. § 473, and not by appeal on the judgment roll as every presumption is resolved in favor of the regularity of the proceedings unless the defect is disclosed in the record. Johnston v. Callahan, 146 Cal. 212, 79 P. 870.

87. If allegations are insufficient to sustain judgment it will be reversed. Dame v. Cochiti Reduction & Imp. Co. [N. M.] 79 P. 296.

88. Appeal determined on pleadings and judgment alone under Code Civ. Proc. §§ 634, 670. Johnston v. Callahan, 146 Cal. 212, 79 P. 870.

89. See 5 C. L. 987.

90. Plea filed without authority after default will be stricken. Morris v. Duncan [Ga.] 54 S. E. 1045.

91. Error to hold inquest without notice. American Mail Order Co. v. Marsh, 118 Ill. App. 248. A demurrer to the complaint being equivalent to a general appearance (Code Civ. Proc. § 421), where the demurrer is overruled, though defendant fails to answer over he is entitled under § 1219 to notice of the assessment of damages by the clerk as well as of the application to the court for judgment. Mathot v. Triebel, 102 App. Div. 426, 92 N. Y. S. 512.

92. Ballinger's Ann. Codes & St. § 4886. No notice where default was entered in foreclosure proceedings. Hyde v. Heaton [Wash.] 86 P. 664.

93. An order pro confesso is an admission of the bill by the defendants served with process, but merely puts the bill in issue as to one served by publication as a non resident without attachment. Shannon's Code § 6181. Bashaw v. Temple, 115 Tenn. 596, 91 S. W. 202.

94. Does not admit that complaint contains true construction of written instrument sued on, or conclusions of law. Dame v. Cochiti Reduction & Imp. Co. [N. M.] 79 P. 296.

95. Parratt v. Hartsuff [Neb.] 106 N. W. 966; Scottish Nat. Ins. Co. v. Adams, 122 Ill. App. 471.

96. For payment of money. Gordon v. Gordon [S. D.] 105 N. W. 244.

97. Scottish Nat. Ins. Co. v. Adams, 122 Ill. App. 471.

98. Where in an action against a town for injuries from a defective highway defendant suffered a default, and gave notice of its intention to deny that the place was a public highway, the burden was upon defendant, upon a hearing in damages, to prove the denial. Paulsen v. Wilton [Conn.] 61 A. 61.

99. Gen. Laws 1896, p. 830, c. 243, § 5. Dyson v. Rhode Island Co., 25 R. I. 600, 57 A. 771. The question of the excessiveness of dam-

thorized to enter final judgment in actions on contract for liquidated money demands,[1] but where extrinsic evidence is necessary to ascertain the amount due, plaintiff is not entitled to judgment without an inquest,[2] and the proper practice in an action at law in such case is to have the damages assessed by a jury.[3]

DEFINITE PLEADING; DEL CREDERE AGENCY; DEMAND; DEMURRAGE; DEMURRERS; DEMURRER TO EVIDENCE; DEPARTURE, see latest topical index.

DEPOSITIONS.[4]

§ 1. Occasion or Necessity; Right to Take (1129).
§ 2. Procedure to Obtain Deposition (1130).
§ 3. Taking the Testimony or Evidence Adduced (1131).
§ 4. Returning and Filing (1132).
§ 5. Suppression and Objections before Trial (1133).
§ 6. Use as Evidence (1135).

§ 1. *Occasion or necessity; right to take.*[5]—The right to take the deposition of witnesses,[6] in or out of the state,[7] is governed entirely by statute.[8] The court must have jurisdiction of the case, and it must appear that the evidence sought is material to the issues,[9] and that a deposition is necessary in order to obtain it;[10] but an objection to the taking of a deposition that the action is untenable and cannot be maintained is invalid.[11] Examination of the adverse party before suit by way of discovery is allowed in some states,[12] but depositions proper can be taken only after

ages awarded by the jury was not before the court on petition for a new trial where the court of common pleas had not assessed the damages nor approved or disapproved the finding of the jury. Dyson v. Rhode Island Co., 25 R. I. 600, 57 A. 771.

1. Plaintiff as surety on defendant's bond was compelled to pay a judgment for penalty and costs of trial and several appeals, and counsel fee and brought action against defendant for reimbursement. Upon defendant's stipulation, judgment absolute was awarded plaintiff in the court of appeals. Held, the penalty and costs being liquidated amounts could be allowed without application to the court and also the counsel fee disbursed in defense of the action, under Civ. Code §§ 420, 1212, providing for assessment without application to the court upon default in an action for breach of contract to pay money, or money received or disbursed, and the procedure thereon. City Trust, Safe Deposit & Surety Co. v. American Brewing Co., 182 N. Y. 285, 74 N. E. 948.

2. Where plaintiff asked for a lien for services rendered and that its extent "be ascertained and defendant adjudged to pay the same" and defendant failed to answer after the overruling of his demurrer and the rendition of an interlocutory judgment which did not direct final judgment, plaintiff was not entitled to judgment for the amount of his demand with interest and costs without proceeding to ascertain the amount as per Code Civ. Proc. §§ 1222, 1223. Mathot v. Triebel, 102 App. Div. 426, 92 N. Y. S. 512.

3. Parker v. Dekle, 46 Fla. 452, 35 So. 4. Rev. St. 1892, § 1035, contemplates that the clerk can enter final judgment after default only where the cause of action is purely a money demand founded upon contract. Where extrinsic evidence is necessary to ascertain the amount of recovery the clerk cannot entertain such evidence or found a final judgment thereon. Id. Upon a hearing in damages after the overruling or sustaining of a demurrer, the case stands with reference to the evidence necessary for plaintiff and admissible for defendant precisely as upon a default. Id. To ascertain the reasonableness of an attorney's fee requires testimony, and entry of judgment on a mere affidavit by plaintiff heard by the clerk is error. Id.

4. This article includes the various proceedings for taking the testimony of witness before trial for use therein. The equitable remedy of discovery, and proceedings to force disclosure of facts within the knowledge of the adverse party or a witness, or to procure inspection of documents or person, are treated elsewhere. See Discovery and Inspection, 5 C. L. 1019, and post, 7 C. L. 1167.

5. See 5 C. L. 988.

6. A party to the action is a "witness" within the meaning of statutes authorizing the taking of depositions. Under Mill's Ann. Code §§ 341, 348, authorizing the taking of a deposition within the state when the witness is a party, and the taking of a deposition of a "witness" out of the state, the deposition of a party out of the state may be taken. Doherty v. Healy [Colo.] 86 P. 323.

7. Under § 2024, Code Civ. Proc., authorizing the taking of the deposition of a witness "out of the state," it is not necessary that the witness be a nonresident. In re Dolbeer's Estate [Cal.] 86 P. 695.

8. See 5 C. L. 988.

9. Where testimony as to insanity of defendant's ancestors was not shown to be material. Clements v. State [Fla.] 40 So. 432.

10. A rule of court authorizing either party to take depositions of witnesses without regard to whether they are aged, infirm, or going witnesses, on eight days' notice, is invalid. International Coal Min. Co. v. Pennsylvania R. Co. [Pa.] 63 A. 880.

11. These are questions for trial court. Hartman v. Feenaughty, 139 F. 887.

suit,[13] the time for such taking varying in the different states.[14] Bills to perpetuate testimony will not lie to perpetuate the deposition of a deceased witness, either in equity[15] or ordinarily under the codes.[16]

The Federal conformity act[17] did not in any way affect or impair the power of the Federal courts to take testimony under previous laws,[18] and the testimony of any witness, including the parties to the cause,[19] may be taken in a civil action by deposition de bene esse, when such witness lives more than one hundred miles from the place of trial.[20]

§ 2. *Procedure to obtain deposition.*[21]—The motion for leave to take a deposition is usually made on affidavit of the party, unless another is better apprised of the facts,[22] showing among other things the residence of the witness[23] and the materiality of his testimony,[24] but a waiver of an order for a commission is a waiver of an affidavit of materiality.[25] The requisites of the order,[26] the time when it may

12. See Discovery and Inspection, 7 C. L. 1167.

13. Under Pub. St. 1901, c. 225, § 13, authorizing the taking of depositions by a defendant in a criminal case, a criminal case must be pending before the deposition can be taken. One merely bound over to await action of grand jury could not take deposition of prosecuting witness. State v. Naud [N. H.] 63 A. 673.

14. In California, under Code Civ. Proc. § 2021, subd. 3, and § 2032, a deposition may be taken when it is believed the witness will be absent when his testimony is "required," and so a deposition taken during the trial may be used on proof that witness left the state two days before and was then absent. In re Dolbeer's Estate [Cal.] 86 P. 695. Upon a proper application of defendant in a criminal case, under § 2912, Rev. St. 1892, the court cannot refuse a commission to take the testimony of an absent witness, but the application must be made at the time of the arraignment, and defendant cannot await his pleasure thereafter. Clements v. State [Fla.] 40 So. 432.

15, 16. Morris v. Parry, 110 Mo. App. 675, 85 S. W. 620. The plaintiff, in a suit against a husband and wife to establish a lost deed, procured a deposition proving the execution of such deed. Husband and wife disclaimed as to plaintiff's land and the suit was dismissed. After the death of the husband and deponent the wife sued the owner of another part of the land for dower. Held that defendant could not maintain a bill to "establish and perpetuate" as testimony to establish the lost deed in the action for dower, the testimony of the dead witness as contained in the deposition on file. Id.

Note: In this connection see 1 Greenleaf on Ev. § 325; 3 Greenleaf on Ev. § 325; Story's Eq. Juris. §§ 1505-1508; Bispham's Prin. of Eq. §§ 535, 567, 573; Adams, Eq. § 24. Quaere: Would not a certified copy of the deposition have been admissible?

On bills to perpetuate testimony and bills de bene esse, see Fletcher Eq. Pl. & Pr. §§ 795-803.

17. Act March 9, 1892, allowing the taking of depositions in the Federal courts according to the laws of the states where the courts convene.

18. Plaintiff could take defendant's deposition under Rev. St. § 863, and not under the New York Code. Hartman v. Feenaughty, 139 F. 887.

19. A defendant, in an action at law pending in a circuit court of the United States, who resides out of the district and more than 100 miles from the place of trial, may be examined as a witness by plaintiff under Rev. St. §§ 863 (U. S. Comp. St. 1901, p. 661). Hartman v. Feenaughty, 139 F. 887. A plaintiff in a Federal court, who is a citizen of another state and resides more than 100 miles from the place of trial, may be compelled by defendant to appear and testify by deposition de bene esse in advance of the trial, under Rev. St. § 863 (U. S. Comp. St. 1901, p. 661). Blood v. Morrin, 140 F. 918. Such deposition need not be taken at the place where the witness resides, but may be taken at any place where he is found and served with subpoena. Id.

20. Rev. St. § 863 (U. S. Comp. St. 1906, p. 661). A party whose right to sue in the Federal court depends upon his residence in another state cannot be considered as residing at the place of trial for the purpose of testing the right of his adversary to take his deposition, merely because he was at that place at the time the subpoena was served upon him. Blood v. Morrin, 140 F. 918.

21. See 5 C. L. 989.

22. On motion for the deposition of a third person, an affidavit of plaintiff's attorney that the third person was a physician, that he had attended plaintiff, and intended to leave the state, held insufficient, no reason being shown why the affidavit of the third person could not be procured. Vincent v. Kilmer, 107 App. Div. 499, 95 N. Y. S. 343.

23. Not necessary in personal injury case where plaintiff or attorney did not know exact place, and testimony of physician was material to plaintiff's case. Dambmann v. Metropolitan St. R. Co., 110 App. Div. 165, 97 N. Y. S. 91. That an alleged nonresident witness, for whose testimony a commission is asked had been seen in a restaurant in the county of trial, did not tend to disprove his nonresidence. Id.

24. Art. 436, Code of Practice, requiring an affidavit of materiality as a condition to granting a commission to take testimony of a nonresident witness, does not apply to proceedings in the city court of New Orleans. Wertheimer v. Favalora [La.] 40 So. 848.

be made,[27] and the form and requisites of the commission,[28] depend on the terms of the statute. The privilege of taking the testimony wholly or partly on oral examination is given in certain cases,[29] but open commissions are granted only in extreme cases.[30]

§ 3. *Taking the testimony or evidence adduced. Officers authorized to take.*[31] —A commission cannot be executed by an officer to whom it is not addressed.[32] An attorney in the case cannot act as commissioner[33] in the absence of a waiver.[34]

Notice of hearing and attendance of witness.[35]—Notice of hearing must usually be served upon the opposite party,[36] service on his attorney not being sufficient unless the irregularity is waived.[37] Since a notary does not exercise judicial func-

25. Under art. 436, Code of Practice, requiring affidavit of materiality as condition to granting of commission. Wertheimer v. Favalora [La.] 40 So. 848.

26. An order for a commission to examine a nonresident material witness, upon interrogatories annexed to the commission, as provided in Code Civ. Proc. § 887, should provide that it is issued to examine upon interrogatories annexed thereto, and the witness should be named therein. Ordway v. Radigan, 100 N. Y. S. 121. Under Code Civ. Proc. § 893, allowing the court in its discretion to direct the issuance of a commission without written interrogatories, and that the deposition be taken on oral questions, or partly on oral questions and partly on interrogatories, the order must expressly provide that the depositions be taken on oral questions or partly on oral questions and partly on interrogatories. Id.

27. Under § 2913, Rev. St. 1892, an order for a commission to take testimony of absent witness may be made in term or vacation upon application of defendant in a criminal action. Clements v. State [Fla.] 40 So. 432.

28. Lack of indorsement held not to invalidate commission. St. Louis S. W. R. Co. v. Kennedy [Tex. Civ. App.] 96 S. W. 653.

29. Where complainant's notice for the taking of testimony signifies a desire that the testimony be taken orally, defendants will be allowed to cross-examine complainant's **foreign witness** orally, if they so elect, immediately following the close of the direct examination Edison Elec. Co. v. Westinghouse, Church, Kerr & Co., 138 F. 460. Should defendants elect to do so, complainants will be given leave to withdraw direct interrogatories filed by them and examine the witness orally. Id. Equity rule 67, authorizing the evidence in a cause to be taken orally upon application by either party, is applicable to depositions taken on commission issued under Rev. St. § 866 (U. S. Comp. St. 1901, p. 663), and where a party applies for such commission to take testimony of foreign witnesses, the court has power to permit the adverse party to cross-examine such witnesses orally. Encyclopaedia Britannica Co. v. Werner Co., 138 F. 461. See Forms Nos. 187, 188, in 1 Loveland's Forms of Federal Practice, on right to orally examine witnesses in foreign country under a commission or dedimus potestatem. Under Code Civ. Proc. § 895, providing that an applicant for a commission to take testimony cannot be examined in his own behalf, under §§ 893, 894, providing for an open commission and for one to examine wholly or partly on oral questions, a defendant in an action against him and another for goods sold to them is not entitled to the examination of the other defendant on an open commission or a commission to examine wholly or partly on oral questions. Ordway v. Radigan, 100 N. Y. S. 121.

30. Showing as to nonresidence of a codefendant held insufficient to justify the issuance of an open commission, under Code Civ. Proc. § 894. Ordway v. Radigan, 100 N. Y. S. 121. Moving papers held not to justify oral examination of nonresident physician. Dambmann v. Metropolitan St. R. Co., 110 App. Div. 165, 97 N. Y. S. 91.

31. See 5 C. L. 990.

32. Where addressed to "any judge, justice of the peace, or Louisiana commissioner," it cannot be executed by a notary. DeRenzes v. DeRenzes, 115 La. 675, 39 So. 805. Under Rev. St. 1895, art. 2284, providing that "the officer to whom commission is directed" shall proceed, etc., a notary of N. parish could not take on commission addressed to notary of C. parish. German Ins. Co. v. Gibbs, Wilson & Co. [Tex. Civ. App.] 15 Tex. Ct. Rep 798. 92 S. W. 1068.

33. Member of law firm which had moved to dismiss complainant's bill was, while such motion was pending, disqualified to act as commissioner Code 1896, § 1834. Bledsoe v. Jones [Ala.] 40 So. 111.

34. No waiver where complainant did not know that person named in the notice was the same person who had appeared for defendant in the case. Bledsoe v. Jones [Ala.] 40 So. 111.

35. See 5 C. L. 990.

36. Service of notice on the principal legatee of a will held sufficient compliance with Code § 4689, requiring service on "the opposite party," where such legatee had filed objections to a prior will and described herself as proponent, and there was no attorney of record in support of the will contested. In re Jones' Estate [Iowa] 106 N. W. 610. In **Louisiana** no notification of the time and place of taking the deposition need be given the opposite party if interrogatories are attached to the commission and communicated to him, and an opportunity is afforded him to cross them. DeRenzes v. DeRenzes, 115 La. 675, 39 So. 805.

37. Could not be used where client resided within the state. Webb v. Ritter [W. Va.] 54 S. E. 484. Mere silence of attorney at time of service and of the party after knowledge thereof is not a waiver. Id.

tions in the taking of a deposition,[38] he must confine himself strictly to the measures prescribed by statute in enforcing the attendance of witnesses.[39] Provision is usually made for subpoena to procure attendance of the deponent.[40] The power to punish for nonattendance is sometimes conferred on the officer taking the deposition,[41] while in other states the power is in the court.[42]

Proceedings at hearing.[43]—Witnesses are bound to answer all material questions lawfully propounded,[44] but not those calling for incompetent, impertinent, or privileged matters.[45] It is not essential that the commissioner himself take down the answers of a witness in his own handwriting,[46] but the taking down of the answers[47] and the conduct of the examination generally must be so ordered as to avoid improper influences upon the witness.[48]

§ 4. *Returning and filing.*[49]—The officer taking the deposition is generally required to return it directly to the court, or other tribunal having charge of the case,[50] within a specified time,[51] duly certified and authenticated.[52] The fact that

38. Does not constitute a law court. Powers derived solely from statute. In re Butler [Neb.] 107 N. W. 572.

39. Notary could not commit witness to jail for failure to respond to subpoena. Punishment could not exceed the statutory fine of $50. In re Butler [Neb.] 107 N. W. 572.

40. A subpoena issued under the commission of a foreign court to take testimony within the state will be vacated where the foreign court is without jurisdiction. Canadian court without jurisdiction to wind up a West Virginia corporation. In re Great Northern Const. Co., 100 N. Y. S. 564.

41. Power to punish by fine only. In re Butler [Neb.] 107 N. W. 572.

42. Justice of peace could not punish where superior court, in which case was tried, had power to punish for contempt. Gay v. Thorpe [Cal. App.] 82 P. 221.

43. See 5 C. L. 991. Irregularities of procedure as ground for suppression, see post. § 6.

44. Unless it clearly appear that by so doing he would be injured in his business or personally, or that the questions are frivolous, or that the information was procured or the papers called for were prepared exclusively for purposes of defense in an action by the party for whose benefit the deposition is being taken. In re Schoepf, 6 Ohio C. C. (N. S.) 590. Not bound to answer questions or produce documents unless it is "lawfully ordered." Ex parte Schoepf [Ohio] 77 N. E. 276. Where in the Federal practice a deposition is taken in an action at law in another district, under Rev. St. § 863 (U. S. Comp. St. 1901, p. 661), and a witness refuses to answer on the ground of privilege or the inadmissibility of the evidence on other grounds, and the matter is certified to the circuit court of the district where the testimony is being taken, such court will require the witness to answer all questions in conformity with the equity practice, an opportunity being given for review in the appellate court in contempt proceedings should the witness still refuse to answer. Butte & B. Consol. Min. Co. v. Montana Ore Purchasing Co., 139 F. 843.

45. Where not pertinent to issues already made or necessary to case of party calling for it. Officer could not punish for contempt for refusal to answer. Ex parte Schoepf [Ohio] 77 N. E. 276. In action for personal injuries plaintiff could not enforce production of report by conductor and motorman of street railway to claim agent whose deposition was taken. Id. Where a certain defense is eliminated from the case, the court of another district in which testimony is being taken will on objection exclude testimony offered in support of such defense. Independent Baking Powder Co. v. Boorman, 137 F. 995.

46. May cause it to be done by witness himself or some impartial person. Code 1896, § 1841. Ebersole v. Southern Bldg. & Loan Ass'n [Ala.] 41 So. 150. Under Superior Court Rule 24 (71 N. H. 679), an exception to the admission of a deposition on the ground that it was written by a stenographer under the direction of the commissioner is untenable. Gallagher v. Cotton [N. H.] 64 A. 583. Under a statute requiring the officer to write the deposition, it is sufficient if the writing be actually done by a person under his immediate direction. Where deposition was written by notary's clerk. Civ. Code Prac. § 582. Western Union Tel. Co. v. Corso & Sons [Ky.] 89 S. W. 212.

47. That witness dictated his answers to a stenographer in the office of defendant's attorney, not necessarily a fatal irregularity. Tarlton v. Orr [Tex. Civ. App.] 13 Tex. Ct. Rep. 913, 90 S. W. 534.

48. Presence of counsel for witness who read the interrogatories to him, not a fatal irregularity. Southern Pac. Co. v. Wilson [Ariz.] 85 P. 401. Suggestions to witness by party who was husband of witness held not fatal irregularity. Gulf, etc., R. Co. v. Luther [Tex. Civ. App.] 14 Tex. Ct. Rep. 195, 90 S. W. 44.

49. See 5 C. L. 991. Irregularities in authentication and return as ground for suppression, see, also, post § 5.

50. But in the case of a **return to arbitrators** where the submission simply provided for taking a deposition without any formal commission, before a notary, to be returned to the arbitrators, the fact that, through mistake, the deposition was mailed to one of the parties, and not directly to the arbitrators, did not render it inadmissible where it was placed in the hands of the arbitrators by the party to whom it was

the commissioner returns answers made by one not named in the commission does not vitiate the deposition of the person named.[53] In Texas the postmaster mailing a deposition is required to sign a receipt showing that he received it from the officer before whom it was taken.[54] The refusal of the court to order the filing of a deposition taken for the adverse party is not error unless it is shown that the statements made in the deposition are relevant.[55]

§ 5. *Suppression and objections before trial.*[56]—Objections to the validity of the deposition not going to the admissibility of the testimony itself are generally required to be made by motion to suppress before trial,[57] it being the policy of the law to allow, where possible, a recommitment under proper restrictions[58] for the purpose of amendment as to formal defects.[59] Among the objections usually made are those relating to the signing,[60] sealing, certifying,[61] authenticating,[62] or in-

sent, unopened and unaltered within the prescribed time, the strict rules of evidence not applying in arbitrations, and the submission not providing for any particular channel through which the deposition was to reach the arbitrators. Roberts v. Consumers' Can Co., 102 Md. 362, 62 A. 585.

51. The provision of Rev. St. 1895, art. 2280, that the commission shall require the officer to return the deposition "without delay" is not mandatory, and a motion to suppress was properly overruled though the officer delayed the return for six months after the deposition was taken, where it was returned one month before the first term after taking and no prejudice was shown, the statute merely prescribing the requisites of the commission, and art. 2284, prescribing the duties of the officer, making no mention of the time within which the return must be made. Kane v. Sholars [Tex. Civ. App.] 14 Tex. Ct. Rep. 480, 90 S. W. 937.

52. Seal essential. Gharst v. St. Louis Transit Co., 115 Mo. App. 403, 91 S. W. 453. Omission of the seal of a foreign notary does not invalidate his certificate. Code 1899, c. 130 § 33. Hanley v. West Virginia Cent. & P. R. Co. [W. Va.] 53 S. E. 625. Where the dedimus is addressed to a named person the statutory certificate of his official character is not required. North American Acc. Ins. Co. v. Williamson, 118 Ill. App. 670. Need not certify that he is not attorney for either party. Rouse Hempstone & Co. v. Sarratt [S. C.] 54 S. E. 757. The certificate need not state notary's authority to administer oaths. North American Acc. Ins. Co. v. Williamson, 118 Ill. App. 670. The name of the notary is sufficiently written across the seal within Rev. St. 1895, art. 2284, if, while not extending across the lap of the envelope it extends over the cover containing the mucilage. Texas & P. R. Co. v. Felker [Tex. Civ. App.] 14 Tex. Ct. Rep. 308, 90 S. W. 530. Signing of separate certificate by witness held sufficient. Potomac Bottling Works v. Barber & Co. [Md.] 63 A. 1068.

53. That commissioner also returned in the same envelope the answers of a third person to the interrogatories propounded to the witness did not render inadmissible the deposition of the witness named in the commission. Southern Pac. Co. v. Wilson [Ariz.] 85 P. 401.

54. Under Rev. St. 1895, art. 2286, requiring the postmaster or his deputy mailing a deposition to make indorsement that he received it from the officer before whom it was taken, a receipt reading: "Received this package * * * from the hands of E. T., the officer before whom they were taken. R. H., P. M. per S. Postmaster at," etc., was a sufficient "postmaster's" receipt. Texas & P. R. Co. v. Felker [Tex. Civ. App.] 14 Tex. Ct. Rep. 308, 90 S. W. 530.

55. Little & H. Inv. Co. v. Pigg [Ky.] 96 S. W. 455.

56. See 5 C. L. 992.

57. Where defendant claimed to have been injured by reason of an insufficient notice, he should have moved promptly before trial to suppress. Kelly v. Ning Yung Benev. Ass'n [Cal. App.] 84 P. 321. Motion to suppress for disqualification of commissioner held timely where made before the hearing. Bledsoe v. Jones [Ala.] 40 So. 111.

58. Practice of returning deposition already filed should be exercised with caution. Held error to allow one of the parties over the objection of another to withdraw the deposition, already opened and filed, and send it by private communication to the commissioner for amendment. Chicago City R. Co. v. Schaefer, 121 Ill. App. 334.

59. Upon defendant's motion to suppress for failure to attach certificate and because the commissioner did not subscribe his name as per Code Civ. Proc. § 901, plaintiff should be allowed to return it to the commissioner for amendment. Risley v. Harlow, 48 Misc. 277, 96 N. Y. S. 728.

60 Where instead of signing the deposition made by him, each witness at the close of all the depositions signed a separate certificate certifying to the truthfulness of his testimony, and the commissioner certified beneath each signature that it was subscribed and sworn to before him, this was a sufficient signing by the witnesses even if the statute, Code Pub. Gen. Laws 1904, art. 35, § 16, had in express terms required the witnesses to sign the depositions. But while Code Pub. Gen. Laws 1904, art. 35, § 17, requires depositions to be signed by the witnesses when no commission is issued no such requirement is found in § 16, relating to depositions taken by commission as in this case. Potomac Bottling Works v. Barber & Co. [Md.] 63 A. 1068.

61. Under Rev. St. 1895, art. 2284, requiring the officer to "write his name across the seal," it was sufficient where the notary's signature while not extending literally

dorsing the deposition or commission;[63] the presence of, or interference by, counsel or his client, at the hearing;[64] to failure to answer interrogatories;[65] or to alleged improper changes in the language of the answers after the deposition is taken.[66] The deposition will not be suppressed for unimportant irregularities not prejudicial[67] or for defects which have been waived.[68] An order suppressing a deposition

across the edge of the lap forming the seal extended across the portion of the cover containing the mucilage forming the seal. Texas & P. R. Co. v. Felker [Tex. Civ. App.] 14 Tex. Ct. Rep. 308, 90 S. W. 530. It is not essential that the certificate state that the notary who took the deposition was authorized by the laws of the state where he resides and where the deposition was taken, to administer oaths. Sufficient where authorized by trial court. North American Acc. Ins. Co. v. Williamson, 118 Ill. App. 670. The statute does not require that the notary taking testimony de bene esse shall certify that he is not attorney or counsel for either party. The burden is on objector to show that fact. Rouse, Hempstone & Co. v. Sarratt [S. C.] 54 S. E. 757. Under Rev. St. c. 51, § 30, requiring a certificate of the official character of the officer taking the deposition when the dedimus or commission is directed to any judge, master, notary, or justice, no such certificate is required where the dedimus is addressed to a specified individual who merely happened to be a notary. North American Acc. Ins. Co. v. Williamson, 118 Ill. App. 670. Certificate may be attached at any time before deposition is read in evidence. Id.

62. Under Rev. St. 1899, § 2899, providing that depositions taken by a notary shall be sufficiently authenticated when certified by him and accompanied by his seal, if he has one, a deposition taken in a sister state, bearing the notary's signature but not attested by his seal was not sufficiently authenticated it being presumed that the notary had a seal. Gharst v. St. Louis Transit Co., 115 Mo. App. 403, 91 S. W. 453. But this statute is not exclusive, and a deposition taken in a sister state, signed but not sealed by the notary, is sufficiently authenticated where a certificate of the clerk of court annexed to the notary's certificate certifies to the notary's official character, his term of office, and that his signature is genuine. Id.

63. That the commission was not indorsed on the back "issued" followed by the number and style of the case and the signature of the officer issuing it held no ground for quashing, where the style of the case appeared in the body of the commission and it was attested by the clerk with his seal. St. Louis S. W. R. Co. v. Kennedy [Tex. Civ. App.] 96 S. W. 653.

64. Motion to suppress properly overruled though witness dictated his answers to stenographer in office of defendant's attorneys but after same were transcribed witness and notary carefully reviewed the questions and answers in absence of the attorneys who did not assist in framing answers, and witness acknowledged correctness of answers to notary and swore to them. Tarlton v. Orr [Tex. Civ. App.] 13 Tex. Ct. Rep. 913, 90 S. W. 534. The presence of counsel for the witness does not render the deposition inadmissible in the absence of prejudice shown. Southern Pac. Co. v. Wilson [Ariz.] 85 P. 401. That solicitor for witness read to him the interrogatories contained in the commission did not require suppression where answers were read in presence of commissioner though witness was beneficially interested. Id. While plaintiff took the deposition of his wife she asked him concerning immaterial matters called for in the interrogatories. Plaintiff's attorney without making suggestions, requested the wife to answer more fully, and sometimes framed the language in which the answers were reduced to writing but never without satisfying the notary that the answer expressed the meaning of the witness. The wife was cross-examined by defendant at the trial. Held no ground for suppression. Gulf, etc., R. Co. v. Luther [Tex. Civ. App.] 14 Tex. Ct. Rep. 195, 90 S. W. 44.

65. Where it is sought so suppress the entire deposition for failure to answer cross interrogatories such interrogatories must be shown to be material. Kirby Lumber Co. v. Chambers [Tex. Civ. App.] 14 Tex. Ct. Rep. 913, 95 S. W. 607.

66. A deposition will be suppressed where the language used by a witness is changed by the commissioner after it has been subscribed and sworn to, as it is not for the court to pass upon the materiality of the changes. Chicago City R. Co. v. Schaefer, 121 Ill. App. 334.

67. Under Civ. Code Prac. § 557, allowing a defendant to take depositions immediately after filing his answer, an exception that the deposition was taken before the answer filed was verified was properly overruled, where plaintiff was present and cross-examined the witnesses. Weisiger v. Mills [Ky.] 91 S. W. 689. Where papers were referred to in an interrogatory as being attached thereto, the fact that the opposite party was not served with copies of such papers before the commission was issued and the deposition taken did not subject the deposition to a motion to quash. Equitable Mfg. Co. v. Howard [Ala.] 41 So. 628. That the notary through mistake misstated the name of the witness in the certificate, where the name was given correctly in the caption, and also signed his own name to the deposition reciting that the signature was made by him for the witness under a stipulation authorizing him to sign the transcript of the shorthand notes, which notes had been signed by the witness, held not sufficient to exclude the deposition where both parties were present and no prejudice resulted, and objection was not made before trial. Columbus R. Co. v. Patterson [C. C. A.] 143 F. 245. Motion to quash properly overruled where the depositions of several witnesses were taken under a single commission each signing at the conclusion of his answers and the notary affixing to the answers of each a

may be set aside, and the deposition admitted, after an amendment of formal errors for which it was suppressed.[69]

§ 6. *Use as evidence.*[70]—In some states it is necessary to prove the continued absence of deponent before the deposition can be read in evidence;[71] in others such proof is required only where the deposition was taken within the state.[72] Depositions taken for use in a former trial[73] or in a contemporaneous suit may be used where the parties and issues are substantially the same.[74] Usually either party has the right to have the deposition read in evidence.[75] In Wisconsin the "deposition" of a party to the action takes the place of the old bill of discovery and is admissible as original evidence in the nature of an admission though the deponent be present in court.[76] In allowing the reading of a deposition, the court is vested with the usual discretion relative to the order of proof.[77] After suppression a deposition cannot be used in evidence as an admission against the witness without proper proof of his having made and subscribed to the statements.[78]

separate caption and certificate showing that they were sworn to before him. St. Louis S. R. Co. v. Kennedy [Tex. Civ. App.] 96 S. W. 653.

68. Where notice referred to the action as pending in the district court instead of the county court and the deposition was returned to the district court but by agreement of the parties taken and used in the county court defendant could not, on appeal to the district court, have the deposition suppressed because not properly certified and because no action was pending in the district court when it was taken and returned to that court. Union Pac. R. Co. v. Thompson [Neb.] 106 N. W. 598. Objection to sufficiency of notice of taking deposition held waived where defendant's attorney was present at hearing and cross-examined witness at length. Kelly v. Ning Yung Benev. Ass'n [Cal. App.] 84 P. 321.

69. Amendment of captions, jurats, and certificates. Warth v. Loewenstein, 121 Ill. App. 71.

70. See 5 C. L. 993.

71. Under Code Civ. Proc. § 872, subd. 7, providing for the taking of depositions of corporations, and § 882 providing that such depositions "except that of a party taken at the instance of an adverse party" shall not be read in evidence without proof of inability to attend, the deposition of an officer of a defendant corporation taken at the instance of plaintiff is not admissible where deponent is present and examined at the trial. Miners' & Merchants' Bank v. Ardsley Hall Co., 99 N. Y. S. 98. Under Code Civ. Proc. § 8, subd. 3, and § 225, authorizing the reading of a deposition before a grand jury upon proof to the court that the witness cannot be found in the state, proof of this fact before the grand jury is sufficient. People v. Dundon, 98 N. Y. S. 1048.

72. Where a deposition is taken without the state as authorized by Code Civ. Proc. § 2024, it is not a condition to its admission to show that witness continued absent at the time of offering the deposition, as § 2032 requiring such proof refers only to depositions taken within the state. Absence will be presumed. In re Dolbeer's Estate [Cal.] 86 P. 695. Civ. Code § 343, requiring proof of continued absence or infirmity before a deposition can be read in evidence does not apply to depositions taken out of the state. Stone v. Victor Elec. Co. [Colo.] 85 P. 327. That it was not shown that witness was out of the state when deposition was offered held no ground for exclusion where witness was out of state when deposition was taken. Hanley v. West Virginia Cent. & P. R. Co. [W. Va.] 53 S. E. 625.

73. Mechanic's lien suit being a chancery proceeding, deposition taken therein could be used on second trial after reversal. Miller v. Calumet Lumber & Mfg. Co., 121 Ill. App. 56. There is no difference in this regard between depositions taken under a dedimus and those taken before a master on a general order of reference. Id.

74. Where two actions were pending against the same employer for the death of different servants there being a common administrator and a common counsel and the same negligence was relied on in both cases depositions taken in one case and relevant to the other could be read in the latter if filed therein before trial. Andrews' Adm'r v. Pineville Coal Co. [Ky.] 90 S. W. 233.

75. The plaintiff has the right to read in evidence a deposition taken by defendant and not withdrawn. Bartlett v. Slusher, 117 Ill. App. 138.

76. A principal officer of a corporation is a "party to the action" under Rev. St. 1898, § 4096, as amended by Laws 1901, p. 328, c. 244. Johnson v. St. Paul & W. Coal Co., 126 Wis. 492, 105 N. W. 1048. The officers of a plaintiff corporation are deemed parties to the action and their depositions taken by defendant before trial may be read in evidence though the officers are present in court. Clark Co. v. Rice [Wis.] 106 N. W. 231. But the deposition of the foreman of a corporation, taken before trial under Rev. St. 1898, § 4096, authorizing the examination of the principal officer or managing agent of a corporation made a party to an action cannot be read on the trial if the foreman is present, he being a mere employe. Anderson v. Chicago Brass Co. [Wis.] 106 N. W. 1077.

77. Held not reversible error to permit reading by plaintiff, of deposition taken by defendant, after defendant had demurred to plaintiff's evidence where statute provided that if deposition is not read by party taking it, it may be read by the other party. Poca-

Objections.[79]—All objections except those going to the competency of the witness or the admissibility of his testimony[80] are usually held to have been waived unless made before trial.[81] Other objections may be waived by participation at the hearing,[82] failure to make timely objection at the trial,[83] or by inconsistent conduct.[84] Omission from the certificate of recitals which go to the competency only of the deposition as evidence may be supplied by amendment after objection made at trial where no prejudice results to objector.[85] The fact that in the preamble to the answers the cause is referred to as pending in the wrong county does not render the evidence inadmissible if it elsewhere clearly appears for what case it was intended.[86] The usual rules apply as to the relevancy or competency of the evidence.[87] One cannot complain of the nonproduction at the trial of documents from which he had a full opportunity to cross-examine the deponent at the hearing.[88]

DEPOSITS; DEPUTY, see latest topical index.

hontas Collieries Co. v. Williams [Va.] 54 S. E. 868.

78. German Ins. Co. v. Gibbs, Wilson & Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 798, 92 S. W. 1068.

79. See 5 C. L. 994.

80. Incompetent testimony in a deposition may be objected to and excluded at the trial. Raymond v. Edelbrock [N. D.] 107 N. W. 194. Code Civ. Proc. § 2032, authorizes either party to read a deposition subject to all legal objections except "to the form of an interrogatory." Held plaintiff who read his own deposition taken by defendant was not estopped to object to a question calling for the "deliberate judgment" of a witness as to a matter, instead of for the facts, the same being clearly incompetent and immaterial. Madera R. Co. v. Raymond Granite Co. [Cal. App.] 87 P. 27.

81. Objection that envelope was not properly indorsed. Root v. Coyle [Okl.] 82 P. 648. Under Civ. Code Prac. § 587, providing that no exception except as to competency or relevancy shall be regarded unless filed before trial and before or during the first term after filing of the deposition, objection that deposition was not written by the officer held too late where filed nearly two years after deposition was filed though court had continuous sessions, 60 days being regarded as a term. Western Union Tel. Co. v. Corso [Ky.] 89 S. W. 212. Where plaintiff participated in the taking of depositions and cross examined the witnesses without making any objection until the depositions were offered in court she waived her right to object that they were taken in term time and outside the state without the issuance of a commission. Sheibley v. Ashton [Iowa] 106 N. W. 618. All exceptions except to the competency of the witness or the competency or relevancy of his testimony must be filed and noted on the record before trial. Code Civ. Proc. §§ 586, 587. Objection properly overruled where no exception was filed. Andricus' Adm'r v. Pineville Coal Co. [Ky.] 90 S. W. 233. Rev. St. 1899, § 2906, excludes the right to object at trial to the mere form of a question. Such objection must be made when the deposition is taken and renewed at the trial. Williamson v. Brown, 195 Mo. 313, 93 S. W. 791. Objection that commission was issued after change of venue held waived where not made before trial. Palatine Ins. Co. v. Santa Fe Mercantile Co. [N. M.] 82 P. 363.

82. Where party filed cross interrogatories and joined in the proceeding, he waived objection that commission issued after change of venue. Palatine Ins. Co. v. Santa Fe Mercantile Co. [N. M.] 82 P. 363.

83. Objection on the ground that the necessity for taking a deposition is not shown to exist at the time it is offered on the trial is waived if not made before the same is read in evidence. Schlag v. Gooding-Coxe Co. [Minn.] 108 N. W. 11. Where at the time an answer to a direct interrogatory was read, defendant knew that it was based on hearsay but did not object on that ground, held not error to refuse to exclude the answer after reading of an answer to a cross interrogatory, which stated that all he knew was what had been told him. Kirby Lumber Co. v. Chambers [Tex. Civ. App.] 14 Tex. Ct. Rep. 913, 95 S. W. 607.

84. Code Civ. Proc. § 2034, provides that a deposition may be read by either party and will then be deemed the evidence of the reader. Held, where defendant took plaintiff's deposition and called for copies of certain records which were then incorporated in the deposition and the plaintiff offered the deposition in evidence, defendant could not object that the copies were not the best evidence. Madera R. Co. v. Raymond Granite Co. [Cal. App.] 87 P. 27.

85. Caption failed to recite his presence or absence at the taking. Gallagher v. Cotton [N. H.] 64 A. 583.

86. Where case and court were properly stated in caption to interrogatories, and at head of answers immediately preceding caption thereto, the case was again correctly stated. Baird v. Smith, 124 Ga. 251, 52 S. E. 655.

87. Secondary evidence in the form of copies will be excluded, the originals not being accounted for. Marx v. Ely [Ala.] 41 So. 411. Though copies of certain letters should not have been appended to plaintiff's depositions without notice to defendant to produce the originals, an objection to all the evidence taken under the commission was properly overruled, as the particular copies should have been designated. Potomac Bottling Works v. Barber & Co. [Md.] 63 A.

DESCENT AND DISTRIBUTION.

§ 1. Law Governing Descent (1137).
§ 2. Persons Entitled to Share or Inherit (1137).
§ 3. Inheritable and Distributable Property (1139).
§ 4. Course of Descent and Distribution (1141).
§ 5. Quantity of Estate or Share Acquired (1142).
§ 6. Husband or Wife as Heir (1142).

Scope of topic.—This topic deals only with the rules governing the disposition of the property of those dying intestate. The construction and effect of wills,[89] and the administration and management of estates of decedents,[90] are treated elsewhere.

§ 1. *Law governing descent.*[91]—The descent of realty is governed by the law of its situs,[92] and the succession to personalty by that of the domicile of the owner at the time of his death.[93] Intestacy as to any part of a decedent's estate is to be determined as of the date of his death,[94] and the distribution of his property is governed by the laws in force at that time.[95] It has been held in Wisconsin that the right to take property by inheritance is a natural one which cannot be wholly taken away or substantially impaired by the legislature, though it is subject to reasonable regulation.[96]

§ 2. *Persons entitled to share or inherit.*[97]—One becomes an heir only on the death of the ancestor,[98] and the statutes in force at that time must determine who are the intestate's heirs and their rights to the inheritance.[99]

As a general rule, legally adopted children inherit in the same manner as natural ones.[1] A grandchild adopted by his grandfather inherits as the latter's

1068. Deposition for which no proper predicate was laid held properly excluded. Campos v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 511, 95 S. W. 1042. Where no objection is made to the interrogatories, answers, responsive thereto, are not open to objection at the trial. Creel v. Keith [Ala.] 41 So. 780.

88. Where witnesses were permitted to refresh their memory from certain books and the adverse party did not avail himself of the opportunity of being present and cross-examining from the books, he could not complain of the nonproduction of the books at the trial where they were under the control of the United States circuit court. Southern Bldg. & L. Ass'n v. Penna. Fire. Ins. Co., 23 Pa. Super. Ct. 88.

89. See Wills, 6 C. L. 1880.

90. See Estates of Decedents, 5 C. L. 1183.

91. See 5 C. L. 995.

92. See 5 C. L. 995, n. 15.

93. Must be distributed according to the law of decedent's domicile, regardless of the place of administration. In re Titterington's Estate [Iowa] 106 N. W. 761.

94. Moore v. Deyo, 212 Pa. 102, 61 A. 884.

95. Rights of surviving spouse. Safe Deposit & Trust Co. v. Gittings [Md.] 63 A. 1046. Acts 1898, c. 331, p. 916, providing that husbands shall have same interest in personalty of deceased wives which the statute gives widows in the estates of their deceased husbands, held to have no operation until death of wife in husband's lifetime, but at her death and upon and by virtue of his survivorship his rights come into being. Id. Act has no retroactive effect and does not apply to a case where husband had survived his wife prior to its going into effect, but where her death occurs after that time it is effective, regardless of the date of the marriage. Id.

96. Nunnemacher v. State [Wis.] 108 N. W. 627.

97. See 5 C. L. 995.

98. One who owns personalty absolutely has right to give it away, and his children cannot say that he gave same to his wife in fraud of their rights, since they have no rights in it. Doty v. Dickey [Ky.] 96 S. W. 544.

99. In re Garr's Estate [Utah] 86 P. 757. Relationship of parties making them heirs at law of life tenant, when deed was executed which made such heirs remaindermen, held not to confer any vested rights on them during life tenant's life, but legislature had power to provide for different line of descent. Gilliam v. Guaranty Trust Co. [N. Y.] 78 N. E. 697, afg. 97 N. Y. S. 758. A child adopted under the provisions of the act of 1873, giving no right of inheritance, is entitled to the benefit of Laws 1896, c. 272, p. 225, subsequently enacted, conferring such right. Id.

1. Child held to have been legally adopted and to have a right of inheritance in the estate of his adopted parent the same as if he had been a natural child. Cubitt v. Cubitt [Kan.] 86 P. 475. Words "will or devise," as used in Laws 1896, p. 225, c. 272, § 60, providing that nothing in that statute providing for inheritance by adopted children "applies to any will, devise, or trust made or created before June 25, 1878, or alters, interferes with, or changes, such will, devise, or trust," are confined to testamentary disposition of property, and do not include a grant and conveyance by deed. Gilliam v.

child only, and not in the double capacity of child and grandchild.[2] Adopting parents and their heirs are not ordinarily the heirs of the adopted child,[3] though in some states they and their heirs inherit from the child and his descendants property received by the child from or through the adopting parents.[4]

By statute in most states an illegitimate child inherits from his mother equally with legitimate children.[5] In some jurisdictions he inherits from his father if the latter acknowledges him as his own and takes him into his family;[6] in others, the acknowledgment gives him the right to inherit if there are no legitimate children or descendants of legitimate children.[7] When the right to inherit is once vested in the illegitimate, it extends to his descendants, and they likewise become heirs in the event of the death of their father.[8]

The common law rule that aliens cannot inherit has been changed or abrogated by various treaties with foreign nations,[9] and by statute in many of the states.[10]

Guaranty Trust Co. [N. Y.] 78 N. E. 697, afg. 97 N. Y. S. 758. Only trust created by deed conveying land in trust for named beneficiary for life, "and after her death to her heirs at law," is one for life of beneficiary, and hence permitting adopted child to take did not permit him to take under a trust, or in any manner alter or interfere with the only trust created. Id. There being no evidence that decedent had been legally adopted by persons with whom he lived, held that latter were not entitled to any part of his estate, but whole went to brother who was his sole next of kin. In re Huyck's Estate, 49 Misc. 391, 99 N. Y. S. 502.

2. Act May 19, 1887 (P. L. 125). Morgan v. Reel, 213 Pa. 81, 62 A. 253.

3. Rev. St. 1903, c. 4, § 6, does not make them such heirs. Coleman v. Swick, 120 Ill. App. 381.

4. Natural mother not entitled to take such property after death of the child of her illegitimate adopted child. Rev. St. 1903, p. 128, § 6. Coleman v. Swick, 120 Ill. App. 381. Right extends to proceeds of the property as well as to the property in kind. Id.

5. A claim to share in the estate as an illegitimate child of a decedent must be established by clear and convincing evidence, particularly where child was repudiated by the latter during his lifetime. Petition dismissed for insufficiency of evidence. In re Dundas' Estate, 213 Pa. 628, 63 A. 45.

6. Under Rev. St. 1898, §§ 10, 2833, where bachelor acknowledged an illegitimate child to be his own and took him into his family as such, held that he acquired same right of inheritance as though legitimate. In re Garr's Estate [Utah] 86 P. 757. Evidence held to show acknowledgment. Id.

7. Under Burns' Ann. St. 1901, § 2630a, an illegitimate child of a man dying intestate without legitimate children or the descendants of legitimate children inherits the same as though legitimate, provided the father during his lifetime has acknowledged him as his own. Townsend v. Meneley [Ind. App.] 76 N. E. 321. Since the statute does not require an acknowledgment of the right to inherit, but merely specifies what shall be evidence to establish the relation of parent and child, it is immaterial that the acknowledgment was made before the passage of the statute. Id.

8. In re Garr's Estate [Utah] 86 P. 757. Where illegitimate child was acknowledged by his father, held that on his death, before the death of his father, his children inherited from the latter. Id.

9. Provision of treaty of 1827 between U. S. and Hanseatic Republic of Bremen that, in case the laws of either country prevent the citizens of the other from entering into the possession of inherited realty on account of their alienage, a period of three years shall be granted in which to dispose of it, held inapplicable, since no such disability was imposed on aliens by statute when intestate died. Sparks v. Friedrich [Kan.] 82 P. 463.

10. Provision of the original § 17 of the bill of rights of the state constitution that "no distinction shall ever be made between citizens and aliens in reference to the purchase, enjoyment, or descent of property," made the statute of descents and distributions apply to aliens as well as citizens and enabled former to inherit realty. Sparks v. Friedrich [Kan.] 82 P. 463. Amendment of 1888 permitting regulation of right of aliens to hold property, and statute passed pursuant thereto, held not to affect rights of foreign heirs which had previously vested, since they could not be divested by changes in the law. Id. Amendment is not self-executing so as to ipso facto abolish right of aliens to inherit, and does not operate to change rule that brother inherits immediately and directly from brother. State v. Ellis [Kan.] 83 P. 1045. Resident citizen half-sisters of a resident citizen who died intestate, leaving neither widow nor children, and whose parents both died before him, nonresident aliens inherit his lands immediately and directly. Id. Alien land law of 1891, even if valid, does not apply to case where intestate died before its passage. Id. Under Act Feb. 23, 1791 (3 Smith's Laws, p. 4), providing that alien citizens shall be capable of acquiring or taking realty by devise or descent in the same manner as citizens, an alien husband is entitled, as tenant by the curtesy, to the realty of which his wife died seised. Cooke v. Doron [Pa.] 64 A. 595. Tenancy by the curtesy is one acquired by "descent,"

A legitimate child of an Indian and a white man, who was a citizen of the United States, inherits from the father in accordance with state statutes.[11]

In some states posthumous[12] and pretermitted[13] children are entitled to the shares they would have taken had the parent died intestate.

One whom the statute in plain terms designates as entitled to inherit is not deprived of the right by reason of the fact that he murders the intestate.[14]

The effect of a transfer by the heir of his interest in the ancestor's estate is treated elsewhere.[15] The heir at law is not to be disinherited except by express words in a will, or by necessary implication arising from them.[16]

§ 3. *Inheritable and distributable property.*[17]—Property not disposed of,[18] or ineffectually disposed of[19] by will, passes to the heirs or distributees under the intestate laws. Vested remainders[20] and contingent remainders and other contingent interests, unless the contingency is one affecting the capacity to take,[21] descend to the heirs or pass to the personal representatives according as the property is realty or personalty. The heirs of a timber culture entryman upon public lands of the United States who dies before completing the period of occupancy and receiving his patent, succeed to all his rights, and upon making the required proof take title as direct grantees and purchasers from the government, and not by inheritance.[22] So too, the state laws of descent do not affect the method of perfecting a claim under the Federal home-

within the meaning of the act rather than by purchase. Id.

11. Daughter who is only heir. Pourier v. McKinzie, 147 F. 287.

12. Under Act April 8, 1833 (P. L. 249), in the absence of an express provision to the contrary in the will, a posthumous child is entitled to the same share in its father's estate as it would have had if the father had died intestate after its birth. Bowman v. Hoke, 30 Pa. Super. Ct. 633. The statute does not give such child any greater rights than the living children would have in the case of intestacy. Id. Where a testator devised land to his wife subject to the lien of a judgment, and left surviving him his wife and two daughters, and the judgment was properly revived against the wife as executrix and sole devisee, a posthumous daughter was not entitled to a one-third interest free from the lien of the judgment, but took her interest subject thereto. Bowman v. Hoke, 30 Pa. Super. Ct. 633.

13. Child born after making of will and not provided for by settlement or in the will and not disinherited, there being other children when the will was made, held to have become vested with an absolute title to the same share in father's estate that he would have had had the latter died intestate, though he died without issue before reaching the age of 21. Ann. Code 1892, §§ 4489, 4490, construed. Watkins v. Watkins [Miss.] 40 So. 1091. Burden of proof is upon pretermitted children or grandchildren to show that they were not intentionally omitted. Brown v. Brown [Neb.] 108 N. W. 180. Evidence held to show intentional omission. Id.

14. In view of Gen. St. 1901, §§ 2521, 2529, 2532, giving estate of wife to husband if there are no children, he is not deprived of the right to it because he murders her. McAllister v. Fair [Kan.] 84 P. 112. The fact that a husband has murdered his wife does not prevent him from inheriting her estate under the intestate laws. Johnson's Estate, 29 Pa. Super. Ct. 255.

15. See Estates of Decedents, 5 C. L. 1183.

16. In re Reed's Estate [Del.] 64 A. 822. See, also, Wills, 6 C. L. 1880.

17. See 5 C. L. 998.

18. See, also, Wills, 6 C. L. 1880. Four-fifths of realty not devised. Gilmore v. Jenkins [Iowa] 106 N. W. 193. Personalty undisposed of by residuary clause. In re Fleming, 48 Misc. 589, 98 N. Y. S. 306.

19. See, also, Wills, 6 C. L. 1880. Property covered by trust which was void because contravening the rule against perpetuities. In re Kountz's Estate, 213 Pa. 390, 62 A. 1103.

20. Where one having a vested remainder with possession postponed until he reaches the age of 21 dies before that time, the previous disposition of the interest terminates and the heirs at law and next of kin of the remainderman have a right to the immediate enjoyment of the property. Hooker v. Bryan, 140 N. C. 402, 53 S. E. 130.

21. Passes to heirs or devisees of remainderman in case of his death before the happening of the contingency. In re Brooke's Estate [Pa.] 63 A. 411.

22. U. S. Rev. St. § 2448. Gould v. Tucker [S. D.] 105 N. W. 624. Heirs take land in such case subject to specific liens voluntarily placed thereon by the entryman after making final proof, but not to debts contracted before that time. Id. This is true though administrator of the estate uses money belonging to the estate to commute the entry. Id. County court has no jurisdiction over the claim, and no right to authorize administrator to borrow money thereon to purchase land from government or to authorize its sale to pay mortgage given to secure it, and other indebtedness. Haun v. Martin [Or.] 86 P. 371.

stead law in case of the death of the entryman.[23] On the other hand the possessory right of a locator of a mining claim, who has done nothing to perfect his title other than to perform the required assessment work, passes to his heirs by descent.[24] The fact that an administrator with the will annexed deals with the proceeds of a judgment against the Federal government based on a French spoliation claim as if they were an asset of the estate does not deprive the next of kin of their interest therein.[25]

The title to lands or any interest therein vests in the heir immediately on the death of the ancestor,[26] subject to all liens and charges existing against it,[27] and subject to the payment of the ancestor's debts.[28]

23. Widow to whom patent was issued under U. S. Rev. St. § 2291 (U. S. Comp. St. 1901, pp. 1390, 1394), after death of husband, took the land free from claims of daughter under the state statute. McCune v. Essig, 199 U. S. 382, 50 Law. Ed. —. The doctrine of relation cannot be invoked to confer any interest in the land under the state laws upon a daughter of a deceased homestead settler as against the widow to whom the patent was issued in accordance with U. S. Rev. St. § 2291. Id.

24. Is property, and passes to his heirs by descent, and not directly as the designated donees or beneficiaries of the United States and hence probate court has jurisdiction to direct their sale by the administrator. O'Connell v. Pinnacle Gold Mines Co. [C. C. A.] 140 F. 854.

25. In re Warren, 105 App. Div. 582, 94 N. Y. S. 286. In an application for leave to issue execution on a judgment against an administrator, the fund held by him was part of the proceeds of a French spoliation claim, and the administrator averred by affidavit that there is not property in his hands with which to pay the judgment. Held court should have ordered an accounting under Code Civ. Proc. 2725, subd. 1, to determine whether the judgment was assets of the estate. Id.

26. See, also, Estates of Decedents, 5 C. L. 1183, as to right to bring actions in regard to realty. Realty descends instantly to heir at law and does not become assets for payment of debts unless personalty is insufficient for that purpose. Baldwin v. Alexander [Ala.] 40 So. 391. Failure of plaintiffs suing in ejectment as heirs at law of a decedent to show that they were all and his only heirs held to preclude them from recovering the entire interest in the land. Hudson v. Vaughn [Ala.] 40 So. 757. To recover a proportionate interest, held that it was necessary for them to show what that proportionate interest was. Id. Realty descends directly to the heirs, subject to the payment of the debts of the deceased, and the administrator has no title or interest therein except to the rents, unless it becomes necessary to resort to the realty to pay the debts. Adams v. Slattery [Colo.] 85 P. 87. A cause of action for a trespass or injury to land such as waste, occurring after the death of the decedent, does not pass to the executor or administrator, but to the heir or devisee. Id. Executor cannot maintain action for waste where he has no estate in the premises except a right to lease the same. Id. In suit to enjoin execution sale on ground that judgment debtor has no interest in the property, burden is on plaintiff to negative presumption of interest arising from fact that he is the heir of the last owner who died intestate. Hickey v. Davidson [Iowa] 105 N. W. 678. Where vendee refuses to accept deed tendered by vendor, on latter's death, the legal title to the land descends to his heirs at law, subject to the vendee's right to accept the deed, or subject to the power of the chancellor to compel him to accept it. Brackett's Adm'r v. Boreing [Ky.] 89 S. W. 496. Heirs are necessary parties to action involving the title. Id. Title to realty vests in heir at the date of the death of the ancestor, subject only to the contingency of a sale of so much thereof as may be necessary to pay the debts of the estate in case there is not sufficient personality for that purpose. Marvin v. Bowlby [Mich.] 12 Det. Leg. N. 723, 105 N. W. 751. Neither heir's distributive share of realty nor the proceeds of a sale thereof in hands of the administrator can be charged with his indebtedness to the estate. Id. Remedy of heirs of law of deceased mortgagor of realty situated in a foreign state who were not made parties to foreclosure proceedings, held to be by a suit to recover possession of realty in courts of that state. Nunnally v. Robinson, 99 N. Y. S. 594. The title of the heir vests at the death of the ancestor, and does not originate in a decree of distribution. Final decree of distribution only operates to release property of heir from conditions to which it was subject as the estate of a decedent. Hume v. Laurel Hill Cemetery, 142 F. 552. May maintain suit to enjoin enforcement of city ordinance prohibiting burials in cemetery in which his ancestor owned lot though there has been no decree of distribution. Id.

27. Where testatrix devised certain land to S. with remainder to testatrix's heirs upon payment by them to the heirs of S. for any improvements made on the land, held that any interest acquired by the heirs of S. they took under the will and not from S., and hence they could not be held bound to carry out his contracts or answer for his debts with property derived from him. Hill v. Gianelli [Ill.] 77 N. E. 458.

28. For a discussion of the right to sell realty to pay debts, and the right of creditors to resort to realty in the hands of the heir, see Estates of Decedents, 5 C. L. 1183. Where sole heir accepts succession unconditionally she acquires all the property but is liable

The title to personalty,[29] including choses in action,[30] ordinarily passes to the personal representatives, though this rule has been changed by statute in some states.[31]

§ 4. *Course of descent and distribution.*[32]—Brother inherits immediately and directly from brother and not mediately through the father.[33] Brothers and sisters of the whole blood generally take to the exclusion of those of the half blood.[34] In Georgia the half blood on the paternal side takes equally with the whole blood.[35] In Minnesota, realty inherited by a child from his father's estate goes to his brothers and sisters when he dies without issue and before coming of age.[36] In Kansas the whole estate of one who leaves no wife or descendants or father or mother goes half to the heirs of the father and half to those of the mother.[37] In the District of

for all the debts. Pellerin v. Sanders [La.] 40 So. 917.

29. See, also, Estates of Decedents, 5 C. L. 1183. Personalty goes to administrator and he is the proper party to recover it, the next of kin having no cause of action therefor. Nunnally v. Robinson, 99 N. Y. S. 594. Timber severed from realty passes to executor. Curry v. Lanning, 105 App. Div. 615, 94 N. Y. S. 535. The personalty of a decedent does not vest in the heirs, but is in abeyance until administration is granted, and is then vested in the administrator by relation from the time of death. McBride v. Vance [Ohio] 76 N. E. 938. Hence, as a general rule, administration is a prerequisite to the devolution of personalty. Id. No right of action on promissory note belonging to a decedent is shown by party in an action on note by proof of possession and that he is the sole heir of the decedent. Id. Personalty passes to personal representatives. Graham v. Spence [N. J. Eq.] 63 A. 344. Administrator takes legal title to personalty, and it does not pass to distributees except through proper probate administration. Wright v. Holmes, 100 Me. 508, 62 A. 507. Rents of realty accruing during decedent's lifetime go to the administrator, but those accruing after his decease belong to those entitled to the realty. Righter v. Haines [N. J. Law] 64 A. 148.

30. See Estates of Decedents, 5 C. L. 1183, as to right of representative to recover personalty belonging to estate. Equity of redemption in mortgaged lands descends to heirs, subject to widow's right of dower. Appeal of Beard [Conn.] 62 A. 704. Personal representative upon his appointment and qualification takes title to and possession of all the personalty of a decedent. Nelson v. Nelson [Ky.] 96 S. W. 794. Heirs cannot maintain action to recover personalty belonging to estate unless representative refuses to do so, in which case he must be joined as a defendant. Id. Representative may collect it by action without joining heirs at law. Id. Right to sue for conversion passes to administrator. Hagar v. Norton, 188 Mass. 47, 73 N. E. 1073. Claim to purchase money of land sold passes to vendor's personal representatives. Brackett's Adm'r v. Boreing [Ky.] 89 S. W. 496. Where equitable title to and possession of land passed to purchaser under title bond, held that heir of vendor had no right to recover possession of the land for nonpayment of the purchase price, but remedy was action by administrator against vendee to recover purchase price. Doty v. Jameson [Ky.] 93 S. W. 638. Action for purchase price could not be maintained by heir, though he would have been a necessary party if representative had asserted a vendor's lien and a tender of the deed to the vendee had been required. Id. Heirs may maintain a bill in equity to set aside for fraud mortgages executed by an intestate and to recover property fraudulently obtained from him, where the administrator refuses to sue. Marsh v. Marsh [Vt.] 63 A. 159. Is no adequate remedy at law since matter is beyond the jurisdiction of the probate court. Id.

31. Under Wilson's Rev. & Ann. St. Okl. 1903, § 6394, personalty as well as realty passes to the heirs, subject to the control of the probate court and hence to the possession of the administrator appointed by the court. Litz v. Exchange Bank [Okl.] 83 P. 790. Right of one holding chattel mortgage to foreclose and sell property of intestate is suspended and held in abeyance until appointment of an administrator. Id. The title to personalty is suspended and held in abeyance pending the granting of letters of administration. Id.

32. See 5 C. L. 999.

33. Rule not changed by Gen. St. 1901, § 2522. State v. Ellis [Kan.] 83 P. 1045. Resident citizen half-sisters of a resident citizen who died intestate, leaving neither widow nor children, and whose parents both died before him nonresident aliens, inherit his lands immediately and directly. Id.

34. Sister of whole blood takes to exclusion of sister of half blood. Watkins v. Watkins [Miss.] 40 So. 1001. Estate in remainder held to pass to brother and sister of the whole blood to the exclusion of those of the half blood. In re Brooke's Estate [Pa.] 63 A. 411.

35. Civ. Code 1895, § 3355, subds. 5, 6. Raburn v. Bradshaw, 124 Ga. 552, 52 S. E. 922.

36. Under Gen. St. 1894, § 4471, subd. 7. In re Kenny's Estate [Minn.] 106 N. W. 344.

37. Under Gen. St. 1901, § 2522, providing that if one of the intestate's parents be dead the whole of the estate shall go to the survivor, and if both be dead it shall be disposed of in the same manner as if they, or either of them, had outlived the intestate, and died in the possession and ownership of the portion thus falling to their share or to either of them, and so on through the ascending ancestors or their issue, held that where both of the intestate's parents predecease him, the property descends one-half

Columbia the heirs of the father take precedence over those of the mother.[38] In Georgia, where there is no surviving husband, wife, child, or lineal descendant, the brothers and sisters of the intestate inherit.[39] If the father is living he takes an equal share with the brothers and sisters.[40] In New York, if there be no widow and no children, and no representative of a child, the whole surplus of the personalty goes to the next of kin in equal degree to the deceased and their legal representatives.[41]

Collateral relatives of equal degree of kinship with the deceased ordinarily take share and share alike, and those of unequal degree by representation.[42] Those who take by representation take the share to which the parent whom they represent would be entitled if living.[43] In the case of personalty, representation is only resorted to when necessary to bring the claimants to equality of position as next of kin.[44] In some states it is admitted among collaterals in the same manner as allowed by law in reference to realty.[45] Thus, where the nearest of kin are uncles and aunts and the children of deceased uncles and aunts, such children take per stirpes, by representation, the shares their parents would have respectively taken had they survived the intestate.[46] The same is true of grandnephews and nieces, where the intestate's only next of kin are nephews and nieces and the descendants of deceased nephews and nieces,[47] and of second and third cousins where the sole next of kin are first, second, and third cousins, the descendants of deceased uncles and aunts.[48]

§ 5. *Quantity of estate or share acquired.*[49]—The shares of the heirs or next of kin may be increased or decreased by transfers of property made between them and the ancestor during the latter's lifetime, depending upon whether such transactions are gifts[50] or advancements.[51]

§ 6. *Husband or wife as heir.*[52]—The right to curtesy[53] and dower is treated elsewhere.[54] At common law, and except where the rule has been changed by

to the heirs of each, regardless of which parent survived the other. Sparks v. Friedrich [Kan.] 82 P. 463. Statute does not change common-law rule that brother inherits immediately and directly from brother. State v. Ellis [Kan.] 83 P. 1045.

38. Where in partition it appeared that title was formerly in one B. who died intestate and without issue, but there was no sufficient proof that the numerous classes of the heirs of B's father had become extinct, the court would not decree the title to be in the kindred of B's mother, since under D. C. Code §§ 940-944 [31 St. at L. 1342, c. 854] the former class is entitled to priority over the latter. Smith v. Cosey, 26 App. D. C. 569.

39. Civ. Code 1895, § 3355, subds. 5, 6. Raburn v. Bradshaw, 124 Ga. 552, 52 S. E. 922.

40. Civ. Code 1895, § 3355. Raburn v. Bradshaw, 124 Ga. 552, 52 S. E. 922.

41. Code Civ. Proc. § 2732, subd. 5. In re McGovern, 98 N. Y. S. 304. Where intestate left no ancestor, widow, descendant, brother, or sister, but was survived by a nephew, three nieces, and a grandnephew and grandniece, held that residue would be divided into 5 equal shares, one of which would be equally divided between grandnephew and grandniece Id.

42. Laws 1896, p. 620, c. 547, § 287. In re McGovern, 98 N. Y. S. 304. Where intestate left nephew, three nieces, and a grandnephew and grandniece, held that estate would be divided into five shares, and one share divided equally between the grandnephew and grandniece, it being the share their parent would have taken if living. Id.

43. Code Civ. Proc. § 2732, subd. 11. In re McGovern, 98 N. Y. S 304. Grandnephew and grandniece held entitled to one share to be equally divided between them. Id.

44. Under Revisal 1905, § 132, personalty should be distributed per capita between children of deceased brothers and sisters, who are the only next of kin. Ellis v. Harrison, 140 N. C. 444, 53 S. E. 299.

45. Code Civ. Proc. § 2732, as amended by Laws 1898, p. 941, c. 319. In re Dunning's Estate, 48 Misc. 482, 96 N. Y. S. 1110; In re McGovern, 98 N. Y. S. 304.

46. Laws 1896, p. 620, c. 547, § 288. In re Dunning's Estate, 48 Misc. 482, 96 N. Y. S. 1110. Rule applies equally in case of personalty under Code Civ. Proc. § 2732, as amended by Laws 1898, p. 941, c. 319. Id.

47. Representation should be allowed to grandnephews and nieces and they should take the shares which their respective parents would have taken if living. In re Fleming, 48 Misc. 589, 98 N. Y. S. 306.

48. In re Fleming, 48 Misc. 589, 98 N. Y. S. 306.

49. See 5 C. L. 1001.

50. See Gifts, 5 C. L. 1587.

51. See Estates of Decedents, 5 C. L. 1183.

52. See 5 C. L. 1001.

53. See Curtesy, 7 C. L. 1016.

54. See Dower, 5 C. L. 1043.

statute, a surviving husband is entitled to the whole of his wife's net personalty.[55] In some states, where the wife leaves no children or other descendants capable of inheriting, the husband takes half of her realty and personalty.[56] In Kansas, where her only heirs are her husband and several grandchildren, the husband takes a half of her separate realty and the grandchildren the other half.[57] In some states the widow is included as a distributee and is entitled to a child's share of the personalty;[58] in others she may elect to take a child's part of the whole estate in lieu of dower on dissenting from the provisions of the will.[59] The surviving spouse is generally given certain specified articles of household furniture and the like.[60] In Indiana the survivor is entitled to one-third of the realty in fee.[61] The husband of course takes no interest in property held by his wife in trust for specified purposes.[62] The widow stands on no better footing than any other distributee as to any share of her husband's estate given her by the statute of distributions in excess of dower.[63]

In Indiana, where a man has no children by a second wife, land descending to her at his death goes at her death to the children of his first wife;[64] and a widow, having children by a previous marriage, who marries again, may not alienate realty acquired by virtue of such previous marriage unless such children shall all be of age and join in the conveyance, and on her death during her marriage such land goes to the children of the marriage by virtue of which she acquired it.[65]

55. Wright v. Leupp [N. J. Eq.] 62 A. 464. Contract of assignment held not to create enforceable trust in favor of children. Id. Where married woman possessed of separate personal estate dies without having disposed of it in her lifetime or by will, the title thereto vests in her husband, and cannot be affected by granting of administration upon her estate. Gittings v. Russel, 49 Misc. 432, 99 N. Y. S. 1064. On death of married woman without descendants, title to personalty which is part of her separate estate and which she has not disposed of during her lifetime or by will vests in her husband. Austin v. Metropolitan St. R. Co., 108 App. Div. 249, 95 N. Y. S. 740. Surviving husband is entitled to all the personalty and choses in action, including legacies, belonging to his wife. Henry v. Wert [Ala.] 39 So. 711 [Advance sheets only].

56. Rev. St. 1891, § 2938, providing that where wife dies without children or other descendants capable of inheriting, husband shall be entitled absolutely to half the realty and personalty belonging to her at the time of her death, subject to the payment of her debts, applies to any wife who dies thereafter, whether she and her surviving husband were married prior to its enactment or not, and hence to property owned by her at the time of her marriage and prior to the passage of the act. Gilroy v. Brady, 195 Mo. 205, 93 S. W. 279.

57. Husband and several children of her daughter by a former marriage. Oliver v. Sample [Kan.] 84 P. 138.

58. Under Rev. St. 1898, § 3935, subd. 6, widow held entitled to child's share of proceeds of benefit certificate payable to member's legal heirs. Thomas v. Covert, 126 Wis. 593, 105 N. W. 922.

59. Rev. St. 1892, §§ 1830, 1833. Saxon v. Rawls [Fla.] 41 So. 594.

60. Rev. St. 1899, § 111, providing that, if wife dies intestate owning personalty in her own name, husband shall be allowed, in addition to curtesy, to keep as his absolute property all articles and property provided for widow in deceased husband's property, by §§ 105-107, 109, does not apply where widow dies testate. Black v. Brittain, 116 Mo. App. 386, 92 S. W. 500.

61. Under Burns' Ann. St. 1901, § 2642, providing that, where husband survives his wife, one-third of her realty shall descend to him subject to its proportion of her debts contracted before marriage, held that where wife died without issue and realty was sold because incapable of being partitioned in kind, husband was entitled to one-third of the proceeds, which was not a part of the assets of the estate and was not subject to payment of wife's debts contracted after marriage. Weaver v. Gray [Ind. App.] 76 N. E. 795. Same is true though land was conveyed to her in consideration of love and affection and she died without issue. Burns' Ann. St. 1901, § 2628. Id.

62. Husband held to take no interest in property received by wife under her father's will in trust for her sole and separate use for her life, and after her death in trust for such of her children as she should limit and appoint to take the same, which power was exercised by will. Safe Deposit & Trust Co. v. Gittings [Md.] 63 A. 1046.

63. Her share of personalty abates with other share for payment of debts in preference to realty. Appeal of Beard [Conn.] 62 A. 704.

64. Under Burns' Ann. St. 1901, §§ 2652, 2660, giving widow title to one-third of lands of which her husband was seized during coverture, in the conveyance of which she did not join, and Rev. St. 1881, § 2487, providing that where a man has no children by a second wife the land descending to her at his death shall, at her death, go to the children of his first wife, held that where second and childless wife survives her husband she takes one-third in fee of realty conveyed by him during second marriage, under § 2652, where she does not join in the conveyance, not as heir but as purchaser,

Community property ordinarily descends one-half to the surviving spouse and the other half to the children.[66] If there are no children the survivor takes the whole in some states.[67]

The homestead of one dying without children generally descends to the widow.[68] In Iowa the surviving spouse may continue to occupy the whole homestead until it is otherwise disposed of, and may elect to retain it for life in lieu of a distributive share.[69] In Texas the probate court may grant the right to occupy it to the widow.[70]

In order to entitle the widow to the marital fourth under the laws of Louisiana, she must show that her husband died rich and left her in necessitous circumstances.[71] The object of the statute is to prevent her condition being changed suddenly for the worse,[72] and her rights must be tested by the situation or condition at the date of the death of her husband and not at the date of the settlement of the succession,[73] and are lost if she lives immorally during widowhood.[74]

A widow may release her right of quarantine to the heir or terre-tenant, but such release does not operate as a conveyance of the quarantine right, but by way of extinguishment of it.[75] A joinder by her with an heir in a mortgage to a stranger does not operate as a release by her to the heir, but is simply an attempt by her to convey her right to the mortgagee as security for a debt, which cannot be enforced in a court of law.[76] In Kentucky the widow is entitled to one-third of the gross rents of her husband's dowable realty until her dower is assigned.[77]

In Pennsylvania, desertion and nonsupport without lawful cause will bar the husband's rights in the estate of his deceased wife.[78] In Minnesota, where a divorce

which she can convey, and the husband having conveyed during his lifetime, nothing remains to descend to the children of his first wife under § 2487. Fry v. Hare [Ind.] 77 N. E. 803.

65. 1 Rev. St. 1852, pt. 1, c. 27, § 18, as amended by Laws 1879, p. 123, c. 44. Pence v. Long [Ind. App.] 77 N. E. 961. A conveyance by her is void unless all the children are of age and all join thereln. Id.

66. Civ. Code § 1402. Wife does not take half absolutely and an additional one-third of the remaining half as heir. In re Angle's Estate [Cal.] 82 P. 668.

67. Under Rev. St. 1895, art. 1696, wife's interest in community property vests in her surviving husband. Stein v. Mentz [Tex. Civ. App.] 15 Tex. Ct. Rep. 4, 94 S. W. 447. Evidence held to sustain finding that wife left no children. Id. In absence of evidence court may assume that property was acquired during existence of marriage relation. Id. Evidence held to show that appellees were nephews and niece of deceased husband and his only heirs at law. Id.

68. Laws 1899, c. 4730, p. 119, providing that homestead of one dying without children shall descend to widow and shall not be the subject of devise by will, is not in conflict with Const. art. 10, § 4, relating to homesteads (Saxon v. Rawls [Fla.] 41 So. 594; Thomas v. Williamson [Fla.] 40 So. 831), nor is it in conflict with art. 10, § 1 (Saxon v. Rawls [Fla.] 41 So. 594), nor with Const. 1885, art. 3, § 16, providing that each law shall embrace but one subject which shall be briefly expressed in the title (Id.), nor with § 1 of the 14th amendment to the Federal constitution as seeking to abridge the privileges of one class of citizens (Id.).

69. Code § 2985. John Deere & Co. v. Meyer [Iowa] 108 N. W. 236. Must be some evidence of an election to take homestead before such right will be established or recognized, since survivor will be deemed to have taken distributive share in absence of any showing as to an election. Id. Quitclaim deeds of other land to children by husband held not to show an election to take distributive share, where within three months after administration was granted he filed formal election to take homestead. Id.

70. Widow who abandons homestead assigned to her by probate court held entitled only to an undivided one-third interest for life in lands of her husband. Mecaskey v. Morris [Tex. Civ. App.] 89 S. W. 1085.

71. Succession of Kunemann, 115 La. 604, 39 So. 702.

72. Succession of Kunemann, 115 La. 604, 39 So. 702. Where deceased was supported entirely by wife's earnings up to time of his death, held that widow was not entitled to marital fourth as against his mother, who was his forced heir, on discovery 10 years after his death that he was owner of valuable stocks. Id.

73. Must be in necessitous circumstances at the time of his death. Succession of Kunemann, 115 La. 604, 39 So. 702.

74. Succession of Kunemann, 115 La. 604, 39 So. 702.

75, 76. Penney v. Weems [Ala.] 39 So. 574.

77. Under Ky. St. 1903, § 2138. Redmond v. Redmond's Adm'x [Ky.] 91 S. W. 260.

78. The lawful cause which will justify a husband in separating from his wife and refusing to support her and prevent the act

is granted to wife on ground of adultery, she has same interest in his estate as upon his death.[79]

DETECTIVES; DETERMINATION OF CONFLICTING CLAIMS TO REALTY, see latest topical index.

DETINUE.[80]

To maintain the action of detinue, the plaintiff must have property in the thing sought,[81] a right to its immediate possession,[82] the property must be capable of identification,[83] and have value,[84] and must be in the possession of defendant at the time of commencing the suit.[85] Detinue will lie to recover the possession of promissory notes.[86] Demand is essential only when necessary to render the detention unlawful.[87] The plea of the general issue puts in issue plaintiff's right of recovery,[88] and evidence negativing plaintiff's right to immediate possession or defendant's wrongful possession, is admissible thereunder.[88] Where defendant is not a trespasser as to his possession,[90] damages for detention prior to the service of the writ cannot be recovered without special demand.[91] Only the legal title is available to one called in under the Alabama statute.[92] In Alabama the defendant in an action of detinue by a mortgagee may interpose any defense which would have been available in an action on the debt, except the statute of limitations,[93] but no affirmative judgment can be rendered.[94] As in other actions the proof must correspond to the allegations.[95] In Alabama the jury need assess the separate value of the things sued for only when practicable.[96]

DEVIATION; DILATORY PLEAS, see latest topical index.

of May 4, 1885, P. L. 430, from operating to debar him, after her decease, from claiming his rights in her estate under the intestate laws, must be such as would entitle him to a decree of divorce against her, and the burden of proof is upon him. Hayes's Estate, 23 Pa. Super. Ct. 570.

79. Linse v. Linse [Minn.] 108 N. W. 8. Judgment awarding her alimony in lieu of all other rights held final, and, having accepted alimony so awarded, she was estopped to deny its validity. Id.

80. See 5 C. L. 1003.

81. Hefner v. Fidler, 58 W. Va. 159, 52 S. E. 513. General or special property. Ryall v. Pearson Bros. [Ala.] 41 So. 673.

82. Hefner v. Fidler, 58 W. Va. 159, 52 S. E. 513; Ryall v. Pearson Bros. [Ala.] 41 So. 673. Where a conditional contract of sale by mistake omits interest, until corrected in equity, detenue will not lie until default in payment of purchase money Welliden v. Witt [Ala.] 40 So. 126.

83. Hefner v. Fidler, 58 W. Va. 159, 52 S. E. 513.

84. Hefner v. Fidler, 58 W. Va. 159, 52 S. E. 513. Where a contract of sale has been rescinded, notes given by the buyer for the purchase price have no value sufficient to sustain detinue. Id.

85. Ryall v. Pearson Bros. [Ala.] 41 So. 673. Defendant must have had possession some time prior to the bringing of the suit. Hefner v. Fidler, 58 W. Va. 159, 52 S. E. 513.

86. Hefner v. Fidler, 58 W. Va. 159, 52 S. E. 513.

87. Worthington v. Rhodes & Son Co. [Ala.] 39 So. 614. Where a conditional sale contract provides for possession by seller if the purchaser sells the property without his consent, upon breach of the condition the third party's possession is wrongful and no demand is necessary. Id.

88. Equivalent to the common-law plea of non detinet. Ryall v. Pearson Bros. [Ala.] 41 So. 673.

89. Snellgrove v. Evans [Ala.] 40 So. 567. Evidence of a lien in favor of defendant held admissible. Id.

90. A mortgagee who obtains possession by an action of detinue against a third person in possession and in which suit the mortgagor is made a party, is not a trespasser as to a subsequent mortgagee. Daniel Bros. v. Jordan [Ala.] 40 So. 940.

91. Daniel Bros. v. Jordan [Ala.] 40 So. 940.

92. One called in under Code 1896, § 2634, cannot assert a paramount lien or an equitable title. Howard v. Deens, 143 Ala. 423, 39 So. 346.

93. Under Code 1896, § 1476, breach of warranty and false representation in a sale may be asserted in an action of detinue under the purchase-price mortgage. McDaniel v. Sullivan [Ala.] 39 So. 355.

94. McDaniel v. Sullivan [Ala.] 39 So. 355.

95. Where the complaint in detinue by a mortgagee describes the mule as a "dark bay," a description in the mortgage as a "black" mule, is not such a variance as to render the mortgage inadmissible. Holman

DIRECTING VERDICT AND DEMURRER TO EVIDENCE.

§ 1. Directing Verdict (1146). The Motion (1151). Effect of Ruling; Appeal; Waiver (1153).

§ 2. Demurrers to Evidence (1154). Effect (1155). Waiver (1155).

Insufficiency of evidence, while the most frequent ground for directed verdict or demurrer to evidence, is frequently raised in other ways. Accordingly, reference must be had to topics dealing with the specific subject-matter for a full treatment of sufficiency of evidence on particular questions.[97]

§ 1. *Directing verdict. Grounds and occasions.*[98]—The power of a superior court to direct a judgment is practically commensurate with its power to direct a nonsuit;[99] and the power of a trial court to direct a verdict is governed by the same principles which authorize it to sustain a demurrer to the evidence. The principles differ slightly in their application.[1] The direction to return a certain verdict is in fact a withdrawal of the case from the jury and a decision by the court.[2] In directing a verdict the form of the instruction, or the particular words used by the judge, are of no moment, for the act of the jury in returning the verdict is merely formal.[3] Such a direction is not an instruction within the terms of the rule requiring all instructions to be in writing.[4] A direction of a verdict for plaintiff reserving the question of law "whether there is any evidence to go to the jury entitling the plaintiff to recover" is an inappropriate form, as a reserved question of law capable of a clear statement should be so stated.[5] The failure of a complaint to state a cause of action is a good ground for the direction of a verdict for defendant.[6] It is the duty of the court to direct a verdict where there is no evidence[7] or a mere scintilla of evidence[8] to support the cause of action,[9] or where the

v. Clark [Ala.] 41 So. 765. Nor the fact that the complaint alleges a sale about "two or three" years prior to the bringing of the suit, while the mortgage proves a sale only one year and nine months before. Id. Where there is a substantial correspondence between the description of the mule in the complaint and in the mortgage, a variance in regard to age is immaterial. Id.

96. Where the evidence only discloses the value of the property as a whole, an entire assessment is proper under the statute. Howard v. Deens, 143 Ala. 423, 39 So. 346.

97. See such topics as Master and Servant, 6 C. L. 521. See, also, Appeal and Review, 7 C. L. 128, for extent of appellate review of verdicts.

98. See 5 C. L. 1004.

99. Weir v. Seattle Elec. Co., 41 Wash. 657, 84 P. 597.

1. Taylor v. Modern Woodmen of America [Kan.] 83 P. 1099.

2, 3, 4. Lacy Bros. v. Morton [Ark.] 89 S. W. 842.

5. Riggs v. Bair, 213 Pa. 402, 62 A. 1086.

6. McPherson v. Hattich [Ariz.] 85 P. 731.

7. Huntt v. McNamee [C. C. A.] 141 F. 293; Libby v. Cook [Ill.] 78 N. E. 599; Chicago & C. Coal Co. v. Hartwell, 122 Ill. App. 330. Where plaintiff failed to support the allegations of his petition, a peremptory instruction for defendant with the option of a compulsory nonsuit was proper at the close of plaintiff's evidence, notwithstanding the absence of proof in support of defendant's plea of res judicata. Matousek v. Bohemian Roman Catholic First Cent. Union, 192 Mo. 588, 91 S. W. 538. Where the evidence in an action for injuries to a passenger entirely failed to show any wantonness on the part of the trainmen, the general affirmative charge with hypothesis for defendant was properly given as to counts alleging wantonness. Sweet v. Birmingham, R. & Elec. Co. [Ala.] 39 So. 767. A peremptory instruction for defendant is proper where there is no evidence of defendant's negligence as charged and the doctrine of res ipsa loquitur is not applicable. Baltimore, etc., R. Co. v. Friend, 119 Ill. App. 306. The trial judge may order a verdict, although the jury have been allowed a view, if it does not appear that the jury could have acquired from the view knowledge of material facts which were not put in evidence in court. McMahon v. Lynn & B. R. Co. [Mass.] 77 N. E. 826. Where plaintiff's case rested solely on the statutory presumption of negligence arising from the killing of stock, and the testimony of defendant's engineer, neither disputed nor unreasonable, showed that the killing was unavoidable, defendant was entitled to a peremptory instruction. Southern R. Co. v. Murry [Miss.] 39 So. 478.

8. Libby v. Cook [Ill.] 78 N. E. 599; Dye v. Corbin [W. Va.] 53 S. E. 147. Until the supreme court sees fit to modify or abolish the "scintilla rule," it is the duty of a nisi prius judge to follow and apply it, notwithstanding his personal inclination or his opinion as to the merits of the case. Barr v. Poor, 7 Ohio C. C. (N. S.) 333. But it has no longer its former force and vigor in

evidence or admitted facts, with all the reasonable inferences therefrom, is insufficient to warrant a verdict,[10] or where the evidence on material points is undisputed[11] so that the only issue is one of law,[12] or is such that all reasonable men or ordinary minds could draw but one conclusion therefrom,[13] or where there is a material variance between the plaintiff's allegations and his proofs.[14]

Defendant is entitled to a directed verdict where, after admitting every fact proved by plaintiff, as well as the reasonable inferences therefrom, plaintiff has failed to establish his case,[15] or where there is no conflict in the evidence on the material and controlling issues, and, with all its reasonable inferences, it demanded a verdict for him,[16] or where plaintiff's witnesses established defendant's case,[17] or where issue was joined on a plea to the entire cause of action and the plea was proved without any con-

Ohio, and where the probative value of plaintiff's evidence is so slight that a motion for a new trial would have to be granted if a verdict be based upon it, it is the duty of the court to grant a motion to nonsuit or to direct a verdict for defendant at the conclusion of plaintiff's evidence. MacBride v. Gould, 3 Ohio N. P. (N. S.) 469.

9. The courts of the United States have always exercised the right to control the disposition of causes when either the allegations of the plaintiff or the evidence in support thereof fails to make out a case. Huntt v. McNamee [C. C. A.] 141 F. 293. Direction of verdict for insufficiency of plaintiff's evidence affirmed. Turnbull v. Ross [C. C. A.] 141 F. 649. Where the proof does not fairly tend to make a case for plaintiff, it is proper to direct a verdict for defendant. Bowen v. Chicago & N. W. R. Co., 117 Ill. App. 9. Where the evidence will not authorize a recovery, a directed verdict for defendant on the ground that the petition did not allege a cause of action is not ground for reversal even if the petition is sufficient. Siewerssen v. Harris County [Tex. Civ. App.] 91 S. W. 333. Where, in an action for injuries at a crossing, the evidence showed contributory negligence on plaintiff's part and no willfulness or wantonness on the motorman's part, a verdict should have been directed for defendant. Sims v. St. Louis & S. R. Co., 116 Mo. App. 572, 92 S. W. 909. Where the court is able to see, in an action for personal injuries, that the negligence complained of was not the proximate but the remote cause of the injury, the court must direct a verdict for defendant. Snyder v. Colorado Springs, etc., R. Co. [Colo.] 85 P. 686. In a suit to recover money retained by attorneys as fees, where the undisputed evidence showed a contract for a reasonable fee and the sum retained was reasonable and fair under the circumstances, the general affirmative charge for defendants was proper. German v. Browne [Ala.] 39 So. 742.

10. Smithley v. Snowden, 120 Ill. App. 86; Libby v. Cook [Ill.] 78 N. E. 599; Dye v. Corbin [W. Va.] 53 S. E. 147; Bartlett v. Wabash R. Co., 220 Ill. 163, 77 N. E. 96; McGuire v. Blount, 199 U. S. 142, 50 Law. Ed. —; Ford v. Ford, 27 App. D. C. 401; Scott v. District of Columbia, 27 App. D. C. 413. No legally sufficient evidence of a breach of covenant sued on. Lucente v. Davis, 101 Md. 526, 61 A. 622. In an action against a city for injuries caused by a falling sign, alleged to have been maintained contrary to an ordinance, where the ordinance was not introduced in evidence, a peremptory instruction should have been given for the city. Loth v. Columbia Theater Co. [Mo.] 94 S. W. 847.

11. Woodward v. Chicago, etc., R. Co. [C. C. A.] 145 F. 577. Where the facts are admitted and all reasonable minds agree that an injury was the result of plaintiff's own negligence, the court may so inform the jury by a peremptory instruction. Hewes v. Chicago & E. I. R. Co., 217 Ill. 500, 75 N. E. 515; Northern Pac. R. Co. v. Jones [C. C. A.] 144 F. 47. Where the facts were conclusively determined by the admission in evidence of a default judgment in a case between the same parties involving the same facts, the court properly directed a verdict. Standard Supply & Equipment Co. v. Merritt, 48 Misc. 498, 96 N. Y. S. 181.

12. Lamberida v. Barnum [Tex. Civ. App.] 14 Tex. Ct. Rep. 434, 90 S. W. 698; Ziehn v. United Elec. Light & Power Co. [Md.] 64 A. 61; Merritt v. State [Tex. Civ. App.] 15 Tex. Ct. Rep. 925, 94 S. W. 372. The question of negligence is one of law where the evidence is undisputed and where, with all justifiable inferences therefrom, it is so insufficient that reasonable minds would so pronounce it without hesitation or dissent. Darrow v. The Fair, 118 Ill. App. 665. In an action for the death of a section foreman by being struck by a train, a directed verdict for defendant on the ground of assumption of risk sustained. Ives v. Wisconsin Cent. R. Co. [Wis.] 107 N. W. 452.

13. Maffi v. Stephens [Tex. Civ. App.] 15 Tex. Ct. Rep. 140, 93 S. W. 158; Hutchens v. St. Louis S. W. R. Co. [Tex. Civ. App.] 89 S. W. 24.

14. It was not error to direct a verdict for defendant where the complaint charged him with liability for his agent's negligence, and it appeared that the alleged agent was an independent contractor (Huntt v. McNamee [C. C. A.] 141 F. 293), but affirmative charge asked solely on the theory of a variance in the complaint and evidence, properly refused (Birmingham R. Light & Power Co. v. Enslen [Ala.] 39 So. 74).

15. Miller v. Metropolitan Life Ins. Co. [Ky.] 89 S. W. 183; Southern R. Co. v. Goddard [Ky.] 89 S. W. 675.

16. Civ. Code 1895, § 5331. Kern v. Kansas City Southern R. Co. [Ga.] 54 S. E. 355.

17. Where, at the close of plaintiff's case, defendant's motion for a directed verdict was denied, and he introduced evidence, none of which helped plaintiff's case, defendant's motion for a directed verdict at the close of all the evidence should have been granted.

flict in the evidence.[18] If the evidence, on the trial of a case appealed from a justice's court, demands a verdict for defendant, the judge may direct such verdict;[19] and if the plaintiff does not wish to be concluded by the verdict, he should move to dismiss the case before the verdict is rendered.[20] An instruction to find for the defendant on one count cannot be granted until all the evidence on both sides is in.[21] It is generally held to be the duty of the court to direct a verdict where a contrary verdict would have to be set aside as against the testimony,[22] but this rule does not obtain in Washington,[23] nor in Illinois;[24] but peremptory charges should be given only where the evidence, taken as absolutely true and so found by the jury, would establish no legal right or fail to maintain the issue.[25] Where the facts admit of but one interpretation, are not questioned by the opposite party, and the witness is not impeached, the court may in its discretion submit the case to the jury or peremptorily instruct a verdict.[26] Although evidence is uncontradicted, yet where a reasonable doubt may be entertained of the accuracy of the knowledge of witnesses, an issue is raised for the jury.[27] Upon a motion to direct a verdict for defendant for failure of proofs, it is within the sound discretion of the court, on motion of plaintiff, to grant a continuance to procure certain evidence.[28] Where the damages depend upon expert or opinion evidence, although plaintiff's testimony is uncontradicted or unimpeached, the court ought not to direct a verdict, but should permit the jury to assess the damages,[29] and if there is any substantial evidence bearing upon the issue,[30] whether direct or inferential,[31] with inferences legitimately to be drawn therefrom[32] to which the jury might, in the proper exercise of its function, give credit, the court cannot rightfully direct the jury to find in opposition thereto,[33] even though such evidence is slight[34] or is uncorroborated

Dow v. Kansas City Southern R. Co., 116 Mo. App. 555, 92 S. W. 744.

18. Gilliland v. Martin [Ala.] 42 So. 7.

19, 20. Callaway v. Southern R. Co. [Ga.] 55 S. E. 22.

21. White v. Wilmington City R. Co. [Del.] 63 A. 931.

22. Hi Williamson & Co. v. Nigh, 58 W. Va. 629, 53 S. E. 124; Green v. Macy [Ind. App.] 76 N. E. 264. Under 1 Mills' Ann. Code § 217, subd. 6. Livesay v. First Nat. Bank [Colo.] 86 P. 102. It is the settled rule of the Federal courts that it is the duty of the trial judge to direct a verdict where, in his opinion, the evidence would not sustain a verdict for the adverse party. Turnbull v. Ross [C. C. A.] 141 F. 649; Ford v. Ford, 27 App. D. C., 401; Scott v. District of Columbia, 27 App. D. C. 413; Huntt v. McNamee [C. C. A.] 141 F. 293; Western Union Tel. Co. v. Baker [C. C. A.] 140 F. 315. Where the trial court has directed a verdict in a case where the evidence, though conflicting, was of so conclusive a character that the court in the exercise of sound discretion would set aside a contrary verdict, the appellate court cannot reverse the judgment unless the evidence was not of such conclusive character. Woodward v. Chicago, etc., R. Co. [C. C. A.] 145 F. 577.

23. Weir v. Seattle Elec. Co., 41 Wash. 657, 84 P. 597.

24. Ware v. Illinois C. R. Co., 119 Ill. App. 456; Fleming v. Ludington, 121 Ill. App. 54.

25. Fore v. Alabama & V. R. Co. [Miss.] 39 So. 493. A motion for peremptory instruction can be granted only where there is no fact in dispute, no conflict in the evidence; and no theory of the case upon which the plaintiff would be entitled to recover. Sovereign Camp, Woodmen of the World, v. Welch [Okl.] 83 P. 547.

26, 27. Pritchard v. Hooker, 114 Mo. App. 605, 90 S. W. 415.

28. Wilson v. Johnson [Fla.] 41 So. 395.

29. Pritchard v. Hooker, 114 Mo. App. 605, 90 S. W. 415.

30. There is always a preliminary question for the judge before the submission of a case to the jury, and it is not whether there is any evidence but whether there is any substantial evidence upon which a jury may properly render a verdict. Western Union Tel. Co. v. Baker [C. C. A.] 140 F. 315.

31. McManus v. Oregon Short Line R. Co. [Mo. App.] 94 S. W. 743.

32. Western Underwriters Ass'n v. Hankins [Ill.] 77 N. E. 447.

33. Wabash R. Co. v. Barrett, 117 Ill. App. 315; Libby v. Cook [Ill.] 78 N. E. 599; Alabama Great Southern R. Co. v. Bonner [Ala.] 39 So. 619; Waters v. Davis [C. C. A.] 145 F. 912; Snydor v. Arnold [Ky.] 92 S. W. 289; Sanders v. Houston, etc., R. Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 567, 91 S. W. 245; Smith v. Cashie & C. R. & Lumber Co., 140 N. C. 375, 53 S. E. 233; Robert Buist Co. v. Lancaster Mercantile Co. [S. C.] 52 S. E. 789. Evidence as to whether defendant had neglected to properly protect the place where decedent worked, and as to his contributory negligence. Reilly v. Troy Brick Co. [N. Y.] 77 N. E. 385. Held that there was evidence of plaintiff's injury being caused by the defective condition of the car and its appliances. Chicago & J. Elec. R. Co. v. Muff,

and contradicted.[35] Where there are several defendants in an action in tort and the plaintiff is entitled to go to the jury as to one of them, it is error to instruct the jury to find them not guilty.[36] In such case the court could properly direct a verdict as to any defendant against whom there was no evidence, or submit the case to the jury with proper instructions as to such defendant.[37] In Texas an issue raised by the evidence must be submitted to the jury, although the evidence would not warrant a verdict thereon in favor of the party at whose instance it was submitted.[38] Where the real facts in a case have not been established by the evidence,[39] or where the evidence is conflicting,[40] and such as to afford an inference adverse to the right of recovery by the party asking the charge,[41] so that different minds may draw different inferences or conclusions from it,[42] the case should be

122 Ill. App. 183. Though the only evidence is the uncontradicted evidence of the party having the burden of proof, a question of fact is presented requiring submission to the jury. Fuller Buggy Co. v. Waldron, 99 N. Y. S. 561. Where, in an action by a wife to recover property levied on as her husband's, there was other evidence of her claim besides that of herself and her husband, it was proper for the court to refuse a directed verdict for defendant. Hawley v. Bond [S. D.] 105 N. W. 464. In an action to compel the construction of an overhead crossing where the issue was whether a grade crossing was agreed upon and there was no evidence of such agreement, the court properly refused to direct a verdict for defendant. Herrstrom v. Newton & N. W. R. Co. [Iowa] 105 N. W. 436.

34. McManus v. Oregon Short Line R. Co. [Mo. App.] 94 S. W. 743. Where there is any evidence in support of the action, defendant is properly denied a directed verdict. Louisville & N. R. Co. v. Fowler [Ky.] 96 S. W. 568; Kellyville Coal Co. v. Strine, 217 Ill. 516, 75 N. E. 375.

35. Holladay v. Rutledge [Ala.] 39 So. 613; Kitler v. People's St. R. Co., 27 Pa. Super. Ct. 602.

36. Aygarn v. Blue, 118 Ill. App. 393. In an action for alienation of affection, proof against one codefendant failing, a joint motion for a directed verdict was properly overruled, although it would have had to be sustained if made separately by the codefendant against whom no cause of action was proven. Harvey v. Harvey [Neb.] 106 N. W. 660.

37. Aygarn v. Blue, 118 Ill. App. 393.

38. Waggoner v. Wyatt [Tex. Civ. App.] 16 Tex. Ct. Rep. 196, 94 S. W. 1076.

39. Facts from which negligence may be reasonably inferred. Vrooman v. North Jersey St. R. Co., 70 N. J. Law 818, 59 A. 459.

40. Kitler v. People's St. R. Co., 27 Pa. Super. Ct. 602; Snyder v. Bougher [Pa.] 63 A. 893; Bishop Co. v. Shelhorse [C. C. A.] 141 F. 643; Wabash R. Co. v. Barrett, 117 Ill. App. 315; McCune v. Badger, 126 Wis. 186, 105 N. W. 667; Kenneweg Co. v. Miley [W. Va.] 53 S. E. 556; Bullard v. Hudson [Ga.] 54 S. E. 132; Home Ins. Co. v. Chattanoochee Lumber Co. [Ga.] 55 S. E. 11; Birmingham R. Light & Power Co. v. Euslen [Ala.] 39 So. 74; Romano v. Vicksburg R. & Light Co. [Miss.] 39 So. 781; Tennessee Coal, Iron & R. Co. v. Bridges [Ala.] 39 So. 902; Holman v. Calhoun [Ala.] 40 So. 356; Gates v. Morton Hardware Co. [Ala.] 40 So. 509; Reeder v. Huffman [Ala.] 41 So. 177; Wilson v. Taylor [Ala.] 41 So. 824; Selber v. Johnson Mercantile Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 293, 90 S. W. 516. Evidence as to scope of contract. Guild v. Pringle [C. C. A.] 145 F 312. The question of plaintiff's contributory negligence, like any other question of fact, is for the jury when conditioned by conflicting testimony or doubtful deductions from the evidence. Western Union Tel. Co. v. Baker [C. C. A.] 140 F. 315. The court is not justified in withdrawing a question of fact from the jury because plaintiff's witnesses disagree. Goff v. Philadelphia [Pa.] 63 A. 431. Where defendant's testimony flatly contradicts the case made by the plaintiff, the real facts can be determined only by the jury. Vrooman v. North Jersey St. R. Co., 70 N. J. Law, 818, 59 A. 459. In an ejectment suit the evidence as to the location of the land on section 25 or 26, being irreconcilably conflicting, the general affirmative charge with hypothesis, requested by plaintiff, was properly refused. Shiver v. Hardy [Ala.] 39 So. 669. There being some conflict in the evidence in an ejectment suit as to whether the purchaser took actual possession, to what extent, and for how long, and as to the nature of the possession claimed by both parties, it was error to direct a verdict for defendant. Harriss v. Howard [Ga.] 55 S. E. 59. Where there are not only issues of negligence raised on the complaint but also issues of contributory negligence raised by the defendant an instruction that, if the evidence is evenly balanced, the verdict must be for defendant is erroneous. Hickey v. Rio Grande Western R. Co., 29 Utah 392, 82 P. 29.

41. Southern R. Co. v. Hill [Ala.] 39 So. 987.

42. Roedler v. Chicago, etc., R. Co. [Wis.] 109 N. W. 88; United R. & Elec. Co. v. Weir, 102 Md. 286, 62 A. 588; St. Louis S. W. R. Co. v. Demsey [Tex. Civ. App.] 13 Tex. Ct. Rep. 961, 89 S. W. 786; Ziehn v. United Elec. Light & Power Co. [Md.] 64 A. 61; Merritt v. State [Tex. Civ. App.] 15 Tex. Ct. Rep. 925, 94 S. W. 372. Where there was evidence tending to show that the location of the disputed boundary line was otherwise than as claimed by plaintiff, it was not error to refuse a charge that its location should be ascertained in accordance with plaintiff's contention. Matfield v. Kimbrough [Tex. Civ. App.] 13 Tex. Ct. Rep. 927, 90 S. W. 712.

submitted to the jury;[43] but it is the exclusive province of the court to determine whether conflicting reasonable inferences may fairly be drawn from the evidence.[44] The case must also be submitted to the jury when it depends on the weight of evidence[45] or the credibility of witnesses.[46] Where plaintiff's oral evidence was not contradicted but defendants admitted no fact entitling plaintiff to recover, the interest of the plaintiff in the event of the suit was of itself sufficient to require the submission of the case to the jury;[47] but the rule that the credibility of a witness who is a party to the action must be submitted to the jury is not absolute and inflexible, and where his evidence is not contradicted directly or by inference, is not improbable or surprising or suspicious, there is no reason to deny its conclusiveness.[48] Where there are several issues of fact and both parties move for a directed verdict, a subsequent motion by the unsuccessful party for a submission to the jury, without specifying any particular questions of fact, may be denied,[49] and where the testimony is conflicting, the trial court, disbelieving plaintiff's testimony, may set aside a verdict rendered for him and grant a new trial, but cannot direct a verdict for defendant.[50] A request by the party having the burden of the issue, for the direction of a verdict, should not be granted when the verdict must be based upon the testimony of witnesses wholly or partially.[51] The court cannot take the case from the jury by charging some theory unsupported by the evidence.[52]

Plaintiff is entitled to a directed verdict where he makes out a prima facie case[53] or proves his case as laid,[54] or where his testimony is positive, uncontra-

43. Where the evidence is conflicting, a submission of plaintiff's with apparent approval, and defendant's so as cast doubt upon its truthfulness, was error. Lingle v. Scranton R. Co. [Pa.] 63 A. 890.

44. McCune v. Badger, 126 Wis. 186, 105 N. W. 667.

45. Semet-Solway Co. v. Wilcox [C. C. A.] 143 F. 839; Kenneweg Co. v. Miley [W. Va.] 53 S. E. 556; Folley v. Chicago, etc., R. Co. [Okl.] 84 P. 1090.

46. Folley v. Chicago, etc., R. Co. [Okl.] 84 P. 1090; Kenneweg Co. v. Miley [W. Va.] 53 S. E. 556; Siebe v. Heilman Mach. Works [Ind. App.] 77 N. E. 300; Smith v. Cashie & C. R. & Lumber Co., 140 N. C. 375, 53 S. E. 233. Where plaintiff's claim rests on oral evidence, the credibility of the witnesses is for the jury. Bartlett v. Rothschild [Pa.] 63 A. 1030. The question of the credibility of plaintiff was for the jury, and her contradicting herself did not warrant a directed verdict for defendant. Chicago & A. R. Co. v. Jennings, 217 Ill. 494, 75 N. E. 560.

47. Dysart-Cook Mule Co. v. Reed, 114 Mo. App. 296, 89 S. W. 591.

48. Electric Fireproofing Co. v. Smith, 99 N. Y. S. 37.

49. Bowers v. Ocean Acc. & Guarantee Corp., 110 App. Div. 691, 97 N. Y. S. 485.

50. Dowling v. Brooklyn Heights R. Co., 107 App. Div. 312, 95 N. Y. S. 105.

51. Stephens v. American Car & Foundry Co. [Ind. App.] 78 N. E. 335.

52. Where, under the evidence, the accident which caused plaintiff's injury must have resulted from defendant's negligently allowing rocks, etc., to accumulate dangerously near the car track, or from plaintiff's slipping off a rail beside the track onto the car, it was not error to refuse defendant's request to charge that it might have resulted from a rock in some "unknown and accidental way getting on the track." Western Coal & Min. Co. v. Honaker [Ark.] 96 S. W. 361.

53. Hi Williamson & Co. v. Nigh, 58 W. Va. 629, 53 S. E. 124; Armour Packing Co. v. Vietch-Young Produce Co. [Ala.] 39 So. 680. Where plaintiff makes a prima facie case and defendant introduces conflicting testimony, it is error to direct a verdict against plaintiff, although there may be some issues upon which defendant's is the only positive testimony. Taylor v. Modern Woodmen of America [Kan.] 83 P. 1099. It was not error to refuse to direct a verdict for defendant because plaintiff did not show that the insured was a member in good standing at the time of his death, that being matter of defense. Kinney v. Brotherhood of American Yeomen [N. D.] 106 N. W. 44; Hutchens v. St. Louis S. W. R. Co. [Tex. Civ. App.] 89 S. W. 24. Where it was shown that decedent was killed by a train, that the servants operating it were negligent, that such negligence caused his death, and that he was free from contributory negligence, the court could not direct a verdict for defendant. Id.

54. Where plaintiff established his cause of action and there was no conflict of evidence, a verdict was properly directed for him. Harding v. Roman Catholic Church of St. Peter, 99 N. Y. S. 945. Where the insurer's sole defense to an action on a policy was that a prior judgment was res judicata, thereby admitted plaintiff's prima facie case, defendant having failed to establish such plea in bar, plaintiff was entitled to a directed verdict. Stone v. Grand Lodge, A. O. U. W. [Mo. App.] 92 S. W. 1143. Where the statement of claim contained a copy of the contract on which it was based, with all the accounts between the parties, and the affidavit of defense denied no material averment

dicted, and not inherently improbable,[55] or where the single material issue is proved beyond adverse inference,[56] or where there is no issue of fact to submit to the jury,[57] or where defendant's evidence and all reasonable inferences therefrom show no defense,[58] but a verdict should not be directed in favor of a plaintiff who fails to make a case,[59] yet, although plaintiff may not make out a prima facie case, he may go to the jury, if defendant offers evidence which, in connection with plaintiff's, might reasonably satisfy the jury of his right to recover.[60] Where no evidence was submitted upon which the jury could lawfully find for one party, the trial court could not direct the jury to find a verdict for the opposite party.[61]

The motion.[62]—A motion to exclude plaintiff's evidence and direct a verdict for defendant must be made in writing, if it is desired to preserve the question;[63] and it should specifically state the grounds therefor.[64] This is a usual motion in Federal practice, quite frequently resorted to and resulting in the saving of time and expense.[65] The General Assembly of Rhode Island has the constitutional authority to enact that the appellate court shall have power to direct judgment without a further jury trial in accordance with its former procedure.[66] The difference between a motion to direct a nonsuit and a motion to direct a verdict for defendant is rather a matter of form than of substance, except that the latter ends the litigation, unless a new trial is granted.[67] A request by defendant for a peremptory instruction raises the question whether there is any evidence which, with all reasonable inferences therefrom, is sufficient to support a verdict for plaintiff,[68] and challenges

in the statement, the case was for the court and not for the jury. Ryon v. Starr [Pa.] 63 A. 701. Where plaintiff's stated account is admitted by the answer and there is no plea of set-off or recoupment, and the only plea left is one which presents no legal defense, it is not error to direct a verdict for plaintiff, although the plea was not demurred to and evidence was received to support it. Williams Mfg. Co. v. Warner Sugar Refining Co. [Ga.] 54 S. E. 95. When the jury could come to no other conclusion than that plaintiff was injured through the negligence of defendant's employes, the court properly directed a verdict to be found for plaintiff if the jury believed the evidence. Birmingham R. Light & Power Co. v. Rutledge, 142 Ala. 195, 39 So. 338.

55. Brown v. Petersen, 25 App. D. C. 359.

56. In a suit on a bond or bill single, issue was taken on plaintiff's replication that it was given in settlement of controversies, and such allegation was proved without dispute. Union Fertilizer Co. v. Johnson [Ala.] 39 So. 684. The making and breach of a contract were indisputably established without adverse inference. McCleskey v. Howell Cotton Co. [Ala.] 42 So. 67. Where it was evident that the title to goods was retained by the seller after delivery to the carrier, it was error to submit such question to the jury for an adverse finding. Cragun Bros. v. Todd [Iowa] 108 N. W. 450.

57. Schonbachler's Adm'r v. Mischell [Ky.] 89 S. W. 525.

58. Defendant's objection to plaintiff's title to the land for which the note was given having been cured, the execution of the notes being admitted and no other valid defense appearing, a verdict for plaintiff was properly directed. Cornett v. Ault, 124 Ga. 944, 53 S. E. 460.

59. Erroneous direction of verdict for plaintiffs in ejectment, who had parted with their interest in the land without bringing in the real parties in interest, under Revisal 1905, §§ 400, 414, notwithstanding § 415, preventing certain abatements of actions. Burnett v. Lyman [N. C.] 54 S. E. 412. Where, in assumpsit, pleas of the general issue and set-off were filed, and plaintiffs offered no evidence, but defendant offered evidence to support his set-off, it was error to instruct the jury to find for the plaintiffs for the full amount of their claim. Hillsborough Grocery Co. v. Leman [Fla.] 40 So. 680.

60. Southern R. Co. v. Hill [Ala] 39 So. 987.

61. Hillsborough Grocery Co. v. Leman [Fla.] 40 So. 680.

62. See 5 C. L. 1008.

63. Chicago & A. R. Co. v. Brooks, 115 Ill. App. 5.

64. Hanson v. Lindstrom [N. D.] 108 N. W. 798.

65. Bishop Co. v. Shelhorse [C. C. A.] 141 F. 643.

66. Const. art. 4, § 10, and art. 14, § 3. Gunn v. Union R. Co. [R. I.] 63 A. 239.

67. Huntt v. McNamee [C. C. A.] 141 F. 293. A directed verdict is res adjudicata, while a nonsuit is not, unless based upon some affirmative finding. Weir v. Seattle Elec. Co., 41 Wash. 657, 84 P. 597.

68. Elgin, etc., R. Co. v. Hoadley, 220 Ill. 462, 77 N. E. 151; Smith v. Eitel, 121 Ill. App. 464. Judgment for plaintiff should not be reversed for refusal to peremptorily instruct for defendant, unless, after giving plaintiff the benefit of the most favorable view of the evidence and every reasonable inference in his favor, no other reasonable conclusion can be reached than that he was guilty of contributory negligence. Asphalt Granitoid Const. Co. v. St. Louis Transit Co. [Mo. App.] 80 S. W. 741.

the right of the defendant in any event, as a matter of law, to have a verdict in its favor.[69] A motion to direct a verdict admits for the purpose of the motion the truth of the testimony which supports the opponent's case[70] together with all inferences which may reasonably be drawn therefrom,[71] and the court is bound to assume them as true,[72] taking the most favorable view thereof as against the motion,[73] giving it all the weight it will reasonably bear,[74] and ignoring all opposing testimony.[75] And the rulings as to the admission of evidence must be regarded as the law of the case;[76] but, in passing upon the motion, the court cannot weigh the evidence.[77] The statute of Washington, which provides that where the sufficiency of the evidence is challenged and the court determines as a matter of law what verdict should be found, the jury shall be discharged and judgment entered accordingly,[78] has reference alone to the legal sufficiency of the evidence and does not justify a court to pass on its probative sufficiency on a motion for a directed verdict.[79] Where, at the close of the evidence, both parties request peremptory instructions, they both concede that there is no case for the jury,[80] that the only question to be decided by the court is one of law,[81] and they submit the whole case to the decision of the court,[82] giving the court authority to determine the facts;[83] and, in such case, the court's finding has all the incidents of a general finding in a case submitted after waiver of a jury,[84] or the same effect as the verdict of a jury.[85] A previous request to direct a verdict does not preclude a party from requesting to have the case submitted to the jury;[86] and where, both parties having made such

69. Hamilton v. Schlitz Brewing Co. [Iowa] 105 N. W. 438.

70. Ubhoff v. Brandenburg, 26 App. D. C. 3. Being in the nature of a demurrer to the evidence it concedes it to be true. Hobbs v. Ray [Ky.] 96 S. W. 589.

71. Ubhoff v. Brandenburg, 26 App. D. C. 3. Every inference which the jury would have been warranted in drawing from the evidence adduced. McLean v. Omaha & C. B. R. & Bridge Co. [Neb.] 103 N. W. 285; Phelan v. Granite Bituminous Pav. Co., 115 Mo. App. 423, 91 S. W. 440; Hall v. Terre Haute Elec. Co. [Ind. App.] 76 N. E. 334; Roberts v. Terre Haute Co. [Ind. App.] 76 N. E. 895; Shoninger Co. v. Mann [Ill.] 76 N. E. 354.

72. United R. & Elec. Co. v. Weir, 102 Md. 286, 62 A. 588; Illinois, etc., R. Co. v. McCollum, 122 Ill. App. 531; Chicago & A. Co. v. Seevers, 122 Ill. App. 558; Birmingham Rolling Mill Co. v. Rockhold [Ala.] 42 So. 96; Shoninger Co. v. Mann [Ill.] 76 N. E. 354.

73. Hamilton v. Schlitz Brewing Co. [Iowa] 105 N. W. 438; Phelan v. Granite Bituminous Pav. Co., 115 Mo. App. 423, 91 S. W. 440; Hall v. Terre Haute Elec. Co. [Ind. App.] 76 N. E. 334; Roberts v. Terre Haute Elec. Co. [Ind. App.] 76 N. E. 895; Birmingham Rolling Mill Co. v. Rockhold [Ala.] 42 So. 96.

74. McCune v. Badger, 126 Wis. 186, 105 N. W. 667.

75. Illinois, etc., R. Co. v. McCollum, 122 Ill. App. 531; Chicago & A. R. Co. v. Seevers, 122 Ill. App. 558. Only evidence tending to prove the plaintiff's case is considered, and it matters not from which party the evidence comes. Nothing in rebuttal of plaintiff's case is to be considered. C., P. & St. L. R. Co. v. Condon, 121 Ill. App. 440.

76. Hamilton v. Schlitz Brewing Co. [Iowa] 105 N. W. 438.

77. Shoninger Co. v. Mann [Ill.] 76 N. E. 354; C. P. & St. L. R. Co. v. Condon, 121 Ill. App. 440. The rule prevailing in Illinois does not permit the trial judge to weigh conflicting testimony in deciding a motion to direct a verdict. Bowen v. Chicago & N. W. R. Co., 117 Ill. App. 9.

78. Ballinger's Ann. Codes & St. § 4994. Morris v. Warwick [Wash.] 85 P. 42.

79. Morris v. Warwick [Wash.] 85 P. 42.

80. Western Exp. Co. v. U. S. [C. C. A.] 141 F. 28; Love v. Scatcherd [C. C. A.] 146 F. 1. Each party assumes, from his point of view, that there is no dispute as to the facts. Bowers v. Ocean Acc. & Guarantee Corp., 110 App. Div. 691, 97 N. Y. S. 485. Where there is no conflict the facts most favorable to plaintiff must be deemed to have been found. Zirinsky v. Post, 98 N. Y. S. 132. Where both parties moved for a verdict, without any request by defendant to go to the jury, the court was entitled to take defendant's testimony, unfavorable to himself, in determining whether the transactions were "options" and hence illegal or were for the actual future delivery of grain and valid. Zeller v. Leiter, 99 N. Y. S. 624.

81. McComb v. Baskerville [S. D.] 106 N. W. 300; Love v. Scatcherd [C. C. A.] 146 F. 1.

82. Western Exp. Co. v. U. S. [C. C. A.] 141 F. 28; Michigan Home Colony Co. v. Tabor [C. C. A.] 141 F. 332.

83. Zirinsky v. Post, 98 N. Y. S. 132.

84. Michigan Home Colony Co. v. Tabor [C. C. A.] 141 F. 332.

85. Zirinsky v. Post, 98 N. Y. S. 132. Where both parties requested a direction of the verdict, a directed verdict has the same effect as if rendered by the jury where the unsuccessful party did not ask to go to the jury. Baker v. Appleton & Co., 107 App. Div. 358, 95 N. Y. S. 125.

86. Seddon v. Tagliabue, 98 N. Y. S. 236.

request, the defendant, before action by the court, asked to go to the jury on the whole issue, it was error for the court to direct a verdict for plaintiff, unless there was no question of fact on which the evidence would have authorized a different result.[87] An exception to a motion to direct a verdict, in the absence of anything implying a waiver, prevents a waiver of the right to go to the jury;[88] but where defendant, in excepting to plaintiff's motion for a directed verdict, stated that there was only one question on which he desired to go to the jury, it was a waiver of the right to have any other question presented.[89] And where both parties request a verdict, and after direction and entry by the clerk the defeated party excepts to the direction, he cannot subsequently insist upon his right to go to the jury upon the disputed question of fact.[90] A defendant cannot complain of the refusal of a general request to go to the jury, without mention of any specific question, where the evidence supports the plaintiff's claim and defendant offers no evidence in disproof of it.[91]

Effect of ruling; appeal; waiver.[92]—Where a peremptory instruction for defendant is complained of, the true question is whether there is any evidence which, if true, with all the inferences reasonably to be drawn therefrom, would have a tendency to support a verdict for plaintiff,[93] and this question is to be considered, leaving entirely out of view the effect of all modifying and countervailing evidence,[94] and considering the testimony in the light most favorable to the losing party.[95] In testing the correctness of the denial of a request for a peremptory instruction, the supreme court must look to all the testimony and will not reverse on account of such denial, if upon the whole case there is sufficient evidence to sustain the verdict.[96] The ruling on a motion for a verdict will be affirmed unless the record shows it to be clearly wrong,[97] but where the record does not contain all the evidence, it cannot be determined on appeal whether the court erred in refusing a peremptory charge for defendant.[98] The court of appeals may review the refusal of a peremptory instruction for defendant, even after verdict for plaintiff approved by the lower court.[99] In the absence of a request for a peremptory instruction, the question of whether the evidence fairly tended to support the verdict will not be reviewed upon appeal.[1] Where both parties request the direction of a verdict, they are concluded by the court's finding of facts,[2] and the only question reviewable is the finding of law,[3] both parties being estopped from

87. Cravath v. Baylis, 99 N. Y. S. 973.

88, 89. Wood v. Rairden, 97 N. Y. S. 735.

90. Zajic v. Elian, 98 N. Y. S. 652.

91. Keene v. Newark Watch Case Material Co., 98 N. Y. S. 68.

92. See 5 C. L. 1009.

93. Ware v. Illinois C. R. Co., 119 Ill. App 456; Fleming v. Ludington, 121 Ill. App. 54; Robinson v. Ward [Mich.] 12 Det. Leg. N. 113, 104 N. W. 373.

94. Ware v. Illinois Cent. R. Co., 119 Ill. App. 456; Fleming v. Ludington, 121 Ill. App. 54.

95. O'Neill v. Northern Assur. Co. [Mich.] 13 Det. Leg. N. 620, 108 N. W. 996. The appellant is entitled to the most favorable inferences deducible from the evidence and all are to be treated as established in his favor. West v. Woodruff, 97 N. Y. S. 1054.

96. Grooms v. Neff Harness Co. [Ark.] 96 S. W. 135. Where a judgment is reversed on appeal because the trial court erred in refusing defendant's motion for a directed verdict, he is not entitled to such verdict unless the evidence is substantially the same. Denver & R. G. R. Co. v. Arright [C. C. A.] 141 F. 67.

97. McCune v. Badger, 126 Wis. 186, 105 N. W. 667.

98. Sloss-Sheffield Steel & Iron Co. v. Hutchinson [Ala.] 40 So. 114.

99. Asphalt Granitoid Const. Co. v. St. Louis Transit Co. [Mo. App.] 80 S. W. 741.

1. Chicago City R. Co. v. Shaw, 220 Ill. 532, 77 N. E. 139.

2. McCormick v. National City Bank [C. C. A.] 142 F. 132; Western Exp. Co. v. U. S. [C. C. A.] 141 F. 28. The court assumes the place of the jury. Richter v. Phoenix Bldg. & Loan Co., 7 Ohio C. C. (N. S.) 360.

3. McCormick v. National City Bank [C. C. A.] 142 F. 132. The question presented is not whether there was a scintilla of evidence either way, but whether the court was authorized on the evidence to take the action

questioning the findings of fact on review, except on the controlling issues, whether there was any evidence to sustain the verdict[4] or any reversible error in the admission or rejection of evidence,[5] and there must be an affirmance if there is any evidence to support the finding of the trial court.[6] The defendant waives the court's error in refusing to direct a verdict in his favor, where he proceeds to put in evidence in defense,[7] or introduces evidence which, together with plaintiff's, is legally sufficient to support the verdict,[8] or fails to renew the motion after the close of the evidence.[9]

§ 2. *Demurrers to evidence.*[10]—A motion by plaintiff at the close of the evidence to direct a verdict in his favor,[11] or a motion by the defendant to instruct that the plaintiff cannot recover, is in the nature of a demurrer to the evidence.[12] A demurrer to evidence must be in writing,[13] but where the court immediately reduces to writing and delivers to the jury an oral instruction directing a verdict that is a sufficient compliance with a statute requiring all instructions to be written.[14] In Florida a party demurring to the evidence must set forth on the record all of the evidence intended to be admitted thereby, otherwise the opposing party cannot be required to join therein;[15] and even if he voluntarily joins therein, the supreme court can give no judgment on the demurrer, but must award a venire de novo.[16] A demurrer to the evidence is properly overruled where there is substantial evidence tending to establish plaintiff's case,[17] and it is error to sustain a demurrer to the evidence merely because there are conflicts and contradictions between plaintiff's testimony in chief and the cross-examination;[18] but it should be sustained when, taken as a whole, the evidence is insufficient to support a judgment for plaintiff.[19] On a demurrer to the evidence, the court cannot weigh the testimony.[20] A demurrer to evidence which does not state all the evidence admitted thereby is properly overruled.[21] In Arkansas practice, a demurrer to the evidence as a means of challenging its sufficiency is unknown,[22] but defendant may test its legal sufficiency by a request for a peremptory instruction in his favor.[23]

which was taken. Richter v. Phoenix Bldg. & Loan Co., 7 Ohio C. C. (N. S.) 360.

4. Western Exp. Co. v. U. S. [C. C. A.] 141 F. 28.

5. Michigan Home Colony Co. v. Tabor [C. C. A.] 141 F. 332.

6. McCormick v. National City Bank [C. C. A.] 142 F. 132.

7. Oates v. Union R. Co. [R. I.] 63 A. 675.

8. Grooms v. Neff Harness Co. [Ark.] 96 S. W. 135.

9. Garland v. Keeler [N. D.] 108 N. W. 484.

10. See 5 C. L. 1010.

11. Ubhoff v. Brandenburg, 26 App. D. C. 3.

12. Phelan v. Granite Bituminous Pav. Co., 115 Mo. App. 423, 91 S. W. 440.

13, 14. Landt v. McCullough, 218 Ill. 607, 75 N. E. 1069.

15, 16. Skinner Mfg. Co. v. Wright [Fla.] 41 So. 28.

17. Duncan v. Huse [Kan.] 85 P. 589. If there is any evidence whatever to support plaintiff's case, it must be left to the jury to decide as to its weight and credibility. Acker v. Norman [Kan.] 84 P. 531. The court can sustain a demurrer to plaintiff's evidence, or direct a verdict for defendant only where the plaintiff has wholly failed to introduce any substantial evidence in support of some material point in his case (Avery v. Union Pac. R. Co. [Kan.] 85 P. 600), or where the material facts proven and the inferences which may be drawn therefrom fail to prove a fact essential to recovery (Hollweg v. Bell Tel. Co., 195 Mo. 149, 93 S. W. 262). The court must be able to say, as a matter of law, that the party introducing the evidence has not proved his case. Conklin v. Yates [Okl.] 83 P. 910. Defendant's demurrer to the evidence on the ground that the only testimony on which plaintiff could go to the jury was elicited by a leading question and was in conflict with her previous testimony was properly overruled, where plaintiff had already testified to the same fact without prompting by counsel. McCaffery v. St. Louis, etc., R. Co., 192 Mo. 144, 90 S. W. 816.

18. Acker v. Norman [Kan.] 84 P. 531.

19. Pringey v. Guss [Okl.] 86 P. 292. Where a party having the burden of the issue introduces evidence which supports his case and then introduces evidence which prima facie defeats it, a demurrer to the evidence cannot be overruled and judgments rendered in favor of the party producing the evidence. Kibby v. Gibson [Kan.] 83 P. 968.

20. Acker v. Norman [Kan.] 84 P. 531; Duncan v. Huse [Kan.] 85 P. 589.

21. Atlantic Coast Line R. Co. v. Dexter [Fla.] 39 So. 634.

22, 23. Grooms v. Neff Harness Co. [Ark.] 96 S. W. 135.

Effect.[24]—On demurrer to plaintiff's evidence, it must be taken as absolutely true and every reasonable inference be drawn therefrom in plaintiff's favor.[25] Every fact that the jury might infer if the evidence were before them is admitted,[26] as well as every fact and conclusion which the evidence most favorable to the other party tends to prove.[27] The court can consider only those facts and inferences which are favorable to plaintiff and not defendant's contradictory evidence,[28] and must consider as true every portion of the evidence tending to prove the case of the party resisting the demurrer.[29]

Waiver.[30]—A defendant waives his demurrer to plaintiff's evidence where, after the overruling of his demurrer, he offers evidence in his own behalf;[31] but he does not waive a demurrer to the whole of the evidence by requesting instructions on the theory of the case adopted by plaintiff's counsel.[32]

DISCLAIMERS, see latest topical index.

DISCONTINUANCE, DISMISSAL AND NONSUIT.

§ 1. Voluntary Nonsuit or Discontinuance (1155). An Attorney (1157). If Affirmative Relief is Demanded (1157). When Right to Voluntary Nonsuit is Lost (1157). Discontinuance by Operation of Law (1157). Effect of Discontinuance (1157). Retraxit (1157).
§ 2. Involuntary Dismissal or Nonsuit (1157). Grounds in General (1157). Want of Jurisdiction (1158). Defect in Pleadings; Parties (1159). Failure of Prosecution (1159). Nonsuit for Failure of Proof (1160). Variance (1163). Motion for Nonsuit; Effect (1164). Effect of Dismissal or Nonsuit (1164). Setting Aside Order; Reinstating Cause (1165). Practice on Appeal (1166).

§ 1. *Voluntary nonsuit or discontinuance.*[33]—At common law the plaintiff could of right become nonsuit at any time before verdict,[34] but many authorities require the right to be exercised before the submission of the case,[35] but a case is not

24. See 5 C. L. 1011.

25. Robertson v. Fuller Const. Co., 115 Mo. App. 456, 92 S. W. 130; Gilpin v. Missouri, etc., R. Co. [Mo.] 94 S. W. 869; Forbes v. Dunnavant [Mo.] 95 S. W. 934; Phelan v. Granite Bituminous Pav. Co., 115 Mo. App. 423, 91 S. W. 440; Pendelton's Adm'r v. Richmond, etc., R. Co., 104 Va. 813, 52 S. E. 574; Gerock v. Western Union Tel. Co. [N. C.] 54 S. E. 782. When the evidence of the two sides conflicts, the oral evidence of the demurrant conflicting with that of the demurree is disregarded, and that of the demurree is held to prove all that it can fairly be regarded as proving. Kelley v. Ohio River R. Co., 58 W. Va. 216, 52 S. E. 520. Under the rules applicable to a demurrer to the evidence, the testimony of two of demurrant's witnesses, one of whom was discredited by two witnesses and the other of whom had given testimony inconsistent in itself, should be disregarded. Poplin's Adm'x v. Southern R. Co. [Va.] 54 S. E. 45.

26. Moore v. St. Louis Transit Co., 194 Mo. 1, 92 S. W. 390. Where the evidence as to plaintiff's contributory negligence is conflicting and defendant withdraws that question from the jury by demurring to the evidence, the court must find plaintiff not guilty thereof, if the jury could have so found. Lane Bros. & Co. v. Bott, 104 Va. 615, 52 S. E. 258.

27. Acker v. Norman [Kan.] 84 P. 531.

28. Missouri Can Co. v. Ross [Kan.] 83 P. 616.

29. Conklin v. Yates [Okl.] 83 P. 910.

30. See 5 C. L. 1011.

31. Brock v. St. Louis Transit Co., 107 Mo. App. 109, 81 S. W. 219; United States Fidelity & Guaranty Co. v. Woodson County Com'rs [C. C. A.] 145 F. 144.

32. Brock v. St. Louis Transit Co., 107 Mo. App. 109, 81 S. W. 219.

33. See 5 C. L. 1011.

34. This now substantially the rule in North Carolina. Parks v. Southern R. Co. [C. C. A.] 143 F. 276. In Michigan the plaintiff in an action in justice's court has the right to discontinue or submit to a nonsuit at any time before verdict. Under Comp. Laws 1897, § 836, providing for judgment of nonsuit in certain cases. Burkart v. Blaumann [Mich.] 12 Det. Leg. N. 621, 105 N. W. 81.

35. Parks v. Southern R. Co. [C. C. A.] 143 F. 276. In an action to establish a corner, plaintiff had the right to dismiss without prejudice as to certain defendants before determination of the issue joined, under Code § 3764. Dittmer v. Mierandorf [Iowa] 106 N. W. 158. Plaintiff has the right to take a nonsuit at any time before submission of the case, under the express provisions of Kirby's Dig. § 6167. Carpenter v. Dressler [Ark.] 89 S. W. 89. From the time of the submission of a motion to instruct a verdict for defendant, the granting of a nonsuit to plaintiff lies wholly in the discretion of the court. Parks v. Southern R. Co. [C. C. A.] 143 F. 276. Under Code Iowa § 3764, providing that a plaintiff may dismiss an action "before the final submission of the case to the jury," it was too late for dismissal where the judge

finally submitted until the argument is closed and until that time plaintiff can take a nonsuit.[36] After an appeal which opens the case for trial de novo plaintiff may take a nonsuit.[37] Plaintiff may, in such manner as local practice prescribes,[38] discontinue as to either or all the defendants[39] on payment of costs[40] where there is no counterclaim or affirmative relief claimed,[41] and there exist no special reasons why a dismissal should be refused.[42] A failure to appear is deemed an election to become nonsuit.[43] A formal order of discontinuance is unnecessary where an action is discontinued by agreement of parties.[44] Where an order of dismissal is set aside and the case reinstated, defendant waives his right to object to the reinstatement by appearing and taking part in all subsequent proceedings to final judgment on the merits.[45] Where the nonsuit was properly denied, the reasons given by the court for so doing are immaterial.[46]

had directed a verdict for defendant and the foreman was in the act of signing such verdict. Duffy v. Glucose Sugar Refining Co., 141 F. 206. Where the state practice permits a voluntary nonsuit, it is within the discretion of a Federal court to refuse a nonsuit after a motion by defendant for a directed verdict had been submitted and sustained. Huntt v. McNamee [C. C. A.] 141 F. 293.

36. Under the express provisions of Kirby's Dig. § 6167. Carpenter v. Dressler [Ark.] 89 S. W. 89. Where, during the argument of an ejectment suit, one link in plaintiff's evidence was held incompetent as secondary evidence, and plaintiff was permitted neither to lay the proper foundation therefor nor to take a nonsuit, held an abuse of discretion. Id.

37. Where a plaintiff recovers judgment in justice's court he has an absolute right upon appeal to dismiss his suit without defendant's consent. Mundt v. Cooke-Rutledge Coal Co., 118 Ill. App. 124. On an appeal from the county court to the district court, plaintiff has the same right to dismiss his action that he would have if it had originated in the district court. Thornhill v. Hargreaves [Neb.] 107 N. W. 847.

38. The provision of Code Civ. Proc. § 581, requiring a written request filed with the clerk, is neither mandatory nor exclusive, and plaintiff can move in open court for an order of dismissal (McDonald v. California Timber Co. [Cal. App.] 83 P. 172), and such application is an ex parte proceeding of which defendant is not entitled to either notice or hearing (Id.). A dismissal without prejudice is not however a voluntary nonsuit. Roberts, J. & R. Shoe Co. v. Westinghouse Elec. & Mfg. Co. [C. C. A.] 143 F. 218.

39. Where in an action for damages for injury to a passenger in a street car, caused by a collision between the car and a wagon, the company owning the wagon is made a party, a motion to dismiss as to such party is not a matter of which the traction company can complain, inasmuch as the liability of the defendants, if any, was separate as well as joint. Cincinnati Traction Co. v. Baron, 3 Ohio N. P. (N. S.) 633. Where the board of public works and their sureties were joined with abutting owners as defendants, in an action for injuries from a defective sidewalk, the board could not object to a dismissal as to the owners, they being jointly and severally liable. Heath v. Manson, 147 Cal. 694, 82 P. 331.

40. Code Civ. Proc. § 581. McDonald v. California Timber Co. [Cal. App.] 83 P. 172. On plaintiff's motion for leave to discontinue the order should impose the costs as a condition of granting the leave, and should not discontinue absolutely, requiring plaintiff to pay costs. Hyde v. Anderson, 98 N. Y. S. 62. Payment of costs and stay of prosecution of a second action until the costs are paid or their nonpayment is excused. Burns' Ann. St. 1901, § 336. Zuelly v. Casper [Ind. App.] 76 N. E. 646. But money paid for a dismissal need not be returned as a condition precedent to the instituting of a new action. Id. Where a railway company dismisses condemnation proceedings, in good faith, pending the selection of the jury, under Rev. St. 1898, § 3181, it is not liable to the landowner for his expenses which cannot be taxed as costs. McCready v. Rio Grande Western R. Co. [Utah] 83 P. 331.

41. Deere & W. Co. v. Hinckley [S. D.] 106 N. W. 138. Plaintiff in condemnation proceedings, where there is no counterclaim or affirmative relief asked, may dismiss the proceedings of course, pending the selection of a jury, under Rev. St. 1898, § 3181. McCready v. Rio Grande Western R. Co. [Utah] 83 P. 331. A plaintiff may, as of right, strike the name of one defendant where he asks no relief against the plaintiff or any codefendant, taking the risk that such striking may have on his case. Civ. Code 1895, § 5104. Walker v. Wadley, 124 Ga. 275, 52 S. E. 904. Where plaintiffs sued for an accounting, alleging an indebtedness to them, and defendants submitted to an account, averring that plaintiffs owed them a balance, a counterclaim was in effect set up and plaintiffs could not take a voluntary nonsuit. Boyle v. Stallings, 140 N. C. 524, 53 S. E. 346.

42. Deere & W. Co. v. Hinckley [S. D.] 106 N. W. 138. Where, in an action for an accounting for profits and losses in speculative transactions, no specific amount was demanded in the complaint, and plaintiff's net interest had not been fixed by accounting, affidavit or the pleadings, it was error to grant plaintiff's motion for a discontinuance on payment to defendants of an extra allowance of $500. Weidenfeld v. Byrne, 99 N. Y. S. 271. Upon an intimation by the court, pending the argument, that if the jury believes certain evidence of the defendant plaintiff cannot recover, plaintiff may not take a voluntary nonsuit and appeal, leaving the question of fact still open. Midgett v.

An attorney has been held to have implied authority to dismiss the suit,[47] but since the weight of authority is against his right to compromise,[48] such authority must be very limited.

If affirmative relief is demanded[49] against plaintiff, he may not dismiss his suit,[50] and where defendant sets up a counterclaim, to entitle plaintiff to discontinue upon payment of costs, he must make such showing as will justify the court in its discretion, in permitting him to discontinue;[51] but under a statute permitting a nonsuit without prejudice to a claim for affirmative relief, plaintiff's right to a nonsuit is not affected by the fact that after the motion for nonsuit, defendant seeks to amend his pleadings so as to claim affirmative relief.[52]

When right to voluntary nonsuit is lost.[53]

Discontinuance by operation of law.[54]

Effect of discontinuance.[55]—Voluntary discontinuance terminates the suit[56] beyond reinstatement after the close of the term[57] without determination of the merits,[58] and when entered as to a single defendant, he is not bound by subsequent proceedings.[59] Costs are taxable on discontinuance[60] except as controlled by agreement.[61] In dismissing an action without prejudice, the court cannot adjudge that a new action shall not be subject to the defense of the statute of limitations.[62]

Retraxit.[63]

§ 2. *Involuntary dismissal or nonsuit.*[64]—In Arizona the trial court cannot direct an involuntary nonsuit.[65] An order of court dropping the case from the docket, with leave to reinstate, was not a dismissal or discontinuance.[66]

Grounds in general.[67]—A case which presents only an academic question is

Branning Mfg. Co., 140 N. C. 361, 53 S. E. 178.

43. Bacon v. Mitchell [N. D.] 106 N. W. 129.

44. Valentine v. Stevens, 109 App. Div. 284, 96 N. Y. S. 299.

45. Grand Pacific Hotel Co. v. Pinkerton, 217 Ill. 61, 75 N. E. 427.

46. Carter v. Western Union Tel. Co. [S. C.] 53 S. E. 539.

47. Bacon v. Mitchell [N. D.] 106 N. W. 129.

48. See Attorneys and Counselors, 7 C. L. 319.

49. See 5 C. L. 1012.

50. Where defendant's title was attacked and he asserted ownership in fee, demanding a decree that he was the sole owner, the court did not abuse its discretion by denying plaintiff's motion to discontinue. Subera v. Jones [S. D.] 108 N. W. 26.

51. Fizburg v. Ramsey, 97 N. Y. S. 359. It is not sufficient that plaintiff "believes that it will be for the best interests of the parties" that the action be discontinued. Id.

52. Walker v. Hernandez [Tex. Civ. App.] 15 Tex. Ct. Rep. 456, 92 S. W. 1067.

53. See 5 C. L. 1012.

54, 55. See 5 C. L. 1013.

56. Where plaintiff in an action in justice's court, under the Michigan statute, discontinues his action, the justice is deprived of all jurisdiction to render any judgment but that of nonsuit, under Comp. Laws 1897, § 836. Burkart v. Blauman [Mich.] 12 Det. Leg. N. 621, 105 N. W. 81.

57. Wilson's Adm'r v. De Loach [Ky.] 96 S. W. 514.

58. But plaintiff can thereafter commence a new suit in any court having jurisdiction of the subject-matter, although the justice made no formal entry of judgment of nonsuit. Burkart v. Blauman [Mich.] 12 Det. Leg. N. 621, 105 N. W. 81. The voluntary dismissal of an action before the jury retires, or the finding of the court is announced, will not support a plea of res judicata in a subsequent action for the same cause. Zuelly v. Casper [Ind. App.] 76 N. E. 646. The dismissal by plaintiff of his action, on appeal from the county court to the district court, does not operate as an affirmance of the judgment of the lower court so as to bar a future action. Thornhill v. Hargreaves [Neb.] 107 N. W. 847.

59. In case of the dismissal by the plaintiff as to certain defendants before determination of the issue raised, the decree rendered is not conclusive on such defendants. Dittmer v. Mierandorf [Iowa] 106 N. W. 158.

60. See Costs, 7 C. L. 956.

61. Where an action to enforce a lien claimed by an attorney for services in a partition suit was discontinued by agreement of parties without prejudice to plaintiff's claims "for costs, allowance and compensation for services," etc., he was not entitled to taxable costs and an allowance in the partition suit, but only to compensation for services therein. Valentine v. Stevens, 109 App. Div. 284, 96 N. Y. S. 299. Provisions of order of discontinuance held to keep the action alive in order that a reference might be had to determine plaintiff's claim. Id.

62. Linton v. Cooper [Neb.] 106 N. W. 170.

63. See 3 C. L. 1100.

64. See 5 C. L. 1013.

65. Santa Fe, etc., R. Co. v. Ford [Ariz.] 85 P. 1072.

66. Livingston v. New England Mortg. Sec. Co. [Ark.] 91 S. W. 752.

properly dismissed.[68] Illegality of the contract sued on,[69] or the appearance of a clear legal defense, such as former adjudication[70] or limitations,[71] justifies a dismissal. An objection to the form of the action not appearing on the face of the pleadings can be made available only as a ground of nonsuit,[72] but the invocation of the aid of the wrong tribunal is not sufficient cause for dismissal where plaintiff is entitled to some relief, but the court should remove the cause to the proper court;[73] and in California the fact that an action was not begun in the proper county does not justify a dismissal but only a transfer to the proper county.[74] An action or writ can be stricken off only when irregular, defective, or improper,[75] and an action should not be dismissed for a mere irregularity in practice which can be remedied by amendment without prejudice to the parties' rights.[76] In California the authority given the court to dismiss or enter a judgment of nonsuit where, after verdict or final submission, the party entitled to judgment neglects to demand or have it entered for more than six months, is discretionary.[77] Irregularities may sometimes be waived by proceeding with the trial,[78] but an objection to the form of the action not appearing on the face of the pleadings is not waived by submission of the case to the jury, but may be raised at any stage of the trial.[79]

Want of jurisdiction.[80]—Proceedings will be dismissed when there is an entire want of jurisdiction over the subject-matter[81] or of the person.[82]

67. See 5 C. L. 1013.

68. An action by a county against the fiscal court thereof, ostensibly to restrain the issue of certain bonds but in fact to determine their validity in advance, held to present no real controversy, but to be a purely academic proceeding. Owen County v. Threlkeld [Ky.] 90 S. W. 971.

69. Where the illegality of the contract sued on is apparent from the complaint or the plaintiff's case, the court will, at any stage of the proceedings, dismiss the action, although the illegality is not pleaded as a defense or insisted upon by the parties, or may even have been waived by them, it being an objection which the court is itself bound to raise in the due administration of justice, regardless of the parties' wishes. Jackson v. Baker [Or.] 85 P. 512.

70. Where pendency of another action is pleaded as a partial defense and it appears that such action applied to only two of the three items sued for, it is error to dismiss the complaint absolutely. Alcolm Co. v. Philip Hano & Co., 96 N. Y. S. 221. Where it appears that the claim of damages should have been litigated in a former action between the same parties, a motion for a nonsuit should be sustained. Shields v. Johnson [Idaho] 85 P. 972.

71. Where it appeared that the statute of limitations had run in defendant's favor and they were served by publication only and did not appear, an action to foreclose a mortgage was properly dismissed without prejudice, as no personal judgment could have been rendered. Ingersoll v. Davis [Wyo.] 82 P. 867.

72. Conroy v. Equitable Acc. Co. [R. I.] 63 A. 356.

73. Under the express provisions of Code Pub. Gen. Laws, art. 26, § 44, and art. 75, § 113. Safe Deposit & Trust Co. v. Cahn, 102 Md. 530, 62 A. 819. The bringing of an action in ordinary, when it should have been in equity, is not a ground for dismissal where the petition shows a right to relief, but it should be transferred to the equity docket. Star Drilling Mach. Co. v. McLeod [Ky.] 92 S. W. 558.

74. Sanipoli v. Pleasant Valley Coal Co. [Utah] 86 P. 865.

75. Good v. Grit Pub. Co. [Pa.] 63 A. 1039. It is error to strike an action upon an alleged settlement where the plaintiff denies the settlement. Id. Where defendant procured from plaintiff a settlement and stipulation for discontinuance of an action for damages, but did not reveal that fact until a jury was impaneled, and offered to pay plaintiff's costs, disbursements, and compensation, which offer was rejected, whereupon defendant asked for a reference to determine the fairness of the settlement, it was error to decide that issue without further proofs. Kuehn v. Syracuse Rapid Transit R. Co., 183 N. Y. 456, 76 N. E. 589.

76. A justice's summons which contains merely a partnership name instead of the partner's Christian names is merely irregular and can be amended. Morgridge v. Stoefer [N. D.] 104 N. W. 1112.

77. Under Code Civ. Proc. § 581, subd. 6. Fitzhugh v. Mason [Cal. App.] 83 P. 282.

78. Where plaintiff's counsel, during adjournment, took a drink with two of the jurors, at the invitation of one of them, though nothing was said about the case and defendant's counsel knowing thereof proceeded with the trial, his motion later to discharge the jury for misconduct was properly denied. Louisville R. Co. v. Masterson [Ky.] 96 S. W. 534. And see Saving Questions for Review, 6 C. L. 1385.

79. Conroy v. Equitable Acc. Co. [R. I.] 63 A. 356.

80. See 5 C. L. 1014.

81. Prior to act Feb. 26, 1889 (Acts 1889, p. 57, Code 1896, § 1484), there was no provision for trial of right of property between plaintiff in detinue and a stranger, and courts had no jurisdiction to try such

Defect in pleadings; parties.[88]—Although the New York municipal court act does not in terms authorize a dismissal of a written complaint for failure to state a sufficient cause of action,[84] yet the power to dismiss must be deemed inherent in the court, it being idle to permit plaintiff to prove a state of facts which could only result in a nonsuit.[85] In New York the objection that the complaint does not state facts sufficient to constitute a cause of action is not waived by failure to raise the question by demurrer or answer,[86] but such question can be raised by motion for nonsuit at the close of the evidence.[87] Where no amendment of a defective declaration is offered,[88] or the declaration or bill is bad beyond cure,[89] the action should be dismissed, and likewise where there is an absence of necessary parties.[90] The allowance of an amendment being obligatory where a written demurrer is sustained,[91] the court should by analogy allow an amendment upon the granting of a motion to dismiss for insufficiency of the complaint, which is, in effect, an oral demurrer.[92] It is error to dismiss a complaint for insufficiency of substance where the determination of the motion involves a resort to extrinsic matters.[93] Where a count in the complaint was eliminated from the case by the statement of plaintiff's counsel and the instructions of the court, it was not prejudicial error to refuse a nonsuit on such count.[94]

Failure of prosecution.[95]—Abandonment[96] and failure to prosecute[97] are recog-

claims. Baggett v. Mason [Ala.] 39 So. 728. Where, in an action to enforce a materialman's lien on a vessel, the attachments are not sufficient to give jurisdiction of the res, the action should be dismissed. Action under Pub. St. 1882, c. 192, § 17. Merriman v. Currier [Mass.] 77 N. E. 708. Such dismissal is not based on "defect of form or process," within Rev. Laws c. 173, § 76, making the decision of the superior court final on a motion to dismiss for such defect. Id.

82. Where, on an order for substituted service, the officer's return failed to show that he left the summons at defendant's last and usual place of abode, the case was remanded for amendment of the return, if necessary, or dismissal, unless further service were ordered. Abbott v. Abbott [Me.] 64 A. 615.

83. See 5 C. L. 1014.

84. Laws 1902, p. 1536, c. 580. Rogers v. Fine, 97 N. Y. S. 1004.

85. Rogers v. Fine. 97 N. Y. S. 1004.

86, 87. Code Civ. Proc. § 499. Wood v. Ball, 100 N. Y. S. 119.

88. No judgment can be rendered on a declaration which names no one as defendant and the action should be dismissed unless the defect is remedied by amendment. Poling & Co. v. Moore, 58 W. Va. 233, 52 S. E. 99.

89. Where the status quo cannot be restored and no attempt is made to do so, a bill to rescind a contract for fraud will be dismissed (Muehlhof v. Boltz [Pa.] 64 A. 427), and where such a bill failed as a whole but a part might have been good as a bill for discovery had it been filed therefor, and the information sought was furnished by the evidence, it was properly dismissed (Id.). Where a bill cannot be so amended as to give it equity against certain defendants, it is properly dismissed as to them without opportunity to amend. Merritt v. Alabama Pyrites Co. [Ala.] 39 So. 555.

90. Where defendants in an action for the sale of land by tenants in common, file a counterclaim asking affirmative relief confirming the title to the land, and it appears that necessary parties to the action are lacking, the action should be dismissed (Harrison v. International Silver Co. [Conn.] 62 A. 342); but it was error to dismiss a complaint on the ground that the wrong person had been sued, as defendant's son was the contractor and defendant merely a voluntary superintendent, where the evidence showed that defendant was in charge of the work and had its direction (Page v. Dempsey [N. Y.] 77 N. E. 9). Where a demurrer to a complaint for defect of two parties was sustained and they were brought in by a supplemental summons and complaint, such summons and complaint could not be dismissed for defect of a third party apparent on the face of the complaint, but the remedy was by demurrer. Under Code Civ. Proc. § 488. Smith v. Irvin, 98 N. Y. S. 945.

91. Under Municipal Court Act, Laws 1902, p. 1536, c. 580, § 145, subd. 4. Rogers v. Fine, 97 N. Y. S. 1004.

92. Rogers v. Fine, 97 N. Y. S. 1004.

93. Where plaintiff, who had been in default to a certain amount, sued to recover the balance of money deposited as security for performance of the terms of a lease, alleging no terms but the payment of rent, and the answer alleged other covenants which plaintiff had violated, it was error to dismiss the complaint for insufficiency. Landesman v. Hauser, 98 N. Y. S. 663.

94. Flinn v. Crooks [Cal. App.] 83 P. 812.

95. See 5 C. L. 1015.

96. Where after action brought and issue of law raised on the pleadings the case was allowed to lie dormant 3½ years, and the claim was sent to a collection agency independent of the action, there was no abuse of discretion in dismissing it. First Nat. Bank v. Hunt, 40 Wash. 190, 82 P. 285. Where the personal representatives of a

nized grounds for dismissal, but a suit or action cannot be dismissed at rules in the office by the clerk for want of a declaration where the process has not been executed, unless defendant appears and enters a rule for bill or declaration,[98] and it is error for the court to dismiss an action of its own motion when plaintiffs had called but one witness and asked to be allowed to put in their proofs,[99] or because of plaintiff's failure to answer questions on cross-examination, it appearing that there was no intentional or willful defiance of the court, but that he was trying to answer the questions.[1] A stipulation signed by the attorneys of both parties, extending the time to answer, though not filed, is an appearance within the terms of a statute providing that actions in which defendants have appeared shall not be dismissed for failure to serve and return summons for three years.[2] In California an action may be dismissed for plaintiff's failure to appear on the trial,[3] but it should not be done without proof of service of the five days' notice of trial required.[4] Failure to move for a dismissal and entry of plea operate as a waiver of the right to a dismissal for failure to prosecute.[5]

Nonsuit for failure of proof.[6]—Where there is no evidence to sustain the cause of action,[7] or that introduced is wholly insufficient,[8] not only is a nonsuit proper[9]

complainant in equity instituted and prosecuted proceedings in another jurisdiction, to obtain the same relief, defendant was entitled to a dismissal on the ground of abandonment. Brown v. Fletcher, 140 F. 639. Such action also amounted to an election to pursue a different remedy, which also entitled defendant to a dismissal. Id.

97. Prima facie showing of failure to prosecute, under Code Civ. Proc. § 822, and Gen. Rule of Practice 36, providing for dismissal for failure to prosecute. Mladinich v. Livingston, 98 N. Y. S. 46. Plaintiff's showing of another action pending and his inability to pay the necessary disbursements to put the case on the calendar, held not be a sufficient excuse for delay. Id. The fact that defendant waited before moving the dismissal, until after plaintiff had noticed the action and put it on the calendar, could be considered by the court in determining whether the motion should be granted. Id. Plaintiff sued for rent and defendant filed a counterclaim. Plaintiff failed to appear, but the court represented him in the taking of evidence and rendered judgment in his favor over and above the counterclaim. Held error, as plaintiff should have been nonsuited or his action dismissed. Cornell v. King [Mo. App.] 94 S. W. 822. If there be more than one defendant and complainant neglects or refuses to bring all of them into court, the proper remedy of a defendant who has answered is to move to dismiss the bill for want of prosecution. Macfarlane v. Hills [Fla.] 39 So. 994. Where after the death of complainant in an equity suit no steps are taken within a reasonable time to revive the suit, defendant may move to dismiss for want of prosecution. Brown v. Fletcher, 140 F. 639. Action properly dismissed for failure to prosecute, after nearly 3 years' delay in complying with an order to pay the costs of a prior suit involving the same matter, in the absence of any excuse shown for such nonpayment. Arthur v. Washington Water Power Co. [Wash.] 85 P. 28. Upon the dismissal of a complaint without evidence offered or question of fact or law submitted, the judgment should be one of nonsuit, and if entered as of one of dismissal on the merits, plaintiff is entitled to a correction of the record. Freedman v. Sirota, 109 App. Div. 874, 96 N. Y. S. 812.

98. United States Oil & Gas Well Supply Co. v. Gartlan, 58 W. Va. 267, 52 S. E. 524.

99. Barish v. Knepper Realty Co., 98 N. Y. S. 218.

1. Dougherty v. McCollum, 98 N. Y. S. 590.

2. Code Civ. Proc. § 581. Roth v. Superior Ct., 147 Cal. 604, 82 P. 246.

3. Code Civ. Proc. § 581, subd. 3. In re Dean's Estate [Cal.] 87 P. 13.

4. Code Civ. Proc. § 594. In re Dean's Estate [Cal.] 87 P. 13. Where a will contest was erroneously tried in contestant's absence and without proper notice of trial, but prior to actual dismissal the judge asked one of contestant's attorneys if he had notice and if he desired to take any steps thereunder, prior to the ruling, and the attorney declined to do anything then, the irregularity was not thereby cured. Id.

5. Where suit against a borough for personal injuries was not prosecuted for eight years after issue of summons and the defendant entered a plea of not guilty. Munley v. Sugar Notch Borough [Pa.] 64 A. 377.

6. See 5 C. L. 1015.

7. Ferguson v. McCowan, 124 Ga. 669, 52 S. E. 886; Freedman v. Sirota, 109 App. Div. 874, 96 N. Y. S. 812. Code Civ. Proc. § 581. In re Morey's Estate, 147 Cal. 495, 82 P. 57. The refusal to submit the evidence to the jury, if equivalent to a nonsuit, is justified where plaintiff's evidence does not warrant a verdict in his favor (Id.), and the irregularity of making special findings after granting a nonsuit is harmless where the nonsuit was properly granted (Id.). Plaintiff in ejectment having introduced no evidence of her right to the land, of ouster by defendant, or of any right to oust defendant, nonsuit was properly granted. Billings v. Pearson [Cal. App.] 86 P. 825. Where the original petition was subject to demurrer and was cured by amendments,

but it is the duty of the judge to grant one;[10] but it is only when plaintiff entirely fails to prove his cause of action that the question becomes one of law,[11] in which case a nonsuit and not a dismissal on the merits should be granted,[12] unless the court can say on the whole case, as a matter of law, that the plaintiff cannot recover in any event.[13] Where it seems probable that the failure to offer the necessary evidence to establish a demand was the result of a misapprehension, the judgment should be one of nonsuit.[14] It is within the sound judicial discretion to dis-

but on the trial it developed that there was no evidence to support the material and essential allegations of the amendments, it was not error to sustain a nonsuit. Steele v. Georgia Iron & Coal Co., 124 Ga. 957, 52 S. E. 1038. Where the answer puts in issue the material allegations of the complaint, and plaintiff introduces no evidence in support of his case, it is not error to enter judgment of nonsuit if no affirmative relief is sought by the answer. Mills Novelty Co. v. Dunbar [Idaho] 83 P. 932. In New York, where plaintiff demurred to a defense on the ground of insufficiency (Code Civ. Proc. 494), thereby admitting the facts alleged, and an order sustaining the demurrer was reversed on appeal without leave to plaintiff to withdraw the demurrer and it was never in fact withdrawn, defendant was entitled to a final judgment dismissing the complaint. National Contracting Co. v. Hudson River Water Power Co., 110 App. Div. 133, 97 N. Y. S. 92.

8. In Idaho an action may be dismissed or a judgment of nonsuit entered, on motion of defendant, when the plaintiff fails to prove a sufficient case for the jury. Rev. St. 1887, § 4354. Shields v. Johnson [Idaho] 85 P. 972. Where the only reasonable inference that can be drawn from the evidence is that the deceased was guilty of contributory negligence, in an action for death of a servant, a nonsuit should be granted. Vinson v. Los Angeles Pac. R. Co., 147 Cal. 479, 82 P. 53. The scintilla rule of evidence has no longer its former force and vigor in Ohio, and where the probative value of plaintiff's evidence is so slight that a motion for a new trial would have to be granted if a verdict be based upon it, it is the duty of the court to grant a motion to nonsuit or to direct a verdict for defendant at the conclusion of plaintiff's evidence. MacBride v. Gould, 3 Ohio N. P. (N. S.) 469. Where a case was withdrawn from the jury, practically nonsuiting plaintiffs, it was not fatal to the judgment on appeal, where the evidence would not have sustained a verdict for plaintiffs, under Code Civ. Proc. § 475. In re Morey's Estate, 147 Cal. 495, 82 P. 57. Where the sole object of the recovery is damages, a failure to prove substantial damages is a failure to prove the substance of the issue and entitles defendant to judgment of nonsuit (Woodhouse v. Powles [Wash.] 86 P. 1063); and where, in an action to enjoin the removal of a boom from a stream, a cross complaint was filed to have plaintiff enjoined from obstructing the stream, but it appeared that defendant was not injured by the obstruction, the cross complaint should be dismissed without prejudice (Winsor v. Hanson, 40 Wash. 423, 82 P. 710).

9. Where a man 36 years of age was struck on a crossing by a brilliantly lighted car that could be seen for 300 feet, and there was no evidence of undue speed or failure to give signals, a nonsuit was proper. Mulvaney v. Pittsburgh R. Co., 213 Pa. 343, 62 A. 926. Where the evidence showed that plaintiff, eighteen years of age, had assumed the risks incident to his employment, an order of nonsuit was justifiable. Danisch v. William Amer & Co. [Pa.] 63 A. 416. Where a demurrer to the reply to an answer, which set up a former judgment sufficient to bar the action, was sustained, there were no further issues calling for evidence and a dismissal was proper. Spring Hill Irr. Co. v. Lake Irr. Co. [Wash.] 85 P. 6. Where plaintiff, having been ordered to cross defendant's track to load cars, crawled under a train standing there not under defendant's control and was injured by the train's starting, nonsuit was properly entered. Slota v. Albert Lewis Lumber & Mfg. Co. [Pa.] 64 A. 632. Where in an action of trover it appeared that the plaintiff had parted with the title to the property, it was not error to grant a nonsuit at the conclusion of the plaintiff's evidence. Hall v. Simmons [Ga.] 54 S. E. 751.

10. Kearns v. Southern R. Co., 139 N. C. 470, 52 S. E. 131.

11. Bowen v. Farley, 99 N. Y. S. 205; Martin v. Wermann, 107 App. Div. 482, 95 N. Y. S. 284; Braunton v. Southern Pac. Co. [Cal. App.] 83 P. 265. Where several grounds of negligence are alleged, failure to prove one is no ground for nonsuit or the direction of a verdict for defendant. Cain v. Atlantic Coast Line R. Co. [S. C.] 54 S. E. 244. Where plaintiff sues on two causes of action and the evidence tends to establish one cause against both defendants, a motion for nonsuit as to both is properly denied, although one defendant is not connected by the evidence with the second cause of action. Barfield v. Coker & Co. [S. C.] 53 S. E. 170. A nonsuit cannot be granted for lack of evidence to support one count where there are several counts in the declaration. White v. Wilmington City R. Co. [Del.] 63 A. 931. Where plaintiff is entitled to merely nominal damages, it is error to enter a nonsuit. Stokes v. Pennsylvania R. Co. [Pa.] 63 A. 1028.

12. Martin v. Wermann, 107 App. Div. 482, 95 N. Y. S. 284. Judgment upon the insufficiency of the plaintiff's case alone should generally be as of nonsuit, which would leave him the right to renew his action if so advised. Oates v. Union R. Co. [R. I.] 63 A. 675.

13. Municipal Court Act, Laws 1902, p. 1561, c. 580, § 249. Bowen v. Farley, 99 N. Y. S. 205.

14. Succession of Gragard [La.] 40 So. 543.

miss, without prejudice, a bill to remove a cloud from the title to real estate, when it appears upon a hearing on the bill, answer, and replication, that the merits cannot be justly and equitably passed upon without evidence taken.[15] While the legal sufficiency of evidence is for the court, the weight of legally sufficient evidence is for the jury.[16] The reasonableness of any given rule or regulation adopted by a carrier is a question of law for the court.[17] Where there is some evidence tending to support plaintiff's case,[18] even though supplied by the defendants's proofs,[19] or when the plaintiff makes out a prima facie case,[20] or the evidence is conflicting,[21] or the credibility of witnesses is involved,[22] or there is any reasonable doubt in the

15. Meffert v. Thomas [Fla.] 40 So. 764.

16. Campbell v. Everhart, 139 N. C. 503, 52 S. E. 201.

17. Pullman Co. v. Krauss [Ala.] 40 So. 398.

18. Fish v. Utica Steam & Mohawk Valley Cotton Mills, 109 App. Div. 326, 95 N. Y. S. 673; Bowden v. Bowden [Ga.] 53 S. E. 606; Later v. Haywood [Idaho] 85 P. 494; McCowan v. Northeastern Siberian Co., 41 Wash. 675, 84 P. 614; Zentner v. Oshkosh Gaslight Co., 126 Wis. 196, 105 N. W. 911; Archibald Estate v. Matteson [Cal. App.] 84 P. 840. A scintilla of evidence in favor of plaintiff is sufficient to take the case to the jury. Louisville, etc., R. Co. v. Hall [Ky.] 94 S. W. 26. Evidence tending to show negligence. Carter v. Western Union Tel. Co. [S. C.] 53 S. E. 539. A motion to dismiss, on the ground that a shipper could not sue on an implied contract arising from delivery and acceptance of goods, but must sue on the written contract contained in the carrier's receipt, was properly denied where there was evidence that the receipt was not delivered until after the goods were delivered and accepted. Kann v. Weir, 95 N. Y. S. 584.

19. A refusal to nonsuit plaintiff for failure of proofs is not reversible error where such proofs are afterwards supplied by the defendant during the progress of the trial. Van Cott v. North Jersey St. R. Co., 72 N. J. Law, 229, 62 A. 407. Where defendant's evidence supplied the requisite proofs, the refusal to grant a nonsuit was harmless error. Levy v. Wolf [Cal. App.] 84 P. 313. Where after denial of a motion for nonsuit defendant introduced evidence which supplied defects in plaintiff's proofs, the error in denying the motion was waived. Lyon v. United Moderns [Cal.] 83 P. 804.

20. Where the evidence in a personal injury case showed that the car was started before plaintiff had a reasonable time to get on, and there was no evidence of contributory negligence, it was error to dismiss at the close of plaintiff's case. Silber v. New York City R. Co., 99 N. Y. S. 837. Where in an action for personal injuries defendant demurs to plaintiff's evidence on the ground of his alleged contributory negligence, it is not error to overrule the demurrer if the facts justify a contrary conclusion. Electric R., Light & Ice Co. v. Brickell [Kan.] 85 P. 297. Where plaintiff complained of damage to lands by the negligent flow of acids from defendant's tower house, and the testimony showed that defendant's employes constantly poured the same on his land, it was error to direct a nonsuit. Stokes v. Pennsylvania R. Co. [Pa.] 63 A. 1028. It was error to dismiss an action for damages for interference with the easements of access, light, and air, where plaintiff's proofs showed him entitled to some fee damage, though he failed to show any diminution in rental value. Niewenhous v. Manhattan R. Co., 98 N. Y. S. 501. Where it was shown that defendant had received goods and made payments thereon, that the goods were selected by defendant and his wife, and the agreement of sale was signed by the wife but not by defendant on account of his inability to go to plaintiff's place of business, plaintiff made such a prima facie case that it was error to dismiss his complaint on the merits. Monahan v. Campion, 96 N. Y. S. 1019.

21. Kramm v. Stockton Elec. R. Co. [Cal. App.] 86 P. 738; Esher v. Mineral R. & Min. Co., 28 Pa. Super. Ct. 387; Dossett v. St. Paul & T. Lumber Co., 40 Wash. 276, 82 P. 273; Goff v. Philadelphia [Pa.] 63 A. 431; Thomas v. Stickler [Ky.] 93 S. W. 648. Conflicting as to the terms of a contract. Belknap v. Belknap [S. D.] 107 N. W. 692. Error to grant nonsuit where the evidence warranted the inference that plaintiff's injuries were due to defendant's negligence, without contributory negligence, but was contradicted by his physician's evidence, which was at variance with his written statement. Festa v. New York City R. Co., 95 N. Y. S. 595. Where suit was brought on an open account, but it appeared on the trial that there was a written contract which plaintiff's evidence tended to show had been fully performed, it was error to grant a nonsuit. Southern Printers' Supply Co. v. Felker [Ga.] 54 S. E. 193, dist'g Blue v. Ford, 12 Ga. 45. Where there is conflicting evidence as to the fact on which plaintiff's right to recover depends, the court cannot dismiss on the merits, under Municipal Court Act, Laws 1902, p. 1561, c. 580, § 249, authorizing dismissal where the court deems plaintiff not entitled to recover as a matter of law. Bowen v. Farley, 99 N. Y. S. 205. Where the evidence in an action for personal injuries was conflicting as to contributory negligence, the jury could not be restricted to any assumed state of facts, though there was some evidence to support such assumption. Dodge v. Lamont [Iowa] 107 N. W. 948.

22. Goodwin v. Sommer, 97 N. Y. S. 960. Although several witnesses testify to certain facts and but a single witness contradicts them the jury may believe the latter. Louisville, etc., R. Co. v. Hall [Ky.] 94 S. W. 26. A case depending upon the uncorroborated testimony of plaintiff is for the jury, although uncontradicted. Mendoza v. Levy, 97 N. Y. S. 753.

inference to be drawn therefrom,[23] it is for the jury,[24] though the court might deem it its duty to set aside a verdict for plaintiff as against the weight of evidence.[25] A motion for nonsuit should not be granted where the plaintiff's evidence is sufficient to put the defendant to his proofs.[26] It is for the jury to say whether the evidence is sufficient to overcome a prima facie case.[27] It is only where an admission or a statement made to a jury will, as a matter of law, preclude a party from recovering upon his cause or defense that the court can withdraw the same from the jury;[28] and where plaintiff, on cross-examination, showed that he was not earning as much at the time of the accident as he stated in his complaint, though not contradicted by defendant, the question of the value of his earnings was for the jury.[29] It is not error for the court to omit to submit to the jury, in support of an action, evidence which is outside of the pleadings and the issues raised.[30] In the submission of issues to the jury it is requisite only that they be submitted in such form as when decided either way they may be the basis of the judgment.[31] Where, at the close of the evidence, defendant moved to dismiss but made no motion for a directed verdict, the court reserving decision and a verdict being rendered for plaintiff, the court could dismiss but could not set aside the verdict and direct one for defendant.[32]

Variance between the pleadings and evidence may warrant a nonsuit.[33] The question of fatal variance between the complaint and evidence may be raised by a motion to dismiss at the close of plaintiff's evidence.[34] Failure to object to the testimony when introduced does not preclude defendant from moving for a nonsuit on the ground of variance.[35]

23. Where reasonable minds acting within the limitations prescribed by law might reach different conclusions from an examination of the evidence. Campbell v. Everhart, 139 N. C. 503, 52 S. E. 201. Where the testimony of the garnishee left it doubtful whether or not he had moneys of the defendant in his hands. Klein v. Cohen, 25 Pa. Super. Ct. 621. Judgment of nonsuit is warranted only where the record presents such a state of facts that all reasonable men must arrive at the same conclusion. Tuckett v. American Steam & Hand Laundry [Utah] 84 P. 500. In a suit for personal injuries a nonsuit should be refused, unless the evidence reasonably leads to the conclusion that the plaintiff was negligent. Central of Georgia R. Co. v. Harper, 124 Ga. 836, 53 S. E. 391.

24. Where the evidence presents a question for the jury, a judgment of nonsuit is technically erroneous. Yates v. New York, etc., R. Co., 107 App. Div. 629, 95 N. Y. S. 497.

25. Yates v. New York, etc., R. Co., 107 App. Div. 629, 95 N. Y. S. 497. In case of contradictions between the parties as to the facts, the case must go to the jury, although a verdict found for plaintiff would have to be set aside. Schmal v. Rothschild, 96 N. Y. S. 179. Where the evidence was conflicting it was improper for the court, in setting aside a verdict for plaintiff because of the insufficiency of the evidence, to dismiss the complaint upon the merits, but it should have ordered a new trial. Drake v. Baker, 96 N. Y. S. 1057. Both the trial court and the appellate division have power to set aside a verdict contrary to the evidence and grant a new trial, in an action where a nonsuit could not be granted, and in case of the trial court's doing so, the appellate division must do so. Fish v. Utica Steam & M. Valley Cotton Mills, 109 App. Div. 326, 95 N. Y. S. 673.

26. Later v. Haywood [Idaho] 85 P. 494.

27. Belknap v. Belknap [S. D.] 107 N. W. 692. Presumption of fact with evidence tending to rebut it. Opet v. Denzer [Tex. Civ. App.] 16 Tex. Ct. Rep. 118, 93 S. W. 527. Where, in an editorial criticism of a public officer, the epithets and language used were so severe as to tend to overcome the prima facie presumption of privilege, the case was for the jury and it was error to direct a nonsuit. Mulderig v. Wilkes-Barre Times [Pa.] 64 A. 636.

28. Statements of counsel held not to preclude the defense of ownership of the land. Hall v. Davidson [Kan.] 84 P. 556.

29. Guyon v. Brooklyn Heights R. Co., 97 N. Y. S. 1038.

30. Andresen v. Jetter [Neb.] 107 N. W. 789.

31. Wright v. Cotten, 140 N. C. 1, 52 S. E. 141.

32. Crecelius v. New York, 100 N. Y. S. 314.

33. Where the complaint proceeds upon the theory of a common carrier's common-law liability for the loss of goods, and the proofs show a special contract, the variance is sufficient to justify a nonsuit. Braunton v. Southern Pac. Co. [Cal. App.] 83 P. 265. In an action for slander, held that there was no such variance between the words charged and those proved as to warrant a nonsuit. Kloths v. Hess, 126 Wis. 587, 106 N. W. 251.

34. Allegation of negligence in starting a car while plaintiff was boarding it and

Motion for nonsuit; effect.[36]—The difference between a motion to direct a nonsuit and to direct a verdict for defendant is rather a matter of form than of substance, except that the latter ends the litigation.[37] A motion for nonsuit or to dismiss the complaint must specify the supposed defects.[38] Where voluntary nonsuits are permitted by the state practice, it is within the discretion of a Federal court to refuse to allow a nonsuit at the conclusion of plaintiff's evidence, where a motion had been made by defendant and sustained for a directed verdict on account of the insufficiency of the complaint and evidence.[39] After judgment rendered and removal of the cause by writ of error, it is too late to dismiss the suit as to a defendant improperly joined.[40] A motion to dismiss a bill for want of equity, as to certain defendants, properly raised the question whether as to them the venue was in another county.[41] A motion for nonsuit admits the truth of plaintiff's evidence[42] and the existence of every fact which the evidence tends to prove, or which can be gathered from any reasonable view of the evidence[43] when construed in the light most favorable to him.[44] In New York a decision on a motion to dismiss a complaint may be reserved until after verdict.[45] In entering a judgment of dismissal for want of service, the judge should find the facts upon which his judgment is based, and not merely that the facts set forth in the several affidavits are true.[46] Where the equity of a bill is directly challenged, a dismissal for want of equity is as proper in vacation as in term time.[47] A motion for nonsuit is waived by the subsequent introduction of testimony by the mover,[48] unless the motion is renewed at the close of the evidence,[49] and his right to stand upon the motion is waived.[50]

Effect of dismissal or nonsuit.[51]—The difference between a motion to direct a nonsuit and a motion to direct a verdict for defendant is rather a matter of form

proof of an assault by the conductor and the violent ejection of plaintiff. Fiorito v. Interurban St. R. Co., 95 N. Y. S. 528.

35. Kalispell Liquor & Tobacco Co. v. McGovern [Mont.] 84 P. 709.

36. See 5 C. L. 1016.

37. Huntt v. McNamee [C. C. A.] 141 F. 293.

38. Burrows Co. v. Rapid Safety Filter Co., 97 N. Y. S. 1048. It is error to grant a motion for nonsuit where the record shows no specification of grounds for the motion. DeLeonis v. Hammel, 82 P. 349.

39. Huntt v. McNamee [C. C. A.] 141 F. 293.

40. Commissioners of Union Drainage Dist. No. 3 v. Highway Com'rs of Virgil & Cortland, 220 Ill. 176, 77 N. E. 71.

41. Merritt v. Alabama Pyrites Co. [Ala.] 39 So. 555.

42. Wagner v. Wedell [Cal. App.] 85 P. 126; Kramm v. Stockton Elec. R. Co. [Cal. App.] 86 P. 738; Volosko v. Interurban St. R. Co., 99 N. Y. S. 484; Portman v. Oppenheim, 99 N. Y. S. 537.

43. Later v. Haywood [Idaho] 85 P. 494; Fox v. Myers [Nev.] 86 P. 793; Kramm v. Stockton Elec. R. Co. [Cal. App] 86 P. 738.

44. Biles v. Seaboard Air Line R. Co., 139 N. C. 528, 52 S. E. 129; Kramm v. Stockton Elec. R. Co. [Cal. App.] 86 P. 738; Volosko v. Interurban St. R. Co., 99 N. Y. S. 484; Tuckett v. American Steam & Hand Laundry [Utah] 84 P. 500.

45. Under the express provisions of Code Civ. Proc. § 1187. Zeiser v. Cohn, 98 N. Y. S. 1078. Where after a verdict favorable to plaintiff the court dismissed the complaint on the ground that it had erred in permitting plaintiff to prosecute his action as one on contract instead of one in the nature of a creditor's bill, plaintiff was not precluded from proving the cause of action which the court finally determined was the only one he had alleged. Id.

46. Sherwood Higgs & Co. v. Sperry & Hutchinson Co., 139 N. C. 299, 51 S. E. 1020.

47. Merritt v. Alabama Pyrites Co. [Ala.] 39 So. 555.

48. Conine v. Olympia Logging Co. [Wash.] 84 P. 407. A submission of the case on its merits, without a motion for nonsuit or order of judgment, is a waiver by defendant of his right to object to the insufficiency of the evidence. Gendron v. St. Pierre [N. H.] 62 A. 966. Where a motion for nonsuit on the ground of variance was reserved by the court and defendants then introduced evidence to support issues raised by affirmative defenses and a cross complaint, they thereby waived the ruling on the nonsuit and on appeal could raise no questions except as to matters connected with their pleadings. Franklin v. Burris [Colo.] 84 P. 809.

49. Shields v. Johnson [Idaho] 85 P. 972.

50. Conine v. Olympia Logging Co. [Wash.] 84 P. 407. A defendant has an undoubted right to stand upon his motion for a nonsuit and have his writ of error, if it be refused, but he has no right to insist upon his exception after having subsequently put in his testimony and made his case upon the merits, since the court and jury have the right to consider the whole case as made by the testimony. Shields v. Johnson [Idaho] 85 P. 972.

51. See 5 C. L. 1017.

than of substance, except that the latter ends the litigation if a new trial is not granted.[52] Where the court withdrew the case from the jury, practically granting a nonsuit, the case presented substantially the same aspect as if, at the close of the evidence, the court had directed a verdict against the contestants.[53] A decree sustaining a demurrer to the bill, allowing a specified time to amend, is not final and does not ipso facto dismiss the bill, but a subsequent order is necessary for that.[54] An order dismissing a cause so far as the issue of divorce was concerned, but retaining that part designed to set aside fraudulent conveyances of community property, as to the latter was merely interlocutory.[55] Although a dismissal not on the merits may be stricken out, yet it is a final judgment which may terminate the case,[56] and in those cases where a dismissal may be stricken out or substantially altered, such action can be taken only after due notice to the party whose rights are affected.[57] The dismissal of a suit in general terms does not, after six months, operate as a bar to a second suit between the same parties and on the same cause of action, if not barred by the statute of limitations applicable thereto;[58] and where a valid writ of error has been sued out to reverse a judgment of dismissal, the statutory period of six months within which a dismissed suit may be renewed so as to prevent a barring of the action by limitation does not run pending such writ of error.[59] In Arkansas, if an action be commenced within the statutory limitation and the plaintiff suffer nonsuit, he may commence a new action within one year thereafter.[60] A judgment of nonsuit rendered by a justice of the peace because the facts adduced by plaintiff are insufficient, not being a trial on the merits, does not bar a subsequent action for the same cause,[61] but the entry "Libel dismissed," without adding "without prejudice," purports to be a final judgment upon the merits, and is a bar to further proceedings upon the cause of action set out in the libel.[62] Where one of two defendants was not served and suit against him was dismissed and judgment rendered against the other and a return of nulla bona was made on the execution against him, plaintiff was not required to pay the costs of the first action before beginning action against the person not served, as for want of service the former suit was not begun against him.[63]

Setting aside order; reinstating cause.—A case dismissed for failure of a party to appear upon the preliminary call of cases may be reinstated upon proper showing,[64]

52. Huntt v. McNamee [C. C. A.] 141 F. 293.

53. In re Morey's Estate, 147 Cal. 495, 82 P. 57.

54. Bledsoe v. Jones [Ala.] 40 So. 111.

55. Michael v. Michael [Tex. Civ. App.] 14 Tex. Ct. Rep. 562, 91 S. W. 239.

56. Karrick v. Wetmore, 25 App. D. C. 415. A dismissal or discontinuance, though not a final determination of the controversy, is a final ending of that particular suit. Livingston v. New England Mortg. Sec. Co. [Ark.] 91 S. W. 752. An order dismissing a cause without costs for want of prosecution is a final order disposing of the case and not a mere striking of it from the docket. Green v. Union El. R. Co., 118 Ill. App. 1.

57. Karrick v. Wetmore, 25 App. D. C. 415.

58. Hackney v. Asbury & Co., 124 Ga. 678, 52 S. E. 886. Civ. Code 1895, § 3786, providing that if a plaintiff be nonsuited, or discontinue or dismiss his case, and recommence within 6 months, the second suit shall stand, as to limitation, upon the same footing as the first, has no application. Id.

59. Seaboard Air Line R. Co. v. Randolph [Ga.] 55 S. E. 47.

60. Kirby's Dig. § 5083. Where plaintiff in a suit to foreclose a mortgage suffered nonsuit, but caused a summons to be issued and served on defendants, that was equivalent to the beginning of a new suit within the statute. Livingston v. New England Mortg. Sec. Co. [Ark.] 91 S. W. 752.

61. Smith v. Superior Ct. [Cal. App.] 84 P. 54.

62. Where plaintiff prior to the beginning of the trial moved a dismissal without prejudice, because of inability to obtain a witness, it was error to dismiss the libel on its merits. Roach v. Roach, 190 Mass. 253, 76 N. E. 651.

63. Hackney v. Asbury & Co., 124 Ga. 678, 52 S. E. 886.

64. Affidavits showing a meritorious defense and that the party's counsel was engaged in another court and could not be present when the preliminary call of cases was made were sufficient to entitle the party

but where neither plaintiff nor his attorney was present when the cause was reached for trial, a dismissal therefor should not be set aside without a showing of due diligence.[65] Where a defendant in a mechanic's lien suit, who had a right to try the issues between himself and co-defendants, was not served with notice of trial and had no knowledge of the dismissal of the complaint, the court could relieve him by vacating the dismissal as to him.[66] An attorney's mistake in law or ignorance of facts is not sufficient ground for vacating a judgment of dismissal moved by him,[67] and inadvertence and ignorance of plaintiff's attorneys that a cause was not on the calendar did not excuse a failure to bring a cause to trial for two years and require the court to permit its further prosecution.[68] The dismissal of a bill to set aside a dismissal of an action at law does not render res adjudicata a motion, in the court which entered the dismissal, to set it aside.[69] After the expiration of the term the court cannot reinstate a cause dismissed after a hearing.[70]

Practice on appeal.[71]—Refusal to dismiss,[72] or nonsuit,[73] being discretionary, is not ordinarily reviewable;[74] but where, on a special appearance, a motion to dismiss is made and overruled, defendant may proceed with the trial without losing his right to have the ruling reviewed on appeal.[75] An order dismissing an action on plaintiff's motion, where no counterclaim was interposed and no special reason existed for refusing the dismissal, cannot be appealed from.[76] Where a complaint was drawn on the theory of defendant's liability on account of a violation of the labor law,[77] and did not allege the facts necessary to bring it within the employers' liability act, plaintiff's appeal was not aided by request after the nonsuit to amend the complaint on the ground that the case was so brought within the latter act.[78] Parties having procured the dismissal of a divorce action so far as related to the issue of divorce, on the ground that no mandate had been taken out after final judgment in the appellate court, they could not complain of it in subsequent proceedings in error.[79] An arbitrary dismissal before trial of the issue will be reversed on appeal.[80] The supreme court will not dismiss a case because of a cessation of the controversy, unless the cessation is shown by clear and satisfactory proof.[81] On appeal from a judgment of dismissal for want of service, the complaint is not properly before the supreme court.[82] The question presented on appeal from granting a motion for a nonsuit is a question of law.[83] In the case of

to a reinstatement of his case. Doppelt v. Blum, 118 Ill. App. 64.

65. Poggensee v. Feddlen [Neb.] 106 N. W. 654.

66. Hinkle v. Sullivan, 108 App. Div. 316, 95 N. Y. S. 788.

67. Bacon v. Mitchell [N. D.] 106 N. W. 129.

68. Brown v. Gauss, 95 N. Y. S. 538.

69. Grand Pacific Hotel Co. v. Pinkerton, 118 Ill. App. 89.

70. Gray v. Ames, 220 Ill. 251, 77 N. E. 219.

71. See 5 C. L. 1018.

72. The disposition of a motion to dismiss an action for want of prosecution rests in the discretion of the trial court (Marks v. Keenan [Cal.] 82 P. 772), and its action will not be disturbed unless such discretion has been grossly abused (Id.).

73. The refusal of a compulsory nonsuit is not reversible error. Morgan v. Duquesne Borough, 29 Pa. Super. Ct. 100.

74. The Federal supreme court has declined to entertain writs of error on nonsuits (Huntt v. McNamee [C. C. A.] 141 F. 293), and has held that the circuit courts have no authority to order a nonsuit in invitum (Id.).

75. Woodard v. Tri-State Milling Co. [N. C.] 55 S. E. 70.

76. Neither Rev. Code Civ. Proc. § 440, nor § 462, authorizes such appeal. Deere & W. Co. v. Hinckley [S. D.] 106 N. W. 138.

77. Laws 1897, c. 415, p. 467, § 18. Sutherland v. Ammann, 98 N. Y. S. 574.

78. Sutherland v. Ammann, 98 N. Y. S. 574.

79. Michael v. Michael [Tex. Civ. App.] 14 Tex. Ct. Rep. 562, 91 S. W. 239.

80. Teitelbaum v. Scheinert, 99 N. Y. S. 813. Where the trial court dismisses an action prematurely on motion of defendant before he has rested and on an issue not raised by the pleadings, the supreme court will not try the case anew but order a new trial. Viets v. Silver [N. D.] 106 N. W. 35.

81. State v. Superior Ct., 41 Wash. 450, 83 P. 726.

82. Sherwood Higgs & Co. v. Sperry & Hutchinson Co., 139 N. C. 299, 51 S. E. 1020.

83. Smith v. Superior Ct. [Cal. App.] 84 P. 54.

an involuntary dismissal the appellate court would look into the pleadings and facts, and if they disclosed a case for the jury, would reverse the judgment,[84] but, if the nonsuit were voluntary, it would be presumed that plaintiff deemed his evidence insufficient, and in order to secure reinstatement, or reversal of an order denying reinstatement, it must appear that other evidence had been discovered to strengthen his case.[85] On review of an order of dismissal or nonsuit the plaintiff is entitled to have his testimony taken as true[86] and given its most favorable construction in his favor.[87] Where the trial judge dismissed the complaint, but on appeal by the defendant the appellate court rendered judgment partly in favor of plaintiff, it should have reversed the judgment of the trial court and remitted the case for entry of a proper judgment.[88] Where no bill of exceptions is filed, an appeal from an order of dismissal will be dismissed.[89]

DISCOVERY AND INSPECTION.

§ 1. Discovery in Equity (1167).
§ 2. Production and Inspection of Books and Papers or Survey of Property (1168).
§ 3. Examination or Interrogation of Party Before Trial (1170).
§ 4. Physical Examination to Prepare for Trial (1173).

This article does not deal with the taking of depositions for use as evidence at the trial,[90] nor with examinations of parties during the trial,[91] nor during proceedings supplementary to execution,[92] nor with the power of a court to compel a contumacious witness to answer,[93] nor with interrogatories under the admiralty rules.[94]

§ 1. *Discovery in equity.*[95]—Statutes providing for the production and inspection of books or papers in actions at law do not divest courts of equity of their inherent power to grant discovery in aid of such actions when the statutory remedy is insufficient.[96] The proceeding is a personal one to be enforced against the person decreed to make the discovery.[97] As in other cases of resort to equity it must appear that there is no adequate remedy at law.[98] A party is entitled to a discovery of such facts or documents in the possession or control of his adversary as are

84. Sanchez v. Atchison, etc., R. Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 439, 90 S. W. 689.

85. A mere statement that plaintiff has a good cause of action which he can substantiate by additional evidence, without setting out such testimony, is insufficient. Sanchez v. Atchison, etc., R. Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 439, 90 S. W. 689.

86. Silber v. New York City R. Co., 99 N. Y. S. 837.

87. Rawson v. Silo, 99 N. Y. S. 934; Brooks v. International R. Co., 98 N. Y. S. 765.

88. Brown v. McKie [N. Y.] 78 N. E. 64.

89. A motion to dismiss for the reason that the petition shows the action to be local and originating in another state is a motion to dismiss and not a demurrer, so that an order granting it is not reviewable without a bill of exceptions. Hawthorn v. Alexander [Mo. App.] 91 S. W. 444.

90. See Depositions, 7 C. L. 1129.

91. See Trial, 6 C. L. 1731.

92. See Supplementary Proceedings, 6 C. L. 1586.

93. See Contempt, 7 C. L. 746; Witnesses, 6 C. L. 1975.

94. See Admiralty, 7 C. L. 34.

95. See 5 C. L. 1019.

96. Garden City Sand Co. v. People, 118 Ill. App. 372. Hurd's Ill. St. § 9, c. 51, held inadequate as it does not give complainant the right to inspection or examination before trial. Id.

97. Extra territorial service not sufficient. Wallace v. United Elec. Co., 211 Pa. 473, 60 A. 1046.

98. **Adequate:** Alleged impossibility of the United States to state when or by whom timber on the public domain was wrongfully cut and converted did not show necessity for discovery and accounting in equity, in view of the law providing for the examination of defendants, and U. S. Rev. St. § 724 (U. S. Comp. St. 1901, p. 583), providing for the production of books and writings in actions at law. United States v. Bitter Root Development Co., 200 U. S. 451, 50 Law. Ed. —.

Inadequate: Discovery as to contents of an agreement as to the liability of defendants on a promissory note allowed, where defendants by their conduct had created uncertainty so as to render a remedy at law inadequate. Enochs v. Mississippi Bank & Trust Co. [Miss.] 39 So. 529.

material and necessary to make out his own case,[99] but this right does not extend to a discovery of the manner in which the case of the adverse party is to be established or of evidence relating exclusively to the opponent's case.[1] A bill of discovery will not lie where the matter sought to be disclosed will tend to incriminate the respondent,[2] nor can it be used as a mere pretense to confer equity jurisdiction,[3] but where equity has jurisdiction of the case, it may authorize a discovery in connection therewith whether or not a bill could be maintained for discovery alone.[4] In a bill of discovery only it is not necessary to allege that only by discovery can the demand be sustained,[5] but in one for discovery and relief,[6] the demand being properly one at law, it must be alleged that discovery is indispensable to a recovery.[7] Where complainant's bill is one for relief by decree, a waiver of answer under oath does not waive the right to a discovery.[8] An insufficient reference to the main action may be obviated by amendment.[9]

§ 2. *Production and inspection of books and papers or survey of property. Nature of remedy and right thereto.*[10]—The power to compel the production or inspection of books and writings of the adverse party to enable one to prepare for trial is inherent in courts of equity and now commonly conferred upon courts of law by virtue of statutory enactments.[11] It will not be exercised however except for cogent reasons, especially in the case of corporations,[12] hence the inspection must be shown to be necessary,[13] the particular documents containing the material

99. Plaintiff did not show that conductor's report of accident on street car was necessary and related to his case. Ex parte Schoepf [Ohio] 77 N. E. 276.

1. Attempt to discover manner of defense in personal injury case against electric car company. Ex parte Schoepf [Ohio] 77 N. E. 276.

2. Would not lie to compel production of libelous article and require defendant to disclose the persons who dictated the article to him and procured him to publish it. Noyes v. Thorpe [N. H.] 62 A. 787. See Witnesses, 6 C. L. 1975.

3. On theory that equity having jurisdiction for purposes of discovery will also grant relief. Larkey v. Gardner [Va.] 54 S. E. 886. A discovery which is merely incidental to the main relief sought will not be granted where there is no right to the main relief. Cannot be used as mere pretense to give equity jurisdiction. Discovery refused where there was no right to accounting. Elk Brewing Co. v. Neubert, 213 Pa. 171, 62 A. 782. Discovery refused where complainant had no right to accounting. Brown v. Equitable Life Assur. Soc., 142 F. 835.

4. Where equity had jurisdiction to enjoin a trespass, it could authorize a discovery as to defendant's profits whether the bill could be maintained for discovery alone or not. Coleman v. Elliott [Ala.] 40 So. 666.

5. Full relief in equity not being asked but only aid in an action at law. Larkey v. Gardner [Va.] 54 S. E. 886. For the requisites of a bill of discovery, see Fletcher Eq. Pl. & Pr. § 809.

6. For distinction between bill of discovery and bill for discovery and relief, see 5 C. L. 1019, n. 8.

7. Larkey v. Gardner [Va.] 54 S. E. 886. **Bill for discovery and relief,** alleging that defendant was indebted to complainant on two bonds in defendant's possession, that complainant did not remember the amounts thereof and so could not sue on them or recover possession at law, **held insufficient** for failure to aver that discovery was indispensable. Larkey v. Gardner [Va.] 54 S. E. 886.

8. Where bill was for accounting and foreclosure of mechanic's lien. Utah Const. Co. v. Montana R. Co., 145 F. 981.

9. Where bill for discovery in action for libel stated the nature of the action, the names of the parties, the term of court, and where the action was pending, it was not demurrable for failure to set out a legal cause of action in aid of which the discovery was sought. Noyes v. Thorpe [N. H.] 62 A. 787.

10. See 5 C. L. 1019.

11. Complainant in suit for accounting and foreclosure of mechanic's lien held entitled to books and papers necessary to establish his cause of action. Utah Const. Co. v. Montana R. Co., 145 F. 981.

12. While an employee would be entitled to examine one of defendant's officers for the purpose of preparing for trial in an action to recover commissions and to have the books produced by subpoena duces tecum to enable the officers to testify, he was not entitled to inspection of the books for that purpose. Harbaugh v. Middlesex Securities Co., 110 App. Div. 633, 97 N. Y. S. 350.

13. Petition for examination of plaintiff's books in preparation for trial, stating that it was necessary to discover what services were rendered by plaintiff to a codefendant, held insufficient where petitioner wae attorney for the other defendant and it did not appear that the other defendant had lack of knowledge. Ferguson v. Bien, 97 N. Y. S. 986. Showing held sufficient to entitle complainant to inspect books and papers necessary in suit to foreclose mechanic's lien and

evidence must be pointed out,[14] and, upon inspection being granted, it must not extend beyond the necessities of the case.[15] Inspection is however granted with much freedom in case of a fiduciary relation between the parties.[16] A statute merely authorizing the inspection and taking of copies of books or writings does not confer authority to order the production of the documents in court.[17] An order is not justified as against one not connected with the case.[18] So called "fishing expeditions" are not allowed,[19] and disclosure of privileged matters cannot be required.[20] Refusal to comply with a valid order must be accompanied by a sufficient excuse.[21]

The survey of property belonging to the adverse party and involved in the case is allowed by statute in some states.[22]

Proceedings.[23]—In some jurisdictions the application may be made by motion supported by affidavit;[24] in others an order for inspection must be made on petition.[25] In any event the necessity of the inspection must appear[26] and the documents desired must be plainly described.[27] In the absence of statute defendant

for accounting. Utah Const. Co. v. Montana R. Co., 145 F. 981. In suit by stockholders to set aside alleged fraudulent transfer of the corporation property, plaintiff held entitled to inspection of evidences of the transfer and minute books of corporation in order to prepare for trial. Snyder v. De Forest Wireless Tel. Co., 99 N. Y. S. 644. Where plaintiff was entitled to receive a certain per cent of defendant's net profits for acting as superintendent, he was entitled to inspect defendant's books to determine the amount. Thomas v. Waite Co., 99 N. Y. S. 297. That plaintiff had formerly had access to the books did not bar his right (Id.), nor the fact that he had become a business competitor (Id.).

14. In suit to set aside alleged fraudulent transfer of the corporation property, plaintiff held not entitled to examine generally all the corporation books of account on mere statement that all the books contained entries material to proof of his case without showing the grounds thereof. Snyder v. De Forest Wireless Tel. Co., 99 N. Y. S. 644. It must appear that the books or documents sought contain matter which would aid the petitioner in preparing for trial. Not shown. Ferguson v. Bien, 97 N. Y. S. 986.

15. Affidavit held not to justify order for production of the general records, books, and documents of a corporation, where the main question at issue was as to the authority of an employe to make a contract, no necessity for all such documents being shown. Wood v. Mott Iron Works, 99 N. Y. S. 677.

16. Where plaintiff was to receive a certain per cent of the defendant's net profits for superintending its fire proof construction, thus forming sort of a quasi partnership arrangement, plaintiff held entitled to inspect defendant's books almost as a matter of right to enable him to prove his claim. Thomas v. Waite Co., 99 N. Y. S. 297.

17. Order erroneous under Code § 578, which directed plaintiff to deposit books, etc., with the clerk and allow them to remain two weeks. Mills v. Biscoe Lumber Co., 139 N. C. 524, 52 S. E. 200.

18. Order for inspection of books of corporation not justified as against one not shown to be an officer or director of the corporation. Snyder v. De Forest Wireless Tel. Co., 99 N. Y. S. 644.

19. The clause in § 5247, Rev. St. 1906, "which he may be compelled to produce as evidence," must be construed in connection with § 5289, Rev. St. 1906, and is limited to evidence pertinent to the issue in cases and under circumstances where a party might heretofore have been compelled to produce the same by the ordinary rules of proceeding in chancery. Ex parte Schoepf [Ohio] 77 N. E. 276. See Discovery in Equity, ante, § 1. Motion for inspection of books and papers necessary for prosecution of suit for accounting and to foreclose mechanic's lien granted as against objection that it was a "fishing expedition," where made merely to enable complainant to prove allegations already made. Utah Const. Co. v. Montana R. Co., 145 F. 981.

20. In an action against a street railway company, the conductor's report of an accident, sent to the claim agent and to be used by the company for settlement or defense, was privileged and could not be discovered. Ex parte Schoepf [Ohio] 77 N. E. 276.

21. Affidavit that since making of order to show cause in contempt proceedings for failure to produce the books of a corporation affiant had not had possession or control of any of the books, that he had been unable to comply with order to produce them, and that they were in the hands of another person, held too indefinite and evasive. Metheany v. Perkins [Mich.] 12 Det. Leg. N. 851, 106 N. W. 147.

22. Section 372, p. 107, of the court and practice act of Rhode Island passed in 1905, requiring a defendant to allow a reasonable inspection of his premises, applies to actions at law for personal injuries in a Federal court within the state. Mills v. Providence Belting Co., 145 F. 447. Does not violate any constitutional privilege of defendant. Id.

23. See 5 C. L. 1020.

24. Utah Const. Co. v. Montana R. Co., 145 F. 981.

25. An order for production of books and documents for inspection before trial, under Code Civ. Proc. §§ 803, 805, must be made on petition and not on affidavit. Hirshfield v. Rosenthal & Co., 99 N. Y. S. 912.

cannot be required to deposit the documents in the office of the county clerk.[28] The inspection of a copy will not be granted on motion for inspection of the original.[29] Where the order is discretionary a second application may be made after a previous refusal.[30] Laches may defeat the application.[31]

§ 3. *Examination or interrogation of party before trial.*[32]—The statutes of many states authorize the examination or interrogation of a party to an action[33] before trial generally where it is necessary to enable the examining party to prosecute or defend on issues already made,[34] but sometimes to enable him to plead.[35]

26. Ferguson v. Bien, 97 N. Y. S. 986; Snyder v. De Forest Wireless Tel. Co., 99 N. Y. S. 644; Thomas v. Waite Co., 99 N. Y. S. 297; Utah Const. Co. v. Montana R. Co., 145 F. 981.

27. Snyder v. De Forest Wireless Tel. Co., 99 N. Y. S. 644; Ferguson v. Bien, 97 N. Y. S. 986.

28. Provision in order for inspection of defendant's documents that, in default of defendant allowing plaintiff to inspect at defendant's office, defendant should deposit the documents in the office of the clerk of the county of New York, held erroneous. Caldwell v. Mutual Reserve Life Ins. Co., 99 N. Y. S. 984.

NOTE. Manner of inspection and custody of documents in equity: Where a party establishes his right to inspect books in the adverse party's possession, it is of course to grant the order for inspection, with liberty to take copies. 1 Barbour, Ch. Pr. 235; Hide v. Holmes, 2 Molloy, 372. The defendant may seal up such parts of the books, documents, and papers as he swears do not relate to the claim of the complainant. 1 Barbour, Ch. Pr. 235; Camphell v. French, 2 Cox, 286; Dias v. Merle, 2 Paige [N. Y.] 494; Gerard v. Penswick, 1 Wils. Ch. 222. It seems to be the rule that, under an order for inspection, the examination may be conducted without the presence of the defendant or his solicitor. The papers must be delivered into the possession of the officer of the court to be open to the view of the complainant whenever he pleases, and it will not be a compliance with the order to deposit the papers in a box, under lock, with a notice to send for the key whenever it is wanted. 1 Barbour, Ch. Pr. 235; Preston v. Carr, 1 McClel. & Y. 457. Where documents mentioned in a schedule by the defendant are deposited in court for the inspection of the complainant, under an order for that purpose, the defendant is entitled to have them restored to him as soon as such inspection has taken place, and the complainant is not entitled to have them left in the custody of the clerk of the court, notwithstanding that it may be necessary that they should be produced before the master in taking the account directed by the decree or on the hearing of an appeal from the decree. 1 Barbour, Ch. Pr. 236; Small v. Attwood, 1 Younge & C. 37. Where it is referred to a master to superintend the production or delivery of books and papers, all parties interested may examine the party producing as to the fact that the order has been fully and fairly complied with, and the master should allow a reasonable time to inspect the books and papers delivered, and to prepare interrogatories for the examination of the party if necessary. Hallett v. Hallett, 2 Paige [N. Y.] 432; Gower v. Baltinglass, Turn. & R. 195, note; Hoffman, Mast. Ch. 11. —From Fletcher Eq. Pl. & Pr. § 377.

29. Motion for inspection of an affidavit properly denied where original had been destroyed and there was no motion for inspection of a copy or proof of its existence. Memphis Trotting Ass'n v. Smathers, 99 N. Y. S. 1057.

30. Where on appeal to him the judge reversed an order of the clerk for the deposit of books and papers made under Code § 578, the motion could be renewed and a new order obtained, it being a discretionary matter, and the order an administrative one not affecting the merits. Mills v. Biscoe Lumber Co., 139 N. C. 524, 52 S. E. 200.

31. Application for order for inspection of plaintiff's books to enable defendant to prepare for trial held too late where cause had been once tried and a new trial ordered, and it was placed on day calendar and marked "ready." Ferguson v. Bien, 97 N. Y. S. 986. Inspection before trial denied on condition that defendant stipulate that it will produce the documents at the trial, in view of plaintiff's delay in making application the character of the action, and the fact that a contract similar to the one involved had been previously construed. Caldwell v. Mutual Reserve Life Ins. Co., 99 N. Y. S. 984.

32. See 5 C. L. 1020.

33. Rev. St. 1898, § 4096, as amended by Laws 1901, p. 328, c. 244, in effect makes the examination of the principal officers of a corporation defendant the examination of a "party to the action," so that a deposition taken in such examination may be read in evidence, though deponent is present in court. Johnson v. St. Paul & W. Coal Co., 126 Wis. 492, 105 N. W. 1048.

34. Where main question at issue was as to the authority of an employee of defendant corporation to make a contract on its behalf, an examination of the officers of the corporation was material and necessary to show the authority of the employee. Wood v. Mott Iron Works, 99 N. Y. S. 677. Held proper to allow examination of defendants and taking of their depositions before trial where, in an action for personal injuries sustained as a passenger on a car, the ownership and operation of the car was peculiarly within defendant's knowledge and necessary to the cause of action. Watt v. Feltman, 97 N. Y. S. 737. Plaintiff in action to recover commissions on business transacted by defendant held entitled to examine defendant's officer in order to prepare for trial and to have books, etc., produced by subpoena duces tecum to enable the officer to testify. Harbaugh v. Middlesex Securities Co., 110 App. Div. 633, 97 N. Y. S. 350. Was not required to have the matter postponed until trial and take risk that the

The charter of New York authorizes the city comptroller to examine persons presenting claims against the city relative to the justness of the claims,[36] but this right exists only up to the time of the commencement of a suit to recover such claim, after which the right to examine is limited to that given by the code to examine a party before trial.[37] A demand upon a corporation defendant for copies of the necessary documents is not a condition precedent,[38] and it is not a valid answer to an application that the party can be reached by subpoena or would appear at the trial,[39] or that the applicant can procure the evidence from other persons.[40] The examination of a party before trial or the production of his books or papers will not be authorized merely to enable one to acquire information for use in instituting proceedings against persons not parties to the cause,[41] or merely for the purpose of prying into the defense to the action.[42] One may not be examined at his own dwelling house,[43] in the absence of a waiver of the privilege of security.[44] The examination must be confined to eliciting information necessary in preparation for trial,[45] and free from any incriminating[46] or privileged character.[47] The answers must be responsive to the interrogatories,[48] except where the statute otherwise provides.[49] The party ex-

books be removed beyond the jurisdiction of the court. Id.

35. Rev. St. 1898, § 4096, authorizing examination of adverse party in any action or proceeding before issue joined to enable the party to "plead," is not limited to a complaint, answer, or reply, but extends to a "claim" in defense of a proceeding in aid of an action or defense, including examination of a plaintiff who has brought a proceeding for the inspection of defendant's books, etc., before the filing of a complaint as authorized by § 4183. Ellinger v. Equitable Life Assur. Soc., 125 Wis. 643, 104 N. W. 811. Circuit Court Rule 19, § 5, subd. 1, providing that an order to show cause on application for inspection of books, etc., shall stay all proceedings "in the action" of the party against whom made, does not bar the party resisting the application from the right to examine the applicant otherwise than as a witness at the trial, as authorized by Rev. St. 1898, § 4096. Id.

36. Under Greater New York Charter § 149 (Laws 1901, p. 50, c. 466), "persons presenting claims" includes officers of a corporation claimant. In re Grout, 105 App. Div. 98, 34 Civ. Proc. R. 231, 93 N. Y. S. 711.

37. Limited to examination under Code Civ. Proc. §§ 390, 391. In re Grout, 105 App. Div. 98, 34 Civ. Proc. R. 231, 93 N. Y. S. 711.

38. To right to examine before trial. Jacobs v. Mexican Sugar Refining Co., 98 N. Y. S. 541.

39. Under Code Civ. Proc. § 870, as amended by Laws 1904, p. 1693, c. 696, and §§ 872, 873, by which the "deposition" of any party may be taken before or during the trial where the testimony is necessary and material. Goldmark v. U. S. Electro-Galvanizing Co., 97 N. Y. S. 1078.

40. Goldmark v. U. S. Electro-Galvanizing Co., 97 N. Y. S. 1078.

41. Not to find out whether stockholders not parties were indebted to a company and the extent of such liability. In re Great Northern, Const. Co., 100 N. Y. S. 564.

42. Examination sought held not to be for purpose of prying into defense but to enable plaintiff to establish his cause of action where, in action for specific performance, plaintiff alleged necessity for setting aside fraudulent conveyances of the land, and asked for trusteeship and accounting. McKenna v. Tully, 109 App. Div. 598, 96 N. Y. S. 561.

43. Violates common law and constitutional right to immunity from unreasonable search and seizure. McSwane v. Foreman [Ind.] 78 N. E. 630.

44. Privilege of preventing invasion of his dwelling not waived because the party absented himself on the day fixed for his examination and locked the house. McSwane v. Foreman [Ind.] 78 N. E. 630.

45. In an action by stockholders in a corporation against it and another company to annul the cancellation of a lease by the latter to the former, an order for examination of the former before trial held too broad for authorizing examination into operation of the plantation by the latter after the cancellation, since, if the lease was unlawfully cancelled, there could be an accounting later. Jacobs v. Mexican Sugar Refining Co., 98 N. Y. S. 541. In an examination under the New York charter of persons presenting claims against the city, only such questions can be asked by the comptroller as in good faith appear to be necessary to enable him to determine whether he will settle, and such as are competent and material to a determination of the justness of the claims. Comptroller not entitled to examine officers of corporation presenting claim for electricity as to formation of corporation, value of property, etc., where he denied any contract and asserted liability only on quantum meruit. In re Grout, 105 App. Div. 98, 34 Civ. Proc. R. 231, 93 N. Y. S. 711.

46. Defendant could not be compelled to give names of persons who procured him to publish a libelous article. Noyes v. Thorne [N. H.] 62 A. 787.

47. In an examination for the purpose of enabling plaintiff to frame his complaint in an action for slander, defendant could not be compelled to give statements made by him to the prosecuting attorney or grand jury while investigating a charge against plaintiff, the latter having no cause of action for slander in such case. Schultz v. Strauss [Wis.] 106 N. W. 1066.

amined cannot invoke restrictions upon the examination interposed merely for the protection of others.[50] Where the ordinary contempt proceedings do not apply,[51] the method of compelling disclosures is generally regulated by the various statutes under which the examination is had.[52] Interrogatories will not be taken as confessed unless refusal to answer is contumacious or deliberate.[53]

The doctrine of laches can, of course, have no application under a statute authorizing an examination before or during the trial.[54] Under a statute providing for examination on affidavit to the judge, it is error to grant an application made to the court.[55] In the absence of statute the witness cannot be required to make and file written answers and serve a copy on the applicant's attorney.[56] An order refusing an examination before trial is appealable in some states as an order refusing a provisional remedy.[57]

48. In re Knickerbocker Steamboat Co., 139 F. 713.

49. Under Rev. St. 1895, arts. 2293, 2296, providing that the party examined as a witness upon interrogatories may, in answer to the questions, state any matter connected with the case and pertinent to the issues, matters pertinent to the issues may be stated, though they are not responsive to the interrogatories. Sparks v. Taylor [Tex.] 14 Tex. Ct. Rep. 506, 90 S. W. 485. The party examined need not notify the opposite party that he intends to state matters not responsive (Id.), nor need the examining party be present to entitle the other to state such matters (Id.).

50. Where on application for the examination of E and H before trial the order limited the examination to transactions between plaintiff and H, the restriction was merely to prevent a direct examination concerning the affairs of E with a view to ascertaining whether applicant had a cause of action against E, and did not enable H to refuse to disclose facts necessary to enable plaintiff to frame his complaint against H, though the examination might incidentally develop facts showing a cause of action against E. In re Sands, 98 N. Y. S. 459.

51. See Contempt, 7 C. L. 746; Witnesses, 6 C. L. 1975.

52. Section 150 of Civ. Code Prac., penalizing, upon affidavit filed, the failure of a party to answer interrogatories attached to the pleading under § 140, by considering the claim admitted, does not apply where the deposition of the party to whom such interrogatories are addressed is taken relative to the matter in question. Huntsberry v. Smith's Adm'r [Ky.] 90 S. W. 601. Under Rev. St. 1898, § 4096, as amended by Laws 1901, p. 328, c. 244, authorizing the examination of a party his agent or employer as an adverse witness before trial, and § 4097, providing that upon the refusal of witness to testify his pleadings may be stricken, it is discretionary with the court to strike the pleadings and its action will not be disturbed in the absence of abuse. Eastern R. Co. v. Tuteur [Wis.] 105 N. W. 1067. Ballinger's Ann. Codes & St. §§ 6009, 6013, providing for the filing of interrogatories for the discovery of "facts and documents," the interrogatories to be answered by the adverse party under penalty of having his pleadings stricken and judgment entered against him, and § 6047, providing for the inspection of books and papers, do not give a cumulative remedy, and failure to annex documents to answers given under § 6009 does not justify inflicting the penalty prescribed by § 6013, the purpose of § 6009 being merely to enable a party to discover the existence and whereabouts of documents in order that they might be had at the trial or obtained for inspection under § 6047. Lawson v. Black Diamond Coal Min. Co. [Wash.] 86 P. 1120. Under Ballinger's Ann. Codes & St. § 6013, authorizing the striking of the pleadings of a party failing to answer interrogatories filed under § 6009, and the entry of judgment against him, a party who invokes this penalty must show that his adversary has failed to discover facts material to the support of the action or defense. Id. The statute does not deprive of property without due process where discovery is sought as to all the issues as a failure to answer may be treated as an admission of the facts in relation to which the discovery is sought. Id. Where answers to interrogatories under § 6009 are deemed insufficient, the court should fix a time within which further answers may be filed in order that the time of default for failure to file may be definitely known. Id.

53. Motion to take as confessed overruled where defendant was advised by attorney and notary refused examination of questions, but later due effort was made to have him appear. Sanborn v. Bush [Tex. Civ. App.] 14 Tex. Ct. Rep. 521, 91 S. W. 883.

54. Code Civ. Proc. § 870, as amended by Laws 1904, p. 1693, c. 696, and §§ 872, 873. Goldmark v. U. S. Electro-Galvanizing Co., 97 N. Y. S. 1078.

55. Code Civ. Proc. §§ 870, 872, providing for examination before trial of a party or his books and papers. Hirshfield v. L. Rosenthal & Co., 99 N. Y. S. 912.

56. Order of discovery to enable plaintiff to file complaint held erroneous for directing witness to answer questions in writing, verify and file them, and serve a copy on applicant's attorney, as the witness should be required to appear before the court and answer the questions. In re Sands, 98 N. Y. S. 459.

57. An order refusing examination under Rev. St. 1898, § 4096, of one who has instituted proceedings under § 4183 for inspection of documents before filing of complaint, is appealable as an order refusing a provisional remedy. Ellinger v. Equitable Life Assur. Soc., 125 Wis. 643, 104 N. W. 811.

§ 4. *Physical examination to prepare for trial.*[58]—As to the authority of the court to compel an examination of a party, the decisions are in conflict.[59] The physical examination of a party before trial is an encroachment on the common-law rights of litigants, and the power of a court in this respect must be exercised strictly within the terms of the statute.[60] Personal service must be made upon the party sought to be examined.[61] The New York statute provides that if plaintiff is a female she shall be entitled to have the examination before physicians of her own sex.[62] The examination under oath should be limited to inquiries as to the nature and extent of the injuries complained of, and the place where, and manner in which they were received, so far as necessary to enlighten the other party as to the nature and extent of the injuries.[63] In the absence of statute a plaintiff is not bound to submit to a physical examination and the fact that he refuses to do so is not admissible in evidence as bearing upon his claim of injury.[64]

DISCRETION; DISFRANCHISEMENT; DISMISSAL AND NONSUIT, see latest topical index.

DISORDERLY CONDUCT.[65]

Disorderly conduct as herein treated includes not only the common law offense of the breach of the peace,[66] but also violations of statutory acts prohibiting specific disorderly conduct, as using profane language near a private house so as to disturb the inmates,[67] being a person of "evil life,"[68] using language calculated to produce a breach of the peace,[69] or doing acts generally tending to disturb or endanger the public peace.[70] Where a city otherwise has the power, it may enact ordinances denounc-

58. Physical examination at trial, see Damages, 7 C. L. 1029.

59. See note 5 C. L. 1022.

60. Code Civ. Proc. §§ 873, 881. Goldenberg v. Zirinsky, 100 N. Y. S. 251. Under Code Civ. Proc. §§ 873, 881, providing for examination by physicians to be appointed by the court, held improper to direct that both plaintiff and defendant might have a physician of his own choosing present at the examination. Id. Under Code Civ. Proc. § 873, providing for the physical examination of a plaintiff in a personal injury case, by physicians to be designated by the court, the order directing the examination may not provide for an examination of the physicians before the referee. Potter v. Hammondsport, 98 N. Y. S. 186.

61. Court did not acquire jurisdiction to compel a nonresident plaintiff in personal injury case to submit to physical examination by service of the order upon the attorney. Goldenberg v. Zirinsky, 100 N. Y. S. 251. Plaintiff not required to submit to examination while matter was before the court on appeal. Id.

62. The provision in Code Civ. Proc. § 873, that if plaintiff is a female she shall be entitled to have the examination "before" physicians of her own sex, means an examination by, and not merely in the presence of, physicians of her own sex. Potter v. Hammondsport, 98 N. Y. S. 186.

63. An order under Code Civ. Proc. § 873, for examination before trial of plaintiff in a personal injury case, she to submit to a physical examination by physicians, should limit the examination under oath as above. Potter v. Hammondsport, 98 N. Y. S. 186.

64. Illinois Central R. R. Co. v. Downs, 122 Ill. App. 545. For examination during trial, see Damages, 5 C. L. 904.

65. See 5 C. L. 1024.

66. Assault and abusive epithets in public place. Town of Neola v. Reichart [Iowa] 109 N. W. 5. Where one went upon a gallery of a house in the nighttime and rattled the door, and on discovering that he had mistaken the house excused himself, there was no breach of the peace. Garrett v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 263, 91 S. W. 577. Evidence of intoxication is admissible as bearing upon the probability of the mistake. Id.

67. Under Pen. Code 1895, art. 334, no conviction can be had for using profane language near a private house without proof that it was used in a manner calculated to disturb the peace of the inmates. Jones v. State [Tex. Cr. App.] 96 S. W. 29.

68. A person playing a piano in a house of ill fame for hire is not a person of "evil life" within the act of Congress of July 8, 1898 (30 Stat. at L. 723, c. 638). Fields v. District of Columbia, 26 App. D. C. 70.

69. Whether the language used was of such a character as was calculated to cause a breach of the peace, and whether there was provocation sufficient to excuse its use, is for the jury. Error for court to instruct the jury that the words alleged are opprobrious and abusive within the statute, and that a given set of facts would not be a sufficient provocation to justify their use. Fish v. State, 124 Ga. 416, 52 S. E. 737.

70. The playing of "craps" by boys on a vacant lot is not an act which disturbs or

ing specific disorderly acts, although those same acts constitute an offense against the state.[71] Where defendant's acts and words constituted a breach of the peace, it was no defense that he was mistaken as to the place and the person against whom directed.[72]

An indictment for disorderly conduct must charge facts bringing the case clearly within the statute.[73] An indictment for eavesdropping must allege that such acts were habitual and that the conversation overheard has been repeated by defendant.[74] Defendant's guilt must be established beyond a reasonable doubt.[75]

DISORDERLY HOUSES.[76]

This topic includes only the criminal offense of keeping or frequenting a bawdy house;[77] the keeping of gaming houses,[78] and the remedies against bawdy houses as nuisances,[79] are elsewhere treated.

In New Jersey a place where persons habitually meet to do acts in violation of positive law is a disorderly house.[80] A bawdy house is one where persons of opposite sex meet for the purpose of sexual commerce.[81] Under the statute of Iowa it is not necessary that a house of ill fame be kept for gain.[82] The character of the house may be proven by reputation;[83] or by facts and circumstances,[84] and any evi-

endangers the public peace within Pen. Code § 675. People v. McDermott, 97 N. Y. S. 901.

71. Under Code § 680, a city may enact ordinances prohibiting assaults, affrays, and the use of blasphemous language, notwithstanding those same acts are prohibited by state law. Town of Neola v. Reichart [Iowa] 109 N. W. 5.

72. As where he went to the wrong house and rattled the door and threatened to kill the inmates. Garrett v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 263, 91 S. W. 577.

73. An indictment under Pen. Code 1895, art. 334, providing that if any person shall rudely display a "pistol or other deadly weapon," etc., he shall be fined, must allege that the gun displayed was a deadly weapon. Jones v. State [Tex. Cr. App.] 96 S. W. 29. A complaint charging that defendant disturbed the peace of D. at a certain time and place by using vulgar and profane language, etc., does not charge the offense of disturbing the peace "in a loud and boisterous manner," under Pen. Code § 415. Ex parte Boynton [Cal. App.] 82 P. 90. Neither does it charge disturbing the peace by offensive conduct, as it does not allege that the language was offensive. Id.

74. Indictment held insufficient. State v. Davis, 139 N. C. 547, 51 S. E. 897.

75. Testimony of one witness that defendant drew a revolver, saying "Let's go and shoot 'em up!" put it back in his pocket and walked off, and that shooting was subsequently heard in the direction he went, is insufficient to warrant conviction of disturbing the peace of a town. Stanclift v. U. S. [C. C. A.] 139 F. 806.

76. See 5 C. L. 1025.

77. See Indecency, Lewdness and Obscenity, 5 C. L. 1776, as to prostitution.

78. See Betting and Gaming, 7 C. L. 434.

79. See Nuisance, 6 C. L. 827. See, also, Injunction, 6 C. L. 6.

80. As where loans are habitually made at usurious rates of interest in violation of the statute. State v. Dimant [N. J. Law] 62 A. 286.

81. An instruction held not to authorize a conviction if either lewd men or women remained in defendant's house without a further finding that both sexes met there for immoral purposes. Mash v. People, 220 Ill. 86, 77 N. E. 92.

82. State v. Porter [Iowa] 107 N. W. 923. Hence not necessary to prove that it was kept for gain. Id.

83. The reputation of the defendant and the inmates of her house for chastity is admissible to characterize the house, though defendant has not put her character in issue. State v. Price, 115 Mo. App. 656, 92 S. W. 174. Under an indictment for keeping a house of ill fame between specific dates, a prior reputation is admissible where the undisputed evidence shows that the house under the same management had acquired the reputation which continued through the alleged period. People v. Wheeler [Mich.] 12 Det. Leg. N. 634, 105 N. W. 607. A justice of the peace may testify to the reputation of the house from discussions he had heard between peace officers, and it is not objectionable as admitting the proceedings and records of the justice court. State v. Cambron [S. D.] 105 N. W. 241. Evidence that the house was one of ill repute is not sufficient to convict, it being necessary that the house was of ill fame, was resorted to for the purposes alleged, and was kept by defendant or that she aided in keeping it. People v. Wheeler [Mich.] 12 Det. Leg. N. 684, 105 N. W. 607.

84. Laws 1903, c. 154, p. 179, permitting conviction upon reputation, is cumulative and does not preclude proof of character by facts and circumstances. State v. Cambron [S. D.] 105 N. W. 241. The fact that men and women frequent a house in a manner not recognized by social custom, coupled with the ill fame of such house is very persuasive that the place is used for purposes of prostitution and in-

dence tending to show the character is admissible.[85] One may be convicted of keeping a disorderly house, although jointly maintained with another.[86] In some states the keeper of a house of prostitution is liable for permitting an unmarried female under eighteen years of age[87] to board therein.[88] In Michigan there is no presumption that a married woman who keeps a house of ill fame is coerced by her husband.[89] An indictment for keeping a house of ill fame need not allege the location of the house,[90] but where defendant is charged with permitting a house owned by him on a named lot to be used for immoral purposes, it must be strictly proved.[91]

Dissolution; Distress; District Attorneys; District of Columbia, see latest topical index.

DISTURBANCE OF PUBLIC ASSEMBLAGES.[92]

An act prohibiting "any person" from disturbing a public school includes an enrolled pupil.[93] Under a statute making it an offense to disturb persons "lawfully assembled for divine service," an assemblage for such purpose is sufficient to render one disturbing it liable, though no services are in fact held.[94] In a prosecution for disturbing religious worship, testimony of a witness that he ceased attending on account of defendant's conduct is inadmissible.[95]

Ditches; Dividends; Division of Opinion, see latest topical index.

DIVORCE.

§ 1. **Jurisdiction (1176).** Domicile of Complainant (1176). Service of Process on a Nonresident Defendant (1177.)
§ 2. **Grounds for Divorce (1177).** Desertion (1177). Cruel and Inhuman Treatment and Indignities (1179). Incompatibility of Temper (1180). Drunkenness (1180). Conviction of Crime (1180). Adultery (1180). Impotency (1180). Vagrancy (1180). Failure or Refusal of the Husband to Support the Wife (1181).
§ 3. **Defenses and Facts Constituting a Bar (1181).** Collusion (1181). Connivance (1181). Condonation (1181). Recrimination (1182). Dissolution of the Marriage (1182).
§ 4. **Practice and Procedure (1182).** Limitations (1182). Pleading (1182.) Evidence and Proof (1183). Interlocutory and Final Decrees (1184). Dismissal (1184). Procedure Where Husband Disregards Order for Temporary Alimony (1184). Rights of Corespondent (1185). Conclusiveness of Decrees; Vacation and Modification (1185). Appeal and Review (1186).
§ 5. **Custody and Support of Children (1186).**
§ 6. **Adjustment of Property Rights (1189).**
§ 7. **Effect of Divorce (1190).**
§ 8. **Foreign Divorces (1191).**

Scope of article.—The subject of alimony is given separate treatment,[96] though the final division of property beween the parties is here discussed. Suits for annulment[97] and for support and separate maintenance[98] are treated in connection with other titles.

tended to be so used by the persons in charge. State v. Price, 115 Mo. App. 656, 92 S. W. 174.

85. As who went there, as to what they were doing there, as to other hacks being there at the same time, as to the visits being in the nighttime. State v. Cambron [S. D.] 105 N. W. 241. Evidence of the sale of intoxicating liquors and the manner of such sale is admissible as showing the character of the house. Id. In view of the undisputed testimony showing that defendant kept the house of ill fame, held not reversible error to admit evidence that she kept a bank and store account under an assumed name. People v. Wheeler [Mich.] 12 Det. Leg. N. 684, 105 N. W. 607. Evidence that defendant and one of the inmates of the house were found together in a hotel and of the conversation between them and with the sheriff who discovered them was admissible, the conversation being in defendant's presence, and although the woman was not indicted. State v. Cambron [S. D.] 105 N. W. 241.

86. State v. Cambron [S. D.] 105 N. W. 241.

87. Evidence of the prosecuting witness that she was 17 years old, which information she received from her grandmother and

§ 1. *Jurisdiction.*[99]—Jurisdiction relative to divorce and alimony rests wholly upon statute.[1] In New Jersey an appearance of a nonresident wife as complainant by her solicitor is equivalent to jurisdiction by "service of process" on her and supports a decree on the cross bill for her adultery.[2] Unless the court has jurisdiction of the parties[3] and the subject-matter, its decree is void. While there can be no divorce from a deceased spouse, yet it is held that the presumption of death from seven years' absence unheard of does not arise to defeat divorce.[4] Jurisdiction usually depends upon the domicile of the plaintiff and not upon the place of the marriage or of the commission of the offense against the marital relation,[5] and in case of a divorce on constructive service, the separation of domicile must have been rightful as against defendant spouse,[6] but in some states offenses committed outside the jurisdiction at a time when neither of the parties resided within the jurisdiction cannot be relied upon.[7] The place of trial within the state is statutory.[8] Statutory provisions authorizing constructive service are strictly construed.[9]

Domicile of complainant.[10]—Bona fide residence of complainant in the state for the period required by law is a jurisdictional prerequisite.[11] The wife may acquire

aunt, and like testimony of the physician that attended her birth, held sufficient to show that she was under 18 years of age. Mash v. People, 220 Ill. 86, 77 N. E. 92.

88. In a prosecution for permitting an unmarried female under 18 years old to board in a house of prostitution contrary to Crim. Code (1 Starr & C. Ann. St. 1896, p. 1228, c. 38), § 3, par. 7b, an instruction as to liability of one aiding and abetting the keeping of a house of ill fame held not to charge that one so aiding was guilty of the crime charged against defendant (Mash v. People, 220 Ill. 86, 77 N. E. 92), nor objectionable as ignoring all the elements necessary to warrant a conviction (Id.).

89. Hence not error to refuse a requested instruction that the state must disprove coercion, there being no evidence of coercion as a fact. People v. Wheeler [Mich.] 12 Det. Leg. N. 684, 105 N. W. 607.

90. Sufficient if it shows the court's jurisdiction by alleging that it is within the county. State v. Cambron [S. D.] 105 N. W. 241.

91. Failure to prove that defendant owned a house on such lot is fatal, although there is proof that he owned one on a separate lot. Oligschlager v. Oklahoma [C. C. A.] 146 F. 131.

92. See 5 C. L. 1025.

93. Laws 1903, p. 328, c. 156, § 12. State v. Packenham, 40 Wash. 403, 82 P. 597. Act held not unconstitutional as embracing more than one subject. Id.

94. As where one prevents a congregation from entering the church and they disperse without attempting services. Liable under Penal Code of 1895, § 418. Tanner v. State [Ga.] 54 S. E. 914. Instruction held proper. Tanner v. State [Ga.] 54 S. E. 915.

95. Bare conclusion of the witness. Deskin v. State [Tex. Cr. App.] 93 S. W. 742.

96. See Alimony, 7 C. L. 104.

97. See Marriage, 6 C. L. 515.

98. See Husband and Wife, 5 C. L. 1731.

99. See 5 C. L. 1026.

1. Cizek v. Cizek [Neb.] 107 N. W. 1012.

2. Storms v. Storms [N. J. Eq.] 64 A. 700.

3. Haddock v. Haddock, 201 U. S. 562, 50 Law. Ed. —. Where, in direct proceeding to set aside divorce decree, the evidence clearly and conclusively establishes the fact that no service, actual or constructive, was had on defendant, the decree will be held void and set aside. Rodgers v. Nichols [Okl.] 83 P. 923. Where plaintiff went to Nebraska solely for divorce, and had no residence there such as is required to give the court jurisdiction of him, and defendant was never personally served, the decree of divorce was void. Field v. Field, 117 Ill. App. 307.

4. 1 Gen. St. p. 1187, creating such presumption in certain cases, held not to apply in divorce. Spiltoir v. Spiltoir [N. J. Eq.] 64 A. 96.

5. Residence of libellant in state for 5 years gives court jurisdiction, regardless of place where offense was committed. Rev. Laws, c. 152, § 5. Franklin v. Franklin, 190 Mass. 349, 77 N. E. 48.

6. Haddock v. Haddock, 201 U. S. 562, 50 Law. Ed. —.

7. Adultery by husband in Pennsylvania and New York held no ground for divorce in Massachusetts, where neither husband nor wife resided in Massachusetts when such offenses were committed. Rev. Laws, c. 152, § 4. Clark v. Clark [Mass.] 77 N. E. 702.

8. Under Comp. St. 1903, ch. 25, § 6, the district court has jurisdiction to hear and determine an action for divorce in any county in the state where the parties, or one of them, reside. Eager v. Eager [Neb.] 105 N. W. 636. By Code Civ. Proc. §§ 902, 903, actions for divorce are taken out of the general code provisions for the prosecution of other actions therein mentioned. Id. In Nebraska, where plaintiff resides in one county and defendant in another, the summons may issue from the county where the plaintiff resides and the action is commenced to any other county in the state where defendant resides. Id.

9. Rodgers v. Nichols [Okl.] 83 P. 923.

10. See 5 C. L. 1026.

a domicile apart from her husband's when he has been guilty of conduct entitling her to a divorce,[12] and where the deserted wife remains at the home of the parties, her domicile is not changed by occasional visits to other states, where she has no intention of changing her place of residence.[13]

Service of process on a nonresident defendant[14] must be made in the manner prescribed by law.[15]

§ 2. *Grounds for divorce.*[16]—Though general public policy is opposed to the granting of divorces, where the legislature has declared the policy of the state by enumerating grounds for divorce, what shall constitute a cause therefor is no longer a subject of judicial inquiry, and one who establishes a statutory ground by the required proof is entitled to relief, as in any other civil action.[17] Much discretion must be allowed trial courts in divorce cases, and their decisions are rarely interfered with by appellate courts in the absence of an abuse of discretion or error of law.[18]

In some states courts will not grant a divorce for a cause which arose in another state at a time when neither of the parties resided in the state where suit is brought.[19]

Desertion[20] is a ground of divorce when shown to be willful and obstinate, and continuous[21] for the statutory period.[22] Where a separation is not originally a

11. Evidence held sufficient to support finding that plaintiff had been a resident for required period. Wilkerson v. Wilkerson [Cal. App.] 84 P. 784. Where there was no proof that petitioner, the wife, was ever a resident of the state, and the husband lived there a few days with a bigamous wife, and fled on being discovered, but was brought back and sent to prison, the petition was dismissed for want of jurisdiction. Osiel v. Osiel [N. J. Eq.] 63 A. 549. Evidence sufficient that wife's domicile was bona fide and for the legal period, she having been forced to leave her husband and having special reasons for having come where she did. Reed v. Reed, 30 Pa. Super. Ct. 229. See, also, Haddock v. Haddock, 201 U. S. 562, 50 Law. Ed. —- and ante this section.

12. Wife held entitled to sue for divorce in Massachusetts, though husband lived in New York, he having committed adultery. Clark v. Clark [Mass.] 77 N. E. 702.

13. Where plaintiff resided at St. Louis after her marriage with her husband, the fact that, after he deserted her, she left the city occasionally for visits elsewhere did not change her domicile and she could sue for divorce in Missouri. Humphrey v. Humphrey, 115 Mo. App. 361, 91 S. W. 405.

14. See 5 C. L. 1027.

15. Where process was served on defendant in another state where plaintiff's affidavit showed that he resided, the service was not void because the affidavit failed to state that service could not be made upon defendant "in the state." Paddock v. Paddock [Mo. App.] 91 S. W. 398. Where wife filed bill for divorce from bed and board and for custody of children, and service was by publication, an order for publication being served on defendant in another state, and the wife was given the relief asked, after proofs taken, and the amount of alimony fixed, and property of the husband sequestered, a petition to set aside the entire decree because of no service on defendant in the state was denied. McGuinness v. McGuinness [N. J. Eq.] 62 A. 937.

16. See 5 C. L. 1028.

17. Wald v. Wald [Mo. App.] 96 S. W. 302.

18. Darman v. Darman [Ind. App.] 78 N. E. 89.

19. Rev. Laws, c. 152, § 4. Clark v. Clark [Mass.] 77 N. E. 702. Where evidence warranted finding that wife had been deceived by husband as to adultery committed in Massachusetts and other states, and after learning facts had withdrawn an earlier condonation of the offense in Massachusetts, she was entitled to rely upon the offense in Massachusetts as a cause for divorce. Id.

20. See 5 C. L. 1028.

21. Sterling v. Sterling [N. J. Eq.] 63 A. 548; Ojserkis v. Ojserkis [N. J. Eq.] 62 A. 113. Where wife left her husband and refused absolutely to return, the mere fact that the husband, seeking divorce, did not produce the letters which passed between them was no reason for denying the divorce, when he was not asked to produce them. Lamere v. Lamere, 41 Wash. 475, 84 P. 26. Charge of desertion by wife held supported where plaintiff was old and blind and had no means except a pension of $12 a month, and wife said she did not want to live with plaintiff owing to the trouble they had over their children by former marriages. Bascombe v. Bascombe [Neb.] 106 N. W. 468. Not when forced to leave by cruelty. Daugherty v. Daugherty, 28 Pa. Super. Ct. 327.

Held insufficient: Returning home husband found house dismantled and wife gone and saw her but twice afterwards. She gave no explanation and he testified that he knew of no cause why she left. He voluntarily gave her money after she left. Olson v. Olson, 27 Pa. Super. Ct. 128.

22. In Illinois the two-year period of de-

desertion, it can be converted into a desertion only by a demand made by one party in good faith for the resumption of marital relations, and a refusal of the other to accede thereto.[23] Thus, where the wife leaves the husband, it is his duty to make a bona fide[24] offer of reconciliation and to seek to renew the matrimonial status,[25] but a demand for the return of the wife is not essential where the circumstances are such as to warrant the inference that such a demand would be wholly ineffective.[26] An offer of reconciliation made by a deserter is ineffective, if made after the desertion has become a sufficient ground of divorce.[27] Where parties intermarry secretly, agreeing to live separately for the present, the separate living of the husband will not be a desertion of the wife until she repudiates the agreement for separate living by offering to live with him and demanding that he support her.[28] A demand for support alone will not be sufficient.[29] The wife must not condition her return on her husband's willingness or ability to support her better than his means or equal to her wishes.[30] A willful refusal by the wife to accompany the husband in a change of domicile is a desertion by her, unless the change is plainly unreasonable.[31] Some states hold there may be a desertion though the parties live in the same house.[32] To establish a constructive desertion it must appear that the separation of the petitioner from defendant was justifiable[33] and not by mutual agreement.[34] Cruelty justifying abandonment by the wife does not consist in a

sertion required by statute is computed by excluding the first day and including the last. Trimmer v. Trimmer, 117 Ill. App. 64.

23. Separation by husband held not a desertion, and wife held not entitled to a divorce where she refused to return to him except upon terms named by her. Provost v. Provost [N. J. Eq.] 63 A. 619. Husband not entitled to divorce under Rev. St. 1898, § 2356, subd. 7, authorizing divorce where parties have voluntarily lived entirely separate for five years, where the wife's separation was originally caused by his cruel treatment, and he never attempted to effect a reconciliation, and her reason for separate living remained the same. Jakubke v. Jakubke, 125 Wis. 635, 104 N. W. 704.

24. Evidence held to show offer of reconciliation not made in good faith, but to aid in showing cause for divorce. Stoneburner v. Stoneburner [Idaho] 83 P. 938. Offer of husband to provide home for wife in New Jersey held **not** made **in good faith,** and hence her failure to accept did not make her a deserter. Grady v. Grady [N. J. Eq.] 64 A. 440. Merely sending letter to a third person to be shown the wife, without offering to pay expenses back, or telling her where he was, is **not** a sufficient **offer to receive** the wife. Ojserkis v. Ojserkis [N. J. Eq.] 62 A. 113.

25. Sterling v. Sterling [N. J. Eq.] 63 A. 548. Mere fact that wife went to her mother did not constitute desertion where he did not disclose his whereabouts nor offer to receive her back, or try to effect a reconciliation. Ojserkis v. Ojserkis [N. J. Eq.] 62 A. 113.

26. Husband held not to have proved that wife had willfully deserted him for another man so as to relieve him of duty to demand her return. Sterling v. Sterling [N. J. Eq.] 63 A. 548.

27. Stoneburner v. Stoneburner [Idaho] 83 P. 938.

28. McAllister v. McAllister [N. J. Eq.] 62 A. 1131.

29. Evidence held not to show an offer by wife to live with husband, hence desertion not shown. McAllister v. McAllister [N. J. Eq.] 62 A. 1131.

30. A claim by a wife that her husband has deserted her is unfounded where she refuses to return to him because he cannot support her in the way she demands. Provost v. Provost [N. J. Eq.] 63 A. 619.

31. Refusal of wife in England to accompany or to come to the husband in America, held desertion, where the husband came here to better his condition and that of his family. Franklin v. Franklin, 190 Mass. 349, 77 N. E. 48. Husband has right to choose domicile, and wife's refusal to accompany him, without a good reason, constitutes an abandonment. Buell v. Buell [Wash.] 84 P. 821.

32. Where wife refused to cohabit with husband for two years, though the two lived in the same house, in separate portions of it, he was entitled to a divorce. Groves v. Groves [Miss.] 41 So. 384.

33. Desertion by husband held **not justified** by slovenly, unclean, and lazy habits of wife. Hunter v. Hunter, 121 Ill. App. 380. Where agreement to live apart was induced by wife's accusation of lewdness against husband and her statement that she would see him dead and in hell before she lived with him another year, and he left her for the statutory period and made no effort at reconciliation, he was not entitled to a divorce on the ground of desertion. Gray v. Gray [Tex. Civ. App.] 95 S. W. 46. The fact that a wife objected to her husband's being in the saloon business, and said she could not live with him if he continued in it, does not justify his leaving his home and family, and never offering to resume his place as husband and father so as to convert her into a deserter and warrant the granting of a divorce to him. This is not desertion under Rev. Civ. Code § 70. Barrett v. Barrett [S. D.] 105 N. W. 463.

34. Must be no agreement. Olson v. Olson,

single act of violence.[35] Abandonment is a ground of divorce from bed and board, in Louisiana, but it must be made to appear in the manner provided by statute.[36]

Cruel and inhuman treatment and indignities[37] are grounds of divorce in most jurisdictions, though the rules as to what constitutes such treatment vary in different states and under different statutes. Cruelty and indignities are distinct grounds in Pennsylvania,[38] and the cruelty for which a husband may be divorced is not the same as that on which the wife may sue.[39] In Pennsylvania a husband may have a divorce when his wife was cruel and barbarous in her treatment if it also rendered his life burdensome.[40] Actual violence to the person must be shown in Alabama,[41] but in most jurisdictions, while a charge of cruelty may be sustained by proof of personal violence,[42] such proof is not essential. Thus, threats of violence and false charges of criminal conduct,[43] "indignities,"[44] and a course of conduct which causes grievous mental suffering,[45] or renders the marital relation intolerable,[46] have been held grounds for divorce. Illustrative facts insufficient to make out statutory cruelty have been considered in cases below.[47]

27 Pa. Super. Ct. 128. If a wife abandons her husband without just cause and then files a bill for divorce a mensa et thoro and alimony, and a settlement is then made whereby the husband gives the wife a sum of money and she releases him and his property from all claims, though the husband, both before and after execution of the contract, makes a bona fide effort to induce the wife to return, such contract is not a bar to his suit for divorce on the ground of abandonment (Lemmert v. Lemmert [Md.] 63 A. 380), since it cannot be said to be an acquiescence in the separation or a condonation of the wife's offense (Id.).

35. Lemmert v. Lemmert [Md.] 63 A. 380.

36. Three summonses, from month to month, and three notifications of judgment. Civ. Code art. 139. Van Horn v. Arantes [La.] 40 So. 592.

37. See 5 C. L. 1029.

38, 39. In his case it need not "endanger" his life but only make it "intolerable." Fay v. Fay, 27 Pa. Super. Ct. 328.

40. Fay v. Fay, 27 Pa. Super. Ct. 328. Neglect of housekeeping duties by wife, the use to him before children and strangers of profane, abusive, and obscene language, and vile epithets, threats, and desires to stab or poison him and hopes for his death, held to be cruel and barbarous and to make life burdensome. Id.

41. In Alabama a charge of cruelty is sustained only by proof of actual violence to the person attended with danger to life or health, or such conduct as to cause a reasonable apprehension of such violence. Charge held not sustained as required by Code 1896, § 1487, especially as wife (plaintiff) appeared also to be at fault. May v. May [Ala.] 39 So. 679.

42. Divorce properly granted on ground of extreme cruelty where evidence showed husband choked wife so that her throat was inflamed and swollen for a week. Hays v. Hays [Neb.] 106 N. W. 773.

43. Continued threats of personal violence by husband, and accusations of crime and other vile abuse, held to support petition by wife for divorce on ground of cruelty. Griffith v. Griffith [Neb.] 108 N. W. 981. An unsupported charge of adultery against the wife by the husband is cruel and inhuman conduct entitling her to a divorce. Barlow v. Barlow [Ky.] 90 S. W. 216.

44. Where husband sustained intimate relations with bad women, he was held guilty of indignities to the wife warranting divorce, though her charge of adultery was not proved. Hall v. Hall [Mo. App.] 93 S. W. 315.

45. Wife's conduct held extreme cruelty within Civ. Code § 94, where she often left him, did not attend to household duties, accused and abused him, hid his clothes, etc. Avery v. Avery [Cal.] 82 P. 967. The infliction of mental suffering, as well as of bodily injury, may constitute extreme cruelty in Colorado. Sess. Laws 1893, p. 236, c. 80. Harding v. Harding [Colo.] 85 P. 423. Where there is evidence of cruel conduct from which mental suffering might reasonably have resulted, it is not essential that plaintiff should testify directly that such mental suffering endangered her health or life. Id.

46. Evidence of husband's neglect, abusive and coarse language, and indifference when wife was ill, held sufficient to support finding of extreme cruelty. Harding v. Harding [Colo.] 85 P. 423. Habitual treatment for six months by the husband as indicates a settled aversion to his wife and destroys her happiness and peace of mind is a ground of divorce under Ky. St. 1903, § 2117. Hooe v. Hooe [Ky.] 92 S. W. 317. Conduct and acts of husband, or such treatment of the wife as causes reasonable apprehension of personal violence, or produces mental anguish, distress, and sorrow, and renders cohabitation miserable, and impairs the wife's health, is cruel and inhuman conduct authorizing a divorce from bed and board (Code 1899, c. 64, § 6), though no personal violence is used. Goff v. Goff [W. Va.] 53 S. E. 769. Decree of divorce from bed and board (preliminary to absolute divorce a year later) granted on ground of **defamation, excesses,** and cruel treatment of wife, a woman of refinement, where husband published an item saying he would not be responsible for her debts, and it appeared he had at times been brutal toward her, and that life with him was intolerable. Harrison v. Harrison, 115 La. 817, 40 So. 232. Evidence held to support decree for wife on the ground that

Incompatibility of temper is not a ground for divorce in most states.[48]

Drunkenness,[49] when made a ground of divorce, must be shown to be habitual and to have continued for the statutory period.[50] One is an habitual drunkard who has a fixed habit of frequently getting drunk.[51] In Massachusetts, to justify a decree of divorce on the ground of drunkenness, or the excessive use of opiates, the evidence must be such as to warrant a finding that the habit was gross and confirmed and existed when the divorce proceeding was commenced.[52]

Conviction of crime[53] involving moral turpitude[54] as a ground rests partly on the loss of conjugal rights,[55] and hence a pardon after sentence does not efface it.[56]

Adultery[57] is a sufficient cause when established by the quantum of proof required.[58]

Impotency is a sufficient cause in Massachusetts.[59]

Vagrancy.—In Missouri, proof that the husband is a vagrant entitles the wife to a divorce.[60]

her life with defendant had been rendered intolerable by his constant **nbuse, nagging,** and **threats,** and conduct showing disregard of her rights and **lack of affection** for her. Wald v. Wald [Mo. App.] 96 S. W. 302. Where the **husband took a young woman into his family** and the two openly talked of their love for each other, and he told his wife he no longer cared for her, such conduct on his part constituted cruel and inhuman treatment warranting a divorce at her request. Craig v. Craig [Iowa] 105 N. W. 446.

47. Charge of cruel and inhuman treatment held not sustained where it appeared **both** parties were **at fault** and plaintiff's (wife's) health or life were never endangered. Olson v. Olson [Iowa] 106 N. W. 758. Judgment denying divorce affirmed where charges of cruelty consisting of abuse and assault, and reflections on plaintiff's virtue, were not sustained by the proof. Luhn v. Luhn [Tex. Civ. App.] 15 Tex. Ct. Rep. 732, 93 S. W. 525.

Where plaintiff knew when she married that her husband was addicted to drink, was an epileptic and a spendthrift, she was denied a divorce on the ground of cruel and inhuman conduct, when the evidence showed that he had become a drunkard, did not provide for his wife and son, and had abused her verbally, and on three occasions had struck her. Robertson v. Robertson [Iowa] 106 N. W. 166. Charge of extreme cruelty in overworking wife, and putting her in sanatarium, not proved, the **wife** appearing to be **mentally deficient.** Hewelt v. Hewelt [Mich.] 13 Det. Leg. N. 495, 108 N. W. 504. Charge of cruelty not proved where it appeared husband used only such **force** as was necessary **to keep** wife from taking away **their child.** Mills v. Mills [Or.] 83 P. 390. Proof that **wife** continually **found fault** with and worried and **harassed** the husband held not to support charge of extreme cruelty. Geisseman v. Geisseman [Colo.] 83 P. 635.

48. Olson v. Olson [Iowa] 106 N. W. 758. Divorce from bed and board denied where parties were both old and feeble, had lived together half a century, and had three adult married daughters, no serious difficulty between them being proved, but it appearing that both were irritable and possibly unkind to each other. Smith v. Smith [La.] 41 So. 238.

49. See 5 C. L. 1030.

50. Habitual drunkenness must be shown to have continued for a year before it is a cause for divorce, under Rev. St. 1899, § 2921. McCarthy v. McCarthy [Mo. App.] 93 S. W. 317.

51. It is not necessary that he should be constantly drunk, or should have more drunken than sober hours. Page v. Page [Wash.] 86 P. 582.

52. Decree of divorce allowed to stand, being supported by proof, and libellee not having proved that she had given up the habit. Gowey v. Gowey [Mass.] 77 N. E. 526.

53. See 5 C. L. 1030.

54. Voluntary manslaughter. Holloway v. Holloway [Ga.] 55 S. E. 191.

55, 56. Holloway v. Holloway [Ga.] 55 S. E. 191.

57. See 5 C. L. 1029.

58. Evidence insufficient: To prove adultery by wife. Rogers v. Rogers [N. J. Err. & App.] 63 A. 1119. To prove anything criminal in wife's conduct, though she admitted she had been indiscreet. Russell v. Russell [Neb.] 108 N. W. 149. Evidence held insufficient because almost wholly confessions. Michalowicz v. Michalowicz, 25 App. D. C. 484.

Held sufficient to show that adultery of husband was accompanied by public scandal and disgrace of the wife, as required by Spanish laws to sustain a divorce, where it appeared he abandoned his wife, excluded her from his house, and formed open illicit relations with three other women. De La Roma v. De La Roma, 201 U. S. 303, 50 Law. Ed. —. Admission of paramour held sufficient without corroboration, he not being of that character which requires it. Storms v. Storms [N. J. Eq.] 64 A. 700.

Instructions: Refusal to charge on opportunity for and inclination to adultery held proper in view of general charge. Talley v. Talley, 29 Pa. Super. Ct. 535.

59. Where sexual intercourse was impossible without causing the wife such physical distress as to endanger her health, and the parties separated after seven years, on advice of a physician, the husband was held

Failure or refusal of the husband to support the wife is not a ground for separation from bed and board in Louisiana, other remedies being provided by law.[61]

§ 3. *Defenses and facts constituting a bar. Collusion.*[62]—An agreement between the parties to a pending suit for a divorce for the collusive rendition of a decree therefor will defeat the action,[63] and it is immaterial that one of the parties may have supposed such agreement to be free from legal or moral wrong.[64]

Connivance by one spouse in the offense of the other, when shown,[65] will also bar relief.

Condonation[66] is the conditional forgiveness of a matrimonial offense constituting a cause of divorce,[67] and, when shown, restores the parties to a position of equality in law.[68] The forgiveness is always conditioned on the future good conduct of the forgiven spouse,[69] and a subsequent commission of the offense revives the wrong.[70] Cohabitation with knowledge of infidelity condones that offense,[71] but in Kentucky, cohabitation with the husband after a knowledge of the fact that he has a loathsome disease does not bar the wife's right to a divorce.[72] After condonation by the wife of adultery by the husband, he may be divorced from her for a subsequent similar offense.[73] A separation agreement in settlement of the wife's suit for limited divorce does not condone her fault, she having been the real deserter.[74]

to be entitled to a divorce. S——— v. S——— [Mass.] 77 N. E. 1025.

60. Rev. St. 1899, § 2921. That young physician, just starting, failed to support himself and wife, and had to use his wife's funds, did not prove him a vagrant within the meaning of Rev. St. 1899, § 2228. Gallemore v. Gallemore, 115 Mo. App. 179, 91 S. W. 406.

61. She may purchase necessaries at his expense, or have him prosecuted under Act No. 34, p. 42, of 1902. Van Horn v. Arantes [La.] 40 So. 592.

62. See 5 C. L. 1030.

63. Branson v. Branson [Neb.] 107 N. W. 1011.

Evidence held not to show collusion where wife abandoned husband and absolutely refused to return. Lamere v. Lamere, 41 Wash. 475, 84 P. 26. Where husband admitted wife's right to divorce for cruel and inhuman treatment, but agreed to make certain allowances if the charge was changed to nonsupport, and if the wife would release her dower rights, and this agreement was carried out in open court after examination by the judge, the decree was not invalid as collusive, fraudulent, or against public policy. Schlesinger v. Kiinger, 98 N. Y. S. 545. A collusive agreement with reference to divorce is one by which the parties agree to obtain a divorce either by suppression of the facts or by manufactured or false evidence. Where an agreement only provides that one party will not contest, it is not collusive but calls for a closer scrutiny by the court of all the facts, and leaves it a matter for the court to consider in connection with all the evidence adduced. MacBride v. Gould, 3 Ohio N. P. (N. S.) 469.

64. Branson v. Branson [Neb.] 107 N. W. 1011.

65. Evidence held not to show connivance by husband in opium habit of wife, his purchases for her after he learned of the habit being on a physician's advice to wean her from the habit gradually. Gowey v. Gowey [Mass.] 77 N. E. 526.

66, 67. See 5 C. L. 1030.

68. When a matrimonial offense has been condoned the parties are restored to a position of equality, and the offense is, in law, blotted out as a cause of divorce. Talley v. Talley [Pa.] 64 A. 523.

And see Storms v. Storms [N. J. Eq.] 64 A. 700.

69. Craig v. Craig [Iowa] 105 N. W. 446.

70. Where husband continued cruel treatment of wife after she returned to him her return did not constitute a condonation. Harding v. Harding [Colo.] 85 P. 423. Where husband's attentions to young woman were continued and grew more pronounced after the wife forgave him, his original wrong was revived. Craig v. Craig [Iowa] 105 N. W. 446.

71. Infidelity of Wife: Condoned by subsequent cohabitation with her and husband denied divorce. Griffith v. Griffith [Neb.] 108 N. W. 981. Where he cohabited with her, after he knew of her infidelity and immoral life, up to within three weeks of their separation. McAninch v. McAninch [Iowa] 108 N. W. 232. Husband who lives with wife 4 years after learning of her adulterous conduct condones her offense. Hunter v. Hunter, 121 Ill. App. 380.

Husband's offense: That wife lived in family homestead with husband after knowing of his adulterous conduct held not to show condonation where she occupied a separate room and denied him cohabitation. Mattes v. Mattes, 121 Ill. App. 400. Evidence sufficient to show bigamous adultery condoned by wife after knowledge. Storms v. Storms [N. J. Eq.] 64 A. 700.

72. Hooe v. Hooe [Ky.] 92 S. W. 317. Where the husband inoculated the wife with a venereal disease, her subsequent cohabitation with him was not a condonation of his lewdness, adultery, and other acts, under Ky. St. 1903, § 2120. Muir v. Muir [Ky.] 92 S. W. 314.

Recrimination.[75]—Divorce is a remedy for the innocent only,[76] and one who has himself violated the marital contract is not entitled to relief,[77] unless his offense has been condoned.[78] One whose wrong was condoned is not "guilty of adultery" within the New Jersey law denying a divorce on that ground where both are guilty.[79] In some states the recriminatory charges must be similar in nature or gravity.[80] Adultery of the wife, established in an action for divorce brought by the husband, where the husband was denied relief on account of his own adultery, will not bar a suit by the wife for separation.[81]

Dissolution of the marriage by death if proved as a fact is a defense.[82]

§ 4. *Practice and procedure.*[83]

Limitations.—The general limitation statutes of Kansas are held not to apply in actions for divorce.[84]

Pleading.[85]—Facts necessary to jurisdiction must be pleaded.[86] Adultery should be charged with such reasonable certainty as to time, place, and person, that the defendant may know the charge he is called upon to meet.[87] If the name of the person with whom the adultery was committed is known, it should be stated; if the name be unknown, that fact should be stated.[88] The objection that a complaint alleging extreme cruelty fails to allege specific acts of cruelty is waived where defendant answers to the merits and fails to move to have the complaint made more certain.[89] Under the Montana statute defining extreme cruelty, grievous bodily in-

73. In action by husband on ground of adultery, wife could not prove adultery by him as a bar where she admitted that she had condoned his offense. Construing Act Mar. 13, 1815, § 7. Talley v. Talley [Pa.] 64 A. 523.

74. Lemmert v. Lemmert [Md.] 63 A. 380.

75. See 5 C. L. 1031.

76. Stoneburner v. Stoneburner [Idaho] 83 P. 938.

77. Husband not entitled to divorce on ground of desertion where he himself was a deserter and his wife had a good cause for divorce on that ground. Stoneburner v. Stoneburner [Idaho] 83 P. 938. Divorce denied where both parties drank to excess, and when intoxicated abused each other. Healey v. Healey [Ark.] 90 S. W. 845. Both parties held to be in fault, and evidence held not to show acts warranting decree of divorce for either. Judkins v. Judkins [Neb.] 107 N. W. 254. Divorce denied where both parties were found guilty of adultery (3 Mills' Ann. St. § 1566a), and held error for trial court to award alimony and separate maintenance when divorce was denied. Elliott v. Elliott [Colo.] 83 P. 630. Adultery by the husband is admissible. Talley v. Talley, 29 Pa. Super. Ct. 535.

78. Act Mar. 13, 1815, § 7, providing that in a suit for divorce on the ground of adultery the defendant may prove the plaintiff guilty of the same offense, as a bar, does not preclude the husband's suit if a previous act of adultery by him has been condoned by the wife. Talley v. Talley [Pa.] 64 A. 523.

79. Storms v. Storms [N. J. Eq.] 64 A. 700.

80. In Louisiana a party may be granted a divorce though also at fault, if the offenses of the parties are not of a similar nature or gravity. Husband granted divorce where wife was proved guilty of adultery, though he was proved guilty of desertion and non-support. Van Horn v. Arantes [La.] 40 So. 592. Where complainant has been guilty of marital offenses of an enormity equal to or greater than those charged against defendant, no relief will be granted. No relief where husband was charged with cruel and inhuman conduct and wife was proved guilty of infidelity. Stiehr v. Stiehr [Mich.] 13 Det. Leg. N. 427, 108 N. W. 684.

81. Suit for separation is practically one for maintenance, and wife's act does not bar her right to support where husband has no right to a divorce. Hawkins v. Hawkins, 110 App. Div. 42, 96 N. Y. S. 804.

82. Seven years' presumption held inapplicable. Spiltoir v. Spiltoir [N. J. Eq.] 64 A. 96.

83. See 5 C. L. 1031.

84. And there are no special statutes applicable. Cullison v. Cullison [Kan.] 85 P. 289.

85. See 5 C. L. 1032.

86. Where petition did not allege facts required by Rev. St. 1899, § 2924, the whole proceeding was void, though evidence and recitals of decree showed such facts to exist. Stansbury v. Stansbury [Mo. App.] 94 S. W. 566. An allegation by plaintiff that "she and defendant both reside in Smith county, Texas, and that she is now and has been a bona fide resident citizen of Smith county, Texas, for more than six months next prior to and immediately preceding the bringing of this suit," held sufficient to give court jurisdiction under Rev. St. 1895, art. 2978. Owens v. Owens [Tex. Civ. App.] 14 Tex. Ct. Rep. 143, 90 S. W. 664.

87. Complaint held sufficient where names of cities where acts were committed were given and periods during which they were committed were specified within narrow limits. Wilkerson v. Wilkerson [Cal. App.] 84 P. 784.

88. Wilkerson v. Wilkerson [Cal. App.] 84 P. 784.

jury, and bodily injury dangerous to life, are ultimate facts which must be pleaded.[90] Failure to prove desertion under a special charge does not preclude a petitioner from proving, under a general charge, desertion for two years previous to the filing of the petition.[91] Recrimination must be pleaded.[92]

While separate causes should be separately pleaded,[93] and two causes warranting different relief should not be united,[94] such defects may be ignored if not specifically challenged. Where a bill contains a prayer for divorce absolute and for general relief, a decree of mere separation may be granted under the latter prayer.[95]

Where acts subsequent to the filing of the original pleadings are relied on, they should be put in issue by amendments to the pleadings,[96] but where the court has jurisdiction, a departure from the approved and proper practice will not cause a decree for divorce, supported by the actual case made, to be disturbed.[97] Where a supplemental answer is filed by leave of court, charging adultery by the plaintiff subsequent to the filing of the original answer, defendant is entitled to a divorce upon proof of the charge in the supplemental answer, without proving the offense charged in the original answer.[98]

A cross bill is necessary only where affirmative relief is asked.[99] Though the answer sets up an offense by the complainant as a defense, it need not allege jurisdictional facts where the court has already passed affirmatively on the question of jurisdiction.[1] In Indiana, in an action for temporary separation, defendant may file a cross complaint for absolute divorce.[2] In Pennsylvania the court in discretion may receive an answer nunc pro tunc.[3]

A framed issue comprising both cruelty endangering life and indignities making it burdensome may be amended after submission so as to present cruelty making life burdensome since the new issue is within the old.[4]

Evidence and proof.[5]—Plaintiff has the burden of proving his case as laid in his pleadings.[6] The matrimonial offense relied on as a ground of divorce cannot be established by the uncorroborated testimony of the applicant for the divorce.[7] Cor-

89. Geisseman v. Geisseman [Colo.] 83 P. 635.

90. Ryan v. Ryan [Mont.] 84 P. 494. Under Civ. Code § 134, a complaint which set out specific brutal acts of violence, but failed to allege either that such acts produced grievous bodily injury or that they were repeated and produced injury dangerous to plaintiff's life, was held insufficient. Id.

91. Grady v. Grady [N. J. Eq.] 64 A. 440.

92. Avery v. Avery [Cal.] 82 P. 967.

93. A complaint which intermingles several causes for divorce in one paragraph is not fatally defective, but is sufficient to sustain a decree if any of the causes alleged is supported by proof. Where complaint alleged habitual drunkenness, personal indignities, and failure to support, it was error to construe the pleading as setting up only the ground of drunkenness and denying a divorce on that ground. Page v. Page [Wash.] 86 P. 582.

94. When a bill charges adultery, warranting absolute divorce, and desertion, warranting a decree of separation, a general demurrer thereto will be disregarded. Different causes must be separately demurred to. Trough v. Trough [W. Va.] 53 S. E. 630.

95. Trough v. Trough [W. Va.] 53 S. E. 630.

96. Ferguson v. Ferguson [Mich.] 13 Det. Leg. N. 453, 108 N. W. 682.

97. Divorce properly granted where defendant filed an affidavit showing condonation, and plaintiff then showed breach of condition by defendant subsequent to filing of original pleadings. Ferguson v. Ferguson [Mich.] 13 Det. Leg. N. 453, 108 N. W. 682.

98. Sodini v. Sodini [Minn.] 104 N. W. 976.

99, 1. Duke v. Duke [N. J. Eq.] 62 A. 471.

2. Construing Act Feb. 28, 1903, and Burns' Ann. St. 1901, § 1052. Harrington v. Harrington [Ind. App.] 75 N. E. 1082.

3. Daugherty v. Daugherty, 28 Pa. Super. Ct. 327.

4. Fay v. Fay, 27 Pa. Super. Ct. 328.

5. See 5 C. L. 1032.

6. Evidence insufficient to support charge that husband was too penurious to make life with him bearable, and other charge not established. Branch v. Branch [Mich.] 13 Det. Leg. N. 216, 107 N. W. 897. Where a complaint alleged extreme and repeated acts of cruelty, and answer only denied extreme cruelty, plaintiff was nevertheless under the duty of proving his case as laid. Geisseman v. Geisseman [Colo.] 83 P. 635.

7. Mere evidence of separation is not sufficient corroboration of applicant testifying to desertion to warrant a divorce. Kline v. Kline [N. J. Eq.] 61 A. 1060. Wife's testimony alone insufficient to prove desertion by

roboration of a party's testimony in the main particulars is, however, sufficient; corroboration in every detail is not essential.[8] Confessions must be well established, free from suspicion, and corroborated.[9] Uncontradicted testimony may not be capriciously rejected but need not be taken as true against its inherent improbability.[10] In Missouri, in case of a default by defendant, plaintiff is required to prove good conduct and innocence.[11]

In a suit by the wife, she is a competent witness in her own behalf,[12] and evidence of statements of the wife as to her relations with her husband is also competent.[13] In a suit by a husband on the ground of adultery, evidence of the wife's good reputation for chastity is inadmissible.[14]

Interlocutory and final decrees.[15]—In New York, where no final judgment can be entered until after three months from the filing of the decision of the court, an interlocutory decree, left with the clerk but not filed, may not be filed nunc pro tunc,[16] but if sufficient cause for delay is shown, it may be filed forthwith.[17] In Louisiana, proceedings for separation from bed and board are separate and distinct from proceedings for absolute divorce, and the latter are not a mere continuation of the former.[18] After one year has elapsed since rendition of the decree of separation, proceedings for final divorce must be carried out contradictorily with defendant, accompanied by petition and citation addressed to defendant.[19] A judgment granting a divorce from bed and board for a period of two years, and awarding certain property rights to the plaintiff, and expressly providing that it should not prejudice plaintiff's right to apply for a permanent separation or divorce, and should not be considered a final distribution of the property between the parties, being an interlocutory judgment only,[20] does not bar an application for divorce from bed and board forever after the expiration of two years.[21]

Dismissal.—Where, in an action by the wife for a divorce, the parties become reconciled before issue joined, it is proper for the court to dismiss the action at the instance of the plaintiff,[22] and such dismissal carries with it a pending application for temporary alimony which plaintiff's attorney is not entitled to revive, by means of intervention, and prosecute for his own benefit.[23]

Procedure where husband disregards order for temporary alimony.—In New

husband where he did not intend to desert her when he first left her. Snedaker v. Snedaker [N. J. Eq.] 62 A. 942. Constructive desertion by the wife, by her driving him from the house, held not proved by the husband's testimony alone, there being no sufficient corroboration. Grady v. Grady [N. J. Eq.] 64 A. 440. Husband's testimony alone insufficient to prove elements of desertion by wife. Ojserkis v. Ojserkis [N. J. Eq.] 62 A. 113. Evidence of only one party to any of the essential facts warranting divorce for desertion, uncorroborated, is insufficient. Sterling v. Sterling [N. J. Eq.] 63 A. 548. Wife's testimony alone insufficient to prove willful and obstinate desertion by husband. Wood v. Wood [N. J. Eq.] 62 A. 429.

8. Civ. Code § 130. Avery v. Avery [Cal.] 82 P. 967.

9. Michalowicz v. Michalowicz, 25 App. D. C. 484. D. C. Code § 964, forbidding any "admission contained in the answer" to be taken as proof, does not render confessions inadmissible. Id.

10. Olson v. Olson, 27 Pa. Super. Ct. 128.

11. Where husband defaulted in suit by wife, and court, on questioning wife, found she had angered her husband by drinking with friends in his saloon, and requested counsel to bring in the husband to testify, but this was not done, the court's action in dismissing the petition was held proper. Grenzebach v. Grenzebach [Mo. App.] 94 S. W. 567.

12. Wood v. Wood [N. J. Eq.] 62 A. 429.

13. Graves v. Graves [Miss.] 41 So. 384.

14. Talley v. Talley [Pa.] 64 A. 523; Id., 29 Pa. Super. Ct. 535.

15. See 5 C. L. 1033.

16. Cods Civ. Proc. § 1774, construed. Townsend v. Townsend, 100 N. Y. S. 464.

17. Townsend v. Townsend, 100 N. Y. S. 464.

18. Donato v. Frillot [La.] 40 So. 634.

19. Defendant is entitled to a hearing on question whether there has been a reconciliation. Donato v. Frillot [La.] 40 So. 634.

20. Under Rev. St. 1898, § 2883. Lamberton v. Lamberton, 125 Wis. 616, 104 N. W. 807.

21. Lamberton v. Lamberton, 125 Wis. 616, 104 N. W. 807.

22, 23. Petersen v. Petersen [Neb.] 107 N. W. 391.

York the husband cannot be heard on any proceeding in an action instituted by him until he complies with the order of the court requiring payment of alimony and counsel fees.[24] In Oklahoma, where a defendant is in default for answer or appearance, and has refused to comply with an order for alimony pendente lite, the court has power to grant leave to appear and defend on the day of trial, on condition that defendant comply with the order of the court within a given time, and if defendant refuses to accept the leave granted upon such terms, and offers no excuse therefor, the case may properly be tried as upon default.[25] In West Virginia it is held that a court has no power to strike out and disregard depositions filed by a defendant in defense of a suit for divorce, for failure to pay suit money and temporary alimony, and render a final decree of divorce against him,[26] such decree being a violation of due process of law.[27]

Rights of co-respondent.—In New York, where a co-respondent is given the right to appear and defend, a co-respondent who demands service of the complaint and summons after the issues have been tried is not entitled to a retrial of the issue of adultery.[28]

Conclusiveness of decrees; vacation and modification.[29]—To render a decree of divorce subject to collateral attack it must be void; mere irregularities are insufficient to invalidate it so as to permit strangers to it to successfully attack it.[30] In Massachusetts, an order of a probate court on a petition by the wife for separate maintenance is conclusive in a subsequent action for divorce on all issues actually heard and determined,[31] but not on issues not in controversy and not heard and determined.[32] Judgments in divorce cases will not be readily set aside, especially in jurisdictions where the parties are permitted to remarry,[33] but a decree of divorce will be annulled upon the ground of fraud and imposition practiced upon the court or adverse party.[34] Where a decree is vacated for fraud and on the ground that the court had no jurisdiction, it is not error to refuse to hear evidence tending to establish the grounds for divorce set forth in the original complaint.[35] An application for the vacation of a decree must be brought within a reasonable time.[36] In New Jersey a bill of review, seeking to have a decree set aside for fraud,[37] can be

24. Not entitled to preference in trial of case under Code Civ. Proc. § 791, subd. 13, until he pays. Fennessy v. Fennessy, 97 N. Y. S. 602. A defendant who willfully disobeys an order, made on his written consent, for payment of alimony and counsel fees, cannot complain of an order staying him from moving for trial until he obeys the order of the court. Harney v. Harney, 110 App. Div. 20, 96 N. Y. S. 905.

25. Bennett v. Bennett [Okl.] 83 P. 550.

26. Trough v. Trough [W. Va.] 53 S. E. 630.

Note: See this case for discussion of power of court to compel payment of temporary alimony by refusal of a defense.

27. Trough v. Trough [W. Va.] 53 S. E. 630.

28. Construing Code Civ. Proc. § 1757, subd. 2. Boller v. Boller, 97 N. Y. S. 609.

29. See 5 C. L. 1034.

30. McDermott v. Gray [Mo.] 95 S. W. 431.

31. Harrington v. Harrington, 189 Mass. 281, 75 N. E. 632.

32. Where bill for separate maintenance alleged lewd conduct of husband, but not adultery, and court found ground for separate maintenance but not for permanent separation, the order granting separate maintenance was not a bar to a subsequent action by the wife for divorce on the ground of adultery. Harrington v. Harrington, 189 Mass. 281, 75 N. E. 632.

33. No relief by way of setting aside divorce decree for carelessness of attorney. Winstone v. Winstone, 40 Wash. 272, 82 P. 268.

34. Rodgers v. Nichols [Okl.] 83 P. 923. Where husband, for the purpose of procuring the issuance of a warning order, made a false affidavit that his wife was not in the state, and later induced her to leave the state, without disclosing his purpose to sue for divorce, it was proper to vacate the decree of divorce. Corney v. Corney [Ark.] 95 S. W. 135.

35. Where plaintiff did not reside in county where he brought suit, as required by Kirby's Dig. § 2674. Corney v. Corney [Ark.] 95 S. W. 135.

36. A decree of divorce will not be set aside on a mere petition after a lapse of 13 years, and after a bill of review filed by the petitioner to impeach the same has been decided against him. Leach v. Leach, 122 Ill. App. 94.

37. Bill alleging fraud by petitioner in

filed only by leave of court.[38] An ex parte decree obtained by means of false and fraudulent representations as to petitioner's residence, and as to whereabouts of the defendant, may be set aside on petition in the cause without resort to a bill of review.[39] In Oklahoma it is held that where a decree of divorce is void for want of jurisdiction, it will be set aside after the death of the party who procured it by fraud and imposition.[40] In Washington it is held that a decree of divorce will not be set aside on application of the defeated party after the death of the successful party,[41] and that the personal representatives of the decedent have no power to consent to a vacation of the decree, or to represent the decedent in a proceeding by the adverse party.[42] In Michigan the oath of the complainant for a divorce must recite that there is no collusion between the parties,[43] and where there is no such recital in the oath, a default cannot be said to have been regularly entered, and hence may be set aside, though application for such relief is not made within six months.[44]

Appeal and review.[45]—Appeals from the supreme court of the Philippines to the Federal supreme court are governed by act of congress.[46] No appeal lies from a decree granting a divorce in Kentucky.[47] The verdict of a jury has the same, but no greater, weight, than a verdict in an ordinary civil action.[48] On appeal in Pennsylvania the evidence will be carefully reviewed and will not be treated as in the ordinary case of findings of fact by a court or master.[49]

§ 5. *Custody and support of children.*[50]—In awarding custody of the children, their welfare is the paramount consideration,[51] and custody will be awarded to the party best fitted by character and situation to properly care for and maintain them.[52] Custody being awarded to one, the right of visitation should usually be

falsely representing that he was a resident and that defendant was absent and her whereabouts unknown, held a bill of review and not an original bill to set the decree aside. Kerans v. Kerans [N. J. Eq.] 62 A. 305.

38. Bill demurrable because not alleging that it was filed by leave of court. Kerons v. Kerons [N. J. Eq.] 62 A. 305.

39. Kerons v. Kerons [N. J. Eq.] 62 A. 305.

40. Rodgers v. Nichols [Okl.] 83 P. 923.

41. Divorce decree affects status of parties, and subject of controversy is removed by death of a party. Dwyer v. Nolan, 40 Wash. 459, 82 P. 746.

42. Dwyer v. Nolan, 40 Wash. 459, 82 P. 746.

43. Comp. Laws § 8625. McWilliams v. Lenawee Circuit Judge [Mich.] 12 Det. Leg. N. 662, 105 N. W. 611.

44. McWilliams v. Lenawee Circuit Judge [Mich.] 12 Det. Leg. N. 662, 105 N. W. 611.

45. See 5 C. L. 1035, and also see Appeal and Review, 7 C. L. 128.

46. Under Act of Cong. of July 1, 1902, § 10, allowing appeals from the supreme court of the Philippines to the supreme court of the United States, where the amount in controversy exceeds $25,000, the latter may review a decree of the former reversing a decree of the court of first instance granting a divorce to the wife and alimony in excess of that amount. De La Rama v. De La Rama, 201 U. S. 303, 50 Law. Ed. —. In such appeal the sufficiency of the evidence on which a divorce was refused may be reviewed. Id.

47. Muir v. Muir [Ky.] 92 S. W. 314.

48. Judgment for plaintiff reversed on ground that charge of cruelty was proved so as to support verdict. Geisseman v. Geisseman [Colo.] 83 P. 635.

49. Reed v. Reed, 30 Pa. Super. Ct. 229.

50. See 5 C. L. 1035.

51. Custody awarded father, pending trial, where he had wealth and would put them in a good home, and mother was gay, indiscreet, out a great deal, and neglected children. People v. Lawson, 111 App. Div. 473, 98 N. Y. S. 130. Welfare of children is primary object, and to this, claims and desires of parents, and even wishes of children themselves, must yield. Kane v. Miller, 40 Wash. 125, 82 P. 177.

52. Custody of children during tender years awarded mother, who lived with her parents, where husband was not suitable person. Breckinridge v. Breckinridge [Ark.] 94 S. W. 715. Evidence of adultery by wife was admissible on issue of custody of children, though not pleaded as a cause of divorce. Id. Held proper to award custody of delicate boy of 7 or 8 to mother. Barlow v. Barlow [Ky.] 90 S. W. 216. Where it appeared that father drank too freely, but divorce was denied the wife, who already had the children, it was proper to award the custody of the children to her. Hoskins v. Hoskins [Ky.] 89 S. W. 478. Discretion of trial court in granting care and custody of child to both parents alternately held properly exercised. Chambers v. Chambers [Neb.] 106 N. W. 993. The affluence of relatives who owe the children no duty is not controlling as against the care and interest of their mother. Graviess v. Graviess, 7 Ohio C. C. (N. S.) 135. Custody of child awarded to father where mother was proved

awarded the other.[53] Under the Wisconsin statute the court has no power to award the custody of the children to the husband, and at the same time require them to be kept at the home of the wife's mother.[54] Power conferred by statute to provide for the custody and care of children is limited to provision for them during their minority.[55] The discretion vested in a trial court with reference to the custody of children will not be inquired into by a reviewing court, except on a charge of abuse of discretion or that a grave mistake has been made.[56]

Where custody of the children is awarded to the wife, the court may order the husband to provide for their maintenance,[57] whether the divorce is granted to the wife or husband,[58] and such order may be enforced by proceedings in contempt,[59] or for sequestration of the husband's property.[60] The court has continuing power to review and revise such order and may modify it where a change of circumstances is made to appear,[61] and this power of a court to modify its decree is not abridged by reason of the fact that the decree is based upon an agreement of the parties.[62] In Iowa it is held that a decree concerning the custody of children is final and not subject to change or modification, otherwise than by appeal or by some statutory method, where the court was in possession of all the facts and fully considered

guilty of adultery and loose conduct. Mills v. Mills [Or.] 83 P. 390. Held not error to award custody of girl of 13 to father, where he was better able to care for her, and she preferred his custody. Smith v. Smith [Tex. Civ. App.] 14 Tex. Ct. Rep. 933, 91 S. W. 815. Where parties had both remarried, and mother had good home and means and would give good care and have proper influence, and father would be gone from home and had another child by his second marriage, custody was awarded the mother. Kane v. Miller, 40 Wash. 125, 82 P. 177.

53. An order awarding custody of child to mother should provide for visitation by the father at reasonable times. Barlow v. Barlow [Ky.] 90 S. W. 216.

54. The statute (Rev. St. 1898, § 2362) contemplates that they shall be left in the care and control of one of the parents. McCabe v. McCabe, 126 Wis. 154, 105 N. W. 665.

55. Construing Rev. St. 1898, § 2362. Boehler v. Boehler, 125 Wis. 627, 104 N. W. 840. Judgment directing husband to pay annual stated sum to wife so long as she had care and custody of children, held to apply only during minority of children. Id. Hence, on showing that sum ordered had been paid, the lien of the judgment should be discharged, after majority of the children. Id.

56. Graviess v. Graviess, 7 Ohio C. C. (N. S.) 135.

57. Provision for maintenance by father authorized by Rev. Code 1852, as amended by laws of 1893, c. 75, § 11. State v. Redmile [Del.] 63 A. 575. In New Jersey, where a divorce from bed and board is granted on petition by the wife, and she is given custody of the children, the court has power to provide for the maintenance of the wife and children and enforce its orders upon the husband's property, which can be reached by sequestration. McGuinness v. McGuinness [N. J. Eq.] 62 A. 937. Where husband is ordered to pay a sum of money for the support of his child, the sum should be ordered invested in some safe way so that the income or principal could be used as needed. Barlow v. Barlow [Ky.] 90 S. W. 1055.

58. Though husband is granted a divorce, if the custody of the children is awarded to the wife, he may be compelled to pay a monthly sum for their support. Rev. St. 1899, § 2926. Cole v. Cole, 115 Mo. App. 466, 91 S. W. 457.

59. A defendant who is in default in payments toward support of children may be proceeded against as for contempt. Compton v. Compton, 97 N. Y. S. 618.

60. McGuinness v. McGuinness [N. J. Eq.] 62 A. 937.

61. Decree awarding custody of children may be modified when condition of parties has changed. Kane v. Miller, 40 Wash. 125, 82 P. 177. Judgment for alimony for wife and support of children may be enforced after wife's death, but is subject to modification according to the changed condition and needs of the children; if they are of age or self-supporting, nothing should be allowed. Gerrein's Adm'r v. Michie [Ky.] 91 S. W. 252. Under Comp. Laws 1897, § 8641, where order for an allowance was unauthorized but was not appealed from, and was not subject to collateral attack, court had power to change it by increasing the amount and providing for permanent alimony, where the wife had become unable to support herself. Cole v. Cole [Mich.] 13 Det. Leg. N. 316, 108 N. W. 74. Decree requiring husband to pay for support of child of 14, and giving him the right to visit the child, modified, where the child had left the state and was living with other relatives. Myers v. Myers [Mich.] 12 Det. Leg. N. 885, 106 N. W. 402. The continuing jurisdiction which is vested in the court of common pleas with reference to the custody of children for the purpose of modifying orders in divorce proceedings does not authorize a rehearing of a matter theretofore submitted and determined, but is only to be called into exercise when a substantial change in the condition of the parties requires a modification

them;[63] and that under the statute permitting a modification of such a decree when a change of circumstances renders such modification expedient, it should appear that the change of circumstances or condition was not known to, or within the contemplation of, the court, and that owing to the change the enforcement of the decree as made will be attended by positive wrong or injustice.[64] If custody of the children is awarded the wife, and the original decree makes no provision for their maintenance, the decree may be subsequently modified so as to include such provision,[65] or an agreement of the parties relating thereto may be enforced by the courts.[66] In Delaware, where the superior court grants a divorce and awards custody of minor children to the wife, but makes no provision for the maintenance of the children,[67] the court of general sessions may make an order for the maintenance of the children by the father.[68] Applications for modification of decrees providing for the custody of children are addressed to the sound discretion of trial courts.[69] Upon principle and the weight of judicial authority, the legal obligation of a father for the support of his minor children is not impaired by a decree of divorce at the suit of the wife for his misconduct, which gives custody of the children to her but is silent as to their support.[70] If, under such circumstances, he refuses or neglects to support them, the mother may recover from him in an original action a reasonable sum for necessaries furnished for their support after such decree.[71] There are, however, au-

of the former order. Graviess v. Graviess, 7 Ohio C. C. (N. S.) 135.

62. Black v. Black [Cal.] 86 P. 505.

63. Crockett v. Crockett [Iowa] 106 N. W. 944.

64. Modification of decree granting custody of child to wife three years, then to husband three years, denied, where both were capable of properly caring for child, and only change was removal of husband to another city in the state. Crockett v. Crockett [Iowa] 106 N. W. 944.

65. Where circumstances require it, the court may at a subsequent term enter a supplemental decree with respect to the custody of the children, although the original decree contains no provision therefor. Chambers v. Chambers [Neb.] 106 N. W. 993. When a decree of divorce is granted the wife and the custody of the minor child awarded to her, but no provision is made for the support and education of the child, and the wife has no means, the court has power to modify the decree so as to require the husband to provide for the child. McAllen v. McAllen [Minn.] 106 N. W. 100. Under Comp. St. 1903, c. 25, § 27, the district court has a continuing power, after a decree of divorce and alimony has been granted, to review and revise the provisions for alimony at its subsequent terms on petition of either of the parties. Thus, where original decree awarding alimony is void for want of jurisdiction, court may award alimony at subsequent term upon proper showing. Cizek v. Cizek [Neb.] 107 N. W. 1012.

Contra: Where there is a decree of divorce in favor of the wife, and she is granted alimony and the custody of the children is awarded to her, but no provision is made for the future maintenance of the children, there is no order in behalf of the children which is reviewable under Rev. St. 1899, § 2932. Seely v. Seely, 116 Mo. App. 362, 91 S. W. 979.

66. Contract between parties held to require father to support child one year and clothe him until he was 21. Recovery on such agreement sustained. Denler v. Denler [Mich.] 12 Det. Leg. N. 729, 105 N. W. 770.

67. Provision for maintenance by the father may be made under Rev. Code 1852, as amended in 1893, c. 75, § 11. State v. Redmile [Del.] 63 A. 575.

68. This is authorized by Rev. Code 1852, as amended in 1893, c. 230. State v. Redmile [Del.] 63 A. 575.

69. They will not be disturbed unless an abuse of discretion is made to appear. Black v. Black [Cal.] 86 P. 505.

70. Spencer v. Spencer [Minn.] 105 N. W. 483. A father, by securing a divorce from his wife, who is the mother of his minor children, and assuming new marital relations, is not thereby relieved from liability for the support of his children by the first marriage. Monroe County v. Abegglen [Iowa] 105 N. W. 350. In an action involving a claim by a divorced wife for support of a child born after the divorce was granted and for whom no provision was made in the decree for alimony, it is error to so instruct the jury as to create the impression that the care and support of the child was a joint obligation upon both parents. Under the law of Ohio, so far as necessary care and support are concerned, the whole legal obligation as between the father and the mother is upon the father. Young v. Young, 7 Ohio C. C. (N. S.) 419.

71. The law implies a promise by him to pay for such necessaries. Spencer v. Spencer [Minn.] 105 N. W. 483. Where a wife is granted a divorce and custody of the children, and no provision is made for their maintenance, she may recover from him in an action at law for necessaries supplied them. Seely v. Seely, 116 Mo. App. 362, 91 S. W. 979. In such a case the wife is not entitled to pay for her whole time in caring for the child, but only for such a proportion of her time as was necessarily thus occupied, and for support the allowance should be proportionate to the father's means, consider-

thorities to the contrary.[72] A decree requiring payments by the husband for the support of a child does not become inoperative by reason of the death of the husband, but sums due thereunder may be made a lien on his estate.[73]

§ 6. *Adjustment of property rights.*[74]—In some states a court which has jurisdiction of a divorce proceeding has power to settle the property rights of the parties.[75] This power may be exercised regardless of any contract which the parties, in contemplation of marriage, may have made,[76] and where a court has jurisdiction of the parties, its authority extends to the personal property within its jurisdiction.[77] This power includes authority to determine questions of ownership as between the parties.[78] All of the property, separate as well as community, is subject to the disposition of the court.[79] In making a division due regard should be had to the legal and equitable rights of each party, the ability of the husband, the special estate of the wife, the character and situation of the parties, and all the circumstances of the case.[80] Ordinarily an allowance of one-third of the property to the wife is considered liberal, in the absence of special circumstances.[81] In Minnesota, where the wife is granted a divorce upon the ground of adultery, her interest in her husband's estate is the same as upon his death,[82] and this interest vests in her without a judgment;[83] but if the wife freely agrees to a different division of the property, and such agreement is embodied in a judgment of the court, she cannot thereafter claim a dower interest.[84] It is proper for the court to make a just al-

ed in connection with the health and interests of the child. Young v. Young, 7 Ohio C. C. (N. S.) 419. A claim for necessaries cannot be based upon services rendered by an attorney in prosecuting the claim of a divorced wife against her former husband for support and education furnished their minor child, but such a claim is like an ordinary debt to be collected at the expense of the creditor. Karch v. Bacciocco, 7 Ohio C. C. (N. S.) 190.

72. See citations in Spencer v. Spencer [Minn.] 105 N. W. 483.

73. Held proper to fix present value of periodical payments and make the amount a lien on husband's property. Creyts v. Creyts [Mich.] 12 Det. Leg. N. 1039, 106 N. W. 1111.

74. See 5 C. L. 1036.

75. Property rights growing out of the marriage relation are involved in divorce proceedings and may be there settled. Watson v. Watson [Ind. App.] 77 N. E. 355. Divorce decree merely providing for a division of the property (Rev. St. 1895, art. 2980), held not error as attempting to divest husband of title to homestead. Smith v. Smith [Tex. Civ. App.] 14 Tex. Ct. Rep. 933, 91 S. W. 815.

76. Watson v. Watson [Ind. App.] 77 N. E. 355.

77. Division of household furniture, and tools and implements of husband's trade, held proper. Hays v. Hays [Neb.] 106 N. W. 773.

78. Comp. Laws § 8640, authorizing division of property in divorce case, empowers court to determine what property husband has and to divide it between the parties, and hence court had power to decide that property held in wife's name belonged to husband. Carnahan v. Carnahan [Mich.] 12 Det. Leg. N. 1023, 107 N. W. 73.

79. Budlong v. Budlong [Wash.] 86 P. 648. All the community property is subject to partition when a divorce is granted. Smith v. Smith [Tex. Civ. App.] 14 Tex. Ct. Rep. 933, 91 S. W. 815.

80. Martin v. Martin, 126 Wis. 237, 105 N. W. 783. Where wife obtains divorce for fault of husband, a decree giving her less property than her interest in the husband's property, as his wife, amounted to, was erroneous. Brown v. Brown [Mich.] 13 Det. Leg. N. 312, 108 N. W. 288. Award of property worth $10,000 to wife, and only $1,000 worth to husband, held inequitable, and certain other property directed to be awarded to husband. Budlong v. Budlong [Wash.] 86 P. 648. Award of all the community property ($3,500) to wife proper where she was granted divorce, considering merits of parties, condition in which parties will be left, and party through whom property was acquired. Bal. Code § 5723. Miller v. Miller, 38 Wash. 605, 80 P. 816. Kirby's Dig. § 2684, providing that a judgment of divorce shall restore to each party property acquired from or through the other, or in consideration or by reason of the marriage, does not require restoration of property conveyed by husband to wife under a separation agreement or property conveyed to her in consideration of her living with him again. McNutt v. McNutt [Ark.] 95 S. W. 778.

81. Award of $1,500 to wife reduced to $600 where total value of husband's property was shown to be only $1,760.10. Martin v. Martin, 126 Wis. 237, 105 N. W. 783.

82. Linse v. Linse [Minn.] 108 N. W. 8.

83. In Minnesota, where a wife is granted a divorce on the ground of adultery, her dower interest in his lands vests in her without a judgment. Gen. St. 1894, § 4808. Sodini v. Sodini [Minn.] 104 N. W. 976.

84. Thus, if, in the divorce action, the wife freely and advisedly consents to a certain division of the estate and agrees to accept a certain amount as permanent alimony in

lowance to the wife out of the husband's personal property in addition to the dower interest in his land.[85] In Wisconsin, where application is made for final division of the property, subsequent to the granting of the divorce, the value of the husband's estate should be determined as of the date of the application and not the date of the original judgment for divorce and alimony.[86] Under the Oregon statute authorizing the award of one-third the real estate owned by the party at fault to the innocent party, and also an allowance for support and maintenance, it is held that the court has no power to award to the wife the possession of public land occupied by the husband with the intention of acquiring a homestead under Federal law.[87] In Michigan, where a decree is rendered requiring the wife to pay over to the husband a portion of a fund held by her in trust, such payment cannot be enforced by execution against her,[88] but the decree is enforceable by contempt proceedings.[89]

§ 7. *Effect of divorce.*[90]—A decree of divorce terminates the marriage relation[91] and divests the parties of such rights as depend upon the existence of the relation.[92] By such decree the status of the parties is fixed, and the relation of husband and wife cannot be re-established by an adjudication not binding on both.[93] A divorce destroys a tenancy by the entirety and makes the former husband and wife tenants in common.[94] It does not divest a wife's interest in a policy of insurance on her husband's life, wherein she is beneficiary.[95]

It is competent for the legislature to disqualify a person who has been divorced from the right to contract a second marriage for a reasonable time after the divorce has been granted.[96] Such a statute applies to persons who have been divorced previous to its passage.[97] The Massachusetts statute, prohibiting remarriage of the party from whom a divorce was granted within two years after the decree has become final, does not prohibit a remarriage of the parties to the divorce suit to each other within the prescribed period.[98] In Illinois the county clerk is prohibited by law from issuing a marriage license to a person who has been divorced within the previous year on certain grounds.[99]

lieu of all other interests, and such division is accepted and adopted by the trial court, and judgment is entered that, except as to such amount, the wife has no share or interest in the husband's estate, such judgment is final unless set aside for cause, and, having accepted and retained the amount adjudged as permanent alimony, she is estopped from denying the validity of the judgment. Linse v. Linse [Minn.] 108 N. W. 8.

85. Allowance of personal property held reasonable. Sodini v. Sodini [Minn.] 104 N. W. 976.

86. Under Rev. St. 1898, § 2369. Martin v. Martin, 126 Wis. 237, 105 N. W. 783.

87. Construing B. & C. Comp. § 511 and § 513. Huffman v. Huffman [Or.] 86 P. 593.

88. Construing Comp. Laws § 8640. Carnahan v. Carnahan [Mich.] 12 Det. Leg. N. 1023, 107 N. W. 73.

89. Comp. Laws § 10,891, subd. 3. Carnahan v. Carnahan [Mich.] 12 Det. Leg. N. 1023, 107 N. W. 73.

90. See 5 C. L. 1037.

91. Watson v. Watson [Ind. App.] 77 N. E. 355.

92. A divorced husband cannot make a complaint of adultery against his former wife since, under Code § 4932, only a husband or wife can make such complaint. State v. Loftus, 128 Iowa, 529, 104 N. W. 906. A divorce obtained by the wife subsequent to an injury to her husband held to divest her of any interest in the cause of action for his injury, where the decree restored to each spouse all property obtained by either directly or indirectly through or from the other, or by reason of the marriage. Houston & T. C. R. Co. v. Helm [Tex. Civ. App.] 14 Tex. Ct. Rep. 460, 93 S. W. 697.

93. Wife was granted divorce in Oklahoma, no personal service being had on husband. Held she could not change her status by an ex parte order setting aside the decree for want of jurisdiction of the husband. Buxbaum v. Mason, 48 Misc. 396, 95 N. Y. S. 539.

94. Joerger v. Joerger, 193 Mo. 133, 91 S. W. 918.

95. Wallace v. Mutual Ben. Life Ins. Co. [Minn.] 106 N. W. 84.

96. Statute prohibiting remarriage within a year of persons divorced on the ground of extreme cruelty, or abandonment and desertion, held valid. Olsen v. People, 219 Ill. 40, 76 N. E. 89.

97. Laws 1905, p. 194, construed. Olsen v. People, 219 Ill. 40, 76 N. E. 89.

98. Rev. Laws c. 152, § 21. Parties divorced May 17, 1903, could legally remarry Feb. 27, 1904. Chase v. Chase [Mass.] 77 N. E. 782.

99. Under Hurd's Rev. St. 1903, c. 89, clerk cannot be compelled to issue license to one

§ 8. *Foreign divorces.*[1]—It has been recently held by the Federal supreme court that the mere domicile within the state of one party does not give the courts of that state jurisdiction to render a decree of divorce enforceable in all other states, by reason of the full faith and credit clause of the constitution, against a nonresident who did not appear and who was only constructively served with notice.[2] Many state courts hold that every state has jurisdiction to decree a divorce for a proper cause in favor of its own citizens, for the purpose of determining and establishing the status of the citizen, though the other party is a nonresident over whom no jurisdiction can be obtained to render a judgment in personam.[3] For the determination of the status the divorce takes effect as a judgment in rem.[4] Such a judgment, to be effective for the citizen obtaining it, must be effective against the absent husband or wife, since the status of one involves the status of the other.[5] If there is complete jurisdiction of the domiciled citizen asking an adjudication of his rights, the validity of the judgment as against the absent party depends upon the question whether or not reasonable effort has been made under the law to give such absent party notice and an opportunity to be heard.[6] Statutes relative to service on nonresident defendants must be strictly complied with.[7] It has been held that recitals in a decree showing jurisdiction are conclusive as against collateral attack,[8] but it is usually held that a decree of divorce in one state may be impeached collaterally in the courts of another state by proof that the court granting the divorce had no jurisdiction, notwithstanding recitals in the decree showing jurisdiction.[9] Where a party seeks the aid of a court and obtains a decree of divorce, submitting himself voluntarily to the jurisdiction of the court, he cannot thereafter impeach the validity of the decree on the ground of want of jurisdiction of the parties.[10] Where in a suit by a wife for divorce the husband appeared and pleaded a divorce granted to him in another state, and she did not claim that the former decree was void for fraud or want of jurisdiction, and her action was held to be barred by the former decree, such adjudication was binding upon her, and she could not thereafter claim that the parties were still husband and wife.[11] A personal judgment of another

who has been divorced within the year on the ground of extreme cruelty, desertion, or abandonment. Olsen v. People, 219 Ill. 40, 76 N. E. 89.

1. See 5 C. L. 1037.

2. Haddock v. Haddock, 201 U. S. 562, 50 Law. Ed. —.

Note: See this case of Haddock v. Haddock, 201 U. S. 562, 50 Law. Ed. —, and note in 5 C. L. 1037, for various holdings on question of extraterritorial effect of divorce decrees.

3. Clark v. Clark [Mass.] 77 N. E. 702. A decree of divorce is a judgment in rem and has extraterritorial force and binds the parties, though one was a nonresident of the state when the decree was granted. Stuart v. Cole [Tex. Civ. App.] 15 Tex. Ct. Rep. 748, 92 S. W. 1040.

4. Stuart v. Cole [Tex. Civ. App.] 15 Tex. Ct. Rep. 748, 92 S. W. 1040; Clark v. Clark [Mass.] 77 N. E. 702.

5, 6. Clark v. Clark [Mass.] 77 N. E. 702.

7. Arkansas decree of divorce held void in Illinois where it appeared that affidavit of nonresidence required as basis for warning order was not signed nor sworn to as required by law, and record contained no finding that such affidavit was filed, though it recited that the court had jurisdiction, and the decree recited the giving of the warning order. Forrest v. Fey, 218 Ill. 165, 75 N. E. 789.

8. Recitals in a foreign judgment showing that the court passed upon the facts required to show jurisdiction of the parties, and found that service upon a nonresident defendant had been had in accordance with the statute, are evidence of the facts recited, and on a collateral attack are conclusive. Arkansas court held to have had jurisdiction, the necessary steps having been taken to get service on nonresident defendant. Stuart v. Cole [Tex. Civ. App.] 15 Tex. Ct. Rep. 748, 92 S. W. 1040.

9. Haddock v. Haddock, 201 U. S. 562, 50 Law. Ed. —. Evidence held to show that wife either did not sign acknowledgment of service or was deceived as to what she was signing, so that Texas court had no jurisdiction. Ingram v. Ingram [Ala.] 42 So. 24.

10. Husband went to South Dakota, leaving his wife, and obtained divorce. In proceeding against him for nonsupport he could not assert invalidity of South Dakota decree. People v. Shrady, 47 Misc. 333, 95 N. Y. S. 991.

11. Hence she could not maintain action for separate maintenance under Code § 1292. Bidwell v. Bidwell, 139 N. C. 402, 52 S. E. 55.

state, ordering a party to bring a child into the state, rendered without due notice or jurisdiction of the party against whom the order is directed, is subject to collateral attack, though it recites due notice.[12]

DOCKETS, CALENDARS AND TRIAL LISTS.[13]

Right to Go on the Calendar (1192).
Placing Cause on Calendar (1192).
Posting of Trial List (1192).
Passing or Advancing Cause (1192).
Transfer, Correction, or Striking Off (1193).
Short-Cause Calendar (1194).
Reinstatement and Restoration (1194).

Right to go on the calendar.[14]—An action does not stand for trial until issue joined,[15] or until the term at which the process is returnable,[16] or, in some states, at the next term after the expiration of a specified time from the return.[17] When ready for hearing the cause must, as a step in orderly procedure,[18] go on the calendar appropriate to the form of the action or the nature of the issue.[19]

Placing cause on calendar.[20]—A notice of trial is usually required, and where trial is not had at the term or date assigned, a new notice is ordinarily necessary to bring the case on for another date.[21] Though service by ordinary course of mail satisfies the New York statute, sending of notice by registered mail,[22] or with the indorsement "personal delivery only,"[23] does not render such service void, but if delivery of the notice is thereby prevented, the judgment will be opened.[24] In some states causes are placed on the docket in the order in which the petitions are filed,[25] such docketing being a mere administrative function with respect to which a judge may modify the order of his predecessor. In a few jurisdictions cases are placed on a general docket and thence assigned among departments or divisions. In such case the discretion of the assigning court should be exercised so as to give hearing before a full court when practicable.[26]

Posting of trial list.[27]

12. Where judge who rendered decree of divorce told plaintiff's counsel that he would, on application, order plaintiff to bring a child within the state, this was not notice to plaintiff giving the court jurisdiction to make such order, and, even though the order recited that the court had jurisdiction, and that notice had been given, the order was not conclusive in another state. In re Culp [Cal. App.] 83 P. 89.

13. Calendars and dockets of appellate courts, see Appeal and Review, 7 C. L. 128.

14. See 5 C. L. 1039.

15. See Pleading, 6 C. L. 1008, as to time to plead and rules for joinder of issue. A cause is at issue when material pleas are traversed, though a demurrer to an immaterial plea is pending. McDonald v. People [Ill.] 78 N. E. 609.

16. See Process, 6 C. L. 1078. Where a writ is returnable at a subsequent term, the presence of the parties as spectators does not authorize the court to proceed to trial. Sanger Bros. v. Wise County Coal Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 301, 90 S. W. 518.

17. In an action on a money contract by notice according to the West Virginia practice, notice need be returned only long enough before term to permit of docketing. The 20 days prescribed applies only to service. Knox v. Horner, 58 W. Va. 136, 51 S. E. 979.

18. In a suit for divorce a vinculo matrimonii based upon a decree of separation from bed and board, either party has the right to require the case to be set down on the ordinary docket. Donato v. Frillot [La.] 40 So. 634.

19. An action for partition of real estate is in equity, and hence properly on the special term calendar. Adams v. Bristol, 108 App. Div. 303, 95 N. Y. S. 628. See, also, post, Transfer, Correction, and Striking Off.

20. See 5 C. L. 1039.

21. An order staying all proceedings in an action until a certain bond is filed, which need not be done until after the date set for trial, renders a new notice of trial necessary. In re Dean's Estate [Cal.] 87 P. 13. Filing of the bond on the day originally set for trial by one of the coplaintiffs did not authorize a trial without notice to the other plaintiffs. Id. Hence error to dismiss the cause for nonappearance. Id.

22, 23, 24. Sears v. Tenhagen, 100 N. Y. S. 469.

25. Rev. St. 1895, arts. 1177-1179 [1181-1183]. Ranson v. Leggett [Tex. Civ. App.] 14 Tex. Ct. Rep. 250, 90 S. W. 668; Kaylor v. Hiller, 72 S. C. 433, 52 S. E. 120.

26. Error to assign to the branch division where one of its members will be disqualified to sit because of having heard the case below. Provident Sav. Life Assur. Soc. v. King, 216 Ill. 416, 75 N. E. 166. Held not prejudicial because no action was taken until such member had retired. Id.

27, 28. See 5 C. L. 1039.

Passing or advancing cause.[28]—The advancement of causes[29] is largely within the discretion of the court,[30] and a case may be called out of its order without notice to the parties,[31] in the absence of statutory restrictions.[32] In New York preference is granted to certain classes of cases, as divorce cases in which temporary alimony has been awarded,[33] actions by executors[34] and receivers,[35] and in case of illness of parties under certain circumstances.[36] A mistake in bringing the action against the wrong party does not give the right to substitute the proper action in its place on the calendar.[37]

Transfer, correction, or striking off.[38]—Where the pleadings in a law action raise equitable issues, the case should be transferred to the equity docket,[39] but in some states, where such transfer will result in delay, a bond conditioned to pay any judgment which may be rendered may be required.[40] An action wrongfully on the equity docket may be retained where a subsequent pleading raises an equitable issue.[41] The word "may," in a rule relative to transferring causes to another justice

29. An appeal from an order of distribution entered in probate court is a "cause" within Practice Act § 16. Ford v. Ford, 117 Ill. App. 502.

30. Ford v. Ford, 117 Ill. App. 502. Will not be interfered with on appeal unless an abuse clearly appears. Id.

31. No abuse of discretion to pass causes upon the calendar and proceed to the trial of a subsequent case without notice to one of the parties where the case was likely to be called at any time and no leave of absence had been given. Linderman v. Nolan [Okl.] 83 P. 796. Upon continuing a case the court may call the next case on the trial list without notice to the parties. Poggensee v. Feddien [Neb.] 106 N. W. 654. An assignment of causes for trial made at the opening of the term which does not fix a day certain for the trial of each case is provisional and subject to meet unforeseen contingencies. Id. In Texas a case may be called for trial out of its regular order on the calendar by order of court. A general announcement on the last day of a term, and again on appearance day of the next term, that divorce cases would be taken up first, does not justify a court in taking up such cases, no order being entered as required by Rev. St. 1895, art. 1287. Gardell v. Gardell [Tex. Civ. App.] 15 Tex. Ct. Rep. 117, 94 S. W. 457. The party complaining has the burden of showing injury when seeking a new trial on such ground. Ranson v. Leggett [Tex. Civ. App.] 14 Tex. Ct. Rep. 250, 90 S. W. 668. No showing of prejudice. Id.

32. St. 1893, § 4204, prescribing the order of trial for causes, is not mandatory, but leaves the order of trial largely in the discretion of the court. Linderman v. Nolan [Okl.] 83 P. 796.

33. A husband who has not complied with the order granting temporary alimony and attorney fees is not entitled to the preference allowed under Code Civ. Proc. § 791, subd. 13. Fennessy v. Fennessy, 97 N. Y. S. 602.

34. The fact that the title to the complaint and summons does not show the representative capacity does not defeat the right to preference under Code Civ. Proc. § 791, subd. 5, if such capacity clearly appears from the entire complaint. Chúmar v. Melvin, 98 N. Y. S. 351.

35. Where an action by a receiver can be shortly disposed of, it is error to refuse a preference so as to allow its determination before time for making a final accounting, though he was guilty of delay in commencing the suit and noticing it for trial. Schlesinger v. Gilhooly, 97 N. Y. S. 606.

36. Illness must be proven by certificate of a physician. Crawford v. New York City R. Co., 108 App. Div. 190, 95 N. Y. S. 769. Old age alone is not a sufficient ground for preferring a cause. Id.

37. Especially where the first is still pending. Crawford v. New York City R. Co., 108 App. Div. 190, 95 N. Y. S. 769.

38. See 5 C. L. 1040.

39. Where by the issues formed it became necessary to have an accounting of partnership property, the case is transferable to the equity docket. Civ. Code Proc. § 10, subsec. 4, as amended by the law of 1890. Davis v. Ferguson [Ky.] 92 S. W. 968. Where, in an action of ejectment, defendants claim title under a deed which by reply and amended petition is attacked as fraudulent and cancellation is demanded, the case is transferable under Civ. Code Prac. § 6, subsec. 1, and § 10. Hunt v. Nance [Ky.] 92 S. W. 6.

40. Where an accounting becomes necessary the court, under Civ. Code of Prac. § 10, subsec. 4, may transfer the case without requiring a bond, it being discretionary. Davis v. Ferguson [Ky.] 92 S. W. 968. Held abuse of discretion under the facts of case to refuse to transfer without bond. Id. Inability to give bond does not, however, deprive one of the right to assert equitable defenses. Id.

41. As where the answer in an action of ejectment admits legal title in plaintiff, but alleges that it is held in trust for defendant. Turner v. Johnson [Ky.] 93 S. W. 1038.

42. Gassenheimer v. U. S., 26 App. D. C. 422. Common-law rule 23 of the supreme court, providing that where a jury has disagreed the trial justice "may" transfer the cause to another justice, held not mandatory but discretionary. Id.

43. Although in South Carolina demurrers should be heard on a different calendar from that on which issues of fact are triable, the

upon disagreement of the jury, is not interpreted "shall," as in the case of statutes.[42] Failure to transfer to the appropriate calendar when a mere irregularity[43] is not a ground for reversal.[44] Provisions for dismissal of causes upon the preliminary call of the calendar should be liberally construed.[45]

Short-cause calendar.[46]—As in other cases, joinder of issue is prerequisite.[47] A cause can be placed upon the short-cause calendar in Illinois only upon personal notice,[48] and after the filing of the original affidavit as to the probable duration of the trial.[49] A motion to strike a cause from the short-cause calendar must be timely made.[50] Where a cause has been regularly placed upon the short-cause calendar, it cannot be reinstated upon the regular calender except upon notice to the defendant.[51]

Reinstatement and restoration.[52]—The reinstatement of an action dismissed from the calendar is largely within the discretion of the court.[53] On application of an attorney to restore a cause to the docket on the ground that it was fraudulently settled and dismissed to defraud him of his fees, a refusal to postpone the hearing to enable the applicant to introduce evidence in support of his averments is discretionary.[54] The courts are more liberal in restoring appeal cases to the docket[55] than original causes which may be prosecuted anew.[56]

DOCUMENTS IN EVIDENCE, see latest topical index.

DOMICILE.

Definition, elements, and establishment.[57]—The terms "domicile" and "residence" are generally held synonymous in construing statutes,[58] although in some states a distinction is drawn so as to permit the establishment of a "residence" apart from one's domicile for a special purpose,[59] and the construction of the terms is

failure to transfer is a mere irregularity. Able v. Southern R. Co. [S. C.] 52 S. E. 962.

44. Able v. Southern R. Co. [S. C.] 52 S. E. 962.

45. Doppelt v. Blum, 118 Ill. App. 64. Rule 20 of superior court of Cook County held not to authorize a dismissal of an appeal from the probate court upon the failure of the appellant to appear, the appellee being present. Id.

46. See 5 C. L. 1041.

47. A cause is at issue when material pleas are traversed, though a demurrer and motion to strike certain immaterial pleas are still undisposed of. McDonald v. People [Ill.] 78 N. E. 609.

48. Notice served by registered letter is insufficient under Hurd's R. S. 1903, section 95, chap. 110, p. 1414. Genius v. Rayfield, 121 Ill. App. 549.

49. Where the only evidence tending to impeach a filed affidavit as an original was a recital in a notice to defendant's attorney attached to the affidavit that on March 21, 1904, affidavit, "of which the foregoing is a copy," was filed, etc., a finding that the original was filed was justified. McDonald v. People [Ill.] 78 N. E. 609.

50. Where notice to place a cause on the calendar was served March 21, 1904, and placed thereon 10 days later, a motion to strike made on day of trial, May 16, is too late. McDonald v. People [Ill.] 78 N. E. 609.

51. Hence, when restored without notice, it is wrongfully on such calendar. Black v. Exley, 121 Ill. App. 254. But where defendant appears and moves to strike, an overruling of his motion is equivalent to replacing on notice, and the court may proceed with the case. Id.

52. See 5 C. L. 1041.

53. Dismissed for want of prosecution upon the regular call of the calendar. Nordstrom v. Chicago, 119 Ill. App. 465. No abuse of discretion to refuse to reinstate where the declaration does not state a cause of action. Id.

54. De Wandelaer v. Sawdey [Conn.] 63 A. 446.

55. Proof that the appellant's attorney was engaged in the trial of a case in another court is sufficient ground for reinstating an appeal from the probate court to the superior court dismissed on preliminary call of the calendar for nonappearance. Doppelt v. Blum, 118 Ill. App. 64.

56. Doppelt v. Blum, 118 Ill. App. 64. The fact that an attorney was to look to the judgment for his fees gives him no right to have a case settled and dismissed by the parties restored. De Wandelaer v. Sawdey [Conn.] 63 A. 446.

57. See 5 C. L. 1043.

58. It has been said that in statutes relating to taxation, right of suffrage, divorce, limitation of actions, and the like, the term "residence" is used in the sense of "legal residence," that is, the place of domicile or permanent abode as distinguished from the place of temporary residence or habitat. Downs v. Downs, 23 App. D. C. 381. See Domicile, 5 C. L. 1041, note on distinctions between "residence" and "domicile."

59. "Residence" used in sense of habitat.

varied by statutory purpose or context.[60] Every person must have a domicile somewhere[61] and but one at any particular time,[62] hence, where the same prerequisites of residence are required for divorce and for the exercise of the elective franchise, one cannot at the same time be a resident of one jurisdiction for one and a resident of another jurisdiction for the other.[63] The intention to remain permanently or indefinitely at a particular place is essential to constitute it a domicile,[64] which is generally at the place one calls home, to which he returns to vote and where he pays personal taxes.[65] A domicile once gained remains until a new one is acquired,[66] which latter may be done by the concurrence of an actual change of residence with the intention to establish a new domicile,[67] even while entertaining an intention at some future, remote, or indefinite time to return to the former habitation,[68] and necessarily the old is lost on the acquisition of the new,[69] but temporary absence with no intention of establishing a domicile elsewhere will not destroy the one already acquired.[70]

A married man's residence is generally where his family resides,[71] and the mere temporary absence of his family does not affect his residence.[72] The case of an unmarried man is different, the latter having no family or home, except the home of his parents or his rooming or boarding place.[73] The domicile of the husband is

In re Titterington's Estate [Iowa] 106 N. W. 761. In Texas a person, although domiciled in another state, may establish a "residence" for the purposes of a suit. Defendant, a citizen of New York, where his family resided and whither he frequently returned, established a business in Texas and had "resided" there for 14 months except when visiting his family. Held he was entitled to be sued in the county in Texas where he "resided." Taylor v. Wilson [Tex. Civ. App.] 14 Tex. Ct. Rep. 900, 93 S. W. 108, afd. [Tex.] 15 Tex. Ct. Rep. 577, 93 S. W. 109.

60. See such topics as Corporations, 7 C. L. 862; Elections, 5 C. L. 1065; Jurisdiction, 6 C. L. 267; Process, 6 C. L. 1078; Taxes, 6 C. L. 1602; Venue and Place of Trial, 6 C. L. 1806.

61. In re Titterington's Estate [Iowa] 106 N. W. 761.

62. Cannot have two at the same time. In re Titterington's Estate [Iowa] 106 N. W. 761.

63. Downs v. Downs, 23 App. D. C. 381.

64. Barfield v. Coker & Co. [S. C.] 53 S. E. 170. A mere temporary sojourn within a state for business purposes with the intention of returning to one's former inhabitance is insufficient. In re Mulford, 217 Ill. 242, 75 N. E. 345.

65. In re Dalrymple's Estate [Pa.] 64 A. 554. Evidence that a person began business in a certain county, owned both personal and real property there, and that it was the only place in which he ever voted or paid a personal tax, sufficient to sustain a finding that it was his domicile, although he was away from it much of the time, owned property in other states, and had declared his intention to make another state his home. Id.

66. In re Titterington's Estate [Iowa] 106 N. W. 761.

67. In re Titterington's Estate [Iowa] 106 N. W. 761. A declared intention not carried into effect by an actual change of habitation and contradicted by actions does not result in a change of domicile. In re Dalrymple's Estate [Pa.] 64 A. 554.

68. In re Titterington's Estate [Iowa] 106 N. W. 761. Evidence examined and held not to support finding that deceased's domicile in Illinois was retained after he removed to Iowa. Id.

69. Domicile is lost by leaving the place where one has acquired a permanent home and removing to another place without a present intention of returning. In re Mulford, 217 Ill. 242, 75 N. E. 345.

70. Evidence that plaintiff always registered as from St. Louis at hotels, told her friends that she intended to return to St. Louis and that she herself always considered St. Louis her home, sufficient to show her intention to keep her residence there. Humphrey, 115 Mo. App. 361, 91 S. W. 405. Where a wife went to live with her husband in Missouri on her marriage to him, she acquired a domiciliary residence there, entitling her to sue for a divorce, which was not lost by her temporary absence from the state after being deserted by her husband to visit her children, or in search of health. Id.

71. Jackson v. Washington, 3 Ohio N. P. (N. S.) 453. On evidence showing that a person spent much of his time in attending to his business in one county and occasionally visited his family residing in another county, the trial court did not commit an error of law in holding such person's residence to be in the county where his family is located. Barfield v. Coker & Co. [S. C.] 53 S. E. 170.

72. Jackson v. Washington, 3 Ohio N. P. (N. S.) 453. Defendant rented his house for a year and leased a house in another town for a year, whither his family went for the health of his wife, but defendant remained and attended to his business within the city of Augusta, and he assumed none of the privileges of citizenship in the new place of residence of his family but retained them in Augusta. Milligan v. Fortson [Ga.] 54 S. E. 915. Evidence held to show that defendant had done nothing to lose his residence and was domiciled in the ward from which he was elected. Id.

the domicile of the wife, even though the wife maintains a separate establishment in another state where she and her husband spend much of their time,[74] but she may acquire a separate domicile in certain cases.[75] In Pennsylvania the orphan's court may determine the domicile of a testator notwithstanding a foreign probate court had admitted his will to probate and granted letters testamentary.[76]

Issues and evidence.[77]—The presumptions that a man is domiciled where he is found unless there for some temporary purpose; that a man is domiciled where he dies, which is even stronger; that on the return of an alien to his domicile of origin his original domicile instantly reverts; and that in doubtful cases the original domicile is considered the true one, are presumptions of fact and not of law,[78] and hence cannot arise where the findings are silent as to them.[79] The existence of a domicile, once established,[80] is presumed to continue,[81] hence the domicile of minor children, being that of their parent, will be presumed to remain the same after his death.[82] One may be estopped to deny that his domicile is in a certain place.[83]

The question of domicile is generally held to be one of fact to be determined principally from a person's intent,[84] as indicated by his acts and declarations,[85] and the finding of the trial court if supported by any evidence is conclusive.[86] Acts such as residence,[87] and voting,[88] have great probative force, but declarations made

73. Jackson v. Washington, 3 Ohio N. P. (N. S.) 453.

74. Husband rector of church in Dover, N. J., where he is legally domiciled, wife a woman of independent means maintaining a residence in New York City where she and her husband spend much of their time. In re Hartman's Estate [N. J. Eq.] 62 A. 560.

75. On his desertion and removal to another state the wife's domicile did not accompany his, hence suit in Federal courts based on diverse citizenship was proper. Action for alienation of affection. Gordon v. Yost, 140 F. 79. Held desertion fully and aptly charged within the exception stated in the text. Id. The "mere domicile" within the state of the spouse at fault will not support a divorce decree by publication. Haddock v. Haddock, 201 U. S. 562, 50 Law. Ed. —.

76. In re Dalrymple's Estate [Pa.] 64 A. 554.

77. See 5 C. L. 1043.

78. Donaldson v. State [Ind.] 78 N. E. 182. See Aliens, 7 C. L. 100, note on presumptions of fact as to domicile of aliens.

79. Where an alien emigrated to America and established a residence here, but a short time before his death returned to his native country, no presumption of his foreign residence can arise when the findings of the court are silent on that point, in an action by the alien heirs of such person to recover the land of which he died seised and claimed by the state as escheated. Donaldson v. State [Ind.] 78 N. E. 182.

80. Before the presumption of the continuance of a domicile can arise its existence must be first established. Morrison v. Turnbaugh, 192 Mo. 427, 91 S. W. 152. The residence of a person in a certain county being left an open question, no presumption of his continuing to reside there can arise. Id. Floating into several counties of a state sporadically and by way of parenthesis three or four times many years previously, and claiming to live in another county within the state which is left an open question, is not sufficient to establish his residence there so as to destroy the jurisdiction of the court because the summons was published, as in the case of nonresidence. Id.

81. This presumption aided by evidence of an aunt that she knew deceased until his death, had visited him once at his place of residence, and had heard from him "once in a while" as being in that city. In re Colton's Estate [Iowa] 105 N. W. 1008.

82. In re Bunting's Estate [Utah] 84 P. 109.

83. One procuring his registry and right to vote in Baltimore on his representation of being domiciled there will not subsequently be permitted to show that his domicile was actually in Washington, D. C., in order to entitle him to sue for a divorce there. Downs v. Downs, 23 App. D. C. 381.

84. Canadian Pac. R. Co. v. Wenham, 146 F. 207. On the question whether a person who has removed himself from one district to another where he is living and doing business when served with process. Id.

85. Barfield v. Coker & Co. [S. C.] 53 S. E. 170; Forlaw v. Augusta Naval Stores Co., 124 Ga. 261, 52 S. E. 898. Held question was properly submitted to jury under the evidence in this case. Id. Question of residence must be determined by acts and intentions of the party himself; it cannot be taken from inference but must be determined solely from the facts. Local option election. Jackson v. Washington, 3 Ohio N. P. (N. S.) 453. While the testimony of witnesses as to oral declarations by a deceased person with reference to his domicile is unsatisfactory in some cases, when it bears the marks of truthfulness and reliability, and is supported by the fact of residence for a long period, it is valuable and should be given weight. In re Titterington's Estate [Iowa] 106 N. W. 761.

86. Barfield v. Coker & Co. [S. C.] 53 S. E. 170.

87. Actual residence for a long time is strong evidence of an intention to make

after a person is apprised of the benefits of a change of domicile,[89] or contradicted by other facts and circumstances,[90] are not controlling. Mere presence within a county is not proof of residence.[91] The burden of proof is on the movant for a change of venue based on an issue of domicile.[92] The tests given to the jury for determining domicile must be applicable to the evidence.[93] Residence may be charged without defining and distinguishing "actual" and "legal" residence, unless proper request is made.[94]

DOWER.[95]

§ 1. Nature of Right; Persons Entitled; Elections (1197).
§ 2. In What Dower May be Had (1198).
§ 3. Extinguishment, Release, or Bar, and Revival of Dower (1199).
§ 4. Liens and Charges on Dower (1200).
§ 5. Assignment of Dower and Money Awards (1200).
§ 6. Remedies and Procedure (1200).

§ 1. *Nature of right; persons entitled; election.*[96]—Dower consummate on the husband's death but not yet assigned constitutes no possessory estate in the lands,[97] and until assignment dower may be released to the fee owner only.[98] Equity will recognize dower in personalty as given by some statutes, though it is not judicially assigned.[99] A conveyance of land by a widow carries with it an equitable transfer of her unassigned dower.[1] In Florida, when a married man dies testate and without issue, the widow has an election to take under the will, her dower interest or a child's part,[2] but ordinarily an election between a testamentary provision and dower is required only when the former is given in lieu of the latter.[3] An election is sometimes presented between dower and the statutory homestead rights.[4]

such place of residence the domicile, and when accompanied by other acts and declarations entirely consistent therewith is all but conclusive. In re Titterington's Estate [Iowa] 106 N. W. 761.

88. The act of voting at one's place of residence, while not conclusive, is a valuable circumstance in determining a question of domicile. In re Titterington's Estate [Iowa] 106 N. W. 761. Finding that domicile was where person voted and paid taxes sustained, though he was absent much of the time and had declared an intent to make another state his home. In re Dalrymple's Estate [Pa.] 64 A. 554.

89. Canadian Pac. R. Co. v. Wenham, 146 F. 207. Where one has left his home in one city and state, gone to another, entered into business there, and is living with a paramour whom he introduces as his wife, remaining away from his former home to avoid civil arrest but expressing the hope of returning there some time, his domicile is where he has gone into business and there he may be sued. Id.

90. Recitals in the deeds and will of a testator are not controlling in fixing his domicile when contradicted by other facts and circumstances. In re Dalrymple's Estate [Pa.] 64 A. 554.

91. The fact that an alleged nonresident has been seen in a county does not tend to disprove his nonresidence. On motion for a commission to examine an alleged nonresident who was seen in a restaurant in the county of trial. Dambmann v. Metropolitan St. R. Co., 110 App. Div. 165, 97 N. Y. S. 91.

92. Alleging domicile in another county. Barfield v. Coker & Co. [S. C.] 53 S. E. 170.

93. Whether one had a "family" being somewhat in doubt, it was proper to give both the test of family abode and its converse. Forlaw v. Augusta Naval Stores Co., 124 Ga. 261, 52 S. E. 898. Where there was some evidence showing that a certain person's business caused a frequent change of residence, it is not error to instruct jury as to the domicile of transients and persons residing indifferently in two or more places. Id. Such instructions held applicable to the facts in the case. Id.

94. Failure to draw distinction not error in absence of request. Forlaw v. Augusta Naval Stores Co., 124 Ga. 261, 52 S. E. 898.

95. See Tiffany Real Prop. 420.

96. See 5 C. L. 1043.

97. Adverse title held to arise from widow's possession of entire tract under a deed from the heir to two-thirds and color of title to the other third, and not from possession under a claim of dower right. Tarplee v. Sonn, 109 App. Div. 241, 96 N. Y. S. 6.

98. Chicago, etc., R. Co. v. Kelly [Ill.] 77 N. E. 916.

99. Where the personalty in the possession of the widow is less than the $400 to which she is entitled as a part of her dower, under Rev. St. 1899, §§ 107, 108, she will be regarded in equity as having title thereto, though there was no administration. Mahoney v. Nevins, 190 Mo. 360, 88 S. W. 731.

1. Griffin v. Dunn [Ark.] 96 S. W. 190. Does not postpone the heirs' right of entry under homestead claim so as to toll the statute of limitations. Id.

2. Sections 1830, 1833, Rev. St. 1892. Saxon v. Rawls [Fla.] 41 So. 594.

§ 2. *In what dower may be had.*[5]—Ordinarily, dower may be had in any estate of inheritance of which the husband was seised at any time during coverture,[6] and to which the dowress has not relinquished her right,[7] but by some statutes the husband must be seised of the estate at death,[8] though he need not be in actual possession.[9] A beneficial seisin being essential,[10] no dower attaches to an estate in remainder.[11] A transitory seisin is insufficient to give rise to dower.[12] At common law dower did not attach to lands of which the husband was only equitably seised,[13] but this rule has been changed by statute in many states.[14] A conveyance made after marriage pursuant to a bond for title executed before marriage defeats dower.[15]

Where the owner of an undivided interest dies, the widow takes dower in her husband's interest and not in any particular tract.[16]

A fraudulent conveyance to defeat a future wife's dower may be set aside by her, though directed against no woman in particular when made.[17] A duly recorded conveyance before marriage was contemplated is not in fraud of dower despite the husband's continued possession, he having reserved a life estate.[18]

3. Will construed as making a devise in addition to the dower, and not in lieu thereof. Casey v. McGowan, 50 Misc. 426, 100 N. Y. S. 538.

4. A widow by accepting dower in her deceased husband's lands thereby makes an election and precludes herself from claiming a distributive share in the homestead. Kennedy v. Kennedy [S. C.] 54 S. E. 773.

5. See 5 C. L. 1044.

6. A woman by marrying is not a purchaser for value of a life estate in one-third of her husband's estate so as to render void a prior unrecorded deed, under Revisal 1905, §§ 979, 980, and thus giving her a dower interest therein. Haire v. Haire [N. C.] 53 S. E. 340.

7. A widow is entitled to dower in lands conveyed by her husband in which she did not join. Hyatt v. O'Connell [Iowa] 107 N. W. 599. A sale of land of a decedent before assignment of dower is not void, but the purchaser takes subject to the dower interest. Shell v. Young [Ark.] 95 S. W. 798. A mortgage in which the wife does not join does not affect her inchoate right of dower (Lowe v. Walker [Ark.] 91 S. W. 22; Shackleford v. Morrill [N. C.] 55 S. E. 82); and upon foreclosure of a superior mortgage the court will protect the contingent interest of the wife if the land sells for more than enough to satisfy the first, by adjudging that a foreclosure under the second shall be subject thereto (Id.). Where defendant and his wife acquired a domicile in Michigan before a partnership between her husband and plaintiff to plat and sell lands of the defendant became legally formed, the wife is entitled to an inchoate right of dower. Chase v. Angell [Mich.] 13 Det. Leg. N. 616, 108 N. W. 1105.

8. Under Comp. Laws 1897, § 8938, giving a **nonresident** wife dower in lands of which her husband dies seised, a ripened adverse possession as against him bars dower. Putney v. Vinton [Mich.] 13 Det. Leg. N. 459, 108 N. W. 655.

9. Under Comp. Laws 1897, § 8938, the legal right to the possession is sufficient without actual possession. Putney v. Vinton [Mich.] 13 Det. Leg. N. 459, 108 N. W. 655.

10. A wife has no dower right in lands held by the husband in trust for her. Barker v. Smiley, 218 Ill. 68, 75 N. E. 787.

11. Gray v. Whittemore [Mass.] 78 N. E. 422; Redding v. Vogt, 140 N. C. 562, 53 S. E. 337. Mere possession is not seisin where the precedent estate still exists. Id.

12. A purchase price mortgage is superior to the dower interest of the wife of the vendee though not joined in by her. Harrow v. Grogan, 219 Ill. 228, 76 N. E. 350. Where a grantee in a deed executes a mortgage to his grantor of even date and covering the same land, the law will presume that it is a purchase money mortgage. Id.

13. Held in trust for the husband. Seaman v. Harmon [Mass.] 78 N. E. 301.

14. Under Gen. St. p. 1275, § 1, dower attaches to lands whereof a third person is seised to the husband's use under circumstances which entitle the husband and heirs to a conveyance and the actual seisin of the land. Radley v. Radley [N. J. Eq.] 62 A. 195. A recital in a deed by a husband and wife to a third person to hold in trust for the husband and heirs that the purpose is to free the lands from dower does not affect the wife's dower right in the equitable estate thereby created. Id.

15. Where an attorney in fact executed a bond for title prior to his appointment, a ratification by his principal before marriage defeats dower, though conveyed thereafter. Britt v. Gordon [Iowa] 108 N. W. 319. Facts held insufficient to show such ratification. Id. If the husband had no knowledge of the bond the widow is presumptively entitled to dower. Id.

16. Bloom v. Sawyer [Ky.] 89 S. W. 204. And hence a judgment, awarding her dower in one-third of her husband's lands, gives a freehold for life in one-third of the undivided interest and she becomes a tenant in common. Id.

17. Higgins v. Higgins, 219 Ill. 146, 76 N. E. 86. Not necessary that the grantee participate in the fraudulent intent. Id. Action may be prosecuted during husband's life (Id.) and the plaintiff must not be guilty of laches (Id.). Held not guilty of laches considering the husband's promises to right the wrong. Id.

18. Dowress could not rely on his posses-

§ 3. *Extinguishment, release, or bar, and revival of dower.*[19]—Dower may be extinguished by a release freely executed,[20] by an election to take some inconsistent right,[21] by a jointure[22] or an ante-nuptial contract specifically renouncing it[23] followed by an election,[24] by post-nuptial agreement,[25] by the foreclosure of a superior lien[26] unless fraudulent,[27] by laches in asserting the right,[28] by estoppel,[29] by the operation of the statute of limitations[30] which runs from the husband's death,[31] by divorce[32] or by marital misconduct, as adultery,[33] wrongful and continuous abandonment.[34] Where a widow has dower in lands incumbered with a mortgage, the execution of an absolute deed as security will not bar her right.[35] The right to have dower assigned in land held as a homestead is not lost by the abandonment of the latter,[36] nor by absence from the land.[37] The acceptance of the provisions of a will is no bar unless an election is presented.[38] A lienor who pays another lien to protect his own is subrogated as against a dower claimant where the protected lien was superior thereto.[39] Money paid to secure the release of a dower interest becomes the absolute property of the dowress.[40]

sion against constructive notice by the record. Collings v. Collings [Ky.] 92 S. W. 577. And see note, 5 C. L. 1045, n. 78.

19. See 5 C. L. 1045.

20. A release will not be set aside on the ground of coercion by the husband unless the person in whose favor it was executed had knowledge of the fraud. Campbell v. Harris Lithia Springs Co. [S. C.]' 54 S. E. 378. Complaint to set aside held demurrable for failure to allege such knowledge. Id.

21. See ante § 1, and see Election and Waiver, 5 C. L. 1078.

22. Contract of family settlement held not to create a jointure so as to present an election within Burns' Ann. St. 1901, § 2665, Case v. Collins [Ind. App.] 76 N. E. 781.

23. Antenuptial contract, reciprocally releasing such rights as would accrue to each in the property of the other by virtue of the prospective marriage, construed to release only such rights as were common to both and hence not the widow's reward. Kroell v. Kroell, 120 Ill. App. 76. Antenuptial contract held not to include a release of the widow's reward. Pratz v. Pratz, 122 Ill. App. 101.

24. Kroell v. Kroell, 120 Ill. App. 76.

25. Where a husband in an action for divorce admitted the ground and stipulated for a certain alimony conditioned for a release by the wife of her dower interest, and divorce was thereupon granted and a release executed, held that the release is binding under Real Property Law 1896, § 186, Laws 1896, p. 587, c. 547. Schlesinger v. Klinger, 98 N. Y. S. 545. Evidence held insufficient to show that the divorce was collusive so as to affect the release. Id.

26. A vendor's lien is superior to the dower interest of the vendee's wife (Matney v. Williams [Ky.] 89 S. W. 678), and hence a sale thereunder terminates the dower (Id.).

27. The fraudulent foreclosure of a mortgage for the express purpose of barring dower does not bar such right. Turner v. Kuehnle [N. J. Eq.] 62 A. 327. And the purchaser cannot assert in an action to establish dower that the wife might have discovered the fraud and protected herself at the sale. Id.

28. Wife held not guilty of laches because of the fraudulent representations made by the husband and his counsel that her interest was not to be affected. Turner v. Kuehnle [N. J. Eq.] 64 A. 478.

29. Where a wife expressly refused to join in a deed of her husband's land, the fact that she allowed the husband to use the proceeds in support of herself as a member of the family does not estop her from asserting her dower interest. Hyatt v. O'Connell [Iowa] 105 N. W. 835 [advance sheets only]; Id. [Iowa] 107 N. W. 599. False representations of the husband before a board of review cannot work an estoppel against the wife. Chase v. Angell [Mich.] 13 Det. Leg. N. 616, 108 N. W. 1105.

30. In Missouri a wife's right of assignment is barred in ten years from the accrual of the right. Joplin Brewing Co. v. Payne [Mo.] 94 S. W. 896. Code § 3369, relating to the admeasurement of dower, does not apply to an action in equity or for the partition of a distributive share. Britt v. Gordon [Iowa] 108 N. W. 319. An action for partition of distributive share when against a stranger claiming adversely is controlled by Code § 3447, subd. 7, providing for the recovery of real property generally. Id. Held barred in twelve years. Id.

31. The wife's right to assignment of dower accrues immediately on the death of the husband. Joplin Brewing Co. v. Payne [Mo.] 94 S. W. 896.

32. In New York a divorce destroys the wife's right of dower, especially where she obtains a divorce in another state upon a ground not recognized in New York. Voke v. Platt, 48 Misc. 273, 96 N. Y. S. 725.

33. The common-law rule that adultery by the wife while willingly living separate from her husband, unless condoned by him, defeats her right to dower, prevails in Indian Territory. Daniels v. Taylor [C. C. A.] 145 F. 169.

34. In North Carolina abandonment without cause continued until death of the husband bars dower. Hicks v. Hicks [N. C.] 55 S. E. 106. Evidence as to whether plaintiff in an action for dower left her husband of her own volition or because of cruel and inhuman treatment is admissible. Id.

35. Debt paid but no conveyance made during husband's life. Wild v. Storz Brewing Co. [Neb.] 108 N. W. 145.

§ 4. *Liens and charges on dower*[41] comprise prior mortgages or incumbrances or paramount estates in the land as well as those estates in the grant whereof the dowress joined.[42]

§ 5. *Assignment of dower and money awards.*[43]—An agreement to partition the "rents" with the heir may be construed so as to set out the dower estate.[44] Where land is conveyed during the lifetime of the husband subject to dower, it is measured as of the date of alienation.[45] Money awards are often made under statutes,[46] or when necessary to work out the equities,[47] or with the consent of the dowress[48] to protect her inchoate dower interest. In Illinois, where a widow is entitled to both homestead and dower, the latter is a one-third interest in remainder after deducting the homestead.[49]

Until dower is assigned, rents accruing from the endowable estate belong to the heirs,[50] or at least until demand for assignment,[51] except as changed by statute.[52] In Arkansas the widow is entitled to the possession of the dwelling house and the farm thereto attached until the assignment of dower.[53]

§ 6. *Remedies and procedure.*[54]—The right to a judicial assignment can not be cut off by a will or by aught than consent of the dowress.[55] The personal repre-

36. Griffin v. Dunn [Ark.] 96 S. W. 190.
37. Bartee v. Edmunds [Ky.] 96 S. W. 535.
38. Pratz v. Pratz, 122 Ill. App. 101.
39. Partially discharged a superior lien and paid interest thereon and taxes upon the land. Lidster v. Poole, 122 Ill. App. 227. Where a superior lien is partially discharged by a junior lienor to protect his own, and with the consent of a dower claimant who knew he relied upon a lien, she cannot subsequently repudiate her consent. Id.
40. Not simply entitled to a life interest (Williams v. Merriam [Kan.] 83 P. 976), and hence where she is led to believe that she has only a life interest, and makes an investment whereby the interest is payable to her during life and the principal to the decedent's heirs at death, the latter provision may be revoked (Id.).
41. See 3 C. L. 1146.
42. See ante §§ 2, 3, and see 3 C. L. 1146.
43. See 5 C. L. 1046.
44. A parol agreement as to "rents" of property held not to be one for division of the estates therein between dower man and heirs. Chicago, etc., R. Co. v. Kelly [Ill.] 77 N. E. 916.
45. Not entitled to the benefit of improvements subsequently made and advancement in value. Turner v. Kuehnle [N. J. Eq.] 62 A. 327. Damages for detention will be measured from the time of demand. Id.
46. Where partnership property is to be sold to effect a dissolution, and it appears that the wife of one partner has a superior inchoate dower interest therein, the court must determine her right under Comp. Laws § 11,100, providing for investment of a portion of the proceeds to her use, etc. Chase v. Angell [Mich.] 13 Det. Leg. N. 616, 108 N. W. 1105.
47. Where a collusive foreclosure sale to carry out a contract of sale is had, she is entitled to a charge upon the land for an annuity equal to the interest on one-third of the proceeds, less the amount of the mortgage. Turner v. Kuehnle [N. J. Eq.] 64 A. 478.
48. Bankrupt's real estate sold free of dower with the wife's consent and compensation allowed out of the proceeds. Savage v. Savage [C. C. A.] 141 F. 346.
49. Perkins v. Perkins, 122 Ill. App. 370. And hence where the property is sold she gets one-third of the proceeds remaining after deducting the $1,000 exempt homestead fund. Id.
50. Where a widow fraudulently purchased her minor children's share and sold entire property to a third person, upon setting aside the conveyance such person cannot escape paying rent on the widow's unassigned dower interest. Sunter v. Sunter, 190 Mass. 449, 77 N. E. 497.
51. A widow asserting her right of dower against a grantee of her husband is not entitled to rent prior to a demand for assignment. Hyatt v. O'Connell [Iowa] 105 N. W. 835 [advance sheets only]; Id. [Iowa] 107 N. W. 599. Evidence held insufficient to show demand prior to commencement of suit, and hence not entitled to back rent. Wild v. Storz Brewing Co. [Neb.] 108 N. W. 145.
52. Ky. St. 1903, §-2138, entitles the widow to one-third of the "gross," and not net, rents and profits of her husband's endowable property until assignment. Redmond v. Redmond's Adm'x [Ky.] 91 S. W. 260.
53. Kirby's Dig. § 2704. Griffin v. Dunn [Ark.] 96 S. W. 190. This right is lost by attempted transfer. Id.
54. See 5 C. L. 1046.
55. A trustee of an estate subject to the widow's dower may bring action for an assignment, although authorized by the will to disembarrass by agreement. Shipley v. Mercantile Trust & Deposit Co., 102 Md. 649, 62 A. 814. Where a husband devises lands subject to dower, no act of the husband or decree of court can destroy the right of assignment unless waived. Id. Where a will devising lands provides for disembarrassment by agreement between trustee and widow, neither her consent to the court's assumption of jurisdiction over the administration of the trust, nor a declaration of a willingness in her answer to free the lands from dower, is a waiver of the right of assignment. Id.

sentative is not a necessary party to an action for assignment of dower.[56] The seisin and possession of the husband need not be specifically alleged.[57] Failure to file decedent's title papers with the petition for allotment as required by statute in Kentucky is not a ground for demurrer.[58] Marriage may be proved by reputation.[59] In an action of ejectment to recover unassigned dower the defendant cannot restore a mortgage wrongfully discharged of record to defeat recovery.[60] A finding that a deed was in fraud of dower before marriage is fatally variant from allegations that it was antedated.[61] A judgment awarding dower is not void for failing to direct that the commissioners be sworn as required by statute.[62] Until dower has been allotted the statute of limitation against her action for possession does not commence to run.[63]

DRAINS; DRUGS; DRUGGISTS; DRUNKENNESS, see latest topical index.

DUELING.[64]

DUE PROCESS; DUPLICITY, see latest topical index.

DURESS.[65]

What constitutes.—Duress may consist, among other modes of mental constraint,[66] in threats of prosecution,[67] regardless of whether the accused person is guilty,[68] whereby assent is coerced.[69] Threats, abuse, and violence will not amount to duress unless intended to compel the act sought to be avoided.[70] A compromise

56. Higgins v. Higgins, 219 Ill. 146, 76 N. E. 86.

57. An allegation that deceased and plaintiff owned the land jointly and that they had been in possession and lived thereon for thirty years up to his death is sufficient. Bartee v. Edmunds [Ky.] 96 S. W. 535.

58. Code Civ. Prac. § 499. Bartee v. Edmunds [Ky.] 96 S. W. 535. Upon due motion they will be ordered filed. Id. Failure to so move waives the objection. Id.

59. Parties cohabiting together as man and wife. Bartee v. Edmunds [Ky.] 96 S. W. 535. Under Code Civ. Prac. § 606, a widow is incompetent to testify as to her marriage with the decedent. Id.

60. Must resort to equity. Putney v. Vinton [Mich.] 13 Det. Leg. N. 459, 108 N. W. 655.

61. A petition to set aside a deed framed upon the theory that the deed was executed after marriage and ante-dated will not support a judgment founded upon a finding that it was executed prior to the marriage but in fraud of the prospective wife. Higgins v. Higgins, 219 Ill. 146, 76 N. E. 86.

62. The statute and not the judgment requires that they be sworn. Bartee v. Edmunds [Ky.] 96 S. W. 535.

63. Bartee v. Edmunds [Ky.] 96 S. W. 535.

64. No cases have been found for this subject since the last article. See 3 C. L. 1147.

65. See 5 C. L. 1047. For the effect of duress on contracts generally, see Hammon, Cont. §§ 134-136.

66. See 5 C. L. 1047.

67. Notes and mortgage executed solely in consideration of a promise not to institute a threatened criminal prosecution are void for duress. Henry v. State Bank [Iowa] 107 N. W. 1034.

68. To sustain the defense of duress to a note executed to avoid a criminal prosecution, it need not affirmatively appear that the person accused is guilty, nor will his innocence absolve the duress. Henry v. State Bank [Iowa] 107 N. W. 1034.

69. No defense to a mortgage that it was given to stop a threatened prosecution where no showing is made of a promise not to prosecute if it were executed. Moyer v. Dodson, 212 Pa. 344, 61 A. 937.

Note: The opposite party must have agreed to abandon or suppress the prosecution, else it is not duress. Moyer v. Dodson [Pa.] 61 A. 937, citing Johnston v. Allen, 22 Fla. 224, 1 Am. St. Rep. 180; Cass County Bank v. Bricker, 34 Neb. 516, 33 Am. St. Rep. 649; Miller v. Minor Lumber Co., 98 Mich. 163, 39 Am. St. Rep. 524. The Michigan Law Review says of this case: "Of these three cases [cited] the first two are not in point for they were decided on the ground of compounding felonies, while the third, which is in point, holds contrary to the court in the principal case. The court in Miller v. Minor Lumber Co., 98 Mich. 163, 39 Am. St. Rep. 524, says: 'They had the right to receive money from Miller * * * so long as they did not transgress the law, by promising, either expressly or by implication, not to prosecute.' In the principal case, however, there is an implied promise that they will not prosecute."—See note 4 Mich. Law Rev. 315.

70. Where altercations over their respective rights in certain property arose between a husband and wife in the course of which a personal encounter occurred and threats,

agreement executed voluntarily to avoid litigation,[71] or executed to procure payment of an unliquidated demand,[72] are not void for duress. Consent given, although reluctantly and in fear of financial loss when one might have refused, will not avoid a contract for duress,[73] especially when the contract involved is a family settlement[74] under which complainant has enjoyed great benefits.[75] Statutory definitions of duress may include constraint by fear of loss.[76] Threatening to institute a civil action,[77] to withhold payment of a debt except upon the giving of a receipt that the amount paid was all that was due,[78] to eject a debtor by process under the decree of confirmation of a sale of land unless the debtor execute a deed to the purchaser under the decree of sale,[79] or to sell collateral securities according to the terms of an agreement unless the debt secured is paid,[80] do not constitute duress, nor is the mere retention of stock as security, which retention was subsequently ratified.[81]

Negotiable instruments[82] and deeds executed under duress are void,[83] if delivered within the time during which the influence of the duress is presumed to continue,[84] but in the hands of a bona fide purchaser they become good.[85] A contract of marriage procured by duress and not subsequently ratified may be annulled.[86]

abuse, and violence practised on the wife, immediately after which she executed a deed to her husband but out of his presence and so far as appears from the evidence without his knowledge, it is not void for duress. Hintz v. Hintz, 222 Ill. 248, 78 N. E. 565.

71. Dickey v. Jackson [Or.] 84 P. 701. Evidence held to show voluntary execution. Id.

72. Procuring acceptance of a sum less than claimed on an unliquidated demand as satisfaction in full, by a threat not to pay unless so accepted, is a compromise not void for duress. Earle v. Berry [R. I.] 61 A. 671.

73. Andrews v. Connolly, 145 F. 43. Excessive payments made under fear of the burden of litigation with an opponent of great wealth held not constrained by duress. Sanborn v. Bush [Tex. Civ. App.] 14 Tex. Ct. Rep. 521, 91 S. W. 883.

74. Settlement of disputes between brothers as to their respective rights and interests in mining property signed by complainant for fear the mines might otherwise be shut down. Andrews v. Connolly, 145 F. 43.

75. Andrews v. Connolly, 145 F. 43.

76. In Georgia, under a statute providing that a contract is void for duress if procured "by threats or other arts by which the free will of the party is restrained and his consent induced," threats of acts involving great financial loss may operate as duress. A plea showing that plaintiff by a preconceived plan got control of defendant's business in such manner that his departure would inflict great financial loss, that he threatened to take money in his possession with him, as well as papers, contracts, and other property, that plaintiff was insolvent, and to avoid execution of these threats the notes sued on were executed, is a good plea of duress. Whitt v. Blount, 124 Ga. 671, 53 S. E. 205.

77. Bond v. Kidd, 122 Ga. 812, 50 S. E. 934.

78. Earle v. Berry [R. I.] 61 A. 671.

79. A threat by one having good title to land and entitled to possession as purchaser under a decree of sale, as against the debtor occupying the land, to eject such occupant by process under the decree of confirmation of sale, does not constitute fraud or duress to set aside a deed made by such occupant to such owner. Dunfee v. Childs [W. Va.] 53 S. E. 209.

80. Where stock had been deposited as security with an agreement that it might be sold in case of nonpayment of the debt, payment of such debt to prevent the sale of the stock, within the terms of the agreement, is not made under duress (Buck v. Houghtaling, 110 App. Div. 52, 96 N. Y. S. 1034), even though the debtor believes that she is not rightfully indebted to her creditors but nevertheless ratifies such indebtedness by paying it (Id.).

81. The mere retention by a broker of stock as security on a balance due him, without any use of it to compel the execution of an agreement to pay such balance or any threats to sell the stock to liquidate the amount due, which retention and indebtedness is ratified, does not constitute duress. Buck v. Houghtaling, 110 App. Div. 52, 96 N. Y. S. 1034.

82. Whitt v. Blount, 124 Ga. 671, 53 S. E. 205.

83. Henry v. State Bank [Iowa] 107 N. W. 1034.

84. Notes and mortgage are not rendered valid because by agreement they are not delivered until several days later, at a time when the influence of the duress is presumed still to continue. Henry v. State Bank [Iowa] 107 N. W. 1034.

85. 10 Am. & Eng. Enc. of Law [2nd Ed.] 335. A decree of cancellation of a deed for duress cannot be made against a bona fide purchaser. Dunfee v. Childs [W. Va.] 53 S. E. 209.

86. Marsh v. Whittington [Miss.] 40 So. 326. Evidence that the father and brother of plaintiff's wife came to him and accused him of being responsible for her pregnancy and forced him to marry her by putting him in fear of his life, they procuring the license and the minister, and that immediately after the ceremony the newly married couple went

Remedies and procedure.—Duress and deceit have been held simply different methods of consummating fraud,[87] hence one injured by duress is entitled to the same remedies available in cases of deceit.[88] He may proceed in equity for a rescission of the contract, rescind by his own act and sue at law, or allow the contract to stand and sue at law for damages.[89] Relief on the ground of duress must be sought promptly[90] or within a reasonable time[91] as determined by the circumstances,[92] delay operating as a waiver,[93] except in an action at law for damages upon the contract to which the equitable doctrine of laches has no application and which may be brought at any time within the period of limitations,[94] in which case delay is material only so far as it throws light on the issue of duress.[95] In pleading duress facts sufficient to show it must be alleged.[96] Whether duress was exercised is ordinarily a question for the jury.[97] In Kentucky but one spouse may testify in an action on a note against the wife who raises the defense of duress.[98] Threats communicated to a wife by her husband are admissible to show in what state of mind she executed a note, but not to prove that the payee actually made them,[99] and the court should so charge.[1] Evidence of duress in the execution of a mortgage is properly excluded in the absence of any showing that the mortgagee was present or had notice or cause to believe that duress was practised.[2] Where plaintiff is compelled to pay money through threats of an illegal sale of his property, the onus is on him to show he did not owe it.[3]

DYING DECLARATIONS, see latest topical index.

EASEMENTS.

§ 1. **Nature and Creation (1203).** A Grant (1205). A Way of Necessity (1206). Creation by Prescription (1206). Creation by Estoppel (1208). The Condemnation of Private Lands for Private Ways (1208). Natural Easements (1208). Negative Easements (1209).

§ 2. **Location, Maintenance, and Extent of Right (1209).** Maintenance (1209). Extent of Use (1209).

§ 3. **Transfer and Assignment (1210).**

§ 4. **Extinguishment and Revival (1210).**

§ 5. **Interference with Easements and Remedies and Procedure in Respect Thereto (1211).**

§ 1. *Nature and creation.*[4]—An easement is the right to use the land of another[5] for a special purpose[6] not inconsistent with his general property rights.[7]

to New Orleans, where plaintiff deserted defendant and filed his bill for divorce, held sufficient to show contract made under duress and not ratified. Id.

87, 88, 89. Neibuhr v. Gage [Minn.] 108 N. W. 884.

90. Buck v. Houghtaling, 110 App. Div. 52, 96 N. Y. S. 1034.

91. Where pursuant to a settlement of the amount due from a grantor to his grantee's husband the former, to secure this amount, executes a deed absolute instead of a mortgage under duress, he cannot, after the lapse of 5 or 6 years and the death of the grantee's husband, have such deed transformed into a mortgage because of the duress except on the terms of the settlement stated in the deed. Bryan v. Hobbs, 72 Ark. 635, 83 S. W. 341. Evidence held sufficient to justify finding that defendant executed a deed instead of a mortgage under duress. Id.

92. To set aside a deed for duress suit must be brought in a reasonable time under the circumstances of the particular case, especially where the rights of third persons are involved. Dunfee v. Childs [W. Va.] 53 S. E. 209.

93. A delay of three years held to have waived the alleged duress. Buck v. Houghtaling, 110 App. Div. 52, 96 N. Y. S. 1034.

94, 95. Neibuhr v. Gage [Minn.] 108 N. W. 884.

96. Alleging that the obligee on a contract told the obligor that he "could have sent another man after him" instead of coming himself will not be construed into a threat to send a sheriff with a warrant in the absence of explanatory averments showing that such was its meaning as generally understood. Bond v. Kidd, 122 Ga. 812, 50 S. E. 934. Held that the pleading failed to allege facts sufficient to show duress. Id.

97. It is a question for the jury whether a contract executed to preserve the good name of the obligor, and which he recognized as binding by paying several annual instalments thereon, and also in his will drawn a few days before his death, is void for duress. Wakley v. King, 98 N. Y. S. 957. Suit against estate of testator for an annual instalment of

An easement is distinguished from a license in that it is an interest in land,[8] and hence cannot be created by parol grant.[9] It may be acquired by grant,[10] dedication,[11] immemorial custom,[12] or prescription which presupposes a grant,[13] and lying in grant, and not in seisin, it cannot be made subject to conditions.[14] Several consistent easements may exist in the same land.[15] If the beneficiary exercises the use as a personal right, the easement is in gross,[16] but if enjoyed as the owner of

$500 due upon a contract between plaintiff and testator, whereby the former waived all claims against the latter for the seduction of her minor daughter. Id. It was a question for the jury to determine whether a landlord signed a note under duress where her only tenant was threatened with immediate arrest on a criminal charge preferred against him, unless he arranged for settlement of a certain claim and she agreed to go on the note with him provided he indemnified her by the execution of a trust deed to some cattle. Russell v. Johnson [Miss.] 39 So. 782.

98. Under Civ. Code Prac. § 606, providing that in an action against a married woman which might have been brought against her if she were unmarried, one but not both can testify. Ditto v. Slaughter [Ky.] 92 S. W. 2.

99, 1. Ditto v. Slaughter [Ky.] 92 S. W. 2.

2. On trial seire facias sur mortgage. Moyer v. Dodson, 212 Pa. 344, 61 A. 937.

3. Buck v. Houghtaling, 110 App. Div. 52, 96 N. Y. S. 1034.

4. See 5 C. L. 1048.

5. One cannot have an easement in his own lands. Miller v. Hoeschler, 126 Wis. 263, 105 N. W. 790.

6. Stringing clothes lines. Steiner v. Peterman [N. J. Eq.] 63 A. 1102. Under Civ. Code § 811, a right of way and the right to receive from and discharge water upon the lands of another may become easements. Jones v. Deardorff [Cal. App.] 87 P. 213.

7. A finding that plaintiff was the owner and entitled to the possession of a strip of land is not supported by proof of an easement of way therein. Galletly v. Eackius [Cal. App.] 82 P. 1109.

8. Licenses: A driveway established by adjoining lot owners, one-half on each lot, for mutual convenience is not an easement but a license. Wilkinson v. Hutzel [Mich.] 12 Det. Leg. N. 870, 106 N. W. 207. Tenants of an adjoining building held to have only a license and not an easement in a side stairway for storage purposes. Empire Realty Corp. v. Sayre, 107 App. Div. 415, 95 N. Y. S. 371.

Easement: The right to use the walls of a building for advertising for a definite period upon payment of a valuable consideration held to be in the nature of an easement. Levy v. Louisville Gunning System [Ky.] 89 S. W. 528.

9. Settle v. Cox [Ky.] 89 S. W. 534. But such parol grant so characterizes the subsequent use as to create a prescriptive right if continued sufficiently long. Id.

10. A deed describing one boundary as "along the south side of the 10 foot alley" did not impose an easement or estop the owner from closing the same. Milliken v. Denny [N. C.] 53 S. E. 867. Where lots assigned for the benefit of creditors are sold severally under an order reserving an alley upon which they abut, the free use thereof passes as appurtenant to the lots. Cook v. Burton [Ky.] 92 S. W. 322.

11. Where lands are platted and sold with reference thereto, an express dedication is made. Milliken v. Denny [N. C.] 53 S. E. 867.

Evidence held inadmissible to show dedication: The understanding of the public 11 years after the alleged dedication. Milliken v. Denny [N. C.] 53 S. E. 867. A map subsequently made. Id. Testimony that an alley extends from one street to another and that the witness did not know how much farther is too indefinite to fix termini. Id. Evidence held insufficient to show a dedication. Id.

12. NOTE. Easements by immemorial custom: "In this action of trespass on land, the defendants asserted an entry in the exercise of a right of way belonging by immemorial custom to all the inhabitants of a certain town, Blissville by name. Held that it was error to instruct the jury that if a substantial portion of the inhabitants of such town had for 15 years uninterruptedly and adversely passed over the land, with the knowledge of the owner, a right of way in favor of all the inhabitants was thereby acquired, which attached to every one who for the time being was an inhabitant. Graham v. Walker, 78 Conn. 130, 61 A. 98.

"The view of the court as to the right of way by custom was taken in New Jersey and the same reason given. Ackerman v. Shelp, 8 N. J. Law, 153. And in Virginia in Harris v. Carson, 7 Leigh [Va.] 632, the same result was attained but on the ground that a practice or usage can have no force in this country because it lacks the essential ingredient of a good custom—it is not immemorial. New Hampshire seems to stand alone in directly affirming the existence of such customary rights. Nudd v. Hobbs, 17 N. H. 524; Knowles v. Dow, 22 N. H. 387. Several other states, however, have assumed the existence of such rights, alhough deciding adversely to the existence of the right in the particular case. Pearsall v. Post, 20 Wend. [N. Y.] 111; Thomas v. Ford, 63 Md. 346, 52 Am. Rep. 513; Bethum v. Turner, 1 Me. 111; Chambers v. Furry, 1 Yeates [Pa.] 167; Waters v. Grilley, 4 Pick. [Mass.] 14."—From 4 Mich. L. R. 168.

13. An easement may be acquired by grant, dedication, prescription (Milliken v. Denny [N. C.] 53 S. E. 867), adverse user, or by estoppel (Stevens v. Headley [N. J. Eq.] 62 A. 887).

14. Gray v. Cambridge, 189 Mass. 405, 76 N. E. 195.

15. Prescriptive easement for water way in public highway. Terre Haute & I. R. Co. v. Zehner [Ind.] 76 N. E. 169.

16. A lease of a divisional alley for a

another piece of land, it is appurtenant,[17] the latter always being favored in law.[18] An easement appurtenant can only be used in connection with the land to which it is attached.[19] A conveyance of a right of way and its "appurtenances" will not carry an easement in adjacent land.[20] The owner of property abutting on a public street has an easement of view, air, light, and access therein.[21]

A grant[22] will be construed in the light of the intended purpose[23] and to effectuate the intention of the parties as shown by the surrounding circumstances.[24] The instrument must be construed as a whole[25] and the words be given their ordinary and popular meaning.[26] An agreement creating a mutual way for the use of

period of 99 years with mutual covenants to maintain it unobstructed is an easement in gross if an easement at all. Savidge v. Merrill [N. J. Eq.] 62 A. 946.

17. Towaliga Falls Power Co. v. McElroy, 124 Ga. 1014, 53 S. E. 682.

Held to be appurtenant: A private way acquired by prescription under Political Code, § 678 et seq. Nugent v. Watkins, 124 Ga. 150, 52 S. E. 158. A reservation of an easement of way for the use of the owners of designated lots in common with the owner of the servient estate. Thompson v. Germania Life Ins. Co. [Minn.] 106 N. W. 102. A reservation of the right "to connect wash lines from the yard of the property at No. 299 K. street * * * with the yard of the property hereby conveyed." Steiner v. Peterman [N. J. Eq.] 63 A. 1102. Use of an irrigation ditch for a particular designated piece of land. Jones v. Deardorff [Cal. App.] 87 P. 213.

NOTE. Appurtenant easements. Physical continuity: "It is well settled that a right in no way connected with the enjoyment or use of land cannot be annexed as an incident to such land so as to become appurtenant. Linthicum v. Ray, 76 U. S. 241, 19 Law. Ed. 657.

"Connected use should be the test, not mere physical contiguity; for it is plain that a right of way may be perfectly and directly connected with the enjoyment or use, and have no terminus touching the dominant tenement. There are cases and text writers that lay down the requirement of one terminus being on the tenement, but they are against the weight of reason and authority. Washburn, Easements, p. 161, 23 Am. & Eng. Enc. Law 6, 'Private Ways;' Louisville, etc., R. Co. v. Koelle, 104 Ill. 455; Whaley v. Stevens, 21 S. C. 221; 27 S. C. 549. These cases all state that for the way to be appurtenant, one of its ends or termini must begin on the dominant tenement, but no reason is given why such should be the case. What seems to be the clearer and more sensible rule, lies the other way. Horner v. Keene, 177 Ill. 390, 52 N. E. 492; Stocks v. Booth, 1 Term R. 428; Cady v. Springfield Water-works Co., 134 N. Y. 118, 31 N. E. 245. See Fiske v. Ley, 76 Conn. 295, 56 A. 559."—From 4 Mich. L. R. 68.

18. Thompson v. Germania Life Ins. Co., [Minn.] 106 N. W. 102. Private ways are construed to be appurtenant if possible. Nugent v. Watkins, 124 Ga. 150, 52 S. E. 158.

19. A grant of a yard for access to a particular lot does not inure to the benefit of other abutting owners. Zerbey v. Allan [Pa.] 64 A. 587.

20. Moss v. Chappell [Ga.] 54 S. E. 968.

21. Schlemmer Co. v. Steinman-Meyer Furniture Co., 7 Ohio C. C. (N. S.) 468. Easement of view extends over the entire length of the street. First Nat. Bank v. Tyson [Ala.] 39 So. 560.

Contra: Easement of light, air, and access, limited to portion immediately in front of lot. Hindley v. Manhattan R. Co. [N. Y.] 78 N. E. 276. Interference with street easement is a sufficient special injury to sustain a private action to abate a public nuisance. McLean v. Llewellyn Iron Works [Cal. App.] 83 P. 1082. Interference with view. First Nat. Bank v. Tyson [Ala.] 39 So. 560; Bischof v. Merchants' Nat. Bank [Neb.] 106 N. W. 996.

22. See 5 C. L. 1049.

23. A contract granting to a railroad company "the full and free right of way of the width of 50 feet" held to create an easement only. South Penn Oil Co. v. Calf Creek Oil & Gas Co., 140 F. 507.

24. Acts and declarations of the parties during negotiations are admissible to show whether a certain supply ditch was included in the grant of "privileges and appurtenances." Fayter v. North [Utah] 83 P. 742. Facts held to show that it was included. Id. Deed construed as giving grantee the use in common with the grantor of a way over grantor's land. O'Brien v. Murphy, 189 Mass. 353, 75 N. E. 700. A deed conveying one-half of a house, granting and reserving "all privileges and appurtenances" to the respective parts, creates cross easements in the land of the other for the maintenance of each portion extending beyond the line. Jeffrey v. Winter, 190 Mass. 90, 76 N. E. 282. The cellar being undivided, each had an easement in the half belonging to the other so long as the house stood. Id. Easement of way construed to be in favor of the two lots and not the houses thereon so that the destruction of the latter did not terminate it. Bailey v. Agawam Nat. Bank, 190 Mass. 20, 76 N. E. 449. Grants of lots according to a plat construed to give a fee to 100 feet in depth with mutual easements in the adjoining lot owners of passage over 10 feet at the rear of each lot, rather than 90-foot lots with an easement of way and fee in the grantor. Hence the grantees could jointly extinguish the easement and revest the whole title in themselves. City of Chicago v. Hogberg, 217 Ill. 180, 75 N. E. 542.

25. Flaherty v. Fleming, 58 W. Va. 669, 52 S. E. 857. Word "free" as used in a grant of a way construed to mean "without obstruction" and not "without compensation" (Id.), and hence no gate can be lawfully placed across it (Id.).

26. Unless the context indicates that they were used in a different sense, or unless as

adjoining landowners is binding only on those assenting to it.[27] An easement cannot be created by reservation in favor of a stranger,[28] nor can an easement be created by exception unless it has a physical existence at the time.[29] The word "heirs" is essential to the creation of an easement of perpetuity.[30]

Where the owner of two pieces of land so arranges and uses them as to create a quasi easement, a sale of either gives rise to an easement of implied grant in favor of the other,[31] if apparent[32] and reasonably necessary.[33] Such easement however will be implied more readily in favor of the grantee than the grantor,[34] and a covenant against incumbrances estops the latter from asserting such right.[35] One of the essentials of an easement of way by implied grant or adverse user is an interest in the termini.[36]

A way of necessity[37] is implied from the grant of lands so situated as to be accessible only over other lands of the grantor.[38] Strict necessity must exist,[39] and the party claiming such right has the burden of proof.[40] No way of necessity can be acquired in a stranger's lands.[41]

Creation by prescription.[42]—To create an easement by prescription an adverse,[43]

applied to the subject-matter they have a technical meaning. Flaherty v. Fleming, 58 W. Va. 669, 52 S. E. 857.

27. A material alteration releases prior signers. Hershman v. Stafford, 58 W. Va. 459, 52 S. E. 533.

28. Brace v. Van Eps [S. D.] 109 N. W. 147. Where plaintiffs became the owners of all the property to which a reservation of easement extended, defendants who are strangrs have no interest therein. Id.

29. Easement of way. Bailey v. Agawam Nat. Bank, 190 Mass. 20, 76 N. E. 449.

30. Bailey v. Agawam Nat. Bank, 190 Mass. 20, 76 N. E. 449.

31. Easement of air and light in favor of grantee of land so situated and improved as to imply party wall agreement. Lengyel v. Meyer [N. J. Eq.] 62 A. 548. Such easement arises notwithstanding an agreement that the wall shall be a party wall. Id. Easement of way in favor of grantee. Martin v. Murphy [Ill.] 77 N. E. 1126. Projecting porch. Wilson v. Riggs, 27 App. D. C. 550. Shed extending over divisional line. Watson v. Carver, 27 App. D. C. 555. Sale of furnace property held not to carry as appurtenant an adjacent lot used for dumping ashes and connected by a railroad. Empire Steel & Iron Co. v. Lawrence, 27 Pa. Super. Ct. 620.

32. Nonapparent drain. Biddison v. Aaron, 102 Md. 156, 62 A. 523.

33. Johnson v. Gould [W. Va.] 53 S. E. 798. Use of drain and stairway held not reasonably necessary. Gaynor v. Bauer [Ala.] 39 So. 749. Drain held not necessary to the premises conveyed. Biddison v. Aaron, 102 Md. 156, 62 A. 523. No implied grant in favor of the grantor will arise where he has access over his own land, although he was using a way over the conveyed premises at the time. O'Brien v. Murphy, 189 Mass. 353, 75 N. E. 700.

34. Wilson v. Riggs, 27 App. D. C. 550.

35. Empire Realty Corp. v. Sayre, 107 App. Div. 415, 95 N. Y. S. 371. Applicable to partition by heirs. Johnson v. Gould [W. Va.] 53 S. E. 798. Easement of a natural flowage of water feeding a spring. Id. Where upon partition of lands among the heirs it was agreed that those taking the back parcels should have a way across the portions abutting on the highway, such way rested in implied grant as a way of necessity, though not mentioned in the deeds. Graham v. Olson, 116 Mo. App. 272, 92 S. W. 728.

36. Stevens v. Headley [N. J. Eq.] 62 A. 887.

37. See 5 C. L. 1050. In Wisconsin, easements of necessity are limited almost exclusively to ways. Miller v. Hoeschler, 126 Wis. 263, 105 N. W. 790. No easement of necessity in door yard. Id.

38. Bentley v. Hampton [Ky.] 91 S. W. 266. Where heirs partition lands so that the portions received by some are inaccessible except over the lands of the others, an implied grant of a way of necessity arises, though the deeds are silent. Graham v. Olson. 116 Mo. App. 272, 92 S. W. 728.

39. No easement of way of necessity can exist where other possible ways are open. Bully Hill Copper Min. & Smelting Co. v. Bruson [Cal. App.] 87 P. 237. Suitableness or convenience is insufficient. Staples v. Cornwall, 99 N. Y. S. 1009. In a suit to establish a way of necessity, proof that the property may be made accessible in another way by a reasonable expenditure is admissible. Id. Where an easement of way of necessity is established on appeal and is remanded for further evidence on the issue of damages, the enforcement of the judgment will not be enjoined because of the opening of a new way. Lewis v. D'Albor [La.] 41 So. 31.

40. Staples v. Cornwall, 99 N. Y. S. 1009. Must prove that the other ways are not public. Id.

41. Must have been a common ownership, and the fact that both tenements were once public domain is insufficient. Bully Hill Copper Min. & Smelting Co. v. Bruson [Cal. App.] 87 P. 237. A way of necessity does not arise in favor of one whose two tracts merely corner, making passage impossible without touching others' lands. Earp v. White [Iowa] 108 N. W. 1117.

42. See 5 C. L. 1050.

43. Use of a divisional driveway established for mutual convenience held not adverse. Wilkinson v. Hutzel [Mich.] 12 Det. Leg. N. 870, 106 N. W. 207. Evidence held in-

open,[44] continuously hostile use,[45] under claim of right[46] with the knowledge of the fee owner, actual or constructive,[47] must concur.[48] Such an easement need not be necessary or convenient.[49] No prescriptive rights can be acquired by permissive use[50] or under a license,[51] but one may rest on use continued after revocation.[52]

The adverse user must continue for the statutory period,[53] which commences upon the accrual of a cause of action.[54] As a prescriptive easement presupposes a grant,[55] it can only arise where a valid grant could have been made in the first in-

sufficient to show adverse user. Null v. Williamson [Ind.] 78 N. E. 76. Adverse user **presumed** from continuous use for longer than statutory period. For 15 years or more. Schwer v. Martin [Ky.] 97 S. W. 12; Smith v. Pennington [Ky.] 91 S. W. 730. 23 years held sufficient to raise such a presumption. Ray v. Nally [Ky.] 89 S. W. 486. Where the use of a passway has been used for a large number of years, very slight evidence will be sufficient to show that it was used under claim of right. Schwer v. Martin [Ky.] 97 S. W. 12. Casts the **burden** upon the servient owner to prove permissive use. Schwer v. Martin [Ky.] 97 S. W. 12; Smith v. Pennington [Ky.] 91 S. W. 730; Sparks v. Rogers [Ky.] 97 S. W. 11; Smoot v. Wainscott [Ky.] 89 S. W. 176. The fact that permission was never asked or given does not overcome the presumption that it was hostile. Smith v. Pennington [Ky.] 91 S. W. 730. The use of a passway for 30 years raises a presumption of a grant. Sparks v. Rogers [Ky.] 97 S. W. 11; Smoot v. Wainscott [Ky.] 89 S. W. 176.

44. Projecting eaves held not such visible adverse user as to warrant a presumption of an implied grant against a bona fide purchaser. Puroto v. Chieppa, 78 Conn. 401, 62 A. 664.

45. A verbal protest is insufficient to arrest the running of time for the purpose of acquiring an easement. Morris Canal & Banking Co. v. Diamond Mills Paper Co. [N. J. Eq.] 64 A. 746. Use of water as often as required for irrigation held to be a sufficiently continuous use. Collins v. Gray [Cal. App.] 86 P. 983.

46. Where a passageway is used by one in common with the public it will be presumed that he claimed no particular right therein. Null v. Williamson [Ind.] 78 N. E. 76. A grant by a city of the right to construct an elevated road is sufficient to give color of title on which to acquire a prescriptive right. Hindley v. Manhattan R. Co. [N. Y.] 78 N. E. 276.

Inadmissible evidence: A statement in a petition for reduction of taxes that defendant would have to pay $8,000 to property owners to get the free use of its franchise is inadmissible to disprove claim of right by prescription. Hindley v. Manhattan R. Co. [N. Y.] 78 N. E. 276. Settlement with other abutting lot owners. Id.

47. Gray v. Cambridge, 189 Mass. 405, 76 N. E. 195. Construction of gates across a passway is proof of knowledge of the use and a recognition of the right. Smith v. Pennington [Ky.] 91 S. W. 730.

48. Falter v. Packard, 219 Ill. 356, 76 N. E. 495. The joint use of a drain and stairway on the dividing line has none of the elements of adverse possession. Gaynor v. Bauer [Ala.] 39 So. 749. The possession taken by an elevated railway company in constructing its road is open, hostile, and exclusive. Hindley v. Manhattan R. Co. [N. Y.] 78 N. E. 276.

Easements by prescription: Adverse user of a passageway for 23 years. Ray v. Nally [Ky.] 89 S. W. 486. Use of well under claim of right for 25 years. McPherson v. Thompson [Ky.] 89 S. W. 195. 15 years adverse user of a passageway. Id. Open and notorious user of a road under a claim of right for 15 years. Crigler v. Newman [Ky.] 91 S. W. 706. Use of water main to supply water for irrigating purposes for five years under claim of right. Collems v. Gray [Cal. App.] 86 P. 983.

49. Evidence held immaterial. Ray v. Nally [Ky.] 89 S. W. 486.

50. See ante this paragraph. Zerbey v. Allan [Pa.] 64 A. 587; Woodbury v. Allen [Pa.] 64 A. 590; Null v. Williamson [Ind.] 78 N. E. 76. The permissive use of a stream so as to flood land. Crabtree Coal Min. Co. v. Hamby's Adm'r [Ky.] 90 S. W. 226. Permissive during a part of the statutory time. Kolpack v. Kolpack [Wis.] 107 N. W. 457. Where a valuable consideration was given for an implied grant of a way of necessity, the subsequent use thereof is not permissive in the sense that no prescriptive rights can arise. Graham v. Olson, 116 Mo. App. 272, 92 S. W. 728. Evidence held to show permissive use of a passageway. Roberts v. Williams [Ky.] 90 S. W. 565.

51. License to maintain bridge. Staples v. Cornwall, 99 N. Y. S. 1009.

52. License to use way revoked by sale of the servient tenement and a prescriptive way subsequently acquired. Toney v. Knapp [Mich.] 12 Det. Leg. N. 872, 106 N. W. 552.

53. Under Rev. St. 1836, c. 24, § 61 (substantially embodied in Gen. St. 1860, c. 46, § 1), a prescriptive easement to maintain a boathouse on a public landing does not mature unless so maintained for 40 years. Gifford v. Westport, 190 Mass. 323, 76 N. E. 1042. Evidence held insufficient to show continuous user for such period. Id. In Arkansas a private way may be acquired in the same time that a public highway is created by adverse use, which is seven years. Clay v. Penzel [Ark.] 94 S. W. 705. The fact that each passing train is a trespass does not continue the period of user necessary to give a prescriptive easement. Hindley v. Manhattan R. Co. [N. Y.] 78 N. E. 276.

54. The prescriptive right to maintain a railroad bridge so as to turn the current and wash away land does not commence to run upon the construction of the bridge but from the first injury to the land. Roe v. Howard County [Neb.] 106 N. W. 587.

55. Where there has been open and continuous user for the statutory period, the owner of the servient estate cannot show that there was no grant, but he may explain

stance.[56] An agreement by the tenant of the dominant estate to pay rent for a way does not estop the landlord from asserting a prescriptive right,[57] nor the tenant upon subsequently acquiring the latter's interest.[58] Attempt to condemn a private way under a void statute does not preclude a party from asserting a prescriptive right in the same strip.[59] No prescriptive rights can be acquired in light and air in Connecticut.[60]

Creation by estoppel.[61]—An easement may be created by estoppel,[62] as where lots are sold with reference to a map or plat showing streets,[63] bridges,[64] or parcels reserved for a special use.[65] Such easements depend upon the language of the deed[66] read in the light of the circumstances.[67]

The condemnation of private lands for private ways.[68]—The way opened under the Arkansas statute to afford a private person access to a public highway is a public road,[69] and while absolute necessity for such road is not required,[70] the fact that it is shorter and more easily maintained is insufficient where it would greatly injure the servient estate.[71]

Natural easements[72] of drainage,[73] of lateral and subjacent support, exist in favor of adjacent and surface owners.[74]

the use. Null v. Williamson [Ind.] 78 N. E. 76.

56. Johnson v. Philadelphia, etc., R. Co. [Del.] 62 A. 86. Hence a longitudinal easement of way along a railway right of way cannot be acquired by prescription. Id.

57. Schwer v. Martin [Ky.] 97 S. W. 12.

58. Since given in a different capacity. Schwer v. Martin [Ky.] 97 S. W. 12.

59. McKim v. Carre [Kan.] 83 P. 1105.

60. Gen. St. 1902, § 4046. Puroto v. Chieppa, 78 Conn. 401, 62 A. 664.

61. See 5 C. L. 1051. See, also, ante this section, A grant, etc.

62. A party is not estopped unless he has misled another, and the failure to object to the construction of a down-river dam does not create an easement of floodage by estoppel. Towaliga Falls Power Co. v. McElroy, 124 Ga. 1014, 53 S. E. 682.

63. The designation of a street as a boundary is an implied covenant that it shall be open to the grantee as a public street. Barnes v. Philadelphia, etc., R. Co., 27 Pa. Super. Ct. 84. Streets dedicated but unaccepted by the public. Van Duyne v. Knox Hat Mfg. Co. [N. J. Eq.] 64 A. 149. Unless the land is platted it does not come within Act of May 9, 1889 (P. L. 173), providing for the abandonment of platted streets not used. Barnes v. Philadelphia, etc., R. Co., 27 Pa. Super. Ct. 84. Where lands are platted and lots sold with reference thereto, the purchasers acquire **appurtenant easements** in the streets. United States v. Certain Lands in Jamestown, 140 F. 463.

Rule does not apply where conveyance and attendant circumstances negative such easement. Neely v. Philadelphia, 212 Pa. 551, 61 A. 1096. The careful and minute description of the land granted held sufficient to negative the grant of an easement. Id. A sale of lots with reference to map showing a street ending in a cul-de-sac does not create an implied easement in the street toward the closed end. Stevens v. Headley [N. J. Eq.] 62 A. 887. One purchasing with knowledge of an agreement to close a street has no easement. Id. Evidence held to show notice Id.

64. Where the owner of outlying land plats the same and constructs a bridge connecting the street with the city, a sale of lots with reference to such bridge carries an implied grant of an easement. Oney v. West Buena Vista Land Co., 104 Va. 580, 52 S. E. 343.

65. When one purchases a lot with reference to a map designating a strip as "reserved for railroad purposes," he acquires as appurtenant to his lot the right to have it used for that purpose alone. Temple v. Sanborn [Tex. Civ. App.] 14 Tex. Ct. Rep. 715, 91 S. W. 1095.

66. Where lots are sold by reference to a filed map and the deed expressly extends the lots to include one-half of the street, there is no implied easement in favor of the adjoining lots over the street. In re West 214th St., 109 App. Div. 575, 96 N. Y. S. 557.

67. Young v. Pennsylvania R. Co., 72 N. J. Law, 94, 62 A. 529. Reference to an avenue as the boundary held insufficient to reserve a private easement of way, especially in view of the fact that the deed was given in settlement of a dispute respecting the rights of the parties therein. Id. Where lots are sold with reference to a plat showing a park, declarations of the seller that such park would be kept open are admissible in the construing of the contract. Marshall v. Columbia & E. C. Elec. St. R. Co. [S. C.] 53 S. E. 417. Not objectionable as varying the terms of a written instrument. Id.

68. See 5 C. L. 1052. See, also, Eminent Domain, 5 C. L. 1097.

69. Kirby's Dig. § 3010. Pippin v. May [Ark.] 93 S. W. 64. Eminent domain may be exercised in opening such road. Id.

70. Where the existing road is longer and its maintenance expensive and travel difficult because of its wet and boggy condition, a new road may be opened if it can be done without great injury to the servient estate. Pippin v. May [Ark.] 93 S. W. 64. Question of necessity is for the court, who may consider the relative benefit and injury and the number of people served. Id.

71. Pippin v. May [Ark.] 93 S. W. 64.

72. See 5 C. L. 1052.

Negative easements[75] may be created by restrictive covenants as to the use of land.[76]

§ 2. *Location, maintenance, and extent of right.*[77]—The extent[78] and location of an easement are to be ascertained from the terms of the grant,[79] and if they be general, reference may be had to the intended purpose and acts of the parties.[80] A practical location by the parties will control[81] unless it violates the clear terms of the grant.[82]

Maintenance.—In the absence of a special contract or a prescriptive right to the contrary, the beneficiary and not the grantor of an easement must keep the same in repair.[83]

Extent of use.[84]—The use to which an easement may be put depends upon the terms of the grant,[85] the purpose for which it was created,[86] and the intention of the parties as shown by attendant circumstances.[87] Thus a way of necessity is no basis for a claim of right therein as a public way.[88] A practical construction of an easement general in its terms by exercise in a particular manner fixes the extent of the use.[89] A grant of an easement is construed in favor of the grantees.[90] The grant

73. See Waters and Water Supply, 6 C. L. 1840.

74. See Adjoining Owners, 7 C. L. 28.

75. See 5 C. L. 1052.

76. A high board fence held to be a "building" within the meaning of a covenant against the erection of certain buildings. MacGregor v. Linney, 6 Ohio C. C. (N. S.) 524. See Buildings and Building Restrictions, 7 C. L. 507.

77. See 5 C. L. 1052.

78. A grant of an easement of way to a railroad "to so much and no more * * * than such company * * * would have the right to condemn," held to grant an easement of 100 feet in width under Rev. Code c. 61. Seaboard Air Line R. Co. v. Olive [N. C.] 55 S. E. 263. The space between buildings through which a way "sufficiently wide for all purposes of travel" exists simply limits the boundaries and does not mark them. O'Brien v. Murphy, 189 Mass. 353, 75 N. E. 700.

79. A reservation of an easement of way ten feet wide abutting on the southwesterly "end of the strip," means next to the southwesterly boundary and is not indefinite as to location. Reed v. Gasser [Iowa] 106 N. W. 383.

80. O'Brien v. Murphy, 189 Mass. 353, 75 N. E. 700.

81. Courts will not disturb a practical location. Bowling v. Rouse [Ky.] 90 S. W. 1073. A way adopted and used for thirty years as the way of necessity will be treated as the one granted. Bentley v. Hampton [Ky.] 91 S. W. 266. Driveway in use adopted by court. Wait v. Brock [Iowa] 109 N. W. 471.

82. Exercise of lesser right than that conferred by the grant, when viewed in the light of the circumstances, etc., does not limit. Winslow v. Vallejo [Cal.] 84 P. 191.

83. Bridge. Oney v. West Buena Vista Land Co., 104 Va. 580, 52 S. E. 343. The owner of a second story has no equitable right to compel the owner of the lower to keep it in repair so as to furnish support, in the absence of a contract so to do. Jackson v. Bruns [Iowa] 106 N. W. 1.

84. See 5 C. L. 1053.

85. Under appropriate rules of construction, and from the situation of the lands to which it is appurtenant. Thompson v. Germania Life Ins. Co. [Minn.] 106 N. W. 102. Should not be extended by legal construction beyond the objects originally contemplated and agreed upon. Id. A deed granting "the right of way" over the land in question "for the purpose of constructing and maintaining any and all levees that may be built thereupon" grants only one right of way (Board of Directors of St. Francis Levee Dist. v. Bowen [Ark.] 95 S. W. 993), and where one has been located no other can be constructed (Id.). An easement of a drainage ditch held to authorize upper landowners to construct additional drains into it, although going to a lower level than would be affected in the state of nature. Neuhring v. Schmidt [Iowa] 106 N. W. 630.

86. A private easement of way does not authorize the laying of water pipes therein. Van Duyne v. Knox Hat Mfg. Co. [N. J. Eq.] 64 A. 149. An easement for pipes conveying water from a certain pond to the city reservoir does not authorize its use for distributing pipes. Gray v. Cambridge, 189 Mass. 405, 76 N. E. 195.

87. Whether an easement is exclusive depends upon the nature of the occasion, the use shown, and the terms of the creative agreement. Thompson v. Germania Life Ins. Co. [Minn.] 106 N. W. 102. In determining the nature and extent of an easement recourse may be had to the attendant circumstances (Towaliga Falls Power Co. v. McElroy, 124 Ga. 1014, 53 S. E. 682), and the situation of the parties (Winslow v. Vallejo [Cal.] 84 P. 191). Where an easement of floodage was given when only a seven foot dam was contemplated, it did not include the right of floodage for a 25 foot dam, although general in its terms. Towaliga Falls Power Co. v. McElroy, 124 Ga. 1014, 53 S. E. 682.

88. Town of Como v. Pointer [Miss.] 40 So. 260.

89. Winslow v. Vallejo [Cal.] 84 P. 191. Laying of a single 10-inch water pipe held to construe a general grant of easement

of an "alley" does not authorize its use for drainage or a stairway.[91] The owner of the dominant estate must so exercise his rights as not to unnecessarily injure the servient tenement.[92] The prescriptive right to use the waters of a well includes the right of access.[93] Where an easement of light and air is granted by a party wall agreement,[94] it can be cut off only by the servient owner's use of the wall as contemplated.[95]

§ 3. *Transfer and assignment.*[96]—Appurtenant easements are inseparable from the land[97] and pass with the conveyance of the dominant estate[98] without special mention.[99] Easements in gross are personal to the beneficiary and hence do not pass with the land with which they are used.[1] An appurtenant easement acquired after the execution of a mortgage upon the dominant estate inures to the benefit of the mortgagee.[2] A purchaser of the servient estate with actual[3] or constructive notice[4] of the easement takes it subject thereto, and equity will enforce the easement against him.[5]

§ 4. *Extinguishment and revival.*[6]—By the terms of a grant the grantor may have the right to terminate the easement upon the happening of certain events,[7] and such right passes with the servient estate.[8] An easement created by deed can only be extinguished by grant or adverse possession,[9] and an unexecuted parol grant is insufficient.[10] The destruction of a reservoir does not extinguish the easements for supply pipes.[11] An easement may be extinguished by adverse user[12] by the owner of the servient estate for the statutory period.[13] Changes in the course of an easement by consent do not affect it.[14]

for water pipes so as to preclude the city from subsequently laying additional pipes. Id.

90. Thompson v. Germania Life Ins. Co. [Minn.] 106 N. W. 102.

91. Though they existed at the time of partition. Gaynor v. Bauer [Ala.] 39 So. 749. But see Watts v. I. Johnson & B. Real Estate Corp. [Va.] 54 S. E. 317, holding that it includes the right of sewerage, and entrance of light and air.

92. A grant of an easement for a track does not authorize the company to so construct it as to divert water onto the grantor's land. Crabtree Coal Min. Co. v. Hamby's Adm'r [Ky.] 90 S. W. 226.

93. McPherson v. Thompson [Ky.] 89 S. W. 195.

94, 95. Lengyel v. Meyer [N. J. Eq.] 62 A. 548.

96. See 5 C. L. 1053.

97. Reservation of the easement of air and light and the benefits of a suit for the infraction thereof held ineffectual. McKenna v. Brooklyn Union El. R. Co., 184 N. Y. 391, 77 N. E. 615. Freund v. Biel, 99 N. Y. S. 1067. Nor does it create an equitable lien on such easements. McKenna v. Brooklyn Union El. R. Co., 184 N. Y. 391, 77 N. E. 615. Also insufficient to create a trust in the easements. Freund v. Biel, 99 N. Y. S. 1067. A release by the grantee is valid. McKenna v. Brooklyn Union El. R. Co., 184 N. Y. 391, 77 N. E. 615. A resulting trust, however, exists in favor of the grantor in money received for a release. Freund v. Biel, 99 N. Y. S. 1067. McKenna v. Brooklyn Union El. R. Co., 184 N. Y. 391, 77 N. E. 615.

98. Spencer v. Lighthouse, 99 N. Y. S. 1015. Implied grant of a way of necessity. Graham v. Olson, 116 Mo. App. 272, 92 S. W. 728. Where an easement is expressly created by reservation, affirmative proof of user is not necessary to establish a right which would pass. Reed v. Gasser [Iowa] 106 N. W. 383.

99. Reed v. Gasser [Iowa] 106 N. W. 383; Martin v. Murphy [Ill.] 77 N. E. 1126.

1. Savidge v. Merrill [N. J. Eq.] 62 A. 946.

2. Deed of trust. Especially where it contains a clause granting "all easements, rights, privileges," etc. Warner v. Grayson, 200 U. S. 257, 50 Law. Ed. —.

3. Shed extending over onto the purchased lot. Watson v. Carver, 27 App. D. C. 555.

4. One purchasing land over which there is an open and visible easement of way is charged with notice. Sparks v. Rogers [Ky.] 97 S. W. 11; Ray v. Nally [Ky.] 89 S. W. 486; Schwer v. Martin [Ky.] 97 S. W. 12; Bentley v. Hampton [Ky.] 91 S. W. 266. Purchasers of an equity of redemption in property after an apparent easement had attached and enured to the mortgagee take subject to it. Warner v. Grayson, 200 U. S. 257, 50 Law. Ed. —.

5. Injunction against obstructions is the usual remedy. Bailey v. Agawam Nat. Bank, 190 Mass. 20, 76 N. E. 449.

6. See 5 C. L. 1054.

7. As failure to maintain a dock at the terminus of an easement of way. Ellis v. Pelham, 106 App. Div. 145, 94 N. Y. S. 103.

8. Ellis v. Pelham, 106 App. Div. 145, 94 N. Y. S. 103.

9. Spencer v. Lighthouse, 99 N. Y. S. 1015.

10. Levine v. Carroll, 121 Ill. App. 105.

11. Reservoir may be rebuilt. Gray v. Cambridge, 189 Mass. 405, 76 N. E. 195.

12. Construction of gates across an easement of way which still permit of use by the dominant owner is not adverse. Reed

Abandonment.[15]—An easement may be extinguished by abandonment, but to constitute an abandonment there must be a nonuser[16] accompanied by an intent to abandon.[17]

Merger.—The vesting of the absolute title to both the servient and dominant estates in the same person extinguishes the easement.[18]

Revival.—Where an easement of way has been extinguished by failure to maintain a dock at the terminus, the rebuilding of the dock does not work a revival.[19]

Reverter.—There is a reverter where an easement for a particular use is abandoned.[20]

§ 5. *Interference with easements and remedies and procedure in respect thereto.*[21]—Ordinarily the owner of the servient tenement may use it in any manner not unreasonably interfering with the use granted.[22] The beneficiary of an easement of way may remove obstructions unlawfully placed therein.[23] An easement cannot be taken without compensation,[24] but the enlargement of the servitude by eminent domain is not necessarily a taking.[25]

Form of remedy.[26]—The appropriate remedy for the disturbance of an easement is an action at law for damages,[27] or a suit in equity to enjoin the interfer-

v. Gasser [Iowa] 106 N. W. 383; Martin v. Murphy [Ill.] 77 N. E. 1126.

13. An obstruction does not extinguish the easement unless continued for the statutory period. Crigler v. Newman [Ky.] 91 S. W. 706.

Extinguished: Easement of way obstructed for twenty-one years. Woodbury v. Allen [Pa.] 64 A. 590. Easement of way lost by the erection of a substantial fence maintained for twenty years. In re West 214th St., 109 App. Div. 575, 96 N. Y. S. 557.

14. Crigler v. Newman [Ky.] 91 S. W. 706.

15. See 5 C. L. 1054.

16. Must be a total nonuser. Failure to use an alley for passage does not constitute an abandonment where still used for sewerage and for light and air. Watts v. Johnson & R. Real Estate Corp. [Va.] 54 S. E. 317. Nonuser of easement of way by railroad company and user by the owner of the servient estate under Revisal 1905, § 388 (Rev. Code c. 65, § 23), can not operate as a bar or be the basis for a presumption of an abandonment. Seaboard Air Line R. Co. v. Olive [N. C.] 55 S. E. 263.

17. Oney v. West Buena Vista Land Co., 104 Va. 580, 52 S. E. 343. Failure to repair a bridge for an unreasonable length of time will constitute an abandonment of the easement. Id. Not, however, where the iron work was well preserved and the owner still used for foot passage and insisted upon repairing. Id. An easement in a hallway is not extinguished by the payment of rent in connection with the cleaning of the same. Spencer v. Lighthouse, 99 N. Y. S. 1015.

18. Zerbey v. Allan [Pa.] 64 A. 587.

19. Ellis v. Pelham, 106 App. Div. 145, 94 N. Y. S. 103.

20. Gift of land by "warranty" deed for "railroad purposes only" held to revert. Mobile, etc., R. Co. v. Kamper [Miss.] 41 So. 513.

21. See 5 C. L. 1054.

22. Thompson v. Germania Life Ins. Co. [Minn.] 106 N. W. 102; Galletly v. Bockius [Cal. App.] 82 P. 1109. In an action to open a passageway the court may permit gates if reasonably necessary. Bowling v. Rouse [Ky.] 90 S. W. 1073. Gates across a passway long maintained without objection and reasonably necessary may be maintained. Smith v. Pennington [Ky.] 91 S. W. 730. May subject to additional easements if they do not conflict. Id. Can not change the physical condition so as to destroy an easement. Johnson v. Gould [W. Va.] 53 S. E. 798.

Uses held not to interfere unreasonably: Light wells duly arched over do not interfere with easement of way. Mershon v. Walker [Pa.] 64 A. 403. Gates across a private way over agricultural lands. Watson v. Hoke [S. C.] 53 S. E. 537.

Unreasonable: Construction of a ditch materially affecting a spring. Johnson v. Gould [W. Va.] 53 S. E. 798. Doors and shutters extending out into the passageway held an interference with the easement. Mershon v. Walker [Pa.] 64 A. 403. Also a balcony extending over it at insufficient height to clear high wagons. Id. A prescriptive right to swing doors and shutters over an easement of way does not include the right to have the door occupy the way when open. Id. Where no gate was constructed across a private way for eight years it tends to negative the right. Flaherty v. Fleming, 58 W. Va. 669, 52 S. E. 857.

23. O'Brien v. Murphy, 189 Mass. 353, 75 N. E. 700.

24. Eminent domain. United States v. Certain Lands in Jamestown, 140 F. 463.

25. The conversion of a private way into a public way does not injure the easement. No compensation can be recovered. Clayton v. Gilmer County Ct., 58 W. Va. 253, 52 S. E. 103. The construction and operation of an elevated train system is a taking of the easements of light, air, and access for which compensation must be made. Caldwell v. New York & H. R. Co., 97 N. Y. S. 588.

26. See 5 C. L. 1055.

27. Can only recover for damages accruing since the purchase of the dominant estate. Couson v. Wilson [Cal. App.] 83 P. 262. Evidence of damage to an easement of way by removal of culverts before plaintiff acquired the dominant tenement is inadmissi-

ence.[28] Equity however will not assume jurisdiction unless the right to the easement is clear,[29] but will transfer the case to a court of law for adjudication,[30] granting a temporary injunction in the meantime.[31]

Parties.[32]

Pleading and evidence.[33]—A petition to enjoin interference must show the existence of the easement,[34] its location,[35] and that complainant has no adequate remedy at law.[36] Action to compel the removal of obstructions in a private way may be prosecuted against the obstructors severally.[37] Before an injunction will issue plaintiff must show an easement, the extent of it, and interference actual or threatened.[38]

Findings in respect to extent of easements are definite if couched in terms locally well understood[39] and certain, though the utmost particularity is lacking.[40]

ECCLESIASTICAL LAW; EIGHT-HOUR LAWS, see latest topical index.

EJECTMENT (AND WRIT OF ENTRY).

§ 1. **Cause of Action and Nature of Remedy (1212).** Title in Plaintiff (1214). Prior Possession (1215). Nature of the Remedy (1215).
§ 2. **Defenses (1215).**
§ 3. **Parties (1216).**
§ 4. **Process and Pleading (1216).**
§ 5. **Evidence (1217).**
§ 6. **Trial and Judgment (1220).**
§ 7. **New Trial (1221).**
§ 8. **Mesne Profits and Damages (1221).**
§ 9. **Allowance for Improvements and Expenditures (1221).**

§ 1. *Cause of action and nature of remedy.*[41]—Ejectment, being a possessory action,[42] lies only for the recovery of corporeal things,[43] although in New York it

ble. Id. A finding of specific damages for their removal is irrelevant unless it shows that they occurred since plaintiff acquired the estate. Id.

28. Flaherty v. Fleming, 58 W. Va. 669, 52 S. E. 857. City enjoined from laying additional pipes. Winslow v. Vallejo [Cal.] 84 P. 191. Where an easement of way is being permanently obstructed, a court of equity will restrain the continuing trespass. Wilson v. Cather, 214 Pa. 3, 63 A. 190. A mandatory injunction will lie to compel the removal of an obstruction in a private way. Hershman v. Stafford, 58 W. Va. 459, 52 S. E. 533. The easement of way of a railroad company will be protected from interference without regard to the solvency of the person interfering. Seaboard Air Line R. Co. v. Olive [N. C.] 55 S. E. 263. There **must be a threatened interference.** Forrester v. Island Heights Ass'n [N. J. Eq.] 62 A. 775. A transfer of the fee in the land is no interference. Id. The drafting of a resolution by a stockholder of a corporation for submission to the council indicating an intention to use property in violation of a negative easement, where it is not shown that he acted for the corporation or that the private interests were not to be adjusted, does not show a threatened violation. Id.

29. Wilson v. Cather, 214 Pa. 3, 63 A. 190; Bernei v. Sappington [Md.] 62 A. 365. Need not have been adjudicated where the evidence is of such a nature as would not require submission to a jury if adduced in a law court. Wilson v. Cather, 214 Pa. 3, 63 A. 190.

30. Where a bona fide contention as to the existence of an easement arises. Bernei v. Sappington [Md.] 62 A. 365.

31. Where the threatened injury will be great and irreparable. Bernei v. Sappington [Md.] 62 A. 365. Where the way has been closed for a number of years and no timely objection was made, temporary injunction will not issue. Id.

32, 33. See 5 C. L. 1055.

34. A general allegation of adverse user for the required period is sufficient without alleging the extent of the use. Smoot v. Wainscott [Ky.] 89 S. W. 176. Pol. Code, § 672, held not applicable to private ways acquired by prescription, and hence a petition need not allege that the way was laid out by the petitioner or that the defendant had notice of the user. Nugent v. Watkins, 124 Ga. 150, 52 S. E. 158.

35. Failure to specifically describe and locate an easement of way can not be reached by demurrer but is subject to a motion to make more specific. Smoot v. Wainscott [Ky.] 89 S. W. 176.

36. Gaynor v. Bauer [Ala.] 39 So. 749.

37. Hence not error to deny defendant's motion to make the other obstructors defendants. Hershman v. Stafford, 58 W. Va. 459, 52 S. E. 533. In an action to abate an obstruction in right of way, evidence of obstructions by others is irrelevant. McLean v. Llewellyn Iron Works [Cal. App.] 83 P. 1082.

38. Seaboard Air Line R. Co. v. Olive [N. C.] 55 S. E. 263.

39. A finding that plaintiff had customarily used forty inches of water is not indefinite because no standard of measure is specified, the regular measure of the locality being presumed. Collins v. Gray [Cal. App.] 86 P. 983.

has been successfully invoked to recover space above the surface.[44] Plaintiff must have the immediate right of possession[45] at the commencement of the action,[46] and

40. A finding that plaintiff has an interest in a pipe line for the purpose of conveying sufficient water for irrigation and the extent of such interest is a sufficient finding of an easement and ownership by plaintiff. Collins v. Gray [Cal. App.] 86 P. 983.

41. See 5 C. L. 1056.

42. Where defendant is in possession of a house partly built on land claimed by plaintiff and partly on land conceded to belong to defendant, ejectment is the appropriate remedy. Cromwell v. Hughes [Mich.] 13 Det. Leg. N. 107, 107 N. W. 323. Upon disclaimer of possession by defendant it is error to decree title in plaintiff. Calumet Coal Co. v. Cordova Coal, Land & Imp. Co. [Ala.] 40 So. 390. A finding that plaintiff was seised in fee and entitled to possession is sufficient to sustain a judgment though the evidence is insufficient to show a fee within the Code. Dondero v. O'Hara [Cal. App.] 86 P. 985.

43. A mere license to go upon lands to prospect and mine for oil will not sustain an action of ejectment unless possession has been taken. Kelly v. Keys, 213 Pa. 295, 62 A. 911. Immaterial that his right was exclusive and that oil has been mined, since his interest in the oil is personalty. Id.

44. Action under Code Civ. Proc. § 3343, subd. 20, to recover possession of space occupied by wires. Butler v. Frontier Tel. Co., 109 App. Div. 217, 95 N. Y. S. 684, afd. [N. Y.] 79 N. E. 716.

Note: The foregoing case has attracted general attention to the novelty of its facts and has been the subject of some valuable comment hereafter quoted: "Although an action on the case for a nuisance is allowed in England and in the United States for projections of parts of buildings over adjoining land (Fay v. Prentice, 14 L. J. C. P. [N. S.] 298; Codman v. Evans, 89 Mass. 431) the advantages of ejectment have led in this country to attempts to apply it to such situations. The cases, however, are so few and contradictory that there is still occasion for a reference to fundamental principles in the effort to work out a correct result. In legal contemplation land is regarded more as a solid or volume than as a surface, although its third dimension is necessarily indeterminate. As it may be divided vertically, so there may be horizontal divisions, and there may be an estate in the minerals underneath or in the upper story of a house without ownership of the surface. It is quite possible, therefore, that there should be several estates coextensive with the same lateral limits, and that different occupants should be in possession above the surface, on the surface, and below it. But as description of land in the ordinary form presumptively includes everything above and below the surface, so possession of the soil is presumed to extend up and down unless rebutted by the possession of another. For example, it has been held that where adequate adverse possession of the surface gave title to it, the title did not cover mines in operation underneath. Delaware & Hudson Canal Co. v. Hughes, 133 Pa. 66, 63 Am. St. Rep. 743, 38 L. R. A. 826. It would be surprising, therefore, if ejectment were restricted to ousters from the surface estate, and it has not been so restricted. From early times up to the present, ejectment has lain for the wrongful occupation of a mine (Comyn v. Kyneto, Cro. Jac. 150; Moragne v. Moragne [Ala.] 39 So. 161), or of the upper story of a house (Ford v. Lerke, Noy 109; Brady v. Kreuger, 8 S. D. 464, 59 Am. St. Rep. 771). What difference in principle is there in the case of projecting eaves, walls, bay-windows, and foundation stones? Sherry v. Frecking, 4 Duer [N. Y.] 452; Murphy v. Bolger Brothers, 60 Vt. 723. See McCourt v. Eckstein, 22 Wis. 153. The dispossession of the owner from a part of his land, though small, has been actual and permanent in its nature. The disseisor may not be personally present, but he has subjected the land to a purpose of his own to the exclusion of the owner. Quicksilver Mining Co. v. Hicks, 4 Sawy. [U. S.] 688. The fact that the instrument of occupation does not rest on the soil is of no consequence. The upper stories of a great office building in New York have been built depending for their support on an adjoining building, yet they would seem to constitute an effectual occupation of the premises. There is no greater difficulty in the sheriff delivering possession than in the case of underground encroachments from neighboring land. It seems hard to escape from the above considerations. The courts that refuse the action rest their decisions mainly on the apparent intangible nature of the invasion, which they regard as affecting not a loss of possession, but merely an injury to its exercise. Aiken v. Benedict, 39 Barb. [N. Y.] 400. See Norwalk Heating & Lighting Co. v. Vernam, 75 Conn. 662, 96 Am. St. Rep. 246. Some recent Wisconsin cases adopt the view that where the plaintiff has occupied to the line under the projecting eaves he has elected to treat the encroachment as a mere trespass. Rasch v. Noth, 99 Wis. 285. This reasoning is evidently founded on the notion that an ouster, to be effective, must be from the whole of a vertical plane, including the surface, but the fallacy in thus mistaking a presumption for a necessity has already been shown. New York has vacillated, but the latest case on the question decides that ejectment will lie for a telephone wire strung without right over the plaintiff's premises. Butler v. The Frontier Tel. Co., 109 App. Div. 217. A more extreme case within the principle could scarcely be imagined, but evidently no requisite is lacking. The defendant assumed continuous control of the wire, and used it for his own business purposes. It was not a dead wire abandoned on the premises, and control yielded up. On this distinction a different result might be reached in the case of overhanging branches of trees, for there in many instances the adjoining landowner makes no assumption of possession. See further 14 Harv. L. Rev. 291."—From 19 Harv. L. R. 369.

"The case of Butler v. Frontier Tel. Co., 109 App. Div. 217, 95 N. Y. S. 684, is apparently unique upon its facts. However, the

hence it will not lie against a vendee in possession under an executory contract of sale without default,[47] nor against a tenant during term[48] unless he has forfeited his rights therein.[49] While defendant must be in possession[50] unless otherwise provided by statute,[51] it is no defense that his codefendants are not.[52] Statutory notice or demand of possession is necessary in certain cases to fix the possessory right.[53]

Title in plaintiff.[54]—Plaintiff must recover on the strength of his own title[55] and not on the weakness of defendant's,[56] and hence must show a title good against the world or against defendant by estoppel,[57] and such title must be legal as dis-

same result has been reached in the case of an overhanging wall (Sherry v. Frecking, 4 Duer [N. Y.] 452), a roof (Murphy v. Bolger, 60 Vt. 723), and a projecting foundation (McCourt v. Eckstein, 22 Wis. 148). The authority of Sherry v. Frecking, 4 Duer [N. Y.] 452, has been diminished by Aiken v. Benedict, 39 Barb. [N. Y.] 400, and Vrooman v. Jackson, 6 Hun [N. Y.] 326,—cases holding that such an ejectment will not lie because the sheriff cannot give possession of the locus in dispute, that is, the air. But ejectment will lie for land under water (Blakslee Mfg. Co. v. Iron Works, 129 N. Y. 155; Nichols v. Lewis, 15 Conn. 137), and by analogy it would seem that in the principal case a dispossession of the defendant would constructively re-establish the possession of the plaintiff, he being in possession of the surface of the land. The rule laid down in Aiken v. Benedict, supra, is applicable only where the thing, possession of which is sought, is not definitely pointed out (Doe v. Plowman, 1 East, 441), or is something lying only in grant (Wood v. Turnpike Co., 24 Cal. 474; L. & N. R. Co. v. Massey, 136 Ala. 156)."—From 6 Columbia L. R. 206.

One annotator questions the principle as follows: "The question involved in the present case is one which has been variously decided. At common law ejectment would not lie for anything whereon entry could not be made. 2 Crabb, Real Property, 710. It was first held in New York that it would lie for anything attached to the soil of which the sheriff could deliver possession. Jackson v. May, 16 Johns. [N. Y.] 184. But later in Sherry v. Frecking, 4 Duer [N. Y.] 452, such action was held maintainable where the injury consisted of overhanging eaves, on the theory that land extends upwards as well as downwards as far as the owner of the subjacent soil may see fit to extend it (3 Kent's Com. 487); this case being overruled by Aiken v. Benedict, 39 Barb. [N. Y.] 400, and Vrooman v. Jackson, 62 Hun [N. Y.] 362, holding nuisance to be the proper remedy. Thus the present case reverses the former New York rule and is in accord with the weight of recent authority. Murphy v. Bolger Bros., 60 Vt. 723; McCourt v. Eckstein, 22 Wis. 153. But that nuisance is the proper remedy, see Wood, Nuisance, § 105; Tyler, Eject. 38."—From 15 Yale Law J. 246.

45. Marks v. McGookin, 127 Iowa 716, 104 N. W. 373.

46. Deas v. Sammons [Ga.] 55 S. E. 170. Evidence of a subsequently acquired title is inadmissible. Id. A premature suit by the landlord is not cured by expiration of the lease pending the action. Jackson Brewing Co. v. Wagner [La.] 40 So. 528.

47. Coles v. Meskimen [Or.] 85 P. 67; Toledo, etc., R. Co. v. Turney, 7 Ohio C. C. (N. S.) 370.

48. Jackson Brewing Co. v. Wagner [La.] 40 So. 528.

49. Mineral lands lease. Brooks v. Gaffin [Mo.] 95 S. W. 418. Notice by tenant that he will not vacate at end of term does not give rise to an immediate cause of action. Jackson Brewing Co. v. Wagner [La.] 40 So. 528. Where right of re-entry is reserved in lease upon covenant broken, ejectment lies upon default. Palmieri v. Antinozzi, 47 Misc. 237, 95 N. Y. S. 865. No notice need be given unless the lease so provides. Id.

50. Moore v. McClain [N. C.] 54 S. E. 382. An action under Comp. Laws § 11,164 to recover real estate will not lie against one not in possession, though his assignees are. Delaney v. Michigan Elm, Hoop & Lumber Co. [Mich.] 12 Det. Leg. N. 441, 104 N. W. 658.

51. Act March 29, 1824 (P. L. 168), authorizing ejectment against the tax purchaser of vacant lands upon appearance after notice by publication, held inapplicable where he appeared without such notice. Kreamer v. Voneida, 213 Pa. 74, 62 A. 518. Return of the sheriff held to show that the land was vacant. Id.

52. Dennes v. Price [Ala.] 41 So. 840.

53. Statutory notice held only applicable to actions between landlord and tenant. Carlson v. Curran [Wash.] 85 P. 627.

54. See 5 C. L. 1057.

55. Cline v. Hays [Ind. App.] 76 N. E. 257; Wilson v. Gaylord [Ark.] 92 S. W. 26; McGuire v. Blount, 199 U. S. 142, 50 Law. Ed. —. Where the answer is a general denial plaintiff must recover on the strength of his own case. Link v. Campbell [Neb.] 104 N. W. 939. Plaintiff may rely upon the title secured by five years' possession under a recorded tax deed valid on its face as against one wrongfully dispossessing him. Nicholson v. Hale [Kan.] 85 P. 592. Two year statute of limitation has no application to such an action. Id.

56. Krause v. Nolte, 217 Ill. 298, 75 N. E. 362; Ropes v. Minshew [Fla.] 41 So. 538; Malone v. La Croix [Ala.] 41 So. 724. Where plaintiff fails to show that the land is embraced within his title, it is immaterial whether defendant's deed includes it. Wade v. McDougle [W. Va.] 52 S. E. 1026.

57. Rumbough v. Sackett [N. C.] 54 S. E. 421; Campbell v. Everhart, 139 N. C. 503, 52 S. E. 201. One taking possession of land under another cannot dispute his title until possession is restored. Id. Hence plaintiff may prove a title from one under whom defendant's grantor took and continued possession. Id. Court held to have invaded the province of the jury in holding on the evidence that possession was so acquired. Id.

tinguished from equitable.[58] Where a husband is a mere pro forma party to a suit by the wife, recovery cannot be had upon his title.[59] The laches of defendant in taking possession is unavailable to plaintiff.[60] In ejectment all plaintiffs must prevail or none.[61]

Prior possession[62] unless abandoned[63] is sufficient against a mere intruder,[64] but not as against one who acquires peaceable possession in good faith under color of title.[65]

Nature of the remedy.[66]—Ejectment is a legal remedy[67] but may be converted into an equitable proceeding by the interposition of equitable defenses[68] or demands for equitable relief.[69] Injunction may issue in aid of a pending action of ejectment.[70]

§ 2. *Defenses.*[71]—Since plaintiff must recover on the strength of his own title,[72] defendant may show a fatal defect in plaintiff's chain[73] or title in a third person,[74] unless plaintiff has had prior possession and defendant is a mere trespasser,[75] but the title of such third person must be one which would sustain an ac-

Defendant lessee of one against whom plaintiff's title had been adjudicated superior. Minnesota Debenture Co. v. Johnson [Minn.] 107 N. W. 740.

58. Where plaintiff claims title in fee, he must show a fee simple title at law as distinguished from an equitable one. Krause v. Nolte, 217 Ill. 298, 75 N. E. 362. Legal title in plaintiff's mother. Pierce v. Lee [Mo.] 95 S. W. 426. Must show that a deed under which he claims was sufficiently definite to pass a legal title. Martin v. Kitchen, 195 Mo. 477, 93 S. W. 780. An action under Code Civ. Proc. § 626 to recover lands cannot prevail unless plaintiff has the legal estate in and immediate right to possession of the lands. Zion Evangelical Lutheran Church v. St. Johns Evangelical Lutheran Church [Neb.] 106 N. W. 1010. Beneficiaries of property held in trust for their use cannot maintain the action. Id.

59. Perry v. Hackney [N. C.] 55 S. E. 289.

60. Dunbar v. Green, 198 U. S. 166, 49 Law. Ed. —.

61. Dake v. Sewell [Ala.] 39 So. 819.

62. See 5 C. L. 1057.

63. Possession must have continued until ousted or have been terminated with intention of again being resumed. McCreary v. Jackson Lumber Co. [Ala.] 41 So. 822.

64. Moss v. Chappell [Ga.] 54 S. E. 968; McMurray v. Dixon [Va.] 54 S. E. 481. Where neither party has the legal title, the older possession gives the better right. McCreary v. Jackson Lumber Co. [Ala.] 41 So. 822. Error to grant nonsuit where evidence tended to show prior possession in plaintiff. Calatro v. Chabut, 72 N. J. Law, 458, 63 A. 272. Cannot defeat plaintiff's recovery by showing title in a third person. McBride v. Sleinweden [Kan.] 83 P. 822. Where a witness testified that a grantor was in possession and enumerated possessory acts insufficient to show possession, the question is **for the jury.** McCreary v. Jackson Lumber Co. [Ala.] 41 So. 822.

65. McCreary v. Jackson Lumber Co. [Ala.] 41 So. 822.

66. See 5 C. L. 1057.

67. The doctrine of **equitable estoppel** has no application. Milan v. Coley [Ala.] 39 So. 511. Evidence **impeaching conveyance** for fraud held inadmissible. Rix v. Smith [Mich.] 13 Det. Leg. N. 508, 108 N. W. 691; Bliss v. Slater [Mich.] 13 Det. Leg. N. 216, 108 N. W. 86. A mortgage discharged of record cannot be restored in an action of ejectment to **work out equities** in favor of the defendant. Putney v. Vinton [Mich.] 13 Det. Leg. N. 459, 108 N. W. 655.

68. Where the answer admits that the legal title is in plaintiff and alleges a trust in favor of defendant, it was properly retained on the equity docket. Turner v. Johnson [Ky.] 93 S. W. 1038.

69. In an action to recover lands from a railroad company a prayer that defendant be required to remove its tracks held not to change it to a suit in equity. Remsen v. New York, etc., R. Co., 97 N. Y. S. 902. Action held to be one for recovery of real property under Rev. St. § 5781, notwithstanding there were allegations which seemed to call for some form of equitable relief. Toledo Exposition Co. v. Kerr, 8 Ohio C. C. (N. S.) 369.

70. Harding v. Perin, 8 Ohio C. C. (N. S.) 533.

71. See 5 C. L. 1058.

72. See ante § 2.

73. Where plaintiff claims under a trust deed foreclosure, defendant may show that such sale was void without offering to redeem. Cobe v. Lovan, 193 Mo. 235, 92 S. W. 93.

74. Beardsley v. Hill [Ark.] 91 S. W. 757; McQuire v. Blount, 199 U. S. 142, 50 Law. Ed. —. Defendant claiming under color of title may show title in a third person. Anniston City Land Co. v. Edmonson [Ala.] 40 So. 505.

Evidence held to show that plaintiff's ancestor was divested of title by judicial sale and to authorize a directed verdict for defendant. McQuire v. Blount, 199 U. S. 142, 50 Law. Ed. —. Defendant makes a prima facie case of forfeiture to state for taxes by proof that the land has been omitted from the proper books for five successive years. Jeffrey v. Lemon, 58 W. Va. 662, 52 S. E. 769. Plaintiff's evidence held to show outstanding title in a third party. McCreary v. Jackson Lumber Co. [Ala.] 41 So. 822.

75. Dondero v. O'Hara [Cal. App.] 86 P. 985. See ante § 1, Prior possession.

tion by the holder.[76] The legal title though acquired pendente lite,[77] and the equitable title where available in an action at law,[78] are good defenses, but not an outstanding inchoate dower interest in defendant's wife.[79] The statute of limitation is a defense.[80] One in adverse possession cannot claim forfeiture of plaintiff's title by nonuse under the terms of his deed for failure to sooner eject him.[81]

§ 3. *Parties.*[82]—A landlord may appear and defend in an action against the tenant,[83] but under a statute authorizing the tenant to bring in his landlord, only one call can be made.[84] Under a statute requiring actions to be brought in the name of the real party in interest, a transferee pendente lite should be made a party upon motion of defendant,[85] but a provision that the action shall be prosecuted against the person in possession does not make the wife of such person a proper or necessary party.[86] A grantee bringing ejectment under the statute in the name of the grantor for lands that were in the adverse possession of another must bring the case within its terms.[87]

§ 4. *Process and pleading. Process.*[88]

The complaint[89] must allege title and right of possession in plaintiff[90] at the commencement of the action,[91] but failure to allege may be cured by the answer.[92] It must also contain a description of the land, but where there are several defendants it need not identify the portion in possession of each.[93] Where plaintiff relies on prior possession he need not allege that defendant is an intruder.[94] Performance

76. Proof of tax sale to the state is insufficient. Morse v. Auditor General [Mich.] 13 Det. Leg. N. 101, 107 N. W. 317.

77. Acquired a second foreclosure deed pendente lite. McCauley v. Jones [Mont.] 86 P. 422.

78. Shaffer v. Detie, 191 Mo. 377, 90 S. W. 131. A trustee cannot maintain ejectment against the cestui que trust in lawful possession under the trust. Bucher v. Overlees [Ind. T.] 89 S. W. 1021.

79. Bouton v. Pippin, 192 Mo. 469, 91 S. W. 149.

80. Ejectment by the owner of land sold for delinquent taxes is barred in five years. Gavin v. Ashworth [Ark.] 91 S. W. 303. For further treatment see Taxes, 6 C. L. 1654; limitations for recovery of land generally, see Limitation of Actions, 6 C. L. 469. An allegation that defendant has been in possession "since" a specific date does not allege possession on that date, and hence case held not to be barred by Gen. St. 1904, § 2670. Lawyer v. Great Northern R. Co. [Minn.] 105 N. W. 1129.

81. Property to revert upon failure to use for school purposes. Birmingham Public School Dist. v. Sharpless, 27 Pa. Super. Ct. 630.

82. See 5 C. L. 1059.

83. Under a statute enacted during the reign of George II a landlord was permitted to appear and defend. Bower v. Cohen [Ga.] 54 S. E. 918. Word "landlord" interpreted to include all persons claiming title consistent with the tenant's. Id. One claiming under a bond for titles admitted. Id.

84. Code 1896, § 1534, held not to authorize the bringing in of a second party at a continued term. Dake v. Sewell [Ala.] 39 So. 819.

85. Revisal 1905, § 400, notwithstanding § 415 providing that no action shall abate by a transfer of interest, etc. Burnett v. Lyman [N. C.] 54 S. E. 412.

86. Rev. St. 1899, § 3056. Bouton v. Pippin, 192 Mo. 469, 91 S. W. 149.

87. Code Civ. Proc. § 1501. Flagler v. Devlin, 109 App. Div. 904, 95 N. Y. S. 801. Will not lie where the grantee acquires grantor's interest by a partition action and does not rely on the champertous deed. Id. The only issue in such action is the ownership as between the grantor and adverse holder (Flagler v. Devlin, 109 App. Div. 904, 95 N. Y. S. 801), and title acquired by grantee from another source is immaterial (Id.).

88, 89. See 5 C. L. 1059.

90. An allegation that petitioners are heirs of a life tenant shows no title in themselves. Furr v. Burns, 124 Ga. 742, 53 S. E. 201. Where lands were left in remainder to four persons and their children, an allegation that the other three had been unheard of for 30 years and it was not known whether they left any children or not, held insufficient to show that there were no children. Id.

91. An allegation that plaintiff was seised in 1905 for the purpose of putting in a crop sufficiently tendered an issue of seisin in April, the court taking judicial notice that the month comes within the crop season. McGillivray v. Miller [Cal. App.] 84 P. 778.

92. Where plaintiff commences an action in April and alleges a lease for the purpose of putting in a crop, failure to allege that April is a cropping month is cured by an answer filed in May alleging that defendant is in possession and has a crop nearly ready for harvest. McGillivray v. Miller [Cal. App.] 84 P. 778. A cross complaint averring possession in defendants which is not denied is sufficient to show ouster. Dondero v. O'Hara [Cal. App.] 86 P. 985. An answer denying that defendant "without right or title" entered into possession admits ouster of plaintiff. Id.

93. Specific description of the whole is

of conditions precedent must be alleged.[95] Plaintiff cannot attack an ancestor's deed for want of consideration, undue influence, or fraud not in the factum without specific allegations,[96] but grantor's lack of mental capacity and fraud in the factum need not be specifically alleged.[97] The statutory requirement that a cotenant must allege a denial of his right does not apply where the action is for the full title and it only develops on trial that they are cotenants.[98] A prayer for equitable relief is not controlling in fixing the nature of the action.[99]

Answer.[1]—Where a defendant admits possession the only plea open to him is the general issue,[2] which is sufficient though plaintiff sets out a deed from the commissioner of state lands which is prima facie evidence of title.[3] If defendant wishes to put in issue only a specific portion of the premises sought, he must do so in his answer.[4] It is not essential to a plea of ownership in defendant that he set out the mode of acquiring it,[5] though equitable defenses must be pleaded.[6] A defendant cannot by cross petition maintain ejectment against his codefendant.[7]

Amendments.[8]—Where plaintiff fails to pay the costs of the first trial as required by statute before bringing the second, the answer may be amended to show nonpayment.[9] Description held sufficient to authorize an amendment describing the premises with more particularity.[10]

§ 5. *Evidence.*[11]—Since defendant's possession is presumed lawful until the contrary appears,[12] the burden is upon plaintiff to establish his title to the property[13]

sufficient within Civ. Code Prac. § 125. Bryant v. Strunk [Ky.] 89 S. W. 549.

94. Moss v. Chappell [Ga.] 54 S. E. 968.

95. Complaint on second trial must allege payment of the costs of the first under Code Civ. Proc. 1902, § 98, subd. 2. Peterman v. Pope [S. C.] 54 S. E. 569.

96, 97. Alley v. Howell [N. C.] 53 S. E. 821.

98. Failure to allege does not defeat partial recovery. Young v. Bigger [Kan.] 84 P. 747.

99. Petition construed as alleging an action in ejectment and not a suit to quiet title, although containing a prayer appropriate to the latter. Turner v. Johnson [Ky.] 93 S. W. 1038.

1. See 5 C. L. 1060.

2. Dennis v. Price [Ala.] 41 So. 840.

3. Cook v. Ziff Colored Masonic Lodge, No. 119 [Ark.] 96 S. W. 618.

4. Crawford v. Masters, 140 N. C. 205, 52 S. E. 663.

5. Civ. Code Prac. § 125, providing that defendant must state in his answer whether he claims any of the land, does not require him to allege title by adverse possession. Asher v. Howard [Ky.] 91 S. W. 270.

6. Evidence of possession of a ditch under contract with plaintiff's grantor is inadmissible unless pleaded. Dondero v. O'Hara [Cal. App.] 86 P. 985. An answer alleging a partition and that plaintiff went into possession thereunder, and praying that he be estopped to assert its invalidity, does not allege an equitable defense, since such partition will be presumed legal. Ming v. Olster, 195 Mo. 460, 92 S. W. 898.

7. Cross petition properly dismissed in so far as it was a counterclaim but it was still available as a defense. Toledo Exposition Co. v. Kerr, 8 Ohio C. C. (N. S.) 369.

8. See 5 C. L. 1060.

9. Code Civ. Proc. 1902, § 194. Peterman v. Pope [S. C.] 54 S. E. 569.

10. Luquire v. Lee, 121 Ga. 624, 49 S. E. 834.

11. See 5 C. L. 1060. The **evidence** necessary or proper to proof of **particular titles or modes of acquiring them** is excluded to titles like Adverse Possession, 7 C. L. 41; Deeds of Conveyance, 7 C. L. 1103; Public Lands, 6 C. L. 1126.

12. Proof of title in plaintiff destroys the presumption. Sonneman v. Mertz [Ill.] 77 N. E. 550.

13. Until plaintiff has made a prima facie case defendant is not required to introduce any evidence. Mobile Docks Co. v. Mobile [Ala.] 40 So. 205. Plaintiff must locate and establish title to the identical land sought (Pennington v. Underwood [W. Va.] 53 S. E. 465), unless there is a disclaimer or waiver (Clark v. Beard [W. Va.] 53 S. E. 597). Where plaintiff's deed covers the strip in dispute it is error to grant a nonsuit though it would give him more than the deed called for. Calatro v. Chabut, 72 N. J. Law, 458, 63 A. 272. Where plaintiffs **claim by descent** they must prove that they are the only heirs or their proportional share. Hudson v. Vaughn [Ala.] 40 So. 757. Plaintiff **claiming** land as an **accretion** has the burden of showing that it is an accretion. Mallory v. Brademyer [Ark.] 89 S. W. 551; Dowdle v. Wheeler [Ark.] 89 S. W. 1002. Must prove that parties executing a **deed to trust property** had power to convey. Robertson v. Rock Island Lumber & Mfg. Co. [Kan.] 85 P. 799. Color of **title in a demisor** deceased before suit is not available. Anniston City Land Co. v. Edmondson [Ala.] 40 So. 505. Where the only dispute is the **location of a boundary,** plaintiff need not prove title out of the state. Williamson v. Bryan [N. C.] 55 S. E. 77.

Evidence held sufficient to locate the land although the description in the deed did not close. Survey reversed and applied to the

at the commencement of the action[14] unless it is admitted.[15] To make out a paper title plaintiff must deraign it from the government[16] or show a superior title from a common source,[17] conveyances by deed[18] or judicial decree from one not shown to have title being insufficient.[19] Plaintiff must prove that defendant is in possession[20] and that the land is within the territorial jurisdiction of the court.[21] When plaintiff has made a prima facie case[22] defendant must negative the case so made.[23] Where plaintiff shows prior possession and ouster,[24] the burden is upon defendant

monuments. Calatro v. Chabut, 72 N. J. Law, 458, 63 A. 272.

Evidence held insufficient to establish lost deed. Thorn v. Lister [Iowa] 105 N. W. 434. To locate starting point of plaintiff's deed. Yost v. Moog [Md.] 63 A. 1059. To show that deed from plaintiff to defendant was forged. Ford v. Ford, 27 App. D. C. 401.

14. A patent from the government to plaintiff shows prima facie title at the commencement of the suit. Lee v. Livingston [Mich.] 12 Det. Leg. N. 922, 106 N. W. 713.

15. A disclaimer of possession and issue thereon admits title. Shiver v. Hardy [Ala.] 39 So. 669. Hence an instruction placing plaintiff's right of recovery on proof of superior title is erroneous. Id.

16. Krause v. Nolte, 217 Ill. 298, 75 N. E. 362; Scott v. Herrell, 27 App. D. C. 395. Acts 1905, p. 947, c. 773, merely dispenses with proof of title out of the government and does not authorize recovery on proof of an older chain of deeds. Mitchell v. Garrett, 140 N. C. 397, 53 S. E. 226.

17. Birge v. Centralia, 218 Ill. 503, 75 N. E. 1035; Scott v. Herrell, 27 App. D. C. 395; Brinkley v. Bell [Ga.] 55 S. E. 187; Dondero v. O'Hara [Cal. App.] 86 P. 985; Marbach v. Holmes [Va.] 52 S. E. 828. Security deed from plaintiff's grantor. Hamilton v. Rogers [Ga.] 54 S. E. 926. Where defendant's deed from the common grantor was the older, plaintiff cannot recover. Id. Where defendant's deed from the common grantor was the older, it is immaterial whether it was a security or unconditional deed. Id. Where the wife of a debtor pays the debt and takes an assignment of the security deed, one claiming under a junior deed from the husband cannot recover without first paying the debt. Id. Not necessary that fact of claim through common source should appear in the pleadings. Sufficient if it appears from the evidence. Brinkley v. Bell [Ga.] 55 S. E. 187. Remainderman and one claiming under the life tenant claim under a common source. Id. Production of deed upon notice raises a prima facie presumption that defendant claims thereunder. Id. Where only a part of the land is traced to a common source, a directed verdict is erroneous. Hoyle v. Mann [Ala.] 41 So. 835. Adverse claimant cannot be driven back to a claim under a common grantor to strengthen adversary's title. Id. Introduction of a later deed from the government to defendant not shown to include the land in dispute does not estop him from denying title in government at time of plaintiff's deed. Wall v. Wall [N. C.] 55 S. E. 283.

18. Wade v. McDougle [W. Va.] 52 S. E. 1026. Deed from one not shown to have title is inadmissible. McBride v. Steinweden [Kan.] 83 P. 822. Where plaintiff claims under a security deed he must show title in the maker or some other facts sufficient to show legal right to possession superior to defendant. Hamilton v. Rogers [Ga.] 54 S. E. 926. Failed to sustain burden as to 4.88 acres. Id.

19. Decree of distribution. Helm v. Johnson, 40 Wash. 420, 82 P. 402. Judicial sale on judgment in personam. Wilson v. Gaylord [Ark.] 92 S. W. 26. Deed to the auditor general for delinquent taxes and a deed from the commissioner of the state land office to a purchaser are not proof of title. Morse v. Auditor General [Mich.] 13 Det. Leg. N. 101, 107 N. W. 317.

20. Plaintiff may testify of his own knowledge but he cannot base it upon a survey made by third persons. Ross v. Roy [Ala.] 39 So. 583. An agreement looking to a settlement and upon which a continuance was allowed, containing no admission of possession, is inadmissible to show possession. Id.

21. Patent to the land describing it as being in Mackinac county held sufficient to prove that it was within the county. Lee v. Livingston [Mich.] 12 Det. Leg. N. 922, 106 N. W. 713.

22. **Held sufficient to make a prima facie case:** Record title. May v. Dobbins [Ind.] 77 N. E. 353. Prior possession. Moss v. Chappell [Ga.] 54 S. E. 968; Calatro v. Chabut, 72 N. J. Law, 458, 63 A. 272. One claiming by descent by proof of heirship and seisin of ancestor. Wilson v. Johnson [Fla.] 41 So. 395. Evidence of a deed creating a life estate and remainder in plaintiffs, that defendant claims under the life tenant, and that such tenant is dead. Brinkley v. Bell [Ga.] 55 S. E. 187. One claiming an island under Act Jan. 27, 1806 (4 Smith Laws, p. 268), by proof of the warrant, survey, and patent, it being presumed that all conditions precedent were complied with. Houseman v. International Nav. Co. [Pa.] 64 A. 379. Record title to strip along right of way and defendant's map showing that it was not included in the right of way. South Grand Rapids Imp. Co. v. Michigan Cent. R. Co. [Mich.] 12 Det. Leg. N. 866, 105 N. W. 1121.

23. Moss v. Chappell [Ga.] 54 S. E. 968; South Grand Rapids Imp. Co. v. Michigan Cent. R. Co. [Mich.] 12 Det. Leg. N. 866, 105 N. W. 1121; Lawrence v. Alabama State Land Co. [Ala.] 41 So. 612. The burden of proof of title however does not shift, but defendant must go forward with the evidence. Moore v. McClain [N. C.] 54 S. E. 382.

24. Evidence of tax assessment roll showing that plaintiff was assessed is admissible to show possession. Dondero v. O'Hara [Cal. App.] 86 P. 985. Testimony of plaintiff that he entered into possession under certain squatter's quitclaim deeds is admissible as showing possession though not showing that

to establish a superior title[25] or bring the case within the class against which prior possession is unavailable.[26] The evidence need only preponderate,[27] and if conflicting must be submitted to the jury.[28] Where plaintiff pleads his title generally, proof of forgery[29] and adverse possession[30] are admissible under the general denial. Courts will take notice of the real party litigant.[31] In general any evidence which tends to identify the land[32] or establish or disprove title[33] is admissible. The general rules of relevancy,[34] materiality,[35] hearsay evidence,[36] and opinion testimony[37]

he retains the possession. Whitman v. McComas [Idaho] 83 P. 604.

25. McMurray v. Dixon [Va.] 54 S. E. 481. Evidence held insufficient. Id. Where a defendant in possession defends under an oral contract of sale, he has the burden of showing possession under such contract. Marks v. McGookin, 127 Iowa, 716, 104 N. W. 373.

26. Title by one of the methods enumerated by Code Civ. Proc. § 1006. Dondero v. O'Hara [Cal. App.] 86 P. 985.

27. Need not "satisfy" the jury. Sonnemann v. Mertz [Ill.] 77 N. E. 550. An instruction that plaintiff must recover by a "fair" preponderance criticised, but held not prejudicial. Link v. Campbell [Neb.] 104 N. W. 939. A claimant by adverse possession need only reasonably satisfy the jury. Lawrence v. Alabama State Land Co. [Ala.] 41 So. 612.

28. Location of boundary. Reilly v. Crown Petroleum Co., 212 Pa. 325, 61 A. 915. Defendant's adverse possession. Theodore Land Co. v. Lyon [Ala.] 41 So. 682.

Evidence of title held to warrant a nonsuit. Billings v. Pearson [Cal. App.] 86 P. 825. Uncontradicted proof of title by adverse possession. Briel v. Jordan, 27 App. D. C. 202.

Held question for the jury: Proof of locus in quo. McCreary v. Coggeshall [S. C.] 53 S. E. 978. Prescriptive title in plaintiff. Equitable Securities Co. v. Matthews [Ga.] 54 S. E. 1044. Location of boundary. Shiver v. Hardy [Ala.] 39 So. 669. Title by accretion. Bradshaw v. Edelen, 194 Mo. 640, 92 S. W. 691. An admission by a defendant claiming by adverse possession that he had the holder of a tax deed execute a quitclaim deed to the holder of the legal title upon redeeming is not conclusive of his right to recover, and hence wrong to take the case from the jury. Hall v. Davidson [Kan.] 84 P. 556.

29. Chrast v. O'Connor, 41 Wash. 360, 83 P. 238.

30. Link v. Campbell [Neb.] 104 N. W. 939.

31. Party suing in the name of another. Wilson v. Hammond [Ala.] 40 So. 343. Where plaintiff sues in the name of or for the use of another or the evidence shows the title to be in the other, he must connect himself therewith. Id.

32. Where the evidence shows a survey and a correct map thereof, such map is admissible to identify the land. Driver v. King [Ala.] 40 So. 315.

33. Squatter's quitclaim deed held admissible. Whitman v. McComas [Idaho] 83 P. 604. Also quitclaim deed to the grantor. Where plaintiff's complaint admits ouster by defendant on Nov. 3, 1904, a claim of possessory right made and filed on the following day is inadmissible. Id. Where defendant claims a prior release of squatter's rights from the common grantor, plaintiff's quitclaim deed signed by defendant as a witness is admissible. Id. Where the genuineness of a partition is attacked, evidence of possession of the partitioners thereunder is admissible. Ming v. Olster, 195 Mo. 460, 92 S. W. 898. An administrator of an entryman who dies before final proof acquires no interest and hence cannot attack a patent under which plaintiff claims. Warner Valley Stock Co. v. Morrow [Or.] 86 P. 369. Where defendants claim under a prior patent to their ancestor, evidence that defendants patented a part of it is corroborative of plaintiff's claim that the land was vacant. Asher v. Howard [Ky.] 91 S. W. 270. Claims must be consistent. Defendant cannot deny title in plaintiff's grantor and that the infant's title passed for an inadequate consideration, and hence the deed was void. Shaffer v. Detie, 191 Mo. 377, 90 S. W. 131. Records of a prior action in which defendant claimed by same chain of title the other undivided interest. Rebuttal. Houseman v. International Nav. Co. [Pa.] 64 A. 379. Pleadings and evidence held insufficient to show that defendant claimed under a will to the exclusion of a deed. Williamson v. Brown, 195 Mo. 313, 93 S. W. 791.

34. **Held irrelevant:** Testimony of a sale of a distinct piece of land. Hoyle v. Mann [Ala.] 41 So. 835. A statement by a witness "I sold those lands." Id. Evidence of a survey between lands of parties under whom neither party claimed. Wade v. McDougle [W. Va.] 52 S. E. 1026. The relevancy of a question "Did he do some writing for you on Saturday" not appearing, the court properly excluded it. Beddow v. Bagley [Ala.] 39 So. 773.

35. **Held immaterial:** Questions of title prior to a new title by adverse possession. Interstate Coal & Iron Co. v. Clintwood Coal & Timber Co. [Va.] 54 S. E. 593. That his grantor did not claim title. Id. Evidence as to whether a purchaser of lands in the adverse possession of another knew of the fact. Hoyle v. Mann [Ala.] 41 So. 835. Where plaintiff's claim is by adverse possession, evidence as to how defendant induced his grantor to execute a deed is immaterial. Id. Evidence of contracts relating to the land but not in the chain. Kirkman v. Holland, 139 N. C. 185, 51 S. E. 856. Evidence showing that the disputed strip is not included in defendant's deed is immaterial. Wade v. McDougle [W. Va.] 52 S. E. 1026. Question where plaintiff has been in possession for twenty-five years, seven being sufficient to give title. Broadwell v. Morgan [N. C.] 55 S. E. 340.

36. Declaration of sale to a particular person by one not in possession or claiming title. Anniston City Land Co. v. Edmondson

apply. An error in admission of evidence leading to the common title is harmless.[38]

§ 6. *Trial and judgment.*[39]—It is discretionary with the court to allow additional time in which to file a statutory defense bond required by the North Carolina practice.[40] Objections to the sufficiency of a statutory abstract must be raised before trial,[41] but mere clerical errors therein may be corrected at the trial.[42] Failure of plaintiff to file an affidavit setting forth who are the claimants is waived by a trial on the merits,[43] and it may be filed by a nunc pro tunc order.[44]

Instructions.[45]—The instructions must conform to[46] and cover the issues raised by the evidence,[47] be consistent with one another,[48] but must not charge on the effect of the testimony.[49]

Verdict and judgment.[50]—The verdict should find as to plaintiff's right to possession,[51] and, where it attempts to describe the land, must do so with certainty.[52] A partial finding for plaintiff is not a finding that defendant has the title to the remainder.[53] The judgment must conform to the verdict,[54] and a general finding for plaintiff entitles him to recover the amount described in the complaint.[55] Judgment for plaintiff in fee transfers whatever title defendant may have had.[56] The enforcement of a judgment will not be enjoined on any ground which might have been asserted as a defense.[57]

A writ of possession[58] issued after rendition but before entry of judgment is valid.[59] One who goes into possession pendente lite is subject to removal under a writ of possession unless he shows that he is not holding under defendant.[60]

Costs.[61]—If the defendant disclaims possession[62] he commonly has his costs, but

[Ala.] 40 So. 505. Declarations of sale by a life tenant against the grantee of a third person who had possession at the time. Kirkman v. Holland, 139 N. C. 185, 51 S. E. 856. Recital in a deed to plaintiff's ancestor as against one not claiming thereunder. Campbell v. Everhart, 139 N. C. 503, 52 S. E. 201.

37. Testimony that witness was in possession of the title properly excluded. McCreary v. Jackson Lumber Co. [Ala.] 41 So. 822. A witness may testify that he is the purchaser of the land in dispute. Driver v. King [Ala.] 40 So. 315.

38. Mansfield v. Johnson [Fla.] 40 So. 196.

39. See 5 C. L. 1063.

40. Allowed at subsequent term. Dunn v. Marks [N. C.] 53 S. E. 845.

41. Abstract under Code 1896, § 1531. Hoyle v. Mann [Ala.] 41 So. 835.

42. Especially where it works no surprise. Hoyle v. Mann [Ala.] 41 So. 835.

43, 44. King v. McGrannis, 29 Pa. Super. Ct. 367.

45. See 5 C. L. 1063.

46. Where defendant claimed under a **tax deed,** an instruction that the legal title to land can only be transferred by deed is erroneous. May v. Dobbins [Ind.] 77 N. E. 353.

47. Defendant is entitled to have the jury instructed with reference to **title by adverse possession** if there is any competent evidence of the same. Link v. Campbell [Neb.] 104 N. W. 939. Where a deed in plaintiff's proof calls for **distances** and **natural objects,** the court should instruct as to which controls in case of conflict. Jennings v. White, 139 N. C. 23, 51 S. E. 799.

48. Two rulings on prayers based on the question whether there was any competent evidence for plaintiff held inconsistent. Yost v. Moog [Md.] 63 A. 1059.

49. Where there is evidence to support defendant's adverse possession a charge to find for plaintiff is in violation of Code 1896, § 3326. Theodore Land Co. v. Lyon [Ala.] 41 So. 682.

50. See 5 C. L. 1063.

51. Verdict finding that plaintiff is the fee simple owner does not find as to the right of possession and is irregular. Ropes v. Minshew [Fla.] 41 So. 538.

52. Impossible description. New trial awarded. Stephens v. Gunzenhauser, 27 Pa. Super. Ct. 417. Where the evidence shows that each party is entitled to a part of the land, the verdict should specify the part of each. Clark v. Beard [W. Va.] 53 S. E. 597.

53. Williams v. Jones [S. C.] 54 S. E. 558.

54. A judgment for possession is not supported by a verdict merely finding a fee simple estate in plaintiff. Ropes v. Minshew [Fla.] 41 So. 538.

55. Unless restricted by instructions or otherwise. Crawford v. Masters, 140 N. C. 205, 52 S. E. 663.

56. Wade v. McDougle [W. Va.] 52 S. E. 1026.

57. As adverse possession. Johnson v. Oldham [Ala.] 40 So. 213.

58. See 5 C. L. 1064.

59. Baum v. Roper [Cal. App.] 82 P. 390.

60. Baum v. Roper [Cal. App.] 82 P. 390. Evidence held insufficient to show that present occupant did not go in under defendant in ejectment. Id.

61. See 5 C. L. 1064.

62. A plea denying possession and praying that the action abate as to him is in effect a disclaimer. Dennis v. Price [Ala.] 41 So. 840. A disclaimer of forty acres in an action for 400 where plaintiff recovered a large part of the land sued for does not

in Alabama the plaintiff may take judgment and stand costs,[63] or may join issue on the disclaimer and recover costs if he prevails.[64]

§ 7. *New trial.*[65]

§ 8. *Mesne profits and damages.*[66]—Plaintiff may in most states recover damages for the wrongful withholding of property if the proper claim is made,[67] although he was not dispossessed by the defendant.[68] Under a statute allowing a successful plaintiff to recover rents and profits for a term "not exceeding six years," such term is computed from the commencement of suit.[69] When sued for independently of the action of ejectment mesne profits should be recovered by trespass or tort action, not by assumpsit.[70] Where defendant is a bona fide possessor under a claim of right, the measure of the mesne profits is the rental value without the improvements placed thereon by defendant.[71] Such profits however may be applied to equities in favor of others connected with the land.[72] Sureties are not liable on bond for mesne profits until condition broken.[73]

§ 9. *Allowance for improvements and expenditures.*[74]—At common law no affirmative relief could be had for improvements, but they could be off-set to the extent of the mesne profits.[75] By statute, however, in many states defendant may recover for improvements and expenditures[76] made in good faith[77] without actual[78] or constructive notice[79] while claiming under record or paper title,[80] and especially where plaintiff seeks mesne profits,[81] but the statutory procedure to claim the right must be complied with[82] unless waived.[83] This right extends to improvements made

affect the costs. Lawrence v. Alabama State Land Co. [Ala.] 41 So. 612. A general denial coupled with a statement that defendant only owns a part and has no information as to the rest is insufficient disclaimer. Young v. Bigger [Kan.] 84 P. 747.

63, 64. Dennis v. Price [Ala.] 41 So. 840; Calumet Coal Co. v. Cordova Coal, Land & Imp. Co. [Ala] 40 So. 390.

65. See 5 C. L. 1064. See, also, New Trial, etc., 6 C. L. 796.

66. See 5 C. L. 1064.

67. No mesne profits can be awarded unless claim therefor is made in the writ. Stubbs v. Franklin & M. R. Co. [Me.] 64 A. 625. Where the value of the use exceeds the actual rents received by defendant, interest is allowable only from the commencement of the action. Fagan v. McDonnell, 100 N. Y. S. 641.

68. Meriwether v. Howe [Kan.] 82 P. 723. The only issues are whether plaintiff is entitled to possession, whether defendant wrongfully withholds the same, and whether such wrongful withholding resulted in damage to plaintiff. Id.

69. Code Civ. Proc. § 1531, and hence plaintiff may recover for six years plus that accrued during pendency of action. Fagan v. McDonnell, 100 N. Y. S. 641. Where summons was served on tenants and later on one claiming title, there being no unity of interest, the action was not commenced as to the latter until service on him. Id.

70. Reilly v. Crown Petroleum Co., 213 Pa. 595, 63 A. 253.

71. Lee v. Humphries [Ga.] 52 S. E. 1007.

72. Where a devisee recovered lands sold to pay debts, the accrued annual instalments of rent should be applied to the payment of improvements of the purchaser, interest on the debts, taxes paid by the purchaser and then to the discharge of the principal. Card v. Finch [N. C.] 54 S. E. 1009.

73. Where the bond is conditioned upon plaintiff establishing a superior title, no liability exists where the action is dismissed as against the principal upon recovering possession for principal's tenant. Graham v. James, 27 Pa. Super. Ct. 211.

74. See 5 C. L. 1064.

75. Dawkins v. Griffin, 195 Mo. 430, 94 S. W. 525.

76. Interest paid on a mortgage executed by plaintiff allowed. Fagan v. McDonnell, 100 N. Y. S. 641. The fact that a gross amount was paid for janitor service for the care of several premises does not prevent deduction from gross rents if it can be proportioned. Id.

77. Where improvements are made in good faith under a belief of ownership in fee, the fact that he had a life estate does not preclude recovery therefor. Gallenkamp v. Westmeyer [Mo. App.] 93 S. W. 816.

78. Gallenkamp v. Westmeyer [Mo. App.] 93 S. W. 816; Wakefield v. Van Tassell, 218 Ill. 572, 75 N. E. 1058.

79. Purchaser at judicial sale excused for failure to discover defective service of summons. Gallenkamp v. Westmeyer [Mo. App.] 93 S. W. 816.

80. Only evicted persons having a clear and connected record title, without actual notice of an adverse record title, can claim improvements under 2 Starr & C. Ann. St. 1896, pp. 1626-1629. Wakefield v. Van Tassell, 218 Ill. 572, 75 N. E. 1058.

81. Under 2 Starr & C. Ann. St. 1896, pp. 1624-1626, defendant may offset improvements against mesne profits (Wakefield v. Van Tassell, 218 Ill. 572, 75 N. E. 1058), but if plaintiff does not file such claim he is entitled to the improvements unless defendant brings himself within the statute (Id.).

82. Defendant must file the statutory **suggestion of adverse possession** if he wishes an affirmative judgment. New v. Young

by defendant's predecessors.[84] No recovery can be had where the eviction is brought about by defendant's own acts.[85] Improvement statutes are not retroactive,[86] and the claimant has the burden of showing that they were made since the statute took effect.[87] Nothing can be considered as an "improvement" which does not increase the value of the land to the true owner.[88] In some states plaintiff has an election to pay the value of the improvements or to accept the value of the unimproved land and convey title to defendant.[89, 90]

ELECTION AND WAIVER.

§ 1. **Election in General (1222).**
§ 2. **Occasions for Elections (1222).**
A. Of Remedies (1222).
B. Of Rights and Estates (1224).
§ 3. **Waiver in General; Definition (1225).**
§ 4. **Acts and Indicia of Election and Waiver (1225).**
§ 5. **Consequences of an Election or Waiver (1229).**
§ 6. **Pleading (1230).**

Only a general treatment of the doctrines of election and waiver is here attempted. For application of the principles involved to particular facts, reference must be had to the topic dealing with the subject-matter concerned. Election between counts[1] and the waiver of objections in judicial proceedings[2] are specifically treated elsewhere, as are the doctrines of estoppel[3] and laches.[4]

§ 1. *Election in general. Definition.*[5]—An election is a choice between two or more available, inconsistent rights or remedies.[6]

§ 2. *Occasions for elections. A. Of remedies.*[7]—Where two or more remedies are open to a party he may select any one of them,[8] but if two remedies[9] applica-

[Ala.] 41 So. 523. May offset against mesne profits without such suggestion. Id.

83. Failure to file **claim for improvements** and an **estimate of value** of premises without them as required by Rev. St. c. 106, § 24, is waived by trial of the issue. Proctor v. Maine Cent. R. Co. [Me.] 64 A. 839.

84. Gallenkamp v. Westmeyer [Mo. App.] 93 S. W. 816.

85. Broken condition subsequent. Wakefield v. Van Tassell, 218 Ill. 572, 75 N. E. 1058, afg. 122 Ill. App. 32.

86. Laws 1903, p. 262, c. 137, does not authorize recovery for improvements made prior thereto. Barton v. Wickizer, 41 Wash. 293, 83 P. 312; Monk v. Duell, 41 Wash. 403, 83 P. 313.

87. Monk v. Duell, 41 Wash. 403, 83 P. 313.

88. Proctor v. Maine Cent. R. Co. [Me.] 64 A. 839. No compensation allowed a railroad company for ties and rails. Id. Allowed for filling in flats. Id.

89, 90. Rev. St. 1899, §§ 3067 et seq., does not authorize such alternate judgment. Dawkins v. Griffin, 195 Mo. 430, 94 S. W. 525. Plaintiff is not entitled to a judgment requiring defendant to pay the value of the land as provided by Rev. St. 1899, § 3076, until he has made an election and relinquished his interest. Gallenkamp v. Westmeyer [Mo. App.] 93 S. W. 816.

1. See Pleading, 6 C. L. 1008.

2. See Saving Questions for Review, 6 C. L. 1385; Appeal and Review, 7 C. L. 128.

3. See Estoppel, 5 C. L. 1285.

4. See Equity, 5 C. L. 1144.

5, 6. See 5 C. L. 1078.

7. See 5 C. L. 1079.

8. Acts Ex. Sess. 1891, p. 86, c. 26, § 18, providing that when a bill to collect taxes shall be dismissed on account of double assessment the assessor shall be liable for costs, does not provide an exclusive remedy so as to relieve the county of liability. State v. Alexander, 115 Tenn. 156, 90 S. W. 20.

Tort or contract: Where personal property has been converted the owner may waive the tort and sue in assumpsit. Fountain v. Sacramento, 1 Cal. App. 461, 82 P. 637. Could do so under complaint merely alleging the common counts for goods sold. Kleinbohe v. Hoffman House of New York, 97 N. Y. S. 1122. May sue in assumpsit on the wrongdoer's implied contract to pay the value of the property. Tidewater Quarry Co. v. Scott [Va.] 52 S. E. 835. Where defendant canceled a contract by which plaintiff was to conduct a horticultural department in defendant's store and refused to surrender the goods, plaintiff could waive the conversion and sue for breach of contract. New York Market Gardeners' Ass'n v. Adams Dry Goods Co., 100 N. Y. S. 596. A passenger wrongfully ejected may sue on contract or in tort at his election. Delmonte v. Southern Pac. Co. [Cal. App.] 83 P. 269. Where a bill of lading was sent to a bank as security for an attached draft and the carrier wrongfully delivered the goods to another, the bank could bring trover against the carrier or detinue against the party to whom delivery was made. Tishomingo Sav. Inst. v. Johnson, Nesbitt & Co. [Ala.] 40 So. 503.

9. There must be two remedies between which one has the right to elect. Defense that in another action plaintiff had set up a claim for damages for defendant's refusal to sell and deliver certain goods did not

ble to the same state of facts[10] are inconsistent,[11] he cannot have both[12] but may be required to elect between them.[13] A distinction must be made between an election and a mistake of remedy.[14] Thus an attempt to apply a remedy not in existence does not bar the right to subsequently invoke the proper one.[15] The doctrine may be invoked against a defendant as well as against a plaintiff.[16]

show an election so as to defeat an action in replevin for the goods. Porter v. Fuld & H. Knitting Co., 99 N. Y. S. 815.

10. The doctrine of election of remedies applies only where a party having elected to pursue one of two inconsistent remedies open for the assertion of a right arising from the same state of facts is thereby estopped from afterwards pursuing the other. Watson v. Perkins [Miss.] 40 So. 643. Did not apply where plaintiff sought to recover land on the ground that a trust deed was void and also on the ground of subrogation if it was not void, as she could assert any number of independent grounds. Id. Did not apply where complaint stated two separate causes of action, one for unlawful seizure of property and the other for false imprisonment. Barfield v. Coker & Co., 73 S. C. 181, 53 S. E. 170.

11. The principle of election does not apply to coexisting and consistent remedies: The recovery of an unsatisfied judgment for the price of personalty is not a bar to a subsequent action for damages for fraud in obtaining the property. Standard Sewing Mach. Co. v. Owings, 140 N. C. 503, 53 S. E. 345. An action on a contract and one to recover damages for having been induced to enter into it are not inconsistent as both leave the contract undisturbed. The test is: Are the facts necessary to support one remedy consistent with those necessary to support the other? Palmer v. Goldberg [Wis.] 107 N. W. 478. Where plaintiff sued and recovered judgment on a note which he was fraudulently induced to accept for certain horses and execution was thereafter returned unsatisfied, he was not precluded from thereafter suing for damages sustained by a conspiracy to induce him to accept the note. Id. The fact that the prayer sought to recover the value of the horses instead of the difference between them and the note did not show inconsistency where the note was worthless. Id. In Louisiana an opposition wherein the opponent alleges that he is in possession of the property in dispute is not a petitory action and hence does not estop the opponent from afterwards bringing the possessory action. Williams' Heirs v. Zengel [La.] 42 So. 153. One who sets up the same matter as **defense** in one action and as **ground of recovery** in a cross action is required to elect between his remedies. Defense and cross action in action on building contract. Hebert v. Dewey [Mass.] 77 N. E. 822.

12. Plaintiff could not have a forged deed set aside and title to land of which his mother died seised declared in him and at the same time trace the proceeds of the sale of the land into other land purchased by his stepfather, who had placed the forged deed on record and thereafter sold the land. Darragh v. Rowe, 109 App. Div. 560, 96 N. Y. S. 666. Where plaintiff elected to rescind a building contract he could not recover for a breach. Meacham v. Gardner, 27 Pa. Super. Ct. 296.

13. A plaintiff who has sued both at law and in equity at the same time and for the same matter may be required to elect between the two tribunals. Where the personal representative of a deceased complainant in a federal court of equity failed to revive the suit for more than eighteen months, but meanwhile instituted proceedings in another jurisdiction for the same relief, this constituted an election which entitled defendant to a dismissal. Brown v. Fletcher, 140 F. 639.

14. An unsuccessful attempt to enforce a remedy which a party mistakably believed to be applicable is not an election so as to preclude his invoking a proper remedy. That plaintiff was unsuccessful in a suit on a certificate of deposit because it had been paid by notes of third persons did not preclude her from suing the bank for the proceeds of the notes collected by it. Lemon v. Sigourney Sav. Bank [Iowa] 108 N. W. 104.

15. A purchaser of land refused tender of a warranty deed and insisted on one under an order of the probate court, which being refused he brought an action at law for damages, but was defeated. Thereafter the vendor refused to deliver the warranty deed. Held there was no election of remedies barring specific performance. Wilson v. Knapp [Mich.] 12 Det. Leg. N. 917, 106 N. W. 695. Suit to rescind a contract for misrepresentation and default of performance, dismissed on its merits, held no defense to an action to enforce the contract. Barnsdall v. Waltemeyer [C. C. A.] 142 F. 415. Unsuccessful prosecution of action at law upon insurance policy did not bar suit in equity for reformation of policy and recovery thereon as reformed. Northern Assur. Co. v. Grand View Bldg. Ass'n, 27 S. Ct. 27. Proceeding under a void statute to condemn land for a private road did not preclude the assertion of a prescriptive right. McKim v. Carre, 72 Kan. 461, 83 P. 1105. The party must have actually at his command two inconsistent remedies. Southern R. Co. v. Attalla [Ala.] 41 So. 664. Since an owner of personalty converted by another cannot waive the tort and sue for money had and received unless there has been a sale of the property by the latter, the fact that plaintiff in an action for conversion had previously sued in assumpsit was no defense where it was not shown that defendant had sold the property. Id. Certain heirs cited the administrator to account for the proceeds of a sale of land made by him. Later they recovered the land in ejectment against the purchaser but lost it on its being subjected to the claim of a creditor of the purchaser as against whom they were estopped because of their election to claim the proceeds of the sale. Held they were not precluded from

Where a statute creates a new right and also prescribes an adequate remedy for its enforcement, the prescribed remedy is exclusive,[17] but where a right already exists at law or in equity, a new remedy given by statute is cumulative.[18]

(§ 2) *B. Of rights and estates.*[19]—One may have two or more rights under a given condition or state of facts,[20] but he will not be permitted to act upon and derive the benefits of two inconsistent rights at the same time.[21] As applied to instruments of donation the doctrine of election rests upon the principle that one cannot take under and against an instrument at the same time.[22] A widow is put to an election between accepting the benefits conferred on her by her husband's will and her statutory rights in his estate.[23] If a widow dies without making an election, the right to collect a legacy vests in her personal representative.[24] In some states a widow may elect between dower and a child's part.[25] Beneficiaries in a will may renounce its provisions and divide the property between themselves by contract.[26]

demanding an accounting as against a surety on the administrator's bond. Worthy v. Battle, 125 Ga. 415, 54 S. E. 667.

16. Defendant who had sued for breach of warranty of a horse could not defend an action on the note for the price on the ground of fraud in procuring it by false representations as to the horse. Davis v. Schmidt, 126 Wis. 461, 106 N. W. 119.

17. Richardson v. People's Life & Acc. Ins. Co. [Ky.] 92 S. W. 284.

18. Statute authorizing attorney general to apply for receiver for insolvent insurance company did not take away right of creditors to so apply. Richardson v. People's Life & Acc. Ins. Co. [Ky.] 92 S. W. 284.

19. See 5 C. L. 1080.

20. The fact that an agreement between husband and wife in regard to the latter's will creates a trust in favor of the children in property devised by her to him does not deprive the children of the right to have the will annulled for fraud in procuring such agreement. They may enforce the trust or have the will annulled for fraud where husband did not intend to perform his part of the agreement when it was entered into. Morrison v. Thoman [Tex.] 89 S. W. 409. See, also, [Tex. Civ. App.] 86 S. W. 1069.

21. The owner of a copyright cannot at the same time have the benefit of the copyright statute and also retain his common-law rights. Bobbs-Merrill Co. v. Straus [C. C. A.] 147 F. 15. The constitutionality of the trade-mark act of Congress of February 20, 1905, cannot be questioned by the owner of a trade mark who, as permitted by that act, opposes the registration of a rival's trade mark. Buchanan-Anderson-Nelson Co. v. Breen, 27 App. D. C. 573; Gaines v. Carlton Importation Co., 27 App. D. C. 571; Gaines v. Knecht, 27 App. D. C. 530.

22. One will not be permitted to hold under and against a will at the same time. Where a husband attempted to devise the wife's land and made other beneficial provisions for her in the will, and the wife failed to renounce the will within the statutory period, she could not thereafter assert title to the land. Young v. Biehl [Ind.] 77 N. E. 406. Where a testatrix made an invalid devise of real estate to defendant and in the same will bequeathed other property of her own, one-half to defendant and one-half to certain infant legatees who would share in the realty if the devise thereof was set aside, on the vacation of such devise the court should make a proper election for the infants between their interest in the realty and the property bequeathed to them. Thom v. Thom, 101 Md. 444, 61 A. 193. Where a husband devised to his wife a life estate in lands belonging to her, together with other personal property, the proceeds of the land to be divided among others after the death of the wife, the latter was required to elect to accept or reject the will. Sorenson v. Carey [Minn.] 104 N. W. 958. But under Shannon's Code, § 4023, declaring that **property exempt by law** shall on the death of the husband pass as exempt property to the widow and not to the executor, the widow is entitled to the exempt property, though she otherwise accepts the provisions of a will which purports to dispose of all the property including that which is exempt. Rowlett v. Rowlett [Tenn.] 95 S. W. 821.

23. See, also, Dower, 5 C. L. 1043; and Wills, 6 C. L. 1956. A widow cannot take under her husband's will and at the same time take dower inconsistent therewith. Where testator had directed that after remarriage or death of widow the property should go to his daughter. In re Johnson's Estate, 50 Misc. 99, 100 N. Y. S. 373. A different intent being manifested by the will, where a testator devised all his land to his wife for life and provided for the erection of tombstones after the wife's death, the price thereof to be realized from a sale of "the above described lands," and also provided that after the wife's death all the land should be divided among his children, the widow could not take under the will and also under the statute but was bound to elect. Parker v. Parker [Iowa] 106 N. W. 8.

24. The effect of the widow's death within the year allowed for election without making an election, is not to destroy the legacy but to vest the right to collect it in her executor. Flynn v. McDermott, 183 N. Y. 62, 75 N. E. 931.

25. Rev. St. 1892, §§ 1830, 1833, provide how the widow may dissent from the provisions of a will and also give her the right to elect between dower and a child's part. Saxon v. Rawls [Fla.] 41 So. 594.

26. A contract between beneficiaries renouncing provisions in a will and providing for a division of the property is valid though its effect is to deprive the state of

§ 3. *Waiver in general; definition.*[27]—A waiver is an intentional relinquishment of a known right.[28] A waiver contrary to an express statute is ineffectual.[29]

§ 4. *Acts and indicia of election and waiver.*[30]—The doctrine of election differs from that of estoppel in its broadest sense in that the party invoking it need not always show that he will suffer any material disadvantage unless his adversary be required to abide by his election.[31] An election is usually evinced by the doing of some decisive act indicating a choice,[32] hence the act or acts must be done with full

an inheritance tax otherwise assessable on a devise to a collateral legatee. In re Stone's Estate [Iowa] 109 N. W. 455.

27, 28. See 5 C. L. 1082.

29. Under Code 1896, § 2038, as amended by act February 23, 1899, laborers' wages to the amount of $25 are exempt from garnishment, notwithstanding a waiver by the debtor of his exemptions. Richardson v. Kaufman, 143 Ala. 243, 39 So. 368. Statute not unconstitutional by reason of the fact that the constitution allows a debtor to waive his exemptions. Id. Did not impair the obligation of a contract made after its enactment. Id.

30. See 5 C. L. 1082.

31. Election of remedies. In re Pederson's Estate [Minn.] 106 N. W. 958.

Note: The relation between the two is intimate. Thus matter of equitable estoppel and election may lie in the same situation. An estoppel as to certain facts may conclude the facts indicative of an election between rights depending on those facts [Editor].

32. Acts held to constitute an election: When a party has two inconsistent remedies, any decisive act done by him with knowledge of his rights and of the facts determines his election of his remedy. Bringing of suit on one theory held election precluding enforcement of alternative remedy. Klipstein & Co. v. Grant [C. C. A.] 141 F. 72. The doctrine of election of remedies applies where a party who actually has at hand two inconsistent remedies with full knowledge of such fact proceeds to enforce one of these remedies. Turner v. Grimes [Neb.] 106 N. W. 465. Where a notice in a **copyrighted** publication recited that a sale at less than $1 would be treated as an **infringemnt** of the copyright, the publisher thereby elected to pursue that remedy for a violation of the notice and could not maintain **injunction** to restrain the sale. Bobbs-Merrill Co. v. Straus [C. C. A.] 147 F. 15. A vendee who notified his vendor that because of insufficiency of title he would not accept a conveyance of land and claimed stipulated damages for the vendor's breach, thereby elected to pursue his remedy at law in **damages** and was not thereafter entitled to **specific performance.** Sutton v. Miller, 219 Ill. 462, 76 N. E. 838. Any unequivocal act whereby a seller with knowledge of the buyer's **fraud** elects to treat the sales as valid, whether made in court or not, is sufficient to prevent a subsequent **rescission.** Sceley v. Seeley-Howe-Le Van Co. [Iowa] 105 N. W. 380. A vendee by suing for **breach of warranty** thereby elected his remedy and could not thereafter defend an **action** on a note given **for the price** on the ground of fraudulent representations. Davis v. Schmidt, 126 Wis. 461, 106 N. W. 119. Institution of suit for **breach of warranty** constituted an election of remedy for the breach, although the vendee subsequently amended his complaint so as to set up a different cause of action. Id. A de jure officer of a municipality who brought an **action** and recovered judgment for his salary **against a de facto officer** to whom it had been paid, thereby made an election of remedies and could not thereafter recover **against the town** because he failed in execution against the judgment debtor. Samuels v. Harrington [Wash.] 86 P. 1071. Where a pledgor demanded an **accounting** by the pledgee of profits and also of the proceeds of a wrongful sale and sued to recover such sums, he thereby waived the **conversion** so that defendant was not entitled to a jury. Demars v. Hudon [Mont.] 82 P. 952. Where a bank as holder of a bill of lading as security for a draft had the right to maintain **conversion** against a carrier for wrongful delivery of the goods to another and also the right to bring **detinue** against the party to whom the goods were delivered, the assertion of the bank's claim in a suit against the seller of the goods in which the goods were attached was an election to pursue the latter remedy. Tishomingo Sav. Inst. v. Johnson, Nesbitt & Co. [Ala.] 40 So. 503. Where a deed imposed upon the grantee certain conditions relative to the platting of the property and similar conditions upon the grantor as to the remainder, and upon breach of the condition by the grantee the grantor treated the **agreement as rescinded** and platted his own property in violation of the condition, he could **not thereafter recover the premises** from the grantee. Tower v. Compton Hill Imp. Co., 192 Mo. 379, 91 S. W. 101. The filing of a complaint after the default of a mortgagor is a sufficient notice of **election by the mortgagee to claim the whole amount due.** San Gabriel Valley Bank v. Lake View Town Co. [Cal. App.] 86 P. 727.

Election under or against a will: Where a husband devised land belonging to his wife to others, and other property to her, the wife's express assent to the terms of the will at the time it was made, coupled with the fact that after the husband's death she appropriated the property devised to her, constituted an election to abide by the will. Sorenson v. Carey [Minn] 104 N. W. 958. Where a testator devised certain property to his wife and the residue in trust, the income to be paid to his wife during life or until she remarried, and the widow prior to her remarriage took the income from the entire estate without suggestion that she was claiming dower only, she thereby elected to take under the will. In re Johnson's Estate, 50 Misc. 99, 100 N. Y. S. 373. An action by plaintiff to enforce a contract made by deceased to pay an annuity for services rendered was an election to take under the con-

knowledge of the facts and legal rights.[33] An election to take under or against a will must be made within a reasonable time or the time prescribed by statute unless an extension is granted.[34] A failure to act is sometimes held to constitute an elec-

tract and to waive a provision in a will executed by deceased. Parsons v. Teller, 97 N. Y. S. 808. Under the law as it stood in 1872, a widow who was called upon to elect between testamentary provisions and her statutory rights in her deceased husband's estate was required to signify her choice by open avowal or affirmative act only when her aim was to accept under the will. O'Brien v. Knotts, 165 Ind. 308, 75 N. E. 594. On the issue of a widow's election to take under a will there must be some clear and positive evidence that the widow consented to surrender her statutory rights. Id. Evidence held to sustain finding that a widow elected to take her statutory estate instead of a devise. Id.

Acts held not to constitute an election: Where an entire contract for the manufacture of law reports contained subsidiary provisions as to performance and instalments, an action for a breach with respect to certain instalments was not necessarily an election of remedies so as to bar a subsequent action for other instalments. Jones & Co. v. Gammel-Statesman Pub. Co. [Tex. Civ. App.] 94 S. W. 191. The question whether plaintiff had elected to terminate a contract by suing to recover instalments was properly left to the jury where in a subsequent action to recover further instalments it could not be determined as a matter of law from an inspection of the record in the prior action whether plaintiff had so elected. Id. The taking of an appeal from an order establishing a highway, which appeal was dismissed for irregularity, a subsequent filing of a claim for damages allowed in part by the commissioners after notice of an attempt to withdraw it, and an appeal from the order allowing the claim in part was not an election on plaintiff's part to take damages so as to preclude injunction restraining the establishment of the road. Johnson v. Clontarf [Minn.] 108 N. W. 521. By charging defendant in one count as guarantor and in another as indorser of a note plaintiff did not elect to hold defendant in either capacity. Lloyd & Co. v. Matthews, 119 Ill. App. 546. Course pursued must be inconsistent with subsequent election. Where land was conveyed in consideration of maintenance and support an action in damages for breaches on the part of the grantee committed prior to the action, and receipt of payments after such breaches, was not an election between remedies as to subsequent breaches so as to defeat an action to rescind the contract because of the subsequent breaches. Gall v. Gall, 126 Wis. 390, 105 N. W. 953. Intention to elect must be manifested either by word or conduct. A secret resolve is not sufficient. The institution of an action of forcible detainer is not notice of an election to terminate the tenancy for nonpayment of rent so as to authorize the maintenance of such action without further notice. Lane v. Brooks, 120 Ill. App. 501. An action by a widow to contest the probate of her husband's will is not an election to take dower if the will is set aside or to take under the will if it is sustained. Did not preclude her executor from collecting the legacy. Flynn v. McDermott, 183 N. Y. 62, 75 N. E. 931.

33. Evidence held to sustain finding that a seller with knowledge of fraud in the sale elected to treat the sale as valid so as to preclude recovery of the goods. Seeley v. Seeley-Howe-Le Van & Co. [Iowa] 105 N. W. 380. Where the fraudulent buyer disposed of some of the goods but retained the rest in stock and the seller attempted to collect the entire account without distinction between the goods disposed of and those in stock, he thereby ratified the entire sale and elected to treat it as valid. Id. Evidence that plaintiff's attorney at the time of commencing an attachment suit for the price of goods had no knowledge of fraud held insufficient to deprive the suit of its effect as an election to affirm the sale and bar a rescission of the contract. Baker v. Brown Shoe Co. [Ark.] 95 S. W. 808. Where plaintiff's officers had knowledge of the fraud but failed to communicate it to its attorney, plaintiff was bound by such knowledge. Id. When defendant introduced the record of the former suit to recover the price of the goods, the burden fell upon plaintiff to show ignorance of the facts. Id. The fact that a legatee under a will filed a petition for its probate was not an election to take under the will where she did not have knowledge of the circumstances under which the will was executed and of her rights. In re Pederson's Estate [Minn.] 106 N. W. 958.

Widow's election: To constitute an election on the part of a widow to waive dower she must act with full knowledge of all her rights and it must appear that she intended by her acts to take under the will. Occupancy of homestead held no election. Mellinger v. Mellinger [Ohio] 76 N. E. 615. The duties enjoined upon the probate court by § 5964, Rev. St. 1905, are judicial duties, and a deputy clerk of that court cannot receive the election of a widow or widower to take under a will. Mellinger v. Mellinger [Ohio] 76 N. E. 615. An election made before such deputy and entered of record may be vacated on application of the party making it to a court of equity. Id. Evidence held to show that a widow accepted the provisions of her husband's will with full knowledge that she would thereby preclude herself from enforcing a note. In re Haskell's Estate, 212 Pa. 469, 61 A. 1018.

34. Where a husband applied under the statute for an extension of time within which to waive the provisions in his wife's will, the burden was on him to show that justice required it. Jaques v. Chandler [N. H.] 62 A. 713. The provision "for good cause shown" in Pub. St. 1901, c. 186, § 13, and c. 195, § 14, providing that a husband must elect to take against his wife's will within one year after her decease, unless the judge shall extend the time "for good cause shown" means whenever it would be reasonable and just to do so or whenever justice requires it. Id. Findings held insufficient to justify an

tion.[35] Of two rights or remedies a party will be presumed to have elected the one more beneficial to him.[36]

A waiver may consist of acts which clearly evince an intention to abandon a certain right,[37] or which are inconsistent with an intention to insist upon it.[38] Fail-

extension of time to waive the provisions in the wife's will where the husband was not misled and there was no finding that if he had anticipated a rise in the value of certain stock he would have waived the will. Id.

35. The failure of a widow to renounce the provisions of her husband's will constitutes an election to affirm it and waives statutory rights. Young v. Biehl [Ind.] 77 N. E. 406.

36. Where a petition filed in the district court states facts sufficient to entitle plaintiff to both legal and equitable relief and prays relief, a part of which only can be had at law but all of which can be had in equity, the pleader will be held to have intended to invoke the chancery and not the common law powers of the court. Ames v. Ames [Neb.] 106 N. W. 584. After filing such petition plaintiff may elect to proceed at law but to do so he should manifest his election by some unequivocal act which commits him to the theory that he has abandoned his claim to equitable relief. Id. A mere demand for a jury to try the issues of fact would not warrant the court in assuming that plaintiff has abandoned his claim to equitable relief. Id.

37. Whether the assertion of one of two consistent rights is a waiver of the other is a question of intention and is governed by the doctrine of waiver of rights. Watson v. Perkins [Miss.] 40 So. 643. A conditional offer to waive a right must be accepted and the conditions complied with. Complainant did not waive her right to set aside a void sale of land under a trust deed where her offer to abide by the sale on certain conditions was not accepted and acted upon. Id. An insured held not to have waived his right to an endowment under his policy and to have consented to have his policy turned into one for life where he made unnecessary payments on representations of the insurer that they were necessary to keep the policy alive pending the receipt of funds with which to pay the endowment. Hopkins v. Northwestern Nat. Life Ins. Co., 41 Wash. 592, 83 P. 1019. Complainant not precluded from asserting the invalidity of a void foreclosure sale where without knowledge of all the facts connected therewith she accepted a surplus as part payment on a note. Wasserman v. Metzger [Va.] 54 S. E. 893. Where a testator devised an estate subject to the widow's dower and provided for a disembarrassment of the trust estate from dower by agreement between the widow and the trustee, neither the widow's consent to the assumption of jurisdiction by the court, nor a declaration in her answer of her willingness to free the estate from her dower after a construction of the words "dower or thirds," could be regarded as a waiver of her right to have her dower assigned in case no agreement was made between her and the trustee. Shipley v. Mercantile Trust & Deposit Co., 102 Md. 649, 62 A. 814. Where the grantee in a deed made in consideration of support and maintenance committed a breach by selling the premises without the grantor's knowledge and without making provision for her, and the vendees claimed to be bona fide purchasers, the grantor had a right to submit to the contract of sale without jeopardizing her right to rescind for breach of the condition. Gall v. Gall, 126 Wis. 390, 105 N. W. 953.

38. Waiver of grounds of nonliability: Where a party gives a reason for his decision and conduct touching anything involved in a controversy, he is estopped after litigation has begun from changing his ground and putting his conduct on another and different consideration. Where a bank refused to honor a check solely because payment had been stopped, it could not at the trial justify on the ground of no funds. First State Bank v. Stephens Bros. [Neb.] 105 N. W. 43.

Other acts of waiver: An heir who joins his wife in the execution of a mortgage on land devised to her by his ancestor thereby waives his right to attack the will. Could not thereafter attack will on ground of mental incapacity. Starkey v. Starkey [Ind.] 76 N. E. 876. A provision in a building contract that applications for extension of time must be made in writing within twenty-four hours held waived where all delays were occasioned by the owner's architect and he led the contractors to believe that an extension would be granted without such application. Huber v. St. Joseph's Hospital [Idaho] 83 P. 768. Held error to exclude evidence of such waiver. Id. Recovery of damages for failure to deliver an instalment of goods under an entire contract is a bar to a subsequent action for failure to deliver subsequent instalments. Pakas v. Hollingshead, 184 N. Y. 211, 77 N. E. 40. Provision in logging contract requiring defendant to do the work during the first of two seasons unless notified to the contrary before July 1, held waived by plaintiff's notifying defendant after that date not to begin work until satisfactory arrangements could be made for the transportation of the logs. Mueller v. Cook, 126 Wis. 504, 105 N. W. 1054. A vendee of land could not recover of the vendor because of a shortage in acreage after payment of the full purchase price with full knowledge of the shortage. Fields v. Fields [Va.] 54 S. E. 888. A carrier held "estopped" to object that a shipper's claim for damages to cattle was not verified where its agent retained the notice and acted upon it. Farmers' Bank v. Wabash R. Co. [Mo. App.] 95 S. W. 286. Stockholders of a corporation who consented to the entry of a judgment whereby title to certain land was established and confirmed in one C., thereby precluded themselves from afterwards asserting any equity or trust so as to prevent the property from passing to the trustee in bankruptcy of C. In re Coffin, 146 F. 181.

Held not to constitute a waiver: A mortgagee of chattels by calling on one who

ure to assert rights within a reasonable time[39] or to raise a proper objection at the proper time[40] may also constitute a waiver. An express valid agreement fixing the rights of the parties in the case of future contingencies will ordinarily exclude com-

converts them to pay him the amount realized therefrom does not waive his right to sue in conversion. Baker v. Hutchinson [Ala.] 41 So. 809. One who is in possession of personal property under a valid lien and gives timely notice of his claim to the officer does not lose his right to claim the property by purchasing it at a sale under execution against the owner. Brown v. Petersen, 25 App. D. C. 359. One selling a chattel on condition that title remain in him until the price is paid does not lose title by suing and recovering judgment for the price, the same not being paid. Forbes Piano Co. v. Wilson [Ala.] 39 So. 645. Creditors of estate of father were also creditors of estate of his son and filed claims against both estates and commenced suit thereon. Representative of father was not a party to suits against estate of son. Cases were heard together and in those against son decree was rendered subjecting son's interest in lands derived from his father to sale. Held that creditors were not inconsistent in failing to assert their debts against the estate of the father in the suits against the son's estate so as to preclude them from maintaining their suit against the father's estate. Davis' Adm'x v. Davis, 104 Va. 65, 51 S. E. 216. That a purchaser of mining machinery made payments for materials used in the construction of the plant did not operate as a waiver of his right under the contract to reject the whole plant. Ark-Mo. Zinc Co. v. Patterson [Ark.] 96 S. W. 170. The receipt by a landlord after notice to quit of rent for a new term or part thereof is a waiver of his right to demand possession under that notice, but receipt of rent for the current month pending a notice to quit does not have that effect. Byrne v. Morrison, 25 App. D. C. 72. That certain landowners cultivated a part of land unlawfully drained by an irrigation company did not amount to a waiver of their right to recover damages and enjoin the maintenance of a dam. Madson v. Spokane Valley Land & Water Co., 40 Wash. 414, 82 P. 718. Lessors of a coal mine held not to have waived their right to collect royalties for coal mined and not accounted for by accepting minimum royalties where they had no knowledge of the mining of any excess of royalty coal over the amount paid for. Hoyt v. Kingston Coal Co., 212 Pa. 205, 61 A. 885. City patrolman merely by accepting a less compensation per month than that to which he was legally entitled did not thereby lose his right to the additional compensation. City of Chicago v. McNally, 117 Ill. App. 434. Taking the note of a contractor by a subcontractor for a debt which is a lien and negotiation of it at a bank does not waive the lien where he is compelled to take up the note. Mivelaz v. Genovely [Ky.] 89 S. W. 109. That a payee on tender of payment of a note stated that he did not desire the money but wished it to be used for another purpose did not preclude him from subsequently demanding payment. Leask v. Dew, 102 App. Div. 529, 92 N. Y. S. 891. Where the attorney of the holder of an attachment lien on property subject to a mortgage directed the sheriff not to sell the property at the time, but it was not shown that the attorney had authority to waive or intended to waive the attachment lien, such facts were insufficient to show a waiver of the lien. Katz v. Obenchain [Or.] 85 P. 617. Where a court had no jurisdiction to appoint any one to the office of special administratrix of an estate, the fact that testator's widow asked that she be appointed did not estop her to object to the appointment of another. State v. District Ct. [Mont.] 85 P. 1022. That complainant petitioned the city to pave a street did not preclude her suing to enjoin a change of grade. Town of New Decatur v. Smith [Ala.] 41 So. 1028. Plaintiff held not precluded from suing for forcible entry on the ground that defendants chiseled away a portion of her wall which they claimed projected over their land, by the fact that when told of such projection she said that she did not want anything that did not belong to her, and that she underpinned her wall when defendants began to excavate. Holzhausen v. Haskins, 115 Mo. App. 261, 91 S. W. 410. A deed required the grantee to erect and maintain a stone wall. Held the grantor, by acquiescing in the putting in of a wooden wall, did not waive his right to a stone wall under the covenant when a new wall was necessary by reason of the grantee removing the first wall. Flege v. Covington & C. El. R. & Transfer & Bridge Co. [Ky.] 91 S. W. 738.

39. Failure to seasonably rescind, on the ground of fraud, a contract for the purchase of the right to operate burial associations. Burk v. Johnson [C. C. A.] 146 F. 209. Where a sale of property under a trust deed was voidable at a widow's election for violation of her demand upon the trustee that property other than the homestead should be sold first to pay debts, but in an action by the purchaser to recover possession the widow failed to assert her right to vacate it, she thereby waived her right to have it set aside. Weber v. McCleverty [Cal.] 86 P. 706.

40. See, also, Saving Questions for Review, 6 C. L. 1385. Defendant who after a change of venue from a special judge to another court demurred to the complaint and excepted to the overruling thereof, thereby waived his right to object that the special judge was improperly appointed. Whitesell v. Strickler [Ind.] 78 N. E. 845. Objection that complaint in suit to foreclose a mortgage was insufficient for failure to state a definite amount as due held waived by failure to interpose special demurrer. San Gabriel Valley Bank v. Lake View Town Co. [Cal. App.] 86 P. 727. One who is joined as defendant in a foreclosure proceeding and appears and answers without making objection to the joinder is precluded from making such objection in a subsequent action on the notes secured by the mortgage. Black v. Thomson, 120 Ill. App. 424.

mon-law rights.[41] Questions of waiver peculiar to insurance are treated elsewhere.[42]

§ 5. *Consequences of an election or waiver.*[43]—A deliberate and intelligent election between available but inconsistent rights or remedies bars a second election.[44] It concludes the electing party[45] and operates in toto,[46] but leaves him free from any restraints in connection with the rights waived.[47] Consistent reme-

41. Where city took indemnity bond from street railway company fixing liability over against the company for injuries to others, this precluded the city from suing the company in case. City of Pawtucket v. Pawtucket Elec. Co. [R. I.] 61 A. 48.

42. See Insurance, 6 C. L. 69. A letter by an insurer to the husband of the insured stating that the amount of the policy would be paid to him did not confer any rights on the husband by way of waiver where it was optional with the insurer, to pay the amount to others, there being nothing to be waived. Ferretti v. Prudential Ins. Co., 49 Misc. 489, 97 N. Y. S. 1007.

43. See 5 C. L. 1084.

44. See, also, ante § 4. Where a party with full knowledge of all the facts and his rights makes a deliberate choice of one of two or more appropriate but inconsistent remedies, he is bound by his election and estopped from again electing and resorting to another remedy. In re Pederson's Estate [Minn.] 106 N. W. 958. Where the holder of a check sues on the debt and proceeds by garnishment of the bank, she is bound by her election of remedies and is entitled to nothing by virtue of holding the check as against other holders of checks. Kuhnes v. Cahill, 128 Iowa, 594, 104 N. W. 1025. Seller who with knowledge of fraud in the sale attempted to collect the price cannot thereafter elect to rescind and recover the goods. Seeley v. Seeley-Howe-Le Van Co. [Iowa] 105 N. W. 380. The election is conclusive though no injury was done by reason of it or would result from setting it aside. Id. Nor can he recover the purchase price after asserting title to and taking possession of the property under the contract of sale. Cooper v. Payne, 97 N. Y. S. 863. Plaintiff could not contend that his applying the proceeds of a sale of the property on the purchase money notes, negotiating some of them and bringing action on others, constituted an irrevocable election to affirm the sale so as to preclude him from taking the property as owner. Id. A suit for breach of warranty is an affirmance of the sale and precludes repudiation for fraud though no damages are recovered. Davis v. Schmidt, 126 Wis. 461, 106 N. W. 119. Where plaintiff pleaded conversion of a team of horses and the subsequent execution of a bill of sale on defendant's promise to pay a fixed price, he could not afterwards in another action claim that title never passed and recover for defendant's negligence. He could not both treat the title as having passed and sue for the wrong. Turner v. Grimes [Neb.] 106 N. W. 465. Where plaintiff sued defendant in contract for money received "as his agent," he thereby waived the right to sue the agent for any tort involved in receiving the money as agent. Starin v. Fonda, 107 App. Div. 539, 95 N. Y. S. 379. Where a widow elects to take under a will by which land belonging to her is disposed of to others and other property is devised to her, the election operates as a transfer and disposal of her land. Sorenson v. Carey [Minn.] 104 N. W. 958. Where claimant accepted a devise of land under a will which recited that testatrix had acquired title thereto by deed from her son, he could not thereafter set up any claim of his own to the land as heir of the son which would defeat any part of the will. Cunningham v. Cunningham's Estate, 220 Ill. 45, 77 N. E. 95. A husband who, after the death of his wife, accepted the provisions of a mutual will between himself and his wife could not thereafter revoke it or defeat it as against the children by making voluntary conveyances. Bower v. Daniel [Mo.] 95 S. W. 347. Where a wife received her share of land under an agreement with her husband for a division thereof in settlement of a suit between them, she could not assert any interest in his part either against him or his grantee. Rash v. Hart [Ky.] 89 S. W. 192. A suit by an administrator of a deceased employee of defendant railroad company, who was a member of the relief department of that company, to recover damages under the statute for wrongfully causing the death of the employee, bars a subsequent action upon the membership certificate in such department when the administrator is the same person named as beneficiary in the contract. Chicago, etc., R. Co. v. Healy [Neb.] 107 N. W. 1005. A cause of action under Kan. Gen. St. 1889, § 1192, to enforce the double liability of a stockholder by motion after an unsatisfied judgment against the corporation, is not the same as one between the same parties to enforce such liability under §§ 1200, 1204, on the ground of one year's suspension of business by the corporation, and the commencement of an action upon one of these causes is a bar to the prosecution of an action between the same parties to recover a liability of the stockholder in the same corporation under the other. Harrison v. Remington Paper Co. [C. C. A.] 140 F. 385.

45. Where a defendant elected to treat a submission to arbitration as a statutory submission and it was void as such, he could not complain that the court disregarded it and proceeded to trial. Nay v. Boston, etc., R. Co. [Mass.] 78 N. E. 547.

46. A widow who by electing to take against a will thereby reduces the amount which the executor would have taken as legatee cannot thereafter invoke a provision in the will requiring the executor to serve for a nominal consideration. Murray's Estate, 28 Pa. Super. Ct. 474.

47. Where a widow refused to take under a will she, the executors, and all the legatees, could enter into an agreement that the will should be probated and the widow should have the use of the realty during life, the personalty to remain in the hands

dies may be pursued concurrently but full satisfaction in one is a satisfaction in all.[48] A widow's election to take against the will may be vacated for fraud[49] in the absence of laches,[50] but a renunciation of dower cannot be set aside for fraud as against an innocent purchaser.[51] In the absence of statute a widower who waives the provisions of his wife's will in his favor is not entitled to a distributive share of her personal estate.[52]

One who waives a known right will not be permitted thereafter to assert rights inconsistent with his waiver.[53]

§ 6. *Pleading.*[54]

ELECTIONS.[91]

§ 1. **Definition of Election, Legal Authorization, Time, Place, and Notice (1230).** Constitutional Guaranties and Limitations (1232). Time (1232). Place (1232). Election Districts (1232). Resubmission (1233). Notice (1233).

§ 2. **Eligibility and Registration of Electors (1233).** Residence (1234). Registration (1236).

§ 3. **Nominations by Convention or Petition (1237).** Conventions and Nominations (1237). Petitions (1237). Certificates and Declination and Vacancies (1238). Contests and Disputes (1238).

§ 4. **Official Ballot (1238).** Questions Submitted (1239). Use of Party Name (1240).

§ 5. **Primary Elections (1240).** Control by Party Committees (1242). Ballots for Primaries (1242)

§ 6. **Officers of Election (1243).**

§ 7. **Polling and Receiving the Vote (1243).** Voting by Machine (1244).

§ 8. **Marking and Signing Ballot; Irregularities and Ambiguities Therein (1244).** The Marks (1245). The Writing in of Names (1246).

§ 9. **Secrecy of Ballot and Distinguishing Marks (1246).**

§ 10. **Count, Return, and Canvass, Custody of Ballots and Recount; Determination of Result and Certificates (1247).** Recount of Ballots (1247). Determination of Result; Certificates (1248).

§ 11. **Judicial Control and Supervision (1284).** Mandamus (1249). Injunction (1249).

§ 12. **Judicial Proceedings to Contest or Review (1250).** Rights and Remedies (1250). Grounds for Contest or Review (1251). Jurisdiction 1251). Notice or Summons; Pleadings and Issues (1251). Dismissal (1253). Preservation and Production of Ballots (1253). Evidence (1253). Costs (1255). Decision and Review Thereof (1255). Security for Appeal; Costs (1256).

§ 13. **Offenses Against Election Laws (1256).**

§ 1. *Definition of election, legal authorization, time, place, and notice.*[92]—The word "election" within the meaning of the statutes of Wisconsin includes a referen-

of the executors for investment and the widow to receive the income and such part of the principal as she might need from time to time, and such agreement was valid as against any subsequent creditor of a legatee. Hess's Estate, 27 Pa. Super. Ct. 498.

48. One who having a right to sue two parties jointly sued only one and recovered judgment which was satisfied could not thereafter sue both jointly. King v. Arney, 114 Ill. App. 141.

49. Complaint held to state cause of action where widow's daughter, her husband, and a judge had led complainant to believe that testator was incompetent. Whitesell v. Strickler [Ind.] 78 N. E. 845.

50. Complainant's delay sufficiently excused where at the time she was induced by her son-in-law to take under the law she was urged to silence about the matter and did not learn of the fraud until a few weeks prior to her action to set aside the election. Whitesell v. Strickler [Ind.] 78 N. E. 845. A suit by a widow to rescind for fraud an election to take under the law as distinguished from an election to take under the will may be brought at any time within six years if sufficient excuse is given for her delay. Id.

51. Complaint insufficient where it did not charge grantee with participation in the fraud or knowledge thereof. Campbell v. Harris Lithia Spings Co. [S. C.] 54 S. E. 378.

52. Prior to Pub. Laws 1903, c. 160, § 1, there was no statute in this state giving a widower a distributive share in the wife's personal estate after having waived the provisions of her will in his favor. Stewart v. Skolfield, 99 Me. 65, 58 A. 56.

53. See, also, ante, § 4. A vendee of land who accepted a deed and paid for the land therein described, after being notified by the vendor that owing to a mistake in the survey the deed did not include all the land contracted for, could not thereafter claim the land excluded as against a subsequent purchaser thereof. Williams v. Virginia-Pocahontas Coal Co. [W. Va.] 53 S. E. 923. Where a lessor waived a provision in the lease requiring the lessee to redeliver the property leased at specified place by accepting the property at another place, it could not thereafter hold the lessee's sureties liable for the expense of removing the property or claim any further rent. White River, etc., R. Co. v. Star Ranch & Land Co. [Ark.] 91 S. W. 14. A contractor who failed to perform a contract for the construction of a public ditch and participated in subsequent proceedings looking to the let-

dum vote to decide a question of policy.[93] No election is valid unless called by authority legally exercised,[94] which for certain matters of local policy must be invoked by the filing of a petition[95] properly signed[96] and acknowledged[97] by the requisite number of citizens qualified thereto[98] praying the submission of the matters to be voted upon.[99] Authority to call special elections to vote on local propositions is usually vested in municipal authorities.[1] A municipality's powers may be exercised by vote of the citizens[2] when no other mode is designated, and the municipality may regulate the mode of such election. The order or precept for an election must with substantial accuracy describe the thing or office to be voted upon.[3] A precept for a special election is seasonably issued if giving time to call a nominating caucus.[4] General laws govern in matters relating to local elections but not specially regulated,[5] but the penal provisions of the Arkansas general law have been held inapplicable to certain local elections.[6]

ting of a new contract by putting in a bid could not, after failing to get the contract under his bid, contend that he should be permitted to perform the same work under his old contract. Brown & Co. v. Pottawattamie County Sup'rs [Iowa] 105 N. W. 1019. One who abandoned a contract by which he was to assist in the perfection of an appliance in consideration of an interest in any patent which might be obtained, held "estopped" to assert an interest in the patent after it was obtained by the assistance of another. Stitzer v. Withers [Ky.] 91 S. W. 277.

54. See 3 C. L. 1181.

91. Scope of topic: The law of election is not regarded as including that of offices and officers or their remedial rights (see Officers and Public Employes, 6 C. L. 841; Mandamus, 6 C. L. 496; Quo Warranto, 6 C. L. 1190), nor does it include appointive votes whereby public bodies like "boards" or "councils" choose officers (see Officers and Public Employes, 6 C. L. 841). Many questions pertaining to elections whereby voters act on matters of law or local policy submitted to them are not susceptible of generalization, therefore in addition to this topic the topics Animals (stock law elections), 7 C. L. 120; Constitutional Law (adoption and amendment), 7 C. L. 691; Intoxicating Liquors (local option elections), 6 C. L. 165; Municipal Bonds, 6 C. L. 704; Municipal Corporations, 6 C. L. 714; Public Works and Improvements, 6 C. L. 1143; Schools and Education, 6 C. L. 1415, should be consulted as to elections specially relating to such matters.

92. See 5 C. L. 1065.

93. Issuance of school bonds. Hall v. Madison [Wis.] 107 N. W. 31.

94. The county court's order authorizing an election under the local option law, made by the county judge and one county commissioner in vacation, after an adjournment of the regular term and without a special term having been called. State v. Rhodes [Or.] 85 P. 332.

95. Under § 16 of the Liquor Tax Law the local option question cannot be submitted except on the filing of a petition duly signed and acknowledged. Kennedy v. Warner, 51 Misc. 362, 100 N. Y. S. 616.

96. A petition for the submission of the local option question under the Liquor Tax Law, Laws 1896, p. 57, c. 112, § 16, need not contain all the names of petitioners on one paper. In re Cipperley, 50 Misc. 266, 100 N. Y. S. 473.

97. Acknowledgment must be the same as the acknowledgment of a deed. Kennedy v. Warner, 51 Misc. 362, 100 N. Y. S. 616.

98. In North Carolina mere registration at the preceding election without payment of poll tax does not constitute one a "registered voter" entitled to sign a petition for a special election. Pace v. Raleigh, 140 N. C. 65, 52 S. E. 277.

99. The petition must request the submission of all the questions provided by statute. Kennedy v. Warner, 51 Misc. 362, 100 N. Y. S. 616.

1. In South Carolina municipal authorities may order a special election on the question of issuing bonds to purchase a waterworks system. Dick v. Scarborough [S. C.] 53 S. E. 86. Civil Code of 1902, § 2021, authorizing municipal authorities to order a special election on the question of issuing bonds for enlarging, extending, or establishing waterworks, includes the purchase of such. Id.

2. Under its charter the city council of Omaha, having authority to provide by ordinance the method of executing a power bestowed on it by the legislature, the manner of exercising which has not been pointed out by statute, may regulate the manner of holding a special election for an authorized purpose and hold an election pursuant thereto. To submit question of issuing bonds to construct firehouses. Linn v. Omaha [Neb.] 107 N. W. 983.

3. A misdescription of the length of the term of an officer in a resolution, otherwise sufficient, ordering a special election, held a mere irregularity. Koster v. Coyne, 184 N. Y. 494, 77 N. E. 983.

4. Issued in sufficient time to permit a caucus to be called to make nominations before the next annual election, even though the nominating caucus is already in session when the precept is issued. Attorney General v. Campbell [Mass.] 78 N. E. 133.

5. Matters not provided for by the local option election law. Arnold v. Anderson [Tex. Civ. App.] 14 Tex. Ct. Rep. 713, 93 S. W. 692.

6. In Arkansas, provisions of the general election law do not apply to elections held

Constitutional guaranties and limitations.—It is generally provided that elections must be free and equal.[7] The legislature in providing election machinery for the execution of a constitutional power given to cities cannot limit its application to a part of such power only.[8] A general election law is not rendered unconstitutional as being local because it does not repeal existing local laws inconsistent therewith.[9] In some states to make the operation of a law depend upon the result of a referendum is unconstitutional.[10]

Time.[11]—The election must be held within the authorized hours.[12]

Place.[13]—Holding an election at a place other than that specified by law but under such circumstances that no voter was misled is not fatal to the legality of the election.[14] Elections on matters of local policy are generally coextensive with a precinct or county.[15]

Election districts.[16]—In New York apportionments of districts for election purposes must be as nearly equal in the number of inhabitants and compact in form as possible[17] and must not omit any part of the apportioned territory.[18] In Pennsylvania the court of quarter sessions may, without advisory inquiry, divide a township into election districts on petition merely,[19] and adopt the scheme of division recommended by the petitioners.[20] The boundaries of an election district may in some instances be sufficiently designated by city or borough streets.[21] On dividing a borough ward into election districts such court may designate the polling place.[22] Under a constitutional provision in New York that each assembly district must be wholly embraced within a senatorial district, there can be no valid assembly apportionment unless there was a valid prior senatorial apportionment.[23]

In single school districts organized in cities and in incorporated towns. Kirby's Digest § 1667, regulating the punishment of election officers for violation or nonperformance of their duty, held a part of the general election law. Brown v. Haselman [Ark.] 95 S. W. 136.

7. The local option law, Laws Or. 1905, pp. 41, 47, c. 2, does not violate Const. art. 2, § 1, providing that all elections shall be free and equal, as any qualified voter may vote on such issue and have his vote counted. State v. Richardson [Or.] 85 P. 225.

8. Const. art. 8, § 5, providing that cities may acquire waterworks and on a majority vote of its citizens issue bonds therefor, authorizes the purchase of a waterworks system, although the legislature provided for an election on a bond issue for the construction of such a system only and failed to make any provision for purchasing a system already constructed. Dick v. Scarborough [S. C.] 53 S. E. 86.

9. State v. Thompson, 142 Ala. 98, 38 So. 679. A general election law not rendered unconstitutional in the absence of notice by providing that it is not to apply to existing laws governing special primary, county, or municipal elections inconsistent therewith. Id.

10. As being an improper delegation of legislative functions. Small stock law not to become operative in any county until adopted by a majority of the legal voters. Wright v. Cunningham, 115 Tenn. 445, 91 S. W. 293.

11. See 5 C. L. 1066.

12. Lower Terrebonne Refining & Mfg. Co. v. Police Jury of Parish of Terrebonne, 115 La. 1019, 40 So. 443.

13. See 5 C. L. 1066.

14. Bordwell v. State [Ark.] 91 S. W. 555. As where a livery barn was designated as the polling place, but the election was held at a court house nearby and it did not appear that any voter was misled. Id.

15. In Alabama an election on the question of the stock law may be had in a county under both the local law and the general law, but under the latter law only in a single precinct. Phillips v. Bynum [Ala.] 39 So. 911. Cannot be ordered for any territory less than a precinct. Commissioners' Ct. v. Johnson [Ala.] 39 So. 910; Phillips v. Bynum [Ala.] 39 So. 911.

16. See 5 C. L. 1066.

17. In re Timmerman, 51 Misc. 192, 100 N. Y. S. 57.

18. An apportionment which by omitting a city disenfranchises its electors is invalid. In re Timmerman, 51 Misc. 192, 100 N. Y. S. 57.

19. The court of quarter sessions may upon petition divide a township into election districts in the exercise of their constitutional power without the appointment of commissioners and without proceeding by view, review, and exceptions. Waynesburg Borough's North Ward, 29 Pa. Super. Ct. 525.

20. No presumption that a court of quarter sessions did not exercise the judgment and discretion vested in it by the constitution in the erection of election districts arises from the fact that it adopted the scheme of division recommended by the petitioners. Waynesburg Borough's North Ward, 29 Pa. Super. Ct. 525.

21. Not necessary to set forth their angles and courses in addition. Waynes-

Resubmission of a referendum is not proper where the original was fatally defective,[24] nor will it be made merely because of misdoing even though criminal at the election,[25] or because of an injurious effect upon business resulting from the vote.[26]

Notice.[27]—Adequate notice must be given the voters as nearly as possible in accordance with the literal terms of the statutory requirements,[28] which generally fixes the length of time and number of publications,[29] and in this respect a special law unrepealed prevails over a later general one.[30] The duty of designating the newspapers in which notices of elections are to be published rests by charter upon the board of aldermen of New York City and not upon the board of elections.[31]

§ 2. *Eligibility and registration of electors.*[32]—The right of suffrage arises and exists under the constitutions and laws of the several states[33] which may put limitations upon it.[34] Qualifications fixed by constitution are exclusive,[35] and diversity of rights between legal voters cannot arise out of or rest upon the number of people

burg Borough's North Ward, 29 Pa. Super. Ct. 525.

22. Waynesburg Borough's North Ward, 29 Pa. Super. Ct. 525.

23. In re Timmerman, 51 Misc. 192, 100 N. Y. S. 57.

24. An objection that a petition for the submission of local option questions is defective cannot be raised on a motion for resubmission, as there can be no resubmission if such petition is defective. In re Cipperley, 50 Misc. 266, 100 N. Y. S. 473.

25. Although it is reprehensible for ladies to serve refreshments consisting of coffee and doughnuts to electors on election day at which local option questions are submitted, and if served within 100 feet of the polls might subject them to prosecution for violation of the election laws, it is no sufficient ground for a resubmission of the questions at a special town meeting. In re Cipperley, 50 Misc. 266, 100 N. Y. S. 473.

26. The mere fact that the prohibition of the sale of liquor will injuriously affect the business interests of a locality is not a ground for the resubmission of the local option question. In re Cipperley, 50 Misc. 266, 100 N. Y. S. 473.

27. See 5 C. L. 1066.

28. Amos Brown's Estate v. West Seattle [Wash.] 85 P. 854. Publication of an election notice in a newspaper widely circulated in a city and largely devoted to local news, but printed in another city, is a sufficient publication in a newspaper "printed and published in the city" where no newspaper actually is printed in such city. Amos Brown's Estate v. West Seattle [Wash.] 85 P. 854.

29. In Missouri notice of an election on the local option issue must be published for 28 days, and the election may be held on any day within 10 days after the last publication. The election being held on Sept. 6, publication on Aug. 4th, 11th, 18th, 25th, and Sept. 1st, and on Aug. 3d, 10th, 17th, 24th, and 31st, is sufficient. State v. Dobbins, 116 Mo. App. 29, 92 S. W. 136. Where the official journal of a parish is published only every Saturday, a statute requiring that a notice of election "shall be published for 30 days in the official journal of the parish" is complied with if the notice is published in the official journal five consecutive Saturdays and the election is held 32 days after the first publication. Lower Terrebonne Refining & Mfg. Co. v. Police Jury of Parish of Terrebonne, 115 La. 1019, 40 So. 443.

30. Notices of a local option election posted in conformity to the local option law render such election valid, although not posted the length of time required by the Terrell Election Law. Held that the Terrell Election Law did not repeal the local option law. Parks v. State [Tex. Cr. App.] 96 S. W. 328.

31. In an action by a newspaper to recover compensation for a published notice under designation by the board of supervisors to whose authority the board of aldermen have succeeded. Standard Pub. Co. v. New York, 97 N. Y. S. 740.

32. See 5 C. L. 1067.

33. Was not conferred by the Fourteenth Amendment. State v. Webber [Minn.] 105 N. W. 490.

34. A limitation upon the right of suffrage as respects naturalized citizens to such as are admitted to **citizenship three months preceding the election** at which they tender their vote is not in violation of the Fourteenth Amendment prohibiting states from abridging the privileges or immunities of citizens of the United States. Construing Const. art. 7, § 1, as amended in 1895 (Gen. Laws, 1895, p. 7, c. 3). State v. Webber [Minn.] 105 N. W. 490. Individual ownership in property and payment of taxes thereon qualifies one, though by error the property is **erroneously** assessed to the owners as a firm. Commonwealth v. Shrontz, 213 Pa. 327, 62 A. 910. All common owners are thereby qualified. Id. On a quo warranto for illegal voting without having paid tax the question whether the tax had really been paid may be examined beyond the receipt or other evidence proffered to the election board. Id. Payment of **poll tax** required. Pace v. Raleigh, 140 N. C. 65, 52 S. E. 277.

35. In Oregon under a constitutional provision prescribing the qualifications of voters "at all elections prescribed by law" and "not otherwise provided by the constitution," does not permit the legislature to add to these qualifications. Requiring payment of the poll tax as a qualification violative of

in the county where the voter happens to reside.[36] The Soldiers' Home of Missouri is not such an asylum, supported at the public expense, as to disfranchise its inmates.[37] In Wisconsin women are fully qualified constitutional electors in all school matters,[38] which includes the right to vote on the question of the issuance of school bonds.[39] Annexation of contiguous territory to a city for educational purposes does not necessarily carry with it the right of suffrage in school matters.[40]

The vote of a qualified elector must be received,[41] although someone else has voted previously in his name,[42] and a refusal by an election board to permit a person to vote who has been adjudged legally entitled thereto by a court constitutes contempt.[43] The right to vote being a political right, equity will not interfere to protect it.[44] The jurisdiction to adjudge the right of a person to vote is statutory.[45]

Residence[46] within an election district is generally one of the requisites of the

Const. art. 2, § 2. Livesley v. Litchfield [Or.] 83 P. 142.

36. People v. Chicago Election Com'rs [Ill.] 77 N. E. 321.

37. Hale v. Stimson [Mo.] 95 S. W. 885.

38. The word "electors" in Rev. St. 1898, § 943, did not mean such electors only as were qualified to vote at all elections, but the electors qualified by law to vote on any given proposition. Hall v. Madison [Wis.] 107 N. W. 31.

39. Hall v. Madison [Wis.] 107 N. W. 31. The Wisconsin act giving women the right to vote in school matters is constitutional. Construing Rev. St. 1898, § 428a. Id.

40. The inhabitants of contiguous portions of a town attached to a city for the purpose of enabling them to send their children to the city school on payment of their proportionate share of the expenses were not entitled thereby to vote on the question of the issuance of school bonds by the city. Hall v. Madison [Wis.] 107 N. W. 31.

41. When a person legally qualified offers to vote the inspectors of election must receive it. People v. Doe, 109 App. Div. 670, 96 N. Y. S. 389.

42. To deprive him of his ballot under such circumstances violates Const. art. 1, § 1, providing that no citizen shall be deprived of his rights and privileges except by the law of the land or the judgment of his peers, and also Const. art. 2, § 1, prescribing the qualifications of a voter. People v. Doe, 109 App. Div. 670, 96 N. Y. S. 389.

43. A district board refusing to permit a person to vote presenting a certificate of the court of common pleas that he is entitled to vote constitutes contempt of that court under Act of 1905 (P. L. 1905, p. 262). In re Contempt of the Gloucester Pleas [N. J. Law] 64 A. 170.

44. Shoemaker v. Des Moines [Iowa] 105 N. W. 520.

45. Under § 2 of a supplement to an act regulating elections (P. L. 1905, p. 262), the jurisdiction of the court of common pleas to adjudge whether "a person registered" is entitled to vote is complete if his vote has been rejected by the district board and his name appears upon the register delivered by the county clerk to the court as required by § 3 of this supplement. In re Contempt of the Gloucester Pleas [N. J. Law] 64 A. 170. The adjudications by the court of common pleas under this supplement supersedes the authority previously vested in the district boards by § 25 of the general election law (P. L. 1898, p. 249) to adjudge a registered person's right to vote in a certain district. Id.

46. See 5 C. L. 1067. The word "residence" as employed in the election statutes is synonymous with "home" or "domicile" and means a fixed or permanent abode or habitation to which the party when absent intends to return. State v. Savre [Iowa] 105 N. W. 387. As between the place where one rooms and sleeps, and the place where one eats his meals without other facts indicating the contrary, the former must be regarded as his place of residence. Id.

NOTE. Residence of voters who are not house-holders: In the case just cited, State v. Savre [Iowa] 105 N. W. 387, it appeared that defendant indicted for illegal voting was a physician who slept in one of the rooms of a suite of offices occupied by him professionally. There were no house-keeping equipments in the rooms, but he passed his unoccupied hours there in large part. His meals he procured at restaurants and boarding-houses, and as a usual rule he took two meals each day at a place in the precinct where he tendered his vote. He purchased meal tickets and hence was not entirely regular in his patronage of this place, and he did not remain there longer than was necessary to eat his meals. He testified, however, that he regarded this boarding house as his residence, and had always voted accordingly. It was decided that his voting residence followed the place where he slept, for the reason that though his intention was otherwise, the place of his residence had never concurred with the place of his intention. In this case the court said: "The word residence as employed in the election statutes is synonymous with home or domicile and means a fixed or permanent abode or habitation to which the party, when absent, intends to return. Vanderpoel v. O'Hanlon, 53 Iowa, 246, 5 N. W. 119, 36 Am. Rep. 216; Sharp v. McIntire, 23 Colo. 99, 46 P. 115; State v. Aldrich, 14 R. I. 171; Chase v. Miller, 41 Pa. 403; Hannon v. Grizzard, 89 N. C. 115. As said in the case first cited, he is entitled to vote only in the county where his home is, where his fixed place of residence is for the time being, and such place is and must be his domicile or place of abode, as distinguished from a residence

right to register and vote.[47] It is determined from the acts and intentions of the person himself.[48] Inmates of public institutions may establish a residence there.[49]

acquired as a sojourner for business purposes, the attainment of an education, or any other purpose of a temporary character. There is no absolute criterion by which to determine one's place of residence. Each case must depend on its particular facts or circumstances. **Three rules,** however, are well established: (1) That a man must have a residence or domicile somewhere; (2) when once established, it remains until a new one is acquired; and (3) a man can have but one domicile at a time. See 10 Am. & Eng. Ency. of Law [2d Ed.] 598. Ordinarily little difficulty is experienced in determining the residence of a man with a family for it is, save in exceptional cases, where the family live or have their home. Brewer v. Linnaeus, 36 Me. 428. See Schlawig v. De Peyster, 83 Iowa, 324, 49 N. W. 843, 32 Am. St. Rep. 308, 13 L. R. A. 785. But the occupation of single men is often such that they are seldom at the same place for any considerable time. And in determining their domicile it is of the utmost importance that the law be so construed as not to deprive them of the right to exercise the privileges of citizenship. On the one hand, the intention alone cannot fix the place of abode, nor, on the other, can conduct in stopping for a time at a particular locality. One cannot by his intention alone fix his dwelling place, and his stay may be for a temporary purpose only. As observed in Cohen v. Daniels, 25 Iowa, 88, the intention and the acts must concur. This was lucidly explained in an opinion by Wright, C. J., in Hinds v. Hinds, 1 Iowa, 36: True it is there must be the fact of the intent. Now, what fact? We answer, the act of abiding; the fact of a dwelling; a habitation; and having this residence —having an abode—this abode, this dwelling, then if the intent exists, the domicile is perfect. In other words, the mere intent, without the fact of residence or abiding, cannot constitute the domicile. Neither can the intent, without having the abode, the home, the place to dwell, constitute the residence. Residence, as there used, we think, has reference to the fact that the citizen or person has a place that, to use an expressive word, is called 'home,' with no present intention of removing therefrom. Not that the person is to remain continuously there, in order to retain his residence or domicile, but if absent for a long or short time, with the animus revertendi, the domicile still continues. See, also, Whitcomb v. Whitcomb, 46 Iowa, 437; Fitzgerald v. Arel, 63 Iowa, 104, 16 N. W. 712, 18 N. W. 713, 50 Am. Rep. 733; State v. Minnick, 15 Iowa, 123. Mere bodily presence or absence cannot have controlling effect in determining residence when once established. Many qualified voters spend most of their time in pursuits out of the ward or even the state. Persons who travel for business or pleasure for long or short periods do not lose their residence by such absence. But bodily presence ordinarily is essential in effecting a domicile in the initiative. One might intend to dwell in a place as his permanent abode, and yet never see it. So he might dwell there without thought of remaining. In neither event would he be a resident within the meaning of the election laws. There must be the act of abiding without the present intent of removing therefrom. As said in Story on Conflict of Laws, § 41, there must be to constitute residence 'an actual home, in the sense of having no other home, whether he intends to reside there permanently, or for a definite or indefinite length of time.' The vital inquiry, then, in determining the residence of a person always is, where is his home, the home where he lives, and to which he intends to return when absent, or when sick, or when his present engagement ends?

"**[Illustrations]** * * * In Smith v. Thomas [Cal.] 52 P. 1079, one Phoebus had been a wood chopper for 11 years, but whenever out of work or sick he returned to Neal's place, in Vasalia, which he called home, and he was adjudged a resident of the ward in which such place was located and entitled to vote there. In Behrenmeyer v. Kreitz, 135 Ill. 591, 26 N. E. 704, an engineer operating a train between Quincy, Ill., and Hannibal, Mo., a distance of about 20 miles, usually started from Quincy at 5 o'clock p. m. each day and returned the next morning. He was unmarried, and took his meals at a boarding house in Quincy and had his washing done there. But he maintained a well furnished room over a drug store in Hannibal, where he slept and which he claimed as his home, and his vote at Quincy was denounced as illegal. In Robinson v. Brewster, 140 Ill. 649, 30 N. E. 683, 33 Am. St. Rep. 265, one Dwiggins kept store in the town of Ross, where he did all his business and boarded with his father, who lived there. About a year later his father moved to Grant township, and Dwiggins slept most of the time at his father's home, but a part of the time at the hotel in Ross. Ordinarily he took breakfast and supper at his father's, but often ate at the hotel or a boarding house, kept part of his apparel there, and part at the store, and was town clerk of Ross. The court held that his residence was in the town of Ross, saying: 'He retained his business in the town of Ross, claimed that as his residence and his intention was to keep his residence in that town. The intention of a party has an important bearing on the question of residence, especially where the party is unmarried and has no family as the case was here. So long as he remained in the town of Ross engaged in his business, and treated that as his permanent abode, he had the right to cast his vote in that town.' See, also, Langhammer v. Munter, 80 Md. 518, 31 A. 300, 27 L. R. A. 330. In Warren v. Board of Registration, 72 Mich. 398, 40 N. W. 553, 2 L. R. A. 203, it appeared that a statute had been in force 50 years declaring that in ward elections in the city of Detroit the residence of the elector shall be in the ward where he boards or takes his regular meals,' and was then omitted from a new charter, and the court held that 'usage for so long a period, under express sanction of law, should be able to continue without

Registration[50] is frequently made a voting qualification[51] with others,[52] the purpose being that the registration lists shall contain only the names of qualified electors.[53] The permanent registration list of persons exempt from the educational test in North Carolina does not dispense with precinct registration for each election.[54] Statutes declaring that certain evidence shall presumptively authorize the striking of a name from the registry list are not unconstitutional,[55] even though applying only to a part of a state,[56] but a provision that such presumptive evidence can be rebutted only by the evidence of the elector himself orally or by affidavit is unconstitutional.[57] In Maryland the list may be purged of an ineligible name by an official proceeding founded either on the official belief of a sworn officer or on a voter's oath[58] showing the disqualifying cause[59] and the service of a summons at the

further re-enactment unless the legislative will is expressed to the contrary.' The opinion inferentially admits that, but for the statute, a different conclusion would have been reached. In Inhabitants of Abington v. Inhabitants of North Bridgeport, 23 Pick. [Mass.] 170, a house was located on the line between two towns, and the question to be determined was in which did a pauper reside. After citing English decisions to the same effect, the court, speaking through Chief Justice Shaw, declared that 'if the line had divided the house more equally, we think, on the authorities, that, if it could be ascertained where the occupant habitually slept, this would be a preponderating circumstance, and, in the absence of other proof, decisive.'

47. The right to register and vote depends upon an actual residence and is not a matter of mere choice. People v. Ellenbogen, 99 N. Y. S. 897.

48. Question of residence must be determined by acts and intentions of the party himself; it cannot be taken from inference, but must be determined solely from the facts. Local option election. Jackson v. Washington, 3 Ohio N. P. (N. S.) 453.

49. Inmates of soldiers' homes may establish a residence for the purpose of voting where the home is located. Hale v. Stimson [Mo.] 95 S. W. 885. Paupers living in an infirmary cannot be regarded as residing there temporarily, but the precinct in which the infirmary is located is the precinct of their residence. Jackson v. Washington, 3 Ohio N. P. (N. S.) 453.

50. See 5 C. L. 1067.

51. So in North Carolina, hence a "majority of the qualified voters" means a majority of the registered voters. Clark v. Statesville, 139 N. C. 490, 52 S. E. 52.

52. Payment of poll tax as well as registration necessary. Pace v. Raleigh, 140 N. C. 65, 52 S. E. 277.

53. People v. District Ct. [Colo.] 84 P. 694.

54. Every voter is required to register anew at each election, even though appearing on the permanent registration lists of those persons exempt from educational qualification because they or their lineal ancestors were voters prior to 1867. Clark v. Statesville, 139 N. C. 490, 52 S. E. 52. Under Private Acts 1905, p. 581, c. 204, § 15, relating to Robersonville Graded School district, copying the old registration books, with an opportunity to register to such as do not appear on the old books, would seem to suffice. An election on the question of forming a new school district is not invalid in North Carolina because no new registration was ordered for the entire electorate of the new district, the registrar having copied the names of persons appearing in the registry books of the precincts included in the territory into the new books and having registered persons whose names did not appear in the old books. Smith v. Robersonville Graded School Trustees [N. C.] 53 S. E. 524.

55. Statute providing that the affidavit of a sworn officer stating his information, and its source, of the nonresidence of a registered elector is presumptive evidence, putting elector to the proof of his residence after service personally or by mail, held constitutional. In re Morgan, 99 N. Y. S. 775.

56. Applying only to the Metropolitan election districts where peculiar conditions seem to require especial provisions. In re Morgan, 99 N. Y. S. 775.

57. In re Morgan, 99 N. Y. S. 775.

58. An officer of registration can take action to procure the purging of a registered voter's name from the registry only under sanction of the oath of a voter of the ward or county, or under his own belief entertained and held under the sanction of his own official oath. Carter v. Applegarth, 102 Md. 336, 62 A. 710. An unsworn list of "suspected voters" handed by the executive of a party in a ward to his party member of the board of registers, and by the latter presented to the board but averring that he himself had no suspicions as to the names, could not swear that they were suspected and so presented them only because ordered to do so from political headquarters, is not a sufficient list under Code Pub. Gen. Laws, art. 33, §§ 11, 20, and 21. Carter v. Applegarth, 102 Md. 336, 62 A. 710.

59. A single member of the board of registration cannot require the board to place upon the list of suspects any registered voter named by him without inquiry into the grounds of suspicion or belief as to the disqualifying cause. Wilson v. Carter [Md.] 63 A. 369. A list originating with a person not a member of the board, not sworn, not even appearing as a voter of the ward, handed privately to an officer of the board, who filed it himself a few minutes before the close of the last session of the registry board, giving as the sole cause of suspicion of the person in question that his place of residence had been burned, is not a sufficient list of suspected persons under Code Pub. Gen. Laws 1904, art. 33, § 26. Id.

"suspect's" place of residence.[60] In Colorado such names should be omitted in copying the lists for election officers.[61]

The registry list being a public record[62] may be inspected and copied by a voter[63] under reasonable regulations.[64]

§ 3. *Nominations by convention or petition. Conventions and nominations.*[65] —The power and duty of calling caucuses[66] and making nominations[67] is now largely statutory. Irregularities in making and certifying nominations[68] will not affect the validity of an official ballot after it has been voted, in the absence of objections to the nominations or certificates duly presented,[69] or unless defeating the will of the majority of voters.[70] A nominating convention reassembled after the time for filing original nominations or nominations to fill vacancies caused by declinations had expired is functus officio.[71]

Petitions.[72]—Who may sign[73] and how many signatures are necessary to a petition for nomination[74] is regulated by statute. Petitions must be certain as to the

60. Under Code Pub. Gen. Laws 1904, art. 33, § 24, summons left at his place of residence is a sufficient service thereof. Carter v. Applegarth, 102 Md. 336, 62 A. 710.

61. People v. District Ct. [Colo.] 84 P. 694.

62. As filed with the county board of elections. Higgins v. Lockwood [N. J. Law] 64 A. 184.

63. Mandamus will lie to compel such permission. Higgins v. Lockwood [N. J. Law] 64 A. 184. That the names are very numerous, or that unlawful alterations might be made, or that the voter has no right to challenge, which was the only disclosed purpose for the inspection of the lists, is no ground for denying him his right. Id.

64. Higgins v. Lockwood [N. J. Law] 64 A. 184. Must be between hours of 9 A. M. and 5 P. M. at times when the boards of elections are not using the books and must pay for special guards engaged to protect the lists. Id.

65. See 5 C. L. 1068.

66. Under Pub. Laws 1902, p. 35, c. 1078, § 14, the board of canvassers of the City of Providence had no power to call a supplementary caucus where the prior caucus failed to make any valid nominations owing to misconduct in the performance of its functions, hence mandamus to compel it to issue the call was denied. Greenough v. Whiteley [R. I.] 62 A. 213.

67. In South Dakota nominations for county officers on party tickets must be made by the regular county convention of such party. Rev. Pol. Code § 810, providing that nominations for county commissioners be made by district conventions rather than county conventions, repealed by the Caucus Law, Laws 1905, p. 145, c. 107. State v. Rexford [S. D.] 109 N. W. 216.

68. Nomination made at a time other than the law specified, placed upon the official ballot and such nominee elected. Kulp v. Railey [Tex.] 13 Tex. Ct. Rep. 1009, 89 S. W. 957.

69. Attorney General v. Campbell [Mass.] 78 N. E. 133.

70. While the provisions as to holding caucuses for the nomination of candidates and as to the filing of nomination papers are binding upon the officers for whose guidance they are intended, they may be disregarded in determining the validity of a subsequent election if it plainly appears that the will of a majority of the electors is fairly expressed by their ballots. Attorney-General v. Campbell [Mass.] 78 N. E. 133. The failure of a political committee to issue a call for a caucus to make nominations to fill a vacancy by a special election pursuant to a precept by the governor is an irregularity, but where the nominations made by the regular caucus in session when the precept was issued goes unchallenged until after the elections, such irregularity did not invalidate the election. Id.

71. In re Halpin, 108 App. Div. 271, 95 N. Y. S. 611.

72. See 5 C. L. 1068.

73. A person, although having participated in a party primary, may thereafter sign a petition for the nomination of an independent candidate. In re Herman, 108 App. Div. 335, 96 N. Y. S. 144. An unregistered voter may sign. Although statute uses words "voter" and "legally qualified voter or elector." Id. Unregistered electors subscribing a certificate before the time for registration had expired had the necessary qualifications to join in an independent nomination, but not if the time for registration had passed under an election law requiring a subscriber to swear that he intends in good faith to support at the polls the candidate whom he seeks to nominate. In re Horan, 108 App. Div. 269, 95 N. Y. S. 607. In the cities of Providence, Pawtucket, and Newport, signing one nomination paper is not a disqualification for signing the nomination papers for a different office and a candidate representing a different political principle. In these cities an elector may sign the nomination papers for a prohibition candidate for governor, a socialist candidate for the legislature, and a "Good Government" candidate for a municipal office, all of whom are to be voted for at the same election. Attorney General v. Rowe [R. I.] 62 A. 117.

74. In New York the assembly and aldermanic districts being coterminous the certificate of nomination of an independent candidate for the office of alderman requires by analogy the same number of names as the certificate of an assemblyman, namely 500. Must be subscribed and verified by 500 electors. In re Gulotta, 108 App. Div. 278,

term for which a candidate is running,[75] and a petition void for uncertainty cannot be legalized by amendment after the time for filing has expired,[76] nor can the board of elections arbitrarily designate for which of several terms a candidate is running.[77]

Certificates and declination and vacancies.[78]—Who is to execute certificates of nomination is entirely regulated by law.[79] Statutes prescribing the time within which a certificate must be filed are mandatory.[80] The declaration of the signer's intention to support the nominee at the polls required in New York may appear on the last sheet of the certificate only,[81] and in that state signers may take the oath of support and acknowledge their signatures before one of the candidates for office.[82] A board of elections must recognize a certificate of nomination unless the evidence shows that it was not properly executed.[83] The revocation of a certificate of nomination issued pursuant to a primary election dates back to the primary and leaves the candidate as if no certificate had ever been issued to him,[84] even though he appeals from the action of the party committee.[85]

Contests and disputes.[86]—Statutes setting the last day for filing certificates as the time by which all final orders on nominating petitions must have been made are directory only,[87] hence the board of elections could hear and determine objections to petitions after the time specified when, although acting diligently, it could not have done so sooner.[88] On application for mandamus to compel the issuance of a certificate of nomination the court will consider only the right of the applicant to the certificate.[89]

§ 4. *Official ballot.*[90]—To entitle a candidate to a place on the official ballot the certificate of nomination must comply with all the legal requirements.[91] The fact of a nomination, duly made, coming regularly to the knowledge of the proper officer, it becomes his duty to place the name of the nominee on the official ballot.[92]

95 N. Y. S. 616. A candidate for alderman of the city of New York does not require more than 100 names. In re Herman, 108 App. Div. 335, 96 N. Y. S. 144. A justice of the municipal court being a municipal officer may be nominated by 500 electors. Id.

75. Must specify the term for which the nomination is made, when there are to be elections to the same office for different terms. Remster v. Sullivan [Ind. App.] 75 N. E. 860. Where members of a board are to be elected for different terms, petitions of nomination not specifying the term for which their candidates are nominated are void for uncertainty. Five members of a school board to be elected, the terms of some of whom are to begin two years later than of others. Id.

76. Pleading failing to allege that the designation by a candidate of the term for which he is running was made within the statutory time for filing the petition is defective. Remster v. Sullivan [Ind. App.] 75 N. E. 860.

77. Six out of thirteen candidates having failed to designate for which of two terms of office they propose to run. Remster v. Sullivan [Ind. App.] 75 N. E. 860.

78. See 5 C. L. 1068.

79. The chairman and secretary of a nominating convention are the proper officers to execute certificates of nomination made by a convention under Rev. St. 1906, § 2966-18. State v. Jones [Ohio] 78 N. E. 505.

80. Laws 1896, p. 927, c. 909, §§ 58, 59 construed. In re Halpin, 108 App. Div. 271, 95 N. Y. S. 611.

81. Of a certificate composed of several sheets firmly fastened together. Election law, Laws 1896, p. 925, c. 909, § 57. Several sheets firmly bound together constitute but one paper within the law. In re Bulger, 48 Misc. 584, 97 N. Y. S. 232.

82. Certificates of nomination are not rendered defective because some of the signers took the oath and acknowledgment before notaries who were candidates for office. In re Bulger, 48 Misc. 584, 97 N. Y. S. 232.

83. As it did not appear before the board of elections by evidence satisfactory to the court that the certificate was not signed as required by statute, the court will direct the board to recognize such certificate. In re Levine, 96 N. Y. S. 340.

84, 85. Eversole v. Holliday [Ky.] 96 S. W. 590.

86. See 5 C. L. 1068.

87, 88. In re Herman, 108 App. Div. 335, 96 N. Y. S. 144.

89. Upon an application for mandamus to compel the secretary of a convention to issue a certificate of nomination the court will consider only the right of the applicant to the certificate, leaving all questions as to the validity of the claims of rival candidates to be the nominee of a party to be determined by the election board. State v. Jones [Ohio] 78 N. E. 505.

90. See 5 C. L. 1069.

91. A certificate of nomination signed by less than 2,000 qualified voters did not entitle the candidate to a place on the official ballot for any purpose. In re Official Ballot

In Kentucky independent candidates are entitled on request to be placed in one column under one party device,[93] and a candidate by petition may select his own picture as a device under which he will run on the ballot,[94] and need not designate the name or title of the party or principle which he represents.[95] The rule in that state that candidates shall be placed on the ballot in the order of the importance of their office does not apply to a single independent candidate nominated by petition,[96] and a candidate whose certificate of nomination by a party has been annulled by the latter may have his name placed on the ballot by petition without a request to the county clerk that his name be printed as nominated by petition.[97] Whether candidates for county and municipal offices may be printed on the same ballot depends on the statutes.[98] Objections going to the right of a ticket on the official ballot must generally be made before election.[99] The absence of a party emblem, to which no timely objection was made, will not invalidate a ballot.[99a]

Questions submitted must be printed on the regular ballot according to the laws of Illinois.[1] They must appear in the place prescribed by statute,[2] and when so required be properly designated by caption and number[3] and be stated in a clear, unambiguous manner[4] so as to give notice of the issue involved,[5] which should be

for General Election of November [Minn.] 109 N. W. 1.

92. Shines v. Hamilton [Miss.] 39 So. 1008. Placing a nominee's name on the official ballot without the written request of one of the candidates so nominated, or of a qualified voter stating under oath that he was a member of the nominating body or participated in the primary election, was not improper. Id.

93. Browning v. Lovett [Ky.] 94 S. W. 661.

94, 95, 96. Eversole v. Holliday [Ky.] 96 S. W. 590.

97. Under Ky. St. 1903, § 1454, declaring that where a candidate is nominated both by a party and by petition, his name shall be printed with the party ticket, unless he especially requests that it be printed as nominated by petition. Eversole v. Holliday [Ky.] 96 S. W. 590.

98. In Kentucky in cities of the sixth class in which registration is required and which constitutes an election precinct. Cope v. Cardwell [Ky.] 93 S. W. 3. Failure to provide separate ballots for municipal and county candidates held not fatal. Id.

99. Where the statute provides that questions as to whether a party actually exists is entitled to a place on the official ballot and to a circle whereby the entire ticket may be voted by one mark may be raised by filing objections to the certificate of nominations, the failure to file such objections in time precludes taking advantage of such defects by objecting to the counting of the ballots so marked. Ogg v. Glover [Kan.] 83 P. 1039.

99a. Ogg v. Glover [Kan.] 83 P. 1039.

1. The question of the extension of the Torrens Land title system must be submitted by being printed on the regular ballot, and submission by being printed on a special ballot is fatal thereto. Harvey v. Cook County [Ill.] 77 N. E. 424.

2. Law requiring question to be printed at the top is not substantially complied with by printing it in the second place. Harvey v. Cook County [Ill.] 77 N. E. 424.

3. Evidence held to show that voters were not misled by the method of submission of the questions (In re Cipperley, 50 Misc. 266, 100 N. Y. S. 473), nor by a failure to number the propositions submitted from one to four inclusive, especially where such numbering would tend to confuse the voter (In re Merow, 112 App. Div. 562, 99 N. Y. S. 9). In the submission of the local option questions under the Liquor Tax Law, Laws 1896, p. 57, c. 112, § 16, it is not necessary that they be numbered 1, 2, 3 and 4 as they are in the law, but may be given any four consecutive numbers appropriate to their sequence in the questions submitted to popular vote, as when coming after seven constitutional questions submitted they were numbered 8, 9, 10 and 11 on the voting machine (In re Cipperley, 50 Misc. 266, 100 N. Y. S. 473), or although preceded by constitutional amendments numbered from one to seven may be numbered from one to four exactly as they appear in § 16. Such an arrangement held not confusing in spite of twenty-eight affidavits of voters that they had been confused where fifteen of them were Italians largely under the influence of one man. In re Webster, 50 Misc. 253, 100 N. Y. S. 508. Election Laws, art. 1, § 6, requiring amendments and questions submitted to popular vote to be separately and consecutively numbered, does not apply to the submission of local option questions under the liquor tax law, but such questions are covered by Election Laws, § 82, requiring amendments and questions to be separately numbered and printed. Id. The submission of a local option question is not invalidated in New York by the **failure to print a caption** to it. In re Merow, 112 App. Div. 562, 99 N. Y. S. 9.

4. Ballot as printed held ambiguous and providing no clear way of voting against the proposition submitted. Harvey v. Cook County [Ill.] 77 N. E. 424.

5. A ballot squarely submitting the issue as to the advisability of issuing bonds to an amount necessary to purchase a waterworks system without specifying the amount is not on that account objectionable in the absence of any statutory provision as to the form of

single.[6] A law stating obscurely how a question of public policy should appear on the ballot will be construed according to its obvious intent.[7] In submitting a proposition for acquiring a lighting system by a village reference to the means of operating it are unnecessary,[8] and hence are harmless though providing for more than one means.[9]

Use of party name.[10]—Provision is generally made to protect a party in the exclusive use of its party name or device,[11] and against misleading similarity of names.[12] In New York any body of independent voters, acting in unison, may have their candidates appear under one title and emblem on the official ballot.[13] A local political party in Kansas is entitled to the same party privileges as a general organization.[14] When a new district is created by division by the court in Pennsylvania, it will appoint the election board.[15]

§ 5. *Primary elections.*[16]—Primary election laws are not contrary to public policy,[17] and in the absence of constitutional inhibitions a legislature has inherent authority to enact them[18] subject to such restrictions as attend other enactments,[19]

the ballot, especially where through official notices the voter was informed approximately of the amount of such a bond issue. Dick v. Scarborough [S. C.] 53 S. E. 86.

6. A proposition submitting the advisability of constructing more than one public building of the same general character and purchasing the necessary land is not objectionable as containing more than one proposition. Question submitting advisability of buying land and building a fire engine house in one locality and building another fire engine house in a different locality. Linn v. Omaha [Neb.] 107 N. W. 983.

7. Statute providing that the ballot should contain the words "for the small stock law" and "against said law." Later phrase interpreted to mean "against the small stock law." Wright v. Cunningham, 115 Tenn. 445, 91 S. W. 293.

8. Everett v. Potsdam, 98 N. Y. S. 963.

9. Submitting a proposition authorizing the operation of the system by water power, steam power, electric current, or a combination of these, does not violate Election Law, § 82, requiring different propositions to be separately numbered and printed. Everett v. Potsdam, 98 N. Y. S. 963.

10. See 5 C. L. 1069.

11. In re Social Democratic Party, 182 N. Y. 442, 73 N. E. 415. Where a national party ticket went under the name of the "Socialist Party" but the state ticket of the same party used the name "Social Democratic Party," refusing to conform to the national party's device, it was held to be an infraction of the rights of the democratic party to the exclusive use of its name, being conducive of deception and the courts will compel a change in conformity to the national party name. Id.

12. Nominations of candidates under the names "Independent Republican Party" and "Independent Democratic Party," which candidates were the same on both tickets and were already on the ballots under the party name of "Union Labor Party." Partridge v. Devoto [Cal.] 82 P. 775.

In determining whether or not a name is likely to mislead the public the court may consider matters of public and common knowledge, such as the existence of the old parties and their respective names in common use, the recent formation of a new party known by the name adopted in the certificate or the absence of such organization, and from all the circumstances thus known may consider the probability of deception by the designation adopted. Partridge v. Devoto [Cal.] 82 P. 775.

13. The persons composing a body of independent voters entertaining the same political views, appearing to be acting in harmony, desiring to nominate a complete ticket of candidates, and executing certificates, are to be regarded as one **"independent body"** entitled to have their candidates appear under one title and emblem on the official ballot. In re Wise, 108 App. Div. 52, 95 N. Y. S. 843.

14. A political party having only a local organization may nominate a ticket for city offices by a convention, primary election, or caucus, and have it placed upon the official ballot so that it may be voted for by a single cross mark made in a circle at the head of the ticket. Ogg v. Glover [Kan.] 83 P. 1039.

15. Waynesburg Borough's North Ward, 29 Pa. Super. Ct. 525.

16. See 5 C. L. 1069.

17. Kenneweg v. Allegany County Com'rs, 102 Md. 119, 62 A. 249.

18. Const. art. 3, § 42, providing that the general assembly shall pass laws for the preservation of the purity of the elections, does not confer power to pass such a law, but is a mandate to execute a power already existing. Kenneweg v. Allegany County Com'rs, 102 Md. 119, 62 A. 249. The Primary Election Law of 1903 of New Jersey and its supplement are constitutional. State v. Johnson [N. J. Law] 63 A. 12, following Hopper v. Stack, 69 N. J. Law 562, 56 A. 1.

19. A primary election law, which though general in terms, in effect and by intendment **will apply to** but **one county** in a state, is objectionable as **special legislation.** Making the law or parts of it applicable only to counties with a population of over 125,000. People v. Chicago Election Com'rs [Ill.] 77 N. E. 321. A primary law **leaving it to the county central committee** to determine whether a candidate shall be nominated by the voters at the primaries or by delegates

and preserving the equality of rights and freedom of voters.[20] Such laws cannot add to the constitutional qualifications for office.[21] Requiring candidates for primary nominations to pay a fee to defray the expenses of the election is not imposing an additional qualification[22] nor an unreasonable regulation,[23] nor is it imposing a tax not uniform or equal[24] even though not requiring a fee from those expected to serve without compensation,[25] but requiring a fee arbitrarily without regard to services rendered to candidate[26] or to the expenses of the election is illegal and void.[27] This is true even though a candidate might be nominated without payment of the fee by having the voter write his name into the ballot.[28] Requiring a party to possess a certain numerical strength to entitle it to the privileges of a primary election is a proper regulation,[29] likewise prescribing different days for holding the

chosen at such primaries and also whether candidates shall be nominated by a majority or plurality vote is an unconstitutional **delegation of legislative authority.** Primary Election Law § 6. Id. Section 2 of the Primary Election Law seeking to amend the Ballot Law by changing the time in which a petition of nomination may be filed and confining the right to certain parties is void as being in violation of Const. art. 4, § 13, prohibiting the **amending of a law by reference** to its title only. Id. Section 33 of the Primary Election Supplement does not violate the constitutional interdict against legislation by reference to an existing law because it makes § 193 of the act to regulate elections, whereby it is made a misdemeanor to carry intoxicating liquors into a polling place, applicable to primary elections. State v. Johnson [N. J. Law] 63 A. 12. Provisions relating to the form and makeup of the official ballot used at general elections is **not within the scope and title** of the primary election law of Nebraska and hence were void. State v. Drexel [Neb.] 105 N. W. 174. Section 33 of the Primary Election Law Supplement making § 193 of the general election law, which makes taking liquor into a polling place a misdemeanor, applicable to the primaries, is **within the scope of its title.** State v. Johnson [N. J. Law] 63 A. 12. Hence an indictment for the offense described in § 193 found under § 33 of the primary law is valid. Id. The provisions amendatory of the general registration laws contained in the primary election law of Nebraska are void as not being comprehended within the title of the act. Sess. Laws 1905, c. 66, p. 325. State v. Drexel [Neb.] 105 N. W. 174.

20. A provision that a primary law is to apply to a particular party in a county having a stated population only in case it casts 20 per cent. of the couny vote at the last preceding presidential election, but does apply to any party in any other county having cast 10 per cent. of the total vote of the state, is void as special legislation and as interfering with freedom and equality of voters in different counties. People v. Chicago Election Com'rs [Ill.] 77 N. E. 321. The Primary Election Law violates the freedom and equality of the ballot by making different provisions for voting at primary elections for voters within Cook county and voters in the rest of the state. Id.

21. Primary Election Law § 58, restricting the number of candidates that may be nominated for senator or representative from one county. People v. Chicago Election Com'rs [Ill.] 77 N. E. 321.

22. Not the imposition of a property qualification nor a superaddition to the qualifications specified in the constitution. Kenneweg v. Allegany County Com'rs, 102 Md. 119, 62 A. 249. Fees of $10 and $20 not unconstitutional as imposing a property qualification on a candidate for nomination. Const. art. 1, § 17. State v. Scott [Minn.] 108 N. W. 828.

23. In Minnesota requiring a fee of $20 and $10 has been held a reasonable regulation. State v. Scott [Minn.] 108 N. W. 828.

24. Const. art. 9, § 1. State v. Scott [Minn.] 108 N. W. 828.

25. The fact that the law omits to require a fee of those who are expected to serve largely without compensation does not create such a marked distinction as to condemn the law. State v. Scott [Minn.] 108 N. W. 828.

26. A filing fee required of candidates for nomination at primary election, arbitrarily imposed without regard to the value of the services performed in filing the nomination papers, are generally held an unwarrantable hindrance and impediment to the exercise of the elective franchise. A filing fee of 1 per cent. of the expected emoluments of the office for which nomination was sought held in violation of Const. art. 1, § 22, guaranteeing the freedom of the ballot. State v. Drexel [Neb.] 105 N. W. 174. As interfering with the freedom of the electorate in its choice of candidates for nomination. Id. The portions of the Nebraska primary law held invalid, not being considered as inducements to the passage of the law, the **remainder of the act is valid.** Id.

27. A primary law requiring candidates for nomination to pay a fee, bearing no relation to services rendered in filing the papers or the expenses of the election. People v. Chicago Election Com'rs [Ill.] 77 N. E. 321.

28. Primary Election Law of Illinois, however, makes no valid provision even for the writing in the name of a candidate by the voter, and hence is void. People v. Chicago Election Com'rs [Ill.] 77 N. E. 321.

29. Requiring a party to have the numerical strength of 1 per cent. of the total votes to enjoy the privileges of the primary election law is not an unreasonable regulation nor an unwarranted restriction on the right of representation on the primary election ballot. State v. Drexel [Neb.] 105 N. W. 174. A primary election is not invalid because it

primaries of different parties.[30] Conditioning a voter's right to participate in the primary election of a party upon his political affiliation with the same is valid.[31] A petition for holding party primaries must be filed within the statutory time.[32]

Control by party committees.[33]—Primary election calls are usually under the control of the party governing committee, the date of which may be changed[34] for proper cause.[35] The authority of the chairman of the county committee is wholly fixed by the party rules and the statutes.[36] The length of the term of such committee is regulated by party rules.[37]

Ballots for primaries. Review and contest of primary.[38]—In the absence of statutes otherwise providing, the determination of primary election contests is usually wholly and finally within the control of the governing power of the party,[39] and the authority of the courts extends merely to seeing that the acting body proceeded regularly according to its own rules;[40] and on an appeal wherein the record shows the facts, the supreme court of Pennsylvania will examine whether the judgment is correct upon such facts and may for that purpose consider the opinion of the court as part of the record.[41] Such contests are not matters of equity and a statute vesting chancery courts with jurisdiction as to them is unconstitutional in Arkansas.[42] Courts cannot even direct a party committee as to what evidence it shall receive in determining a primary election contest.[43] In Arkansas the constitutional mandate

applies to the two numerically strongest parties only. Kenneweg v. Allegany County Com'rs, 102 Md. 119, 62 A. 249.

30. Prescribing different days for the holding of primary elections of different parties is not violative of the Fourteenth Amendment as denying to any political party the equal protection of the laws, since no party has an inherent right to insist that the primaries of all parties shall be held on the same day (Kenneweg v. Allegany County Com'rs, 102 Md. 119, 62 A. 249), and accordingly a provision setting an earlier date for the primaries of the party casting the highest vote for the highest state office at the preceding election, being applicable to any successful party, is not invalidating (Id.). It is not valid objection to the constitutionality of a primary election law that by fraudulent devices the primaries of one party might be postponed so long as to exclude it from the official ballot. Id.

31. State v. Drexel [Neb.] 105 N. W. 174.

32. Secretary of state properly denied a petition filed too late as Act No. 181, p. 251, Pub. Acts 1905, is mandatory. Cramton v. Secretary of State [Mich.] 13 Det. Leg. N. 152, 107 N. W. 875.

33. See 5 C. L. 1070.

34. The state central committee for the county of Anne Arundel after the passage of the Act of 1904, p. 1043, c. 603, had still the power to revoke an election call and issue one for a later date for proper cause. Revell v. Holladay, 102 Md. 82, 61 A. 1081.

35. Issuing a new election call because election judges were not appointed within the statutory time under the old one, that vacancies had occurred in the board of supervisors, that improper appointments of judges and clerks of election had been made, and that owing to inability to get at the records it was impossible to tell which appointments were legal and which were illegal, held sufficient ground for postponement. Revell v. Holladay, 102 Md. 82, 61 A. 1081.

36. Chairman within his authority under Act June 22, 1897, in declaring no nominating conventions were necessary owing to the fact that there were no more than one candidate for each office, but this did not dispense with the necessity of holding district elections at the regular time to elect members of the county committee. In re Chester County Republican Nominations, 213 Pa. 64, 62 A. 258.

37. Under rule four of the rules of the republican party of Chester county, a committeeman elected for the "ensuing year" is elected not for the calendar year but for the political year; hence a committeeman elected on the Saturday before the time for holding the nominating conventions in the county, which happened to fall on March 18, 1904, held office not only until March 18, 1905, but until the Saturday before the next annual nominating convention to have been held on April 18, 1905. In re Chester County Republican Nominations, 213 Pa. 64, 62 A. 258. A county committee elected for a political year could act with authority at any time before the expiration of the political year, although the chairman erroneously supposed their term ended with a calendar year and his reappointment of the committee was nugatory. Id.

38. See 5 C. L. 1070.

39. Sole remedy in Kentucky is a contest before the county committee whose decision is final. Circuit court was without jurisdiction. Whitaker v. Swanner [Ky.] 89 S. W. 184.

40. Under a primary election statute making the rules of the party the law of the case. In re Chester County Republican Nominations, 213 Pa. 64, 62 A. 258.

41. In re Chester County Republican Nominations, 213 Pa. 64, 62 A. 258.

42. Hester v. Bourland [Ark.] 95 S. W. 992.

43. Cannot compel it to receive and count the ballots. Lucas v. Avis [Ky.] 89 S. W. 1.

to the general assembly to provide a means for contesting elections not already provided for in the constitution has no application to primary elections.[44] Whether or not a successful primary candidate disqualified himself for office by bribery cannot be collaterally inquired into in an action to have his name removed from the poll books as having improperly been declared elected.[45]

§ 6. *Officers of election.*[46]—Officers of election and canvassing boards do not ordinarily have any but ministerial duties[47] defined by statute.[48] Where they stand as public officers they can be removed only as such.[49] In San Francisco the power of removing election officers for misconduct in office does not rest exclusively in the mayor but on accusation by the grand jury rests also in the superior court.[50] Election officers cannot receive double compensation for registration services rendered on election day unless so allowed by statute.[51] On failure of the regularly appointed election officers to act the citizens present may elect others and proceed with the election in Illinois.[52] In Pennsylvania the law providing for the appointment of watchers did not repeal the law providing for the appointment of overseers.[53] The acts of officers of election who, although ineligible, act as such, thereby becoming de facto officers, are valid in the absence of fraud.[54] A registrar of election is not personally liable for the compensation of his assistant whom he appoints unless he pledges his own credit by plain words.[55]

§ 7. *Polling and receiving the vote.*[56]—Legislatures may surround elections with restrictions and conditions having for their object the purity of the ballot box.[57] Such instructions for voters must be given as the statutes require, but unconfusing errors may be disregarded.[58] Votes cast before the hour for polling the vote has arrived are not votes[59] and persons receiving them are not de facto election officers,[60] especially when the person voting knew they were not authorized to receive the

44. Hester v. Bourland [Ark.] 95 S. W. 992.

45. Whitaker v. Swanner [Ky.] 89 S. W. 184.

46. See 5 C. L. 1070.

47. Inspectors of election act only ministerially. People v. Doe, 109 App. Div. 670, 96 N. Y. S. 389.

48. Have no power except such as is conferred by statute. People v. Doe, 109 App. Div. 670, 96 N. Y. S. 389. In certifying the election of an officer the power of the deputy supervisors of elections is limited to certifying that the successful candidate has been elected and they have **no power to decide** upon a **disputed term** of office as whether it is three or four years long. State v. Pattison [Ohio] 76 N. E. 946.

49. Judges and clerks of election in the city of St. Louis are public officers (State v. Maroney, 191 Mo. 531, 90 S. W. 141), and cannot be removed from office by the board of election commissioners without notice of the charges preferred against them as the cause of the removal and a reasonable opportunity to be heard upon such charges (Id.).

50. Roberts v. Superior Ct. of San Francisco, 147 Cal. 568, 82 P. 201.

51. In New Jersey boards of registry performing their duties under the general election laws in continuing the registry of voters during the hours when they were conducting a primary election are not entitled to extra compensation as provided in the primary election act in addition to what they receive under the general election law. Vanderveer v. Applegate [N. J. Law] 64 A. 459.

52. After election officers provided by law have for five hours failed to open the polls and begin holding the election. Foltz v. Mings, 118 Ill. App. 557.

53. Act June 10, 1893, providing for the appointment of watchers at elections, did not repeal act January 30, 1874, providing for the appointment of overseers on the petition of five or more citizens of any election district. In re Parrish's Petition, 214 Pa. 63, 63 A. 460.

54. McCarthy v. Wilson, 146 Cal. 323, 82 P. 243.

55. Dunn v. Foley, 78 Conn. 670, 63 A. 122.

56. See 5 C. L. 1070.

57. Arnold v. Anderson [Tex. Civ. App.] 14 Tex. Ct. Rep. 713, 93 S. W. 692. An act providing that no ballot shall be counted unless signed by the presiding election judge not unconstitutional as denying qualified voters the right to vote. Id.

58. Nor by the failure of the instruction card to correctly represent the face of the **voting machine.** In re Merow, 112 App. Div. 562, 99 N. Y. S. 9. Evidence held to show that the voters were not confused by such irregularity. Id.

59. Until the hour comes for the election to be held there cannot be said to be an election (Lower Terrebonne Refining & Mfg. Co. v. Police Jury, 115 La. 1019, 40 So. 443); hence a vote cast before the time for the opening of the poll has arrived and before any of the commissioners of election have arrived is no vote (Id.).

60. Bystanders who take it upon themselves to open the poll before the hour fixed by law has arrived. Lower Terrebone Re-

votes.[61] Mere ineligibility of officers does not invalidate the election.[62] One must vote in his proper ward notwithstanding the election is general.[63] Technical irregularities merely will not vitiate an election,[64] but an election held under circumstances preventing a full, free, and fair vote,[65] or in disregard of mandatory provisions,[66] or so tainted as to change or render it impossible to ascertain the true result,[67] will throw it out. The aldermen of Boston have no authority to locate a voting booth in a public street.[68] An election in which a sufficient number of illegal votes were cast to affect the result would be "illegally" though not "fraudulently" conducted.[69]

Voting by machine.[70]—In elections on questions of public policy the statement of the question on the label of the voting machine may be abbreviated to meet the requirements of the limited space.[71] A taxpayer cannot have a contract for the purchase of voting machines enjoined on the ground of their inefficiency where the contract relieves the municipality of all liability until their utility is established.[72]

§ 8. *Marking and signing ballot; irregularities and ambiguities therein.*[73]—In Texas the presiding judge must,[74] in person,[75] sign his name to every ballot, and without this they cannot be counted.[76] In Mississippi the statute enables the voters to act in certain cases and validly use ballots rendered unofficial by some irregulari-

fining & Mfg. Co. v. Police Jury, 115 La. 1019, 40 So. 443.

61. Even if bystanders improperly receiving ballots could be held de facto officers in the case of a person induced to vote under the belief that they had authority, they cannot be so held where the person voting appointed them himself and had knowledge of who the regular commissioners were. Lower Terrebonne Refining & Mfg. Co. v. Police Jury, 115 La. 1019, 40 So. 443.

62. McCarthy v. Wilson, 146 Cal. 323, 82 P. 243.

63. The fact that an election under the Beal Law is general, the result affecting the entire community alike, does not furnish warrant for the casting of his ballot by a voter in some other ward than the one in which he resides, and a ballot so cast is an illegal ballot. Jackson v. Washington, 3 Ohio N. P. (N. S.) 453.

64. In re Merow, 112 App. Div. 562, 99 N. Y. S. 9. In the absence of any charge of fraud a minority candidate receiving less than ¼ of the votes cast is not entitled to the office because of alleged irregularities in the holding of the election. Shines v. Hamilton [Miss.] 39 So. 1008. Irregularities in the conduct of an election are generally to be disregarded unless the statute declares that they shall be fatal to the election or unless they are such in themselves as to change or render it impossible to ascertain the result. Williamson v. Musick [W. Va.] 53 S. E. 706. The following irregularities have been held insufficient to invalidate an election within the above rule:

Changing the entrance to the election place so that it opens upon another street but thereby not misleading any voter.

Holding the election in two rooms instead of one.

Using a ballot box with a hole in it.

One of the poll clerks being a usurper.

Electioneering by poll clerk but not changing any vote thereby.

The admission of the votes of persons challenged without the statutory affidavits.

Illegal votes where they can be thrown out or are not in sufficient numbers to affect the result. Williamson v. Musick [W. Va.] 53 S. E. 706.

65. Amos Brown's Estate v. West Seattle [Wash.] 85 P. 854. Upon a showing that an election for the annexation of certain territory was held in a city in defiance of an order of a court of competent jurisdiction prohibiting it, **the burden of showing that such election was fair** and a correct expression of the voters rests upon the city. Id. Held that the election was held under circumstances preventing a full, free, and fair vote. Id.

66, 67. Williamson v. Musick [W. Va.] 53 S. E. 706.

68. In Massachusetts Rev. Laws c. 11, § 186, providing for the location of voting booths. Haberlil v. Boston, 190 Mass. 358, 76 N. E. 907.

69. Whaley v. Thomason [Tex. Civ. App.] 15 Tex. Ct. Rep. 207, 93 S. W. 212.

70. See 5 C. L. 1071.

71. Linn v. Omaha [Neb.] 107 N. W. 983.

72. Shoemaker v. Des Moines [Iowa] 105 N. W. 520.

73. See 5 C. L. 1071.

74. Acts 1903, p. 147, § 72, mandatory. Arnold v. Anderson [Tex. Civ. App.] 14 Tex. Ct. Rep. 713, 93 S. W. 692.

75. Cannot delegate authority to sign his name. Arnold v. Anderson [Tex. Civ. App.] 14 Tex. Ct. Rep. 713, 93 S. W. 692.

76. Section 72 of the Terrell law declaring that no ballot shall be counted that does not bear the presiding judge's signature or to which his signature has been forged is mandatory, and ballots thus defective are nullities (Clark v. Hardison [Tex. Civ. App.] 14 Tex. Ct. Rep. 227, 90 S. W. 342), but it is not mandatory as to the time of indorsement; hence signature **may be indorsed after the ballot is returned** by the voter to be placed in the ballot box (Id.).

ty.[77] The numbering of the ballots in Alabama is directory and hence not indispensable.[78]

Irregularity in the preparation of the ballot will generally not invalidate an election.[79] A ballot is not invalidated by failure to comply with advisory directions as to the manner of voting.[80]

The marks.[81]—Statutes specifying the instrument with which ballots should be marked are generally directory only.[82] Irregularities in marks made in good faith in the proper place,[83] due to the unfavorable circumstances under which the ballots were marked,[84] or physical infirmities of the voter,[85] are harmless, a substantial compliance with the requisites of a valid voting mark without a manifest intent to evade or violate the law being sufficient.[86] Ballots stamped with a cross after the words "no nominations,"[87] or after a name written in a blank column,[88]

77. Where the same irregularity avoided two separate appointments of election commissioners and the same invalidity attached to each of two so-called official ballots, then the electors holding the election were duly empowered to act by virtue of § 3643, Rev. Code 1892, and the ballots actually used were properly counted whether official or not, under § 3661, Rev. Code 1892. Shines v. Hamilton [Miss.] 39 So. 1008.

78. Failure of an inspector to number ballots as required by statute will not require such unnumbered ballots to be rejected (Montgomery v. Henry [Ala.] 39 So. 507), such a requirement being directory only (Id.).

79. Ogg v. Glover, 72 Kan. 247, 83 P. 1039. The vote of an entire precinct will not be rejected because the ballots of certain alleged illiterates were cast irregularly. Ballots accepted without swearing in the illiterates before aid was given them. Browning v. Lovett [Ky.] 94 S. W. 661. But **the burden is on the one attacking** such precinct to show what ballots were illegal and for whom cast. Id.

80. The seven rules in § 105 of the Election Law following the introduction "The elector should observe the following rules in marking his ballot" are advisory only. In re Hearst, 48 Misc. 441, 96 N. Y. S. 122.

81. See 5 C. L. 1072.

82. Statutes requiring ballots to be marked with a stamp have been held to be directory only, and not invalid for the sole reason that the cross is made with a lead pencil. McClelland v. Erwin, 16 Okl. 612, 86 P. 283.

83. In Kansas, wherever a voter apparently attempts in good faith to comply with the statute by making single cross marks in the proper squares, effect will be given to his intention as so expressed, although some departure from symmetry and regularity is shown. Not made for purpose of identification. Ogg v. Glover, 72 Kan. 247, 83 P. 1039. A ballot is not rendered invalid by the mere fact that some of the lines extend outside the voting space provided the point of intersection lies within such space. In re Hearst, 48 Misc. 453, 96 N. Y. S. 119.

Note: Ballots have been rejected for the following causes:

The use of a blue or purple pencil in marking.

The placing in any square of a cross one of the arms of which is distinctly and purposely paralleled by a third line. Wheeler v. Caldwell, 68 Kan. 776, 74 P. 1031.

The placing in any square or circle of a distinct third line in addition to the two forming the cross, although not parallel to either.

The placing in any square or circle of a single line not crossed by another.

The placing in any square or circle of a nondescript character which shows no attempt at forming a simple cross.

The placing of a cross outside of any square or circle.

The placing of a cross in a square in the blank column, opposite which no name is written.

The defacing of the ticket by apparent attempts at erasing marks already made.

The placing of a cross in the circle and also a cross in one of the squares in the same column, but not in all of them. The law in this respect is changed by § 3, c. 222, p. 369, Laws 1905.

The placing of a cross in the circle and also a cross in a square of some other column.

The placing of crosses in the squares opposite the names of two candidates for the same office. The law in this respect is also changed by the Act of 1905.

The writing in the blank column of a name, which is already printed on the ballot as that of a candidate for the office indicated.

The writing of a name in the blank column without placing a cross in the corresponding square.

The writing of a name on the ballot elsewhere than in the blank column.—From the opinion in Ogg v. Glover [Kan.] 83 P. 1039.

84. Narrow booths, dim light, dull pencil, thick paper, uneven shelves, etc. In re Hearst, 48 Misc. 453, 96 N. Y. S. 119.

85. Blindness, nervousness, lack of skill in use of pencil, etc. In re Hearst, 48 Misc. 453, 96 N. Y. S. 119.

86. Although the Election Law, Laws 1898, p. 968, c. 335, rule 7, § 105, defines a valid voting mark as one straight line crossing another straight line, a ballot will not necessarily be held invalid because the marks constituting the cross are not exactly

or stamped with two crosses after a name,[89] have been held void. In New York it has been held that placing a mark at the head of two columns, one of which contains but one name, is a sufficient expression of a specific intention to vote for the latter,[90] and will therefore take precedence of the general choice expressed by the mark at the head of the other column.[91] An additional mark at the side of the name in the column containing but one candidate is surplusage,[92] and if in addition to the preceding marks an additional mark is placed at the side of a name in a third column, the ballot is still valid[93] and should be counted as a vote for all the candidates of the party ticket voted except the two candidates specified.[94]

The writing in of names.[95]—When striking out of names and the writing in of others is the prescribed mode, the tearing out and piecing together of portions of ballot is not a legal vote.[96]

§ 9. *Secrecy of ballot and distinguishing marks.*[97]—Under the secret ballot system, wherever an attempt at a distinguishing mark can be inferred,[98] or a facsimile of the ballot be produced,[99] it should be rejected. A distinguishing mark is one, whether letters, figures, or characters, that shows an intention on the part of the voter to distinguish his particular ballot from others of its class and not one that is common to and not distinguishable from others of a designated class.[1] The test is whether a peculiarity of marking is accidental or designed,[2] to assist in determining which a magnifying glass may be used,[3] and each case must be decided on its own facts.[4] Such a mark is none the less fatal because small and inconspicuous,[5] or because appearing on the reverse side of the ballot.[6] A pencil writing in an improper place on a ballot invalidates it.[7] Marks, merely the result of habit,[8] or so indistinct that it is impossible to determine whether made by the printer or voter,[9] restamping a ballot to make the mark more distinct,[10] or stamping both in the device and opposite the name,[11] have been held not to be distinguishing. Tears in ballots are in general presumed not to have been made by the voter.[12] The general presumption is that any distinguishing mark on a ballot, on its face or its back,

straight, even, or regular. In re Hearst, 48 Misc. 453, 96 N. Y. S. 119.

87, 88, 89. McCarthy v. Wilson, 146 Cal. 323, 82 P. 243.

90. Placing a mark at the head of the republican ticket and at the head of a ticket marked "The Jerome Nominators" containing only the name of Jerome as candidate for the district attorneyship. In re Hearst, 48 Misc. 441, 96 N. Y. S. 122.

91. In re Hearst, 48 Misc. 441, 96 N. Y. S. 122.

92. A mark both at the head of the column styled "The Jerome Nominators," and at the side of the name of Jerome. See note preceding the last. In re Hearst, 48 Misc. 441, 96 N. Y. S. 122.

93. The ballot being marked at the head of the republican ticket and of the Jerome ticket (see preceding note), and at the side of Mr. Jerome's name and also at the side of Mr. Hearst's name on the Municipal Ownership ticket. In re Hearst, 48 Misc. 441, 96 N. Y. S. 122.

94. A vote for Mr. Jerome, Mr. Hearst, and the candidates for the other offices specified on the republican ticket. In re Hearst, 48 Misc. 441, 96 N. Y. S. 122.

95. See 5 C. L. 1072.

96. Under a statute declaring that a voter shall prepare his ballot by striking out the name of any candidate thereon he does not wish to vote for and insert his choice underneath, he may not tear the national ticket off one ballot and fasten it onto the state ticket of another ballot. Bigham v. Clubb [Tex. Civ. App.] 15 Tex. Ct. Rep. 479, 95 S. W. 675.

97. See 5 C. L. 1072. See ante § 8.

98. Since the primary object of the election law is the secrecy and purity of the ballot. In re Hearst, 48 Misc. 453, 96 N. Y. S. 119.

99. Use of carbon copy outfit held to destroy secrecy of ballot and render votes illegal. Jackson v. Washington, 3 Ohio N. P. (N. S.) 453.

1. McClelland v. Erwin, 16 Okl. 612, 86 P. 283.

2, 3, 4, 5. In re Hearst, 48 Misc. 453, 96 N. Y. S. 119.

6. Election Law, Laws 1898, p. 971, c. 335, § 110, subd. 2, rule 9. In re Hearst, 48 Misc. 453, 96 N. Y. S. 119.

7. McCarthy v. Wilson, 146 Cal. 323, 82 P. 243.

8. As a slight upward stroke before beginning the downward stroke, but a distinct and firmly drawn loop would be evidence of an intent and such a ballot would be rejected. In re Hearst, 48 Misc. 453, 96 N. Y. S. 119.

9. In re Hearst, 48 Misc. 453, 96 N. Y. S. 119.

10, 11. McClelland v. Erwin, 16 Okl. 612, 86 P. 283.

was there at the time the ballot left the hand of the elector,[13] except in a case where the ground of protest is specified,[14] but if the protest is general and states no ground the general presumption prevails.[15]

§ 10. *Count, return, and canvass, custody of ballots and recount; determination of result and certificates.*[16]—A count, canvass, and declaration of result is essential to an election.[17] A return may not be an essential to action founded on a referendum.[18] Ministerial duties relating to the canvass may be delegated without invalidating the election.[19] Under a city charter empowering the common council, after an election, to meet and determine who has been elected, constitutes it a board of canvassers.[20]

Every ballot should be counted on which the elector's intention is apparent unless prohibited by some policy of the law or statute.[21] In case of a specific protest before a canvassing board only the defect specified is presumed to exist at the time the ballot was opened, and the decision of the canvassers must stand or fall upon that ground alone.[22] There is no provision in the Vermont statutes authorizing boards of civil authority to canvass and count the votes taken on the question of license in towns having not more than 4,000 inhabitants.[23] In Colorado the certificate of the precinct election officials is controlling in making up the election returns in case of a discrepancy between it and the tally lists,[24] and mistakes in filling up the certificates cannot be corrected by the canvassers or precinct election officials by reference to the tally lists.[25] Election returns will not be thrown out merely for irregularities in the care of the ballots by the election officials.[26] Where, however, "repeaters" and fraudulent votes have been permitted to such extent that they cannot be disclosed and separated with reasonable certainty, it will necessitate the rejection of the entire returns.[27]

Recount of ballots.[28]—Proceedings for a recount of the votes being strictly statutory are of no effect unless authorized by statute and begun and conducted as the statute provides.[29] Re-examination of ballots will not be allowed if the ballots

12, 13, 14, 15. In re Hearst, 48 Misc. 453, 96 N. Y. S. 119.

16. See 5 C. L. 1072.

17. The "submission" of a question is not complete until the vote is canvassed and the result announced. Under a statute providing for a special election on failure to "properly submit" a question. In re Burrell, 50 Misc. 261, 100 N. Y. S. 470.

18. In Arkansas a county court may grant licenses for the sale of intoxicating liquors if the majority of the electors vote for license, even though the board of election commissioners failed to lay before the court the election returns on the license question. Bordwell v. State [Ark.] 91 S. W. 555.

19. A city election will not be annulled by the courts because the city council delegated to persons not members thereof the ministerial duty of assisting the city clerk in tabulating the election returns in the absence of fraud or mistake. Linn v. Omaha [Neb.] 107 N. W. 983.

20. Within Comp. Laws 1897, § 3725, providing that any aggrieved candidate may apply to and have a recount by the board of canvassers. Ward v. Culver [Mich.] 13 Det. Leg. N. 134, 107 N. W. 444.

21. In re Hearst, 48 Misc. 441, 96 N. Y. S. 122.

22. In re Hearst, 48 Misc. 453, 96 N. Y. S. 119.

23. Hence no mandamus will lie to compel it to make such a canvass. Page v. McClure, [Vt.] 64 A. 451.

24. By the temporary election commission acting in the capacity of a board of canvassers. People v. Tool [Colo.] 86 P. 231.

25. Do not come within § 61 of Election Law, 1 Mills' Ann. St. § 1642, authorizing the board of canvassers to correct clerical mistakes. People v. Tool [Colo.] 86 P. 231.

26. Failure of election officers to write their names across the seal in the absence of any showing of tampering or interference with the ballots. McCarthy v. Wilson, 146 Cal. 323, 82 P. 243.

27. People v. Tool [Colo.] 86 P. 229.

28. See 5 C. L. 1073.

Michigan act is constitutional: It is presumed that public officers will produce the ballot boxes and that a recount board consisting of a public officer and two persons chosen by the contestant and contestee will act; hence a statute providing for a recount in that way is not dependent on consent of individuals for its efficacy. Comp. Laws 1897, § 3725. Ward v. Culver [Mich.] 13 Det. Leg. N. 134, 107 N. W. 444.

29. Under Rev. Laws c. 11, § 267, providing for a recount of the ballots, does not provide for a recount except in cases where the official ballot is used or where the officers are voted for on one ballot, and a re-

have not been kept as cast and canvassed without tampering.[30] In Michigan the recount board must from an inspection of the box first determine that they have been so kept as the law directs, including sealing,[31] but the mere fact that the seal became broken and tampering possible does not excuse a refusal to recount where the board found no legal requirement lacking.[32] On a recount the court may accept the certificate of the officers of election for a precinct wherein the ballot boxes have been robbed.[33] It is the duty of a recount board to adopt the majority report of a committee appointed by it to recount the vote.[34] Under a statute declaring that the board of recount shall receive the report of a recount committee as true, they are under no duty to review alleged errors of the committee.[35] Where the vote was very close a petition for a recount was sufficient in Michigan, although the allegations of error in the count are made only on information and belief and although it is not alleged that a rectification of the errors committed would change the result.[36]

Determination of result; certificates.—A majority of qualified voters means a majority of registered voters where that is a qualification.[37] A statute requiring a proposition to be submitted to popular vote and to be approved "by a majority of the voters of the corporation tax district" is satisfied if the proposition is approved by a majority of those voting and does not require a majority of the qualified voters.[38] As between persons elected to similar offices for which terms differ, an agreement between them to settle the doubt has been held not against public policy.[39]

§ 11. *Judicial control and supervision.*[40]—A court of equity will not supervise the acts and management of a political party for the protection of a purely political right,[41] nor has equity any jurisdiction in determining purely political questions as to what should go on the ballot.[42] In Colorado the district court, having no authority to issue prerogative writs, cannot supervise an election affecting the public only,[43] even though franchises involving private property interests are to be voted

count in other cases is invalid. Eldredge v. Nickerson [Mass.] 78 N. E. 461.

36. 10 Am. & Eng. Enc. Law [2d Ed.] 732 n. 4, 734 n. 6. When a recount is demanded and made, if the box appears to have been opened since its sealing by the election officers, or if the ballots show evidence of having been tampered with, the court should reject them and accept the certificate of the officers of election as the correct vote of the precinct. Browning v. Lovett [Ky.] 94 S. W. 661.

31. Keith v. Wendt [Mich.] 13 Det. Leg. N. 78, 107 N. W. 443. A recount can be had under Comp. Laws § 3725, only in cases where the recount board can find from an inspection of the ballot box that the statutory requirements for the preservation of the ballots as cast have been observed. Id.

32. A return to mandamus that the seal had been broken held insufficient. Ward v. Culver [Mich.] 13 Det. Leg. N. 134, 107 N. W. 444.

33. Browning v. Lovett [Ky.] 94 S. W. 661.

34. Under Comp. Laws, § 3725. Ward v. Culver [Mich.] 13 Det. Leg. N. 142, 107 N. W. 446.

35. Atwood v. Sault Ste. Marie [Mich.] 12 Det. Leg. N. 403, 104 N. W. 649.

36. Ward v. Culver [Mich.] 13 Det. Leg. N. 134, 107 N. W. 444.

37. Clark v. Statesville, 139 N. C. 490, 52 S. E. 52.

38. A plan for incurring liability for procuring additional water supply. City of Rome v. Whitestown Waterworks Co., 113 App. Div. 547, 100 N. Y. S. 357.

39. Five members of a board of aldermen having been elected without designating which of them was to fill a short term, an agreement between them by which one of their number consented to take the short term in consideration of his being elected president of the board held not contrary to public policy. Hobbs v. Uppington [Ky.] 89 S. W. 128.

40. See 5 C. L. 1073.

41. The illegal calling of a convention. McDonald v. Lyon [Tex. Civ. App.] 95 S. W. 67.

Prohibition will not lie to prevent a majority of a party committee from ousting a minority from membership, as such an action is not judicial in its nature, and especially where the proceedings for their removal had not yet been commenced. State v. Witthoeft [Mo. App.] 93 S. W. 284.

42. The question whether the words "giving anti-prohibitionists and prohibitionists equal privileges," following the words "For amendment to the local option law," should be stricken out as argumentative and unfair is a political question involving no property or civil rights, and therefore equity has no jurisdiction to compel the secretary of state to omit them from the ballot. State v. Dunbar [Or.] 85 P. 337.

43. People v. District Ct. of Second Judicial Dist. [Colo.] 86 P. 87. Issuing a writ prohibiting certain alleged conspirators from

upon.[44] A private citizen may not institute proceedings of this character until it appears that the public prosecutor refuses to act.[45] The conduct of a party committee which is injurious to the party in general will not give individuals a cause of action on their own behalf.[46] Where the constitution fixes on the governor the duty of determining whether the constitutional requirements for ordering an election have been complied with, the courts cannot interfere.[47] It is within the power and the duty of a mayor and city council to stop an election in obedience to an order of a court of competent jurisdiction.[48] The remedy in case of the submission of a local option question on a defective petition is an order restraining all proceedings under such election.[49] In New York the court has no authority to order a recount of ballots cast in an election district.[50]

Mandamus.[51]—Mandamus will lie to compel the execution of a certificate of nomination in a proper case,[52] to compel a county committee postponing an election for an unlawful purpose to act,[53] to permit an elector to vote in case of an illegal refusal by an election board,[54] or to compel a county court to perform the ministerial duties incident upon the results of an election.[55] It will not lie to compel the county court to declare the result of a void election,[56] or to compel a board to complete an unauthorized canvass,[57] or for a recanvass where the unlocked ballot boxes were left open to the public for 24 hours or more after the vote was canvassed.[58]

Injunction.[59]—Only an unlawful election may be enjoined.[60] That it will im-

committing certain acts feared, appointing watchers, ordering the arrest of an election judge after election for interfering with a watcher, requiring the county treasurer to produce his original books of record, ordering the storing of ballot boxes in a building other than that designated by law, and ordering many citizens and taxpayers to appear for examination. Id.

44. People v. District Ct. of Second Judicial Dist. [Colo.] 86 P. 87.

45. Practice requires that before a private citizen institutes proceedings for the supervision of an election it must be made to appear that the attorney-general or district attorney has refused to act. People v. District Ct. of Second Judicial Dist. [Colo.] 86 P. 87.

46. That the executive committee called a convention at a place inconvenient to 90 per cent. of the party did not give certain individuals inconvenienced thereby a cause of action. McDonald v. Lyon [Tex. Civ. App.] 95 S. W. 67.

47. Const. art. 7, § 1, imposes exclusively on the governor the duty of determining whether there has been a compliance with the requirements of the constitution preparatory to the ordering of an election for the formation of a new county, and the courts have no power of interfering with him in the exercise of his discretion. Lamar v. Croft, 73 S. C. 407, 53 S. E. 540.

48. State v. Nicoll, 40 Wash. 517, 82 P. 895.

49. Mandamus, resubmission, and certiorari, not appropriate remedies. Kennedy v. Warner, 51 Misc. 362, 100 N. Y. S. 616. Action brought by an individual on his own behalf only who had leased property for saloon purposes and who would have been prejudiced by proceedings in conformity with the void elections. Id.

50. Under Election Law, Laws 1896, p. 893, c. 909, mandamus will not lie. Hearst v. Woelper, 183 N. Y. 274, 76 N. E. 28, rvg. 110 App. Div. 346, 96 N. Y. S. 341. Laws 1896, p. 938, c. 909, § 84, providing for a recount on a discrepancy being apparent between the number of votes on the tally sheet and the number of ballots shown by the ballot clerk's return, is a direction to the election inspectors for immediate action before a declaration of the result of the election, and does not authorize the court to interfere and order a recount. Id., 183 N. Y. 274, 76 N. E. 28,

51. See 5 C. L. 1074.

52. Where one person acts as secretary of two rival conventions and he executes a certificate of nomination to the candidate of one, mandamus will lie to compel him to issue a certificate of nomination to the rival nominee. To enable the two nominees to present their claims for adjudication to the election board named in § 2966-23, Rev. St. 1906. State v. Jones [Ohio] 78 N. E. 505.

53. Postponing election of a new committee merely to perpetuate their own power. In re Chester County Republican Nominations, 213 Pa. 64, 62 A. 258.

54. People v. Doe, 109 App. Div. 670, 96 N. Y. S. 389.

55. Mandamus will lie to compel a county court to declare the result of an election on local option and to make an order prohibiting the sale of liquor when the result favors prohibition, as such duties are ministerial only. State v. Richardson [Or.] 85 P. 225.

56. State v. Rhodes [Or.] 85 P. 332.

57. The fact that a board having no power or duty to canvass and count a certain vote assumed the same and proceeded to act thereunder as a board will not subject its members to mandamus to complete the canvass and count if abandoned beforehand. Page v. McClure [Vt.] 64 A. 451.

58. In re Burrell, 50 Misc. 261, 100 N. Y. S. 470.

59. See 5 C. L. 1075.

pose an additional burden on taxpayers is not a ground for enjoining a legal election.[61] The question of the propriety of enjoining an election on the eve thereof without notice is addressed to the discretion of the court and does not go to its jurisdiction.[62] The state in its sovereign capacity may bring a suit in equity in the supreme court of Colorado to enjoin acts pursuant to an alleged conspiracy violating the election laws, although such acts if committed would be punishable as crimes,[63] and denials of the equities of such a bill are wholly immaterial where the respondents have no right and claim none to perform the acts enjoined.[64] The authority of the court after issuing an injunction to prevent election frauds is not limited to orders merely punitive in their nature but to accomplish its ends may issue orders remedial in character.[65]

§ 12. *Judicial proceedings to contest or review. Rights and remedies.*[66]—A proceeding to contest an election is a purely statutory proceeding and is not regarded as a cause at law or in equity,[67] but in Illinois it is in the nature of a chancery suit and the rules of chancery practice apply.[68] Ballot boxes containing the ballots, the keys, and the reports of the election officials, are not judicial records reviewable under a writ of certiorari.[69] Where no other method of judicial review is provided, certiorari is the proper remedy to review the action based on a void election.[70] The remedy for an illegal election on the license question is an election contest and not proceedings to quash the licenses.[71]

Appeal to the courts in an election matter is under statutory regulation,[72] but ordinarily lies only from final judgments of the election officers.[73] In Colorado the supreme court will assume jurisdiction in an original proceeding in certiorari involving an election judge's rights.[74] In Missouri the courts have no authority to entertain a primary election contest by a writ of certiorari.[75] In Mississippi an election

60. Conner v. Gray [Miss.] 41 So. 186. Equity cannot enjoin an election called pursuant to a constitutional statute for the creation of a new county. Id.

61. For the creation of a new county. Conner v. Gray [Miss.] 41 So. 186.

62. State v. Nicoll, 40 Wash. 517, 82 P. 895.

63, 64. People v. Tool [Colo.] 86 P. 224.

65. A motion to restrain canvass of returns which, because of flagrant frauds, are untrue in making up the final abstract of votes. People v. Tool [Colo.] 86 P. 229.

66. See 5 C. L. 1075.

67. Properly transferred from the chancery to the common-law docket. Quartier v. Dowiat, 219 Ill. 326, 76 N. E. 371.

68. Demurrer to plea in abatement after cause had been transferred to common-law docket properly sustained. Quartier v. Dowiat, 219 Ill. 326, 76 N. E. 371. Recital in summons that the cause was on the chancery side of the court not inaccurate as proceeding is governed by chancery practice. Id.

69. State v. Reynolds, 190 Mo. 578, 89 S. W. 877.

70. Even though the statute gives the right to contest election. Commissioners' Ct. of Blount County v. Johnson [Ala.] 39 So. 910.

71. Bordwell v. State [Ark.] 91 S. W. 555.

72. Under a statute giving any citizen the right to appeal from the decision of the officer with whom a certificate of nominations has been filed upon the objections raised thereto, only the citizen instituting the proceeding by filing the objections may appeal. In re Social Democratic Party, 182 N. Y. 442, 75 N. E. 415. The secretary of state having ruled upon objections to a certain certificate of nominations filed with him, an appeal lay only at the instance of the person objecting, and an appeal taken by another citizen who had filed no objections upon which appeal an adjudication was had was without authority and the court without jurisdiction to entertain it. Id.

73. Refusal of the board to place name and address of a certain person on suspected list of persons "who are not qualified voters" is not such a determination and final judgment on the rights of the name involved as to permit an appeal for the purpose of having said name "struck from the list." Wilson v. Carter [Md.] 63 A. 369. An appeal does not lie from a mere finding of a county board in an election contest and before any final order or judgment has been pronounced. The record of the board that it "finds the contestee William F. Brown is elected * * * and the contestor Levi Summe does now pray an appeal to the circuit court" is a mere finding. Summe v. Browne, 165 Ind. 490, 76 N. E. 99.

74. To review a judgment claimed to deprive an election judge of his joint custody of the registration lists and his share of the official ballots. People v. District Ct. [Colo.] 84 P. 694.

75. State v. Reynolds, 190 Mo. 578, 89 S. W. 877. The primary election law relating to cities of 300,000 inhabitants and over does not confer on the courts of Missouri authority to try and determine contested primary election cases. Id.

contest involving a municipal office is properly brought under the code provisions for contests in state and county elections.[76] In California service of a person whose right to office is contested and who cannot be found may be had by leaving a copy of the citation at the house where he last resided.[77] In Minnesota election contests involving issues of fact must be tried at the county seat.[78] Persons affected by a void election are proper parties to apply for a writ of certiorari.[79]

Grounds for contest or review.—Relief will not be granted on a doubtful showing of wrong,[80] or to review a void election,[81] or to change what could not have affected the result,[82] but the court may determine an election contest even though the question involved has become moot by the passing of election day if they vitally affect the conduct of future elections.[83] In order to make a case of fraud and illegality in an election it is not necessary that the election officers be implicated.[84] Bribery is a ground for setting aside an election.[85] While in West Virginia bribery at an election disqualifies the guilty party from holding office,[86] a formal conviction is necessary before it can be used as the basis of a contest.[87]

Jurisdiction.[88]

Notice or summons, pleadings and issues.[89]—In the notice the grounds may be set forth by attaching the complaint to and making it a part of the notice.[90] In Missouri an election contest is not a case or suit which requires the filing of a petition in court and the suing out of a writ of summons in the name of the state,[91] a notice in conformity with the statute being due process.[92] Such notice need not be filed before service nor state that it has been filed or the particular day when it would be,[93] and is not insufficient because it notifies contestee that plaintiff "shall contest" the former's election.[94] A defective notice, being in Missouri subject to amendment,[95] is not ground for prohibiting a court from proceeding with an election contest.[96]

76. Under Rev. Code 1892, § 3034, making all provisions of the law on state and county elections so far as applicable govern in municipal elections. Shines v. Hamilton [Miss.] 39 So. 1008.

77. Under Code Civ. Proc. § 1119, which is constitutional. Chatham v. Mansfield, 1 Cal. App. 298, 82 P. 343.

78. An election contest involving issues of fact, though a special proceeding, must be tried at the county seat in order to give the court jurisdiction under the general rule requiring all issues of fact to be tried at the county seat. Decision reached after trial at any other place than county seat, though correct on the merits will be reversed. Bell v. Jarvis [Minn.] 107 N. W. 547. Objections to trial at a place other than county seat having been seasonably made are not waived by subsequent participation in proceedings. Id.

79. Resident electors and landowners in a precinct to be affected by a void election on the question of the application of the stock law are sufficiently interested to be entitled to apply for a writ of certiorari to review the election proceedings. Commissioners' Ct. of Blount County v. Johnson [Ala.] 39 So. 910.

80. Where investigation showed an affidavit to support a petition for an inspection of ballots to be unreliable and the only error in the ballot clerk's returns was conceded and voluntarily corrected, and no extraneous proof of error introduced, the petition will be denied. In re Slattery, 50 Misc. 212, 100 N. Y. S. 419.

81. Phillips v. Bynum [Ala.] 39 So. 911.

82. Where a proper canvass would not have changed the result, irregularities in a canvass making a recanvass impossible will not be ground for ordering a special election. In the submission of local option issues under the Liquor Tax Law 1896, p. 57, c. 112, § 16. In re Burrell. 50 Misc. 261, 100 N. Y. S. 470. Held that other errors committed in admission and rejection of ballots just balanced each other. McCarthy v. Wilson, 146 Cal. 323, 82 P. 243.

83. In re Morgan, 99 N. Y. S. 775.

84. Whaley v. Thomason [Tex. Civ. App.] 15 Tex. Ct. Rep. 207, 93 S. W. 212.

85. A local option election may be set aside in an election contest on the ground of bribery if a sufficient number of bribed votes have been cast to affect the result. Whaley v. Thomason [Tex. Civ. App.] 15 Tex. Ct. Rep. 207. 93 S. W. 212.

86, 87. Morrison v. McWhorter [W. Va.] 52 S. E. 394.

88, 89. See 5 C. L. 1075.

90. Murtha v. Howard [S. D.] 105 N. W. 100.

91. As required by Const. art. 6, § 38, and Rev. St. 1899, § 4681. State v. Hough, 193 Mo. 615, 91 S. W. 905.

92. Rev. St. 1899, § 7029. State v. Hough, 193 Mo. 615, 91 S. W. 905.

93, 94, 95, 96. State v. Hough, 193 Mo. 615, 91 S. W. 905.

The pleadings or their equivalent must state the grounds of contest[97] according to the rules in other civil suits.[98] An objection to the counting of particular ballots as spurious or bad need not be incorporated in the pleadings.[99] Although a petition in an election contest prays for general equitable relief and is indorsed "Bill in Chancery," the petition is not thereby rendered a bill in chancery.[1]

Objections may be raised by any mode appropriate to the proceeding.[2] Special contest courts though of limited jurisdiction have power to determine the regularity and sufficiency of their own pleadings.[3] A contestant attacking the legality of certain votes should not have them counted for himself.[4]

The issues are limited by the pleadings as in other civil suits,[5] and the extent and character of judicial review is almost entirely statutory depending on the character and operation of the proceeding.[6] In Montana malconduct on the part of

97. A notice of contest for a judicial office is a pleading and serves not only to institute the proceedings and bring the contestee into court but also to inform him of the character and cause of the ground of contest. Morrison v. McWhorter [W. Va.] 52 S. E. 394.

98. A notice of contest alleging that many illegal votes were cast and counted for contestee, the names and precincts being unknown to contestant, and many legal votes were cast for contestant and not counted for him, the names and precincts being unknown to him, is insufficient for indefiniteness. Hale v. Stimson [Mo.] 95 S. W. 885. The **sufficiency of the pleadings** in an election contest, as a question of law, is for the consideration and determination of the court. Morrison v. McWhorter [W. Va.] 52 S. E. 394. A petition for setting aside an election on the ground of bribery is sufficient which charges that the poll tax of voters was paid for them to influence their votes. Petition held sufficient. Whaley v. Thomason [Tex. Civ. App.] 15 Tex. Ct. Rep. 207, 93 S. W. 212. A statement in an election contest is not fatally defective in not alleging that at the time of filing it plaintiff is an elector where he alleges that he was an elector at all times mentioned in said statement, but it was not filed until the day after it was dated. Court will not presume that he ceased to be an elector on the following day. Chatham v. Mansfield, 1 Cal. App. 298, 82 P. 343. An allegation that the defendant received a less number of legal votes at an election than did an opponent states a mere conclusion and will not admit proof of illegality of ballots due to visibility of marks on the back of ballot, improper words printed on ballot, nor that certain party candidates' names were not placed in the proper place, or that ballots bore distinguishing marks. Hamer v. Howell [Utah] 86 P. 1073.

99. An objection to the counting of ballots on the ground that they had been tampered with is an objection to evidence only, has no place in the pleadings, and does not enlarge the issues. Moorhead v. Arnold [Kan.] 84 P. 742.

1. Quartier v. Dowiat, 219 Ill. 326, 76 N. E. 371.

2. And may be raised by motion to quash, demurrer, or by mere objection or suggestion. Morrison v. McWhorter [W. Va.] 52 S. E. 394. Whether it is the duty of a board to canvass and count the votes in a certain election being a **question of law,** an allegation to that effect in a complaint is **not admitted by a demurrer.** Page v. McClure [Vt.] 64 A. 451.

3. An election contest court, although of limited jurisdiction, has jurisdiction to determine questions touching the regularity and sufficiency of the pleadings in a contest for a judicial office. Morrison v. McWhorter [W. Va.] 52 S. E. 394.

4. Bigham v. Clubb [Tex. Civ. App.] 15 Tex. Ct. Rep. 479, 95 S. W. 675.

5. Objections to and challenges of ballots must be within the allegation of the complaint. Hamer v. Howell [Utah] 86 P. 1073. Where ineligibility at the time of election is the ground on which a person's right to office is contested, it should be alleged in the statement. McCarthy v. Wilson, 146 Cal. 323, 82 P. 243. A petition in an election contest attacking a certain vote as illegal because the voter had not paid his poll tax will not authorize a finding that it is illegal because the voter resides in another precinct. Bigham v. Clubb [Tex. Civ. App.] 15 Tex. Ct. Rep. 479, 95 S. W. 675. In an election contest a petition attacking a certain vote as illegal because the voter had not paid his poll tax does not authorize the judge to investigate and rule on the age of the voter. Holding such vote illegal on ground that voter was under age. Id. In the absence of any question under the pleadings as to the eligibility of a contestee the court need make no finding thereon. McCarthy v. Wilson, 146 Cal. 323, 82 P. 243.

6. In New York the power of a judge of the supreme court or of the court is limited to a review of the decision of the election board on written objections filed with it, and in the absence of such decision there is nothing to review. In re Candidates for Member of Assembly in Thirty-Second Assembly Dist., 108 App. Div. 361, 95 N. Y. S. 616. Failure to file objections. In re Walsh, 108 App. Div. 361, 96 N. Y. S. 147. The court has authority to determine not only whether a ballot is valid but of determining for whom they should be counted. In mandamus proceedings under Election Law, Laws 1896, p. 966, c. 909, § 114. In re Hearst, 48 Misc. 441, 96 N. Y. S. 122. In Kentucky eligibility to office cannot be passed on in an election contest. Under Act of 1900, § 1596a, repealing a previous act expressly authorizing a review of the eligibility of the candidates. Wilson v. Tye [Ky.] 92 S. W. 295.

election judges and the reception of illegal votes are separate grounds for contesting an election,[7] hence under allegations of the former the latter question cannot be raised.[8] A motion to exclude election returns from certain precincts, rendered false by frauds, does not involve the question of the disfranchisement of voters, does not make an election contest, nor does it involve title to office so that candidates are neither proper nor necessary parties.[9] Whether a contestant has obeyed all the statutory requirements necessary to institute a suit is for the court.[10]

Dismissal.[11]—For fundamental insufficiency of allegations dismissal sua sponte is proper.[12] In the absence of bad faith a proceeding to contest an election should not be dismissed for insufficiency of the security until an opportunity has been given to furnish additional and sufficient security.[13]

Preservation and production of ballots.[14]—Irregularity in observing directory provisions for the preservation of ballots is not fatal.[15] The integrity of ballots is generally impeached by the mere opportunity for tampering by evil minded persons,[16] but not when the opportunity does not extend beyond the officers having them rightfully in custody.[17] After ballots have become a part of the court files, presumptions of tampering do not arise from the mere opportunity.[18] In determining whether ballots have been properly preserved by a deputy auditor his title to office is not in issue,[19] and no inference that the ballots have not been properly preserved can flow from the mere fact that he is deputy de facto only.[20] Neither party to an election contest having anything to do with an irregularity in the custody of ballots, they cannot be affected by it.[21] The ballots having been destroyed and it being impossible to determine the number of legal ballots, the whole vote must be rejected.[22]

Evidence.[23]—The official certificate of the election officers is competent evidence and when introduced makes a prima facie showing of the facts certified,[24] which

7. Code Civ. Proc. § 2010. Coleman v. Kerr [Mont.] 83 P. 393.
8. Coleman v. Kerr [Mont.] 83 P. 393.
9. People v. Tool [Colo.] 86 P. 229.
10. Whether a contestant has filed a statement of his election expenses as required by law and whether his failure to file it has any pertinency in the contested election proceedings is for the court wherein the proceeding is pending to determine in the first instance and does not furnish a ground for issuing a writ of prohibition. State v. Taylor, 193 Mo. 654, 91 S. W. 917.
11. See 3 C. L. 1175.
12. If the pleadings are fatally defective by failing to disclose on their face a ground of contest, it is the duty of the court to abate the proceedings sua sponte. Morrison v. McWhorter [W. Va.] 52 S. E. 394.
13. Murtha v. Howard [S. D.] 105 N. W. 100.
14. See 5 C. L. 1076.
15. In Iowa provisions as to folding, wiring, and sealing ballots for their preservation are directory and irregularities in not strictly pursuing these directions will not defeat the will of the electors. Murphy v. Lentz [Iowa] 108 N. W. 530.
16. Chatham v. Mansfield, 1 Cal. App. 298, 82 P. 343. It was error to admit ballots in evidence where the envelopes containing them were broken at the time the county clerk received them, that thereafter they lay in a public vault to which the public generally had access, that 6 ballots were missing at the time of their production in court and no evidence was introduced showing that they had ever been properly sealed. Id.
17. Murphy v. Lentz [Iowa] 108 N. W. 530. Evidence held not to warrant any interference with finding of trial court that ballots had not been tempered with. Id.
18. No presumption that an attorney in a case made any changes in them arises from the fact that he had an opportunity to do so. Ogg v. Glover, 72 Kan. 247, 83 P. 1039. Ballots transmitted to the supreme court unsealed as part of the evidence in an election contest do not lose their probative effect from being temporarily intrusted by the clerk to the possession of the attorneys of one of the parties. Id.
19. Immaterial whether he is an officer de jure or de facto. Murphy v. Lentz [Iowa] 108 N. W. 530.
20. Murphy v. Lentz [Iowa] 108 N. W. 530.
21. Violation of a directory provision that ballots were to be kept in auditor's office by their unauthorized removal to the clerk's office. Murphy v. Lentz [Iowa] 108 N. W. 530.
22. People v. Davidson [Cal. App.] 83 P 161.
23. See 5 C. L. 1076.
24. Fleener v. Johnson [Ind. App.] 77 N. E. 366. It being the duty of election officers to canvass the votes cast, their certificate is evidence of the result. Id.

may be overthrown by the production of the ballots,[25] whereupon a contrary presumption arises.[26] Although the ballots themselves are the best evidence, if it appears that they have been tampered with, the certificate of return may prevail,[27] or in case of the destruction of the ballots the testimony of the officers of election may become the best in degree,[28] but they will not be permitted to contradict their own certificate of election from memory several months after the election.[29] It is proper for the court on the request of the contestant to open the ballot boxes and recount the votes.[30] Although no objections to the introduction of tampered ballots are made, the contest court is not obliged to count spurious returns,[31] but may in its discretion investigate and reject such ballots as not the best evidence.[32] Either party may introduce, during the hearing, witnesses who in the presence of the court and the parties have examined the box and the ballots to testify as to their condition.[33] A census taken some months later is not admissible to prove population at the time of election,[34] nor can it be proven by the election proclamation,[35] but it may be shown by the last preceding Federal and state census.[36] Fraud perpetrated on the day of election may be proved even though it involves inquiry into what took place immediately or even long before the election,[37] but matters occurring prior to election day and the suspicions and motives of the respective parties were immaterial on the question as to which of two election boards was the legal one.[38] One may state how he voted,[39] and, while not compelled to do so,[40] is not entitled to be advised by the court as in the case of criminating questions.[41] The contestant has the burden of proving the alienage of the contestee whose right to office is challenged on this ground.[42] Cases considering the sufficiency of the evidence on particular points are shown in the note.[43]

25. Fleener v. Johnson [Ind. App.] 77 N. E. 366. The record of election returns is generally merely prima facie evidence of the facts stated therein and may be overcome by extrinsic evidence. So held under Pol. Code § 1282, Code Civ. Proc. §§ 1920, 1926. People v. Davidson [Cal. App.] 83 P. 161.

26. People v. Davidson [Cal. App.] 83 P. 161.

27. Where it appears that ballots were tampered with after the return by the election officers, and that some of the ballots were void because one poll clerk signed the names of both on them, the certificate return, not being otherwise impeached, will prevail over the ballots themselves as evidence of the result of the election in that precinct. Williamson v. Musick [W. Va.] 53 S. E. 706. See the preceding paragraph.

28. Where the ballots cast at an election had been destroyed before trial of an action to oust certain persons from office, evidence of the election officers that nearly all of the ballots were marked for two candidates held the best in degree that existed. People v. Davidson [Cal. App.] 83 P. 161.

29. An officer of election will not be permitted to contradict a certificate of election signed by him on the night of election by oral testimony given some months later from memory only in an election contest. Browning v. Lovett [Ky.] 94 S. W. 661.

30. Browning v. Lovett [Ky.] 94 S. W. 661.

31, 32. Moorhead v. Arnold [Kan.] 84 P. 742.

33. Browning v. Lovett [Ky.] 94 S. W. 661.

34. Where the right of a township to elect two persons to a certain office depended upon the population of the township at the time of the election. People v. Davidson [Cal. App.] 83 P. 161.

35. People v. Davidson [Cal. App.] 83 P. 161.

36. The right to elect certain officers in a township depending upon the population. People v. Davidson [Cal. App.] 83 P. 161.

37. Whaley v. Thomason [Tex. Civ. App.] 15 Tex. Ct. Rep. 207, 93 S. W. 212.

38. In an election contest involving the question as to which of two election boards is the legal one, events occurring prior to election day, the suspicions of the respective parties and the grounds they had therefor are incompetent and their motives in their conduct are immaterial. Foltz v. Mings, 113 Ill. App. 557.

39. Not opposed to policy of a secret ballot. State v. Matlack [Del.] 64 A. 259.

40, 41. State v. Matlack [Del.] 64 A. 259.

42. Buckley v. McDonald [Mont.] 84 P. 1114.

43. Where record of board of supervisors showed that the number of votes cast for each candidate for a certain office and that one of them received the highest number of votes, held such evidence was overcome by other undisputed evidence showing that the number of registered voters in the township and the number of ballots cast at the election were greatly less than the number of votes counted and shown by the record. Id. Evidence held sufficient to show that illegal ballots were cast in all the precincts of the township. Id. In an action to oust evidence held sufficient to show that the illegal ballots were sufficient in number to

Costs.—The successful party in an election contest tried before an unauthorized tribunal is not entitled to his costs.[44]

Decision and review thereof.[45]—On a finding that a contestant was not elected a failure to find as to his eligibility is immaterial,[46] nor was it necessary to find upon such allegations in the statement as were admitted by the answer either by a specific statement or a failure to deny.[47] Findings of an election contest court as to the appearance, condition, and contents of a sack containing ballots, based on an inspection of the same by the members of the court, is supported by evidence.[48] Where a motion to transfer an election contest from the chancery to the common-law docket and a demurrer to the action on the ground of want of jurisdiction were argued and considered together and the granting of the motion shows that the demurrer was in effect overruled, it was not a fatal error not to enter a formal order showing the disposition of the demurrer.[49]

Appellate jurisdiction[50] and procedure[51] in election contests is regulated by law. In West Virginia either party to an election contest may appeal from the county court to the circuit court where the contest will be tried de novo.[52] An appeal must be made within the statutory time[53] or extensions thereof subject to proper conditions,[54] and the record for appeal must be seasonably prepared.[55] Expiration of the term of a contested office is not ground for dismissing the appeal.[56]

make a difference in the result of the election. People v. Davidson [Cal. App.] 83 P. 161. Finding that no improper promises were made by contestee to secure his election supported by the evidence. Hamer v. Howell [Utah] 86 P. 1073.

44. Contestee not entitled to $635 costs of trial before a board contest which was without jurisdiction, not even under Ky. St. 1903, § 887, providing that the party in error, if the action be dismissed for want of jurisdiction, shall pay the costs. Johnson v. Davison [Ky.] 89 S. W. 518.

45. See 5 C. L. 1077.

46, 47. McCarthy v. Wilson, 146 Cal. 323, 82 P. 243.

48. Moorhead v. Arnold [Kan.] 84 P. 742.

49. Quartier v. Dowiat, 219 Ill. 326, 76 N. E. 371.

50. The appeal from a decree of the quarter sessions imposing costs in a contested election case should go to the superior court, as the supreme court is without jurisdiction. Such an appeal does not involve title to office. In re Hayes' Election, 214 Pa. 551, 63 A. 974. The revisory jurisdiction of the supreme court on an appeal from an order of the quarter sessions creating election districts is the same as on certiorari. Waynesburg Borough's North Ward, 29 Pa. Super. Ct. 525. On an appeal from an order of the court below purporting to divide an entire ward into three election districts, the appellate court has no jurisdiction to determine a disputed question as to whether the three districts include the entire territory of the ward. Waynesburg Borough's North Ward, 29 Pa. Super. Ct. 525; Waynesburg Borough's South Ward, 29 Pa. Super. Ct. 532. The supreme court of West Virginia has jurisdiction upon a writ of error to review the final order of a circuit court in an election contest for a county office where it is shown that the value of the office is greater than $100. Williamson v. Musick [W. Va.] 53 S. E. 706. In New York the special term is expressly authorized to review summarily the decision of the board of elections, and its order on such review is appealable. Election Law, Laws 1896, p. 922, c. 909, § 56. In re Halpin, 108 App. Div. 271, 95 N. Y. S. 611.

51. In Iowa, on appeal in election cases, the cause will be heard anew in the supreme court. Under Code § 1222 as amended by Acts 28th Gen. Ass. p. 22, c. 39, § 1. Murphy v. Lentz [Iowa] 108 N. W. 530.

52. Acts 1901, p. 76, c. 80, held constitutional. Williamson v. Musick [W. Va.] 53 S. E. 706.

53. On the failure to appeal from a judgment of the superior court annulling an election within 10 days, it becomes final. Wilson v. Arnot [Cal. App.] 84 P. 293. An appeal from a decree annulling an election certificate must be taken within 10 days in California or the decree becomes final. Under Code Civ. Proc. § 1127. The term "commission" therein used is the equivalent of "election certificate" (Wilson v. Fisher, 148 Cal. 13, 82 P. 421), and hence of course deprives the former officer of his salary pending an appeal taken later (Id.). While a statutory provision that an appeal based on the ground that the decision is not supported by the evidence must be taken within sixty days applies to election contest cases (McCarthy v. Wilson, 146 Cal. 323, 82 P. 243), it will not preclude an appeal taken after the sixty days based on improper admission and exclusion of evidence (Id.).

54. Requiring a contestee to surrender an office to a contestant as a condition for extending the time within which to perfect an appeal lies within the discretion of the court. McCarty v. Wilson [Cal. App.] 83 P. 170.

55. Where appellant fails to comply with conditions contained in an order extending the time for presenting a bill of exceptions until, owing to change of circumstances, he no longer can comply, an offer then to comply would not entitle him to have his bill

Objections to the pleadings[57] or to the evidence[58] cannot be raised for the first time on appeal. Rulings of the court on objections are reviewable as in other cases if properly excepted to,[59] and when such rulings are erroneous and of a number sufficient to be prejudicial,[60] the judgment must be reversed.[61] On an appeal or writ of error to reverse a final order in an election contest the burden of preserving the evidence to sustain the attack rests on the person questioning the judgment.[62] To be considered on appeal, ballots must be properly preserved and certified to.[63]

Security for appeal; costs.[64]

§ 13. *Offenses against election laws.*[65]—"Willful" illegal voting in Iowa involves either a knowledge of one's disqualification or a reckless disregard of whether one is disqualified or not,[66] hence one in good faith believing himself entitled to vote is not guilty of the crime of "willful" voting within the Iowa statute.[67] Under the "Terrell Election Law" of Texas, treating voters on election day with liquor and tobacco is bribery.[68] Laws making it a crime for "officers" of election knowingly to prevent a qualified voter from voting do not apply to clerks of election not within the meaning of the act.[69] A law denouncing the offense of illegal voting and providing a punishment therefor applies to and is not repealed by subsequent laws requiring additional qualifications of voters, noncompliance with which would be punishable.[70] Under a law repealing a former registration statute and "all penalties thereunder," an offense against the repealed statute committed prior to its repeal cannot be tried and punished thereafter.[71] One acting as an officer at an election and acting corruptly cannot avail himself of any irregularity in his appointment in his defense.[72] One may be convicted of illegal voting although already convicted of false swearing in connection with it.[73]

of exceptions signed. Wilson v. Arnot [Cal. App.] 84 P. 293.

56. An appeal in an election contest will not be dismissed because the term of the office contested has expired, since the right to the fees, salary, and emoluments of such office is a substantial vested right to which a contestant is entitled if elected which would be denied him if the appeal were dismissed on such ground. McClelland v. Erwin, 16 Okl. 612, 86 P. 283.

57. Failure by plaintiff to allege that he is an elector at the time that the statement is filed. Chatham v. Mansfield, 1 Cal. App. 298, 82 P. 343.

58. McCarthy v. Wilson, 146 Cal. 323, 82 P. 243.

59. Each particular ballot is regarded as a piece of evidence and the ruling of the court on an objection thereto, when excepted to by the injured party, is reviewable by the appellate court on an appeal from the judgment to the same extent as any other ruling in the matter of the admission or rejection of evidence. McCarthy v. Wilson, 146 Cal. 323, 82 P. 243. The supreme court will not review the ruling of the trial court upon any particular ballot in the absence of exception reserved thereto by the party complaining. Id.

60. Error in counting the ballots from a certain precinct is not prejudicial if the result of the election would not be affected by their exclusion. Pledge v. Griffith [Mont.] 83 P. 392. The admission of testimony of election officers that nearly all of the voters marked their ballots for two candidates, even if erroneous, held harmless where it was shown that the number of votes counted greatly exceeded the number of ballots cast. People v. Davidson [Cal. App.] 83 P. 161.

61. McCarthy v. Wilson, 146 Cal. 323, 82 P. 243.

62. Quartier v. Dowiat, 219 Ill. 326, 76 N. E. 371. See ante this section, Preservation and Production of Ballots.

63. In order that ballots may be considered on appeal they must be certified by the trial judge to be the original ballots used at the trial and in the original form as introduced in the evidence. Sending up a box containing the ballots to which is attached a memorandum of the judge to the effect that he had never opened or examined the box or its contents but believes it to contain the original ballots used upon such trial, not a sufficient identification. Pledge v. Griffith [Mont.] 83 P. 392.

64, 65. See 5 C. L. 1078.

66. State v. Savre [Iowa] 105 N. W. 387.

67. A person upon due inquiry ascertaining all the facts and in good faith concluding that he is qualified to vote. State v. Savre [Iowa] 105 N. W. 387.

68. Whaley v. Thomason [Tex. Civ. App.] 15 Tex. Ct. Rep. 207, 93 S. W. 212.

69. Ky. St. 1903, § 1583, not applicable to clerks of election. Barrow v. Commonwealth [Ky.] 92 S. W. 981.

70. Terrell Election Law does not repeal Pen. Code 1895, art. 171. Arrington v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 934, 89 S. W. 643.

71. Wilson v. People [Colo.] 85 P. 187.

72. Commonwealth v. Brown [Ky.] 93 S. W. 605.

73. False swearing, although occurring

The indictment.[74]—A prosecution by information before judges trying the facts is valid in Delaware in the case of a violation of Const. Delaware art. 5, § 7,[75] and it is not necessary to aver that a complaint charging the place of the crime was made to any judge entitled to sit in the supreme court,[76] and no preliminary examination is required.[77] The allegations must show that the election was legal,[78] and when misconduct of an officer is charged that he was such.[79] An averment that election officers willfully failed to properly read and truly accredit the ballots sufficiently alleges a violation of their official duty.[80] An accusation that one violated his official duty is not double in charging a failure to fully read the ballots and also a failure to make a true statement of them.[81] A charge of the giving away of liquor on election day in Texas must negative a proviso respecting medicinal uses, and must aver each giving separately.[82] Violations of official duty by misreading ballots and untruly stating the result at primary elections on September 24 and again on December 21 in the same year may be by separate counts brought in one information.[83]

Variance.—It is not a fatal variance that an indictment charging defendant with making a false certification of election made two slight errors in copying the certificate into the indictment.[84]

Burden of proof and evidence.—In a prosecution for making false statements to a deputy election officer it is not incumbent on the state to prove that such deputy or his principal, both of whom have been acting as election officers, have ever taken or filed their respective oaths of office.[85] A witness may testify that a certain form of ballot is similar to the ballot actually used in an election.[86] On proof that but one form of ballot was officially used a form of ballot identified by a witness as exactly like it may be received.[87] The oath of office actually administered is admissible in a prosecution for violation of official duty though the law prescribed a different oath.[88] In a trial of election officers for violation of their official duty a witness may testify that he voted, such evidence not being secondary to the election books.[89] As bearing upon the question of intent in voting illegally, a person may show that he acted upon the advice of one learned in the law.[90] Tenants guilty of

contemporaneously with illegal voting, does not constitute them one and the same offense so that conviction of the former would prevent conviction of the latter. Arrington v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 934, 89 S. W. 643.

74. See 5 C. L. 1078.

75. Making it an offence for an election officer to willfully violate his official duty. State v. Matlack [Del.] 64 A. 259.

76, 77. State v. Matlack [Del.] 64 A. 259.

78. In a prosecution for the giving away of intoxicating liquors on election day, an information charging that the election for the entire county to determine whether intoxicating liquors should be sold within the county was held in a certain precinct. Thweatt v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 391, 95 S. W. 517.

79. Alleging that accused "pretended to act" as an officer of election is insufficient. Commonwealth v. Brown [Ky.] 93 S. W. 605.

80, 81. State v. Matlack [Del.] 64 A. 259.

82. An information charging accused with having given away intoxicating liquor on election day and having informed several persons where they could obtain it is fatally defective for not negativing the statutory proviso that it may be sold for medicinal purposes, and also as alleging separate offences committed in distinct transactions between different persons in the same count. Thweatt v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 391, 95 S. W. 517.

83. Not separate and distinct offences. State v. Matlack [Del.] 64 A. 259.

84. Alleging that on a certain proposition the vote was 240 where the original showed 340 and a failure to show that a certain candidate received one vote. Commonwealth v. Brown [Ky.] 93 S. W. 605. Held that court properly instructed the jury to find for the defendant where the prosecution under an indictment for making a false certificate of election failed to show that the certificate and stubbooks returned into court were the originals, nor that defendant signed or authorized another to sign for him the certificate. Id.

85. People v. Ellenbogen, 99 N. Y. S. 897.

86. State v. Matlack [Del.] 64 A. 259.

87. Not secondary. State v. Matlack [Del.] 64 A. 259.

88. State v. Matlack [Del.] 64 A. 259.

89. State v. Matlack [Del.] 64 A. 259. Evidence held to show a criminal misreading of ballots in polling the vote. Id.

90. State v. Savre [Iowa] 105 N. W. 387.

the crime of false registration are not accomplices of their landlord in his false statements as to their residence, and hence may testify against him without corroboration.[91]

Question for the jury.—Evidence of having voted in good faith raises question of intent which should go to the jury.[92]

ELECTRICITY.[93]

§ 1. Electric Franchise (1258).
§ 2. Contracts (1259).
§ 3. Duty of Care Respecting Electricity (1259).
§ 4. Causes of Action; Remedies and Procedure (1263). Pleading (1263). Evidence (1264). Questions for Jury (1266).

This topic deals with the law relative to the rights and duties which persons furnishing or using electricity have or owe to third persons not in their employ,[94] except in so far as such rights and duties are peculiar to a specific application of electricity, as its use in propelling street cars[95] or in transmitting messages between parties.[96] The general principles as to what constitutes negligence,[97] and the rules for measuring damages,[98] are treated elsewhere.

§ 1. *Electric franchise.*[99]—Electric companies furnishing current to the public generally and using the public streets and highways for such purpose are quasi public corporations[1] and cannot discriminate in charges for the same service.[2] The acceptance of a franchise gives the conditions imposed the force of binding contracts.[3] No wires can be strung under a license or franchise except such as its terms cover. Placing an extra feed wire in a street is prohibited under an ordinance permitting no wires to be placed therein except a trolley wire.[4] Legislative authority to construct and operate a plant for the generation of electricity does not authorize the maintenance of a nuisance in the exercise of such authority.[5] The right to exercise the franchise cannot be collaterally attacked.[6] The board of electrical control of New York City has been held to have no power to grant a franchise.[7]

91. In the prosecution of a landlord for making false statements as to certain persons being his tenants, such tenants, although guilty of the crime of false registration, are not accomplices of the landlord in his false statements so as to render it necessary to corroborate their testimony against him. People v. Ellenbogen, 99 N. Y. S. 897. Where a landlord averred on oath that certain persons were tenants of his and were then at his house where he had a short time before left one of them asleep, a showing that in fact such persons during such time were in the election officer's rooms adjoining and the tenants' testimony that they had lived elsewhere for two years is sufficient evidence to sustain a verdict of conviction. Id.

92. Evidence that one voting in the wrong ward supposed his residence to be in the ward where he voted, and that he acted on the advice of attorneys, raises the question of intent which should go to the jury. Error to direct a verdict of acquittal. State v. Savre [Iowa] 105 N. W. 387.

93. See 5 C. L. 1086.

94. Duty as to employes, see Master and Servant, 6 C. L. 521.

95. See Street Railways, 6 C. L. 1556.

96. See Telegraphs and Telephones, 6 C. L. 1065.

97. See Negligence, 6 C. L. 748.

98. See Damages, 7 C. L. 1029.

99. See 5 C. L. 1086.

1. Armour Packing Co. v. Edison Elec. Illuminating Co., 100 N. Y. S. 605.

2. Armour Packing Co. v. Edison Elec. Illuminating Co., 100 N. Y. S. 605. Money paid by a patron charged discriminatory rates under the belief that others were paying the same rate for the service may be recovered, even though the payments were made pursuant to specific contracts. Id.

3. Condition that others might use the same poles subject, in case of dispute as to compensation, to the arbitrament of a municipal officer binds the acceptor to either agree on compensation or accept the arbitrament of the official, unless shown to be arbitrary or the result of corruption. Montgomery Light & W. P. Co. v. Citizens' Light, H. & P. Co. [Ala.] 40 So. 981.

4. City of Monroe v. Detroit, etc., R. Co. [Mich.] 12 Det. Leg. N. 1035, 106 N. W. 704.

5. Liable in trespass for the maintenance of a nuisance. Townsend v. Norfolk R. & Light Co. [Va.] 52 S. E. 970.

6. Portions of complaint in action for injuries denying defendant's right to operate freight cars held properly stricken out. Roberts v. Terre Haute Elec. Co. [Ind. App.] 76 N. E. 323.

7. The board of electrical control is not

§ 2. *Contracts.*[8]—Electricity is personal property[9] and subject to ownership, barter, and sale as such.[10] A contract to use enough electricity by measurement to make a certain minimum monthly bill, or pay that amount should sufficient current to make it not be used, is not one for liquidated damages,[11] but the stipulation is a part of the direct obligation of the contract.[12] The violation of a contract to take the whole of one's supply of electric current from a single manufacturer is remediable by injunction in the absence of an adequate legal remedy,[13] and there is no adequate legal remedy where the current is to be taken for a term of years by measurement subject to a minimum monthly charge.[14] Injunction lies also to compel one public service corporation to furnish another with electricity pursuant to a contract between them until such time as the plaintiff can procure current elsewhere,[15] and this rule applies though the contract between them is violative of the express provisions of the defendant's franchise forbidding any restraint on competition.[16]

§ 3. *Duty of care respecting electricity.*[17]—The courts are not in harmony as to the dangers of electricity in comparison with other dangerous agencies.[18] Without expressing affirmatively the degree of care required the courts have declared various acts to be negligence or not and defined the duty of handlers of electricity in specific instances,[19] but proof of negligence is not essential to establishing liability when the maintenance of the danger amounts to a nuisance.[20] In some instances

empowered to grant a franchise for the use of the subways or ducts of New York City by electric companies without the consent of the board of aldermen. Laws 1887, p. 928, c. 716, etc., construed. West Side Elec. Co. v. Consolidated Tel. & Electrical Subway Co., 110 App. Div. 171, 96 N. Y. S. 609.

8. See 5 C. L. 1087.

9. Civ. Code §§ 654, 655, 663, construed. Terrace Water Co. v. San Antonio Light & Power Co., 1 Cal. App. 511, 82 P. 562.

10. Terrace Water Co. v. San Antonio Light & Power Co., 1 Cal. App. 511, 82 P. 562.

11, 12, 13, 14. Beck v. Indianapolis Light & Power Co., 36 Ind. App. 600, 76 N. E. 312.

15, 16. Seattle Elec. Co. v. Snoqualmie Falls Power Co., 40 Wash. 380, 82 P. 713.

17. See 5 C. L. 1088.

18. Louisiana: The need of vigilance in keeping electricity bound is even greater than keeping a tiger within his cage. Simmons v. Shreveport Gas, Elec. Light & Power Co., [La.] 41 So. 248.

Michigan: Electricity is to be classed with gunpowder, dynamite, and other treacherous and destructive agents. Warren v. City Elec. R. Co. [Mich.] 12 Det. Leg. N. 415, 104 N. W. 613.

Ohio: Electricity is to be classed with steam rather than dynamite. Marsh v. Lake Shore Elec. R. Co., 7 Ohio C. C. (N. S.) 405.

19. Failure to use the "magneto pole" test for detecting a closed circuit is proof of negligence where other tests are shown to be inefficient and the magneto pole is shown to have been at hand. O'Leary v. Glens Falls Gas & Elec. Light Co., 107 App. Div. 505, 95 N. Y. S. 232. An owner of high-tension electric light and power wires in proximity to telephone wires owes to linemen engaged in service of the telephone company the clear legal duty to have its wires so placed and insulated as to permit them to work in safety. Ziehn v. United Elec. Light & Power Co. [Md.] 64 A. 61. A telephone company was not negligent in failing to learn of and repair a broken wire within an hour or an hour and a half after it fell where the day was very stormy and there was much sleet and ice and wires were breaking down and falling all over the city. Aument v. Pennsylvania Tel. Co., 28 Pa. Super. Ct. 610. Where a bank electrically charged a hand rail in front of its building facing on a public street for the purpose of shocking persons who stopped there, it was liable for injuries caused by its janitor turning on the electricity, even though he did so against positive orders. Whaley v. Citizens' National Bk., 28 Pa. Super. Ct. 531. The maintenance of wires in violation of a municipal regulation requiring thorough insulation is negligence for which the owner is liable in the absence of contributory negligence of a person injured thereby. Clements v. Potomac Elec. Power Co., 26 App. D. C. 482. An electric company generating and sending out a deadly current owes to employes of third persons lawfully on its premises in the service of such third persons the duty of keeping its wires so insulated and protected as to be safe to work in their vicinity. Ryan v. St. Louis Transit Co., 190 Mo. 621, 89 S. W. 865. Giving one employed to clear snow off the ties of a railway having an electrically charged third rail an iron shovel to work with is not negligence, though no specific warning is given of the danger. Smith v. Manhattan R. Co., 48 Misc. 393, 95 N. Y. S. 529.

20. Where a bank electrically charged a hand rail in front of its building facing on a public street for the purpose of shocking persons who stopped there and the

the courts have been enabled to decide the question presented on the basis of ordinary or reasonable care without committing themselves to a decision as to a higher degree.[21] Beyond that the decisions are inharmonious, passing from the requirement of a reasonable degree of care[22] to a high degree[23] and on up to the highest degree.[24] The true rule would seem to be that the degree of care changes with changing circumstances[25] and must be in proportion to the danger.[26]

The liability of a municipal corporation in the operation of electric enterprises

current was sufficient to inflict serious injury, the device was unlawful and a nuisance per se, rendering the bank liable for injuries inflicted thereby regardless of the question of negligence. Whaley v. Citizens' Nat. Bk., 28 Pa. Super. Ct. 531.

21. An instruction that the duty requisite in the handling of electricity is such as ordinarily careful and prudent persons would exercise in dealing with it under similar circumstances is sufficiently favorable to defendant in an action for injuries caused by electric current. Warren v. City Elec. R. Co. [Mich.] 12 Det. Leg. N. 415, 104 N. W. 613. An instruction that defendant, an electric lighting company, was required to use reasonable care in constructing and maintaining its system, and to prevent the secondary system being charged with a high voltage current, was as favorable to defendant as it could ask in an action for the death of a patron in his residence while attempting to use the light. Witmer v. Buffalo & N. F. Elec. Light & Power Co., 98 N. Y. S. 781.

22. Montana: The owner or operator of an electric plant must use a reasonable degree of care in erecting pole lines, selecting appliances, and insulating the wires wherever people have a right to go and are liable to come in contact with them. Bourke v. Butte Elec. & Power Co. [Mont.] 83 P. 470.

23. North Carolina. Fisher v. New Bern, 140 N. C. 506, 53 S. E. 342.

Wisconsin: Wilbert v. Zurheide Brick Co. [Wis.] 106 N. W. 1058.

New York: An electric lighting company maintaining a primary circuit, charged with an alternating current of 2,400 volts, must exercise a high degree of care to protect its patrons in the use of its current. Morhard v. Richmond Light & R. Co., 111 App. Div. 353, 98 N. Y. S. 124.

24. Illinois: Persons utilizing electric energy as a business are bound to exercise the highest degree of care and skill to protect others from its dangers. Byron Tel. Co. v. Sheets, 122 Ill. App. 6. In the absence of stipulations to the contrary, those who engage in the business of serving the public with telephones must be held to possess and employ the requisite knowledge and skill to protect their patrons so far as practicable from the dangers incident to the business, whether those dangers arise from the currents employed by them or such as may reasonably be expected to get on the wires from other sources. Id.

Kentucky: Nothing short of the utmost care is sufficient, by which is meant the highest degree of care and skill known which may be used under the same or similar circumstances. Mangan's Adm'r v. Louisville Elec. Light Co. [Ky.] 91 S. W. 703.

Pennsylvania: A telephone company's duty to its patrons is to exercise at all times the highest degree of care and vigilance to protect them from a dangerous electric current over its wires from any source. Delahunt v. United Tel. & T. Co. [Pa.] 64 A. 515. Where a bank had electrically charged a brass hand rail in front of its building facing on a public street for the purpose of shocking persons who stopped there, it was bound to use the very highest degree of care practicable to avoid injury to everyone who might be lawfully in proximity to the rail and come accidentally or otherwise in contact therewith. Whaley v. Citizens' Nat. Bk., 28 Pa. Super. Ct. 531.

25. That danger arose after the construction of telephone line and was due to the running of electric light wires below guy wire was no excuse. Guinn v. Delaware & A. Tel. Co., 72 N. J. Law, 276, 62 A. 412.

26. Wood v. Wilmington City R. Co., [Del.] 64 A. 246; Mangan's Adm'r v. Louisville Elec. Light Co. [Ky.] 91 S. W. 703; Bourke v. Butte Elec. & Power Co. [Mont.] 83 P. 470.

Note: The Supreme Court of Michigan says: We find it unnecessary to say, as some courts have said, that the use of electricity imposes the duty of the greatest possible care. The circuit judge did not so charge, but contented himself with saying that the duty requisite was such as ordinarily careful and prudent persons would exercise in dealing with electricity under similar circumstances. This was sufficiently favorable to the defendant, although it involved the idea, before expressed, that the nature of the hazard is an element in determining the question. The frequency and nature of the inspections required depend in a measure upon this. The following authorities, suggested by plaintiff's brief, show the trend of decisions upon this subject: Friesenhan v. Telephone Co., 134 Mich. 292, 96 N. W. 501; Wolpers v. N. Y. & Q. Elec. Co., 86 N. Y. 845; Paine v. Elec. Co., 64 App. Div. 477, 72 N. Y. 279; Will v. Edison Co., 200 Pa. 540, 50 A. 161, 86 Am. St. Rep. 732; Denver Con. Elec. Co. v. Lawrence [Colo.] 73 P. 39; Economy L. & P. Co. v. Hiller, 203 Ill. 518, 68 N. E. 72; Memphis St. R. v. Kartright [Tenn.] 75 S. W. 719; Lexington R. Co. v. Fain [Ky.] 71 S. W. 628; Lutolf v. United Elec. Co. [Mass.] 67 N. E. 1026; Richmond & P. Elec. R. Co. v. Rubin [Va.] 47 S. E. 834; Keasbey, Elec. Wires, §§ 242, 269; 3 Current Law, 1182; 1 Current Law, 996; City Elec. Co. v. Conery, 61 Ark. 381, 33 S. W. 426, 54 Am. St. Rep. 262, 31 L. R. A. 570,

of its own is the same as that of private corporations,[27] and it must use care commensurate with the dangers attaching to the use of electricity.[28] Municipal boards or commissions in exercising their supervisory powers over public electric utilities are agents of the municipality which is liable for their acts.[29]

A contract for electric lighting exempting the electric company from liability for damage to person resulting from the use of the light does not exonerate it from liability for injuries caused through its own negligence in the absence of an express provision therefor.[30]

Inspection is an essential element in the exercise of due care on the part of persons engaged in the business of utilizing electric energy.[31] The watchfulness needed to prevent accidents from the use of electric current should take into account the acts of strangers and the public generally.[32] Knowledge or the opportunity to know of defects is a further requisite on which to predicate negligence,[33] but knowledge will be inferred by failure to acquire it within a reasonable time after opportunity therefor,[34] or from a reckless disregard of the rights of others.[35] Custom will not excuse the exposure of the public to unnecessary danger from electric apparatus,[36] nor the violation of a municipal regulation.[37]

The fact that a person injured by electric apparatus is a bare licensee of a third person on whose premises the accident occurs, or even a trespasser, does not affect the liability of the owner of the apparatus,[38] but as to its own licensees or trespassers as to it, an electric company owes no active duty beyond the exercise of rea-

3 Current Law, 1185.—From Warren v. City Electric R. Co. [Mich.] 104 N. W. 613.

27. Eaton v. Weiser [Idaho] 86 P. 541.

28. Eaton v. Weiser [Idaho] 86 P. 541. Having notice thereof a city, as operator of an electric plant, was negligent in allowing a live wire charged with a deadly current to remain suspended over a street in such manner that it was likely to come in contact with persons on horseback or in vehicles traveling thereon. Id.

29. The water and light commission created by Priv. Laws 1903, c. 41, for the city of Newbern, is an agent of the city. Fisher v. Newbern, 140 N. C. 506, 53 S. E. 342.

30. Witmer v. Buffalo & N. F. Elec. L. & P. Co., 98 N. Y. S. 781.

31. The operator of a plant for the generation of electricity must maintain a system of inspection by which any change that has occurred in the physical conditions surrounding the plant and equipment, which would tend to create or increase the danger to persons lawfully in pursuit of their business or pleasure, may be discovered within a reasonable time. Bourke v. Butte Elec. & Power Co. [Mont.] 83 P. 470. Where a lighting company knew of the grounding of its wire and sent a man to locate the trouble, who reported the line "O. K.," it was negligent in turning the current on upon the receipt of such report without making a further test from the power house to ascertain if the trouble had been remedied. Harrison v. Kansas City Elec. Light Co., 195 Mo. 606, 93 S. W. 951. Verdict for defendant in action for death of a child from touching the end of a severed electric light wire hanging in a tree on a public street held unjustifiable, it having been for several days discoverable that a wire was broken but no tests to that end having been taken. O'Leary v. Glens Falls Gas & Elec. Light Co., 107 App. Div. 505, 95 N. Y. S. 232.

32. Wilbert v. Zurheide Brick Co. [Wis.] 106 N. W. 1058.

33. Negligence cannot be predicated on the inadequacy of insulating material unless the user knew or ought to have known of it. Mangan v. Hudson River Tel. Co., 50 Misc. 388, 100 N. Y. S. 539. The wire of a telegraph company being harmless, the company is not liable to a stranger hurt by touching it when the wire has become charged without its knowledge or anything in the circumstances to put it on notice. Martin v. Citizens' General Elec. Co. [Ky.] 92 S. W. 547.

34. Telephone company's foreman held guilty of gross negligence in sending lineman to work in contact with light company's wires after time for turning on current of lighting company with warning merely to be careful. East Tennessee Tel. Co. v. Carmine [Ky.] 93 S. W. 903.

35. Where a bank caused a brass rail in front of its building facing a public street to be charged with electricity for the purpose of shocking persons who stopped in front of the building, it was bound to know that it might be dangerous and the extent of the danger. Whaley v. Citizens' National Bk., 28 Pa. Super. Ct. 531.

36. Miller v. Lewiston Elec. Light, Heat & Power Co., 212 Pa. 593, 62 A. 32.

37. Regulation requiring thorough insulation held not affected by custom in other localities to use no insulation. Clements v. Potomac Elec. Power Co., 26 App. D. C. 482. Evidence held insufficient to establish the unreasonableness of a municipal regulation requiring electric wires in certain districts of the municipality to be thoroughly insulated. Id.

sonable care.[39] One sustaining contractual relations with an electric company has a right to assume, in the absence of notice, that the appliances are in good order and free from defects,[40] nor can an electrical company be heard to say that it owed no duty to a resident along a highway in front of whose premises its line of wires was strung.[41] The negligence of an employe is imputable to his employer.[42] The doctrine of concurrent negligence obtains in electrical cases.[43] The law merely requires that appliances of an electrical company shall be reasonably safe.[44] It is not an insurer of its patrons against danger of electric currents on its wires.[45] The ordinary rules as to proximate cause[46] and contributory negligence obtain in electrical cases.[47]

38. Guinn v. Delaware & A. Tel. Co., 72 N. J. Law, 276, 62 A. 412.

39. Where a telephone company and an electric lighting company maintain their wires on the pole of an electric street railroad, the situation does not imply a license or permission from one company to another to remove or in any manner interfere with its wires. Mangan v. Hudson River Tel. Co., 50 Misc. 388, 100 N. Y. S. 539.

40. Mangan's Adm'r v. Louisville Elec. Light Co. [Ky.] 91 S. W. 703.

41. Harrison v. Kansas City Elec. Light Co., 195 Mo. 606, 93 S. W. 951.

42. Where an electric lighting company discovered a grounding of one of its wires and sent a man to locate it who falsely or misleadingly reported the line "O. K." when in fact he had merely concluded that the trouble was on another line, his negligence was imputable to the company. Harrison v. Kansas City Elec. Light Co., 195 Mo. 606, 93 S. W. 951.

43. Electric company held liable for death of man whose son grounded defendant's wire on deceased's premises without the knowledge or consent of defendant or of deceased who accidentally came in contact therewith. Harrison v. Kansas City Elec. Light Co., 195 Mo. 606, 93 S. W. 951. The mere fact that the negligence of an electrical company concurred with that of the son of a person killed by contact with its current did not relieve it from liability. Id. Where wires maintained concurrently by different persons or concerns are so erected or strung that one is likely to fall upon or come in contact with the other, thereby producing possible destructive consequences, either or both must make efforts to abate such dangerous condition, and if injury occurs through a neglect of such duty, both are liable. Simmons v. Shreveport Gas, Elec. Light & Power Co. [La.] 41 So. 248. A condition of defective insulation continuing through a period of over nine months to the time of an injury therefrom is the proximate cause of the injury irrespective of an intervening negligent act of another which may have added to the danger of the situation. Id.

44. In action for death of person by contact with wires of electrical company, evidence that the accident might have been avoided had defendant provided its line with loops for cutting off grounded line held inadmissible. Harrison v. Kansas City Elec. Light Co., 195 Mo. 606, 93 S. W. 951.

45. Delahunt v. United Tel. & T. Co. [Pa.] 64 A. 515.

46. Omission of electric companies to guard against contact of their wires on the burning of a building to which the wires of one of such companies were attached held the proximate cause of injury to a fireman in attempting to remove a wire after it had fallen as an interference with his passage in the line of his duty. Horning v. Hudson River Tel. Co., 97 N. Y. S. 625. Where injuries were sustained by plaintiff's mere playing with live electric wires, neither their proximity to the ground nor the fact that one of them was defective as to insulation was the proximate cause of the injury. Stark v. Muskegon Traction Lighting Co. [Mich.] 12 Det. Leg. N. 550, 104 N. W. 1100. Negligence of lighting company held proximate cause of injury to children coming in contact with its wires, notwithstanding act of telephone company in placing wires in contact with light wires. Simmons v. Shreveport Gas, Elec. Light & Power Co. [La.] 41 So. 248. Where an electric lighting company after a grounding of its wire had been discovered and it had sent a man to locate the trouble, who reported the line "O. K.," turned on a deadly current which resulted in the death of a person at a point where the line was grounded, the negligence of the lighting company was a proximate cause of the death. Harrison v. Kansas City Elec. Light Co., 195 Mo. 606, 93 S. W. 951. The want of proper insulation of wires of street railroad in its power house held the proximate cause of death of employe of third person lawfully on its premises, resulting from the wrench or pipe which he was handling coming in contact with current. Ryan v. St. Louis Transit Co., 190 Mo. 621, 89 S. W. 865. The rule that where the damages have been inflicted by one of two causes, for one of which defendant is responsible and for the other of which he is not responsible, the plaintiff cannot succeed where it is just as probable that the damage was done by one cause as the other was held inapplicable to defeat the liability of an electric light company for the death of a patron while alone in his cellar as against the theory of electrocution. Morhard v. Richmond Light & R. Co., 111 App. Div. 353, 98 N. Y. S. 124. The rule was, however, held applicable to prevent recovery against a trolley company for causing the burning of a building by the falling of its trolley wire. Imeson v. Tacoma R. & Power Co., 42 Wash. 74, 84 P. 624.

47. An employe of a telephone company in handling the wires of an electric light

§ 4. *Causes of action; remedies and procedure.*[48]—Where the negligence is alleged to have been concurrent, two or more of the wrongdoers may be joined as defendants in one complaint in New York,[49] but it is not necessary in that state that all be joined,[50] especially one against whom no negligence is charged or from whom no duty is alleged to have been owing.[51] Companies using the same pole for their wires are suable jointly for injuries to an employe of one injured while working on the pole by the current of the other,[52] and are not entitled to separate trials when so sued.[53] Where a municipal regulation makes it the duty of those engaged in transmitting electric energy by wires to thoroughly insulate them, a breach of the regulation gives a right of action to one injured thereby without express language conferring it,[54] and this is true though the regulation imposes a penalty for its violation, recoverable in a criminal action, in the absence of any intention to make the criminal remedy exclusive.[55]

Pleading.[56]—In actions to protect a franchise or right the facts must be pleaded.[57] The rule in California as to admissibility of evidence under pleadings in actions for breach of contract of sale of personalty has been held to apply to breach of contract for sale of electricity.[58] In pleading negligence a general averment that

company on the same pole is charged with reasonable care, whether a licensee or trespasser. Mangan v. Hudson River Tel. Co., 50 Misc. 388, 100 N. Y. S. 539. Employe of telephone company held guilty of contributory negligence in deliberately and intentionally coming in touch with the wires of an electric lighting company on the same pole. Id. A licensee or trespasser owes himself the duty of exercising reasonable care in the handling of electrical appliances. Id. Telephone and electric light companies held liable for injuries to fireman from shock caused by contact of their wires resulting from his attempt to remove the telephone wire as an interference with his passage while in the line of his duty. Horning v. Hudson River Tel. Co., 97 N. Y. S. 625. Contributory negligence of a child 10 years of age in playing with electric wires will defeat recovery for injuries sustained thereby. Stark v. Muskegon Traction & Lighting Co. [Mich.] 12 Det. Leg. N. 550, 104 N. W. 1100. The fact that one injured by voluntarily and for mere sport seizing a live wire was not aware of the danger does not operate of itself to entitle him to damages therefor. Id. One wrongfully seizing a live wire cannot recover for injuries received thereby. Child 10 years of age held a wrongdoer in selzing a live wire. Id. One sui juris voluntarily and unnecessarily going into dangerous proximity to a live wire, charged with a deadly current, is guilty of contributory negligence, precluding recovery for his death caused thereby, even though the wire is negligently left exposed. Carroll v. Grand Ronde Elec. Co. [Or.] 84 P. 389. The rule of law recognizing a distinction between knowledge of the condition of an instrumentality and recognition of the risk incident thereto held inapplicable to fasten liability on an electric company for the death of a person, not a servant of the company, by a voluntary exposure to the current of a broken wire. Id. Owner of telephone wire which caused runaway of horse drawing vehicle held not entitled to predicate contributory negligence on fact of injured occupant of vehicle jumping therefrom. Jacks v. Reeves [Ark.] 95 S. W. 781. Failure to look up and see sagging telephone wire which might scrape top of vehicle is not contributory negligence of occupant of vehicle. Id. Permitting a 14 year old girl, accompanied by two grown women, to drive a gentle horse along a public highway held not to warrant inference of contributory negligence in action for injury to one of the occupants. Id. The violation of a rule that linemen should treat every wire as a live wire is not conclusive on the question of contributory negligence. Mahan v. Newton & B. St. R. Co., 189 Mass. 1, 75 N. E. 59. Where a municipal regulation required the thorough insulation of wires transmitting a current of voltage dangerous to life, one coming in contact with such wires, even in play, has a right to presume that the regulation had been complied with or that the wires were not used to convey a dangerous current. Clements v. Potomac Elec. Power Co., 26 App. D. C. 482. Evidence held sufficient to warrant finding of contributory negligence on part of employe of electric company touching telegraph wire while having his foot on wire carrying deadly current. Martin v. Cltizens' General Elec. Co. [Ky.] 92 S. W. 547.

48. See 5 C. L. 1091.

49, 50, 51. Mangan v. Hudson River Tel. Co., 50 Misc. 388, 100 N. Y. S. 539.

52, 53. East Tennessee Tel. Co. v. Carmine [Ky.] 93 S. W. 903.

54, 55. Clements v. Potomac Elec. Power Co., 26 App. D. C. 482.

56. See 5 C. L. 1091.

57. Bill to enjoin rival electrical company from stringing wires on plaintiff's pole held to contain mere conclusions. Montgomery Light & Power Co. v. Citizens' Light, Heat & Power Co. [Ala.] 40 So. 981.

58. In action for breach of contract of sale of electricity, evidence as to plaintiff's obtention of current from another manufacturer held admissible under the general ad damnum clause of the complaint in view

it was negligent to allow a wire to sag suffices.[59] The general rules as to issues, proof, and variance are applicable as illustrated in cases cited.[60]

Evidence.[61]—Judicial notice will be taken of the general nature of electricity.[62] Negligence is not presumed from the corresponding absence of contributory negligence[63] or from mere violation of a regulation,[64] but may be inferred from the mere happening of an accident if of that unusual character that bespeaks negligence,[65] though where there are no contractual relations between the persons or other occasion for special care the rule has been denied.[66] Modes of construction,[67] the nec-

of the express provisions of Civ. Code § 3308, relating to breaches of contracts for sales of personalty. Terrace Water Co. v. San Antonio Light & Power Co., 1 Cal. App. 511, 82 P. 562.

59. Complaint predicating negligence on act of telephone company in permitting wire to sag while charged held to sufficiently charge negligence as against a general demurrer. Southern Bell Tel. & T. Co. v. Howell, 124 Ga. 1050, 53 S. E. 577.

60. Plan of construction held brought in question by averment in declaration for death caused by defective insulation. Morgan v. Westmoreland Elec. Co., 213 Pa. 151, 62 A. 638. Where plaintiff alleged only the breaking and fall of a wire as due to the negligent maintenance thereof, he could not recover for negligence predicated on acts after the fall. Augusta R. & Elec. Co. v. Weekly, 124 Ga. 384, 52 S. E. 444. Whether telephone company was negligent in not maintaining guard wires to prevent its wires in case of their falling from coming in contact with electric light wires, held not an issue under the pleadings. Aument v. Pennsylvania Tel. Co., 28 Pa. Super. Ct. 610. Where a complaint charged negligence in improperly fastening wires to the poles and they were of such poor material that they fell onto the sidewalk, a recovery for fall of the wires from any negligent cause was not warranted. Politowitz v. Citizens' Tel. Co., 115 Mo. App. 57, 90 S. W. 1031.

61. See 5 C. L. 1091.

62. Judicial notice will be taken of the dangerous quality of electricity. Warren v. City Elec. R. Co. [Mich.] 12 Det. Leg. N. 415, 104 N. W. 613. It is a matter of common knowledge that the best insulation is at times and under certain conditions entirely inadequate. Mangan v. Hudson River Tel. Co., 50 Misc. 388, 100 N. Y. S. 539.

63. The negligence of a defendant cannot be inferred from a presumption of care on the part of the person killed for whose death defendant is sued. Looney v. Metropolitan R. Co., 200 U. S. 480, 50 Law. Ed. ——.

64. Failure to comply with an ordinance requiring wires not to be put up within 25 feet of the ground will not be presumed to have caused or contributed to an injury from such wires. Stark v. Muskegon Traction & Lighting Co. [Mich.] 12 Det. Leg. N. 550, 104 N. W. 1100.

65. Where a horse was killed by stepping on a charged street railway rail. Wood v. Wilmington City R. Co. [Del.] 64 A. 246. Where a child at play was killed by contact with a severed wire hanging from a tree in a public street. O'Leary v. Glens Falls Gas & Elec. Light Co., 107 App. Div. 505, 95 N. Y. S. 232. Where a bank caused a brass rail in front of its building facing a public street to be charged with electricity for the purpose of shocking persons who stopped in front of the building, and a passer-by stopped to speak with a friend, touched the rail, and was injured by a shock, a presumption of negligence arose against the bank. Whaley v. Citizens' Nat. Bk., 28 Pa. Super. Ct. 531. Where traveler on highway was injured by jumping or being thrown from vehicle in runaway caused by sagging of telephone wire which scraped top of vehicle, tore it off, frightening the horse which was being driven. Jacks v. Reeves [Ark.] 95 S. W. 781. Where a telephone subscriber was killed by a current of electricity while attempting to use his telephone. Delahunt v. United Tel. & T. Co. [Pa.] 64 A. 515. Evidence held insufficient to rebut presumption of negligence of owner of telephone line in allowing wire to sag and obstruct highway. Jacks v. Reeves [Ark.] 95 S. W. 781. Street railroad held not liable for death of pitman while engaged in arranging the apparatus for transfer of a car from a "plow" system to a trolley line where defendant's negligence was not affirmatively shown. Looney v. Metropolitan R. Co., 200 U. S. 480, 50 Law. Ed. ——.

66. In the absence of a contractual relation between the parties or of a statute regulating the matter, the doctrine of res ipsa loquitur applies only to the case of such highly dangerous things or agencies as are kept or used solely because of their highly dangerous character, and not to electricity which is classed with steam rather than dynamite. Marsh v. Lake Shore Elec. R. Co., 7 Ohio C. C. (N. S.) 405. Electricity is of a highly dangerous character but of such common and recognized use in modern civilization that its use and keeping are sanctioned by law, and if injurious consequences flow from its use and keeping, negligence of the user or keeper must be shown to render him liable to one injured by an electric current. Id. The mere fact that electricity, generated by an electric railroad company, escaped from its trolley wire to one of its span wires; thence to a telephone cable of a telephone company; thence to a telephone cable of another telephone company; thence to a gas pipe in a store building; thence to the lead connection with a gas meter in the basement, which

essary voltage of an alleged deadly current,[68] and the existence of known and efficient safety appliances,[69] are relevant, but not a custom to disregard a legally imposed safety regulation,[70] nor what safety appliances might have accomplished in the particular case.[71] Plaintiff may show his belief that wires were dead.[72] Res gestae has been held to include remarks made just before a search for the cause of the trouble which resulted in the shock,[73] and declarations of that nature made by defendant's employe need not be strictly contemporaneous to render them admissible in Texas as part of the res gestae.[74] The competency of evidence of other similar defects or instances of vagrant or erratic currents,[75] or of the fact that defendant repaired the defect in question,[76] and of demonstrative evidence,[77] is governed by

was melted off, igniting the gas, setting fire to the floor above and damaging a stock of goods, does not render all or any of said companies liable in damages to the owner of the goods, in the absence of proof of negligence on the part of one or more of said companies. Id. No prima facie presumption of a telephone company's negligence is raised as between it and one with whom it had no contract relation by proof that its wire broke under the strain of a severe sleet storm. Aument v. Pennsylvania Tel. Co., 28 Pa. Super. Ct. 610. The fact of a horse, while being driven, stepping on the wire of an electric company, falling in a dying condition, whereby the driver was precipitated to the ground and received a shock and burn, raises no presumption of negligence of the electric company under Civ. Code 1895, § 2321. Augusta R. & Elec. Co. v. Weekly, 124 Ga. 384, 52 S. E. 444. In action for injuries from live wire where horse being driven by plaintiff stepped on the wire and fell in dying condition precipitating plaintiff to his injury. Civil Code 1895, § 2321, held inapplicable to relieve plaintiff of burden of proof. Id.

67. In an action for death of a lineman of an electric lighting company alleged to have been caused by contact with wire of trolley company, evidence that in that part of the country, according to the usual construction, a trolley wire would be lifted three or four inches by a passing car was admissible. Mahan v. Newton & B. St. R. Co., 189 Mass. 1, 75 N. E. 59.

68. Where a municipal regulation required wires to be insulated in the district in which injuries were caused by defective insulation, and the evidence in an action for the injuries had taken a wide range in respect to negligence generally and the unreasonableness of the regulation, plaintiff was entitled to show the voltage necessary for the purpose for which the wires in question were used. Clements v. Potomac Elec. Power Co., 26 App. D. C. 482.

69. In action for shock received by trolley wire coming in contact with light wire for alleged negligence in failing to maintain guard wires, evidence of the existence of an appliance known as a "guard wire" in common use to prevent trolley wires from coming in contact with other wires is admissible. Mahan v. Newton, etc., R. Co., 189 Mass. 1, 75 N. E. 59.

70. Where a municipal regulation required wires to be insulated in the district in which injuries were caused by defective insulation, evidence, in an action for the injuries, of a custom of other companies to use uninsulated wires for the same purpose the wires in question were used was inadmissible. Clements v. Potomac Elec. Power Co., 26 App. D. C. 482.

71. In an action for the death of a person by contact with defendant's wires, evidence that the accident might have been avoided had defendant's line been provided with a loop device for cutting off grounded wires held inadmissible. Harrison v. Kansas City Elec. Light Co., 195 Mo. 606, 93 S. W. 951.

72. In an action for injuries to a boy by coming in contact with wires of a lighting company while playfully climbing in a tree near a pole on which the wires were strung, evidence that he believed the wires were old and disused was admissible. Clements v. Potomac Elec. Power Co., 26 App. D. C. 482.

73. Statements by a man made to his wife while he was turning off the switch controlling the electric lighting apparatus in his house held admissible in an action for his death which occurred during the same search for the cause of trouble with the lights. Witmer v. Buffalo & N. F. Elec. L. & P. Co., 98 N. Y. S. 781.

74. Declarations of agent as to defectiveness of apparatus after injury to plaintiff caused thereby held admissible. City of Austin v. Nuchols [Tex. Civ. App.] 15 Tex. Ct. Rep. 156, 94 S. W. 336.

75. In showing that electricity, negligently controlled, was the origin of a particular event, evidence of other instances of similar results along the same circuit is admissible. Vicksburg R. & Light Co. v. Miles [Miss.] 40 So. 748. In an action for death by electric shock, testimony as to previous shocks by other persons at other places eight or ten months previously was inadmissible, especially where no serious results attended the previous shocks. Fox v. Manchester, 183 N. Y. 141, 75 N. E. 1116. Testimony as to insulation of other wires than those alleged to have caused the injury held inadmissible. Ziehn v. United Elec. Light & Power Co. [Md.] 64 A. 61.

76. A change of location of wires after an accident cannot affect the question of liability for injuries received by the accident. Ziehn v. United Elec. Light & Power Co. [Md.] 64 A. 61.

77. Insulator or hanger held admissible.

the usual rules.[78] On the question of known danger it is proper to elicit the fact of warnings given.[79] Electrical phenomena are the subject of expert testimony by properly qualified witnesses.[80]

Questions for jury.[81]—Questions of fact, of which there was some proof involving negligence, have been held to be for the jury as indicated in the foot notes,[82] as have questions involving contributory negligence[83] and proximate cause of injury.[84]

ELEVATORS, see latest topical index.

Warren v. City Elec. R. Co. [Mich.] 12 Det. Leg. N. 415, 104 N. W. 613.

78. See Evidence, 5 C. L. 1301.

79. Warren v. City Elec. R. Co. [Mich.] 12 Det. Leg. N. 415, 104 N. W. 613. In an action for injuries by electric current from a span wire of a trolley system in contact with a telephone wire, it was not improper to show on cross-examination that defendant's foreman may have warned linemen against hot span wires. Id.

80. Certain witnesses held qualified to testify as electrical experts. Warren v. City Electric R. Co. [Mich.] 12 Det. Leg. N. 415, 104 N. W. 613.

81. See 5 C. L. 1092.

82. Failing to maintain electric system with due regard for the safety of human life. Witmer v. Buffalo & N. F. Elec. Light & Power Co., 98 N. Y. S. 781. Whether janitor of bank sprinkled the pavement in front of the building and turned on the electricity charging a brass rail in front of the building for the purpose of injuring plaintiff who as a passerby had stopped to speak with a friend when he came in contact with the rail. Whaley v. Citizens' Nat. Bk., 28 Pa. Super. Ct. 531. Whether janitor of bank building was at the bank at and before the time of injury to plaintiff by being shocked on touching a hand rail in front of the building electrically charged by the bank for the purpose of shocking people who stopped there. Id. Whether janitor of bank building had authority to use battery connecting with hand rail in front of building charged with electricity by the bank for the purpose of shocking people who stopped there. Id.

Not for jury: Whether city or its water and light commission were negligent in putting in use certain transformer and continuing its use. City of Austin v. Nuchols [Tex. Civ. App.] 15 Tex. Ct. Rep. 156, 94 S. W. 336. Whether a telephone company was negligent in failing to repair a broken wire within an hour or an hour and a half after it fell. Aument v. Pennsylvania Tel. Co., 28 Pa. Super. Ct. 610. Whether telephone company was negligent on no other evidence than that its wire broke and fell during a severe sleet storm, coming in contact with wires of light company, resulting in the death of a horse belonging to a person sustaining no contractual relation with it. Id. Whether telephone company was negligent in not maintaining guard wires to prevent its wires in case of their falling from coming in contact with electric light wires. Id.

Absence of guard wires, etc.: Omission of guard between electric light wire and telephone wire of defendant. Guinn v. Delaware & A. Tel. Co., 72 N. J. Law, 276, 62 A. 412. Failing to protect the span wires of an electric street railway from the impact of other wires. Warren v. City Elec. R. Co. [Mich.] 12 Det. Leg. N. 415, 104 N. W. 613. Whether a telephone and an electric lighting company should have taken further precaution to guard against contact of their wires than a mere separation of eight feet. Horning v. Hudson River Tel. Co., 97 N. Y. S. 625. Whether failure to take precautions other than a mere separation of eight feet between the wires of a telephone and an electric lighting company was such negligence as rendered them liable for injuries resulting from a contact caused thereby. Id. Whether there were precautions that could have been taken other than a mere separation of eight feet between the wires of an electric lighting company and a telephone company's wires. Id.

Low or sagging wires: Lowering electric light wires at night. Miller v. Lewiston Elec. Light, Heat & Power Co., 212 Pa. 593, 62 A. 32. Whether, after notice that its wires were down, a traction company was negligent in continuing to send a deadly current through them. Sorrell v. Titusville Elec. Trac. Co., 23 Pa. Super. Ct. 425. Circumstances surrounding death of horse by contact with piece of wire hanging from feed wire of trolley system held to present no evidence of negligence for submission to the jury. Jones v. Union R. Co., 98 N. Y. S. 757.

Bad insulation: Failing to discover defects in insulation and the danger of escape of current therefrom onto a tree wire fastened on same post with guy wires of electric light. Wilbert v. Zurheide Brick Co. [Wis.] 106 N. W. 1058. Failing to make inspection of transformer showing signs of defective insulation. Morhard v. Richmond Light & R. Co., 111 App. Div. 353, 98 N. Y. S. 124. Whether insulators used were effective. Warren v. City Elec. R. Co. [Mich.] 12 Det. Leg. N. 415, 104 N. W. 613. Whether the span wires of a street railway were properly insulated. Id.

Excessive current: Permitting electric lighting wires in residence to become overcharged with a deadly current of electricity. Witmer v. Buffalo & N. F. Elec. Light & Power Co., 98 N. Y. S. 781.

Dead and unused wires and inconstant currents: Leaving useless wire hang in street. Fox v. Manchester, 183 N. Y. 111, 75 N. E. 1116. Failing to give notice to person using wires of fact of their being charged. Snyer v. New York & N. J. Tel. Co. [N. J. Err. & App.] 64 A. 122. Whether a lineman was warned that wires causing his death were charged. Smith v. Milwaukee

EMBEZZLEMENT.

§ 1. Nature and Elements of Offense (1268).
§ 2. Prosecution and Punishment (1271). Evidence (1272). Sufficiency of Evidence (1273). Variance (1274). Questions for the Jury; Instructions (1274). The Verdict (1274). The Judgment (1275). Punishment (1275).

This topic includes not only the offense of embezzlement proper, but equivalent statutory offenses denominated larceny, larceny by bailee, larceny after trust, etc.

Elec. R. & Light Co. [Wis.] 106 N. W. 829. Whether telephone company's foreman was negligent in sending lineman in contact with light company's wires after time for turning on current of lighting company with warning merely to be careful. East Tennessee Tel. Co. v. Carmine [Ky.] 93 S. W. 903. Whether hanging a live wire on a pole in a portion of a city frequented by many persons and permitting it to remain suspended for two days was negligence. Fisher v. New Bern, 140 N. C. 506, 53 S. E. 342.

Knowledge of defect or negligence in inspection: Whether electric street railroad company had knowledge of defective insulation of its wires as affecting liability for death of employe of third person lawfully on its premises caused by contact with its wires. Ryan v. St. Louis Transit Co., 190 Mo. 621, 89 S. W. 865. Whether a defect in insulation had existed for a sufficient time for its discovery and repair before the injury sued for happened. Wilbert v. Zurheide Brick Co. [Wis.] 106 N. W. 1058. Whether existence of tree wire fastened to post with electric guy wire was such unusual condition as not reasonably to be apprehended in the conduct of an electric lighting business. Id. Whether inspection proved was reasonable and proper. Warren v. City Elec. R. Co. [Mich.] 12 Det. Leg. N. 415, 104 N. W. 613. Whether electric company was negligent in failing to discover defective condition of pole which fell causing the death of a person. Savannah Elec. Co. v. Bell, 124 Ga. 663, 53 S. E. 109.

83. Crossing street at point other than regular crossing and coming into contact with wires. Miller v. Lewiston Elec. Light, Heat & Power Co., 212 Pa. 593, 62 A. 32; Fox v. Manchester, 183 N. Y. 141, 75 N. E. 1116; Southern Bell Tel. & T. Co. v. Howell, 124 Ga. 1050, 53 S. E. 577. Whether death was caused by stepping on live wire or touching it. Fisher v. New Bern, 140 N. C. 506, 53 S. E. 342. Seizing hold of wire hanging in street. Fox v. Manchester, 183 N. Y. 141, 75 N. E. 1116. As affecting liability for injuries caused by telephone lineman coming in contact with wire of electric light and power company. Ziehn v. United Elec. Light & Power Co. [Md.] 64 A. 61. Whether driver of team was guilty of contributory negligence in driving on telephone wires lying in public highway as result of blowing down of a derrick, whereby they became charged with a deadly current from a traction company's wires which were also crushed to the ground, resulting in killing the horses. Sorrell v. Titusville Elec. Trac. Co., 23 Pa. Super. Ct. 425. Whether lineman was in the exercise of due care to see and avoid contact with exposed splices in wires. New Omaha Thomson-Houston Elec. Light Co. v. Rombold [Neb.] 106 N. W. 213. In use of telephone by subscriber when he heard it making a noise and by standing on wet carpet to take down receiver. Delahunt v. United Tel. & T. Co. [Pa.] 64 A. 515. Obviousness of danger of injury to telephone lineman in stringing wires across those of electric light company as affecting question of assumption of risk. Snyer v. New York & N. J. Tel. Co. [N. J. Err. & App.] 64 A. 122. Whether employe of third person killed by contact with defectively insulated wires of street railroad was guilty of contributory negligence. Ryan v. St. Louis Transit Co., 190 Mo. 621, 89 S. W. 865. Assumption by employe of duty of making his own inspection to discover defective insulation. New Omaha Thomson-Houston Elec. Light Co. v. Rombold [Neb.] 106 N. W. 213. Whether employe in charge of horse was guilty of negligence contributing to the death of the horse by leading him through a pool of water in which there was a live electric wire. Aument v. Pennsylvania Tel. Co., 28 Pa. Super. Ct. 610. Openness and obviousness of defects in insulation as affecting liability. New Omaha Thomson-Houston Elec. Light Co. v. Rombold [Neb.] 106 N. W. 213. Of lineman of electric lighting company killed by contact with wire while violating rule to treat every wire as a live wire and handling same without rubber gloves. Mahan v. Newton & B. St. R. Co., 189 Mass. 1, 75 N. E. 59. Whether driver of horse should not have seen wire hanging from feed wire of trolley system in time to prevent contact of horse therewith. Jones v. Union R. Co., 98 N. Y. S. 757. Whether employe of electric company was guilty of contributory negligence in touching telegraph wire while having his foot on wire carrying deadly current. Martin v. Citizens' General Electric Co. [Ky.] 92 S. W. 547.

84. From electric light wires lowered at night. Miller v. Lewiston Elec. Light, Heat & Power Co., 212 Pa. 593, 62 A. 32. From tree falling on telephone wire and pressing it against charged span wire of trolley system. Warren v. City Elec. R. Co. [Mich.] 12 Det. Leg. N. 415, 104 N. W. 613. As affecting liability for death of lineman found dead in proximity to charged iron brace on pole. Morgan v. Westmoreland Elec. Co., 213 Pa. 151, 62 A. 638. Whether burning of building was due to negligence of electric company in the maintenance of its wires. Romano v. Vicksburg R. & Light Co. [Miss.] 39 So. 781. Placing of wires on certain pole by defendant's servants as affecting liability for injuries to one on premises of third person. Guinn v. Delaware & A. Tel. Co., 72 N. J. Law, 276, 62 A. 412. Whether current which killed lineman of electric light company came from wire of trolley company.

§ 1. *Nature and elements of offense.*[85]—Embezzlement is not a common-law offense but is purely statutory[86] and cannot be made criminal retrospectively,[87] though a statute passed subsequently to a fund coming into a receiver's hands has been held applicable to determine his embezzlement of the fund.[88] It is variously defined a composite of the definitions showing the intention to protect relations of trust conserving the interest of the person reposing trust in the custodian of property.[89] It is a separate and distinct crime from larceny, though denominated larceny in the statutes creating the offense,[90] the distinction being that in embezzlement the wrongful conversion of property is without trespass, or where the original taking or possession is lawful.[91] The Oregon statute classifying embezzlement as larceny has reference to statutory larceny which consists in the felonious conversion of the personal property of another, of which the person guilty thereof had the rightful possession.[92] The criminality of embezzlements by officers of financial institutions may exist, though the particular act constitutes a special statutory crime,[93] and the like is true of public officers misappropriating money.[94]

It is a single crime where numerous sums were all received in course of business, but the conversion was entire.[95] Sums received on different days may be aggregated to make out felony instead of misdemeanor where accountability was for the whole sum and not for daily receipts.[96]

It is essential that there be a fraudulent[97] conversion or misappropriation[98] of

Mahan v. Newton & B. St. R. Co., 189 Mass. 1, 75 N. E. 59. Whether any person was in or about a bank at the time of injury to a person by touching an electrically charged hand rail in front of the building as showing possibility of the injury being caused by an employe of the bank. Whaley v. Citizens' Nat. Bk., 28 Pa. Super. Ct. 531. Whether battery connecting with a hand rail in front of a bank building electrically charged for the purpose of shocking persons who stopped there was strong enough to injure a person. Id.

85. See 5 C. L. 1093.

86. State v. Browning [Or.] 82 P. 955; State v. Moyer, 58 W. Va. 146, 52 S. E. 30; Territory v. Munroe [Ariz.] 85 P. 651; Teston v. State [Fla.] 39 So. 787.

The statute title "An act in relation to the crime of embezzlement" is sufficient to put the legislature on notice that the crime of embezzlement was before them for modification. Laws 1903, p. 96, c. 5160, held not repugnant to Const. art. 3, § 16, relating to the title of acts. Teston v. State [Fla.] 39 So. 787.

87. Const. 1870, art. 2, § 14, forbidding the passage of ex post facto laws, applied in construing Laws 1903, p. 156, § 81½. Brown v. People, 218 Ill. 361, 75 N. E. 984.

88. Property that may have passed into defendant's possession as receiver before Code D. C. § 841 [30 Stat. at L. 1326, c. 854] went into effect is comprehended by it when thereafter embezzled. Fields v. U. S., 27 App. D. C. 433.

89. Embezzlement is a fraudulent appropriation or misappropriation of the property of another by one in whose care it has been intrusted with the intention of depriving the owner thereof. State v. Moyer, 58 W. Va. 146, 52 S. E. 30. Embezzlement is the fraudulent appropriation of property by a person to whom it has been intrusted. Rev. St. 1887, § 7066. State v. Steers [Idaho] 85 P. 104. Embezzlement consists in the breach of some trust relation by one in the lawful possession of the personal property of another. State v. Browning [Or.] 82 P. 955.

Statutes construed in extenso: Acts 1903, p. 89, c. 18, § 19. State v. Moyer, 58 W. Va. 146, 52 S. E. 30. D. C. Code § 834 [31 Stat. at L. 1325, c. 854]. Gassenheimer v. United States, 26 App. D. C. 432.

90. State v. Moyer, 58 W. Va. 146, 52 S. E. 30.

91. State v. Moyer, 58 W. Va. 146, 52 S. E. 30; State v. Browning [Or.] 82 P. 955.

92. B. & C. Comp. § 1798, construed. State v. Browning [Or.] 82 P. 955.

93. An officer of a building and loan association held subject to conviction for embezzlement under the general statute relating to embezzlement by fiduciaries notwithstanding a statute directly applicable to such officers. Rev. St. 1899, §§ 1374, 1912. State v. Shour [Mo.] 95 S. W. 405.

94. When public funds are detained by a justice of the peace with fraudulent and felonious intent to misuse and misappropriate the same, his case is brought within the statute denouncing the crime of embezzlement by public officers, notwithstanding a statute penalizing failure of justices to make payment within a given time. Robinson v. Com., 104 Va. 888, 52 S. E. 690.

95. State v. Moyer, 58 W. Va. 146, 52 S. E. 30.

96. Accused could not claim exemption from punishment as for a felony because the sale of goods, the proceeds of which he embezzled, did not amount to enough on any one day to warrant a conviction for anything higher than misdemeanor. Clark v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 1028, 89 S. W. 647.

97. Territory v. Munroe [Ariz.] 85 P. 651. The making of an intentionally wrong disposal of the property, indicating a design to cheat and defraud the owner, is an essen-

money or property[99] by the act of one not the owner and in a position of trust to the owner[1] lawfully in possession[2] at the time of converting it.[3] One may become a fiduciary of money which is legally payable to himself and may embezzle it.[4] Embezzlement cannot be committed unless the accused was in the lawful possession of the property at the time of the conversion,[5] but manual possession need not be shown.[6] The criminal intent must be present at the time of the conversion,[7] but it is not essential that the employment or agency of accused shall have continued till then.[8] In Michigan the statute makes it criminal when the money was entrusted under a written agreement specifying how it should be applied,[9] and the reception as agent of another of money under a writing made for the other's behalf is not embezzlement.[10] An "agent" within the statutes is one who would ordinarily be regarded as such,[11] regardless of what the contract of employment calls him.[12] Where

tial element of the crime of embezzlement. Higbee v. State [Neb.] 104 N. W. 748. Must be actuated by the fraudulent purpose to deprive the owner of his property. State v. Disbrow [Iowa] 106 N. W. 263. One of the constituents of the crime of larceny and of embezzlement is the fraudulent conversion of the personal property of another without his consent which, in each instance, constitutes the gist of the offense. State v. Browning [Or.] 82 P. 955. Evidence **in proceeding to obtain discharge from arrest** on charge of grand larceny in first degree denounced by Penal Code § 528, **held insufficient** to show criminal intent. People v. Moss, 99 N. Y. S. 138, rvg. 100 N. Y. S. 427.

98. To complete the misapplication of the funds of a bank it is necessary that the fund should be withdrawn from the possession and control of the bank or a conversion thereof occur so that the bank loses the same. United States v. Martindale, 146 F. 280. It does not affect the validity of a conviction whether the act of accused in depositing the fund in his own name or his subsequent act in withdrawing it was the conversion. Stephens v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 937, 93 S. W. 545. The crime denounced by the Kentucky statute is a single offense complete in itself when the fraudulent conversion takes place. Ky. St. 1903, § 1358a. Hylton v. Com. [Ky.] 91 S. W. 696. Where the secretary of a building association procures the issue of checks of the association in the names of fictitious applicants for loans and endorses them in the names of the fictitious payees, his collection of such checks would estop him from asserting their original invalidity, even if they were invalid, and would amount to embezzlement under section 6843. Livingston v. Fidelity & Deposit Co., 7 Ohio C. C. (N. S.) 66. Where a statute declares one guilty of embezzlement who fraudulently appropriates property to his own use or secretes it with a fraudulent intent to appropriate it, the secreting and appropriating are substantive acts and facts that may separately constitute the offense. State v. Lonne [N. D.] 107 N. W. 524.

99. Rights in action are subject to embezzlement in Nebraska. Cr. Code § 121. Higbee v. State [Neb.] 104 N. W. 748. But under the statute making the embezzlement of a right in action a crime, the "securing of credit by an agent in his individual capacity and for his own use" for any right in action of his employer would not be sufficient to constitute the crime (Id.), unless by securing the credit for himself he deprived his employer of the right in action by destroying or alienating his title to the subject of that right (Id.), nor unless he did this with felonious intention (Id.).

1. Special masters, commissioners, and receivers are not subject to prosecution for embezzlement in Ohio. State v. Fabin, 4 Ohio N. P. (N. S.) 288.

2, 3, 4. Where a part of purchase money was handed to a vendor to pay off the lien of a prior vendor's note and he undertook to pay the same, he was a trustee of the money and guilty of embezzlement by the conversion thereof to his own use. Cowan v. State [Tex. Cr. App.] 93 S. W. 553.

5. State v. Browning [Or.] 82 P. 955.

6. Cr. Code § 121, construed. Higbee v. State [Neb.] 104 N. W. 748.

7. State v. Moyer, 58 W. Va. 146, 52 S. E. 30. Evidence in proceeding to obtain discharge from arrest on magistrate's warrant for violation of Penal Code § 528, held insufficient to show criminal intent. People v. Moss, 99 N. Y. S. 138, rvg. 100 N. Y. S. 427. A mere detention of money belonging to another, without a fraudulent intent to convert it to the use of the one by whom it is detained and to deprive the other thereof, is not embezzlement. State v. Moyer, 58 W. Va. 146, 52 S. E. 30.

8. Not essential to the guilt of an officer of a voluntary association that his term of office has expired. Laws 1903, p. 96, c. 5160, construed. Teston v. State [Fla.] 39 So. 787.

9. People v. Ritchie [Mich.] 13 Det. Leg. N. 498, 108 N. W. 747. Receipt held a sufficient written agreement as to the parties to warrant a prosecution for embezzlement under Comp. Laws § 11,572. Id.

10. An agent making an agreement in the name of a bona fide principal and duly authorized to make the contract is not within the Michigan statute (Comp. Laws § 11,572) making a misappropriation of a fund paid upon a written agreement a felony. People v. Ritchie [Mich.] 13 Det. Leg. N. 498, 108 N. W. 747.

11, 12. An express messenger whose duties require him to transmit money from one place to another for his employer is an agent within a statute defining embezzlement as it is required to be construed in Texas. White's Ann. Pen. Code arts. 10, 938. Lamb v. State

one has charge of funds in a fiduciary capacity and authorizes another to unlawfully convert the same, the act of such other person in so doing renders the first criminally liable therefor.[13]

In case of actual misappropriation it is immaterial that the duty to surrender the property to the owner was not yet matured.[14] Where the conversion is predicated on a retention, demand is requisite,[15] unless there is by statute[16] or contract[17] a duty to turn over without demand.

It is no defense that a corporation whose funds were embezzled was not a domestic one and had not obtained permission to do business in the state.[18] The retention of money by an employe under a claim of right is not necessarily criminal, though the claim is unfounded,[19] but a public officer cannot justify by advice of his counsel, after the crime has been committed, to withhold money.[20] To justify retention on a claim of partial ownership acquired from the principal, all things precedent to the right must have been done.[21] Where an attorney takes a sum of money as a fee intending to do nothing to earn the fee, his conduct will not amount to embezzlement of the fee,[22] but the employment of an attorney on a contingent fee does not give him such an interest in the proceeds as to preclude his criminal liability for a conversion of his client's interest in the proceeds of the cause of action when recovered,[23] and where he collects money on a contingent fee, which he deposits in bank in his own name and checks out to the client but a portion of the client's interest therein on the false representation that the collection was less than it actually was, he is criminally liable for the conversion.[24] The owner's consent to the conversion deprives the act of its criminality,[25] but the taking of security for the amount due does not ratify the wrongful appropriation,[26] and where the crime has been completed, no subsequent restitution will relate back to efface the wrong.[27] The temporary nonfraudulent use by an agent of the money of his principal is not criminal.[28]

[Tex. Cr. App.] 16 Tex. Ct. Rep. 228, 93 S. W. 734.

13. State v. Shour [Mo.] 95 S. W. 405.

14. That a fund in the hands of receivers may have been finally ordered to be distributed after the alleged date of its appropriation by the receivers to their own use, or that it in future may be so ordered on final settlement of the litigation can have no effect on the ownership as affecting the criminal liability of the receivers. Fields v. U. S., 27 App. D. C. 433.

15. **Iowa:** A demand by the proper person on a delinquent county officer is an essential element in the crime of embezzlement by county officers in Iowa. Laws 1896, p. 69, c. 67. State v. McKinney [Iowa] 106 N. W. 931.

Pennsylvania: Letter from comptroller of commonwealth to clerk of court held not a demand within the statutory requirement as a prerequisite to prosecution for embezzlement. Commonwealth v. Shoener, 212 Pa. 527, 61 A. 1093.

16. **Arizona:** Averment of demand for return of property held unnecessary in indictment notwithstanding Pen. Code § 463. Territory v. Munroe [Ariz.] 85 P. 651.

17. Where a definite time is fixed by contract for payment of money by an agent, no demand for its payment is necessary as a prerequisite to a conviction of embezzlement by the agent of funds collected under the contract. State v. Moyer, 58 W. Va. 146, 52 S. E. 30.

18. Wilder v. Com. [Ky.] 89 S. W. 732.

19. Where an employe without concealment and under a claim of right made in good faith retains money left with him by his employer, he is not guilty of embezzlement irrespective of whether the claim is well founded. Staples v. Johnson, 25 App. D. C. 155.

20. State v. Steers [Idaho] 85 P. 104.

21. Where an agent is not entitled to commissions under a contract for payment of salary by commission until he has paid over to the principal all money collected, he cannot claim a joint ownership in the collections to avoid criminal liability for conversion thereof. State v. Moyer, 58 W. Va. 146, 52 S. E. 30.

22. State v. Jones, 114 Mo. App. 343, 89 S. W. 366.

23. People v. Birnbaum, 100 N. Y. S. 160.

24. Pen. Code § 528, subd. 2, construed. People v. Birnbaum, 100 N. Y. S. 160.

25. To authorize a conviction of a bailee for conversion of his bailor's money, it must be shown that the conversion was without the bailor's consent. Wilkinson v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 529, 91 S. W. 589

26. State v. Pingel, 128 Iowa, 515, 105 N. W. 58.

27. Robinson v. Com., 104 Va. 888, 52 S. E. 690.

28. A temporary use by an agent of money of his principal without any design to defraud the owner or deprive him of his prop-

The misappropriation of mail matter delivered to accused by mistake is not within the Federal statute.[29]

§ 2. *Prosecution and punishment.—The indictment*[30] may follow the language of the statute[31] if the crime is completely defined therein,[32] the concrete facts being so averred as to make the statute apply.[33] It is not necessary to follow the statute and its equivalents will suffice.[34] It must be alleged in whom was the ownership of the property,[35] or the special ownership,[36] that accused held a fiduciary relation to the owner,[37] and that accused converted it with fraudulent intent[38] at a specified time prior to indictment.[39] In Texas the venue may be properly laid in the county where the embezzled property was received.[40] Where the acts averred might have constituted distinct crimes under other statutes, the others need not be met by the averments.[41] The nature of the crime, whether embezzlement or preparation thereto, must be averred if both are crimes defined in the statute,[42] and where either misappropriation or fraudulent secretion of property is of itself criminal, they should not be charged in the alternative,[43] such not being regarded as averments of means pleadable in the alternative.[44] Where embezzlement may be committed in either of two ways, a count of an indictment charging its commission by both is not double.[45] That accused "took, stole, and carried away" the goods need not be alleged though the generic statute defining the furtive crimes terms them all "larceny."[46] An indictment under the Federal statute, relating to the misappropriation of mail matter, and embezzlement of contents, must allege an unlawful taking.[47]

erty is not embezzlement within the West Virginia statute. Acts 1903, p. 89, c. 18, § 19. State v. Moyer, 58 W. Va. 146, 52 S. E. 30.

29. The Federal statute, relating to the misappropriation of mail matter, does not reach a case where by mistake a delivery is made to the wrong person who innocently obtains possession of a letter and afterwards wrongfully appropriates its contents. United States v. Meyers, 142 F. 907.

30. See 5 C. L. 1094.

31. Teston v. State [Fla.] 39 So. 787. Indictment of receiver for embezzlement under Code D. C. § 841 [30 Stat. at L. 1326, c. 854], held sufficient. Fields v. U. S., 27 App. D. C. 433.

32. See Indictment and Prosecution, 5 C. L. 1802. Taking mail and embezzling contents. Rev. St. U. S. § 5469, construed. United States v. Meyers, 142 F. 907.

33. State v. Larew, 191 Mo. 192, 89 S. W. 1031.

34. Territory v. Munroe [Ariz.] 85 P. 651.

35. State v. Forbes, 4 Ohio N. P. (N. S.) 394.

36. When a clerk in a hotel with whom a guest leaves money for safekeeping embezzles the same, an indictment therefor properly avers ownership to be in the proprietor of the hotel. Manovitch v. State [Tex. Cr. App.] 96 S. W. 1.

37. An indictment which fails to allege the existence of any relation of trust or confidence toward the person whose property is alleged to have been converted is fatally defective under the Kentucky statute. Laws 1902, p. 151, c. 66. Farmer v. Com. [Ky.] 91 S. W. 1129.

38. An indictment which fails to charge a fraudulent intent on the part of accused is fatally defective under the Kentucky statute. Laws 1902, p. 151, c. 66. Farmer v. Com. [Ky.] 91 S. W. 1129.

39. Averring an impossible date of conversion (later than indictment) held harmless because an obvious clerical mistake, the true time being elsewhere stated. State v. Roland [Idaho] 83 P. 337.

40. Under the direct provisions of the statutes of Texas (Code Cr. Proc. 1895, art. 240), a prosecution for embezzlement is authorized in the county where the money was received. Schweir v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 559, 94 S. W. 1049.

41. Indictment of justice of the peace for misuse of fine collected held sufficient under Code 1904, § 3717, notwithstanding section 723 relating particularly to justices. Robinson v. Com., 104 Va. 888, 52 S. E. 690.

42. A statute (Rev. Codes 1899, § 7462) declaring one guilty of embezzlement of the property of a corporation who fraudulently appropriates it to his own use or secretes it with a fraudulent intent to appropriate it does not make either the appropriating or secreting the means of committing the crime. State v. Lonne [N. D.] 107 N. W. 524.

43. In North Dakota an indictment of an officer of a corporation is bad which charges in the alternative the appropriation of property or secreting it with fraudulent intent to appropriate it. Rev. Codes 1899, § 7462. State v. Lonne [N. D.] 107 N. W. 524.

44. Not aided by a statute permitting the means to be alleged in the alternative in the same count. State v. Lonne [N. D.] 107 N. W. 524.

45. O'Brien v. U. S., 27 App. D. C. 263.

46. The statutory declaration that a person who embezzles the property of another shall be deemed guilty of larceny does not blend those crimes so as to require an indictment or an information charging embezzlement to aver that the defendant "took, stole, and carried away" the goods converted. State v. Browning [Or.] 82 P. 955.

Pleading the facts takes the place of an express averment that accused was a "bailee,"[48] and conversely the terms of the bailment need not be added to an averment that accused was a bailee.[49] When the facts are averred they must, as a conclusion of law, show ownership in whom property was laid.[50] It need not be averred that the person whose goods were embezzled was a "private person."[51] Averring deprivation of "the use" of the property is a sufficient averment of conversion of the property itself.[52] Intent may be averred generally or by use of the word feloniously. A specific intent to embezzle need not be averred of a misappropriation under a statute which defining both embezzlement and the criminal secretion of property preparatory thereto, makes a specific intent essential only in the latter crime.[53] An averment of the relation of accused to the owner need not be repeated in connection with that of nonconsent.[54] Allegations of demand and refusal or nonconsent of the owner to the misappropriation are unnecessary in certain statutory embezzlements,[55] and ordinarily in cases of fraudulent conversion,[56] as distinguished from retention of the property. The demand by a municipal corporation or county on its delinquent officer must be averred to have been made by the proper officer.[57] The means by which conversion was accomplished need not be alleged,[58] nor the source from which the owner's money came to accused.[59]

Evidence.[60]—The burden of proof is on the state to prove beyond a reasonable doubt the felonious intent[61] and that the property described was embezzled in the county charged,[62] but venue need not be established by express and positive testimony.[63] As to "money of the United States" it must be proved to have been such,[64]

47. Rev. St. 5469, construed. United States v. Meyers, 142 F. 907.

48. Territory v. Munroe [Ariz.] 85 P. 651.

49. Where the embezzlement is by an agent, an indictment charging defendant with having converted money as "agent, servant, and bailee" is not rendered insufficient for failure to set forth the terms of the bailment. State v. Fellows [Minn.] 108 N. W. 825.

50. Funds were bequeathed as follows, to-wit: "All the rest and residue of my estate, I give, devise and bequeath to the directors in trust and their successors in office of the Lorain County Infirmary, to be used by them to the best interests in caring for the poor and inmates of said infirmary." Held that said funds did not become the property of Lorain county, and that an indictment which set forth the above bequest, and charged the infirmary directors with embezzlement of said funds as funds of Lorain county, did not properly allege ownership of the property, and that a demurrer to such indictment should be sustained. State v. Forbes, 4 Ohio N. P. (N. S.) 394. Indictment of county officer for embezzlement under Rev. St. 1887, § 7066, held sufficient to inform accused of the particular crime with which he was charged without averring that the money belonged to the county. State v. Steers [Idaho] 85 P. 104.

51. Where an indictment names an individual whose funds are alleged to have been embezzled, it need not allege that such person is a private person. State v. Larew, 191 Mo. 192, 89 S. W. 1031.

52. Indictment under Rev. St. 1899, § 1912. State v. Larew, 191 Mo. 192, 89 S. W. 1031.

53. State v. Larew, 191 Mo. 192, 89 S. W. 1031.

54. An indictment alleging accused's employment by a certain person, that he came into possession of her money and that he embezzled the same without her assent, naming her, satisfies the statute (Rev. St. 1899, § 1912), requiring the conversion to be "without the assent of his employer." State v. Larew, 191 Mo. 192, 89 S. W. 1031.

55. Laws 1903, p. 96, c. 5160, relating to embezzlement by officers of societies, etc., construed. Teston v. State [Fla.] 39 So. 787.

56. An indictment for embezzlement need not aver a demand on the accused for return of the property and refusal, notwithstanding the provision of the statute (Pen. Code § 463) that no one shall be adjudged guilty until a demand shall have been made. Territory v. Munroe [Ariz.] 85 P. 651.

57. An indictment averring a demand by the county is insufficient under statutes making the failure of a county officer to account on demand of the person entitled thereto and requiring the officer in question to deliver up all the books, papers, moneys, and all other property pertaining to his office to his successor. Laws 1896, p. 69, c. 37; Code § 1461. State v. McKinney [Iowa] 106 N. W. 931.

58. State v. Larew, 191 Mo. 192, 89 S. W. 1031. In Delaware an indictment for embezzlement by a bailee need not set forth the particular kind of conversion. State v. Abbott [Del.] 63 A. 231. Under a statute making conversion to one's own use an essential element of embezzlement, the means of conversion need not be alleged in an indictment. Gassenheimer v. U. S., 26 App. D. C. 432. Fields v. U. S., 27 App. D. C. 433.

59. State v. Larew, 191 Mo. 192, 89 S. W. 1031.

60. See 5 C. L. 1095.

61. State v. Summers [N. C.] 53 S. E. 856.

62. Knight v. State [Ala.] 41 So. 911.

and as to "money to the amount of" a certain sum, its kind and value must be shown.[65] Incorporation de facto,[66] or the record evidence of incorporation[67] of the owner, suffices. Where money of another is wrongfully converted to one's own use, it will be presumed that the intent was to defraud.[68]

The circumstances of the embezzlement,[69] the amount of money the accused had,[70] the several amounts received for the principal within the period of limitations,[71] the changing of money by him for other kinds,[72] are relevant and admissible, but not evidence of other crimes of a like nature,[73] or that accused intended to restore the property.[74] Parol evidence is admissible to explain an ambiguous instrument under which money was received as affecting the guilt of the receiptor.[75]

Sufficiency of evidence.[76]—The inference that a prisoner has embezzled property

63. State v. Shour [Mo.] 95 S. W. 405. Evidence held sufficient to show commission of offense in county charged in indictment as affecting the venue. Id. Evidence held sufficient to show receipt of money in county charged in indictment as affecting venue of prosecution under Code Cr. Proc. 1895, art. 240. Schweir v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 559, 94 S. W. 1049. Evidence held insufficient to show conversion of funds in county charged in indictment. Hylton v. Com. [Ky.] 91 S. W. 696.

64, 65. Where the indictment charged in one count the embezzlement of lawful money of the United States of a certain amount, and in another "money to the amount of" a certain sum, but there was no allegation of value, defendant was entitled to a general charge in his favor in the absence of evidence as to the kind or value of the money. Knight v. State [Ala.] 41 So. 911.

66. One indicted for embezzling the funds of a corporation who has been put into possession thereof as receiver by appointment of court cannot deny the de facto status of the corporation. Fields v. U. S., 27 App. D. C. 433.

67. Where the owner of a fund is charged, in an indictment for the embezzlement thereof, to have been a corporation, proof of the allegation may be made by the record of its incorporation or by evidence that it was de facto organized and acting as such. Fields v. U. S., 27 App. D. C. 433.

68. O'Brien v. U. S., 27 App. D. C. 263.

69. Manovitch v. State [Tex. Cr. App.] 96 S. W. 1.

70. Teston v. State [Fla.] 39 So. 787. Accused is entitled to prove the amount of money he had on deposit when he quit an employer who charged him with embezzlement. State v. Moyer, 58 W. Va. 146, 52 S. E. 30. Its relevancy is not limited to the "personal history" of accused. Teston v. State [Fla.] 39 So. 787. Comments by court held error. Id.

71. Where the information charged accused with embezzlement of a specific sum of money from a building and loan association while secretary thereof, evidence of all the transactions of accused as secretary and the receipt of different smaller amounts than that charged at various times during the period not covered by the statute of limitations was admissible. State v. Shour [Mo.] 95 S. W. 405. Where accused was charged with embezzling a sum of money in excess of the amount requisite to convict of felony but not particularly described, evidence of the taking of a sum too small for that purpose at the same time and by the same act was admissible generally on the charge. Manovitch v. State [Tex. Cr. App.] 96 S. W. 1.

72. Testimony relating to the identification of defendant as one who had exchanged silver for currency at a bank after the alleged embezzlement, held admissible. Manovitch v. State [Tex. Cr. App.] 96 S. W. 1. Where an attorney takes a sum of money as a fee and for procurement of bondsmen, he is entitled on a prosecution for embezzlement of the whole sum to show that he made an effort to procure bondsmen for his client. State v. Jones, 114 Mo. App. 343, 89 S. W. 366.

73. State v. Newman [N. J. Law] 62 A. 1008. On a prosecution of an officer for misuse of public funds, evidence is not admissible to show the practice of other officers of the same class as accused regarding public funds. Robinson v. Com., 104 Va. 888, 52 S. E. 690. On a prosecution of a guardian for embezzlement under Code § 4842, evidence of his failure to account in other guardianships than the guardianship charged in the indictment is inadmissible. State v. Disbrow [Iowa] 106 N. W. 263. See also, Indictment and Prosecution, 5 C. L. 1790.

74. After accused had exhibited amount of money alleged to have been embezzled, question whether he was willing to deposit that to await termination of civil litigation held properly excluded. State v. Summers [N. C.] 53 S. E. 856.

75. Instrument receipting for money of receiptee "subject to his order on demand" held ambiguous. Stephens v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 937, 93 S. W. 545.

76. See 5 C. L. 1095.

Evidence sufficient: To support a conviction of an agent. State v. Pingel, 128 Iowa 515, 105 N. W. 58; State v. Fellows [Minn.] 108 N. W. 825. By a trustee. Brumley v. State [Tex. Cr. App.] 95 S. W. 503. Of secretary of building and loan association. State v. Shour [Mo.] 95 S. W. 405. Of justice of the peace for misuse of public funds. Robinson v. Com., 104 Va. 888, 52 S. E. 690. To sustain conviction for embezzlement of money intrusted for the purchase of certain property. State v. Buchanan [Wash.] 86 P. 650. To show embezzlement of horse. State v. Roland [Idaho] 83 P. 337.

To show relation of agent. State v. Fellows [Minn.] 108 N. W. 825. To show that accused was a commission merchant within the stat-

by fraudulently converting it to his own use may be drawn from the fact that he has not paid the money in due course to the owner,[77] or from the fact that he has not accounted for the money which he has received.[78]

Variance.[79]—The evidence must make out embezzlement as distinguished from larceny.[80] Venue of the conversion must be proved as laid.[81] It is not a variance to prove the owner's full name under an averment by initials.[82] Conversion of a note taken for money lent sufficiently proves an allegation that the money was converted.[83]

Questions for the jury; instructions.[84]—The facts showing the accused's right to use the money,[85] or the capacity in which he held it,[86] his intent,[87] or ratification of the misappropriation,[88] or in which county the conversion was done,[89] are for the jury. Where a written contract between defendant and prosecutor is unambiguous, the relation created thereby should be declared by the court as matter of law.[90] A charge defining the crime should present in itself all the elements of the offense[91] and cannot be eked out by others.[92] A charge that taking any portion of the money would be "embezzlement thereof as charged" does not invite conviction of taking all that was charged on proof of taking part of it.[93]

The verdict is subject to the usual tests in criminal cases.[94] It is defective if it follows the words of a faulty charge in describing the crime.[95]

ute defining embezzlement. 31 Stat. at L. 1325, c. 845. Green v. U. S., 25 App. D. C. 549. To show the value of rights in action alleged to have been embezzled. Higbee v. State [Neb.] 104 N. W. 748. To show bailor's consent to bailee's expenditure of money alleged to have been embezzled. Wilkinson v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 529, 91 S. W. 589. Where one is charged with embezzlement as agent of a corporation, proof of a de facto corporation as principal satisfies the charge. Higbee v. State [Neb.] 104 N. W. 748. To show that accused on a prosecution for embezzlement was a common carrier, by reason whereof property had passed out of person in whom laid. Knight v. State [Ala.] 41 So. 911.

Held insufficient: To make out a case of embezzlement by one who had mortgaged his stock to prosecutor for a loan and given possession under the mortgage. Forbish v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 58, 93 S. W. 1029.

77, 78. O'Brien v. U. S., 27 App. D. C. 263.

79. See 5 C. L. 1095.

80. A conviction cannot be had under the Kentucky statute where the evidence shows larceny. Laws 1902, p. 151, c. 66. Farmer v. Com. [Ky.] 91 S. W. 1129.

81. Evidence held insufficient. Hylton v. Com. [Ky.] 91 S. W. 696; Knight v. State [Ala.] 41 So. 911.

82. Full name consonant therewith. Knight v. State [Ala.] 41 So. 911.

83. A guardian converted notes held as the evidence of the actual money invested for his ward. State v. Disbrow [Iowa] 106 N. W. 263.

84. See 5 C. L. 1096.

85. State v. Pingel, 128 Iowa 515, 105 N. W. 58.

86. Whether money alleged to have been embezzled was intrusted to defendant or paid as the contract price for work to be done. State v. Buchanan [Wash.] 86 P. 650. Whether accused as a trustee converted the money alleged to have been embezzled or was a principal in the transaction. Brumley v. State [Tex. Cr. App.] 95 S. W. 503.

87. Whether the conversion was with felonious intent. State v. Summers [N. C.] 53 S. E. 856. Whether act of receiver in drawing funds of receivership and passing same to co-receivers was a fraudulent conversion thereof. Fields v. U. S., 27 App. D. C. 433.

88. State v. Pingel, 128 Iowa 515, 105 N. W. 58. Whether principal accepted a sheriff's certificate of sale in full settlement of balance due from agent as affecting agent's guilt of embezzlement. Id.

89. State v. Roland [Idaho] 83 P. 337; Hopkins v. State [Fla.] 42 So. 52. The place where the conversion was complete of money received in one and taken to another county is for the jury. Knight v. State [Ala.] 41 So. 911.

90. State v. Fellows [Minn.] 108 N. W. 825.

91, 92. An instruction which attempts to cover the whole case but which omits to require the finding of a **felonious intent** is not cured by another instruction which covers the point. Higbee v. State [Neb.] 104 N. W. 748.

93. State v. Moyer, 58 W. Va. 146, 52 S. E. 30.

94. Where the information charged defendant with embezzlement, a verdict finding him **"guilty as charged"** is sufficient. State v. Shour [Mo.] 95 S. W. 405. A verdict need not use the word "fine" in **assessing punishment** by way of fine. State v. Jones, 111 Mo. App. 343, 89 S. W. 366.

Verdict of guilty which does not find accused guilty as charged and fails to find whose property was embezzled is fatally defective. State v. Jones, 114 Mo. App. 343, 89 S. W. 366.

95. Where the jury were told to find defendant guilty of embezzlement "by a bailee of money" on certain conditions, a verdict

The judgment[96] must follow the verdict.[97]

Punishment must not exceed the statute under which conviction is had.[98] Civil forfeitures declared against embezzling officers cannot be adjudged in criminal prosecutions.[99]

EMBLEMENTS AND NATURAL PRODUCTS.[1]

The doctrine that the landlord and tenant are tenants in common of the growing crops, where rent is reserved in a share of the crops, is recognized by statute in Nebraska,[2] and the landlord becomes the owner of a share as soon as the crops are so far advanced that they may be said to be property.[3] This rule is not affected by a provision in a lease requiring the tenant to gather that portion of the crop belonging to the landlord.[4] The contract between the parties usually determines their status with relation to the crops,[5] the title thereto,[6] and the right to possession of the land and the crops so far as necessary for the purposes of the contract.[7] Though straw be treated as fixtures, yet by contract the tenant may remove it.[8] It is a question for the jury whether good husbandry, according to reasonable custom of country, gave title of farm products to tenant or required their consumption on the farm, in the absence of a controlling provision in the lease.[9] Where a landowner and tenant are tenants in common of crops, the landowner is not guilty of converting them, unless the crops are sold, destroyed, or removed from the farm by the landowner.[10]

EMBRACERY.[11]

following the quoted language of the charge is defective. State v. Jones, 114 Mo. App. 343, 89 S. W. 366.

96, 97. See 5 C. L. 1096. Where accused was adjudged guilty of theft and sentenced for embezzlement, while the verdict was for embezzlement, the judgment was subject to reformation on appeal in Texas to conform to the verdict. Code Cr. Proc. 1895, art. 904, applied. Burk v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 582, 95 S. W. 1064. Where judgment was entered for the crime of theft and sentence followed the judgment, but the indictment charged and the verdict found embezzlement, the sentence and judgment were subject to reformation on appeal in Texas to conform to the verdict. Brumley v. State [Tex. Cr. App.] 95 S. W. 503.

98. In imposing a sentence exceeding one year for embezzlement under Code D. C. § 841 [30 Stat. at L. p. 1346, c. 854], the court is not warranted in inserting the words "at labor." Fields v. U. S., 27 App. D. C. 433.

99. Court having jurisdiction of embezzlement cause against a receiver held not authorized to impose forfeiture of his commissions as part of the punishment, under Code D. C. § 341 [30 Stat. at L. p. 1346, c. 854]. Fields v. U. S., 27 App. D. C. 433.

1. See 5 C. L. 1096. Cropping contracts and liens, see Agriculture, 7 C. L. 94.

2. Code § 1073. Wendt v. Stewart [Neb.] 105 N. W. 550.

3. Wendt v. Stewart [Neb.] 105 N. W. 550.

4. Vendee of landlord held not entitled to portion of crops severed from realty before consummation of contract of sale of premises under lease with reservation of share of crop as rent. Wendt v. Stewart [Neb.] 105 N. W. 550.

5. Contract for farming on shares held to make the landlord and tenant as parties thereto, tenants in common of crops. Rector v. Anderson, 96 Minn. 123, 104 N. W. 884.

6. Contract for farming on shares construed and title to crops until a division thereof held to be in owner of land as security for performance of contract by cropper. Rector v. Anderson, 96 Minn. 123, 104 N. W. 884.

7. Cropper held entitled, under lease reserving share of crop as rent, to such possession of the land and the crops as necessary to enable him to perform the contract on his part. Rector v. Anderson, 96 Minn. 123, 104 N. W. 884.

8. While it is common practice in leasing farms to treat hay and straw as manure is treated at common law, that is, as a fixture of the farm, and such a provision was incorporated in the lease to the defendant, yet in construing a subsequent contract terminating the lease, the provision thereof that the defendant was to harvest his crops and remove them by December 1 must be construed as giving him the right to remove the straw. Garrett v. Brant, 6 Ohio C. C. (N. S.) 509.

9. Wilson v. Griswold [Conn.] 63 A. 659.

10. Rector v. Anderson, 96 Minn. 123, 104 N. W. 884. Evidence held not to show a conversion of crops by a landlord as against a tenant on shares. Id.

11. No cases have been found for this subject since the last article. See 5 C. L. 1097.

EMINENT DOMAIN.

§ 1. **The Power of the State and Delegations of It (1276).**
A. Definition and Nature of Power (1276).
B. Who May Exercise the Right; Delegation of Power (1278). Rights of Transferees, Agents, or Receivers of Delegates (1279). Exhaustion of the Power (1279).
C. Extent of Power (1280).
§ 2. **Purposes and Uses of a Public Character (1280).** Particular Purposes and Uses (1282).
§ 3. **Property Liable to Appropriation and Estate Therein Which May be Acquired (1283).** Property in Actual and Necessary Use for a Public Purpose (1284). Property Exempt by Law (1285). Statutory Authority to Petitioner to Choose his Own Location (1285).
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§ 5. **Conditions Precedent to the Exercise of the Power; Location of Route (1290).**
§ 6. **Measure and Sufficiency of Compensation (1291).** Benefits (1294). Particular Elements of Damage (1295). Taking Rights in Public Way (1296). Amount of Damages as Dependent on Estate or Interest Appropriated (1296). Extent and Sufficiency of Damages (1296).
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§ 13. **Commissioners or Other Tribunal to Assess Damages; Trial by Jury (1303).**
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§ 17. **Costs and Expenses (1311).**
§ 18. **Review of Condemnation Proceedings (1312).**
§ 19. **Remedy of Owner by Action or Suit (1315).**
A. Actions for Tort, Damages or Trespass; Recovery of Property (1315).
B. Suits in Equity; Injunction (1317). Parties (1319). Pleading and Proof (1319). Decree, Judgment, or Order (1319).
§ 20. **Payment and Distribution of Sum Awarded; Title or Interest Requiring Compensation (1319).** Lien and Enforcement (1320).
§ 21. **Ownership or Interest Acquired (1320).**
§ 22. **Transfer of Possession and Passing of Title (1321).**
§ 23. **Relinquishment or Abandonment of Rights Acquired (1322).**

§ 1. *The power of the state and delegations of it. A. Definition and nature of power.*[12]—The right of eminent domain is inherent in the state, but lies dormant until quickened into activity by appropriate legislation.[13] The exercise of this power is said to be against common right,[14] but the necessity of the right of eminent domain is universally conceded,[15] being an exercise of the sovereign power of the state.[16] The use being public, the right of eminent domain is absolute in the general assembly, unless restricted by the constitution.[17] The exercise of the right is an incident of the tenure of all real property,[18] and a taking by eminent domain is excepted from the operation of a covenant for quiet enjoyment.[19] Subject to the authority of the courts to determine certain questions, the legislature is the exclusive judge of the necessity or emergency justifying the exercise of the power of eminent domain,[20] and, while not conclusive upon the courts, the judgment of the legisla-

12. See 5 C. L. 1097.
13. Jones v. North Georgia Elec. Co., 125 Ga. 618, 54 S. E. 85.
14. Claremont R. & Lighting Co. v. Putney, 73 N. H. 431, 62 A. 727.
15. Aldridge v. Board of Education, 15 Okl. 354, 82 P. 827.
16. Pabst Brewing Co. v. Thorley [C. C. A.] 145 F. 117.
17. Wheeling, etc., R. Co. v. Toledo R. & Terminal Co., 72 Ohio St. 368, 74 N. E. 209.
18, 19. Pabst Brewing Co. v. Thorley [C. C. A.] 145 F. 117.
20. Tanner v. Treasury Tunnel, Min. &

ture is entitled to great weight.[21] The legislature may, however, submit the necessity to judicial inquiry.[22]

The right is dependent on the existence of a public use or purpose[23] necessitating a taking of private property,[24] and upon the payment of just compensation,[25] unless such compensation is waived or forfeited.[26] Under a statute authorizing service of process in condemnation proceedings on the agent of the owner, the agent cannot waive the owner's right to damages.[27] A railroad company seeking to expropriate land for a right of way has the burden of proving the necessity, in the particular case, of exercising the right of eminent domain.[28] Due process of law is not denied an upper riparian owner by the provisions of the Massachusetts statutes, giving mill owners the right of flowage to develop water power, where adequate compensation is secured.[29] Separate portions of an act may stand despite the failure of other parts to provide compensation.[30]

Reduction Co. [Colo.] 83 P. 464. The legislature determines the necessity for the exercise of this sovereign power, while the courts may ascertain if the use is of the character contemplated. Ortiz v. Hansen [Colo.] 83 P. 964.

21. Tanner v. Treasury Tunnel, Min. & Reduction Co. [Colo.] 83 P. 464.

22. The question of necessity is for the court to determine when the right to condemn is given if purchase cannot be effected. City of Rome v. Whitestown Waterworks Co., 113 App. Div. 547, 100 N. Y. S. 357.

23. Minnesota Canal & Power Co. v. Koochiching Co. [Minn.] 107 N. W. 405. If the location be nugatory because covering lands impossible of acquisition by any means, there is no public use to be subserved. Shamberg v. New Jersey Shore Line R. Co. [N. J. Err. & App.] 64 A. 114.

24. Evidence held sufficient to establish the existence of a reasonable necessity for the condemnation of land to increase the water supply of a city. City of Rome v. Whitestown Waterworks Co., 113 App. Div. 547, 100 N. Y. S. 357. A statute making persons negligently setting fires on their own property, to the injury of others, guilty of a misdemeanor and also liable to the injured party in double his damages does not take the property of one person and give it to another without compensation. Comp. Laws § 11,653, held constitutional. Allen v. Bainbridge [Mich.] 13 Det. Leg. N. 471, 108 N. W. 732. The advantage to the public accruing from the establishment of an accessible park at a point of great scenic beauty is not an occasion of public necessity. Great Falls Power Co. v. Great Falls & O. D. R. Co., 104 Va. 416, 52 S. E. 172.

25. Raymond v. Com. [Mass.] 78 N. E. 514; Minnesota Canal & Power Co. v. Koochiching Co. [Minn.] 107 N. W. 405. Rev. St. 1899, §§ 897-900, violates Const. art. 1, § 32, prohibiting the taking of private property for public use, unless by the owner's consent, without due compensation. Sterritt v. Young [Wyo.] 82 P. 946. Compensatory damages should be allowed for land taken from a railroad right of way for a public road. Missouri Pac. R. Co. v. Cass County [Neb.] 107 N. W. 773. Act Apr. 12, 1899 (Laws 1899, p. 78), authorizing second class cities to improve streets without petition of the property owners, etc., is not an unconstitutional taking of private property without compensation. Hund v. Rackliffe, 192 Mo. 312, 91 S. W. 500. While a city may take stone from one part of a street to repair another part, it cannot do so to the injury of an abutting owner without first making compensation therefor. Graden v. Parkville, 114 Mo. App. 527, 90 S. W. 115. Acts 1905, pp. 596, 197, providing for the holding of court in the city hall in the bank building of a certain town and the keeping of the records in the bank vaults, where it contemplates the consent of the owner, is not unconstitutional as taking of private property for public use without compensation. Pryor v. Murphy [Ark.] 96 S. W. 445.

Necessity of prepaying or securing compensation, see post, § 22.

26. The failure by a landowner to take advantage of the remedy prescribed for recovery of damages works a forfeiture of any claim therefor. Raymond v. Com. [Mass.] 78 N. E. 514. Petitions for damages under St. 1899, p. 509, c. 457, were restricted to one year from its passage, St. 1902, p. 471, c. 543, granted two years for the filing of a petition for damages, and St. 1905, p. 151, c. 224, extended the time another year. Held that the statute of 1902 constituted a fresh taking and petitions might be filed within 3 years from its passage. Id.

27. Dee & Bros. v. Harrison [Tex. Civ. App.] 95 S. W. 1093.

28. Where a city ordinance granting a right of way in certain streets was only permissive and not conditioned on the location of the road along the streets, and it was established that the general welfare would be subserved by not having the tracks in the street, the company was not deprived by the ordinance of the right to condemn the land sought because of want of necessity. Lousiana R. & Nav. Co. v. Xavier Realty, 115 La. 328, 39 So. 1.

29. Mass. Pub. Stat. c. 190. Otis Co. v. Ludlow Mfg. Co., 201 U. S. 140, 50 Law. Ed. —. The provisions of said statute in the matter of compensation held sufficient. Id.

30. The invalidity of the provision of Act Mar. 16, 1893 (Acts 1893, p. 102), creating a levee district, which authorizes the taking of private property for public use without just compensation, contrary to Const. art. 2,

The constitution and statutes of Colorado confer upon private persons the right to take land for a private use, such as ditches for irrigating agricultural lands,[31] and this power may be invoked by him, though other remedies are available,[32] but only in the capacity and under the circumstances pointed out by the statute. He cannot take such proceedings in his own right, in a representative capacity and "as trustee for the public," to acquire private lands to make an artificial channel for a natural stream which will enable him in his individual capacity to utilize an individual right.[33]

(§ 1) *B. Who may exercise the right; delegation of power.*[34]—None but the state or its delegates acting in the manner prescribed may exercise the power.[35] The state may primarily exercise the right for any public purpose, but there is no limitation which prevents the state by legislation from delegating to others the authority to exercise it for any public use or purpose.[36] Delegation may be by the constitution or by an act of the legislature.[37] In determining whether statutes confer the right to exercise the power of eminent domain, the rules of strict construction are to be applied,[38] and the power can be exercised by a private individual or corporation only by express legislative authority,[39] every presumption being in favor of the individual landowner.[40] A municipal corporation cannot condemn lands outside of its corporate limits without "express" legislative authority, but such express authority will be found in authority to do a thing which without power to go beyond limits would be abortive.[41] The power given a municipality is not impliedly extended beyond its limits when some other branch of government has the power for the same purpose in such region.[42] The power to condemn may be delegated to any corporation or individual who shall comply with the terms upon which the right is given,[43] but special delegations will prevail over general

§ 22, does not affect the validity of the act as a whole in cases where it is not necessary to take private property without consent. Porter v. Waterman [Ark.] 91 S. W. 754.

31. Mills' Ann. St. § 2257. Ortiz v. Hansen [Colo.] 83 P. 964.

32. Ortiz v. Hansen [Colo.] 83 P. 964.

33. The court cannot on appeal treat as surplusage the allegations of his petition asserting the right to proceed in a representative capacity. Ortiz v. Hansen [Colo.] 83 P. 964.

34. See 5 C. L. 1099.

35. A corporation can injure or destroy private property only where it possesses the power of eminent domain and exercies that power in the manner provided by law. Ganster v. Metropolitan Elec. Co. [Pa.] 64 A. 91.

36. Jones v. North Georgia Elec. Co., 125 Ga. 618, 54 S. E. 85. A water company organized to **store and furnish water** and water power is presumably a **private** corporation and cannot be constitutionally invested with the right of eminent domain. Chartered under Act Apr. 29, 1874 (P. L. 74), § 2, cl. 18. Peifly v. Mountain Water Supply Co., 214 Pa. 340, 63 A. 751.

37. Ortiz v. Hansen [Colo.] 83 P. 964.

38. The charter of a street railroad company, authorizing it to acquire such real estate as was necessary and convenient for its business, but not expressly conferring the power of eminent domain nor pointing out any steps for its exercise, was held not to confer such power. Claremont R. & Lighting Co. v. Putney, 73 N. H. 431, 62 A. 727. Gen. St. R. Law, § 4 (Laws 1895, p. 368, c. 27, as amended by Laws 1901, p. 586, c. 93), authorizing street railway corporations to take and hold lands necessary to install and maintain power plants, does not authorize the condemnation of land and water privileges, etc., to procure power to operate their lines. Id.

39, 40. Minnesota Canal & Power Co. v. Koochiching Co. [Minn.] 107 N. W. 405.

41. Ballinger's Ann. Codes & St. §§ 938, 944, authorize a third class city to condemn land outside of its limits to **straighten a stream forming part of** its boundary line. City of Puyallup v. Lacey [Wash.] 86 P. 215.

42. In California the power to condemn lands without a city for levee purposes being given to the state board of swamp land commissioners, by St. 1861, p. 355, c. 352 (McCarty v. Southern Pac. Co., 148 Cal. 211, 82 P. 615), the city board of Sacramento had no authority to condemn lands outside of its limits for such purpose, under Act Apr. 9, 1862 [St. 1862, pp. 152, 153, 158, c. 158, §§ 4, 7, 17] (Id.).

43. Boca & L. R. Co. v. Sierra Valleys R. Co. [Cal. App.] 84 P. 298.

Corporations held to have the power: Boom companies organized under the statutes of **Washington** are quasi public corporations and have the power of eminent domain. 1 Ballinger's Ann. Codes & St. §§ 4378-4394. Nicomen Boom Co. v. North Shore Boom & Driving Co., 40 Wash. 315, 82 P. 412. **In New**

ones.[44] A general delegation avails none save such public service institutions as the statute clearly intends.[45] Corporations, to have the right, must be chartered under the laws of the domestic or of some other state, or of the United States, and must be legally incorporated.[46] In the absence of statutory provisions expressly conferring the right of eminent domain upon foreign corporations, interstate comity does not require that this right be extended to a foreign telephone company, and there is no inherent power vested in such a company to condemn private property for purely local purposes and as a part of an interstate system;[47] and in Kentucky a foreign railroad company, which merely complies with the law in filing its articles of incorporation, acquires only the right to "possess, control, maintain and operate" a railroad in the state,[48] and has no power to exercise the right of eminent domain, or to maintain a suit to subject the property of another to its use,[49] without becoming a full Kentucky corporation.[50] The legality of the organization of a corporation, however, cannot be attacked in condemnation proceedings instituted by it,[51] nor can the lack of corporate as distinguished from condemnatory power.[52] A railroad corporation legally incorporated cannot ignore its de jure entity and condemn a right of way as a de facto corporation,[53] and the charter limitations cannot be circumvented by the corporation's assuming to be a "person seeking to acquire property for any of the uses mentioned" in the code.[54]

Rights of transferees, agents, or receivers of delegates. Exhaustion of the power[55] does not result from a single or partial exercise.[56]

York an electric light company having a contract with a town **for municipal lighting** can acquire by condemnation such real estate as may be necessary for its purposes. Under the express provisions of Laws 1896, p. 404, c. 446. This statute is constitutional. In re East Canada Creek Elec. Light & Power Co., 49 Misc. 565, 99 N. Y. S. 109. In **Illinois,** a **drainage district** already organized may condemn land for its ditches and drains. Act May 29, 1879 (Laws 1879, p. 120), for the organization of such districts. Eminent Domain Act, 2 Starr & C. Ann. St. [2d Ed.] p. 1763. Hutchins v. Vandalia Levee & Drainage Dist., 217 Ill. 561, 75 N. E. 354. In Illinois, **boards of education of township high schools** are authorized to condemn land for a township high school. 3 Starr & C. Ann. St. 1896, p. 3661, c. 122, art. 3, § 41, authorizes such boards to act as school directors, who are empowered to condemn lands by §§ 31, 32, of the school law. Thompson v. Trustees of Schools for Rio Tp., 218 Ill. 540, 75 N. E. 1048.

44. Acts 24th Leg. (Laws 1895) p. 213, c. 132, creating a road system for certain counties, controls the general law, as to those counties, so far as the condemnation of lands and award of damages are concerned. Dallas County v. Plowman [Tex.] 14 Tex. Ct. Rep. 848, 91 S. W. 221.

45. In **Mississippi** a **telephone company** has **no right** to condemn land, though declared by the constitution to be a common carrier. Const. § 195. Alabama & V. R. Co. v. Cumberland Tel. & T. Co. [Miss.] 41 So. 258. Acts 1886, p. 93, c. 38, authorizing telephone or telegraph companies to exercise the power of eminent domain, was repealed by Code 1892, §§ 854-858 inclusive, and § 4291, relating to telegraph companies and authorizing them to exercise the power. Id.

46. Cumberland Tel. & T. Co. v. St. Louis, etc., R. Co. [La.] 41 So. 492.

47. Central Union Tel. Co. v. Columbus Grove, 8 Ohio C. C. (N. S.) 81.

48. Ky. St. 1903, § 841. Evansville & H. Traction Co. v. Henderson Bridge Co. [C. C. A.] 141 F. 51.

49. Const. Ky. §§ 202, 211. Evansville & H. Traction Co. v. Henderson Bridge Co. [C. C. A.] 141 F. 51.

50. By organizing under Ky. St. 1903, § 763. Evansville & H. Traction Co. v. Henderson Bridge Co. [C. C. A.] 141 F. 51.

51. Eddleman v. Union County Traction & Power Co., 217 Ill. 409, 75 N. E. 510. A **de facto corporation** may exercise the power of eminent domain. Morrison v. Indianapolis & W. R. Co. [Ind.] 76 N. E. 961.

52. In condemnation proceedings by a railroad company, the question cannot be raised whether the grant of corporate power has been forfeited by failure to construct the road within the time limited. By 3 Starr & C. Ann. St. p. 3238, c. 114, § 26. Thomas v. South Side El. R. Co., 218 Ill. 571, 75 N. E. 1058. The question whether a railroad being constructed is owned by a parallel and competing road and whether it is thus rendered illegal cannot be raised collaterally in condemnation proceedings. Memphis, etc., R. Co. v. Union R. Co. [Tenn.] 95 S. W. 1019.

53. Boca & L. R. Co. v. Sierra Valleys R. Co. [Cal. App.] 84 P. 298.

54. Code Civ. Proc. § 1238. Boca & L. R. Co. v. Sierra Valleys R. Co. [Cal. App.] 84 P. 298.

55. See 5 C. L. 1101.

56. The right of the Portland Bridge Company, under the Act of Oct. 18, 1878, to change the grade of a street for an approach to its bridge, without compensation to abutting owners for consequential damages,

(§ 1) *C. Extent of power.*[57]—The power of eminent domain can be exercised only within the strict terms of the legislative grant,[58] or if the public itself be the taker within the scope of the act declaring the purpose,[59] and subject to the constitutional restrictions.[60] A corporation which asserts the right must show affirmatively that it has been granted the power for the specific purpose.[61] The extent of the power granted is largely a question of statutory construction,[62] and the power being undoubtedly conferred, the statute will be liberally and reasonably construed, so as to make its purpose effective,[63] limited always by necessity[64] and the place where the use has been located,[65] and to enumerated purposes if they be enumerated.[66]

§ 2. *Purposes and uses of a public character.*[67]—No precise definition exists to test whether a use is public or private,[68] for the definition must be such as to give it a degree of elasticity capable of meeting new conditions and improvements, and the increasing needs of society.[69] The term public use is narrower than public benefit, utility or convenience.[70] A use is not public unless the public, under proper

was not exhausted by an exercise of the right as to a portion of the street only. Mead v. Portland, 200 U. S. 148, 50 Law. Ed. —.

57. See 5 C. L. 1100.

58. Gen. St. 1894, c. 34, does not authorize a corporation organized thereunder for the creation of a water power and electric power plant, etc., to withdraw and divert, from its natural course, the water of streams so as to interfere with present or future navigation. Minnesota Canal & Power Co. v. Koochiching Co. [Minn.] 107 N. W. 405.

59. Act Aug. 1, 1888, c. 728, 25 Stat. 357 [U. S. Comp. St. 1901, p. 2516], providing for proceedings to condemn lands for the United States, confers no general authority but only authority to institute proceedings when otherwise authorized. But Act Apr. 24, 1888, c. 194, 25 Stat. 94 [U. S. Comp. St. 1901, p. 3525], authorizes the secretary of war to institute condemnation proceedings for the improvement of rivers and harbors. United States v. Certain Lands, 145 F. 654. Appropriation Act Mar. 3, 1905, c. 1482, 33 Stat. 1119, for the improvement of Point Judith Harbor of Refuge, R. I., authorized the secretary of war to take enough of the shore for not only the end of the breakwater to rest upon, but also for control of the shore terminus, a landing place with access to a highway. Id.

60, 61. Minnesota Canal & Power Co. v. Koochiching Co. [Minn.] 107 N. W. 405.

62. Under the construction of Act Mar. 17, 1858 (P. L. p. 415), § 3, the first section of the supplementary road act of May 8, 1905 (P. L. p. 448), does not apply to cities. Manufacturers' Land & Improvement Co. v. Camden [N. J. Law] 63 A. 5.

63. City of Puyallup v. Lacey [Wash.] 86 P. 215. The grant of power to a city "to lay out additions and alterations to be made to the public wharves and docks," made after the destruction by fire of the structures along a water front (Act Mar. 11, 1904 [Laws 1904, p. 141, c. 87], known as the "Burnt District Act"), is not to be narrowly construed. Dyer v. Baltimore, 140 F. 880. Not limited to the building of additions to existing wharves and docks, but including enlargement of the facilities of the port by the making of new ones. Id. In Texas the power of eminent domain conferred on channel and dock companies, to be exercised in the manner provided by law for railroad companies, does not limit their right to the cases where it may be exercised by railroad companies. Bigham Bros. v. Port Arthur Canal & Dock Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 440, 91 S. W. 848.

64. Taking of property already in public use. Great Falls Power Co. v. Great Falls & O. D. R. Co., 104 Va. 416, 52 S. E. 172. Testimony held to show that no more land was proposed to be taken for water power purposes than was necessary. State v. Centralia-Chehalis Elec. R. & Power Co., 42 Wash. 632, 85 P. 344.

65. See post, § 5.

66. Act 1893, § 13 (3 Gen. St. p. 3239, § 132), does not confer power upon a trolley company to condemn a strip of land beside its right of way, to be used in connection therewith, as such land was not to be used as an extension of the line of an existing road or as a new line. Metlar v. Middlesex & S. Traction Co., 72 N. J. Law 524, 63 A. 497. The statutes of South Dakota authorizing one railroad company to "cross, intersect, join and unite its road" with that of another company do not authorize it to build its road longitudinally upon another's right of way [Civ. Code §§ 488, 505] (South Dakota Cent. R. Co. v. Chicago, etc., R. Co. [C. C. A.] 141 F. 578), and in the absence of such statutory authority it cannot condemn such a right of way (Id.). Authority to take land for power plants does not include the taking of water rights to develop hydraulic power. Claremont R. Lighting Co. v. Putney, 73 N. H. 431, 62 A. 727.

67. See 5 C. L. 1101.

68. Tanner v. Treasury Tunnel, Min. & Reduction Co. [Colo.] 83 P. 464.

69. The physical conditions of the country, the needs of a community, the character of the benefit which a projected benefit may confer upon a locality and the necessities for such improvement in the development of the resources of a state are to be taken into consideration. Tanner v. Treasury Tunnel, Min. & Reduction Co. [Colo.] 83 P. 464.

police regulation, has the right to resort to the property for the use for which it was acquired, independently of the mere will or caprice of the person or corporation in which the title will vest upon condemnation.[71] Indirect advantages to the general public, such as arise from the establishment of manufactories which furnish labor, develop and utilize natural advantages, and create new markets, do not justify the exercise of the power of eminent domain.[72] When the taking is for a public use, it is no objection that incidental and private advantages will result to the petitioners,[73] though a use which is of itself partly private or a merger of public and private is objectionable.[74] Thus it is no objection that the plaintiff is a private corporation, so long as the use or purpose to which the property is to be devoted is public.[75] It is not a public use to take physical properties devoted to a public use and permit their use by a private corporation performing exactly the same public service.[76] The public use required need not be of the whole state or any considerable portion of it,[77] but the use and benefit must be in common, not to particular individuals.[78] It must be a use by the public or by some agency that is quasi public.[79] Whether or not the use is public is a judicial question.[80] The burden of proof to show a public use is on the party seeking to appropriate the land.[81] It is largely dependent upon the facts surrounding the subject,[82] and it

70. Such a public use as justifies the taking of private property against the owner's will cannot rest merely upon public benefit, or public interest, or great public utility. State v. Superior Ct. for Thurston County, 42 Wash. 660, 85 P. 666. See 5 C. L. 1101, n. 74.

71, 72. Minnesota Canal & Power Co. v. Koochiching Co. [Minn.] 107 N. W. 405.

73. Minnesota Canal & Power Co. v. Koochiching Co. [Minn.] 107 N. W. 405. A grant of power to condemn property for use in constructing wharves and docks, according to a comprehensive plan, is not invalid as authorizing the taking of property for private uses, because certain piers and docks are not required for strictly public use, but may be leased to private parties for the use of navigation and commerce, for a limited time and subject to regulation. Dyer v. Baltimore, 140 F. 880.

74. Under a constitutional inhibition against the taking of private property for private use a corporation cannot condemn property to promote not only the operation of a municipal light plant and electric railway system but also the business of selling electricity generally. Const. art. 1, § 16. State v. Superior Ct. for Thurston County, 42 Wash. 660, 85 P. 666. Where it is sought to condemn property for both public and private uses indiscriminately, that is, where the purposes are part public and part private, the right must be denied. Minnesota Canal & Power Co. v. Koochiching Co. [Minn.] 107 N. W. 405.

75. In re East Canada Creek Elec. Light & Power Co., 49 Misc. 565, 99 N. Y. S. 109. The mere fact that a corporation has charter authority to condemn land for both public and private uses will not prevent it from exercising the power for the promotion of the public use only. Minnesota Canal & Power Co. v. Koochiching Co. [Minn.] 107 N. W. 405. Though the articles of incorporation show some objects of a private nature, a corporation may exercise the power of eminent domain, where the petition and testimony show a desire to condemn for the purpose of carrying on the business of a common carrier. State v. Centralia-Chehalis Elec. R. & Power Co., 42 Wash. 632, 85 P. 344.

76. The granting of permission by a borough, to a later corporation, to lay a part of its tracks on the tracks of another corporation theretofore granted permission to occupy the street, is an unconstitutional taking of the earlier company's property. The borough could not grant the second corporation the right to lay its track a-straddle of the track of the other. Commonwealth v. Bond, 214 Pa. 307, 63 A. 741.

77. Madera R. Co. v. Raymond Granite Co. [Cal. App.] 87 P. 27.

78. Madera R. Co. v. Raymond Granite Co. [Cal. App.] 87 P. 27. Use by an individual or number of particular individuals is not a public use. In re Twenty-First St. [Mo.] 96 S. W. 201.

79. State v. Superior Ct. for Thurston County, 42 Wash. 660, 85 P. 666.

80. Wheeling, etc., R. Co. v. Toledo R. & Terminal Co., 72 Ohio St. 368, 74 N. E. 209. The legislative character of an ordinance extending a street does not preclude the courts from investigating whether the real purpose is to open the street for the benefit of the public or of private individuals. In re Twenty-First St. [Mo.] 96 S. W. 201. Evidence may be introduced in condemnation proceedings to show that the proposed street is for the use of an individual. Id.

81. Evidence held sufficient. Madera R. Co. v. Raymond Granite Co. [Cal. App.] 87 P. 27.

82. The courts must determine from all the circumstances whether or not, in the particular case, the purpose is a public use (Madera R. Co. v. Raymond Granite Co. [Cal. App.] 87 P. 27), even though the public use is declared by a general statute which enumerates many objects so designated [Code Civ. Proc. §§ 1238, 1241, including railroads] (Id.).

will not be presumed when a private corporation asserts the power.[83] But under the act of Pennsylvania authorizing a bill to restrain a corporation from taking private property for private use,[84] the burden of proof is on complainant to show that a railroad company, incorporated under a public act, is being constructed for a private use.[85] The mere fact that the railroad is to run through undeveloped country is insufficient to show that it is for private use.[86] And in condemnation proceedings the court must presume that the company, in building its railroad to a point originally fixed upon as a terminus, is acting for the purpose of serving the public.[87] In condemnation proceedings to extend a particular street pursuant to a general scheme, the scheme is admissible on the public character of the use to which the street will be put.[88] Neither the length of a railroad nor the fact that it is a branch or spur has any necessary bearing upon the question of public use or interest,[89] except possibly as bearing upon the alleged fact that the road is solely for the private use of the plaintiff.[90] The fact that citizens, as an inducement to the building of a railroad, agreed to furnish the right of way, in no wise militated against the fact that the land was to be obtained for a necessary public purpose.[91]

Particular purposes and uses.[92]—Among the uses held public are electric lighting,[93] power houses and car barns for a common carrier,[94] spur tracks for transfer purposes,[95] drainage works,[96] private irrigation works in the arid regions,[97] cemeteries,[98] and the widening of highways,[99] while the contrary has been held as to

83. A corporation which asserts the right to take property against the will of the owner must affirmatively show that it proposes to use the property, when acquired, for the public use and not for private benefit. Minnesota Canal & Power Co. v. Koochiching Co., [Minn.] 107 N. W. 405.

84. Act June 19, 1871 (P. L. 1360). Deemer v. Bells Run R. Co., 212 Pa. 491, 61 A. 1014.

85, 86. Deemer v. Bells Run R. Co., 212 Pa. 491, 61 A. 1014.

87. Central of Georgia R. Co. v. Union Springs & N. R. Co. [Ala.] 39 So. 473.

88. In re Twenty-First St. [Mo.] 96 S. W. 201. Scheme may be shown by contemporary ordinances or the best evidence of which the fact is susceptible. Id. Where the street as extended will be a cul-de-sac, evidence of an ordinance for extending another street so as to connect is admissible. Id.

89. Madera R. Co. v. Raymond Granite Co. [Cal. App.] 87 P. 27.

90. Madera R. Co. v. Raymond Granite Co. [Cal. App.] 87 P. 27. Neither the fact that the advantage of a railroad inures to a particular individual or class of individuals, nor the fact that a corporation was formed to build a railroad to connect with another as a branch thereof, nor the fact that all the stockholders in a railroad company were stockholders in a corporation which would be primarily benefited by the construction of the railroad, nor the fact that a railroad company had not the cars to operate the road and intended to arrange with another company to operate it, renders its use not public. Id.

91. Shirley v. Southern R. Co. [Ky.] 89 S. W. 124.

92. See 5 C. L. 1103.

93. Electric lighting is universally recognized as a public enterprise, in aid of which the right of eminent domain may be invoked. Minnesota Canal & Power Co. v. Koochiching Co. [Minn.] 107 N. W. 405. Furnishing light to a municipality is a public use and benefit. In re East Canada Creek Elec. Light & Power Co., 49 Misc. 565, 99 N. Y. S. 109. The furnishing of electricity to the inhabitants of a thickly settled and extensive territory for illuminating purposes and for extensive street surface railroads constitutes a "public use." In re Niagara, L. & O. Power Co., 97 N. Y. S. 853.

94. A street railway may condemn private property necessary for car barns, power houses, etc. Eddleman v. Union County Traction & Power Co., 217 Ill. 409, 75 N. E. 510.

95. A spur transfer track serving a number of industrial plants for inward and outward shipments held a public use. Kansas City, etc., R. Co. v. Louisiana W. R. Co., 116 La. 178, 40 So. 627.

96. Code, c. 30, and amendments, providing for drainage, are not unconstitutional as authorizing the taking of land for a private purpose. Porter v. Armstrong, 139 N. C. 179, 51 S. E. 926.

97. In view of peculiar conditions existing in Utah, the statute permitting individuals to enlarge the ditch of another to obtain water for their own land does not violate the Federal constitution. Clark v. Nash, 198 U. S. 361, 49 Law. Ed. 1085.

98. In Tennessee the lands of a cemetery company were held to be devoted to a public purpose. Memphis State Line R. Co. v. Forest Hill Cemetery Co. [Tenn.] 94 S. W. 69.

99. The taking of land by a county to widen a public highway is a taking for public use, within Code Civ. Proc. § 1238, subds. 3, 4, Pol. Code, § 2681, and County Government Act, § 25, subd. 4 (Gen. Laws 1903, p. 121). Mendocino County v. Peters [Cal. App.] 82 P. 1122.

a park to be used in connection with an electric railway,[1] logging railways,[2] and presumed as to water storage and supply,[3] and power generating plants have under differing circumstances been held both public and private.[4] The taking of land for a public street, even though in the form of a cul-de-sac, is for a public use.[5] The condemnation of a right of way for a tunnel, to be used for draining mines and the transportation of waste and ore for all proprietors who desire to use it, is for a public use.[6] The condemnation of a right of way by one railroad company over that of another is a taking of private property for public use and must be done under the provisions of law governing eminent domain.[7]

§ 3. *Property liable to appropriation and estate therein which may be acquired.*[8]—Property of every kind, whether public or private, may be taken for an authorized use.[9] A tenant's term is "property," and he is, therefore, entitled to compensation for injury to his leasehold.[10] An agreement made by a railroad company in consideration of the grant of a right of way, for the payment of money to construct cattle guards and make certain wagon roads over its tracks, may be severed, so as to allow the condemnation of the right to the wagon roads to widen the company's roadway.[11] Neither the owner of land nor the courts can interfere with the exercise of the sound discretion of the municipal authorities in the question of widening a street.[12] A maximum amount of land that may be taken for railroads or the like is often prescribed with leave to take more, if necessary.[13] The land and right of way permitted to be taken by railroad companies for "station purposes" must be determined from the existing conditions in each case,[14] but such grounds must be necessary, convenient and actually used by the companies in the transaction of their business.[15]

1. Great Falls Power Co. v. Great Falls & O. D. R. Co., 104 Va. 416, 52 S. E. 172.

2. Laws 1887, p. 97, c. 46, amendatory of Code, §§ 2056, 2057, so as to authorize the construction, over lands of others, of railways for the removal of standing timber, is invalid as authorizing the taking of lands for a use not public. Cozad v. Kanawha Hardwood Co., 139 N. C. 283, 51 S. E. 932.

3. Storage and supply of water and water power held presumptively private. Peifly v. Mountain Water Supply Co., 214 Pa. 340, 63 A. 751.

4. The creation of a water power and a water power plant, for the purpose of "supplying water power from the wheels thereof" to the public, is a private enterprise in aid of which the power of eminent domain cannot be exercised. Minnesota Canal & Power Co. v. Koochiching Co. [Minn.] 107 N. W. 405. Acts 1897, p. 68; Van Epps' Code Supp. §§ 6454-6456, which confers upon owners of water powers, on certain conditions, to condemn lands, does not take property without due process of law. Jones v. North Georgia Elec. Co., 125 Ga. 618, 54 S. E. 85. An act authorizing the condemnation of land by hydraulic companies to erect dams is not unconstitutional on the ground that the use is not a public one. Stoy v. Indiana Hydraulic Power Co. [Ind.] 76 N. E. 1057.

5. State v. Superior Ct. for Whatcom County, 42 Wash. 521, 85 P. 256.

6. Under Laws 1891, p. 98, § 3 (3 Mills' Ann. St. Rev. Supp. § 616). Tanner v. Treasury Tunnel, Min. & Reduction Co. [Colo.] 83 P. 464.

7. Code Civ. Proc. §§ 1238, 1240. Boca & L. R. Co. v. Sierra Valleys R. Co. [Cal. App.] 84 P. 298.

8. See 5 C. L. 1104.

9. Ortiz v. Hansen [Colo.] 83 P. 964.

10. Within the meaning of Comp. Laws, § 4239, for condemnation proceedings in the abolition of grade crossings. City of Detroit v. Little Co., 141 Mich. 637, 12 Det. Leg. N. 589, 104 N. W. 1108.

11. Under Act Mar. 17, 1869 (P. L. 12; 2 Purd. Dig. 1798). Lilley v. Pittsburg, etc., R. Co., 213 Pa. 247, 62 A. 852. It being presumed that such contract for a right of way was not intended to barter away its right to make necessary improvements, as contemplated by the act of Mar. 17. Id.

12. City of Durham v. Rigsbee [N. C.] 53 S. E. 531.

13. Evidence held to show reasonably that a 100-foot strip was necessary for a railroad. State v. Superior Ct. of Clarke County [Wash.] 87 P. 40. The testimony of the railroad company's civil engineer, that it was necessary to take a 125-foot strip to make the necessary filling, when it is the only evidence on the point is sufficient to bring the case within the statutory provision permitting the taking of more than 100 feet. Hurd's Rev. St. 1903, p. 1437, c. 114, § 20, cl. 4. Prather v. Chicago Southern R. Co. [Ill.] 77 N. E. 430.

14. Within the meaning of Rev. St. 1883, c. 18, § 29, or Rev. St. 1903, c. 23, § 31. Appeal of Atlantic, etc., R. Co., 100 Me. 430, 62 A. 141.

15. Appeal of Atlantic, etc., R. Co., 100 Me. 430, 62 A. 141.

Property in actual and necessary use for a public purpose.[16]—Franchises and property already in a public use may be applied to another public use,[17] yet it cannot be so taken without legislative authority expressly conferred or arising by necessary implication,[18] and when the power is given it should not be extended by construction beyond the necessity of the statute.[19] A general legislative authority to condemn will not be construed to give power to take when such taking will be inconsistent with a prior public use to which the property has been dedicated.[20] The properties of a corporation or person endowed with the power of eminent domain, but which properties are not devoted to the public use, may be taken as ordinary property,[21] and the possibility that in future they may be devoted to the public use does not change this rule.[22] Sometimes the test is whether the particular lands are essential to the prior use.[23] Thus in New Jersey, by statute, lands used but not necessary because of the feasibility of change may be taken.[24] But, although one company has a right to condemn property of another, in public use, such right cannot be claimed for slight reasons[25] or to the practical destruction of another public use of equal necessity or importance,[26] and this although the prior use has not yet been put in actual operation.[27]

16. See 5 C. L. 1105.

17. Commonwealth v. Bond, 214 Pa. 307, 63 A. 741; In re Southwestern State Normal School, 213 Pa. 244, 62 A. 908.

What uses are public. See, also, ante, § 2. Where a proposed spur track is intended for the transfer of freight in car lots to and from several industrial plants, its use is open to the public and land may be expropriated for a crossing for one spur track over another. Act 74, p. 103, of 1902. Kansas City, etc., R. Co. v. Louisiana W. R. Co., 116 La. 178, 40 So. 627. In Kansas, the statutes providing for the condemnation for cemetery purposes of lands which have been continuously used as a public burial ground for ten years or more, do not apply to an existing cemetery platted and used as such as required by law. Rev. St. 1899, § 8963 (Shiel v. Walker, 114 Mo. App. 521, 90 S. W. 124), but only to such grounds as have not been platted and recorded (Id.). Rev. St. 1899, § 5217, and Sess. Acts 1901, p. 54, § 5217a, held not to apply to platted cemetery lands. Id.

Illustrations: In Illinois, the sanitary district of Chicago can condemn land which is used by a railroad company as a freight terminal. Under Laws 1889, p. 129, § 8. Pittsburgh, etc., R. Co. v. Sanitary Dist., 218 Ill. 286, 75 N. E. 892. Railroad right of way for road. Missouri Pac. R. Co. v. Cass County [Neb.] 107 N. W. 773.

18. Act July 10, 1901 (P. L. 632), authorizing the condemnation of land needed for the use of state normal schools, does not authorize the condemnation of streets and alleys for a campus In re Southwestern State Normal School, 213 Pa. 244, 62 A. 908.

19. Great Falls Power Co. v. Great Falls & O. D. R. Co., 104 Va. 416, 52 S. E. 172. Power to longitudinally appropriate a right of way will not be implied from a grant evincing a design that crossings and connections should be acquired. South Dakota Cent. R. Co. v. Chicago, etc., R. Co. [C. C. A.] 141 F. 578. The taking of land belonging to another corporation by a railway company for a park at its terminal is not a taking for a public use. Within Va. Code 1904, p. 576, c. 46a, § 1105e, subd. 52. Great Falls Power Co. v. Great Falls & O. D. R. Co., 104 Va. 416, 52 S. E. 172.

20. Atlanta & W. P. R. Co. v. Atlanta, B. & A. R. Co., 124 Ga. 125, 52 S. E. 320.

21. Property of a railroad company, not in actual use for railroad purposes, but held simply in anticipation of future needs, may be condemned by another railroad company for railroad purposes. Atlanta & W. P. R. Co. v. Atlanta, B. & A. R. Co., 124 Ga. 125, 52 S. E. 320.

22. The future needs of the owning company must yield to the present lawful needs of the condemning company. Atlanta & W. P. R. Co. v. Atlanta, B. & A. R. Co., 124 Ga. 125, 52 S. E. 320.

23. Where property of a railroad company has not been used and because of its shape cannot be used for yard purposes, another railroad may condemn a right of way across it where it lies in the only practicable route. Memphis & S. L. R. Co. v. Union R. Co. [Tenn.] 95 S. W. 1019.

24. Under a statute permitting the condemnation of lands of a corporation not necessary for the purposes of its franchise, but only a right to cross those that are so necessary, a footpath leading to a ferry, that can be changed without detriment to its usefulness, cannot be deemed necessary to the enjoyment of the ferry franchise. Philadelphia & C. Ferry Co. v. Intercity Link R. Co. [N. J. Law] 62 A. 184.

25. State v. Superior Ct. of Spokane County, 40 Wash. 389, 82 P. 417.

26. A railroad company cannot condemn a right of way through the terminal grounds of another road, where such condemnation would render the use of the terminal grounds impracticable. State v. Superior Ct. of Spokane County, 40 Wash. 389, 82 P. 417. Where another route can be obtained of the same length and at only the additional expense of two bridges, and the terminal grounds are hardly sufficient and cannot be enlarged. Id. In Virginia, before the land of a corporation having the power of eminent domain can be taken under the right of eminent domain

Property exempt by law.[28]—In Indiana, the route of a highway cannot be run through an inclosure of more than one year's standing, unless a good way cannot be otherwise had without departing from the route petitioned for.[29] The Indiana statute providing the enjoining of the construction of a railroad on any cemetery ground, protects not only such part as is occupied by graves, but all reasonable additions, though not so occupied.[30] In Tennessee a railroad company has no right to condemn a right of way through cemetery lands, though unimproved and not used for burial purposes.[31] The provision in the Louisiana statute for the protection of the "dwelling house, yard, garden and other appurtenances," does not apply to a tenement bought and held merely as an investment and which the owner has never occupied as a dwelling.[32] Under a statute prohibiting the running of a railroad line through any outbuilding of the value of $300, without the owner's consent, the burden of proof of such value is on the complainant in a suit to restrain such action.[33] In Texas a railroad company cannot arbitrarily locate its machine and repair shops, without reference to damage to neighboring property, as it can its right of way.[34]

Statutory authority to petitioner to choose his own location[35] may be given.[36]

§ 4. *What is a "taking," "injuring," or "damaging" of property.*[37]—Any direct injury to or interference with private property demands compensation,[38] irrespective of interference with the title or actual encroachment on the land,[39] but it must be a direct damage to the property and not mere personal inconvenience to the owner.[40] The terms "taking or expropriation" in the Louisiana statutes are equivalent,[41] and the term "taken," in the state constitutions of 1879 and 1878, is used

by another corporation. Under Va. Code 1904, p. 576, c. 46a, § 1105e, subd. 52 (Great Falls Power Co. v. Great Falls & O. D. R. Co., 104 Va. 416, 52 S. E. 172), it must be made to appear (1) that a public necessity or an essential public convenience requires it; and (2) that such land is not essential to the purposes of the appellant (Id.).

27. State v. Superior Ct. of Spokane County, 40 Wash. 389, 82 P. 417.

28. See 5 C. L. 1105.

29. Burns' Ann. St. 1901, § 6743. Baker v. Gowland [Ind. App.] 76 N. E. 1027.

30. Burns' Ann. St. 1901, §§ 4708d, 4708e, 4708f. McCann v. Mt. Gilead Cemetery Trustees [Ind.] 77 N. E. 1090.

31. In view of the provisions of Shannon's Code, §§ 1844, 3053-3058, 6512, 6524, 6772; Acts 1885, p. 245, c. 135; Acts 1873, p. 129, c. 94. Memphis State Line R. Co. v. Forest Hill Cemetery Co. [Tenn.] 94 S. W. 69.

32. Civ. Code, art. 2637. Louisiana & A. R. Co. v. Moseley [La.] 41 So. 585.

33. The evidence being conflicting, held that complainant had not sustained the burden of proof. Johnson v. Philadelphia, etc., R. Co. [Del.] 62 A. 86.

34. Under Const. art. 1, § 17, and Rev. St. 1895, arts. 4424, 4445. Rainey v. Red River, etc., R. Co. [Tex.] 14 Tex. Ct. Rep. 850, 90 S. W. 1096.

35. See 5 C. L. 1106.

36. The selection of the source and system, as well as the location of a dam for which land is sought to be taken, to increase its water supply, may be conferred upon a city. Such authority is conferred on the city of Rome by Acts 1899, p. 1371, c. 624, §§ 10, 11. City of Rome v. Whitestown Waterworks Co., 113 App. Div. 547, 100 N. Y. S. 357.

37. See 5 C. L. 1107.

38. Where a railroad company appropriated a highway for its road and constructed another nearer the front of the lots of an abutting owner, placing a high embankment in front of them, impeding ingress and egress, it was liable for the damages. Const. § 242. Yates v. Big Sandy R. Co. [Ky.] 89 S. W. 108. A railroad company is not liable in damages to a landowner for the closing of a highway where another one is substituted for the one closed. Rockafeller v. Northern Cent. R. Co., 212 Pa. 485, 61 A. 960.

39. In Massachusetts, one whose land is damaged by the taking of other land for highway purposes, as authorized by St. 1894, p. 283, c. 288, and St. 1895, p. 504, c. 450 (Whitney v. Com., 190 Mass. 531, 77 N. E. 516), may recover damages therefor from the city or town. Under St. 1894, p. 286, c. 288, § 5, providing that all damages for land taken for a public highway shall primarily be paid by the city or town (Id.).

40. Damages cannot be recovered for personal inconvenience from the operation of a railroad near a residence in the absence of negligence. Oklahoma City & T. R. Co. v. Scarborough [Tex. Civ. App.] 16 Tex. Ct. Rep. 506, 95 S. W. 1089; Texas Short Line R. Co. v. Clifford [Tex. Civ. App.] 15 Tex. Ct. Rep. 804, 94 S. W. 168. Where the damages to land were due to the negligent construction of a ditch in the highway, which was not on plaintiff's land, they did not constitute a taking of or an injury to plaintiff's private property for which the county was liable. Zavalla County v. Akers [Tex. Civ. App.] 15 Tex. Ct. Rep. 176, 91 S. W. 245.

in the sense of "expropriation," that being also its proper meaning in the legislation relative to the exercise of the power of eminent domain.[42] The revocation by a city of a privilege given to construct a vault within a street, subject to the future requirement of the space occupied for public improvements, was not a taking of the property by the exercise of the power of eminent domain.[43] An act which attempts to make lawful a trespass by one man on the lands of another is an unlawful taking of private property for public or private use without just compensation.[44] The construction and operation of a city waterworks plant, in competition with a private plant operated under a franchise granted by the city, is not a taking of the company's property without due process of law within the meaning of the Federal constitution, nor without just compensation within the meaning of the Mississippi constitution.[45] The condemnation of a right of way across a placer mining claim, for an aerial bucket line for a mining corporation, when authorized by the laws and judicial decisions of a state, cannot be said to be a taking of private property for private use, in defiance of the Federal constitution.[46]

Exercise of police or taxing power.[47]—The requirement of compensation imposes no restriction on the exercise of the police[48] or taxing power,[49] but otherwise, the fact that a taking is for public benefit does not avoid necessity of compensation.[50]

Changing uses of streams and highways.[51]—The state may improve navigable streams for navigation purposes without compensating a riparian owner for any injury to his right to use the water for irrigation,[52] but ordinarily for the taking[53] or pollution of water[54] or the flooding of land,[55] compensation must be made.

41. Act No. 96, p. 142, of 1896, amending the general expropriation laws. Amet v. Texas & P. R. Co. [La.] 41 So. 721.

42. Amet v. Texas & P. R. Co. [La.] 41 So. 721.

43. Pabst Brewing Co. v. Thorley [C. C. A.] 145 F. 117.

44. Sess. Laws 1903, p. 233, c. 112, giving the public the right to fish in any stream stocked at public expense, subject to actions for trespass on property along the banks, so far as it attempts to legalize such trespass, contravenes Const. art. 2, § 15. Hartman v. Tresise [Colo.] 84 P. 685.

45. City of Meridian v. Farmers' Loan & Trust Co. [C. C. A.] 143 F. 67.

46. U. S. Const. 14th Amdt. Strickley v. Highland Boy Gold Min. Co., 200 U. S. 527, 50 Law. Ed. —.

47. See 5 C. L. 1108.

48. Flooding of land which can be prevented by raising the banks, interruption of access to lands, and impairment of navigation, caused by the erection of a private dam authorized by the legislature in the exercise of its police power of drainage of swamp lands, are not such a taking as requires compensation to afford due process of law. Manigault v. Springs, 199 U. S. 473, 50 Law. Ed. —. The imposition on a railway company of the entire cost of removing and rebuilding a bridge and culvert, necessary to the widening and deepening of the channel of the stream by drainage commissioners, was not such a taking of private property as requires compensation, under Illinois Farm Drainage Act of July 1, 1885 (Chicago, etc., R. Co. v. People, 200 U. S. 561, 50 Law. Ed. —), but the expense of removing the soil attendant upon such widening and deepening could not be imposed on the company without compensation (Id.).

49. The liens of separate tax bills against separate tracts of land for the improvement of a street on which they front are separate and distinct and one may be released without affecting the others. Ross v. Gates, 117 Mo. App. 237, 93 S. W. 856. An act authorizing an order for the inspection of a person's books by a county assessor to determine whether all property has been returned for taxation. Acts 1901, p. 100, c. 71; Const. U. S. Amd. 5. Washington Nat. Bank v. Daily [Ind.] 77 N. E. 53.

50. Where private rights are invaded by legislative authority in the interests of the general public, there is a taking or damaging for public use, within the meaning of the constitution, entitling the injured party to compensation, except perhaps where an exercise of the police power is involved. Vacation of street causing special injury to lot owner. Vanderburgh v. Minneapolis [Minn.] 108 N. W. 480.

51. See 5 C. L. 1109.

52. Bigham Bros. v. Port Arthur Canal & Dock Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 440, 91 S. W. 848. Interruption of access to lands and impairment of navigation, caused by the erection of a private dam across a navigable stream, authorized by the legislature in the exercise of its police power of drainage, is not such a "taking" as requires compensation. Manigault v. Springs, 199 U. S. 473, 50 Law. Ed. —.

53. Where it was sought to condemn a water power by raising a dam across a river, the fact that riparian owners were owners in severalty and no one of them owned land on both sides of the stream was no defense to the city's liability for compensation. Rankin v. Harrisonburg, 104 Va. 524, 52 S. E. 555.

54. Making a stream a part of the open

When a private right of way is enlarged into a public road by the joint action of the fee owner and the public authorities, neither the easement nor right of way is destroyed or injured and no right of compensation accrues.[56]

Establishment or vacation of streets.[57]—While there is no constitutional obligation to pay damages resulting from vacating a street,[58] it is within the power of the legislature to impose such burden on the commonwealth or its agents by statute.[59] Where, by the vacation of a street, a lot owner suffers an injury special and peculiar to his property, not common to the public at large, he is entitled to compensation,[60] but no recovery can be had where the damage is not special and peculiar.[61]

Establishment or change of street grade.[62]—At common law, municipal corporations were not liable to one whose land was not taken for damages resulting from a change of street grade, although he had made improvements according to a former grade,[63] and such common law remains in force in Virginia, except when changed by the constitution or statutes,[64] but such liability is now ordinarily imposed by statute where an established grade is changed,[65] though usually not for

sewer system of a city by discharging its sewage therein. Carpenter v. Lancaster, 212 Pa. 581, 61 A. 1113.

55. Where there is a practical destruction or material impairment of the value of one's lands by flooding consequent upon the construction of a private dam, authorized by the legislature to subserve drainage purposes, there is a taking which demands compensation (Manigault v. Springs, 199 U. S. 473, 50 Law. Ed. —-), but if the flooding is of minor extent and can be prevented by raising the banks, there is no such taking (Id.). Where land is carried away by water from an underground stream tapped in the construction of a tunnel under a street, the damage is an infringement and taking of property within the meaning of the constitution. Farnandis v. Great Northern R. Co., 41 Wash. 486, 84 P. 18. Where the erection of a dam for a municipal water power would throw water back over the lands of riparian owners, flood the river banks, increase the volume of water, destroy a ford, render lands more liable to overflow, and alter the natural flow and condition of the stream, such facts were sufficient to entitle owners to compensation. Rankin v. Harrisonburg, 104 Va. 524, 52 S. E. 555.

56. Clayton v. Gilmer County Ct., 58 W. Va. 253, 52 S. E. 103.

57. See 5 C. L. 1109.

58. Penrose Ferry Ave., 27 Pa. Super. Ct. 341.

59. Damages for the vacation of streets in Philadelphia were grafted into the general system of road damages by Act Apr. 21, 1858, P. L. 385, § 6. Penrose Ferry Ave., 27 Pa. Super. Ct. 341. Act May 16, 1891 (P. L. 75), contains no express or implied grant to property owners of right to damages for vacating a highway. Howell v. Morrisville Borough, 212 Pa. 349, 61 A. 932.

60. Plaintiff's property was left fronting a cul-de-sac or blind alley, cutting off his ingress and egress in one direction. Vanderburgh v. Minneapolis [Minn.] 108 N. W. 480.

61. Neighboring property owners, obliged by the discontinuance of a street where it crosses a railroad to go around by a new street and over a bridge to cross, suffer no damage for which they can recover. Hyde v. Fall River, 189 Mass. 439, 75 N. E. 953.

62. See 5 C. L. 1110.

63. Swift & Co. v. Newport News [Va.] 52 S. E. 821. In Oregon a change or alteration of the grade of a street may be made by lawful authority without liability to abutting property owners for consequential damages. Mead v. Portland, 200 U. S. 148, 50 Law. Ed. —-.

64. The previous constitution (art. 1, § 8; art. 5, § 14) provided only for compensation for property "taken," but under the present Const. art. 1, § 6; art. 4, § 58 (Va. Code 1904, pp. ccix, ccxxii), prohibiting the "taking" or "damaging" of property without compensation, an action may be had for such damage. Swift & Co. v. Newport News [Va.] 52 S. E. 821. A city, after the adoption of the present constitution, could not carry out proceedings to change a street grade begun under the prior constitution without making compensation for damages. Id.

65. Since the adoption of the constitution of 1877, a municipal corporation is liable to property owners for consequential damages from raising the grade of a street, destroying or impairing his ingress and egress. City of East Rome v. Lloyd, 124 Ga. 852, 53 S. E. 103, citing City of Atlanta v. Green, 67 Ga. 386. If a city grades its streets to make them more useful to the public, and private property is damaged thereby, the owner is entitled to an action against the city. Atlantic & B. R. Co. v. McKnight, 125 Ga. 328, 54 S. E. 148. When a railway company locates its road along a public street and changes the grade, it is liable to an abutting owner for damages resulting therefrom, although done with the consent of the municipality, it not appearing to be a part of a general plan of the municipality in grading streets. Id., distinguishing South Carolina R. Co. v. Steiner, 44 Ga. 546, and Campbell v. Metropolitan St. R. Co., 82 Ga. 320, 9 S. E. 1078, from Austin v. Terminal Ry. Co., 108 Ga. 671, 34 S. E. 852, 47 L. R. A. 755, and Ga. R. Co. v. Maddox, 116 Ga. 64, 42 S. E. 315. Where the grading of a street has the effect of damaging the property of an abutting owner, he is entitled to compensa-

damages resulting from establishing grade and conforming streets thereto.[66] Where a lot owner built houses to conform to an incorrect grade given by the city engineer and the city caused the street to be lowered to the correct grade, there was no change of grade for which the city was liable in damages.[67] Where an owner erects a building upon a street line after the establishment of a change of grade therein, he is not entitled to damages for such change.[68] In proceedings to take land for street purposes, an owner of land on an intersecting street, affected by grade changes thereof and not by the grade of the new street, is not entitled to damages for such changes,[69] and an owner who changes the position of his building to meet the change of grade in such intersecting street has no claim for damages therefor, regardless of the motives which induced the change of the building.[70] One whose land is not taken for the abolition of a grade crossing, but in front of whose house, only forty feet distant, a street nearly fifteen feet high is built, can recover the damages sustained.[71] Where the grade of a street is altered by the grant of a location of a street railway, it is not altered "for the purpose of repairing such way," within the meaning of the statute requiring compensation therefor.[72]

Railroads or other ways or structures on city streets.[73]—Where deeds describe property conveyed as parts of a platted tract and refer to streets thereon, the grantees acquire a right of passage over such streets and are entitled to damages wherever any part thereof is condemned for a use which interferes with such right of passage.[74] Although a railroad company can cross any highway outside of cities and villages without further condition than that it shall not unnecessarily impair the usefulness of the highway,[75] yet it cannot construct its railroad upon or across a city or village street without the consent of such municipality,[76] and under peculiar charter provisions the municipality has been held entitled to damages.[77] The location of a railway on any public way is an additional servitude entitling abutting owners to damages,[78] and also, the owner having a vested right in the easements of

tion. Graden v. Parkville, 114 Mo. App. 527, 90 S. W. 115.

66. The right of a borough to change the proper grades of unopened streets and the actual grades of those which have been improved cannot be questioned, property owners being entitled to have the resulting damages ascertained in the manner provided by law. Robinson v. Norwood Borough, 27 Pa. Super. Ct. 481. The fact that a street has been open and used for many years, and property owners have built thereon with reference to the natural grade, does not afford ground for recovery of damages because of a subsequent change to an established grade where it appears that the change was a reasonable one. Taber v. Bowling Green, 7 Ohio C. C. (N. S.) 385. The presentation of a claim for damages on account of a change of grade, as required by section 2315, as it stood at the time the improvement in this case was made, is a prerequisite to the right to recover damages because of such change. Id.

67. Moore v. Lancaster, 212 Pa. 642, 62 A. 109.

68, 69, 70. In re West Farms Road, 47 Misc. 216, 95 N. Y. S. 894.

71. Under Rev. Laws 1902, c. 111, § 153. Hyde v. Fall River, 189 Mass. 439, 75 N. E. 953.

72. Rev. Laws c. 51, § 15. Laroe v. Northampton St. R. Co., 189 Mass. 254, 75 N. E. 255.

73. See 5 C. L. 1110.

74. United States v. Certain Lands, 140 F. 463.

75. Any railroad company incorporated under Rev. St. ch. 114. City of Chicago v. Chicago Terminal Transfer R. Co., 121 Ill. App. 197.

76. City of Chicago v. Chicago Terminal Transfer R. Co., 121 Ill. App. 197. Such municipal grants of privileges in the streets are strictly construed and all doubts are to be resolved against the grantee. Id. They may be made conditional. Id. A power to cross a street with "one or more railroad tracks" construed not to be continuing but as exhausted by the construction of a single track. Id.

77. Under the provisions of its charter in force in 1901, the city of South Omaha was entitled to at least nominal damages for the condemnation of a railroad right of way over portions of its streets and alleys. Under that charter the fee of the streets was in the city with the right on vacating them to be paid by the abutters for the land reverting to them. It was held this constituted a valuable right in the city. City of South Omaha v. Omaha Bridge & Terminal R. Co. [Neb.] 107 N. W. 988.

78. De Lucca v. North Little Rock, 142 F. 597. St. 1894, p. 764, c. 548, §§ 8, 9. Peabody v. Boston El. R. Co., 191 Mass. 513, 78 N. E. 392. Affidavit that the construction of the railroad in the street would increase

light and air, for interference therewith.[79] The reverse is ordinarily true of an ordinary street passenger railway,[80] or of telephone poles and wires.[81] Where "damages" are allowable to abutters on a street taken for a street railway, they must be actually damaged in some special way.[81a] Where an electric street railway was organized under the railroad law instead of the street railroad act to operate through several counties and to transport passengers, baggage, mails, express, and milk, it was a commercial railroad and constituted an additional servitude upon the fee of the property owner to the center of the street.[82] A reservation of "wharves and wharfing privileges" in the dedication of an addition to a city does not include the right to appropriate a street for wharfage purposes without compensation.[83] The construction of a viaduct the whole width of a street is not an additional servitude.[84] Structures below the surface do not ordinarily impose an additional servitude,[85] but walls and embankments above the street level do.[86]

Use of rural highways for purposes other than general public travel.[87]—The construction and operation of a telegraph and telephone line upon a rural highway, not being a highway use within the purpose of the original dedication, constitutes an additional servitude upon the fee of the abutting owner for which he is entitled to compensation,[88] and the Federal statutes authorizing the construction of telegraph

the values of abutting property, properly excluded as irrelevant and immaterial. Atlanta, W. & P. R. Co. v. Atlanta, B. & A. R. Co., 125 Ga. 529, 54 S. E. 736. An owner of a lot which is depreciated in value by the operation of a railroad in the street is entitled to damages. Under Const. art. 1, § 17, prohibiting the taking of property for public use without compensation. Grossman v. Houston, etc., R. Co. [Tex.] 15 Tex. Ct. Rep. 572, 92 S. W. 836. The construction and operation of a railroad in the streets is an additional burden for which compensation must be made. Abbott v. Milwaukee Light, Heat & Traction Co., 126 Wis. 634, 106 N. W. 523. Where the reconstruction of a railroad occupying a street impairs an abutting property owner's right of access, he may recover under a statute authorizing recovery for damages. Little Rock & Ft. S. R. Co. v. Greer [Ark.] 96 S. W. 129. The construction of an ordinary steam passenger and freight railroad upon the streets of a city constitutes an additional servitude and abutting property owners are entitled to compensation for damages resulting to their property. Frazier v. East Tenn. Tel. Co., 115 Tenn. 416, 90 S. W. 620. The construction and operation of a railroad in a public street is a physical invasion of an abutting owner's easement of access, and is a damage to his property for which compensation must be made. Atlantic & B. R. Co. v. McKnight, 125 Ga. 328, 54 S. E. 148.

79. Owner protected against such interference where the railroad company substituted an elevated structure for its partly depressed roadbed, though the elevated structure did not extend beyond the lines of the former depressed roadbed. Rose v. New York & H. R. Co., 108 App. Div. 206, 95 N. Y. S. 711. Impairment of easements of air, light, and access in a street is actionable if the abutter's fee is injured, though the rental value is not diminished. Niewenhous v. Manhattan R. Co., 98 N. Y. S. 501. The running of trains below the surface of a street does not interfere with easements of light and air and access but the running of them on an elevated structure is a taking of such easements for which compensation is required. Caldwell v. New York & H. R. Co., 97 N. Y. S. 588.

80. Frazier v. East Tenn. Tel. Co., 115 Tenn. 416, 90 S. W. 620; De Lucca v. North Little Rock, 142 F. 597; Parsons v. Waterville & O. St. R. Co. [Me.] 63 A. 728.

81. Frazier v. East Tenn. Tel. Co., 115 Tenn. 416, 90 S. W. 620. See 4 Mich. L. R. 558.

81a. Birmingham R., Light & Power Co. v. Oden [Ala.] 41 So. 129.

82. Wilder v. Aurora, DeKalb & R. Elec. Traction Co., 216 Ill. 493, 75 N. E. 194.

83. Mead v. Portland, 200 U. S. 148, 50 Law. Ed. —.

84. De Lucca v. North Little Rock, 142 F. 597. Though the fee of streets is in the abutting owners, the public having only an easement therein. Id.

85. A water company can lay pipes in a public street without paying compensation to any one. Jayne v. Cortland Waterworks Co., 107 App. Div. 517, 95 N. Y. S. 227.

86. The construction of bridge approaches so high above the street level that access to an adjoining lot by driving is entirely cut off, and persons on foot must descend a flight of steps, is a taking of the property of the owner. Ranson v. Sault Ste. Marie [Mich.] 13 Det. Leg. N. 113, 107 N. W. 439. Where a stone embankment in a street on which a railroad was constructed, was increased in height as authorized by Laws 1892, p. 694, c. 339, thereby causing damages to plaintiff's premises exceeding her previous damages, such change was a taking of plaintiff's property entitling her to damages. Wallach v. New York & H. R. Co., 97 N. Y. S. 717.

87. See 5 C. L. 1111.

88. Cosgriff v. Tri-State Tel. & Tel. Co.

lines along "post roads," under certain conditions, do not affect the landowner's right to compensation.[89]

Additional servitudes on railways.[90]—Where a telephone line crossed a railroad, but the poles were not on the right of way and the wire was five feet above the telegraph wires beside the track, the obstruction was not sufficient to justify the cutting of the telephone wire, even though erected without consent of the railroad company and without condemnation proceedings.[91]

§ 5. *Conditions precedent to the exercise of the power; location of route.*[92]—Condemnation proceedings are purely statutory and every condition prerequisite to the exercise of the right must be strictly pursued.[93] Whether or not an offer to purchase is a necessary condition precedent to condemnation is purely a statutory question.[94] Such an attempt may be shown by oral evidence or by facts and circumstances.[95] The right to take possession is frequently dependent on payment or security for payment.[96] For certain projects[97] it is made necessary that a route or location be adopted[98] showing plan or profile or both[99] within which the lands to be taken must fall[1] at least substantially,[2] but immediate completion of all the proposed works is not necessary to hold the location.[3] A location on inalienable public land is naught and can support no taking of any lands.[4] A railroad company

[N. D.] 107 N. W. 525. **Contra,** see Hobbs v. Long Distance Tel. & T. Co. [Ala.] 41 So. 1003.

89. Rev. St. U. S. §§ 5263-5268 [U. S. Comp. St. 1901, pp. 3579-3581]. Cosgriff v. Tri-State Tel. & T. Co. [N. D.] 107 N. W. 525.

90. See 5 C. L. 1112.

91. McGowan v. State [Ala.] 40 So. 142.

92. See 5 C. L. 1112.

93. Johnson v. Philadelphia, etc., R. Co. [Del.] 62 A. 86; Broadmoor Land Co. v. Curr [C. C. A.] 142 F. 421.

94. City of Puyallup [Wash.] 86 P. 215. Under Civ. Code S. D., § 488, an effort to make an agreement is a condition precedent to the condemnation of a railroad right of way by one company over the track of another. South Dakota Cent. R. Co. v. Chicago, etc., R. Co. [C. C. A.] 141 F. 578. Held necessary on part of city which has power in "same way as by railroads." City of Durham v. Rigsbee [N. C.] 53 S. E. 531.

95. Southern Ill. & M. Bridge Co. v. Stone, 194 Mo. 175, 92 S. W. 475.

96. See post, § 22.

97. Railroad Law (Laws 1890, p. 1084, c. 565, § 6, as amended by Laws 1892, p. 1384, c. 676), requiring the filing of a map and profile, does not apply to a proceeding under Laws 1890, p. 1086, c. 565, § 7, as amended by Laws 1905, p. 2056, c. 727, for taking land for terminal facilities, where there is no change of route or new one laid out. New York, etc., R. Co. v. Ernst, 100 N. Y. S. 175. Boom companies. Under Ballinger's Ann. Codes & St. §§ 4378-4394. Nicomen Boom Co. v. North Shore Boom & Driving Co., 40 Wash. 315, 82 P. 412.

98. Where the location of the line of a railroad was made at a meeting of the trustees outside of Washington, the institution of condemnation proceedings within the state was a sufficient adoption of the line within the state to enable the company to condemn lands therein. State v. Superior Ct. [Wash.] 87 P. 40.

99. Rev. St. 1899, § 1056, requiring a railroad company to file a profile map in the county clerk's office of its proposed route before beginning its construction is not satisfied by map of a section of the route. Kansas City Interurban R. Co. v. Davis, 197 Mo. 669, 95 S. W. 881.

1. A resolution of the board of directors for the condemnation of a 40-foot strip of land for a railroad right of way, required by 22 Del. Laws, p. 794, c. 394, § 82, was insufficient to sustain a report of the commissioners of damages for the taking of defendant's land to the width of 42 2-10 feet in the widest part. Johnson v. Philadelphia, etc., R. Co. [Del.] 62 A. 86.

2. Where the charter of a railroad company states its purpose to be to construct a railroad upon a designated route, its right to condemn lands is limited to the route substantially as designated. Boca & L. R. Co. v. Sierra Valleys R. Co. [Cal. App.] 84 P. 298. A railroad corporation cannot condemn a crossing at a point fifteen miles beyond the terminals as designated in its articles of incorporation. Id. But under the description of its route, filed under Civ. Code, § 291, a railroad company was held entitled to condemn a crossing ¾ of a mile east of a town on its route. Id. A railroad company by stating, under Civ. Code, § 291, subd. 2, where one branch was to run, could not condemn a crossing on a different branch from that described. Id.

3. Where a boom company filed a plat or survey of the lands proposed to be appropriated for its use, as required by statute, it was required to construct its works upon such portion only as it required for immediate use and could retain the rest as against another company, for its future use. 1 Ballinger's Ann. Codes & St. §§ 4378-4394. Nicomen Boom Co. v. North Shore Boom & Driving Co., 40 Wash. 315, 82 P. 412.

4. The location of a railroad right of way upon lands of the state which, from considerations of public policy, it cannot acquire either by consent or condemnation does not invest it with the right to condemn other lands covered by such location. Sham-

can only condemn land for the specific road called for by its charter[5] or franchise, but the franchise need not be first procured[6] if a bona fide effort to do so is on foot.[7] It is not necessary that the power plant of an electric railway be near the line.[8] Where boom companies are required by law to file maps of location showing the shorelines and territory proposed to be used for booming purposes, they acquire by such filing rights analogous to those acquired by railroads upon the filing of their locations[9] and may prevent other companies, by injunction, from afterwards adopting and using conflicting locations.[10] Mere temporary nonuser of a portion of the territory so located is not an abandonment thereof,[11] a company being required only to construct its works over such portion of the territory as is necessary for the existing demands of its business and may use the balance of the territory for an extension of its works when required.[12] A statute providing that a one-year cesser of use of property acquired by a boom company by eminent domain shall vest title in the original owner does not apply to property acquired by purchase,[13] nor to lands acquired for future needs but which has never been used for booming purposes.[14]

§ 6. *Measure and sufficiency of compensation.*[15]—As a general rule the proper measure of damages as to property actually taken is the fair cash market value of such property at the time of taking,[16] with interest to the time of the award,[17] ir-

berg v. New Jersey Shore Line R. Co. [N. J. Err. & App.] 64 A. 114.

5. Kansas City Interurban R. Co. v. Davis, 197 Mo. 669, 95 S. W. 881. Cannot abandon a part of the chartered route, notwithstanding Rev. St. 1899, § 1161, providing that in case of forfeiture for noncompletion within the statutory period, it may operate the portion finished. Id. Hence where the charter authorizes a line from Kansas City to Lees Summit, the company cannot condemn a route to Swope Park, though on the chartered line, where the record shows an intention to stop there. Id.

6. The fact that land sought to be condemned for a terminal for a rapid transit railway was not mentioned in the franchise granted and the plan of route and terminals, did not necessarily prevent its condemnation, such land being necessary, and such railways being authorized to acquire such real estate. Under Laws 1891, p. 14, c. 4, § 23, in cities of over 1,000,000 inhabitants. Hudson & M. R. Co. v. Wendel, 98 N. Y. S. 341. A railroad company need not secure a franchise from a municipality before exercising the right of eminent domain within its limits (Memphis & S. L. R. Co. v. Union R. Co. [Tenn.] 95 S. W. 1019), and if a condition precedent a landowner could not raise the objection (Id.)

7. It is not necessary that an electric street railway corporation to connect two cities shall have secured its franchises and entire right of way to entitle it to condemn land for a public purpose. State v. Centralia-Chehalis Electric R. & Power Co., 42 Wash. 632, 85 P. 344. It is sufficient that it has obtained most of its right of way, is negotiating for the franchises which are practically agreed upon, that it is proceeding diligently and there is nothing shown to prevent its success. Id.

8. Under a statute authorizing the appropriation of property by an electric railway company for any corporate purpose, with no limitation as to location, land may be condemned for power purposes, however distant from the railway. Laws 1903, p. 366, c. 175, § 2. State v. Centralia-Chehalis Elec. R. & Power Co., 42 Wash. 632, 85 P. 344.

9, 10, 11, 12, 13, 14. That a boom company acquired a practical monopoly of the boom business on a river did not justify interference with its location by another company where the extent of the river would not permit the operation of more than one boom company thereon. Nicomen Boom Co. v. North Shore Boom & Driving Co., 40 Wash. 315, 82 P. 412. Diligence in construction depends upon circumstances. Plaintiff held not guilty of lack of diligence. Id.

15. See 5 C. L. 1113.

16. Chicago, B. & D. R. Co. v. Kelly, 221 Ill. 498, 77 N. E. 916; Swift & Co. v. Newport News [Va.] 52 S. E. 821; Brown v. Weaver Power Co., 140 N. C. 333, 52 S. E. 954. The constitution and the law require that the property owner shall receive such compensation that he will be as well off after the taking as he was before. Sanitary Dist. v. Pittsburgh, etc., R. Co., 216 Ill. 575, 75 N. E. 248. Where lands proposed to be taken have a market value, such value is the standard of just compensation. Id. Land forming a portion of a freight terminal of a railway station has no market value, and the market value of other property is no criterion of compensation for condemning it. Id. Instruction held to state the measure of damages sufficiently. Consolidated Traction Co. v. Jordan, 36 Ind. App. 156, 75 N. E. 301. An instruction held to make clear that the fair market value of the property at the time of taking should be made the basis of damages, and not purely imaginative or speculative value, and approved. Blincoe v. Choctaw, etc., R. Co., 16 Okl. 286, 83 P. 903. Where the condemnation is of a perpetual easement in an entire tract of land which has only a surface value, the measure of damages is the value of the land, the same as if the fee were taken. Dethample v. Lake Koen Nav., Reservoir & Irr. Co. [Kan.] 84 P. 544. In such case it was misleading and erroneous to instruct the jury that only an easement was taken and

respective of contingencies which may affect such value in the future.[18] Where only part of a tract of land is taken or injured, the measure of damages is the difference between the market values of the whole tract before and after the taking,[19]

the fee remained in the owner, without further instructing them that no value should be attached to such fee. Id. Where a county collects water in a ditch along a public road and discharges it upon land, the rule, as a measure of damages, that if the land is worth as much in the market after the injury as before no recovery can be had, does not apply. Tracewell v. Wood County Ct., 58 W. Va. 283, 52 S. E. 185. In an action by five out of seven tenants in common for damages caused by the construction of a public utility in a street, the measure of damages was five-sevenths of the total damages. Birmingham R. Light & Power Co. v. Oden [Ala.] 41 So. 129. In an action for damaging lands for a public use, the gist of the action is just compensation and not an invasion of a right, and hence nominal damages as such are not recoverable. Swift & Co. v. Newport News [Va.] 52 S. E. 821. The damage for land taken is not to be measured by its market value in the peculiar shape brought about by the condemnation. Long narrow strip. Caruthers v. Johnson County [Tex. Civ. App.] 94 S. W. 912. Under the provisions of Const. 2, § 22, and Kirby's Dig., § 2899, the owner of land taken for railroad purposes is entitled at the time of taking to all damages, present and prospective, which result from such taking. Little Rock, etc., R. Co. v. Greer [Ark.] 96 S. W. 129.

Evidence of value: In condemnation proceedings returns of the property for taxation, made by the owner's lessee, are not conclusive as to its value. Sanitary Dist. v. Pittsburgh, etc., R. Co., 216 Ill. 575, 75 N. E. 248. The jury may estimate the damages at less than the value of the premises as fixed by the opinion of any witness, where there is also testimony describing the property, the selling price of other property in the vicinity and that the property involved has no market value. City of Seattle v. Williams, 41 Wash. 366, 83 P. 242. The proper test of the value of land appropriated for railroad purposes is not the price paid at a particular sale but the general selling price in the neighborhood. Cleveland Terminal & V. R. Co. v. Gorsuch, 8 Ohio C. C. (N. S.) 297.

17. In re Opening of 178th St., 107 App. Div. 22, 94 N. Y. S. 838. The allowance of interest on an award for past or rental damages, against an elevated railroad company and in favor of an abutting owner, is discretionary with the court. Kerr v. New York El. R. Co., 49 Misc. 331, 96 N. Y. S. 1021. An award of such damages being made up to the date of the trial and interest on that sum computed only from the trial to the judgment. Id.

18. While the right to the exclusive use of a pier and relief from the burden of having vessels put in at a wharf may be subject to repeal, yet no repeal having been made at the time of the taking of the property, its value was to be estimated under the conditions then prevailing. In re Pier Old No. 15, East River [N. Y.] 78 N. E. 531.

19. Cox v. Philadelphia, etc., R. Co. [Pa.] 64 A. 729; Moudy Mfg. Co. v. Pennsylvania R. Co. [Pa.] 64 A. 373; Chicago, etc., R. Co. v. Kelly [Ill.] 77 N. E. 916; Freiberg v. South Side El. R. Co. [Ill.] 77 N. E. 920; In re Brooklyn Union El. R. Co., 99 N. Y. S. 222; Moudy Mfg. Co. v. Pennsylvania R. Co., 212 Pa. 156, 61 A. 906; Southern Pac. R. Co. v. Hart [Cal. App.] 84 P. 218; Warner v. Ford Lumber & Mfg. Co. [Ky.] 93 S. W. 650; Gorgas v. Philadelphia, etc., R. Co. [Pa.] 64 A. 680. The measure of damages to a landowner by making a stream a part of the open sewer system of a city is the difference between the value of the property before and after the injury. Carpenter v. Lancaster, 212 Pa. 581, 61 A. 1113. Defendant in condemnation proceedings is not entitled to recover damages sustained by property other than that directly involved in the proceedings. Louisiana R. & Nav. Co. v. Xavier Realty, 115 La. 328, 39 So. 1. Where 150 acres of land were entirely used for agricultural purposes, but 90 acres thereof had been subdivided into town lots, through which a railroad right of way was condemned, the owner could not have the damages assessed to the 90-acre tract alone. Gorgas v. Philadelphia, etc., R. Co. [Pa.] 64 A. 680. He could not show the number of lots that would be taken according to his plan of lots and the average value thereof. Id. The defendant is entitled to have the whole of the tract of land affected considered in the estimation of damages. State v. Superior Ct. [Wash.] 87 P. 40. Where the answer in condemnation proceedings alleged that other land described was a part of the tract described in the petition and it appeared that both descriptions constituted the same farm, the court should have described all the land in the order of condemnation. Id. Evidence as to whether, if defendant's lands were divided by the proposed road, they would not sell for more to respective adjoining owners, was properly excluded. Chicago, etc., R. Co. v. Kelly [Ill.] 77 N. E. 916. Where the effect of taking the land would be to require the removal of an annex to a building on land not taken, questions as to the effect of such removal on the value of the building were improper, but should have been directed to the effect on the fair cash market value of the land not taken. Freiberg v. South Side El. R. Co. [Ill.] 77 N. E. 920. The measure of damages to land not taken for a railroad right of way is not what some particular person, even though willing to buy, will give for the land, but what can be obtained for it in the market generally. Chicago, etc., R. Co. v. Kelly [Ill.] 77 N. E. 916. The measure of damages to property not taken is the diminution of its market value (Peirson v. Boston El. R. Co., 191 Mass. 223, 77 N. E. 769), and not a diminution of its mortgage value (Id.). Even if evidence of the diminution of its mortgage value be competent, which is at least doubtful, evidence that persons applied to were unwilling to loan on a mortgage on the property the amount before loaned on it, is not competent for that purpose. Id. And in the absence of any show-

including consequential damages to that not taken from the proposed use,[20] and in the absence of proof as to the extent of the proposed use, with a view to the most damaging possible use.[21] For a temporary taking the measure of damages is the rental value during the period thereof.[22] Value is sometimes computed from the

ing that there is a market for mortgages, whereby the same percentage of the market value can be borrowed on all properties, evidence of diminution in mortgage value is not competent to show diminution in market value. Id. If the realty not taken is not depreciated then no damages are to be allowed therefor; but if the taking, or the use of the part taken, causes any depreciation in the land not taken, damages are to be allowed therefor. Freiberg v. South Side El. R. Co. [Ill.] 77 N. E. 920.

20. The proper rule is to award not only the value of the land actually taken, but the consequential damage to the balance arising from the use to which the land taken was to be put. People v. Muh, 100 N. Y. S. 62. Where in the construction of a bridge and its approaches, the approaches are constructed in an existing street, the damages to abutting owners occasioned thereby are to be assessed; but where lands are condemned outside of the street, the value of the land taken and the damage to the residue caused by prevention of access to the street is to be assessed. Id. Measure of damages for land taken is the market value and damages to the rest of the land from the building of the railroad across it and from floods or overflows caused by the construction of the road. Pine Bluff & W. R. Co. v. Kelly [Ark.] 93 S. W. 562. Where the proposed use of property taken would depreciate the value of that which is not taken, such proposed use can be regarded and the depreciation arising therefrom be awarded as part of the consequential damages. People v. Muh, 100 N. Y. S. 62. When a part of a tract of land is taken, just compensation includes damages to the remainder. Id. For the construction of a telegraph line across land, under the power of eminent domain, compensation may be awarded both for the land actually taken and for all consequential damages arising from the erection of poles, wires and other fixtures (Postal Tel. Cable Co. v. Peyton, 124 Ga. 746, 52 S. E. 803), but proof must be made of the nature and extent of the consequential damages and data furnished for a reasonable and proper estimate thereof (Id.). Verdict held excessive, there being no evidence of consequential damages and the amount of the award being far in excess of the value of the land. Id. In Oklahoma, the damages awardable to one injured by the exercise of the right of eminent domain are not limited to the real estate taken and injured but extend to damages actually sustained to real or personal property. Blincoe v. Choctaw, O. & W. R. Co., 16 Okl. 286, 83 P. 903. The elements of disadvantage and burden imposed upon the land as a direct and necessary result of the location of the railroad upon it may be taken into consideration. Moudy Mfg. Co. v. Pennsylvania R. Co., 212 Pa. 156, 61 A. 906. Incidental damages may sometimes be considered as bearing upon the question of depreciation in value. Id. In condemning a railroad right of way through a stock farm, the jury may consider the increase in the risk of loss by fire and increased danger to stock, if any, only so far as it depreciates the market value of the land not taken (Chicago So. R. Co. v. Nolin [Ill.] 77 N. E. 435), damage to stock or from fire possibly resulting from the negligence of the railroad company being too remote (Id.). Instruction authorizing the jury to consider such possible damages held erroneous. Chicago & A. R. Co. v. Staley, 221 Ill. 405, 77 N. E. 437. An adjoining property owner is entitled to damages sustained by the noise and discomfort resulting from blasting operations in the construction of a railroad (Gossett v. Southern R. Co., 115 Tenn. 376, 89 S. W. 737), but no recovery of damages can be had for mere loss of sleep, discomfort and inconvenience not resulting in physical injury or impairment of health (Id.). The depreciation in the value of land not taken for a railroad right of way, because of the risk of fire from locomotives, may be considered, but not the possibility of the destruction of buildings. Erroneous instruction given. St. Louis Belt & Terminal R. Co. v. Mendonsa, 193 Mo. 518, 91 S. W. 65.

Contra: The only measure of compensation for the land taken is its fair cash value, independent of any consequential damages to other lands not taken. Prather v. Chicago So. R. Co. [Ill.] 77 N. E. 430. The only question for the jury, so far as the land not taken is concerned, is the amount of depreciation in its market value. Chicago So. R. Co. v. Nolin [Ill.] 77 N. E. 435; Chicago, etc., R. Co. v. Staley, 221 Ill. 405, 77 N. E. 437. The owner cannot recover damages for injuries to a boom on the river, resulting from a proper operation of the ferry. Warner v. Ford Lumber & Mfg. Co. [Ky.] 93 S. W. 650. In condemnation proceedings for a railroad right of way in adjacent street no compensation can be had for the additional nuisance of another intersecting road being compelled to stop and signal according to statute. Bracey v. St. Louis, etc., R. Co. [Ark.] 95 S. W. 151.

21. In the absence of any proof on the subject, the presumption is that a bridge, for which it is sought to condemn land for approaches, will be of such a character as to do the most injury to the remaining property of the land owner. Hadley v. Board of Chosen Freeholders of Passaic County [N. J. Law] 62 A. 1132. An instruction that the jury, in determining damages, should award them for the most injurious use that might reasonably and lawfully be made of a right of way, was erroneous, when there was nothing to indicate that such use would be made of the lands. Chicago & S. L. R. Co. v. Kline, 220 Ill. 334, 77 N. E. 229.

22. Where a railroad company instituted proceedings to condemn land for a right of way, took and held possession for a time and then abandoned it, the measure of damages was the rental value of the land taken and the damages resulting to the rest of the land.

time of beginning proceedings,[23] and in other jurisdictions from the decree unless there be a precedent actual taking.[24] Where the owner of land through which a railroad right of way is condemned receives the value of the land taken and the decreased value of the remainder, he cannot add the general increased value of the land in the community.[25]

Benefits.[26]—While benefits resulting from the improvement cannot be set off against the value of land taken, the value of such benefits as are direct[27] and peculiar to the land owner, as distinguished from those shared by him in common with other citizens,[28] should, unless statutes otherwise provide,[29] be set off against the damages to land[30] not taken.[31] If the property is worth more with the improve-

Pine Bluff & W. R. Co. v. Kelly [Ark.] 93 S. W. 562.

23. The value of land taken and damages to that not taken must be considered as it existed when the petition was filed (Chicago, etc., R. Co. v. Mines [Ill.] 77 N. E. 898), and not as it might reasonably be expected to be in the near future (Id.). In Utah the right to compensation and damages accrues at the date of the service of summons and the actual value of property at that date is the measure of compensation for property taken [under Rev. St. Utah 1898, § 3599] (Oregon Short Line R. Co. v. Jones, 29 Utah 147, 80 P. 732), but when property condemned for railroad purposes is held and used by the owner until the final order of condemnation, the service of summons is not a taking of the property within the constitutional provisions as to compensation (Id.), and the owner is not entitled to interest on the assessment of compensation from the date of service of summons to the verdict (Id.).

24. The damages for the taking of water from a stream for a reservoir are to be assessed as of the date of the taking. Stauffer v. East Stroudsburg Borough [Pa.] 64 A. 411. Where a railroad company took possession during condemnation proceedings, but before judgment fixing the damages, the amount should be fixed with reference to the time of taking possession. Under Const. art. 1, § 21, and Shannon's Code, § 1865, requiring the payment or securing of payment before taking possession. Chicago, etc., R. Co. v. Mogridge [Tenn.] 92 S. W. 1114.

25. Presumptively included. Panhandle & G. R. Co. v. Kirby [Tex. Civ. App.] 15 Tex. Ct. Rep. 827, 94 S. W. 173.

26. See 5 C. L. 1116. Assessment of cost of public improvements against benefited property, see Public Works and Improvements, 6 C. L. 1143.

27. In an action for damages for constructing a switch in front of property, evidence of the enhanced value of the property for warehouse purposes was not admissible, the property not being used for such purpose. Romano v. Yazoo, etc., R. Co. [Miss.] 40 So. 150. Where an increase in value of property is traceable directly to the presence of the railroad in the street, no judgment for damages for its construction can be maintained. Evidence held sufficient to sustain a finding that the increase in value of plaintiff's property, both fee and rental, was attributable to other causes. Schmitz v. Brooklyn Union El. R. Co., 97 N. Y. S. 791.

28. St. 1894, p. 764, c. 548, §§ 8, 9. Peabody v. Boston El. R. Co., 191 Mass. 513, 78 N. E. 392. In an action for damages by a change of street grade, the cost of grading, curbing, and macadamizing or improving the surface of the roadway was not a special benefit which could be set off against the damage to abutting property. Within Const. art. 2, § 21, forbidding damage to private property for public use without compensation. Widman Inv. Co. v. St. Joseph, 191 Mo. 459, 90 S. W. 763. The fact that a railroad company intends to build a depot and elevator on land adjoining a farm through which it seeks to condemn its right of way is not a special benefit where the deed of the land for the depot was made by a third party and could not be enforced by the land owner in case of default. Illinois, etc., R. Co. v. Borms, 219 Ill. 179, 76 N. E. 149. General benefits in increase of value or otherwise from the construction of the road, common to all in the vicinity, cannot be set off against damages caused by collecting water in a ditch along the road and casting it in a body on land. Tracewell v. Wood County Ct., 58 W. Va. 283, 52 S. E. 185.

29. Under the various statutes of Indiana relating to condemnation of lands for railroad rights of way, in the case of an electric interurban railway, damages should be assessed as in case of railroads [Civ. Code 1852, art. 41, § 683 et seq.; 1 Rev. St. 1852, p. 409 (Burns' Ann. St. 1901, §§ 5134, et seq., 5159, 5160); Burns' Ann. St. 1901, § 5468a, as amended by Acts 1903, p. 92, c. 34] (Indianapolis Northern Traction Co. v. Ramer [Ind. App.] 76 N. E. 808), and consequently no deduction should be made for benefits which may be supposed to result from the construction of the road (Id.). In Alabama the amount of compensation to which the property owner is entitled must not be reduced by accidental benefits. Code 1896, § 1718. Birmingham R. Light & Power Co. v. Oden [Ala.] 41 So. 129. In considering the damages caused by the construction of a public utility along a street, under Const. 227, the jury are not to consider whether such construction enhanced or decreased the value of an abutting owner's property. Id.

30. Equipment and fixtures in the soil of streets, used by public service corporations under their rights and franchises, cannot be assessed for benefits in street improvements. In re West Farms Road, 47 Misc. 216, 95 N. Y. S. 894.

31. Notwithstanding the different rule provided by § 11, St. 1894, p. 764, c. 548, for the assessment of damages for the taking of private land outside of ways. Peabody v. Boston El. R. Co., 191 Mass. 513, 78 N. E.

ment, then the excess of valuation is to be offset against the value of the easements taken.[32] The award of compensation for parts of lots taken to widen a street, and the assessment of the rest for benefits accruing from the improvement, did not constitute a taking without just compensation nor without due process of law.[33]

Particular elements of damage.[34]—Every element of value which would be considered on a private sale is to be taken into account,[35] including not only impairment of the present use[36] but the adaptability of the property to other uses.[37] The value of all improvements on the land[38] made before the initiation of condemnation proceedings,[39] and the consequential damages to other property not taken,[40] are to be allowed for. Where a municipality wrongfully takes possession of land and makes improvements thereon, in a subsequent proceeding to condemn such land the owner is not entitled to the value of such improvements on the theory that they were attached to the soil and were a part of the real estate,[41] but he can recover only the value of the land at the time it was taken,[42] but is entitled to the value of

392. In condemnation proceedings a railroad company is entitled to the benefits accruing to lands not taken or injured. Cox v. Philadelphia, etc., R. Co. [Pa.] 64 A. 729. The benefits accruing to the landowner by the operation of the road are to be deducted from the damages, in proceedings to condemn land for an interurban street railroad. Under Burns' Ann. St. 1901, § 5468a et seq. Carrell v. Muncie, etc., R. Co. [Ind. App.] 78 N. E. 254. Where land is condemned by a railroad company, the benefits peculiar to the portion of the land not taken and which are not common to the public at large can be set off against the damages assessed for the appropriating of the property. Southern Illinois & M. Bridge Co. v. Stone, 194 Mo. 175, 92 S. W. 475. The city of Philadelphia is liable for damages resulting from the vacation of streets, with the right to recover from property owners specially benefited, unless by a two-thirds vote of the councils the city elects to pay all the damages. Under the provisions of Act Apr. 21, 1858, P. L. 385, § 6. Penrose Ferry Avenue, 27 Pa. Super. Ct. 341.

32. In re Brooklyn Union El. R. Co., 99 N. Y. S. 222.

33. In re Pike St., 42 Wash. 551, 85 P. 45.

34. See 5 C. L. 1117.

35. Norfolk & W. R. Co. v. Davis, 58 W. Va. 620, 52 S. E. 724. Where the power of eminent domain is exercised in the erection of a dam for water power, the jury may consider as an element of damages the manner of the flow of water over plaintiff's land as it relates to and is connected with the flow over defendant's lands, as constituting effective water power (Brown v. Weaver Power Co., 140 N. C. 333, 52 S. E. 954), and in estimating damages the jury should also consider the fact that a railroad company owned a right of way over the lands in question (Id.).

36. The damage resulting to a farm by having a portion of it separated from the part having the buildings on it, thus rendering the farm more inconvenient for farming, could be considered. Prather v. Chicago Southern R. Co. [Ill.] 77 N. E. 430.

37. The proper inquiry is, what is the most advantageous uses to which the land may be applied? Norfolk & W. R. Co. v. Davis, 58 W. Va. 620, 52 S. E. 724; Cox v. Philadelphia, etc., R. Co. [Pa.] 64 A. 729. Not only the use for which the land may be maintained at the time of the proceedings, but also its adaptability to any and every useful purpose to which it may be put. Norfolk & W. R. Co. v. Davis, 58 W. Va. 620, 52 S. E. 724; Moudy Mfg. Co. v. Pennsylvania R. Co. [Pa.] 64 A. 373; Farnandis v. Great Northern R. Co., 41 Wash. 486, 84 P. 18; Gorgas v. Philadelphia, etc., R. Co. [Pa.] 64 A. 680. The owner may show that the lands were valuable for raising ducks, but could not show how many could be raised in a year so as to base the estimate of his damages on the profits thereof. Cox v. Philadelphia, etc., R. Co. [Pa.] 64 A. 729. The railroad company could not show in reply that the use of the land for duck raising would pollute a stream running through it to the injury of lower riparian owners, as that would be a matter concerning them alone. Id.

38. In awarding compensation for land taken for a railroad right of way, the jury should award the reasonable value of the land taken, the reasonable cost of fencing made necessary, the depreciation in market value of the whole or any part of the land, and the discomforts in the owner's residence by smoke, etc., from locomotives on the track. Shirley v. Southern R. Co. [Ky.] 89 S. W. 124. Where there is a well on land taken for street and sewer purposes in order to reduce the award of damages as to the well to the mere cost of digging a new one on land not taken, the burden is on the city to show that the new well is as good as the other. In re West Farms Road, 47 Misc. 216, 95 N. Y. S. 894.

39. In New York city, partial maps of an improvement filed before the completion of maps covering the whole district to be affected by the improvement are binding on the property owners [Laws 1893, p. 929, c. 443, amending Laws 1890, p. 965, c. 545] (In re Vyse St., 95 N. Y. S. 893), and damages cannot be awarded for parcels of land upon which buildings are erected after the filing of such partial maps (Id.).

40. See ante this section.

41. Land wrongfully taken by a school district and buildings erected thereon. Aldridge v. Board of Education, 15 Okl. 354, 82 P. 827.

the land as increased by the structures wrongfully erected.[43] But this rule applies only when the entry was as a willful trespasser, or there was some inequitable conduct sufficient to raise a counter equity.[44]

Taking rights in public way.[45]—The measure of damages for construction of a railway in a public street is the diminution in value of abutting property by the impairment of the easement,[46] and if the abutter owns the fee, the value of the property taken.[47] The measure for change of a street grade is the impairment of the value of abutting property.[48] In case of the taking of an easement over a railroad right of way, the amount of damage actually resulting is allowed.[49]

Amount of damages as dependent on estate or interest appropriated.[50] *Extent*

42. Aldridge v. Board of Education, 15 Okl. 354, 82 P. 827.

43. Village of St. Johnsville v. Smith, 184 N. Y. 341, 77 N. E. 617.

44. The company covenanted, in consideration of the right of way, to erect a passenger station and double track its road for a certain distance, but failed to fulfill such conditions. Baltimore, etc., R. Co. v. Bouvier [N. J. Eq.] 62 A. 868.

45. See 5 C. L. 1118.

46. Abbott v. Milwaukee Light, Heat & Traction Co., 126 Wis. 634, 106 N. W. 523; Birmingham R. Light & Power Co. v. Oden [Ala.] 41 So. 129. Where abutting owners were not owners of the street, it was proper to award them as damages the difference between the value of the property without the elevated road in the street and the consequential damages ascribed to the annoyance caused by noise, vibration, unsightliness of structure, and all other elements other than the value of easements of light, air, and access. In re Brooklyn Union El. R. Co., 99 N. Y. S. 222. Personal inconvenience and discomfort occasioned to an abutting owner by the operation of a railroad in a street gives rise to no cause of action for damages. Grossman v. Houston, etc., R. Co. [Tex.] 15 Tex. Ct. Rep. 572, 92 S. W. 836. The damages to abutting property by a change of a street grade are the difference in market value before and after the change, considering the location, the adaptability, the uses to which the property is put, and the effect of the change on its accessibility, and excluding benefits accruing to the owner in common with the general public. Warren County v. Rand [Miss.] 40 So. 481. In an action for damages owing to the maintenance of an elevated railroad in a street, the court's refusal to find that the easement of light, air, and access, aside from consequential damages, if any, had only a nominal value was reversible error. Schmitz v. Brooklyn Union El. R. Co., 97 N. Y. S. 791. Where a railroad company was by resolution of the common council authorized to lay its tracks in an avenue and afterward obtained a conveyance of part of the avenue, but the city acquired the fee in the avenue by subsequent condemnation proceedings, the abutting owners then had the same rights in the avenue as abutting owners in other streets. Caldwell v. New York & H. R. Co., 97 N. Y. S. 588. Where a railroad company erected a bridge over a street of which plaintiff owned the fee, placing pillars in the street to support the bridge, plaintiff was entitled as damages to the difference in value of his adjoining land with the street obstructed and unobstructed (Coatsworth v. Lehigh Valley R. Co., 100 N. Y. S. 504), but not unless he has suffered substantial damages by the obstruction of his right of way appurtenant to adjoining land (Id.) The measure of damage to abutting property from the laying of railroad tracks in the street is the decreased market value of such property. Texas Short Line R. Co. v. Clifford [Tex. Civ. App.] 94 S. W. 168.

47. Where a railroad condemns the whole of a dedicated street, the abutting owner is entitled to compensation for the full value of the land taken. Suffolk & C. R. Co. v. West End Land & Improvement Co., 137 N. C. 330, 49 S. E. 350.

48. The measure of damages to a building resulting from the change of grade of a street is limited to the damage caused by such change. New York City Charter, Laws 1901, p. 411, c. 486, § 980. In re Vyse St., 95 N. Y. S. 893. In an action for damages caused by the change of a street grade by a railroad company in constructing its line, evidence as to smoke, noise, dust, cinders, etc., may be considered by the jury, not as independent elements of damage, but in determining the value of the property after the construction and operation of the railroad. Atlantic & B. R. Co. v. McKnight, 125 Ga. 328, 54 S. E. 148. But plaintiff can recover only because his property is damaged thereby, and not because the occupant is inconvenienced by them. Id. The measure of damages for change of street grade is the resultant diminution in the market value of the property. City of East Rome v. Lloyd, 124 Ga. 852, 53 S. E. 103, afg. Roughton v. Atlanta, 113 Ga. 948, 39 S. E. 316; Widman Inv. Co. v. St. Joseph, 191 Mo. 459, 90 S. W. 763.

49. Where it is necessary to grade through a railroad right of way to make the proper approaches to the track, the company should be allowed, as damages for opening a highway across its right of way, such sum as the county would have been compelled to pay had the railroad never been built. Missouri Pac. R. Co. v. Cass County [Neb.] 107 N. W. 773. Where only an easement of crossing is taken for one railroad spur track over another, the compensation should be based only on the depreciation in value resulting from the joint use. Kansas City, etc., R. Co. v. Louisiana W. R. Co., 116 La. 178, 40 So. 627. Mere interruption or inconvenience, increased liability to accidents,

and sufficiency of damages.[51]—The term "damages to the owner" means the diminution of the value of the land not taken, by direct injury thereto, as to the whole ownership therein, legal and equitable.[52] The damages paid when a street is constructed are for all time and for all public purposes fairly contemplated at the time the land is taken.[53]

§ 7. *Who is liable for compensation.*[54]—Payment of compensation on the taking of private property is incumbent on the general government,[55] a municipality,[56] or a corporation proceeding under delegated power.[57]

§ 8. *Condemnation proceedings in general.*[58]—The proceeding being wholly statutory[59, 60] is not a civil action, nor is it necessary that it be conducted in the ordinary course of legal proceedings,[61] and is not within the purview of the general statute of limitations.[62] An injunction against trespass upon or damage to real property is no bar to expropriation proceedings as to such property.[63] Proceedings

and the stopping or flagging of trains at crossings, if required by law, are not elements of damage. Id.

50, 51. See 5 C. L. 1119.

52. Rev. St. 1898, § 1848. Stamner v. Milwoukee & S. L. R. Co. [Wis.] 109 N. W. 100.

53. Street railway not an additional burden. Parsons v. Waterville & O. St. R. Co. [Me.] 63 A. 728. Allowance of $4,000 as fee damages for impairment of easements of light and air by substitution of elevated railway, for a depressed roadbed, justified. Rose v. New York, etc., R. Co., 108 App. Div. 206, 95 N. Y. S. 711.

54. See 5 C. L. 1119.

55. The secretary of war cannot require county commissioners to tear down a bridge, wholly within the limits of a state, over a navigable river, on the ground that it is an unreasonable obstruction of navigation, without tendering compensation therefor. State v. Ashtabula County Com'rs, 7 Ohio C. C. (N. S.) 469.

56. The Pennsylvania act making boroughs liable for damages to property resulting from changes in street grades is constitutional. Act May 16, 1891, P. L. 75; Const. xvi, § 8. Nicholson Borough, 27 Pa. Super. Ct. 570. The provision of the statute for the assessment of benefits upon all property enhanced in value by the improvement of a street does not affect the liability of the borough for damages. Id. In Massachusetts, where the commissioners have by a valid order cast the expenses and damages, caused by taking land for highway purposes, upon the town, the county is not required to pay the land damages first and then recover from the town. Rev. Laws c. 48, § 52, in view of the history of legislation on the subject, construed not to require it. Livermore v. Norfolk County, 189 Mass. 326, 75 N. E. 724. A county, which collects surface water in a ditch along a public road and casts it in a body upon land, is liable for damages. Under Const. art. 3, § 9. Tracewell v. Wood County Court, 58 W. Va. 283, 52 S. E. 185.

57. Where a railroad company constructs and maintains its road in a street, as permitted by statute and with consent of the city, it is nevertheless liable for injury to an abutting owner's right of access to his property. Coats v. Atchison, etc., R. Co., 1 Cal. App. 441, 82 P. 640. A railroad company which raises a street grade, even with consent of the city, is liable for injury to abutting property. Yazoo & M. V. R. Co. v. Lefoldt [Miss.] 39 So. 459. Where a street railway company was granted the use of a street, it was not liable for a slight raising of the grade, reasonably necessary in the construction of its road. Laroe v. Northampton St. R. Co., 189 Mass. 254, 75 N. E. 255. A railroad company in constructing its road through an alley which has not been vacated is a trespasser and liable in damages to abutting owners. Mitchell v. St. Louis, etc., R. Co., 116 Mo. App. 81, 92 S. W. 111.

58. See 5 C. L. 1119.

59, 60. The provisions of the charter of Phillipsburg (P. L. 1872, p. 497, art. 5, § 1) for the condemnation of lands for new streets, having been superseded by the general act (Revision of 1900, P. L. 1900, p. 79), proceedings begun under the charter should have been taken under the general law. Lehigh Valley R. Co. v. Phillipsburg [N. J. Law] 62 A. 194. The provision of § 17 of the act of 1900 (P. L. 1900, p. 86), excepting from the act certain proceedings, does not include those provided for in the Phillipsburg charter. Id. Although Ballinger's Ann. Codes & St. § 944 authorizes condemnation of land by a city for public use only after failure to agree, yet the procedure in condemnation cases is regulated by Laws 1905, p. 102, c. 55, § 50. City of Puyallup [Wash.] 86 P. 215.

61. Sterritt v. Young [Wyo.] 82 P. 946. Condemnation proceedings are not common-law actions, and when such statutes meet the constitutional requirements and provide for notice to the parties affected they are valid though they do not provide for trial in the course of the common law. Board of Directors v. Redditt [Ark.] 95 S. W. 482. Act Feb. 15, 1893, p. 34, § 19, creating a levee district and providing for the acquisition of land as provided in similar cases, and Kirby's Dig. §§ 4944, 4945, authorizing the board to appear in the county court and cause a jury of 12 men to view and assess damages for property taken, and providing for notice to the owner, held to meet the requirements of Const. art. 12, § 9. Id.

62. Statute of limitations of Mar. 27, 1713. Stauffer v. East Stroudsburg Borough [Pa.] 64 A. 411.

63. Xavier Realty v. Louisiana R. & Nav. Co., 115 La. 343, 39 So. 6.

by a railroad company to condemn a right of way are within the meaning of the Federal judiciary act and are removable for diversity of citizenship where the jurisdictional amount is involved.[64] In a proceeding to condemn lands for a railroad, though there may be numerous property owners defendant, there is a single controversy presented as to the right to condemn, and the mere fact that a defendant is the owner of part of the lands does not create a separable controversy so as to enable him to remove the same to a Federal court.[65] Upon removal of condemnation proceedings under state law to the Federal court the power and procedure therein are regulated by the state statutes.[66] Where in proceedings to condemn land the only question was whether another party had an easement in the land, entitling him to compensation, a judgment against him in an action in which he claimed to own the fee did not operate as a bar.[67] The corporation in condemnation proceedings acts as the agent of the state.[68] In proceedings to condemn a right of way for an irrigating ditch on defendant's land, to carry waste and surplus water to plaintiff's land, the statutes for enlarging ditches and their use by others than the owners do not apply;[69] and in such proceedings neither the fact that plaintiff had not the right to appropriate the water, nor that there might not be sufficient water for her use, nor that her plan for using it might be impracticable, is of any importance,[70] nor was a judgment in an action involving plaintiff's right to construct a ditch, without having first secured the right of way, conclusive against plaintiff.[71] A charter provision that the council shall have the same jurisdiction to condemn for streets as the county court has for roads does not give the council power to condemn by itself, but merely to institute and prosecute condemnation proceedings in the proper court.[72] The object of the statutory proceeding in Arkansas for the condemnation of land for a railroad right of way is to ascertain the value of the land taken and the damages resulting to the rest of the land by the building of the road.[73]

Discontinuance or abandonment.[74]

Parties.[75]—In a proceeding by a corporation to condemn the rights of an abutting owner in a public highway, the municipality in which the highway lies is not a necessary party.[76] In Missouri the owners of all lands within the county or circuit to be taken, with whom the plaintiff has been unable to agree as to compensation, must be made defendants to the condemnation proceedings.[77] Under the statute

64. Act March 3, 1887, c. 373, § 1 [24 Stat. 552]; Act Aug. 13, 1888, c. 806, § 1, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508]. South Dakota Cent. R. Co. v. Chicago, etc., R. Co. [C. C. A.] 141 F. 578.

65. Proceedings under Rev. St. Wis. 1898, § 1845 et seq. Perkins v. Lake Superior & S. E. R. Co., 140 F. 906. In South Dakota a proceeding to condemn a railroad right of way against a number of defendants owning land in severalty presents a separable controversy with respect to each owner and is removable by a defendant for diversity of citizenship. South Dakota Cent. R. Co. v. Chicago, etc., R. Co. [C. C. A.] 141 F. 578.

66. Broadmoor Land Co. v. Curr [C. C. A.] 142 F. 421.

67. In re Water Front of New York, 98 N. Y. S. 1063.

68. Boca & L. R. Co. v. Sierra Valleys R. Co. [Cal. App.] 84 P. 298.

69. Mills' Ann. St. §§ 2256, 2257. Schneider v. Schneider [Colo.] 86 P. 347.

70, 71. Schneider v. Schneider [Colo.] 86 P. 347.

72. Town of Glasgow v. Mathews [Va.] 54 S. E. 991.

73. Other damages cannot be awarded. Pine Bluff & W. R. Co. v. Kelly [Ark.] 93 S. W. 562.

74. See 5 C. L. 1121.

75. See 5 C. L. 1122.

76. Philadelphia & C. Ferry Co. v. Intercity Link R. Co. [N. J. Law] 62 A. 184.

77. Rev. St. 1899, § 1264, held mandatory, notwithstanding § 1267 providing that any number of owners resident in the same county or circuit may be joined in one petition. Kansas City Interurban R. Co. v. Davis, 197 Mo. 669, 95 S. W. 881. Where by a statute all landowners with whom no agreement has been reached are necessary parties to a condemnation proceeding, and the answer alleges that the owners of all parcels of land sought to be condemned have not been made parties, an objection that the answer does not allege that no agreement can be reached with such parties cannot be raised for the first time on appeal. Id.

of Colorado authorizing the amendment of the petition at any time before final judgment by bringing in a new party defendant, a temporary restraining order at the suit of a nonresident owner ought not to enjoin the making of such owner a party, since he may remove the proceedings to the Federal court and there try the whole question of condemnation.[78] The purchaser of the interest of a litigant in property in controversy, and also involved in condemnation proceedings, may be permitted by the court to become a party to such proceedings.[79] Within Rev. St. Utah 1898, § 3594, requiring the complaint to contain the owners' names, one who filed a homestead entry but relinquished and canceled it on agreement with the board of land commissioners to select the lands under grant from the United States, to preserve his rights and to sell to him at a reasonable sum, he remaining in possession as an owner, was an owner.[80] But where the statute provides that all persons in occupation of the land or claiming an interest therein may appear and defend, it is not necessary to include all the owners or alleged owners in the complaint,[81] and under a statute providing for the continuance of proceedings in the name of the original party in case of the transfer of interest in the property, pending an action, it is not necessary that the purchaser be made a party in condemnation proceedings.[82] It is not necessary for the petition to make the resident owners of lands to be traversed by the road, but not described in the petition, parties to the proceeding.[83]

§ 9. *Jurisdiction.*[84]—The right of eminent domain cannot be enforced in equity, either on an original or cross bill,[85] the jurisdiction of the special tribunal provided being exclusive.[86] Where the court had jurisdiction of the parties and the subject-matter, the fact that there was no evidence to support the allegation of the petition that petitioner had endeavored to agree upon damages would not oust the court of jurisdiction.[87] In Louisiana a justice of the peace has no judicial function to perform, but acts ministerially only, and his actions therein may be controlled by mandamus.[88]

§ 10. *Applications; petitions; pleadings.*[89]—While formal pleadings are not required in many jurisdictions,[90] the necessary contents being frequently prescribed by statute,[91] if one undertakes to plead formally the ordinary rules of pleading ap-

78. Colorado Eastern R. Co. v. Chicago, etc., R. Co. [C. C. A.] 141 F. 898.

79. Eddleman v. Union County Traction & Power Co., 217 Ill. 409, 75 N. E. 510.

80. Brigham City v. Chase [Utah] 85 P. 436.

81. Rev. St. 1898, § 3595. Brigham City v. Chase [Utah] 85 P. 436.

82. Rev. St. 1898, § 2920. Brigham City v. Chase [Utah] 85 P. 436.

83. Rev. St. 1889, § 1264. Kansas City Interurban R. Co. v. Nelson, 193 Mo. 297, 91 S. W. 1036.

84. See 5 C. L. 1122.

85. Mobile, etc., R. Co. v. Hoye [Miss.] 40 So. 5.

86. Code 1892, c. 40, § 1679. Mobile, etc., R. Co. v. Hoye [Miss.] 40 So. 5.

87. Southern Illinois & M. Bridge Co. v. Stone, 194 Mo. 175, 92 S. W. 475.

88. Where a justice dismissed a petition filed by the attorney general on behalf of the state for the benefit of a railroad company, and the circuit court on mandamus sustained a demurrer to the petition, the judgment was not res judicata in proceedings by the company to condemn the same land. Sullivan v. Yazoo, etc., R. Co., 85 Miss. 649, 38 So. 33.

89. See 5 C. L. 1122.

90. Where a city charter does not require formal pleadings in proceedings to condemn land for streets, the filing of a motion averring that the ordinance providing for the street is invalid as taking property for private use sufficiently raises the issue of the character of the use. In re Twenty-First St. [Mo.] 96 S. W. 201.

91. The eminent domain act of Illinois prescribes the petition to be filed by an already existing and established corporation vested with power to condemn land [2 Starr & C. Ann. St. (2d Ed.) p. 1763, § 2] (Hutchins v. Vandalia Levee & Drainage Dist., 217 Ill. 561, 75 N. E. 354; Pittsburgh, etc., R. Co. v. Sanitary Dist., 218 Ill. 286, 75 N. E. 892), and a petition filed by property owners under the drainage act of May 29, 1879 (Laws 1879, p. 120), for the organization of a drainage district, cannot be regarded as a substitute for it (Hutchins v. Vandalia Levee & Drainage Dist., 217 Ill. 561, 75 N. E. 354). Hence the county court in a proceeding to organize such district, under the act of May 29, 1879, cannot invoke the provisions of the eminent domain act, where the petition required thereby has not been filed. Id. Laws 1885, p. 129, § 46, amending the act of May 29,

ply.[92] The petition must show the right of the petitioner to condemn,[93] the public character of the proposed use,[94] and the nature and extent of the proposed appropriation,[95] set out the proceedings prerequisite to condemnation,[96] and must allege the name of the landowner and the extent of his title[97] and the location of the land.[98] The allegations of the petition as to defendant's title are conclusive on

1879, authorizing drainage districts to proceed under the eminent domain act, applies only to the construction of additional drains or the repair of drains by districts already organized. Id. In New Jersey the necessary contents of a petition and the requisite verification are prescribed by the eminent domain act and a petition cannot be held insufficient for not stating matters not so required. Philadelphia & C. Ferry Co. v. Intercity Link R. Co. [N. J. Law] 62 A. 184. Though only petition and cross petition are contemplated by statute authorizing condemnation proceedings, record must show some sort of objection, issue, or traverse to justify court in deciding issue of title. Sanitary Dist. v. Pittsburgh, etc., R. Co., 216 Ill. 575, 75 N. E. 248.

92. Where the defendant in condemnation proceedings undertakes to plead formally and files a written answer, the ordinary rules of pleading should prevail and no affirmative defense not pleaded can be relied upon. Mason v. Iowa Cent. R. Co. [Iowa] 109 N. W. 1.

93. The allegations of the complaint must bring the condemning corporation substantially within the provisions of the statute upon which it relies and the proofs must sustain the essential facts as alleged. Morrison v. Indianapolis & W. R. Co. [Ind.] 76 N. E. 961. The right of eminent domain, involving as it does an attribute of sovereignty and an interference with private rights, must always be strictly construed, and the petition of a private corporation, claiming the right to exercise this power, must clearly set forth the grounds upon which its claims rest, and these allegations must be clearly proved. Central Union Tel. Co. v. Columbus Grove, 8 Ohio C. C. (N. S.) 81. In a condemnation proceeding brought by a foreign telephone company, the petition must allege, not only that the petitioner is a corporation of its home state, duly created for the purpose of erecting and maintaining lines of telephone within such state, but also that by its charter it is empowered to appropriate private property therein, and in the absence of such averments the petition is bad on demurrer. Id.

94. A petition alleging that the land is to be used as a right of way for a regularly organized and chartered railroad sufficiently shows that the land is to be subjected to a public use. Kansas City Interurban R. Co. v. Nelson, 193 Mo. 297, 91 S. W. 1036.

95. A petition to condemn a telephone right of way was fatally defective for failure to describe the size, number and location of poles to be erected, their height, etc., and the manner of stringing the wires. Suffolk County Tel. Co. v. Gammon, 99 N. Y. S. 295. An allegation in a petition of the necessity of the acquisition of the property, whether necessary or not, after the petition had already alleged that certain officials had passed upon the question of necessity, would not be stricken out as superfluous when it was not apparent how the allegation could harm the moving party. In re City of New York, 48 Misc. 602, 96 N. Y. S. 554.

96. A complaint in a proceeding to condemn land for a highway, showing a hearing after notice, that the land owner was represented, the approval of the viewers' report and award, the setting apart of the sum awarded, the drawing of the warrant therefor, and the owner's refusal for 10 days to accept it, was sufficient. Within Pol. Code §§ 2688, 2689, and Code Civ. Proc. § 1963, subds. 15-20. Mendocino County v. Peters [Cal. App.] 82 P. 1122. In Washington a petition by a city to condemn land for a public use need not allege the failure to agree as to the price. City of Puyallup v. Lacey [Wash.] 86 P. 215. Failure of the petition to state that petitioner had located its road over the strip sought to be condemned did not deprive the county court of jurisdiction, but the court could allow an amendment. Martin v. Chicago & M. Elec. R. Co., 220 Ill. 97, 77 N. E. 86. Where the charter of a city provided that land for streets should be condemned in the same way as by railroad companies, it was necessary for the petition to show a previous effort to acquire title. Facts held to show sufficiently such an effort on the part of the city. City of Durham v. Rigsbee [N. C.] 53 S. E. 531.

97. In Wisconsin the petition must state the names of the landowners [Rev. St. 1898, §§ 1846-1848] (Murray Hill Land Co. v. Milwaukee Light, Heat & Traction Co., 126 Wis. 14, 104 N. W. 1003), and on appeal from the award of the commissioners, such allegation is conclusive and the landowner is not required to prove his title (Id.). In an application to have an assessment of damages made by a sheriff's jury, for the taking of land for a railway, an allegation that plaintiff was the owner of "part" of a certain quarter section upon and over which the railway was located was a sufficient description of the property. Gray v. Iowa Cent. R. Co., 129 Iowa, 68, 105 N. W. 359. It is the duty of the petitioner to ascertain the title to the premises and to name the owner in the petition. Sanitary Dist. v. Pittsburgh, etc., R. Co., 216 Ill. 575, 75 N. E. 248. If the title of the owner of the premises is less than a fee simple, the petition should so state. Id.

98. A petition to the quarter sessions of a certain county to appoint viewers to widen a road in a township of said county sufficiently designates the county. Quemahoning Tp. Road, 27 Pa. Super. Ct. 150. A complaint describing a railroad crossing sought to be condemned as about ¾ of a mile eastward of a certain town, and showing the general route, termini, etc., of the

the petitioner, and defendant need not prove his title.[99] Where a lump sum is claimed as damages and the petition sets forth distinct items of damage, without specifying the proportion of the sum to each, testimony offered to support the claim is properly rejected.[1] Defects in the original petition may be cured by a petition for review.[2] The eminent domain act of Illinois expressly provides that the petition may be amended, even as to jurisdictional allegations.[3] The provision of the Illinois eminent domain act for the inclusion of separate parcels of land in the same petition does not require the separate parcels to be owned by the same person.[4] After a motion to dismiss has been overruled, a plea to the jurisdiction based on the same ground should not be entertained.[5] Under the Indiana statute the objections of defendant provided to be filed may fill the office of a demurrer and may present issues of fact defeating the condemnation,[6] and the provision in such statute that defendant's objections "shall be filed not later than the first appearance of such defendant," if it contemplates a filing on the day he is notified to appear, rather than that on which he does appear, is directory only.[7] The court on proper showing by defendant or by consent of plaintiff may permit a filing of objections by defendant's appearing after the time notified,[8] and a failure by the plaintiff to object to such filing of objections after the time fixed is a waiver of the requirement as to the time of filing.[9]

§ 11. *Process, notice, citation, publication.*[10]—As a general rule, notice to the landowner is essential,[11] but constructive notice from the proceedings themselves is often held sufficient.[12] Where the provisions of a statute prescribing the procedure for the condemnation of land for street purposes plainly imply notice to the owner and notice is in fact given, he is not deprived of property without due process of law.[13] In proceedings to condemn land for a street, the resolution condemning and appropriating the land is a legislative ex parte act of which the owner is not en-

lines of road, was sufficient under Code Civ. Proc. § 1244. Boca & L. R. Co. v. Sierra Valleys R. Co. [Cal. App.] 84 P. 298.

99. Sanitary Dist. v. Pittsburgh, etc., R. Co., 216 Ill. 575, 75 N. E. 248.

1. Louisiana R. & Navigation Co. v. Sarpy [La.] 41 So. 477.

2. The caption of the petition for review in the absence of the original petition from the record may be looked to to determine whether the termini, county, and township are sufficiently set forth. Quemahoning Tp. Road, 27 Pa. Super. Ct. 150.

3. The county court may permit the amendment of a petition that fails to allege that petitioner has located its line of road over the strip of land sought to be taken. Martin v. Chicago & M. Elec. R. Co., 220 Ill. 97, 77 N. E. 86.

4, 5. Martin v. Chicago & M. Elec. R. Co., 220 Ill. 97, 77 N. E. 86.

6. Act Feb. 27, 1905, § 5 (Acts 1905, p. 59, c. 48; 4 Burns' Supp. 1905, § 893 et seq.). Morrison v. Indianapolis & W. R. Co. [Ind.] 76 N. E. 961.

7. Act Feb. 27, 1905, §§ 3, 5 (Acts 1905 p. 61, c. 48; 4 Burns' Supp. 1905, § 893 et seq.). Morrison v. Indianapolis & W. R. Co. [Ind.] 76 N. E. 961.

8, 9. Morrison v. Indianapolis & W. R. Co. [Ind.] 76 N. E. 961.

10. See 5 C. L. 1124.

11. Statute not providing for notice denies due process of law. Sterritt v. Young [Wyo.] 82 P. 946. It must be legal notice and in the absence of any authority for notice by publication or posting, in a proper case, none but personal notice would be legal. Id.

12. Seizure is constructive notice and the character of the proceeding gives notice to the world. State v. Jones, 139 N. C. 613, 52 S. E. 240. Where it was matter of common knowledge, after the destruction by fire of the structures along the water front, that the city was acquiring property by condemnation for harbor and dock purposes, two weeks' notice of the commissioners' meeting to assess damages, four days' notice of the review of the assessment, and two weeks' notice of the right to appeal, are reasonable. Dyer v. Baltimore, 140 F. 880. Notice that the board of street commissioners deemed it necessary to relocate a certain watercourse and take land therefor, under a statute which authorized such taking only for "sewerage works," was sufficient notice of the taking of the land for such relocation and for sewerage works. St. 1897, p. 396, c. 426. Evans v. Boston, 190 Mass. 525, 76 N. E. 905. Where a town proceeds to take land for waterworks, it is immaterial that no personal notice is given to the owner of an easement therein, under St. 1893, p. 911, c. 277 (Inhabitants of Walpole v. Massachusetts Chemical Co. [Mass.] 78 N. E. 140), the notice by the public acts of the town and its officers, and the statutory registration required being sufficient (Id.).

13. Creedmoor Charter, Priv. Acts 1905, p. 1006, c. 398. State v. Jones, 139 N. C. 613, 52 S. E. 240.

titled to notice.[14] Although the statute of California for the condemnation of lands for levee purposes does not specifically require notice to property owners, the notice of the appointment of appraisers to examine the premises required by order of the court is sufficient notice of the proceedings;[15] but the statute of Wyoming for the condemnation of lands for irrigation ditches is unconstitutional in that there is no express provision for notice to the landowner of the time and place where he may be heard as to his damages, notwithstanding the requirement that he be notified of the appointment of appraisers.[16] The statutes of Washington authorize personal service on a defendant out of the state in condemnation proceedings.[17] When given under legislative authority, notice by publication is sufficient.[18] Under a statute authorizing service of process in condemnation proceedings on the agent of the owner, the agent may waive such service.[19] Where nonresident landowners entered a full appearance and filed pleas in bar, all question as to jurisdiction of their persons was waived.[20]

§ 12. *Hearing and determination of right to condemn.*[21]—Since the Indiana statute provides for a hearing and determination of all objections to the right of condemnation prior to the appointment of appraisers or the taking of the property,[22] it is not unconstitutional as a deprivation of property without due process of law.[23] The court may rightfully determine whether the petitioner has the power to exercise the right of eminent domain, whether the property is subject to that right and is being taken for a public use, whether the power is being abused and other kindred questions;[24] but it cannot deny the right to condemn, where such

14. State v. Jones, 139 N. C. 613, 52 S. E. 240. See 4 Mich. L. R. 485.

15. St. 1861, p. 358, c. 352, § 16. McCarty v. Southern Pac. Co., 148 Cal. 211, 82 P. 615.

16. Rev. St. 1899, §§ 897-900. Deprival of property without due process of law, contrary to Const. art. 1, § 6. Sterritt v. Young [Wyo.] 82 P. 946.

17. Laws 1905, c. 55, § 5, provides for service of summons in condemnation proceedings as in civil actions, and Ballinger's Ann. Codes & St. § 4875, authorizes personal service out of the state which shall be equivalent to service by publication. State v. Superior Ct. for Whatcom County, 42 Wash. 521, 85 P. 256. An affidavit that copies of the petition and summons were left with each defendant, and an affidavit that the party making the service was qualified, constituted proof of valid service. Id.

18. Where one of the attorneys of the railroad company made affidavit that the landowner's residence was unknown and after diligent inquiry could not be discovered, and the sheriff returned that after diligent inquiry he was unable to find him in the county, a service by publication was authorized under 2 Ballinger's Ann. Codes & St. § 5638. Moynahan v. Superior Ct. for Spokane County, 42 Wash. 172, 84 P. 655. The statute does not require a showing that the owner's residence was unknown to and could not be discovered by any of the corporation's officers or agents. Id.

19. Dees Bros. v. Harrison [Tex. Civ. App.] 95 S. W. 1093.

20. Douglas v. Indianapolis & N. W. Traction Co. [Ind. App.] 76 N. E. 892.

21. See 5 C. L. 1124.

22. Act Feb. 27, 1905 (Acts 1905, p. 59, c. 48; 4 Burns' Supp. 1905, § 893 et seq.). Morrison v. Indianapolis & W. R. Co. [Ind.] 76 N. E. 961. Where it is proper to file written objections to the proceedings prior to the appointment of appraisers, a right to the trial of such issues will be implied. Act Feb. 27, 1905, § 5 (Acts 1905, p. 61, c. 48; 4 Burns' Supp. 1905, § 893 et seq.). Id.

23. Morrison v. Indianapolis & W. R. Co. [Ind.] 76 N. E. 961.

24. Pittsburgh, etc., R. Co. v. Sanitary Dist., 218 Ill. 286, 75 N. E. 892. Where the corporate existence of a corporation seeking to condemn land is properly challenged, it is incumbent on the plaintiff to shows its de jure or de facto existence. Defendant challenged its corporate existence in objections filed under Act Feb. 27, 1905, § 5. Morrison v. Indianapolis & W. R. Co. [Ind.] 76 N. E. 961. Although the statute empowers a railroad corporation to condemn land "when duly organized" [Code 1896, § 1163] (Central of Georgia R. Co. v. Union Springs & N. R. Co. [Ala.] 39 So. 473), it cannot be urged to defeat condemnation proceedings that the certificate of incorporation, issued by the secretary of state, does not contain the names of the incorporators who signed the declaration of intention required to be filed (Id.). Where a corporation not organized for railroad purposes was authorized by the supervisors to build a railroad along a highway but was enjoined therefrom, and a railroad corporation was organized for the purpose, petitioning for a franchise and waiving the other franchise, the landowner, in proceedings to condemn a right of way, could not object on the ground of the nonconveyance by the former corporation of its right of way to the railroad corporation. Under Civ. Code, § 494, relating to sales of property by one railroad to another. Madera R. Co. v. Raymond Granite Co. [Cal. App.] 87 P. 27. The good faith of corporators in

right exists, on the ground that its exercise is unnecessary or inexpedient.[25] Where the answer in proceedings to condemn land for the extension of a street avers that the street is to be for a private purpose, it is the duty of the court to hear the evidence and dismiss the proceedings if it so finds.[26] While a corporation has primary discretion in determining what land is necessary to be taken,[27] the ultimate power is in the court to determine the necessity for taking.[28] Where the public value of the purpose for which land is sought to be condemned is dependent upon the successful termination of an independent condemnation action, final judgment therein should be withheld subject to the outcome of the other action.[29] Under the eminent domain act of New Jersey, the justice before whom condemnation proceedings are pending, can permit amendments and adjourn the hearing on the petition.[30]

§ 13. *Commissioners or other tribunal to assess damages; trial by jury.*[31]—In many states the parties have a constitutional right to a jury trial,[32] but that right may be waived, in some states, by failure to demand such a trial,[33] and statutes usually give a right to such jury,[34] and prescribe the manner of selection.[35] In

organizing the corporation cannot be questioned in proceedings to condemn lands for a railroad. Id. A corporation organized under the laws of one state and seeking to expropriate land in another, must meet the objection of the illegality of its organization by proof of the regularity thereof. Cumberland Tel. & T. Co. v. St. Louis, etc., R. Co. [La.] 41 So. 492. The right of a telegraph company to condemn lands cannot be defeated by showing that it is only a dummy company for a telephone company, without capital stock, organized for the purpose of enabling the telephone company to condemn land indirectly. Alabama & V. R. Co. v. Cumberland Tel. & T. Co. [Miss.] 41 So. 258. Under a statute prohibiting the condemnation of land for railroad purposes until the whole of the capital stock is subscribed, the corporation's books are admissible to show such subscription [Ballinger's Ann. Codes & St. § 4250] (State v. Superior Ct. [Wash.] 87 P. 40), and the fact that some of the stock has been subscribed by one as trustee is immaterial, since either the undisclosed principal or the trustee is liable (Id.).

25. Pittsburgh, etc., R. Co. v. Sanitary Dist., 218 Ill. 286, 75 N. E. 892.

26. In re Twenty-First St. [Mo.] 96 S. W. 201.

27. Wheeling, etc., R. Co. v. Toledo R. & T. Co., 72 Ohio St. 368, 74 N. E. 209.

28 Rev. St. 6420. Wheeling, etc., R. Co. v. Toledo R. & T. Co., 72 Ohio St. 368, 74 N. E. 209.

29. Independent proceedings to extend two streets so as to connect, each being a cul de sac if the other fails. In re Twenty-First St. [Mo.] 96 S. W. 201.

30. P. L. 1900, p. 86, § 17. Philadelphia & C. Ferry Co. v. Intercity Link R. Co. [N. J. Law] 62 A. 184.

31. See 5 C. L. 1125.

32. Const. Colo. art. 2, § 15. Broadmoor Land Co. v. Curr [C. C. A.] 142 F. 421.

33. Where a defendant landowner removed the proceedings to a Federal court, and appeared and answered therein on the date set for hearing, without at that time demanding a jury, he waived his right thereto. Broadmoor Land Co. v. Curr [C. C. A.] 142 F. 421. Const. 1875, art. 12, § 4, preserves the right of jury trial in condemnation proceedings and a party who excepts to the report of commissioners may have his damages assessed by a jury. Southern Missouri & A. R. Co. v. Woodward, 193 Mo. 656, 92 S. W. 476. The provisions of the drainage act of May 29, 1879 (Laws 1879, p. 120), as amended by Laws 1885, p. 108, authorizing the assessment of damages by commissioners instead of by a jury, are unconstitutional. Hutchins v. Vandalia Levee & Drainage Dist., 217 Ill. 561, 75 N. E. 354, citing Juvinall v. Jamesburg Drainage Dist., 204 Ill. 106, 68 N. E. 440. The provisions of drainage act (2 Starr & C. Ann. St. 1896, p. 1508, c. 42) par. 44, for the assessment of damages by a jury or commissioners is unconstitutional, as the landowner has the right to have a jury. Hull v. Sangamon River Drainage Dist., 219 Ill. 454, 76 N. E. 701.

In North Carolina, there is no constitutional provision guarantying a jury trial in condemnation proceedings (State v. Jones, 139 N. C. 613, 52 S. E. 240), but the right to condemn and the duty to pay compensation are recognized by the courts as a right and duty appertaining to sovereignty, which the state may exercise freely upon all proper occasions and which a jury has no right to control, except where an appeal is taken and tried in the nisi prius courts (Id.). And the right of a landowner to a jury trial is protected, in street opening cases, where provision is made for an appeal from the award of damages, to a court where all issues of fact are triable by jury. Id.

34. In Missouri, where the effect of grading a street is to damage an abutting property owner, he is entitled to compensation to be assessed by a jury or a board of commissioners, before the grading is done, under Const. art. 2, § 21. Graden v. Parkville, 114 Mo. App. 527, 90 S. W. 115. In Massachusetts, any person dissatisfied with the determination of damages by commissioners for the taking of water for a water supply, may claim a trial by jury to determine such damages. Under Pub. St. Supp. 1895, c. 488, §§ 14, 15. Carville v. Com., 189 Mass. 273, 75 N. E. 639. The report of the commissioners that petitioner was not entitled to damages

other jurisdictions compensation is assessed by commissioners, whose competency,[36] appointment,[37] and powers,[38] depend wholly on local statutes. An ordinary case of street opening, no more difficult than the usual cases, is not one in which the court can increase the compensation of the commissioners of estimate and assessment, under the statute permitting extra allowance in difficult or unusual cases.[39] Under the provisions of the Illinois eminent domain act authorizing the inclusion of separate parcels in the same petition and the assessment of compensation for each by the same or different juries as the court may direct, it will be presumed that such discretion was properly exercised in the denial of separate juries, in the absence of anything in the record to the contrary.[40]

§ 14. *The trial or inquest, and hearings on the question of damages.*[41]—Under the provision of the Illinois eminent domain act for the inclusion of separate parcels of land in the same petition, a property owner is not entitled to a separate trial as a matter of right.[42] Expropriation proceedings are to be tried summarily,[43] and a

should be entirely disregarded in passing on his motion for a jury trial. Id. The acceptance of such report, in the absence of a waiver, does not preclude the allowance of the motion for a jury trial, filed not later than the term succeeding the filing of the report. Id.

35. The wide scope given for selection, the narrow scope given for objection by the owner and the great weight attached to the jury's verdict make it the duty of courts to rigidly construe and enforce the requirements of the law touching the competency of jurors. Louisiana & A. R. Co. v. Moseley, 115 La. 757, 40 So. 37. The jury should be composed, as far as possible, of men not only without pecuniary interest in the object sought to be carried out, but also of men taking no special active steps towards its accomplishment. Id. In an expropriation case the jury should be taken as much as possible from the vicinage. Louisiana R. & Nav. Co. v. Morere, 116 La. 997, 41 So. 236. Where a jury was impaneled without objection and the case continued to another on the understanding that defendant would then answer, a motion to quash the venire on grounds known where the jury was impaneled, came too late. Louisiana R. & Navigation Co. v. Sarpy [La.] 41 So. 477. The lawful impaneling of a jury is a necessary incident to the ascertainment of the proper amount of damages. State v. Superior Ct. [Wash.] 86 P. 205.

36. In the absence of any statute prohibiting county commissioners from serving in proceedings for establishing a drain, where they are personally interested, such proceedings are voidable only and not void [Proceedings under Burns' Ann. St. 1901, § 5655 et seq.] (Carr v. Duhme [Ind.] 78 N. E. 322), and where such interest is disclosed by the record and is well known to the parties, the failure to make objection is a waiver of the disqualification to act (Id.). In Iowa the provision of law that the freeholders appointed to condemn property shall be the commissioners to assess all damages to the owners of land taken does not require that the jury to assess compensation must be the same persons who served in the condemnation of the property several years before. Code, § 2000. Gray v. Iowa Cent. R. Co., 129 Iowa 68, 105 N. W. 359. The qualifications of commissioners of estimate in condemnation proceedings are made the same as those of jurors by New York City Revised Charter (Laws 1901, p. 610, c. 466). Held that Code Civ. Proc. § 1027, as to the general qualifications of jurors, does not govern in New York county, but § 1079, as to the qualifications of jurors in said county. In re 112th and 113th Sts., 51 Misc. 337, 100 N. Y. S. 327.

37. Under the constitution and statutes of Colorado, it is the positive duty of the court to appoint commissioners on the request of the landowner [Const. Colo. art. 2, § 15; Mills' Ann. St. Colo. § 1720] (Broadmoor Land Co. v. Curr [C. C. A.] 142 F. 421), even though the request was for their appointment only to ascertain and determine the necessity of the proposed taking (Id.). The duty of the viewers in Pennsylvania being fully set forth in the statute, it is not necessary to include in the order of appointment a direction in detail to comply with the statutory requirements. Nicholson Borough, 27 Pa. Super. Ct. 570. The act of March 24, 1892 (P. L. p. 255), for permanent commissioners of assessment in first-class cities applies to an assessment of damages for taking land for a street in Newark, notwithstanding the general condemnation act of 1900 (P. L. p. 79), because of the exception in § 17. Morris v. Newark [N. J. Law] 62 A. 1005.

38. In Pennsylvania the damages occasioned by the improvement of a borough street are recoverable in a proceeding before viewers. Robinson v. Norwood Borough, 27 Pa. Super. Ct. 481. In Pennsylvania, in the condemnation of land for railroad purposes, it is the duty of the viewers to determine whether any damages have been sustained and then to fix the amount. Under Act Mar. 27, 1848 (P. L. 273). William H. Moudy Mfg. Co. v. Pennsylvania R. Co., 212 Pa. 156, 61 A. 906. In proceedings to condemn property for docks and wharves, the assessment of damages by a special commission appointed by the mayor of the city is valid. Under Act App. Mar. 11, 1904 (Laws 1904, p. 141, c. 87), known as the "Burnt District Act." Dyer v. Baltimore, 140 F. 880.

39. In re Butler St., 49 Misc. 609, 99 N. Y. S. 1109.

40. Martin v. Chicago & M. Elec. R. Co., 220 Ill. 97, 77 N. E. 86.

defendant, who waits until the jurors are assembled and the case is called to present exceptions involving both questions of law and fact, cannot insist upon a separate trial of the same before the judge.[44] Where in condemnation proceedings to widen a highway the ownership of the lands is not in issue but is expressly admitted, defendant has no right to open and close the argument.[45]

Admissibility of evidence.[46]—Commissioners are not bound down by any narrow, technical rules of evidence, but they may seek information wherever it is to be found.[47] When not too remote to be indicative of value,[48] evidence showing the value of the premises as distinguished from that of the business carried on there,[49] such as its rental value,[50] the condition and character of the land and improvements,[51] and the conditions wrought or to be wrought by the taking but not those affecting other premises,[52] or due to other public improvements,[53] its adaptability to prospective needs as bearing on present value,[54] admissions of value[55] of the owner

41. See 5 C. L. 1127.

42. Martin v. Chicago & M. Elec. R. Co., 220 Ill. 97, 77 N. E. 86.

43, 44. Louisiana & A. R. Co. v. Moseley [La.] 41 So. 585.

45. Mendocino County v. Peters [Cal. App.] 82 P. 1122.

46. See 5 C. L. 1127.

47. In re Brooklyn Union El. R. Co., 99 N. Y. S. 222.

48. Evidence as to whether the village in which the lands were situated was improving was too indefinite and properly disallowed. Martin v. Chicago & M. Elec. R. Co., 220 Ill. 97, 77 N. E. 86. Questions relating to the location of a naval school in the village were immaterial, in the absence of evidence that such location had been made (Id.), also questions of a witness as to what value he placed on lots in the vicinity of the tract in question (Id.), also questions concerning factory sites in the village and whether they were usually sold or donated, and how certain property near factory sites rented, etc. (Id.). Certain plans showing a certain manner of subdividing the tract in question into lots, and thereby illustrating a witness' testimony, were properly excluded. Id.

49. In proceedings to recover damages for the construction of an elevated railway, evidence is not admissible to show damage to business conducted on the premises affected [Proceedings under St. 1894, p. 761, c. 548] (Peabody v. Boston El. R. Co., 191 Mass. 513, 78 N. E. 392), but only to show the diminution in value of the property for use in the business (Id.).

50. In a suit for damages to a building resulting from an elevated railway in the street, it was within the court's discretion to admit or exclude a question as to what would have been a fair price for the use of a part of the building before the railway was constructed. Cotton v. Boston El. R. Co., 191 Mass. 103, 77 N. E. 698; Magee v. Oklahoma City & T. R. Co. [Tex. Civ. App.] 95 S. W. 1092. Rental value after the construction of the road. Texas Short Line R. Co. v. Clifford, 94 S. W. 168. In action for damages to land by construction and operation of elevated railway, it was proper to admit proof of rents received for several years prior thereto, in good faith and in the regular course of business. Levenson v. Boston El. R. Co., 191 Mass. 75, 77 N. E. 635.

51. In proceedings to condemn land by a water power company, the owner may show that the land was naturally adapted to reservoir purposes. Brown v. Forest Water Co., 213 Pa. 440, 62 A. 1078. In proceedings to extend a street across a railroad right of way, the city can show a way by user of less width than the street, to be considered in connection with defendant's evidence that the extension of the street would render its yards less useful and increase the cost of operation. Chicago Terminal Transfer Co. v. Chicago, 217 Ill. 343, 75 N. E. 499. Cost of building on land, built in good faith and under normal conditions, could be shown in action for assessment of damages to land by construction and operation of elevated road. Levenson v. Boston El. R. Co., 191 Mass. 75, 77 N. E. 635.

52. On the question of damages for the construction of a railroad along a highway over defendant's lands, it was proper to exclude evidence as to the condition in which the highway was left by plaintiff's grading at other points. Madera R. Co. v. Raymond Granite Co. [Cal. App.] 87 P. 27. In determining the damages for land taken for a railroad right of way, it was not error to admit evidence of a cut in the grade of the road along the land involved. Consolidated Traction Co. v. Jordan, 36 Ind. App. 156, 75 N. E. 301. Evidence that inhalation of particles of steel and iron, floating into a building from the operation of an elevated street railway, was apt to cause pulmonary affections and injure the health was admissible. Cotton v. Boston El. R. Co., 191 Mass. 103, 77 N. E. 698. On the effect of the operation of an elevated railway, the testimony of the keeper of a restaurant on the premises that customers on several occasions left because they could not talk and hear one another is relevant. Peirson v. Boston El. R. Co., 191 Mass. 223, 77 N. E. 769. Evidence of injury to furnishing by smoke, cinders, etc., is admissible as bearing on the diminution in market value. Texas Short Line R. Co. v. Clifford [Tex. Civ. App.] 15 Tex. Ct. Rep. 804, 94 S. W. 168.

53. In an action for damages caused to an abutting owner by the construction of an embankment along a street by a corporation constructing a public utility, it was error to admit evidence of the amount of material required to raise his lot up to a level with the rail on the embankment. Birmingham R. L. & Power Co. v. Oden [Ala.] 41 So. 129.

or appropriator,[56] are admissible on the value of the land and the damages. Sales of adjacent and similar land may be shown[57] when not too remote in time,[58] but not mere offers.[59] The presence of inducing motives in a sale aside from the value of the land renders evidence of the sale inadmissible, and such is the rule as to sales made to the condemning party for the same use[60] and speculative purchases.[61] Hence it may be shown in rebuttal that sales proven were made under exceptional circumstances not indicative of true value.[62] To prove value, such sales may be proved by parol evidence.[63] In determining whether plaintiff's property has been depreciated in value by the construction of certain stock pens and railroad yards nearby, it is error to admit evidence of an increase of value in dissimilar property.[64] The verdict of a jury in a case between other parties for the expropriation of similar property in the neighborhood is good evidence of value.[65] Decreased value is not

54. In proceedings to condemn part of a freight terminal of a railroad, evidence of the extent of business done there, as well as the capacity of the property for extension to meet the increasing demands of the business, is admissible. Sanitary Dist. v. Pittsburgh, etc., R. Co., 216 Ill. 575, 75 N. E. 248. It was proper to show that the land involved was adaptable to subdivision and its enhanced value therefore could be considered. Martin v. Chicago & M. Elec. R. Co., 220 Ill. 97, 77 N. E. 86. In determining the compensation to be awarded, reference should be had to use for which the property is suitable, having regard to existing conditions and the business wants that may be reasonably expected in the immediate future. Metropolitan St. R. Co. v. Walsh, 197 Mo. 392, 94 S. W. 860. Evidence of the increased value of property generally because of the acquisition of property by large industrial enterprises in the vicinity may be shown if such holdings were acquired prior to the condemnation proceedings. Id. Market value for residence purposes before and after the construction of such road is admissible to show diminution in market value. Texas Short Line R. Co. v. Clifford [Tex. Civ. App.] 15 Tex. Ct. Rep. 804, 94 S. W. 168.

55, 56. In condemnation proceedings against the owner and his mortgagee, an option contract executed by the owner alone to convey the land to petitioner on payment of a certain sum was inadmissible as an admission as against either party. Stamnes v. Milwaukee & S. L. R. Co. [Wis.] 109 N. W. 100. Where the plaintiff testified that the value of his property after the erection of defendant's elevated railway was from $7,800 to $10,000, evidence that he employed agents to sell it and named $17,000 as his price was admissible. Cotton v. Boston El. R. Co., 191 Mass. 103, 77 N. E. 698.

57. Evidence of voluntary sales of other lands is not admissible as tending to show the value of the land sought to be taken, unless such lands were in the same locality and of the same general character. Chicago, etc., R. Co. v. Kline, 220 Ill. 334, 77 N. E. 229. In determining the value of land bordering on a river, evidence of the price received by the landowner on the opposite side was admissible. Hadley v. Passaic County Chosen Freeholders [N. J. Law] 62 A. 1132. Evidence of the sale price of platted lots in the vicinity was inadmissible in determining the value of unplatted land sought to be condemned. Martin v. Chicago & M. Elec. R. Co., 220 Ill. 97, 77 N. E. 86. Where the value of land was affected by its distance from a city, evidence of sales of land much nearer the city was inadmissible. Chicago, etc., R. Co. v. Mines [Ill.] 77 N. E. 898.

58. In determining the value of property condemned, evidence of sales of similar property in the locality at or about the time is admissible. Metropolitan St. R. Co. v. Walsh, 197 Mo. 392, 94 S. W. 860. The price paid for neighboring property for a railroad right of way is admissible to show value, though the purchase was after suit brought. Louisiana R. & Nav. Co. v. Morere, 116 La. 997, 41 So. 236.

59. Evidence of offers to purchase other property in the neighborhood of the land in question, about the time of the institution of condemnation proceedings, was properly rejected. Blincoe v. Choctaw, etc., R. Co., 16 Okl. 286, 83 P. 903. Evidence that a witness had offered to sell defendant similar property in the vicinity at a certain figure and he had refused is inadmissible. Metropolitan St. R. Co. v. Walsh, 197 Mo. 392, 94 S. W. 860. Evidence of offers made by the condemning party in an endeavor to purchase the property is inadmissible. Id.

60. Metropolitan St. R. Co. v. Walsh, 197 Mo. 392, 94 S. W. 860. Evidence held sufficient to show that plaintiff had purchased certain lots for use with defendant's property. Id. Plaintiff is not precluded from taking advantage of error in admitting such evidence by subsequently introducing similar evidence. Id.

61. Evidence of speculative purchases is inadmissible on the issue whether plaintiff's property has been depreciated by construction of defendant's yards and railroad lines nearby. Dennis v. Dallas, etc., R. Co. [Tex. Civ. App.] 94 S. W. 1092.

62. Where the opinions of the landowners' witnesses as to the value of his land were based mainly on land sales in the immediate vicinity, the railroad company could show that such sales were made under special circumstances and that the prices received were in excess of the market value. Henkel v. Wabash Pittsburg Terminal R. Co., 213 Pa. 485, 62 A. 1085.

63. Louisiana R. & Nav. Co. v. Morere, 116 La. 997, 41 So. 236.

64. Dennis v. Dallas, etc., R. Co. [Tex. Civ. App.] 94 S. W. 1092.

relevant when other damaging causes have intervened.[66] Tax assessments not made at the market value of property are not relevant.[67] The amount paid by the owner of property sought to be appropriated for railroad purposes does not fix its present value[68] nor is its present value shown by evidence as to its value at a date remotely prior,[69] but both have a bearing on its present value and are admissible in evidence as tending to show present value.[70] He may show the value of his land separate from the building, and the value of the building separate from the land, and in the absence of all other evidence the aggregate of these two valuations should be taken as the value of the parcel.[71] The contract for the improvement for which the land is taken is not admissible for the landowner.[72] Evidence by the landowner as to the number of children in his family was properly excluded,[73] and so of evidence that a building on the land to be taken was so conducted as to violate city ordinances and the state laws was immaterial.[74] The notary's statement in an act that the price recited in the act is the true price, so far as he knows, does not make the act admissible as proof of value in an expropriation case.[75] The relative magnitude and importance of the proposed use may be admitted if it affects the value of the property remaining.[76] Maps and plats when resting on a proper foundation[77] may be admitted.

Opinions of witnesses as to the extent to which the property has been damaged are incompetent.[78] Expert evidence is admissible on the issue whether the property has been enhanced or depreciated by the improvement.[79]

In California the warrant drawn by the county for the award made on the taking of a highway is admissible in judicial proceedings to condemn it.[80] The opinion of experts as to the value of property before and after the change of a street grade is merely advisory and not binding on the jury.[81] In Pennsylvania the viewers' report is prima facie on appeal therefrom only when proceedings were under the act of 1903.[82] In proceedings to condemn a railroad right of way, along a highway over defendant's land, it was not prejudicial error to admit the testimony of a witness on the question of damages when the condemnation of the highway was be-

65. Louisiana R. & Nav. Co. v. Morere, 116 La. 997, 41 So. 236.

66. Under the New York act authorizing the presentation of claims for damages suffered by the improvement of Park avenue, but including no damages for which any railroad company might be liable, it was error to admit evidence showing a decrease in value of the property after the beginning of the running of trains. Laws 1901, p. 1787, c. 729. Sander v. State, 182 N. Y. 400, 75 N. E. 234.

67. Louisiana R. & Nav. Co. v. Morere, 116 La. 997, 41 So. 236.

68, 69, 70, 71. Cleveland, etc., R. Co. v. Gorsuch, 8 Ohio C. C. (N. S.) 297.

72. Carson v. Allegheny City, 213 Pa. 537, 62 A. 1070.

73. Shirley v. Southern R. Co. [Ky.] 89 S. W. 124.

74. Freiberg v. South Side El. R. Co. [Ill.] 77 N. E. 920.

75. Louisiana R. & Nav. Co. v. Morere, 116 La. 997, 41 So. 236.

76. Testimony that the company using the freight house adjoining the premises operates one of the largest systems in the country is proper because of the greater value of property thus located over that on an insignificant line. Cleveland, etc., R. Co. v. Gorsuch, 8 Ohio C. C. (N. S.) 297.

77. In condemnation proceedings, an unrecorded plat, made twelve years prior to the taking and not including all the land involved, is not admissible in evidence. Gorgas v. Philadelphia, etc., R. Co. [Pa.] 64 A. 680. A map shown to be incorrect and made by one who had no sufficient data as to the premises was properly excluded. Cox v. Philadelphia, etc., R. Co. [Pa.] 64 A. 729.

78. Bell County v. Flint [Tex. Civ. App.] 14 Tex. Ct. Rep. 256, 91 S. W. 329.

79. Swift & Co. v. Newport News [Va.] 52 S. E. 821.

80. In proceedings by a county to condemn lands to widen a highway, the auditor's warrant for the damages awarded was admissible in evidence. Under Code Civ. Proc. § 1870, subd. 1, providing that evidence may be admitted on the precise fact in issue. Mendocino County v. Peters [Cal. App.] 82 P. 1122.

81. Widman Inv. Co. v. St. Joseph, 191 Mo. 459, 90 S. W. 763.

82. Where a report of benefits and damages in proceedings under Act May 16, 1891 (P. L. 75), was appealed from, it could not be received as prima facie evidence of benefits, as provided by Act April 2, 1903 (P. L. 124), for reports of viewers in proceedings under the latter act. Carson v. Allegheny City, 213 Pa. 537, 62 A. 1070.

fore the court, the testimony being limited to the value of the land and it being shown that the value had not changed.[83]

Witnesses and examination thereof.[84]—Otherwise qualified[85] witnesses who are adequately informed of values indicative of the value of the land taken may give their opinions.[86] An expert can appraise lands after hearing the evidence without going to view it.[87] The danger of damage may be considered,[88] but such damages must not be included in the question propounded.[88]

A witness cannot be asked on his direct examination as to the money value of land similar to that involved.[90] Cross-examination as to offers to sell declined by the witness has been held improper,[91] but after testifying to extent of the decrease in value of the land not taken, it is proper cross-examination to ask the affect on segregated parts of the remaining tract.[92]

Instructions.[93]—Unless in issue the owner's title or interest should not be submitted.[94] Instructions are not erroneous, as assuming that the property has been damaged, because the court omitted to repeat in each instruction the words "if any" used in the first.[95] The measure of damages must be clearly and unambiguously stated[96] without singling out particular elements of value or depreciation.[97] The

83. Madera R. Co. v. Raymond Granite Co. [Cal. App.] 87 P. 27.

84. See 5 C. L. 1129. Photographs of costly residences in the vicinity of the land involved were inadmissible as tending to **impeach** a witness for petitioner **as to the value** of the land. Chicago, etc., R. Co. v. Kline, 220 Ill. 334, 77 N. E. 229.

85. The owner of property sought to be condemned is not disqualified to give his opinion as to its value because of his interest, but such interest may be considered by the jury. Metropolitan St. R. Co. v. Walsh, 197 Mo. 392, 94 S. W. 860. A person residing near the premises, who owns and has bought and sold land there and knows of other sales there, is not disqualified to give an opinion as to value, because he states that he would consider to some extent the amount paid him by plaintiff to compromise a proceeding to expropriate land owned by him and wife in the neighborhood. Louisiana R. & Nav. Co. v. Sarpy [La.] 41 So. 477. Such fact merely affects his credibility.

86. Required to have such knowledge of the subject-matter as can reasonably be expected in view of the circumstances of the case. A witness acquainted in a neighborhood where sales are infrequent is not required to have as full knowledge of values as in places where sales are frequent and of public interest and attention. Lally v. Central Valley R. Co. [Pa.] 64 A. 633.

They need know the value of the particular land or kind of land only and not general land values. Consolidated Traction Co. v. Jordan, 36 Ind. 156, 75 N. E. 301. In order that a witness may be admitted to testify as an expert as to value, it is sufficient that he shows he has some knowledge of the value of the property in question. Louisiana R. & Nav. Co. v. Morere, 116 La. 997, 41 So. 236. In proceedings to condemn part of land devoted to a public use, witnesses who knew the value of property so used were qualified to testify as experts, although they did not know the market value of land generally. Sanitary Dist. v. Pittsburgh, etc., R. Co., 216 Ill. 575, 75 N. E. 248. Property owners well acquainted with the property in question can testify as to its value when they know what owners are asking for property in the vicinity and the actual selling price thereof. Sutton v. Pennsylvania R. Co., 214 Pa. 274, 63 A. 791.

Knowledge must be founded on present conditions. A witness who has only a general knowledge of the value of property to be expropriated, derived from passing through on a railroad train and has not for six years kept in touch with property values elsewhere, is not qualified to enlighten a jury as to values. Louisiana R. & Nav. Co. v. Sarpy [La.] 41 So. 477. Witnesses could testify as to value of property in the neighborhood of a stream appropriated for a reservoir when the water was taken 15 years before, although their examination was made but a short time before the trial of the action for damages. Stauffer v. East Stroudsburg Borough [Pa.] 64 A. 411.

87. Louisiana R. & Nav. Co. v. Kohn, 116 La. 159, 40 So. 602.

88. A witness may base his opinion as to damages on the possibility of danger from sparks from locomotives. Illinois, etc., R. Co. v. Ring, 219 Ill. 91, 76 N. E. 83.

89. Southern Missouri & A. R. Co. v. Woodard, 193 Mo. 656, 92 S. W. 470.

90. Gorgas v. Philadelphia, etc., R. Co. [Pa.] 64 A. 680.

91. Metropolitan St. R. Co. v. Walsh, 197 Mo. 392, 94 S. W. 860.

92. Panhandle v. G. R. Co. v. Kirby [Tex. Civ. App.] 15 Tex. Ct. Rep. 827, 94 S. W. 173.

93. See 5 C. L. 1130.

94. Where condemnation proceedings were instituted after the landowner had recovered against the railway company in ejectment, and commissioners were appointed to ascertain the just compensation for the fee simple title to the strip, a requested charge that they were to consider whether the owner had dedicated the strip of land to public use was properly refused as opening up a question settled in the ejectment suit. Newport News & O. P. R. & Elec. Co. v. Lake [Va.] 54 S. E. 328.

95. Southern Missouri & A. R. Co. v. Woodard, 193 Mo. 656, 92 S. W. 470.

charge should eliminate elements of damage incident not to the taking but to the enjoyment and use of what was taken,[98] distinguishing elements of damage which otherwise might erroneously be considered or confused.[99] Where there was no stipulation as to when possession of the land should be taken, it was not error, if the time taken to remove part of the land would affect the amount of damages to the rest, to instruct the jury to estimate the damages on the basis of what should be the ordinary and natural consequences to the strip and the damages resulting therefrom.[1] An instruction to the jury to disregard the evidence given in open court and fix the value of damages only by their view of the premises was error.[2] An instruction as to the form of the verdict, providing that "we, the jury, find no other property will be taken or damaged," was erroneous where the evidence showed defendant entitled to damages for property not actually taken.[3]

§ 15. *View of appropriated premises.*[4]—The better rule seems to be that the jury, after a view and inspection of the premises, could exercise their own judgment, based upon their inspection and observation, together with all the evidence,[5] but it is also held that the jury is not permitted to view the premises for the purpose of gathering evidence, but for the purpose of better understanding the evidence adduced respecting the premises,[6] and such a view does not put the jury in possession of evidence, so as to preclude the supreme court from reviewing the facts, on the ground that all the evidence on which the jury based its verdict was not before it.[7]

§ 16. *Verdict, report or award; judgment thereon and lien or enforcement of judgment.*[8]—The report must contain a finding on every fact committed to the

96. Where the jury were instructed that the proper measure of damages was the market value of the land taken, it was not error to tell them to "keep in mind the interest to be taken in the lands," that having reference to the interests of others less than the fee and not meaning that the market value of the fee was not the proper measure. Prather v. Chicago Southern R. Co. [Ill.] 77 N. E. 430. An instruction that private property cannot be damaged for public use, except "on due compensation" first made, was not objectionable when the instructions as a whole properly stated the law. Warren County v. Rand [Miss.] 40 So. 481. A detailed explanation of the meaning of the words "market value" as set forth in a requested instruction approved. Metropolitan St. R. Co. v. Walsh, 197 Mo. 392, 94 S. W. 860. Charge defining the words "fair market value" approved. Id. In an action to recover damages to property by the construction of railroad tracks and other improvements nearby, an instruction that if "such improvements were placed there at the same time and in such manner as you cannot determine its proper market value from a preponderance of the evidence immediately before the construction of tracks, depot, and cotton platform on the purchased strip after the tracks had been constructed, you will find for the defendant," held incomprehensible and misleading. Magee v. Oklahoma City & T. R. Co. [Tex. Civ. App.] 95 S. W. 1092.

97. An instruction that the measure of damages to the abutting property from the laying of railroad tracks in the street is the difference in market value before and after, "taking into consideration the uses to which the property was being put," held not objectionable as singling out facts where such use was the only one for which the property was adapted. Texas Short Line R. Co. v. Clifford [Tex. Civ. App.] 15 Tex. Ct. Rep. 804. 94 S. W. 168.

98. The jury having been instructed not to consider remote or fanciful injuries, resting wholly in conjecture and not admitting of an estimate in damages, certain particular things being specified as such, an instruction that they could consider "any other things either annoying or hurtful and necessarily incident to the permanent location of a traction line across a farmer's premises" was **harmless.** Indianapolis Northern Traction Co. v. Dunn [Ind. App.] 76 N. E. 269.

99. In condemnation proceedings, a point calling attention to the necessity of distinguishing between the results of the operation of the railroad at or before the time of the taking and those which might follow an enlarged operation of the road should have been given. Sutton v. Pennsylvania R. Co., 214 Pa. 274, 63 A. 791.

1. Sanitary Dist. v. Pittsburgh, etc., R. Co., 216 Ill. 575, 75 N. E. 248.

2. Chicago, etc., R. Co. v. Mines [Ill.] 77 N. E. 898.

3. Chicago Terminal Transfer R. Co. v. Chicago, 217 Ill. 343, 75 N. E. 499.

4. See 5 C. L. 1130.

5. Blincoe v. Choctaw, etc., R. Co., 16 Okl. 286, 83 P. 903. Jury may consider, in connection with the evidence as to the value of the land, what they see while visiting and inspecting the premises, in determining questions of values, benefits and damages. Martin v. Chicago & M. Elec. R. Co., 220 Ill. 97 77 N. E. 86.

viewers.[9] An omission by the viewers in Pennsylvania to note in their report improvements along the road is not fatal; they may be noted upon the draft accompanying the report.[10] The viewers' report in Pennsylvania needs to be signed only by a majority of their number.[11] Their report need not affirmatively show that they met at the time and place designated in the notice, it being presumed, in the absence of evidence or inference to the contrary, that they did their duty.[12]

The damages to separate[13] tracts is ordinarily awarded separately. Likewise the amounts awarded for the value of the land taken and for the damages to the remainder should be stated separately,[14] though a joint judgment for both may be rendered,[15] the award being sometimes regarded as indivisible, covering the entire value of the land actually taken and the injury to that not taken.[16] In Washington several claimants have a right to separate awards of damages, except where there is a doubt or contest as to ownership or interests in the property, when they may be required to interplead after condemnation.[17] In New York, the award of the commissioners may be set aside for irregularity or error of law, or on the ground of excessiveness or insufficiency,[18] but the presumption is always that the commissioners acted within the law.[19]

Sufficiency.[20]—Omissions which can be supplied by clear intendment of other parts of the record may be ignored.[21]

6, 7. City of Seattle v. Williams, 41 Wash. 366, 83 P. 242.

8. See 5 C. L. 1130.

9. A report of viewers on the establishment of a road to the effect that the route selected passed through inclosures of more than one year's standing and that a good way could not be otherwise had without essentially departing from the route petitioned for showed that the viewers complied with the statute in such cases. Burns' Ann. St. 1901, § 6743, providing for viewing the premises and determining such questions. Baker v. Gowland [Ind. App.] 76 N. E. 1027. In proceedings to condemn land to improve the water front of a river, it was the duty of the commissioners to determine whether a grantee of a right of wharfage was entitled to damages in consequence of the taking of the property sought to be acquired. In re Water Front of New York, 98 N. Y. S. 1063. Condemnation proceedings under Laws 1882, p. 1, c. 410 and amendments, to improve the river front as authorized by Laws 1870, p. 366, c. 137, as amended by Laws 1871, p. 1231, c. 574, and amendments. Id.

10. Quemahoning Tp. Road, 27 Pa. Super. Ct. 150.

11. Where two of the three signed the report in due time, it was not vitiated by the fact that the third viewer did not sign it until the return day. Greenwood Township Road, 27 Pa. Super. Ct. 549.

12. Greenwood Tp. Road, 27 Pa. Super. Ct. 549.

13. Where land has been platted in acre tracts, but is still owned and occupied by one person and there are no physical evidences of platting or improvements, it is not necessary that compensation for taking a part for a right of way be assessed separately. Gray v. Iowa Cent. R. Co., 129 Iowa, 68, 105 N. W. 359. Where the viewers' report showed that the only property damaged by a change of street grade was a lot with a dwelling thereon, they did not err in considering another lot and dwelling contiguous thereto, but fenced off, as a separate property. Nicholson Borough, 27 Pa. Super. Ct. 570.

14. Where there is a number of items and the property is of considerable value, it may be of some assistance in ascertaining the amount to be fixed, if each item is considered separately. Louisiana R. & Nav. Co. v. Kohn, 116 La. 159, 40 So. 602.

15. Where the value of the land expropriated and the damages occasioned could easily be taken as one item, it was not illegal to consider them together. Louisiana R. & Nav. Co. v. Kohn, 116 La. 159, 40 So. 602.

16. Stamnes v. Milwaukee, etc., R. Co. [Wis.] 109 N. W. 100.

17. Session Laws 1895, p. 84, c. 55, §§ 8 (p. 87), 13 (p. 89). City of Seattle v. Park, 42 Wash. 151, 84 P. 644. Where, on appeal, the record showed 12 persons appearing at the trial, represented by counsel and apparently claiming interests in the property, it was presumed that there were doubts as to ownership and conflicting claims, and that the court did not err in dismissing cross-petitions for separate awards, and refusing to consider the claimants' several interests until after the award. Id. But it was the duty of the court to reinstate such cross-petitions as an interpleader and determine the respective interests of claimants, under Laws 1905, p. 89, c. 55, § 13. Id.

18. Code Civ. Proc. 3371. Mead v. Conger, 97 N. Y. S. 526.

19. Where the award made for land taken for a schoolhouse site was general, being a gross sum for the value of the land and necessarily including the consequential damages, the presumption prevailed, and the award could not be set aside as excessive. Mead v. Conger, 97 N. Y. S. 526.

20. See 5 C. L. 1131.

21. The omission to name the township in the petition, order of view and report, is not cause for the reversal of an order of

Effect or conclusiveness.[22]—A verdict is conclusive on all matters necessarily found in reaching the conclusion.[23] Statutes may validly attach prima facie force to a report.[24] In New York the judgment of the commissioners is to prevail, provided they have acted within the law.[25] In Indiana, on the filing of exceptions to the appraisers' report in condemnation proceedings by a street railway for a right of way, the question of damages is triable de novo,[26] and the burden is on the landowner to establish his damages.[27]

Judgment or confirmation and enforcement.[28]—Matters necessarily decided by the result reached need not be formally mentioned.[29] A proceeding had on notice and a hearing is conclusive[30] on those who stood as parties,[31] and binding in a subsequent proceeding;[32] but where appeals in three proceedings were consolidated and plaintiff elected to accept the awards made in the first two only, separate judgments entered therein did not operate as an adjudication of the claim of damages in the third proceeding.[33] Where the statute authorizes the court to modify or annul an assessment of benefits, it may order a per centum deducted from the amount originally assessed against property and make it a general charge against the city.[34]

§ 17. *Costs and expenses.*[35]—Proceedings to condemn land are civil actions within the meaning of the statutes regulating costs,[36] and such items only as the statute contemplates are allowable,[37] and a railway company, which in good faith dismisses condemnation proceedings pending the selection of the jury, is not liable to the landowner for expenses incurred in preparing his defense and not taxable

confirmation, where the terminl are so precisely described in the report as to leave no doubt of the location of the road. Quemahoning Tp. Road, 27 Pa. Super. Ct. 150.

22. See 5 C. L. 1131.

23. And where the route selected by the viewers ran through an inclosure exempt except in case of necessity and a jury trial resulted in favor of the establishment of a highway, the judgment properly followed the verdict and directed the establishment of the road on the route selected. Baker v. Gowland [Ind. App.] 76 N. E. 1027. A verdict in condemnation proceedings will not be disturbed on appeal, where the evidence is conflicting and the jury viewed the premises, in the absence of any showing of prejudice or excess of damages allowed. Illinois, etc., R. Co. v. Ring, 219 Ill. 91, 76 N. E. 83.

24. Local Improvement Act 1897, § 23 (Starr & C. Ann. St. Supp. 1902, c. 24, par. 59), making the commissioners' report prima facie evidence, being a mere rule of procedure, is not unconstitutional. Chicago Terminal Transfer R. Co. v. Chicago, 217 Ill. 343, 75 N. E. 499.

25. In re Brooklyn Union El. R. Co., 99 N. Y. S. 222.

26. Under Burns' Ann. St. 1901, §§ 5468d, 5468e, as amended by Acts 1903, p. 92, c. 36. Douglas v. Indianapolis & N. W. Traction Co. [Ind. App.] 76 N. E. 892.

27. Douglas v. Indianapolis & N. W. Traction Co. [Ind. App.] 76 N. E. 892.

28. See 5 C. L. 1131.

29. Where the report of re-reviewers was presented for confirmation and exceptions were filed thereto, and also a petition for another review, it was not error to confirm the report without formally disposing of the petition, as such confirmation was in effect a refusal of another review, the granting of which was discretionary. Greenwood Tp. Road, 27 Pa. Super. Ct. 549.

30. Where a party had due notice and an opportunity to be heard, in a proceeding to widen an alley, he could not again be heard to insist that the assessment of damages and benefits should be annulled, because the jury failed to make a correct assessment and apportionment, although it appeared to be a case of hardship. Brandenburg v. District of Columbia, 26 App. D. C. 140.

31. An order, made after an appeal, confirming the appraisal commissioners' report, was not conclusive on persons not parties to the appeal, nor to the subsequent proceedings. Cochrane v. Smadbeck, 99 N. Y. S. 5.

32. Where viewers reported an assessment of benefits for a street improvement, the landowner could not, on appeal, set off damages caused by the widening of the street under an ordinance passed nine months before, where the cost thereof had been assessed by other viewers in a separate proceeding. Duquesne Borough v. Keeler, 213 Pa. 518, 62 A. 1071.

33. Mason v. Iowa Cent. R. Co. [Iowa] 109 N. W. 1.

34. In re Pike Street, 42 Wash. 551, 85 P. 45.

35. See 5 C. L. 1132.

36. Burns' Ann. St. 1901, §§ 603, 924. Douglas v. Indianapolis & N. W. Traction Co. [Ind. App.] 76 N. E. 892. In Utah the allowance and taxation of costs in civil actions control in condemnation proceedings. Rev. St. 1898, § 3606. McCready v. Rio Grande Western R. Co. [Utah] 83 P. 331.

37. The term "costs" includes only such as are taxable under the statutes. Rev. St.

as costs.[38] Under a statute providing for the payment by the petitioner of all costs, expenses, and reasonable attorney fees of defendant,[39] the court can allow only such fees as the defendant is liable for, being restricted as to attorney fees by the contract between defendant and his attorney, or in the absence of any such contract to a reasonable allowance for services.[40] In New York where the award of the commissioners in proceedings to acquire land for a schoolhouse site exceeded the amount offered defendant for the land before proceedings taken, he was entitled to costs.[41] In New York, the submission of a written offer by one purporting to be the attorney of the landowner, but without proof of his authority to act as attorney, is not such a compliance with the statute as to entitle the owner to costs and extra allowance.[42]

§ 18. *Review of condemnation proceedings. The right to review*[43] is wholly statutory.[44] The payment of the award by the condemning corporation does not preclude it from appealing.[45]

Saving questions for review.[46]—Errors not fundamental cannot be first raised on appeal.[47] Motion for new trial is not necessary in Indiana.[48] Payment[49] or acceptance of payment[50] is ordinarily a waiver of error. The method of condemna-

1898, §§ 3181, 3190, 3605. McCready v. Rio Grande Western R. Co. [Utah] 83 P. 331.

38. McCready v. Rio Grande Western R. Co. [Utah] 83 P. 331. In proceedings to condemn land for an irrigating ditch, plaintiff cannot be compelled to pay defendant's attorney fees, the statute not providing therefor. Schneider v. Schneider [Colo.] 86 P. 347.

39. Laws 1897, p. 218, § 10. Chicago & S. Traction Co. v. Flaherty [Ill.] 78 N. E. 29.

40. An allowance of $800 held to be against the weight of evidence. Chicago & S. Traction Co. v. Flaherty [Ill.] 78 N. E. 29.

41. Mead v. Conger, 97 N. Y. S. 526.

42. Greater New York Charter (Laws 1901, p. 1, c. 466). Baker v. New York, 98 N. Y. S. 331. And where an attorney served notice on the city of appearance in behalf of another who claimed to own the lands in question with others, and afterward filed an offer by plaintiff as owner to sell the land, but made no proof as to his authority to act as attorney, his offer was properly rejected, as his notice of appearance showed that the land was claimed by another than the alleged owner in the offer to sell. Id.

43. See 5 C. L. 1132.

44. The provisions of the Greater New York charter for an appeal from the confirmation by the special term of the supreme court of the commissioners' report as to the value of land taken, to the appellate division [Laws 1897, p. 351, c. 378, §§ 986, 988] (In re Commissioner of Public Works [N. Y.] 78 N. E. 146), are not affected or controlled by the provisions of the Code of Civil Procedure applicable to appeals (Id.). In proceedings under Laws 1894, p. 288, c. 147, which makes applicable (§ 4) those charter sections, the appellate division cannot entertain an appeal from an order refusing to confirm the commissioners' report and returning it for further report. Id. Although, under Civ. Code, arts. 2636, 2637, defendant in condemnation proceedings may perhaps appeal suspensively from the judgment, Civ. Code, art. 2634 being possibly modified to that extent, it cannot be concluded that the latter article is repealed, in so far as it allows an appeal by plaintiff corporation as to the damages assessed, etc. New Orleans Terminal Co. v. Firemen's Charitable Ass'n, 115 La. 441, 39 So. 437.

45. Burns' Ann. St. 1901, § 5468e. Douglas v. Indianapolis & N. W. Traction Co. [Ind. App.] 76 N. E. 892.

46. See 5 C. L. 1133.

47. Defects in proceedings to widen a road, where no jurisdictional question is involved, cannot be considered on appeal, in the absence of exceptions thereto. Quemahoning Tp. Road, 27 Pa. Super. Ct. 150; Shirley v. Southern R. Co. [Ky.] 89 S. W. 124. Alleged irregularities in a proceeding to widen an alley under Act Cong. July 22, 1892, as amended by Act Aug. 24, 1894, were insufficient when not raised until after the award of the jury and then in a proceeding against the commissioners by certiorari to quash the assessment of benefits against the property involved. Brandenburg v. District of Columbia, 26 App. D. C. 140; Martin v. District of Columbia, 26 App. D. C. 146.

48. The statute of Indiana providing that there shall be no pleadings but the complaint, defendant's written objections and the exceptions to the appraiser's report, and that an appeal may be taken from an interlocutory order overruling the objections, but making no provision for a motion for new trial, no such motion need be made. Act Feb. 27, 1905, § 5 (Acts 1905, p. 59, c. 48; 4 Burns' Supp. 1905, § 893 et seq.). Morrison v. Indianapolis & W. R. Co. [Ind.] 76 N. E. 961.

49. Where, in proceedings to determine the value of property to be taken and damaged by regrading a street, the city paid the amount awarded by the jury after deduction of certain special benefits, it could not afterward urge the invalidity of the statute authorizing the proceedings, to justify an assessment for special benefits. Smith v. Seattle, 41 Wash. 60, 82 P. 1098.

50. On a claim that the acceptance of

tion of land is within the exclusive control of the legislature, limited by the organic law, and where the statute is strictly followed, the courts cannot aid a landowner, until the question of compensation is reached.[51] And where the owner excepted only to the amount of damages and demanded a jury trial of the damages assessed by the commissioners, on appeal to the superior court, he was bound by the verdict of the jury.[52] A general appearance in condemnation proceedings constitutes a waiver of error in denying a motion to quash the service of summons.[53]

Taking and perfecting an appeal.[54]—The appeal must be taken[55] and bond, if one be required, given[56] within the statutory time. In Kansas on an appeal to the district court from an award of damages made by a board of county commissioners, the appellant is not required to file a petition;[57] but if he does file a petition and alleges any facts therein which defeat the whole or any part of his claim, such facts are effective against him.[58] In Indiana, no formal complaint is necessary in an appeal from an assessment of benefits and damages under the statute relative to levees and dikes.[59]

Mode of review.[60]—On motion to set aside a judgment in condemnation, after entry by the clerk in the circuit court, on the ground of want of proper notice, the remedy on refusal of an order to vacate the judgment is not certiorari, but appeal.[61]

Decisions reviewable.[62]—Although the Greater New York Charter expressly authorizes any party affected by the confirmation of the report in a street opening case to appeal, in the manner provided in relation to special proceedings,[63] yet an order in proceedings for the construction of the Harlem river bridge was not appealable.[64]

Jurisdiction of appeal.[65] *Record.*[66]—As in other cases, all matter for the consideration of the appellate court must be duly brought into the record,[67] and every presumption favors the correctness of the record below.[68]

part of the award by the owner's predecessor estopped him to assert the invalidity of the proceedings, it did not appear that the owner knew of any such payment. McCarty v. Southern Pac. Co., 148 Cal. 211, 82 P. 615.

51. City of Durham v. Rigsbee [N. C.] 53 S. E. 531.

52. Revisal 1905, § 2588. City of Durham v. Rigsbee [N. C.] 53 S. E. 531.

53. Eddleman v. Union County Traction & Power Co., 217 Ill. 409, 75 N. E. 510.

54. See 5 C. L. 1134.

55. Acts 1903, pp. 377, 378, § 6, amending Code 1896, § 1720, limiting appeals to 30 days from final judgments in condemnation proceedings, applies to all judgments rendered after the passage of the act and any appeal taken after 30 days will be dismissed. Galloway Coal Co. v. Walker [Ala.] 40 So. 216.

56. In Kentucky on appeal from the county to the circuit court, the appeal bond, statement of the parties, and transcript of the orders of the county court must be filed within 30 days after judgment, and a failure to execute the bond within such time necessitates the dismissal of the appeal. Kotheimer v. Louisville & I. R. Co. [Ky.] 89 S. W. 104.

57, 58. Walbridge v. Russell County Com'rs [Kan.] 86 P. 473.

59. 2 Horner's Ann. St. 1901, § 7326. Lewis Tp. Imp. Co. v. Royer [Ind. App.] 76 N. E. 1068. The statute requires only a written statement of the date of the assessment, a description of the lands and a brief specification of the grounds of complaint. Id. Allegations that the construction of the levee would cause the water to overflow appellant's land were sufficient, without stating how, that being a matter of evidence. Id.

60. See 5 C. L. 1133.

61. Ex parte Postal Tel. Cable Co., 72 S. C. 552, 52 S. E. 676.

62. See 5 C. L. 1134.

63. Laws 1901, p. 417, c. 466, § 988; Code Civ. Proc. § 1356. In re Commissioner of Public Works, 97 N. Y. S. 503.

64. Proceedings under Laws 1894, p. 286, c. 147. Code § 1361, requires appeals in special proceedings to be governed by the general rules of practice, unless otherwise prescribed, and the appeal in street opening cases is prescribed to be from the order "confirming a report." In re Commissioner of Public Works, 97 N. Y. S. 503.

65. See 5 C. L. 1134.

66. See 5 C. L. 1135.

67. The ruling on a motion to dismiss a petition can be preserved for review only by a bill of exceptions duly settled. Cella v. Chicago & W. I. R. Co., 217 Ill. 326, 75 N. E. 373. A motion in arrest does not preserve for review a ruling denying a motion to dismiss the petition. Id.

68. Where a petition in condemnation proceedings alleges a charter to construct a railroad to a certain point and the filing

Hearing and scope of review.[69]—Errors not assigned[70] and urged[71] will not be considered. In Washington an appeal from any final judgment brings up for review any order made in the action, either before or after judgment, and a city may appeal from an order dismissing a petition in condemnation proceedings.[72] Where an appeal to the circuit court in condemnation proceedings, by exceptions to the award, is provided for, preliminary objections to the service and the appointment of appraisers are not brought forward by such appeal and are not reviewable on appeal to the supreme court.[73] Under a statute providing that an appeal from the judgment for damages shall bring before the supreme court the propriety and justness of the amount of damages in respect to the parties appellant,[74] the adjudication as to the public use and necessity cannot be reviewed on appeal, but only by certiorari.[75] But an objection that the jury was illegally impaneled was reviewable on such appeal and certiorari was not available.[76] Except where a trial de novo is allowed,[77] rulings on questions of fact[78] and matters addressed to the discretion of the court below[79] will be disturbed only for palpable error.

of a map of "said railroad" and the evidence shows that the charter provides for a line to another point, the failure of the appellant landowner to incorporate such map in the appeal record does not raise a presumption that the map corresponded to the charter. Kansas City Interurban R. Co. v. Davis, 197 Mo. 669, 95 S. W. 881. An award of damages, as to one of two adjoining parcels of land affected by a change of grade, cannot be held erroneous in principle in view of the award as to the other, where there is nothing in the record inconsistent with the conclusion that the parcels were different in character, so far as the structural condition of buildings thereon were concerned. In re West Farms Road, 47 Misc. 216, 95 N. Y. S. 894. Where a view is without evidentiary purpose but is merely an aid to the application of evidence it cannot be said that the record fails to present all the evidence because of the impossibility of reproducing the information gathered from the view. City of Seattle v. Williams, 41 Wash. 366, 83 P. 242.

69. See 5 C. L. 1135.

70. Where the overruling of a demurrer is not assigned as error, it cannot be reviewed. Illinois, etc., R. Co. v. Ring, 219 Ill. 91, 76 N. E. 83.

71. Objections to the sufficiency of the complaint not pointed out or urged on appeal will be considered as waived. Morrison v. Indianapolis & W. R. Co. [Ind.] 76 N. E. 961.

72. Laws 1905, p. 102, c. 55, § 50, providing that the procedure under the eminent domain act and in the matter of appeals shall be the same as in civil actions, does not restrict the right of review to the question of damages, but Ballinger's Ann. Codes & St. § 6500, subd. 1, applies. City of Puyallup v. Lacey [Wash.] 86 P. 215.

73. Stoy v. Indiana Hydraulic Power Co. [Ind.] 76 N. E. 1057.

74. Ballinger's Ann. Codes and St. § 5645. State v. Superior Ct. [Wash.] 86 P. 205.

75, 76. State v. Superior Ct. [Wash.] 86 P. 205.

77. Under a statute requiring a trial de novo on appeal, the whole question of damages is properly submitted to the jury, though no exceptions were taken to that part of the commissioners' report which ascertained the damages to land not taken. Shirley v. Southern R. Co. [Ky.] 89 S. W. 124.

78. Where two juries have assessed damages nearly alike and their verdicts have been sustained by a preponderance of evidence, the supreme court will not disturb the last verdict. Louisiana & A. R. Co. v. Moseley [La.] 41 So. 585. In case of railroad crossings, where nothing is taken but the joint use of small portions of spur tracks and the injury to the rest is but doubtful, the award of a jury who have viewed the premises and know the surroundings will not be disturbed on appeal. Kansas City, etc., R. Co. v. Louisiana W. R. Co., 116 La. 178, 40 So. 627. Where the evidence is conflicting and the jury viewed the premises, the verdict will not be disturbed as excessive or inadequate, unless manifestly against the weight of evidence. Prather v. Chicago Southern R. Co. [Ill.] 77 N. E. 430. In the absence of obvious error in the application of the law, the award of commissioners, approved by the court at special term, will not be disturbed. In re Brooklyn Union El. R. Co., 99 N. Y. S. 222. An exception in the court below based upon a question of fact will be presumed to have been properly determined by that court. Quemahoning Tp. Road, 27 Pa. Super. Ct. 150. Where the evidence is conflicting and there is nothing to show that injustice has been done or that passion or prejudice influenced the action of the jury, the verdict will not be disturbed. Martin v. Chicago & M. Elec. R. Co., 220 Ill. 97, 77 N. E. 86.

79. The question whether a separate trial shall be granted in condemnation proceedings against several defendants rests within the discretion of the trial court and will not be interfered with in the absence of a showing of abuse. Eddleman v. Union County Traction & Power Co., 217 Ill. 409, 75 N. E. 510. The discretion reposed in the proper borough authorities cannot be reviewed by the courts. Robinson v. Norwood Borough, 27 Pa. Super. Ct. 481. Where a plan has been regularly adopted, it is

Decision and determination.[80]—Reversal will not be ordered for errors not operating to the prejudice of the party complaining.[81] Where the condemning corporation paid the award and appealed, upon a reduction of the award on a trial de novo, it was proper for the court to enter judgment against the landowner for the difference.[82] The reversal of a judgment of condemnation and remand for new trial on the ground that the road purchased by petitioner was a parallel road, does not preclude further proof on retrial that the roads are not competing.[83] A judgment confirming the award of full damages to one party, irrespective of the right of another to claim easements therein, must be set aside, for, if affirmed, and the other party subsequently established a claim, the city would be required to pay damages twice.[84] Where, in case of a railroad crossing, the hearing was had on the theory that plaintiff would have to construct and maintain the crossing, the verdict and judgment were amended accordingly.[85]

§ 19. *Remedy of owner by action or suit. A. Actions for tort, damages or trespass; recovery of property.*[86]—Where condemnation proceedings are instituted, the owner's remedy is usually therein and not by action,[87] and acceptance of the award[88] bars all action for damages within the purview of such proceedings; but if the land is taken without proceedings,[89] or if the eminent domain statute pro-

not for the courts to say whether the authorities have acted wisely. Id. Nor is it for the courts to inquire whether some other plan would have been more advantageous. Id. The granting of a motion for a new trial in condemnation proceedings, on the ground that the verdict was not supported by the evidence is peculiarly within the discretion of the trial court. City of Seattle v. Williams, 41 Wash. 366, 83 P. 242.

80. See 5 C. L. 1136.

81. Where the description of the property in the complaint and deed, in an action for damages for the construction of a railway in front thereof, was a lot 25 feet front and 75 feet deep, on which was a building 50 feet deep having a small extension in the rear, but the evidence was confined to the 50 feet in depth, an error in the finding describing the property as 75 feet deep was immaterial, for there could be no subsequent recovery for easements appurtenant to the area in the rear of the building. Scallon v. Manhattan R. Co., 98 N. Y. S. 272. A judgment for plaintiff in condemnation proceedings will not be reversed for refusal to permit the amendment of the petition by striking out a description of land below low water mark in a river, where it was not asked until many witnesses were examined without objection. McGunnegle v. Pittsburg, etc., R. Co., 213 Pa. 383, 62 A. 988. Where the jury is distinctly instructed that the effect of fillings beyond low-water mark in a river cannot be considered in determining values, remarks by witnesses as to such effect are not ground for reversal. Id. On appeal, the defendant landowner in a railroad right of way proceeding could not complain of the court's ruling as to the admissibility of evidence referring entirely to lands of other defendants not parties to the appeal. Prather v. Chicago Southern R. Co. [Ill.] 77 N. E. 430.

82. Burns' Ann. St. 1901, § 5468e. Douglas v. Indianapolis & N. W. Traction Co. [Ind. App.] 76 N. E. 892.

83. Illinois State Trust Co. v. St. Louis, etc., R. Co., 217 Ill. 504, 75 N. E. 562.

84. In re Water Front of New York, 98 N. Y. S. 1063.

85. Kansas City, etc., R. Co. v. Louisiana W. R. Co., 116 La. 178, 40 So. 627.

86. See 5 C. L. 1137.

87. The remedy must be found in the proceedings in which the condemnation judgment was rendered or in some court having jurisdiction to regulate such proceedings. Xavier Realty v. Louisiana R. & Nav. Co., 115 La. 343, 39 So. 6.

88. Where appeals were taken in three condemnation proceedings and judgment entered in two, and the company paid the amounts thereof to the sheriff, acceptance thereof by plaintiff as a payment of the awards in the first two proceedings only, did not estop him to claim damages in the third, although the receipt given therefor included the third proceeding. Mason v. Iowa Cent. R. Co. [Iowa] 109 N. W. 1.

89. Where a railroad company fails to comply with the law, by payment of compensation to abutting owners before constructing its road on a public highway [Comp. Laws 1897, § 6234, subd. 5] (Keyser v. Lake Shore & M. S. R. Co. [Mich.] 12 Det. Leg. N. 653, 105 N. W. 143), all the damages to which he is entitled, and not merely such as have accrued up to the time of the suit brought, should be recovered in the one action (Id.); but only such damages as are reasonably permanent in character and arise from the operation of the railroad in the usual way can be recovered, damages resulting from mere inconvenience and annoyance not being recoverable (Id.). Where land is appropriated by a railroad company, without proceedings to acquire it, the owner can waive the trespass and recover compensation for all damages sustained thereby (Zimmerman v. Kansas City N. W. R. Co. [C. C. A.] 144 F. 622), and the judgment in such action is conclusive as to plaintiff's damages, not only as against the defendant company, but also

vides no method of litigating disputed claims,[90] an action will lie, and such consequential damages as may not be asserted in the condemnation proceeding[91] may be recovered by action[92] unless they have been released.[93] The action must be brought by the person owning the estate or easement taken[94] at the time of the taking.[95] Limitations are determined by the local statutes.[96] Statutes usually require notice

against a successor corporation purchasing the railroad on foreclosure (Id.). In Arkansas no action for trespass will lie after the commencement of a condemnation suit to recover damages which may be awarded in the latter. Held error to refuse evidence of the pending condemnation proceeding. Board of Directors of St. Francis Levee Dist. v. Redditt [Ark.] 95 S. W. 482. For a physical injury or direct invasion of property rights, damages are recoverable under the provisions of the constitution against the taking of private property for public or private use without just compensation. Farnandis v. Great Northern R. Co., 41 Wash. 486, 84 P. 18.

90. The condemnation statute of South Carolina provides no method of determining the right of compensation where it is disputed and such right must be adjudicated in an appropriate action. Glover v. Charleston & S. R. Co., 72 S. C. 381, 51 S. E. 917. Rev. St. 1893, c. 61, art. 2, §§ 1743-1765, relative to compensation for a right of way, do not apply to such right against remaindermen after death of life tenant, on the company's refusal of compensation and denial of right to same, and where the owners have not consented to the company's entry. Id.

91. See ante, § 6.

92. Such inconveniences as are inseparable from the use of a public way cannot be made the foundation of an action for damages. Street railway not an additional servitude. Parsons v. Waterville & O. St. R. Co. [Me.] 63 A. 728. Where the injury occasioned to a lot owner by the act of the public authorities is only consequential and no private property is actually taken, he has a right of action against the municipality. Vanderburgh v. Minneapolis [Minn.] 108 N. W. 480. Where a lot owner is specially injured by the vacation of a street, his lot being left fronting on a cul-de-sac, or blind alley, and all ingress and egress cut off in one direction. Id. A borough cannot be held liable in an action for trespass because the plan for the improvement of a street, adopted by its officers, was not the best that engineering skill might have devised. Robinson v. Norwood Borough, 27 Pa. Super. Ct. 481.

93. Where plaintiff released all claims for damages for land taken for the diversion of a water course, under a statute providing for taking land only "for sewerage works," he thereby released any damages on account of the use of the land for sewerage works. Evans v. Boston, 190 Mass. 625, 76 N. E. 906.

94. The easements of light, air and access, appurtenant to real property abutting on a public street or highway, being inseparable from the dominant estate, the grantee is the only person who can sue for damages to such easements by a railroad company, or execute a release thereof. McKenna v. Brooklyn Union El. R. Co., 184 N. Y. 391, 77 N. E. 615. An abutting owner on a highway, which is excluded in the description in his deed, cannot recover damages on account of any interest in the soil of the highway, in case of the construction of a railroad therein. Keyser v. Lake Shore & M. S. R. Co. [Mich.] 12 Det. Leg. N. 653, 105 N. W. 143. The mortgagee's right to maintain a petition for the assessment of damages for the taking of mortgaged property depends entirely upon statute and cannot be extended beyond the statutory terms [Rev. Laws, c. 48, § 114; Id. c. 111, §§ 112, 113] (Taber v. Boston, 190 Mass. 101, 76 N. E. 727), and a mortgagee cannot recover damages, where his petition recites that he has an unincumbered fee in the land taken (Id.). A mortgagee who has not taken possession under his mortgage but who has gone on the property and taken stone therefrom under a license from the mortgagor and has negotiated with the latter for a purchase of the property, has no such possessory title as to enable him to maintain a petition for the assessment of damages as the owner of the property. Id. Where the cost of changing a building after widening a street was paid by the tenants and the rentals paid were higher after the widening, the life tenant in possession of the building could recover no damages from the city on account of the widening. Himes v. Pittsburg, 213 Pa. 362, 63 A. 126.

95. The vendee of lands upon which a railroad company tortiously builds its road, depot buildings, etc., cannot recover of the company damages for the tort, but the right of action therefor remains in the original owner. Bruce v. Seaboard Air Line R. Co. [Fla.] 41 So. 883. The right to recover damages resulting from a street improvement is in the owner of the property injured at the time the injury was sustained, and not in his subsequent grantee. Robinson v. Norwood Borough, 27 Pa. Super. Ct. 481.

96. A right of action for damages caused by the construction of a switch in front of plaintiff's property is barred by limitations in six years. Romano v. Yazoo & M. V. R. Co. [Miss.] 40 So. 150. A suit for damages for change of a street grade, instituted within four years from the time of the change is not barred by the statute of limitations. Civ. Code 1895, § 3898. City of East Rome v. Lloyd, 124 Ga. 852, 53 S. E. 103. The two years' prescription in Louisiana applies only where there has been a judgment of expropriation and the corporation has entered into possession without payment of the compensation awarded. Amet v. Texas & P. R. Co. [La.] 41 So. 721, reaffirming Mitchell v. New

of claim before suits against municipalities.[97] In an action by an adjoining property owner against a railroad company and its contractors for injuries caused by blasting operations in the construction of a railroad, the liability, if any, was joint and neither was primarily or secondarily liable.[98] Where a right is given to "damages" to abutting property, all the statutory facts predicative of the right must be averred.[99] An action to compel a railroad company to pay the value of private property occupied by it, as damages, is petitory and the burden of showing title rests on plaintiff.[1] Under a constitutional provision making a corporation constructing a public utility along a street, under a franchise, liable for damages, it was necessary for an abutting owner to prove as alleged that the embankment was constructed under a franchise.[2]

(§ 19) *B. Suits in equity; injunction.*[3]—Injunction will issue against the taking of property without condemnation[4] and payment,[5] or against unauthorized

Orleans, etc., R. Co., 41 La. Ann. 363, 6 So. 522. Again affirmed. Scovell v. St. Louis S. W. R. Co. [La.] 41 So. 723. Where the vendee of the company that constructed a railroad in a street operated heavier trains and used the road day and night for hauling freight, thus increasing the discomfort and annoyance of an abutting owner, his cause of action for damages did not arise until the change in the use of the road. Grossman v. Houston, etc., R. Co. [Tex.] 15 Tex. Ct. Rep. 572, 92 S. W. 836. Where a commercial steam railway was constructed in a street in front of plaintiff's premises ten years before its purchase by defendant company and had been used all that time by the original company in the same way as used by the defendant company, plaintiff's action for damages from noise, vibration, smoke and cinders, was barred by the two-year limitation, and defendant could assume that such claims had been either adjusted or waived. Houston, etc., R. Co. v. Grossman [Tex. Civ. App.] 89 S. W. 312.

97. A statutory provision requiring all claims for damages against a city to be presented to the city council and filed with the clerk within thirty days after they accrue, as a condition precedent to action thereon, applies to claims for damages by the grading of a street. Seattle City Charter, art. 4, § 29. This provision is not invalid as not allowing a reasonable time to present such claims. Postel v. Seattle, 41 Wash. 432, 83 P. 1025. Under a statute prohibiting suit against a county unless the claim shall have first been presented to the commissioners' court and been neglected or rejected, a claim for damages resulting from the establishment of a public road across plaintiff's lands may be presented after the commissioners' court has indicated its intention to appropriate the land, although it has not actually appropriated it. Rev. St. 1895, art. 790. Bell County v. Flint [Tex. Civ. App.] 14 Tex. Ct. Rep. 256, 91 S. W. 329.

98. Gossett v. Southern R. Co., 115 Tenn. 376, 89 S. W. 737.

99. Pleading held sufficient. Birmingham R. Light & Power Co. v. Oden [Ala.] 41 So. 129. In suing for "damage" to abutting property, facts constituting some special damage must be pleaded. Id.

1. Lindner v. Yazoo & M. V. R. Co., 116 La. 262, 40 So. 697.

2. Const. § 227. Birmingham R. Light & Power Co. v. Oden [Ala.] 41 So. 129.

3. See 5 C. L. 1138.

4. The statutes of Missouri providing for the ascertainment of damages to adjacent owners when it is proposed to dam a water course, a private individual specially damaged by a dam erected without such proceedings is entitled to the remedy by injunction, notwithstanding the power and duty of officials to proceed in the name of the people to protect the public from such nuisance [Rev. St. 1899, § 8752] (Scheurich v. Southwest Mo. Light Co., 109 Mo. App. 406, 84 S. W. 1003), and notwithstanding he has sued for and recovered double damages therefor, under the statute [Rev. St. 1899, § 8750] (Id.). Where the abutting owner owns to the center of the street, he can restrain the building of a railroad thereon without his consent or the acquirement of his title to the street. Miller v. New York, etc., R. Co., 183 N. Y. 123, 75 N. E. 1111. A judgment in short form in such action, formerly permitted by Code Civ. Proc. § 1022, where the trial court found plaintiff to be the owner of the premises but without finding whether his title extended to the center of the street, did not authorize the dismissal of the complaint. Id.

Against municipalities: Equity can enjoin a municipal corporation from opening up and using as a street, against the owner's consent, land not condemned, dedicated, or used as a street. McGourin v. De Funiak Springs [Fla.] 41 So. 541. Where a bill for an injunction alleges and the proofs show seisin and possession of land and an attempt by a town to take and subject it to public use on the ground of dedication, but the dedication is not proved, an injunction should issue. Id. The jurisdiction in equity to prevent the taking of private property for public purposes, without payment of compensation therefor, or security for the same having been given, is undoubted (Clayton v. Gilmer County Court, 58 W. Va. 253, 52 S. E. 103), and injunction lies in such cases even against a county court (Id.). Where a proposed change in street grade will seriously injure abutting property and the damages

or improper operation producing unnecessary damage,[6] subject to the usual equitable considerations, such as laches,[7] irreparable injury,[8] and inconsequence of the injury as compared with that resulting from injunction.[9] When the right to institute condemnation proceedings is contested, the proper remedy is to bring an action in the court of common pleas in order that the court may, in the exercise of its chancery powers, determine such right.[10] Such an action is independent and not ancillary to the condemnation proceedings,[11] and where the court grants a de-

have not been ascertained or paid, the change may be enjoined. Hart v. Seattle, 42 Wash. 113, 84 P. 640. The taking of property for street purposes without the owner's consent or statutory proceedings therefor, is unauthorized and is a trespass of a permanent character which may be enjoined. Town of Syracuse v. Weyrick [Ind. App.] 76 N. E. 559. Where work in grading a street was begun without previous ascertainment of compensation for damages as required by Const. art. 2, § 21, an abutting owner, having no adequate remedy at law, was entitled to an injunction restraining the work. Graden v. Parkville, 114 Mo. App. 527, 90 S. W. 115. Where at the time a person acquired his property, the city had authority to make street improvements, he took his property subject to such conditions and is limited in his remedies to those provided by law. De Lucca v. North Little Rock, 142 F. 597.

5. Where condemned property is sought to be taken without the payment or deposit of the compensation as required, an injunction will issue restraining such taking. Const. art. 12, § 9. Board of Directors of St. Francis Levee Dist. v. Redditt [Ark.] 95 S. W. 482. The failure to make or tender due compensation to the landowner will justify relief by injunction. Johnson v. Clentarf [Minn.] 108 N. W. 521.

6. Where the grant permitted the laying of a spur track across the land of the grantor, with the condition and limitation that the track can be used only for certain specified business, injunction will lie to prevent the carrying of a greatly increased business over this track without compensation to the owner. Collins v. Craig Shipbuilding Co., 7 Ohio C. C. (N. S.) 350. The fact that the owner of the land in such a case might tender a deed and demand compensation for the land occupied by the track is no defense to an action to enjoin the railroad company from unlawfully continuing its use and possession of the property. Id.

7. Laches will defeat the right of a property owner to relief by injunction or a decree for damages as an alternative relief. Beers v. Chicago, etc., R. Co. [C. C. A.] 141 F. 957. An owner who with full knowledge of the facts and without objection, permits work to be done and a large amount of money expended in the elevation of a track in a street, under requirement of a city ordinance, is chargeable with laches. Id. Where defendant without right, but in good faith and under color of legislative authority, and with no objection by plaintiff for ten years, constructed a third elevated track, in a suit to restrain the maintenance thereof as an interference with plaintiff's easements of light and air, the court could refuse an injunction on condition of the payment of damages where the damage to the defendant and the public from the removal of the track would be greatly in excess of plaintiff's. Kneth v. Manhattan R. Co., 109 App. Div. 802, 96 N. Y. S. 844.

8. A bill by a railroad company to enjoin the condemnation of another right of way across its own, on the ground that it would inflict irreparable damages, was insufficient without an allegation of facts and circumstances shewing whether in a legal sense the damage was irreparable (South & W. R. Co. v. Virginia & S. E. R. Co., 104 Va. 323, 51 S. E. 843), nor could such a bill be maintained on the ground that the defendant company had failed to obtain previous permission from the state corporation commission, where there was no allegation of the failure to secure such permission as required by law [Va. Code 1904, p. 576, § 1105e, cl. 52] (Id.). The constitutional provisions of Arkansas prohibiting the taking of private property for public use without just compensation do not entitle a lot owner to an injunction to restrain the building of a viaduct on the street in front of his lot where the damage is only incidental, he having an adequate remedy at law. Const. Ark. art. 2, § 22; art. 12, § 9. De Lucca v. North Little Rock, 142 F. 597. Equity will not, at least in the absence of any allegation of financial irresponsibility, enjoin, until damages are paid, the construction of a private dam in a navigable stream, in behalf of one who fears the flooding of his lands, interruption of access thereto, and impairment of navigation, where the act authorizing the work in the interests of drainage makes provision for compensation for damages. Manigault v. Springs, 199 U. S. 473, 50 Law. Ed. —. Even if an abutting owner is entitled to compensation for cutting trees in a highway by a telephone company, his remedy at law is adequate and he is not entitled to an injunction. Hobbs v. Long Distance Tel. & T. Co. [Ala.] 41 So. 1003.

9. Where an illegal occupation of a street by a railroad company was not wanton or negligent but owing to stress of circumstances, a bill to enjoin the same was not dismissed, but a reasonable time was given for abatement of the nuisance or an agreement with the complainant. Hall v. Pennsylvania R. Co. [Pa.] 64 A. 408.

10. Columbia Water Power Co. v. Nunamaker, 73 S. C. 550, 53 S. E. 996.

11. The rule that a bill filed on the equity side of a court to restrain suits at law in the same court is ancillary to the original court, does not apply to a suit in

murrer restraining order, he cannot dispense with the injunction bond required.[12]

Parties.[13]—Under the Indiana statute, persons holding land for cemetery purposes can enjoin the construction of a railroad on it, whether they hold the absolute title or hold it in trust.[14] The real owner of the land is not precluded from enjoining the further entry and use of his land, especially where the petitioner before entry has notice of his claim of title, by the statute authorizing condemnation proceedings against the apparent owner and entry and use of the land upon payment into court of the prima facie damages.[15]

Pleading and proof.[16]—Where a municipality is about to take land for street purposes without the owner's consent or taking the proper statutory steps therefor, the complaint need not allege that defendant is insolvent or unable to pay any damages, or specify the amount of land to be taken.[17] Where the judge could properly find that petitioner had not shown title to the land in question, there was no abuse of discretion in refusing to grant the injunction prayed for.[18]

Decree, judgment, or order.[19]

§ 20. *Payment and distribution of sum awarded; title or interest requiring compensation.*[20]—Under the Nebraska statute the payment must be made to the owner of the land,[21] and all persons who have an interest in the land are owners within the meaning of the statute.[22] Apportionment may be made between adverse claimants[23] or claimants of interests in severalty,[24] or the fund may be ordered paid

the common pleas to restrain condemnation proceedings in a special statutory tribunal which on appeal could be taken to such court. Columbia Water Power Co. v. Nunamaker, 73 S. C. 550, 53 S. E. 996.

12. Code Civ. Proc. 1902, § 243. Columbia Water Power Co. v. Nunamaker, 73 S. C. 550, 53 S. E. 996.

13. See 5 C. L. 1138.

14. Burns' Ann. St. §§ 4708d, 4708e, 4708f. McCann v. Mt. Gilead Cemetery Trustees [Ind.] 77 N. E. 1090.

15. Mills' Ann. St. Colo., § 1726. Colorado Eastern R. Co. v. Chicago, etc., R. Co. [C. C. A.] 141 F. 898. Rev. St. U. S., § 720 [U. S. Comp. St. 1901, p. 581], prohibiting the writ of injunction to stay proceedings in a state court, does not apply to the case of a nonresident owner of land entered in condemnation proceedings who has not been made a party. Id. Nor does Mills' Ann. St. Colo., § 1726, providing that other persons may become parties to the proceedings by cross petition, that statute being only permissive, preclude such nonresident owner from the right of appeal by injunction to the Federal court. Id.

16. See 5 C. L. 1138.

17. Town of Syracuse v. Weyrick [Ind. App.] 76 N. E. 559.

18. Haden v. Atlanta Northern R. Co., 124 Ga. 399, 52 S. E. 431.

19, 20. See 5 C. L. 1133.

21. State v. Missouri Pac. R. Co. [Neb.] 105 N. W. 983.

22. A lien for taxes is such an interest. State v. Missouri Pac. R. Co. [Neb.] 105 N. W. 983. Where a will devised land to a devisee for life, with right to dispose of the same from the time of her death, there being no gift over, and the devisee conveyed to a trustee for her benefit, who reconveyed to her, the devisee became seised of the land and entitled to damages for a taking thereof for public use. Raymond v. Com. [Mass.] 78 N. E. 514.

23. In New York the special term had jurisdiction to determine the controversy, where the mortgagee petitioned for the payment to him of damages awarded and the owner's attorneys had previously filed a lien on the award for their services. Under the New York city charter (Laws 1901, p. 426, c. 466, § 1001). In re Crescent Ave., 183 N. Y. 14, 75 N. E. 937. Land under lease with privilege of renewal was condemned for railway purposes and a jury fixed the value of the part taken with damages to the residue, and in answer to a special interrogatory found that $15 of the monthly rental of $115 was taken by reason of the appropriation. Thereupon the court, in the order of distribution, impounded $1,200 of the share of the verdict awarded by the jury to the lessee for payment of rent during the additional term in the event the lease was renewed, or to be paid in full to the lessor in the event the lease was not renewed. Held that this was error and that the court should have determined the conflicting claims of the lessor and the lessee in the award. Good v. Droste, 8 Ohio C. C. (N. S.) 452.

24. A tenant is entitled to have his damages assessed and apportioned between his landlord and himself (Douglas v. Indianapolis & N. W. Traction Co. [Ind. App.] 76 N. E. 892), but where he fails to plead any interest in the land, he assents to a recovery of all damages by the landlord (Id.). Riparian owners of land in severalty, on both sides of a stream that would be damaged by the construction of a dam for a municipal water power, could orally agree for the distribution of the compensation therefor among them in particular proportions and execute a deed inter se to carry it into effect. Rankin v. Harrisonburg, 104 Va. 524, 52 S. E. 555.

into court to await the event of pending litigation between claimants.[25] Invalid street assessments levied against the property condemned cannot be deducted from the award.[26]

Lien and enforcement.[27]

§ 21. *Ownership or interest acquired.*[28]—The estate allowed to be acquired by the enabling act,[29] unless a less interest is asked in the condemnation proceeding,[30] is acquired against all persons made parties to the proceeding.[31] The property does not become the private property of the condemning corporation in the sense that it can appropriate it to uses of a private nature,[32] but it must use the property for the purposes for which it was condemned or submit to its reversion at the suit of the state.[33] Although a private corporation is vested by the state with a portion of its sovereign power the property is not taken, in condemnation proceedings, by the state;[34] nor is a railway company, in such proceedings, the agent of the state, and the state has no ownership in the lands by virtue thereof.[35] The power granted to a railroad company to construct its road is a privilege only which must be exercised in strict conformity to private rights.[36] A deed conveying land to a railroad company for a right of way gives it no more rights in the land than it would have acquired by condemnation.[37] A taking of an entire tract of land

25. Where the title to property sought to be condemned is in controversy in chancery, the court may charge the jury in the condemnation proceedings that the damages should be paid to the county treasurer to abide the result of the chancery suit. Eddleman v. Union County Traction & Power Co., 217 Ill. 409, 75 N. E. 510.

26. In a proceeding to recover an award for the condemnation of certain wharfage rights under New York charter (Laws 1901, p. 426, c. 466, § 1001), where it was sought to deduct certain street assessments levied against a pier condemned, the court had jurisdiction to determine the validity of such assessments, and on finding them void to deny the city's right to deduct them. In re City of New York, 114 App. Div. 519, 100 N. Y. S. 140.

27, 28. See 5 C. L. 1140.

29. While it is within the power of the state to provide by statute that the fee shall be taken (McCarty v. Southern Pac. Co., 148 Cal. 211, 82 P. 615), yet it is the rule that, in all cases where property is taken for public use and an easement is sufficient for the purpose of the use, the fee will not be deemed to be appropriated unless it is so stated or necessarily implied either in the statute or the judgment of condemnation. Under St. 1861, p. 355, c. 352; Act Apr. 9, 1862 (St. 1862, p. 153, c. 158), § 8, and Acts 1861 (St. 1861, p. 358, c. 352), § 16, the City of Sacramento did not acquire the fee of lands taken for the purpose of a levee. Id.

30. Although a statute for the condemnation of land for constructing a ditch provided that the corporation should become seised in fee of the land [Rev. St. 1868, p. 130, c. 18, § 48] (Smith Canal or Ditch Co. v. Colorado Ice & Storage Co. [Colo.] 82 P. 940), yet a corporation asking only for a right of way acquired merely an easement and not an absolute fee (Id.). and the landowner had such a right of way to convey water across the land so condemned as would not interfere with the superior easement of the corporation (Id.).

31. If a railway company fails to make all parties interested in the land desired for its purposes parties to the proceedings or to give them notice thereof, it takes the land subject to all prior liens. State v. Missouri Pac. R. Co. [Neb.] 105 N. W. 983. In such case the state's lien for delinquent taxes is not cut off. Id. The mortgage lien of one not a party to the proceedings is not affected thereby. Stamnes v. Milwaukee, etc., R. Co. [Wis.] 109 N. W. 100. The mortgage security cannot be impaired so as to bind the mortgagee by an agreement between the parties or by an appraisal in condemnation proceedings without a money equivalent therefor, the mortgagee having an opportunity to be heard (Id.). and the taking that must be made good to the mortgagee, in the condemnation of a railroad right of way, covers the whole injury to the estate and not the mere value of the strip of land taken [Rev. St. 1898, §§ 1848, 1853] (Id.).

32. State v. Centralia-Chehalis Elec. R. & Power Co., 42 Wash. 632, 85 P. 344. A railroad company having no power to grant a longitudinal right of way along or beside its track, and such use being inconsistent with its proper use by the railroad company, such an easement will not be presumed from mere user. Johnson v. Philadelphia, etc., R. Co. [Del.] 62 A. 86.

33. State v. Centralia-Chehalis Elec. R. & Power Co., 42 Wash. 632, 85 P. 344.

34, 35. State v. Missouri Pac. R. Co. [Neb.] 105 N. W. 983.

36. It was error to charge that, the work of constructing a railroad opposite plaintiff's premises being authorized by law, defendant was liable only for its negligent prosecution, since it was not exempt from responsibility for injuries to private rights, whether resulting from negligence or otherwise. Gossett v. Southern R. Co., 115 Tenn. 376, 89 S. W. 737.

for a public purpose, describing it as if unencumbered, includes an easement therein as well as the fee.[38]

§ 22. *Transfer of possession and passing of title.*[39]—Payment of the compensation assessed is ordinarily a condition precedent to the taking of possession,[40] except where the taking is by the public,[41] though in some states entry before payment is permitted either generally or on leave of court.[42] Where the damages resulting from the vacation of a street were consequential, no property being actually taken, it was unnecessary as a condition precedent to the vacation that the damages be first ascertained.[43] Landowners cannot raise the question of the limit of the city's indebtedness, in proceedings to condemn land for a street, for the property cannot be taken until actual compensation has been made.[44] The payment of an award gives the condemning corporation authority to take possession of the land for the construction of its road, notwithstanding an appeal from the appraisers' award,[45]

37. Shepard v. Suffolk & C. R. Co., 140 N. C. 391, 53 S. E. 137.

38. A town having taken land under St. 1893, p. 911, c. 277, for a site for buildings, wells, etc., for waterworks, a right to flow water over the land, which would interfere with the use of the land, was included. Inhabitants of Walpole v. Massachusetts Chemical Co. [Mass.] 78 N. E. 140.

39. See 5 C. L. 1142.

40. State v. Missouri Pac. R. Co. [Neb.] 105 N. W. 983. In the erection of public buildings, the making of public improvements and the building of public highways, such as railroads and canals, the exigencies of the occasion sometimes make it very advantageous to enter upon the property needed without delay (Aldridge v. Board of Education, 15 Okl. 354, 82 P. 827), but such entry before condemnation and payment is unlawful (Id.).

41. Where property is directly taken by the state, the constitutional requirement is satisfied if an impartial tribunal is provided for determining the question of compensation, to which the owner may resort and be heard, and the sum to which he is entitled is made a charge upon the public treasury of the state or some subdivision thereof. Johnson v. Clontarf [Minn.] 108 N. W. 521. The liability of the county is sufficient security. Id. In proceedings to condemn land for a street, delay in payment of damages did not stay the right of the public to take possession. State v. Jones, 139 N. C. 613, 52 S. E. 240. Laws 1875, p. 157, c. 181, as amended by Laws 1885, p. 370, c. 211, authorizes a municipality to enter land to be condemned before proceedings taken, to make surveys, etc., but requires an appraisement and payment of damages before taking possession, and possession taken before that, without the owner's consent, is trespass. Village of St. Johnsville v. Smith, 184 N. Y. 341, 77 N. E. 617. Damages assessed under Laws 1905, p. 84, c. 55, for the condemnation of land by cities, must be paid before possession can be taken. City of Puyallup [Wash.] 86 P. 215.

42. In New York, where it appears that public interests will be prejudiced by delay, the court may permit the plaintiff to enter immediately upon depositing the sum stated in the answer as the value of the land. Code Civ. Proc. § 3380. In re Niagara L. & O. Power Co., 97 N. Y. S. 853. Where the intention was to furnish electricity for lighting and street railway purposes in an extensive and thickly settled district for which contracts contemplating early delivery had been made and the construction of lines was in active prosecution, there was a public interest which would be prejudiced by delay. Id. Said § 3380 is not unconstitutional under Const. art. 1, § 6, as a taking of property without compensation (Id.), and where defendant's answer denied plaintiff's estimate of the value and declined to make any estimate themselves, the court could permit plaintiff to enter on depositing an amount fixed by the court. Under Code Civ. Proc. § 3382, providing that where the practice is not expressly provided by law the court may make all necessary orders. Id. In New York the court may, under certain circumstances, direct that the plaintiff be permitted to enter immediately on the land sought to be taken. In re New York, etc., R. Co., 51 Misc. 333, 100 N. Y. S. 388. Under Code Civ. Proc. § 3380, when an answer has been interposed and public interests will be prejudiced, plaintiff may be permitted to enter on depositing the sum stated in the answer as the value of the property. Id. But where the answer alleged that such value was $129,342, which plaintiff claimed was grossly excessive, the court could not grant permission for immediate entry upon the deposit of $21,422.50, which plaintiff alleged to be fair and ample to cover the value of the property. Id.

43. Vanderburgh v. Minneapolis [Minn.] 108 N. W. 480.

44. State v. Superior Ct. for Whatcom County, 42 Wash. 521, 85 P. 256.

45. Douglas v. Indianapolis & N. W. Traction Co. [Ind. App.] 76 N. E. 892. In Wisconsin, the filing of the commissioners' award and the payment of the amount thereof as prescribed in the statutes vests the title and exclusive use of the premises in the corporation, subject to an increase or diminution of the award on appeal. Rev. St. 1898, §§ 1850, 1851. Murray Hill Land Co. v. Milwaukee Light, Heat & Traction Co., 126 Wis. 14, 104 N. W. 1003. The fact that a landowner refused to appoint an appraiser of damages in

but failure to pay an increased award made on appeal works a divestiture.[46] Under the constitutional provisions of the states generally, title does not pass from the owner of land appropriated to public use until compensation is actually made.[47] As the constitution prohibits a taking unless just and adequate compensation is first paid, the power of the state to make such a trespass the basis of a special short prescription is more than doubtful.[48] Where, pending condemnation proceedings, an order was entered of record whereby the company proposed to construct and maintain certain crossings, such order to be made a part of the judgment, but judgment for damages was entered without mention of the order, and the owners agreed with the company's successor, on payment of the damages, to transfer the benefit of the judgment and deed the right of way, which was done, the company was required to make the crossings.[49] The award as an entirety takes the place of the land as regards a mortgage thereon.[50]

§ 23. *Relinquishment or abandonment of rights acquired.*[51]—Where there is no adverse possession, nonuser does not of itself work an extinguishment of a railroad right of way acquired by condemnation.[52] Abandonment is a question of intent,[53] which intent may be found as a fact from long nonuse,[54] but in the absence of legislation to that effect, mere nonuser does not of itself constitute an abandonment.[55] In Washington, property acquired by a boom company, by eminent domain, for its operations, reverts to the original owners or representatives on repayment of the original cost, whenever the use of such property for such purposes shall cease for one year,[56] but this rule does not apply to lands acquired by purchase and not by eminent domain.[57]

EMPLOYER'S LIABILITY; ENTRY, WRIT OF; EQUITABLE ASSIGNMENTS; EQUITABLE ATTACHMENT; EQUITABLE DEFENSES, see latest topical index.

street opening proceedings, when notified to do so, but appealed, did not have the effect to delay the opening of the street until the appeal was finally determined. Creedmoor Charter, Priv. Acts 1905, p. 1006, c. 398. State v. Jones, 139 N. C. 613, 52 S. E. 240.

46. Where defendants file no exceptions to the award but receive it, and plaintiff excepts and has a trial on the issues so raised, plaintiff must pay the additional award of damages or lose all rights in the land. Indianapolis Northern Traction Co. v. Dunn [Ind. App.] 76 N. E. 269.

47. Payment of the judgment recovered by plaintiff for damages for appropriation of his land without condemnation proceedings was a condition precedent to the passing of title, under Const. Kan. art. 12, § 4. Zimmerman v. Kansas City N. W. R. Co. [C. C. A.] 144 F. 622.

48. Amet v. Texas & P. R. Co. [La.] 41 So. 721.

49. Louisville & A. R. Co. v. Sale [Ky.] 93 S. W. 613.

50. That for land taken not divisible from that for damage to what remains. Stamnes v. Milwaukee, etc., R. Co. [Wis.] 109 N. W. 100. The gross award stands as a substitute for the land, which the city takes free and clear from incumbrances, and the rights, interests, and liens of parties are transferred to the fund. In re New York, 114 App. Div. 519, 100 N. Y. S. 149.

51. See 5 C. L. 1143.

52. Hamlin v. Kansas R. Co. [Kan.] 85 P. 602.

Note: Abandonment is wholly a matter of intent (Brunswick, etc., R. Co. v. Waycross, 91 Ga. 573; McClain v. Chicago, etc., R. Co., 90 Iowa, 646; Scarritt v. Kansas City, etc., R. Co., 148 Mo. 676; Conabeer v. New York Cent. R. Co., 156 N. Y. 474; Junction R. Co. v. Ruggles, 7 Ohio St. 1; Rutland R. Co. v. Chaffee, 71 Vt. 84), and nonuser, while not alone sufficient, is admissible as evidence of an intent to abandon (McClain v. Chicago, etc., R. Co., 90 Iowa, 646). The question is ordinarily one for the jury. Tennessee, etc., R. Co. v. Taylor, 102 Ala. 224. Misuse of the easement does not amount to an abandonment of which the landowner may take advantage, though it may give him a cause of action for damages resulting to him from the misuse. Merrimac Riv. Lock Co. v. Nashua, etc., R. Co., 104 Mass. 1, 6 Am. Rep. 181; Gurney v. Minneapolis Union Elevator Co., 63 Minn. 70. Neither does transfer of rights to another company give the landowner any reason to claim an abandonment, the property continuing to be used for railroad purposes. Marling v. Chicago, etc., R. Co., 67 Iowa, 331; Crolley v. Minneapolis & St. Louis R. Co., 30 Minn. 541. But see Blakely v. Chicago, etc., R. Co., 46 Neb. 272; Lyon v. McDonald, 78 Tex. 71.

53, 54, 55. Nicomen Boom Co. v. North Shore Boom & Driving Co., 40 Wash. 315, 82 P. 412.

56. 1 Ballinger's Ann. Codes & St. § 4378. Nicomen Boom Co. v. North Shore Boom & Driving Co., 40 Wash. 315, 82 P. 412.

57. Nicomen Boom Co. v. North Shore Boom & Driving Co., 40 Wash. 315, 82 P. 412.

EQUITY.

§ 1. **Nature of, and General Principles Controlling, Equity (1323).**
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§ 16. **Other Equitable Remedies for Which no Specific Title is Provided (1383).** Bill Quia Timet (1383). Bills of Peace (1383).

Scope of title.—This title is confined to a general treatment of equity principles and procedure, the specific application of such principles to particular subjects[1] and the consideration of particular equitable remedies[2] being more particularly and exhaustively treated of under their own appropriate titles. Separate articles are also devoted to various matters of practice and procedure,[3] and in so far as pleading in equity has been made by statute to conform to the rules applicable to actions at law, the former is treated of in connection with the latter.[4] The equity jurisdiction of particular courts is likewise treated of elsewhere.[5]

§ 1. *Nature of, and general principles controlling, equity.*[6]—The difference between courts of law and of equity lies in the variance of their several capacities to protect the rights of the parties appealing to them for relief.[7]

1. See such titles as Assignments, 7 C. L. 277; Assignments for Benefit of Creditors, 7 C. L. 286; Estoppel, 5 C. L. 1285; Fraud and Undue Influence, 5 C. L. 1541; Fraudulent Conveyances, 5 C. L. 1556; Liens, 6 C. L. 451; Mistake and Accident, 6 C. L. 678; Penalties and Forfeitures, 6 C. L. 996; Trusts, 6 C. L. 1736.

2. See such titles as Accounting, Action for, 7 C. L. 19; Cancellation of Instruments, 7 C. L. 517; Creditors' Suit, 7 C. L. 1007; Discovery and Inspection, 7 C. L. 1167; Divorce, 7 C. L. 1175; Foreclosure of Mortgages on Land, 5 C. L. 1441; Injunction, 6 C. L. 6; Marshalling Assets and Securities, 6 C. L. 520; Partition, 6 C. L. 897; Quieting Title, 6 C. L. 1183; Receivers, 6 C. L. 1250; Reformation of Instruments, 6 C. L. 1279; Restoring Instruments and Records, 6 C. L. 1310; Specific Performance, 6 C. L. 1498; Subrogation, 6 C. L. 1581.

3. See such titles as Appeal and Review, 7 C. L. 128; Appearance, 7 C. L. 251; Agreement and Conduct of Counsel, 7 C. L. 257; Continuance and Postponement, 7 C. L. 757; Costs, 7 C. L. 956; Dockets, Calendars and Trial Lists, 7 C. L. 1192; Defaults, 7 C. L. 1122; Depositions, 7 C. L. 1129; Discontinuance, Dismissal and Nonsuit, 7 C. L. 1155; Examination of Witnesses, 5 C. L. 1371; Interpleader, 6 C. L. 163; Limitation of Actions, 6 C. L. 465; Masters and Commissioners, 6 C. L. 607; Motions and Orders, 6 C. L. 702; Process, 6 C. L. 1078; Reference, 6 C. L. 1272; Removal of Causes, 6 C. L. 1292; Saving Questions for Review, 6 C. L. 1385; Stay of Proceedings, 6 C. L. 1550; Trial, 6 C. L. 1731; Venue and Place of Trial, 6 C. L. 1806; Witnesses, 6 C. L. 1975.

4. See Pleading, 6 C. L. 1008.

5. See Jurisdiction, 6 C. L. 267.

6. See 5 C. L. 1144.

7. Baltimore & N. Y. R. Co. v. Bouvier [N. J. Eq.] 62 A. 868.

Note: "The quality of justice or injustice in a given transaction does not depend upon

§ 2. *Equity jurisdiction and occasions for relief. A. In general.*[8]—The jurisdiction of equity is determined by the facts alleged[9] and not by the pleader's conclusions as to the character of such facts,[10] or by the prayer for relief based thereon,[11] but even allegations of jurisdictional facts are unavailing unless supported by proof.[12] Lack of jurisdiction in the bill may be cured by the filing of a cross bill setting up a case for equitable relief.[13] Consent cannot confer jurisdiction[14] but it may resolve a doubt in regard thereto.[15] Failure to raise the question in proper time may influence the court in favor of jurisdiction,[16] or may even operate as a waiver of the objection.[17] On the other hand it is broadly laid down that objections for jurisdictional defects may be raised at any stage of the proceedings,[18] provided only that they be raised before the making of the findings of fact;[19] or the court may act thereon of its own motion.[20] Thus it appears that there is an apparent conflict between some of the cases on this point, but most, if not all, of these cases may be harmonized under what seems to be the true rule, which is that where there is a total want of equity jurisdiction the objection cannot be waived by anything short of going to trial and taking the chance of a favorable termination of the suit before making the objection, but that where a given case is within the general jurisdiction

or vary with the name or character of the court under whose jurisdiction it is brought for consideration. What is considered unjust in a court of equity is also considered unjust in a court of law, and so says Justice Depue in North Hudson County R. Co. v. Booraem, 28 N. J. Eq. 450. It is felt to be quite as unjust by a common-law judge for a trustee of the legal title to eject the cestui que trust and hold the subject of the trust against him as it was by the equity judge. The difference, and the only difference, between the two courts, lies in the variance in their several capacities to protect the rights of the cestui que trust. It is a mere matter of judicial machinery. * * * Aristotle (Ethics, book 5, c. 10) defines equity as 'a better sort of justice, which corrects legal justice where the latter errs through being expressed in a universal form and not taking account of particular cases.' And Grotius condensed this definition into the modern one, namely: 'Equity is the correction of the law, wherein by reason of its universality it is deficient.'"—From Baltimore & N. Y. R. Co. v. Bouvier [N. J. Eq.] 62 A. 868.

8. See 5 C. L. 1144.

9. United States v. Bitter Root Development Co., 200 U. S. 451, 50 Law. Ed. —.

10. Charges of fraud, conspiracy, and breach of trust will not confer equity jurisdiction where they are not sustained by the facts alleged. United States v. Bitter Root Development Co., 200 U. S. 451, 50 Law. Ed. —.

11. Necessary allegations cannot be supplied from the prayer. Jacoby v. Funkhouser [Ala.] 40 So. 291. Fact that prayer was for legal relief only did not prevent the court from taking jurisdiction where the allegations of the bill were sufficient. Rugg v. Lemly [Ark.] 93 S. W. 570.

12. Where the jurisdictional facts are not proved, equity will not retain jurisdiction in order to grant purely legal relief. Pennsylvania Coal & Coke Co. v. Jones, 30 Pa. Super. Ct. 358.

13. Dickinson v. Arkansas City Imp. Co. [Ark.] 92 S. W. 21.

14. Williams v. Wetmore [Fla.] 41 So. 545.

15. Williams v. Wetmore [Fla.] 41 So. 545. In cases of concurrent jurisdiction the consent of the parties may influence the court to assume jurisdiction of the particular case. Daab v. New York Cent. & H. R. Co. [N. J. Eq.] 62 A. 449.

16. Venable v. Shafer, 7 Ohio C. C. (N. S.) 337.

17. When no motion is made to transfer a case to the law court, the right to object to the jurisdiction of the court of equity is waived. Harris v. Umsted [Ark.] 96 S. W. 146. As to waiver of objection on the ground of existence of an adequate remedy at law, see post, this section, subd. B, Existence of Adequate Remedy at Law.

18. Haydon v. St. Louis & S. F. R. Co. [Mo. App.] 93 S. W. 833. Lack of jurisdictional amount appearing from pleadings and proof may be raised at hearing. Brassington v. Waldron [Mich.] 12 Det. Leg. N. 1011, 107 N. W. 100. See Jurisdiction, 6 C. L. 267.

19. Owens v. Goldie, 213 Pa. 579, 62 A. 1117, dist'g Pennsylvania R. Co. v. Bogert, 209 Pa. 589, 59 A. 100.

20. Total want of equity jurisdiction. Haydon v. St. Louis & S. F. R. Co. [Mo. App.] 93 S. W. 833. Formerly, in the practice of the Federal courts, jurisdiction of a case commenced originally in a circuit court of the United States attached if the bill of complaint contained sufficient averments of the jurisdictional facts, and to oust the court of jurisdiction the defendant was required to contest the jurisdiction by a special plea, but under the statutes now governing the practice the Federal courts are required on their own motion to disclaim jurisdiction at any stage of a case if satisfied that any essential fact does not exist. Therefore, whenever the record shows upon its face that there is a controversy as to a jurisdictional fact, the court may require proof to support a finding to eliminate such question, or else assume that it does not have jurisdiction. Klenk v. Byrne, 143 F. 1008.

of equity the question whether such jurisdiction will be exercised is within the sound discretion of the court and objections to the exercise of or the failure to exercise such jurisdiction must be taken in limine.[21] It is very generally held that jurisdictional objections cannot be raised for the first time on appeal.[22] Questions relating to the hearing on jurisdictional objections are treated elsewhere.[23]

Only courts vested with equitable jurisdiction can grant equitable relief,[24] nor can purely equitable relief ordinarily be granted in an action at law[25] or upon a purely legal cause of action,[26] but in some states equitable defenses may be interposed in actions at law.[27] A suit at law which has been abandoned is no bar to a suit in equity upon the same cause of action,[28] but where a party invokes both law and equity at the same time he cannot, after an adverse decision in equity, insist upon a decision at law.[29] The distinction between legal and equitable causes of action and proceedings is also important as bearing upon the conclusiveness of the findings of the trial court.[30] The question as to whether a controversy is legal or equitable may arise in connection with the plaintiff's capacity to sue,[31] and sometimes the question arises as a preliminary to the correct solution of the problems presented on the merits.[32]

A court of equity has power to protect its jurisdiction by punishing for contempt.[33]

Effect of code or statutory provisions.[34]—The most sweeping statutory provisions relative to the distinction between law and equity are those abolishing the distinction between actions at law and suits in equity, but even these provisions do not abolish the distinction between legal and equitable principles,[35] though such dis-

21. Southern Pac. R. Co. v. U. S., 200 U. S. 341, 50 Law. Ed. —.

22. Owens v. Goldie, 213 Pa. 579, 62 A. 1117; Lloyd v. Simons [Minn.] 105 N. W. 902. Where both parties submitted a boundary dispute to a court of equity, defendant could not object to jurisdiction for first time on appeal. Williams v. Wetmore [Fla.] 41 So. 545. Want of equity jurisdiction cannot be raised on appeal as ground for reversal. Const. 1890, § 147. Mississippi Fire Ass'n v. Stein [Miss.] 41 So. 66. When a bill is framed and tried as a bill in equity without objection, the defendant cannot object on appeal that the case was at law and should have been brought up by writ of error. Madden v. McKenzie [C. C. A.] 144 F. 64. See Saving Questions for Review, 6 C. L. 1385; Appeal and Review, 7 C. L. 128.

23. See post, § 12, Hearing or Trial.

24. Municipal court could not pass upon the validity of a release of claim for compensation in an application by a city employee for leave of absence on ground that the applicant did not understand the English language well enough to know the effect of the paper signed by him. Tepidino v. New York, 98 N. Y. S. 693. See Jurisdiction, 6 C. L. 267.

25. A plain action at law upon a married woman's note cannot be turned into an equitable action and such relief given as is grantable only in equity. Bailey v. Fink [Wis.] 109 N. W. 86.

26. As in action for recovery of damages for breach of contract. Todd v. Bettingen [Minn.] 107 N. W. 1049.

27. See post this section, subd. Effect of Code or Statutory Provisions.

28. Mellerio v. Freeman, 211 Pa. 202, 60 A. 735.

29. Where, pending a rule to show cause why a judgment should not be opened, the defendant sued in equity to cancel the judgment, he could not, after the dismissal of his bill, complain of the discharge of the rule without decision. Mellerio v. Freeman, 211 Pa. 202, 60 A. 735.

30. Ex parte Wallace, 73 S. C. 109, 52 S. E. 873. See Appeal and Review, 7 C. L. 128; Verdicts and Findings, 6 C. L. 1814.

31. Right of married woman to sue husband. Muller v. Witte [Conn.] 62 A. 756. A bill seeking merely the recovery of a legal debt arising out of a loan made by a wife to her husband, or out of an agreement made between them, calls for only legal relief. Id.

32. An action by a county against an exposition company to recover land no longer used by the company for giving fairs, and for rents and profits is one for the recovery of real property under Rev. St. § 5781, notwithstanding there are allegations which seem to call for some form of equitable relief. Toledo Exposition Co. v. Kerr, 8 Ohio C. C. (N. S.) 369.

33. The vice chancellor may hear contempt proceedings arising out of a suit before him, though such proceedings were not referred to him by the chancellor and though the contempt consisted of an attempt to influence improperly the administration of justice by compelling an affiant to make a false affidavit contradicting a previous affidavit made by him in the same cause. Seastream v. New Jersey Exhibition Co. [N. J. Eq.] 61 A. 1041. See Contempt, 7 C. L. 746.

34. See 5 C. L. 1145.

tinction is thus rendered important only as bearing upon matters of pleading[36] and practice.[37] Another radical statutory change is that equitable defenses may be interposed in actions at law,[38] thus carrying the case into equity,[39] but the facts thus pleaded must constitute an equitable and not legal[40] defense.[41] The rule is not uniform as to whether an equitable defense may include matters calling for affirmative relief.[42] Statutes creating special remedies for wrongs already cognizable in equity do not impliedly deprive equity of jurisdiction,[43] nor will the statutory enlargement of an equitable remedy so as to make it concurrent with a legal remedy destroy the equitable nature of the equitable remedy,[44] but statutes giving a party

35. Dewey v. Shreiber Implement Co. [Idaho] 85 P. 921; Madden v. McKenzie [C. C. A.] 144 F. 64.

36. See Pleading, 6 C. L. 1008.

37. Under Alaska Code Civ. Proc. [Carter's Codes Alaska, p. 145, § 1] the question whether a complaint states a legal or equitable cause of action is material only as affecting the procedure according to which the case shall be tried. Madden v. McKenzie [C. C. A.] 144 F. 64. See Appeal and Review, 7 C. L. 128; Dockets, Calendars and Trial Lists, 7 C. L. 1192; Jury, 6 C. L. 316; Trial, 6 C. L. 1731.

38. Code Pub. Gen. Laws 1904, art. 75, §§ 86, 88. Albert v. Freas [Md.] 64 A. 282. Rev. St. 1898, § 2657. Chicago & N. W. R. Co. v. McKeigue, 126 Wis. 574, 105 N. W. 1030. Under Rev. St. 1899, § 605, an equitable title may be set up as a defense in ejectment by the owner of the legal title. Shaffer v. Detie, 191 Mo. 377, 90 S. W. 131. Rev. St. c. 84, §§ 17-21. Hurd v. Chase, 100 Me. 561, 62 A. 660. In a real action to recover a life estate the court had power to look behind the instrument reserving an absolute life estate in order to ascertain whether the reservation was in fact unconditioned or only as security for some obligation. Id.

39. Where vendor sued at law to enforce contract of sale and vendee set up equitable defense, the case was thus carried into equity, and it was within the province of the chancellor to determine whether the contract was fair and equitable and to grant or refuse relief accordingly. Bridgewater v. Byassee [Ky.] 93 S. W. 35. An equitable defense with prayer for affirmative relief changes an action at law to one in equity. Shaffer v. Detie, 191 Mo. 377, 90 S. W. 131; Bouton v. Pippin, 192 Mo. 469, 91 S. W. 149.

40. Estoppel in pais held not pleadable as equitable defense. Albert v. Freas [Md.] 64 A. 282. To an action for breach of a lumber contract, a plea on equitable grounds to the effect that the real consideration for the contract sued on was another contract or combination entered into by the parties with three other lumber dealers, designed to control the price of lumber in that port, which other contract or combination the plaintiff had violated, and that by mistake of law the latter was not written into the contract sued on, was bad as setting up a purely legal defense as an equitable one. Pensacola Lumber Co. v. Sutherland-Innes Co. [Fla.] 39 So. 789. An answer in an action on a supersedeas bond alleging an agreement between the judgment creditor and debtor whereby the latter was induced not to pay the judgment, though he was solvent at the time, and that he subsequently died leaving an insolvent estate, did not set up an equitable defense so as to require a transfer of the case to the chancery docket. United States Fidelity & Guaranty Co. v. Boyd [Ky.] 94 S. W. 35. In an action for the price of merchandise, an answer which alleged that the order for the merchandise was subject to cancellation on certain conditions and that pursuant to such conditions it was cancelled set up a legal and not an equitable defense. Equitable Mfg. Co. v. Thomasson [Ark.] 95 S. W. 459. Where a railroad company in an action for injury to stock pleaded a contract limiting its liability to injuries on its own line, a replication alleging a mistake in the contract and that the contract was really to carry the stock to a certain point beyond the terminus of defendant's line set up purely legal matter. Cincinnati, etc., R. Co. v. Pendleton [Ky.] 96 S. W. 434.

41. To require the municipal court to certify a case to the district court, under Sp. Laws 1889, c. 351, p. 999, § 22, on the ground that an equitable defense has been interposed, the answer must set forth facts sufficient to constitute a defense. Selover v. Williams [Minn.] 107 N. W. 960.

42. In Florida it is held that equitable pleas in actions at law must be purely defensive. Pensacola Lumber Co. v. Sutherland-Innes Co. [Fla.] 39 So. 789. In Missouri an equitable defense may include a prayer for affirmative relief. Bouton v. Pippin, 192 Mo. 469, 91 S. W. 149. In Wisconsin, facts calling for affirmative relief must be set up by way of counterclaim. Chicago & N. W. R. Co. v. McKeigue, 126 Wis. 574, 105 N. W. 1030.

43. That the anti-trust act making a conspiracy in restraint of trade a crime does not deprive equity of jurisdiction to restrain such a conspiracy. Leonard v. Abner-Drury Brewing Co., 25 App. D. C. 161. Quere whether, if the wrongs complained of would be remediless save by resort to the anti-trust act, any party other than the United States could invoke the jurisdiction of equity to restrain their commission. Id. The statute providing for proceedings to compel a railroad company to construct crossings did not deprive a landowner of the right to specific performance of a contract, entered into prior to the enactment of the statute, whereby the company agreed to construct several crossings on complainant's land, the statutory remedy not being as adequate and complete as the equitable remedy. Baltimore & O. S. W. R. Co. v. Brubaker, 217 Ill. 462, 75 N. E. 523.

44. Equitable remedy to quiet title not

an adequate remedy at law are sometimes construed as depriving equity of jurisdiction.[45] A state legislature cannot enlarge or diminish the equity jurisdiction of the Federal courts,[46] but a statutory change as to procedure may be recognized and followed by the Federal courts.[47]

In some states the jurisdiction of courts of equity is limited by the amount in controversy.[48]

(§ 2) *B. Maxims and principles controlling the application of equitable relief. General principles and maxims.*[49]—Conscience, good faith, and reasonable diligence are all necessary to call a court of equity into activity.[50] A court of equity will not exercise its jurisdiction uselessly,[51] or where no right has been violated,[52] or to enforce a hard and unconscionable bargain,[53] and one who seeks equity must do equity.[54] Equity looks to the substance and not the form,[55] and will regard that as done which ought to have been done,[56] and will not allow that to be done indirectly which may not be lawfully done directly.[57] Equity aids only the vigilant[58] and will compel a party to bear the consequences of his own negligence as against one not in fault.[59] Equity abhors forfeitures[60] and penalties,[61] but favors compromise settle-

destroyed by statute giving a party out of possession the benefit of such remedy and thus making it concurrent with ejectment. Costello v. Muheim [Ariz.] 84 P. 906.

45. Whatever jurisdiction equity may have had to grant relief to an evicted tenant on account of improvements was taken away by the occupying claimants' law which gives an adequate legal remedy in all such cases where equitable relief could be administered in the absence of the statute. Van Tassell v. Wakefield, 122 Ill. App. 32.

46. A Federal court, therefore, cannot enjoin a state tax on the sole ground of illegality, though a state statute makes illegality a ground for such relief in the state courts. Illinois Life Ins. Co. v. Newman, 141 F. 449. A state statute extending or defining the rule that complainant must offer to do equity will not affect the jurisdiction of a Federal court, and hence the right of a Federal court to pass upon a claim asserted by the defendant under a tax title was not affected by 2 Ball's Ann. Codes & St. §§ 5678-5680, requiring that complainant in such a suit must have tendered the amount justly due. It will be sufficient if the bill offer to submit to such terms as the court may impose. Klenk v. Byrne, 143 F. 1008.

47. Right under Mont. Civ. Code § 1891 to sue in one action all parties infringing a water right and to have all rights pertaining thereto settled in one judgment. Ames Realty Co. v. Big Indian Min. Co., 146 F. 166.

Note: For an instructive discussion of the effect of state statutes on Federal equity jurisdiction, see Holland v. Challen, 110 U. S. 15, 28 Law. Ed. 52.

48. Under Code Pub. Gen. Laws 1904, art. 16, § 102, courts of equity have no jurisdiction where the damages or amount claimed is less than $20. Kenneweg v. Allegany County Com'rs, 102 Md. 119, 62 A. 249. Where lack of jurisdictional amount appears on the face of the bill the objection may be reached by demurrer, otherwise the objection must be taken by plea or answer, though in any case where the defect appears from the pleadings or proofs the objection may be raised at the hearing. Brassington v. Waldron [Mich.] 12 Det. Leg. N. 1011, 107 N. W. 100. See Jurisdiction, 6 C. L. 267.

49. See 5 C. L. 1146.

50. Bibber v. Carville [Me.] 63 A. 303.

51. Will not construe void contract. Gueutal v. Gueutal, 98 N. Y. S. 1002.

52. A party who conceived the idea of combining certain industries had no right in the idea which could be protected by equity as against another party who appropriated the idea and carried it out. Haskins v. Ryan [N. J. Eq.] 64 A. 436.

53. By specific performance. Kilpatrick v. Wiley [Mo.] 95 S. W. 213.

54. Equity will not enforce a contract unless the applicant himself has performed or is ready to perform his part. Havre de Grace Real Estate & Power Co. v. Havre de Grace, 102 Md. 33, 61 A. 662. In a suit to annul a bond for a deed and to foreclose the defendant's interest in the property the complainant will be compelled to give the defendant a reasonable opportunity to redeem. Higginbotham v. Frock [Or.] 83 P. 536. Where the owner of land invokes the aid of a court of equity to recover it from an occupying claimant, he must compensate the claimant for all beneficial improvements in good faith placed thereon by such claimant. Wakefield v. Van Tassell, 218 Ill. 572, 75 N. E. 1058. Party asking relief from forfeiture for nonpayment of claim barred by limitations must pay amount equitably due. People v. Freeman, 110 App. Div. 605, 97 N. Y. S. 343.

55. Mitchell v. Hannah, 121 Ill. App. 597. In suit to enjoin payment of appropriation for acquisition of Panama Canal right of way, the United States held to be the substantial owner of the soil and to have acquired substantial sovereignty over the same. Wilson v. Shaw, 25 App. D. C. 510.

56. Wright v. Breckenridge, 125 Iowa 197, 101 N. W. 111.

57. Injunction not allowed where only effect was to dispossess a tenant, the landlord's remedy being at law. Mitchell v. Hannah, 121 Ill. App. 597.

58. Bibber v. Carville [Me.] 63 A. 303. See post § 3. Laches and Acquiescence.

ments.[62] On a conflict of equities strength of equity will overcome priority as to time.[63]

Clean hands.[64]—He who comes into equity must do so with clean hands.[65] Under this maxim a party may be debarred from interposing an equitable defense in an action at law,[66] or may be precluded from objecting to the jurisdiction of equity,[67] or may lose his right to relief by his conduct pending the litigation.[68] Examples of a still broader application of this maxim are that a release of the right to relief against a principal wrongdoer will bar a suit against mere accessories,[69] and that negligence may bar a suit for fraud.[70] Where a party comes within the operation of this maxim, parties claiming under and in privity with him will also be barred.[71] The maxim is applicable only when the party seeking the relief is guilty of reprehensible conduct in connection with the matter as to which the relief is sought.[72] Fraud induced by the defendant by his own fraud upon the complainant will not place the latter in pari delicto as to relief against the former.[73]

59. Maker of note who delivers it with blanks unfilled must bear consequences of alteration by filling in of blanks as against an innocent holder for value without notice. Humphrey Hardware Co. v. Herrick [Neb.] 101 N. W. 1016.

60. Brewster v. Lanyon Zinc Co. [C. C. A.] 140 F. 801; Yeiser v. Portsmouth Sav. Bank [Neb.] 106 N. W. 784; Higginbotham v. Frock [Or.] 83 P. 536; Wheeling & E. G. R. Co. v. Triadelphia [W. Va.] 52 S. E. 499; Thornton v. Natchez [Miss.] 41 So. 498; People v. Freeman, 110 App. Div. 605, 97 N. Y. S. 343; Barlow v. McDowell, 118 Ill. App. 506. See post this section, subd. C, Occasions and Subjects of Equitable Relief.

61. Miller v. Willett [N. J. Eq.] 62 A. 178.

62. Haydon v. St. Louis & S. F. R. Co. [Mo. App.] 93 S. W. 833.

63. But the strength of the prevailing equities must be substantial and based upon solid grounds and not upon mere fanciful or sentimental ones. Indiana Match Co. v. Kirk, 118 Ill. App. 102.

64. See 5 C. L. 1146.

65. Sioux City v. Chicago & N. W. R. Co. [Iowa] 106 N. W. 183; Little v. Cunningham, 116 Mo. App. 545, 92 S. W. 734. While parties to a fraudulent transaction are, as respects each other, bound thereby, a court of equity will neither enforce nor avoid the transaction at the demand of either party. Roche v. Hoyt [N. J. Eq.] 64 A. 174. Party, who by fraudulent representations obtained money to purchase land and then failed to complete the purchase and let the land be sold for taxes, denied relief as against the lender, who, to save himself, completed the purchase and took title in himself. Slater v. Gribbel, 41 Wash. 168, 83 P. 19. The fact that a party seeking to enjoin a city from engaging in the coal business was a member of a combination of dealers in violation of Comp. Laws 1897, §§ 11,377, 11,378, 11,379, was proper to be considered in determining whether complainant came into court with clean hands. Baker v. Grand Rapids [Mich.] 12 Det. Leg. N. 879, 106 N. W. 208. A computing scale sought to be protected by injunction from derogatory circulars disseminated by defendant held, as a matter of fact, to be a dishonest scale and not entitled to the protection of equity. Toledo Computing Scale Co. v. Computing Scale Co. [C. C. A.] 142 F. 919. Divorce will not be granted to one guilty of an offense against the marital rights and duties similar to that charged as grounds for the divorce. Stoneburner v. Stoneburner [Idaho] 83 P. 938. See Divorce, 5 C. L. 1026. When complainant seeking injunction against violation of contract of lease had himself violated the contract. Ashe-Carson Co. v. Bonifay [Ala.] 41 So. 816. Landowner who had failed to perform a covenant requiring him to open a street could not enjoin laying of pipes in and along the property which should have been opened as a street. Jayne v. Cortland Waterworks Co., 107 App. Div. 517, 95 N. Y. S. 227.

66. A purchaser at a sale under a junior mortgage who bought with knowledge of the fraud and force of the junior mortgagee in obtaining the property and who paid only the amount secured by the junior mortgage, though the property was sufficient to pay both claims, could not in replevin by the senior mortgagee invoke the equitable doctrine that a senior lienor must exhaust his remedy against all other properties covered by his lien before proceeding against that covered by the junior lien. Youngberg v. Walsh, 72 Kan. 220, 83 P. 972.

67. In a suit to quiet title the defendant cannot set up a possession by him which has been unlawfully and forcibly acquired, and thus deprive equity of jurisdiction on the ground that there is an adequate remedy at law. Slaughter v. Mallet Land & Cattle Co. [C. C. A.] 141 F. 282.

68. Where complainant pending suit assumed the right to acquire by force and arms the relief sought in the suit. Little v. Cunningham, 116 Mo. App. 545, 92 S. W. 734.

69. Where claim for infringement of trade mark was waived as to the principal infringer, it could not be enforced against a party who merely furnished the boxes and labels used by the principal infringer in perpetrating the wrong. Hillside Chemical Co. v. Munson & Co., 146 F. 198.

70. But a party may be excused by slight circumstances for failure to exercise due diligence to protect himself from the consequences of defendant's mistakes or fraud. Thus, complainant was not barred from equitable relief by failure to examine a deed before accepting it where the injury flowed

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Existence of adequate remedy at law.[74]—Lack of adequate remedy at law is not only an independent ground of equity jurisdiction[75] but is the fundamental basis thereof.[76] Even where there is concurrent jurisdiction at law and in equity, the jurisdiction of the latter will not ordinarily be exercised where the remedy at law

from failure of defendant's agent to prepare the deed as directed by complainant. Loyd v. Phillips, 123 Wis. 627, 101 N. W. 1092.

71. Heir of fraudulent grantor cannot have deed set aside. Foster v. Beidler [Ark.] 96 S. W. 175.

72. It does not apply where the reprehensible transaction is merged in a new transaction upon an adequate consideration. Cohn v. Pitzele, 117 Ill. App. 342. See Contracts, 7 C. L. 761; Novation, 6 C. L. 826. Where a creditor conspired with his debtor to defraud other creditors, and pursuant to such conspiracy property was conveyed to the debtor's wife, the latter could not avoid a foreclosure of a deed of trust on the property given to such creditor by her on the ground of the original fraud by which she acquired the property. Cohn v. Pitzele, 117 Ill. App. 342. Suit to enforce a contract for the sale of a business and to enjoin the violation of a stipulation by the seller not to engage in the same business could not be defended on the ground that the purchase by the plaintiff was pursuant to a scheme to form an unlawful combination. Camors-McConnell Co. v. McConnell, 140 F. 412. A guaranty company which is liable on the bond of a defaulting corporate officer and to which the corporation has assigned its deposits may recover the deposits from the depositaries, not being affected by the criminal acts of the officer which led to the assignment. Fidelity & Deposit Co. v. Fidelity Trust Co., 143 F. 152. The maker or indorser of a usurious note is not precluded from relief under the doctrine of in pari delicto. Horner v. Nitsch [Md.] 63 A. 1052.

73. Where defendant, complainant's brother, fraudulently induced her to execute a bogus mortgage to him which was in fraud of creditors. Phillips v. Bradford [Ala.] 41 So. 657.

74. See 5 C. L. 1148.

75. Where a note tendered to an insurance company through its agent in payment of premiums was rejected and then subsequently reinstated as a valid obligation under a written agreement between the insured and the agent, and the note was then accepted by the company and returned to the agent for collection, who thereupon, being the president of a bank, purchased the note as such president from himself as agent, and the insured upon being thereafter requested by the bank to pay the note repudiated his liability thereon on the ground that the written agreement had been violated by the other parties thereto, it was held that the bank might maintain a suit in equity against the insured, the agent, and the insurance company to determine the liability on the note and for a discovery, the case being one peculiarly for equity jurisdiction on account of the uncertainty and confusion created by the defendants which rendered the remedy at law utterly inadequate. Enochs v. Mississippi Bank & Trust Co. [Miss.] 39 So. 529. When a party has a valid lien unenforceable in law, he may enforce it in equity. Evans v. Silvey & Co. [Ala.] 42 So. 62; Marks v. Equitable Life Assur. Soc., 109 App. Div. 675, 96 N. Y. S. 551.

76. Equity will not take jurisdiction where there is an adequate remedy at law. Barnett v. Hickson [Fla.] 41 So. 606; Ritterhoff v. Puget Sound Nat. Bank, 37 Wash. 76, 79 P. 601; Rupert v. Patron's Mut. Life Ins. Co. [Mich.] 108 N. W. 968; Carswell v. Swindell, 102 Md. 636, 62 A. 956.

Illustrations: For a more exhaustive treatment of the subjects here used as illustrations see the various specific titles relating thereto.

Cases in Which the Legal Remedy has Been Held Adequate: Where a party who had conceived the idea of combining certain industries proposed the plan to another party who agreed to assist in such combination but who appropriated the idea and formed the combination without the co-operation of the first party, such first party's only remedy, if he had any, was an action at law for the value of his idea. Haskins v. Ryan [N. J. Eq.] 64 A. 436.

Accounting: Action at law by assignee of patents to recover profits, damages, and royalties, held adequate. Allen v. Consolidated Fruit Jar Co., 145 F. 948; Owens v. Goldie, 213 Pa. 579, 62 A. 1117.

Bailment: Enforcement of rights of bailor against bailee. Young v. Mercantile Trust Co. [C. C. A.] 145 F. 39.

Boundary disputes: Suit to establish boundaries does not lie where the disputed land is occupied by defendant, ejectment being a sufficient remedy. Livingston County Bldg. & Loan Ass'n v. Keach, 219 Ill. 9, 76 N. E. 72.

Cloud on title: Bill to remove cloud does not lie when complainant is not in possession or the lands are not unoccupied. Livingston County Bldg. & Loan Ass'n v. Keach, 219 Ill. 9, 76 N. E. 72. A bill to remove a cloud cannot be maintained unless the actual possession and legal title are united in complainant. First Baptist Church of Sharon v. Harper, 191 Mass. 196, 77 N. E. 778. But the defendant cannot defeat the jurisdiction of equity by setting up a possession wrongfully and forcibly acquired. Slaughter v. Mallet Land and Cattle Co. [C. C. A.] 141 F. 282. See ante this section, and subdivision Clean Hands.

Conditions subsequent: Remedy at law adequate for breach of a condition to use land for burial purposes only. Thornton v. Natchez [Miss.] 41 So. 498.

Contracts: The remedy at law for mere breach of contract is adequate. Van Sciver v. Churchill [Pa.] 64 A. 322. The presumption that the remedy at law for violation

is adequate and there are no independent grounds of equity jurisdiction,[77] but a concurrent remedy at law does not necessarily oust equity of jurisdiction.[78] The

of a contract to convey land is incomplete may be overcome, as where the bill itself shows that performance is desired in order that the vendee may himself carry out a contract to sell the property at a certain price. Hazelton v. Miller, 25 App. D. C. 337.

Conversion: Where party who cut and carried away timber from public lands had resorted to various devices, such as organizing different corporations, in order to render it more difficult to prove a case against him, the remedy at law was adequate, since the right to inspect the books of the corporations was available in an action at law, and thus the same facts might thus be obtained in an action at law as could have been obtained in a suit in equity. United States v. Bitter Root Development Co., 200 U. S. 451, 50 Law. Ed. ---. Under the law providing for the examination of defendants, and under Rev. St. § 724 [U. S. Comp. Stat. 1901, p. 583], providing for the production of books and writings in actions at law, there was no occasion to resort to a court of equity in such case for a discovery. Id.

Corporations: Equity has no jurisdiction to enforce the several liability of stockholders of a banking corporation to creditors where there are no independent equities in the bill, such as the necessity of an accounting, etc., the remedy at law in such case being adequate. Miller v. Willett [N. J. Eq.] 62 A. 178. See Corporations, 7 C. L. 862. An agreement between the officers of a corporation whereby its assets were divided between them, and some of them assumed a note of the corporation, gave rise to merely a legal obligation as to the payment of the note. Mills v. Hendershot [N. J. Eq.] 62 A. 542.

Covenants for title: The remedy for breach of a covenant for title is by action at law, and where a life tenant sold standing timber, giving covenant for title, the purchaser had no lien on account of the breach of such covenant on the purchase price paid, either in the hands of the life tenant or his heirs, and equity had no jurisdiction to render a personal decree for such purchase price. Zimmerman Mfg. Co. v. Wilson [Ala.] 40 So. 515.

Deeds: Where there is a duplicate description in a deed, the remedy at law is adequate for the recovery of all such damages as double payment. Willson v. Legro, 73 N. H. 515, 63 A. 399.

Executions: A circuit judge, under the provisions of § 1196, Rev. St. 1892, has full power, either in term time or vacation, to stay an execution issued from and returnable to the circuit court in cases at law, and resort to a court of equity is unnecessary where there is no independent equity apart from the execution. Barnett v. Hickson [Fla.] 41 So. 606.

Insurance: A false warranted statement, made through mistake, in an application for fire insurance, is not alone sufficient to give equity jurisdiction of a suit merely to recover a loss under the policy, the question of the mistake being triable at law in an action on the policy. Rupert v. Patron's Mut. Life Ins. Co. [Mich.] 108 N. W. 968.

Landlord and tenant: Bill does not lie to recover possession from a tenant. Mitchell v. Hannah, 121 Ill. App. 597.

Money had and received: An action at law for money had and received is an adequate remedy to recover money equitably due. Owens v. Goldie, 213 Pa. 579, 62 A. 1117; Elk Brewing Co. v. Neubert, 213 Pa. 171, 62 A. 782. Where grantee in mortgage by deed absolute sold the property. Barchent v. Snyder [Wis.] 107 N. W. 329. Suit by contractor against owner of buildings and trustees to whom the owner conveyed the property to recover portion of proceeds of sale of the property claimed by the contractor under a contract with the owner. Van Sciver v. Churchill [Pa.] 64 A. 322.

Patents: Equity has no jurisdiction of suit by assignee of patent to recover profits, damages, and royalties, the remedy at law being adequate. Allen v. Consolidated Fruit Jar Co., 145 F. 948. Bill by assignee of interest in patent against patentee for moneys due complainant from sale of patent and royalties dismissed on ground that the claim was merely one for money had and received. Owens v. Goldie, 213 Pa. 579, 62 A. 1117.

Remainders: Where a life tenant granted a right to construct a levee on the property and the remainderman did not prevent the grantee from constructing the levee without compensation for the interests of the remainderman, the latter's only remedy was an action at law for damages, such remedy being adequate. Crawford v. Board of Directors of St. Francis Levee Dist. [Ark.] 96 S. W. 143.

Right to property or possession: Equity will not ordinarily take jurisdiction of disputes concerning merely the legal title to land, and under Gen. St. 1902, § 4053, providing for a suit in equity to quiet title, equity has no jurisdiction to redress a wrongful entry and dispossession. Foote v. Brown, 78 Conn. 369, 62 A. 667. Equity has no jurisdiction of suit merely to recover land in possession of another. Remsen v. New York, etc., R. Co., 97 N. Y. S. 902. Equity has no jurisdiction merely to determine legal title. Carswell v. Swindell, 102 Md. 636, 62 A. 956; Woglom v. Kant [N. J. Eq.] 63 A. 283; State v. Inhabitants of Trenton [N. J. Eq.] 63 A. 897; Pennsylvania Coal & Coke Co. v. Jones, 30 Pa. Super. Ct. 358. See post this section, subd. C, Occasions For and Subjects of Equitable Relief. When the question is merely whether complainant or defendant is entitled to certain property, equity has no jurisdiction. Merritt v. Alabama Pyrites Co. [Ala.] 39 So. 555. The occupying claimants' law gives a party who has placed improvements on land, from which he is ejected by a judgment in ejectment an adequate remedy in all cases where equitable relief could be administered in the absence of the statute. Van Tassell v. Wakefield, 122 Ill. App. 32.

Taxes: The statute affords a plain, adequate, and speedy remedy to one whose property has been excessively valued for taxation and in cases in which the county board of equalization has committed prejudicial errors or irregularities in procedure. Western Union Tel. Co. v. Douglas County [Neb.] 107 N. W. 985.

adequate remedy at law which will prevent relief in equity must be as certain, complete, prompt, and efficient to attain the ends of justice as the remedy in equity.[79]

Cases in Which the Legal Remedy has Been Held to be Inadequate. Accounting: Where the remedy at law and the remedy in equity both involve an accounting and the consideration of many items, the remedy in equity is more complete and efficient and better adapted to attain the ends of justice than the remedy at law. Castle Creek Water Co. v. Aspen [C. C. A.] 146 F. 8; Fidelity & Deposit Co. v. Fidelity Trust Co., 143 F. 152.

Beneficial associations: Member of voluntary beneficial association wrongfully expelled has no adequate remedy at law and may sue in equity for reinstatement. Mesisco v. Guiliano, 190 Mass. 352, 76 N. E. 907.

Conditional sales: The reservation by the seller of right to retake machinery sold was not a bar to his right to sue a subpurchaser in equity, nor was such suit precluded by the fact that the seller had the purchaser's bond to secure the purchase price, the bond, however, being for less than the purchase price. Quigley v. Spencer Stone Co. [C. C. A.] 143 F. 86.

Contracts: Where a city has refused to perform its contract to purchase the waterworks of a company at a price based on their productive worth, to be determined by appraisers, the water company has no remedy at law as complete and efficient as the specific performance of the contract in equity. Castle Creek Water Co. v. Aspen [C. C. A.] 146 F. 8. The remedy at law for violation of a contract to convey land is usually assumed to be inadequate. Hazleton v. Miller, 25 App. D. C. 337. Courts of law have jurisdiction and power to afford relief by judgment for money or property, under some circumstances, when a right to rescind exists and has been properly claimed, but the remedy at law is incomplete and inadequate because of lack of power to effect a rescission by a direct adjudication thereof. Bruner v. Miller [W. Va.] 52 S. E. 995.

Corporations: An action for damages does not always afford an adequate remedy for the refusal of a corporation to recognize a person as a stockholder, and a bill in equity lies to compel a corporation to issue a certificate to a transferee of stock. Westminster Nat. Bank v. New England Elec. Works, 73 N. H. 465, 62 A. 971. An action at law for dividends does not lie until the dividends have been declared, and hence there is no remedy at law which will prevent equity from taking cognizance of a suit to compel a declaration of dividends. Cratty v. Peoria Law Library Ass'n, 219 Ill. 516, 76 N. E. 707. The right of action for damages in favor of minority stockholders against the majority for disposition of the corporation's property in fraud of the rights of the minority does not preclude the right to follow such property in equity. Jones v. Missouri-Edison Elec. Co. [C. C. A.] 144 F. 765. Where stockholders are induced to subscribe by fraudulent representations, they have no such remedy at law as will bar suit to cancel their subscriptions. Hamilton v. American Hulled Bean Co. [Mich.] 12 Det. Leg. N. 1005, 106 N. W. 731. The jurisdiction of equity of a suit by creditors against stockholders is not dependent upon an accounting and may attach even where an accounting is not necessary, the remedy at law against the separate stockholders not being as efficient as the remedy in equity against all the stockholders. Cook v. Carpenter, 212 Pa. 165, 61 A. 799. See Corporations, 7 C. L. 862.

Estates of decedents: The probate court having no power to reach property fraudulently obtained from decedent during life, equity has jurisdiction of a suit to recover such property. Marsh v. Marsh, 78 Vt. 399, 63 A. 159.

Highways and streets: "Whatever may be the law elsewhere, it is too well settled in this state for further controversy 'that, under constitutional guaranties, a municipal corporation may not take or injure the property of a citizen in the exercise of its power to improve its highways without first making compensation; and the right to injunctive relief in such a case as this exists without reference to the solvency or insolvency of the municipality and regardless of the consideration that he might recover full compensatory damages in an action at law.' City Council of Montgomery v. Lemle, 121 Ala. 609, 25 So. 919; Avondale v. McFarland, 101 Ala. 381, 13 So. 504; Niehaus v. Cooke, 134 Ala. 223, 32 So. 728." Town of New Decatur v. Scharfenberg [Ala.] 41 So. 1025. Parties aggrieved by the establishment of a road without proper notice are entitled to equitable relief where they have no right of appeal and the record of the proceedings recites the jurisdictional facts, thus cutting off the remedy by certiorari. Williams v. Routt County Com'rs [Colo.] 84 P. 1109.

Injury to business: Remedy at law inadequate where defendant was circulating circulars derogatory of articles manufactured by complainant. Toledo Computing Scale Co. v. Computing Scale Co. [C. C. A.] 142 F. 919.

Liens: Judgment lien uninforceable at law because of insolvency and death of debtor, held enforceable in equity. Evans v. Silvey & Co. [Ala.] 42 So. 62.

Municipal bonds: Where a school district was divided according to Code 1873, § 1715, a holder of the bonds of such district could enforce his rights in equity, his remedy at law being inadequate. Gamble v. Rural Independence School Dist. [C. C. A.] 146 F. 113. Remedy at law insufficient to protect rights of holders of railroad aid bonds issued by a county where county treasurer refused or failed to apply to the payment of coupons taxes levied for such purpose. Board of Com'rs of Onslow County v. Tollman [C. C. A.] 145 F. 753.

Railroad crossings: The statutory proceedings to compel a railroad company to construct a crossing held not as efficient as a suit for specific performance of a contract whereby the company had agreed to construct several crossings on complainant's land. Baltimore & O. S. W. R. Co. v. Brubaker, 217 Ill. 462, 75 N. E. 523.

Restraint of trade: The remedy at law is inadequate to redress injury to private individuals flowing from a conspiracy in restraint of trade, since such damages as

On the other hand the remedy at law must be inadequate in fact,[80] nor can equity jurisdiction be sustained on the ground that equitable relief may be incidentally

flow from loss of speculative profits, etc., cannot be considered or allowed at law. Leonard v. Abner-Drury Brewing Co., 25 App. D. C. 161.

Right to property or possession: Replevin is inadequate where the circumstances are such that the levy of the writ cannot be completed, as where a piano belonging to complainant was in an apartment owned by defendant and could not be removed therefrom without enlarging a window, which the defendant would not allow. Berry v. Friedman [Mass.] 78 N. E. 305. There was no such conversion in such a case as would bar a suit in equity. Id. Under Rev. Laws c. 159, § 3, cl. 1, a suit in equity may be maintained to recover chattels where they are concealed so that they cannot be reached by replevin. Pels & Co. v. Cambridge Architectural Iron Works [Mass.] 77 N. E. 1152.

Trespass: Injunction against cutting and removing timber where plaintiff's damages recoverable at law would not give him full compensation. Hall v. Wellman Lumber Co. [Ark.] 94 S. W. 43.

Vendor and purchaser: Where complainant purchased property from defendant, giving him as part payment a large claim secured by mortgage on the land conveyed in reliance upon defendant's assurance that the property was incumbered only to a small extent, and received a deed, in reliance upon the promise of defendant's agent, thinking that it contained a covenant against all incumbrances, whereas it excepted the mortgage transferred to defendant, and the property was additionally heavily incumbered, the defendant being insolvent, the complainant was without adequate remedy at law. Loyd v. Phillips, 123 Wis. 627, 101 N. W. 1092.

Wills: No action at law can be maintained under Code Civ. Proc. § 2653a, to set aside a will before probate and hence a suit in equity may be maintained for this purpose. Irving v. Bruen, 110 App. Div. 558, 97 N. Y. S. 180.

77. Daab v. New York Cent. & H. R. Co. [N. J. Eq.] 62 A. 449; Barchent v. Snyder [Wis.] 107 N. W. 329. Where equity and law have concurrent jurisdiction, it is often a good rule for equity to hold off until it has been demonstrated that the legal remedy is inadequate. Daab v. New York Cent. & H. R. Co. [N. J. Eq.] 62 A. 449. A court of equity will not withdraw a case from a court of law in which it is pending except where such withdrawal is necessary to do complete justice between the parties. Standard Roller Bearing Co. v. Crucible Steel Co. [N. J. Eq.] 63 A. 546. Suit by trustee in bankruptcy to avoid preferences given by bankrupt. Boonville Nat. Bank v. Blakey [Ind.] 76 N. E. 529. Will not be exercised to take from the orphan's court the distribution of an estate except upon equitable grounds. Wyckoff & O'Neil [N. J. Eq.] 63 A. 982. Where the law courts have jurisdiction to determine several items of an account taken as a single claim, the jurisdiction of equity to decree an accounting is, at most, only concurrent with the jurisdiction of the law courts, and will not be exercised unless the remedy at law is inadequate. Daab v. New York Cent. & H. R. Co. [N. J. Eq.] 62 A. 449. As a general rule the jurisdiction of equity in cases of fraud is concurrent with that of law, and the question of its exercise depends upon the whole aspect of the case. Smith v. Krueger [N. J. Eq.] 63 A. 850.

Holding a chancery cause in abeyance pending the determination of an action at law, which may settle the whole controversy, is within the discretion of the chancellor (Schmid v. Benzie Circ. Judge [Mich.] 108 N. W. 356), but upon the reversal of the judgment and the granting of a new trial in the action at law the two cases stand upon an equal footing and the defendant in the chancery cause has the right to bring it to a hearing (Id.).

78. Cancellation of written release or assignment procured by fraud not precluded by remedy by way of reinstating cause of action settled by such release or assignment or by way of a new action upon the same cause. Bush v. Prescott & N. W. R. Co. [Ark.] 89 S. W. 86.

Effect of statutory provisions: The creation of a concurrent legal remedy does not necessarily deprive equity of jurisdiction. Baltimore & O. S. W. R. Co. v. Brubaker, 217 Ill. 462, 75 N. E. 523. See ante this section, subd. A, Effect of Code and Statutory Provisions. Statutory enlargement of an equitable remedy so as to make it practically equivalent to the legal remedy does not necessarily destroy the equitable remedy, as where a statute authorizes one out of possession to sue in equity to quiet his title. Costello v. Muheim [Ariz.] 84 P. 906. But it may have this effect, and in Illinois the occupying claimants' law has been held to deprive equity of jurisdiction of an evicted tenant's claim for improvements. Van Tassell v. Wakefield, 122 Ill. App. 32.

79. Castle Creek Water Co. v. Aspen [C. C. A.] 146 F. 8; Ritterhoff v. Puget Sound Nat. Bank, 37 Wash. 76, 79 P. 601; Brewster v. Lanyon Zinc Co. [C. C. A.] 140 F. 801. Injunction against ordinance fixing telephone rates. Ozark-Bell Telephone Co. v. Springfield, 140 F. 666. Suit by assignee of corporation to collect and distribute assets, including liability on stock subscriptions. Cook v. Carpenter, 212 Pa. 165, 61 A. 799. See Corporations, 7 C. L. 862. Equity's concurrent jurisdiction arising out of fraud will be exercised where the remedy at law is not as efficient as that in equity, as where a note is obtained by fraud, the remedy at law is not as efficient as a suit for cancellation, especially where the note has been assigned. Manning v. Berdan, 135 F. 159; Ritterhoff v. Puget Sound Nat. Bank, 37 Wash. 76, 79 P. 601. But see Johnson v. Swanke [Wis.] 107 N. W. 481. U. S. Rev. St. § 723 [U. S. Comp. St. 1901, p. 583] does not alter the rule, but is merely declaratory of the rule in force prior to 1789, when the statute was enacted. Manning v. Berdan, 135 F. 159. The statutory remedy, under Ballinger's Ann. Codes & St. §§ 6034-6038, by way of perpetuation of testimony, is not as efficient as the equitable remedy of cancellation of a void note. Ritterhoff v. Puget

necessary to supplement the remedy at law,[81] or that the equitable remedy will be more convenient[82] or more easily sustained by proof[83] than the legal remedy. Equity will not relieve a party from the consequences of his failure to appeal[84] or to interpose a defense in an action at law,[85] nor can equity grant relief not presently necessary and which may be obtained by way of defense to a pending[86] or future[87]

Sound Nat. Bank, 37 Wash. 76, 79 P. 601. Complicated and intricate accounts rendering it improbable that a jury could do justice between the parties, especially where a discovery is necessary. Fidelity & Deposit Co. v. Fidelity Trust Co., 143 F. 152. Where the agent of a beneficial order opened an account with a bank in his name as agent and embezzled a portion of such account, the remedy at law of the assignee of the order was inadequate. Id.

Note: "In the absence of chancery powers in our courts, equitable relief was afforded wherever practicable in common-law forms. When later the legislature granted equitable powers, it was held that, if the subject of a bill was one within the proper and established jurisdiction of chancery, the invention of a new remedy in common-law form, or the extension of an old one, would not necessarily oust the equitable jurisdiction. Wesley Church v. Moore, 10 Pa. 273. The question in such cases turns on the completeness, adequacy, and convenience of the remedy at law, and our decisions have been liberal in the consideration of all these elements. Kirkpatrick v. McDonald, 11 Pa. 387; Bierbower's Appeal, 107 Pa. 14; Brush Elec. Co.'s Appeal, 114 Pa. 574, 7 A. 794; Johnston v. Price, 172 Pa. 427, 33 A. 688; Gray v. Citizens' Gas Co., 206 Pa. 303, 55 A. 988. In the last case it was said by our Brother Dean: 'The question raised in this case is not alone whether plaintiff has a remedy at law, for that remedy it clearly has, but whether, in view of the facts, it is an adequate one. It may be conceded that the time is not very remote in our judicial history, when a wronged party sought the intervention of equity, and he could be truthfully met by the reply, "You have a remedy at law in an action for damages," such reply would have been the end of his bill. He would have been turned out of court for want of jurisdiction. But this answer is no longer conclusive as to the jurisdiction. Courts now go further, and inquire whether under the facts the remedy at law is not vexatiously inconvenient, and whether it is so proximately certain as to be adequate to right the wrong complained of.' Testing by this standard the numerous actions that would be required at law, and comparing that remedy with the superior certainty, uniformity, and convenience of the present bill, we have no hesitation in holding that it is a proper case for equitable jurisdiction."—From Cook v. Carpenter, 212 Pa. 165, 61 A. 799.

80. Not merely one which might possibly turn out to be inadequate. Daab v. New York Cent. & H. R. Co. [N. J. Eq.] 62 A. 449.

81. Ejectment was adequate remedy to recover lands from railroad company, though tracks, ties, and other appurtenances were situated thereon. Remsen v. New York, etc., R. Co., 97 N. Y. S. 902.

82. Miller v. Willett [N. J. Eq.] 62 A. 178.

83. United States v. Bitter Root Development Co., 200 U. S. 451, 50 Law. Ed. —.

84. Grant v. Justice's Court of Second Tp., 1 Cal. App. 383, 82 P. 263; Hoskins v. Nichols, 48 Misc. 465, 96 N. Y. S. 926.

85. In action at law, wherein judgment was alleged to have been obtained by false testimony. Hoskins v. Nichols, 48 Misc. 465, 96 N. Y. S. 926. Bill to enjoin execution on judgment could not be sustained where it was based upon matters which might have been set up as a defense in the action in which the judgment was rendered. Wilson v. Cook [Tex. Civ. App.] 15 Tex. Ct. Rep. 144, 91 S. W. 236. Where defendant in ejectment had title by adverse possession but did not assert it. Johnson v. Oldham [Ala.] 40 So. 213. That a chattel mortgage was made for the benefit of the mortgagee and was not intended to operate as a mortgage was available in an action for a deficiency after foreclosure. Koehler & Co. v. Duggan, 49 Misc. 100, 96 N. Y. S. 1025. Where a grantee orally assumed certain notes of the grantor, the holder of the notes could not intervene in an action at law by the grantor against the grantee until the liability of the latter to the holder was determined, and hence his failure to do so would not preclude a suit to establish the notes as a claim against the property conveyed. Greenley v. Greenley, 100 N. Y. S. 114.

Estoppel in pais may be set up as a defense at law. South Penn Oil Co. v. Calf Creek Oil & Gas Co., 140 F. 507. "Especially to the action of ejectment, as held in Kirk v. Hamilton, 102 U. S. 68, 26 Law. Ed. 79, and Dickerom v. Colgrove, 100 U. S. 578, 25 Law. Ed. 618." Id. But as a general rule it will be administered by equity alone. Id.

86. Bill to enjoin action by administrator on ground that claim had been released by decedent's sole heir, held subject to demurrer on ground that the release was pleadable, under Rev. St. 1898, § 2657, as a defense in the action by the administrator. Chicago & N. W. R. Co. v. McKeigue, 126 Wis. 574, 105 N. W. 1030. When an action at law is pending in which the defendant has a complete defense, this court will not withdraw the question from the law court, unless the case involves some equitable element which the law court cannot apply, but which must be applied to do complete justice, or unless the relief of defendant cannot be afforded by the law court or without the intervention of the equity court. Standard Roller Bearing Co. v. Crucible Steel Co. [N. J. Eq.] 63 A. 546.

87. Johnson v. Swanke [Wis.] 107 N. W. 481.

Relief against void note: The American doctrine is that the aid of equity cannot be invoked to avoid the menace of a prosecution on a void note, the remedy by defense of action on the note being adequate. Johnson v. Swanke [Wis.] 107 N. W. 481. But this rule

action at law. In applying the test of adequate remedy at law, the legal machinery of the present day and not that of the past must be considered.[88]

The lack of adequate legal remedy or the existence of concurring legal and equitable remedies must affirmatively appear from the allegations of the bill.[89] Objection on account of the absence of such allegations may be made at any stage of the proceedings,[90] or the court may of its own motion raise the objection,[91] but the proper practice is to raise such objections in limine before answering to the merits, and a failure to do so leaves the question of retention or rejection of jurisdiction within the sound discretion of the court.[92] It is sometimes broadly declared that the objection is waived by failure to demur,[93] but this is decidedly against the weight of authority.[94] In New York the defense of adequate remedy at law must be pleaded.[95] The objection that the complainant might secure relief by way of defense to an action at law may, likewise, be waived by failure to raise it in proper time.[96] The particular methods of raising the question of existence of adequate remedy at law are considered elsewhere.[97]

Where the distinction between actions at law and suits in equity has been abolished, the existence of an adequate remedy has no jurisdictional significance.[98]

is limited to cases where there are no special circumstances rendering the legal remedy by way of defense inadequate. Id. The ground of prevention of multiplicity of suits cannot be invoked in such case merely because each of several parties jointly and separately liable may be independently sued. Id. Fraud alone is not sufficient to satisfy this demand for special grounds of equity jurisdiction. Id. The fact that the note was given for an unsound and useless horse, and that complainants would be charged with the expense of his keep while waiting for the holder of the note to sue thereon, did not give equity jurisdiction to cancel the note, since complainants could offer to rescind and return the horse, and upon refusal by defendant could sell the horse and apply the proceeds to their expenses. Id. But equity will grant relief where complainant is in danger of losing his evidence if the holder of the note is allowed to delay his suit on the note. Ritterhoff v. Puget Sound Nat. Bank, 37 Wash. 76, 79 P. 601. So also, equity will exercise its concurrent jurisdiction to grant relief against a note procured by fraud where the remedy at law is not as efficient as that in equity. Manning v. Berdan, 135 F. 159.

88. Daab v. New York Cent. & H. R. Co. [N. J. Eq.] 62 A. 449.

89. Haydon v. St. Louis & S. F. R. Co. [Mo. App.] 93 S. W. 833; Gaynor v. Bauer [Ala.] 39 So. 749; Carswell v. Swindell, 102 Md. 636, 62 A. 956. Bill to enjoin threatened trespass held insufficient in that it failed to show danger of irreparable injury. Carswell v. Swindell, 102 Md. 636, 62 A. 956.

90. Haydon v. St. Louis & S. F. R. Co. [Mo. App.] 93 S. W. 833. Where the bill plainly shows that there is adequate remedy at law, the objection may be considered by the court even after answer to the merits. Toledo Computing Scale Co. v. Computing Scale Co. [C. C. A.] 142 F. 919. Where the defect is apparent upon the face of the bill, the objection may be raised at any time before the making of the finding of facts. Owens v. Goldie, 213 Pa. 579, 62 A. 1117.

91. Haydon v. St. Louis & S. F. R. Co. [Mo. App.] 93 S. W. 833.

92. Hoagland v. Supreme Council, Royal Arcanum [N. J. Eq.] 61 A. 982; Toledo Computing Scale Co. v. Computing Scale Co. [C. C. A.] 142 F. 919; Owens v. Goldie, 213 Pa. 579, 62 A. 1117.

93. Lloyd v. Simons [Minn.] 105 N. W. 902.

Note: It is to be noted that the real point decided in this case was that the question of adequate remedy at law could not be raised for the first time on appeal, and the case thus falls within the principle applicable to jurisdictional defects in general. See ante, § 2 A, In General.

94. Owens v. Goldie, 213 Pa. 579, 62 A. 1117, dist'g Pennsylvania R. Co. v. Bogert, 209 Pa. 589, 59 A. 100; Hoagland v. Supreme Council, Royal Arcanum [N. J. Eq.] 61 A. 982; Toledo Computing Scale Co. v. Computing Scale Co. [C. C. A.] 142 F. 919; Haydon v. St. Louis & S. F. R. Co. [Mo. App.] 93 S. W. 833.

95. Rose v. Merchants' Trust Co., 96 N. Y. S. 946; Irving v. Bruen, 110 App. Div. 558, 97 N. Y. S. 180. Objection held waived by not making it in answer. Colby v. Mt. Morris, 100 N. Y. S. 362.

96. Where, pending an action at law for trespass in which defendant interposed a plea of title, the defendant in such action applied for a temporary injunction to restrain the plaintiff therein from building a wall on the land in dispute, and after four years defendant was decreed to be the owner of the land, the action at law having never been decided, it was too late for the plaintiff in the action at law to insist that the defendant therein, the complainant in the suit in equity, should be remanded to his remedy by way of defense to the action at law. McGaw v. Manning [Mich.] 108 N. W. 512.

97. See post, § 6 E, Demurrer; post, § 6 G, Answer; post, § 9, Dismissal.

98. Under Alaska Code Civ. Proc. [Carter's Codes Alaska, p. 145, § 1] the question as to whether a complaint states a legal or

Doing complete justice.[99]—When equity jurisdiction has once attached the cause will be retained for the purpose of deciding the whole controversy,[1] and any relief to which any of the parties are entitled may be granted,[2] regardless of whether such relief is legal or equitable[3] and regardless of statutory jurisdictional limitations as to the matters thus incidentally adjudicated.[4] This rule, however, is not without exceptions,[5] but ordinarily the only limitation upon it is that the matters adjudicated must be germane to or such as arise out of the matters conferring jurisdiction.[6] A

equitable cause of action is immaterial except as bearing upon the procedure according to which the case shall be tried. Madden v. McKenzie [C. C. A.] 144 F. 64.

99. See 5 C. L. 1151.

1. Lawrence v. Halversen, 41 Wash. 534, 83 P. 889; Smith Canal or Ditch Co. v. Colorado Ice & Storage Co. [Colo.] 82 P. 940; Grant v. Cumberland Valley Cement Co., 58 W. Va. 162, 52 S. E. 36. In suit to dissolve partnership court may enforce division of assets by compelling conveyance. Lawrence v. Haiversen, 41 Wash. 534, 83 P. 889. Restoration of street to former condition may be compelled in suit to enjoin changes of grade. Town of New Decatur v. Scharfenberg [Ala.] 41 So. 1025. In a suit against a county clerk and his sureties to surcharge his account the court, after correcting the account, properly allowed the county a decree for the amount of outstanding fraudulent warrants issued by the clerk, giving the defendants the right to satisfy the decree by production of the warrants, and thus making provision for the settlement of the whole controversy. Place v. State [Ark.] 92 S. W. 242. Where a case is properly in a court of equity under any of its accustomed heads of jurisdiction, and a question of construction of a deed or devise arises, the court will determine it. State v. Settle [N. C.] 54 S. E. 445. Settlement and distribution of decedent's estate made in suit to subject real estate to debts. Id.

2. Dickinson v. Arkansas City Imp. Co. [Ark.] 92 S. W. 21. To defendant in accounting though no demand was made in answer for affirmative relief. Consolidated Fruit Jar Co. v. Wisner, 110 App. Div. 99, 97 N. Y. S. 52. Where a complaint prayed for a passway over defendant's land, the court had power to restrict the relief by allowing defendant to erect and maintain gates over the passway. Bowling v. Rouse [Ky.] 90 S. W. 1073.

3. Dickinson v. Arkansas City Imp. Co. [Ark.] 92 S. W. 21; Lawrence v. Halversen, 41 Wash. 534, 83 P. 889. Where an issue of fraud is properly before a court of equity and damages are claimed on account of the same fraud, the court, in the exercise of its concurrent jurisdiction, should dispose of both issues in the same action and for all purposes. Smith v. Krueger [N. J. Eq.] 63 A. 850. The court may refuse to enjoin a continuous trespass and award damages, especially as the distinction between law and equity has been abolished by Code Civ. Proc. § 3339. Sadlier v. New York [N. Y.] 78 N. E. 272. Where the relief sought by a bill to enjoin the destruction of a house and for specific performance of a contract to convey the land on which the house was situated was denied as to the specific performance on the ground that complainant had only a parol license to build the house on the land, the cause should have been retained in order to decree compensation to the complainant for interference with his parol license, or, where the licensor had sold the land, the injunction should have been continued in order to give complainant a reasonable time in which to remove the house. Shipley v. Fink, 102 Md. 219, 62 A. 360.

4. The Federal statutory limitation against a suit by an assignee of a chose in action, unless its enforcement may be claimed in a Federal court by the assignor, has no application where the court has jurisdiction upon other grounds, and the controversy relating to the chose in action is merely a branch of the main controversy of which the court has jurisdiction. Howe & Davidson Co. v. Haugan, 140 F. 182. Cross bill claiming judgment on note secured by deed of trust allowed to be filed in suit to enjoin sale under the deed of trust, though the note was for less than $500. Walker v. Woody [Tex. Civ. App.] 13 Tex. Ct. Rep. 957, 89 S. W. 789.

5. It is not an infallible rule that equity, having jurisdiction for one purpose, will give full relief on all matters involved, though some be proper for a court of law. If a trial of such legal matters by jury is essential to relief, or peculiarly more appropriate for trial by jury than by a judge, equity will decline jurisdiction as to those matters, leaving the parties to their legal remedies. The facts of each case must determine as to this. Deepwater R. Co. v. Motter & Co. [W. Va.] 53 S. E. 705.

6. Lawrence v. Halversen, 41 Wash. 534, 83 P. 889. This doctrine is especially applicable in the so called code states. Id. The jurisdiction of equity to decide between several claimants to a common fund will not authorize an injunction against an action at law merely because the defendant in the action at law has been garnished by several creditors of the plaintiff, the liability of defendant to plaintiff having no necessary relation to the liability of the latter to his own creditors. Deepwater R. Co. v. Motter & Co. [W. Va.] 53 S. E. 705.

Codefendants will not be allowed to litigate matters between themselves which are wholly foreign to the matters between plaintiff and defendants. Pickens' Ex'rs v. Daniels, 58 W. Va. 327, 52 S. E. 215.

Misjoinder of causes: Independent legal and equitable causes of action, as, for example, a claim for cancellation and reconveyance and a claim for damages for breach of contract, cannot be joined. Chapman v. Yellow Poplar Lumber Co. [C. C. A.] 143 F. 201. Where a legal cause of action is joined with an equitable one, the court may require the complainant to file a declaration

cause will not be retained, however, to grant purely legal relief where it appears from the pleadings that complainant is not entitled to equitable relief,[7] or where the jurisdiction of equity is based solely upon a prayer for incidental equitable relief,[8] or where the evidence fails to establish the grounds of equity jurisdiction alleged;[9] but where the parties submit themselves to the jurisdiction of the court, damages may be awarded even though the equitable cause of action has entirely failed.[10] Where there are substantial grounds of equity jurisdiction, legal relief may be granted though equitable relief is denied on account of the particular circumstances of the case,[11] or on account of matters arising pending suit which render equitable relief impossible.[12]

Multiplicity of suits.[13]—Whether a court of equity will take jurisdiction to prevent multiplicity of suits will depend upon the circumstances of each case.[14] It will take jurisdiction to prevent several suits against the same party in connection with the same subject-matter,[15] or to avoid the necessity of several suits under the same cir-

on the law side of the court, under penalty, for failure to do so, of having the legal cause dismissed or ignored. Id.

7. Complaint showed on its face that complainant was not entitled to equitable relief. Brownback v. Keister, 220 Ill. 544, 77 N. E. 75.

8. Where a bill is filed for an accounting and for a discovery, the discovery is prima facie merely incidental to the accounting. Elk Brewing Co. v. Neubert, 213 Pa. 171, 62 A. 782. Prayer for discovery will not authorize accounting in equity where the grounds for such an accounting are lacking, especially where the bill waives answer under oath. Daab v. New York Cent. & H. R. Co. [N. J Eq.] 62 A. 449. Where discovery fails, jurisdiction also fails, even under the authorities holding that jurisdiction for discovery founds jurisdiction for relief. Id.

9. Pennsylvania Coal & Coke Co. v. Jones, 30 Pa. Super. Ct. 358. Where the evidence fails to establish the equitable cause of action, damages predicated thereon cannot be awarded. Rauch v. Bruckmann Brewing Co., 7 Ohio C. C. (N. S.) 460.

Under the codes the rule is the same, though law and equity are administered by the same court, and purely legal relief will not be granted in an equitable action where the latter is not sustained by the evidence. Boonville Nat. Bank v. Blakey [Ind.] 76 N. E. 529; Sadlier v. New York [N. Y.] 78 N. E. 272.

Multiplicity of suits: The cause is sometimes retained under such circumstances in order to prevent multiplicity of suits, as where complainant in a suit to set aside a contract of sale made by a broker failed to establish his case, it was held proper to allow the broker, who had been joined by complainant as a party defendant, his brokerage fees. Kilpatrick v. Wiley [Mo.] 95 S. W. 213. Compensation for interference with a license may be awarded in a suit for injunction and specific performance though the specific relief prayed for is denied on the ground that the license is in parol. Shipley v. Fink, 102 Md. 219, 62 A. 360.

10. Specific performance of covenant to maintain railroad crossing denied, and complainant given the right to elect whether his bill should be dismissed or retained in order to ascertain his damages. Speer v. Erie R. Co., 68 N. J. Eq. 615, 60 A. 197.

Note: "The jurisdiction of the court of chancery to award damages where both parties submit themselves to the jurisdiction of the court is established. The cases are collected in Vice Chancellor Pitney's opinion in Sparks Mfg. Co. v. Newton, 57 N. J. Eq. 367, at pages 392, 393, 41 A. 385, at page 395, and the opinion met with the approval of this court in Ingersoll v. Newton, 60 N. J. Eq. 399, 45 A. 596."—From Speer v. Erie R. Co., 68 N. J. Eq. 615, 60 A. 197.

11. Damages awarded though injunction refused on grounds of public policy. Sadlier v. New York [N. Y.] 78 N. E. 272. Personal judgment rendered against defendant in suit for cancellation of notes though cancellation was denied on ground that notes were held by innocent purchaser. Roberts v. Leutzke [Ind. App.] 78 N. E. 635.

12. Where a nuisance was abated pending suit to abate it, the court had the right to retain the cause for the purpose of awarding damages. Miller v. Edison Elec. Illuminating Co., 184 N. Y. 17, 76 N. E. 734.

13. See 5 C. L. 1151.

14. Injunction against actions at law. Adams v. Oberndorf, 121 Ill. App. 497.

Note: "In the class of cases to which the present one belongs, it is said that the determination of the question whether a court of equity should intervene and investigate and enforce primary legal rights which have no color of equity is very largely addressed to the discretion of the court, a discretion which must be exercised largely according to the peculiar circumstances of each particular case. Bellingham v. Palmer, 54 N. J. Eq. 138, 139, 33 A. 199. In the case of Cranford v. Watters, 61 N. J. Eq. 284, 48 A. 316, Vice Chancellor Pitney, after examining a large number of cases, formulates the following rule or principle to guide the court in determining whether or not to take jurisdiction of cases of the class to which the present one belongs: 'The test is, are the issues so numerous and so distinct, and the evidence to sustain them so variant, technical, and voluminous, that a jury is incompetent to intelligently deal with them and come to a final conclusion.' "—From Daab v. New York Cent. & H. R. Co. [N. J. Eq.] 62 A. 449.

15. Johnson v. Swanke [Wis.] 107 N. W. 481. One of the cases in which equity will

cumstances,[16] or to avoid the necessity of several suits against several parties having a common interest in the subject-matter.[17] Equity will not take jurisdiction merely to prevent several parties jointly and severally liable from being separately sued,[18] or to avoid the necessity of several suits against several parties having no common interest in the subject-matter,[19] or when it appears that only one action at law will be necessary,[20] or when the effect would involve greater inconvenience than would flow from allowing the suits to be maintained separately,[21] or when the same persons will have to be made parties regardless of whether the suit is in equity or at law.[22]

(§ 2) *C. Occasions for, and subjects of, equitable relief.*[23]—Equity suffers no wrong rising above mere moral transgressions to go unredressed in the face of a seasonable, clean-handed application to it for a remedy.[24] Its very origin and fundamental basis[25] precludes any attempt at exhaustive classification of its remedies. Some of these remedies, however, have assumed such definite form as to be susceptible of specific classification, such as specific performance,[26] discovery,[27] subroga-

take jurisdiction on this ground is in suits by a single party against a number of persons to restrain the prosecution of simultaneous actions at law against him by each defendant, where all the actions depend upon the same questions of law and fact. Adams v. Oberndorf, 121 Ill. App. 497. Suit to enjoin two actions at law by different parties against the complainant and involving the same subject-matter. South Penn Oil Co. v. Calf Creek Oil & Gas Co., 140 F. 507. Injunction against city ordinance fixing telephone rates, where the company would have been liable to many prosecutions under the ordinance. Ozark-Bell Tel. Co. v. Springfield, 140 F. 666. Federal court had jurisdiction to enjoin suits against a street railroad company for violation of an ordinance relating to transfers alleged to be unconstitutional. Chicago City R. Co. v. Chicago, 142 F. 844.

16. Injunction against dissemination of circulars derogatory of articles manufactured by complainant. Toledo Computing Scale Co. v. Computing Scale Co. [C. C. A.] 142 F. 919. Suit for specific performance of 999 year lease whereby one railroad company granted another the right to use its tracks. Grand Trunk W. R. Co. v. Chicago & E. I. R. Co. [C. C. A.] 141 F. 785.

17. Where defendants have a common interest in the essential questions of law and fact but would have to be sued separately at law. Columbia University v. Taylor, 25 App. D. C. 124. Bill by assignee of creditors against assignee of debtor for benefit of creditors in which creditor who received unlawful preference from assignee of debtor was joined as defendant. Andrews v. Tuttle-Smith Co., 191 Mass. 461, 78 N. E. 99.

18. Johnson v. Swanke [Wis.] 107 N. W. 481. Equity will not take jurisdiction of a suit to enforce several money demands against several parties where there are no equities upon which equitable jurisdiction may rest, as where there is no necessity for an accounting or discovery, and no trust, fraud, or other element of equity jurisdiction. Miller v. Willett [N. J. Eq.] 62 A. 178.

19. Separate stockholders cannot be joined in suit by creditor to enforce subscription liability. People's Nat. Bk. v. Saville, 25 App. D. C. 139. See Corporations, 7 C. L. 862.

20. Where only one of the defendants was in possession of complainant's land, a suit in equity against both to determine the boundary could not be sustained on the ground that it would prevent a multiplicity of suits. Livingston County Bldg. & Loan Ass'n v. Keach, 219 Ill. 9, 76 N. E. 72.

21. As where the effect would be to deprive defendants of a jury trial. Boonville Nat. Bk. v. Blakey [Ind.] 76 N. E. 529.

22. Action against joint tort feasors. United States v. Bitter Root Development Co., 200 U. S. 451, 50 Law. Ed. —.

23. See 5 C. L. 1151.

24. Loyd v. Phillips, 123 Wis. 627, 101 N. W. 1092.

25. See ante, § 1, Nature of and General Principles Controlling Equity; ante this section, subd. B, Existence of Adequate Remedy at Law.

26. Contract to convey land. Hazelton v. Miller, 25 App. D. C. 337; Marvel v. Fralinger, 67 N. J. Eq. 622, 63 A. 166. Contract by city to purchase waterworks. Castle Creek Water Co. v. Aspen [C. C. A.] 146 F. 8. Specific performance of a contract is within the sound discretion of the court and will not be enforced as a matter of course, or where it will impose unreasonable or unjust hardship upon one of the parties without corresponding benefits to the other. However, where all the necessary elements, conditions, and incidents are present, relief by way of specific performance should be granted as a matter of right and not as a mere favor. Baltimore, etc., R. Co. v. Brubaker, 217 Ill. 462, 75 N. E. 523.

27. While discovery is now seldom the object of a suit in equity and doubtless would not uphold such a suit when full information is obtainable at law, yet it is a well recognized ground of equity jurisdiction. Southern Pac. R. Co. v. U. S., 200 U. S. 341, 50 Law. Ed. —. Though discovery is an independent source of equity jurisdiction and is not affected by statutory provisions authorizing examination of parties as witnesses in courts of law, where there is any other ground of jurisdiction a discovery may be granted with-

tion,[28] reformation,[29] cancellation[30] and rescission,[31] creditors' bills,[32] accounting,[33] injunctions,[34] quieting title,[35] and removal of cloud on title.[36] Another and broader

out inquiring whether the bill would be sufficient for discovery alone. Coleman v. Elliott [Ala.] 40 So. 666. The right to resort to equity for a discovery may be limited by statutes giving the right to a discovery in actions at law. Law providing for examination of defendants and Rev. St. § 724 [U. S. Comp. Stat. § 1901 p. 583] providing for production of books and writings in actions at law. United States v. Bitter Root Development Co., 200 U. S. 451, 50 Law. Ed. —.

28. Where a surety, upon notice by the party entitled to performance, has performed his principal's contract, he may maintain a suit in equity for subrogation to his principal's rights. Taylor v. McCafferty, 27 Pa. Super. Ct. 122.

29. Where an agreement has been actually entered into but the contract, deed, or other instrument in its written form does not express what was really intended by the parties thereto, equity has jurisdiction to reform the written instrument so as to make it conform to the intention, agreement, and understanding of all the parties. Jacobs v. Parodi [Fla.] 39 So. 833. While equity will reform a written instrument when by a mistake it does not contain the true agreement of the parties, yet it will only do so when the mistake is plain and the proof full and satisfactory. The writing should be deemed to be the sole expositor of the intent of the parties until the contrary is established beyond reasonable controversy. Id. On account of mistake or misprision of scrivener. Sicher v. Rambousek, 193 Mo. 113, 91 S. W. 68. Equity will exercise its power to reform instruments not only as between the original parties but also as between parties claiming under and in privity with them. Id. Duplicate description of property in a deed is not ground for reformation, the grantee having a remedy at law for all damages, such as double payment. Willson v. Legro, 73 N. H. 515, 63 A. 399.

30. Fred Macey Co. v. Macey [Mich.] 12 Det. Leg. N. 948, 106 N. W. 722. Written release or assignment of cause of action. Bush v. Prescott & N. W. R. Co. [Ark.] 89 S. W. 86. Government land patents. Southern Pac. R. Co. v. U. S., 200 U. S. 341, 50 Law. Ed. —; Rozell v. Chicago Mill & Lumber Co. [Ark.] 89 S. W. 469. State lease of lands under water on ground that it was induced by fraudulent representations of lessee. Grey v. Morris & C. Dredging Co. [N. J. Eq.] 63 A. 985. Mortgage. Smith v. Krueger [N. J. Eq.] 63 A. 850. Note obtained by fraud. Manning v. Berdan, 135 F. 159. See ante this section and subdivision, Adequate Remedy at Law.

31. Rescission of contracts affecting any estate or interest in land on the ground of fraud in the procurement thereof, or mutual mistake of the parties in effecting the same, belongs to the exclusive jurisdiction of courts of equity. Bruner v. Miller [W. Va.] 52 S. E. 995. On ground of mistake. Bibber v. Carville [Me.] 63 A. 303.

32. Manning v. Jagels [N. J. Eq.] 63 A. 492. Bill in aid of execution held to state cause of action. Gavazzi v. Dryfoos, 47 Misc. 15, 95 N. Y. S. 199.

33. Equity's jurisdiction over matters of account rests upon three grounds: The complicated character of the account, the need of a discovery, and the existence of a fiduciary or trust relation. Burton v. Trainer, 27 Pa. Super. Ct. 626. Where the rights of the parties can only be determined by an accounting involving intricate computations and statements in order to ascertain the balance between the parties, equity will take jurisdiction. Price v. Middleton [S. C.] 55 S. E. 156; Castle Creek Water Co. v. Aspen [C. C. A.] 146 F. 8; Fidelity & Deposit Co. v. Fidelity Trust Co., 143 F. 152. The question as to whether equity will take jurisdiction of an account is largely addressed to the discretion of the court. Daab v. New York Cent. & H. R. Co. [N. J. Eq.] 62 A. 449.

Illustrations. Jurisdiction sustained: Bill against county clerk and sureties for several terms to surcharge the clerk's account and for an accounting, sustained. Place v. State [Ark.] 92 S. W. 242. Accounting by holder of usurious notes at instance of indorser. Homer v. Nitsch [Md.] 63 A. 1052. Where plaintiff put money into defendant's business under a proposed agreement, which was not consummated, whereby plaintiff was to have had a certain interest in the business, equity had jurisdiction to enforce plaintiff's rights. Fourchy v. Ellis, 140 F. 149. Where complainant was wrongfully expelled from firm and sought a recovery of and an accounting for profits of several years, thus involving intricate mutual accounts and breach of trust. Price v. Middleton [S. C.] 55 S. E. 156. Suit for accounting from party with whom complainant had placed sums of money on deposit held an equitable suit, complainant having no liquidated demand against defendant. Goupille v. Chaput [Wash.] 86 P. 1058. A bill in equity was the proper remedy where one person acted as trustee for nine or more others in buying and selling property. Horine v. Mengel, 30 Pa. Super. Ct. 67. Assumpsit held the improper and a suit in equity the proper remedy upon a quadrilateral agreement to buy and sell property under which one of the parties was trustee and handled the money for all the parties, and a complicated accounting was necessary. Burton v. Trainer, 27 Pa. Super. Ct. 626. A sufficient ground of equitable jurisdiction was stated in the allegations that the defendant, under a void chattel mortgage obtained from the insolvent corporation, had, by taking possession and sale of that company's chattels wrongfully, realized unknown sums of money, for which the bill prayed he might be decreed to account to the receiver of that company. Pryor v. Gray [N. J. Eq.] 62 A. 439.

Jurisdiction denied: Equity cannot take jurisdiction of an ordinary action at law on an ordinary account merely because it involves many items. Price v. Middleton [S. C.] 55 S. E. 156. An action for a tort cannot be converted into a proper case for an account merely because the defendant kept an account of his tortious transactions, and an examination of his books may be necessary in order to prove plaintiff's case, the remedy

classification may be based upon the subject-matters in connection with which equitable relief may be invoked, such as relations of confidence[37] and trust,[38] contracts[39]

at law for such examination being sufficient and there being no accounts between the parties. United States v. Bitter Root Development Co., 200 U. S. 451, 50 Law. Ed. —. Assignee of patent has no right to an equitable accounting as to profits, damages, and royalties. Allen v. Consolidated Fruit Jar Co., 145 F. 948; Owens v. Goldie, 213 Pa. 579, 62 A. 1117.

34. Against nuisances. Weiss v. Gaylor [Ala.] 39 So. 519; Nixon v. Boling [Ala.] 40 So. 210; Dickinson v. Arkansas City Imp. Co. [Ark.] 92 S. W. 21; Chicago, etc., R. Co. v. People, 120 Ill. App. 306; United States v. Luce, 141 F. 385. Injunction to prevent closing or obstruction of an alley. Bernei v. Sappington [Md.] 62 A. 365. Against obstruction of streets. Chicago, etc., R. Co. v. People, 120 Ill. App. 306; Weiss v. Gaylor [Ala.] 39 So. 519; Dickinson v. Arkansas City Imp. Co. [Ark.] 92 S. W. 21. Against taking private property for public use without compensation. Clayton v. Gilmer County Court, 58 W. Va. 253, 52 S. E. 103; Town of New Decatur v. Scharfenberg [Ala.] 41 So. 1025. Against illegal expenditure of public funds. Bates v. Hastings [Mich.] 13 Det. Leg. N. 626, 108 N. W. 1005. Against ordinance fixing telephone rates. Ozark-Bell Tel. Co. v. Springfield, 140 F. 666. Against trespass, Sadlier v. New York [N. Y.] 78 N. E. 272; Brassington v. Waldron [Mich.] 12 Det. Leg. N. 1011, 107 N. W. 100; Coleman v. Elliott [Ala.] 40 So. 666; Carswell v. Swindell, 102 Md. 636, 62 A. 956. Against actions at law. Lyons v. Importers' & Traders' Nat. Bank, 214 Pa. 428, 63 A. 827. Against circulation of circulars derogatory of articles manufactured by complainant. Toledo Computing Scale Co. v. Computing Scale Co. [C. C. A.] 142 F. 919.

35. Carswell v. Swindell, 102 Md. 636, 62 A. 956. Complainant must be in actual or constructive possession. Merritt v. Alabama Pyrites Co. [Ala.] 39 So. 555. Though defendant occupied the land previous to but not at the time of the suit. Ferrell v. Lord [Wash.] 86 P. 1060. Suit by United States to confirm the title of bona fide purchasers from the patentee of land and to cancel patents to other lands. Southern Pac. R. Co. v. U. S., 200 U. S. 341, 50 Law. Ed. —. Statute enabling party out of possession to maintain suit to quiet title did not destroy equitable nature of remedy. Costello v. Muheim [Ariz.] 84 P. 906.

36. Suit by lessor of oil and gas rights in possession after forfeiture to remove cloud created by lease. Brewster v. Lanyon Zinc Co. [C. C. A.] 140 F. 801. Possession unlawfully and forcibly acquired will not deprive equity of jurisdiction to remove a cloud at the suit of the party dispossessed. Slaughter v. Mallett Land & Cattle Co. [C. C. A.] 141 F. 282.

37. Equity has a general jurisdiction to prevent the abuse of confidential relations, such as relation between son-in-law and his old and infirm mother-in-law. Horner v. Bell, 102 Md. 435, 62 A. 736. As where a daughter, intending to obtain a tax title to land in which her mother had an interest by way of remainder, was present when notice to redeem was served on her mother, the latter being very old and infirm, the daughter was not allowed to set up the title acquired by her and equity could compel her to submit to a redemption by the heirs. Woglom v. Kant [N. J. Eq.] 63 A. 283. Rescissions of sale by attorney to client induced by misuse of relationship between them. Hill v. Hall, 191 Mass. 253, 77 N. E. 831.

38. Equity has a general jurisdiction over trusts. Baltimore Bargain House v. St. Clair, 58 W. Va. 565, 52 S. E. 660.

What constitutes a trust: Fiduciary relations cognizable in equity are not necessarily implied from the relations of principal and agent, bailor and bailee, or pledgor and pledgee, and a mere deposit of money for specific purposes does not necessarily create such a trust relation as is cognizable in equity. Young v. Mercantile Trust Co., 140 F. 61; Francis v. Gisborn [Utah] 83 P. 571. A mere bailment or deposit does not create a trust enforceable in equity. Young v. Mercantile Trust Co. [C. C. A.] 145 F. 39. "That the transactions of principal and agent, bailor and bailee, and pledgor and pledgee are not cognizable in equity is clear, unless accompanied by facts and circumstances from which it may be presumed that the intendment of the parties was to create a trust, or where the obligations imposed arose out of confidential relations. Miller v. Kent, 16 F. 13; Sawyer v. Atchison, etc., R. Co., 119 F. 252; Marvin v. Brooks, 94 N. Y. 71; American Spirits Mfg. Co. v. Easton, 120 F. 440; Upshur v. Briscoe, 138 U. S. 377, 34 Law. Ed. 931. To the same effect, see Sanford v. Sanford, 139 U. S. 642, 35 Law. Ed. 290, and Minnesota v. Northern Securities Co., 184 U. S. 199, 46 Law. Ed. 499." Young v. Mercantile Trust Co., 140 F. 61. The fact that defendants had permission to cut timber on certain tracts of land did not make them trustees ex maleficio as to timber wrongfully cut by them on other tracts. United States v. Bitter Root Development Co., 200 U. S. 451, 50 Law. Ed. —.

Protection of rights of beneficiaries of trusts as against wrongful acts of trustees, such as right of congregation to use church as against threatened exclusion by trustees. See P. L. 1898, p. 423, § 4. Barna v. Kirczow [N. J. Eq.] 63 A. 611.

Removal of trustee: A bill brought to remove a trustee to whom personal property has been assigned for the benefit of creditors, and to appoint a receiver for the trust property, to be sufficient must contain full and precise allegations showing the necessity for the removal and that there is danger of loss or misappropriation of the trust property. Baltimore Bargain House v. St. Clair, 58 W. Va. 565, 52 S. E. 660.

Construction of trusts is a matter peculiarly within equity jurisdiction. Columbian University v. Taylor, 25 App. D. C. 124. A court of equity has plenary power to determine the rights and liabilities arising between a trustee and the beneficiaries of the trust. Young v. Mercantile Trust Co., 140 F. 61.

Establishment and enforcement of trusts:

and rights arising out of contract but not resting on privity of contract,[40] constitutional rights,[41] corporations[42] and corporate stock and stockholders,[43] beneficial asso-

County officers who have collected a special tax levied for the payment of county bonds hold the proceeds of such tax as trustees for the bondholders, and may be held accountable in equity. Tolman v. Onslow County Com'rs, 140 F. 89. Where taxes collected were impressed with a trust for the benefit of a railroad company in the aid of which county bonds had been issued. Board of Com'rs of Onslow County v. Tollman [C. C. A.] 145 F. 753. Regulation of use of public institution established partly with charity funds. Board of Trustee of School for Industrial Education v. Hoboken [N. J. Eq.] 62 A. 1. Implied trust created by payments by teacher to pension fund under Act 1900, which was unconstitutional. Venable v. Shafer, 7 Ohio C. C. (N. S.) 337. Where express trust created by will fails, a resulting trust, enforceable in equity, accrues to the heirs. Columbian University v. Taylor, 25 App. D. C. 124. Where a grantee orally assumed notes of the grantor and then repudiated his obligation and claimed the land absolutely, the holder of the notes could sue in equity to establisb the notes as a valid claim against the property conveyed. Greenley v. Greenley, 100 N. Y. S. 114. A verbal statement of one holding the equitable title to land to the effect that he wants the same conveyed to his wife will not operate to pass equitable title to her, and where, after the death of the husband, his vendor, on account of such statement, conveys the land to the widow, such deed does not thereby vest the equitable title to said land in the widow, but it will operate only to convey the legal title, to be held by her in trust for the heirs, which a court of equity will enforce upon proper bill filed for that purpose. Gentry v. Poteet [W. Va.] 53 S. E. 787. One taking a deed for land knowing that another has a valid equitable title to the same land from the same vendor is held in equity as holding the legal title in trust for the benefit of the first purchaser, and equity will compel him to pass the legal title to such first purchaser. Reel v. Reel [W. Va.] 52 S. E. 1023. Confidential agent who invested money of decedent for him held a trustee of such funds and investments for the benefit of the legatees of the decedent so as to give equity jurisdiction of a suit by the legatees to recover the funds and property belonging to such estate as against the executors and legatees of the agent. Darlington v. Turner, 202 U. S. 195, 50 Law. Ed. —. Equity will follow trust funds, as where funds realized from school district bonds, which were void under Const. § 157, were invested in school property, it was held that the funds might be followed into the property and the bondholders be thus given relief. Board of Trustees v. Postel [Ky.] 88 S. W. 1065. But trust funds cannot be followed unless they can be identified, and hence the United States could not sue in equity to recover for the cutting and conversion of timber on public lands where the allegations of the bill failed to identify the specific property sought to be subjected as the proceeds of the timber cut and converted. United States v. Bitter Root Development Co., 200 U. S. 451, 50 Law. Ed. —. At common law a voluntary assignment by a debtor of his property for the benefit of creditors when accepted by the assignee establishes a trust, the enforcement of which may be compelled in equity by a creditor or the assignor, either of whom also may demand and is entitled to an accounting by the assignee of his administration of the assets. Andrews v. Tuttle-Smith Co., 191 Mass. 461, 78 N. E. 99. Under Rev. Laws c. 173, § 4, an assignee of the creditors may sue in his own name. Id. The right to equitable relief in such case does not depend upon the misconduct of the assignee of the debtor, since both the debtor and the creditors are entitled to an account. Id.

39. Construction of antenuptial contract in order to determine the wife's future rights thereunder. Dulaney's Adm'r v. Dulaney [Va.] 54 S. E. 40. Rescission. Bruner v. Miller [W. Va.] 52 S. E. 995. As to specific performance and cancellation of contracts, see ante this section and subdivision.

Statute of frauds: Equity protects a parol gift of land equally with a parol agreement to sell it, if accompanied by possession and the donee, induced by the promise to give it, has made valuable improvements on the property, and this applies to the gift of a life estate as well as the fee. Merriman v. Merriman [Neb.] 106 N. W. 174.

40. Suit by holder of school district bond to enforce his rights after division of the district under Code 1873, § 1715. Gamble v. Rural Independent School Dist. of Allison [C. C. A.] 146 F. 113. Suit to reach an assignee of a contract between whom and complainant there is no privity of contract, the assignor being insolvent. Quigley v. Spencer Stone Co. [C. C. A.] 143 F. 86.

41. Preventing the taking of private property for public use without compensation. Clayton v. Gilmer County Court, 58 W. Va. 253, 52 S. E. 103; Town of New Decatur v. Scharfenberg [Ala.] 41 So. 1025.

42. The control of corporations is within the general jurisdiction of equity. Cook v. Carpenter, 212 Pa. 165, 61 A. 799. For a more exhaustive and specific discussion of the power of equity over corporations, see Corporations, 7 C. L. 862.

Assets: Collection and distribution of assets. Cook v. Carpenter, 212 Pa. 165, 61 A. 799. The jurisdiction of a court of equity of a suit by the assignee for creditors of a corporation to enforce stock subscriptions is not ousted by the fact that the bill alleges that the assets are insufficient to cover the liabilities, and thus shows that no accounting is necessary, the necessity for an accounting not being the exclusive test of equity jurisdiction in such cases. Id.

Dissolution: Equity has jurisdiction of voluntary dissolution proceedings. Ralvey v. Freeport Smokeless Coal & Coking Co., 58 W. Va. 424, 52 S. E. 528.

Elections: Equity will not take jurisdiction of a corporate election contest except where such contest is incidentally involved in a suit of which there are other grounds for jurisdiction. Hayes v. Burns, 25 App. D. C. 242. The relief sought must depend up-

ciations,[44] estates of decedents,[45] executions,[46] estoppel,[47] forfeitures,[48] fraudulent conveyances,[49] highways and streets,[50] judgments,[51] liens,[52] lost instruments,[53]

on the validity or invalidity of the election. Crow v. Florence Ice & Coal Co., 143 Ala. 541, 39 So. 401. Right to have fictitious stock cancelled held not necessarily to involve validity of a corporate election. Id. Equity will not decide which of two sets of trustees of a church were elected, quo warranto being the proper remedy. Barna v. Kirczow [N. J. Eq.] 63 A. 611.

43. Where complainant sold his stock, reserving certain interest and the right to dividends, and the purchaser sold the stock, on terms contrary to the original agreement of sale, to the president of the corporation who denied complainant's rights, and the corporation disposed of all its assets, the complainant, charging fraud and asking for rescission and accounting, was entitled to relief. Phillips v. Jacobs [Mich.] 13 Det. Leg. N. 542, 108 N. W. 899.

Transfer of stock: Bill to compel corporation to issue new certificate to transferee of stock. Westminster Nat. Bank v. New England Electrical Works, 73 N. H. 465, 62 A. 971. Bill by pledgor of stock to compel retransfer. Eichbaum v. Sample, 213 Pa. 216, 62 A. 837.

Dividends: Bill to compel declaration of dividends and to prevent discrimination between stockholders of the same class. Cratty v. Peoria Law Library Ass'n, 219 Ill. 516, 76 N. E. 707.

Minority stockholders: Suit to recover property of corporation fraudulently disposed of by majority stockholders. Jones v. Missouri-Edison Elec. Co. [C. C. A.] 144 F. 765. Equity cannot be invoked to aid the minority of the members of a religious corporation in obtaining control of a church to the exclusion of the majority. Duessel v. Proch, 78 Conn. 343, 62 A. 152.

Cancellation of fictitious stock. Crow v. Florence Ice & Coal Co., 143 Ala. 541, 39 So. 401.

Stock subscriptions may be enforced by a suit in equity by creditors. Cook v. Carpenter, 212 Pa. 165, 61 A. 799; Dickinson v. Traphagan [Ala.] 41 So. 272; Montgomery Iron Works v. Roman [Ala.] 41 So. 811; Lewisohn v. Stoddard, 78 Conn. 575, 63 A. 621; Meyer v. Ruby-Trust Min. & Mill. Co., 192 Mo. App. 162, 90 S. W. 821. But see Miller v. Willett [N. J. Eq.] 62 A. 178. In this connection the article on corporations, 7 C. L. 862, should be consulted. Cancellation of stock subscriptions induced by fraudulent representations. Hamilton v. American Hulled Bean Co. [Mich.] 12 Det. Leg. N. 1005, 106 N. W. 731.

44. Reinstatement of member of voluntary association wrongfully expelled. Mesisco v. Giuliano, 190 Mass. 352, 76 N. E. 907.

45. Suit to recover property fraudulently obtained from decedent during his lifetime. Marsh v. Marsh, 78 Vt. 399, 63 A. 159. Any person entitled to share in the distribution of an estate has the right to have the estate administered in a court of equity without assigning any special equity for transferring the estate to such court. Bresler v. Bloom [Ala.] 41 So. 1010. Under Shannon's Code §§ 4000-4003, 6071, 6112, the court of chancery has concurrent jurisdiction with the circuit and county courts with regard to the sale of land to pay debts of decedents. Bashaw v. Temple, 115 Tenn. 596, 91 S. W. 202. The jurisdiction of the court of chancery in such case under Shannon's Code. §§ 4000-4003, may attach though the property is of less value than $1,000. Id. Equity jurisdiction of the distribution of estate according to the terms of the will is concurrent with that of the orphan's court, and will not be exercised except upon equitable grounds. Wyckoff v. O'Neill [N. J. Eq.] 63 A. 982. The fact that the will devises and bequeaths the property to the defendant during his life presents no obstacle to the assumption by a court of equity of the administration of the estate; especially is this so when the bill is filed by the remaindermen, and it is averred in the bill that the defendant has invested a part of the property bequeathed by the will in other property and has taken the title in his own name absolutely, and in disregard of complainant's reversionary rights, thus making it easy and possible for defendant to dispose of the property to innocent third parties, and finally deprive the complainant of her rights under the will. Bresler v. Bloom [Ala.] 41 So. 1010. Equity does not acquire jurisdiction of an action for a tort merely because one of the defendants is the administrator of one of the tort feasors, where no discovery of assets is sought and the bill shows that the decedent's estate is solvent. United States v. Bitter Root Development Co., 200 U. S. 451, 50 Law. Ed. ---.

46. In Alabama equitable relief from a wrongful execution is granted upon a petition for supersedeas of the execution, such petition being a substitute for a bill in equity. Jesse French Piano & Organ Co. v. Bradley, 143 Ala. 530, 39 So. 47.

47. While estoppel in pais may be set up as a defense at law, such an estoppel, being a creation of equity, will generally be administered by equity alone. South Penn Oil Co. v. Calf Creek Oil & Gas Co., 140 F. 507. This is peculiarly so where the circumstances out of which the estoppel is claimed are complicated and involved in transactions between different parties. Id. The Federal courts will follow the decisions of the state courts as to whether estoppel in pais is a subject of equitable cognizance. Id. "The supreme court of appeals of West Virginia, in Hanly v. Watterson, 39 W. Va. 214, 19 S. E. 536, and in Norfolk & W. R. Co. v. Perdue, 40 W. Va. 442, 21 S. E. 755, has distinctly held that estoppel by conduct of party, commonly called 'estoppel in pais,' is an equitable defense." Id. See, also, Bias v. Vickers, 27 W. Va. 456.

48. Where the covenant is pecuniary and there is default and consequent forfeiture, equity will relieve independently of the circumstances of fraud, accident, mistake, and surprise. Wheeling, etc., R. Co. v. Triadelphia, 58 W. Va. 487, 52 S. E. 499. A party asking relief from a default in not paying money according to his contract must pay into court the amount equitably due. People v. Freeman, 110 App. Div. 605, 97 N. Y. S. 343. Equity will also relieve from for-

nuisances,[54] taxes,[55] and assessments,[56] and public funds,[57] usury,[58] vexatious litigation,[59] wills.[60] Fraud[61] and mistake[62] are subjects of equity jurisdiction concurrent,

feitures for nonperformance of covenants other than those for the payment of money arising out of accident, mistake, or surprise, and in the absence of willful and deliberate refusal to perform when no pecuniary injury has resulted to the covenantee, and the wrong done is easily remediable, but such power of relief is discretionary and will not be exercised unless the delinquent covenantor is able and willing to immediately perform the covenant. Wheeling, etc., R. Co. v. Triadelphia, 58 W. Va. 487, 52 S. E. 499. The discretion of the court in such case is a sound legal discretion, subject to review, and the appellate court will reverse the action of the trial court when, in its opinion, relief has been improperly denied. Id. Relief granted from forfeiture under deed granting right of way to a railroad company for breach of a covenant to double track across grantor's land and to establish passenger depot, it appearing that the road was intended only as a freight road and that the grantor, therefore, could derive no benefit from the performance of the covenants. Baltimore & N. Y. R. Co. v. Bouvier [N. J. Eq.] 62 A. 868. Defending an action at law by the grantor and attempting to avoid the forfeiture did not deprive the company of its right to invoke the aid of equity for relief from the forfeiture, the questions raised in the action at law being real and not merely colorable. Id. The jurisdiction of equity to relieve from forfeitures depends upon the intrinsic nature of a forfeiture and not upon other general heads of equity jurisprudence, such as fraud, accident, etc. Id. A judgment in ejectment in favor of the grantor in a deed granting a right of way to a railroad company, awarding the possession of the land to the grantor on account of breach of a condition subsequent by the railroad company was not a bar to the right of the railroad company to equitable relief from the forfeiture. Id.

Note: "'A court of equity has power to relieve a party against forfeiture or penalty incurred by the breach of a condition subsequent, when no willful neglect on his part is shown, upon the principle that a party having a legal right shall not be permitted to avail himself of it for the purpose of injustice and oppression.' Noyes v. Anderson, 124 N. Y. 175, 26 N. E. 316, 21 Am. St. Rep. 657. The forfeiture in this case was for failure to pay an assessment for a sewer. 'When a mortgagor, without his fault or neglect, is prevented by accident from paying an installment on the day named in a decree of foreclosure, on a bill brought to redeem, equity will grant relief; and he will be reinstated, but on terms that he satisfy the equitable rights of the other party.' Kopper v. Dyer, 59 Vt. 477, 9 A. 4, 59 Am. Rep. 742. 'Equity will relieve against a forfeiture incurred by the breach of a covenant to insure in a lease of real estate, caused by accident or mistake, if no actual damage has been sustained by the lessor.' Mactier v. Osborn, 146 Mass. 399, 15 N. E. 641, 4 Am. St. Rep. 323. 'A court of equity may grant relief from the forfeiture of an estate conditioned for the maintenance and support of the grantee, where the forfeiture was accidental and unintentional, and not attended with irreparable injury. But it rests in the sound discretion of the court when relief shall be granted in this class of cases.' Henry v. Tupper, 29 Vt. 358. This is a leading case, and the opinion was written by Chief Justice Redfield, who, in the course of his opinion, said: 'That relief might be granted in equity, even where the condition was for the performance of collateral acts seems to be admitted in most of the cases upon this subject. Webber v. Smith, 2 Vernon, 103; Hack v. Leonard, 9 Mod. 90; Cox v. Higford, 2 Vernon, 664; Saunders v. Pope, 12 Vesey 282. These are cases of nonrepair of premises leased; and the chancellor, Lord Erskine, says in the last case: "I cannot agree it is necessary the nonperformance of the covenant should have arisen from mere accident or ignorance." The cases are abundant where relief has been granted against forfeiture of title by nonperformance of other collateral acts as for not renewing a lease (Rowstone v. Bentley, 4 Br. C. C. 415), or for cutting down timber when covenanted against on pain of forfeiture (Northcote v. Duke, Ambler, 511; Thomas v. Porter, 1 Ch. Cas. 95). But it has been held relief will not be granted where the forfeiture arises from an act incapable of compensation although of no essential damage to the other party, as the breach of a condition not to assign. Wafes v. Mocato, 9 Mod. 112. The same rule obtains where the forfeiture arises from an omission to secure. Rolfe v. Harris, 2 Price, 206. * * * It seems, however, to be pretty well established in England that relief for nonrepair of premises will not be granted as matter of course, and especially where there was a willful default (Bracebridge v. Buckley, 2 Price, 200; Hill v. Barclay, 16 Vesey, 403, and 18 Vesey, 56); but where the failure is from "accident, fraud, surprise, or ignorance not willful," relief will be granted (2 Lead. C. in Equity, 464, 465; Eaton v. Lyon, 3 Vesey, 693)—the result of all which seems to be that there is no well-settled rule upon the subject, or none which is not liable to considerable variation, and to be affected by the circumstances of the particular case. * * * But we must all feel that cases of the character before the court should be received with something more of distrust, and relief afforded with more reserve and circumspection, than in ordinary cases of collateral duties. And although we are not prepared to say that it must appear that, in all cases, the failure arises from surprise, accident, or mistake, we certainly should not grant relief when the omission was willful and wanton, or attended with suffering or serious inconvenience to the grantee, or there was any good ground to apprehend a recurrence of the failure to perform, as was held in Dunklee v. Adams, 20 Vt. 421, 50 Am. Dec. 44.'"—From Wheeling & E. G. R. Co. v. Triadelphia, 58 W. Va. 487, 52 S. E. 499.

Under municipal ordinances: A forfeiture

however, with that of law,[83] and as in other cases of concurrent jurisdiction, such as

provided for in a city ordinance granting a street railroad company the right to construct and maintain its road in the city streets is not within the rule that equity will not relieve against a statutory forfeiture, the ordinance not being a statute but in the nature of a contract. Wheeling, etc., R. Co. v. Triadelphia, 58 W. Va. 487, 52 S. E. 499. In the exercise of the power of forfeiture under an ordinance of a municipal corporation prescribing notice and specification of cause as a necessary preliminary step, the officers of such corporation must deal fairly, openly, and frankly with the party whose rights they attempt to take away, and abstain from such conduct as will work a surprise upon him. This conduct is governed by sustantially the same rules and principles as apply to proceedings by private persons under similar circumstances In order to be inequitable and oppressive, their conduct need not be actually fraudulent. If in equity and conscience it is oppressive or lacking in fairness, equity will relieve, however honest and sincere the parties attempting to forfeit may have been. Id. A declaration of forfeiture of a street railway privilege in a street by the council of a town, effected by repeal of the ordinance by which the privilege was granted, pursuant to a reservation of power so to do, for cause and after notice, has not the force and effect of a judicial determination of the existence of cause for forfeiture and does not preclude a resort to the courts by the railway company for vindication of its rights. After such repeal, pursuant to notice, the railway company may, by injunction, prevent the town authorities from removing or disturbing its track, if no cause of forfeiture existed, or the circumstances shown are such as to call for the exercise of equity jurisdiction to relieve from forfeiture. In so far as the decision in Town of Davis v. Davis, 40 W. Va. 464, 21 S. E. 906, imports the contrary of the foregoing proposition, it is re-examined and disapproved. Id.

49. Suit by judgment creditor to set aside fraudulent conveyance by debtor. McDevitt v. Connell [N. J. Eq.] 63 A. 504.

50. Relief against establishment of road without proper notice. Williams v. Routt County [Colo.] 84 P. 1109. Injunction against taking or injuring private property in connection with improvement of highways without first making compensation. Town of New Decatur v. Scharfenberg [Ala.] 41 So. 1025. Injunction against obstruction of alley. Andreas v. Steigerwalt, 29 Pa. Super. Ct. 1. Injunction against obstruction of streets. Weiss v. Taylor [Ala.] 39 So. 519; Dickinson v. Arkansas City Imp. Co. [Ark.] 92 S. W. 21. Injunction against unauthorized appropriation of streets by railroad company. Chicago, etc., R. Co. v. People, 120 Ill. App. 306.

51. Vacation and opening fraudulent judgments. Kerans v. Kerans [N. J. Eq.] 62 A. 305. Whether this should be done by petition or by bill of review, or by independent bill to vacate. See post § 15, Bill of Review, and see Judgments, 6 C. L. 214. Equity will not interfere with a judgment at law on account of fraud unless the fraud relates to something extrinsic and collateral to the matter which has been tried. It will not interfere on account of fraudulent testimony (Hoskins v. Nichols, 48 Misc. 465, 96 N. Y. S. 926), nor where the complainant has failed to avail himself of his remedy by way of defense to the action at law or by appeal or motion therein (Id.). Where a conditional purchaser of personalty recovered a judgment against a railroad company for its loss, equity had jurisdiction, at the instance of the seller who had reserved the legal title until payment, to prevent the misapplication of the fund and to enjoin its payment to the purchaser. Murphy & Co. v. American Soda Fountain Co., 86 Miss. 791, 39 So. 100.

Note: "As fast as the power of the courts of common law has been extended, so as to permit those courts to set aside judgments and grant new trials on the ground of fraud, mistake, or newly discovered evidence, the exercise of jurisdiction by this court has been renounced and curtailed. Hayes v. U. S. Phon. Co., 65 N. J. Eq. 5, 55 A. 84; Wolcott v. Jackson, 52 N. J. Eq. 387, 28 A. 1045; Hannon v. Maxwell, 31 N. J. Eq. 318."—From Kerans v. Kerans [N. J. Eq.] 62 A. 305.

52. Enforcement of judgment lien unenforceable at law because of insolvency and death of debtor. Evans v. Silvey & Co. [Ala.] 42 So. 62. The bankruptcy act did not deprive a court of equity of jurisdiction to declare an equitable lien upon the bankrupt's realty, and a lien so declared will be recognized by a court of bankruptcy. Crosby v. Ridout, 27 App. D. C. 481. An agreement by an adjoining owner to pay part of cost of party wall created an equitable lien upon the lot on which wall was built, and such lien was enforceable in equity. Rugg v. Lemly [Ark.] 93 S. W. 570. Where an attachment lien on an insurance policy cannot be enforced without a surrender of the policy, a suit may be maintained to compel such surrender. Marks v. Equitable Life Assur. Soc., 109 App. Div. 675, 96 N. Y. S. 551. Bill held defective in that it did not allege or show that the lien could not be enforced without a surrender of the policy. Id. It could not be inferred from the use of the words "surrender value" that it would be necessary to physically surrender the policy in order to enforce the lien. Id. The bill was also defective in that it did not allege any request for the surrender of the policy or that defendant had refused to surrender it or to recognize complainant's claim. Id. An assignment subsequent to the levy of the attachment was not ground for equitable relief, since the lien of the attachment was superior to the claim of the assignee and could be enforced in an appropriate action in aid of the attachment. Id.

53. "It is a very ancient head of equity jurisdiction to entertain suits upon sealed instruments which have been lost or destroyed, or which have come into the possession of the defendant, who retains the same. 1 Fonblanque's Equity, [4 Am. Ed.] p. 32, c. 1, § 3; Smith's Manual of Equity [1st Am. Ed.; 9th London Ed.] p. 39 et seq.; Daniell's Chan. Pr. & Pl. [6th Am. Ed.] p. 545 (552); Story's Eq. Juris.

cases involving an accounting,[64] the exercise of equity jurisdiction will depend

13th Ed.] p. 8 et seq.; Pomeroy's Eq. Juris. [3d Ed.] p. 77, § 71; Reeves v. Morgan, 48 N. J. Eq. 428, 21 A. 1040." Hoagland v. Supreme Council, Royal Arcanum [N. J. Eq.] 61 A. 982.

54. Injunction against continuing nuisance. Nixon v. Boling [Ala.] 40 So. 210. Injunction against obstruction of alley, to use of which complainant was entitled under deed from defendant. Andreas v. Steigerwalt, 29 Pa. Super. Ct. 1. Obstruction of streets enjoined. Dickinson v. Arkansas City Imp. Co. [Ark.] 92 S. W. 21; Weiss v. Taylor [Ala.] 39 So. 519. Equity has jurisdiction at the instance of the state's attorney to enjoin a railroad company from unauthorized appropriation of streets and highways. Chicago, etc., R. Co. v. People, 120 Ill. App. 306. Injunction by Federal government against the operation of fish factories that constituted a nuisance to a government hospital and quarantine station. United States v. Luce, 141 F. 385.

55. Injunction against taxes fraudulently assessed. National Tube Co. v. Shearer [Del.] 62 F. 1093. Illegality of a tax is not alone ground for equity jurisdiction, and consequently a Federal court cannot enjoin a state tax on the sole ground of illegality, though there is a state statute making illegality ground of equitable relief in the state courts. Illinois Life Ins. Co. v. Newman, 141 F. 449. See ante § 2 A, Effect of code and statutory provisions.

56. Injunction against fraudulent sewer assessment. Hudlemyer v. Dickinson [Mich.] 12 Det. Leg. N. 1000, 106 N. W. 885.

57. Bill to restrain illegal expenditures of public moneys. Bates v. Hastings [Mich.] 13 Det. Leg. N. 626, 108 N. W. 1005.

Trespass: Injunction against continuous trespass. Sadlier v. New York [N. Y.] 78 N. E. 272; Coleman v. Elliott [Ala.] 40 So. 666. Prevention of irreparable injury by enjoining trespass. Brassington v. Waldron [Mich.] 12 Det. Leg. N. 1011, 107 N. W. 100. Mere threats of trespass will not sustain an injunction. Carswell v. Swindell, 102 Md. 636, 62 A. 956.

58. Equity may grant relief from usurious contracts, no matter what their form. Horner v. Nitsch [Md.] 63 A. 1052. Such relief will be extended, sometimes, to persons injured by the usurious contract, though not a party thereto. Id. The maker or indorser of a usurious note is not precluded from equitable relief under the doctrine of in pari delicto. Id.

59. Lyons v. Importers' & Traders' Nat. Bank, 214 Pa. 428, 63 A. 827. Where the vexatious litigation includes a suit in a Federal court, such suit will not be enjoined, but a bill of peace will be sustained. Id. See post, § 16.

60. Aside from statutory enactments, equity has no inherent jurisdiction of a will contest. It therefore follows that any jurisdiction which it may have is by authority of the statute and must be construed in accordance with the terms therein employed. O'Brien v. Bonfield, 220 Ill. 219, 77 N. E. 167. Hurd's Rev. St. 1903, c. 148, § 7, is the only enactment conferring such jurisdiction. Under this section and sections 13, 14, 18, equity is not deprived of jurisdiction merely because the bill is not filed within a year after the order of the county court admitting the will to probate, where the order of the county court is appealed from to the circuit court. In such case the limitation of one year specified in section 7 begins to run from the time of the filing in the county court of the certified order of the circuit court admitting the will to probate. Id. The equitable power to set aside the probate of a will will not be exercised unless there is some substantial equitable ground for such relief, such as fraud, accident, or mistake, which renders it against conscience to execute the decree allowing the probate. Knight v. Hollings, 73 N. H. 495, 63 A. 38. Suit may be maintained to set aside will before probate. Irving v. Bruen, 110 App. Div. 558, 97 N. Y. S. 180. The chancery court is clothed with the fullest jurisdiction to determine all matters relating to the administration of estates and is always open for a hearing of a petition by any one interested, asking for the construction of the last will of a decedent. Owens v. Waddell [Miss.] 39 So. 459. A petition by a legatee of a "comfortable support" to construe the will was not within Code 1892, §§ 1922, 1961, prohibiting suits against executors until after the expiration of a certain time where it was the evident intention of the testator that the support should commence at once. Id.

61. Bruner v. Miller [W. Va.] 52 S. E. 995. Fraudulent concealment is a ground of equity jurisdiction as well as fraudulent assertion. Fred Macey Co. v. Macey [Mich.] 12 Det. Leg. N. 948, 106 N. W. 722. Injunction against collection of taxes fraudulently assessed. National Tube Co. v. Shearer [Del.] 62 A. 1093. See Injunction, 6 C. L. 6; Taxes, 6 C. L. 1602. Equity has jurisdiction to relieve a landowner from the fraud of the drain commissioner in making an assessment. Hudlemyer v. Dickinson [Mich.] 12 Det. Leg. N. 1000, 106 N. W. 885.

62. Bruner v. Miller [W. Va.] 52 S. E. 995. Rescission of contract on account of mistake. Bibber v. Carville [Me.] 63 A. 303. Mere ignorance of the law is not ground for equitable relief in the absence of fraud or misplaced confidence. Burke v. Mackenzie, 124 Ga. 248, 52 S. E. 653. Equity will not ordinarily correct mistakes of law, such as mistake as to effect of agreement as to boundaries. Kitchen v. Chantland [Iowa] 105 N. W. 367. A mistake of law as to the effect of an agreement, unconnected with any mistake of fact or with any fraud, imposition, or undue influence, will not be corrected by a court of equity. Steinfeld v. Zeckendorf [Ariz.] 86 P. 7. A mistake of law is an erroneous conclusion as to the legal effect of known facts. A mistake of fact is a mistake not caused by the neglect of any legal duty and which consists of ignorance of some fact, past or present, material to the transaction, or belief in the existence of some such fact when it does not exist. Id. See note on mistake of law as ground for relief in equity, 5 C. L. 1153.

63. Fraud. Fred Macey Co. v. Macey [Mich.] 12 Det. Leg. N. 948, 106 N. W. 722; Smith v. Krueger [N. J. Eq.] 63 A. 850; Bush

largely upon the adequacy of the remedy at law.[65] Equity has an ancillary jurisdiction to enjoin any act which will interfere with the full and complete determination of the cause.[66] Equity will not ordinarily enforce penalties[67] or forfeitures,[68] but on the contrary will grant relief therefrom,[69] but this rule is not without exception.[70] Nor has equity any general jurisdiction to compel compensation for improvements placed on land by a party evicted therefrom by a judgment in ejectment,[71] nor to destroy or establish personal status,[72] nor of election contests for nomination,[73] nor to control the exercise of legislative functions,[74] nor of political

v. Prescott & N. W. R. Co. [Ark.] 89 S. W. 86; Ritterhoff v. Puget Sound Nat. Bank, 37 Wash. 76, 79 P. 601; Johnson v. Swanke [Wis.] 107 N. W. 481; Manning v. Berdan, 135 F. 159. Courts of law have concurrent jurisdiction with courts of equity to prevent the use of an instrument obtained through fraud as evidence, thereby preventing the party guilty of the fraud from obtaining any advantage from it. Fraudulent execution of lease may therefore be shown by parol in action of unlawful detainer. Sass v. Thomas [Ind. T.] 89 S. W. 656. Mistake. See Equity, 5 C. L. 1144, 1152.

64. Fidelity & Deposit Co. v. Fidelity Trust Co., 143 F. 152.

65. See ante, § 2 B, Existence of Adequate Remedy at Law.

66. Injunction against action at law. See Code Pub. Gen. Laws, art. 16, § 190. Horner v. Nitsch [Md.] 63 A. 1052.

67. A bill seeking to subject the stockholders of a corporation to the payment of the full amount of their statutory liability, without regard to the necessity of such payment in order to meet the liabilities of the corporation and without joining all the stockholders, is in effect a bill to enforce a penalty. Miller v. Willett [N. J. Eq.] 62 A. 178.

68. Barlow v. McDowell, 118 Ill. App. 506. Equity will not declare a forfeiture, but will leave the party to his legal remedy, if any. Higinbotham v. Frock [Or.] 83 P. 536. A court of equity will not enforce against a vendee a technical forfeiture of an executory contract for the sale of land if the defendant offers to do equity in consideration of being restored to his contractual rights. Yeiser v. Portsmouth Sav. Bank [Neb.] 106 N. W. 784. Equity cannot be invoked merely to enforce a forfeiture or to divest an estate for breach of a condition subsequent as against a vendee in possession. Thornton v. Natchez [Miss.] 41 So. 498. A suit, the primary and only purpose of which is to establish a forfeiture as matter of record and to cancel the thing forfeited, in this instance a lease, is a suit to give effect to, and therefore to aid in, the enforcement of a forfeiture, and the equity which it presents must be strong enough to overcome the general indisposition of courts of chancery towards granting such relief. Brewster v. Lanyon Zinc Co. [C. C. A.] 140 F. 801.

69. See ante this section and subdivision.

70. In a case otherwise cognizable in equity there is no insuperable objection to the enforcement of a forfeiture when such enforcement is more consonant with the principles of right, justice, and morality than to withhold equitable relief. Brewster v. Lanyon Zinc Co. [C. C. A.] 140 F. 801.

71. In no case will such relief be granted where the evicted tenant has not acted in good faith and in reliance on his title, as where he is evicted because of breach of a condition in his deed or where the improvements are placed on the land before he acquires his title. Van Tassell v. Wakefield, 122 Ill. App. 32.

Note: "Some recognition of the power of a court of equity to compel compensation for lasting and valuable improvements, independent of the occupying claimants' statute, is found in Bright v. Boyd, 1 Story Rep. 478, also Hart's Heirs v. Baylor, Hard. 606, and Jones v. Jones, 4 Gill, 87, all of which are cited by our Supreme Court in Ross v. Irving, 14 Ill. 171, but the rule has not been applied very generally, which may be accounted for by the fact that most of our states have a statute similar to ours permitting compensation to be made by the law court pronouncing the judgment of eviction. In the few cases we have been able to find where a court of equity has assumed jurisdiction to compel the successful plaintiff in ejectment to compensate the evicted tenant for the lasting and valuable improvements placed upon the premises by him, it is held that it is only in cases where the evicted tenant acted in good faith and in the honest belief that his title was valid, and where he had no notice of the paramount title of his successful adversary, that relief would be granted."—From Van Tassell v. Wakefield, 122 Ill. App. 32.

72. The remedy of destroying or establishing personal status does not belong to the original jurisdiction of a court of chancery. Vanderbilt v. Mitchell [N. J. Eq.] 63 A. 1107. Equity has no jurisdiction to cancel or correct the record of a child's birth at the instance of its reputed father, or to enjoin the use of the certificate of birth as evidence. Id. The nearest analogy to the relief sought is jactitation of matrimony, but this relief belonged to the ecclesiastical courts and was never a part of original equity jurisdiction. Id. Quere, whether equity has jurisdiction of a bill by an ostensible parent to declare a child a bastard. Id.

73. Hence Acts 1905, p. 782, conferring jurisdiction of such matters upon chancery courts, is in violation of Const. art. 7, § 1, vesting courts of chancery with jurisdiction of matters in equity alone. Hester v. Bourland [Ark.] 95 S. W. 992. The constitutional provision authorizing the general assembly to provide the mode of election contests refers only to elections for office and not to elections for nomination. Id.

74. In the absence of a statute conferring it, courts of equity have no power to con-

questions which do not affect civil rights.[75] The question whether equity will investigate and enforce primary legal rights which have no color of equity is very largely addressed to the discretion of the court.[76] Equity has no jurisdiction of controversies relating solely to legal title,[77] but a court of equity may pass upon the question of legal title when it is incidentally or collaterally involved in a cause of which the court has jurisdiction on other grounds.[78]

trol, by injunction or otherwise, public officers and tribunals in the exercise of purely legislative or governmental functions. Fraud, perpetrated by private persons in the procurement of the exercise of a legislative or governmental power, of itself, affords no ground of equity jurisdiction, unless it is expressly given by statute. Mann v. Mercer County Court, 58 W. Va. 651, 52 S. E. 776.

75. No jurisdiction to compel secretary of state to change title to ballot in local option election. State v. Dunbar [Or.] 85 P. 337.

Note: "As stated by Chief Justice Fuller in Green v. Mills [C. C. A.] 69 F. 852, 30 L. R. A. 90: 'It is well settled that a court of chancery is conversant only with matters of property and the maintenance of civil rights. The court has no jurisdiction in matters of a political nature, nor to interfere with the duties of any department of government, unless under special circumstances and when necessary to the protection of the rights of property, nor in matters merely criminal, or merely immoral, which do not affect any right of property.' In re Sawyer, 124 U. S. 200, 31 Law. Ed. 402; Luther v. Borden, 7 How. [U. S.] 1, 12 Law. Ed. 581; Mississippi v. Johnson, 4 Wall. [U. S.] 475; 18 Law. Ed. 437; Georgia v. Stanton, 6 Wall. [U. S.] 50, 18 Law. Ed. 721. 'Neither the legislature nor the executive department,' said Mr. Chief Justice Chase, in Mississippi v. Johnson, 'can be restrained in its action by the judicial department though the acts of both, when performed, are, in proper cases, subject to its cognizance.' This is the well recognized principle as announced by many of the highest tribunals of our states. Fletcher v. Tuttle, 151 Ill. 41, 37 N. E. 683, 42 Am. St. Rep. 220, 25 L. R. A. 143; People v. Canal Board, 55 N. Y. 393; Smith v. Meyers, 109 Ind. 1, 9 N. E. 692, 58 Am. Rep. 375; Hardesty v. Taft, 23 Md. 513, 87 Am. Dec. 584; Sheridan v. Colvin, 78 Ill. 237, in which case the court said: 'It is elementary law, that the subject of the jurisdiction of the court of chancery is civil property. The court is conversant only with questions of property, and the maintenance of civil rights. Injury to property, whether actual or prospective, is the foundation on which the jurisdiction rests. The court has no jurisdiction in matters merely criminal, or merely immoral, which do not affect any right of property. Nor do matters of a political character come within the jurisdiction of the court of chancery. Nor has the court of chancery jurisdiction to interfere with the public duties of any department of the government, except under special circumstances and where necessary for the protection of rights of property.' To the same effect is High, Injunctions [4th Ed.] §§ 20b, 1326. See, also, People v. Mills, 30 Colo. 263, 70 P. 322; State v. Thorson, 9 S. D. 149, 68 N. W. 202, 33 L. R. A. 582. And this court in the case of State ex rel. v. Lord, 28 Or. 498, 43 P. 471, 31 L. R. A. 473, has followed the same rule."—From State v. Dunbar [Or.] 85 P. 337.

76. Accounting. Daab v. New York Cent. & H. R. Co. [N. J. Eq.] 62 A. 449.

Note: "The circumstances under which a court of equity may be invoked to aid or protect a legal right have been fixed by numerous decisions in this state. The party seeking the protection of the court must be able to show a clear title, or at least a fair prima facie case in support of the title he asserts; and, in addition thereto, he must show that irreparable or serious injury will result from the invasion of his legal rights; the irreparable or serious nature of the injury to which the property in question is subject, and will likely sustain, before the legal right can be fully vindicated in the proper forum, being the equity on which the application for injunction is founded. Whalen v. Dalashmutt, 59 Md. 250; Gulick v. Fisher, 92 Md. 353, 48 A. 375. In the case of Clayton v. Shoemaker, 67 Md. 216, 9 A. 635, it is said that when an application is made for an injunction to prevent waste or trespass, it is incumbent on the plaintiff to make out a prima facie title to the property; but if his title to the extent it is set up by him is denied and contested by the respondent, and evidence enough is offered to show some ground for the denial, the injunction will not be granted till the disputed title between the parties is first settled on appropriate pleadings and full testimony. In cases where the legal title to the property is in dispute, and it appears by the pleadings and proof that serious loss or injury will result, or is likely to result, to the plaintiff before the disputed title could be established at law, the court will grant a temporary injunction preserving the present status until the title has been decided in a court of law. Lanahan v. Gahan, 37 Md. 105; Amelung v. Seekamp, 9 Gill & J. [Md.] 468."—From Bernei v. Sappington [Md.] 62 A. 365.

77. Carswell v. Swindell, 102 Md. 636, 62 A. 956; Woglom v. Kent [N. J. Eq.] 63 A. 283. Equity has no jurisdiction to determine the right of a municipality to hold lands beyond its corporate limits. State v. Inhabitants of Trenton [N. J. Eq.] 63 A. 897. Equity has no jurisdiction to determine the title to realty where such determination requires the construction of formal legal conveyances, the ascertainment, from contradictory testimony, of facts as to notice and possession, and the application of proper legal principles to such facts. Under such circumstances the defendant has a constitutional right to trial by jury. Pennsylvania Coal & Coke Co. v. Jones, 30 Pa. Super. Ct. 358.

78. Where the legal title is put in issue in a suit in equity, the court has power to determine it, as in a suit to enjoin trespass

§ 3. *Laches and acquiescence.*[79]—Independently of the statute of limitations, courts of equity have inherent power to refuse relief after undue and inexcusable delay.[80] Such delay is called laches and will bar equitable relief.[81] Mere lapse of time does not constitute laches.[82] It may in any case be considered in reaching an equitable determination of the cause,[83] but in order that it may of itself constitute a bar to equitable relief, it must be such as to afford a reasonable presumption of satisfaction or abandonment of the claim sought to be enforced,[84] or must be such that to enforce the claim would result in injustice to the adverse party[85] or to third parties.[86] Laches is a question of fact[87] to be determined from the circumstances

upon realty. O'Brien v. Murphy, 189 Mass. 353, 75 N. E. 700. Equity is not deprived of jurisdiction to prevent the taking of private property for a public use without compensation therefor or security for the same having been given by reason of the fact that there is a controversy as to the title of the property turning on the construction of plaintiff's deed, but the court will construe it. Clayton v. Gilmer County Court, 58 W. Va. 253, 52 S. E. 103.

79. See 5 C. L. 1155.

80. Hawley v. Von Lanken [Neb.] 106 N. W. 456. In cases of purely equitable cognizance a court of equity is controlled by the purely equitable doctrine of laches without regard to the statute of limitations. Ferrell v. Lord [Wash.] 86 P. 1060. Where stockholders stood by and saw, without objection, parties dealing with the corporate property in a manner inconsistent with any trust, they could not thereafter assert a trust, though they had not delayed six years, the statutory period. Brown v. Kemmerer, 214 Pa. 521, 63 A. 822.

In New York it has been questioned whether the equitable doctrine of laches exists independently of the statute of limitations. New York Water Co. v. Crow, 110 App. Div. 32, 96 N. Y. S. 899. "In Cox v. Stokes, 156 N. Y. 491, 51 N. E. 316, it is said: 'Whether the equitable doctrine of laches, as distinguished from the statute of limitations, exists in this state, is open to serious doubt.'" Id.

81. Thurmond v. Chesapeake & O. R. Co. [C. C. A.] 140 F. 697; Bibber v. Carville [Me.] 63 A. 303; Williams v. Woodruff [Colo.] 85 P. 90; Lloyd v. Simons [Minn.] 105 N. W. 902; Ampt v. Cincinnati, 2 Ohio N. P. (N. S.) 489. Wife may lose inchoate right of dower in property fraudulently conveyed by the husband where she delays an unreasonable time in suing to vacate the conveyance. Higgins v. Higgins, 219 Ill. 146, 76 N. E. 86.

In action at law: The equitable doctrine of laches is applicable to an action at law for fraud. Neibuhr v. Gage [Minn.] 108 N. W. 884.

82. Cook v. Ceas, 147 Cal. 614, 82 P. 370; Lloyd v. Simons [Minn.] 105 N. W. 902; Sicher v. Rambousek, 193 Mo. 113, 91 S. W. 68; Selden's Ex'r v. Kennedy, 104 Va. 826, 52 S. E. 635. A suit to redeem from mortgage foreclosure is not barred because not instituted until the last day before the expiration of the period of statutory limitation. Cox v. American Freehold & Land Mortg. Co. [Miss.] 40 So. 739.

83. Acquiescence for 25 years in tax sale. Morrison v. Turnbaugh, 192 Mo. 427, 91 S. W. 152.

84. Selden's Ex'r v. Kennedy, 104 Va. 826, 52 S. E. 635.

85. Hawley v. Von Lanken [Neb.] 106 N. W. 456. As where the adverse party could not establish his defense on account of death of parties, loss of evidence, or for other reasons flowing from the delay. Selden's Ex'r v. Kennedy, 104 Va. 826, 52 S. E. 635. Action on guardian's bond. Cook v. Ceas, 147 Cal. 614, 82 P. 370. Suit to recover land not barred by delay where there was no adverse possession by defendant, his improvements were of a trifling character, and he had realized from the land as much as he had paid out for taxes. Lipscomb v. Adams, 193 Mo. 530, 91 S. W. 1046. Suit by principal to recover property purchased by agent in own name not barred where there was no injury to defendant from delay. Hudson v. Cahoon, 193 Mo. 547, 91 S. W. 72. Suit by equitable owner of public land to cancel patent issued to another not barred by delay where the land was wild and unoccupied and defendant had not been prejudiced by the delay. Rozell v. Chicago Mill & Lumber Co. [Ark.] 89 S. W. 469. Action by city to foreclose lien of an assessment of benefits from local improvements, held not barred by delay in absence of injury resulting from the delay. City of Hartford v. Mechanics' Sav. Bank [Conn.] 63 A. 658.

86. Suit to establish trust in land to which another held unrecorded deed, held not barred as against creditors of holder of legal title where it did not appear that the delay caused the creditors to extend credit to the holder of the legal title or to forbear to enforce their rights against him. New York Water Co. v. Crow, 110 App. Div. 32, 96 N. Y. S. 899.

87. In suit by transferee of stock to compel corporation to issue certificate to him. Westminster Nat. Bank v. New England Electrical Works, 73 N. H. 465, 62 A. 971. Suit to reform lease held not barred. Bronk v. Standard Mfg. Co. [Mich.] 12 Det. Leg. N. 626, 105 N. W. 33. Party held barred from right to injunction to prevent violation of a covenant in deed. Island Heights Ass'n v. Island Heights Water Power, Gas & Sewer Co. [N. J. Eq.] 62 A. 773. Bill for specific performance held barred by delay of 16 years. Thurmond v. Chesapeake & O. R. Co. [C. C. A.] 140 F. 697. Suit to quiet title held barred. Ferrell v. Lord [Wash.] 86 P. 1060. Suit by stockholders to cancel subscription on account of fraudulent representations, held not barred. Hamilton v. American Hulled Bean Co. [Mich.] 12 Det.

of each case,[88] and when the evidence is conflicting the question of laches is within

Leg. N. 1005, 106 N. W. 731. Stockholders held barred from suing to set aside sale of corporate property. Kessler & Co. v. Ensley Co., 141 F. 130. Cotenant held barred from asserting a lien upon the other tenant's share of the property for rents collected by such other tenant as against the beneficiary of a deed of trust upon such other tenant's portion of the property. Flach v. Zanderson [Tex. Civ. App.] 14 Tex. Ct. Rep. 540, 91 S. W. 348. Bill against assignees for creditors for misconduct and accounting held brought in proper time. Andrews v. Tuttle-Smith Co., 191 Mass. 461, 78 N. E. 99.

88. Lloyd v. Simons [Minn.] 105 N. W. 902; Selden's Ex'r v. Kennedy, 104 Va. 826, 52 S. E. 635; Thurmond v. Chesapeake & O. R. Co. [C. C. A.] 140 F. 697.

Illustrations: For a more specific and exhaustive treatment of the doctrine of laches as applied to particular subjects, see the various specific titles relating thereto and the titles relating to particular equitable remedies, such as Accounting, Action for, 7 C. L. 19; Cancellation of Instruments, 7 C. L. 517; Creditors' Suit, 7 C. L. 1007; Discovery and Inspection, 7 C. L. 1167; Injunction, 6 C. L. 6; Quieting Title, 6 C. L. 1183; Reformation of Instruments, 6 C. L. 1279; Specific Performance, 6 C. L. 1498.

Conduct Amounting to Laches. Accounting: A party cannot found an equity in his own favor for an accounting by allowing a number of legal claims to accumulate from year to year which he might have asserted within a reasonable time after their accrual. Daab v. New York Cent. & H. R. Co. [N. J. Eq.] 62 A. 449.

Contracts: Right of landowner to enjoin laying of pipes in a street which the landowner was charged by a covenant in his deed with the duty of opening, lost by 15 years' acquiescence in such performance by the owner of the pipes as was actually attempted of a contract with the landowner to open the street as a condition to the right to lay the pipes. Jayne v. Cortland Waterworks Co., 107 App. Div. 517, 95 N. Y. S. 227.

Deeds: To set aside a deed for fraud, suit must be brought in a reasonable time, a time reasonable under circumstances of the particular case. Delay, especially where it affects third persons, will bar relief. Dunfee v. Childs [W. Va.] 53 S. E. 209.

Estates of decedents: Delay of 50 years by purchaser at administrator's sale before attempting to enforce divestiture of title out of the heirs was a bar to equitable relief as against a judgment in ejectment in favor of the heirs. Johnson v. Oldham [Ala.] 40 So. 213.

Liens: Right to enforce an undisclosed purchase-money lien on realty lost by delay of five years with knowledge of a suit by a county against the apparent owner to declare the land escheated. Stuart v. Pierce County, 40 Wash. 267, 82 P. 270.

Mining claim: Right to assert title to mining claim by way of cross complaint in suit to quiet title held barred by 12 years' delay in asserting such title as against parties in possession who had improved the claim and paid assessments thereon. Bradley v. Johnson [Idaho] 83 P. 927.

Partition: Party to contract of partition held precluded from objecting to the division by delay of over 30 years. Stover v. Stover [W. Va.] 54 S. E. 350.

Patents: Eleven years' delay in prosecuting an infringement of patent constituted laches. National Cash Register Co. v. Union Computing Mach. Co., 143 F. 342.

Taxes: Injunction will not be granted against levy to defray expenses of a primary election after the levy has been made, most of the amount has been collected, and the primary and also the general election has been held. Kenneweg v. Allegany County Com'rs, 102 Md. 119, 62 A. 249.

Title to land: Suit to quiet title held barred by delay of 20 years. Woodward v. Barr, 128 Iowa 727, 105 N. W. 207. If a trespasser is permitted to expend a large sum of money in the erection of a permanent building without protest from the owner of the land, or any attempt by the owner to assert his rights for a long period, equity will not favor a late assertion of such stale rights by injunction, but will leave the parties to their remedy at law, or if estoppel is pleaded will lean favorably toward such a defense. McCleery v. Alton, 8 Ohio C. C. (N. S.) 481.

Trusts: Suit to remove trustee on ground of relationship to beneficiary held barred where it was not instituted until the day of the sale under the trust deed and complainant had had seven years to discover the relationship between the parties, who had the same surname, and complainant had actually known of the relationship for several weeks. Ravold v. Grumme, 118 Mo. App. 305, 94 S. W. 298. Where an express trust is repudiated the beneficiary may be barred by laches. Residuary legatee held barred from suing executor by delay of 13 years without asserting her rights, though property was still in hands of executor. Williams v. Woodruff [Colo.] 85 P. 90. Delay of ten years and death of party against whose estate contract for division of proceeds of sale of land was sought to be enforced, held a bar to relief. Dexter v. MacDonald [Mo.] 95 S. W. 359.

Wills: Suit to set aside probate of will held barred by delay of 12½ years, the will, moreover, having been completely executed. Knight v. Hollings, 73 N. H. 495, 63 A. 38.

Conduct Not Amounting to Laches. Account: Delay of eight years before suing an attorney for an accounting as to proceeds of property handled and sold by him as trustee for complainant held not such laches as would bar the suit, complainant having been sick for part of the time and having, through other attorneys, endeavored for four years to obtain a settlement. Horine v. Mengel, 30 Pa. Super. Ct. 67. Where one of the parties to an agreement of dissolution of a partnership discovers, within a few weeks after the settlement is effected, that he has been defrauded by the other, and immediately calls upon such other partner to rectify the wrong he has perpetrated, which the latter declines to do, the former is not guilty of such laches as will preclude a recovery by waiting seven months before filing his petition for further accounting. Oliver v. House, 125 Ga. 637, 54 S. E. 732.

the discretion of the court.[89] The doctrine of laches will be applied only when it will be equitable to do so,[90] and in suits between parties standing in fiduciary relations the defense of laches is not favored.[91] It will not be applied when the laches is mutual,[92] nor does it apply, so far as purely equitable relief is concerned, where the wrong complained of is continuous.[93] As a general rule the doctrine of laches is not applicable as against the state,[94] though it has been thus applied as regards a right of forfeiture.[95] The doctrine cannot be invoked by the complainant.[96]

A party cannot be chargeable with delay until his rights have been repudiated[97] or until he has knowledge or notice of the wrong.[98]

It has been held that laches must be pleaded in the answer in order that complainant may have an opportunity to explain,[99] but the doctrine generally followed is that laches apparent from the face of the complaint is ground for demurrer,[1] or it may be raised on the argument,[2] or the court may of its own motion remain passive,[3] but where it does not thus appear it must be alleged and proved,[4] the burden of proof being upon the party alleging the laches.[5] The question should not be raised for the first time on appeal.[6]

Contracts: Delay in demanding deed held not such laches as would bar suit for specific performance where complainant was in actual occupancy of the land and defendants had refused to convey. Detroit United Ry. v. Smith [Mich.] 13 Det. Leg. N. 228, 107 N. W. 922.

Corporations: Bill to compel declaration of corporate dividends and to prevent discrimination between stockholders of the same class held not barred by laches. Cratty v. Peoria Law Library Ass'n, 219 Ill. 516, 76 N. E. 707. Suit to compel corporation to issue certificate to transferee of stock held not barred by delay when it did not appear that the delay was unreasonable or that the defendant was injured thereby. Westminster Nat. Bank v. New England Electrical Works, 73 N. H. 465, 62 A. 971.

Highways and streets: Parties aggrieved by establishment of road without proper notice held not barred from attacking the validity of the proceedings by cross complaint in suit to enjoin obstruction of the road. Williams v. Routt County Com'rs [Colo.] 84 P. 1109.

Legacies: Fifteen years' delay in suing an administrator for a legacy held, under the circumstances of the case, no bar. Selden's Ex'r v. Kennedy, 104 Va. 826, 52 S. E. 635.

Nuisances: Government held not barred by laches from relief against a nuisance affecting a hospital and quarantine station. United States v. Luce, 141 F. 385.

Title to property: Failure to assert title to wild and unoccupied lands as against a subsequent grantee was not laches. Rannels v. Rowe [C. C. A.] 145 F. 296.

Trusts: Suit to enforce an express trust held not barred. Gentry v. Poteet [W. Va.] 53 S. E. 787.

89. Granting relief in suit to establish lost deed and to cancel subsequent adverse deeds held not an abuse of the court's discretion as to laches, the evidence being conflicting. Lloyd v. Simons [Minn.] 105 N. W. 902.

90. Gray v. Bloomington & N. R. Co., 120 Ill. App. 159.

91. Mansfield v. Wallace, 217 Ill. 610, 75 N. E. 682.

92. Rannels v. Rowe [C. C. A.] 145 F. 296.

93. Not applicable as against right to enjoin the continuance of the wrong (Mahler v. Sanche, 121 Ill. App. 247), but the right to damages may, at the same time, be barred by the delay (Id.).

94. Injunction against unauthorized use and obstruction of public streets. People v. Decatur, etc., R. Co., 120 Ill. App. 229.

95. State held barred from declaring a forfeiture of water rights after delay of 54 years, during which time third parties had acquired rights. People v. Freeman, 110 App. Div. 605, 97 N. Y. S. 343.

96. Section 3775 of the Civil Code of 1895, providing an equitable bar in cases where "from the lapse of time and laches of the complainant, it would be inequitable to allow a party to enforce his legal rights," is not available to a complainant in an equitable proceeding to enjoin the enforcement of a purely legal right. Georgia R. & Banking Co. v. Wright, 124 Ga. 596, 53 S. E. 251.

97. Where a water company contracted with a party to open a way over certain land, a suit to compel performance was not barred where it was commenced as soon as defendant placed a permanent obstruction upon the route of the proposed way. Bell v. Louisville Water Co. [Ky.] 96 S. W. 572.

98. Laches begins to run against suit based on fraud only from discovery of the fraud or after knowledge of circumstances such as to put the party upon inquiry. Mansfield v. Wallace, 217 Ill. 610, 75 N. E. 682. See post, this section, subd. Excusable Delay.

99. Ballard v. Golob [Colo.] 83 P. 376, expressly disapproving of the doctrine that laches may be raised by demurrer.

1. Cook v. Ceas, 147 Cal. 614, 82 P. 370. See post § 6 E, Demurrer.

2, 3. National Cash Register Co. v. Union Computing Mach. Co., 143 F. 342.

4. Cook v. Ceas, 147 Cal. 614, 82 P. 370.

5. Field v. Field, 215 Ill. 496, 74 N. E. 443.

6. New York Water Co. v. Crow, 110 App. Div. 32, 96 N. Y. S. 899.

The doctrine of acquiescence is closely akin to that of laches, and the same general rules apply to both.[7]

Excusable delay.[8]—Delay may be excusable, in which case it does not constitute laches.[9] Where the complaint shows delay it must also show some excuse.[10] Delay may be excused by lack of knowledge or notice of the wrong,[11] or by negotiations looking to a settlement.[12] Absence alone is no excuse.[13]

Application of analogous statutes of limitation.[14]—While courts of equity are not generally within the words of the statute of limitations,[15] they will generally, by analogy, apply the statute in any case where the remedy in equity is merely concurrent with the legal remedy.[16] Even where the jurisdiction of equity is exclusive the legal limitation applies where the remedy invoked is analogous to the remedy at law,[17] or a mere substitute therefor.[18] Thus a lien cannot ordinarily be enforced

7. Parties held precluded, by acquiescence, from contending that county judge had no authority to take affidavits. Seastream v. New Jersey Exhibition Co. [N. J. Eq.] 61 A. 1041. Where a party acquiesced in the construction of a building which closed up an alley, he could not thereafter maintain a bill to prevent the closing of the alley. Bernei v. Sappington [Md.] 62 A. 365. The refusal of the seller of corporate stock to accept the purchaser's offer to return the stock and to place the seller in statu quo was an acquiescence in the sale. Hooker v. Midland Steel Co., 117 Ill. App. 441.

8. See 5 C. L. 1159.

9. Hawley v. Von Lanken [Neb.] 106 N. W. 456.

10. Where fraud constituting the subject of a suit did not occur within the statutory period, the complaint must show when the fraud was discovered and also facts showing freedom from negligence in discovering the fraud. Kramer v. Gille, 140 F. 682.

11. Right to reform deed on account of mistake accrued upon discovery of the mistake. Garst v. Brutsche, 129 Iowa 501, 105 N. W. 452. A party is chargeable with delay in suing for fraud only from the time of knowledge of the fraud or of such circumstances as would, in the exercise of ordinary care, put him upon notice. Manning v. Mulrey [Mass.] 78 N. E. 551. A party is chargeable with delay in attacking a decree only from the time of notice of the decree. Field v. Field, 215 Ill. 496, 74 N. E. 443.

What constitutes notice: Whatever is notice enough to put an interested party upon inquiry is generally regarded as sufficient notice of all matters which a reasonably diligent inquiry would have disclosed. Williams v. Woodruff [Colo.] 85 P. 90.

12. Bill by corporation for relief from fraudulent acts of promoters. Fred Macey Co. v. Macey [Mich.] 12 Det. Leg. N. 948, 106 N. W. 722. Suit for accounting against administrator of guardian. Murphy v. Cady [Mich.] 13 Det. Leg. N. 412, 108 N. W. 493.

13. Where the party has notice of the repudiation of his rights. Williams v. Woodruff [Colo.] 85 P. 90.

14. See 5 C. L. 1159.

15. People v. Michigan Cent. R. Co. [Mich.] 13 Det. Leg. N. 552, 108 N. W. 772; Brown v. Kemmerer, 214 Pa. 521, 63 A. 822. The statute of limitations is no defense to a hill to abate a public nuisance. Weiss v. Taylor [Ala.] 39 So. 519.

16. Hesley v. Shaw, 120 Ill. App. 92. Code 1892, § 2731. Thornton v. Natchez [Miss.] 41 So. 498. Suit to enforce forfeiture against a city for breach of a condition that property was to be used for a cemetery held barred by the ten year limitation, notwithstanding Code 1892, §§ 2731, 2749, there being no concealed fraud in such case. Id. Nonresidents were in no better position to avoid the statute in such case than residents, the action of the municipal authorities repudiating the condition being open and notorious. Id. As to right to recover damages equity will not extend the limitation of the statute where an action at law would be barred. Mahler v. Sanche, 121 Ill. App. 247. Damages for fraud. Smith v. Krueger [N. J. Eq.] 63 A. 850. Suit for accounting between depositor and depository, no case for exclusive jurisdiction of equity being made out. Francis v. Gisborn [Utah] 83 P. 571. Suit to enforce lien given by Laws 1846, pp. 60, 61, §§ 32-34, for taxes on railroad stock and construction loans, held analogous to a suit to foreclose a mortgage and hence not barred by the limitation applicable to assumpsit. People v. Michigan Cent. R. Co. [Mich.] 13 Det. Leg. N. 552, 108 N. W. 772.

17. Hesley v. Shaw, 120 Ill. App. 92. Suit for reformation of deed held barred by delay for period greater than the period of limitation prescribed by Code §§ 3447, 3448, relating to actions on written contracts and to recover realty. Garst v. Brutsche, 129 Iowa 501, 105 N. W. 452. Suit against guardian's surety barred after four years from death of guardian. Comp. Laws, § 8727. Murphy v. Cady [Mich.] 13 Det. Leg. N. 412, 108 N. W. 493. In a suit to declare a trust void and to recover the property, equity will apply the statute of limitations applicable to ejectment, but the statute will not begin to run in such case until the trust has failed, unless its invalidity is apparent upon the face of the instrument attempting to create it. Columbia University v. Taylor, 25 App. D. C. 124. Receiver held barred after six years from recovering from stockholder dividends paid out of capital stock where stockholder had no notice that the dividends were paid out of capital. Mills v. Hendershot [N. J. Eq.] 62 A. 542. But not where directors and officers of a corporation divided its assets between them as dividends to the detriment of creditors. Id. The fact that under the corporation act (Laws 1896, p. 286, c. 185, § 30) the directors are not

in equity after the debt secured is barred at law,[19] but the fact that a claim is barred at law will not bar any equitable remedy that may exist for its enforcement.[20] The time from which the statute begins to run is computed, as in actions at law, from the accrual of the right of action.[21] The bar will not be applied where it has attached while the complainant was relying on the acts of the defendant,[22] nor will it be applied in favor of a party who is unwilling to do equity.[23] Where the equitable remedy is invoked within the statutory limit for the analogous legal remedy, the doctrine of laches will not be applied except upon extraordinary circumstances.[24]

§ 4. *Practice and procedure in general.*[25]—The practice and procedure in equity is to a great extent controlled by statutory provisions.[26] A suit in equity commences with the issue of process to answer.[27] A general appearance waives defects in notice.[28] A conditional appearance will not have this effect,[29] but the motion on a conditional appearance must be directed only to some formal defect in the bill or irregularity in the service with nothing by way of defense on the merits.[30] In some states a legal action may be transferred from the equity to the legal docket.[31] Where the rules prescribed by the Federal supreme or circuit courts do not apply, the Federal courts will follow the practice of the high court of chancery of England[32] or the state practice.[33]

liable as such after six years did not bar their liability as stockholders for the capital stock knowingly received by them as dividends. Id.

18. People v. Michigan Cent. R. Co. [Mich.] 13 Det. Leg. N. 552, 108 N. W. 772.

19. City of Hartford v. Mechanics' Sav. Bank [Conn.] 63 A. 658. Foreclosure of mortgage or redemption of property covered by mortgage in form of deed absolute, barred where the debt was barred. Caraway v. Sly, 122 Ill. App. 648. Where a mortgagee acquired the legal title, a suit by him to remove the lien of an attachment which was subsequent to the mortgage lien was not barred by the limitation applicable to foreclosure of mortgages. Katz v. Obenchain [Or.] 85 P. 617. But where an ordinance expressly makes a lien for an assessment for local improvements perpetual, the rule stated in the text does not apply. City of Hartford v. Mechanics' Sav. Bank [Conn.] 63 A. 658. See Foreclosure of Mortgages on Land, 5 C. L. 1441.

20. Suit to establish as a valid demand against property certain notes of the grantor assumed by the grantee. Greenley v. Greenley, 100 N. Y. S. 114.

21. Limitation does not begin to run against breach of express trust until the trust has been terminated or repudiated. Andrews v. Tuttle-Smith Co., 191 Mass. 461, 78 N. E. 99. See Limitation of Actions, 6 C. L. 465.

22. Mortgagee in possession under voidable sale and relying on a credit given to the mortgagor, Code Miss. § 2733, not being applicable to such a case, though the mortgage debt was barred. Haggart v. Wilczinski [C. C. A.] 143 F. 22.

23. Party asking relief from a forfeiture for failure to pay claim barred by the statute must pay the money due for the nonpayment of which the forfeiture accrued. People v. Freeman, 110 App. Div. 605, 97 N. Y. S. 343. See ante § 2 B, General Maxims and Principles, and § 2 C, Occasions For, and Subjects of, Equitable Relief.

24. Suit by party out of possession, as authorized by statute, to quiet title. Costello v. Muheim [Ariz.] 84 P. 906.

25. See 5 C. L. 1160.

26. For a summary of the statutory provisions relating to practice and procedure, see Harris v. Bogle, 115 Tenn. 701, 92 S. W. 849.

27. A suit in equity is commenced at the time process to answer the plaintiff's bill is issued, although the bill be not then filed. The bill, when filed, relates back to the time the process was issued. Columbia Finance & Trust Co. v. Fierbaugh [W. Va.] 53 S. E. 468.

28. Taylor v. McCafferty, 27 Pa. Super. Ct. 122.

In Pennsylvania a peculiar practice, unknown elsewhere, prevails in proceedings at law of entering an appearance "de bene esse," under which the defendant may question the form and service of the writ without being held to have waived its defects, but this practice does not obtain in equity, and a precipe sufficient as an appearance "de bene esse" at law cannot be treated as a conditional appearance in equity. Taylor v. McCafferty, 27 Pa. Super. Ct. 122.

29. Taylor v. McCafferty, 27 Pa. Super. Ct. 122.

30. If it presents anything in the nature of a reply to the matters contained in the bill it goes beyond the scope of a conditional appearance and implies submission to the judgment of the court on such reply. It thus operates as an appearance to the action and also as an answer or demurrer, according to the nature of the reply, and hence as a waiver of any formal defect in the bill or defect in the service. Taylor v. McCafferty, 27 Pa. Super. Ct. 122.

31. Remsen v. New York, etc., R. Co., 97 N. Y. S. 902. See ante § 2, Effect of Code or Statutory Provisions. And see Dockets, Calendars and Trial Lists, 7 C. L. 1192.

32. General equity rule 90. Brown v. Fletcher, 140 F. 639.

33. While service of a subpoena from a

§ 5. *Parties.*[34]—The rights of parties not before the court cannot be adjudicated.[35] The general rule in equity therefore is that all persons materially interested, either legally or beneficially, in the subject-matter of a suit must be made parties either as complainants or defendants, so that a complete decree binding all parties may be made,[36] and the fact that no specific relief is prayed against some of the parties is immaterial.[37] Parties connected with the subject-matter merely as agencies through which the defendant accomplished the result from which relief is sought are not always necessary parties, though the complainant unnecessarily prays for relief against them.[38] The assignor of a claim sued on in equity is not a necessary party.[39] The right to maintain a suit in equity depends upon the interest of the complainant in the subject, the rule being that he must have a substantial interest therein.[40] Any party interested in common with the complainant may be joined as a cocomplainant.[41] Equity will sometimes enforce at the instance of one person a promise made to another, though not made for the benefit of complainant.[42] By statute in Ohio suits are required to be brought by the real party in interest.[43]

Federal court in equity upon a nonresident corporation cannot be controlled by state statutes, yet, when there is no applicable provision of a Federal statute, the procedure of the state statutes may be followed, if deemed reasonable and adapted to the purpose. Toledo Computing Scale Co. v. Computing Scale Co. [C. C. A.] 142 F. 919.

34. See 5 C. L. 1160.

35. Grand Trunk W. R. Co. v. Chicago & E. I. R. Co. [C. C. A.] 141 F. 785.

36. Florida Land Rock Phosphate Co. v. Anderson [Fla.] 39 So. 392. Necessary parties are those without whom the court cannot properly adjudicate the matters in suit. Id. Indispensable parties are persons who have such an interest in the controversy that an equitable disposition of the case cannot be made without them. Landram v. Jordan, 25 App. D. C. 291. Parties claiming interest adverse to plaintiff in bill in aid of execution. Gavazzi v. Dryfoos, 47 Misc. 15, 95 N. Y. S. 199. Bill to establish gift inter vivos or causa mortis must join parties who, but for the gift, would receive the subject-matter thereof. Graham v. Spence [N. J. Eq.] 63 A. 344. In a suit to remove a cloud from title and to cancel a conveyance as fraudulent, the parties who executed the conveyance are necessary parties, especially if the conveyance contains covenants of general warranty. Florida Land Rock Phosphate Co. v. Anderson [Fla.] 39 So. 392.

37. Gavazzi v. Dryfoos, 47 Misc. 15, 95 N. Y. S. 199.

38. In a suit for an accounting as to the proceeds of a judgment for damages rendered in condemnation proceedings by a city, on the ground that complainant had been fraudulently induced by defendant's agent to execute a quitclaim deed to the property and to give an order on the city comptroller for such proceeds, the agent and the city comptroller were not necessary parties, though the petition contained an unnecessary prayer to have the quitclaim deed and the order set aside, and the court unnecessarily decreed that they be set aside so far as they affected complainant's right to recover from defendant. Heath v. Schroer [Mo. App.] 96 S. W. 313.

39. The receiver of a corporation was not a necessary party to a suit by guarantee company, to whom the receiver had assigned certain funds, to recover such funds, though under the terms of the assignment the receiver was to have a certain proportion of the recovery. Fidelity & Deposit Co. v. Fidelity Trust Co., 143 F. 152.

40. Suit to foreclose mortgage. Bennett v. First Nat. Bank, 117 Ill. App. 382. Neither a remainderman nor the trustee of his interests can sue for the cancellation of a contract by the holder of the limited estate granting the right to construct a levee on the property, since the contract does not affect their interests, and having failed to prevent the construction without compensation for their interests, their only remedy was an action at law for damages. Crawford v. St. Francis Levee Dist. Directors [Ark.] 96 S. W. 143. A beneficiary under a will who received an income for life had no interest in the cancellation of the record of birth of a child, which stated that the beneficiary was the father of the child, the real parties interested being those whose estates would be increased if the purported father died without issue. Vanderbilt v. Mitchell [N. J. Eq.] 63 A. 1107. But even those whose estates would be thus increased had no standing to maintain a suit to cancel the record during the life of the purported father. Vanderbilt v. Mitchell [N. J. Eq.] 63 A. 1106. Taxpayer not personally interested could not sue to restrain operation of contract between city water commissioners and railroad company. Ampt v. Cincinnati, 2 Ohio N. P. [N. S.] 489.

41. Party having interest in patented inventions properly joined as complainant in suit for infringement. Daimler Mfg. Co. v. Conklin, 145 F. 955. Joint suit by several parties deceived by same fraud and all injured in same way and seeking same relief. Hamilton v. American Hulled Bean Co. [Mich.] 12 Det. Leg. N. 1005, 106 N. W. 731. See post § 6 B, Multifariousness.

42. So where a landlord allowed a tenant to put a leased piano into the rented apartments by enlarging a window and promised that the piano might be removed in the same way, equity would enforce the promise at the instance of the lessor of the piano, the lease thereon having expired. Berry v. Friedman [Mass.] 78 N. E. 305.

In some cases a bill may be filed by parties in behalf of themselves and all others similarly situated.[44] A single creditor may sue to set aside a conveyance as fraudulent against him.[45] All parties joined as defendants must have some common interest in the subject-matter or be in some way jointly liable.[46] One may be a proper though not a necessary party.[47]

An objection on account of parties is waived if not properly raised.[48] The question may be raised by demurrer,[49] plea,[50] or answer.[51] The objection cannot be raised for the first time on appeal.[52]

Bringing in new parties.[53]—New parties may be brought in by way of amendment.[54]

Intervention.[55]—Parties having an interest in the subject-matter of the suit and who are either necessary or proper parties thereto, if not made so by the plaintiff, may come in by way of application to intervene and be made parties complainant or defendant to the end that their interests may be adjudicated and protected;[56] but where one party brings suit in his own behalf and on behalf of all others similarly situated, one of the latter will not ordinarily be allowed to intervene by another attorney.[57] The rights of the parties on the merits will not be decided upon a petition to intervene.[58] An order of interpleader does not necessarily involve the exercise of equity jurisdiction.[59]

43. Suit cannot be brought by a taxpayer in his capacity as such under the statute in that behalf to restrain the operation of a contract between the board of commissioners of waterworks of a city and a railroad company, the complainant not being personally interested in such suit. Ampt v. Cincinnati, 2 Ohio N. P. (N. S.) 489.

44. As where the parties are very numerous and there is a common interest or common right which is sought to be enforced. Dornan v. Buckley, 119 Ill. App. 523.

45. Tissier v. Walles [Ala.] 39 So. 924.

46. Boonville Nat. Bank v. Blakey [Ind.] 76 N. E. 529; Merritt v. Alabama Pyrites Co. [Ala.] 39 So. 555; Elk Brewing Co. v. Neubert, 213 Pa. 171, 62 A. 782; Miller v. Willett [N. J. Eq.] 62 A. 178. See post § 6 B, Multifariousness.

47. In a suit by a party to cancel a note purporting to have been executed jointly by complainant and a decedent, the personal representative of the deceased is a proper but not a necessary party. Ritterhoff v. Puget Sound Nat. Bank, 37 Wash. 76, 79 P. 601.

48. Unless raised by demurrer or answer. Code Civ. Proc. § 499. Rose v. Merchants' Trust Co., 96 N. Y. S. 946. Where proper but not indispensable parties were not joined, but objection was made for the first time on the hearing of a demurrer. Landram v. Jordan, 25 App. D. C. 291.

49. Code Civ. Proc. § 499. Rose v. Merchants' Trust Co., 96 N. Y. S. 946. See post § 6 E, Grounds. Such defects appearing on face of complaint are waived unless raised by demurrer. Rose v. Merchants' Trust Co., 96 N. Y. S. 946.

50. Mackey v. Mackey [N. J. Eq.] 63 A. 984. See post § 6 F, Plea.

51. Rose v. Merchants' Trust Co., 96 N. Y. S. 946.

52. Where an action at law is changed to a suit in equity by way of amendment without exception on the part of the defendant who has appeared to the action at law, he cannot, on appeal, complain that he is not a party to the suit in equity. Westminster Nat. Bank v. New England Electrical Works, 73 N. H. 465, 62 A. 971. See Saving Questions for Review, 6 C. L. 1385.

53. See 5 C. L. 1161.

54. Substitution of subsequent grantee of a decedent as complainant in suit by administrator to set aside prior grant. Busiere v. Reilly, 189 Ill. 518, 75 N. E. 958. In such case the bill will be treated as having been originally brought by the substituted complainant. Id. Where in a suit by the alleged equitable owners of interests in a judgment at law, to enjoin payment to the judgment plaintiff, the answer alleged that complainants had assigned their claim to third persons before the rendition of the judgment at law, it was proper to allow the bill to be amended by making such third persons parties defendant. Murphy & Co. v. American Soda Fountain Co., 86 Miss. 791, 39 So. 100.

55. See 5 C. L. 1161.

56. Wightman v. Evanston Yaryan Co., 217 Ill. 371, 75 N. E. 502. The right of intervention, in the absence of statutory regulation, is controlled by the general rules in equity as to proper parties. Id. Any proper, though not necessary party, may intervene where the rights of the other parties will not be jeopardized. Brinckerhoff v. Holland Trust Co., 146 F. 203.

57. He may be made a cocomplainant appearing by the original complainant's attorney, and if the case is disposed of in any way other than at final hearing on the pleadings and proof, the court will then determine whether to allow the intervention. Bowker v. Haight & Freese Co., 140 F. 794.

58. Whether there could be contribution between joint tort feasors and whether petitioner should be subrogated to the rights of the complainant. Brinckerhoff v. Holland Trust Co., 146 F. 203.

§ 6. *Pleading. A. General rules.*[60]—Questions not put in issue by the pleadings will not be considered.[61] A pleading is taken to be what it is in substance, regardless of its form or the name given to it by the pleader.[62] Allegations of conclusions without the facts on which they are based are insufficient.[63] On the other hand, legal conclusions need not be alleged at all but may be left to be drawn by inference from the facts alleged.[64] Allegations must not be vague and indefinite.[65] The matter of withdrawal of pleadings is within the discretion of the court.[66]

(§ 6) *B. Original bill, petition, or complaint.*[67]—All the facts essential to relief must be alleged.[68] The allegations must be of facts and not of mere conclusions.[69] Indeed, the conclusion may be left to be drawn by inference from the facts alleged.[70] Allegations on information and belief need not be considered where the other allegations entitle complainant to the relief sought.[71] It is not necessary to interrogate the defendant specially upon any material statement in the bill unless complainant desires a discovery.[72] Where a petition states facts sufficient to entitle complainant to both legal and equitable relief and prays relief only a part of which can be had at law but all of which can be had in equity, the pleader will be held to have invoked the chancery and not the common-law powers of the court.[73]

59. Municipal Court Act, § 187 [Laws 1902, p. 1546, c. 580] giving the municipal court authority to make an order of interpleader is not unconstitutional. Satkofsky v. Jarmulowsky, 49 Misc. 624, 97 N. Y. S. 357.

60. See 5 C. L. 1161.

61. Lawler v. French, 104 Va. 140, 51 S. E. 180. See post § 6, I, Issues, Proof, and Variance. Proof without averment is as unavailable as is averment without proof where the averment is denied. Jacoby v. Funkhouser [Ala.] 40 So. 291.

62. A so-called amended supplemental bill held in effect a new suit. Columbia Finance & Trust Co. v. Fierbaugh [W. Va.] 53 S. E. 468.

63. Fraud. Daab v. New York Cent. & H. R. Co. [N. J. Eq.] 62 A. 449; Ellis v. Crawson [Ala.] 41 So. 942. Misconduct of corporate directors. Allen v. Luke, 141 F. 694. That insurance policy had no surrender value. Marks v. Equitable Life Assur. Soc. 109 App. Div. 675, 96 N. Y. S. 551.

64. Fraud. Bates v. Hastings [Mich.] 13 Det. Leg. N. 626, 108 N. W. 1005.

65. Burkheimer v. National Mut. Bldg. & L. Ass'n [W. Va.] 53 S. E. 372; Godwin v. Phifer [Fla.] 41 So. 597; Graham v. Spence [N. J. Eq.] 63 A. 344.

66. Discretion held not abused in allowing withdrawal of a bill in the nature of a supplemental bill filed by an intervener after defendant had filed an answer denying that intervener had any interest in the suit. City of Vicksburg v. Vicksburg Waterworks Co., 202 U. S. 453, 50 Law. Ed. —. In such case the court may suppress testimony in support of such pleadings. Id.

67. See 5 C. L. 1162.

68. Godwin v. Phifer [Fla.] 41 So. 597; Graham v. Spence [N. J. Eq.] 63 A. 344; Haydon v. St. Louis, etc., R. Co., 117 Mo. App. 76, 93 S. W. 833. The complainant cannot avail himself of any claim not covered by his bill, though established by the evidence. Millard v. Millard [Ill.] 77 N. E. 595. Averment that a grantee made advances to the grantor subsequent to the execution of the deed and looked to the property conveyed for payment did not show any debt between grantor and grantee at date of deed or any agreement that the deed was to be considered a mortgage for future advances. Jacoby v. Funkhouser [Ala.] 40 So. 291.

Lack of adequate remedy at law must be shown by the bill. Haydon v. St. Louis, etc., R. Co., 117 Mo. App. 76, 93 S. W. 833. Injunction against trespass. Carswell v. Swindell, 102 Md. 636, 62 A. 956. Injunction against disturbance of easement. Gaynor v. Bauer [Ala.] 39 So. 749.

69. Godwin v. Phifer [Fla.] 41 So. 597. A general allegation of fraud is unavailing to confer jurisdiction where the facts alleged do not show fraud. Daab v. New York Cent. & H. R. Co. [N. J. Eq.] 62 A. 449. In will contest, allegation that will was procured by fraud and misrepresentation was insufficient. Ellis v. Crawson [Ala.] 41 So. 942. Where the facts constituting alleged misconduct of bank directors resulting in losses to the bank were not alleged, the allegation of misconduct was an allegation of a conclusion. Allen v. Luke, 141 F. 694. Where the provisions of an insurance policy were not alleged and the policy was not made a part of the complaint, an allegation that the policy had no surrender value was a conclusion of law. Marks v. Equitable Life Assur. Soc., 110 App. Div. 675, 96 N. Y. S. 551.

70. Fraud may be sufficiently charged by inference from the facts alleged. In suit to restrain illegal application of public funds. Bates v. Hastings [Mich.] 13 Det. Leg. N. 626, 108 N. W. 1005.

71. Manning v. Jagels [N. J. Eq.] 63 A. 492.

72. Equity rule 40, requiring this, was repealed in 1850. Way v. Hygienic Fleeced Underwear Co. [C. C. A.] 144 F. 870.

73. In the district court. Ames v. Ames [Neb.] 106 N. W. 584. After filing a petition of that character the plaintiff may elect to proceed at law, but to do so he should manifest his election by some unequivocal act, which commits him to the theory that he has abandoned his claim to equitable relief. Id.

Allegations of the loss, detention, or destruction of the instrument sued on must be verified.[74] Where a bill is verified by complainant's agent or attorney, the verification must show that the affiant knew the contents of the bill.[75] Allegations properly pleaded and not denied by the answer are admitted.[76] The allegations of an unsworn bill are not available as evidence in favor of a cross complainant.[77]

Sufficiency of allegations.[78]—The allegations must be definite and certain.[79] A bill is sufficiently definite if it notifies the defendant of the purpose of the suit.[80] Indefiniteness in the allegations of a bill may be cured by amendment,[81] and necessary specific allegations may be supplied by exhibits.[82] The allegations must not be repugnant.[83]

Multifariousness.[84]—There is no absolute standard by which to determine whether or not a bill is multifarious and it is impossible to state a rule applicable to all cases.[85] The question is largely within the discretion of the court,[86] and to a considerable degree depends upon the particular facts of each case.[87] The essence of multifariousness is the improper blending of distinct demands or independent matters in one bill,[88] and it may consist of the misjoinder of either parties[89] or causes

A mere demand for a jury to try the issues of fact is not such an act as would warrant the court in assuming that the plaintiff has abandoned his claim to equitable relief, because, where the relief sought is equitable, a court in its discretion may submit the issues of fact to a jury. Id.

74. Objection waived if not taken before answering to the merits. Hoagland v. Supreme Council Royal Arcanum [N. J. Eq.] 61 A. 982.

75. See Code 1899, c. 145, § 42. Baltimore Bargain House v. St. Clair, 58 W. Va. 565, 52 S. E. 660.

76. See post this section, subd. G, Answer.

77. Bledsoe v. Jones [Ala.] 40 So. 111.

78. See 5 C. L. 1162.

79. Graham v. Spence [N. J. Eq.] 63 A. 344. Allegations intended to show that a corporation had not complied with the laws of the state of its creation held insufficient to call for answer. Burkheimer v. National Mut. Bldg. & L. Ass'n [W. Va.] 53 S. E. 372. This principle applies to all bills in equity, but is especially applicable to bills seeking an injunction, the rule being that the title or interest of the complainant and the facts upon which he predicates his prayer for such relief must be stated positively with clearness and certainty. Godwin v. Phifer [Fla.] 41 So. 597.

80. Bill by receiver of insolvent corporation for an accounting from a mortgagee in an alleged void mortgage on the corporate property held sufficiently definite. Pryor v. Gray [N. J. Eq.] 62 A. 439. Bill by receiver of bank to recover from directors money of bank lost through their misconduct held not demurrable for failure to state amount of losses. Allen v. Luke, 141 F. 694.

81. Bill for specific performance. White v. Poole, 73 N. H. 403, 62 A. 494. Failure to allege acts showing misconduct of defendants in suit against former directors of a corporation for money lost through their misconduct. Allen v. Luke, 141 F. 694.

82. Grant v. Cumberland Valley Cement Co., 58 W. Va. 162, 52 S. E. 36.

83. An allegation that a will was not properly attested was not necessarily repugnant to a copy filed as an exhibit which showed on its face that the will was properly attested, since the facts thus shown by the copy might not be true. Ellis v. Crawson [Ala.] 41 So. 942.

84. See 5 C. L. 1163.

85. Horner v. Nitsch [Md.] 63 A. 1052; Howe & Davidson Co. v. Haugan, 140 F. 182; Fidelity & Deposit Co. v. Fidelity Trust Co., 143 F. 152.

86. South Penn. Oil Co. v. Calf Creek Oil & Gas Co., 140 F. 507.

87. South Penn. Oil Co. v. Calf Creek Oil & Gas Co., 140 F. 507. Bill to protect easements and water rights held not multifarious. Howe & Davidson Co. v. Haugan, 140 F. 182.

88. Horner v. Nitsch [Md.] 63 A. 1052; Gray v. Bloomington & N. R. Co., 120 Ill. App. 159.

89. Lack of a common interest on the part of all the defendants makes a bill multifarious. Miller v. Willett [N. J. Eq.] 62 A. 178. The mere existence of similar questions of fact will not justify a joinder of defendants. Boonville Nat. Bank v. Blakey [Ind.] 76 N. E. 529. The mere fact that each demand is asserted as a right growing out of the administration of an estate so that each case involves some common elements of fact will not warrant the joining of separate claims against defendants growing out of different transactions and involving material inquiries which are essentially foreign to each other. Id. A bill which joins separate respondents acting in different capacities upon different rights and not chargeable with any joint liability or interest in the relief sought is defective. Elk Brewing Co. v. Neubert, 213 Pa. 171, 62 A. 782. In a suit to enforce a trust in land the joinder of parties who merely claimed an adverse interest in the land but not in the trust rendered the bill multifarious. Merritt v. Alabama Pyrites Co. [Ala.] 39 So. 555. The rule under chancery rule 108 that in mortgage suits subsequent incumbrancers are proper parties and may be brought in by a general allegation that they are subsequent incumbrancers

of action,[90] or both.[91] It is not indispensable, however, that all the defendants should have an interest in all the matters in litigation,[92] or that they should be interested in the same manner and to the same extent.[93] A bill is not multifarious for misjoinder of complainants where all of them have been injured in the same way by the same defendant and all seek the same relief,[94] nor will any bill be held multifarious in which there is a unity of purpose and all the equities involved relate to the same subject-matter,[95] or which presents a common point of litigation, the de-

and claim some interest cannot be extended to other cases nor to other parties claiming other rights. Id.

90. Bill by receiver of corporation against directors for negligence and malfeasance held multifarious. Emerson v. Gaither [Md.] 64 A. 26. A bill by the heirs of a deceased person against a purchaser of the decedent's real estate at a sale thereof for nonpayment of taxes, to set aside the deed acquired under such purchase and to declare the dower of the widow of such decedent in the same land barred, is multifarious. Frum v. Fox, 58 W. Va. 334, 52 S. E. 178. Joinder of legal and equitable causes of action, as where member of voluntary association sued for reinstatement and for recovery of sick benefits. Mesisco v. Giuliano, 190 Mass. 352, 76 N. E. 907.

91. Complaint by trustee in bankruptcy against several creditors alleged to have received preferences and one alleged to have received a fraudulent conveyance held multifarious, no vital connection appearing between the several transactions involved. Boonville Nat. Bank v. Blakey [Ind.] 76 N. E. 529. Bill seeking alimony from complainant's husband and to compel a settlement of a partnership between the husband and a third party, held multifarious. Stuckey v. Stuckey, 122 Ill. App. 555. A bill in equity which charged that certain real estate was bought for the plaintiff corporation by its president and was paid for in whole or in part with its funds, or with the proceeds of its stock unlawfully issued and sold, and not properly accounted for, and that its president fraudulently caused the real estate to be conveyed to his son, one of the defendants, through whom several other defendants, but not all the defendants, had legal or equitable titles, which they should convey to the plaintiff; that a part of the above defendants, and two other defendants, had unlawfully received stock in the plaintiff corporation, which they should account for to it; and that still another defendant had unlawfully received and sold the stock of the plaintiff, in part, at least, other than that mentioned in the preceding class, for the proceeds of which he should account to it,—was bad for multifariousness. Camden Land Co. v. Lewis [Me.] 63 A. 523.

92. It is sufficient if each party has an interest in some essential matters involved which are connected with the others. Jones v. Missouri-Edison Elec. Co. [C. C. A.] 144 F. 765. Gray v. Bloomington & N. R. Co., 120 Ill. App. 159. A bill seeking to enjoin the prosecution of two actions at law against the complainant involving the same subject-matter, but instituted by different plaintiffs, is not multifarious. South Penn. Oil Co. v. Calf Creek Oil & Gas Co., 140 F. 507. A bill against a county clerk and his several sureties for several terms, charging fraudulent manipulation by the clerk of his accounts, was not multifarious. Place v. State [Ark.] 92 S. W. 242.

93. A bill is not multifarious where one general right only is claimed by it, although the defendants have only separate interests in distinct questions which arise out of or are connected with such right. All of the defendants, however, must be affected in some respect by the action or by some part thereof. State v. Knife Falls Boom Corp., 96 Minn. 194, 104 N. W. 817. Under this rule, where a corporation assigned its deposits, in two depositories, to a guaranty company which had furnished bond for the corporation's defaulting treasurer, and it appeared that both depositories were concerned in the fraudulent manipulation of the deposits by such treasurer, though not to the same extent nor always in the same way, it was held that the guaranty company might sue the depositories jointly. Fidelity & Deposit Co. v. Fidelity Trust Co., 143 F. 152. That assignees for creditors may have been unfaithful in different ways or that all may not be responsible does not render a bill against them by a creditor multifarious (Andrews v. Tuttle-Smith Co., 191 Mass. 461, 78 N. E. 99), nor does the joinder of a creditor who has received an unlawful preference from the assignees render the bill multifarious (Id.). Bill by indorser for an accounting against holder of usurious notes, to which another indorser was made party defendant, held not multifarious. Horner v. Nitsch [Md.] 63 A. 1052. Where there was a concert of action between a lessor and the holder of a tax sale certificate against the property to use such certificate in order to oust the lessee, a bill to be relieved from the forfeiture, under the lease, for failure to pay the tax was not multifarious because it joined the lessor and the holder of the certificate as defendants. Kann v. King, 25 App. D. C. 182.

94. Bill by stockholders for cancellation of subscriptions on account of fraudulent representations held not multifarious, though the representations were made to each complainant separately. Hamilton v. American Hulled Bean Co. [Mich.] 12 Det. Leg. N. 1005, 106 N. W. 731.

95. Bill to quiet title against parties deriving title from the same grantor as complainant and involving portions of a single original tract of land. Sicard v. Guyllou [Ala.] 41 So. 474. Where a will and a deed were parts of the same scheme to obtain the property of a decedent and both were held by the same person, the will not having been probated, a single suit was proper to set aside both instruments. Irving v. Bruen, 97 N. Y. S. 180. Bill for infringement of several patents used as integral parts of the

cision of which will affect the whole subject-matter and settle the rights of all the parties.[96] A bill will not be rendered multifarious by impertinent matter[97] or by consistent alternative averments.[98] The test of multifariousness under the Codes is the same as under the general equity practice.[99]

The question of multifariousness may be raised by demurrer,[1] motion,[2] plea or answer.[3] If not properly raised it is waived.[4] It is often a matter of discretion with the chancellor whether complainant will be required to separate suits improperly joined.[5] A motion for a separate trial may be granted for good cause.[6]

Prayer.[7]—A party seeking equitable relief must specifically demand it, unless the nature of the cause itself indicates that the relief sought is equitable.[8] Under a general prayer any relief may be granted which is authorized by the pleadings and proof.[9] Inconsistent prayers are not permissible,[10] nor will a complainant be allowed to set out two inconsistent states of fact and ask for alternative relief,[11] but

same machine, and conjointly used and conjointly infringed by the defendant, held not multifarious. Daimler Mfg. Co. v. Conklin, 145 F. 955. Bill by minority stockholder to avoid a reorganization and for the rehabilitation of the old corporation held not multifarious. Jones v. Missouri-Edison Elec. Co. [C. C. A.] 144 F. 765. Bill for accounting of partnership transactions and to declare a lien in complainant's favor upon defendant's interest in the assets of a new firm. Selman & Co. v. Walling [Ala.] 39 So. 568.

96. Jones v. Missouri-Edison Elec. Co. [C. C. A.] 144 F. 765. Application of the assets of a national bank to its liabilities and the enforcement of stockholders' liability being made by statute a part of the liquidation of such a bank, both remedies may be pursued in one bill. Wyman v. Wallace, 201 U. S. 230, 50 Law. Ed. —-; Frenzer v. Wallace, 201 U. S. 244, 50 Law. Ed. —-. Bill in equity by receiver of an insolvent national bank against several former directors to recover money lost to the bank by defendants' misconduct, held not multifarious. Allen v. Luke, 141 F. 694.

97. Howe & Davidson Co. v. Haugan, 140 F. 182.

98. As where bill by creditor to set aside fraudulent conveyance by debtor contained alternative averments in connection with each of which actual fraud by grantor and grantee was charged, and the relief prayed in connection with each alternative phase of the bill was the same. Tissler v. Walles [Ala.] 39 So. 924.

Distinguished from repugnancy: Multifariousness is not synonymous with inconsistency or repugnancy. Ellis v. Crawson [Ala.] 41 So. 942.

99. The test whether several causes of action are improperly united in the complaint is whether all the matters alleged therein could have been included in a bill in equity under the old practice without making it multifarious. If so, they may be properly united in one complaint under the code practice. State v. Knife Falls Boom Corp., 96 Minn. 194, 104 N. W. 817.

1. See post this section, subd. E, Grounds.

2. Where a bill was multifarious by reason of the joinder of certain defendants and the defect could not be cured by amendment eliminating the other defendants without disclosing lack of local jurisdiction, it was proper to dismiss the bill on motion. Merritt v. Alabama Pyrites Co. [Ala.] 39 So. 555. See post § 9, Dismissal. Objection for multifariousness in misjoinder of parties should be taken by motion for separate trials. Boonville Nat. Bank v. Blakey [Ind.] 76 N. E. 529.

3. See Equity, 5 C. L. 1144, 1164.

4. The general rule is that the objection is waived if not taken by demurrer before answering to the merits. Ellis v. Crawson [Ala.] 41 So. 942; Shellenberger v. Altoona & P. Connecting R. Co., 212 Pa. 413, 61 A. 1000. Objection for multifariousness is waived by answer and submission to trial on the merits. Bird v. Bird, 218 Ill. 158, 75 N. E. 760.

5. Upon the joinder of suits which are wholly of equitable cognizance the objections to multifariousness are the tendency to prolixity and confounding of proofs and the loading of a defendant with unnecessary costs, and such a joinder does not go to that which is vital or essential. Boonville Nat. Bank v. Blakey [Ind.] 76 N. E. 529.

6. The granting of such motion is ordinarily a matter of discretion, but where distinct causes of action have been joined the overruling of the motion constitutes an abuse of discretion. Boonville Nat. Bank v. Blakey [Ind.] 76 N. E. 529.

7. See 5 C. L. 1164.

8. Muller v. Witte, 78 Conn. 495, 62 A. 756.

9. Katz v. Obenchain [Or.] 85 P. 617. Though prayer for special relief is denied. Thompson v. American Percheron Horse Breeders' & Importers' Ass'n, 114 Ill. App. 131. Under a general prayer in a bill for specific performance a money decree may be rendered. Barlow v. McDowell, 118 Ill. App. 506. Decree of foreclosure allowed in suit by mortgagee in possession to require mortgagor to elect to affirm or disaffirm the sale, though no foreclosure was prayed for. Haggert v. Wiiczinski [C. C. A.] 143 F. 22.

10. Prayers in a suit by a trustee in bankruptcy that a conveyance by the bankrupt be set aside as fraudulent and that the parties receiving the proceeds of such sale be declared trustees for the benefit of the estate were inconsistent. Chisholm v. Wallace [Ala.] 40 So. 219.

11. Gray v. Bloomington & N. R. Co., 120 Ill. App. 159. As where the bill clearly discloses the fact that he seeks relief based upon the recognition of the validity of a transaction which he seeks to specifically en-

he may state the facts and ask for alternative relief according to the conclusions of law which the court may draw from such facts.[12] The fact that some of the relief prayed for cannot be granted will not invalidate the whole bill.[13]

(§ 6) *C. Amended and supplemental bills, complaints, or petition.*[14]—Amendments may relate to matters of either substance or form.[15] Thus, amendments have been allowed to cure indefiniteness in the allegations,[16] to conform pleadings to proof,[17] to change the capacity in which the complainant sues,[18] to bring in new parties,[19] and to recast the bill so as to make it state an equitable instead of legal cause of action.[20] A bill may be amended so as to set up facts omitted from the original bill and which tend to establish the claim for the relief sought in such bill,[21] but the fact that essential facts are thus added may raise a presumption against the truth of such facts.[22] An amendment must not constitute a departure from the original pleadings,[23] nor set up a new cause of action,[24] the test as to a new cause of action being whether the same evidence would sustain both bills and the measure of damages would be the same.[25] An amendment will not be allowed mere-

force, and at the same time pray for the annulment of such transaction as fraudulent. Cella v. Brown [C. C. A.] 144 F. 742.

12. Thus, a bill may be framed in a double aspect with an alternative prayer. Gray v. Bloomington & N. R. Co., 120 Ill. App. 159; Cella v. Brown [C. C. A.] 144 F. 742. Where a complainant is uncertain whether upon a certain state of facts he is entitled to avoid a contract or transfer for fraud or breach of trust and to recover back his property, or to enforce a lien upon it for its value, he may pray for each in the alternative, and a court of equity will grant him the relief to which it deems him entitled. Jones v. Missouri-Edison Elec. Co. [C. C. A.] 144 F. 765.

In New York the complainant may demand equitable relief with an alternative demand for legal relief. Doyle v. Delaney, 98 N. Y. S. 468.

13. Doyle v. Delaney, 98 N. Y. S. 468.

14. See 5 C. L. 1165.

15. Brassington v. Waldron [Mich.] 12 Det. Leg. N. 1011, 107 N. W. 100.

16. Failure to allege acts charged as misconduct in action by bank receiver against former directors. Allen v. Luke, 141 F. 694. Bill for specific performance. White v. Poole, 73 N. H. 403, 62 A. 494.

17. Deering v. Shreyer, 110 App. Div. 200, 97 N. Y. S. 14. Such amendments are freely permitted before final decree if promptly made. Laskey v. Burrill [Va.] 54 S. E. 23. The bill must be so amended where there is a variance between it and the proofs, otherwise the decree cannot stand. Higgins v. Higgins, 219 Ill. 146, 76 N. E. 86.

18. Bill to foreclose by executor in individual capacity amended by substitution of complainant in his representative capacity. Leahy v. Haworth [C. C. A.] 141 F. 850.

19. Murphy & Co. v. American Soda Fountain Co., 86 Miss. 791, 39 So. 100; Busiere v. Reilly, 189 Ill. 518, 75 N. E. 958. See ante § 5, Bringing in New Parties.

20. Kramer v. Gille, 140 F. 682. Where justice requires it an action at law may be changed to a suit in equity. Westminster Nat. Bank v. New England Electrical Works, 73 N. H. 465, 62 A. 971. Where the evidence in an action brought and tried as one at law shows that it is really a suit in equity, the court should not dismiss the complaint but should treat it as amended to conform to the proofs, thus making it an equitable action and triable as such. Goupille v. Chaput [Wash.] 86 P. 1058.

21. Cheever v. Ellis [Mich.] 13 Det. Leg. N. 341, 108 N. W. 390.

22. Where facts which must have been known when the original bill was filed were omitted therefrom, though they were essential to the relief sought, the omission of such facts from the original bill and the bringing them in by way of amendment will be considered in determining the truth of such facts. Calkins v. Calkins, 220 Ill. 111, 77 N. E. 102.

23. No departure where bill alleging that complainant's brother induced her to execute a bogus mortgage to him in order to protect her from certain debts was amended by leaving out specific reference to debts and alleging that she was advised by her brother that the mortgage was to protect her rights and to protect her homestead, and by a subsequent amendment alleging that the mortgage was not necessary to protect her homestead. Phillips v. Bradford [Ala.] 41 So. 657.

24. Kramer v. Gille, 140 F. 682; Rice v. O'Neal, 120 Ill. App. 259.

25. Where the original bill stated a cause of action against officers of a corporation for selling their stock to the corporation for money, an amendment alleging a sale in exchange for a stock of goods stated a new cause of action. Kramer v. Gille, 140 F. 682. An amendment of a bill to subject the lands of a father and son to a judgment against them by setting up a conveyance from the father to the son and seeking to set it aside for fraud did not set out a new cause of action. Hobson's Adm'r v. Hobson's Adm'r [Va.] 53 S. E. 964. An amendment which affects property rights not involved in the original bill will not be allowed. Ellis v. Whitacre [Va.] 54 S. E. 993. A bill by a trustee to establish liens on the land covered by the trust and to ascertain their priorities could not be amended so as to attack another deed of trust executed by the same grantor to an-

ly to conform the bill to a theory advanced by the court in its opinion,[26] or when it would be useless,[27] or which affects property rights in which complainant has no interest.[28] Amendments to sworn bills are allowed[29] but with great caution.[30]

Amendments may be allowed at almost any stage of the proceeding,[31] as, after answer,[32] at hearing,[33] after interlocutory decree,[34] or after remand from an appellate court.[35] An amendment which is objected to will not be allowed after the case has been heard without any ruling upon the proffered amendment.[36]

Matters inserted by amendment must be treated as if incorporated in the original bill.[37]

A supplemental bill[38] is proper where it is necessary to bring in matters arising pending the suit and which affect the sufficiency of the relief prayed for in the original bill,[39] but want of equity in the original bill cannot be cured in this way.[40] Matters brought in by supplemental bill must be germane to the subject-matter of the original bill.[41] Failure to interpose a supplemental bill will not prevent the adjudication of the matter which ought to have been thus presented from being res adjudicata.[42]

(§ 6) *D. Cross bill or petition.*[43]—A cross bill is a bill filed by the defend-

other trustee. Id. Amendment abandoning a claim that a mortgage had been paid and setting up an estoppel to assert the validity of the mortgage was not a change of the cause of action. Deering v. Shreyer, 110 App. Div. 200, 97 N. Y. S. 14.

26. As where the theory is an impossible one and there is no variance between pleadings and proof. Grand Central Min. Co. v. Mammoth Min. Co., 29 Utah 490, 83 P. 648.

27. It is only when it appears from the bill that amendments can be made which would entitle the complainant to relief that such amendments will be considered as made. Merritt v. Alabama Pyrites Co. [Ala.] 39 So. 555. Where a petition has been held on appeal to set up a stale demand, an amendment after remand which does not cure the defect of staleness will not be allowed. Cheney v. McWhorter, 125 Ga. 168, 53 S. E. 1003.

28. Ellis v. Whitacre [Va.] 54 S. E. 993.

29. Where an amendment to conform pleadings to proof was so slight that the issues were not changed, it was error to refuse to allow it. Leaskey v. Burrill [Va.] 54 S. E. 23.

30. Leaskey v. Burrill [Va.] 54 S. E. 23.

31. No error in allowing amendment at or near the close of the trial where defendant was given time to answer the complaint as amended and no objection was made as to the time. Deering v. Shreyer, 110 App. Div. 200, 97 N. Y. S. 14.

32. Brassington v. Waldron [Mich.] 12 Det. Leg. N. 1011, 107 N. W. 100.

33. Bill for injunction. Rice v. O'Neal, 120 Ill. App. 259.

34. After decree establishing a resulting trust in favor of several complainants the bill may be amended so as to ask for a partition of the property between complainants. Stahl v. Stahl, 220 Ill. 188, 77 N. E. 67.

35. A case may be remanded with leave to file an amended bill in the trial court, and the fact that an order granting such leave recited that a "supplemental bill" might be filed did not render an amended bill filed pursuant to such leave subject to demurrer because such bill did not contain matter proper to be presented by a supplemental bill, where all the parties understood and the order recited the purpose of the bill authorized to be filed and the amendment was in conformity with such purpose. Cheever v. Ellis [Mich.] 13 Det. Leg. N. 341, 108 N. W. 390.

36. Muehlhof v. Boltz [Pa.] 64 A. 427.

37. Amendments to bill in condemnation proceedings made before any proceedings had been had before the commissioners. Baltimore & N. Y. R. Co. v. Bouvier [N. J. Eq.] 62 A. 868. An amendment to a bill to foreclose changing the complainant from an individual to representative capacity as executor related back to the beginning of the suit so as to save the suit from the bar of limitations. Leahy v. Haworth [C. C. A.] 141 F. 850.

38. See 5 C. L. 1166.

39. Duessel v. Proch, 78 Conn. 343, 62 A. 152. As where, pending a suit for cancellation and reconveyance, the defendant agreed to reconvey but failed to do so. Chapman v. Yellow Poplar Lumber Co. [C. C. A.] 143 F. 201. A curative deed obtained pending the suit may be set up by supplemental bill, as where complainant had inchoate title when suit was brought and the deed brought forward by supplemental bill simply perfected his title. Reeve v. North Carolina Land & Timber Co. [C. C. A.] 141 F. 821. Where in a suit to remove a cloud it appeared that the legal title was not in the complainant, the defect might be cured by a supplemental bill showing that complainant had received a confirmatory conveyance from the holder of the paramount title. First Baptist Church of Sharon v. Harper, 191 Mass. 196, 77 N. E. 778.

40. Brownback v. Keister, 220 Ill. 544, 77 N. E. 75.

41. But answering a supplemental bill without objection that it is not germane waives the point. Illinois Nat. Bank v. Trustees of Schools, 111 Ill. App. 189.

42. Laing v. Fish, 119 Ill. App. 645. See Former Adjudication, 5 C. L. 1502.

43. See 5 C. L. 1166.

ant against the plaintiff, and also against other parties if necessary, touching the subject-matter of the original bill, being to most intents and purposes a new suit.[44] A cross bill is not necessary in order that the defendant may be granted relief.[45] Its purpose[46] is to obtain relief for the defendant which cannot be granted under the original pleadings,[47] or to obtain a discovery in aid of the defense,[48] or to enable the court to do full justice between all the parties[49] touching the subject-matter of the original bill.[50] New issues may be made by a cross bill where they are necessary in order to adjust all the equities connected with the subject-matter of the original bill[51] but not otherwise.[52] A cross bill may be filed against a codefendant as well as against the complainant.[53] As against the plaintiff in the original bill it is not always necessary that the cross bill should show any ground of equity or ask equitable relief,[54] or that the cross complainant has no adequate remedy at law,[55] but where a cross bill shows that the controversy has been settled, the court will not retain the cause merely to enforce the payment of the consideration of the settlement.[56]

A cross bill must be filed without unreasonable delay.[57] It may be filed after interlocutory decree establishing the rights of the parties,[58] or in vacation.[59] Service

44. Doremus v. Paterson [N. J. Eq.] 62 A. 3.

45. The court may condition its grant of relief to the complainant by requiring that he shall do equity to the defendant. Andrews v. Connolly, 145 F. 43. See post § 13, Measure of Relief. Lien defendants in a foreclosure suit need not file a cross bill in order to have their rights determined. Such rights may be determined upon their answers. Gouwens v. Gouwens [Ill.] 78 N. E. 597. See post this section subd. G, Answer.

46. **Note:** "A cross bill is often filed to obtain affirmative relief for the defendant in the original suit, to obtain a discovery in aid of the defense in that suit, to enable the defendant to interpose a more complete defense than that which he could interpose by answer, or to obtain full relief to all parties, and a complete determination of all controversies which arise out of the matters charged in the original bill. The Court of Appeals of the Eighth Circuit held in Springfield Milling Co. v. Barnard & Leas Mfg. Co. [C. C. A.] 81 F. 263, that if a cross bill 'fairly tends to accomplish either of these purposes,' it is generally a sufficient ground for its interposition. Section 399, Story on Equity Pleading, says a cross bill is to be treated as a mere auxiliary suit, or as a dependency upon the original suit. In Cross v. De Valle, 1 Wall. [U. S.] 1, 17 Law. Ed. 515, the Supreme Court of the United States quote this language of Judge Story, and, proceeding, say: 'It may be brought by a defendant against the plaintiff in the same suit, or against other defendants, or against both, but it must be touching the matters in question in the bill.'"—From Ames Realty Co. v. Big Indian Min. Co., 146 F. 166.

47. As where defendant in suit to set aside a contract wishes to have the contract established and enforced. American Graphophone Co. v. Smith, 26 App. D. C. 563.

48. Doremus v. Paterson [N. J. Eq.] 62 A. 3.

49. Ashe-Carson Co. v. Bonifay [Ala.] 41 So. 816.

50. Doremus v. Paterson [N. J. Eq.] 62 A. 3. A cross complaint must relate to the matters covered by the bill. Ames Realty Co. v. Big Indian Min. Co., 146 F. 166; Ashe-Carson Co. v. Bonifay [Ala.] 41 So. 816. In suit by stockholders to enjoin actions at law by a receiver of the corporation to recover upon the stockholders' secondary liability for the debts of the corporation, the receiver could not file a cross bill to recover upon the claims already sued on at law. Francis v. Hazlett [Mass.] 78 N. E. 405.

51. Ashe-Carson Co. v. Bonifay [Ala.] 41 So. 816. Damages by way of recoupment may be claimed in a cross bill when they are of the same class as those claimed by the bill and relate exclusively to the subject-matter of the bill and connected therewith. Id. In a suit to enjoin the obstruction of a road a cross complaint may attack the validity of the proceedings by which the road was established. Williams v. Routt County Com'rs [Colo.] 84 P. 1109.

52. In a suit to restrain the pollution of a stream it was not proper to bring in, by cross bill, such matters as the diversion of the stream and the building of dams by the other parties, thus increasing the pollution. Doremus v. Paterson [N. J. Eq.] 62 A. 3.

53. In suit to settle water rights. Ames Realty Co. v. Big Indian Min. Co., 146 F. 166.

54. Ashe-Carson Co. v. Bonifay [Ala.] 41 So. 816; Francis v. Hazlett [Mass.] 78 N. E. 405.

55. Ashe-Carson Co. v. Bonifay [Ala.] 41 So. 816.

56. Hartford v. Bridgeport Trust Co., 143 F. 558.

57. After dismissal of the original bill and after the term at which final decree was entered, the court had no jurisdiction to allow the filing of a cross bill. Howison v. Ruprecht, 121 Ill. App. 5.

58. A defendant in a suit to establish a trust who had an interest in the property might file a cross bill for partition and accounting after decree establishing the trust. Stahl v. Stahl, 220 Ill. 188, 77 N. E. 67.

59. Where indorsers of a purchase-money note who were sued jointly with the maker paid the decree for foreclosure of a vendor's lien reserved on the property sold, a cross

of the subpoena to answer a cross bill may be made upon the solicitors of the defendant therein.[60]

(§ 6) *E. Demurrer. Grounds.*[61]—Demurrer lies for defects and objections appearing upon the face of the pleading,[62] such as failure to state cause of action,[63] lack of jurisdiction,[64] lack of equity,[65] insufficiency of allegations,[66] lack of verification,[67] defects of parties,[68] laches and limitations,[69] existence of adequate remedy at law,[70] multifariousness,[71] inconsistency in prayer,[72] status of complainant.[73] The right of a stockholder to sue for the corporation cannot be raised by demurrer.[74] Demurrer will not lie for impertinency,[75] nor on the ground that another suit is

complaint by them against the maker was not an amendment which could be filed only with leave, but was a cross petition which might be filed in vacation. Matney v. Williams [Ky.] 89 S. W. 678.

60. Where the cross bill is defensive, either in whole or in part. American Graphophone Co. v. Smith, 26 App. D. C. 563. A motion to allow service to be made "upon solicitors for said defendant in this case" was sufficient where the court expressly directed the service on the solicitors by name and the record showed that they were the defendant's solicitors in the principal case and also in a law suit in which their client was sole defendant, though there had been no appearance to the cross bill. Id.

61. See 5 C. L. 1167.

62. Matter dehors a bill must be raised by plea or answer. Lindsley v. McIver [Fla.] 40 So. 619. Laches and limitations. Marsh v. Marsh, 78 Vt. 399, 63 A. 159; Turners Falls Fire Dist. v. Millers Falls Water Supply Dist., 189 Mass. 263, 75 N. E. 630; Hawley v. Von Lanken [Neb.] 106 N. W. 456; Thurmond v. Chesapeake & O. R. Co. [C. C. A.] 140 F. 697; Cook v. Ceas, 147 Cal. 614, 82 P. 370. Defect of parties. Rose v. Merchants' Trust Co., 96 N. Y. S. 946.

63. Burke & Williams v. Mackenzie, 124 Ga. 248, 52 S. E. 653.

64. But demurrer is not the exclusive method of raising the question of jurisdiction. Owens v. Goldie, 213 Pa. 579, 62 A. 1117. See ante § 2 A, In General, and § 2 B, Existence of Adequate Remedy at Law. But since Comp. Laws § 435, fixing the jurisdictional amount, does not require it to be alleged, lack of the jurisdictional amount in controversy cannot be reached by demurrer unless the defect appears on the face of the bill. Brassington v. Waldron [Mich.] 12 Det. Leg. N. 1011, 107 N. W. 100.

65. A bill which seeks to enforce a statutory obligation in the nature of a guaranty of a debt, by compelling the payment of sums largely in excess of the amount necessary to satisfy that debt, is demurrable for want of equity. Miller v. Willett [N. J. Eq.] 62 A. 178. A bill or complaint which states that the complainants jointly have rights of action against several defendants, no one of whom is liable in whole or in part for the others' debt, which asks neither accounting nor discovery but demands simply the payment by each defendant separately of a definitely ascertained sum of money, which shows no joint or related liability between the defendants, and which alleges neither the breach of a trust, the perpetration of a fraud, nor any other ground for equitable relief, is demurrable for want of equity. Id.

66. Bill by receiver of bank to recover from directors money of the bank lost through their misconduct, held demurrable for failure to allege the facts constituting the misconduct. Allen v. Luke, 141 F. 694.

67. Where jurisdiction depended on loss, detention, or destruction of the instrument sued on, and there was no verification of the allegations of loss, etc. Hoagland v. Supreme Council, Royal Arcanum [N. J. Eq.] 61 A. 982.

68. Such defects are waived unless raised by demurrer. Rose v. Merchants' Trust Co., 96 N. Y. S. 946. Where the defect appears on the face of the complaint. Code Civ. Proc. § 488. Id.

69. City of Memphis v. Postal Tel. Cable Co. [C. C. A.] 145 F. 602. Laches. Thurmond v. Chesapeake & O. R. Co. [C. C. A.] 140 F. 697; Marsh v. Marsh, 78 Vt. 399, 63 A. 159; Turners Falls Fire Dist. v. Millers Falls Water Supply Dist., 189 Mass. 263, 75 N. E. 630; Hawley v. Von Lanken [Neb.] 106 N. W. 456. Laches must be alleged and proved unless it appears upon the face of the complaint, in which case it may be taken advantage of by demurrer. Cook v. Ceas, 147 Cal. 614, 82 P. 370. Bill to compel transfer of stock claimed to have been delivered to defendant pursuant to an agreement in violation of 2 Gen. St. p. 1606, relating to gaming, barred by limitations. Myers v. Fridenberg [N. J. Eq.] 62 A. 532.

Contra: The question of laches must be raised by answer in order that the other party may have an opportunity to explain. Ballard v. Golob [Colo.] 83 P. 376, expressly dissenting from doctrine that question may be raised by demurrer.

70. Lloyd v. Simons [Minn.] 105 N. W. 902; Hoagland v. Supreme Council [N. J. Eq.] 61 A. 982; Owens v. Goldie, 213 Pa. 579, 62 A. 1117.

71. Ellis v. Crawson [Ala.] 41 So. 942; Boonville Nat. Bank v. Blakey [Ind.] 76 N. E. 529. Objection for multifariousness should be raised by demurrer before answer filed. Shellenberger v. Altoona & P. Connecting R. Co., 212 Pa. 413, 61 A. 1000.

72. Prayer to have sale set aside inconsistent with prayer for proceeds. Chisholm v. Wallace [Ala.] 40 So. 219.

73. A trustee under a will had no standing to maintain a suit to cancel the record of the birth of his brother's child on the ground that if the brother died without issue the trustee would receive a larger portion of the estate, it not being certain that the brother would die without issue even though the record were cancelled. Vanderbilt v. Mitchell [N. J. Eq.] 63 A. 1106.

pending where it appears of record that the prior suit did not cover all the subject-matter of the second suit,[76] nor can questions as to the extent and character of the relief to be granted be raised by demurrer.[77] Objections which might have been urged on demurrer to the original bill but were not urged cannot be assigned as grounds of demurrer to an amended or supplemental bill.[78]

Form.[79]—A demurrer must point out the objections constituting the grounds thereof.[80] It should not deny facts alleged in the bill or allege facts not thus alleged.[81] A demurrer may be filed in the name of a partnership.[82]

Effect of, and procedure on, demurrer.[83]—A demurrer admits all allegations well pleaded,[84] but not those which are not well pleaded,[85] and hence conclusions of law are not admitted.[86] Facts alleged on information and belief are admitted.[87] In passing upon a demurrer to the whole bill, every presumption is included against the bill,[88] but the court can only inquire whether the pleading is sufficient under the rules of law and equity to make a case if supported by proof,[89] and the bill should not be dismissed if by any reasonable construction a case is stated entitling the plaintiff to the relief sought.[90] A general demurrer goes to the whole bill[91] and will be overruled if, upon the whole bill, the complainant is entitled to any equitable

74. Groel v. United Elec. Co. [N. J. Eq.] 61 A. 1061. See Corporations, 7 C. L. 862.

75. The objection must be raised by exception. Howe & Davidson Co. v. Haugan, 140 F. 182.

76. Partition. Love v. Robinson, 213 Pa. 480, 62 A. 1065.

77. Such questions are determinable in the final decree. Ellis v. Crawson [Ala.] 41 So. 942. The fact that both legal and equitable relief are demanded when complainant is entitled to but one is not ground for demurrer. Doyle v. Delaney, 98 N. Y. S. 468.

78. Pryor v. Gray [N. J. Eq.] 62 A. 439. See post this section and subdivision, Effect of, and Procedure on, Demurrer.

79. See 5 C. L. 1167.

80. A general claim that the facts alleged in the complaint are insufficient to constitute a cause of action is insufficient. Foote v. Brown, 78 Conn. 369, 62 A. 667. Under Code 1896, § 700, general grounds of demurrer will not be considered. Crow v. Florence Icè & Coal Co., 143 Ala. 541, 39 So. 401.

81. Such a demurrer is called a speaking demurrer and cannot be considered unless the matter thus erroneously inserted can be regarded as surplusage. Graham v. Spence [N. J. Eq.] 63 A. 344; McDevitt v. Connell [N. J. Eq.] 63 A. 504; Star Ball Retainer Co. v. Klahn, 145 F. 834. Where it can be done, such denials and allegations will be disregarded. Id. And the demurrer will not be overruled where there are other grounds properly stated. Graham v. Spence [N. J. Eq.] 63 A. 344. When a demurrer to a bill by a judgment creditor to set aside a conveyance by the debtor alleged facts not stated in the bill as to the foundation of the judgment. McDevitt v. Connell [N. J. Eq.] 63 A. 504.

82. Where parties are sued in chancery in their own right, and as partners doing business in the firm name by which the partnership is known, a demurrer filed in the name of the firm is the demurrer of all such defendants in their partnership capacity. Allen v. South Penn. Coal Co., 58 W. Va. 197, 52 S. E. 454.

83. See 5 C. L. 1167.

84. Lindsley v. Mclver [Fla.] 40 So. 619; Allen v. South Penn. Coal Co., 58 W. Va. 197, 52 S. E. 454; Star Ball Retainer Co. v. Klahn, 145 F. 834; Naganab v. Hitchcock, 25 App. D. C. 200. Demurrer to cross complaint. Williams v. Routt County Com'rs [Colo.] 84 P. 1109.

85. Under P. L. 52, Gen. St. p. 2006, relating to registration of births where the record in a suit to cancel a record of a birth showed that the certificate of birth was made and filed by the physician in attendance, a demurrer did not admit an allegation of the bill that the mother caused the certificate to be filed. Vanderbilt v. Mitchell [N. J. Eq.] 63 A. 1107.

86. Gavazzi v. Dryfoos, 47 Misc. 15, 95 N. Y. S. 199. Allegation that there was a trust relation between complainant and defendant. Francis v. Gisborn [Utah] 83 P. 571; Young v. Mercantile Trust Co., 140 F. 61. Allegation that a paragraph in a will was void. The Columbian University v. Taylor, 25 App. D. C. 124. Legal effect of statutes and documentary exhibits. Naganab v. Hitchcock, 25 App. D. C. 200.

87. Allegation that city bonds "will be immediately issued * * * as your orators are informed and believe." Bates v. Hastings [Mich.] 13 Det. Leg. N. 626, 108 N. W. 1005. An allegation of fact qualified by the phrase "as your orators are informed and believe" is not the same as a mere allegation of belief, such as "your orator is informed and believes that," etc. Id.

88. Lindsley v. Mclver [Fla.] 40 So. 619.

89. A demurrer to a bill against public officers will not be aided by any presumption as to character or conduct of the defendants. Bates v. Hastings [Mich.] 13 Det. Leg. N. 626, 108 N. W. 1005.

90. Averment, in bill for specific performance, that defendant agreed "to give the land," construed as an averment of an agreement to "convey." Shipley v. Fink, 102 Md. 219, 62 A. 360.

91. Garrett v. Simpson, 115 Ill. App. 62. A general demurrer reaches only the equity

relief.[92] As a general rule only facts disclosed by the record can be considered,[93] but admissions of counsel on argument of a demurrer may be considered though the facts admitted do not appear on the face of the pleading.[94] Facts, the absence of which is not specifically made ground of demurrer, may be supplied by inference from the facts alleged.[95] Where the case may be disposed of upon one or more of the grounds urged, other grounds need not be considered.[96] A bill will not be rendered subject to a demurrer by the fact that a recovery may render the allegations untrue.[97] Where the pleading and evidence on a former hearing are made part of an amended bill filed after remand, a demurrer to the amended bill raises the question whether the whole record presents a case for relief.[98]

The demurrer of one defendant may be sustained and that of another overruled,[99] but a joint demurrer by several defendants cannot be sustained except upon grounds good as to all the demurrants.[1] So also, a good cause of action against one defendant will sustain the bill against a demurrer by any other defendant who is necessary as a party to enable the court to grant full relief.[2]

Where the demurrer is incorporated in the answer the parties are not entitled to a separate hearing on the demurrer.[3] A plea is not overruled by the sustaining of a demurrer to the bill.[4] Where a general demurrer is overruled and the defendant elects to stand by it, the bill will be considered as taken for confessed.[5] A decree sustaining a demurrer with leave to amend does not operate ipso facto as a dismissal upon failure to amend.[6] A judgment of repleader does not lie after demurrer,[7] but when legal and equitable causes of action are joined, the court may allow or require the complainant to file a declaration on the law side of the court.[8] Damages not properly recoverable may be disallowed even after demurrer to the bill has been overruled.[9]

of the bill. Cranes v. Stafford, 217 Ill. 21, 75 N. E. 424.

92. Garrett v. Simpson, 115 Ill. App. 62; Gray v. Bloomington & N. R. Co., 120 Ill. App. 159; Allen v. South Penn. Coal Co., 58 W. Va. 197, 52 S. E. 454; Lindsley v. McIver [Fla.] 40 So. 619; Bresler v. Bloom [Ala.] 41 So. 1010; Phillips v. Jacobs [Mich.] 13 Det. Leg. N. 542, 108 N. W. 899.

93. On hearing of demurrer to bill for partition, facts disclosed by the plea should not have been considered. Love v. Robinson, 213 Pa. 480, 62 A. 1065.

94. Where bill alleged contract without stating whether or not it was in writing and counsel admitted on argument that it was oral, demurrer based on statute of frauds was sustained. Wilhite v. Skelton [Ind. T.] 82 S. W. 932.

95. In a bill to foreclose a chattel mortgage, even if it is essential to allege that the personal property was within the jurisdiction of the court at the commencement of the suit, if there are allegations from which such fact may be inferred, the bill is good as against a demurrer not directed to this point. Tyler v. Toph [Fla.] 40 So. 624.

96. Miller v. Willett [N. J. Eq.] 62 A. 178.

97. Bill by receiver of bank to recover money lost through misconduct of directors not subject to demurrer because a recovery might render the allegation of the bank's insolvency untrue. Allen v. Luke, 141 F. 694.

98. Cheever v. Ellis [Mich.] 13 Det. Leg. N. 341, 108 N. W. 390.

99. Each of two defendants filed a general demurrer, and the petition set out a cause of action against one but not against the other. Oliver v. House, 125 Ga. 637, 54 S. E. 732.

1. Phillips v. Jacobs [Mich.] 13 Det. Leg. N. 542, 108 N. W. 899.

2. Demurrer by parties claiming interest adverse to the plaintiff in suit in aid of execution. Gavazzi v. Dryfoos, 47 Misc. 15, 95 N. Y. S. 199. The extent of the demurrant's interest need not appear, it being sufficient if it appear that he asserts an adverse interest and that he is necessary as a party in order that full relief may be granted. Id.

3. When defendants in a chancery suit have answered and in their answer have inserted the usual demurrer clause and replications have been filed, the case must go to a hearing upon the issues joined and a final decree rendered. Gray v. Eldred [Mich.] 13 Det. Leg. N. 88, 107 N. W. 719.

4. Love v. Robinson, 213 Pa. 480, 62 A. 1065.

5. Garrett v. Simpson, 115 Ill. App. 62.

6. In such case a subsequent order of dismissal is necessary. Bledsoe v. Jones [Ala.] 40 So. 111. When, therefore, pending a motion to dismiss for failure to amend, counsel for the parties in whose behalf the motion was made was appointed commissioner to take a deposition, such parties were parties to the cause and were represented by the commissioner, who was, therefore, disqualified to act as such. Id.

7. Except, perhaps, where the answer and replication are bad. Chapman v. Yellow Poplar Lumber Co. [C. C. A.] 143 F. 201.

8. Chapman v. Yellow Poplar Lumber Co. [C. C. A.] 143 F. 201.

9. Damages claimed in cross bill disal-

Pleading or answering over after demurrer overruled is a waiver of the demurrer,[10] except as to the failure of the complaint to state a cause of action[11] and as to jurisdictional defects.[12]

The trial judge has discretionery power to allow an amendment to a demurrer.[13]

(§ 6) *F. Plea.*[14]—The object of a plea is to reduce the cause to a single point.[15] A mere denial of a substantive fact alleged in the bill is not a proper plea.[16] Some of the matters which may be made the subjects of pleas are, another suit pending,[17] nonjoinder of parties,[18] lack of jurisdiction of defendant's person.[19]

Several separate pleas may be filed[20] or they may all be incorporated in the answer,[21] but a single plea should not state two or more facts or separate sets of facts, each of which constitutes an answer to the bill.[22] In the absence of rule or statute requiring it, a plea need not be verified.[23]

The legal sufficiency of a plea is determined by setting the plea down for argument,[24] and when a plea is thus set down the truth of its allegations is admitted,[25]

lowed after demurrer to cross bill had been overruled. Turner v. Lawson [Ala.] 39 So. 755.

10. Creamer v. James, 116 Ill. App. 465; Hudson v. Cahoon, 193 Mo. 547, 91 S. W. 72. A plea or answer to the whole or a part of a bill, the whole of which is demurred to, overrules the demurrer. McDevitt v. Connell [N. J. Eq.] 63 A. 504.

11. Hudson v. Cahoon, 193 Mo. 547, 91 S. W. 72.

12. Creamer v. James, 116 Ill. App. 465; Hudson v. Cahoon, 193 Mo. 547, 91 S. W. 72. The benefit of a demurrer for want of jurisdiction may be saved by claiming it in the answer. McDevitt v. Connell [N. J. Eq.] 63 A. 504.

13. Phillips v. Jacobs [Mich.] 13 Det. Leg. N. 542, 108 N. W. 899.

14. See 5 C. L. 1168.

15. A pleading which traverses the facts constituting the plaintiff's cause of action and sets up other facts which would defeat a recovery sets up a defense which should be made by answer and not by plea. Groel v. United Elec. Co. [N. J. Eq.] 61 A. 1061. The right of a stockholder to sue in behalf of the corporation cannot be raised by plea but should be raised, it seems, by analogy to the English practice, by petition. Id.

Note on kinds of pleas: "Pleas in equity are of three classes: (1) To the jurisdiction of the court; (2) in abatement of the suit; and (3) in bar of the bill; and all pleas must fall within one of these classes. 1 Bates, Fed. Eq. § 221. Pleas in bar, considered with reference to their form, are of three kinds, viz.: (1) affirmative, (2) negative, and (3) anomalous. 1 Bates, Fed. Eq. § 228. It was formerly a question of some difficulty to determine whether or not a purely negative plea in equity was legitimate, though it now seems to be so considered in some instances, as where the title of the complainant or his right to maintain the suit is denied. Story's Eq. Pl. § 668; 1 Bates, Fed. Eq. § 228 (2). But a mere denial of a substantive fact alleged in the bill as grounds for relief is not proper as a plea. In Sharp v. Reissner, 9 F. 445, Mr. Justice Blatchford, then circuit judge, held that in a suit for infringement of patent a plea which sets up the single defense of noninfringement is not a good plea, that such defense should be brought forward by answer—citing Milligan v. Milledge, 3 Cranch [U. S.] 220, 2 Law. Ed. 417; Bailey v. Le Roy, 2 Edw. Ch. [N. Y.] 514; See, also, Story's Eq. Pl. § 652, n. 2; 2 Daniell, Ch. [5th Ed.] 603, n. 4; 1 Bates, Fed. Eq. § 222."—From Glucose Sugar Refining Co. v. Douglass & Co., 145 F. 949.

16. Plea denying infringement of patent, in suit for infringement. Such defense should be set up by answer. Glucose Sugar Refining Co. v. Douglass & Co., 145 F. 949.

17. A plea in equity setting up a former decree in bar must show that the former suit was substantially between the same parties for the same subject-matter. It must set forth so much of the former bill and answer as will suffice to show that the same point was then in issue, and it should aver that the allegations as to the title to relief against the defendants were substantially the same in the second bill as in the first. It is neither necessary nor proper practice to attach as an exhibit to such a plea all the testimony taken in the former suit. Lindsley v. McIver [Fla.] 40 So. 619.

18. Mackey v. Mackey [N. J. Eq.] 63 A. 984.

19. Want of jurisdiction on account of want of service of process. Lanning v. Twining [N. J. Eq.] 64 A. 466.

20. Town of New Decatur v. Scharfenberg [Ala.] 41 So. 1025.

21. Town of New Decatur v. Scharfenberg [Ala.] 41 So. 1025. Under Code 1896, § 699. Sellers v. Farmer [Ala.] 41 So. 291. When thus incorporated in the answer they may still be treated as separate pleas. Town of New Decatur v. Scharfenberg [Ala.] 41 So. 1025.

22. Such a joinder of separate defenses constitutes duplicity. Town of New Decatur v. Scharfenberg [Ala.] 41 So. 1025.

23. Town of New Decatur v. Scharfenberg [Ala.] 41 So. 1025.

24. Glucose Sugar Refining Co. v. Douglass & Co., 145 F. 949.

25. Gouwens v. Gouwens [Ill.] 78 N. E. 597; Mackey v. Mackey [N. J. Eq.] 63 A. 984; Town of New Decatur v. Scharfenberg [Ala.] 41 So. 1025. The court takes the allegations of the plea and the uncontradicted parts of the bill as verities. Groel v. United Elec. Co. [N. J. Eq.] 61 A. 1061.

otherwise the defendant must affirmatively prove the facts upon which his plea is based.[26] Where the defendant fails to prove his plea it will be overruled and the complainant will be entitled to a decree according to the case stated in his bill,[27] or the defendant will be assigned to answer.[28] If a plea upon which issue is taken is proved, the effect is merely to defeat the relief sought by complainant.[29] The defendant cannot be granted relief on a plea.[30] Where a plea alleges matters not proper to be thus set up, it may be stricken on motion or set down as an answer to the bill.[31] A plea to the whole or part of a bill, the whole of which is demurred to, overrules the demurrer.[32]

(§ 6) *G. Answer.*[33]—An answer must be responsive to the bill.[34] Denials in an answer must be direct and positive and not literal and evasive.[35] A general denial is not sufficient.[36] The answer may be as of the defendant's own knowledge and belief,[37] or upon information and belief.[38] An answer should not set up inconsistent defenses.[39] Some of the defenses which may be set up in an answer are laches,[40] adequate remedy at law,[41] and defects of parties.[42] Where defendant desires affirmative relief upon the matters set out in his answer, he should pray for such relief,[43] but notwithstanding the failure to make such prayer the court may grant

26. American Graphophone Co. v. Leeds & Catlin Co., 140 F. 981. To support a plea in equity, as at law, all its averments must be established as made. Plea to bill to remove cloud on title. A. Shiff & Son v. Andress [Ala.] 40 So. 824.

27. Fennimore v. Wagner [N. J. Eq.] 64 A. 698. Where the plea is found to be false, a decree pro confesso may be entered. Knott v. Giles, 27 App. D. C. 581. See post § 7, Taking Bill as Confessed or on Default.

28. Unless the court is satisfied that the plea was interposed vexatiously or for delay, in which case a decree pro confesso may be entered. See equity rule 34. American Graphophone Co. v. Leeds & Catlin Co., 140 F. 981.

29, 30. A. Shiff & Son v. Andress [Ala.] 40 So. 824.

31. Glucose Sugar Refining Co. v. Douglass & Co., 145 F. 949.

32. McDevitt v. Connell [N. J. Eq.] 63 A. 504. But in some cases, as where the demurrer is for want of jurisdiction, the benefit of the demurrer, if claimed by the answer, may be given at the final hearing on the bill and answer. Id.

33. See 5 C. L. 1169.

34. Answer to bill against officer of corporation for secretly receiving and appropriating the property of the corporation held responsive. Rushbrook Coal Co. v. Jenkins, 214 Pa. 517, 63 A. 891. Answer is responsive when it is confined to such facts as are necessarily required by the bill and those inseparably connected with them as a part of one and the same transaction. Southern Lumber & Supply Co. v. Verdier [Fla.] 40 So. 676. An answer may be responsive as well when it discharges as when it charges the defendant. Id. The answer must meet the allegations of the bill with a full and frank disclosure of all the facts and circumstances within the defendant's knowledge connected with the transactions in question. Answer in suit to set aside deed as fraudulent and procured by undue influence held insufficient. Horner v. Bell, 102 Md. 435, 62 A. 736. When the answer is not responsive it will not be considered unless sustained by the proof upon the final hearing. See Code Pub. Gen. Laws 1904, art. 16, § 160. Id.

35. Denials of allegations in bill to remove cloud on title as to complainant's residence upon the property, held insufficient as being literal and evasive. A. Shiff & Son v. Andress [Ala.] 40 So. 824. A simple denial of an allegation that plaintiff has no adequate remedy at law is sufficient to raise an issue on such point. An affirmative allegation that complainant has such a remedy is unnecessary. Clements v. Sherwood-Dunn, 108 App. Div. 327, 95 N. Y. S. 766.

36. When the defendant submits to answer he must answer each material allegation of fact charged in the bill. Thompson v. North, 67 N. J. Eq. 278, 63 A. 164.

37. Thompson v. North, 67 N. J. Eq. 278, 63 A. 164.

38. Defendant must state not only his information but also his belief (Thompson v. North, 67 N. J. Eq. 278, 63 A. 164), but the defendant is not bound to inform himself as to transactions not his own (Id.). If defendant has no information and belief, he must say so. Id.

39. An answer in a suit to cancel a mortgage by deed absolute, which denied the complainant's right to recover, but which prayed for a recovery for defendant's improvements in case the cause was decided in complainant's favor, did not set up inconsistent defenses. Bluett v. Wilce [Wash.] 86 P. 853.

40. Ballard v. Golob [Colo.] 83 P. 376, holding that laches must be set up by answer. But see ante § 3, Laches and Acquiescence, and § 6 E, Demurrer.

41. Rose v. Merchants' Trust Co., 96 N. Y. S. 946; Irving v. Bruen, 97 N. Y. S. 180; Colby v. Mt. Morris, 100 N. Y. S. 362. See ante § 2 B, Existence of Adequate Remedy at Law, and ante § 6 E, Demurrer.

42. Where defect does not appear on the face of the complaint. Rose v. Merchants' Trust Co., 96 N. Y. S. 946.

such relief to the defendant as the allegations of the answer and the findings justify.[44] Lien defendants in a foreclosure suit may have their rights determined upon their answers.[45] The right of a stockholder to sue for the corporation should not be raised by answer.[46] The sufficiency of an answer may be tested by exceptions.[47] In a proper case an amended answer may be filed.[48]

Verification.[49]—It has been held that a statute requiring verification of pleadings in certain "actions" did not require an answer in chancery to be verified.[50] The complainant may waive answer under oath.[51]

Effect of answer.[52]—Where a cause is submitted upon bill and answer, the defendant is entitled to the benefit of all denials in the answer of matters set forth in the bill and all matters properly pleaded in the answer.[53] All allegations of the bill properly pleaded and not denied by the answer are admitted;[54] but where the answer contains the usual general denial found in answers in chancery and contains no admission of certain material allegations in the bill, such allegations cannot be assumed to be true, the burden being upon the complainant to prove such allegations as well as the matters denied in the answer.[55] Matters not well pleaded, such as vague and uncertain allegations,[56] and legal conclusions,[57] are not admitted by failure to answer them, nor are matters thus admitted which arise after the filing of the bill.[58] Answer waives demurrer overruled except where the subject-matter of the bill is wholly foreign to equity jurisdiction,[59] or where no cause of action is stated.[60]

43. Gwyn-Harper Mfg. Co. v. Cloer, 140 N. C. 128, 52 S. E. 305.

In Alabama no affirmative relief can be obtained under an answer, a cross bill being necessary for this purpose. Ashe-Carson Co. v. Bonifay [Ala.] 41 So. 816.

44. Where defendant in suit to recover land set up a deed and alleged a mistake therein, the deed might be reformed though such relief was not asked. Gwyn-Harper Mfg. Co. v. Cloer, 140 N. C. 128, 52 S. E. 305.

45. Gouwens v. Gouwens [Ill.] 78 N. E. 597.

46. It seems that this question should be raised by petition by analogy to the English practice. Groel v. United Elec. Co. [N. J. Eq.] 61 A. 1061. See Corporations, 7 C. L. 862.

47. Way v. Hygienic Fleeced Underwear Co. [C. C. A.] 144 F. 870.

48. Before the court should allow an amended answer to be filed it ought to be satisfied that the reasons for it are cogent and satisfactory, that the mistakes to be corrected or facts to be added are made highly probable, if not certain, that they are material, that the party has not been guilty of negligence and that the mistakes have been ascertained and the new facts have come to the knowledge of the party since the original answer was filed. Refusal to allow amended answer to be filed after report of commissioner held not error where new facts set up therein were known before filing of original answer. Miller v. Mitchell, 58 W. Va. 431, 52 S. E. 478.

49. See 5 C. L. 1170.

50. Section 33 of the Practice Act, which provides that no person shall be permitted to deny on trial the execution of any instrument in writing, upon any "action" which may have been brought, unless the person denying the same shall verify his plea by affidavit, applies only to actions at law and not to suits in chancery. Clokey v. Loan & Homestead Ass'n, 120 Ill. App. 214.

51. Where the bill calls for answer without oath, a verified answer is, at most, merely an ex parte affidavit which, if read without objection, might be treated as evidence, and this, notwithstanding that the bill propounds special interrogatories. Marvel v. Fralinger, 67 N. J. Eq. 622, 63 A. 166. Laws 1867, p. 166; Laws 1902, p. 517. Daab v. New York Cent. & H. R. Co. [N. J. Eq.] 62 A. 449.

52. See 5 C. L. 1170.

53. Atlantic Trust Co. v. Chapman [C. C. A.] 145 F. 820.

54. Grant v. Cumberland Valley Cement Co., 58 W. Va. 162, 52 S. E. 36; Klenk v. Byrne, 143 F. 1008. Chancery rule 10. Greilick Co. v. Rogers [Mich.] 13 Det. Leg. N. 161, 107 N. W. 885. Allegation in bill to enforce mechanic's lien that defendant could not be found. Id.; Hoock v. Sloman [Mich.] 13 Det. Leg. N. 390, 108 N. W. 447. Amount due on mortgage foreclosure. Id.

55. Godwin v. Phifer [Fla.] 41 So. 597.

56. An allegation in a bill, which by reason of its vagueness and uncertainty fails to show materiality of its subject-matter, need not be answered. Burkheimer v. National Mut. Bldg. & L. Ass'n [W. Va.] 53 S. E. 372.

57. Where a bill alleges the legal construction of a will instead of its paragraphs in haec verba, failure to answer such allegations does not constitute an admission thereof. Thompson v. North, 67 N. J. Eq. 278, 63 A. 164.

58. Amount of taxes paid after filing of bill to foreclose mortgage. Hoock v. Sloman [Mich.] 13 Det. Leg. N. 390, 108 N. W. 447.

59. Hudson v. Cahoon, 193 Mo. 547, 91 S. W. 72; Creamer v. James, 116 Ill. App. 465.

As evidence.[61]—Where the answer is not verified it is not evidence against the plaintiff,[62] nor is a verified answer evidence where complainant waives answer under oath.[63] A verified answer is not conclusive, though demanded by the bill, and an answer under oath though responsive to a bill which does not waive the oath is not always even prima facie conclusive as to disclosures not called for by the bill.[64] The general rule, however, is that if the averments of a verified answer are of the defendant's personal knowledge and directly responsive to the bill, they are conclusive unless overcome by the testimony of two witnesses or the equivalent thereof;[65] but so far as the answer is evidence, it is nevertheless to be weighed the same as it would be if it appeared in a deposition outside of the defendant's pleading.[66] Details of the principal subject-matter not called for by the bill are not evidence,[67] nor are denials on information and belief,[68] nor allegations in confession and avoidance.[69] When a cause is set down for a hearing upon the bill and answer, all the averments of the answer are to be taken as true.[70] Averments which are not responsive to the bill must be proved by the defendant by a preponderance of the testimony,[71] but in some cases, where the averments are positive and certain, they may impose the burden of proof upon the complainant, though they are not of personal knowledge or directly responsive.[72] An answer and cross bill cannot be admitted as evidence in favor of the cross complainant.[73] The rule that a sworn answer is evidence in behalf of the party answering does not apply to answers given

Answer to whole or part of bill demurred to overrules the demurrer. McDevitt v. Connell [N. J. Eq.] 63 A. 504.

60. Hudson v. Cahoon, 193 Mo. 547, 91 S. W. 72.

61. See 5 C. L. 1170.

62. Originally, answers in chancery had the dual capacity of a mere pleading and as a means of obtaining evidence; but statutes (Laws 1867, p. 166; Laws 1902, p. 517) permitting plaintiff to call for an answer without oath give him an option to obtain an answer which has no evidentiary value against him. Daab v. New York Cent. & H. R. Co. [N. J. Eq.] 62 A. 449. Notwithstanding the special provisions for interrogatories to be answered under oath, under Chancery Act 1902, § 191 (Laws 1902, p. 517), the practice is to permit the complainant to submit interrogatories in his bill to be answered without oath, and thus to secure admissions which may be useful to him without the risk of making the answers evidence against himself, but it seems that the only penalty for a false answer in such case is the possible discrediting of the defendant or imposition of costs. Id.

63. Marvel v. Fralingen, 67 N. J. Eq. 622, 63 A. 166. See ante this section and subdivision, Verification. Chancery rule 10 does not make such answers conclusive, but their weight is for the court to determine. Barron v. Meyers, 140 Mich. 431, 12 Det. Leg. N. 223, 103 N. W. 842.

64. Bill to set aside post-nuptial settlement called for discovery as to transfer of land and personalty but not as to transfer of insurance policy. Vashon v. Barrett [Va.] 54 S. E. 705.

Note: "In 1884 the statute was passed modifying the effect of answers as evidence in chancery suits by allowing the complainant to waive an answer under oath. Prior to that time, all answers were under oath; but then, as now, in cases of this nature, every post-nuptial settlement, where the husband was indebted at the time it was made, was, as against his creditors, fraudulent and void, and such settlement was taken as voluntary unless those claiming under it could show by clear and satisfactory evidence, apart from the answer, that it was made for a valuable consideration. Blow v. Maynard, 2 Leigh [Va.] 30; Fink Bro. & Co. v. Denny, 75 Va. 663; Rankin v. Goodwin, 103 Va. 81, 48 S. E. 521; Kline v. Kline's Creditors, 103 Va. 263, 48 S. E. 882."—From Vashon v. Barrett [Va.] 54 S. E. 705.

65. Phelps v. Root, 78 Vt. 493, 63 A. 941; Mayo v. Hughes [Fla.] 40 So. 499.

Circumstantial evidence may take the place of one or both witnesses. Phelps v. Root, 78 Vt. 493, 63 A. 941.

66. Phelps v. Root, 78 Vt. 493, 63 A. 941.

67. Barlow v. McDowell, 118 Ill. App. 506.

68, 69. Phelps v. Root, 78 Vt. 493, 63 A. 941.

70. Godwin v. Phifer [Fla.] 41 So. 597. When a cause is set down for hearing upon bill, answer, and replication by agreement of the parties before the expiration of the three months allowed by the statute for the taking of testimony, the allegations of the answer responsive to the bill will be taken as true, but such allegations are to be considered according to their legal import. Southern Lumber & Supply Co. v. Verdier [Fla.] 40 So. 676. The rule as to making an answer evidence in favor of the defendants when a case is heard on bill, answer and replication, requires that it should not only be responsive but direct, positive, and unequivocal. Id.

71. Tyler v. Toph [Fla.] 40 So. 624.

72. Averment of failure of consideration. Mayo v. Hughes [Fla.] 40 So. 499. The burden in such case may be sustained by the testimony of one witness. Id.

73. Bledsoe v. Jones [Ala.] 40 So. 111.

in response to a bill for discovery pure and simple;[74] and statutory provisions for requiring answers under oath from the opposite party being a substitute for the equitable action for discovery,[75] it would seem that such answers are available only to the party propounding the interrogatories.[76]

Admissions.[77]—Admissions in an answer may be based on information and belief.[78] When the answer is used in support of the bill, the whole answer must be taken together.[79] Admissions improvidently made must be expunged from the record in proper time or otherwise they will be binding.[80] The question of admission of the truth of allegations of the bill by failure to deny them is treated of elsewhere.[81]

(§ 6) *H. Replication, exceptions, and motions.*[82]—A replication cannot be filed with a master to whom the case has been referred.[83]

The sufficiency of the answer may be tested by exceptions.[84] Objections on account of impertinency should be raised by exception,[85] but such exceptions will not be sustained where the particular facts averred shed any light upon the acts and conduct of the defendant.[86] In ruling upon exceptions the court will deal with the substance and not the mere form of language used in the pleading.[87]

A motion to strike is proper where the pleading sets up matters not properly the subject of the particular pleading,[88] or where the pleading is entirely insufficient to accomplish the purpose for which it is filed,[89] or where it is desired to have irrelevant and immaterial matters stricken from a pleading.[90] On a motion to strike a portion of a complaint the court should be liberal in indulging any statement of facts which may be material to the relief sought.[91] The only party affected by the granting of a motion to strike is the party making the motion.[92] If a complaint is not sufficiently specific the defect may be reached by motion to make more specific.[93]

74, 75. Beem v. Farrell [Iowa] 108 N. W. 1044.

76. Answers to interrogatories propounded under Code § 3604. Beem v. Farrell [Iowa] 108 N. W. 1044. No doubt in behalf of the parties calling for the answers, they are admissible whether the party making them is present and might be called as a witness or not (Id.), but in view of the restrictions imposed by Code § 4709 as to the introduction of a deposition when the witness is present, such answers cannot be introduced as evidence by the party making them where he is in court and may be called as a witness (Id.).

77. See 5 C. L. 1170.

78. An unqualified admission on information and belief will generally dispense with proof of the fact alleged. Thompson v. North, 67 N. J. Eq. 278, 63 A. 164.

79. Explanations given must be used in connection with the admissions made. Reager's Adm'r v. Chappelear, 104 Va. 14, 51 S. E. 170.

80. Where defendant elects to stand by his answer until entry of final decree, he will be concluded by the admissions of the answer. Chicago, etc., R. Co. v. People, 120 Ill. App. 306.

81. See ante this section and subdivision, Effect.

82. See 5 C. L. 1170.

83. Where a replication is so filed it is the duty of the master to refuse to go to trial, but error in allowing a hearing in such case will be cured by leave subsequently obtained from the chancellor to file a replication nunc pro tunc. Cushman v. Davis [Vt.] 64 A. 456.

84. Certain exceptions to an answer considered. Way v. Hygienic Fleeced Underwear Co. [C. C. A.] 144 F. 870.

85. And not by demurrer. Howe & Davidson Co. v. Haugan, 140 F. 182.

86, 87. United States v. Hyde, 145 F. 393.

88. Mere denial in plea. Glucose Sugar Refining Co. v. Douglass & Co., 145 F. 949.

89. Bill to set aside former decrees under which complainant's lands were sold for taxes held properly stricken from the files, the bill not being one for leave to file a bill of review nor a petition to open a decree for correction of errors, and complainant not having complied with Laws 1897, p. 286, § 70, relating to setting aside sales for taxes. Carpenter v. Auditor General [Mich.] 13 Det. Leg. N. 160, 107 N. W. 878.

90. Alexander v. Du Bose, 73 S. C. 21, 52 S. E. 786.

91. This is especially true when fraud is alleged, it being essential that the facts and circumstances constituting the fraud should be set out. Alexander v. Du Bose, 73 S. C. 21, 52 S. E. 786. In such case it is not error to refuse to strike matters either directly or remotely relevant to the matters sought to be established. Id.

92. Carpenter v. Auditor General [Mich.] 13 Det. Leg. N. 160, 107 N. W. 878.

93. But a motion to make more specific cannot be substituted for a demand for a bill of particulars. Goupille v. Chaput [Wash.] 86 P. 1058.

Motions to dismiss[94] and exceptions to reports of masters and auditors[95] are treated elsewhere.

(§ 6) *I. Issues, proof, and variance.*[96]—In the absence of an amendment to conform the pleadings to the proof,[97] a total variance between the pleadings and the proofs is fatal to a recovery,[98] but a partial variance is not necessarily fatal.[99] The defendant cannot avail himself of any matter not covered by his answer, though established by the evidence,[1] but a variance between the answer and the evidence adduced in support thereof does not necessarily destroy the responsive character of the answer or its force as evidence.[2] When there is no objection on account of a variance the court will decree according to the evidence.[3]

(§ 6) *J. Objections and waiver thereof.*[4]—Questions as to the legal sufficiency of a pleading are waived by failure to raise them in proper time and manner.[5] Some of the objections which have been held to have been waived thus are objections on account of parties,[6] lack of verification,[7] multifariousness,[8] variance.[9] Answering a supplemental bill without objecting that it is not germane to the original bill waives the point.[10]

§ 7. *Taking bill as confessed or on default.*[11]—Formerly a decree pro confesso in default of appearance and answer could not be entered,[12] but the general

94. See post § 9, Dismissal.
95. See post § 10, Trial By Jury or Master; Their Verdicts and Findings.
96. See 5 C. L. 1171.
97. See ante § 6 C, Amended and Supplemental Bills, Complaints or Petitions.
98. Higgins v. Higgins, 219 Ill. 146, 76 N. E. 86; Reager's Adm'r v. Chappelear, 104 Va. 14, 51 S. E. 170.
99. Complainant in suit for specific performance of contract for sale of land allowed to recover an estate in the land less than that claimed in the complaint (Brandon v. West [Nev.] 83 P. 327), but he could not have recovered if the evidence had indicated property different from that described in the complaint (Id.).
1. Millard v. Millard [Ill.] 77 N. E. 595.
2. Especially where the matters testified to occurred twelve years prior to the trial. Rushbrook Coal Co. v. Jenkins, 214 Pa. 517, 63 A. 891.
3. Gerting v. Wells [Md.] 64 A. 298.
4. See 5 C. L. 1171.
5. Where pleas were incorporated in answer and their sufficiency was not tested by complainant, he was presumed to have taken issue thereon. Sellers v. Farmer [Ala.] 41 So. 291. Where pleas to a cross bill were not objected to as insufficient and the cause was submitted on them along with other matters, it was held that it would be presumed that issue had been taken on such pleas and that plaintiff, having proved them, was entitled to a decree as against the cross bill. Moody v. Atkins [Ala.] 40 So. 305.
6. Objection must be raised by demurrer or answer. Rose v. Merchants' Trust Co., 96 N. Y. S. 946. Nonjoinder of proper but not indispensable parties. Landram v. Jordan, 25 App. D. C. 291. See ante § 5, Parties.
7. Failure to verify allegations of loss or detention of instrument sued on. Hoagland v. Supreme Council, Royal Arcanum [N. J. Eq.] 61 A. 982.
8. Bird v. Bird, 218 Ill. 158, 75 N. E. 760; Ellis v. Crawson [Ala.] 41 So. 942; Shellenberger v. Altoona & P. Connecting R. Co., 212 Pa. 413, 61 A. 1000. See ante this section, subd. B, Multifariousness.
9. Gerting v. Wells [Md.] 64 A. 298.
10. Illinois Nat. Bank v. Trustees of Schools, 111 Ill. App. 189.
11. See 5 C. L. 1171.
12. At common law, the defendant's appearance was necessary to give the court jurisdiction. Hence there could be no judgment against him until he had appeared, and his default in this respect subjected him to process designed to enforce his appearance. In the practice on this point, equity followed the law, and upon the defendant's default process of contempt was issued to compel his appearance. Taylor v. McCafferty, 27 Pa. Super. Ct. 122.

Note on Pennsylvania practice: "In Pennsylvania, at an early day, judgment for want of appearance in proceedings at law was authorized by statute; and a practice arose, unknown elsewhere, of entering an appearance 'de bene esse,' under which the defendant was permitted to question the form and service of the writ, without being liable to the consequences of a default should these be sustained, or of an appearance should they be held defective. * * * In equity, however, during the existence of a court of chancery in this state, from 1720 until 1736, there was no authority to enter a decree pro confesso for want of appearance, and process of contempt was still employed to compel the defendant to appear, and also to answer, in accordance with chancery practice in England. Rawle on Equity in Pennsylvania. Under this practice, if the defendant wished to contest the regularity of the subpoena or service, he was required to move for leave, which was of course, to enter a conditional appearance, and therein to submit himself to such process as the court should direct against him should his contention in the premises fail. In the latter event his appearance became absolute and he was liable to process of contempt to compel an answer: 1 Daniell's Chan. Pr. 453-537.

rule now is that such a decree may be entered for default of appearance[13] or of answer,[14] or where objections raised on special appearance are overruled,[15] or where defendant's plea is found to be false.[16] A bill should not be taken for confessed on a motion to withdraw answers before its allowance,[17] nor can a decree pro confesso be entered in a suit against infants.[18] As to all defendants served, an order pro confesso amounts to an admission of the allegations of the bill,[19] but the conclusions of law are not admitted,[20] and the relief granted is not necessarily according to the prayer but such as is deemed proper by the court upon the facts alleged.[21] As to defendants proceeded against by publication an order pro confesso merely puts the bill at issue.[22] A decree pro confesso must conform to the pleadings.[23] A decree pro confesso should not be set aside except for good cause[24] or without requiring the filing of an answer showing merits,[25] and is conclusive until set aside.[26]

§ 8. *Abatement and revival.*[27]—The rule, irrespective of any statute, is that where a sole plaintiff dies before decree the suit cannot be revived at the instance of a defendant or his legal representative,[28] nor can a suit be revived by an assignee or devisee of the cause of action.[29] Upon the death of a party a proper practice is to make an ex parte application, based upon a proper showing by affidavit, for a rule to show cause why the action should not be continued by or against the party sought to be substituted,[30] but any procedure having substantially the same effect, filling the requirements of notice, proof, and opportunity to contest the facts, will be sufficient.[31] The representative of a deceased party cannot be substituted as a party on appeal where the necessity of the substitution arose pending the trial below.[32]

In England statutory provision has been made for a decree pro confesso without an appearance; and in this state the rules based on the legislation, beginning in 1836, giving courts of law equity powers, authorize a decree pro confesso on default of appearance or of answer, while preserving to the plaintiff, at his election (rules 13 and 29) the right to process of contempt to compel both." Taylor v. McCafferty, 27 Pa. Super. Ct. 122.

13, 14. Taylor v. McCafferty, 27 Pa. Super. Ct. 122.

15. Under Chancery rule 5, a special appearance does not entitle defendant to notice before entry of default against him after the overruling of his objections. Hews v. Hews [Mich.] 13 Det. Leg. N. 482, 108 N. W. 694.

16. Knott v. Giles, 27 App. D. C. 581. See ante § 6 F, Plea.

17. Jenkins v. Barber, 85 Miss. 666, 38 So. 36.

18. Suit to subject land of ancestor to debts. Tabb v. Wortham's Adm'r [Ky.] 89 S. W. 191.

19. Bashaw v. Temple, 115 Tenn. 596, 91 S. W. 202; Knott v. Giles, 27 App. D. C. 581.

20. Knott v. Giles, 27 App. D. C. 581.

21. Knott v. Giles, 27 App. D. C. 581.

A bill for specific performance where confessed does not entitle the complainant to performance as of right. Knott v. Giles, 27 App. D. C. 581. Where, within 20 days after making contract for sale of land, vendor was adjudged a habitual drunkard, placed in charge of a committee, which committee received an offer of $225 more per acre for same land, it was held that plaintiff was not entitled to specific performance. Id.

22. Publication without attachment of property. See Shannon's Code, § 6181. Bashaw v. Temple, 115 Tenn. 596, 91 S. W. 202.

23. Decree pro confesso in partition proceedings was erroneous where it awarded a recovery of rents against defendants not alleged to have been in use and occupation of the premises. Austin v. Barber [Miss.] 41 So. 265.

24. Bashaw v. Temple, 115 Tenn. 596, 91 S. W. 202.

25. Shannon's Code § 6185. Bashaw v. Temple, 115 Tenn. 596, 91 S. W. 202.

26. Where a party who has appeared by attorney makes no effort to vacate a decree pro confesso against him, the court will be justified in treating the decree as conclusive upon him at the time of entry of final decree. Glos v. Shedd, 218 Ill. 209, 75 N. E. 887.

27. See 5 C. L. 1172.

28. Brown v. Fletcher, 140 F. 639. U. S. Rev. St. § 955, U. S. Comp. St. 1901, p. 697, providing for the revival of actions which have abated by the death of a party does not apply to suits in equity. Id. The defendant in a suit in equity cannot, therefore, have the suit revived after the death of the complainant, but may have it dismissed, unless it is revived within a reasonable time by the representatives of the complainant. Id.

29. The assignee or devisee must file an original bill. Brown v. Fletcher, 140 F. 639.

30, 31. Marion v. City Council of Charleston, 72 S. C. 576, 52 S. E. 418.

32. Especially where the appeal is from an order correctly refusing to allow the sub-

§ 9. *Dismissal. Voluntary dismissal.*[33]

Involuntary dismissal.[34]—There being no such thing as a technical nonsuit in equity,[35] a motion to dismiss for insufficiency of evidence will not lie.[36] A motion to dismiss lies for want of equity,[37] multifariousness,[38] existence of adequate remedy at law,[39] pendency of action at law,[40] lack of jurisdictional amount in controversy,[41] failure of representative of deceased complainant to revive the suit in a reasonable time,[42] complainant's lack of interest in the subject-matter,[43] and failure to prosecute the suit,[44] and on the ground that a legal title is involved.[45] The grounds of dismissal enumerated in the Federal equity rules are not exclusive.[46]

A motion to dismiss for want of equity may be acted on and the bill dismissed in vacation,[47] but in the absence of jurisdictional defects a bill should not be dismissed before any issue has been reached.[48]

Effect.[49]—A general decree of dismissal renders all the issues in the case res

stitution. Marion v. City Council of Charleston, 72 S. C. 576, 52 S. E. 418.

33. See 5 C. L. 1172.

34. See 5 C. L. 1173.

35. Garner v. Garner, 72 S. C. 437, 52 S. E. 194.

36. Such a motion is in effect a motion for a nonsuit. Garner v. Garner, 72 S. C. 437, 52 S. E. 194.

37. Bill to remove cloud on title held sufficient as against motion to dismiss for want of equity. Shiff v. Andress [Ala.] 40 So. 824. Where a court upon inspection of a bill dissolves a temporary injunction, it is proper where it appears that the bill is without equity to likewise dismiss the bill for want of equity. Hontros v. Chicago, 113 Ill. App. 318. A motion to dismiss for want of equity raises the question of venue. Merritt v. Alabama Pyrites Co. [Ala.] 39 So. 555.

In Alabama, want of equity which cannot be cured by amendment is ground for motion to dismiss. Merritt v. Alabama Pyrites Co. [Ala.] 39 So. 555. On a motion to dismiss for want of equity, the bill will be considered as amended in all amendable defects. Stephenson v. Atlas Coal Co. [Ala.] 41 So. 301. This rule does not extend to amendments giving equity to the bill by averment of new and independent facts, but applies only to amendable defects apparent on the fact of the bill. Id. Time for amendment will not be allowed after decree on motion to dismiss for want of equity. Id. Where a bill is susceptible to two constructions, upon one of which complainant would be entitled to relief, though not upon the other, but there is no demurrer addressed to such defect, the defect being amendable is not ground of motion to dismiss. Town of New Decatur v. Scharfenberg [Ala.] 41 So. 1025.

38. Where the multifariousness could not be cured without disclosing an incurable defect of parties. Merritt v. Alabama Pyrites Co. [Ala.] 39 So. 555.

39. Hoagland v. Supreme Council [N. J. Eq.] 61 A. 982.

40. Cross bill by corporation, in suit by stockholder, attacking a credit claimed by the stockholder as a payment on his stock, dismissed on account of an action at law against the corporation by the party through whom the credit was claimed. Essex v. Essex [Mich.] 12 Det. Leg. N. 439, 104 N. W. 622.

41. Since Comp. Laws § 435, providing for the dismissal of suits where the matter in dispute does not exceed $100, does not make the allegation of the amount jurisdictional, it was error to dismiss a suit for failure to allege the jurisdictional amount. Brassington v. Waldron [Mich.] 12 Det. Leg. N. 1011, 107 N. W. 100.

42. Though the delay is not such that the action is barred by limitations. Brown v. Fletcher, 140 F. 639. Where the representative of a deceased complainant in a Federal court failed to revive in the Federal court and sued in a state court, this was ground for dismissal, at the instance of the defendant, of the suit in the Federal court. Id.

43. Ellis v. Whitacre [Va.] 54 S. E. 993.

Note: "According to well settled rules of equity pleading, a bill filed by a sole plaintiff having no interest in the subject-matter of the suit must be dismissed. Sillings v. Bumgardner, 9 Grat. [Va.] 273; Coffman v. Sangston, 21 Grat. [Va.] 263; Clark v. Oliver, 91 Va. 421, 427, 22 S. E. 175; Keyser v. Renner, 87 Va. 249, 12 S. E. 406; Turner v. Barraud, 102 Va. 324, 337, 46 S. E. 318. See also, 1 Daniell's Ch. Pr. 314; Saunders v. Baltimore Bldg. & Loan Ass'n, 99 Va. 140, 37 S. E. 775."—From Ellis v. Whitacre [Va.] 54 S. E. 993.

44. Where complainant neglects or refuses to bring all the defendants into court upon proper issues. Macfarlane v. Hills [Fla.] 39 So. 994. If there has been inexcusable neglect in such case, the bill should be dismissed or terms imposed on complainant. Id. Circuit court rules 85, 86, have no application to such a case. Id.

45. Where the answer of one defendant to a bill to foreclose sets up adverse title to the premises, proper equity practice requires the bill to be dismissed as to such defendant, but the mere allegation of a lien is not within the rule. Illinois Nat. Bank v. Trustees of Schools, 111 Ill. App. 189. See ante § 2 C, Occasions For, and Subjects of, Equitable Relief.

46. General equity rules 38, 52, 66, and circuit court equity rule 2. Brown v. Fletcher, 140 F. 639.

47. Merritt v. Alabama Pyrites Co. [Ala.] 39 So. 555.

48. Court erred in dismissing bill upon motion to dissolve temporary injunction where no demurrer or answer had been filed. Welch v. Sheaffer, 29 Pa. Super. Ct. 619.

49. See 5 C. L. 1173.

judicata.[50] In some cases, however, the bill may be dismissed without prejudice.[51] Where, therefore, the court does not intend to decide upon the merits, the decree should expressly provide that the dismissal is without prejudice.[52] The dismissal of a bill does not necessarily dispose of a cross bill.[53]

Vacation of order.[54]

§ 10. *Trial by jury or master,*[55] *their verdicts and findings.*[56]—Except where there is a statute conferring the right to a trial by jury in a suit in equity,[57] there is no absolute right to such a trial,[58] the matter resting in the sound discretion of the trial court.[59] Where the case is submitted to a jury, their verdict is advisory only,[60] and it is not only the right but the duty of the court to determine all the questions of fact,[61] the court having a discretionary power, however, to adopt the

50. Fowler v. Osgood [C. C. A.] 141 F. 20.

51. Where cause is heard, on defendant's motion, on bill, answer, and replication, without proofs, and the case is such that it cannot be properly decided without proofs, dehors the pleadings, the chancellor has discretionary power to dismiss the bill without prejudice. Meffert v. Thomas [Fla.] 40 So. 764.

52. Where a demurrer to the bill is general, and special for the want of jurisdiction, the judgment sustaining the demurrer solely on the ground of want of jurisdiction should be limited accordingly, as a decree of dismissal of the bill concludes the defendant on the merits. Fowler v. Osgood [C. C. A.] 141 F. 20.

53. Where a cross bill sets up additional facts relating to the subject-matter of the bill, but not alleged therein, and prays affirmative relief, upon dismissal of the bill such relief should be granted under the cross bill as might have been granted if it had been an original bill. Webster v. De Bardeleben [Ala.] 41 So. 831. Injunctive relief granted under cross bill though bill was dismissed. Id.

54. See 5 C. L. 1174.

55. See 5 C. L. 1174. See Masters and Commissioners, 6 C. L. 607; Reference, 6 C. L. 1272.

56. See 5 C. L. 1174. See Verdicts and Findings, 6 C. L. 1814. As to findings by court, see post § 13.

57. See Shannon's Code §§ 6282, 6283, 6284. Harris v. Bogle, 115 Tenn. 701, 92 S. W. 849. Even then a reference obtained upon the party's own application waives his right to a jury. Id. A rule of the court of chancery, adopted pursuant to the authority conferred by Shannon's Code § 5739, providing for the time and manner of applying for a jury, will, if possible, be construed so as not to conflict with §§ 6283, 6284, relating to the same matter. Id. Rule 35, that application for jury must be made by petition in open court upon the first day of the trial term, means the first day of the term at which the case is tried, and not on the first day of the term at which it is at issue and is triable, and as thus construed is not in conflict with Shannon's Code § 6284, providing that where the demand is made only after the cause is ready for hearing, the trial shall be before a jury summoned instanter. Id. If a jury is not demanded in the pleadings, as authorized by Shannon's Code § 6283, the case falls within § 6374, and chancery rule 2, § 4, relating to the time for the taking of evidence, and a party cannot demand a jury, under § 6284, until the rights of the other party under § 6274 and rule 2, § 4, have been fully enjoyed. Id.

58. Defendants in suit by trustee to set aside mortgage by bankrupt were not entitled to jury trial. Vollkommer v. Frank, 107 App. Div. 594, 95 N. Y. S. 324. Suit to cancel mortgage by deed absolute and to recover the property held to be an equitable action within this rule. Bluett v. Wilce [Wash.] 86 P. 853. Where the issue was intricate, involving not only the weighing of testimony but a careful application of the evidence to peculiar circumstances, there was no error in refusing to allow an issue out of chancery and in referring the cause to a master instead. Harrodsburg Water Co. v. Harrodsburg [Ky.] 89 S. W. 729. Even where the equitable grounds of jurisdiction cease pending suit, as where a nuisance is abated pending suit to enjoin it, the claim for damages is not triable by a jury as of right. Miller v. Edison Elec. Illuminating Co., 184 N. Y. 17, 76 N. E. 734. Where an action brought and tried as one at law appears at the close of the evidence to be an equitable action, the court should take the case from the jury and treat the case as in equity. Goupille v. Chaput [Wash.] 86 P. 1058. An equitable defense with prayer for affirmative relief changes an action at law to one in equity triable without a jury. Bouton v. Pippin, 192 Mo. 469, 91 S. W. 149. See ante § 2 A, Effect of Code or Statutory Changes.

A cross action at law is triable by a jury as of right. Sandstrom v. Smith [Idaho] 86 P. 416.

59. Sandstrom v. Smith [Idaho] 86 P. 416; Ames v. Ames [Neb.] 106 N. W. 584. Discretion held properly exercised in refusing to submit issues to jury. Cochran v. Cochran, 96 Minn. 523, 105 N. W. 183.

60. Bird v. Bird, 218 Ill. 158, 75 N. E. 760; Bouton v. Pippin, 192 Mo. 469, 91 S. W. 149; Hobson v. Anderson [Colo.] 83 P. 634; Short v. Estey [Mont.] 83 P. 479; Tobin v. O'Brieter, 16 Okl. 500, 85 P. 1121; Sandstrom v. Smith [Idaho] 86 P. 416. In suit for specific performance. Detroit United R. v. Smith [Mich.] 13 Det. Leg. N. 228, 107 N. W. 922. In proceedings to enforce contract for adoption of child. In re Peterson [Neb.] 107 N. W. 993. In suit to set aside deed for want of mental capacity of grantor. Chadwell v. Reed [Mo.] 95 S. W. 227.

61. Tobin v. O'Brieter, 16 Okl. 500, 85 P. 1121. If the jury fail to make necessary

jury's finding as its own or to make new findings.[62] The mere form of the chancellor's instructions to the jury are, therefore, immaterial,[63] and the court has a broader right to direct a verdict than in actions at law;[64] but though the ultimate findings are made by the court where a jury is called, the case is not one tried without a jury.[65] The failure to return a general verdict is not necessarily fatal.[66] In submitting the case to the jury the procedure prescribed by rules of court must be followed.[67]

The matter of referring a case to a master or commissioner is generally within the discretion of the court.[68] The order should not be made, however, until the issues are made up as to all the defendants.[69] A reference should not be ordered for an accounting upon the allegations of the bill alone without proof of the right to an accounting.[70] After a decree establishing a resulting trust, the cause should be referred to a master for an account of the rents and profits.[71] Where the answer admits the gravamen of the bill, an order of reference may be made without further proof,[72] and so also where the answer is not responsive to the gravamen of the bill.[73] Counsel for parties to the suit are disqualified to take depositions to be used in the cause.[74] No special notice is necessary of an order of reference made on the call of a cause at a regular term,[75] but it is the right of all parties in interest,

findings the court must make them. Sandstrom v. Smith [Idaho] 86 P. 416. The trial is not concluded until the presiding justice has made his findings of fact and conclusions of law. Tefft v. Greenwich & J. R. Co., 47 Misc. 26, 95 N. Y. S. 205. Where the findings of the jury and the facts submitted by the pleadings cover the entire case, a motion for judgment is proper, but such a motion constitutes a part of the action, and in an action relating to realty must, under the Code, be made at a term of court in the county of the venue. Id.

62. Bouton v. Pippin, 192 Mo. 469, 91 S. W. 149; Sandstrom v. Smith [Idaho] 86 P. 416.

63. Certainly where there is no material evidence before the appellate court. Bouton v. Pippin, 192 Mo. 469, 91 S. W. 149. The court cannot commit reversible error in giving or refusing instructions. In re Peterson [Neb.] 107 N. W. 993.

64. A preponderance of the evidence is sufficient to sustain a directed verdict. Short v. Estey [Mont.] 83 P. 479.

65. An equity action in which a jury is called to find part or all of the facts is not an action tried without a jury, within the meaning of section 5630, Rev. Codes 1899, and is therefore not governed by that section, either as to the manner of trial in the district court or the review on appeal. Spencer v. Beiseker [N. D.] 107 N. W. 189.

66. 3 Starr & C. Ann. St. 1896, p. 3167, relating to special verdicts, has no application to verdicts upon issues out of chancery. Bird v. Bird, 218 Ill. 158, 75 N. E. 760. See Verdicts and Findings, 6 C. L. 1814.

67. Motion to fix a day for submission of an issue to a jury denied because not in compliance with circuit court rule 28. Marion v. City Council of Charleston, 72 S. C. 576, 52 S. E. 418.

68. The allowance or disallowance of the motion made by the respondents after the second hearing for the appointment of a commissioner to report the evidence taken at such hearing was clearly a matter within the discretion of the presiding justice. Manning v. Mulrey [Mass.] 78 N. E. 551. An order of reference made on the call of a case at a regular term is a discretionary order, and hence not appealable. Lockwood v. Lockwood, 73 S. C. 198, 53 S. E. 87.

69. It was error to appoint a master to take testimony where only one of several defendants had appeared and answered, other defendants not having been served. Macfarlane v. Hills [Fla.] 39 So. 994.

70. Such a reference, however, is harmless where no account is taken under the order of reference. Reager's Adm'r v. Chappelear, 104 Va. 14, 51 S. E. 170.

71. Stahl v. Stahl, 220 Ill. 188, 77 N. E. 67.

72. Grant v. Cumberland Valley Cement Co., 58 W. Va. 162, 52 S. E. 36.

In suits against infants, where the answer of the guardian ad litem admits the allegations of the bill of complaint to be true, the proper practice is to refer the cause to a master to take the proof and report thereon, and guardians ad litem should in all cases have notice of proceedings in the master's office and should attend and protect the interests of their wards. Mote v. Morton [Fla.] 41 So. 607.

73. Grant v. Cumberland Valley Cement Co., 58 W. Va. 162, 52 S. E. 36.

74. Code 1896, § 1834. Bledsoe v. Jones [Ala.] 40 So. 111. Counsel who represented parties in whose behalf a motion to dismiss for failure to amend after demurrer sustained was disqualified, the failure to amend not operating ipso facto as a dismissal. Id. Mere knowledge of complainant of defendant's application to have a certain party appointed, such party being in fact a member of a law firm which represented the defendant, but it not appearing that complainant knew this fact, was not a waiver of the objection. Id.

75. Lockwood v. Lockwood, 73 S. C. 198, 53 S. E. 87.

in a cause not under default, upon a reference to a master, to have notice of proceedings in the master's office,[76] and parties are entitled to notice of the filing of the master's report.[77] Ex parte affidavits are not admissible in hearing before a master.[78] Testimony taken at a former hearing before one master is ex parte, and hence inadmissible on a second hearing before a second master as to parties who were not parties on the first hearing.[79] A motion to reopen the case merely to admit cumulative evidence must be made in proper time.[80] The report of a master should show the basis of his findings,[81] including all the evidence, regardless of whether he considers it relevant or irrelevant.[82] An auditor may file with his report, as a brief of the oral evidence, the questions and answers of witnesses as transcribed from a stenographic report of the case.[83] The findings of an auditor must be construed in connection with the pleadings.[84] The findings of a master or commissioner upon a question of fact are not as conclusive as the verdict of a jury, but are entitled to great weight,[85] and in the absence of exceptions they are conclusive.[86] Even when excepted to they are presumptively correct where they are supported by the evidence and have been confirmed by the trial court.[87] The decree, however, must be supported by the findings.[88] The fact that a party requests the

76. Mote v. Morton [Fla.] 41 So. 607.

77. Rule 84 of the rules of the circuit courts in suits in equity is to be construed in connection with section 1425 of the Revised Statutes of 1892, and, so construed, it is the proper practice for a master in chancery to give the respective parties notice when his report is ready to be filed in order that they may make such objections and take such exceptions as they may be advised are necessary in order that they may be in a situation to present them to the court, and it is a further duty of the master to give notice to the parties of the filing of his report in order that they may be able to avail themselves of the right of exception given them by said rule 84. Cepero v. Hartridge [Fla.] 41 So. 192. Where the record fails to show that notice was given the appellant of the filing of the master's report, and there is nothing to show that appellant either expressly or impliedly waived notice, and the record fails to show that the case was set down for hearing as provided in rules 85 and 86 of the rules of the circuit court in suits in equity, and it appears that the cause was finally heard and a final decree made without notice to appellant, the decree will be reversed. Id.

78. Crane v. Stafford, 217 Ill. 21, 75 N. E. 424. But they may be filed where a cause is referred to a master upon the question of the jurisdiction of defendant's person, though the court in considering them will consider the fact that they are ex parte. Canadian Pac. R. Co. v. Wenham, 146 F. 206.

79. Testimony taken before a former master in a cause, at a time when certain minors, subsequently made parties, were not parties thereto, is not admissible as against such newly made minor parties in further proceedings before a second master appointed after such minors were made parties. Mote v. Morton [Fla.] 41 So. 607.

80. Where the motion is not made until after the close of the evidence and the arguments, the master may refuse to reopen the case. Matthews v. Whitehorn, 220 Ill. 36, 77 N. E. 89.

81. When a reference is made to a master to ascertain a fact depending upon testimony, his report should show the basis of his finding so that the court may see the correctness of his conclusions, and the evidence upon examination before a master should be taken down by him, or some other person by his authority in his presence, and filed with his report. Mote v. Morton [Fla.] 41 So. 607.

82. As a general rule a master or commissioner empowered to determine the admissibility of evidence should elicit and transmit to the court not only the evidence confessedly competent, but also what is deemed incompetent, irrelevant, and immaterial, in order that if the reviewing court considers the evidence competent it may at once render final decree. Huttig Sash & Door Co. v. Fuelle, 143 F. 363.

83. Linder v. Whitehead, 125 Ga. 115, 53 S. E. 588.

84. The finding of the auditor, when construed in the light of the petition and amendment, was a sufficient foundation for a decree, and the decree as entered was not subject to any of the objections set forth in the assignments of error thereon. Linder v. Whitehead, 125 Ga. 115, 53 S. E. 588.

85. Pickens' Ex'rs v. Daniels, 58 W. Va. 327, 52 S. E. 215.

86. Beck v. Stoddard, 118 Ill. App. 370; Lies v. Klaner, 121 Ill. App. 332; Matthews v. Whitehorn, 220 Ill. 36, 77 N. E. 89; Fordyce v. Omaha, etc., R. Co., 145 F. 544.

Excuse for not objecting: Ignorance of the method of objecting to a master's findings is no excuse for not filing objections. Matthews v. Whitehorn, 220 Ill. 36, 177 N. E. 89.

87. Orr v. Cooledge, 125 Ga. 496, 54 S. E. 618; Hall v. Hall, 104 Va. 773, 52 S. E. 557; Pickens' Ex'rs v. Daniels, 58 W. Va. 327, 52 S. E. 215; Huttig Sash & Door Co. v. Fuelle, 143 F. 363. The findings will not be disturbed in such case unless they appear to be palpably wrong by the most persuasive weight of evidence. Fordyce v. Omaha, etc., R. Co., 145 F. 544.

cause to be referred to a master does not render the latter's findings conclusive upon such party.[89] Exceptions must be definite and specific, and not merely to the general result,[90] and must set out or call the court's attention to such evidence as is necessary to be considered in passing upon the correctness of the findings.[91] A motion to recommit may be heard at the same time as a motion for confirmation, the order of such business being within the discretion of the court.[92]

§ 11. *Evidence.*[93]—Testimony should be signed by the witnesses.[94] In the absence of statutory authority, witnesses cannot be examined in open court,[95] and even where there is such authority[96] the parties desiring to avail themselves of the privilege thereby conferred must bring themselves strictly within the terms of the statute.[97] Affidavits to be used in an equity cause may be made before any one having general authority to administer oaths;[98] but ex parte affidavits are inadmissible on the hearing of the cause.[99] Exceptions to testimony must be presented to the chancellor at or before final hearing.[1] Where depositions are inadmissible, a motion to suppress is proper.[2] Rulings upon the admissibility of evidence must be precise and definite, but an equity decree will not be reversed on account of admission of incompetent evidence.[3] Failure to maintain all the allegations of the bill

88. But this does not mean that findings of the master which were not objected to may be reviewed. Matthews v. Whitehorn, 220 Ill. 36, 77 N. E. 89.

89. Millard v. Millard [Ill.] 77 N. E. 595.

90. Fordyce v. Omaha, etc., R. Co., 145 F. 544.

91. Where exceptions are based upon particular evidence contradicting the conclusions of the master, they should refer to the place in the record where the evidence may be found. Fordyce v. Omaha, etc., R. Co., 145 F. 544. It is incumbent upon a party excepting to the report of an auditor in an equity case, when the exception thereto involves a consideration of the evidence on which the auditor based his findings, to set forth, in connection with such exception of law or of fact, the evidence necessary to be considered in passing thereon, or to attach thereto as an exhibit so much of the evidence as is pertinent, or at least to point out to the court where such evidence is to be found in the brief of the evidence prepared and filed by the auditor. Orr v. Cooledge, 125 Ga. 496, 54 S. E. 618; First State Bank v. Avera, 123 Ga. 598, 51 S. E. 665; Linder v. Whitehead [Ga.] 53 S. E. 588.

92. Eddy v. Fogg [Mass.] 78 N. E. 549.

93. See 5 C. L. 1174.

94. An objection that the testimony in chancery proceeding was not signed by the witnesses cannot be made for the first time in the appellate court, particularly when the party so objecting asks that he be allowed the benefit of such testimony. Tyler v. Toph [Fla.] 40 So. 624.

95. Code 1892, § 1764, authorizing witnesses to be examined in open court in certain cases, is restrictive and does not apply to a suit to remove a cloud from a title. Johnson v. Hall [Miss.] 40 So. 1.

96. Comp. Laws 1897, § 491, providing for the examination of the complainant or his solicitor in open court as to payments to be credited to defendant, refers to cases against absent, concealed, or nonresident defendants, and not to mortgage foreclosure proceedings against residents. Hoock v. Sloman [Mich.] 13 Det. Leg. N. 390, 108 N. W. 447.

97. Agreement in writing and notice required by Code 1892, § 1764. Johnson v. Hall [Miss.] 40 So. 1. Comp. Laws 1897, § 10,188, requiring notice, was not repealed as to Wayne county by Pub. Acts 1903, No. 31, p. 37, providing that either party or his attorney may have a cause listed by the clerk and that said cause shall then be ready for trial after the lapse of one week. Hoock v. Sloman [Mich.] 13 Det. Leg. N. 390, 108 N. W. 447.

98. County judge. Seastream v. New Jersey Exhibition Co. [N. J. Eq.] 61 A. 1041.

99. An ex parte affidavit offered by one party cannot, over the objection of the adverse party, be considered by the court upon the hearing of a chancery cause upon its merits, in the determination of the issues raised by the pleadings, where there has been no previous consent that such affidavit might be so considered, and no consent to, or waiver of notice of, the taking of such affidavit. Herold v. Craig [W. Va.] 53 S. E. 466. On a hearing of objections to the jurisdiction of a Federal court on the ground that the defendant is not a resident of the district, the question will not be disposed of upon the ex parte affidavit of the defendant, but such affidavit may be considered. Canadian Pac. R. Co. v. Wenham, 146 F. 206.

1. Where rulings on such exceptions are made for the first time on petition for rehearing, the chancellor may refuse to enter his rulings thereon solely on account of the delay in asking for them. Jacobs v. Parodi [Fla.] 39 So. 833.

2. On account of disqualification of commissioner, under Code 1896, § 1834, by reason of his being counsel in the cause. Bledsoe v. Jones [Ala.] 40 So. 111. Motion to suppress made before final hearing held in time. Id.

3. McCormick v. Parsons, 195 Mo. 91, 92 S. W. 1162. On appeal the court will, where it has all the evidence before it, consider

will not preclude relief where the allegations sustained by the evidence are sufficient to support the decree.[4]

§ 12. *Hearing or trial.*[5]—There are no terms of court in equity proceedings, and on motion of either party the cause may be set down for a hearing at such time as the court shall order,[6] but a final hearing cannot be had until the cause is ready as to all the defendants.[7] Objection to the setting down of a cause for hearing without defendant's evidence may be waived by failure to raise it in proper time.[8] The notice of submission need not mention the pleadings.[9] Objections to jurisdiction should be determined before consideration of merits.[10] So also, where the case involves both legal and equitable issues, the latter will be tried first.[11] Where the cause is set down for hearing upon the bill and plea, the plaintiff is bound by the allegations of the plea,[12] and the same rule applies when the cause is set down for hearing upon the bill and answer.[13] Suits relating to realty must be tried in the county of the venue.[14] Instructions have no proper function in a suit in equity tried by the court.[15] A cross bill need not be heard at the same time as the original bill.[16]

§ 13. *Findings by the court*[17] *and decree, judgment, or order.*[18]—Findings must be made upon all the material issues,[19] but where the cause is triable de novo

whether the decree is supported by the competent evidence, regardless of questions of admissibility of other evidence. Morrison v. Turnbaugh, 192 Mo. 427, 91 S. W. 152.

4. O'Brien v. Murphy, 189 Ill. 353, 75 N. E. 700.

5. See 5 C. L. 1174.

6. Allan v. Allan [Me.] 63 A. 654.

7. Where the cause is not ready as to some of the defendants, a defendant who has appeared and answered cannot notice the cause for hearing, but must move to dismiss for want of prosecution. Macfarlane v. Hills [Fla.] 39 So. 994. Circuit court rules 85, 86, have no application in such a case. Id.

8. Where defendant failed to pay costs of his evidence according to stipulation and made no objection to the hearing other than a mere protest upon which the chancellor could not act. Williams v. Wetmore [Fla.] 41 So. 545.

9. Where pleas were incorporated in answer, failure of notice of submission to show the issue had been joined on the pleas was immaterial. Sellers v. Farmer [Ala.] 41 So. 291.

10. It was error to dismiss a bill by a trustee in bankruptcy of a decedent to recover a claim against the government, upon the demurrer of the secretary of the treasury based on the nonassignability of the claim, without deciding the administrator's special objection or plea to the jurisdiction of his person. Bryan v. Curtis, 26 App. D. C. 95. An objection to the jurisdiction of defendant's person will not be left to be decided under pleas or answer where the defendant is under arrest. In such case the cause will be referred to a master and ex parte affidavits may be filed, but in considering them the court will give proper consideration to the fact that affiants have not been subjected to cross-examination. Canadian Pac. R. Co. v. Wenham, 146 F. 206.

11. Where, in an action at law, the answer interposes an equitable counterclaim, the issues arising on the latter should be determined before the trial of the legal issues, just as if the counterclaim were a separate suit in equity, and if the decree entered on the equity side of the case renders unnecessary the trial of the legal issues, such decree will be a final determination of the action. Cotton v. Butterfield [N. D.] 105 N. W. 236.

12. Town of New Decatur v. Scharfenberg [Ala.] 41 So. 1025; Mackey v. Mackey [N. J. Eq.] 63 A. 984; Gouwens v. Gouwens [Ill.] 78 N. E. 597. In a hearing upon a bill and plea the court takes the uncontradicted parts of the bill and the allegations of the plea as verities. Groel v. United Elec. Co. [N. J. Eq.] 61 A. 1061.

13. Atlantic Trust Co. v. Chapman [C. C. A.] 145 F. 820. Defendant is also entitled to the benefit of all denials in the answer. Id.

14. The provisions of the code making this requirement apply to all parts of the trial, including a motion for judgment. Tefft v. Greenwich & J. R. Co., 47 Misc. 26, 95 N. Y. S. 205. See Venue and Place of Trial, 6 C. L. 1806.

15. See ante § 10, Trial by Jury, etc. An equitable defense accompanied by a prayer for affirmative equitable relief will be treated as a suit in equity in which instructions are improper, the case being triable by the chancellor (Shaffer v. Detie, 191 Mo. 377, 90 S. W. 131); but an action under the statute for foreclosure of a mortgage is an action at law, and hence instructions on the law should be given where properly requested, though the case is tried by the court without a jury (White v. Black, 115 Mo. App. 28, 90 S. W. 1153).

16. The two may be heard together or separately. Dornan v. Buckley, 119 Ill. App. 523.

17. See Verdicts and Findings, 6 C. L. 1814.

18. See 5 C. L. 1175.

19. In suit to determine adverse claims to realty under Laws 1901, c. 5, p. 9. Spencer v. Beiscker [N. D.] 107 N. W. 189. It is error to dismiss a cause for failure of proofs with-

on appeal, the failure of the trial court to make findings is not reversible error.[20] The conclusions of law and findings of fact should be expressed in separate, numbered paragraphs.[21] Findings must be within the issues.[22] A finding of fact in a decree will be construed as of the date of the decree.[23] Findings which rest on substantial evidence will not ordinarily be disturbed.[24]

Decree.[25]—A decree is the conclusion of the court deduced from facts believed to be established and found to exist simultaneously with or before the decree.[26] Where the equitable relief sought is merely ancillary to legal relief, a formal decree granting the former is not necessary.[27] The decree should be made by the court and not by a single judge.[28] It is irregular to incorporate formal common-law judgments in orders and decrees in equity.[29] A decree based upon the verdict of a jury need not recite the evidence.[30] A misnomer of the court in its decree will not necessarily render the decree invalid.[31] A decree must conform to the pleadings[32] and proof[33] and must be responsive thereto, that is must dispose of the material issues raised by the pleadings and proof.[34] A decree must also be supported by the findings.[35] A final decree cannot be entered until all the defendants have been brought into court in the manner prescribed by law,[36] nor until the expiration of the time for bringing the cause to trial,[37] but premature entry of a decree is not necessarily fatal to its validity.[38] A decree cannot be entered after the death of

out making and filing a decision as required by Code Civ. Proc. §§ 1021, 1022. Wise v. Cohen, 99 N. Y. S. 663; Id., 99 N. Y. S. 667.

20. Williams v. Husky, 192 Mo. 533, 90 S. W. 425. See Harmless and Prejudicial Error, 5 C. L. 520.

21. Gaynor v. Quinn, 212 Pa. 362, 61 A. 944. See equity rule No. 62. Zerbey v. Allan [Pa.] 64 A. 587. But failure to do so is not fatal where the findings and conclusions are considered separately and can be readily ascertained. Id.

22. Where a cause was referred to a commissioner, a decree based upon a theory which was not within the issues made, either by the pleadings or before the commissioner, could not be sustained. Hall v. Hall, 104 Va. 773, 52 S. E. 557.

23. Knott v. Giles, 27 App. D. C. 581.

24. Gaynor v. Quinn, 212 Pa. 362, 61 A. 944. See Appeal and Review, 7 C. L. 128. Joseph Schlitz Brewing Co. v. Komp, 118 Ill. App. 566. See Appeal and Review, 7 C. L. 128.

25. See 5 C. L. 1175.

26. Hence a decree once entered is not affected by special findings of fact thereafter made and filed. Shaffer v. Detle, 191 Mo. 377, 90 S. W. 131.

27. Recovery may be allowed on an insurance policy upon the assumption that it has been reformed as prayed for without any formal decree of reformation. Aetna Ins. Co. v. Brannon [Tex.] 14 Tex. Ct. Rep. 208, 89 S. W. 1057.

28. Where the decree shows on its face that it was made by the court and not by an individual judge, an objection that it was not rendered by the court in banc cannot be sustained. Zerbey v. Allan [Pa.] 64 A. 587.

29. McReynolds v. Brown, 121 Ill. App. 261.

30. Berg v. Berg, 119 Ill. App. 422.

31. As where, through clerical error, a decree of the circuit court of one county, ratifying a mortgage foreclosure, recited that it was the decree of the circuit court of another county, but the record clearly exposed the error and showed which court rendered the decree. Primrose v. Wright, 102 Md. 105, 62 A. 238.

32. Higgins v. Higgins, 219 Ill. 146, 76 N. E. 86; Gray v. Bloomington & Normal R. Co., 120 Ill. App. 159; Kilpatrick v. Wiley, 197 Mo. 123, 95 S. W. 213. Objection for nonconformity to pleadings cannot be raised for the first time on appeal. Gerting v. Wells [Md.] 64 A. 298.

33. Kilpatrick v. Wiley, 197 Mo. 123, 95 S. W. 213.

34. Decree in suit to enjoin foreclosure of mortgage on homestead property held not responsive. Pearson v. Helvenston [Fla.] 39 So. 695.

35. Matthews v. Whitehorn, 220 Ill. 36, 77 N. E. 89.

36. Though by Rev. Laws c. 182, §§ 6-10, the general description of parties found in the bill and in the prayer was authorized, yet, after due notice, none of the defendants within this description having appeared, and no interlocutory decree taking the bill for confessed having been ordered, the case, independently of the invalidity of the plaintiff's title, was not ripe as to them under section 10 for final disposition. First Baptist Church v. Harper, 191 Mass. 196, 77 N. E. 779.

37. Under Act March 29, 1902, § 5 [Acts 1892, p. 273, c. 122, § 5], a decree entered at a special term where the pleadings had not been completed 30 days prior to the beginning of the term was premature. Tabb v. Wortham's Adm'r [Ky.] 89 S. W. 191.

38. Entry of decree resting on publication within less than five days after the day set for hearing is not fatal, provided the court does not adjourn sine die within the five day period. Goodell v. Auditor General [Mich.] 12 Det. Leg. N. 947, 106 N. W. 890. Such a decree will not be set aside on peti-

one of the parties unless the cause was ready for the decree at the time of such death,[39] nor can a consent decree be entered after any party who will be materially affected thereby has withdrawn his consent.[40]

Effect and construction.[41]—Where both legal and equitable issues are involved, a decree on the equity side of the case which renders unnecessary the trial of the legal issues is the final determination of the case.[42] Where a decree confers rights without specifying any time for their exercise, they must be exercised within a reasonable time.[43] A final decree is conclusive of every matter decided by it and of every matter which, by the rules of equity practice, the parties were bound to set up in reference to it before submitting it for adjudication.[44]

Measure of relief.[45]—One of the distinguishing features of equity is the elasticity of its remedies,[46] and, subject to the limitation that the relief granted must be in conformity with the pleadings[47] and proof,[48] full relief may be granted to all parties.[49] The defendant may be granted affirmative relief though no demand therefor is made in his answer,[50] or the relief granted to the complainant may be conditioned upon his doing equity.[51] As a general rule a defendant will not be allowed affirmative relief against a codefendant,[52] but this rule is not without exception.[53] The relief granted is such as is adapted to the situation at the time of the decree.[54]

Modification and amendment; vacation and setting aside; collateral attack.[55]—While as a general rule a decree will not, in the absence of fraud, surprise, or ir-

tion where there is nothing to show that there was any appearance and objection within the five day period. Id.

39. McReynolds v. Brown, 121 Ill. App. 261.

40. A draft of a consent decree, agreed to and signed out of court by the parties to a pending cause, cannot be entered as a consent decree, if, at the time such draft is offered for entry, consent thereto is withdrawn, and its entry is objected to by one of the parties who signed it, and who will be materially affected thereby. Herold v. Craig [W. Va.] 53 S. E. 466.

41. See 5 C. L. 1176.

42. Where an equitable counterclaim is interposed in an action at law, the counterclaim must be tried first, and the decree thereon may render unnecessary the trial of the legal issues. Cotton v. Butterfield [N. D.] 105 N. W. 236.

43. Decree giving right to remove timber from land. Hall v. Wellman Lumber Co. [Ark.] 94 S. W. 43.

44. Barbour v. Tompkins, 58 W. Va. 572, 52 S. E. 707. See Former Adjudication, 5 C. L. 1502. As to effect of decree of dismissal, see ante § 9, Dismissal.

45. See 5 C. L. 1176.

46. Specific performance of contract by water company to open a way refused where it would have necessitated the removal of obstructions which were necessary for the public health and service, and complainant granted damages in lieu of the relief sought. Bell v. Louisville Water Co. [Ky.] 96 S. W. 572.

47. Kilpatrick v. Wiley, 197 Mo. 123, 95 S. W. 213; Gray v. Bloomington & N. R. Co., 120 Ill. App. 159. A decree cannot be supported by evidence which does not conform to the allegations of the bill. Higgins v. Higgins, 219 Ill. 146, 76 N. E. 86. An objection that a decree is not in conformity with the relief asked cannot be considered on appeal where it conforms to the evidence and no exceptions are taken to such evidence. Gerting v. Wells [Md.] 64 A. 298.

48. Kilpatrick v. Wiley, 197 Mo. 123, 95 S. W. 213.

49. See ante § 2 B, Doing Complete Justice.

50. Where on an accounting balance was found in favor of defendant. Consolidated Fruit Jar Co. v. Wisner, 110 App. Div. 99, 97 N. Y. S. 52.

51. Andrews v. Connolly, 145 F. 43. Return of bonds where sale thereof was cancelled. Hill v. Hall, 191 Mass. 253, 77 N. E. 831. Equity will relieve from a forfeiture for nonpayment of money only upon condition that the money due be paid. People v. Freeman, 110 App. Div. 695, 97 N. Y. S. 343. Equity will not set aside a decree of foreclosure at the instance of the mortgagor except upon the condition of his offering to pay what is equitably due under such decree, with interest thereon. Stull v. Masilonka [Neb.] 104 N. W. 188.

52. Horner v. Nitsch [Md.] 63 A. 1052.

53. In a suit by an indorser against the holder of usurious notes, another indorser, made a codefendant, may be allowed an injunction against such holder restraining the prosecution of a pending suit at law upon the notes until the decision of the suit in equity, though no decree for an account has been rendered. Horner v. Nitsch [Md.] 63 A. 1052.

54. Hence an order refusing to modify the decree so as to make it speak as of the time of the commencement of the suit was proper. Union Bag & Paper Co. v. Allen Bros. Co., 107 App. Div. 529, 95 N. Y. S. 214. Complainant forfeited his right to relief by undertaking, pending suit, to acquire by force and arms the relief sought in the suit. Little v. Cunningham, 116 Mo. App. 545, 92 S. W. 734.

55. See 5 C. L. 1177.

regularity in its procurement, be corrected after its enrollment upon mere petition or motion,[56] a court of equity has inherent power to correct clerical errors in its decrees at any time, even after enrollment.[57] The court may, likewise, at any time before the proceedings cease to be in fieri, amend its orders so as to make them speak the truth[58] and may, at the same term at which an order is entered, modify such order as it may deem proper;[59] but a final decree can be corrected or modified only in some manner authorized by law,[60] and, since a decree becomes final at the close of the term at which it is entered, it follows that a decree cannot be materially altered after the expiration of the term at which it is entered.[61] Where the motion to modify is made at the term at which the decree is entered, it may be continued to and heard at the next term.[62] The only office of a nunc pro tunc order is to supply some omission in the record of an order which was really made at the designated time but which by mistake was omitted from the record.[63]

56. The remedy being by way of bill of review. Primrose v. Wright, 102 Md. 105. 62 A. 238.

57. Equity rules 51, 52, providing that clerical errors may be corrected on petition before enrollment of the decree, and prohibiting the granting of a rehearing or the correction of an error upon petition filed after enrollment of the decree, does not take away this power. Primrose v. Wright, 102 Md. 105, 62 A. 238.

Note: "In Straus v. Rost, 67 Md. 479, 10 A. 74, which was decided in 1887 long after the adoption of the rules in question, there was an application by petition to correct an error in an order of final ratification of an auditor's account which had been passed several years before the filing of the petition. This court affirmed an order granting the application, saying in its opinion, through the late Judge Miller: 'The general rule of practice that a decree or decretal order after enrollment can be revised or annulled only by a bill of review or by an original bill for fraud is well settled. Thruston v. Devecmon, 30 Md. 210; Downes v. Friel, 57 Md. 531; United Lines Tel. Co. v. Stevens, 67 Md. 156, 8 A. 908. But there are certain well-defined exceptions to this general rule, which are equally well established, where the procedure may be by petition. These are in cases not heard on their merits and in which it is alleged that the decree was entered by mistake or surprise or under such circumstances as shall satisfy the court in the exercise of a sound discretion that the enrollment ought to be discharged and the decree set aside. Herbert v. Rowles, 30 Md. 278; Bank v. Eccleston, 48 Md. 155; Pfeaff v. Jones, 50 Md. 264; Gechter v. Gechter, 51 Md. 187; Patterson v. Preston, 51 Md. 190; Downes v. Friel, 57 Md. 533.'"—From Primrose v. Wright [Md.] 62 A. 238.

58. Boonville Nat. Bank v. Blakey [Ind.] 76 N. E. 529.

59. Where an order of default gave defendant leave to appear generally, the court had power, at the same term, to modify such order by making certain requirements of defendant as a condition to the right to have the default opened. Hews v. Hews [Mich.] 13 Det. Leg. N. 482, 108 N. W. 694.

60. By bill of review or appeal. Stout v. Stout, 104 Va. 480, 51 S. E. 833. Leave given to reinstate a cause for the purpose of any proper relief at the foot of the decree does not prevent the decree from being final. Id. A decree that is appealable under clause 7 of section 1 of chapter 135 of the Code of 1899, as one adjudicating the principles of a cause, or that is final in such sense as to make it reviewable by bill of review, is conclusive of every matter decided by it, and of every matter which, by the rules of equity practice, the parties were bound to set up in reference to it, before submitting it for adjudication, and cannot be altered or disturbed, except by appeal or bill of review within the respective periods allowed therefor by the statutes. Barbour v. Tompkins, 58 W. Va. 572, 52 S. E. 707. A decree made in a suit brought to enforce the liens of judgments and a deed of trust, fixing the amounts and priorities of the liens, decreeing payment thereof, and directing a sale of the debtor's land on default of payment, is final and conclusive as to the amounts of the debts after the expiration of the term at which it is pronounced, and an answer praying the elimination of usury from one of the debts so adjudicated cannot be received thereafter. Id.

61. The uniform rule is that after the expiration of the term at which a decree is rendered the court has no power over it except to correct it in matters of form. Finch v. Finch, 111 Ill. App. 481. Alleged errors of law cannot be revised on mere motion after the close of the term at which the decree is entered. Crane v. Stafford, 217 Ill. 21, 75 N. E. 424. After the expiration of the term at which such a decree was made and entered, it cannot be materially altered by the court which pronounced it as to anything so decided or deemed in law to be thereby concluded, except upon some proceeding instituted in said court for setting aside and annulling the same or correcting error therein. Barbour v. Tompkins, 58 W. Va. 572, 52 S. E. 707. After the expiration of the term at which such a decree has been pronounced, the same cannot be reopened for the reception of pleadings setting up defenses as to any matter so decided or concluded. A defendant has no right of election to interpose his matters of defense singly and take separate successive trials and adjudications thereon. By allowing a cause to be decided without having set up a defense, or any one or more of his defenses, he is deemed to have waived all matters so withheld. Id.

A decree cannot be collaterally attacked.[64]

§ 14. *Rehearing.*[65]—An application for a rehearing of an equity case is governed by the same principles which govern a motion for a new trial at law after verdict.[66] Where the application is based on newly-discovered evidence, it must show that the new matter is such that if it had been heard on the original hearing it probably would have changed the result.[67] The right to a rehearing in some cases is sometimes provided for by statute.[68]

§ 15. *Bill of review.*[69]—A bill of review, strictly speaking, is a proceeding to correct a final decree in the same court for error apparent on the face of the decree or on account of new evidence discovered since the final decree.[70] A bill of review is a new suit.[71] The bill must show substantial equities,[72] and where it is filed to review errors on the face of the record, the pleadings and the decree must be made a part of the bill.[73] A bill of review does not lie where there is any other plain, speedy, and adequate remedy.[74] It will not lie for error of law pending an appeal,[75] nor for error on the face of a decree which has been affirmed on appeal,[76] nor for errors which might have been corrected by an appeal,[77] nor to review a consent decree.[78] Where the decree sought to be reviewed is interlocutory, it may be reviewed on a supplemental bill in the nature of a bill of review,[79] and such a

62. Motion to modify order of default. Hews v. Hews [Mich.] 13 Det. Leg. N. 482, 108 N. W. 694.

63. Finch v. Finch, 111 Ill. App. 481.

64. Carpenter v. Auditor General [Mich.] 13 Det. Leg. N. 160, 107 N. W. 878.

65. See 5 C. L. 1177.

66. Rehearing before vice chancellor. Feinberg v. Feinberg [N. J. Eq.] 62 A. 562. See New Trial and Arrest of Judgment, 6 C. L. 796.

67. Feinberg v. Feinberg [N. J. Eq.] 62 A. 562. A new hearing will not be granted to allow the impeachment of a witness who testified on the original hearing. Id.

68. Where a defendant has not been served with process in this state and has not appeared in the cause, he has the right to file a petition for a rehearing, as provided in section 14, c. 124, Code 1899, and as a prerequisite to such right it is not required that he return to and appear openly in this state. This is only required in attachment proceedings where a defendant is proceeded against by order of publication and where he did not appear and make defense. Johnson v. Ludwick, 58 W. Va. 464, 52 S. E. 489.

69. See 5 C. L. 1177.

70. Hardwick v. American Can Co., 115 Tenn. 393, 89 S. W. 735, quoting from Laidley v. Merrifield, 7 Leigh [Va.] 346. A bill to impeach a decree against a minor for errors of law apparent upon the face of the record is not a bill of review. Crane v. Stafford, 217 Ill. 21, 75 N. E. 424. See post § 16, Other Equitable Remedies, etc.

71. Hence a party who purchases the property in litigation after final decree but before the filing of the bill of review is not a pendente lite purchaser. Dunfee v. Childs [W. Va.] 53 S. E. 209.

Note: "A bill of review or appeal is a second lis pendens, and must have its own notice. It does not relate back to the rendition of the judgment or decree. 2 Cyc. 510; Bennett on Lis Pendens, §§ 40, 70; Wooldridge v. Boyd, 13 Lea [Tenn.] 151; 21 Am. & Eng. Enc. L. [2d Ed.] 618; Scudder v. Sargent [Neb.] 17 N. W. 369; Hollister v. Maun [Neb.] 58 N. W. 1128; Taylor's Lessee v. Boyd, 3 Ohio, 337, 17 Am. Dec. 603; Lee County v. Rogers, 7 Wall. [U. S.] 181, 19 Law. Ed. 162; Warren County v. Marcy, 97 U. S. 96, 24 Law. Ed. 977; Ludlow's Heirs v. Kidd, 3 Ohio, 541; Barton's Chancery Prac. 331; Bank v. Jenkins, 104 Ill. 143; Macklin v. Allenberg, 100 Mo. 343, 13 S. W. 350; Cole v. Miller, 32 Miss. 89."—From Dunfee v. Childs [W. Va.] 53 S. E. 209.

72. Smith v. Smith [Mich.] 12 Det. Leg. N. 745, 105 N. W. 880.

73. Hence questions which, from the bill, do not appear to have been presented on the original hearing, cannot be considered. Adriaans v. Reilly, 27 App. D. C. 167.

74. Code Civ. Proc. § 1068. Grant v. Justice's Ct. of Second Tp., 1 Cal. App. 383, 82 P. 263.

75. Appeal to supreme court of appeals. Dunfee v. Childs [W. Va.] 53 S. E. 209.

76. Variance between verdict and decree. Booth & Co. v. Mohr, 125 Ga. 472, 54 S. E. 147.

77. Smith v. Smith [Mich.] 12 Det. Leg. N. 745, 105 N. W. 880; Avocato v. Dell'Ara [Tex. Civ. App.] 14 Tex. Ct. Rep. 794, 91 S. W. 830. Failure of counsel to perfect an appeal will not excuse the failure to appeal so as to authorize a bill of review. Id.

78. Smith v. Smith [Mich.] 12 Det. Leg. N. 745, 105 N. W. 880.

79. Such supplemental bill is unlike a bill of review in that it is a part of the proceedings in which the decree sought to be reviewed was rendered, and any decree rendered on the review is interlocutory. It is, on the other hand, like a bill of review in that it lies on account of error on the face of the decree or for newly discovered evidence. Hardwick v. American Can Co., 115 Tenn. 393, 89 S. W. 735. The new matter must be brought to the attention of the court as soon as discovered. If, after discovering such matter, the party allow the case to go to final decree, he cannot use the new matter. Id.

bill may be filed by either the complainant or the defendant.[80] All the parties to the decree and their privies must be made parties to a bill of review.[81] A proceeding analogous to that by way of bill of review is a petition for a new trial in equity after the right to a new trial at law is barred.[82]

Time for bill; laches.[83]—The right to file a bill of review may be lost by laches.[84]

Grounds.[85]—A bill of review will lie to review a decree on account of fraud,[86] want of jurisdiction,[87] errors of law apparent on the face of the record,[88] newly discovered evidence.[89] The newly discovered evidence which will sustain a bill of review must relate to matters of fact existing at the date of the decree sought to be reversed,[90] and must be such that it could not, by the exercise of reasonable diligence, have been obtained in time to use it on the original hearing,[91] and such that if it had been produced on the original hearing it would probably have changed the result.[92] The question of diligence in bringing forward newly-discovered evidence upon which the bill is based is a preliminary one, addressed to the court, to be

80. Hardwick v. American Can Co., 115 Tenn. 393, 89 S. W. 735. A defendant may file a supplemental bill in the nature of a bill of review for the purpose of putting in issue new matter discovered after the filing of the answer and after the passing of the decree of reference, and while the latter decree is in process of execution before the master. Id.

81. Landram v. Jordan, 25 App. D. C. 291. A widow who acquired dower right in the property in controversy after the rendition of the decree was not an indispensable party, and failure to join her was waived where the objection was taken for the first time on hearing of demurrer. Id. Quere, whether a party interested in the subject-matter but not a party to the original bill should be made a party. Id.

82. Where it would be proper for a court of law to grant a new trial, if the application had been made while that court had the power, it is equally proper for a court of equity to do so, if the application is made when the court of law has no means of granting such a trial, but a court of equity will only grant such relief in case of newly discovered evidence, surprise, or fraud or where a party is deprived of the means of defense by circumstances beyond his control. Bankers' Union of the World v. Landis [Neb.] 106 N. W. 973.

83. See 5 C. L. 1178.

84. Motion for leave to file bill of review in proceedings for writ of assistance instituted by purchaser at tax sale, refused on account of delay in making the application. Brown v. Fitzpatrick [Mich.] 13 Det. Leg. N. 133, 107 N. W. 438. Bill of review held brought within the statutory time and not barred by laches, notwithstanding delay in obtaining published notice to nonresident defendants. Landram v. Jordan, 25 App. D. C. 291.

85. See 5 C. L. 1178.

86. Crane v. Stafford, 117 Ill. App. 57.

87. A personal decree, taken against one who was not served with process and who did not appear in the cause, is void, and upon a proper bill of review, filed for that purpose, the decree will be reversed. Johnson v. Ludwick, 58 W. Va. 464, 52 S. E. 489. Quere, whether a bill of review was proper to vacate a decree for want of jurisdiction of a bill filed by a testamentary trustee for the purpose of annulling the entire will under pretense of seeking a construction of the trusts created thereby. Landram v. Jordan, 25 App. D. C. 291.

88. Hardwick v. American Can Co., 115 Tenn. 393, 89 S. W. 735; Crane v. Stafford, 117 Ill. App. 57; Adriaans v. Reilly, 27 App. D. C. 167.

Errors reviewable on appeal will not sustain a bill of review. Smith v. Smith [Mich.] 12 Det. Leg. N. 745, 105 N. W. 880. Variance between verdict and decree. Booth & Co. v. Mohr, 125 Ga. 472, 54 S. E. 147. That the verdict was not sufficient to sustain the judgment and was at variance with the instructions and not warranted by the pleadings and evidence, and that the judgment was contrary to law. Avocato v. Dell'Ara [Tex. Civ. App.] 14 Tex. Ct. Rep. 794, 91 S. W. 830.

89. Safe Deposit & Trust Co. v. Gittings, 102 Md. 456, 62 A. 1030. A bill seeking relief which will vary a decree previously made in a cause for specific performance of an agreement for exchange of lands, upon allegations of facts subsequently discovered, which, if proved, will justify relief, is good upon demurrer. Roche v. Hoyt [N. J. Eq.] 64 A. 174.

90. Dunfee v. Childs [W. Va.] 53 S. E. 209. The reversal by the supreme court is not newly discovered evidence or matter for a bill of review to reverse a decree of a circuit court made before such reversal. Id.

91. Avocato v. Dell'Ara [Tex. Civ. App.] 14 Tex. Ct. Rep. 794, 91 S. W. 830. Failure of counsel to investigate and to allege and prove a foreign law is such negligence as will preclude a review of the judgment on the ground that it would have been different if the foreign law had been alleged and proved. Id.

Newly discovered materiality of evidence all the time within reach of the parties is not ground for a bill of review. Lafferty Mfg. Co. v. Acme R. Signal Mfg. Co. [C. C. A.] 143 F. 321.

92. Lafferty Mfg. Co. v. Acme R. Signal Mfg. Co. [C. C. A.] 143 F. 321. Proper case made for opening foreclosure proceedings instituted after death of mortgagor. Pomeroy v. Noud [Mich.] 13 Det. Leg. N. 401, 108 N. W. 498.

passed upon, once for all, at the time of the application to file the bill.[93] A bill of review on the ground of newly-discovered evidence will lie in the trial court to review a judgment entered pursuant to the mandate of an appellate court.[94] Such a bill will also lie on the ground that the original decree was obtained by perjury,[95] but under the rule applicable to newly-discovered evidence it must appear that the perjury could not have been exposed before final decree.[96] The same rule as to diligence is applicable to a bill in the nature of a bill of review.[97] Where a bill in the nature of a bill of review on the ground of newly-discovered evidence is filed by the defendant, the new matter set up must not be inconsistent with the answer.[98]

Application and proceedings.[99]—Leave to file a bill of review is discretionary.[1] A supplemental bill in the nature of a bill of review cannot be filed without leave of the court.[2] On a bill of review, for error of law, the evidence cannot be considered.[3] A reversal on bill of review of a joint judgment as to one of several co-defendants operates as a reversal as to them all,[4] but in some cases the decree under review may be vacated in part only.[5] Where the case made by the bill and upon which leave to file is granted is not sustained, the bill may be dismissed at hear-

93. An averment of diligence in the bill, therefore, and its denial in the answer, raised an immaterial issue. Kelley Bros. v. Diamond Drill & Mach. Co., 142 F. 868.

94. Safe Deposit & Trust Co. v. Gittings, 102 Md. 456, 62 A. 1030. See Appeal and Review, 7 C. L. 128.

Note: The rule announced in the text is supported by the following authorities: Griffin's Heirs v. Griffin's Ex'rs, 11 N. C. 403; Schaefer v. Wanderle, 154 Ill. 577, 39 N. E. 623; Reynolds v. Reynolds' Ex'rs, 88 Va. 152, 13 S. E. 395, 598; Hing v. Ruckman, 22 N. J. Eq. 551; Putnam v. Clark, 35 N. J. Eq. 145; Tommey v. White, 1 H. L. Cases, 166; Mitford's Pl. 88; Cooper's Pl. 92; 2 Hoff. Ch. Pr. 12; 2 Daniell's Ch. Pr. p. 1579; Story's Equity Pl. §§ 408-418; 3 Enc. Pl. & Pr. 574; Pinkney v. Jay, 12 Gill & J. [Md.] 69; Flower v. Lloyd, L. R. 6 Ch. Div. 297; Haskell v. Raul, 1 McCord, Eq. [S. C.] 22; McCall v. Graham, 1 Hen. & M. [Va.] 13. But see contra, Southard v. Russell, 16 How. [U. S.] 547, 14 Law. Ed. 1052; Kingsbury v. Buchner, 134 U. S. 671, 33 Law. Ed. 1047.

95. Avocato v. Dell'Ara [Tex. Civ. App.] 14 Tex. Ct. Rep. 794, 91 S. W. 830.

96. Failure of petitioner to testify in opposition to the alleged perjury calls for a denial of the bill of review. Avocato v. Dell'Ara [Tex. Civ. App.] 14 Tex. Ct. Rep. 794, 91 S. W. 830. But merely contradicting the perjured witness, without using other available means to expose the perjury, is not sufficient to sustain the bill of review. Id.

97. Where it is shown that the plaintiff has not used ordinary diligence in making or attempting to make his defense in a former action at law, he will be denied a new trial in equity. Bankers' Union of the World v. Landis [Neb.] 106 N. W. 973. In such a case the plaintiff must also plead and prove that he has a valid defense to the action in which the judgment complained of was rendered. Id.

98. In a suit involving a contract for sale of certain kind of stoves by complainant to defendant, a supplemental bill in the nature of a bill of review filed by defendant and alleging a newly discovered violation of the contract by complainant, in that he had sold stoves to another merchant, was inconsistent with an allegation of the answer that the stoves sold defendant were worthless and had to be sold by him at a loss and to the injury of his credit. Hardwick v. American Can Co., 115 Tenn. 393, 89 S. W. 735.

99. See 5 C. L. 1179.

1. This discretion must be exercised so as to effectuate substantial justice. Smith v. Smith [Mich.] 12 Det. Leg. N. 745, 105 N. W. 880. Leave to file bill to review a decree made to enable the partles to carry out an agreed settlement held properly refused. Id.

2. But the bill may be drawn so as to serve both as a petition for leave and as the bill proper. Hardwick v. American Can Co., 115 Tenn. 393, 89 S. W. 735.

3. Adriaans v. Reilly, 27 App. D. C. 167. Depositions cannot be considered. Dunfee v. Childs [W. Va.] 53 S. E. 209.

4. A wife, holding the legal title to a tract of land, died, leaving surviving her her husband and her heirs at law, a brother and two sisters. After her death the husband, claiming to have purchased the land and to have paid the purchase money therefor, and to have had the same conveyed to the wife, pursuant to an agreement between himself and wife that she would take the conveyance in her name and hold the land in trust for him, filed his bill in equity against the heirs for the enforcement of the trust. There was no legal service of process upon one of the defendants. The defendants being cotenants, and the decree against them being joint, a reversal of such decree, upon bill of review, as to the one not served with process, operates as a reversal as to all of them. Johnson v. Ludwick, 58 W. Va. 464, 52 S. E. 489.

5. Where a decree vacating a testamentary trust was vacated so far as complainant in the bill of review was concerned, the court, under its general equity jurisdiction, had power to appoint another trustee to enforce the trust in complainant's favor. Landram v. Jordan, 25 App. D. C. 291.

ing.[6] Where the former decree is dismissed the court loses all power over the case.[7]

§ 16. *Other equitable remedies for which no specific title is provided.*[8]—Equity has jurisdiction of a bill to impeach a decree against a minor for errors of law apparent on the face of the record.[9] In Alabama equitable relief from a wrongful execution is granted upon a petition for supersedeas of the execution.[10] A bill in the nature of equitable ejectment cannot be maintained against defendants not in possession.[11] A bill to remove an admitted lien by redemption is not a bill to remove a cloud or quiet a title.[12] Such a bill will not lie against a defendant in possession.[13]

Bill quia timet.[14]—Bills quia timet are of well recognized equitable cognizance.[15]

Bills of peace.[16]—A bill of peace lies to prevent the future assertion of claims where there is danger of irreparable injury in delay.[17] It also lies to prevent vexatious litigation.[18]

ERROR CORAM NOBIS; ERROR, WRIT OF, see latest topical index.

ESCAPE AND RESCUE.[19]

Where an escaped convict is returned there is no occasion for a trial of any issue,[20] unless his identity is denied,[21] or the state attempts to inflict additional punishment.[22] By statute in many states it is made an offense to escape from jail,[23] or from lawful custody,[24] or to attempt to do so.[25] These statutes being penal, the

6. Where no new matter which might have produced a different result was presented. Pomeroy v. Noud [Mich.] 13 Det. Leg. N. 401, 108 N. W. 498.

7. And cannot continue an injunction awarded by such decree pending an appeal from the decision on the bill of review. Kelly Bros. v. Diamond Drill & Mach. Co., 142 F. 868.

8. See 5 C. L. 1179.

9. Such a bill is not a bill of review and may be allowed without any previous application for a rehearing or bill of review, or writ of error, and may be filed at any time during the minor's minority or within the statutory period allowed after majority to prosecute a writ of error. Crane v. Stafford, 217 Ill. 21, 75 N. E. 424; Johnson v. Buck, 220 Ill. 226, 77 N. E. 163.

10. Such petition being a substitute for a bill in equity. Jesse French Piano & Organ Co. v. Bradley, 143 Ala. 530, 39 So. 47. Matter existing anterior to the judgment upon which the execution is issued cannot be made the ground for the supersedeas. Id.

11. Merritt v. Alabama Pyrites Co. [Ala.] 39 So. 555.

12. In such a suit, where the right to redeem is disputed, a court of equity alone can afford adequate relief. Klenk v. Byrne, 143 F. 1008.

13. But where the bill avers that the land is unoccupied, and such averment is not denied, the rule does not apply. In the absence of a denial of the allegations of the bill that the land is unoccupied, an affirmative averment in the answer that the defendant is in possession is a mere conclusion. Klenk v. Byrne, 143 F. 1008.

14. See 5 C. L. 1179.

15. Bill to determine rights of grantee of water rights as against other claimants from the same source, Howe & Davidson Co. v. Haugan, 140 F. 182. Where an oil and gas lease had been forfeited, the grantor, having resumed possession, might maintain a suit in the nature of a bill quia timet where there was danger of irreparable injury in delay. Brewster v. Lanyon Zinc Co. [C. C. A.] 140 F. 801.

16. See 5 C. L. 1179.

17. Where oil and gas lease had been forfeited, the grantor, having resumed possession, might maintain a bill in the nature of a bill of peace where there was danger of irreparable injury in delay. Brewster v. Lanyon Zinc Co. [C. C. A.] 140 F. 801.

18. Lyons v. Importers' & Traders' Nat. Bank, 214 Pa. 428, 63 A. 827. Where the vexatious litigation includes a suit in a Federal court, such suit cannot be enjoined, but the remedy is by way of a bill of peace. Id. A bill in the nature of a bill of peace lies at the instance of the owner of land to test his claim to the exclusive right to fish in a lake on such land as against the public. Percy Summer Club v. Astler, 145 F. 53.

19. See 5 C. L. 1178.

20. Petition of Moebus, 73 N. H. 350, 62 A. 170.

21. One confined as an escaped convict is entitled to process to try his identity unless already adjudicated. Petition of Moebus, 73 N. H. 350, 62 A. 170. An express refusal to join issue on identity admits the same. Id.

22. As authorized by Pub. St. c. 285, § 13; Id. c. 253, § 14. Petition of Moebus, 73 N. H. 350, 62 A. 170. Failure to so prosecute gives him no ground of complaint. Id.

23. Shannon's Code, §§ 6684, 6685, 7552, 7566. McCaslin v. McCord [Tenn.] 94 S. W. 79. An escape from a jailor while being worked on the road is an escape from jail within Ky. St. 1903, § 1338. Saylor v. Com. [Ky.] 93 S. W. 48.

24. One breaking jail while under sentence

case must come clearly within their terms.[26] An indictment for assisting another to escape must allege that the acts were done with the intent of so aiding.[27] An escaped convict under sentence for a felony may be arrested by a private person without a warrant.[28] As in other cases voluntary confessions are admissible.[29]

ESCHEAT.[30]

Property escheats without office found where the only heirs are nonresident aliens who die without declaring their intention of becoming citizens.[31] Where the title vests in nonresident alien heirs and is only lost by failure to appear and claim within a prescribed period, an escheat proceeding within such period is premature,[32] and where the statute provides for only one action, it must be postponed until it can be maintained against all classes of heirs.[33] The information in escheat proceedings must allege facts sufficient to show title in the state.[34] In California the nonappearance of heirs as claimants is prima facie proof of nonexistence.[35] In New York there is no prescribed time within which the state must redeem from a mortgage foreclosure on escheated property.[36]

ESCROWS.[37]

An escrow is a deed or other instrument delivered to some third person, to be by him delivered to the grantee, on the performance of some condition precedent by the grantee or another or the happening of some event.[38] A deposit of money has been treated as an escrow or of the nature of an escrow.[39] The intervention of a third person as a depositary,[40] a holding until the performance of some condi-

to the penitentiary, suspended pending an appeal, is punishable under Code 1896, § 4710, relating to escapes from lawful custody and not under § 4707 relating to escapes from the penitentiary, hirer, or guard, nor under § 4705, which is applicable only to those serving a sentence in the jail. Bradford v. State [Ala.] 41 So. 471.

25. Code 1896, § 5306, held to authorize an indictment for an attempt. Bradford v. State [Ala.] 41 So. 471. The procurement of tools adapted to jail breaking is not an "attempt" to break jail. State v. Hurley [Vt.] 64 A. 78.

26. A judgment that the state recover $2.50 and costs from defendants, and if they fail to pay the same to be required to work the same out on the public road, is not of itself a "sentence to imprisonment" within Ky. St. 1903, § 1338. Saylor v. Com. [Ky.] 98 S. W. 48. Nor is an oral direction to the jailor to take charge of them. Id.

27. Indictment under Pen. Code 1895, art. 225. Jenkins v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 56, 93 S. W. 554.

28. Petition of Moebus, 73 N. H. 350, 62 A. 170. For full treatment of the right of recapture, see Arrest and Binding Over, 7 C. L. 265.

29. On prosecution for attempt held that confession was properly admitted, there being sufficient proof of the corpus delicti, and the proper predicate having been established. Bradford v. State [Ala.] 41 So. 471.

30. See 5 C. L. 1180.

31. Where a widow's application for administration recited that decedent's next of kin were residents of a foreign country and there is nothing to show that they did not die such, the possibility of escheat renders the title unmarketable. Lowenfeld v. Ditchett, 99 N. Y. S. 724.

32. Civ. Code, § 1404, prescribes five years. State v. Miller [Cal.] 85 P. 609.

33. Premature as to nonresident alien heirs. State v. Miller [Cal.] 85 P. 609.

34. Under Civ. Code § 1386, providing that if a decedent leaves no heirs his estate shall escheat to the state, an allegation that there are no heirs is sufficient as to resident heirs (State v. Miller [Cal.] 85 P. 609), and under § 1404, providing that nonresident alien heirs shall forfeit their estate unless they appear and claim the same within five years, an allegation that such time has elapsed and no claim has been made is sufficient as to them (Id.).

35. Under Civ. Code § 1271, the state need not prove nonexistence of heirs by affirmative evidence if there are no claimants. State v. Miller [Cal.] 85 P. 609.

36. Lowenfeld v. Ditchett, 99 N. Y. S. 724.

37. See 5 C. L. 1181.

38. Anderson v. Goodwin, 125 Ga. 663, 54 S. E. 679.

39. Money deposited by a property owner to indemnify guarantors of mechanics' liens against the property is released to the depositor on payment of the liens at a judicial sale to satisfy incumbrances, irrespective of the fact that the guarantors themselves furnished the money with which to meet the amount of the mechanics' liens. Stone v. Mulvaine, 119 Ill. App. 443.

40. Larsh v. Boyle [Colo.] 86 P. 1000. Can be no delivery in escrow by the grantor to the grantee. Id. A sealed instrument can-

tion,[41] and a parting with all present or temporary right of possession, are necessary elements.[42] If the instrument remains in the control of the maker it is not strictly an escrow,[43] but it is not necessary that control be parted with for all time.[44] When a deed is delivered as an escrow, no title passes until the conditions on which it is to be delivered are complied with.[45] An unauthorized delivery contrary to the conditions is ineffectual for any purpose,[46] but a delivery on terms other than those agreed may be ratified by acquiescence.[47] The conditions on which the instrument is to become operative may be express or implied,[48] and may be changed by a subsequent agreement,[49] but the grantor cannot himself add any new condition[50] nor refuse to accept a tender of compliance with the true condition and thereby defeat the grantee's right to the deed or prevent transmutation of possession and title.[51] The original conditions are not affected by the fraudulent act of the custodian in disregarding them where there was no negligence in selecting him.[52] A memorandum by the custodian indorsed on the deed as to when delivery should be made is not conclusive of the terms on which it was deposited.[53] An escrow agreement is ordinarily nullified by the occurrence of an event inconsistent with the possibility of the contingency arising on which the escrow was based.[54] The depositary is a mere agent[55] who cannot be required to do, with reference to the subject-matter of

not be delivered to the grantee or obligee himself as an escrow to take effect upon a condition not appearing on its face. Bieber v. Gans, 24 App. D. C. 517.

41. Franklin v. Killilea, 126 Wis. 88, 104 N. W. 993. Deeds from husband and wife to third person, and from such third person to the wife passing expectancy of the husband on death of his mother, which were retained by such third person until after the death of the person on whose life the expectancy depended, held not deposited in escrow with such third person. Rendlen v. Edwards, 116 Mo. App. 390, 92 S. W. 731.

42. Franklin v. Killilea, 126 Wis. 88, 104 N. W. 993. Evidence held to show that power and control of release was parted with when it was delivered to depositary, and right of possession could only be restored upon nonperformance of the condition of the deposit. Id. The reservation of the right of the grantor of a deed deposited in escrow, for delivery after the grantor's death, to withdraw it at any time during his life on payment of all legal claims against him held by the grantee, renders a delivery by the depositary after the grantor's death ineffectual to pass the title as against the grantee of a deed executed and delivered in the lifetime of the grantor. Keyes v. Meyers, 147 Cal. 702, 82 P. 304.

43. Anderson v. Goodwin, 125 Ga. 663, 54 S. E. 679.

44. Franklin v. Killilea, 126 Wis. 88, 104 N. W. 993.

45. Schmidt v. Musson [S. D.] 107 N. W. 367; Craddock v. Barnes [N. C.] 54 S. E. 1003. Prior to the time for performance of the condition the grantor's title is not extinguished. Grantor in escrow agreement held entitled to be counted as a legal petitioner for a drain as to the land affected by the escrow. Hull v. Sangamon River Drainage Dist., 219 Ill. 454, 76 N. E. 701. On performance of the conditions the title vests in the grantee. Francis v. Francis [Mich.] 12 Det. Leg. N. 1004, 106 N. W. 864. It has been held that the placing of a deed in the bank box of the grantee to be effective on the death of the grantor, construed as an escrow, would vest title in the grantee on the death of the grantor. Hutton v. Cramer [Ariz.] 85 P. 483.

46. Paper taken from the depository by legal proceedings and recorded. Schmidt v. Musson [S. D.] 107 N. W. 367. Paper delivered and recorded contrary to the condition of the deposit forms no part in a chain of title even in favor of innocent purchasers. Franklin v. Killilea, 126 Wis. 88, 104 N. W. 993.

47. Defendant held estopped by acceptance of consideration and treating the property as having passed to claim that deed in escrow was erroneously delivered. Dempwolf v. Greybill, 213 Pa. 163, 62 A. 645.

48. Contract deposited with attorney held to operate as an escrow. Naylor v. Stene, 96 Minn. 57, 104 N. W. 685.

49. An agreement in writing executed by the grantee of a deed deposited in escrow after the deposit has been made is as effectual to qualify his title or right to the property as if it had been made at the time the deed was originally deposited. Keyes v. Meyers, 147 Cal. 702, 82 P. 304. See 6 Columbia L. R. 202.

50, 51. Craddock v. Barnes [N. C.] 54 S. E. 1003.

52. Release of mortgage held to have obtained no legal existence by delivery and recording in violation of conditions of deposit. Franklin v. Killilea, 126 Wis. 88, 104 N. W. 993.

53. Francis v. Francis [Mich.] 12 Det. Leg. N. 1004, 106 N. W. 864.

54. Where a litigant delivered to counsel for his adversary a consent to a discontinuance and a general release to become effective if in another action his wife obtained a judgment for alimony and should release him from payment thereof, his success in the divorce proceeding nullified the escrow

the agency, anything which could not be required of the principal.[56] The doctrine of substantial performance is applicable in escrow transactions,[57] as is also the doctrine of relation, in protecting the equities of the parties on performance of the conditions of the escrow.[58] The doctrine of partial performance ordinarily has no application,[59] and if the grantee allows his rights to lapse, no resulting trust arises in favor of himself or his privies for sums paid by him in partial performance as against a subsequent purchaser with notice.[60] One who has failed to exercise an option for the purchase of land within the time limited cannot enforce any right with respect to an escrow agreement between the grantors and third persons dependent upon the carrying out of the option agreement by him.[61] Whether a deposit in escrow was made is ordinarily a question of fact,[62] but the principle of estoppel applies to take the case from the jury when the party contending for the negative of the proposition has himself, in a contract executed by him, admitted the depositing of the deed in escrow, in the absence of allegation and proof of fraud or mistake as to the recitals of the contract.[63]

ESTATES OF DECEDENTS.

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agreement. Tucker v. Dudley, 99 N. Y. S. 339.

55. Hardin v. Neal Loan & Banking Co., 125 Ga. 820, 54 S. E. 755.

56. Depositary of deed held entitled to surrender of bond for title given by the grantor in the escrow agreement as condition precedent to surrender of deed or a showing that the bond was not in any event enforceable against the maker (Hardin v. Neal Loan & Banking Co., 125 Ga. 820, 54 S. E. 755), and where a deed is to be delivered only on a certain condition, it is immaterial whether the depositary is considered as the holder of an escrow or as a special agent (Anderson v. Goodwin, 125 Ga. 663, 54 S. E. 679). In either event he would not be authorized to deliver the deed except on the happening of the condition. Id.

57. Seller held not entitled to withdraw stock sold under escrow agreement for breach of conditions by purchaser. Boyd v. American Sav. Bank & Trust Co., 40 Wash. 571, 82 P. 904.

58. Whitmer v. Schenk [Idaho] 83 P. 775; Craddock v. Barnes [N. C.] 54 S. E. 1003. Vendee held entitled to rents from date of contract of sale, though deed was deposited in escrow and subsequently delivered on compliance with conditions thereof. Scott v. Sloan, 72 Kan. 545, 84 P. 117.

59. Whitmer v. Schenk [Idaho] 83 P. 775.

60. Purchaser stands in no relation of trust or confidence toward the grantee. Whitmer v. Schenk [Idaho] 83 P. 775.

61. White v. Bank of Hanford, 148 Cal. 552, 83 P. 698.

62. Allison v. Williams [Tex. Civ. App.] 14 Tex. Ct. Rep. 535, 91 S. W. 249. Evidence held to sustain finding that a mortgage release was placed in escrow by the mortgagee without notice to his assignee (Franklin v. Killilea, 126 Wis. 88, 104 N. W. 993), and that the release was obtained from the depositary and recorded without payment of the debt (Id.), and for the fraudulent purpose of discharging the assignee's mortgage lien (Id.). Evidence held insufficient to show the placing of a deed in escrow. Rendlen v. Edwards, 116 Mo. App. 390, 92 S. W. 731.

63. Evidence held to show the deposit of a deed in escrow. Allison v. Williams [Tex. Civ. App.] 14 Tex. Ct. Rep. 535, 91 S. W. 249.

B. Exhibition, Establishment, Allowance, and Enforcement of Claims (1422). Jurisdiction (1422). Occasion and Necessity of Proving Claims (1422). Time for Presentation; Limitations (1424). Notice (1427). The Claim; Its Form and Substance (1427). Allowance and Rejection (1428). Contests and Actions on Claims (1428). Evidence and Proof (1430). Set-off (1431). Judgments in Actions on Claims and Enforcement Thereof (1432).
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§ 13. Enforcement of Orders and Decrees by Attachment as For a Contempt (1473).
§ 14. Discharge of Personal Representatives (1473).
§ 15. Probate Orders and Decrees (1473).
§ 16. Appeals in Probate Proceedings (1479).
§ 17. Rights and Liabilities Between Beneficiaries of Estate (1483).
A. In General (1483).
B. Advancements (1485). Hotchpot (1486).
§ 18. Rights and Liabilities Between Beneficiaries and Third Persons (1487).

Scope of title.—Matters relating to the descent of property under the intestate law,[1] the validity, probate, and interpretation of wills,[2] testamentary trusts,[3] the administration of partnership property by the surviving partner,[4] and inheritance and succession taxes,[5] are treated elsewhere.

§ 1. *Necessity or occasion for administration and kinds thereof.*[6]—As a general rule administration is a prerequisite to the devolution of the personal estate of a decedent,[7] but is not necessary to pass title to his realty,[8] nor to the maintenance of a suit to enjoin the foreclosure of a trust deed for a debt claimed to be void.[9] A creditor is generally entitled to have an administrator appointed where there are

1. See Descent and Distribution, 7 C. L. 1137.
2. See Wills, 6 C. L. 1880.
3. See Trusts, 6 C. L. 1736.
4. See Partnership, 6 C. L. 911.
5. See Taxes, 6 C. L. 1602.
6. See 5 C. L. 1184.
7. McBride v. Vance [Ohio] 76 N. E. 938. No right of action on a promissory note belonging to a decedent is shown by a party in an action on the note by proof of possession and that he is the sole heir of the decedent. Id.
8. Realty passes under a will from the death of the testator without probate. Irving v. Bruen, 110 App. Div. 558, 97 N. Y. S. 180. Under Bal. Ann. Codes & St. § 4640, providing that interest of a decedent in realty shall vest immediately in his heirs or devisees subject to his debts, etc., and Id. § 4642, providing that realty shall not be liable for decedent's debts unless administration is had within six years after his death, held that where 11 years had elapsed since testator's decease, and his estate had been fully settled in another state by a court of competent jurisdiction and all his debts paid, and he left no personalty in Washington, but his only property was realty to which he held the equitable title, there was no necessity for administration in Washington. Murphy v. Murphy, 42 Wash. 142, 84 P. 646.
9. Appointment of executor or administrator for estate of deceased beneficiary held

assets within the jurisdiction of the court,[10] but where there are no debts the heirs and distributees may settle and distribute the estate without administration.[11] In most states an administrator may be appointed for the sole purpose of enforcing the statutory liability for death by wrongful act, though the proceeds will not become general assets of the estate.[12] An administrator may be appointed for the estate of a deceased minor.[13] In Louisiana the question as to whether a succession shall be placed under administration rests to a very large extent in the sound discretion of the trial judge to be exercised for the benefit of all parties in interest, and especially for the benefit of parties advancing claims against the succession.[14] The state has power to provide for the administration and distribution of the estates of absentees, provided the latter are not thereby deprived of their property without due process of law.[15]

Ancillary administration.[16]—The administration granted in the state of the decedent's domicile is generally regarded as the principal one, and any others as ancillary,[17] though the location of the bulk of the assets and the majority of the creditors and beneficiaries is made the test in some states.[18]

An administrator de bonis non[19] will not be appointed long after the estate has been closed, and a former administrator de bonis non discharged, merely for the purpose of enforcing a small claim not paid in the former administration which the claimant may collect out of property in the hands of the heirs.[20]

An administrator with the will annexed cannot be appointed where the court refuses to admit the will to probate.[21]

not necessary, since court may retain in its custody any amount found due the estate until person authorized to receive same has been qualified. Peebles v. Yates [Miss.] 40 So. 996.

10. Where it was undisputed that there were some assets at the time of the death of the intestate within the jurisdiction of the probate court, held that a creditor was entitled to have an administrator appointed, the next of kin having no authority to dispose of such assets to the prejudice of creditors. Ex parte Conrad [S. C.] 54 S. E. 799.

11. Settlement and distribution render administration unnecessary even as to personalty, and an administrator subsequently appointed cannot recover assets from those to whom they have been distributed pursuant thereto. Douglas v. Albrecht [Iowa] 106 N. W. 354. Evidence held to authorize submission to jury of issue as to whether agreement for distribution without administration was made. Id. Fact that there was only one debt held not to defeat jurisdiction of probate court to appoint administrator where it was not paid by the heirs to prevent administration. Rye v. Guffey Petroleum Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 739, 95 S. W. 622.

12. See § 2, post.

13. Bowden v. Jacksonville Elec. Co. [Fla.] 41 So. 400.

14. Succession of Theriot, 116 La. 25, 40 So. 519. Administration held properly granted where there were a large number of heirs, some of whom were minors and some nonresidents. Id.

15. See, also, Absentees, 7 C. L. 9. State legislature held to have power to pass Burns' Ann. St. 1901, §§ 2385-2390, it not being claimed that statute was invalid if legislature had power to pass any statute for that purpose under the 14th amendment. Barton v. Kimmerley, 165 Ind. 609, 76 N. E. 250. Laws 1896, p. 434, c. 246 (Code 1904, § 234), held to be in violation of art. 23 Md. Bill of Rights and the 14th amendment to the Federal constitution, in that it is unreasonable and because it makes the decision of the court that the absentee is dead conclusive as to him and does not require an inquiry as to the fact of death, or adequately provide for the protection of the absentee's rights should he be alive. Savings Bank v. Weeks [Md.] 64 A. 295. Code 1904, p. 1786, providing that if a resident absents himself from the state for seven years successively he shall be presumed to be dead in any case where his death shall come into question, unless proof be made that he was alive within that time, if construed in connection with Code 1904, pp. 1160, 1352, which provide for the granting of letters of administration on a decedent's estate so as to authorize the administration of an absentee's property during his lifetime without his knowledge or consent and in a proceeding in which he is not a party and of which he has no notice, is repugnant to Const. U. S. Amend. 14. Seldon's Ex'r v. Kennedy, 104 Va. 826, 52 S. E. 635.

16. See 5 C. L. 1185.

17. Where administration has in fact been granted in two or more states. In re William's Estate [Iowa] 107 N. W. 608.

18. Administration in Washington held principal one where widow moved into that state after testator's death, and bulk of property was in that state and was to be ueed in establishing a charity there, though testator and two of the executors were residents of Oregon. Rader v. Stubblefield [Wash.] 86 P. 560.

19. See 5 C. L. 1185.

20. Turner v. Wallace [Tex.] 14 Tex. Ct. Rep. 977, 92 S. W. 31, afg. 89 S. W. 432.

21. Where superior court denies probate

A special administrator may generally be appointed when there is delay in granting letters testamentary or of administration for any cause.[22]

Limited administration.—In New York letters may be issued limited to the prosecution of a right of action given to the executor or administrator by special provision of law.[23]

§ 2. *Jurisdiction and courts controlling administration.*[24]—Courts of probate generally have only such powers as are conferred upon them by statute, and such as are necessarily incidental thereto.[25] In many states their jurisdiction over the estates of decedents is exclusive.[26] In some states provision is made for the removal of proceedings to a court of general jurisdiction where the probate judge is disqualified.[27] The jurisdiction of the various courts over proceedings for the removal of a representative,[28] to sell[29] or partition realty,[30] to recover property

to the will, it is not authorized to appoint an administrator with the will annexed. In re Bonyssou's Estate [Cal. App.] 84 P. 460.

22. Under Code Civ. Proc. § 2500, held that court had no jurisdiction to make such an appointment pending a will contest where persons instituting contest had no right to do so, the words "from any cause" meaning any legal cause. State v. District Ct. [Mont.] 85 P. 1022. Widow could not confer such jurisdiction, and hence was not estopped to object to appointment of another person because she herself asked to be appointed. Id.

23. Code Civ. Proc. § 2664. In re Halligan's Estate, 50 Misc. 481, 100 N. Y. S. 622.

24. See 5 C. L. 1185. See, also, Jurisdiction, 6 C. L. 267.

25. Surrogate. In re Thompson, 184 N. Y. S. 36, 76 N. E. 870. The district court, sitting as a court of probate, is limited by the provisions of the statute in the exercise of its jurisdiction. In re Tuohy's Estate [Mont.] 83 P. 486. Has by implication all power incidentally necessary to exercise those expressly conferred. State v. District Ct. [Mont.] 86 P. 269.

26. The probate court has exclusive jurisdiction of the settlement of estates subject to appeal to the district court for review of any proceeding had therein. Abrams v. White [Idaho] 83 P. 602. Oversight and direction of settlement of estates is committed to district courts, and supreme court will not interfere therein except upon a clear and satisfactory showing that justice demands it. Wheeler v. Long, 128 Iowa, 643, 105 N. W. 161.

27. Where proceeding is removed to county or circuit court under Rev. St. 1899, § 1760, it does not lose its probate character but is governed by administration law, except in matters of practice. Keele v. Keele, 118 Mo. App. 262, 94 S. W. 775.

28. On petition for revocation of letters and for appointment of petitioner as administratrix on ground that she was decedent's widow, held that surrogate had jurisdiction to determine whether there had been sufficient service of process to give supreme court jurisdiction to annul petitioner's marriage in a trial on default. In re McGarren's Estate, 98 N. Y. S. 415.

29. **Massachusetts:** Power to authorize sale of realty to pay debts is in probate court under Rev. Laws, c. 146, §§ 6-8, and supreme court cannot direct or control it in this regard by determining what property shall be sold first in suit by representative for instructions. Robinson v. Cogswell [Mass.] 78 N. E. 389.

North Carolina: Superior court as court of general equity jurisdiction held to have alone had jurisdiction to direct sale of realty to create fund to pay debts and thereby preserve the personalty in accordance with an agreement by the interested parties. State v. Settle [N. C.] 54 S. E. 445.

Tennessee: The circuit and chancery courts have concurrent jurisdiction with the county court to sell lands for the payment of a decedent's debts after the exhaustion of the personalty. Shannon's Code, §§ 4000-4003, 6071, 6112, construed. Bashaw v. Temple, 115 Tenn. 596, 91 S. W. 202. Suit is maintainable in the chancery court where the proper steps have not been taken to have the estate administered as insolvent, though the property of the estate is of less value than $1,000. Id. Where the estate has been declared insolvent and is worth less than $1,000, the county court has exclusive jurisdiction over its administration, and hence, though an appeal lies to the circuit court from an order dismissing the petition of the administrator alleging the insolvency of the estate and praying for a sale of the lands, that court has no jurisdiction to decree a sale of the lands and have the same sold by the clerk, but after settling the controversy must remand the cause to the county court for further proceedings, Shannon's Code §§ 4066-4094, 4879, construed. Harness v. Hughett [Tenn.] 97 S. W. 68.

30. Probate court has no jurisdiction to decree partition where the lands are not susceptible of division into equal parts, or parts of equal value, and hence has none where the parties own unequal interests. Bozone v. Daniel [Ala.] 39 So. 774. Original jurisdiction of courts of equity to partition lands among joint owners or tenants in common is not taken away by Code 1896, § 3178, conferring jurisdiction on probate court to sell land held by joint owners or tenants in common in certain cases, but two courts have concurrent jurisdiction in regard to all matters in regard to which statute confers authority on probate court. Id. An executor may file a bill in the chancery court. Code 1896, §§ 3185, 3187, 3262, construed. Schuessler v. Goodhue [Ala.] 41 So. 958.

conveyed by decedent during his lifetime,[31] to determine adverse claims to property held by the representative,[32] for the setting off of the widow's award,[33] for an accounting by the representative,[34] for the settlement and distribution of estates,[35] to

31. The probate court being without power to reach property which decedent was fraudulently induced to convey or to create liens or enforce transfers, equity has jurisdiction to grant appropriate relief in a suit for that purpose on ground that there is no adequate remedy at law. Marsh v. Marsh, 78 Vt. 399, 63 A. 159.

32. New Jersey: Orphans' court held to have no jurisdiction to determine equitable ownership of a note inventoried as assets of the estate and claimed by petitioner to have taken the place of a previous note made by the same maker to a person previously deceased, which petitioner claimed had been given by the latter to the intestate for life and on her death to petitioner, petitioner's remedy being by a suit in equity against the maker or his representatives, who were not parties to the proceeding in the orphans' court. In re Ferdon's Estate [N. J. Eq.] 62 A. 551.

Texas: Vendor rescinded contract of sale after vendee's death and instituted suit of trespass to try title to recover the land against the vendee's widow individually and as administratrix of his estate and caused the land to be sequestered. The administratrix, in her official capacity and under order of the county court, replevied it and continued in possession under a replevy bond until final judgment was rendered in favor of the vendor. Held that an action by the vendor for the rents of the land pending the suit was to be treated as one asserting an adverse claim of ownership to property unlawfully withheld by the administratrix, and not as one to collect a debt due by the estate so that the district and not the county court had jurisdiction, and it was immaterial that administratrix's final account had not been approved and the estate closed. Fidelity & Deposit Co. v. Texas Land & Mortg. Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 183, 90 S. W. 197.

33. Probate court has jurisdiction to determine which of two claimants is entitled thereto. Field v. Field, 117 Ill. App. 307.

34. California: Right of administrator to compensation and to be reimbursed for expenses, etc., can only be determined by probate court, and sureties are not entitled to credit therefor in an action on bond before such determination. Elizalde v. Murphy [Cal. App.] 87 P. 245.

New Jersey: The court of chancery has jurisdiction to require an accounting by the representative, but, while paramount, its jurisdiction is to some extent concurrent with that of orphans' court. Ker v. Banta [N. J. Eq.] 63 A. 550.

New York: Surrogate's court held proper tribunal in which to take account of executor and testamentary trustee under Code § 2514, subd. 11. Meeks v. Meeks, 100 N. Y. S. 667. The supreme court has concurrent jurisdiction with the surrogate's court to call an executor or administrator to account, and will entertain an action for that purpose when it is shown that the circumstances of the case are such as to require relief of a nature which could not be obtained in the surrogate's court. Citizens' Central Nat. Bank v. Toplitz, 98 N. Y. S. 826. An actual or probable attack upon the validity of an assignment of a legacy or distributive share, concerning which surrogate's court has no jurisdiction to adjudicate, would constitute a circumstance authorizing the supreme court to entertain the action. Id. Action by assignee in supreme court should be one for an accounting. Id. Complaint alleged that two legatees assigned to plaintiff their shares in the estate and authorized administrator to retain from any distribution their shares and to pay therefrom a note given by them to plaintiff in case same had not been paid, that assignment was presented to administrator who accepted it and "promised and agreed" to comply with its provisions, that administrator was notified that note had not been paid, and that more than sufficient money to pay note had come into his hands, which he had paid over to legatees. Held that complaint would be dismissed, it appearing that defendant still had in his hands more than enough money belonging to legatees to pay plaintiff, the agreement not being binding on defendant personally, and the complaint not being framed for an accounting, which was necessary. Id. Upon the judicial settlement of the accounts of an executor or trustee, the surrogate has full power to pass upon all questions necessarily involved in such accounting, whether they refer to realty or are confined to personalty, and hence may construe a will of realty. In re Bruchaeser's Estate, 49 Misc. 194, 98 N. Y. S. 937. Question whether executor and testamentary trustee had paid over the whole or only a part of a legacy claimed by a beneficiary held within the power of the surrogate to determine, and complaint in action in supreme court to compel an accounting and to set aside decrees of surrogate confirming previous accounts dismissed. Meeks v. Meeks, 100 N. Y. S. 667. On settlement of accounts has jurisdiction to determine whether claim has been rejected or allowed. In re Jacobs, 109 App. Div. 293, 96 N. Y. S. 133.

35. Illinois: The court of probate has jurisdiction, notwithstanding the absence of special statutory enactment, to ascertain and determine by decree the heirs of an estate over which it has jurisdiction. Ford v. Ford, 117 Ill. App. 502.

Maryland: Authority to superintend the distribution of the estate necessarily involves authority to determine what is to be distributed, and hence what are assets, and where there is a will, who are the legatees and what is given them by the will. Gallagher v. Martin, 102 Md. 115, 62 A. 247. Under Code Pub. Gen. Laws art. 93, § 234, orphans' court has authority to determine whether legacy was adeemed. Id. Held error to dismiss petition of executor to set aside account showing that legacy was dis-

determine conflicting interests of heirs or distributees and third persons,[36] to settle controversies in regard to advancements,[37] over suits by legatees to recover their legacies,[38] and on bonds given to secure their payment,[39] and to determine questions incidentally involved in such proceedings, is largely regulated by statute and varies in the different states. The same is true in regard to the equitable jurisdiction of courts of probate.[40]

tributable to legatee and to revoke former order setting aside account, without a hearing on question whether legacy had been adeemed as alleged in such petition. Id.

Minnesota: Under Laws 1901, p. 567, c. 346, § 1, as amended by Laws 1903, p. 29, c. 23, providing for the determination by the probate court of the descent of realty and the making of a decree for its distribution on a petition showing that more than five years has elapsed since the death of the person owning it or any interest therein, and that no will has been probated and no administration granted in the state on his estate, held that probate court of any county wherein lies any part of the lands of a decedent in which a proper petition is filed has jurisdiction to determine the descent of all lands of the decedent in the estate and decree distribution thereof, though part of them may lie in other counties. Chadbourne v. Alden [Minn.] 107 N. W. 148.

New Jersey: The orphans' court has ample jurisdiction, upon the application of any party in interest, to make just distribution of the estate in accordance with the directions of the will and to enforce its decrees with like effect to those of the court of chancery. P. L. 1898, p. 781, § 173. Wyckoff v. O'Neil [N. J. Eq.] 63 A. 982.

North Carolina: Probate and superior courts have concurrent jurisdiction in suits for the settlement of estates, the latter court being one of general equitable jurisdiction. Laws 1876-77, p. 447, c. 241, § 6. State v. Settle [N. C.] 54 S. E. 445.

Texas: Estates must be administered in county court, and hence judgment of district court directing manner of distribution held erroneous. Smart v. Panther [Tex. Civ. App.] 15 Tex. Ct. Rep. 448, 95 S. W. 679.

36. California: While probate courts have all the powers of courts of equity in the settlement of estates to determine the conflicting interests of heirs and lienors, such interests can only be determined in an appropriate proceeding under proper pleadings. In re Heeney's Estate [Cal. App.] 86 P. 842. Where two of the heirs paid off a mortgage on property of the decedent and procured an assignment of the note and mortgage to another heir, and latter and one of the others died, held that the respective rights of the heirs could not be determined in a proceeding for the settlement of the final accounts of the other who was subsequently appointed administrator. Id.

Illinois: Probate court has no power to determine the validity of collateral agreements between legatees or devisees executed subsequent to the death of the ancestor and to adjust the equities arising therefrom, but its sole province is to see that the will of the testator is executed in the manner therein provided. Teel v. Mills, 117 Ill. App. 97.

Missouri: The probate court has no jurisdiction to determine the conflicting claims of distributees and outside parties to funds in the hands of an administrator awaiting distribution. Conflicting claims between administrator and decedent's husband to surplus resulting from sale of realty, which was deeded to wife for life with remainder to husband after payment of her debts and funeral expenses. In re Winnegar's Estate, 118 Mo. App. 445, 94 S. W. 833.

Pennsylvania: The power of the orphans' court to distribute includes the power to decide all questions necessary to a proper distribution, and in a proceeding for distribution of proceeds of sale of realty among devisees it may determine the validity and effect of a conveyance by a devisee to a third person. In re King's Estate [Pa.] 64 A. 324.

New York: Surrogate has no jurisdiction to try the issue as to whether, as between the widow personally and the creditors of her deceased husband, any part of the proceeds of an insurance policy on the husband's life was charged with a lien in favor of his creditors under Laws 1896, p. 220, c. 272, § 22. In re Thompson, 184 N. Y. S. 36, 76 N. E. 870.

37. Code 1896, providing that controversies in regard to advancements are cognizable before the probate court, etc., held to refer only to controversies as to whether advancements have been made or not, and their amounts, and not to authorize that court in partition suits to adjust and equalize advancements among tenants in common where the lands descend from a common ancestor. Bozone v. Daniel [Ala.] 39 So. 774. Where only interest parties had in land was right under a decedent's will to a distributive share in the proceeds of the sale thereof, subject to a deduction to be made on account of advancements, held that the probate court had no jurisdiction to adjust such matters in the statutory proceedings to sell lands for partition among joint owners. Greer v. Herren [Ala.] 41 So. 783.

38. The court of chancery has jurisdiction notwithstanding the pendency of administration proceedings in the orphans' court. Wyckoff v. O'Neil [N. J. Eq.] 63 A. 982. The orphans' court has jurisdiction, the proceedings being in all respects governed by the rules and practice of the court of chancery in similar suits. P. L. 1898, p. 787, § 192. Id.

39. District court and not county court has jurisdiction of an action on a bond conditioned on payment to the obligee of the amount of her legacy under a will when the will was established, which was executed for the purpose of preventing and did prevent the appointment of an administrator with the will annexed. Hummel v. Del Greco [Tex. Civ. App.] 14 Tex. Ct. Rep. 246, 90 S. W. 339.

40. Illinois: Possesses no general chan-

The death of the decedent[41] and the existence of property or assets within the county are necessary prerequisites to jurisdiction.[42] So, too, the existence of assets within the state is a condition precedent to the administration of the estate of a nonresident.[43] In case there is property within two or more counties the courts of all of them have concurrent jurisdiction,[44] but the one to which application for letters is first made will retain the jurisdiction so acquired to the exclusion of the others.[45] A right of action for death by wrongful act is generally held to be assets within these rules,[46] though there seems to be some conflict of authority in

cery jurisdiction though clothed with equitable powers to a certain extent. Teel v. Mills, 117 Ill. App. 97.

Missouri: Has no jurisdiction to award equitable relief and hence its judgment, and that of circuit court on appeal, allowing a claim, were nullities where allowance called for exercise of powers of court of equity to set aside a contract between decedent and claimant. Ivie v. Ewing [Mo. App.] 96 S. W. 481.

Ohio: Where a claim by a divorced wife against estate of deceased minor child for past maintenance and support is presented to the probate court under Rev. St. § 6100, there is drawn to that court the chancery jurisdiction necessary to a complete exercise of the jurisdiction specially conferred by the statute. Spink v. Spink, 7 Ohio C. C. (N. S.) 89.

41. Probate proceedings on the estate of one who is not dead are void and he may recover the property taken possession of by the administrator provided he commences an action therefor within the time fixed by the statute of limitations. Fay v. Costa [Cal. App.] 83 P. 275. Action held barred by Code Civ. Proc. § 338, where it was not commenced until more than three years after plaintiff discovered the facts. Id. On discovering facts plaintiff procured a decree in superior court annulling probate proceedings and directing administrator to return to plaintiff all the property received by him in that capacity. Defendant subsequently procured a writ of review from supreme court which thereafter set aside and annulled the decree of the superior court. Held that the decree was not "reversed on appeal" within the meaning of Code Civ. Proc. § 355, so as to suspend the running of limitations and give plaintiff a year within which to commence a new action. Id. The grant of administration on, and the appointment of an administrator for, the estate of a living person is absolutely null and void from the beginning for all purposes whatsoever for want of jurisdiction of the subject matter. Payment to administrator in such case would be no defense. In re Clark's Estate [Vt.] 64 A. 231.

42. Administration on the estates of nonresidents may be had in any county in which he left property. Code Civ. Proc. § 1294, subd. 3. Dungan v. Superior Ct. [Cal.] 84 P. 767. Corporate stock is, within the meaning of § 2476, subd. 3, property within the county where the corporate property is, or where the corporation has its principal place of business. In re Arnold, 99 N. Y. S. 740. Evidence held sufficient to justify finding that deceased left property in county so that court had jurisdiction, under Rev. St. 1898, § 3819, to appoint public administrator to take charge of his estate pending application by those entitled to letters. Jordan v. Chicago & N. W. R. Co., 125 Wis. 581, 104 N. W. 803.

43. V. S. 2326, 2327. Church's Ex'r v. Church's Estate, 78 Vt. 360, 63 A. 228. Ancillary letters can only be granted where there are assets to be administered or where there is some right or purpose of the estate to be subserved thereby, within the jurisdiction where such administration is sought. Cooper v. Gulf, etc., R. Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 9, 93 S. W. 201.

44. Where nonresident left personalty in several counties and realty in another county and no ancillary administration had been issued in the state, held that surrogate's courts of counties in which he left personalty had concurrent jurisdiction to issue letters. Code Civ. Proc. §§ 2476, 2477, construed. In re Arnold, 99 N. Y. S. 740.

45. Code Civ. Proc. § 1295. Dungan v. Superior Ct. [Cal.] 84 P. 767. The filing of a proper petition with the clerk of the superior court constitutes the making of an application within the meaning of this section. Id. Constitutional provision conferring probate jurisdiction on the superior courts does not mean that all the superior courts in the state have concurrent jurisdiction in every particular probate matter, but legislature has authority to prescribe by general laws rules for determining what particular court shall exercise such jurisdiction in any particular estate. Id. Where public administrator of one of two counties in which decedent leaves property files petition for appointment, court of that county has exclusive jurisdiction of the estate pending proceedings thus instituted, and court of another county has no jurisdiction to grant letters to its public administrator. In re Davis' Estate [Cal.] 87 P. 17. Prohibition will lie where a superior court assumes jurisdiction of the administration of an estate of a nonresident in spite of the fact that an application for letters has previously been made in another county, the remedy by appeal being inadequate. Dungan v. Superior Ct. [Cal.] 84 P. 767. The public administrator who has been appointed administrator by the court in which the application was first made, and the next of kin, have a sufficient beneficial interest to enable them to apply for the writ. Id.

46. Reiter-Conley Mfg. Co. v. Hamlin [Ala.] 40 So. 280; Young's Adm'r v. Louisville & N. R. Co. [Ky.] 89 S. W. 475. A personal representative may be appointed for a nonresident decedent killed in the state through negligence, though he has no other property in the state. Id. While cause of action given by Rev. St. Wyo. 1899, §§ 3448, 3449,

this regard.[47] It has been held that a statutory right of action for personal injuries which survives to the injured party's personal representatives cannot be made the basis of an administration in a foreign state.[48] A court, ordinarily, has no jurisdiction to compel an accounting by a foreign representative, nor to determine matters necessarily involving such an accounting.[49] Jurisdiction over the person may be acquired by appearance as in other cases.[50] In states where the probate court has no jurisdiction over trusts, its jurisdiction ceases when the estate has been fully settled and distributed and the representative discharged, though he retains property as testamentary trustee.[51]

Jurisdiction of courts of equity.[52]—The jurisdiction of courts of equity over proceedings to sell realty, for an accounting, to recover legacies and the like, has already been treated.[53] Equity does not acquire jurisdiction over a suit for conversion of property from the mere fact that one of several defendants is an executor.[54] A general creditor of a decedent cannot sustain a bill in equity on a purely legal demand unless he shows that he has exhausted his legal remedy, or that such remedy, for some good cause, would be inadequate or unavailing.[55] A bill filed by a general creditor against the administrator and heirs, which does not seek to charge the decedent's realty and to subject the same to the payment of his debts, is bad on demurrer if it fails to show that there are assets in the hands of the administrator to be administered.[56] Equity generally has jurisdiction to review the proceedings of the probate court and to set aside its judgments where fraud has been practiced on the court or the other party.[57] In some states, any person interested in the

is not a general asset of the estate, it is a sufficient asset for the purpose of appointing an administrator. In re Lowham's Estate [Utah] 85 P. 445.

47. Where decedent was injured on defendant's railroad in Indian Territory and subsequently died in Oklahoma where he resided, and left no kin and no property in Texas, held that the right of action for death by wrongful act given his personal representatives for the benefit of his widow and next of kin by Mansf. Dig. §§ 5225, 5226, in force in Indian Territory, was not assets in Texas in which state defendant was domiciled, and county court of that state had no jurisdiction to appoint administrator for sole purpose of enforcing it. Cooper v. Gulf, etc., R. Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 9, 93 S. W. 201.

48. Mansf. Dig. § 5223, in force in Indian Territory, providing that for wrongs done to the person or property of another an action may be maintained against the wrongdoers by the injured party or by his executor or administrator after his death, is a local law, having no extraterritorial effect, and cannot be enforced in courts of Texas. Cooper v. Gulf, etc., R. Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 9, 93 S. W. 201. Hence right of action given thereby for damages for personal injuries, which survives to the injured party's personal representatives after his death, does not confer jurisdiction on Texas courts to appoint an administrator for sole purpose of collecting such a claim against a Texas corporation resulting from injuries received by a resident of Oklahoma in Indian Territory, no such right of action existing under the laws of Texas. Id.

49. On application for sale of realty of infants, held that court was without jurisdiction to adjudicate on claim of their mother for money expended for their support based on her dealings as administratrix with the estate of her husband, she having been appointed as such administratrix by the courts of a foreign state, and a settlement of her accounts being necessary to an adjustment of her claim. In re Wyckoff, 50 Misc. 190, 100 N. Y. S. 417.

50. Proceedings for distribution. Ford v. Ford, 117 Ill. App. 502.

51. Orphans' court has no power to impose a proctor's fee, allowed in a suit to vacate probate of the will, on funds remaining in hands of executor as testamentary trustee. In re Meyers' Estate [N. J. Eq.] 64 A. 137.

52. See 5 C. L. 1189. See, also, Equity, 7 C. L. 1323; Jurisdiction, 6 C. L. 267.

53. See ante, this section.

54. Does not give court jurisdiction of a suit for the wrongful cutting, carrying away, and conversion of timber from the public domain, where complainant's bill shows that the estate is solvent and no discovery of assets is sought. United States v. Bitter Root Development Co., 200 U. S. 451, 50 Law. Ed. —, afg. [C. C. A.] 133 F. 274.

55. Bill by administrator with the will annexed against heirs and administrator of one to whom distribution was made before the discovery of a will and who was entitled to nothing under the will, held demurrable. Crawford's Adm'r v. Turner's Adm'r, 58 W. Va. 600, 52 S. E. 716.

56. Bill by administrator with will annexed against heirs and administrator of one to whom distribution was made before a discovery of the will and who was not entitled to anything under the will, held de-

estate may have the administration transferred to a court of equity without assigning any cause for equitable interposition, providing the probate court has not yet taken jurisdiction for the special purpose of final settlement.[58] If the probate court has taken such jurisdiction, however, no removal can be had unless some exclusive ground of equity cognizance is shown, or some fact averred because of which the powers of the probate court are inadequate.[59] The bill need not aver that decedent died or that the estate has assets in the county in which administration is pending.[60] Where courts of equity and the probate court have concurrent jurisdiction, the court first obtaining jurisdiction will retain it to the exclusion of the other, in the absence of special circumstances rendering the jurisdiction at law inadequate.[61] As in other cases, the court having rightfully assumed jurisdiction, will

murrable. Crawford's Adm'r v. Turner's Adm'r, 58 W. Va. 600, 52 S. E. 716.

57. Will relieve the heirs against a judgment obtained against the administrator by collusion with him or from a failure on his part to use proper diligence to defend the suit, unless it was for a valid and subsisting claim. Refusal of relief held error. Patteson v. Carter [Ala.] 41 So. 133. Where probate court found that claim of estate on certain notes, given for money advanced to the maker to purchase certain land, could not be realized in money or property and ordered the same to be sold, held that the court having had jurisdiction to make the order and there being no evidence of fraud in procuring it or in making the sale, the chancery court would not set aside such sale. Dorsey v. Connerly [Ark.] 92 S. W. 771. Equity will not lend its aid in an original proceeding in the district court involving the settlement of an estate unless it is shown that fraud has been perpetrated in the probate court. Is not sufficient that party has permitted statutory time to run against an appeal. Abrams v. White [Idaho] 83 P. 602. The particular act and thing constituting the fraud must be definitely and positively alleged, and that the party is without remedy elsewhere than in a court of equity. Complaint held demurrable. Id. The district court has jurisdiction of a suit, brought after the administration has been closed and the executor fully discharged, by a devisee to set aside a sale of land by the executor to his surety on the ground of fraud. Suit by one who was minor when sale was made and was unrepresented in the proceedings, and in which relief demanded was setting aside sale, canceling deed, placing plaintiff in possession, decreeing partition, and awarding damages for rents and profits. Fincke v. Bundrick, 72 Kan. 182, 83 P. 403. Equity has jurisdiction to set aside a judgment of the probate court for fraud practiced for the purpose of misleading the court into assuming jurisdiction, or proceeding with the trial of a cause over which jurisdiction has been obtained, and which has misled both the court and the opposing party into acting as neither would otherwise have done, provided such opposing party has been free from actual negligence, has acted with due diligence in discovering the fraud, and is without legal remedy in the proceeding in which the judgment was obtained. Fitzpatrick v. Stevens, 114 Mo. App. 497, 89 S. W. 897. Judgment allowing claim may be set aside in suit by administrator where note on which it was based had been paid by decedent in his lifetime, but administrator had no knowledge of that fact or of any facts putting him on inquiry, and claimant made a false affidavit that claim was due, an affidavit being necessary to give probate court jurisdiction to pass on the claim. Id. Remedy provided by Rev. St. 1899, § 214, requiring probate court to vacate allowance of claims in certain cases on application of the administrator within four months after such allowance is made, is not exclusive in case of fraud but is concurrent with that afforded by suit in equity to set aside judgment of allowance. Id. Limitation imposed upon representative's right to sue in equity to set aside judgment for fraud is that fixed by Rev. St. 1899, § 214. Id. Equity will not entertain bill to set aside decree of distribution and declare will under which it was made void, unless under extraordinary circumstances where fraud or a breach of trust extrinsic to the proceedings is shown. Goodrich v. Ferris, 145 F. 844. Such a case held not to have been shown by allegation that complainant, who was not an heir, but claimed an interest in estate through his deceased wife, was told by executor after her death that she had no interest in the estate, which was true under will previously probated without objection, which gave her a life estate only. Id.

58. Bill held sufficient. Cloquitt v. Gill [Ala.] 41 So. 784. Fact that will devised and bequeathed property to defendant, who was also administrator, for life, held no obstacle to assumption of administration by court of equity, particularly where the bill is filed by the remainderman and it is averred that defendant has invested a part of the property bequeathed in other property to which he has taken title in his own name absolutely, and in disregard of complainant's reversionary rights. Bresler v. Bloom [Ala.] 41 So. 1010.

59. Cloquitt v. Gill [Ala.] 41 So. 784.

60. Those facts are referable only to issuance of letters of administration by the probate court, to which alone Code 1896, § 55, applies. Cloquitt v. Gill [Ala.] 41 So. 784.

61. To partition realty. Bozone v. Daniel [Ala.] 39 So. 774. Court of chancery will not interfere with the jurisdiction of the orphans' court to compel accounting except for some special cause. Held that administrator with will annexed would not be decreed to

retain it for the purpose of granting all necessary relief which is within the scope of the petition.[62]

Jurisdiction of Federal courts.[63]—In cases where the requisite diversity of citizenship exists and the jurisdictional amount is involved, the Federal courts have jurisdiction to adjudicate and allow claims against the estates of decedents.[64] So, too, a Federal circuit court has jurisdiction of a suit by citizens of another state to determine and award their shares in an estate where no part of the property has passed into the hands of an administrator, or otherwise into the possession of a state court, but is in part held by a receiver of the state court and in part by a surviving partner as trustee of decedent's interest.[65] In such case the court may order the payment of the money in its custody directly to the persons found entitled thereto without the intervention of an administrator.[66]

§ 3. *The persons who administer and their letters. A. Selection and nomination.*[67]—The executor named in the will has a right to the appointment unless he is within the class of persons declared by the statute to be incompetent,[68] or unless he renounces his right, either expressly[69] or by failure to apply for letters within the time prescribed by law.[70] In case a corporation named as executor merges with another and goes out of existence before the death of the testator, its right to administer does not pass to its successor.[71] Conviction of an infamous

settle his account in court of chancery where no good cause was shown for requiring accounting in that court, and it distinctly appeared that it would be inequitable to do so. Ker v. Banta [N. J. Eq.] 63 A. 550. Court of chancery will not exercise jurisdiction over suits by legatees to recover legacies where administration is pending, unless special cause and good reason be shown therefor. It is not the right of the party to change the form of settlement at his pleasure, but chancellor must exercise his discretion in the matter and judge as to the proprlety of interposing. Wyckoff v. O'Neil [N. J. Eq.] 63 A. 982. Complainants held not to have shown any need to resort to equity to secure their rights. Id.

62. Where court has acquired jurisdiction of a suit for partition between heirs, it will adjust the question of advancements between them, the right being of equitable cognizance. Bozone v. Daniel [Ala.] 39 So. 774. Decree confirming sale by commissioner to administrator and directing latter to charge himself with the proceeds, pay debts, and account for and distribute the excess, held not final so as to deprive court of jurisdiction, but court retained the cause for further decrees, particularly in view of recital to that effect in subsequent decree which could not be collaterally attacked. Id. Where superior court takes jurisdiction of proceeding for sale of realty to create a fund to pay debts and thereby preserve the personalty in accordance with an agreement by the interested parties. State v. Settle [N. C.] 54 S. E. 445. Petition held sufficient to authorize court to retain jurisdiction for purpose of making a full settlement and distribution of the estate. Id.

63. See 5 C. L. 1188.

64. Federal courts of Wisconsin may adjudicate against executors appointed in that state the amount of a claim against the estate, the fund being in charge of the Wisconsin state court, but will not order the officers of the Wisconsin state court to turn over a fund under the control of that court to the officer of another state court for administration in the latter state. Graham v. Lybrand [C. C. A.] 142 F. 109.

65, 66. Pourier v. McKinzie, 147 F. 287.

67. See 5 C. L. 1191.

68. Must ordinarily be appointed unless he is ineligible, or a statutory discretion in the matter is given to the court either expressly or by implication. Breen v. Kehoe [Mich.] 12 Det. Leg. N. 620, 105 N. W. 28. Under Comp. Laws 1897, § 9310, must be appointed if he is legally competent and will accept, and gives required bond. Id.

69. Holding of orphans' court that son had not neglected or declined to qualify as executor, held correct. In re Berry's Estate [N. J. Eq.] 64 A. 136. Application for probate and letters signed and verified by his proctor and adopted by him, held to disclose his purpose to act, it being immaterial that he did not personally sign and verify it. Id. Trust company appointed coexecutor with decedent's son should not renounce merely because requested to do so by the latter and the legatees. In re McManus' Estate, 212 Pa. 267, 61 A. 892.

70. Under P. L. 1898, p. 724, § 27, if he neglects to prove will for 40 days after testator's death, administration with the will annexed will be granted to the next of kin, or, if they will not accept it, to such other person as will. In re Acker's Will [N. J. Eq.] 62 A. 556. The latter must act promptly and waive their right to administration under such circumstances by neglecting to assert it until after the executor has applied for letters. Id.

71. Right becomes vested only on the death of the testator. Where a strictly banking corporation organized under general law was named as executor, held that trust company with which it merged before testator's death, and which was organized under a special law and had much wider powers,

crime ordinarily disqualifies one from acting,[72] but, in the absence of a statute to the contrary, indebtedness to testator[73] or hostility to the beneficiaries under the will[74] does not. It is doubtful whether even the fact that the nominee has been guilty of fraud in transactions with the testator will justify a refusal to appoint him.[75] In some states nonresidence is not a disqualification,[76] in others it disqualifies one absolutely,[77] and in still others the appointment of a nonresident is discretionary.[78]

Letters of administration on the estate of one dying intestate must be granted to the person given preference by statute, unless he is within the statutory disqualifications.[79] The right is generally given first to the surviving husband or wife,[80] then to the next of kin,[81] and then to creditors.[82] If none of these apply within the time prescribed, the court may appoint any suitable person.[83] In some states the

had no right to petition for probate of decedent's will. In re Stikeman's Will, 48 Misc. 156, 96 N. Y. S. 460.

72. A "crime rendering one infamous according to law" within the meaning of Code Pub. Gen. Laws, art. 93, § 51, is one involving moral turpitude, or rendering the offender incompetent as a witness in court. Garitee v. Bond, 102 Md. 379, 62 A. 631. One convicted of making an overcharge for prosecuting a pension claim in violation of Act Cong. June 27, 1890, c. 634, § 4, 26 St. 183, is not guilty of such a crime, though subject to imprisonment in the penitentiary in the discretion of the court. Id. Even if Federal courts would regard it as such, that fact is immaterial in state courts. Id. Code Civ. Proc. § 2612, providing that no person is competent to serve as executor who at the time the will is proved has been convicted of an infamous crime, does not render one so convicted incompetent where he has been pardoned before will is proved. In re Raynor, 48 Misc. 325, 96 N. Y. S. 895.

73. Breen v. Kehoe [Mich.] 12 Det. Leg. N. 620, 105 N. W. 28.

74. Litigation between executor and legatees prior to probate of will, resulting in setting aside of deed made by testator to the executor and giving it effect as a mortgage only, and the consequent antagonism between them, held not to disqualify him. In re Acker's Will [N. J. Eq.] 62 A. 556. Copy of final decree in that litigation held of no evidentiary force on issue of antagonism, in absence of record of cause to which it related. Id.

75. Evidence held insufficient to show that son named in will as executor had been guilty of fraud in transactions with testatrix, even if such fact, if proven, would justify court in refusing him letters on ground that he was an unfit person to act. In re Berry's Estate [N. J. Eq.] 64 A. 136.

76. In re Acker's Will [N. J. Eq.] 62 A. 556.

77. Act 1872, c. 3, § 18 (4 Starr & C. Ann. St. Supp. 1902, p. 32), as amended by Acts 1897, p. 1, providing that no nonresident shall be appointed or act as executor, is not in conflict with U. S. Const. art. 4, § 2, providing that the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states, the right to be appointed or act as executor not being a privilege or immunity within the meaning of that section (In re Mulford, 217 Ill. 242, 75 N. E. 345), nor is it in conflict with Ill. Const. art. 2, § 2, providing that no person shall be deprived of life, liberty, or property without due process of law (Id.).

78. Comp. Laws 1897, § 9317. Breen v. Kehoe [Mich.] 12 Det. Leg. N. 620, 105 N. W. 28.

79. In re Greene's Estate, 48 Misc. 31, 96 N. Y. S. 98.

80. See 5 C. L. 1192, n. 89.

81. Under Civ. Code 1895, § 3367, subd. 2, where there is no surviving husband or wife, the next of kin of the intestate at the time of his death, according to the laws requiring relationship and distribution, is entitled to letters. Raburn v. Bradshaw, 124 Ga. 553, 52 S. E. 922. In such case the law of relationship should not be relied on to the exclusion of that of distribution. Id. Other things being equal, letters will be granted to person who is entitled as distributee, in whole or in part, of the residue of the estate after the claims of creditors have been satisfied. In re Randall's Estate [R. I.] 63 A. 806. A stranger should not be preferred to the next of kin except for good reasons. Id. Next of kin who applies within 30 days after decedent's death should be appointed if a suitable person in preference to a stranger nominated by some of the heirs, though latter is also a suitable person. Peck v. Greene, 27 R. I. 487, 63 A. 489. Evidence held to sustain finding that certain claimants were not sons and grandsons, and that certain other claimants were not brothers and sisters of deceased. In re McClellan's Estate [S. D.] 107 N. W. 681.

82. Plaintiff in suit for damages pending at decedent's death held a creditor within meaning of statute authorizing creditors to petition for letters when next of kin do not do so, the question whether his action was one in tort which abated at defendant's death not being open for consideration on the application for letters. Ex parte Conrad [S. C.] 54 S. E. 799. It is only when none of the relatives or next of kin will accept the appointment, or when no one of them applies within three months after decedent's death, that court is empowered to appoint a creditor either on his own petition or that of another creditor. Rev. St. 1898, §§ 3812-3815, construed. In re Owens' Estate [Utah] 85 P. 277. Officer of a real estate company which was a creditor of the estate held not to be for that reason a creditor within meaning of the statute. Id.

83. County court of a county in which a nonresident intestate is killed through negligence and who at the time has no next of

trustee of an insane person is entitled to administer on an estate where such insane person would have been entitled to do so if competent.[84] Treaties with foreign countries sometimes provide that their consuls shall be entitled to administer on the estates of their subjects who die intestate in this country.[85] In the appointment of a dative testamentary executor of a nonresident in Louisiana, the widow who has been appointed administratrix with the will annexed by the court of the domicile will be preferred to a citizen whose status as a creditor has not yet become fixed.[86] As between persons equally entitled the appointment is generally discretionary with the court.[87] In some states males are preferred to females in such case,[88] and in others the person selected by a majority of the distributees must be appointed.[89] In some states letters may be granted to one or more competent persons not otherwise entitled thereto when the person entitled consents to be joined

kin, distributee, or creditor residing in the state, may appoint an administrator at the first term of court succeeding the death, St. 1903, § 3897, providing that if none of the persons named in § 3896 apply at the second county court from the death of the intestate the court may grant administration to a creditor or to any other person in his discretion, having no application where those given the preference are disqualified by nonresidence. Young's Adm'r v. Louisville & N. R. Co. [Ky.] 89 S. W. 475. After second county court administrator so appointed may only be removed for cause. Id.

84. Where such insane person was entitled to the residue. Boyd v. Cloud [Del.] 62 A. 294.

85. Under the "most favored nation clause" (art. 8) of the treaty of Dec. 6-18, 1832, between Russia and the United States (8 Stat. 448), when construed in connection with the treaties between the United States and the Argentine Republic of July 10, 1853 (10 Stat. 1000), and between the United States and Costa Rica, of July 10, 1851 (10 Stat. 921), held that the Russian vice-consul was entitled to be appointed administrator of a Russian subject dying intestate and leaving personalty to the exclusion of the public administrator. In re Wyman, 191 Mass. 276, 77 N. E. 379. Treaties prevail over inconsistent provisions of state constitutions and statutes. Id. Treaties held not to be beyond the jurisdiction of the treaty making power. Id.

86. Succession of Henry, 116 La. 202, 40 So. 253.

87. Action of trial court in selecting one of two opposing nephews of deceased as administrator will not be reversed where evidence establishes the fitness of the party chosen, and that he was the relative to whom deceased was most closely attached and with whom he had lived for many years. Succession of Theriot, 116 La. 25, 40 So. 519. Where four next of kin who were equally entitled to appointment under Cobbey's Ann. St. 1903, § 5043, Comp. St. 1903, c. 23, § 178, could not agree as to who should be appointed, court held to have discretion as to which one of the persons named by next of kin he should appoint. In re Scott's Estate [Neb.] 106 N. W. 1003. Rehearing denied. In re Scott's Estate [Neb.] 107 N. W. 1004. Nearness of relationship and consequent preponderance of interest are not necessarily controlling in the selection of an administrator from among rival claimants belonging to the same statutory class unless other things are equal. In re Davis' Estate, 48 Misc. 489, 96 N. Y. S. 1106. Where both applicants for appointment as administrator with will annexed belonged to third class of those entitled to letters under Code Civ. Proc. § 2643, held that, where four grandnephews, together representing one-fourth of the estate, requested the appointment of one of their number, he would be appointed in preference to a niece who represented an equal interest and requested that letters be issued to her, the estate being involved in litigation and the niece being a married woman whose private interests might conflict with her duties as representative. Id. As between parties of equal suitability and statutory rights, a court may well choose the one possessing the confidence of and desired by the major portion of the beneficiaries of the trust. Sargent v. Corbley, 7 Ohio C. C. (N. S.) 226. Where the appointee answers the requirements of the statute as to suitability and qualification, the fact that another court on the same showing might have made a different selection is not proof of abuse of discretion, neither does it furnish any ground to review such appointment. Id. A rule of the probate court not to appoint a resident of another county is not a principle of law but is of the court's own making, and while it should be generally and impartially applied, it need not be a bar to an act which a sound exercise of the court's discretion dictates, and a waiver of or departure from such rule is not an abuse of discretion. Id.

88. Where several persons are within same degree of kindred. Code Civ. Proc. § 2660. In re Greene's Estate, 48 Misc. 31, 96 N. Y. S. 98. See, also, In re Davis' Estate, 48 Misc. 489, 96 N. Y. S. 1106.

89. Under Civ. Code 1895, § 3367, subd. 3, if there are several of the next of kin equally near in degree, the person selected in writing by a majority of those interested as distributees of the estate and who are capable of expressing a choice. Raburn v. Bradshaw, 124 Ga. 552, 52 S. E. 922. Brother of half blood on paternal side selected in writing by father of himself and of the intestate and by four sisters of the half blood on the paternal side of the intestate, held properly appointed in preference to sister of whole blood on paternal side who was selected in writing by another sister of the whole blood. Id.

with them.[90] Nonresidence,[91] improvidence,[92] or the conviction of an infamous crime,[93] are among the common grounds of disqualification. In the absence of statutory authority a corporation cannot act as administrator.[94] The preferential right to appointment may be waived either expressly[95] or by failure to apply for letters within the time prescribed.[96] In some states the person having the preferential right may designate any competent person to serve in his stead.[97] In others no such right exists unless the person having the preference is himself qualified to serve.[98]

Public administrators.[99]—Statutes in some states provide for a public administrator[1] whose duty it is to apply for letters when those entitled to them neglect to do so within a specified time.[2]

Special administrators.—Statutes in some states provide that in the appointment of a special administrator preference shall be given to the person entitled to letters testamentary or of administration.[3]

(§ 3) *B. Procedure to obtain administration and grant of letters.*[4]—The ad-

90. Code Civ. Proc. § 2660 held to authorize administration to be granted to one or more competent persons not entitled to letters when the person entitled consents to be joined with them, so that a joint administration by the person entitled and the person whom he consents to be joined is not necessary, but if both join in the petition, letters may be issued to latter alone where former fails to qualify. In re Ireland's Estate, 47 Misc. 545, 95 N. Y. S. 1079.

91. Nonresident otherwise entitled cannot be appointed nor dictate to the court who shall be appointed. Young's Adm'r v. Louisville & N. R. Co. [Ky.] 89 S. W. 475. Sayles' Ann. Civ. St. 1897, art. 2026, providing that administrator may be removed if he absents himself from the state for a period of three months at one time without permission of the court, impliedly prohibits the appointment of a nonresident who otherwise has a preferential right. Widow. Stevens v. Cameron [Tex. Civ. App.] 96 S. W. 1086.

92. Son held not incompetent by reason of improvidence within meaning of Code Civ. Proc. § 2661. In re Greene's Estate, 48 Misc. 31, 96 N. Y. S. 98.

93. Son convicted of misdemeanor in Federal court and fined $50 held not convicted of an infamous crime within meaning of Code Civ. Proc. § 2661. In re Greene's Estate, 48 Misc. 31, 96 N. Y. S. 98.

94. Not in Nebraska. Continental Trust Co. v. Peterson [Neb.] 107 N. W. 786.

95. The right of the surviving husband to be appointed administrator of his deceased wife's estate is a personal right which may be waived as well before marriage as after her death. In re Evans' Estate, 117 Mo. App. 629, 93 S. W. 922. Right to priority given him by Rev. St. 1899, § 7, held waived by antenuptial contract whereby he agreed not to "control" or claim any of wife's property during her lifetime or after her death. In re Evans' Estate, 117 Mo. App. 629, 93 S. W. 922. Where one whose sole right to administer arose from fact that he was creditor, agreed to wait for payment of his claim for a few weeks when heir promised to pay it, held that he thereby waived his right to administer, at least until expiration of time agreed upon. In re Farnham's Estate, 41 Wash. 570, 84 P. 602.

96. Next of kin held not to have forfeited his right to appointment by failure to make application within 30 days after the death of the intestate. In re Randall's Estate [R. I.] 63 A. 806.

97. Where sister was only relative or next of kin who ever petitioned court for appointment, held that her nominee should have been appointed in preference to a creditor who applied before the expiration of three months after decedent's death, though she was herself disqualified from serving because of nonresidence. Rev. St. 1898, §§ 3812-3815, construed. In re Owens' Estate [Utah] 85 P. 277.

98. Sayles' Ann. Civ. St. 1897, art. 1916, providing that surviving husband or wife, or if there is no such survivor, any one of the heirs, may "renounce" his right to the administration in favor of some other qualified person who may be appointed, authorizes such renunciation only when the party making it is himself qualified to serve, and hence party designated by the widow and son, who are disqualified by nonresidence, is not entitled to the appointment. Stevens v. Cameron [Tex. Civ. App.] 96 S. W. 1086.

99. See 5 C. L. 1194.

1. Under Const. art. 18, § 6, the county treasurer is made ex-officio the public administrator. Appeal of Rice [Idaho] 85 P. 1109.

2. Revisal 1905, § 20, providing that the public administrator shall apply for letters when those entitled to them under § 3 have neglected to do so for six months, does not have the effect of making a delay of six months by those otherwise entitled a forfeiture of their rights, but they have the right to letters in preference to the public administrator even after that time if they apply before he has been allowed to qualify. In re Bailey's Will [N. C.] 53 S. E. 844.

3. Appointment of public administrator over objection of widow, who was also legatee, devisee, and named in the will as executrix, held improper under Code Civ. Proc. 1895, § 2502. State v. District Ct. [Mont.] 85 P. 1022.

mission of the will to probate is a condition precedent to the issuing of letters testamentary.[5] The allowance or probate of a will and the granting of letters testamentary are two distinct things involving two different judgments or decrees and dependent upon different conditions.[6] So too, a refusal to admit the will to probate and the appointment of an administrator are separate and distinct proceedings,[7] and where the court refuses to admit the will, he cannot appoint an administrator unless the proceedings are in conformity with the steps prescribed by statute in cases of intestacy.[8]

Application must be made within the time prescribed[9] by a petition substantially complying with the statutory requirements.[10] Notice to the persons interested is generally required,[11] except where letters are granted to the public administrator pending the application of those entitled,[12] and any person interested may appear and oppose the appointment.[13] In California an order appointing a special administrator may be made at any time without notice.[14] A petition for ancillary

4. See 5 C. L. 1194.

5. Rule applies equally in case of lost wills. In re Gurdy [Me.] 63 A. 322. Appeal from decree refusing to grant letters will be dismissed where it does not appear that will has been admitted to probate. Id.

6. Though record evidence of both decrees may be, and often is, contained in same paper. In re Gurdy [Me.] 63 A. 322. Appeal from order admitting will does not affect an order appointing an executor, unless an appeal is also taken from the latter. Does not preclude him from suing on behalf of the estate. Gen. St. 1894, §§ 4665, 4668, 4670. Foster v. Gordon, 96 Minn. 142, 104 N. W. 765.

7. In re Bouyssou's Estate, 1 Cal. App. 657, 82 P. 1066.

8. In re Bouyssou's Estate [Cal. App.] 84 P. 460.

9. Shannon's Code § 3955, providing that, except in certain specified cases, no letters of administration shall be granted where deceased died more than 20 years before application made for the same, and that letters granted after the expiration of that time shall be void, applies to administrators de bonis non. Gallatin Turnpike Co. v. Puryear [Tenn.] 92 S. W. 763.

10. Petition for appointment of two persons as administratrices and verification thereto, though informal, held sufficient, and defects therein did not deprive surrogate of jurisdiction where jurisdictional facts existed, and decree was made in accordance with rights of the parties so that no injury resulted. In re Ireland's Estate, 47 Misc. 545, 95 N. Y. S. 1079. A petition for limited letters of administration authorizing the administrator to maintain an action for the wrongful death of his decedent need only set out that the death was wrongfully caused, it being unnecessary to allege who were the persons who caused or are believed to have caused it. In re Halligan's Estate, 50 Misc. 481, 100 N. Y. S. 622. Fact that the petition gave name of party alleged to have caused decedent's death, and it was subsequently discovered that it was due to the negligence of two or more joint tort feasors, held not to require revocation of letters and issuance of new ones. Id. Petition for letters of administration held not demurrable for failure to allege that deceased left any property to be administered, since that fact could be proved by evidence outside the petition. Ex parte Conrad [S. C.] 54 S. E. 799.

11. Notice required by rule 2 of orphans' court must be given persons in interest on application for appointment of administrator under P. L. 1898, § 27, p. 724, on failure of executor named to file will within 40 days. In re Acker's Will [N. J. Eq.] 62 A. 556. Where proponent of will was only person who had appeared in proceedings for probate of will, held that he was the only person entitled to notice of application for appointment of temporary administrators, and, where he was present in court when application was made and consented to act as one of such administrators, no notice whatever was necessary. Code Civ. Proc. § 2670, construed. In re Ashmore's Estate, 48 Misc. 312, 96 N. Y. S. 772. Order appointing administrator held void for want of jurisdiction for failure to publish notice in manner prescribed by order of court pursuant to Rev. St. 1898, § 4026. In re Bunting's Estate [Utah] 84 P. 109. Failure to mail notice to heirs, as required by Rev. St. 1898, § 3818, of the time and place of the hearing of the petition, held to have deprived court of jurisdiction so that appointment was void. Id. Fact that petition recited that ages and residence of heirs were unknown to petitioner held not to dispense with necessity for giving such notice where it was further recited that deceased was a resident of a certain place at the time of his death, that a certain person was guardian of the minor heirs, and the names of the heirs, in view of the presumption that residence of infant heirs, who were children of decedent, was same as that of their parent. Id.

12. Under Rev. St. 1898, § 3819, he may be appointed without notice in such case. Jordan v. Chicago, etc., R. Co., 125 Wis. 581, 104 N. W. 803.

13. Code Civ. Proc. § 1374. In re Davis' Estate [Cal.] 87 P. 17. Where superior court had no jurisdiction to appoint public administrator as administrator of the estate of a nonresident because proceedings had been previously begun for the administration of the estate in another county, held that the administrator so illegally appointed was not entitled to oppose the appoint-

letters testamentary must generally be accompanied by a copy of the will and of the foreign letters, if any have been issued.[15] In some states such letters cannot be issued except upon the application or with the consent of the foreign executor.[16] Mandamus will not issue to compel the issuance of letters to an executor named in a will admitted to probate until it clearly appears that the officer whose duty it is to issue them has refused to do so.[17]

(§ 3) *C. Security or bond, and oath.*[18]—The representative is generally required to give a bond conditioned on the faithful performance of his trust,[19] unless the will provides to the contrary,[20] and even in such case the court generally has discretionary power to require it under proper circumstances.[21] In some states the court may require security whenever proof is made to its satisfaction that property in the hands of an executor is unsafe, insecure, or in danger of being wasted.[22] In Louisiana a forced heir has no right to compel a testamentary executor to give bond, that right being confined to creditors or claimants of specific property.[23]

Oath.—Whether or not the representative is required to file an oath depends upon the statutes of the various states.[24]

(§ 3) *D. Removals and revocation of letters.*[25]—The representative should

ment of the public administrator in the latter county, he not being a "person interested." Id.

14. Order held valid whether made by the court or by the judge at chambers. Code Civ. Proc. §§ 1411, 1412. Raine v. Lawlor, 1 Cal. App. 483, 82 P. 688.

15. Code Civ. Proc. § 2695. Baldwin v. Rice, 183 N. Y. 55, 75 N. E. 1096, afg. 100 App. Div. 241, 89 N. Y. S. 738.

16. Under Code Civ. Proc. § 2697, where the executor named in the will has received letters testamentary in a foreign jurisdiction, the surrogate has no authority to grant ancillary letters to anyone else unless his application therefor is accompanied by an instrument executed by the foreign executor, acknowledged in like manner as a deed, authorizing him to receive them. Baldwin v. Rice, 183 N. Y. 55, 75 N. E. 1096, afg. 100 App. Div. 241, 89 N. Y. S. 738. Nonresident appointed administrator in New York died testate pending administration. Will was probated in foreign state but executor refused to apply for ancillary letters or to consent to appointment of any person as ancillary administrator or administrator with will annexed in New York. Held that, in the absence of such application or consent, surrogate of latter state had no power to appoint anyone to represent the estate of the deceased administrator or to procure or state his account as administrator. In re McCauley's Estate, 49 Misc. 209, 99 N. Y. S. 238.

17. Miller v. Henderson, 212 Pa. 263, 61 A. 913. Not before hearing of application by executor for letters. Id.

18. See 5 C. L. 1195.

19. Where vice-consul is, on his own application, appointed administrator of a citizen of the foreign country represented by him, he should be required to give bond and in other respects to conduct himself with reference to the estate as would any other administrator. In re Wyman, 191 Mass. 276, 77 N. E. 379.

20. The security required by statute from a nonresident executor may be expressly waived by the testator in his will. In re Acker's Will [N. J. Eq.] 62 A. 556. Pasch. Dig. art. 1284, providing that where married woman is appointed executrix she may execute official bond jointly with her husband and she and her husband shall act jointly in all matters pertaining to said representative capacity, held not to require independent executrix who married after qualifying to give bond. McAllen v. Raphael [Tex. Civ. App.] 96 S. W. 760.

21. Under Administration Act, §§ 7, 8, where testator directs that executors shall not be obliged to give security, the court of probate should not require security upon application for leave to sell real estate to pay debts, unless it shall see from its knowledge or from the suggestion of creditors or legatees that fraud may be practiced or that the personal estate will not be sufficient to discharge the debts. Wood v. Stewart, 120 Ill. App. 34. Petition by one neither a legatee nor a creditor will not confer jurisdiction to require security where the will has waived the same. Id. Under St. 1903, § 3887, providing that surety shall not be required when the will so directs unless on the motion of some one interested, or from the knowledge of the court, it may appear proper to require it. McCann v. McCann's Ex'x [Ky.] 93 S. W. 1045. Court not having found any mismanagement, held that executrix nominated without bond would not be compelled to give one. In re Fisher's Estate, 128 Iowa, 626, 104 N. W. 1023. Discretion is not limited to cases of fraud, or bad faith, or insolvency, but includes all circumstances showing it to be proper that a bond should be executed. Id. Held not an abuse of discretion to allow wife to qualify as executrix without bond. Id.

22. P. L. 1898, p. 767, § 140. Woolsey v. Woolsey, 68 N. J. Eq. 763, 62 A. 686. Conduct of executors held to have justified court in requiring security, and amount required held not excessive. Id.

23. Merrick's Rev. Civ. Code, art. 1667. Succession of Kranz, 115 La. 545, 39 So. 594.

24. No oath is necessary under the Nebraska statutes. Leahy v. Haworth [C. C. A.] 141 F. 850.

ordinarily be removed only for cause and when the best interests of the estate demand it.[26] Among the common grounds for removal are the fact that the person appointed was not entitled to the appointment,[27] that there was no necessity for administration,[28] misconduct,[29] or a refusal to bring necessary actions in behalf of the estate,[30] that the representative has become bankrupt or insolvent or is in failing circumstances,[31] and absence from the state for more than a specified length of time.[32] Mere unfriendly relations with a co-representative will not warrant a removal unless the interests of the estate are thereby jeopardized.[33] Any person interested may ordinarily petition for the removal.[34] The representative may be personally taxed with costs of proceedings to revoke letters where he concealed the

25. See 5 C. L. 1196.

26. Court not having found any mismanagement, held that executrix would not be summarily removed. In re Fisher's Estate, 128 Iowa, 626, 104 N. W. 1023. While county courts have large discretion in their supervisory jurisdiction over representatives, the latter have such an interest in the execution of the trust as entitles them to protection from removal without just cause. Gill v. Riley [Ky.] 90 S. W. 2. After final account of a succession has been homologated, and nothing remains to be settled except matters which can be more properly settled among the heirs in a partition proceeding, and it is evidently to the interest of all parties that the executor should not be removed, he will not be removed where no peremptory ground for removal is presented. Judgment refusing to dismiss executor affirmed. Succession of Gerard, 116 La. 912, 41 So. 206. Held that letters of temporary administration issued would not be revoked because both appointees were interested in the estate, nor because one of them was the executor named in the will, the scrivener of the will, the main proponent thereof, a legatee, and was charged with having unduly influenced the testator. In re Ashmore's Estate, 48 Misc. 312, 96 N. Y. S. 772. Allegations as to age, health, mental condition, and inexperience in business affairs of administratrices, held not to warrant their removal. In re Ireland's Estate, 47 Misc. 545, 95 N. Y. S. 1079. In a proceeding for the removal of an executor, based upon a motion filed under Rev. St. § 6017, and the gist of the charge being fraud, it is error to grant an order of removal where no attempt has been made to show fraud. In re Breckinridge, 7 Ohio C. C. (N. S.) 86.

27. Letters of administration issued to woman claiming to be decedent's widow revoked where it appeared that she had a husband living when she married him and that he, on learning this, ceased to live with her and married petitioner, which facts she concealed from the court. In re Ward's Estate, 50 Misc. 483, 100 N. Y. S. 634. Where one, whose sole right to administer arose from the fact that he was a creditor, agreed with heir to wait for payment of his claim for a few weeks when heir promised to pay it, but before such time had expired, and while heir was out of the city, procured his own appointment as administrator, held that his letters were properly revoked. In re Farnham's Estate, 41 Wash. 570, 84 P. 602.

28. Letters revoked by supreme court on appeal from chancery court. Patteson v. Carter [Ala.] 41 So. 133. Where it is determined that administration is unnecessary after administrator has been appointed. Murphy v. Murphy, 42 Wash. 142, 84 P. 646.

29. Executor removed under Code Civ. Proc. § 2685, subd. 2, for investing property in securities unauthorized by law and paying claims without authority, though he acted in good faith. In re Sheldon's Estate, 96 N. Y. S. 225. Executor removed for making personal profit out of sale of stock belonging to the estate. In re Sandrock's Estate, 49 Misc. 371, 99 N. Y. S. 497.

30. Administrator who refuses to take steps to determine whether conveyance by his decedent was fraudulent. Dunbar v. Kelly, 189 Mass. 390, 75 N. E. 740.

31. St. 1903, § 3846, does not refer to his past condition but to his condition at the time it is sought to remove him, and hence fact that husband had been discharged in bankruptcy before his appointment was no ground for his removal. Gill v. Riley [Ky.] 90 S. W. 2. Insolvency or failing circumstances refers to a condition in which representative is unable to discharge his own obligations out of his own means in the ordinary course of business, and hence mere fact that he owns no property is not ground for removal where he owes no debts. Id.

32. Absence of executor from state for more than one year is peremptory cause for removal under Civ. Code art. 1158. Succession of Gerard, 116 La. 912, 41 So. 606.

33. Held an abuse of discretion to remove two executors because they refused to transact business in presence of personal attorney of third executor. In re Waterman's Estate, 98 N. Y. S. 583.

34. Person sued by one acting as administrator de bonis non under apparent authority of the county court has sufficient interest to apply to that court for the revocation of his appointment on the ground that it was made after the expiration of the time fixed by statute within which such appointment could be made. Gallatin Turnpike Co. v. Puryear [Tenn.] 92 S. W. 763. Railroad company against whom administrator had commenced action for injuries to and the wrongful death of his intestate, held entitled to maintain action in county court to vacate administration and procure discharge of administrator on ground that court had no jurisdiction to appoint him for sole purpose of bringing such action. Cooper v. Gulf, etc., R. Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 9, 93 S. W. 201.

fact that he was not entitled to them.[35] A judgment of removal does not deprive the representative of his right to appeal.[36]

§ 4. *The authority, title, interest, and relationship of personal representatives. A. In general.*[37]—A person's authority to act as representative is to be determined by the law of the place of his appointment.[38]

At common law the title of an executor was derived solely from the will, and hence he could, before its probate, exercise all the powers of an executor which did not require profert of his letters.[39] This rule has been changed by statute in many states, so that the person named in the will as executor is not entitled to act as such until the will has been admitted to probate and he has been appointed by the probate court and has qualified in the manner prescribed by law.[40] In such case it is only by relation that the grant of letters confers title upon him and validates his acts from testator's death.[41] In some states his powers before probate of the will are specially enumerated.[42] Lawful acts done by the executor after the probate of the will and before it is invalidated are binding, and are not affected by its subsequent nullification.[43] The authority of an executor who has not resigned or been removed continues as long as there are assets unadministered, though the estate has been wound up.[44] An independent executor in Texas represents both the separate and community property.[45] The fact that the same persons are named as executors and trustees does not merge the trusteeship in the executorship, but the two are separate and distinct offices.[46]

An administrator derives his authority by virtue of the order appointing him.[47] His authority ordinarily relates back to the death of his intestate.[48] All acts of an administrator which would be in due course of law in case of intestacy, if done in good faith and without notice, cannot be impeached though a will is afterwards discovered and established.[49] One purchasing property from an administrator is

35. Letters issued to one claiming to be widow revoked with $50 costs payable by her personally where she concealed fact from the court that marriage was a nullity. In re Ward's Estate, 50 Misc. 483, 100 N. Y. S. 634.

36. Williams v. Dougherty [Ind. App.] 77 N. E. 305.

37. See 5 C. L. 1199.

38. Power to sue is not suspended by appeal from the decree granting him letters where his authority is not thereby suspended in the state where he was appointed. Beaumont v. Beaumont, 144 F. 288.

39. His title, interest, and right to possession vested at testator's death. Wheeler v. Chicago Title & Trust Co., 217 Ill. 128, 75 N. E. 455.

40. Wheeler v. Chicago Title & Trust Co., 217 Ill. 128, 75 N. E. 455.

41. An executor is not subject to garnishment until the will is probated and letters testamentary have been issued to him, and the rule is not changed by the fact that the legacy garnished is an absolute one, or that the will is admitted and the executor has qualified when he files his answer. Hurd's Rev. St. 1899, p. 936, c. 63. Wheeler v. Chicago Title & Trust Co., 217 Ill. 128, 75 N. E. 455, afg. 119 Ill. App. 508.

42. In Illinois, are restricted to the burial of the testator, the payment of funeral expenses, and the doing of such acts as are necessary to preserve the estate. Wheeler v. Chicago Title & Trust Co., 217 Ill. 128, 75 N. E. 455, afg. 119 Ill. App. 508.

43. Under St. 1903, § 3848. Trustees of Home for Poor Catholic Men v. Coleman [Ky.] 92 S. W. 342. Executor held not personally liable for amount of legacy paid under order of court pursuant to will, where provision of will was afterwards declared invalid. Id. Action held barred by laches. Id.

44. Authority to sell realty conferred by will. Reeve v. North Carolina Land & Timber Co. [C. C. A.] 141 F. 821.

45. Where widow is also independent, executrix creditor cannot proceed against her as survivor of the community. Judgment against her in latter capacity held superfluous and unwarranted. Hartz v. Hausser [Tex. Civ. App.] 14 Tex. Ct. Rep. 141, 90 S. W. 63.

46. West v. Bailey, 196 Mo. 517, 94 S. W. 273.

47. In action by administrator for conversion of property belonging to decedent, failure to prove allegation that decedent left a will held not fatal to plaintiff's case. Grant v. Hathaway, 118 Mo. App. 604, 96 S. W. 417.

48. May sue for conversion of stock obtained from decedent while non compos mentis. Hagar v. Norton, 188 Mass. 47, 73 N. E. 1073.

49. Act Feb. 24, 1834, P. L. 73. Flannigan's Estate, 28 Pa. Super. Ct. 487. Administrator was appointed in belief that decedent died intestate. He continued to carry on decedent's business of blacksmithing and subsequently sold blacksmith shop. Will

entitled to a return of the purchase price on the subsequent discovery of a will giving said property to him.[50]

The authority of a special administrator is ordinarily limited to the preservation of the estate.[51]

The administrator de bonis non can recover from his predecessor or his representatives only such of the estate as remains in specie, the right to recover for assets converted by the first representative into money in his hands being in the distributees.[52] Except where the rule is changed by statute,[53] he does not ordinarily succeed to trust powers conferred on an executor by the will, but on the latter's death a trustee must be appointed to receive the trust property,[54] the personal representatives of the deceased executor being entitled to the possession of it in the meantime.[55]

Letters testamentary or of administration have no legal force or effect beyond the territorial limits of the state in which they are granted,[56] hence the representative must derive all his authority from the laws of the sovereignty in which he is appointed, and has no authority nor liability[57] and acquires no title to property[58] in any other state. There is no privity between a representative in one state and a representative in another, though the same person holds both appointments,[59] and a judgment against a representative in one state furnishes no cause of action against a representative in another state so as to affect assets of the estate in the latter,[60]

was subsequently discovered which gave shop to the purchaser. Held that purchaser was entitled to return of purchase price but not to profits made by administrator while conducting the business. Id.

50. Flannigan's Estate, 28 Pa. Super. Ct. 487.

51. A special administratrix, appointed before probate of the will, has no authority to compromise a claim on a policy of insurance on decedent's life payable to his executor without the authority of, or approval by, the court. Code §§ 3299, 3300, construed. Rauen v. Prudential Ins. Co., 129 Iowa, 725, 106 N. W. 198.

52. Boyd v. Immegart's Ex'rs [Ky.] 91 S. W. 1132.

53. Under Act Feb. 24, 1834 (P. L. 78), § 31, providing that administrators de bonis non shall have power to demand and recover from their predecessors, or their representatives, all assets, etc., remaining in their hands due and owing to the estate of the decedent, held that administrator d. b. n. c. t. a. was entitled to trust fund vested in the executor by virtue of his office, the trust being one for administration and distribution, even though the trust was an active one, and court had no authority to appoint trustee to receive it. In re Sheets' Estate [Pa.] 64 A. 413.

54. Where an executor who is to settle the estate and hold the residue in trust dies after discharging all the duties of administration. Boyd v. Immegart's Ex'rs [Ky.] 91 S. W. 1132.

55. Are responsible for it until they turn it over to some one entitled to receive it. Boyd v. Immegart's Ex'rs [Ky.] 91 S. W. 1132. Held that they could recover it from widow for whose benefit it was to be held in trust for life, with remainder over. Id.

56. Clarke v. Webster [Tex. Civ. App.] 16 Tex. Ct. Rep. 320, 94 S. W. 1088.

57. Clarke v. Webster [Tex. Civ. App.] 16 Tex. Ct. Rep. 320, 94 S. W. 1088. Letters of administration have no extraterritorial effect, and an administrator cannot oust the jurisdiction of the court appointing him or limit the exercise of its authority by going into a foreign state and engaging in litigation therein, at least when his excursion into the foreign state is made without the order or sanction of the court whose officer he is. In re Williams' Estate [Iowa] 107 N. W. 608. After appointment of administrator in Iowa, a creditor of decedent procured appointment of another administrator in Michigan. Attorney of Iowa administrator placed written objections to appointment of other administrator in hands of Michigan probate judge out of court, but it did not appear that such objections were filed and order of Michigan court contained no reference to any appearance by Iowa administrator and made no attempt to pass on issue between opposing claimants. Held that such order was not conclusive on Iowa administrator as to his rights and did not deprive Iowa court of jurisdiction to direct distribution of funds collected by its administrator in Michigan. Id. Executors appointed by Wisconsin court held to have no power of their own motion to go into another state and make promises to pay, and could not by so doing create by estoppel in an administrator appointed in that state a right to any part of the fund in the Wisconsin court which would not otherwise exist. Graham v. Lybrand [C. C. A.] 142 F. 109.

58. Certificate of stock in foreign corporation held in Missouri is not assets in that state and public administrator of that state acquires no title to it and cannot sue for its conversion. Richardson v. Busch [Mo.] 95 S. W. 894.

59, 60. Clarke v. Webster [Tex. Civ. App.] 16 Tex. Ct. Rep. 320, 94 S. W. 1088.

nor can it be made the basis of a suit against him in a state in which he has never been appointed representative.[61]

A judgment against one in his representative capacity is not binding on him individually.[62]

The representative does not acquire title to property belonging to the estate by wrongfully transferring it to himself individually.[63]

A representative may delegate the performance of ministerial acts to an agent, who will be held accountable to him to the same extent as other agents.[64]

(§ 4) *B. Contracts, conveyances, charges, and investments. Contracts.*[65]—The representative is generally held to be personally liable on all contracts made by him, though acting in his official capacity and for the benefit of the estate,[66] unless an intention that he shall not be bound thereby clearly appears,[67] and persons rendering services thereunder must look to him alone for their compensation,[68]

61. Clarke v. Webster [Tex. Civ. App.] 16 Tex. Ct. Rep. 320, 94 S. W. 1088. The filing and recording of a foreign will in Texas under Rev. St. 1895, § 5353, does not ipso facto make the person named therein as executrix the executrix in Texas, but she must qualify and take out ancillary letters in that state before she can be sued in her official capacity in its courts. Id.

62. A judgment against an executrix in her representative capacity cannot be made the basis of a judgment against her individually in an action thereon in another state. Clarke v. Webster [Tex. Civ. App.] 16 Tex. Ct. Rep. 320, 94 S. W. 1088.

63. An executor does not acquire title to shares of stock belonging to the estate of his testator by wrongfully transferring them into his own name, but such transfer is a conversion which does not deprive estate of its title thereto. Holland v. Ball [Mass.] 78 N. E. 772.

64. In action by administrator against agent employed to aid him in settling the estate to recover balance alleged to have been received by him and not accounted for, held that, where the agent claimed special authority to make certain payments and plaintiff denied it, the court properly instructed that he was not entitled to credit for disbursements made without express authority. Harms v. Wolf, 114 Mo. App. 87, 89 S. W. 1037. Held that where agent claimed express authority to pay appraisers a sum in addition to $1 per day, which was denied, he was not entitled to credit in excess of that amount unless he proved express authority. Id. An agent of the administrator has, by virtue of his agency, authority to pay an attorney reasonable compensation for services rendered in the administration and accepted by the administrator, since administrators are allowed reasonable counsel fees. Id. In an action by administrator against agent for money received and not accounted for, held error to require a finding that agent paid attorney at instance and request of plaintiff before he could be given credit for the amount so paid, the only question for the jury being whether the amount paid was reasonable. Id.

65. See 5 C. L. 1200.

66. Independent contracts originating with and purporting to be executed by an executor or administrator officially, for the sole benefit of the estate and intended to bind it only, are void as to the estate and personally binding on the representative. Hayes v. Shirk [Ind.] 78 N. E. 653. Instrument executed by executor waiving irregularities in assessment for street improvements on lots standing in his name as executor, and promising to pay the same, held binding on him personally, though void as to the estate, and on his decease after street had been improved persons purchasing bonds issued for the improvement on the faith of the agreement could enforce it against his estate. Id. Executors have no power or authority to deplete the funds in their hands by promising to pay their attorneys more than is due them from the estate. Lupton v. Taylor [Ind. App.] 78 N. E. 689. If executors promise to pay attorneys more than is found to be due them upon balancing the account, there is no consideration for the promise as to the excess, and promise is unenforceable to that extent. Id. Where testator devised land to his wife and certain other named persons, and appointed her executrix and another person executor, held that a contract, whereby she and the executor and other devisees gave one an option to purchase the land and appointed him agent to sell it, was binding on her individually, though she signed it as executrix, the land not being assets of the estate and hence not a subject-matter concerning which she could contract as executrix. Millard v. Smith [Mo. App.] 95 S. W. 940. She having received proceeds of sale and delivered deed of her individual interest could not contend that agent had no authority to sell her individual interest. Id. Whenever he exceeds his powers and undertakes to transfer and convey without authority, he becomes personally liable to the grantee on his covenants. Rannels v. Rowe [C. C. A.] 145 F. 296.

67. A representative acting within his authority is not personally liable on contracts and conveyances made in his representative capacity. Rannels v. Rowe [C. C. A.] 145 F. 296.

68. The repesentative is personally liable to the attorney employed by him for the reasonable value of his services, regardless of the amount allowed by the probate court. In re Scott's Estate, 1 Cal. App. 740, 83 P. 85. And hence an order making an allow-

though disbursements by reason thereof, when necessary and reasonable in amount, will constitute a charge in his favor against the estate.[69] An attorney is not, however, deprived of his lien for professional services and disbursements on money or property received by him in the course of his employment by reason of the fact that his client is an executor, and the services were rendered and the property received on behalf of the estate.[70] The usual rules relating to change of attorneys apply in probate proceedings.[71] An administrator is not liable on the theory of a quasi contract for services beneficial to the estate rendered before his appointment by a mere volunteer.[72] The representative may be sued in his official capacity for money received by him in that capacity which he is not entitled to retain,[73] and an independent executor is liable in his representative capacity for money borrowed for the use and benefit of the estate.[74] A contract by the representative to personally pay a claim against the estate is valid and enforceable if supported by a sufficient consideration.[75]

An administrator carrying on the business of decedent does so at his own risk.[76]

Conveyances.[77]—An administrator of the estate of an intestate has no power

ance to the representative for such fees does not conclude the attorneys as to the amount of their respective fees. Id. Two of three executors drew $5,000 under order of court to be applied as attorney's fees. They paid $4,750 to their attorneys and $250 to the attorney of the third executor. On accounting court allowed the two executors $4,000 and the third executor $1,000 for attorney's fees. Held that the order making the allowance did not purport to adjudicate, as between the two executors and their attorneys, the amount of the fees of the latter, the probate court having no power to make such an adjudication, and was not conclusive on the attorneys as to the amount of their fees, but was merely an allowance to the executors which the court had power to make. Id. Is personally liable to his attorney for his fee or compensation. Kelly v. Odum, 139 N. C. 278, 51 S. E. 953.

69. See § 9 D, post.

70. In re Bender's Will, 97 N. Y. S. 171. Surrogate is authorized to determine and enforce attorney's lien for services rendered estate, under Code Civ. Proc. §§ 2, 66, Const. 1894, art. 6, § 15. Id.

71. Gen. Rules Prac. No. 10, held applicable to surrogate's court under Code Civ. Proc. § 17. In re Bender's Will, 97 N. Y. S. 171.

72. One employed by deceased to handle and break horses for him held not entitled to recover from his administrator on theory of quasi contract for feeding and exercising horses before administrator's appointment it not appearing that it was necessary for him to do so either on grounds of humanity or otherwise, or that he was other than a mere volunteer. Mathie v. Hancock, 78 Vt. 414, 63 A. 143.

73. Money paid them in their official capacity as part of the purchase price of land belonging to the estate where they are unable to give good title. Schelbeler v. Albee, 99 N. Y. S. 706. Cannot be sued in that capacity for money expended by purchaser in examination of title and for counsel fees connected therewith. Id. Complaint held improperly dismissed where it stated good cause of action against representatives in their official capacity, though it also sought recovery on claim for which they were not liable in that capacity. Id.

74. Where note was in fact executed by defendant as independent executrix, though that fact was not disclosed on its face, and money secured thereby was borrowed for use and benefit of the estate. Ellis v. Littlefield [Tex. Civ. App.] 14 Tex. Ct. Rep. 514, 93 S. W. 171.

75. Contract whereby an administrator agreed to pay plaintiff's claim himself if he would not press it against the estate held supported by a sufficient consideration where plaintiff in reliance thereon failed to file his claim and realize on it and defendant was thereby enabled to collect his claim against the deceased. Blake v. Robinson, 129 Iowa, 196, 105 N. W. 401. Contract held not within statute of frauds, it having been made to subserve defendant's own objects and purposes and having resulted in profit to him. Id. In action on such contract, held that quitclaim deed from heirs to administrator was admissible in evidence to explain report of special administrator appointed to pass on defendant's claims against the estate. Id.

76. Liable for losses. Flannigan's Estate, 28 Pa. Super. Ct. 487. Where an administrator continues the business of the decedent in good faith at a profit, a subsequent administrator de bonis non will not be permitted to deny the validity of claims presented by sons and heirs of the decedent on account of services rendered and money advanced in connection with the business and which resulted in increasing that part of the estate. Rembold v. White, 7 Ohio C. C. (N. S.) 509. Where the business of the decedent was carried on without any authorization of law and at a loss, heirs who joined therein, although acting in the best of faith, will be charged with knowledge of the want of capacity of the administrator, and cannot thereafter assert their claims for contributions of money or services whether against the assets involved in the business or the general assets of the estate in preference to the claims of original creditors. Id.

to sell and convey realty belonging to the estate except under an order of court for the payment of debts,[78] or for the purpose of distribution,[79] or for some other purpose authorized by statute.[80] The same is true of an executor, except that he has any additional power given him by the will.[81] In case the representative attempts to convey property of the estate without authority, any interest owned by him individually passes to the grantee under the doctrine of estoppel.[82]

Investments.[83]—In making investments the representative must exercise that degree of diligence and prudence as, in general, prudent men of discretion and intelligence employ in their own like affairs.[84] As a general rule, and in the absence of a provision in the will to the contrary, the executor is not justified in continuing investments made by the decedent which he would not be justified in making himself,[85] but it is his duty to convert them into money within a reasonable time after his appointment.[86] Statutes in some states provide in what securities the funds of the estate may be invested.[87]

(§ 4) *C. Title, interest, or right in decedent's property.*[88]—Except where the rule is changed by statute,[89] or by will,[90] the legal title to the personalty of a decedent remains in abeyance until the appointment or qualification of the executor or administrator[91] when it vests in him.[92] The legal title to realty passes to the

77. See 5 C. L. 1202.
78. See § 7, post.
79. See § 12, post.
80. See § 5 E, post.
81. See § 5 E, post. For construction of wills to determine what powers of sale are thereby given executors, see Wills, 6 C. L. 1880.
82. Where widow, who was entitled to half interest in realty under the will, joined in unauthorized conveyance by warranty deed, held that her interest passed to grantee. Rannels v. Rowe [C. C. A.] 145 F. 296. Interest of devisee who was also executor held not to pass to purchaser where will required him to account for advancement and it did not affirmatively appear that he took any interest in the lands upon settlement of the estate. Id. Deed signed and acknowledged by widow and another in their capacity as personal representatives of a decedent, and reciting a decree of the probate court empowering them as such representatives to make title to land to grantee pursuant to a contract between him and decedent, and the receipt by them of the agreed consideration and purporting to convey the land, held to estop one claiming as heir of the widow to recover her interest in the land as against the grantee, though the probate court had no authority to order the sale of the land in performance of the contract and the deed was therefore void as to decedent's heirs. Cope v. Blount [Tex.] 14 Tex. Ct. Rep. 636, 90 S. W. 868, afg. [Tex. Civ. App.] 15 Tex. Ct. Rep. 99, 91 S. W. 615. The property being presumed, in the absence of evidence to the contrary, to have been community property, by reason of the fact that it was held by decedent and his wife at the time of his death, and the recitals in the deed being admissible to show the existence of the contract between decedent and the grantee, and in connection with other circumstances being sufficient to show that fact and that the consideration was paid, held that the grantee had good title to the whole of the land as against the claimant, even though the latter claimed as heir of the decedent as well as of his widow, where it also appeared that no one claiming under decedent had previously claimed land, though claimant had known of deed for 40 years, but that grantee and those claiming under him had continuously claimed title and paid taxes. Id.
83. See 5 C. L. 1202.
84, 85. In re Sheldon's Estate, 96 N. Y. S. 225.
86. Stocks. In re Sheldon's Estate, 96 N. Y. S. 225. Where legatee accepted stocks which testator had purchased before his death as a partial settlement of her portion of the personalty, held that she could not, in a proceeding to remove the executor, question such investments except in so far as they related to the executor's acts and conduct in the management of the estate. Id.
87. Laws 1902, p. 852, c. 295. In re Sheldon's Estate, 96 N. Y. S. 225. Loan made by executor to a nonresident three months after testator's death, which was evidenced by a promissory note and was not paid until more than twelve months after it became due, held an unauthorized investment and a breach of trust. Id. Loans secured by mortgages on farm property in another state, of whose value he had no personal knowledge, held unauthorized and illegal. Id. P. L. 1881, p. 130, is intended for protection of executors and does not apply to a mortgage taken by an executrix to secure a part of the purchase price of land sold as directed by the will. Cumberland Trust Co. v. Padgett [N. J. Eq.] 61 A. 837.
88. See 5 C. L. 1203.
89. See 5 A, post.
90. See Wills, 6 C. L. 1880.
91. The personal property of a deceased person does not vest in his heirs, but is in abeyance until administration is granted, and is then vested in the administrator by relation from the time of death. McBride v. Vance [Ohio] 76 N. E. 938. The right to the

heirs or devisees immediately on the death of the decedent,[93] subject to the statutory right to sell the same for the payment of his debts,[94] or for purposes of distribution,[95] and to any powers of sale conferred by the will.[96] The representative takes only such title as the decedent had in the property at the time of his death.[97] In Louisiana the property is regarded as being owned by the succession pending administration.[98]

§ 5. *The property, its collection, management, and disposal by personal representatives. A. Assets.*[99]—The title to and right to possession of the realty of a decedent ordinarily passes to his heirs at law or devisees immediately upon his death,[1] subject to the statutory right to sell the same for the payment of his debts,[2] and to

possession of personalty between the time of the death of the intestate and the granting of letters. Litz v. Exchange Bank, 15 Okl. 564, 83 P. 790. A mortgagee's right to foreclose and sell the property is therefore held in abeyance until an administrator is appointed, and any attempt to sell it is a wrongful intermeddling with the property of the intestate. Id.

92. See § 5 A, post. Title does not pass to distributees except through proper probate administration. Wright v. Holmes, 100 Me. 508, 62 A. 507.

93. See § 5 A, post.

94. See §§ 7, 8, post.

95. See § 12, post.

96. See § 5 E, post, and Wills, 6 C. L. 1880.

97. Property held by decedent as security only passes to the representative charged with the same trust and still stands in his hands as security. Finding that decedent held stock as security only held sustained by the evidence. Collins v. Denny Clay Co., 41 Wash. 136, 82 P. 1012. Property held by a decedent as bailee passes to his representative who also holds it as bailee. Newcomb v. Burbank, 146 F. 400.

98. This means only that the property is so held for purposes of administration and not that it is so held in hostility to or exclusive of the ownership and legal seisin of the legal heir or the universal legatee. Tulane University v. Board of Assessors, 115 La. 1025, 40 So. 445.

99. See 5 C. L. 1204.

1. See, also, Descent and Distribution, 7 C. L. 1137. Baldwin v. Alexander [Ala.] 40 So. 391. No intervention of court or administrator is necessary. Hinman v. Hinman, 126 Wis. 191, 105 N. W. 788. Equity of redemption in mortgaged realty passes to heirs subject to widow's right of dower. Appeal of Beard, 78 Conn. 481, 62 A. 704. Heir does not take absolute title, but it is subject to payment of debts and expenses of administration. Marvin v. Bowlby [Mich.] 12 Det. Leg. N. 723, 105 N. W. 751. Administrator has no rights therein except those given him by statute. Tyndale v. Stanwood, 190 Mass. 513, 77 N. E. 481. Has nothing to do with realty and no control over it, except when will provides to the contrary or it is needed to pay debts. Hayes v. Shirk [Ind.] 78 N. E. 653. Has no right, title, or interest therein, except to the rents thereof, unless it is necessary to have recourse to the realty to pay the debts. Adams v. Slattery [Colo.] 85 P. 87. Property having passed to widow and children under the will, held that executors had nothing to do with keeping realty in repair, there being more than enough personalty to pay debts, etc., but was duty of life tenant to do so. In re Sheldon's Estate, 96 N. Y. S. 225. Heirs are entitled to immediate possession and may require partition at once. O'Keefe v. Behrens [Kan.] 85 P. 555. Heirs suing for the possession and partition of realty to which they have acquired title by descent are not required to show, as a condition precedent to recovery, that the land is not subject to appropriation for the payment of decedent's debts. Land may be sold after partition if necessary. Id. Expenses incurred by heirs in removing clouds on the title to property descending to them are not a charge on the estate of which it is a part. In re Heeney's Estate [Cal. App.] 86 P. 842. Where the vendee of land refuses to accept the deed tendered by the vender, the legal title passes to the vender's heirs at law who take subject to the vendee's right to accept the deed or the power of the chancellor to compel him to do so (Brackett's Adm'r v. Boreing [Ky.] 89 S. W. 496), and no title can be made to the vendee in an action to which they are not parties (Id.). Grantee in deed held equitable owner of land attempted to be conveyed thereby, and as such entitled to rents and profits thereof, notwithstanding misdescriptions in deed which she could have had corrected in court of equity, so that heir of granter could not compel her estate to account therefor. Cunningham v. Cunningham's Estate, 220 Ill. 45, 77 N. E. 95, afg. Cunningham v. Dougherty, 121 Ill. App. 395. Instruction to find for defendant if jury found that it was the intention of the granter to convey the land by his deed held proper and not objectionable as submitting the question whether the deed conveyed the legal title to the property. Id. Heirs of deceased beneficiary of trust deed, for whose estate no executor or administrator had been appointed, and trustee held the only necessary and proper parties defendant to a suit for an injunction to prevent foreclosure. Peebles v. Yates [Miss.] 40 So. 996. Where heir had been absent and unheard of for more than seven years, and hence was presumed to be dead, held that there was no presumption that she died at any particular time during that period, and hence no portion of her interest in ancestor's property would pass under deeds executed by guardians of her minor cotenants who were also her heirs. Chapman v. Kullman, 191 Mo. 237, 89 S. W. 924.

any powers of sale conferred by the will.[3] Hence in the absence of a statutory provision to the contrary,[4] actions in respect thereto[5] must ordinarily be brought by the heir or devisee, and the representative is not a necessary party to proceedings to enforce liens thereon acquired during decedent's lifetime.[6] In some states the representative is given the right to possession and control of the realty when necessary for the payment of debts,[7] or for purposes of administration,[8] or when the rents and profits thereof are necessary in the settlement of the estate,[9] or when the estate is insolvent[10] or is directed by the court to be administered as insolvent.[11] In the absence of a statutory provision to the contrary,[12] rents of realty which accrued during decedent's lifetime go to the representative, but those accruing after his death belong to the person then entitled to the land.[13] Realty acquired by the

2. See §§ 7, 8, post.

3. As to sales under powers see § 5 E, post. For construction of wills in this particular, see Wills, 6 C. L. 1880.

4. See § 5 B, ante.

5. A cause of action for trespass or injury to land occurring after decedent's death passes to the heir or devisee and not to the executor or administrator. Adams v. Slattery [Colo.] 85 P. 87. Hence an executor who has no estate in the premises except a right to lease the same cannot maintain an action for waste, but it must be brought by the reversioner in fee. Id. Not where petition did not allege that there were any debts, or that waste complained of would lessen the rental value of the estate, nor that the estate would be prejudiced, and negatived any presumption as to title being in the estate. Id. Sole heir is vested at once on the death of the ancestor with title which will support an action against a third party with respect thereto, regardless of whether there has been a settlement of the estate and a decree of distribution. Hume v. Laurel Hill Cemetery, 142 F. 552.

6. Not a necessary party to proceedings to revive a judgment against decedent directing the sale of land in which no personal relief was granted. Galloway v. Craig [Ky.] 92 S. W. 320.

7. Under Kirby's Dig. § 79, giving administrator possession and control of lands for payment of debts, he holds them as trustee for the creditors and the heirs. Reeder v. Meredith [Ark.] 93 S. W. 558.

8. Finding that possession was necessary held sustained by the evidence. Kern v. Gerzema [Minn.] 106 N. W. 962. In order to defeat his right to recover possession the heirs, or those claiming under them, must show that as a matter of fact the personal property is sufficient for the purposes of administration. Is not sufficient to show that there is no absolute necessity for his taking possession, nor that the personalty will probably be sufficient to pay debts and expenses. Id. If no reasonable necessity exists he cannot create one by commencing an action for the recovery of the possession of the land, thereby incurring costs and attorney's fees. Id. In action by administrator to recover possession, error in admission of evidence as to value of services of his attorney in such action held harmless where court found as a fact that possession was necessary, and finding was sustained by evidence. Id.

9. Rev. St. 1898, § 3823, gives him no right to take possession unless there are debts. Hinman v. Hinman, 126 Wis. 191, 105 N. W. 788. Such a right, until exercised, does not constitute an estate in possession as against the heir, or an intervening estate so as to make that of the heir merely one in remainder or reversion. Id. Complaint in suit by heirs for partition held not demurrable on ground that there could be no estate in possession in the heirs because of administrator's right to possession under certain circumstances, it not appearing from the complaint that an administrator was in possession, or that there was any administrator, or that there were any debts, and there being an allegation that no persons other than defendants, among whom administrator was not included, had any interest in the land. Id.

10. Under Pub. St. 1901, c. 189, § 13, is, in such case, required to account for net proceeds in his administration account. Ayers v. Laighton, 73 N. H. 487, 63 A. 43.

11. Pub. St. 1901, c. 192, § 1, construed, and held that when probate court orders estate to be administered as insolvent, the administrator has at least a prima facie right to the possession of the realty and must account officially for rents collected by him if he takes possession in his official capacity, even though estate subsequently proves to be solvent. Ayers v. Laighton, 73 N. H. 487, 63 A. 43. Where administrator, at his own instance, obtains a decree directing estate to be administered as insolvent and collects rents of realty, he will be estopped to insist, upon settlement of his account, that he was not acting in his official capacity. Id. In such case his title and right to possession commence at the date of the decree of the probate court that the estate is insolvent, or directing that it be administered as though insolvent. Decree does not have a retroactive effect so as to render his previous unauthorized collection of rents an administrative act for which he is accountable officially in the probate court. Id. Executors who take possession of the realty must account for the income received from it after the decree of insolvency. Harris v. Ingalls [N. H.] 64 A. 727.

12. It is the duty of the administrator to apply rents accruing on the property of the estate in his possession to the payment of its debts. Smith v. Goethe, 147 Cal. 725, 82 P. 384.

13. In suit by administratrix to recover

representative in satisfaction of judgments forming a part of the assets of the estate is to be treated as personalty for all purposes of administration.[14] Under the Federal statute the heirs of a timber culture claimant who dies before acquiring title take the claim directly as donees of the government and not by inheritance.[15]

Except where the rule is changed by will,[16] or by statute,[17] the legal title and right to possession of personalty[18] belonging to a decedent[19] passes to his personal

rents from one who had acted as agent for the intestate for their collection, held that a direction of a verdict for plaintiff for the full amount claimed was erroneous where it did not appear whether rents were from realty or were all assets of the estate, some having been collected before the intestate's death and some after. Righter v. Haines [N. J. Law] 64 A. 148. Administrator is not officially accountable in settlement of his accounts for rents collected by him. Ayers v. Laighton, 73 N. H. 487, 63 A. 43. Has no right to rents accruing after decedent's death. Winkle v. Meany, 30 Pa. Super. Ct. 339. Hence, where heirs leased property for one year with right to end term on 90 days' notice, administrator, on subsequently obtaining an order of sale, had no right to release tenant from further payment of rent in consideration of his giving up possession, and such release did not relieve tenant from liability. Id.

14. Weir v. Bagby, 72 Kan. 67, 82 P. 585. Heirs do not take title to it by descent from ancestor, since he never owned it, nor until the probate court of proper jurisdiction has exhausted its authority over it by an order of distribution, either general or special, which is final in character. Id.

15. Upon death of a timber culture claimant before performance by him of the conditions precedent to obtaining title from the government, his heirs succeed to the claim and may obtain a patent therefor in their own names on making the required proofs, but they take directly as donees of the government and not by inheritance. Haun v. Martin [Or.] 86 P. 371. See, also, Public Lands, 6 C. L. 1126; Descent and Distribution, 7 C. L. 1137.

16. See Wills, 6 C. L. 1880.

17. Under Wilson's Rev. & Ann. St. 1903, § 6894, the personalty as well as the realty descends to the heirs subject to the control of the probate court and to the possession of any administrator appointed by that court for the purposes of administration. Litz v. Exchange Bank, 15 Okl. 564, 83 P. 790. Personalty as well as realty descends to heir immediately on ancestor's death, subject to payment of debts. Manchester v. Bursey [Tex. Civ. App.] 14 Tex. Ct. Rep. 657, 91 S. W. 817.

18. Nelson v. Nelson [Ky.] 96 S. W. 794; Wright v. Holmes, 100 Me. 508, 62 A. 507; McBride v. Vance [Ohio] 76 N. E. 938. Where land has been sold and conveyed and title has passed the vendor's claim for the purchase money passes to his personal representative, who may collect it by action without joining the heirs at law. Brackett's Adm'r v. Boreing [Ky.] 89 S. W. 496. One seeking to establish alleged gift of personalty of which he has not possession must seek to obtain possession by appropriate proceedings against personal representatives of deceased donor, who but for the alleged gift would have had title to property, either alone or in conjunction with the persons having actual possession of the property. Graham v. Spence [N. J. Eq.] 63 A. 344. Bill against executors of party alleged to have taken possession of property, to which persons who would have been entitled to the property but for the alleged gift were not made parties, held demurrable for failure to allege whether deceased donor died testate or intestate, and to whom property would pass in either case. Id. Debtors of estate executed several notes to beneficiaries under will for amount of their debt. There being a question as to whether one of the beneficiaries took his share for life or absolutely, the note for his share was made payable to the testator's estate. Held that last named note was an asset of the estate and was properly delivered to one of the executors. In re Kemp's Estate, 49 Misc. 396, 100 N. Y. S. 221. Is entitled to recover money in hands of heir belonging to the estate. Manchester v. Bursey [Tex. Civ. App.] 14 Tex. Ct. Rep. 657, 91 S. W. 817. Mandamus being a discretionary writ, held that there was no abuse of discretion in denying a writ to compel a county judge holding a fund belonging to a decedent to turn it over to the administrator, whose bond was not sufficient to protect it, the judge's official bond being sufficient for that purpose if he held fund in his official capacity as the relator contended. State v. Hendee [Neb.] 105 N. W. 892. Immaterial that administrator tendered an additional bond where there was no order fixing the amount thereof or approving it. Id.

19. In proceeding to compel former administrator, who had been removed, to turn over to his successor certain money alleged to belong to the estate, evidence held to sustain finding that intestate had given money to former administrator personally as a gift. Foster v. Murphy [Neb.] 107 N. W. 843. An administrator is not entitled to the possession of property of which the decedent whose estate he represents died possessed, as against a defendant who shows that he is the equitable owner thereof, in the absence of proof that there are creditors of the estate whose equitable claims to the property take precedence over that of the defendant. Not entitled to recover possession of property which decedent had contracted should belong to him at the time of his death in consideration of services which were duly performed by defendant. Koslowski v. Newman [Neb.] 105 N. W. 295. On petition in orphans' court for order directing administrator to turn over to petitioner a note inventoried as assets of the estate, evidence held not to show a gift of the note to the

representative, and all actions for its recovery must be brought by him.[20] The proceeds of insurance policies payable to the widow and children,[21] the damages recovered for the negligent killing of the decedent which the statute provides shall be for the sole benefit of the widow and next of kin,[22] and accrued pensions,[23] are not assets. The right of the survivor to sell community property to pay community debts cannot be exercised in disregard of the right of the general creditors of the estate to subject it to the payment of their claims nor of the right of the minor children to subject it to their claim for an allowance.[24]

petitioner by the maker. In re Ferdon's Estate [N. J. Eq.] 62 A. 551. Personal representatives of life tenant held to have no legal right to rents accruing after her decease under lease of realty made by her. Steuber v. Huber, 107 App. Div. 599, 95 N. Y. S. 348. On death of tenant in possession under a lease for a definite term or from year to year, his estate passes to his personal representatives, and if they continue in possession without terminating the tenancy, they are liable in their representative capacity for rent thereafter accruing. Id. Lessee having entered into possession under a lease made by an executrix and life tenant, held estopped to contend, in an action for rent, that it was void because not confirmed by the court, and such estoppel extended to and bound his executors who entered into and retained possession of the property under the lease, and precluded them from setting up such invalidity in an action against them for rent accruing after their testator's death. Id. Evidence held to sustain finding that executors of deceased lessee held possession of the leased premises in their representative capacity. Id. Complaint in action by administrator to recover a deposit made by decedent in defendant bank held properly dismissed for failure of proof that at time of decedent's death there was any money belonging to him on deposit, where pass book showed a deposit made by decedent and a subsequent withdrawal, but there was no evidence as to the date of decedent's death. Harris v. State Bank, 49 Misc. 458, 97 N. Y. S. 1044. Statement by plaintiff at the time when he made demand on defendant that decedent died on a certain date had no probative force as evidence of decedent's death or the time of his death. Id. Admission in answer that decedent made a deposit in his lifetime held not an admission that sum was still on deposit at time of his death, in view of express denial of that fact and proof from pass book that deposit was withdrawn. Id. Orphans' court held to have properly dismissed petition by administrator d. b. n. c. t. a. to obtain possession of personalty and the proceeds of realty alleged to belong to the estate in the possession of the executor of a deceased life tenant and the beneficiaries under her will, where it did not appear from the will that the administrator was entitled thereto in preference to the remainderman, or that the funeral expenses of the life tenant, for which the property was liable, had been paid. Coover's Estate, 27 Pa. Super. Ct. 12. In action by administrator to recover personalty from vendee of decedent's husband on ground that husband purchased property as decedent's agent and that therefore it belonged to her estate, held that nonsuit was properly granted on the ground that evidence was insufficient to show ownership in decedent. Du Bose v. Gladden [S. C.] 55 S. E. 152.

20. See § 5 B, post.

21. See, also, Insurance, 6 C. L. 69; Fraternal Mutual Benefit Associations, 5 C. L. 1523. Proceeds of benefit certificate payable to decedent's "legal heirs" held not assets of the estate, the heirs taking by virtue of the contract and not by succession. Burke v. Modern Woodmen of America [Cal. App.] 84 P. 275. Proceeds of insurance policies payable to children held not made assets by arrangement whereby, under order of court, legal title was transferred to insured and by him to a loan company in order that policies might be kept alive for children's benefit. In re Joost's Estate, 50 Misc. 78, 100 N. Y. S. 378. Where will stated that testator was insured in a beneficial association in a specified sum made payable to person named as executor, who was to distribute same according to directions given him by decedent during his lifetime, and there was no evidence as to the character of the policy, held that the proceeds of the policy were not shown to be assets of the estate and were improperly included in the executor's account. Kelley's Estate, 29 Pa. Super. Ct. 106.

22. See, also, Death by Wrongful Act, 7 C. L. 1083. Under Act March 3, 1848, 1 Gen. St. p. 1188. Gottlieb v. North Jersey St. R. Co., 72 N. J. Law, 480, 63 A. 339. In case the statute provides that the action shall be brought by the administrator, he holds the fund as trustee for its distribution in the manner pointed out. Husband, not being one of the next of kin within meaning of Act March 3, 1848, 1 Gen. St. p. 1188, is not entitled to any part of it, and when he receives it as administrator must distribute it among next of kin. Id. Is not assets or liable for debts under Iowa Code § 3313, or Comp. Laws Mich. § 6309. In re Williams' Estate [Iowa] 107 N. W. 608. If beneficiary resides in another jurisdiction the statutes of the state giving the right of action cannot follow the fund, when once collected, into the domicile of the beneficiary, and there determine whether it shall be exempt from the debts of the deceased. Id.

23. Under Federal pension laws, accrued pensions are not assets or liable for debts, but inure to the benefit of the widow, or the children if there is no widow, and hence guardian of infant children of deceased widow of pensioner are entitled to accrued pension due her at her death as against administrator who seeks possession of it to

(§ 5) *B. Collection and reduction to possession.*[25]—Since the legal title and right to possession of personalty is in the representative,[26] all actions for its recovery must ordinarily be brought by him,[27] the heirs not being necessary parties,[28] and limitations commence to run from the date of his appointment.[29] Where he refuses to sue, however, the heir may do so, but the representative must, in such case, be made a party defendant.[30] Legatees may follow funds of the estate into property in which they have been wrongfully invested by the representative where it appears that all other claims in the nature of debts and bequests have been paid.[31] Stat-

pay debts. Pinson v. Sanders [Ky.] 96 S. W. 444.

24. Hence the sale and transfer of personalty by the widow after her husband's decease to a creditor in payment of a community debt was no defense to an action by her as administratrix to recover such property from him, in the absence of a showing that defendant's claim was superior to that of the other creditors or of the minor children of the deceased or that there was other property of the estate sufficient to pay the other creditors and provide an allowance for said minor children. Latham v. Dawson [Tex. Civ. App.] 13 Tex. Ct. Rep. 675, 89 S. W. 315. Unauthorized sale of community property by widow held to pass only such part thereof as she might be entitled to have set off to her in the administration of the estate. Id.

25. See 5 C. L. 1207.

26. See § 5 A, ante.

27. Action on injunction bond restraining the cutting of timber for damages for timber cut and carried away by plaintiffs in injunction suit before defendant's death should be brought by personal representatives of the defendant in that suit, or he should be a party plaintiff, or in case of his refusal to sue or join in the suit he should be made a defendant, since amount recovered would be assets in his hands. Miller v. Smythe [Ky.] 92 S. W. 964. An action to recover personalty alleged to have been converted by widow cannot be maintained by an heir or distributee, but must be brought by the personal representative. Nelson v. Nelson [Ky.] 96 S. W. 794. Fact that there is no personal representative does not authorize heirs to bring suit, since they can have one appointed and it is their duty to do so. Id. Administrator is the proper party to sue for the recovery of personalty given away by the intestate in her lifetime in fraud of her husband's rights. Wright v. Holmes, 100 Me. 508, 62 A. 507. Administratrix of deceased bailor may recover money placed in bailment by him for purpose of defrauding his creditors. Knapp v. Knapp, 118 Mo. App. 685, 96 S. W. 295. Petition in action by administrator for conversion of stock held insufficient to show conversion where it merely alleged that defendant refused to give up stock certificates. Richardson v. Busch [Mo.] 95 S. W. 894. In action by administrator on note alleged to have been given to decedent, statements of deceased in his lifetime tending to show friendly and confidential relations between himself and defendant held too remote. Steltemeier v. Barrett, 115 Mo. App. 323, 91 S. W. 56. In action by administrator on note belonging to decedent, declaration by decedent tending to show ownership of note and that it was due and unpaid held self-serving and inadmissible. Id. An executor and testamentary trustee may sue in his representative capacity to recover assets of the estate in the possession of the defendant, though he in his individual capacity acted in collusion with the defendant in despoiling the estate. Suit against coexecutor and others to set aside conveyance made by both executors through fraud of defendant executor. Smith v. David Stevenson Brewing Co., 50 Misc. 395, 100 N. Y. S. 521. He may also join himself as a plaintiff in his individual capacity for the purpose of having his individual rights in the property determined. Id. Fact that executor converts personalty converted by him into land does not give heirs of a legatee a right to recover possession thereof. Conley v. Walton, 49 Misc. 1, 96 N. Y. S. 400. Pending administration, administrator alone has authority to sue for rents accruing on decedent's estate before the appointment of the administrator. Smart v. Panther [Tex. Civ. App.] 15 Tex. Ct. Rep. 448, 95 S. W. 679.

28. Where equitable title and right to possession have passed to vendee of land under title bond, the vendor's heirs have no right to sue to recover the land for nonpayment of the purchase price, but the remedy is an action by the vendor's representative to recover the unpaid purchase money, to which the heirs are not necessary parties, where no lien is asserted and specific performance is not asked. Doty v. Jameson [Ky.] 93 S. W. 638. Heirs and next of kin of a deceased legatee held improperly joined as plaintiffs in suit by administratrix of such legatee against executrix of deceased executor of estate of legatee's testator, both individually and in her representative capacity, to reach land in which it is alleged that the executor invested funds embezzled by him from his testator's estate and conveyed to defendant, his wife, with intent to defraud those interested in the estate, and to create a secret and illegal trust in favor of himself and his family, they not having a right to recover the property. Code Civ. Proc. § 446, relating to joinder of parties plaintiff, construed. Conley v. Walton, 49 Misc. 1, 96 N. Y. S. 400.

29. Appointment of first administrator held a general one empowering him to make an inventory and do everything else necessary to collect a note due the estate, and, he having failed to make an inventory, limitations proceeded to run against the estate. Walker's Adm'r v. Turley [Ky.] 90 S. W. 576. Limitations against the right to recover property alleged to have been converted by defendant. White v. Blankenbeckler, 115 Mo. App. 722, 92 S. W. 503.

30. Action to recover personalty alleged

utes in some states provide for a summary proceeding by the representative in the probate court for the recovery of personalty in the possession of others.[32]

As a general rule the heirs alone have the right to bring actions in regard to realty,[33] but the representative is the proper party to do so in states where he is entitled to its possession.[34] By statute in some states he may maintain an action against one wrongfully in possession under an adverse claim of title.[35] His right to recover realty fraudulently conveyed by decedent in his lifetime is generally limited to cases where he has been authorized to sell it,[36] or where there is a deficiency of

to have been converted by widow. Nelson v. Nelson [Ky.] 96 S. W. 794.

31. Complaint held to sufficiently allege ownership of the funds in plaintiffs, it appearing therefrom that all other claims in the nature of debts and bequests had been paid. Chaves v. Myer [N. M.] 85 P. 233.

32. Administration Act § 81 held to apply only to property owned by decedent at the time of his death, which has not at the time of the petition filed thereunder been reduced to possession by the representative and not where the representative has once had possession of the property and has lost or parted therewith. Mohlke v. People, 117 Ill. App. 595. The proceeding is regarded as one of an equitable nature, and pleadings filed thereunder are to be treated and regarded as pleadings in equity. Id. Sufficiency of affidavit to petition held waived where respondent filed answer after his motion to quash was overruled. Id. Summary proceedings provided for by Gen. St. 1901, § 3002, for the discovery and to compel the delivery of property or effects of an estate suspected of having been concealed, embezzled or conveyed away, is not the proper remedy to enforce the payment of a debt to an estate, or to try contested rights to property as between the representative of the estate and others. Humbarger v. Humbarger, 72 Kan. 412, 83 P. 1095. Court held to have properly closed investigation and discontinued proceeding where it appeared on the hearing that note alleged to have been concealed was not concealed, and it was then proposed to extend the inquiry as to the maker's liability thereon. Id. In proceedings by administrator under Code Civ. Proc. § 2707, et seq., for discovery and delivery of assets, evidence held not to show such a clear right to property in administrator as to justify relief prayed for. In re Haniman's Estate, 50 Misc. 245, 100 N. Y. S. 481. In any event application must be denied where it appears that property is not in possession of party from whom it is sought to be recovered but has been disposed of by him. Id. Under §§ 2709, 2710, as amended by Laws 1903, p. 1195, c. 526, held that surrogate has discretionary power to examine the person proceeded against, notwithstanding the interposition of an answer alleging title to the property in question. Gick v. Stumpf, 98 N. Y. S. 961, afg. Gick's Will, 49 Misc. 32, 98 N. Y. S. 299. Under Bal. Ann. Codes & St. § 6212, authorizing court, on complaint of any person interested, to cite a person charged with concealing assets and to examine him under oath on the matter of such complaint, and Id. § 6213, providing that all interrogatories put to him and his answers shall be in writing and signed by him, it is not necessary that all the interrogatories shall be reduced to writing and submitted before witness is required to answer any of them, but proper practice is to reduce each interrogatory to writing as asked and each answer as given. Main v. Hadfield, 41 Wash. 504, 84 P. 12.

33. See § 5 A, ante.

34. As a general rule the right to recover possession of property forming a part of the estate of a decedent is in the administrator, if there be administration, and the heirs at law cannot sue for that purpose without his consent. Rule applied to realty. Anderson v. Goodwin, 125 Ga. 663, 54 S. E. 679. If the administrator commits a fraud upon the estate or colludes with others to do so, this rule does not prevent the heirs from bringing an equitable action against him and those in collusion with him for the purpose of protecting the estate. Id. To recover realty illegally sold for inadequate price through collusion with administrator. Id. General allegations of fraud held insufficient. Id. One heir alone can go no farther than is necessary to protect his own interest, and cannot recover the entire estate for the benefit of the others in spite of their quitclaim deeds and over their protest. Id. Allegations as to debts held too vague to affect the question. Id. Action for cancellation of deed may be continued on plaintiff's death by his executor, when properly substituted, without joining the devisees as parties. Rev. Code Civ. Proc. § 82, and Rev. Prob. Code §§ 147, 242, 243, construed. Subera v. Jones [S. D.] 108 N. W. 26. Rights of residuary legatees held to have been fully protected by order allowing them to intervene if they so desired. Id.

35. Under Bal. Ann. Codes & St. §§ 6200, 6296, 6297, may do so on behalf of estate and all the heirs, though it is not alleged that there are any debts, at least where such administrator is appointed within 6 years from the date of decedent's death and hence before debts are barred as claims against realty by Id. § 4642. Gibson v. Slater, 42 Wash. 347, 84 P. 648. Id. § 4640, providing that lands of which an intestate dies seised shall immediately vest in his heirs, and that their title and right to possession shall be good as against all persons claiming adversely to them except the administrator, and that they may sue for and recover their respective shares from any person except the administrator, held not to be inconsistent with sections above cited, and not to prevent such a suit. Id.

36. As between the debtor and his creditors, property fraudulently conveyed remains the property of the debtor and may be recovered or sold by the administrator by due

assets to pay debts.[37] In some states creditors are given a right to recover realty so conveyed where the estate is insolvent.[38] Where the administrator refuses to act, an heir may sue to set aside mortgages and to recover property alleged to have been fraudulently obtained from the intestate.[39]

It is the duty of the representative to settle the estate, pay the debts, and distribute the surplus.[40] He is bound to settle the estate with reference to the situation of the assets at the time of the death of the decedent, and must not attempt by trade or speculation to adjust its affairs on a different basis, or speculate in demands against the creditors.[41] He should collect the debts due the estate in cash, and if he assumes the responsibility of changing their nature, as by accepting a judgment against a third person in lieu of a note, he should be deemed to have done so in his individual capacity, and must sue for the new debt in his own name.[42] In the absence of a statute to the contrary, he may assign, sell, and transfer the choses in action of the estate held by him.[43] In many states he may not settle

proceedings. Rev. Laws c. 146, §§ 2, 17; Id. c. 178, § 1. Dunbar v. Kelly, 189 Mass. 390 75 N. E. 740. Rev. Laws c. 146, § 17. Action is premature when brought pending an appeal from a probate decree granting the license, since the appeal renders the decree of no effect as to future proceedings, and if finally affirmed a new decree is entered which takes effect from the time of entry under the order of affirmation. Tyndale v. Stanwood, 190 Mass. 513, 77 N. E. 481. Rev. Laws c. 146, § 2, providing that no claim by entry or by action to land fraudulently conveyed by the deceased shall be made, unless within five years after the decease of the grantor, is a statute of limitations, and writ of entry brought by administrator in land court more than 5 years after decedent's death, to recover land fraudulently conveyed, is barred. Id. This is true though administrator previously procured license to sell land and brought another action for the same purpose which was premature, Rev. Laws c. 202, § 31, authorizing the bringing of a new action on the abatement of a former one within the time limited in that chapter, having no application to actions under c. 146. Id.

37. Where there is deficiency of assets because of allowance of claims which are a charge on the estate. Comp. Laws 1897, § 9363, et seq. Chapoton v. Prentis [Mich.] 13 Det. Leg. N. 186, 107 N. W. 879. Neither an order of the probate court nor an application by creditors is a necessary prerequisite to the bringing of such a suit. Id. Executor is not required in first instance to prove claims allowed against estate for purpose of showing a deficiency of assets other than by the report of the commissioners or the judgment of the circuit court on appeal, the burden being on defendant to impeach their validity. Id. Allowance of claims by commissioners not shown on their face to have accrued after testator's death is prima facie evidence that they accrued before that time. Id. Answer having admitted that commissioners gave notice of meetings according to the statute, it was unnecessary to prove that fact. Id. Defense that no notice of meetings was given to executor held not available under answer where record did not set out order of probate court and it did not appear that it contained any such requirement. Id. Creditor who had parted with his interest in the property conveyed held not a necessary party. Id. Decree directing reconveyance of the property held too broad, and modified so as to require grantee to pay allowed claims and costs of the proceedings with a provision for sale of land in case of a failure to do so. Id.

38. Under Laws 1896, p. 604, c. 547, § 232, providing that a creditor of a deceased insolvent debtor having a claim or demand exceeding $100 may sue to set aside a conveyance of realty by the decedent as fraudulent without having first obtained a judgment on such claim or demand which, if disputed, may be established at the trial, held that plaintiff in such action must prove his claim in same manner in which he would be required to prove it in an action at law. Mertens v. Mertens, 48 Misc. 235, 96 N. Y. S. 785. In suit by administrator of deceased son to set aside a conveyance by deceased father as in fraud of son's rights as creditor, held that evidence was insufficient to show that father's estate was insufficient to meet debt to son. Id. It is incumbent on him to prove his debt and that the estate of the decedent is insufficient to meet it. Id. Where executor states under oath in his account that he knows of no claims in favor of the estate other than those stated, he cannot thereafter, in a suit by a creditor to set aside a conveyance of his decedent as fraudulent, claim that other assets existed for the purpose of showing that the estate is solvent. Id.

39. Marsh v. Marsh, 78 Vt. 399, 63 A. 159.

40, 41. Hayes v. Rich [Me.] 64 A. 659.

42. Hayes v. Rich [Me.] 64 A. 659. Where he accepted worthless judgment in lieu of note, there being no evidence that the maker of the note was not able to pay it. Id. Administrator held not entitled to judgment in his representative capacity where it did not explicitly or satisfactorily appear that note which he used to purchase the judgment sued on was in fact a part of the assets of the estate. Id. Assumption that he could recover in his representative capacity held incompatible with right of defendant to testify in his own behalf. Id.

claims in favor of the estate for less than the full amount due without the approval of the probate court.[44] He has no power to relieve one holding money belonging to the estate as an involuntary trustee from his trust relation to the estate.[45] A release of a debt by a beneficiary under the will does not bar a suit thereon by the representative, at least where the person giving it is not the sole beneficiary.[46] An action of conversion cannot be maintained against a representative for property alleged to have been converted by his decedent in the absence of a showing that any of it came into the representative's hands.[47]

The principal administrator on his appointment at once takes title to the entire personal estate of the deceased, wherever situated.[48] Though his letters do not authorize him to go into a foreign state and enforce his rights by action in its courts, he may take possession of assets wherever found if he can do so peaceably, and may receive payment of debts and claims due the estate wherever the same is voluntarily made, and his quittance or discharge given therefor is valid against the claim of an ancillary administrator subsequently appointed.[49] A representative may sue to foreclose a mortgage on land in a state other than that of his appointment where he complies with the laws of the forum, though a representative has previously been appointed in the latter state.[50]

It is frequently made the duty of the public administrator to take charge of property or assets of a decedent left in a situation exposed to loss or damage where no other person administers on them.[51] In some states temporary administrators

43. May sell choses in action without resort to, and notwithstanding Code Civ. Proc. § 2717, providing for the sale of personalty when necessary to pay debts. Huck v. Kraus, 99 N. Y. S. 490. Written assignment of note, made and executed by executors, held to confer title thereto on the assignee and to give him right to sue thereon, though one of the executors claimed that estate was still interested in note and that recovery thereon would inure to its benefit. Id.

44. Claims accruing in decedent's lifetime. Van Dusen v. Topeka Woolen Mill Co. [Kan.] 87 P. 74. May compound with a debtor of the deceased for a debt due with the approval of the probate court. Marsh v. Marsh, 78 Vt. 399, 63 A. 159. Allegations of bill held insufficient to show that compromise of suit by creditors to set aside mortgages given by deceased was intended to bar suits by heirs to set aside conveyances of other property. Id.

45. First Nat. Bank v. Wakefield, 148 Cal. 558, 83 P. 1076. Where money was deposited in bank under mistaken belief that it belonged to a partnership of which decedent was a member, but it was subsequently judicially determined that no such partnership existed and that the money was assets of the decedent's estate, held that the bank was an involuntary trustee, and administrator had no authority to authorize it to use any part of the money to satisfy a mortgage held by it on property belonging to the estate. Id.

46. Release of widow of claim on policy of insurance on decedent's life, payable to his executor, held not a bar to a suit thereon by the executor, she not being the only person interested in the proceeds under Code §§ 1805, 3313, and not having been given the right by the will under which she took proceeds charged with the payment of her debts, and it not appearing whether she had elected to take under the will or under the statute. Rauen v. Prudential Ins. Co., 129 Iowa, 725, 106 N. W. 198.

47. Where widow took charge of deceased husband's property and used and disposed of it as she pleased during her lifetime, and on her death none of it could be identified as coming into the hands of her administrator, held that husband's administrator subsequently appointed could not sue widow's administrator for conversion of the property, but his remedy was by a proceeding for the allowance of his claim against the widow's estate in the probate court. White v. Blankenheckler, 115 Mo. App. 722, 92 S. W. 503. Even if widow could be regarded as trustee for heirs under agreement with them as to the possession of the property, and they might be entitled to establish an equity in the assets in the hands of her administrator superior to the claims of her heirs, they could only do so in an equitable proceeding for that purpose and not in an action for conversion against her administrator. Id.

48. In re Williams' Estate [Iowa] 107 N. W. 608.

49. In re Williams' Estate [Iowa] 107 N. W. 608. Domiciliary administrator held entitled to receive damages collected from railway company on whose line deceased was killed in foreign state, and his title to such money could not be disturbed in favor of administrator subsequently appointed in latter state on application of a creditor. Id.

50. May do so under Code 1896, § 360, where he has complied with Id. § 359. Campbell v. Hughes [Ala.] 42 So. 42.

51. Word "papers" in Rev. St. 1899, § 292, declaring it to be the duty of the public administrator to take charge of the estates

are required to deposit funds received by them with a depositary designated by the court, and the money so deposited cannot be paid out without an order of court.[52]

In some states the probate court may compel the representative of a deceased representative to account for the acts and doings of the latter and to turn over any of the property of the estate which has come into his possession or under his control.[53]

Whatever property is lawfully received by the representative after the death of his decedent in virtue of his representative capacity he holds as assets of the estate and is liable therefor in such capacity to the true owner.[54] Where he refuses in such case to turn it over, the latter may generally sue him either in his official capacity or individually at his election.[55] In Louisiana an administrator who maliciously inventories the property of another as belonging to the succession is individually liable for the resulting loss to the owner.[56] Where the vendor of realty rescinds the contract of sale after the death of the vendee, the latter's representative is liable for the reasonable rental value of the property pending a suit by the vendor for its recovery.[57]

A surviving partner has a right to the possession and control of partnership property superior to that of the administrator of a deceased partner, and the latter can claim only so much of it as remains after the payment of the partnership debts.[58]

of decedents "when money, property, papers, or other estate are left in a situation exposed to loss or damage, and no other person administers on the same," etc., refers to papers constituting assets of the estate, that is papers in which there is a property value. Richardson v. Busch [Mo.] 95 S. W. 894. The right of the public administrator to administer on an estate under such section depends on the existence of property or assets in Missouri belonging to decedent at the time of his death, it being immaterial whether there are any debts against the estate or not. Id.

52. Code Civ. Proc. §§ 2678, 2680. In re Rothschild, 109 App. Div. 546, 96 N. Y. S. 372. Company held bound by order appointing it depositary, though not served with a copy thereof, where administrator wrote it that he was required by the order appointing him to deposit funds with it, and inclosed surrogate's certificate as to his qualification. Id.

53. Under Code Civ. Proc. § 2606, surrogate has power to require executor of a deceased executor to account for the acts and doings of the decedent and for the trust property which came into his possession, and may at the same time compel the executor or administrator of the deceased executor to deliver over any of the trust property which has come into his possession or under his control. In re Walton, 98 N. Y. S. 42. Court can only, however, require executor of deceased executor to pay over to his successors money or property which has come into his possession or under his control, and hence decree directing such payment cannot be made where there was no allegation in the petition and no finding that money or property came into the possession of the executor of the deceased executor belonging to the latter's testator. Id. Surrogate held to have jurisdiction to determine on the merits an application to compel the executrix of a deceased administrator to pay into court the assets of the estate of such administrator's intestate which came into her hands, where administrator had accounted and had failed to pay over money as directed by decrees entered on accounting. In re Collyer, 99 N. Y. S. 213.

54. Newcomb v. Burbank, 146 F. 400. Securities received by executors from the estate of the testator which are not distinguishable from the latter's other property become assets of the estate and the true owner must assert his claim as that of a general creditor. Id.

55. Newcomb v. Burbank, 146 F. 400. Stock standing in name of deceased as security. Collins v. Denny Clay Co., 41 Wash. 136, 82 P. 1012. If he elects to sue executor in his representative capacity, can only take such judgment as law authorizes in actions against representatives. Id. Where stock stood in name of decedent as security, its value in such an action held properly fixed as of the date of the trial. Id.

56. Williams' Heirs v. Zengel [La.] 42 So. 153. Since his liability individually and as administrator grows out of same act, he may be joined as defendant in both capacities in one suit. Id.

57. Vendor rescinded contract of sale after vendee's death and instituted suit of trespass to try title to recover the land against widow individually and as administratrix of vendee's estate, and caused the land to be sequestered. The administratrix, in her official capacity and under order of the county court, replevied the property and continued in possession under a replevy bond. Held that on final judgment in favor of the vendor he was entitled to recover from the administratrix the reasonable rental value of the property pending suit, without regard to the amount actually collected by her or the care and diligence exercised by her in the care of the property. Fidelity & Deposit Co. v. Texas Land & Mortg. Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 183, 90 S. W. 197.

58. For full discussion of the rights of

(§ 5) *C. Inventory and appraisal.*[59]—The representative is generally required to file an inventory of all the property of the estate which comes into his hands.[60] Statutes in some states provide for the recovery of a penalty from an administrator for his unexcused failure to do so within the time prescribed.[61] The mere inclusion of property in the inventory does not establish the fact that the estate has title to it.[62] In Louisiana the inventory should embrace all property in the succession but not property in the hands of heirs or third persons claiming to own the same.[63] The remedy of an heir seeking to reach such property is by a direct action for that purpose and not by a rule asking for the amendment of the inventory or the filing of a new one.[64] The representative must be made a party to a rule to have the inventory amended.[65] An heir seeking to have property inventoried as belonging to the succession must clearly show what the property is.[66] An opposition to inventorying property as belonging to an estate is not a petitory action, and hence does not estop the opponent from afterwards bringing a possessory action.[67]

(§ 5) *D. Property allowed widow or children.*[68]—In some states the widow is entitled to hold possession of the dwelling house of the decedent and the farm thereto attached until her dower is assigned.[69] She may release her right of quarantine to the heir or terre-tenant, such release operating by way of an extinguishment of the right and not as a conveyance thereof.[70] Her joinder in a mortgage with an heir to a stranger does not operate as a release to the heir[71] but is merely an attempt by her to convey such right to the mortgagee as security for a debt, which cannot be enforced in a court of law.[72]

each in partnership property, see Partnership, 6 C. L. 911.

59. See 5 C. L. 1209.

60. St. 1903, §§ 3855, 3857, requiring personal representatives to return inventories and sale bills and providing a penalty for failure to do so, are mandatory, and representative is not relieved from compliance therewith by receipt from devisees showing a complete settlement of the estate to their satisfaction. Dant's Ex'rs v. Cooper [Ky.] 96 S. W. 454.

61. Pub. Acts 1905, p. 365, c. 160, repealing Gen. St. 1902, § 324, which provided for recovery of such penalty, held not to have affected actions pending under such section, in view of Gen. St. 1902, § 1, relating to the effect of repealing statutes. Atwood v. Buckingham, 78 Conn. 423, 62 A. 616. Since the repealing statute contained no saving clause, it was effectual not only to prevent the institution of new actions for future delinquencies but also to prevent the bringing of such actions for past ones. Id. General provision of Gen. St. 1902, § 1, that the repeal of an act shall not affect any punishment, penalty, or forfeiture incurred before the repeal takes effect, does not save right to institute new suits for past delinquencies, since § 324 expressly provides that there shall be no forfeiture incurred where delinquent before suit brought makes to probate court an acceptable excuse for delay, and hence there can be no incurred forfeiture before suit. Id. Pub. Acts 1905, p. 413, c. 217, providing that in all actions pending under § 324 the recovery shall be for $1 only as the forfeiture for such neglect and the taxable costs of the court, and that upon plaintiff's refusal to accept a tender by defendant before trial of $1 and accrued costs he shall not recover any sum in excess thereof, is retroactive and applies to pending causes, and renders ineffective Gen. St. 1902, § 1. Id. Chapter 217 is not unconstitutional because retrospective, there being nothing in the constitution prohibiting such legislation, which is not of itself unlawful. Id. Since no person has a vested right in an unenforced penalty, it is not unconstitutional, in so far as it affects pending suits, as divesting vested rights. Id. Does not violate contract rights, since there is no contract relation between the state and the person suing for the penalty. Id. Is not unconstitutional as invading the judicial province, or interfering, dictating to, or coercing the judicial province. Id. Does not deny equal protection of the laws, since new actions cannot be commenced. Id.

62. McKenna v. Cosgrove, 41 Wash. 332, 83 P. 240.

63, 64. Succession of Kranz, 115 La. 545, 39 So. 594.

65. A rule to have inventory amended so as to bring in property alleged to belong to the succession cannot be maintained against a coheir, who is also executrix, personally, but the executrix must be made a party. Succession of Kranz, 115 La. 545, 39 So. 594.

66. Showing held insufficient. Succession of Kranz, 115 La. 545, 39 So. 594.

67. Williams' Heirs v. Zengel [La.] 42 So. 153.

68. See 5 C. L. 1210.

69. Under Kirby's Dig. § 2704. Griffin v. Dunn [Ark.] 96 S. W. 190. Right is a personal privilege and not an estate in land which can be conveyed to another, and such an attempted conveyance operates as an abandonment and gives the heir a right of

The widow and minor children are generally given an extended estate of homestead in decedent's land free from any liability for his debts.[73] A sale of the property[74] or a removal therefrom generally operates as an abandonment.[75] The right of a child to have a probate homestead set apart to him is waived by his failure to make application therefor until after he attains his majority.[76]

The widow is usually given an allowance for the support of herself and the minor children[77] during the period of administration,[78] the amount being either fixed by statute[79] or discretionary with the court.[80] The procedure to procure the allowance is purely statutory and varies in the different states.[81] The representative will be charged with the full amount of the allowance where he makes a volun-

entry, subject only to the right to have dower assigned. Id.

70, 71, 72. Penney v. Weems [Ala.] 39 So. 574.

73. See, also, Homestead, 5 C. L. 1689. So long as the homestead of decedent is occupied or used by the widow, his children cannot have partition thereof nor an accounting by her for its use. Stevens v. Wilbourn [Miss.] 41 So. 66.

74. Under St. 1903, § 1707, when the widow sells and conveys her homestead, she will be deemed to have abandoned it, and the infant children at once have the sole right to the use of the homestead until the youngest child becomes of age. Davidson v. Marcum [Ky.] 89 S. W. 703.

75. Widow cannot claim homestead in home place where she removed from property and lived elsewhere after her second marriage. Nelson v. Nelson [Ky.] 96 S. W. 794. Where probate court assigned homestead to widow for such period as she saw proper to occupy it as such, held that she lost her right to it when she abandoned it and lived at another and different place. Mecaskey v. Morris [Tex. Civ. App.] 89 S. W. 1085.

76. In re Heywood's Estate [Cal.] 84 P. 834.

77. The minor children have no claim to any portion of the family allowance made to the widow under Code Civ. Proc. § 1467, nor is it held in trust for them, and she is not required to account to them for the manner in which it has been expended. Bell v. Bell [Cal. App.] 83 P. 814. Code Civ. Proc. § 1468, providing that when property is "set apart" to the use of the family half of it shall belong to the widow and the remainder in equal shares to the children, does not apply to such allowance, but is applicable only when some specific or tangible property has been set apart for the use of the family, such as exempt property or the homestead. Id. A widow's award is not such a judgment as draws interest under Rev. St. c. 74, § 3. Field v. Field, 117 Ill. App. 307. Under Rev. Laws c. 140, § 2, probate court is required to make an allowance to the widow out of the personal property as necessaries, which cannot be taken as assets for the payment of debts, legacies, or charges of administration. Whitcomb v. Taylor [Mass.] 78 N. E. 536. Term "personal property" means the personal property left by the deceased at the time of his death, and not that in the hands of the administrator at the time of filing the petition for an allowance for necessaries, and the rights of the widow under this statute cannot be taken away by the hasty action of the representative in paying the debts. Id. Cannot be deprived of her right to allowance by reason of the fact that representative expends all the property applicable thereto in paying debts of the estate before the expiration of the year after his appointment during which, under Rev. Laws, c. 141, § 1, he cannot be sued, and in such case his account will not be allowed. Id. Bounty given to widow by Rev. St. 1899, § 107, belongs to her absolutely, provided she applies for it within the time prescribed by § 108, regardless of the debts of her husband, and is unaffected by the exercise of her election to take a child's portion of the realty under § 2944, which does not refer to personalty. Hill v. Evans, 114 Mo. App. 715, 91 S. W. 1022.

78. Allowance may continue during the time reasonably necessary for the settlement of the estate. Code Civ. Proc. § 2582, construed. In re Dougherty's Estate [Mont.] 86 P. 38. Court held to have properly discontinued allowance from time when estate was ready for distribution, the widow being also the executrix. Id. Fact that interested parties could have compelled final settlement and distribution at any time after such date, but did not do so, held not to preclude them from objecting to amount of allowance claimed thereafter. Id.

79. Rev. St. § 3061 provides that year's allowance of $300 shall be made to the widow and $100 in addition thereto for every other member of the family, and § 3062 defines "family" as every person to whom deceased or widow stood in place of a parent, who was residing with the deceased at his death, whose age did not exceed 15 years. Held that, where the widow refused to assume the control and maintenance of two step-children under 15 years of age after the death of her husband, she was only entitled to an allowance of $300, the allowance for the children being payable to their guardian. In re Stewart, 140 N. C. 28, 52 S. E. 255.

80. Even if widow's allowance is subject to modification to meet changed conditions, this must be done upon motion made for that purpose, and may not be done by objection to the account. In re Dougherty's Estate [Mont.] 86 P. 38.

81. While the probate court has no power to substitute its judgment for that of the appraisers making a widow's award, yet it has power to set aside such appraisement and direct the appraisers to make another. Field v. Field, 117 Ill. App. 307. Under Code Civ. Proc. §§ 2580, 2582, widow is entitled

tary distribution in disregard of a seasonable demand therefor.[82] In some states the widow is also entitled to an allowance for necessary provisions[83] and fuel for a specified time after her husband's death.[84] She is also often given the wearing apparel of her husband[85] and certain enumerated articles of personalty, such as household furniture and the like, not to exceed a specified value.[86] The latter right is given to the husband in some states where the wife dies intestate.[87] In some states the whole of the personalty goes to her[88] or the children when it does not exceed a specified sum.[89]

The right to an allowance or award generally depends upon marriage, the continuance of the marriage relation until death, and the survivorship of the wife.[90] It may be released by antenuptial contract where there are no children,[91] and may be waived either by some unequivocal act manifesting her intention not to claim it, or by such unreasonable delay in making her demand as to warrant the presumption of such intention.[92] The mere acceptance of a testamentary provision in her favor

to an allowance as a matter of right, and no notice of the court's intention or action in the matter is required, nor is it necessary that there be a formal application. In re Dougherty's Estate [Mont.] 86 P. 38.

82. Administrator held properly charged with full amount of widow's allowance, where he disregarded a demand therefor made by her while he had sufficient funds for its payment in his hands and distributed the money without taking refunding bonds and without asking court to make a decree of distribution or to appoint an auditor. Marshall's Estate, 30 Pa. Super. Ct. 574.

83. Allowance to widow for necessary provisions for 60 days after death of her husband should not be restricted to what she might consume personally, but may include provisions consumed by her relatives who were members of decedent's family before his death. In re Griffith's Estate, 49 Misc. 405, 100 N. Y. S. 215. Widow does not waive right by reason of failure of appraisers to make it, but it may be allowed to her upon final accounting. Id.

84. Administratrix held entitled to credit for amount paid by her for fuel used in house for 60 days after decedent's death to be credited upon her award as widow under Code Civ. Proc. § 2713. In re Schroeder, 99 N. Y. S. 176.

85. Widow held not entitled to wearing apparel and ornaments of husband under § 2713, subd. 4. In re Griffith's Estate, 49 Misc. 405, 100 N. Y. S. 215.

86. Under Code Civ. Proc. § 2713, subd. 5, where decedent had a family and his personalty, not exempted by Id. subds. 1-4, exceeds $150, the appraisers must set apart to widow and minor children furniture, provisions, or other personal property to the value of $150, their discretion extending only to selecting the articles and determining the value thereof. In re Campbell's Estate, 48 Misc. 278, 96 N. Y. S. 768. Minors are not vested with any interest, either absolute or contingent, in any part of the property specified in subd. 5, and hence have no interest in determination of question whether widow has waived her right thereto. Id. Sum of money cannot be set off as exempt in lieu of articles enumerated in Code Civ. Proc. § 2713, subds. 1-4, which decedent did not own. Id. No allowance will be made in lieu of any articles enumerated in Code Civ. Proc. § 2713, subd. 4, which husband did not own. In re Griffith's Estate, 49 Misc. 405, 100 N. Y. S. 215.

87. Rev. St. 1899, § 111, providing that if wife dies intestate owning personalty in her own name her husband shall be entitled, in addition to curtesy, to all the articles and property and all the remedies and reliefs given by §§ 105-107, 109, to the widow in her deceased husband's property, has no application where wife dies testate. Black v. Brittain, 116 Mo. App. 386, 92 S. W. 500.

88. Statute authorizing probate court to vest estate of a decedent in the widow or children if it was less than the aggregate value of $300 held repealed by Act April 1, 1887 (Acts 1887, p. 206), which applies only to personalty, so that court had no jurisdiction to award whole estate, consisting of lands of less value than $300, to her and such order was void. Calhoun v. Moore [Ark.] 94 S. W. 931. Her deed to such land conveyed nothing but her unassigned dower. Id.

89. In absence of any showing to the contrary, guardian of infant children held entitled to $40, derived from sale of personalty of decedent, under exemption laws as against administrator seeking to recover same to use in paying debts. Pinson v. Sanders [Ky.] 96 S. W. 444.

90. Right to widow's award. Kroell v. Kroell, 219 Ill. 105, 76 N. E. 63.

91. Contract releasing all rights in husband's property, etc., held to bar right to award. Kroell v. Kroell, 219 Ill. 105, 76 N. E. 63, rvg. 120 Ill. App. 76; Pavlicek v. Roessler [Ill.] 78 N. E. 11, rvg. 121 Ill. App. 219.

92. Right held not prejudiced by delay in taking out letters of administration for which widow was not to blame. Marshall's Estate, 30 Pa. Super. Ct. 574. Mere delay of about three months after issuance of letters before making formal demand for exemption held not to raise presumption of waiver, particularly where she made informal oral demand when personalty was appraised. Id. Mere fact that she does not make formal demand for appraisement until after administrator obtains order for sale of realty does not necessarily show laches. Id.

does not operate as a waiver,[93] even though it be in lieu of dower,[94] unless the will either expressly or impliedly so provides.[95] So, too, her right to a part of her husband's personalty may be waived,[96] and is lost by desertion and misconduct of the wife during her husband's lifetime,[97] though it has been held that her right to it and to an allowance is not destroyed by a separation.[98]

The right of a child to have a family allowance[99] and the exempt property set aside to him is lost by his failure to make application therefor until after he attains his majority.[1]

(§ 5) *E. Management, custody, control, and disposition of estate.*[2]—The management and disposal of property under testamentary trusts, though the same persons act as executors and trustees, is treated in the article on trusts.[3] Persons occupying realty belonging to the estate pending the administration are ordinarily liable for its reasonable rental value.[4] In some states a married woman appointed executrix is required to act jointly with her husband in the administration of the estate.[5]

In Texas a testator may provide for the administration of his estate by his executor free from the control of the probate court,[6] in which case the independent executor, as he is called, may do voluntarily whatever a regular executor or administrator might do under order of the probate court.[7]

Control by courts.[8]—Probate courts ordinarily have power to summarily issue orders for the protection of the estate.[9] Courts of equity have full power to au-

93. Mere fact that widow elects to accept testamentary provision made for her by her husband's will does not deprive her of allowance given her by Burns' Ann. St. 1901. § 2424. Bowman v. Olrick, 165 Ind. 478, 75 N. E. 820.

94. Acceptance by widow of a bequest in lieu of dower does not deprive her of her right to allowance of $400 out of personal property given her by Rev. St. 1899, § 107, such allowance not being dower in the strict sense. Ellis v. Ellis [Mo. App.] 96 S. W. 260.

95. Allowance of $500 held waived by implied acceptance of provisions of will which gave her all the realty for life, except a lot valued at $160, where testator left no personalty, so that sale of land to pay allowance would have defeated will. Bowman v. Olrick, 165 Ind. 478, 75 N. E. 820.

96. Widow held to have waived rights under Code Civ. Proc. § 2713, subd. 5, where she stated that she was satisfied with what had already been set off to her under Id. subds. 1-4, and did not wish to have any further personalty set off to her. In re Campbell's Estate, 48 Misc. 278, 96 N. Y. S. 768.

97. Mansf. Dig. Ark. §§ 62, 63, extended over and put in force in Indian Territory by Congress providing for special allowances to widow, contemplate the case of a widow who has lived with husband during his lifetime as a member of his family and performed the duties of that relation, and not one who willingly separated from him, performed none of the duties of a wife, and by her gross misconduct disqualified herself from succeeding him as the head of the family. Daniels v. Taylor [C. C. A.] 145 F. 169.

98. The fact that a husband and wife separate and live apart for a number of years does not destroy the wife's right of exemption as a widow until they are divorced. In re McMillan's Estate, 8 Ohio C. C. (N. S.) 294.

99, 1, In re Heywood's Estate [Cal.] 84 P. 834.

2. See 5 C. L. 1213.

3. See Trusts, 6 C. L. 1736.

4. Where heir and another remained in possession of property until its sale at request of administrator and under agreement with him that they were to pay $3 per month rent, held that they should not be charged rent at any higher rate under the circumstances. Hill's Guardian v. Hill [Ky.] 92 S. W. 924.

5. Provisions of Pasch. Dig. § 1284, held fully complied with in execution of conveyance, even if applicable where independent executrix married after her appointment. McAllen v. Raphael [Tex. Civ. App.] 96 S. W. 760.

6. A provision in the will relieving the executor from executing a bond does not divest the county court of control over the estate unless the will in express terms or by necessary construction indicates the desire of the testator that his estate shall be administered independent of such court. Gray v. Russell [Tex. Civ. App.] 14 Tex. Ct. Rep. 836, 91 S. W. 235.

7. Where testator held legal title to land in trust for a third person, held that independent executor had authority to convey legal title to him or his grantees. Sydnor v. Texas Sav. & Real Estate Inv. Ass'n [Tex. Civ. App.] 15 Tex. Ct. Rep. 100, 94 S. W. 451. Since, where decedent took deed under agreement to reconvey, the obligation could have been enforced in probate court had estate been administered there, held that his independent executrix had power to satisfy such obligation by executing reconveyance. McAllen v. Raphael [Tex. Civ. App.] 96 S. W. 760.

thorize the conversion of property contrary to the provisions of a will and differing from the purposes and plans of the testator where there is a necessity for such conversion for the preservation of the estate,[10] but there must be some important and controlling reason therefor and a conversion is not justified by the mere fact that the court may conclude that some other plan than that of the testator would have been better.[11]

Contracts for the sale or conveyance of land by or to decedent.[12]—By statute in some states the court may direct the representative to convey realty pursuant to a contract to convey made by decedent during his lifetime which could have been enforced against him had he lived.[13]

Right to sell realty.[14]—An executor has no authority to sell the realty of his testator except under a power given him by the will,[15] or under order of court for the payment of debts,[16] or for division among those entitled thereto.[17] The extent of a testamentary power of sale is of course to be determined from the language of the will.[18] A power of sale does not include a right to bind the realty by a confession of judgment.[19] A pretended conveyance made under an assumed power conferred by the will, which by true construction does not confer such power, cannot operate to deprive the devisees of their title,[20] provided they seasonably undertake to assert it and do not accept the fruits of the sale.[21] As a general rule, where a power is vested in several executors, all must unite in making the sale.[22] A power conferred upon executors ratione officii may be exercised by one succeeding to that office,[23] but the rule is otherwise where the power is personal and involves special

8. See 5 C. L. 1213.

9. Where petition showed that petitioner was sole owner of the property, subject to widow's life estate, and hence negatived any presumption of title in the estate, held that he was not entitled to a summary order in the administration proceedings restraining a tenant in possession from committing waste, but, the action being a personal one, could only obtain the relief sought through ordinary injunction proceedings in which defendant was entitled to be heard. Adams v. Slattery [Colo.] 85 P. 87.

10. Johnson v. Buck, 220 Ill. 226, 77 N. E. 163.

11. Bill held not to state facts justifying sale of property for purpose of conserving interests of minor devisee. Johnson v. Buck, 220 Ill. 226, 77 N. E. 163.

12. See 5 C. L. 1214.

13. Code Civ. Proc. § 1597, held applicable only when deceased was bound by a written contract to convey, and not to a suit against an executrix to redeem from certain deeds to her testator alleged to have been in fact mortgages. Wadleigh v. Phelps [Cal.] 87 P. 93.

14. See 5 C. L. 1214.

15. See, also, Wills, 6 C. L. 1880. Where will conferred no power of sale, deed purporting to be made by executrix, but without proper order of court and under a sale made on premises instead of at court house door, held not to convey estate's title but only the individual interest of the executrix. Glore v. Scroggins, 124 Ga. 922, 53 S. E. 690.

16. See § 7, post.

17. See § 12, post.

18. See, also, Wills, 6 C. L. 1880. Power in executors to sell land for purpose of making a division will not be implied where will contains no express power of sale and no direction to executors to divide. Campbell v. Cole [N. J. Eq.] 64 A. 461. Executor having power under the will to sell any part of testator's estate may direct the making of a sheriff's deed, to which testator was entitled, to a third party. Reeve v. North Carolina Land & Timber Co. [C. C. A.] 141 F. 821.

19. An executrix given a life interest with an unrestricted power of sale has no power to bind the realty by a confession of judgment, particularly for a claim which, by lapse of time, has ceased to be a lien on said realty. Rosengarten's Estate, 30 Pa. Super. Ct. 244.

20. Authority of executors being a matter of public record, their act in attempting sale without authority is a nullity. Forbes v. Keyes [Mass.] 78 N. E. 733.

21. Forbes v. Keyes [Mass.] 78 N. E. 733. Where parties in interest assented to accounts by which executors were charged with proceeds of sales, and devisees accepted and receipted for moneys received from sales and never objected to their validity, the title conveyed or the prices received, held that they were estopped to claim that sales constituted a breach of executors' bond. Id.

22. Brown v. Doherty [N. Y.] 78 N. E. 147, afg. 93 App. Div. 190, 87 N. Y. S. 563. Executors acting under imperative power, sold realty at public auction, both being present. Deed was made by only one of them in which other, for some unassigned reason, did not join. Latter died some years later without contesting purchaser's title. Held, in action by heirs, that purchaser acquired the whole equitable title, the heirs having, at most, the legal title as trustees for his benefit. Id. In action by purchaser to determine title under Code Civ. Proc. c. 14,

trust and confidence.[24] Errors of judgment in delaying the sale do not render the executor personally liable where no loss results to the estate.[25] In some states the executor is required to make a return to the court and the sale must be confirmed before it becomes effectual.[26] In others the court is given a discretionary power to set aside the sale if a higher offer is thereafter made by a responsible person,[27] or if such a course is manifestly for the best interest of the estate.[28] Where a sale has been set aside the purchaser cannot question the right of the court to direct a new sale on application of the executor.[29] A private sale by an executor acting under a power and without an order of court will not divest the lien of a judgment against him, though the debt upon which the judgment is founded was a liability of the estate created after the death of the testator.[30]

Executor's deeds made without procuring authority from the court having jurisdiction are void as to devisees not joining therein.[31] Heirs who with knowledge of the facts aid in procuring and effectuating a private sale cannot thereafter have it set aside in equity on the ground that it should have been a public one.[32]

Sale of personalty.—An executor selling personalty without an order of court becomes personally responsible for its value.[33]

tit. 1, art. 5, held that judgment barring any claim by heirs and establishing plaintiff's ownership was authorized. Id.

23. Under Act April 6, 1888, 2 Gen. St. p. 1429, an administrator with the will annexed may sell lands where will gives executors power of sale by implication. Ker v. Banta [N. J. Eq.] 63 A. 550. Powers conferred by act are, however, limited to sale of lands and it does not operate to make administrator with will annexed succeed to trust created by will. Id. Administrator d. b. n. c. t. a. held to have authority to exercise power. Ocheltree v. McDaniel [Del.] 63 A. 687.

24. P. L. 1888, p. 395, held not to give a substituted administrator any power to sell lands which are the subject of an express devise in trust. Hegeman's Ex'rs v. Roome [N. J. Eq.] 62 A. 392. Discretionary power coupled with a trust and involving special trust and confidence cannot be executed by him. Id.

25. Where executor, having large discretionary powers under the will as to the sale instead of strictly pursuing directions of will, followed his own judgment, held that he was not, in the absence of fraud, liable for delaying sale longer than necessary, his mistake, if there was one, being one of judgment and no loss having resulted to the estate. In re Cunningham's Estate, 212 Pa. 441, 61 A. 993.

26. Under Code Civ. Proc. § 1561, sale is not effectual until confirmed by proper superior court, which, under Id. § 1575, has authority to compel executor to make return. In re Walker [Cal.] 85 P. 310. Where only persons interested in proceeds of sale, which had not been confirmed though part of purchase price had been paid under contract, had so ratified executor's contract as to estop themselves from disputing it, held that court could compel a return and confirm sale on that ground and direct the execution of a conveyance upon compliance with the contract, or that at least the objections of such beneficiaries would be ineffectual to prevent a ratification. Id.

27. Under Code Civ. Proc. § 1552, may do so if an offer of 10 per cent more in amount than that named in the return be made to him in writing by a responsible person. In re Reed's Estate [Cal. App.] 85 P. 155. Where such an offer was made by the original purchaser, held that the court had discretionary power either to accept such offer and confirm the sale or to order a new sale. Id. Was not bound to accept such offer, particularly where another offer ten per cent greater was subsequently made in writing by a responsible person. Id. Held immaterial that original purchaser's increased bid was result of a mistake. Id. Fact that under new bid conditions of deed were changed held not to prevent its acceptance where executor acquiesced in change which it appears would have been equally beneficial to the estate. Id.

28. A sale under a testamentary power, while not primarily requiring confirmation by the orphans' court, is subject to its supervision and control and may be set aside and a resale ordered when such a course is manifestly to the interest of the estate, even though bona fide. Brittain's Estate, 28 Pa. Super. Ct. 144. Sale properly set aside where evidence showed that land had really been bought by executor through an agent and petitioners gave bond to bid a much larger amount therefor. Id. Petition to set aside sale on ground that executor had bought land for a grossly inadequate price will not be dismissed because another beneficiary has filed exceptions to the executor's account seeking to surcharge him with the profits of the sale, even though exceptant joins in the petition. Id.

29. In re Reed's Estate [Cal. App.] 85 P. 155.

30. Only judicial sales divest existing liens. Hollinshed v. Woodard, 124 Ga. 721, 52 S. E. 815.

31. Rannels v. Rowe [C. C. A.] 145 F. 296.

32. Heir at law who knew that realty was to be sold at private sale took part in accomplishing that result and made a quit-

§ 6. *Debts and liabilities of estate; their establishment and satisfaction. A. Claims provable*[34] embrace those arising out of contracts express[35] or implied,[36] valid and enforceable against decedent during his lifetime, and not extinguished by his death, and torts which survive.[37] They must subsist in law and be enforceable as against a plea of limitations,[38] or of the statute of frauds[39] or other like defense.[40] A claim against a decedent's estate and a judgment recovered thereon against the representative are assignable,[41] and the assignor thereby acquires all the rights of the assignee which he may and must enforce in his own name by an action or special proceeding.[42] Upon the death of one of two partners, the primary liability for partnership obligations rests upon the survivor, and the liability of the personal representative of the decedent is dependent on the insolvency or inability to pay of the survivor, which is a fact essential to the cause of action as against the survivor and the representative jointly, and must be alleged in the complaint.[43]

(§ 6) *B. Exhibition, establishment, allowance, and enforcement of claims. Jurisdiction.*[44]—The jurisdiction of the various courts to pass on and allow claims has been discussed in a previous section.[45] A creditor who is a resident of the place of principal administration and files his claim to share in the distribution therein may be enjoined from prosecuting ancillary proceedings in a foreign court for the purpose of securing an advantage over other claimants.[46]

Occasion and necessity of proving claims.[47]—In most states all claims against the estate must be presented to and allowed by the probate court or the representative before they can be paid or enforced.[48] This rule does not, however, apply to lia-

claim deed in order to effectuate that purpose. Anderson v. Goodwin, 125 Ga. 663, 54 S. E. 679.

33. Executors held to have become responsible for value of cooperage sold, regardless of whether or not the total amount received was credited to the estate in their accounts. In re Scott's Estate, 1 Cal. App. 740, 83 P. 85. Particularly where sales were admitted to have been made at prices in excess of those shown in the accounts. Id.

34. See 5 C. L. 1217.

35. See Contracts, 7 C. L. 761. Where a part of the consideration for a deed is an agreement by the grantee to support the grantors for life, they may, on his death, file claims against grantee's estate for damages suffered by them by reason of the fact that the conditions to be performed by him have not been complied with since his death and cannot be in the future. Calkins v. Calkins, 220 Ill. 111, 77 N. E. 102.

36. See Implied Contracts, 5 C. L. 1756.

37. See Abatement and Revival, 7 C. L. 1.

38. See Limitation of Actions, 6 C. L. 465. See, also, § 6 B, post. Claim of undertaker for funeral expenses of decedent's husband held barred by limitations before decedent's death. In re Primmer's Estate, 49 Misc. 413, 99 N. Y. S. 830.

39. See Frauds, Statute of, 5 C. L. 1550.

40. See Duress, 7 C. L. 1201; Fraud and Undue Influence, 5 C. L. 1541, etc.

41. Code Civ. Proc. § 1910. Bamberger v. American Surety Co., 48 Misc. 221, 109 App. Div. 917, 96 N. Y. S. 665.

42. Code Civ. Proc. §§ 1909, 449. Bamberger v. American Surety Co., 48 Misc. 221, 109 App. Div. 917, 96 N. Y. S. 665.

43. In action against both partners, where the one who has been served dies, it is not necessary to make his representative a party in absence of allegation that survivor is insolvent or unable to pay the debt. Latz v. Blumenthal, 50 Misc. 407, 100 N. Y. S. 527. See, also, Partnership, 6 C. L. 911.

44. See 5 C. L. 1217.

45. See § 2, ante.

46. In re Williams' Estate [Iowa] 107 N. W. 608.

47. See 5 C. L. 1218.

48. Where the lands as well as the personalty are liable for debts, a claim for damages for breach of the decedent's contract will not lie against the heirs in the first instance, but the claim should be presented in due course of administration and be asserted against the personal representative. Zimmerman Mfg. Co. v. Wilson [Ala.] 40 So. 515. On breach of covenant of warranty made by life tenant on sale of timber, purchaser held to have no lien on purchase money in hands of life tenant or her children which would authorize a bill in equity against either to obtain a personal decree for the purchase price, and hence court could not, by a species of equitable attachment or garnishment or by an injunction against distribution, seize and hold in gremio legis the moneys of the children, coming to them as heirs of their father, to satisfy a decree which plaintiff could never obtain. Id. Under Burns' Ann. St. 1901, § 2465, prohibiting the bringing of actions against executors and administrators on claims and providing that a statement of such claims shall be filed with clerk, held that payee of notes filing claims thereon was not entitled to attorney's fees provided for thereby, there having been no breach of the stipulations of the notes by the maker and the claims not having been contested. St. Joseph County Sav. Bank v.

bilities incurred by the estate after the death of the decedent,[49] nor where payment is not sought out of the assets of the estate,[50] nor to claims on which suit is pending at the decedent's death where the suit is subsequently revived against his representative,[51] nor in some states to claims for damages for torts.[52] It has also been held not to apply to claims for the enforcement of decedent's liability as a stockholder in a corporation.[53] In some states claims are enforced by direct action against the representative and need not be filed unless the estate is administered as insolvent.[54] Provision is generally made for the presentation and allowance of contingent claims and for the retention of sufficient funds to pay them when they become absolute.[55] Since a failure to present a claim does not operate to extinguish the debt,[56] mortgages and other liens on land may ordinarily be foreclosed without presenting claims for the debts secured thereby.[57] In some states an exception to this rule exists in the case of liens on the homestead.[58]

Randall [Ind. App.] 76 N. E. 1012. Stipulation for attorney's fees held not to cover expense of preparing and presenting claims. Id. Held not necessary to determine whether right to sue on note was barred by limitations in absence of evidence that note was ever presented as a claim against the estate of the deceased maker to the administrator by anyone to whom he could legally pay it. McBride v. Vance [Ohio] 76 N. E. 938. Where administratrix of deceased wife failed to file claim against estate of deceased husband for money loaned to him by wife, held that bar of statute was not affected by fact that son had previously, and within the time fixed, filed a claim against the father's estate for the same money, claiming that it had been placed in father's hands in trust for son's benefit and seeking to have trust established in his favor, which claim was defeated on ground that no such trust existed. Barry v. Minahan, 127 Wis. 570, 107 N. W. 488. Claim of son was a different cause of action prosecuted in a different interest, and situation is not changed by fact that son may eventually profit as heir of his mother by a recovery on the part of the administratrix. Id.

49. Are not properly claims against his estate. Allowance as a debt of amount paid by administrator for insuring property of the estate held not prejudicial, it being a charge against the estate as an item of expense incident to the preservation of the property pending administration and as such payable prior to payment of debts. Enscoe v. Fletcher, 1 Cal. App. 659, 82 P. 1075. Vendor rescinded contract for sale of land after vendee's death and instituted suit of trespass to try title for the recovery of the land against the vendee's widow individually and as administratrix and caused land to be sequestered. The administratrix in her official capacity and under order of court replevied the property and gave a replevy bond, in pursuance of which she remained in possession. Held that a claim by the vendor for rents of the land pending the action and until final judgment in his favor was not a claim against the deceased vendor, and it was not necessary to present it. Fidelity & Deposit Co. v. Texas Land & Mortg. Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 183, 90 S. W. 197.

50. Where court having jurisdiction construed will and by decree of distribution distributed a certain sum to a charitable association, to be paid out of the rents, issues, and profits of a life estate, and to be invested by the life tenant in a satisfactory security to be transferred to said association upon the trusts provided for in the will, and life tenant segregated such sum, held that on life tenant's death before paying it over to the association it was not necessary for the latter to present a claim for such fund. Kauffman v. Foster [Cal. App.] 86 P. 1108.

51. Statute of nonclaim is inapplicable in such case. Moss v. Mosley [Ala.] 41 So. 1012.

52. Claim for damages for assault and battery is not one to be probated against the estate under Ann. Code 1892, § 1933, that statute referring to contractual claims only. Feld v. Borodofski [Miss.] 40 So. 816.

53. Roebling Sons Co. v. Shawnee Valley Coal & Iron Co., 4 Ohio N. P. (N. S.) 113. Under a will providing that all debts of the estate shall first be paid, the stock of an insolvent corporation comes into the hands of the executor as a liability and not as an asset, but where the executor is also the sole devisee, and the stock is not specifically mentioned in the will and is not accepted by the devisee, the statutory liability cannot be enforced against such devisee personally. Id.

54. A suggestion of the insolvency of the estate made by the executor or administrator or a creditor to the clerk of the county court does not operate as an injunction against the bringing of suits against the representative and require all claims to be filed in the county court unless and until it is followed by the required publication. Shannon's Code §§ 4068-4072, construed. Bashaw v. Temple, 115 Tenn. 596, 91 S. W. 202.

55. Under Mich. Comp. Laws 1897, § 9411, may be presented with proofs to probate court or commissioners, and court may direct retention of assets for their payment, and provision is also made for allowance and payment of contingent claims that have become absolute, and such as have been presented to probate court and proven at any time within one year after they become absolute. Rankin v. Herod, 140 F. 661.

56. Appeal of Beard, 78 Conn. 481, 62 A. 704.

57. Where the holder of a mortgage on

Time for presentation; limitations.[59]—A claim is ordinarily barred unless filed or presented within the time fixed by statute,[60] in the absence of peculiar circumstances entitling the claimant to equitable relief.[61] Contingent claims are not ordinarily barred by failure to present or file them.[62] Claims which accrue or become absolute after the expiration of the time fixed may generally be presented and proved within a specified time after they become due.[63] In some states claims not presented

realty expressly waives all recourse against any other property of the estate, no presentation is necessary. Code Civ. Proc. § 1500. Heeser v. Taylor, 1 Cal. App. 619, 82 P. 977. Hence, since debts are payable primarily out of general personal estate, administrator should pay mortgage debt therefrom though claim is not presented. Appeal of Beard, 78 Conn. 481, 62 A. 704. A mortgage debt which is barred by the special statute of limitations is not a debt payable by the executors, but the mortgage is an incumbrance on the land which can only be sold subject to it. Robinson v. Cogswell [Mass.] 78 N. E. 389.

58. Under Code Civ. Proc. § 1475, if there are subsisting liens or incumbrances on the homestead, the claims secured thereby must be presented and allowed as other claims against the estate and paid out of the funds of the estate proportionately with the other claims, and may only be enforced against the homestead for any deficiency after such payment. Weber v. McCleverty [Cal.] 86 P. 706. Deed of trust whereby title was transferred to trustee to secure a debt held not a lien or incumbrance within the meaning of this section. Id.

59. See 5 C. L. 1220.

60. Gen. St. 1902, § 326. Appeal of Beard, 78 Conn. 481, 62 A. 704. Claim against estate for return of insurance money on ground that decedent fraudulently represented that he was the sole owner of the property and that the title thereto was in his name, when in fact he had conveyed it to his children, held barred by failure to present it within two years from the granting of administration, so that no action could be maintained thereon against the heirs to whom distribution had been made, where deed of decedent to children was recorded and children did not conceal the fact that they claimed the property, but openly asserted title thereto. Planters' Mut. Ins. Co. v. Nelson [Ark.] 96 S. W. 123. Act of May 15, 1903 (Laws 1903, p. 3), amending Hurd's Rev. St. c. 3, § 70, by reducing time within which claims may be filed from two years to one year after issuance of letters, held not to be retroactive and not to apply to estate in which letters were issued before it took effect. Hathaway v. Merchants' Loan & Trust Co., 218 Ill. 580, 75 N. E. 1060, afg. 121 Ill. App. 478. Under Code § 3349, claims are barred unless they are filed and notice thereof served within 12 months from the giving of notice by publication of the issuance of letters of administration, in the absence of peculiar circumstances entitling claimant to equitable relief. Mosher v. Goodale, 129 Iowa 719, 106 N. W. 195. Laws 1901, p. 326, c. 28 (Comp. St. 1903, c. 23, § 226), requiring claims, whether due or not, to be exhibited to the judge or commissioners within the time limited by the court or to be forever barred, and providing that claim shall be barred if claimant fails for two years after the death of the decedent to apply for or take out, or cause to be taken out, letters of administration on his estate, has no application to claims pending before its enactment. Korff's Estate v. Bueker [Neb.] 105 N. W. 1099. Under Rev. St. 1898, § 3844, a person failing to present a claim within the time limited by the probate court is forever barred from recovering such demand or setting off the same in any action whatever, such a bar being as effectual as payment. Franklin v. Killilea, 126 Wis. 88, 104 N. W. 993. Time for exhibiting a claim against an estate to fix personal liability on a note comes within this section. Id. A "person having a claim" includes all creditors, and hence the estate of a deceased creditor is such a person. Barry v. Minahan, 127 Wis. 570, 107 N. W. 488. Where wife loaned her husband money payable on demand and both died, held that claim of her estate for the money was barred where it was not filed until after expiration of time fixed. Rev. St. 1898, §§ 3840, 3844. Id.

61. Claimant held not to have made out a case entitling him to equitable relief under Code § 3349. Mosher v. Goodale, 129 Iowa 719, 106 N. W. 195. Held that there was nothing in the record entitling claimant to relief on the ground of fraud on the part of the representative, the lower court having refused to find that any fraud was committed. Barry v. Minahan, 127 Wis. 570, 107 N. W. 488. Where claim was based on note secured by mortgage, held that no recovery could be had under Rev. St. 1898, § 3860, on failure to present it on theory that deceased was guilty of fraud in wrongfully obtaining and recording a release of the mortgage, such fraud being involved only as showing that mortgage was still a valid lien on the land. Franklin v. Killilea, 126 Wis. 88, 104 N. W. 993.

62. Mich. Comp. Laws 1897, § 9411, authorizing their presentation and allowance, is permissive only, and commissioners have no authority to adjudicate upon them, their duties in regard to them being merely ministerial. Rankin v. Herod, 140 F. 661. Failure of receiver of national bank to present claim for assessment on stock owned by decedent held not a bar to action thereon against heir. Id. Fact that claim became absolute within period of two years limited for presentation of claims by creditors held not to change rule where assessment was not levied, and hence claim did not become absolute until after the estate had been distributed, the administration closed and the administrator discharged, and the probate court had lost jurisdiction. Id.

within a specified time may only be asserted against the unadministered assets.[64] In others, a failure to make such presentation precludes the recovery of interest.[65]

In states where claims are enforced by a direct action against the representative, the action is generally barred unless brought within a specified time after his appointment,[66] or after the accrual of the right,[67] in the absence of special circumstances excusing the delay.[68] It is also frequently provided that no such action may be brought until the expiration of a year after the representative's appointment.[69] In some states claims which have been presented and disallowed are barred unless an action is brought thereon within a specified time thereafter.[70] This is

63. Will gave personalty to one for life and provided that after her death certain legacies should be paid out of the property remaining, if any, and that the residue, if any, should be paid to plaintiff. Executor made final settlement after death of life tenant and a decree was rendered against him in favor of plaintiff for a specified sum, which was never paid. After execution against executor had been returned unsatisfied, and within 12 months after the rendition of such decree, plaintiff commenced suit against the estate of a deceased surety on the executor's bond. Held that plaintiff's legacy was a contingent one, and hence her claim against defendant was a contingent one which accrued only on the rendition of the decree fixing the amount to which it was entitled, so that it was filed in time under Code 1896, §§ 129, 130. Stakely v. Executive Committee [Ala.] 39 So. 653. Under Rev. St. 1898, § 3860, may be presented within one year after they accrue. Franklin v. Killilea, 126 Wis. 88, 104 N. W. 993. Provision held not applicable to claim on note where there was a period of more than a year after time it became due before time for presenting claims expired. Id. Statute has no application to a claim for money loaned deceased during his lifetime and payable upon demand, since the cause of action in such case accrues at the time of the loan. Barry v. Minahan, 127 Wis. 570, 107 N. W. 488.

64. Revisal 1905, § 94, allowing claimant who has not presented his claim within 12 months after general notice duly published to assert his demand against unadministered assets, does not, in view of Id. § 41, apply if personal notice to exhibit his claim is served on a creditor and he fails to do so within six months. Morisey v. Hill [N. C.] 55 S. E. 193.

65. Contention that no interest should be allowed must be made promptly, and hence could not be maintained when first made 12 years after demand on representative for payment where it did not appear that it was not then verified. Beddow v. Wilson [Ky.] 90 S. W. 228.

66. Under Rev. Laws c. 141, § 9, must be brought within two years. McMahon v. Miller [Mass.] 78 N. E. 457. Under Code 1904, p. 1540, § 2920, the right of action against the estate of any person which shall have accrued at his death does not continue longer than five years from the qualification of his personal representative, and under § 3577, p. 1910, an action on a judgment when brought against the personal representative of a decedent must be brought within five years from the qualification of the representative. Spencer v. Flanary, 104 Va. 395, 51 S. E. 849.

67. Where obligee in bond on which decedent was a surety obtained a decree against the principal and sureties and thereafter, and for the purpose of enforcing her decree, intervened in a suit to settle the estate of a deceased surety, held that the demand asserted in last named suit was not one on the bond but on the decree against the principal and sureties, and the five-year limitation prescribed by Code 1887, § 2920, in reference to claims against decedents, did not begin to run until such decree was entered. Turk v. Ritchie, 104 Va. 587, 52 S. E. 339.

68. Under Rev. Laws c. 141, § 10, supreme judicial court may grant relief to creditor who fails to sue on claim within two years, if justice and equity require it, and the creditor has not been guilty of culpable negligence. McMahon v. Miller [Mass.] 78 N. E. 457. Plaintiff held entitled to relief where delay was due to request of executors that he would not sue and thus force a sale of realty, but would allow them time to sell at private sale. Id. Fact that executors acted in good faith and that both parties were mistaken in believing that plaintiff could force a sale of the land by bringing an action, and that claim could be paid at any time, though suit was not brought within two years, held not to affect plaintiff's right to relief even though mistake was one of law. Id.

69. The execution of a power of sale contained in a deed made by decedent to secure a debt is not a suit against the administrator. Baggett v. Edwards [Ga.] 55 S. E. 250. Actions on unpreferred claims. Rev. Laws c. 141, § 1. Whitcomb v. Taylor [Mass.] 78 N. E. 536. Action on note of testator. Jump v. Leon [Mass.] 78 N. E. 532.

70. Under P. L. 1898, p. 740, § 71, creditor is required to bring suit within three months after representative gives him written notice that claim is disputed, and if suit is not commenced within that time, the decree entered upon the rule limiting creditors, provided for by a previous section, bars recovery "as if said debt or claim had not been presented within the time so limited by the court." Simons v. Forster [N. J. Law] 63 A. 858. A claim presented before the rule to limit creditors has been taken out is barred by failure to bring suit on it within such time, though suit is brought before the rule is taken out. Id. Evidence held to show that written notice disputing plaintiff's claim was served on her by executor more than six months before she commenced her action, so that it was barred under Code Civ. Proc. § 1822. Hummel v. Hurd, 98 N. Y. S. 801. Under Revisal 1905, § 93, unless action is brought within six months after rejection.

true in New York, unless both parties consent in writing that they may be heard and determined by the surrogate on the judicial settlement of the representative's accounts.[71] A presentation by claimant's duly authorized agent is binding on him.[72] Such statutes do not apply to suits to foreclose mortgages in which no other relief is sought.[73]

Statutes limiting the time within which claims must be presented are regarded as statutes of nonclaim and are generally applied more rigorously than the general statutes of limitation,[74] and in the absence of a saving clause run against all persons, including married women.[75] After a claim is once barred the representative has no power or authority to voluntarily renew or reinstate it to the prejudice of the parties in interest.[76]

The general statute of limitations does not begin to run where no administration exists on the decedent's estate at the time the cause of action accrues,[77] but in the absence of a statutory provision to the contrary,[78] death will not toll the statute when limitations have once begun to run.[79] Limitations do not, however, run against claims which are not barred when presented and which are presented within the time prescribed,[80] and a provision prohibiting the bringing of actions on claims against representatives for a specified time after their appointment suspends the running of the statute during that period.[81] In states where claims are enforced in an equitable action to settle the estate, laches may operate as a bar.[82]

Morisey v. Hill [N. C.] 55 S. E. 193. Fact that no general notice to creditors has been published, as required by Id. § 39, does not prevent enforcement of § 93, the two being independent. Id.

71. Under Code Civ. Proc. § 1822, held that the filing of such consents does not authorize the bringing of an action on the claim in the supreme court after the expiration of the 6 months, but creditor's only remedy is to submit claim to surrogate on such settlement. Clark v. Scovill, 97 N. Y. S. 1117.

72. If the claim is so presented and rejected, such rejection is binding on the claimant, though he is not informed thereof or is informed by such agent that it has not been rejected. Gardner v. Pitcher, 109 App. Div. 106, 95 N. Y. S. 678.

73. Suit to have deed declared mortgage and to foreclose. Fox v. Bernard [Nev.] 85 P. 351.

74. Barry v. Minahan, 127 Wis. 570, 107 N. W. 488.

75. Defense of coverture held not to apply under Rev. St. 1898, § 3844. Barry v. Minahan, 127 Wis. 570, 107 N. W. 488. In any event a claim by the administratrix of a deceased wife against the estate of her decedent's deceased husband for money loaned by the wife to the husband is not an action between husband and wife. Id.

76. Barred by failure to sue within six months after rejection. Gardner v. Pitcher 109 App. Div. 106, 95 N. Y. S. 678.

77. See Limitation of Actions, 6 C. L. 465 for a full discussion of this question. Right to foreclose mortgage where debt did not accrue until after decedent's death. Code Civ. Proc. §§ 353, 312, construed. Heeser v Taylor, 1 Cal. App. 619, 82 P. 977.

78. Under Code Civ. Proc. § 353, a party having a cause of action against the estate of a deceased person is not bound to cause administration to be had because the statute expressly extends his time to sue for one year after the issuance of letters. Churchill v. Woodworth, 148 Cal. 669, 84 P. 155. Where action was commenced against heirs to have a deed of decedent declared a mortgage and to foreclose the same, and summons was served on them within a year after commencement of action, held that court had authority to bring in a subsequently appointed administrator as a party and direct the issuance and service of summons on him more than a year after the commencement of the action but within a year after the issuance of letters to him. Code Civ. Proc. §§ 581, 353, 389, construed. Id. Plaintiffs suing to have a deed given by a decedent declared a mortgage and to foreclose the same held not to have waived their right to bring an action against the administrator within a year after the issuance of letters by commencing the action against the heirs before the appointment of an administrator. Id. Under Civ. Code 1895, § 3782, the statute of limitations, relatively to claims against the estate of a decedent, is suspended during the period between his death and representation upon his estate if such period does not exceed five years, at least where the debt sought to be enforced was not created until after the passage of the act. Hawes v. Glover [Ga.] 55 S. E. 62.

79. The appointment of a representative does not suspend the running of limitations. Liggett v. Estate of Liggett, 3 Ohio N. P. (N. S.) 518. The relation of the executor or administrator to the estate does not create a continuing and subsisting trust under Rev. St. § 4974. Id.

80. In re Tuohy's Estate [Mont.] 83 P. 186.

81. Is suspended for 12 months after appointment of administrator. Civ. Code 1895, §§ 3421, 3423. Hawes v. Glover [Ga.] 55 S. E. 62.

Notice.[88]—In some states the statutory period for presenting claims does not commence to run until the representative publishes a notice of his appointment,[84] or a notice specifying the time within which claims must be filed.[85]

The claim; its form and substance.[86]—As a general rule the claim filed must show the amount and nature of the demand[87] and must be verified.[88] In some states, if it is founded on a written instrument, a copy thereof must be filed with it.[89] Such requirements have been held to be jurisdictional.[90]

82. Personal representatives and legatees of deceased surety held not entitled to assert defense of laches to defeat right of obligee to enforce judgment thereon against estate of their decedent in a suit brought for its settlement where delay was due to fact that obligee first proceeded against the principal and the other surety, thereby reducing the liability of the estate. Turk v. Ritchie, 104 Va. 587, 52 S. E. 339.

83. See 5 C. L. 1224.

84. Under Code § 3304, providing that administrators within ten days after the receipt of their letters shall publish such notice of the appointment as the court or clerk may direct, which direction shall be indorsed on the letters when issued, it is not necessary that such order or direction, when made by the clerk, be entered of record, his indorsement on the letters being sufficient. Mosher v. Goodale, 129 Iowa 719, 106 N. W. 195. Fact that indorsement purported by its recital to be a direction by the court itself held not to change rule where it was signed by the clerk, not by way of certification but as his own action. Id.

85. Order fixing time for presenting claims and providing for notice to creditors and the notice itself, held to sufficiently comply with Rev. St. 1898, § 3840. Barry v. Minahan, 127 Wis. 570, 107 N. W. 488.

86. See 5 C. L. 1224.

87. Pending suits for contribution by one of two indorsers of accommodation notes defendant died. Plaintiff's attorney, within the time fixed for presenting claims, called administrator's attention to fact that plaintiff had a claim against the estate, showed him the notes, and told him of the suits. Writs of scire facias were served on the administrator and he entered his appearance to them. Held that there was a sufficient presentation, it being unnecessary, in the absence of a request, to state with greater particularity how the joint liability arose. Pratt v. Rhodes [Conn.] 61 A. 1009. All that is necessary in order to comply with Rev. St. 1899, § 188, is an identification of the claim in the exhibition thereof, to the extent that the administrator may be apprised of its amount and origin so that he may investigate it intelligently, and that a recovery may be a bar to another action thereon. Britian v. Fender, 116 Mo. App. 93, 92 S. W. 179. By going to trial on merits without moving to have claim made more definite and certain, administrator waives objection that statement is meager and indefinite, and cannot object on that ground, particularly after verdict. Id. Judgment in favor of claimant will be sustained against objection first made on appeal that claim as presented was insufficiently stated, unless statement was so defective that it could not be cured by verdict. Id. Items held sufficiently definite after verdict. Id.

88. Provision of Code 1896, § 133, that any defect or insufficiency in the affidavit may be amended at any time, applies equally to claims on which suit is pending. Moss v. Mosley [Ala.] 41 So. 1012. Where amended affidavit as set out in replication was in substantial compliance with statute and amendment was averred to have been made by leave of the judge of probate, held that demurrer thereto was properly overruled. Id. Where a claim is properly authenticated when exhibited to the administrator and is subsequently assigned, the assignee need not again verify or authenticate it. Kirby's Dig. §§ 115, 118, 123, construed. Collier v. Trice [Ark.] 96 S. W. 174. Verified answer, in suit by judgment creditor of decedent to set aside mortgage as fraudulent, containing the proper averments, held a sufficient affidavit of claim based on mortgage debt. Beddow v. Wilson [Ky.] 90 S. W. 228. In action against executor on claim, proof of the items of the account sued on held properly rejected where the account was not "signed by the creditor" and there was no affidavit "attached thereto" as required by statute. Walker v. Nelson [Miss.] 39 So. 809. Verification as required by Rev. St. 1899, § 195, is a condition precedent to the right of the probate court to exercise jurisdiction over it. Fitzpatrick v. Stevens, 114 Mo. App. 497, 89 S. W. 897. Where claim was verified by affidavit of the claimant, held that affidavit was sufficient, though it closed with words "to the knowledge of said claimant" instead of "to the knowledge of the affiant," the words used in Code Civ. Proc. § 2604. Dorais v. Doll [Mont.] 83 P. 884. Under Rev. St 1895, art. 2072, claim must be accompanied by affidavit that it is just and that all legal payments, credits, and offsets known to affiant have been allowed. Granberry v. Granberry [Tex. Civ. App.] 13 Tex. Ct. Rep. 896, 90 S. W. 711.

89. Claims held grounded in assumpsit for money had and received and not on certain notes, so that it was not necessary to accompany them by copies of notes under Rev. St. 1899, § 188. Britian v. Fender, 116 Mo. App. 93, 92 S. W. 179. Claim held founded on oral agreement of compromise, the result of which was an account stated, and not on a bond, bill, note, or other instrument within the meaning of Code Civ. Proc. § 2607. Dorais v. Doll [Mont.] 83 P. 884.

90. Requirements of Rev. St. 1899, § 188, that demand must be in writing and must state the amount and nature of the claim and must be accompanied by a copy of the instrument or account on which it is founded, are jurisdictional, and unless complied with,

Allowance and rejection.[91]—In the absence of a statutory provision to the contrary, the allowance or rejection of a claim by the representative need not be in writing or in any particular form,[92] the question whether the claim was actually allowed or rejected being one of fact in a subsequent action thereon.[93] Mere silence on the part of the representative after the filing of the claim does not conclude him from objecting to it on his accounting.[94] In some states he must indorse his allowance or rejection on the claim itself,[95] a failure to do so within a specified time operating as a rejection and authorizing the claimant to proceed accordingly.[96] After disallowance the claimant is sometimes required to file the claim with the clerk.[97] In some states claims are referred to commissioners whose duty it is to examine and pass on them.[98]

Contests and actions on claims.[99]—Proceedings on contested claims are generally triable at law.[1] The assignor of an assignable claim is not a necessary party to proceedings for its collection.[2] In actions on claims the usual rules of pleading apply.[3] Where presentation is a condition precedent to an action thereon, it must be alleged.[4] Recovery must be had, if at all, on the same cause of action as that set up in the claim.[5] One sued as administrator in a pure action at law cannot be held as an individual upon an entirely different cause of action in equity.[6] The plea

neither the probate nor appellate court obtains jurisdiction over the cause. Britian v. Fender, 116 Mo. App. 93, 92 S. W. 179.

91. See 5 C. L. 1225.

92. Communication to attorney for claimant held sufficient. In re Jacobs, 109 App. Div. 293, 96 N. Y. S. 133. Verbal rejection is sufficient to set in operation statute requiring action to be brought within six months after rejection. Gardner v. Pitcher, 109 App. Div. 106, 95 N. Y. S. 678.

93. Question held for jury where evidence was conflicting. Gardner v. Pitcher, 109 App. Div. 106, 95 N. Y. S. 678. Verdict that administrator had not rejected claim held not contrary to the weight of the evidence. Id.

94. In re Jacobs, 109 App. Div. 293, 96 N. Y. S. 133.

95. Where attorney, under direction of administrator, indorsed claim "rejected" and signed administrator's name, held a sufficient compliance with Code Civ. Proc. § 2606. Dorais v. Doll [Mont.] 83 P. 884.

96. After ten days may, at his option, regard failure as rejection. Dorais v. Doll [Mont.] 83 P. 884.

97. Failure to do so held waived where administrator appeared and defended an action thereon. Plummer v. Wells & Co. [Ind. T.] 90 S. W. 303.

98. A debt represented by a note and mortgage is an absolute claim, and one which the commissioners are authorized to try and decide under Comp. Laws § 9378. Flynn v. Lorimer's Estate, 141 Mich. 707, 12 Det. Leg. N. 629, 105 N. W. 37.

99. See 5 C. L. 1225.

1. Proceedings under Code § 3341. Mosher v. Goodale, 129 Iowa 719, 106 N. W. 195.

2. Payee who has assigned note. Kirby's Dig. § 6000. Collier v. Trice [Ark.] 96 S. W. 174.

3. In an action on claim for personal services rendered decedent, allegations as to the value of the property which came into executor's hands were immaterial and should have been stricken. McGrew's Ex'r v. O'Donnell [Ky.] 92 S. W. 301. Count stating that H. in his lifetime was indebted to plaintiff in the sum of $500, and made a writing by which he ordered his executors to pay, one year after his death, to plaintiff the sum of $500, held not to state a cause of action against the executors, there being no statement of a promise to pay or of a delivery of the paper, and the paper being testamentary in character. Haines v. Rogers [N. J. Law] 62 A. 272. Bill in suit by obligee on bond held sufficient to confer jurisdiction on court to render a decree against the personal representatives of deceased sureties under prayer for general relief. Turk v. Ritchie, 104 Va. 587, 52 S. E. 339.

4. Complaint held to allege a cause of action for breach of contract to care for live stock and not one for a tort, and hence was demurrable for failure to allege presentation as required by Code Civ. Proc. § 1500. Morse v. Steele [Cal.] 86 P. 693.

5. Claim presented and rejected. Enscoe v. Fletcher, 1 Cal. App. 659, 82 P. 1075. Cause of action set up in claim by joint maker of notes for half the amount of principal and interest due and that set up in complaint held the same, both demands being identical in every respect. Id. Fact that complaint segregated and lumped certain classes of items of the claim without increasing or diminishing the amount of any item, and without alleging any different contract as to liability on any such items than appeared on the face of the claim, held immaterial. Id. Under Code Civ. Proc. §§ 2610, 2606, 2608, presentation of the claim to the representative and his rejection of it is a condition precedent to the right to sue thereon, and hence a party cannot present one claim and sue on a different one not presented. Brown v. Daly [Mont.] 84 P. 883. Where two parties filed separate claims for alleged breach of a contract made with them jointly, each claiming half the amount alleged to be due, held that they could not maintain a joint action thereon. Id.

of plene administravit no assets ultra is inapplicable.[7] It is the duty of the representative to raise the question of the statute of limitations.[8] In states where the estate is settled by a suit in equity for that purpose, it is proper for the commissioner to whom the matter has been referred to report any valid outstanding debt and for the court to decree its payment at any time before the decrees of reference are fully executed and the data arrived at whereby an account can be made for final distribution.[9] A personal representative administering a solvent estate cannot defeat a pending suit against him on a claim which has been properly presented, and which he has assets in his hands sufficient to pay, by ignoring its existence, making final settlement, surrendering the assets either to the legatees or the probate judge, and obtaining a discharge from the probate court.[10] The venue of actions to foreclose mortgages on the land of a decedent is regulated by the statutes of the various states.[11] In Texas, in the case of independent executorships, any creditor may enforce his claim by suit against the executor and may have execution issued on a judgment recovered therein to run against the estate of the testator in the hands of the executor that may be subject to such debt.[12] The statute applies where the estate is insolvent as well as when it is solvent, in so far as the establishment of a claim by judgment is concerned.[13] The petition in such an action need not allege that the estate is solvent, nor that there is no other valid claim against the estate of a higher class than that of the plaintiff,[14] nor that the defendant as such executor has received any property of the decedent's estate liable for his debts;[15] nor does the fact that the petition does not negative insolvency, prevent the issuance of execution, though, if the estate were insolvent, the creditor would have no right to sell the property thereunder and apply it to his own debt to the exclusion of other creditors.[16]

6. On a claim against an estate for a debt supposed to be due from it, which defendant is defending in his representative character as administrator only, the administrator cannot be held individually on the theory of a trust or an estoppel. Tyler v. Stitt, 127 Wis. 379, 106 N. W. 114. Two causes of action could not be joined, and hence one cannot be turned into the other. Id.

7. Since judgment operates merely to establish the debt and not to fix defendant with assets or make him personally liable. Hall v. Herring [Del.] 63 A. 576.

8. In re Milligan's Estate, 98 N. Y. S. 480. Held duty of executor to have opposed claim of coexecutor which was barred. In re Sheldon's Estate, 96 N. Y. S. 225.

9. Turk v. Ritchie, 104 Va. 587, 52 S. E. 339. Where commissioner's report did not purport to be a final finding as to the outstanding debts, a decree adopting only certain specific findings therein and recommitting it to the commissioner to take further account held not final so as to preclude a creditor from thereafter coming in and asserting his claim in such suit. Id.

10. Discharge held not to affect plaintiff, since his claim was not in litigation in that court and could not have been drawn into its jurisdiction without a report of insolvency. Odom v. Moore [Ala.] 41 So. 162. In action against administratrix, pleas by her that since its institution she has settled the estate and has delivered and surrendered all assets in her hands as provided by law, and has been discharged from further liability, held not in bar of the suit but in bar of its further maintenance. Id. Replication thereto setting up that claim was presented, that estate was solvent, that defendant had sufficient assets in his hands to pay claim, etc., held a complete answer to pleas, not a departure from the complaint, and that alleging such facts by way of replication was proper practice. Id.

11. May be brought in the county where the land is situated, where no action is pending for the settlement of the estate, or for its distribution or its partition among heirs, or for its sale for payment of debts. Code Civ. Proc. §§ 62, 65, 66, construed. Galloway v. Craig [Ky.] 92 S. W. 320.

12. Rev. St. 1895, art. 1996. Hartz v. Hausser [Tex. Civ. App.] 14 Tex. Ct. Rep. 141, 90 S. W. 63.

13. Hartz v. Hausser [Tex. Civ. App.] 14 Tex. Ct. Rep. 141, 90 S. W. 63. Fact that decedent died insolvent, that there existed valid claims against his estate of a higher class than plaintiff's, and that the only property left by him passed to the defendant as widow and was exempt, held no defense. Id.

14. Both because solvency is presumed and because insolvency and existence of such debts would not prevent the recovery of judgment. Hartz v. Hausser [Tex. Civ. App.] 14 Tex. Ct. Rep. 141, 90 S. W. 63.

15. Where independent executrix was also decedent's widow, held not necessary to allege that property had come into her hands which was not exempt to her as widow. Hartz v. Hausser [Tex. Civ. App.] 14 Tex. Ct. Rep. 141, 90 S. W. 63.

16. Is contemplated that writ will be

Evidence and proof.[17]—The burden of proving the claim[18] and proper presentation thereof[19] is ordinarily on the claimant. Where claimant proves that the debt was contracted, the burden of proving payment is on the estate.[20]

Claims are generally required to be established by very satisfactory evidence,[21] particularly where they are on oral contracts alleged to have been made by decedent during his lifetime,[22] or on implied contracts for services.[23] In some states a claim cannot be allowed on the unsupported testimony of the claimant.[24] In Kentucky, in a suit to settle the estate where issue is joined on the merits of a claim, only proof by deposition can be heard on the final trial.[25] Where the statute gives the estate the benefit of all defenses except that of set-off, it may prove any fact which is a good defense to the claim.[26] Cases dealing with the admissibility of particular

levied on property subject to it only, and award of execution adds nothing to judgment, nor does it adjudicate what property is or is not subject thereto, and it is presumed that property not subject to it will not be levied on. Hartz v. Hausser [Tex. Civ. App.] 14 Tex. Ct. Rep. 141, 90 S. W. 63. Held proper for judgment to contain award of execution against the estate. Id.

17. See 5 C. L. 1226.

18. In suit to settle estate. Cottrell v. Barnes' Adm'r [Ky.] 90 S. W. 1048. In view of Rev. St. 1895, art. 2072, prohibiting the allowance or approval of a claim unless accompanied by an affidavit that the claim is just, and that all legal payments, credits, and offsets known to affiant have been allowed, claimant in an action on a rejected claim has the burden of proving that such offsets, etc., have been allowed, and payments, offsets, and credits are in issue, though not pleaded by defendant. Granberry v. Granberry [Tex. Civ. App.] 13 Tex. Ct. Rep. 896, 90 S. W. 711. Evidence held to sustain claim for money fraudulently taken by deceased from a bank of which he was an officer. McElroy v. Allfree [Iowa] 108 N. W. 119.

19. The rule that on a plea of nonclaim the burden in on plaintiff to prove presentation does not apply where the issue presented is an immaterial one. Moss v. Mosley [Ala.] 41 So. 1012.

20. Evidence held to support finding that plaintiff's claim had been fully paid and discharged prior to decedent's death. Sanguinetti v. Pelligrini [Cal. App.] 83 P. 293.

21. For proving against the estate of a decedent a claim for a large sum of money alleged to have been confided to him and not accounted for, specific allegations and unsuspicious proof are required. Evidence held insufficient. Barrow v. Grant's Estate, 116 La. 952, 41 So. 220.

22. Contract must be definite and certain and founded upon an adequate consideration, and must be established by the clearest and most convincing evidence. Lucas v. Boss, 110 App. Div. 220, 97 N. Y. S. 112. If contract is alleged to have been in parol it must be proved by evidence given or corroborated in all substantial particulars by disinterested witnesses. Id. Evidence insufficient to establish contract to pay plaintiff for services more than the weekly compensation received by her. Id. Evidence held insufficient to show oral contract to pay for board and attendance. Kane v. Smith, 109 App. Div. 163, 95 N. Y. S. 818. Evidence insufficient to establish contract by decedent to pay son wages for his services. In re Milligan's Estate, 98 N. Y. S. 480. Every intendment should be taken against validity of claim for extra compensation for services of a domestic. Grossman v. Thunder, 212 Pa. 274, 61 A. 904. Where she receives fixed compensation for such services cannot recover for alleged extra services in absence of proof of express contract to that effect, or an agreement to provide for such compensation by legacy. Id. Evidence held insufficient to show contract. Id. Claims by children under alleged contracts by parents to pay them for their board are to be rigidly scrutinized. Evidence sufficient. Shadle's Estate, 30 Pa. Super. Ct. 151.

23. Evidence held to show that services rendered decedent were not gratuitous but that both parties expected that they would be paid for. Greenwood v. Judson, 109 App. Div. 398, 96 N. Y. S. 147. Receipt in full of all claims against estate on payment of claim for disbursements held to show that claimant did not intend to present a claim for anything further and to bar recovery for services alleged to have been rendered decedent. Koebel v. Beetson, 98 N. Y. S. 408.

24. Under B. & C. Comp. § 1161, must be other material and pertinent testimony supporting or corroborating that given by him, sufficient to go to the jury, and upon which it might find a verdict. Bull v. Payne [Or.] 84 P. 697. Evidence in suit to recover on claim based on contract in regard to mining claim held sufficient to go to the jury under this rule. Id. Instruction held not to permit plaintiff to recover on his own uncorroborated testimony. Id.

25. Affidavits insufficient. Cottrell v. Barnes' Adm'r [Ky.] 90 S. W. 1048.

26. In contest on claim founded on certificate of deposit issued by decedent, who was a private banker, to claimant, which recited that third person had deposited certain sum in decedent's bank payable to claimant, held that it was competent for the estate to show that the third person did not give claimant the amount of the alleged deposit or deposit it for her use with decedent, and for that purpose evidence that the third person allowed taxes and mortgage to remain delinquent during the period she claimed to have in her possession the money alleged to have been deposited was admissible. Henderson v. Henderson, 165 Ind. 666, 75 N. E. 269. Questions as to whether anyone was associated with decedent in the banking

evidence will be found in the note.[27] Cases dealing with the question as to when contracts to pay for services and the like will be implied, and the sufficiency of the evidence to establish implied[28] or express contracts,[29] have been excluded.

Set-off.[30]—As a general rule, in actions by the representative asserting a demand in favor of the estate, the defendant may set off any demands he may have had against the decedent at the time of his death.[31] As in other cases the demands must be mutual and the parties must stand in the same right and capacity.[32] There is a conflict of authority as to whether he may set off demands barred by the statutes of nonclaim.[33] The representative cannot offset against a judgment rendered upon a liability of the decedent another judgment on a claim, with which he had no connection in his lifetime, purchased by the representative with the funds of the estate for that purpose after his death.[34] So too, where the estate is insolvent, the defendant in an action by the representative cannot set off a claim which accrued during decedent's lifetime and which he has purchased at a discount since his death.[35] One having a claim not yet due against an estate has no equitable right to have it set off against a debt of his own held by the estate and already due where the estate has not been adjudged insolvent though it is insolvent in fact.[36] Where, however, under such circumstances, one is sued on a debt owed by him to the estate and is unable to set off debts owed by the estate to him by reason of a special statute of limitations prohibiting suits against executors and administrators within a year after their appointment, he is entitled to a continuance of plaintiff's case after verdict until he can obtain judgment on his claim, so that such set-off may be ultimately made.[37]

business and as to whether bank ever ceased to do business in the town held immaterial. Id.

27. Letter written by plaintiff to third persons in regard to amount of claim held admissible as tending to discredit plaintiff's claim. Sanguinetti v. Pelligrini [Cal. App.] 83 P. 293. In action against executor on claim for services alleged to have been rendered decedent, evidence of appraisers as to what they found in the kitchen and larder a month after decedent's death held inadmissible. McGrew's Ex'r v. O'Donnell [Ky.] 92 S. W. 301.

28. See Implied Contracts, 6 C. L. 1756.

29. See Contracts, 7 C. L. 761.

30. See 5 C. L. 1227.

31. Under Pierce's Code § 1093, may set off such demands in same manner as if action had been brought by and in the name of the deceased. Fishburne v. Merchants' Bank, 42 Wash. 473, 85 P. 38. In action against administrator on rejected claim for money alleged to have been paid out for decedent during his lifetime, instruction directing jury to deduct from amount found to have been so paid such sums as plaintiff had collected for decedent during his lifetime held error in view of evidence tending to show that plaintiff had paid money so collected to decedent or had used it for his benefit. Granberry v. Granberry [Tex. Civ. App.] 13 Tex. Ct. Rep. 896, 90 S. W. 711.

32. A representative sued on a claim against his decedent may set off such demands as the latter might have set off in an action against him, but no demands due to or from the representative in his own right. Rev. St. c. 84, § 77. Rich v. Hayes [Me.] 64 A. 656. Two judgments belonging to administrator in his own right and awarded to him in his individual capacity could not be set off against plaintiff's note against decedent before judgment. Id. Executions on judgments cannot be set off under Rev. St. c. 86, § 27, since creditor in one is not the debtor in the other in the same capacity and trust. Id. One recovering a judgment against an estate on a note may set it off against a judgment recovered by the executrix in her individual capacity against him on a note belonging to the estate under Rev. Laws c. 174, § 5, the court looking to the substance rather than the form in determining whether there is a diversity of parties. Jump v. Leon [Mass.] 78 N. E. 532.

33. North Carolina: Creditor whose claim is barred under Revisal 1905, § 93, by failure to sue thereon within six months after its rejection, cannot set it up as a counterclaim in an action thereafter brought against him by the executor. Morisey v. Hill [N. C.] 55 S. E. 193.

Washington: Special statutes of limitations requiring presentation do not apply in such case. Fishburne v. Merchants' Bank, 42 Wash. 473, 85 P. 38. Where no claim has been presented, defendant is limited to the extinguishment of the demand against him, and cannot recover a judgment over against the estate for any excess. Id. Under Pierce's Code §§ 380, 1091, relating to, counterclaims, a bank sued by administrator for a deposit alleged to belong to deceased may interpose as a set off or counterclaim a note held by it against decedent which matured after latter's death but before the commencement of the action. Id.

Judgments in actions on claims and enforcement thereof.[38]—As a general rule a judgment against the representative in an action on a claim against the estate operates merely to establish the debt and does not fix the defendant with assets or make him personally liable.[39] It must ordinarily be filed in the probate court and paid in due course of administration in the same manner as other claims.[40] It is, however, conclusive as to the validity of the claim.[41] Property held by the representative in his official capacity does not vest in a receiver appointed in proceedings supplementary to an execution issued under a judgment against him.[42]

(§ 6) *C. Classification, preferences, and priorities.*[43]—Claims are generally classified by statute and provision made for their payment in the order of such classification.[44] The expenses of administration are ordinarily given priority over debts.[45]

34. Rich v. Hayes [Me.] 64 A. 656.

35. Van Dusen v. Topeka Woolen Mill Co [Kan.] 87 P. 74.

36. Jump v. Leon [Mass.] 78 N. E. 532.

37. Notes purchased by defendant after commencement of suit against him. Jump v. Leon [Mass.] 78 N. E. 532. In action by executrix on certain notes held that, she not having had a decree passed by the probate court adjudging the estate insolvent, defendant could not show actual insolvency for the purpose of procuring an equitable set off, under Rev. Laws c. 173, § 28, of notes held by him against the estate on which he could not sue the executrix because a year had not elapsed since her appointment. Id.

38. See 5 C. L. 1257.

39. Rule different at common law. Hall v. Herring [Del.] 63 A. 576. Under Ball. Ann. Codes & St. § 5697, a judgment against a representative is not evidence of assets in his hands unless assets are alleged. Collins v. Denny Clay Co., 41 Wash. 136, 82 P. 1012.

40. Under Mills' Ann. St. § 4793, providing that, on recovery of judgment against administrator in any other court than county court for a demand due from the intestate, no execution shall issue but transcript shall be filled in county court, and same shall be allowed and paid as other demands, district court held to have had no authority to allow judgment as a fourth class claim. Hotchkiss v. First Nat. Bank [Colo.] 85 P. 1007. A creditor who has procured a judgment against the personal representative of his debtor cannot proceed by motion in the same cause to have the land sold, either by the representative or a commissioner, for the purpose of paying the judgment, unless the suit was also brought to enforce a lien acquired by a judgment or some other kind of security. Atkinson v. Ricks, 140 N. C. 418, 53 S. E. 230. Lien of attachment levied in the lifetime of the debtor cannot be enforced in that way, but creditor must proceed against the representative under Revisal 1905, §§ 43, 100, 103-131, to have the property of the estate applied to its payment, any lien acquired by the levy being preserved to him in such application under Id. §§ 87, 167. Id. Under Bal. Ann. Codes & St., judgment operates only to establish the claim in same manner as though it had been allowed by the defendant and the court, and judgment must be that the representative pay, in due course of administration, the amount found due, and no execution may issue thereon, nor does it create a lien upon the property of the estate or give the judgment creditor any priority of payment. Collins v. Denny Clay Co., 41 Wash. 136, 82 P. 1012. Applies where executor is sued in his representative capacity for applying money or the proceeds of property belonging to a third person, and held by deceased as security only, to the benefit of the estate. Id.

41. In absence of a showing of fraud or collusion, a judgment recovered in an action against the administrator on a judgment note given by decedent cannot be attacked by a creditor when presented to the auditor as a claim against the estate on the ground that the note was without consideration. In re McPherran's Estate, 212 Pa. 432, 61 A. 956.

42. Code Civ. Proc. § 2468, providing that the property of the judgment debtor is vested in the receiver, being applicable to property held by him as executor. Jones v. Arkenburgh, 98 N. Y. S. 532.

43. See 5 C. L. 1227.

44. Claimant held entitled to an allowance of her claim as of the second class. Ross v. Will, 121 Ill. App. 421. Laws 1898, p. 738, c. 234, § 66, providing that judgments entered of record against a decedent during his lifetime, funeral charges and expenses, etc., shall have preference, refers only to judgments entered of record in the lifetime of the deceased, and does not include cases in which execution has been issued on the judgment and levy made on defendant's lands during his lifetime. Wright v. Wright [N. J. Eq.] 62 A. 487. Does not operate to prefer funeral expenses over lien of such judgment. Id. Statute applies only when decedent's estate is in the hands of an executor or administrator in process of application to the payment of claims against the estate, and all that parties claiming the benefit of it in a suit for partition can claim is the equitable application of it, that is they may show that it is just and equitable that the substantial benefits of the statute should be allowed them. Id. Respondents held judgment, execution, and levy charged against share of one of the parties to a partition suit. Pending the latter suit debtor died and land was thereafter sold free from respondent's lien. After the sale petitioners, who were parties to the suit, sought to

Secured debts and liens.[46]—The lien of a judgment obtained against a decedent during his lifetime continues indefinitely against his heirs and devisees.[47] Where the estate is administered in the probate court, a judgment against the representative ordinarily ranks no higher than the claim on which it is founded.[48] In some states an attachment of realty or personalty is dissolved by the death of the debtor before it is taken or seized on execution, provided administration proceedings are instituted within a specified time.[49] In some states the lien of a chattel mortgage is transferred to the fund arising from the sale of the property by the representative.[50]

(§ 6) *D. Funds, assets, and securities for payment.*[51]—The assets of an estate in the hands of the representative are primarily charged with the payment of decedent's debts, and continue so as to each claim against the estate until it is paid or is barred by the statute of nonclaim applicable thereto.[52] A voluntary settlement and distribution by the representative will not relieve him from liability to a creditor having a valid claim where he had sufficient assets in his hands to pay the same, though he acted in good faith and without notice.[53] A representative having no funds of the estate in his hands and not chargeable with any such funds owes no duty to the estate to advance money to pay claims or to purchase and discharge claims against it.[54] Debts secured by mortgage should be paid out of the general personal estate if it is adequate for that purpose, and can be used without prejudice to the rights of unsecured creditors,[55] and this is true though the mortgagor

have claim for funeral expenses preferred over that of respondent. Held that petitioners, having failed to assert claim sooner and so given respondent opportunity to bid up price of property, was not entitled to substantial benefits of statute. Id. Claims held not due from decedent in a fiduciary capacity so as to be preferred debts of the fourth class under Code 1904, § 2660. Pope v. Prince's Adm'r [Va.] 52 S. E. 1009. Infant's claim against a constructive trustee holding a fund for his benefit is not a preferred claim against the trustee's estate. Id.

45. Amount paid by administrator for insuring property of the estate. Enscoe v. Fletcher, 1 Cal. App. 659, 82 P. 1075.

46. See 5 C. L. 1228.

47. This does not prevent the general presumption of payment from arising after twenty years. Roberts v. Powell [Pa.] 60 A. 258.

48. See, also, § 6 B, post. In the distribution of an insolvent estate, and hence an unrecorded mortgage executed by decedent during his lifetime takes precedence over a general judgment against the administrator on a claim which would have been inferior to such mortgage. Civ. Code 1895, §§ 2727, 3424, construed. Hawes v. Glover [Ga.] 55 S. E. 62. Judgment does not give judgment creditor any priority of payment. Collins v. Denny Clay Co., 41 Wash. 136, 82 P. 1012.

49. Rev. Laws c. 167, § 112, providing that an attachment of realty or personalty shall be dissolved if the debtor dies before it is taken or seized on execution and administration is granted in the state upon an application therefor made within one year after his decease, applies to property fraudulently conveyed as well as to property standing in the name of the debtor at the time of his death. Dunbar v. Kelly, 189 Mass. 390, 75 N. E. 740. This statute is not superseded by Rev. Laws c. 167, §§ 38, 63, 64; Id. c. 178, §§ 1, 47, giving creditors a remedy by writs of attachment and execution in the case of lands fraudulently conveyed. Id.

50. Where a mortgagor in possession of goods dies, and his administrator proceeds to administer the same in accordance with the statute regulating the administration of estates, the mortgagee cannot maintain an action of replevin against the administrator for the possession of the mortgaged property, even though the condition in the mortgage was broken at the time of the death of the mortgagor. Linghler v. Kraft, 3 Ohio N. P. (N. S.) 653.

51. See 5 C. L. 1229.

52. Danieli v. Baldwin [Ala.] 40 So. 421.

53. Danieli v. Baldwin [Ala.] 40 So. 421. Any settlement and distribution made by administrator of his own motion is a voluntary one within this rule, notwithstanding general duty resting on him to seasonably make it, and his liability for interest on funds in his hands if he fails to seasonably make final settlement. Id. Voluntary settlement and distribution held not to have discharged administrator from liability to minor creditor where he had received sufficient assets to pay her claim, and claim was presented within 12 months after she became of age as authorized by Code 1896, § 131. Id. Where he is not guilty of negligence, he may be substituted to rights of creditors and compel distributees to reimburse him. Id.

54. Smith v. Goethe, 147 Cal. 725, 82 P. 384.

55. Appeal of Beard, 78 Conn. 481, 62 A. 704. Heirs or devisees have right to compel payment of mortgage debt out of personalty to the exemption of realty. Browne v. Bixby, 190 Mass. 69, 76 N. E. 454. Where wife signed husband's note as surety and gave mortgage on her realty to secure its payment, held that her administrator with

fails to present his claim within the time fixed for that purpose,[56] and though legacies[57] and the shares of distributees[58] will thereby be diminished. The rule that, where trust property and other property are both pledged for the debt of the trustee, the latter must first be applied to the payment of the debt to the exoneration of the trust property has no application where the only property pledged is trust property.[59] A trust should not be declared against an insolvent estate on the ground that the proceeds of trust property in decedent's hands went into the general assets, and thereby increased the amount in the hands of the administrator.[60] The abatement of legacies for the payment of debts is treated elsewhere.[61]

(§ 6) *E. Payment and satisfaction.*[62]—The representative has no authority to pay claims until they are proved and allowed according to law.[63] He should not ordinarily pay them until after the expiration of the time allowed him for the settlement of the estate,[64] and does so at his own risk in reference to the possibility that the estate may prove insolvent.[65] So too, when he procures an order for the payment of certain claims in full by representing to the court that the estate is solvent when in fact it is not, he will be held personally responsible for the amount

the will annexed could maintain a suit against husband's estate to compel his legal representatives to exonerate her property and relieve her estate from liability by paying the note. Id. Has an interest sufficient for that purpose, since devisees or heirs, if mortgage is enforced against realty, have a right to resort to him to have debt paid out of personalty to the exemption of the realty. Id. When, after the death of the grantor, it is necessary to invoke equity jurisdiction to foreclose a deed of trust upon specific real estate given to secure a debt, the court ought to require the personal estate in the hands of the administrator to be first ascertained and determine how much of it is applicable to the payment of the trust debt, and should require it to be so applied before it decrees a sale of the land in satisfaction thereof. Miller v. Mitchell, 58 W. Va. 431, 52 S. E. 478.

56. Since claim is not extinguished by failure to present it and mortgagor still has a right to foreclose and take the land. Appeal of Beard, 78 Conn. 481, 62 A. 704.

57. Where the will directs the payment of all of the debts out of the personalty, a devisee of realty, incumbered by testator after the execution of the will, is entitled to have such incumbrance discharged out of the personalty to the disappointment of pecuniary and specific legatees. French v. Vradenburg's Ex'rs [Va.] 52 S. E. 695.

58. Though share allowed the widow in addition to dower will thereby be diminished, she stands on same footing as other distributees as to such share. Appeal of Beard, 78 Conn. 481, 62 A. 704.

59. Where decedent pledged trust property as security for a loan, held that the owner was not entitled to have the administrator of his insolvent estate use the general assets of the estate to pay the loan to the exoneration of the pledged property. Lowe v. Jones [Mass.] 78 N. E. 402.

60. Where deceased pledged property held by him in trust to secure a loan, held that owner was not entitled to have his administrator use the general assets of his insolvent estate to pay the loan to the exoneration of the trust property. Lowe v. Jones [Mass.] 78 N. E. 402.

61. See Wills, 6 C. L. 1880.

62. See 5 C. L. 1230.

63. In view of Code Civ. Proc. § 1493, et seq., providing that all claims must be presented and allowed before the administrator can have rightful authority to pay them, an heir paying incumbrances on property of the estate before the institution of administration proceedings is not entitled to credit therefor in his account on his subsequent appointment as administrator. In re Heeney's Estate [Cal. App.] 86 P. 842. Fact that under Id. § 1500, where suit has been commenced to foreclose mortgage, administrator might be authorized to pay or compromise mortgage debt without presentation does not give him authority to pay all debts secured by mortgage without presentation or suit. Id. Payment of claim presented by co-executor, which had not been proved and allowed as provided by Code Civ. Proc. § 2719, and which was barred by limitations, held unwarranted and without authority. In re Sheldon's Estate, 96 N. Y. S. 225.

64. Where the statute provides that no action may be brought against him until a year after his appointment, he should not ordinarily pay debts until the expiration of that time. Whitcomb v. Taylor [Mass.] 78 N. E. 536.

65. If he pays before expiration of year after his appointment where statute provides that no actions on claims can be brought against him during that time. Whitcomb v. Taylor [Mass.] 78 N. E. 536. In doing so he is bound to know that the amount applicable to payment of debts is liable to be diminished by the making of an allowance to the widow for necessaries, and takes the risk that there may not be enough personalty for both purposes and of having his account disallowed for that reason. Id. Executors held entitled to credit for full amount of debt paid by them if estate was solvent, but only for pro rata dividend thereon if it was insolvent, and their accounts surcharged with the amount thereof with the subrogated right to present the claim for payment. In re Groff's Estate [Pa.] 64 A. 783.

of the overpayment.[66] Interest should be allowed as a matter of right and law on all claims, whether evidenced by a written or oral contract, which are liquidated and are due and payable at a fixed time.[67]

§ 7. *Subjection of realty to payment of debts under orders of court. A. Right to resort to realty.*[68]—The personalty being insufficient for that purpose,[69] so much of the realty, not exempt from sale on execution,[70] as may be necessary, may be sold for the payment of decedent's debts.[71] In many states realty cannot be sold to pay the expenses of administration or debts contracted by the representative,[72] and in such case the representative is not entitled to be reimbursed out of the proceeds of a sale to pay debts to the exclusion of claims for funeral expenses and claims of general creditors.[73] Land which the will authorizes to be sold should be taken in preference to that directed to be held during the lives of certain beneficiaries,[74] and land specifically devised should not be sold until after the rest of the estate has been exhausted.[75] When necessary to sell it all, specific devisees should contribute ratably.[76] Where land is sold on partition pending administration, the proceeds will be ordered paid into court to await final adjudication of the claims

66. Where executors, by informing court under oath that estate was solvent, procured an order for payment of employes in full, and estate turned out to be insolvent, and other creditors received 70 per cent of their claims, held that such payment was improvident and unauthorized to the extent of 30 per cent, and item of his account was properly disallowed to that extent. United States Rubber Co. v. Peterman, 119 Ill. App. 610, afd. [Ill.] 77 N. E. 1108.

67. Properly allowed on claim based on failure of decedent to comply with his agreement to devise and bequeath property to claimant in consideration of services. Cline v. Waters [Ky.] 90 S. W. 231.

68. For right to resort to realty in hands of heirs and devisees, see § 8, post.

69. Lands do not become assets unless there is insufficient personalty. Baldwih v. Alexander [Ala.] 40 So. 391. Under Code Civ. Proc. § 429. Davidson v. Marcum [Ky.] 89 S. W. 703. Personalty must first be exhausted. Marvin v. Bowlby [Mich.] 12 Det. Leg. N. 723, 105 N. W. 751.

70. Probate court has no jurisdiction to order sale of homestead to pay debts, and such a sale is void. Griffin v. Dunn [Ark.] 96 S. W. 190. Homestead of less value than $2,000 cannot be sold either to discharge an incumbrance thereon or to pay debts, and license purporting to authorize such a sale is void. Brandon v. Jensen [Neb.] 104 N. W. 1054. Since heirs of timber culture claimant who dies before obtaining a patent succeed to his claim directly as donees of the government and not by inheritance, the county court has no jurisdiction to authorize its sale for payment of debts of decedent, or to authorize administrator to mortgage it for that purpose. Haun v. Martin [Or.] 86 P. 371. Allegations of bill held insufficient to show that heir was estopped to assert title as against purchaser at administrator's sale. Id.

71. Interest of sole devisee of deceased executor may be sold to satisfy judgment against the estate of such executor for balance of share of distributee of executor's testator which he failed to turn over to her, and devisee cannot require that same shall be rented and proceeds applied to satisfaction of the judgment. Frazer v. Fidelity & Deposit Co. [Ky.] 89 S. W. 134. Executor invested share of devisee's son in land. Later widow elected to renounce will, but thereafter released to devisee's son her claim against the land to make up the amount to which she was entitled under the statute. Held that, in suit against devisee, the son's land was properly set off to him, the devisee having no interest therein. Id. On issue as to whether decedent was the sole owner of a business conducted under a copartnership name held that it was error to refuse to permit witness who testified that he did business with the firm to testify as to what persons constituted the firm, or whether it was composed of more than one member of decedent's family or whether decedent was a member of it. In re Dusenbery, 106 App. Div. 235, 94 N. Y. S. 107.

72. Proceedings for so doing are void and no title passes thereunder. Bolen v. Hoven, 143 Ala. 652, 39 So. 379. Fact that deed recites that the sale was "to pay the debts of said estate" does not show that sale was to pay expenses of administration. Shell v. Young [Ark.] 95 S. W. 798.

73. Under Code Civ. Proc. § 2793, par. 6, when construed in connection with all other statutory provisions for sale of realty to pay debts, and before Laws 1900, p. 209, c. 120, and Laws 1904, p. 1907, c. 750 went into effect. In re Hatch, 182 N. Y. 320, 75 N. E. 153, rvg. 97 App. Div. 496, 90 N. Y. S. 33.

74. Land which will provided might be sold after five years where that time had elapsed. Robinson v. Cogswell [Mass.] 78 N. E. 389.

75. Error in directing the sale of land specifically devised is immaterial where the evidence clearly shows that the assets primarily liable are sufficient to pay the costs and debts. West v. Bailey, 196 Mo. 517, 94 S. W. 273.

76. Code Civ. Proc. § 1822. Devisee has no right to have his devise exempted from sale, or the sale postponed until other prop-

properly enforceable against it.[77] In the absence of express authority in the will, the executor cannot sell land except upon an order of the proper court in a proceeding instituted for that purpose.[78]

Proceedings to procure a sale must be instituted within the time limited by statute,[79] or, if no time is fixed, within a reasonable time.[80] A testator cannot by a provision in his will postpone the time of sale until the vesting of future estates.[81]

(§ 7) *B. Procedure to obtain order.*[82]—Proceedings in the probate court are generally instituted by a petition filed by the representative[83] or a creditor,[84] which must describe the land to be sold,[85] and name the persons interested in the prop-

erty specifically devised has been resorted to, for the reason that the devise to him was made for a valuable consideration. In re Tuohy's Estate [Mont.] 83 P. 486.

77. Under Gen. St. p. 2432, § 52, where decree fails to direct money to be paid into court, omission may be corrected by supplemental order or amendment. Morgan v. Morgan [N. J. Eq.] 64 A. 155. P. L. 1898, p. 659, § 43, authorizing court to transfer lien from land sold to proceeds of sale, is not restrictive, and does not deprive court of power to order proceeds to be paid into court though land was not ordered sold free and discharged of debts. Id.

78. Anderson v. Messinger [C. C. A.] 146 F. 929. Where will gave independent executors no express power to sell land and it appeared that personalty was sold for enough to pay debts, held that it would be presumed, in suit of trespass to try title, that proceeds of sale of personalty were used in discharging debts, so that deeds of realty executed by executors were invalid. Johnson v. Short [Tex. Civ. App.] 16 Tex. Ct. Rep. 204, 94 S. W. 1082.

79. Under Code Pub. Gen. Laws, art. 57, § 7, when realty is liable to be proceeded against operation of statute of limitations is suspended in relation to the heirs for 18 months from the death of the decedent, that is the statute is suspended for that period in favor of the creditor and against the heir or devisee. Creditor's bill against heirs to obtain sale. Eirley v. Eirley, 102 Md. 452, 62 A. 962. Application to sell realty is not an action to recover realty or the possession of it, nor an action arising out of the title thereto or the rents and profits thereof within the meaning of Comp. St. 1887, div. 1, §§ 29, 30; Pol. Code 1895, § 9, Code Civ. Proc. §§ 483, 484, 3456, prescribing the time within which such actions may be brought. In re Tuohy's Estate [Mont.] 83 P. 486. As to the purchaser of the land of a decedent the debts of the estate cease to be a lien thereon after the expiration of the year fixed by statute within which the land may be sold for their payment (Morgan v. Morgan [N. J. Eq.] 64 A. 155), but as to the heirs the lands remain liable, notwithstanding the elapse of the year, until a bona fide sale has been made (Id.). The power of the court to order a sale remains after the expiration of the year, but a conveyance under an order obtained after that time passes only the estate of which the heirs were seised when the order was made. Id. A judgment by confession of the executrix more than five years after the death of the decedent is not a lien on his realty, under act of 1834. Rosengarten's Estate, 30 Pa. Super. Ct. 244. Ball. Ann. Codes & St. § 4642, providing that no realty of a decedent shall be liable for his debts unless letters testamentary or of administration shall be granted within six years after his death, is not unconstitutional as depriving a mortgage creditor whose debt is due at the time of decedent's death, of his property without due process of law. Fuhrman v. Power [Wash.] 86 P. 940.

80. Neither creditors nor executor held guilty of such laches as to bar right, where delay was due to fact that executor had been managing property under an agreement between heirs and creditors with a view to payment of debts out of rents and profits. Mayo v. Mayo [Ark.] 96 S. W. 165. Conclusion of court that executor had not been guilty of laches held sustained by the evidence, even if that fact would justify a denial of order of sale. In re Tuohy's Estate [Mont.] 83 P. 486. Devisees held not entitled to object to delay, where it was due to their own urging. Id. Four years of unexplained delay, following the extinguishment of the homestead and dower claims which prevented an immediate sale held to estop creditors from selling land where in the meantime rights of third parties had intervened. Frier v. Lowe, 119 Ill. App. 246.

81. May not, by devising lands to one for life, with remainder to parties not in esse, prevent their sale until all are born who may possibly take under the will. Carraway v. Lassiter, 139 N. C. 145, 51 S. E. 968.

82. See 5 C. L. 1232.

83. Since Code 1896, § 158, provides that application must be made by the administrator, the probate court acquires no jurisdiction when application is made by another and an order of sale made under such circumstances is void. Bolen v. Hoven, 143 Ala. 652, 39 So. 379.

84. State hospital for treatment of indigent insane which was a creditor of the estate, held to have the right to institute proceeding. In re Buffalo State Hospital, 47 Misc. 33, 95 N. Y. S. 209. Where mortgagor gave to an attorney money to pay off mortgage but latter converted it to his own use and for several years continued to pay interest to mortgagee, held that by accepting money he became the attorney for the mortgagor, and by converting it became his debtor to the amount thereof so that, on death of both parties, executors of mortgagor were

erty.[86] The required notice must be given,[87] the sale being void as to all heirs or devisees not served.[88] Formal pleadings are not necessary, but the answer of the heir or devisee, when required, is sufficient if it in terms denies the existence of debts for the payment of which a sale is sought.[89] The applicant has the burden of showing the necessity for a sale,[90] and any fact showing the nonexistence or extinguishment of debts is available to the heirs as a defense.[91] In some states they may contest the validity of claims admitted or allowed by the representative.[92] The right to a jury trial depends upon the statutes of the various states.[93] Questions of title cannot ordinarily be determined in such a proceeding.[94] It is not necessary to appoint a guardian ad litem for the minor husband of the devisee of a life estate in the property.[95]

The venue of suits in equity to subject the realty to the payment of debts is regulated by statute.[96] A bill by a general creditor against the representative and

creditors of attorney's estate, within Code Civ. Proc. § 2750. In re Lowerre, 48 Misc. 317, 96 N. Y. S. 764.

85. Must accurately describe it. Code 1896, § 158. Little v. Marx [Ala.] 39 So. 517. Description in application and decree held insufficient. Id.

86. Failure to name person claiming interest in petition does not deprive surrogate of jurisdiction, but he may be brought in at any time before the making of any order affecting the sale of the premises, either by amendment of the petition or by a supplemental citation directed to him. Code Civ. Proc. § 2754 construed. In re Wheeler, 48 Misc. 323, 96 N. Y. S. 762. Allegation in petition by widow and administratrix that names and number of beirs were unknown to petitioner, and that she did not know whether there were any persons claiming under heirs whom she knew of 17 years before, held insufficient, there being no statement that any effort had been made to ascertain who the heirs were, and no statement as to who the heirs were of whom petitioner had heard 17 years before. Petition denied under Code Civ. Proc. § 2756, requiring surrogate to determine whether proceedings have been in conformity with the Code. In re O'Neill, 49 Misc. 285, 99 N. Y. S. 237.

87. Notice required by statute is a jurisdictional fact. Desloge v. Tucker, 196 Mo. 587, 94 S. W. 283. Under Rev. St. 1899, § 184, requiring personal notice to be served on "heirs or devisees" who are residents of the county where administration is had, legatees need not be so served. Id.

88. Fact that decedent owed debts for which the land sold was liable, and that land brought a fair price and proceeds were properly applied held not to peclude devisees not served from recovering the land subject to the right of the purchaser to repayment of the amount expended by him for which the land was liable. Card v. Finch [N. C.] 54 S. E. 1009. Where will devised realty to widow for life with vested remainders to named devisees held that widow did not represent remaindermen so as to bind them by judgment of sale where she was made a party to the proceedings but they were not, particularly where she had dissented from the will. Id.

89. Little v. Marx [Ala.] 39 So. 517.

90. Administrator. Little v. Marx [Ala.] 39 So. 517. Under Code 1896, § 164, the applicant must show that the personalty is insufficient to pay the debts and such proof must be made by the deposition of disinterested witnesses and filed and recorded. Id. Proof by administrator alone held insufficient where land was sought to be sold to pay his claims. Id.

91. Little v. Marx [Ala.] 39 So. 517. Heid error to order sale to pay claims of administrator where he did not establish a compliance with the statutory provisions as to presenting and filing them. Id.

92. Under Code Civ. Proc. § 2755. In re Neufeld, 50 Misc. 215, 100 N. Y. S. 444. Heirs held not estopped by stipulation of attorney for entry of judgment after 90 days in suit against administrator on claim, it not clearly appearing that attorney was authorized by heirs to concede the validity of such claim. Id.

93. Trial by jury of objections to sale held properly denied regardless of what the issues were, where no written demand for a jury trial was ever filed, and demands for such trial contained in the objections were never called to the attention of the trial court or judge until after the hearing began. Code Civ. Proc. §§ 2923, 2924, 2340, construed. In re Tuohy's Estate [Mont.] 83 P. 486.

94. District court has no authority to investigate title, and hence cannot determine that certain devises were made for a valuable consideration and hence should not be sold until after rest of realty had been disposed of; no provision made for trial of such issues in Code Civ. Proc. § 2671, or elsewhere. In re Tuohy's Estate [Mont.] 83 P. 486. If devise was made under circumstances warranting a decree requiring a conveyance by the executor, such relief can only be granted by court of equity in a suit brought for that purpose. Id. Question of adverse possession, as between the executor and a devisee, cannot be tried upon such an application, but must be settled in an appropriate action brought in the district court as a court of general jurisdiction. Id. Finding upon question of title held wholly outside the purview of the application and immaterial, and hence error in making it was harmless. Id.

95. Carraway v. Lasseter, 139 N. C. 145, 51 S. E. 968.

heirs for that purpose must be upon behalf of plaintiff and all other creditors, and must show that the personalty is insufficient.[97] The remedy of an infant heir for failure to appoint a guardian ad litem for him is by an appeal and not by an action to set aside the sale after he becomes of age.[98] In an action against infant heirs for the settlement of the estate and the sale of realty for that purpose, the court cannot take the allegations of the petition as confessed, but they must be supported by proof.[99]

(§ 7) *C. The order.*[1]—An order made upon due notice for the sale of real estate by a representative is sufficient to authorize a sale by his successor in trust.[2] A party is not prejudiced by two decrees to sell, one ordering an appraisement and the other an upset price, especially if the sale realizes more than two-thirds of the appraisement and more than the upset price fixed by the court.[3] The conclusiveness of the order and its immunity from collateral attack is treated in a subsequent section.[4]

(§ 7) *D. The sale.*[5]—The court may order a representative proceeding with a sale under its order to proceed no further where circumstances have since arisen rendering a sale unnecessary.[6] No note or memorandum in writing is necessary to charge either the administrator or the purchaser at any administrator's sale.[7] The sale must be confirmed by the court before it becomes effective,[8] the question of confirmation resting in judicial discretion.[9] Interested

96. Decedent owned certain land in F. county and a fourth interest in a lot in J. county, his co-tenants in latter tract having no interest in the former and one of them being his minor son. Administrator qualified in F. county and filed a petition in equity in that county alleging that each of the lots was indivisible and asking that the estate be settled, the land sold, and the proceeds distributed. Held that, in so far as the land in J. county was concerned, the proceeding was one under Civ. Code Prac. § 490, for the sale of the land and the division of the proceeds on the ground that the land was indivisible, which, under § 62, must be brought in the county where the land or some part of it lies, and hence court of F. county had no jurisdiction to sell land in J. county, though adult cotenants made no objection, § 66 providing that action for sale of decedent's land to pay debts must be brought in county where representative qualified being inapplicable. Goldsmith's Adm'r v. Hieatt [Ky.] 90 S. W. 259.

97. Bill by administrator with the will annexed against heirs and administrator of one to whom distribution was made before discovery of will and who took nothing under the will held demurrable. Crawford's Adm'r v. Turner's Adm'r, 58 W. Va. 600, 52 S. E. 716. In action for settlement of estate held error to direct a sale of realty, where petition did not state amount of indebtedness, or make creditors parties, and it did not appear that the court made any order of reference to a commissioner before whom creditors might appear and prove their claims, nor that the creditors ever presented their claims in the action, the proceedings not being in conformity to Code Prac. §§ 428-430. Tabb v. Wortham's Adm'r [Ky.] 89 S. W. 191.

98. Davidson v. Marcum [Ky.] 89 S. W. 703.

99. Tabb v. Wortham's Adm'r [Ky.] 89 S. W. 191.

1. See 5 C. L. 1233.

2. Where nonresident died testate in Illinois owning property in Kansas, and executors named in the will were appointed and qualified in Illinois, and letters testamentary were afterwards issued to the same persons in Kansas, after the will had been admitted to probate in that state, under Gen. St. 1901, §§ 7962-7965, held that an administrator de bonis non, appointed in Illinois on account of the death of one executor and the removal of the other, was not thereby made the successor in trust of the executors under their Kansas appointment, so far as to enable the Kansas court to permit him to sell realty to pay debts under an order previously granted to the executors, without the giving of a new notice by the administrator of his application for such authority. Albright v. Bangs, 72 Kan. 435, 83 P. 1030. Sale without such notice held void, so that deed under it constituted no defense to an action of ejectment brought by legatees or their successors in interest. Id.

3. Ferguson v. Ferguson, 3 Ohio N. P. (N. S.) 549.

4. See § 15, post.

5. See 5 C. L. 1233.

6. May stay execution of order of sale pending hearing of petition for partial distribution. State v. District Ct. [Mont.] 86 P. 269.

7. Is not a contract for sale of lands or any interest in or concerning them within meaning of statute of frauds, the purchaser being liable under Civ. Code 1895, § 5466, for the amount of the purchase price as soon as the hammer falls. Green v. Freeman [Ga.] 55 S. E. 45.

8. Rev. St. 1899, § 167. Desloge v. Tucker, 196 Mo. 587, 94 S. W. 283.

9. Desloge v. Tucker, 196 Mo. 587, 94 S.

parties are generally given a right to appear and object to a confirmation.[10] The court is generally authorized to vacate the sale and direct another to be had in case he finds that the proceedings in making it were unfair.[11] The fact that persons were restrained from bidding by reason of the pendency of litigation in regard to the title to the land and of a caveat to the will does not constitute ground for setting aside the judgment and a sale thereunder which has been confirmed by the court, but can only be considered in a separate action attacking the sale for fraud by showing that the purchaser knew of the facts and took an unfair advantage of them.[12] Where property is encumbered by dower and homestead to its full value, it is not necessary or proper for the representative to sell it subject thereto but he or the creditors may wait until the encumbrance is extinguished and then sell.[13] A sale without assigning dower is not void for want of jurisdiction, but is merely inoperative so far as the dower is concerned.[14] Where the whole of the land is sold, the surviving husband's statutory right to a third thereof is transferred to the proceeds.[15] Any surplus remaining after the payment of the debts is to be distributed as other property of the estate.[16] The hearing on an order to show cause why a master appointed to sell land in a suit for the settlement of an estate should not turn over the proceeds to the representative should be continued until the cost and expenses of the sale have been determined.[17]

The purchaser takes title free from the personal obligations of the devisee,[18] and, in the absence of fraud, is only required to see that the court has jurisdiction of the parties and the subject-matter.[19] He may rescind where he was induced

W. 283. Private sale for less than half its value and for less than enough to pay debts held improperly confirmed. Id. Sale is not, strictly speaking, a judicial one until it is confirmed and a deed made, and hence rule that mere inadequacy of consideration will not avoid a judicial sale has no application on proceedings for confirmation. Id.

10. Petition in county court objecting to confirmation of sale held sufficient, in absence of special exception, to admit proof that claims for payment of which sales were made were barred by limitations. Smart v. Panther [Tex. Civ. App.] 15 Tex. Ct. Rep. 448, 95 S. W. 679. Exception held not to raise objection that it failed to allege facts showing that claims did not come within exceptions which would prevent bar of limitations. Id. Petition objecting to confirmation on ground that claims for payment of which it was made were barred by limitations when allowed and approved held filed within a reasonable time and not too late. Id. Where petition was based solely on ground that claims were barred, judgment setting aside allowance and awarding claimants only half the amount on ground that claims were for contribution between cosureties held erroneous. Id. Judgment creditor of an heir who purchased land on sale under his judgment held to have such an interest therein as entitled him to maintain a proceeding in the county court to prevent confirmation of a sale of same land to pay debts alleged to have been wrongfully allowed. Id.

11. Rev. St. 1898, § 3896. Greiling v. McLean's Estate [Wis.] 107 N. W. 339. Purchaser held not estopped from rescinding for false representations by reason of the fact that the administrator had paid out the purchase money with his knowledge and consent in paying off liens on the property. Id.

12. Carraway v. Lassiter, 139 N. C. 145, 51 S. E. 968.

13. Thomas v. Waters, 122 Ill. App. 434.

14. Purchaser takes subject to widow's right to have dower set aside. Shell v. Young [Ark.] 95 S. W. 798.

15. Third of proceeds of sale of wife's realty, to one-third of which husband was entitled absolutely under the statute, held not to be assets of the estate, but to be a trust fund in the hands of the administrator making the sale. Weaver v. Gray [Ind. App.] 76 N. E. 795.

16. Should be held to be disposed of under the will. Robinson v. Cogswell [Mass.] 78 N. E. 389. Where land was conveyed to wife for her sole and separate use during life with remainder to her husband after her debts and funeral expenses were paid, and after wife's death was sold for payment of her debts, held that any surplus remaining in the hands of her administrator after such debts were paid belonged to her husband. In re Winnegar's Estate, 118 Mo. App. 445, 94 S. W. 833.

17. Where court directed master to sell lands and pay over proceeds, less expenses, to executrix, and she claimed that master had retained a larger sum than he had a right to. Lockwood v. Lockwood, 73 S. C. 18, 52 S. E. 735.

18. Purchasers at administrator's sale who acted in good faith, and paid in cash the adequate value of the property relying upon the probate proceedings, the authority of the administrator to sell, and court's

to purchase through false representations[20] or mistake of fact.[21] In order that he may be subrogated to the rights of creditors as against a devisee in remainder not a party to the proceeding, he must show, beyond an order for payment of the claims made, that such claims existed as a charge on the land.[22] Where he purchases at a specified price per acre and is induced by the false representations of the officer making the sale to pay for more land than the tract actually contains, he may recover the excess from the distributees if no prejudice will result to those for whose interest the sale was made.[23] In North Carolina the fact that a caveat to the will is pending does not affect his title where no order has been issued to the representative suspending further proceedings.[24] An administrator's deed creates color of title,[25] and recitals therein are evidence of the facts stated.[26]

Actions to recover realty sold must be brought within the time specified by the statute of limitations,[27] or where no time is fixed, within a reasonable time.[28]

order confirming the sale. McKenna v. Cosgrove, 41 Wash. 332, 83 P. 240.

19. May rely on the judgment of the clerk ordering the sale, followed by the approval of the proceedings by the resident judge of the district before payment of the price. Carraway v. Lassiter, 139 N. C. 145, 51 S. E. 968.

20. Proof of actual damage not necessary. Greiling v. McLean's Estate [Wis.] 107 N. W. 339. Evidence held to support finding that diagram made and used by administrator at sale falsely represented the width of street on which lots fronted. Id.

21. Sale set aside where it did not include adjoining tract of land and building used in connection with the land sold and which purchaser had reason to believe was included in the sale, and which was necessary to the reasonable enjoyment of the premises in the manner contemplated. Biddison v. Aaron, 102 Md. 156, 62 A. 523. Fact that advertisement only mentioned building on land actually sold, and the dimensions of the lot did not embrace other building, and that purchaser did not ask in regard to the latter though an opportunity was given him to do so, held immaterial, where administrator could not have given him information in regard to the matter had he asked for it. Id.

22. Rice v. Bamberg, 72 S. C. 384, 51 S. E. 987.

23. Peacock v. Barnes, 139 N. C. 196, 51 S. E. 926. Since his claim did not arise from the discharge of a specific lien, but because purchase money paid by him under mistake of fact had been used to satisfy the indebtedness of the testator, his remedy was in indebitatus assumpsit against the estate, and he was not subrogated to the rights of the mortgagees and could not maintain an action for the deficiency after the action of assumpsit was barred by limitations though mortgages were not barred. Peacock v. Barnes [N. C.] 55 S. E. 99.

24. Code § 2160, construed. Carraway v. Lassiter, 139 N. C. 145, 51 S. E. 968.

25. Shaffer v. Detie, 191 Mo. 377, 90 S. W. 131.

26. Recitals and evidence held to conclusively show authority of administrator to make the sale. Williams v. Cessna [Tex. Civ. App.] 16 Tex. Ct. Rep. 162, 95 S. W. 1106. Records of county having been shown to have been destroyed by fire, recitals in deed, which was an ancient instrument, held sufficient in themselves to show that sale was made under the orders of the probate court. Id.

27. Statute providing that all actions against purchaser his heirs or assigns, for recovery of land sold at judicial sales must be brought within five years after the date of such sale applies to causes of action arising after the sale but within the five year period. Griffin v. Dunn [Ark.] 96 S. W. 190. Cause of action in favor of heirs to recover homestead illegally sold to pay debts held to have arisen on abandonment of homestead by widow about five months after the sale so that it was barred at the expiration of five years from date of sale. Id. Fact that conveyance by widow, which constituted an abandonment of her homestead right, carried with it her unassigned dower right did not postpone accrual of right of action until her death, the outstanding right to have dower assigned not postponing the heir's right of entry. Id. Neither did widow's right to occupy dwelling house and farm thereto attached until dower was assigned, where she abandoned such right by attempting to convey it, heir's right of entry becoming complete on such abandonment. Id. Statute contains no exception in favor of married women. Id. Code Civ. Proc. § 16, requiring action to be brought within five years after the date of the recording of the deed made in pursuance of the sale, applies to sales which are void for want of notice to the heirs of the proceedings upon which the deed is based. O'Keefe v. Behrens [Kan.] 85 P. 555. Cobbey's Ann. St. 1903, § 4982, providing that action must be brought within five years after the sale, is only intended to aid irregular and voidable sales, and does not apply to sales which are absolutely void, as sale of homestead. Brandon v. Jensen [Neb.] 104 N. W. 1054. Where judgment directing sale was void as to devisees because they were not made parties, held that their right to maintain ejectment against the purchaser was not barred by the lapse of any time less than that prescribed by the statute of limitations. Card v. Finch [N. C.] 54 S. E. 1009. Under Burns' Ann. St. 1901, § 294, par. 4, an action to recover realty sold by an administrator of an absentee, under an order of court specially directing the sale, is barred aft-

Where the deed purports to convey the whole legal title, the right to have the sale set aside for fraud accrues to the remainderman when the deed is delivered.[29] Failure to deny the execution of the deed under oath does not admit the validity of the proceedings on which it is based.[30] The vacation of a judgment of sale does not affect the title of bona fide purchasers under it.[31] If no actual fraud is shown on the part of the purchaser at a void sale, he is entitled, on its being set aside, to a return of the purchase price and the value of lasting improvements made by him, less the reasonable rental value of the land while in possession, with a lien on the land therefor.[32]

Actions against the representative by the heirs to recover the proceeds of invalid sales must be brought within the time fixed by the statute of limitations.[33] An heir is not entitled to recover the proceeds of a sale from the estate of the representative on the ground that the land was improperly described, where the report of the sale, which was confirmed, described it correctly, the proceedings were conducted in good faith, the proceeds were fully accounted for, and the land involved was that intended to be sold.[34]

§ 8. *Subjection of property in hands of heirs or beneficiaries to payment of debts.*[35]—At common law a simple contract creditor, whose debt remains unpaid after the settlement of his deceased debtor's estate, has no right to proceed against the debtor's heirs and distributees, even though they have received realty and assets from the hands of the representative as inheritances.[36] By statute in some states realty in the hands of the heirs or devisees may be subjected to the payment of the decedent's debts,[37] provided the creditor can show his inability to collect in the probate proceedings or from the representative or the legatees or next of kin,[38] there

er five years from the confirmation of the sale though sale is void because of misdescription of property in proceedings and deed. Barton v. Kimmerley, 165 Ind. 609, 76 N. E. 250.

28. Where sale was not attacked by remainderman for more than 28 years after it was made, and until 3 years after death of life tenant, and 16 months after death of purchaser, held that suit to set it aside for fraud was barred by laches. Lindsey v. Fabens, 189 Mass. 329, 75 N. E. 623.

29. Where land passed to widow for life under will and remainder passed to heirs as intestate property. Lindsey v. Fabens, 189 Mass. 329, 75 N. E. 623.

30. In suit by heirs to recover possession of realty and for partition. O'Keefs v. Behrens [Kan.] 85 P. 555.

31. Code Civ. Proc. § 391. At instance of minor heirs. Davidson v. Marcum [Ky.] 89 S. W. 703. Where purchaser and person to whom he assigned his bid were plaintiffs in action in which land was sold held that they were not bona fide purchasers since they knew, or would be presumed to have known, that the method used to deprive the minor heirs of their land was illegal. Id.

32. Davidson v. Marcum [Ky.] 89 S. W. 703.

33. Held that there was no fraudulent concealment which arrested running of limitations against right of heir to compel estate of deceased administratrix to account for proceeds of sale because of misdescriptions. Cunningham v. Cunningham's Estate, 220 Ill. 45, 77 N. E. 95, afg. 121 Ill. App. 395.

34. Cunningham v. Cunningham's Estate, 220 Ill. 45, 77 N. E. 95, afg. 121 Ill. App. 395. Proceedings for the sale and records of county court showing the application of the proceeds held admissible in evidence. Id.

35. See 5 C. L. 1237.

36. Clevenger v. Matthews, 165 Ind. 689, 76 N. E. 542, rvg. 75 N. E. 23; Id., 76 N. E. 836.

37. Under Code Civ. Proc. § 1843, are liable to the extent and value of the real property which descends or is devised to them. Lawrence v. Binninger, 98 N. Y. S. 279. The liability is limited to the amount of assets received. Where a creditor made a party to an action to settle an estate failed to allege or prove what, if anything, the heirs of decedent had received from his estate, held that the court in rendering judgment for creditor for amount of his claim was only authorized to render it against the administratrix to be levied on the assets in her hands as such fiduciary. St. 1903, § 2088. Cline v. Waters [Ky.] 90 S. W. 231. Under Code 1899, c. 86, § 9, may be sued in equity by any creditor to whom a debt is due for which the estate descended or devised is liable, or for which the heir or devisee is liable, in respect to such estate, and no action at law can be maintained against such heir for any matter for which there may be redress by such suit in equity. Crawford's Adm'r v. Turner's Adm'r, 58 W. Va. 600, 52 S. E. 716. Bill held insufficient though it alleged that land descended from deceased to his heirs, and that one of them owned certain land, where it did not allege that the land alleged to have descended was the land

being no personal liability on the part of the heir or devisee unless he has disposed of the property, and then only to the extent of its value.[39] In other states the heirs, devisees, and distributees are personally liable to the extent of the property of the decedent received by them to creditors laboring under a disability at the time of final settlement.[40] Such statutes being in derogation of the common law, the party seeking to take advantage of them must bring himself fully within their conditions,[41] and cannot recover unless he institutes his suit within the time therein limited for that purpose.[42] In equity, property of the deceased in the hands of heirs and distributees may be subjected to the payment of claims accruing after the administration has closed,[43] but this rule does not apply where the land has passed to innocent purchasers for value before the commencement of the suit to charge them.[44] Where there is no statutory limitation the suit must be brought within a reasonable time.[45]

sought to be charged in the suit, or where it was situated, or whether or not it had been disposed of, or, if disposed of, what disposition was made of it, or that land alleged to be owned by heir descended to her from the decedent. Id.

38. Must show that the assets of the estate were not sufficient to pay his debt, or that he has been, or will be, unable with due diligence to collect it by proceedings in the surrogate's court or by action against the representative or the legatees or next of kin. Code Civ. Proc. §§ 1848, 1849. Lawrence v. Binninger, 98 N. Y. S. 279. Mere proof that plaintiffs had recovered judgment against the executor held insufficient, in absence of showing that they had made any attempt to collect it by calling executor to account or otherwise. Id. Under Code Civ. Proc. § 1848, providing that an executor's or administrator's account "as rendered to, and settled by the surrogate" may be used as prima facie evidence of lack of assets and inability to collect, held that an intermediate account filed in the surrogate's court was insufficient for that purpose in the absence of proof that it was settled by the surrogate, or that any decree was entered thereon. Id.

39. Where realty remains in hands of devisee or heir, the most that can be done is to direct that the execution be satisfied out of such property (Code Civ. Proc. § 1852), but where it has been taken under condemnation proceedings, no lien can be established against the proceeds of the fund, but devisee is personally liable in such case for the value of the property received (Code Civ. Proc. § 1854). Lawrence v. Binninger, 98 N. Y. S. 279. Complaint held sufficiently broad to charge defendants as devisees with the property received by them, or its value, and prayer for lien on fund resulting from condemnation proceedings, though improper, did not nullify it in those respects. Id. Under Code 1899, c. 86, §§ 3, 5, realty of an intestate is made assets for the payment of his debts, and if assets remain unsold in the hands of the heir, they may be taken for that purpose, and it is only when they have been sold that he is personally liable, and then only to their value. Crawford's Adm'r v. Turner's Adm'r, 58 W. Va. 600, 52 S. E. 716.

40. Under Burns' Ann. St. 1901, § 2597, are liable to extent of property received by them to any creditor whose claim remains unpaid, who, six months prior to final settlement, was insane, an infant, or out of the state, provided suit is brought within one year after disability is removed, and within two years after final settlement. Clevenger v. Matthews, 165 Ind. 689, 76 N. E. 542.

41. Clevenger v. Matthews, 165 Ind. 689, 76 N. E. 542.

42. Clevenger v. Matthews, 165 Ind. 689, 76 N. E. 542. Under Burns' Ann. St. 1901, § 2597, a nonresident paying surety cannot enforce contribution against the heirs and distributees of a deceased cosurety after the lapse of two years from the final settlement of the latter's estate, though he had no knowledge of the insolvency of the principal or of the nonpayment of the debt and was not called on to pay it until after the expiration of the two years. Id., rvg. [Ind. App.] 75 N. E. 23; Id., 75 N. E. 836.

43. Claim for breach of covenant of warranty in deed. Scoggin v. Hudgins [Ark.] 94 S. W. 684. Claim may be decreed a lien on land occupied by widow and minor children as a homestead with a provision that it shall not be sold until the homestead expires, notwithstanding constitutional provision that homestead shall not be subject to the lien of any judgment, etc. Id. Where one with whom decedent was cosurety was compelled to discharge a liability as surety after the decedent's estate was settled and the executor discharged, held that he could maintain a suit in equity against the deceased surety's legatees to whom distribution had been made to compel contribution. Comstock v. Keating, 115 Mo. App. 372, 91 S. W. 416. Rule not changed by Rev. St. 1899, § 4519, providing that remedies given to sureties to enforce contribution may be maintained against personal representatives, nor by §§ 890, 891, relating to survival of claims against joint obligors (Id.), nor by fact that one distributee is insolvent so that entire sum due as contribution will have to be repaid by the other (Id.). A bill by a receiver of an insolvent national bank against the distributees of an ex-director to recover alleged losses for malfeasance and gross negligence of such director, merely describing such defendants as distributees under the will of said director but failing to allege that the director left any estate, or, if he did, that defendant distributees had

In some states land of the decedent may be taken on execution on a judgment against the representative in the same manner as if execution had been levied against the decedent in his lifetime.[46]

In Louisiana a sole heir who accepts the succession unconditionally thereby becomes liable for decedent's debts.[47]

A petition seeking to hold the widow liable on the debt of her deceased husband on the ground that there was no administration and no necessity therefor, and that she is in possession of his estate and assets, must allege the amount and value of the property received by her.[48]

§ 9. *Rights and liabilities between representative and estate. A. Management of and dealings with estate.*[49]—The representative is chargeable with and must account for all the assets of the estate coming into his hands[50] in his representative ca-

received anything therefrom, was fatally defective. Emerson v. Gaither [Md.] 64 A. 26

44. Scoggin v. Hudgins [Ark.] 94 S. W. 684.

45. Action held not barred by laches Brock v. Kirkpatrick, 72 S. C. 491, 52 S. E. 592.

46. Rev. Laws c. 178, §§ 53, 54, gives a right to proceed against the realty of a deceased person to anyone obtaining an execution on a judgment against the executor or administrator which right may be enforced against purchasers from heirs and devisees. Tracy v. Strassel, 191 Mass. 187, 77 N. E. 700. Right to levy execution in such case held not defeated by the fact that creditor released an attachment on mesne process of the realty during decedent's lifetime. Id. Creditor may cause execution to be levied on land fraudulently conveyed by debtor. Rev. Laws c. 178, § 53, and provisions relative to levy on lands fraudulently conveyed construed. Dunbar v. Kelly, 189 Mass. 390, 75 N. E. 740.

47. Pellerin v. Sanders, 116 La. 616, 40 So. 917.

48. Otherwise it does not authorize a judgment against her personally for any amount. Breck v. Coffield [Tex. Civ. App.] 14 Tex. Ct. Rep. 823, 91 S. W. 594. Judgment ordering that plaintiff recover against defendant as widow of decedent, and directing execution to issue against the community property of the decedent and against the widow, held a personal judgment against widow which rested against her separate property as well as that of the community, so that it could not be upheld on theory that petition would support a judgment against her to be satisfied out of the community property. Id.

49. See 5 C. L. 1238.

50. In suit against executor and trustee to compel him to account for certain bonds, evidence held to show that decedent owned a half interest in them and the executor the other half, so that latter should only be compelled to account for half of them and half the interest. Gerting v. Wells [Md.] 64 A. 298. Evidence held to show that third person made a party defendant never had possession of the bonds or was guilty of any fraud on the estate. Id. Evidence held to show that executor and trustee received certain dividends on claim against insolvent firm owned jointly by himself and decedent and hence held that he should be charged with half the amount so received with interest from the date of payment. Id. Evidence held insufficient to support claim that executor had collected certain money for which he had not accounted. Id. Estate of deceased executor should not be charged with amount of uncollected debts and judgments where he never received them, either as executor or otherwise, but on his death they vested in the administrator with the will annexed of the estate of his testator. In re Walton, 98 N. Y. S. 42. Where same person acted as temporary administrator and executor and filed inventories in both capacities, held that he should be charged with the amount of assets inventoried by him as executor, though it was less than the amount inventoried by him as administrator, in absence of showing by the contestant that such amount was incorrect and that executor had received assets other than those accounted for. In re Tisdale, 110 App. Div. 857, 97 N. Y. S. 494. Where executrix, who was also life tenant and a devisee of a part of the estate in fee, individually took out policy of insurance on property of estate before will was probated, loss being made payable to a mortgagee holding a mortgage executed by testator, as his interest might appear, held that she would be regarded as having acted in her representative capacity and was properly charged with the proceeds thereof, which she collected with the mortgagee's consent, less the premium. Linzy v. Whitney, 110 App. Div. 462, 96 N. Y. S. 1075. Where will gave executrix authority to cut and sell timber only if necessary to pay expenses and debts, held that she was chargeable, on settlement of her accounts, with sum received for timber cut and sold above what was necessary for the purposes specified. Id. Administratrix charged with value of furniture, etc., evidence being insufficient to show that deceased had given it to her before his death. In re Schroeder, 99 N. Y. S. 176. In action by trustee of minor beneficiaries against executor and another to recover share due them under the will where the only issue was as to whether testator had given certain notes to administrator's codefendant, held that the question of value was immaterial so that it was not error to assume in instruction that they were worth their face value. Crawford v. Hord [Tex. Civ. App.] 14 Tex. Ct. Rep. 71, 89 S. W. 1097.

pacity,[51] and is entitled to credit for all sums actually expended by him in paying valid claims against the estate,[52] and the expenses of administration.[53] On his removal he must account to his successor for all such property.[54] The representative of a representative can only be charged with so much of the property of the estate as actually comes into his hands.[55] An heir paying off incumbrances on realty for the purpose of dispensing with administration is not entitled to credit in his accounts for the amount so paid on his subsequent appointment as administrator.[56] The burden of impeaching payments[57] and of showing that the representative has received assets not accounted for is on the contestant.[58] As in the case of other trustees, an accounting must be rendered in every case before any inferences can be indulged in favor of a representative, and hence, in the absence of an accounting, there is no presumption that a representative shown to have converted a certain part of the assets of the estate has not converted more.[59]

51. The administrator is not ordinarily authorized to manage the realty or to collect the rents and profits thereof, and hence is not officially accountable in the settlement of his probate account for rents received by him, his act in collecting them being deemed merely that of an individual for which he might be held personally accountable to the heirs in a proper proceeding. Ayers v. Lalghton, 73 N. H. 487, 63 A. 43.

52. Evidence held to support finding that payments for which executor claimed credit were made by decedent during her lifetime, so that items therefor in his account were properly disallowed. In re Pease's Estate [Cal.] 85 P. 149. Executor held not entitled to credit for balance due on mortgage given by testator until he furnished evidence that he had paid same as an obligation of the estate. In re Tisdale, 110 App. Div. 857, 97 N. Y. S. 494. Administratrix, who was also widow, held entitled to allowance for groceries and flowers ordered before decedent's death (In re Schroeder, 99 N. Y. S. 176), and for amount of bill for clothing, a part of which was ordered by her during her husband's lifetime, and balance of which was for mourning garments (Id.), but not for amount paid for jewelry ordered by her before her marriage, it not appearing that decedent ever knew of or intended to pay for it (Id.). Husband held alone liable for physician's services to wife while she was living with him, so that his estate was not entitled to reimbursement out of her separate estate for money so expended in absence of agreement between wife and physician that credit should be extended to her. In re Stadtmuller, 110 App. Div. 76, 96 N. Y. S. 1101.

53. See § 9 D, post.

54. Rev. St. 1899, §§ 47, 48, refers only to property coming into his hands by virtue of his office, it not being his appointment and qualification which renders him liable to account, but the receipt of property of the estate in his official capacity. Hanley v. Holton [Mo. App.] 96 S. W. 691. Hence where letters of executrix were recalled on the same day on which they were issued, and she made no inventory and in no manner took possession of or charged herself with any of the property of the estate in her official capacity, held that administrator pendente lite could not compel her to make a settlement under such statute, though she had wrongfully obtained possession of and held property of the estate in her individual capacity, the remedy for obtaining possession of such property being a proceeding for the discovery of assets under §§ 74-78. Id. Intestate deposited funds in a bank to his credit as trustee for S., but retained bank book in his possession and drew out interest as it accrued. S. died before the intestate. Accountant was appointed administrator of the estate of S. and thereafter of intestate's estate, and took possession of the deposit as intestate's administrator. Held that he was bound to account for deposit to his successor in latter capacity, leaving ownership thereof to be determined on final accounting as provided by Code Civ. Proc. § 2731. In re Dwyer, 98 N. Y. S. 329.

55. Where administrator was awarded a part of the funds in his hands as one of the next of kin of his decedent, and it appeared that such award included sums which he had already distributed to himself and disposed of in his lifetime, held that an administrator of the administrator would not be charged with the whole amount of the award but only with so much of it as actually came into his hands. Nolde's Estate, 27 Pa. Super. Ct. 413.

56. In re Heeney's Estate [Cal. App.] 86 P. 842.

57. In re Milligan's Estate, 98 N. Y. S. 480. Objection to payment of physician's bill for services to decedent's son held not sustained where it appeared that son was member of decedent's household and it was not shown that he was not a minor. Id.

58. In re Tisdale, 110 App. Div. 857, 97 N. Y. S. 494.

59. In re McCauley's Estate, 49 Misc. 209, 99 N. Y. S. 238. Nonresident appointed administrator in New York died testate in a foreign state where his will was afterwards probated. His executor refused to apply for ancillary letters in New York or consent to ancillary administration in that state. Administrator de bonis non was appointed who collected from sureties of deceased administrator the amount which latter was shown to have received and converted to his own use. Held that upon an accounting by the administrator de bonis non there was no presumption that administrator had not received and converted a larger sum than that recovered from his sureties. Id. One to

In the management of the estate the representative is bound to act with that degree of care and skill which a prudent man would exercise in the direction and management of his own affairs,[60] and where he does so is not ordinarily responsible for losses.[61] He is, however, responsible for losses due to negligence,[62] or to his unauthorized acts or omissions.[63] The burden is ordinarily on him to show an excuse for failure to collect claims due the estate.[64] Mere failure to sue on such a

whom foreign executor had assigned deceased administrator's interest in the estate held to have the burden of proving that no property in excess of the sum recovered from the sureties was received by the administrator, and not entitled to share of such sum in absence of such proof. Id. Judgment in action by administrator de bonis non against sureties of deceased administrator who was also a distributee held binding on administrator's foreign executor, who had notice thereof and selected sureties' counsel, and conclusive against him and his assignee that amount recovered was not greater than surrogate would require estate of deceased administrator to pay to persons other than himself after due accounting. Id.

60. The measure of his duty is to act with fidelity and with that degree of diligence and prudence which a man of ordinary judgment would be expected to bestow upon his own affairs of a like nature. Elizalde v. Murphy [Cal. App.] 87 P. 245. Is only bound to exercise reasonable business prudence. In re Fisher's Estate, 128 Iowa, 626, 104 N. W. 1023. Stands in the position of a trustee to those interested in the estate, and is liable only for the want of due care and skill, the measure of due care and skill being that which prudent men exercise in the direction and management of their own affairs. Hill v. Evans, 114 Mo. App. 715, 91 S. W. 1022.

61. Administrator held not negligent in failing to collect note where maker was at all times insolvent and he made an unsuccessful effort to collect it through a collection agency. Elizalde v. Murphy [Cal. App.] 87 P. 245. Not for losses due to fluctuations in market value of property of the estate. In re Fisher's Estate, 128 Iowa, 626, 104 N. W. 1023. Code § 3322, requiring representative to apply to court for leave to sell perishable property or property "likely to depreciate in value," does not require, under penalty of personal liability, an immediate sale of all property subject to fluctuation in market value, and solely because thereof. Id. Administratrix held to have acted with due care and for the benefit of the estate in the employment of an agent so that she was not liable for loss resulting from his unauthorized and wrongful acts. Hill v. Evans, 114 Mo. App. 715, 91 S. W. 1022. Administrator held not liable for amount of uncollected note which he received as assets, though he permitted it to run until after maturity, where he thereafter transferred it with other assets to guardian of residuary legatees, who, on settlement, turned it over to wards, who permitted it to become outlawed in their hands without offering to return it to the administrator, and maker was supposed to be responsible down to time of his failure. In re Krisfeldt's Estate, 49 Misc. 26, 97 N. Y. S. 877.

62. Parks v. McDaniel [S. C.] 54 S. E. 801. Executor held liable for value of property in hands of third person where he abandoned suit for its recovery, though he thought it belonged to estate, no reason for such abandonment being shown. In re Pease's Estate [Cal.] 85 P. 149. Executors not allowed for repayment of sums expended by a certain corporation in paying certain of testator's debts where such corporation was heavily indebted to the estate, and amount so paid was ultimately lost. Woolsey v. Woolsey, 68 N. J. Eq. 763, 62 A. 686. One of two executors held guilty of negligence and nonfeasance in failing to give proper attention to the management of the estate, and to call the estate of his coexecutor to account promptly after latter's decease. Hill v. Hill [N. J. Eq.] 62 A. 385. Where note was put in custody and control of one of two coexecutors, held that she became obligated to the parties having interests in it to be diligent in its collection and was liable for amount thereof where it was lost through her negligence. In re Kemp's Estate, 49 Misc. 396, 100 N. Y. S. 221. Administrator de bonis non is liable for losses due to his failure to investigate and collect all sums due the estate, whether by the former administrator or by other debtors. Mann v. Baker [N. C.] 55 S. E. 102. Trust company held guilty of gross negligence in failing to collect judgment which was a lien on realty and collectible for more than a year after its appointment as executor. Kauffeld's Estate, 28 Pa. Super. Ct. 162.

63. Even if executors were justified in continuing business of testator without an order of court, held that they acted without authority in selling goods on time without taking security, and were responsible for any loss to the estate by reason of their delinquency in so doing. Peterman v. U. S. Rubber Co. [Ill.] 77 N. E. 1108, afg. 119 Ill. App. 610. The fact that the total profits on all sales exceeded the losses, and that consequently the general net result was advantageous to the creditors, held not to relieve them from liability for such losses. Id. Is personally responsible for any loss resulting from investing funds in unsecured promissory notes. In re Krisfeldt's Estate, 49 Misc. 26, 97 N. Y. S. 877.

64. To show that uncollected assets were worthless. In re Joost's Estate, 50 Misc. 78, 100 N. Y. S. 378. Executrix seeking to escape liability for amount of note which she failed to collect has burden of showing that maker was insolvent. In re Kemp's Estate, 49 Misc. 396, 100 N. Y. S. 221. Evidence held insufficient to show insolvency. Id. In an action by the heirs and distributees against the administrator d. b. n. for a settlement, it is competent for them to show any indebtedness due the estate. Mann v. Baker [N. C.] 55 S. E. 102. Held error to refuse to al-

claim is not negligence unless there is a reasonable prospect of collection.[65] Where a payment by the representative of a judgment against him is assailed, the question is not merely whether he was negligent in the conduct of the suit leading to the judgment, but whether he acted in such bad faith toward his trust or in such utter disregard of his duty as would warrant a court in setting aside the judgment or in depriving him of any equitable right to be subrogated to the position of the judgment creditor, or in treating the judgment as of no avail as a protection for its payment.[66] In such case the burden of proof is upon the party assailing the payment, at least to show the invalidity of the claim and that the judgment was the result of the representative's breach of duty.[67]

The representative is only bound to bring to the discharge of his duties the intelligence which an ordinarily good business man would use in like matters,[68] and where he in good faith acts upon the advice of counsel in matters involving intricate questions of law, he is not responsible for the consequences.[69]

As in the case of other trustees, the representative may not use or deal with the property of the estate to his own personal advantage,[70] and any contract he may

low plaintiffs to show that former administrator had received certain sums as proceeds of sale of realty under order of court. Id. Upon their doing so the burden is then upon the administrator to show that he used due diligence in collecting the same, and that he was unable to collect, or, having collected, has accounted for the same. Is not sufficient simply to show that he has accounted for sums he actually collected. Id.

65. Failure to sue on note included in inventory held not negligence where maker was at all times insolvent, and attempt was made to collect it through collection agency which was unsuccessful. Elizalde v. Murphy [Cal. App.] 87 P. 245.

66. In suit for accounting. Parks v. McDaniel [S. C.] 54 S. E. 801. Civ. Code 1902, § 1113, providing that physicians who have failed to qualify to practice in the state in the manner prescribed shall not recover for services rendered, held not to prevent an allowance to an executor for amount of judgment recovered against him by a physician who had failed to comply with the statute, particularly where complaint in suit for accounting did not allege that he had not so complied and that executor was negligent in failing to resist claim on that ground, but only objection was that such claim was excessive. Id. Physician's charges for extra attention held not so excessive that it could be affirmed with certainty that if executor had contested his claim they would have been disallowed, and hence that judgment rendered thereon by default was due to his negligence. Id. Executor held entitled to credit for amount of judgment against him which he had paid, though it was recovered by default and though his motions for leave to answer after time and to open the judgment on the ground that his neglect was excusable were denied. Id.

67. Parks v. McDaniel [S. C.] 54 S. E. 801.

68. In re Joost's Estate, 50 Misc. 78, 100 N. Y. S. 378.

69. Executor held not chargeable with negligence in acting on advice of counsel that no proceedings could be taken to collect a note or enforce collateral until six months' notice provided for in indorsement thereon had been given. In re Joost's Estate, 50 Misc. 78, 100 N. Y. S. 378. Fact that executor's attorney told that there was nothing due on a judgment in favor of the estate when there was, held not to relieve it from liability for failure to collect it, such statement being one of fact and not legal advice. Kauffeld's Estate, 28 Pa. Super. Ct. 162.

70. State v. Culhane, 78 Conn. 622, 63 A. 636. An administrator who purchases a mortgage given by himself and his decedent jointly on land owned by them jointly, and purchases all the property at the foreclosure sale, will not be allowed to hold the same adversely to the estate, but will be charged in respect to the title as trustee of the estate, and will be compelled to reconvey it to the estate upon payment to him of the amount equitably due him from the estate on account of the joint debt which the mortgage was given to secure. Smith v. Goethe, 147 Cal. 725, 82 P. 384. Where administrator negotiated a loan on same property and other property belonging to him for purpose of paying his own indebtedness and that of the estate, money in equity became that of the borrower and its subsequent use by lender to purchase the joint mortgage was in legal effect a purchase for the administrator. Id. Lender in such case is to be regarded as agent of administrator in his individual capacity in making purchase and could acquire no rights superior to those which would have accrued to administrator had he himself made the purchase. Id. One purchasing from lender before foreclosure with notice, held in same position after foreclosure as the lender, and hence is chargeable as trustee and bound to reconvey on payment of amount justly due upon the portion of the debt owing by the estate to the administrator. Id. Neither the right to redeem from the foreclosure sale nor the effect of the judgment of foreclosure as an estoppel could operate to take away or diminish the right of the estate to charge purchaser as trustee. Id. Held that transaction, whereby administrator permitted judg-

make to that end is invalid, although no fraud may be perpetrated or duress practiced.[71] A purchase by him of the property of the estate at his own sale, either directly or through a third person, is generally held to be voidable at the option of the heirs or other interested parties,[72] though in some states it is valid if made with the permission of the court.[73] So too, transfers by heirs and legatees to the representative of their interests in the estate are generally held to be voidable at their election.[74] A sale of realty by an executor to his bondsman will be set aside if made

ment against his intestate to be assigned to one for whom he was also acting as agent and with whom he had a contract by which he had an interest in the money that might be collected on the judgment, was not a breach of his official duty, and even if there was a constructive fraud against the estate, it could not be taken advantage of by the executor of the purchaser of the judgment in an action against him for breach of the contract between his testator and such administrator. Mills v. Smith [Mass.] 78 N. E. 765. Executor having contract to sell certain stock procured coexecutors to turn over to him stock belonging to the estate, paying therefor the same price at which he had purchased stock from others, but $100 less than he had contracted to sell it for. He then consummated his contract of sale, which also contained personal covenants on his part, such as that he would not engage in a certain business for a specified time. He also procured consent of other executors to invest purchase price of estate's stock in certain bonds, and turned over to estate a sufficient number of these bonds already owned by him to pay for such stock. Held that he was chargeable with full amount received by him for stock purchased from the estate. In re Sandrock's Estate, 49 Misc. 371, 99 N. Y. S. 497. Administratrix held accountable to estate for money paid her by a stockholder of a corporation, in which decedent owned a majority of the stock, to induce her to refrain from exercising her right to demand a dissolution of the corporation, under an agreement between decedent and the person making the payments, and a payment of the corporation's indebtedness to the estate, though her action in refraining from pressing those matters was of benefit to the estate. In re Schroeder, 99 N. Y. S. 176.

71. Contract whereby widow turned over to executor and his sister a certain part of the income to which she was absolutely entitled under the will held voidable where executor refused to consent to formation of corporation to carry on business in which testator was interested until she signed it. Slater v. Slater, 99 N. Y. S. 564.

72. Administrator held guilty of actual fraud as to minor heir in making sale of realty belonging to estate, for much less than its actual value, to a third person, who later reconveyed it to the administrator personally, no money being in fact paid as a consideration for either conveyance. Manning v. Mulrey [Mass.] 78 N. E. 551. The evidence warranting a finding of actual fraud, neither the administrator, nor his estate, nor those claiming under him, was entitled to an allowance for the sum with which he charged himself in his account as the proceeds of the sale, nor for sums expended by him for taxes and otherwise in the preservation of the estate, such expenditures having been made in furtherance of his fraud. Id. Evidence held to support finding that complainant was not guilty of laches. Id. Executor cannot purchase at his own sale under a testamentary power, unless by consent of the interested parties or the court or unless the power authorizes him to do so. Brittain's Estate, 28 Pa. Super. Ct. 144. Where vendor conveyed land before his death and hence his estate had no interest in it, held that vendor's administrator could purchase it from the vendee. Davis v. Ragland [Tex. Civ. App.] 15 Tex. Ct. Rep. 615, 93 S. W. 1099. Where an executrix purchased by a circuitous method at her own sale, although the sale was constructively fraudulent, no relief will be awarded where such sale was, with full knowledge, ratified by the only person having a right to object, and the heirs of such ratifying person have no greater rights than she would have had if living. Mayer v. Schneider, 122 Ill. App. 4. A beneficiary who consents, or with knowledge of the transaction, subsequently acquiesces in the purchase of a portion of the estate or of property in which the estate is interested, by the attorney for the administrator, for the purpose of aiding the administrator in settling the estate, will not be heard to question the propriety of the transaction. In re Robbins' Estate [Minn.] 109 N. W. 229.

73. The matter of allowing an administrator to purchase at his own sale rests in the sound discretion of the orphans' court, and its action will not be disturbed when no abuse is shown. In re McPherran's Estate, 212 Pa. 425, 61 A. 954. When an administrator purchases by permission of court, and the sale to him is confirmed by the court, he acquires title in fee simple, and is not responsible to the estate for any profits realized by him on the transaction. Id.

74. Transfer of stock by heir to administratrix without consideration and under belief by heir, who was below the average intelligence, that he would thereby prevent the appointment of a conservator over him, and without any appreciation of its effect, held voidable at his election. State v. Culhane, 78 Conn. 622, 63 A. 636. Administratrix held properly charged with dividends received on stocks from time when she appropriated them as her own, and with interest on avails of sale of stock from time when she sold it. Id. Legatee sold her interest in the estate to a third persron, who 18 years later transferred it to the executor on a settlement of some matters between them. At time of sale the legatee was urging executor to buy and expressed herself as satisfied with the sale to the third person. Held not to show that executor was real pur-

by virtue of an order procured through the fraudulent conduct of the executor, even though the surety is ignorant of the dishonest character of the proceeding.[75] The widow as representative is not personally chargeable with the rent of a house leased by the decedent, which she continues to occupy after his death, where the lease has not expired and she makes a reasonable effort to sublet it.[76]

Subrogation of representative to rights of estate or third persons.[77]—A representative purchasing a mortgage given jointly by himself and his decedent to secure a joint debt is entitled to subrogation, as against the estate, to the rights of the mortgagee.[78] A representative accounting for money converted by his attorney is subrogated as an individual to all the rights of the estate.[79] So too, a representative who is held personally liable to creditors by reason of the fact that he makes a voluntary distribution before paying their claims may, when he has not been guilty of negligence, be substituted to their rights and compel the distributees to reimburse him.[80] A representative who pays claims against the estate out of his own funds stands in the position of an equitable assignee of the creditors, and must enforce his claim against the estate within the time limited for them to do so.[81] So too, a representative who pays the funeral expenses of the wife and recovers a judgment therefor against the husband obtains no greater rights against him than the original creditors.[82]

Executors de son tort.[83]—An executor de son tort is liable for any loss to the estate due to his failure to exercise such diligence in the management of the estate as prudent men ordinarily bestow upon their affairs.[84] A judgment in an action against him by one subsequently appointed representative to recover property lost through his negligence renders the question of such negligence res judicata in a subsequent suit by him to prevent its enforcement.[85] The representative may be estopped to enforce such judgment to his own individual advantage where he was equally responsible for the loss.[86] In states where personalty as well as realty descends to the heir immediately on the death of the ancestor, subject only to the payment of debts, an heir who takes possession of and distributes it in the absence of

chaser. In re Cunningham's Estate, 212 Pa. 451, 61 A. 993. Purchase of property of estate by administrator from heirs held invalid where he procured it through misrepesentation and for an inadequate price. Reeder v. Meredith [Ark.] 93 S. W. 558.

75. Fincke v. Bundrick, 72 Kan. 182, 83 P. 403. Evidence held to sustain finding of fraud. Id.

76. Widow as administratrix held not chargeable with rent of leased house, which she continued to occupy after husband's death, where lease had not expired and she made all reasonable and profitable efforts to sublet it. In re Schroeder, 99 N. Y. S. 176.

77. See 5 C. L. 1241, n. 41.

78. Smith v. Goethe, 147 Cal. 725, 82 P. 384.

79. Lupton v. Taylor [Ind. App.] 78 N. E. 689.

80. Where administrator acts in good faith in turning over land to heirs after final settlement and thereafter is compelled to pay a debt of which he had no previous knowledge, and there is no personalty available. Baldwin v. Alexander [Ala.] 40 So. 391. Conveyances by heirs with intent to defraud creditors of the estate to persons taking with notice of the fraud held not to stand in the way of subjecting the land to the payment of decedent's debts. Id.

81. Where account showing that administratrix had paid debts out of her own funds was allowed by judgment which was not appealed from and she did nothing to enforce her claim until five years later, when she filed a petition to sell realty, and then took no further steps until ten years thereafter, and failed to close up the estate, held that her claim was barred by limitations. In re Young [Mich.] 108 N. W. 88. Negotiations between herself and heirs looking toward her reimbursement held not to have prevented the running of limitations. Id.

82. Husband may set up any exemption against him that he could have against them. Weaver v. Gray [Ind. App.] 76 N. E. 795.

83. See 5 C. L. 1242.

84. Rohn v. Rohn, 117 Ill. App. 512. The basis of such liability is not the intermeddling but negligence, and another executor de son tort cannot be held to have participated in such loss unless such other executor de son tort has likewise participated in the negligence which caused the loss. Id.

85. Though plaintiff recovered the judgment in her official capacity, and chancery suit to prevent its enforcement is brought against her both in her individual and offi-

any administration or any known necessity therefor is not liable as an executor de son tort, but an administrator subsequently appointed must look to each of the heirs for the portion received by him.[87] In such case the heir may show in defense of the action that money coming into his hands as heir has been properly applied to the payment of just debts of the estate prior to the appointment of the administrator.[88]

By statute in some states, anyone converting[89] or alienating any of the property of the estate is liable in an action by the representative for double its value.[90]

(§ 9) *B. Representative as debtor or creditor.*[91]—As a general rule debts owed by the representative to the estate are regarded as assets and he is chargeable therewith as so much money in his hands[92] unless he is insolvent at the time of his appointment and remains so during the course of his administration,[93] but insolvency is no defense where the representative is also a distributee.[94]

Claims held by the representative against the estate must ordinarily be presented, proved, and allowed in the same manner as those of other creditors.[95] The

cial capacities. Rohn v. Rohn, 117 Ill. App. 512.

86. Rohn v. Rohn, 117 Ill. App. 512.

87. Manchester v. Bursey [Tex. Civ. App.] 14 Tex. Ct. Rep. 657, 91 S. W. 817.

88. Rule applies in case of executor de son tort also. Manchester v. Bursey [Tex. Civ. App.] 14 Tex. Ct. Rep. 657, 91 S. W. 817.

89. An administrator suing under B. & C. Comp. § 1152, for double damages for conversion of property belonging to the estate before the granting of administration, must so state in his complaint or the action will be treated as one under Id. § 385, for the value of the property taken and the actual damages sustained. Springer v. Jenkins [Or.] 84 P. 479. The statute does not apply where defendant acted in good faith under color of legal right, supposing he had title to the property or a right to enforce a lien thereon, even though he should subsequently be unable to establish such title or right, and hence administrator cannot recover double damages until it is made to appear that defendant acted from wrongful motives or in bad faith. Id.

90. Wilson's Rev. & Ann. St. 1603. Chattel mortgagee who forecloses and sells the property. Litz v. Exchange Bank, 15 Okl. 564, 83 P. 790.

91. See 5 C. L. 1242.

92. Executor held properly debited with amount of money shown to have been given him by deceased before her death not as a gift. In re Pease's Estate [Cal.] 85 P. 149. Under Code Civ. Proc. § 2714. In re Strong, 97 N. Y. S. 459. Amount of judgment rendered in favor of decedent and against administratrix. In re Griffith's Estate, 49 Misc. 405, 100 N. Y. S. 215. On accounting surrogate cannot set aside judgment of supreme court against administratrix in favor of her decedent on ground that it was confessed at decedent's request and was without consideration. Id. Section applies to administrators as well as to executors. Id. Decree on accounting charging executor with his debt to the estate as so much money in his hands and directing him to make payments out of balance in his hands held conclusive upon him that money was in his hands, under Code Civ. Proc. § 2552. In re Strong, 97 N. Y. S. 459. 2 Rev. St. N. Y. [1st Ed.] p. 84, pt. 2, c. 6, tit. 3, § 13. Ward v. Ward, 144 F. 308. Bond given by administrator to decedent which had matured held extinguished by his appointment, he being liable under the statute for the amount thereof upon the fiction that the claim had been collected and paid by him into the funds of the estate, and the presumption that it was so collected and paid was not rebuttable. Id. Action on such a bond cannot be converted into one to recover the proceeds thereof from administrator's estate on theory that under statute administrator is presumed to have collected the money, since two causes of action are inconsistent and require different allegations and proof. Id. Rule not changed by fact that action on bond is barred by limitations. Id.

93. Surrogate has no authority to determine whether administratrix is able to pay debt or not, but must charge her with amount thereof though her insolvency might be a defense when debt is sought to be enforced against her or her sureties. In re Griffith's Estate, 49 Misc. 405, 100 N. Y. S. 215. In proceedings to punish executor for contempt for failing to obey order charging him with amount of debt and directing him to make payments out of balance in his hands, held that burden was on him to show that he had been insolvent ever since his appointment. In re Strong, 97 N. Y. S. 459. Evidence held insufficient to sustain burden. Id.

94. Lambright v. Lambright [Ohio] 78 N. E. 265.

95. Under Code 1896, § 129, claim held by personal representative or in which he is interested and which accrued prior to the grant of letters must be presented within 12 months thereafter by filing the same, verified by affidavit, in the office of the probate judge, as is provided by Id. § 133. Little v. Marx [Ala.] 39 So. 517. Payments made by executor before his appointment properly disallowed, where he never presented any claim for them to the court, and testified that at the time he made them he did not intend to charge the estate with them. In re Pease's Estate [Cal.] 85 P. 149. Executor on accounting must prove his individual claims by same amount of evidence

claim of an administrator for money expended before his appointment cannot be established by his uncontradicted evidence, especially when such evidence and the assignment presented as a voucher show that on the face of the record the legal claim or right is in another whose rights are not foreclosed.[96] Mere possession by an executor of a note or bond payable by the decedent to him will not prevent a recovery thereon by the latter,[97] nor, in the absence of fraud, is he bound to prove that it had not been paid or surrendered to the maker, or that it was in the possession of the payee at the time of the maker's death though it was then overdue.[98]

(§ 9) *C. Interest on property or funds.*[99]—The representative will be charged with interest on money actually in his hands and paid out without authority of law,[1] or used by him for his own individual benefit,[2] and on money owed by him to the decedent which he fails to pay when due.[3] He is not entitled to credit for interest paid on claims after the time when he should have paid them, where he had ample funds for that purpose.[4] Where he pays debts out of his own funds to prevent a sale of the realty, he is not entitled to interest thereon against the estate until his reimbursement.[5]

(§ 9) *D. Allowance for expenses, costs, counsel fees, and funeral expenses.*[6]—The representative is entitled to a reasonable allowance for all necessary expenses incurred by him in the care, management, and settlement of the estate,[7] even when acting, in good faith, under a voidable order of appointment.[8] He will ordinarily

as stranger would be required to do. In re Primmer's Estate, 49 Misc. 413, 99 N. Y. S. 830. On accounting, where the administrator seeks credit for payments made on account of his individual and personal claims, the burden is on him to establish such claims by clear and convincing evidence. In re Cozine, 98 N. Y. S. 1041, modifying 104 App. Div. 182, 93 N. Y. S. 557. Cannot apply the assets to the payment of his claim until it has been presented and allowed. Liggett v. Estate of Liggett, 3 Ohio N. P. (N. S.) 518.

96. For money expended in paying mortgage which, with notes secured thereby, was assigned to another heir. In re Heeney's Estate [Cal. App.] 86 P. 842.

97, 98. In re McPherran's Estate, 212 Pa. 425, 61 A. 954.

99. See 5 C. L. 1243.

1. Will not be charged with interest unless he has used the money or unreasonably retained it after he ought to pay it over or ought to have accounted for it to the court. United States Rubber Co. v. Peterman, 119 Ill. App. 610, afd. [Ill.] 77 N. E. 1108. Executors will not be charged with interest on losses due to selling goods of the estate on time without security while carrying on testator's business without an order of court, where they endeavored to sell property for best interests of the estate, and aggregate final result was probably beneficial to it. Peterman v. U. S. Rubber Co. [Ill.] 77 N. E. 1108, afg. 119 Ill. App. 610. Properly charged with interest at rate of 10 per cent. per annum beginning at expiration of 2 years and 6 months after issuance of letters on money paid one of their number for services in carrying on testator's business after his death. Id. Charged with interest on amount of improper advances to widow (United States Rubber Co. v. Peterman, 119 Ill. App. 610, afd. [Ill.] 77 N. E. 1108), and on sum for which they twice took credit (Id.). Charged with interest on money improperly used by them to pay bookkeeper. In re Scott's Estate, 1 Cal. App. 740, 83 P. 85. Where administrator loaned funds on unsecured note and amount was lost, held that he would be charged with interest at the rate of 3 per cent. from the date of the last payment of interest by the maker of the note. In re Krisfeldt's Estate, 49 Misc. 26, 97 N. Y. S. 877.

2. Executor held properly charged with simple interest. In re Pease's Estate [Cal.] 85 P. 149.

3. On loan made to him by decedent and secured by judgment note, which he failed to pay for several years. In re Groff's Estate [Pa.] 64 A. 783.

4. Items for interest accruing on notes owed by estate after one year from date of letters disallowed. In re Hawley, 108 App. Div. 185, 96 N. Y. S. 61.

5. Where will provided that he should first pay debts. In re Hawley, 108 App. Div. 185, 96 N. Y. S. 61. Where will provided that $4,000 should be set apart and income thereof paid to the widow, and that son, who was one of the executors, should have the use of the balance of the estate for six years, and there was insufficient personalty to set apart such sum, held that an arrangement between son and widow that $3,000 of the personal estate should remain in note owed by son to the estate, and that he should pay her the income on $1,000 worth of realty, which was to remain invested therein, was unauthorized by the will and surrogate properly required note to be paid. Id. Decree held not to entitle executor to such interest. Id.

6. See 5 C. L. 1244.

7. Rev. St. 1898, § 3929. Mackin v. Hobbs, 126 Wis. 216, 105 N. W. 305. Executors are entitled to costs accruing to them under the law in the honest and faithful administration of the estate. Crawford v. Hord [Tex. Civ. App.] 89 S. W. 1097.

8. Administrator with will annexed. Rice v. Tilton [Wyo.] 82 P. 577.

be reimbursed for sums necessarily expended for clerk hire,[9] postage and stationery,[10] traveling expenses,[11] insurance,[12] a copy of the inventory,[13] a surety bond,[14] the amount paid physicians for services to decedent during his last illness,[15] and the amount paid the widow on account of her allowance,[16] but not for disbursements for his own personal benefit[17] or which are unnecessary[18] or improper,[19] or which are the result of bad faith or inexcusable negligence.[20] As a general rule he is not entitled to credit for money expended for the benefit of the realty unless he is charged with some duty in relation thereto,[21] though an allowance may be made for that purpose when the expenditure is necessary and reasonable and the same persons are entitled to the realty and the personalty.[22]

9. United States Rubber Co. v. Peterman 119 Ill. App. 610, afd. [Ill.] 77 N. E. 1108.

10. Charge held too large and reduced. In re Stevens, 47 Misc. 560, 95 N. Y. S. 1084.

11. Finding that traveling on business of estate was neither necessary nor proper held supported by evidence so that item for expenses so incurred was properly disallowed. In re Pease's Estate [Cal.] 85 P. 149. Allowed for expenses incurred in collecting money due estate and in traveling to and from the county seat where court was held. Rice v. Tilton [Wyo.] 82 P. 577.

12. Insurance on property of estate is item of expense incident to preserving property. Enscoe v. Fletcher, 1 Cal. App. 659, 82 P. 1075.

13. Administrator held entitled to credit of $1.00 for copy of inventory. Nolde's Estate, 27 Pa. Super. Ct. 413.

14. Rev. St. 1899, § 2621. Rice v. Tilton [Wyo.] 82 P. 577. Fact that administrator's appointment was subsequently revoked on the ground of its irregularity held not to prevent allowance, the appointment being valid until revoked, and the order of revocation having continued the bond in force. Id.

15. Executors held entitled to credit for amount paid where they exercised their honest judgment in believing claim to be a proper one and paying it, and they were not personally liable though they erred in such judgment and bill was too large. In re Title Guaranty & Trust Co., 100 N. Y. S. 243.

16. Account surcharged with amount alleged to have been paid widow as her exemption, where it appeared that exemption had previously been set off to her in goods and chattels. In re Groff's Estate [Pa.] 64 A. 783.

17. Item for money claimed to have been paid for services to estate reduced one-half, where evidence justified finding that half of the services were rendered to the executor personally. In re Pease's Estate [Cal.] 85 P. 149. Item for electric light in house occupied by widow, who was also administratrix, after decedent's death held properly disallowed. In re Schroeder, 99 N. Y. S. 176. Where widow, who was also one of the executrices, retained horse for her personal use instead of selling it, held that she was personally responsible for the expense of its keep. In re Johnson's Estate, 50 Misc. 99, 100 N. Y. S. 373.

18. Item for rent of safe deposit box held properly disallowed in view of executor's testimony that he only kept papers in it which he could have safely kept at home. In re Pease's Estate [Cal.] 85 P. 149. Expense of publishing notice of sale of realty in a paper printed in a county other than that where the land was situated held properly disallowed. Id. Executors properly charged with payments wrongfully made by them to parties who were not creditors, "for influence." United States Rubber Co. v. Peterman, 119 Ill. App. 610, afd. [Ill.] 77 N. E. 1108.

19. Payment of Federal inheritance tax after law providing therefor was repealed held improper, and executrix surcharged with amount so paid. In re Marx's Estate, 49 Misc. 280, 99 N. Y. S. 334. Executors held properly charged with sum advanced to widow without any authority of law. United States Rubber Co. v. Peterman, 119 Ill. App. 610, afd. [Ill.] 77 N. E. 1108. Under Federal Statutes held that administrator had no authority to contract to pay any person as fees for prosecuting an Indian depredation claim an amount in excess of 15 per cent. of the amount allowed by the court of claims, and hence contract to do so was void though approved by county court, and he was not entitled to credit for payments made thereunder. Friend v. Boren [Tex. Civ. App.] 16 Tex. Ct. Rep. 54, 95 S. W. 711.

20. Where allowance is discretionary. Mackin v. Hobbs, 126 Wis. 216, 105 N. W. 805. Expenses of litigation over administrator's account and in attempting to collect balance claimed by him out of the realty disallowed where over 80 per cent of his claim was fictitious and over 75 per cent was sought to be recovered in bad faith, and the very small amount which was valid could by reasonably prudent management have been collected without litigation. Id.

21. Where executor was given a naked power of sale but was charged with no duty respecting a mill and was not authorized to continue testator's business, held that he was not authorized to make permanent improvements to the mill, and was properly charged with amount expended in so doing, where estate received no substantial benefit therefrom. In re Tisdale, 110 App. Div. 857, 97 N. Y. S. 494. Evidence held insufficient to show that petitioner acquiesced in the making of such improvements. Id.

22. Where persons who are next of kin are also heirs at law, and it is manifestly advantageous that property descending to them as heirs be maintained, and it can only be so maintained and preserved intact by paying therefor from the funds to which

He is entitled to a reasonable allowance for attorney's fees[23] and the costs and expenses of litigation necessarily incurred,[24] even though such litigation is unsuccessful,[25] but not where they were incurred for his individual benefit,[26] or through his negligence,[27] or where he abandons the litigation without cause.[28] Where sev-

they are entitled as next of kin. In re Higginbotham, 51 Misc. 158, 100 N. Y. S. 414. Heir held not entitled to object under such circumstances where she knew of such payments and acquiesced therein. Id. Allowed disbursements for repairs to house though it was to become his property as heir under the will, the conveyance to him required by the will not having been made, the property having been inventoried and accounted for as belonging to the estate, and the administrator having charged himself with the rents thereof which amounted to at least as much as the cost of the repairs. Rice v. Tilton [Wyo.] 82 P. 577.

23. Though executor personally is primarily liable for all contracts made by him in the execution of his trust, the necessary expenses of administering an estate may be regarded as a charge upon the estate, and expenses incurred by the executor when found by the court to be necessary and proper are payable from the estate. Attorney's fees. In re Bender's Will, 97 N. Y. S. 171. On application by attorneys to have a lien for their services determined and enforced, where surrogate adjudged amount due a lien on assets of estate, and none of the services were shown to have been rendered to the executors individually, held error to direct that attorneys have execution against the executors individually, that being, in effect, a judgment against them individually which surrogate had no power to direct. Id. Costs and counsel fees should be considered and allowed on an adjudication of the accounts of the representative. Trust company named as coexecutor held entitled to compel an accounting by other executor, who had administered estate alone and had all its funds in his hands, for purpose of procuring such allowance. In re McManus' Estate, 212 Pa. 267, 61 A. 892. Under Code 1883, § 1524, is entitled to credit for reasonable charges paid by him for services of attorney necessarily employed by him to protect estate or to enable him to manage it properly. Kelly v. Odum, 139 N. C. 278, 51 S. E. 953. Entitled to allowance where he employs counsel to defend action for partition brought by heir. Mayer v. Schneider, 122 Ill. App. 48. Fees are allowed to the representative and not to the attorney. In re Scott's Estate, 1 Cal. App. 740, 83 P. 85. Allowance made by surrogate held not an abuse of discretion. In re Schroeder, 99 N. Y. S. 176. Allowance of counsel fees to trust company held not excessive, where coexecutor administered entire estate but company was compelled for its own protection to require him to account. In re McManus' Estate, 214 Pa. 634, 63 A. 1074. Accountants held properly allowed amounts paid by them for fees under the circumstances. In re Groff's Estate [Pa.] 64 A. 783. Payment disallowed on ground that accountants should have postponed its payment until allowed by the court at the audit, they being aware that it would be contested, and there being reason to believe that they did not act for the best interests of the estate. Id. Legal services in court are specially mentioned in Rev. St. 1899, § 4710, and payments made for other legal advice are expenses in the care, management, and settlement of the estate within the meaning of the same section. Rice v. Tilton [Wyo.] 82 P. 577. Evidence held to show that services were rendered for benefit of estate and not for personal benefit of the administrator. Id. Estate held liable under Rev. St. 1899, § 223, for services consisting of advice, drawing papers, collecting and adjusting claims, etc. Hill v. Evans, 114 Mo. App. 715, 91 S. W. 1022. Allowance held not excessive. Id.

24. Administrator held entitled to credit for costs and expenses of defending suit pending at decedent's death in which he was substituted as defendant though he was unsuccessful, where he acted in good faith under advice of counsel and was seeking to preserve the estate for the benefit of creditors. Nolde's Estate, 27 Pa. Super. Ct. 413. Witness' fees paid by the administratrix in connection with a hearing had before the probate court, to determine a matter of heirship, should be allowed to her, especially where the payment antedated the application for allowance by about four years and no effort had been made by the objecting parties to fix its status. Mayer v. Schneider, 122 Ill. App. 48.

25. Where he in good faith and upon advice of counsel defends against a claim against the estate. Comp. Laws, § 9402. Shouldice v. McLeod's Estate [Mich.] 13 Det. Leg. N. 593, 108 N. W. 1083. Rule is not changed by the fact that after paying them there will not be enough assets left to pay such claim. Id.

26. Services of counsel in aiding administrator in attempting to establish his individual claim against the estate and disbursements incurred in such litigation held not a charge against the estate. In re Seigler's Estate, 49 Misc. 189, 98 N. Y. S. 929. Administratrix, who was also decedent's widow, held not entitled to allowance for fees and disbursements incurred in defending suit brought against her for rent of house occupied by her before her marriage to decedent, the evidence being insufficient to show that deceased promised to pay it. In re Schroeder, 99 N. Y. S. 176.

27. Crawford v. Hord [Tex. Civ. App.] 14 Tex. Ct. Rep. 71, 89 S. W. 1097. In action by trustee of minors to recover amount due them under the will, it being alleged that defendant executor had failed to inventory and account for a large part of the estate, question whether executor was entitled to attorney's fees alleged to have been paid by him in suit to remove him held for the jury. Id. Allowance for fees is based on the prudence and good faith of the administrator and will not be made if the litigation has been improperly instituted by him, or was the result of his neglect or improper conduct. Kelly v. Odum, 139 N. C. 278, 51 S. E. 953. Fees incurred in suit to charge land

eral representatives employ different attorneys, an allowance may be made to each.[29] It has been held that where a representative who is himself an attorney associates another attorney with him in the prosecution of a suit in behalf of the estate he is entitled to an allowance to the extent of the reasonable value of their joint services,[30] and that in such case it is not necessary for him to have actually paid the fee to himself and his associate or to have procured a receipt from either.[31] There is a conflict of authority as to whether he is entitled to an allowance for costs and counsel fees incurred in defending the will.[32] In some states no allowance will be made for judgments for costs against him unless the court rendering them directs them to be paid out of the estate.[33] The allowance of costs to an ancillary representative is governed by the laws of the forum.[34] The right to reimbursement is personal to the representative and may be waived.[35] The burden is on him to show affirmatively the necessity for the services and their value.[36]

Funeral expenses.[37]—Only such a sum will be allowed for funeral expenses as

with payment of judgment in favor of administrator's father disallowed where administrator made no defense to suit in which judgment was obtained and judgment was attacked in suit in which services were rendered and defeated on ground that it was obtained through fraud and collusion. Id.

28. Item for expense of suit brought by executor to recover property held properly disallowed where it appeared from his own testimony that he abandoned the suit though he thought the property belonged to the estate, and no good reason for the abandonment was shown. In re Pease's Estate [Cal.] 85 P. 149.

29. Where executors honestly differ and two of them employ one firm of attorneys and the third employs another attorney, the court may allow a reasonable attorney's fee to the latter as well as to the former. In re Scott's Estate, 1 Cal. App. 740, 83 P. 85. Rule not changed by Code Civ. Proc. § 1355, providing that, where there are more than two representatives, the act of a majority is valid, that section referring to acts under the will or in relation to the trust. Id.

30. John v. Sharpe [Ala.] 41 So. 635.

31. After allowance of fee to administrator on settlement, the associate counsel must look to him alone for his share. John v. Sharpe [Ala.] 41 So. 635.

32. See, also, Wills, 6 C. L. 1880.

California: Code Civ. Proc. § 1720, authorizing appellate court to allow and order paid costs incurred by executors in a will contest held to refer only to costs incurred in that court or by reason of the appeal, and not to give court discretion to allow costs whose allowance was in the discretion of the superior court. In re Scott's Estate, 1 Cal. App. 740, 83 P. 85. Fact that some of the devisees and legatees refused to contribute to fund for expenses of will contest held to afford no reason for interfering with order refusing to allow item of executor's account for money necessary to reimburse those who did contribute. Id.

Kentucky: Executor who had reasonable grounds to appeal from judgment refusing to admit will to probate held entitled to necessary reasonable counsel fees in supreme court as well as in circuit court to be paid out of the estate, but such allowance should be made first in circuit court. Gardner v. Moss [Ky.] 96 S. W. 461. Costs taxed against executor in supreme court on appeal from judgment of circuit court refusing to admit will should be paid by him out of estate of decedent in his hands, and he will be credited therefor in his settlement where he had reasonable grounds to appeal. Id.

Louisiana: Succession held responsible for fees of attorneys employed by executor in mortuary proceedings and in suit to annul the will, though will was annulled after probate on ground of testator's insanity and though executor knew of such insanity. Succession of Morere [La.] 42 So. 132.

New York: Executors held entitled to be reimbursed for amounts legitimately and in good faith expended by them in defending the will, though litigation resulted in judgment declaring provision attacked invalid. In re Title Guaranty & Trust Co., 100 N. Y. S. 243.

Ohio: Whether an executor can be allowed credit for expenses incurred in the successful defense of the will depends upon the circumstances of each particular case. Weir v. Weir, 7 Ohio C. C. (N. S.) 289. In a case where the attack on the will was chiefly due to the fact that a large special bequest was made to the executor, such an allowance is not permissible, the hardship cast upon the legatee in making the defense against an attack which was perhaps not justified being only one of the burdens incident to the acquisition and ownership of property. Id.

33. Rev. St. 1898, § 3929. Mackin v. Hobbs, 126 Wis. 216, 105 N. W. 305.

34. In re Kucielski's Estate, 49 Misc. 404, 99 N. Y. S. 828.

35. Fact that he made no claim therefor in previous accounts held not an absolute waiver of right thereto. Elizalde v. Murphy [Cal. App.] 87 P. 245.

36. In absence of such evidence they will be disallowed. In re O'Hara's Estate, 50 Misc. 495, 100 N. Y. S. 635. Where administrator's attorney was notified before reference that he must make such proof, and administrator made various false and fraudulent charges against the estate in his account, held that matter would not be sent back to referee to hear evidence as to such services after he had once disallowed item. Id.

37. See 5 C. L. 1247.

may be deemed a reasonable expenditure for that purpose, taking into consideration the estate left by the decedent, and his station in life.[38] The traveling expenses of the minister who officiates at the funeral,[39] and the amounts paid the undertaker and for flowers for the funeral[40] have been held to be proper items, though an allowance for the cost of flowers placed on decedent's grave by his widow and administratrix has been refused.[41] There is a conflict of authority as to whether the funeral expenses of a married woman are a charge against her separate estate.[42]

(§ 9) *E. Rights and liabilities of corepresentatives.*[43]—Representatives are not bound to transact the business of the estate in the presence of the personal attorney of their corepresentative.[44] Each representative is only liable for his own acts unless he joins in the direction and misapplication of the assets.[45] The exclusive control of one of two corepresentatives may, as between himself and the other executor, render him solely responsible for a devastavit,[46] but a representative who assents to a course of conduct by his corepresentative,[47] or who knows of and acquiesces in his breach of trust,[48] or who, through his inexcusable neglect, permits him to lose the estate, is jointly and severally liable with him.[49] The fact that the heirs were guilty of fraud in procuring the appointment of a representative,

38. Amount claimed held too large. In re Primmer's Estate, 49 Misc. 413, 99 N. Y. S. 830.

39. Where no clergyman of the denomination to which decedent belonged lived in the immediate neighborhood, and one was brought from another place. Nolde's Estate, 27 Pa. Super. Ct. 413.

40. In re Stadtmuller, 110 App. Div. 76, 96 N. Y. S. 1101.

41. In re Schroeder, 99 N. Y. S. 176.

42. See 5 C. L. 1247. Husband and Wife, 5 C. L. 1731.

New York: Husband's estate held entitled to be reimbursed from wife's separate estate for her funeral expenses paid by him, in absence of a showing that he actually released her estate, or that he did some positive act indicative of an intention to make a gift of the money so expended to her estate. In re Stadtmuller, 110 App. Div. 76, 96 N. Y. S. 1101.

Wisconsin: Funeral expenses are treated as a debt against the estate by Rev. St. 1898, §§ 3822, 3852, and the estates of all decedents are primarily liable therefor. Schneider v. Breier's Estate [Wis.] 109 N. W. 99. Rule applies equally to estates of married women leaving separate property, and her estate is primarily liable therefor regardless of the liability of the husband. Id. Fact that husband orders services, etc., does not change rule where they were rendered solely upon credit of wife's estate. Id. Rev. St. 1898, §§ 2341, 2342, refer to debts which are exclusively those of the husband, and not such as are primarily a charge on the estate of the wife. Id.

43. See 5 C. L. 1247.

44. In re Waterman's Estate, 98 N. Y. S. 583.

45. Cheever v. Ellis [Mich.] 13 Det. Leg. N. 341, 108 N. W. 390.

46. Cheever v. Ellis [Mich.] 13 Det. Leg. N. 341, 108 N. W. 390. Evidence held to show that deceased executor assumed through agent the sole management and control of certain properties, so that, there being no negligence in the appointment of such agent, his coexecutor was not responsible for losses due solely to his negligence. Id. In action by representatives of deceased executor for accounting and contribution by coexecutor, where record showed the exact relation of the two to the trust fund, held that the fact that the inventory was a joint one did not, as between the two executors, estop either (Id.), nor did the filing of joint accounts conclude the executors under such circumstances (Id.). Rule that executor is not liable for negligence of coexecutor having practically the entire management and control of the estate is not changed by fact that first named executor is also a legatee under the will (Id.), nor is such first executor by reason of that fact estopped by any other or different acts than would be effective to estop him as executor (Id.). Supreme court held to have power to permit amendment to bill by representative of deceased executor against coexecutor and legatees for an accounting of decedent's transactions as executor, so as to set up facts claimed to entitle complainants to contribution which were omitted from original bill. Id. Though order designated amendment as a supplemental bill, the propriety of the practice was not open to collateral attack while the order stood, where all parties understood, and order recited the purpose of the bill. Id. Demurrer to supplemental bill held to raise question whether whole record showed a case rendering coexecutor prima facie liable for contribution. Id. Averment of original bill that defendant executor intrusted practically the whole management of the estate to his deceased coexecutor, held not inconsistent with averment in amended bill that defendant joined with him in appointment of agent to manage affairs of the estate in a certain county. Id.

47. In suit by legatees or creditors. Cheever v. Ellis [Mich.] 13 Det. Leg. N. 341, 108 N. W. 390.

48. United States Rubber Co. v. Peterman, 119 Ill. App. 610, afd. [Ill.] 77 N. E. 1108.

49. Hewlett v. Beede [Cal. App.] 83 P. 1086.

who subsequently embezzles certain funds of the estate, furnishes no reason why his corepresentative should not account to the administrator de bonis non for the assets of the estate legally chargeable to him.[50]

A representative may recover from his corepresentative property belonging to the estate but claimed by the latter in his individual capacity.[51] His right to compel him to account is treated in a subsequent section.[52]

(§ 9) *F. Compensation.*[53]—In the absence of a statutory provision on the subject, the amount to be allowed a representative for his services is generally discretionary with the court having charge of the administration proceedings.[54] By statute in many states he is given a fixed commission based on the value of the property passing through his hands[55] as full compensation for all his services.[56] Provision is sometimes made for the allowance of additional compensation in case of unusual, difficult, and extraordinary services,[57] and for the apportionment of commis-

50. Ayers v. Laighton, 73 N. H. 487, 63 A. 43.

51. Special administratrix sued to have deed from decedent to defendant set aside and the property declared assets of the estate. Subsequently, a will naming plaintiff and defendant executors was probated, and they qualified as such, whereupon plaintiff was substituted in her capacity as executrix for herself as administratrix. Held that defendant could not defeat suit on ground that an executor cannot sue his coexecutor for the exclusive possession of property belonging to the estate. Stohr v. Stohr, 148 Cal. 180, 82 P. 777.

52. See § 11 B, post.

53. See 5 C. L. 1247.

54. Is a question of fact to be determined by the orphan's court, and its allowance will not be interfered with on appeal unless so clearly erroneous as to justify the appellate court in holding that it is unreasonable and excessive. In re McManus' Estate, 214 Pa. 634, 63 A. 1074. Allowance to trust company of about half the amount given its coexecutor held proper and reasonable where latter administered entire estate and company was compelled for its own protection to require him to file an account. Id.

55. Entitled to commissions on full amount for which mortgaged property is sold where the entire interest of the estate, regardless of a mortgage thereon, is sold to a third person, and not merely the equity of redemption, and the mortgagee has filed a claim against the estate for the full amount of the mortgage debt, the executor being accountable for the entire purchase price in such case. In re Pease's Estate [Cal.] 85 P. 149. Same is true though purchaser or broker pays amount of mortgage debt directly to mortgagee. Id. Is not entitled to commissions on item not actually received by him but which as a matter of bookkeeping might properly be included in his report. Morrissey v. Rogers, 120 Ill. App. 37. Sums received and paid out are made the basis of compensation by Code Civ. Proc. § 2730. In re Hurst's Estate, 97 N. Y. S. 697. Executor and trustee held not entitled to commissions on both income and corpus of estate on intermediate accounting, and commissions allowed on income only. In re Stevens, 47 Misc. 560, 95 N. Y. S. 1084. Administrator whose letters were revoked by subsequent probate of a will held not entitled to commissions on deposits made by decedent where he did not disturb them (In re Hurst's Estate, 97 N. Y. S. 697), nor on securities turned over to the executor in specie (Id.). Executors held entitled to commissions on value of personalty, etc., to be managed by them and turned over to themselves as trustees, though it was never converted into cash. In re Freel's Estate, 49 Misc. 386, 99 N. Y. S. 509. Where under the will the estate was to be first managed by executors and then turned over to themselves as trustees, held that they were entitled to full commissions on value of property to be so turned over. Id. Agreement between heirs and widow whereby she was to receive a fixed sum annually instead of the income of a certain fund as provided in the will, held to contemplate that payments to be made to her should come out of the estate of the deceased so that executor was entitled to his commissions out of the fund rather than out of the annuity. Van Sise v. Van Sise, 113 App. Div. 691, 100 N. Y. S. 53. Ancillary administrator allowed costs and commissions. In re Kucielski's Estate, 49 Misc. 404, 99 N. Y. S. 828. Allowed ten per cent on amount collected under Rev. St. 1899, § 4712. Rice v. Tilton [Wyo.] 82 P. 577.

56. Executors charged with sum paid one of their number, without an order of probate court, for services rendered in carrying on the business of the testator after his death. United States Rubber Co. v. Peterman, 119 Ill. App. 610, afd. [Ill.] 77 N. E. 1108. Cannot receive from the estate any greater compensation than the statutory commissions, however meritorious or extraordinary his services may be. In re Krisfeldt's Estate, 49 Misc. 26, 97 N. Y. S. 877. Item for services in looking after personal property of the estate and for loss of time from usual occupation disallowed. In re Seigler's Estate, 49 Misc. 189, 98 N. Y. S. 929.

57. Executor will not be deprived of extra compensation, authorized by Comp. Laws § 9438, for extraordinary services in unsuccessfully defending against a claim where he acted in good faith and on advice of counsel, though estate is insolvent. Shouldice v. McLeod's Estate [Mich.] 13 Det. Leg. N. 593, 108 N. W. 1083. Additional compensation authorized by Rev. St. 1898, § 3929, should not be allowed unless services were

sions between corepresentatives.[58] A reasonable sum may also be allowed for services necessary to the preservation of the estate but outside the regular duties of the representative.[59] Half commissions are sometimes allowed on property received but not paid out.[60] A county officer who is ex officio public administrator is generally required to account to the county for all fees and compensation received by him in the latter capacity.[61] The right of an ancillary representative to commissions is determined by the law of the forum.[62] Neither the revocation of an administrator's letters by the subsequent probate of a will,[63] nor the fact that the order appointing him is voidable, will deprive him of his right to commissions where he acts in good faith.[64] The right to compensation may be waived[65] or forfeited by improper or fraudulent conduct.[66] A widow electing to take against the will is estopped to contend that it requires the executor to serve for a nominal compensation.[67] The compensation of testamentary trustees is treated elsewhere.[68] One acting both as executor and testamentary trustee is not entitled to commissions in both capacities unless the functions and duties of each are separate, and one duty precedes and is to be performed before the other.[69] Claims for commissions are claims against the estate to be passed upon on allowance of the final account.[70]

(§ 9) *G. Rights and liabilities of sureties and actions on bonds.*[71]—It is the right and duty of the surviving executor, as such, to sue the sureties of his deceased coexecutor for funds of the estate for which the latter has failed to account.[72] The administratrix of a deceased partner is a proper relatrix in an action on the bond of the surviving partner as administrator of the partnership affairs.[73] The failure of the representative to turn over property received by him to his suc-

honestly rendered to promote reasonably some object beneficial to the estate, and should be disallowed where representative has been guilty of bad faith or inexcusable negligence. Mackin v. Hobbs, 126 Wis. 216 105 N. W. 305.

58. The probate court has jurisdiction under Rev. St. § 524 to apportion the statutory commissions between two or more executors in accordance with the services performed by each where the accounts between the estate on the one hand and the executors on the other have not been settled and determined. Meyers v. Hopkins, 7 Ohio C. C. (N. S.) 240.

59. Charge for work and services of executor allowed, the work being necessary for the preservation of the corpus of the estate and the charge being reasonable. In re Stevens, 47 Misc. 560, 95 N. Y. S. 1084.

60. Administrator whose letters were revoked by subsequent probate of will held only entitled to half commissions on interest on mortgage collected by him, he not having paid it out within the meaning of the statute by turning it over to his successor. In re Hurst's Estate, 97 N. Y. S. 697.

61. County treasurer, who is by Const. art. 18, § 6, made ex officio public administrator. Appeal of Rice [Idaho] 85 P. 1109. It is by virtue of holding the office of county treasurer that the individual becomes ex officio public administrator, and he is thereby and for that reason alone qualified to become the administrator of an estate under Rev. St. 1887, §§ 5351, 5682. Id.

62. In re Kucielski's Estate, 49 Misc. 504, 99 N. Y. S. 828.

63. In re Hurst's Estate, 97 N. Y. S. 697.

64. Administrator with will annexed. Rice v. Tilton [Wyo.] 82 P. 577.

65. Fact that administrator made no claim for compensation for extraordinary expenses in previous account held not absolute waiver of right thereto. Elizalde v. Murphy [Cal. App.] 87 P. 245.

66. Commissions disallowed for including false and fraudulent charges in account. In re O'Hara's Estate, 50 Misc. 495, 100 N. Y. S. 635. Charges for compensation and claim for extraordinary services disallowed where executors credited themselves with sum alleged to have been paid widow as her exemption, but it appeared that her exemption had been previously set off to her in goods and chattels. In re Groff's Estate [Pa.] 64 A. 783.

67. Where she thereby decreased the amount which the executor would have received thereunder as legatee and devisee. Murray's Estate, 28 Pa. Super. Ct. 474.

68. See Trusts, 6 C. L. 1736.

69. Held not such a separation of functions of executor and trustee as to entitle him to double commissions. In re Stevens, 47 Misc. 560, 95 N. Y. S. 1084.

70. One executor may, for purpose of procuring allowance of commissions, compel an accounting by coexecutor who has administered entire estate and has all its funds in his possession, and should not be required to proceed against him by suit on common-law side of court to recover his share. In re McManus' Estate, 212 Pa. 267, 61 A. 892.

71. See, also, Suretyship, 6 C. L. 1590.

72. Hewlett v. Beede [Cal. App.] 83 P. 1086.

cessor is a breach of his bond,[74] but the occupation of the realty and the collection of rents with the consent of the devisees is not, where the statute requires the representative to account for the income of realty used and occupied by him.[75] Breaches may be waived by acts and conduct showing an intention on the part of interested parties to acquiesce therein.[76] Heirs are not estopped from seeking to hold the representative and his sureties accountable for the proceeds of a sale of land by reason of the fact that they recovered the land from the purchaser, where they subsequently lost possession, on its being subjected to the rights of a mortgage creditor of such purchaser.[77]

The liability of a representative's sureties is coextensive with that of their principal,[78] they being responsible for whatever he lawfully receives in his official capacity, though it is afterward determined that the property so received does not in law belong to the estate.[79] An order directing the representative to pay his attorney a specified sum out of the funds of the estate does not increase his burden or that of his bondsmen.[80] In an action against the representative of a deceased surety, the fact that he has also been appointed administrator of the sole beneficiary under the surety's will and has assumed charge of the assets in that capacity is no reason why judgment should not be rendered against him in the capacity in which he is sued.[81] There is no joint liability between the sureties on the separate bonds of coexecutors and no right of contribution by one set of sureties against the other.[82]

Actions on bonds must of course be brought within the time fixed by the statute of limitations.[83] In some states, before an action can be maintained on the bond,

73. Harrah v. State [Ind. App.] 76 N. E. 443.

74. McAlpine v. Kratka [Minn.] 107 N. W. 961. Complaint held to state facts sufficient to constitute a cause of action. Id.

75. In view of Rev. Laws c. 150, § 6. Forbes v. Keyes [Mass.] 78 N. E. 733.

76. Held no breach for executors to attempt to sell realty under supposed power contained in will, though will actually conferred no such power, where devisees acquiesced therein by failure to object and by accepting proceeds. Forbes v. Keyes [Mass.] 78 N. E. 733. An allowance of an account by consent of all interested parties is, as to them, a waiver of all prior breaches in not rendering an account. Id.

77. Worthy v. Battle, 125 Ga. 415, 54 S. E. 667.

78. Interest charged under Hurd's Rev. St. 1903, c. 3, § 114, p. 124, on funds in representative's possession after the expiration of 2 years and 6 months from the date of his letters, is a proper charge on his bondsmen. McDonald v. People [Ill.] 78 N. E. 609.

79. Fidelity & Deposit Co. v. Texas Land & Mortg. Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 183, 90 S. W. 197. Vendor rescinded contract of sale after vendee's death and instituted suit of trespass to try title to recover possession of the land against vendee's widow personally and as administratrix of his estate, and caused the land to be sequestered. Administratrix in her official capacity and under order of the county court replevied the property and continued in possession, under replevy bond. Final judgment was rendered in favor of the vendor for the land and the rents thereof pending suit. Heid that sureties on her bond as administratrix were liable for amount of such rents. Id.

80. Since, if the order had not been paid, the amount due the distributees would have been increased by that much. McDonald v. People [Ill.] 78 N. E. 609.

81. It being his duty to take possession of the assets in that capacity and any rights he might have therein as administrator of the legatee being subject to their liability for decedent's debts. Worthy v. Battle, 125 Ga. 415, 54 S. E. 667.

82. Hewlett v. Beebe [Cal. App.] 83 P. 1086. Pol. Code § 969, providing for contribution between sureties on original bond of an officer and those on an additional bond, which he is required to give, held not to apply to sureties on bonds of two or more executors. Id. Hence an executor who has been compelled to make good to the heir losses due to the default of his coexecutor whom he negligently permitted to mismanage the estate cannot in his individual capacity recover the same from the latter's sureties. Action is a personal matter between the two executors individually, and only obligation assumed by sureties was to answer to the heirs, or to the estate for them, for any default on the part of their principal. Id. Since only action that could be maintained in such case was one by executor in his official capacity for benefit of heirs, he could not hold them for the costs of an action against him by the heir to compel him to make good the default of his cosurety. Id.

83. Executor's right of action to recover from sureties of deceased coexecutor for latter's default accrues immediately on death of such coexecutor or at least, when a demand is made on him by the heir to make good the loss, and action brought more than four years after latter date is barred by Code Civ. Proc. § 337. Hewlett v. Beebe

a judgment must have been recovered against the representative and execution have been issued and returned unsatisfied,[84] the judgment and return in such case being prima facie proof of a devastavit.[85] Proof of the solvency of the estate and of sufficient assets in the representative's hands to pay a debt, with returns of no property on executions de bonis intestatis issued on a judgment therefor against him, concludes his sureties on the issue of devisavit vel non, and, with the judgment, fixes their liability for the debt.[86] An assignee of a claim and the judgment thereon against the representative may sue in his own name.[87] In some states a decree of distribution is not a necessary prerequisite to an action on the bond by heirs or legatees for failure of the representative to turn over to them the shares to which they are entitled,[88] nor an adjustment of the original administrator's final account to an action on his bond by his successor for failure to turn over to him the property in his hands and to settle the estate within the time prescribed.[89] A demand is generally necessary before an action can be maintained on the bond for failure of the representative to pay over funds to those entitled thereto.[90] The plea of nil debit is not a proper plea.[91] A plea of plene administravit in an action against the legal representative of a deceased surety may be met by proof that defendant's testator left property subject to plaintiff's demand which ought to be in defendant's possession for administration.[92] The opinion of witnesses that the estate received by the principal was insolvent is of no probative value on the issue as to whether a devastavit was committed by him.[93]

[Cal. App.] 83 P. 1086. Where referee appointed by court of equity to find and report facts with respect to the distribution of the personalty filed a report showing the facts to which was attached the report of the administrator, which were affirmed by the court and a judgment was entered directing distribution in accordance therewith, held that the amount due being fixed by such judgment, a failure to pay the shares of minors into court was a breach of the bond, and they were bound to sue for such breach within three years after becoming of age, under Revisal 1905, § 395, subsec. 6. State v. Settle [N. C.] 54 S. E. 445.

84. Though Code Civ. Proc. § 2607 provides that in order to entitle one whose execution against an executor or administrator has been returned unsatisfied to sue on his official bond, the execution must have issued to the county where the principal debtor resides if he is a resident of the state, held that an omission to allege that it so issued did not render complaint demurrable. Bamberger v. American Surety Co., 48 Misc. 221, 109 App. Div. 917, 96 N. Y. S. 665.

85. Worthy v. Battle, 125 Ga. 415, 54 S. E. 667. A return of nulla bona reciting that there is no property of the "defendant" to be found is to be construed as referring to property in the hands of the administrator belonging to his intestate, and not to property belonging to him individually. Id.

86. Daniell v. Baldwin [Ala.] 40 So. 421.

87. Under Code Civ. Proc. § 2607, providing that where an execution, issued upon a surrogate's decree, against the property of an executor or administrator has been returned wholly or partially unsatisfied, an action to recover the sum remaining uncollected may be maintained upon his official bond by and in the name of the person in whose favor the decree was made. Bamberger v. American Surety Co., 48 Misc. 221, 109 App. Div. 917, 96 N. Y. S. 665.

88. Gen. St. 1902, § 394, providing for decree of distribution, does not change this rule, it being merely declaratory of the pre-existing law. State v. Culhane, 78 Conn. 622, 63 A. 636. Transaction whereby, after administratrix had filed final account, heir transferred to her his interest in certain stocks belonging to the estate to which he was entitled, held not to amount to a delivery to him of the stock by her after the filing of her account and a transfer of it by him to her after the settlement of the estate. Id.

89. McAlpine v. Kratka [Minn.] 107 N. W. 961. Prima facie the amount of the sureties' liability is the amount received by the principal, not to exceed the face of the bond. Id.

90. Forbes v. Keyes [Mass.] 78 N. E. 733. Report held not to show such joint maladministration or individual wrong on part of one of two joint executors as to warrant a suit under Rev. Laws c. 149, § 3, without a previous demand for payment of legacies. Id. A demand made 30 days before suit brought upon an executor or administrator to pay money or dividends in accordance with the order of the court is not a prerequisite to a suit against him and his bondsmen upon his administrator's bond, under Hurd's Rev. St. 1903, c. 3, § 115, and c. 103, § 13, the requirement of such a demand in the first named statute applying only to proceedings for the imprisonment of the representative for failure to make payments as ordered. McDonald v. People [Ill.] 78 N. E. 609.

91. In action on administrator's bond. McDonald v. People [Ill.] 78 N. E. 609.

Sureties who have been compelled to make payments on behalf of the representative are subrogated to all the rights of the estate against him[94] and to his rights against the distributees.[95] In an action on the bond they are not entitled to credit for attorney's fees, expenses, and compensation to which the representative has never asserted any claim in the probate court.[96] They cannot, by any private understanding among themselves, fix their liability relatively to any person not a party thereto,[97] and do not become creditors of the estate by carrying out a voluntary undertaking to discharge the indebtedness of the estate out of their private funds and to waive all right to reimbursement by the representative.[98] Where, however, they discharge such indebtedness in order to escape threatened liability to creditors under the bond, they are entitled to be subrogated to the rights of the latter as against the heirs at law.[99]

§ 10. *Actions by and against representatives and costs therein.*[1]—Matters relating to the abatement of actions by the death of a party and their revival by or against a representative,[2] and to actions for damages for death by wrongful act,[3] are treated elsewhere.

In equity the executor named in the will may file a bill in his capacity as executor before probate of the will, and maintain an action as such executor, provided he secures probate before the hearing of the cause.[4] Thus the domiciliary executor may sue in a foreign jurisdiction before obtaining ancillary letters, provided he obtains them before trial, and when he obtains them may set up that fact by amendment.[5]

92. Proof held sufficient. Worthy v. Battle, 125 Ga. 415, 54 S. E. 667.

93. Is liable for amount received less amount paid out. Worthy v. Battle, 125 Ga. 415, 54 S. E. 667.

94. Surety held not entitled to recover from sole devisee of a deceased executor costs which he claims to have been compelled to pay in suit against him by testator's widow where claim therefor was denied and there was no proof that he had paid them. Frazer v. Fidelity & Deposit Co. [Ky.] 89 S. W. 134. In suit by widow of testator and surety of deceased executor against sole devisee of such executor to satisfy judgment for interest of widow in the estate, held that the executor's estate was not chargeable with costs incurred in obtaining such judgment where court had previously determined that they should be charged to widow and paid by her as compensation to the executor. Id. Where an administrator, who was also a distributee of the estate, wrongfully paid therefrom money in excess of the amount to which he and his brother were entitled to R. for the purchase of certain stock for the benefit of himself and brother, and R. had knowledge that the money so paid belonged to the estate, he was liable, in the absence of debts against the estate, to return to the administrator de bonis non only the excess over the amounts to which the administrator and his brother were entitled as distributees, and judgment having been rendered against the administrator's surety for the amount of the devastavit, such surety was subrogated to the rights of the administrator de bonis non against R. Caviness v. Fidelity & Deposit Co., 140 N. C. 58, 52 S. E. 265.

95. Where administrator made a voluntary settlement of the estate and distributed the balance in his hands without paying the claim of a minor creditor of which he had no knowledge and which the creditor was not required to present because of his minority, and on minor becoming of age he recovered judgment against the administrator which his sureties paid. Baldwin v. Alexander [Ala.] 40 So. 391.

96. May be waived by administrator, and even if sureties are entitled to be subrogated to his claim therefor, they are restricted in the enforcement of such subrogated rights to the manner prescribed for their enforcement by the principal, who could only assert them in an account and upon a petition presented to the probate court. Elizalde v. Murphy [Cal. App.] 87 P. 245.

97, 98. Worthy v. Battle, 125 Ga. 415, 54 S. E. 667.

99. Worthy v. Battle, 125 Ga. 415, 54 S. E. 667. Where sureties paid debts in order to escape liability to creditors by reason of a fraudulent sale of realty by the administrator, held that, in a subsequent action on the bond by the heirs at law because of a devastavit by the administrator, they were entitled to credit for the amount thus expended on theory that heirs benefitted thereby through receiving more property than they would have had the debts been paid out of the property of the estate. Id.

1. See 5 C. L. 1253. For actions on claims, see § 6 B, post.

2. See Abatement and Revival, 7 C. L. 1.

3. See Death by Wrongful Act, 7 C. L. 1083.

4. Leahy v. Haworth [C. C. A.] 141 F. 850.

5. Leahy v. Haworth [C. C. A.] 141 F.

The right of an executor or administrator to sue as such depends upon the law of the place where the action is brought.[6] In the absence of an enabling statute, he cannot maintain an action in his official capacity in the courts of a state other than that in which he was appointed,[7] but he is, in most states, permitted to do so on filing an authenticated copy of his letters,[8] compliance with the state statutes in such case authorizing him to sue in the Federal courts.[9] Neither the rule nor the statutory requirements apply where the representative sues as trustee,[10] or is himself a party to the transaction out of which the cause of action arises,[11] or where the action is on a debt having its situs in the state of the domicile and no part of the estate has its situs in the state of the forum.[12] In the absence of a statute to the contrary, an executor or administrator cannot be sued in his representative character, either at law or in equity, in the courts of any state or county other than that in which he received his appointment.[13]

An administrator may sue to foreclose a mortgage on land in a state other than that of his appointment, where he has complied with its statutory provisions relative to actions by foreign representatives, though an administrator has previous-

850. Where English executor filed bill in equity in Federal court in his individual capacity to foreclose mortgage belonging to his testator, and which matured after latter's death, held that it was proper to permit him to file amended bill in his representative capacity setting up same cause of action. Id. His qualification in such case relates back at least to the filing of the amended bill, and where he files amendment before running of limitations suit is not barred. Id.

6. Suit by domiciliary administrator to recover from ancillary executors assets alleged to have been surreptitiously removed by defendants to another state prior to decedent's death is one in which he sues solely in his representative capacity. Graham v. Lybrand [C. C. A.] 142 F. 109.

7. Beaumont v. Beaumont, 144 F. 288. Either in state or Federal courts. Graham v. Lybrand [C. C. A.] 142 F. 109. Under the Wisconsin statutes a domiciliary administrator cannot maintain in the Federal courts of that state a suit to compel the ancillary executors to turn over to him assets of the estate which is being administered in the Wisconsin state courts. Id.

8. Under N. J. P. L. 1887, p. 154, and P. L. 1896, p. 173, held that foreign administrator could sue in Federal court in New Jersey, where he filed exemplified copy of letters in office of clerk of that court and also in office of register of prerogative court of that state. Beaumont v. Beaumont, 144 F. 288.

9. Beaumont v. Beaumont, 144 F. 288.

10. Where complaint in suit by foreign executors to enforce a mortgage lien alleged that mortgage and indebtedness were assigned to their testator, that after his death they as his executors recovered a judgment against the mortgagors establishing the liability and the extent thereof, that by virtue of the will such security claim and judgment became a part of the residuary estate which passed to them as trustees, and that the claim, mortgage, and judgment are still owned by them as trustees, held that it sufficiently showed ownership in them as trustees and that it was not necessary to set out the provisions of the will. Newton v. Jay, 107 App. Div. 457, 95 N. Y. S. 413. In such case they sue as owners of the debt and not as executors, and hence may sue in a state other than that of their appointment. Id. Foreign executor who purchased property, in his own name for benefit of estate under agreement between himself, his coexecutor, and beneficiaries under the will held to hold same as trustee of an express trust and not as executor, so that he could maintain an action in respect to the property in courts of Washington. Doe v. Tenino Coal & Iron Co. [Wash.] 86 P. 838.

11. Where foreign executors sold their testator's business and accepted a note therefor, held that they could sue thereon in New Jersey without filing copy of letters. Morse v. King [N. J. Err. & App.] 63 A. 986.

12. In action by executor of wife against estate of her husband on notes of husband, plea in bar that plaintiff was a foreign executor held insufficient for failure to show where husband resided at time of his wife's death or his own death, since, if he resided in foreign state at time of her death and continued to reside there until his own death, the situs of the debt was there, and could form no basis for administration of wife's estate in state where suit was brought, and no part of her estate having its situs in latter state, and hence no administration being possible there, foreign executor could sue there, though he could not do so if husband died there. Church's Ex'r v. Church's Estate, 78 Vt. 360, 63 A. 228.

13. Babbitt v. Fidelity Trust Co. [N. J. Eq.] 63 A. 18. Foreign executors cannot, against their will, be made parties to a suit to compel an accounting by a resident trustee, though the estate which they represent is interested in the subject-matter of the accounting. Id. Foreign executrix cannot be sued in Texas on judgment rendered against her in her official capacity in state of her appointment until she has taken out ancillary letters in Texas. Clarke v. Webster

ly been appointed in the latter state.[14] The objection that the ancillary administrator has no right to sue a resident of the state of the domiciliary administration who happens to be in the jurisdiction of the ancillary administration is waived unless raised in limine.[15]

In Louisiana a succession can ordinarily only be sued in the court in which it is pending and the administrator in the court which appointed him,[16] but this rule does not apply to suits in revendication of realty, which may be brought in the parish where the property is situated.[17] A suit against an administrator individually on a liability alleged to have grown out of his personal acts must be brought in the court of his domicile.[18]

An administrator suing on a cause of action accruing after the death of his intestate may sue in his representative capacity.[19] If decedent had a vested right to sue, the representative is a proper party to maintain the action.[20] He is not a necessary party unless the action affects some interest or title which he represents in his official capacity.[21] The title and pleadings may be considered together to determine whether the action is an individual or representative one.[22] Where the record shows an order reviving a suit in the name of plaintiff as administrator, he becomes plaintiff in his representative capacity regardless of the form of the caption.[23] Where it does not appear from the declaration that the cause of action accrued to the estate, words describing plaintiff as executor or administrator may be stricken as descriptio personae, and he may be allowed to recover in his individual capacity.[24]

The complaint in an action by an executor or administrator must allege facts showing his authority.[25] The want of profert of letters does not warrant the striking out of a declaration containing an averment of the granting of letters with the mention of their date and the officer granting them.[26] The usual rules as to joinder of counts[27] and the necessity of verified denials[28] apply. The right of an inde-

[Tex. Civ. App.] 16 Tex. Ct. Rep. 320, 94 S. W. 1088.

14. Under Code 1896, § 360, where he has complied with § 359. Campbell v. Hughes [Ala.] 42 So. 42.

15. Kraft v. Moore [Ark.] 89 S. W. 51.

16. Code Prac. art. 164. Applies to suit for damages against succession and administrator for slander of title in inventorying property as belonging to the succession, though joined with a suit in jactitation. Williams' Heirs v. Zengel [La.] 42 So. 153.

17. As a suit in jactitation. Williams' Heirs v. Zengel [La.] 42 So. 153.

18. As a suit growing out of his act in maliciously causing property of another to be inventoried as belonging to the succession he administers. Williams' Heirs v. Zengel [La.] 42 So. 153.

19. Sautter v. Metropolitan Life Ins. Co. [N. J. Law] 63 A. 994.

20. Action for conversion of stock by transfer procured from decedent while he was non compos mentis. Hagar v. Norton, 188 Mass. 47, 73 N. E. 1073.

21. Not a necessary party to a bill by the widow to have dower and homestead assigned to her. Higgins v. Higgins, 219 Ill. 146, 76 N. E. 86.

22. Where executrix was substituted for deceased plaintiff and filed supplemental complaint showing her succession to plaintiff's rights, and issued supplemental summons against additional defendants, held that the fact that title of summons and complaint did not describe her as executrix did not deprive her of her right to have action preferred upon trial calendar over other cases noticed for trial at same term under Code Civ. Proc. § 791, subd. 5. Chumar v. Melvin, 98 N. Y. S. 351.

23. Southern R. Co. v. Morris [Ala.] 42 So. 17.

24. Hayes v. Rich [Me.] 64 A, 659.

25. Since under Const. art. 5, § 17, county judge has general power to grant letters of administration, and since letters may be granted on the estate of a minor, an allegation in a declaration that a named person was duly appointed administrator of the estate of a named deceased minor is a sufficient allegation of the granting of the letters of administration, the regularity of the granting thereof not being subject to collateral attack. Bowden v. Jacksonville Elec. Co. [Fla.] 41 So. 400. Allegation in declaration that B was "duly appointed" administrator is equivalent to an allegation that he was appointed according to law. Id.

26. Defect held purely technical and, so far as appeared, without harm to defendant, since letters are matters of public record (P. L. 1898, p. 775, § 158), of which defendant could require plaintiff to furnish a copy before plea filed (P. L. 1903, p. 567, § 102). Sautter v. Metropolitan Life Ins. Co. [N. J. Law] 63 A. 994.

27. Joinder of common money counts in

pendent executor to sue for the recovery of property belonging to the estate can only be questioned under a plea in abatement.[29] A complaint against the defendant individually and in his representative capacity is good on demurrer though the court has no jurisdiction of an action against him in the latter capacity.[30]

Costs and counsel fees.[31]—The costs and disbursements of suits to settle the estate[32] and the costs of a reference in a suit for partition of the realty and the distribution of the personalty among those entitled thereto[33] are ordinarily payable out of the funds of the estate. Where the representative unreasonably neglects and resists the payment of a claim, costs may be awarded against him, payable out of the estate, in an action to enforce it.[34] A penalty taxed against a surety on an appeal taken by him solely for his own benefit is not chargeable against the estate.[35] In Maine a judgment for costs in favor of an administrator on the granting of a nonsuit in an action brought against him in his representative capacity belongs to him personally, and he may sue thereon in his own name.[36]

§ 11. *Accounting and settlement by representatives. A. The right and duty.*[37]—Representatives are generally required to file accounts at specified times.[38] The representative of a deceased executrix who was entitled to the income of the estate for life may be required to account for the principal of the estate.[39] No

assumpsit setting forth sundry indebtednesses of defendant to plaintiff as administrator, etc., and special counts based upon policies of life insurance issued to plaintiff's intestate and payable to his administrator, held not to tend to prejudice or embarrass a fair trial of the action. Sautter v. Metropolitan Life Ins. Co. [N. J. Law] 63 A. 994.

28. Acceptance of drafts by executrix in her representative capacity held established by their introduction in evidence in an action thereon against her, where there was no denial under oath as required by statute. Ellis v. Marshall Car Wheel & Foundry Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 719, 95 S. W. 689.

29. The right of one appointed independent executor by order of the probate court to sue for the recovery of property belonging to the estate can only be questioned under a plea in abatement. Fischer v. Giddings [Tex. Civ. App.] 16 Tex. Ct. Rep. 288, 95 S. W. 33.

30. Where executor is sued both individually and as executor, the complaint is good against demurrer though court has no jurisdiction of an action against an executor in his representative capacity. Burstein v. Levy, 49 Misc. 469, 98 N. Y. S. 853.

31. See 5 C. L. 1257. For allowance to representative on accounting see § 9 D, ante. For imposition of costs in various probate proceeding see sections dealing with proceedings referred to. For costs in will contests, etc., see Wills, 6 C. L. 1880.

32. In absence of order making executrix personally liable therefor. Lockwood v. Lockwood, 73 S. C. 18, 52 S. E. 735.

33. McCoy v. McCoy [Va.] 54 S. E. 995.

34. Code Civ. Proc. § 1836. Gardner v. Pitcher, 109 App. Div. 106, 95 N. Y. S. 678. Award held proper where only issue was whether claim had been presented and rejected and was, therefore, barred by limitations, where that issue was decided against the administrator. Id.

35. Ten per cent. penalty taxed against surety of executor on unsuccessful appeal by him from judgment in favor of widow of testator for her interest in the estate. Frazer v. Fidelity & Deposit Co. [Ky.] 89 S. W. 134.

36. Hayes v. Rich [Me.] 64 A. 659.

37. See 5 C. L. 1258.

38. Agreement between widow and adult heirs for purpose of settling and distributing estate, and providing that she was to be appointed administratrix without bond, held when construed in light of statutes relating to duties of administrators, not to relieve widow, when appointed, from duty to file inventory and render an account imposed by Rev. Laws, c. 155, § 9, and c. 150, §§ 1, 5, or to deprive probate court of its jurisdiction over the estate. Fletcher v. Fletcher, 191 Mass. 211, 77 N. E. 758. In any event agreement was not binding on minor heir, without the appointment of a probate guardian, so that she had right to demand accounting in probate court. Id. St. 1903, § 3858, requiring representative to have his accounts settled in county court and to file settlement and vouchers supporting same, is mandatory and cannot be waived by heirs, and hence representative is not relieved from compliance therewith by receipt from devisees, all of whom are sui juris, showing a complete settlement of the estate to their satisfaction, nor are they entitled to have such receipt filed as their final settlement and thereupon to be discharged. Dant's Ex'rs v. Cooper [Ky.] 96 S. W. 454.

Special administrators: Code Civ. Proc. §§ 1622-1627, relating to accounting by executors and administrators, apply to special administrators so that it is the duty of such an administrator to file the accounts therein provided for prior to the appointment of a regular executor or administrator and of the court to hear and determine the issues raised by the filing of objections thereto. French v. Superior Ct. [Cal. App.] 85 P. 133.

39. Where widow, who was also executrix, was entitled to income of trust fund

accounting is necessary where the representative is the sole person interested.[40] In New York the surrogate has authority to make a trust company designated by him as the depositary of the funds coming into the hands of the temporary administrator a party to the latter's accounting.[41] A final accounting should not be ordered pending the settlement of an adverse claim to certain property by the representative individually.[42]

Actions for an accounting must be brought within the time fixed by the statute of limitations,[43] but unless the facts upon which the running of limitations depends are clear and uncontroverted mere lapse of time is not a bar to an accounting by the representative, and the question whether the statute of limitations is a bar to any claim made by the petitioner should not be decided until after the accounting is had.[44] The right to compel an accounting in equity may be barred by laches.[45]

(§ 11) *B. Who may require.*[46]—Anyone interested in the estate may ordinarily compel an accounting by the representative.[47] One executor may compel

during her life but not to any part of the principal which was to go to others on her death, held that on her death her administrator was properly required to account for the principal, though executrix had previously filed an administration account showing such principal in her hands. In re Stewart's Estate, 212 Pa. 327, 61 A. 941.

40. Where executrix who was sole legatee of personalty paid decedent's debts, and funeral expenses, and expenses of administration, her title to personalty as executrix merged in her title as legatee and no judicial settlement of her accounts or decree of court was necessary to effect such merger. In re Kinsella's Estate, 50 Misc. 235, 100 N. Y. S. 485. Since she, being the only person interested in the personalty and the will being self-executing as to the realty, could not be compelled to account, held that, upon her death, a devisee of the realty in remainder could not compel her executrix to account for the purpose of subjecting the personalty to the payment of the transfer tax on his share of the realty and the expense of determining the amount thereof, or the expense of his appointment as administrator with the will annexed, such appointment being unnecessary. Id.

41. The surrogate has authority to make a trust company, designated by him as the depositary of the funds of a temporary administrator under Code Civ. Proc. § 2678, a party to the accounting of such administrator, the company being an officer of the court in view of Id. § 2680, providing that money so deposited cannot be paid out without an order of court. In re Rothschild, 109 App. Div. 546, 96 N. Y. S. 372.

42. Application for order requiring a final report and for distribution properly denied pending an appeal from an order adjudging that certain notes belonged to the administratrix individually and were not assets of the estate. In re Smith's Estate [Iowa] 109 N. W. 196.

43. Action held barred. Monroe v. Mather-Lovelace, 100 N. Y. S. 27.

44. In re Ashheim's Estate, 97 N. Y. S. 607. Fact that ten years had elapsed since granting of letters held not a defense to a proceeding to compel an executor, who held and managed trust fund himself instead of turning it over to trustee as provided by the will, to account, but question whether right of petitioner to compel him to turn over fund to trustee had been barred would be left open until after accounting. Id.

45. Suit arising out of neglect of survivor of two executors to give proper attention to the management of the estate, and to call the estate of his coexecutor to account promptly after his decease, and calling for an accounting, held barred by delay of 17 years, complainants being chargeable with notice of their rights. Hill v. Hill [N. J. Eq.] 62 A. 385.

46. See 5 C. L. 1259.

47. Court held to have jurisdiction to entertain proceeding by mere volunteer to compel executor, who was also guardian of minor legatee, to make a final report of his trust and charge himself as guardian with the unexpended remainder of the estate, though, as far as appeared from the record, the ward, who was old enough to choose her own guardian, was not dissatisfied with the situation of the estate. Wheeler v. Long, 128 Iowa, 643, 105 N. W. 161. Supreme court held not justified in overruling conclusion of probate court that there was no sufficient reason for an immediate closing of executor's account. Id. Where executrix advertised for claims and after expiration of time fixed therein paid out entire estate in paying claims presented, but never wound up the estate by final accounting and decree, held that, under Code Civ. Proc. § 2726, a creditor who had never presented his claim had an absolute right to compel her to account in proceedings instituted in the surrogate's court. In re Gill, 183 N. Y. 347, 76 N. E. 274, rvg. 101 App. Div. 607, 91 N. Y. S. 1095. Beneficiary held a person interested and hence entitled to compel executor and testamentary trustee to account under Code Civ. Proc. § 2808. Meeks v. Meeks, 100 N. Y. S. 667. One to whom legatees have assigned portions of their legacies may go into the surrogate's court, which is the appropriate tribunal for that purpose, and call the administrator to account. Citizens' Central Nat. Bank v. Toplitz, 98 N. Y. S. 826. Under Code Civ. Proc.

an accounting by his coexecutor where the latter has administered and distributed the estate to the exclusion of the former.[48]

(§ 11) *C. Scope and contents of account.*[49]—The representative should charge himself with the assets described in the inventory and credit himself with all proper expenditures and with property turned over to the heirs under valid agreements.[50] In most states the account must be accompanied by vouchers covering all expenditures.[51] Items of credit must not be too narrowly or technically construed.[52] The representative is not officially accountable for funds received by him in the management of realty where he was unauthorized to receive them.[53]

(§ 11) *D. Procedure.*[54]—The statutory notice of the proceedings for the settlement of the account must be given.[55] Anyone interested is generally given the right to file objections,[56] or the court may inquire into and settle the account of his own motion.[57] A failure to object to items in the first report is not a waiver of the right to objeet to them upon the filing of a supplemental report.[58] Objections to matters not touched upon in intermediate reports will be ignored where the estate remains open.[59] In some states the account may be sent to a referee for examination.[60] In New York proceedings in the surrogate's court for an ac-

§ 2725, widow who was given use of residue of estate for life in lieu of dower held entitled to petition surrogate for an intermediate accounting by the executor. In re Tisdale, 110 App. Div. 857, 97 N. Y. S. 494. Deed of widow held not to show election to take dower in view of other evidence, so that its exclusion was not reversible error. Id. Failure of widow to allege and prove performance of conditions subsequent on which legacy was given to her held not to defeat her right to accounting. Id. Nor did failure to allege and prove election to take under the will, where there was enough in the record to show such an election. Id.

48. Trust company may do so both for purpose of protecting itself against creditors and to enable it to present its claim for commissions and expenses. In re McManus' Estate, 212 Pa. 267, 61 A. 892.

49. See 5 C. L. 1259.

50. Under agreement between widow and adult heirs and a third person to be appointed guardian of minor heir, whereby widow was to pay certain notes and certain property was to be delivered to the adults and they released their interest in other property to widow and minor, held that widow as administratrix in her account should have charged herself with the assets described in the inventory, and credited herself with the property turned over to the adult heirs in pursuance of the agreement, and have shown that property released by them had been turned over to her as widow and the minor heir, leaving items outside of the agreement to be accounted for in the usual way. Fletcher v. Fletcher, 191 Mass. 211, 77 N. E. 758. Account ascertaining what the shares of each party would have been if no agreement had been made, and showing a performance of the agreement and showing a payment of the notes by widow and charging them on debit and credit side of her account, held to accomplish same result, and could be treated as if allowed after a formal decree of distribution. Id. Money for which executrix gave executor checks payable to bearer which executor testified he did not use for any personal object held properly credited among items of household expense made by the executrix, the stubs of the check book showing that it was drawn for that purpose. In re Freel, 99 N. Y. S. 505.

51. Executors not allowed for payment made to one of their number, since deceased, to reimburse him for money alleged to have been advanced by him to one of the legatees, there being no voucher from such legatee, and the evidence being insufficient to warrant its allowance. Woolsey v. Woolsey, 68 N. J. Eq. 763, 62 A. 686. Under Rev. St. 1899, § 4721, administrator must file vouchers for all payments made by him, and no allowance will be made where he does not do so, at least without a showing that it was practically impossible to procure them. Rice v. Tilton [Wyo.] 82 P. 577.

52. Held to sufficiently appear in credit that administrator was claiming an allowance for joint fee for attorneys' services rendered by himself and an associate. John v. Sharpe [Ala.] 41 So. 635.

53. For rents collected before date of order directing estate to be administered as insolvent, though he would be personally accountable therefor to the heirs in a proper proceeding. Ayers v. Laighton, 73 N. H. 487, 63 A. 43.

54. See 5 C. L. 1260.

55. An allegation by sureties of want of actual notice is of no avail, where it appears that the notice required by statute was given. In re Sheets' Estate [Pa.] 64 A. 413.

56. Legatee may file objections to account being a "person interested" within the meaning of Code Civ. Proc. § 1626. In re Pease's Estate [Cal.] 85 P. 149.

57. Executor cannot complain because objections were not filed by a person interested. In re Pease's Estate [Cal.] 85 P. 149.

58. Failure to object to particular items by party objecting to others. Morrissey v. Rogers, 120 Ill. App. 37.

59. Objections relating to management

counting will be stayed pending the determination of an action previously commenced in the supreme court covering every question which could be raised on the accounting.[61]

In an action by the heirs and distributees against the administrator for an account and settlement, the complaint need only allege a breach of duty in failing to file a final account and to fully account and settle, it being unnecessary to specifically set out the debts which the administrator has failed to collect.[62] An objection that such action should have been brought on relation of the state is waived unless made promptly,[63] and the court may in its discretion allow an amendment in this regard.[64]

(§ 11) *E. The decree or order.*[65]—In some states judgments allowing intermediate accounts are conclusive[66] while in others they are only prima facie correct.[67] It is sometimes provided that on every settlement former accounts may be so far opened as to correct any mistake or error therein except as to disputed matters previously heard and determined.[68] The settlement of an intermediate account is not an adjudication of the absolute right of the heirs to the funds that may finally remain in the representative's hands, nor does it conclude his right and the right of his sureties to redress for actionable fraud on the part of the heirs.[69] An order overruling objections to intermediate reports will not be reversed because of an error in the balance carried over from the first to the second account where the estate remains open so that the error may be corrected in the final account.[70] The approval of the corrected final report entitles the representative to his discharge whether the corrections were made by the court or by the representative pursuant to the court's order.[71]

of the realty. In re Smith's Estate [Iowa] 109 N. W. 196.

60. Surrogate, having authority to send account to referee, may send it back for a fuller report. In re Schroeder, 99 N. Y. S. 176.

61. In re Llado's Estate, 50 Misc. 227, 100 N. Y. S. 495.

62. Mann v. Baker [N. C.] 55 S. E. 102. Complaint in action against administrator d. b. n. held sufficient to show that action was for a full accounting and to recover, not only any balance actually collected, but for any sums which should have been collected. Id.

63. Objection that action by heirs and distributees against administrator d. b. n. for an account and settlement should have been brought by them on relation of the state held waived by delay in making it. Mann v. Baker [N. C.] 55 S. E. 102.

64. Mann v. Baker [N. C.] 55 S. E. 102.

65. See, also, § 15, post.

66. Judgment allowing annual account of administratrix is final and can only be set aside on ground of fraud or mistake. In re Young [Mich.] 108 N. W. 88. On application for a bill of review no distinction is to be made between original and final account. In re Sheets' Estate [Pa.] 64 A. 413. Where sureties fail to object to charges against administrator in original accounts and decisions confirming them are never reversed or reviewed, they cannot question correctness of such charges in subsequent accounts. Id.

67. Are prima facie correct as between the partles interested as to items in support of which there is evidence filed with such settlement. Under St. 1903, §§ 1062, 1067, there is no presumption in favor of an item unless there is evidence on file with the court's settlement upon which the county judge could reasonably have acted in allowing the claim. Herndon v. McDowell [Ky.] 89 S. W. 539. Item for claim in favor of administratrix for board of deceased proved by her affidavit and that of a third person and included in settlement held prima facie correct. Id. Petition seeking to surcharge settlement which merely alleged that claim for board of deceased was unjust because claimant was not an innkeeper or a keeper of a house of private entertainment held insufficient for failing to allege that decedent had not made a contract to pay for such board. Id.

68. Rev. St. 1906, § 6187. Adjudication and settlement of first account held not conclusive as to whether administrator should be charged with amount of his debt to the estate. Lambright v. Lambright [Ohio] 78 N. E. 265.

69. Settlement of account with reference to rents collected while estate was being administered as insolvent, and order charging him with all of them, including those embezzled by co-administrator, held not to conclude his right to redress for fraud of heirs in procuring appointment of co-administrator. Ayers v. Laighton, 73 N. H. 487, 63 A. 43.

70. In re Smith's Estate [Iowa] 109 N. W. 196.

In the absence of a showing of bad faith or gross neglect on the part of an administrator whose accounts are surcharged, the entire amount so realized will not be given to the creditor procuring the surcharge,[72] nor will he be given an allowance for counsel fees, though the surcharge was opposed by certain other claimants.[73]

Costs of accounting proceedings are ordinarily payable out of the estate,[74] but may be charged against the representative personally where he has been guilty of fraud or misconduct.[75]

Interested parties are not prejudiced by the allowance of accounts or items where they consent thereto.[76]

§ 12. *Distribution and disposal of funds.*[77]—The jurisdiction of the various courts over proceedings to obtain distribution and to determine matters incidentally involved therein has been treated in a previous section.[78]

Occasion and time for distribution.[79]—Cash in the hands of the representative should not be ordered distributed before the final winding up of the estate.[80] Realty not needed for the payment of debts, expenses, and legacies, should be distributed to the devisees immediately after the settlement of the executor's account.[81] The interested parties may waive the rendition and settlement of the account and consent that distribution be made without it.[82] The fact that all the property is given to the representative for life to use for her comfortable maintenance does not prevent the closing of the estate during her lifetime.[83] The court has no au-

71. Corrected final report held to be final report of administratrix. Hartzell v. Hartzell [Ind. App.] 76 N. E. 439.

72. Will be divided among all creditors. In re McPherran's Estate, 212 Pa. 425, 61 A. 954.

73. Particularly where claim therefor was not made at the audit. In re McPherran's Estate, 212 Pa. 425, 61 A. 954.

74. Appellate court held not to have erred in ordering costs of that court on appeal in proceedings on final report of executors to be paid out of the estate. Peterman v. U. S. Rubber Co. [Ill.] 77 N. E. 1108, afg. 119 Ill. App. 610. Circuit court held not to have abused discretion in requiring one-third of the costs to be paid out of the funds of the estate on appeal to it. Id. Special guardian and counsel who, in effect, represented estate held entitled to costs payable out of the estate. In re Seigler's Estate, 49 Misc. 189, 98 N. Y. S. 929. Where there was nothing requiring expense of intermediate accounting to be charged against administrator personally, and though technically a voluntary one it was practically a compulsory one called for by the remainderman who objected to the crediting of certain funds to income and thereby giving them to life beneficiary, and account was sustained, held that such expense should be borne half by the corpus of the estate and half by the income. In re Stevens, 47 Misc. 560, 95 N. Y. S. 1084. Executrix of deceased executor held improperly charged personally with costs of proceeding to compel her to account as to the estate of which he was executor, she having received no property as executrix, and having been guilty of no misappropriation of funds or other wrongdoing, but they should be made payable out of the estate of which he was executor. In re Walton, 98 N. Y. S. 42. Orphans' court, being a court of equity, is vested with wide discretion upon subject of the imposition of costs, and its decrees upon the subject will not be disturbed except for clear error. Shadle's Estate, 30 Pa. Super. Ct. 160. Costs of audit of administrator's accounts held properly charged against estate. Id. Costs of audit of administrator's accounts will not be imposed upon him where they were not incurred solely by reason of his dereliction. Id.

75. Objectors to account awarded costs against administrator, payable out of his share of the estate as an individual on confirming referee's report, where he included false and fraudulent items in his account, and his application to have matter again referred to take testimony as to necessity for and value of attorney's services was denied because he failed to produce such evidence at first hearing after notice that it was necessary. In re O'Hara's Estate, 50 Misc. 495, 100 N. Y. S. 635.

76. Cannot claim that administrator's returned checks were not proper vouchers where they were offered and received as such without objection. Rice v. Tilton [Wyo.] 82 P. 577.

77. See 5 C. L. 1262.

78. See § 2 ante.

79. See 5 C. L. 1262.

80. It being necessary to make provision for payment of commissions, expenses, etc. In re Schroeder, 99 N. Y. S. 176.

81. Executors have no authority to hold and manage it after that time. Harris v. Ingalls [N. H.] 64 A. 727.

82. Where after probate of will executrix acquired absolute right to residue under will and by assignments, held that her statement in petition for decree of distribution, filed after time for filing claims had expired, that she had filed no accounts as executrix because she was entitled to the whole of the residue was a waiver of an account, and de-

thority, upon petition of the distributees and over the objection of creditors, to arrest the course of distribution, charge the assets with a lien for the unpaid debts, legacies, and expenses, discharge the administrator, and deliver the property to the heirs, devisees, or residuary legatees burdened only with the charge for the sums due, to be paid at the will of the distributees, or when they are compelled to pay by a suit to enforce the lien.[84] A voluntary settlement and distribution does not relieve the representative from liability to a creditor having a valid claim against the estate where he had sufficient assets in his hands to pay it, even though he acted in good faith and without notice.[85] In Louisiana, pending the homologation of the account, the succession representative has the right to retain the property of the succession to secure the payment of any balance that may be found due him,[86] and hence a judgment recognizing heirs and decreeing that they are entitled to receive the estate from the representative does not close the succession or authorize the heirs to partition the property.[87] Statutes in some states provide for a proceeding in the probate court to determine the descent of realty and for its distribution where there has been no administration and a specified time has elapsed since the decedent's death.[88]

Partial distribution.[89]—In some states an application for a partial distribution may be made at any time after the lapse of one year from the issuance of letters.[90] An order for partial distribution does not affect the title of the representative to property not covered thereby.[91]

Persons entitled to receive payment or transfer of share.[92]—Distribution should be made to those entitled thereto by the will[93] or under the statutes of descent and distribution.[94] Distribution must be made in accordance with the rights of the

cree distributing residue to her without requiring an account, made after due notice, was valid on collateral attack. Middlecoff v. Superior Ct. [Cal.] 84 P. 764.

83. In re Young [Mich.] 108 N. W. 88.

84. In re Washburn's Estate, 148 Cal. 64, 82 P. 671. Even if the court had discretionary power to make a decree of distribution under such circumstances conditioned on concurrent payment of the amounts due by the distributees, held that it could not be done where costs of administration were unsettled and uncertain, and estate was not in a condition to have administration closed. Id. Where offer was to pay debts, etc., "on the decree of distribution being granted," held that no such course was pursued or proposed. Id. Proceeding held not to come under Code Civ. Proc. §§ 1663, 1658-1661, providing for distribution in certain cases on distributee's giving bond as security for his share of the debts. Id.

85. See § 6 D, ante.

86. Code Prac. arts. 1003, 1007. Succession of Landry [La.] 41 So. 490.

87. Executrix may oppose partition and retain property until final account is homologated. Succession of Landry [La.] 41 So. 490.

88. Laws 1901, p. 567, c. 346, § 1, as amended by Laws 1903, p. 29, c. 23. Chadbourne v. Alden [Minn.] 107 N. W. 148. It is not necessary that the order fixing the time and place of hearing the petition should describe the land. Id. Order held valid as to all the land though it described only a part of it. Id.

89. See 5 C. L. 1263.

90. Under Code Civ. Proc. § 2835, held that court may grant petition for partial distribution after he has made an order for sale of realty to pay debts, and may direct a postponement of sale pending a hearing on such petition. State v. District Ct. [Mont.] 86 P. 269.

91. Held not to divest administrator of title to judgments belonging to the estate, and not to affect realty subsequently taken in satisfaction of them. Weir v. Bagby, 72 Kan. 67, 82 P. 585.

92. See 5 C. L. 1264.

93. Evidence held to support finding that appellant was not the legatee named in the will and was not entitled to any part of the estate. In re Walker's Estate, 148 Cal. 162, 82 P. 770. Decree of distribution followed language of will and set out certain described property "to W. in trust for B. during her life and after her decease to her heirs." B. and her son, who was her only heir, were consulted in making the distribution, but there was no agreement, consent, or understanding between the distributees that son should take more than the will gave him. Held that the son took only the interest given him by the will, and the remainder to B.'s heirs being void as contrary to the rule against perpetuities, he took nothing. Gerard v. Ives, 78 Conn. 485, 62 A. 607. Decree of distribution held proper as to various items. Brown v. Brown [S. C.] 54 S. E. 838.

94. The administrator must distribute the residue of the estate among those entitled to it under the direction of the court and according to law. Mefford v. Lamkin [Ind.

parties in interest as then existing, and the probate court has no jurisdiction to order payment to a devisee or legatee whose right to participate has passed by the judgment of a court of competent jurisdiction to a third person not a party to the order of distribution.[95] So too, a decree of a court of general jurisdiction as to the ownership of the proceeds of a life insurance policy is conclusive on the distribution of the fund in the probate court.[96] The Indiana statute authorizing the administrator to pay the moneys held by him into court for distribution was enacted for his convenience and security, and he cannot by virtue of its provisions relieve himself from the obligations imposed by the acceptance of his trust.[97]

The validity of contracts between the heirs and distributees affecting the manner of distribution,[98] the effect of the assignment of shares to third persons,[99] and the jurisdiction of the probate court to pass on such matters,[1] are treated in other sections.

The distribution of and succession to personalty, wherever situated, is governed by the laws of the decedent's domicile.[2] The validity of payments on behalf of minor legatees is ordinarily to be determined by the law of their domicile.[3] As a general rule assets remaining in the hands of an ancillary representative after paying the claims of local creditors will be transferred to the place of the domicile for distribution.[4] The courts of a state other than the domicile may, however, after the payment of costs and debts, administer and distribute the personal estate within their jurisdiction according to the laws of the domicile.[5]

Distribution in kind[6] is generally allowable with the consent of the interested parties.[7]

Procedure to obtain order for final distribution.[8]—The distribution, when the petition therefor is not filed with the final account, is a separate and, to some extent, an independent proceeding, jurisdiction being acquired by the filing of a

App.] 76 N. E. 1024; Id., 77 N. E. 960. One claiming share of estate as a bastard child of an intestate can only recover on clear and convincing evidence where claim was repudiated by decedent during his lifetime. In re Dundas' Estate, 213 Pa. 628, 63 A. 45.

95. Order directing payment to legatee held not to protect administrator against whom judgment had been rendered as garnishee in action against legatee by third person. Gelger v. Galge [Iowa] 105 N. W. 1007.

96. While the orphans' court can alone distribute the proceeds of an insurance policy belonging to the estate of a decedent and in the hands of her administrator among those entitled to receive them, it cannot award the fund to a claimant whose claim has been adversely passed upon by a court of competent jurisdiction to which he, in a proper proceeding before it, submitted the same. In re Shortlidge's Estate [Pa.] 64 A. 318. Decree of common pleas that assignee for creditors of the insured was not entitled to the fund held conclusive. Id.

97. Burns' Ann. St. 1901, § 2557. Mefford v. Lamkin [Ind. App.] 77 N. E. 960; Id., 76 N. E. 1024. Validity of subsequent order of distribution is unaffected by such payment. Id.

98. See § 17, post.

99. See § 18, post.

1. See § 2, ante.

2. Distribution by ancillary administrator. Rader v. Stubblefield [Wash.] 86 P. 560.

3. Transfer in District of Columbia of property there situated to father of minor legatees residing in Louisiana held valid and binding on minors where under laws of Louisiana the father was fully empowered to collect and receive same, though father was resident of Virginia under whose laws he would not have been entitled to receive it without an order of court, it not appearing that there were any creditors in Virginia. Darlington v. Turner, 202 U. S. 195, 50 Law. Ed. ---.

4, 5. Rader v. Stubblefield [Wash.] 86 P. 560.

6. See 5 C. L. 1264.

7. Where there were no debts and no charges which will directed should be paid in money, held that executrix was not bound to sell stocks purchased by testator for investment purposes and bringing a fair profit, but could, by analogy to Code, § 3364, relating to estates of intestates, hold them for distribution in kind. In re Fisher's Estate, 128 Iowa, 626, 104 N. W. 1023. Where estate held majority of stock in a corporation and it was agreed that it would not be advisable to sell it, held that it was proper to order distribution thereof whereby control came into hands of relatives of minor heir, who was entitled to most of it, who were friendly to her interests and there was no showing that they were incapable of managing the corporation, it appearing that the administratrix had used the property of the estate to further her own interests. In re Schroeder, 99 N. Y. S. 176.

proper petition and the giving of the required notice.[9] The proceeding to obtain a decree of distribution is not a suit between parties, but in the nature of a proceeding in rem settling the rights of the parties, and is simply declarative of those rights.[10] Hence the parties may be bound by a reasonable constructive notice.[11] In New York, surplus moneys arising on a foreclosure sale which have been paid into court can only be distributed after citation of all persons entitled to share therein, unless there is pending a proceeding for the sale of realty to pay debts, in which case the decree must provide for its payment to the administrator.[12]

Adjustment of shares.[13]—Debts due by distributees should ordinarily be deducted from their distributive shares,[14] and this is equally true whether such indebtedness existed before the death of the deceased or arose thereafter,[15] and regardless of the solvency or insolvency of the distributee.[16] The rule applies only where the distribution is to be made out of the general assets of the estate,[17] and in some states only in the distribution of personalty.[18] In New York the usual rules as to what may be the subject of a counterclaim apply in an action by the assignee of a

8. See 5 C. L. 1265.

9. Where separate petition for distribution was filed and proper notice was given, and it was made to appear by the record that no account was really necessary and that it had been waived by the sole party interested, irregularity in making distribution before account was filed held cured as to such party, and, there being no objection or appeal by any other person, the decree was valid and secure against collateral attack. Middlecoff v. Superior Ct. [Cal.] 84 P. 764. Where the administrator files his final account showing the balance for distribution and notice thereof is given according to law, the court thereby acquires jurisdiction over the matter of the distribution of such surplus as an incident to final settlement. Statements in report as to who are heirs at law are germane to the final settlement. Mefford v. Lamkin [Ind. App.] 76 N. E. 1024; Id., 77 N. E. 960.

10. In orphan's court. Bayley v. Bayley [N. J. Eq.] 63 A. 11.

11. Notice given in accordance with requirements of Cal. Code Civ. Proc. §§ 1633, 1634, by posting notices in three public places 10 days before hearing, held not unreasonably short. Goodrich v. Ferris, 145 F. 844. Giving of such notice held to constitute due process of law without regard to residence of interested parties. Id.

12. Code Civ. Proc. § 2799. In re Schuessler's Estate, 49 Misc. 203, 98 N. Y. S. 939. Petition reciting that certain persons are heirs at law and that certain others claim to be creditors held insufficient in failing to show affirmatively that they were the only persons entitled to share in the distribution of the proceeds. Id.

13. See 5 C. L. 1266.

14. Weaver v. Gray [Ind. App.] 76 N. E. 795; Lambright v. Lambright [Ohio] 78 N. E. 265. A debt due from an heir, legatee, or creditor is an asset of such estate, and, where the distributive share of such heir or legatee, or the claim of such creditor, is equal to or greater than his indebtedness to the estate, the representative should charge himself with and account for the full amount of the same. Id. Decedent was secondarily liable as surety for his son on certain unpaid obligations. Son, who was insolvent, was appointed administrator and paid such obligations out of the assets of the estate and claimed and was allowed credit therefor. He did not charge himself with, or account for, his resulting debt to the estate, but his account showed that he retained and paid out to himself as distributee, and for fees, etc., a sum in excess of the amount thereof. Held that he should be charged with the amount of such debt as assets of the estate in his hands for distribution according to law. Id. Where land of a decedent has been ordered sold in a partition proceeding between heirs, and the respective interests of the parties determined and an order made for distribution, a debt due the estate from one of them may be deducted from his share of the proceeds. Barnett v. Thomas, 36 Ind. App. 441, 75 N. E. 868.

15. Lambright v. Lambright [Ohio] 78 N. E. 265.

16. Lambright v. Lambright [Ohio] 78 N. E. 265. Right to offset judgment against widow owned by estate against her distributive share does not depend on her insolvency. In re Angle's Estate, 148 Cal. 102, 82 P. 668. Where administrator obtained a decree foreclosing a mortgage executed by decedent's widow on her interest in land belonging to the estate and subsequently assigned to the estate with the debt secured thereby, and pending an appeal therefrom, regularly sold the interest of decedent in the mortgaged premises, which sale was subsequently confirmed, held that the sale did not operate as a payment of the mortgage debt, but merely transferred estate's security to her interest in the proceeds of the sale. Id.

17. Under Burns' Ann. St. § 2642, husband held entitled absolutely to one-third of deceased wife's realty free from wife's debts contracted after marriage, and on sale of such land by administrator for purpose of division between him and person entitled to other two-thirds, the administrator was not entitled to deduct from husband's share of the proceeds a sum sufficient to reimburse him for funeral expenses paid by him for which he had recovered a judgment against the husband, such share not being a part of the assets of the estate. Weaver v. Gray [Ind. App.] 76 N. E. 795.

18. The distributive share due an heir

legatee to recover the legacy.[19] The fact that the decree of distribution awards a note to one of the joint makers thereof does not operate as a payment of the note in full or as an extinguishment of the obligation of the other joint maker for his proportion of the amount due thereon.[20] The distributee must also account for advancements received by him from the decedent,[21] and for partial distributions and anticipations.[22]

Interest on legacies.[23]—The law of the place of decedent's last domicile governs in determining whether or not interest shall be allowed on pecuniary legacies.[24] Unless a different time for payment is fixed by the will,[25] they ordinarily draw interest after one year from the death of the testator.[26] The rule is not changed by reason of the fact that the settlement of the estate is delayed by a contest over the allowance of the will which was participated in by the legatees claiming the interest.[27]

Setting out and retaining funds and precedent interests.[28]—On distribution pending an appeal from a decision that a legacy is not subject to the transfer tax, a sum equal to the amount of the tax will be retained.[29] A sufficient sum should be set apart to pay annuities provided for by the will,[30] and the corpus should be paid to the legatees entitled thereto on the expiration of the annuities.[31] Representatives paying annuities which the will provides are to be paid out of income thereby estop themselves from denying the receipt of income applicable to that purpose.[32] Unless personalty bequeathed to one for life is turned over to the life

from personal estate may be applied by the administrator in payment of a debt due the estate by the heir (Marvin v. Bowlby [Mich.] 12 Det. Leg. N. 723, 105 N. W. 751), but the distributive share of the realty of an heir debtor to the estate of his ancestor, is not chargeable with such indebtedness either as against the land or the proceeds of the sale thereof in the hands of the administrator (Id.). Indebtedness must be collected in same manner as other debts due the estate, even though heir is insolvent. Id.

19. In action by assignee of legatee to recover legacy due to assignor and payable out of assets generally, held that executor could not set off a claim arising from the fact that after he had reduced assets to possession the assignor of the plaintiff had forcibly taken and converted a portion thereof. Is not connected with subject of action within meaning of Code Civ. Proc. § 501. Lehleuter v. Shano, 49 Misc. 99, 96 N. Y. S. 716.

20. In view of Code Civ. Proc. § 1543, providing that a release of one or more of several joint debtors does not extinguish the obligation of any of the others, unless they are mere guarantors. Enscoe v. Fletcher, 1 Cal. App. 659, 82 P. 1075.

21. See § 17 B, post. As preliminary to the distribution it is the duty of the orphans' court to settle all questions of advancements or debts that are to stand for advancements. Whether distributee has rendered himself liable for rents and damages by holding property beyond time fixed by will for its sale. In re Alexander's Estate, 214 Pa. 369, 63 A. 799.

22. Advances to the widow as a part of her distributive share should not be included in the final account, the administrator being only entitled to reimbursement out of her share when distribution is ordered. Elizalde v. Murphy [Cal. App.] 87 P. 245.

23. See 5 C. L. 1266.

24. In re Kucielski's Estate, 49 Misc. 404, 99 N. Y. S. 828.

25. Where will provided that legacies should be paid not later than six years after testator's death, held that they did not bear interest until the expiration of that time. Bank of Niagara v. Talbot, 110 App. Div. 519, 96 N. Y. S. 976.

26. Rule not changed by reason of the fact that the statute does not fix a time for payment or forbid payment before a specified time, but authorizes court to fix a time which shall not exceed a year in the first instance, and provides for an extension when circumstances require it. Woodward's Estate v. Holton, 78 Vt. 254, 62 A. 718. Interest allowed on legacy from one year from date of testator's death, where executor, who was residuary legatee and devisee, had ample funds and only deferred payment so that he could hold realty for better prices. German Pioneer Verein v. Meyer [N. J. Eq.] 63 A. 835.

27. Woodward's Estate v. Holton, 78 Vt. 254, 62 A. 718.

28. See 5 C. L. 1267.

29. In re Kucielski's Estate, 49 Misc. 404, 99 N. Y. S. 828.

30. Should be transferred to executors as trustees. Harris v. Ingalls [N. H.] 64 A. 727. Duty to set apart fund and pay income to widow as prescribed by will. Arrangement between widow and son, who were executors, whereby latter was permitted to retain realty, held not to entitle her, on subsequent sale of realty, to have arrears of income made up out of corpus of resulting fund contrary to terms of will. In re Hawley, 108 App. Div. 185, 96 N. Y. S. 61.

31. Harris v. Ingalls [N. H.] 64 A. 727.

32. Where annuities were payable only out of income derived from the estate after

tenant on his giving sufficient security, it is the duty of the executor to invest the same and pay him the income.[33]

Refunding bonds.[34]—Life tenants before receiving the property should ordinarily be required to give bond to the remaindermen that it will be forthcoming at the termination of the particular estate,[35] but this does not apply where the life tenant is authorized to use the principal.[36] No bond should be required from one to whom the will gives a defeasible fee.[37]

Suits for payment of shares or settlement.[38]—In some states legatees and distributees and their personal representatives[39] may recover from the representative the amounts awarded them by the decree of distribution, even though their shares have been wrongfully paid to others.[40]

Statutes in some states provide that a representative, legatee, distributee, or creditor of a deceased person may bring a suit in equity for the settlement of his estate.[41] In such case distribution is made on motion after notice to the parties in interest.[42] In some states legatees or annuitants may institute proceedings to compel distribution after the expiration of a year from the grant of letters.[43]

A bill in chancery for distribution must show that there is a fund for distribution and complainant's right to a share thereof.[44] All the residuary legatees are necessary parties to a suit in equity by two of them for the ascertainment and distribution of the residuary estate and to compel payment of their legacies.[45] Parties suing in equity to compel payment of their legacies must include all their claims against the estate as legatees in one suit, and will not be permitted to split

setting aside enough money for a trust fund and to pay certain legacies, held that by paying such annuities the executors estopped themselves from denying that they had received income applicable to that purpose, and were not entitled to an allowance for the payments as against the corpus of the estate which was needed to meet the trust fund and pay the legacies. Woolsey v. Woolsey, 68 N. J. Eq. 763, 62 A. 686.

33. In proceeding for removal of executor, where no account was rendered during lifetime of life tenant and there was no evidence to show that property constituting life legacy was turned over to life tenant, held that executors would be deemed to have held same in their representative capacity, and hence it was their duty to invest same and pay income to life tenant. In re Sheldon's Estate, 96 N. Y. S. 225.

34. See 5 C. L. 1268.

35. Powell's Ex'rs v. Cosby [Ky.] 91 S. W. 1133.

36. Where testator gave property to wife, the money to be invested and she to have the income thereof and the right to use the principal as she might need it, and appointed no testamentary trustees and directed that money be kept distinct from any she might inherit from her father's estate, held that she was entitled to possession of the fund after payment of debts without giving bond. In re Trelease's Estate, 79 Misc. 205, 96 N. Y. S. 318.

37. Powell's Ex'rs v. Cosby [Ky.] 91 S. W. 1133.

38. See 5 C. L. 1265.

39. Administrator of a legatee may sue the administrator of the executrix for the amount due the heirs of the legatee. Carlisle v. Farrow [S. C.] 54 S. E. 766.

40. Code Civ. Proc. § 1666. Bryant v. McIntosh [Cal. App.] 84 P. 440. As where executor wrongfully paid amount due distributees to his attorney who pretended to also be, but was not, the attorney for the distributees, in violation of an agreement between all the parties that the payment was to be made directly to them. Id.

41. Civ. Code. Prac. § 428. Guardian of infant judgment creditor of deceased may do so. Beddow v. Wilson [Ky.] 90 S. W. 228.

42. Objection that order for distribution was made without giving distributee an opportunity to be heard overruled where she had two months' notice of motion for distribution, but filed no exception to the proposed scheme of settlement, and was heard by attorney who presented no objections to the decree. Brown v. Brown [S. C.] 54 S. E. 838. Fact that notice of motion for distribution was addressed to "the heirs at law" of decedent instead of to the "legatees and devisees under the will" of decedent held not to render it insufficient, particularly where they were parties to the suit. Id.

43. Bill in chancery for the construction of will and to determine the amount to which petitioner was entitled under a provision for her "comfortable support" held not a proceeding by a legatee or annuitant to compel distribution within Code 1892, § 1961, authorizing such proceedings at any time after expiration of 12 months from the grant of letters. Owens v. Waddell [Miss.] 39 So. 459.

44. McIntosh Bros. v. Rutland [Miss.] 41 So. 372. Bill by assignee of husband's interest in proceeds of sale of timber, which were only assets of deceased wife's estate, held sufficient. Id.

45. Wyckoff v. O'Neil [N. J. Eq.] 63 A. 982.

them up into several suits.[46] Since the representative is a trustee of the funds shown by the decree of distribution to be in his hands, limitations do not run against the distributees.[47] Mere delay is not necessarily a bar to a suit by an absentee to recover a legacy paid to an administrator appointed for his estate.[48] The court in an action to settle the estate may order the trustee of the heirs, to whom the property has been turned over by the commissioner and receiver, to return a part of it on becoming satisfied that there are not enough funds remaining on hand to pay the debts.[49] The right of the legatee to follow funds of the estate into property in which they have been wrongfully invested is treated elsewhere.[50]

Partition of realty among heirs and devisees.[51]—The power given executors to partition realty devolves upon the court if for any reason they are disqualified, unable, or refuse to act.[52] In Texas land is divided among those entitled thereto by a commission appointed by the probate court.[53] In case they report that it is not capable of division in kind the court may order it sold, no notice to the heirs of the proceeding to sell being necessary.[54] The statutory limitation as to the price at which the land may be taken by an heir has no application to such a sale,[55] the only restriction being that the sale must be confirmed by the court.[56] Heirs retaining the benefits of a sale are estopped to attack it for want of jurisdiction.[57]

Decree of distribution; its form, enforcement and effect.—The usual form of a decree of distribution is for distribution and payment of the amount remaining unadministered to certain persons and in certain proportions.[58] A person found to have no interest in the estate cannot object to a failure to make necessary findings or contend that those made are not supported by the evidence.[59] An order directing the payment of a distributive share should fix the amount to be paid.[60] The

46. Cannot limit their bill to recovery of specific legacies and interest only where they are also residuary legatees. Wyckoff v. O'Neil [N. J. Eq.] 63 A. 982.

47. Where it appeared from decree of distribution that executrix had funds in her hands and there was nothing to show that she had paid them to those entitled or had done anything showing an intention to terminate her trust. Carlisle v. Farrow [S. C.] 54 S. E. 766.

48. Fifteen years' delay, where the executor whose duty it was to pay the legacy was still living and no evidence had been lost by death, no records had been destroyed, and there was no uncertainty in the amount due, nor any presumption of payment. Selden's Ex'r v. Kennedy, 104 Va. 826, 52 S. E. 635.

49. Where claimant became a party to an action to settle an estate, and having been defeated in lower court executed a supersedeas bond and appealed and thereafter an order was made directing court's commissioner and receiver to turn over property in his hands to the trustee of the heirs. Cline v. Waters [Ky.] 90 S. W. 231.

50. See Trusts, 6 C. L. 1736.

51. See 5 C. L. 1268.

52. O'Donaghue v. Smith, 184 N. Y. 365, 77 N. E. 621, afg. 85 App. Div. 324, 83 N. Y. S. 398.

53. Administrator's written application for appointment of commissioners held sufficient under Sayles' Ann. Civ. St. 1897, art. 2154. Rye v. Guffey Petroleum Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 739, 95 S. W. 622. Minutes and report of commissioners held to show that they were appointed at proper time. Id.

54. Rye v. Guffey Petroleum Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 739, 95 S. W. 622.

55. Limitation fixed by Sayles' Ann. Civ. St. 1897, art. 2178. Rye v. Guffey Petroleum Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 739, 95 S. W. 622.

56. Record held to sufficiently show confirmation, it being unnecessary for deed to recite order of confirmation. Rye v. Guffey Petroleum Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 739, 95 S. W. 622.

57. Where minor heirs by their guardian actively joined in procuring sale of homestead and received benefits of the same, held that purchaser acquired an equitable title which heirs were estopped to deny while retaining benefits of sale, though court had no jurisdiction to order sale for purpose of partition. Murphy v. Sisters of the Incarnate Word [Tex. Civ. App.] 97 S. W. 135. Estoppel held to operate against heirs' claim to their mother's interest in the property as well as their father's where father's will attempted to dispose of entire estate, the application for partition and order of sale dealt with the property in its entirety, and the amount paid by purchaser and accepted by heirs was the appraised value of the entire property. Id.

58. Decree held one for distribution, though directing payment of all the remaining estate to the husband of the intestate entitled to the same jure mariti. Bayley v. Bayley [N. J. Eq.] 63 A. 11.

59. One whom court found on sufficient evidence had no interest in the estate, held

conclusiveness of decrees and their immunity from collateral attack is treated in a subsequent section.[61] No execution can be issued upon a mere decree of distribution.[62] The distribution amounts merely to a conveyance from the deceased to the distributee and the latter acquires only such title as the deceased had.[63] The representative is not a necessary party to an action on an account allotted to a distributee in the partition of the estate where the estate has been fully partitioned and the representative discharged.[64]

§ 13. *Enforcement of orders and decrees by attachment as for a contempt.*[65]—In New York a decree directing the representative to pay over money of the estate to persons to whom it is adjudged due may be enforced by contempt proceedings.[66]

§ 14. *Discharge of personal representatives.*[67]—The authority of an executor who has not resigned or been removed continues as long as there are assets remaining unadministered though the estate has been wound up.[68] An order approving his final report, settling the estate, and discharging him has the effect of closing his account only up to the time of the approval of such report,[69] and does not operate to revoke an unexecuted power of sale conferred on him for the purpose of distribution.[70] The representative's discharge, until regularly set aside, precludes the heirs from calling on him to account for profits made by him by secretly purchasing property of the estate through an agent.[71] It has been held, however, that his liability for wrongfully paying the shares of certain distributees to their pretended attorney is not affected by a decree discharging him from all liability to be incurred thereafter.[72]

§ 15. *Probate orders and decrees.*[73]—Courts having charge of the administration of estates are usually regarded as courts of general jurisdiction in regard to probate matters, and hence, when such is the case, their judgments and decrees are as binding on parties to the proceedings and their privies,[74] and, until vacated or

not in a position to object that court failed to make findings necessary to a decree of distribution and that certain findings were not supported by the evidence. In re Walker's Estate, 148 Cal. 162, 82 P. 770.

60. Otherwise it is void. Ford v. Ford, 117 Ill. App. 502.

61. See § 15, post.

62. Bayley v. Bayley [N. J. Eq.] 63 A. 11. Decree is not one whereby money is ordered paid by one party to another within the meaning of P. L. 1898, p. 785, c. 234, § 184, authorizing the issuance of execution by orphans' court, the decree referred to therein being one made in a proceeding in which there are parties seeking and resisting, or having an opportunity to resist, such decree. Id. To so construe it would nullify provisions of § 172 (p. 781) requiring distributees to give refunding bonds. Id. Bill seeking to avoid conveyances claimed to be fraudulent and subject lands conveyed to an execution issued out of orphans' court upon a decree of distribution held demurrable. Id.

63. Rule applies to decree of distribution giving property to state to which it has escheated. Helm v. Johnson, 40 Wash. 420, 82 P. 402.

64. Hill v. Herndon [Tex. Civ. App.] 14 Tex. Ct. Rep. 19, 89 S. W. 813.

65. See 5 C. L. 1269.

66. Code Civ. Proc. § 2555. In re Strong, 97 N. Y. S. 459. Since executor is made liable for debt due him to estate as for so much money in his hands (Code Civ. Proc. § 2714), and decree directing him to pay money to persons adjudged entitled thereto is conclusive that there are sufficient assets in his hands for that purpose (Id. § 2552), held that where decree on accounting charged executor with amount of his debt to estate and directed him to make payments, which he failed to do, he was properly adjudged guilty of contempt, unless he sustained burden of showing his inability to pay the debt. Id. Held not necessary that order adjudging him guilty of contempt should contain finding that he was able to pay. Id.

67. See 5 C. L. 1269.

68. Where he had authority to sell any part of testator's realty, held that he could direct sheriff's deed, to which testator was entitled, to a third person, though testator had been dead 16 years and his estate had been wound up. Reeve v. North Carolina Land & Timber Co. [C. C. A.] 141 F. 821.

69. Is void as to unsettled portions of the estate, Starr v. Willoughby, 218 Ill. 485, 75 N. E. 1029.

70. Starr v. Willoughby, 218 Ill. 485, 75 N. E. 1029.

71. Wicker v. Howard [Ga.] 54 S. E. 821.

72. Code Civ. Proc. § 1697. Bryant v. McIntosh [Cal. App.] 84 P. 440.

73. See 5 C. L. 1269. See, also, Judgments, 6 C. L. 214; Former Adjudication, 5 C. L. 1502.

74. See, also, Former Adjudication, 5 C. L. 1502.

Settlement and allowance of accounts:

reversed, set aside, or modified on appeal, as conclusive as to matters necessarily involved in the determination of the questions passed upon,[75] as those of any other

Sureties who do not appear after due notice of proceedings for final settlement and take no part therein until after the period for appeal has elapsed are concluded by the judgment therein. State v. Goggin, 191 Mo. 482, 90 S. W. 379. Judgment rendered against administrator on final settlement held not conclusive on estate of deceased surety who died three years before notice of the proceedings was given or judgment was rendered where there was no administrator of surety's estate. Id. On application for order directing administrator to pay judgment creditor where administrator admitted that assignment of distributive share on which judgment was based was made and filed prior to the final accounting, thereby in effect admitting that the assignee was a proper party thereto, held that burden was on him to show that assignee was bound by the decree on the accounting by reason of being a party thereto or because served with proper notice thereof. In re Weil's Estate, 110 App. Div. 67, 96 N. Y. S. 1017. Distributees sought to have account of executor surcharged on account of rent claimed to be due and owing to estate from another distributee because of his alleged occupancy of realty after period fixed by will for its sale but which accountant had failed to collect, and for damages as well on account of his retention of the premises. Held that decree refusing surcharge on ground that no legal liability on the part of the distributee was shown was a bar to an action at law by exceptants against such distributee to recover the same rents and damages, and such an action in the name of the executor would be enjoined by the orphans' court. In re Alexander's Estate, 214 Pa. 369, 63 A. 799. Distributee was a party to proceeding to surcharge accountant, since if account had been surcharged it would have been the duty of the orphans' court to have directed a corresponding deduction from distributive share of the distributee. Id.

Proceedings to sell realty: An order of the ordinary granting the administrator leave to sell land for the purpose of making distribution is not conclusive on the heir as to the necessity for the sale where he was not served with personal notice of the application therefor and hence in a suit against him by the administrator to recover land in his possession for the purpose of making such sale he may attack such order by showing that such notice was never served on him, though it appears that the usual citation was published according to law. Civ. Code 1895, § 3358 construed. Park v. Mullins, 124 Ga. 1072, 53 S. E. 568. The order is even in such case, however, prima facie evidence of the necessity of a sale for distribution, but such evidence may be overcome by any competent evidence showing that there is no necessity for a sale, the burden of proof being on the heir. Id.

75. Sales of realty: On final judgment parties to proceeding by administrator in probate court to sell lands to pay debts must be held to have litigated all questions that could have been settled which were necessary to a determination of the issues presented. Hollingsworth v. McAndrew [Ark.] 95 S. W. 485. The sale of the equity of redemption in mortgaged property under a general license of the probate court does not establish the validity of the mortgages. Marsh v. Marsh, 78 Vt. 399, 63 A. 159.

Allowance of claims: As a general rule the allowance of a claim is a judgment, which becomes final when not appealed from, and is conclusive on final settlement, but this is not true where court had no jurisdiction to make the allowance. Ivie v. Ewing [Mo. App.] 96 S. W. 481. Commissioners of claims act in a judicial capacity when trying and deciding claims which they are authorized to try and decide, and their action is final when not appealed from. Flynn v. Lorimer's Estate, 141 Mich. 707, 12 Det. Leg. N. 629, 105 N. W. 37. Allowance is conclusive against the estate and all persons who had an opportunity to be heard where they had jurisdiction. Chapoton v. Prentis [Mich.] 13 Det. Leg. N. 186, 107 N. W. 879.

Order granting leave to issue execution: Under Code Civ. Proc. § 2552, order of surrogate granting leave to a petitioner to issue execution upon a judgment against an administrator is, except on appeal therefrom, conclusive evidence that there are sufficient assets in administrator's hands to satisfy the judgment. In re Weil's Estate, 110 App. Div. 67, 96 N. Y. S. 1017.

Settlement and allowance of accounts: The approval of the executor's final report and the entering of an order declaring the estate settled is not conclusive of the validity of the will, or a bar to a suit to contest it. Stuckwisch v. Kamman [Ind.] 77 N. E. 349. In view of statute giving right to contest within three years and statute authorizing settlement of estate at expiration of one year after granting of letters. Foley v. O'Donaghue [Ind.] 77 N. E. 352. A final decree by the orphans' court upon the accounting of the representative is conclusive as to the distribution of the estate. P. L. 1898, p. 761, § 127. Wyckoff v. O'Neil [N. J. Eq.] 63 A. 982. Decree settling accounts of executor in which he was allowed an amount paid a deceased coexecutrix in settlement of her claim against the estate, held conclusive, under Code Civ. Proc. § 2742, in a proceeding for his removal that such item was correct. In re Sheldon's Estate, 96 N. Y. S. 225.

Decree of distribution: Under Code Civ. Proc. § 2743 is conclusive of status and ownership of stock issued by company to represent its surplus earnings so as to bar subsequent action by legatee of life tenant to recover it from remaindermen on ground that it was a dividend belonging to the life tenant. Chester v. Buffalo Car Mfg. Co., 183 N. Y. 425, 76 N. E. 480. In action by legatee of life tenant to recover from other remainderman certain stock distributed by company, pursuant to an agreement to increase stock to dispose of surplus earnings, on theory that such stock was a mere dividend belonging to the life tenant, held that legatee, who was also an executor of the original will and had held stock either individually or in his repesentative capacity during all

court. The existence of all facts necessary to give jurisdiction will be presumed until the contrary appears,[76] and such judgments cannot be collaterally attacked[77]

the time covered by the controversy, could not contend that he was ignorant of the fact that company had claimed the right to convert surplus into capital. Id.

Discharge of representative: Judgment of court of ordinary, which is regular upon its face, is conclusive until duly set aside, either on motion in court in which it was rendered, or in an equitable proceeding instituted in the superior court. Summerlin v. Floyd, 124 Ga. 980, 53 S. E. 452. Civ. Code 1895, § 3511, providing that a discharge obtained by an administrator by means of any fraud practiced on the heirs or the ordinary is void and may be set aside on motion and proof of fraud, does not change this rule, the word "void" meaning "voidable" in a proper proceeding to set it aside. Id.

76. See, also, Judgments, 6 C. L. 214. Ford v. Ford, 117 Ill. App. 502; Desloge v. Tucker, 196 Mo. 587, 94 S. W. 283; Ferguson v. Ferguson, 3 Ohio N. P. (N. S.) 549. The following are not jurisdictional facts: The reasons for the removal of an administrator under Rev. St. § 6017, the qualification of his successor under §§ 6005, 6018; the latter's failure to file a complete statement of the value and nature of the estate to be administered; and in actions to sell real estate, that evidence was heard therein finding it necessary to sell. Nor is it necessary that such facts affirmatively appear in the journal entries to sustain their regularity in proceedings on error. Id.

Appointment of representative: Existence of everything necessary to give validity to appointment of administrator de bonis non which the record does not contradict will be presumed. Smith v. Alexander [Ala.] 42 So. 29. Will be presumed that person applying for removal of administrator was a person authorized by statute to do so, and that court acquired jurisdiction of administrator's person though record shows that no citation was served or publication made where it does not appear that citation and publication were not waived. Id. Court having jurisdiction of both the estate and the executrix, order appointing her successor has the solemnity of a judgment, and, when collaterally attacked, every fact necessary to support the order, and which is not actually negatived by the record, will be presumed in its favor. McKenna v. Cosgrove, 41 Wash. 332, 83 P. 240.

Sales of realty: Order directing sale of homestead. Murphy v. Sisters of the Incarnate Word [Tex. Civ. App.] 97 S. W. 135. There being no competent evidence in the record negativing the statement of the petition for the sale that the lot sold was all the property belonging to the estate, it will be presumed in aid of the proceedings on collateral attack that there was no other realty. McKenna v. Cosgrove, 41 Wash. 332, 83 P. 240. Mere fact that another lot was included in inventory held not to establish that it belonged to the estate. Id. Oral testimony of witness that he understood that another lot belonged to the deceased held incompetent to establish that fact. Id. Sale of land specifically devised to pay debts having been made under order of court having jurisdiction over the estate, held that it would be presumed in aid of the proceedings on collateral attack, and in the absence of positive facts appearing in the record to the contrary, that the court was advised that there was no personal property which had not been already properly applied, the petition for the sale stating that there was no personalty. Id. There being nothing in record to the contrary, will be presumed in collateral proceedings that a mortgage by the executrix was regularly and authoritatively executed in behalf of the estate. Id. Attack on sale on appeal from order confirming it is not collateral in strict sense, though appeal lies from order directing sale and none was taken, and hence question of jurisdiction to make original order of sale may be raised. Desloge v. Tucker, 196 Mo. 587, 94 S. W. 283.

Partition of realty: Would be presumed that heirs were properly served, where contrary did not appear. Rye v. Guffey Petroleum Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 739, 95 S. W. 622.

Decree of distribution: Will be presumed, in support of a decree of distribution made by a court of competent jurisdiction distributing personalty to an association upon a specified use and trust, that the association had power to accept, and was competent to act as trustee. Kauffman v. Foster [Cal. App.] 86 P. 1108.

77. See, also, Judgments, 6 C. L. 214.

Appointment of representative: The district court being a court of general jurisdiction and possessing exclusive jurisdiction in probate matters (Rev. St. 1899, § 4531), its judgments in probate matters are not subject to collateral attack unless absolutely void, and where merely voidable because of irregularities will be presumed valid until set aside in a direct proceeding for that purpose. Rice v. Tilton [Wyo.] 82 P. 577. Order appointing administrator reciting that proof of notice was made held not subject to collateral attack for failure to mail notice to executor of will as required by Rev. St. 1899, § 4577. Id. Validity of grant of letters cannot be inquired into in action by administrator. Reiter-Conley Mfg. Co. v. Hamlin [Ala.] 40 So. 280; Bowden v. Jacksonville Electric Co. [Fla.] 41 So. 400; Thomas v. Waters, 122 Ill. App. 434. Issuing of letters by clerk of superior court, for failure to require bond. Plemmons v. Southern R. Co., 140 N. C. 286, 52 S. E. 953. Where petition for administration on estate of a nonresident alleged the existence of property in the county, question of its existence there was a jurisdictional fact to be determined by the court to which the application was made, and its decision thereon was not open to collateral attack on application for a writ of prohibition to prevent the court of another county from assuming jurisdiction over the estate. Dungan v. Superior Court [Cal.] 84 P. 767. Under Rev. St. 1898, § 3819, authorizing the court to grant administration of the estates of persons who die "leaving property in this state" in certain cases, held that court has jurisdiction to de-

except for want of jurisdiction apparent on the face of the record,[78] or for fraud

termine whether a decedent left property in the state, and the appointment of such administrator is conclusive of this question in a collateral action. Jordan v. Chicago & N. W. R. Co., 125 Wis. 531, 104 N. W. 803. Where petition for appointment was regular in form and there was an estate within the jurisdiction of the probate court, its determination that a creditor was entitled to letters is not open to collateral attack. Ackerman v. Pfent [Mich.] 13 Det. Leg. N. 647, 108 N. W. 1084. One sued by an administrator de bonis non cannot in such suit collaterally attack his appointment on the ground that it was made after the expiration of the time fixed by statute, when that fact does not appear on the face of the appointment, but remedy is by a proceeding in the county court for a revocation of the appointment. Gallatin Turnpike Co. v. Puryear [Tenn.] 92 S. W. 763. In action by administrator where certified copy of entire record down to and including letters was admitted without objection for purpose of establishing his representative capacity, held that it was proper to refuse to allow plaintiff to be asked on cross examination if he had been sworn in. Nickles v. Seaboard Air Line R. Co. [S. C.] 54 S. E. 253. The rule that the authority of the public administrator to take charge of the estate of the deceased cannot be questioned in a collateral proceeding does not prevent one sued for conversion of stock in a foreign corporation alleged to belong to the estate from claiming that the stock of which he holds the certificates was never in the state and hence does not belong to the administrator. Richardson v. Busch [Mo.] 95 S. W. 894. Unnecessary recitals are not part of the judgment within the rule prohibiting collateral attack. Fact that order admitting will to probate and appointing executor recited that will provided that no further action be taken in county court other than the probate of the will and the appointment of the executor and the filing and approving of an inventory and list of claims, held not conclusive in action of trespass to try title as to executor's right to sell land of the estate as independent executor without an order of the county court. Gray v. Russell [Tex. Civ. App.] 14 Tex. Ct. Rep. 836, 91 S. W. 235.

Widow's allowance: Order making an allowance being final and appealable, it becomes final and conclusive unless appealed from within 60 days, and cannot thereafter be collaterally attacked. In re Dougherty's Estate [Mont.] 86 P. 38.

Setting aside homestead: Judgment of probate court setting aside homestead to widow before any grant of administrator held not subject to collateral attack in action of ejectment by the administrator, where petition under which proceedings were had contained all necessary averments to give court jurisdiction under Code 1896, §§ 2070, 2097, and its subsequent proceedings and orders in all respects conformed to the statutory requirements. Jenkins v. Clisby [Ala.] 39 So. 735.

Allowance of claims: Order allowing a claim is in effect a judgment and is not open to collateral attack on the ground that the statute of limitations had run against it before its allowance. Van Dusen v. Topeka Woolen Mill Co. [Kan.] 87 P. 74.

Sales of realty: Where record recited a compliance with Code 1896, § 167, as to taking testimony in support of petition for sale of land for payment of debts and other jurisdictional facts, held that failure to make an heir a party to the proceedings for the sale was a mere irregularity which did not vitiate the sale or affect the title of the purchaser and was not available to such heir upon a collateral attack upon the sale in an action of ejectment brought by him against one claiming under the purchaser. Haynes v. Simpson, 143 Ala. 554, 39 So. 352. Proceedings whereby land was sold and proceeds applied to payment of debt secured by mortgage executed by executrix not being shown by face of record to have been void, their regularity held not subject to collateral attack as against a bona fide purchaser. McKenna v. Cosgrove, 41 Wash. 332, 83 P. 240. Petition in county court objecting to confirmation of sale on ground that claims for payment of which it was ordered were barred by limitations when allowed and approved held not a collateral attack on judgment of that court approving such claims and ordering them paid. Smart v. Panther [Tex. Civ. App.] 15 Tex. Ct. Rep. 448, 95 S. W. 679.

Orders on accounting and settlement: The judgment on final settlement is conclusive against collateral attack and a bar to the recovery of a distributive share by an heir omitted therefrom. Mefford v. Lamkin [Ind. App.] 76 N. E. 1024; Id., 77 N. E. 960. Order of probate court approving administrator's account, charging him with interest on funds remaining in his hands after the expiration of 2 years and 6 months from the date of his letters, and determining the amounts to be paid by him to attorneys and distributees, which was never appealed from or set aside, held binding and conclusive on administrator and his sureties in a suit on his official bond. McDonald v. People [Ill.] 78 N. E. 609. Order allowing an account is appealable, and after the lapse of 60 days becomes final and conclusive, so that no item allowed therein can be called in question upon the settlement of a subsequent account. Code Civ. Proc. § 2795. In re Dougherty's Estate [Mont.] 86 P. 38.

Partition of realty: Probate court being given by statute general jurisdiction over the partition of estates of decedents, its order within the scope of its jurisdiction cannot be declared void on collateral attack, simply because the prescribed procedure, which may be waived by the interested parties, has not been strictly followed. Rye v. Guffey Petroleum Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 739, 95 S. W. 622. Judgment of probate court approving and acting on report of commissioners appointed to partition realty recommending a sale on ground that it could not be divided fairly by a division in kind held not open to collateral attack in action to try title. Id. Fact that

or collusion.[79] Any judgment or decree is admissible on collateral matters even as against persons not parties thereto, though it is not conclusive as to them.[80]

The right of the court to vacate or modify its decrees depends upon the statutory provisions of the various states.[81] Decrees and judgments should not be opened

judgment was premature (Id.), that order did not require commissioners to distribute personalty and bring advancements into hotchpot (Id.), and that no guardian ad litem was appointed for minor heir who had no general guardian, held not to render proceedings void on collateral attack (Id.).

Distribution, etc.: Decree of California superior court distributing estate, made after statutory notice and not appealed from, held conclusive upon all interested parties as to who was entitled to take. Goodrich v. Ferris, 145 F. 844. County court being one of general jurisdiction with reference to probate matters, its orders are binding on collateral attack unless record affirmatively shows want of jurisdiction. Wallace v. Turner [Tex. Civ. App.] 89 S. W. 432, afd. on other grounds 14 Tex. Ct. Rep. 977, 92 S. W. 31. Orders are binding until vacated or reversed in a direct proceeding for that purpose. Id. Effect of order closing estate was to determine that it was fully administered, and it could not be collaterally attacked for error in that regard. Id. Judgment ordering administration closed held not void because no citation had been issued and no notice published of the presentation of the final account. Id.

78. Persons collaterally attacking the appointment of an administrator de bonis non cannot succeed unless the record affirmatively shows that the court was without jurisdiction to make it. Smith v. Alexander [Ala.] 42 So. 29. Where petition of the administrator de bonis non for sale of lands to pay debts was attacked on the ground that the record affirmatively showed that there was no vacancy in the administration when the appointment was made, held that the attack was a collateral one. Id. There being no statutory authority for appointing a corporation as administrator, action of probate court in attempting to appoint one was a mere nullity and order of appointment could be attacked in suit by appointee. Continental Trust Co. v. Peterson [Neb.] 107 N. W. 786. Where petition and summons in special proceeding for sale of realty to pay debts named widow and heirs at law of decedent as parties but failed to name the devisees under his will, which had been admitted to probate, and record did not show that devisees or anyone representing them had been served, held that decree ordering sale was an absolute nullity as to them and could be collaterally attacked by them in action of ejectment to recover the land from the purchaser, though it recited that defendants were duly served and failed to appear. Card v. Finch [N. C.] 54 S. E. 1009.

79. See 5 C. L. 1273, n. 66.

80. In action by administrator of a legatee against the administrator of the executrix to recover the amount due the heirs of the legatee, held that the decree of the probate court determining the amount due the legatee and directing the executrix to pay it was admissible to show that the executrix held at least that amount at that time. Carlisle v. Farrow [S. C.] 54 S. E. 766. Where a judgment was obtained on a note against an executor, and was acknowledged by him in his accounting on his final discharge, allowed as a claim against the estate and enrolled in the probate court as a judgment on which judgment execution issued, it is binding on the estate and the creditor and is prima facie evidence in a suit by the creditor to subject the lands of devisees to the payment of the debt without production of the note. Brock v. Kirkpatrick, 72 S. C. 491, 52 S. E. 592. In a suit by an independent executor the order of the probate court admitting the will and appointing him is prima facie evidence of the existence of the facts authorizing the order, including the fact of the testator's death. Fischer v. Giddings [Tex. Civ. App.] 16 Tex. Ct. Rep. 288, 95 S. W. 33. An order of the probate court finding the heirship in an estate is, in an appeal to the circuit court from a subsequent order of the probate court in that estate, prima facie evidence of the facts found. If the party denying the heirship does not wish to assume the burden of proof in the circuit court, he must in probate court attack the finding of heirship, and if defeated appeal from the order making it, or from one refusing to vacate it. Ford v. Ford, 117 Ill. App. 502.

81. See, also, Judgments, 6 C. L. 214.

California: Superior court or judge thereof has power to set aside order appointing special administrator where it was inadvertently made. Raine v. Lawlor, 1 Cal. App. 483, 82 P. 688. Decision of superior court that order was inadvertently made held conclusive on petition for writ of prohibition revoking the order of appointment. Id.

Georgia: Though an administrator who has misappropriated assets may have obtained his discharge through fraud practiced on the ordinary and heirs at law, yet the judgment discharging him cannot be set aside at the instance of the adult heirs unless they attack it by a proceeding commenced within three years from the date of its rendition. Wicker v. Howard [Ga.] 54 S. E. 821.

Illinois: Probate court has jurisdiction to set aside order approving final account of executors and discharging them, where motion is made at same term at which order was entered. Griswold v. Smith [Ill.] 77 N. E. 551. The courts of probate have no jurisdiction to entertain a petition in the nature of a bill of review to set aside a decree for constructive fraud after the lapse of the entry term. Beavers v. Rennels, 122 Ill. App. 483. Until an estate is completely administered any previous order entered therein may be directly attacked in such court when application is made for another order which involves a further step in the administra-

unless it clearly appears that substantial justice will be promoted thereby, or that such action is necessary to correct errors entering into the decree.[82] Consent decrees cannot be set aside or vacated except for fraud, accident, or mistake.[83] Statutes in some states provide for actions to set aside probate decrees in certain cases.[84]

tion. Ford v. Ford, 117 Ill. App. 502. No notice need be given to the widow, heirs, and legatees of a motion by one of the executors to set aside an order approving the final account of the executors and discharging them, and to make him an allowance of fees. Griswold v. Smith [Ill.] 77 N. E. 551. Attorney held to represent heirs and legatees as well as executors, so that notice to him was sufficient in any event. Id.

Minnesota: A final decree of the probate court assigning realty to the heirs may be vacated and set aside by such court on the ground of fraud (In re Kenny's Estate [Minn.] 106 N. W. 344), but to justify such action as against a stranger to the record who purchases the property from one of the distributees, the purchaser must be connected by actual or constructive notice with the fraud (Id.). Evidence held insufficient to charge purchaser with participation in or actual or constructive notice of the alleged fraud, and on vacation of decree its rights should be protected. Id.

Missouri: Rev. St. 1899, § 214, providing that, if any executor, administrator, heir or creditor of an estate shall, within four months after the allowance of a demand, file an affidavit of himself or some credible person stating that the affiant believes that it has been improperly allowed and shall furnish satisfactory evidence of that fact to the court, and that notice has been given to the opposite party or parties in interest, the probate court shall vacate such order of allowance and try the matter anew, does not allow a party interested in the estate who appears and contests the allowance of a demand to thereafter move to vacate the allowance on the same grounds on which he contested it, but his remedy is by appeal. Keele v. Keele, 118 Mo. App. 262, 94 S. W. 775. But an heir whose application to be heard in opposition to the allowance of the claim is not concluded by the judgment of allowance may move to vacate it under such section. Id. Provision requiring moving party to furnish satisfactory evidence that the demand was improperly allowed does not require such proof as would defeat the allowance of the demand on the merits, but only such a probable showing against its propriety as will convince the court that the matter should be reheard in order to be more sure of a correct result. Id. Findings of fact in judgment vacating allowance held to show that court was satisfied to the extent required, so that there was no abuse of discretion in the ruling. Id. Fact that demand was allowed by circuit court to which proceeding had been transferred under Rev. St. 1899, § 1760, because of the disqualification of the probate judge, held not to deprive probate court of right to vacate allowance on motion of heir to whom a hearing was denied where there was no hearing on the merits. Id. Remedy is not exclusive in case of fraud, but is concurrent with that afforded by a suit in equity to set aside the judgment of allowance. Fitzpatrick v. Stevens, 114 Mo. App. 497, 89 S. W. 897. Probate court having made an order allowing claim against the individual estate of a decedent, held to have no authority to thereafter alter judgment entry without notice to claimant by interlining provisions that all debts of decedent not allowed against partnership of which he was a member should first be paid, and that claim should not be payable out of assets of individual estate until individual debts should have been satisfied. Ault v. Bradley, 191 Mo. 709, 90 S. W. 775. Error held not prejudicial where claim had also been presented and allowed against partnership estate. Id.

New York: Surrogate has jurisdiction to vacate decree settling accounts of executor and testamentary trustee for fraud or irregularity. Meeks v. Meeks, 100 N. Y. S. 667. Complaint in action in supreme court to set aside such decree dismissed. Id.

Texas: Where county court closed the administration and discharged the administrator de bonis non it had no power after the expiration of the term to grant another administration thereon and appoint another administrator. Wallace v. Turner [Tex. Civ. App.] 89 S. W. 432, afd. on other grounds, 14 Tex. Ct. Rep. 977, 92 S. W. 31. Claims having been allowed and approved by court, judgment of allowance cannot be set aside on proof merely that they appear on their face to have been barred by limitations, but it must be further shown that no facts existed at time of allowance which would take them out of operation of statute. Smart v. Panther [Tex. Civ. App.] 15 Tex. Ct. Rep. 448, 95 S. W. 679.

82. Distributee sued surety on administrator's bond to recover her distributive share which a previous decree of surrogate had directed to be paid to her. Surety, who was not cited in proceeding in which last mentioned decree was rendered, petitioned surrogate that it be set aside, claiming that distributee had filed a release of her share and that administrator had conveyed realty to her, and that these facts showed payment of at least a part of the claim. It appeared that conveyance was as security for plaintiff's share, and that after giving release the administrator had filed an account showing a balance in his hands for distribution corresponding with the decree entered. No fraud or collusion was alleged, nor was there any allegation that whole of distributee's share had been paid, or that administrator had any property from which amount due could be collected. Held that petition would be denied. In re Haight's Estate, 50 Misc. 238, 100 N. Y. S. 488.

83. Failure to include allowance of fee to executor in final account held ground for setting aside order approving account and discharging executors, where it was the

The power of courts of equity to do so has already been discussed.[85] The requirement of the Washington statutes that the findings of fact and conclusions of law of the trial court shall be separately stated does not apply to probate proceedings.[86]

§ 16. *Appeals in probate proceedings.*[87]—Appeals are generally allowed from all final orders and decrees,[88] orders affecting a substantial right and in effect determining the question involved,[89] and intermediate orders involving the merits and materially affecting the final decision,[90] and may be taken by any interested party[91] aggrieved thereby.[92]

fault of an attorney. Griswold v. Smith [Ill.] 77 N. E. 551.

84. Where administrator filed final report showing that he and another were the only heirs, which was heard and approved, and procured an order of final settlement directing distribution to be made to them, held that a third person who was in fact sole heir and who had no notice or knowledge of the hearing and did not appear at it, was entitled to have the final settlement set aside under Burns' Ann. St. 1901, § 2558. Mefford v. Lamkin [Ind. App.] 76 N. E. 1024, rehearing denied 77 N. E. 960. Order of distribution is as much a part of the final settlement where the fund is in the hands of the clerk as where it is retained by the administrator, the judgment being conclusive in either event against collateral attack, and a bar to a recovery of a distributive share by an heir omitted therefrom. Id.

85. See § 2, ante.

86. In re Farnham's Estate, 41 Wash. 570, 84 P. 602.

87. See 5 C. L. 1274.

88. An appeal lies from a final order or judgment of a county court in probate matters to the district court, whether it be upon the merits or otherwise. Weeke v. Wortmann [Neb.] 109 N. W. 503. A writ of error lies to review the decree of a court of probate in relation to a proceeding to sell real estate to pay the debts of a decedent. Thomas v. Waters, 122 Ill. App. 434. Error does not lie to order removing administrator. Ferguson v. Ferguson, 3 Ohio N. P. (N. S.) 549.

Orders and decrees held appealable: Order denying motion of administrator pendente lite to require suspended executrix to make a settlement. Rev. St. 1899, § 278. Hanley v. Holton [Mo. App.] 96 S. W. 691. Order requiring a former administrator to turn over to his successor certain money, claimed by the former to have been given him by the intestate as a gift and by the latter to belong to the estate. Foster v. Murphy [Neb.] 107 N. W. 843. Order denying motion of executor to set aside order approving final account of executors and discharging them, and to allow him fees. 1 Starr & C. Ann. St. p. 345, c. 3. Griswold v. Smith [Ill.] 77 N. E. 551. Order vacating order appointing an administrator. Code Civ. Proc. § 963. In re Bouyssou's Estate, 1 Cal. App. 657, 82 P. 1066. Since an order refusing probate of the will and an order appointing an administrator are distinctive proceedings, an order granting a "motion to vacate order refusing probate of will and appointing administrator" must be read distributively and regarded as severally applicable to the former orders, and appeal therefrom will not be dismissed in so far as it is an appeal from the order vacating the appointment of the administrator, there being nothing in the bill of exceptions indicating that the appointment did not proceed upon a record separate from that for the probate of the will, or that it was in any respect dependent upon the order denying probate to the will, though order vacating last named order is not appealable. Id.

Orders and decrees held not appealable: Order simply confirming a commissioner's report refusing to allow a claim in a suit for a settlement of an estate. Cottrell v. Barnes' Adm'r [Ky.] 90 S. W. 1048. Order to show cause why attachment should not issue against special administrator for failing to make deposit of funds as directed, issued under Code Civ. Proc. § 2679. In re Hopkins' Will, 109 App. Div. 861, 96 N. Y. S. 941.

89. Code § 4101. Order striking out resistance and cross petition of administrator to petition by state treasurer to compel filing of inventory for the assessment of inheritance taxes. In re Stone's Estate [Iowa] 109 N. W. 455.

90. Code § 4101. Order striking out resistance and cross petition of administrator to petition by state treasurer to compel filing of inventory for assessment of inheritance taxes. In re Stone's Estate [Iowa] 109 N. W. 455.

91. A "person interested" is one who has some legal right, or is under some legal liability that may be enlarged or diminished by the decree. In re Clarke's Estate [Vt.] 64 A. 231. Administrator de bonis non with the will annexed may appeal from order appointing an administrator for the estate of one to whom he has been ordered by the probate court to pay a part of the funds in his hands, where he claims that person to whom payment was ordered made is not dead, since in such case payment to latter's administrator would not protect him. Id. It is the character of the suit that determines the right to appeal, which does not depend upon the mere naming of a party as executor or administrator in the process or declaration, but upon the cause of action developed by the pleadings, and whether recovery is sought in a representative or individual capacity. Williams v. Dougherty [Ind. App.] 77 N. E. 305. Action against defendant to vacate and set aside letters of administration issued to him held one against him in his representative capacity, though complaint was entitled against him person-

The jurisdiction of appellate courts[93] and the steps necessary to perfect the appeal[94] are regulated by the statutes of the various states. Though technical preci-

ally, and he was entitled to appeal in his representative capacity from a judgment of revocation. Id.

92. Interested persons aggrieved by decree of distribution may appeal to county court from whose decree exceptions will lie to supreme court. Harris v. Harris [Vt.] 64 A. 75. Fact that executor may be personally aggrieved does not deprive him of right to appeal in his official capacity. Teel v. Mills, 117 Ill. App. 97. Executor held aggrieved by order denying motion to set aside order approving final account of executors and discharging them, the motion being made for the purpose of procuring him an allowance of fees which was omitted from original order. Griswold v. Smith [Ill.] 77 N. E. 551. Purchaser of land at administrator's sale to pay debts held aggrieved by order confirming sale where he was induced to make purchase by false representations of the administrator as to width of street on which lots fronted. Grelling v. McLean's Estate [Wis.] 107 N. W. 339. Administratrix held not aggrieved in her official capacity by order directing that no further allowance be paid to the widow. In re Dougherty's Estate [Mont.] 86 P. 38.

93. See 5 C. L. 1274, n. 79. See, also, Appeal and Review, 7 C. L. 128.

94. Notice of appeal must be liberally construed. In re Andrus' Estate [Minn.] 105 N. W. 66. Notice of appeal to district court from "order allowing the claim of H. against the above estate" in a specified sum, held sufficient to bring up the whole order of the probate court allowing the claim in part and disallowing it in part, there being only a single order in such case under Gen. St. 1894, § 4517. In re Andrus' Estate [Minn.] 105 N. W. 66. Where appeal was taken by German consul in his own name, but for benefit of parties in interest whom he represented under a duly executed power of attorney, fact that notice of appeal recited he "being aggrieved hereby appeals" did not render it insufficient on ground that appeal appeared to have been taken by one not aggrieved, it being apparent that his principals were the parties aggrieved and that notice was filed in their behalf. In re Sander's Estate, 126 Wis. 660, 105 N. W. 1064.

Bond: Appeal from order denying motion to set aside order approving executors' final account and discharging them held allowed to executor in his individual capacity so that bond executed by him in that capacity was sufficient. Griswold v. Smith [Ill.] 77 N. E. 551. An executor and residuary legatee who has given bond, under the provisions of Cobbey's Ann. St. 1903, § 5030, to pay the debts and legacies may appeal from a judgment of the county court allowing a claim against the estate without giving an appeal bond. Thompson v. Pope's Estate [Neb.] 109 N. W. 498.

Record: Two appeals to superior court from two separate judgments of register of wills, one revoking letters of administration and removing administrator and the other granting letters of administration c. t. a. to another person, will not be dismissed for failure to file separate transcripts. Boyd v. Cloud [Del.] 62 A. 294. Appeals to superior court from orders of register of wills will not be dismissed because of his failure to certify the record, but papers will be remanded for required certificates. Id. While there is no such thing, technically, as a judgment roll in probate proceedings, the successive determinations in the course of them, whenever the statute directly or by implication declares them final, must be regarded as final judgments for purposes of appeal, and the portions of the record on which they are based must be regarded as the record for the particular determination, it being unnecessary that they be authenticated by bills of exceptions. In re Dougherty's Estate [Mont.] 86 P. 38. Record, on appeal from order settling accounts, consisting of the account, the written objections thereto, and the findings and order, certified by the clerk, with a certified copy of the notice of appeal, held sufficient. Id. On appeal to the prerogative court from an order of orphans' court denying an application to appoint the person named in the will executor and appointing another, held improper to annex to the record the testimony of the witnesses examined on the question of the right to letters, and the argument and discussion of counsel prior to the examination of the witnesses. In re Acker's Will [N. J. Eq.] 62 A. 556.

Bills of exceptions, settled case, etc.: Probate courts are courts of record (Gen. St. 1901, § 1974), and hence, under Laws 1901, p. 502, c. 275, § 1, Gen. St. 1901, § 4753, they, and the judges thereof at chambers, have authority to settle and sign bills of exceptions. Humbarger v. Humbarger, 72 Kan. 412, 83 P. 1095. Where in proceedings for removal of executor no evidence was taken but decree of removal was made on pleadings and admissions of counsel, fact that such admissions did not appear as part of case made up and settled by surrogate under Code Civ. Proc. § 2576, held not to preclude a review of the facts on appeal where record declared that it contained all the evidence and facts as found did not justify removal. In re Waterman's Estate, 98 N. Y. S. 583. Order revoking letters will not be reviewed where there is no statement of facts or bill of exceptions. In re Farnham's Estate, 41 Wash. 570, 84 P. 602.

Abandonment: Appeal to superior court from order of probate court held to have been abandoned by delay. Love v. Love, 139 N. C. 363, 51 S. E. 1024.

Dismissal of appeal: Where an inspection of the record fails to show any failure to comply with the provisions of Sess. L. 1891, p. 109, § 3, giving right of appeal in probate cases to district court from county court, dismissal of appeal as improper will be reversed. Litigation over property al-

sion of statement and pleading are not required in probate appeals to the same extent as in actions at law,[95] the appeal must show what order, sentence, decree, or denial of the judge of probate is appealed from,[96] and, taking all the allegations in the appeal and the reasons therefor to be true, it must appear that there was error.[97] Appellant cannot sustain an appeal from a named decree by showing that one not named was erroneous,[98] nor can he amend so as to convert his appeal into one from another and different decree.[99]

All persons whose rights may be affected by a reversal must be made parties.[1] A joint appeal cannot be taken by parties whose rights are separate and distinct.[2]

Where the appellate court acts as a court of review, merely the usual presumptions in favor of the proceedings below will be indulged in,[3] and findings of fact will not be reversed unless clearly erroneous.[4] So too, discretionary rulings will not be disturbed unless an abuse of discretion clearly appears.[5]

leged to belong to estate and improperly withheld. Kirkwood v. Palmer [Colo.] 85 P. 175.

95. Appeal from decree of judge of probate to the supreme judicial court sitting as the supreme court of probate. In re Gurdy [Me.] 63 A. 322.

96. In re Gurdy [Me.] 63 A. 322.

97. In re Gurdy [Me.] 63 A. 322. Appeal from order refusing to grant letters testamentary will be dismissed where there is no statement either in the appeal or the reasons that will has been admitted to probate, since without it no error appears. Id.

98. Where he expressly states that he appeals from order refusing to grant letters testamentary, he cannot have appeal treated as one refusing to admit will to probate, though some of the reasons of appeal assigned might be sufficient to sustain an appeal from the latter. In re Gurdy [Me.] 63 A. 322.

99. Cannot change appeal from order refusing to grant letters into one from order refusing to admit will to probate, since to do so would introduce new cause of action. In re Gurdy [Me.] 63 A. 322.

1. Where a minor, after attaining majority, appeals from a judgment homologating a provisional account filed by the natural tutrix, administering the succession of the deceased father and husband, the creditors, whose claims are recognized on such account and have been paid, and who have therefore an interest in maintaining the judgment of homologation, must be made parties to the appeal; otherwise, and if there is no prayer that they be cited, the appeal will be dismissed. Succession of Guillebert [La.] 41 So. 653, 41 So. 654. Provisional account filed by the natural tutrix, administering the succession of the deceased father and husband, held not an account of tutorship, but merely an administrator's account. Id.

2. Creditor and distributee held not entitled to maintain a joint appeal from a decree of orphans' court allowing and refusing to allow certain claims against the estate where their alleged rights are separate and distinct. Bitter's Estate, 30 Pa. Super. Ct. 84.

3. In absence of any showing to the contrary it will be presumed, on second appeal from order granting administrator leave to sell realty, that lower court on former trial determined in limine that petitioner was duly appointed administrator. Hollingsworth v. McAndrew [Ark.] 95 S. W. 485. On appeal from superior court error will not be presumed, but every presumption will be indulged in support of the judgment or order and the action of the lower court will be affirmed in the absence of any showing of error. In re Bouyssou's Estate [Cal. App.] 84 P. 460. On appeal from order vacating order appointing administrator, where record does not show that clerk had set a day for hearing of petition for appointment or whether there was any proof that notice was given by posting as required by Code Civ. Proc. § 1373, it will be assumed, for the purpose of sustaining the order, that there was no notice and that court properly vacated the order because it lacked jurisdiction to make it. Id. In absence of the evidence, appellate court will presume that items of expense claimed to have been incurred in the probate of the will were properly disallowed by the superior court. In re Scott's Estate, 1 Cal. App. 740, 83 P. 35. Where notice of proceedings for sale was properly posted as required by Rev. St. 1899, § 148, and it did not appear that any of the heirs were residents of the county so as to be entitled to personal service under such section, held that it would be presumed on appeal from an order confirming the sale that they were not. Desloge v. Tucker, 196 Mo. 587, 94 S. W. 283. On appeal to the prerogative court from an order of the orphans' court denying an application to appoint the person named in the will executor and appointing another, it will be presumed that the paper admitted to probate was the last will of the deceased, executed and published in due form, though there is no evidence as to how a caveat thereto was disposed of where no appeal was taken from the order admitting the will. In re Acker's Will [N. J. Eq.] 62 A. 556.

4. Finding of orphans' court that claim for nursing was not sustained by the evidence. Bitler's Estate, 30 Pa. Super. Ct. 84. Finding of auditor that decedent expressly contracted to pay son board, approved by orphans' court. Shadle's Estate, 30 Pa. Super. Ct. 151. Where claim is disallowed

All the findings and matters decided which enter into and form a part of the order appealed from go up with it,[6] but not separate orders not appealed from.[7]

A remand for the purpose of enabling the lower court to reconsider a particular issue does not authorize a review of the whole case.[8]

In some states, on appeal to an intermediate court, the matter is tried de novo.[9] Several petitions for the appointment of an administrator are properly heard together on such an appeal.[10] The right to a jury trial is regulated by statute.[11]

As a general rule only matters passed upon below will be considered on appeal.[12] In Arkansas, where an appeal is taken to the circuit court from a judg-

by auditing judge whose action is affirmed by the orphans' court. Eslen's Estate, 30 Pa. Super. Ct. 475. Held that finding of auditor, approved by lower court, that under agreement between executors, legatees and widow, executors were to pay certain taxes and pay widow's funeral expenses, would not be disturbed on appeal at instance of judgment creditor of legatee whose judgment was expressly made subject to such agreement, particularly where evidence on which finding was based was not in the record. Hess's Estate, 27 Pa. Super. Ct. 498.

5. Letters of administration should ordinarily be granted to the next of kin or the widow where timely application is made, but where next of kin are unable to agree on an administrator, the appointment of a person selected by some of those entitled to the appointment will not be disturbed on appeal unless it appears that court has abused its discretion. In re Scott's Estate [Neb.] 106 N. W. 1003; Id., 107 N. W. 1004. Where supreme court holds that letters of appellant were properly revoked, it will not review discretion of trial court in appointing his successor. In re Farnham's Estate, 41 Wash. 570, 84 P. 602.

6. On appeal to circuit court from order allowing award of appraisers to widow as her award, held that appraisers' award was before court for consideration, though not formally introduced in evidence, and hence judgment of circuit court approving award was not without evidence to sustain it. Pavlicek v. Roessler [Ill.] 78 N. E. 11; Id., 121 Ill. App. 219. Appeal from disallowance of item for money paid executor for services in carrying on testator's business held to bring up question whether executors should be charged with interest thereon. Peterman v. U. S. Rubber Co. [Ill.] 77 N. E. 1108, afg. 119 Ill. App. 610. An appeal to the district court from an order of the probate court vacating and setting aside an administrator's account ordinarily presents for review only the propriety of the order appealed from and not the merits of the account. In re Bradley's Estate [Minn.] 106 N. W. 338. But where, on such appeal, the parties voluntarily litigate the merits of the account, and court hears, adjusts, and determines the same, the parties are bound by the result to same extent as though the matters were properly before the court. Id.

7. Where aggregate item claimed as a credit by executors in their account was made up of two separate and distinct accounts for goods sold by executors to separate firms, and probate court separated such item into two and credited executors with one and disallowed the other, an appeal from the order as to the one allowed held not to bring up the order as to the other for review. Peterman v. U. S. Rubber Co. [Ill.] 77 N. E. 1108, rvg. 119 Ill. App. 610.

8. Order reversing decree of orphans' court disallowing claim and remanding case with leave to parties to offer evidence on a particular issue and to the court to reconsider case on that point. In re Brown's Estate, 213 Pa. 604, 63 A. 133.

9. On appeal to the district court from an order of the probate court. In re Robbins' Estate [Minn.] 109 N. W. 229. Under Rev. Code 1903, § 359, appeals to circuit court on questions of fact or questions of law and fact are tried de novo, and the hearing is to be conducted in same manner as though case and proceedings had originated in that court. In re McClellan's Estate [S. D.] 107 N. W. 681. No merit in objection that judgment of circuit court on appeal approved and affirmed order of probate court as though it was a court of review, where that part of judgment was merely prefatory and was followed by judgment containing all the formal requisites. Pavlicek v. Roessler [Ill.] 78 N. E. 11; Id., 121 Ill. App. 219.

10. Rev. Code 1903, §§ 89, 359. On appeal to circuit court. In re McClellan's Estate [S. D.] 107 N. W. 681. Claimants held not entitled to separate trial where they consented to consolidation of several petitions, and other petitioners were entitled to contest their claim. Id. Petitioners for appointment of administrator held not entitled to contend that separate appeal of other petitioners should be dismissed where they consented to have all the petitions heard together and objected to allowance of separate trial to other petitioners. Id.

11. On appeal to the district court from an order appointing an administrator, the issue presented is one for the court and should not be submitted to a jury, the matter being to a certain extent discretionary. In re Scott's Estate [Neb.] 106 N. W. 1003. Appeal from judgment on petition for the appointment of an administrator held not "a case at law" within meaning of Const. art. 6, § 6, so that parties were not entitled to jury trial on question of relationship to deceased. In re McClellan's Estate [S. D.] 107 N. W. 681.

12. Fact that in final account certain items are improperly credited to the administrator can properly come up on exceptions to settlement before county court, and hence circuit court had no right to consider them on appeal from order refusing to re-

ment of the probate court confirming the auditor's report on an accounting, a further appeal to the supreme court will not be treated as one in chancery.[13] The right of an intermediate court to review orders of the probate court by writ of certiorari depends on the statutes of the various states.[14] An appeal in cases where an executor or administrator has been substituted for a deceased party is governed by the statutory provisions governing appeals in general, and not by the special provisions governing appeals in proceedings for the settlement of decedents' estates.[15]

The authority of the representative is not suspended by an appeal from the order granting him letters[16] or refusing to vacate letters already granted.[17] A sale of lands pending an appeal from the order allowing it is not void where the appeal is subsequently abandoned.[18]

§ 17. *Rights and liabilities between beneficiaries of estate. A. In general.*[19] —Contracts between the parties interested in the estate in regard to its distribution are generally held to be valid and enforceable[20] if supported by a sufficient con-

move him where account had not been finally passed upon by county court. Gill v. Riley [Ky.] 90 S. W. 2. On appeal from order allowing administrator's final account, district court cannot determine the right of the administrator to compensation for services rendered or disbursements made after the filing of his account in the probate court. In re Robbins' Estate [Minn.] 109 N. W. 229. Application must first be made to the probate court, and after it has passed upon the matter the district court may pass upon it on appeal. Id. Objection to decree of distribution not made in common pleas court cannot be considered on appeal to supreme court. Brown v. Brown [S. C.] 54 S. E. 838.

13. Should not be treated as a chancery appeal and tried de novo, but only question was whether evidence was legally sufficient to sustain the findings of the circuit court, notwithstanding that Kirby's Dig. § 144 provides that auditor to whom account is referred shall be governed by rules laid down for government of masters in chancery in auditing accounts. Matthews v. Taylor Co. [Ark.] 96 S. W. 134.

14. See, also, Certiorari, 7 C. L. 606.

In Illinois the circuit court has no jurisdiction to issue the statutory writ of certiorari for the purpose of bringing up for review an order or judgment of the court of probate. Schaeffer v. Burnett, 120 Ill. App. 79.

In Texas the order of the county court settling the account of a representative may be reviewed by the district court by writ of certiorari at any time within two years on petition of anyone interested. Petition for review by heirs who alleged that they had received no part of fund received by administrator and no notice of proceedings held not subject to general demurrer. Friend v. Boren [Tex. Civ. App.] 16 Tex. Ct. Rep. 54, 95 S. W. 711. The right is not barred by failure to appeal from the order, since remedy under Rev. St. 1895, art. 322, is as distinctly statutory, and hence as legal, as that by appeal, and is not made dependent upon a showing of cause why latter remedy was not pursued (Id.), nor by reason of the fact that the estate has been finally distributed and the representative discharged (Id.). The trial is de novo, and it is the duty of the court to restate the account in accordance with the law and the evidence and to ascertain the heirs and make proper disposition of the estate not lawfully paid out by the representative. Under Rev. St. 1895, arts. 2198, 2202. Id.

15. Appeal in action against executor in his individual capacity on his contract to pay certain assessments continued after his death against his representative under Burns' Ann. St. 1901, § 272, is governed by Id. §§ 644, 645, and not by §§ 2609, 2610. Hayes v. Shirk [Ind.] 78 N. E. 653.

16. Does not suspend his power to sue in foreign state on complying with its laws. Beaumont v. Beaumont, 144 F. 288.

17. An appeal from an order refusing to vacate letters does not stay the proceedings or debar the person to whom they were issued from exercising the powers and performing the duties of administrator. Dungan v. Superior Ct. [Cal.] 84 P. 767.

18. Sale to pay debts. Love v. Love, 139 N. C. 363, 51 S. E. 1024.

19. See 5 C. L. 1279.

20. Since title to realty vests in heirs immediately on the death of the decedent, they may divide it in kind if there are no debts, and none of them are minors or laboring under disabilities. Park v. Mullins, 124 Ga. 1072, 53 S. E. 568. Probate courts may respect and carry out agreements of settlement among the parties interested in the estate by which benefits under the will are renounced. In re Stone's Estate [Iowa] 109 N. W. 455. Such an agreement held valid though it operated to deprive the state of a collateral inheritance tax otherwise assessable on a legacy to one of the parties thereto. Id. Parties of full age may arrange, settle, and distribute an estate among themselves without any formal decree of the court, and such settlement is binding in the absence of fraud or undue advantage. Blair v. Hampton, 98 N. Y. S. 109. Settlement between heirs whereby all the rest of them conveyed all their interest in decedent's property to one of their number subsequently appointed administrator in consideration of certain payments made by him, which was made fairly and in good faith and was acceptable to all parties, held a bar to an action by one of the heirs for an accounting.

sideration[21] and free from fraud[22] or coercion.[23] The usual rules for the construction of contracts apply.[24] Agreements on behalf of minor heirs must be made through guardians ad litem.[25] Where pending an appeal from the probate of a will a bond is executed for the payment of a legacy on the establishment of the will, the liability of the obligors becomes absolute upon the affirmance of the judgment of the probate court,[26] and the extent of the liability is the amount of the

Monroe v. Mather-Lovelace, 100 N. Y. S. 27. Agreement between executors, legatees, and widow who refused to take under will, giving widow the use of certain realty and income of personalty with such part of personalty as might be necessary held valid. Hess's Estate, 27 Pa. Super. Ct. 498. Children of legatee held not estopped to have default opened and decree of distribution modified, in so far as it held that legacy had lapsed and become a part of the final residuary estate, by receipts by which they in terms ratified the proceedings already had, such a form of receipt having been given to permit distribution before lapse of time for appeal, and final residuary estate not having been actually distributed when motion was made. In re Trust & Deposit Co., 110 App. Div. 528, 97 N. Y. S. 405. Release and satisfaction acknowledging receipt in full from executor and consenting to entry of decree judicially settling his accounts without notice held bar to suit by heir for an accounting. Monroe v. Mather-Lovelace, 100 N. Y. S. 27.

21. Contract, being under seal, imported a consideration. Fletcher v. Fletcher, 191 Mass. 211, 77 N. E. 758.

22. Petition held to state a cause of action for relief against an order of the probate court allowing the administrator's final account, ordering distribution, and discharging the administrator, on ground that agreement on which it was based was procured through fraud. Weeke v. Wortmann [Neb.] 109 N. W. 503.

23. Evidence held to support finding that petitioner did not sign agreement under coercion. Ensign v. Barker, 191 Mass. 323, 77 N. E. 719.

24. See, also, Contracts, 7 C. L. 761. Compromise agreement construed and held that court properly credited balance found to be in hands of administratrix on amount to which she was entitled thereunder though she had not yet delivered certain deeds to be made by her. Hartzell v. Hartzell [Ind. App.] 76 N. E. 439. Agreement between petitioner and other heirs and the executors and trustees under a will for the division of the residue of the estate, which was carried out and embodied in the final account allowed by the probate court, no appeal being taken from the decree of allowance, held to have been intended as a full settlement of the trust account, and petitioner was not entitled to have probate decrees opened and account opened and settled. Ensign v. Barker, 191 Mass. 323, 77 N. E. 719. Settlement must be regarded as a full and final settlement of all matters appearing upon the face of the accounts, and also of all matters which the petitioner, in the exercise of reasonable diligence, could have known. Id. Agreement between widow and adult heirs and third person to be appointed guardian of minor heir held to include an assumption by the widow, as between herself and the maker, of the payment of certain notes executed by one of the adult heirs and indorsed by decedent, it not being the intention to impose any liability on the third person, who was joined merely as an attempt to bind him in his official capacity when appointed guardian. Fletcher v. Fletcher, 191 Mass. 211, 77 N. E. 758. Contract between heirs and third person that latter should purchase lands of estate and, after selling them and discharging incumbrances, should divide surplus in specified manner, held not to give a particular heir one-eleventh of the land and one-fifth of the surplus, but one-eleventh was to be taken from surplus. Howard v. Brown, 197 Mo. 52, 95 S. W. 195. Evidence held not to show agreement by children that entire personalty should be converted for benefit of mother, who was also administratrix, and certain of the children, even though there was an agreement that she should have the profits of testator's business which was conducted by son, so that she was properly chargeable with amount of personalty which came into her hands, subject to credits for money properly paid out, uncollectible assets, and legitimate losses on sales. In re Davies' Estate, 50 Misc. 94, 100 N. Y. S. 349. Conceding that independent executors had power to sell lands devised and upon final settlement to partition among the devisees property left after payment of debts, held that agreement between executors and one of the devisees, to which the other devisees were not parties and did not consent, whereby he was to take certain property as his share of the estate under the will did not amount to a legal partition of the lands of the estate, where it did not appear that, when agreement was made, the will had been probated or any of the debts had been paid, and devisee's receipts recited that the property had been received to apply on his share of the estate. Agreement merely required devisee to account, on final distribution, for property so received. Johnson v. Short [Tex. Civ. App.] 16 Tex. Ct. Rep. 204, 94 S. W. 1082.

25. In case there are minor heirs they can only make such an agreement through guardians ad litem who must show to the court that such a course would be for their best interests, and hence a defendant does not sustain the burden of showing such an agreement by proof that there are no debts where it appears that some of the heirs are minors incapable of agreeing. Park v. Mullins, 124 Ga. 1072, 53 S. E. 568.

26. Hummel v. Del Greco [Tex. Civ. App.] 14 Tex. Ct. Rep. 246, 90 S. W. 339. Bond executed pending appeal from order admitting will conditioned on payment of legacy on establishment of will, and which was

legacy regardless of the amount of indebtedness against the estate.[27] The attorney for the representative has no right as such to waive or compromise his rights or to make a settlement for him with the heirs at law.[28]

The abatement of legacies for the payment of debts and other charges is treated elsewhere.[29] Losses due to the insolvency of the representative after partial distribution should be borne by the whole estate.[30]

(§ 17) *B. Advancements.*[31]—In the absence of a statute to the contrary, the law of advancements applies only when the ancestor dies wholly intestate.[32] The question of whether or not an advancement was made is ordinarily one of intention,[33] though in some states it is held that where the ancestor dies intestate the question is regulated by the statute and the declaration of intention by the ancestor cannot control the fact.[34] Gifts of money[35] and conveyances of land in consideration of natural love and affection, or for a nominal consideration, when made by a parent to a child, are generally presumed to be advancements in the absence of circumstances showing a contrary intention,[36] but conveyances supported by a substantial consideration are presumed to be sales.[37] A transaction whereby the purchase money for land is paid by a husband or parent and the legal title is taken in the name of the wife or child is generally presumed to be an advancement,[38] but this rule does not apply where the child takes title in himself without

executed for purpose of preventing, and did prevent, the appointment of an administrator with the will annexed, held a valid common-law obligation and hence enforceable according to its terms, even if it was not a statutory bond given to a creditor to defeat administration under Rev. St. 1895, art. 1896, and having been given by obligors voluntarily and at their own request, they could not contend it was contrary to public policy. Id.

27. Obligation to pay is absolute and not conditioned on amount of debts. Hummel v. Del Greco [Tex. Civ. App.] 14 Tex. Ct. Rep. 246, 90 S. W. 339. In any event plea of indebtedness was bad for failure to show that the assets of the estate were insufficient to pay the debts and the legacy. Id.

28. Attorney for executrix. Succession of Landry, 116 La. 970, 41 So. 490.

29. See Wills, 6 C. L. 1880.

30. Where will showed an intention to equalize legatees, and fund in executor's hands was lost by reason of his becoming insolvent after he had made payments to some of them, held that such loss should be borne by the whole estate, and that out of amount subsequently realized legatees who had received nothing must first be paid an amount equal to that received by those to whom payments had previously been made before the latter received anything further. Barret v. Gwyn [Ky.] 88 S. W. 1096.

31. See 5 C. L. 1281.

32. Under Iowa statute providing for bringing advancements into hotchpot when given by an "intestate" to his heir, no property so given can be taken into consideration in making distribution where the ancestor leaves a will, though he fails to dispose of all his property thereby. Gilmore v. Jenkins, 129 Iowa, 686, 106 N. W. 193.

33. Appeal of Melony, 78 Conn. 334, 62 A. 151; Baum v. Palmer, 165 Ind. 513, 76 N. E. 108. Money or property must have been intended as such and not as a mere gift. Id. Finding of auditor that advancement and not a gift or loan was intended, when approved by the court, will not be disturbed unless plainly erroneous. In re Reinoehl's Estate, 212 Pa. 359, 61 A. 943.

34. In case of intestacy regulated by St. 1903, § 1407. Sullivan v. Sullivan [Ky.] 92 S. W. 966.

35. Gift of more than child's share in estate held an advancement. Morrison v. Morrison [Tex. Civ. App.] 96 S. W. 100.

36. Conveyance held an advancement, in absence of evidence to rebut presumption, so that title passed to son. Seed v. Jennings [Or.] 83 P. 872. Intestate died seised of a homestead worth $15,000, leaving seven children as his heirs at law having previously conveyed to complainant who was one of them property valued at $10,000 by a bargain and sale deed for a nominal consideration. Complainant disclaimed that the transfer was made in consideration of services, and there was evidence that intestate told the attorney who was present when the deed was executed that, as complainant had taken care of him, he wanted to do something for her right away in excess of what he intended to do for the rest of the family. Held, that such conveyance to complainant constituted an advancement. Schlicher v. Keeler [N. J. Eq.] 62 A. 4.

37. Deed from parent to child in consideration of $25, the receipt of which was acknowledged, and further consideration that grantee should pay grantor half the crops raised on the land for ten years, held presumably a sale and not an advancement, which presumption was not rebutted. Ex parte Griffin [N. C.] 54 S. E. 1007.

38. Where deed was made to wife by direction of husband, and he voluntarily paid a part of the purchase price, it will be presumed, in the absence of evidence to the contrary, that the transaction was an advancement or gift to the wife. Nelson v. Nelson [Ky.] 96 S. W. 794.

the knowledge of the parent,[39] or where the property is afterwards transferred to the parent.[40] It has been held in Texas that heirs will not be required on final settlement to account for realty received from the ancestor during his lifetime in the absence of evidence that the transfers were intended as advancements.[41] Under the Kentucky statute the maintaining or educating or the giving of money to a child without any view to a portion or settlement in life is not an advancement.[42]

Declarations of the donor prior to or contemporaneous with the advancements are competent on the question of intention,[43] but subsequent declarations are inadmissible unless a part of the res gestae, or against the interest of the donor.[44] Book accounts kept by the parent are competent to show the amount of advancements, the purpose for which they were made, and that they were made with a view to a portion or settlement in life.[45] Parol evidence is admissible to rebut the presumption that a deed of gift was intended as an advancement.[46]

Debts may be converted into advancements by the mutual agreement of the parties.[47] Where an advancement is completed by the receipt of the money, the subsequent execution of a note therefor by the person to whom it is made does not operate to change it into a debt, in the absence of a new agreement to that effect supported by a new consideration.[48] The fact that the maker of the note agrees to, and does, pay interest thereon as long as required, does not necessarily show the existence of the relation of debtor and creditor.[49] A note given to evidence an advancement is without consideration, and can serve no other purpose.[50]

As a general rule advancements do not bear interest.[51]

Hotchpot.[52]—Upon the principle that equality is equity, persons receiving advancements must bring them into hotchpot before they will be allowed to share in the distribution of the estate.[53] There is a conflict of authority as to whether

39. Moore v. Scruggs [Iowa] 109 N. W. 205.

40. Presumption entirely destroyed by such transfer. Moore v. Scruggs [Iowa] 109 N. W. 205.

41. Smart v. Panther [Tex. Civ. App.] 15 Tex. Ct. Rep. 448, 95 S. W. 679.

42. Hill's Guardian v. Hill [Ky.] 92 S. W. 924. Where father had furnished sons with ordinary education suited to their station and opportunities in life, held that further sums advanced to them for the purpose of enabling them to secure professional educations should be regarded as given with a view to a portion or settlement in life and charged as advancements under St. 1903, § 1407, particularly where parent manifested that such was his intention by keeping an account in which they were charged therewith. Id.

43. Hill's Guardian v. Hill [Ky.] 92 S. W. 924.

44. Declarations of parent indicating a purpose to charge sons with advancements made to them for purpose of obtaining college and professional educations made during time money was being expended and thereafter, held inadmissible. Hill's Guardian v. Hill [Ky.] 92 S. W. 924.

45. Hill's Guardian v. Hill [Ky.] 92 S. W. 924.

46. Ex parte Griffin [N. C.] 54 S. E. 1007.

47. In order to effect such a change there must be a meeting of the minds between the father and son such as to create a new contractual status. Appeal of Melony, 78 Conn. 334, 62 A. 151. Agreement held to change debt, if it was such, into an advancement. Baum v. Palmer, 165 Ind. 513, 76 N. E. 108. Evidence held to show that indebtedness of son to father was converted into an advancement by agreement. Hickey v. Davidson, 129 Iowa, 384, 105 N. W. 678.

48, 49, 50. Baum v. Palmer, 165 Ind. 513, 76 N. W. 108.

51. McCoy v. McCoy [Va.] 54 S. E. 995.

52. See 5 C. L. 1283.

53. Morrison v. Morrison [Tex. Civ. App.] 96 S. W. 100. In proceedings between heirs for the partition of a decedent's realty, the court may and should take into account advancements made by the decedent to some of the heirs, by requiring such advancements to be brought into hotchpot and adjusted so that all the shares will be equal. Barnett v. Thomas, 36 Ind. App. 441, 75 N. E. 868. The child receiving the advancement cannot be required to pay back any part of it to the estate, but if he has received an equal share with, or a greater share than the others, he can only be excluded from participation in the division or distribution of the estate. McCoy v. McCoy [Va.] 54 S. E. 995. Where lands given daughter as advancement equaled approximately her aliquot part of the intestate's realty held that she would either be allowed to retain the same as her full share of the realty and receive a conveyance thereof under order of court, she never having received one from her father, or, at her election, could bring land into hotchpot. Id.

this rule applies where those receiving the advancements have relinquished all further interest in the inheritance.[54] In Virginia the fact that a child has received an advancement of realty does not preclude him from sharing in the distribution of the personalty, the two being kept separate.[55] The personalty is the primary source from which advancements should be equalized,[56] and one who has acquired the rights of one of the heirs is entitled, in a partition suit between the heirs to which he is a party, to have advancements equalized out of personalty belonging to the estate and previously converted by the heirs to their own use without administration, so that his interest may come to him unburdened by them.[57] The value of advancements is generally to be reckoned as of the time when they are made.[58] Where an advancement of realty is brought into hotchpot the party receiving it is entitled to an allowance for the value of permanent improvements made by him.[59]

§ 18. *Rights and liabilities between beneficiaries and third persons.*[60]—An assignee of an heir or distributee takes whatever interest his assignor had[61] and nothing more.[62] Hence his interest may be reduced by showing that the assignor received advancements from the ancestor during the latter's lifetime.[63] Assignments may of course be abrogated by mutual consent[64] and the assignee may waive his rights thereunder.[65] An order directing the representative to pay a third person a certain sum out of the assignor's legacy operates as an assignment pro tanto, and when accepted by the representative binds him to pay the same out of the fund as it accrues.[66] In an action by a distributee on an account allotted to him

54. In Virginia the rule is not affected by such relinquishment. McCoy v. McCoy [Va.] 54 S. E. 995.

55. McCoy v. McCoy [Va.] 54 S. E. 995. Father gave son certain land as an advancement, but failed to convey it to him, and thereafter sold it to a third person, giving son a part of the purchase price. Held that where son, in a suit by the heirs for partition of the remainder of the father's realty and division of the personalty, agreed to accept balance of purchase price of such land in full of his interest in father's realty, decree should have debarred him from participation in the realty on receipt of such balance, but he should not be debarred from participation in the division of the personalty. Id. See 1 Am. & Eng. Enc. Law, 764, n. 5.

56. Burns' Ann. St. 1901, § 2563. Barnett v. Thomas, 36 Ind. App. 441, 75 N. E. 868.

57. Barnett v. Thomas, 36 Ind. App. 441, 75 N. E. 868.

58. Land brought into hotchpot should be charged to child receiving it at its value when turned over to him. McCoy v. McCoy [Va.] 54 S. E. 995. Father conveyed land to daughter by deed providing that it should not go into effect until his death. He subsequently sold underlying coal to a third person and turned over purchase price to her. Held that as land and money approximately equaled her share of the estate she could either retain same or bring it into hotchpot, in which latter case she should be charged with value of the land at the time it was turned over to her and with money as of date she received it. Id. Where father intended to give daughter certain realty as an advancement but before giving her a deed therefor sold it to a third person and turned the purchase price over to her, held that she should only be charged with the sum so received in the division of the intestate's realty. Id.

59. McCoy v. McCoy [Va.] 54 S. E. 995.

60. See 5 C. L. 1283.

61. Ritchey v. McKay, 36 Ind. App. 539, 75 N. E. 161, 1090.

62. Purchaser of heir's interest in realty. Barnett v. Thomas, 36 Ind. App. 441, 75 N. E. 868.

63. Barnett v. Thomas, 36 Ind. App. 441, 75 N. E. 868. In suit by grantees of certain heirs of a decedent to restrain a sale of a part of the land of the intestate under an execution on a judgment against another heir the burden is on plaintiff to show that by reason of an advancement made to the latter heir he is entitled to no interest in the intestate's estate. Hickey v. Davidson, 129 Iowa, 384, 105 N. W. 678.

64. Evidence held not to show abrogation. Indiana Match Co. v. Kirk, 118 Ill. App. 102.

65. The mere fact that assignee, while living with her husband, consented to waive, for the purpose of allowing a partial payment to him, the strict enforcement of her rights under her assignment, does not prevent her from asserting such rights against those with whom she entertained no relations and of whom she had no knowledge. Indiana Match Co. v. Kirk, 118 Ill. App. 102.

66. Administrator's acceptance of assignment, providing that he should retain a sufficient sum out of legatee's share to pay a note given by legatees to assignee, and agreement to comply therewith held not to bind him personally and absolutely to pay the note, but only to pay it in case sufficient funds for that purpose should be received by him in his official capacity. Citizens' Central Nat. Bank v. Toplitz, 98 N. Y.

on distribution, the defendant is entitled to recover in reconvention damages resulting to him from a breach of the contract on which the account is based.[67] A judgment creditor of a distributee is entitled to enforce his claim only against so much of the estate as belongs to such distributee or his successors in interest.[68]

In the absence of a statutory provision to the contrary, funds in the hands of a representative cannot be made the subject of garnishment proceedings before an order of distribution.[69] After an order of distribution the representative becomes personally liable to a distributee for his share of the estate, and hence may be summoned as a garnishee in his individual capacity in an action against such distributee.[70] Garnishment before an order of distribution is permitted in some states in certain cases,[71] and in such case the representative is bound to pay over the funds in accordance with a judgment against him as garnishee, and is personally liable in case he fails to do so.[72] The probate court has no jurisdiction to avoid the effect of the garnishment judgment, and the administrator, in such case, is not protected by its order directing payment to be made to the person originally entitled to the fund.[73] An executor is not subject to garnishment before the probate of the will and before letters have been issued to him.[74] In Illinois the assignment by an heir of his interest in the estate does not defeat a subsequent garnishment unless the assignment is filed in the office of the clerk of the county court in which the administration is pending.[75] The practice depends on the statutory provisions of the various states.[76] As in other cases a verdict or judgment against or in favor

S. 826. Even if action at law would lie against him under such circumstances on his making payment to legatees instead of assignee, payment would not constitute breach on his part where he still retained a sufficient sum to satisfy plaintiff's demand. Id.

67. In an action by the widow on an account for pasturage of cattle which had been allotted to her on distribution of the estate held that defendant was entitled to recover in reconvention damages resulting from decedent's failure to carry out his contract to furnish water and pasturage for the cattle, where plaintiff pleaded that the account sued on and all other accounts and notes belonging to the estate had been allotted to her on the partition, and it was proved that she received a large sum in cash in addition thereto, and there was no exception to defendant's pleading as failing to show plaintiff's liability. Hill v. Herndon [Tex. Civ. App.] 14 Tex. Ct. Rep. 19, 89 S. W. 813. Widow having alleged that partition had taken place and that she had received notes and accounts it was proper to show their value, and also that she received a large sum in cash in addition thereto, though defendant did not plead that she had received any property belonging to the estate where his pleading was not excepted to on that ground. Id.

68. In re Angle's Estate, 148 Cal. 102, 82 P. 668.

69. At the instance of a creditor of a creditor. Equitable Trust Co. v. Clark, 119 Ill. App. 341.

70. Rev. St. 1899, § 3435, construed. Kiernan v. Robertson, 116 Mo. App. 56, 92 S. W. 138. After time for allowance of claims has elapsed, and all debts and charges have been paid, and an order of distribution has been made and nothing remains to be done but to comply with such order, the representative becomes the personal debtor of each distributee for the amount of the share due him. Id. Failure to prove order of distribution by the best evidence held cured by garnishee's admission, while testifying as a witness, that the order had been made when he was served, and where his defense on the merits was based in part on its existence. Id.

71. Funds belonging to devisee or legatee are subject to garnishment. Geiger v. Gaige [Iowa] 105 N. W. 1007. A creditor is not a distributee within the meaning of R. S. c. 62, § 35, providing that administrators and executors may be garnished with respect to any money or other estate "belonging to any devisee or legatee under any will or belonging to any heir or distributee of any estate." Equitable Trust Co. v. Clark, 119 Ill. App. 341.

72. Geiger v. Gaige [Iowa] 105 N. W. 1007.

73. Court cannot, on application of administrator, order payment to devisee or legatee, when his right to participate has passed by judgment of a court of competent jurisdiction to a third person who is in no sense a party to the order of distribution. Geiger v. Gaige [Iowa] 105 N. W. 1007.

74. Subsequent appointment pending the garnishment proceedings does not relate back so as to validate the proceedings prematurely instituted. Wheeler v. Chicago Title & Trust Co., 217 Ill. 128, 75 N. E. 455, afg. 119 Ill. App. 508.

75. Particularly where will gives executor a power of sale. Staaland v. Thompson, 122 Ill. App. 109.

76. An attorney at law may make the necessary statements to obtain a garnishment against an executor or administrator

of the garnishee in an execution attachment is not conclusive against one claiming adversely to the original defendant, who was not a party to and took no part in the attachment proceeding.[77]

ESTATES TAIL, see latest topical index.

ESTOPPEL.

§ 1. In General (1489).
§ 2. Estoppel by Record (1489).
§ 3. Estoppel by Deed (1489).
§ 4. Estoppel In Pais (1492).
§ 5. Extent of Operation of Doctrine of Estoppel (1508).

Scope of title.—Many common applications of the doctrine of estoppel are so closely related to other subject-matters that it is deemed best to treat them elsewhere; thus, estoppel to claim that a corporation acted ultra vires or to aver want of authority in a corporate officer or agent,[78] to question the existence or scope of an agent's authority,[79] to deny partnership,[80] and the estoppel of a tenant to deny his landlord's title,[81] are elsewhere discussed.

§ 1. *In general. Kinds of estoppel.*[82]—Estoppels are usually divided into three classes, namely, estoppels by record, by deed, and by matter in pais.[83] Conflicting estoppels set the matter at large.[84]

§ 2. *Estoppel by record.*[85]—This doctrine is based upon the rule that public official and judicial records import absolute verity. Estoppel by judgment is given separate treatment in Current Law,[86] and so is the conclusiveness of public records in general, the same being based upon principles of evidence.[87]

§ 3. *Estoppel by deed.*[88]—The rule is well established that one who conveys by warranty deed or other instrument purporting to carry a particular estate,[89] as dis-

under Civ. Code 1895, § 4735. Morrison v. Hilburn [Ga.] 54 S. E. 938. Right of representative under such section to delay answer until the estate in his hands is sufficiently administered to enable him to answer the same must be asserted by a proper plea or motion, and it is not incumbent on the plaintiff to show the condition of the estate. Id.

77. Where legacy was attacked by judgment creditor of legatee and executors alleged in their answer that legacy had been assigned, but creditor did not bring in assignee, held that a judgment in his favor subject to a family settlement participated in by the legatee and limited as to execution until the estate was settled in orphans' court, was not res adjudicata as to the rights of the assignee. Act April 10, 1849, P. L. 619, construed. Hess's Estate, 27 Pa. Super. Ct. 498.

78. See Corporations, 7 C. L. 862.

79. See Agency, 7 C. L. 61.

80. See Partnership, 6 C. L. 911.

81. See Landlord and Tenant, 6 C. L. 345.

82. See 5 C. L. 1285.

83. See post §§ 2, 3, 4.

84. Tappan v. Huntington [Minn.] 106 N. W. 98. It may happen that a plaintiff being estopped to allege a state of facts which defendant is estopped to deny, the interest of justice will require that both should be liberated. Ackerman v. Larner, 116 La. 101. 40 So. 581. Appellants moved to dismiss respondent's petition for the probate of a will, but the motion was denied. Respondent thereafter contested the will and appellants appeared in support of it. Upon respondent's appeal to the district court from an order admitting the will appellants moved to dismiss on the ground that respondent had elected to take under the will and was estopped to contest it. Held appellants were estopped to raise the question for the first time in the district court. In re Pederson's Estate [Minn.] 106 N. W. 958.

85. See 5 C. L. 1285.

86. See Former Adjudication, 5 C. L. 1502.

87. See Evidence, 5 C. L. 1301.

88. See 5 C. L. 1285.

89. By the express provisions of Rev. Civ. Code § 947, where one purports to convey real estate in fee simple, any subsequent title acquired by him passes to the grantee or his successors. Bernardy v. Colonial & U. S. Mortg. Co. [S. D.] 105 N. W. 737. If a deed of bargain and sale or quitclaim shows upon its face that the parties intended to invest the grantee with a particular estate, the effect of the instrument will be as binding upon the grantor and those claiming under him as if a formal covenant to that effect had been inserted. Indenture under which defendants claimed title held a conveyance in presenti and grantors held estopped to assert title under subsequent conveyance against their prior grantee. Bradley Estate Co. v. Bradley [Minn.] 106 N. W. 110. A deed being sufficient in form to convey the entire interest in land, an interest

tinguished from a deed of quitclaim pure and simple,[90] is estopped to assert title in himself thereafter,[91] and that a title subsequently acquired by him inures to the benefit of his grantee;[92] but this inurement does not operate against the assignee of a subsequently acquired contract to purchase, the legal title never having vested in his assignor.[93] A covenant of warranty and one against incumbrances will estop the grantor from afterwards asserting or enforcing an existing incumbrance or lien upon the premises,[94] and a subsequent assignee of a mortgage held by such grantor is in no better position unless he shows himself entitled to the protection accorded to innocent purchasers;[95] but a conveyance by a subsequent grantee subject to such mortgage operates as an estoppel against the former estoppel setting the matter at large, so that the mortgage becomes enforceable in the hands of the original grantor or his assignee.[96] At law, where in a lease an interest passes, there is no estoppel on the lessor as to an after-acquired interest,[97] but equity does not inflexibly follow this rule.[98] A warranty deed does not estop one to say that he told the grantee of the fact that a lease was outstanding.[99] An heir claiming an independent title in himself is not estopped to assert it by the mere force of covenants of his ancestor.[1]

It is the general rule, subject to exceptions,[2] that an estoppel by deed does not arise against a grantee[3] in the absence of recitals or covenants on his part. But

afterwards acquired by the grantor passes by way of estoppel to the grantee. Buchanan v. Harrington [N. C.] 53 S. E. 478. A deed executed and delivered is conclusive as to the intention of the grantor to pass title. Mascarel v. Mascarel's Ex'rs [Cal. App.] 86 P. 617.

90. A quitclaim deed does not of itself operate as an estoppel against either the grantor or grantee as to the nature or extent of the title. Olmstead v. Tracy [Mich.] 13 Det. Leg. N. 452, 108 N. W. 649. Where a deed contains no covenant of title, a title subsequently acquired by the grantor does not pass by estoppel. Caldwell v. New York & H. R. Co., 97 N. Y. S. 588. A conveyance by one having no interest must be by warranty deed to affect his after-acquired title. Pence v. Long [Ind. App.] 77 N. E. 961.

91. Six children held the equitable fee to land under a will, subject to be divested by their death before that of their father and joined in a deed whereby the share of each was conveyed to him free from all contingencies of the others. One child subsequently deeded away his interest. Held one of the other children who joined in the partition deed was estopped to assert any interest in the one-sixth deeded away, though the child who conveyed died before the father. Clay v. Chenault [Ky.] 96 S. W. 1125. Deed purporting to convey title. Weeks v. Wilkins, 139 N. C. 215, 51 S. E. 909.

92. By warranty. New England Mortg. Sec. Co. v. Fry [Ala.] 42 So. 57; Chapman v. Sault Ste. Marie [Mich.] 109 N. W. 53. Where a party contracts to sell land in which he has no interest but which he subsequently acquires by contract of purchase, such fact cannot be taken advantage of by a subsequent assignee of the contract as against a prior assignee. McPheeters v. Ronning, 95 Minn. 164, 103 N. W. 889. This doctrine extends to the warranty implied from the use of the statutory words "grant, bargain and sell." Mortgage. New England Mortg. Sec. Co. v. Fry [Ala.] 42 So. 57.

93. Where grantor subsequently acquired a contract to purchase from the true owner. Davis v. Denham [Ala.] 40 So. 277.

94. Mortgage. Tappan v. Huntington [Minn.] 106 N. W. 98. Covenant of warranty. Mortgage lien. Brynjolfson v. Dagner [N. D.] 109 N. W. 320. Where at the time one contracted to sell premises by conveyance containing covenants against incumbrances he was the owner of an adjacent building, the vendee could not resist specific performance on the ground that the vendor had an easement in favor of the adjacent building, the latter being estopped to assert such easement. Empire Realty Corp. v. Sayre, 107 App. Div. 415, 95 N. Y. S. 371.

95. Brynjolfson v. Dagner [N. D.] 109 N. W. 320.

96. Conveyance subject to mortgages "duly recorded," etc. Tappan v. Huntington [Minn.] 106 N. W. 98. The mortgage having provided for foreclosure by advertisement, the character of the remedy is not changed from such foreclosure to a suit in equity. Id.

97. Globe Soap Co. v. Louisville & N. R. Co., 7 Ohio C. C. (N. S.) 218.

98. Where, as in the case at bar, the parties in addition to the usual lease covenants have contracted specially as to such after-acquired interest, their contract may be treated as a covenant for a further assurance, and the estoppel will be extended to bind such after-acquired interest, particularly as fairness and good conscience seem to require it. Globe Soap Co. v. Louisville & N. R. Co., 7 Ohio C. C. (N. S.) 218.

99. In suit by grantee against lessee to enjoin trespass. Ladnier v. Stewart [Miss.] 38 So. 748.

1. Zimmerman Mfg. Co. v. Wilson [Ala.] 40 So. 515.

2. In a suit to foreclose a lien on land a remote grantee claiming title could not question the title of grantors from whom his grantor derived title on the ground that the land had been previously conveyed to another. Malone's Committee v. Lebus [Ky.] 96 S. W. 519.

somewhat closely related to estoppel by deed is the doctrine that one who has taken a power of attorney[4] from, or possession under, another, is estopped to deny the title which he has thus recognized as superior.[5] In the latter case, however, the estoppel continues only while possession is retained,[6] and is grounded upon the fact that having admitted the sufficiency of the title for the purpose of having been let into possession, a party will not thereafter be heard to say that it was insufficient;[7] hence, one who is already in possession under an independent color of title is not estopped, by reason of purchasing an outstanding title, to afterwards deny its validity and claim under his previous title,[8] and the fact that prior to an action to quiet title, plaintiff takes a quitclaim deed from a former owner, does not work an estoppel against him where both parties claim under deeds of prior date.[9] A grantee of land subject to a mortgage is not estopped to set up usury unless he has received benefits from the amounts claimed to be usurious.[10] The rule that litigants cannot question the title of a common grantor does not apply unless the grants include the same land.[11]

Estoppel against contesting the validity of a street assessment will not be inferred in the case of a grantee who purchased subsequent to the levying of the assessment, unless the language of the deed fairly warrants the conclusion that the grantee reserved from the purchase money an amount sufficient to satisfy the lien.[12]

Since estoppels must be mutual, the doctrine of estoppel by deed does not extend to strangers.[13] It applies to married women in jurisdictions where they enjoy enlarged property rights,[14] and to infants who, on becoming of age, fail to disaffirm their voidable deeds.[15]

3. Johnson v. Thomason, 120 Ga. 531, 48 S. E. 137.

4. A junior grantee who accepts a power of attorney from a senior grantee is estopped to question the validity of the latter's title. Chapman v. Sault Ste. Marie [Mich.] 109 N. W. 53.

5. One who enters into possession of land under another and looks to him for title cannot dispute the title of his vendor. Haycraft v. Duvall [Ky.] 89 S. W. 543. A vendee of land is estopped to deny his vendor's title under which he entered and took possession. Purchaser of timber who entered and cut under bill of sale knowing that vendor relied on a tax title could not thereafter acquire original title and set it up against his vendor. Patreski v. Minzgohr [Mich.] 13 Det. Leg. N. 241, 108 N. W. 77. One taking possession of land under another is estopped to dispute the latter's title until possession is restored to him. Campbell v. Everhart, 139 N. C. 503, 52 S. E. 201. A tenant who enters into and retains possession of premises is estopped to assert the invalidity of the lease in an action to recover the rent provided thereby. His executors who entered under his rights, also bound. Steuber v. Huber, 107 App. Div. 599, 95 N. Y. S. 348.

6. After possession is restored a party may assert whatever rights he may have to the property. Campbell v. Everhart, 139 N. C. 503, 52 S. E. 201.

7. Fitch v. Gentry [Ky.] 92 S. W. 586.

8. Previous adverse holding under tax deed. Fitch v. Gentry [Ky.] 92 S. W. 586.

9. And defendant's conduct was not affected by the quitclaim deed. Hornet v. Dumbeck [Ind. App.] 78 N. E. 691.

10. Not estopped to assert usurious character of mortgage where he did not receive any part of the usury as part of the consideration and was not otherwise benefited. Cobe v. Summers [Mich.] 12 Det. Leg. N. 965, 106 N. W. 707.

11. In ejectment, where defendants claimed under a deed executed in 1843 and plaintiff claimed under a grant from the state in 1879, defendant was not estopped to deny plaintiff's title derived from the state by introducing a grant from the state in 1882 where there was no evidence that this grant included the land in controversy. Wall v. Wall [N. C.] 55 S. E. 283.

12. Waldschmidt v. Bowland, 4 Ohio N. P. (N. S.) 411.

13. Recital in a deed that a decree of foreclosure became absolute, not binding on grantee as against strangers. Capen's Adm'r v. Sheldon, 78 Vt. 39, 61 A. 864. A grantee cannot rely upon recitals in his deed that the grantor, who is in fact only a life tenant, is the sole heir and legatee of the former owner, and invoke such recitals against the remaindermen under the will of the former owner. Weigel v. Green, 218 Ill. 227, 75 N. E. 913. A recital in a deed conveying land appropriated to the use of the first settled minister in the town that the grantor was the first settled minister held not binding on a stranger to the deed. Capen's Adm'r v. Sheldon, 78 Vt. 39, 61 A. 864. The intention of a grantor and grantee as expressed in the recital in the covenant of warranty, "except maturing street assessments on Floral avenue which the grantee assumes and agrees to pay," is construed in this case to be that the grantor was to be relieved from any liability on account of said assess-

The doctrine of estoppel by deed can apply only after a delivery, but one may be estopped to deny that a delivery was made.[16]

§ 4. *Estoppel in pais.*[17]—Estoppel in pais is the preclusion of a party who by his declarations or misleading conduct has induced another to act in a particular manner, from thereafter denying the truth of his declarations or repudiating the effect of his conduct to the injury of the one who acted upon them.[18] The doctrine should be sparingly applied where it is sought to divest a true owner of his title to land.[19] Estoppels in pais are available at law in the Federal courts in defense of actions of ejectment, trespass, and conversion.[20]

Elements.[21]—It must appear that the party claimed to be estopped[22] has made

ment, and not that the contract should inure to the benefit of the municipality. Bell v. Norwood, 8 Ohio C. C. (N. S.) 435.

14. Where a husband conveyed land by warranty deed in which his wife joined in order to convey her right of dower, she was bound by the covenant of warranty and could not acquire title in proceedings under a mortgage which was a lien on the premises at the time the deed was made and set up such title against the grantee. George v. Brandon [Pa.] 64 A. 371.

15. Estopped to set up after acquired title against grantee. Deed of bargain and sale with clause of warranty. Weeks v. Wilkins, 139 N. C. 215, 51 S. E. 909.

16. Where a decedent executed a deed of land to defendant in consideration of defendant's caring for him during life, and deposited it with a third person but informed defendant that he could have possession of the deed at once if he wished, and defendant fully performed his part of the agreement, decedent and his heirs were thereby estopped to deny the delivery of the deed. Fifer v. Rachels [Ind. App.] 76 N. E. 186.

17. See 5 C. L. 1288.

18. Deering v. Schreyer, 110 App. Div. 200, 97 N. Y. S. 14. Where one by his words or conduct willfully causes another to believe in the existence of a certain state of things and induces him to act on that belief so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time. Larson v. Anderson [Neb.] 104 N. W. 925. Estoppel arises where one by his acts, representations, admissions or silence intentionally or negligently induces another to believe in the existence of certain facts, and such other rightfully relies and acts on such belief so that he would be prejudiced if the former is permitted to deny the existence of such facts. Dye v. Crary [N. M.] 85 P. 1038. The doctrine of estoppel in pais involves a question of legal ethics. It lies at the foundation of morals and applies whenever a party has made a representation by word or conduct which he cannot in equity and good conscience prove to be false. Williams v. Ketcham [Ind. App.] 77 N. E. 285. Estoppel in pais is based upon fraud, and the conduct relied upon to establish it must be such as amounts to fraud, actual or constructive. No estoppel by mere silence where there was no duty to speak. Beechley v. Beechley [Iowa] 108 N. W. 762.

19. Williams v. Ketcham [Ind. App.] 77 N. E. 285. "In the application of the doctrine of estoppel in pais with respect to the title to real property, it must appear first, that the party making the admission, by his declaration or conduct was apprised of the true state of his own title; second, that he made the admission with intent to deceive or with such culpable negligence as to amount to constructive fraud; third, that the other party was not only destitute of all knowledge of the true state of the title but of the means of acquiring such knowledge; and further, that he relied directly upon such admission and will be injured by allowing its truth to be disproved." Id. In order to establish an equitable estoppel against an owner of real property, the party attempting to raise it must show either an actual fraudulent representation or concealment, or such negligence as would amount to fraud in law, and that he was actually misled thereby to his injury. Mine claimant held not estopped to assert his interest. Dye v. Crary [N. M.] 85 P. 1038. An owner of land cannot be divested of his title by his mere oral disclaimer or admission of no title. Wade v. McDougle [W. Va.] 52 S. E. 1026.

20. Form no basis for prohibition of such actions at law. Campbell v. Golden Cycle Min. Co. [C. C. A.] 141 F. 610.

21. See 5 C. L. 1288.

22. Representations by a husband before the board of review, as to his domicile, cannot create an estoppel against the right of his wife to dower. Chase v. Angell [Mich.] 13 Det. Leg. N. 616, 108 N. W. 1105. In condemnation proceedings, the fact that the sheriff gave a railroad company a receipt in full for all damages did not estop the landowner from claiming damages for land not appraised where the landowner accepted the money from the sheriff only as payment of other awards. Mason v. Iowa Cent. R. Co. [Iowa] 109 N. W. 1. Where M. & Co. purchased a part of a tract of land for taxes on the whole tract but it was not shown that M. was the purchaser, M. was not estopped to claim the entire tract under previous conveyances, especially since the persons setting up the estoppel had not altered their positions on account of the sale. Martin v. Kitchen, 195 Mo. 477, 93 S. W. 780. That the son and agent of a taxpayer as attorney for the city failed to sue for the recovery of taxes could not estop the taxpayer to plead limitations in an action by the city, in the absence of fraud or collusion between the taxpayer and the attorney. City of Houston v. Stewart [Tex. Civ. App.] 13 Tex. Ct. Rep. 981, 90 S. W. 49. Plaintiff conveyed land which had been decreed to his grantors in

some misrepresentation[23] or wrongful concealment[24] of material existing facts[25]

partition proceedings. Later he attempted to adjust an error in the division between the land and land decreed to another. Held his purchaser or those claiming under him could not be estopped. Davis v. Ragland [Tex. Civ. App.] 15 Tex. Ct. Rep. 615, 93 S. W. 1099. Agreement between the tenant of land and the owner of an adjoining tract whereby the former paid the latter for the use of a passway over his land did not estop the landlord to assert his rights to the passway by adverse use. Schwer v. Martin [Ky.] 97 S. W. 12. The fact that the books of a nursery company whose business was purchased by appellant showed an account due against a bank could not estop the true owner of the money in the bank from recovering the amount remitted by the bank to appellant. DeMoss v. Thomas, 118 Ill. App. 467. Where complainant and defendant held certain theatre leases jointly, the fact that complainant's agent participated in a breach of trust by defendant by taking a renewal of the leases for his own benefit could not estop complainant from asserting her rights against defendant. McCourt v. Singers-Bigger [C. C. A.] 145 F. 103.

23. The treasurer of a railroad executed a trust mortgage on the road to secure certain bonds under circumstances charging him with knowledge that the mortgage included land which belonged to him. Held this was a representation to the purchasers of the bonds that he did not have title and he could not recover the land as against their successors in interest. Stubbs v. Franklin & M. R. Co. [Me.] 64 A. 625. The fact that the public records disclosed the true state of the title did not prevent the estoppel of plaintiff to deny an easement in the railroad. Id. Where in an action to recover on a debt defendants contended that by plaintiff's consent they had paid the amount claimed to a third person on plaintiff's account, but defendants admitted that at the time plaintiff authorized such payment he protested that there was a mistake in his account with the third person, held the jury were authorized to find that the evidence did not create an estoppel against the plaintiff. Putnam v. Grant [Me.] 63 A. 816. The true owner of personal property is not estopped to deny the paper title of another unless he has by some act or conduct induced the holder of such title to act to his prejudice. DeMoss v. Thomas, 118 Ill. App. 467. The owner of a stock certificate delivered it to the agent of a pledgee but clothed no one with indicia of title. Held the owner was not estopped to assert title as against a purchaser. Treadwell v. Clark, 144 App. Div. 493, 100 N. Y. S. 1. Owner of certificate of stock held not estopped to recover it from innocent holders, to whom the owner's messenger had wrongfully transferred it, where the owner had conferred no apparent title or authority to transfer the title on the messenger. Hall v. Wagner, 97 N. Y. S. 570. Where a deed by a husband to his wife was never delivered, the children were not estopped to assert title as against a subsequent grantee of the wife, there being no action or nonaction or misleading speech or silence on their part necessary to constitute an estoppel. Ligon v. Barton [Miss.] 40 So. 555. One by attaching property is not estopped to maintain that he was holding it at the time as pledgee of the debtor. Attachable interest is retained by pledgor. Ottumwa Nat. Bank v. Totten, 114 Mo. App. 97, 89 S. W. 65. Failure on the part of the purchaser of mining machinery to make objections while the work of installation was in progress did not estop him to reject the machinery after the work was completed where the contract stipulated for acceptance or rejection after completion of the plant. Ark.-Mo. Zinc Co. v. Patterson [Ark.] 96 S. W. 170. Where a bond executed by the owner of property was invalid and ineffectual to dissolve a mechanic's lien, the lien claimant was not estopped from asserting its invalidity as against a purchaser who did not show that the claimant before the purchase informed him that the lien was dissolved. Rockwell v. Kelly, 190 Mass. 439, 77 N. E. 490. Evidence held to show that defendant represented to plaintiff that by making a purchase from defendant and two other persons he would become the owner of the exclusive right to use a certain remedy within the state, so as to preclude defendant from setting up a right claimed to have been acquired from his brother. Murray v. Fales [Mich.] 12 Det. Leg. N. 881, 106 N. W. 282. Where a wife refused to join in her husband's deed and the husband then conveyed the land without her signature, she was not estopped after his death to assert dower in the absence of any connivance by her in any representation by which the purchaser was induced to believe that the grantor was unmarried. Hyatt v. O'Connell [Iowa] 107 N. W. 599.

24. That silence may constitute an estoppel it is essential that the party against whom an estoppel is invoked has stood by and seen the other party committing an act infringing upon his rights (No estoppel where mortgagor permitted a sale of the land to be made under a trust deed, free of incumbrances. Crisman v. Lanterman [Cal.] 87 P. 89), and his failure to speak must have induced the person committing the act to believe that he assents to its being committed (Id.). Where executor did not induce the release of a mortgage, he was not estopped to defend on the ground that a personal liability could not thereafter be enforced. Id. Lessor held not estopped to deny liability on notes made by the lessees in his name where payee had notice of the facts and was not misled. Skillern v. Arkansas Woolen Mills [Ark.] 91 S. W. 303. Silence does not estop unless there was a duty to speak. Before plaintiff's marriage her future husband deeded certain land to his son and after her marriage she and her husband gave another deed of the balance of the husband's land to another son, she having no knowledge of the prior conveyance. Held the failure of the first son on taking the acknowledgment of the second deed to disclose the existence of the conveyance to himself did not estop him after his father's

with knowledge thereof, actual or constructive,[26] and with the intention, real or imputed,[27] that it should be acted upon by the party asserting the estoppel,[28] and

death to rely on such conveyance. Beechley v. Beechley [Iowa] 108 N. W. 762. There must be not only a duty to speak but the silence must amount to a legal fraud in that thereby the other party, ignorant of the truth, was misled into doing that which he would not have done but for such silence. If both parties know the truth there can be no estoppel by silence. Wingert v. Snouffer [Iowa] 108 N. W. 1035. That owners of property abutting on a street improved under contract with the city knew during the progress of construction that the contractor did not comply with the contract but made no objections in response to a notice published pursuant to a resolution of the council, or in any other way, did not estop them from resisting payment to the contractors. Id. There must be not only the right but the duty to speak and the silent party must be conscious that thereby he works a fraud. One is not estopped by failure to answer a letter asking for extension of the time of payment of a note, he being under no duty to speak. Haines v. Barber, 113 App. Div. 696, 100 N. Y. S. 75. Letter held not necessarily to call for an answer. Des Allemands Lumber Co. v. Morgan City Timber Co. [La.] 41 So. 332. Plaintiff assisted the owner of a tract of land in locating a fence along a highway and worked the road once or twice. At the time, plaintiff had a contract for the purchase of a tract on the other side of the highway, but it was surrendered and he did not purchase until after such location and working. Held he was not estopped to insist that the fence was in the highway. Christenson v. Simmons [Or.] 82 P. 805. In an action to quiet title the fact that before plaintiff took his deed defendant knew that the deed to the former's grantor was on record but took no steps to have it annulled did not estop him to deny that such deed was ever delivered, plaintiff not being a bona fide purchaser. Gulf Coal & Coke Co. v. Alabama Coal & Coke Co. [Ala.] 40 So. 397. That a mortgagee had knowledge of and consented to the application for a loan by the mortgagor to a mortgage company did not estop her to assert her mortgage, there being no duty to affirmatively object and she doing nothing to induce the action of the company. New England Mortg. Sec. Co. v. Fry [Ala.] 42 So. 57. Insurance agent not estopped to show incorrectness of a statement of the balance due him and sent him by the company, where he notified the company when the statement was received that it was not correct and that he would not accept it as final. Watson v. Travelers' Ins. Co. [Wash.] 86 P. 659.

25. A party will not be estopped by an admission as to the law. Dye v. Crary [N. M.] 85 P. 1038. The representations must relate to some past or existing fact. A mere promise by a mortgagee to apply on the mortgage debt a claim assigned to him by the mortgagor could not be the basis of an estoppel against the mortgagee to apply it on another debt as against a subsequent mortgagee. Weidemann v. Springfield Breweries Co., 78 Conn. 660, 63 A. 162. That one claiming ownership of land on which another asserts a lien may have agreed to pay off his claims of indebtedness does not estop the claimant of the land to set up title. Remedy is on contract. Equitable Loan & Security Co. v. Lewman, 124 Ga. 190, 52 S. E. 599.

26. The misrepresentations or concealment must have been made with knowledge of the facts. That defendant did not inform plaintiff of the existence and ownership of an outstanding note against a mortgagor at the time when plaintiff negotiated for the purchase of a certificate of sale at foreclosure could not estop defendant from the right to redeem as a subsequent holder of the note where it was not shown that he had knowledge of these facts. Wyman v. Friedman, 120 Ill. App. 543. An essential ingredient of an estoppel in pais is knowledge of the facts upon which the estoppel is sought to be predicated. Defendant in action for commissions did not know that plaintiff had made a sale contrary to terms prescribed by him. Crosthwaite v. Lebus [Ala.] 41 So. 853. Where, on a purchase of land by her mother, a daughter took title in her own name without the mother's consent, the mother was not estopped to assert title as against a creditor of the daughter who extended credit to her, in the absence of the mother's knowledge of dealings between the daughter and the creditor. Moore v. Scruggs [Iowa] 109 N. W. 205. A daughter was not estopped to assert the fraudulent character of a transfer by her mother of land in which she was interested where it was made without her knowledge, though she subsequently lived with her mother on the premises taken in exchange where she was ignorant that they were incumbered and that a third person had made valuable improvements upon the land conveyed. Austin v. Jones [Ala.] 41 So. 408. One who fails to assert his interest in land when he knows another is mortgaging it is not estopped where at the time he is ignorant of his interest. Scottish-American Mortg. Co. v. Bunckley [Miss.] 41 So. 502. In a suit for partition the fact that a third person, not a party, whose land was included therein, assisted in the survey did not estop him or his heirs where he did not know that he owned the land included nor influence the surveyor or the commissioners. Herman v. Dunman [Tex. Civ. App.] 16 Tex. Ct. Rep. 372, 95 S. W. 80. The fact that one is ignorant of the true state of a title does not excuse him where by his own representations he misleads a purchaser. Stubbs v. Franklin & M. R. Co. [Me.] 64 A. 625. That an owner of land was ignorant of his interest in oil lands did not prevent his estoppel where he permitted certain lessees to enter and drill for oil and aided them in their operations, and he could not thereafter claim the oil. South Penn. Oil Co. v. Calf Creek Oil & Gas Co., 140 F. 507.

27. To constitute an estoppel the person sought to be estopped must do some act or make some admission with an intention of influencing the conduct of another, or that

that this party was excusably without knowledge[29] or the means of acquiring knowl-

he had reason to believe would influence his conduct, and which act or admission is inconsistent with the claim he proposes now to make, and the other party must have acted upon the strength of such admission or conduct. Madson v. Spokane Valley Land & Water Co., 40 Wash. 414, 82 P. 718. That the owners of land covered by a portion of a nonnavigable arm of a lake permitted defendant company to erect a dam near their land and construct a canal at great expense, and cultivated a portion of the land drained by the canal, did not estop them to deny defendant's right to maintain the dam. Id. But it is not necessary that there should be intentional moral wrong. There may be such negligence as is the equivalent of fraud. Where mortgage of a railroad included land belonging to plaintiff and he made no claim for more than 19 years. Stubbs v. Franklin & M. R. Co. [Me.] 64 A. 625. There need not necessarily be, at the time, an intention to mislead. If the acts were voluntary and calculated to mislead and actually did mislead, another acting in good faith, that is sufficient. Deering v. Schreyer, 110 App. Div. 200, 97 N. Y. S. 14. Where a landowner contracted to pay an attorney in consideration of his services one-half of the damages that might be awarded in condemnation proceedings and represented that a mortgage on the property had been paid which was believed and relied upon by the attorney, the owner was estopped to claim that the mortgage was unpaid and that the amount thereof should be deducted before division of the award. Id. Where a conditional vendor induced one who had taken a mortgage from the vendee to continue making advances to the vendee relying on the mortgage, he was thereafter estopped to claim adversely to the mortgagee regardless of intention in making his statements, if they were such as would cause a reasonably prudent man to act on them. Slayton & Co. v. Horsey [Tex. Civ. App.] 14 Tex. Ct. Rep. 732, 91 S. W. 799. Whether the mortgagee at the time the statements were made knew or believed that the vendor had an interest in the property was immaterial if the statements were such as to induce him to continue advancing supplies. Id.

28. To constitute an estoppel by conduct the representation relied on must have been made to the party setting up the estoppel, or it must have been of such a nature and made under such circumstances that the party making it must be taken to have contemplated that it would be communicated to and acted upon by the other party. Agreement by a mortgagee to apply a certain claim on the mortgage debt did not estop him as against a subsequent mortgagee from applying it on another debt according to a later agreement. Weidemann v. Springfield Breweries Co., 78 Conn. 660, 63 A. 162. The refusal of a garnishee to make further payments to defendant in an attachment suit on the ground that the debt had been attached could not avail the plaintiff, as an estoppel against the garnishee, to deny the validity of the notice, especially where the garnishee denied any indebtedness and relied on limitations. Clyne v. Easton, Eldridge & Co., 148 Cal. 287, 83 P. 36. That one claiming title to land upon which another asserts a lien may have agreed with a third person to pay off the claim of indebtedness cannot estop the land claimant from asserting title as against the lienholder. Equitable Loan & Security Co. v. Lewman, 124 Ga. 190, 52 S. E. 599. The representations must have been in some way communicated to the party charging the estoppel and relied upon by him. In a suit to have an absolute deed declared a mortgage, the fact that plaintiff after the conveyance, in qualifying himself as a surety in another action, understated the value of his property and the amount of his debts, and that in his bankruptcy schedules subsequently executed he made no mention of any property held in trust for his benefit, could not estop plaintiff as against the grantee. Alexander v. Grover, 190 Mass. 462, 77 N. E. 487.

29. A settlement and dismissal of an action against a county auditor for money illegally detained did not estop the county from maintaining a subsequent action to recover the money with which the auditor was wrongfully credited in the settlement where the auditor was in full possession of all the facts and there was no fraud or overpayment. Zuelly v. Casper [Ind. App.] 76 N. E. 646. Where plaintiffs after purchasing certain land petitioned a city for the vacation of certain streets and thereby recognized that the city claimed rights therein, but proceeded to erect permanent improvements in the streets without the petition being granted, they were not in a position to invoke equitable estoppel against the city to assert dominion over the streets. Unzelman v. Snohomish, 40 Wash. 588, 82 P. 911. Where the assignee of a note and mortgage had notice that the mortgagor had only a leasehold interest, or had notice of facts which should have put him upon inquiry, the assignor was not estopped to assert that the assignee had only such an interest where after the expiration of the leasehold estate she purchased the fee, there being no evidence that she assigned the mortgage with intent to purchase the fee or that she failed to notify the assignee of any existing right she had at the time of the assignment. Tucker v. Tucker, 72 S. C. 295, 51 S. E. 876. The right of a public lighting company to maintain its wires on municipal poles cannot be acquired by estoppel where the company claiming such right has been charged from the beginning with full knowledge that whatever rights it might acquire to the use of such poles must be through strict legal contract with the municipality. City of Columbus v. Columbus Public Service Co., 4 Ohio N. P. (N. S.) 329. Silence will not estop a party where the truth is known to both parties. Mere silence of a lot owner did not estop him from demanding removal of obstructions in a street where a purchaser of other lots who placed the obstructions therein had notice by deeds in his chain of title that he was encroaching.

edge of the facts,[30] and reasonably[31] relied and acted upon the representation or concealment[32] to his prejudice.[33] It is also essential that the party against whom the

Garvey v. Harbison-Walker Refractories Co., 213 Pa. 177, 62 A. 778.

30. A party setting up an estoppel by conduct must show that he exercised due diligence to know the truth, and that he was destitute not only of knowledge of the true state of things but also of any convenient and available means of acquiring such knowledge. Where plaintiff did not use due diligence to inquire whether a certain claim which a prior mortgagee had promised to apply on the mortgage debt had been so applied. Weidemann v. Springfield Breweries Co., 78 Conn. 660, 63 A. 162. There is no estoppel where all parties have an equal opportunity to determine the true facts. Dye v. Crary [N. M.] 85 P. 1038. Where the parties have equal means of knowledge, no estoppel can be predicated upon concealment or silence. Wyman v. Friedman, 120 Ill. App. 543. Failure to assert interest in lands mortgaged did not work estoppel where plaintiff's interest appeared of record. Scottish-American Mortg. Co. v. Bunckley [Miss.] 41 So. 502.

31. Where under a will a widow was entitled to only a life estate in certain land with remainder in fee to complainant, the fact that the widow released her dower, relying upon the failure of complainant for eight years to secure a construction of the will, could not estop complainant where he did nothing inconsistent with his claim to the fee. Thorn v. Scofield [Mich.] 13 Det. Leg. N. 37, 107 N. W. 100. Evidence insufficient to sustain finding that plaintiff had reasonable grounds for belief that a note on which he was liable would be renewed or extended. Haines v. Barber, 113 App. Div. 696, 100 N. Y. S. 75.

32. The doctrine of estoppel in pais does not apply unless the party to whom the representations were made relied upon them and shaped his conduct thereby. Members of a firm held not estopped to plead a defect of parties defendant in an action on a contract, though at the time the contract was made one of them stated to plaintiff that he and the other defendants were the only members. Reisman v. Silver, 48 Misc. 399, 95 N. Y. S. 483. The treasurer of a railroad executed a trust mortgage on the road to secure certain bonds. The mortgage included land belonging to him. Held while there can be no estoppel unless the party asserting it was induced to act and did act, in reliance upon the conduct of the party whom he seeks to estop, yet it will be presumed that the purchasers of railroad bonds rely upon the trust mortgage as security. Stubbs v. Franklin & M. R. Co. [Me.] 64 A. 625. Where at the time of loaning money on real estate the mortgagee through her attorney was aware that the true owner of the land had not conveyed it to the mortgagor, she could not have relied on a previous statement of the owner that he had sold the land to the mortgagor and there could be no estoppel against the owner. Williams v. Ketcham [Ind. App.] 77 N. E. 285. A lien claimant held not estopped from asserting the invalidity of a bond to dissolve the lien as against a purchaser not shown to have bought, believing that the property was unincumbered or not shown to have been misled by the lien claimant. Rockwell v. Kelly, 190 Mass. 439, 77 N. E. 490. Where a purchaser at foreclosure knew that his deed covered only the land actually described in the mortgage, the fact that at the time the mortgage was given other lands were pointed out as being within its terms did not estop the grantee of the mortgagor to claim such land in an action of ejectment by the purchaser at foreclosure where the mortgagees had made no conveyance to the purchaser. Pereles v. Gross, 126 Wis. 122, 105 N. W. 217. The act of the attorney general in procuring a dismissal of a writ of error in a criminal case after leading plaintiff in error to believe that he would not do so, and after the expiration of the two years within which such writ could issue did not estop the state to move to dismiss a writ subsequently sued out on the ground that it had not been issued within the two years from the date of judgment. O'Donnell v. State, 126 Wis. 599, 106 N. W. 18. Creditors of a corporation are presumed to have relied upon representations by the company and its officers as to the amount and existence of paid-up capital stock. Rule applied as against directors of a mutual insurance company. Dwinnell v. Minneapolis Fire & Marine Mut. Ins. Co. [Minn.] 106 N. W. 312. Presumption does not extend to creditors who accepted policies which by their terms expressly provided for a mutual liability. Id. It must affirmatively appear that the party was in fact misled. In an action to recover cattle a plea that the cattle were included in defendant's mortgage with plaintiff's knowledge held insufficient. McQueen v. Bank of Edgemont [S. D.] 107 N. W. 208. Proof that plaintiff knew that her husband and his partner were mortgaging their own stock, having a brand similar to that used by her, did not estop her to assert her right to her own cattle running on the same range which were improperly included in the mortgage. Id. Failure of trustees to notify defendant held not to estop them to recover money loaned to defendant on mortgage security, though defendant had repaid the money to a cotrustee who had given him a forged satisfaction piece and absconded, where nothing was done or omitted by defendant in reliance upon plaintiff's conduct. Vohmann v. Michel, 109 App. Div. 659, 96 N. Y. S. 309. Where at the time plaintiff purchased certain real estate he had no knowledge that the attorney of a plaintiff in an attachment suit had directed the sheriff not to sell the property, he could not claim that plaintiff in the attachment suit was estopped to insist on his attachment lien. Katz v. Obenchain [Or.] 85 P. 617. Plea of estoppel in pais in suit to reform a contract of reinsurance held insufficient which did not state that plaintiff did anything or failed to do anything in reliance upon defendant's representations, but merely alleged what plaintiff could have done if defendant had claimed that the contract

estoppel is asserted should be charged in the same capacity as that in which he acted when he made the representation.[34]

had expired. Delaware Ins. Co. v. Pennsylvania Fire Ins. Co. [Ga.] 55 S. E. 330. Where a husband executed a deed to his wife but it was never delivered, and after his death the wife conveyed to another, the children were not estopped as against the grantee who had no knowledge of the husband's deed. Ligon v. Bartin [Miss.] 40 So. 555. Where it was not shown that a grantee relied upon the acquiescence of a daughter in a transfer by her mother of land in which the daughter was interested. Austin v. Jones [Ala.] 41 So. 408. No reliance on failure to assert interest in land mortgaged. Scottish-American Mortg. Co. v. Bunckley [Miss.] 41 So. 502. Standing by and permitting illegal sale under a mortgage, and later assisting the purchaser in removing the property does not estop the mortgagor to assert the invalidity of the sale as against the mortgagee. Aultman & Taylor Co. v. Meade [Ky.] 89 S. W. 137.

33. The different elements are given in Dye v. Crary [N. M.] 85 P. 1038. A statement made by a mortgagee to a purchaser at an execution sale, that the lien of the mortgage had been released, did not work an estoppel where it was not clearly shown that the purchaser sustained a loss. Schwab v. Edge [Pa.] 64 A. 80. Distributees of a grantor held not estopped to recover the land on the ground of insufficient mental capacity of the grantor where the grantee had not changed her position to her prejudice by improvements or otherwise. Bidwell v. Piercy [N. J. Eq.] 63 A. 261. Retraction must result in injustice. A grantee of land, abutting on a private way, who would not be injured by the closing of the way beyond his property, was not entitled to object that the owners were estopped to close it. Stevens v. Headley [N. J. Eq.] 62 A. 887. In an action for damages for delay by reason of the owner's failure to have his building ready for plaintiff's work, a defense of estoppel on the ground that no claim had been made before defendant settled with other contractors was insufficient where the evidence failed to show that defendant changed his position by reason thereof, and it was not error to exclude this question from the jury. Havens v. Robertson [Neb.] 106 N. W. 335. Acceptance of payment on a firm note given in renewal of one made before the retirement of a partner held not to work an estoppel so as to bar the creditor's right to recover the balance from the retiring partner. Smart v. Breckinridge Bank [Ky.] 90 S. W. 5. Lessees not being influenced to their injury by a contract of the lessor to pay them for a building which in fact belonged to her, she was not estopped to assert that the contract was without consideration. Precht v. Howard, 110 App. Div. 680, 97 N. Y. S. 462. Where it was optional with an insurance company to pay the amount of a life policy to the husband of the insured, a letter to the husband stating that his claim would be paid did not estop the company where the husband did nothing and lost nothing in reliance thereon. Ferretti v. Prudential Ins. Co., 49 Misc. 489, 97 N. Y. S. 1007. That a niece in whom title to land purchased by her uncle was taken, delivered to the latter a deed blank as to grantee, executed a bond and mortgage upon which money was borrowed and used by the uncle to improve the property, and allowed the uncle to have the beneficial use of the premises for ten years, did not estop the niece to claim title, no one being misled or injured by her acts. Fagan v. McDonnell, 100 N. Y. S. 641. An estoppel in pais cannot be claimed by a corporation against parties dealing with its agent where nothing said or done misled the agent to the injury of the corporation. No agreement that proceeds of a sale should be applied on a mortgage held by the corporation. Gates v. Quong [Cal. App.] 85 P. 662. There can be no estoppel preventing the reformation of an instrument as against one whose situation is no different from what it would be had there been no mistake. Detweiler v. Swartley [Kan.] 86 P. 141. Estoppel in pais arises only when the other party has been led to change his position. The mere bringing of a suit in support of which the estoppel is invoked is not a change of position. Des Allemands Lumber Co. v. Morgan City Timber Co. [La.] 41 So. 332. On the void foreclosure of a trust deed the property was sold for $50. Later, plaintiff purchased the assets of the purchaser for $80,000. Held the fact that the landowner permitted the deed to remain on record and unchallenged did not estop him to assert its invalidity as against plaintiff. Cobe v. Lovan, 193 Mo. 235, 92 S. W. 93. Where a broker had already earned his commissions by procuring a sale which could not be called off without the buyer's consent, a statement made by the broker to the principal not to call off the trade as he did not claim commissions did not estop the broker to assert his right to the commissions. Ross v. Moskowitz [Tex. Civ. App.] 16 Tex. Ct. Rep. 381, 95 S. W. 86. One whose name had been forged to a note held not estopped where, on being shown his purported signature, he denied its authenticity but said "it will be all right anyway," no one having changed his position and he not having adopted the signature. Pye v. Commercial Nat. Bank [Tex. Civ. App.] 97 S. W. 127. Children of a legatee held not estopped to move to open a default and modify the decree of distribution, though on delivery to them of property distributed they signed a decree ratifying the proceedings already had when the additional property claimed by them had not been distributed when the motion was made. In re Trust & Deposit Co. of Onondaga, 110 App. Div. 528, 97 N. Y. S. 405. The fact that a statement filed by an insurance corporation with the state auditor showed certain notes given by some of its shareholders as part of the assets of the corporation, and that a continuation of the company's franchise was thus secured, did not estop the makers to deny that they were unconditional obligations. Anderson v. Buckley [Ala.] 41 So. 748

Illustrative applications of doctrine.[35]—One who is silent concerning matters which it is his duty to disclose[36] will not thereafter be permitted to speak to the injury of others.[37] One who disowns title in himself[38] or recognizes title in another[39]

Where certain annuities were paid by executors who thereby represented that they had sufficient income from the estate therefor after the payment of certain legacies and provision for a trust fund, the representation was prejudicial, though most of the money was received by the legatees who were also annuitants. Woolsey v. Woolsey, 68 N. J. Eq. 762, 62 A. 686.

34. Where a landlord was not estopped to assert his right to a passway over the land of another by an agreement on the part of his tenant to pay for its use, the tenant was not estopped after a subsequent purchase of the land from the landlord. Schwer v. Martin [Ky.] 97 S. W. 12. The holder of a trust deed at a sale thereunder consented to have the property conveyed to the purchaser free of all incumbrances, though he held a prior mortgage on the premises and thus released the mortgagor from any personal liability. Held the fact that, individually, the executor of the mortgagor and former owner requested that before the payment of the mortgage note the proceeds of the sale should be applied on certain later notes given by the testatrix and on part of which the executor was liable as a signer did not estop him as executor to deny consent of the estate to the release of the mortgage. Crisman v. Lanterman [Cal.] 87 P. 89.

35. See 5 C. L. 1292.

36. One who conceals facts required by good faith and fair dealing to be disclosed will not thereafter be permitted to assert those facts to the injury of persons misled by such conduct. Defendant, who in New Jersey indorsed her husband's note dated and payable in New York, was estopped to deny, as against an innocent purchaser, that the indorsement was a New York contract, and to assert that it was invalid under the New Jersey law. Chemical Nat. Bank v. Kellogg, 183 N. Y. 92, 75 N. E. 1103. The rights of the parties did not depend upon what plaintiff knew at the time of trial as to defendant's intention, but upon what it knew at the time it discounted the note. Id.

37. Where the attorney of a mortgagee fraudulently transferred a mortgage but the mortgagee without notice to the mortgagor permitted him to pay interest to the assignee and recovered the mortgage by decree without joining the mortgagor or asking for interest, she could not thereafter recover the interest from the mortgagor. Union Trust Co. v. Cain, 29 Pa. Super. Ct. 189. An owner of a lien on land, who with knowledge of the existence of an action against the record owner of his lien and of a judgment therein establishing title to the land in the plaintiff, stands by without disclosing his interest and makes no effort for five years to vacate the judgment, cannot thereafter prosecute his claim. Stuart v. Pierce County, 40 Wash. 267, 82 P. 270. Grantor held estopped to deny the title of the grantee, who had wrongfully obtained possession of a deed, as against an innocent purchaser, where he negligently permitted the grantee's apparent ownership to remain unchallenged for an unreasonable length of time. Johnson v. Erlandson [N. D.] 105 N. W. 722. Plaintiff held estopped to assert ownership of a wagon which she let one C. use for over a year pending the consummation of an agreement for the letting of certain land, where C. in the meantime mortgaged it to defendant. Davis v. First Nat. Bank [Ind. T.] 89 S. W. 1015. This seems contrary to the weight of authority. [Editor.]

Permitting expenditures: Plaintiffs held estopped to assert rights in mining premises by knowingly permitting defendant for 18 months to work a claim adjoining the one in which they were in possession, and encouraging large expenditures of money. Sharkey v. Candiani [Or.] 85 P. 219. Where the owners of a canal permitted the operators of a paper mill to discharge refuse matter into the canal for many years, and stood by while thousands of dollars were expended in repairs and additions to the mill, they were estopped thereafter to object to the discharge of a smaller quantity of refuse. Morris Canal & Banking Co. v. Diamond Mills Paper Co. [N. J. Eq.] 64 A. 746. Landowner and his lessee, who with full knowledge permitted complainant and its predecessors to expend large sums of money in drilling oil wells under an invalid lease from a railroad, held estopped to recover the value of the oil. South Penn. Oil Co. v. Calf Creek Oil & Gas Co., 140 F. 507. Landowner injured by overflow of his farm held estopped to enjoin the maintenance of a dam, and thereby stop the operation of electric light plants, where he acquiesced in the building of the dam and stated to defendant that he would "wait and see" before determining what he would do in case of injury to the farm. Andrus v. Berkshire Power Co. [C. C. A. 145 F. 47. One who with knowledge that another claimed a fee title to certain land and was making valuable improvements failed for nearly ten years to assert any interest in the property, held estopped from doing so thercafter. Lewis v. Sherwin Bros., 129 Iowa, 682, 104 N. W. 511, 106 N. W. 183. If a trespasser is permitted to expend a large sum of money in the erection of a permanent building without protest from the owner of the land, or any attempt by the owner to assert his rights for a long period, equity will not favor a late assertion of such stale rights by injunction, but will leave the parties to their remedy at law, or if estoppel is pleaded will lean favorably toward such a defense. McCleery v. Alton, 8 Ohio C. C. (N. S.) 481. A city held estopped to assert title to a "municipal square" where, without objection, it had permitted the county since its organization to occupy the same and erect thereon costly and substantial buildings. City of Victoria v. Victoria County [Tex. Civ. App.] 15 Tex. Ct. Rep. 873, 94 S. W. 368.

by standing by and permitting property in which he has an interest to be sold to one who is ignorant of the true state of the title,[40] or who induces or encourages such party to encumber,[41] lease,[42] or purchase such property,[43] or other property,[44] from a third person will thereafter be estopped to assert rights in himself inconsistent with his previous attitude, to the prejudice of the party misled. One who has treated an instrument,[45] proceeding, or transaction, as valid,[46] and sought or derived benefits therefrom,[47] cannot thereafter deny its validity.

38. The husband of an heir of one whose property was sold at judicial sale was made defendant and disclaimed any interest in the land. Held, he was thereafter estopped to assert any interest against the purchaser. Stine v. Goodman [Ky.] 92 S. W. 612. In a suit to set aside an exchange of property for failure of title, certain defendant heirs who disclaimed any interest in the land would be estopped by their disclaimer and by the fact that they received and enjoyed the property taken by their ancestor in exchange, so that plaintiff could not be awarded relief on the ground of any interest in them. Milby v. Hester [Tex. Civ. App.] 15 Tex. Ct. Rep. 495, 754, 94 S. W. 178. Does not apply in jurisdictions where a disclaimer can be made only by deed or in a court of record. Plaintiff held not estopped by statements to defendant's grantors at the time they were about to convey to defendant that she did not own or claim the land. McMurray v. Dixon [Va.] 54 S. E. 481.

39. Where a city conveyed land to complainant's father and later condemned part of it, levied a special assessment and received taxes, it could not contend that the land had been dedicated to the public for an alley. Falter v. Packard, 219 Ill. 356, 76 N. E. 495.

40. Where the general manager of a lumber corporation stood by while its lumber was assessed to the president of the corporation and not to the corporation itself, attempted to have the tax reduced, promised to pay it and was present at the time of levy upon and sale of the lumber for nonpayment of the tax, but made no claim that the lumber belonged to the corporation, the latter was estopped to assert ownership as against the purchaser at the tax sale. Wisconsin Oak Lumber Co. v. Laursen, 126 Wis. 484, 105 N. W. 906. Where nine years before trial land was sold at sheriff's sale without objection on the part of the heirs of an alleged donee, and the purchaser had made valuable improvements, they could not thereafter claim the land. In re Lahaye, 115 La. 1089, 40 So. 468.

41. Disclaimer of interest in crop held to work estoppel to claim the property as landlord where plaintiffs took a mortgage on the faith thereof. Chancellor v. Law [Ala.] 41 So. 514.

42. In an action to recover rent the acts of plaintiff in representing that he executed the lease for one T., causing the rent to be paid to T., and concealing his own interest in the property, held to estop him to assert that he executed the lease in his own behalf. Niles v. Gonzales, 1 Cal. App. 324, 82 P. 212.

43. Where an owner of land stands by and with knowledge of his title encourages a sale or does not forbid it, and another person in ignorance of the true title is induced to make the purchase under the supposition that the title is good, he cannot thereafter dispute the purchaser's title. Haun v. Martin [Or.] 86 P. 371. But to justify the application of this principle it is indispensable that the party sought to be estopped should by conduct or gross negligence encourage or influence the purchase, and that the other party, being at the time ignorant of the actual title, should have been misled by his acts and conduct and induced thereby to change his position. Id. Heir not estopped to assert invalidity of sale by administrator of timber culture claim. Id. The true owner of land by attesting a deed, the contents of which he knows, made by a person who has no title, will be estopped to assert his title against a grantee and his privies (Equitable Loan & Security Co. v. Lewman, 124 Ga. 190, 52 S. E. 599), but this estoppel will not bind an existing creditor of such owner (Id.). Where the creditor subsequently reduces his debt to judgment, his lien is superior to the equities of the grantee who acquired neither lien nor title from the true owner but as against whom the latter is estopped to assert title. Id. A widow held estopped to assert an interest in land where in defendant's hearing she agreed to surrender it to a third person in consideration that the latter pay the debts, and later stated to defendant that if he desired to purchase the land he would have to do so from the third person, which he did in reliance on her representations. Hughes v. Landrum [Tex. Civ. App.] 13 Tex. Ct. Rep. 787, 89 S. W. 85. A father represented to his son that the latter's grandmother had complete title to certain land and requested the son to purchase it, which the son did. Held, the son having assumed the care of his grandmother in consideration of the transfer, the father could not subsequently assert a title to the land which he then disowned. Larson v. Anderson [Neb.] 104 N. W. 925. Where defendant purchased certain property on plaintiff's representation that while he held a bill of sale he had not himself bought the property, defendant's title was superior to plaintiff's. Chandler Bros. v. Higgins [Ala.] 39 So. 576.

44. Where a bank to which a non-negotiable paper was presented for discount inquired of the maker and he replied so as to induce the bank to purchase the paper, he could not thereafter deny liability, though the bank gave no notice that it had discounted the paper. Strang v. MacArthur, 212 Pa. 477, 61 A. 1015. Maker of usurious note held estopped to assert usury as against one whom he had induced to purchase the note by representations that a certain sum

was due, and his promise to pay later. Walker v. Hillyer, 124 Ga. 857, 53 S. E. 313.

45. Where the holders of an option to purchase a mine assigned a half interest, and, with their assignees, formed a partnership and began work on the mine under the assignment, they could not be heard to say that it was not a perfected and delivered instrument. Larsh v. Boyle [Colo.] 86 P. 1000. Defendant by requesting a postponement of a tender to purchase land held to have recognized the validity of his contract to sell and to be thereafter estopped to assert that it was repugnant to the statute of frauds. Alston v. Connell, 140 N. C. 485, 53 S. E. 292. Where defendant received money from his wife knowing that she held it in trust for her son, he cannot, in an action on a note he gave her therefor, and which she assigned to the son, claim that it was void because executed before the passage of the Weissenger Act (Ky. St. 1903, c. 66, art. 3), or plead in bar a judgment in which she recovered alimony from him. Kefauver v. Kefauver, 26 Ky. L. R. 1058, 83 S. W. 119. An agent or trustee who collects money under an invalid contract cannot set up the invalidity of the contract in an action for an accounting. Multnomah County v. White [Or.] 85 P. 78. A holder of tax certificates, wrongfully transferred from the county, collected money on them from the delinquent taxpayers. Held, in a suit by the county to recover the amount collected, he was estopped to assert that the certificates were void. Id.

46. Where in an action against a town to recover for legal services it appeared that at a town meeting a motion to disallow the claim had been defeated, and thereafter, but before the services were rendered, the town paid plaintiff a certain sum on account, the town was estopped to contend that the expenditure was illegal. Newton v. Hamden [Conn.] 64 A. 229. A widow paid a sum of money to the heirs, the parties believing that such payment vested the absolute title to the homestead in the widow, and the heirs retained the payments made and remained silent for more than ten years. Held the heirs were estopped to assert title as against the widow's grantee in good faith. Staats v. Wilson [Neb.] 107 N. W. 230. Where pursuant to a stockholders' resolution the property of a corporation was conveyed to trustees to be sold for the payment of debts, and the company with full knowledge of all the facts allowed the trustees to sell property until all the debts were paid and accepted a reconveyance of the remainder and retained the same, it could not thereafter question the validity of the steps for the creation of the trusteeship or deny the validity of the acts of the trustees. Kessler & Co. v. Ensley Co., 141 F. 130.

47. A traction company which accepted and enjoyed the privileges and franchises granted by an ordinance, subject to certain restrictions, could not resist the claim of the municipality for enforcement of the restrictions on the ground that the ordinance was ultra vires. Borough of Rutherford v. Hudson River Traction Co. [N. J. Law] 63 A. 84. A bonding company with knowledge of an informality in the execution of a bond by its agent received and retained the premium paid for the bond. Held it was estopped in an action on the bond, to urge such infirmity as a defense. Farmers' & Merchants' Irr. Co. v. U. S. Fidelity & Guaranty Co. [Neb.] 108 N. W. 156. Where a contract by an insurance company to sell its good will and turn over a list of its policies to another company was fully performed by the seller and the buyer obtained the full benefit thereof by reinsuring a large share of the seller's risks, the buyer was estopped to deny the power of the insurance company to make the contract. Bowers v. Ocean Acc. & Guarantee Corp., 110 App. Div. 691, 97 N. Y. S. 485. The daughter of a debtor, who had failed to present a claim to his assignee and who had accepted the benefit of a settlement deed which contemplated a complete discharge of the debtor's estate from the claims of creditors, held not in a position to contest the validity of the deed and assert her claim against the interest of the other children in the land covered thereby. Estill's Trustee v. Francis [Ky.] 89 S. W. 172. A client who accepts and profits by the services of an attorney, knowing that the latter had previously represented another party, is estopped to dispute the attorney's right to his fee on the ground of his having previously represented the other party. Patterson v. Fleenor [Ky.] 89 S. W. 705. Where a municipal contract had been fully executed and tax bills in payment thereof issued to the contractor, he and his surety were estopped to defend an action by a materialman on the ground that the contract was void. Kansas City v. Schroeder, 196 Mo. 281, 93 S. W. 405. A corporation which for over seven years took no steps to repudiate the action of its officers in filing amended articles of incorporation creating it a corporation under the present law, and enjoyed all its attendant privileges, though charged with record notice thereof, could not when sued for the state organization tax under Ky. St. 1903, § 4225, assert that the action of its officers was unauthorized. Licking Valley Bldg. Ass'n No. 3 v. Com. [Ky.] 89 S. W. 682. Where a shareholder in an association voted his shares in favor of the liquidation of the association and accepted dividends on account thereof after liquidation, he was estopped to maintain an action for recovery of the money paid for the shares. Foresters' Bldg. & Loan Ass'n v. Quinn, 119 Ill. App. 572. One cannot attack the validity of a delegate meeting of a society where he participates in the meeting and becomes a candidate for one of the offices to be filled. Burdick v. Sons & Daughters of Protection [Neb.] 106 N. W. 466.

Conveyances: One who accepts and appropriates to her own use the proceeds of a sale of real estate in partition as one of the cotenants is estopped to assert a subsequently acquired title adverse to the title as adjudicated in the partition proceedings. Gruenewald v. Neu, 215 Ill. 132, 74 N. E. 101. Where in partition proceedings the decree for sale and its execution was made, so to speak, by the direction in writing of a husband and wife so that the master's deed was in substance and effect their deed, and they received their share of the consideration money, they were estopped from setting

Other applications of the doctrine,[48] and cases where it did not apply,[49] are

up that the conveyance did not pass their interest in the land. Baltimore & N. Y. R. Co. v. Bouvier [N. J. Eq.] 62 A. 868. Where minor heirs by their guardian joined in procuring a partition sale of a homestead in which they were interested and received and accepted a portion of the purchase price, the purchaser acquired an equitable title which the heirs were estopped to deny while retaining the benefits of the sale, though the court was without jurisdiction to order the sale. Murphy v. Sisters of the Incarnate Word [Tex. Civ. App.] 97 S. W. 135. The estoppel operated against their claim to their mother's interest in the estate as well as against that to the interest of their father. Id. Community property was conveyed by a father to his son on the latter's promise to sell the same and account for the proceeds. Held, in an action against the son for conversion of the proceeds, brought by the father for himself and as executor for his deceased wife, the son having conveyed the property and received the proceeds, could not defend on the ground that the conveyance to him was void because his father's wife did not join. Rohrer v. Rohrer, 40 Wash. 259, 82 P. 289. A deed by a widow as legal representative in performance of her husband's contract of sale of community property, she receiving the consideration, estops her and her heirs to thereafter assert an interest in the land, though the recited decree of the probate court purporting to authorize the deed is void. Cope v. Blount [Tex. Civ. App.] 15 Tex. Ct. Rep. 99, 91 S. W. 615. Where land was conveyed and sold by the grantee to pay the grantor's debts, a subsequent grantee of the latter could not recover the land on the ground of insufficiency of description in the first deed and illegality of consideration. Phelan v. Wilson, 114 La. 813, 38 So. 570. Where plaintiff purchased land from an insolvent grantor in reliance on defendant's promise to release a vendor's lien held by him and defendant received the consideration for such release, he could not thereafter assert the invalidity of the agreement under the statute of frauds in a suit to have the lien set aside. McKinley v. Wilson [Tex. Civ. App.] 96 S. W. 112. One purchasing at judicial sale is estopped from questioning the validity of an incumbrance shown by the appraisement and deducted from the appraised value of the estate sold where he makes no objection to the validity of the incumbrance prior to the sale. Topliff v. Richardson [Neb.] 107 N. W. 114.

48. Defendants who replevied and sold goods wrongfully transferred, and credited the proceeds to the account of a prior purchaser, held estopped on his subsequent insolvency to assert that the proceeds should not have been so credited. Moors v. Ladenburg, 189 Mass. 93, 75 N. E. 145. One who, as attorney, brings a proceeding for the unlawful detainer of real estate in the name of another may thereby estop himself to deny that the nominal plaintiff is the real party in interest and entitled to compromise and settle the suit, though defendant may have notice that such attorney claims to be himself entitled to the possession of the property. Such estoppel shown. Edwards v. Sourbeer [Kan.] 84 P. 1033. An owner of lots who built sheds on one of them so as to encroach upon a private alley, the sheds being built to induce another to buy the lot, was thereafter estopped to compel the purchaser to remove the shed because of the encroachment and such estoppel ran against his grantee of one of the other lots who knew of the sheds when he bought. Watson v. Carver, 27 App. D. C. 555. A vendee in a conveyance, who procures his vendor to make a second deed to one to whom the former has sold the land, is estopped to set up his older deed as against his own vendee. Haycraft v. Duvall [Ky.] 89 S. W. 543. A mortgagee who subsequently took a trust deed on the same property, securing the same and a further indebtedness, and sold the property thereunder free of incumbrance, releasing the mortgage, and realized a sum sufficient to pay the mortgage but applied a part of it to the other indebtedness, is estopped as against the purchaser from asserting the invalidity of the release and, having no right to enforce the mortgage, cannot make it the basis of an action against the mortgagor to recover a deficiency judgment. Crisman v. Lanterman [Cal.] 87 P. 89. Where a mortgagor procured the mortgagee to make certain payments, knowing that the mortgagee relied on the mortgage as security therefor, the mortgagor was estopped to deny that the payments made were so secured. Mausert v. Christian Feigenspan [N. J. Eq.] 64 A. 801. A city having designated a "municipal square" as a site for a jail erected by the county was thereafter estopped to complain of its location as against the county. City of Victoria v. Victoria County [Tex. Civ. App.] 15 Tex. Ct. Rep. 873, 94 S. W. 368.

Estoppel to deny representations: Where a grantee returned to the grantor and represented to him that he had not accepted the deed but had destroyed it, and thereby induced the grantor to execute a second deed to the wife of the grantee, the grantee and likewise his subsequent grantee were estopped to assert against the wife that the first deed had been accepted. Ames v. Ames [Ark.] 96 S. W. 144. Where stockholders of a corporation held a mortgage on corporation property but procured the corporation to sell the property "free from any incumbrance whatever," and the money was in part used to pay debts for which the stockholders were sureties, the stockholders were afterwards estopped to assert against the purchaser title acquired by foreclosure of the mortgage. Parker v. Citizens' R. Co. [Tex. Civ. App.] 15 Tex Ct Rep. 718, 95 S. W. 38. Breach by vendee of a condition subsequent in the deed requiring him to operate a street car line did not avoid the estoppel. Id. Where the secretary of a building association procures the issue of checks of the association in the names of fictitious applicants for loans, and endorses them in the names of the fictitious payees, his collection of such checks would estop

shown in the notes. Questions of estoppel peculiar to insurance are elsewhere treated.[50]

him from asserting their original invalidity, even if they were invalid, and would amount to embezzlement under Rev. St. § 6843. Livingston v. Fidelity & Deposit Co., 7 Ohio C. C. (N. S.) 66. Plaintiff bank held estopped to enforce payment of certain notes against the estate of a surety where, after the latter's death, his widow, upon inquiry, was informed by plaintiff that her husband's name did not appear as surety on the notes and the widow was thereby prevented from taking steps to prevent loss to the estate. Bank of Taylorsville v. Hardesty [Ky.] 91 S. W. 729. Where a taxpayer renders several lots of land in bulk, he is estopped to assert the illegality of the bulk assessment. City of Houston v. Stewart [Tex. Civ. App.] 13 Tex. Ct. Rep. 981, 90 S. W. 49. The same principle applies where the city in assessing unrendered property adopts a rendition in bulk previously made by the owner. Id. Where the owner of land sells lots or blocks according to descriptions given in a plat, he is thereafter estopped to deny the dedication of the streets and alleys shown on the plat as against purchasers who would suffer special injury. Special injury not shown. Thorpe v. Clanton [Ariz.] 85 P. 1061. Directors of an insolvent mutual insurance company, who subscribed to a fund which the company with their knowledge represented to be paid up capital, held estopped to deny their liability as against policy holders who became such in reliance upon the representations. Dwinnell v. Minneapolis Fire & Marine Mut. Ins. Co. [Minn.] 106 N. N. W. 312. Where certain annuities were payable only out of the income of an estate after the payment of certain legacies, and providing for a certain trust fund, the executors, by making payments to the annuitants, who were also interested in the corpus of the estate, which was needed to pay the legacies and meet the trust fund, thereby represented that they had other income and were estopped to deny this fact, and were not entitled to allowance for the payments against the corpus of the estate. Woolsey v. Woolsey, 68 N. J. Eq. 763, 62 A. 686.

Estoppel by acquiescence: Defendant consented to a survey to establish the division line between his land and plaintiff's, recognized the line fixed as the true one, and not only constructed improvements with reference thereto but saw plaintiff incurring expense relying on such survey without objection. Held defendant could not thereafter claim title by adverse possession to land beyond such line. Kitchen v. Chantland [Iowa] 105 N. W. 367. Acquiescence for 15 years in maintenance of water pipes through complainant's land held to bar the right to have their maintenance enjoined. Jayne v. Cortland Waterworks Co., 107 App. Div. 517, 95 N. Y. S. 227. Heirs of the former owner of land held estopped to assert title where they permitted his son to remain in possession for 30 or 40 years and make extensive improvements, dismissed a previous action to recover the land, and surcharged the accounts of the son as administrator of his father's estate in respect to sums allowed him as credits for taxes paid on the land. Haddix v. Fairchild [Ky.] 89 S. W. 171. An Indian nation employed an attorney to prosecute a claim against the United States. Upon the death of the attorney his representatives employed another attorney to prosecute the claim. Upon the latter discovering that his contract was invalid, he contracted directly with the Indian nation and with knowledge of the representatives of the first attorney rendered services and incurred expense in obtaining an allowance of the claim. Held the representatives of the first attorney were estopped to claim any part of the compensation paid by the nation to the second attorney. Love v. Peel [Ark.] 95 S. W. 998.

49. Estoppel in pais does not arise unless a party has done some act or used some language whereby he has derived a benefit or prejudiced another, nor where the facts are known to both parties. A judgment creditor to whose lien a homestead was subject acted under order of court as "receiver" in making a sale of the homestead land and reinvesting the proceeds in other land, erroneously taking the deed to himself as "trustee and receiver" to be held as a homestead to the use of the beneficiaries of the original homestead with reversion to the estate of him from whose property the homestead had been set apart. Held he was not estopped from enforcing his judgment against the last mentioned land. Johnson v. Thomason, 120 Ga. 531, 48 S. E. 137. A town board was not estopped to deny liability on a contract for the erection of bridges which the board had no authority under the statute to purchase where it did not receive or use the bridges, and the contract did not recite any facts showing the board to have authority and the contractor was not misled or ignorant of the circumstances. People v. Voorhies, 99 N. Y. S. 918. In an action at law by one mining company against another to recover damages for alleged unlawful removal of ore, the defendant could not have the cause transferred into equity on the ground of estoppel where the bill did not aver the elements of an equitable estoppel, i. e., knowledge and misrepresentation of facts by the parties to be estopped, ignorance of the facts and injurious change of situation by the victim in reliance upon the misrepresentations. Campbell v. Golden Cycle Min. Co. [C. C. A.] 141 F. 610. Where the Federal government never acquiesced in the operation of certain fish factories near the site of a quarantine station, nor induced the building of the factories or made any promise, express or implied, that no complaint would be made of offensive odors passing to the station, the government was not estopped from maintaining an injunction to restrain the operation of the factories. United States v. Luce, 141 F. 385. After a determination by the auditor general, under the statute, that lands delinquent for taxes are subject to transfer to the state, the receipt by him of redemption money from the original owner did

not support an estoppel against the state or affect its rights. Jackson, etc., R. Co. v. Solomon Lumber Co. [Mich.] 109 N. W. 257. Evidence held insufficient to show that an attorney, while representing a client in enforcing a judgment against land which had been fraudulently conveyed, had advised another client, an adverse party, that his title was good so as to estop an assignee of the attorney, the latter having purchased at the execution sale and acquired the judgment, from claiming title to the property. Waldrop v. Vaught [Ark.] 94 S. W. 53. Certain heirs, after citing the administrator to account for the proceeds of a sale of land, recovered the land in ejectment against the purchaser but subsequently lost it on its being subjected to the claim of a creditor of the purchaser. Held in a suit by them against a surety on the administrator's bond for an acounting of the proceeds of the sale, an estoppel in pais did not arise in favor of the surety. Worthy v. Battle, 125 Ga. 415, 54 S. E. 667. Where the parties to a deed measured the land from the side of a roadway and it was understood that no part of the road should pass, and the grantee subsequently treated the road as belonging exclusively to others for whom it had been laid out, the grantor was not estopped to assert that no part of the road was conveyed, though the deed described the land so as to include a part of the road. Graham v. Olson, 116 Mo. App. 272, 92 S. W. 728. A void default judgment was rendered against O. S. S. Thereafter, an application for an injunction to restrain the sale of the land of Oliver S. was presented to a district judge, the grounds of the application being that Oliver S. did not owe the debt, had not been served with citation, and was a nonresident. The application was refused. Held the heirs of Oliver S. were not estopped to claim the land as against a purchaser at a sale under the judgment. Lutcher v. Allen [Tex. Civ. App] 16 Tex. Ct. Rep. 149, 95 S. W. 572. In trespass, an instruction that plaintiff was estopped to deny the existence of the division line between tracts of land, as claimed by defendant, held properly refused as ignoring any reference to an arrangement alleged by plaintiff to have been made for an exchange of lands in connection with the line as claimed by defendant. Dexter v. Thayer, 189 Mass. 114, 75 N. E. 223. The fact that statutes, or ordinances of a city, levy taxes upon wharves as private property does not estop the state or city to assert title to the land on which the wharves are located. Murray v. Barnes [Ala.] 40 So. 348. The fact that plaintiff appealed from an order of the county commissioners allowing part of his claim for damages in proceedings to lay out a highway did not estop him from attacking the entire proceedings for want of jurisdiction where the county was not prejudiced by the filing of the claim or the appeal. Johnson v. Clontarf [Minn.] 108 N. W. 521. Where, after notice by a bank to which certain accounts had been assigned as security for loans made, the debtors remitted directly to the bank, except in certain cases, evidence held to show that the bank was not estopped, as against the trustee in bankruptcy of the assignor, to deny that the accounts were to be collected by the assignor. Bunnell v. Bronson, 78 Conn. 679, 63 A. 396. The fact that plaintiff took from the manager of a corporation a note of the corporation executed by the manager without authority for certain old accounts, which the manager himself had assumed without plaintiff's knowledge, and that plaintiff furnished a statement to the corporation of its indebtedness without including the accounts, held insufficient to establish an estoppel to assert the claims against the corporation after the insolvency of the manager. Fitzgerald v. Thompson Towing & Wrecking Ass'n [Mich.] 12 Det. Leg. N. 961, 106 N. W. 853. The attempt of a plaintiff in attachment to show that a note payable to a third person is in fact the property of the judgment debtor does not estop him from afterwards acquiring title to the note from the payee and recovering thereon from the maker, though the latter was one of the garnishees in the attachment proceedings. Young v. Stein, 29 Pa. Super. Ct. 205. Mill owner held not estopped to assert the continuing force of a contract by a landowner to furnish timber, as against the latter's vendee, whose personal liability thereon the former had attempted to substitute by oral agreement. Carey v. Leonard, 141 Mich. 273, 104 N. W. 581. The fact that landowner paid certain amounts claimed by the owner of an irrigation canal for water furnished under certain contracts did not, under the evidence, constitute a construction by them of the contracts so as to estop them to assert that they were not liable in such amounts. Riverside Heights Water Co. v. Riverside Trust Co., 148 Cal. 457, 83 P. 1003.

Silence, knowledge, or inaction: The owner of land wrongfully taken by a railroad company held not estopped to maintain ejectment by mere silence for three years, it not appearing that he had knowledge thereof or that improvements were made or that the entry was induced or the occupancy acquiesced in by anything he said or did, or that the company acted in good faith. Smith v. Oregon Short Line R. Co. [Utah] 84 P. 108. Where an execution was levied on all the interest of the debtor in certain land, and a sale of such interest was made, the purchaser was not estopped to claim the entire property sold, by his silence at the sale when a third person protested that the debtor had only a one-fifth interest. Mansfield v. Johnson [Fla.] 40 So. 196. The fact that one who has filed a homestead entry on land makes no objection to the construction of a ditch thereon by an irrigation company, until after he has obtained his patent, does not estop him to assert that his patent is not subject to the company's rights, the statute providing that all contracts creating an incumbrance on real estate shall be by deed. Atkinson v. Washington Irr. Co. [Wash.] 86 P. 1123. Mere knowledge on the part of a contractor of the wrongful repledging of bonds pledged to secure the contractor did not work an estoppel against him, he not having consented to and ratified the wrongful act. Interurban Const. Co. v. Hayes, 191 Mo. 248, 89 S. W. 927. A subcontractor is not estopped to assert a mechanic's lien, though he knew that the principal contractor in-

Owing to the general sense in which the word "estoppel" is often used by the courts, it has been deemed proper to include in this discussion certain holdings strictly pertinent to another topic,[51] but which more or less resemble cases of estoppel.[52]

tended to and did collect the contract price from the owner, in the absence of a showing that he has waived his lien or that he made any representations which induced the payment. Mivelaz v. Genovely [Ky.] 89 S. W. 109. Evidence that a testator's widow talked with the executor "about the advisability of making the repairs" on property of the estate did not preclude the widow from questioning the executor's right to make the repairs. In re Tisdale, 110 App. Div. 857, 97 N. Y. S. 494. Plaintiff fenced in a portion of a highway and planted a willow hedge on the bank of a stream flowing through the portion fenced in. Held the fact that the county authorities permitted the hedge to grow did not estop them from afterwards removing the fence. Bigelow v. Ritter [Iowa] 108 N. W. 218. Where a husband purchased lands with his wife's money and quieted her by the assurance that it was so arranged that she would have the land on his death, her failure to assert her rights until after his death did not estop her from asserting her title against his heirs. Smith v. Smith [Iowa] 109 N. W. 194. Where the will and judgment of a beneficiary was so dominated by the trustee that the former unhesitatingly followed the advice of the latter in all business transactions, the fact that the beneficiary consented to and approved certain investments made by the trustee did not estop her from demanding an accounting for the money improperly invested. Wieters v. Hart, 67 N. J. Eq. 507, 63 A. 241.

Accepting payments or benefits [See, also, Accord and Satisfaction, 7 C. L. 10]: The mere fact that a city patrolman received and receipted for less pay per month than that to which he was legally entitled did not estop him from afterwards claiming the difference between the amount received and the full pay. City of Chicago v. McNally, 117 Ill. App. 434. Retention of a sum of money insufficient to satisfy an alleged accord in an action on a life insurance policy does not estop the plaintiff to deny that the accord had been executed. Kinney v. Brotherhood of American Yeomen [N. D.] 106 N. W. 44. That complainant accepted a surplus on a void foreclosure sale as a part payment on her unpaid note did not "estop" her to assert the invalidity of the sale where, at the time, she was without knowledge of all the facts connected with the sale, and no prejudice resulted. Wasserman v. Metzger [Va.] 54 S. E. 893. That the holders of municipal improvement warrants accepted money from the city collected under a void ordinance, in payment of a part of such warrants, did not estop them from compelling the city by mandamus to collect the money necessary to pay the remaining warrants. Waldron v. Snohomish, 41 Wash. 566, 83 P. 1106. The fact that a wife allows her husband to use the proceeds of a sale of land in her support does not estop the wife from claiming dower on the ground that she refused to join in the deed. Hyatt v. O'Connell [Iowa] 107 N. W. 599. The fact that a party, without complaint, accepts work done for him does not estop him from afterwards claiming damages for breach of contract. MaGirl v. Hastings, 120 Ill. App. 276.

50. See Insurance, 6 C. L. 69.

51. See Election and Waiver, 7 C. L. 1222. The term estoppel is sometimes used to designate the equitable doctrine that, where one of two innocent parties must suffer by the act of a third, the loss should fall on the one whose conduct occasioned it. Defendant held "estopped" to set up defense to action on a note. Summerford v. Davenport [Ga] 54 S. E. 1025. See Equity, 7 C. L. 1323.

52. A vendee of land who accepted a deed and paid for the land therein described, after being notified by his vendor that the deed did not include all the land contracted for, owing to a mistake in the survey, held "estopped" to claim the land excluded as against a subsequent purchaser. Williams v. Virginia-Pocahontas Coal Co. [W. Va.] 53 S. E. 923. One of several parties to a contract of partition who acquiesces therein, recognizing the rights of all the parties thereto for over 30 years, is, by his gross laches, "estopped" to claim title to the portion set apart to either of the other parties to the partition. Stover v. Stover [W. Va.] 54 S. E. 350. Four years of unexplained delay following the extinguishment of homestead and dower claims held to estop creditors from selling the real estate to pay the debts of their deceased debtor where, in the meantime, the rights of third persons had intervened. Frier v. Lowe, 119 Ill. App. 246. The fact that an owner of land has given a deed calling for a street as the boundary, at a time when it had been projected by a municipality but not opened, will not "estop" him from claiming damages when the street is actually opened. Neely v. Philadelphia, 212 Pa. 551, 61 A. 1096. The voluntary alteration of a deed by its owner does not "estop" him from giving parol evidence of its former contents where there is no evil design and the act could not benefit the party, and there is no doubt of the terms of the deed before the alteration was made. Gibbs v. Potter [Ind.] 77 N. E. 942. The fact that plaintiff when told that her building projected on defendant's land, said that she did not want anything that did not belong to her, and that she underpinned her wall along the line claimed by defendants when the latter commenced excavating for their building, did not "estop" her from suing for forcible entry when defendants chiseled away a portion of her wall to give room for their building. Holzhausen v. Hoskins, 115 Mo. App. 261, 91 S. W. 410. Plaintiffs held "estopped" to assert that defendants had breached a logging contract by refusing to do certain work during the first of two seasons where they led defendants to be-

lieve that the work was to be postponed. Mueller v. Cook, 126 Wis. 504, 105 N. W. 1054. Evidence insufficient to show that an administratrix, who had obtained a judgment against an executor de son tort for negligence in collecting a note, was herself negligent in the matter so as to equitably "estop" her from enforcing the judgment to her own individual advantage. Rohn v. Rohn, 117 Ill. App. 512. The fact, if it were so, that the administratrix solicited appellant to act as executor de son tort did not work an estoppel against the administratrix, since appellant's liability was not based on merely taking possession of the estate. Id. A person appointed by order of court as receiver of a corporation cannot question the de facto status of such corporation. Fields v. U. S., 27 App. D. C. 433. A creditor took a deed absolute in form as security only and quitclaimed the property back to the grantor for the same consideration, the amount of the debt, reserving a vendor's lien. Held he was not estopped by foreclosing the lien, to assert that the conveyance was only a security. James v. Mallory [Ark.] 89 S. W. 472. The court having no jurisdiction to appoint any one to the office of special administrator of an estate, the fact that a widow asked that she be appointed did not "estop" her to object to the appointment of another. State v. Dist. Ct. of Second Judicial Dist. [Mont.] 85 P. 1022. Where an executor about a year after the determination of litigation establishing the validity of certain claims applied for an order authorizing the sale of land to pay them, devisees who encouraged the executor to lease the land and took part in proceedings to raise money to pay the debts, in order to avoid a sale of the land, were "estopped" to assert that the debts should not be paid because of laches on the part of the executor in petitioning for the sale. In re Tuohy's Estate [Mont.] 83 P. 486. That complainant petitioned the city to pave a street did not prevent her from suing to enjoin a change of grade. Town of New Decatur v. Smith [Ala.] 41 So. 1028.

"Estoppel" by recitals and agreements: In an action on a constable's indemnifying bond which recited that a levy had been made prior to the execution of the bond, defendants were estopped to assert that there had been no levy because the property was in custodia legis. Smith v. Rogers, 191 Mo. 334, 90 S. W. 1150. In an action on a bond given to the treasurer of a county by one in his employ, to recover for a default in a transaction by him, as deputy, of business pertaining to the treasurer's office, a recital in the bond that the principal is deputy treasurer in the service of the treasurer will estop the sureties on the bond to deny that he was such deputy and that the bond was an official bond. United States Fidelity & Guaranty Co. v. McLaughlin [Neb.] 109 N. W. 390. In an action on an appeal bond, a defendant surety is by his signature estopped from asserting that the judgment appealed from was void. McCarthy v. Alphons Custodis Chimney Const. Co., 219 Ill. 616, 76 N. E. 850. An insolvency bond, admittedly the deed of the surety, recited that the debtor was in custody. Held the surety was estopped from denying the truth of this recital in an action on the bond. Hauser v. Ryan [N. J. Law] 63 A. 4. In an action by plaintiff, as agent, against defendant, as principal, for malicious prosecution of a charge of embezzlement, plaintiff held estopped to deny the correctness of weekly reports sent by him and on the faith of which defendant instituted the proceeding. Singer Mfg. Co. v. Bryant [Va.] 54 S. E. 320. The report of the superintendent of assessments, reciting that he had investigated the district in which it was proposed to locate a sewer system as required by Local Improvement Act § 39, could not be impeached by calling the superintendent to testify that he had not discharged his duty in that respect. Washington Park Club v. Chicago, 219 Ill. 323, 76 N. E. 383. In mandamus to compel a county superintendent of schools to correctly date a teacher's certificate issued by him, the superintendent was estopped to collaterally attack the certificate by showing that it was issued without due examination. Van Dorn v. Anderson, 219 Ill. 32, 76 N. E. 53. Under Act April 1, 1878, §§ 1, 6, 10 (Civ. Code p. 779), forbidding warehousemen to issue receipts for goods which have not been received, a warehouseman is estopped to deny actual receipt and possession of goods represented by a receipt. Riley v. Loma Vista Ranch Co., 1 Cal. App. 488, 82 P. 686. A carrier is not estopped by statements in a bill of lading from showing that no goods were in fact received for transportation. Even as against an innocent indorsee, unless by his usual mode of doing business he has given his agents authority to issue bills for goods not received. Evidence insufficient to sustain such finding. Swedish-American Nat. Bank v. Chicago, etc., R. Co., 96 Minn. 436, 105 N. W. 69. See Carriers, 7 C. L. 535. Where a stock certificate recited that the person to whom it was issued was its owner and entitled to certain shares of fully paid and nonassessable stock, the corporation was estopped to deny the title of an innocent transferee, who had given value on the faith of the certificate, on the ground that the corporation was prohibited by law from issuing stock until fully paid and the stockholder had paid nothing for his stock. Westminster Nat. Bank v. New England Electrical Works, 73 N. H. 465, 62 A. 971. Where will devising lands to claimant recited that testatrix had acquired title thereto by deed from her son and claimant accepted the devise, held that he was estopped to set up any claim of his own to the land as heir of testatrix's son, which would defeat any part of the will. Cunningham v. Cunningham's Estate, 220 Ill. 45, 77 N. E. 95. Petitioners filed a sworn statement against a county for $2,000 as payment for a heating system, and thereafter made a further demand claiming that the first claim was intended to apply on another contract. Held they were estopped to show that their verified claim was not a payment on the heating contract. Russell-Vail Engineering Co. v. Kirby, 1 Cal. App. 707, 82 P. 1078. In an action to set aside a deed, one will not be heard to deny that he sold the land after and not before he obtained a final receiver's receipt under the homestead law. Wood v. Noel, 116 La. 516, 40 So. 857. Where an executor asserted in his

sworn statement that he knew of no claims in favor of the estate other than those stated, he could not afterwards, in an action to set aside as fraudulent a conveyance by the decedent to him, claim, for the purpose of showing that the estate was not insolvent, that other assets existed. Mertens v. Mertens, 48 Misc. 235, 96 N. Y. S. 785. In an action by a county to recover school lands, an agreement by the parties that the case should abide the decision in another case brought by it estopped the county, on rendition of a decision against it, to thereafter assert title to the same land. Lamar County v. Talley [Tex. Civ. App.] 94 S. W. 1069. In ejectment between former cotenants who had voluntarily partitioned their property, evidence held to require submission to the jury whether defendant was estopped to deny that the walls of buildings on adjoining lots showed the boundaries of the lot partitioned. Scott v. Baird [Mich.] 13 Det. Leg. N. 513, 108 N. W. 737. Where defendants claimed title to certain land involved in a suit in equity as heirs at law of a certain person, and joined in a compromise agreement whereby the land should be sold and a portion of the proceeds distributed to defendants as such heirs at law, in an accounting as to defendant's portion of the proceeds of the sale, two of them were estopped to claim under a will a larger interest in the fund than they would be entitled to as heirs at law. Dangerfield v. Williams, 26 App. D. C. 508. A husband and wife in settlement of a suit agreed to divide a tract of land equally between them. The division was made and she received her half. Held she was estopped to assert any interest in his part as well against his vendee as against him. Rash v. Hart [Ky.] 89 S. W. 192. Where a second mortgagee agreed with the owners of the equity that she would redeem from the first mortgage and allow them to redeem from her, and in reliance thereon the owners did not redeem from the first mortgage and the second mortgagee paid the first and took a deed of the land, held, though the agreement with the owners was oral, the second mortgagee was estopped to deny the right of the owners to redeem. Phelps v. Root, 78 Vt. 493, 63 A. 941. The signing by a property owner of a petition for the improvement of a street to a certain grade does not estop him from contesting the legality of the assessment, where the original petition was referred back to the property owners with the direction to file a new petition for an improvement at a different grade, and the second petition was not signed by the contesting owner. Carlisle v. Cincinnati, 8 Ohio C. C. (N. S.) 46.

Inconsistent positions in litigation: One will not be permitted to assume antagonistic positions in litigation with reference to the same property or state of facts to the prejudice of another party to the same suit or series of suits. Where a city defended an action to recover land on the ground that the land had been dedicated, and that it had conveyed a portion of the land in reliance on such dedication to its codefendant, it could not thereafter sue its codefendant for the land and deny the dedication and conveyance. Sioux City v. Chicago & N. W. R. Co., 129 Iowa, 694, 106 N. W. 183. Where a party assumes a certain position in a judicial proceeding and succeeds in maintaining that position, he may not, thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of a party who has acquiesced in the position formerly taken by him. Purchaser at foreclosure could not defeat redemption on the ground that the bond was void and thereafter sue thereon. Reiger v. Faber, 116 Mo. App. 123, 92 S. W. 183. That plaintiff did not include the year of redemption in his motion for assessment of damages on the injunction bond was immaterial. Id. One who with knowledge of the breach of a condition in a contract sets up the contract as valid for the purpose of defeating an action cannot, in a subsequent action between the parties, contend that the contract was not in force. Galt v. Provan [Iowa] 108 N. W. 760. Where in replevin, defendant offered to prove title in another, the court had the right to assume that he did not intend to prove title in himself. Sanford v. Millikin [Mich.] 13 Det. Leg. N. 171, 107 N. W. 884. Under Laws 1896, pp. 867, 868, c. 716, §§ 4, 5, a claimant who is awarded a hearing for the assessment of damages for change of grade of a street cannot assert, in opposition to a writ of certiorari to review such hearing, that the statute did not provide for the hearing. People v. Lawrence, 48 Misc. 52, 94 N. Y. S. 820. In an action by a corporation against its manager for an accounting, plaintiff attempted to credit certain dividends declared on stock held by defendant as trustee as well as those declared on his individual stock. Held plaintiff could not contend that defendant could not recover the dividends declared on the stock held by him as trustee upon its being shown that he owed plaintiff nothing. Consolidated Fruit Jar Co. v. Wisner, 110 App. Div. 99, 97 N. Y. S. 52. A creditor is not in a position to contest the validity of receivers' certificates as constituting prior liens upon trust property where the relief sought by him is based on such a certificate. Nisbet v. Great Northern Clay Co., 41 Wash. 107, 83 P. 15. Where, in a proceeding to re-establish a partition in kind of land, defendants assert that each cotenant took possession of the land allotted to him, they cannot thereafter successfully claim that one cotenant, who sold and put his vendee in possession of the tract assigned to him, did not take possession and that such portion of the land was not partitioned. Broussard v. Guidry, 114 La. 913, 38 So. 616. Where complainant claimed possession and title to land adversely to defendant and the public, it could not enjoin defendant from disposing of it on the ground that defendant held title for the public or that the contract for its disposition was void. Murray v. Barnes [Ala.] 40 So. 348. Where, in ejectment, defendants denied that an infant under whom plaintiff claimed had any title, they could not contend that the infant's title passed for an inadequate consideration. Shaffer v. Detie, 191 Mo. 377, 90 S. W. 131. Where a grantee in a deed violated two conditions therein but the grantor later violated a condition similar to the first and, in an injunction suit by the grantee to restrain the violation, relied on the breach of the

Pleading and proof; questions of law and fact.[53]—To be available an estoppel must be pleaded[54] with particularity and precision,[55] but if evidence sufficient to

first condition by the grantee as a defense, he could not successfully maintain that he had waived the first breach, and in ejectment against the grantee insist on the second breach in order to avoid the statute of limitations. Tower v. Compton Hill Imp. Co., 192 Mo. 379, 91 S. W. 104. The fact that an action of ejectment is submitted upon an agreed statement of facts does not estop defendant therein to file a bill in equity setting up matters not cognizable in the law action and praying for an injunction restraining its prosecution. Gentry v. Poteet [W. Va.] 53 S. E. 787. A creditor obtaining appointment of a receiver on ground of insolvency cannot deny such insolvency in bankruptcy proceedings by other creditors. In re Spalding, 134 F. 507. An administrator who obtained an order for the administration of the estate as insolvent, and thereby became entitled to receive rents and profits from the real estate, was estopped to change his position in a subsequent proceeding to compel an accounting and claim that the estate was not actually insolvent, and his act in collecting rents was merely a personal and not an administrative act. Ayers v. Laighton, 73 N. H. 487, 63 A. 43. The plaintiff presented a check at a bank and was told that the drawer had instructed the bank not to pay it. The bank, when sued, offered to prove that the drawer had no funds on deposit when the check was presented. Held that the evidence is inadmissible, as the bank is estopped to set up a different defense from the one stated when payment was refused. First State Bank v. Stephens Bros. [Neb.] 105 N. W. 43.

Note: It is difficult to find estoppel in this case. A necessary element of estoppel is reliance upon representation. Lingonner v. Ambler, 44 Neb. 316. Had the plaintiff relied upon the representation he would not have sued, for, if true, it would have defeated his action. Dykers v. Leather Manufacturers' Bank, 11 Paige [N. Y.] 612. Even if the bank were estopped to deny the representation, the offered evidence would be admissible, for showing that the drawer of a check has no funds on deposit is not inconsistent with saying that he stopped payment. Banks frequently honor overdrafts. This peculiar doctrine of estoppel first appears in Nebraska in a dictum, following a dictum of the United States Supreme Court. Ballou v. Sherwood, 32 Neb. 666. The supreme court lays down the broad principle that if a party states one reason for his conduct during the transaction he is estopped to introduce another at the trial. Railway Co. v. McCarthy, 96 U. S. 258, 24 Law. Ed. 693. A series of New York cases are cited by the supreme court holding that a bailee, after claiming title in himself, cannot set up his lien for charges when sued for conversion. The cases are plainly right in holding the lien forfeited, but they fail to support the broad principle which the court bases upon them. Unfortunately, the dictum has been followed literally in several states.—From 19 Harv. L. R. 383.

A pleader cannot urge that a corporation was organized not for pecuniary profit where by his bill he alleges that it was organized for pecuniary profit. Cratty v. Peoria Law Library Ass'n, 120 Ill. App. 596. A husband who, in suing for divorce, alleged that a child born to the wife after she left him was an adulterous bastard is bound by such allegation in a subsequent proceeding by him to recover the custody of the child, it appearing that only a judgment of nonsuit was rendered in the former suit. State v. Thompson [La.] 41 So. 367. Where in an action to set aside an execution sale a father by sworn answer averred that his son was the owner of the land by means of the execution, and the judgment was for the son, the father and his heirs were estopped to claim the land as his. Layne v. Layne [Ky.] 90 S. W. 555. Pleadings and testimony in other litigation may affect the credibility of a litigant, but should not ordinarily estop him from testifying. Ackerman v. Larner, 116 La. 101, 40 So. 581.

Proceedings on appeal: On a former appeal appellant secured a reversal on the ground that a certain instruction should have been given, and on the second trial the charge was given in the identical language contended for by appellant. Held on a second appeal he could not question its correctness. Galveston, etc., R. Co. v. Fitzpatrick [Tex. Civ. App.] 14 Tex. Ct. Rep. 790, 91 S. W. 355. Where plaintiff moved to dismiss an appeal on the ground that it was not taken in time and the motion was sustained, he was estopped, in an action against the surety on the bond, to insist that the appeal was taken in time, and that the bond was therefore valid. Zimmer v. Massie, 117 Mo. App. 344, 93 S. W. 859. Defendant surety was not estopped to assert that the dismissal released him. Id. Where a party on appeal assumed that the judgment appealed from had only a certain effect and so procured an opinion along such lines and acquiesced therein, he could not on a subsequent appeal contend that the judgment had any other effect. State v. Clinton County Com'rs [Ind.] 76 N. E. 986. By dismissing appeal and accepting compensation, one may estop himself from claiming that condemnation proceedings are irregular or void. Roberts v. Sioux City & P. R. Co. [Neb.] 102 N. W. 60. Where on appeal to the circuit court in proceedings for the appointment of an administrator all the parties agreed that their several petitions should be heard together, and thereafter one of the parties resisted the application of another for a separate trial on account of the agreement to consolidate, the party so resisting could not thereafter have the appeal of the movant for a separate trial dismissed. In re McClellan's Estate [S. D.] 107 N. W. 681.

53. See 5 C. L. 1298.

54. Peyton v. Old Woolen Mills Co. [Ky.] 91 S. W. 719; McQueen v. Bank of Edgemont [S. D.] 107 N. W. 208. Estoppel against plaintiff in an action for the wrongful death of an infant must be pleaded and

constitute an estoppel is admitted without objection, the defence is available though not pleaded,[56] and if all the facts are sufficiently pleaded, it is immaterial that the complaint does not claim an estoppel in terms.[57] Where the matter which operates as an estoppel against defendant appears in the declaration, the plaintiff may demur to a plea by which defendant attempts to set up the same matter as a defense.[58] Where a party pleads and relies upon an estoppel, the burden is upon him to establish the facts upon which it is based,[59] and the evidence must be clear and convincing.[60] Whether certain facts constitute an estoppel is for the court, but the existence of such facts is for the jury where the evidence is conflicting.[61]

§ 5. *Extent of operation of doctrine of estoppel.*[62]—The doctrine of estoppel affects parties and privies.[63] It has an extensive operation, ramifying, as it

proved by defendant. Wilmot v. McPadden, 78 Conn. 276, 61 A. 1069. Contention that defendant by bringing condemnation proceedings to assess plaintiff's damages estopped itself to assert that plaintiff had no title. Watkins v. Iowa Cent. R. Co., 123 Iowa, 390, 98 N. W. 910. Estoppel of a corporation to deny authority of agent must be pleaded. Tres Palacious Rice & Irrigation Co. v. Eidman [Tex. Civ. App.] 14 Tex. Ct. Rep. 852, 15 Tex. Ct. Rep. 318, 93 S. W. 698. All acts, representations and conduct relied on as an estoppel should be specially pleaded before evidence to establish the same can be received. Deming Inv. Co. v. Shawnee Fire Ins. Co., 16 Okl. 1, 83 P. 918.

55. Nothing supplied by inference or intendment. Haun v. Martin [Or.] 86 P. 371. Bill insufficient to show estoppel against an heir to claim title to land unlawfully sold by the administrator where it did not aver his knowledge of, or acquiescence in, the sale, or that plaintiff was ignorant of the true state of the title and relied on defendant's conduct. Id. It must be alleged that the party setting up the estoppel relied upon such facts believing them to be true, and would be prejudiced by allowing them to be disproved. Id. Cross complaint held sufficient to authorize finding that decedent by his declarations and acceptance of benefits had estopped himself from denying that a certain deed had been delivered. Fifer v. Rachels [Ind. App.] 76 N. E. 186. An estoppel must be pleaded in order to enable a party to avail himself of it at the trial, and must be pleaded with particularity in order to constitute either a cause of action or defense. Could not be invoked, where not pleaded, to prevent removal of obstructions placed by plaintiff in public highway. Tonkawa Milling Co. v. Tonkawa, 15 Okl. 672, 83 P. 915.

56. Where case is tried as though estoppel is in issue. Edwards v. Sourbeer [Kan.] 84 P. 1033.

Contra: Where defendant did not plead an estoppel in an action to recover cattle, it could not avail itself thereof though the evidence established such defense. McQueen v. Bank of Edgemont [S. D.] 107 N. W. 208.

57. Alston v. Connell, 140 N. C. 485, 53 S. E. 292.

58. Demurrer to plea that appeal bond sued on and judgment therein recited were void. McCarthy v. Alphons Custodis Chimney Const. Co., 219 Ill. 616, 76 N. E. 850.

59. Instruction erroneous which required defendant to show by a preponderance that its refusal to accept the remainder of certain gravel purchased by it was not based exclusively on matters outside the contract. Parkins v. Missouri Pac. R. Co. [Neb.] 107 N. W. 260. Estoppel is an affirmative defense and he who relies upon it has the burden of proving the facts upon which it is based. A railroad company erected a bridge over land the fee to which was in plaintiff's grantors. Held plaintiff was not estopped to object where defendant did not get its title from plaintiff's ancestors or grantors, and there was no evidence that the bridge was built without objection on the part of those who then owned the land, and plaintiff was an infant at the time. Coatsworth v. Lehigh Valley R. Co., 100 N. Y. S. 504. On conflicting evidence not set out in the opinion, plaintiff held not to have established an estoppel against defendant to claim compensation for the use of a party wall by certain statements alleged to have been made by defendant. Howell v. Goss, 128 Iowa, 569, 105 N. W. 61. The burden of proving an estoppel against a property owner as to a street assessment is upon the treasurer seeking to enforce the collection. Bell v. Norwood, 8 Ohio C. C. (N. S.) 435.

60. The party relying on an estoppel must establish it affirmatively by clear, precise and unequivocal evidence. In an action by a vendee of land to recover an abatement of the price for a deficiency in quantity, evidence of the vendee's statements at the time of the assignment of certain bonds given for the price held insufficient to estop him as against the vendors. Berry's Ex'x v. Fishburne, 104 Va. 459, 51 S. E. 827. Where not clearly shown that a mortgagee stated to a purchaser at execution that the lien of the mortgage had been released, and that the purchaser sustained a loss by relying on the statement. Schwab v. Edge [Pa.] 64 A. 80. Estoppel is never presumed but must be proven. Crosthwaite v. Lebus [Ala.] 41 So. 853.

61. Appellant held estopped as a matter of law from recovering interest from mortgagor where it was undisputed that, without notice, she had permitted him to pay the interest to one to whom her attorney in fact had fraudulently transferred the mortgage. Union Trust Co. v. Cain, 29 Pa. Super. Ct. 189.

62. See 5 C. L. 1299.

63. Where plaintiff's grantor by reason

does, into all the different departments of the law.[64] It may apply to minors of mature appearance who fraudulently represent themselves to be of age,[65] to married women,[66] even to the extent of defeating a claim of homestead,[67] to municipalities,[68] to the public at large,[69] or even to the state itself;[70] but a minor is not estopped by inconsistent conduct on the part of his counsel or next friend in litigation,[71] and neither a public municipality[72] nor the state[73] is estopped by the

of having received the benefits of a void judicial sale was estopped to question its validity, plaintiff, having knowledge of the facts or knowledge sufficient to put him on inquiry, was also estopped to assert title as against a remote grantee under the sale. Comstock v. Robertson, 72 Kan. 465, 83 P. 1104.

64. See the particular topics treating of substantive matters to which it applies.

65. Where a minor has reached that stage of maturity which indicates that he is of age and enters into a contract falsely representing himself to be of age, accepting the benefits thereof, he will be estopped to deny that he was of age when it is sought to enforce the contract against him by one who believed him to be of age. Commantler v. Brazil [Miss.] 41 So. 497.

66. Estoppels bind married women as other people. Where appellant rendered services without objection, knowing that they were rendered in return for support and that no further pay was to be demanded, she could not recover for such services though she was a married woman separated from her husband. Smith v. Sisters of Good Shepherd [Ky.] 96 S. W. 549. To estop a married woman to assert the invalidity of her acknowledgment to a deed, it is essential that she be guilty of some positive act of fraud or of concealment or suppression equivalent thereto. Kopke v. Votaw [Tex. Civ. App.] 16 Tex. Ct. Rep. 316, 95 S. W. 15.

67. Where a husband executed a lease of the right to take salt from a tract of land occupied as a homestead and the wife did not join therein, but both she and her husband without objection to the lessee, permitted him to expend large sums of money and to operate the mine for many years both prior and subsequent to an abandonment of the homestead by them, they were thereafter equitably estopped to assert the invalidity of the lease. Shay v. Bevis Rock Salt Co., 72 Kan. 208, 83 P. 202.

68. On estoppel as applied to illegal contracts entered into by municipal corporations, see, also, Municipal Corporations, 6 C. L. 731. City estopped to deny liability under contract for the furnishing of water and waterworks, though the same was entered into for 30 years instead of 20 years, where the city accepted the benefits for many years. McGonigale v. Defiance, 140 F. 621. A municipality may be estopped by its own acts; it cannot deny the existence of facts which, by the action of its duly authorized officers, have theretofore been declared to exist, when such facts are necessary to authorize the doing of some other thing which has misled another to his prejudice. Raynolds v. Cleveland, 8 Ohio C. C. (N. S.) 278.

69. The public right to the use of streets and other lands dedicated for public use may be lost by estoppel. Where a city acquiesced in the expenditure of large sums of money by a railroad in reliance upon a title acquired from the city, and asserted a conveyance by it to the railroad in a previous litigation, it was estopped to subsequently deny the railroad's title. Sioux City v. Chicago & N. W. R. Co., 129 Iowa, 694, 106 N. W. 183. Though limitations as such does not run to defeat the right of the public to the use of a highway or street, its right may be defeated by estoppel if acts are done by an adjoining owner, showing that he in good faith claims as his own that which is in fact a part of the highway and is expending money on the faith of his claim by adjusting his property to the highway as he supposes it to be. Where plaintiff in good faith improved a portion of a street laid out but not accepted as such, and municipality allowed improvements to remain for over 13 years. Oliver v. Synhorst [Or.] 86 P. 376.

70. The state having appropriated money received into its treasury from pool selling and bookmaking, and thereby recognized the validity of Rev. St. 1899, § 7419, authorizing such gaming, it was thereafter estopped to assert its invalidity, and forfeit the charter of a corporation because it engaged in such business. State v. Delmar Jockey Club [Mo.] 92 S. W. 185.

71. Where, in partition, both parties relied upon the validity of a deed executed to one G. by his father, which was ineffective to pass title, complainants, G.'s minor heirs, were not precluded by any consent to treat such title as valid, from claiming the land of their grandfather through their father, and repudiating a conveyance made by their father. Jolly v. Graham [Ill.] 78 N. E. 919.

72. Unauthorized acts of officials will not estop a municipal corporation. Board of Park Com'rs v. Taylor [Iowa] 108 N. W. 927. City not liable for price of brick purchased by single trustee in violation of the charter, though it used the brick. Fountain v. Sacramento, 1 Cal. App. 461, 82 P. 637. The doctrine of estoppel cannot be urged against the defense of ultra vires invoked to defeat a franchise granted by public officers without authority of law. Unlawful grant of franchise by county commissioners to lay and maintain water pipes under public highways. State v. Monroe, 40 Wash. 545, 82 P. 888. City not estopped to set up illegality of purchase of fire engine, though it retained the property and paid all but one of the notes given for the price. Town of Wadley v. Lancaster, 124 Ga. 354, 52 S. E. 335. A township cannot be bound by estoppel or otherwise by the acts of a township trustee beyond the scope of his limited statutory authority. Unlawful borrowing of

unauthorized acts of its agents. A taxpayer whose property has been assessed in reliance upon a statement of his property furnished by him to the assessor is estopped to deny the ownership of the property for the purpose of avoiding the tax.[74] It has been held, also, that an administrator is estopped to assert the invalidity of a plaintiff's marriage to the deceased in an action to enforce her rights as a widow.[75]

Estoppel will not supply the want of power or make valid an act prohibited by express provision of law.[76] It cannot be invoked to change a status made criminal by statute into a lawful one,[77] or so as to permit public officers to enforce an unlawful contract or to repudiate an agreement because a party declines to be bound by an illegal provision.[78] A wrongdoer, while retaining the fruits of his wrong, cannot interpose an act intentionally and wrongfully induced by him as an estoppel against the injured party in an action for redress.[79] A receiver who has violated the order of the court by a wrongful disposition of property cannot invoke the estoppel of the owner of such property as an excuse.[80] Reliance, by the promisee, upon a parol promise does not ordinarily estop the promisor to invoke the statute of frauds.[81]

Since parties to a suit cannot confer judicial power upon a court by consent, an estoppel cannot be invoked which would have that effect.[82] While the levy upon

money. Indiana Trust Co. v. Jefferson Tp. [Ind. App.] 77 N. E. 63. Where county tax certificates were wrongfully transferred without consideration, the fact that the transfer was voluntary and with full knowledge of the facts was no defense to an action by the county to recover the amount collected by the assignees from the delinquent taxpayers. Multnomah County v. White [Or.] 85 P. 78.

73. The state is not estopped by the act of a defaulting officer, even in case of a belated settlement. Defendant who had received state money from a defaulting sheriff could not urge estoppel on the ground that the state had not required prompt returns and settlement. State v. Jahraus [La.] 41 So. 575. The state and a board of park commissioners claiming thereunder could not be estopped by the acts of city officials relative to land claimed by defendants. Board of Park Com'rs v. Taylor [Iowa] 108 N. W. 927.

74. Inland Lumber & Timber Co. v. Thompson [Idaho] 83 P. 933.

75. Though marriage void under the statute. Smith v. North Memphis Sav. Bank, 115 Tenn. 12, 89 S. W. 392. This decision seems to contravene the weight of authority. Williams v. Williams, 63 Wis. 58; Gathings v. Williams, 27 N. C. 487; Robbins v. Potter, 98 Mass. 532.

76. Could not validate conveyance of homestead in which husband did not join. Weatherington v. Smith [Neb.] 109 N. W. 381. An estoppel as predicated upon the maxim that one cannot be heard to allege his own turpitude cannot control the law in matters concerning which it speaks definitely and cannot be given the effect of subordinating the law and its policy to the will or infirmity of the citizen. Gift of all of one's property not validated by estoppel. Ackerman v. Larner, 116 La. 101, 40 So. 581.

77. Plaintiff in conversion for alleged wrongful attachment could not contend that the officer was estopped by his conduct to justify the attachment by asserting that plaintiff was engaged in an unlawful saloon business. McCarthy v. Payne, 141 Mich. 571, 12 Det. Leg. N. 570, 104 N. W. 981.

78. Where the advertisement of a county board for bids for a contract for county printing contained an unlawful provision that a union label should be used on the work, the act of a bidder in submitting a bid upon the specifications containing the illegal clause did not estop it to assert its illegality in a proceeding to require the board to approve its bond. People v. Edgcomb, 98 N. Y. S. 965.

79. Complainant was fraudulently induced by E. to take against her husband's will, and immediately thereafter two-thirds of the realty was sold to pay debts and purchased by E., who expended money in repairs. Held, as between complainant and E., the latter could not claim that the former was estopped to set aside the election for fraud. Whitesell v. Strickler [Ind.] 78 N. E. 845.

80. Receiver in foreclosure could not contend that mortgagor consented to disposition of rents and was therefore estopped to recover them. Starrett v. Berkovec, 118 Ill. App. 683.

81. The fact that relying on defendant's oral agreement to convey a life estate plaintiff purchased part of the land from the remaindermen, defendant knowing that he so relied, and defendant's accepting a partial payment did not estop her to set up the statute of frauds in an action on the agreement. Miller v. Hart [Ky.] 91 S. W. 698.

82. That defendant's counsel presented to the regular judge a bill of exceptions, reciting that the regular judge had presided at the trial, could not estop defendant from thereafter obtaining an amendment of the record so as to show that an attorney, not elected, presided as special judge. Arkadelphia Lumber Co. v. Asman [Ark.] 95 S. W. 134.

and sale of property by a person generally estops him from denying that the other party has a leviable interest therein,[83] this doctrine does not extend to the divestiture of rights under previous sales made under different process.[84] A dedication of streets invalid under the statute cannot be made a valid statutory dedication by estoppel.[85] As a rule, an estoppel cannot be invoked against a trustee in his representative capacity.[86]

EVIDENCE.

§ 1. Necessity and Duty of Adducing Evidence (1511).
A. Judicial Notice (1512).
B. Presumptions and Burden of Proof (1515).
§ 2. Relevancy and Materiality (1520).
§ 3. Competency or Kind of Evidence in General (1528).
§ 4. Best and Secondary Evidence (1529).
§ 5. Parol Evidence to Explain or Vary Writings (1536).
§ 6. Hearsay (1548).
A. General Rules (1548). Matters of Pedigree (1552). Market Reports (1553). Census Reports (1554).
B. Res Gestae (1554).
C. Admissions or Declarations Against Interest (1558).
D. Declarations of a Person Since Deceased (1567).
§ 7. Documentary Evidence (1567).
A. In General (1567). Proof of Handwriting (1570).
B. Books of Account (1571). Corporate Records (1573).
C. Public and Judicial Records and Documents (1573).
D. Proceedings to Procure Production of Documentary Evidence (1576).
§ 8. Evidence Adduced in Former Proceedings (1577).
§ 9. Expert and Opinion Evidence (1577).
A. Conclusions and Nonexpert Opinions (1577).
B. Subjects of Expert Testimony (1585).
C. Qualifications of Experts (1588).
D. Basis of Expert Testimony and Examination of Experts (1590).
§ 10. Real or Demonstrative Evidence (1592).
§ 11. Quantity Required and Probative Effect (1594).

Scope of article.—This article treats specifically of the competency of evidence, the competency of witnesses and the rules governing their examination being entirely excluded,[87] and questions of relevancy and sufficiency of evidence, except so far as they illustrate some general rule, being excluded to titles dealing with the particular subject or issue to which the evidence is addressed. Evidence in criminal prosecutions is also treated elsewhere,[88] though occasional holdings of undoubted general application are here retained.

§ 1. *Necessity and duty of adducing evidence.*[89]—Evidence need not be adduced to prove facts admitted in the pleadings,[90] or by stipulation of counsel,[91] or by admission in open court,[92] and evidence to support admitted facts may properly be excluded.[93] The admission of an attorney, made within the scope of his authority and during the continuance of his employment, binds his client to the same extent as a stipulation.[94]

83, 84. Harris v. Stephenson [Ala.] 41 So. 1008.

85. Gen. Laws 1877, c. 100, § 7, relative to the dedication of streets not having been complied with, only a common-law dedication can result, and no subsequent conduct of the city or donor can operate by way of estoppel to cure the defective dedication so as to vest the fee of the streets in the city. City of Leadville v. Coronado Min. Co. [Colo.] 86 P. 1034.

86. Not estopped by failure to notify defendant of fraud of cotrustee. Vohmann v. Michel, 110 App. Div. 659, 96 N. Y. S. 309.

87. See Witnesses, 6 C. L. 1975.

88. See Indictment and Prosecution, 5 C. L. 1790.

89. See 5 C. L. 1302.

90. Facts admitted in pleadings, or legal inferences from facts admitted, need not be proved. Williams' Ex'r v. Chamberlain [Ky.] 94 S. W. 29. Facts admitted by pleadings need not be proved. Kannow v. Farmers' Coop. Shipping Ass'n [Neb.] 107 N. W. 563.

91. Where counsel stipulate that laws of a foreign territory shall be considered as evidence in both courts, proof of the common law as required by Ky. St. 1903, § 1641, is not necessary. Williams' Ex'r v. Chamberlain [Ky.] 94 S. W. 29.

92. Where incorporation of two companies was admitted in open court certified copies of their charters were properly excluded. Armour Packing Co. v. Vietch-Young Produce Co. [Ala.] 39 So. 680.

93. Courts are not bound to admit evidence supporting admissions in the pleadings. Townsend v. Sullivan [Cal. App.] 84 P. 435.

(§ 1) *A. Judicial notice.*[95]—Judicial notice takes the place of proof and is of equal force.[96] Courts take judicial notice of their own records and proceedings[97] so far as they are relevant to causes pending before them,[98] but a court will not judicially know that proceedings in a case are pending in another jurisdiction.[99] An appellate court will take judicial notice of the terms of a lower court,[1] but not of its rules.[2] State courts take judicial notice of public domestic statutes[3] and of a long continued practical construction given such statutes by public officials;[4] of the constitution of the state;[5] of public documents;[6] of who are commissioned officers of the state[7] and of their terms of office[8] and of the genuineness of their signatures;[9] of the seals of notaries;[10] of public surveys and the boundaries of counties;[11] of

94. Heywood Bros. & Wakefield Co. v. Doernbecher Mfg. Co. [Or.] 86 P. 357.

95. See 5 C. L. 1302.

96. Sun Ins. Co. v. Western Woolen Mill Co., 72 Kan. 41, 82 P. 513. The process of taking judicial notice does not necessarily imply that the judge at the moment actually knows and feels sure of the matter submitted. It merely relieves a party from offering evidence because the matter is either known or can be easily ascertained by the judge. Ball v. Flora, 26 App. D. C. 394.

97. Matters constituting part of record in the cause. Pavlicek v. Roessler, 121 Ill. App. 219. Facts acquired at prior hearing of same cause. State v. Richardson [Or.] 85 P. 225. An appellate court takes judicial notice of its own records, and may inspect same in considering a case, either on its own motion or on suggestion of counsel. Hancock v. Diamond Plate Glass Co. [Ind. App.] 75 N. E. 659. Supreme court takes judicial notice of its own records, and hence will know that judgment on which garnishment proceedings were based has been reversed by it. Chicago Herald Co. v. Bryan, 195 Mo. 590, 92 S. W. 906. Court of appeals may take judicial notice of its own records to determine identity of fund in issue with one recovered for a certain person in a prior suit. Sawyer v. First Nat. Bank [Tex. Civ. App.] 14 Tex. Ct. Rep. 701, 93 S. W. 151. In garnishment proceedings instituted after judgment rendered in the same court, court will take judicial notice of judgment. Baze v. Island City Mfg. Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 483, 94 S. W. 460.

98. On appeal from order sustaining demurrer to complaint in suit to set aside a judgment, court will not take judicial notice of record on appeal from an order denying a motion to set aside the same judgment. Estudillo v. Security Loan & Trust Co. [Cal.] 87 P. 19.

99. District court will not take judicial notice of proceedings in a case in another jurisdiction. Cumberland Tel. & T. Co. v. St. Louis, etc., R. Co. [La.] 41 So. 492.

1. Supreme court takes judicial notice of dates on which terms of circuit court began and ended. Fry v. Radzinski, 219 Ill. 526, 76 N. E. 694. Supreme court judicially knows that circuit court convened on a certain day and that its session was limited to a certain time. McMullen v. Long [Ala.] 39 So. 777.

2. Supreme court will not judicially notice rules of district courts (under Code Civ. Proc. § 3150) specifying what facts courts will judicially notice. Bowen v. Webb [Mont.] 85 P. 739.

3. Public laws of the state. Doss v. Mermentau Levee Dist. Com'rs [La.] 41 So. 720. Requirements of cattle quarantine laws. Wabash R. Co. v. Campbell, 117 Ill. App. 630. General laws of commonwealth need not be put in evidence. Barnes v. Squier [Mass.] 78 N. E. 731. Courts take judicial notice of quarantine laws relating to transportation of cattle. Wabash R. Co. v. Campbell, 219 Ill. 312, 76 N. E. 346.

4. Supreme court will judicially notice long continued practical construction given by territorial board of equalization to statutes under which it acted. Copper Queen Consol. Min. Co. v. Territorial Board of Equalization [Ariz.] 84 P. 511.

5. Court takes judicial knowledge of repeal of statute by constitution. Campbell v. Shelby County [Ala.] 41 So. 407.

6. Letter of commissioner of general land office concerning public lands in railway grant is a public document and will be judicially noticed. Southern Pac. Co. v. Lipman, 148 Cal. 480, 83 P. 445.

7. Courts take judicial notice of commissioned officers of the state and county but not of de facto officers. Williams v. Finch [Ala.] 41 So. 834.

8. Of terms of public officers fixed by statutes of the territory. Aultman Taylor Machinery Co. v. Burchett, 15 Okl. 490, 83 P. 719. Where the sufficiency of a bond of a county supervisor, the amount of which was based on the taxes, was in issue, the court took judicial notice of the time when his term of office began and that at that time certain taxes had not been collected. State v. Smith [Miss.] 40 So. 22.

9. Genuineness of signatures of commissioned officers of the state. Ryan v. Young [Ala.] 41 So. 954. That a successor to the officer who signed a document in question has been chosen does not alter the rule. Id.

10. Of seals of notaries public. Code Civ. Proc. § 1875, subd. 7. Pardee v. Schanzlin [Cal. App.] 86 P. 812.

11. State v. Southern R. Co. [N. C.] 54 S. E. 294. Governmental survey of territory of state, and relative location as originally laid off, and the effect of legislative enactments changing boundaries and creating new counties. Huxford v. Southern Pine Co., 124 Ga. 181, 52 S. E. 439. In an action to recover taxes paid a county on the ground that the land taxed was situated in another county, the court should judicially notice the location of the boundary line between the two, this being established by Pol. Code §§ 3918, 3919. Merritt v. Trinity County [Cal. App.] 84 P. 675.

the classification to which a certain county belongs;[12] of the location of cities;[13] of the population of towns and cities as shown by the last Federal census;[14] of the permanent locations of important railroads;[15] of the navigability of rivers.[16] Courts may take judicial cognizance of the boundaries of a city established by a public statute,[17] but cannot know the boundaries of cities not so established,[18] nor that certain designated streets are within or outside of the limits of a city.[19] A state court will take judicial notice of a charter granted to a railroad company by the secretary of state under a general statute authorizing such incorporation.[20]

Courts will not take judicial notice of the statutes of another state,[21] nor of the decisions of its courts.[22] Laws of the United States and regulations of the executive departments will be judicially noticed,[23] but it is better practice to incorporate departmental regulations in the record, on appeal to a Federal court.[24] The terms of a treaty with Indians, setting aside certain lands within the state, as a reservation for a certain tribe, will be judicially noticed by the state courts.[25] A city charter[26] and the fact of incorporation of a city and that its charter has been amended[27] will be judicially noticed when shown by a public statute. State courts of general

12. That a particular county belongs to a certain class within a statutory classification. Alameda County v. Dalton, 148 Cal. 246, 82 P. 1050.

13. Geographical positions of cities and towns within the jurisdiction. State v. Southern R. Co. [N. C.] 54 S. E. 294. County within which a city of the state is located. Anniston Elec. & Gas Co. v. Elwell [Ala.] 42 So. 45. Distance between two towns on railroad in the state. Johnson v. Atlantic Coast Line R. Co. [N. C.] 53 S. E. 362. Court will take judicial notice that a certain place is a city and the county seat of a certain county in another state. Phillips v. Lindley, 98 N. Y. S. 423.

14. Page v. McClure [Vt.] 64 A. 451; Ferrell v. Ellis, 129 Iowa, 614, 105 N. W. 993.

15. Runs and locations of railroads between two points in the state. Texas, etc., R. Co. v. Walker [Tex. Civ. App.] 15 Tex. Ct. Rep. 836, 95 S. W. 743. Judicial notice taken of permanent location of important line of railroad through the state upon a firmly estalished route, and that certain lands conveyed to the railroad company by patent from the state under authority of an act of congress, are within the limits of such permanent location and a part of the lands granted to the company. Worden v. Cole [Kan.] 86 P. 464.

16. That Tennessee river is a navigable stream. Terrell v. Paducah [Ky.] 92 S. W. 310. Judicial notice will be taken of the navigability of large streams which are used for navigation as a matter of common knowledge, but the navigability of streams for such purposes as floating logs is a matter for proof. McKinney v. Northcutt, 114 Mo. App. 146, 89 S. W. 351.

Contra: Judicial notice will not be taken of whether a stream is or is not navigable; this is a question of fact for the jury. People v. Board of Supervisors, 122 Ill. App. 40.

17, 18. City of Topeka v. Cook, 72 Kan. 595, 84 P. 376.

19. As that an alley between two designated streets is within territorial limits of City of Topeka. City of Topeka v. Cook, 72 Kan. 595, 84 P. 376.

20. Atlanta & W. P. R. Co. v. Atlanta, etc., R. Co., 124 Ga. 125, 52 S. E. 320.

21. Leathe v. Thomas [Ill.] 75 N. E. 810; White v. Richeson [Tex. Civ. App.] 94 S. W. 202; Smith v. Aultman [Mo. App.] 96 S. W. 1034; McKnight v. Oregon Short Line R. Co. [Mont.] 82 P. 661. Statutes of another state must be proved as any other fact. Snuffer v. Karr, 197 Mo. 182, 94 S. W. 983. Courts will not take judicial knowledge of statutes of another state under which a corporation was organized. Cumberland Tel. & T. Co. v. St. Louis, etc., R. Co. [La.] 41 So. 492.

22. Judicial notice cannot be taken of the decisions of the courts of other states. Southern Exp. Co. v. Owens [Ala.] 41 So. 752.

23. Laws of the United States and regulations of land office relating to sales of public lands and issuance of patents thereto. Kimball v. McKee [Cal.] 86 P. 1089. Regulations of Federal department of agriculture, relative to transportation of cattle, will be judicially noticed by state courts. State v. Southern R. Co. [N. C.] 54 S. E. 294. For purposes of removal of a cause, a Federal court will take judicial notice that a corporation named in a pleading is one created by Federal law. Heffelfinger v. Choctaw, etc., R. Co., 140 F. 75. Judicial notice taken that there is a Federal statute making the laws of Arkansas operative in Indian Territory. Bink v. State [Tex. Cr. App.] 89 S. W. 1075.

24. Departmental regulations should be put in the record of the trial court; it is unfair to a Federal appellate court to ask it to judicially notice such regulations. Nagle v. U. S. [C. C. A.] 145 F. 302.

25. As that the reservation belonged to the tribe as such and not to the Indians as individuals. Peano v. Brennan [S. D.] 106 N. W. 409.

26. Judicial notice will be taken of a city charter when it is made a public act. City of Austin v. Forbis [Tex.] 13 Tex. Ct. Rep. 818, 89 S. W. 405.

27. That City of Houston has been incorporated for over 40 years and that its charter has been amended from time to time by the legislature. City of Houston v. Dooley [Tex. Civ. App.] 89 S. W. 777.

jurisdiction cannot judicially notice municipal ordinances,[28] but municipal courts may do so.[29]

All courts take judicial notice of matters of common and general knowledge,[30]

28. State courts cannot judicially notice municipal ordinances and regulations. Town of Canton v. Madden [Mo. App.] 96 S. W. 699. Municipal ordinances. Gardner v. State [Ark.] 97 S. W. 48. City ordinances. City of St. Louis v. Liessing, 190 Mo. 464, 89 S. W. 611. No court except the municipal court can take judicial notice of a municipal ordinance. Hill v. Atlanta, 125 Ga. 697, 54 S. E. 354.

29. Ex parte Luening [Cal. App.] 84 P. 445. In a trial before a municipal court, the recorder or other presiding judge may take judicial notice of the ordinances of the city defining offenses against the same. Hill v. Atlanta, 125 Ga. 697, 54 S. E. 354.

30. That whisky is intoxicating. Wilcoxson v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 33, 91 S. W. 581. That kerosene is product of crude petroleum. Moeckel v. C. A. Cross & Co., 190 Mass. 280, 76 N. E. 447. That no fruit is growing on peach or apple trees on or about January 10th. Putnam v. St. Louis S. W. R. Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 651, 94 S. W. 1102. The court will take judicial notice that cigarettes are generally made of tobacco rolled within "small pieces of tissue paper of the size of about one and three-fourths inches by three and one-fourth inches." Kappes v. Chicago, 119 Ill. App. 436. Manner of loading ties for exportation by water. Ayer & Lord Tie Co. v. Keown [Ky.] 93 S. W. 588. That a time after 4 and before 6 o'clock in the afternoon of September 16th is before sunset. Dayton & W. Traction Co. v. Marshall, 36 Ind. App. 491, 75 N. E. 824. That the maintenance of switch lanterns at railroad sidings tends to promote the safety of employes and the traveling public. Southern R. Co. v. Blanford's Adm'x [Va.] 54 S. E. 1. That in many counties of Kentucky most important highways are toll roads built largely by private capital. Rousch v. Vanceburg, etc., Turnpike Co., 27 Ky. L. R. 542, 85 S. W. 735. That a company organized under state laws and operating a street railway is a carrier of passengers. Indianapolis St. R. Co. v. Ray [Ind.] 78 N. E. 978. Necessity of keeping locomotive engine in good condition and repair. Wabash R. Co. v. Thomas, 117 Ill. App. 110. Of such soil conditions within its territorial jurisdiction as are matters of common knowledge. City of Chicago v. Duffy, 117 Ill. App. 261. Laws of nature; effect of freshet in stream on riparian land under certain circumstances. Morton v. Oregon Short Line R. Co. [Or.] 87 P. 151. Courts judicially know that mass of property in the state is made up of lands and personalty, but not the amount of personalty. Georgia R. & Banking Co. v. Wright, 125 Ga. 589, 54 S. E. 52. Supreme court of New York county will take judicial notice of sufficient facts concerning public streets of city to identify places described in a petition. In re City of New York, 48 Misc. 602, 96 N. Y. S. 554. In determining whether a patent has been infringed, court will take judicial notice of facts of general knowledge and devices in common use wherein the same or a similar principle is involved as in the claimed invention. Baker v. Duncombe Mfg. Co. [C. C. A.] 146 F. 744. Courts will take judicial notice of general duties and character of occupations classed as "professions," in determining what are professional instruments exempt from execution. O'Reilly v. Erlanger, 108 App. Div. 318, 95 N. Y. S. 760. Courts will take judicial notice of the meaning of English words and of such matters of general knowledge, science, or natural history as are or may be, known by men of ordinary understanding and intelligence. Sun Ins. Co. v. Western Woolen-Mill Co., 72 Kan. 41, 82 P. 513. Judicial notice taken by Federal supreme court that in New Mexico and other parts of the west cattle are required to be branded to identify ownership, and that they run at large in great stretches of country with only the brands or other marks to identify them. Territory of New Mexico v. Denver, etc., R. Co., 27 S. Ct. 1.

Not judicially noticed: That 50 or 55 miles an hour is not a dangerous rate for a train. Texas & N. O. R. Co. v. Langham [Tex. Civ. App.] 15 Tex. Ct. Rep. 567, 95 S. W. 686. That a foggy night brings a foggy morning. Id. Courts will not take judicial notice of the compact made by members of a labor union with the union, nor of the principles governing such unions. Birmingham Paint & Roofing Co. v. Crampton [Ala.] 39 So. 1020. A custom of agents in selling hotel furnishings to enter into a covenant that the seller shall not engage in a competing business if it exists cannot be judicially noticed. Sanders v. Brown [Ala.] 39 So. 732. Held that court could not take judicial notice of location of "Denver Tramway Company" or of "South Broadway" where there was no proof of the town, city, county, or state wherein they were situated. Ingersoll v. Davis [Wyo.] 82 P. 867. Court does not take judicial knowledge that there are but two telegraph companies in the state. State v. Atlantic Coast Line R. Co. [Fla.] 40 So. 875. Courts cannot take judicial knowledge of character of light supplied and maintained at any time by an incorporated town of the state. Chicago, etc., R. Co. v. Salem [Ind.] 76 N. E. 631. Where a protest is made to the granting of a liquor license the court will not take judicial notice that the protest is signed by persons qualified as signers. Guinn v. Cumberland County Ct. [Ky.] 90 S. W. 274. Where it appears that only two persons in the state have been proceeded against for taxes on a particular kind of personal property, the court cannot take judicial notice that there are other persons in the state who own personal property of that description and who have not been required to pay taxes. Georgia R. & Banking Co. v. Wright, 125 Ga. 589, 54 S. E. 52. Court does not know judicially that a municipal ordinance providing for cess pools in its system of sanitation is oppressive or unreasonable. Logan v. Childs [Fla.] 41 So. 197. Court cannot take judicial notice that racing as-

such as historical facts,[31] general customs and usages,[32] and the coincidence of days of the month with days of the week.[33]

(§ 1) *B. Presumptions and burden of proof.*[34]—The so-called conclusive presumptions, being in effect rules of substantive law, are not here treated; and only those disputable presumptions which are of wide application are discussed or illustrated.

It is competent for the legislature to establish rules of evidence which do not conflict with constitutional rights and privileges.[35] Thus, statutes which make public records or documents,[36] or proof of certain facts,[37] presumptive evidence of certain other ultimate facts are valid.

A presumption of fact is simply an inference or conclusion logically deduced from known data. Such a presumption cannot be based upon another disputable presumption,[38] but must be an immediate inference from facts proved.[39] Such a presumption is only evidence to be considered by a jury in determining the issue before them, and the weight of such evidence will depend upon the circumstances under which the presumption is invoked.[40] Presumptions of this nature are always disputable, even when declared by statute,[41] in the absence of express statutory provisions to the contrary.[42] When controverted by other evidence, they have been

sociation created and paid over each year a fund for an agricultural exhibit at the state fair when it in fact had no such exhibit. State v. Delmar Jockey Club [Mo.] 92 S. W. 185.

31. That country was in a state of war in 1861, and that state of Mississippi had a de facto government whose officials were bound to obey its mandates. Day v. Smith [Miss.] 39 So. 526. That governments of Italy and the United States are at peace. Trotta's Adm'r v. Johnson [Ky.] 90 S. W. 540. Courts will take judicial notice of the division of the Methodist Episcopal Church, the territory over which each division exercises jurisdiction and the articles of separation, with reference to the territorial division of the property. Malone v. La Croix [Ala.] 41 So. 724.

32. Appellate court judicially knows that "f. o. b." means free on board. Kilmer v. Moneyweight Scale Co., 36 Ind. App. 568, 76 N. E. 271. The abreviation "pres." for "president" is in such common use that courts will take judicial notice of its meaning. Griffin v. Erskine [Iowa] 109 N. W. 13. That men ordinarily, during business hours, wear their watches in their vests. Wamser v. Browning, King & Co., 109 App. Div. 53, 95 N. Y. S. 1051. Courts are bound to take judicial notice of all common-law rights and duties and of general customs. Clement v. Graham, 78 Vt. 290, 63 A. 146. Court takes judicial notice that "standard" or "railroad" time is the system for designating time which has been in general use in the jurisdiction since territorial days. Orvik v. Casselman [N. D.] 105 N. W. 1105. Courts cannot judicially know the business hours of a particular bank, but will take judicial notice that the usual opening hour for banks in cities and towns of same size is 9 o'clock a. m. Lewis, Hubbard & Co. v. Montgomery Supply Co. [W. Va.] 52 S. E. 1017. Though courts cannot judicially notice the existence or mode of business of any particular bank they will take judicial notice that in all cities and towns of large population and extensive business there are banks which have rules and regulations governing their mode of business, and that parties dealing with them or in commercial paper conform thereto. Id.

33. The court will take judicial notice that a certain date was Sunday. State v. Bergfeldt, 41 Wash. 234, 83 P. 177.

34. See 5 C. L. 1303.

35. Banks v. State, 124 Ga. 15, 52 S. E. 74.

36. Competent for legislature to make certified copies of mine inspectors' reports prima facie proof of truth of recitals. Andricus' Adm'r v. Pineville Coal Co. [Ky.] 90 S. W. 233. It is competent for the legislature to make the records of a county clerk's office prima facie evidence of the existence or nonexistence of a license to practice medicine, and an objection that such statute is unconstitutional as declaring an arbitrary and illogical rule of evidence is untenable. State v. Lawson, 40 Wash. 455, 82 P. 750.

37. Act of 1903 (relative to procuring advance under pretended contract of hire) making proof of certain facts presumptive evidence of a fraudulent intent is valid. Banks v. State, 124 Ga. 15, 52 S. E. 74.

38. An inference of fact cannot be legitimately drawn from a rebuttable presumption, but only from premises which are certain. United States Fidelity & Guaranty Co. v. Des Moines Nat. Bank [C. C. A.] 145 F. 273.

39. United States Fidelity & Guaranty Co. v. Des Moines Nat. Bank [C. C. A.] 145 F. 273.

40. People v. Wong Sang Lung [Cal. App.] 84 P. 843.

41. The statutory presumption of fraud arising from a sale of goods in bulk without complying with the statute regulating such sales may be overcome by evidence of good faith. Williams v. Fourth Nat. Bank, 15 Okl. 477, 82 P. 496.

said to cease to operate,[43] but the question whether they have in fact been overcome by other facts is ordinarily for the jury.[44]

Among the presumptions of fact commonly recognized is the presumption that a person, a relation or status, or a state of facts, once shown to exist continues to exist,[45] but not that it existed at a previous date.[46] Identity of person is presumed from identity of name,[47] especially where there is also a similarity in residence, or trade, or circumstances, or where the name is unusual,[48] but this presumption can be invoked only in a case where the name is to be applied to a particular person involved.[49] If the name is common in the vicinity, or if it be shown that there is more than one person to whom the name may be applied, there can be no presumption that such person is the one to whom the jury should apply it.[50] Proof that a letter was properly addressed, stamped, and mailed,[51] raises a presumption of fact that it was received in due course by the addressee,[52] rebuttable, of course, by contrary proof.[53] Possession of a written contract is only prima facie, not conclusive evidence of delivery.[54] This presumption is not raised where the instrument shows on its face that some act remains to be done to make it complete.[55] Where party

42. Code Civ. Proc. § 1962, declares certain presumptions conclusive. People v. Wong Sang Lung [Cal. App.] 84 P. 843.

43. Under the California code, the presumptions which are declared to be disputable are in effect only inferences which, in the absence of any controverting evidence, the jury is required to make. Code Civ. Proc. § 1963. People v. Wong Sang Lung [Cal. App.] 84 P. 843. Such disputable presumptions cease to operate, so as to require certain deductions by the jury, when controverted by other evidence. Id.

44. Whether a presumption of fact has been overcome by other facts and circumstances shown is for the jury. Opet v. Denzer [Tex. Civ. App.] 16 Tex. Ct. Rep. 118, 93 S. W. 527. The presumption that letters and telegrams sent in due course of business were received by the addressee is rebuttable, but whether it has been rebutted is for the jury. Long Bell Lumber Co. v. Nyman [Mich.] 13 Det. Leg. N. 577, 108 N. W. 1019.

45. When the existence of a person, a personal relation or a state of things is once established by proof, the law presumes the continuance thereof until the contrary is shown or until a different presumption is raised from the nature of the subject in question. Adjudicated status of college presumed to continue. State v. Chittenden, 127 Wis. 468, 107 N. W. 500. Where it is alleged that another and prior action had been brought relating in some degree to the same subject-matter, and there is no allegation that such prior action had been determined, it must be assumed to be still pending. Williams v. Ellis [Me.] 63 A. 818.

Rule held inapplicable: Evidence that sacks of fertilizer were tagged when delivered to a carrier for shipment does not raise a presumption that they were still tagged when delivered at destination. Alabama Nat. Bank v. Parker & Co. [Ala.] 40 So. 987.

46. Proof of insanity raises no presumption of its past existence. In re Dalbeer's Estate [Cal.] 86 P. 695.

47, 48. Layton v. Kraft, 98 N. Y. S. 72.

49, 50. People v. Wong Sang Lung [Cal. App.] 84 P. 843.

51. Proof that a letter was "mailed" to the addressee is sufficient to raise the presumption that it was received in due course. Ward v. Morr Transfer & Storage Co. [Mo. App.] 95 S. W. 964. Mere proof that an address had been "sent" does not warrant an inference that it was duly mailed so as to raise a presumption that it was received in due course of mail. Id. That a letter, duly addressed, was stamped before it was mailed may be proved by evidence that only stamped envelopes were used in the office of the sender, and that clerks in the office always used these envelopes for letters of the sender. Burch v. Americus Grocery Co., 125 Ga. 153, 53 S. E. 1008. Where a witness testifies that he mailed a letter by depositing it in a street letter box, it is presumed that the letter was duly stamped. Reynolds v. Maryland Casualty Co., 30 Pa. Super. Ct. 456.

52. Siebe v. Heilman Mach. Works [Ind. App.] 77 N. E. 300; Opet v. Denzer [Tex. Civ. App.] 16 Tex. Ct. Rep. 118, 93 S. W. 527. There is a presumption that letters and telegrams sent in due course of business were received by the addressee. Long Bell Lumber Co. v. Nyman [Mich.] 13 Det. Leg. N. 577, 108 N. W. 1019. Where there was proof that check was enclosed in properly addressed and mailed letter, and that it would have reached the addressee in due course the next day, the issue of receipt of the check was raised. Pink Front Bankrupt Store v. Mistrot & Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 889, 14 Tex. Ct. Rep. 200, 90 S. W. 75.

53. Presumption that letter directed to person in the same city and mailed in the morning was delivered the same day overcome, where addressee testified he did not receive it, and mail carrier testified post mark showed it was not received at post office until 3 hours after the last delivery, and would not have been delivered ordinarily until next morning. Beeman v. Supreme Lodge, Shield of Honor [Pa.] 64 A. 792.

54. Dodd v. Kemnitz [Neb.] 104 N. W. 1069.

to an instrument signs with a cross mark, it will be presumed, in the absence of evidence to the contrary, that he was illiterate and could not read.[56] A negotiable note or order drawn by a debtor and accepted by the creditor is presumed to be payment on an existing indebtedness,[57] but this presumption is rebuttable.[58]

Failure to produce available evidence on a material issue raises the presumption that the evidence, if produced, would be unfavorable to the party suppressing it,[59] and failure to call an available witness to rebut a prima facie showing made by the other party on a particular issue[60] warrants the inference by the jury that the testimony of the witness, if called, would be unfavorable.[61] For the purpose of meeting this presumption, evidence explaining failure of a party to call a particular person as a witness is admissible,[62] and where it is made to appear that such person was not in fact available as a witness, no unfavorable presumption arises.[63] No unfavorable inference can be drawn from the failure or refusal of a party to waive his privilege as to information acquired by his physician in a professional capacity.[64] There is a conflict as to whether it may be shown, in a personal injury action, that plaintiff

55. Rule applied where insurance policy lacked revenue stamp. Amos-Richia v. Northwestern Mut. Life Ins. Co. [Mich.] 13 Det. Leg. N. 129, 107 N. W. 707.

56. Interstate Coal & Iron Co. v. Clintwood Coal & Timber Co. [Va.] 54 S. E. 593.

57. Lewis v. England [Wyo.] 82 P. 869.

58. Acceptance of checks held not payments on an account where it was shown that checks were cashed by the creditor to enable debtor to pay off his employes, there being no bank convenient. Lewis v. England [Wyo.] 82 P. 869.

59. Lewis v. Fleer, 30 Pa. Super. Ct. 237; Alexander v. Blackman, 26 App. D. C. 541; Robinson v. Union Cent. Life Ins. Co., 144 F. 1005; Choctaw & M. R. Co. v. Newton [C. C. A.] 140 F. 225. From an omission to produce certain evidence, jury may infer either that it could not be produced, or, if produced, would be unfavorable to party failing to produce it. Murray v. Joseph, 146 F. 260. If parties to a suit have evidence peculiarly within their own knowledge and do not produce it, the presumption is that if produced it would be unfavorable. Western Union Tel. Co. v. McClelland [Ind. App.] 78 N. E. 672. Evidence being conflicting as to whether a rope which had parted was defective, failure of the vessel, which had the rope, to produce it, would be construed against it in solving the doubt. The Luckenbach, 144 F. 980. In action of trover, where defendant failed to produce lease, jury was warranted in assuming that provisions as to his right to remove goods were unfavorable to defendant. Willson v. Griswold, 73 Conn. 515, 63 A. 659. Where veins included in mining lease were in dispute between the lessor and lessee, failure of the lessor to produce its office map, referred to in the description in the lease, warranted the presumption that the map if produced, would be evidence unfavorable to the lessor. Isabella Gold Min. Co. v. Glenn [Colo.] 86 P. 349.

60. Where a defendant fails to make out a prima facie defense plaintiff is not bound to offer any counter evidence, and in such case the rule that an unfavorable inference may be drawn against a party who fails to produce available proof has no application. Southern Exp. Co. v. B. R. Elec. Co. [Ga.] 55 S. E. 254.

61. Where wife and sons of a tax debtor were living in the parish where the trial was had, and were not called as witnesses by the defendant to testify as to the alleged death of the husband and father prior to 1890, the presumption is that their testimony would not have aided in establishing such contention. Iberia Cypress Co. v. Thorgeson, 116 La. 218, 40 So. 682. If father in feigned issue of title to property could have produced son as a witness and failed to do so, the presumption was that, if produced, the son's testimony would be unfavorable, but this presumption was not conclusive. Green v. Brooks [Pa.] 64 A. 672.

62. Proper to show why boy did not testify on a former trial. McDonald v. City Elec. R. Co. [Mich.] 13 Det. Leg. N. 252, 108 N. W. 85. Party may explain that a witness whom he would be expected to call is absent in foreign countries. Warth v. Loewenstein, 219 Ill. 222, 76 N. E. 379. It is competent for a party to show the unavoidable absence of a material witness not produced by him. Warth v. Loewenstein, 121 Ill. App. 71. Evidence that defendant was not notified of the accident is admissible to overcome the prejudice of the jury arising from the fact that defendant called no witnesses. Hirsch v. Union R. Co., 48 Misc. 527, 96 N. Y. S. 333.

63. Where agent who executed contract sued on had left defendant's employ, and was no longer subject to his control or direction, no unfavorable presumption arose from defendant's failure to call him as a witness. Naughton Co. v. American Horse Exch. Co., 49 Misc. 227, 97 N. Y. S. 387. Where in an action based on a street car accident it appeared the motorman was in the Philippines, and it was not shown that his testimony, if given, would be material, an instruction to the effect that a commission might have been procured to take his testimony, and that failure to produce it warranted an inference that, if produced, it would be unfavorable, was error. Rooder v. Interurban St. R. Co., 48 Misc. 519, 96 N. Y. S. 255.

64. No unfavorable inference may be

refused to submit to a medical examination.[65] Where the person best qualified to testify to certain facts is called, failure to call others to testify to the same facts does not warrant an instruction that the testimony of the person called should be viewed with distrust.[66] Failure of a party to testify, where certain facts, if they exist, would be peculiarly within his own knowledge, warrants the presumption that such facts do not exist,[67] provided such party would be a competent witness to the facts in question.[68]

There are certain rebuttable presumptions indulged by the courts on grounds of public policy. Thus, the law presumes the validity and regularity of the official acts of public officers within the line of their official duties, and this presumption obtains until overcome by proof as to such acts,[69] except in cases where it is sought to take away personal rights of a citizen, or deprive him of his property, or place

drawn from the failure or refusal of a patient to waive his privilege with reference to information acquired by his physician, which is privileged by reason of Code Civ. Proc. N. Y. §§ 834, 836. Pennsylvania R. Co. v. Durkee [C. C. A.] 147 F. 99.

65. Refusal to submit to medical examination cannot be shown. Illinois, etc., R. Co. v. Downs, 122 Ill. App. 545. In a personal injury action, defendant may not only prove that plaintiff has refused to submit to a physical examination, but may also ask plaintiff, while on the stand, if he is willing to submit to such examination. Gulf, etc., R. Co. v. Booth [Tex. Civ. App.] 97 S. W. 128. Plaintiff may then explain a negative answer. Id.

66. Where only one of four physicians who attended a patient was called, the one called having had charge of the case, and the others having been called in consultation, it was not error to refuse to charge that evidence should be viewed with distrust, where stronger or better evidence was available but was not used. Wood v. Los Angeles Traction Co., 1 Cal. App. 474, 82 P. 547.

67. Where a party who would necessarily have known alleged facts had they existed refused to testify thereto when on the stand, the inference was warranted that the facts did not exist. Aragon Coffee Co. v. Rogers [Va.] 52 S. E. 843. Where a defendant can, by his own testimony, throw light upon matters in issue necessary to his defense and peculiarly within his knowledge, if the facts exist, and fails to go upon the witness stand, the presumption is raised that the facts do not exist. State v. Jahraus [La.] 41 So. 575. Where certain facts are within the peculiar knowledge of a party and he voluntarily absents himself and fails to testify, that fact may fairly be commented on by counsel in his argument before the jury. Ledford v. Emerson [N. C.] 54 S. E. 433.

68. No unfavorable presumption is raised by a party's failure to testify to certain facts when as to such facts he is not competent as a witness. Reinhardt v. Marks' Adm'r [Ky.] 93 S. W. 32.

69. Public survey presumptively made in accordance with law. Christ v. Fent, 16 Okl. 375, 84 P. 1074. There is at least a prima facie presumption that city officials intend to act legally and within their powers. Connor v. Marshfield [Wis.] 107 N. W. 639. Law presumes that all officers intrusted with custody of public files and records will keep them safely in their offices. Clement v. Graham, 78 Vt. 290, 63 A. 146. Presumed in absence of contrary proof that town treasurer complied with Mills' Ann. St. §§ 4460, 4461, relating to order of payment of city and town warrants. Town of Manitou v. First Nat. Bank [Colo.] 86 P. 75. Regularity of official acts of notaries public will be presumed. Code Civ. Proc. § 1963, subd. 15. Pardee v. Schanzlin [Cal. App.] 86 P. 812. Presumed that surveyor recorded field notes and filed certificate as required by law, where patent was subsequently issued by proper authorities. Waterhouse v. Corbett [Tex. Civ. App.] 96 S. W. 651. Where award of school land, classified as dry grazing land, was cancelled, the land being in fact dry agricultural land, the presumption of regularity attached to the cancellation and not the award. Smithers v. Lowrance [Tex. Civ. App.] 15 Tex. Ct. Rep. 88, 91 S. W. 606. A warrant for public land, and a patent issued pursuant thereto, are presumptive evidence that acts required to be done by Act Jan. 27, 1806, have been done by officials of land office, and person holding same need not prove such acts to make a case. Houseman v. International Nav. Co. [Pa.] 64 A. 379. Where tax roll contains certificate of county auditor that it was subscribed and sworn to by the assessor as required by Laws 1891, p. 41, c. 14, § 40, there is a presumption that the oath was administered, though the affidavit of the assessor is not signed. Bandow v. Wolven [S. D.] 107 N. W. 204. When a sheriff's deed to land, regular upon its face, reciting a levy and sale under an execution issued from a justice's court, has been admitted in evidence, and there is evidence showing the loss of the execution, there is a presumption that before the land was levied upon a proper officer had made upon the execution an entry of no personal property to be found. Patterson v. Drake [Ga.] 55 S. E. 175. Where statute required delinquent tax lists to be filed as a part of the records of the county court, and the certificate of the publisher was to the effect that the published list had been filed in the "office of the county clerk and ex-officio clerk of the county court," it could not be presumed that the statute had been complied with. Drennan v. People [Ill.] 78 N. E. 937.

a charge or lien thereon.[70] It is presumed that judicial proceedings were regular where the court had jurisdiction.[71] The rule that a certificate of election issued by the proper authority is presumptive proof of right to the office does not apply where two certificates are issued to different persons for the same office.[72] Everyone is presumed to know the law,[73] and compliance therewith will be presumed until the contrary is shown.[74] There is a presumption against suicide, even where it is shown that death was self-inflicted.[75] The presumptions of innocence and legitimacy are presumptions of law and are good until disproved.[76] There is no presumption of law that a man who marries a second time has been legally divorced from his first wife, who is living at the time of the second marriage.[77] Such a presumption can be raised only by facts upon which it may be legitimately founded.[78]

Where there is no proof of the law of another state, it will be presumed that the common law prevails in that state[79] and that its law is the same as that of the forum;[80] but it is only the common law of the forum which is presumed to be the same as that of the sister state,[81] there is no presumption that statute law of the forum prevails in another state.[82] There are, however, authorities to the contrary.[83]

70. Christ v. Fent, 16 Okl. 375, 84 P. 1074.

71. A court is presumed to have authority to administer oaths to witnesses, and an oath administered by a clerk will be presumed to have been administered under authority from the court. State v. Harter [Iowa] 108 N. W. 232. Presumed that execution had been issued upon judgment under which garnishment proceedings were instituted. Baze v. Island City Mfg. Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 483, 94 S. W. 460. Presumed that judgment foreclosing rights of certificate to land was properly filed as required by Pol. Code § 3550. Shepard v. Mace, 148 Cal. 270, 82 P. 1046. Presumed that lunatic was present at inquest where he was adjudged insane, since the law so requires. Porter v. Eastern Kentucky Asylum for Insane [Ky.] 90 S. W. 263.

72. People v. Davidson [Cal. App.] 83 P. 161.

73. A claim that a contract should be held valid because a party to it assumed validity of certain law under which it was made, when the law was in fact invalid, held untenable. City of Plattsmouth v. Murphy [Neb.] 105 N. W. 293.

74. Compliance with law is presumed until the contrary is shown. Hanson v. Lindstrom [N. D.] 108 N. W. 798. Presumed that trustee in bankruptcy immediately took possession of bankrupt's property. Goodnough Mercantile Co. v. Galloway [Or.] 84 P. 1049. Where purchaser at tax sale procured a deed for taxes of 1860, it will be presumed in the absence of a contrary showing, that he paid taxes for 1861 and 1862, which the law required him to pay. Day v. Smith [Miss.] 39 So. 526.

75. This rule is founded upon the natural human instinct or inclination of self-preservation which renders suicide improbable with rational beings. Grand Lodge A. O. U. W. v. Banister [Ark.] 96 S. W. 742. Presumption against suicide may be treated as evidence in insurance cases. Tackman v. Brotherhood of American Yeomen [Iowa] 106 N. W. 350.

76. Bowman v. Little, 101 Md. 273, 61 A. 223, 657, 1084.

77. Hammond v. Hammond [Tex. Civ. App.] 15 Tex. Ct. Rep. 835, 94 S. W. 1067.

78. Thus, a divorce could not be presumed, where it was shown that there was no ground therefor, and that fraud must have been practiced to obtain it. In re Colton's Estate, 129 Iowa, 542, 105 N. W. 1008.

79. Thomas v. Clarkson, 125 Ga. 72, 54 S. W. 77.

80. Laws of Missouri presumed to be same as those of Texas. Southern Kansas R. Co. v. Burgess Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 191, 90 S. W. 189. It is presumed that the law of a sister state is identical with that of Illinois. Scholten v. Barber, 119 Ill. App. 241. Laws of another state presumed, in absence of contrary evidence, to be same as those where court is sitting. White v. Richeson [Tex. Civ. App.] 94 S. W. 202. Where the law of another state is not alleged or proven, it will be presumed to be the same as that of the forum. Law relative to exemption, for reasonable time, of proceeds of homestead. Campbell v. Campbell, 129 Iowa 317, 105 N. W. 583. Where accident occurred in Connecticut for which suit was brought in New York, the common law of New York was held to control in the absence of proof of the law of Connecticut. Fallon v. Mertz, 110 App. Div. 755, 97 N. Y. S. 417.

81. In the absence of proof as to the actual law of a foreign state, it will be presumed to be the same as the common law of the state where the action is pending. Spencer v. Busch, 98 N. Y. S. 690. In the absence of proof to the contrary, Kansas courts will assume the common law of the Indian Teritory to be the same as the common law of Kansas. St. Louis, etc., R. Co. v. Johnson [Kan.] 86 P. 156.

82. There is no presumption that New York statute law prevails in other states; presumption is that common law prevails there. Robb v. Washington and Jefferson College [N. Y.] 78 N. E. 359. There is no presumption that statutes of sister state are same as those of forum. Wilcox v. Bergman, 96 Minn. 219, 104 N. W. 955. Where action was based solely on Iowa statute,

It will not be presumed that the common law of another state is the same as the common law of England;[84] at least, that presumption cannot be indulged where the other state was never subject to the laws of England.[85] The presumption that the law of another state is similar to that of the forum will not be indulged when to do so would impose a penalty or work a forfeiture.[86]

The burden of proof[87] is always upon the party asserting a fact as the basis of his cause of action[88] or defense,[89] and it never shifts during the progress of the trial.[90] There is said to be a conflict as to the burden of proof where the defense that the cause is barred by limitations is raised.[91]

§ 2. *Relevancy and materiality.*[92]—Any fact is relevant which logically tends to prove or disprove a fact in issue,[93] and such fact is admissible in evidence if otherwise competent.[94] A reasonable, visible connection between the principal fact and the evidentiary fact must be made to appear.[95] A fact which renders the existence or nonexistence of any fact in issue probable by reason of its general resemblance thereto, and not by reason of its being connected therewith, is deemed not to be rele-

the presumption, if any, as to laws of Minnesota could not be considered. Bowlin Liquor Co. v. Brandenburg [Iowa] 106 N. W. 497.

83. Where statutes of another state are not proved, case will be decided with reference to law of forum. Smith v. Aultman [Mo. App.] 96 S. W. 1034. In this case it was claimed that statute of limitations of Arkansas barred the claim, but the statute was not proved. Id. Where statutes of California were not pleaded, it was held that it must be assumed that the statutes of that state relative to the subject of inquiry (mortgages and deeds given to operate as such) were the same as those of Washington. Mantle v. Dabney [Wash.] 87 P. 122.

84. Spencer v. Busch, 98 N. Y. S. 690.

85. Since the state of Idaho was a part of territory acquired from Spain in 1819, and was never subject to the laws of England, no presumption can be indulged that the common law of England prevails in that state. McManus v. Oregon Short Line R. Co. 118 Mo. App. 152, 94 S. W. 743. Where laws of Idaho were not proved, laws of forum governed in determining whether failure to block guard rails constituted negligence, since English common law never prevailed in that state and hence common law could not be presumed to exist. Id.

86. Samuel Westheimer v. Habinck [Iowa] 109 N. W. 189.

87. See 5 C. L. 1308.

88. Defendant has burden of proof on counterclaim. Simonoff v. Horwitz, 95 N. Y. S. 522. He who affirms must prove, and when all the evidence upon the issue involved leaves the case in equipoise, the party affirming must fail. Klunk v. Hocking Valley R. Co., 74 Ohio St. 125, 77 N. E. 752. When a party alleges a material fact and offers no evidence in support of it, the court is authorized, if denied, to find its nonexistence. Miller v. Donovan [Cal. App.] 85 P. 159. A plaintiff has the burden of proving new matter inferentially set up in a reply which the law pleads for him. Gatlin v. Vaut [Ind. T.] 91 S. W. 38. Burden of plaintiff where allegations of complaint setting up assault by defendant's servant were denied by defendant. New Ellerslie Fishing Club v. Stewart [Ky.] 93 S. W. 598. Where there are two reasonably provable theories to account for plaintiff's injury, the burden is upon plaintiff to show by credible evidence that theory which establishes defendant's liability. Peat v. Chicago, etc., R. Co. [Wis.] 107 N. W. 355. Instruction held erroneous for failure to require plaintiff in personal injury suit to prove his damages by a preponderance of the evidence, and for casting burden upon defendant. Illinois C. R. Co. v. Becker, 119 Ill. App. 221.

89. On an affirmative defense burden of proof is on defendant. Johnson v. Berdo [Iowa] 106 N. W. 609. Defendant must establish new matter alleged in the answer by a preponderance of the evidence. John Ainsfield Co. v. Rasmussen [Utah] 85 P. 1002. Party alleging affirmative defense has burden of proving it. Prince v. Kennedy [Cal. App.] 85 P. 859. A defendant who sets up new matter in his answer has the burden of proving it. Gatling v. Vaut [Ind. T.] 91 S. W. 38.

90. The burden of sustaining the affirmative of an issue in an action does not shift during the progress of the trial, but is upon the party alleging the facts constituting the issue and remains there until the end. Vertrees v. Gage County [Neb.] 106 N. W. 331.

91. In Nebraska this is an affirmative defense which must be proved by defendant. Van Burg v. Van Engen [Neb.] 107 N. W. 1006. In some states it is held that plaintiff has burden of showing that his cause is not barred. Id.

92. See 5 C. L. 1308.

93. Alabama Great Southern R. Co. v. Guest [Ala.] 39 So. 654.

94. Whatever evidence is offered which will assist in knowing which party speaks the truth of the issues in an action is relevant and admissible if otherwise competent. Prior v. Oglesby [Fla.] 39 So. 593. A wide range of testimony is allowed in cases involving mental capacity, and as a general rule any and all conduct of the one whose sanity is in issue may be shown. Kempf v. Koppa [Kan.] 85 P. 806.

vant to such fact.[96] Evidence may be material and relevant upon one theory of the case, and immaterial upon the theory of the adverse party. In such case, evidence upon both theories may be admitted, to be considered by the jury under proper instructions.[97]

Evidence as to collateral matters, not directly in issue,[98] and not related to or connected with the transaction or matter in issue,[99] and furnishing no legal inference as to facts in dispute,[1] is inadmissible. If evidence, though relevant, is so remote as to have little or no evidentiary value it may be excluded;[2] the admission or exclusion of such facts is largely discretionary with the trial court.[3]

95. Johnson v. Atlantic Coast Line R. Co., 140 N. C. 574, 581, 53 S. E. 362.

96. Ross v. Moskowitz [Tex. Civ. App.] 16 Tex. Ct. Rep. 381, 95 S. W. 86.

97. Evidence admitted upon quantum meruit theory, though other party claimed there was an agency. Radel v. Lesher, 137 F. 719.

98. Evidence of general safety of swing staging held inadmissible, when that point was not in issue, only the safety of the particular stage being in controversy. Lewis v. Crane, 78 Vt. 216, 62 A. 60. Where two persons claim under a common grantor, a deed to such grantor is inadmissible, since the source of his title is immaterial. Corker v. Stafford, 125 Ga. 428, 54 S. E. 92. Testimony as to condition of property at time of trial irrelevant when injury sued for was temporary and damages claimed were only those suffered up to time of trial. Baltimore Belt R. Co. v. Sattler, 102 Md. 595, 62 A. 1125. In action for injuries to horses while being transported, evidence of price paid by shipper is irrelevant, the measure of damages being market value at destination. Texas & P. R. Co. v. Dishman [Tex. Civ. App.] 14 Tex. Ct. Rep. 650, 91 S. W. 828. Where issue was existence of a certain disease when application for insurance was made, evidence as to the cause of the disease is irrelevant. Taylor v. Modern Woodmen of America, 42 Wash. 304, 84 P. 867. Where the issue was the reasonableness of rates charged by a railroad between two points in a state, evidence as to rates between other points and on other roads was irrelevant. Anniston Mfg. Co. v. Southern R. Co. [Ala.] 40 So. 965. Where mental capacity of plaintiff to maintain suit is in issue, her disposition (susceptibility to undue influence) is irrelevant. Simmons v. Kelsey [Neb.] 107 N. W. 122.

99. In action for injuries to skins by dresser, evidence of the effect upon skins of soda when used in dressing was inadmissible when there was no evidence that soda was used in this case. Friedman v. Bindseil, 49 Misc. 639, 97 N. Y. S. 995. Depreciation in mortgage value cannot be shown on the issue of diminution in market value. Peirson v. Boston El. R. Co., 191 Mass. 223, 77 N. E. 769. Defendants were charged with fraud and conspiracy to deprive plaintiff of his interest in a mine. A letter written to plaintiff by one of the defendants, while plaintiff and the writer were interested in a mine tending to show they used disreputable devices to boom the mine, was inadmissible, having reference wholly to collateral matters. Murray v. Moore, 104 Va. 707, 52 S. E. 381. On issue of testamentary capacity, a finding of a jury in a proceeding involving another will, between different parties, was mere opinion, and inadmissible. Packham v. Ludwig [Md.] 63 A. 1048. Proof of existence of association of insurance companies, for exchange of information concerning applicants, inadmissible to show knowledge of matters claimed to have been misrepresented by an applicant, when defendant company was not shown to be a member of such association. Provident Sav. Life Assur. Soc. v. Whayne's Adm'r [Ky.] 93 S. W. 1049. In action for fire set by sparks from locomotive engine, where it was shown that the sparks which caused the fire came from a particular engine, proof that other engines had started fires was inadmissible. Cleveland, etc., R. Co. v. Loos [Ind. App.] 77 N. E. 948. In action for setting fire to plaintiff's factory by sparks from an engine, evidence of a witness that he rode on what he thought was the same train the next day, and when it stopped at a station he noticed a carload of cotton seed hulls was on fire, without testimony that sparks were emitted from the engine nor that the fire so originated, was inadmissible. Johnson v. Atlantic Coast Line R. Co., 140 N. C. 574, 581, 53 S. E. 362.

1. That defendant's son was a shrewd business man had no tendency to prove that his father had not transferred certain property to him, in fraud of creditors. Arnold v. Harris [Mich.] 105 N. W. 744. Evidence concerning thickness of coal in mine 1½ miles away from land in issue has no tendency to prove existence of coal in such land, conditions being shown variable in vicinity. Mier v. Phillips Fuel Co. [Iowa] 107 N. W. 621.

2. Where relevancy of evidence relating to facts occurring long after institution of suit was not made to appear, it was properly excluded. Beddow v. Bagley [Ala.] 39 So. 773. Where issue was capacity of dynamo when installed, evidence of a test two years thereafter and six months after it had broken down was inadmissible. New Era Mfg. Co. v. O'Reilly, 197 Mo. 466, 95 S. W. 322. Where overflow of watercourse was partly caused by rainfall, evidence of the amount of rain which fell the same day in a valley 7 or 8 miles away from that drained by the stream in question was too remote. Carhart v. State, 100 N. Y. S. 499. Where right of township to elect certain officers depended on the population of the township at the time, a census taken some months later was immaterial. People v. Davidson [Cal. App.] 83 P. 161. Price paid for mules 11 months

To prove the existence or nature of a particular fact or transaction or the intention of parties in a particular instance, proof of wholly independent transactions,[4] such as those between parties different from those connected with the transaction in issue,[5] is inadmissible, but proof of similar transactions is sometimes admitted to

before their alleged conversion irrelevant on issue of damages. Grant v. Hathaway, 118 Mo. App. 604, 96 S. W. 417. Whether witness saw anyone go into a closet "on or before" a certain day upon which its condition was in issue, held inadmissible, the time being too indefinite. Huggard v. Glucose Sugar Refining Co. [Iowa] 109 N. W. 475. In action for failure to deliver goods destroyed by fire in warehouse, evidence of other fires of incendiary origin about the same time was too remote to show want of negligence of carrier. Jungclaus v. Great Northern R. Co. [Minn.] 108 N. W. 1118. In an action for injuries resulting from collision between car and vehicle, testimony of motorman as to custom of allowing funeral processions to pass without interruption, a year after the injury complained of, was inadmissible. White v. Wilmington City R. Co. [Del.] 63 A. 931. Testimony of cab driver to same point inadmissible because not connected with time of injury. Id.

3. Whether evidence is so remote as to be of no evidentiary value is largely a question for the trial court. Sunter v. Sunter, 190 Mass. 449, 77 N. E. 497. Where, in action for assault and battery, defendant claimed plaintiff was drunk, and plaintiff testified he never drank, evidence that several years before the assault plaintiff did drink was not objectionable as too remote. McQuiggan v. Ladd [Vt.] 64 A. 503. That testimony relating to issue of negligence had reference to a time 9 months previous to accident in issue did not render it inadmissible. Missouri, etc., R. Co. v. Parrott [Tex. Civ. App.] 96 S. W. 950.

4. Where broker sued for commission earned in procuring a loan, and claimed the loan failed because of defendant's acts, evidence that another application for a loan on the same security had been refused was inadmissible. Duckworth v. Rogers, 109 App. Div. 168, 95 N. Y. S. 1089. In personal injury case, an affidavit in support of a motion for a new trial in another case to the effect that plaintiff in such other case had admitted that he was injured through his own carelessness, was irrelevant. International & G. N. R. Co. v. Boykin [Tex.] 89 S. W. 639. Where issue was whether order for goods was given or not, the salesman who is claimed to have taken it may not testify that he took an order of the same kind from another company when managed by the alleged purchaser, and that such order was accepted. Robert Buist Co. v. Lancaster Mercantile Co., 73 S. C. 48, 52 S. E. 789. On issue whether property owner promised to pay materialman if latter would refrain from enforcing lien, evidence that materialman had instructed his agent to perfect the lien was irrelevant. McGillivray v. Cremer, 125 Wis. 74, 103 N. W. 250. On the issue of fraud and undue influence in execution of will in 1902, findings of a jury impeaching for fraud a will executed in 1903 were inadmissible, no connection being shown so as to prove a general scheme to defraud. Packham v. Ludwig [Md.] 63 A. 1048. On issue whether one employed to improve a building was to receive a commission on the amount of the pay roll in addition to wages, evidence that for other work he had received both wages and commission from defendant was inadmissible. Shall v. Old Forge Co., 109 App. Div. 907, 96 N. Y. S. 75. For same reason, evidence that he had received commissions when doing such work for a third person was inadmissible. Id. Other transaction by purchaser of certain stock inadmissible in action by broker for commissions on a certain deal. Ross v. Moskowitz [Tex. Civ. App.] 16 Tex. Ct. Rep. 381, 95 S. W. 86. Customary charges of attorneys for services may be shown, but what a particular attorney charged in other cases is irrelevant on the issue of the value of particular services. Fuller v. Stevens [Ala.] 39 So. 623.

5. Evidence of obligations of plaintiff under similar contract between witness and plaintiff held irrelevant. Stapper v. Wolter [Tex. Civ. App.] 85 S. W. 850. Statement of attorneys to defendant as to costs of an action to which plaintiff was not a party was not evidence against plaintiff. Erie City Iron Works v. Tatum, 1 Cal. App. 286, 82 P. 92. On issue as to settlement of accounts, evidence of settlement of another controversy is inadmissible where the parties are not the same and one settlement had no influence on the other. Collins v. Denny Clay Co., 41 Wash. 136, 82 P. 1012. Documents found in the record of another suit against a corporation, offered in evidence on the trial of oppositions to a receiver's account, cannot be received or considered as evidence against the creditors of the insolvent. Ziegler v. Interior Decorating Co., 116 La. 752, 41 So. 59. In suit to abate certain structures of defendant, evidence that other persons had occupied the right of way in question was irrelevant. McLean v. Llewellyn Iron Works [Cal. App.] 83 P. 1082. In garnishment proceedings where plaintiffs claimed garnishees were indebted to the principal defendants on a purchase of certain merchandise, evidence of a subsequent alleged fraudulent transaction by defendants, not connected with the former sale and not brought to the knowledge of the garnishees, was inadmissible. Seitz v. Starks [Mich.] 13 Det. Leg. N. 377, 108 N. W. 354. In action of trespass for taking coal from plaintiff's land, evidence tending to show that defendant took coal from the land of another, adjoining, is inadmissible. Mier v. Phillips Fuel Co. [Iowa] 107 N. W. 621. In detinue where plaintiff claimed property under a mortgage, a mortgage subsequently given by him to a bank, which did not include the property in question, was irrelevant. Holman v. Clark [Ala.] 41 So. 765. In an action to recover for services for procuring certain property for defendant, evidence regarding another subsequent

show authority of a person to act for another,[6] or the intention of the parties,[7] or to show that the transaction in issue is a part of a general scheme to defraud.[8] In case of an equivocal act, which is unlawful if so intended, though not otherwise, or claimed to have been accidental or through mistake, evidence of unconnected but similar facts is always admissible to show intent or system or rebut accident.[9]

On the issue of negligence, alleged as the cause of injury, evidence of other similar accidents or occurrences is inadmissible[10] except to show notice;[11] evidence that no

transaction, wherein plaintiff lost $250 on an option which defendant failed to take up, was inadmissible, St. Louis S. W. R. Co. v. Irvine [Tex. Civ. App.] 13 Tex. Ct. Rep. 822, 89 S. W. 428. A deed from one not shown to have any interest in or connection with the land proposed to be conveyed is inadmissible as evidence of title in an action for its recovery. McBride v. Steinweden, 72 Kan. 508, 83 P. 822. In suit to restrain defendant from building on land below high water mark at time of grant from state, a deed from the state's grantee to another, containing an easement to land above high water mark, at time of conveyance, covering none of the locus in quo at time of acts complained of, was irrelevant. Atlantic City v. New Auditorium Pier Co., 67 N. J. Eq. 621, 63 A. 169. In trespass for cutting trees where plaintiff testified that he had sued another for a similar injury and had settled for $50, he cannot be asked whether the trees then alleged to have been injured were worth $2,000 as alleged in his narr. in that suit, for the purpose of showing that the damages for which the suit at bar was brought was occasioned by cutting done by another. Western Union Tel. Co. v. Ring, 102 Md. 677, 62 A. 801. Where fraudulent misrepresentations were pleaded as defense to note, evidence of representations made to third persons, not in defendant's presence, some of them after the note in issue was given was inadmissible. Clark Co. v. Rice, 127 Wis. 451, 106 N. W. 231. Printed matter which defendant had not seen, some of it printed after note in suit was given, inadmissible to prove fraudulent misrepresentations as defense to suit on note. Id. In action by abutting owner against elevated road for injuries to easements of light, air, and access, evidence of settlements between the road and other abutting owners was not admissible to disprove a prescriptive right in the road to such easements. Hindley v. Manhattan R. Co. [N. Y.] 78 N. E. 276.

6. To show authority of clerk to deliver certificate of benefit association, proof that he had delivered one to another person was admissible. Sovereign Camp, Woodmen of the World v. Carrington [Tex. Civ. App.] 14 Tex. Ct. Rep. 397, 90 S. W. 921. On issue of ownership of property claimed by plaintiff to have been purchased for him by another as agent, evidence of other transactions in which the alleged agent had acted was admissible to show the nature of the transaction in issue. Smiley v. Hooper [Ala.] 41 So. 660.

7. Collateral transactions may sometimes be shown to prove intent. Standard Mfg. Co. v. Brons, 118 Ill. App. 632. Where the issue was whether goods had been sold outright or consigned to defendant to be sold by him, evidence relating to the payment of previous bills where the transactions were claimed to be similar was admissible. Weir v. Long [Ala.] 39 So. 974.

8. Upon an issue of fraud, it may be shown that defendants committed similar frauds upon others to show motive, intent, or scienter, but this does not open up the entire field so as to allow defendants to show they were honest with some people. Elbert v. Mitchell [Iowa] 109 N. W. 181. Where in an action against conspirators, who defrauded persons by means of fictitious races, it was claimed a bank co-operated in cashing checks before the makers could stop payment, evidence of other similar transactions was admissible. Hobbs v. Boatright, 195 Mo. 693, 93 S. W. 934.

9. United States v. Milwaukee Refrigerator Transit Co., 142 F. 247.

10. Evidence of prior injury claimed to have been caused by defendant held irrelevant. City of Aurora v. Plummer, 122 Ill. App. 143. On issue of contributory negligence of servant in violating rules of the master, evidence of prior violations, which had resulted in accidents, was inadmissible. Missouri, etc., R. Co. v. Parrott [Tex. Civ. App.] 96 S. W. 950.

11. In action against city for personal injuries, evidence that other persons had been injured at the same place where plaintiff was hurt was admissible on the issue of notice by the city. City of Dallas v. McCullough [Tex. Civ. App.] 16 Tex. Ct. Rep. 348, 95 S. W. 1121. In action for injuries caused by fall of clothes pole, evidence that another pole set out at the same time, and similar to the one causing the injury, had previously fallen, was admissible to show notice. Hanselman v. Broad, 99 N. Y. S. 404. In action for personal injuries caused by attack of vicious steer, evidence of other attacks on people by the steer, and that he came from Western Washington and was of a wild and vicious kind, "range steers," was admissible to show notice to the owner of his vicious character. Harris v. Carstens Packing Co. [Wash.] 86 P. 1125. In action for injuries caused by exposed cogs, evidence of other similar accidents on the same wheels and other similar ones in the mill admissible on issue of notice. Hansen v. Seattle Lumber Co., 41 Wash. 349, 83 P. 102. On issue whether a steam shovel operated by defendant was likely to frighten ordinarily safe and gentle horses, evidence that two other horses had been frightened by it, besides plaintiff's, was admissible. Heinmiller v. Winston Bros. [Iowa] 107 N. W. 1102. Evidence of a prior accident is admissible only when the condition causing it is shown to have remained unchanged. City of Aurora v. Plummer, 122 Ill. App. 143.

other injuries had occurred at the place in question is also excluded.[12] To prove the existence of a certain condition at a particular time, evidence of the condition before or after the time in issue is admissible,[13] if not too remote,[14] and when it appears that there has been no change.[15] Proof of conditions at places other than that in issue is inadmissible,[16] unless those conditions are shown to be similar to that in dispute.[17] To prove that an act was conscious or willful, proof of similar previous acts by the same person is admissible.[18] Proof of what is usually or customarily done, under the same circumstances,[19] is admissible on the issue of negligence,[20] but not to ex-

12. In action for injuries caused by negligent guarding of excavation in street, evidence that no other acidents had occurred there was inadmissible. Carty v. Boeseke-Dawe Co. [Cal. App.] 84 P. 267.

13. In an action for damages caused by fire started by sparks from an engine, evidence that the same engine emitted sparks a short time before or after the fire is admissible. Johnson v. Atlantic Coast Line R. Co. [N. C.] 53 S. E. 362. Evidence of condition of spark arresters and similar devices on a locomotive a month before the fire in issue held not too remote. Woodward v. Chicago, etc., R. Co. [C. C. A.] 145 F. 577. In action for injuries alleged to have been caused by defective machinery, evidence that two weeks before the machinery was "red hot" was not too remote. Davis v. Holy Terror Min. Co. [S. D.] 107 N. W. 374. Evidence of conditions at place where injury occurred, a few days previous, held admissible. Huggard v. Glucose Sugar Refining Co. [Iowa] 109 N. W. 475. In personal injury action, evidence relating to condition of place of accident is relevant. Edmunds Mfg. Co. v. McFarland, 118 Ill. App. 256.

14. In action for death caused by breaking of machine running at unusual speed, evidence that the machine made more noise than others (introduced to show high speed) was inadmissible when not shown to relate to the time of the accident or about such time. Stecher Cooperage Works v. Steadman [Ark.] 94 S. W. 41. In action for damages resulting from fire caused by sparks from an engine, evidence that the engine emitted sparks on other occasions was proper; evidence that other fires had been seen near trains was inadmissible. Fleming v. Pullen [Tex. Civ. App.] 97 S. W. 109.

15. Evidence of condition of a street after an accident was admissible in connection with proof that the condition had remained unchanged since the accident. City of Dallas v. McCullough [Tex. Civ. App.] 16 Tex. Ct. Rep. 348, 95 S. W. 1121. Where railroad accident occurred in September, 1903, a witness who examined the track in March, 1905, was properly not allowed to testify to the condition of it where there was no evidence that its condition was the same, even though there was some proof that no repairs had been made. Redus v. Milner Coal & R. Co. [Ala.] 41 So. 634. Where negligence charged consisted in permitting combustible material to accumulate near a bridge, evidence that driftwood had lodged against the trestle several months before the bridge burned was inadmissible, in the absence of evidence that this condition remained unchanged. Root v. Kansas City Southern R. Co., 195 Mo. 348, 92 S. W. 621. In action for injury caused by loose board in a walk, evidence of a witness that he saw the walk next morning and that the boards were then loose was admissible. Barker v. Kalamazoo [Mich.] 13 Det. Leg. N. 765, 109 N. W. 427. Observations made immediately, or so soon after the main fact in issue as to preclude the possibility of a change in conditions, are relevant when they may throw light on question in issue. Elgin, A. & So. Traction Co. v. Wilson, 120 Ill. App. 371.

16. Testimony as to insulation of wires other than those used by defendant inadmissible in personal injury action based on negligence. Ziehm v. U. S. Elec. Light & Power Co. [Md.] 64 A. 61.

17. In an action for injuries caused by falling of frame placed over sidewalk for decorating purposes, evidence of the construction of other similar frames, and that all were insecure and dangerous and constructed in the same way, was admissible on the question of notice to the city of the dangerous condition of the one which fell. Farrell v. Dubuque, 129 Iowa 447, 105 N. W. 696. In action for injuries caused by falling of package of lumber which was being hoisted up an elevator shaft, evidence of the manner in which other packages were tied up was admissible, since it was reasonable to suppose they were all being tied the same way. Smith v. Dow [Wash.] 86 P. 555. In an action for damages caused by overflow of a drain, evidence of other overflows before suit, but after defendant had commenced to maintain the drain, was admissible to show the effect upon the property. Central of Georgia R. Co. v. Keyton [Ala.] 41 So. 918. In action for damages to land caused by overflow of creek on account of an improper embankment made by defendant, proof of the flooding of other lands similarly situated at the same time was admissible. Missouri, etc., R. Co. v. Bell [Tex. Civ. App.] 93 S. W. 198.

18. In action for refusal to receive and transmit a telegram, evidence of other refusals of the agent to receive it was admissible on the issue of a willful intent of the company not to perform its duty. Western Union Tel. Co. v. Simmons [Tex. Civ. App.] 15 Tex. Ct. Rep. 349, 93 S. W. 686. In action for injuries caused by lowering cage in mine at excessive speed, contrary to statute, evidence that engineer had lowered the cage at excessive speed on former occasions was admissible to prove that his violation of law was conscious and to charge the engineer and hence the master whom he represented, with knowledge. Joseph Taylor Coal Co. v. Dawes, 220 Ill. 145, 77 N. E. 131.

19. The inquiry being what was proper to be done under given circumstances at a

cuse negligence.[21] Proof of repairs or other precautions to prevent injury, subsequent to the occurrence of the alleged injury, is inadmissible.[22]

On the issue of the value of land at a particular time, evidence of sales of other lands in the vicinity is admissible,[23] if such other lands are shown to be similar in character and location,[24] and if the sales are not too remote in time,[25] but mere offers are usually inadmissible.[26] The general selling price of property cannot, however, be shown by proof of particular sales of alleged similar property.[27] In condemnation proceedings, prices paid by the condemning party for other land bought for the same purpose,[28] and offers for other property,[29] are inadmissible. The as-

particular point, proof of what was usually done at a point near by under different circumstances is irrelevant. Atlanta Ice & Coal Co. v. Mixon [Ga.] 55 S. E. 237.

20. Custom of railroad company to require inspection of locomotives by engineers and firemen held competent on issue of negligence in setting fire because of defective spark arresters, etc. Woodward v. Chicago, etc., R. Co. [C. C. A.] 145 F. 571. Where negligence charged was failure to provide switch lights at a misplaced switch, evidence that defendant company used switch lights on other parts of its line and that such lights were used by other railway companies, was admissible. Southern R. Co. v. Blanford's Adm'x [Va.] 54 S. E. 1. In action for injuries to passenger caused by sudden starting of car as he was alighting, evidence that there was a common practice among passengers of alighting at that point was admissible. Chicago City R. Co. v. Lowitz, 218 Ill. 24, 75 N. E. 755. Proof that lights were customarily placed on approaching trains at a certain place held to warrant inference that omission to place lights on a particular occasion was negligence. Caffi v. New York, etc., R. Co., 49 Misc. 620, 96 N. Y. S. 835. Custom and practice of handling and regulating cars at street crossing held competent on issue of negligence alleged as cause of street crossing accident. Chicago City R. Co. v. Sugar, 117 Ill. App. 578.

21. In negligent injury case, evidence offered to show custom of placing switch engine and cars on certain track to keep people off at time when a certain train was due was excluded. MacFeat v. Philadelphia, etc., R. Co. [Del.] 62 A. 898.

22. Evidence of repairs made after accident inadmissible. City of Aurora v. Plummer, 122 Ill. App. 143. That location of electric wires was changed after accident could not be shown. Ziehn v. United Elec. Light & Power Co. [Md.] 64 A. 61. Precautions taken to prevent recurrence of an injury held incompetent. Louisville & N. R. Co. v. Morton [Ky.] 89 S. W. 243. In action by servant for injuries received while unloading telephone poles, evidence of a change of method of unloading, subsequent to the injury, is inadmissible to prove the former method negligent. Fitter v. Iowa Tel. Co., 129 Iowa 610, 106 N. W. 7. Evidence that after damage to breakwater government sent out notice to mariners concerning its location and lights on it was inadmissible. Davidson S. S. Co. v. U. S. [C. C. A.] 142 F. 315.

23. Sales of similar property in vicinity about the same time may be shown in condemnation proceedings. Metropolitan St. R. Co. v. Walsh, 197 Mo. 392, 94 S. W. 860. In an expropriation case, the price paid for neighboring property by a railway company for its right of way is admissible to show value, though the purchase was made after suit brought. The objection goes only to the effect of such evidence. Louisiana R. & Nav. Co. v. Morere, 116 La. 997, 41 So. 236. Value of land taken for approach to bridge being in issue, price received for land on other side of river, to be used for other approach, could be shown. Hadley v. Passaic County Chosen Freeholders [N. J. Law] 62 A. 1132.

24. Evidence of value of other lands inadmissible, such lands not being shown similar in location and condition to that in issue. Mier v. Phillips Fuel Co. [Iowa] 107 N. W. 621. Evidence of sales of land much nearer city than land in question held inadmissible on issue of value. Chicago, etc., R. Co. v. Mines [Ill.] 77 N. E. 898. In condemnation proceedings, evidence of voluntary sales of other lands, not in same locality or of same character, was properly excluded. Chicago, etc., R. Co. v. Kline, 220 Ill. 334, 77 N. E. 229. Evidence of sale price of unplatted lands in vicinity inadmissible on value of platted lands taken. Martin v. Chicago & M. Elec. R. Co., 220 Ill. 97, 77 N. E. 86.

25. Price at which property sold a short time previous to time in question is some evidence of its value. State v. Jackson, 128 Iowa 543, 105 N. W. 51.

26. In trespass for damage to trees, evidence that a prospective purchaser had made an offer for a portion of the property upon which some of the trees injured were located, but refused to take it on learning that the trees were cut, inadmissible. Western Union Tel. Co. v. Ring, 102 Md. 677, 62 A. 801. In an action for trespass for cutting timber testimony offered on the issue of value to the effect that about the time the timber was cut plaintiff offered to sell "for a good deal less" than he testified on the trial that it was worth, was properly excluded as too indefinite to be of any value. Hardwood Mfg. Co. v. Wooten [Ga.] 54 S. E. 814.

27. Gorgas v. Philadelphia, etc., R. Co. [Pa.] 64 A. 680.

28. Metropolitan St. R. Co. v. Walsh, 197 Mo. 392, 94 S. W. 860.

29. Offers to purchase land in vicinity inadmissible on value in condemnation proceedings. Blincoe v. Choctaw, etc., R. Co., 16 Okl. 286, 83 P. 903. Offers for property cannot be shown, in condemnation proceedings, where the parties failed to agree on a price. Metropolitan St. R. Co. v. Walsh, 197 Mo. 392, 94 S. W. 860. Offers to sell ad-

sessment for taxes,[30] and the price paid by the owner many years before,[31] are also irrelevant. The verdict of a jury in a case involving similar property in the vicinity is admissible.[32]

Where intent of a party charged is a material inquiry, and the facts and circumstances shown leave the question of intent in doubt, the character of the party charged may be shown, to aid in the determination of such question.[33] Evidence of particular opinions and particular acts is inadmissible to prove general reputation.[34] This can be proved only by one having adequate knowledge of the prevailing opinion in regard thereto.[35]

The general rules as to relevancy of evidence are further illustrated by the cases cited in the note.[36]

jacent property inadmissible in condemnation proceedings. Id.

30. Assessments, not being made at market value, are inadmissible to show value in expropriation proceedings. Louisiana R. & Nav. Co. v. Morere, 116 La. 997, 41 So. 236.

31. Price paid by owner 17 years before land was taken by railroad could not be shown in condemnation proceedings. Davis v. Pennsylvania R. Co. [Pa.] 64 A. 774.

32. Verdict of jury, in a case between other parties for the expropriation of property of similar character in the neighborhood, is good evidence of value. Louisiana R. & Nav. Co. v. Morere, 116 La. 997, 41 So. 236.

33. Sovereign Camp of Woodmen of the World v. Welch, 16 Okl. 188, 83 P. 547.

34. That a person paid all his bills upon periodical visits to a certain locality was inadmissible on the issue of his reputation for financial standing and promptness in paying debts. Allison's Ex'r v. Wood, 104 Va. 765, 52 S. E. 559.

35. Allison's Ex'r v. Wood, 104 Va. 765, 52 S. E. 559.

36. **Illustrations. Held relevant:** Where brakeman was injured between cars he was trying to couple, evidence as to the condition of certain cars and their couplings was admissible in connection with other proof showing the identity of the cars with those causing the injury. Huggins v. Southern R. Co. [Ala.] 41 So. 856. Where, in detinue, plaintiff claimed a mule under a purchase-money mortgage, and it appeared the mortgagee had been in possession for some time prior to giving the mortgage, it was proper to show that the relation of landlord and tenant existed between plaintiff and the mortgagor, and that plaintiff had furnished mules to the mortgagor, among them the mule in question. Holman v. Clark [Ala.] 41 So. 765. That a street car was making a great deal of noise when approaching a place where a dog was killed was admissible as a part of the res gestae. Wallace v. North Alabama Traction Co. [Ala.] 40 So. 89. In action on note, testimony concerning sale which was a part of transactions leading up to a settlement wherein the note was given was admissible. Lovell & Co. v. Sneed [Ark.] 95 S. W. 157. Evidence of proper method of sounding timbers relevant when sufficiency of inspection of trestle was in issue Bowen v. Sierra Lumber Co. [Cal. App.] 84 P. 1010. In an action for breach of warranty as to the variety of seed wheat sold plaintiff, where defendant testified that he had sold wheat from the same lot to another, such person's testimony that he had bought wheat from defendant about that time and that it did not prove to be white Australian wheat was competent and relevant. Moody v. Peirano [Cal. App.] 84 P. 783. But evidence that defendant had warranted wheat sold to others to be white Australian wheat was irrelevant. Id. On issue whether kerosene oil contained a dangerous proportion of gasoline, evidence of a general custom of employes to use the same buckets in drawing both kerosene and gasoline was admissible. Standard Oil Co. v. Parrish [C. C. A.] 145 F. 829. Custom of trust companies to require indemnity bonds admissible where person dealing with such a company claimed to be ignorant of such requirement. Security Trust Co. v. Robb [C. C. A.] 142 F. 78. Where one party had introduced proof of drunkenness and incompetency of a superintendent, to show that certain mill work was unsatisfactory, the other party was properly allowed to show that other work of the same kind turned out for others under direction of the same superintendent had been satisfactory. Burrell v. U. S. [C. C. A.] 147 F. 44. Letter forming part of negotiations leading up to business transaction held admissible. Hunter v. Porter [Iowa] 109 N. W. 283. Where injured servant claimed he was struck by a piece of gas pipe which fell from an upper floor, through an opening, being loosened from a pile of bone dust by the wind and the vibration caused by the machinery, evidence of the effect of the wind and machinery was admissible, though it was not shown that at the time of the injury the machinery was moving or the wind blowing. Huggard v. Glucose Sugar Refining Co. [Iowa] 109 N. W. 475. Where issue was whether building fell because of faulty plan of construction or poor work of defendant, the effect of improperly placing the front of the building could be shown. Fraternal Const. Co. v. Jackson Foundry & Mach. Co. [Ky.] 89 S. W. 265. In an action for interfering with plaintiff's business, evidence that plaintiff was a Jew, and that the day in question, when a crowd gathered at his shop and threw missles, was a Jewish holiday, when Jews usually closed their shops, was admissible. Botkin v. Miller, 190 Mass. 411, 77 N. E. 49. Where it was shown that Detroit price of wheat governed price at Lansing, and that price of wheat indirectly

controlled price of flour, market price of flour at Detroit was admissible to prove market price of flour at Lansing. Tri-State Milling Co. v. Breisch [Mich.] 13 Det. Leg. N. 478, 108 N. W. 657. Letter calling attention to failure of defendants to carry on agreement, and threatening suit, held relevant. Illinois Roofing & Supply Co. v. Cribbs [Mich.] 12 Det. Leg. N. 901, 106 N. W. 274. Record of suit in chancery, wherein a sum of money was paid into court as compensation for a right of way, admissible in subsequent suit to recover such amount under an alleged agreement, to show the origin of the fund sued for. Rapley v. McKinney's Estate [Mich.] 13 Det. Leg. N. 41, 107 N. W. 101. Where a witness fixes the date of an event by other contemporaneous events, the dates of the latter may also be shown. Levels v. St. Louis & H. R. Co., 196 Mo. 606, 94 S. W. 275. Where in garnishment proceedings it was claimed the garnishee held property of the debtor for the purpose of hindering the creditors, a former judgment in a suit to set aside transfers to the garnishee was admissible to show the garnishee's intent. Dodge v. Knapp, 112 Mo. App. 513, 87 S. W. 47. It is a fair presumption that price obtained at public auction for articles sold on usual terms represents their value. Wieters v. Hart, 67 N. J. Eq. 507, 63 A. 241. In a suit upon a specialty, evidence of a uniform custom of transacting business with the public with reference to the matter in dispute is admissible when introduced for the purpose of showing an agent's authority to make the contract in question on behalf of his principal. Pullman Co. v. Willett, 7 Ohio C. C. (N. S.) 173. On issue whether attachment debtor owned the property attached or had bought it as agent only, not having means to buy it for himself, evidence of his financial condition on the day of the purchase and before was admissible. Flegel v. Charles Koss & Bros. Co. [Or.] 83 P. 847. Where value of services was attacked, workman could show that he did more work than others and that employer had not before found fault with services rendered. Hebert v. Hebert [S. D.] 104 N. W. 911. In action for conversion of corn by railway company after rejection by consignee, an issue was made as to quality of corn. Evidence that the corn was part of a carload sold to others as being a certain quality, and that such purchasers had not complained, was relevant. St. Louis S. W. R. Co. v. Arkansas & T. Grain Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 372, 95 S. W. 656. Testimony of one who was on engine with fireman, who was injured, that he had not noticed defective condition that was alleged to have caused the injury, was admissible. Galveston, etc., R. Co. v. Udalle [Tex. Civ. App.] 14 Tex. Ct. Rep. 668, 91 S. W. 330. In trespass to try title, a judgment between predecessors in interest of the parties, showing that heirs of original owner denied that he had ever executed a deed for the premises, was relevant. Veatch v. Gray [Tex. Civ. App.] 14 Tex. Ct. Rep. 316, 91 S. W. 324. On the issue of the proper manner of computing the amount of timber on land, evidence of an expert in scaling lumber as to the method of scaling in general use was admissible. Wall v. Melton [Tex. Civ. App.] 16 Tex. Ct. Rep. 112, 94 S. W. 358. In an action for injuries to cattle caused by failure to supply sufficient water, evidence of condition of cattle in another pasture was admissible when the two pastures were shown to be similar. Tuttle v. Moody [Tex. Civ. App.] 15 Tex. Ct. Rep. 763, 94 S. W. 134. In a suit by the United States to enjoin an alleged conspiracy by paper manufacturers to suppress competition by creating a general selling and distributing agent, evidence oral or documentary, tending to show the manner in which such agent performed his functions, is material. Nelson v. U. S., 201 U. S. 92, 50 Law. Ed. —. In an action of trover against a sheriff for conversion of lumber, leases of the yard to plaintiff and a quitclaim deed and contract covering the lumber, executed by a third person to plaintiff, were held relevant, in connection with evidence of persons who were in possession. Marcy v. Parker, 78 Vt. 73, 62 A. 19. A conversation with plaintiff having been testified to, plaintiff could in rebuttal testify that the conversation was at a later time than that given by the other witness. Jewett v. Buck, 78 Vt. 353, 63 A. 136. Fair rental value of premises could be shown in action for rent under a lost lease where parties disagreed as to what the rent stipulated was. Green v. Dodge [Vt.] 64 A. 499. Proof of representations made by a third party admissible, though only representations by defendant were alleged, where they were of the same character and tended to explain defendant's actions and words. McMullen v. Rousseau, 40 Wash. 497, 82 P. 883. To rebut testimony of physicians that plaintiff had "hysterical paralysis," largely simulated, and that this was aggravated by pendency of law suit, evidence that they permitted a claim agent to visit plaintiff while in the hospital was relevant. Williams v. Spokane Falls & N. R. Co., 42 Wash. 597, 84 P. 1129. To prove value of stock of corporation whose sole object was to hold lands, the value of the lands is relevant. Collins v. Denny Clay Co., 41 Wash. 136, 82 P. 1012. A written contract between other parties than the parties to a suit, which is referred to in the written contract sued upon and to any extent supplements the same, is admissible in evidence. Vale v. Suiter, 58 W. Va. 353, 52 S. E. 313.

Held irrelevant: In personal injury action, held proper to exclude question whether plaintiff had ridden horseback or muleback since he was hurt. Southern R. Co. v. Cothran [Ala.] 42 So. 100. Lessee of railroad being bound to keep a drain along the right of way open, regardless of the terms of the lease, the lease showing lessee's duties, was immaterial. Chicago, etc., R. Co. v. McCutchen [Ark.] 96 S. W. 1054. Proper to exclude question as to whether there was any discussion at meeting of aldermen as to location of street lines, since such discussion could not affect order made in resolution actually adopted. Loomis v. Connecticut R. & Lighting Co., 78 Conn. 156, 61 A. 539. In an action for damages caused by communication of hog cholera by hogs purchased from defendant to others owned by plaintiff, evidence of a witness for plaintiff that he had also purchased hogs from defendant which were diseased and which communicated the disease to another herd having been admitted, further evidence of

§ 3. *Competency or kind of evidence in general.*[37]—Where one party has introduced certain matters without objection, the other may introduce similar evidence in rebuttal,[38] though such evidence is incompetent or irrelevant.[39] The mere

the number of hogs witness owned was properly excluded. Elbert v. Mitchell [Iowa] 109 N. W. 181. Evidence of others that they had purchased hogs of defendant, and that he had not warranted them, was also irrelevant. Id. In an action for shooting of a trespasser on a train, evidence of frequency with which messages were sent to authorities announcing such conduct of trainmen toward trespassers was irrelevant. Baltimore & O. R. Co. v. Deck, 102 Md. 669, 62 A. 958. In action to recover mining stock, claimed to belong to bankrupt, where dividends and value of stock had been shown, the reputation and standing of the mine, and others in the vicinity, were immaterial. Arnold v. Harris [Mich.] 105 N. W. 744. What a certain prescription was held inadmissible on issue of sanity as constituting at best the physician's opinion that patient was suffering from a certain disease. Ames v. Ames [Neb.] 106 N. W. 584. Where constitutionality of act imposing a penalty on any person working more than 8 hours a day in a mine, smelter, or reduction plant, on the ground that such work was not unhealthful, evidence that particular works and mills, including the one where petitioner worked, were healthful, was inadmissible. Ex parte Kair [Nev.] 82 P. 453. A final decree, without the record of the cause, has no evidential effect as proof of antagonism between executor and legatees in will case. In re Acker's Will [N. J. Eq.] 62 A. 556. Letters by attorney to landlord in a different proceeding in which parties were different were inadmissible to show identity of premises in subsequent holdover proceedings. Kasower v. Sandler, 96 N. Y. S. 734. In an action on a bond given to secure weekly payments by husband to wife, he having been convicted of nonsupport, evidence that after his conviction he had offered to live with and support his wife was immaterial. Tully v. Stout, 96 N. Y. S. 1080. In an action against a newspaper for breach of a contract to carry a certain number of inches of advertising matter to be inserted within the year as the advertiser might require, a rate card showing only rates for advertisements of a certain size carried a certain number of times was inadmissible. Boston Outfitting Co. v. People & Patriot Co., 73 N. H. 506, 63 A. 229. Inventory of decedent's personal property filed by plaintiff as administratrix, and plaintiff's annual account as administratrix, held irrelevant on issue of earning power of deceased, in action for his death. Cooper v. North Carolina R. Co., 140 N. C. 209, 52 S. E. 932. Rental value of business property is irrelevant on issue of rental value of unoccupied property not in business portion. Keeney v. Fargo [N. D.] 105 N. W. 93. On issue whether a person bought or sold as agent or owner, to determine right to money claimed to be commission, the value of the land was immaterial. Buchanan v. Randall [S. D.] 109 N. W. 513. In an action for illness resulting to a passenger from being required to sit in a cold waiting room, the fact that other passengers suffered in some degree from the cold but none of them became sick is immaterial. International & G. N. R. Co. v. Johnson [Tex. Civ. App.] 15 Tex. Ct. Rep. 982, 95 S. W. 595. Where building contract required contractor to pay liquidated damages for delay caused otherwise than by owner, evidence of delay caused by persons employed by contractor was inadmissible. Neblett v. McGraw [Tex. Civ. App.] 14 Tex. Ct. Rep. 496, 91 S. W. 309. Field notes of survey made 30 years before survey in question by surveyor, who had no knowledge of lines in dispute, held inadmissible. Goodson v. Fitzgerald [Tex. Civ. App.] 14 Tex. Ct. Rep. 424, 90 S. W. 898. Evidence of a custom of draftsmen in land commissioner's office to make changes in field notes of surveys to make them correspond to maps in the office, held inadmissible to show that certain field notes were changed. Clawson v. Wilkins [Tex. Civ. App.] 15 Tex. Ct. Rep. 662, 93 S. W. 1086. Proof of a statement by a party that a certain representation had been made to him does not tend to prove personal knowledge by the party of the fact involved in the representation by the third party. Jewett v. Buck, 78 Vt. 353, 63 A. 136.

37. See 5 C. L. 1315.

38. One party having testified without objection to certain elements of a settlement, omitted from a writing, the other party could introduce similar evidence in rebuttal. Dunnett v. Gibson, 78 Vt. 439, 63 A. 141. The introduction or exclusion of immaterial evidence to meet immaterial evidence is within the discretion of the court. Bennett v. Susser, 191 Mass. 329, 77 N. E. 884. Part of a conversation being shown by one party, the other may show the entire conversation, so far as relevant. Smith v. Milwaukee Elec. R. & Light Co., 127 Wis. 253, 106 N. W. 829; McNeese v. Carver [Tex. Civ. App.] 13 Tex. Ct. Rep. 820, 89 S. W. 430. Part of conversation having been introduced by one party, the other could show other portions to explain those already in. Id. Part of a conversation having been introduced by one party, the remainder was competent at the instance of the other, though it involved a declaration in the interest of the declarant. Wilson v. Gordon, 73 S. C. 155, 53 S. E. 79. Where a conversation is brought out on a cross-examination, a statement made during it may be shown by the other party. Anniston City Land Co. v. Edmondson [Ala.] 40 So. 505. Letters forming part of a correspondence having been introduced by one party, the other was entitled to produce others in answer thereto. Proctor v. Hobart M. Cable Co. [Mich.] 13 Det. Leg. N. 644, 108 N. W. 992. Where a witness for one party testified to the result of a conversation at which he was present that a certain agreement was made, it was competent for the other party to deny that such agreement was made. Lefevre v. Silo, 98 N. Y. S. 321. Held error to allow a witness to testify that a certain agreement was made in the course of a conversation, and to refuse to allow the other party to

fact that evidence is cumulative does not justify its exclusion.[40] That evidence has been obtained by unlawful means is not a valid objection to its admission.[41]

§ 4. *Best and secondary evidence.*[42]—The best evidence of which the case in its nature is susceptible must always be presented.[43] What is the best evidence of a fact to be proved depends upon the nature of the fact and the circumstances of the case.[44] Evidence which carries on its face no indication that better evidence exists

deny such agreement, and then allow first witness to prove a settlement on the basis of the contract as an admission of the second party that the contract had been made. Id. Where theory of case as tried was a suit upon an express contract for machinery it was not error to exclude evidence as to the value of the machinery, offered by defendant, though the court had erroneously admitted such evidence when offered for plaintiff. Union Steel & Chain Co. v. Wagoner [Colo.] 85 P. 836. Custom of children of playing in the street having been gone into by one party, similar evidence by the other was admissible. Wells v. Gallagher [Ala.] 39 So. 747. Declarations of one not shown to be the agent of the party against whom they were offered having been admitted, other statements could be shown by the adverse party. St. Louis S. W. R. Co. v. Irvine [Tex. Civ. App.] 13 Tex. Ct. Rep. 822, 89 S. W. 428. Defendant having had the benefit of a part of certain depositions, plaintiff was entitled to introduce the remainder. Hunter v. Johnson [Mo. App.] 94 S. W. 311.

39. Evidence having been introduced by one party without objection, evidence of the same kind will be permitted to be introduced by the other, though it is irrelevant. O'Neal v. Weisman [Tex. Civ. App.] 13 Tex. Ct. Rep. 503, 88 S. W. 290. One who has introduced incompetent or irrelevant evidence cannot object to the introduction by his adversary of evidence relating to the same matter. Warren Live Stock Co. v. Farr [C. C. A.] 142 F. 116. An objection to evidence as inadmissible is properly overruled where the objecting party has introduced evidence of the same kind. St. Louis S. W. R. Co. v. Bryson [Tex. Civ. App.] 14 Tex. Ct. Rep. 656, 91 S. W. 829. Oral evidence concerning transfer of judgment having been admitted, similar evidence was admissible in rebuttal. St. Louis S. W. R. Co. v. Parks [Tex. Civ. App.] 14 Tex. Ct. Rep. 232, 90 S. W. 343.

40. Held error for court to exclude declarations of a decedent as to reason why notes were given him, on ground that there was sufficient evidence before the court on the facts in issue. Bradley v. Bush, 1 Cal. App. 516, 82 P. 560.

41. Papers and letters not objectionable because obtained by alleged unlawful means. Mossman v. Thorson, 118 Ill. App. 574.

42. See 5 C. L. 1315.

43. Security Trust Co. v. Robb [C. C. A.] 142 F. 78.

44. A marriage may be proved by the testimony of one of the parties thereto. Southern R. Co. v. Brown [Ga.] 54 S. E. 911. Express agent may testify that he did not transport a corpse on a certain day without producing the books of his company. Bink v. State [Tex. Cr. App.] 89 S. W. 1075. Justice properly allowed to testify to remittitur, so as to bring case within his jurisdiction, where the judgment was not contradicted. Peeples v. Slayden-Kirksey Woolen Mills [Tex. Civ. App.] 14 Tex. Ct. Rep. 144, 90 S. W. 61. Earning capacity of deceased employe may be shown without proving the contract under which he was employed. Central of Georgia R. Co. v. Alexander [Ala.] 40 So. 424. Where defendants introduced plaintiff's telegram, calling for an answer, it was proper to ask one of the defendants whether he had answered the telegram. Lipschutz v. Weatherly, 140 N. C. 365, 53 S. E. 132. Bank cashier properly allowed to testify that certain money in the bank was credited to a certain person without producing the books. Smith v. First Nat. Bank [Tex. Civ. App.] 16 Tex. Ct. Rep. 729, 95 S. W. 1111. A receipt or bill of lading is not the best evidence of the fact of delivery of freight to a carrier. That fact may be proven by oral evidence. Atlantic Coast Line R. Co. v. Dexter [Fla.] 39 So. 634. The minutes of a board of county commissioners do not constitute the exclusive evidence of its acts nor of instructions given to other officials whose actions the board are by law authorized to direct and control. Instructions to the county treasurer, relative to a tax sale, could therefore be proved by the treasurer or members of the board. Phillips v. Welts, 40 Wash. 501, 82 P. 737. Oral testimony that danger signs were put up at public road crossings was not objectionable as not the best evidence on the ground that the records of the court of ordinary would show the existence of public roads. Atlantic Coast Line R. Co. v. Taylor, 125 Ga. 454, 54 S. E. 622. In action for failure to furnish cars, evidence of written orders for cars was not objectionable as not the best evidence though written orders were subsequently given. Mauldin v. Seaboard Air Line R. Co., 73 S. C. 9, 52 S. E. 677. Where original execution and sheriff's return was filed in the justice court where issued, and a copy filed in the county court of another county, it was proper for the sheriff to testify that a copy of the execution attached to a deposition of the justice was correct and that he had not made certain interlineations in the copy filed in another county. Peeples v. Slayden-Kirksey Woolen Mills [Tex. Civ. App.] 14 Tex. Ct. Rep. 144, 90 S. W. 61. Parol evidence of transactions of company held competent where there was proof that no minute or stock books were kept, or if kept, that they were lost. Garmany v. Lawton, 124 Ga. 876, 53 S. E. 669. Where a city charter does not require action of a city board to be taken in any particular manner, nor that its acts shall be recorded, nor that the record shall be the exclusive evidence of its acts, parol proof of its acts is competent. Parol

is not objectionable as secondary,[45] but evidence which shows on its face that there exists better or more original evidence cannot be introduced without first accounting for such other evidence.[46] Thus, oral evidence cannot be substituted for any instrument which the law requires to be in writing[47] or for any written evidence of a contract which the parties have reduced to writing,[48] or for any writing the existence or contents of which is disputed and which is material to the issues raised.[49] Oral

proof competent to show that Denver park board provided for erection of stand in a public park. City of Denver v. Spencer [Colo.] 82 P. 590. Appointment of a public officer may, in collateral proceedings, be shown otherwise than by his commission. Callaghan v. McGown [Tex. Civ. App.] 14 Tex. Ct. Rep. 280, 90 S. W. 319. Original petition and report in proceedings to condemn land for highway held admissible as primary evidence under Code Civ. Proc. § 1829. Mendocino County v. Peters [Cal. App.] 82 P. 1122. Evidence as to items taken into consideration in making up a written statement does not violate best evidence rule. Sheldon Canal Co. v. Miller [Tex. Civ. App.] 14 Tex. Ct. Rep. 279, 90 S. W. 206. Evidence of marks and brands held competent to prove ownership of cattle though such marks and brands were not recorded. Hurst v. Territory, 16 Okl. 600, 86 P. 280.

45. Testimony that witness was treasurer and manager of a certain corporation is not objectionable on the ground that the identity of such officer could only be proved by corporate records. Empire Smelter Co. v. Gardiner Worthen & Goss Co. [Ariz.] 85 P. 729. One who knows the meaning of "cypher" words used in a telegram may testify to their meaning without producing the key. McCleskey v. Howell Cotton Co. [Ala.] 42 So. 67. In the absence of any showing that a corporation had minutes or a record of its contracts it was proper to show by parol what was done at a directors' meeting, to establish employment of a certain person as superintendent. Braxmer v. Stanton, 110 App. Div. 167, 96 N. Y. S. 1096. Where witness was simply asked the amount of a claim of a creditor and in answer merely stated the amount, the evidence was not objectionable as not the best. Nixon v. Goodwin [Cal. App.] 85 P. 169. Fact that witness who drew notice of injury had made a memorandum of it which he did not have with him did not preclude his testifying from memory in regard thereto. Garske v. Ridgeville, 123 Wis. 503, 102 N. W. 22. Nor was such oral testimony precluded by the fact that he had testified differently in a deposition taken some time before. Id. Where defendant testifies that he has a certain contract, and offers letters to fix the date, and then testifies to certain matters not included in the contract, testimony called out on cross-examination as to his understanding of the agreement, and what he proposed to do under it, was not objectionable as not the best evidence. Shields v. Norton [C. C. A.] 143 F. 802. Where neither the complaint nor proof showed that a contract sued on was in writing, testimony of plaintiff as to the person with whom he made the contract was not objectionable as not the best evidence. Union Foundry & Mach. Co. v. Lankford [Ala.] 39 So. 765. An objection to oral proof of contents of a letter on the ground that a letterpress copy of the letter was available is untenable, since there are no degrees of secondary evidence. People v. Christian [Mich.] 13 Det. Leg. N. 222, 107 N. W. 919.

46. Book accounts which summarized details of transactions instead of itemizing them, were not competent as secondary evidence, because they disclosed the existence of better evidence. Putnam v. Grant [Me.] 63 P. 816. Where a writing is known by the witness to be a correct record of a fact, but fails to refresh the memory of the witness, the writing is the best evidence of the fact. Ft. Worth & D. C. R. Co. v. Garlington [Tex. Civ. App.] 14 Tex. Ct. Rep. 741, 92 S. W. 270.

47. Recitals in deeds of trust held best evidence of contract embodied therein as between parties thereto, and persons in privity with them. Flach v. Zanderson [Tex. Civ. App.] 14 Tex. Ct. Rep. 540, 91 S. W. 348. The testimony of a witness as to the contents of a will under which testatrix claimed title to the property attempted to be disposed of by her is inadmissible because not the best evidence. In re Jones' Estate [Iowa] 106 N. W. 610.

48. Parol evidence that note was secured by real estate mortgage incompetent when no reason appears for nonproduction of the instrument or an authenticated copy thereof. Brynjolfson v. Dagner [N. D.] 109 N. W. 320. Oral proof of contents of bond for title held incompetent where original was not shown to have been lost or destroyed or beyond control of party. Jones v. Tennis Coal Co. [Ky.] 94 S. W. 6. If there was a written contract for the sale of mules, the writing would be the best evidence of it. Hirsh & Co. v. Beverly, 125 Ga. 657, 54 S. E. 678. Evidence that certain lots were sold by deeds referring to a plat for the description was incompetent, though an abstract showing grantors to be the owners was introduced, where the deeds were not produced nor accounted for. Incorporated Town of Hope v. Shiver [Ark.] 90 S. W. 1003. Oral evidence that certain persons executed a deed properly excluded, the deed being the best evidnce. Beardsley v. Hill [Ark.] 91 S. W. 757. Though a witness pretends to testify from his independent recollection of the facts, if it appears that his testimony is really based on his reading of written instruments, his testimony is secondary. Russell v. Excelsior Stove & Mfg. Co., 120 Ill. App. 23.

49. Offer to prove contract to certain effect was "drawn" properly refused where contract was not produced and there was no proof of its execution. Franklin v. Conrad-Stanford Co. [C. C. A.] 137 F. 737. Oral evidence of contents of writing inadmissible unless demand on party having possession of it has been made and refused. Wombl

evidence is also incompetent to prove facts shown by original entries in books of account.[50] A summarization of complicated accounts is not, however, objectionable as secondary evidence.[51] Similarly copies of writings cannot be substituted for originals when it does not appear that the originals cannot be produced.[52] The best evidence of the contents of a telegram is the original filed for transmission, and not a copy retained in the receiving office of the telegraph company.[53]

Facts which, if they exist, would be shown by a public record, cannot be proved by parol.[54] Such records are themselves the best evidence of their contents. But

v. Wilbur [Cal. App.] 86 P. 916. Where statements to a commercial agency were in writing, parol evidence was inadmissible to show them. Bruce v. Bruce [Tex. Civ. App.] 89 S. W. 435. No error in refusing proof by parol of contents of memorandum in handwriting of a deceased, without any offer to produce the original. Merchants' Loan & Trust Co. v. Egan [Ill.] 78 N. E. 800. Error to admit parol proof of contents of card showing address and telephone number without proving loss or destruction of card. Young v. People [Ill.] 77 N. E. 536. If claims paid off and alleged to be liens had been reduced to writing or recorded, the writing would be the best evidence of the same. Hirsh & Co. v. Beverly, 125 Ga. 657, 54 S. E. 678. Where the examination of an applicant for insurance is reduced to writing, the writing is the best evidence of disclosures made by insured. Taylor v. Modern Woodmen of America, 42 Wash. 304, 84 P. 867. Letter making offer of employment held best evidence thereof. St. Louis S. W. R. Co. v. Kennedy [Tex. Civ. App.] 96 S. W. 653. Letter having been excluded it was error to permit a witness to testify concerning it. Gregory v. Webb [Tex. Civ. App.] 13 Tex. Ct. Rep. 1016, 14 Tex. Ct. Rep. 277, 89 S. W. 1109. Parol proof of contents of letter was inadmissible when the letter was shown to have been in possession of one of the defendants, and he had not been notified to produce it. Young v. People [Ill.] 77 N. E. 536. Secondary proof of contents of letter inadmissible where there was no effort to have letter produced. Hanson v. Lindstrom [N. D.] 108 N. W. 798.

50. Oral proof of corporate transaction which record would show held incompetent. Nixon v. Goodwin [Cal. App.] 75 P. 169. Books are the best evidence as to what they show; oral evidence of contents inadmissible. Johnson v. State, 125 Ga. 243, 54 S. E. 184. Error to allow witness to testify to what books would show; books being best evidence. Fidelity & Deposit Co. v. Tex. Land & Mortg. Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 183, 90 S. W. 197.

51. Expert accountants may summarize result of examination of complicated accounts. Haines v. Goodlander [Kan.] 84 P. 986. An expert accountant may state the result of his examination of books of accounts which are in evidence. Brown v. U. S. [C. C. A.] 142 F. 1. An expert accountant may testify to the result of an examination and computation of complicated accounts; the books, checks, or memoranda making up the account being first introduced in evidence. Kannow v. Farmers' Co-op. Shipping Ass'n [Neb.] 107 N. W. 563. Where books were out of the state and beyond jurisdiction, and if produced could not be conveniently examined in court, the results of an examination by a competent witness could be shown. Provident Sav. Life Assur Soc. v. King, 117 Ill. App. 556.

52. Letterpress copies of letters inadmissible without accounting for originals. Hoffman Heading & Stave Co. v. St. Louis, etc., R. Co. [Mo. App.] 94 S. W. 597. Letterpress copies of letters inadmissible where non-existence of or inability to produce originals was not shown, though parties seeking to prove them did not have them in his possession. Menasha Wooden Ware Co. v. Harmon [Wis.] 107 N. W. 299. No error in excluding exhibits which were copies when it was not shown that originals could not be produced. Marx v. Ely [Ala.] 41 So. 411. A copy of a private document is not evidence unless the original is lost or destroyed or in the hands of a third person who cannot be compelled to produce it. Clement v. Graham, 78 Vt. 290, 63 A, 146. Copies of letters excluded, though their correctness was shown, where no foundation was laid by showing loss or inaccessibility of originals. Security Trust Co. v. Robb [C. C. A.] 142 F. 78. Copies of letters inadmissible without notice to produce originals. Higgins v. Matlock [Tex. Civ. App.] 16 Tex. Ct. Rep. 170, 95 S. W. 571. Copy of bill of lading inadmissible without accounting for original. Missouri, etc., R. Co. v. Morrison [Tex. Civ. App.] 15 Tex. Ct. Rep. 829, 94 S. W. 173.

53. Young v. People [Ill.] 77 N. E. 536.

54. Facts concerning execution of county bonds cannot be shown by parol. Board of Com'rs v. Tollman [C. C. A.] 145 F. 753. Record of action is best evidence of time when it was brought; oral proof inadmissible. Mullenary v. Burton [Cal. App.] 84 P. 159. Parol evidence is incompetent to prove an order of the County Court ratifying employment of an attorney for the county; only a certified copy of the record is competent. State v. True [Tenn.] 95 S. W. 1028. Contents of books of the internal revenue department, showing returns made by owner of tobacco as to the amount and kind of certain tobacco destroyed, insurance on which was sought to be recovered, cannot be proved by parol, upon proof that the rules of the department will not allow the books to be produced. The only method of procuring such evidence is by rule of court on the secretary of the treasury for copies. Meyer v. Home Ins. Co., 127 Wis. 293, 106 N. W. 1087. Parol evidence is inadmissible to show that a corporation has been put into liquidation or that another is a foreign corporation authorized to do business in the state, or that the two had been merged. Pattison v. Gulf Bag Co., 116 La. 963, 41 So. 224. Letter purporting to have been written by a trustee in bankruptcy reciting a sale of a claim against the

owing to the nature of public documents and records, and the inconvenience or impossibility of producing them in court, copies or transcripts, certified and authenticated in the manner required by law,[55] are competent proof of their contents.[56] Similarly, instruments required by law to be filed or recorded are provable by a properly authenticated copy,[57] and in such case proof of execution of the original is sometimes unnecessary.[58] Public documents or records, within the meaning of this rule, are such as are required by law to be filed or kept.[59] Abstracts of title are usually held secondary evidence of title and inadmissible.[60] Oral proof of facts disclosed by an examination of a record is sometimes competent,[61] and a witness who has examined records may testify that they do not show certain facts.[62]

county, and directing the clerk to deliver a warrant to the buyer held not the best evidence of a sale. Keller v. Faickney [Tex. Civ. App.] 15 Tex. Ct. Rep. 541, 94 S. W. 103.

55. Copies of original attestation and register sheet of a soldier—the originals being part of the records of the British army, which could not be produced—held admissible, upon proof by the deposition of a British officer who had charge of the records of the manner in which such records were kept, etc. In re McClellan's Estate [S. D.] 107 N. W. 681.

56. Certified copies of records of circuit court are competent owing to inconvenience of removing originals. Mansfield v. Johnson [Fla.] 40 So. 196. Where original record of a suit in the circuit court was lost, but a copy of the transcript had been filed in the office of the clerk of the court of appeals a certified copy of the latter was competent under Rev. St. c. 35, § 4, making copies of court records, attested by legal custodian, competent. Smith v. Gowdy [Ky.] 96 S. W. 566. In the absence of proof of records of the interstate commerce commission, the best evidence of the filing of a schedule of rates with the commission would be a certified copy from the commission. Griffin v. Wabash R. Co., 115 Mo. App. 549, 91 S. W. 1015. Where a document is of a public nature, a copy of it is evidence, production of the original being dispensed with on account of the inconvenience which would result from the frequent removal of public documents, and hence absence of original affords no presumption of fraud. Clement v. Graham, 78 Vt. 290, 63 A. 146. Properly certified transcript of recorded judgment from record of foreign judgments is admissible to prove the fact of record. Mansfield v. Johnson [Fla.] 40 So. 196. Certified copy of original execution, returned to court is admissible without producing original. Id.

57. Where affidavit required by statute is made, certified copy of warranty deed is admissible in evidence, and adverse party has no right to cross-examine the maker of the affidavit. Glos v. Garrett, 219 Ill. 208, 76 N. E. 373. Rev. St. 1892, § 1110, providing that copies of wills and letters testamentary "heretofore" recorded shall be admissible when certified to by the keeper of the records, does not apply to wills or letters recorded after the passage of the act. Thomas v. Williamson [Fla.] 40 So. 831. Affidavit of loss of original deed, executed in Iowa, having been filed, a certified copy was admissible though the acknowledgment was not in the mode prescribed by Illinois statutes, proof of Iowa statutes under which the acknowledgment was proper, having been erroneously excluded. McCraney v. Glos [Ill.] 78 N. E. 921.

58. Under Rev. St. 1899, § 933, a certified copy of a recorded deed is admissible without proof of execution of the original. Ming v. Olster, 195 Mo. 460, 92 S. W. 898. Certified copy of recorded deed properly admitted, where it appeared the party offering did not have control of original, though adverse party claimed to have original, which was not offered, and which appeared to have been altered, and though such adverse party claimed the copy to be a copy of a forgery. Id. In Florida, certified copies of instruments the recordation of which is required or provided for by law are competent, but the court may require the original to be produced or accounted for. Rev. St. 1892, § 1111. Thomas v. Williamson [Fla.] 40 So. 831.

59. Public documents, within the meaning of this rule, are such as are required by law to be filed and kept in a public office. Vouchers accompanying claims against the state must be filed in auditor's office (V. S. 305) and hence are public documents. Clement v. Graham, 78 Vt. 290, 63 A. 146. Cancellation of award of school lands, indorsed in red ink on purchaser's obligation and on classification and appraisement records, held a part of the public records and hence provable by certified copies. Smithers v. Lawrence [Tex. Civ. App.] 15 Tex. Ct. Rep. 88, 91 S. W. 606. Certified copy of public records, purporting to show cause of a person's death, held inadmissible because records contained matters not required by statute to be shown by such records. Globe Mut. Life Ins. Ass'n v. Meyer, 118 Ill. App. 155.

60. Abstracts of title are inadmissible to prove title unless the failure to produce the original deeds is explained. Glos v. Holberg, 220 Ill. 167, 77 N. E. 80. Abstract of title of patented and located lands, not designated by law as evidence of boundaries or location in suits between individuals held secondary evidence, the records and data in the land office being primary evidence. Clawson v. Wilkins [Tex. Civ. App.] 15 Tex. Ct. Rep. 662, 93 S. W. 1086. Where abstract of title made before records were destroyed, by a private individual, for his own purposes was not authenticated by the person who made it as correct, it was incompetent. Einstein v. Holliday-Klotz Land & Lumber Co., 118 Mo. App. 184, 94 S. W. 296.

61. Deposition of British army officer

The rule under discussion, however, requires only that the best evidence available shall be produced. Thus, secondary proof is admissible of facts which have been reduced to writing or made a matter of record, when the proper foundation has been laid,[63] as, by showing that the original written or documentary evidence has been lost or destroyed,[64] and that diligent but fruitless search has been made for it[65] in places where it was most likely to be found,[66] or that it is in the possession of the adverse party or his attorney, who has failed to produce it after notice to do so.[67] Whether a proper foundation has been laid for the introduction of

held competent concerning regulations governing regimental records, that he had searched the same and what he had found, he being the legal custodian, and it being impossible to produce such records. In re McClellan's Estate [S. D.] 107 N. W. 681.

62. An attorney who has examined records of a county may testify that they do not contain a decree of divorce between two named persons. In re Colton's Estate, 129 Iowa 542, 105 N. W. 1008.

63. When it is shown that a muniment of title cannot be produced, parol evidence of its contents is admissible. Houston v. State, 124 Ga. 417, 52 S. E. 757. Copies of letters and telegrams admissible after proper foundation laid. Stephens v. Faus [S. D.] 106 N. W. 56.

64. Copy of account books admissible when originals were lost. Merrit v. Bush, 122 Ill. App. 189. If an original deed which was duly recorded has been lost or destroyed a certified copy from the registry is admissible in evidence, whenever the court is satisfied of the fact of loss or destruction. Civ. Code 1895, § 3630. Patterson v. Drake [Ga.] 55 S. E. 175. Where there was evidence that letter could not be produced as it had been burned or destroyed, proof of its contents by a true copy was competent. Bazelon v. Lyon [Wis.] 107 N. W. 337. Ballots being destroyed, evidence by election officers as to the way they were marked, was competent. People v. Davidson [Cal. App.] 83 P. 161. Where plaintiff showed that letters from defendant had been destroyed, and that their destruction was not from any improper motive and that defendant had been notified to produce copies sent to and received from plaintiff, plaintiff was entitled to prove the correspondence by secondary evidence. Nelson v. National Drill Mfg. Co. [S. D.] 105 N. W. 630. If an execution is lost or destroyed, parol evidence as to its contents is admissible after proper proof of its loss or destruction. Patterson v. Drake [Ga.] 55 S. E. 175. Where party and his attorneys testified to loss of original contract, a copy was competent. Wolf Co. v. Galbraith [Tex. Civ. App.] 94 S. W. 1100. Where pleadings in a case have been lost, parol evidence is competent to show what was in issue. Latta v. Wiley [Tex. Civ. App.] 14 Tex. Ct. Rep. 621, 92 S. W. 433. The existence and loss of a proces verbal of a probate sale of land having been proven, parol evidence is admissible to prove that the lost instrument evidenced an adjudication to a particular person, and also to prove the facts of adjudication, payment and transfer of possession. Moulierre v. Coco, 116 La. 845, 41 So. 113. Where bill of sale was shown to have been lost while in the custody of a third person for the use of either party, parol evidence of its contents was competent. Shultis v. Rice, 114 Mo. App. 274, 89 S. W. 357. Affidavit of loss of deed described deed as that of "J. H. R." and certified copy had it "I. H. R." The variance was held immaterial and the copy admissible. Williams v. Cessna [Tex. Civ. App.] 16 Tex. Ct. Rep. 162, 95 S. W. 1106. The recitals in a sheriff's deed of an execution and a seizure and sale thereunder may be looked to as secondary evidence of the contents of the execution, where it appears that the execution has been lost and is not recorded. Patterson v. Drake [Ga.] 55 S. E. 175.

65. Mere proof that inquiry had been made for a deed from one succeeding to the title, was insufficient proof of its loss or destruction to warrant the admission of a copy. Bower v. Cohen [Ga.] 54 S. E. 918. Secondary evidence of contents of note, admissible in action thereon when its existence, loss and a diligent search including office of attorney where it presumably ought to have been, were proven. Mortgage Trust Co. v. Elliott [Colo.] 84 P. 980. Certified copies of mortgages admissible where witness testified that they had been turned over to a certain person, that the office of such person had been burned, and that search for them had failed to disclose them after the fire. Ryan v. Shaneyfelt [Ala.] 40 So. 223. Where an instrument was traced through the hands of all accessible possessors, until it was found to have gone into the hands of a person who was outside the state, and it was then shown that he had lost it, secondary evidence of its contents was admissible. Interstate Inv. Co. v. Bailey [Ky.] 93 S. W. 578.

66. Testimony that witness and last custodian of a paper made a search for it among the latter's papers and failed to find it was sufficient foundation for secondary evidence of its contents. Thompson v. Chaffee [Tex. Civ. App.] 13 Tex. Ct. Rep. 167, 89 S. W. 285. Proof need not show search in every possible place; search in the place where it would be likely to be found if in existence is sufficient. Thus, where witness testified to unsuccessful search at his shop, where the paper was last seen, secondary evidence was admissible. Saunders v. Tuscumbia Roofing & Plumbing Co. [Ala.] 41 So. 982.

67. Oral evidence of contents of deed competent when deed was in defendant's possession, and he failed to produce it after due notice. Stephens v. Faus [S. D.] 106 N. W. 56. A notice to defendant to produce letters or copies thereof sent to and received from plaintiff, relating to a matter named, and written on or about certain specified dates is sufficiently specific as to the letters

secondary evidence is a matter resting largely in the discretion of the trial court.[68] The existence, execution and genuineness of a writing must usually be shown before secondary proof of its contents is admissible.[69] For this purpose, the genuineness of a writing may be established by indirect or circumstantial evidence.[70] It has been held that proof that a paper is out of the jurisdiction of the court is not alone sufficient foundation for the admission of secondary evidence of its contents;[71] but there are authorities to the contrary.[72] Where corporate records are by statute

to be produced. Nelson v. National Drill Mfg. Co. [S. D.] 105 N. W. 630. Notice to produce letters from R. to B. and M. is insufficient to require production of letters from R. to M. Bryson v. Boyce [Tex. Civ. App.] 14 Tex. Ct. Rep. 651, 92 S. W. 820. Where notice had been given to produce the envelope in which a telegram had been mailed, testimony by the postmaster that he had received a letter addressed to "Slater" (Salter being party's real name) and had returned it to the sender, was competent. Western Union Tel. Co. v. Salter [Tex. Civ. App.] 15 Tex. Ct. Rep. 362, 95 S. W. 549. Oral testimony of employment of witness competent where letters showing contract of employment were not produced, after notice. Sheldon Canal Co. v. Miller Tex. Civ. App.] 14 Tex. Ct. Rep. 279, 90 S. W. 206. Where an instrument would naturally be in the possession of the adverse party or his agent, and was last seen in such possession and the party fails to produce it after notice to do so, secondary evidence is admissible without proof of the loss of the original. International Harvester Co. v. Campbell [Tex. Civ. App.] 96 S. W. 93. Instrument designating homestead was executed by husband and wife, and they failed to produce it after notice, a certified copy was admissible. McGaughey v. American Nat. Bank [Tex. Civ. App.] 14 Tex. Ct. Rep. 350, 92 S. W. 1003. When a letter is shown to have been received in due course of mail in response to another notice to the writer of the reply to produce the original letter sent to him is sufficient to admit in evidence a letterpress copy of the same. Loverin & Browne Co. v. Bumgarner [W. Va.] 52 S. E. 1000. Parol evidence of deed competent when it was not recorded, and adverse party had possession of it and had failed to produce it after notice. Shine v. Culver, 42 Wash. 484, 85 P. 271. Where there was no provision of law requiring the charter of a consolidated railway corporation to be recorded, a certified copy of such charter by the secretary of state, under the state seal, was inadmissible, no notice to produce the original charter having been given. Montgomery v. Seaboard Air Line R. Co., 73 S. C. 503, 53 S. E. 987.

68. The sufficiency of the evidence of loss or destruction of primary evidence is for the court. Loss of original deed, to admit certified copy of registry. Patterson v. Drake [Ga.] 55 S. E. 175. The best evidence must be produced when feasible, but considerable discretion must be allowed the trial court in applying the rule. Discretion not abused in allowing numbers on wrappers around sticks of dynamite to be shown without producing the wrappers. Mattson v. Minnesota & N. W. R. Co. [Minn.] 108 N. W. 517.

69. Witness having testified that a copy of a letter was a copy of one sent to defendant, and that he received an answer thereto, the copy was admissible. Interurban Const. Co. v. Hayes, 191 Mo. 248, 89 S. W. 927. Oral evidence of recitals in deed and note incompetent when execution of deed was not proved and no foundation was laid for secondary evidence. Davis v. Ragland [Tex. Civ. App.] 15 Tex. Ct. Rep. 615, 93 S. W. 1099. Certificate construed as meaning that original deed was truly copied on the record, and not that a copy was recorded, and hence the certified copy was not objectionable as a copy of a copy. Williams v. Cessna [Tex. Civ. App.] 16 Tex. Ct. Rep. 162, 95 S. W. 1106. Where defendant's witness, in whose possession a contract of sale was left, testified that a paper produced by him was such contract, plaintiff was not precluded from showing the contents of a paper which he claimed to be the contract by failing to call defendant's witness. Stark v. Burke [Iowa] 109 N. W. 206. Witness testified that he dictated, read and signed a letter, and left it with the stenographer to be mailed by her in the usual way, but that he did not personally know whether it had been mailed. The stenographer was not produced. Held insufficient to admit proof of contents of letter by secondary evidence. Hardin v. Missouri Pac. R. Co. [Mo. App.] 96 S. W. 681. Undated copy of a letter claimed, but not proved to have been written by an agent of the payee of the note in suit, held inadmissible without proof of the writing of the original letter, and of its whereabouts. Crosby v. Emerson [C. C. A.] 142 F. 713. An admission by a deceased person that an account kept in a certain book is correct is not sufficient to warrant the admission in evidence of a copy of the account in another book. Fitch v. Martin [Neb.] 104 N. W. 1072.

70. Rule applied where oral evidence of contents of letter was sought to be introduced. International Harvester Co. v. Campbell [Tex. Civ. App.] 96 S. W. 93.

71. Copy inadmissible where it was shown that original was out of the jurisdiction, but it did not appear that any reasonable effort had been made to get it. Bruger v. Princeton & St. Marie Mut. Fire Ins. Co. [Wis.] 109 N. W. 95. Secondary evidence of contents of written instrument is not admissible even when the instrument is in the possession of one not a party to the suit and who lives in another state, without first showing that the instrument is lost or is beyond control of the party wishing to prove its contents. Pringey v. Guss, 16 Okl. 82, 86 P. 292.

72. Parol evidence is admissible to prove contents of a paper shown to be outside the state. Hoyle v. Mann [Ala.] 41 So. 835. Entries from books of account competent as

made provable by copy, the statutory requirements relative to the authentication of such copies must be complied with.[73] Only such matters as are within the scope and meaning of the statute may be thus proved.[74]

The best evidence rule does not apply to proof of merely collateral facts,[75] nor does it apply where it is sought to prove the admissions of a party.[76] Thus, verbal admissions by a party of the contents of letters received and written by such party are competent.[77] Failure to prove a fact by the best evidence is cured by an admission of the fact.[78] The right to have the best evidence produced may be waived by stipulations.[79]

In the case of duplicates, each is primary evidence, and one may be introduced without the other,[80] but secondary evidence of the contents of one is incompetent without proof of the loss of both,[81] since all originals must be accounted for before secondary evidence of the contents of any one is admissible.[82] Original letters and letterpress copies are not regarded as duplicates.[83]

In case of a knowing and apparently fraudulent alteration of an instrument, the person making the alteration will not be permitted to prove by parol the contents of the original unaltered instrument, without preliminary proof rebutting the suspicion of fraud;[84] but if the alteration is innocently made, for a proper purpose, and against the interests of the person making it, such person is not estopped to prove the contents of the original instrument by parol.[85] Where a writing is in-

evidence, but in another jurisdiction, may be proved by certified copies. Wright v. Chicago, etc., R. Co., 118 Mo. App. 392, 94 S. W. 555.

73. Extracts from corporate minutes incompetent, when accompanied by affidavit of president, but not certified by custodian as required by Code Civ. Proc., § 1918, subds. 6, 7. Nixon v. Goodwin [Cal. App.] 85 P. 169. Under Hurd's Rev. St. 1903, c. 51, § 15, books and papers of corporations may be proved by copy certified by secretary, clerk, cashier or keeper, having corporate seal attached. Hence, a lease by a railroad company may be proved by certified copy, under seal, as required by the statute. Chicago, etc., R. Co. v. Weber, 219 Ill. 372, 76 N. E. 489.

74. Under Illinois Evidence Act, §§ 15, 16, certified copies of the action of a board or body of officers acting for a corporation are competent evidence only of matters which are allowed or required by law to be acted upon by such board or body. Chicago, etc., R. Co. v. Weber, 121 Ill. App. 455. Certified copies of contract between a corporation and another are incompetent against a third person. Id.

75. Commencement of prior suit could be proved in entry and detainer action without producing the record. Fowler v. Prichard [Ala.] 41 So. 667. In an action for injuries received while walking on a track, testimony that the right of way was a private one, acquired by purchase, was not objectionable as that fact was one collateral to the main issue. Levelsmeier v. St. Louis & S. R. Co., 114 Mo. App. 412, 90 S. W. 104.

76. Purinton v. Purinton [Me.] 63 A. 925.

77. Woman read parts of letters to private carrier; the parts read to carrier were provable by him as admissions. Purinton v. Purinton [Me.] 63 A. 925.

78. Where in garnishment proceedings against an administrator, there was a failure to prove the order of distribution by the best evidence—the order of the court or record thereof—such failure was cured by an admission of the garnishee, while testifying, that the order was made. Kiernan v. Robertson, 116 Mo. App. 56, 92 S. W. 138.

79. Where a copy of a report of a street car accident was by stipulation allowed to take the place of the original, the copy was the best evidence of the contents of the report and the motorman could not testify in regard thereto. McCarthy v. Consolidated R. Co. [Conn.] 63 A. 725.

80. Hayes v. Wagner, 220 Ill. 256, 77 N. E. 211. Where lease was executed in duplicate, each was original, and could have been introduced without producing the other. Peaks v. Cobb [Mass.] 77 N. E. 881. Carbon copies of "scale tickets" showing weight of cattle, held admissible, being practically originals. Wright v. Chicago, etc., R. Co., 118 Mo. App. 392, 94 S. W. 555.

81. Hayes v. Wagner, 220 Ill. 256, 77 N. E. 211. Where contract was shown to have been executed in duplicate, proof of loss of one, without accounting for the other copy, was insufficient to admit oral proof of its terms. Bryson v. Boyce [Tex. Civ. App.] 14 Tex. Ct. Rep. 651, 92 S. W. 820.

82. Where lease was executed in duplicate, secondary evidence was inadmissible where it was not shown that reasonable effort had been made to produce one of the originals. Peaks v. Cobb [Mass.] 77 N. E. 881.

83. Menasha Wooden Ware Co. v. Harmon [Wis.] 107 N. W. 299.

84. Gibbs v. Potter [Ind.] 77 N. E. 942.

85. Where complainant, who was grantee in a deed, altered it so as to give defendant, a minor, a life estate in the property, the complainant was not estopped to show the contents of the original deed in a suit to reform it by having her own name replaced therein as grantee. Gibbs v. Potter [Ind.] 77 N. E. 942

nocently altered, the right of recovery thereon not being lost, proof of the contents of the unaltered duplicate, retained by the other party, is competent.[86]

§ 5. *Parol evidence to explain or vary writings.*[87]—When a written contract imports on its face to be a complete expression of the whole agreement, it is presumed that the parties have introduced therein every item or term,[88] and that all prior negotiations and contemporaneous oral agreements have been merged therein;[89] hence the well settled rule that evidence of prior or contemporaneous oral agreements is inadmissible to vary, add to, or contradict the terms of a valid written instrument,[90] and the rule applies equally in courts of equity.[91]

86. Hayes v. Wagner, 220 Ill. 256, 77 N. E. 211.

87. See 5 C. L. 1319.

88. When a contract is reduced to writing, in the absence of fraud, accident or mistake, it is conclusively presumed that the whole engagement and manner and extent thereof was reduced to writing. Dexter v. MacDonald, 196 Mo. 373, 95 S. W. 359.

89. Osgood v. Skinner, 111 Ill. App. 607; Fox v. Denargo Land Co. [Colo.] 86 P. 344. Written contract must be accepted as final measure of rights and obligations of parties. Current v. Muir [Minn.] 108 N. W. 870. All parol negotiations, understandings, and agreements are merged in the written contract, and the latter cannot be controlled or varied by parol proof thereof. Kentucky Vermillion Min. & Concentrating Co. v. Norwich Union Fire Ins. Soc. [C. C. A.] 146 F. 695. Where a written contract is signed, a contemporaneous oral promise of an agent to affix a printed "slip" to the contract which would add new terms and conditions to the contract cannot be proved as a defense. Biggers v. Equitable Mfg. Co., 124 Ga. 1045, 53 S. E. 674. In the absence of fraud or mutual mistake, no representation, promise or agreement made, or opinion expressed in the previous parol negotiations as to the terms or legal effect of the resulting written contract, can be permitted to prevail, either in law or in equity, over the plain provisions and proper interpretation of the contract. Connecticut Fire Ins. Co. v. Buchanan [C. C. A.] 141 F. 877; Lefler v. New York Life Ins. Co. [C. C. A.] 143 F. 814. The theory that proof of prior and contemporaneous negotiations and representations, though not admissible to vary the terms or legal effect of the written contract, may be received to raise an estoppel in pais, is a mere evasion of the parol evidence rule, and is not tenable. Id.

90. Alexander v. Ferguson [N. J. Law] 63 A. 998; Clark v. Emery, 58 W. Va. 637, 52 S. E. 770. Affidavit of defense adding parol terms to written contract sued on does not state a defense. Farnham Co. v. Southeastern Const. Co., 144 F. 989.

Illustrations. Miscellaneous contracts: Where contract was apparently complete, an alleged omitted portion could not be supplied by parol. Harding, Whitman & Co. v. York Knitting Mills, 142 F. 228. Oral agreement inadmissible against written contract employing attorneys. Spurrier v. Bullard [Iowa] 107 N. W. 1036. Where pleading showed a written contract of shipment, and the contract was not impeached in any way by the pleading, parol evidence of a different contract was inadmissible. Gulf, etc., R. Co. v. Batte [Tex. Civ. App.] 15 Tex. Ct. Rep. 581, 94 S. W. 345. Evidence of declared intention to make a gift of money and to pay a note and mortgage inadmissible as contradicting written contract. Townsend v. Sullivan [Cal. App.] 84 P. 435. Where contract provided that defendant was to pay all expenses of harvesting certain ice, parol evidence that all expenses incident to harvesting of ice were not included was inadmissible. Chariton Ice Co. v. Spring Lake Ice Co., 129 Iowa 523, 105 N. W. 1014. In action to dissolve a partnership and for an accounting, parol evidence is inadmissible to contradict the written contract by showing that one of the parties signing is only the agent for another. David Belasco Co. v. Klaw, 48 Misc. 597, 97 N. Y. S. 712. Where written contract for making of statue required it to be made like a photograph, oral evidence was inadmissible to show an agreement for a variation from the photograph in a single particular. Bounanni v. White Bronze Monument Co. [Iowa] 108 N. W. 524. Where a deposit in a bank was made under a written contract between two persons, and the contract was clear and complete and the bank had knowledge of its terms, parol evidence was inadmissible to vary it, in an action to recover the deposit. Pierson v. Pierce, 42 Wash. 164, 84 P. 731. Where railroad subscription contract provided for location of depot within a certain described locality, oral evidence that it was to be located on a particular lot was inadmissible. Williams v. Dallas, etc., R. Co. [Tex. Civ. App.] 96 S. W. 1099. Contract under seal cannot be modified by parol, but this rule does not apply if it has been performed. Snow v. Greisheimer, 120 Ill. App. 516. Oral evidence incompetent to show that plain and express terms of written contract did not show agreement of parties. Schiml v. Edgeworth, 118 Ill. App. 332. In the absence of fraud or mistake, one party to a contract, complete on its face, cannot assert that it does not contain the entire agreement. Kerting v. Hatcher, 117 Ill. App. 647. An oral understanding that contract should be considered by parties as providing for liquidated damages cannot be proved in an action other than to reform the contract, where the writing is clear and unambiguous. Long v. Furnas [Iowa] 107 N. W. 432. Where contract for option on land was unambiguous, and its terms did not show that one of the parties was acting as agent for another, parol evidence of a contemporaneous transaction to such relation was incompe-

tent. Schriner v. Dickinson [S. D.] 107 N. W. 536. Where bond for deed purported to contain entire contract between vendor and purchaser, evidence of a prior oral agreement and of acts done thereunder was immaterial. Taber v. Boston, 190 Mass. 101, 76 N. E. 727. Where creditor received a conveyance to secure indebtedness due him, and executed an instrument expressing the agreement between the parties which was unambiguous and apparently complete, oral evidence was incompetent to show that other debts than those mentioned were to be secured. Blake v. Lowry [Tex. Civ. App.] 15 Tex. Ct. Rep. 728, 93 S. W. 521. Where it was agreed that certain work was to be done according to plans and specifications, parol evidence was inadmissible to prove that certain things called for by the specifications were not required to be done by the contract. Sundmacher v. Lloyd, 114 Mo. App. 317, 89 S. W. 368. Written contract made plaintiff general manager of defendant's Dallas stores "with headquarters at Dallas." Parol evidence was held inadmissible to show that his duties were to be performed at a particular store. Wolf Cigar Stores Co. v. Kramer [Tex. Civ. App.] 14 Tex. Ct. Rep. 46, 89 S. W. 995. Where execution of a note which a surety paid, had no reference to certain partnership litigation between two sureties, in the course of which an agreement was executed, settling their difference, such agreement, being complete and unambiguous and making no reference to the note, evidence in a suit for contribution that the agreement included liability on the note, was inadmissible, as it contradicted the agreement. Tillar v. Wilson [Ark.] 96 S. W. 381. Beneficiaries of a life policy assigned their interest to insured by an unambiguous, apparently absolute, assignment. Held proof that the assignment was special and limited to a particular purpose, upon performance of which the assigned interest was to revest in the beneficiaries, was inadmissible. Doty v. Dickey [Ky.] 96 S. W. 544. Contract for insertion of advertisement of mineral water in newspaper which also provided that no agreement or statement not set forth in writing in the contract would be recognized, held complete, so as to exclude parol proof of an agreement that no advertisement of other mineral waters would be carried. Solomon v. Lighte & Bros., 99 N. Y. S. 540. Parol evidence inadmissible to vary or contradict unambiguous written **assignment** of cause of action. Flynn v. Butler, 189 Mass. 377, 75 N. E. 730.

Separation agreement between husband and wife being unambiguous, parol evidence to show intent of parties was incompetent. Lemmert v. Lemmert [Md.] 63 A. 380. Where by an unambiguous **antenuptial contract,** the husband of a decedent bound himself not to control or claim any of the wife's property during her life or after her death, evidence that he had managed her property during her life was inadmissible to show the construction they had placed upon it. In re Evans' Estate, 117 Mo. App. 629, 93 S. W. 922. Parol evidence held inadmissible to change condition of gifts of land by a mother to her daughters when given by separate **act of sale** reciting the receipt of price. Spann v. Hellen, 114 La. 336, 38 So. 248. Where life **insurance policy** provided that premiums should be due on the 15th of each month, it was incompetent to prove an oral agreement between insured and an agent that they should not be payable until the 20th. Metropolitan Life Ins. Co. v. Hall, 104 Va. 572, 52 S. E. 345. The rule that parol evidence cannot be admitted to contradict or alter a clear and unambiguous written contract, in the absence of fraud or mistake, applies to policies of insurance. Hence, oral evidence is inadmissible to show a waiver of written conditions by an agent. Deming Inv. Co. v. Shawnee Fire Ins. Co., 16 Okl. 1, 83 P. 918. Where policy described property insured as being in a certain building, and such building was shown to be in existence, parol evidence was inadmissible, in an action on the policy, to show that it was intended to insure the property while in another building. Aetna Ins. Co. v. Brannon [Tex.] 14 Tex. Ct. Rep. 208, 89 S. W. 1057. Where insured executed a nonwaiver agreement before any adjustment of his loss was attempted, evidence of what occurred at the time between himself and the agent was properly excluded. Weddington v. Piedmont Fire Ins. Co. [N. C.] 54 S. E. 271. Under Rev. Civ. Code, § 1239, where a receipt to an application for insurance puts the insurance in force from the date of the application, parol evidence of prior negotiations was inadmissible to show that the receipt was not in fact binding. Bowen v. Mutual Life Ins. Co. [S. D.] 104 N. W. 1040. Where accident policy provides for a recovery of one-tenth of the amount recoverable for death in case of loss from hernia accidentally produced, parol evidence is inadmissible, in the absence of fraud, to show that the agent represented that the recovery was limited to one-tenth in case of a loss caused by hernia previously existing. Kelsey v. Continental Casualty Co. [Iowa] 103 N. W. 221.

Lease "for one year and the privilege of four years, at $500 per year" held not ambiguous, and proof of intention of parties at the time by parol held inadmissible. Willis v. Weeks, 129 Iowa 525, 105 N. W. 1012. Oral evidence incompetent to show that parties intended a contract to be a sale of land and not a lease. Thomas v. Johnson [Ark.] 95 S. W. 468. Oral testimony inadmissible to vary or contradict a contract for the leasing of land to show it was intended as a sale. Smith v. Caldwell [Ark.] 95 S. W. 467. Where lease was complete and provided that premises were leased "with the furniture now contained in the house" and that lessee agreed to cut the grass on the lawn once a week and to trim the hedges, oral proof of a different contemporaneous agreement as to the furniture and the lawn was incompetent. Leeming v. Duryea, 49 Misc. 240, 97 N. Y. S. 355. Where a lease is silent as to use of building exclusively for rental of apartments for a term of a month or more, parol evidence of such a restrictive covenant is inadmissible as adding to the contract. Bristol Hotel Co. v. Pegram, 49 Misc. 535, 98 N. Y. S. 512. Where lease appeared to be complete and stipulated that tenant should keep premises in as good repair as they were when he received them parol evidence was incompetent to show that a list of repairs to be made by the tenant was drawn up, and

that this list was agreed to be a part of the contract of lease. Hallenbeck v. Chapman, 72 N. J. Law, 201, 63 A. 498.

Deeds and mortgages: Where deed is on its face an absolute grant, oral evidence is inadmissible to show the reservation of an easement by the grantor or that the grantee agreed to grant an easement. Hubenthal v. Spokane & I. R. Co. [Wash.] 86 P. 955. Parol evidence is inadmissible to prove that a person named as vendee is not the real vendee. Barrow v. Grant's Estate, 116 La. 952, 41 So. 220. Legal effect of deed cannot be limited by parol. Levine v. Carroll, 121 Ill. App. 105. Statements of grantor that he conveyed all the land owned by him in a certain locality insufficient to contradict deed which did not include certain land in the vicinity in the description. Auxier v. Herald [Ky.] 96 S. W. 915. Estate conveyed by written instrument cannot be changed by a parol agreement. Waters v. Waters, 124 Ga. 349, 52 S. E. 425. Parol evidence is inadmissible in an action of ejectment to show that by mistake land not intended to be conveyed was included in the deed. King v. Thompson, 58 W. Va. 455, 52 S. E. 487. Where the calls of a deed were not ambiguous but were capable of being applied to the ground, parol evidence was inadmissible to control or change them. Hamilton v. Blackburn [Tex. Civ. App.] 15 Tex. Ct. Rep. 721, 95 S. W. 1094. In an action at law involving title (not a suit to correct or reform a deed) evidence of the intention of the grantors in a deed contrary to the description expressed in the deed, is incompetent. Herman v. Dunman [Tex. Civ. App.] 16 Tex. Ct. Rep. 372, 95 S. W. 80. Where deed described a tract of land by metes and bounds and recited a certain consideration for the entire tract, oral evidence was incompetent to show a sale at a certain price per acre, and that the tract did not contain the number of acres paid for. Hendricks v. Vivion, 118 Mo. App. 417, 94 S. W. 318. A deed, absolute in form, and without limitations or qualifications as to the interest to be conveyed, and containing covenants, cannot be contradicted or varied by parol evidence to show the intention of the parties in executing it. Bernardy v. Colonial & U. S. Mortg. Co. [S. D.] 105 N. W. 737. A deed executed by a decedent in his lifetime conveyed a present interest and required the grantee to pay a specified sum to a named person within 5 years after the grantor's death. The grantor kept the deed and instructed the grantee to record it after his death. Held, extrinsic evidence was inadmissible to prove that the deed was intended as a will. Dodson v. Dodson [Mich.] 12 Det. Leg. N. 831, 105 N. W. 1110. Where a clause in a deed was clear and unambiguous and presented a question of legal interpretation only, parol evidence as to what the parties intended by it was inadmissible. Hawley v. Kafitz, 148 Cal. 393, 83 P. 248. A restriction or reservation cannot be added to a deed by parol evidence of the intention of the parties. Parol proof inadmissible to show that gasoline engine was not intended to pass with realty, where the general description included it. State Security Bank v. Hoskins [Iowa] 106 N. W. 764. Where **mortgage** secured note and also contained express and unambiguous provision that it should secure future advances, the lien of the mortgage for such advances actually made cannot be defeated by parol proof than when mortgage was executed nothing more was contemplated than the existing debt. Davis v. Carlisle [C. C. A.] 142 F. 106. In a hypothecary action to enforce a judicial mortgage, parol evidence is not admissible to prove that the purchase price of the property was not paid in cash as recited in the deed to defendant's author, but that the true consideration was partly cash, a special mortgage held by the purchaser, and his assumpsit of a vendor's lien and a mortgage held by a third person. Abbeville Rice Mill v. Shambaugh, 115 La. 1047, 40 So. 453. Where mortgage securing note provided that payee of note agreed to extend it from time to time, parol proof was competent to show that a note bearing a later date was a renewal of the one first given. Garmany v. Lawton, 124 Ga. 876, 53 S. E. 669.

Notes: Contemporaneous parol agreement that note need not be paid inadmissible to contradict express promise of note. Payne v. Mutual Life Ins. Co. [C. C. A.] 141 F. 339. A promissory note cannot be varied by evidence of a contemporaneous agreement entered into when the note was executed. Chapman v. Chapman [Iowa] 109 N. W. 300. Maker of note cannot prove that at time he executed it, it was agreed that he need not pay it. Bass v. Sanborn [Mo. App.] 95 S. W. 955. Where subscribers to stock of company formed to purchase a horse executed joint and several notes, parol evidence in an action on a note was inadmissible to show that liability was to be several only, and not joint. City Deposit Bank v. Green [Iowa] 106 N. W. 942. An absolute conveyance of land was made in partial payment of a debt and notes absolute as to time and amount were given. Held, parol evidence was inadmissible to show that if land increased in value the notes were to be cancelled. Pearson v. Dancy [Ala.] 39 So. 474. In an action on a note and to foreclose a mortgage a parol agreement that the payee—an attorney—was to be paid reasonable compensation for his services, and that the note and mortgage should be given as security for payment of the same, cannot be proved as a defense. Mosnat v. Uchytil, 129 Iowa 274, 105 N. W. 519.

Contracts of purchase and sale: Letter held to constitute unambiguous contract of purchase and sale and parol agreement could not be shown. Midland Linseed Co. v. Remington Drug Co., 127 Wis. 242, 106 N. W. 115. Contract for sale of goods having been reduced to writing, evidence of prior conversations to show an express warranty was inadmissible. Day Leather Co. v. Michigan Leather Co., 141 Mich. 533, 12 Det. Leg. N. 548, 104 N. W. 797. Written contract for sale of steam roller containing no warranty as to width of roller, cannot be added to by parol proof of such warranty. Scholl v. Killorin, 190 Mass. 493, 77 N. E. 382. Where, by written confract, a seller of coal agreed to furnish what coal a buyer would need between certain dates at a certain price, proof that such contracts were subject to strikes and matters beyond the seller's control, was inadmissible. City of Covington v. Kanawha Coal & Coke Co. [Ky.] 89 S. W. 1126. Contract for sale of all ash timber

Where it appears, however, that the parties did not intend to reduce the entire contract to writing, oral evidence is competent to show omitted terms, consistent with those contained in a written memorandum,[92] since the existence of such

on certain land of the diameter of 15 inches and less held unambiguous so that proof that all the ash trees on the land were hollow at the butt was incompetent to explain the contract. Strother v. American Cooperage Co., 116 Mo. App. 518, 92 S. W. 758. A complete contract of sale of silverware, specifying that it was made under inducements specified in it and no others, cannot be varied by proof of a verbal agreement whereby seller agreed not to sell to other local merchants and agreed to furnish a catalogue. Brennard Mfg. Co. v. Citronelle Mercantile Co. [Ala.] 41 So. 671. Contract for sale of coal to be delivered at defendant's furnaces by wagon, the purchaser agreeing to pay a certain sum per bushel "to be measured in the cabs" at the furnaces, cannot be modified by proof of a custom whereby the quantity of coal sold was determined by its bulk at the elevator or furnace. Shelby Iron Co. v. Dupree [Ala.] 41 So. 182. Written order for goods containing provision that there was no verbal agreement aside from it and that its terms were accepted, could not be contradicted by proof that agent agreed to guaranty sale of goods ordered. Fulton v. Sword Medicine Co. [Ala.] 40 So. 393. Where no misrepresentations as to the contents of a written order for goods were proved, oral proof of an agreement not to sell goods of the same kind to other merchants in the town was inadmissible. Main v. Radney [Ala.] 39 So. 981. Where a written agreement for the sale of stock provided for a sale to a named person or his assigns parol evidence that such person was to take the stock and sell it to a certain named person only was incompetent. Watkins v. Robertson [Va.] 54 S. E. 33. In the absence of fraud or mistake or ambiguity in a contract to furnish piles, oral evidence of prior agreements held incompetent. Carlin & Co. v. Fraser [Va.] 53 S. E. 145. Written contract for sale of two vehicles contained detailed description as to each. Held oral proof of a contemporaneous agreement changing the written description was incompetent in action for price to establish defense that article sent was not as ordered. Buckeye Buggy Co. v. Montana Stables [Wash.] 85 P. 1077. Written order for sale of second-hand threshing outfit was signed and sent to vendor and contained express stipulations that warranty therein did not cover second-hand machinery and that no verbal agreements would be recognized by the vendor. This became the contract of purchase. Held, the writing could not be contradicted by oral evidence of representations and warranties made by the agent. Buffalo Pitts Co. v. Shriner, 41 Wash. 146, 82 P. 1016. Where in the absence of fraud or mistake, a written order for the sale of personalty is complete in itself, but silent as to a warranty of the quality and condition of the property, oral evidence is inadmissible to prove such warranty. McNaughton v. Wahl [Minn.] 108 N. W. 467. When parties agree upon a sale and one party has the terms thereof reduced to writing and embraced in the document, although it is in the nature of a receipt, and has the other party sign it upon payment of a part of the purchase money, the party who prepares it and has it signed by the other and retains it, is as much bound by its recitals as the party signing it, especially when relating to a transaction not required to be in writing. Finney v. Lucy [Ala.] 39 So. 583.

91. In the absence of fraud, accident or mistake, the rule is the same in equity as at law, that parol evidence of an oral agreement at the time of drawing, making or indorsing a bill or note cannot be permitted to vary, contradict, add to or subtract from, the absolute terms of the written contract. Hutchins v. Langley, 27 App. D. C. 234.

92. Oral agreement of sale included farm and personalty; writing referred only to farm; terms of sale of personalty could be shown by parol. Brosty v. Thompson [Conn.] 64 A. 1. Terms of contract omitted from the writing may be proved by parol if consistent with the writing. Evans v. Freeman [N. C.] 54 S. E. 847. Written contract of sale being silent as to time of delivery, parol evidence is admissible to show what is a reasonable time. Walter Pratt & Co. v. Frasier & Co., 72 S. C. 368, 51 S. E. 983. Parol warranty may be shown when written order neither contains nor excludes a warranty. Florence Wagon Works v. Trinidad Asphalt Mfg. Co. [Ala.] 40 So. 49. Correspondence held not to constitute a complete contract for sale of machines; hence, oral evidence was competent to show omitted terms consistent with those reduced to writing. Goodwin Mfg. Co. v. Arthur Fritsch Foundry & Mach. Co. [Mo. App.] 89 S. W. 911. Where contract of employment was partly oral and partly written, oral evidence of an agreement by the employe not to enter into competition with his employer at the termination of his employment was competent. Turner v. Abbott [Tenn.] 94 S. W. 64. Where written contract executed in August did not show whether it related to past or future services of broker, evidence of parol agreement in previous March, and of services rendered that month in procuring a purchaser, was admissible. Levin v. New Britain Knitting Co., 78 Conn. 338, 61 A. 1073. Contract between principal and agent for sale of goods held not to cover goods delivered to agent and previously shipped to third persons; hence, parol evidence was admissible in regard to such goods. Harrison Wagon Co. v. Brown [Mich.] 13 Det. Leg. N. 614, 108 N. W. 1109. Where agreement for a lease contained no provision as to commissions to be paid a broker, parol evidence was competent to show that no commission was to be paid until the lease had been executed according to the terms of the writing. Benedict v. Pincus, 109 App. Div. 20, 95 N. Y. S. 1042. Where letters did not purport to constitute contract, but referred to conversation in which it was made, oral evidence was admissible to contradict a statement in a letter. Leary v. Moore, 48

a partial memorandum does not prevent proof of the real and entire contract of the parties.[93] The intended scope and operation of a memorandum, not intended to evidence an entire contract, may be shown.[94] Where there are two written contracts, it is competent to show by parol that they relate to one and the same transaction and constitute but one contract.[95] Whether parties intended to embody in a writing their entire contract or only a part of it may be a question for the trial court.[96]

Where the written evidence of a contract or a term thereof is ambiguous or uncertain, oral or extrinsic evidence is admissible to explain the ambiguity or clear up the uncertainty, in order that the real intention of the parties may be made to appear.[97] For this purpose, evidence of the facts and circumstances leading up to

Misc. 551, 96 N. Y. S. 266. In action for price of machine, an "order" for the machine, signed by defendants but not by plaintiffs, which did not purport to contain the entire contract did not preclude proof of oral warranty of machine. Louis De Jonge & Co. v. Printz, 49 Misc. 112, 96 N. Y. S. 750. Where memorandum of sale of realty recited receipt of deposit and some of the terms, and provided for execution of a formal contract at a certain time and place, it was competent to show prior negotiations, since the memorandum did not purport to contain the complete and final contract. Winter v. Friedman, 97 N. Y. S. 733. Where a written modification of a lease stated a reduction in the rent but did not state the consideration therefor, the whole agreement, including such consideration, may be shown by parol. Natelsohn v. Reich, 99 N. Y. S. 327. Where it appears that parties to a contract did not intend to reduce it all to writing, and the omitted portion is consistent with the writing, such omitted portion may be shown by parol. Where written settlement was silent as to time and manner of a $500 payment, parol proof of these facts was competent. Dunnett & Slack v. Gibson, 78 Vt. 439, 63 A. 141. Where defendant in order to induce plaintiff to enter into a contract to raise onions on shares, agreed to erect the necessary cribs and warming houses, but the written contract, though referring to buildings on the land, did not contain defendant's agreement to build, and plaintiff called attention to the omission and was assured by defendant that it was all right, held, the entire contract was not reduced to writing and defendant's obligation could be shown by parol. Beld v. Darst [Mich.] 13 Det. Leg. N. 729, 109 N. W. 275. Contract for sale of stock of goods contained no provision as to character or quantity of goods, nor as to method of carrying on business after execution of contract and prior to delivery of stock. Held, a contemporaneous oral agreement that goods were first class and that sales should be only in ordinary course of business up to time of delivery, could be shown, where seller closed out a part of the stock sold at reduced prices. North American Transportation & Trading Co. v. Samuels [C. C. A.] 146 F. 48. If a written memorandum confirmatory of a previous oral agreement does not purport to recite the whole of the latter, oral testimony is admissible to supply omitted covenants not inconsistent with the writing. De Laval Separator Co. v. Jellnek [Neb.] 109 N. W. 169. Where written contract for the sale of lots and erection of buildings was silent as to the price of the lots and the character of the buildings, documentary and oral evidence was admissible to supply the omissions. Landvoigt v. Paul, 27 App. D. C. 423.

93. Writing held a mere memorandum of contract, and oral evidence competent to show real and entire contract. Avil Printing Co. v. Kaiser Pub. Co. [Mo. App.] 89 S. W. 900. Where the writing does not disclose a complete contract, a part of the contract not reduced to writing may be shown by parol, but the written portion must not be contradicted. Clark v. Emery, 58 W. Va. 637, 52 S. E. 770. Memorandum indorsed on proof of a claim for a cow killed by a locomotive, signed by plaintiff but not by defendant, held not to exclude parol proof of settlement made. Keylon v. Missouri, etc., R. Co., 114 Mo. App. 66, 89 S. W. 337. Instruments in the form of notes which provided that title and right to possession of the goods for which the notes were given should not pass until the notes were paid, held not to constitute a complete contract so as to exclude oral evidence of a warranty of the goods. National Drill & Mfg. Co. v. Maher, 49 Misc. 640, 97 N. Y. S. 1029. Where verbal contract called for transportation of horses by special train, and bill of lading did not mention this, but agent said it was a mere matter of form and that the shipper would never hear of it, the real contract was held not to have been reduced to writing, and the parol evidence rule did not apply. Southern R. Co. v. Graddy [Ky.] 91 S. W. 1125.

94. Rouseville Borough School Dist. v. Cornplanter Tp. School Dist., 29 Pa. Super. Ct. 214. Writing that was intended only as memorandum for disposition of a suit and not as a contract, could be explained by parol to show its intended scope and operation. Wright v. Anderson, 191 Mass. 148, 77 N. E. 704. Where deed named a consideration of $24,000 for timber land, parol evidence was admissible to show that $4,000 of that sum was for a contract owned by the grantee and assigned to the grantor. Mueller v. Cook, 126 Wis. 504, 105 N. W. 1054.

95. Rock Island Sash & Door Works v. Moore & Handley Hardware Co. [Ala.] 41 So. 806.

96. Brosty v. Thompson [Conn.] 64 A. 1.

97. Where parties disagreed as to mean-

and attending the execution of the writing is admissible,[98] and acts of the parties

ing of term "without time limit" in contract for shipment of macaroni, and term was ambiguous, oral evidence was admissible to explain it. Sholl v. Prince Line, 96 N. Y. S. 368. Oral evidence admissible to explain that "Pt." used after name in draft meant "president." Griffin v. Erskine [Iowa] 109 N. W. 13. When ambiguity in the terms of a deed renders the meaning uncertain, parol evidence of the conditions under which it was executed and the character and situation of the property may be considered, in connection with its terms, in arriving at the intention of the parties. Clayton v. Gilmer County Court, 58 W. Va. 253, 52 S. E. 103. Where contractor agreed to do all the work on a building that was "properly brickwork" and these words were not explained in the specifications, parol evidence was competent to show what they meant. Edmonds v. First Nat. Bank [Pa.] 64 A. 671. Contract employing plaintiff to work mining claims held ambiguous as to the claims to be worked and those from the net proceeds of which he was to be compensated, and hence parol evidence was competent to explain the ambiguity. Lindblom v. Fallet [C. C. A.] 145 F. 805. Parol evidence is admissible to explain ambiguous terms in a contract but not to contradict plain terms. Licking Rolling Mill Co. v. Synder & Co. [Ky.] 89 S. W. 249. Where a written order referred to previous dealings, and was ambiguous, it was proper to show the previous dealings of the parties and the surrounding facts and circumstances in order to aid in the interpretation of the contract. Weir v. Long [Ala.] 39 So. 974. A building contract required the contractor to furnish some material. Evidence that the contractor verbally agreed to furnish the lumber was not objectionable as contradicting the contract. Gates v. O'Gara [Ala.] 39 So. 729. Where business was continued in firm name after the death of a partner, and in course of settlement of partnership affairs, a deed was taken in the firm name, parol evidence was admissible to show that the heirs and distributees were the parties intended to explain the latent ambiguity. Walker v. Miller, 139 N. C. 448, 52 S. E. 125. Warehouse receipt for wheat stored, delivered and accepted as the contract between the parties, held subject to parol explanation when it was ambiguous and uncertain in several respects. Savage v. Salem Mills Co. [Or.] 85 P. 69. A contract of reinsurance covered certain wheat while contained in a "warehouse." The contract was based on maps and ratebooks in which a distinction was made between a certain warehouse and elevator, different rates being charged on the two. Held, there was a latent ambiguity in the contract as to whether it covered both buildings, explainable by parol. Fireman's Fund Ins. Co. v. Aachen & M. Fire Ins. Co. [Cal. App.] 84 P. 253. On a proposed contract of sale of land was indorsed an agreement to pay the broker a further commission "at time and place of passing title to above described property;" held, oral evidence admissible to show agreement that broker was to be paid such commission in case the purchaser whom the broker was to secure took title. Hancox v. Appleton, 49 Misc. 110, 96 N. Y. S. 1029. An agreement between two school districts provided that one of them should have "all the resources except the contents of the storeroom" and would "divide the state appropriation pro rata if the appropriation is for the year 1900-1901." Held, parol evidence was admissible to show what were the resources spoken of, what were the contents of the storeroom and what was intended by the reference to the state appropriation. Rouseville Borough School Dist. v. Cornplanter Tp. School Dist., 29 Pa. Super. Ct. 214.

Contracts held not ambiguous within this rule: A contract for purchase of bicycles "to be filled by April 1st or as soon as possible" is not ambiguous. Williams v. Gridley, 110 App. Div. 525, 96 N. Y. S. 978. Where words "satisfactory demonstration" used in contract of agency for sale of automobiles, were not shown to be equivocal in meaning, oral evidence of the intention of the parties in using such words was inadmissible. Grout v. Moulton [Vt.] 64 A. 453. Extrinsic evidence inadmissible to show meaning of words "building" and "machinery" used in fire policy. Tubbs v. Mechanics' Ins. Co. [Iowa] 108 N. W. 324. Parol evidence is inadmissible to show that parties used words in a sense different from their ordinary meaning. Oral evidence of meaning of "estate" as used by parties inadmissible. Morrison v. Hazzard [Tex.] 15 Tex. Ct. Rep. 131, 92 S. W. 33.

98. Conversation at time note was made held competent. Gates v. Morton Hardware Co. [Ala.] 40 So. 509. Testimony of what transpired at time of execution of a written contract is competent. Shreve v. Crosby, 72 N. J. Law, 491, 63 A. 333. Circumstances leading up to contract and showing consideration may be shown. Hightower v. Ansley [Ga.] 54 S. E. 939. Seller of cattle agreed to stand loss of cattle en route, and buyer was to pay for those delivered. Seller settled with railroad company for cattle killed en route. Held, evidence of facts surrounding execution of contract of settlement were admissible in action by buyer to show that he was not bound thereby. International & G. N. R. Co. v. Jones [Tex. Civ. App.] 14 Tex. Ct. Rep. 530, 91 S. W. 611. Oral evidence of circumstances surrounding execution of release held admissible to show intent of parties. El Paso & S. R. Co. v. Darr [Tex. Civ. App.] 15 Tex. Ct. Rep. 145, 93 S. W. 166. Where a deed is ambiguous as to whether the sale was intended to be by acre or in gross, parol evidence of the situation and circumstances of the parties at the time of the execution of the deed is competent, but no evidence that would contradict a written statement as to the quantity conveyed is admissible. Winton v. McGraw [W. Va.] 54 S. E. 506. Circumstances surrounding making of contract for sale of second-hand business and good will admissible to show that sale of established business was contemplated. Shafer v. Sloan [Cal. App.] 85 P. 162. Where contract is in writing oral evidence is competent to show conversations prior to and concurrent with the

tending to show the construction placed by them upon their contract may also be shown.[99] When the language of a contract is clear and unambiguous,[1] proof of custom or usage is inadmissible to give an interpretation to the contract inconsistent with its language.[2] But a trade usage, not inconsistent with the language used, may be shown to add an incident to the contract.[3]

Extrinsic evidence is also competent, when necessary, to identify or locate the subject-matter of the contract.[4] Where the description in a deed is uncertain

execution of the contract relating wholly to the subject-matter and consideration in order to identify the subject-matter and to give effect to the contract. Ditchey v. Lee [Ind.] 78 N. E. 972. By a conveyance of land to a city for a street, the city was bound to macadamize the street within 2 years. Held, oral evidence was admissible to show facts surrounding transaction, and the condition of the parties, to show what was meant by the words "the street." City of Versailles v. Brown [Ky.] 96 S. W. 1108. Where a deed conveyed, in addition to the land, "all tenements, hereditaments, privileges, and appurtenances thereunto belonging or therewith used and enjoyed," and it was admitted that the right to water from a certain ditch passed, but there was a dispute as to whether the right to use water from another also passed, it was held that the deed was ambiguous, and evidence of conversations of the parties at the time, and of prior and subsequent acts and statements of the grantor, was admissible. Fayter v. North [Utah] 83 P. 742. Where language of lease was ambiguous as to term, evidence of attendant circumstances, and that one party stated what he understood the "season," covered by the lease, to be, was admissible. Buffington v. McNally [Mass.] 78 N. E. 309. If written contract is ambiguous or obscure so that an inspection of it will not disclose the intention of the parties, parol evidence of the subject-matter, relations of the parties, and surrounding facts and circumstances is admissible to aid in the interpretation of the contract. Jacobs v. Parodi [Fla.] 39 So. 833.

99. Evidence tending to show construction placed on a contract by a party is not objectionable as tending to vary or contradict it. Marshall v. Columbia & E. C. Elec. St. R. Co., 73 S. C. 241, 53 S. E. 417. Evidence tending to show subsequent recognition of a contract for the sale of stock by the holder of the stock, including a written calculation made by him as to the amount due by a purchaser under a like contract with another stockholder is admissible to show upon what terms the parties understood the stock was to be sold. Hightower v. Ansley [Ga.] 54 S. E. 939. Evidence tending to explain a contract of shipment, and tending to show that it was understood by agents of the final carrier handling the shipment, held not objectionable as varying the terms of the contract. Southern Kan. R. Co. v. Burgess Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 191, 90 S. W. 189. Where failure to furnish water was claimed, and contract did not require plaintiff to provide means of conveying water to premises in question, evidence that failure to get water was due to failure of defendant's landlord to keep a lateral in good condition, according to contract between defendant and his landlord, did not vary or contradict plaintiff's contract to supply water. Gravity Canal Co. v. Sisk [Tex. Civ. App.] 15 Tex. Ct. Rep. 984, 95 S. W. 724.

1. Held that a "watchman's clause" in insurance policy did not render it ambiguous, and hence parol evidence to explain the term was inadmissible. Kentucky Vermillion Min. & Concentrating Co. v. Norwich Union Fire Ins. Co. [C. C. A.] 146 F. 695.

2. Savage v. Salem Mills Co. [Or.] 85 P. 69.

3. Where contract of sales agent provided for compensation by deduction from price of goods sold him, and did not contemplate sales by others than such agent, proof of a trade usage whereby an exclusive agent is paid for all sales in his territory regardless of who makes the sale, is admissible. Garfield v. Peerless Motor Car Co., 189 Mass. 395, 75 N. E. 695.

4. Parol evidence is admissible to identify personal property covered by or intended to be covered by a mortgage. State v. Jackson, 128 Iowa, 543, 105 N. W. 51. Oral evidence for the purpose of locating on the ground a boundary of land—the street line—is not objectionable as contradicting the deed. Rix v. Smith [Mich.] 13 Det. Leg. N. 508, 108 N. W. 691. Where a policy of fire insurance did not describe a house either as occupied or vacant, parol proof that it was in process of erection and hence not occupied as a residence did not contradict the written policy. Harris v. North American Ins. Co., 190 Mass. 361, 77 N. E. 493. Where location of 2 parcels of land included in contract of sale was not given, oral evidence was competent to locate them. Morrison v. Hazzard [Tex.] 15 Tex. Ct. Rep. 131, 92 S. W. 33. Where contract to convey was embodied in letters between the parties, parol evidence was competent to show what particular piece of property was meant by the letters. Warner v. Marshall [Ind.] 75 N. E. 582. Fire policy covered lumber "in mill buildings, on cars under mill sheds, and in sheds adjoining said mill building." Held, parol evidence was admissible to show the situation of lumber and sheds in order to determine what lumber was covered by the policy. Wolverine Lumber Co. v. Phenix Ins. Co. [Mich.] 13 Det. Leg. N. 642, 108 N. W. 1088. Defendant solicited by letter a bid for scrap iron not including engines, generators, valves or piping in a building, and offered other information if desired. Plaintiff made an appointment to meet defendant and find out what he had for sale, but later made a bid for "all the old material you have for sale" in the building. Held, parol evidence was admis-

or ambiguous, but is capable of being made certain, extrinsic evidence is competent for that purpose,[5] but if a description is so deficient as to render a deed void, parol evidence is incompetent to supply the deficiency,[6] since oral evidence cannot be received to describe land sold and then to apply the description.[7]

Parol evidence is competent to show the actual relation of parties named in a writing to the contract evidenced by it,[8] as between the immediate parties thereto.[9]

It is usually held that a simple receipt is only prima facie evidence of the fact recited, and is subject to contradiction or explanation by parol,[10] though there are authorities to the contrary.[11] But if the writing constitutes or is accompanied by a contract, the parol evidence rule applies.[12] The recitals of consideration in a

sible to show whether sale included structural iron in building. United R. & Elec. Co. v. Wehr & Co. [Md.] 63 A. 475.

5. Where land was described in contract of sale as that "north and west of the graveyard" parol evidence was admissible to complete and fix the description. McFarland v. Stansifer, 36 Ind. App. 486, 76 N. E. 124. Deed in which description commenced, "beginning at a pine on the east side of Gum Swamp," held sufficiently definite and certain so that parol proof was competent to aid it. Broadwell v. Morgan [N. C.] 55 S. E. 340. Description of land and timber in contract of sale held such that it could be made certain by extrinsic evidence, and hence such evidence was competent to show the location of the land. Howison v. Bartlett [Ala.] 40 So. 757. A conflict in a description in a deed between a call for distance and a call for a railroad right of way may be explained by extrinsic evidence. Couch v. Texas & P. R. Co. [Tex.] 14 Tex. Ct. Rep. 690, 90 S. W. 860. Where there was a patent ambiguity in the description in a deed, parol evidence was held admissible to show the situation and circumstances to enable the court to arrive at the true intention of the parties. Reynolds v. Lawrence [Ala.] 40 So. 576.

6. As where description did not refer to the range or township. Martin v. Kitchen, 195 Mo. 477, 93 S. W. 780.

7. Martin v. Kitchen, 195 Mo. 477, 93 S. W. 780.

8. Parol evidence is competent to show true relation of maker of note to transaction. Morgan v. Thompson, 72 N. J. Law, 244, 62 A. 410. Where husband and wife signed note and mortgage, parol evidence was competent to show that she signed only as surety. Gibson v. Wallace [Ala.] 41 So. 960. Where contract was signed with name of defendant's husband, parol evidence was competent to show that she signed the husband's name, and thereafter recognized it as her own contract. Wuertz v. Braun, 99 N. Y. S. 340.

9. Parol evidence is admissible by the maker of a note, who appears by its terms to be a principal, to show that he is in fact a surety, except as against persons who have acted on the faith of his apparent character of principal. National Bank of Commerce v. Schirm [Cal. App.] 86 P. 981. As between the immediate parties to a note its real character may always be shown, as that wife's note was given for the accommodation of her husband. People's Nat. Bank v. Schepflin [N. J. Law] 62 A. 333. As between the immediate parties to a promissory note, parol evidence is admissible to show that the makers thereof, though all appear to be principal debtors, bear the relation to each other of principal and surety. Kaufman v. Barbour [Minn.] 107 N. W. 1128. As between original parties, oral evidence is competent to show that some were sureties for others. Western Bank & Trust Co. v. Gibbs [Tex. Civ. App.] 96 S. W. 947.

10. Jersey Island Dredging Co. v. Whitney [Cal. App.] 86 P. 509; Estate of Augustus Switzer v. Gertenbach, 122 Ill. App. 26. As a general rule receipts are open to explanation by parol. Murphy v. Black [Ala.] 41 So. 877. Oral evidence is competent to contradict recitals of bill of lading that goods were received in good order. Foley v. Lehigh Valley R. Co., 96 N. Y. S. 182. Carrier's receipt for goods may be contradicted by showing goods were not in fact received. Strawn v. Missouri, etc., R. Co. [Mo. App.] 96 S. W. 488. An indorsement of payment on a negotiable instrument is in the nature of a receipt and not of a contract, and may be contradicted or explained by parol. McCaffrey v. Burkhardt [Minn.] 105 N. W. 971. Recital in contract for work that a certain amount of cash was paid not conclusive; oral evidence competent to contradict it. House v. Holland [Tex. Civ. App.] 15 Tex. Ct. Rep. 543, 94 S. W. 153.

11. In the absence of fraud or mistake, the plain and unambiguous terms of a receipt cannot be contradicted by parol. Murphy v. Black [Ala.] 41 So. 877. Where a receipt states on its face what it is for, evidence to show that it was given for a purpose other than that stated is inadmissible. Holcomb-Lobb Co. v. Kaufman [Ky.] 96 S. W. 813.

12. Jersey Island Dredging Co. v. Whitney [Cal. App.] 86 P. 509. When a receipt imports a contract it cannot be explained by parol. Murphy v. Black [Ala.] 41 So. 877. Where in addition to being a receipt, a writing contains evidence of a promise of sale which would become absolute on performance by the vendee, and no ambiguity or error was shown, the parol evidence rule was held to apply. Barfield v. Saunders, 116 La. 136, 40 So. 593. While a bill of lading is prima facie evidence of the receipt of merchandise and of its condition when received, yet as a contract for carrying freight it cannot be varied by parol. The Presque Isle, 140 F. 202. A written receipt given upon the compromise of a disputed claim, purporting to be in full satisfaction of the

contract, being in the nature of a receipt, are not conclusive; oral evidence is always competent to show the real consideration,[13] at least as between the original parties.[14] The fact that there was[15] or was not[16] a consideration may also be shown by parol. Where a contract for the purchase of two articles names a single sum as the consideration, the amount to be paid for each may be shown.[17] A recital of payment of consideration cannot be contradicted for the purpose of impairing the validity or legal effect of the instrument.[18] One cannot, under the guise of proving the true consideration for a deed, prove an independent oral agreement which is within the statute of frauds, or which is prior to or contemporaneous with the written contract.[19]

Fraud in the inception of the contract,[20] or which induced its execution,[21] may

claim, operates as a contract and cannot be varied or explained by parol. Bill for dredging work was disputed and upon a compromise of it, it was indorsed across the face, "Paid $650 in full satisfaction of all claims and guaranteed against liens." This was held to be a complete, unambiguous contract, and evidence to explain some of the items, and to show a party's understanding of it, was incompetent. Jersey Island Dredging Co. v. Whitney [Cal. App.] 86 P. 509. The Supreme court, passing upon the same instrument, held that it was prima facie a release only of claims appearing on the bill and those prior to the date thereof, and that parol evidence was admissible to show circumstances surrounding its execution, to aid in its interpretation. Jersey Island Dredging Co. v. Whitney [Cal.] 86 P. 691. Where railroad bonds were deposited with a person designated by a subcontractor as security, and such person executed an instrument showing the nature of the transaction, and advanced money on the bonds, the instrument was not a mere receipt and could not be contradicted by parol. Interurban Const. Co. v. Hayes, 191 Mo. 248, 89 S. W. 927.

13. True consideration of deed may be shown by parol. Levine v. Carroll, 121 Ill. App. 105. Real consideration for contract for exchange of land held provable by parol notwithstanding recitals of contract. Yore v. Meshew [Mich.] 13 Det. Leg. N. 672, 109 N. W. 35. It may be shown by parol that mortgagee as part consideration for mortgage agreed to pay off a prior mortgage. Barton v. Eminence Bldg. & L. Ass'n [Ky.] 93 S. W. 9. Valuable consideration, in addition to that expressed in a deed, may be shown by parol. Whitman v. Corley, 72 S. C. 410, 52 S. E. 49. A reservation of the rents for the current year by the grantor may be shown by parol though the deed is absolute and contains no such reservation. Such evidence is competent to show the true consideration. Applegate v. Kilgore [Tex. Civ. App.] 15 Tex. Ct. Rep. 17, 91 S. W. 238. It is held that where a chattel mortgage is attacked as fraudulent by a subsequent good faith purchaser of the mortgaged property, it is competent for the mortgagor to testify whether the mortgage was without consideration and given to delay or defraud creditors, though his declarations in that respect, made out of court, might not be competent. Allen v. Knutson, 96 Minn. 340, 104 N. W. 963.

14. Between the original parties to a bill or note, the consideration may always be inquired into. Deming Inv. Co. v. Wallace [Kan.] 85 P. 139. As between original parties, real consideration for note may be shown by parol. Morgan v. Thompson, 72 N. J. Law, 244, 62 A. 410. Oral proof that note was given for purchase price of land competent. Davis v. Evans [N. C.] 55 S. E. 344. As between the vendor and vendee, the vendor may show, after vendee is in possession, that the recitals of consideration in the deed are untrue. Brackett's Adm'r v. Boreing [Ky.] 89 S. W. 496. Consideration of note may be shown by parol though it was given for purchase money for land. McPeters v. English [N. C.] 54 S. E. 417.

15. Though written contract is silent as to consideration, parol evidence is admissible to show that there was a consideration. Delta County v. Blackburn [Tex. Civ. App.] 90 S. W. 902.

16. Parol evidence admissible to show want of consideration for a writing purporting to be a note, and to prove that the writing was in fact a will. McCourt v. Peppard, 126 Wis. 326, 105 N. W. 809.

17. Where single written order was for two vehicles and consideration was stated in a single sum, oral proof of the price agreed upon for each was competent. Buckeye-Buggy Co. v. Montana Stables [Wash.] 85 P. 1077.

18. Recital of payment in deed cannot be contradicted to destroy effect of deed as a conveyance. Stannard v. Aurora, etc., R. Co., 220 Ill. 469, 77 N. E. 254.

19. Proof of oral agreement to pay taxes excluded. Alsterberg v. Bennett [N. D.] 106 N. W. 49.

20. Fraudulent execution of lease may be shown by parol in action of unlawful detainer. Sass v. Thomas [Ind. T.] 89 S. W. 656. The fraud which opens the door to parol evidence, in the case of title to realty, is that which causes error in contracts or is a fraud on creditors, and which can be proved only by parol. Barrow v. Grant's Estate, 116 La. 952, 41 So. 220.

21. Fraud inducing signature of contract subscribing for stock may be shown by parol. Metropolitan Lead & Zinc Min. Co. v. Webster, 193 Mo. 351, 92 S. W. 79. Parol evidence rule inapplicable where fraud inducing execution of contract is alleged. State Life Ins. Co. v. Johnson [Kan.] 85 P. 597. Parol testimony is competent to prove fraud and misrepresentation in procuring execution of note where fraud is pleaded as

be shown by parol, though the contract is in writing; and where it is claimed that through fraud or mutual mistake the contract as written is not the one actually made, parol evidence is admissible to show the true contract.[22]

Parol evidence is admissible to show that delivery of a contract was conditional,[23] and that, by reason of the nonperformance of the condition, the contract never became operative.[24] A condition precedent resting in parol may be shown though the contract contains other express conditions.[25] Oral evidence is competent to identify the contract which was in fact executed by the parties,[26] or to show that the contract executed by them has been altered.[27]

a defense. Deming Inv. Co. v. Wallace [Kan.] 85 P. 139. The parol evidence rule does not apply in an action to cancel notes for fraudulent representations. Karner v. Ross [Tex. Civ. App.] 16 Tex. Ct. Rep. 737, 95 S. W. 46. Oral evidence admissible to show fraud inducing a purchase though contract of sale—order for goods—was in writing. Elgin Jewelry Co. v. Withaup & Co., 118 Mo. App. 126, 94 S. W. 572. That the execution of a contract was procured solely by a false statement of a nonexistent fact may be shown; this does not contradict or vary, but shows no contract was in fact made. Sheldon Co. v. Harleigh Cemetery Ass'n [N. J. Law] 62 A. 189. An agreement to pay for a policy of title insurance is independent of the consideration to be paid for the property, and in an action on a check for the whole amount defendant may show by parol that by reason of fraud he was induced to promise to pay a sum greater than the insurance company's charge for such title insurance. Alexander v. Vidootzky, 49 Misc. 471, 97 N. Y. S. 992. Though applications for stock in a corporation are reduced to writing, evidence of fraudulent representations inducing the subscription is admissible. Hinkley v. Sac Oil & Pipe Line Co. [Iowa] 107 N. W. 629. A positive affirmation in a deed that a certain quantity of land is conveyed cannot be contradicted, but parol evidence is admissible on the issue whether the affirmation is a fraudulent representation and whether the grantee relied on the representation. Winton v. McGraw [W. Va.] 54 S. E. 506. Representations by agent selling fruit trees that the seller desired to set out a sample orchard, and that this would involve no expense to the buyer, who would take his compensation out of the fourth year's crop, reduced to writing and placed on the back of the contract, could be shown by parol to be a part of the contract, notwithstanding printed provisions that agents had no power to vary the printed form of contract. Bonewell & Co. v. Jacobson [Iowa] 106 N. W. 614.

22. Nichols & Shepard Co. v. Berning [Ind. App.] 76 N. E. 776. Where it was claimed that by reason of fraud a written contract of sale did not embody the contract as agreed upon by the parties, and the contract was long and involved and the party sought to be bound relied on the other and did not read it carefully, parol evidence was admissible to show the true agreement. Lilienthal v. Herren, 42 Wash. 209, 84 P. 829. Oral evidence is admissible to show that by mistake a reservation of the right to reconstruct the front of the building leased was omitted from the written lease by mistake of the scrivener. Cage v. Patton [Tex. Civ. App.] 14 Tex. Ct. Rep. 525, 91 S. W. 311. Evidence of a parol agreement is admissible on the issue of mistake, though the agreement itself would have been invalid because not in writing. Reed v. Bank of Ukiah, 148 Cal. 96, 82 P. 845. Where the indorsement of a credit on a bond was changed to another debt and a mistake was made in making the change, a correction may be made upon clear proof of the mistake. Smith v. Allmon [S. C.] 54 S. E. 1014.

23. Conditions on which notes and mortgage were executed and deed delivered may be shown by parol, these acts all being contemporaneous. McCormick v. Merritt [Iowa] 105 N. W. 428. Oral evidence is competent to explain the possession of a written contract, and to prove that its delivery was conditional and not to become effective until the happening of some other event, as to show that contract for purchase of books was not to become effective until approved by school directors. Dodd v. Kemnitz [Neb.] 104 N. W. 1069. Where bonds were delivered by attorney to client, and notes given by client, parol evidence was competent as between the original parties to prove that notes were only memoranda of amount to be paid in case bonds were sold, and that there was to be no payment if they were not sold. Hill v. Hall, 191 Mass. 253, 77 N. E. 831. Where one party sold a partnership interest to another, together with land and personalty of the partnership, in consideration of a deed to be executed by the purchaser, oral evidence was admissible to prove the time of delivery of the deed, and the conditions upon which delivery was to be made. Schmidt v. Musson [S. D.] 107 N. W. 367.

24. Golden v. Meier [Wis.] 107 N. W. 27.

25. Written contract contained stipulation that it was not to become operative until signed by certain number of persons. Held, a further condition that it should not operate until one party had obtained a written contract to furnish certain supplies for the contemplated business was provable by parol. Golden v. Meier [Wis.] 107 N. W. 27.

26. Parol proof competent to show that when defendant executed a contract a printed slip containing a clause agreed upon between them had been pinned to the writing. Barton-Parker Mfg. Co. v. Taylor [Ark.] 94 S. W. 713.

27. Evidence relied on by B. to show relation of landlord and tenant, in proceed-

The objects or purposes with which parties executed certain instruments may be shown by parol,[28] and it is competent to prove a contemporaneous oral agreement which is being violated by an unauthorized use of the contract;[29] and to corroborate proof of such oral agreement, evidence of prior conversations and transactions is admissible.[30] Parol evidence is admissible to show that a deed absolute on its face is in fact a mortgage.[31] It is also competent to prove by parol what the real object of a mortgage is and that it is given for a purpose not disclosed in the condition.[32] That a contract is in writing does not exclude parol proof that it is but a cloak for a usurious transaction.[33]

Parol evidence is admissible to show a contemporaneous, collateral, and independent agreement, omitted from the writing and not inconsistent with its terms;[34] also to show a subsequent modification of a written contract resting in parol,[35] even though the original contract was under seal.[36] A subsequent modification by a parol agreement being shown, execution of the contract as modified may also be shown.[37] Where one party admits that he assumed an obligation not set forth in the writing, the other may prove that such obligation has not been performed.[38]

The parol evidence rule applies only as between parties to the written contract, and not as between third persons or a party and a third person.[39] But where a person not a party to a written contract bases a claim upon it or upon the relation

ings to remove A. from such lands, consisted in part of descriptive terms in a promissory note. It was proper for A. to show by parol that such terms were not in the note at the time of its execution. Bullard v. Hudson, 125 Ga. 393, 54 S. E. 132.

28. Earle v. Owings, 72 S. C. 362, 51 S. E. 980.

29. Where lessees claimed exclusive right to premises contrary to oral agreement that, if given lease, they would not make such claim, the oral agreement could be shown. Phillips Gas & Oil Co. v. Pittsburg Plate Glass Co. [Pa.] 62 A. 830.

30. Phillips Gas & Oil Co. v. Pittsburg Plate Glass Co. [Pa.] 62 A. 830.

31. Alexander v. Cleland [N. M.] 86 P. 425.

32. Campbell v. Perth Amboy Shipbuilding & Engineering Co. [N. J. Eq.] 62 A. 319. Where mortgage recites that it is given to secure a note of even date, parol evidence is competent to show that it was given to indemnify the mortgagee to a certain amount for indorsing notes of the mortgagor to a third person, and for assuming liability for indebtedness to such third person. Ladd v. Lookout Distilling Co. [Ala.] 40 So. 610. Evidence held admissible to show that written chattel mortgage was never to have any effect as a contract. Koehler & Co. v. Duggan, 49 Misc. 100, 96 N. Y. S. 1025.

33. Campbell v. Connable, 98 N. Y. S. 231.

34. Earle v. Owings, 72 S. C. 362, 51 S. E. 980. Collateral warranty of machine provable by parol notwithstanding written order for machine signed only by defendants. Louis De Jonge & Co. v. Printz, 49 Misc. 112, 96 N. Y. S. 750. An oral agreement to make repairs during the term of the tenancy (as distinguished from an agreement to make repairs before the commencement of the term) is not an agreement collateral to the written lease, and may not be shown by parol. Greene v. Ker, 95 N. Y. S. 569.

35. Subsequent oral modification of lease of theatre whereby lessor promised to provide additional exits could be shown, when the matter was not contemplated by parties when lease was made. Taylor v. Finnigan, 189 Mass. 568, 76 N. E. 203. A subsequent modification of a contract made by acts of the parties and by mutual consent may be shown. That a party to a contract went into possession of premises on November 1 instead of October 1, as provided in the contract, could be shown, this merely proving acts under the contract. Margolys v. Mollenick, 98 N. Y. S. 849. A parol agreement, on sufficient consideration, after a mortgage has been executed and delivered, extending the time of payment, is valid. Moody v. Atkins [Ala.] 40 So. 305.

36. Parol evidence of a subsequent waiver of any of the stipulations of a written contract, or of a right under such contract, is admissible, even when such contract is under seal. Hilton v. Hanson [Me.] 62 A. 797. Subsequent oral agreement may be shown even though original contract is under seal, where circumstances show that written contract has been equitably discharged. American Food Co. v. Halstead, 165 Ind. 633, 76 N. E. 251.

37. Where lease was verbally altered by reducing the rent payable in consideration of lessee's making repairs, and the contract, so changed, was carried out, the repairs being made, and reduced amount of rent paid several months, such facts may be shown. Snow v. Griesheimer, 220 Ill. 106, 77 N. E. 110.

38. Pleading admitted obligation and alleged performance of it. Williams v. Walden, 124 Ga. 913, 53 S. E. 564.

39. Morgan v. Aldrich [Mo. App.] 91 S. W. 1024; Shreve v. Crosby, 72 N. J. Law, 491, 63 A. 333.

created by it, the parol evidence rule applies, and such claim cannot be defeated by oral evidence of an agreement inconsistent with the writing.[40]

The parol evidence rule does not exclude oral proof of collateral facts having no tendency to contradict or vary the terms of the writing,[41] nor does it exclude oral proof of the contents of a writing which is collateral to the main issues in the suit.[42] The true date of an instrument, that of delivery, may be shown by parol, to be different from that written in the instrument, unless such date is material and essential.[43] A statement in a contract which forms no part of it, such as an admission in favor of a third person, may be contradicted by parol.[44] The existence of certain relations, though created by instruments in writing, may be shown by parol.[45] Oral evidence is competent to prove that a note was to be paid out of a certain fund.[46]

The parol evidence rule applies with peculiar force to contracts required by the statute of frauds to be in writing,[47] but while a memorandum, to satisfy the statute, must contain what is necessary to show the contract between the parties, the property mentioned in it may be ascertained and located by extrinsic evidence.[48]

Parol evidence to vary or explain public records.[49]—Public records, required by law to be kept, cannot be aided or changed by parol,[50] but ambiguities therein may be explained by oral evidence.[51]

40. Real estate broker secured a purchaser for land, and written contract was drawn up between seller and purchaser. Only a portion of the tract was then conveyed, the balance being sold later. In a suit by the broker for commissions on the sale of the latter portion, held, the seller could not show by parol that the parties agreed that the written contract was to be effective only as to a portion of the entire tract. Current v. Muir [Minn.] 108 N. W. 870.

41. A contract of shipment providing that horses were not to be transported within any particular time or in time for any particular market, is not contradicted by testimony that a sale was lost by reason of a negligent delay in the shipment. Texas & P. R. Co. v. Stewart [Tex. Civ. App.] 96 S. W. 106. A contract by heirs of a testator providing that an executor named in the will should manage the estate and execute the powers of an executor is not contradicted by proof of a parol agreement between the heirs and creditors that lands should not be sold, but should be leased and so managed that debts could be paid out of profits. Mayo v. Mayo [Ark.] 96 S. W. 165. Parol evidence on an issue whether or not a legacy or devise was intended to forgive a debt from the legatee or devisee does not offend against the parol evidence rule. Bromley v. Atwood [Ark.] 96 S. W. 356.

42. In an action on a surety's bond, which did not give the terms of the principal's contract to insure performance of which the bond was required, the terms of such contract could be proved by parol to show the extent and nature of the surety's liability. Germania Fire Ins. Co. v. Lange [Mass.] 78 N. E. 746. Evidence of a verbal contract on which action was based, to furnish cars and deliver cattle at a certain point within a given time, was not objectionable as varying a written contract executed after cattle were loaded and shipped. Gulf, etc., R. Co. v. Funk [Tex. Civ. App.] 15 Tex. Ct. Rep. 393, 92 S. W. 1032. Parol evidence is admissible to show an agreement of sale of neighboring property when the purpose is not to affect title of real estate, but simply to show value. Louisiana R. & Nav. Co. v. Morere, 116 La. 997, 41 So. 236.

43. Ehrmann v. Stitzel [Ky.] 90 S. W. 275.

44. Recital in contract for sale of realty, between vendor and purchaser, that broker was entitled to $300 as a commission, held not conclusive. Goodman v. Reinowitz, 48 Misc. 404, 95 N. Y. S. 534.

45. One in possession of land may testify that he holds as tenant, though there is a written lease. Minnesota Debenture Co. v. Johnson, 96 Minn. 91, 104 N. W. 1149, 107 N. W. 740.

46. Evans v. Freeman [N. C.] 54 S. E. 847.

47. Where a mortgage is sought to be annulled on the ground that the mortgagor was not the owner of the mortgaged property, the issue involves the title of the mortgagor and parol evidence is inadmissible. Barrow v. Grant's Estate, 116 La. 952, 41 So. 220. Parol evidence is inadmissible to supply facts omitted from a written contract to sell land which is unambiguous, in order to make it enforceable. Dillard v. Sanders [Tex. Civ. App.] 97 S. W. 108.

48. Especially where the memorandum refers to such other evidence. Bowers v. Ocean Acc. & Guarantee Corp., 110 App. Div. 691, 97 N. Y. S. 485.

49. See 5 C. L. 1328, n. 84.

50. When transcript included certificate of taxation of costs testimony that costs were erroneously taxed is inadmissible. Clark v. Barber, 21 App. D. C. 274. Oral evidence inadmissible to show purpose of assessments different from that declared in resolutions of board adopted when assessments were levied. Hewel v. Hogan [Cal. App.] 84 P. 1002. A regular receiver's receipt and certificate on which a patent issued in due course cannot be contradicted

Corporate records are not conclusive but may be supplemented or explained by parol.[52]

Where *calls of a survey* give rise to no ambiguity, parol or extrinsic evidence cannot be resorted to to show the survey to occupy some other position,[53] but when the calls of a survey, on being applied to the ground, develop an inconsistency in themselves, extrinsic evidence is competent.[54]

§ 6. *Hearsay. A. General rules.*[55]—Unsworn statements, out of court, by persons not parties to the action, and not in the presence or hearing of a party, are inadmissible,[56] and testimony based on hearsay,[57] and not on the personal knowledge

or varied by unauthorized entries and memoranda on the register of sales book or the tract book, kept by the local officers of the United States land office. Foster v. Meyers [La.] 41 So. 551. Record as made by filing of affidavit of service of notice to property owners to redeem from tax sale cannot be aided by evidence aliunde. Grimes v. Ellyson [Iowa] 105 N. W. 418. Where records of county supervisors did not show that certain supervisors were present but did not vote at an election, that fact cannot be shown by parol. Howland v. Prentice [Mich.] 12 Det. Leg. N. 1031, 106 N. W. 1105. Recitals in record of deed cannot be changed or contradicted by parol, in action where such relief is not asked. Weisiger v. Mills [Ky.] 91 S. W. 689. Parol evidence is not admissible against the affirmative showing of the **journals of the legislature.** Wade v. Atlantic Lumber Co. [Fla.] 41 So. 72.

51. Assessment lists being silent as to property to which assessments referred, parol proof was competent to identify such property. Commonwealth v. American Tobacco Co. [Ky.] 96 S. W. 466. Where tax deed and some of the records show a sale of lot 7 for taxes, and other records show a sale of lot 8, oral evidence was admissible to explain the ambiguity in a suit to quiet title under the deed. McCash v. Penrod [Iowa] 109 N. W. 180. When bailiff's return to venire is uncertain oral evidence to aid it is competent. in an action by him to recover fees. County of Carroll v. Durham, 120 Ill. App. 330.

52. As where minutes were ambiguous. Rose v. Independent Chevra Kadisho [Pa.] 64 A. 401.

53. Warner v. Sapp [Tex. Civ. App.] 97 S. W. 125.

54. Extrinsic evidence held admissible to explain locality of corner. Warner v. Sapp [Tex. Civ. App.] 97 S. W. 125.

55. See 5 C. L. 1328.

56. Held incompetent as hearsay. Pennsylvania Iron Works Co. v. Mackenzie, 190 Mass. 61, 76 N. E. 228. What grantor told another that he told grantee about a third person's interest. Allen v. Anderson [Tex. Civ. App.] 96 S. W. 54. Conversation between witness and third person with reference to property in issue in forcible entry and detainer action. Fowler v. Prichard [Ala.] 41 So. 667. What plaintiff was told by her husband and agent as to the transaction in issue. Dooly v. Pinson [Ala.] 39 So. 664. Declaration of stranger that statement made to witness by another was true. Pegram v. Seaboard Air Line R. Co., 139 N. C. 303, 51 S. E. 975. Declarations of a third person in the absence of a party against whom they are offered. Baker v. Drake [Ala.] 41 So. 845. In action for libel, testimony of witness concerning conversations with third persons who had read the alleged libellous article. Salem News Pub. Co. v. Caliga [C. C. A.] 144 F. 965. In action for slanderous statement made to a certain person concerning plaintiff, what such person said to witness concerning plaintiff. Yager v. Bruce [Mo. App.] 93 S. W. 307. In action for injuries to a shipment of horses, statements made by man on engine to shipper that it was his first trip over the road. Ft. Worth & D. C. R. Co. v. Snyder [Tex. Civ. App.] 89 S. W. 1119. Testimony by injured plaintiff that physician told him he had a certain disease. Dunphy v. St. Joseph Stock Yards Co., 118 Mo. App. 506, 95 S. W. 301. In action for broker's commissions, evidence concerning what witness told the purchaser that seller told him concerning the purchaser's chances of buying the stock. Ross v. Moskowitz [Tex. Civ. App.] 16 Tex. Ct. Rep. 381, 95 S. W. 86. Plaintiff's testimony to statements of third person as to what he had heard defendant say. Duvall v. Ferwerda [Mich.] 13 Det. Leg. N. 659, 108 N. W. 1115. Conversation between witness and a person since deceased who had been testator's confidential advisor. Lancaster v. Lancaster's Ex'r, 27 Ky. L. R. 1127, 87 S. W. 1137. Statements as to boundary by a person who testified at the trial, and who had no power to bind the party against whom they were offered. Camp v. League [Tex. Civ. App.] 92 S. W. 1062. In action by woman for her own seduction, her testimony as to defendant's statements to others. Greenman v. O'Riley [Mich.] 13 Det. Leg. N. 344, 108 N. W. 421. Evidence that a receipt, of which defendant produced a purported copy, was a copy of a paper shown an agent of defendant by one who said he represented plaintiff. Kann v. Weir, 95 N. Y. S. 584. What plaintiff said on a former trial that defendant's agent had told him as to the cause of delay in delivery of a telegram. Willis v. Western Union Tel. Co., 73 S. C. 379, 53 S. E. 639. Statements of a person who ordered certain coal not shown to be the agent of defendant, that the coal was ordered for defendant and another. Williamson Co. v. Cooper, 49 Misc. 551, 98 N. Y. S. 842. In suit to have an absolute deed from mother to child declared a trust deed in favor of other children, declarations of the mother before and after execution of the deed to show why the deed was made. Kennedy v. Bates [C. C. A.]

of the witness,[58] or which is conjectural only,[59] is also incompetent. Testimony

142 F. 51. Letter to plaintiff by third person not shown to be connected with defendant, purporting to contain a statement of defendant. Security Trust Co. v. Robb [C. C. A.] 142 F. 78. In contest for proceeds of certificate in mutual benefit association, testimony that insured (plaintiff's husband) had said he had demanded certificate from his mother, so that he could obtain a new one. Coston v. Coston [Mich.] 13 Det. Leg. N. 540, 108 N. W. 736. In action by real estate broker against seller for commission, a question whether the purchaser said anything about the commission called for hearsay. Lewis v. Susmilch [Iowa] 106 N. W. 624. Correspondence between defendant and another to which plaintiff was not a party. Sunley v. Metropolitan Life Ins. Co. [Iowa] 109 N. W. 463. In action for price of cattle sold at public sale, witness could not testify to conversation with seller in buyer's absence. Austin v. Smith [Iowa] 109 N. W. 289. In action against connecting carriers for damages for delay in shipment of cattle, telegrams and letters of plaintiff's agent were incompetent to prove market value of cattle at the time. Missouri, etc., R. Co. v. Williams [Tex. Civ. App.] 96 S. W. 1087. Letter from an agent to his principal, narrating an interview between the agent and a third person which took place previously is inadmissible against the third person. Inman Bros. v. Dudley & D. Lumber Co. [C. C. A.] 146 F. 449. Statements by testator's wife as to what testator had said, were hearsay, and could not be proved by one who heard her make them. Kelly v. Kelly [Md.] 63 A. 1082. Declarations of husband, in wife's absence, asserting title in himself, held inadmissible against the wife to show that property belonged to husband, and that her claim was false. Maffi v. Stephens [Tex. Civ. App.] 15 Tex. Ct. Rep. 140, 93 S. W. 158. Reports of husband to commercial agencies also incompetent. Id. In action for recovery of notes claimed under a will, a memorandum made by the surrogate's clerk, on plaintiff's petition for letters testamentary, was inadmissible. Twaddell v. Weidler, 109 App. Div. 444, 96 N. Y. S. 90. Declarations of third person inadmissible to show nature of transaction between plaintiff and another. Smiley v. Hooper [Ala.] 41 So. 660; Eagle Iron Co. v. Baugh [Ala.] 41 So. 663. Statement by another not in party's presence, or known by him to have been made, held inadmissible against him. Reinhardt v. Marks' Adm'r [Ky.] 93 S. W. 32. In action against two defendants for conversion, a conversation between agents of defendants is inadmissible. Trammell v. Guffey Petroleum Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 492, 94 S. W. 104. In action on check alleged to have been given in pursuance of contract to dismiss prosecution against maker's son, evidence of plaintiff that his attorney told him that he could do nothing in regard to settling the criminal case held inadmissible, it not appearing that statement was made in defendant's presence, or that he knew of it when check was given. McNeese v. Carver [Tex. Civ. App.] 13 Tex. Ct. Rep. 820, 89 S. W. 430. Receipt hearsay as to persons not parties to the transaction recited. Pritchard v. Hooker, 114 Mo. App. 605, 90 S. W. 415. Statements by plaintiff to her physician, as to the cause of her injury, made at a time remote from the time of the accident, are incompetent. City of Aurora v. Plummer, 122 Ill. App. 143. Where principal in bond conditioned to construct a building according to certain plans showed plans to a surety in the bond his statement that they were the plans agreed upon was inadmissible, if made in the owner's absence. Thompson v. Chaffee [Tex. Civ. App.] 13 Tex. Ct. Rep. 167, 794, 89 S. W. 285. In action for damages by shipper of hogs, a notation on the bill of sale, made by the commission man, showing some of the hogs had died, was incompetent. Illinois Cent. R. Co. v. Holt [Ky.] 92 S. W. 540. Letter written by a daughter of decedent, not shown to have been written with his authority or under his direction, held incompetent to establish a claim against the estate of decedent. Hammer v. Crawford [Mo. App.] 93 S. W. 348. Statement by a defendant to plaintiff when buying goods from him, that she was not married, held hearsay on issue of coverture, as to a codefendant, not present when statement was made. Sweeney v. Taylor Bros. [Tex. Civ. App.] 14 Tex. Ct. Rep. 696, 92 S. W. 442. Testimony of witness that he had been interviewed by the editor of a paper concerning an occurrence held not to make the newspaper article competent. Southern Pac. Co. v. Cavin [C. C. A.] 144 F. 348. In an action on a check by an alleged bona fide holder, statements claimed to have been made by the original payee to third persons, not in the presence or hearing of plaintiff, were inadmissible on issue of his good faith. Maslon v. Sprickerhoff, 98 N. Y. S. 618. Where issue was whether certain men performed work on a mining claim during a certain time, a time book, purporting to be signed by them, their signatures not being proved, were inadmissible to prove that the men worked for another company. Matko v. Daley [Ariz.] 85 P. 721. Blue print of water gauge, with indorsements showing use of it by certain companies, and a manufacturer's statement of the advantages of such gauge, held hearsay and inadmissible to show negligence in failing to use such a gauge. Norfolk & W. R. Co. v. Bell, 104 Va. 836, 52 S. E. 700. A written receipt executed by one not a party to the action, though an admission against interest, is inadmissible unless the person who executed it is shown to be dead or beyond the jurisdiction. Walnut Ridge Mercantile Co. v. Cohn [Ark.] 96 S. W. 413. Statements in letters of third persons incompetent to prove that plaintiff got a commission for selling a certain mine, in a suit on a contract between plaintiff and defendant whereby they agreed to engage in mining deals, sharing profits. Rutan v. Huck [Utah] 83 P. 833. In an action for criminal conversation, an alleged confession by the wife, who was not, of course, a party, purporting to be only a narration of past events, made out of the presence of plaintiff and defendant, and not binding on either, was inadmissible. Kohlhoss v. Mob-

apparently based on the personal knowledge of the witness[60] or based upon

ley, 102 Md. 199, 62 A. 236. The rule excluding hearsay applies to affidavits used upon motions to vacate and set aside judgments, and a statement that heirs had no actual notice of a judgment is insufficient for any purpose. Kipp v. Clinger [Minn.] 106 N. W. 108. Held error to permit proponents to show declarations of testatrix's husband, who died before her will was made and from whom she acquired her property, as to what he intended to do with his property, they not having been made in testatrix's presence. In re Jones' Estate [Iowa] 106 N. W. 610.

Statements not authorized by nor made in presence of party inadmissible against him. McNeese v. Carver [Tex. Civ. App.] 13 Tex. Ct. Rep. 820, 89 S. W. 430. Statements not made in presence of plaintiff inadmissible against him. Scott v. Llano County Bank [Tex.] 13 Tex. Ct. Rep. 808, 89 S. W. 749. Declarations of defendant and another, testified to by witness, held hearsay as against plaintiffs. Lovell & Co. v. Sneed [Ark.] 95 S. W. 157. Evidence of conversation between a party and a third person held inadmissible against the other party, who was not present at the time. Whitman v. McComas [Idaho] 83 P. 604. Conversation between defendant and third person not provable by plaintiff. Cone v. American Electric Fuse Co. [Mich.] 13 Det. Leg. N. 637, 108 N. W. 991. In will contest, declarations by the executor and chief legatee, before execution of the will, that the testator was incompetent, were inadmissible against the other parties. In re Myer's Will, 184 N. Y. 54, 76 N. E. 920. In an attachment suit, when a person intervened claiming the property, declarations of intervener's husband, made in her absence, were inadmissible against her. Vermillion v. Parsons, 118 Mo. App. 260, 94 S. W. 298. In an action to recover property wrongfully mortgaged to defendant by plaintiff's husband and his partner, declarations of the husband, made in the wife's absence, were inadmissible against her. McQueen v. Bank of Edgemont [S. D.] 107 N. W. 208.

57. Testimony of witness admittedly based on what another had told him. In re Dunahugh's Will [Iowa] 107 N. W. 925. Testimony to cost of repairs by witness whose knowledge was based wholly on what he had been told. Byers v. Anderson [Mich.] 12 Det. Leg. N. 971, 106 N. W. 734. That witness had heard a certain person was drowned in a certain year. Iberia Cypress Co. v. Thorgeson, 116 La. 218, 40 So. 682. That a telegram was sent by a certain person cannot be proved by person receiving it when knowledge of latter is based wholly on statements of messenger. Chicago & A. R. Co. v. Jennings, 217 Ill. 494, 75 N. E. 560. Hearsay as to what a person did or did not claim is incompetent to prove a chain of title in ejectment. Hoyle v. Mann [Ala.] 41 So. 835. Evidence concerning the sentiment of the people regarding a conveyance —whether it was fraudulent—was hearsay. Perry v. Pore [Ky.] 90 S. W. 952. In action for slander evidence of evil reports concerning plaintiff current in the neighborhood before the slanderous words were spoken was hearsay. Overton v. White, 117 Mo. App. 576, 93 S. W. 363. Where plaintiff sued for delay in delivery of telegram, whereby he failed to reach his father's bedside before his death, evidence of what plaintiff had been told, on reaching home, about his father, was hearsay. Whitten v. Western Union Tel. Co. [N. C.] 54 S. E. 289. A physician who treated a person just prior to her death may not in a prosecution for abortion testify as to what her ailment was where his opinion is based on the patient's narration of the history of her complaint. Stevens v. People, 215 Ill. 593, 74 N. E. 786.

58. Testimony not based on personal knowledge. St. Louis S. W. R. Co. v. Irvine [Tex. Civ. App.] 13 Tex. Ct. Rep. 822, 89 S. W. 428. Statement that agent of corporation had no authority to employ, based on information derived from others. International Harvester Co. v. Campbell [Tex. Civ. App.] 96 S. W. 93. Evidence as to persons with whom contracts were made not based on witness' own knowledge. Missouri, etc., R. Co. v. Sproles [Tex. Civ. App.] 92 S. W. 40. Testimony of witness, shown on cross-examination to be based wholly on what others had told him. Theodore Land Co. v. Lyon [Ala.] 41 So. 682. Testimony of witness as to manner of injury, based wholly on information given by injured person. Little Rock, etc., R. Co. v. Cross [Ark.] 93 S. W. 981. Declarations of one having no connection with property in suit, whose knowledge was based on information derived from others. Roberts, Long & Co. v. Ringemann [Ala.] 40 So. 81. Testimony as to value of cattle based on information given by cattle raisers in the vicinity. Gulf, etc., R. Co. v. Jackson [Tex.] 14 Tex. Ct. Rep. 100, 89 S. W. 968. A witness cannot state contents of telegram or market reports relating to market value. Fountain v. Wabash R. Co., 114 Mo. 676, 90 S. W. 393. Testimony of insurance agent to existence of association of companies incompetent when his knowledge was based on a circular letter from his company. Provident Sav. Life Assur. Soc. v. Whayne's Adm'r [Ky.] 93 S. W. 1049. No error in striking testimony concerning headlight by witness who showed by other testimony that he could not have seen it. Chicago City R. Co. v. Shaw, 220 Ill. 532, 77 N. E. 139. In action of ejectment, it was not competent for plaintiff to state that defendant was in possession, where his statement was based wholly on a survey made by third persons. Ross v. Roy [Ala.] 39 So. 583. Testimony of sheriff that he did not himself turn over property to a trustee in bankruptcy but that records in the office would show it was, inadmissible. Goodnough Mercantile Co. v. Galloway [Or.] 84 P. 1049. In action for injuries to cattle, an account of the sales, attached to a deposition of the salesman, not testified to by him to be correct of his own knowledge, and not used to refresh his memory, was incompetent. Ft. Worth & R. G. R. Co. v. Cauble [Tex. Civ. App.] 15 Tex. Ct. Rep. 93, 91 S. W. 244. Testimony of car accountant as to composition and equipment of a freight train was hearsay, where it was based, not on his per-

competent entries in books of account[61] is competent, and a witness may testify to what he says is his best recollection of a fact.[62] Proof of the fact whether or not certain declarations were made is not objectionable as hearsay where the truth of the declarations is not sought to be proved.[63]

A fact incapable of direct proof may be established by proof of general opinion in the community,[64] and proof of the notoriety of a fact in the neighborhood is competent to show knowledge of such fact.[65] Custom may be shown by general reputation.[66] A general reputation must be the common report of the community,[67]

sonal knowledge of that particular train but on records and reports, and on his knowledge of such trains in general. Bryce v. Chicago, etc., R. Co., 129 Iowa, 342, 105 N. W. 497. In a hearing on a remonstrance against granting a liquor license, a witness who testifies that petitioners told him they were freeholders, and that he examined a list of freeholders prepared by the county clerk, does not thereby qualify himself to testify who the freeholders of the village are. Swihart v. Hansen [Neb.] 107 N. W. 862. Error to permit party to reproduce contents and state effect of letters and telegrams received by him from his agent, relating to purchases and sales by the agent. Western Union Tel. Co. v. Bradford [Tex. Civ. App.] 91 S. W. 818. Report of fire made by captain of department wholly from memorandum put on slate by another, captain himself not having been at the fire, held inadmissible to prove cause of fire. Over v. Dehne [Ind. App.] 75 N. E. 664. Statement of witness that his "impression" was that certain persons did a certain thing held incompetent. Union Pac. R. Co. v. Connolly [Neb.] 109 N. W. 368.

59. One who says he does not know the amount of checks passing through his hands should not be permitted to estimate their amount. Haines v. Goodlander [Kan.] 84 P. 986.

60. Since witness could testify to feeling between persons from his own observation, such testimony was not hearsay. Western Union Tel. Co. v. Bell [Tex. Civ. App.] 13 Tex. Ct. Rep. 968, 90 S. W. 714. Testimony of witness, as to schedule time of trains, apparently based on personal knowledge, was competent. Gulf, etc., R. Co. v. Funk [Tex. Civ. App.] 15 Tex. Ct. Rep. 393, 92 S. W. 1032. Testimony regarding written accounts and admissions as to their correctness, given as though from the personal knowledge of the witness, was not incompetent as hearsay. Rouss v. King [S. C.] 54 S. E. 615. Where a witness' negative answer to a question whether an organization had financial responsibility imports personal knowledge of the facts, it is competent. Harrison Granite Co. v. Pennsylvania R. Co. [Mich.] 13 Det. Leg. N. 631, 108 N. W. 1081. Physicians may testify to objective symptoms observed on an examination of the patient, the testimony not involving information based on the patient's statements. Hughes v. Chicago, etc., R. Co., 126 Wis. 525, 106 N. W. 526. Physician may testify to cause of death though not present when it occurred, when he attended patient daily during the illness. Chadwick v. Phoenix Acc. & Sick Ben. Ass'n [Mich.] 13 Det. Leg. N. 50, 106 N. W. 1122. Husband properly allowed to testify to work done by his wife, though he was not present when she did the work, where from all the circumstances it appeared that he knew about what work she did. Gulf, etc., R. Co. v. Booth [Tex. Civ. App.] 97 S. W. 128. In the absence of memory, one who knows that, if an act had been done by him or his department, it would have been recorded upon a book or paper which he had at the time and which he identifies, may testify that he knows it was not done, from the absence from the record of any note of it, although this fact does not refresh his memory, and the record and this testimony are competent evidence of the fact that the act was not performed. Woodward v. Chicago, etc., R. Co. [C. C. A.] 145 F. 577.

61. Statement of number of bales of cotton sold by witness to a party admissible though based on book entries made from tickets written at time of sales and turned over to buyers. Hubbard City Cotton Oil & Gin Co. v. Nichols [Tex. Civ. App.] 14 Tex. Ct. Rep. 1, 89 S. W. 795.

62. Haynes v. Gray & Co. [Ala.] 41 So. 615.

63. Engel v. Conti, 78 Conn. 351, 62 A. 210. Testimony by attorney as to whether he was instructed to make a demand for premises did not involve testimony to a conversation. McCrum v. McCrum, 36 Ind. App. 636, 76 N. E. 415. Testimony of night foreman that he passed over a piece of track daily and had never heard of a broken water main which softened the track was not hearsay. Kirby Lumber Co. v. Chambers [Tex. Civ. App.] 14 Tex. Ct. Rep. 913, 95 S. W. 607. Evidence that other portions of a carload of grain was sold to purchasers who made no complaint as to quality held not hearsay. St. Louis, etc., R. Co. v. Arkansas & T. Grain Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 372, 95 S. W. 656. In action to set aside deed for fraud, where plaintiff said he could not read, it was proper to ask him who told him what the effect of the deed was, in order to show that he acted as soon as informed of the fraud. Hodge v. Hudson, 139 N. C. 358, 51 S. E. 954.

64. What witness afterward understood or heard was the reason why bidders abstained on a judicial sale is hearsay; what was the general understanding at the sale is admissible. King v. Bynum, 137 N. C. 491, 49 S. E. 955.

65. It is admissible to prove general reputation as to ownership of property on an issue of waiver of misrepresentations in relation thereto to prove the knowledge of an insurance agent who issued a policy on the property. Continental Ins. Co. v. Cummings [Tex. Civ. App.] 16 Tex. Ct. Rep. 279, 95 S. W. 48.

and while it may be established by the assertion of individuals, such assertion must be in effect the statement of the reputation.[68]

Matters of pedigree form an exception to the general rule excluding hearsay, reputation or tradition, as proof of a particular fact.[69] Declarations concerning such matters are competent when it is shown that the declarant is dead,[70] that the declarations were made in good faith, and ante litem motam,[71] and that declarant was a member of the family the pedigree of which is sought to be shown,[72] or a branch thereof.[73] Only slight proof of such relationship is required.[74] Where the issue is the heirship of a certain person, relationship of declarant to the person who died seised need not be shown; it is sufficient if it appears that he was related to the alleged heir.[75] In addition to such declarations, inscriptions and entries presumptively made with no motive to deceive are competent to prove matters of pedigree and family history.[76] Thus, inscriptions on tombstones,[77] entries in church records[78] and in a family Bible,[79] are competent. But Bible entries are competent only when they are original entries made in a Bible that contains a history of the facts about which they purport to speak.[80] Recitals of pedigree in ancient deeds

66. Wall v. Melton [Tex. Civ. App.] 16 Tex. Ct. Rep. 112, 94 S. W. 358.

67. Bland v. Beasley, 140 N. C. 628, 53 S. E. 443.

68. Testimony as to "what people said" about a boundary, held incompetent, had heard only one person speak of it, and that person was alive and testified at the trial. Bland v. Beasley, 140 N. C. 628, 53 S. E. 443.

69. Owing to impossibility of proving such matters by evidence of a different kind. Layton v. Kraft, 98 N. Y. S. 72. Hearsay is admissible to prove pedigree, owing to the great difficulty of proving the fact or degree of kinship. Rollins v. Atlantic City R. Co. [N. J. Law] 62 A. 929.

70. In re McClellan's Estate [S. D.] 107 N. W. 681; Overby v. Johnston [Tex. Civ. App.] 15 Tex. Ct. Rep. 766, 94 S. W. 131; Layton v. Kraft, 98 N. Y. S. 72; Rollins v. Atlantic City R. Co. [N. J. Law] 62 A. 929.

71. In re McClellan's Estate [S. D.] 107 N. W. 631; Rollins v. Atlantic City R. Co. [N. J. Law] 62 A. 929; Overby v. Johnston [Tex. Civ. App.] 15 Tex. Ct. Rep. 766, 94 S. W. 131. Declarations of a witness held incompetent because based on declarations of a deceased person at a time when he was interested or after a controversy had arisen. Kirby v. Booz [Tex. Civ. App.] 14 Tex. Ct. Rep. 498, 91 S. W. 642. Declarations contained in deposition in another suit (declarant having since died) held incompetent because subsequent to the time when the controversy to which they related had arisen. Id.

72. Overby v. Johnston [Tex. Civ. App.] 15 Tex. Ct. Rep. 766, 94 S. W. 131; Layton v. Kraft, 98 N. Y. S. 72. The ground on which hearsay evidence is allowed to prove pedigree is the interest of declarant in the person from whom the descent is made out and his consequent interest in knowing the connection of the family. Hence an attorney who knows personally but one member of a family and who is not related to the family cannot testify as to its pedigree. Scott v. Herrell, 27 App. D. C. 395.

73. Relation by blood or affinity to some branch of family is sufficient. Rollins v. Atlantic City R. Co. [N. J. Law] 62 A. 929.

74. Since that fact may be as difficult to prove as the very fact in controversy. Layton v. Kraft, 98 N. Y. S. 72. Evidence of witness who knew members of the family and had heard them discuss family relations held sufficient to show declarant's relation. Id.

75. Overby v. Johnston [Tex. Civ. App.] 15 Tex. Ct. Rep. 766, 94 S. W. 131.

76. Inscriptions on tombstones, a pedigree hung up in a family mansion, entries in a family Bible, and recitals in deeds have been held competent. See cases cited in Layton v. Kraft, 98 N. Y. S. 72.

77. Layton v. Kraft, 98 N. Y. S. 72.

78. Records of Collegiate Reformed Church (first established on Manhattan Island in 1628) held competent, where it appeared that records of births, baptisms, and marriages were first supplied by pastors of various congregations, and were then placed on record by a clerk of the corporation; the entries in question were not proved to be in the handwriting of the clerk acting as such at the time nor was the identity of such clerk shown, but the records were offered as church records, by the clerk, who received them from his predecessor. No rule of the church requiring such records to be kept was shown. Layton v. Kraft, 98 N. Y. S. 72. Church records showing certain births, baptisms, marriages and deaths held competent on issues of pedigree. Id. That the name of a person mentioned was spelled differently in different places in the records held not to render them incompetent. Id.

79. Entries in a family Bible stating the fact and date of the birth, marriage, or death of a child or other relative are competent evidence as declarations of the person by whom they were made and may be admitted though the person who made them is dead. Bryant v. McKinney [Ky.] 96 S. W. 809. Where prosecutrix in rape case had been brought up in her grandfather's home, the family Bible of her grandparents, in which births were recorded, was competent evidence of the age of prosecutrix, her birth having been recorded there. State v. Hazlett [N. D.] 105 N. W. 617.

are evidence of the facts recited, even as against strangers[81] if the deed was made by one related to a branch of the family which the pedigree concerns,[82] or if such recital is supported by other facts not inconsistent therewith, and which render credible the truth of the fact recited.[83] In questions of race ancestry, general or common reputation is received under certain conditions,[84] and may in such cases be established not only by oral expression but by proof of the manner in which the person in question was treated and received by his neighbors and the community generally.[85] The weight to be given hearsay evidence admitted to prove matters of pedigree depends upon the facts surrounding each particular case.[86] The evidence of a witness whose knowledge with reference to the subject is derived from an intimate acquaintance with the family is admissible as to such facts of family history as marriage, kinship, name, and death.[87]

In some states, under some restrictions, hearsay evidence and common reputation are admissible, from the necessity of the case, on questions of private boundaries.[88] To be competent for this purpose, the common reputation should have its origin at a time comparatively remote and always ante litem motam.[89] Furthermore, it should attach itself to some monument of boundary or natural object, or be fortified by evidence of occupation and acquiescence tending to give the land some fixed and definite location.[90]

Market reports in journals such as the commercial world rely upon, are competent evidence of the state of the market.[91]

80. Entry of fact and date of birth, transferred from Bible where it was originally made, to the fly leaf of another, and placed by itself, and not on the page where other facts of family history were recorded, was inadmissible. Bryant v. McKinney [Ky.] 96 S. W. 809.

81. Recitals in a deed nearly 60 years old, as to the pedigree of the grantors, are evidence against strangers. Webb v. Ritter [W. Va.] 54 S. E. 484. An ancient deed, made by a commissioner to the heirs of a deceased purchaser of land, under an order of sale in a proceeding to sell it as forfeited for nonpayment of taxes, reciting the death of the purchaser, and inheritance by the grantees, is evidence of the facts recited, against strangers. Id.

82. Rollins v. Atlantic City R. Co. [N. J. Law] 62 A. 929. Declaration of grantor in a deed in a chain of title that he was sole heir of a former owner held incompetent as proof of the fact, where declarant was not shown by other proof to be a member of the family. Lowenfeld v. Ditchett, 99 N. Y. S. 724.

83. Rollins v. Atlantic City R. Co. [N. J. Law] 62 A. 929. Though deed was not made by one related to family, where there was long possession consistent with the fact recited, and no persons had claimed title adversely to such recital, and the deed had been on record for a long time, and grants had been repeatedly made by its grantees and by successors in title without quesion, its recitals were held evidence of facts recited. Id.

84. As on issue whether certain children were of pure white or of mixed blood. Gilliand v. Buncombe County Committee [N. C.] 54 S. E. 413.

85. On issue whether ancestor of certain children was of pure or mixed blood (negro) it was competent to show by one who knew and lived near him, that he was allowed to vote at a time when negroes could not vote. Gilliand v. Buncombe County Committee [N. C.] 54 S. E. 413.

86. Layton v. Kraft, 98 N. Y. S. 72.

87. Witness whose wife was half sister of wife of deceased, and an intimate family friend, competent to testify to relationship and heirship of certain persons. Hoyt v. Lightbody [Minn.] 108 N. W. 843. Declarations of witness concerning pedigree of a person, based on information received from his mother and aunt and father, held competent. Kirby v. Booz [Tex. Civ. App.] 14 Tex. Ct. Rep. 498, 91 S. W. 642.

88. Bland v. Beasley, 140 N. C. 628, 53 S. E. 443. Evidence of general repute and recognition of the location of a boundary line is admissible. Goodson v. Fitzgerald [Tex. Civ. App.] 14 Tex. Ct. Rep. 424, 90 S. W. 898. On the issue of the location of a dividing line between two owners, evidence as to the recognition of a certain corner as the true corner by adjoining landowners was properly excluded, where it did not appear who the landowners referred to were, nor whether they were landowners at the time they recognized the corner, nor at what time they recognized it. Hix v. Gulley, 124 Ga. 547, 52 S. E. 890.

89. Common reputation originating in a survey 17 years before held not sufficiently remote. Bland v. Beasley, 140 N. C. 628, 53 S. E. 443.

90. Reputation as to boundary line inadmissible because not conforming to restrictions above. Bland v. Beasley, 140 N. C. 628, 53 S. E. 443.

91. Chicago, etc., R. Co. v. Todd [Neb.] 105 N. W. 83. Market price of flour as published in daily newspaper competent. Tri-

Census reports are competent to prove facts of a public nature but not private matters.[92] A census list is incompetent without proof that it comes from the proper custody, was properly made, and was based on reliable information.[93]

(§ 6) *B. Res gestae.*[94]—Contemporaneous, or nearly contemporaneous acts or declarations, explanatory of the act, transaction, or condition which is the subject of controversy, and growing naturally therefrom, are admissible as a part thereof.[95]

State Milling Co. v. Breisch [Mich.] 13 Det. Leg. N. 478, 108 N. W. 657.

92. Not competent to show that a certain person was not in esse at a certain time. Campbell v. Everhart, 139 N. C. 503, 52 S. E. 201.

93. Census list found in clerk's office held inadmissible. Campbell v. Everhart, 139 N. C. 503, 52 S. E. 201.

94. See 5 C. L. 1332.

95. The statement of one in a position to know at the time of an act or near thereto, spontaneously made without design, that characterizes and explains the act, is admissible. City of Austin v. Nuchols [Tex. Civ. App.] 15 Tex. Ct. Rep. 156, 94 S. W. 336; Gulf, etc., R. Co. v. Batte [Tex. Civ. App.] 15 Tex. Ct. Rep. 581, 94 S. W. 345. Words accompanying conduct can always be put in evidence where the nature and significance of such conduct is in controversy, and it is of an equivocal character which these words tend to explain. Engel v. Conti, 78 Conn. 351, 62 A. 210. In suit for alienation of affections of plaintiff's wife, it became material whether wife sought to renew marital relations with her husband when they spent a night in the same room, after a separation of some months. Held, husband could testify as to what was said by them, to show the character and meaning of their meeting. Id. Whenever the intention is of itself a distinct and material fact in a chain of circumstances it may be proved by contemporaneous oral or written declarations of the party. Declarations of party that he intended to take a certain boat competent in proving his death, the boat having gone down. The San Rafael [C. C. A.] 141 F. 270. When it is material to prove the state of a person's mind, or his intentions, his declarations are competent. Declarations of one exercising rights of ownership in priority of water right held competent to show he had no intention to abandon. Central Trust Co. v. Culver [Colo.] 83 P. 1064. What plaintiff said at the time a deed was handed to him, held admissible to show his intention and as part of the res gestae, even though the grantor was not present. Renshaw v. Dignan, 128 Iowa 722, 105 N. W. 209. In action for injuries to engineer, evidence of station agent as to his instructions from train dispatcher which he transmitted to engineer, was not hearsay. Galveston, etc., R. Co. v. Fitzpatrick [Tex. Civ. App.] 14 Tex. Ct. Rep. 790, 91 S. W. 355. Memoranda, contemporaneous with the making of a contract, and made in the presence of both parties, are admissible as part of the res gestae. Rogers v. Krumrei [Mich.] 12 Det. Leg. N. 890, 106 N. W. 279. In an action for alienation of the husband's affections, against the husband's father, evidence of declarations of the husband to the wife on informing her that his father desired a separation, and the husband's action and manner at the time, indicating his love for her, and his sorrow at his father's acts, was admissible as part of the res gestae. Hardwick v. Hardwick [Iowa] 106 N. W. 639. Where person in vehicle was killed in a collision at a railway crossing, declarations of the person who was driving deceased, 2 or 3 minutes after the accident, regarding their acts just before the collision, were admissible. Louisville & N. R. Co. v. Molloy's Adm'x [Ky.] 91 S. W. 685. In action for injuries by steam from locomotive, testimony that witness went around the engine about two minutes after he heard the blowing off of steam, and heard a man on the engine say, "Those women out there claim to be scalded," held competent as a part of the res gestae. Gulf, etc., R. Co. v. Tullis [Tex. Civ. App.] 14 Tex. Ct. Rep. 478, 91 S. W. 317. Declarations of a grantor relative to boundaries, contemporaneous with the making of a deed, and made for the purpose of settling the street boundary, are admissible. Rix v. Smith [Mich.] 13 Det. Leg. N. 508, 108 N. W. 691. Motorman's reply to bystander who tried to warn and stop him, held admissible as a part of the res gestae, where the collision occurred immediately afterwards. Chicago City R. Co. v. McDonough [Ill.] 77 N. E. 577. In describing conditions which caused delay in building operations the words, "Can't I start?" used over telephone by contractor at the time he was endeavoring to complete his job, were held admissible as a part of the res gestae. Fitzgerald v. Benner, 219 Ill 485, 76 N. E. 709. Where section hand was struck by a train while working on the track, his question "What hit me?" on regaining consciousness was competent. Mills v. Missouri Pac. R. Co. [Mo.] 94 S. W. 973. What was said by parties who delivered trees for shipment to drivers, and statements of drivers, held admissible as res gestae on issue of agency of drivers. Pacific Exp. Co. v. Needham [Tex. Civ. App.] 15 Tex. Ct. Rep. 889, 94 S. W. 1070. On issue of origin of fire claimed to have been negligently set by defendant's employes, statements by employes while the fire was raging and while one of them was trying to protect a derrick from it, were competent. Paraffine Oil Co. v. Berry [Tex. Civ. App.] 15 Tex. Ct. Rep. 715, 93 S. W. 1089. Language of an agent of a telegraph company in refusing to send a telegram is admissible on the question of motive actuating the refusal. Western Union Tel. Co. v. Simmons [Tex. Civ. App.] 15 Tex. Ct. Rep. 349, 93 S. W. 686. Declarations of donor subsequent to gifts to children are inadmissible to show they were advancements; but declarations contemporaneous with the gifts, or against the donor's interest, explaining the nature of the acts, are admissible to show that they were

It is not essential that a statement or admission should be exactly coincident with the act, if it arises naturally therefrom and tends to characterize or explain it.[96]

advancements. Hill's Guardian v. Hill [Ky.] 92 S. W. 924. Letter identified as a part of negotiations leading up to sale of cotton, held admissible as res gestae, in action for breach of the contract. Walnut Ridge Mercantile Co. v. Cohn [Ark.] 96 S. W. 413. In action to recover proceeds of drafts purporting to have been drawn by plaintiff's bank on another bank, the monthly statement rendered to plaintiff by drawee, showing amounts of drafts and dates of payment, was not hearsay, being between the parties to the suit. Clifford Banking Co. v. Donovan Commission Co., 195 Mo. 262, 94 S. W. 527. In action for killing hog by street car, evidence that motorman said at the time that the "hog jumped on the track right in front of the car" was admissible. Little Rock R. & Elec. Co. v. Newman [Ark.] 92 S. W. 864. Where cause of delay was in issue in action on building contract, statements by workmen, contemporaneous with acts of interference by owner, testified to, were competent. Neblett v. McGraw [Tex. Civ. App.] 14 Tex. Ct. Rep. 496, 91 S. W. 309. In a claim and delivery action to recover a wagon and mules seized by a constable, because being used to haul liquors, a bill by the wholesale dealer purporting to show that the liquor was bought for personal use was admissible as part of the res gestae. Jaro v. Holstein, 73 S. C. 111, 52 S. E. 870. In an action for damages by a passenger for insults offered by an attendant in a station, an exclamation of one of plaintiff's children, in whose presence the insults were offered, that they should leave the depot, was admissible as a part of the res gestae. Gulf, etc., R. Co. v. Luther [Tex. Civ. App.] 14 Tex. Ct. Rep. 195, 90 S. W. 44. In action for delay in transportation of cattle a telegram sent by a local agent at one point on the line to the dispatcher, acted on by a yardmaster who had authority to do so, was competent as a part of the res gestae, though the one who sent it had no authority. Texas & P. R. Co. v. Scoggin [Tex. Civ. App.] 14 Tex. Ct. Rep. 297, 90 S. W. 521. In action for delay in transporting cattle, caused by overloading train, a declaration of the conductor, when the train was stalled, that he was overloaded, was competent as a part of the res gestae. Missouri, etc., R. Co. v. Stanfield Bros. [Tex. Civ. App.] 14 Tex. Ct. Rep. 301, 90 S. W. 517. Where deceased was killed by electric current in wires in his house, his statement just before the accident, as the switch was being turned off, in answer to his wife's warning to be careful, that there was no danger, was admissible as res gestae. Witmer v. Buffalo & N. F. Elec. Light & Power Co., 98 N. Y. S. 781. Where issue was ownership of notes which defendant claimed to have received from plaintiff's brother, testimony as to what occurred when there was an attempt to execute a power of attorney was admissible as res gestae when it appeared that the bill of sale in question was afterwards executed on the statement of the brother that it was the same paper which was discussed with witness at the time. Twaddell v. Weidler, 109 App. Div. 444, 96 N. Y. S. 90. Declarations of a grantor made contemporaneously with the signing and acknowledgment of a deed and explanatory of the subsequent act of the grantor in having the deed spread on the records are competent on the disputed question of delivery. Napier v. Elliott [Ala.] 40 So. 752.

Held incompetent as res gestae: In action for death of brakeman testimony that witness saw the train running fast on the morning in question, held inadmissible as a part of the res gestae, where it did not appear that the fact testified to was contemporaneous with the accident. Norfolk & W. R. Co. v. Gesswine [C. C. A.] 144 F. 56. Where issue was whether policeman had been injured while in performance of duties, the policeman's statements as to what was the matter made to one who had heard a policeman's whistle and had gone toward the place where it sounded and on the way saw some men running away, and then came up to the policeman, who was being supported by two men, and was holding his side, held incompetent. Murphy v. Police Pension Fund Com'rs [Cal. App.] 83 P. 577. Where the method of unloading telephone poles was changed after an accident, the change could not be proved as a part of the res gestae. Fitter v. Iowa Tel. Co., 129 Iowa, 610, 106 N. W. 7. Declarations of person in an answer filed in a former action that he was non compos mentis inadmissible, such declarations not being spontaneous. Ames v. Ames [Neb.] 106 N. W. 584. In an action for malicious prosecution, a private interview between plaintiff and his counsel at the time plaintiff had been charged with embezzlement, showing the theory of his defense to the charge, was not a part of the res gestae. Singer Mfg. Co. v. Bryant [Va.] 54 S. E. 320. Where, at time a will was being drawn, testator's wife ran to another room for water for him, and said, while out of his presence, that she was afraid he would die before the business was finished, her statement was not a part of the res gestae. In re Murray's Will [N. C.] 54 S. E. 435. Declarations of a decedent that she did not want a person to have her money and that he was after it inadmissible as res gestae in suit between such person, claiming as transferee, and the administrator of the decedent, where the declarations were not made at or near the time of the making of the alleged contract. Drefahl v. Security Sav. Bank [Iowa] 107 N. W. 179. In action for ejection of passenger from street car evidence of the conductor's rude manner toward other passengers, after he had ejected plaintiff, was inadmissible as a part of the res gestae. Dobbins v. Little Rock R. & Elec. Co. [Ark.] 95 S. W. 794.

96. Statements of agent inspecting electrical apparatus after an accident held competent. City of Austin v. Nuchols [Tex. Civ. App.] 15 Tex. Ct. Rep. 156, 94 S. W. 336. A declaration, to be a part of the res gestae, need not necessarily be coincident in point of time with the main fact proved. City of

But statements subsequent to the transaction in issue, which do not form a part thereof, but are in effect only narrative of past events, are incompetent.[97] Declarations of bystanders or spectators are competent only when intimately connected with the transaction.[98]

Lexington v. Flcharty [Neb.] 104 N. W. 1056. It is enough that the two are so clearly connected that the declaration can be said to be a spontaneous expression of the fact or condition. Testimory of witness that he asked person injured, after he got up, if he was hurt, and that he said he was, was competent. Id. In a personal injury action, proof that plaintiff was taken to a train and carried to a station immediately after he was injured was admissible as a part of the res gestae. Houston, etc., R. Co. v. O'Donnell [Tex. Civ. App.] 90 S. W. 886. Statements to physician by injured person, two days after injury and a month before suit to enable physician to treat injured person held competent. Orlando v. Syracuse Rapid Transit R. Co., 109 App. Div. 356, 95 N. Y. S. 898. Statement by motorman to conductor, just after a collision, that brakes failed him on account of a wet rail made in the presence of all parties concerned held admissible. Cincinnati, etc., R. Co. v. Stahle [Ind. App.] 76 N. E. 551. Statement of a foreman after accident, as soon as injured man became quiet, that accident would not have happened if a cleaver for which he had asked had been furnished, was admissible. Young v. Seaboard Air Line R. Co. [S. C.] 55 S. E. 225. Statement of injured person (who afterwards died) shortly after he was knocked from a car, and while he was staggering along the track, as to how he was knocked off the car, held admissible as a part of the res gestae. Southern R. Co. v. Brown [Ga.] 54 S. E. 911. In action on accident policy, statements of deceased to a doctor, one hour after the accident, tending to show how the accident occurred, held admissible as res gestae, where injured man was badly mangled, and died within 36 hours. Starr v. Aetna Life Ins. Co., 41 Wash. 199, 83 P. 113.

97. Statement of foreman as to what he had done, made a half hour or an hour after an injury to an employe, was inadmissible against the master. Martin v. South Covington, etc., R. Co. [Ky.] 92 S. W. 571. Declarations of motorman after car had killed dog inadmissible in action for damages. Wallace v. North Alabama Traction Co. [Ala.] 40 So. 89. An alleged statement of a person that he was going to cause all the trouble possible to defendant made a month after the trouble at issue and not connected with an act of the speaker in issue, held inadmissible. Warren Live Stock Co. v. Farr [C. C. A.] 142 F. 116. In action for death of a servant, a statement made by the president of the defendant company while talking with relatives of deceased some days after the death, that it was the company's intention to have the current off, was inadmissible as a part of the res gestae, being merely a narrative of a past event. Zentner v. Oshkosh Gas Light Co., 126 Wis. 196, 105 N. W. 911. In action for damages by fire alleged to have been negligently started by defendant's employes, evidence of declarations of employes 4 or 5 days after the fire that they set fire to grass to protect an oil tank from accidental fire, was inadmissible. Paraffine Oil Co. v. Berry [Tex. Civ. App.] 15 Tex. Ct. Rep. 715, 93 S. W. 1089. In action to recover for animal killed by train, statements made by section boss to witness, after the accident, as to the place where it occurred and what the section crew did after the animal had been struck, were not admissible as res gestae. Poindexter & O. Live Stock Co. v. Oregon Short Line R. Co. [Mont.] 83 P. 886. In action against newspaper for libel subsequent declarations of reporter who wrote the article were incompetent. American Pub. Co. v. Gamble, 115 Tenn. 663, 90 S. W. 1005. Declarations of the principal that a debt was secured by a guaranty, made after the debt was incurred, held incompetent against the guarantor. Opet v. Denzer [Tex. Civ. App.] 16 Tex. Ct. Rep. 118, 93 S. W. 527. Statement of engineer, 20 to 45 minutes after collision of two engines, "Look what I have done through my own carelessness," inadmissible. Southern Ind. R. Co. v. Osborn [Ind. App.] 78 N. E. 248. Narrative statement by plaintiff, as to how she was injured, made some minutes after the transaction was over, and after she had walked 200 or 300 yards away, to her intended destination, was not admissible as a part of the res gestae. McBride v. Georgia R. & Elec. Co., 125 Ga. 515, 54 S. E. 674. In an action to recover for injuries received from the bite of a horse, the declarations of a person purporting to be the driver, to the effect that the horse had bitten other persons, were inadmissible as part of the res gestae, where declarant was not present when the biting occurred and made the statement after plaintiff had returned from a hospital where he had his wound dressed. Quigley v. Adams Exp. Co., 27 Pa. Super. Ct. 116.

98. In action for injuries, exclamation of bystander at time of accident, that "the hook hit him" **held admissible.** Johnson v. St. Paul & W. Coal Co., 126 Wis. 492, 105 N. W. 1048. In an action for wrongful treatment of plaintiff's invalid daughter, evidence that while she was being taken care of by the carrier's servants, a bystander stepped up and told them not to put her in the baggage car, was admissible as a part of the res gestae. Gulf, etc., R. Co. v. Coopwood [Tex. Civ. App.] 96 S. W. 102. On issue whether conductor had knowledge of dangerous situation of a brakeman, the acts and statements of persons on the car in the conductor's presence and hearing, were admissible as part of the res gestae. Dale v. Colfax Consol. Coal Co. [Iowa] 107 N. W. 1096. In forcible entry and detainer action, declarations of a witness who came on the property after others had entered, and who did not have any interest therein, were **inadmissible** as a part of the res gestae. Fowler v. Prichard [Ala.] 41 So. 667. In action for ejection of a passenger, where conductor was present and observed

Complaints or natural expressions of present existing pain or suffering[99] or other natural expressions of an existing bodily or mental condition[1] may be shown under the res gestae rule. Statements by an injured person to an attending physician, merely descriptive of the patient's present physical condition, are competent,[2] unless it appears that they were made for the purpose of providing evidence to support a claim for damages.[3]

In regard to declarations of persons in possession of property[4] there is some difference of opinion. It is held by some courts that declarations made by a party while in actual possession of property, asserting title in himself, are admissible in evidence as a part of the res gestae, explanatory of the possession;[5] but this doc-

plaintiff's conduct, evidence of what other passengers said to him, and that they asked him to remove the passenger, was incompetent as res gestae, and also because consisting of their opinions. Nashville, etc., R. Co. v. Moore [Ala.] 41 So. 984. A mere expression of opinion as to the origin of a fire which destroyed a car, entertained by one not shown to have any knowledge or means of knowledge upon the subject, and made at a later time and a different place although the fire was still burning, cannot be regarded as one of those "undesigned incidents of the litigated act which are admissible when illustrative of such act." Trexler v. Baltimore & O. R. Co., 28 Pa. Super. Ct. 198. Expressions or exclamations do not become a part of the res gestae unless they were automatic and involuntary, and involved no intellectual processes or matter of inference or education; and an exclamation by the decedent an instant before the accident occurred is not competent as a part of the res gestae where the same matter would not be admissible were the party still living and on the stand. Cincinnati Interurban Co. v. Haines, 8 Ohio C. C. (N. S.) 77.

99. Missouri, etc., R. Co. v. Wade [Kan.] 85 P. 415. Evidence of moans apparently the result of pain, is competent. City of Aurora v. Plummer, 122 Ill. App. 143. Exclamations or expressions such as usually and naturally accompany and manifest the existence of present pain are competent. Weeks v. Boston El. R. Co., 190 Mass. 563, 77 N. E. 654. Fact that injured person complained and of what she complained held competent; language used by her held incompetent. O'Dea v. Michigan Cent. R. Co. [Mich.] 12 Det. Leg. N. 718, 105 N. W. 746. Testimony that plaintiff "complains of pains in her back," competent. Lindsay v. Kansas City, 195 Mo. 166, 93 S. W. 273.

1. A witness who was in the house when plaintiff received a telegram may testify that he saw her crying, on issue of mental suffering. Western Union Tel. Co. v. Manker [Ala.] 41 So. 850. Where defendant in trespass for removal of furniture claimed that plaintiff consented to its removal, the fact that she sat in a corner crying while the furniture was being removed was admissible as a part of the res gestae. Terry v. Williams [Ala.] 41 So. 804. Statement of injured person riding in carriage that it "rode hard" was admissible. Weeks v. Boston El. R. Co., 190 Mass, 563, 77 N. E. 654.

2. Statements of an injured party, made to a physician, expressive of his then present existing physical condition, may be given by the physician as a part of his examination. Indianapolis & M. Rapid Transit Co. v. Reeder [Ind. App.] 76 N. E. 816. Physician called to testify to condition of patient properly allowed to give patient's statement to him that she had injured her ankle, this being merely introductory to his examination, and not being regarded as hearsay. Indiana Union Traction Co. v. Jacobs [Ind.] 78 N. E. 325.

3. See 5 C. L. 1334, n. 84. Where defendant's physician was called by a person injured on one of defendant's trains for the purpose of substantiating her claim for injuries, complaints of suffering made to such physician were hearsay and inadmissible. O'Dea v. Michigan Cent. R. Co. [Mich.] 12 Det. Leg. N. 718, 105 N. W. 746. Statements to physician as to declarant's ability to hear admissible unless made for the purpose of use in the trial. St. Louis S. W. R. Co. v. Demsey [Tex. Civ. App.] 13 Tex. Ct. Rep. 961, 89 S. W. 786.

4. See 5 C. L. 1340.

5. Baker v. Drake [Ala.] 41 So. 845. Declarations or admissions of one in possession of property explanatory of his possession, as that he holds it in his own right, or as tenant or trustee of another, are admissible because explaining his possession. Farmers' Bank v. Barbee [Mo.] 95 S. W. 225. Doctrine applied to personal property. Holman v. Clark [Ala.] 41 So. 765. Statements of one in possession of personalty levied on, that the property belonged to his wife and not to the partnership debtor, were admissible. Roberts, Long & Co. v. Ringemann [Ala.] 40 So. 81. Declarations of one who claimed to hold land adversely to cotenant admissible to show character of his possession. Cole v. Lester, 48 Misc. 13, 96 N. Y. S. 67. When one was in possession of land, statements made by him to plaintiff while they were driving over the land, as that "these are our woods, the line is further out there" are admissible as a part of the res gestae, and characterizing possession, though declarant is living, no motive to misrepresent appearing. Driver v. King [Ala.] 40 So. 315. On issue of fraud in transfer of chattels, evidence of a statement of the vendee that the sale was a "ground hog sale" and that the property was all he "had to show" was competent. Griswold v. Nichols, 126 Wis. 401, 105 N. W. 815. On issue of abandonment of priority in a water right, declarations of a former owner of the priority, during his ownership, showing that he claimed to be the owner and was exercising rights of ownership were competent to show he had no intention of abandoning. Central Trust Co. v. Culver [Colo.] 83 P.

trine cannot be extended to include declarations as to the history and source of such title.[6] Other courts hold that declarations of a person in possession of property are not admissible as evidence in his favor, or of those claiming under him, to show title in him,[7] unless the declarant is dead.[8] It is well settled that declarations of a person in possession of property, in disparagement of his title, before he has parted with title, are admissible against one claiming under him.[9] But declarations of a grantor or vendor of property, subsequent to the transfer thereof by him, are incompetent to defeat or impeach the title of the transferee.[10]

(§ 6) *C. Admissions or declarations against interest.*[11]—Upon the presumption that one will not readily speak untruthfully against his own interest, admis-

1064. Where the issue was whether wife's title, derived from the husband, was merely colorable, to protect the property from the husband's creditors, declarations of the husband, while he was in exclusive possession and control of the property, that he was the owner thereof, were held competent to show whether the transfer was bona fide, though made in the wife's absence. Chan v. Slater [Mont.] 82 P. 657. Declarations of person who rented land, at the time of renting it, made to the tenant, that he was acting for a certain other person, were competent as res gestae, and as characterizing and accompanying the taking and holding of possession. Bivings v. Gasnell [N. C.] 53 S. E. 861. Statements of a person cutting timber on land or cultivating it, that he is so doing under authority of a certain person as owner, made while so doing, are admissible when the question of possession by such owner is involved. Wade v. McDougle [W. Va.] 52 S. E. 1026. The rule admitting declarations of persons in possession of land does not include acts of parties who were never in possession. Lawrence v. Alabama State Land Co. [Ala.] 41 So. 612. In suit between an alleged transferee of property of a decedent and the administrator, declarations of the decedent that such transferee was after her money and that she did not want him to have it were inadmissible on the theory that they were explanatory of decedent's possession. Drefahl v. Security Sav. Bank [Iowa] 107 N. W. 179.

6. Baker v. Drake [Ala.] 41 So. 845; Samaha v. Mason, 27 App. D. C. 470.

7. Farmers' Bank v. Barbee [Mo.] 95 S. W. 225.

8. Declarations of one in possession when pointing out boundaries to which he claimed at a time when there was nothing making it to his interest to misrepresent the facts is admissible, declarant being dead. Goodson v. Fitzgerald [Tex. Civ. App.] 14 Tex. Ct. Rep. 424, 90 S. W. 898. Acts and declarations of a person while in possession of land, indicating that she claimed to be the owner held competent after her death. Seawell v. Young [Ark.] 91 S. W. 544.

See, also, post, "Declarations of persons since deceased."

9. Norcum v. Savage, 140 N. C. 472, 53 S. E. 289; Mower v. McCarthy [Vt.] 64 A. 578; Stewart v. Doak, 58 W. Va. 172, 52 S. E. 95. Statements of vendor in disparagement of title, before parting with it, are competent. Campbell v. Eichorst, 122 Ill. App. 609.

10. Maffi v. Stephens [Tex. Civ. App.] 15 Tex. Ct. Rep. 140, 93 S. W. 158. Evidence of declarations of a grantor after she had parted with title, incompetent. Rix v. Smith [Mich.] 13 Det. Leg. N. 508, 108 N. W. 691. Declarations of an alleged fraudulent grantor, made long after the conveyance, are not competent as against his grantee to prove either intent, insolvency, or want of consideration. Wadleigh v. Wadleigh, 97 N. Y. S. 1063. Declarations of a decedent, after he had parted with his interest in land, to the effect that a certain person bought it, held incompetent. Brown v. Brown, 110 App. Div. 913, 96 N. Y. S. 1002. Declarations of a deceased person after he had conveyed that property still belonged to him, inadmissible against his grantee. Perry v. Pore [Ky.] 90 S. W. 952. Where a deed purported to convey absolute title for a valuable consideration, a declaration by the grantor subsequent to the deed, that the grantee had no interest in the property conveyed was incompetent. Foster v. Beidler [Ark.] 96 S. W. 175. Declarations of a person since deceased, while on certain land, but at a time when he was not living on it and did not claim it, having previously parted with his title, held incompetent against successors in interest. Anniston City Land Co. v. Edmondson [Ala.] 40 So. 505. Declarations of a grantor who has parted with title are incompetent to defeat the title in the absence of evidence of fraud or conspiracy. Leonard v. Fleming, 13 N. D. 629, 102 N. W. 308. Declarations of seller after the transfer, in the buyer's absence, that the transfer was fraudulent, are inadmissible to impeach the buyer's title. Hart v. Brierley, 189 Mass. 598, 76 N. E. 286. Declarations of assignor of property subsequent to the assignment and tending to defeat it, inadmissible, though assignor has since died. Crawford v. Hord [Tex. Civ. App.] 14 Tex. Ct. Rep. 71, 89 S. W. 1097. Statements of person since deceased that he had sold property to a certain person inadmissible against one who claimed to have purchased the property before such statements were made. Jones v. Tennis Coal Co. [Ky.] 94 S. W. 6. Declarations of a vendor, made after the sale and without the presence or knowledge of the vendee cannot be received in evidence to defeat the vendee's title to the property conveyed. Bruce v. Bruce [Tex. Civ. App.] 89 S. W. 435. An admission by a private owner after his estate has terminated and while he was occupying as a tenant was inadmissible to affect a vendee's title. Interstate Coal & Iron Co. v. Clintwood Coal & Timber Co. [Va.] 54 S. E. 593.

11. See 5 C. L. 1335.

sions and declarations out of court by a party in interest,[12] or a person in privity with him[13] against his interest,[14] are received as original evidence. Admissions made in the course of judicial proceedings are of course within this rule.[15]

12. Declaration of the representative of a decedent relating to a personal transaction by him is competent. Bennett v. Best [N. C.] 55 S. E. 84. Where issue was whether deed was absolute or intended as a mortgage, letters between the parties thereto relating to their rights in the property were competent as admissions. Wadleigh v. Phelps [Cal.] 87 P. 93. Admissions of engineer, after accident caused by his negligence, admissible against him, though not against company, where both were sued. Illinois Cent. R. Co. v. Houchins [Ky.] 89 S. W. 530. Where plaintiff called defendant as a witness and the latter testified that an assignment of a policy was absolute, plaintiff could prove admissions by defendant that the assignment was as security, though such admissions were not competent to impeach defendant as a witness. Gould v. Hancock Mut. Life Ins. Co., 99 N. Y. S. 833.

13. Declarations and admissions of grantee in deed admissible against the heirs of the grantee in a suit against them to set the deed aside. Benson v. Raymond [Mich.] 12 Det. Leg. N. 767, 105 N. W. 870. In action by widow to enforce claim for money furnished husband on his promise to convey to her land bought with it, evidence of husband's declaration that deed was unnecessary as wife would inherit land from grantor, was admissible against his heirs. Cross v. Iler [Md.] 64 A. 33. Entries in private account book of ancestor of defendant in suit to quiet title in such ancestor's handwriting, showing disposition of money contributed by religious society, held binding on defendant. First Baptist Church of Sharon v. Harper, 191 Mass. 196, 77 N. E. 778. In partition suit, declarations of plaintiff's husband, since deceased, under whom she claimed relative to indebtedness against the land which was agreed to be assumed by the widow of a testator on conveyance to her by his heirs, of whom plaintiff's husband was one, were admissible against plaintiff. O'Brien v. Knotts, 165 Ind. 308, 75 N. E. 594. Where defense to action on policy of life insurance was fraudulent misrepresentations by insured as to his health, declarations of insured showing that he was suffering from a disease were competent, he having denied having such disease when applying for insurance. Nophsker v. Supreme Council of Royal Arcanum [Pa.] 64 A. 788. Where bastardy proceedings were commenced and dismissed upon defendant's confession and offer to marry the woman, and security was demanded for performance of the promise to support the mother and child and the mortgagor, in a suit to foreclose, denied that the mortgage was given to secure such promise, declarations of the promisor, the principal, promising to marry the woman, were admissible against the mortgagor, who stood as surety. Jangraw v. Perkins [Vt.] 64 A. 449. Declarations of deceased patentee, as to location of corners of his pre-emption, held competent against persons claiming under him. Warner v. Sapp [Tex. Civ. App.] 97 S. W. 125.

14. Held competent as admissions against interest: Written statement admitted by plaintiff to be correct when read to him admissible, though not signed by him. Huggins v. Southern R. Co. [Ala.] 41 So. 856. Certain I. O. U.'s conceded to be in decedent's handwriting, held admissible as admissions by decedent that he owed the sums mentioned. Lefevre v. Silo, 98 N. Y. S. 321. Letter showing particular part of tract of land claimed as homestead admissible in suit to foreclose trust deeds on other parts of the tract. McGaughey v. American Nat. Bank [Tex. Civ. App.] 14 Tex. Ct. Rep. 350, 92 S. W. 1003. "Prices current" sent by factor to customer admissible against factor on issue of market price of apples. Weldner v. Olivit, 108 App. Div. 122, 96 N. Y. S. 37. Proof of an admission by a person that if he had not shot plaintiff he would have kicked him, etc., held some proof that he did shoot plaintiff. Baltimore & O. R. Co. v. Deck 102 Md. 669, 62 A. 958. Plaintiff in breach of promise suit could prove declarations and representations of defendant at time of making promise. Massucco v. Tomassi, 78 Vt. 188, 62 A. 57. An offer to sell at a certain price may be shown as an admission of the owner on the question of value. Phelps v. Root, 78 Vt. 493, 63 A. 941. Where suit for delay in delivering telegram was for $1,000, it may be shown that plaintiff, before suit was begun, put in a claim for $25. Western Union Tel. Co. v. Stubbs [Tex. Civ. App.] 16 Tex. Ct. Rep. 210, 94 S. W. 1083. A declaration of a grantor since deceased, not in privity with either party to the suit, that she had deeded land to her son-in-law because of her regard for him, and on account of his kindnesses, was held an admission against interest and admissible. Smith v. Moore [N. C.] 55 S. E. 275. On issue of false representations as to title to wheat in mill, evidence that defendant said to plaintiff when the deed was executed for a half interest, "Now, one-half of everything that is here is yours," was admissible. Rahm v. Bunger [Ky.] 90 S. W. 257. Where it is sought to set aside a will and certain deeds of a testator, an admission of a grantee in one of the deeds that he did not consider the grantor to be of sound mind was admissible on the issue of the validity of his deed. Bird v. Bird, 218 Ill. 158, 75 N. E. 760. In action for breach of contract to deliver cattle, admissions of defendant that he had sold to plaintiff and statements of plaintiff, in defendant's presence, in regard to such sale, were competent. McKay v. Elder [Tex. Civ. App.] 92 S. W. 268. Declaration of owner of land that he had dedicated water front to public held competent as admission against interest, on issue of dedication of certain land. Davies v. Epstein [Ark.] 92 S. W. 19. On issue of validity of note from mother to son, the statement of the son before arbitrators, appointed to examine the validity of the note, that he was not entitled to retain it because he had not performed promised services for his mother was competent. Sullivan v. Sullivan [Ky.] 92 S. W. 966. Declarations of a decedent about the time certain property was deeded

to him that he bought it for a certain company (plaintiff's predecessor) and that it belonged to such company, held competent against his heirs to establish an equitable title in plaintiff. New York Water Co. v. Crow, 110 App. Div. 32, 96 N. Y. S. 899. In an action by a passenger for personal injuries, declarations of plaintiff out of court, made to physician, relating to the cause of physical disorders from which he suffered, were admissible, being in the nature of declarations against interest. Chicago City R Co. v. Henry, 218 Ill. 92, 75 N. E. 758. Where evidence tended to show that plaintiff said to a witness before the institution of proceedings that he did not know about bringing suit, as he himself was partly to blame, a question whether he had consulted counsel before he made such statement was properly rejected, as that fact would not affect the force of his admission on the facts. Harvey v. Chicago & A. R. Co. [Ill.] 77 N. E. 569. Where insurance policy provided that proofs of death required by rules of the company should be evidence in behalf of, but not against, the company, such proofs were held admissible in an action on the policy but not conclusive on the question of the cause of death. Krapp v. Metropolitan Life Ins. Co. [Mich.] 12 Det. Leg. N. 1032, 106 N. W. 1107. In foreclosure action, testimony by plaintiff that he thought one of the mortgagors was bordering on insanity a short time before the mortgage was executed was competent as an admission against interest. Stafford v. Tarter [Ky.] 96 S. W. 1127. Admission of liability by one surety held competent and admissible though it would not be competent against his cosurety. Hunter v. Porter [Iowa] 109 N. W. 283. Where action was against master and fellow-servant of deceased, statements of the fellow-servant after the accident as to what he did to prevent it, were competent against him as substantive evidence, but as against the master were competent only to impeach the testimony of the fellow-servant. Cooper's Adm'r v. Oscar Daniels Co. [Ky.] 96 S. W. 1100.

Held not an admission against interest: A complaint drawn and sworn to by the attorney for a corporation, and immediately withdrawn and dismissed, is incompetent to show an admission by the corporation. Kirven v. Virginia-Carolina Chemical Co. [C. C. A.] 145 F. 288. A prior owner of land was not a party to a suit affecting title, nor to a compromise thereof. The mere fact that he signed by mark a power of attorney, signed also by others, and was present at a meeting of land owners, where a compromise of the suit was effected, was insufficient to charge him with notice so as to make the compromise admissible as an admission against him. Interstate Coal & Iron Co. v. Clintwood Coal & Timber Co. [Va.] 54 S. E. 593. Where at time will was drawn testator's wife ran to another room for water for him and said she was afraid he would die before the business was finished, her statement was not an admission against interest, though she was given a life estate in certain property. In re Murray's Will [N. C.] 54 S. E. 435. Proof that an employe suing for compensation had said that during his employment he had drawn money "from time to time as shown by" an account, which was produced as a counterclaim, is not proof of an admission of the correctness of the account but only that he drew in the manner shown by the account. Caldwell v. Caldwell Co., 47 Misc. 599, 94 N. Y. S. 476. Petition of elevated railroad company, through president, for reduction of franchise tax, reciting that $5,000,000 would be required to obtain an unobstructed right to exercise its franchise, was not an admission that the road did not claim by prescription the easements of light, air, and access, connected with abutting property. Hindley v. Manhattan R. Co. [N. Y.] 78 N. E. 276. Admission of ownership of vehicle which caused an injury held not to carry with it an admission of control of the vehicle at the time. United Breweries Co. v. Bass, 121 Ill. App. 299.

15. Statements of defendant in **depositions** taken in judicial proceedings competent as admissions of his place of residence at certain times. Phillips v. Lindley, 98 N. Y. S. 423. Statements in a deposition which was suppressed held inadmissible as admissions without proof that they were in fact made by the party against whom they were offered. German Ins. Co. v. Gibbs, Wilson & Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 798, 92 S. W. 1068. To show an agreement to make mutual wills, the **testimony** of a decedent, a party to the alleged agreement, taken in proving the will of the other party before a probate judge, is competent as an admission against her right to revoke her will. Wilson v. Gordon, 73 S. C. 155, 53 S. E. 79. Abandoned **pleadings** containing relevant statements are admissible as admissions against interest though not signed nor sworn to by party himself, but by attorney. Pecos & N. T. R. Co. v. Blasengame [Tex. Civ. App.] 15 Tex. Ct. Rep. 203, 93 S. W. 187. Defendant's abandoned answer in slander action, competent as an admission though written by attorney. Overton v. White, 117 Mo. App. 576, 93 S. W. 363. Where defendants were allowed to file an amended answer, the original answer was competent to show admissions. Norcum v. Savage, 140 N. C. 472, 53 S. E. 289. Statement in complaint in former proceeding held competent as an admission. Boulder & White Rock Ditch Co. v. Leggett Ditch & Reservoir Co. [Colo.] 86 P. 101. Admission in pleadings of plaintiffs' ancestor held competent against plaintiffs. Warner v. Sapp [Tex. Civ. App.] 97 S. W. 125. Pleadings in a previous suit between the same parties, but upon a different cause of action, are competent as admissions, but are not conclusive. Commonwealth v. Monongahela Bridge Co. [Pa.] 64 A. 909.

Agreement of parties at former term, continuing the action, containing no admission by defendant that he was in possession, was inadmissible. Ross v. Roy [Ala.] 39 So. 583. That plaintiff's counsel admitted on an **argument** in appellate court that he did not make a certain contention was inadmissible on a future trial, as such admission, if made, would not prevent raising and relying on such contention at the trial. Cadigan v. Crabtree [Mass.] 78 N. E. 412. Where amount of tobacco sold was in issue in an action for breach of contract for sale of a crop, a **forthcoming bond** executed by the seller in a prior unsuccessful attachment

Silence or acquiescence of a party when a statement adverse to his interest is made in his presence is construed as an admission,[16] if the circumstances are such as would naturally call for a denial, if the statement were untrue.[17] Similarly, a failure to assert a claim may, under certain circumstances, be construed as an admission that it does not exist, or that it is invalid.[18]

Proof of bona fide offers of compromise is usually excluded on grounds of public policy,[19] but the admissibility or nonadmissibility of evidence offered to prove an alleged compromise depends upon the intention of the party seeking it.[20] If he intends his offer to be a compromise settlement, it is inadmissible.[21] If he intends it to be an admission of liability, coupled with an endeavor to settle such liability, then it is admissible to prove such liability.[22] Where a party makes admissions without regard to a compromise, and when it does not appear that any compromise or proposition to compromise is in view, the fact that such party may afterwards propose a compromise will not render incompetent previous admissions.[23] Matters relating to a compromise of a former suit are not incompetent.[24]

suit, showing the amount of the crop, was admissible as an admission against interest since the seller could have availed himself of an appraisement before giving the bond, under Civ. Code Prac., §§ 215, 258. Tingle v. Kelly [Ky.] 92 S. W. 303. In ejectment by an individual against a company to recover an undivided interest in land, the record in another suit wherein the company recovered an undivided interest from the individual, relying on the same chain of title on which the individual relies in the later action, is admissible as an admission, but not to prove plaintiff's title. Houseman v. International Nav. Co. [Pa.] 64 A. 379.

16. A statement made in a party's presence may be shown; whether the party heard it is for the jury, who may consider his silence. State v. Johnson [N. J. Law] 63 A. 12.

17. The rule of admission by silence of the truth of statements made in one's presence extends only to cases where the court can say that the natural and reasonable inference from silence is admission. Leggett v. Schwab, 97 N. Y. S. 805. Fact that wife did not at once deny statements by husband in hearing before a referee held not an admission by her of the truth of his statements. Id. Statements made in the presence of a party and not denied by him are competent as admissions against him only when it appears that he heard and understood them and the circumstances were such as to call for a denial, if the statement were untrue. Parulo v. Philadelphia & R. R. Co., 145 F. 664. Silence of the wife in an action by her husband to which she was not a party when her husband's attorney asserted the husband's ownership of land, was not an admission by her that she did not own it. Foster v. Hobson [Iowa] 107 N. W. 1101.

18. Evidence that defendant made no claims regarding amount of rent or to whom payments should be made, in the course of conversations concerning the matter, was admissible, where he naturally would have made such claims had there been any basis for them. Green v. Dodge [Vt.] 64 A. 499. The fact that inventories of estates contain no reference to a claim relied on as a cross claim in a suit for an accounting is some evidence that the claim was invalid and was not regarded as property of the estates. Crane v. Brooks, 189 Mass. 228, 75 N. E. 710.

19. Wall v. Melton [Tex. Civ. App.] 16 Tex. Ct. Rep. 112, 94 S. W. 358; Nahm v. Register Newspaper Co., 27 Ky. L. R. 887, 87 S. W. 296. Whether a letter contains a bona fide offer of compromise is a question for the court. Biggs & Co. v. Langhammer [Md.] 63 A. 198. Evidence inadmissible to show attempt of defendant in breach of promise suit to compromise claim. Wrynn v. Downey, 27 R. I. 454, 63 A. 401. Letter relating to refusal to perform charter construed as bona fide offer of compromise of claim of damage, and hence inadmissible. Biggs & Co. v. Langhammer [Md.] 63 A. 198. Admissions or propositions made with a view to compromise are not admissible. McBride v. Georgia R. & Elec. Co., 125 Ga. 515, 54 S. E. 674. An offer of a landowner to settle with a railroad company for land taken cannot be shown as an admission. Indianapolis Northern Traction Co. v. Dunn [Ind. App.] 76 N. E. 269. Where settlement of a city with a taxpayer was void because it provided for acceptance of paving certificates, it was not competent as an admission of liability on the part of the taxpayer. City of Houston v. Stewart [Tex. Civ. App.] 13 Tex. Ct. Rep. 981, 90 S. W. 49. In cases of tort, when a party has reasonable ground to anticipate that a claim for damages will be made, he may seek a settlement without any presentation of his claim by the claimant, and such offer of settlement cannot be proved against him. Finn v. New England Tel. & T. Co. [Me.] 64 A. 490. Where question did not show on its face that it did not call for statements made during negotiations for a compromise of a claim for damages, but left the witness to decide, it was proper to exclude it. St. Louis, etc., R. Co. v. Continental Brick Co. [Mo.] 96 S. W. 1011.

20, 21. Finn v. New England Tel. & T. Co. [Me.] 64 A. 490.

22. Finn v. New England Tel. & T. Co. [Me.] 64 A. 490. A letter stating that full investigation of salvage claim had been made and offering $500 in full of all claims, held properly considered in corroboration of other testimony to claim since the letter con-

Ex parte, unsworn, self-serving declarations of a party are incompetent.[25]

The alleged admission must be shown to have been made by the party against whom it is offered, or by one authorized to speak for him, or whose statements are

tained an admission of fact, and did not contain a caution that it was confidential. The Car Float No. 19, 138 F. 435.

23. McBride v. Georgia R. & Elec. Co., 125 Ga. 515, 54 S. E. 674.

24. That conversation related to compromise of a former suit did not render it incompetent in suit at bar. McCrum v. McCrum, 36 Ind. App. 636, 76 N. E. 415.

25. Letter containing only a self-serving declaration properly excluded. Hightower v. Ansley [Ga.] 54 S. E. 939. Letter by witness who testified held incompetent as self-serving declaration. In re McClellan's Estate [S. D.] 107 N. W. 681. Evidence based on declarations of a party out of court in his own interest held incompetent. Telford v. Howell, 220 Ill. 52, 77 N. E. 82. To rebut evidence of financial embarrassment, the declaration of the person that she had offered to pay a large debt was self-serving. Haines v. Goodlander [Kan.] 84 P. 986. Where issue was whether an employe was entitled to a commission in addition to wages, evidence of a conversation between him and defendant's paymaster, wherein he said he would let his commissions go until the work was done, was inadmissible. Shall v. Old Forge Co., 109 App. Div. 907, 96 N. Y. S. 75. In action for breach of warranty of horse sold, a letter written by plaintiff to defendant, containing statement that horse had heaves and not a cold, was inadmissible. Riddell v. Jenkins, 109 App. Div. 463, 95 N. Y. S. 702. Letter from bookkeeper of corporation defendant to its president held inadmissible. Snyder v. Patton & Gibson Co. [Mich.] 12 Det. Leg. N. 1041, 106 N. W. 1106. In action against alleged partners, declaration of one defendant to officers of plaintiff as to another defendant's being a partner was inadmissible. Third Nat. Bank v. Fults, 115 Mo. App. 42, 90 S. W. 755. Evidence of statements by a defendant to a co-defendant in the absence of other parties was hearsay. Watkins v. Robertson [Va.] 54 S. E. 33. Communications between a party to a suit and his employes, not in the presence of the adverse party and of which he has no notice, are not admissible in his behalf unless a part of the res gestae. Vale v. Suiter, 58 W. Va. 353, 52 S. E. 313. After written indorsement extending broker's contract had been made, a statement made by a party to witness, in the absence of the other party, as to his understanding of what had been done, was inadmissible. Clark v. Dalziel [Cal. App.] 84 P. 429. Letter from plaintiff to his agent, with which defendant was not shown to have any connection or knowledge, was inadmissible against him. Blair v. Baird [Tex. Civ. App.] 15 Tex. Ct. Rep. 59, 94 S. W. 116. In an action on a note, a declaration by plaintiff's intestate made to a witness just before the intestate went to a hospital during his last illness to "save this note for me until I get back" was a declaration of ownership of the note implying that it was due and unpaid, and inadmissible. Steltemeler v. Barrett, 115 Mo. App. 323, 91 S. W. 56. In action for malicious prosecution, defendant's statement that he desired the prosecution dismissed was inadmissible. Rutherford v. Dyer [Ala.] 40 So. 974. A memorandum, signed only by plaintiff, showing an exchange whereby he came into possession of a mare held inadmissible, in replevin to recover the mare, as a self-serving declaration. Lowe v. Donnelly [Colo.] 85 P. 318. Recitals of pedigree in a deed, not an ancient document, held incompetent as against strangers to the deed. Mace v. Duffy, 39 Wash. 597, 81 P. 1053. Where issue was validity of a contract transferring money, in a suit between the transferee and the administrator of the transferor, declarations of the decedent transferor that the transferee was after her money and that she did not want him to have it were inadmissible, being in her own interest. Drefahl v. Security Sav. Bank [Iowa] 107 N. W. 179. Recital in deed to heirs of a living person that latter had paid a certain consideration to the grantor is inadmissible, in ejectment by his children, as against a defendant claiming under such person. Campbell v. Everhart, 139 N. C. 503, 52 S. E. 201. In suit to reform a deed, reciting love and affection, statements of grantor to draftsman in absence of grantee, to the effect that the real consideration was an agreement to build on the land and to render certain services to the grantor. Graham v. Strawsburg [Ky.] 91 S. W. 737. Memorandum of insured, showing he was innocently mistaken as to the amount of his insurance, not made in a regular account book, held incompetent as a self-serving declaration, in an action on the policy defended on the ground of misrepresentations by insured. Provident Sav. Life Assur. Co. v. Whayne's Adm'r [Ky.] 93 S. W. 1049. In an action for willfully and wrongfully appropriating plaintiff's property, evidence of statements of one defendant that he had not sold the property to a co-defendant, and that the latter had no right to it, not made in the presence of the other defendants, was hearsay. Jackson v. Poteet [Tex. Civ. App.] 14 Tex. Ct. Rep. 45, 89 S. W. 980. Where an unincorporated religious society sued to quiet title to land taken by defendant's ancestor in his own name, records kept by the ancestor were evidence that he was acting for the society, and they were not objectionable as self-serving declarations disparaging defendant's title. First Baptist Church of Sharon v. Harper, 191 Mass. 196, 77 N. E. 778. The president of a company placed on the back of returned certificates an indorsement to the effect that the certificates had been assigned to him, this being done by him as an individual and not in his official capacity. Held the indorsements were self-serving declarations and incompetent. Geneva Mineral Spring Co. v. Steele 97 N. Y. S. 996. In action by contractor on public work to recover for unwarranted deduction from contract price, a letter from official of public works department to plaintiff, calling attention to departures from contract terms, was incompetent, being ex parte declarations. Gearty v. New York, 183 N. Y. 233, 76 N. E. 12.

binding upon him.[26] Thus, in the case of a conversation with the witness by telephone, the person speaking must be identified.[27] Such a conversation can be proved by a third person only when both parties talking are identified by the witness.[28] An interpreter called by two persons speaking different languages as the medium of their communication with each other is regarded as their joint agent for that purpose, and statements made through such interpreter are regarded as the statements of the persons themselves and may be proved, like any admission, by the testimony of any person who heard them without calling the interpreter as a witness.[29]

Admissions and declarations of an agent of a party, against the interest of the party, accompanying and explaining acts then being done by him, so as to constitute a part of the res gestae,[30] such acts being within the scope of his authority as

26. Where a conversation with a person is sought to be proved against a party, the objection that the identity of the person talking with the party is not sufficiently shown, raises a question of fact, not of law. Prior v. Fuller, 73 N. H. 608, 62 A. 716. Letter and verbal statements of president of corporation held competent against corporation. Masonic Temple Safety Deposit Co. v. Langfelt, 117 Ill. App. 652. Declarations as to incompetency of grantor made by grantee before she acquired title held incompetent in action against heirs. Benson v. Raymond [Mich.] 13 Det. Leg. N. 506, 108 N. W. 660. Declarations of wife, during life of her husband, impeaching his title, held inadmissible in an action by her after his death; where the title she was asserting depended upon her husband's title her declaration could not bind his estate. Hoyt v. Zumwalt [Cal.] 86 P. 600. Declarations of one joined as party simply because his wife was plaintiff, having no interest in the land in issue, and not being a predecessor in interest of his wife nor of other parties held incompetent, unless authorized by his wife. Daugherty v. Taylor, 140 N. C. 446, 53 S. E. 296. In proceeding to try title to goods levied on as belonging to husband, but claimed by the wife, declarations of the husband, in the wife's absence and after the levy, to the effect that the goods were his, and that he had made a bill of sale of them to his wife to hinder his creditors, are inadmissible where he is not a witness nor a party to the issue. Thomas v. Butler, 24 Pa. Super. Ct. 305. Son having given chattel mortgage to father obtained what goods he could without paying for them. Held his declarations tending to show an intention to defraud his creditors were inadmissible against his father without other evidence connecting his father with the fraud. Mower v. McCarthy [Vt.] 64 A. 578. Mere relation of mortgagor and mortgagee, without proof of collusion, did not render such declarations competent against mortgagee. Id.

27. Telephone conversation competent when party speaking was identified. Harrison Granite Co. v. Pennsylvania R. Co. [Mich.] 13 Det. Leg. N. 631, 108 N. W. 1081. Where party making an offer of employment called witness up and made the offer over the telephone, proof of the offer so made by the witness was competent. St. Louis S. W. R. Co. v. Kennedy [Tex. Civ. App.] 96 S. W. 653. Question of identity of person talking with witness over the telephone, held for the jury, where witness who testified to conversation could not positively identify him as the party to the suit, but circumstantial evidence strongly indicated such party as the speaker. American Nat. Bank v. First Nat. Bank [Tex. Civ. App.] 14 Tex. Ct. Rep. 569, 92 S. W. 439. Where a witness in testifying as to a conversation had by telephone makes a positive statement as to who it was with whom he conversed, and he is not cross-examined as to the identity of the person at the other end of the wire, the conversation is admissible notwithstanding the uncertainty which may exist as to the identity of the other party speaking. Pullman Co. v. Willett, 7 Ohio C. C. (N. S.) 173.

28. Evidence of telephone conversation inadmissible where witness did not know party he could not see, and had never heard her voice, unless she was the party he had talked to in morning of the same day. Dunham v. McMichael, 214 Pa. 485, 63 A. 1007.

29. Kelly v. Ning Yung Benev. Ass'n [Cal. App.] 84 P. 321.

30. Admissions of an agent are competent against the principal only when made during the continuance of the agency and in regard to a transaction then being executed. Peyton v. Old Woolen Mills Co. [Ky.] 91 S. W. 719.

Declarations of agent held competent: Statements made by insurance agents as to reason why policy in his hands had not been delivered to insured were admissible as a part of the res gestae. Wheaton v. Liverpool & London & Globe Ins. Co. [S. D.] 104 N. W. 850. Agent's statements during negotiations leading up to contract held admissible against principal as part of res gestae. Grout v. Moulton [Vt.] 64 A. 453. Statement of freight agent held admissible in action for injuries to horses being transported where made in response to inquiries by the shipper. Louisville & N. R. Co. v. Brown [Ky.] 90 S. W. 567. Declarations of the agent of the guarantor of a contract, made in connection with its assent to rescission of the contract, and stating reasons why the guarantor refused to refund the money paid by the other party, were held not objectionable as relating to a past transaction in an action to recover on the guaranty. Aetna Indemnity Co. v. Auto-Traction Co. [C. C. A.] 147 F. 95. Statement of motorman, immediately after accident to passenger, that he was under the impression that the passenger had previously got off

agent,[31] are competent against the principal, and the rule applies to declarations by

admissible. McDonough v. Boston El. R. Co., 191 Mass. 509, 78 N. E. 147. Representations of agent of carrier who made arrangements with shipper to transport live stock, as to the time required for shipment held competent evidence. Missouri, etc., R. Co. v. Stanfield Bros. [Tex. Civ. App.] 14 Tex. Ct. Rep. 301, 90 S. W. 517. Statements by custodian of dog tending to show knowledge of its vicious nature admissible against defendant, owner of the dog. Soronen v. Von Pustau, 98 N. Y. S. 431. Admission by a foreman, in connection with management of the business, tending to show knowledge of a defective appliance which caused an injury, admissible against corporation. Cudahy Packing Co. v. Hays [Kan.] 85 P. 811. In action for injuries caused by coming into contact with electric wires, statements made by defendant's agent and employe concerning the electric apparatus, while he was inspecting it after the accident were held competent. City of Austin v. Nuchols [Tex. Civ. App.] 15 Tex. Ct. Rep. 156, 94 S. W. 336. In action for injuries caused by escape of train down a grade, evidence that the engineer said that brakes did not work when train was 9 miles from the grade was admissible. Louisville & N. R. Co. v. Bohan [Tenn.] 94 S. W. 84. The declarations of an agent are admissible against the principal only when made in regard to a transaction in the course of his agency pending at the very time of the declaration, and where the statements or declarations are a part of the res gestae. Herman Waldeck & Co. v. Pacific Coast S. S. Co. [Cal. App.] 83 P. 158.

Declarations of agent held incompetent: Statements of section foreman that he had torn down plaintiff's fence, after the act, held incompetent against railway company. Gulf, etc., R. Co. v. McMurrough [Tex. Civ. App.] 14 Tex. Ct. Rep. 476, 91 S. W. 320. Admissions by agent with respect to a past transaction, not a part of the res gestae, are incompetent against the principal. Helbig v. Citizens Ins. Co., 120 Ill. App. 58. In action against carrier for assault by conductor on a passenger, a conversation between the conductor and passenger 3 weeks after the assault was inadmissible. Louisville & N. R. Co. v. Williamson [Ky.] 96 S. W. 1130. Declarations explanatory of a past act of the agent which was within the scope of his agency are incompetent. Herman Waldeck & Co. v. Pacific Coast S. S. Co. [Cal. App.] 83 P. 158. What brakeman said to third persons about passenger who he ejected, after such act, was inadmissible. Southern R. Co. v. Thurman [Ky.] 90 S. W. 240. Admissions of engineer, long after accident caused by his negligence, held incompetent against the railway company. Illinois Cent. R. Co. v. Houchins [Ky.] 89 S. W. 530. Receipt given by agents inadmissible because not shown to have been given as agents for defendant. Foreman v. German Alliance Ins. Ass'n, 104 Va. 694, 52 S. E. 337. Declarations of cattle drovers, the day after a vicious steer injured plaintiff, that they knew the steer was vicious, inadmissible. Harris v. Carstens Packing Co. [Wash.] 86 P. 1125. In action for delay in delivery of telegram, evidence of subsequent admissions and declarations of defendant's agent as to why it was not delivered sooner was inadmissible. Hamrick v. Western Union Tel. Co., 140 N. C. 151, 52 S. E. 232. Statements made to witness by a section boss, after an animal had been killed by a train, as to where the accident occurred, and what the crew did with the animal, held incompetent as not a part of the res gestae, and outside the scope of his agency. Poindexter & Orr Live Stock Co. v. Oregon Short Line R. Co. [Mont.] 83 P. 886. In action against a lighting company for death of a lamp trimmer by an electric shock, evidence by a witness that he heard a former superintendent say some years before that the hoods used on the lamps were unsafe was inadmissible. Gardner v. Schenectady R. Co., 98 N. Y. S. 1034. In action for damages for injuries to shipment of pelts, a letter written by an agent of defendant after the pelts had been shipped, relating to the manner of packing and stowing, was incompetent. Herman Waldeck & Co. v. Pacific Coast S. S. Co. [Cal. App.] 83 P. 158. In action against an express company for injuries to goods while in its possession as carrier, evidence of a statement by one of its servants, after the goods had been delivered, that they were not in good condition when delivered was incompetent. Hoffman v. Metropolitan Exp. Co., 97 N. Y. S. 838. In action for killing an animal on a railway track, declarations of the conductor, two days after the event, tending to show that the train chased the animal until it caught up with and killed it, were inadmissible against the company. International, etc., R. Co. v. Carr [Tex. Civ. App.] 14 Tex. Ct. Rep. 864, 91 S. W. 858. In action for loss by fire caused by failure to supply water, an admission by the employe in charge of the waterworks, while he was on the grounds near the reservoir, that there was a fire and he did not have a bit of water, was held not a part of the res gestae. Shelbyville Water & Light Co. v. McDade [Ky.] 92 S. W. 568.

31. Declarations of an officer or agent while acting within the scope of his authority or employment are binding on the corporation or person represented by him in the transaction. Declarations of street and sidewalk commissioner as to dangerous condition of certain structures over the walks, made while supervising their erection, held admissible against the city. Farrell v. Dubuque, 129 Iowa, 447, 105 N. W. 696. What secret but accredited agent said and did within the scope of his authority held admissible against principal. Schiffer v. Anderson [C. C. A.] 146 F. 457. Where there was prima facie proof that an agent had authority in the transaction in issue, his letters and statements relating thereto were admissible. Hoffman Heading & Stave Co. v. St. Louis, etc., R. Co. [Mo. App.] 94 S. W. 597. Statements of person delegated to represent a party in a certain negotiation held competent evidence against him. McNeese v. Carver [Tex. Civ. App.] 13 Tex. Ct. Rep. 820, 89 S. W. 430. Statements of receiving clerk and cashier in the main office

public officers.[32] There must be at least a prima facie showing of the existence of the agency before such admissions or declarations are admissible;[33] neither the fact of agency,[34] nor the extent of an agent's authority,[35] can be shown by declarations

of a telegraph company, respecting matters within the apparent scope of their authority, are not hearsay. Western Union Tel. Co. v. Wells [Fla.] 39 So. 838. Statements of general manager of corporation, made at its office, of which he was apparently in charge, as a consequence of which proceedings in an action by the corporation were actually stayed, accompanied by evidence of his subsequent acting with authority in the matter, are admissible in evidence against the corporation. Carey v. Wolff & Co., 72 N. J. Law, 510, 63 A. 270. Where a business transaction was arranged by an agent whose action was afterwards ratified by his principal, conversations between the agent and the other party at the time, throwing light upon the intended contract, were admissible, regardless of the scope of the agent's original authority. Hamilton v. Schlitz Brewing Co., 129 Iowa, 172, 105 N. W. 438. On the issue of place of delivery of wood, the declaration of defendant's president, who made the contract with plaintiff, in plaintiff's presence, that plaintiff need not deliver on the right of way, and that it would be paid for where it was, was admissible against defendant. Ives v. Atlantic & N. C. R. Co. [N. C.] 55 S. E. 74 In action against corporation to enjoin use of certain easement for private purposes, declarations of corporation president, when purchasing a lot, with reference to an adjoining easement, were admissible. Marshall v. Columbia & E. C. Elec. St. R. Co., 73 S. C. 241, 53 S. E. 417. Acts of general manager of railroad shown to have been assented to by company were provable to show the extent of his authority. Arkansas S. W. R. Co. v. Dickinson [Ark.] 95 S. W. 802.

Admissions or declarations of an agent are inadmissible against the principal, unless made during the transaction of business for the principal, within the scope of the agency. Letter of insurance agents held not binding on company. Shoemaker v. Commercial Union Assur. Co. [Neb.] 106 N. W. 316. Where manager of branch bucket shop sought to recover money paid by him on speculation deals with his employer, memoranda given by his own clerk, who had no power to act for the manager's employer, were inadmissible, being outside the scope of the clerk's authority. McCarthy v. Meaney, 183 N. Y. 190, 76 N. E. 36. Declarations of county officials held incompetent to impeach county's title to certain lands. Lamar County v. Talley [Tex. Civ. App.] 94 S. W. 1069.

Mere admissions of liability by an agent are not usually competent against the principal. In action for injuries sustained in collision, admission by motorman that it was his fault was not competent to prove negligence of defendant. Robinson v. Old Colony St. R. Co., 189 Mass. 594, 76 N. E. 190. In action for death caused by breaking of a wheel on a machine, evidence that the manager, not shown to be an officer of or to have an interest in the defendant company, told plaintiff that he was sorry and did not feel clear, and would pay certain bills for her, was incompetent against defendant. Stecher Cooperage Works v. Steadman [Ark.] 94 S. W. 41. Admissions of liability made by a servant who is not a general agent, or while not engaged in the performance of his duty, are inadmissible against the master. McDonough v. Boston El. R. Co., 191 Mass. 509, 78 N. E. 141.

Contra: The admission of one who is held out as general sales manager for a company, of liability for compensation for a sale, is admissible against the company. Garfield v. Peerless Motor Car Co., 189 Mass. 395, 75 N. E. 695.

32. Testimony of village trustees at a coroner's inquest on the body of a person killed by contact with wires hanging in a street is not admissible in an action for the death to show notice of the dangerous condition on the part of the village authorities. Fox v. Manchester, 183 N. Y. 141, 75 N. E. 1116.

33. Declarations of agent, written and oral, inadmissible against principal without proof aliunde of agency. Fifer v. Clearfield & C. Coal & Coke Co. [Md.] 62 A. 1122. Agency cannot be proved by declarations or admissions of the alleged agent; there must be some other evidence of agency to make such declarations admissible. Eagle Iron Co. v. Baugh [Ala.] 41 So. 663. Acts or statements of one not shown to have authority to represent defendant in transaction inadmissible against him. St. Louis S. W. R. Co. v. Irvine [Tex. Civ. App.] 13 Tex. Ct. Rep. 822, 89 S. W. 428. Conversation of chairman of a city commission with foreman of electric plant inadmissible where chairman was not shown to be the agent of the commission or the city for settling claims for injuries. City of Austin v. Forbis [Tex.] 13 Tex. Ct. Rep. 818, 89 S. W. 405. Acts and declarations of a third person are inadmissible against a party unless such third person is shown to be the party's agent, and agency must be shown otherwise than by the person's declarations. Jackson v. American Tel. & T. Co., 139 N. C. 347, 51 S. E. 1015. Declarations of a person claimed to be the agent of another are not admissible to affect such other person, or show his connection with the transaction under discussion, without proof of the agency of the person making them. Indiana Fruit Co. v. Sandlin, 125 Ga. 222, 54 S. E. 65. There is no legal presumption that an officer of a corporation has power or authority to bind the corporation by his admissions. Admission by vice-president and director of bank excluded as against bank. Westminster Nat. Bank v. New England Electrical Works, 73 N. H. 465, 62 A. 971. Testimony of person that he was employed by a secretary of a corporation admissible where there was other proof that the person employing him was such secretary. Kelly v. Ning Yung Benev. Ass'n [Cal. App.] 84 P. 321.

34. Declarations of an agent are incompetent to prove the agency. Shesler v. Pat-

of the alleged agent. Extrajudicial admissions made by an attorney in the management of litigation, for the purpose of influencing the proceedings in the cause, are admissible against the party;[36] such an admission may be withdrawn before it is acted upon, but its withdrawal goes only to its weight, not to its competency, as evidence.[37]

Where several persons are jointly interested the admissions of one may be shown against all.[38] Otherwise, an admission may be proven only against the person making it, or one whom he represents.[39] It is said that the great weight of both reason and authority is against the admission of declarations of one legatee or devisee in will contests,[40] but there is a conflict upon this question.[41] After proof of a partnership,[42] the act or declaration of a partner within the scope of the partnership, and during its existence, is competent against the firm.[43] When the existence of a conspiracy has been prima facie established,[44] acts and declarations of conspirators, after formation of the conspiracy, and prior to its consummation, made during the execution of the common purpose, are admissible against all.[45] An act or declaration of a co-conspirator after the purpose of the conspiracy has been accomplished is inadmissible against another.[46] While the fact of a conspiracy cannot be proved by evidence of declarations of a co-conspirator,[47] this rule does not render incompetent testimony of one who admits that he was a conspirator, to the fact of the conspiracy, and to what was said and done in furtherance of the common object.[48]

An admission against interest is not admissible in evidence as such unless it is made upon the positive knowledge of the person making it.[49] If it appears from the statement itself that it is based upon information derived from another, it is hearsay and incompetent.[50] An admission or declaration of a party is of course inadmissible unless relevant to issues in the case.[51]

ton, 100 N. Y. S. 286. Declarations of a person that he is the agent of another are no proof of the fact of agency. Indiana Fruit Co. v. Sandlin, 125 Ga. 222, 54 S. E. 65. Declarations of salesman at time he took an order as to his authority held inadmissible against principal. Gould v. Cates Chair Co. [Ala.] 41 So. 675. Fact of agency or extent of authority cannot be shown by agent's statements or representations. Peyton v. Old Woolen Mills Co. [Ky.] 91 S. W. 719. When issue was whether a person acted for his wife in certain transactions, his statements in her absence were incompetent to show his agency for her. Id.

35. Peyton v. Old Woolen Mills Co. [Ky.] 91 S. W. 719.

36, 37. Liberty v. Haines [Me.] 64 A. 665.

38. Stamnes v. Milwaukee S. L. R. Co. [Wis.] 109 N. W. 100. Where parties are co-operating in a joint enterprise, the admissions of one are binding upon the others. Summerville v. Penn Drilling Co., 119 Ill. App. 152.

39. In suit against owner and mortgagee to condemn land, an option previously given by the owner alone to sell at a certain price was inadmissible. Stamnes v. Milwaukee & S. L. R. Co. [Wis.] 109 N. W. 100. Declarations of one defendant do not bind all in the absence of proof or admission that they are engaged in a joint enterprise. Whaples v. Fahys, 109 App. Div. 594, 96 N. Y. S. 323.

40. When mental capacity is in issue. In re Dolbeer's Estate [Cal.] 86 P. 695. In will contests, where there are several beneficiaries, the admissions against interest of one are inadmissible. Fothergill v. Fothergill, 129 Iowa, 93, 105 N. W. 377; King v. Gilson, 191 Mo. 307, 90 S. W. 367.

41. See authorities pro and con cited in In re Dolbeer's Estate [Cal.] 86 P. 695.

42. Conversation of two partners as to taking in a third, not in the presence of the third party, is incompetent. Providence Mach. Co. v. Browning, 72 S. C. 424, 52 S. E. 117.

43. Code Civ. Proc. § 1870, subd. 5. Dondero v. O'Hara [Cal. App.] 86 P. 985.

44. There must be prima facie proof of the existence of a conspiracy before declarations of one conspirator are admissible against others. Mower v. McCarthy [Vt.] 64 A. 578. To render competent acts and declarations of one conspirator against the others, there must first be sufficient proof to establish prima facie in the opinion of the court the existence of the conspiracy, or the person offering such proof must undertake to supply such preliminary evidence at a later stage of the trial. Lawrence v. State [Md.] 63 A. 96.

45. Lawrence v. State [Md.] 63 A. 96. After evidence of a conspiracy has been introduced, admissions of a conspirator are competent. Meier v. Buchter, 197 Mo. 68, 94 S. W. 883. Rule applied in will contest where conspiracy of contestees to defraud was alleged. Id.

46. Conversation as to whereabouts of stolen watch incompetent. State v. Wells [Mont.] 83 P. 476.

47, 48. People v. Zimmerman [Cal. App.] 84 P. 446.

Declarations against interest are admissible in their entirety,[52] and where a portion of such a declaration has been introduced by one party, the other may show the entire statement or document.[53] An alleged admission having been introduced by one party, the other may introduce evidence to explain it or destroy its effect.[54]

(§ 6) *D. Declarations of a person since deceased.*[55]—Declarations of a person relating to relevant facts are admissible, even as between third parties,[56] where it appears that the declarant is dead, that the declaration was against his pecuniary or proprietary interest, that he had competent knowledge of the fact declared, and that he had no probable motive to falsify.[57] In some jurisdictions, declarations of a person since deceased are admissible, even though not against the interest of the declarant,[58] but such declarations are not entitled to much weight.[59] By statute in Massachusetts, declarations of a person since deceased are competent if made in good faith, before commencement of the action, when the declarant, if living, would have been a competent witness.[60] Such declarations are not inadmissible, under the statute, because put in writing.[61] That declarations were made prior to the enactment of the statute does not render them incompetent.[62]

§ 7. *Documentary evidence. A. In general.*[63]—A written instrument upon

49. Maher v. Empire Life Ins. Co., 110 App. Div. 723, 96 N. Y. S. 496.

50. Statement in proofs of death as to age of insured, explicitly based on information given by insured's mother, held incompetent. Maher v. Empire Life Ins. Co., 110 App. Div. 723, 96 N. Y. S. 496.

51. Womble v. Wilbur [Cal. App.] 86 P. 916.

52. A declaration which is against interest is admissible in its entirety, though statements contained in it, which constitute an integral or substantial part of it, are not against interest. Smith v. Moore [N. C.] 55 S. E. 275. Held not error to require letters showing admissions to be read in their entirety. Bosler v. Coble [Wyo.] 84 P. 895.

53. Where part of an abandoned pleading was read in evidence, and this, if unexplained, would be misleading, the remainder of the pleading was competent. Galveston, etc., R. Co. v. Fitzpatrick [Tex. Civ. App.] 14 Tex. Ct. Rep. 790, 91 S. W. 355.

54. A plaintiff may testify that he did not make statements which would warrant certain allegations in the pleading drawn by his attorney. Galveston, etc., R. Co. v. Fitzpatrick [Tex. Civ. App.] 14 Tex. Ct. Rep. 790, 91 S. W. 355. Conversation between two defendants, relating to subject-matter of letter written by one of them and tending to explain a statement claimed by plaintiff to be an admission, held admissible, though not had in presence of plaintiff or his agent. Dennie v. Clark [Cal. App.] 87 P. 59.

55. See 5 C. L. 1342.

56. Smith v. Moore [N. C.] 55 S. E. 275.

57. Smith v. Moore [N. C.] 55 S. E. 275. Declarations of person as to location of a marked corner admissible when declarant was dead and disinterested and declarations were made ante litem motam. Bullard v. Hollingsworth, 140 N. C. 634, 53 S. E. 441. Declarations of person since deceased, who lived in vicinity of land, made when disinterested, as to the location of a corner marked by a pine tree, held competent. Broadwell v. Morgan [N. C.] 55 S. E. 340. Declarations of a deceased person as to boundaries held incompetent because proper preliminary showing as to knowledge of declarant, his interest at the time, etc., was not made. Hill v. Dalton, 140 N. C. 9, 52 S. E. 273.

58. Declarations of a surveyor who is deceased, he being shown to have been in a position to know the fact which the declaration concerns, is admissible, and such declaration may be expressed in field notes even in a junior survey. Keystone Mills Co. v. Peach River Lumber Co. [Tex. Civ. App.] 96 S. W. 64.

59. Subsequent declarations of a grantee that an absolute deed was intended as a mortgage, will be closely scrutinized after the death of the declarant and will not, without corroboration, be sufficient to overcome previous conduct of the parties. Wilson v. Terry [N. J. Eq.] 62 A. 310.

60. Mass. Rev. Laws, c. 175, § 66. Hall v. Reinherz [Mass.] 77 N. E. 880. Under Rev. Laws, c. 175, § 66, declarations of a former occupant of land, since deceased, who then claimed under a deed, were competent. Luce v. Parsons [Mass.] 77 N. E. 1032. Declarations of a person since deceased, at time boundary wall was being built between his and another's land, that "we will give and take," held admissible, being apparently made in good faith, before commencement of action. Gray v. Kelley, 190 Mass. 184, 76 N. E. 724. Declarations of decedent directing subordinates to do certain work of which he was in charge admissible. Putnam v. Harris [Mass.] 78 N. E. 747. Under Rev. Laws, c. 175, § 66, providing for the admission in evidence of declarations of deceased persons, cumulative evidence of such declarations may be introduced. Weeks v. Boston El. R. Co., 190 Mass. 563, 77 N. E. 654.

61. Written statement by girl seduced admitted, after her death, in civil action by her foster parent for her seduction. Hall v. Reinherz [Mass.] 77 N. E. 880.

62. Hall v. Reinherz [Mass.] 77 N. E. 880.

which the action is based,[64] or any private writing the contents of which are relevant and material,[65] is admissible in evidence when the proper foundation has been laid by due and sufficient proof of its authenticity[66] and proper execution.[67] The

63. See 5 C. L. 1342.

64. Written building contract admissible in evidence when sued on and pleaded by either party. Neblett v. McGraw [Tex. Civ. App.] 14 Tex. Ct. Rep. 496, 91 S. W. 309. A written order sued upon, and not denied by a plea of non est factum, is admissible without other proof of its execution. Fulton v. Sword Medicine Co. [Ala.] 40 So. 393. Under Code 1896 § 1801, providing that an instrument which is the foundation of the suit, the execution of which is not denied by verified plea, is admissible, a note sued upon may be admitted though not proved by attesting witness, when its execution is not denied. Gates v. Morton Hardware Co. [Ala.] 40 So. 509. Where the party producing an instrument is a party to it or claims under it, the production of it dispenses with proof of its execution. Maffi v. Stephens [Tex. Civ. App.] 15 Tex. Ct. Rep. 140, 93 S. W. 158.

65. Letter between parties relating to and explaining a transaction, and constituting part of a correspondence concerning such matter, held admissible. Frame v. Oregon Liquor Co. [Or.] 85 P. 1009. Bucket shop operator telegraphed orders to main office and, when accepted, gave customers a memorandum of the deal. Held, such memorandum, being evidence of the contract or wager, was admissible in an action under the statute to recover money paid on a wager. McCarthy v. Meaney, 183 N. Y. 190, 76 N. E. 36. Letters by one party to the other are admissible regardless of how received. North American Acc. Ins. Co. v. Williamson, 118 Ill. App. 670.

66. Contract resulting from correspondence, and shown to have been acted upon by the parties and recognized, held sufficiently authenticated so as to be admissible in evidence. Richards v. Herald Shoe Co. [Ala.] 39 So. 615. Letter to sales agent purporting to come from defendant company held admissible on proof that it was written by sales manager, who signed name of company. Garfield v. Peerless Motor Car Co., 189 Mass. 395, 75 N. E. 695. Field notes in handwriting of county surveyor, contained in book handed down by predecessors in office, and apparently genuine, held admissible on issue of boundaries. Camp v. League [Tex. Civ. App.] 92 S. W. 1062. Where there was proof that many letters passed between two parties, and a letter was found in the room of one, in the handwriting of the other, it was properly admitted in evidence. Purinton v. Purinton [Me.] 63 A. 925. Where it was shown, in an action against "W. J. Hayes & Sons" that telegrams relating to a certain matter had been received signed "W. J. H. & Sons," a telegram so signed and relating to such matter was properly received. Interurban Const. Co. v. Hayes, 191 Mo. 248, 89 S. W. 927. Where witness said he knew handwriting of parties to lease and transfer written on the back of it, and that the signatures were in the handwriting of the persons who appeared to have signed, the paper was admissible, the transfer being acknowledged. Rutherford v. Dyer [Ala.] 40 So. 974. Dray receipts not objectionable on ground that execution was not shown, where it appeared they were executed by a witness. Houston & T. C. R. Co. v. Bath [Tex. Civ. App.] 14 Tex. Ct. Rep. 117, 90 S. W. 55. On issue of character and worth of paper purporting to be certificate of trust company, police officer having testified to seizure of certificates and certificate book of the concern, the book and certificates were admissible to identify the certificate in question. Lawrence v. State [Md.] 63 A. 96. In garnishment proceedings, where garnishees claimed they did not buy certain property of the principal defendants, a memorandum made under the direction of and read and approved by defendant's agent who negotiated the sale, and given to the garnishees, was admissible in evidence. Seitz v. Starks [Mich.] 13 Det. Leg. N. 377, 108 N. W. 354. Notes **not admissible** to show indebtedness of mining company when authority for their execution was not shown. Nixon v. Goodwin [Cal. App.] 85 P. 169. A paper writing is not admissible in evidence, where its execution is denied by the answer, and no evidence is offered tending to show that it was ever in fact signed by the parties whose names appear as the subscribing witnesses. Bunner v. Ison, 8 Ohio C. C. (N. S.) 260. The fact that a paper writing bears date forty years prior to the time it is offered in evidence does not, standing alone, bring it within the rule as to ancient instruments. Id. Without evidence of an adjudication of bankruptcy or the appointment of a trustee, a letter purporting to have been written by a trustee was inadmissible. Killer v. Faickney [Tex. Civ. App.] 15 Tex. Ct. Rep. 541, 94 S. W. 103. In order that a receipt may be admissible in evidence, the authority of the signer must be shown. Brinn v. Levine, 97 N. Y. S. 966. Indorsements on mortgage properly excluded where mortgage note was not introduced and signatures of indorsers were not proven. Hodge v. Hudson, 139 N. C. 358, 51 S. E. 954. An unsigned writing—purporting to be a memorandum of contract drawn up by an agent—but not shown to have been submitted to the parties or to embody the terms to which they agreed is inadmissible. Wood v. Holah [Conn.] 64 A. 220. A freight receipt to which the name of a railway agent appears to have been signed by stencil is not admissible in evidence without accompanying proof to show that he issued the receipt, or that its genuineness has been recognized by his principal. Bell Bros. v. Western & A. R. Co., 125 Ga. 510, 54 S. E. 532. Letter written by auditor of the state to a patentee whose name did not appear in the land book entries nearly 40 years before trial transmitting to him a certificate of redemption from a sale made under such entries is not admissible to prove identity of the land, though found among the papers and effects of such patentee, long after his death, and produced, for the purpose, by his grandson, one of

genuineness of a letter is sufficiently established to permit its introduction in evidence, when it is shown that it was received in due course of mail in response to a letter sent to the supposed writer.[68] Where a letter desired to be introduced is a reply to another, the two should be offered together.[69] Where the execution of a written instrument or paper is denied under oath, the party relying thereon must in the first instance introduce in chief all of his evidence tending to prove its execution.[70] The execution of a deed properly acknowledged by a married woman and joined in by the husband may be proved in any manner known to the law.[71] A deed is not inadmissible on account of insufficiency of the description unless the description is so vague, indefinite, and uncertain as to render the deed void on its face.[72] If the description is such that the land can be identified and located the deed is admissible.[73] The rule requiring proof by attesting witnesses of a specialty is not applicable to a bail bond required to be attested by a justice of the peace and lacking his signature.[74] An ancient record or document if it comes from a custody which the court deems proper, and is itself free from any indication of fraud or invalidity, proves itself.[75] Recitals in ancient deeds are competent evidence of the facts recited.[76]

the plaintiffs. Webb v. Ritter [W. Va.] 54 S. E. 484. Contract specifications inadmissible because not identified. Streator Independent Tel. Co. v. Continental Tel. Construction Co., 118 Ill. App. 14.

67. Under Code 1896, § 1797, execution of an instrument may be proved by the maker, without producing an attesting witness; but this does not permit proof of execution by evidence of an admission of the maker. Lewis v. Glass [Ala.] 39 So. 771. Where there is an attesting witness to an instrument its execution must be proved by such witness, unless he is without the jurisdiction of the court, in which case it may be otherwise proved. Code 1896, § 992. Id. Where execution of a note is denied by a plea of non est factum, the note is inadmissible without extrinsic proof of its execution, but slight proof is sufficient. Patton v. Bank of La Fayette, 124 Ga. 965, 53 S. E. 664. The sufficiency of such preliminary proof is for the court. Id. Acknowledgment held to have been taken by notary and deed was admissible. Williams v. Cessna [Tex. Civ. App.] 16 Tex. Ct. Rep. 162, 95 S. W. 1106. Affidavit of forgery being filed against an agreement by a grantee to reconvey, it was shown that the grantee, subscribing witness, and notary were dead; that agreement was in handwriting of a subscribing witness, and that grantee's signature was in handwriting of another witness; that signatures of subscribing witnesses were genuine, and that they had a good standing in the community. Held, instrument was proved as was required at common law, and such proof was sufficient. McAllen v. Raphael [Tex. Civ. App.] 96 S. W. 760. A deed the execution of which is not proved otherwise than by a certificate of acknowledgment, reciting that it was acknowledged by the grantor before his deputy, as such deputy, and signed by the grantor himself, as clerk of a county court, is inadmissible as evidence. Webb v. Ritter [W. Va.] 54 S. E. 484. A deed execution of which is not proved otherwise than by a certificate of acknowledgment, signed by the grantee as clerk of a county court, is properly rejected when offered as evidence. Id. A deed purporting to convey land in West Virginia, acknowledged in 1872 in New York city before a commissioner for the commonwealth of Virginia in the state of New York, recorded in West Virginia and in the county where the land lies, and reacknowledged before a competent officer in the state after commencement of the action, is admissible between the parties and against all other persons except subsequent purchasers claiming the land and creditors seeking to charge it. Id.

68. Loverin & Browne Co. v. Bumgarner [W. Va.] 52 S. E. 1000. A sufficient foundation is laid for the introduction of letters of a principal to show an agent's authority, when it is shown that such letters were received in due course of mail in answer to letters written by the agent to the principal, and duly mailed to the address of the party sought to be bound. Peycke v. Shinn [Neb.] 107 N. W. 386.

69. Security Trust Co. v. Robb [C. C. A.] 142 F. 78.

70. He cannot introduce prima facie proof, and then put in instruments, and when attacked, put in additional proof of their execution; burden to show execution is on him throughout. Baum v. Palmer, 165 Ind. 513, 76 N. E. 108.

71. Proof as at common law is proper. Lamberida v. Barnum [Tex. Civ. App.] 14 Tex. Ct. Rep. 434, 90 S. W. 698.

72, 73. Walker v. Lee [Fla.] 40 So. 881.

74. He may testify to the signatures of the parties. State v. Matlack [Del.] 64 A. 259.

75. Rule applied to church records shown to have been kept by clerk of the corporation. Layton v. Kraft, 98 N. Y. S. 72. Deed conveying land in Texas, executed in 1836, admissible as ancient instrument. Hyde v. McFaddin [C. C. A.] 140 F. 433. Documents showing probate of will in proceedings had under Spanish regime in Florida, and a judicial sale of testator's lands, bearing every sign of age and authenticity, and coming from the official custody of the surveyor

Standard mortality tables are competent when life expectancy is in issue.[77] Hospital records are incompetent without proof of their correctness and the manner in which they were made.[78]

Proof of handwriting[79] may be necessary when the genuineness of a signature or other writing is in issue.[80] Generally, it is held that any writing admitted or proved to be genuine is competent as a standard for comparison with the disputed writing.[81] Some courts, however, hold that only writings which are introduced for some other purpose are competent as standards of comparison.[82] That a signature offered in evidence as a standard of comparison was made since the time of the signature in dispute may, under certain circumstances, be considered as affecting its credibility;[83] but such fact will not render it incompetent unless it is shown to have been made since the controversy arose, for the purpose of comparison, by one having a motive to fabricate.[84] Comparison of writings may be made by experts,

general of the United States, held admissible as ancient documents, especially since they had been recognized in subsequent legal proceedings and conveyances. McGuire v. Blount, 199 U. S. 142, 50 Law. Ed. —. A deed more than 30 years old is ancient and proves itself. Ford v. Ford, 27 App. D. C. 401.

76. Recitals in ancient deed, against the interest of the parties making them, are competent evidence of the facts recited. Sydnor v. Tex. Sav. & Real Estate Inv. Ass'n [Tex. Civ. App.] 15 Tex. Ct. Rep. 100, 94 S. W. 451. Recitals in an admissible deed, referring to descriptions in other deeds, held admissible with the deed. Id. Recitals of a power under which an ancient deed purports to have been executed are evidence of the existence of the power. Id. Where ancient deed recited sale by probate court in 1845, when confirmation was not required, the recital was held sufficient proof that the sale was under order of the court. Williams v. Cessna [Tex. Civ. App.] 16 Tex. Ct. Rep. 162, 95 S. W. 1106.

77. Standard mortality tables competent in action for death. Norfolk & W. R. Co. v. Spencer's Adm'x, 104 Va. 657, 52 S. E. 310. Mortality tables competent in actions for wrongful death. Illinois Cent. R. Co. v. Cane's Adm'x [Ky.] 90 S. W 1061. Expectancy table admissible in action for damages for breaking boy's leg. McMahon v. Bangs [Del. Super.] 62 A. 1098. American mortality tables competent on life expectancy. Illinois Cent. R. Co. v. Houchins [Ky.] 89 S. W. 530. Carlisle mortality tables competent where injuries were shown to be permanent. Brown v. Blaine, 41 Wash. 287, 83 P. 310. The mortality tables are admissible on the question of the value of a life estate without proof that the life tenant is in sound health. Cusick v. Boyne, 1 Cal. App. 643, 82 P. 985. Where there was evidence that plaintiff's injuries were permanent, Carlisle tables were admissible, though declaration did not allege that injuries were permanent. O'Clair v. Rhode Island Co., 27 R. I. 448, 63 A. 238.

78. Hospital record made by nurse since dismissed, and who did not appear in court, held inadmissible. McMahon v. Bangs [Del. Super.] 62 A. 1098. Hospital record inadmissible when it showed additions and alterations not made by hospital physicians and not otherwise accounted for. Franklin v. Atlanta & C. Air Line R. Co. [S. C.] 54 S. E. 578.

79. See 5 C. L. 1345. See, also, note in 3 C. L. 1377.

80. Mere proof that it was customary to require men to sign a time book before being paid, that a certain book was the time book of the company, and that it contained certain signatures the making of which witness did not see, held not sufficient proof of the signatures. Matks v. Daley [Ariz.] 85 P. 721.

81. Where disputed writing was 70 years old, it was competent to prove it by comparison with other admittedly genuine writings. McCreary v. Coggeshall [S. C.] 53 S. E. 978. Where one whose signatures is in dispute seeks to compare other signature made by him with the signature in controversy it must appear that they were made prior to the time the controversy arose or, if made thereafter, that they were made under such circumstances as to negative all idea that they were made for the purpose of being used by him as evidence in his own favor. In action on partnership notes, the signature to the affidavit of defense of the only defendant served could not be compared with the firm's signatures to the notes. Daniel v. Lance, 29 Pa. Super. Ct. 454. It is said that the authorities are conflicting as to the use of **photographic reproductions of signatures** as a basis for comparison by experts, but the court here intimates, though it does not decide, that such reproductions are competent for that purpose. Their use in this case was held not prejudicial, if error. In re McClellan's Estate [S. D.] 107 N. W. 681.

82. Certain court records containing signatures admittedly genuine, and introduced as evidence in the case, held to be proper standards for comparison with disputed writings. Bivings v. Gosnell [N. C.] 53 S. E. 861. When the genuineness of a writing or signature is disputed, extraneous writings, though admitted to be genuine, cannot be presented to the court or jury, or to an expert for comparison. Hence, where letters were not in evidence, and not even shown to be genuine, it was proper to refuse to allow comparison between them and a disputed signature to a check, claim-

in some states, when they are shown to be qualified as such.[85] Where a paper admitted to be in a party's handwriting is already in evidence for some other purpose, a comparison between it and a disputed writing may be made by the jury,[86] without preliminary proof of the genuineness of the disputed paper by a witness thereto,[87] and without the aid of expert testimony on the issue of the genuineness of the writing in dispute.[88]

(§ 7) *B. Books of account.*[89]—Where books of account are shown to have been regularly kept,[90] original entries therein, made in the usual course of business, at or near the time of the transaction to which they relate,[91] and shown to be true and correct,[92] are competent evidence of the facts to which they relate,[93] either for[94]

ed to be forged. Bolton v. State [Ala.] 40 So. 409.

83, 84. Greenwald v. Ford [S. D.] 109 N. W. 516.

85. Witness not shown to be qualified as an expert cannot compare writings to determine genuineness of disputed signature. Bivings v. Gosnell [N. C.] 53 S. E. 861. Cashier who had been in a bank 15 years and had seen many signatures of the alleged maker of a note, held competent to compare admitted signatures with that on a note and give an opinion thereon, such comparison being authorized by Code Pub. Gen. Laws, art. 35, § 7. Councilman v. Towson Nat. Bank [Md.] 64 A. 358. Where experts were called to prove handwriting in anonymous letters by comparison with certain standards produced, and they testified that the anonymous letters were in disguised writing, it was proper to show that disguised writings show certain characteristics of the writer, shown also in his usual hand, so that the identity of the writer may be disclosed. McGarry v. Healey, 78 Conn. 365, 62 A. 671. That a witness, subpoenaed to testify to the genuineness of a signature, is shown signatures before the trial and induced to change his mind, does not render his testimony to the nongenuineness of the signature incompetent. Ray v. Hunter, 122 Ill. App. 466.

86. Plaintiff introduced a written assignment by a party; defendant put in a release by the same party, the genuineness of which was denied; jury could make comparison. Castor v. Bernstein [Cal. App.] 84 P. 244. This is the rule under Code Civ. Proc. § 1944, and also by reason of an exception to the common-law rule that comparison of writings could not be made by the court or jury. Id.

87. Castor v. Bernstein [Cal. App.] 84 P. 244.

88. Since expert testimony, if introduced, would not be binding on the jury. Castor v. Bernstein [Cal. App.] 84 P. 244.

89. See 5 C. L. 1346.

90. The law prescribes no regular mode or method in which accounts must be kept to make them competent as evidence. The question of competency must be decided by the appearance and character of the book, regard being had to the degree of education of the party, the nature of his business, the manner of his charges against others, and all the circumstances. Lewis v. England [Wyo.] 82 P. 869. When books of account are introduced, the custom in keeping the accounts and the time of the entries may be shown. Mullenary v. Burton [Cal. App.] 84 P. 159. Where it appeared that each laborer was required to make out a time slip for work done each day, which was handed to the foreman and approved by him, such slips, so approved, were competent evidence, as against an objection that they were not properly identified. Jonesboro, etc., R. Co. v. United Iron Works Co., 117 Mo. App. 153, 94 S. W. 726.

91. Where entries were made each day in the regular course of business, as sales were made, the entries were competent. Bader v. Schult & Co., 118 Mo. App. 22, 94 S. W. 834. Books of physician, showing entry made by physician at the time of attending mother at birth of a child, held competent to show such birth. Neill v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 359, 91 S. W. 791. Books of account, started by a parent when he commenced to advance money to his children, held competent to show amount given and purposes of the gift. Hill's Guardian v. Hill [Ky.] 92 S. W. 924. "Ledger slips," containing entries from "day slips," were shown also to contain original entries concerning certain money transactions, which were made regularly from time to time under direction of the proprietor. Such original entries in the ledger slips were competent. Lewis v. England [Wyo.] 82 P. 869. On issue whether purchase and sale of cotton were bona fide sales or mere deals in margins, telegrams sent by plaintiff to its agent over a leased wire, transmitting defendant's orders for execution and taken down at the time by the agent, were original memoranda made at the time, and competent evidence. Overbeck, Starr & Cooke Co. v. Roberts [Or.] 87 P. 158. An entry or memorandum in a book, or in any other form, made in the usual course of business at the time of the transaction, by a person legitimately connected with such transaction, not a party to the suit, but who is shown to have had means of knowledge of the fact recorded and no interest in misrepresenting or misstating the facts, is admissible in evidence. Fruit Dispatch Co. v. Sturges, 7 Ohio C. C. (N. S.) 445.

92. Physician's account book held inadmissible because it was not proved by the physician that the entries were just and true, as required by Mills' Ann. St. § 4817. Temple v. Magruder [Colo.] 85 P. 832. Book entries inadmissible upon mere proof that they were in handwriting of an agent, without proof as to how and when they were made and whether they were correct. Missouri, etc., R. Co. v. Morrison [Tex. Civ.

or against[95] the person who kept the book or made the entries. Secondary entries are usually held incompetent unless supported by the original data from which they were made up,[96] but entries regularly and correctly made are not necessarily inadmissible merely because based on information given by others to the person making such entries.[97] The train sheet or register of a train dispatcher, made up by him from orders sent by him and reports received by him, is competent evidence.[98] There are authorities which hold that books of account are not competent evidence of the payment or lending of money;[99] but it is said that the great weight of modern authority is to the effect that where cash entries appear in the general course of accounts, as a part of the regular course of business transacted, such entries are competent.[1] Where entries in a book of accounts do not itemize the transactions record-

App.] 15 Tex. Ct. Rep. 829, 94 S. W. 173. Books of account were properly excluded where the preliminary proof consisted only in evidence of a bookkeeper that he had examined the books, that they were the books in question, there being no showing as to the handwriting, nor as to the entries in the books. Charleston Sav. Inst. v. Farmers' & Merchants' Bank, 73 S. C. 545, 54 S. E. 216. Book entries and exhibits properly excluded where there was no compliance with Rev. St. 1898, § 4139, requiring proof by the person who made the entries, or by the custodian of the books (who testifies that entries were made by authorized person, in whose handwriting they are) that they are true and correct to the best of his knowledge and belief. Bazelon v. Lyon [Wis.] 107 N. W. 337. Journal and ledger held inadmissible because entries were not shown to have been made in the ordinary course of business nor at the time of or near the transactions to which they referred and no satisfactory excuse for lack of such proof given, and charges were not verified by clerk who made the entries, and no reason for such omission was given, these things being required by Code § 4623. Kossuth County State Bank v. Richardson [Iowa] 106 N. W. 923. Where entry in a book of account was shown to the person charged and he admitted it, proof of these facts rendered the entry competent. Britian v. Fender, 116 Mo. App. 93, 92 S. W. 179.

93. Books of a bank held admissible on issue of insolvency to show amount of indebtedness to it of the alleged insolvent company. Brown v. U. S. [C. C. A.] 142 F. 1. Where entries do not relate to the subject of inquiry, they may be excluded. Drumm-Flato Commission Co. v. Edmisson [Okl.] 87 P. 311.

94. In action for services of attorney since deceased, it was held not error to allow his diaries to be introduced to show the services rendered. Burke v. Baker, 97 N. Y. S. 768. Books of original entry are admissible though made up by the agent who represented in the transaction in issue the party offering them as evidence. Books of commission company admissible to show weight of cattle in action by shipper, though he was represented by the company whose books were offered. Wright v. Chicago, etc., R. Co., 118 Mo. App. 392, 94 S. W. 555.

95. Merchants' books are good evidence against them. Civ. Code art. 2248. Hill v. Hill, 115 La. 489, 39 So. 503.

96. Where weights were first entered on check stubs and then on memorandum books, the latter were inadmissible without accounting for the stubs. San Antonio & A. P. R. Co. v. Turner [Tex. Civ. App.] 15 Tex. Ct. Rep. 457, 94 S. W. 214. Where saloonkeeper kept "day slips" on which his employees entered charges in the course of the business, a slip being used for each day, and entered the charges on "ledger slips" from time to time, each slip containing charges against the person named, with date and amount, the ledger slips, while inadmissible so far as the secondary entries were concerned, were competent in connection with the day slips to explain charges on the latter. Lewis v. England [Wyo.] 82 P. 869.

97. Books of commission company showing weight of cattle, entries being made up from "scale tickets" made when cattle were received according to the custom of such agents, are competent. Wright v. Chicago, etc., R. Co., 118 Mo. App. 392, 94 S. W. 555. Where bookkeeper had nothing to do with weighing and handling cattle, the weights being called out to him by the weigher, and being reduced to writing, and then placed on the books by him, the book entries, testified to by the bookkeeper as correct and kept in regular course of business, were competent. International G. N. R. Co. v. Startz [Tex. Civ. App.] 15 Tex. Ct. Rep. 384, 94 S. W. 207. Telegraph operator testified that service marks on a telegram were in his handwriting and that they indicated that the telegram had been sent and received. He said he did not send the message but must have known at the time he placed the service marks on it that it had been sent. Held such marks were admissible in connection with his testimony to show that the telegram was sent. St. Louis S. W. R. Co. v. White Sewing Mach. Co. [Ark.] 93 S. W. 58.

98. Under rule admitting properly kept books of account. Louisville & N. R. Co. v. Daniel [Ky.] 91 S. W. 691. Train sheets held competent on issue of time of departure of two trains from a certain city. Louisville, etc., R. Co. v. Hall [Ky.] 94 S. W. 26.

99. See authorities cited in Lewis v. England [Wyo.] 82 P. 869.

1. Certain "ledger slips" held competent to prove cash entries (loans) where such entries were original and were regularly made. Lewis v. England [Wyo.] 82 P. 869.

ed; but in fact comprise the details of several transactions, the book is inadmissible as independent evidence.[2] A book of accounts offered in toto, without limiting the offer to proof of a particular account or item therein, is properly excluded.[3] Books of account having been introduced, evidence tending to discredit them is also admissible.[4]

Corporate records.[5]—Corporate records, or the records of unincorporated societies, are competent evidence of the internal affairs of the corporation or society;[6] but entries in the account books or other records of a corporation are not admissible in evidence against a party to prove that he is a stockholder in the corporation, unless accompanied by proof of authorization, assent, knowledge, and acquiescence or other confirmatory conduct, making the party privy to the entries.[7] Admissions of a party against his interest, inscribed upon the books of a corporation, are, however, as competent and persuasive evidence against him as though written elsewhere.[8] Private records of a private corporation are inadmissible.[9] In New York, stock transfer books of a corporation are competent evidence.[10]

(§ 7) *C. Public and judicial records and documents.*[11]—Public records, required or authorized by law to be kept,[12] and public official documents,[13] are competent evidence of the facts recited. Instruments so executed as to be entitled to recordation,[14] under a statute providing therefor, are provable by the record or duly

Held incompetent: An entry in a book of accounts, charging defendant with a note, unconnected with other transactions, which were sales made by merchant to customer, and unexplained and not proved to have been made in usual course of business, held incompetent. Bader v. Ferguson, 118 Mo. App. 34, 94 S. W. 836.

2. Putnam v. Grant [Me.] 63 A. 816.

3. Armour Packing Co. v. Vietch-Young Produce Co. [Ala.] 39 So. 680.

4. Seiber v. Johnson Mercantile Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 293, 90 S. W. 516.

5. See 5 C. L. 1348.

6. Corporate books are competent evidence to show that all the corporate stock has been subscribed. State v. Superior Ct. [Wash.] 87 P. 40. Records of unincorporated religious society, empowered to acquire land, are competent evidence to show organization and vote taken on question of purchase of land and erection of building thereon. First Baptist Church of Sharon v. Harper, 191 Mass. 196, 77 N. E. 778.

7. Girard Life Ins. Annuity & Trust Co. v. Loving, 71 Kan. 558, 81 P. 200. Books and records of a private corporation are not competent evidence against third persons, in the absence of proof of their knowledge and assent to them, to establish their relation of stockholders to the corporation or to prove other contracts between them and it. Harrison v. Remington Paper Co. [C. C. A.] 140 F. 385.

8. Harrison v. Remington Paper Co. [C. C. A.] 140 F. 385.

9. Private interchange records of carrier held inadmissible. Wooten v. Mobile & O. R. Co. [Miss.] 42 So. 131.

10. In New York, stock transfer books of corporations are made competent evidence by Laws 1875, p. 759, c. 611, § 17. Where the original transfer book of a company was lost, a book in which returned certificates had been pasted, which were indorsed by the president as having been assigned to him, was held not a stock transfer book within the meaning of the statute. Geneva Mineral Spring Co. v. Steele, 97 N. Y. S. 996.

11. See 5 C. L. 1349.

12. Under Laws 1893, ch. 661, p. 1495, § 22, providing that certificates of death shall be presumptive evidence of the facts recited, such certificates were held admissible in an action on a policy of insurance to show cause of death. Krapp v. Metropolitan Life Ins. Co. [Mich.] 12 Det. Leg. N. 1032, 106 N. W. 1107. Daily register of school teacher showing names, ages, and dates of entrance of pupils, kept as required by Rev. St. 1899, § 9800, held competent on the age of a pupil who attended the school. Levels v. St. Louis, etc., R. Co., 196 Mo. 606, 94 S. W. 275. School enumeration lists shown to have been made in accordance with statute, held competent on age of child, but others, not properly made up, excluded. Id. "Miscellaneous record" of county showing a "binding out" of an inmate of a poor house to a person, purporting to be signed by supervisors, held incompetent, in the absence of proof of a statute showing authority for recordation of such instruments. In re Jones' Estate [Iowa] 106 N. W. 610.

13. Under Ky. St. 1903, § 2725, a certified copy of the report of a mine inspector is admissible to show defects in a mine, and is prima facie proof of the truth of its recitals. Andricus' Adm'r v. Pineville Coal Co. [Ky.] 90 S. W. 233. Certificate of election officers whose duty it is to canvass the votes is admissible in evidence and makes a prima facie case, subject to be overthrown by production of the ballots. Fleener v. Johnson [Ind. App.] 77 N. E. 366. Report of government inspector of hogs at place of destination of hogs shipped, showing their condition, proved correct by the inspector, held competent in action for damages by shipper. Illinois Cent. R. Co. v. Holt [Ky.] 92 S. W. 540.

authenticated copies thereof.[15] Records of courts,[16] of legislative bodies,[17] and of administrative or executive branches of the government,[18] are competent. Since

14. A police magistrate of New York City has no power to take acknowledgments of instruments such as will entitle them to record, and hence an instrument so acknowledged is inadmissible under Code Civ. Proc. § 937. Tully v. Lewitz, 98 N. Y. S. 829. A copy of the registry of a deed having only one witness is incompetent, such a deed not being entitled to registration. Civ. Code 1895, § 3630. Bower v. Cohen [Ga.] 54 S. E. 918. Record of deed or contract of sale recorded in 1879 in proper place and order, by a clerk shown to be competent and honest, admissible though the instrument was not proved for record. Veatch v. Gray [Tex. Civ. App.] 14 Tex. Ct. Rep. 316, 91 S. W. 324.

15. Under Rev. Code Civ. Proc. § 533, a certified copy of an acknowledged and duly recorded mortgage is admissible in evidence without further proof. Bruce v. Wanzer [S. D.] 105 N. W. 282. Under Ball. Ann. Codes & St. § 6046, certified copy of duly recorded deed is prima facie evidence of the genuineness of the original, and is admissible without preliminary proof of the original. Chrast v. O'Connor, 41 Wash. 360, 83 P. 238. Copy of recorded deed showing signature of "Fannie C." as wife of grantor, though Frances C. was her true name, held admissible without proof of identity of "Fannie C." and Frances C. Id. Copies of the record of deeds and other similar private writings made in a sister state are admissible in evidence where properly certified and authenticated as provided by the act of Congress. Rev. St. U. S. § 906. Wilcox v. Bergman, 96 Minn. 219, 104 N. W. 955. But they will be given such force and effect only as is given thereto by the law of the state from which they are taken, and it must appear that the record was one which was authorized and provided for by the statutes of that state. Id. Where it was sought to prove a deed by a certified copy of it, which certified copy was asserted to be spurious and not sealed with the seal used by the clerk of court, instruments shown to bear the genuine seal of the court were admissible to permit comparison and it was also permissible to allow a witness who had examined a number of documents bearing the seal to so testify, and that they were different from that attached to the certified copy. Loring v. Jackson [Tex. Civ. App.] 95 S. W. 19.

16. Where deputy sheriff testified that a writ of attachment was issued out of the circuit court and that he seized goods under it, the writ was sufficiently authenticated to be admissible in evidence. Ryan v. Young [Ala.] 41 So. 954. A bond taken in proceedings before a magistrate to secure support of a family by one who has abandoned it, must be shown to have come from the proper custody, the magistrate's court, to render it admissible, and proof that it came from the files of the commissioner of public charities would not render it competent. Tully v. Lewitz, 98 N. Y. S. 829. Record of judgment, valid on its face, and establishing defendant's liability, admissible in action on bond to pay judgment. Hosie v. Hart, 141 Mich. 679, 12 Det. Leg. N. 596, 105 N. W. 32. The introduction in evidence of original papers from the courts of Baltimore City is regulated by Acts 1898, p. 410, c. 123, § 388, and where parties and subject-matter of suit are identified, such evidence need not be accompanied by transcript under seal of docket entries. Calvert Bank v. Katz & Co., 102 Md. 56, 61 A. 411. Certified copy of docket entries of Massachusetts bankruptcy court held inadmissible, the entries not constituting a record but only minutes from which to make a record. Gibson v. Holmes, 78 Vt. 110, 62 A. 11. A judicial opinion is not a part of the records in a case, and statements therein are not competent evidence unless the judgment refers to the opinion so as to make it part of the record. Greitzer v. Ershowsky, 47 Misc. 653, 94 N. Y. S. 258. But the opinion of the court of last resort of another state may be received in evidence to show the construction of a statute of that state. Beckley v. U. S. Sav. & Loan Co. [Ala.] 40 So. 655. A sheriff's deed is admissible in evidence as a muniment of title when accompanied by the execution under which the land was sold. Patterson v. Drake [Ga.] 55 S. E. 175.

17. Contents of journal of city charter convention cannot be received in evidence, when not authorized to be so received by law or the constitution. People v. Lindsley [Colo.] 86 P. 352.

18. Transcript of books and proceedings of treasury department, certified and authenticated by the register of the treasury, held competent in action on bond of Indian agent under U. S. Rev. St. § 866. United States v. Pierson [C. C. A.] 145 F. 814. Rev. St. U. S. § 886, which makes competent in a suit against an officer, charged with the disbursement of money, a certified copy of his account, from the books of his department, does not render competent other statements contained in the certificate. Nagle v. U. S. [C. C. A.] 145 F. 302. Certificate of postmaster's account incompetent in so far as it showed a charge on account of money paid "for which no service was rendered." Id. By Laws 1906, c. 240, the printed copies are the original journals of the senate and assembly, and such copies, or copies thereof, are competent evidence, when certified by the respective clerks of the senate or assembly. In re Stickney's Estate [N. Y.] 77 N. E. 993. Rev. St. 1895, art. 2308, making certified copies of records of land office competent evidence, does not make competent a certified copy of a letter received by the office and placed on file without proof that the letter was written by the purported writer. Flynt v. Taylor [Tex. Civ. App.] 14 Tex. Ct. Rep. 648, 91 S. W. 864. Resolutions of state board of agriculture, certified under hand of secretary, with seal of the department affixed, held authenticated as required by Revisal 1905, §§ 1616, 1617, and admissible. State v. Southern R. Co. [N. C.] 54 S. E. 294. Regulations of the Federal government are not, as applied in the states, foreign laws, within the meaning of Revisal 1905, § 1594, providing a mode of proof

it is impracticable to produce the originals, public records are almost universally provable by copy or transcript, which must be authenticated as required by statute.[19] Foreign statutes must be authenticated in the manner provided by law.[20] The law of a foreign country cannot be proved by an alleged copy of a portion of a written law, without evidence by lawyers of the country to show the construction placed thereon by the courts.[21] Printed statutes of another state purporting to be published under authority of the state, are competent;[22] and pamphlets or books containing municipal ordinances, purporting to have been published by authority of the municipality are competent evidence of the ordinances.[23] Usually a record should be introduced as a whole,[24] unless portions of it are clearly shown to be irrelevant.[25]

of such laws. Id. Printed pamphlet, headed "United States Department of Agriculture * * * Regulations Concerning Cattle Transportation," but not otherwise purporting to be issued by the department, and not certified or authenticated in any way, held inadmissible. Id. Certified copies of record of proceedings to incorporate city held inadmissible without preliminary proof of filing of record and giving of notice as required by Rev. Civ. St. 1897, art. 2312. Lamar v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 392, 95 S. W. 509. Certified copy of letter on file in land commissioner's office competent under Rev. St. 1895, art. 4218p, and arts. 2306 and 2308. Trimble v. Burroughs [Tex. Civ. App.] 14 Tex. Ct. Rep. 753, 95 S. W. 614. Notice from land office to state treasurer of cancellation of lease of school land, not being a part of the records of the treasurer's office, is not provable by certified copy though the copy retained in the land office would be a part of the records of that office. Id. Certificate of land commissioner as to certain facts shown by his records held competent evidence. Smithers v. Lowrance [Tex.] 15 Tex. Ct. Rep. 953, 93 S. W. 1064. Certificate of commissioner of land office to county clerk made as required by Laws 1901, c. 125, held competent on issue whether lands previously sold were properly classified as applied for. Id. [Tex.] 15 Tex. Ct. Rep. 953, 93 S. W. 1064, rvg. [Tex. Civ. App.] 15 Tex. Ct. Rep. 88, 91 S. W. 606. Evidence that land commissioner cancelled awards to a purchaser, and proof of indorsements on file wrappers of applications, showing such cancellation, held incompetent, since the commissioner had no legal authority to take such action. Id. [Tex.] 15 Tex. Ct. Rep. 953, 93 S. W. 1064. Copy of classification and appraisement of school lands, certified by commissioner of land office as true and correct and made under certain statutes, held competent. Id.

19. U. S. Rev. St. § 891 determines competency of records referred to, but not materiality. Howard v. Perrin, 200 U. S. 71, 50 Law. Ed. —. Record of judgment held authenticated substantially as required by U. S. Rev. St. § 905. Seymour v. Du Bois, 145 F. 1003. A transcript of a justice of the peace need not be authenticated in accordance with Code Civ. Proc. § 414, but is receivable in evidence if authenticated according to § 415, relating specifically to judgments of justices of the peace of other states. Gordon Bros. v. Wageman [Neb.] 108 N. W. 1067. It is indispensable to the authentication of a judicial record of a sister state that it have attached thereto a certificate of the presiding judge that the attestation is "in due form" or "in due form of law." Chapman v. Chapman [Neb.] 104 N. W. 880. A transcript from the docket of a justice of the peace showing a judgment entered thereon and other entries relating to the case, when certified by the justice in office having custody of the docket, is admissible in evidence in the courts of the county in which the justice holds office. Civ. Code 1895, §§ 5214, 5215. Patterson v. Drake [Ga.] 55 S. E. 175. Exemplified copies of pension vouchers, made pursuant to Rev. St. U. S. § 882, prove themselves and are admissible in evidence. Murphy v. Cady [Mich.] 12 Det. Leg. N. 412, 108 N. W. 493.

20. Authentication of foreign statute by secretary of the sister state, under the great seal of the state, held sufficient proof thereof, under Code § 420. Topliff v. Richardson [Neb.] 107 N. W. 114.

21. Copy of Cuban mortgage law, which deponent believed to be existing law of Cuba, and which the Cuban consul had informed him was the law, held insufficient to prove the law of Cuba on the question in issue. In re International Mahogany Co. [C. C. A.] 147 F. 147.

22. McCraney v. Glos [Ill.] 78 N. E. 921.

23. Pamphlets containing printed ordinances purporting to have been published by authority of the city council held admissible as prima facie proof of such ordinances. City of Houston v. Stewart [Tex. Civ. App.] 13 Tex. Ct. Rep. 981, 90 S. W. 49. Held proper to prove city ordinances from book entitled "charter and ordinances of the city of," etc., under charter provision making competent printed ordinances appearing to have been published under authority of the city. Texarkana, etc., R. Co. v. Frugia [Tex. Civ. App.] 16 Tex. Ct. Rep. 724, 95 S. W. 563. Pamphlet of ordinances purporting to be published by authority of board of trustees of village held competent, though name of village had been changed since such publication. Illinois C. R. R. Co. v. Whiteaker, 122 Ill. App. 333.

24. Held error, in trespass to try title, to admit in evidence a portion of a list of school lands showing their classification and appraisement, without the part of it showing that such lands had been sold and were not on the market. Knapp v. Patterson [Tex.] 14 Tex. Ct. Rep. 321, 90 S. W. 163.

25. Portions of record of bankruptcy proceeding held admissible without other parts not shown to be relevant. Beall v. Chatham [Tex. Civ. App.] 16 Tex. Ct. Rep. 325, 94 S. W. 1086.

When it is sought merely to establish the fact that a judgment has been rendered, a certified copy of the judgment, without the proceedings prior thereto, is admissible.[26] But this is not sufficient when the judgment is sought to be used as an estoppel upon the parties thereto.[27] An examined copy of a record may be made and proved by any person competent as a witness in the case.[28]

(§ 7) *D. Proceedings to procure production of documentary evidence.*[29]—A court has power to order the production of documentary evidence, which is in the possession or control of an adverse party,[30] when such evidence is shown to be relevant.[31] The power of a court to make such an order is inherent; it does not depend upon statutes regulating production of papers by a party before trial.[32] Where counsel complies with such order without further objection, having refused the request of opposing counsel, any rights with reference to a limited use of the document, not insisted upon, are waived.[33] Where a party is bound to know from the nature of the action that he is charged with the possession of a document and will be required to produce it on trial, notice to him to produce it is unnecessary.[34] A party desiring the production of documentary evidence should be required to specify what documents are desired, and to show that they are material.[35] It is proper

26, 27. Patterson v. Drake [Ga.] 55 S. E. 175.

28. Examined copies of records in land office pointed out by commissioner to witness as certain records, held competent. Smithers v. Lowrance [Tex.] 15 Tex. Ct. Rep. 953, 93 S. W. 1064, rvg. [Tex. Civ. App.] 15 Tex. Ct. Rep. 88, 91 S. W. 606.

29. See 5 C. L. 1351.

30. Proper to order original telegram produced in action for delay in delivery. Whitten v. Western Union Tel. Co. [N. C.] 54 S. E. 289. Since parties may now be compelled to testify in civil actions, they may also be compelled to produce documentary evidence in their possession which is relevant and otherwise competent. Banks v. Connecticut R. & Lighting Co. [Conn.] 64 A. 14.

31. In an action against a corporation for violation of the anti-trust law, the court has power to compel production of the stock book of the corporation, if the book is material to the issues, since Rev. St. 1899, § 737, gives power to compel production of documentary evidence. State v. Standard Oil Co., 194 Mo. 124, 91 S. W. 1062. Where it was alleged that a corporation owned stock of two others which aimed to control the oil business of the state, and that it was organized merely to deceive the public into believing that it was a competitor, and that this violated the anti-trust act, the stock book of such corporation was material, and its production could be ordered under Rev. St. 1899, § 737. Id. A court may upon trial of a cause, upon motion of one of the parties, order his adversary or the latter's counsel to produce to the court, for such use in the progress of the trial as it may authorize, any document claimed to be relevant which is then in court and in the possession of the person to whom the order is addressed. Court held to have power to order counsel for company to produce report of accident made by street car conductor, which counsel had with him in court. Banks v. Connecticut R. & Lighting Co. [Conn.] 64 A. 14. Policy of liability insurance based premium on compensation paid employes by insured and gave insurer right to examine books of insured to determine the same. Held, in action for premium, insurer was entitled to an order requiring books to be produced, so far as necessary, to determine the premium, but was not entitled to an injunction against destruction of books by defendant. United States Casualty Co. v. Robins Co., 108 App. Div. 361, 95 N. Y. S. 726. Proper for court to refuse to order production of documents which would not be material if produced. Consolidated Coal Co. v. Jones & Adams Co., 120 Ill. App. 139. No error in refusing to compel production in evidence of private diaries of a deceased brought into court by defendant, because of a subpoena duces tecum, when no showing was made that the contents would be pertinent or material to the issues. Dorris v. Morrisdale Coal Co. [Pa.] 64 A. 855.

32. Gen. St. 1902, § 732, does not apply. Banks v. Connecticut R. & Lighting Co. [Conn.] 64 A. 14.

33. Counsel for plaintiff asked opposing counsel for report of accident, was refused, and court said, "I think you should supply it." The report was then handed to plaintiff's counsel without further objection or suggestion. Held right to have document submitted first to court, and to have portions of it excluded from the case or from view of opponents, was thereby waived. Banks v. Connecticut R. & Lighting Co. [Conn.] 64 A. 14.

34. Maffi v. Stephens [Tex. Civ. App.] 15 Tex. Ct. Rep. 140, 93 S. W. 158.

35. Where subpoena duces tecum had reference to 21 large books, it was proper to require the party desiring their production to specify which particular books were required, so as not to compel examination of all of them in court, but it was improper to limit the party to a right to send someone to examine the books, their presence being necessary to prove the party's case. McDonald v. Ideal Mfg. Co. [Mich.] 12 Det. Leg. N. 896, 106 N. W. 279. Subpoena duces tecum modified so as not to require witness to produce books of account subsequent to transactions in issue, or to produce copies

for a subpoena to require a witness to produce books to refresh his recollection while testifying.[36]

§ 8. *Evidence adduced in former proceedings.*[37]—Testimony of a witness on a former trial is admissible when the witness is dead or beyond the jurisdiction,[38] provided the issues and parties in the two actions were identical.[39] Whether sufficient effort has been made to secure attendance of a living witness, so as to render admissible his testimony on a former trial, is for the trial court.[40] A transcript of evidence on a former trial is incompetent unless properly authenticated and shown to be correct.[41] The testimony of persons who were present at a trial and heard the testimony there given is primary evidence thereof.[42] Minutes of a justice of the peace are incompetent to prove testimony of witnesses in a proceeding before him.[43] A formal admission of fact made by an attorney in open court is competent and conclusive in a subsequent proceeding between the parties, if there was no limitation of the use of the admission;[44] if use of the admission is limited to the trial wherein it is made, it cannot be received at a subsequent trial;[45] where it is uncertain what was the scope and intent of the admission, that matter is one for the jury.[46]

A finding of a coroner or coroner's jury is incompetent to show cause of death in a subsequent action at law.[47]

§ 9. *Expert and opinion evidence. A. Conclusions and nonexpert opinions.*[48]

of letters to be used in trial in another state (witness was called to give testimony before a notary to be used in trial in another state). In re Waterman, 110 App. Div. 115, 97 N. Y. S. 169. One who fails to obey a subpoena duces tecum requiring the production of a long list of documents and books, many of which apparently have no bearing on the issues in controversy, will not be punished for contempt. One applying will be required to take out separate subpoenas for each book, each of which will then be considered on its merits. Miller v. Mutual Reserve Fund Life Ass'n, 139 F. 864.

36. In re Waterman, 110 App. Div. 115, 97 N. Y. S. 169.

37. See 5 C. L. 1352.

38. See 5 C. L. 1352, n. 3.

39. Transcript of evidence of deceased witness on former trial competent when issues in the two trials were substantially the same. Levine v. Carroll, 121 Ill. App. 105. In an action by a city to recover from a contractor the amount of a judgment paid by it recovered for injuries caused by excavation in the street, testimony of the person injured, who had since died, on the trial of the case against the city, was inadmissible to prove the manner in which the injury occurred, since the contractor was not a party to the former action, and even though he had notice of it. City of Spokane v. Costello, 42 Wash. 182, 84 P. 652.

40. Delahunt v. United Tel. & T. Co. [Pa.] 64 A. 515. Testimony given at former trial admitted where witness had but recently returned from without the jurisdiction and diligent effort had been made to serve subpoena. Greenan v. Eggeling, 30 Pa. Super. Ct. 253.

41. Transcript of a stenographer's minutes of evidence on a former trial, unverified by him, is not evidence. Jaffe v. Pennsylvania R. Co., 49 Misc. 520, 97 N. Y. S. 1037. The party against whom it is introduced has the right to cross-examine the person verifying such transcript. Id. Stenographer's transcript of testimony of witnesses at a former trial held inadmissible without proof that testimony was correctly taken and transcribed or that the paper offered was a correct copy of the testimony, other than the stenographer's certificate. Williams v. Sleepy Hollow Min. Co. [Colo.] 86 P. 337. Evidence given on a former trial was inadmissible where it was not certified by the reporter, nor proof made of the facts required by the statute to be certified, the reporter merely testifying that he took the testimony on the former trial and that the copy of his minutes offered was a correct copy. Rev. St. 1898, § 4141, requiring certification by the reporter of the transcript, is not thereby complied with. Wells v. Chase, 126 Wis. 202, 105 N. W. 799. An offer to read to a witness "extracts" from a "purported" transcript of evidence in a former proceeding, and ask witness if such testimony was given, was properly refused. Witness should give his recollection or transcript should be identified and authenticated. Packham v. Ludwig [Md.] 63 A. 1048.

42. Plaintiff and his attorney in former action competent to testify as to evidence in former action, and to an amendment of the complaint so as to withdraw certain claims. Dickman v. MacDonald, 99 N. Y. S. 429.

43. McRavy v. Barto, 99 N. Y. S. 712.

44, 45, 46. Moynahan v. Perkins [Colo.] 85 P. 1132.

47. Document signed by coroner, stating what appeared to him to be the cause of death, is inadmissible in an action to recover insurance. Kinney v. Brotherhood of American Yeomen [N. D.] 106 N. W. 44. On the issue of testamentary capacity the verdict of a coroner's jury, finding that death was by suicide, is inadmissible. In re Dolbeer's Estate [Cal.] 86 P. 695.

—Mere conclusions of the witness,[48] or the opinions of nonexperts on issues which

48. See 5 C. L. 1353.

49. **Held mere conclusion and inadmissible:** Whether two persons "acted like lovers." Kesselring v. Hummer [Iowa] 106 N. W. 501. Why a certain party was absent. Packham v. Ludwig [Md.] 63 A. 1048. Evidence, in will contest, that testatrix was woman easily influenced and susceptible to flattery. Compher v. Browning, 219 Ill. 429, 76 N. E. 678. That cars were furnished a shipper within a reasonable time. Pecos, etc., R. Co. v. Evans-Snider-Buel Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 199, 93 S. W. 1024. What one party "understood" as to whom a certain person represented. Love v. Scatcherd [C. C. A.] 146 F. 1. What would be the effect upon credit of a firm of declining to extend credit in a certain transaction. Upchurch v. Mizell [Fla.] 40 So. 29. Testimony of engineer that he did not have time to make any effort to prevent a collision with cattle. Western R. Co. v. Stone [Ala.] 39 So. 723. Testimony of an engineer, after he had testified to what he did to prevent an accident, that he could have done no more. Macon, etc., R. Co. v. Stewart, 125 Ga. 88, 54 S. E. 197. In action by broker to recover commission, testimony of purchaser that he understood plaintiff had the sale of the land. Zitske v. Grohn [Wis.] 107 N. W. 20. Testimony that an agent had no authority to employ salesman, based on witness' deductions from his knowledge of the agent's employment. International Harvester Co. v. Campbell [Tex. Civ. App.] 96 S. W. 93. In action for injuries to passenger getting off car, a question whether it was physically possible for the motorman to see a passenger alighting from the rear platform at night. Chicago City R. Co. v. Lowitz, 218 Ill. 24, 75 N. E. 755. Testimony that witness heard plaintiff say she was trying to get off the car after it started again, which would indicate that the car had stopped. South Covington, etc., R. Co. v. Core [Ky.] 96 S. W. 562. Testimony that witness did not know why cattle had been kept in pens as long as they were, but supposed it was to catch an early stock train the next day. Dupree v. Texas & P. R. Co. [Tex. Civ. App.] 96 S. W. 647. Whether it was physically possible in the nighttime for the motorman to see anybody getting off a box car. Chicago City R. Co. v. Lowitz, 119 Ill. App. 360. Testimony that estimates by engineer under contract between railway company and contractors included damages for delay in furnishing materials. Gorham v. Dallas, etc., R. Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 365, 95 S. W. 551. Testimony of witness who said claims passed through his hands, that it was not probable that a claim could be presented without coming to his knowledge. Pecos, etc., R. Co. v. Evans-Snider-Buel Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 199, 93 S. W. 1024. Whether insured would have paid insurance premiums if demanded, and whether it was not agent's duty to collect at residence after an extension of time. Metropolitan Life Ins. Co. v. Hall, 104 Va. 572, 52 S. E. 345. Statement of injured man that a fellow workman had left a cross bar (which was struck by a passing train and thrown against him) too near the track was a mere conclusion and inadmissible, even though part of the res gestae. Dunn v. Chicago, etc., R. Co. [Iowa] 107 N. W. 616. Prospectus of manager of institution stating that it was a charitable one held inadmissible on issue of its real character. Bishop & Chapter of Cathedral of St. John the Evangelist v. Treasurer of Denver [Colo.] 86 P. 1021. In an action to recover assets of a bankrupt from defendants, it was error to permit a sheriff to testify that he had become satisfied, in levying execution, that one of the defendants had no property. Arnold v. Harris [Mich.] 105 N. W. 744. Testimony that sparks from an engine must have caused a fire held incompetent, without statement of facts on which conclusion was based. Fleming v. Pullen [Tex. Civ. App.] 97 S. W. 109. Any statement or answer which is merely a supposed inference or conclusion from a state of facts may be stricken or excluded. Chicago, etc., R. Co. v. Stibbs [Okl.] 87 P. 293. Where witness said that injured person did not go out as much after as she had before her injury, but that she did not know whether this was due wholly to the accident, a question whether the injured person had had any sickness which might have kept her in called for a conclusion. Barker v. Kalamazoo [Mich.] 13 Det. Leg. N. 765, 109 N. W. 427.

Held statement of fact, and admissible: That deceased had room to sit on car frame without using a plank on which he was sitting when he fell. Beaumont Traction Co. v. Dilworth [Tex. Civ. App.] 16 Tex. Ct. Rep. 257, 94 S. W. 352. That a street car could not be seen from a certain point. Wallace v. North Alabama Traction Co. [Ala.] 40 So. 89. Testimony that plaintiff had worked very little since an accident, and not steadily. Lindsay v. Kansas City, 195 Mo. 166, 93 S. W. 273. Testimony of one accustomed to horses that a horse was frightened. Ward v. Meredith, 122 Ill. App. 159. Testimony of plaintiff in personal injury action that he had been unable to follow any business since his injury, on account of such injury. Galveston, etc., R. Co. v. Holyfield [Tex. Civ. App.] 14 Tex. Ct. Rep. 545, 91 S. W. 353. Statement of plaintiff in personal injury action that he had been a nervous wreck ever since the accident. Chicago & Joliet Elec. R. Co. v. Patton, 122 Ill. App. 174. Testimony by injured person that he had no use of his foot. McDonald v. City Elec. R. Co. [Mich.] 13 Det. Leg. N. 252, 108 N. W. 85. Evidence of plaintiff's daughter in personal injury action that plaintiff was unable to do anything. Mobile Light & R. Co. v. Walsh [Ala.] 40 So. 560. Statement of plaintiff in personal injury action that he "looked carefully" before walking along right of way. Houston & T. C. R. Co. v. O'Donnell [Tex. Civ. App.] 90 S. W. 886. In an action by a broker to recover a commission, testimony of the purchaser procured by him that he was ready, willing, and able to buy. Clark v. Wilson [Tex. Civ. App.] 14 Tex. Ct. Rep. 770, 91 S. W. 627. Testimony of railway conductor of 14 years' experience that he had nothing to do with sleeping cars, they being in charge of conductors of those cars. Pullman Co. v. Nor-

are for the court[50] or jury,[51] or the subject-matter of which requires expert skill

ton [Tex. Civ. App.] 14 Tex. Ct. Rep. 869, 91 S. W. 841. Whether rails on switch tracks leading to mines and slate dumps are ordinarily as heavy as those on the main track. Redus v. Milner Coal & R. Co. [Ala.] 41 So. 634. Question to surveyor if he had ever surveyed on the ground a tract of land described in a petition. Camp v. League [Tex. Civ. App.] 92 S. W. 1062. Whether witness knew of anything that would prevent the engineer of a locomotive from seeing the track ahead. Southern Ind. R. Co. v. Osborn [Ind. App.] 78 N. E. 248. Testimony that horse became frightened or showed fright at approach of automobile. Ward v. Meredith, 220 Ill. 66, 77 N. E. 118. Statement of insurance agent when delivering a policy that it was "all right" and would stand in any court. Aetna Ins. Co. v. Brannon [Tex. Civ. App.] 15 Tex. Ct. Rep. 527, 91 S. W. 614. Where witness had knowledge of business, question whether person running machine had control over assistant was proper. Forbes v. Davidson [Ala.] 41 So. 312. In an action by an executor on a note payable to testator, declarations by a coexecutor, while at work on the inventory of the state, to the effect that the note had no value and that she was surprised that it had been kept were not objectionable as opinions. Stone v. Stone, 191 Mass. 371, 77 N. E. 845. Asking a witness in a personal injury suit against a street railway how far he could distinguish a vehicle of the size and color of the wagon in question is a matter of fact and not of opinion. Chicago St. R. Co. v. Rohe, 118 Ill. App. 322. Question as to effect on the business done on a street of a railway maintained thereon did not call for expert opinion, but for facts. Cotton v. Boston El. R. Co., 191 Mass. 103, 77 N. E. 698. Where plaintiff, to make out his case, must prove nondelivery of a deed, he may testify that he did not receive a deed, when there are no facts in evidence tending to show delivery. Renshaw v. Dignan, 128 Iowa, 722, 105 N. W. 209. Testimony of a witness who had examined conditions at a crossing as to whether certain obstructions interfered with a view of the track was testimony to facts. Rietveld v. Wabash R. Co., 129 Iowa, 249, 105 N. W. 515. On issue of competency of cook, testimony that guests would not eat meals prepared by the cook, but sent them back untouched, was not objectionable as a conclusion. Zuckerman v. Moser, 95 N. Y. S. 561. A contracting party may testify whether he expressly consented to a variation of an existing contract. Providence Mach. Co. v. Browning, 72 S. C. 424, 52 S. E. 117. In an action by an employe for injuries received while oiling a stationary engine that he had to oil it was not objectionable as a conclusion but was a narration of a part of his duties. Sloss-Sheffield Steel & Iron Co. v. Hutchinson [Ala.] 40 So. 114. Question, "What appreciable time elapsed from the time" an order was given "until deceased was struck, * * * and did he have time to get away?" held to call for a statement of fact in the manner most intelligible to the jury, actual computation of the time being impracticable. Reiter-Conley Mfg. Co. v. Hamlin [Ala.] 40 So. 280. Where witness testified that a car did not slow up as deceased attempted to get on it, his statement that deceased was not thrown from the car by any jerking in its movement was not objectionable as a conclusion. Smith v. Birmingham R., Light & Power Co. [Ala.] 41 So. 307. A witness may testify that a certain person was a traveling salesman for a concern and had authority to take orders subject to approval by his principal. Gould v. Cates Chair Co. [Ala.] 41 So. 675. Where witness said he knew the difference between the sound of two gongs on a street car, his testimony that the bell he heard when plaintiff was injured was the one used to start the car was not a mere conclusion. Kohr v. Metropolitan St. R. Co., 117 Mo. App. 302, 92 S. W. 1145. Where a surveyor had investigated on the ground to find location of boundary line between two lots, a question "Where in your opinion, is the line between Nos. 83 and 84?" did not call for an opinion but for a statement of fact. Brundred v. McLaughlin, 213 Pa. 115, 62 A. 565. On issue of contributory negligence, question whether plaintiff knew that conditions out of which injury arose were dangerous did not call for an opinion. International Mercantile Marine Co. v. Smith [C. C. A.] 145 F. 891. Where witness testified that his duties were the same as decedent's, his testimony that it was not decedent's duty to inspect or repair a track was not objectionable as a conclusion. Kirby Lumber Co. v. Chambers [Tex. Civ. App.] 14 Tex. Ct. Rep. 913, 95 S. W. 607. Question as to the time within which a mine roof could have been propped or made secure was not objectionable as calling for a conclusion. Tutwiler Coal, Coke & Iron Co. v. Farrington [Ala.] 39 So. 898. Expression of witness "it was so understood," after testifying to facts, construed as a statement of fact and not a mere conclusion. Holman v. Clark [Ala.] 41 So. 765. Testimony of witnesses as to circumstances under which, and time within which, they had seen other trains stopped at the place in question was not objectionable as the conclusion as to the time within which the train in question could be stopped. Texas & P. R. Co. v. Brannon [Tex. Civ. App.] 96 S. W. 1095.

50. Statement of witness that no contract existed between certain parties. International Harvester Co. v. Campbell [Tex. Civ. App.] 96 S. W. 93. Witness' testimony that certain transactions and conversations amounted to an agreement to a certain effect between them. Hillock v. Grape, 97 N. Y. S. 823. Statement of witness that defendant took a verbal lease for a year held a mere conclusion as to legal effect of a conversation. Friedman v. Yamner, 97 N. Y. S. 357. Testimony that an order to a carrier was, by custom, a delivery or acceptance was a mere legal conclusion. Calvert v. Schultz [Mich.] 13 Det. Leg. N. 14, 106 N. W. 1123. Opinion of attorney on question of law inadmissible. State v. Justice Ct. of Carson Tp. [Nev.] 87 P. 1. In ejectment, a witness may not testify that he was in possession of the title. McCreary v. Jackson Lumber Co. [Ala.] 41 So. 822. Evidence of

or knowledge,[52] are inadmissible. But the opinions of nonexperts are received in

witnesses as to their construction of a document similar to those whose legal effect has been frequently determined by the courts is inadmissible. Dorr v. Reynolds, 26 Pa. Super. Ct. 139. Witness held competent only to state facts, and his statement that a partnership existed was incompetent. Hubbard v. Mulligan [Colo.] 82 P. 783. Admission of testimony as to witness' understanding of who was to take under a will held error. In re Jones' Estate [Iowa] 106 N. W. 610. A witness cannot be asked whether a hypothetical state of facts would or would not, in his opinion as a business man, constitute implied notice to a creditor of his debtor's insolvency. Hawes v. Bank of Elberton, 124 Ga. 567, 52 S. E. 922. Where under Mexican laws field notes of surveys made by Mexican government in Texas could be obtained only from the general land office, testimony of witnesses that such was the fact was incompetent. Clawson v. Wilkins [Tex. Civ. App.] 15 Tex. Ct. Rep. 662, 93 S. W. 1086. Opinion of attorney that there could not be a lien on personal property held inadmissible on issue whether there was one. Hirsch & Co. v. Beverly, 125 Ga. 657, 54 S. E. 678. Where issue is whether or not a devastavit has been committed by an administrator, the opinion of witnesses that the estate represented by him was not insolvent at the time of the death of the intestate is of no probative value. Worthy v. Battle, 125 Ga. 415, 54 S. E. 667. Where the place of a sale is in issue, testimony of a witness that he bought the goods at a certain place from a salesman, who agreed to make delivery there, but not showing what was said or done at the time, as a mere conclusion as to the legal effect of the entire transaction. Bowlin Liquor Co. v. Beaudoin [N. D.] 108 N. W. 545. Question to conveyancer, who had examined title of petitioner, whether he could be said to have good title to the land or only a part of it, was properly excluded. Luce v. Parsons [Mass.] 77 N. E. 1032.

51. It is error to permit a witness to testify to the ultimate fact to be determined by the jury, or to give his opinion in answer to an inquiry embracing the entire merits of the case. Sun Ins. Office v. Western Woolen Mill Co., 72 Kan. 41, 82 P. 513. That railroad crossing where accident occurred was dangerous. Louisville & N. R. Co. v. Molloy's Adm'x [Ky.] 91 S. W. 685. Whether railroad crossing was dangerous. Tiffin v. St. Louis, etc., R. Co. [Ark.] 93 S. W. 564. Safety of embankment of certain dimensions. Cain v. Atlantic Coast Line R. Co. [S. C.] 54 S. E. 244. Cause of wreck. Nickles v. Seaboard Air Line R. Co. [S. C.] 54 S. E. 255. Whether machine was dangerous for child of tender years to be around. Evans v. Josephine Mills, 124 Ga. 318, 52 S. E. 538. Whether station platform was an unusually unsafe crossing on which to wait for trains from a certain direction. MacFeat v. Philadelphia, etc., R. Co. [Del.] 62 A. 898. Whether train stopped at station long enough to permit all passengers to alight from and board a train. Houston, etc., R. Co. v. Schuttee [Tex. Civ. App.] 14 Tex. Ct. Rep. 725, 91 S. W. 806. Whether driver of wagon could have avoided running over a mule's foot. Atlanta Ice & Coal Co. v. Mixon [Ga.] 55 S. E. 237. How boy got hurt while oiling machinery. Forbes v. Davidson [Ala.] 41 So. 312. Whether plaintiff could have been caught and hurt while oiling machinery if he had been careful. Id. Where source of gas was in issue, testimony that witness was overcome by gas from holes in the furnace on a former occasion. Stenger v. Buffalo Union Furnace Co., 109 App. Div. 183, 95 N. Y. S. 793. Testimony of witness as to what certain rice would have netted him if it had been milled and sold at the proper time. El Campo Rice Mill. Co. v. Montgomery [Tex. Civ. App.] 16 Tex. Ct. Rep. 269, 95 S. W. 1102. Where identity of premises leased was in issue, testimony of a witness that a lease referred to the same premises then occupied by the lessee. Kasower v. Sandler, 96 N. Y. S. 734. Testimony of an adjuster that plaintiff represented defendant's interests on the adjustment of a fire loss held incompetent as the mere conclusion of the witness, that fact being in issue. McCormack v. Herboth, 115 Mo. App. 193, 91 S. W. 164. Opinion incompetent on issue whether a larger ditch would be more effective in draining land than a cleaning of the old ditches. Beery v. Driver [Ind.] 76 N. E. 967. If purpose of question was to show that way traveled by witness was safer than that selected by plaintiff, it was properly excluded as calling for a conclusion. Virginia Bridge & Iron Co. v. Jordan [Ala.] 42 So. 73. When issue was whether a transaction was a sale, witness could not testify that she sold the property. Rea v. Schow [Tex. Civ. App.] 15 Tex. Ct. Rep. 931, 93 S. W. 706. Where witness had described a house in detail, it was not error to exclude his opinion as to whether it was a substantial structure. Shafter Estate Co. v. Alvord [Cal. App.] 84 P. 279. In action for damages for negligent transportation of cattle, evidence of a witness as to what caused the condition of the cattle complained of, which was in effect an opinion that the carrier had been negligent, was inadmissible. Texas & P. R. Co. v. Felker [Tex. Civ. App.] 14 Tex. Ct. Rep. 308, 90 S. W. 530. A witness cannot testify in an action of ejectment that a certain person was in open and notorious possession of the land in dispute. Driver v. King [Ala.] 40 So. 315. Whether a person could or could not have known of a fact is a matter for the determination of the jury from the evidence, and is not a matter for opinion evidence by witnesses. Southern Cotton Oil Co. v. Skipper, 125 Ga. 368, 54 S. E. 110. Testimony of surveyor concerning two surveys inadmissible when field notes were in evidence and there was no conflict or ambiguity to be explained. Goodson v. Fitzgerald [Tex. Civ. App.] 14 Tex. Ct. Rep. 424, 90 S. W. 898. Witnesses may testify fully concerning the physical and mental characteristics of a child of 10, injured by a street car, but may not testify whether or not such child is capable of appreciating danger from cars under certain circumstances, or exercising the same degree of care as an adult person. Citizens' R. Co. v. Robertson [Tex. Civ. App.] 14 Tex. Ct. Rep. 518, 893, 91 S. W.

regard to such matters as value,[53] ownership,[54] sanity or mental condition,[55] and other matters not requiring expert skill or knowledge,[56] when the witness is shown to be

609. Question whether or not witness bought land from a certain person called for a conclusion when the issue was whether the person sold as agent or not. Buchanan v. Randall [S. D.] 109 N. W. 513.

52. Witness who had been a workman and foreman at place of accident, but was not an expert, could not testify that it would "be a good idea" to have a certain rule and that workmen could not be protected without it. McLaughlin v. Manhattan R. Co., 97 N. Y. S. 719. Witness not shown to be qualified may not testify within what distance a cable car may be stopped without injury to passengers. Boring v. Metropolitan St. R. Co., 194 Mo. 541, 92 S. W. 655. Lay witness incompetent to testify whether from person's actions he thought he had a certain disease. Taylor v. Modern Woodmen, 42 Wash. 304, 84 P. 867. Nonexpert witnesses held incompetent to testify that person quarantined did not have smallpox. City of Bardstown v. Nelson County [Ky.] 90 S. W. 246. Only persons who have had experience in the business of logging and loading logs may testify as to what is the proper and reasonably safe way of loading them. Louisville & N. R. Co. v. Morton [Ky.] 89 S. W. 243.

53. Value of article in almost universal use need not be established by expert testimony. Hey v. Hawkins, 120 Ill. App. 483. The market value of property may be shown by opinion evidence. Alabama Consol. Coal & Iron Co. v. Turner [Ala.] 39 So. 603. Witnesses familiar with character and value of property may testify to value. Wiggins v. St. Louis, etc., R. Co. [Mo. App.] 95 S. W. 311. Statement of witness as to market value of land is not a conclusion. St. Louis S. W. R. Co. v. Terhune [Tex. Civ. App.] 16 Tex. Ct. Rep. 16, 94 S. W. 381. Nonexperts may give opinions on value of articles with which they are acquainted or familiar. Southern R. Co. v. Morris [Ala.] 42 So. 17. Whether a shipment of horses compared favorably with a previous shipment. Texas & P. R. Co. v. Stewart [Tex. Civ. App.] 96 S. W. 106. Value of an article may be shown by the opinions of witnesses, though they are not experts, if they have knowledge of facts on which to predicate such opinion. Slaton v. Fowler, 124 Ga. 955, 53 S. E. 567. Witnesses may give opinions, in connection with facts stated by them, as to depreciation in value of property caused by the taking of land for railway purposes. Southern Missouri & A. R. Co. v. Woodard, 193 Mo. 656, 92 S. W. 470.

54. Ownership of personal property may be testified to as a fact. In claim and delivery, it was competent for plaintiff to testify directly that she owned the property, ownership of which was in dispute. Hawley v. Bond [S. D.] 105 N. W. 464. A question "Are you the purchaser of the property in dispute in this case?" held proper. Driver v. King [Ala.] 40 So. 315.

Contra: Impression or knowledge of a witness as to ownership of property is not admissible. Continental Ins. Co. v. Cummings [Tex. Civ. App.] 16 Tex. Ct. Rep. 279, 95 S. W. 48.

55. Any witness who has had opportunities to observe may testify on sanity of person. Chicago Union Traction Co. v. Lawrence, 113 Ill. App. 269. An unprofessional witness, who has had adequate opportunities to observe the conduct, declarations, and appearance of a person alleged to be insane, is competent to form and express an opinion as to the mental condition of such person. Kempf v. Koppa [Kan.] 85 P. 806. On issue of insanity of person, men who have business and professional dealings with him may testify thereto and give their opinions as to whether his acts were rational or irrational. Schoenberg & Co. v. Ulman, 99 N. Y. S. 650. Witness who had testified to a long acquaintance with testator, to his habits, appearance, manner of conversation, memory, and disposition, was properly allowed to give opinion as to his mental condition. Swygart v. Willard [Ind.] 76 N. E. 755. Question construed as asking witness to give opinion on mental condition of a testator based on his own observation and the facts and appearances detailed to the jury. Id. A general practitioner who has had experience in the various kinds of mental diseases is as competent to testify to the sanity or insanity of a person as the skilled expert who devotes his entire time to the study of mental diseases. In re Dolbeer's Estate [Cal.] 86 P. 695. In New York it is held that lay witnesses may not give opinions on the question of mental capacity, but may state their contemporary impressions produced by conversation or conduct of testator. In re Myer's Will, 184 N. Y. 54, 76 N. E. 920. Exclusion of question to agent of testator who had had extensive business dealings with her, whether her acts impressed him as rational or irrational held error. In re Brower's Will, 98 N. Y. S. 438.

56. Condition or state of health may be testified to by any person who has had opportunity to observe. Supreme Lodge Mystic Workers of the World v. Jones, 113 Ill. App. 241. Nonexperts may testify that relatives of a deceased died of consumption (in suit on policy of insurance). Krapp v. Metropolitan Life Ins. Co. [Mich.] 12 Det. Leg. N. 1032, 106 N. W. 1107. Injured person who claimed his hearing had been affected by his injury was properly allowed to testify to facts concerning his own hearing, tending to show injury. Houston & T. C. R. Co. v. O'Donnell [Tex. Civ. App.] 90 S. W. 886. In action for breach of contract of employment, plaintiff may testify as to his ability to perform the contract, notwithstanding the state of his health. Semet-Solway Co. v. Wilcox [C. C. A.] 143 F. 839. Witness who had known testator 10 years, and had known of his habits, could testify that he drank more, used more profanity and was more indecent in his latter years. Swygart v. Willard [Ind.] 76 N. E. 755. Witness who had book before him could testify whether it contained entries of a certain kind, as that did not involve expert testimony. Lawrence v. State [Md.] 63 A. 96.

As to the speed of vehicles or trains: That horses attached to car were going at

qualified[57] by his observation or familiarity with the subject of inquiry,[58] and when

full speed. Beaumont Traction Co. v. Dilworth [Tex. Civ. App.] 16 Tex. Ct. Rep. 257, 94 S. W. 352; Northern Ohio Traction Co. v. Drown, 7 Ohio C. C. (N. S.) 549. Speed of car. Chicago St. R. Co. v. Rohe, 118 Ill. App. 322. Held proper to allow witness who had seen horse races and timed express trains to give an estimate as to the speed at which an automobile was going at a particular time. Porter v. Buckley [C. C. A.] 147 F. 140. It is not error to permit witnesses to testify that a car was moving at "full speed," meaning at the highest rate of speed usually traveled. Chicago St. R. Co. v. McDonough [Ill.] 77 N. E. 577. Testimony of witness who said he could not say how fast a street car was running, but, judging from the ordinary rate, 6 to 8 miles an hour, it was running at the rate of about 20 miles an hour, was competent. Little Rock Traction & Elec. Co. v. Hicks [Ark.] 96 S. W. 385. Nonexpert testimony is competent to prove that a street car was going fast at the time of a collision. Beier v. St. Louis Transit Co., 197 Mo. 215, 94 S. W. 876. Testimony of plaintiff, injured by collision with street car, not given as expert, as to speed of car, admissible. Sluder v. St. Louis Transit Co., 189 Mo. 107, 88 S. W. 648.

57. A witness called to testify to the value of land may properly be cross-examined as to his competency before he is permitted to give his opinion. Davis v. Pennsylvania R. Co. [Pa.] 64 A. 774. An expert testifying to the value of property may properly be examined as to the facts and reasons on which his opinion is based. Baltimore Belt R. Co. v. Sattler, 102 Md. 595, 62 A. 1125. Under B. & C. Comp. § 718, subd. 10, admitting opinions of intimate acquaintances on the issue of mental capacity, such opinion must be based on personal knowledge. Lassas v. McCarty [Or.] 84 P. 76.

58. Witness held qualified: Former employe of telephone company who had procured many licenses for company to attach wires held competent to testify to ownership of wires attached to certain building. Bunke v. New York Tel. Co., 110 App. Div. 241, 97 N. Y. S. 66. Witness held to have sufficient knowledge of cattle in question to testify to probability of fattening them in one season. Tuttle v. Robert Moody & Son [Tex. Civ. App.] 15 Tex. Ct. Rep. 763, 94 S. W. 134.

On issue of speed of trains, etc.: A person of ordinary experience, familiar with trains, and possessed of a knowledge of time and distance, is competent to testify to the speed of a train, though not skilled in handling them. Colorado & S. R. Co. v. Webb [Colo.] 85 P. 683. Proper to allow witness, who had seen cars running at a certain place and knew their usual rate of speed, to testify that a car which struck plaintiff's vehicle was going at the usual rate, which was pretty fast as it was on a down grade. Little Rock R. & Elec. Co. v. Green [Ark.] 93 S. W. 752. Witness who had lived beside railroad track 4 years, had observed trains, had timed trains between stations, and had just returned from a long railroad journey, was competent to express an opinion on the speed of a train. Line v. Grand Rapids & I. R. Co. [Mich.] 12 Det. Leg. N. 929, 106 N. W. 719. Persons who lived near a railway, who had watched trains, and who could tell whether they were going fast or slow, held competent to give opinions on rate of speed of a particular train at a certain time and place. Garran v. Michigan Cent. R. Co. [Mich.] 13 Det. Leg. N. 97, 107 N. W. 284. Witness who saw train running when an accident occurred, and who prior thereto had seen other trains running, could properly be asked as to the speed of the train at the time of the accident. Louisville & N. R. Co. v. Jones [Fla.] 39 So. 485.

On issue of value: A farmer is ordinarily competent to give opinion evidence on value of such horses as he owns. Palmer v. Goldberg [Wis.] 107 N. W. 478. A witness who shows that he has some knowledge of the value of the property is competent to testify to the value. Louisiana R. & Nav. Co. v. Morere, 116 La. 997, 41 So. 236. On issue of value of household property, witness was held competent to testify to value of articles she had purchased herself, of which she had personal knowledge, but incompetent as to articles purchased by her husband who had told her what he paid, that being her only knowledge of them. Cook v. Purman [Ariz.] 86 P. 6. Men who had had much experience in sheep raising held competent to testify to value of sheep at time of conversion, though they knew of no sales at the particular place in question, their knowledge being derived from market value in the state, or from Chicago prices and reports, which fixed market price in state. Rich v. Utah Commercial & Sav. Bank [Utah] 84 P. 1105. Real estate men having some knowledge of land in vicinity held qualified to testify to value of benefits to land caused by local improvement. Johnson v. Tacoma, 41 Wash. 51, 82 P. 1092. Witness who said he knew what was usually charged for a certain kind of concrete work, and had talked with contractors about it, competent to testify to the value of certain work of that kind. Camp v. Behlow [Cal. App.] 84 P. 251. Owner competent to testify to value of laundry and machinery destroyed by fire in action for insurance. Tubbs v. Mechanics' Ins. Co. [Iowa] 108 N. W. 324. Witnesses to value are only required to have such knowledge as can reasonably be expected in view of the circumstances; thus, where sales of realty are infrequent in the vicinity, a witness may be competent though his knowledge of values is not so extensive as would be required where many sales were made. Lally v. Central Valley R. Co. [Pa.] 64 A. 633. Property owners living near property in question, who are well acquainted with it, and know selling prices of other property in vicinity and what people are asking, were competent witnesses to value. Sutton v. Pennsylvania R. Co., 214 Pa. 274, 63 A. 791. One who owns and resides on property in the vicinity, and has bought and sold and knows of other sales, may testify to value in expropriation proceedings, though he testifies that he considers also the amount paid him by plaintiff in a compromise of a proceeding to expropriate his lands. Louisiana R. & Nav. Co. v. Sarpy [La.] 41

his opinion is accompanied by a statement of the facts or reasons on which it is based.[59]

So. 477. In an action for damages for appropriation of a stream for a reservoir witnesses long familiar with property and the stream are competent to give opinions on the value when the water was taken 15 years before, it appearing that the stream and property in question were in practically the same condition at that time. Stauffer v. East Stroudsburg Borough [Pa.] 64 A. 411. Dealer in apples who had raised them a number of years, and had sold in New York, one sale being recent, and another who had bought and sold in New York during the year, held competent to testify to New York **market price** of apples. Weidner v. Olivit, 108 App. Div. 122, 96 N. Y. S. 37. Witness who gained knowledge concerning market price of rice from what he heard others say and from general quotations in newspapers held qualified to testify to market value. El Campo Rice Milling Co. v. Montgomery [Tex. Civ. App.] 16 Tex. Ct. Rep. 269, 95 S. W. 1102. Witnesses who had never seen cattle killed by defendant held competent to testify to value, where by experience and observation such as is common to men in that business they knew the value of similar cattle. Harris v. Quincy, etc., R. Co., 115 Mo. App. 527, 91 S. W. 1010. Merchandise broker who bought and sold vinegar in a certain market and said he knew prices there at a certain time, was a competent witness as to such prices, though his testimony rested on hearsay. Genesee Fruit Co. v. Clarksville Cider Co., 114 Mo. App. 422, 89 S. W. 914. One experienced in cattle business is qualified to give an opinion on their market value, though it is based in part on market reports and communications from other dealers, such as all business men use and rely on. Fountain v. Wabash R. Co., 114 Mo. App. 676, 90 S. W. 393.

Witness held not qualified: Witness who had not testified that he had any knowledge of testatrix could not give opinion as to her testamentary capacity. Packham v. Ludwig [Md.] 63 A. 1048. Testimony of witness as to testamentary capacity based merely on information received from others is incompetent. In re Dolbeer's Estate [Cal.] 86 P. 695. Where witness merely said he knew something about values of trees like those injured, he was not shown to be qualified to testify to their value. Western Union Tel. Co. v. Ring, 102 Md. 677, 62 A. 801. One who had only a general knowledge of the value of the land taken, derived from passing through it on a train, and who had not kept informed for six years on the value of property like that taken, held not competent. Louisiana R. & Nav. Co. v. Sarpy [La.] 41 So. 477. Witnesses who did not know customary charges of physicians in certain counties were incompetent to testify in regard thereto. Duggar v. Pitts [Ala.] 39 So. 905. Error to allow witness, not shown to be competent, to testify to value of work done on certain garments. Manhattan Delivery Co. v. Simon, 98 N. Y. S. 844. Brakeman and fireman of only 2½ years' experience held not competent to give opinions on speed of logging train based merely on conditions surrounding wreck, they not having seen the accident. Cook v. Stimson Mill Co., 41 Wash. 314, 83 P. 419. Liveryman of 10 years' experience held qualified to testify that horse was sick and would not eat, but not that the trouble was lung fever. Louisville & N. R. Co. v. Brown [Ky.] 90 S. W. 567. Witness who had no personal knowledge of price of oil in Louisville, Ky., was not competent to testify in regard thereto from letters which were not "prices current" or "commercial lists" within Code 1896, § 1810. Kentucky Refining Co. v. Conner [Ala.] 39 So. 728. Witness who testified that an automobile coming toward him in the dark made no noise heard by him, and that automobiles made little noise when running at a high rate of speed, and much noise if running at a low rate of speed, was not shown to be competent to testify to its speed. Wright v. Crane [Mich.] 12 Det. Leg. N. 794, 106 N. W. 71. An opinion as to the identity of a person, based wholly on the statement of another, is incompetent; such opinion, to be competent, must be based on personal knowledge. People v. Gray, 148 Cal. 507, 83 P. 707. Opinion evidence as to speed of wrecked train incompetent when based merely on conditions observed after the wreck, the operation of the train at the time, whether it was going at full speed or not, and the manner in which the collision occurred, not being taken into consideration. Cook v. Stimson Mill Co., 41 Wash. 314, 83 P. 419.

59. Nonexpert opinion that plaintiff, when witness saw him, was unable to work, held incompetent without a statement of the facts on which it was based. St. Louis S. W. R. Co. v. Demsey [Tex. Civ. App.] 13 Tex. Ct. Rep. 961, 89 S. W. 786. Opinions as to how land could have been drained and an overflow prevented held incompetent unless facts could not be presented to jury so that they could draw conclusions therefrom. St. Louis S. W. R. Co. v. Morris [Ark.] 89 S. W. 846. Nonexpert witnesses, familiar friends of deceased, whose testamentary capacity is in issue, cannot be examined by means of hypothetical questions based on facts to which they did not themselves testify. In re Dolbeer's Estate [Cal.] 86 P. 695. Nonexpert witnesses called upon the question of the mental capacity of a testator must state the facts upon which their opinion is based. In re Isaac's Estate [Neb.] 107 N. W. 1016. Any person may testify as to his opinion of the mental condition of another, if he also states the facts on which his opinion is based; without such facts the opinion is of very little value. Stafford v. Tarter [Ky.] 96 S. W. 1127. Subscribing witnesses to a will, and other persons acquainted with testator and in a situation to observe his conduct, may give opinions as to his mental soundness without reciting facts on which they are based, but it is proper to instruct that the weight to be given them depends on the facts shown in connection with the opinions. In re Wharton's Will [Iowa] 109 N. W. 492. On issue of value of timber on a tract of land, the owner of an adjoining tract, after testifying that the timber on the two tracts was about the same, and stating

A witness may properly be allowed to characterize acts or statements of another,[60] or to give an opinion as to his appearance or condition,[61] or to state a collective fact,[62] when the facts upon which such testimony is based are of such a nature that they cannot be intelligibly presented to the jury.[63] It is held by some courts that a witness cannot testify to his uncommunicated motives or reasons;[64] by others it is held that whenever the motive, belief, or intention of any party, whether a party to the action or not, is a material fact to be proved, it is competent to prove it by the direct testimony of such party.[65] A witness cannot testify to the intention[66] or knowledge[67] of another concerning a particular fact or transaction.

that he had sold some of his, could give his estimate of the value of his timber. Kean v. Landrum, 72 S. C. 556, 52 S. E. 421. Where a witness has been permitted to state his opinion on the merits, or to testify to an ultimate fact, the error is immaterial when he afterwards states all the facts and circumstances on which his conclusions were based. Sun Ins. Office v. Western Woolen-Mill Co., 72 Kan. 41, 82 P. 513. Policeman whose beat included place in issue, after testifying to condition of sidewalk before and at time of an injury, could give opinion as to whether it was reasonably safe for travel. Campbell v. New Haven, 78 Conn. 394, 62 A. 665. Where witness testified to facts from which a conclusion could be drawn as to the rental value of certain overflowed land, there was no error in refusing to exclude his opinion and statement as to how he arrived at it. Chicago, etc., R. Co. v. Seale [Tex. Civ. App.] 14 Tex. Ct. Rep. 48, 89 S. W. 997. Under Code Civ. Proc. § 1870, a nonexpert may testify to the mental condition of an intimate acquaintance only on giving **reasons** for his opinion. In re Dolbeer's Estate [Cal.] 86 P. 695. Under B. & C. Comp. § 718, subd. 10, the opinion of an intimate acquaintance is competent on mental capacity to contract, but the reason for the opinion must be stated. Lassas v. McCarty [Or.] 84 P. 76.

60. Witness properly allowed to state whether any act or statement of a certain person indicated an attempt to coerce or influence a testator. Nichols v. Wentz, 78 Conn. 429, 62 A. 610. A question whether an elevator boy was a wideawake, attentive boy when engaged in his duties did not call for an opinion. First Nat. Bank v. Chandler [Ala.] 39 So. 822.

61. Opinion of nonexpert that injured plaintiff did not appear to be 50% as good a man as he was before the accident held competent. St. Louis, etc., R. Co. v. Smith [Tex. Civ. App.] 14 Tex. Ct. Rep. 376, 90 S. W. 926. Testimony that witness could see that a person was drunk and that he acted drunk was not objectionable as a mere conclusion. Kuhlman v. Wieben, 129 Iowa, 188, 105 N. W. 445. Testimony that persons were about half drunk. Henderson v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 570, 91 S. W. 569.

62. A statement of a witness that a certain person was indebted to him on a particular day was the statement of a collective fact and not an opinion and was competent evidence. Richards v. Herald Shoe Co. [Ala.] 39 So. 615. Whether witness owed a certain person for transportation or not did not call for a conclusion but for a collective fact. Owen v. McDermott [Ala.] 41 So. 730.

63. Nichols v. Wentz, 78 Conn. 429, 62 A. 610. Husband may testify as to clothing needed by wife and children, since their needy condition could not be described by placing details observed by witness in evidence. Baker v. Oughton [Iowa] 106 N. W. 272. Witnesses shown to be qualified by experience held properly allowed to state their opinion as to the amount of damage done to the wearing apparel injured in a wreck. Withey v. Pere Marquette R. Co., 141 Mich. 412, 12 Det. Leg. N. 511, 104 N. W. 773.

64. In ejectment, it was proper to refuse to allow defendant to tell why he did not pay taxes on land. Lawrence v. Alabama State Land Co. [Ala.] 41 So. 612. Evidence concerning the uncommunicated motive or purpose of a witness in performing certain acts to which he had testified held incompetent. Reeder v. Huffman [Ala.] 41 So. 177. Question to defendant in forcible entry and detainer as to how he came to go into the house. Sprouse v. Story [Ala.] 42 So. 23. Why person who received telegram did not deliver it. Western Union Tel. Co. v. Long [Ala.] 41 So. 965. On issue whether a conveyance was absolute or as security, the party executing it could not testify what his intention was in so doing. Russell v. Haltom [Ark.] 89 S. W. 471. Testimony as to a person's purpose in falsifying as to her age. Levels v. St. Louis & H. R. Co., 196 Mo. 606, 94 S. W. 275. In action for carrying passenger beyond her destination, evidence of the undisclosed intention of the conductor to make provision for caring for the passenger was inadmissible. Chesapeake & O. R. Co. v. Lynch [Ky.] 89 S. W. 517.

65. Proper to permit party to testify whether in executing and delivering deed it was the intention to carry out the terms of a contract. Grout v. Stewart, 96 Minn. 230, 104 N. W. 966. Owner of ditch may properly be asked directly if he ever had any intention of abandoning it. Boulder & White Rock Ditch Co. v. Leggett Consol. Ditch & Reservoir Co. [Colo.] 86 P. 101. Held proper to ask plaintiff if he relied on the master's promise to make repairs though this was an issue in the case, there being no other way to prove it. Huggard v. Glucose Sugar Refining Co. [Iowa] 109 N. W. 475.

66. Testimony of defendant's manager as to defendant's intention in taking bills of lading in his name and forwarding them, indorsed, with draft attached, to a bank.

On questions of damage a witness may testify to facts within his knowledge constituting elements of damage,[68] but should not be allowed to state his conclusion as to the fact of injury or damage[69] or as to the amount of damages,[70] this being for the jury.[71] But it is held that plaintiff, in a personal injury action, may testify as to the amount of damage he has suffered,[72] after testifying to the facts.[73]

(§ 9) *B. Subjects of expert testimony.*[74]—Expert opinion evidence is admissible in regard to matters adequate knowledge of which presupposes special skill, experience, or investigation;[75] it is inadmissible upon matters of common knowl-

Hamilton v. Jos. Schlitz Brewing Co., 129 Iowa, 172, 105 N. W. 438.

67. Testimony of officer of mutual benefit association that none of the other officers of the association had any knowledge of the delivery of a certain certificate. Sovereign Camp, Woodmen of the World v. Carrington [Tex. Civ. App.] 14 Tex. Ct. Rep. 397, 90 S. W. 921.

68. City of McCook v. McAdams [Neb.] 106 N. W. 988. Persons familiar with property, and with the effect on its value of smoke, cinders, gas, etc., from locomotive engines, may testify in regard to damage so caused. Baltimore Belt R. Co. v. Sattler. 102 Md. 595, 62 A. 1125. Opinion of plaintiff in personal injury action that his earning capacity was reduced one-half by the injury was competent. Houston, etc., R. Co. v. Fanning [Tex. Civ. App.] 91 S. W. 344.

69. In action for breach of contract, it is improper to ask plaintiff if he sustained any damage by reason of defendant's refusal to perform. Richmond v. Brandt, 118 Ill. App. 624.

70. City of McCook v. McAdams [Neb.] 106 N. W. 988. The opinions of witnesses are incompetent as to the amount of damages; they may testify only to elements of damage. Mauldin v. Seaboard Air Line R. Co., 73 S. C. 9, 52 S. E. 677. Opinions as to amount of damage to fences and meadow held incompetent. Wiggins v. St. Louis, etc., R. Co. [Mo. App.] 95 S. W. 311. Opinion evidence incompetent as to extent of damage to property by establishment of county road. Bell County v. Flint [Tex. Civ. App.] 14 Tex. Ct. Rep. 256, 91 S. W. 329. Witness may not state amount of damages caused by nuisance. City of Huntington v. Stemeh [Ind. App.] 77 N. E. 407. One shown to be qualified may, in an action for damage to property, state the condition of the property before and after the injury, but should not be allowed to estimate the damages in exact figures, this is for the jury. Western Union Tel. Co. v. Ring, 102 Md. 677, 62 A. 801. An expert witness, testifying merely as an expert, may not testify either to the fact or amount of damage resulting from an alleged injurious act, but may give his opinion as to the value of the property below and after the act complained of. Baltimore Belt R. Co. v. Sattler, 102 Md. 595, 62 A. 1125. In an action for damages to property caused by an overflow, it was held proper to allow a witness to state what was the effect of the overflow on the property, but not to allow witness to state that it was damaged, or that it was damaged a great deal. Central of Georgia R. Co. v. Keyton [Ala.] 41 So. 918. Opinion of witness as to amount of damage, without a statement of facts on which the estimate is based, is incompetent. Raymond v. Edelbrock [N. D.] 107 N. W. 194.

71. City of McCook v. McAdams [Neb.] 106 N. W. 988.

72. Roundtree v. Charleston, etc., R. Co., 72 S. C. 474, 52 S. E. 231.

73. Jackson v. Southern R. Co., 73 S. C. 557, 54 S. E. 231.

74. See 5 C. L. 1358.

75. Expert testimony is not confined to matters within the fields of "science, art or skill," as technically used, but extends to all matters concerning which special knowledge, skill, or experience may be required. Hamann v. Milwaukee Bridge Co., 127 Wis. 550, 106 N. W. 1081. Opinion evidence is not limited by technical meaning of terms "science, art, or skill," but extends to every subject in regard to which one may acquire special knowledge. Schwantes v. State, 127 Wis. 160, 106 N. W. 237. Effect on persons and buildings of explosions of certain amounts of dynamite within certain distances. Remsberg v. Iola Portland Cement Co. [Kan.] 84 P. 548. Experienced horsemen may testify whether steam shovel in operation is likely to frighten ordinarily safe and gentle horses. Heinmiller v. Winston Bros. [Iowa] 107 N. W. 1102. Expert opinion evidence is admissible on the question whether a public improvement will benefit or injure property. Swift & Co. v. Newport News [Va.] 52 S. E. 821. Experts on customary rate of exchange may testify as to custom of charging exchange where interest is charged and included. Sullivan & Co. v. Owens [Tex. Civ. App.] 90 S. W. 690. Expert testimony admissible to show that cotton had been injured by fresh, and not by salt, water. Houston, etc., R. Co. v. Bath [Tex. Civ. App.] 14 Tex. Ct. Rep. 117, 90 S. W. 55. Real estate experts may testify to amount of benefits to land caused by local improvement. Johnson v. Tacoma, 41 Wash. 51, 82 P. 1092. Opinions of expert real estate man properly received on issue of value of farm. Yore v. Meshew [Mich.] 13 Det. Leg. N. 672, 109 N. W. 35. Testimony by Italian priest shown to be qualified, that marriage by religious ceremony alone did not in Italy constitute a legal marriage, held properly admitted. Massucco v. Tomassi, 78 Vt. 188, 62 A. 57. Evidence of fruit inspector, an expert, in action for breach of warranty of apples found to be unmerchantable, that if apples were in merchantable condition on March 21 they could not have been in condition in which they arrived on March 26, held competent. Jones v. Emerson [Wash.] 82 P. 1017. Witnesses, qualified as experts, were properly allowed to express opinions on proper method of tying

edge,[76] or when the facts can be intelligibly presented to the jury and are of such

packages of lumber for hoisting, when they had testified that method used was not safe. Smith v. Dow [Wash.] 86 P. 555. The terms "basis" and "returns" used in contracts for sale of cotton are technical trade terms, and experts in the cotton business may testify as to their meaning. Daniel v. Maddox-Rucker Banking Co., 124 Ga. 1063, 53 S. E. 573. Proper to ask expert surveyor if property described by field notes in a petition was embraced within metes and bounds given in a deed examined by the witness. Camp v. League [Tex. Civ. App.] 92 S. W. 1062. Where plaintiff and defendant disagreed as to proper manner of measuring timber, testimony of experienced lumbermen was competent to show how amount should be computed. Wall v. Melton [Tex. Civ. App.] 16 Tex. Ct. Rep. 112, 94 S. W. 358. In action for injuries resulting from slipping on a sloping walk, one who had been engaged in laying such cement walks for many years was properly allowed to testify whether the one in question was laid at a dangerous slope, the material used being uncommon. Garberg v. Samuels, 27 R. I. 359, 62 A. 211. In an action for refusal to allow a contractor to complete work in laying pipes in the street, one shown to be familiar with such work and with conditions of the particular work was properly allowed to testify to the fair cost of completing the work. Shields v. Norton [C. C. A.] 143 F. 802. Question, though ambiguous, held to inquire of expert whether there were risks, and if so how great, attendant upon the work of cutting blades from unannealed steel, and held proper. Arnold v. Harrington Cutlery Co., 189 Mass. 547, 76 N. E. 194. In an action for death caused by electric current, a question to an electrical expert how under certain hypothetical conditions a person could have received a shock was held not to be an encroachment on the province of the jury. Goddard v. Enzler [Ill.] 78 N. E. 805.

Medical, scientific, and other professional matters: Medical expert who examined and treated the plaintiff was competent to express an opinion as to future consequences of his injury reasonably to be expected to follow therefrom. Vohs v. Shorthill & Co. [Iowa] 107 N. W. 417. It is competent for an expert medical witness to testify as a matter of opinion that there was "apparent inability to use" a hip. Chicago City R. Co. v. Lowitz, 119 Ill. App. 360. Physician may testify to what extent an injury will impair a man's ability to work. McDonald v. City Elec. R. Co. [Mich.] 13 Det. Leg. N. 252, 108 N. W. 85. Medical expert may give opinion that an injury is permanent, based on the history of the case, his own observations, and the length of time which had elapsed since the injury. Missouri, etc., R. Co. v. Lynch [Tex. Civ. App.] 14 Tex. Ct. Rep. 237, 90 S. W. 511. Medical expert may testify that conditions named by him and shown by evidence would produce pain. Western Union Tel. Co. v. Stubbs [Tex. Civ. App.] 16 Tex. Ct. Rep. 210, 94 S. W. 1083. Opinion of physician that patient had neurasthenia, based on his examination, was competent. Bach v. Brooklyn, etc., R. Co., 109 App. Div. 654, 96 N. Y. S. 321. Physician's opinion admissible as to extent of suffering endured by injured person. Indianapolis & M. Rapid Transit Co. v. Reeder [Ind. App.] 76 N. E. 816. Physician may explain effect of excessive use of alcohol on brain, nervous system, and body. Swygart v. Willard [Ind.] 76 N. E. 755. Physician answering question as to serious character of injury may properly testify that "he was afraid a clot or something of that kind would form on the brain." Monize v. Begaso, 190 Mass. 87, 76 N. E. 460. Not error to allow physician's statement that he found an "apparent inability" to use the hip joint, since he was competent to give an expert opinion. Chicago City R. Co. v. Lowitz, 218 Ill. 24, 75 N. E. 755. Where injuries result from a stiff ankle, the nature of the stiffness, the motions it will impede, its causes and character, whether temporary or permanent, are subjects for expert testimony. Lewis v. Crane, 78 Vt. 216, 62 A. 60. Physician properly allowed to testify regarding peculiarities of various forms of mental unsoundness, and to give an opinion of the kind from which a testator was suffering, when facts showing some form of mental unsoundness were hypothetically stated to him. Swygart v. Willard [Ind.] 76 N. E. 755. Proper to ask physician whether physical condition of patient as observed by him could, would, or might have resulted from injuries and accident detailed in the hypothetical question, when the question does not ask the expert to decide a fact in issue which is for the jury. Bragg v. Metropolitan St. R. Co., 192 Mo. 331, 91 S. W. 527. In an action for injuries to an eye, the physician who treated it may state, in answer to a question whether the eye was apt to become diseased on account of the condition it was left in, that it was more apt to become so than the well eye. Vohs v. Shorthill & Co. [Iowa] 107 N. W. 417. Where ear specialist had testified that plaintiff's ear was diseased prior to an explosion, alleged to have injured it, it was not error to admit his opinion that if the ears of persons 50 to 80 feet away were not injured, plaintiff's ears could not have been injured by it. Hickey v. Texas & P. R. Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 88, 95 S. W. 763. Where physician testified to condition of patient, he was properly allowed to say whether her condition was the result of violence or disease. Gulf, etc., R. Co. v. Booth [Tex. Civ. App.] 97 S. W. 128. Lawyers may testify to value of legal services. Sexton v. Bradley, 110 Ill. App. 495.

Machinery, construction, engineering: Rated capacity of boiler of heating plant, and proper method of ascertaining same. United States Heater Co. v. Jenss [Wis.] 107 N. W. 293. Capacity of iron columns to sustain weight, and effect of holes and cracks therein on their capacity. Fraternal Const. Co. v. Jackson Foundry & Mach. Co. [Ky.] 89 S. W. 265. Proper method of trestle construction, kinds of bolts to be used, comparative strength of different timbers, etc. Bowen v. Sierra Lumber Co. [Cal. App.] 84 P. 1010. What conditions make timbering in mine necessary to make it safe. Bird v. Utica Gold Min. Co. [Cal. App.] 84 P. 256.

a nature that jurors generally are competent to form opinions and draw conclusions from them.[77] Expert opinion is inadmissible upon the ultimate issues of fact,[78] and upon questions of law.[79]

Experienced carpenter who had used swing staging could testify to strength of hooks used in such staging. Lewis v. Crane, 78 Vt. 216, 62 A. 60. Duly qualified expert properly allowed to testify whether use of cast iron in steam pipe created unusual danger from breaking of the pipe. Erickson v. American Steel & Wire Co. [Mass.] 78 N. E. 761. Expert testimony is admissible upon question whether laundry machine can be guarded, and as to ordinary and proper manner of guarding such machine. Carlin v. Kennedy [Minn.] 106 N. W. 340. Expert may testify how track for traveling crane was built and what he considers a safe and proper construction. Hamner v. Janowitz [Iowa] 108 N. W. 109. Expert in elevator well construction was properly allowed to testify that strips nailed on beams in shaft were unnecessary, and that elevator wells were not usually or properly constructed in that way. Obermeyer v. Logeman, Chair Mfg. Co. [Mo. App.] 96 S. W. 673.

Railroad construction and management: Efficiency of spark arrester on engine. St. Louis S. W. R. Co. v. Parks [Tex. Civ. App.] 14 Tex. Ct. Rep. 232, 90 S. W. 343. Practical locomotive engineer properly allowed to testify as to proper manner of handling engine when passing combustible material. St. Louis, etc., R. Co. v. Dawson [Ark.] 92 S. W. 27. Error to refuse to allow witness, who had had much experience with railroad wrecks, that he could not discover the cause of the wreck in question. Southern Kan. R. Co. v. Sage [Tex. Civ. App.] 16 Tex. Ct. Rep. 254, 94 S. W. 1074. Experienced railroad men were properly allowed to testify to method of handling cars and trains in railroad yards. Pittsburgh, etc., R. Co. v. Nicholas, 165 Ind. 679, 76 N. E. 522. Railway superintendent properly allowed to testify that it was not necessary to go between cars to couple them. Huggins v. Southern R. Co. [Ala.] 41 So. 856. Railroad man may give opinion as to what cars may be coupled without going between them. Id. Railroad experts may testify what constitutes an ordinary train crew and what would be a proper crew for a light engine. Stewart v. Raleigh & A. Air Line R. Co. [N. C.] 53 S. E. 877. That running trains over a trestle will cause vibration and thereby loosen nails with which it is put together. Bowen v. Sierra Lumber Co. [Cal. App.] 84 P. 1010.

76. Schwantes v. State, 127 Wis. 160, 106 N. W. 237. Effect of weak timber in trestle when heavy train came on it. Bowen v. Sierra Lumber Co. [Cal. App.] 84 P. 1010. Whether team and wagon passing over paved street would make so much noise that a boy in the street would have heard it if he had been standing still. Star Brewery Co. v. Houck [Ill.] 78 N. E. 827. Offer of expert testimony that difference in density between iron and steel cannot be detected by the eye alone when both are polished, properly excluded. Wolfe v. New Bedford Cordage Co., 189 Mass. 591, 76 N. E. 222. In action on fire policy, where sole question is whether spontaneous combustion occurred, it is proper to refuse to permit an expert chemist to testify to the meaning of such terms as "fire," "ignition," "ignition point," and the relation between "fire" and "flame" and similar terms, of which the meaning is commonly understood by all well informed persons. Sun Ins. Co. v. Western Woolen-Mill Co., 72 Kan. 41, 82 P. 513. Testimony of expert accountant as to amount of interest on certain payments held properly excluded, the jury being competent to assess interest. Clements v. Mutersbaugh, 27 App. D. C. 165.

77. What ought to have been done to make a mine reasonably safe. Kellyville Coal Co. v. Moreland, 121 Ill. App. 410. Ability or inability of deceased to save himself from injury under conditions recited. Illinois Cent. R. Co. v. Whiteaker, 122 Ill. App. 333. Whether manner adopted of moving heavy machine from car to building was proper. Hamann v. Milwaukee Bridge Co., 127 Wis. 550, 106 N. W. 1081. Whether first sexual intercourse under certain conditions was likely to result in conception held not subject for expert testimony. Kesselring v. Hummer [Iowa] 106 N. W. 501. Whether door of entrance to elevator shaft was properly placed for safety. Siegel, Cooper & Co. v. Trcka, 218 Ill. 559, 75 N. E. 1053. Whether wounds were such as would be caused by being struck by a train going at a certain rate. MacFeat v. Philadelphia, etc., R. Co. [Del.] 62 A. 898. Whether excavation in street was properly guarded and lighted. Carty v. Boeseke-Dawe Co. [Cal. App.] 84 P. 267. Position camera must have been in to take certain picture. MacFeat v. Philadelphia, etc., R. Co. [Del.] 62 A. 898. Whether chipping or cutting cast iron with a chisel and hammer is a dangerous occupation. Olwell v. Skobis, 126 Wis. 308, 105 N. W. 777. Whether method adopted of crossing bridge with traction engine was ordinarily safe. Central City v. Morquis [Neb.] 106 N. W. 221. That machine which injured boy was dangerous and that boys were not usually allowed to operate them for that reason. Anderson v. Chicago Brass Co., 127 Wis. 273, 106 N. W. 1077. Formation of accretion to land, in a river, is not a subject demanding expert testimony. Mallory v. Brademyer [Ark.] 89 S. W. 551. What would be the effect of a woman weighing 132 pounds riding a bicycle over a depression, dishshaped, and 2½ inches deep, in a sidewalk, held not a proper subject for opinion evidence. Lee v. Salt Lake City [Utah] 83 P. 562. Where evidence showed a boiler exploded when steam pressure was low, and other conditions normal, it was error to allow an expert to testify that it was the condition of the boiler due to want of repairs that caused the explosion. O'Doherty v. Postal Tel. Cable Co., 99 N. Y. S. 351. On the issue of value of corporate stock which had no market value, where certain witnesses, called as experts, had detailed all the facts in their possession relative to the stock, it was not error to exclude their

(§ 9) *C. Qualifications of experts.*[80]—Qualification of a witness to testify as an expert is a preliminary question[81] addressed largely to the discretion of the trial court.[82] Special familiarity with the subject under investigation, experience, and professional skill and training, are the tests usually applied.[83] Expert capacity is a matter wholly relative to the subject of a particular question.[84]

opinions, since the trial court could as well pass on such facts as the witnesses. Cabble v. Cabble, 97 N. Y. S. 773. Evidence by physician that nervous condition of patient might have been caused by the injury is not competent evidence that such condition was caused by the injury. Boland v. New York City R. Co., 48 Misc. 523, 96 N. Y. S. 262. Opinion of physician whether injury could have been caused by a crow bar thrown by a moving train inadmissible. Dunn v. Chicago, etc., R. Co. [Iowa] 107 N. W. 616. Disposition of a person (susceptibility to undue influence) is not a subject of expert testimony. Simmons v. Kelsey [Neb.] 107 N. W. 122. Testimony of physician that plaintiff's condition was in his opinion due to a fall and not to a previous diseased condition held incompetent. Glasgow v. Metropolitan St. R. Co., 191 Mo. 347, 89 S. W. 915. In an action for injuries received by employe in burning building, where all the facts concerning it were shown, expert opinion that, from a fire insurance standpoint, the building was an extra hazardous one was incompetent. Dakan v. Chase Mercantile Co., 197 Mo. 238, 94 S. W. 944. Expert opinion is admissible on question whether particular situation is dangerous only when jury cannot be supplied with all the facts so that they can form an intelligent opinion thereon for themselves. Hamann v. Milwaukee Bridge Co., 127 Wis. 550, 106 N. W. 1081.

78. Where question called for degree of care required in riding a bicycle over a depression in a sidewalk, it was improper. Lee v. Salt Lake City [Utah] 83 P. 562. Where cause of death was in issue, plaintiff claiming it was an electric shock, and defendant that it was heart disease, it was improper to allow an electrical expert to testify whether he thought deceased received an electric shock before he fell. Martin v. Des Moines Edison Light Co. [Iowa] 106 N. W. 359. Hypothetical questions calling for ultimate conclusions of facts, which are for the jury, are improper. Chicago City R. Co. v. Sugar, 117 Ill. App. 578. Question asking opinion as to cause of present condition held improper where the issue was whether a certain accident was the cause of his condition. City of Chicago v. Powers, 117 Ill. App. 453. Whether an injury was caused by a given accident is for the jury; medical witnesses may testify only whether the accident "might" have caused the injury. Illinois C. R. R. Co. v. McCollum, 122 Ill. App. 531. In action to recover for death of a boar, an expert may testify to natural disposition of boars to fight each other when kept in the same enclosure, and whether cuts or wounds appearing on one might have been caused by tusks of another boar, but he cannot testify whether such wounds were in fact caused by boar's tusks, nor show nature's purpose in providing boars with tusks. Walters v. Stacey, 122 Ill. App. 658.

79. Train dispatcher, though qualified as an expert, cannot testify to the meaning of printed rules of a railway; their construction is for the court, where the language is used in its ordinary sense and significance. Stewart v. Raleigh & A. Air Line R. Co. [N. C.] 53 S. E. 877.

80. See 5 C. L. 1361.

81. Fact that civil engineer was allowed to testify to percolating character of soil involves finding that he was qualified to testify, and parties are bound by this finding unless they except thereto. Flint v. Union Water Power Co., 73 N. H. 483, 62 A. 788.

82. Texas & P. R. Co. v. Warner [Tex. Civ. App.] 15 Tex. Ct. Rep. 530, 93 S. W. 489. Qualification of witnesses to give opinion evidence is for trial court. Dallas Consol. Elec. St. R. Co. v. English [Tex. Civ. App.] 15 Tex. Ct. Rep. 606, 93 S. W. 1096. Preliminary questions of competency of witness and competency of opinion evidence offered are for trial court, and its rulings are conclusive unless clearly shown to be wrong. Schwantes v. State, 127 Wis. 160, 106 N. W. 237. Discretion of trial court held not abused by refusing to permit witness familiar with stopping of street cars to testify that a motorman made a good stop, and as quick a one as could be made at the time and place. Dallas Consol. Elec. St. R. Co. v. English [Tex. Civ. App.] 15 Tex. Ct. Rep. 606, 93 S. W. 1096.

83. Illustrations. Held competent: Experienced life insurance agent, familiar with standard mortality tables, properly allowed to testify to injured person's life expectancy. Southern Pac. Co. v. Cavin [C. C. A.] 144 F. 348. Witnesses who from experience are entirely familiar with the color, taste, and smell of a certain bitters may testify that a liquid made by defendant is not such bitters. Hostetter Co. v. Gallagher Stores, 142 F. 208. An attorney is competent to testify to the value of professional services upon being informed as to the nature of the services rendered. His knowledge of the skill and attainments of the person rendering the services is matter for cross-examination. Fuller v. Stevens [Ala.] 39 So. 623. Experienced motorman competent to give opinion as to whether a car could be stopped with appliances at hand in time to prevent killing a dog. Wallace v. North Alabama Traction Co. [Ala.] 40 So. 89. Witness who said he was familiar with ripsaw machines, and was an experienced mill man, held competent to testify as an expert regarding ripsaws, though he had used only one saw machine and not four saw machines like the one causing the injury. Yates v. Huntsville Hoop & Heading Co. [Ala.] 39 So. 647. Witness who had had 35 years' experience around blast furnaces was properly allowed to testify whether a particular furnace was in proper condition for use at the time of an accident, and to describe and explain its condition. Williamson Iron Co. v. McQueen

[Ala.] 40 So. 306. Proper for person familiar with ferry and ferry rates to testify that rates were reasonable. Covington v. St. Francis County [Ark.] 91 S. W. 186. Experienced section men who had used and repaired hand cars held competent to state whether certain peculiarities rendered the car defective. St. Louis S. W. R. Co. v. Plumlee [Ark.] 95 S. W. 442. Skilled trestle and bridge builder qualified to testify as to proper manner of constructing trestles. Bowen v. Sierra Lumber Co. [Cal. App.] 84 P. 1010. Miner who had worked 2 years in another mine where timbering was done, and 23 days in mine in question, properly allowed to testify under what circumstances timbering was necessary in a stope or chamber. Bird v. Utica Gold Min. Co. [Cal. App.] 84 P. 256. Witnesses able to figure the cost of performing the work of furnishing and erecting ironwork for a warehouse to within 2 to 5% of the actual cost were properly allowed to testify as to such cost, omitting failures to complete within the required time, accidents, delays, etc. Hayes v. Wagner, 220 Ill. 256, 77 N. E. 211. Wool merchants and manufacturers, who have had years of experience in their business, are competent to give opinions based on facts falling within their experience, such as to the effect of water falling on a large mass of wool and the probability of a spontaneous combustion in it. Sun Ins. Co. v. Western Woolen-Mills Co., 72 Kan. 41, 82 P. 513. Witness who had been shipping cattle to a certain market for 15 years, and who saw certain cattle when shipped and on their arrival, was qualified to testify that they would have brought a better price if delivered on the morning of the day of delivery, though he did not know the fluctuations of the market. Farmers' Bank v. Wabash R. Co. [Mo. App.] 95 S. W. 286. When witness said she knew what it would cost to repair foundation wall of house, she was qualified to testify thereto. Frick v. Kansas City, 117 Mo. App. 488, 93 S. W. 351. One who had worked for years in different railroad yards, which had switches connecting with each other at one end, held competent to testify to reasonableness of rule governing work in yards where switches connected at both ends, since the work of coupling cars was essentially the same in all yards. Freemont v. Boston & M. E. R. Co., 98 N. Y. S. 179. Witness shown to have had long experience in running and managing threshing engines was qualified to give an opinion as to the alignment of a particular engine. Port Huron Machinery Co. v. Bragg [Neb.] 109 N. W. 398. One who had had long experience with horses held qualified to testify concerning them, though not a veterinarian. Palmer v. Cowle, 7 Ohio C. C. (N. S.) 46. Persons who had been engaged in running and operating sawmills and machinery many years held competent to testify whether defective fly wheel should be repaired or replaced by new one. Boop v. Laurelton Lumber Co., 212 Pa. 523, 61 A. 1021. Witness who had been in railway service as switchman, brakeman, and conductor for 12 years was competent to testify that force with which a coupling was made was not unusual. Mullen v. Galveston, etc., R. Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 963, 92 S. W. 1000. Witness who testified that he had himself made a survey was properly allowed to testify that certain meanderings would fit only a certain part of a stream Camp v. League [Tex. Civ. App.] 92 S. W. 1062. Witness shown to be familiar with land and its productiveness and who knew what kind of a year it was when land was overflowed was properly allowed to state what amount of cotton the overflowed land would have produced. Chicago, etc., R. Co. v. Seale [Tex. Civ. App.] 14 Tex. Ct. Rep. 48, 89 S. W. 997. Surveyor who had run a line held qualified to testify as to identity of the line run by him with line in dispute. Goodson v. Fitzgerald [Tex. Civ. App.] 14 Tex. Ct. Rep. 424, 90 S. W. 898. One who had been engaged in railroading for 10 years, and said he knew how a train of cabooses should be handled, held competent to testify that a man should have been stationed on the last caboose. St. Louis & S. F. R. Co. v. Smith [Tex. Civ. App.] 14 Tex. Ct. Rep. 376, 90 S W 926. Witnesses who testified to much experience with and knowledge concerning stationary engines, and that the blow off cock and injector of locomotives and stationary engines work on same principle, were competent to testify to action of blow off of locomotive in throwing off water and steam. Gulf, etc., R. Co. v. Tullis [Tex. Civ. App.] 14 Tex. Ct. Rep. 478, 91 S. W. 317. Witness who was a graduate of engineering college, had taken advanced work on subject of rivers and harbors and hydrostatics, and had had experience in railroad engineering, held competent to testify to sufficiency of pumps under certain conditions. Gulf, etc., R. Co. v. Wynne [Tex. Civ. App.] 14 Tex. Ct. Rep. 600, 91 S. W. 823. Witnesses who testified that damage to goods in transit was caused by improper packing or storing in the car held to have stated sufficient facts to render their opinions competent. Texas & P. R. Co. v. Warner [Tex. Civ. App.] 15 Tex. Ct. Rep. 530, 93 S. W. 489. Secretary, treasurer, and bookkeeper of corporation competent to testify whether corporation had assets at a certain time. Collins v. Chipman [Tex. Civ. App.] 15 Tex. Ct. Rep. 411, 95 S. W. 666. Witness who testified that he accompanied a shipment of cattle, and had made other shipments over a certain route, held qualified to testify as to what a reasonable time for such shipment would be in connection with court's own knowledge of the location and runs of the defendant roads. Texas & N. O. R. Co. v. Walker [Tex. Civ. App.] 15 Tex. Ct. Rep. 836, 95 S. W. 743. Physician shown to have had thorough training and long experience, and who had operated on patient, held qualified to express opinion whether a cancer which he removed was of recent growth. Taylor v. Modern Woodmen of America, 42 Wash. 304, 84 P. 867. In an action to recover for the death of a child, where it was contended that the evidence was insufficient to show negligence, two reputable physicians of long practice and high standing, each of whom had examined the child shortly before its death and were apprised of the conditions under which the sickness began, gave it as their deliberate opinion that the death was due to an inhalation of gas. Held such evidence could not be rejected or ignored, though neither of the physicians had ever before treated or especially observed a case of exactly similar

(§ 9) *D. Basis of expert testimony and examination of experts.*[85]—The opinion of an expert may be based on his personal knowledge of the facts as disclosed by his testimony,[86] or upon other evidence in the case shown to or heard by him.[87] Usually, expert opinions are elicited by means of hypothetical questions.[88] Such a question should hypothesize all the essential fasts relating to the matter on which the opinion is sought,[89] which the testimony of the witness[90] or other evidence in

character. Flaherty v. Scranton Gas & Water Co., 30 Pa. Super. Ct. 446. Experienced shingle mill men, sawyer, knee bolter, and millwright, competent to testify to custom of guarding saws in such mills. Thomson v. Issaquah Shingle Co. [Wash.] 86 P. 588. Mechanical engineer of considerable experience, who testified that he understood the mechanism of locomotive boilers, held competent to testify as an expert concerning their construction though he had never inspected them. Hanley v. West Virginia Cent. & P. R. Co. [W. Va.] 53 S. E. 625.

Held incompetent: Witness held not qualified by experience or special knowledge to testify whether lactic acid in distilling slops in vat would percolate or seep through staves of vat to any extent. Hupfer v. National Distilling Co., 127 Wis. 306, 106 N. W. 831. On the question of identity of land on which taxes have been charged and paid, as shown by the land books and tax receipts, with land on which it is claimed such charges and payments were made, the opinion of a person whose claim to competency is based solely upon the facts that he is surveyor of the county in which the land lies, has served as deputy for the clerk of the county court, and executed the order of survey in the pending action, is inadmissible. Webb v. Ritter [W. Va.] 54 S. E. 484.

84. Witness may testify to quality of horse without qualifying as expert on value of horses. Colorado & S. R. Co. v. Webb [Colo.] 85 P. 683. Witness who knows rental value of business property, but not rental value of unoccupied property not in the business section, is incompetent to testify to value of use of property of the latter description. Keeney v. Fargo [N. D.] 105 N. W. 93. One familiar with blasting in city streets but not with blasting in stonequarries, and who did not know quantity of explosives used in work of latter kind, held not qualified to testify as expert whether workmen could be protected in quarries while rock was being blasted. McMahon v. Bangs [Del.] 62 A. 1098. Where it was not shown that witnesses offered had traveled on street cars at a particular place, and knew the usual rate of speed at that place, they were not qualified to testify as to whether the speed on a particular occasion was extraordinary or not. Verrone v. Rhode Island Suburban R. Co., 27 R. I. 370, 62 A. 512. Seller of cattle to plaintiff, not shown to have any knowledge of market value of cattle at the place of destination or the vicinity, held not competent to testify to their value in action for loss of cattle being shipped. Texas & P. R. Co. v. Sherrod [Tex.] 14 Tex. Ct. Rep. 216, 89 S. W. 956. A witness may testify that the crookedness of belting constitutes a defect and that it was caused in the manufacture thereof, notwithstanding he never saw the particular belt in litigation. Jewell Belting Co. v. Hamilton Rubber Mfg. Co., 121 Ill. App. 13. On issue of value of brickmaking plant, and extent of damage to it caused by condemnation of right of way, witnesses who knew the value of such plants and had had experience with them were qualified to testify, though they did not know the value of other lands in the vicinity for farming or other purposes. St. Louis, etc., R. Co. v. Continental Brick Co. [Mo.] 96 S. W. 1011. In an action on a promissory note where it was contended that the seal was added after the note was signed, experts in microscopy or photography could testify as to special facts within the range of their scientific investigation, though they were not experts in handwriting. Wenchell v. Stevens, 30 Pa. Super. Ct. 527.

85. See 5 C. L. 1363.

86. Hanley v. West Virginia Cent. & P. R. Co. [W. Va.] 53 S. E. 625. Physician may base opinion that patient was nervous on what he himself saw, without relying on what patient said, and hence his opinion is not objectionable as being based on hearsay. Chicago City R. Co. v. McCaughna, 216 Ill. 202, 74 N. E. 819. Held not error to permit physician to give opinion as to cause of "traumatic neurosis," his opinion being based on symptoms which he observed while treating her. McCaffery v. St. Louis & M. R. Co., 192 Mo. 144, 90 S. W. 816.

87. Where photographs and plats of property to be appraised were in evidence, experts were properly allowed to give opinions as to its value, though they had not viewed the property itself. Louisiana R. & Nav. Co. v. Kohn, 116 La. 159, 40 So. 602.

88. Expert may give an opinion upon facts shown in evidence and assumed in a hypothetical question submitted to him. Hanley v. West Virginia Cent. & P. R. Co. [W. Va.] 53 S. E. 625. Witness who examined deceased after his death, and was qualified as an expert, could give opinion as to cause of death, based on facts stated to him. Foley v. Ploneer Mln. & Mfg. Co. [Ala.] 40 So. 273. On an issue as to the value of an attorney's services, the proper question to be asked an expert is what is the reasonable and customary charge for such services as were rendered, but if there is no reasonable and customary charge, it is proper to ask what the services are reasonably worth. Maneaty v. Steele, 112 Ill. App. 19.

89. It is improper to admit an expert opinion on the value of horses based merely on a general description. Wallingford v. Kaiser, 110 App. Div. 506, 96 N. Y. S. 981. Questions to experts to value of land in condemnation proceedings held proper where witnesses were told to assume proper construction of the railroad and to consider

the case tends to show,[91] but should not assume facts not in evidence.[92] A question calling for an opinion based in part on facts not in the record is improper, though the facts are personally known to the expert.[93] That the facts assumed in

other matters that would bear on the market value. Guinn v. Iowa, etc., R. Co. [Iowa] 109 N. W. 209. Medical opinions as to incapacity to make a will, based on the fact that testator was mentally unsound on one subject, will not be accepted by the courts, since it is the law that one may have testamentary capacity though mentally unsound on particular subjects. Sayre v. Princeton University Trustees, 192 Mo. 95, 90 S. W. 787. Question held proper: "Doctor, assuming that she broke the leg by reason of the fall that she suffered on the sidewalk, would such a fall, or might such a fall, cause internal injuries or strains that would produce pains of the character that she was complaining of?" Kerr v. Grand Forks [N. D.] 107 N. W. 197. Hypothetical question asking for estimate of speed of car, which did not assume that witness (who did not see the occurrence) had heard all the testimony, and did not show that witness knew the weight of the car, its load, or its momentum, was properly excluded. LaLonde v. Trans St. Mary's Traction Co. [Mich.] 13 Det. Leg. N. 376, 108 N. W. 365.

90. Hypothetical question based on facts observed by physician which he had detailed to jury proper. Bach v. Brooklyn, etc., R. Co., 109 App. Div. 654, 96 N. Y. S. 321. Hypothetical question to physician held to have been based on conditions discovered by physician on examination of patient, and which had been fully detailed to the jury. Hunter v. Ithaca, 141 Mich. 539, 12 Det. Leg. N. 571, 105 N. W. 9.

91. Question to medical expert held not based on testimony. Root v. Kansas City Southern R. Co., 195 Mo. 348, 92 S. W. 621. A hypothetical question is proper if within the possible or probable range of the evidence without being based on all the evidence given or upon a judicial summing up of the fair effect of that evidence. Coles v. Interurban St. R. Co., 49 Misc. 246, 97 N. Y. S. 289. Facts assumed as basis of expert opinion need not be uncontroverted; it is sufficient if there is evidence from which the existence of such facts may be found by the jury. Collins v. Chipman [Tex. Civ. App.] 15 Tex. Ct. Rep. 411, 95 S. W. 666. A hypothetical question is proper only when the facts assumed are fairly within the range of the testimony. Question whether certain proceeding instituted by attorney was necessary to recover leased land held improper where attorney's contract covered other matters besides recovery of such land. Fuchs v. Tone, 218 Ill. 445, 75 N. E. 1014. Evidence held to warrant question whether witness would consider disease of which man died to be smallpox if nurse, who had not been vaccinated and had not had smallpox, did not contract the disease. Trull v. Modern Woodmen of America [Idaho] 85 P. 1081. Where there was evidence tending to show that a woman was well before the injury for which suit was brought, hypothetical questions to medical experts, assuming that she was well, were proper. Herbeck v. Germain [Mich.] 13 Det. Leg. N. 175, 107 N. W. 901. Where there was evidence tending to show that a certain stope in a mine had been opened "throughout its entire length, breadth and height," a hypothetical question as to necessity for timbering bases on such assumed fact was not objectionable. Bird v. Utica Gold Min. Co. [Cal. App.] 84 P. 256. Hypothetical question relative to danger of removing sliver from machine held not erroneous, though size of sliver as assumed in question was not the same as that shown by the proof. Rice v. Dewberry [Tex. Civ. App.] 15 Tex. Ct. Rep. 193, 93 S. W. 715. Conditions stated in hypothetical question concerning sufficiency of openings in pumps held supported by proof and to furnish proper basis for expert opinion. Gulf, etc., R. Co. v. Wynne [Tex. Civ. App.] 14 Tex. Ct. Rep. 600, 91 S. W. 823.

92. Hypothetical question held not to have assumed fact not proved. Arnold v. Harrington Cutlery Co., 189 Mass. 547, 76 N. E. 194. Hypothetical question not predicated on any evidence in the case is improper. Sanford v. Hoge, 118 Ill. App. 609. The opinion of a physician as to the cause of death is inadmissible unless the facts on which it is based are in evidence. Kinney v. Brotherhood of American Yeomen [N. D.] 106 N. W. 44. Error to admit hypothetical question assuming that molten lead got into plaintiff's eye when that fact was not established, the physician testifying he did not know what it was that he took out. Smith v. Manhattan R. Co., 48 Misc. 393, 95 N. Y. S. 529. A hypothetical question is not improper simply because it includes only a part of the facts in evidence, and counsel may assume the facts in accordance with his theory of them, if supported by the evidence of some of his witnesses. But if the hypothetical question contains material exaggerations of facts, and is unwarranted by any testimony in the case, it is improper and should not be allowed. McLean v. Cincinnati, 3 Ohio N. P. (N. S.) 676. It is error to instruct a jury that the opinions of expert witnesses, based on hypothetical statements of fact, are of little value in case the jury find the hypothesis not in accordance with the facts. The jury should be instructed that the opinions are of no value. Id.

93. Pyke v. Jamestown [N. D.] 107 N. W. 359. Expert cannot be allowed to base opinion partly on facts not in evidence and known only to himself. Davis v. Maxwell, 108 App. Div. 128, 96 N. Y. S. 45. Questions calling for the opinion of an expert witness must be based upon facts previously stated by the witness, or upon facts testified to by others or upon facts agreed to or assumed as true hypothetically. Pyke v. Jamestown [N. D.] 107 N. W. 359. An expert's answer should be stricken where it states the consequences of a fact not in the record. McDermott v. Brooklyn Heights R. Co., 94 N. Y. S. 516. A physician, testifying as an expert, is not permitted to testify to his conclusions as to the permanency of an

a hypothetical question are identical with those of the case on trial does not render it improper.[94] An expert opinion cannot be based on mere conclusions or opinions of other witnesses.[95] Speculative opinions are incompetent.[96]

A wide range of inquiry is permitted in the cross-examination of experts[97] which may be directed both to the competency of the expert and the soundness and value of the opinion or conclusion to which he testifies.[98] By weight of authority, scientific books are incompetent to corroborate or contradict a witness,[99] but where an expert bases his opinion upon a particular work, he may be examined regarding it to test his accuracy or knowledge of it.[1] There is no right to put in evidence of matters which are incompetent as substantive evidence for the purpose of fortifying the opinion of an expert witness, though such evidence is offered under the guise of reasons for his opinion, and though it might properly have been admitted on cross-examination to test the value of the opinion.[2]

§ 10. *Real or demonstrative evidence.*[3]—Real evidence is admissible, provided its relevancy be first shown.[4] It is proper to refuse to allow the jury to make a

injury to his patient based partially upon the history of the case as related by the patient or other persons, and partially on his own examination. Federal Betterment Co. v. Reeves [Kan.] 84 P. 560. Opinions as to what value of certain corporate stock would have been, if issued, no facts, real or hypothetical being stated as a basis therefor, properly excluded. Eisenmayer v. Leonardt, 148 Cal. 596, 84 P. 43.

94. Seaboard Air Line R. Co. v. Bradley, 125 Ga. 193, 54 S. E. 69.

95. Kelly v. Kelly [Md.] 63 A. 1082.

96. Opinion of physician as to possible future consequences of injury held incompetent because too speculative and indefinite. Poole v. New York City R. Co., 49 Misc. 628, 97 N. Y. S. 395. In action for injuries, question whether, if man had had rheumatism, it would "be likely" to become localized in the injured part, held improper. Kavanagh v. New York Transp. Co., 95 N. Y. S. 567. Question to physician stating, hypothetically, condition of patient, and circumstances of injury, whether injury so caused could produce an injury to the medulla held not objectionable as not asking whether such injury was likely to result, such objection going only to the weight of the opinion and not to its competency. Hunter v. Ithaca, 141 Mich. 539, 12 Det. Leg. N. 571, 105 N. W. 9. Proper to refuse to allow physician who had not examined injured man, and who had heard only a part of his testimony as to the manner in which he fell and sustained an injury, to testify as to the probability of a rupture resulting from a fall such as witness had described. City of Ottawa v. Green, 72 Kan. 214, 83 P. 616.

97. Broad range of inquiry allowed, in discretion of court, in cross-examination of experts. Vohs v. Shorthill & Co. [Iowa] 107 N. W. 417. Extent of cross-examination discretionary with trial court. Swygart v. Willard [Ind.] 76 N. E. 755.

98. Witness to value may properly be cross-examined as to what value of land cut off by railroad would be. Davis v. Pennsylvania R. Co. [Pa.] 64 A. 774. Where experts testified to value of stock, basing opinions on an inspection of the books, it was proper cross-examination to inquire if the fact that there appeared to be no assets a year later did not show an overvaluation on the books. Collins v. Chipman [Tex. Civ. App.] 15 Tex. Ct. Rep. 411, 95 S. W. 666. Where witnesses testified to effect on land not taken on condemnation of land for railway purposes, it was proper to cross-examine them as to the effect on certain parts of the land into which it was divided by the road. Panhandle & G. R. Co. v. Kirby [Tex. Civ. App.] 15 Tex. Ct. Rep. 827, 94 S. W. 173. Where, in an action against a carrier for delay in transporting cattle, the depreciation in market value is claimed, one who bases his opinion as to value upon what commission men loaned on them may be cross-examined as to the cost of the cattle when purchased and expense of shipping them to destination. Gulf, etc., R. Co. v. Jackson [Tex.] 14 Tex. Ct. Rep. 100, 89 S. W. 968. Witness to value may be asked on cross-examination concerning his knowledge of particular sales to test his competency to testify but such testimony is inadmissible on the direct examination. Gorgas v. Philadelphia, etc., R. Co. [Pa.] 64 A. 680. An attesting witness to a will, having given his opinion as to the testator's mental condition at the time of executing the will may be cross-examined concerning prior relations with testator, and his opportunity for observing him, to test the good faith and value of his expressed opinion. Nichols v. Wentz, 78 Conn. 429, 62 A. 610. Medical expert who has testified to condition of patient may be fully cross-examined as to physical and mental condition of patient and effect of his treatment. In re Jones' Estate [Iowa] 106 N. W. 610. Witness who testified to value of land, in condemnation proceedings, was properly cross-examined as to amount allowed another claimant for similar property, where he was one of the commissioners who made the award. St. Louis, etc., R. Co. v. Continental Brick Co. [Mo.] 96 S. W. 1011.

99. Medical works inadmissible to show how disease could be spread among cattle. Harper, Brooks & Co. v. Weikel [Ky.] 89 S. W. 1125.

1. Harper, Brooks & Co. v. Weikel [Ky.] 89 S. W. 1125.

2. Peirson v. Boston El. R. Co., 191 Mass. 223, 77 N. E. 769.

3. See 5 C. L. 1365.

microscopic examination of real evidence.[5] Photographs[6] and maps or plats[7] are admissible when it is shown that they are properly made,[8] and that they correctly represent the actual conditions or facts sought to be proved by them.[9] It has been held proper to operate a phonograph in the presence of the jury to reproduce sounds, the making of which was in issue,[10] where the instrument was proved to be a substantially accurate and trustworthy reproducer of the sounds actually made.[11] Exhibition of wounds or injuries before the jury is usually permitted.[12] A court has, in the absence of statutory authority, no power to compel the plaintiff, in an action for personal injuries, to submit to a physical examination by experts.[13] Such power is conferred by statute in some states.[14] In a suit to set aside a deed, on the ground of mental incompetency of the grantor, it was held not error to produce the grantor in court for examination.[15]

4. Samples of hay, not properly identified as samples of the hay the quality of which was in issue, properly excluded. Whaley v. Vannatta [Ark.] 91 S. W. 191. It is proper to admit plaster casts worn by the injured party as showing the nature and extent of the injury. Village of Gardner v. Paulson, 117 Ill. App. 17.

5. Court did not abuse discretion in refusing to allow jury to examine through a microscope dust particles claimed to have come from operation of railroad, where he permitted plaintiff to show that railroad operation caused dust to accumulate in his place of business. Cotton v. Boston El. R. Co., 191 Mass. 103, 77 N. E. 698.

6. Photograph of station where injury occurred held competent. MacFeat v. Philadelphia, etc., R. Co. [Del.] 62 A. 898.

7. Map or plat of lands in dispute, shown to be correct, properly admitted. Driver v. King [Ala.] 40 So. 315. Map made in 1856, produced from proper custody, held competent on issue of boundaries between other parties. Cravath v. Baylis, 99 N. Y. S. 973. Code 1892, § 1653, giving a party in ejectment the right to have a survey made under a commission, attended by certain formalities, does not make inadmissible a map of the premises made after institution of suit and shown to be correct. Lenoir v. People's Bank [Miss.] 40 So. 5.

8. Plat of scene of accident held inadmissible because horizontal and vertical distances were represented on different scales. White v. Wilmington City R. Co. [Del.] 63 A. 931. Photographic reproductions of portions of enlistment papers held competent, upon proof that photographer taking them was competent. In re McClellan's Estate [S. D.] 107 N. W. 681. Paper purporting to be a map of land showing their subdivision into lots and streets held inadmissible without proof that it was made by an officer authorized to make it, or evidence by the person making it that it was correct. Bower v. Cohen [Ga.] 54 S. E. 918. The mere fact that there was an entry on it showing it to be 30 years old, without proof as to the origin of the entry, did not render it competent. Id.

9. In action for death caused by bursting of vat containing distilling slops, photographs of broken hoops of vat held to have been sufficiently identified as pictures of the hoops in issue to render them admissible. Hupfer v. National Distilling Co., 127 Wis. 306, 106 N. W. 831. Where photographs of the place where an accident occurred were taken a year after the accident, and disclosed conditions which could not have been proved to exist at the time of the accident, they were properly excluded. Porter v. Buckley [C. C. A.] 147 F. 140. Photographs, to be admissible, must be shown to have been taken at the time of accident or when the situation and surroundings are unchanged. Chicago, etc., R. Co. v. Crose, 214 Ill. 602, 73 N. E. 865. Photographs of place where crossing accident occurred admissible where person who took them testified that they correctly represented the place at the time. The points from which they were taken would go to their value as evidence, but not to their admissibility. New York, etc., R. Co. v. Robbins [Ind. App.] 76 N. E. 804. Where witness deposed that he had made a survey and plat of land and that it correctly represented the land in dispute, the map and plat were competent evidence. Atlanta & W. P. R. Co. v. Atlanta, B. & A. R. Co., 125 Ga. 529, 54 S. E. 736. Plat or diagram showing location of piles of lumber held competent though it did not show certain other piles which were not in issue. Marcy v. Parker, 78 Vt. 73, 62 A. 19. Blue print of right of way not identified as showing place in controversy, nor shown to be correct or authentic, properly excluded. Williamson v. Missouri, etc., R. Co., 115 Mo. App. 72, 90 S. W. 401.

10. To show noise made by trains running on track close to a hotel. Condemnation proceedings, issue of damages. Boyne City, etc., R. Co. v. Anderson [Mich.] 13 Det. Leg. N. 739, 109 N. W. 429.

11. Boyne City, etc., R. Co. v. Anderson [Mich.] 13 Det. Leg. N. 739, 109 N. W. 429.

12. Examination of plaintiff by physician before the jury to show nature and extent of injury held not error. Missouri, etc., R. Co. v. Lynch [Tex. Civ. App.] 14 Tex. Ct. Rep. 237, 90 S. W. 511.

13. Richardson v. Nelson [Ill.] 77 N. E. 583.

14. Order for physical examination vacated where it appeared such examination had already been had without an order. Code Civ. Proc. § 873, construed. Orlando v. Syracuse Rapid Transit R. Co., 109 App. Div. 356, 95 N. Y. S. 898.

15. Benson v. Raymond [Mich.] 12 Det. Leg. N. 769, 105 N. W. 870.

Evidence of experiments performed out of court is admissible when the experiments are shown to have been fairly and honestly made under conditions similar to those surrounding the occurrence in question.[16] The matter is one resting largely in the discretion of the trial court.[17] Such evidence is properly excluded where the test or experiment is found to be uncertain or inconclusive,[18] or where the conditions existing at the time and place in issue manifestly cannot be accurately reproduced.[19] Medical experts are sometimes permitted to illustrate their testimony.[20]

§ 11. *Quantity required and probative effect.*[21]—The weight of evidence[22] and the credibility of witnesses[23] are exclusively for the jury or trial court, to be determined in the light of all the facts and circumstances shown by the evidence.[24]

16. Evidence of experiment inadmissible without proof of similarity of conditions surrounding experiment and accident in issue. Chicago Folding Box Co. v. Schallawitz, 118 Ill. App. 9. Evidence of a comparison made by witness of the noises made by automobiles of different types held inadmissible without proof that the condition of the various cars was the same. Porter v. Buckley [C. C. A.] 147 F. 140. That experiments were made subsequent to an accident does not alone make proof of them incompetent but conditions of experiments and of accident must be shown similar. Elgin, A. & S. Traction Co. v. Wilson, 120 Ill. App. 371. Evidence of experiments tending to show that death of a person who was found strangled by bridle hanging from harness peg in his stable might have been accidental, held admissible, the conditions of the experiments being shown identical with those surrounding the dead man when found. Tackman v. Brotherhood of American Yeomen [Iowa] 106 N. W. 350.

17. In action for injuries caused by alleged premature starting of train, evidence of a subsequent test made to determine how long it took the engineer to oil his engine on the occasion in question was properly excluded. O'Dea v. Michigan Cent. R. Co. [Mich.] 12 Det. Leg. N. 718, 105 N. W. 746. Evidence of tests as to effect of vibration of machinery on piles of bone dust properly excluded in action for injury claimed to be caused by gas pipe falling from pile of bone dust. Huggard v. Glucose Sugar Refining Co. [Iowa] 109 N. W. 475. On an issue whether voices and other sounds could be heard through a partition experiments made nearly eight years after the events sought to be proved were properly excluded, in discretion of court. Dow v. Bulfinch [Mass.] 78 N. E. 416.

18, 19. Huggard v. Glucose Sugar Refining Co. [Iowa] 109 N. W. 475.

20. Held not error to allow plaintiff in personal injury case to bare a portion of his body to permit a physician to show the course of certain nerves. Houston v. Chicago, etc., R. Co., 118 Mo. App. 464, 94 S. W. 560.

21. See 5 C. L. 1368.

22. Mallory v. Brademyer [Ark.] 89 S. W. 551. The relative weight of different classes of evidence is for the jury, and court should not instruct that one class is preferable to another. Coulter v. Thompson Lumber Co. [C. C. A.] 142 F. 706. Instruction, in effect, that jury was bound to give greater weight to testimony of disinterested than to that of interested witnesses, held error. Lawrence v. Metropolitan St. R. Co., 99 N. Y. S. 735.

23. Credibility of witnesses is for jury, and they may believe a single witness though he is contradicted by several. Louisville, etc., R. Co. v. Hall [Ky.] 94 S. W. 26.

24. The credibility of evidence is for the jury, who should consider interest of witnesses, their opportunity to know facts to which they testify, their opponent bias or fairness, and other circumstances which will aid them in determining the weight to be given their testimony. Evans v. Barnett [Del.] 63 A. 770; Garrett v. People's R. Co. [Del.] 64 A. 254. It is duty of jury to reconcile conflicting testimony if possible, and if not, to give credit to witnesses who by bearing, apparent truthfulness, and opportunity to know the truth, are entitled to credit, in view of all the facts and circumstances. Green v. Council of Newark [Del.] 62 A. 792. When the only person who could dispute a witness' testimony is dead, such testimony should be closely scrutinized. In re Bailey, 98 N. Y. S. 725. Certified copies of census returns from Ireland, showing certain vital statistics held to have no probative force owing to untruths and inconsistencies appearing upon their face. Maher v. Empire Life Ins. Co., 110 App. Div. 723, 96 N. Y. S. 496. Testimony that the goods were worth "about" a certain amount is not equivalent to positive proof of their exact value or that they were not worth less than that sum. Atlantic & B. R. Co. v. Howard Supply Co., 125 Ga. 478, 54 S. E. 530. Testimony of witnesses who had measured height of car step above the rail held entitled to greater weight than that of witnesses who merely estimated the height. Truesdell v. Erie R. Co., 99 N. Y. S. 694. The fact that witnesses could not remember that an alleged invention had been used before, or when it had been used, until their memories had been refreshed by reading items in newspapers published at the time, held not to discredit their testimony, where after reading such items, they said they remembered the fact clearly. Bragg Mfg. Co. v. New York, 141 F. 118. Evidence of weight of certain stones held not to have been wholly discredited by evidence that scales were out of order and variable, where a test of the scales was shown, which proved they were correct, and no change in the scales was shown between the time when the stone was weighed and the test made. Kelly v. Saugerties, 110 App. Div. 561, 97 N. Y. S. 177. In an action

A preponderance of evidence, by which is meant the greater weight of the evidence, and not necessarily the greater number of witnesses,[25] is all that is required in civil cases,[26] unless the pleadings charge a criminal offense.[27] Evidence which reasonably satisfies the jury is sufficient.[28] Prima facie evidence is such as in the judgment of the law is sufficient to establish the fact, and, if unrebutted, remains sufficient for that purpose.[29] By "strict proof" is meant proof amounting to a moral certainty; not proof amounting to a mathematical demonstration.[30] Circumstantial evidence consists of proof of collateral facts and circumstances from which the mind arrives at the conclusion that the main facts in issue existed.[31] A theory can-

at law for damages, where plaintiff denies the execution of a release under seal, and the indorsing of a check alleged to have been received in settlement, both of which purport to have been signed by her by her mark, the equitable rule requiring clear, precise, and indubitable evidence in order to set aside such an instrument does not apply, but plaintiff is entitled to have the question submitted to the jury, even though her evidence is uncorroborated. Clark v. Lehigh Val. R. Co., 24 Pa. Super. Ct. 609. The court may in its discretion call the attention of the jury to considerations affecting the credibility of particular evidence in the case. Held proper for court to call attention to youth of witness, and his liability to repeat what he had heard, jury having been repeatedly told that they were sole judges of credibility. Banks v. Connecticut R. & Lighting Co. [Conn.] 64 A. 14. The weight to be given nonexpert opinions on the mental competency of a grantor to execute a deed depends upon the opportunities for observation which such witnesses have had, and the facts and reasons disclosed by such witnesses as the basis for their opinions. Teter v. Teter [W. Va.] 53 S. E. 779. Opinions of subscribing witnesses to a will as to the testator's mental condition, when accompanied by facts and circumstances on which they are based, are subject to the same tests by the jury in determining their weight, as is the testimony of any other witness. In re Wharton's Will [Iowa] 109 N. W. 492. Interest in the action does not disqualify a witness but may be considered by jury or trial court in weighing the testimony. Code Civ. Proc. § 1879. Ripperdan v. Weldy [Cal.] 87 P. 276.

25. Number of witnesses does not alone determine where preponderance lies. Elgin, etc., R. Co. v. Hoadley, 122 Ill. App. 165. Preponderance is not necessarily on the side having the greater number of witnesses. Chicago & J. Elec. R. Co. v. Patton, 122 Ill. App. 174. Instruction to effect that it is not alone the number of witnesses which determines where the preponderance of evidence lies, approved. Dale v. Colfax Consol. Coal Co. [Iowa] 107 N. W. 1096. The preponderance of the evidence does not depend upon the number of witnesses but upon the weight and credibility of the testimony of each. Ford v. Taylor, 140 F. 356. Court may accept testimony of one witness in preference to that of another. McNeill v. Stitt [Cal. App.] 82 P. 1121.

26. Only a preponderance of evidence is required in civil cases to sustain a verdict or decree. Fitch v. Vatter [Mich.] 13 Det. Leg. N. 68, 107 N. W. 106. Plaintiff must establish material allegations of his complaint, denied by defendant, by a preponderance of the evidence, and the jury should be so instructed. John Ainsfield Co. v. Rasmussen [Utah] 85 P. 1002. Passenger suing for injuries need only prove his case by a preponderance of evidence; proof beyond a reasonable doubt is not required. Chicago Consol. Traction Co. v. Schritter [Ill.] 78 N. E. 820. Where a decree as agreed upon was relied upon by a party as a final adjustment of matters, a preponderance of evidence only and not clear and conclusive proof is required to show that the decree was intended as a final settlement. White River, etc., R. Co. v. Star Ranch & Land Co. [Ark.] 91 S. W. 14. Instruction to find for plaintiff if evidence "preponderates in his favor though but slightly" held not error but not approved by appellate court. Chicago Union Traction Co. v. Lawrence, 113 Ill. App. 269.

27. In Illinois, except as modified by statute in slander and libel cases, the rule is that when a criminal offense is charged in the pleadings, and must be established to sustain the cause of action or maintain the defense, the presumption of innocence arises and the crime charged must be proven by evidence which removes every reasonable doubt of guilt. People v. Sullivan, 218 Ill. 419, 75 N. E. 1005. Rule applied in disbarment proceedings where attorney was charged with the commission of crimes. Id.

28. Evidence which reasonably satisfies the jury is sufficient; it is error to instruct that issuable facts must be proved with reasonable certainty. Smiley v. Hooper [Ala.] 41 So. 660; Eagle Iron Co. v. Baugh [Ala.] 41 So. 663. Error to instruct jury in civil case that party having burden of proof must "satisfy" the jury. Sonnemann v. Mertz [Ill.] 77 N. E. 550. Held error to instruct jury that party having burden of proof must support his contentions by a preponderance of evidence, that is, by evidence of greater convincing power; the jury should have been further instructed that the party having the burden must produce evidence which will satisfy or convince the minds of the jury as to the truth of his contention. Anderson v. Chicago Brass Co., 127 Wis. 273, 106 N. W. 1077. Instruction that negligence must be a "reasonable, logical and necessary conclusion" from the evidence requires too high a degree of proof, it is sufficient if it be the most reasonable and logical conclusion that can fairly be drawn. Dakan v. Chase & Son Mercantile Co., 197 Mo. 238, 94 S. W. 944.

29. Thomas v. Williamson [Fla.] 40 So. 831.

30. Bowman v. Little, 101 Md. 273, 61 A. 223, 657, 1084.

31. Buckler v. Kneezell [Tex. Civ. App.]

not be said to be established by circumstantial evidence, even in a civil action, unless the facts relied upon are of such a nature, and are so related to each other, that it is the only conclusion that can fairly or reasonably be drawn from them.[32] If the facts are equally consistent with either of two opposing theories, they prove neither,[33] since verdicts cannot rest upon mere conjectures or possibilities.[34]

Positive testimony is of greater weight than negative;[35] but this rule cannot be permitted to conflict with the general rule that the weight of all testimony is for the jury.[36] The testimony of experts is not conclusive and binding on the jury, but is merely advisory,[37] and the weight to be given it is for the jury.[38] Mortality

14 Tex. Ct. Rep. 800, 91 S. W. 367. That sparks from an engine started a fire may be proved by circumstantial as well as by direct evidence. Fleming v. Pullen [Tex. Civ. App.] 97 S. W. 109.

32. United States Fidelity & Guaranty Co. v. Des Moines Nat. Bank [C. C. A.] 145 F. 273; Neal v. Chicago, etc., R. Co., 129 Iowa, 5, 105 N. W. 197.

Contra: Instruction erroneous which required circumstantial evidence to exclude every other hypothesis. Brister & Co. v. Illinois Cent. R. Co. [Miss.] 40 So. 325.

33. United States Fidelity & Guaranty Co. v. Des Moines Nat. Bank [C. C. A.] 145 F. 273.

34. Verdicts cannot rest upon mere conjectures or possibilities. They must be founded on evidence which convinces the mind and warrants the inferences necessary to sustain them. Kern v. Snider [C. C. A.] 145 F. 327. A bare possibility has no probative value and cannot overcome a legal presumption of innocence or legitimacy. Bowman v. Little, 101 Md. 273, 61 A. 223, 657, 1084. The mere fact that after an injury, the injured person took to her bed and died shortly thereafter does not alone warrant the inference that the injury caused her death. DeMaet v. Fidelity Storage, Packing & Moving Co. [Mo. App.] 96 S. W. 1045.

35. Testimony of witnesses who say they heard bell of street car ring is of more weight than testimony of others that they did not hear it ring. White v. Wilmington City R. Co. [Del.] 63 A. 931. Testimony of witnesses who said they did not see a defect in a sidewalk is not entitled to the same weight as testimony of others that they did see it. Alft v. Clintonville, 126 Wis. 334, 105 N. W. 561. Positive testimony by members of train crew that just before an accident the bell was rung and whistles blown, overcomes evidence of section boss that he did not hear the signals, accompanied by his testimony that he was riding on a railway velocipede, which made considerable noise. Ives v. Wisconsin Cent. R. Co. [Wis.] 107 N. W. 452. Testimony that witnesses were watching for a train and heard certain whistles but not others, may be given greater weight than testimony of others that they heard no whistles but were where they would have heard them had they sounded. New York, etc., R. Co. v. Robbins [Ind. App.] 76 N. E. 804. Where there is positive testimony to market value of horses at a certain place, evidence of certain witnesses that they did not know and could not testify that horses had a market value there raises no issue. St. Louis, etc., R. Co. v. Berry [Tex. Civ. App.] 15 Tex. Ct. Rep. 600, 93 S. W. 1107. Testimony of witnesses who saw a train strike a person that the engineer did everything in his power to stop the train is of greater weight than testimony of experts that the train could have been stopped sooner. Louisville, etc., R. Co. v. Jolly's Adm'x [Ky.] 90 S. W. 977. Testimony of persons looking for a car in the direction from which it is coming, that the car had no headlight and was completely dark, is not merely negative evidence. Cox v. Schuylkill Valley Traction Co., 214 Pa. 373, 63 A. 599. Positive testimony is entitled to greater weight than negative where it does not appear that the witnesses who testify negatively were in as good a position to observe as those who testify affirmatively. In re Wharton's Will [Iowa] 109 N. W. 492. Where witnesses having equal opportunity with others testifying to the contrary to hear and know whether a gong was sounded, testify that it was not, their evidence is deemed affirmative. Chicago Consolidated Traction Co. v. Gervens, 113 Ill. App. 275.

36. Weight of negative testimony is for jury and should be submitted. Board of Com'rs v. Garrigus, 164 Ind. 589, 73 N. E. 82, 74 N. E. 249.

37. Testimony by attorneys as to the reasonableness of charges of other attorneys is not binding on the court. Lee v. Lomax, 219 Ill. 218, 76 N. E. 377. Expert testimony as to disputed handwriting is not conclusive on the jury, where they have writings before them and may make comparison. Castor v. Bernstein [Cal. App.] 84 P. 244. The jury are not absolutely bound by the opinion of an expert touching the market value of goods at the point of destination. Atlantic & B. R. Co. v. Howard Supply Co., 125 Ga. 483, 54 S. E. 530. Testimony of unimpeached expert on value of auctioneer's services held not conclusive on register. Andrews v. Frierson [Ala.] 39 So. 512. Opinion of physician as to value of medical services is not conclusive on jury but only advisory. Guyon v. Brooklyn Heights R. Co., 49 Misc. 514, 97 N. Y. S. 1038. Expert opinion on value of property before and after change of grade held advisory only. Widman Inv. Co. v. St. Joseph, 191 Mo. 459, 90 S. W. 763. Opinion evidence (as to value) though uncontradicted, is not conclusive but only advisory, and the issue is for the jury. Pritchard v. Hooker, 114 Mo. App. 605, 90 S. W. 415.

38. Weight of expert evidence is for the jury; such evidence is not conclusive. King v. Gilson, 191 Mo. 307, 90 S. W. 367. Refusal to give cautionary instruction as to weight to be given expert testimony held not error. Wood v. Los Angeles Traction Co., 1 Cal. App. 474, 82 P. 547. The weight

tables are not conclusive on the issue of life expectancy.[39] Admissions of a party against his interest are not to be taken as conclusively true,[40] the weight to be given them depends upon their nature and the surrounding facts and circumstances.[41] Where testimony taken on former trials is used by both parties, it is entitled to the same weight as though the witnesses were present and testified in court.[42]

The positive testimony of an unimpeached, uncontradicted witness, cannot be arbitrarily disregarded, though the witness is a party,[43] but the testimony of a party need not be accepted as true, though uncontradicted, if it is inherently improbable[44] or is uncorroborated,[45] and testimony inherently improbable need not be accepted though uncorroborated.[46] A party is concluded by adverse testimony of his own witness only where the matter brought out is collateral to the issue.[47] The im-

of the opinion of an intimate acquaintance on the mental capacity of a person (B. & C. Comp. § 718, subd. 10) is for the court or jury, considering whether the facts testified to by the witness giving the opinion justifies the same. Lassas v. McCarty [Or.] 84 P. 76. In will contest, physicians testified that testatrix at time of executing a codicil to her will, was suffering from a complication of diseases which necessarily affected her mind. It was held error to direct a verdict; the jury should have been allowed to pass on the issue of testamentary capacity. Byrne v. Byrne, 109 App. Div. 476, 96 N. Y. S. 375.

39. Under Revisal of 1905 § 1626, mortality tables are only prima facie evidence of life expectancy, and an instruction making them conclusive was error. Sledge v. Weldon Lumber Co., 140 N. C. 459, 53 S. E. 295.

40. Admissions by a party in the course of his testimony are binding upon him but are not to be taken as conclusively true. Houston v. Chicago, etc., R. Co., 118 Mo. App. 464, 94 S. W. 560. Proof of an unqualified admission of a party against his interest is not conclusive; if there is credible evidence conflicting with the admission, the issue may still go to the jury. Bruger v. Princeton & St. M. Mut. Fire Ins. Co. [Wis.] 109 N. W. 95. Instruction that admissions of a party against interest "must be taken as true" was properly modified to the effect that such admissions would be "presumed to be true." McCaffery v. St. Louis & M. R. Co., 192 Mo. 144. 90 S. W. 816.

41. Declaration which was ambiguous and equivocal held without weight as evidence. Keystone Mills Co. v. Peach River Lumber Co. [Tex. Civ. App.] 96 S. W. 64. Effect of admission in letter written by attorney for party was for jury. Kabat v. Moore [Or.] 85 P. 506. Evidence of verbal admission should be received with caution, especially where witnesses testify long after and there was no reason why the words should be remembered particularly. Ladd v. Lookout Distilling Co. [Ala.] 40 So. 610. Verbal admissions are the weakest kind of evidence, especially where the exact language cannot be given and where the purpose is to eke out a written contract or to put a particular interpretation upon such contract. Des Allemands Lumber Co. v. Morgan City Timber Co. [La.] 41 So. 332. Where admissions of a casual character were made to a witness who had no interest in them and no reason why he should remember them, his testimony concerning them after a long lapse of time and after the death of the person making them should be received with great caution. Russell v. Sharp, 192 Mo. 270, 91 S. W. 134.

42. Garvik v. Burlington, etc., R. Co. [Iowa] 108 N. W. 327.

43. Lewis v. New York City R. Co., 99 N. Y. S. 462. The fact that a plaintiff's case is supported solely by his own testimony is no reason why his testimony should be rejected unless his testimony is inherently improbable or suspicious, or his veracity has been impeached. Madden v. New York City R. Co., 99 N. Y. S. 320; Kappes v. New York City R. Co., 99 N. Y. S. 322. Court held not justified in wholly discrediting plaintiff's testimony on an issue when she was uncontradicted and unimpeached, and her story was not improbable. Rosseau v. Hallenbeck, 97 N. Y. S. 394.

44. Statement of interested party that he purchased before maturity, without notice and for value, rejected where it did not appear credible in view of all the circumstances. Keene v. Behan, 40 Wash. 505, 82 P. 884. Where plaintiff's own testimony showed that an injury could not have caused the death for which action was brought, the testimony of a witness that such injury did cause the death was insufficient. DeMaet v. Fidelity Storage, Packing & Moving Co. [Mo. App.] 96 S. W. 1045.

45. Delay in bringing action and inadequacy of testimony of amount of damages for injury held to justify a judgment in defendant's favor, plaintiff being uncorroborated. Hartman v. Interurban St. R. Co., 88 N. Y. S. 352. Where plaintiff is uncorroborated and is opposed by three witnesses, two of whom are disinterested, a verdict for him cannot stand. Feuer v. Brooklyn, etc., R. Co., 49 Misc. 629, 97 N. Y. S. 293.

46. Even where a witness has sworn positively to an alleged fact, the court may for good and sufficient reasons, refuse to credit his testimony. Alexander v. Blackman, 26 App. D. C. 541. The inherent probability or improbability of such fact is to be tested by the unquestioned circumstances surrounding the main transaction or occurrence as well as by the ordinary laws governing human conduct. Id.

47. Where plaintiff called defendant's husband to prove the husband's authority to sign a contract for defendant, plaintiff was not bound by husband's testimony that wife said he should not sign such contract. Plaintiff may prove the agency by other competent evidence. Alcolm Co. v. Brenack, 98 N. Y. S. 199, rvg. 96 N. Y. S. 1055. A

peachment of one witness does not affect the weight or credibility of the testimony of other witnesses.[48]

Where evidence introduced is competent only for a certain purpose, its probative effect should be limited by a proper instruction by the court.[49] Evidence competent only to impeach a witness cannot be considered as independent evidence on other issues.[50] But the probative effect of evidence cannot be limited by statements as to the purpose in introducing it.[51] Parties may by stipulation, by silent acquiescence, or by failure to except to admitting rulings, waive objections to inadmissible evidence.[52] Evidence thus received may establish the fact in controversy as conclusively as the best evidence, regularly procured.[53] Evidence erroneously admitted over objection cannot be disregarded as inadmissible on grounds not urged.[54]

The quantum of proof required to prove particular facts is treated in titles dealing with the subject or issue to which the evidence is addressed; but a few illustrative holdings are given in the note.[55] One who relies on a lost deed must establish its execution, contents, and loss, by clear and convincing evidence.[56]

EXAMINATION BEFORE TRIAL, see latest topical index.

EXAMINATION OF WITNESSES.

§ 1. **General Rules of Examination (1599).** The Propriety of Calling an Interpreter (1600). Leading Questions (1600). Responsiveness (1602). Refreshing Memory (1602).
§ 2. **Cross-examination (1604).** Limitation to Scope of Direct Examination (1605). Limitation to Issues (1607). Examination Going to Credibility of Witness (1608).
§ 3. **Redirect Examination (1610).**
§ 4. **Recalling Witness for Further Examination (1612).**

Scope of article.—This article treats generally of the rules governing the examination of witnesses, except those peculiarly applicable to the examination of ex-

party is not conclusively bound by the testimony of one of his witnesses whose testimony is opposed to that of himself and other witnesses. Dinsmore v. St. Louis, 192 Mo. 255, 91 S. W. 95. Plaintiff held not concluded by **testimony of adverse party** on a material fact. Manhattan Leasing Co. v. Weill, 98 N. Y. S. 686.

48. Korter v. Gulf, etc., R. Co. [Miss.] 40 So. 258.

49. Evidence of threats should have been limited to proof of state of mind of wife while executing note, being incompetent on issue whether husband made them. Ditto v. Slaughter [Ky.] 92 S. W. 2.

50. Evidence of contradictory and corroboratory statements of a witness sought to be impeached, can be considered only on the issue of the credibility of the witness, and not on other issues in the case. Hicks v. State, 165 Ind. 440, 75 N. E. 641. Evidence introduced for impeaching purposes can be considered only for such purposes. Franklin v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 641, 88 S. W. 357. Under the rule that a party may contradict a witness called by him by other evidence or by showing that at other times he made statements inconsistent with his testimony, such inconsistent statements merely discredit the witness and do not have the effect of independent evidence. Donaldson v. New York, etc., R. Co., 188 Mass. 484, 74 N. E. 915.

51. Board of Sup'rs of Macomb County v. Lovejoy [Mich.] 13 Det. Leg. N. 51, 107 N. W. 276.

52. Objections that evidence is not the best, or that it was not properly taken, or other objections, may be thus waived. Paine v. Willson [C. C. A.] 146 F. 488.

53. Paine v. Willson [C. C. A.] 146 F. 488. Instruction excluding from jury facts proved without objection held erroneous. Geringer v. Novak, 117 Ill. App. 160. Incompetent evidence has probative force when received without objection. Metropolitan Music Co. v. Shirley [Minn.] 108 N. W. 271; Lindquist v. Dickson [Minn.] 107 N. W. 958; Ehrlich v. Weber, 114 Tenn. 711, 88 S. W. 188. Where evidence offered was not the best, but was received without objection, it was held sufficient to support claim in issue. Dorais v. Doll [Mont.] 83 P. 884. Where hearsay evidence was introduced without objection, but later a motion to strike it was made, which the trial court overruled, the evidence was treated as though in the case without objection and given probative weight. McWilliams v. Lake Shore, etc., R. Co. [Mich.] 13 Det. Leg. N. 722, 109 N. W. 272.

54. Ewald v. Poates, 107 App. Div. 242, 94 N. Y. S. 1106.

55. Possession of real estate is some evidence of title, but is not alone sufficient to establish a freehold estate. Swihart v. Hansen [Neb.] 107 N. W. 862.

56. Lloyd v. Simons [Minn.] 105 N. W. 902.

perts, which are treated in the preceding article.[57] Matters pertaining to the impeachment of witnesses, and the privileges of witnesses,[58] and general questions of trial procedure, such as the exclusion of witnesses from the court room,[59] and the proper manner of raising objections,[60] are elsewhere discussed.

§ 1. *General rules of examination.*[61]—The manner of examining witnesses is a matter resting largely in the discretion of the trial court, though controlled by certain well settled general rules.[62] It is proper for the trial court to examine witnesses, when this course is deemed necessary to elicit the truth, but this right should be carefully exercised so as not to indicate, directly or indirectly, any opinion on the merits or any bias in favor of either party.[63] If a witness is guilty of improper conduct while on the stand, it is proper for the court to admonish the witness to conduct himself in a proper manner and to adjudge him guilty of contempt if he does not heed the directions given him.[64] It is improper for the trial judge to interrupt repeatedly or unnecessarily while a witness is being examined,[65] but to assist an embarrassed witness, by suggesting the meaning of the question, is not improper.[66] Where there are several counsel the court may limit to one counsel the examination of each witness.[67] Needless repetition,[68] or a prolonged and useless examination,[69] may be prevented in the discretion of the court. It is improper for counsel to try to get before the jury, by indirect means, matters which have been excluded by the court.[70]

Questions put to witnesses should not be argumentative in form,[71] and should

57. See Evidence, 7 C. L. 1511.
58. See Witnesses, 6 C. L. 1975.
59. See Trial, 6 C. L. 1731.
60. See Saving Questions for Review, 6 C. L. 1335.
61. See 5 C. L. 1371.
62. See cases in notes following.
63. Komp v. State [Wis.] 108 N. W. 46; State v. Hazlett [N. D.] 105 N. W. 617. Held not error for court to question witness, where court was careful not to intimate any opinion or prejudice the jury. People v. Dinser, 49 Misc. 82, 98 N. Y. S. 314. A trial court may properly question witnesses in order to elicit the truth, provided no opinion is disclosed on the merits. Miller v. Territory, 15 Okl. 422, 85 P. 239. Cross-examination by judge held error because intimating an opinion on the defense of insanity. O'Shea v. People, 218 Ill. 352, 75 N. E. 981.
64. A witness in a criminal prosecution refused to answer questions, and continued to watch the defendant for signals instead of looking at the jury as directed by the court. It was held not error for the trial judge to admonish the witness to answer and stop watching defendant, and to inquire if he was afraid, and to finally adjudge him guilty of contempt and sentence him to imprisonment, the latter being done in presence of the jury. State v. Dalton [Wash.] 86 P. 590.
65. Misconduct warranting new trial held to be shown, where trial judge unnecessarily and repeatedly interrupted the cross-examination of the state's witnesses by questions and remarks which hindered effective cross-examination and tended to create the impression that the trial judge was convinced of the truthfulness of such witness and the merits of the state's case. State v. Hazlett [N. D.] 105 N. W. 617.
66. Remark of court to witness held not erroneous as rescuing witness from a dilemma and showing ill will toward defendant. Boles v. People [Colo.] 86 P. 1030.
67. The matter is one pertaining to the police of the court. State v. Nugent, 116 La. 99, 40 So. 581.
68. No abuse of discretion in refusing to allow repetition of question to witness. Nashville, etc., R. Co. v. Moore [Ala.] 41 So. 984. Where one witness had testified to the effect of maintaining a railway on a street on the business done on that street, it was error to exclude, as repetition, testimony of another witness to the same facts. Cotton v. Boston El. R. Co., 191 Mass. 103, 77 N. E. 698.
69. The trial judge has to a reasonable extent, at least, the sound discretion to put a stop to prolonged and useless examination of a witness. State v. Rodriguez, 115 La. 1004, 40 So. 438.
70. After ruling by court that certain matter was inadmissible it was improper for counsel to try to get it before the jury by suggestive questions. Chicago & S. L. R. Co. v. Mines [Ill.] 77 N. E. 898. It is not proper for counsel, in propounding to witnesses questions, to include therein and assume as facts, matters which the court has already excluded, and though the court excluded the answers to such questions, the counsel should not be allowed to reiterate the same. Chicago & S. L. R. Co. v. Kline, 220 Ill. 334, 77 N. E. 229.
71. Where answer of witness to question as to effect of riding bicycle over a depression in a walk was argumentative, showing under what conditions it could be safely done, it was argumentative and improper. Lee v. Salt Lake City [Utah] 83 P. 562. A question to an executor, in a suit by him

not assume as true facts in issue.[72] They should be clear,[73] specific, and certain.[74] A question to a witness called in rebuttal which does not call the witness' attention to some particular statement or fact and demand a denial or explanation thereof is improper in form.[75] Where it is sought to show that a witness has made statements out of court inconsistent with his testimony, the statement supposed to have been made, and to which his attention has been called, should be incorporated in the impeaching question so that the question can be answered yes or no by the impeaching witness.[76] When an objection is raised to testimony being given in narrative form, counsel has the right to have testimony elicited by question and answer, in order that objections may be raised and improper matter excluded.[77] It has been held proper to allow a witness to illustrate the state's theory on a particular issue in a criminal prosecution.[78]

The propriety of calling an interpreter,[79] and the fitness of the person so called, are matters for the trial court,[80] when statutory requirements have been met.[81] It has been held proper to take the testimony of a deaf mute through an interpreter by signs.[82] A witness may properly be allowed to explain a word used by him in his testimony.[83]

Leading questions.[84]—In general, leading questions, that is, those which suggest a desired answer, are improper on direct examination, but the matter is one resting in the trial court's discretion,[85] and a ruling will not be interfered with on appeal, unless an abuse of discretion is made to appear.[86] Whether a question is leading, or, if leading, is objectionable, depends largely upon the circumstances

on a note payable to testator, whether he could find anything constituting a payment for certain bonds, unless such bonds were received in payment of the note, was not argumentative. Stone v. Stone, 191 Mass. 371, 77 N. E. 845.

72. Nelson v. Hunter, 140 N. C. 598, 53 S. E. 439.

73. Hypothetical question held improper because involved, obscure, suggestive and leading. Chicago City R. Co. v. Sugar, 117 Ill. App. 578.

74. A question so general that irrelevant evidence would be responsive to it is properly excluded. Parham v. State [Ala.] 42 So. 1. Question, "Were you insolvent at the time?" not specifying any time or transaction in particular, held too indefinite. Crew v. Heard [Ala.] 40 So. 337. In an action by a wife for alienation of her husband's affections, a question to plaintiff, on her cross-examination, to "state some other things you talked about after you were married that happened to you while you were single," was too general and indefinite. Hardwick v. Hardwick [Iowa] 106 N. W. 639. A question whether witness has ever been "arrested and convicted" of a certain crime, held not objectionable as containing reference to two facts, only one of which could be shown. Koch v. State, 126 Wis. 470, 106 N. W. 531. Statements made in negotiations for compromise being incompetent, a question which left the witness to decide whether such statements or other matter was called for, was properly excluded. St. Louis, etc., R. Co. v. Continental Brick Co. [Mo.] 96 S. W. 1011.

75. Kinney v. Brotherhood of American Yeomen [N. D.] 106 N. W. 44.

76. Haddix v. State [Neb.] 107 N. W. 781.

77. Altkrug v. Horowitz, 97 N. Y. S. 716.

78. Held not improper to allow witness to put on vest worn by deceased on night of his death to illustrate state's theory. Turner v. Com. [Ky.] 89 S. W. 482.

79. See 5 C. L. 1372, n. 21.

80. Use of Indian interpreter where witness was an Indian and did not understand English thoroughly, but knew a little Spanish, held proper. People v. Salas [Cal. App.] 84 P. 295.

81. Code Civ. Proc. § 1884, permits use of interpreter who is a resident of the county. People v. Salas [Cal. App.] 84 P. 295.

82. Dobbins v. Little Rock R. & Elec. Co. [Ark.] 95 S. W. 794.

83. Proper to allow witness to explain sense in which he used word "indecent," in describing a testator's habits. Swygart v. Willard [Ind.] 76 N. E. 755. Proper for expert to explain meaning of word "monomania" used by him. Id.

84. See 5 C. L. 1372.

85. State v. Johnson [N. J. Law] 63 A. 12; State v. Drake, 128 Iowa, 539, 105 N. W. 54; State v. Woodward, 191 Mo. 617, 90 S. W. 90; People v. Weber [Cal.] 86 P. 671. The right of a trial court, in its discretion, to allow leading questions to be put to a witness and to decide whether a question is leading, is universally admitted. The court may in its discretion strike out an answer, though no objection was made to the question before it was answered. Luckenbach v. Sciple, 72 N. J. Law, 476, 63 A. 244.

86. Teston v. State [Fla.] 39 So. 787; State v. Hazlett [N. D.] 105 N. W. 617; Maguire v. People, 219 Ill. 16, 76 N. E. 67; McBride v. Georgia R. & Elec. Co., 125 Ga. 515, 54 S. E. 674; Caldwell v. Atlantic Coast Line R. Co. [S. C.] 55 S. E. 131; State v. Bateman [Mo.]

attending the examination of the witness.[87] Where a witness is hostile or unwilling,[88] or is lacking in intelligence and cannot comprehend the questions propounded,[89] it is not error to allow leading questions to be asked, and such questions are also proper to refresh or aid the recollection of a witness whose memory has failed him.[90]

94 S. W. 843. Where an adverse party is called as a witness, it is within the court's discretion to refuse to allow counsel for the party called to ask him leading questions on the cross-examination. Lauchheimer v. Jacobs [Ga.] 55 S. E. 55. That leading questions were permitted is no ground for reversal where no prejudice is shown as a result. Leek v. People, 118 Ill. App. 514.

87. **Held leading and objectionable.** Heinrich v. Heinrich [Cal. App.] 84 P. 326 Question whether headlight on engine was regulation or another kind. Chicago City R. Co. v. Shaw, 220 Ill. 532, 77 N. E. 139 Where witness said he was not familiar with value of land, but thought it might be worth $115 an acre, a question, "Wouldn't it be worth more than that upon the market?" was leading and improper. Prather v. Chicago Southern R. Co. [Ill.] 77 N. E. 430. Where negligence charged consisted in feeding materials of improper size into a blast furnace, a question "Don't you know with the utmost care they slip in?" was leading. Williamson Iron Co. v. McQueen [Ala.] 40 So. 306. In an action to recover overcharges, the following was held an improper and leading question: "Has the traffic increased on the Southern Railway since 1899, and was not the traffic greater since 1899 than it was for two years prior thereto?" Anniston Mfg. Co. v. Southern R. Co. [Ala.] 40 So. 965. A question "whether or not" an insured party told an agent taking proofs as to loss that an inventory required to be kept in an iron safe "had been lost in the fire" held leading. Continental Ins. Co. v. Cummings [Tex. Civ. App.] 16 Tex. Ct. Rep. 279, 95 S. W. 48. Where a witness testified that an insurance agent was satisfied with the examination of books after the fire, a question, "He said he was satisfied?" was held leading. Id. Where it appeared that prosecutrix in rape case, who was 16 years old, was a willing witness, but that nearly all her testimony was elicited by leading questions, an abuse of discretion, calling for new trial, was shown. State v. Hazlett [N. D.] 105 N. W. 617. Where witness for people has identified accused, it is improper for counsel for state to seek to strengthen the identifying testimony by asking leading questions. Briggs v. People, 219 Ill. 330, 76 N. E. 499.

Held not objectionable: Question, "Did defendant stoop as he came along the fence with the gun in his hand?" held not to suggest an affirmative answer; if leading it was not reversible error to allow it. Moore v. State [Tex. Cr. App.] 96 S. W. 321. Held not leading: "State whether or not the corner of the east end of said line was a hickory corner, and state whether or not said hickory was recognized by all the adjoining owners as the correct corner." Hix v. Gulley, 124 Ga. 547, 52 S. E. 890. Witness having testified that at time of offense defendant "took a notion to go away," a question "You say on Monday he said he had to go away?" was not objectionable as leading or as assuming facts the witness had not testified to. Bolton v. State [Ala.] 40 So. 409. In action for injuries from being scalded by steam from a locomotive, a question whether steam from a blow-off could burn or scald a person 15 or 18 feet away was held not leading. Gulf, etc., R. Co. v. Tullis [Tex. Civ. App.] 14 Tex. Ct. Rep. 478, 91 S. W. 317. Question, "Did L. tell you what to testify?" held not leading or suggestive. Coons v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 319, 91 S. W. 1085. Where question asked if witness had told an agent to be on hand to thresh grain, and the answer was that he had told agent that he had engagements at the place in question and was to be there at a certain time to commence work, there was no reversible error, conceding question to be a leading one. Chicago, etc., R. Co. v. Calvert [Tex. Civ. App.] 14 Tex. Ct. Rep. 642, 91 S. W. 825.

88. Leading questions may be permitted in case the witness is unwilling to testify. State v. Dalton [Wash.] 86 P. 590. State may ask leading questions of one of its witnesses who proves to be unwilling to testify freely. Burch v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 265, 90 S. W. 168. It is for court to determine whether witnesses are unwilling, so as to render leading questions proper. State v. Cambron [S. D.] 105 N. W. 241. Not improper to permit leading questions where witness called is unfriendly or where his statements on the stand differ from his statement previously made to counsel. Chicago & A. R. Co. v. Walker, 118 Ill. App. 397.

89. There is no abuse of discretion in allowing leading questions to a feeble or simple minded witness. State v. Simes [Idaho] 85 P. 914. Where witnesses are young or inexperienced, or laboring under evident timidity or embarrassment, or are apparently lacking in intelligent comprehension of the questions propounded, or are unwilling or evasive, leading questions are proper. State v. Drake, 128 Iowa, 539, 105 N. W. 54.

90. Allowance of leading questions held not an abuse of discretion where witness was old and his memory appeared not to be good. Gray v. Kelley, 190 Mass. 184, 76 N. E. 724. Allowance of leading questions not an abuse of discretion where recollection of witnesses was poor. Stark v. Burke [Iowa] 109 N. W. 206. Discretion of court not abused by permitting counsel to lead and refresh memory of unwilling witness as to former testimony. Hackney v. Raymond Bros. Clark Co. [Neb.] 106 N. W. 1016. Where defendant failed to produce a letter after notice, and in testifying in regard thereto, defendant's recollection failed him, leading questions, calling his attention to

Responsiveness.[91]—Voluntary statements of the witness, not responsive to the question, should be stricken[92] upon motion for such relief.[93] The objection that an answer is not responsive is one to be made by the party questioning the witness and not by his antagonist;[94] if the answer is competent and material, the examining party has the right to take and retain it if he so desires.[95]

Refreshing memory.[96]—For the purpose of refreshing his memory, a witness may consult any memorandum made at or near the time of a transaction or occurrence, whether made by himself or another,[97] when the recitals of the memorandum are shown to be correct either by testimony of the witness or the person who made it.[98] It must appear, however, that when the memory of the witness is so refreshed, he testifies to the facts as being within his own knowledge.[99] A mem-

certain matters, should have been allowed. De Kremen v. Clothier, 109 App. Div. 481, 96 N. Y. S. 525.

91. See 5 C. L. 1375.

92. In re Dolbeer's Estate [Cal.] 86 P. 695. Nonresponsive answer properly stricken. Nixon v. Goodwin [Cal. App.] 85 P. 169; De Coster v. Herzog Co., 97 N. Y. S. 295. That witness always stopped his car before going down a certain hill is not responsive to a question whether there was a rule or custom of stopping cars at a certain point. Sloss-Sheffield Steel & Iron Co. v. Smith [Ala.] 40 So. 91. In trespass for taking goods, a defendant was asked to state circumstances under which he got the "stuff." An answer that he told a certain person to collect a debt secured by the property taken and to get possession of the property by legal proceedings was not responsive and was properly stricken. Gilliland v. Martin [Ala.] 42 So. 7. On an issue as to the knowledge of ownership of certain property, a witness should not be permitted to state his impression in response to a proper question as to general reputation in the community as to ownership. Continental Ins. Co. v. Cummings [Tex. Civ. App.] 16 Tex. Ct. Rep. 279, 95 S. W. 48.

93. Where an answer is not responsive to the question, the remedy is by motion to strike out and reject the answer. Diamond Block Coal Co. v. Cuthbertson [Ind.] 76 N. E. 1060.

94, 95. In re Dunahugh's Will [Iowa] 107 N. W. 925.

96. See 5 C. L. 1373.

97. Geer v. New York City R. Co., 99 N. Y. S. 483. Any writing may be used to refresh the memory of a witness who, after examining it, testifies from present recollection of the facts. Where witness had made memoranda of various household goods from time to time, on separate pieces of paper, and later had a typewritten list made, either the original slip or the typewritten copy could be used by a witness who testified from present recollection. Ward v. Morr Transfer & Storage Co. [Mo. App.] 95 S. W. 964. Witness properly allowed to refresh his recollection by use of memorandum. Fay v. Walsh, 190 Mass. 374, 77 N. E. 44. Held proper to permit witness for plaintiff contractor to refer to private memorandum book made by him in course of his duties in order to refresh memory as to time of completing work, condition of weather, etc. Fitzgerald v. Benner, 219 Ill. 485, 76 N. E. 709. Where a justice of the peace, at the time he wrote a note and mortgage, also prepared a memorandum which was signed by the mortgagor, showing that mortgagee was to distribute certain sums after the mortgagor's death and keep the balance, the memorandum was properly used by the officer to refresh his memory while testifying to the transaction. McCourt v. Peppard, 126 Wis. 326, 105 N. W. 809.

98. Proper to allow salesman to refresh his memory from entries in books of account shown by testimony of bookkeeper to be correct. International & G. N. R. Co. v. Startz [Tex. Civ. App.] 15 Tex. Ct. Rep. 384, 94 S. W. 207. Where weights of hogs were entered on check stubs when sales were made, and then entered in books, the memorandum books were competent for refreshing the memory of a witness without production of the check stubs, when shown to be correct. San Antonio & A. P. R. Co. v. Turner [Tex. Civ. App.] 15 Tex. Ct. Rep. 457, 94 S. W. 214. Witness may use a copy which he has compared and swears is identical with the original of a memorandum made under his direction when the facts were fresh in his mind, and which he knows states the facts correctly. People v. Brown [Cal. App.] 84 P. 670. It is proper to allow a witness to refresh his memory from a memorandum made under his direction when the facts were fresh in his recollection, and he knew that the facts were correctly stated therein. Code Civ. Proc. § 2047. Id.

99. Geer v. New York City R. Co., 99 N. Y. S. 483. Manager of branch bucket shop sought to recover, under statute, money paid on speculative deals made through main office. Memoranda made by his clerk were incompetent to refresh his memory as a witness, where he could not recollect, even after using them, whether he actually paid the money or gave his employer credit for it, and where he himself did not make or verify the memoranda McCarthy v. Meancy, 183 N. Y. 190, 76 N. E. 36. Error to allow witness to testify from a letter relating to price of oil when he had no personal knowledge of the price, and the letter was not competent evidence of it. Kentucky Refining Co. v. Conner [Ala.] 39 So. 728. List of articles on farm made up by stranger to the action under circumstances not shown, held not proper basis for list made by plaintiff; hence plaintiff's list was hear-

orandum made by another, reciting facts of which the witness had no personal knowledge at the time, is incompetent.[1] By some courts it is held that a witness may not use a memorandum unless, after using it, he can testify from present recollection of the facts;[2] by others, it is held that where the witness swears positively that the memorandum or entry was made at the time according to the true facts, he may testify therefrom though the facts are not in his present remembrance.[3] It has been held proper to allow a witness to refresh his memory from books of account,[4] from newspaper items,[5] from a complaint sworn to by the witness,[6] from a bill of particulars,[7] and from the return to a search warrant made by the witness.[8] Generally, it is not essential that a memorandum used by a witness to refresh his memory should be introduced in evidence;[9] but it is held that a writing which fails to refresh the memory of a witness, but which he knows to be a correct transcript of a fact known to him when the writing was made, and since forgotten, is an essential part of his testimony,[10] and when oral testimony in proof of such fact is offered, the adverse party may require production of the writing.[11]

say and could not be used by him to refresh his memory while on the stand. Dryden v. Barnes, 101 Md. 346, 61 A. 342.

1. Where a memorandum was a copy of books of account and witness said he had no knowledge of the facts independent of the books, the memorandum was incompetent to refresh his memory. Jones v. State [Ala.] 41 So. 299.

2. If a witness, after refreshing his memory by an examination of his books as to a transaction made by himself, finally testifies from his recollection thus refreshed, such testimony is admissible. Johnson v. State, 125 Ga. 243, 54 S. E. 184.

3. Where physician testified that application for insurance filled out by him did not refresh his recollection, but said that he knew at the time that the statements therein made by him were true, it was error to refuse to allow him to testify from the written application, though the writing itself was inadmissible. Holden v. Prudential Life Ins. Co., 191 Mass. 153, 77 N. E. 309. When a witness testifies to making a record at the time of the transaction, and that he would not have made it if it had not been true, this is a sufficient basis for him to testify as to the facts as they appear in his record, though he may not be able to recall these facts to his memory. Franklin v. Atlanta & C. Air Line R. Co. [S. C.] 54 S. E. 578. Where it is claimed a witness, who testified before a grand jury, changed his testimony on the trial, an official court stenographer, who took his testimony before the grand jury in shorthand, may, as impeaching such witness, read his notes in evidence to the jury, if he remembers and can testify that at the time it was correctly taken, and that the notes contain all the evidence of the witness on the question at variance, although at the time he is called to testify he has no independent recollection of his testimony. Baum v. State of Ohio, 6 Ohio C. C. (N. S.) 515.

4. Held proper to permit express agent to refer to his books to refresh his memory. Cantwell v. State [Tex. Cr. App.] 85 S. W. 19. Agent of railroad who received waybills and entered them in a book of original entry was properly allowed to testify from such book. Walker v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 216, 94 S. W. 230. Ledger entries, posted at close of calendar month, examined by witness at or near the time of entry, and known by him then to be correct, competent for use in refreshing his memory. Grunberg v. U. S. [C. C. A.] 145 F. 81. In prosecution for embezzlement, the bookkeeper of defendant's employer could refresh his memory by reading lead pencil entries made by him in a ledger and showing amounts due from customers from whom defendant had made collections which it was alleged he had failed to account for, where the entries were made at the time a statement of such amounts was given by the bookkeeper to defendant. O'Brien v. U. S., 27 App. D. C. 263.

5. Witnesses testifying to prior use of alleged invention may properly refresh their memories by news items in newspapers published at the time. Bragg Mfg. Co. v. New York, 141 F. 118.

6. A complaint sworn to by the witness on the very day of the occurrence, concerning which he desired to refresh his memory, is within this rule. Geer v. New York City R. Co., 99 N. Y. S. 483.

7. Proper to allow witness to refresh memory by referring to bill of particulars. Snyder v. Patton & Gibson Co. [Mich.] 12 Det. Leg. N. 1041, 106 N. W. 1106.

8. In prosecution under intoxicating liquor laws, officer who made search of premises may refresh his memory by the return to the search warrant and may be cross-examined from the warrant. State v. Costa, 78 Vt. 198, 62 A. 38.

9. Where sufficient foundation had been laid for admission in evidence of books of account, it was proper to allow witness to refer to them and read from them to refresh his memory, though the books were not introduced in evidence. Moynahan v. Perkins [Colo.] 85 P. 1132. Where a witness refers to books or papers not in themselves admissible as evidence, merely for the purpose of refreshing his memory, it is not necessary that such documents be produced in court. Lowrie v. Taylor, 27 App. D. C.

It is proper for counsel, when examining a witness, to call his attention to previous testimony or statements to refresh his memory.[12] The testimony of a witness upon the preliminary examination of one accused of crime may be used by the witness upon the trial of such accused person for the purpose of refreshing his present recollection,[13] but when so used it is not admissible in evidence, and should not be read to the witness in the presence of the jury.[14]

§ 2. *Cross-examination.*[15]—The manner and extent of the cross-examination of witnesses is largely discretionary with the trial court.[16] It is proper for the court to prevent needless repetition[17] or to limit the cross-examination when the matters of inquiry have been fully developed and placed clearly before the jury.[18]

A greater latitude is allowed in the cross-examination of a party who takes the stand than in the case of an ordinary witness.[19] In many states there are statutes permitting the adverse party to be called for cross-examination.[20] Such statutes are remedial and are to be construed with reasonable liberality.[21]

522. See, also, Curtis v. Bradley, 65 Conn. 99, 28 L. R. A. 145, 48 Am. St. Rep. 177; 1 Wigmore, Ev. §§ 749, 753, 754.

10, 11. Ft. Worth & D. C. R. Co. v. Garlington [Tex. Civ. App.] 14 Tex. Ct. Rep. 741, 92 S. W. 270.

12. Where a prosecuting witness attempted to shield accused, and said he did not make a certain statement before the jury, it was proper for counsel to call witness' attention to a previous contradictory statement. McMahan v. State [Tex. Cr. App.] 96 S. W. 17. Held proper for prosecuting attorney to refresh memory of witness, on cross-examination, by calling attention to a statement made before the grand jury. McLin v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 881, 90 S. W. 1107.

13, 14. State v. Legg [W. Va.] 53 S. E. 545.

15. See 5 C. L. 1375.

16. Extent of cross-examination largely discretionary. American Woolen Co. v. Boston & M. R. Co., 190 Mass. 152, 76 N. E. 658; Regester v. Regester [Md.] 64 A. 286; Schwoebel v. Fugina [N. D.] 104 N. W. 848; Hill v. State [Ala.] 41 So. 621. Discretion of trial court held not to have been abused by allowing a long cross-examination, caused in part by opposing counsel's objections. Herbeck v. Germain [Mich.] 13 Det. Leg. N. 175, 107 N. W. 904. In cross-examination, an adverse party is usually allowed great latitude of inquiry, limited by the sound discretion of the trial court. Birmingham R. & Elec. Co. v. Mason [Ala.] 39 So. 590. Held not an abuse of discretion to permit plaintiff's memory to be exhausted on cross-examination in regard to what took place at an interview where an agreement was signed. Taylor v. Schofield, 191 Mass. 1, 77 N. E. 652. Extent of cross-examination on collateral issues is largely discretionary with trial court. Robinson v. Old Colony St. R. Co., 189 Mass. 594, 76 N. E. 190. But contradictory statement relating to material issue, should be allowed to be proved. Id. In homicide where defendant's objection to the admission of a conversation between him and a witness was sustained and subsequently the witness was permitted to make the bare statement that defendant told her he killed deceased but not to repeat the conversation, held, the refusal to permit defendant to fully cross-examine the witness on the statement was not error. Posey v. State, 86 Miss. 141, 38 So. 324.

17. Repetition of question on cross-examination properly disallowed. Southern R. Co. v. Cothran [Ala.] 42 So. 100. Held improper to allow repeated questions to accused why he did not leave the scene of the trouble and go home. Carnes v. Com., 27 Ky. L. R. 1205, 87 S. W. 1123.

18. Held proper to limit cross-examination along certain line, ground having been sufficiently covered. Fitzgerald v. Benner, 219 Ill. 485, 76 N. E. 709. When counsel states that he does not expect to gain anything by a cross-examination on which he is about to enter, it is not error for the court to refuse to let him cross-examine. Union R. Co. v. Hunton, 114 Tenn. 609, 88 S. W. 182. Limitation of cross-examination as to custom of propping up roofs in a mine held proper. Tutwiler Coal, Coke & Iron Co. v. Farrington [Ala.] 39 So. 898. Held proper to limit cross-examination when matter of inquiry had been fully developed and clearly placed before the jury. Richardson v. State [Ark.] 96 S. W. 752. Where cross-examination was stated to be for the purpose of showing the activity of a newspaper in aiding in the arrest of defendant, and the instrumentality of the paper was admitted, it was proper to stop the cross-examination. Boles v. People [Colo.] 86 P. 1030. Where judge permitted cross-examination of a witness to last over an hour, and then interrupted and allowed it to continue 10 minutes more, no abuse of discretion was shown. State v. Foster [N. D.] 105 N. W. 938. Direction by court to close a cross-examination at a certain hour proper where it had continued several hours, and many improper questions were asked. Barnes v. Squier [Mass.] 78 N. E. 731.

19. No abuse of discretion where plaintiff was allowed to prove, on cross-examination of defendant, a fact essential to his case, which he had not proved in making his case. Schwoebel v. Fugina [N. D.] 104 N. W. 848. Cross-examination of plaintiff in personal injury action should not be restricted to his movements at the precise time of the injury, but should be allowed to include his movements a short time before it. Chicago City R. Co. v. Schaefer, 121 Ill. App. 334.

20. The right to call an adverse party

When defendant in a criminal prosecution takes the stand in his own behalf he may be cross-examined the same as any other witness,[22] and his credibility may be impeached in the same manner.[23] A wide range of cross-examination is allowed in the case of a prosecuting witness[24] or a witness actively interested in the prosecution.[25]

Limitation to scope of direct examination.[26]—The cross-examination should, in general, be confined to the subject-matter of the examination in chief,[27] but mat-

and cross-examine him being given by V. S. 1246, it was not error to call defendant in trespass for assault and examine him as first witness, where it did not appear that plaintiff's only purpose was to discredit defendant, or that plaintiff exceeded his statutory right. Jennett v. Patten, 78 Vt. 69, 62 A. 33.

21. Under Minn. Gen. St. 1894, § 5659, providing for the calling of the adverse party, a master of a vessel is the managing agent of the corporation owner in respect to his duties and may be called under the provision for the calling of managing agents when a corporation is the adverse party. Davidson S. S. Co. v. U. S. [C. C. A.] 142 F. 315.

22. State v. Buffington, 71 Kan. 804, 81 P. 465. Accused who takes stand waives privilege and may be cross-examined as to pertinent matter covered by his direct examination. Miller v. State [Ala.] 40 So. 342. Held, proper in homicide case, to cross-examine accused as to his conduct at time of shooting, and as to whether the clothes offered on the trial as those worn at the time had been offered at the preliminary examination. Barden v. State [Ala.] 40 So. 948. Held proper in homicide case to allow cross-examination of accused to show his movements after the crime tending to show flight. Untreiner v. State [Ala.] 41 So. 285. Accused, who testifies in his own behalf, may be cross-examined as to matters germane to those brought out on his direct examination. State v. Baudoin, 115 La. 773, 40 So. 42. Where a defendant in a criminal prosecution takes stand in his own behalf he may be cross-examined regarding any matter pertinent to the issues, regardless of scope of direct examination. Lawrence v. State [Md.] 63 A. 96. On an issue whether the facts amounted to larceny as charged or false pretenses growing out of negotiations by accused to purchase property for prosecutrix, a question putting it direct to prosecutrix whether she bought from accused or the third person was proper cross-examination as tending to show whether prosecutrix parted with her money to accused or to the possession of accused for the other. People v. Delbos, 146 Cal. 734, 81 P. 131. An accused who takes the stand waives his privilege and may be cross-examined as to circumstances connecting him with the crime the same as any other witness. Sawyer v. U. S., 202 U. S. 150, 50 Law. Ed. —.

23. Proper to inquire of accused if he had not been previously convicted of using the mails to further a scheme to defraud. Ball v. U. S. [C. C. A.] 147 F. 32. Previous conviction of crime may be shown. Williams v. State [Miss.] 39 So. 1006. Proper to show on cross-examination of accused that he had been convicted of a misdemeanor and sent to the workhouse. State v. Barrington [Mo.] 95 S. W. 235. Where accused takes stand in his own behalf, proof of conviction of other felonious crimes incompetent on his cross-examination to impeach him. State v. Lawrence [Nev.] 82 P. 614. Accused may be asked if he had ever been imprisoned for forgery, since Civ. Code Prac. § 597, permits conviction of felony to be shown on issue of credibility. Henderson v. Com. [Ky.] 91 S. W. 1141. An accused may be cross-examined as any other witness, but cannot be examined as to independent offenses and then contradicted. Nickolizack v. State [Neb.] 105 N. W. 895.

See, also, post, Examination Going to Credibility of Witness.

24. Ample latitude should be allowed in cross-examination of prosecutrix in rape case, where the case depends almost wholly on her testimony. State v. Hazlett [N. D.] 105 N. W. 617. Held error to restrict cross-examination in such case. Id.

25. Where it appeared that a witness for the state had been active in aiding the prosecution and in getting evidence against defendant, a wide range of cross-examination was proper. State v. Griffin [Wash.] 86 P. 951.

26. See 5 C. L. 1376.

27. Citizen's Bank v. Emley [Neb.] 107 N. W. 1014; Staunton Coal Co. v. Bub. 218 Ill. 125, 75 N. E. 770. Questions not calling for matters brought out on direct are properly excluded. Hurrle Glass Co. v. Hooker Co., 120 Ill. App. 433. Facts not inquired into on direct examination, and which go to make an affirmative defense cannot be shown on cross-examination of a witness for plaintiff. Meyer v. Johnson, 122 Ill. App. 87. Witness who testified only as to price paid for land could not be cross-examined as to person from whom he purchased. Buchanan v. Randall [S. D.] 109 N. W. 513. Where witnesses were reserved for rebuttal it was error to permit a cross-examination of them covering the whole case. Walton v. State [Miss.] 39 So. 689. An engineer called by plaintiff on the sole question of speed cannot on cross-examination testify as to the giving of signals. Clarke Co. v. Railroad Co., 27 Pa. Super. Ct. 251. No mention of testimony of a witness on a former trial having been made on the direct examination, it was proper to exclude such testimony on cross-examination. Baltimore & O. R. Co. v. Deck, 102 Md. 669, 62 A. 958. Where witness was asked to state what testatrix said to him on certain subject, he could not be asked to give what she said on other subjects on the cross-examination. Compher v. Browning, 219 Ill. 429, 76 N. E. 678. In suit to recover contract price for work, where direct examination of witness did not cover cost of doing work, it was

ters pertinent to and growing out of or clearly connected with matters brought out on the examination in chief are competent.[28] Where a matter has been partially

proper to exclude such matter on cross-examination. Streator Independent Tel. Co. v. Continental Tel. Const. Co., 217 Ill. 577, 75 N. E. 546. Where direct examination of witness covered only value of property to be taken, and the value to it of an improvement, a question on cross-examination as to the benefit which the city would derive was properly overruled. Sheedy v. Chicago [Ill.] 77 N. E. 539. Where witness testified on direct examination concerning a certain well on land in issue, cross-examination as to other places similar to that where well was located was properly excluded. Chicago, etc., R. Co. v. Kelly [Ill.] 77 N. E. 916. In prosecution for sale of liquor, cross-examination as to settlement of civil suit for damages was improper when defendant had not testified in regard thereto on his direct examination. State v. Campbell, 129 Iowa, 154, 105 N. W. 395. Where witness testified to identity of defendant, according to description given him by decedent, it was not proper to attempt on the cross-examination to show that another person, first arrested for the crime, answered to the description given by decedent. People v. Gray, 148 Cal. 507, 83 P. 707. Where direct examination was confined to declarations of defendant in the witness' presence, a question calling for witness' opinion of defendant's guilt was not proper cross-examination. People v. Darr [Cal. App.] 84 P. 457. Witness for state testified that person subsequently killed said to accused, "You have several times tried to kill me, why don't you do it now?" This did not make proper on cross-examination the question: "Have you ever heard of a previous attempt by the accused on the life of deceased?" State v. Thompson, 116 La. 829, 41 So. 107. Where, in homicide case, a sheriff was cross-examined as to his unfriendly feeling toward defendant, it was proper to exclude conversations between the sheriff and third persons relative to defendant. State v. Seery, 129 Iowa, 259, 105 N. W. 511. Where direct examination of character witness was confined to defendant's general reputation, it was proper to exclude on cross-examination, evidence of defendant's real character. Green v. Dodge [Vt.] 64 A. 499. Where witnesses testified to defendant's reputation prior to act charged, they could not be cross-examined as to specific instances reflecting on his reputation subsequent to such time. State v. Wertz, 191 Mo. 569, 90 S. W. 838. Where good faith of plaintiff in taking a check was in issue it was held competent to cross-examine plaintiff's witnesses on that issue, though it was not covered in the direct examination. Detroit Nat. Bank v. Union Trust Co. [Mich.] 13 Det. Leg. N. 593, 108 N. W. 1092.

28. State v. Feazell, 116 La. 264, 40 So. 698. It is error to refuse to allow inquiry as to the time, place, and circumstances of a transaction testified to on the direct examination. Faulkner v. Birch, 120 Ill. App. 281. Cross-examination held proper as relating to matter brought out on direct. Illinois Roofing & Supply Co. v. Cribbs [Mich.] 12 Det. Leg. N. 901, 106 N. W. 274. Questions pertaining to subject-matter of direct examination are proper. Edmunds Mfg. Co. v. McFariand, 118 Ill. App. 256. Questions testing statements of witness on direct examination are proper. Id. Questions pertaining to subject-matter of direct examination are proper. Campbell v. Eichorst, 122 Ill. App. 609. Cross-examination held proper because relating to and explaining matters covered in direct examination. Womble v. Wilbur [Cal. App.] 86 P. 916. Where witness testified as to what cars could be coupled without going between them, he was properly asked on cross-examination whether it was necessary to go between the cars in question. Huggins v. Southern R. Co. [Ala.] 41 So. 856. Officer who used return to search warrant to refresh recollection, could be cross-examined from the warrant. State v. Costa, 78 Vt. 198, 62 A. 38. Where witness had testified to having heard defendant speak English (he having denied that he could speak it after proof of admissions by him in English), it was error to exclude cross-examination as to the length of the alleged conversation in English with defendant, what he said, and whether he spoke fluently. Baxter v. Krainik, 126 Wis. 421, 105 N. W. 803. Where plaintiff, assignee of notes in suit, testified to assignment to him, defendant should have been allowed to cross-examine as to time and place of indorsement. Gillespie v. Salmon [Cal. App.] 84 P. 310. Witness who had testified fully concerning events and circumstances surrounding homicide, and had said that deceased had come up to defendant, who was with witness, and struck him with an axe handle, was properly asked on cross-examination if he had seen deceased carrying the axe handle around that day. State v. Trueman [Mont.] 85 P. 1024. Witness having testified that he and deceased had been together on day of homicide and had voted before they had anything to drink, a question as to whether they had anything to drink that day was proper cross-examination. Id. Where witness testified to an intelligent understanding of the situation before making a contract, it was proper cross-examination to ask if he had consulted an attorney before making it. Speliopoulos v. Schick [Wis.] 109 N. W. 568. Where plaintiff in an accident case was permitted to testify as to his residence, he could be cross-examined as to whether he was a citizen of the United States. Greenwood v. Union Traction Co., 30 Pa. Super. Ct. 488. In an action by a minor to recover for injuries sustained at a prohibited employment held error to exclude questions propounded to plaintiff on cross-examination concerning an affidavit that had been prepared for his father to sign as to his age, and as to whether at the time he gave his age to defendant, who inquired of him for it, he knew the purpose of the inquiry; the questions being within the purview of proper cross-examination. Swift & Co. v. Rennard, 119 Ill. App. 173. Where in a suit to recover the value of corporate stock it was testified that the stock was worth par, it was im-

developed on the examination in chief, it may be gone into fully on the cross-examination.[29] On cross-examination it is proper to meet any inferences that may be drawn from a witness' testimony in chief,[30] and matters connected with the subject-matter of the direct examination, and which tend to explain, qualify, or destroy the effect of the testimony in chief, are competent.[31] Matters which have been inquired into on the direct examination may be covered by the cross-examination, even though irrelevant.[32] Where a cross-examination covers matters outside the scope of the direct examination, the examining party makes the witness his own to that extent.[33] There is no right to cross-examine a witness called and sworn but not examined by the party calling him.[34]

Limitation to issues.[35]—The cross-examination should generally be confined to material issues in the case,[36] but this, also, is a matter resting to a great extent in

proper to exclude a question on cross-examination as to whether the stock ever paid a dividend. Hughes v. Ferriman, 119 Ill App. 169.

29. State v. Nugent, 116 La. 99, 40 So. 581. Part of a conversation being shown, the whole was competent on cross-examination. Letcher v. State [Ala.] 39 So. 922 Part of conversation being shown on direct, the whole of it, so far as relevant, was admissible on cross-examination though otherwise incompetent as involving self-serving declarations. Wilson v. Gordon, 73 S. C. 155, 53 S. E. 79. Where witness testifies to what he had said to another person, he may be further questioned on cross-examination as to what he said to such person, where it is not made to appear that there was more than one conversation. Jewett v. Buck, 78 Vt. 353, 63 A. 136. Where witness was asked concerning circumstances surrounding transfer of note to him, it was proper on cross-examination to bring out entire conversation between payee and witness at the time. Crosby v. Emerson [C. C. A.] 142 F. 713.

30. Where issue was mental capacity, and physician testified to testatrix's physical condition, it was proper to ask on cross-examination if her disease affected her mind. In re Jones' Estate [Iowa] 106 N. W. 610. On cross-examination of an accused person, anything within the knowledge of the witness tending to rebut an unfavorable inference from the direct examination may be shown. State v. Harvey [Iowa] 106 N. W. 938.

31. Any questions directly tending to show that the real import of a witness' testimony in chief is materially different from its original aspect are within the range of legitimate cross-examination. Colloty v. Schuman [N. J. Law] 62 A. 186. Where lessee testified as to intention in giving him a lease, he was properly cross-examined to show the real reason why the lease was given. Pinch v. Hotaling [Mich.] 12 Det. Leg. N. 841, 106 N. W. 69. Witness who testified to taking out block and placing planks in a crossing could be asked on cross-examination why he took out the block. Hughes v. Chicago, etc., R. Co., 126 Wis. 525, 106 N. W. 526. Where it was shown that witness for the state was gone for a month after the commission of the offense charged against defendant it was proper on cross-examination to show why he had gone. Sims v. State [Ala.] 41 So. 113. Where witness said he carried whisky to a ball game, it was proper to show on cross-examination what he did with the whisky. Owens v. State [Tex. Cr. App.] 96 S. W. 31. Where, in a homicide case, accused testified that deceased had been "trailing" him, and threatening to injure him, and prosecution claimed that deceased had only been trying to get a picture of him for purposes of identification, it was proper cross-examination to ask accused if deceased had not told him that he desired a snap shot of him. Ball v. U. S. [C. C. A.] 147 F. 32.

32. Louisville & N. R. Co. v. Quinn [Ala.] 39 So. 756. Cross-examination of defendant relevant to other testimony to show motive held proper though it related to matters collateral to issues. Thompson v. U. S. [C. C. A.] 144 F. 14. Though matter admitted on direct examination was irrelevant, cross-examination on the same matter, to test the accuracy and recollection of the witness, was proper. Main v. Radney [Ala.] 39 So. 981. If cross-examination on collateral matters is proper, in view of the scope of the direct examination, the examining party is not bound by answers of the witness as to such collateral matters. Levine v. Carroll, 121 Ill. App. 105.

33. Valentini v. Metropolitan Life Ins. Co., 106 App. Div. 487, 94 N. Y. S. 758. A party who recalls a witness to ask him impeaching questions does not thereby make the witness his own. Schultz v. Reed, 122 Ill. App. 420.

34. Harris v. Quincy, etc., R. Co., 115 Mo. App. 527, 91 S. W. 1010. But there are courts which follow a contrary rule. Id.

35. See 5 C. L. 1377.

36. Error to inquire of prosecutrix in rape case if she was at the time of trial the wife of the accused. State v. Falsetta [Wash.] 86 P. 168. Where condition of defendant's injured hand was material in identifying him, it was proper to ask a physician who examined it if he asked defendant the cause of the injury. Boles v. People [Colo.] 86 P. 1030. On cross-examination of defendant in action by a miner for compensation, it was proper to ask if he did not employ and pay off men during the time for which plaintiff claimed pay, where defendant denied hiring plaintiff and claimed he did not work the mine during the time for which plaintiff claimed compensation. Corcoran v. Halloran [S. D.] 107

the sound discretion of the trial court,[37] and the examination may include collateral matters under some circumstances.[38]

Examination going to credibility of witness.[39]—It is always proper on cross-examination to interrogate a witness, within reasonable bounds, as to any matter of fact calculated to affect his credibility or the weight of his testimony, and the extent of the examination for this purpose is necessarily left largely to the discretion of the trial court.[40] Matters tending to show the interest, bias, or hostility of the witness may be shown,[41] and questions tending to test the accuracy, recollection and truthfulness of the witness are proper.[42] Thus, particular facts inconsistent

N. W. 210. Where plaintiff charged defendant with fraud in a land deal, and claimed he was deceived and misled, defendant was properly allowed to show plaintiff's experience as a real estate man, upon cross-examining him. Kolbe v. Boyle [Minn.] 108 N. W. 847. Where dogs were used to hunt down defendant, and the evidence showed how he was traced by them, he should be allowed full opportunity for cross-examination to show the breeding and skill of the dogs. Richardson v. State [Ala.] 41 So. 82. Cross-examination of witnesses properly restricted to those who appeared, and evidence reflecting on the wife of a witness, who did not appear, was properly excluded. State v. Peterson [Minn.] 108 N. W. 6.

37. Whether a witness shall be permitted to be cross-examined as to a matter irrelevant to the issue is a matter largely within the discretion of the trial judge and to be determined from the peculiar facts of each case. State v. High, 116 La. 79, 40 So. 538.

38. As where irrelevant matters have been introduced on the direct examination. See preceding paragraph.

39. See 5 C. L. 1377.

40. Where the trial court is vested with discretion as to the extent to which a witness may be examined as to his credibility, the exercise of such discretion will be interfered with only in case it has been clearly abused. Shailer v. Bullock, 78 Conn. 65, 61 A. 65. The extent of cross-examination to test the accuracy, recollection, and truthfulness of a witness, is a matter largely discretionary with the trial court. Smiley v. Hooper [Ala.] 41 So. 660.

41. Relation between witness and party may be shown. Chicago City R. Co. v. Schaefer, 121 Ill. App. 334. Relations between witness and parties, and whether they are friendly or hostile, and fact of communications between them, may be shown. Toledo, etc., R. Co. v. Stevenson, 122 Ill. App. 654. For the purpose of discrediting a witness, a wide range of cross-examination is permitted as a matter of right in regard to his motives, interest or animus as connected with the cause or the parties thereto. Pittman v. State [Fla.] 41 So. 385. These matters are not collateral and the witness may be contradicted in regard thereto. Id. Proper to ask witness in criminal prosecution if he expected part of reward offered for conviction of accused. People v. Harper [Mich.] 13 Det. Leg. N. 440, 108 N. W. 689. On cross-examination of defendant's witness it was proper to ask him how much defendant had paid him on account of injuries suffered in the wreck in which plaintiff was also injured. Cain v. Atlantic Coast Line R. Co. [S. C.] 54 S. E. 244. It is always proper to ask an adverse witness to whom he has talked about the case. Banks v. State [Ala.] 39 So. 921. State witness properly cross-examined as to whether he had made threats of violence against defendant. Vaughn v. State [Fla.] 41 So. 881. To show bias on part of defendant, it was proper to show on his cross-examination that he had sworn out a warrant for prosecutor's arrest. Cross v. State [Ala.] 41 So. 875. Where injured person waived his privilege by allowing his physician to testify, yet he was properly permitted to thoroughly cross-examine the witness for the purpose of discrediting him by showing interest or bias. Williams v. Spokane Falls & N. R. Co., 42 Wash. 597, 84 P. 1129. On cross-examination, the examining party has an absolute right, within reasonable limits, to interrogate the witness as to specific facts and circumstances which tend to show ill will or other specific motive for falsifying, although the witness denies the existence of such motives. State v. Malmberg [N. D.] 105 N. W. 614. Where a party seeks to discredit a witness by showing ill will or a motive for falsifying he has a right to show so much of the facts and circumstances as may be necessary to fairly inform the jury of the nature and extent of the alleged improper influence. Id. Animus or bias may be shown by proof of difficulties between prosecutor and accused but the details of such difficulties are inadmissible unless they illustrate other phases of the case. Henderson v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 570, 91 S. W. 569.

42. Testimony designed to test accuracy and value of testimony given on direct examination is properly brought out on cross-examination. Baltimore Belt R. Co. v. Sattler, 102 Md. 595, 62 A. 1125. Witnesses who testified that they did not think a certain place could be seen from a public road, were properly asked on cross-examination if they would testify that it could not be seen from any point on such road. Bradford v. State [Ala.] 41 So. 1024. Where it appeared defendant had promised to give up visiting a woman, cross-examination tending to show he had not kept his promise was proper. State v. Stukes, 73 S. C. 386, 53 S. E. 643. Where negligence in operation of car was charged, and motorman testified that brakes were out of order, cross-examination tending to show improbability of brakes being out of order was proper.

with a general statement of the witness may be inquired into.[43] In the case of experts or witnesses who give opinion evidence, a wide range of examination is proper to test the accuracy and value of their opinions.[44] A character witness may be examined as to his knowledge of particular facts concerning the person whose reputation or character is in issue,[45] but the details of the conduct of such person cannot be inquired into.[46] Previous statements or testimony inconsistent with testimony given at the trial may be shown[47] when the proper foundation has been

Bragg v. Metropolitan St. R. Co., 192 Mo. 331, 91 S. W. 527. Question excluded on cross-examination of witness to value because not tending to impeach him, not being necessarily inconsistent with his former testimony. Brown v. Weaver Power Co., 140 N. C. 333, 52 S. E. 954. In an action by a minor to recover for injuries sustained while working at prohibited work plaintiff's father should have been required to state whether he had ever given a certificate of plaintiff's age to be delivered to defendant, whether he knew that plaintiff was working for defendant, and how long he had been so working, as being within the domain of proper cross-examination for the purpose of testing the truthfulness of the witness' testimony given in chief. Swift & Co. v. Rennard, 119 Ill. App. 173.

43. Improper to ask plaintiff in personal injury action if he had not been present at trial of another case without testifying therein. Chicago City R. Co. v. Rohe, 118 Ill. App. 322. Where witness testified that he did not know that a company had refused a certain order, a question whether he had not been so informed was proper cross-examination. Fulton v. Sword Medicine Co. [Ala.] 40 So. 393. Where prosecuting witness in cattle stealing case testified that he had no agreement with defendant relative to sale or disposal of cattle, it was proper on cross-examination to ask if he did not on a certain day stop at defendant's house and have a certain conversation with him concerning sale of the cattle. State v. Strodemier, 40 Wash. 638, 82 P. 915. Where one accused of being in the lottery business denied any connection with a certain lottery company, he was properly cross-examined to show that he bought and sold lottery tickets for the company in question. State v. Miller, 190 Mo. 449, 89 S. W. 377. Where witness said husband had never tried to bring about a reconciliation with his wife after a separation, and had never written to her, it was proper to ask him if a letter had not been handed to him by the husband for the wife. Willis v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 870, 90 S. W. 1100. Where witness testified that he was a hotel watchman, and that the rules of the hotel required him to be on hand constantly and that he always obeyed the rules, it was proper on cross-examination to show instances when he had failed to observe such rules. State v. Smith [Mo.] 90 S. W. 440. Where brakeman testified that he could not have made the mistake of leaving a switch open, it was proper to ask on cross-examination if he had not made a similar mistake on a former occasion. Southern R. Co. v. Blanford's Adm'x [Va.] 54 S. E. 1. Where engineer testified that he did not run train at high rate of speed, and did not strike animals for the killing of which action was brought, it was proper to elicit on cross-examination that when running high speed he sometimes, though rarely, ran onto crossings before he knew of them. Anson v. Gulf, etc., R. Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 398, 94 S. W. 94.

44. Wide range of cross-examination is proper in case of expert witnesses. Trull v. Modern Woodmen of America [Idaho] 85 P. 1081. Where defendant in examination in chief placed a value on property, he could be asked on cross-examination what he paid for it a short time before. State v. Jackson, 128 Iowa, 543, 105 N. W. 51. Where a witness is called by the defendant in a will contest to give his opinion in chief as to the mental capacity of the testator, no right exists in favor of the plaintiff to cross-examine him upon the facts and grounds upon which his opinion is based, until after the conclusion of the examination in chief. Moore v. Caldwell, 6 Ohio C. C. (N. S.) 484.

45. A witness who testifies to the general good character of accused may be cross-examined as to particular facts to test the soundness of his opinion and the data upon which it rests. State v. Le Blanc, 116 La. 822, 41 So. 105. Witness who testified that character of a certain person was good, was properly asked on cross-examination if he had heard that such person had been turned out of a church for living in adultery with a negro woman. Williams v. State [Ala.] 40 So. 405. Where witness has testified to the general reputation of a defendant, he may be cross-examined as to whether he has heard of conduct of defendant inconsistent with his testimony. State v. Beckner, 194 Mo. 281, 91 S. W. 892. In cross-examining a character witness, it is proper to ask if he has ever heard of the person to whose character he has testified, being accused of acts inconsistent with the character he has attributed to such person. People v. Weber [Cal.] 86 P. 671.

46. State v. Beckner, 194 Mo. 281, 91 S. W. 892.

47. Full cross-examination as to prior statements and acts inconsistent with testimony held proper. Larkin v. Saltair Beach Co. [Utah] 83 P. 686. On cross-examination it is proper to question witness as to testimony given in another proceeding relating to the same matters. Brown v. Brown, 110 App. Div. 913, 96 N. Y. S. 1002. It may be shown on cross-examination that witness made contradictory statements in a deposition, though deposition is not introduced. Warth v. Loewenstein, 219 Ill. 222, 76 N. E. 379. Where witness for state identifies accused, he may be asked on cross-examination if he did not state at coroner's inquest that he was not positive of the identity of ac-

laid.[48] A foundation for the impeachment of a witness may be laid on the cross-examination.[49] While it is proper for counsel to assume that a previous answer of a witness is untrue, and to frame his questions so as to show its falsity,[50] it is improper to ask a witness directly if a former statement made by him is true.[51]

A witness cannot be cross-examined as to collateral and irrelevant matters for the purpose of contradicting him,[52] and having answered as to a collateral fact showing bias the details of the fact cannot be elicited.[53] Matters are not relevant upon the cross-examination, within the meaning of this rule, unless it would be competent to prove them otherwise, upon a proper foundation being laid, when necessary.[54] But where facts sought to be shown are such as tend to discredit the witness in the particular case on trial, as distinguished from facts which tend to discredit him generally, the rule forbidding contradiction on collateral matters does not apply.[55] A witness cannot be impeached by incompetent evidence.[56]

A party to an action,[57] or the defendant in a criminal prosecution[58] testifying in his own behalf, may be impeached, as any other witness.

§ 3. *Redirect examination.*[59]—The redirect examination should be confined to matters related to those brought out on the cross-examination.[60] Matters tend-

cused. Briggs v. People, 219 Ill. 330, 76 N. E. 499. Fact that witness did not on preliminary examination testify to a fact disclosed by him on trial may be shown. Shirley v. State [Ala.] 40 So. 269. Cross-examination of defendant as to interview with a reporter proper to test his credibility. State v. Stukes, 73 S. C. 386, 53 S. E. 643. Where witness testified that he and defendant had had trouble but denied ever having tried to frighten him, a question on cross-examination as to whether he had not told others that he had done so was proper, though not specifying time or place of the statements. State v. Beeskove [Mont.] 85 P. 376. It is proper to refuse to allow further examination as to prior statements after the discrepancy between such statements and the testimony on the trial has been made to appear. State v. Wells [Mont.] 83 P. 476.

48. It is not error to refuse to let counsel read a letter to a witness for the purpose of asking him if he wrote or authorized it to be written in his name where he has testified that he did not write or authorize it. Sharpton v. Augusta & A. R. Co., 72 S. C. 162, 51 S. E. 553.

49. Campbell v. Elchorst, 122 Ill. App. 609.

50. Briggs v. People, 219 Ill. 330, 76 N. E. 499.

51. Proper to refuse to allow witness to be asked, "If you stated that, it was not true?" Southern R. Co. v. Cothran [Ala.] 42 So. 100.

52. Kelly v. Louisville & N. R. Co. [Ala.] 41 So. 870. Matters utterly irrelevant cannot be inquired into on cross-examination even for the purposes of impeachment. Schwantes v. State, 127 Wis. 160, 106 N. W. 237. On cross-examination of plaintiff, held proper to exclude inquiries as to other suits against appellant, such matter being incompetent to show bias or feeling and being also irrelevant. Texas & P. R. Co. v. Dishman [Tex. Civ. App.] 14 Tex. Ct. Rep. 650, 91 S. W. 828.

53. A witness who has been examined as to an irrelevant collateral fact tending to show bias cannot be farther examined as to the nature of the fact itself. Where, in an action for personal injuries, plaintiff had been permitted to prove that a witness was employed by an insurance company which insured defendant against accidents, it was error to permit further questions tending to bring out the nature of the insurance. Capital Const. Co. v. Holtzman, 27 App. D. C. 125.

54. Examination as to imaginary circumstances, merely to contradict answers of witness, improper. Schwantes v. State, 127 Wis. 160, 106 N. W. 237.

55. State v. Malmberg [N. D.] 105 N. W. 614.

56. While wide range of cross-examination to test knowledge of witness to value should be permitted, it is proper to exclude evidence of offers, which would be incompetent evidence. Metropolitan St. R. Co. v. Walsh, 197 Mo. 392, 94 S. W. 860.

57. Cross-examination of a party for the purpose of discrediting his testimony is governed by the same rules as that of any other witness. Schwantes v. State, 127 Wis. 160, 106 N. W. 237. See, also, supra, § 1.

58. A defendant testifying in his own behalf may be impeached as any other witness. Haddix v. State [Neb.] 107 N. W. 781. An accused person who offers himself as a witness is subject to the same range of cross-examination regarding motives, animus and interest as any other witness. Pittman v. State [Fla.] 41 So. 385. See, also, supra, § 1.

59. See 5 C. L. 1381.

60. Where a witness to a testator's mental condition is cross-examined as to peculiarities of testator's brother, he may be re-examined for the purpose of showing the brother's mental condition. In re Nichols, 78 Conn. 429, 62 A. 610. A party who has brought out certain matter on cross-examination cannot object to re-examination on the same point. Lewis v. Crane, 78 Vt. 216, 62 A. 60. After a cross-examination in which a recent fabrication has been imputed to the witness, a re-examination is competent as to prior statements by the witness. Cincinnati Traction Co. v. Stephens, 7 Ohio C. C. (N. S.) 454. Where part of a con-

ing to explain statements made on the cross-examination,[61] or tending to qualify or destroy the effect of testimony brought out on the cross-examination,[62] are proper. The court may, in its discretion, prevent a mere repetition,[63] and may allow questions to be put to the witness on the redirect examination which should have been asked upon the examination in chief.[64] Where an incompetent witness is called for cross-examination as an adverse party, he may testify generally for the other party as to other relevant matters, though such matters were not touched upon in his cross-examination.[65]

versation is shown on cross-examination, it is proper to prove the rest of it on the redirect. Simmons v. State [Ala.] 40 So. 660. Testimony regarding matter not touched on in direct or cross-examination properly excluded on redirect. Baltimore Belt R. Co. v. Sattler, 102 Md. 595, 62 A. 1125.

61. Proper to allow child to testify on redirect examination that she told defendant that she had lied about him because she was afraid of him. Grabowski v. State, 126 Wis. 447, 105 N. W. 805. Where prosecutrix in rape case was cross-examined as to her first charging another than defendant with the crime, it was proper to allow her to state on redirect why she had done so. People v. Darr [Cal. App.] 84 P. 457. Where witness was cross-examined as to evidence given on former trial, it was held error to limit his testimony on redirect examination intending to explain his former testimony. Hupfer v. National Distilling Co., 127 Wis. 306, 106 N. W. 831. In action for injuries from being struck by locomotive tender, it was error to refuse to allow plaintiff on redirect examination to explain a statement on his cross-examination that he could see a distance of two blocks at the place of the accident, the explanation being that he could not have seen an unlighted tender, and that there was an obscured space. Caffi v. New York, etc., R. Co., 49 Misc. 620, 96 N. Y. S. 835. Where physician stated on cross-examination that he did not ask of defendant the cause of an injury to his hand, it was proper on redirect to ask him why he had not inquired. Boles v. People [Colo.] 86 P. 1030.

62. Where plaintiff in breach of promise suit testified that she considered herself defendant's wife, she could on re-examination testify that she did not consider herself his legal wife. Massucco v. Tomassi, 78 Vt. 188, 62 A. 57. In an action for alienating affections of plaintiff's wife, plaintiff, on cross-examination, admitted having spent a night in the same room with his wife, on a recent occasion. Held, on redirect examination, he could tell what was said by them on that occasion, as showing that the wife had not intended to resume marital relations. Engel v. Conti, 78 Conn. 351, 62 A. 210. In action on note defendant claimed he had made a partial payment, and plaintiff, on cross-examination, admitted that defendant had paid him a sum of money. Held, on redirect, plaintiff was properly allowed to testify that such payment was for work done, and that work was worth the sum paid. Hebert v. Hebert [S. D.] 104 N. W. 911. On redirect examination a party has a right to explain impeaching conduct of a witness brought out on the cross-examination. Lenfest v. Robbins [Me.] 63 A. 729. Where plaintiff was cross-examined as to having lived in various houses since her marriage, it was proper to show on redirect examination that she had paid the rent for each house she had occupied. Farrell v. Dubuque, 129 Iowa, 447, 105 N. W. 696. In an action for a commission for selling land, where plaintiff was cross-examined as to a sale of an adjoining piece of land which he did not succeed in selling, it was proper to allow plaintiff to state on redirect examination that defendant had sold it to the purchaser of the land on which plaintiff claimed his commission. Lewis v. Susmilch [Iowa] 106 N. W. 624. On redirect prosecuting witness corrected testimony given on cross-examination. She was then asked if she had not talked with the prosecuting attorney about her testimony. Held it was proper for the prosecuting attorney to inquire if she had not asked him if she could correct her testimony. People v. Murphy [Mich.] 13 Det. Leg. N. 602, 108 N. W. 1009. Where witness for accused had testified to trouble between defendant and certain persons, and admitted on cross-examination that there was a woman in the case, it was proper on redirect to show that defendant had nothing to do with the woman. Brundige v. State [Tex. Cr. App.] 95 S. W. 527. Where witness on cross-examination testified to ill feeling toward defendant, it was proper to inquire on redirect if such feeling had colored his testimony. People v. Zimmerman [Cal. App.] 84 P. 446. On redirect examination, matter in rebuttal of that brought out on the cross-examination may be shown. Whatley v. State [Ala.] 39 So. 1014. Where witness admitted on cross-examination that he had had trouble with accused, it was proper on redirect to show the nature of the trouble without going into details. Glass v. State [Ala.] 41 So. 727. Where parts of a **conversation** are elicited upon cross-examination, it is proper upon redirect examination to permit the **entire conversation** to be brought out. Chicago City R. Co. v. Lowitz, 119 Ill. App. 360.

63. Refusal of court to allow the same question to be asked on redirect examination as was asked on the cross-examination held not an abuse of discretion. Lauchheimer v. Jacobs [Ga.] 55 S. E. 55.

64. Chesapeake & O. R. Co. v. Lynch [Ky.] 89 S. W. 517.

65. Act May 23, 1887, P. L. 158. Shadle's Estate, 30 Pa. Super. Ct. 151. Where it was sought to surcharge an administrator and he was called and testified on cross-examination as to matters occurring in the lifetime of the decedent, he could testify in his own behalf to a contract by which he was to be compensated for boarding decedent and his son,

§ 4. *Recalling witness for further examination.*[66]—This, also, is a matter resting in the sound discretion of the trial court. It has been held proper to allow a witness to be recalled in order to lay a foundation for his impeachment.[67]

EXCEPTIONS AND OBJECTIONS; EXCEPTIONS, BILL OF, see latest topical index.

EXCHANGE OF PROPERTY.[68]

The general contract rules governing exchange of property are elsewhere treated.[69]

Contracts for the exchange of lands must be in writing.[70] Under a contract for exchange of property "subject to inspection" by both parties, either may reject the land,[71] and in the absence of bad faith the ground for rejection cannot be investigated.[72] If a contract of exchange is executory, failure of title in one relieves the other from obligation to perform,[73] but if executed, failure of title is not a ground for rescission unless eviction is probable,[74] and defendants may cure such defects within a reasonable time after notice.[75] An exchange of property is not a "sale."[76] Where the contract fixes the value of the exchanged property and one party fails to deliver,[77] or if the contract is rescinded and restitution is impossible,[78] recovery may be had as for property sold at such agreed price. Where in an action for the value of certain real estate which defendant had agreed to exchange, the only issue is as to whether he has done so, an offer to quitclaim the same by plaintiff is immaterial.[79] A breach of an express warranty against incumbrances in the exchange of personal property gives rise to an action for damages and not for rescission.[80] The general rules of construction of contracts apply.[81]

and this though the contract was not referred to in the cross-examination. Id.

66. See 5 C. L. 1382.

67. Guffy Petroleum Co. v. Hamill [Tex. Civ. App.] 15 Tex. Ct. Rep. 475, 94 S. W. 458. Held not an abuse of discretion to allow accused to be recalled after he had left the stand, in order to lay foundation for impeachment by proof of a conversation, where prosecuting attorney said he did not know of the conversation when accused was on the stand. Stout v. Com. [Ky.] 94 S. W. 15.

68. See 5 C. L. 1382.

69. See Contracts, 7 C. L. 761; Fraud and Undue Influence, 5 C. L. 1541; Sales, 6 C. L. 1320; Vendors and Purchasers, 6 C. L. 1791; Specific Performance, 6 C. L. 1498.

70. An oral agreement whereby parties in possession of land respectively claimed by the other agree to exchange the same is void under the statute of frauds. Begley v. Treadway [Ky.] 93 S. W. 1045. And where one party's title has ripened by adverse possession, he may claim both, notwithstanding such agreement. Id.

71, 72. Stotts v. Miller, 128 Iowa, 633, 105 N. W. 127.

73. Only tenant in common and had no authority to convey all. Blackledge v. Davis, 129 Iowa, 591, 105 N. W. 1000.

74. Milby v. Hester [Tex. Civ. App.] 15 Tex. Ct. Rep. 495, 754, 94 S. W. 178. Evidence held insufficient to show such danger. Id. Can be no rescission where plaintiff has acquired title by adverse possession and there is no reasonable probability that he will not be able to establish such title if attacked. Id.

75. Milby v. Hester [Tex. Civ. App.] 15 Tex. Ct. Rep. 495, 754, 94 S. W. 178.

76. Code Civ. Proc. § 2348, relating to the sale of real estate of infants, held not to authorize the court to permit an exchange. In re Adderley, 50 Misc. 189, 100 N. Y. S. 421. A contract between the owner of real estate and a broker for the "sale" of the same does not contemplate an exchange. Lucas v. County Recorder of Cass County [Neb.] 106 N. W. 217.

77. Niebels v. Howland [Minn.] 106 N. W. 337.

78. Fagan v. Hook [Iowa] 105 N. W. 155. Cannot show that the property was not of the value specified. Id.

79. Renshaw v. Dignan, 128 Iowa, 722, 105 N. W. 209.

80. Especially in the absence of fraud or concealment. Mason v. Bohannan [Ark.] 96 S. W. 181.

81. Where there has been a general shifting of buildings so as to extend onto the adjoining lots, and the evident purpose of the parties was to correct this, a contract whereby one conveys a strip to the adjoining owner in exchange for a "lot which includes the remainder and an equal strip on the opposite side" construed as calling simply for the strip. Messer v. Hibernia Sav. & Loan Soc. [Cal.] 84 P. 835. While in contracts for the sale of land the execution of a deed usually merges the entire contract, it does not do so where the prior agreement provides for payment in stock to be invoiced by parties joint-

EXCHANGES AND BOARDS OF TRADE.

Membership, rights, and dealings.[82]—A nonmember of an exchange who furnishes the purchase price of a seat therein, bought in the name of a partner, does so in subordination to the rights of members derived through the constitution and rules of the exchange.[83] Members may as part of the contract of membership or precedent thereto bind themselves to obey rules and regulations of the exchange,[84] and a rule requiring submission of disputes between members to the arbitrament of a committee is a proper one.[85] Seeking relief thereunder, in a case where the rule is applicable, is a condition precedent to the right of a member to proceed in the courts for relief.[86]

Property and contract rights of board.[87]—Until they are published generally,[88] market quotations are property of the exchange.[89] Within terms of their contracts, exchanges may protect their property rights in quotations from wrongful disclosure by transmission agents,[90] and a mere privilege of disseminating such quotations may be restricted or withdrawn.[91] The right of property in the market quotations of an exchange endures for a sufficient length of time to enable it to avail itself of the benefits thereof.[92] A bucket shop cannot compel an exchange to furnish to it market quotations contrary to contract stipulations[93] or in the absence thereof,[94]

ly and surrendered before conveyance. Wilson v. Wilson, 115 Mo. App. 641, 92 S. W. 145. Hence, where the contract called for the land free from incumbrance, except a specified one, an acceptance of a deed providing for the assumption of an additional incumbrance did not modify the agreement. Id.

82. See 5 C. L. 1383.

83. Sale of seat of insolvent member of exchange to liquidate obligations of insolvent to members to the exclusion of other creditors, pursuant to rule of exchange, held not within jurisdiction of equity to enjoin at suit of partner of insolvent who furnished the money to purchase the seat. Zell v. Baltimore Stock Exch., 102 Md. 489, 62 A. 808.

84, 85. Pacaud v. Waite, 218 Ill. 138, 75 N. E. 779. This is true though it affects property rights (Id.), and though its effect is to deprive the courts of jurisdiction to the extent that it is validly enforced (Id.); nor is it any objection to its validity that it is made compulsory where the charter of the exchange authorizes generally the establishment of rules, regulations, and by-laws for the management of the business and the manner in which it shall be transacted (Id.), notwithstanding other provisions of the charter authorizing only voluntary submissions for a specific and different purpose (Id.).

86. Pacaud v. Waite, 218 Ill. 138, 75 N. E. 779.

87. See 5 C. L. 1383.

88. The effect of a publication of market quotations is to be determined by inquiring whether it is so restricted in point of place, purpose, and persons, as to be inconsistent with the retention by the owner of its proprietary right, or is so general as to indicate an intent to dedicate them to the public. McDearmott Commission Co. v. Board of Trade of Chicago [C. C. A.] 146 F. 961, afg. 143 F. 188. Injunction limited to restraining dissemination of "continuous quotations," i. e., those separated by less interval than ten minutes. Board of Trade of Chicago v. McDearmott Commission Co., 143 F. 188, afd. [C. C. A.] 146 F. 961.

89. McDearmott Commission Co. v. Board of Trade of Chicago [C. C. A.] 146 F. 961, afg. 143 F. 188.

90. Contract between exchange and telegraph company, relative to quotation service pending injunctive litigation to which company was a party, held not to affect right of exchange to restraining order in suit brought in name of exchange to enjoin wrongful use of its market quotations (New York Cotton Exch. v. Hunt, 144 F. 511), nor to prevent the exchange from restraining the wrongful use of its market quotations while an injunction is pending against the telegraph company's removal of tickers or wires (Id.).

91. A contract between a telegraph company and a patron for market quotations of an exchange, made at a time when the telegraph company was exercising the privilege of distributing the quotations to whomsoever it pleased, by the grace of the exchange, does not stand in the way of the exchange limiting the distribution of its quotations as affecting the patrons of the telegraph company. New York Cotton Exch. v. Hunt, 144 F. 511.

92. Evidence held insufficient to show that plaintiff's market quotations used by defendant had been superseded by later ones so as to become surrendered and dedicated to the public. Board of Trade of Chicago v. Cella Commission Co. [C. C. A.] 145 F. 28.

93, 94. Board of Trade of Chicago v. Cella Commission Co. [C. C. A.] 145 F. 28; Western Union Tel. Co. v. State, 165 Ind. 492, 76 N. E. 100. The refusal on the part of a telegraph company to furnish the market quotations of an exchange to a bucket shop is justified under a contract with the exchange prohibiting such service and requiring every applicant for the quotations to obligate himself

but a telegraph company is under a duty to the public to make no discriminations in furnishing market quotations,[95] and this duty may be compelled.[96]

Actions and litigation.—Neither injunction[97] nor mandamus[98] will issue when to do so will require the furnishing of quotations for the making of gambling contracts, though available in proper cases to prevent discriminations in the furnishing of such quotations;[99] but injunction will be limited to such quotations as are protected by the contract which is violated,[1] and should not encroach on rights which are not the subject of restraint.[2] An exchange may sue in a state other than its domicile, but in which it does no business, irrespective of laws relating to foreign corporations doing business therein,[3] and need not wait until the damages equal the jurisdictional amount of $2,000 before instituting suit in the Federal courts,[4] which resort is not barred by the pendency of a suit in the state courts between different parties.[5] In suing to protect a property right in quotations, it must be averred by fair intendment that they originated in sales made on the exchange,[6] and the violation of that right must be pleaded as a fact.[7] The president of an exchange standing as a party in its behalf is entitled to appeal from a decree which declared a rule of the exchange invalid.[8]

EXECUTIONS.

§ 1. Definition (1615).
§ 2. Right to Have Execution (1615).
§ 3. Stay and How Procured (1616).
§ 4. Procedure to Procure Issuance of Writ (1617).
§ 5. Power to Allow or Issue and to Recall Writ (1617).
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K. Liability for Wrongful Levy (1622).
§ 9. Claims of Third Persons and Trial Thereof (1622).
§ 10. Appraisement (1624).
§ 11. Execution Sales (1624). Rights and Liabilities of Bidder (1625). Fees and Costs (1625).
§ 12. Return and Confirmation of Sale (1625).
§ 13. Redemption (1626).
§ 14. Title and Rights Acquired in Property Sold, and Evidence Thereof (1627). Right to Possession of Realty (1628.) The Sheriff's Deed (1629).
§ 15. Legal and Equitable Remedies Against Defective or Improper Levy or Sale (1629). Affidavits of Illegality (1630). Setting Aside the Sale (1630).
§ 16. Restitution on Reversal of Judgment (1631).

Scope of title.—This article relates only to the ordinary writ of execution or final process on a money judgment to enforce it by levy and sale.[9]

not to use the same for supplying market quotations to bucket shops (Id.), and such refusal is equally justified in the absence of such contract (Id.).

95. Western Union Tel. Co. v. State, 165 Ind. 492, 76 N. E. 100.

96. Western Union Tel. Co. v. State, 165 Ind. 492, 76 N. E. 100. See 6 Columbia L. R. 259.

97. Board of Trade of Chicago v. Cella Commission Co. [C. C. A.] 145 F. 28.

98, 99. Western Union Tel. Co. v. State, 165 Ind. 492, 76 N. E. 100.

1. Where it appeared in a suit to restrain the use, without contractual right, of market quotations sent out by telegraph from complainant's exchange, that the contract between complainant and the telegraph companies and the contracts required of the subscribers, from whom defendant secured the quotations in question, referred only to what were known as "continuous quotations," defined by the contract to be those wherein the price of any commodity shall be quoted oftener than at intervals of ten minutes, the injunction will be limited to the use of such quotations. Board of Trade of Chicago v. McDearmott Commission Co., 143 F. 188, afd. [C. C. A.] 146 F. 961.

2. Terms of temporary injunction held not

§ 1. *Definition.*[10]—Execution is used to mean a process for the enforcement of a judgment for money recovered in a civil action out of property of the judgment debtor.[11] A special execution is one that directs a levy on some special property, while a general execution is one that makes no such requirement, but demands a levy on the debtor's property generally.[12] A further distinction between them is in the fact that ordinarily a special execution issues only in a proceeding where the defendant has not been brought into court by personal service,[13] whereas a general execution, which may be levied on any property the defendant owns, follows a general judgment based on personal service.[14] A writ of execution is the process by which a court carries out its judgment,[15] and is therefore a judicial writ.[16]

§ 2. *Right to have execution.*[17]—Essential to the right is a valid judgment to be enforced.[18] Lapse of time in procuring the issuance of execution bars the right to the writ by rendering the judgment dormant at different periods under territorial[19] and state laws,[20] or as an ordinary limitation,[21] but a decree for alimony is

too broad and therefore improvident. Hammond Elevator Co. v. Board of Trade of Chicago [C. C. A.] 143 F. 292.

3. Exchange held entitled to maintain suit to enjoin wrongful use of its market quotations. New York Cotton Exch. v. Hunt, 144 F. 511.

4. Board of Trade of Chicago v. Cella Commission Co. [C. C. A.] 145 F. 28.

5. The pendency of a suit in a state court involving the right to use the market quotations of an exchange, to which it is not a party, is not a bar to a suit by it in the Federal court to restrain an alleged wrongful use of its market quotations by a complainant in the state court action. New York Cotton Exch. v. Hunt, 144 F. 511.

6. Complaint to enjoin use of market quotations held sufficient, as against demurrer, in charging that the quotations were produced by plaintiff, an incorporated chamber of commerce. Chamber of Commerce v Wells, 96 Minn. 492, 105 N. W. 1124.

7. Objection that complaint to enjoin use of market quotations contained conclusions of law as to wrongful use and dissemination held not fatal on demurrer. Chamber of Commerce v. Wells, 95 Minn. 492, 105 N. W. 1124.

8. Pacaud v. Waite, 218 Ill. 138, 75 N. E. 779.

9. **Procedure to aid execution** is elsewhere discussed. See Civil Arrest (body execution), 7 C. L. 653; Creditors' Suit, 7 C. L. 1007; Garnishment, 5 C. L. 1574; Supplementary Proceedings, 5 C. L. 1585. Writs **in execution of judgments not for money** are discussed in Assistance, Writ of, 7 C. L. 293; Possession, Writ of, 6 C. L. 1072; and in titles treating possessory actions, such as Ejectment (and Writ of Entry), 5 C. L. 1056; Trespass (to try title), 6 C. L. 1721; Forcible Entry and Unlawful Detainer (writ of restitution), 5 C. L. 1437; Quo Warranto (writ of ouster), 6 C. L. 1190; Replevin, 6 C. L. 1801.

Exemption from execution is treated separately. See Exemptions, 5 C. L. 1490; Homesteads, 5 C. L. 1689. The lien, dormancy and revivor of judgments are discussed in Judgments, 6 C. L. 214. Compare Attachment, 7 C. L. 300, and for procedure for collection of judgments against representatives, receivers, and fiduciaries, see Receivers, 6 C. L. 1250; Estates of Decedents, 5 C. L. 1183; Guardianship, 5 C. L. 1603; Trusts, 6 C. L. 1736.

10. See 5 C. L. 1384.

11, 12. Smith v. Rogers, 191 Mo. 334, 90 S. W. 1150.

13. By statute, however, there are cases where no general judgment is entered even when defendant is personally served. Smith v. Rogers, 191 Mo. 334, 90 S. W. 1150.

14. There can be no just distinction drawn betwen the levy of a special and of a general execution under Rev. St. 1899, § 4043. Smith v. Rogers, 191 Mo. 334, 90 S. W. 1150.

15. Smith v. Rogers, 191 Mo. 334, 90 S. W. 1150.

16. Hence it is amendable to obviate clerical mistakes. Hamant v. Creamer [Me.] 63 A. 736.

17. See 5 C. L. 1384.

18. Where a justice renders judgment in a suit in which the amount in controversy is in excess of his jurisdiction, an execution issued thereon is void. Hamilton v. Rogers [Ga.] 54 S. E. 926.

19. By statute in Oklahoma the failure to issue an execution for five years or to sue out a writ after the lapse of five years from the suing out of a former one renders the judgment dormant. St. 1893, § 4337. Beadles v. Smyser [Okl.] 87 P. 292. The failure to sue out a writ against a city within such time is not excused by contract between the city and creditors and a resolution of the city council pertaining to the order of payment. Id.

20. By statute in Georgia, to prevent the dormancy of a judgment, it is required that an execution shall issue on such judgment and be placed on the execution docket within seven years from the date of the rendition of the judgment. Civ. Code 1895, § 3761. Rountree v. Jones, 124 Ga. 395, 52 S. E. 325. An entry of the execution on the general execution docket will not prevent the dormancy of a judgment rendered in the superior court, where the execution has not been placed on the execution docket of that court within seven years from the rendition of the judgment. Id. In Michigan the lien on realty by execution is void after the expiration of five years from the making of the levy, unless the property is sooner sold

not within the Ohio statute relating to dormancy.[22] Where a statute provides for registration of a judgment and authorizes execution, an execution issued pursuant thereto is on the original judgment,[23] and such statute is not given a retrospective operation by applying it to uphold a judgment registered under the act, but rendered prior to the enactment of the statute.[24] A statute authorizing an order for execution without notice after the lapse of five years from the rendition of judgment, and before the same is barred, is valid as to all judgments rendered after its passage.[25] An order for the enforcement of a judgment is authorized by statute in California,[26] and this is equivalent to authorizing an execution on a money judgment.[27] In New York a decree for the payment of money into the surrogate's court may be enforced by execution, whether the sum to be paid consists in costs alone or otherwise.[28] The transfer of an execution must be in writing to put the legal title in the transferee and authorize him to proceed in his own name.[29] A waiver of exemption restricted to proceedings under a landlord's warrant is inapplicable to an execution on an ordinary judgment against the debtor.[30] In the absence of statutory inhibition, an ordinary execution may issue on a judgment against a city of the first class in Oklahoma.[31] Execution will not ordinarily go against a decedent's property unless pursuant to judgment which carries a lien relating to decedent's lifetime.[32] In Texas the solvency or insolvency of a decedent's estate does not affect the right to execution against an independent executor.[33]

§ 3. *Stay and how procured.*[34]—In addition to the stay usually allowed by statute under specified conditions, a stay may result from appeal or other proceeding suspensive of the judgment,[35] or may be granted when there are equities thereto.[36] Where it is sought to stay an execution against mortgaged realty on the ground of estoppel by statements of the mortgagee, leading a purchaser to believe the lien had been released, the evidence should be precise, clear, and unequivocal to warrant the relief.[37] It will not be stayed as matter of right of the judgment defendant because he has pending an attachment in his own favor of the judgment plaintiff's money in his own hands, unless the money be tendered into court.[38] A circuit judge has, by statute in Florida, full power, either in term time or vacation, to

thereon under Comp. Laws § 9233. Bliss v. Slater [Mich.] 13 Det. Leg. N. 216, 108 N. W. 86.

21. The lapse of over fifteen years between the rendition of a decree before the issuance of execution thereon bars the right thereto. Quinnin v. Quinnin [Mich.] 13 Det. Leg. N. 215, 107 N. W. 906.

22. Rev. St. 1906, § 5380. Peeke v. Fitzpatrick [Ohio] 78 N. E. 519.

23. Jefferson County Sav. Bank v. Miller [Ala.] 40 So. 513.

24. A statute (Acts 1903, p. 273) authorizing execution on a judgment registered as provided therein is not given retrospective operation by applying it to uphold an execution on a judgment registered under the act, but rendered prior to its enactment, the lien having been intact during the life of the judgment. Jefferson County Sav. Bank v. Miller [Ala.] 40 So. 513.

25. St. 1895, p. 38, c. 33. Water Supply Co. v. Sarnow, 1 Cal. App. 479, 82 P. 689.

26. Code Civ. Proc. § 685. Water Supply Co. v. Sarnow, 1 Cal. App. 479, 82 P. 689.

27. Water Supply Co. v. Sarnow, 1 Cal. App. 479, 82 P. 689.

28. Under Code Civ. Proc. § 2554. In re Hirsch's Estate [N. Y.] 78 N. E. 294.

29. Screws v. Anderson, 124 Ga. 361, 52 S. E. 429.

30. Schock v. Waidelich, 27 Pa. Super. Ct. 215.

31. Beadles v. Smyser [Okl.] 87 P. 292.

32. See Estates of Decedents, § 6, 7 C. L. 1386.

33. Execution held properly awarded against a decedent's estate on a judgment against an independent executor under Rev. St. 1895, art. 1996, irrespective of the question of solvency or insolvency of the estate. Hartz v. Hausser [Tex. Civ. App.] 14 Tex. Ct. Rep. 141, 90 S. W. 63.

34. See 5 C. L. 1385.

35. See Appeal and Review, 7 C. L. 159.

36. The re-establishment of a creditor's security on a mortgage debt before issuance of execution is good cause for staying execution, where the default of the mortgagor was merely the prompt payment of taxes. Fox v. Helmuth, 27 Pa. Super. Ct. 81. Payment of taxes before levy of execution on a judgment taken on a bond accompanying a mortgage held cause for staying execution, though plaintiff was not notified of the payment and the receipt was not exhibited as required by the mortgage on which judgment was taken. Id.

stay an execution issued from and returnable to the circuit court in cases at law,[39] and in such cases resort to equity is unnecessary, where there is no independent equity apart from the execution.[40]

§ 4. *Procedure to procure issuance of writ.*[41]—A docket entry by a justice of the issuance of an execution is not essential to the validity of the process in Missouri.[42]

§ 5. *Power to allow or issue and to recall writ.*[43]—A justice of the peace has power to issue an alias execution.[44] An execution may issue on a judgment without any award of execution,[45] and is issuable on a judgment reviving a judgment, though the revivor did not authorize execution except under the original judgment.[46] In Alabama where a case is commenced by attachment issued by a justice of the peace and levied on land, the city court of Mobile acquires no jurisdiction by a return of the proceedings to that court,[47] and its proceedings on a motion to sell the land are void,[48] the circuit court alone having such power.[49] In North Dakota, execution may be issued on a justice of the peace judgment after five years from its rendition when it has been transcribed to the circuit court within that time,[50] but transcription to the circuit court ends the power of the justice to issue execution in North Dakota.[51] A statutory provision that execution shall not issue within 24 hours of the entry of judgment is for the benefit of the debtor and may by him be waived by a proper agreement filed in court.[52] In the absence of statutory inhibition, an ordinary execution may issue on a judgment against a city of the first class in Oklohoma.[53] An order of the surrogate's court granting leave to issue execution against an administrator is, except on appeal therefrom, conclusive evidence of assets applicable to the judgment.[54] An execution may be recalled and reformed to meet modifications in the judgment.[55]

§ 6. *Form and contents of writ.*[56]—Where damages are recovered on each of several counts of a petition for specific sums stated therein, execution is properly issued for the sum total as constituting one judgment, though the clerk failed to so enter it in form,[57] and separate executions on each count, in such case, are not authorized.[58] Under the Michigan statutes an execution is void which directs a levy on the debtor's property and in the absence of an order of court in the alternative, to take the body of the debtor.[59] Such writ is incapable of amendment,[60] but in Maine an execution is held to be amendable as a judicial writ.[61] Where an execution on

37. Schwab v. Edge [Pa.] 64 A. 80.
38. Hanscom v. Chapin, 27 Pa. Super. Ct. 546.
39. Rev. St. 1892, § 1196, construed. Barnett v. Hickson [Fla.] 41 So. 606.
40. Barnett v. Hickson [Fla.] 41 So. 606.
41. See 6 C. L. 1385.
42. Commercial Real Estate & Brokerage Co. v. Riemann [Mo. App.] 93 S. W. 305.
43. See 5 C. L. 1386.
44. Summons on garnishees by virtue of alias execution issued by justice of the peace held to confer jurisdiction of them on the court. Commercial Real Estate & Brokerage Co. v. Riemann [Mo. App.] 93 S. W. 305.
45. Hartz v. Hausser [Tex. Civ. App.] 14 Tex. Ct. Rep. 141, 90 S. W. 63; Taylor v. Doom [Tex. Civ. App.] 16 Tex. Ct. Rep. 172, 95 S. W. 4.
46. Taylor v. Doom [Tex. Civ. App.] 16 Tex. Ct. Rep. 172, 95 S. W. 4.
47. Acts 1871-72, p. 109, and Code 1896, §§ 574, 944, construed in connection with sections 481 and 1977 of the Code. Moog v. McDermott [Ala.] 40 So. 390.
48, 49. Moog v. McDermott [Ala.] 40 So. 390.
50. Rev. Codes 1899, §§ 5498, 6500, 6723, construed. Holton v. Schmarback [N. D.] 106 N. W. 36.
51. Holton v. Schmarback [N. D.] 106 N. W. 36.
52. Agreement held sufficient as a waiver. Washington Nat. Bank v. Williams, 190 Mass. 497, 77 N. E. 383.
53. Beadles v. Smyser [Okl.] 87 P. 292.
54. Under Code Civ. Proc. § 2552. In re Weil's Estate, 110 App. Div. 67, 96 N. Y. S. 1017.
55. Seymour v. Bruske [Mich.] 12 Det. Leg. N. 520, 104 N. W. 691.
56. See 6 C. L. 1386.
57, 58. Sheridan v. Forsee, 114 Mo. App. 588, 90 S. W. 120.
59. Comp. Laws, §§ 10,301, 10,305, construed. Sink v. Oceana Circuit Judge [Mich.] 13 Det. Leg. N. 680, 109 N. W. 115.
60. Sink v. Oceana Circuit Judge [Mich.] 13 Det. Leg. N. 680, 109 N. W. 115.
61. Hamant v. Creamer [Me.] 63 A. 736.

a judgment bearing interest was issued four years after rendition of the judgment, no variance was shown by reason of the amount for which it issued, being larger than the original amount of the judgment.[62] While under former practice a venditioni exponas was necessary in a suit begun by attachment in order to sell the attached goods or lands,[63] it is now necessary in North Carolina only to issue a general execution in such case,[64] which vests the sheriff with as much power as if an execution, in the form of a venditioni exponas, had been issued to him specially commanding him to sell the property attached.[65]

§ 7. *Quashal of writ.*[66]—An execution will not be quashed for irregularities of procedure occurring prior to the judgment on which it is based.[67]

§ 8. *The levy. A. Leviable property and order of leviability.*[68]—Speaking generally, whatever is tangible property[69] owned[70] by the judgment debtor, and not exempt,[71] is leviable. Thus, levy may be made on property transferred by the debtor under a condition precedent which has never been fulfilled,[72] and may not be made where his title has been divested by rescission.[73] It is not essential that the property be in defendant's possession,[74] or that his ownership of chattels be unqualified.[75] The extent to which equitable interests in land may be levied on depends on statute.[76] A purchaser's right must be matured,[77] and if a vendor rescinds,[78] or the contract to purchase be abandoned,[79] the land becomes leviable again as his. In some states levy may be made on property in a fraudulent grantee's hands.[80] By statute in California a levy on personalty cannot be sustained where prior thereto the personalty had been sold by the judgment debtor, and the sale ac-

62. Taylor v. Doom [Tex. Civ. App.] 16 Tex. Ct. Rep. 172, 95 S. W. 4.

63, 64. Code § 370. May v. Getty, 140 N. C. 310, 53 S. E. 75.

65. May v. Getty, 140 N. C. 310, 53 S. E. 75.

66. See 5 C. L. 1386.

67. Mistake of newspaper publisher in affidavit of publication held not ground for quashing execution on judgment rendered on the faith of due publication. Harbert v. Durden, 116 Mo. App. 512, 92 S. W. 746.

68. See 5 C. L. 1386. What are leviable as fixtures or as movables, see Bronson on Fixtures, §§ 92-98.

69. See Property, 6 C. L. 1106; Real Property, 6 C. L. 1248, and topics relating to specific kinds of property.

70. See Descent and Distribution, 7 C. L. 1137; Deeds, etc., 7 C. L. 1103; Gifts, 5 C. L. 1587; Sales, 6 C. L. 1320, and like topics suggestive of modes of acquiring ownership. In the absence of fraud or collusion, a crop grown on a married woman's land is not subject to execution against her husband merely because he assisted in making the crop. At most the husband's creditors would only be entitled to reach what, if anything, might be due the husband for his services by process of garnishment. Dollar v. Busha, 124 Ga. 521, 52 S. E. 615. Property acquired by a corporation, succeeding one that had been dissolved, in payment of a debt due the dissolved company is not subject to execution for a debt owing by the dissolved company. Houston Ice & Brewing Co. v. Stratton [Tex. Civ. App.] 13 Tex. Ct. Rep. 887, 89 S. W. 1111.

71. See Exemptions, 5 C. L. 1400; Homesteads. 5 C. L. 1689.

72. Property in the hands of a trustee for the benefit of creditors under a conditional assignment, the condition of which was never complied with, is subject to execution for the debts of the assignor. Peeples v. Slayden-Kirksey Woolen Mills [Tex. Civ. App.] 14 Tex. Ct. Rep. 144, 90 S. W. 61.

73. Property sold to an execution defendant under contract which is rescinded before levy is not subject to a valid levy. Baker v. Drake [Ala.] 41 So. 845.

74. Hollinshed v. Woodard, 124 Ga. 721, 52 S. E. 815.

75. Goods in the hands of a conditional vendee are subject to levy by his creditors irrespective of any reserved rights of the vendor. Duplex Printing Press Co. v. Clipper Pub. Co., 213 Pa. 207, 62 A. 841.

76. Especially for the satisfaction of a judgment for the purchase money of the land. Revisal 1905, § 629, construed. McPeters v. English [N. C.] 54 S. E. 417.

77. The interest of a vendee in a contract for the sale of land on which a portion only of the purchase price has been paid is not subject to levy and sale on execution. May v. Getty, 140 N. C. 310, 53 S. E. 75.

78. The interest of a vendor in land which has been sold by him on a credit, and a lien expressly retained to secure the payment of the purchase money, is not such interest as is subject to levy and sale under execution until there has been a rescission of the sale. Rutherford v. Mothershed [Tex. Civ. App.] 15 Tex. Ct. Rep. 620, 92 S. W. 1021.

79. May v. Getty, 140 N. C. 310, 53 S. E. 75.

80. In Massachusetts, an execution under a judgment recovered against an administrator may be levied on land of the decedent alleged to have been fraudulently conveyed by him. Dunbar v. Kelly, 189 Mass. 390, 75 N. E. 740.

companied by immediate delivery and followed by actual and continuous change of possession.[81] Choses in action and mere rights[82] are not leviable on execution, but should be reached by garnishment or the like.[83]

The principle of estoppel has been held applicable to prevent a levy on particular property.[84]

Property affected with a public interest.[85]—An ordinary execution against a city of the first class in Oklohoma cannot be levied on any of the general revenues of the city, either before or after collection,[86] or on any property, real or personal, which is reasonably necessary for government purposes,[87] but any property which is not reasonably necessary for the public welfare, held by the city as private property for its benefit, may be levied on and sold to satisfy an execution.[88] Property of a railroad company necessary to enable it to perform its duties to the public is not subject to levy under an ordinary writ of fieri facias.[89]

(§ 8) *B. Mode of making levy.*[90]—Either an actual or constructive seizure of chattels is necessary to constitute a valid levy thereon.[91] Whether there has been a seizure is a question of fact.[92] When goods to be levied on are in possession of a mortgagee, a valid levy can be made without the sheriff actually seeing the goods.[93]

(§ 8) *C. Duty to make levy.*[94]

(§ 8) *D. Extent and adequacy of levy.*[95]—The presumption is that a writ of execution will be levied on property subject to the debt only,[96] and that property not subject to execution will not be levied on.[97] An award of execution adjudicates nothing as to what property is, or is not, subject to the judgment.[98] The defendant in execution may point out to the officer the property to be levied upon,[99] but the refusal of the officer to levy on property pointed out does not invalidate a levy

81. Evidence held sufficient to sustain findings showing a sale within Civ. Code § 3440. Castle v. Sibley, 1 Cal. App. 648, 82 P. 1067.

82. Neither the right to redeem from a foreclosure sale of a leasehold interest in realty (Commerce Vault Co. v. Barrett [Ill.] 78 N. E. 47), nor the interest of a debtor in a surplus in the hands of a sheriff from the sale of property taken and sold under an execution, is subject to levy and sale under an execution (Id.), A surplus remaining in the hands of a sheriff from the sale of property taken and sold under an execution is not specific moneys in the custody of the law (Id.), but the interest of the debtor therein is a mere chose in action (Id.). Hence it is not subject to levy and sale under execution. Id. An unliquidated claim as legatee or otherwise of a judgment debtor against the estate of a debtor's ancestor is not subject to levy and sale on execution in New York. Code Civ. Proc. § 708, subd. 1, construed. Arkenburgh v. Arkenburgh, 99 N. Y. S. 1127. The mere statutory right to redeem from execution sale is not leviable. Wallace v. Markstein [Ala.] 40 So. 201.

83. See Garnishment, 5 C. L. 1574; Creditors' Suit, 7 C. L. 1007. Crop grown on a married woman's land not subject to execution against her husband merely because he assisted in making the crop. At most the husband's creditors would only be entitled to reach what, if anything, might be due the husband for his services by process of garnishment. Dollar v. Busha, 124 Ga. 521, 52 S. E. 615.

84. Where the sale of partnership property to secure payment of judgment notes given in payment for the interest of a retiring partner would result in injury to persons who had relied on the retiring partner's acts and representations, the retiring partner and through him his assignee of the notes are estopped to subject the partnership property to sale on execution under a judgment on the notes. Kreamer, Stevenson & Co. v. Smith [Pa.] 64 A. 542.

85. See 5 C. L. 1388, n. 21 et seq.

86, 87, 88. Beadles v. Smyser [Okl.] 87 P. 292.

89. Ties, rails, lumber, water pipe, iron pipe, etc., used for emergency purposes by railroad, held not subject to levy. Margo v. Pennsylvania R. Co., 213 Pa. 468, 62 A. 1081.

90. See 5 C. L. 1388. As against corporations, see Clark & M. Corp., § 772.

91. Sanders v. Carter, 124 Ga. 676, 52 S. E. 887. Where the officer merely went to the house of the defendant and informed a member of the household that he had levied on a heap of cotton which he had seen in one of the rooms of the house and left without seeing the defendant, and did not even make an entry of such "levy" on the writ, there was no seizure sufficient to constitute a levy. Id.

92. Sevey v. Chappuis Co., 116 La. 759, 41 So. 62.

93. Annexing inventory to return held sufficient to show levy on goods in possession of mortgagee. Avon-by-the-Sea Land & Imp. Co. v. McDowell [N. J. Eq.] 62 A. 865.

94. See 5 C. L. 1401.

95. See 5 C. L. 1389.

96, 97, 98. Hartz v. Hausser [Tex. Civ. App.] 14 Tex. Ct. Rep. 141, 90 S. W. 63.

on other property.[1] The levy of an execution on property of the defendant in the writ is presumed to be sufficient as long as the property remains in legal custody,[2] and this rule is not changed by a statute authorizing the issuance of concurrent and successive writs of execution,[3] but this presumption may be rebutted by proof of the insufficiency of the levy,[4] or that the property has been restored to the defendant.[5] The burden is on a plaintiff seeking a second levy to show that the former levy was insufficient.[6] Where an officer gives the debtor a receipt for less than the amount of the debt, a recital therein that it is in full of the debt is an error which corrects itself.[7] The validity of a levy is not affected because of being made on an entire tract of land when the debtor owns merely an undivided interest therein,[8] nor because the officer has taxed and caused to be satisfied unauthorized fees therefrom,[9] nor when through clerical misprision interest is erroneously charged, if there is sufficient in the writ taken in connection with other facts to identify it with the judgment.[10] An execution issued largely in excess of the amount actually due is fraudulent as to subsequent lien creditors,[11] and the claim which, standing alone, would be valid must fall with the fraudulent one with which it is combined.[12]

(§ 8) *E. Conflicting levies and liens; priorities.*[13]—The legal fiction that there are in law no divisions or fractions of a day does not apply to transactions between parties where priority of right becomes a question of fact.[14] In Michigan, mortgaged property levied on must be sold as a whole subject to the mortgage,[15] and a sale so made has no effect on the rights of the mortgagee.[16] To preserve the priority of a mortgage lien on chattels over the levy of an execution, the mortgagee is required by statute in Iowa to furnish a verified statement on demand,[17] which is complied with if the statement is furnished within a reasonable time before sale under the levy,[18] containing in substance all that the statute requires.[19] Where anterior to the mortgage the mortgagor had procured the redemption of the premises from an execution sale on the promise of a first lien to the person furnishing the money, the lien thus acquired was superior to that of the mortgage.[20] A claim for taxes assessed and levied subsequent to the passage of the Pennsylvania statute has no priority over a mortgage executed and recorded prior to its passage,[21] nor have municipal liens priority over such mortgages under the act.[22] Where a fund is paid

99. Civ. Code § 5429. Hollinshed v. Woodard, 124 Ga. 721, 52 S. E. 815.

1. Hollinshed v. Woodard, 124 Ga. 721, 52 S. E. 815.

2. Ford v. Bigger [Ark.] 97 S. W. 65.

3. Kirby's Dig. §§ 3211, 3212. Ford v. Bigger [Ark.] 97 S. W. 65.

4, 5, 6. Ford v. Bigger [Ark.] 97 S. W. 65.

7. Gaar, Scott & Co. v. Reesor [Ky.] 91 S. W. 717. Evidence held insufficient to show full satisfaction of a judgment by payment to an officer having the execution in hand. Id.

8, 9. Hamant v. Creamer [Me.] 63 A. 736.

10. Execution held sufficiently identified with judgment, notwithstanding error of clerk, to sustain judgment on appeal. Hamant v. Creamer [Me.] 63 A. 736.

11. The Act of 13 Elizabeth applied. Weiskircher v. Volk, 29 Pa. Super. Ct. 611.

12. Weiskircher v. Volk, 29 Pa. Super. Ct. 611.

13. See 5 C. L. 1389.

14. Where defendant claimed equal right with complainant under a mortgage executed on the same day that complainant's was executed, defendant's failure to prove that his mortgage was executed at the same time as complainant's was fatal to defendant's claim. New England Mortg. Sec. Co. v. Fry [Ala.] 42 So. 57.

15. Comp. Laws 1897, § 10,318. Munger v. Sanford [Mich.] 13 Det. Leg. N. 146, 107 N. W. 914.

16. Munger v. Sanford [Mich.] 13 Det. Leg. N. 146, 107 N. W. 914. Hence, when chattels are sold on execution pursuant to the statutory provision, the officer cannot retain a surplus arising from the sale to stand in the place of so much of the property covered by the mortgage. Id.

17. Code § 3987. Becken v. Keystone Mfg. Jewelry Co. [Iowa] 106 N. W. 622.

18. Becken v. Keystone Mfg. Jewelry Co. [Iowa] 106 N. W. 622.

19. Omission of calculation of interest from the statement held immaterial. Becken v. Keystone Mfg. Jewelry Co. [Iowa] 106 N. W. 622.

20. New England Mortg. Sec. Co. v. Fry [Ala.] 42 So. 57.

21. Act June 4, 1901, P. L. 364. Caner v Bergner, 27 Pa. Super. Ct. 220.

22. Martin v. Greenwood, 27 Pa. Super. Ct. 245.

into court for distribution, an execution creditor's rights are not affected by the failure of a landlord claiming a portion of the fund for rent to give notice of his claim prior to the sheriff's sale.[23] Delay on the part of a sheriff in levying an execution is not such fraud as will cause a loss of the lien as matter of law in favor of a subsequent execution creditor.[24] The lien acquired by levy of attachment is not lost by the issuance of a general execution in North Carolina.[25] Levy of execution being made merely for security, the lien is void as to other creditors.[26] Unless the res is under seizure, the court cannot proceed to rank the privilege on it.[27]

(§ 8) *F. Relinquishment and dissolution of levy.*[28]—Where a levy is made on property which has been previously attached, the validity of the levy does not depend on the continuance of the attachment.[29] A plaintiff controls his writ and has the right to recall it at any time,[30] and when the right is exercised, all third oppositions claiming the proceeds of the expected sale necessarily fall with the writ.[31] An officer is only authorized to accept money in payment of an execution in his hands.[32]

(§ 8) *G. Release of property on receipts or forthcoming or delivery bonds.*[33]—In a suit on a forthcoming bond, the only issue to be decided is whether or not there has been a breach of the bond.[34]

(§ 8) *H. Liability of officer for loss of property levied upon.*[35]

(§ 8) *I. Rights as to custody of property levied on and incidental to taking possession.*—By the common law an officer making a levy is authorized to maintain an action against any person who unlawfully takes from his possession chattels levied on under lawful process,[36] and where one by threats or promises to hold harmless induces a constable to deliver property held under a levy, he is liable for all damage which results to the constable from such delivery.[37] An officer who attaches chattels or takes them on execution cannot maintain his right and retain his special property in them without taking them into his possession and keeping them,[38] and an officer seeking to replevin chattels on which he claims to have levied an execution has the burden of showing that he had a special property therein when the action of replevin was brought.[39] When execution is recalled the court may order rights acquired under the levy to be saved.[40]

23. Act June 16, 1836, P. L. 755, § 83, construed. Wadas v. Sharp, 27 Pa. Super. Ct. 233.

24. Wadas v. Sharp, 27 Pa. Super. Ct. 233. Delay on the part of a sheriff in levying an execution, caused entirely by the sheriff who believed and had good reason to believe that defendant was endeavoring to pay the amount of the judgment, held insufficient to cause the loss of the lien. Id.

25. Where the land of a nonresident has been attached, the issuance of a general execution on the judgment recovered in the action, instead of first having the land which had been attached, and which was condemned in the judgment to be sold under a general execution to be issued for that purpose, does not cause a loss of the lien acquired by the levy of the attachment, in view of the new procedure authorized by Code § 370. May v. Getty, 140 N. C. 310, 53 S. E. 75.

26. In re Thackara Mfg. Co., 140 F. 126.

27. Sevey v. Chappuis Co., 116 La. 759, 41 So. 62.

28. See 3 C. L. 1402.

29. Dunbar v. Kelly, 189 Mass. 390, 75 N. E. 740.

30. Evidence held sufficient to show that the action of the sheriff in releasing a seizure and returning the writ was approved by the plaintiff. Sevey v. Chappuis Co., 116 La. 759, 41 So. 62.

31. Sevey v. Chappuis Co., 116 La. 759, 41 So. 62.

32. Proof of delivery of a cow to a sheriff in part payment on an execution is unavailing to show satisfaction of the judgment to any extent. Gaar, Scott & Co. v. Reesor [Ky.] 91 S. W. 717.

33. See 5 C. L. 1390.

34. Hence, neither the legality of the levy nor the authority of the officer to make it is an issuable fact. Oliver v. Warren, 124 Ga. 549, 53 S. E. 100.

35. See 3 C. L. 1402.

36. Dickinson v. Oliver, 99 N. Y. S. 432.

37. Turner v. Woodward, 123 Ga. 866, 51 S. E. 762.

38. Rev. Laws c. 167, § 45, relative to attachment of bulky property, held inapplicable to a seizure of goods on execution. Field v. Fletcher, 191 Mass. 494, 78 N. E. 107.

39. Field v. Fletcher, 191 Mass. 494, 78 N. E. 107.

40. Seymour v. Bruske [Mich.] 12 Det. Leg. N. 520, 104 N. W. 691.

(§ 8) *J. Effect of death of debtor.*[40a]—Where judgment is rendered against two and one dies, execution thereafter issued against both is valid against the survivor, and keeps alive the judgment lien upon the survivor's lands.[41]

(§ 8) *K. Liability for wrongful levy.*[42]—Where several defendants are charged jointly with conversion by causing levy and sale, no recovery can be had unless the defendants are shown to be joint tortfeasors.[43] A mere agent cannot maintain an action for the alleged conversion of his principal's property by levy and sale thereof on execution as the property of another.[44] Hence the burden is on plaintiff to show his ownership of the property.[45] The refusal of the officer to levy on property pointed out by the defendant renders the officer liable to him for such actual damages as he may sustain.[46] Where an indemnifying bond has been required by an officer under the Kentucky statute, when the property is claimed by a third person, the officer is exonerated from liability for the damage, if the bond was solvent when executed.[47] Exemplary damages may be awarded for making a malicious levy and sale of property on execution,[48] but malice in making a levy cannot be implied from the mere fact that a jury might consider the amount unreasonable.[49] Where a waiver of exemption is restricted to proceedings under a landlord's warrant, a sheriff is liable for denying an exemption on an execution on an ordinary judgment against the debtor.[50] The market value of property at the time of an alleged wrongful levy thereon,[51] and whether an excessive levy was maliciously made, have been held to be questions for the jury.[52]

§ 9. *Claims of third persons and trial thereof.*[53]—A judgment creditor has nothing more than a lien upon the interest of the debtor and yields to every equitable claim existing in third persons.[54] Knowledge on the part of the judgment creditor at the time he was furnishing the goods to the debtor, for which the judgment on which the execution issued was rendered, that claimant was asserting any claim to the property levied on, is an immaterial factor in determining the title.[55] A mere lienholder is not entitled to the remedy of the trial of the rights of property,[56] but when the officer in making the levy takes possession of the property to the exclu-

40a. See 1 C. L. 1182.

41. Dieboldt Brewing Co. v. Grabski, 7 Ohio C. C. (N. S.) 221.

42. See 5 C. L. 1391.

43. Livesay v. First Nat. Bank [Colo.] 86 P. 102. And neither the mere giving of an indemnifying bond to an officer by each of the defendants in pursuance of their remedy under separate writs (Id.), nor the fact that they joined in an answer to the complaint, is sufficient to constitute them joint tortfeasors (Id.).

44, 45. Smiley v. Hooper [Ala.] 41 So. 660.

46. Hollinshed v. Woodard, 124 Ga. 721, 52 S. E. 815.

47. Civ. Code Prac. § 643. Manning v. Grinstead [Ky.] 90 S. W. 553.

48. Evidence held sufficient to warrant exemplary damages. Sparks v. Ponder [Tex. Civ. App.] 15 Tex. Ct. Rep. 380, 94 S. W. 428.

49. Mills v. Larrance, 217 Ill. 446, 75 N. E. 555. Error in instructing in an action for an alleged excessive levy that if plaintiff in execution points out and directs a levy on an unreasonable and excessive amount of property he does so at his own peril held cured by another instruction unqualifiedly making malice the gist of the action. Id.

50. Schock v. Waidelich, 27 Pa. Super. Ct. 215. Nor is he relieved from such liability by a recital in the transcript of the justice's docket of a waiver of the benefit of the exemption laws (Id.), nor by an indorsement on the writ made by the prothonotary, under the direction of the plaintiff, to take notice of waiver in transcript on which the writ is issued (Id.).

51. Evidence held sufficient to sustain verdict as to the market value of cotton wrongfully levied on at the date of the levy. Sparks v. Ponder [Tex. Civ. App.] 15 Tex. Ct. Rep. 380, 94 S. W. 428.

52. Mills v. Larrance, 217 Ill. 446, 75 N. E. 555.

53. See 5 C. L. 1391.

54. Magerstadt v. Schaefer, 110 Ill. App. 166. Where, at the time of seizure of property under execution, a third person is the owner and holder of a prior valid lien, and entitled thereunder to the immediate possession thereof, the seizure is invalid. Kansas City Wholesale Grocery Co. v. McDonald, 118 Mo. App. 471, 95 S. W. 279. The casual remark of the president of a corporation while not engaged in the business of the company, that he owned certain property, which was later seized for his debt and claimed by the corporation, is not binding on the corporation in a proceeding to retake the property, in the absence of evidence of authority to him from the corporation to make the representation. Collins Ice Cream Co. v. Normandie, 121 Ill. App. 140.

sion of the pledgee, the latter is entitled to the remedy,[57] unless the officer makes the levy by giving the possessor of the property notice as required by statute, and does not take the property into his possession.[58] When the claim of the wife to ownership of property sought to be subjected to satisfaction of a judgment against her husband falls, her demand for damages for its alleged wrongful seizure also falls.[59] In Maryland the fact that claimant is the wife of the debtor is no ground for quashing a proceeding by her to try the title to property levied on and sold as her husband's.[60] A payment made by a wife of a debt of her husband to prevent the sale of property under the erroneous belief that it belonged to her will not justify her in recovering it from the person to whom it was made, when the effect of the payment was to cause the seizure of the property to fall and the writ of the seizing creditor to be returned.[61] Where a transfer of property by a debtor is void as against his creditors, an officer making a levy thereon is not required to plead and prove the debtor's insolvency to sustain his claim thereto against the claim of the transferee.[62] In Iowa, notice is essential to perfect the claim of a third person,[63] and to state a cause of action, the notice must be pleaded.[64] An officer usually has the right to demand an indemnifying bond when the claim of a third person is brought to his notice,[65] and in Missouri may do so when the claim is filed after the execution is levied,[66] though the execution is special;[67] but the giving of a bond does not constitute a condition precedent to a claimant's right to have the question of the right of property and amount of damages sustained determined on a petition under the Maryland statute.[68] The obligor in an indemnifying bond is estopped to assert as a defense against liability thereon that no levy of execution had been made when the bond was executed where the recitals of the bond contradict the assertion.[69] A variance as to the name of the maker of a machine levied on and sold by virtue of an indemnifying bond is not necessarily ground for releasing the liability of either the principals[70] or surety on the bond.[71] An action on an officer's indemnifying bond is permitted by direct statutory provision in Kentucky for such damages as the successful claimant may be entitled to,[72] but in the absence of malice the obligors are not liable for counsel fees,[73] nor for fees paid for witnesses who were not used, or whose claims were not allowed, in the action to determine the title to the property,[74] and where the property seized was a merchant's stock of goods, legal interest on the value for the time the owner was deprived of its use would not be adequate damages.[75] And since the stock of goods has no usable value,[76] he is entitled to recover for profits lost during the period of enforced suspension of business[77] which are to be arrived at by showing the average profits during a corresponding previous average period.[78] But damages to his future business[79] or credit are not recov-

55. Baker v. Drake [Ala.] 41 So. 845.

56, 57, 58. National Bank of Cleburne v. Citizens' Nat. Bank [Tex. Civ. App.] 93 S. W. 209.

59. Pelletier v. State Nat. Bank [La.] 41 So. 640.

60. The question of her disability to sue can only be raised by plea in abatement. Albert v. Freas [Md.] 64 A. 282.

61. Pelletier v. State Nat. Bank [La.] 41 So. 640.

62. Calkins v. Howard [Cal. App.] 83 P. 280.

63. Notice held insufficient under Code §§ 3906, 3991. Shaw v. Tyrell, 129 Iowa, 556, 105 N. W. 1006.

64. Petition held insufficient under Code §§ 3906, 3991. Shaw v. Tyrell, 129 Iowa, 556, 105 N. W. 1006.

65. Smith v. Rogers, 191 Mo. 334, 90 S. W. 1150.

66. Where property was attached by a constable and no claim was made by any third person for the property, and the attachment suit proceeded to final judgment without such claim being asserted, but a claim was filed after execution was levied on the property, the case was within Rev. St. 1899, § 4043, entitling a constable to demand an indemnifying bond. Smith v. Rogers, 191 Mo. 334, 90 S. W. 1150.

67. Rev. St. 1899, § 4043, construed. Smith v. Rogers, 191 Mo. 334, 90 S. W. 1150.

68. Code Pub. Gen. Laws, art. 9, § 47, Albert v. Freas [Md.] 64 A. 282.

69, 70, 71. Smith v. Rogers, 191 Mo. 334, 90 S. W. 1150.

erable,[80] though the expense of procuring a forthcoming bond for the release of the stock is a proper element of damages.[81] An action to set aside is the better remedy where a conveyance is alleged to be fraudulent.[82] On the trial of the right of property, the issue is whether the property claimed is the property of the defendant in the writ and liable to its satisfaction.[83] The affidavit in a claim proceeding must be in the proper court.[84] The validity of the execution should be specially attacked by plea.[85] The findings must clearly determine the ownership.[86] In a proceeding to try the right of property, the judgment need not be in the alternative for the property or its value under the Alabama statutes.[87] In Texas, where claimant is defeated in a trial of the right of property, the court must adjudge the amount of rent and hire necessary to be tendered under the statute in case claimant desires to return the property unimpaired together with damages and costs in satisfaction of the judgment.[88] Claimant has the burden of establishing his claim,[89] it being presumed that the levy was pursuant to an existing debt,[90] and in case of possession in claimant, the plaintiff must prove an allegation that he was a fraudulent transferee.[91]

§ 10. *Appraisement.*[92]

§ 11. *Execution sales. In general.*[93]—The sheriff in making a sale under an execution is a special agent,[94] and he cannot sell and convey title except in accordance with the law[95] giving such notice as the statute requires.[96] It is a common-law rule that the officer who commences must complete the execution of the writ.[97] A statutory inhibition against a sale of land under execution by a constable does not extend to such sales by sheriffs of city courts in Georgia.[98]

72. Civ Code Prac. § 643. Manning v. Grinstead [Ky.] 90 S. W. 553.

73, 74, 75, 76, 77, 78, 79, 80, 81. Manning v. Grinstead [Ky.] 90 S. W. 553.

82. To rid a title of an alleged fraudulent conveyance, the better course is, after judgment and before execution levy and sale, to bring suit to set aside the conveyance in question, and, if successful, then subject the property to execution process. Welch v. Mann, 193 Mo. 304, 92 S. W. 98.

83. Code 1896, § 4142. Johnson v. Citizens' Bank [Ala.] 39 So. 577. Hence clerical errors in the judgment may be corrected on appeal. Id.

84. An affidavit in a claim proceeding involving $500, filed in the circuit court, is a proceeding in that court, even though it is made before a justice of the peace and bears a caption indicative of a proceeding before the justice. Dunaway v. Ferst [Fla.] 41 So. 451.

85. On the trial of the right of property, the validity of an execution cannot be questioned except by special plea setting up the grounds of alleged invalidity. Courtney Shoe Co. v. Polley [Tex. Civ. App.] 16 Tex. Ct. Rep. 325, 95 S. W. 7.

86. When the jury finds in favor of the claimant as to the right of property, it is not necessary that they also find against the defendant. Albert v. Freas [Md.] 64 A. 282.

87. Code 1896, § 4144. Johnson v. Citizens' Bank [Ala.] 39 So. 577.

88. Rev. St. 1895, art. 4845. Teague v. Ryan [Tex. Civ. App.] 96 S. W. 936.

89. The burden of proof is on claimant to establish affirmative plea that property sold on foreclosure of a chattel mortgage was free from the lien of the mortgage. Hirsh & Co. v. Beverly, 125 Ga. 657, 54 S. E. 678.

90. Where a mortgage on personalty was foreclosed and levied on the mortgaged property, and a claim interposed after proof of possession in the defendant subsequently to the date of the mortgage, the burden was shifted to the claimant to show that the property was not subject. Hirsh & Co. v. Beverly, 125 Ga. 657, 54 S. E. 678.

91. When property levied on is in the possession of a third person claiming to own it, the burden is on the plaintiff in execution to show an alleged fraudulent transfer by the debtor. Claimant held entitled to judgment for want of evidence of fraudulent transfer. Courtney Shoe Co. v. Polley [Tex. Civ. App.] 16 Tex. Ct. Rep. 325, 95 S. W. 7.

92. See 5 C. L. 1392.

93. See 5 C. L. 1393.

94. Fuller v. Exchange Bank [Ind. App.] 78 N. E. 206.

95. Sale held invalid for failure of purchaser to pay amount of his bid. Fuller v. Exchange Bank [Ind. App.] 78 N. E. 206.

96. Publication held to be a "newspaper" within Cobbey's Ann. St. 1903, § 1498 (section 497, Code Civil Procedure), and section 11,420. Merrill v. Conroy [Neb.] 109 N. W. 175. Where a statute requires 30 days' notice of a sale on execution, a sale on the thirtieth day is void. Code Civ. Proc. § 497, construed. Young v. Figg [Neb.] 107 N. W. 788.

97. Rucker v. Tabor [Ga.] 54 S. E. 959.

98. In view of Civ. Code 1895, §§ 4290, 4305. Rucker v. Tabor [Ga.] 54 S. E. 959. Under an execution issued from the city court of Elberton, the sheriff of that court

Rights and liabilities of bidder.[99]—The interest of a purchaser at an execution sale is not a mere lien, but is more appropriately termed an inchoate ownership, prior to the expiration of the time for redemption,[1] but the purchaser is sometimes said to have acquired the legal title[2] even when the sale is of a trust estate.[3] As respects the contract of purchase, a sale under execution is distinguishable from a judicial sale under a decree condemning specific property.[4] The failure to pay the amount bid at an execution sale invalidates the sale when the execution creditor is not himself the purchaser,[5] but a plaintiff who buys on an execution sale is not excused from paying the amount of his bid when it exceeds the amount due under the execution.[6] When a purchaser at a sheriff's sale who has made a deposit of hand money defaults and there is a resale for a less price on heavier terms than the first, the vendor cannot compel the first purchaser to make good the loss,[7] but he will be entitled to a return of his deposit money, less the proper charges and expenses of the sale in which the deposit was made,[8] and the fact that the court prescribed the terms of resale does not alter the rule.[9] An unauthorized purchase of property at a sale under execution may be ratified.[10] A bidder is entitled to a certificate of sale free from an attack on the ground that the land sold should have been subdivided and offered in separate tracts.[11] A resale is proper on the refusal of the bidder to pay the amount or receive the certificate.[12] The measure of damages for failure of a bidder to comply with the terms of a bid at a sheriff's sale is the difference in price on a resale fairly conducted on terms not less advantageous to the purchaser than the first.[13]

Fees and costs.[14]—Costs will be adjudged against the judgment debtor up to the time he made his application for an allowance in lieu of homestead; costs made thereafter must be paid by the execution creditor.[15] The plaintiff as purchaser at his own sale is not bound to pay costs to be relieved of his bid where it was made for a sum largely in excess of the debt through a mistake.[16]

§ 12. *Return and confirmation of sale.*[17]—A statutory provision that the execution shall be returnable within 60 days after its receipt by the officer excludes the time after issuance by the clerk before its delivery to the officer for service.[18] The return of a sheriff on an execution as "fully satisfied" is insufficient to show relief of the debtor's liability.[19] Where an officer's return shows the amount received by

may levy on and sell land. Acts 1896, p. 292, construed. Id.

99. See 5 C. L. 1393.

1. Hardin v. Kelley [C. C. A.] 144 F. 353.

2. Youd v. German Sav. & Loan Soc. [Cal. App.] 86 P. 991.

3. A purchaser of trust property sold for the debts of a cestui who is entitled to a present conveyance under Rev. Laws c. 178, § 1, acquires a legal title. Lyons v. Urgalones, 189 Mass. 424, 75 N. E. 950.

4. A sale under execution is distinguishable from a judicial sale under a decree condemning specific property to be sold by a register in chancery (McGaugh v. Deposit Bank [Ala.] 40 So. 984), in that the court is in legal effect the seller at a judicial sale, unlike a sheriff's sale on ordinary common-law or statutory execution, which is a ministerial act, in making which the law regards the officer and not the court as the vendor (Id.), and this distinction is not lost from the fact that the decree directs the register, in advertising and selling the lands, to proceed in the manner prescribed by law for the sale of lands levied on under execution (Id.).

5. Fuller v. Exchange Bank [Ind. App.] 78 N. E. 206.

6. Munger v. Sanford [Mich.] 13 Det. Leg. N. 146, 107 N. W. 914.

7, 8, 9. Pepper v. Deakyne, 212 Pa. 181, 61 A. 805.

10. Purchase by attorney held ratified by client. Ford v. Bigger [Ark.] 97 S. W. 65.

11. Hence where a 100-acre tract was offered and bid in in bulk without being offered in parcels, the bid was properly rejected and resale made. State Bank v. Brown, 128 Iowa, 665, 105 N. W. 49.

12. Where the bidder at the sale refuses to pay the money or to receive the certificate of sale, the proceedings are not satisfied and the sheriff may proceed to readvertise and sell. Andrews v. Scott, 113 Ill. App. 581.

13. Pepper v. Deakyne, 212 Pa. 181, 61 A. 805.

14. See 5 C. L. 1394.

15. Warns v. Reeck, 8 Ohio C. C. (N. S.) 401.

16. State Bank v. Brown, 128 Iowa, 665, 105 N. W. 49.

17. See 5 C. L. 1394.

him at an execution sale to be less than the debt, a recital that the amount received is the total amount of the debt is an error which corrects itself.[20] Confirmation cannot be had under the Nebraska statutes in the absence of proof of publication of notice of sale.[21] Until reversed or set aside in a direct proceeding instituted for that purpose, the confirmation of an execution sale is conclusive as to everything found by the court essential to its legality.[22]

§ 13. *Redemption.*[23]—The right to redeem does not exist independently of statute,[24] and when the provisions of the statute have been complied with, the property is freed from any claim of the purchaser.[25] It is a mere personal privilege conferred on those named in the statute.[26] The right of redemption is neither property[27] nor the right of property,[28] and is not assignable[29] nor subject to levy and sale under execution.[30] A valid tender is essential to mature the right,[31] and a tender by a stranger has been held sufficient.[32] The effect of the distinction between judicial sales and execution sales proper has an important bearing on the right of redemption.[33] The title acquired by a purchaser of real property at an execution sale can only be divested by a valid redemption.[34] In South Dakota an attaching creditor whose claim has not been reduced to judgment cannot redeem from an execution sale,[35] nor does a judgment subsequently obtained relate back so as to give him the right.[36] The assignment of a judgment does not carry with it the privilege of redeeming property as a judgment creditor in Alabama,[37] and this rule cannot be avoided by a redemption by the assignors,[38] hence it has been held that the assignee is a necessary party complainant to a bill brought by the assignors to enforce redemption.[39] In Alabama the statute extending the right of redemption to the vendee of the debtor only refers to a person to whom the debtor may have sold the equity of redemption before the sale under a decree or mortgage, etc.[40]

18. Rev. Civ. Code § 335. Schroeder v. Pehling [S. D.] 108 N. W. 252.

19. The return should state the facts, showing what the sheriff did. Cambers v. First Nat. Bank, 144 F. 717.

20. Gaar, Scott & Co. v. Reesor [Ky.] 91 S. W. 717.

21. Magney v. Roberts, 129 Iowa, 218, 105 N. W. 430. And an affidavit unsigned by affiant is insufficient proof. Comp. St. Neb. 1903, §§ 6920, 6924, 6927, 7069, construed. Id. As is also a recital in the return of the officer. Id.

22. Description of premises in notice of execution sale held not subject to collateral attack. Schroeder v. Pehling [S. D.] 108 N. W. 252.

23. See 5 C. L. 1395.

24. Hardin v. Kelley [C. C. A.] 144 F. 353; Wallace v. Markstein [Ala.] 40 So. 201.

25. Wenham v. Schmitt, 219 Ill. 195, 76 N. E. 375. Hence the legality of a redemption is not affected by the fact that the person entitled to the redemption money is deprived of his right to receive it at once by an order of court restraining its payment pending an appeal (Id.), nor by the fact that the amount paid does not include interest till the determination of the appeal (Id.).

26. Wallace v. Markstein [Ala.] 40 So. 201; Wenham v. Schmitt, 219 Ill. 195, 76 N. E. 375.

27, 28, 29, 30. Wallace v. Markstein [Ala.] 40 So. 201.

31. Tender for purpose of redeeming from foreclosure sale held insufficient under Code Civ. Proc. §§ 701-703. Youd v. German Savings & Loan Soc. [Cal. App.] 86 P. 991.

32. Where the facts are sufficient to put a purchaser on inquiry as to a tender being made by the owner, he cannot defeat redemption under the Kentucky statute 1903, § 1684, on the ground that tender was made by a stranger. Clemons' Adm'x v. Combs [Ky.] 89 S. W. 113.

33. The effect of the distinction between execution sales proper and judicial sales is that a purchase by a judgment creditor at his own sale for a sum greater than the debt operates as an irrevocable satisfaction of the judgment or decree, barring the creditor's right to redeem (McGaugh v. Deposit Bank [Ala.] 40 So. 984), while such purchase at a judicial sale does not have the effect of barring the creditor's right of redemption prior to confirmation of the sale (Id.).

34. Code Civ. Proc. § 700, cited. Youd v. German Sav. & Loan Soc. [Cal. App.] 86 P. 991.

35. Comp. Laws Dak. 1887, § 5150. Hardin v. Kelley [C. C. A.] 144 F. 353.

36. Hardin v. Kelley [C. C. A.] 144 F. 353. Comp. Laws S. D. 1887, § 5150, authorizing one who has a lien to redeem from a superior lien on the same property, does not give an attaching creditor the right to redeem from an execution sale before the passing of the sheriff's deed. Hardin v. Kelley [C. C. A.] 144 F. 353.

37, 38, 39. Sloss v. Steiner Bros. [Ala.] 40 So. 511.

§ 14. *Title and rights acquired in property sold, and evidence thereof.*[41]—To establish title as derived from a sale by the sheriff, one must show a judgment rendered by a court of competent jurisdiction,[42] and subsisting[43] a writ issued in conformity thereto,[44] and a sale by the sheriff pursuant to the writ,[45] but where the original records are shown to have been lost or destroyed, the existence of those elements, or either of them, may be proved by secondary evidence.[46] A sale under a void judgment confers no title on the purchaser.[47] It has been held in Texas that a sale under a dormant judgment is merely voidable,[48] that it can only be attacked in a direct proceeding for that purpose,[49] and takes precedence over title acquired by deeds of the execution defendant executed before the sale but subsequent to the levy;[50] but under the statutes of Michigan a different conclusion has been reached.[51] The sale relates back to the time of the levy[52] or to whenever the lien attached giving only such title as the debtor had[53] with any rights that inhere in his title or estate.[54] The purchaser is a privy in estate with the debtor,[55] and the sale is subject to all the rights of all who hold a prior lien on the property,[56] but before the title of a purchaser at an execution sale can be defeated by an equity in a third person, the purchaser must not only have actual notice of the equity[57] at the time of the sale,[58] but it must be superior to the lien of the judgment creditor.[59] In Kentucky, however, notice of a bona fide conveyance has been held to give the vendee therein the better title,[60] and in Ohio the vendee under an executory contract of sale has been held to be entitled to the protection of the court to the amount

40. Code 1896, § 3505, held not to authorize a transfer or assignment of the debtor's personal right of redemption. Wallace v. Markstein [Ala.] 40 So. 201.

41. See 5 C. L. 1395.

42. Fontelieu v. Fontelieu, 116 La. 866, 41 So. 120.

43. When the judgment has been satisfied, a sale thereafter on an execution thereunder passes no title. Thus, where the proceeds of a sale on an original execution together with uncredited cash payments had fully satisfied a judgment, the execution creditor could acquire no title by a purchase at a sale on an alias execution on the judgment. O'Brien v. Allen, 42 Wash. 393, 85 P. 8.

44, 45. Fontelieu v. Fontelieu, 116 La. 866, 41 So. 120.

46. Evidence held sufficient to show title. Fontelieu v. Fontelieu, 116 La. 866, 41 So. 120.

47. Aultman & Taylor Co. v. Meade [Ky.] 89 S. W. 137. Where a justice of the peace renders judgment in a suit in which the amount in controversy is in excess of his jurisdiction, a sheriff's sale under an execution issued on the judgment is void. Hamilton v. Rogers [Ga.] 54 S. E. 926.

48, 49. Taylor v. Doom [Tex. Civ. App.] 16 Tex. Ct. Rep. 172, 95 S. W. 4.

50. Layne v. Layne [Ky.] 90 S. W. 555.

51. The title acquired by deed from an execution debtor is superior to the title acquired by a purchaser at an execution sale, within a statute declaring the lien by execution void after five years from the making of the levy, unless the property is sooner sold thereon. Bliss v. Slater [Mich.] 13 Det. Leg. N. 216, 108 N. W. 86.

52. Layne v. Layne [Ky.] 90 S. W. 555.

53. A purchaser of land at an execution sale acquires only such interest as the debtor had at the date of the judgment on which the execution was based. Jones v. Hubbard, 193 Mo. 147, 90 S. W. 1137. A conveyance by a purchaser back to the debtor conveys no title when the debtor had none at the time of the sale. Norcum v. Savage, 140 N. C. 472, 53 S. E. 289. In North Carolina, a sale on execution of a husband's interest in his wife's lands, in case of a marriage celebrated prior to the passage of the act of 1848, passed only his tenancy by the curtesy (Id.), and in case of a marriage celebrated subsequent to the passage of that act, no title passed by such sale (Id.).

54. A lessor's interest in a coal mining lease passes to the purchaser at an execution sale the right to receive the "rentals" or royalties, though the payments are pro tanto purchase money of the coal in place. Coolbaugh v. Lehigh & W. B. Coal Co., 213 Pa. 28, 62 A. 94.

55. Decree of Federal court adjudging interest of party in contract to have been a mere option held conclusive on purchaser at execution sale. Jones v. Hubbard, 193 Mo. 147, 90 S. W. 1137.

56. Hence a purchase by a junior incumbrancer prior to a purchase by a senior did not affect the rights of the senior. Jefferson County Sav. Bank v. Miller [Ala.] 40 So. 513.

57. Equitable Loan & Security Co. v. Lewman, 124 Ga. 190, 52 S. E. 599. Where, at the time the lien is acquired, the creditor has no notice, actual or constructive, of equities of third persons in real estate, the title to which stands in the name of the judgment debtor as the apparent absolute owner, the purchaser at the execution sale thereof takes a good title. Mansfield v. Johnson [Fla.] 40 So. 196.

58. Mansfield v. Johnson [Fla.] 40 So. 196.

59. Equitable Loan & Security Co. v. Lewman, 124 Ga. 190, 52 S. E. 599.

paid by him.[61] The fact that the demand arose out of the relation of attorney and client does not prevent the judgment creditor from becoming purchaser at sale under execution,[62] but when an attorney, acting as such, purchases land at an execution sale for a less sum than is due on the claims of his clients on which it was being sold, a resulting trust arises in favor of his clients,[63] who have a right to claim the benefit of the purchase by demanding a conveyance if they think fit to reimburse the sum actually paid,[64] or an account for the profits in case of a resale,[65] but the sale is not absolutely void,[66] and is voidable merely at the election of those beneficially interested, the execution creditors.[67] A debtor can claim no equity in land as against the purchaser at an execution sale under an alleged contract between them with the conditions of which he has not complied,[68] and having furnished no money to apply on the purchase or given any, or other consideration, he cannot assert the existence of a resulting trust by virtue of the contract.[69]

Where the entire interest in property was being sold, the fact that certain persons interested protested to the creditor that only a partial interest was salable, to which he made no reply, did not estop him to claim the entire interest under his purchase,[70] and the rule that the execution plaintiff is estopped to deny a leviable interest does not operate by estoppel to cause a divestiture of rights under previous sales made under different processes.[71]

The title acquired by the purchaser at an execution sale will be aided by presumptions in favor of its legality,[72] especially on a collateral attack,[73] and as between a fraudulent grantee and an innocent purchaser at an execution sale, the court will amend its process to protect the latter.[74] Invalid sales may be legislatively cured unless the proceedings contain fundamental defects destructive of jurisdiction.[75]

Right to possession of realty.[76]—Plaintiff in ejectment, claiming title under an execution sale, is entitled to prove the interest of the debtor in the property at the time of the sale,[77] and must do so to maintain the action,[78] and the plaintiff in eject-

60. A good faith purchaser by unrecorded deed will be protected against an execution creditor who purchases at the execution sale, if he has notice of the older equity before the sale. Moore v. Faris [Ky.] 92 S. W. 592.

61. Where a creditor obtains judgment and levies execution on property of the debtor during the interval between a sale of the property by the debtor and execution of a deed and its delivery, the purchaser will be entitled, on distribution of the fund arising from the sale on execution, to the protection of the court to the extent of the amount he paid down at the time the contract of sale to him was made. Warns v. Reeck, 8 Ohio C. C. (N. S.) 401.

62. Patterson v. Drake [Ga.] 55 S. E. 175.

63, 64, 65, 66. Whitman v. O'Brien, 29 Pa. Super. Ct. 208.

67. Hence, junior judgment creditors cannot attack the validity of the sale. Whitman v. O'Brien, 29 Pa. Super. Ct. 208.

68, 69. Gloeckner v. Kittlaus, 192 Mo. 477, 91 S. W. 126.

70. Mansfield v. Johnson [Fla.] 40 So. 196.

71. Where a creditor did not subject all of the land of his debtor to the satisfaction of a chancery decree on the first sale, the fact that he thereafter subjected the remainder to levy and sale on execution in no way estopped him from claiming title under the chancery sale. Harris v. Stephenson [Ala.] 41 So. 1008.

72. Rights under the sale will be aided by the presumption that an execution after the judgment would ordinarily have become dormant, was either pursuant to leave given or that leave was rendered unnecessary. Schroeder v. Pehling [S. D.] 108 N. W. 252.

73. That one assumed to be an officer and made a levy and return under a writ directed only to a lawful officer is enough, on collateral attack, to justify the presumption that he was such at the date of his levy. Reeve v. North Carolina Land & Timber Co. [C. C. A.] 141 F. 821. After the lapse of a period approximating 26 years between the execution of a trust deed and the making of a levy on the property covered by the deed, a presumption may be indulged in favor of the satisfaction of the deed on a collateral attack on the validity of the levy. Id.

74. Such amendment may be made by the court of its own motion and in collateral proceedings will be treated as actually made. Hamant v. Creamer [Me.] 63 A. 736.

75. Fuller v. Hager [Or.] 83 P. 782, citing authorities.

76. See 5 C. L. 1396.

77. Where plaintiff in ejectment relied on a title acquired by purchase at an execution sale of all the interest the debtor had in the land, he was entitled to prove what the interest of the debtor was and that the interest sought to be recovered was the same

ment must fail so long as there is a judgment outstanding awarding defendant possession under a purchase at execution sale.[78] A void execution gives no right of possession to a purchaser at the execution sale,[80] and one taking possession by virtue of such sale is a trespasser, even though he held a valid lien against the property at the time.[81] Goods in the hands of a conditional vendee are subject to levy by his creditors irrespective of any reserved rights of the vendor,[82] and when the sale is made by a receiver, the title does not depend on the status of the purchaser as to notice of the vendor's continuing title,[83] but on the powers of the receiver who made the sale.[84]

The sheriff's deed.[85]—The Alabama statute requiring the execution of a deed when real estate or any interest therein is sold to satisfy a judgment or decree only applies to sales made by the sheriff.[86] A sheriff's deed is to be considered as made the day of the levy,[87] but is invalid when made without receiving the purchase price.[88] Particularity in description of the land conveyed is required in a sheriff's deed and in the levy to convey title against the debtor or his privies in blood.[89]

§ 15. *Legal and equitable remedies against defective or improper levy or sale.*[90] *Injunction against levy or sale.*[91]—An injunction will issue to restrain an execution sale of personalty where it is shown that plaintiff has no plain, speedy, and adequate remedy at law,[92] or that defendant is insolvent and not able to respond in damages,[93] and, conversely, it will not issue if there is an adequate remedy at law,[94] or where the grounds for enjoining levy and sale under execution could have been set up by plaintiff as a defense in the suit wherein the judgment sought to be enjoined was rendered and no reason is shown in the bill why the same was not done.[95]

Where a wife seeks to enjoin the sale of property for the debt of her husband, the creditor is not confined to any particular line of defense,[96] and the validity of a dation en paiement as between husband and wife may be successfully attacked without proof of all the allegations called for by a revocatory action,[97] nor need the husband be shown to have been insolvent at the time of the alleged dation en paiement.[98] A wife cannot restrain the sale of land jointly owned by herself and husband, though it was levied on by an attachment of the entire tract, where the notice of sale showed that only his interest was to be sold,[99] but she is entitled to enjoin the sale of property for her husband's debts where the title thereto was taken in his name through the

described in the execution levy. Davis v. Dyer [Ky.] 93 S. W. 629.

78. Where plaintiff in ejectment did not prove the title possessed by the debtor at the execution sale under which he claimed title he could not maintain the action. Kirby's Dig. § 6321. Wilson v. Gaylord [Ark.] 92 S. W. 26.

79. In proceedings for possession, under the Kentucky statute (Ky. St. 1903, § 1689), subsequent to execution sale, the judgment of the circuit court is conclusive as between the parties thereto as long as it remains in force. Combs v. Johnson, 26 Ky. L. R. 12, 80 S. W. 506.

80, 81. Houston Ice & Brewing Co. v. Stratton [Tex. Civ. App.] 13 Tex. Ct. Rep. 887, 89 S. W. 1111.

82, 83. Duplex Printing Press Co. v. Clipper Pub. Co., 213 Pa. 207, 62 A. 841.

84. Receiver held to have power to give good title. Duplex Printing Press Co. v. Clipper Pub. Co., 213 Pa. 207, 62 A. 841.

85. See 5 C. L. 1397.

86. Code 1896, § 1914. McGaugh v. Deposit Bank [Ala.] 40 So. 984.

87. Layne v. Layne [Ky.] 90 S. W. 555.

88. Fuller v. Exchange Bank [Ind. App.] 78 N. E. 206.

89. Veatch v. Gray [Tex. Civ. App.] 14 Tex. Ct. Rep. 316, 91 S. W. 324.

90, 91. See 5 C. L. 1397.

92, 93. Kester v. Schuldt [Idaho] 85 P. 974.

94. Kirby's Dig., §§ 4431, 3224, construed. Arkadelphia Lumber Co. v. Asman [Ark.] 95 S. W. 134.

95. Wilson v. Cook [Tex. Civ. App.] 15 Tex. Ct. Rep. 144, 91 S. W. 236. Injunction does not lie to prevent the sale on execution of a debtor's property in satisfaction of a judgment for a license tax imposed by an ordinance, penal in its nature, which had never been published. Francis Bros. v. Robinson [Tex. Civ. App.] 13 Tex. Ct. Rep. 1016, 89 S. W. 803.

96, 97, 98. Pelletier v. State Nat. Bank [La.] 41 So. 640.

ignorance or mistake of the donor,[1] and the credit was not extended to her husband in reliance on his ownership.[2]

One is entitled to enjoin the sale of his land under an execution on a judgment to which he was not a party and by which he was in no way bound under the Kentucky statute restricting the right to maintain injunction.[3]

The ordinary rules of pleading apply,[4] and as to presumptions and burden of proof.[5]

Affidavits of illegality.[6]—To be available the affidavit of illegality must be definite and certain in its allegations,[7] but it will not reach a defect in process caused by a clerk's signature being appended by an assistant in the absence of the clerk.[8]

Setting aside the sale.[9]—Though inadequacy of price, without more, is not sufficient ground for setting aside a sheriff's sale,[10] yet, where the price is grossly inadequate, the court may seize on other circumstances in order to give relief[11] when the application is made in time,[12] or if the price is so inadequate as to shock the moral sense, the sale will not be allowed to stand,[13] and in Missouri, this latter rule is applicable to sales under judgments for taxes,[14] but the presumption is that property sold at a regular execution sale "fetches its true value,"[15] and diligence is re-

99. Burris v. Craig [Colo.] 82 P. 944.

1, 2. Neeley v. Bank of Independence, 114 Mo. App. 467, 89 S. W. 907.

3. A statutory provision (Civ. Code Prac. § 285), that an injunction to stay proceedings on a judgment shall not be granted in an action brought by the party seeking the injunction in any other court than that in which the judgment was rendered does not prevent one from enjoining a sale of his land under execution on a judgment to which he was not a party, and by which he is not in any way legally bound. Robinson v. Carlton [Ky.] 96 S. W. 549.

4. The petition to enjoin a sale of land on execution under a judgment rendered in an action before a justice of the peace, in which plaintiff was not served with summons or warrant, need not allege that at the time of the rendition of the judgment plaintiff was not indebted to the party recovering the judgment. Robinson v. Carlton [Ky.] 96 S. W. 549. A petition to restrain an execution sale alleging that plaintiffs had the right to point out property to be levied on to make the judgment, but failing to point out other property, is subject to special exception to that portion thereof. Stone v. Tilley [Tex. Civ. App.] 15 Tex. Ct. Rep. 583, 95 S. W. 718.

5. Where an execution is levied on property in which the debtor is apparently interested as heir, he is presumed to be an owner to the extent of his apparent heirship. Hickey v. Davidson, 129 Iowa, 384, 105 N. W. 678. Hence, the burden is on plaintiffs in attempting to enjoin the sale on the ground that the debtor has no interest in the property, to overcome the presumption. Id. Where defendant claims ownership of a judgment by assignment along with a number of specifically designated instruments, among which the judgment is not referred to, the burden is on him, in a suit to enjoin execution thereon, to show ownership thereof. Henning v. Colsch [Iowa] 106 N. W. 922. Where an injunction is taken against the enforcement of payment by executory process of notes bearing on their face 8 per cent interest, on the ground that the holder had agreed to a reduction of interest to 6½ per cent, the burden is on plaintiffs to establish the agreement and its precise terms. Redman v. Murrel [La.] 42 So. 49.

6. See 5 C. L. 1358.

7. An allegation in an affidavit of illegality that the plaintiff in fi. fa. "has taken no steps in the superior court to declare the trust, of which this property is the whole, executed," held insufficient. Rucker v. Tabor [Ga.] 54 S. E. 959.

8. Rucker v. Tabor [Ga.] 54 S. E. 959.

9. See 5 C. L. 1399.

10. Barnes v. Skiles, 30 Pa. Super. Ct. 418; Misener v. Glasbrenner [Ill.] 77 N. E. 467; State Sav. Bank v. Shinn [Iowa] 106 N. W. 921. A sale for $106 of property valued at $8,000 held not subject to be set aside for inadequacy of price. Martin v. Castle, 193 Mo. 183, 91 S. W. 930. Bill to set aside sale made under an execution for inadequacy of price held demurrable. Harris v. Stevenson [Ala.] 41 So. 1008.

11. Barnes v. Skiles, 30 Pa. Super. Ct. 418; Misener v. Glasbrenner [Ill.] 77 N. E. 467. The sale of an entire tract of valuable land to satisfy a judgment for a mere pittance should be set aside on motion, especially where the judgment and execution as well as an express statutory provision, require only so much to be sold as necessary to satisfy the judgment. State v. Elliott, 114 Mo. App. 562, 90 S. W. 122. Sale of property worth at least $4,000 for $188.72. King v. Arney, 114 Ill. App. 141. In a proceeding to set aside a sale, evidence held sufficient to sustain a finding that a sale should be set aside for inadequacy of price. Barnes v. Skiles, 30 Pa. Super. Ct. 418.

12. Application to set aside sale held not made too late to give the court jurisdiction. Barnes v. Skiles, 30 Pa. Super. Ct. 418.

13, 14. State v. Elliott, 114 Mo. App. 562, 90 S. W. 122.

15. Hence, to warrant setting aside of a

quired to be exercised in asserting the right to relief.[16] The matter of setting aside sheriff's sales belongs to the class in which courts exercise discretionary power.[17] The plaintiff in execution is not generally a necessary party to a proceeding to set aside a sale under the execution.[18] When an execution sale of a note and mortgage is set aside, the title revests in the execution defendant.[19]

§ 16. *Restitution on reversal of judgment.*[20]

EXECUTORS AND ADMINISTRATORS; EXEMPLARY DAMAGES, see latest topical index.

EXEMPTIONS.

§ 1. The Right to Exemptions Generally (1631).
§ 2. Persons Who May Claim (1632).
§ 3. Goods and Other Chattel Properties Exempted (1632).
§ 4. Debts and Liabilities Inferior or Superior to Right of Exemption (1633).
§ 5. Loss of Exemption Rights (1633).
§ 6. Selling or Transferring Exempt Property (1634).
§ 7. How the Right Is Claimed and Enforced (1634).
§ 8. Recovery for Selling Exempt Property or Evading Exemption Laws (1635).

§ 1. *The right to exemptions generally.*[1]—Exemption of property from the payment of debts is purely statutory,[2] and while exemption laws are liberally construed,[3] they will not be so enlarged as to include property not fairly within their terms,[4] nor will an exception in a grant of exemption be so construed as to aid in the perpetration of a fraud.[5] Exemption laws pertain to the remedy, and the law of the forum governs.[6] They are no part of the contract,[7] neither are they a contract between the state and a judgment debtor, nor a vested right, and may be changed as circumstances may dictate.[8] The bankruptcy law has adopted the state laws in regard to exemptions,[9] and does not affect the allowance to bankrupts of the exemptions which are prescribed by the state laws in force at the time of filing the petition.[10] As in other cases where the Federal courts apply state statutes,[11] the courts of bankruptcy will follow the construction placed on the exemption laws by the highest courts of the state, so far as they have received a construction, and beyond that will apply to them the general, established rules of construction.[12] A debtor cannot protect nonexempt property from the claims of creditors by taking the title thereto in the name of another, though it is bought with the proceeds of exempt property.[13]

sale for inadequacy of the price, the inadequacy must be averred and proved. Fuller v. Exchange Bank [Ind. App.] 78 N. E. 206.

16. After a sale of property under a decree of the chancery court and a confirmation thereof, the sale will not be set aside on a collateral proceeding unless the party seeking relief acquits himself of want of diligence in resisting confirmation. Harris v. Stephenson [Ala.] 41 So. 1008.

17. Setting aside held not an abuse of discretion. Barnes v. Skiles, 30 Pa. Super. Ct. 418.

18. Petition to set aside sale held to state no cause of action against plaintiff in execution. White-Diamond v. Hightower & Co., 125 Ga. 191, 53 S. E. 1024.

19. He may foreclose. Bank v. Doherty, 42 Wash. 317, 84 P. 872.

20. See 5 C. L. 1399.

1. See 5 C. L. 1400.

2. In re Sullivan, 142 F. 620.

3. Becher v. Shaw [Wash.] 87 P. 71; In re Sullivan, 142 F. 620; Hart & Co. v. Cole [Ohio] 76 N. E. 940. Statutes of exemptions should receive such construction as will carry out the purpose of the legislature to protect the debtors. Gibson v. People, 122 Ill. App. 217.

4. In re Sullivan, 142 F. 620. A matured crop ready for harvesting is not exempt merely because grown on an exempted homestead. Id.

5. Merchandise for which the purchase price has been but partially paid cannot be claimed as exempt under the Constitution of Florida, granting an exemption of $1,000 of personalty to the head of a family, subject to the exception that no property shall be exempt for the payment of obligations for the purchase thereof. Platt v. Platt [Fla.] 39 So. 536.

6, 7. Stone v. Drake [Ark.] 96 S. W. 197.

8. Validity of statute changing exemptions is not affected by its being made applicable to existing judgments. Myers v. Moran, 99 N. Y. S. 269.

9. In re Owings, 140 F. 739.

10. In re Mullen, 140 F. 206.

§ 2. *Persons who may claim.*[14]—One must own property to entitle him to enforce a claim of exemption thereof,[15] but a legal title is not essential.[16] Statutes usually vary the right to and scope of exemptions according to the status of the debtors, as professional men,[17] heads of families,[18] householders,[19] mechanics and laborers.[20] A hunting and fishing guide is within the protection of the statute of Maine exempting tools necessary to a debtor's trade or occupation.[21] A married woman having persons dependent on her is entitled to claim exemptions as against her own creditors, though her husband takes an active part in the management and control of the business conducted by her,[22] and if the husband, as head of the family, leaves the state, the wife or minor children can make the claim of exemption;[23] or the wife may do so if the husband refuses.[24] A partner is entitled to personal property exemptions out of the firm assets in the hands of a trustee in bankruptcy,[25] but one who has, before the bankruptcy of his firm, informally agreed to sell his interest therein, and acted upon the agreement by taking employment as a clerk, cannot.[26] Under a statute exempting for the life of a pensioner a homestead bought with pension money, heirs of the pensioner do not inherit such homestead free from the debts of their ancestor.[27]

§ 3. *Goods and other chattel properties exempted.*[28]—The articles usually exempted include professional implements and furniture,[29] tools and implements of

11. See Stare Decisis, 6 C. L. 1510.
12. In re Owings, 140 F. 739; In re Thompson, 140 F. 257; In re Mullen, 140 F. 206.
13. McLeod's Trustee v. McLeod [Ky.] 89 S. W. 199.
14. See 5 C. L. 1401.
15. A debtor doing business ostensibly as agent, when in fact he is not agent, but has used the fiction to avoid proceedings against him by creditors, cannot take advantage of the fraud after the property has been placed in the hands of a trustee in bankruptcy, and make a valid claim of exemption from the stock, under Const. N. C. art. 10, § 1, allowing exemption of a limited amount of personalty to any resident of the state. In re Woollcott, 140 F. 460.
16. Mozely & Co. v. Fontana, 124 Ga. 376, 52 S. E. 443.
17. A licensed embalmer and undertaker is not entitled to exemptions as a professional man. O'Reilly v. Erlanger, 108 App. Div. 318, 95 N. Y. S. 760.
18. The head of a family who is a citizen of the state is entitled to hold as exempt personal property to the value of $500, in Arkansas. Hoskins v. Fayetteville Grocery Co. [Ark.] 96 S. W. 195.
19. A farmer who is a householder is not entitled to exemption of cows kept for use as against a judgment for purchase money thereof, though otherwise he would be entitled to hold them as exempt. Feenstra v. Tanis [Mich.] 13 Det. Leg. N. 493, 108 N. W. 674. In Mississippi a householder having a family and residing in a municipality is entitled to make a selection of exempt personalty according to the dictates of his own judgment. Tishomingo Sav. Inst. v. Young [Miss.] 40 So. 9.
20. The wages of a journeyman mechanic or day laborer are exempt in Georgia. Evidence held to show a debtor to be a journeyman mechanic or day laborer, within Civil Code 1905, § 4732. Prather v. Pantone, 125 Ga. 808, 54 S. E. 663. A molder who is obligated to do the work of his trade himself is entitled to exemption of his wages from garnishment as an employe or laborer. Moultrie v. Crocker, 125 Ga. 82, 54 S. E. 197. Tools not exempt after debtor has abandoned trade. Cable v. Hoolihan [Minn.] 107 N. W. 967.
21. In re Mullen, 140 F. 206.
22. Ginsberg v. Groner [La.] 41 So. 569.
23. Hoskins v. Fayetteville Grocery Co. [Ark.] 96 S. W. 195.
24. Mozely & Co. v. Fontana, 124 Ga. 376, 52 S. E. 443.
25, 26. In re Fowler & Co., 145 F. 270.
27. Beatty v. Wardell [Iowa] 105 N. W. 357.
28. See 5 C. L. 1402.
29. A candelabra necessarily used by an undertaker at the funerals of deceased persons of certain religious beliefs is not exempt to him under a claim of exemption of "professional instruments and furniture" (O'Reilly v. Erlanger, 108 App. Div. 318, 95 N. Y. S. 760), nor is a desk used in his office (Id.), nor a safe so used (Id.). Under a statute exempting mechanical text-books and books of professional men, tools of mechanics, and all tools or other mechanical instruments or appliances moved or worked by hand, the words "worked by hand or foot" refer to machinery. Undertaking being agreed to be a profession within Code Pub. Gen. Laws Md., art. 83, § 11, an undertaker cannot be deprived of exemption of articles used in his profession merely because they are not "worked by hand or foot." Steiner v. Marshall [C. C. A.] 140 F. 710. In a statute exempting property limited to "necessary household furniture, working tools and team, professional instruments, furniture and library," the words "professional instruments, furniture and library," must be construed together. The office furniture of an ordinary business man is not exempt under a statute limiting exemptions to "necessary household furniture, working

trade,[30] agricultural implements,[31] work horses,[32] and other live stock,[33] and feed for the same.[34] Crops fully matured and ready for the reaper are not exempt merely because grown upon an exempt homestead, in the absence of express statutory provision therefor.[35] The wages of a debtor are not exempt from garnishment, in Arkansas, at the suit of a judgment creditor.[36] The proceeds of fire insurance from exempt chattels destroyed by fire are exempt,[37] and in some states the proceeds of a life insurance policy are exempt.[38]

§ 4. *Debts and liabilities inferior or superior to right of exemption.*[39]—A commutation money judgment is, by express statutory provision in Indiana, superior to the right of exemption,[40] as is a judgment for the purchase money of exempt property in Michigan.[41] Where the right to exemptions depends on the nature of the cause of action, the form of action brought does not control.[42] Execution against a debtor's wages for the satisfaction of a surgeon's claim for services rendered to the debtor's wife at the debtor's request is not authorized by a statute permitting a resort to wages to satisfy claims for "necessaries sold," etc.[43]

§ 5. *Loss of exemption rights.*[44]—A judgment of nonexemption properly entered cannot be abrogated by a nunc pro tunc entry after the term of court at which the judgment was rendered on a showing dehors the record, especially in the face of a statute depriving the court of jurisdiction to change its record at such time.[45] The dismissal of an application for exemption, after hearing evidence, is not an adjudication of the right of possession in favor of the defendant.[46] The failure to

tools and team, professional instruments, furniture and library." O'Reilly v. Erlanger, 108 App. Div. 318, 95 N. Y. S. 760.

30. A canoe is exempt as a necessary implement or tool of a hunting and fishing guide in Maine (In re Mullen, 140 F. 206), but a rifle is not (Id.).

31. A cream separator is exempt as a tool or instrument of a farmer under the Code of Iowa. In re Hemstreet, 139 F. 958. Farming utensils or implements of husbandry to the value of $1,000 are exempt in California, but only to farmers. Evidence held not to show a debtor to be a farmer within Code Civ. Proc. sec. 690, subd. 3, exempting farming utensils and implements of husbandry. Howell v. Boyd [Cal. App.] 84 P. 315.

32. Mules are exempt as "work horses" (McElveen v. Goings, 116 La. 977, 41 So. 229), but horses used solely for the convenience or pleasure of a debtor and his family are not exempt as "work horses" (Tishomingo Sav. Inst. v. Young [Miss.] 40 So. 9).

33. Cows kept for use by a farmer who is a householder are exempt except as against a judgment for the purchase money thereof. Feenstra v. Tanis [Mich.] 12 Det. Leg. N. 493, 108 N. W. 674.

34. Under a statute exempting certain stock, followed by a provision exempting necessary food for the support of the stock, no exemption can be claimed for necessary food for stock when the debtor has no exempted stock (Byrnes v. Deere Plow Co. [Kan.] 85 P. 819), nor can an exemption of wheat be claimed thereunder, when wheat was not regarded in the vicinity as food for stock at the time the wheat was taken (Voss v. Goss [Kan.] 84 P. 564), nor can wheat be claimed as exempt thereunder for the purpose of sale to buy other food for the stock (Id.).

35. In re Sullivan, 142 F. 620.

36. Stone v. Drake [Ark.] 96 S. W. 197.

37. Langley v. Finnall [Cal. App.] 83 P. 291.

38. A beneficiary of a policy of life insurance issued by an insurer doing business on the co-operative or assessment plan under a statute exempting such money paid or to be paid, is entitled to the proceeds after payment by the insurer (People's Bank of Buffalo v. Cushman, 95 N. Y. S. 882), but not under a statute only exempting such money "to be paid" (Recor v. Recor [Mich.] 12 Det. Leg. N. 784, 106 N. W. 82. Insurer not incorporated under Insurance Law of 1892 held nevertheless within section 212 thereof. People's Bank of Buffalo v. Cushman, 95 N. Y. S. 882. Nonresident legatees of the proceeds of life insurance, not to exceed $5,000, hold the same free from the claims of creditors of testator, under the statutes of Mississippi, providing that exemptions thereunder shall be allowed in favor of residents of the state only. Borodofski v. Feld [Miss.] 40 So. 816.

39. See 5 C. L. 1402.

40. Hobbs v. Eaton [Ind. App.] 78 N. E. 333.

41. Feenstra v. Tanis [Mich.] 13 Det. Leg. N. 493, 108 N. W. 674.

42. The recovery for breach of marriage promise is on contract though the action be in trespass and defendant is accordingly entitled to $300 exemption. Keim v. Brumbaugh, 29 Pa. Super. Ct. 557. Exemptions are not allowed in Pennsylvania against execution on a forfeited bail bond, though the judgment was had in assumpsit on the bond. Commonwealth v. Savage, 30 Pa. Super. Ct. 364.

43. Taylor v. Barker, 108 App. Div. 21, 95 N. Y. S. 474.

44. See 5 C. L. 1403.

insist on an exemption at the time the property is taken from the debtor does not in Iowa defeat his right thereto.[47] A conveyance made for the purpose of defrauding creditors does not preclude a debtor from claiming exemptions, when the transaction has been nullified by creditors,[48] though one who has concealed money and property with intent to defraud creditors is not entitled to claim exemptions under the laws of Pennsylvania.[49] A statute providing for the waiver of the benefit of the exemption laws is repugnant to a constitutional provision requiring the legislature to protect by law from forced sale a portion of the homestead and other property of all heads of families.[50] Waiver of exemptions is in some states deemed contrary to public policy,[51] and when allowed waivers are strictly construed.[52] General appearance to a foreign attachment does not preclude an application to release exempt property therefrom.[53] The allowance of an exemption on the levy of execution is no bar to another allowance on a subsequent levy on a revival of the same judgment,[54] nor does the dismissal of an application by a husband for exemption as the head of a family, after hearing evidence, estop the wife from thereafter making claim on the ground of the refusal of the husband to make the application.[55] The tools of a tradesman are not exempt after he has abandoned his trade, leased his tools, and given the lessees the unconditional right to purchase them at a future time notwithstanding his expressed intention of returning to his trade.[56] A statute providing that in any suit in which a waiver of the rights of exemption is sought to be enforced, the fact of the waiver and its extent must be averred in the petition, does not require that facts that would distinguish a valid from an invalid waiver shall be set out.[57] A business is unlawful, so as to prevent a debtor engaged therein from claiming an exemption, though the same business was originally engaged in by the debtor legally.[58]

§ 6. *Selling or transferring exempt property.*[59]—A transfer of exempt property cannot operate as a fraud upon creditors,[60] nor its sale affect their rights,[61] but property of a nonexempt class, bought in the name of another with the proceeds of exempt property, cannot be retained against the claims of creditors.[62] The proceeds of the sale of a homestead are, under the statutes of Washington, exempt from garnishment for a reasonable time, where the homestead claimant intends in good faith to reinvest the proceeds in another homestead.[63]

§ 7. *How the right is claimed and enforced.*[64]—An affidavit setting forth the

45. Story Mercantile Co. v. McClellan [Ala.] 40 So. 123.

46. Mozely & Co. v. Fontana, 124 Ga. 376, 52 S. E. 443.

47. In re Hemstreet, 139 F. 958.

48. In re Thompson, 140 F. 257.

49. Evidence held to show that a debtor concealed money and property with intent to defraud his creditors. In re Alex, 141 F. 483.

50. A provision in a chattel mortgage purporting to waive the exemption laws is therefore void as to husband and wife. Slyfield v. Willard [Wash.] 86 P. 392.

51. The exemption of wages under the Pennsylvania statute cannot be waived. Morris Box Board Co. v. Rossiter, 30 Pa. Super. Ct. 23. And see 5 C. L. 1403, n. 72, and 3 C. L. 1411.

52. Waiver in lease of exemption of personal property held to apply only in case of distraint. Schock v. Waidelich, 27 Pa. Super. Ct. 215.

53. Morris Box Board Co. v. Rossiter, 30 Pa. Super. Ct. 23.

54. Hart & Co. v. Cole [Ohio] 76 N. E. 940.

55. Mozely & Co. v. Fontana, 124 Ga. 376, 52 S. E. 443.

56. Cable v. Hoolihan [Minn.] 107 N. W. 967.

57. Code 1896, §§ 2106, 2107. Story Mercantile Co. v. McClellan [Ala.] 40 So. 123.

58. A saloonkeeper could not claim exemptions from property used in the business where he was, at the time the claim was made, operating the saloon in violation of the penal statutes, though he commenced the business by fully complying with the liquor laws. McCarthy v. Payne, 141 Mich. 571, 12 Det. Leg. N. 570, 104 N. W. 981.

59. See 5 C. L. 1403.

60. Foreman v. Citizens' State Bank, 128 Iowa, 661, 105 N. W. 163.

61, 62. McLeod's Trustee v. McLeod [Ky.] 89 S. W. 199.

63. Becher v. Shaw [Wash.] 87 P. 71. See, also, Homesteads, 5 C. L. 1689.

64. See 5 C. L. 1404.

claim and grounds of exemption is required in some states[65] and such affidavits are liberally construed in aid of the exemption,[66] but a defective claim of exemption cannot be cured by amendment.[67] The provision of the Ohio statute that one bringing an action on a claim for necessaries should first make a demand in writing upon the debtor for the excess over ninety per cent of his personal earnings is jurisdictional, and when this requirement has not been complied with, the attachment should be discharged.[68] The setting apart of homestead and personalty exemptions, without giving the debtor opportunity of exercising his right of selection is void in North Carolina.[69] The act of the ordinary in receiving and recording a schedule of property sought to be exempted under the provisions of the Georgia statute is ministerial only.[70] The determination whether tools and mechanical appliances are necessary to the practice of a trade or profession of one claiming them as exempt involves a question of fact,[71] the burden being on him who claims they are not necessary.[72]

§ 8. *Recovery for selling exempt property or evading exemption laws.*[73]—A statute forbidding the seizure of wages of employes engaged in interstate business and giving a right of action and providing penalties for an evasion thereof is constitutional.[74] A general averment in a petition that the defendant assigned a claim against the plaintiff for the purpose of evading the laws of a state forbidding seizure of wages of employes engaged in interstate business is sufficient, in the absence of a motion for a more specific statement,[75] and an averment that the defendant "claimed to have an account" against plaintiff is a sufficient allegation that the defendant was a creditor or holder of some evidence of indebtedness, book account or claim against the plaintiff, within the statute.[76] The fact that suit has been instituted on a claim in another state, whereby exempt wages of the plaintiff were seized, raises a presumption of violation of the act forbidding the seizure of wages of employes engaged in interstate business and giving a right of action against any creditor taking action outside of the state to evade the law,[77] and this presumption exists however defectively the process may have been served, resulting in the seizure of plaintiff's wages.[78] Where exempt wages are garnished in the hands of an employer, the payment of the money into court by the employer without disclosing the grounds of exemption in its answer and notifying the employe of the garnishment, does not release the liability of the garnishee to the employe, though the employe was made a party to the proceeding and was properly served.[79] Where exempt property was set off to a bank-

65. In New York to obtain an exemption of his wages a debtor must by oath or otherwise make it appear that his earnings are necessary for the use of his family. Seeley v. Connors, 109 App. Div. 279, 95 N. Y. S. 1109.

66. An affidavit by a woman claiming exemptions as "husband" and parent, when read in connection with another part thereof, in which affiant avers that she is a parent and resident of the state, sufficiently specifies the character in which she sues. Brown v. Beckwith, 58 W. Va. 140, 51 S. E. 977. An affidavit claiming property as exempt from execution or other process is sufficient to require the release of property levied on and taken into possession by an officer under an order of attachment. Id.

67. Where a wife filed a claim as against a levy on her husband's property and the claim was void because she did not aver that the husband refused to make claim, she could not under Civ. Code Ga. 1895, perfect the claim by an amendment to supply the deficiency. Stinson v. Hirsch Bros. & Co., 125 Ga. 149, 53 S. E. 1011.

68. Hughes v. Shields, 7 Ohio C. C. (N. S.) 84.

69. McKeithen v. Blue [N. C.] 55 S. E. 285.

70. Civ. Code 1895, § 2866 et seq. Stinson v. Hirsch Bros. & Co., 125 Ga. 149, 53 S. E. 1011.

71, 72. Steiner v. Marshall [C. C. A.] 140 F. 710.

73. See 5 C. L. 1404.

74. Code Civ. Proc. § 531. Gordon Bros. v. Wageman [Neb.] 108 N. W. 1067.

75, 76. Gordon Bros. v. Wageman [Neb.] 108 N. W. 1067.

77. The petition to enforce a liability under Laws 1899, p. 369, c. 25, forbidding the seizure of wages of employes engaged in interstate business, need not aver that defendant had assigned the claim to the person in whose name the proceedings were instituted in another state, whereby plaintiff's exempt wages were seized. Gordon Bros. v. Wageman [Neb.] 108 N. W. 1067.

rupt, but the trustee nevertheless carried off the same, the bankrupt was entitled to repayment out of the estate the value of the exempt property so taken.[80] The fact that an officer levying a writ of attachment set out property of the value which the debtor was entitled to have exempt, but which was not in fact owned by the debtor, did not estop the officer, in an action by the debtor to recover the amount of his exemption, to show that the debtor was not entitled to any exemption.[81]

EXHIBITIONS AND SHOWS.[82]

The proprietor of a theater is engaged in a strictly private business and is under no obligation to serve the public in general,[83] but the state has the right, in the exercise of its police power, to regulate the right to refuse admission to theaters, race courses, or other places of public amusement.[84] Under a statute making irrevocable the license represented by a theater ticket, the ticket and rights represented thereby become property which is transferrable in the absence of stipulations to the contrary,[85] and a statute prohibiting a person from reselling the ticket for a higher price than that originally charged by the management is an infringement upon the constitutional right of property,[86] and cannot be upheld as a valid exercise of the police power of the state.[87] The rights of the purchaser of a theater ticket and the duties of the proprietor are measured by the terms of the contract made upon the purchase of a ticket.[88] This contract is an agreement on the part of the proprietor for the consideration mentioned to admit the holder of the ticket upon presentation thereof to his theater on the date mentioned, with the right to occupy the seat specified and to there witness the performance.[89] The ticket is a license issued by the proprietor pursuant to the contract as evidence of the right of the holder to admission subject to his observation of any reasonable conditions appearing on the face thereof.[90] The license, though granted for a consideration, is revocable for a violation of such con-

78. Gordon Bros. v. Wageman [Neb.] 108 N. W. 1067.

79. Southern R. Co. v. Fulford, 125 Ga. 103, 54 S. E. 68.

80. In re Hemstreet, 139 F. 958.

81. McCarthy v. Payne, 141 Mich. 571, 12 Det. Leg. N. 570, 104 N. W. 981.

82. See 5 C. L. 1405.

83. Trespass would not lie for inadvertent breach of contract created by purchase of ticket. Horney v. Nixon, 213 Pa. 20, 61 A. 1088; Collister v. Hayman, 183 N. Y. 250, 76 N. E. 20. Agreement among managers of theaters to refuse admission to a theatrical critic and his forcible exclusion from the theaters of such parties was not a conspiracy to do an unlawful act where not made to prevent him from exercising his calling, but the motive was merely a dislike and disapproval of his writings. People v. Flynn, 100 N. Y. S. 31.

84. Statute penalizing refusal to admit to any opera, race course, or other place of public amusement, any person over 21 years of age presenting a ticket not contrary to Const. U. S. Amend. 14, or Const. Cal. § 1. Ejection from race course. Greenberg v. Western Turf Ass'n, 148 Cal. 126, 82 P. 684.

Note: The extent of the power of the state to impose upon businesses the duties and obligations of public service companies is very ill-defined. It seems to be clearly settled that the police power will justify the classification of virtual monopolies among public service industries. Munn v. Illinois, 94 U. S. 113, 24 Law. Ed. 77. The supreme court has also sustained a statute imposing a maximum charge to be made by grain warehousemen, although there was no monopoly in the warehousing business. Brass v. North Dakota, 153 U. S. 391, 38 Law. Ed. 757. It seems impossible to tell upon just what principle this last case was decided. A leading text writer maintains that even after this decision the power of the state does not extend to all industries, but that it is limited to a regulation of business essential to industrial welfare. Freund, Police Power, § 378. Obviously, under this definition of the power of the state, public amusements cannot be subjected to regulation as public service companies. See Tiedeman, Police Power 232. **Contra.** Cooley, Torts, 285. The decisions sustaining statutes aimed against discrimination against negroes afford no support to the principal case, since the constitutionality of such statutes is based upon the public policy opposed to race discrimination.—See 19 Harv. L. Rev. 472.

85. Act Cal. 1893 (St. 1893, p. 220. c. 185). Ex parte Quarg [Cal.] 84 P. 766.

86. Act Cal. March 18, 1905 (St. 1905, p. 140, c. 140). Ex parte Quarg [Cal.] 84 P. 766.

87. Prohibits an act not affecting injury

dition by the holder of the ticket.[91] A condition providing that if the ticket is sold by the purchaser at the sidewalk it will be refused at the door is valid and enforceable,[92] and is not an unreasonable restraint upon a person's liberty to sell his property,[93] nor does it violate a statute providing for the equal accommodation of all persons in "places of public accommodation or amusement."[94]

An amusement company in possession of land under a lease, reserving to the lessor the privilege of granting a right of way through the premises for street railway purposes, may prevent by injunction an unreasonable and forcible entry by a street railway so as to unnecessarily interfere with the arrangement of the place,[95] and the motive of complainant in such case is immaterial.[96]

The remedy for the refusal of the proprietor of a theater to allow the purchaser of a ticket to use it is not in tort but by an action for breach of the contract.[97] Surplus allegations in the complaint are immaterial provided it states a cause of action.[98]

EXHIBITS; EXONERATION; EXPERIMENTS; EXPERT EVIDENCE, see latest topical index.

EXPLOSIVES AND INFLAMMABLES.[99]

One in possession of explosives must exercise the highest degree of care,[1] which extends to the selection of the custodian in charge.[2] In some jurisdictions the liability for resulting injuries is absolute unless due to a great and unexpected natural force or the wrongful act of a third person over whom the defendant has no control.[3] Generally, however, one in lawful possession or using for a legal purpose is not liable in the absence of negligence,[4] and the burden is upon the injured party

or endangering public health, morals, or safety. Ex parte Quarg [Cal.] 84 P. 766.

88, 89, 90, 91. Collister v. Hayman, 183 N. Y. 250, 76 N. E. 20.

92. Its purpose being to prevent the resale of tickets by "ticket speculators" at an advance over the price charged by the management. Collister v. Hayman, 183 N. Y. 250, 76 N. E. 20.

93. Collister v. Hayman, 183 N. Y. 250, 76 N. E. 20.

94. Laws 1895, p. 974, c. 1042. Collister v. Hayman, 183 N. Y. 250, 76 N. E. 20.

95. Reservation must be exercised reasonably. Montgomery Amusement Co. v. Montgomery Traction Co., 139 F. 353.

96. That amusement company was furthering the interest of a competing street railway company no defense to bill. Montgomery Amusement Co. v. Montgomery Traction Co., 139 F. 353.

97. Horney v. Nixon, 213 Pa. 20, 61 A. 1088; Taylor v. Cohn [Or.] 84 P. 388.

98. A complaint alleging that defendant is the proprietor of a theater; that plaintiff purchased tickets therefor; that they were presented at the proper time and place but defendant refused to allow plaintiff to occupy the seats; and that by reason thereof he was damaged in a certain sum, states a cause of action for breach of the contract. Taylor v. Cohn [Or.] 84 P. 388.

99. See 5 C. L. 1405. See, also, such topics as Gas, 5 C. L. 1584; Electricity, 7 C. L. 1258; Steam, 6 C. L. 1552.

1. Sowers v. McManus, 214 Pa. 244, 63 A. 601. One engaged in delivering gasoline must use ordinary care in transferring it to a private tank. Waters-Pierce Oil Co. v. Knisel [Ark.] 96 S. W. 342.

2. Question of negligence held for the jury where the custodian was addicted to the use of intoxicants and was obliged to keep a fire in the magazine. Caldwell v. Kerbaugh, 144 F. 443.

3. Flynn v. Butler, 189 Mass. 377, 75 N. E. 730. Not relieved where the explosion was due to the act of the adjoining compartment owner who was making repairs for their mutual benefit. Id.

4. A railroad company is liable for negligently placing a warning torpedo on its tracks so near a public way as to injure a pedestrian when exploded. Illinois Cent. R. Co. v. Schultz [Miss.] 39 So. 1005. Servant held guilty of gross negligence in pouring a liquid upon a floor soaked with nitro-glycerine and scrubbing with a broom without knowing probable effect. Oulighan v. Butler, 189 Mass. 287, 75 N. E. 726. Where an accident would not have occurred except for defendant's conduct in permitting nitroglycerine to escape onto the floor and in having it repaired by an inexperienced man, such negligence is the efficient cause of the accident. Id. Evidence considered together with the physical facts and held insufficient to show that the gasoline escaped because of the negligent use of a siphon and defective funnel. Waters-Pierce Oil Co. v. Knisel [Ark.] 96 S. W. 342. In an action for injuries caused by an explosion of gasoline vapor allowed to escape while transferring with a siphon, testimony that the defendant had purchased a rotary pump because the one they had would not do, but that he did

to establish it,[5] the doctrine of res ipsa loquitur being inapplicable.[6] As in other actions, the negligence must be the proximate cause of the injury.[7] One engaged in blasting is liable for the physical invasion of another's property by flying fragments irrespective of negligence,[8] but not for damages resulting from the vibration of the earth or air unless negligent.[9] All participating in negligent blasting are liable for the resulting injury.[10] The storage of an explosive may constitute a nuisance because of an inappropriate location,[11] and the law implies a duty not to place an explosive where it is likely to injure property or persons.[12] Where the injury complained of is to property, the complaint must show freedom from contributory negligence.[13] One selling an explosive unusually dangerous because of a latent fact, without notice,[14] is liable for injury resulting though it sustains no contractual relation with the person injured.[15] A city permitting a display of fireworks in its public parks is not liable for resulting injury,[16] unless it constitutes a nuisance.[17]

The disposition and storage of explosives is subject to police regulation,[18] and

not know whether it was purchased to deliver into this particular tank, was not prejudicial. Waters-Pierce Oil Co. v. Burrows [Ark.] 96 S. W. 336. Evidence of one who had installed the plant that a rotary pump was safer than a siphon because the flow could be controlled and that he had tested the siphon and found it impracticable held competent. Id.

5. Sowers v. McManus, 214 Pa. 244, 63 A. 601; Waters-Pierce Oil Co. v. Knisel [Ark.] 96 S. W. 342. Evidence held insufficient to show negligence. Sowers v. McManus, 214 Pa. 244, 63 A. 601. Where defendant's evidence shows that blasting was done near plaintiff's premises and is supplemented by proof that ore was frequently thrown against the house and upon the lot of the plaintiff, the question of negligence is for the jury. Herron v. Jones & Laughlin Co., 23 Pa. Super. Ct. 226.

6. Sowers v. McManus, 214 Pa. 244, 63 A. 601.

7. In an action for injuries to plaintiff's ear due to the explosion of dynamite by defendant, it is admissible to show that the ears of person much closer than plaintiff were not injured by the concussion. Hickey v. Texas & P. R. Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 88, 95 S. W. 763. Also, an expert on ear treatment may testify that if plaintiff's ear was injured while the ears of persons nearer were not, it was in a diseased condition. Id.

8. Forrester v. O'Rourke Engineering Const. Co., 48 Misc. 390, 95 N. Y. S. 600. Also to persons injured by such fragments. Hoffman v. Walsh, 117 Mo. App. 278, 93 S. W. 853.

9. Dishes and glassware broken. Forrester v. O'Rourke Engineering Const. Co., 48 Misc. 390, 95 N. Y. S. 600.

10. Hence where it appeared that defendant had charge of the work it is error to dismiss the complaint although it alleged that he was the contractor which was not the fact. Page v. Dempsey, 184 N. Y. 245, 77 N. E. 9.

11. Evidence as to its proximity to dwellings and highways, density of population in the vicinity, etc., is admissible on the issue of nuisance. Flynn v. Butler, 189 Mass. 377, 75 N. E. 730. Whether the storage of dynamite is a nuisance per se by reason of location is a question of fact dependent upon whether persons and property are exposed to unusual and great danger. Remsberg v. Iola Portland Cement Co. [Kan.] 84 P. 548. Facts tending to show that a storehouse was located unnecessarily close to plaintiff's buildings and a public road are proper allegations in an action to enjoin such business. Id. Expert opinion as to the effect of the explosion of certain amount of dynamite within certain distances of houses and persons is admissible. Id. Evidence held sufficiently based upon own experience as to render it expert. Id.

12. Public alley. Wells v. Gallagher [Ala.] 39 So. 747. Such duty being implied of law need not be pleaded. Id. Where injury results from explosives "left" in a public highway the length of time they were there is immaterial. Id. An instruction that defendant was not liable unless the servant knew that the bomb was dangerous when he swept it into the alley properly refused as pretermitting the question of negligence in not ascertaining its dangerous character. Id. Where defendant is charged with wantonly leaving an explosive in a public highway, evidence that children are accustomed to play in such alley is admissible to show wantonness. Id.

13. An allegation in a complaint that the damage was caused solely and entirely by the negligence of defendant in "shooting" the well, sufficiently alleges freedom from contributory negligence. Indiana Nitroglycerine & Torpedo Co. v. Lippencott Glass Co., 165 Ind. 361, 75 N. E. 649.

14. Illuminating oil so mixed with gasoline as to be liable to explode in an ordinary lamp. Standard Oil Co. v. Parrish [C. C. A.] 145 F. 829. Where there is a conflict of evidence whether illuminating oil contained a mixture of gasoline, proof of a custom by defendant's employes to use the same buckets indiscriminately to draw kerosene and gasoline is admissible. Id.

15. Infant child of purchaser killed. Standard Oil Co. v. Parrish [C. C. A.] 145 F. 829.

16. Explosion of a bomb in a manner not authorized. De Agramonte v. Mt. Vernon, 98 N. Y. S. 454.

one keeping explosives in violation of statute,[19] is liable for injuries caused by its explosion.[20] Such regulations, however, must be reasonable.[21]

Ex Post Facto Laws; Express Companies, see latest topical index.

EXTORTION.[22]

Extortion is the unlawful taking by an officer,[23] by color of his office,[24] of money or thing of value which is not due to him, or before it is due, or more than is due.[25] It is not essential that the officer have authority to do the particular act or expressly declare that he has it.[26] A specific demand for the money is not essential where the officer's conduct is such as to lead the person to believe that payment was necessary to secure the object sought.[27] While bribery and extortion are not identical in that the former does not require a pretense of official authority, yet if such pretense is made the same act may constitute both offenses.[28]

EXTRADITION.

§ 1. International (1639). | § 2. Interstate (1640).

§ 1. *International.*[29]—In the construction and carrying out of extradition treaties, the ordinary technicalities of criminal proceedings are applicable only to a limited extent.[30] Where generic terms are used the indictment is sufficient if the offense charged is fairly embraced within them.[31] The indictment must be con-

17. Display of fireworks in a city park is not per se a nuisance. De Agramonte v. Mt. Vernon, 98 N. Y. S. 454.

18. Art. 2, § 3 police regulations D. C. held not unconstitutional as delegating entrusted powers because it required the fire marshal and building inspector to investigate the proposed storage plant and make report. Cahill v. District of Columbia, 26 App. D. C. 163. Sec. 1 prohibiting storage except in the interior of a building, and sec. 5 permitting storage in underground tanks, held not inconsistent since the former has reference to surface storage only. Id. Evidence held to support a conviction for keeping and selling gasoline without a license, it appearing that defendants maintained a garage and filled automobiles. Id. One suing for injuries received from the explosion of "gunpowder" has no statutory cause of action under Rev. Laws c. 102, § 105, since gunpowder is not one of the explosives included in such section. Flynn v. Butler, 189 Mass. 377, 75 N. E. 730.

19. Storing crude petroleum without license as required by Rev. Laws, c. 102, § 114, and without proper ventilation as provided by § 113. Moeckel v. Cross & Co., 190 Mass. 280, 76 N. E. 447. Court will take judicial notice that kerosene is the product of crude petroleum. Id.

20. Moeckel v. Cross & Co., 190 Mass. 280, 76 N. E. 447.

21. A police regulation limiting the quantity of inflammable fluids which may be stored within the city limits to 50 gallons and requiring it to be stored underground outside of buildings is reasonable. Cahill v. District of Columbia, 26 App. D. C. 163.

22. See 5 C. L. 1407. See, also, Blackmail, 7 C. L. 442.

23. Captain of police. Commonwealth v. Wilson, 30 Pa. Super. Ct. 26.

24. While the money must be obtained by the officer by the color of his office, it does not imply that it must be taken for an act which it is his duty or he has the power to perform (Commonwealth v. Wilson, 30 Pa. Super. Ct. 26), but it does imply the exercise of official power possessed, or pretended to be possessed, as distinguished from an act which any person could perform (Id.).

25. Commonwealth v. Wilson, 30 Pa. Super. Ct. 26.

26. Where the conduct of a police officer is tantamount to an assertion and use of his official authority as a cover for the act, whereby he secures money, he may be convicted. Commonwealth v. Wilson, 30 Pa. Super. Ct. 26; Id., 30 Pa. Super. Ct. 32.

27. Evidence of conduct held sufficient to go to the jury. Commonwealth v. Wilson, 30 Pa. Super. Ct. 26.

28. Commonwealth v. Wilson, 30 Pa. Super. Ct. 26.

29. See 5 C. L. 1407.

30. Since exact correspondence between the laws of the two countries cannot be expected and the only purpose of extradition is to put the accused on trial under the laws of his own country. United States v. Greene, 146 F. 766.

31. An indictment charging conspiracy to defraud the United States between an agent of the government and defendants, which sets out facts showing a corrupt agreement between defendants and overt acts by means of which it was effected and the government

strued, not by one generic designation alone, but in consideration of all its clear and substantial averments.[32]

§ 2. *Interstate. Origin of power.*[33]—Interstate extradition is governed principally by the constitution and laws of the United States.[34] The fact that a wrong has been committed against a prisoner in the manner or method pursued in bringing him into the demanding state is no legal or just reason why he should not answer the charge against him when brought before the proper tribunal.[35]

Procedure.[36]—The removal of a person by extradition is summary in its character and the provisions of the act of congress must be strictly complied with.[37] An affidavit for a requisition made on information and belief only is insufficient.[38] In Ohio, the facts which constitute the crime must be made to appear, unless the application is based upon an indictment by a grand jury.[39] This requirement is not satisfied by a formal affidavit charging the offense in the language of the statute, but must be met by facts necessary to make out the crime charged.[40] The complaint or affidavit on which a warrant is issued must show that the accused has been legally charged with crime in the demanding state.[41] In jurisdictions where a verified complaint charging an offense is regarded as equivalent to an affidavit, a governor's warrant reciting that the accused stands charged by complaint is a sufficient compliance with the Federal statute.[42] A requisition cannot be honored where it appears that the offense charged is not within the jurisdiction of the demanding state.[43] It is not essential that the executive warrant be accompanied by certified copies of the affidavit or indictment or that these papers be set out in the warrant, or that the warrant recite that the affidavit or indictment from the demanding state was presented to the governor of the state to which the requisition is directed by any legal authority from the demanding state.[44]

defrauded, charges fraud by an agent and participation therein by defendants within cc. 4, 10, art. 1, of the extradition treaty of 1890 (Act March 25, 1890, 26 St. 1509), between Great Britain and the United States, and is sufficient to warrant their extradition for trial thereunder. United States v. Greene, 146 F. 766.

32. That the crime charged was designated a "conspiracy" was not fatal where indictment clearly charged participation in the act of defrauding the government. United States v. Greene, 146 F. 766. Ashburton treaty of 1842, and the supplemental treaty of 1890, compared. Id.

33, 34. See 5 C. L. 1408.

35. Jurisdiction not impaired by manner in which accused is brought before the court. Ex parte Moyer [Idaho] 85 P. 897.

36. See 5 C. L. 1409.

37, 38. Ex parte Cheatham [Tex. Cr. App.] 95 S. W. 1077.

39, 40. In re Fairman, 3 Ohio N. P. (N. S.) 485.

41. Under 2 Ballinger's Ann. Codes & St. § 7017, providing that when any person shall be found within the state charged with an offense committed in another state any court or magistrate may, on complaint, issue a warrant for his arrest, the complaint on which the warrant is issued must show that the accused has been legally charged with crime in the demanding state. State v. White, 40 Wash. 560, 82 P. 907. Three things are requisite in order to authorize the executive authority of a state to extradite a fugitive from justice: First, the accused must be demanded as a fugitive from justice by the executive of the state from which he fled; second, such demand must be accompanied by a copy of an indictment found or an affidavit made, before a magistrate, charging the accused with having committed a crime in the demanding state; and third, such copy of the indictment or affidavit must be certified by the executive of the demanding state to be authentic. Id. A legal charge within extradition statutes means one made in the state having jurisdiction to try the offense and from which the fugitive has fled. Id. Where accused was arrested under a warrant issued on a complaint which was insufficient to justify the issuance of the warrant, a deposit in lieu of bail to secure a release of the accused was involuntary and depositor was entitled to recover it though accused did not appear. Id.

42. Recital that accused stands charged by "complaint and information" with the crime of embezzlement sufficient compliance with Rev. St. U. S. § 5278 (U. S. Comp. St. 1901, p. 3597), requiring that warrants recite that "accused stands charged by indictment or affidavit." Ex parte Cheatham [Tex. Cr. App.] 95 S. W. 1077.

43. Where affidavit on application to the governor of Colorado showed conversion of certain deeds committed in Kansas, the requisition should not have been honored by the governor of Texas. Ex parte Cheatham [Tex. Cr. App.] 95 S. W. 1077.

44. Ex parte Cheatham [Tex. Cr. App.] 95 S. W. 1077.

Review.[45]—It will be presumed that the requirements of the law were complied with by the governor from whom the requisition proceeded.[46] The court has jurisdiction on a writ of habeas corpus to go behind the executive warrant and review the grounds upon which the governor issued it.[47] In Ohio the probate court has no power, by virtue of its general jurisdiction in habeas corpus or otherwise, to order the discharge of a person arrested by the sheriff by authority of a warrant from the governor to be brought before one of the judges enumerated in the statute.[48] The action of the chief executive of the state in which the accused was found in issuing the executive warrant, and of the executive and ministerial officers acting in aid of the warrant, is a matter for the consideration of the courts of his state subject to the reviewing authority of the Federal courts so far as Federal questions are involved.[49] Hence, where the accused is personally within the jurisdiction of the demanding state and there applies for his discharge on habeas corpus, he cannot raise the question as to whether he was in fact a fugitive from justice within the meaning of the Federal constitution and the act of congress,[50] nor, on such application, can the regularity of the issuance of the warrant of the foreign state be inquired into, the prisoner being held under legal process of a court of competent jurisdiction.[51] In interstate extradition there can be no Federal question involved in the detention of the prisoner after he is brought within the jurisdiction of the demanding state.[52] The motives which prompt the executive of a state to issue his warrant for the rendition of a prisoner are not proper subjects of judicial inquiry.[53]

Rights of extradited persons.[54]—When a person has been returned to a state he may be held to answer for another and distinct offense from that for which he was returned,[55] and after conviction for the offense for which he was returned, he may be tried for another offense without being given an opportunity to return to the state where he was found.[56] A civil suit also may be instituted against him in the state to which he has been returned before his discharge or immediately thereafter.[57]

45. See 5 C. L. 1410.

46. Presumed in habeas corpus that governor's requisition was attached to the papers on which based and that he stated therein that the annexed papers were duly authenticated as per the laws of the demanding state. Ex parte Cheatham [Tex. Cr. App.] 95 S. W. 1077.

47. May determine the sufficiency of papers upon which warrant was issued. Ex parte Cheatham [Tex. Cr. App.] 95 S. W. 1077.

48. When the sheriff receives from the governor a warrant issued by him under § 97, Rev. St. 1906, it is his imperative duty to arrest the person named therein as a fugitive from justice if found within his county, and take him before a judge of the supreme court or of the circuit court, or of the common pleas court of the district, to be examined on the charge named in the warrant. Thomas v. Evans [Ohio] 76 N. E. 862. The provision of the act of February 25, 1852 (50 Ohio Laws, p. 84), giving to the probate courts jurisdiction to allow habeas corpus (now incorporated in § 5727, Rev. St. 1906) is, with respect to the extradition of fugitives from justice, in conflict with the act of March 23, 1875 (72 Ohio Laws p. 79, now § 97 Rev. St. 1906), and is pro tanto superseded by the later act. Id.

49. Not open to examination or consideration by courts of a foreign state. Ex parte Moyer [Idaho] 85 P. 897.

50. Ex parte Moyer [Idaho] 85 P. 897.

51. The warrant whether issued lawfully or not becomes functus officio as soon as the accused is delivered into the jurisdiction of the demanding state. Ex parte Moyer [Idaho] 85 P. 897.

52. The prisoner is held under the extradition process until such time only as he reaches the jurisdiction of the demanding state. He is thenceforth held under the process of the courts of that state. Ex parte Moyer [Idaho] 85 P. 897.

53. Would oppose public policy and freedom of the executive department. Ex parte Moyer [Idaho] 85 P. 897.

54. See 5 C. L. 1411.

55. There is a difference in this respect between international and interstate extradition. Rutledge v. Krauss [N. J. Law] 63 A. 988.

56. Taylor v. Commonwealth [Ky.] 96 S. W. 440. Rule applicable to extraditions under treaty not applicable to extraditions between the states. Id.

57. Not entitled to a reasonable time after discharge to permit him to return to the state whence he came before such suit may be instituted. Rutledge v. Krauss [N. J. Law] 63 A. 988. Case not analogous to that presented where a person comes from one state into another voluntarily as a witness or party to a suit. Id. That plaintiff in the civil suit assisted in the extradition proceedings was no reason for discharging de-

FACTORS.[58]

The relation of factor to consignor.[59]—One having the possession and absolute control of the merchandise of another to sell the same and collect the price is a factor,[60] and, in general, it is this possession and authority to collect which distinguishes him from a broker.[61]

Rights and liabilities inter se and as to third persons.[62]—As between factor and consignor, their rights and liabilities are controlled by the terms of their contract.[63] In the absence of express authority,[64] a factor cannot reship the goods to another market,[65] and if he does so he is liable;[66] nor can he delegate his rights to another,[67] though an unauthorized delegation may be ratified.[68] Where a principal consigns goods without instructions, the factor must sell within a reasonable time at the market price[69] at that place.[70] Moneys received by a factor from sales are held in trust for the consignor.[71] A factor is liable for negligence in the care of goods consigned to him.[72] A consignor is under an implied obligation to reimburse his factor for advancements in excess of the sale proceeds,[73] but there is no liability until

fendant, such assistance being a public duty. Id.

58. See Clark & Skyles Agency, p. 1746.

59. See 5 C. L. 1411.

60. Sinclair & Co. v. National Surety Co. [Iowa] 107 N. W. 184. Correspondence held to show that there was not an absolute sale, but that plaintiffs agreed to act as factors for defendant. Dowler v. Swift & Co., 98 N. Y. S. 983. A fruit dealers' association formed to sell such amounts as its constituent members should ship to it, the latter having control of the sale as to price and being entitled to the net proceeds, the association is in nature a factor. Briere v. Taylor, 126 Wis. 347, 105 N. W. 817.

61. Sinclair & Co. v. National Surety Co. [Iowa] 107 N. W. 184.

62. See 5 C. L. 1412.

63. Where a factor was to have commission on goods withdrawn before sale, he can only recover commissions on goods actually received, although the consignor had agreed to ship a larger amount. Horst v. Lovdal, 98 N. Y. S. 996. An agreement to communicate the best price obtainable does not impose a duty to notify the consignor that no offer whatever can be secured. Dowler v. Swift & Co., 98 N. Y. S. 983. Where cranberry producers formed an association for the sale of their berries, the association to act as a factor, and each shipper to bear the loss or have the profits of his shipments, it was error to charge the total loss to all in proportion to their respective interests. Briere v. Taylor, 126 Wis. 347, 105 N. W. 817. A factor advanced a shipper $1,250 and the latter agreed to ship 100 bales of cotton or at least one bale for every $12.50 advanced. An additional advancement was subsequently made and the shipper consigned cotton in excess of 100 bales. Held that the factor could apply $12.50 of the proceeds of each additional bale to the last advancement, notwithstanding a direction to the contrary. Kemper v. Patrick [Tex. Civ. App.] 95 S. W. 51. Where the contract is clear as to the allowance of commission on goods withdrawn from sale, and the only issue is as to whether all the goods were shipped under such contract, evidence that such terms were unusual is inadmissible. Horst v. Lovdal, 98 N. Y. S. 996.

64. Evidence held insufficient to show authority to reship to Europe. Weidner v. Olivit, 108 App. Div. 122, 96 N. Y. S. 37.

65. No implied authority. Weidner v. Olivit, 108 App. Div. 122, 96 N. Y. S. 37.

66. Consignor may recover the difference between the market value at the place where they should have been sold and the price received. Weidner v. Olivit, 108 App. Div. 122, 96 N. Y. S. 37. "Prices current" sent by the factor to his consignor are admissible as admissions of prices. Id.

67. Under Civ. Code § 2368 (3), a factor cannot delegate his authority to one engaged in an independent business. Akron Cereal Co. v. First Nat. Bank [Cal. App.] 84 P. 778. A person engaged in such business may as a representative of the factors receive and store, but not in his own name (Id.), and where he does so, the consignor has not "allowed another to assume apparent ownership" so as to bring a bona fide pledgee within Civ. Code § 2991 (Id.).

68. Where a factor turned the goods over to another firm to sell and notified the consignor, failure of the consignor to object for six months ratified the delegation. McIntosh v. Merchant, 40 Wash. 477, 82 P. 753.

69. Wynne, Love & Co. v. Schnabaum [Ark.] 94 S. W. 50. Evidence of one or two sales at a higher price does not establish the market price and prove failure to discharge his duty. Id.

70. A factor in Memphis need not consult the market of Pocahontas. Wynne, Love & Co. v. Schnabaum [Ark.] 94 S. W. 50.

71. Boyle v. Northwestern Nat. Bank, 125 Wis. 498, 103 N. W. 1123, 104 N. W. 917.

72. Evidence held for the jury whether plaintiffs' factors were guilty of negligence in failing to inspect the beef upon arrival and afterwards. Dowler v. Swift & Co., 98 N. Y. S. 983. Evidence as to factor's negligence in caring for peanuts while in storage held for the jury. Knowles v. Savage, Son & Co., 140 N. C. 372, 52 S. E. 930.

73. In re Murphy Co.'s Estate, 214 Pa. 258, 63 A. 745.

there has been a sale.[74] Where a factor authorized only to sell for cash sells on time and pays the consignor, he may recover of the purchaser for the goods sold on time.[75] A factor who defends an action solely for his own benefit to protect goods pledged for advancements is not entitled to add the expense of such litigation to his debt.[76] One asserting a pledge for advancements to the factor must show that they were made after the goods came into the factor's possession.[77] Where a factor pledges goods, the owner may redeem any time before sale whether the pledgee claims for advancements made under the factor law or asserts a lien under the lien law.[78] A pledgee having a lien for cartage and storage on goods consigned to a factor, if he has knowledge, actual or charged,[79] is guilty of conversion if he sells at private sale.[80]

FACTORS' ACTS, see latest topical index.

FALSE IMPRISONMENT.

§ 1. What Constitutes, Persons Liable, and Justification (1643).
§ 2. The Action to Recover Damages (1646).

§ 1. *What constitutes, persons liable, and justification.*[81]—False imprisonment is the unlawful[82] restraint of a man's liberty, which may arise from an illegal arrest,[83] unlawful detention,[84] or confinement in an unauthorized place.[85] Any physical detention constitutes imprisonment,[86] which may be accomplished by words and

74. In re Murphy Co.'s Estate, 214 Pa. 258, 63 A. 745. Where the consignor makes an assignment for the benefit of creditors, the factor is only entitled to dividends on the balance after sale and not on the entire advancement. Id.

75. Plummer Mercantile Co. v. Henderson [Colo.] 86 P. 108.

76. Litigation with the other creditors. Smith v. Equitable Trust Co. [Pa.] 64 A. 591.

77. Beken v. Kingsbury, 113 App. Div. 555, 100 N. Y. S. 323. Evidence held insufficient except as to cartage and freight paid. Id.

78. Factor Law, Heydecker's Gen. Laws, p. 4792, c. 34, § 3; Lien Law, Laws 1897, p. 533, c. 418, § 73. Beken v. Kingsbury, 113 App. Div. 555, 100 N. Y. S. 323.

79. Facts sufficient to put the pledgee on inquiry. Beken v. Kingsbury, 113 App. Div. 555, 100 N. Y. S. 323.

80. Must sell at public sale as provided by Lien Law, Laws 1897, §§ 80, 81, 82. Beken v. Kingsbury, 113 App. Div. 555, 100 N. Y. S. 323.

81. See 5 C. L. 1413.

82. Whether the high degree of care required of a conductor in charge of a car in which were a large number of school children in charge of a government Indian agent justified him in locking the doors at night held for the jury. Peck v. Atchison, etc., R. Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 534, 91 S. W. 323.

83. A police officer making an arrest without a warrant and without reasonable ground to believe that a felony has been committed (Johnson v. Collins [Ky.] 89 S. W. 253), or that the party arrested committed it, is guilty of false imprisonment (Southern R. Co. v. Shirley [Ky.] 90 S. W. 597). Facts held sufficient to go to the jury whether the officer had reasonable ground to believe that a "larceny in a building" had been committed, thus constituting a felony. Robinson v. Van Auken, 190 Mass. 161, 76 N. E. 601. Count held to be an action for false imprisonment and not malicious prosecution after striking the allegation that the arrest was under a warrant. Western Union Tel. Co. v. Thompson [C. C. A.] 144 F. 578. Where under Hurd's Rev. St. 1903, p. 677, c. 38, § 342, a private person cannot arrest upon probable cause, an instruction limiting such doctrine to the count for malicious prosecution held proper. Enright v. Gibson, 219 Ill. 550, 76 N. E. 689. False imprisonment begins at the arrest. Egleston v. Scheibel, 99 N. Y. S. 969.

84. Where the wrong one of two parties of the same name is arrested, the officer is liable if he detains him after receiving information of the error. Blocker v. Clark [Ga.] 54 S. E. 1022. An officer failing to exercise reasonable diligence in taking a prisoner before a committing magistrate is liable (Id.), unless the delay was due to the party arrested (Id.). Under Rev. St. U. S. § 1014 [U. S. Comp. St. 1901, p. 716], a sheriff making an arrest has no authority to accept bail, and hence is not liable for detention after rejecting it. Roberts v. Brown [Tex. Civ. App.] 16 Tex. Ct. Rep. 50, 94 S. W. 388.

85. Under V. S. 1701, 1703, an officer arresting one on mesne process in a civil action must commit him to the jail of the county where the arrest is made, and a commitment elsewhere, if there is a legal jail in such county, renders him a trespasser ab initio. Gibson v. Holmes, 78 Vt. 110, 62 A. 11.

threats,[87] actual force being unnecessary. Malice and want of probable cause are not essential elements,[88] although there seems to be a conflict in Kentucky.[89] Where a prosecution and imprisonment are made in good faith under a void ordinance, no liability exists.[90]

One instrumental in procuring an arrest under a void warrant[91] or who ratifies a void affidavit upon which prosecution was based is liable.[92] All parties participating in an illegal arrest[93] or imprisonment[94] are liable for the trespass ab initio. A judge of inferior jurisdiction is liable for false imprisonment in proceedings beyond his jurisdiction.[95] A master is not liable for an unauthorized imprisonment by his servant[96] unless done within the scope of his employment.[97] A partner in an ordinary mercantile business has no implied power to bind his copartners by his acts

86. Egleston v. Scheibel, 99 N. Y. S. 969; Bernheimer Bros. v. Becker, 102 Md. 250, 62 A. 526.

87. Bernheimer Bros. v. Becker, 102 Md. 250, 62 A. 526; Martin v. Houck [N. C.] 54 S. E. 291. Where the conduct and words are such as to induce a reasonable fear of force and the means of coercion are at hand there may be imprisonment without any force. Hebrew v. Pulis [N. J. Err. & App.] 64 A. 121. Unless it is clear that there was no reasonable apprehension of force, the question whether submission was voluntary or induced by fear is for the jury. Id. By threatening words and conduct plaintiff was induced to undress and submit to a search for stolen property. Id. Where defendants informed plaintiff that he was under arrest, and when he asked for the warrant, told him that it was all right, that he must come with them, which he agreed to do, there is sufficient imprisonment, though they never take him but agree to let him come alone the next day. Martin v. Houck [N. C.] 54 S. E. 291.

88. Pandjiris v. Hartman, 196 Mo. 539, 94 S. W. 270; Wood v. Olson, 117 Ill. App. 128. There must be an existing legal cause for arrest. Id.

89. In Kentucky it has apparently been held that malice and want of probable cause are essential. Steinbergen v. Miller [Ky.] 96 S. W. 1101. But in view of the decision in Southern R. Co. v. Shirley [Ky.] 90 S. W. 597, it is probable that the petition in the Sternbergen case was either ambiguous as to the cause of action alleged or contained a count for malicious prosecution.

90. Either as to the magistrate who tried the case, the city attorney who prosecuted, the officer making the arrest, or the person making the complaint. Bohri v. Barnett [C. C. A.] 144 F. 389.

91. Instructions that if defendants signing the warrant caused the justice to omit signing it, and caused plaintiff's arrest under a void warrant, or if defendant proceeded to prosecute knowing the warrant was void, he is liable, held proper. Oates v. McGlaun [Ala.] 39 So. 607.

92. Question of ratification held for the jury under the facts. Shannon v. Sims [Ala.] 40 So. 574.

93. Where the constable secures the wrongful arrest of plaintiff in another county by a constable of such county and receives and takes back such prisoner, both are liable. Sneed v. McFatridge [Tex. Civ. App.] 97 S. W. 113.

94. Arrested and turned over to the various officers at different times. Egleston v. Scheibel, 99 N. Y. S. 969.

95. NOTE. Liability of a judicial officer: "The defendant, a justice of the peace, issued a warrant returnable before himself, instead of before a justice in the town where the offense was committed, as required by statute. In spite of objection, he tried and convicted the plaintiff. This conviction was afterwards reversed. Held, that the warrant did not confer jurisdiction over the plaintiff, and that the defendant is liable in a civil action for false imprisonment. McCarg v. Burr, 106 App. Div. 275. The defendant committed two errors; first, in causing an arrest under a defective warrant, and secondly, in convicting without jurisdiction. The issuing of a warrant, void on its face, is a wrongful exercise of a ministerial, as distinguished from a judicial, function, for which a justice is civilly liable. Blythe v. Tompkins, 2 Abb. Pr. [N. Y.] 468. The sentence purported to be a judicial act, which is absolutely privileged. Cooley, Torts [2d Ed.] 477. But the fact that a judge assumes jurisdiction does not of itself make his acts thereunder judicial. The Case of the Marshalsea, 10 Co. 369. The warrant being defective in substance, not merely in form, gave no jurisdiction in fact over the plaintiff. Wills v. Whittier, 45 Me. 544. The tendency, however, is to accord a presumption of jurisdiction, even to inferior courts. Thompson v. Jackson, 93 Iowa, 376. In the principal case the assumption of jurisdiction did not arise from a mistaken fact, but from an error of law, on which two opinions could not honestly be entertained by reasonable men, and so the presumption of jurisdiction should not protect the defendant. Grove v. Van Duyn, 44 N. J. Law, 654, 43 Am. Rep. 412. See, also, 12 Harv. L. R. 352; 13 Harv. L. R. 407. The criterion suggested for rebutting the presumption, analogous to that applied on motions to set aside verdicts, protects a judge from the consequences of every error of judgment, unless totally unreasonable, but leaves him answerable for the commission of a wrong that is practically willful."—From 19 Harv. L. R. 216.

96. An employe about an ordinary business has no implied authority to arrest and search customers suspected of shop-lifting. Bernheimer Bros. v. Becker, 102 Md. 250, 62 A. 526.

97. Within scope of employment: Procurement of arrest by the foreman of a construction crew to facilitate stringing a tele-

in arresting and searching a customer suspected of shop-lifting,[98] and hence they are not liable unless they ratify the act.[99] A client is liable for false imprisonment by his attorney acting within the scope of his authority.[1] One making an affidavit upon which a search warrant is issued is not liable for an illegal arrest not authorized under such writ.[2]

Justification and excuse.[3]—That the restraint was lawful is a complete defense.[4] Legal process, valid on its face,[5] issuing from a court having jurisdiction,[6] protects one acting thereunder,[7] if it authorizes the acts done,[8] and has been properly returned, if a return is necessary.[9] Mistaken identity does not excuse the arrest of one not named in the warrant,[10] but good faith[11] is a defense where the wrong one of two persons bearing the same name is imprisoned.[12]

Damages.[13]—Such damages should be awarded as the jury may find from the evidence[14] will compensate plaintiff for the injury sustained.[15] Mental suffering is

phone line across such person's property, Jackson v. American Tel. & T. Co., 139 N. C. 347, 51 S. E. 1015.

Outside of scope: Arrest of ejected passenger by conductor. Dobbins v. Little Rock R. & Elec. Co. [Ark.] 95 S. W. 794. Arrest by a detective agency employed to ascertain and report who robbed defendant's train. Milton v. Missouri Pac. R. Co., 193 Mo. 46, 91 S. W. 949.

98. Bernheimer Bros. v. Becker, 102 Md. 250, 62 A. 526. Hence an instruction authorizing plaintiff's recovery upon proof of her arrest and search by employe under direction of one partner is erroneous where his copartners are also defendants. Id.

99. Ordering of plaintiff's husband out of the store when he complained of the acts of a copartner, held not a ratification. Bernheimer Bros. v. Becker, 102 Md. 250, 62 A. 526.

1. A client who retains an attorney to collect a debt is liable where the debtor is imprisoned by the officer at the direction of the attorney in the wrong jail under V. S. 1701, 1703. Gibson v. Holmes, 78 Vt. 110, 62 A. 11.

2. Search warrant authorized an arrest only in the event that stolen property was found by a search of the premises, while arrest was made without search. Ton v. Stetson [Wash.] 86 P. 668.

3. See 5 C. L. 1414.

4. Where the rules of a county house provide for the infliction of punishment on an inmate using profane language, an engineer therein is not guilty of false imprisonment in confining one so offending in the room provided for such purpose. Cunningham v. Shea, 97 N. Y. S. 884. And especially for his continued confinement under order of the keeper. Id. The fact that the profanity was directed against the engineer was immaterial. Id. Engineer should have been permitted to show the rules of the house in evidence. Id. An allegation that plaintiff was arrested and was taken in charge and kept in custody, without reasonable cause, does not imply an arrest under lawful authority. Barfield v. Coker & Co., 73 S. C. 181, 53 S. E. 170.

5. Warrant issued by a justice of the peace in one county and sent to another without proper indorsement to authorize an arrest in such county, is no protection. Sneed v. McFatridge [Tex. Civ. App.] 97 S. W. 113.

6. Where a county judge presides over two courts and jurisdiction in a particular matter is conferred on the "county judge" and not on a particular court, a process signed as judge of either court is good. Steinbergen v. Miller [Ky.] 96 S. W. 1101.

7. Bohri v. Barnett [C. C. A.] 144 F. 389; Barfield v. Coker & Co., 73 S. C. 181, 53 S. E. 170. A jailer confining one under order from a police magistrate before whom the person was brought for a hearing is not liable. Johnson v. Collins [Ky.] 89 S. W. 253.

8. Under a statute requiring a search warrant to be first served by a search of the premises and if stolen property is found to bring the person in possession before a magistrate is no justification for an arrest without a search of the premises. Ton v. Stetson [Wash.] 86 P. 668.

9. Gibson v. Holmes, 78 Vt. 110, 62 A. 11. Return of writ held insufficient as failing to recite what was done thereunder. Id. Nor can the party procuring it justify thereunder. Id.

10. Vice v. Holley [Miss.] 41 So. 7.

11. Good faith is not limited to want of "spite" and "a reckless disregard of the rights and liberties of a citizen," but requires due diligence. Blocker v. Clark [Ga.] 54 S. E. 1022.

12. Blocker v. Clark [Ga.] 54 S. E. 1022.

13. See 5 C. L. 1415.

14. An illegal imprisonment entitles one to nominal damages. Roberts v. Brown [Tex. Civ. App.] 16 Tex. Ct. Rep. 50, 94 S. W. 388. Hence error to instruct for defendant unless plaintiff proves that he has sustained damages. Id. An instruction to award plaintiff such sum as the jury might believe he ought to recover is erroneous. Pandjiris v. Hartman, 196 Mo. 539, 94 S. W. 270.

15. Pandjiris v. Hartman, 196 Mo. 539, 94 S. W. 270. The measure of damages is the sum which will compensate plaintiff for being deprived of his liberty, for the impairment of his health and mental and physical suffering. Johnson v. Collins [Ky.] 89 S. W. 253. Where the affidavit on which a prosecution was based was void, the defendant may show that plaintiff had committed the offense attempted to be charged in mitigation of damages. Shannon v. Sims [Ala.]

an element of damage.[16] Punitive damages are recoverable where the imprisonment is malicious[17] or inflicted under circumstances of contumely and indignity.[18]

§ 2. *The action to recover damages.*[19]—In Alabama trespass for false imprisonment will not lie against a corporation for the negligent and unauthorized act of a servant working under the immediate orders of a superior.[20] Plaintiff may join in one action all who participated in the unlawful imprisonment,[21] but an allegation that they acted "willfully and concertedly" does not require proof of a conspiracy to sustain the action.[22] An allegation and proof that plaintiff has been unlawfully restrained of his liberty is sufficient.[23] Justification must be pleaded.[24] An allegation that the imprisonment was without "reasonable or probable cause" is surplusage where it constitutes no defense,[25] but in Alabama it must be proved if alleged.[26] In an action for false arrest and imprisonment, the burden is on the arresting officer to justify the arrest.[27] A discharge on a writ of habeas corpus is not conclusive as to wrongfulness of the restraint.[28] Evidence must be material.[29] Though malice is not an issue, it may sometimes be shown as bearing on the truth of an alleged justification.[30] Instructions must not impose additional burdens,[31] but must inform the jury of all facts necessary to the determination of the case.[32]

FALSE PERSONATION.[33]

FALSE PRETENSES AND CHEATS.

Elements of Offense (1646).
Statutory Cheats, Swindling, etc. (1648).
Defenses (1649).
The Indictment (1650).
Evidence; Admissibility (1651).
Instructions and Verdicts (1653).

Elements of offense.[34]—To constitute the offense of obtaining property by false pretenses, there must have been a false[35] representation[36] as to a past or existing

40 So. 574. $800 held not excessive for a wrongful arrest and an assault and battery. Scott v. Com. [Ky.] 93 S. W. 668.

16. Shannon v. Sims [Ala.] 40 So. 574.

17. Mistaken identity in arresting plaintiff under a warrant issued against another person may be shown in mitigation of damages and to disprove malice. Vice v. Holley [Miss.] 41 So. 7. Evidence that plaintiff was confined in the court house when arrested and was not given sufficient food or bedding is admissible to show malice. Oates v. McGlaun [Ala.] 39 So. 607.

18. Instruction held erroneous as allowing punitive damages in absence of such facts. Bernheimer Bros. v. Becker, 102 Md. 250, 62 A. 526. Where the foreman of a telephone construction crew secured the wrongful arrest of a landowner solely to get him out of the way while the line was strung across the premises, plaintiff is entitled to punitive damages. Jackson v. American Tel. & T. Co., 139 N. C. 347, 51 S. E. 1015.

Only compensatory damages can be recovered for false imprisonment in a **suit on an officer's bond.** Scott v. Com. [Ky.] 93 S. W. 668.

19. See 5 C. L. 1415.

20. Case is the appropriate remedy. Western Union Tel. Co. v. Thompson [C. C. A.] 144 F. 578.

21, 22. Egleston v. Scheibel, 99 N. Y. S. 969.

23. Immaterial whether the charge against him was well founded. Barfield v. Coker & Co., 73 S. C. 181, 53 S. E. 170. A complaint alleging that a certain police officer took plaintiff from his cell to another room and abused him and then remanded him to his cell does not state a cause of action. Egleston v. Scheibel, 99 N. Y. S. 969.

24. Defendant cannot show that plaintiff was guilty of an offense justifying his arrest under a general denial. Pandjiris v. Hartman, 196 Mo. 539, 94 S. W. 270.

25. Enright v. Gibson, 219 Ill. 550, 76 N. E. 689.

26. Western Union Tel. Co. v. Thompson [C. C. A.] 144 F. 578.

27. Tracy v. Coffey, 8 Ohio C. C. (N. S.) 88.

28. Losaw v. Smith, 109 App. Div. 754, 96 N. Y. S. 191.

29. Evidence of how long a justice of the peace who issued the void warrant had held office is immaterial. Oates v. McGlaun [Ala.] 39 So. 607.

30. Where the evidence as to whether plaintiff was in fact committing an offense when arrested is conflicting, evidence of ill feeling between plaintiff and defendant and a threat by the latter to arrest plaintiff if he ever gave him the slightest cause is admissible. Scott v. Com. [Ky.] 93 S. W. 668.

31. Where there is evidence of unlawful arrest and also of unlawful detention, an instruction making plaintiff's recovery depend upon proof of both is erroneous. Blocker v. Clark [Ga.] 54 S. E. 1022.

32. An instruction as to plaintiff's rights

fact,[37] with intent to deceive,[38] and the owner in reliance upon the representations[39] must have intentionally[40] parted with possession of and title to property to which the defrauding party was not entitled,[41] and suffered injury therefrom.[42] The representations need not be such as would have deceived a person of ordinary prudence, it being sufficient if they were calculated to deceive the person defrauded.[43] Time is not of the essence of the offense.[44]

if he was arrested "as charged in the petition" without informing the jury as to the character of the arrest therein charged is erroneous. Pandjiris v. Hartman, 196 Mo. 539, 94 S. W. 270.

33. No new cases have been found for this topic since last year's article was written. See 5 C. L. 1415. Obtaining property by false personation. See post, False Pretenses and Cheats, 7 C. L. 1648.

34. See 5 C. L. 1416.

35. In a prosecution for obtaining money by selling as clear cattle that were in fact mortgaged, defendant could show that the mortgage relied upon by the state, though fair on its face, was void because based in part upon a consideration made illegal by the anti-trust statute. State v. Wilson [Kan.] 84 P. 737.

36. A representation that a person is in a business or situation in which he is not, made for the purpose of defrauding another, and by which property is fraudulently obtained, is a false pretense. State v. Briggs [Kan.] 86 P. 447. A draft upon a bank payable upon demand is indistinguishable from a check, and either draft or check, considered alone, imports a representation that the drawer has funds to meet it. Semler v. State, 6 Ohio C. C. (N. S.) 393.

37. A false pretense cannot be predicated upon the nonperformance of a future promise or the happening of a future event. A postdated and postpayable check on the faith of which goods are obtained cannot be made the basis for a prosecution for false pretenses either under Acts 1905, p. 751, c. 169, or under § 678. Brown v. State [Ind.] 76 N. E. 881. But the coupling of a future promise with a false pretense does not relieve the pretense of its criminal character. State v. Briggs [Kan.] 86 P. 447. Representations that defendant was organizing a bank and had been sent by a banker to procure complainant's note, and that the proceeds thereof would be used to buy furniture for the bank, held to relate to past and existing facts. State v. Phelps, 41 Wash. 470, 84 P. 24.

38. No intent where accused told prosecutor there was no money in a bank with which to meet a check. State v. Miller [Or.] 85 P. 81. Evidence on trial for larceny that defendant falsely represented that he was brother and partner of a business man in good standing, and thus procured the delivery of property to him, held sufficient to authorize finding that he intended to defraud the owners and appropriate the property. People v. Snyder, 110 App. Div. 699, 97 N. Y. S. 469. Presumption of fraudulent intent in prosecution for obtaining advances on a contract for labor under the act of 1903 (Acts 1903, p. 90), held rebutted and conviction was contrary to law where accused was a minor and his failure to perform was due to his father's direction that he return home and do other work. Howard v. State [Ga.] 55 S. E. 239.

39. Cashier of a bank who drew and certified his personal check without having the money in the bank could not be convicted for false pretenses under B. & C. Comp. § 1812, where the person receiving the check was told by the cashier that there was no money in the bank to meet the check, State v. Miller [Or.] 85 P. 81. Where the person receiving the check was a banker, he was presumed to know the law relative to that business and could not have depended on the primary liability of the bank as giving validity to the check. Id. Where the alleged false pretenses by which property was obtained related to the amount of defendant's indebtedness, a charge that defendant should be acquitted if there was a reasonable doubt as to whether prosecutor knew of defendant's indebtedness before he delivered the property was proper. State v. Jackson, 128 Iowa, 543, 105 N. W. 51.

40. There is a well recognized distinction between larceny and cheating by false pretenses. In the former, the property is taken from the possession of the owner against his consent, in the latter, the owner intends to part with both possession and ownership. Commonwealth v. Barrett, 28 Pa. Super. Ct. 112.

41. To constitute the offense of obtaining property by false pretenses, there must be an attempt to defraud, an actual fraud committed, false pretenses must be used for the purpose of perpetrating the fraud and the fraud must be accomplished by means of the false pretenses made use of for that purpose. In application of these rules, there can be no offense by false pretenses where the person charged was legally entitled to the property procured. Clawson v. State [Wis.] 109 N. W. 578. Evidence held insufficient to show that a real estate broker was guilty of obtaining a note for commissions by false pretenses on the theory that the alleged buyer was a myth. Id.

42. Where the principal in a confessed judgment induced his surety to pay it by falsely representing that he was the owner of certain property which he conveyed to the surety as security, the surety was sufficiently injured and defrauded to warrant a prosecution for false pretenses. Frederick v. State [Ala.] 39 So. 915. To constitute an offense under the act of 1903 (Acts 1903, p. 90), against obtaining property on a contract for services with intent to defraud, it is essential that the hirer should sustain loss or damage. Millinder v. State, 124 Ga. 452, 52 S. E. 760.

43. People v. Smith [Cal. App.] 84 P. 449; State v. Keyes, 196 Mo. 136, 93 S. W. 801. In a prosecution for obtaining property by false pretenses, a charge that if the representations were frivolous and not calculated to deceive a person of ordinary prudence de-

The place of the crime.[45]—The offense is committed and must be prosecuted where the property was obtained,[46] unless the statute otherwise provides.[47]

Statutory cheats, swindling, etc.[48]—Statutes directed against the obtaining of property by false pretenses do not apply to real estate.[49] Among the various offenses specially prohibited by statute may be mentioned the obtaining of money by means of fraudulent checks,[50] or money or property upon a contract of hiring entered into with intent not to perform the services,[51] the obtaining of notes by false pretenses,[52] the fraudulent sale or exchange of diseased animals,[53] the collection of money by building contractors from the owners on false representations that materials have been paid for,[54] the unlawful change of one's name with intent to defraud credi-

fendant should be acquitted held abstractly incorrect. State v. Jackson, 128 Iowa, 543, 105 N. W. 51.

44. Amendment allowed from 5th to 6th of month. Obtaining money by false pretenses. People v. Hoffmann [Mich.] 12 Det. Leg. N. 805, 105 N. W. 838.

45. See 5 C. L. 1417.

40. People v. Hoffmann [Mich.] 12 Det. Leg. N. 805, 105 N. W. 838. There being a question as to the place of delivery of cattle alleged to have been obtained by false pretenses, a charge to acquit unless defendant obtained complete control and absolute possession of the cattle in the county of venue was abstractly proper. State v. Jackson, 128 Iowa, 543, 105 N. W. 51. Where the false representations were made in the county of C. and a draft obtained thereby was mailed to defendant in that county but received by him in another county, the court in C. county had jurisdiction, the draft having been delivered there. State v. Briggs [Kan.] 86 P. 447.

47. On a charge of obtaining money it appeared that an insurance agent by means of false applications procured a check drawn on a bank in the county to which the applications were sent, but cashed it in his own county. Held the court of the former county had jurisdiction under Code § 5157, providing that the place of trial may be in either of two counties when an offense is committed partly in one and partly in the other, etc. State v. Gibson [Iowa] 106 N. W. 270.

48. See 5 C. L. 1417.

49. Code § 5041, providing that if any person by false pretense and with intent to defraud obtain any money, goods, "or other property," he shall be punished, etc., does not apply to false pretenses for the purpose of acquiring real estate. State v. Eno [Iowa] 109 N. W. 119. Since an indictment for conspiracy must charge either an unlawful act or unlawful means by which the conspiracy was accomplished, an indictment for conspiracy to obtain real estate by false pretenses was defective where there was no allegation of unlawful means. Id.

50. Where one leads another to believe that he has a check and receives the money without producing the check and a fraudulent check is handed over several days later, he is guilty of obtaining money by means of a fraudulent check in violation of Pen. Code § 529, though the check was not immediately handed over. People v. Huggins, 110 App. Div. 613, 97 N. Y. S. 187.

51. The act approved August 15, 1903 (Acts 1903, p. 90), making it illegal for any person to procure money or other property on a contract to perform services with intent to defraud, does not violate the constitution of Georgia or that of the United States. Townsend v. State, 124 Ga. 69, 52 S. E. 293. Not imprisonment for debt but punishment for obtaining the property with fraudulent intent not to perform the services, hence does not violate the peonage statute, § 5526, U. S. Comp. St. 1901. Id. The act not being unconstitutional, detention of defendant upon his conviction of being a common cheat and swindler under said act was not illegal. Id. This statute has reference to contracts between a hirer and a person hired, and does not apply where the parties occupy the relation of landlord and tenant. Nor is a tenant subject to prosecution under this act, though as a part of the rental he agrees to clear up the land. Young v. State, 124 Ga. 788, 53 S. E. 101. Evidence insufficient to sustain verdict of guilty of violation of the act of August 15, 1903 (Acts 1903, p. 90), where the relation of the parties was neither that of master and servant nor of landlord and cropper but of landlord and tenant. Townsend v. State, 124 Ga. 69, 52 S. E. 293. Loss or damage to the hirer is an essential ingredient to the offense defined in the act of 1903 (Acts 1903, p. 90) prohibiting the obtaining of money or other property on a contract for services with intent to defraud. Millinder v. State, 124 Ga. 452, 52 S. E. 760. Where evidence disclosed no loss to hirer, the verdict was unauthorized. Id. Presumption of fraudulent intent under this act held rebutted and conviction held contrary to law where failure to perform was due to defendant's father having directed defendant to return home and do other work, he being a minor. Howard v. State [Ga.] 55 S. E. 239.

52. Rev. St. 1898, § 4423, punishing the obtaining by false pretense of money, goods, wares, "or other property," when considered in connection with other sections of the statute defining "property" and "personal property," makes it a criminal offense to obtain by false pretense a promissory note, notwithstanding the rule noscitur a sociis. Clawson v. State [Wis.] 109 N. W. 578.

53. The purpose of Cr. Code 1896, § 4762, making it a misdemeanor to knowingly sell or exchange a horse affected with the disease of "choking," being to prevent fraud, the enactment of the law was a proper exercise of the police power and not an unconstitutional deprivation of the right to use and enjoy property. Wester v. State [Ala.] 41 So. 969.

54. The act of February 27, 1890 (Laws

tors,[55] and false personations.[56] Under the Texas statute there is no theft by false pretext where the owner intends to part with possession and title.[57] In New York a representation as to an independent fact does not come within the statute requiring representations as to a purchaser's ability to pay for goods to be in writing in order to constitute the crime of larceny by false representations.[58] A conspiracy to obtain, in the District of Columbia, from any person, his signature to a check, by false pretense with intent to defraud, is a crime against the United States within the Federal statute making criminal a conspiracy to commit an offense against the United States.[59]

Defenses.[60]—If the representations were made with intent to deceive and to obtain the property and actually had that effect, the weak credulity of the victim of the fraud is no defense;[61] nor that he could have ascertained the falsity of the statements by the exercise of reasonable diligence but failed to do so.[62] The obtaining of money by the presentation of false claims is not purged of its criminality by the fact that before the money is ultimately obtained from the paying officer the claim is certified and allowed by other officers in the usual course of business.[63] An offer to return the property obtained is not a defense,[64] though in Pennsylvania the crime of

1889-90, p. 128), entitled "an act for the protection of builders," making it a felony for one who has contracted with another to supply labor or materials to collect the price by false representations that they have been paid for, is unconstitutional because the subject is not expressed in the title. State v. Clark [Wash.] 86 P. 1067.

55. Act Oct. 10, 1903 (Acts 1903, p. 438), prohibiting a person from changing his name except in the manner provided by law, with intent to defraud, avoid payment of any debt, etc., was a proper exercise of the police power, and did not violate the constitution prohibiting imprisonment for debt. Morris v. State [Ala.] 39 So. 973. In a prosecution for a change of name with intent to avoid the payment of a debt in violation of Act Oct. 10, 1903 (Acts 1903, p. 438), it was immaterial whether the debt was created before or after the passage of the act. Id.

56. For false personations not made for the purpose of obtaining property see separate article False Personation, 5 C. L. 1415. In prosecution for grand larceny under Pen. Code §§ 528, 531, evidence held sufficient to warrant finding that defendant obtained a sum of money by representing himself to be another. People v. Reiss, 99 N. Y. S. 1002.

57. Held not to constitute theft by false pretext under Pen. Code 1895, art. 861, where accused procured prosecutor to give a check upon the former's representation that the latter had assaulted a third person and that if the check was not given accused would have prosecutor arrested. Price v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 876, 91 S. W. 571.

58. Representation on which defendant obtained goods, that he was a member of a firm one of the members of which was his brother, a business man of good financial standing, was of an independent fact, not relating solely to defendant's financial ability, and so not required by Pen. Code § 544 to be in writing to constitute a crime. People v. Snyder, 110 App. Div. 699, 97 N. Y. S. 469.

59. U. S. Rev. St. § 5440 (Comp. St. 1901, p. 3676). Geist v. U. S., 26 App. D. C. 594.

60. See 5 C. L. 1418.

61. People v. Smith [Cal. App.] 84 P. 449. The general rule is that any pretense which deceives the person defrauded is sufficient to sustain an indictment or information for obtaining property of value by false pretenses. State v. Phelps, 41 Wash. 470, 84 P. 24. Information charging false representations that defendant was organizing a bank, that certain needed money could be obtained on complainant's note, that a banker had sent defendant to procure the note, etc., held sufficient as against objection that the representations were not calculated to deceive an ordinary person. Id.

62. People v. Smith [Cal. App.] 84 P. 449. In a prosecution under Rev. St. 1899, § 1927, for obtaining money by false pretenses, where the false representations are neither absurd nor irrational and are calculated to deceive the person to whom they are made, his failure to ascertain their truth or falsity by making an investigation is no defense. State v. Keyes, 196 Mo. 136, 93 S. W. 801. Statutes like this one are designed to furnish protection to those who from undue confidence in others or from inexperience are liable to become the victims of dishonest and designing dealers. Id.

63. In a prosecution of a coroner for obtaining money from the state by false representations that a certain person over whom an inquest was held was a stranger not belonging to the state, so that the expenses of the inquisition were payable by the state and not by the county, it was no defense that the account had been certified and allowed by the circuit judge and that therefore the auditor general in drawing his warrant upon the state treasurer did not rely upon defendant's representations but upon the certificate of the judge. People v. Hoffmann [Mich.] 12 Det. Leg. N. 805, 105 N. W. 838. No argument that the representations had no effect beyond the auditor general. Id. The approval by the circuit court of the coroner's claim is not a judgment so as to bring the case within the rule that the col-

defrauding by false pretenses may be settled between the complainant and the offender at the discretion of the examining magistrate or of the court,[65] but it is essential to such settlement that complainant should acknowledge satisfaction for his injury.[66]

Limitations.—The time within which the prosecution must be brought is regulated by statute.[67]

The indictment.[68]—The indictment must be specific in its allegations,[69] including those relative to the description and value of the property obtained.[70] Whether it is sufficient to use the language of the statute depends upon the particularity with which the offense is therein defined.[71] All the elements of the crime must be alleged.[72] Thus, the ownership of the property,[73] and the means whereby

lection of a judgment, though obtained by false testimony, is not obtaining money by false pretenses. Id.

64. Exclusion of evidence on cross-examination of prosecutor as to his willingness to accept defendant's offer to restore money obtained by false representations held not error. People v. Reiss, 99 N. Y. S. 1002.

65. Act March 31, 1860, § 9, P. L. 427. Commonwealth v. Carr, 28 Pa. Super. Ct. 122.

66. Neither partial restitution by defendant nor an agreement falling short of such acknowledgment bars a prosecution. Not error to refuse to admit certain checks given in partial restitution. Commonwealth v. Carr, 28 Pa. Super. Ct. 122.

67. The offense of obtaining money by false pretenses being punishable by confinement in the penitentiary at the discretion of the court is not within Code Pub. Gen. Laws art. 57, § 11, requiring prosecutions for certain misdemeanors to be brought within one year from the time the offense was committed. Schaumloeffel v. State, 102 Md. 470, 62 A. 803.

68. See 5 C. L. 1418.

69. Must be sufficiently specific to apprise accused of nature and cause of accusation. Indictment charging merely that accused "by a false promise and with intent to injure and defraud one B. did then and there obtain from said B. goods of the value of $3, contrary," etc., held fatally defective. Cook v. State [Fla.] 40 So. 490. An information stating that accused, by the fraudulent manner in which he threw certain playing cards, induced prosecutor to part with a specified sum of money "on his ability to correctly describe one of the cards thrown," stated no offense under Burns' Ann. St. 1901, § 2178, punishing bunco steering, it failing to charge that a wager was laid on the game or that prosecutor participated therein. Clark v. State [Ind.] 77 N. E. 52. Indictment for violation of Acts 1903, p. 90, by fraudulently obtaining money on a contract for services, held fatally defective for failure to state when the services were to commence, or their duration, or that prosecutor agreed to pay any amount to defendant for such services. Judgment should have been arrested on motion. Watson v. State, 124 Ga. 454, 52 S. E. 751. The indictment need only be sufficiently definite to enable the accused to make his defense, and guard against further prosecution for the same cause, and to inform the court of the facts so that it may decide whether they are sufficient in law to support a conviction. Geist v. U. S., 26 App. D. C. 594. Indictment under U. S. Rev. St. § 5440 (U. S. Comp. St. 1901, p. 3676), making it a crime to conspire to commit an offense against the United States, held sufficiently definite where it charged conspiracy by false pretenses with intent to defraud by which defendants obtained a check from a partnership. Id.

70. An indictment charging defendant with having obtained by false pretenses "about 180 head of cattle" of the value of "about $15,000" held too uncertain in its description of the cattle and statement of their value. State v. Jackson, 128 Iowa, 543, 105 N. W. 51.

71. Indictment for obtaining money by false pretenses which is in the form prescribed by Cr. Code 1896, p. 330, § 4923, form 48, is sufficient. Frederick v. State [Ala.] 39 So. 915. Where the statutory definition of the crime includes generic terms, it is not sufficient to follow the language of the statute. Indictment charging obtaining of money held fatally defective for failure to aver ownership of the money, or a legal excuse for failure to make such allegation. Prosecution under Comp. L. 1897, § 1131. Territory v. Hubbell [N. M.] 86 P. 747. The purpose of Cr. Code 1896, § 4762, prohibiting one from knowingly selling or exchanging a horse affected with "choking," was to prevent fraud, and hence an indictment thereunder must state that the offense was committed with intent to defraud. Wester v. State [Ala.] 41 So. 969.

72. Among these are the intent to defraud, the design, the means used by which the fraud was practiced, and the description of the article or thing of value obtained. State v. Phelps, 41 Wash. 470, 84 P. 24. An indictment for theft by false pretext under Pen. Code 1895, art. 861, must allege an appropriation of the property by the accused. A mere charge that the property was obtained by false representations with intent to appropriate is insufficient. Price v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 876, 91 S. W. 571. Under art. 861 the fraudulent intent must exist at the time of obtaining the goods and the representations must be false. Under art. 877 the goods are obtained by contract of bailment and the fraudulent intent is conceived after legally obtaining the property. Id.

73. An indictment for obtaining property by false pretenses must allege the ownership of the property. State v. Jackson, 128 Iowa, 543, 105 N. W. 51; Territory v. Hubbell [N. M.] 86 P. 747. In an indictment for obtaining property by means of a false written statement as to one's financial condition in

it was obtained,[74] must be stated, and it must also be affirmed that the owner relied upon the representations;[75] but a statement that "by means of" the false pretense the property was obtained is equivalent to an allegation that prosecutor relied thereon.[76] Under the Georgia statute against obtaining property on a contract to perform labor, it is not essential that the term of service should have expired before the indictment is preferred.[77] In New York, one may be prosecuted as for larceny on a charge of obtaining money by means of a fraudulent check.[78] A charge of intent to defraud of a draft "and the money obtained upon it" is not necessarily bad for duplicity.[79] An information charging defendant with obtaining money by false representations that he was a loan agent is not bad for failure to state whether the application of the borrower for the loan was written or oral.[80] Amendments to conform to the proof may be made where no prejudice results.[81]

Evidence; admissibility.[82]—If otherwise competent,[83] evidence is admissible which tends to show a pretense,[84] its falsity,[85] the fraudulent intent of the accused,[86]

violation of Laws 1903, c. 5134, p. 73, the ownership of the property parted with is a material allegation. Strickland v. State [Fla.] 40 So. 178.

74. Indictment charging that defendant obtained complainant's note by false representations that he was organizing a bank and had been sent by a banker to get the note, and that the money to be raised thereon would be used to buy furniture for the new bank, held sufficient as against objection that the representations did not relate to past or present facts. State v. Phelps, 41 Wash. 470, 84 P. 24.

75. Indictment under c. 5134, p. 73, Laws 1903, for obtaining property, etc., by means of a false written statement as to one's financial condition, held defective for failure to state that the one parting with the property was deceived by the statement. Strickland v. State [Fla.] 40 So. 178.

76. Indictment alleging that "by means and color of which false pretenses" defendant obtained the property in question, held not demurrable for failure to charge in express terms that prosecutor relied upon the pretenses and was induced by them to part with his property. State v. Dodenhoff [Miss.] 40 So. 641.

77. Act 1903 (Acts 1903, p. 90). Proof of failure to perform and failure to return the property advanced, even during the contract term of service, is sufficient, under the act, to establish prima facie the intent to defraud. Millinder v. State, 124 Ga. 452, 52 S. E. 760.

78. Pen. Code § 528 provides that a person committing the acts therein stated steals the property and is guilty of larceny. Section 529 provides that a person obtaining money by means of a fraudulent draft or check is guilty of stealing the same and punishable accordingly. Held defendant was not prejudiced by being charged with obtaining money by means of a fraudulent check and being prosecuted as for larceny, the deposition of complainant also charging violation of § 529. People v. Huggins, 110 App. Div. 613, 97 N. Y. S. 187. The court of special sessions under Code Cr. Proc. § 56, giving it jurisdiction of a prosecution for petit larceny, has cognizance of the offense of obtaining money by means of a fraudulent check. Id.

79. Information charging the false pretense as having been made with intent to defraud prosecutor out of a draft "and the $60 obtained upon it" was not bad for duplicity, only one offense being charged arising out of the single transaction of obtaining a draft for $60 by false pretenses. State v. Briggs [Kan.] 86 P. 447. Averment that defendant had collected the draft did not state an additional offense. Id.

80. Not error to refuse to make more definite. State v. Briggs [Kan.] 86 P. 447.

81. Amended so as to show that certain land represented by defendant to be owned by him was in West Virginia and not in Virginia. People v. Langley, 114 App. Div. 427, 100 N. Y. S. 123. Court did not err in refusing to direct acquittal on motion of defendant, even though made before the amendment; inasmuch as the identity of the property had been clearly established. Id.

82. See 5 C. L. 1419.

83. In prosecution for obtaining money by false pretenses, evidence that defendant had taken the **advice of counsel** held properly excluded where the offer of proof was not accompanied by a showing that the advice was given in good faith after a full statement of the facts. State v. Oppenheimer, 41 Wash. 630, 84 P. 588. Where the pretense related to defendant's indebtedness, his statements as to what property was included in certain mortgages executed by him were not objectionable as not being the best evidence; the matter inquired into being defendant's statements and not the contents of the mortgages, and it also being permissible to identify, by parol, property covered by a mortgage. State v. Jackson, 128 Iowa, 543, 105 N. W. 51.

84. In a prosecution for false pretenses whereby prosecutor was induced to purchase worthless stock, evidence that one of the defendants in the presence of prosecutor agreed to buy shares of the same stock was admissible as showing a fraudulent scheme. Lawrence v. State [Md.] 63 A. 96. It being claimed that such agreement was merely a part of a fraudulent scheme to mislead the prosecutor, it was proper to admit evidence to show the worthlessness of a certificate of deposit given in payment for the stock purchased by defendant. Id. On a charge of grand larceny by defendant's representing

and reliance upon the representations by the party defrauded.[87] Upon the question of intent evidence of other and similar pretenses made at or about the same time is admissible.[88] Immaterial matters will be excluded.[89] In a prosecution for conspiracy to defraud by false pretenses, evidence to prove a conspiracy other than that charged in the indictment is inadmissible.[90] Under a statute requiring the state to furnish the accused with the names of the witnesses and a statement of the false pretenses relied upon by the prosecution, the state is not limited to the introduction of only those witnesses whose names were disclosed by the list furnished.[91]

himself to be another, it was proper to allow the testimony of the latter that he possessed cards similar to the card used by defendant in making the representations. People v. Reiss, 99 N. Y. S. 1002.

85. In a prosecution for larceny by obtaining money by misrepresentations as to the ownership of certain land, a witness could testify that he, and not defendant, or a certain company, owned the land. People v. Langley, 114 App. Div. 427, 100 N. Y. S. 123. An abstract of title was also admissible. Id. In a prosecution of a coroner for obtaining money from the state by false representations that a certain deceased person was a nonresident so that the expense of inquisition would be payable by the state, entries from city directories in the official library of defendant giving the name and residence of deceased held competent to show that deceased was not a stranger. People v. Hoffmann [Mich.] 12 Det. Leg. N. 805, 105 N. W. 838. Where it appeared that the statement of an attending physician had been procured to the effect that the deceased was a stranger, testimony of the physician as to what was said and done at the hospital at the time the statement was obtained was admissible where she further testified that according to her best recollection it was defendant who procured the statement. Id. Testimony that the physician who made the post mortem examination received no fee whereas a fee was included in the bill presented to the state was admissible. Id. Where on a prosecution for false pretenses whereby worthless stock was sold to complainant, defendant at the time of the sale stated that he had only the amount of stock which he was selling, it was proper to admit evidence that subsequently he had in his possession other shares which he carelessly carried around in a satchel. Lawrence v. State [Md.] 63 A. 96.

86. In a prosecution for a change of name with intent to avoid the payment of a debt in violation of Act Oct. 10, 1903 (Acts 1903, p. 438), evidence that defendant owed other debts than the one alleged in the indictment was admissible to show defendant's fraudulent intent in changing his name. Morris v. State [Ala.] 39 So. 973.

87. Where a coroner was charged with defrauding the state by presenting a false claim, testimony that the deputy auditor general relied upon defendant's certificate as to the residence of a deceased person was properly admitted. People v. Hoffmann [Mich.] 12 Det. Leg. N. 805, 105 N. W. 838.

88. In a prosecution for obtaining commissions in advance on false representations that defendant was a loan agent, testimony that defendant had made similar representations and pretenses to others was admissible to show his knowledge of the falsity of the representations made in the present case, and his guilty intent in making them. State v. Briggs [Kan.] 86 P. 447. Where a coroner was charged with obtaining money from the state by false representations as to the residence of a deceased so as to make the cost of inquisition a state charge, evidence of false representations by defendant in connection with other inquests was admissible to show a fraudulent intent and to prove knowledge of the falsity of the representations. People v. Hoffmann [Mich.] 12 Det. Leg. N. 805, 105 N. W. 838. Evidence that the subject of an inquest in one of the collateral cases who was represented to be a nonresident was for five years a member of a labor union in the state was admissible. Id. Testimony of one named as an inquest witness in one of the collateral cases that defendant was not present at the time witness' testimony at the alleged inquest was given was admissible to show that no inquest was had and that the demand for fees was fraudulent. Id. On a charge of cheating by false pretenses it is proper to allow proof of other false pretenses made at or about the same time for the purpose of showing motive and intent. State v. Gibson [Iowa] 106 N. W. 270. In **Washington** the offense charged must be part of one connected scheme or system to justify the introduction of evidence of similar pretenses. In a prosecution for obtaining money by fraudulent representations of agency to collect for another on account of certain advertisements, evidence of other collections by defendant on account of the advertisements was incompetent as bearing upon the question of intent. State v. Oppenheimer, 41 Wash. 630, 84 P. 588.

89. In a prosecution for larceny by obtaining money by false personation, the exclusion of evidence on cross-examination of prosecutor as to who had been paying his board, held at most a technical error not prejudicial in view of the charge and because it related to an immaterial subject. People v. Reiss, 99 N. Y. S. 1002. Where the charge was obtaining cattle by false pretenses evidence that because of an advance in the price of corn defendant did not make as much on the cattle purchased as he expected to, and that some of the cattle died after he received them was inadmissible. State v. Jackson, 128 Iowa, 543, 105 N. W. 51. In prosecution for obtaining money by pretending to be the owner of property the proceedings and judgment in a claim suit interposed in an action by complainant against defendant were properly excluded as res inter alios acta. Frederick v. State [Ala.] 39 So. 915.

90. Where indictment charged conspiracy to defraud one R., evidence to prove a con-

Sufficiency of proof.[92]—An immaterial variance which could not have been prejudicial to the accused will not warrant setting aside a conviction.[93] A charge of obtaining money is sustained by proof of obtaining a check and receiving the money thereon.[94] It is not necessary to prove that the amount of money received was precisely the same as that alleged in the indictment,[95] but where it is charged that defendant obtained a note, the proof must correspond to the description contained in the indictment;[96] and an allegation that defendant fraudulently procured a note is not supported by proof of the surrender of a note for a larger amount and receipt from defendant of the note referred to in the charge.[97] Proof of any one of several pretenses alleged is sufficient to sustain the indictment.[98] The question of the sufficiency of the acts disclosed by the evidence, if true, to constitute the offense charged, is for the court.[99] Proof beyond a reasonable doubt is all that is required.[1] The sufficiency of the evidence to sustain the verdict must necessarily depend upon each particular case.[2] The state may be relieved of the burden of proving affirmatively matter necessarily admitted by accused as a witness in his denial of the act charged.[3]

Instructions and verdicts.[4]—The usual rules as to instructions apply.[5] The

spiracy to "unload stocks on the people here" was inadmissible. Lawrence v. State [Md.] 63 A. 96.

91. Code Pub. Gen. Laws, art. 27, § 440. Schaumloeffel v. State, 102 Md. 470, 62 A. 803.

92. See 5 C. L. 1419.

93. In prosecution for obtaining money by pretending that property mortgaged by accused was his own and unincumbered it appearing that the property did not belong to defendant, it was immaterial whether the property was incumbered or unincumbered, and the absence of evidence on this question would not involve a material variance. Frederick v. State [Ala.] 39 So. 915.

94. Case should be distinguished from one where only credit entries are obtained by the holder of the instrument. State v. Gibson [Iowa] 106 N. W. 270. Where indictment charged obtaining by false pretenses "$1,800 current money" proof that defendant obtained the money by depositing at a bank a check given by complainant and drawing the proceeds, held not a variance. Schaumloeffel v. State, 102 Md. 470, 62 A. 803. Evidence showing the obtaining of a warrant drawn by the auditor-general upon the state treasurer and the subsequent cashing of a check drawn by the treasurer on a depository of state funds is not a variance from an information charging the obtaining of "money" from the state by false pretenses. People v. Hoffmann [Mich.] 12 Det. Leg. N. 805, 105 N. W. 838.

95. Charge $24.80; proof, $12. State v. Gibson [Iowa] 106 N. W. 270.

96. Indictment for procuring by false pretenses the execution of a note for $66.72 held not supported by proof of obtaining a note for $33.36; the description of the note being of the essence of the offense. State v. McNerney, 118 Mo. App. 60, 94 S. W. 740.

97. Allegation that defendant fraudulently procured a note for $265 held not sustained by proof of the surrender to defendant of a note for $315 and receipt by prosecutor from defendant of the $265 note. State v. McWhirter [N. C.] 53 S. E. 734.

98. State v. Keyes, 196 Mo. 136, 93 S. W. 801. State need not prove all the representations alleged. People v. Smith [Cal. App.] 84 P. 449.

99. Held proper to refuse to instruct that it was prosecutor's duty to make an investigation as to the truth or falsity of the representations, the question whether or not the representations constituted the offense being a question of law for the court. State v. Keyes, 196 Mo. 136, 93 S. W. 801.

1. Held proper to refuse to charge that jury must be convinced beyond a "doubt" that defendant intended to appropriate the money to his own use. People v. Reiss, 99 N. Y. S. 1002.

2. Verdict finding defendant guilty of being a common cheat and swindler held not without evidence to support it where the evidence supported the allegations of the accusation, and the person alleged to have been defrauded parted with his property upon the false representation of a fact and sustained a loss. Thomas v. State [Ga.] 54 S. E. 813. That the conviction was based upon the testimony of complainant was no ground for complaint; his credibility being for the jury, and the verdict being amply sustained when his testimony was taken in connection wth the other evidence in the case. People v. Langley, 114 App. Div. 427, 100 N. Y. S. 123.

3. Where in a prosecution of defendant for changing his name defendant as a witness denied that he had ever changed his name at all the state was thereby relieved of the burden of proving that the change was not made as provided by law. Morris v. State [Ala.] 39 So. 973.

4. See 5 C. L. 1420.

5. Omission of word "feloniously" in instruction as to intent on prosecution for larceny by false representatione was harmless where its use would not have further enlightened the jury. People v. Snyder, 110 App. Div. 699, 97 N. Y. S. 469. Where in a prosecution for false pretenses the first instruction required the jury to find every essential fact necessary to constitute the offense and used the terms

court need not enumerate all the elements of the crime in each specific instruction, it being sufficient if they are given by the entire charge.[6]

FALSE REPRESENTATIONS; FALSIFYING RECORDS; FAMILY SETTLEMENTS; FEDERAL PROCEDURE; FELLOW-SERVANTS, see latest topical index.

FENCES.[7]

Rights, duties, and regulations.[8]—As a proprietary right the owner of land may construct fences thereon, and, if they are lawful,[9] the intent and motive with which they are built are immaterial,[10] and the resulting injury is damnum absque injuria.[11] An order served upon a property owner by a highway commissioner claiming that his fence encroaches upon the highway and ordering him to remove it, is no proof of the fact of encroachment.[12] Appeals from orders of fence viewers must be taken within the required time.[13]

Construction, maintenance, and cost.[14]—One who has assumed the duty of maintaining a partition fence is only bound to maintain one sufficient to restrain domestic animals,[15] and a fence constructed according to statute is in law sufficient.[16] One undertaking voluntarily or pursuant to contract to maintain a division fence must so construct it as not to unnecessarily injure others.[17] One tearing down the fence of another is only bound to restore it to its former condition.[18] One whose stock is

of the statute defining the offense which were not technical, held not error to omit any further definition of the offense. State v. Keyes, 196 Mo. 136, 93 S. W. 801. Where the alleged representations referred to defendant's financial condition and the court charged to acquit if there was a reasonable doubt as to whether prosecutor knew of defendant's indebtedness before he delivered the property, the court should have given a charge requested by the state that if defendant for the purpose of fraudulently obtaining the property told prosecutor that he was not in debt, and prosecutor parted with his property in reliance on such statement, and it was false and known to be false by defendant, the fact that prosecutor had previously heard that defendant was in debt would not preclude a conviction. State v. Jackson, 128 Iowa, 543, 105 N. W. 51. Pen. Code § 1110, provides that defendant cannot be convicted if the false pretense was unaccompanied by a false token or writing unless the false pretense be proven by two witnesses or by one and corroborating circumstances. Held an instruction that the pretense must have been made to the person alleged to have been defrauded was not contradictory to another instruction that a statement made by a third person in the presence of defendant and prosecutor, that defendant had made to her the same representation which was the basis of the prosecution, was not of itself evidence of the fact related in the statement, but was admissible as tending to show the conduct of defendant. The conduct of defendant at the time the statement was made was evidence of a "corroborating circumstance" within § 1110. People v. Smith [Cal. App.] 84 P. 449.

6. Where court had already charged that a person who "knowingly and designedly" defrauds another by false pretenses is guilty of the crime, it was not error to omit the element of knowledge in a subsequent instruction. People v. Smith [Cal. App.] 84 P. 449.

7. Duty of railroads to fence, see Railroads, 6 C. L. 1204.

8. See 5 C. L. 1420.

9. Not render less lawful because they extend only along one side of the land and do not inclose it. Anthony Wilkinson Live Stock Co. v. McIlquam [Wyo.] 83 P. 364. Evidence held insufficient to show that the fence was maliciously constructed to shut off the adjoining owner's light and air. Metz v. Tierney [N. M.] 83 P. 788. For spite fences, see Adjoining Owners, 7 C. L. 28.

10. Built to shut off an adjoining landowner's access to the public lands for pasturage. Anthony Wilkinson Live Stock Co. v. McIlquam [Wyo.] 83 P. 364.

11. Defendant so erected a fence as to practically exclude plaintiff's cattle from the public lands beyond. Anthony Wilkinson Live Stock Co. v. McIlquam [Wyo.] 83 P. 364.

12. Labo v. Asam [Mich.] 12 Det. Leg. N. 892, 106 N. W. 281.

13. Under Code, §§ 2369, 4552, 4548, the appeal bond must be filed within 20 days. Hahn v. Lumpa's Estate [Iowa] 109 N. W. 310.

14. See 5 C. L. 1421.

15. Need not be a legal fence. Hubbard v. Gould [N. H.] 64 A. 668.

16. Pub. St. 1901, c. 143, § 5. Hubbard v. Gould [N. H.] 64 A. 668.

17. Horse injured by becoming tangled in a loose wire. Hubbard v. Gould [N. H.] 64 A. 668.

18. Gulf, etc., R. Co. v. McMurrough [Tex. Civ. App.] 14 Tex. Ct. Rep. 476, 91 S. W. 320. An instruction that defendant was bound to repair so as to keep out stock held erroneous. Id.

injured because of a defective fence resulting from the negligence of another, must not himself be guilty of contributory negligence.[19] Defendant's negligence must be the proximate cause of the injury,[20] and one seeking to recover for time spent in hunting for stock can only recover for such time as a prudent man would have spent.[21] An injunction will not issue to restrain an adjoining land owner from interfering with the construction of a division fence for the expense of which he will be equally liable where the petitioner wrongfully tore down a sufficient one.[22] In Louisiana the owner of a lot cannot be made to contribute to the expense of constructing a partition fence for the exclusive benefit of the adjoining owner.[23]

Crimes and penalties.[24]—In Texas it is a criminal offense to willfully destroy the fence of another,[25] unless done under a mistake of fact,[26] or such fence has been wrongfully attached to the defendant's fence.[27] Under a statute providing that it shall be unlawful for any joint owner to remove a dividing fence without the consent or notice to the adjoining owner, a removal to another location but not separating it is not a violation,[28] nor is such statute applicable where the adjoining owner is using the fence without right.[29]

FERRIES.[30]

A ferry is a public rather than a private right,[31] and the grant of a ferry privilege carries the right to condemn land for a landing place.[32] A ferryman has the same right to navigate a stream that every other citizen enjoys,[33] and such right is not subservient to the right of a riparian owner to maintain booms upon it.[34] In Louisiana the police juries of the several parishes have exclusive control of the ferries within their respective limits,[35] and may operate them directly or through les-

19. The owner of a fence wrongfully torn down by another must exercise reasonable care and diligence to protect himself from resulting damages. Gulf, etc., R. Co. v. McMurrough [Tex. Civ. App.] 14 Tex. Ct. Rep. 476, 91 S. W. 320. Where it appeared that a private gateway could have been repaired for 25c or $1.25, it was a question for the jury whether it could be repaired practically without expense or labor by plaintiff whose mules were killed by escaping onto the tract. Missouri, etc., R. Co. v. Dunnaway [Tex. Civ. App.] 16 Tex. Ct. Rep. 347, 95 S. W. 760. Plaintiff being entitled to let his stock run on his premises their escape therefrom did not relieve the company from liability for failing to maintain a proper gate. Id.

20. Where the cutting of a fence lets stock upon a railroad right of way and because of the absence of cattle guards, they escape onto the highway and are lost, both the cutting of the fence and the absence of the cattle guards are the proximate cause. Southwestern Tel. & T. Co. v. Krause [Tex. Civ. App.] 92 S. W. 431.

21. Instruction held erroneous as not limiting the recovery. Southwestern Tel. & T. Co. v. Krause [Tex. Civ. App.] 92 S. W. 431.

22. Auman v. Cunfer, 30 Pa. Super. Ct. 368.

23. Civil Code, arts. 686, 687, held inapplicable. Bouchereau v. Guilne, 116 La. 534, 40 So. 863.

24. See 5 C. L. 1422.

25. Art. 794, Pen. Code 1895, is applicable to all fences, though not enclosing property used for agricultural purposes. McNeely v. State [Tex. Cr. App.] 96 S. W. 1083.

26. One breaking a fence to release a boat which he in good faith believed he had a right to use, is not liable under the law protecting fences. Giddings v. State [Tex. Cr. App.] 96 S. W. 926. And it is immaterial whether a storm was raging or not. Id.

27. McNeely v. State [Tex. Cr. App.] 96 S. W. 1083. May remove by any means short of a breach of the peace. Id.

28. Pen. Code 1895, arts. 796, 797. Camp v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 403, 92 S. W. 845.

29. Pen. Code 1895, art. 2501. McNeely v. State [Tex. Cr. App.] 96 S. W. 1083.

30. See 5 C. L. 1422.

31. Warner v. Ford Lumber & Mfg. Co. [Ky.] 93 S. W. 650.

32. The measure of damages is the market value of the land taken and the resulting injury to the residue. Warner v. Ford Lumber & Mfg. Co. [Ky.] 93 S. W. 650.

33. Warner v. Ford Lumber & Mfg. Co. [Ky.] 93 S. W. 650.

34. Warner v. Ford Lumber & Mfg. Co. [Ky.] 93 S. W. 650. Hence no damages can be recovered for injury to such booms resulting from the proper operation of the ferry. Id.

35. Blanchard v. Abraham, 115 La. 989, 40 So. 379; Police Jury of Lafourche v. Robichaux, 116 La. 286, 40 So. 705. Act No. 202, p. 391, of 1902, conferring upon the police juries of the several parishes, excepting the parish of Orleans, exclusive rights over ferries, is not a local or special law, by reason of such exception, within art. 48, Const. of

sees.[36] Their lessee has a license which is exclusive in its nature,[37] and the police jury of the parish has the power to prohibit unlicensed "free ferries or bridges" within competitive distance.[38] Toll rates fixed by the court must be reasonable.[39] Ferrymen are liable for their negligence.[40]

FIDELITY INSURANCE; FILINGS; FINAL JUDGMENTS AND ORDERS; FINDING LOST GOODS; FINDINGS, see latest topical index.

FINES.[41]

Fines may be imposed upon corporations for contempt in the willful violation of injunctions.[42] It is often provided by statute that the court may direct the imprisonment of a convict until a fine imposed upon him has been satisfied.[43] The imprisonment thus provided for is no part of the judgment,[44] and a void clause directing imprisonment may be eliminated from the judgment without affecting its validity.[45] Under such statute the court may not direct imprisonment in the state prison for the satisfaction of a fine imposed for the commission of a misdemeanor,[46]

Louisiana. Blanchard v. Abraham, 115 La. 989, 40 So. 379.

36. Police Jury of Lafourche v. Robichaux, 116 La. 286, 40 So. 705.

37. Blanchard v. Abraham, 115 La. 989, 40 So. 379. A combination of a majority of the patrons of a licensed ferry, each subscribing a proportional sum, for the construction of a pontoon ferry bridge, and to which others may become subscribers, is an unlawful infringement of the lessee's franchise (Id.), and cannot be considered as a private ferry operated by individuals for the benefit of themselves and families (Id.).

38. Blanchard v. Abraham, 115 La. 989, 40 So. 379. May also enjoin free ferries within the prescribed prohibited distance. Police Jury of Lafourche v. Robichaux, 116 La. 286, 40 So. 705.

39. One who is familiar with the ferry business and toll rates, may state his opinion whether a particular rate is reasonable or not (Covington v. St. Francis County [Ark.] 91 S. W. 186), but he cannot testify that he would be willing to take the ferry at that rate where the privilege is exclusive to the applicant by virtue of the ownership of the land at the termini (Id.). Where an applicant has exclusive right to ferry by virtue of the ownership of the land at the termini, declarations of law that such licensee cannot be placed in competition with unlicensed parties as to rates, though the road served may be a public county road, and that such owner's rights are not lessened by the fact that such road is a public county road, are not germane to the issue of the reasonableness of the rates fixed. Id. On appeal to the circuit court from ferry rates fixed by the county court, the question of reasonableness under Kirby's Dig. § 3563 was exclusively for the court. Id.

40. Ferry steamers both held at fault for a collision, one in giving a passing signal which required them to cross courses, there being a dense fog, and the other for assenting to it. The San Rafael [C. C. A.] 141 F. 270.

41. See 5 C. L. 1424. See Criminal Law, 7 C. L. 1010, as to extent of fine; Indictment and Prosecution, 5 C. L. 1790, as to procedure for imposition.

42. Franklin Union No. 4 v. People, 220 Ill. 355, 77 N. E. 176. See Contempt, 7 C. L. 746; Corporations, 7 C. L. 862.

43. Penal Code § 1205 provides that a judgment imposing a fine may also direct that defendant be imprisoned until the fine be satisfied. Held a judgment imposing a fine and directing imprisonment until the fine is paid not to exceed one day for each $20 that shall remain unpaid, was not void for using the word "paid" instead of "satisfied," and did not deprive defendant of his right to discharge part of the fine by imprisonment for part of the time. Ex parte Krouse, 148 Cal. 232, 82 P. 1043. General statutory provisions authorizing commitment to jail until a fine is paid apply to fines imposed under subsequent statutes. Under Act July 1, 1905 (Laws 1905, p. 322), § 11, imposing a fine upon persons practicing dentistry without a license, the party convicted may be committed to jail until the fine and costs are paid under Cr. Code div. 14, § 14 (Hurd's Rev. St. 1903, c. 38, § 452), authorizing commitment when a fine is inflicted. Kettles v. People [Ill.] 77 N. E. 472. Defendant was sentenced to jail for 30 days and to pay a fine of $121.75. He remained in jail for 30 days and on the next day thereafter made affidavit that he was unable to pay the fine and was put to work for the benefit of the county which he continued for 60 days and was thereafter kept in jail for 45 days. Held under White's Ann. Code Cr. Proc., allowing $3 per day, defendant was entitled to his discharge, not even counting the 60 days' work. Ex parte Spears [Tex. Cr. App.] 90 S. W. 1011.

44, 45. Pen. Code § 1205. In re Sullivan [Cal. App.] 84 P. 781.

46. Under Pen. Code § 17, reducing the crime of assault with a deadly weapon to the grade of a misdemeanor when the

and an invalid direction to commit having been made and acted upon, the court cannot thereafter substitute a proper direction.[47] Under an ordinance providing that a defendant upon whom a fine has been imposed shall be required to work on the streets until the fine and costs are paid or replevied, a person who fails to pay or replevy his fine may be compelled to work on the streets, though the judgment contains no recital to that effect.[48] In Delaware the fine for trespass, though it constitutes a judgment,[49] is not collectible by execution where an attempted appeal has been made but there has been no dismissal or certificate that it was not duly entered,[50] but in such case the fine should be collected as provided by the statute.[51] The legislature may provide that fines and costs imposed by the inferior courts of a city for violations of state laws and city ordinances shall be paid into the city treasury,[52] and a law to this effect does not change the character of the prosecutions as being state or municipal cases.[53] Where the general criminal law of a state is made a part of the charter of a city, the disposition of fines and penalties collected by the police court of such city will be controlled by subsequent amendments to the general law, notwithstanding the charter may also provide that moneys collected by the police judge shall be paid to the city.[54] The constitution of North Carolina appropriates to the school fund the clear proceeds of all penalties, forfeitures, and fines.[55] It is provided by statute in some states that a complaining witness in a prosecution for the violation of liquor laws shall be entitled to a specified portion of the amount of the fines or penalties recovered.[56]

FIRES.

§ 1. Rights and Duties Respecting Fires (1657).
§ 2. Remedies and Procedure (1659).
§ 3. Fire Districts and Protection (1659).

§ 1. *Rights and duties respecting fires.*[57]—One using fire for a lawful purpose must use a degree of care and prudence commensurate to the danger to which prop-

court imposes a fine as a punishment, that portion of a judgment which provided for imprisonment in the state's prison as a means of enforcing payment of the fine was void. In re Sullivan [Cal. App.] 84 P. 781.

47. Under Pen. Code § 1205 the discretionary power of the court to direct imprisonment must be exercised when the original judgment is rendered. After restraint had been imposed upon defendant, under an order that he be committed to the state prison, the court could not provide for punishment in the county jail. In re Sullivan [Cal. App.] 84 P. 781.

48. Bartlett v. Paducah [Ky.] 91 S. W. 264.

49, 50. Dasey v. State [Del.] 62 A. 300.

51. As per § 21, Rev. Code 1893, c. 128, providing that if it be not paid the justice shall commit offender to prison. Dasey v. State [Del.] 62 A. 300.

52. Could provide that fines and costs imposed by the corporation court of a city established by Gen. Laws 1899, p. 40 c. 33, should be so paid. Howth v. Greer [Tex. Civ. App.] 14 Tex. Rep. 61, 90 S. W. 211.

53. This fact did not deprive the county attorney from appearing for the state in the corporation court established by Gen. Laws 1899, p. 40, c. 33, in prosecutions for violations of state laws. Howth v. Greer [Tex. Civ. App.] 14 Tex. Ct. Rep. 61, 90 S. W. 211.

54. The charter of a city provided that the police judge should exercise the powers granted to him by the Political Code. Sections 4424-4431 of that code define the criminal jurisdiction of the police court and declare that criminal proceedings therein are regulated by Pen. Code pt. 2, tit. 11, c. 1, which includes §§ 1457, 1570. These sections were amended later so as to require all fines collected in any court, less costs, except fines for violation of city ordinances to be paid to the county treasurer. Held fines imposed by the police judge for "state misdemeanors" belonged to the county though the charter also provided that the money collected by the police judge should be paid to the city. City of Marysville v. Yuba County, 1 Cal. App. 628, 82 P. 975.

55. Under Const. art. 9, § 5, appropriating to the school fund the clear proceeds of penalties, forfeitures, and fines, the legislature could not divert the proceeds of fines to any other purpose though it was not precluded from authorizing qui tam actions for penalties, and Laws 1903, p. 146, c. 125, § 9, providing that informant in a prosecution for an illegal sale of liquor shall receive one-half of the fine imposed, is unconstitutional. State v. Maultsby, 139 N. C. 583, 51 S. E. 956. The "clear proceeds" of a

erty is exposed by such use.[58] The caution and diligence of an ordinarily prudent man is exacted both in starting the fire[59] and in preventing its escape thereafter, and this care is demanded though he was not responsible for its origin if discovered on his premises.[60] A city is not liable for a fire negligently set while in the discharge of a public function.[61] Liability for starting[62] and negligently permitting a fire to escape[63] has been the subject of legislation in some states. As in case of torts generally, defendant's negligence must be the proximate cause of the damage,[64] and the party injured must be free from contributory negligence, direct or imputed.[65]

A railroad company must so operate its trains as not to unreasonably interfere with firemen in entering upon and crossing its tracks,[66] but no liability exists unless such interference is willful or negligent.[67] The provision of the Greater New York Charter giving the fire insurance patrol the right of way over all vehicles except mail wagons is constitutional.[68]

The measure of damages[69] is usually the value of the property destroyed,[70] but in Michigan one negligently permitting a fire to escape from his premises is liable in double damages for resulting injury.[71]

fine includes the total sum less only the sheriff's fees for collection in case the fine and costs are not collected in full. Id.

56. Under § 23, c. 50, Comp. St. 1903, providing that the municipality "by whom such license was issued" shall pay to complaining witness," etc., a county is not liable for one-fourth of a sum collected as fines and paid over to the school fund where the complaint is for selling liquor without a license. Chapin v. Seward County [Neb.] 106 N. W. 778.

57. Fires by railroads are treated in the topic Railroads, 6 C. L. 1194.

58. Steam thresher. Martin v. McCrary, 115 Tenn. 316, 89 S. W. 324. The degree of care required of one using a steam thresher is the same as that required of railroad companies in the use of their engines. Id.

59. Allen v. Bainbridge [Mich.] 13 Det. Leg. N. 471, 108 N. W. 732. In determining negligence, the jury may consider all the surrounding circumstances, as the place, the extent of the fire, the nature of the material, combustibility of surrounding property and its proximity, force and direction of the wind, etc. Id.

60. Baird v. Chambers [N. D.] 109 N. W. 61. Instruction held erroneous as requiring him to use the utmost promptness and diligence. Id. Instructions taken as a whole held not to charge that defendant would be liable for failure to extinguish fires starting on its right of way irrespective of its origin. Wick v. Tacoma Eastern R. Co., 40 Wash. 408, 82 P. 711.

61. Sparks from a steam roller used in repairing streets. Alberts v. Muskegon, [Mich.] 13 Det. Leg. N. 735, 109 N. W. 262.

62. Under a statute providing that if any person shall "set on fire" any woods, marshes, or prairies, he shall be liable in a civil action to one damaged thereby, such fire must have been directly and intentionally set. Gen. St. 1901, § 8010. Johnston v. Marriage [Kan.] 86 P. 461.

63. In an action under Ballinger's Ann. Codes & St. § 3138, evidence that defendant frequently left home without leaving any one in charge of his fires held sufficient to sustain a finding that he negligently permitted them to escape. Kuehn v. Dix, 42 Wash. 532, 85 P. 43.

64. Where a fire was negligently set by defendant and plaintiff was burned thereby, the chain of causation between the negligence and the injuries was not broken by plaintiff's removal from the building and return. Birmingham R. Light & Power Co. v. Hinton [Ala.] 40 So. 988.

65. The negligence of a warehouseman in leaving some cotton exposed on the platform cannot be imputed to plaintiff who had cotton stored within. Alabama Great So. R. Co. v. Clark [Ala.] 39 So. 816.

66. American Sheet & Tin Plate Co. v. Pittsburg & L. E. R. Co. [C. C. A.] 143 F. 789.

67. American Sheet & Tin Plate Co. v. Pittsburg & L. E. R. Co. [C. C. A.] 143 F. 789. Not liable for running a freight train between the fire and the apparatus where there was nothing to apprise the crew of the situation except signals to stop, by people beside the track, which are not shown to have been heard or understood. Id. And where the train is interfering when the knowledge is brought home, no liability exists for the failure to choose the quickest way to relieve the situation where the engineer acts to his best judgment. Id. Pulling of the entire train by instead of backing or cutting held under the facts to create no liability. Id.

68. Greater New York Charter, Laws 1897, p. 260, c. 378, § 748, as amended by Laws 1900 p. 255, c. 155. Duffghe v. Metropolitan St. R. Co., 109 App. Div. 603, 96 N. Y. S. 324. Abstractly, it is the absolute duty of a motorman to stop his car if he sees the patrol or by the exercise of reasonable care could see it. Id. Instructions considered together held not to charge that the motorman's duty to stop was absolute irrespective of whether it could be safely done. Id.

69. See 5 C. L. 1426.

70. See Damages, 7 C. L. 1029.

71. Comp. Laws, § 11,653, held not unconstitutional as taking private property without compensation and giving it to another (Allen v. Bainbridge [Mich.] 13 Det. Leg. 471, 108 N. W. 732), nor as inflicting

§ 2. *Remedies and procedure.*[72]—Where a petition is broad enough to include a common-law and a statutory action for intentionally setting fire, and plaintiff in his opening statement and request for instructions treats it as under the latter, he cannot complain of the giving of instructions relating thereto.[73] Failure to allege that the fire was caused by the negligence of the servant while acting within the scope of his employment can only be reached by demurrer.[74] Plaintiff must prove defendant's negligence[75] and damages[76] by a preponderance of the evidence. Where, however, a fire occurs from the escape of sparks from a threshing engine, a presumption of negligence arises,[77] and the burden is on the defendant to overcome such presumption.[78] The burden of proving contributory negligence rests upon the defendant.[79] Where in an action by the landlord to recover for a destroyed crop, the tenant testifies and makes no claims to the crop, the defendant cannot assert such claim.[80] The general rules of evidence[81] and instructions[82] apply.

§ 3. *Fire districts and protection.*[83]—Where an ordinance extending the fire limits insufficiently describes the boundaries, extrinsic evidence is not admissible to show that a certain street commonly bears the name used, although not the name given on the plat.[84]

FISH AND GAME LAWS.

§ 1. Public Control of Fish and Game (1659).
§ 2. Offenses; Penalties; Prosecutions (1662).
§ 3. Private Rights in Fish and Game (1663). Fishery Rights (1663).

§ 1. *Public control of fish and game.*[85]—Since the ownership of fish and game is vested in the state in trust for the public,[86] the legislature may make reasonable regulations for their protection and determine upon what conditions private persons may capture them.[87] The preservation of fish and game is effected in the several

unusual punishment (Id.). Not repealed by Act No. 249, p. 409, Public Laws of 1903. Id.

72. See 5 C. L. 1426.

73. Johnston v. Marriage [Kan.] 86 P. 461.

74. Alabama Great So. R. Co. v. Sanders [Ala.] 40 So. 402.

75. Allen v. Balnbridge [Mich.] 13 Det. Leg. N. 471, 108 N. W. 732. Where M. had authority to direct the clearing of a certain lot for defendants and fire kindled in the work destroyed plaintiff's trees, evidence of the instructions given his subordinates and his statement as to the cause is admissible under Rev. Laws, c. 175, § 66, he being deceased. Putnam v. Harris [Mass.] 78 N. E. 747.

76. Allen v. Balnbridge [Mich.] 13 Det. Leg. N. 471, 108 N. W. 732. Where plaintiff proves the market value of cotton but fails to prove the grade of the cotton destroyed, it was a matter of argument to go to the jury whether they should presume that it was of the average or inferior grade. Alabama Great So. R. Co. v. Clark [Ala.] 39 So. 816.

77. Martin v. McCrary, 115 Tenn. 316, 89 S. W. 324.

78. Martin v. McCrary, 115 Tenn. 316, 89 S. W. 324. Proof that the spark arrester was of the kind in general use and that the engine did not emit sparks more copiously than was "natural for any engine of similar kind and construction," is insufficient. Id. Must show that the engine, in respect to fire precautions, was up to the art of the time when the fire occurred. Id.

79. Southern R. Co. v. Patterson [Va.] 52 S. E. 694.

80. Toledo, etc., R. Co. v. Farris, 117 Ill. App. 108.

81. Under Code Civ. Proc. § 1832, circumstantial evidence as to the origin of the fire which destroyed plaintiff's building is admissible. Murray v. Llewellyn Iron Works Co. [Cal. App.] 87 P. 202. As that defendant's servants were using highly heated rivets on the adjoining lot and that they were thrown from the heater to the user who would sometimes miss them and they would fall on plaintiff's lot. Id.

82. An instruction that the jury are to consider the facts in evidence in determining whether the fire originated in a particular way is not a charge on the weight of the evidence. Murray v. Llewellyn Iron Works Co. [Cal. App.] 87 P. 202.

83. See Municipal Corporations, 6 C. L. 714. Water districts and service, see Waters and Water Supply, 6 C. L. 1840.

84. Lamm v. Danville [Ill.] 77 N. E. 422.

85. See 5 C. L. 1426.

86. State v. Niles, 78 Vt. 266, 62 A. 795; State v. Heger [Mo.] 93 S. W. 252. Fish and oysters in public waters. Raymond v. Kibbe [Tex. Civ. App.] 15 Tex. Ct. Rep. 988, 95 S. W. 727.

states by statutes of various characters, the more common ways being to prohibit the taking of the same during certain seasons of the year,[88] restricting the methods of capture,[89] forbidding the obstruction of streams where fish are wont to run,[90] by requiring hunters to take out licenses,[91] payment of a tax,[92] and by regulating the possession,[93] the shipping,[94] and the sale of the same,[95] especially during the closed season. The legislature may make the receipt of game for shipment an offense irrespective of knowledge or intent,[96] and when so enacted, lack of knowledge or in-

87. State v. Heger [Mo.] 93 S. W. 252. A citizen has no inherent right to fish in the creeks of the state, and such right may be permitted or denied by the legislature. State v. Sutton, 139 N. C. 574, 51 S. E. 1012. There is no individual or property right to fishery in inland waters of a state and extending for a marine league to sea (Daniels v. Homer, 139 N. C. 219, 51 S. E. 992), and it is subject to legislative regulation (Id.).

88. Under Acts 1896, p. 74, No. 94, § 1, and Acts 1904, p. 167, No. 127, it is unlawful for anyone to kill wild deer except during the last week in October, Sunday not included. State v. Burns [Vt.] 64 A. 1129. Section 17 Act June 3, 1878, P. L. 160, prohibiting fishing on Sunday, is not repealed by § 48, Act May 29, 1901, P. L. 302, relating to propagation and protection of fish. Commonwealth v. Rothermel, 27 Pa. Super. Ct. 648.

89. Act of May 29, 1901 (P. L. 302), prohibiting fishing except with rod, hook, and line, "or" with a hand line, does not prohibit the use of the two at the same time. Commonwealth v. Bercaw, 30 Pa. Super. Ct. 335.

Washington, location of traps: Sess. Laws 1905, c. 140, p. 254, § 1, requiring a lateral passageway of at least 900 feet between all fish traps, prohibits the location of any trap where it will be within a distance of 900 feet laterally from another (Johansen v. Mulligan, 41 Wash. 379, 83 P. 417), and such statute is violated where a parallelogram formed by projecting lines at right angles from the ends of the trap for 900 feet and connecting the same intersect another trap, although a similar parallelogram formed from the latter would not intersect it (Id.).

Michigan: The words "and the bays and harbors connected with said lakes" in the statute prohibiting fishing with nets "in any of the waters of this state, except Lakes Michigan, Superior, Huron, and Erie, and the bays and harbors connected with said lakes, Saginaw bay, etc.," refers to lakes previously named and not to the bay and rivers mentioned afterwards. People v. Neal [Mich.] 12 Det. Leg. N. 972, 106 N. W. 857.

90. The words "mill seat" as used in Laws 1905, p. 1022, c. 824, prohibiting hedging or fishing with traps between the mouth of Bear Creek and the Joyner mill seat, are synonymous with "mill site" (State v. Sutton, 139 N. C. 574, 51 S. E. 1012), and the mill owner cannot maintain a hedge below the dam though his land extends below it (Id.). A finding by the commissioners that the discharge of sawdust from a particular mill into a stream materially injures the fish therein and that they were of sufficient value to warrant protection is a legislative function. Finding under Rev. Laws c. 91, § 8. Commonwealth v. Sisson, 189 Mass. 247, 75 N. E. 619. Hence commissioners need not act on sworn evidence (Id.), or afford the parties affected a hearing (Id.), and the order prohibiting a further discharge is a special regulation for the protection of fish (Id.), against which no prescriptive right can prevail (Id.).

91. Laws 1905, p. 168, § 54 et seq., does not require a resident to take out a license to hunt in his own county. Ex parte Helton, 117 Mo. App. 609, 93 S. W. 913. **Contra.** State v. Koock [Mo. App.] 96 S. W. 721.

92. Acts 29th Leg. p. 128, c. 90, imposing a tax on fishing boats and on fish taken for market, is not void as an ad valorem tax in violation of the uniformity and equality clause (Raymond v. Kibbe [Tex. Civ. App.] 15 Tex. Ct. Rep. 988, 95 S. W. 727), nor is it void as a revenue measure originating in the senate (Id.).

93. Acts 1896, p. 74, No. 94, as amended by Acts 1898, p. 84, No. 108, prohibiting the possession of deer during closed season, etc., is not wholly repealed by Acts 1904, p. 167, No. 128, as to nonresidents, but only so far as it is inconsistent. State v. Niles, 78 Vt. 266, 62 A. 795. Under a statute prohibiting the possession of birds of the "grouse family," it is no defense that the particular imported grouse was of a different variety from the native birds. People v. Hesterberg, 184 N. Y. 126, 76 N. E. 1032. Statement in affidavit on which the warrant issued that defendant was in possession of an imported grouse, a further statement that it was of a different variety from the native birds known as grouse, held no defense. Id. Pub. Acts, 1899, No. 88, prohibiting the sale or having in possession particular fish under a certain size, is applicable to fish from without the state, notwithstanding its title "An act to amend * * * 'An act to regulate the catching of fish in the waters of this state.'" People v. Lassen [Mich.] 12 Det. Leg. N. 857, 106 N. W. 143.

94. Under Laws 1905, pp. 170, 171, §§ 69, 70, one cannot ship game without a hunting license duly issued to him, regardless of the county in which it is killed, the place where it is offered, or its destination. Ex parte Helton, 117 Mo. App. 609, 93 S. W. 913. Evidence that there were ducks in the wagon in which defendant had gone to and returned from the lake where the shooting occurred is insufficient to show that he took them on the train with him. Hirsch v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 704, 95 S. W. 513.

95. One may purchase during the closed season, for legitimate purposes, deer and moose skins taken from animals lawfully killed (Allbright v. Northern Pac. R. Co., 96 Minn. 135, 104 N. W. 827), and may ship out of the state for the purpose of having it tanned and returned for manufacturing (Id.).

tent is no defense.[97] These statutes, like all others, must not interfere with Federal distribution of public lands,[98] and must observe constitutional requirements, such as singleness of subject,[99] class legislation,[1] taking of private property without due process of law[2] and without just compensation,[3] interfering with Federal regulation of interstate commerce,[4] and impairing the obligation of contracts.[5] But since the enactment of the "Lacey Act" by congress, providing that game upon arrival in the several states shall become subject to the local laws thereof, the states may legislate in respect to interstate game as well as local,[6] and this act is equally applicable to importations from foreign countries.[7] The Pennsylvania law making the possession of fish for sale during the closed season illegal is not applicable to fish lawfully caught in boundary waters.[8] The Maryland statute relating to culling of oysters and the return of immature ones is applicable to oysters taken from private beds.[9] One who has no legal right of fishery cannot complain of the illegal placing of poles in a seine draw.[10]

96. Wells Fargo Exp. Co. v. State [Ark.] 96 S. W. 189.

97. Under Kirby's Dig. § 3620, it is no defense that the game was fraudulently shipped as furs. Wells Fargo Exp. Co. v. State [Ark.] 96 S. W. 189.

98. Sess. Laws 1903, p. 233, c. 112, is in conflict with the laws of congress relating to the distribution of lands in so far as it attempts to authorize trespass on lands patented by the government, since the admisson of Colorado as a state. Hartman v. Tresise [Colo.] 84 P. 685.

99. Act of 1878, amending and consolidating the various acts relating to game and fish, is not unconstitutional as containing two subjects, "game" and "game fish" (Commonwealth v. Rothermel, 27 Pa. Super. Ct. 648), nor is it unconstitutional as providing penalties not expressed in its title (Id.). An act prohibiting gaming and fishing on Sunday is germane to acts relating to game and game fish. Id.

1. Acts 29th Leg. p. 128, c. 90, authorizing the seizure and confiscation of fish and oysters sold without the permit required thereby, is not void as class legislation because it does not include shrimp in the forfeiture clause. Raymond v. Kibbe [Tex. Civ. App.] 15 Tex. Ct. Rep. 988, 95 S. W. 727. The different rights given residents and nonresidents under Acts 1896, p. 74, No. 94, as amended by Acts 1898, p. 84, No. 108, and Acts 1904, p. 167, No. 128, in regard to penalties for unlawful killing and rights in shipping, held to be authorized by the fact that a license is required of the latter. State v. Niles, 78 Vt. 266, 62 A. 795.

2. Held constitutional: Acts 29th Leg. p. 128, c. 90, authorizing the seizure of fish sold and held without a permit showing the payment of tax thereon. Raymond v. Kibbe [Tex. Civ. App.] 15 Tex. Ct. Rep. 988, 95 S. W. 727. Laws 1905, p. 162, § 18, prohibiting the sale of game whether taken within or without the state. State v. Heger [Mo.] 93 S. W. 252. Code Pub. Gen. Laws, art. 72, § 8, prohibiting any one from having possession of any oysters containing more than five per cent of shells or oysters less than 2½ inches from hinge to mouth, though applicable to private beds. Windsor v. State [Md.] 64 A. 288. Laws 1900, p. 22, c. 20, as amended by Laws 1902, p. 487, c. 194, Laws 1902, p. 879, c. 317, and Laws 1904, p. 1413, c. 588, prohibiting the possession of game during the closed season, applicable to game coming from without the state. People v. Hesterberg, 184 N. Y. 126, 76 N. E. 1032.

3. Held not a taking: Laws 1905, p. 162, § 18, prohibiting the sale of game whether taken within or without the state. State v. Heger [Mo.] 93 S. W. 252.

Held a taking: Sess. Laws 1903, p. 233, c. 112, giving the public a right to fish in all streams stocked at public expense, subject to actions for trespass done to property along their banks, is unconstitutional as contravening § 15 of art. 2 of state Const. Hartman v. Tresise [Colo.] 84 P. 685.

4. Not an luterference: Pub. Act 1899, No. 88, prohibiting the sale and possession of particular fish under a certain size, though applicable to fish lawfully caught in foreign waters. People v. Lassen [Mich.] 12 Det. Leg. N. 857, 106 N. W. 143.

5. Laws 1905, p. 162, § 18, prohibiting the sale of game, does not violate state Const. art. 2. § 15, prohibiting laws impairing the obligation of a contract, nor is it retroactive. State v. Heger [Mo.] 93 S. W. 252.

6. Statutes held valid under the act: Sess. Laws 1903, § 3, p. 168, c. 15, making it a penal offense to receive certain game for shipment. Cameron v. Territory, 16 Okl. 634, 86 P. 68. Laws 1905, p. 162, § 18, prohibiting the sale of game, whether taken within or without the state. State v. Heger [Mo.] 93 S. W. 252. Kirby's Dig. § 2620, prohibiting any transportation of game beyond the line of the state. Wells Fargo Exp. Co. v. State [Ark.] 96 S. W. 189.

7. People v. Hesterberg, 184 N. Y. 126, 76 N. E. 1032, rvg. 109 App. Div. 295, 96 N. Y. S. 286.

8. Act of May 29, 1901, § 3, P. L. 302, does not apply to fish lawfully caught in Lake Erie under Act of May 29, 1901, P. L. 335. Commonwealth v. Bellsteln, 29 Pa. Super. Ct. 373.

9. Code Pub. Gen. Laws art. 72, § 7. Windsor v. State [Md.] 64 A. 288.

10. One who has no license as required by Code 1904, §§ 2086, 2087, to fish with haul nets, cannot complain of the erection of poles in certain waters contrary to Code 1904, § 2120. Whitehead v. Cape Henry Syndicate [Va.] 54 S. E. 306.

§ 2. *Offenses; penalties; prosecutions.*[11]—As a penalty, the legislature may provide for the forfeiture of property used in illegal fishing,[12] and such property may be summarily seized and sold.[13] Where there is a general act providing a penalty for illegal fishing, and a special act permitting certain fish to be caught in a particular manner, a violation of the latter constitutes illegal fishing and is punishable under the general act.[14] In Missouri, penalties collected for illegal gaming or fishing must be paid into the school fund.[15] In the absence of a statutory provision to

11. See 5 C. L. 1428.

12. Daniels v. Homer, 139 N. C. 219, 51 S. E. 992.

13. Acts Gen. Assem. 1905, c. 292, § 9, held not unconstitutional as depriving one of property without due process of law. Daniels v. Homer, 139 N. C. 219, 51 S. E. 992.

NOTE. Right of the state to summarily seize and sell property used in illegal fishing: The supreme court of North Carolina, in the recent case of Daniels v. Holmes [N. C.] 51 S. E. 992, upheld a statute providing for the summary seizure and sale of nets illegally set in certain waters. "This provision is held by the majority of the court to be a legitimate exercise of the police power of the state and not unconstitutional as depriving the citizen of his property without due process of law, Mr. Chief Justice Clark and Mr. Justice Hoke writing opinions concurring in this view. It authorizes, they say, the summary abatement of what the legislature has declared to be a criminal nuisance, and, as the legislature has the right to regulate fishing in the waters of the state, the necessities of the case in this instance justify the seizure and sale of the offending property without notice to the owner or any judgment against him after a hearing. He may contest the question of fact raised by the informant's affidavit in an action to recover the nets before sale, or after sale by an action for the proceeds of the sale or for damages, or by an injunction to prevent the sale. 'He has his full remedy, but it does not include a continuance of the nuisance to his individual profit and the public detriment, while the question of violation of the statute is being determined.' So far as authorities for these views are considered, reliance is placed by the court largely upon the decisions sustaining the validity of the New York and Wisconsin statutes authorizing the seizure and destruction of nets used in violation of the law for the protection of fish. Lawton v. Steele, 119 N. Y. 226, 16 Am. St. Rep. 813, 7 L. R. A. 134; Id., 152 U. S. 133, 33 Law. Ed. 385; Bittenhaus v. Johnston, 92 Wis. 588, 66 N. W. Rep. 805, 32 L. R. A. 380. The court, however, seems to base the decision sustaining this exercise of police power upon the actual necessity for such legislation. Mr. Chief Justice Clark says, for example: 'It (the state) has found the criminal law an ineffectual protection, and that deprivation of the nets is necessary to prevent the violation of the law. * * * The general assembly has found and so says by its statute, that this remedy is necessary to enforce the execution of the law;' and Mr. Justice Hoke says: 'And this, I apprehend, is the true principle on which forfeitures of this character can be sustained—whether it is done in abatement of the nuisance and is required by the reasonable necessity of the case.' The dissenting justices do not recognize the necessity for the arbitrary proceedings prescribed by the statute; and, while conceding the right of the legislature to regulate fishing, to prohibit the placing of nets in such parts of the public waters as it may deem proper and to declare such nets public nuisance which may be summarily abated by removal, they emphatically deny the validity of that part of the act conferring upon the oyster commissioner the power to seize the nets and sell them at auction without notice. either personal or constructive, or any judgment of condemnation by a judicial tribunal after a hearing. Three justices of the supreme court dissented from the majority's conclusion in Lawton v. Steele, 152 U. S. 133, 38 Law. Ed. 385, the New York court of appeals regarded the case 'as very near the border line' (Lawton v. Steele, 119 N. Y. 226, 240, 16 Am. St. Rep. 813, 7 L. R. A. 134), and a recent thoughtful writer says 'the principles which should govern the forfeiture of property were departed from in the decisions' in this case (Freund, Police Power, § 527). It is not easy, in view of constitutional limitations, to see how the public welfare can be promoted ultimately if the doctrine of the principal case is sound. The authorities seem to sustain the propositions announced by Mr. Justice Connor: '(1) That the right to destroy property which is a public nuisance, either per se, or made so by statute, or becoming so by the manner of its use, is restricted to the necessity of the occasion or as an incident to the abatement. (2) That the power to declare property forfeited and subject it to sale by reason of its illegal use is judicial, and not legislative. That it can only be exercised as a penalty or punishment imposed upon the owner for violating the law, and, as a necessary conclusion, the forfeiture and condemnation can only be declared and enforced after a hearing or an opportunity to the owner to be heard.' See Freund, Police Power, §§ 520-528; Edson v. Crangle, 62 Ohio St. 49, 56 N. E. 647; McConnell v. McKillip [Neb.] 99 N. W. 505, 65 L. R. A. 610, and many other authorities cited in the dissenting opinions in the principal case. Fishing nets are capable of being put to lawful use, and are to be distinguished from implements exclusively intended to be used for violating the law and as such subject to summary seizure and detention (Board of Police Commissioners v. Wagner, 93 Md. 182, 48 A. 455, 86 Am. St. Rep. 423)."—From 4 Mich. L. R. A. 294.

14. Commonwealth v. Seechrist, 27 Pa. Super. Ct. 423.

15. Laws 1905, p. 158, held unconstitu-

the contrary, a complaint may be made by a private citizen.[16] The indictment must allege all facts essential to the offense,[17] and the prosecution must establish the material[18] averments of the indictment[19] beyond a reasonable doubt.[20] Where a statute creating an offense in a proviso contains an exception, the state in a prosecution thereunder need not negative such exception in the indictment and proof,[21] but such facts are matters of defense which defendant must prove.[22] In a prosecution for fishing with a seine, it is not necessary to prove that defendant actually carried away fish.[23] The general rule as to hearsay evidence is applicable.[24]

§ 3. *Private rights in fish and game.*[25]—No one has an absolute property right in animals ferae naturae,[26] but the owner of land, by virtue of such ownership, has the exclusive right to hunt and fish thereon,[27] and the fact that the waters are navigable does not destroy this exclusive right.[28] At common law one owning the land bordering on both sides of a non-navigable stream as an incident to the ownership of the underlying soil has the exclusive right of fishery therein.[29] The right of fishery secured to the public under the Colorado constitution does not give the right to trespass upon private property.[30]

Fishery rights.[31]—The title to fish and oysters in public waters is vested in the

tional in so far as it directed the penalties recovered thereunder to be paid into the state treasury in violation of state Const. art. 11, § 8, providing that all clear proceeds of penalties, etc., collected for breach of penal laws shall belong to the school fund. State v. Warner, 197 Mo. 650, 94 S. W. 962.

16. The fact that the legislature specially enjoined upon the fish commissioners the enforcement of chap. 41, Rev. St., does not prevent private citizens from making complaint. State v. Giles [Me.] 64 A. 619.

17. An indictment alleging that defendant placed and maintained a net in a named bayou sufficiently alleges that the net was placed in waters of the state. Richardson v. State [Ark.] 91 S. W. 758.

18. Under a statute prohibiting fishing with nets in any waters of the state except certain specifically named waters, an allegation that the offense was committed in the Quanicassee river, does not require proof that it is a river. People v. Neal [Mich.] 12 Det. Leg. N. 972, 106 N. W. 857. Proof that it was not one of the excepted waters is sufficient. Id.

19. Under a complaint charging the unlawful "possession" of certain fish under the forest, fish and game laws, § 47, as amended by Laws 1905, p. 585, c. 314, and an answer denying the unlawful possession and averring that they were caught without the state and purchased from a duly licensed dealer, the question of resale was not in issue. People v. Wolf, 98 N. Y. S. 381.

20. In a prosecution for illegal shipping of game, a requested instruction that before the jury could convict they must find beyond a reasonable doubt that defendant shipped between the named places, erroneously refused. Jordt v. State [Tex. Cr. App.] 95 S. W. 514. Evidence of defendant held to admit an attempt to catch fish with a net as charged. People v. Neal [Mich.] 12 Det. Leg. N. 972, 106 N. W. 857.

21. Allowing use of seine to catch fish for family use. Richardson v. State [Ark.] 91 S. W. 758.

22. Richardson v. State [Ark.] 91 S. W. 758. In a prosecution under a statute prohibiting the use of a seine for fishing, except to procure fish for family use, evidence held sufficient to sustain a finding that the fish were not caught for such purpose. Id. Under § 47 of the forest, fish and game laws, as amended by Laws 1905, p. 585, c. 314, making the possession of certain fish during the closed season unlawful, but providing that fish, caught without the state, purchased from a licensed dealer, might be possessed, upon proof of purchase from a licensed dealer, the state has the burden of proving that they were not caught without the state. People v. Wolf, 98 N. Y. S. 381.

23. Under Code Supp. 1902, § 2540 et seq., evidence that defendant and others were engaged in drawing a seine and that fish were taken from the water and carried away is sufficient to sustain a conviction. State v. Denhardt, 129 Iowa, 135, 105 N. W. 385. Nor is the conviction limited to the number actually taken from the water by defendant. Id.

24. In a prosecution for shipping wild ducks without making the statutory affidavit, testimony of a witness that he knew that defendant did not make the affidavit from a conversation with a notary public not in defendant's hearing, is inadmissible. Hirsch v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 704, 95 S. W. 513.

25. See 5 C. L. 1429.

26. Only a qualified ownership at most. State v. Niles, 78 Vt. 266, 62 A. 795.

27. Schulte v. Warren, 218 Ill. 108, 75 N. E. 783. **Contra.** Percy Summer Club v. Astle, 145 F. 53.

28. Schulte v. Warren, 218 Ill. 108, 75 N. E. 783, rvg. 120 Ill. App. 10.

29. Common-law rule is applicable in Colorado under Gen. St. 1883, § 197. Hartman v. Tresise [Colo.] 84 P. 685.

30. Art. 16, § 5, providing that "the water of every natural stream, not heretofore appropriated, is hereby declared to be the property of the public," etc. Hartman v. Tresise [Colo.] 84 P. 685.

state, in trust for the public,[32] but at common law, oysters planted in a clearly marked bed in the tide waters of a bay or arm of the sea are the exclusive property of the planter.[33] A franchise for a private oyster bed granted under the New York statute reverts to the state without affirmative action upon failure to mark out and use.[34] A grant to the owner of land abutting on a bay of the right to plant oysters for a prescribed distance from the shore gives no exclusive right to the use of such waters and other abutting owners may pass over them if necessary to enjoy similar rights.[35] A deed by the board of public lands describing the land as bounded by the margin of a bay and ocean at low-water mark does not convey any exclusive right of fishery below such mark.[36] The grant of land under a patent from the King of Hawaii, following an award of the land commissioners, carries fishery rights in the adjoining sea which the grantee and predecessors have enjoyed from time immemorial although not mentioned.[37] Where a trap is located within the prohibited distance as regulated by statute an injunction will issue restraining its maintenance.[38] A suit in equity in the nature of a bill of peace lies in favor of one claiming the exclusive right of fishery as against persons who claim as members of the public.[39] Under a statute making it an offense to take oysters from a private bed where its object is to protect the land, the ownership of the oysters is immaterial.[40] One seeking to enjoin trespass to private oyster beds has the burden of establishing such trespass and the character and extent of the resulting injury.[41]

FIXTURES.

§ 1. Definition (1664).
§ 2. Annexation and Intent (1665).
§ 3. Title of Third Persons (1669).

§ 1. *Definition.*[42]—A fixture is an article which was a chattel but which, by being annexed or affixed to realty, becomes accessory to it and a part and parcel of it.[43]

31. See 5 C. L. 1430.

32. Raymond v. Kibbe [Tex. Civ. App.] 15 Tex. Ct. Rep. 988, 95 S. W. 727.

NOTE. Injury to fishing rights by navigation: In view of the fact that the right to fish may be temporarily suspended without great loss and, further, that if it be made superior to that of navigation the latter would be practically destroyed, it must give way to navigation. And hence there is no liability for unavoidable injury to fishing rights by one legitimately exercising the right of navigation. City of Baltimore, 5 Ben. 474, Fed. Cas. No. 2,744; Mason v. Mansfield, 4 Cranch, C. C. 58, Fed. Cas. No. 9,243. And a boat may pursue her rightful course, doing no unnecessary damage, and need not stop or wait upon the movements of fishermen. Lewis v. Keeling, 46 N. C. 299; Cobb v. Bennett, 75 Pa. 326, 15 Am. Rep. 752. But while the right of navigation is superior to that of fishery, it must be exercised with due regard for the latter, and must not unnecessarily or wantonly interfere or injure it. Wright v. Mulvaney, 78 Wis. 89, 46 N. W. 1045, 9 L. R. A. 807; Post v. Munn, 4 N. J. Law, 61, 7 Am. Dec. 570; Mason v. Mansfield, 4 Cranch, C. C. 580, Fed. Cas. No. 9,243. And one going outside the regular channel of navigation and injuring visible nets is liable. Hopkins v. Norfolk & S. R. Co., 131 N. C. 463, 42 S. E. 902. As, also, is one unnecessarily destroying private oyster beds.—From Crookston Waterworks Power & Light Co. v. Sprague [Minn.] 64 L. R. A. 982.

33. Vroom v. Tilly, 184 N. Y. 168, 77 N. E. 24

34. Granted under Laws 1887, p. 797, c. 584. Vroom v. Tilly, 184 N. Y. 168, 77 N. E. 24. Hence one who subsequently takes possession, marks out and cultivates a bed is protected against the one franchised. Id.

35. Granted under Code 1896, c. 84. Cain v. Simonson [Ala.] 39 So. 571. But where it is necessary to pass over such beds to their irreparable injury, the owner is entitled to an injunction restraining them to the use of a channel agreed upon. Id.

36. Whitehead v. Cape Henry Syndicate [Va.] 54 S. E. 306.

37. Carter v. Territory of Hawaii, 200 U. S. 255, 50 Law. Ed. —.

38. Johansen v. Mulligan, 41 Wash. 379, 83 P. 417.

39. Percy Summer Club v. Astle, 145 F. 53.

40. Code 1895, § 588. Houston v. State, 124 Ga. 417, 52 S. E. 757. Hence where the indictment charges taking of oysters from the bed of Silas Rogers, proof that Rogers and his sons as a partnership were cultivating the oysters is no variance. Id.

41. Cain v. Simonson [Ala.] 39 So. 571.

42. See 5 C. L. 1431.

§ 2. *Annexation and intent.*[44]—Annexation, adaptability, and intention are the tests by which it is determined whether a chattel has become a fixture.[45] Of these, intention is of primary importance,[46] the other tests being taken into account mainly for the purpose of determining whether the accession was intended to be permanent.[47] This being so, no infallible rule can be laid down defining the boundary between movable chattels and immovable fixtures,[48] since intent is shown largely by the relations of the parties and the circumstances of each particular case.[49] But intention alone is generally held not sufficient,[50] physical annexation of some kind being regarded as essential.[51]

43. See 5 C. L. 1431. For a full discussion of the various senses in which the term is used, see Bronson on Fixtures, 1.

44. See 5 C. L. 1432.

45. The tests are (1) Actual annexation to the realty or something appurtenant thereto; (2) appropriation to the use or purpose of that part of the realty with which it is connected; (3) the intention of the party making the annexation to make the article a permanent accession to the freehold. Parker v. Blount County [Ala.] 41 So. 923; Baringer v. Evenson, 127 Wis. 36, 106 N. W. 801; Prudential Ins. Co. v. Guild [N. J. Eq.] 64 A. 694.

Held fixtures: A vault affixed in a building. People v. Wells, 181 N. Y. 245, 73 N. E. 961.

Scales located permanently on a homestead exemption are exempt as a part of the realty. Shaffer Bros. v. Chernyk [Iowa] 107 N. W. 801.

A **brass railing** attached partly to the freehold and partly to an engine in an ice plant, the engine being attached to the freehold, is within Revisal 1905, § 3511, extending the law of larceny to include chattels real. State v. Beck [N. C.] 53 S. E. 843.

Gasoline engine bolted to a solid stone foundation in a permanent building and used for grinding feed, and which could not be removed without cutting a hole in the side of the building, was part of the realty and passed by deed of the land and all appurtenances. State v. Beck [N. C.] 53 S. E. 843.

46. The intention of the party indicated by his acts in attaching the property to the realty and using it in connection therewith is the primary consideration. The character of the annexation is important mainly as showing intention. State Security Bank v. Hoskins [Iowa] 106 N. W. 764. The intention of the parties controls in determining the character of property claimed to be a fixture. First Commercial & Sav. Bank v. Trenton Mill. Co. [Mich.] 13 Det. Leg. N. 168, 107 N. W. 1107. The assignee of a corporation conveyed land to plaintiff together with all the buildings, machinery, and appurtenances erected or being erected, and all railroad tracks and superstructures previously built and used in connection with the improvements and machinery. A controversy arose as to whether certain property was "personal property not sold at said sale" or was fixtures passing with the freehold. It was compromised that "all the property in and about said premises" should pass as fixtures. Held neither the conveyance nor the compromise passed to plaintiff certain unlaid rails which were not on the property sold, of the existence of which the assignee had no knowledge. Alper v. Tormey, 1 Cal. App. 634, 82 P. 1063.

47. Physical annexation is not the sole nor even the controlling test in determining whether an article is a fixture or not. The intention of the party making the annexation is the principal consideration. Fish Co. v. Young, 127 Wis. 149, 106 N. W. 795.

Window and door screens manufactured for and fitted to a building are an appurtenance thereof and subject to a mechanic's lien under Rev. St. 1898, § 3314, subd. 1, giving a lien for materials and labor furnished in the erection and repair of a building or appurtenance, though they are so made as to be removable without injury to the house. Fish Co. v. Young, 127 Wis. 149, 106 N. W. 795.

48. It varies with the different relations of the parties and is largely dependent upon their intention, express or implied. Humes v. Higman [Ala.] 40 So. 128. The fact that a chattel is ponderous and that it cannot be removed from a building without removing a part of a wall does not necessarily constitute it a fixture even as between vendor and vendee. A safe. Parker v. Blount County [Ala.] 41 So. 923.

49. **As between mortgagor and mortgagee** the intention with which a chattel is attached is becoming more and more the decisive test whether or not it has become a part of the realty.

Sawmill and machinery therein intended to be used permanently and not adapted to any other use were permanent fixtures covered by a mortgage on the land. Humes v. Higman [Ala.] 40 So. 128. Notwithstanding the mill site was subject to overflow from a river and was an unsuitable site. Id. A mortgage described certain premises by metes and bounds only, though, at the time, they were occupied by a factory containing a **steam engine and generator** with wiring for the supply of electric light, a steam engine with piping and shafting used to supply power, two **freight elevators** and three **pumps**. The factory represented the greater portion of the value of the mortgaged property. The factory and machinery were operated for years after the mortgage was given. The pumps were removable without injury but used as a part of the common plant. Held all the machinery were fixtures and included in the mortgage. Prudential Ins. Co. v. Guild [N. J. Eq.] 64 A. 694. As between vendor and vendee it is the general rule that things personal in their nature but fitted and prepared to be used with real estate and essential to its beneficial enjoyment, being on the land, and especially if

attached thereto in some permanent way at the time of its conveyance by deed, passes with the realty. Bullard v. Hopkins, 128 Iowa, 703, 105 N. W. 197.

50. NOTE. Intention without actual annexation: The roller-mill cases have furnished an interesting contribution to this subject. In Voorhis v. Freeman, 2 Watts & S. [Pa.] 116, 13 Am. Dec. 490, it was held that a number of detached rolls which were a part of an iron rolling-mill and which included among their number several duplicates, but all of which had at one time or another been in actual operation, were fixtures. This is perhaps the first instance, says the court in Teaff v. Hewitt, 1 Ohio St. 530, 59 Am. Dec. 634, in which movable property was adjudged parcel of the realty for the avowed reason that it ought to be placed beyond the convenient reach of creditors. Yet a similar reason was advanced in Patton v. Moore, 16 W. Va. 428, 37 Am. Rep. 789. In Pyle v. Pennock, 2 Watts & S. [Pa.] 390, 37 Am. Dec. 517, extra rolls of an iron rolling-mill, some of which were in housings and some of which had been used but had been removed from buildings in which they had been accustomed to run and were not in anyway connected therewith, were held to be part of the realty. It does not appear whether any of the detached rolls had never been used in the mill. In the later case of Johnson v. Mehaffey, 43 Pa. 308, 82 Am. Dec. 568, the issue was squarely presented, and it was held that rolls cast for a rolling-mill and paid for and delivered beside it, where they had lain for two or three years in a rough, unfinished state, did not pass on a sheriff's sale of the realty. The two earlier cases were not referred to in the opinion. In England, duplicate rolls of a fixed rolling-mill and detached rolls of different sizes for use in the machine, and which had been actually fitted to it, are essential parts of the machine, but rolls that have never been fitted to or used in the machine, which require something more to be done to them before they are fitted, are not essential parts of it. Ex parte Astbury, L. R. 4 Ch. 630.

As to **other machinery**, it was held in Patton v. Moore, 16 W. Va. 428, 37 Am. Rep. 789, that an engine and boiler bought by the owner of a mill and hauled into the yard with the bona fide intention of attaching them to the mill, and which were necessary for the purpose for which they were to be used, must be regarded as realty, and not liable to the levy of an execution as personalty. This case was cited and followed in McFadden v. Crawford, 36 W. Va. 671, 15 S. E. 408, 32 Am. St. Rep. 894. The latter case involved the character of two railroad spike machines purchased by a rolling-mill company to be attached to its mill, one of which had been unloaded and the other was on the car, but the foundation for both of which had been prepared. In Iowa, a steam engine and other machinery for a mill do not become a fixture so as to defeat the lien of a chattel mortgagee as against a holder of a prior vendor's lien on the land, although it is purchased to be annexed, and it is the intention to annex it, and it is delivered on the ground for that purpose, and although work has been begun for the purpose and with the intention of annexation, where all the machinery is lying on the ground near the mill, or in it, but where none of it has been put in place. Miller v. Wilson, 71 Iowa, 610, 33 N. W. 128. In New Hampshire, the mere fact that saws which have been kept in a mill for a year or more, but never attached, were purchased with the intention to be used as a part of the mill, is not sufficient to make them fixtures, but other saws which have been set and used in the mill are part of the real estate. Burnside v. Twitchell, 43 N. H. 390.

In Illinois, **materials** provided for and **designed to be attached to a railroad** are for the purpose of mortgage or conveyance a part of the realty itself. Palmer v. Forbes, 23 Ill. 301. In Wyatt v. Levis & K. R. Co., 6 Quebec Law Rep. 213, it was held that railroad fastenings and sleepers on hand for the repair of a road were not immovable by destination under art. 379 of the Codes providing that movable things which a proprietor has placed upon his property for a permanency, or which he has incorporated therewith, are immovable by destination so long as they remain there. The question whether old and new rails and rail chairs lying along the track in readiness for repairs were fixtures was raised but not decided in Covey v. Pittsburg, Ft. W. & C. R. Co., 3 Phila. [Pa.] 173, the court taking the position that such property was not liable to seizure for an ordinary debt on the ground of public policy. But the court said that but for the public purpose for which they were used doubtless they were liable to seizure.

The attempt to have **building materials** that have never been attached to the freehold declared fixtures seems to have been generally unsuccessful. The following are cases where such materials have been held not to be a part of the realty: Wooden sash frames intended for a hotel. Tripp v. Armitage, 4 Mees. & W. 687. Light, glazed window sashes. King v. Hedges, 1 Leach C. L. 201. Hewn timbers intended for a granary and lying on the ground at the time it was sold. Cook v. Whiting, 16 Ill. 480. Clap boards piled upon land at the time it was sold and intended for general repairs. Hinkle v. Hinkle, 69 Ind. 134. Commercial finishing material such as doors, mantels, casings, etc., purchased for an unfinished building and placed thereln but not affixed thereto where it was not mentioned or deemed part of a sale under mortgage foreclosure. Blue v. Gunn [Tenn.] 69 L. R. A. 892. A stone brought onto the land for the purpose of being used in a doorstep at some future time, where the land was sold before the stone was used. Woodman v. Pease, 17 N. H. 282. Blinds intended for a house not painted nor hung on the house to remain as a part of it, though fitted to the windows and marked, and painting had begun. Manchester Mills v. Rundlett, 23 N. H. 271. Bricks and lumber lying on the premises and intended to be used for a new building. Beard v. Duralde, 23 La. Ann. 284, under Civil Code art. 468. Lumber, mill work, sashes, etc., delivered on the premises for the purpose of being used in a building. Maxwell v. Willard, 1 Wkly. Notes Cas. [Pa.] 355. Windows and blinds prepared for a house but never attached. Peck v. Batch-

As between landlord and tenant, the old common law on the subject of fixtures has been considerably modified in favor of the tenant.[52]

By agreement or estoppel.[53]—A vendor and a purchaser of land may agree that property annexed to the freehold shall be treated by them as personalty[54] or as realty,[55] as the case may be; but an agreement to treat as personalty buildings erected by a tenant does not change the character of the property for the purpose of taxa-

elder, 40 Vt. 233, 94 Am. Dec. 392. Lumber placed on a homestead lot and intended to be made a part of the homestead dwelling is liable in New Hampshire to seizure under attachment not being protected until it becomes part of the homestead. Carkin v. Babbitt, 58 N. H. 579. But in Wisconsin, lumber obtained for the purpose of repairing a house occupied as a dwelling and actually deposited upon the land is, under the homestead law, exempt from seizure under attachment as personalty. Krueger v. Pierce, 37 Wis. 269. A mortgage on a lot on which stands a partially completed building will pass cut stone and structural iron prepared for the building and located on the lot mortgaged and that adjoining, if the intention of the parties is that the building shall be speedily completed with the material at hand. Bryne v. Werner [Mich.] 69 L. R. A. 900.

In Wisconsin and Vermont it is held that **fencing materials** placed upon a farm with the intention of building necessary fences pass by a conveyance of the realty. Hackett v. Amsden, 57 Vt. 432. Where distributed along line of an intended fence. Ripley v. Paige, 12 Vt. 353; Conklin v. Parsons, 2 Pinney [Wis.] 264. The contrary is held in Illinois and Texas. Cook v. Whiting, 16 Ill. 480; Longino v. Wester [Tex. Civ. App.] 88 S. W. 445. In Indiana, fence stakes plied on the land and intended for general repairs do not pass by a deed of the realty. Hinkle v. Hinkle, 69 Ind. 134. The question was also touched upon in McCarthy v. McCarthy, 20 Can. Law Times 211, and Wincher v. Shrewsbery, 3 Ill. 283, 35 Am. Dec. 108, where the courts held that certain fencing materials did not pass because the evidence did not show that there was any intention to erect them into fences. In Noble v. Sylvester, 42 Vt. 146, the court in holding that a stone hewn from a quarry and intended to be used in a tomb elsewhere did not pass to a vendee of the land from which it was cut and upon which it was suffered to lie after severance declared that the question was analogous to that passed upon in the fence rail cases.

From an examination of the cases **the weight of authority** seems to warrant the conclusion that things placed on land with the intention of annexing them are not fixtures where they are never actually attached.—From Note to Blue v. Gunn [Tenn.] 69 L. R. A. 892.

51. Mere intention to make a chattel a part of the freehold is not of itself sufficient to make it so. There must be some kind of physical annexation to the land, though the nature and strength of the annexation is not material. State v. Martin [N. C.] 53 S. E. 874. An **electric street car** is personalty within Revisal 1905, § 3676, making criminal the willful and wanton injury to personal property. Id. An **ice chest** used in a saloon but in no manner attached to any part of the building held not a fixture. Bush v. Havird [Idaho] 86 P. 529.

52. See post, Right to remove. Where defendants rented certain premises to be used as a game preserve and erected thereon a **house and barn** built on mud sills for the use of guests and the keeper of the preserve, which buildings could be removed without injury to the land, defendants were entitled to remove them during the term of the lease under Civ. Code § 1019, allowing a tenant to remove fixtures if it can be done without injury to the premises, unless the thing has become an integral part of the freehold. Shafter Estate Co. v. Alvord [Cal. App.] 84 P. 279. Property consisting of a **front and back bar,** etc., placed in a saloon building by a lessee and fastened to the wall and floor, constitutes trade fixtures and may be removed by the tenant during his term under § 2882, Rev. St. 1887, relating to the tenant's right to remove fixtures. Bush v. Havird [Idaho] 86 P. 529. An **electro chandelier, annunciator,** and like contrivances or devices, attached to the ceiling or walls of a house by a tenant for his personal comfort and convenience, come within the legal definition of "domestic fixtures" when so placed that they can be readily detached without injury to the premises. Raymond v. Strickland, 124 Ga. 501, 52 S. E. 619.

Question of fact: In an action by a landlord to recover for the tenant's removal of fixtures, evidence held to require submission to the jury as to whether the parties intended that a hot air furnace installed by the tenant should become a permanent accession. Baringer v. Evenson, 127 Wis. 36, 106 N. W. 801.

53. See 5 C. L. 1435.

54. Because of the great weight of a safe, a cement foundation was built from the ground to the level of the floor of a building and the safe was rolled on and supported by the foundation, but was not attached to it in any manner. The safe could be removed only by taking out a part of the wall of the room. On a sale of the building the safe was reserved. Held the safe was not a fixture. Parker v. Blount County [Ala.] 41 So. 923. Machinery or other property placed upon land by a vendee under an executory contract does not become part of the realty as between him and the vendor where there is an express agreement between them that it shall remain the personal property of the vendee. In re Rodgers, 143 F. 594.

55. Attached gas fixtures, though movable, may by agreement be treated by the parties as fixtures and may pass with the land and appurtenances without special mention in the conveyance. Wynne v. Friedman, 49 Misc. 616, 96 N. Y. S. 838. Evidence held not to show agreement that a gasoline en-

tion.[56] Where a machine is sold under a contract reserving title in the seller until the price is paid, the buyer cannot by attaching it to the realty affect the seller's right to enforce his lien as against the buyer.[57] A sale of property so attached to realty as to become a part thereof will operate as a severance.[58] A tenant, by taking a lease, thereby estops himself to question the title of the landlord to trade fixtures already on the premises.[59]

The right to remove.[60]—Tenant's fixtures may be removed by the tenant at any time before the expiration of his term,[61] but not thereafter,[62] unless he is deprived of his opportunity to remove them by the wrongful act of the landlord,[63] or is granted an extension of time.[64] Under a lease requiring the tenant to turn over the premises to the landlord at the expiration of the term in as good a condition as they were in when rented, "reasonable wear and tear excepted," the landlord acquires no interest, under the lease, to any fixtures except those leased with alterations or repairs made by the lessee.[65] By the weight of authority a tenant who renews his lease without reserving his right to remove his fixtures cannot thereafter claim such fixtures.[66] A mortgagee of trade fixtures acquires no greater rights to the prop-

gine should not pass by a deed but by a bill of sale. State Security Bank v. Hoskins [Iowa] 106 N. W. 764.

56. Stationary sawmill with boilers set in masonry erected by tenant with right to remove held liable to taxation against the tenant as real estate for town and county purposes. Bemis v. Shipe, 26 Pa. Super. Ct. 42.

57. Planer and matcher for sawmill. Cameron & Co. v. Jones [Tex. Civ. App.] 90 S. W. 1129.

58. Not violative of statute of frauds, though oral. Finney v. Lucy [Ala.] 39 So 583.

59. Where at the time a lease was taken certain store fixtures were on the premises and used as a part of the store room, the lease in effect ratified the ownership of such property in the lessor and the lessee could not claim it as against the lessor's grantee. Baringer v. Evenson, 127 Wis. 36, 106 N. W. 801.

60. See 5 C. L. 1435. See special article, Fixtures as Between Landlord and Tenant, 6 C. L. 388.

61. Where a tenant attaches to the demised premises fixtures for the use of his business, the law presumes that he means to remove them before the end of his term. It is only on leaving without removing them that an intention to make a gift of them to the landlord is imputed to him. Stopper v. Kantner, 29 Pa. Super. Ct. 48. A tenant's ornamental or domestic fixtures may be removed by him at any time during his term or occupancy if so attached as to be readily detachable without injury to the premises. Raymond v. Strickland, 124 Ga. 501, 52 S. E. 619.

62. Trade fixtures must be removed by a tenant prior to his surrender of possession to the landlord in the absence of agreement to the contrary, otherwise the tenant's right to re-enter and remove them will be deemed lost and abandoned. Bush v. Havird [Idaho] 86 P. 529.

63. May be removed thereafter if the tenant is deprived of his opportunity to remove them by a wrongful taking possession of the premises by the landlord. Raymond v. Strickland, 124 Ga. 501, 52 S. E. 619. They do not lose their character as chattels, and a possessory warrant will lie to recover them from a landlord who wrongfully withholds possession thereof from the tenant. Id. Rule requiring tenant to remove trade fixtures during term does not apply where he attempts to do so in due time but is prevented by wrongful act of the landlord. Stopper v. Kantner, 29 Pa. Super. Ct. 48.

64. Where the landlord gave the tenant a written permission to remove the fixtures during three days following the termination of the tenancy, and the tenant in reliance thereon delayed removing the fixtures, the landlord could not at midnight of the last day of the term lock the building and forbid removal of the fixtures. Stopper v. Kantner, 29 Pa. Super. Ct. 48. The landlord could not revoke the written permission in such manner merely because of very slight injuries to the freehold, some of which were not shown to be the acts of the tenant, though the permission provided that the removal should be made without injury to the freehold or other property. Id. Where a landlord gives his tenant a written permission to remove property belonging to him after the expiration of the term, but specifies in detail the different articles which the landlord admits belong to the tenant, the tenant within the time of grace is entitled to remove only the articles enumerated. Those as to which there is a dispute must be removed before the expiration of the tenancy. Id.

65. And the threatened removal by the tenant, during the term, of fixtures substituted by him for old ones which he claimed had become worn out did not justify an injunction, the remedy at law being adequate for the determination of the rights of the parties under the strict legal rules as to substitution of fixtures. Fox v. Lynch [N. J. Eq.] 64 A. 439.

66. **NOTE. Renewal of lease:** Where a tenant renews his lease without removing or reserving any right to remove his tenant's fixtures, the weight of authority is to the effect that he thereby abandons his right of removal as to such fixtures. Loughran v. Ross, 45 N. Y. 792; Sanitary Dist. of Chicago v. Cook, 169 Ill. 184, 48 N. E. 461, 61 Am. St. Rep. 161, 39 L. R. A. 369; Talbot v. Cruger,

erty than those enjoyed by the tenant and when the latter's right to reenter and remove fixtures has ceased the right of the mortgagee also ceases.[67] Covenants restricting a tenant's right to remove trade fixtures are strictly construed.[68] A vendor of land cannot enforce a limitation within which machinery or other property might be removed by the vendee in case of his failure to pay for the land where such default is due to the failure of the vendor to perfect title.[69]

§ 3. *Title of third persons.*[70]—The question as to the title of third persons may arise between the vendor of a chattel and a mortgagee of the land,[71] or one entitled to claim a forfeiture.[72] On conflicting evidence, questions of fact are for the jury.[73] The trade fixtures of a tenant in possession are within the purport of a deed of the premises by the lessor but do not pass as between the grantee and the tenant.[74]

FOLIOING PAPERS, see latest topical index.

151 N. Y. 117, 45 N. E. 364; Watriss v. First Nat. Bank of Cambridge, 124 Mass. 571, 26 Am. Rep. 694; Abell v. Williams, 3 Daley [N. Y.] 17; Williams v. Lane, 62 Mo. App. 66; Carlin v. Ritter, 68 Md. 478, 6 Am. St. Rep. 467. This rule, however, does not apply where there is an original agreement between the landlord and the tenant treating as personalty fixtures sold by the landlord to the tenant, and where there is a subsequent renewal of the first lease without any mention of the articles. It was so held in respect to marble counters and bar, table, buffet, range, boiler, etc., in a bar and restaurant. O'Brien v. Mueller, 96 Md. 134. See, also, Jungerman v. Bovee, 19 Cal. 355; Marks v. Ryan, 63 Cal. 107; Hedderich v. Smith, 103 Ind. 203, 53 Am. Rep. 509; Carlin v. Ritter, 68 Md. 478, 13 A. 370, 6 Am. St. Rep. 467; Bauernschmidt Brew. Co. v. McColgan, 89 Md. 135, 42 A. 907; Williams v. Lane, 62 Mo. App. 66; Gerbert v. Trustees, 59 N. J. Law, 160; McIver v. Estabrook, 134 Mass. 550; Louis v. Ocean Navigation & Pier Co., 125 N. Y. 341. Other authorities hold that the tenant does not lose his right to the fixtures by taking a renewal of his lease. Kerr v. Kingsbury, 39 Mich. 150, 33 Am. Rep. 362; Second Nat. Bank of Beloit v. Merrill Co., 69 Wis. 501, 34 N. W. 514; Devin v. Dougherty, 27 How. Pr. [N. Y.] 455. See, also, Wright v. Macdonnell, 88 Tex. 140, 30 S. W. 907, where the rule is criticized. The effect of the majority rule may also be produced by any other agreement with the landlord in respect to the premises, as where a tenant, being permitted by the lease, makes a contract for the purchase of the property which he fails to fulfill. Merritt v. Judd, 14 Cal. 60; Perkins v. Swank, 43 Miss. 349; Fitzherbert v. Shaw, 1 H. Bl. 258; Heap v. Barton, 12 C. B. 274. The rule is based on the ground that a lease of land carries with it the buildings and fixtures thereon, and that the tenant, by accepting a new lease without excepting his tenant's fixtures, thereby abandons the same and acknowledges the title of the landlord thereto, and is estopped to controvert it. Sanitary Dist. of Chicago v. Cook, 169 Ill. 184, 48 N. E. 461, 61 Am. St. Rep. 161, 39 L. R. A. 369. Hence it does not apply where tenants hold over under an original lease, either permissively or impliedly. Penton v. Robart, 2 East, 88; Weeton v. Woodcock, 7 Mees. & W. 14; Mackintosh v. Trotter, 3 Mees. & W. 184; Loughran v. Ross, 45 N. Y. 792; Macdonough v. Starbird, 105 Cal. 15, 38 P. 510; Ross v. Campbell, 9 Colo. App. 38; Watriss v. First Nat. Bank of Cambridge 124 Mass. 571, 26 Am. Rep. 694; Estabrook v. Hughes, 8 Neb. 496; Davis v. Moss, 38 Pa. 346; Darrah v. Baird, 101 Pa. 265.—See Bronson, Fixtures, §§ 38a, 38f.

67. Bush v. Havird [Idaho] 86 P. 529.

68. Fox v. Lynch [N. J. Eq.] 64 A. 439. A covenant by a tenant not to claim any rebate for alterations or repair of fixtures does not restrict the tenant's right to remove trade fixtures put in by him. Id.

69. Failure to perfect title until time for performance had expired and purchaser had become unable to perform, and where no claim to enforce forfeiture was made until after purchaser's insolvency. In re Rodgers, 143 F. 594.

70. See 5 C. L. 1436.

71. Machinery placed upon mortgaged premises, but not accepted or paid for nor permanently attached, may be removed by the sellers as against the mortgagee whose security was not taken with reference to the machinery as a part of the real estate, no injury having occurred from the machinery being brought on the premises. First Commercial & Sav. Bank v. Trenton Milling Co. [Mich.] 13 Det. Leg. N. 168, 107 N. W. 1107.

72. Premises were demised by lease providing for the placing of machinery thereon and for reversion of the improvements in case of breach of covenants, the lease being placed on record. Thereafter an engine was sold to the lessee, the note for the price reserving title in the vendor until the price was paid. The engine was placed upon a solid cement foundation bolted thereto and inclosed in a building erected by the lessee, but was removable from the realty without destroying it, and was not necessary to the support of any part of the realty. Held, the engine was personalty and not a fixture as between the seller and the lessor. Best Mfg. Co. v. Cohn [Cal. App.] 86 P. 829.

73. Under the evidence, held a question for the jury whether an engine, dynamo, and pump, firmly attached to the freehold and necessary to the operation of an ice factory, were the property of a corporation placed in

FOOD.

Validity and construction of statutes.[75]—In the exercise of its police power a state[76] or a city, if its charter so permits,[77] may provide for the inspection of food products and prohibit the sale of such as are found injurious to the public health. But in the attempted exercise of this power onerous and unnecessary burdens must not be imposed on legitimate business[78] or the constitutional rights of the parties invaded,[79] and the method of inspection[80] and the tests made must be reasonable.[81]

the plant as trade fixtures or belonged to the owner of the freehold so as to pass to plaintiff by execution sale. Glasgow v. Hill, 29 Pa. Super. Ct. 222.

74. Grantee without actual knowledge could recover against grantor on covenant of warranty. Bullard v. Hopkins, 128 Iowa, 703, 105 N. W. 197.

75. See 5 C. L. 1436.

76. A state may so regulate the introduction and sale of food products as to insure purity, provided the means employed do not go beyond the necessities of the case or impose unreasonable burdens on interstate commerce. Jewett Bros. v. Smail [S. D.] 105 N. W. 738. It is within the police power to require milk to contain a prescribed amount of fat. City of St. Louis v. Liessing, 190 Mo. 464, 89 S. W. 611. The fact that milk vending is a lawful business does not exempt it from reasonable police regulation. City of St. Louis v. Grafeman Dairy Co., 190 Mo. 492, 89 S. W. 617.

77. Under the charter power to inspect milk, regulate and license occupations, and secure the general health, St. Louis may make reasonable regulations for inspection of milk and exact a reasonable fee therefor (City of St. Louis v. Grafeman Dairy Co., 190 Mo. 492, 89 S. W. 617), and has power to enact Ordinance No. 20,808, § 17, prohibiting the sale of milk containing coloring matter (City of St. Louis v. Pollnsky, 190 Mo. 516, 89 S. W. 625), or preservatives (City of St. Louis v. Schuler, 190 Mo. 524, 89 S. W. 621), section 10, requiring milk and cream venders to register and pay a registration fee (City of St. Louis v. Grafeman Dairy Co., 190 Mo. 492, 89 S. W. 617), section 18 requiring milk to contain certain amount of fat (City of St. Louis v. Liessing, 190 Mo. 464, 89 S. W. 611), and section 19 prohibiting the sale of inferior cream (City of St. Louis v. Reuter, 190 Mo. 514, 89 S. W. 628). The provision of Ordinance No. 20,808, requiring venders of milk and cream to register and pay a registration fee, provides merely for an inspection fee, and not a tax (City of St. Louis v. Grafeman Dairy Co., 190 Mo. 492, 89 S. W. 617), but if the latter is void as a tax it does not invalidate the provision requiring registration (Id.). The requirement that the registration and license fees of milk venders be paid to the "city collector" instead of to the license collector, being a mere misnomer does not invalidate the ordinance. Id. Section 18 of St. Louis Ordinance No. 20,808, being severable from the other sections, is enforceable irrespective of their validity. City of St. Louis v. Liessing, 190 Mo. 464, 89 S. W. 611.

78. Act March 20, 1905 (St. 1905, p. 316, c. 302), requiring all packages containing between one-half and six pounds of butter to have the exact weight marked thereon, held unconstitutional. Ex parte Dietrich [Cal.] 84 P. 770.

79. Interference with interstate commerce: Laws 1905, p. 163, c. 114, § 11, requiring the name of the manufacturer and location of the factory on all food products, held void. Jewett Bros. v. Smail [S. D.] 105 N. W. 738.

Taking of property without due process of law: Section 66 of the sanitary code of the city of New York, vesting the discretionary power in the board of health to grant or withhold permits to sell milk, in the absence of a showing of abuse, held constitutional. People of New York v. Van de Carr, 199 U. S. 552, 50 Law. Ed. —. Laws 1903, c. 155, p. 218, § 9, prohibiting the sale of cream containing less than 20 per cent of fat, is not a taking of property without due process of law either within the Federal or state constitution. State v. Tetu [Minn.] 107 N. W. 953.

Equal protection of the law: The singling out of the milk business as a proper subject for regulation does not deny equal protection of the laws. People of New York v. Van de Carr, 199 U. S. 552, 50 Law. Ed. —. Nonproducing venders of milk are not denied the equal protection of the laws because they are not permitted to show that their milk falling below the required quality is in the same condition as when it left the herd as producing venders may do. Laws 1903, c. 338, §§ 20, 22. St. John v. People, 201 U. S. 633, 50 Law. Ed. —.

Held sufficient as to title: St. Louis ordinance 20,808, prohibiting the sale of milk below a certain quality. City of St. Louis v. Liessing, 190 Mo. 464, 89 S. W. 611. Act of May 29, 1901, P. L. 327, relating to the sale of oleomargarine. Commonwealth v. Caulfield, 27 Pa. Super. Ct. 279. A provision that venders of milk and cream shall register and pay a registration fee is sufficiently expressed in a title "to license and regulate the sale of milk and cream, to provide for the inspection thereof, and to prescribe penalties to prevent the sale and distribution of any but pure milk and cream." St. Louis Ordinance No. 20,808. City of St. Louis v. Grafeman Dairy Co., 190 Mo. 492, 89 S. W. 617.

80. St. Louis Ordinance No. 20,808, providing for a prescribed analysis by the city chemist of all milk submitted to him by the inspectors, which test is not made conclusive on the venders, does not vest an arbitrary power in the chemist and deprives the dealers of no constitutional rights. City of St. Louis v. Liessing, 190 Mo. 464, 89 S. W. 611.

81. An ordinance prohibiting the sale of milk unless it shows on analysis not less than 3 per cent. by weight of butter fat, "es-

The use of preservatives[82] and coloring matter[83] may be totally prohibited if reasonably necessary to protect health or prevent deception, though particular ones are not deleterious. A statute requiring packages containing "renovated butter" to be so marked is not satisfied by an oral statement of contents at the time of sale.[84] An act prohibiting the sale of oleomargarine made or colored to imitate yellow butter extends to products so manufactured as to give such color though no artificial coloration is used.[85] The use of a qualifying adjective in a trade name as "evaporated" cream does not take it out of the operation of a statute prohibiting the sale of inferior cream.[86] In an action on contract for milk sold, plaintiff need not prove that it was of statutory quality by showing an analysis.[87]

Crimes; prosecutions.[88]—A criminal conviction under the pure food laws does not depend upon the capacity of the person instituting the proceeding.[89] An information specifically advising defendant of the time, place, and manner of violating an ordinance requiring milk to be of a certain quality, is sufficient.[90] Where an ordinance makes the violation of any one of several provisions an offense and prescribes the same penalty for all, it is error to quash an information charging in a single count the violation of all, if any one is valid.[91] In a prosecution for selling cream containing less than the statutory amount of fat, the state must prove that the product was sold as cream.[92] In prosecutions under the impure food laws, the ordinary rules of evidence are applicable.[93] The admission of incompetent evidence is not reversible error where it is subsequently rendered competent.[94]

FORCIBLE ENTRY AND UNLAWFUL DETAINER.

§ 1. **Civil Rights and Remedies (1671).**
A. The Cause of Action (1671).
B. Procedure (1674).
§ 2. **Criminal Responsibility (1678).**

§ 1. *Civil rights and remedies. A. The cause of action.*[95]—Forcible entry and unlawful detainer is purely a possessory action originally designed only to protect a

timated gravimetrically by the Adams paper coil process," cannot as a matter of law be said to fix an unreasonable method of ascertaining the amount of butter fat. St. Louis Ordinance No. 20 808, § 18. City of St. Louis v. Grafeman Dairy Co., 190 Mo. 507, 89 S. W. 627.

82. St. Louis Ordinance No. 20.808, § 17. City of St. Louis v. Schuler, 190 Mo. 524, 89 S. W. 621.

83. City of St. Louis v. Polinsky, 190 Mo. 516 89 S. W. 625.

84. Agricultural Law, Laws 1893, p. 663, c. 338, § 27. People v. Waters, 100 N. Y. S. 177.

85. Act of May 29, 1901, P. L. 277. Commonwealth v. Mellet, 27 Pa. Super. Ct. 41.

86. Laws 1903, c. 155, p. 218, § 9. State v. Tetu [Minn.] 107 N. W. 953.

87. Proof by other methods sufficient. Copeland v. Boston Dairy Co., 189 Mass. 342, 75 N. E. 704.

88. See 5 C. L. 1437.

89. Conviction under Act of May 26, 1893 (P. L. 152), as amended by Acts of March 13, 1895 (P. L. 17), and June 26, 1895 (P. L. 317), is not invalidated by the fact that it was instituted by a special agent of a commission not authorized under the constitution. Commonwealth v. Spencer, 28 Pa. Super. Ct. 301.

90. City of St. Louis v. Liessing, 190 Mo. 464, 89 S. W. 611.

91. Charging under Ordinance No. 20,808, a sale of milk without a license, failure to register, to pay registration fee, and wagon fee. City of St. Louis v. Grafeman Dairy Co., 190 Mo. 492, 89 S. W. 617.

92. Where a can of condensed milk was labeled as "evaporated cream" in large letters but was followed by a statement of actual contents in small print, held sufficient to sustain a conviction for selling as cream within Laws 1903, c. 155, p. 218, § 9. State v. Tetu [Minn.] 107 N. W. 953.

93. In a prosecution for selling oleomargarine colored to imitate yellow butter, if defendant proves that cotton-seed oil was a necessary ingredient, the prosecution may show that use of such oil does not necessarily have the effect of coloring it in the manner charged. Commonwealth v. Mellet, 27 Pa. Super. Ct. 41. In such prosecution it was incompetent to ask a witness if cotton-seed oil is a "legitimate" ingredient of oleomargarine, which is a question of law. Id. Samples may be introduced to show that oleomargarine may be produced without such color where they have been identified as oleomargarine by an expert chemist although he could not give all the ingredients. Commonwealth v. Caulfield, 27 Pa. Super. Ct. 279. In a prosecution for an illegal sale of oleomargarine under Act of May 29, 1901, P. L. 327, witnesses may testify to the re-

peaceable possession and preserve the public peace by compelling disputants to resort to the law for the settlement of their claims to land.[96] Though entry and detainer are really distinct acts, the general practice is to combine the two words and treat them as a single term.[97] The conditions essential to the right to this action vary in the different jurisdictions.[98] The remedy is commonly resorted to by a landlord against a tenant unlawfully holding over[99] and has been extended in favor of his grantee,[1] or of one who seeks to recover possession of land sold at foreclosure.[2] In cases other than those just mentioned it is generally held essential that plaintiff be shown to have been in the actual,[3] and peaceable[4] possession[5] of the premises at the time of the

semblance between the article sold and yellow butter without producing or accounting for the article itself. Id.

94. The admission of samples of oleomargarine and butter for comparison without proof of genuineness, which proof was subsequently made. Commonwealth v. Mellet, 27 Pa. Super. Ct. 41.

95. See 5 C. L. 1437.

96. See 13 A. & E. Enc. of L. 743.

97. Town of Oyster Bay v. Jacob, 109 App. Div. 613, 96 N. Y. S. 620.

98. Under Shannon's Code, § 5093, defining unlawful detainer as where defendant enters by contract either as tenant or claiming through or under a tenant, unlawful detainer lies only where defendant entered by contract and as lessee or under a lessee, and hence that action will not lie against one who entered under a conveyance from a tenant by curtesy. Shepperson v. Burnette [Tenn.] 92 S. W. 762. The word "tenant" as used in § 5093 has reference to the relation of landlord and tenant. Id.

99. Under forcible entry and detainer statutes authorizing the recovery of possession of premises by a landlord against a tenant it must appear that the relation of landlord and tenant existed. Where one who took title to land stated that he took it for another's benefit and the latter remained in possession and claimed ownership, the holder of the title could not maintain the action under Ballinger's Ann. Codes & St. § 5525, on the theory of a tenancy by sufferance. Meyer v. Beyer [Wash.] 86 P. 661. To authorize an action of forcible entry and detainer, the relation of landlord and tenant must be established between the plaintiff and defendant at the time the action is instituted. Gies v. Storz Brewing Co. [Neb.] 106 N. W. 775. Evidence held insufficient to sustain findings that plaintiff was entitled to possession and a specified sum as rent where the only evidence in his behalf was his own testimony that he knew defendant and that she lived on the premises described. Ahlers v. Barrett [Cal. App.] 87 P. 232. Instruction that if the jury should believe that defendant "is holding possession of the premises in question 'without right' and after the determination of a lease of the said premises" they should find for the plaintiff, was proper especially where the court by subsequent instruction cleared away any possible doubt as to the meaning of the phrase "without right." Kessel v. Mayer, 118 Ill. App. 267.

1. Under Rev. St. 1899, §§ 3352, 3353, a grantee of rented premises may maintain unlawful detainer to recover possession of the land from the grantor's tenant. Doner v. Ingram [Mo. App.] 95 S. W. 983.

2. Under a statute authorizing the recovery by summary proceedings of premises purchased at foreclosure sale when the title has been duly perfected, the remedy cannot be resorted to by one who has not perfected his title. Where assignee of mortgagee made purchase after limitations had run against the mortgage he had not perfected his title as required by Code Civ. Proc. § 2232. Bonacker v. Weyrick, 48 Misc. 189, 96 N. Y. S. 775. Where a judgment creditor of a mortgagor has complied with Code 1896, §§ 3507, 3510, relative to the redemption of land sold under foreclosure, he is entitled to bring the action of unlawful detainer to recover the land as provided by § 3513. Ford v. Lewis [Ala.] 41 So. 144.

3. Possession **held actual** where plaintiffs had been in actual possession by an agent and tenants and a new tenant was daily expected though at the time of defendant's entry the cabin on the premises was temporarily vacant. McCormick v. McDowell [Ky.] 90 S. W. 541. Evidence held sufficient to warrant finding of actual possession on part of petitioner. Town of Oyster Bay v. Jacob, 109 App. Div. 613, 96 N. Y. S. 620. A landlord who by the terms of the lease was required to repair the outer walls of a building held to be in actual possession of a strip of land on which a portion of a wall stood where at the time defendants chiseled away a portion of it he was underpinning and shoring the wall. Holzhausen v. Hoskins, 115 Mo. App. 261, 91 S. W. 410. The inclosure of land by fences and a natural barrier is sufficient to constitute actual possession within Code Civ. Proc. § 1172, providing that it shall be enough for plaintiff to show, in addition to the forcible entry that he was peaceably in the actual possession at the time of the entry. Knowles v. Crocker Estate Co. [Cal.] 86 P. 715. Actual **possession of a part** under bona fide claim and color of title to the whole is possession of the whole or so much as is not in the adverse possession of others. Town of Oyster Bay v. Jacob, 109 App. Div. 613, 96 N. Y. S. 620; Camden v. West Branch Lumber Co. [W. Va.] 53 S. E. 409.

4. Evidence sufficient to show that petitioner was in peaceable possession at time of entry. Town of Oyster Bay v. Jacob, 109 App. Div. 613, 96 N. Y. S. 620.

5. One who has never been in possession of premises cannot maintain unlawful detainer to recover possession. Metz v. Schneider [Mo. App.] 97 S. W. 187. It must appear that plaintiff was in possession of the

entry. Hence a landlord cannot maintain the action for the wrongful dispossession of his tenant.[6] In New York, however, it is sufficient if plaintiff proves a constructive possession at the time of the forcible detention,[7] and in West Virginia actual prior possession is not essential, it being sufficient as against a mere trespasser that the true owner shows title in himself.[8] When a possession is disturbed the occupant must be actually dispossessed,[9] and where physical force is an essential element the force involved in the entry must be more than a mere common trespass,[10] though it is not necessary that the occupant should resist until he compel the doing of overt acts in breach of the peace.[11] In some states a mere entry against the will of the person in possession is sufficient.[12] Where the action is for a wrongful detainer only, it must appear that defendant's possession is in fact unlawful.[13] The action being merely possessory, questions of title[14] or right of possession prior to entry[15]

premises at the time of the alleged forcible entry. Where plaintiff claimed that he had been deprived of possession of land north of an old fence, the location of the true line between the lots of the parties was irrelevant and immaterial. Rockhold v. Doering, 122 Ill. App. 194. The "unlawful detainer" for which proceedings under the Code may be invoked is such as may arise out of a breach of some condition under which defendant received possession from the plaintiff. Knowles v. Crocker Estate Co. [Cal. App.] 86 P. 713 [Advance sheets only].

A county clerk of court whose property was removed from his office in the court house during his absence by order of the county commissioners, and who was refused re-entry, could not maintain forcible entry and detainer to recover possession of the room; the facts not proving such actual, exclusive, and peaceable possession by him as would sustain the action. Watson v. Scarbrough [Ala.] 40 So. 672.

The mere use and enjoyment of an easement without more is not such possession as will entitle one to maintain an action of forcible entry and detainer. Moye v. Thurber [Ala.] 40 So. 822.

6. Under Bailinger's Ann. Codes & St., § 5526 subd. 2, providing that forcible detainer involves an entry during the absence of the "occupant," a demand for possession, and refusal to surrender to the former "occupant." Chezum v. Campbell, 42 Wash. 560, 85 P. 48.

7. The term "constructive possession" within Code Civ. Proc. § 2245, providing that petitioner must prove actual possession at the time of the entry or constructive possession at the time of a forcible holding out, includes a case where petitioner has the absolute fee or right of possession by some grant so that he would be entitled to the actual possession but for the forcible holding out. Town of Oyster Bay v. Jacob, 109 App. Div. 613, 96 N. Y. S. 620.

8. It is held that while title is not determined in the action it is an important element in determining the right of possession. Camden v. West Branch Lumber Co. [W. Va.] 53 S. E. 409. Plaintiff held not to have shown title by adverse possession. Id.

9. Knowles v. Crocker Estate Co. [Cal. App.] 86 P. 713 [Advance sheets only]. If retention of possession by defendant is necessary to authorize an action for forcible entry it is enough that his destruction of fence about the premises put an end to plaintiff's exclusive control and made it a part of defendant's larger tract which was enclosed by a fence. Id. [Cal.] 86 P. 715. That plaintiff entered upon the land and removed certain stone which he had dug out before defendant's entry did not show that he was still in possession. Id.

10. Town of Oyster Bay v. Jacob, 109 App. Div. 613, 96 N. Y. S. 620. Not for merely tearing down a fence and threatening to do so again if it was rebuilt. Knowles v. Crocker Estate Co. [Cal. App.] 86 P. 713 [Advance sheets only]. But see Id. [Cal.] 86 P. 715. Merely opening a gate on entering premises is not such force as in law will constitute forcible entry. Fowler v. Prichard [Ala.] 41 So. 667.

11. Evidence held sufficient to show a forcible entry upon, and detainer of, a beach. Town of Oyster Bay v. Jacob, 109 App. Div. 613, 96 N. Y. S. 620. When a person enters upon land in the actual peaceable possession of another with a number of men acting under his direction and control with such a display of force and accompanied by such instant acts as are calculated to intimidate the occupant from resisting their intrusion and maintaining his possession, such conduct constitutes a forcible entry within the purview of Code Civ. Proc. § 1159 declaring one guilty of forcible entry who by violence or circumstances of terror enters real property. Knowles v. Crocker Estate Co. [Cal.] 86 P. 715.

12. Entry against the will of the person in possession is sufficient to warrant the action under Ann. Code 1892, c. 142, without proof of "force, intimidation, or fraud." Paden v. Gibbs [Miss.] 40 So. 871.

13. Under Code 1896, § 2126, forcible entry and detainer may be maintained against one who enters peaceably on land but by unlawful refusal keeps the party out of possession. Sprouse v. Story [Ala.] 42 So. 23. Where defendant moved into certain premises when plaintiff's subtenant moved out at the expiration of plaintiff's lease, defendant should have been permitted to show that he moved in under a lease from the owner. Id. Where by the terms of a lease the vendor of land was required to surrender possession to the purchaser when the latter should pay the balance due on the land and the purchaser tendered the principal but not the interest, the vendor was not guilty of forcible detainer in refusing to surrender

are ordinarily not involved, though title may become important as determining the right of possession where the entry was peaceable and the gist of the action is the wrongful detainer.[16]

Though the action is legal in its nature,[17] the fraudulent execution of a lease may be shown.[18]

Defenses.[19]—Since the true owner's constructive possession will not excuse forcible entry,[20] superior title in defendant is no defense,[21] nor is the manner in which plaintiff obtained possession in the beginning.[22] Defendant is not bound to defend the possession of one not a party to the action.[23]

Damages.[24]—A claim for damages can be tried only as an incident to the right to possession.[25] Where punitive damages are claimed defendant may show that he entered under a bona fide claim of right.[26] Where defendant gives a bond to retain possession pending the action, he becomes liable for the damages sustained by plaintiff in being kept out of possession.[27]

(§ 1) *B. Procedure.*[28]—A sufficient demand for possession or notice to quit,[29] properly executed and served,[30] is generally required,[31] and the action must be com-

possession. Campbell v. Miracle [Ky.] 96 S. W. 452. This was so though he gave a frivolous reason for his refusal. Id.

14. Title cannot be tried in forcible entry and detainer. Meyer v. Beyer [Wash.] 86 P. 661; Watson v. Scarbrough [Ala.] 40 So. 672. Tenant who held over one year under Ky. St. 1903 § 2295, could not at the end of the year try landlord's title in forcible detainer. Smith v. Hardwick [Ky.] 89 S. W. 731. Proof should have been confined to possession. Rockhold v. Doering, 122 Ill. App. 194.

15. Under Civ. Code Prac. § 452, the only question is whether defendant entered on land in the actual possession of plaintiff without his consent, and defendant cannot justify by showing title or right of entry. McCormick v. McDowell [Ky.] 90 S. W. 541. In forcible entry and detainer before a justice of the peace neither title nor the right of entry and possession is involved the gist of the action being the entry and detainer by force. Moye v. Thurber [Ala.] 40 So. 822. Title or right to possession not involved. Chezum v. Campbell, 42 Wash. 560, 85 P. 48. Where the wall of plaintiff's building had stood for many years on a strip of land claimed by defendants, they were guilty of forcible entry in chiseling away a portion of the wall and erecting their own wall in its place without plaintiff's consent. Holzhausen v. Hoskins, 115 Mo. App. 261, 91 S. W. 410.

16. Whether defendant accepted a deed from plaintiff's grantor with full notice that the land claimed by plaintiff was not included in defendant's deed held a question for the jury. Williams v. Virginia-Pocahontas Coal Co. [W. Va.] 53 S. E. 923.

17. See 5 C. L. 1438.

18. Sass v. Thomas [Ind. T.] 89 S. W. 656. Parol proof was admissible though fraud was not pleaded by plaintiff where defendant set up a fraudulent lease. Id.

19. See 5 C. L. 1438.

20, 21, 22. Town of Oyster Bay v. Jacob, 109 App. Div. 613, 96 N. Y. S. 620.

23. Held not prejudicial to reject a deed or contract offered by defendant showing he did not own and was not in possession of a portion of the premises in the possession of a railroad. Camden v. West Branch Lumber Co. [W. Va.] 53 S. E. 409.

24. See 5 C. L. 1438.

25. If there is no right to possession any claim for damages must be asserted in an ordinary civil action. Stevens v. Jones, 40 Wash. 484, 82 P. 754.

26. In forcible entry and detainer defendant could show that he entered and held possession under a bona fide claim of right and not wantonly and by force of arms, by showing a parol contract for the renting of the land so as not to render him liable to punitive damages. Newell v. Taylor [S. C.] 54 S. E. 212. Defendant could also prove that after the execution by the owner to plaintiff of an alleged fraudulent contract under which plaintiff claimed, the owner had told defendant that she had rented the land to him and no other, and that he went to see the owner who said she had signed no contract. Id.

27. By the express provisions of Mansf. Dig. § 3362 (Ind. T. Ann. St. 1899, § 2296), where defendant in forcible entry and detainer gives a bond to retain possession, he is liable for such damages as plaintiff may have sustained in being kept out of possession. Wilson v. Smith [Ind. T.] 89 S. W. 1009.

28. See 5 C. L. 1438.

29. A notice to quit should show clearly who claims to be entitled to the possession of the premises and who makes the demand therefor, and then no one but the person who thus claims the premises and makes the demand can maintain the action under such notice. Best v. Frazier, 16 Okl. 523, 85 P. 1119. Where defendant objected to the sufficiency of the notice served but introduced no evidence, plaintiff's evidence and all reasonable inferences to be drawn therefrom must be accepted as fact. Doner v. Ingram [Mo. App.] 95 S. W. 983.

30. Where land subject to a lease was sold under a contract entitling the vendees to possession, a notice to quit was properly signed and served by only one of the vendees upon the tenants, and the fact that the name of the owner of the fee was also add-

menced within a reasonable time after service, what is a reasonable time depending upon circumstances.[32] Upon removal of the cause to the circuit court under the Alabama statute,[33] defendant is not entitled to a separate trial on the issue of force,[34] and the question of how defendant held possession after he entered upon the premises is immaterial.[35]

Limitations[36] are governed by the statutes of the different states.[37] The action is not barred where brought immediately following the final disposition of a land contest between the parties.[38] Under a statute providing that the justice cannot give judgment unless the action is brought within a specified time after the entry, the burden is on the plaintiff to show that his action is brought within that time.[39] Possession of a portion of the land, by defendant's tenant, is possession by defendant of so much of the land as is not in the actual possession of some other person.[40]

Jurisdiction.[41]—A purely specious claim of ownership will not oust the jurisdiction of a justice of the peace.[42]

ed was mere surplusage. Willis v. Weeks, 129 Iowa, 525, 105 N. W. 1012. Leaving a copy of the notice with a person over 12 years of age on the premises described in the notice is a substantial compliance with Gen. St. 1901, § 5397. Reddicord v. Berk [Kan.] 86 P. 465. Where the sufficiency of the service is only raised by demurrer to the evidence and there is some testimony showing a service, it will be deemed to be a legal service. Id. Where the order of the secretary of interior disposing of a contest between the parties is dated prior to the service of notice to quit such notice is not premature though the fact of such decision was not known to the parties at the time the notice was served. Best v. Frazier, 16 Okl. 523, 85 P. 1119.

31. Under Rev. St. c. 57, § 2, authorizing the recovery of demised premises when a lessee "holds possession without right after the determination of his lease" an action for wrongful detainer cannot be maintained after default in the payment of rent where no notice of election to terminate the lease was given and the lease does not provide that nonpayment of rent shall put an end to the lease. Lane v. Brooks, 120 Ill. App. 501. That the lease authorized the landlord to terminate it without demanding rent did not dispense with notice. Id. Under Rev. St. c. 57, § 2, authorizing the recovery of possession of demised premises by action of unlawful detainer when a lessee holds possession "without right after the determination of his lease," the institution of the action is not notice of an election to terminate a tenancy for nonpayment of rent such as will sustain the action without other notice. Id.

32. A delay of 27 days after notice before instituting the action held not such unreasonable delay as to prevent the action being based on such notice. Best v. Frazier, 16 Okl. 523, 85 P. 1119.

33. In Alabama an action of forcible entry and detainer when removed from the justice's court to the circuit court is converted into statutory ejectment, requiring plaintiff to recover on the strength of his own legal title, unless he can prove that defendant entered under some contract with plaintiff or those under whom he claims, or by the use of force. Code 1896, § 2149. Moye v. Thurber [Ala.] 40 So. 822. If such proof is made the case remains as an action of forcible entry and detainer. Id.

34. Where the cause is removed to the circuit court under Code 1896, § 2147, giving the right of such removal to defendant upon his making affidavit that he entered peaceably and under claim of title and not under any agreement with plaintiff or his predecessors in interest and that he in good faith desires to contest plaintiff's title, and § 2149 declaring that "on the trial" of such cause the plaintiff must recover on the strength of his legal title unless defendant entered under contract or agreement or by force, in which latter case no inquiry can be had as to the strength of the title of the parties, defendants are not entitled as of right to a separate trial of the issue of force vel non. Fowler v. Prichard [Ala.] 41 So. 667.

35. Under Code 1896, § 2149, declaring that plaintiff must in the circuit court recover on the strength of his title unless he prove that defendant entered under some contract or agreement with plaintiff or by force, the only issue is as to the manner of defendant's entry and not as to how he held possession after he entered. Fowler v. Prichard [Ala.] 41 So. 667.

36. See 5 C. L. 1439.

37. Limitations against an action of forcible entry and detainer against a tenant at sufferance begins to run against the landlord on the termination of the tenancy by the statutory three days' notice. Clark v. Tukey Land Co. [Neb.] 106 N. W. 328.

38. Best v. Frazier, 16 Okl. 523, 85 P. 1119.

39. Plaintiff in an action appealed to the circuit court must show that the entry was within two years before the action was brought. Code 1899, c. 50, § 211. The record must show that fact to sustain a judgment for plaintiff. Karnes v. Johnston, 58 W. Va. 595, 52 S. E. 658.

40. Though lease restricted the right of occupancy and use to but a small portion. Camden v. West Branch Lumber Co. [W. Va.] 53 S. E. 409.

41. See 5 C. L. 1439.

42. Where it was plain that defendant was in possession as a tenant and not under a bona fide claim of ownership. Clark v. Tukey Land Co. [Neb.] 106 N. W. 328.

Parties.[43]—The action may be maintained by one of several tenants in common.[44] The person in possession is the real party defendant.[45]

Pleading.[46]—The usual rules of pleading apply to a large extent.[47] The complaint should be sufficiently definite to enable an officer to readily locate the premises from the description therein contained.[48] In Alabama the complaint need not include a claim for damages.[49] Special pleas of matter available under the general issue may be stricken.[50] Amendments may be allowed in proper cases.[51]

Evidence.[52]—Though possession only is involved, title papers or other oral or documentary proof is admissible for the purpose of locating the premises[53] and showing the character of defendant's entry and possession.[54] That a previous suit had been brought for the property is irrelevant where it does not relate to the forcible entry or to title to the land in controversy.[55] Plaintiff must prove such description of the premises as will enable the court to describe the same in its judgment with such accuracy as will enable the officer to enforce the writ issued pursuant thereto.[56]

The judgment.[57]—A judgment defective as to description of the premises may be aided by intendments drawn from the pleadings or other parts of the record.[58]

43. See 5 C. L. 1439.

44. Error, if any, in receiving parol evidence that one of the tenants had transferred his interest to the other who was plaintiff, was harmless. Willis v. Weeks, 129 Iowa, 525, 105 N. W. 1012.

45. Where a husband abandoned his wife and attempted to alienate the homestead, the wife was the real party defendant in an action of unlawful detainer by the husband's vendee to recover the land which was in the possession of the wife. Metz v. Schneider [Mo. App.] 97 S. W. 187.

46. See 5 C. L. 1440.

47. A complaint alleging that defendant was complainant's lessee by virtue of a monthly hiring which had expired is inconsistent with a right in complainant to enforce a forfeiture of a lease executed to defendant by complainant's grantor. Hartford Wheel Club v. Travelers' Ins. Co., 78 Conn. 355, 62 A. 207. Under Mansf. Dig. § 3351 (Ind. T. Ann. St. 1899, § 2285) relating to forcible entry and detainer and providing that a complaint must be filed, signed by plaintiff or his attorney; and § 5055 (§ 3260) providing that a complaint must be verified, a **complaint** in forcible detainer proceedings **must be verified.** Wilson v. Smith [Ind. T.] 89 S. W. 1009. That the complaint was signed by another, "agent," instead of "as agent" held not fatal. South St. Joseph Town Co. v. Scott, 115 Mo. App. 16, 90 S. W. 727.

48. Description of the land as being in section two where the proof showed that it was in section three was a fatal variance and was not cured by an explanatory statement in the affidavit. Paden v. Gibbs [Miss.] 40 So. 871. Any description by which the premises can be readily identified and located is sufficient. Held sufficient. Town of Oyster Bay v. Jacob, 109 App. Div. 613, 96 N. Y. S. 620. The fact that the notice to leave and the complaint subsequently filed, did not correctly describe all the land leased to defendants did not bar a recovery of the tracts which were correctly described. Peddicord v. Berk [Kan.] 86 P. 465.

49. A complaint for forcible entry and detainer in the form prescribed by Code 1896, p. 948, form 28, need not contain an averment or claim for damages. Heltor v. Ft. Gaines Oil & Guano Co. [Ala.] 39 So. 925.

50. Where an action of forcible entry and detainer is removed to the circuit court under Code 1896, §§ 2147, 2148, the plaintiff must recover on the strength of his own title as in ejectment, and in such case where there is no disclaimer of possession the only appropriate plea is "not guilty," and hence special pleas of matter available under the general issue may be properly stricken on the court's own motion. Cooley v. U. S. Sav. & Loan Co. [Ala.] 39 So. 515.

51. Where the complaint was founded upon a notice which failed at the trial, held not error to permit plaintiff to amend so as to base his claim upon an earlier notice served more than three days before the commencement of the action. Best v. Frazier, 16 Okl. 523, 85 P. 1119.

52. See 5 C. L. 1440.

53. In an action of unlawful entry and detainer plaintiff's title paper held properly admitted in evidence as showing what land plaintiff claimed and the boundaries thereof. Williams v. Virginia-Pocahontas Coal Co. [W. Va.] 53 S. E. 923. Being a possessory action only, title is not involved, but surveys and proof of occupation are admissible merely to show location and that the land occupied was not that the possession of which was claimed. Paden v. Gibbs [Miss.] 40 So. 871.

54. Where defendant claimed to have entered peaceably under a bond for a deed executed by plaintiffs who were the owners of the premises and that plaintiff gave them verbal permission to take possession, it was proper to admit in evidence the bond for the purpose of showing the character of defendant's entry and possession. West v. Comeaux [Kan.] 85 P. 138.

55. Fowler v. Prichard [Ala.] 41 So. 667.

56. Rockhold v. Doering, 122 Ill. App. 194.

57. See 5 C. L. 1440.

58. Adams v. Pacini, 119 Ill. App. 428. The entry of a judgment in this form: "It is considered by the court that the plaintiff should have and recover of and from the said defendant the right of possession of the

So, also, a judgment on a supersedeas bond which fails to set out the names of the sureties against whom it is rendered is not necessarily void.[59] An error in the form of a judgment consisting in a finding as to the title to the premises may be rejected as surplusage.[60] Where only a portion of certain premises is demanded a judgment for that portion is valid though the verdict finds defendant guilty of withholding the entire premises.[61] Where the justice has jurisdiction of the case and plaintiff recovers, he is entitled to possession of the premises in any event,[62] and the fact that the judgment includes rent in excess of the jurisdictional amount renders it void only as to the part relating to rent.[63] A judgment in forcible detainer is conclusive as to the breach of the condition of a lease concerning failure to surrender the premises, in a subsequent action to recover stipulated damages for the wrongful withholding of the premises,[64] but ordinarily it does not bar another action to try title or the right of possession.[65] An agreement to dismiss a traverse of the inquisition and the payment of past due and future rent is in effect an agreement that the judgment of eviction shall be set aside.[66] In some jurisdictions before a writ of possession can issue an affidavit must be filed stating that plaintiff is lawfully entitled to possession.[67] A second writ of possession may issue where the sheriff fails to execute the first one[68] or where the first writ is returned unserved because of plaintiff's failure to file a bond.[69]

Appeal[70] or other method of review is controlled by statute.[71] Appellant is or-

premises in question together with his costs and charges." etc., though not commendable, could be sustained. Id. A judgment that "plaintiff do have and retain possession of the premises in question" though not commendable in form, held sufficient for purpose of execution where it could be made certain by reference to the complaint and the transcript and where it followed the language of the verdict. Mollitor v. Thom Van Co., 118 Ill. App. 293.

59. A judgment on a supersedeas bond in forcible entry and detainer failing to set out the names of the sureties on the bond against whom the judgment was rendered, while informal, was not fatally defective provided the names of the sureties could be made certain by reference to the bond. Helton v. Ft. Gaines Oil & Guano Co. [Ala.] 39 So. 925.

60. Would probably not of itself constitute reversible error. Rockhold v. Doering, 122 Ill. App. 194.

61. Where it was admitted that defendant withheld possession of the portion demanded. Kessel v. Mayer, 118 Ill. App. 267.

62. Under Rev. St. 1899, § 4131, conferring jurisdiction of actions of unlawful detainer on a justice of the peace, and § 4133, a plaintiff, if entitled to recover, is entitled to a judgment for possession of the premises and for the amount of rent due provided the amount does not exceed the justice's jurisdiction. South St. Joseph Town Co. v. Scott, 115 Mo. App. 16, 90 S. W. 727.

63. Where the justice had jurisdiction of cases not exceeding $300, he had jurisdiction where only $262 was claimed for rent, and hence a judgment for $312 was merely erroneous, and was not void for want of jurisdiction. South St. Joseph Town Co. v. Scott, 115 Mo. App. 16, 90 S. W. 727.

64. Was not simply an estoppel by verdict and so conclusive as to those things only which were necessarily determined by or shown to have been involved therein. Kidder v. Walker, 121 Ill. App. 546.

65. Rev. St. § 6601, providing that judgments either before a justice of the peace or in the court of common pleas under the forcible entry and detainer chapter, "shall not be a bar to any further action brought by either party," is not class legislation and unconstitutional because in the interest of landlords, and should be literally construed. Laver v. Canfield, 7 Ohio C. C. (N. S.) 389.

66. Marshall v. Davis [Ky.] 91 S. W. 714.

67. Mansf. Dig. § 5055 (Ind. T. Ann. St. 1899, § 3260), provides that before a writ of possession can issue there must be filed an affidavit stating that plaintiff is lawfully entitled to possession. Held an affidavit made in February and filed in a suit commenced in April was insufficient. Wilson v. Smith [Ind. T.] 89 S. W. 1009.

68. On evidence that the sheriff did not dispossess defendant in forcible detainer proceedings and deliver possession to plaintiff it was proper to quash his return showing that he did so and to issue an alias writ of possession. Smith v. Hardwick [Ky.] 89 S. W. 724.

69. Where a writ of possession is issued under Mansf. Dig. § 3351 (Ind. T. Ann. St. 1899, § 2285), which has been returned unserved because of plaintiff's failure to give a bond to entitle him to possession, plaintiff may thereafter, upon proper application, obtain a second writ. Wilson v. Smith [Ind. T.] 89 S. W. 1009.

70. See 5 C. L. 1440.

71. A judgment of restitution rendered by a city court as authorized by § 1 of a special act of 1905 (14 Sp. Laws p. 600, c. 123) is not appealable under Gen. St. 1902, § 819, providing that writs of error may be brought from the judgments of any city court to the supreme court of errors, and § 788, as amended by Pub. Acts 1905, p. 324, c. 112, authorizing an appeal when one is entitled

dinarily required to give a proper bond.[72] It is his duty, also, to see that the necessary papers are filed with the transcript.[73] The appellate court may render judgment for rent pending the appeal.[74]

§ 2. *Criminal responsibility.*[75]—Where a tenant leaves the premises at the end of his term, the landlord, though not in actual occupancy, is to be regarded as in possession and a third person who enters without the landlord's consent and violently keeps possession with menaces and force, and without authority of law, is guilty of forcible detainer.[76] Actual assault upon the former possessor is not essential.[77]

FORECLOSURE OF MORTGAGES ON LAND.

§ 1. The General Rights and Defenses to Foreclosure and Remedies Available Therefor (1678). Rights and Defenses in General (1678). Accounting and Amount Due (1682). Tender (1683). Presentation to Debtor's Estate (1684). Persons Entitled to Foreclose (1684). The Remedies (1684).
§ 2. Foreclosure by Scire Facias and By Executory Process (1685). Scire Facias (1685). Executory Process (1685).
§ 3. Sale by Trustee in Deed or Under Power (1685).
A. Right and Authority to Sell (1685).
B. Notice (1687).
C. Sale and Deed (1688).
D. Costs and Fees (1688).
§ 4. Entry and Possession or Possessory Action (1688).
§ 5. Strict Foreclosure (1688).
§ 6. Foreclosure by Action and Sale (1688).
A. Right of Action and Nature of Remedy (1688). Jurisdiction (1689). Limitations (1690). Abatement (1692). Leave to Sue (1692). Discontinuance (1692).
B. Parties and Process (1692). Parties Plaintiff (1692). Parties Defendant (1692). New Parties and Intervention (1693). The Process (1694).
C. Pleading, Trial, and Evidence (1694). Bill, Complaint, or Petition (1694). Demurrer, Plea, or Answer (1695). Cross Bills and Supplemental Bills (1695). Trial and Hearing (1695). Evidence (1696).
D. Decree or Judgment (1697).
E. Sale (1698). On Confirmation (1699). Resale (1700).
F. Receivership in Foreclosure (1700).
G. Costs, Fees, and Expenses (1700).
H. Effect of Proceeding (1701).
§ 7. Defective Foreclosures and Avoidance Thereof (1702). Defects and Irregularities (1702). Grounds Available After Confirmation (1704). Fraud, Accident, or Mistake (1704). Modes of Attacking Sale (1705). Offer of Equity (1706). Rights Under Invalid Foreclosure (1707).
§ 8. Title and Rights of Purchaser (1708). Purchases by Beneficiary, Trustee, or the Like (1711). Agreements to Permit Redemption (1712). A Writ of Assistance (1713). Remedies to Assert or Protect Title (1714).
§ 9. The Bid and the Proceeds of Foreclosure (1714). Bid Money or Deposit (1715). Accumulated Rents (1715). Payment and Distribution (1715).
§ 10. Personal Liability and Judgment for Deficiency (1717).
§ 11. Redemption (1719). Right to Possession Pending Redemption (1722). Title and Rights Acquired by Redemption (1723).

§ 1. *The general rights and defenses to foreclosure and remedies available therefor. Rights and defenses in general.*[78]—In order to sustain a foreclosure there

to a writ of error. The remedy is by writ of error under §§ 819, 1087, providing that where a writ of error shall be procured by a defendant in summary process he shall give a bond to answer for rents. Marsh v. Burhans [Conn.] 64 A. 739. Transcript filed in circuit court on appeal from justice court held to show that a "complaint in writing" as required by Rev. St. c. 57, § 5, was filed in the justice court so as to give the circuit court jurisdiction. Hawthorne v. Cartier Lumber Co., 121 Ill. App. 494.

72. Rev. St. 1898, § 3586, providing that an appeal may be taken from a judgment in forcible entry and detainer within 10 days, which appeal shall not stay execution unless an undertaking is filed within 10 days, and § 3587 making applicable to forcible entry and detainer the provisions of the Code relative to civil actions, appeals, etc., make §§ 3747, 3748, relating to appeals from justice's court applicable to an appeal from a judgment in forcible entry and detainer and the undertaking provided thereby must be given to perfect the appeal. Hoffman v. Lewis [Utah] 87 P. 167. An appeal bond executed by defendant in forcible entry and detainer proceedings before a justice of the peace which is not given in any specific amount but merely stipulates that the obligors became security for the costs of the appeal and agreed to pay such judgment as might be rendered in the circuit court is a mere bond for costs and not a supersedeas within Code 1896, § 2145, providing that in cases of forcible entry and detainer an appeal bond does not prevent the issue of writ of restitution unless defendant executes a bond for twice the yearly value of the rent of the premises. Helton v. Ft. Gaines Oil & Guano Co. [Ala.] 39 So. 925.

Failure of the sureties to justify renders

must be a valid mortgage[79] supported by a sufficient consideration,[80] and a default in the performance of the conditions of the mortgage.[81] Default may consist of nonpayment of part of the debt secured[82] or interest,[83] but default in payment of

the appeal ineffectual and there is no distinction in this respect between an appeal from a judgment rendered by a justice of the peace in forcible entry and detainer and an appeal from a justice court in other cases. Hoffman v. Lewis [Utah] 87 P. 167. Under Act July 1, 1872, providing that "the court in which the appeal may be pending may require a new bond," etc., the circuit court acquires jurisdiction of the subject-matter and of the appellant when the bond has been entered into before the justice and the bond and the transcript have been duly filed in the circuit court; and where in such case appellee makes a voluntary appearance the circuit court has complete jurisdiction, and may, at the same term, make an order requiring the surety on the appeal bond to justify at that term, and, at such term, dismiss the appeal for failure to comply with such order. Dickerson v. Johnson, 119 Ill. App. 325, overruling Baines v. Kelly, 73 Ill. 181.

73. Defendant could not urge that appellate court had no jurisdiction because no written complaint was shown in the justice's transcript. Hawthorne v. Cartier Lumber Co., 121 Ill. App. 494.

74. Under Code 1896, § 2146, on appeal by defendant to the circuit court plaintiff is entitled to the rent of the premises pending the appeal if he recovers. Sprouse v. Story [Ala.] 42 So. 23. The circuit court on appeal from the justice court may, on plaintiff's motion, render a judgment against defendant for the value of the rents pending the appeal as provided by Code 1896, § 2146, though there is no claim for damages in the complaint. Helton v. Ft. Gaines Oil & Guano Co. [Ala.] 39 So. 925.

75. See 3 C. L. 1437.

76. Ellis v. State, 124 Ga. 91, 52 S. E. 147.

77. If, when he seeks to re-enter, the conduct of the accused in keeping possession and the circumstances connected therewith be such as are reasonably calculated to cause the former occupant to believe that should he persist in the attempt to re-enter he would be subjected to physical violence the offence is complete. Ellis v. State, 124 Ga. 91, 52 S. E. 147. Evidence held to warrant verdict of guilty of forcible detainer. Id.

78. See 5 C. L. 1441.

79. A decision in a suit in equity declaring a mortgage invalid is res adjudicata and is a good defense to subsequent scire facias proceedings to foreclose. Kay v. Gray, 30 Pa. Super. Ct. 450. Executory process will not issue to enforce mortgage executed in firm name by one partner without authority from the other partners. Fontelieu v. Fontelieu, 116 La. 866, 41 So. 120.

Statute of frauds: Parol agreement to execute mortgage, though coupled with fraud and destruction of mortgage previously executed between the parties, cannot be foreclosed. See Rev. St. 1895, art. 624. Poarch v. Duncan [Tex. Civ. App.] 14 Tex. Ct. Rep. 644, 91 S. W. 1110.

Mortgage of homestead property is prohibited in Texas, and a recital in a mortgage that the property is not used as a homestead will not estop the mortgagor from claiming the homestead where the property was in his possession and was actually so used at the time of the execution of the mortgage. McGaughey v. American Nat. Bank [Tex. Civ. App.] 14 Tex. Ct. Rep. 350, 92 S. W. 1003.

80. Money advanced pursuant to a contract void under the liquor laws was not a valid consideration. Dierkes v. Wideman [Mich.] 12 Det. Leg. N. 921, 106 N. W. 735. Agreement to release one of several sureties from all liability upon payment of a note for a certain amount less than his pro rata liability was sufficient consideration for the note and a mortgage securing it. Chadbourn v. Durham, 140 N. C. 501, 53 S. E. 348. Grantee of corporation may defend suit to foreclose purchase-money mortgage on ground that corporation had no power to convey. Lafferty v. Evans [Okl.] 87 P. 304. Where the mortgagor has received a consideration for the execution of the mortgage, it is no defense that the mortgage was executed to a party other than the real beneficiary thereof. Waterbury v. McKinnon [C. C. A.] 146 F. 737.

Mortgage by married woman: Where a married woman accepts her father's succession unconditionally, she cannot evade the foreclosure of a mortgage executed by her on land inherited by her from her father and securing the repayment of money borrowed to pay a debt due by him, on the ground that she was not benefited by the consideration of the mortgage. Pellerin v. Sanders, 116 La. 616, 40 So. 917.

Partial failure of consideration: When the consideration for a mortgage upon realty is the purchase price of personalty, partial failure of consideration may be pleaded in a suit to enforce the mortgage lien. The principle announced in Reddick v. Mickler, 23 Fla. 335, 2 So. 698, does not control, such principle being based upon the technical rules of common law as to real warranties, and is not to be extended to guaranties of personal property. Otis v. McCaskill [Fla.] 41 So. 458.

Pleading and evidence: As to pleading failure of consideration and evidence thereof see post § 6C, Pleading, Trial, and Evidence.

81. Chace v. Morse, 189 Mass. 559, 76 N. E. 142.

82. Mortgage may provide for foreclosure pro tanto in event of default in payment of any part of the debt when due. Ford v. Lewis [Ala.] 41 So. 144. A provision in a security deed for accelerating the maturity of the debt should not be so construed as to work hardship on the borrower where there has been a bona fide effort on his part to comply with his covenant, and the circumstances are such that his efforts at compliance were apparently acceptable to the lender. In such a case, when there has been no waiver of the covenant by the lender, good faith requires that he should, before undertaking to enforce the provisions of the deed accelerating the maturity of the debt

one instalment will not mature the other instalments unless so provided in the mortgage,[84] and a sale under a power of sale upon default as to one instalment exhausts the power.[85] A stipulation that the mortgage is not to be foreclosed until the maturity of the last instalment of the debt will not prevent suit on each instalment as it becomes due,[86] or a suit to declare the instalments due to be a lien on the land.[87] There can be no default for nonpayment when the debt has been satisfied,[88] or pending an unexpired extension of the time of payment.[89] Mere delay in foreclosing after default is no defense.[90] A party cannot take advantage of a default caused by himself.[91] A general warranty estops the grantor from acquiring and enforcing a mortgage upon the property conveyed,[92] but the matter may be set at large by subsequent conveyances.[93] Breach of covenant by the vendor is a defense to the foreclosure of a purchase-money mortgage.[94] A paramount title cannot be set up by the mortgagor or his privies,[95] but may be set up by a stranger,[96] or even

for noncompliance with the terms of the covenant, afford to the borrower a reasonable opportunity to fully meet his obligations thereunder. Provident Sav. Life Assur. Soc. v. Georgia Industrial Co., 124 Ga. 399, 52 S. E. 289.

83. Suit to foreclose on nonpayment of interest is an election to treat the principal as due. Kilpatrick v. Germania Life Ins. Co., 183 N. Y. 163, 75 N. E. 1124; San Gabriel Valley Bank v. Lake View Town Co. [Cal. App.] 86 P. 727. After having made such election the mortgagee could not demand payment of a bonus provided for in the mortgage as a condition to the right to pay the debt before maturity, and the mortgagor having paid such bonus in order to secure the release of the mortgage could recover it back. Kilpatrick v. Germania Life Ins. Co., 183 N. Y. 163, 75 N. E. 1124. The mortgage and the note secured thereby must be construed together in order to ascertain the intention of the parties as to maturity of the debt upon nonpayment of interest. San Gabriel Valley Bank v. Lake View Town Co. [Cal. App.] 86 P. 727.

84, 85. Ford v. Lewis [Ala.] 41 So. 144.

86. Arnold v. McBride [Ark.] 93 S. W. 989.

87. Arnold v. McBride [Ark.] 93 S. W. 989. In a suit of this kind defendant cannot complain that the court did not render personal judgment for the portion of the debt that was due. Id.

88. Payment may consist of either payment of money (White v. Black, 115 Mo. App. 28, 90 S. W. 1153), or, with the consent of the parties, its equivalent (Id.), but a gift by the debtor to the creditor or a gift of the amount of the obligation by the creditor to the debtor does not constitute payment. (Id.). Where wife allowed husband to act as her agent in taking a mortgage and assigning same, she was bound by payments to him. Barry v. Stover [S. D.] 107 N. W. 672. Assignee of mortgage bound by payments to mortgagee before notice of the assignment. Id. Joint obligor cannot prevent foreclosure by paying his proportion of the debt. Pellerin v. Sanders, 116 La. 616, 40 So. 917. Joint obligor who denies all liability cannot complain that he was called upon to pay the whole debt instead of his proportion thereof. Id.

Payment by third party: Mortgage debtor may, by collateral agreement with third party, have the claim of the holder of the mortgage debt satisfied without extinguishing the mortgage debt or the mortgage, the party paying the debt in such case being subrogated to the rights of the mortgagee. Pellerin v. Sanders, 116 La. 616, 40 So. 917.

The purchase of the debt by mortgagor's grantee, who had assumed the debt, was not a payment of the debt where the purchase was made for and with the money of a third party. Neely v. Black [Ark.] 96 S. W. 984.

Evidence: See post § 6C, Pleading, Trial, and Evidence.

89. Fontelieu v. Fontelieu, 116 La. 866, 41 So. 120. An agreement for an extension of time indorsed on the back of the mortgage note, but erased, is no evidence of such an extension as will render a suit to foreclose premature, where there is no evidence as to how and by whom the erasure was made. Jackson v. Grosser, 218 Ill. 494, 75 N. E. 1032.

90. Lapse of twenty years is not alone sufficient to take the case to the jury on the question of payment. Brownell v. Oviatt [Pa.] 64 A. 670.

91. Default caused by mortgagee. See Civ. Code § 1511. McCue v. Bradbury [Cal.] 84 P. 993. When mortgagee did not object to a tender as made, he could not claim a default on account of the insufficiency of the tender. Id.

92. Though the covenant against encumbrances excepts the mortgage. Tappan v. Huntington [Minn.] 106 N. W. 98.

93. A conveyance of the premises by a subsequent grantee, subject to mortgages on the same which are duly recorded, operates as an estoppel against the former estoppel and sets the matter at large, and the mortgage becomes enforceable in the hands of the original grantor or his assignee. Tappan v. Huntington [Minn.] 106 N. W. 98.

94. Covenant for quiet possession. Cassada v. Stabel, 98 App. Div. 600, 90 N. Y. S. 533. When purchaser holding a deed with covenant for quiet possession is evicted by grantor, he may not only defend foreclosure by grantor of the purchase-money mortgage, but may recover back the principal of the purchase money already paid. Id. Defendant not entitled to damages on account of prior mortgage executed by vendor where complainant tenders the satisfaction of such mortgage. Philip v. Stearns [S. D.] 105 N. W. 467.

by a party to the mortgage where such party is not personally bound by the covenants therein.[97] A bona fide purchaser of the mortgage debt is chargeable with notice of all defects in the mortgagor's title which appear in the record chain of title.[98] Fraud in collateral transactions[99] or in transactions merged in the mortgage transaction[1] is no defense. If the complainant can make out a prima facie case without developing the fraud, neither the mortgagor nor his privies can defend on the ground that the mortgage was in fraud of creditors.[2] Mistake is no defense unless it is mutual.[3] Fraud or mistake, when relied on as a defense, must be pleaded.[4] In the absence of such an agreement between the mortgagee and the mortgagor's grantee,[5] the sale of the mortgaged property by the mortgagor and the assumption of the debt by the grantee is no defense to a suit against the former.[6]

A mortgage may be foreclosed for the benefit of the assignee of the mortgage debt,[7] but an assignment of a mortgage securing a non-negotiable debt is without prejudice to any defense existing at the time of the assignment or before notice thereof.[8] One of several joint mortgagors cannot defend on the ground of want of interest in the property on the part of the others.[9] Under certain circumstances stockholders may defend foreclosure proceedings against the corporation.[10]

95. Gilman v. Crossman [Neb.] 106 N. W. 769.

96. Gilman v. Crossman [Neb.] 106 N. W. 769. Under the Codes, where both law and equity jurisdiction are vested in the same court and provision is made for the bringing in of all parties interested in or claiming an interest in the property, the question of title may be litigated and interested parties who are brought in may defend by setting up adverse title. City of Covington v. Ferguson [Ind.] 78 N. E. 241.

Laches in asserting title: One who holds the legal title to real property is not guilty of laches which will prevent him from asserting the invalidity of a mortgage thereon, in defense of a suit to foreclose the same, merely because he has not instituted a suit to avoid the mortgage. It is time enough for him to present his objection to the mortgage when it is attempted to be asserted against his legal title. Burns v. Cooper [C. C. A.] 140 F. 273.

97. Where the covenants of a married woman in joint mortgage by her and her husband do not operate to bind her personally, or her separate estate, they do not operate to estop her from claiming an interest in the property described in the mortgage lawfully acquired by her after the date of the mortgage freed from its lien. Burns v. Cooper [C. C. A.] 140 F. 273. A married woman is not bound by the covenants in a deed or mortgage where she joins with her husband in making the same for the sole purpose of releasing her dower interest. Section 4806, Comp. St. 1903. Pochin v. Conley [Neb.] 104 N. W. 878.

98. Burns v. Cooper [C. C. A.] 140 F. 273.

99. That the real mortgagee procured the execution of the mortgage to a nonresident in order to evade the state tax on mortgages was no defense to suit to foreclose by the nominal mortgagee. Waterbury v. McKinnon [C. C. A.] 146 F. 737.

1. Where the mortgagee procured the conveyance of the debtor's property to the latter's wife in order to defraud the latter's creditors, and the debtor and his wife then mortgaged the property, upon a sufficient consideration, to the mortgagee. Cohn v. Pitzele, 117 Ill. App. 342.

2. Wife to whom the property had been assigned as separate support could not, as the owner of the equity of redemption, attack the mortgage. Lefmann v. Brill [C. C. A.] 142 F. 44. Nor could the wife attack the mortgage in her capacity as a creditor, it not appearing that she had any unsatisfied judgment or decree according her maintenance. Id.

3. Defendant could not defend on ground that she did not know mortgage contained a recital that the property was not the homestead of herself and husband, where plaintiff did not know of defendant's ignorance. McGaughey v. American Nat. Bank [Tex. Civ. App.] 14 Tex. Ct. Rep. 350, 92 S. W. 1003.

4. McGaughey v. American Nat. Bank [Tex. Civ. App.] 14 Tex. Ct. Rep. 350, 92 S. W. 1003.

5. Payment of interest a few days in advance and payment at an increased rate do not necessarily show such a binding contract between the mortgagee and the mortgagor's grantee, who paid the interest, as will release the mortgagor. Smythe's Estate v. Evans, 209 Ill. 376, 70 N. E. 906.

6. Neely v. Black [Ark.] 96 S. W. 984. The original debtor's remedy in such case is a suit in equity to compel his grantee to pay the debt. Id.

7. Where proceedings were instituted to foreclose a mortgage in the name of the original mortgagee, for the use of certain persons to whom it was alleged that the security notes had been transferred, and no effort was made to cut off any defense which the mortgagor might have, and a mere denial that the title to the notes was in the usees, and an allegation that they held such notes only as securities, did not furnish any valid defense to the foreclosure. Montgomery v. King, 125 Ga. 388, 54 S. E. 135.

8. Rev. Code Civ. Proc. § 81. Barry v. Stover [S. D.] 107 N. W. 672.

9. If the alleged owner is sole owner, he will be bound by his mortgage and will,

The lex fori controls as to what constitutes a defense.[11]

In a proper case equity will enjoin a foreclosure.[12] The mortgagee may be a proper or necessary party to the injunction suit, though he has assigned the mortgage.[13] In a suit to enjoin sale after tender, an offer to pay the amount due is sufficient without paying the money into court.[14] A widow may redeem land from a mortgage executed by her deceased husband, and hence may enjoin a sale after a valid tender by her[15] though her dower has not been assigned[16] and though she has joined in the mortgage in release of dower;[17] and her right to redeem and hence to the injunction will not be affected by a second mortgage by her husband in which she did not join,[18] nor will she be required to pay off the second mortgagee[19] or an open account due the first mortgagee,[20] and in such a suit the rights of heirs of the husband who are not parties need not be considered.[21]

Accounting and amount due.[22]—An account stated is not conclusive where it is founded upon erroneous calculation,[23] but in the absence of fraud, accident, or mistake, the notes secured by the mortgage are conclusive as to the amount due at the time of the execution of the mortgage.[24] An assignee of the equity of redemption cannot demand an accounting as to funds placed in the hands of the mortgagee

furthermore, be estopped, as to persons relying on the joint ownership, to deny the interest of his co-mortgagors. Pellerin v. Sanders, 116 La. 616, 40 So. 917.

10. Where there was no board of directors to whom application to defend might be made. Frederick Milling Co. v. Frederick Farmers' Alliance Co. [S. D.] 106 N. W. 298. See Corporations, 7 C. L. 862. While it might have been more regular to have set aside a foreclosure decree against a corporation entered upon the stipulation of the president, and then to have permitted the stockholders to come in by intervention, an order permitting the stockholders to defend as representatives of the corporation was not reviewable on an appeal from a motion denying plaintiff's motion to vacate an order to show cause why the judgment should not be set aside. Frederick Milling Co. v. Frederick Farmers' Alliance Co. [S. D.] 106 N. W. 298.

11. Failure to comply with Massachusetts law requiring assignee of mortgage to give notice of the assignment not available as a defense in South Dakota. Barry v. Stover [S. D.] 107 N. W. 672.

12. Where sale would be invalid. Wittmeier v. Tidwell [Ala.] 40 So. 963. Injunction against foreclosure of a mortgage by defendant in specific performance suit relating to the mortgaged property held, under the evidence, properly denied. Sire v. Long Acre Square Bldg. Co., 50 Misc. 29, 100 N. Y. S. 307.

Under North Dakota statute: The term "mortgagor," as used in § 5845, Revised Codes of 1899, includes within its meaning any person claiming title to the mortgaged premises under and in privity with the original mortgagor. Scott v. District Ct. of Fifth Judicial Dist. [N. D.] 107 N. W. 61. That an action to foreclose a mortgage is barred by the statute of limitations is one of the defenses which may be shown as a ground for enjoining a foreclosure by advertisement under § 5845 of the Revised Codes of 1899. Id. A purchaser of land at a tax sale cannot avail himself of the ex parte remedy by § 5845, Revised Codes of 1899, to enjoin the foreclosure of a mortgage. Id. Although the law now appearing as § 5845, Revised Codes of 1899, was the first adopted by the legislature of Dakota Territory in 1883, after defendant's mortgage containing the power of sale was given, the obligation of the mortgagee's contract was not thereby impaired, nor was the mortgagee thereby deprived of any property right without due process of law. Id.

Procedure upon dissolution: When there is proof of payments the injunction should not be dissolved without fixing the amount due on the mortgage debt. Gray v. Bryson [Miss.] 39 So. 694. The appellate court could not render a decree as to the amount due, the trial court not having passed on the question. Id.

Bar of limitations as ground for injunction against exercise of power of sale. See post § 3A, Right and Authority to Sell.

Injunction on account of insufficient advertisement: See post § 3B, Notice.

13. Where a bill to enjoin sale averred that mortgagee had assigned the mortgage, but it appeared that his title was not divested by the assignment, he was a proper, if not a necessary, party. Wittmeier v. Tidwell [Ala.] 40 So. 963.

14. Wittmeier v. Tidwell [Ala.] 40 So. 963. See post this section, subd. Tender.

15, 16. Hays v. Cretin, 102 Md. 695, 62 A. 1028.

17. In such case her inchoate right to dower is released only as to the mortgagee, and she may assert it as against others by redeeming the land. Hays v. Cretin, 102 Md. 695, 63 A. 1028.

18, 19, 20. Hays v. Cretin, 102 Md. 695, 63 A. 1028.

21. The only question in such case is the right to redeem as distinguished from subrogation. Hays v. Cretin, 102 Md. 695, 63 A. 1028.

22. See 5 C. L. 1443.

23. Smith v. Allmon [S. C.] 54 S. E. 1014.

24. Cohn v. Pitzele, 117 Ill. App. 342.

by the mortgagor for a purpose entirely disconnected with the mortgage.[25] The finding of the trial court as to the amount due will not be disturbed where it is sustained by the evidence.[26]

Defendant may offset against the debt damages accruing from the wrongful suing out of a writ of sequestration by plaintiff and the dispossession of defendant thereunder.[27]

Tender.[28]—An unconditional tender on the law day of the mortgage discharges the mortgage.[29] The tender must include attorney's fees provided for by the mortgage.[30] Tender must be alleged,[31] but the money need not be paid into court, an offer to pay being sufficient.[32] Any one entitled to redeem may make a valid tender.[33] A tender may be made effective as against a purchaser at foreclosure sale by giving him notice before or at the sale.[34] The sufficiency of a tender is waived by failure to object, and a default cannot thereafter be asserted on account of such

25. Lefmann v. Brill [C. C. A.] 142 F. 44.

26. Evidence in suit for accounting from mortgagee who, after the death of the mortgagor, had come into possession of the land under deed from the widow and heirs, held insufficient to sustain finding that certain payments had been made on the mortgage. Morris v. Anderson [Mich.] 12 Det. Leg. N. 709, 105 N. W. 773. Finding that the debt secured by a first mortgage was not discharged by a second mortgage between the same parties held sustained by the evidence. Id.

27. Blake v. Lowry [Tex. Civ. App.] 15 Tex. Ct. Rep. 728, 93 S. W. 521.

28. See 5 C. L. 1443.

29. Dickerson v. Simmons [N. C.] 53 S. E. 850.

Injunction will issue to restrain sale after valid tender. Wittmeier v. Tidwell [Ala.] 40 So. 963. Where bill does not show that the alleged tender was made before steps taken to foreclose, failure to allege tender of attorneys' fees provided for in mortgage was a fatal defect. Id.

Note on a tender after maturity: "As to the effect of a tender made, as in this case, after maturity, there is much conflict of authority in those jurisdictions where the mortgage is treated simply as a security to a debt. The rule is that a mortgage is discharged by a proper tender made at any time before the foreclosure, and that a sale under the power is void. In those more numerous jurisdictions where the common-law doctrines prevail, the lien of the mortgage is not discharged by the tender, the only effect being to arrest the accruing of interest and to free the debtor from future costs. If the mortgagor desires by his tender to discharge the lien when it is not accepted, he must bring his suit by redemption and pay the money into court. North Carolina, Massachusetts, New Jersey, and other states are classified as jurisdictions which adhere to the common law. 20 A. & E. Enc. Law [2d Ed.] 1063. In the first named jurisdictions it is held that, where tender is made after the law day, a sale under the power is void even as to bona fide purchaser for value. Cameron v. Irwin, 5 Hill [N. Y.] 272-276; Pingree, Mortg. § 1342. The contrary is held in Massachusetts and some other courts which adhere to the common law. Jones, Mortg. § 1798, and cases cited. Those courts regard the power as one coupled with an interest which cannot be revoked, and hold that a sale under the power, after an accepted tender, transfers the legal title to the purchaser, and that the tender is merely a foundation for a suit in equity for redemption. It seems, therefore, that in those a bona fide purchaser for value and without notice of tender gets a good title. It is also held that a mortgagor who has notice of an intended sale and allows it to proceed without objection cannot afterwards show a tender or even a payment in full of the mortgage debt, and thereby defeat the title of a bona fide purchaser for value without notice. Cranston v. Crane, 97 Mass. 459, 93 Am. Dec. 106; Jones, Mortg. § 1798. It has been determined expressly by this court that 'The unaccepted tender of the amount due on the debt, secured by mortgage, does not discharge the lien of the mortgage unless the tender be kept good, and the money paid into court. Its only effect is to stop interest and costs accruing after tender.' Parker v. Beasley, 116 N. C. 1, 21 S. E. 955, 33 L. R. A. 231."—From Dickerson v. Simmons [N. C.] 53 S. E. 850.

30. Dickerson v. Simmons [N. C.] 53 S. E. 850.

31. An averment that the amount called for by the mortgage was tendered, without any averment as to what such amount was, is insufficient, being a mere conclusion. Wittmeier v. Tidwell [Ala.] 40 So. 963.

32. In suit to enjoin sale after tender. Wittmeier v. Tidwell [Ala.] 40 So. 963.

Note: "The phrase, 'keeping his tender good,' does not mean that defendant must have paid the money into court. It seems that payment into court is only authorized or required when there is a statute requiring it or when there is a suit pending to redeem the land, and where the effect is to discharge the mortgage lien. But the debtor must be ready, able, and willing at all times to pay the debt. He may retain the money in his own possession, but the identical money need not be kept on hand, and, if by making use of the money he is not ready to pay the debt in current money at any time when requested, the effect of the tender is destroyed."—From Dickerson v. Simmons [N. C.] 53 S. E. 850.

33. Tenant in common. Dickerson v. Simmons [N. C.] 53 S. E. 850. Mortgagor's grantee. Id. See post § 11, Redemption.

insufficiency.[35] The question of tender as a condition to a suit to redeem from sale is treated elsewhere.[36]

Presentation to debtor's estate.[37]—Where no deficiency judgment is sought against the decedent's estate, presentation of a mortgage debt is not a condition precedent to the right to foreclose.[38]

Persons entitled to foreclose.[39]—Complainant must have a substantial interest in the subject-matter of the suit.[40] The legal holder of notes is prima facie the owner thereof and as such may foreclose a mortgage securing them,[41] but this prima facie right may be rebutted.[42] The equitable owner of the mortgage may foreclose it.[43] So also, the beneficiary of a deed of trust is entitled to have it foreclosed,[44] subject, however, to the provisions of the deed in this regard.[45]

The remedies[46] for foreclosure are particularly discussed in other sections of this topic.[47] In some states the holder of a claim secured by a mortgage is confined by statute to a single remedy or suit,[48] while in others he has several remedies which he may pursue concurrently or successively until he obtains satisfaction,[49] the only limitation being that there can be but one satisfaction.[50] Thus, in Georgia and

34. Dickerson v. Simmons [N. C.] 53 S. E. 850.

35. McCue v. Bradbury [Cal.] 84 P. 993.

36. See post § 11, Redemption.

37. See 5 C. L. 1443.

38. Code Civ. Proc. § 1500. Heeser v. Taylor, 1 Cal. App. 619, 82 P. 977; Way v. Shawer [Cal. App.] 84 P. 283; Fox v. Bernard [Nev.] 85 P. 351. A deed of trust on a homestead to secure a debt is not a lien or encumbrance, within Code Civ. Proc. § 1475, requiring debts secured by "liens or encumbrances" on a homestead to be presented to the decedent's estate. See Civ. Code §§ 1114, 2872, and Code Civ. Proc. § 1180, defining liens and encumbrances. Weber v. McCleverty [Cal.] 86 P. 706.

39. See 5 C. L. 1443.

40. Bennett v. First Nat. Bank, 117 Ill. App. 382.

41. Bennett v. First Nat. Bank, 117 Ill. App. 382. Such right is not affected by an arrangement between such holder and his assignor whereby the latter undertakes to reimburse the former in the event of failure to collect. Id. Question as to whether the mortgage note was endorsed by the payee or by her husband was immaterial where it appeared that he was acting as her agent. Barry v. Stover [S. D.] 107 N. W. 672.

42. Bennett v. First Nat. Bank, 117 Ill. App. 382. Evidence held to show that the notes secured by the mortgage sought to be foreclosed were owned by the defendant. Id.

43. Sprague v. Lovett [S. D.] 106 N. W. 134. Where a party advanced money to pay off a mortgage, intending to take an assignment of the same, but through mistake the note was marked paid, he was nevertheless the equitable owner of the mortgage and note and as such was entitled to foreclose. Id.

44. Allen v. Pierson, 113 App. Div. 586, 100 N. Y. S. 451. See post § 3A, Right and Authority to Sell; post § 6A, Right of Action and Nature of Remedy. Creditor entitled to foreclose mortgage, giving surety on mortgage note or "other legal owner or holder" the right to foreclose. Harwell v. Harbison [Tex. Civ. App.] 16 Tex. Ct. Rep. 510, 95 S. W. 30.

45. Provision that foreclosure could be had only at instance of majority in amount of creditors secured. Allen v. Pierson, 113 App. Div. 586, 100 N. Y. S. 451.

46. See 5 C. L. 1443.

47. See post §§ 2, 3, 4, 5, 6.

48. Fryer v. Fryer [Neb.] 105 N. W. 712. In an action to foreclose a real estate mortgage, the plaintiff is required to allege and prove, as against the owner of the equity of redemption, that no proceedings at law have been laid for the recovery of the debt secured by the mortgage. McDowell v. Markey [Neb.] 108 N. W. 152. Under Code Civ. Proc. § 1628, no action can be maintained on a mortgage debt pending or after foreclosure, without leave of the court in which the foreclosure is pending or was had. LaGrave v. Hellinger, 109 App. Div. 515, 96 N. Y. S. 564; Robert v. Kidansky, 97 N. Y. S. 913. Code Civ. Proc. § 726, providing that an action to foreclose shall be the sole remedy for the recovery of a debt secured by a mortgage, does not apply where the mortgaged property is situated in a foreign state. In such case a personal action against the debtor will lie. McGue v. Rommel, 148 Cal. 539, 83 P. 1000. Where the mortgage is void, a statute requiring mortgage to be enforced before suing on debt secured thereby does not apply. Mantle v. Dabney [Wash.] 87 P. 122.

49. Wyman v. Friedman, 120 Ill. App. 543. See post § 6D, Decree or Judgment.

50. Black v. Thompson, 120 Ill. App. 424. Where, in a suit upon a note purporting to be secured by mortgage, the plaintiff alleges that he reserved his mortgage rights, but does not pray that such reservation be accorded or that the mortgage be recognized or enforced, a decree reserving his mortgage rights is not authorized by a prayer for general and equitable relief, but is ultra petitionem. Lichtenstein v. Lyons, 115 La. 1051, 40 So. 454. Question as to effect of alleged reservation and as to power of court to make such reservation upon proper decree, not determined. Id.

Illinois, an action on the debt and a suit to foreclose may be maintained at the same time,[51] while in Mississippi, after breach of condition, ejectment may be maintained for the land as a means of enforcing the security,[52] and possession having thus been obtained may be retained until the mortgage debt is paid,[53] though the debt is barred by limitations.[54] The cause of action on the mortgage is separate and distinct from that on the obligation secured, and neither need be produced in an action or suit on the other.[55] An equitable lien created by a mortgage on trust property may be enforced in equity.[56]

§ 2. *Foreclosure by scire facias and by executory process. Scire facias.*[57]—The general rules of procedure are discussed in another topic.[58] Two returns of nihil are equivalent to a return of scire feci,[59] and a judgment entered upon two returns nihil cannot be attacked on the ground that the mortgagor was dead at the time of the issue of the writ,[60] but this rule rests upon long continued practice, and cannot be extended to a case where the mortgagor is served and dies before judgment.[61] It is not necessary to produce the obligation secured by the mortgage.[62] The burden of proving payment is upon the defendant.[63] The sheriff's return to a writ of levari facias issued upon a judgment of foreclosure by scire facias is conclusive as to the purchaser and the price.[64] A tender, in order to constitute a good ground for a motion to open a judgment in scire facias proceedings, must be established by clear and satisfactory evidence,[65] and must have been kept good.[66]

Executory process.[67]—The remedy by executory process obtains in Louisiana.[68] The judgment must be for a fixed amount.[69]

§ 3. *Sale by trustee in deed or under power. A. Right and authority to sell.*[70] —A stipulation in a mortgage conferring a power of sale in case of default gives a remedy which must be exercised agreeably to the statutes relating thereto in force when the remedy is invoked.[71] The terms of the power must be strictly complied

51. Montgomery v. Fouche, 125 Ga. 43, 53 S. E. 767; Black v. Thompson, 120 Ill. App. 424.

52, 53. Haggart v. Wilczinski [C. C. A.] 143 F. 22.

54. Haggart v. Wilczinski [C. C. A.] 143 F. 22. And this rule applies in Mississippi, notwithstanding the statutes of this state bar the right as well as the remedy. Id. But the mortgagee, in such case, if sued in ejectment by the mortgagor, might have to resort to equity to protect his rights and possession. Id.

55. Bond need not be produced in foreclosure proceedings on the mortgage, and the mortgage need not be produced in an action on the bond. Brownell v. Oviatt [Pa.] 64 A. 670.

56. Where woman who, in contemplation of marriage, had executed trust deed on land, the income to be given to her for life, and to her husband after her death, with remainder to her children, executed, after the husband's death, a mortgage on the property in which the children joined. Newton v. Jay, 107 App. Div. 457, 95 N. Y. S. 413.

57. See 5 C. L. 1444.

58. See Scire Facias, 6 C. L. 1436.

59. Freemansburg Bldg. & Loan Ass'n v. Billig, 30 Pa. Super. Ct. 101.

60. Lawrence v. Smith [Pa.] 64 A. 776; Freemansburg Bldg. & Loan Ass'n v. Billig, 30 Pa. Super. Ct. 101.

61. Lawrence v. Smith [Pa.] 64 A. 776.

62, 63. Brownell v. Oviatt [Pa.] 64 A. 670.

64. Philadelphia Saving Fund Soc. v. Purcell, 24 Pa. Super. Ct. 205. See post § 8, subd. Remedies to Assert or Protect Title. The real purchaser's remedy is by action against the sheriff for a false return, and not by motion in the scire facias proceedings to correct the return. Id. Act April 21, 1846 (P. L. 430), relating to the correction and amendment of sheriffs' returns, has no application to such a case. Id. Nor can the return be contradicted by parol evidence. Id.

65. The burden of proof being upon the movant. Freemansburg Bldg. & Loan Ass'n v. Billig, 30 Pa. Super. Ct. 101.

66. Freemansburg Bldg. & Loan Ass'n v. Billig, 30 Pa. Super. Ct. 101. See ante § 1, subd. Tender.

67. See 5 C. L. 1444.

68. Fontelieu v. Fontelieu, 116 La. 866, 41 So. 120. Upon a mortgage containing no pact de non alienando, valid executory process cannot issue against property the title to which is in a third party, and that party a succession under administration in a court other than that by which the writ is issued. Id.

69. Judgment by its terms subject to credits is invalid where the amounts of the credits are not stated therein or endorsed thereon. Fontelieu v. Fontelieu, 116 La. 866, 41 So. 120.

70. See 5 C. L. 1444.

71. Orvik v. Casselman [N. D.] 105 N. W. 1105.

with,[72] and the provisions conferring the power will be strictly construed.[73] Authority given to the creditor to appoint a substitute trustee cannot be delegated.[74] A trustee appointed in the first instance by the creditor pursuant to a stipulation in the mortgage is not a substituted but an original trustee.[75] But a sale by a trustee substituted without authority is not absolutely void, and may be ratified by the parties in interest.[76] Application for the removal of a trustee must be made without unreasonable delay.[77] Appraisement of the property is sometimes required before sale.[78] Where the mortgagee conveys the property, he cannot thereafter exercise a power of sale conferred upon him by the mortgage;[79] but the temporary suspension of the right to foreclose by conveyance of the property with warranty by the mortgagor and the subsequent acquisition of the mortgage by him do not destroy the right to foreclose by advertisement upon the matter being set at large by the subsequent conveyance of the property by the mortgagor's grantee subject to the mortgage.[80] Where it is agreed that the trustee shall foreclose upon request of the beneficiary, it is the duty of the trustee to foreclose upon such request.[81] The power may be exercised upon the demand of the real beneficiary.[82] Where the beneficiary is a corporation, the demand must be made by the duly constituted authority.[83] So also, a power of sale vesting in a corporation must be exercised by the proper authority.[84] A power of sale is sometimes rendered nugatory by statute.[85]

The exercise of the power of sale is not a suit[86] and is not barred by the running of the statutory limitation against the debt, though the right to a judicial foreclosure be barred thereby.[87] Equity will not enjoin a sale under a power on the

72. Noncompliance invalidates sale. Chace v. Morse, 189 Mass. 559, 76 N. E. 142. But if everything is done upon which the authority to make the sale depends, irregularities in the manner of doing it or in subsequent proceedings do not render the sale void, but voidable. Id.

73. Sale by trustee's agent void where agent not appointed in writing as provided by trust deed. Cox v. American Freehold & Land Mortg. Co. [Miss.] 40 So. 739.

74. Wilder v. Moren [Tex. Civ. App.] 14 Tex. Ct. Rep. 51, 89 S. W. 1087.

75. Not "substituted trustee" within Laws 1896, p. 105, c. 96, and hence sale not invalidated by failure to record appointment. Searles v. Kelly, Simmons & Co. [Miss.] 40 So. 484.

76. Haggart v. Wilczinski [C. C. A.] 143 F. 22.

77. Grantor barred from suing to remove trustee on ground that he was the son of beneficiary, where she waited seven years, and it appeared that she learned of the relation several weeks before filing suit to remove the trustee, and the suit could not be tried until several months after the date set for the sale. Ravold v. Grumme, 118 Mo. App. 305, 94 S. W. 298.

78. Kirby's Dig. § 5418. Merryman v. Blount [Ark.] 94 S. W. 714. Where the statute requires the appraisers to view and appraise the property, entry upon the property is not necessarily essential. Id.

79. The advertisement and sale should be made by the mortgagee's grantee. Sadler v. Jefferson, 143 Ala. 669, 39 So. 380.

80. Tappan v. Huntington [Minn.] 106 N. W. 98.

81. Miller v. McLaughlin, 141 Mich. 433, 12 Det. Leg. N. 504, 104 N. W. 780.

82. A deed of trust to secure a note which gave the surety on such note or "other legal owner or holder" of the note the right to demand sale on default created a fund for the payment of the note, and was not for the mere personal indemnity of the surety, and hence the holder could demand foreclosure without transfer of the lien from the surety, and was not estopped by the acts of the surety in signing a bond, upon a subsequent transfer of the property, obligating the grantor to convey free from encumbrance. Harwell v. Harbison [Tex. Civ. App.] 16 Tex. Ct. Rep. 510, 95 S. W. 30.

83. Under Rev. St. 1889, § 2813, president of building and loan association had no such authority. Cobe v. Lovan, 193 Mo. 235, 92 S. W. 93.

84. Where a corporation received a deed to the property from its agent who purchased at a sale made by the corporation's president under a mortgage to the corporation, and sued, under Rev. Laws c. 181, § 1, for the possession of the property, such suit was an acceptance of the deed and a ratification of the act of the president in making the sale without the approval of the corporation's finance committee, which approval was originally made a condition to the president's authority to foreclose. New England Mut. Life Ins. Co. v. Wing, 191 Mass. 192, 77 N. E. 376.

85. Under B. & C. Comp. § 423, sale can be had only under decree of foreclosure. Marquam v. Ross [Or.] 86 P. 1.

86. Not a suit against the administrator of the deceased debtor, so as to require a delay of 12 months before action can be taken. Baggett v. Edwards [Ga.] 55 S. E. 250, following Roland v. Coleman, 76 Ga. 652.

ground that the mortgage is barred by limitations,[88] except upon the condition that the mortgagor will pay the amount equitably due under the mortgage.[89] Only one sale can be had under a single power,[90] but the power is not exhausted by a prior void sale thereunder.[91] It is held in Georgia that a power of sale coupled with an interest is not revoked by the death of the debtor,[92] but in Texas it is held that the death of the holder of the equity of redemption revokes the power of sale where the decedent's estate is being administered by an independent executor.[93]

A trustee holding the legal title has a general power to sell coextensive with his ownership of the legal title, and independent and distinct from the execution of a special power given in respect to sale.[94]

(§ 3) *B. Notice.*[95]—The notice must comply with the requirements of the trust deed.[96] Where a certain notice is required, a sale is void if made without notice[97] or upon a notice lacking any essential requirement,[98] but mere irregularities in the notice may render the sale merely voidable as distinguished from void.[99] The use of the abbreviation "P. M." does not necessarily indicate that the hour designated for the sale is to be computed according to the solar time.[1] The length of the notice is sometimes regulated by statute.[2] A sale upon a notice insufficient in point of time may be enjoined.[3] A finding that the advertisement was not sufficient will not be reviewed where it was not excepted to.[4]

87. Williams v. Armistead [Tex. Civ. App.] 14 Tex. Ct. Rep. 381, 90 S. W. 925. Three five, and ten years' limitations apply only to claims for land, and cannot be invoked by one who takes land subject to a mortgage. Id.

88. In New York the statute bars the remedy only and not the debt. House v. Carr [N. Y.] 78 N. E. 171. It was not decided whether the power of sale was barred or whether, if the power was barred, the mortgagor could set up the objection as against the purchaser at the sale. Editor.

89. House v. Carr [N. Y.] 78 N. E. 171.

90. Though the mortgage provides for foreclosure pro tanto upon default as to one instalment of the debt. Ford v. Lewis [Ala.] 41 So. 144.

91. Green v. Collins [Miss.] 38 So. 188; Williams v. Armistead [Tex. Civ. App.] 14 Tex. Ct. Rep. 381, 90 S. W. 925.

92. Where the title to land is conveyed to secure a debt, and the instrument is not merely a mortgage, a power of sale for failure to make payment is a power coupled with interest, and is not revoked by the death of the debtor. Baggett v. Edwards [Ga.] 55 S. E. 250, citing Roland v. Coleman, 76 Ga. 652; Willingham v. Rushing, 105 Ga. 72, 78, 31 S. E. 130; Orient Ins. Co. v. Williamson, 98 Ga. 464, 25 S. E. 560; Brice v. Lane, 90 Ga. 294, 295, 15 S. E. 823.

93. At least pending such administration, the power of sale during such time being in the proper court. Williams v. Armistead [Tex. Civ. App.] 14 Tex. Ct. Rep. 381, 90 S. W. 925. This rule is not affected by the distinctions between administration by executor appointed by will and administration by the probate court under the statute. Id.

94. Chesapeake Beach R. Co. v. Washington, P. & C. R. Co., 23 App. D. C. 587. A sale, therefore, by a trustee of lands in another state, may pass the title regardless of the power of the court to appoint such trustee to make the sale and of limitations on the power of sale in the decree conferring the same. Id.

95. See 5 C. L. 1445.

96. Where trust deed required terms of sale to be advertised, an advertisement of time and place, without terms, was insufficient. Preston v. Johnson [Va.] 53 S. E. 1.

97, 98. Chace v. Morse, 189 Mass. 559, 76 N. E. 142.

99. Including property not covered by the mortgage. Chace v. Morse, 189 Mass. 559, 76 N. E. 142.

1. "Two o'clock p. m.," in a notice of foreclosure sale in 1896, must be taken to mean 2 o'clock in the afternoon, standard time. Orvik v. Casselman [N. D.] 105 N. W. 1105. The court takes judicial notice that "standard" or "railroad" time is the system for designating time which has been in general use in North Dakota since territorial days. Id.

2. Section 5848, Rev. Codes 1895, reducing the period of time previously required for publication of the notice of sale in foreclosures by advertisement, applies to all foreclosures by advertisement made after the revision took effect, even though the mortgage being foreclosed was executed before that time. Orvik v. Casselman [N. D.] 105 N. W. 1105. Section 5848, Rev. Codes 1895, did not, as to previously existing powers of sale, impair the obligation of any contract. Id.

3. Where a creditor was proceeding to advertise the property for sale on a certain date, but the advertisement was not good because not made a sufficient length of time before the date of sale, and where, upon an equitable petition, the sale was temporarily restrained until after the date set for the sale, and the petition was without equity except for the purpose of preventing the sale under the insufficient advertisement at the time fixed in it, which had passed, there was no error in dismissing the petition on demurrer at a later date, there being no

(§ 3) *C. Sale and deed.*[5]—The trustee is vested with a discretion as to the manner of the sale,[6] but he is the agent of both parties, and he must act impartially and so as to protect the interests of both.[7] He is bound to bring the property into the market in such manner as to obtain a fair market price,[8] and must exercise the same degree of prudence as a careful man would exercise in the sale of his own property,[9] and in so doing he should consider the best mode of offering the property for sale,[10] not only as to whether it is best to offer it in parcels or in gross,[11] but also as to the proper location and outline of each parcel,[12] but bad faith or negligence will not be presumed.[13] The sole owner of mortgaged property may demand, of right, that only so much of the property be sold as will satisfy the debt,[14] but this is not the case where other persons have interests in the property.[15] Sales of several tracts or parcels of land may be made in entirety when and only when the interests of all the parties require such a sale.[16] The sale must be conducted according to the terms of the deed of trust.[17] Thus, a provision for a cash sale must be substantially complied with,[18] but a reasonable time may be allowed for the payment of the money.[19] A void sale does not extinguish the mortgage,[20] and a merely irregular sale may be ratified.[21]

(§ 3) *D. Costs and fees.*[22]

§ 4. *Entry and possession or possessory action.*[23]

§ 5. *Strict foreclosure.*[24]

§ 6. *Foreclosure by action and sale. A. Right of action and nature of remedy.*[25]—It is not the province of a foreclosure suit to settle disputed questions as to legal title.[26] The purpose of such a suit is merely to foreclose the equity of redemp-

purpose to subserve by retaining the case in court after it had accomplished all it could, and when there remained nothing further which could authorize a court of equity to act. Baggett v. Edwards [Ga.] 55 S. E. 250.

Costs: The judgment rendered did not award costs, but inasmuch as the presiding judge held that there was sufficient ground for the filing of the petition to prevent the sale under an insufficient advertisement, it was held that in adjudging which party shall be required to pay the costs he would doubtless take this fact into consideration, and hence in affirming the judgment the question as to awarding costs was left open for future determination by the trial judge. Baggett v. Edwards [Ga.] 55 S. E. 250.

4. Baggett v. Edwards [Ga.] 55 S. E. 250.

5. See 5 C. L. 1446.

6. Givens v. McCray [Mo.] 93 S. W. 374.

7. Chas. Green Real Estate Co. v. St. Louis Mut. House Bldg. Co. [Mo.] 93 S. W. 1111; Givens v. McCray [Mo.] 93 S. W. 374.

8, 9, 10, 11, 12. Stirling v. McLane [Md.] 63 A. 205.

13. Presumption being in favor of the proper discharge by the trustee of his duty. Stirling v. McLane [Md.] 63 A. 205.

14, 15. Givens v. McCray [Mo.] 93 S. W. 374.

16. When the interests of the parties require it, the court may authorize the trustee, in his discretion, to make such a sale. Warner v. Grayson, 200 U. S. 257, 50 Law. Ed. —. Where one executes to the same trustees two deeds of trust at different times, conveying separate lots of land to secure to the same person two distinct debts, and where default is made in the payment of the debts and the trustees are required to make sale of the property, they should sell the same separately and not jointly, and to sell it collectively will be an irregularity for which the sale, and deed made pursuant thereto, will be set aside, upon proper bill filed for that purpose. Shears v. Traders' Bldg. Ass'n, 58 W. Va. 665, 52 S. E. 860. The grantors will not be estopped to set such sale aside, because one of them was present at the sale and did not call attention to the irregularity and object to the sale. Id.

17, 18. Chas. Green Real Estate Co. v. St. Louis Mut. House Bldg. Co. [Mo.] 93 S. W. 1111.

19. Fact that money was not paid for several days did not change the sale to a credit sale. Chas. Green Real Estate Co. v. St. Louis Mut. House Bldg. Co. [Mo.] 93 S. W. 1111.

20. Suit to enjoin sale under deed of trust cannot be sustained on ground of prior void sale and receipt of proceeds by the mortgagee, where it appears that the payment did not come from and was not for the benefit of the parties seeking the injunction. Williams v. Armistead [Tex. Civ. App.] 14 Tex. Ct. Rep. 381, 90 S. W. 925.

21. Unauthorized sale by substituted trustee. Haggart v. Wilczinski [C. C. A.] 143 F. 22. Unauthorized sale by president of mortgagee corporation ratified by acceptance of deed by corporation. New England Mut. Life Ins. Co. v. Wing, 191 Mass. 192, 77 N. E. 376.

22, 23, 24, 25. See 5 C. L. 1446.

26. Hazeldine v. McVey, 67 N. J. Eq. 275, 63 A. 165. Questions of title arising after foreclosure must be settled by a judge and

tion.[27] Where the trustee in a mortgage refuses, after proper request, to bring a suit to foreclose, such suit may be brought by a beneficiary,[28] but not otherwise.[29] In some states foreclosure may be had by statutory action at law.[30] In Nebraska the plaintiff in a foreclosure suit is required to allege and prove, as against the owner of the equity of redemption, that no proceedings at law have been had for the recovery of the debt secured by the mortgage.[31]

Jurisdiction.[32]—Jurisdiction to foreclose mortgages rests upon general equity jurisdiction[33] or upon statute,[34] and a court having jurisdiction of foreclosure proceedings from neither of these sources is without power to foreclose.[35] A Federal court may take jurisdiction of foreclosure proceedings ancillary to other relief, regardless of the citizenship of the parties interested in the foreclosure.[36] A mortgage on lands in one state cannot be foreclosed in the courts of another state,[37] but in a proper case the court, when it has jurisdiction of the proper parties, may compel satisfaction of the mortgage debt,[38] or order a sale[39] or conveyance of the land.[40]

jury in a court of law. Id. A tax title, claimed to be adverse and paramount to the rights of both mortgagor and mortgagee, is not a proper subject of adjudication in a suit to foreclose a mortgage on real estate. Pearson v. Helvenston [Fla.] 39 So. 695.

27. Hazeldine v. McVey, 67 N. J. Eq. 275 63 A. 165.

28. Allen v. Pierson, 113 App. Div. 586, 100 N. Y. S. 451.

29. Way v. Shaver [Cal. App.] 84 P. 283. Where the mortgage required that the demand to foreclose should be made by the holders of a majority in amount of the debts secured a demand by holders of less than a majority would not support a suit by such holders. Allen v. Pierson, 113 App. Div. 586, 100 N. Y. S. 451.

30. White v. Black, 115 Mo. App. 28, 90 S. W. 1153.

31. McDowell v. Markey [Neb.] 108 N. W. 152.

32. See 5 C. L. 1447.

33. Scott v. Hughes, 124 Ga. 1000, 53 S. E. 453.

34. Scott v. Hughes, 124 Ga. 1000, 53 S. E. 453. Under 1 S. & C. Ann. Stat. 1200, city courts have jurisdiction of foreclosure suits where the mortgaged property is situated within the city limits. Spitznagle v. Cobleigh, 120 Ill. App. 191.

35. City courts. Scott v. Hughes, 124 Ga. 1000, 53 S. E. 453.

36. Where court had acquired jurisdiction of receivership proceedings, it did not lose jurisdiction because other parties interested in the property and who were citizens of the same state with those adversely interested intervened and asked for foreclosure of a mortgage on the property. Cole v. Philadelphia & E. R. Co., 140 F. 944.

37. Dickson v. Loehr, 126 Wis. 641, 106 N. W. 793.

38. Where court has jurisdiction of debtor's person. Dickson v. Loehr, 126 Wis. 641, 106 N. W. 793. The mortgagee is not obliged to go to a foreign state to enforce a mortgage executed by a resident of his own state on lands in such foreign state, but may secure relief in a personal suit against the mortgagor. Id.

39. It seems that a court having the grantor and the trustee in a deed of trust before it may foreclose as to land not within the state by ordering the trustee to sell. Chesapeake Beach R. Co. v. Washington, etc., R. Co., 23 App. D. C. 587.

40. Dickson v. Loehr, 126 Wis. 641, 106 N. W. 793.

Note: Strict foreclosure as to land in another state allowed where the court had jurisdiction of the parties. House v. Lockwood, 40 Hun [N. Y.] 532. The English courts have asserted the right to enforce, through jurisdiction of the parties, mortgages on land beyond the jurisdiction of such courts. Paget v. Ede, L. R. 18 Eq. 118; Foller v. Carteret, 2 Vern. 495. In foreclosing a mortgage on a railroad lying partly in one state and partly in another, a court of one of such states may decree a sale of the entire road, and compel a conveyance of the part of the road beyond its jurisdiction. Muller v. Daws, 94 U. S. 444, 24 Law. Ed. 207; Mead v. New York, H. & N. R. Co., 45 Conn. 199; McTighe v. Macon Const. Co., 94 Ga. 306, 21 S. E. 701, 47 Am. St. Rep. 153, 32 L. R. A. 208; Union Trust Co. v. Olmsted, 102 N. Y. 729, 7 N. E. 822; McElrath v. Pittsburg & S. R. Co., 55 Pa. 189. The same rule has been applied as to a mortgage on a bridge located partly in Texas and partly in Mexico, the court compelling the bridge company to execute a deed to the purchaser to that part of the bridge lying in Mexico. International Bridge & Tramway Co. v. Holland Trust Co. [C. C. A.] 81 F. 422. Same rule has been applied to a mortgage on a canal lying in two states. Brown v. Chesapeake & O. Canal Co., 73 Md. 567. And so generally, foreclosure and sale of land located in two states may be decreed by a court of one of the states and the title to that portion of the land beyond the court's jurisdiction may be perfected by compelling a conveyance by the parties holding the title. Mead v. Brockner, 82 App. Div. 480, 81 N. Y. S. 594. But a court of one state cannot render a decree which will operate directly upon land beyond its jurisdiction. King v. Tuscumbia, etc., R. Co., Fed. Cas. No. 7,808; Guarantee Trust & S. D. Co. v. Delta & P. Land Co. [C. C. A.] 104 F. 5; Farmers' Loan & T. Co. v. Postal Tel. Co., 55 Conn. 334, 11 A. 184, 3 Am. St. Rep. 531; Pittsburg & State Line R. Co. v. Rothschild, 8 Sadler [Pa.] 83, 4 A. 385; Eaton & H. R. Co. v. Hunt, 20 Ind. 457; Farmers' Loan & Trust Co.

The proper venue is the county in which the property is situated,[41] but objection to the venue may be waived by failure to ask for a change of venue.[42]

Limitations.[43]—At common law the bar of the debt did not bar foreclosure,[44] and this rule still obtains in some jurisdictions,[45] mortgages being subject in such jurisdictions to statutory limitations separate and distinct from those applicable to the mortgage debt,[46] while in other jurisdictions the right to foreclose is barred whenever the right of action on the debt is barred.[47] As to whether the mortgage may be barred while the debt still runs,[48] there is considerable conflict.[49] In Washington and in Wyoming the mortgagor's absence from the state tolls the statute so far as he is concerned.[50] The tolling of the statute as to the mortgagor on account of his absence does not extend to subsequent encumbrancers or holders of the equity of redemption,[51] unless the claims of such parties are more stale than the

v. Bankers' & M. Tel. Co., 44 Hun [N. Y.] 400; Cook v. Weigley, 68 N. J. Eq. 480, 59 A. 1029; Grey v. Manitoba & N. W. R. Co. [1897 P. C.] App. Cas. 254, 66 Law J. P. C. (N. S.) 66; Strange v. Radford, 15 Ont. Rep. 145; Richard v. Boyd, 124 Mich. 396, 83 N. W. 106. The result of the cases seems to be that a court cannot render a decree of foreclosure operating directly upon the land, but that where it has jurisdiction of the parties it may effect a foreclosure indirectly by compelling a conveyance by the defendant holding the title, especially where the land is located partly within the court's jurisdiction, but that the power thus to effect a foreclosure indirectly will not be exercised except for a good reason, as where a foreclosure cannot be had in the state where the land is situated without undue loss or inconvenience. See Eaton v. McCall, 86 Me. 346, 29 A. 1103, 41 Am. St. Rep. 561.—From note to Proctor v. Proctor [Ill.] 69 L. R. A. 673, 682.

41. Rev. St. 1898, § 2928, Code Civ. Proc. c. 7, § 2928. Snyder v. Pike [Utah] 83 P. 692. Under Civ. Code Prac. § 62, a suit to enforce a mortgage lien against the estate of a decedent may be brought in the county where the land is situated, provided no suit is pending, under sections 65, 66, in the county in which the personal representative qualified, to settle the decedent's estate. Galloway v. Craig [Ky.] 92 S. W. 320. See Estates of Decedents, 7 C. L. 1386.

42. Rev. St. 1898, § 2928. Snyder v. Pike [Utah] 83 P. 692.

43. See 5 C. L. 1447.

44. Haggart v. Wilczinski [C. C. A.] 143 F. 22.

45. Code Civ. Proc. § 2039. Philip v. Stearns [S. D.] 105 N. W. 467; Bruce v. Wanzer [S. D.] 105 N. W. 282; Sprague v. Lovett [S. D.] 106 N. W. 134.

46. Where a mortgage executed Jan. 31, 1884, was under seal and contained an express warranty to pay the debt, the limitation then in force was ten years from the accrual of the right to foreclose. Livingston v. New England Mortg. Sec. Co. [Ark.] 91 S. W. 752. Where a consent decree recited that the defendant had an equity of redemption but that he should stand absolutely debarred unless he paid a certain sum to plaintiff within a certain time, there was a relation of mortgagor and mortgagee between the parties, and defendant having been in possession for ten years after the decree, the plaintiff could not recover the land. See Code § 152, subsec. 3. Bunn v. Braswell, 139 N. C. 135, 51 S. E. 927; Bunn v. Braswell [N. C.] 55 S. E. 85. A mortgage under seal comes within the twenty year limitation applicable to sealed instruments. Sprague v. Lovett [S. D.] 106 N. W. 134. A mortgage with the word "seal" printed after the mortgagor's name is a sealed instrument within the statute. Philip v. Stearns [S. D.] 105 N. W. 467. The limitation applicable to actions on specialties or contracts in writing, and not that applicable to suits to recover realty, applies to suits to foreclose mortgages on land. Ingersoll v. Davis [Wyo.] 82 P. 867.

47. Code Miss. 1892, § 2733. Haggart v. Wilczinski [C. C. A.] 143 F. 22. But the rule under this statute does not apply when the mortgagee is in possession. Id. Hurd's St. 1903, c. 83, § 11. Caroway v. Sly, 122 Ill. App. 648. Foreclosure of mortgage by deed absolute barred when debt barred. Id. Rev. St. 1899, § 4276. Martin v. Teasdale [Mo. App.] 92 S. W. 133. This section is expressly limited to mortgages executed after the passage of the act. Id.; Bumgardner v. Wealand, 197 Mo. 433, 95 S. W. 211. Rev. St. 1899, § 4277, providing that no suit shall be maintained to foreclose any mortgage theretofore executed after the expiration of two years after the passage of the act, applies only to mortgages securing obligations already barred at the time of the passage of the act. Martin v. Teasdale [Mo. App.] 92 S. W. 133; Bumgardner v. Wealand, 197 Mo. 433, 95 S. W. 211.

48. Ball's Ann. Codes & St. § 4642, providing that no realty of a decedent shall be liable for his debts unless letters testamentary or of administration are granted within six years from decedent's death, does not deprive a mortgagee in a mortgage executed by a decedent of his property without due process of law, the statute not being intended to bar the debt but merely the lien. Fuhrman v. Power [Wash.] 86 P. 940. Under this statute the mortgage is barred after the expiration of six years without granting of letters testamentary or of administration, regardless of the general statute of limitations. Id.

49. See 5 C. L. 1448, note.

50. Perkins v. Bailey, 38 Wash. 46, 80 P. 177. Rev. St. 1899, § 3463. Ingersoll v. Davis [Wyo.] 82 P. 867.

51. Perkins v. Bailey, 38 Wash. 46, 80 P.

mortgage.[52] Where the record shows that the suit is barred and the allegation that mortgagor left the state before the bar attached is denied by the answer, the burden of proving the mortgagor's absence is upon the complainant,[53] and where the complainant fails to show the absence of the mortgagor from the state, and the statutory period has run, the bar will attach as to all the defendants.[54] The statute is not tolled by the death of the mortgagor,[55] whether such death be known to the mortgagee or not.[56] In California the statute is tolled as against the decedent's representatives until their appointment,[57] but not as against the mortgagor's grantee.[58] No presentation to the estate of a decedent being necessary where no deficiency judgment is sought against the estate,[59] the limitation as to actions on rejected claims against estates of decedents does not apply.[60]

Where there has been a valid extension the statute begins to run from the expiration of the extension.[61] Where the mortgage gives the creditor the right to foreclose as to both principal and interest upon default as to the latter, such default does not ipso facto mature the debt so as to start the statute to running.[62] Interest coupons are not barred where the note is still in force, though the statutory period has elapsed since default as to the interest.[63] Additional time is sometimes given in which to renew the suit after nonsuit or dismissal.[64]

Limitations must be specially pleaded.[65]

Where the mortgagee takes possession as purchaser at a void foreclosure sale,

177. Mortgagor's grantee. California Title Ins. & Trust Co. v. Muller [Cal. App.] 84 P. 453.

52. Where the holder of the mortgagor's note, though charged with notice of the mortgage and having knowledge of the mortgagor's absence, delayed suing until the expiration of the statutory period as to the mortgage debt and then sued out an attachment in which the mortgagee promptly intervened, it was held that, though the attachment lien was not acquired until after the execution of the mortgage, the note sued on, however, being older than the mortgage, the statute was tolled as to plaintiff's note as well as to the mortgage, and hence the mortgage lien was superior to that of the attachment. Perkins v. Bailey, 38 Wash. 46, 80 P. 177.

53. Ingersoll v. Davis [Wyo.] 82 P. 867. Evidence that the mortgagee was at a certain date working for the "Denver Tramway Company," and that he and his wife lived near "South Broadway, by the car shops," without any evidence as to the city, county, or state, was insufficient. Id.

54. Ingersoll v. Davis [Wyo.] 82 P. 867. Quere whether, if the absence of the mortgagor had been shown, the statute would have been tolled as to other defendants. Id.

55. Fuhrman v. Power [Wash.] 86 P. 940.

56. Statute makes no provision for extension in case mortgagor's death is unknown to mortgagee. Fuhrman v. Power [Wash.] 86 P. 940.

57. Code Civ. Proc. § 353. California Title Ins. & Trust Co. v. Muller [Cal. App.] 84 P. 453. Under Code Civ. Proc. § 353, where the mortgagor dies before the accrual of the cause of action, the statute does not begin to run until the appointment or qualification of his personal representative. Heeser v. Taylor, 1 Cal. App. 619, 82 P. 977.

58. California Title Ins. & Trust Co. v. Muller [Cal. App.] 84 P. 453. A provision in the deed that it is subject to the mortgage will not affect the running of the statute in the grantee's favor. Id. A finding that the grantee's deed was recorded more than five years before the institution of the suit to foreclose was a sufficient finding that the mortgagee had such notice of the deed as would set the statute to running in favor of the grantor. Id. As to the mortgagee's remedy when the mortgagor conveys away the property and then dies so shortly before the bar of the statute that no administration can be secured before the bar has attached. See post § 6B, New Parties and Intervention.

59. See ante § 1, Presentation to Debtor's Estate.

60. Fox v. Bernard [Nev.] 85 P. 351.

61. Iowa Loan & Trust Co. v. McMurray, 129 Iowa 65, 105 N. W. 361. Where the time is extended before maturity, the case does not fall within Code § 3456, providing that a debt once barred may be revived only by an admission in writing signed by the party to be charged. Id. When an additional loan is made upon the same security, and the time for redemption is extended, the statute begins to run from the expiration of the extension. Fox v. Bernard [Nev.] 85 P. 351.

62. First Nat. Bank v. Park [Colo.] 86 P. 106. A mere prayer for the higher rate of interest provided for in the event of the exercise of the right to declare a default upon nonpayment of interest was not alone sufficient to show that complainant had in fact asserted such right. Id.

63. First Nat. Bank v. Park [Colo.] 86 P. 106.

64. The issuance and service of summons is tantamount to the commencement of a new suit, and under Kirby's Dig. § 5083, prevents limitations from attaching where it

he becomes, in effect, a mortgagee in possession as to whom the statute does not run.[66] So, where the mortgagee acquires the absolute title and takes possession of the property, a suit by him to remove the lien of an attachment junior to the mortgage lien is not subject to the limitation applicable to foreclosure of mortgages.[67]

Abatement.[68]—A former suit to set aside a mortgage is no defense to a suit to foreclose the mortgage,[69] and whether the foreclosure suit will be stayed pending a decision in the other suit rests in the sound discretion of the court in which the foreclosure suit is brought.[70] A suit by a guardian to foreclose a mortgage for the benefit of his infant ward does not abate upon the coming of age of the ward and his substitution as plaintiff.[71]

Leave to sue.[72]

Discontinuance.[73]

(§ 6) *B. Parties and process. Parties plaintiff.*[74]—The mortgagee is a proper but not an indispensable party to a suit by his assignee to foreclose.[75] There is a direct conflict as to whether the beneficiary is a necessary party to a suit to foreclose where he is not a party to the mortgage.[76]

Parties defendant.[77]—The mortgagor is a necessary party defendant,[78] unless he has conveyed away all his interests in the property,[79] but even in the latter case he is a necessary party in order to obtain a personal judgment against him,[80] or to bar his equity of redemption,[81] or to foreclose any other rights he may have in regard to the property.[82] Where he has conveyed away only a portion of the property or a part interest therein he is a necessary party.[83] The mortgagor's grantee or assignee is not a necessary party,[84] unless a foreclosure of the grantee's interests is desired.[85]

is done within a year after a nonsuit or dismissal. Livingston v. New England Mortg. Sec. Co. [Ark.] 91 S. W. 752.

65. Livingston v. New England Mortg. Sec. Co. [Ark.] 91 S. W. 752.

66. Sawyer v. Vermont Loan & Trust Co., 41 Wash. 524, 84 P. 8. See post § 7, subd. Rights under Invalid Foreclosure.

67. Katz v. Obenchain [Or.] 85 P. 617.

68. See 5 C. L. 1450.

69. Curlette v. Olds, 110 App. Div. 596, 97 N. Y. S. 144.

70. The state court will not stay a foreclosure suit pending a decision of a suit in a Federal court to set aside the mortgage for usury where it appears that the Federal suit is brought merely for delay. Curlette v. Olds, 110 App. Div. 596, 97 N. Y. S. 144.

71. And the guardian was discharged, and revivor was neither necessary nor proper. Shattuck v. Wolf, 72 Kan. 366, 83 P. 1093.

72, 73, 74. See 5 C. L. 1450.

75. Anderson v. Messinger [C. C. A.] 146 F. 929.

76. **In Nebraska** a mortgage made to a trustee may be foreclosed by him without joining the beneficiary as a plaintiff. Tainter v. Abrams [Neb.] 107 N. W. 225. Where the beneficiary is made a coplaintiff with the trustee in a foreclosure action and dies while the suit is pending, irregularity or error in reviving the suit in the name of his administrators is without prejudice to further proceedings in the case, as he was not a necessary party plaintiff. Id.

In New Jersey the beneficiaries are necessary parties to a bill to foreclose a mortgage executed to a trustee where such beneficiaries are known and are not so numerous as to make it impossible or highly inconvenient to make them parties. Butler v. Farry, 68 N. J. Eq. 760, 63 A. 240. This rule applies with special force where the mortgage is by deed absolute. The cestuis que trustent are entitled to be heard upon the question as to whether the deed was really intended as a mortgage. Id.

In Federal courts: Where the lender procured execution of mortgage note and the mortgage to a third party, the lender was not a necessary party to a suit to foreclose by the nominal mortgagee. Waterbury v. McKinnon [C. C. A.] 146 F. 737.

77. See 5 C. L. 1451.

78. Party who executed the deed of trust sought to be foreclosed and the note secured thereby. Black v. Thompson, 120 Ill. App. 424.

79. California Title Ins. & Trust Co. v. Muller [Cal. App.] 84 P. 453; Bernard v. Shemwell, 139 N. C. 446, 52 S. E. 64; Aetna Life Ins. Co. v. Stryker [Ind. App.] 78 N. E. 245.

80, 81. Aetna Life Ins. Co. v. Stryker, [Ind. App.] 78 N. E. 245.

82. Aetna Life Ins. Co. v. Stryker [Ind. App.] 78 N. E. 245. Where the mortgagor claimed that the deed executed by him conveying away the property was procured by fraud and was void, and the mortgagee had notice of such claim but nevertheless failed to make the mortgagor a party to the suit to foreclose, the latter's claims were not barred by the foreclosure decree. Id.

83. Philip v. Stearns [S. D.] 105 N. W. 467.

84. Philip v. Stearns [S. D.] 105 N. W. 467; Livingston v. New England Mortg. Sec. Co. [Ark.] 91 S. W. 752. Assignee in bankruptcy. Spitznagle v. Cobleigh, 120 Ill. App. 191.

The mortgagor's wife is a necessary party.[86] His heirs are also necessary parties in order to foreclose their rights,[87] unless it is otherwise provided by statute.[88] Lienors are parties,[89] and where it is sought to foreclose their rights, they are necessary parties.[90] The administrator of a deceased mortgagor is a proper party.[91] The assignor of a mortgage may be a proper party to a suit by the assignee.[92]

Where a party is required to redeem only his own interest in the property,[93] he cannot object that other interested parties are not parties to the suit.[94] Appearance and answer to the merits waives objection for misjoinder.[95] The cause cannot be heard on the motion of one defendant when other defendants have not been served.[96] An order sustaining a demurrer for want of a party is not appealable where there is no order directing the party to be brought in or dismissing the case.[97]

New parties and intervention.[98]—In a proper case new parties may be brought in by supplemental pleadings[99] and process.[1] An order bringing in new parties is

85. Spitznagle v. Coblelgh, 120 Ill. App. 191; Burns v. Hiatt [Cal.] 87 P. 196; Sawyer v. Vermont Loan & Trust Co., 41 Wash. 524, 84 P. 8; Fagan v. Hook [Iowa] 105 N. W. 155; Philip v. Stearns [S. D.] 105 N. W. 467; Gillett v. Romig [Okl.] 87 P. 325. Failure to make the grantee a party does not extinguish the mortgage lien, and though the debt may be barred the purchaser cannot, without paying the mortgage debt, have his title quieted as against the mortgagee, or recover the property from the mortgagee in possession as purchaser at the mortgage sale. Burns v. Hiatt [Cal.] 87 P. 196. See ante this section, subd. Limitations; post § 7, Rights Acquired under Invalid Foreclosure.

86. Even during her husband's life, her inchoate right of dower giving her an interest to protect. MacKenna v. Fidelity Trust Co., 184 N. Y. 411, 77 N. E. 721, afg. 98 App. Div. 480, 90 N. Y. S. 493.

Purchase-money mortgage: The wife of the mortgagor is not a necessary party to a suit to foreclose a purchase-money mortgage to which she is not a party, since she has no dower in land purchased by husband as against the lien of the purchase-money mortgage. Harrow v. Grogan, 219 Ill. 228, 76 N. E. 350.

87. Nunnally v. Robinson, 99 N. Y. S. 594.

88. Under Wilson's Rev. & Ann. St. 1903, § 1691, the heir of an intestate is not a necessary party to a suit to foreclose a mortgage, and is concluded by a decree of foreclosure and sale against the administrator of such intestate. McClung v. Cullison, 15 Okl. 402, 82 P. 499. The heirs at law of an intestate mortgagor were not necessary parties to a foreclosure proceeding in equity against the administrator of such mortgagor prior to June 13, 1892, when the Revised Statutes of Florida took effect; and when a decree pro confesso had been entered and a master's report had been filed in such a case prior to said 13th day of June, 1892, the final decree of foreclosure rendered therein against such administrator subsequently to said last mentioned date was fully binding upon the heirs at law, though they were not individually named as parties to such decree. McGregor v. Kellum [Fla.] 39 So. 697.

89. If there be prior liens by mortgage, deed of trust, judgment, and claims under the mechanic's lien statutes, on the property sought to be subjected to a mechanic's lien, it is not error of which the debtor can complain, if at all, to make the holders of all such liens parties, convene them before a commissioner, adjudicate them, and decree a sale of the property to satisfy them, although no controversy as to the amounts or priorities of any of them is alleged. Grant v. Cumberland Valley Cement Co., 58 W. Va. 162, 52 S. E. 36. Judgment creditors of the mortgagor are proper parties defendant for the purpose of foreclosing their right of redemption. Gouwens v. Gouwens [Ill.] 78 N. E. 597. The rule under chancery rule 108 that in suits to foreclose mortgages subsequent incumbrancers are proper parties and may be brought in by a general allegation that they are subsequent incumbrancers and claim some interest cannot be extended to other cases nor to other parties claiming other rights. Merritt v. Alabama Pyrites Co. [Ala.] 39 So. 555.

90. Junior lienors whose liens are of record must be made parties in order to foreclose their rights. Code Civ. Proc. § 726. Wemple v. Yosemite Gold Min. Co. [Cal. App.] 87 P. 280. Junior mortgagee whose mortgage is of record at time of foreclosure proceedings not affected by the decree unless he is made a party. Id. See post § 11, Redemption.

91. Black v. Thompson, 120 Ill. App. 424.

92. Under Code Civ. Proc. § 1627, subd. 1, providing that any person liable to plaintiff for the payment of the debt may be made a party defendant to an action to foreclose the mortgage, an assignor of a mortgage who guarantees its collection may be made a party. Robert v. Kidansky, 97 N. Y. S. 913.

93. Code Civ. Proc. § 646.

94. Philip v. Stearns [S. D.] 105 N. W. 467.

95. Black v. Thompson, 120 Ill. App. 424.

96. Macfarlane v. Hills [Fla.] 39 So. 994. See post this section, subsec. C, subd. Trial and Hearing.

97. In such case complainant should decline to make the additional party and allow the action to be dismissed, or should make the party and save the point on an appeal from the final judgment. Bernard v. Shemwell, 139 N. C. 446, 52 S. E. 64.

98. See 5 C. L. 1451.

99. Where the mortgagor conveys away the property and then dies so shortly before the expiration of the statutory limitation

generally discretionary.[2] New parties may be brought in by way of substitution.[3] The court may allow an amendment changing the capacity in which complainant sues.[4]

Persons having no interest in the property cannot intervene,[5] nor can a stranger claiming title to the mortgaged land intervene and have his claim thus adjudicated.[6]

The process.[7]—By virtue of statutory provisions service by publication is sufficient in certain cases.[8] The publication must be within the time specified by the statute.[9] On a collateral attack based on the insufficiency of the affidavit upon which published service was based, the question for consideration is not whether the court erred in granting the order of publication but whether the affidavit contains matter which, in contemplation of the statute, warranted the judge in granting the order.[10] The affidavit upon which the publication is based must allege facts and not mere conclusions.[11] Service by publication may be had on nonresident minors.[12]

(§ 6) *C. Pleading, trial, and evidence. Bill, complaint, or petition.*[13]—The bill must allege the execution of the mortgage[14] and of the obligation secured thereby[15] and the indebtedness of defendant to complainant;[16] but failure to allege a definite and certain amount as due merely renders the complaint uncertain and ambiguous,[17] and objection on account of such a defect is waived by failure to raise it in proper manner.[18] The bill must show the complainant's ownership of the

that no administration can be secured before the bar of the statute attaches, the mortgagee may sue the grantee alone, and then after an administrator has been appointed may bring him in by amendment or supplemental proceedings, and thus prevent his right to a deficiency judgment from being cut off by Code Civ. Proc. § 726, providing that foreclosure shall be the sole remedy upon a debt secured by a mortgage. California Title Ins. Trust Co. v. Muller [Cal. App.] 84 P. 453.

1. The validity of published service against a nonresident defendant based upon the original summons is not affected by the issue of a supplemental summons bringing in the tenants of the premises, as where, at the time of the publication of the summons against a nonresident assignee of a third mortgage, a supplemental summons had been ordered against the tenants, but the publication was based on the original summons. Mishkind-Feinberg Realty Co. v. Sidorsky, 111 App. Div. 578, 98 N. Y. S. 496.

2. Code § 273. Bernard v. Shemwell, 139 N. C. 446, 52 S. E. 64.

3. In case of a transfer of real estate during the pendency of the litigation, the action may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action. Code Civ. Proc. p. 768, § 40. Gillett v. Romig [Okl.] 87 P. 325. Wards, on coming of age, substituted as parties plaintiff in place of guardian. Shattuck v. Wolf, 72 Kan. 366, 83 P. 1093. The proceedings for substitution were properly instituted by motion, and the court had jurisdiction to hear and determine, without further pleadings, and without a jury, the facts presented by the motion. Id. By voluntarily submitting to trial before court, guardian waived objection to form of proceeding and was concluded by the result, except for trial of errors reviewable as in other civil cases. Id.

4. Change from individual capacity to that of executor. Leahy v. Haworth [C. C. A.] 141 F. 850.

5. Patrons of a public service corporation have no interest as such in the corporate property and hence cannot intervene in proceedings to foreclose a mortgage on such property. Wightman v. Evanston Yaryan Co., 118 Ill. App. 379. The interest which entitles a person to intervene must be of such a direct and immediate character that the intervenor will either gain or lose by the direct legal operation of the judgment or decree. Id.

6. He must bring a separate suit. Smith v. Redmond [Iowa] 108 N. W. 461.

7. See 5 C. L. 1451.

8. Where a city court has jurisdiction to foreclose a mortgage, service by publication will be sufficient, though personal service within the city limits is necessary in strictly personal actions. Spitznagle v. Cobleigh, 120 Ill. App. 191.

9. Publication made after the expiration of ninety days after the complaint is filed will not support a decree of foreclosure. Fuhrman v. Power [Wash.] 86 P. 940.

10. Cohen v. Portland Lodge No. 142, 144 F. 266. Under Hill's Ann. Laws Or. § 56, when the affidavit tends to prove the facts which, under the statute, authorize an order of publication, and the court adjudges it sufficient, such adjudication is conclusive in a collateral proceeding. Id.

11. Cohen v. Portland Lodge No. 142, 144 F. 266.

12. Publication under Hill's Ann. Laws, Or., § 56, is the same as to nonresident minors as in other cases. Cohen v. Portland Lodge No. 142, 144 F. 266.

13. See 5 C. L. 1452.

14. Clokey v. Loan & Homestead Ass'n, 120 Ill. App. 214.

15. Bond. Clokey v. Loan & Homestead Ass'n, 120 Ill. App. 214.

16. Madden v. Lubke, 119 Ill. App. 339.

obligation secured by the mortgage.[19] In a suit by the beneficiary of a trust deed, the declaration must allege demand upon the trustee to sue and his refusal to do so,[20] and that the defendant had notice or knowledge of complainant's claim,[21] but absence of such allegations may be cured by the answer.[22] In a suit against the mortgagee's grantee the complainant need not negative the possibility of the defendant's having a paramount title through some independent source.[23]

An amendment must not change the cause of action.[24]

Demurrer, plea, or answer.[25]—An appeal from an order overruling a demurrer does not ipso facto prevent the trial court from proceeding with the trial.[26]

Allegations of payment must be definite.[27] Under a general plea of payment a discharge of the obligation in money,[28] or, by consent of parties, its equivalent,[29] may be shown, but proof of a gift of the amount of the debt by the creditor to the debtor is inadmissible.[30] Failure of consideration should be directly and positively averred in order to impose the burden of proof upon the complainant.[31] An answer setting up want of consideration is sustained by proof of an invalid consideration.[32] The existence and validity of liens claimed by parties defendant may be determined upon their answer.[33]

In the absence of statutory requirement the plea or answer need not be verified.[34]

Cross bills and supplemental bills.[35]—Defendants claiming liens on the property need not file a cross bill in order to have the existence and validity of their liens determined.[36]

Trial and hearing.[37]—Foreclosure suits in equity are controlled by the same rules of practice and procedure applicable in general to suits in equity.[38] The cause cannot be heard on motion of one defendant when other defendants have not been served,[39] or where the cause is not at issue as to other defendants served,[40] nor in such case can the cause be referred to a master.[41] Where the action is at law, it should be tried as such.[42]

17. San Gabriel Valley Bank v. Lake View Town Co. [Cal. App.] 86 P. 727.

18. Should be raised by special demurrer. San Gabriel Valley Bank v. Lake View Town Co. [Cal. App.] 86 P. 727.

19. Madden v. Lubke, 119 Ill. App. 339.

20, 21. Way v. Shaver [Cal. App.] 84 P. 283.

22. Answer admitting knowledge of claim, denying its validity, and alleging payment. Way v. Shaver [Cal. App.] 84 P. 283.

23. Rohrhof v. Schmidt, 218 Ill. 585, 75 N. E. 1062.

24. Amendment abandoning claim of payment and setting up estoppel to assert validity of mortgage was not a change of cause of action. Deering v. Shreyer, 110 App. Div. 200, 97 N. Y. S. 14.

25. See 5 C. L. 1452.

26. Montgomery v. King, 125 Ga. 388, 54 S. E. 135. See Appeal and Review, 7 C. L. 128.

27. A general allegation in an answer that the mortgagor has paid $50 or $60, for which no credit has been given, and that she is unable to give the sum or date of each payment, without alleging to whom, or when, or where such payments were made, is demurrable. Montgomery v. King, 125 Ga. 388, 54 S. E. 135.

28, 29, 30. White v. Black, 115 Mo. App. 28, 90 S. W. 1153.

31. Mayo v. Hughes [Fla.] 40 So. 499.

32. Money advanced to mortgagor under contract void under liquor laws. Dierkes v. Wideman [Mich.] 12 Det. Leg. N. 921, 106 N. W. 735.

33. Gouwens v. Gouwens [Ill.] 78 N. E. 597.

34. Prac. Act § 33, requiring the plea in an "action" to be verified as a condition to the right to deny the execution of a written instrument, does not apply to suits in equity to foreclose mortgages. Clokey v. Loan & Homestead Ass'n, 120 Ill. App. 214.

35. See 5 C. L. 1452.

36. Gouwens v. Gouwens [Ill.] 78 N. E. 597. As to necessity for cross bill, see Equity, 5 C. L. 1144, and note on p. 1166. See, also, Equity, 7 C. L. 1323.

37. See 5 C. L. 1453.

38. See Equity, 7 C. L. 1323.

39, 40. Macfarlane v. Hills [Fla.] 39 So. 994.

41. Macfarlane v. Hills [Fla.] 39 So. 994. Rules 85 and 86 of the circuit court in suits in equity do not control the procedure in a case where the issues are not made up as to all the defendants who are alleged to be interested in the matters which are litigated. Id.

42. Action to foreclose under the statute is an action at law, and hence instructions should be given, though the case is tried by the court without a jury. White v. Black, 115 Mo. App. 28, 90 S. W. 1153.

Evidence.[43]—In the absence of denial the mortgage may prove itself and the debt secured;[44] but where there is a denial, the execution of the mortgage[45] and the mortgage debt must both be proved.[46] Possession of the mortgage and the note secured thereby is prima facie evidence of ownership.[47] The burden of proof as to the consideration may be cast upon the complainant by the answer,[48] but the burden is shifted where the mortgage notes import a consideration upon their face.[49] The burden of proof as to payment is upon the defendant.[50] Credits endorsed on a mortgage bond may be shown to be erroneous.[51] The finding of the trial court as to the amount due will not be disturbed when sustained by the evidence.[52] As against the mortgagor and his privies, no proof of the mortgagor's title is necessary,[53] but as against a defendant who claims an adverse title to that of the mortgagor, this rule does not apply and complainant must prove the mortgagor's title.[54] Where, however, the title of the mortgagor is proved, a party relying on a paramount title must prove it.[55] In a suit to foreclose a mortgage by deed absolute in which the mort-

43. See 5 C. L. 1453.

44. Where the defendant does not deny the execution of the mortgage nor seek in any way to impeach it, and the mortgage recites the debt to secure which it purports to have been executed, a judgment for the debt and a decree for foreclosure may be predicated upon the mortgage alone. Gray v. Bennett [Iowa] 105 N. W. 377. When the mortgage has been acknowledged as required by law it may be introduced in evidence without further proof. Id. Where the abstract of the record fails to show that the mortgage was duly acknowledged, the appellate court need not and usually will not search the record in order to learn the facts in regard thereto. Id.

45. Clokey v. Loan & Homestead Ass'n, 120 Ill. App. 214.

46. The answer need not be verified. Clokey v. Loan & Homestead Ass'n, 120 Ill. App. 214. Prac. Act § 33, providing that the execution of any writing shall not be denied in any "action" thereon, unless the plea containing such denial is verified, applies only to actions at law and not to foreclosure suits in equity. Id.

47. Gilman v. Crossman [Neb.] 106 N. W. 769. Possession of mortgage note endorsed in blank sufficient evidence of ownership thereof. Adams v. Connelly, 118 Ill. App. 441.

48. An answer to a foreclosure, setting up a partial failure of consideration, casts the burden of proof upon the complainant. Otis v. McCaskill [Fla.] 41 So. 458. A failure of consideration should be directly, positively, and unequivocally averred in order to impose the burden of proof on the complainant Mayo v. Hughes [Fla.] 40 So. 499.

Sufficiency of evidence: Defense of failure of consideration not sustained. Mayo v. Hughes [Fla.] 40 So. 499. Evidence held to show that the consideration of the mortgage was advanced by the mortgagee as recited by the mortgage, and not by a partnership composed of the mortgagor and mortgagee. Hubbard v. Mulligan [Colo.] 82 P. 783. Evidence held not to show that mortgagee had retained part of the recited consideration to pay off a prior mortgage. Parton v. Eminence Bldg. & Loan Ass'n [Ky.] 93 S. W. 9. Finding of trial court that the note secured by the mortgage was given without consideration held not sustained by the evidence. Winston v. Armstrong [Neb.] 104 N. W. 941.

49. Chambers v. Powell [Ala.] 39 So. 919.

50. Smith v. Allmon [S. C.] 54 S. E. 1014; Telford v. Howell, 220 Ill. 52, 77 N. E. 82.

Sufficiency of evidence: Evidence held insufficient to show payment. Smith v. Allmon [S. C.] 54 S. E. 1014; Becker v. Bluemel [Wis.] 109 N. W. 534. A discharge and satisfaction of a mortgage executed by a collecting agent in consideration of another mortgage on the same land executed by the first mortgagor's grantee was ineffectual to give the assignee of the second mortgage any superior right to those of the assignee of the first mortgage, both parties being represented by the same agent and neither of the assignments having been recorded. Becker v. Bluemel [Wis.] 109 N. W. 534. In suit to enjoin foreclosure on ground of payment and cross bill praying foreclosure, finding of balance due and decree of foreclosure sustained. Ladd v. Lookout Distilling Co. [Ala.] 40 So. 610. Defense of settlement of mortgage debt held not sustained. Taylor v. Industrial Mut. Deposit Co.'s Receiver [Ky.] 96 S. W. 462. Decree overruling plea of payment held justified by the evidence. Telford v. Howell, 220 Ill. 52, 77 N. E. 82.

51. Smith v. Allmon [S. C.] 54 S. E. 1014.

52. The method of computing the amount due, and the finding of the trial court as to such amount on foreclosure of a building and loan association mortgage, sustained. Oskaloosa Nat. Bldg., Loan & Investment Ass'n v. Bailey, 129 Iowa, 287, 105 N. W. 417.

53. Gilman v. Crossman [Neb.] 106 N. W. 769. When the bill alleged the existence of the mortgage debt, the execution of a deed of trust conveying the fee simple in the property to secure the debt, and the subsequent vesting by mesne conveyance of the mortgagor's interest in the property in the defendant, and the trust deed, duly acknowledged, and conveying the fee simple in trust to secure the debt was introduced in evidence, and proof of default was made, and the defendant's answer admitted that he owned the property when the bill was filed and was occupying the same, and did not set up any paramount independent title, the complainant was entitled to foreclosure without any further proof that the mortgagor had the right to convey the property in trust or that de-

gagor's wife joined, it is incumbent upon the complainant to show that the amount secured by the deed was made known to the wife.[56] Where a judgment lienor asserts and relies upon the mortgagee's actual knowledge of the judgment at the time of the execution of the mortgage, the lienor has the burden of proving such knowledge.[57] In some states complainant must show that no proceedings at law have been had upon the mortgage debt.[58]

Declarations of the mortgagor in his own interest are inadmissible,[59] but declarations against his interest are admissible.[60] Testimony of interested persons with reference to transactions with deceased persons whose estates are involved is incompetent.[61] Upon proof of loss or destruction of the mortgage, a certified copy is admissible.[62] Such copies are also admissible under statutory provisions.[63] As a general rule the recital as to the consideration is only prima facie evidence, and may be rebutted by parol,[64] but the rule is not without exception.[65] Where the proceeding is in equity, witnesses cannot be examined in open court unless there is statutory provision for such procedure.[66] A variance between the mortgage and the note secured thereby does not necessarily render the mortgage inadmissible. Objection for such a variance must be definite and specific.[67]

(§ 6) *D. Decree or judgment.*[68]—All the equities growing out of the whole transaction should be adjusted by the decree,[69] and the priorities of liens and claims

fendant did not hold under an independent paramount title. Rohrhof v. Schmidt, 218 Ill. 585, 75 N. E. 1062.

54. Gilman v. Crossman [Neb.] 106 N. W. 769.

55. Rohrhof v. Schmidt, 218 Ill. 585, 75 N. E. 1062. When complainant alleges title in third party and that such party holds subject to the mortgage, such party, if he relies on a paramount title, must allege and prove it. Id.

56. The wife's inchoate right of dower is liable to the lien of the deed only to the extent to which the amount secured by the deed was made known to her. Butler v. Farry, 68 N. J. Eq. 760, 63 A. 240.

57. Boyd v. Boyd, 128 Iowa, 699, 104 N. W. 798.

58. The rule requiring evidence in support of the allegation, in a petition for the foreclosure of a mortgage, that no proceedings at law have been had, etc., is available to an attaching creditor resisting the foreclosure and plaintiff's claim of priority. Fryer v. Fryer [Neb.] 105 N. W. 712. See ante § 1, The Remedies; post § 10, Personal Liability and Judgment for Deficiency.

59. Telford v. Howell, 220 Ill. 52, 77 N. E. 82.

60. In suit to foreclose second mortgage, evidence that owner of the property, who had acquired the first mortgage, had declared to bank that complainant's mortgage was the only encumbrance on the premises was admissible upon the question of merger of the first mortgage in the legal title. Townsend v. Provident Realty Co., 110 App. Div. 226, 96 N. Y. S. 1091.

61. Ryan v. Shaneyfelt [Ala.] 40 So. 223. When mortgagee is dead the defendant cannot testify as to payments made during decedent's life. Telford v. Howell, 220 Ill. 52, 77 N. E. 82.

62. Ryan v. Shaneyfelt [Ala.] 40 So. 223.

63. Provision making duly acknowledged and recorded instruments provable by certified copy. Bruce v. Wanzer [S. D.] 105 N. W. 282. When such a copy is introduced and the mortgagor testifies that he executed the mortgage and the note described therein, this is sufficient in the absence of conflicting evidence to prove the note and the mortgage. Id. The admission of the original mortgage and note after admission of certified copy of mortgage is within the sound discretion of the court. Id.

64. Barton v. Eminence Bldg. & Loan Ass'n [Ky.] 93 S. W. 9. In suit to enjoin foreclosure on ground of payment and cross bill setting up real consideration and praying foreclosure. Ladd v. Lookout Distilling Co. [Ala.] 40 So. 610.

65. In a suit by a grantor to recover land conveyed to secure a debt, an unambiguous receipt executed by the grantee showing the consideration for the conveyance cannot be varied by parol. Blake v. Lowry [Tex. Civ. App.] 15 Tex. Ct. Rep. 728, 93 S. W. 521.

66. Comp. Laws 1897, § 491, providing for the examination of the complainant or his solicitor in open court as to payments to be credited to defendant, refers to cases against absent, concealed, or nonresident defendants, and not to mortgage foreclosure proceedings against residents. Hoock v. Sloman [Mich.] 13 Det. Leg. N. 390, 108 N. W. 447.

67. Objection to admission of mortgage in evidence on ground that it was "immaterial, irrelevant and incompetent because it does not describe the note described in the complaint," was not as definite as it should have been. Adams v. Connelly, 118 Ill. App. 441. Variance between the mortgage and the note purporting to be secured thereby in that the former was signed by the mortgagor and his wife and described the note as being signed by the "mortgagors," whereas the note was signed by the mortgagor alone, did not render the mortgage inadmissible in evidence where the note was otherwise sufficiently described so as to identify it. Id.

68. See 5 C. L. 1453.

69. Where the mortgagee, at the time of the execution of the mortgage, held the title to certain land as security for a debt which

should be determined,[70] and damages for waste may be allowed.[71] The decree must be supported by the bill,[72] but foreclosure may be granted though not specifically prayed for.[73] Agreements between the parties may be carried out by the decree.[74] A corporation's president has no authority as such to consent to a foreclosure decree against the corporation when the effect would be to deprive the corporation of its property.[75] The decree upon foreclosure of a junior mortgage should be for a sale subject to the prior mortgage.[76]

(§ 6) *E. Sale.*[77]—Where several pieces of property subject to a single mortgage lien are conveyed to different persons, the several parcels are liable for the lien in the inverse order of their alienation,[78] but this rule does not apply where the several parcels are owned by different grantors,[79] nor is it of universal application even where the same grantor owns all the parcels, the question as to which parcels shall be sold first being dependent upon the intention of the parties at the time of the conveyance.[80] So also, when several mortgages do not cover the same land, a separate sale must be made under each mortgage.[81] And in any case, when the land is susceptible to subdivision into separate tracts, it should not be sold in bulk without being offered for sale in separate tracts,[82] but the rule is not an arbitrary one but is enforced when necessary to protect the rights of the debtor, and to insure the best prices that can be obtained for the property.[83] The ruling of the trial court in

was included in the amount covered by the mortgage, it was proper to provide for the reconveyance of such land to the mortgagor in foreclosure at the instance of the mortgagee's assignee, who had succeeded to the title of such land, upon the satisfaction of the total debt covered by the mortgage. Keely v. Gregg [Mont.] 83 P. 222.

70. Graham v. Smart, 42 Wash. 205, 84 P. 824. The rule that an adverse claim prior to the execution of the mortgage cannot be litigated in a suit to foreclose the mortgage will not be extended to a case where the question of priority depends upon the character of the property as whether it is community property or not. So when the mortgage was executed by a husband and wife, the court could determine whether the property was community property or not and thus determine whether or not the mortgage was prior to a separate judgment against the wife under which no levy was made until after the execution of the mortgage, since if the property was community property the judgment did not become a lien until the levy was made. Id.

71. Waste committed by receiver of insolvent mortgagor by removing fixtures. Prudential Ins. Co. v. Guild [N. J. Eq.] 64 A. 694. The damages recoverable are the amount of the diminution in value of the mortgage security by reason of the waste, and this diminution is measured by the difference in value at the time of the sale of the property after the waste, and its value at such time if the waste had not been committed. Id.

72. Madden v. Lubke, 119 Ill. App. 339.

73. Foreclosure granted in suit by mortgagee in possession under void sale, though no foreclosure was asked for. Haggart v. Wilczinski [C. C. A.] 143 F. 22.

74. In the absence of injury to the rights of third parties, the decree may carry out an agreement between the several holders of two notes secured by the mortgage that the claim based on one of the notes shall be superior to the claim based on the other, and a sale may be decreed for the satisfaction of the latter subject to the continuing lien of the mortgage to secure the former. Jackson v. Grosser, 218 Ill. 494, 75 N. E. 1032.

75. Frederick Milling Co. v. Frederick Farmers' Alliance Co. [S. D.] 106 N. W. 298. Where the corporation was represented by an attorney of record, the entry of judgment upon the stipulation of the president was erroneous for the additional reason that it was not assented to by the attorney. Id.

76. It should not be that the trustee in the former mortgage be barred from all equity of redemption, etc., in case of sale. Bortree v. Macon, 121 Ill. App. 111.

77. See 5 C. L. 1454.

78. Hogg v. Rose, 183 N. Y. 182, 76 N. E. 38.

79. Hogg v. Rose, 183 N. Y. 182, 76 N. E. 38. Where two parties join in a mortgage on their respective lands, a subsequent conveyance by one of the parties of his lands will not operate to transfer the lien of the mortgage primarily to the other so as to require the sale of the lands of the latter before those of the former. Id.

80. Hogg v. Rose, 183 N. Y. 182, 76 N. E. 38. If the grantor conveys a portion of the property with warranty, or receives the whole purchase money, then the lands conveyed are not to be sold until after the lands retained are applied to the satisfaction of the mortgage; while, on the other hand, the grantor may by his conveyance charge the whole or any part of the mortgage debt primarily on the lands conveyed. Id.

81. Ryan v. Shaneyfelt [Ala.] 40 So. 223.

82. State Bank v. Brown, 128 Iowa, 665, 105 N. W. 49. See ante, § 3C, Sale and Deed. Where a part of the mortgage debt is not due, a sale should not be ordered unless it appears that the property is susceptible of advantageous division. See Civ. Code Prac. § 694, subd. 3. Rowlett v. Harris [Ky.] 90 S. W. 562. When part of the debt is contro-

this respect will not be reversed by the appellate court unless plainly erroneous,[84] but where property is improperly sold in bulk without first offering it for sale in separate tracts, it will be set aside on proper application.[85]

The deed may be made by the successor of the officer who made the sale.[86] Provision for stay of sale is sometimes made by statute.[87]

On confirmation.[88]—Confirmation is merely the judicial sanction of the sale, being necessary only to complete the legal title,[89] the equitable interest of the purchaser being created by the sale and payment of the purchase money.[90] Mere delay, therefore, in confirmation, will not invalidate the sale.[91] The question of confirmation where there are irregularities rests to a large extent within the discretion of the chancellor.[92] The presumption is in favor of the regularity of the sale.[93] Where the sale vests in the purchaser an absolute right to a deed, confirmation cannot be refused on account of a larger price being offered, even upon the payment of the full amount of the judgment and costs.[94] Confirmation being necessary to complete the title of the purchaser, the title of the mortgagor is not divested until confirmation of the sale and delivery of the deed,[95] and hence the mortgagor is entitled to possession and to rents and profits until confirmation.[96] Questions as to the right to notice of confirmation[97] and as to the execution and recording of the deed[98] depend upon the various statutes. A party who has not been injured cannot complain of confirmation[99] or refusal to confirm.[1]

verted, such part is not due, within the meaning of the code, until the issue thus raised has been decided. Id.

83, 84. Miller v. Trudgeon, 16 Okl. 337, 86 P. 523.

85. State Bank v. Brown, 128 Iowa, 665, 105 N. W. 49.

86. Code Civ. Proc. § 1237. McCauley v. Jones [Mont.] 86 P. 422. Any officer succeeding the one who made the sale is the latter's successor. Id.

87. The word "defendant" as used in § 477b, Code Civ. Proc. (Comp. St. 1903, § 7037), being § 1469, Cobbey's Ann. St. 1903, applies to the mortgagor or to persons in privity with him, and not to cross petitioners seeking to enforce a lien upon the premises or to parties defendant having only a contingent or collateral interest in the property. Clock v. Pahl [Neb.] 106 N. W. 420.

88. See 5 C. L. 1456.

89, 90. Hyde v. Heaton [Wash.] 86 P. 664.

91. Six years delay was not fatal where innocent parties were not injured thereby. Hyde v. Heaton [Wash.] 86 P. 664. Statutes prescribing duration of liens and judgments have no application to such a case. Id.

92. Where the master accepted the bid of defendant's solicitor without requiring payment, thinking that the bid was for the complainant, and while still on the sales stand discovered his mistake and, after notice to defendant's solicitor, reopened the sale and sold the property to complainant for more than twice the amount of the bid of defendant's solicitor, and the property was worth twice the amount of such bid and the amount due under the decree was more than twice such amount, it was held that the chancellor exercised a sound discretion in refusing to confirm either bid. Slack v. Cooper, 121 Ill. App. 485, afd. 219 Ill. 138, 76 N. E. 84.

93. Confirmation will not be refused on the ground of inadequacy of price and because the property was sold as a whole, except upon good and substantial grounds sufficient to overcome the presumption that the trustee has done his duty. Evidence held insufficient to sustain exceptions. Stirling v. McLane [Md.] 63 A. 205.

94. The law prior to 1893 gave the purchaser an absolute right to a deed, provided only that the sale be regularly conducted. Zinkeisen v. Lewis, 71 Kan. 837, 80 P. 44, 83 P. 28.

95. Westerfield v. South Omaha Loan & Bldg. Ass'n [Neb.] 105 N. W. 1087.

96. Westerfield v. South Omaha Loan & Bldg. Ass'n [Neb.] 105 N. W. 1087. The statute, prior to the recent amendment, allowed the supersedeas of a decree confirming a sale upon foreclosure of mortgage by giving waste and cost bond only, and the purchaser at such sale could not recover for the use of the premises while the order of confirmation was so superseded pending an appeal which was voluntarily dismissed by the appellant. Id. But the recent amendment requires the supersedeas bond to guaranty payment for the use of the property in case the order appealed from is affirmed. Id. As to right to rents and profits pending redemption, see post § 11, Right to Possession Pending Redemption.

97. Ball's Ann. Codes & St. § 4886, providing that defendant after appearance is entitled to notice of all subsequent proceedings, does not apply when defendant is in default. Hyde v. Heaton [Wash.] 86 P. 664.

98. Under Pub. Acts 1899, p. 310, Act No. 200, the commissioner may execute and record the deed on the day his report of sale is made, and such acts will not be rendered premature by a subsequent motion to set aside the sale where such motion is denied. Miller v. McLaughlin, 141 Mich. 433, 104 N. W. 780.

99. Selling the property "with a small

Resale.[2]—When a stranger or third person becomes the purchaser, something more than a mere offer of a higher price must appear to justify or require a resale.[3] The payment of the costs of the first sale is not a condition precedent to a resale where the complainant was the purchaser at the first sale,[4] but where a resale is ordered on the defendant's application on account of a misunderstanding as to the date of the first sale, the costs of the first sale should be paid by the defendant.[5] The right of the sheriff to reject a bid and to resell the property is treated elsewhere.[6]

In Georgia.[7]

(§ 6) *F. Receivership in foreclosure.*[8]—The general rule is that to justify the appointment of a receiver pendente lite the mortgagee must show that the land is insufficient to cover the mortgage debt and that the mortgage debtor is insolvent.[9] Where the rents and profits are expressly mortgaged, a somewhat less stringent rule may be applied.[10] A provision in a mortgage for the appointment of a receiver upon foreclosure may be entitled to some weight upon an application for a receiver,[11] but the court will not enforce such a provision where it would be inequitable to do so.[12] A petition for a receiver must be verified, or if the motion is based upon the allegations of the bill, that pleading must be sworn to.[13]

(§ 6) *G. Costs, fees, and expenses.*[14]—Attorney's fees cannot be allowed unless authorized by statute[15] or by the contract of the parties.[16] Fees authorized by the contract of the parties may be allowed[17] and may be made a lien upon the land.[18] Where the trustee acts as the solicitor for the complainant, solicitor's fees will not be allowed.[19] When authority to allow attorney's fees is exhausted by a single al-

fraction off" the same, such fraction being left to the mortgagor, did not injure the mortgagor and he could not complain. Brumley v. Nichols & Shepherd Co. [Ky.] 93 S. W. 667.

1. The refusal of an application for confirmation of a sale of real estate made pursuant to a foreclosure decree cannot be the basis for an assignment of error, where it appears that shortly after such refusal the court made an order of confirmation, not appealed from, and no injury to appellant is shown. Pearson v. Helvenston [Fla.] 39 So. 695.

2. See 5 C. L. 1456.

3. Stirling v. McLane [Md.] 63 A. 205. See post § 7, subd. Fraud, Accident, or Mistake.

4. State Bank v. Brown, 128 Iowa, 665, 105 N. W. 49.

5. Burrill v. Flitner, 109 App. Div. 60, 95 N. Y. S. 1078.

6. See post § 9, subd. The Bid is a Contract.

7, 8. See 5 C. L. 1456.

9. Aetna Life Ins. Co. v. Broecker [Ind.] 77 N. E. 1092.

10. Aetna Life Ins. Co. v. Broecker [Ind.] 77 N. E. 1092. But the existence of such a provision, even when coupled with a stipulation that a receiver may be appointed upon default, does not per se require such appointment. Where the land alone is a sufficient security, equity will leave the complainant to his remedy at law as regards rents and profits. Id.

11, 12. Aetna Life Ins. Co. v. Broecker [Ind.] 77 N. E. 1092.

13. Daley v. Nelson, 119 Ill. App. 627. A condition in the mortgage that upon conditions broken the trustee may take possession does not change this rule, since without a verified pleading there is no competent evidence that the conditions have been broken. Id.

14. See 5 C. L. 1457.

15. Johnson v. Clegg, 121 Ill. App. 550. It was error to allow solicitors' fees against the defendant upon the overruling of his demurrer to the bill. Bortree v. Macon, 121 Ill. App. 111. Rev. St. c. 33, §§ 10, 18, authorize the allowance as costs of only such items as are authorized to be so allowed by statute. Id.

16. Johnson v. Clegg, 121 Ill. App. 550. Where the mortgage contains a provision for attorneys' fees at a per cent of the amount of the debt, but the amount of the per cent is left blank, no one, not even the chancellor, can fill in the blank and the fee cannot be allowed. Id. A provision for the allowance of "all other expenses of this trust" will not authorize the allowance of solicitors' fees where a provision for such fees upon a percentage of the amount of the debt is left incomplete by failure to specify the amount of the per cent. Id.

17. Where a party sues to recover the property on the ground that he was not a party to the foreclosure proceedings, and the mortgagee, being in possession as purchaser at the sale, is thus compelled to set up his mortgage and ask for a foreclosure in order to protect himself, an attorney's fee may be allowed according to the stipulations of the mortgage. Gravelle v. Canadian & American Mortg. & Trust Co., 42 Wash. 457, 85 P. 36.

18. Attorneys' fees provided for by mortgage note. Corson v. McDonald [Cal. App.] 85 P. 861.

19. The same rule applies where the solicitors are a firm of which the trustee is a member. Touhy v. McCagg, 121 Ill. App. 93.

lowance depends upon the terms of contract.[20] An allowance of attorney's fees will not be disturbed on account of the amount unless plainly unreasonable.[21] Clerical error as to amount of fee may be corrected by the trial court.[22]

The allowance of master's fees depends upon statute.[23]

(§ 6) *H. Effect of proceeding.*[24]—A decree of foreclosure is conclusive as between the adverse parties to the proceeding as to all matters adjudicated,[25] or which might properly have been adjudicated therein.[26] The mortgagor,[27] his privies,[28] heirs,[29] and creditors[30] are concluded by the decree, but it is not conclusive as against persons not parties to the proceeding,[31] nor are parties on the same side concluded, as against each other, where no issue between them is presented and adjudicated.[32] Foreclosure may be refused without adjudicating the validity of the mortgage even as between adverse parties.[33] A defendant cannot, on appeal, insist upon an adverse right not set up below.[34]

20. When the mortgage fixes a certain sum allowable as attorneys' fees, such sum may be allowed only once, but if it provides merely for the allowance of reasonable fees, the allowance of a fee in a suit to foreclose as to one of the obligations secured will not deprive the court of power to allow a fee in a subsequent suit to foreclose as to the other obligation. Jackson v. Grosser, 218 Ill. 494, 75 N. E. 1032. Where the abstract on appeal did not show what the provisions of the mortgage were in regard to fees, a second allowance in a second suit could not be disturbed. Id.

21. Amount allowed by judgment presumed to have been found reasonable, though finding stated another sum as reasonable. Corson v. McDonald [Cal. App.] 85 P. 861. Where mortgage provided for fee of $209, and there was uncontradicted evidence tending to show that this was reasonable, allowance of such fee was not error. Rohrhof v. Schmidt, 218 Ill. 585, 75 N. E. 1062.

22. Even after judgment on appeal. Corson v. McDonald [Cal. App.] 85 P. 861.

23. Under Rev. St. c. 63, § 20, master's fees allowed. Touhy v. McCagg, 121 Ill. App. 93.

24. See 5 C. L. 1458.

25. Gouwens v. Gouwens [Ill.] 78 N. E. 597. A proceeding cannot be maintained to set aside or vacate a decree of foreclosure on grounds disposed of in the foreclosure proceedings. City of Lincoln v. Lincoln St. R. Co. [Neb.] 106 N. W. 317. Where the parties and defenses are the same in a foreclosure suit and in an action at law on the debt secured by the mortgage, a decree in the former is res adjudicata as to the questions involved in the latter. Black v. Thomson, 120 Ill. App. 424. The fact that the decree has been appealed from and that the appeal is pending does not change this rule. Id. Where a decree of foreclosure of a mortgage on real estate contains a provision, "in the event said property is sold, that the said defendants H. S. and E. T. H., and all persons claiming by, under, or through them since the recording of the said mortgage, be and they are forever barred and foreclosed of all rights and equity of redemption in and to said property, or any part thereof," is not necessarily an adjudication of a tax title set up in the answer of one of the defendants, but it is held to be an adjudication affecting only the "rights and equity of redemption" under the mortgage. Pearson v. Helvenston [Fla.] 39 So. 695.

26. Thompson v. Hemenway, 218 Ill. 46, 75 N. E. 791. Decree cuts off all defenses that might have been set up. Livingston v. New England Mortg. Sec. Co. [Ark.] 91 S. W. 752.

27. Where the mortgagor and the trustee were parties to the foreclosure suit, the questions as to the relations between the two, and the performance by the trustee of its duty, could not be raised in a subsequent suit by the mortgagee to redeem. Marquam v. Ross [Or.] 83 P. 852. Where a judgment lienor was party to foreclosure suit, decree declaring judgment lien prior to all others and ordering sale for satisfaction of both judgment and mortgage lien was binding upon all parties. Thompson v. Hemenway, 218 Ill. 46, 75 N. E. 791. The power of the court to enforce the judgment, which had been rendered by a federal court, was res adjudicata. Id.

28. Decree binding upon all who subsequently succeed to interests of mortgagor in property, such as subsequent purchasers. Gouwens v. Gouwens [Ill.] 78 N. E. 597.

29. Nunnally v. Robinson, 99 N. Y. S. 594.

30. Where mortgage by widow upon her interest in her husband's estate was assigned to the estate and was thereafter foreclosed, though no sale was had under such foreclosure, the property being sold by the administrator under order of the probate court, the question as to the widow's liability to the estate was res adjudicata and could not be questioned, upon the settlement of the estate, by a creditor of the widow who was a party to the foreclosure suit. In re Angle's Estate, 148 Cal. 102, 82 P. 668.

31. A decree declaring that the holder of a note has a second lien on the premises as second mortgagee thereof does not merge the note where the holder is not a party to the foreclosure proceedings, and hence a subsequent assignee of the note may sue thereon. Wyman v. Friedman, 120 Ill. App. 543.

32. Gouwens v. Gouwens [Ill.] 78 N. E. 597. Where there is no surplus after satisfying the mortgage debt, there is nothing to litigate as between codefendants who claim nothing except the right to participate in the surplus, and hence in such case a subsequent purchaser from the mortgagor is not concluded by an adjudication as to the validity of judgment liens subsequent to the mortgage held by parties to the suit. Id.

The complainant's interests as mortgagee continue until delivery of the deed to the purchaser.[35]

§ 7. *Defective foreclosures and avoidance thereof. Defects and irregularities.*[36] —In considering the subject of defective foreclosures, a clear conception of the distinction between void sales and those merely voidable is of prime importance.[37] Mere irregularities may be entirely harmless[38] or may render the sale merely voidable,[39] and hence subject to ratification[40] or cure by waiver of the objection[41] or by

33. The dismissal without prejudice of a mortgagee's cross complaint for foreclosure is no defense to a subsequent suit to foreclose. Lefmann v. Brill [C. C. A.] 142 F. 44. A decree refusing foreclosure but not adjudicating the validity of the mortgage does not affect the priority of the mortgage over a mortgage executed after the decree but before the expiration of the time for filing a bill of exceptions. Board of Trustees of Westminster College v. Fry, 192 Mo. 552, 91 S. W. 472.

34. Complaint alleged that defendant had an interest in the property subject to the mortgage, and defendant having defaulted, could not, on appeal, claim a superior interest. San Gabriel Valley Bank v. Lake View Town Co. [Cal. App.] 86 P. 727. See Appeal and Review, 7 C. L. 128.

35. Where, therefore, the complainant purchased the property, and after the sale but before delivery of the deed the buildings were destroyed by fire, complainant was entitled to recover upon an insurance policy taken out by him as mortgagee. Uhlfelder v. Palatine Ins. Co., 97 N. Y. S. 499. If a third party had been the purchaser complainant would not have been damaged. Id.

36. See 5 C. L. 1458.

37. **Note:** "The word 'void' is so often used in the sense of 'voidable' as to have almost lost its primary meaning, and, when it is found in a statute or judicial opinion, it is ordinarily necessary to resort to the context in order to determine precisely what meaning is to be given to it. The word, when confined to the effect of the sale and conveyance as a transfer of title, the matter under consideration, was used by the learned Supreme Court with accuracy and technical precision. A purchase by a trustee at his own sale is certainly void as to the beneficiary in the trust. It is void because the seller is not permitted to buy at his own sale. Michoud v. Girod, 4 How. [U. S.] 503, 11 Law. Ed. 1076. The word 'void,' however, is frequently used even by legal writers and jurists where the purpose is nothing further than to indicate that a contract is invalid and not binding in law. Ewell v. Daggs, 108 U. S. 143, 148, 27 Law. Ed. 682. The distinction between 'void' and 'voidable' in their application to contracts is sometimes one of practical importance. A transaction may be void as to one party and not as to another. When entire technical accuracy is desired, the term 'void' can only be properly applied to those contracts that are of no effect whatsoever, mere nullities, such, for example, as are against the law, illegal, or criminal, or in contravention of that which the law requires, and therefore incapable of confirmation or ratification. Allis v. Billings, 6 Metc. [Mass.] 415, 417, 39 Am. Dec. 744; Lawrence v. Hornick, 81 Iowa, 193, 46 N. W. 987, 988; Toledo, etc., R. Co. v. Continental Trust Co. [C. C. A.] 95 F. 497, 525."—From Haggart v. Wilczinski [C. C. A.] 143 F. 22.

38. A junior incumbrancer cannot complain of failure to appraise where the purchaser offers to allow appraisement after sale, and, upon the incumbrancer's refusal of the offer, places sufficient money in the officer's hands to satisfy the junior lien to await the further order of the court. Moresi v. Coleman, 115 La. 792, 40 So. 168. Announcement by trustee that a certain sum would have to be paid by the purchaser when the property was knocked off to him was not ground for setting the sale aside where it did not appear that the property would have brought more but for such announcement. Green Real Estate Co. v. St. Louis Mut. House Bldg. Co. No. 3, 196 Mo. 358, 93 S. W. 1111. Omission of defendant's Christian name is not fatal where the proper party was served, as when record showed only one infant defendant and she was served, and, though the process omitted her Christian name, she could not avoid the judgment on this account. Gravelle v. Canadian & American Mortg. & Trust Co., 42 Wash. 457, 85 P. 36. The title of the purchaser was not affected by an error in an order of publication in that the order required the deposit in the post office of a "notice of the object of the action" instead of a "copy of the complaint," as required by Code Civ. Proc. § 440, when, as a matter of fact, not only the notice but the complaint as well, and all of the other papers required by the Code to be served, were so deposited, and the order was afterwards amended and corrected nunc pro tunc. Mishkind-Felnberg Realty Co. v. Sidorsky, 111 App. Div. 578, 98 N. Y. S. 496. The failure of a guardian ad litem for an infant defendant to answer is not necessarily fatal to the validity of the decree, as when there were sufficient facts admitted to justify the decree even if the guardian had filed an answer denying generally the allegations of the complaint, and there was no contention that there was any affirmative defense or that the ward's interests were not fully protected, the decree of foreclosure was valid as to the ward notwithstanding the guardian's failure to answer. Gravelle v. Canadian & American Mortg. & Trust Co., 42 Wash. 457, 85 P. 36. Misdescription of the title of the cause in the certificate of sale will not invalidate the sale, as when decree misdescribed defendant as "A. M. L.," whereas her name was "M. L." and the mistake was corrected by amendment, but the certificate of sale also misdescribed defendant as "A. M. L." Fay v. Stubenrauch [Cal. App.] 83 P. 82.

39. A foreclosure by advertisement made in the name of the mortgagee by the assignee, whose assignment is unrecorded, is

the sale itself or the confirmation thereof.[42] An attempted sale under a power without breach of condition is void,[43] and so also is a sale by a party not authorized to sell.[44] A sale without notice, where notice is required by the mortgage, or upon a substantially insufficient notice, is void,[45] but a sale upon a notice merely irregular is only voidable.[46] Lack of jurisdiction of the foreclosure proceedings renders the decree and sale void[47] and subject to collateral attack.[48] The admission of evidence in suits to set aside foreclosure sales is regulated by the general rules of evidence.[49] The sale will not be set aside on slight testimony, especially where several years have intervened between the sale and the application to set it aside.[50] A contract between two or more persons whereby one is to purchase for the joint benefit of himself and the others is not void and does not affect the validity of the sale,[51] unless made for the purpose of preventing fair competition and to depress the price.[52] A statutory presumption in favor of a sale, where the deed shows that it was regular, cannot be indulged where such regularity is not shown by the deed.[53] The owner of the land is not estopped to assert invalidity of foreclosure by executory process by acquiring an interest in the judgment of foreclosure.[54] A party having no lien on the property cannot raise technical objections to the decree of foreclosure.[55] A decree of foreclosure is not affected by the sale of the property by the mortgagor before decree.[56] The amendment of a clerical misprision in the decree of foreclosure does not make a new judgment and thus invalidate the sale.[57] The effect of the death of

voidable, but is not a nullity. Higbee v. Daeley [N. D.] 109 N. W. 318. Refusal to sell other property covered by deed of trust before selling homestead covered thereby renders the sale voidable at most. Weber v. McCleverty [Cal.] 86 P. 706.

40. See ante § 3C, Sale and Deed. Receipt of proceeds and application of same on debt not ratification when such receipt and ratification are without knowledge of facts. Wasserman v. Metzger [Va.] 54 S. E. 893.

41. Objection on account of refusal to sell other property before selling homestead property, waived by failure of grantor's widow to raise objection in action by purchaser, who was a stranger without notice of the homestead or the demand for separate sale, for the possession of the property. Weber v. McCleverty [Cal.] 86 P. 706. Where a mortgage sale has the effect of releasing from the operation of the decree properties covered by a junior mortgage, the junior mortgagee cannot complain of irregularities in the decree. Ruprecht v. Galt, 119 Ill. App. 478.

42. See post this section, subsection Grounds Available after Confirmation.

43. Chace v. Morse, 189 Mass. 559, 76 N. E. 142. Judgment on executory process before extension of time of payment had expired invalid as to one not party to the suit, and mortgage contained no pact de non alienando. Fontelieu v. Fontelieu, 116 La. 866, 41 So. 120.

44. Invalid appointment of substituted trustee under power of appointment in deed of trust held fatal in suit to cancel sale. Wilder v. Moren [Tex. Civ. App.] 14 Tex. Ct. Rep. 51, 89 S. W. 1087. Sale by trustee's agent not appointed in writing as required by trust deed. Cox v. American Freehold & Land Mortg. Co. [Miss.] 40 So. 739.

45. Chace v. Morse, 189 Mass. 559, 76 N. E. 142.

46. Irregular in including land not covered by mortgage in addition to that covered thereby. Chace v. Morse, 189 Mass. 559, 76 N. E. 142.

47. Decree of foreclosure and sale thereunder, based on publication against a nonresident after the expiration of ninety days from filing of complaint, was void, and was properly vacated in a subsequent suit to foreclose. Furhman v. Power [Wash.] 86 P. 940. A judge of a court of record may, of his own motion, when approving the minutes of such court at close of term, expunge from the record a judgment of foreclosure which the court was without jurisdiction to enter on account of lack of jurisdiction of foreclosure proceedings. Scott v. Hughes, 124 Ga. 1000, 53 S. E. 453.

48. See post this section, subd. Modes of Attacking Sale.

49. See Evidence, 7 C. L. 1511. In a suit by a real estate company against a building company to set aside a sale under a deed of trust executed to the latter, a member of the former was incompetent to testify to conversations and oral agreements with the agent of the latter, such agent being dead at the time of the trial. Green Real Estate Co. v. St. Louis Mut. House Bldg. Co. No. 3, 196 Mo. 358, 93 S. W. 1111.

50. Terry v. Furth, 40 Wash. 493, 82 P. 882.

51, 52. Starkweather v. Jenner, 27 App. D. C. 348.

53. Prima facie presumption created by Code 1904, § 3333a, not indulged where deed failed to show that terms of sale were advertised as required by deed of trust. Preston v. Johnson [Va.] 53 S. E. 1.

54. Fontelieu v. Fontelieu, 116 La. 866, 41 So. 120.

55. Adams v. Connolly, 118 Ill. App. 441.

56. The only effect would be that if the purchaser is not made a party his rights will be unaffected by the decree. Spitznagle

the mortgagor prior to or pending foreclosure,[58] and of tender before foreclosure,[59] and of irregularities in the manner of sale,[60] have been treated elsewhere.

Grounds available after confirmation.[61]—Confirmation cures all mere irregularities.[62] A party attacking a sale after confirmation for irregularities must, therefore, show a good excuse for not raising the objections on confirmation.[63] The validity of the sale is not affected by mere irregularity in the order of confirmation,[64] or by mere delay in confirmation.[65]

Fraud, accident, or mistake.[66]—Inadequacy of price is not alone ground for setting aside the sale,[67] unless it is so gross as to shock the conscience of equity,[68] but it is always a cogent circumstance to be considered by the jury where there are other circumstances indicating fraud or unfairness.[69] Contracts relating to purchase at the sale are not ipso facto fraudulent.[70] Even collusion in regard to the

v. Cobleigh, 120 Ill. App. 191. See ante, § 6B, Parties Defendant.

57. Fay v. Stubenrauch [Cal. App.] 83 P. 82.

58. See ante, § 2, subd. Scire Facias; ante, § 3A, Right and Authority to Sell.

59. See ante, § 1, subd. Tender; ante, § 2, subd. Scire Facias.

60. See ante, § 3C, Sale and Deed; ante, § 6E, Sale.

61. See 5 C. L. 1459.

62. Under Pierce's Code § 879, Laws 1899, p. 146, c. 93, § 1, an order confirming a sale is a conclusive determination of the regularity of the proceedings concerning the sale as to all persons in any other action, suit, or proceeding whatever. Terry v. Furth, 40 Wash. 493, 82 P. 882. Under this statute confirmation cures the irregularity of the sale having been made on the day after the day advertised for the sale. Id.

63. Terry v. Furth, 40 Wash. 493, 82 P. 882. When it did not appear that the defendant in foreclosure left the state before notice of sale, his absence was no excuse for not urging his objections on confirmation. Id.

64. Where, through clerical error, a decree of the circuit court of one county, ratifying a mortgage foreclosure, recited that it was the decree of the circuit court of another county, but the record clearly exposed the error and showed which court rendered the decree. Primrose v. Wright, 102 Md. 105, 62 A. 238. A misnomer of the court in the final order of confirmation is not fatal where it is a mere clerical misprision and all the other papers in the case show that the order was made by the proper court. Id. The court had inherent power as a court of equity to correct the order even after enrollment, notwithstanding equity rules 51, 52, and Code Pub. Gen. Laws, art. 16, §§ 178, 179, such rules and statute not being intended to take away from courts of equity their inherent power to correct mistakes in their own proceedings at any time. Id. See Equity, 7 C. L. 1323.

65. Hyde v. Heaton [Wash.] 86 P. 664.

66. See 5 C. L. 1459.

67. Davis v. Keen [N. C.] 55 S. E. 359; Macfarlane v. Macfarlane [Fla.] 39 So. 995; Green Real Estate Co. v. St. Louis Mut. House Bldg. Co., 196 Mo. 358, 193 S. W. 1111.

Note: Inadequacy of price not alone sufficient to invalidate sale under power, but gross inadequacy regarded as evidence of fraud sufficient. Ward v. Ward, 108 Ala. 278, 19 So. 354; Hudgins v. Morrow, 47 Ark. 515, 2 S. W. 104; Kennedy v. Dunn, 58 Cal. 339; Lathrop v. Tracy, 24 Colo. 383, 51 P. 486, 65 Am. St. Rep. 229; Hoodlers v. Reid, 112 Ill. 105; Singleton v. Scott, 11 Iowa, 589; Condon v. Maynard, 71 Md. 601, 18 A. 957; Carroll v. Hutton, 91 Md. 379, 46 A. 967; King v. Bronson, 122 Mass. 122; Farmers' Bank v. Quick, 71 Mich. 534, 39 N. W. 752, 15 Am. St. Rep. 280; Martin v. Swofford, 59 Miss. 328; Hardwicke v. Hamilton, 121 Mo. 465, 26 S. W. 342; Markwell v. Markwell, 157 Mo. 326, 57 S. W. 1078; McNair v. Pope, 100 N. C. 404, 6 S. E. 234; Mills v. Williams, 16 S. C. 593; Trenery v. American Mortg. Co., 11 S. D. 506, 78 N. W. 991; Klein v. Glass, 53 Tex. 37; Corrothers v. Harris, 23 W. Va. 177; Maxwell v. Newton, 65 Wis. 261, 27 N. W. 31; Riggs v. Clark, 71 F. 560; Clark v. Trust Co., 100 U. S. 149, 25 Law. Ed. 573. See, also, monographic note to Houston v. National, etc., Loan Ass'n [Miss.] 92 Am. St. Rep. 582. Question is whether deficiency is so great as to amount to evidence of fraud and unfairness in the sale. Newman v. Meek, 1 Freem. Ch. [Miss.] 441. If, by inducing others not to bid, mortgagee buys at sale under his chattel mortgage at less than value, and immediately sells to bystander at full value, mortgagee must account to the mortgagor for the sum thus received by him. Griswold v. Morse, 59 N. H. 211. Where mortgagor announces at sale that mortgage is invalid and that purchaser will take nothing by the sale, he cannot complain of inadequacy of price. Kennedy v. Dunn, 58 Cal. 339.—Quoted in substance from note to Johnson Brothers v. Selden [Ala.] 103 Am. St. Rep. 49, 57.

68. Starkweather v. Jenner, 27 App. D. C. 348.

69. Davis v. Keen [N. C.] 55 S. E. 359; Starkweather v. Jenner, 27 App. D. C. 348. Insufficient and improper advertising. Macfarlane v. Macfarlane [Fla.] 39 So. 995. Sacrifice of property pursuant to fraudulent scheme renders sale invalid. New England Mut. Life Ins. Co. v. Wing, 191 Mass. 192, 77 N. E. 376.

70. Starkweather v. Jenner, 27 App. D. C. 348. An agreement between the purchaser and the mortgage creditor as to the subsequent disposition of the property will not affect the validity of the sale. Moresi v. Coleman, 115 La. 792, 40 So. 168.

purchase will not necessarily render the sale invalid.[71] But slander of the mortgagor's title by the purchaser, resulting in an inadequacy of price, is ground for setting aside the sale.[72] Fraud connected with the execution of the mortgage is not ground for vacating a sale under the mortgage.[73] General allegations of fraud are insufficient.[74]

Modes of attacking sale.[75]—A judgment of foreclosure entered after two returns nihil cannot be set aside on motion on the ground that the mortgagor was dead when the writ was issued,[76] but this rule will not prevent the court, upon proper grounds, from exercising its equitable powers to open the judgment.[77] Such powers, however, will not be exercised where the applicant has been guilty of inexcusable laches.[78] In any case one who seeks to have a voidable sale adjudged void must show affirmatively that he asserted his rights promptly after discovering the facts,[79] and must bring his suit within the period of statutory limitation.[80] A motion to strike the judgment is proper only where the defects appear upon the face of the record.[81] Where the defects do not so appear the remedy is by rule to open the judgment.[82] Where sale is made without appraisement, the remedy of a junior encumbrancer is by application for appraisement after sale, and not by suit to annul the sale.[83] A suit to remove the cloud created by the mortgage and foreclosure will not lie against a mortgagee in possession under the foreclosure sale.[84] A suit in equity lies to set aside a sale for fraud.[85] A suit in equity is the only remedy of the mortgagor against the mortgagee in possession as long as the mortgage relation continues.[86] The purchaser at a foreclosure sale which has been confirmed and who has paid the purchase price is a necessary party to a suit to set the sale aside.[87] Where the defect in the foreclosure is such that complainant's title has not been divested, he may maintain an action at law for the possession of the property.[88] A very common method of

71. A wife cannot attack a sale under a mortgage executed by the husband before marriage on the ground of collusion between the husband and the purchaser to which the mortgagee was not a party. Lacey v. Lacey [Ala.] 39 So. 922.

72. Davis v. Keen [N. C.] 55 S. E. 359. It was proper to use the word "advertising" in submitting the issue whether the purchaser acted as the mortgagee's agent in "advertising and selling" the land. Id. When such issue was found in favor of defendant, he could not complain of its form. Id.

73. Gerry v. Furth, 40 Wash. 493, 82 P. 882.

74. In a suit by a purchaser at sale under a senior mortgage to restrain sale under junior mortgage, a cross bill alleging generally that the foreclosure was fraudulent was insufficient. Ramoneda Bros. v. Loggins [Miss.], 39 So. 1007. Mere allegations of fraud without the facts necessary to sustain such allegations will not sustain a suit to avoid the mortgage sale. Nunnally v. Robinson, 99 N. Y. S. 594.

75. See 5 C. L. 1460.

76. The two returns nihil are equivalent to a return scire feci. Freemansburg Bldg. & Loan Ass'n v. Billig, 30 Pa. Super. Ct. 101. See ante, § 2, subd. Scire Facias.

77. Freemansburg Bldg. & Loan Ass'n v. Billig, 30 Pa. Super. Ct. 101.

78. When a party personally served failed to file an answer showing tender, he was precluded from setting up the tender as a ground of a motion to open the judgment after the property had been advertised for sale. Freemansburg Bldg. & Loan Ass'n v. Billig, 30 Pa. Super Ct. 101.

79. Higbee v. Daeley [N. D.] 109 N. W. 318. Evidence examined and held that the plaintiff failed to show proper diligence in seeking relief from the voidable sale. Id.

80. Under Rev. St. 1898, § 3543, a mortgage sale cannot be attacked for irregularities after the expiration of five years, and this provision extends to foreclosure by advertisement. Coe v. Rockman, 126 Wis. 515, 106 N. W. 290.

81. Lawrence v. Smith [Pa.] 64 A. 776.

82. Death of mortgagor after service and before judgment. Lawrence v. Smith [Pa.] 64 A. 776.

83. Moresi v. Coleman, 115 La. 792, 40 So. 168.

84. Drum v. Bryan [Ala.] 40 So. 131. See Quieting Title, 6 C. L. 1183.

85. If the plaintiff had been guilty of misconduct by which the interests of the defendant had been deliberately sacrificed, or the sale had been conducted for the purpose of permitting the plaintiff to acquire title to the property at less than its fair valuation, a court of equity upon a bill for that purpose would reopen the foreclosure if fraud was found and set the sale aside. New England Mut. Life Ins. Co. v. Wing, 191 Mass. 192, 77 N. E. 376.

86. Nash v. Northwest Land Co. [N. D.] 108 N. W. 792. See post, this section, subd. Rights under Invalid Foreclosure.

87. Macfarlane v. Macfarlane [Fla.] 39 So. 995.

attacking foreclosure sales is by suit to redeem.[89] Such a suit based upon the assumption that the decree or judgment of foreclosure is invalid is a collateral attack,[90] as is also an attack upon a mortgage in proceedings by the mortgagor's widow for the assignment of dower.[91]

The decree or judgment of foreclosure may be collaterally attacked for want of jurisdiction,[92] but where it is regular and valid on its face, it cannot be collaterally attacked.[93] On a collateral attack every presumption will be indulged in favor of jurisdiction,[94] and mere irregularities in the decree[95] or the recording thereof,[96] or in the process and service,[97] are not available. The decree cannot be collaterally attacked on the ground that the foreclosure suit was premature,[98] or that the venue was wrong.[99]

Offer of equity.[1]—Equity will set aside a foreclosure sale only upon the payment of or an offer to pay the amount equitably due on the mortgage debt,[2] notwithstanding the bar of limitations.[3] The purchaser may likewise recover taxes paid by him on the property.[4] The defendant in ejectment by one claiming under a void fore-

88. When payment divests the mortgagee's title, the mortgagor may maintain ejectment against the mortgagee in possession under foreclosure sale made after payment. See Code 1896, §§ 1067, 1547. Drum v. Bryan [Ala.] 40 So. 131. Where heirs of mortgagor were not parties to the foreclosure suit, their remedy was by action for possession of the property, and a suit by such heirs against parties claiming under a foreclosure sale in another state for an accounting on the ground of fraud in the foreclosure proceedings could not be sustained when it did not appear whether complainants were parties to such proceedings and there was nothing to impeach the sale. Nunnally v. Robinson, 99 N. Y. S. 594.

89. Chace v. Morse, 189 Mass. 559, 76 N. E. 142. On ground that power of sale was not properly exercised. Cox v. American Freehold & Land Mortg. Co. [Miss.] 40 So. 739. See post, § 11, Redemption.

90. Kelso v. Norton [Kan.] 87 P. 184; Mann v. Provident Life & Trust Co., 42 Wash. 581, 85 P. 56. As where the suit is based on ground that plaintiff was not properly served. Cohen v. Portland Lodge No. 142, 144 F. 266.

91. Harrow v. Grogan, 219 Ill. 228, 76 N. E. 350.

92. Kelso v. Norton [Kan.] 87 P. 184.

93. Cannot be attacked collaterally on ground that a party to the proceedings was not properly served where the record shows sufficient service. Cohen v. Portland Lodge No. 142, 144 F. 266.

94. Presumption of service on mortgagor. Harrow v. Grogan, 219 Ill. 228, 76 N. E. 350. Jurisdiction of both subject-matter and person presumed in favor of decree of court of general jurisdiction. Cohen v. Portland Lodge No. 142, 144 F. 266. Where process against Richard C. Ludwick and Mary J. Ludwick returned as served on Richard C. Ludwick and Mary J. Lind, it was presumed that Mary J. Ludwick was served. Livingston v. New England Mortg. Sec. Co. [Ark.] 91 S. W. 752.

95. Where a mortgage securing two notes falling due at different dates was foreclosed by the purchaser of the note maturing first, and the decree, pursuant to the conditions under which such note was purchased, provided for a sale subject to the lien of the other note, the power of the court to render such a decree could not be attacked in a subsequent suit to foreclose the mortgage as to the second note. Jackson v. Grosser, 218 Ill. 494, 75 N. E. 1032.

96. The failure to record a final decree, duly passed and signed by the judge and filed by the clerk, does not render subject to collateral attack a sale thereunder that has been formally confirmed by the court. McGregor v. Kellum [Fla.] 39 So. 697.

97. Published service attacked in suit for specific performance of contract of sale of property. Title held marketable notwithstanding irregularities in process and service. Mishkind-Feinberg Realty Co. v. Sidorsky, 111 App. Div. 578, 98 N. Y. S. 496. Failure to make proof of publication in the manner provided by statute is an irregularity which does not affect the jurisdiction of the court and cannot be considered in a collateral proceeding. Johnson v. Lesser [Ark.] 91 S. W. 763. The clerk's failure to endorse the warning order on complaint against nonresidents, as required by statute, is an irregularity not available on collateral attack. Id.

98. In suit to redeem. Mann v. Provident Life & Trust Co., 42 Wash. 581, 85 P. 56.

99. See Rev. St. 1898, § 2928, making failure to ask for change of venue a waiver of the objection. Snyder v. Pike [Utah] 83 P. 692.

1. See 5 C. L. 1461.

2. Avoidance of sale on ground of irregularity where mortgagee is in possession. Haggart v. Wilczinski [C. C. A.] 143 F. 22. See post, this section, subd. Rights under Invalid Foreclosure. Suit by mortgagor. Stull v. Masilonka [Neb.] 104 N. W. 188. Junior mortgagee cannot defend suit by purchaser under senior mortgage to restrain foreclosure of junior mortgage on ground of conspiracy to defeat the junior mortgage lien without offering to pay the senior incumbrance, the purchaser being subrogated to the rights of the senior incumbrancer. Ramoneda Bros. v. Loggins [Miss.] 39 So. 1007.

3. Haggart v. Wilczinski [C. C. A.] 143 F. 22.

closure deed need not offer to redeem.[5] The only remedy of the mortgagor against the mortgagee in possession under an invalid foreclosure, while that relation continues, is a suit in equity in the nature of a suit to redeem.[6] Possession by the mortgagee under invalid foreclosure is adverse to the mortgagor and starts the running of the statute of limitations against the latter,[7] except in those jurisdictions where the mortgage creates only a lien.[8]

Rights under invalid foreclosure.[9]—The mortgage lien is not extinguished by an invalid foreclosure,[10] and though the mortgage debt is barred by limitations,[11] neither the mortgagor nor his privies can have the title to the property quieted as against the mortgagee in possession under such proceedings,[12] or recover the property from the mortgagee without paying the amount equitably due upon the mortgage debt,[13] and this doctrine extends to any purchaser at the foreclosure sale[14] and their privies,[15] such purchaser being subrogated to the rights of the mortgagee to the extent of the purchase money paid,[16] provided, however, that the purchase be bona fide and free from fraud,[17] and that the purchaser be in actual possession.[18] The sum to which the mortgagee in possession, or parties standing in his place, is entitled

4. Taxes paid by the purchaser at a void sale are recoverable under equity principles and not by virtue of statute, and hence do not bear interest at rate prescribed where recovery is under the statute. Fuhrman v. Power [Wash.] 86 P. 940.

5. Cobe v. Lovan, 193 Mo. 235, 92 S. W. 93.

6. Nash v. Northwest Land Co. [N. D.] 108 N. W. 792.

7. Nash v. Northwest Land Co. [N. D.] 108 N. W. 792. Same rule applies to any person in possession under invalid foreclosure sale. Id. Rule applies to one who claims title under a warranty deed from the purchaser at a foreclosure sale. Brynjolfson v. Dagner [N. D.] 109 N. W. 320. The fact that the grantee of the purchaser at a void foreclosure sale may be deemed in equity to be a mortgagee in possession does not make him such in fact, so that his possession under his supposed valid claim of title is not to be regarded as adverse to the mortgagor. Id. Fact that mortgagor consents to such possession does not change the rule. Nash v. Northwest Land Co. [N. D.] 108 N. W. 792.

Term of limitation: The 20 year limitation fixed by §§ 5188, 5189, Rev. Codes 1899, (§§ 6774, 7675, Rev. Codes 1905), does not apply to suits by mortgagor against mortgagee in possession, the limitation being ten years under Rev. Codes 1899, § 5207 (Rev. Codes 1905, § 6793). Nash v. Northwest Land Co. [N. D.] 108 N. W. 792.

The title acquired as in this case, by operation of the statute of limitations, is not a mere equitable right, but is a perfect legal title which may be proved under a complaint alleging a fee simple title in the form prescribed by the statute relating to actions to quiet title. Nash v. Northwest Land Co. [N. D.] 108 N. W. 792.

8. In Oklahoma a mortgage upon real estate creates only a lien in favor of the mortgagee, and neither the legal nor the equitable title passes to the mortgagee until after valid foreclosure, and the rights of a mortgagee in possession are not adverse to the rights of the mortgagor or his grantees so long as the relation of mortgagor and mortgagee exists. Gillett v. Romig [Okl.] 87 P. 325.

9. See 5 C. L. 1461.

10. Burns v. Hiatt [Cal.] 87 P. 196. See, also, ante, § 3A, Right and Authority to Sell; and ante § 6E, Sale. When the mortgagee is the purchaser, a receipt for the mortgage debt executed in payment of the bid does not constitute a payment of the mortgage when the sale is set aside. United States Title Guaranty & Indemnity Co. v. Donohue, 99 N. Y. S. 693.

11. Burns v. Hiatt [Cal.] 87 P. 196; Sawyer v. Vermont Loan & Trust Co., 41 Wash. 524, 84 P. 8; Haggart v. Wilczinski [C. C. A.] 143 F. 22.

12. Burns v. Hiatt [Cal.] 87 P. 196.

13. Burns v. Hiatt [Cal.] 87 P. 196; Gillett v. Romig [Okl.] 87 P. 325; Sawyer v. Vermont Loan & Trust Co., 41 Wash. 524, 84 P. 8. This is the Mississippi doctrine and was followed by the Federal court for that state. Haggart v. Wilczinski [C. C. A.] 143 F. 22.

14. Haggart v. Wilczinski [C. C. A.] 143 F. 22; Gillett v. Romig [Okl.] 87 P. 325; Burns v. Hiatt [Cal.] 87 P. 196; Nash v. Northwest Land Co. [N. D.] 108 N. W. 792; Griffin v. Griffin [S. C.] 55 S. E. 317. As against junior incumbrancer. Ramoneda v. Loggins [Miss.] 39 So. 1007.

15. Griffin v. Griffin [S. C.] 55 S. E. 317; Nash v. Northwest Land Co. [N. D.] 108 N. W. 792; Gillett v. Romig [Okl.] 87 P. 325; Haggart v. Wilczinski [C. C. A.] 143 F. 22.

16. Haggart v. Wilczinski [C. C. A.] 143 F. 22; Gillett v. Romig [Okl.] 87 P. 325; Burns v. Hiatt [Cal.] 87 P. 196; Nash v. Northwest Land Co. [N. D.] 108 N. W. 792; Griffin v. Griffin [S. C.] 55 S. E. 317; Ramoneda v. Loggins [Miss.] 39 So. 1007.

17. Burns v. Hiatt [Cal.] 87 P. 196. Purchaser who was party to conspiracy to deprive mortgagor of homestead property was not entitled to subrogation. Miller v. Kelsay, 114 Mo. App. 598, 90 S. W. 395. Decree vacating sale for fraud participated in by purchaser conclusive upon the purchaser, who was a party to the proceedings to vacate. Id. A purchaser in good faith from the original purchaser is not affected by the

includes all valid charges paid upon the property.[19] The mortgagee in possession under a voidable sale may require the mortgagee or those claiming under him to affirm or disaffirm the sale, and in the event of disaffirmance may apply for a judicial foreclosure.[20] A grantee of a part of the property from the mortgagor before foreclosure will be required to pay only a just proportion of the debt in order to recover such part from the mortgagee in possession.[21] A purchaser of the note and mortgage after maturity from the original mortgagee after an invalid foreclosure acquires no rights as against the purchaser in possession under the mortgage sale.[22] A voidable foreclosure will never be allowed to give the purchaser an unfair advantage of the mortgagor,[23] and where the mortgagor is required to pay the purchaser the amount of the purchase price, he has a correlative right to have such amount credited upon the mortgage debt.[24] Where the title of the mortgagor is not divested by the sale, the purchaser must account for rents and profits,[25] and the same rule applies when the purchase is not bona fide.[26]

§ 8. *Title and rights of purchaser.*[27]—The purchaser at a mortgage sale takes the same title that the mortgagee takes on strict foreclosure,[28] which is the same title that the mortgagor gave the mortgagee, stripped of all equity of redemption,[29] and modified only so far as the mortgagee or his assigns have seen fit, to modify it by subsequent conveyances.[30] In other words he acquires all the interests of the mortgagor[31] and of all persons claiming under him who are parties to the action,[32] and

bad faith of the latter and the mortgagee. Griffin v. Griffin [S. C.] 55 S. E. 317.

18. Payment of taxes not sufficient. Fuhrman v. Power [Wash.] 86 P. 940.

19. The mortgagee or his grantee in possession should be allowed and credited in his account with the costs of all ordinary, reasonably necessary repairs made to the premises and with all reasonable disbursements and expenses necessary for the proper management and protection of the estate. And if any permanent improvements have been erected with the consent or acquiescence of the mortgagor, or his grantees, which increased the value of the estate, just and proper allowance should be made therefor. Gillett v. Romig [Okl.] 87 P. 325.

20. Haggart v. Wilczinski [C. C. A.] 143 F. 22. A mortgagee in possession under a sale void as to a party because the latter was not a party to the foreclosure proceedings may pray for and obtain a foreclosure as against such party. Gravelle v. Canadian & American Mortg. & Trust Co., 42 Wash. 457, 85 P. 36.

21. Burns v. Hiatt [Cal.] 87 P. 196, overruling Davenport v. Turpin, 43 Cal. 597, so far as this case is in conflict with the doctrine announced.

22. Nash v. Northwest Land Co. [N. D.] 108 N. W. 792.

23. Haggart v. Wilczinski [C. C. A.] 143 F. 22.

24. Griffin v. Griffin [S. C.] 55 S. E. 317.

25. In Oklahoma the mortgage is a mere lien and the purchaser at a void sale gets neither legal nor equitable title. Gillett v. Romig [Okl.] 87 P. 325.

26. Possessors under void foreclosure by executory process, without a just title, are liable to the owners of the property for rents and profits from the commencement of their possession. Fontelieu v. Fontelieu, 116 La. 866, 41 So. 120.

27. See 5 C. L. 1462.

28. Sale under decree of foreclosure. Hazeldine v. McVey, 67 N. J. Eq. 275, 63 A. 165.

29. Hazeldine v. McVey, 67 N. J. Eq. 275, 63 A. 165.

30. Where the mortgagor of two lots sold one with an easement of right of way over the other, the mortgagee was not bound by the grant of the easement, nor did a release of the lot sold with all "appurtenances" operate to give the purchaser an easement of right of way over the other lot. Hazeldine v. McVey, 67 N. J. Eq. 275, 63 A. 165. See Easements, 7 C. L. 1203.

31. Hirth v. Zeller, 108 App. Div. 198, 95 N. Y. S. 747; City of Lincoln v. Lincoln St. R. Co. [Neb.] 106 N. W. 317. Defects in execution sale of land were immaterial where same party purchased at both execution and mortgage sale, and the mortgage sale was valid. Martin v. Castle, 193 Mo. 183, 91 S. W. 930.

Right to rents: Where, after default in payment of debt secured by security deed, the grantor was adjudged a bankrupt and his personalty located on the mortgaged premises sold by the trustee in bankruptcy, the purchaser of such personalty was not liable for rent to the grantee in the security deed, who had had the deed foreclosed and purchased the premises, merely because such purchaser, having entered the premises under a license to take possession of the personalty purchased, retained possession of the premises as against the grantee and purchaser thereof. Stevens v. McCurdy, 124 Ga. 456, 52 S. E. 762.

32. Where a mortgagor owned only a leasehold at the time the land was mortgaged, but before foreclosure acquired the fee, and all the parties who could claim under him were made parties, the title acquired by the purchaser was "marketable." Hirth v. Zeller, 108 App. Div. 198, 95 N. Y. S. 747.

the grantee of such purchaser acquires the same title and interests acquired by the purchaser.[33] Where the mortgagor's wife is not a party to the mortgage, the purchaser takes the mortgagor's title subject to the wife's contingent right of dower.[34] Where she is a party to the mortgage the purchaser acquires an indefeasible title as against both the husband and the wife,[35] but her contingent interest in any surplus of the proceeds of the sale will be protected.[36] All inferior liens are extinguished by the sale.[37] Where a prior judgment lienor is a party to the suit and the property is sold for the satisfaction of both the judgment and the mortgage, the purchaser takes a title free from both liens.[38] The sheriff's deed on foreclosure sale takes precedence from the date of its record of all outstanding conveyances and incumbrances executed by the judgment debtor which are not of record and of which the purchaser had no actual notice.[39] Where mortgaged property is selected as a homestead after the execution of the mortgage, the homestead is extinguished by foreclosure sale,[40] unless the law authorizes the designation of a homestead upon mortgaged land.[41] All the property covered by the mortgage and properly subject thereto passes upon a mortgage sale, including after-acquired property,[42] corporate franchises,[43] and fixtures.[44] Where the purchaser appropriates personalty which did not pass, he will be liable for a conversion thereof.[45] The foreclosure decree and the deed pursuant thereto may be sufficient to make a prima facie case in ejectment by a party claiming under the foreclosure sale.[46] A mortgagor's possession of the mortgaged premises after foreclosure and sale will not become adverse until notice to the purchaser that he is holding in hostility to his title.[47]

33. He is not liable to a junior incumbrancer for rents where such incumbrancer does not seek to redeem, though he was not a party to the foreclosure proceedings. City of Lincoln v. Lincoln St. R. Co. [Neb.] 106 N. W. 317.

34. Nielson v. Peterson [Utah] 85 P. 429; Shakleford v. Morrill [N. C.] 55 S. E. 82.

35. Shakleford v. Morrill [N. C.] 55 S. E. 82.

36. When wife joined in first mortgage but not in second, and sale was had under both, it was proper to protect her interest in surplus as against second mortgage. Shakleford v. Morrill [N. C.] 55 S. E. 82.

37. Under Gen. St. 1901, § 4949, real estate which has been once sold on an order of sale issued pursuant to a judgment of foreclosure, in an action upon a note and mortgage securing the same, cannot again be sold upon a judgment lien inferior thereto, under which the holder of the judgment had a right to redeem within 15 months after the foreclosure sale. Gille v. Enright [Kan.] 84 P. 992. Where in such case an inferior judgment creditor causes execution to be issued and levied on the real estate so previously sold, and procures a sheriff's deed to be issued to himself thereon, he acquires no title thereto and has no standing to complain of any judgment which may be rendered in an action brought, after his right of redemption has expired, to quiet the title to said real estate by one in possession thereof. Id.

38. Thompson v. Hemenway, 218 Ill. 46, 75 N. E. 791. In such case the title of the purchaser relates back to the date of the judgment and is superior to the claims of any parties claiming under mortgages subsequent to such date and who were parties to the foreclosure proceedings. Id. The purchasers at a sale under a decree in foreclosure proceedings by a party to the original foreclosure suit acquired no rights as against the purchaser under the decree in the first suit, such purchaser not being a party to the second suit. Id.

39. Getcheel v. Roberts [Neb.] 106 N. W. 781.

40. Mortgage by way of deed of trust to secure debt. Weber v. McCleverty [Cal.] 86 P. 706; Nielson v. Peterson [Utah] 85 P. 429. Rev. St. Utah 1898, § 1155, does not affect the validity of incumbrances on property occupied as homestead unless the premises have been "selected and recorded as a homestead prior to" the incumbrance. Id.

41. This may be done in Texas. McGaughey v. American Nat. Bank of Austin [Tex. Civ. App.] 14 Tex. Ct. Rep. 350, 92 S. W. 1003. See Homesteads, 5 C. L. 1689; Mortgages, 6 C. L. 681.

42. Where the mortgage expressly includes after-acquired property and the foreclosure judgment expressly includes such property. New York Water Co. v. Crow, 110 App. Div. 32, 96 N. Y. S. 899.

43. Contract rights of waterworks company under municipal ordinance. City of Vicksburg v. Vicksburg Waterworks Co., 202 U. S. 453, 50 Law. Ed. —.

44. Sawmill passed, but not loose machinery stored in house on premises. Humes v. Higman [Ala.] 40 So. 128.

45. Such liability may be enforced by cross bill in suit by purchaser to quiet title. See Code 1896, § 720. Humes v. Higman [Ala.] 40 So. 128.

46. Sufficient where decree shows upon its face that all necessary parties were before the court, but the proper practice is to introduce the mortgage and enough of the foreclosure record to show the purpose of the foreclosure suit and the interests in-

Lis pendens and bona fide purchasers.[48]—The doctrine of lis pendens applies to foreclosures.[49] Unless required by statute, no notice of proceedings subsequent to the filing of the lis pendens is necessary.[50] One who purchases at a sale under a mortgage executed pending proceedings to foreclose a prior mortgage takes his title subject to the result of the foreclosure suit,[51] and such a party cannot claim to be a bona fide purchaser where he makes his purchase with notice of an appeal in which the decree refusing to foreclose the prior mortgage is reversed.[52] The purchaser of a mere equity for which he has not paid is not protected as a bona fide purchaser.[53] A pre-existing debt will not support a claim of a bona fide purchase for value,[54] and under the doctrine of de minimis, etc., the purchaser may be precluded by the comparative insignificance of the consideration paid from setting up a claim of a bona fide purchase.[55] The fact that a prior mortgage is of record and unreleased is sufficient to put a purchaser at a sale under a junior mortgage upon inquiry as to whether the prior mortgage has been paid.[56] The mortgagor may preserve his right to redeem by giving notice to the purchaser before purchase of a tender to the mortgagee.[57] The claim of bona fide purchase may be precluded by actual notice that the mortgage is barred by limitations and that a bona fide purchaser from the mortgagor is in adverse possession.[58] Possession by the mortgagor's widow as executrix and as widow is not notice to the purchaser that the widow claims a homestead in the property.[59] The purchaser may be charged with notice of the invalidity of the sale by defects in his deed[60] or in the foreclosure record.[61] And so also a party holding under a quitclaim deed from the purchaser is charged with notice of the contents of the mortgage and of all patent defects in the chain of title.[61a] A party having actual knowledge of defects in the mortgagor's title is not protected as a bona fide purchaser.[62] Where the sale is void, the bona fides of the purchase is immaterial

volved. Chesapeake Beach R. Co. v. Washington, etc., R. Co., 23 App. D. C. 587.

47. Tainter v. Abrams [Neb.] 107 N. W. 225.

48. See 5 C. L. 1464.

49. Title of purchaser subject to vendor's lien attaching prior to mortgage and of which purchaser had notice by filing of lis pendens. Eubank v. Finnell, 118 Mo. App. 535, 94 S. W. 591.

50. Hyde v. Heaton [Wash.] 86 P. 664. Certificate of purchase need not be recorded. Id. No notice of confirmation necessary. Id. See ante § 6E, On Confirmation.

51. Board of Trustees of Westminster College v. Fry, 192 Mo. 552, 91 S. W. 472. A foreclosure suit will be deemed to be pending at least until the expiration of the time for filing a bill of exceptions. Id.

52. Board of Trustees of Westminster College v. Fry, 192 Mo. 552, 91 S. W. 472.

53. Purchase of equity of redemption from purchaser at void sale who had remortgaged property. Wasserman v. Metzger [Va.] 54 S. E. 893.

54. Board of Trustees of Westminster College v. Fry, 192 Mo. 552, 91 S. W. 472.

55. Where one purchased a corporation's property worth $80,000, he could not claim an estoppel to assert the invalidity of a mortgage sale at which a part of such property was purchased for $50.00, the doctrine of de minimis, etc., being applicable. Cobe v. Lovan, 193 Mo. 235, 92 S. W. 93.

56. Malmberg v. Peterson [S. D.] 108 N. W. 339. When the purchaser merely inquired of the first mortgagee and was informed that the mortgage was paid but made no further inquiries, he was not a bona fide purchaser without notice as against the second mortgagee who had redeemed and had thus become subrogated to the rights of the first mortgagee. Id.

57. Dickerson v. Simmons [N. C.] 53 S. E. 850.

58. Purchaser precluded from claiming to be a bona fide purchaser within Code Civ. Proc. § 2395, and hence not entitled under section 2232 to summary process to recover possession, such purchaser's title not having been perfected pursuant to the latter section. Bonacker v. Weyrick, 48 Misc. 189, 96 N. Y. S. 775.

59. Weber v. McCleverty [Cal.] 86 P. 706.

60. Irregularity in acknowledgment of deed to original purchaser may be sufficient to put subsequent purchasers on notice as to regularity of sale. Cox v. American Freehold & Land Mortg. Co. [Miss.] 40 So. 739.

61. A party purchasing at sheriff's sale under executory process illegally issued against property the title to which was in a third person, who was a succession under administration in a court other than that by which the writ was issued, and where there was no judgment against the mortgagee, was not such a bona fide purchaser as could set up the ten-year statute of limitations. Fontelieu v. Fontelieu, 116 La. 866, 41 So. 120.

61a. Aetna Life Ins. Co. v. Stryker [Ind. App.] 78 N. E. 245.

62. The purchaser under a railroad mortgage sale of land wrongfully seized by the

in a suit to redeem.[63] Mere delivery of one of several mortgage notes to the mortgagor without marking it paid will not estop the mortgagee from asserting the invalidity of a fraudulent foreclosure brought about by the use of the paid note.[64]

Purchases by beneficiary, trustee, or the like.[65]—Interest will not preclude a party from purchasing at a mortgage sale,[66] and a beneficiary who has no power of sale may purchase at a sale by a trustee,[67] whether the beneficiary be the mortgagee,[68] his assignee,[69] his executor,[70] or a second mortgagee.[71] So also, a party in possession as the mortgagor's grantee and as purchaser at a sale under a third mortgage may buy the first mortgage, foreclose it, and purchase at the sale,[72] and in such case owes no duty to give notice to or to protect the rights of the holders of the second mortgage.[73] As a general rule the beneficiary, like any other purchaser,[74] takes the property freed from the mortgage lien,[75] but where the debt secured by a first mortgage forms a part of the consideration of a second mortgage to the same party, purchase by the mortgagee at foreclosure of the first mortgage merely extinguishes such mortgage.[76]

A trustee with a power of sale cannot purchase at his own sale,[77] but this rule does not apply where the power can be exercised only by suit and decree of foreclosure,[78] or where the sale is brought about entirely by a third party and over which the trustee has no control.[79] So also when the trust relation has terminated, the trustee may purchase.[80] A purchase by a trustee in violation of his duties is

railroad company for a right of way cannot continue to use such land without paying the damages awarded the owner in a suit against the mortgagor company, where he had actual knowledge of the owner's claim. Zimmerman v. Kansas City N. W. R. Co. [C. C. A.] 144 F. 622. Where the owner was not a party to the foreclosure proceedings, he was not bound by the decree therein, nor was it necessary for him to apply to the court in charge of such proceedings to protect his rights. Id. The court expressly refused to decide as to the possible effect of want of knowledge, on the part of the purchaser, of the owner's claim for damages. Id.

63. Cox v. American Freehold & Land Mortg. Co. [Miss.] 40 So. 739.

64. Mortgagee not estopped as against purchaser at such void sale from foreclosing mortgage as to other notes. Wasserman v. Metzger [Va.] 54 S. E. 893.

65. See 5 C. L. 1465.

66. Anderson v. Messinger [C. C. A.] 146 F. 929.

67. Merryman v. Blount [Ark.] 94 S. W. 714.

68. Marquam v. Ross [Or.] 83 P. 852; Id., 86 P. 1.

69. Assignee of mortgagee complainant. Anderson v. Messinger [C. C. A.] 146 F. 929.

70. Executor of mortgagee substituted as complainant. Schaeppl v. Bartholomae, 118 Ill. App. 316.

71. Marquam v. Ross [Or.] 83 P. 852; Id., 86 P. 1. Second mortgagee in possession may purchase at sale under first mortgage. Id.

72, 73. Searles v. Kelly, Simmons & Co. [Miss.] 40 So. 484.

74. See ante this section.

75. Where the assignee of the mortgagee purchased the property at a sale in foreclosure proceedings instituted by him, he took the mortgagor's title freed from the trust. Anderson v. Messinger [C. C. A.] 146 F. 929.

76. Alexander v. Grover, 190 Mass. 462, 77 N. E. 487.

77. Marquam v. Ross [Or.] 83 P. 852.

Note: "A trustee with a power of sale cannot * * * purchase at his own sale. Neither can a trustee whose duty it is to convert the trust property into money for the benefit of his principal or his creditors purchase at a sale made by himself or by his direction, or, under many authorities, upon a judgment or decree based upon a paramount title or adverse proceeding. Van Epps v. Van Epps, 9 Paige [N. Y.] 237; Jewett v. Miller, 10 N. Y. 402, 405, 65 Am. Dec. 751; Davoue v. Fanning, 2 Johns. Ch. 252; Downs v. Rickards, 4 Del. Ch. 416; Lewis v. Welch, 47 Minn. 193, 48 N. W. 608, 49 N. W. 665; Carson v. Marshall, 37 N. J. Eq. 213; Hamilton v. Dooly, 15 Utah, 280, 49 P. 769; Michoud v. Girod, 4 How. [U. S.] 503, 11 Law. Ed. 1076. Upon this latter point there is a sharp conflict in the decisions (Earl v. Hasley, 14 N. J. Eq. 332; Corpenning's Appeal, 32 Pa. 315, 72 Am. Dec. 789; Anderson v. Butler, 31 S. C. 183, 9 S. E. 797, 5 L. R. A. 166; Allen v. Gillette, 127 U. S. 589, 32 Law. Ed. 271; Fisk v. Sarber, 6 Watts & S. [Pa.] 18), but it is unnecessary at this time for us to examine the adjudged cases, or attempt to deduce any general rule from them, if, indeed, it is possible to do so. It will probably be found on investigation that the decision in each case depends upon the application of the general rule of disqualification to the particular facts, and that, where there was a conflict between duty and self interest, the purchase was held voidable, regardless of the manner in which or by whom the sale was made, and where there was no such conflict, it was upheld."—From Marquam v. Ross [Or.] 83 P. 852.

78. Under B. & C. Comp. § 423, sale can be had only under a decree of foreclosure. Marquam v. Ross [Or.] 86 P. 1.

79. Starkweather v. Jenner, 27 App. D. C.

considered, in equity, as having been made for the benefit of the cestui que trust at his election, regardless of the amount paid and whether there was actual fraud or not.[81] So also, where a pledgee of a mortgage on land forecloses and becomes the purchaser, he will hold the title in trust for the pledgor and as security for the debt secured by the pledge,[82] unless there is an agreement between the parties whereby the pledgee may acquire title in his own name,[83] or unless the sale is conducted by an officer appointed by law.[84]

Agreements to permit redemption.[85]—The time for redemption may be extended by contract beyond the statutory period,[86] and unless contrary to statute[87] an agreement to permit redemption or to extend the time therefor may rest in parol,[88] but it must be satisfactorily proved.[89] Where there is such an extension the owner must comply with the terms of the contract or he will lose his right to redeem,[90] and in a suit to redeem pursuant to such a contract, the complainant must allege that he redeemed or offered to redeem within the time specified by the contract,[91] or some legal excuse for not so doing must be shown.[92] Under an agreement to extend with-

348. See, also, Anderson v. Messinger [C. C. A.] 146 F. 929. A trustee holding property as security for a loan made by it and in trust to collect and apply the profits to certain purposes, including the payment of a prior mortgage, held not guilty of such violation of the trust as caused the foreclosure of the mortgage and thus rendered the trustee a trustee ex maleficio of the property which it purchased at the foreclosure sale. Marquam v. Ross [Or.] 83 P. 852.

80. Where property was deeded to a trustee to secure certain advances made by it to the grantor and also in trust to collect rents and profits and to apply them to certain purposes, including the payment of a prior mortgage, a suit by the prior mortgagee to foreclose terminated the trust created by the deed, and the trustee thereupon became a second mortgagee in possession, entitled to have its lien foreclosed and to bid at the sale. Marquam v. Ross [Or.] 83 P. 852; Id., 86 P. 1.

81. Marquam v. Ross [Or.] 83 P. 852.

82. Munson v. American Sav. Bank & Trust Co. [Wash.] 86 P. 1047; Anderson v. Messinger [C. C. A.] 146 F. 939.

83. Munson v. American Sav. Bank & Trust Co. [Wash.] 86 P. 1047. In which case the pledgee is merely charged with the duty of accounting to the pledgor for the valuation at which the former acquired the title. Id.

84. Anderson v. Messinger [C. C. A.] 146 F. 929.

Note: "A pledgee, who is a trustee, cannot become the purchaser at his own sale of the pledge. But this rule is not applicable to a judicial sale conducted by an officer appointed by law. Nor indeed is such a purchase absolutely void in all circumstances when the sale is a private sale and the purchaser has an interest to protect. In either of the last-stated instances, the sale would be voidable if the purchaser were guilty of any fraud or other wrongful practice in the transaction; in the first instance by a refusal of the court to confirm the sale or by some judicial proceeding to impeach it, and in the latter instance by such appropriate action private or judicial as he should elect to make his objection effective. Richards v. Holmes, 18 How. [U. S.] 143, 15 Law. Ed. 304; Smith v. Black, 115 U. S. 308, 29 Law. Ed. 398; Allen v. Gillette, 127 U. S. 589, 32 Law. Ed. 271; Pewabic Min. Co. v. Mason, 145 U. S. 349, 36 Law. Ed. 732."—From Anderson v. Messinger [C. C. A.] 146 F. 929.

85. See 5 C. L. 1465.

86. Williams v. Hoffman [Ind. App.] 76 N. E. 440. Where third party advanced the money for redemption, taking an assignment of the certificate of purchase as security, and agreed to allow the owner a certain time in which to redeem. Id. The fact that the party advancing the redemption money took a deed before the expiration of the time for redemption specified in the agreement did not cut off the owner's right to redeem within such period. Id.

87. An oral agreement to permit redemption after foreclosure sale, and a quitclaim deed executed by the mortgagor, was within Code §§ 2918, 4625, prohibiting the creation of express trusts in realty by parol. Donaldson v. Empire Loan & Investment Co. [Iowa] 106 N. W. 192.

88. Mann v. Provident Life & Trust Co., 42 Wash. 581, 85 P. 56.

89. Finding of no agreement to extend time sustained. Mann v. Provident Life & Trust Co., 42 Wash. 581, 85 P. 56. Agreement held not established. Matney v. Williams [Ky.] 89 S. W. 678.

90. Williams v. Hoffman [Ind. App.] 76 N. E. 440. The fact that the holder of the certificate of purchase with whom the agreement was made took a deed to the land before the expiration of the time agreed upon did not excuse the owner from redeeming or tendering a redemption within such time. Id.

91. Williams v. Hoffman [Ind. App.] 76 N. E. 440.

92. Williams v. Hoffman [Ind. App.] 76 N. E. 440. An allegation that complainant was prevented from making a sale and thus from raising the redemption money, by reason of defendant having taken a deed for the land before the expiration of the redemption period, and that but for such violation of the contract by defendant complainant could have sold the land for a certain price, was an allegation of a mere conclusion and hence insufficient. Id.

out specification of time, redemption must be made within reasonable time,[93] but acceptance of part of the redemption money operates as an indefinite extension.[94] One purchasing the property without notice of the extension is not affected thereby.[95]

A writ of assistance is intended to aid in the execution of the final decree in order that the purchaser may have the benefit of his purchase.[96] It is a process issued by the court to enforce its decree,[97] and the power to issue it results from the principle that jurisdiction to enforce a decree is coextensive with jurisdiction to hear and determine the rights of the parties.[98] The issue of the writ is discretionary,[99] but it cannot be denied without some reasonable cause.[1] In Wisconsin the court has discretionary power to issue the writ with or without notice.[2] It will never issue in a case of doubt,[3] nor will a question of legal title be tried or decided upon an application for the writ.[4] Where, therefore, a stranger purchases a paramount title and enters into possession after decree of foreclosure, a writ of assistance will not issue at the instance of the purchaser,[5] and a party to the foreclosure proceedings

93. Mann v. Provident Life & Trust Co., 42 Wash. 581, 85 P. 56.

94. If the purchaser or holder of the certificate of sale received any part of the redemption money, which would be a partial redemption, he waives his right to a deed, and the certificate becomes merely the evidence of the lien upon the land as security for the payment of the residue of the redemption money. Williams v. Hoffman [Ind. App.] 76 N. E. 440. Five and one-half years unreasonable, especially where purchaser had made improvements. Id.

95. Matney v. Williams [Ky.] 89 S. W. 678.

96. Board of Home Missions of Presbyterian Church v. Davis [N. J. Eq.] 62 A. 447. The writ is a final order and is appealable. Escritt v. Michaleson [Neb.] 106 N. W. 1016.

Note: "This writ is a process issued from a court of equity to enforce its decree, and its power to issue the writ results from the principle that jurisdiction to enforce a decree is coextensive with jurisdiction to hear and determine the rights of the parties—that the court may do complete justice by declaring the right and enforcing a remedy for its enjoyment. The writ has been in common use in the courts of this state, in foreclosure cases, since Montgomery v. Tutt, 11 Cal. 190. The proceeding to obtain possession through operation of this writ is summary in its nature, and it has been frequently held that title cannot be litigated in this way, or the proceeding converted into a trial of title. Landregan v. Peppin, 94 Cal. 465, 29 P. 771. Against whom the writ will issue, it was said, in Burton v. Lies, 21 Cal. 88: 'Such writ can only issue against the defendants in the suit, and parties holding under them who are bound by the decree.' See, also, Harlan v. Rackerby, 24 Cal. 561; Steinbach v. Le Leese, 27 Cal. 295; Frisbie v. Fogarty, 34 Cal. 11; Tevis v. Hicks, 38 Cal. 234; Henderson v. Tucker, 45 Cal. 647. It was held in Enos v. Cook, 65 Cal. 175, 3 P. 632, that the legal or equitable rights of persons not parties to a foreclosure suit cannot be adjudicated upon application for a writ of assistance. In Kirsch v. Kirsch, 113 Cal. 56, 45 P. 164, the court said: 'The reason for the issuance of the writ is to give effect to rights awarded by the judgment. It should not and cannot operate to establish in the one party, or to destroy in the other, any rights to the property independent of those determined by the judgment,' hence, as has been held, the execution cannot exceed the decree, the writ can issue only against a party bound by the decree. Terrell v. Allison, 21 Wall. [U. S.] 289, 22 Law. Ed. 634; Howard v. Railway Co., 101 U. S. 837, 25 Law. Ed. 1081; Boyd v. U. S., 116 U. S. 623, 29 Law. Ed. 46. See, also, extended note to Wilson v. Polk, 13 Smedes & M. [Miss.] 131, 51 Am. Dec. 151; 2 Enc. Pl. & Pr. p. 975. In Landegran v. Peppin, 94 Cal. 465, 29 P. 771, it was held that the defendant could not defeat the writ of possession by showing that since the date of the judgment he had purchased an outstanding title. The court said: 'Defendant now claims a right to the possession, acquired subsequently to this adjudication. It is sufficient to say, the court cannot determine the merits of defendant's claim upon this application. This is a proceeding upon affidavits and no question of title can be litigated in this way. This is a hearing upon a motion, and a motion cannot be converted into a trial.' Harlan v. Rackerby, 24 Cal. 561, was a case where the mortgagor conveyed the premises during the pendency of the suit, and the writ was refused because the purchaser had no actual or constructive notice of the suit. Clearly the writ would have issued had the purchaser taken from a party defendant or privy with notice. Baker v. Pierson, 5 Mich. 456."—From Fay v. Stubenrauch [Cal. App.] 83 P. 82.

97, 98. Fay v. Stubenrauch [Cal. App.] 83 P. 82.

99. Board of Home Missions of Presbyterian Church v. Davis [N. J. Eq.] 62 A. 447; Prahl v. Rogers, 127 Wis. 353, 106 N. W. 287.

1. Prahl v. Rogers, 127 Wis. 353, 105 N. W. 287.

2. Under Rev. St. 1898, § 3169. Prahl v. Rogers, 127 Wis. 353, 106 N. W. 287.

3. Board of Home Missions of Presbyterian Church v. Davis [N. J. Eq.] 62 A. 447.

4. Board of Home Missions of Presbyterian Church v. Davis [N. J. Eq.] 62 A. 447; Fay v. Stubenrauch [Cal. App.] 83 P. 82. The tenant of a lis pendens purchaser cannot set up the title of his landlord in resistance of the writ. Fay v. Stubenrauch [Cal. App.] 83 P. 82.

5. The final decision of where the legal title rests will not be made on the applica-

who acquires a paramount title from an independent source, having no connection with the mortgagor's title, is within the same rule.[6] Under statute in Wisconsin the writ may issue against any person coming into possession after the institution of the foreclosure proceedings and under or through the parties thereto,[7] but this rule does not apply to cases where a party is in possession under a title not reached by the foreclosure judgment.[8] In such case or in case of a fair controversy as to whether such a situation exists, the parties should be left to their remedy by action.[9] Mere delay is no bar to an application for the writ.[10] The writ should not be denied or vacated upon mere allegations on information and belief which are denied.[11] The return of sale cannot be collaterally attacked on an application for the writ.[12] Omission of the seal of the court from the writ is an amendable irregularity.[13] In the absence of objection an affidavit may be treated as an answer to the application for the writ.[14] The court granting the writ has discretionary power to allow it to be superseded upon the filing of a bond to cover rents and profits.[15]

Remedies to assert or protect title.[16]—The statutory remedy in Massachusetts for recovery of possession of the property by the purchaser cannot be invoked unless there has been a valid sale,[17] but where the sale is sufficient to vest the purchaser with the legal title, defenses based upon equitable grounds, such as fraud, cannot be made.[18] In Wisconsin the purchaser may maintain a suit to quiet his title.[19] Ejectment may be maintained against the mortgagor without joining his wife where she is not a party to the mortgage,[20] but when the wife is made a party the issues raised by her answer should be decided or her name should be stricken from the case.[21]

§ 9. *The bid and the proceeds of foreclosure.—The bid is a contract,*[22] but there is no privity of contract between the purchaser and the mortgagor's grantee.[23]

tion for the writ, and the petitioner will be required to establish his title in a proceeding directed to that end. Board of Home Missions of Presbyterian Church v. Davis [N. J. Eq.] 62 A. 447.

6. Heir of mortgagor purchased independent paramount title after decree and entered into possession. Board of Home Missions of Presbyterian Church v. Davis [N. J. Eq.] 62 A. 447. There was nothing in the report of this case to show whether there was any warranty in the mortgage. Editor.

7. See Rev. St. 1898, §§ 3187, 3169. Prahl v. Rogers, 127 Wis. 353, 106 N. W. 287. Purchaser after foreclosure sale. Id.

8, 9, 10. Prahl v. Rogers, 127 Wis. 353, 106 N. W. 287.

11. Where the papers showed no reasonable probability that the tenant's claim that the applicant was a mere trustee for the tenant as to the purchase of the land was true, a motion to vacate the writ was properly denied. Prahl v. Rogers, 127 Wis. 353, 106 N. W. 287.

12. Commissioner who made sale cannot impeach his return. Fay v. Stubenrauch [Cal. App.] 83 P. 82.

13. Such irregularity is cured by appearance and motion to vacate the writ. See Rev. St. 1898, § 2829. Prahl v. Rogers, 127 Wis. 353, 106 N. W. 287.

14. Board of Home Missions of Presbyterian Church v. Davis [N. J. Eq.] 62 A. 447.

15. Escritt v. Michaleson [Neb.] 106 N. W. 1016. An order allowing such a writ is not within Code Civ. Proc. § 677, subd. 3, providing for the superseding of orders for the delivery of possession of land upon the filing of a waste bond, such section being intended to apply only to orders and judgments in actions involving the title or right to possession of realty as the direct subject of the litigation. Id.

16. See 5 C. L. 1466.

17. Remedy under Rev. Laws c. 181, § 1. New England Mut. Life Ins. Co. v. Wing, 191 Mass. 192, 77 N. E. 376.

18. New England Mut. Life Ins. Co. v. Wing, 191 Mass. 192, 77 N. E. 376.

19. As against tax deeds, though foreclosure not confirmed. Coe v. Rockman, 126 Wis. 515, 106 N. W. 290.

20. See Rev. St. 1899, § 3036, providing that ejectment shall be against party in possession. Bouton v. Pippin, 192 Mo. 469, 91 S. W. 149. The wife's inchoate right of dower did not defeat the action. Id. Deed of trust in this case was on homestead property but was executed before the enactment of the statute requiring wife to join in conveyance of homestead. Id.

21. When her rights are not not thus protected, the appellate court may strike her name from the record. Bouton v. Pippin, 192 Mo. 469, 91 S. W. 149.

22. See 5 C. L. 1466.

23. Hence the grantee's only remedy for the sheriff's wrongful refusal of a bid or failure to enforce it is by a proper action against the sheriff. State Bank v. Brown, 128 Iowa 665, 105 N. W. 49. The right under Code § 4033 to elect to hold a bidder for the amount of his bid belongs exclusively to the holder of the foreclosure judgment and can-

For reasons which appear good and satisfactory to him the sheriff may reject a bid,[24] or having accepted it he may, before the transaction is closed, repudiate it or authorize its withdrawal and resell the property.[25] A bid at a cash sale is not binding unless accompanied or followed by payment or deposit or some offer to arrange for payment,[26] or unless approved by the court,[27] and where the bid is not completed by payment or deposit, the master may again sell the property.[28] This rule does not apply where the complainant is the bidder and the bid is for less than the amount due him.[29] The sheriff in making the sale is the agent of the owner of the property as well as for the other parties,[30] and where, by virtue of statutory authority, he treats the sale as a nullity and so reports it to the court, neither he nor the owner can enforce the bid.[31] A sale under power of sale is within the statute of frauds.[32]

Bid money or deposit.[33]—Where the complainant is the purchaser and his bid does not exceed the amount due him under the decree, he need not pay over any cash though the decree provides for a cash sale.[34]

Accumulated rents.[35]—Where rents falling due after the purchaser comes into possession have been paid in advance to the mortgagor's receiver, the purchaser's remedy is against the tenants.[36]

Payment and distribution.[37]—The application of the proceeds as between several debts may be controlled by the provisions of the mortgage,[38] and a surety on the mortgage debt will be presumed to have contracted with reference to such provisions.[39] A surety has no right as such to require the proceeds of the foreclosure sale to be applied to the portion of the debt as to which he is surety to the exclusion of the other portion.[40] As between separate parcels of land each owned by

not be asserted by anyone else, and hence the mortgagor's grantee cannot hold the complainant to a bid made through mistake and allowed by the sheriff to be withdrawn. Id.

24. Code § 4033. State Bank v. Brown, 128 Iowa 665, 105 N. W. 49.

25. Code § 4033. State Bank v. Brown, 128 Iowa 665, 105 N. W. 49. Code § 4033 gives the holder of the judgment or his attorney the right to elect to proceed against the bidder for the amount of his bid, but this right belongs exclusively to such parties, and when they fail to assert their right to elect it is the duty of the sheriff to resell. Id.

26, 27. Slack v. Cooper, 121 Ill. App. 485, afd. 219 Ill. 138, 76 N. E. 84.

28. Where master, supposing that bidder was complainant, did not demand cash, and bidder did not offer to pay cash until after master had discovered his mistake and had made a resale. Slack v. Cooper, 121 Ill. App. 485, afd. 219 Ill. 138, 76 N. E. 84.

29. See post this section, subd. Bid Money or Deposit.

30, 31. State Bank v. Brown, 128 Iowa 665, 105 N. W. 49.

32. Acceptance of a bid does not create enforceable contract in absence of written memorandum signed by the party to be charged. Dickerson v. Simmons [N. C.] 53 S. E. 850. A deed prepared by the seller but not signed is not sufficient. Id. Printed advertisement not a sufficient memorandum. Id.

33. See 5 C. L. 1466.

34. Slack v. Cooper, 121 Ill. App. 485, afd. 219 Ill 138, 76 N. E. 84.

35. See 5 C. L. 1466.

36. The purchaser in such case is not within the class of claimants to surplus moneys fixed by Code Civ. Proc. § 2405. American Mortg. Co. v. Merrick Const. Co., 50 Misc. 464, 100 N. Y. S. 561.

37. See 5 C. L. 1466.

38. The mortgage may give the mortgagee the right to elect as to the application of the proceeds as between several debts secured by the mortgage and maturing at different times, and the court will carry out such election where properly made. Advance Thresher Co. v. Hogan [Ohio] 78 N. E. 436. Such election is not too late if made by proper demand prior to the trial. Id.

39. Advance Thresher Co. v. Hogan [Ohio] 78 N. E. 436.

40. The primary equity growing out of the relation of creditor, debtor, and surety is that the creditor be paid what is due him, that he does not lose this equity as against the surety except by misconduct to the latter's prejudice. So that, when the creditor in the original contract has received a mortgage covering the entire debt, and a personal guaranty on a part of it, the presumption is, in the absence of circumstances showing the contrary, that he has taken the personal guaranty as additional protection for his debt. This presumption is strengthened where it appears that the creditor, at the inception of the debt guaranteed by the surety, refused to part with the property, the consideration for the notes signed by the surety, without such personal security. The surety has, in case of sale resulting in a sum insufficient to satisfy the entire debt,

different persons, the proceeds of the sale of the entire tract will be apportioned to the several parcels in the ratio in which the respective owners received the benefit of the mortgage,[41] and so also, where several parcels of land are sold as a single tract, the proceeds should be apportioned between the several tracts in the ratio of their respective values and not of their acreages.[42] A widow's share of the proceeds of a sale of her husband's property under order of the probate court belongs to the owner of a mortgage executed by her upon her interest in her husband's property.[43] Where payments made after decree of foreclosure are not credited against the decree, they do not become, upon a subsequent foreclosure, a part of the funds to be distributed by the court.[44]

The mortgagor's right to the surplus is a mere chose in action,[45] and hence is not subject to the lien of a judgment rendered against the mortgagor after the foreclosure sale,[46] but the surplus itself is realty as regards its disposition.[47] The question as to the right to the surplus is solely between the claimant and the mortgagor.[48] The mortgagor's grantee is not entitled to the surplus until other liens against the property are paid.[49] The surplus of the proceeds of the sale of a homestead belongs to the owner of the homestead.[50] The amount for which a mortgagee selling under power of sale will be liable as for surplus depends upon whether the sale is authorized or not.[51] Any party receiving the surplus will be liable therefor to the owner thereof.[52] Statutory methods of ascertaining the right to surplus must be followed.[53]

no standing to demand that the proceeds be applied pro rata upon the notes upon which he is surety. A fortiori is this the case where the mortgage contains a clause to the effect that where any of the notes are guaranteed by a third party he shall have no rights under the mortgage unless the same is assigned to him, and that on sale the proceeds shall be first applied on notes not so guaranteed until the same are fully paid. Advance Thresher Co. v. Hogan [Ohio] 78 N. E. 436.

41, 42. Hogg v. Rose, 183 N. Y. 182, 76 N. E. 38.

43. Sale by administrator of husband under order of probate court did not satisfy the mortgage so as to give widow's creditors a claim to her share of the proceeds as against owner of the mortgage. In re Angle's Estate, 148 Cal. 102, 82 P. 668.

44. Where a party who had acquired an interest in the mortgaged premises after decree of foreclosure, made payments which were not credited against the decree, the court had no power, upon an application for surplus money, to dispose of the fund created by such payments, and the party making them was not, therefore, bound by a decree for less than the full amount of such payments and might sue at law for such amount as for money had and received, the full amount of the decree having been paid to the mortgagee. Brady v. Franklin Sav. Inst. of Newark [N. J. Law] 62 A. 277. The party who made such payments had the right to treat the decree of foreclosure as for the full amount, his payments having never been credited, and could make application for the surplus money on this basis without making the mortgagee a party. Id.

45. Commerce Vault Co. v. Barrett [Ill.] 78 N. E. 47.

46. Commerce Vault Co. v. Barrett [Ill.] 78 N. E. 47. Where a judgment creditor redeemed after foreclosure sale and then had the property resold under his execution, the surplus remaining after the satisfaction of his claims was not subject to levy under executions on judgments rendered against the mortgagor after the mortgage sale. Id.

47. Subject to vendor's lien of which purchaser had notice by lis pendens, but only after vendor has exhausted his remedy by foreclosure of his lien. Eubank v. Finnell. 118 Mo. App. 535. 94 S. W. 591.

48. Hence party entitled to first payment out of proceeds cannot invoke statute of frauds to defeat claim of another party to surplus. Brinkerhoff Zinc Co. v. Boyd, 192 Mo. 597, 91 S. W. 523.

49. State Bank v. Brown, 128 Iowa, 665, 105 N. W. 49.

50. This doctrine is not based on special statutory provisions but upon general principles of equity. In re Barrett's Estate, 140 F. 569.

51. Where the mortgagee in a mortgage by deed absolute is authorized to make the sale, he will be liable to the mortgagor for only the difference between the amount of the proceeds and the amount of the debt but where the sale is unauthorized the mortgagee will be liable for the difference between the value of the property and the amount of the debt. Ullman v. Devereux [Tex. Civ. App.] 15 Tex. Ct. Rep. 470, 93 S. W. 472.

52. Where a second mortgagee acquires title under foreclosure of the first mortgage pursuant to an agreement to sell the land and to account to the mortgagor for the excess of the proceeds over the amount of the second mortgage debt, equity will compel him to account. Chaffee v. Conway, 125 Wis. 77, 103 N. W. 269. Where trustee had notice that corporation claimed portion of proceeds, but nevertheless paid all the proceeds to the bondholder. Brinkerhoff Zinc Co. v. Boyd, 192 Mo. 597, 91 S. W. 523. Lessee of mining corporation's property paid debt for which its bonds were pledged and took assignment of the bonds, and then,

§ 10. *Personal liability and judgment for deficiency.*[54]—Suit, judgment and satisfaction upon a mortgage does not ipso facto discharge the entire obligation secured.[55] Where, therefore, the mortgagee appropriates the mortgaged land by foreclosure, the obligation secured is paid only to the extent of the value of the land.[56] Where the foreclosure is as to only a part of the debt secured, the burden, in a subsequent action for the balance, is upon the defendant to show that the value of the land is sufficient to pay the whole debt.[57] The possession of the mortgage and the obligation secured by the mortgagor may lose its force as proof of payment by reason of the character of the possession and the manner in which it was acquired.[58]

One not personally liable for the mortgage debt is not liable for a deficiency.[59] The wife of a mortgagor, therefore, is not liable for a deficiency merely because she joined in the mortgage.[60] Nor is the mortgagor's grantee liable personally where he does not assume the mortgage debt.[61] The mere fact that a grantee takes the premises "subject to the mortgage" does not render him liable for a deficiency,[62] and even where he assumes the mortgage debt he may defend on the ground of lack of consideration for such assumption.[63] The assumption of the debt by the grantee must be alleged[64] and proved.[65] Where the mortgagee, without the knowledge or consent of the mortgagor, releases a portion of the property to the grantee of the mortgagor, the latter is thereby relieved from liability for a deficiency.[66] A grantee of property who takes subject to a mortgage and who thereafter acquires the mortgage cannot upon foreclosure hold the mortgagor liable for a deficiency.[67]

At common law no personal liability could be enforced in foreclosure proceedings,[68] and it is only so far as this rule has been changed by statute that such lia-

through an invalid act of the directors, sought to acquire the company's equity of redemption, and foreclosed the mortgage securing the bonds and appropriated all the proceeds. Held that he was liable to the corporation for the excess of the proceeds above the amount of the debt for which the bonds were pledged, with interest and costs, and amounts paid on a second mortgage. Id.

53. Under Act June 14, 1836 (P. L. 633), § 19, the right to a surplus must be ascertained upon a petition for a citation upon the trustee to account and not upon a bill in equity. Merchants' Trust Co. v. Real Estate Trust Co. [Pa.] 64 A. 321.

54. See 5 C. L. 1467.

55. Even though the mortgage recites that it is given to secure and "in discharge of said obligation." Stricker v. McDonnell, 213 Pa. 108, 62 A. 520.

56. McKean v. Cook, 73 N. H. 410, 62 A. 729.

57. Mortgage to secure three notes foreclosed as to first two, and subsequent action on the third. McKean v. Cook, 73 N. H. 410, 62 A. 729.

58. In suit on bond secured by second mortgage, the property having been sold under a prior mortgage, the probative force of possession of the bond and mortgage by the mortgagor was destroyed by the fact that he had secured possession as the prospective administrator of the mortgagee. Ward v. Ward, 144 F. 308.

59. Johnson v. Clegg, 121 Ill. App. 550.

60. Johnson v. Clegg, 121 Ill. App. 550.

Liability of married woman for a deficiency depends upon the statutes of the various states. Parratt v. Hartsuff [Neb.] 106 N. W. 966. See Husband and Wife, 5 C. L. 1731.

61. Rabb v. Texas Loan & Investment Co. [Tex. Civ. App.] 96 S. W. 77.

62. Madden v. Lubke, 119 Ill. App. 339.

63. Grantee not precluded from asserting such lack of consideration by finding that he assumed the debt. Parratt v. Hartsuff [Neb.] 106 N. W. 966.

64. Facts showing such assumption must be alleged. Madden v. Lubke, 119 Ill. App. 339. Allegation that grantee assumed debt insufficient as being a mere conclusion. Kreidler v. Hyde, 120 Ill. App. 505.

65. Certified copy of deed containing clause that the grantee assumes the payment of mortgage debt not alone sufficient to charge him with liability for a deficiency. Kreidler v. Hyde, 120 Ill. App. 505. Grantee's acceptance of clause in the deed assuming mortgage debt must be proved by proof that deed was delivered to and accepted by him or that he otherwise assented to such clause. Id. Evidence held sufficient to sustain finding that grantee did not assume mortgage debt. Rose v. Dempster Mill Mfg. Co. [Neb.] 106 N. W. 990.

66. Meigs v. Tunnicliffe, 214 Pa. 495, 63 A. 1019. The fact that the mortgagor's grantee holds the mortgagor's deed with covenants against incumbrances does not change this rule where the mortgagee, at the time of the release, has no notice of such covenants, and the record of the deed containing them is not notice thereof to the mortgagee. Id.

67. The assumption of the mortgage debt by the purchaser showed that such debt was taken into consideration in connection with the purchase price and there was no equitable reason for not allowing the merger of

bility may be enforced in such proceedings.[60] Under a statute authorizing judgment for a deficiency, no personal judgment can be rendered where foreclosure is denied.[70] In New York no action on the mortgage debt can be maintained without leave of court pending foreclosure or after final judgment therein,[71] and to justify the granting of such leave the moving party must show a substantial reason why the debt was not enforced in the foreclosure suit,[72] but the mere fact that the obligor claims to have a defense against the debt is no reason for denying such leave.[73] Where a deficiency judgment in the foreclosure proceeding is authorized, the liability for a deficiency is fixed by the foreclosure decree[74] and cannot be contested on objections to a deficiency judgment,[75] but such finding as to liability, being necessarily indefinite as to amount, is not a judgment,[76] and the better practice is to defer such finding until after the report of sale,[77] at which time an application for a deficiency judgment may be heard upon motion.[78] A return of a deficiency does not require the docketing of a deficiency judgment without a motion therefor.[79] Where the officer is not required to make any return as to a deficiency, he is not officially liable for failure to make such return[80] or for a false return,[81] and the failure of the officer to make a return will not preclude the docketing of a deficiency judgment.[82] In the absence of statutory limitation mere delay in docketing the judgment does not affect its validity or its force as a lien,[83] but an application for a deficiency judgment should be made within the time that the statute would bar an action on the note secured by the mortgage on the foreclosure of which the deficiency arises.[84] Limitations begin to run when the deficiency has been ascertained.[85] An execution

the estates. Wonderly v. Giessler, 118 Mo. App. 708, 93 S. W. 1130.

68. Marling v. Maynard [Wis.] 109 N. W. 537; Howe v. Sears [Utah] 84 P. 1107.

69. Marling v. Maynard [Wis.] 109 N. W. 537.

70. See Rev. St. 1898, §§ 3156, 3071. Marling v. Maynard [Wis.] 109 N. W. 537.

71. Code Civ. Proc. § 1628 forbids such an action without leave of the court in which the foreclosure is pending or was instituted. La Grave v. Hellinger, 109 App. Div. 515, 96 N. Y. S. 564. Under Code Civ. Proc. § 1628 leave is a condition to the right to sue an assignor of a mortgage who guarantees the collection of the mortgage for a deficiency after foreclosure. Robert v. Kidansky, 97 N. Y. S. 913.

72. La Grave v. Hellinger, 109 App. Div. 515, 96 N. Y. S. 564. If it appear for any reason that it would be inequitable to grant such leave, it will be denied. Id.

73. The liability of the obligor should be determined in the action and not upon the motion for leave to sue. La Grave v. Hellinger, 109 App. Div. 515, 96 N. Y. S. 564.

74. Such liability cannot be contested in an action at law on the mortgage debt where there has been a decree of foreclosure and the parties and defenses in the foreclosure suit and in the action at law are the same. Black v. Thompson, 120 Ill. App. 424.

75. While the decree finding personal liabilities first rendered in a foreclosure proceeding is to a certain extent interlocutory, yet as to findings of fact made in such decree on issues properly pleaded it is not subject to review on objections to a deficiency judgment. Parratt v. Hartsuff [Neb.] 106 N. W. 966.

76. Parratt v. Hartsuff [Neb.] 106 N. W. 966, following and approving Brown v. Johnson, 58 Neb. 222, 78 N. W. 515.

77. In a proceeding for a deficiency judgment under section 847 of the Code as it existed prior to the amendment of 1897, the usual and better practice was not to determine the liability of a defendant for such deficiency until after the report of the sale when for the first time it can be definitely ascertained that a deficiency actually exists. Brown v. Johnson, 58 Neb. 222, 78 N. W. 515, followed and approved. Parratt v. Hartsuff [Neb.] 106 N. W. 966.

78. Parratt v. Hartsuff [Neb.] 106 N. W. 966.

79. See Code Civ. Proc. § 726. Hooper v. McDade, 1 Cal. App. 733, 82 P. 1116.

80. Under Pol. Code §§ 4175, 4176, and Code Civ. Proc. § 684, the sheriff is not required to make any return as to whether there is any deficiency after the application of the proceeds of the sale. Hooper v. McDade, 1 Cal. App. 733, 82 P. 1116.

81. Returning an order of sale as satisfying the foreclosure decree when in fact there was a deficiency. Hooper v. McDade, 1 Cal. App. 733, 82 P. 1116.

82. Under Code Civ. Proc. § 726, the failure of the sheriff to make any return as to the deficiency after the application of the proceeds of the sale will not prevent the party entitled to a deficiency judgment from having such a judgment docketed. Hooper v. McDade, 1 Cal. App. 733, 82 P. 1116.

83. Where defendant is not injured by the delay he cannot complain. Brown v. Faile, 98 N. Y. S. 420.

84. Pochin v. Conley [Neb.] 104 N. W. 878.

85. Not upon entry of the foreclosure decree providing for the docketing of a judgment for a deficiency. Howe v. Sears [Utah]

on a deficiency judgment barred by lapse of time may be vacated on petition of the judgment debtor.[86]

The lex loci contractus controls as to liability for a deficiency and the enforcement thereof is a part of the mortgage contract;[87] and where the right asserted and the remedy provided are of such a nature that they cannot be enforced in another state without injustice to the citizens of such state, the courts thereof will remit the parties to the forum in which the peculiar rights and remedies provided for may be enforced.[88]

§ 11. *Redemption.*[89]—The word "redeem" as here used has a well defined legal meaning, and that is that the owner of the equity of the real estate, which has been sold under execution or decree, may have the title vested in him which was divested by the sale by tendering or paying to the holder of the certificate within the redemption period the amount of principal and interest evidenced thereby.[90] Except where the right is conferred by decree of court,[91] the right to redeem, though a mere extension of the time for the assertion of the equity of redemption,[92] is entirely distinct from the right to redeem prior to sale[93] and rests entirely upon statute.[94] The right is neither property nor right of property, but a personal privilege[95] exercisable only in the manner provided by the statute[96] and by the persons

84 P. 1107. Statute begins to run from confirmation of sale. Pochin v. Conley [Neb.] 104 N. W. 878. The cause of action for a deficiency judgment does not accrue until the coming in of the report of the sale. Parratt v. Hartsuff [Neb.] 106 N. W. 966.

86. Execution barred where issued nearly sixteen years after entry of the judgment. Quinnin v. Quinnin [Mich.] 13 Det. Leg. N. 215, 107 N. W. 906.

87. Under Gen. St. N. J. p. 2112, §§ 47, 48, providing that liability for deficiency must be enforced only by action within six months after foreclosure and that the mortgagor may redeem within six months after entry of judgment in such action, a New Jersey mortgage bond cannot, after foreclosure in New Jersey, be sued on in New York as a common-law bond. Hutchinson v. Ward, 99 N. Y. S. 708.

88. Gen. St. N. J. p. 2112, §§ 47, 48, providing for independent action for deficiency, and giving mortgagor right to redeem within six months after judgment in such action, not enforceable in New York, and hence judgment for deficiency on New Jersey mortgage bond against citizen of New York refused, since debtor would have no right to redeem from such judgment. Hutchinson v. Ward, 99 N. Y. S. 708.

89. See 5 C. L. 1468.

90. Williams v. Hoffman [Ind. App.] 76 N. E. 440. Redeem means to "buy back," to "liberate an estate by paying a debt for which it stood as security." Bunn v. Braswell [N. C.] 55 S. E. 85; Id., 139 N. C. 135, 51 S. E. 927. A consent decree that "defendant has an equity to redeem the land" is not a decree for the conditional sale of the land, but shows that the relation of mortgagor and mortgagee previously existed between the parties. Id.

91. See post, this section and subdivision.

92. The statutory extension of the time for redemption does not absolve the debtor from all consequences of his default or deprive the creditor of any right, but only suspends the right of the purchaser to an absolute title until the expiration of the statutory period. Reiger v. Faber, 116 Mo. App. 123, 92 S. W. 183.

Note on constitutionality of statute: In Bradley v. Lightcap, 195 U. S. 1, 49 Law. Ed. 65, it was held that a statute requiring the sheriff's deed on foreclosure to be executed within five years did not affect the title of a purchaser as to when the period for redemption had expired at the time of the enactment of the statute, since the effect would be to impair the obligation of the purchaser's contract. In Barnitz v. Beverly, 163 U. S. 118, 41 Law. Ed. 93, and Cargill v. Powers, 1 Mich. 369, it was held that a law extending the period of redemption in favor of the mortgagor and his judgment creditors enacted after the execution of the mortgage was void. In Robinson v. Howe, 13 Wis. 380, it was held that a law extending the period for redemption from tax sale passed after the sale but before the expiration of the redemption period was void. But in Hooker v. Burr, 194 U. S. 415, 48 Law. Ed. 1046, it was held that as to a stranger purchasing at foreclosure sale, a change in the law subsequent to the execution of the mortgage did not impair any contract.—From 3 Mich. L. R. 157.

93. See Mortgages, 6 C. L. 681.

94. Reiger v. Faber, 116 Mo. App. 123, 92 S. W. 183. Code 1896, p. 988, c. 97. Lacey v. Lacey [Ala.] 39 So. 922.

Construction of statutes: The provisions of the statutes which confer the right to redeem from a foreclosure of a mortgage by advertisement and which regulate its existence are remedial in character and should receive such liberal construction as will advance the remedy rather than restrict the right of redemption. Lightbody v. Lammers [Minn.] 108 N. W. 846.

95. Code 1896, § 3505. Lacey v. Lacey [Ala.] 39 So. 922. A judgment against the mortgagor rendered after foreclosure and sale of a leasehold estate is not a lien upon his right to redeem. Commerce Vault Co. v. Barrett [Ill.] 78 N. E. 47.

authorized thereby.[97] Some of the parties to whom the right has been extended under the various statutes as construed by the courts are the mortgagor's grantee,[98] mortgagor's heirs,[99] tenants in common of the equity of redemption,[1] judgment creditors,[2] and junior encumbrancers.[3] Everything constituting a part of the land is subject to redemption.[4] Where the purchaser repudiates a redemption bond and takes possession, he cannot thereafter recover upon the bond.[5] The time allowed for redemption is usually dependent upon statute.[6] Where the property is not redeemed the title of the purchaser relates back to the date of the purchase so as to cut off all intervening encumbrances,[7] and such title is not affected by failure to apply for a deed immediately after the expiration of the redemption period.[8] Where a court of

96. Lacey v. Lacey [Ala.] 39 So. 922.

97. Lacey v. Lacey [Ala.] 39 So. 922. Code 1896, § 3505, does not authorize a wife claiming the property as a homestead to redeem from sale under mortgage executed by her husband before marriage. Id.

98. Redemption from sale under power. Dickerson v. Simmons [N. C.] 53 S. E. 850.

99. Redemption from sale by advertisement. See Gen. St. 1894, § 6042. Lightbody v. Lammers [Minn.] 108 N. W. 846. Proof of heirship of a person entitled to redeem is sufficient proof of the right to redeem without the production of any document or record, where it does not appear that any probate proceedings have been completed. Id.

1. Redemption from sale under power. Dickerson v. Simmons [N. C.] 53 S. E. 850.

2. Wyman v. Friedman, 120 Ill. App. 543. A judgment creditor held not estopped to redeem as against a purchaser of liens against the property and of the master's certificate of sale under the foreclosure proceedings, no relation of trust or confidence having been established between such creditor and purchaser, and no fraudulent concealment or representation by the creditor as to the acquisition of the note on which his judgment was based having been proved. Id.

In Illinois the right of a judgment creditor to redeem is not dependent upon his having a lien on the property. See Hurd's Rev. St. 1903, c. 77, §§ 20, 23. Wyman v. Friedman, 120 Ill. App. 543; Commerce Vault Co. v. Barrett [Ill.] 78 N. E. 47.

3. Brady v. Gilman, 96 Minn. 234, 104 N. W. 897. Junior mortgagee or judgment lienor may redeem. Code Civ. Proc. § 701. Youd v. German Sav. & Loan Soc. [Cal. App.] 86 P. 991.

Who may contest right: Judgment lienors whose liens are subject to a first and second mortgage cannot contest the right of the second mortgagee to redeem from a sale under the first mortgage. Youd v. German Sav. & Loan Soc. [Cal. App.] 86 P. 991. Where a party claiming under a judgment failed to make a sufficient tender of redemption from sale under first mortgage, he could not complain that a redemption by a second mortgagee and an assignment of the redemption certificate to the first mortgagee, who had purchased the property, was invalid. Id.

Partial redemption: Where there are several senior mortgages on several pieces of property, all of which are covered by the junior mortgage but not by the senior, the junior mortgagee may redeem some of the properties without redeeming the others, and this may be done after decree of foreclosure of all the senior mortgages as well as before such decree. Ruprecht v. Galt, 119 Ill. App. 478.

The order of redemption as between various lienors applies only to the particular proceedings in which the order is made. Cronan v. Corbett, 78 Conn. 475, 62 A. 662.

Notice of intention to redeem: A junior lienor may redeem from foreclosure sale provided he files notice of his intention to do so within the year allowed for redemption. Gen. St. 1894, § 6044. Brady v. Gilman, 96 Minn. 234, 104 N. W. 897. It is a condition precedent to the right of such lienor to redeem that he file notice of his intention to do so, and to entitle him to give notice he must have a lien on the premises at the time he files his notice, and hence a notice of intention to redeem filed before the intended redemptioner is in fact a lienor, as when a judgment creditor files the notice before his judgment is docketed, the notice is void, even though the lien is thereafter perfected, as by docketing the judgment within the year allowed for redemption. Id. The rule that the law does not regard the fractions of a day does not apply in the matter of docketing a judgment, since the statute requires the exact time of such docketing to be shown by the record, and hence a notice by a judgment creditor to redeem given several hours before the docketing of his judgment was premature. Id.

4. In Alabama coal lying under land in its natural deposit is real estate and foreclosure and execution sales thereof are subject to redemption. Traer v. Fowler [C. C. A.] 144 F. 810.

5. Purchaser, in suit to enjoin him from taking possession, denied the validity of the bond given by the mortgagor and relied on by him as ground for an injunction, and secured dismissal of the injunction. Reiger v. Faber, 116 Mo. App. 123, 92 S. W. 183.

6. Where the statute makes no exception in favor of minors, the court can make none. Merryman v. Blount [Ark.] 94 S. W. 714.

7. Westerfield v. South Omaha Loan & Bldg. Ass'n [Neb.] 105 N. W. 1087; Traer v. Fowler [C. C. A.] 144 F. 810. But this does not entitle him to rents and profits during the period allowed for redemption. See post this section, subdivision Right to Possession Pending Redemption.

8. Delay of four years in applying for new deed, and until title was attacked by mortgagor for defects in first deed, held not unreasonable. McCauley v. Jones [Mont.] 86 P. 422.

equity enforces a mortgage on lands in a foreign state by personal decree against the mortgagee,[9] he is entitled to an analogous application of the law relating to foreclosure as to the time allowed for redemption.[10] The bill in a suit to enforce the statutory right to redeem must allege a valid tender before the filing of the bill or some excuse for failure to make such tender,[11] and the money must be paid into court.[12] Failure to allege who was in possession of the land at the date of the foreclosure or the filing of the bill may be cured by amendment,[13] as may also a defective allegation of tender.[14] Where complainant is in possession at the date of foreclosure he is not bound, as a condition precedent to the right to sue for redemption, to surrender possession unless such surrender is demanded by the purchaser or his vendee.[15] Questions determined in the foreclosure proceedings are not open to reconsideration in a suit to redeem by a party to such proceedings.[16]

The right to redeem being incident to the mortgage, a suit in equity to redeem from sale on the ground of invalidity thereof may be maintained by anyone claiming under or through the mortgagor.[17] Under this rule the mortgagor's wife may maintain such a suit,[18] but when she comes into a court of equity to redeem she must do equity[19] and will not be allowed to secure more than adequate protection of her rights or to make a profit out of her own delay and the failure to make her a party to the foreclosure suit,[20] while on the other hand equity will not impose inequitable burdens upon her as a condition to the right to redeem.[21] The right of a mortgagor in possession to assert the right to redeem after an invalid foreclosure is not affected by the rule that a tenant cannot deny the landlord's title.[22] An accounting may be had in a suit for equitable redemption,[23] and to such a suit the mortgagee and his suc-

9. See ante, § 6 A, Jurisdiction.

10. Dickson v. Loehr, 126 Wis. 641, 106 N. W. 793.

11. Code 1896, § 3507. Lacey v. Lacey [Ala.] 39 So. 922. Offer to redeem without tendering cash and without including costs and taxes, is insufficient. Youd v. German Sav. & Loan Soc. [Cal. App.] 86 P. 991.

12. Where a tender is made no statutory redemption can be had unless at the time of the filing of the bill the money is actually paid into court and there is an averment in the bill to that effect. Given v. Troxel [Ala.] 39 So. 578.

13. Fuller v. Varnum [Ala.] 41 So. 777.

14. A bill alleging tender of a gross sum may be amended so as to show that the sum tendered included all lawful charges known to the complainant at the date of the tender. Fuller v. Varnum [Ala.] 41 So. 777.

15. See Code 1896, § 3506. Fuller v. Varnum [Ala.] 41 So. 777.

16. Marquam v. Ross [Or.] 83 P. 852.

17. Mackenna v. Fidelity Trust Co., 184 N. Y. 411, 77 N. E. 721. Subsequent purchasers of equity of redemption. Livingston v. New England Mortg. Sec. Co. [Ark.] 91 S. W. 752.

18. May sue during life of husband. Mackenna v. Fidelity Trust Co., 184 N. Y. 411, 77 N. E. 721.

19. Mackenna v. Fidelity Trust Co., 184 N. Y. 411, 77 N. E. 721. See ante, § 7, subd. Offer of Equity.

20. She cannot speculate at the expense of the purchaser by waiting until the lands have increased in value or have been improved, and then redeem as a matter of right, when the purchaser offers or the court requires him to fully protect her in some other way. Mackenna v. Fidelity Trust Co., 184 N. Y. 411, 77 N. E. 721. She may be fully protected by giving her the right to elect between a release of her dower right from the lien of the mortgage or the payment to her of the value thereof, with the right to full redemption if the purchaser does neither. Id.

21. She will not be required to pay more, except interest and taxes, than she would have been required to pay had she been made a party. Mackenna v. Fidelity Trust Co., 184 N. Y. 411, 77 N. E. 721. It was error to require the wife to pay, as a condition to redemption, a deficiency judgment against her in another foreclosure relating to other property, or to deduct the amount of such judgment from the amount to be paid her if she elected to take the value of her dower. Id., modifying 98 App. Div. 480, 90 N. Y. S. 493.

22. This rule applies only to the landlord's title at the inception of the tenancy, and even if the mortgagor were the mortgagee's tenant, the payment of the debt would destroy the landlord's title. Sadler v. Jefferson, 143 Ala. 669, 39 So. 380. The mere fact that an agreement under which the mortgagor remained in possession provided that the mortgagor should pay the mortgagee certain amounts as "rent" did not create the relation of landlord and tenant. Id.

23. Bill to redeem and for an accounting is not multifarious. Sadler v. Jefferson, 143 Ala. 669, 39 So. 380. An agreement that payments by the mortgagor, who remained in possession, should be applied on the mortgage debt did not need any consideration, since such payments had to be so applied, regardless of agreement. Id.

cessor, to both of whom payments have been made, are proper parties.[24] A tender or offer to pay the amount fixed by the foreclosure decree and sale is not always necessary.[25] A judgment lienor is not a necessary party to a suit to redeem from an invalid sale.[26] The right to redeem may be barred by laches,[27] unless there is an absolute right to redeem by virtue of title,[28] in which case no lapse of time, less than the period of limitation or prescription, will bar the right to redeem,[29] the statutory period for redemption not being applicable to a suit in equity to redeem from invalid sale.[30] The defense of limitations is waived if not pleaded.[31] Where an amended bill sets up a ground of redemption different from that set up in the original bill, the amendment does not relate back to the filing of the original bill so as to prevent the bar of limitations from attaching.[32] A suit to redeem being a collateral attack on the foreclosure proceedings,[33] prematurity of the foreclosure proceedings is not available as a defense.[34] A party purchasing the mortgaged property with notice, either actual or constructive, of the mortgagor's equities will not be protected as a bona fide purchaser.[35] A suit to redeem from foreclosure sale is notice to a pendente lite purchaser from the original purchaser of every fact pertinent to the issues involved in the suit.[36] Where the right to redeem from an invalid sale is allowed, the equities of the parties will be adjusted in accordance with the rights of the mortgagor and mortgagee the same as if there had been no foreclosure.[37] The time allowed for the redemption is within the discretion of the court.[38]

Right to possession pending redemption.[39]—With the exception of the right of

24. Sadler v. Jefferson, 143 Ala. 669, 39 So. 380.

25. As where the purchaser has credits in his hands applicable to the mortgage debt, the complaint need not allege tender of the amount fixed by the foreclosure decree nor make offer of such amount, an offer to pay the amount found due upon an accounting being sufficient. Aetna Life Ins. Co. v. Stryker [Ind. App.] 78 N. E. 245.

26. The object of such a suit being merely to adjust equities between the mortgagor and mortgagee. Kelso v. Norton [Kan.] 87 P. 184.

27. Delay of eight years, during which time the rights of third parties have intervened. Chace v. Morse, 189 Mass. 559, 76 N. E. 142.

28. As when the mortgage sale was absolutely void. Chace v. Morse, 189 Mass. 559, 76 N. E. 142. Where the owner of the equity of redemption is not a party to the foreclosure proceedings, his right to redeem after sale is not barred by the expiration of the statutory period for redemption. Aetna Life Ins. Co. v. Stryker [Ind. App.] 78 N. E. 245.

29. Chace v. Morse, 189 Mass. 559, 76 N. E. 142. Suit on last day before expiration of statutory period, in time. Cox v. American Freehold & Land Mortg. Co. [Miss.] 40 So. 739. Suit to redeem from sale under power is barred in two years under Code 1896, § 3505. Drum v. Bryan [Ala.] 40 So. 131.

30. Sale alleged to be invalid on account of irregularities and because of interest of purchaser. Merryman v. Blount [Ark.] 94 S. W. 714.

31. A demurrer construed and held not to raise defense of limitations. Cox v. American Freehold & Land Mortg. Co. [Miss.] 40 So. 739.

32. Cox v. American Freehold & Land Mortg. Co. [Miss.] 40 So. 739. Original bill alleged that sale was not made by the trustee but by a party who was interested in the debt or was the agent of the owner or holder of the debt, who had no authority to make the sale, was amended by allegation that party making sale was not appointed by the trustee in writing as required by trust deed. Id.

33. See ante, § 7, subd. Modes of Attacking Sale.

34. Mann v. Provident Life & Trust Co., 42 Wash. 581, 85 P. 56.

35. Sadler v. Jefferson, 143 Ala. 669, 39 So. 380. Where a party takes a quitclaim deed from the purchaser at the mortgage sale, he takes his title with notice that it is doubtful and that the mortgagor may have the right to redeem. Aetna Life Ins. Co. v. Stryker [Ind. App.] 78 N. E. 245. Where the lower court allowed the mortgagor to redeem as against a purchaser from the purchaser at the mortgage sale, and the findings did not disclose the nature of the deed to the subsequent purchaser, it was presumed, on appeal, that the deed was a quitclaim deed, such presumption being indulged in favor of the proceedings of the trial court. Id.

36. Aetna Life Ins. Co. v. Stryker [Ind. App.] 78 N. E. 245.

37. Kelso v. Norton [Kan.] 87 P. 184. In an accounting between mortgagor and mortgagee, the latter is entitled to interest on taxes paid by him after taking possession as purchaser at the rate of 12 per centum per annum from date of payment, as provided by § 148 of the tax laws, being § 8423, Gen. St. 1905. Id.

38. Ninety days was not unreasonably short, though the complainant was an infant who was not a party to the foreclosure

the mortgagee to possession after default, which right is not divested by a sale at which he is the purchaser,[40] and in the absence of special provisions in the mortgage contract to the contrary,[41] the mortgagor is entitled to the possession, rents, and profits of the property during the period allowed for redemption,[42] and this rule applies to a mortgagee in possession[43] and to purchasers from him.[44] The rule that the purchaser's title relates back to the date of the purchase applies only to his title so as to cut off intervening incumbrances, and does not apply to the quantum of his estate so as to entitle him to rents and profits.[45] The mortgagor's right to rents accumulating prior to the execution of the deed to the purchaser may be assigned,[46] but it does not pass to the mortgagor's grantee under the habendum clause in the deed without more.[47] The Federal courts will follow the state laws as to the right to rents and profits during the period of redemption.[48] The remedy for the recovery of such rents and profits is an action for money had and received.[49] As a general rule a suit in equity will not lie where there are no long, complicated accounts,[50] but the right to and the amount of such rents and profits may be determined in a suit against such mortgagee and the purchaser from him to redeem.[51] Where a junior encumbrancer makes no attempt to redeem, he is not entitled to an accounting from the purchaser's grantee as to rents and profits.[52]

Title and rights acquired by redemption.[53]—No new rights are acquired by redemption.[54] The mortgage debt is cancelled by redemption by the mortgagor[55] or

proceedings. Gravelle v. Canadian & American Mortg. & Trust Co., 42 Wash. 457, 85 P. 36.

39. See 5 C. L. 1470.

40. Reiger v. Faber, 116 Mo. App. 123, 92 S. W. 183.

41. The mortgage may provide that the rents and profits, pending redemption, shall go to the purchaser, and such provision will apply though the complainant be the purchaser. Schaeppi v. Bartholomae, 118 Ill. App. 316. Where the clause providing that the rents and profits pending redemption shall go to the purchaser also provides that in case of redemption the amount necessary to redeem must be reduced by the amount so received, such clause does not interfere with the right to redeem. Id.

42. Reiger v. Faber, 116 Mo. App. 123, 92 S. W. 183; Aetna Life Ins. Co. v. Stryker [Ind. App.] 78 N. E. 245. In Illinois, Traer v. Fowler [C. C. A.] 144 F. 810.

In Nebraska the mortgagor's title is not divested until final confirmation of the sale, and until such confirmation he is entitled to the possession, rents, and profits of the property. Westerfield v. South Omaha Loan & Bldg. Ass'n [Neb.] 105 N. W. 1087. The purchaser is not entitled to recover from the mortgagor or one holding under him for the rents and profits of the mortgaged premises during the pending of an appeal from an order of confirmation taken prior to the passage of the act requiring appeal bonds to provide for the payment of rents pending appeal, where the appeal bond contains no such condition. Id. This rule applies, however, only to appeals from execution sales prior to the passage of the act requiring appeal bonds, in such cases, to provide for the payment of rents pending the appeal. Id.

43. Aetna Life Ins. Co. v. Stryker [Ind. App.] 78 N. E. 245. Where the mortgagee takes possession as purchaser, his right to retain such possession by virtue of the mortgagor's default does not give him the right to the rents and profits. Reiger v. Faber, 116 Mo. App. 123, 92 S. W. 183. Such possession and the receipt of rents and profits do not affect the validity of a redemption bond given by the mortgagor. Id.

44. Aetna Life Ins. Co. v. Stryker [Ind. App.] 78 N. E. 245.

45. Traer v. Fowler [C. C. A.] 144 F. 810; Westerfield v. South Omaha Loan & Bldg. Ass'n [Neb.] 105 N. W. 1087.

46. Kaston v. Paxton [Or.] 80 P. 209.

47. In the absence of some further assignment the mortgagor's grantee has no right to such rents even after redemption. Kaston v. Paxton [Or.] 80 P. 209.

48. Traer v. Fowler [C. C. A.] 144 F. 810.

49, 50. Kaston v. Paxton [Or.] 80 P. 209.

51. Aetna Life Ins. Co. v. Stryker [Ind. App.] 78 N. E. 245.

52. Junior encumbrancer who was not party to foreclosure proceedings. City of Lincoln v. Lincoln St. R. Co. [Neb.] 106 N. W. 317.

53. See 5 C. L. 1470.

54. Wemple v. Yosemite Gold Min. Co. [Cal. App.] 87 P. 280.

55. Franklin v. Jameson-Wohler [N. D.] 109 N. W. 56; Wemple v. Yosemite Gold Min. Co. [Cal. App.] 87 P. 280. Where a redemption from a mortgage sale was ostensibly made and in the name of an incumbrancer, but was in fact made by and for the mortgagor himself, who owned the land sold, and the certificate of redemption issued to the ostensible redemptioner who assigned it to the mortgagor, by whom it was again assigned to a third person, a sheriff's deed to such subsequent assignee passes no title, in the absence of any showing entitling such assignee to a decree adjudging him to be the

his assigns,[56] or by anyone charged with the payment of such debt,[57] and a junior encumbrancer can acquire no rights by redeeming from such party.[58] As a general rule, however, redemption by a junior incumbrancer operates as an assignment or transfer of the rights of the purchaser,[59] and the redemptioner is subrogated to the rights of the first mortgagee so far as may be necessary to protect the former's rights;[60] but this principle will not operate to keep alive a senior mortgage as against a junior mortgage where the former is foreclosed without making the junior mortgagee a party, and the successors in interest of the senior mortgagor redeem with notice of the junior mortgage.[61] Where confirmation of an execution sale is necessary, the purchase by a judgment creditor at execution sale of the debtor's right to redeem from foreclosure does not, until confirmation, extinguish the debt so as to deprive the creditor of the right to redeem.[62] Under some circumstances a purchase by a junior encumbrancer may operate merely as a redemption and an extension of the time in which the mortgagor may redeem.[63] The purchaser at mortgage sale of an undivided interest in land is not a joint owner with the owners of the other undivided interests within the rule that redemption by a joint owner inures to the benefit of all with a right of contribution.[64]

owner on equitable grounds. Id. Where both the redemptioner and the debtor, through mutual ignorance of their legal rights, regarded the certificate of redemption merely as an evidence of debt in addition to the debt secured by the mortgage, the possession of such certificate by the debtor is prima facie evidence that the same had been discharged and canceled. Id. The evidence insufficient to overcome such prima facie evidence of cancellation. Id.

56. Wemple v. Yosemite Gold Min. Co. [Cal. App.] 87 P. 280.

57. Franklin v. Jameson-Wohler [N. D.] 109 N. W. 56; Niles v. Cooper [Minn.] 107 N. W. 744. Same rule applies to privies of such party. Id.

58. Niles v. Cooper [Minn.] 107 N. W. 744. When party in possession purchased the land from one charged with the mortgage debt, and thereafter purchased the sheriff's certificate of sale, thus extinguishing the mortgage, a redemption from the sheriff by a junior mortgagee without inquiring as to the title of such purchaser who was in possession was ineffectual. Id.

59. If there is no subsequent redemption within the time fixed by law, the lien under which the redemption was effected is extinguished and the redemptioner acquires the title. Franklin v. Jameson-Wohler [N. D.] 109 N. W. 56. A judgment creditor who redeems from a foreclosure sale under the statutes of Illinois buys the lien of the purchaser and secures no more or less rights than the purchaser would have acquired if no redemption had been made. Traer v. Fowler [C. C. A.] 144 F. 810. Where a judgment creditor of the mortgagor's grantee redeemed the property from a sale subject to a certain lien, the priority and validity of such lien were not affected. Jackson v. Grosser. 218 Ill. 494, 75 N. E. 1032.

60. Wemple v. Yosemite Gold Min. Co. [Cal. App.] 87 P. 280. When mortgagee purchased and thereafter second mortgagee redeemed and assigned redemption certificate to mortgagee, judgment lienor could not redeem without paying amount of second mortgage. Youd v. German Sav. & Loan Soc. [Cal. App.] 86 P. 991. Where a junior lienor redeems he thereby acquires the rights of the first mortgagee and may foreclose as to liens subsequent to the first mortgage. Cronan v. Corbett, 78 Conn. 475, 62 A. 662.

61. Wemple v. Yosemite Gold Min. Co. [Cal. App.] 87 P. 280.

62. McGaugh v. Deposit Bank [Ala.] 40 So. 984. Code 1896, § 1914, requiring a deed to be made to the purchaser at a judicial sale upon compliance by the purchaser with the terms of the sale, applies only to sales made by the sheriff, and this section, therefore, cannot be invoked to support the contention that a purchase by a creditor at execution sale made by a register of the debtor's right to redeem from a foreclosure sale extinguished the debt and deprived the creditor of the right to redeem. Id.

63. Where, pursuant to an agreement between the first and a second mortgagee made prior to the expiration of the time allowed the mortgagor to redeem, the second mortgagee, after the expiration of such time, paid the first mortgagee the amount of the latter's claim and received from him a deed to the property, the legal effect, without regard to any agreement between the second mortgagee and the mortgagor, was to open the decree for the purpose of redemption by any person interested in the property. Phelps v. Root, 78 Vt. 493, 63 A. 941. The second mortgagee was estopped to deny the right of the owner of the equity of redemption to redeem, though the agreement between him and the owner of the equity of redemption was in parol. Id. Evidence held sufficient to sustain master's finding that there was such an agreement. Id.

64. Given v. Troxel [Ala.] 39 So, 578. Such purchaser's status as to the question of redemption is not changed by his purchase of an undivided interest of one of the joint owners after the foreclosure sale. Id.

FOREIGN CORPORATIONS.

§ 1. **Status, Privileges, and Regulation (1725).** Permits (1726). License, Excise, or Franchise Taxes (1726). Operation and Construction of Regulatory Statutes (1727). Noncompliance with Statutes; Effect (1728).
§ 2. **Powers (1730).**
§ 3. **Actions by and Against; Jurisdiction of Courts (1731).** Liability to be Sued (1731). Venue (1731). Limitations (1731). Service of Process (1732).
§ 4. **Remedies of Stockholders and Creditors as Against Foreign Corporations and Their Officers (1734).**

§ 1. *Status, privileges, and regulation.*[2]—A corporation created by act of congress is a domestic corporation, for some purposes at least, wherever it may engage in business,[3] but one incorporated under state law is a resident of that state alone, and is foreign as to all others.[4] Since a corporation has no legal existence outside of the jurisdiction creating it, the other states may prescribe the conditions upon which it may do business therein,[5] as requiring it to file a copy of its charter and to designate a person upon whom service of process may be had,[6] or to consent to service upon a particular one,[7] to transact business in conformity to statutes,[8] to

1. Scope of article: This article treats of the status, powers, rights, and liabilities of foreign corporations as such. For general corporation law, see Corporations, 7 C. L. 862; for taxation of foreign corporations, see Taxes, 6 C. L. 1602; for questions peculiar to foreign corporations of a particular kind, see Railroads, 6 C. L. 1194; Building and Loan Associations, 7 C. L. 500; Insurance, 6 C. L. 69; Indemnity, 5 C. L. 1777. For a general treatment of this topic, see Clark & M. on Corporations, §§ 834-865.

2. See 5 C. L. 1470.

3. A railroad company created by Act of Congress is not a foreign corporation within Rev. St. 1895, art. 1194, cl. 25, relating to the venue of such actions (Texas & P. R. Co. v. Weatherby [Tex. Civ. App.] 14 Tex. Ct. Rep. 809, 92 S. W. 58), at least it is in effect a domestic corporation where two domestic corporations have been consolidated with it (Id.).

4. Jameson v. Simonds Saw Co. [Cal. App.] 84 P. 289.

5. State v. Standard Oil Co., 194 Mo. 124, 91 S. W. 1062; Standard Oil Co. v. Com., 104 Va. 683, 52 S. E. 390. The adoption of § 10, art. 11, of the constitution, prohibiting foreign corporations from doing business within the state until they file a copy of their articles and designate a person for receiving service, held to announce a policy of refusing recognition until they submit to the jurisdiction of the courts. Katz v. Herrick [Idaho] 86 P. 873.

6. Under the provisions of § 10, art. 11, of the constitution, and § 2653 of the Rev. St. of 1887, as amended by Act of March 10, 1903 (Laws 1903, p. 49), it is unlawful for a foreign corporation to transact business within the state without filing its articles of incorporation and designating a person upon whom process may be served as therein provided. Katz v. Herrick [Idaho] 86 P. 873.

7. Acts 1905, c. 39, p. 401, requiring the appointment of the state auditor, does not violate the 14th Amend. State v. St. Mary's Franco-American Petroleum Co., 58 W. Va. 108, 51 S. E. 865. The charging of $10 for the service of the auditor does not amount to the taking of property without due process of law. Id. St. 1899, p. 111, c. 94, providing for service on the secretary of state if the corporation fails to designate some one upon whom service may be had, is not void as taking property without due process of law. Olender v. Crystalline Min. Co. [Cal.] 86 P. 1082.

NOTE. Power of state to require the appointment of a particular person, especially where it had complied with a former statute: "Application by the state for a writ of mandamus, under a statute requiring nonresident corporations to appoint the state auditor as their attorney to accept service of process and notice, and to pay him $10 yearly for his services, which fee he was to pay into the state treasury. The general incorporation laws reserved to the state the right to amend all charters granted by it and to alter or repeal all laws applicable thereto. Held, that the statute is valid, as within the reserved power of the state over its corporations. State v. St. Mary's Franco-American Petroleum Co., 58 W. Va. 108, 51 S. E. 865. Sanders, J., dissented on the ground that the reserved power to amend gives no right to pass an act which conflicts with the Federal Constitution, and that, as the statute in question deprived the defendant of its liberty and property without the due process of law, it is unconstitutional. That the state cannot, either in the creation of corporations or in the amendment of their charters, withdraw them from the guaranties of the Constitution, is well settled. Railroad Tax Cases, 13 F. 722, 754; Parrot's Chinese Case, 6 Sawy, 349, 382. Vested rights cannot be taken away under such reserved power. People v. O'Brien, 111 N. W. 1, 7 Am. St. Rep. 684, 2 L. R. A. 255, 2 Wilgus Corp. Cases, 1426; City of Detroit v. Detroit, etc., R. Co., 43 Mich. 140, 5 N. W. 275, 2 Wilgus Corp. Cases, 1458; nor can the fundamental character of the corporation be changed. Zabriskie v. Hackensack & N. Y. R. Co., 3 C. E. Green [N. J.] 178, 90 Am. Dec. 617, 2 Wilgus Corp. Cases, 1466; Shields v. Ohio, 95 U. S. 319, 24 Law. Ed. 357. Subject to these limitations, however, the power may be exercised to almost any extent, to carry into effect the original purposes of the grant and to protect the rights of the public or of the corporation, its stockholders or creditors

regulate its liability to injured employes,[9] so long as the conditions are within constitutional limits[10] and do not infringe upon the power of congress to regulate interstate commerce.[11] While a state cannot impose a condition preventing a foreign corporation from removing causes to the Federal courts it may terminate its right to do business therein upon such removal.[12] Since a state admits foreign corporations only as a matter of comity, it may exclude those engaged in prohibited business.[13] Reasonable conditions upon the right to do business will be enforced by the Federal courts.[14] A corporation, with capacity to exist and do business in a limited territory, extending its business beyond such limits under another name, may be held liable as a partnership as to third persons dealing with it.[15]

Permits.[16]—Parol evidence is not admissible to show that a foreign corporation has been licensed to do business in the state.[17]

License, excise, or franchise taxes.[18]—A license tax on foreign corporations rated upon their capital stock is a tax upon the business and not upon the property,[19] and is valid[20] unless such corporations are exempt,[21] though only a part of the capital

or to promote the due administration of the affairs of the corporation. Looker v. Maynard, 179 U. S. 46, 52, 45 Law. Ed. 79. As the power of a corporation to appoint an agent is derived solely from its charter, any legislation that merely regulates or limits such capacity is authorized by the reserved right of amendment, 'when demanded by the public interest, though not to such an extent as to render it ineffectual or to substantially impair the object of the incorporation.' Leep v. St. Louis, etc., R. Co., 58 Ark. 407, 41 Am. St. Rep. 109, 23 L. R. A. 264; St. Louis, etc., R. Co. v. Paul, 173 U. S. 404, 43 Law. Ed. 746."—From 4 Mich. L. R. 307.

8. State held to have power to enact Acts 1901, p. 368, § 1 (Kirby's Dig. § 6749), providing for the forfeiture of the franchise and charter rights acquired by a railroad under a lease not executed in conformity with the statute and make it applicable to foreign corporations. Louisiana & N. W. R. Co. v. State, 75 Ark. 435, 88 S. W. 559.

9. Code § 2071, as amended by Acts 27th Gen. Assembly p. 33, c. 49, providing that no contract of insurance entered into between a railroad company should constitute a defense to an action to recover for injurles thereafter received. McGuire v. Chicago, etc., R. Co. [Iowa] 108 N. W. 902.

10. A statute prohibiting an insurance company, which has never done business in the state, from suing to recover premiums on a policy issued to a citizen outside of the state conflicts with the 14th Amend. in respect to due process of law. Swing v. Brister & Co. [Miss.] 40 So. 146.

11. Statutes affecting contracts of sale where goods are shipped direct from without the state to the purchaser contravene the interstate commerce clause. Kirven v. Virginia-Carolina Chemical Co. [C. C. A.] 145 F. 288. A foreign corporation engaged in interstate commerce need not secure a permit to do business in a state. French, Finch & Co. v. Hicks [Tex. Civ. App.] 15 Tex. Ct. Rep. 609, 92 S. W. 1034. A petition alleging that plaintiff corporation employed defendant to sell goods in Texas which it manufactured in Minnesota shows that it was engaged in interstate commerce. Id. A contract of a foreign corporation to construct and equip a factory in Michigan in the performance of which labor and material were furnished within the state did not relate to interstate commerce so as not to come under Pub. Acts 1901, p. 317, No. 206, notwithstanding it had no place of business or agent within the state and shipped the machinery in from without. Hastings Industrial Co. v. Moran [Mich.] 13 Det. Leg. N. 131, 107 N. W. 706.

12. Security Mut. Life Ins. Co. v. Prewitt, 202 U. S. 246, 50 Law. Ed. —.

13. A corporation contracting with physicians to defend suits for malpractice is engaged in "professional business" prohibited to corporations by Rev. St. 1903, § 3235, and is not entitled to a certificate permitting them to do business within the state. State v. Laylin [Ohio] 76 N. E. 567.

14. Tennis Bros. Co. v. Wetzel & T. R. Co., 140 F. 193.

15. Marshalling of assets. Campbell v. Campbell Co. [La.] 41 So. 696.

16. See 5 C. L. 1472.

17. Pattison v. Gulf Bag Co., 116 La. 962, 41 So. 224.

18. See 5 C. L. 1472.

19. American Smelting & Refining Co. v. People [Colo.] 82 P. 531. And hence Laws 1902, p. 73, c. 3, § 65, imposing on foreign corporations an annual license tax of 4 cents on each $1,000 of capital stock, providing that where the par value of the stock is less than $1 per share the tax shall be 2½ cents per 1,000 shares, is not subject to Const. art. 10, § 3, relating to property taxes. Id.

20. The tax imposed by Laws 1902, p. 73, c. 3, § 65, being a tax on the business, is not a tax on interstate commerce (American Smelting & Refining Co. v. People [Colo.] 82 P. 531), and the classification made in imposing a different tax on corporations having shares of a par value less than $1 is reasonable and valid (Id.). Held not void as a post facto law within Const. art. 2, § 11. Id.

21. Sess. Laws 1897, p. 157, c. 51, and Sess. Laws 1901, p. 116, c. 52, imposing a fee as a condition precedent to the right to do business in the state, held not to exempt from further taxes (American Smelting & Refining Co. v. People [Colo.] 82 P. 531),

stock is employed within the state,[22] and though it discriminates against foreign corporations in favor of domestic.[23] A statute providing that nonpayment of license tax shall work a forfeiture of a corporation's right to do business in the state is valid.[24] The basis for the assessment of the license fee,[25] and the franchise tax[26] in New York, is the capital, not the capital stock, employed within the state, and in determining the amount of assessable capital so employed no deduction can be made for indebtedness incurred in the prosecution of the business generally.[27] Public service corporations are not required to pay the fee exacted of foreign corporations generally for the right to do business in Virginia,[28] but are subject to a special fee,[29] and the test is whether their charters authorize them to engage in public service business and not whether they intend to carry on such business.[30] A foreign corporation domesticated by compliance with the statutes of Kentucky is not subject to the franchise tax imposed on domestic corporations.[31] The rule that, in case of doubt as to the validity of a tax, the doubt should be resolved in favor of the citizen is inapplicable to a fee exacted from a foreign corporation for the right to transact business in the state.[32]

Operation and construction of regulatory statutes.[33]—The Federal courts will adopt the construction of regulatory statutes given by the local state courts.[34] The words "doing business" or "transacting business" as used in these statutes refer to the general transaction of business and not to isolated acts,[35] or to wholly collateral transactions.[36] The prosecution of suits does not constitute doing business in the state,[37] nor is the taking out of insurance for the protection of property a contract

and if it did attempt to exempt it would be void under Const. art. 10, § 9, declaring that the right to tax corporations shall never be relinquished (Id.). Hence Sess. Laws 1902, p. 73, c. 3, § 65, imposing a license tax, is not void as impairing the obligation of a contract. Id.

22, 23. American Smelting & Refining Co. v. People [Colo.] 82 P. 531.

24. Sess. Laws 1902, p. 74, c. 3, § 66, held not unconstitutional as denying equal protection of the laws. American Smelting & Refining Co. v. People [Colo.] 82 P. 531. And in a quo warranto proceeding to forfeit a corporation's franchise, it cannot complain that such statute is in conflict with Const. art. 2, § 6, providing that the courts shall be open to every person and a speedy remedy afforded for every wrong. Id.

25. As provided by § 181 of the tax law (Heydecker's Gen. Laws, p. 1918, c. 24). People v. Miller, 98 N. Y. S. 751.

26. As provided by § 182 of the tax law (Heydecker's Gen. Laws, p. 1919, c. 24). People v. Miller, 98 N. Y. S. 751. Upon reversal of the state comptroller assessing a franchise and a license tax upon a wrong basis, the supreme court will not modify but remand the case. Id.

27. People v. Miller, 98 N. Y. S. 751.

28. Not liable for the fee prescribed by § 38 of Revenue Laws (Va. Code 1904, p. 2214). Standard Oil Co. v. Com., 104 Va. 683, 52 S. E. 390.

29. Revenue Laws § 37 (Va. Code 1904, p. 2214). Standard Oil Co. v. Com., 104 Va. 683, 52 S. E. 390.

30. Standard Oil Co. v. Com., 104 Va. 683, 52 S. E. 390.

31. Notwithstanding Ky. St. 1903, § 841, declares that on compliance therewith it is a citizen and resident of Kentucky. Commonwealth v. Chesapeake, etc., R. Co., 27 Ky. L. R. 1084, 87 S. W. 1077.

32. Standard Oil Co. v. Com., 104 Va. 683, 52 S. E. 390.

33. See 5 C. L. 1473.

34. Tennis Bros. Co. v. Wetzel & T. R. Co., 140 F. 193.

35. A **single transaction** does **not** constitute **doing business** within §§ 3261-3265, Rev. Codes 1899. State v. Robb-Lawrence Co. [N. D.] 106 N. W. 406. A single sale of merchandise. Kirven v. Virginia-Carolina Chemical Co. [C. C. A.] 145 F. 288. Act Feb. 18, 1901, 31 Stat. 794. Ammons v. Brunswick-Balke-Collender Co. [C. C. A.] 141 F. 570. Two sales held not doing business within Laws 1892, p. 1895, c. 687, § 15. Ozark Cooperage Co. v. Quaker City Cooperage Co., 98 N. Y. S. 113. Sale of cargo of coal in New York by an agent whose territory was the New England district, though having an office in New York, held not doing business within Corporation Law, Laws 1892, p. 1805, c. 687, § 15. Penn Collieries Co. v. McKeever, 183 N. Y. 98, 75 N. E. 935. A single loan and the taking of a mortgage is not engaging in business within 1 Mills' Ann. St. §§ 499, 500, 1868. Roseberry v. Valley Bldg. & Loan Ass'n [Colo.] 83 P. 637. Execution and acceptance of a note payable in Texas does not show that the corporation is doing business therein. Norton v. Thomas & Sons Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 618, 93 S. W. 711.

36. Taking assignments of claims and suing thereon by retailing fish company held not doing business within Const. art. 12, § 9. Booth & Co. v. Weigand [Utah] 83 P. 734. Loan of money and taking of security by insurance company held authorized by Code § 1637. Prudential Ins. Co. v. Cushman [Iowa] 106 N. W. 934.

within the New York statute requiring a permit.[38] Literary and charitable corporations may engage in business in Massachusetts without filing the power of attorney required of foreign corporations generally.[39] The New York stock corporation law, requiring all foreign corporations having an office within the state to keep a stock book for the inspection of its stockholders, is valid.[40] The Virginia statute making the officers, agents, and employes of a corporation, which fails to maintain an office in the state for the settlement of claims, personally liable, is not applicable to those residing without the state.[41]

Noncompliance with statutes; effect.[42]—The effect of noncompliance with these regulatory statutes depends largely upon their terms and the intention of the legislature. Under some statutes noncompliance renders all contracts of such corporation illegal and void,[43] while under others they are enforceable against the corporation but not by it.[44] Where a specific penalty is imposed for noncompliance, some courts hold that such penalty is exclusive and the transactions are valid,[45] unless a contrary intent is manifest.[46] In some states the failure to comply does not affect the validity of its contracts but renders the corporation liable to an ouster,[47] or to a civil suit by the state.[48] In some states, one who has contracted with a foreign corporation cannot question its noncompliance.[49] Statutes validating transactions

37. The bringing of an action is not doing business within Banking Laws, Laws 1892, p. 1861, c. 689, § 31, requiring a certificate from the superintendent of banks as a condition to the right to transact business. Western Nat. Bank v. Kelly, 48 Misc. 366, 95 N. Y. S. 574. A suit by the trustee for the creditors of a foreign insurance company to collect assessments imposed by a judgment in a foreign court is not transacting insurance business within Code 1880, § 1073, and Laws 1890, pp. 15, 16, c. 4. Swing v. Brister & Co. [Miss.] 40 So. 146.

38. Within Gen. Corporation Law, Laws 1901, p. 1326, c. 538, § 15. South Bay Co. v. Howey, 98 N. Y. S. 909.

39. Rev. Laws c. 126, § 4, or St. 1903, pp. 313, 314, c. 43, §§ 58-60, held not to apply to a foreign university corporation. Tulane University v. O'Connor [Mass.] 78 N. E. 494.

40. Laws 1892, p. 1840, c. 688, § 53, imposing a penalty of $250 on foreign corporations, and a penalty of $50 and resulting damages on domestic corporations, is not unconstitutional as imposing a more severe penalty on foreign than domestic corporations, the one simply being liquidated. Pelletreau v. Greene Consol. Gold Min. Co., 49 Misc. 233, 97 N. Y. S. 391.

41. Code 1887, § 1105 (Va. Code 1904, p. 522), held inapplicable to the president who was a resident of a foreign state. Richmond Standard Steel Spike & Iron Co. v. Dininny [Va.] 53 S. E. 961.

42. See 5 C. L. 1475.

43. Regulatory **statutes which must be complied with to give validity:** Rev. St. 1899, § 1025. Chicago Mill & Lumber Co. v. Sims, 197 Mo. 507, 95 S. W. 344. Rev. Civ. Code §§ 883, 885, as amended by Laws 1895, p. 52, c. 47. American Copying Co. v. Eureka Bazaar [S. D.] 108 N. W. 15. Hurd's Rev. St. 1903, c. 32. United Lead Co. v. Reedy Elevator Mfg. Co. [Ill.] 78 N. E. 567.

44. The contracts of a foreign corporation which has not complied with Rev. St. 1898, § 1770b, are void and nonenforceable by the corporation, but may be enforced against it. Allen v. Milwaukee [Wis.] 106 N. W. 1099.

45. Procedure by state to enforce compliance under 3610, 3611, Rev. St. 1898, together with the penalty, held exclusive. Booth & Co. v. Weigand [Utah] 83 P. 734. Since Ballinger's Ann. Codes & St. § 4417 makes it a misdemeanor for any one to solicit subscriptions to the stock of a foreign building association that has not complied with the statutes, such penalty is exclusive and a contract for stock is valid. Horrell v. California, O. & W. Homebuilders' Ass'n, 40 Wash. 531, 82 P. 889.

46. A corporation failing to comply with the constitution and § 2653, Rev. St. 1887, as amended by Act of March 10, 1903 (Laws 1903, p. 49), cannot maintain an action on its contracts notwithstanding certain penalties are also provided. Katz v. Herrick [Idaho] 86 P. 873.

47. In Iowa a judgment of ouster of a foreign corporation for noncompliance with the statutes relating thereto will not be awarded if the corporation complies within a reasonable time. Iowa Lillooet Gold Min. Co. v. U. S. Fidelity & Guaranty Co., 146 F. 437.

48. Failure of a foreign corporation to comply with Code Iowa 1897, § 1637, does not affect the validity of its contracts, but renders it liable to a civil suit by the state. Iowa Lillooet Gold Min. Co. v. U. S. Fidelity & Guaranty Co., 146 F. 437.

49. Code Iowa 1897, § 1636, providing that no person contracting with a corporation shall set up want of legal organization. Id. A mortgagor who has accepted and retained the benefits of his contract cannot assert the invalidity of the mortgage on the ground that the mortgagee, a foreign corporation, has not complied with the statute prescribing the terms upon which it may do business. Prudential Ins. Co. v. Cushman [Iowa] 106 N. W. 934. Where a commercial agent who is also the registered agent as provided by Act April

void for noncompliance must express such purpose in their titles as required by the constitution.[50]

In many states noncompliance does not affect the validity of the contracts entered into, but suspends the right to sue thereon,[51] in which case compliance any time before suit is sufficient,[52] but where the contracts are rendered void, subsequent compliance does not give validity.[53] Rights are determined as of the date of commencing suit.[54] In West Virginia noncompliance may be pleaded in abatement,[55] but must be raised before joinder of issue.[56] These statutes do not apply to contracts executed without the state[57] by a corporation not engaged in business in the state,[58] nor operate to prevent actions for the protection of general rights.[59] A stat-

22, 1874 (P. L. 108), resigns as commercial agent but takes no steps to cancel his appointment as registered agent and enters into a contract with the corporation, he cannot deny his status as registered agent to invalidate the contract. De La Vergne Refrigerating Mach. Co. v. Kolischer, 214 Pa. 400, 63 A. 971.

50. Act of Feb. 8, 1905, entitled "An act relating to foreign corporations doing business in the State of Idaho," its sole purpose being to legalize and validate past transaction by foreign corporations which have not complied with the constitution and statute, held not to sufficiently express its subject in the title and its retroactive character. Katz v. Herrick [Idaho] 86 P. 873.

51. Statutes the Noncompliance with which Suspend the Right to Sue. Michigan: Pub. Acts 1901, p. 317, No. 206. Hastings Industrial Co. v. Moran [Mich.] 13 Det. Leg. N. 131, 107 N. W. 706.

California: Act April 1, 1872 (St. 1871-72, p. 826, t. 566), as amended by Act 1899 (St. 1899, p. 111, c. 94). Black v. Vermont Marble Co., 1 Cal. App. 718, 82 P. 1060.

South Dakota: Rev. Civ. Code § 883. Bishop & Babcock Co. v. Schleuning [S. D.] 104 N. W. 854. Also precludes the corporation from intervening. Thompson v. Scroyer [S. D.] 104 N. W. 854.

South Carolina: Failure to comply with statutory conditions precedent to the right to do business in the state does not render its contracts void, but suspends the right to sue thereon until it does comply. Kirven v. Virginia-Carolina Chemical Co. [C. C. A.] 145 F. 288.

Held Not to Suspend. Utah: The word "benefits" as used in Rev. St. 1898, § 352, providing that a corporation not complying with § 351 shall not be entitled to the benefits of the corporation law does not include the right to sue. Booth & Co. v. Welgand [Utah] 83 P. 734.

52. Kirven v. Virginia-Carolina Chemical Co. [C. C. A.] 145 F. 288. A contract made by a foreign corporation before it has complied with Kirby's Dig. §§ 832, 833, is not void but may be enforced after compliance. Woolfort v. Dixie Cotton Oil Co. [Ark.] 91 S. W. 306.

53. Noncompliance with Hurd's Rev. St. 1903, c. 32, renders all contracts void and subsequent compliance is immaterial. United Lead Co. v. Reedy Elevator Mfg. Co. [Ill.] 78 N. E. 567. Contracts of foreign corporations which have not complied with Rev. St. 1899, §§ 1024, 1025, are void under § 1026, and compliance before suit is immaterial. Tri-State Amusement Co. v. Forest Park Highlands Amusement Co., 192 Mo. 404, 90 S. W. 1020.

54. Plea that plaintiff had not complied at the time the appeal bond was filed is insufficient, especially where the appeal is by the opposing party. McCarthy v. Alphons Custodis Chimney-Const. Co., 219 Ill. 616, 76 N. E. 850.

55. Code W. Va. 1899, c. 54, § 30, as amended by Acts 1901, p. 108, c. 35, § 31. Tennis Bros. Co. v. Wetzel & T. R. Co., 140 F. 193. Noncompliance does not affect the jurisdiction of the Federal courts, but constitutes a defense in abatement which may be waived. Wetzel & T. R. Co. v. Tennis Bros. Co. [C. C. A.] 145 F. 458.

56. Code W. Va. 1899, c. 125, § 16. Tennis Bros. Co. v. Wetzel & T. R. Co., 140 F. 193; Wetzel & T. R. Co. v. Tennis Bros. Co. [C. C. A.] 145 F. 458.

57. Tri-State Amusement Co. v. Forest Park Highlands Amusement Co., 192 Mo. 404, 90 S. W. 1020. A Missouri corporation may sue on a trust deed executed in that state in the courts of Texas without taking out a permit to do business therein. Western Supply & Mfg. Co. v. U. S. & Mexican Trust Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 948, 92 S. W. 986. Held not to apply to contracts made without the state. Kirven v. Virginia-Carolina Chemical Co. [C. C. A.] 145 F. 288. Evidence held to show that contract of sale was consummated by acceptance without the state. Id. A bill of particulars stating that the merchandise was sold to the defendants upon orders obtained by a traveling salesman at Rouses Point, N. Y., and were received by defendants at such place, does not show that the contract was executed in New York and a motion to dismiss the action under General Corporation Law, Laws 1890, p. 1063, c. 563, § 15, as amended by Laws 1901, pp. 267, 1326, cc. 96, 538, and Laws 1904, p. 1250, c. 490, was properly overruled. St. Albans Beef Co. v. Aldridge, 99 N. Y. S. 398.

58. Rev. St. 1898, 1770b, held not applicable to a mortgage executed without the state on property within by a corporation not doing business in the state. Chickering-Chase Bros. Co. v. White & Co., 127 Wis. 83, 106 N. W. 797. Rev. St. 1895, arts. 745, 746, providing that no foreign corporation shall maintain any action in this state until it has complied therewith, does not apply to a corporation not doing business therein suing on a foreign transaction. King v. Monitor Drill Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 315, 92 S. W. 1046.

59. Suit by a New York corporation to

tute prohibiting a foreign corporation from "maintaining" an action until it has complied does not prevent it from commencing the suit and subsequently complying.[60] The disability to sue until compliance extends to the assignee of the corporation.[61] Since compliance is presumed, with some exceptions,[62] a corporation need not allege or prove it,[63] the burden being on the party seeking to escape liability to establish noncompliance.[64] A demurrer to a complaint for noncompliance will not lie unless all the facts necessary to bring the case within the statute appear on the face of the complaint.[65] The defense of noncompliance is not raised by a general denial but must be specifically pleaded,[66] and an affidavit of defense alleging noncompliance must particularize.[67] Regulatory statutes are not retroactive.[68]

§ 2. *Powers.*[69]—The powers of a foreign corporation are those granted by its charter as limited by the laws of the state where it is doing business,[70] but it is not entitled to the benefits[71] nor subject to the liabilities[72] of statutes applicable by their terms to domestic corporations alone. Under the doctrine of comity a foreign corporation may exercise the powers of similar domestic corporations if its charter permits, and it is not contrary to the public policy of the state,[73] but comity does

enjoin a citizen of Tennessee from wrongfully obtaining complainant's stock quotations. New York Cotton Exch. v. Hunt, 144 F. 511.

60. Black v. Vermont Marble Co., 1 Cal. App. 718, 82 P. 1060; Ward Land & Stock Co. v. Mapes, 147 Cal. 747, 82 P. 426.
Contra. Halsey v. Jewett Dramatic Co., 99 N. Y. S. 1122.

61. Failed to pay the license imposed by Tax Law, Laws 1896, p. 856, c. 908, § 181, as a condition precedent to the right to maintain an action. Halsey v. Jewett Dramatic Co., 99 N. Y. S. 1122.

62. In a suit on contract, a complaint failing to allege compliance with General Corporation Law, Laws 1892, p. 1805, c. 687, § 15, as amended by Laws 1901, p. 1326, c. 538, fails to state a cause of action. Wood v. Ball, 100 N. Y. S. 119. In an action to recover the purchase price of an article sold in New York, the character of the transactions, and the sales of the goods made, held to indicate that plaintiff was a stock company within the act. Id.

63. State v. Robb-Lawrence Co. [N. D.] 106 N. W. 406.

64. State v. Robb-Lawrence Co. [N. D.] 106 N. W. 406; Hanson v. Lindstrom [N. D.] 108 N. W. 798. Replevin to recover chattels mortgaged (Chickering-Chase Bros. Co. v. White & Co., 127 Wis. 83, 106 N. W. 797); though the complaint alleges that plaintiff is a foreign corporation (Hanson v. Lindstrom [N. D.] 108 N. W. 798).

65. Failed to show that contract was made in the state or that plaintiff was a stock company within Gen. Corporation Law, Laws 1901, p. 1326, c. 538, § 15. South Bay Co. v. Howey, 98 N. Y. S. 909. An allegation in the complaint that plaintiff is a foreign corporation does not show that it is a stock company. Id.

66. Leonard v. American Steel & Wire Co. [Kan.] 84 P. 553.

67. Judgment awarded notwithstanding an affidavit which failed to specify in what particular plaintiff had failed to comply. Mobile Cotton Mills v. Smyrna Shirt & Hosiery Co. [Del.] 62 A. 146.

68. Laws 1901, p. 1326, c. 538, amending Gen. Corporation Law § 15, by extending the provision prohibiting suit on a contract executed by a foreign corporation which has not complied with the statutes relative to doing business within the state, to its assignee is inapplicable to assignments made prior thereto and protected by the constitutional clause prohibiting the impairment of the obligation of contracts. McNamara v. Keene, 49 Misc. 452, 98 N. Y. S. 860. Rev. St. 1898, § 1770b, providing that all contracts made by a foreign corporation which has not filed a copy of its charter, etc., in respect to property within the state are void as to the corporation and its assigns, does not divest the corporation of lands acquired prior to its enactment or affect the sale thereof. Coe v. Rockman, 126 Wis. 515, 106 N. W. 290. Laws 1901, pp. 118, 121, c. 52, §§ 4, 10, requiring foreign corporations to comply with certain conditions before they shall be entitled to transact any business or prosecute or defend in any action, do not apply to obligations incurred before its enactment. Stone v. Victor Elec. Co. [Colo.] 85 P. 327.

69. See 5 C. L. 1476.

70. Where a beneficial society depends for its power to do business on the statute of two states, one where it is organized and the other wherein it is permitted to do business, the statute of the latter controls as to who may be beneficiaries. Dennis v. Modern Brotherhood of America [Mo. App.] 95 S. W. 967.

71. Comp. Laws §§ 8572, 8573, held not to authorize a foreign corporation to sell its franchise and rights to a domestic corporation. Dieterle v. Ann Arbor Paint & Enamel Co. [Mich.] 13 Det. Leg. N. 1, 107 N. W. 79.

72. Rev. St. 1899, § 1259, relating to the liability of telephone and telegraph companies organized "under the laws of this state" in negligently transmitting messages, does not apply to foreign corporations. McCarty v. Western Union Tel. Co., 116 Mo. App. 441, 91 S. W. 976.

73. New York cemetery corporation may hold property in the District of Columbia. Iglehart v. Iglehart, 26 App. D. C. 209.

not require that a foreign corporation be permitted to condemn private property for local purposes and as a part of an interstate telephone system.[74] A foreign corporation seeking to expropriate property must establish its legal incorporation.[75] The fact that a statute requiring the appointment of an agent to receive service of process fixes no compensation does not preclude the parties from agreeing upon a compensation and for the performance of additional services.[76]

§ 3. *Actions by and against; jurisdiction of courts. Right to sue.*[77]—Courts will entertain jurisdiction of suits by foreign corporations,[78] but the right to sue, existing only by comity, will not be extended so as to enforce a contract which by statute a domestic corporation could not enforce,[79] though it has been assigned.[80] In many states foreign corporations cannot sue until they have complied with the statutes relative to the right to do business therein.[81] In New York, foreign corporations may maintain actions in like manner and subject to the same regulations as domestic corporations.[82]

Liability to be sued.[83]—In Alabama the courts have no jurisdiction of a cause of action against a foreign corporation arising out of the state.[84] To obtain a warrant of attachment against a foreign corporation, plaintiff must show, not merely allege, such status.[85]

Venue.—In Texas a foreign corporation may be sued in any county where the cause of action accrued,[86] and in Washington the action must be brought in the county where some person resides upon whom process may be served,[87] and if brought in another there is no jurisdiction of the subject-matter and an appearance does not cure the defect.[88]

Limitations.[89]—Under the California statute, allowing foreign corporations which have designated a resident for receiving service of process the benefit of the

74. Central Union Tel. Co. v. Columbus Grove, 8 Ohio C. C. (N. S.) 81.

75. Cumberland Tel. & T. Co. v. St. Louis, etc., R. Co. [La.] 41 So. 492.

76. Leidigh & Havens Lumber Co. v. Clark [Ark.] 94 S. W. 686.

77. See 5 C. L. 1477.

78. Westminster Nat. Bank v. New England Electrical Works, 73 N. H. 465, 62 A. 971.

79. Suit on insurance policy contract prohibited by Rev. Codes 1899, § 3108. Walker v Rein [N. D.] 106 N. W. 405. Immaterial that such contract was made outside of the state. Id.

80. The rule of comity expressed by Rev. Codes 1899, § 5756, bars not only the assertion by a foreign corporation itself of a cause of action which a domestic corporation is forbidden to assert, but also bars the assignee of such corporation. Walker v. Rein [N. D.] 106 N. W. 405.

81. See infra § 1, Noncompliance with Statutes; Effect.

82. The right of a foreign corporation to sue under Code Civ. Proc. § 1779, is not restricted by Municipal Court Act, Laws 1902, p. 1489, c. 580, § 1, subd. 18, extending jurisdiction to actions "against" foreign corporations having an office in New York City. Western Nat. Bank v. Kelly, 48 Misc. 366, 95 N. Y. S. 574.

83. See 5 C. L. 1478.

84. Dozier Lumber Co. v. Smith-Isburgh Lumber Co. [Ala.] 39 So. 714.

85. A positive allegation is sufficient if the affiant is in a position to know of his own knowledge. American Trading Co. v. Bedouin Steam Nav. Co., 48 Misc. 624, 96 N. Y. S. 271. An allegation that affiant is a department manager of plaintiff and has personal knowledge of the shipment out of which the claim grew was insufficient to show that he had personal knowledge of the defendant steamship's place of incorporation, although he states it as of his own knowledge. Id.

86. Rev. St. 1895, art. 1194, subd. 25. Bay City Iron Works v. Reeves & Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 329, 95 S. W. 739. Where by the terms of a contract made in a certain county defendant was to furnish and plaintiff to sell machinery in such county for commissions, a cause of action for nonpayment of commissions accrued therein. Id. Where rent for a house is payable in the county where located, a cause of action for nonpayment accrues in such county. Id. An action for deceit may be brought in the county where it occurred though the foreign corporation has its office and agents in another county. Western Cottage Piano & Organ Co. v. Griffin [Tex. Civ. App.] 14 Tex. Ct. Rep. 332, 90 S. W. 884.

87. Under Ballinger's Ann. Codes & St. § 4854, a court in Snohomish county has no jurisdiction of an action against a foreign corporation where the service was made on an agent residing in King county. Hammel v. Fidelity Mut. Aid Ass'n, 42 Wash. 448, 85 P. 35.

88. Hammel v. Fidelity Mut. Aid Ass'n, 42 Wash. 448, 85 P. 35.

89. See 5 C. L. 1482.

statute of limitations, the running of the period does not commence until such appointment.[90] The New York three year statute of limitation prescribed for the enforcement of the statutory liability of stockholders is applicable to actions against stockholders of foreign corporations.[91]

Service of process.[92]—So long as a corporation confines the exercise of its powers to the state creating it, it cannot be reached by process issuing from the courts of other states,[93] but when it engages in business in another, it thereby consents to service as prescribed by the statutes of such state.[94] The doing of business in the state is generally a prerequisite to a valid service.[95, 96] But the manner of service is largely within the regulation of state statutes, and a service on an agent,[97] local agent,[98] managing agent,[99] secretary of state,[1] a special commissioner,[2] or person

90. Act April 1, 1872 (St. 1871-72, p. 826, c. 566), as amended by Act 1899 (St. 1899, p. 111, c. 94). Black v. Vermont Marble Co., 1 Cal. App. 718, 82 P. 1060.

91. Code Civ. Proc. § 394. Ramsden v. Gately, 142 F. 912.

92. See 5 C. L. 1479. See for a full discussion the topic Process, 6 C. L. 1078.

93. Jameson v. Simonds Saw Co. [Cal. App.] 84 P. 289. Service of notice of suit on a foreign corporation, having its office and place of business in another state, by a delivery of the notice and a certified copy of the petition to the president at his office in accordance with Sayles' Ann. Civ. St. 1897, art. 1230 et seq., does not confer jurisdiction. Louisville & N. R. Co. v. Emerson [Tex. Civ. App.] 15 Tex. Ct. Rep. 831, 94 S. W. 1105. A judgment in personam cannot be entered upon a service of process by publication upon a foreign corporation unless there is an appearance. In re Great Northern Const. Co., 50 Misc. 467, 100 N. Y. S. 564. An unauthorized appearance through mistake held not an appearance of the corporation. Id.

94. State v. Standard Oil Co., 194 Mo. 124, 91 S. W. 1062. Hence it impliedly assents that notice to appear and testify in any suit affecting its right to do business served on its attorney as provided by Rev. St. 1899, § 8983, shall be notice to it (Id.), and such statute does not impose an unreasonable burden on foreign corporations in that it requires its nonresident officer to appear at a reasonable time and place to testify in actions under the anti-trust law (Id.). Service on secretary of state if corporation fails to designate person. Olender v. Crystalline Min. Co. [Cal.] 86 P. 1082.

95, 96. Jameson v. Simonds Saw Co. [Cal. App.] 84 P. 289. Evidence that the retailing corporation styled itself the exclusive agent within the territory of the defendant manufacturing corporation held under the facts insufficient to show it was doing business in the state. Id. An allegation in a complaint that defendant at all times therein mentioned was "doing business in the county of T. and the state of California" was sufficient without an allegation of continuance to bring the case within St. 1899, p. 111, c. 94, allowing service on a foreign corporation doing business in the state which has failed to designate a person by service on the secretary of state. Olender v. Crystalline Min. Co. [Cal.] 86 P. 1082. A foreign newspaper corporation engaged also in distributing news, maintaining an office and force in the District of Columbia for the collecting of such news, is doing business therein within D. C. Code § 1537 (31 Stat. at L. 1419, c. 854), relating to service of process on foreign corporations. Ricketts v. Sun Printing & Pub. Ass'n, 27 App. D. C. 222. A single transaction does not constitute "doing business" within Code Civ. Proc. § 411, authorizing service of process on a foreign corporation doing business and having a managing and business agent within the state by service on such agent. Jameson v. Simonds Saw Co. [Cal. App.] 84 P. 289.

97. Ballinger's Ann. Codes & St. § 1875, construed with §§ 2818, 5397, 4854, held to authorize service of a writ of garnishment on soliciting agent of a foreign insurance corporation. Tatum v. Niagara Fire Ins. Co. [Wash.] 86 P. 660. One who has merely authority to sell goods at a stated price held not an agent. Hodge v. Acorn Brass Mfg. Co., 98 N. Y. S. 673. A time-keeper of a foreign corporation doing construction work is an agent within § 155 Code Civ. Proc., authorizing service of process on an agent. Jenkins v. Penn Bridge Co., 73 S. C. 526, 53 S. E. 991.

98. An attorney in a county for the purpose of settling a particular claim is not a "local agent" within Rev. St. 1895, art. 1223, authorizing service on foreign corporations by service on a local agent. Bay City Iron Works v. Reeves & Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 329, 95 S. W. 739. A traveling auditor whose only duty is to inspect the company's books and make reports is not local agent under Code § 217, providing that any person receiving or collecting moneys shall be deemed a local agent receiving service of process. Sherwood Higgs & Co. v. Sperry & Hutchinson Co., 139 N. C. 299, 51 S. E. 1020.

99. One who has exclusive control and supervision of some department, the management of which requires the exercise of independent judgment and discretion, and the exercise of such authority that a service of process on him will result in notice to the corporation, is a managing agent within § 4504, Gen. St. 1901. Federal Betterment Co. v. Reeves [Kan.] 84 P. 560. One who chiefly represents a foreign corporation as sales agent in a particular locality and maintains an office and storeroom is a managing agent within Rev. St. Ohio 1906, § 5043, for service of process, though paid only by commissions. Toledo Computing Scale Co. v. Computing Scale Co. [C. C. A.] 142 F. 919.

conducting the business,[3] is usually provided. Service on the appointed agent after the cancellation of his appointment and the withdrawal of the corporation from the state is void.[4] Service on an officer casually within the state on private business is valid if the corporation is doing business therein,[5] otherwise not.[6] Compliance with regulatory statutes does not make a foreign corporation a domestic corporation so as to render service by attachment inapplicable.[7] Where the statute provides several methods for service, plaintiff may select any one,[8] but where the method is exclusive,[9] service must be made as directed.[10] When plaintiff attempts service by publication he must show facts authorizing such service.[11] In the absence of a controlling statute to the contrary, the Federal courts in equity will follow the mode of service adopted by the local state courts.[12] A voluntary compliance with the Ohio statute exempting foreign corporations complying therewith from service by attachment by a corporation not authorized so to do does not entitle it to the exemption.[13] In Florida a return of service need not state that the corporation is doing business in the state or that the officer served is a resident of the state or was engaged in business therein at the time.[14] Where the commercial agent of a foreign corporation is also its registered agent for service of process, the two agencies are independent, and the resignation as commercial agent does not affect his status as registered agent.[15] Where, in a motion to quash the service of process, the defendant's affidavit puts in issue the "doing of business" within the state, plaintiff has the burden of proving it.[16]

1. St. 1899, p. 111, c. 94, authorizing service of process on a foreign corporation which has failed to designate a person for receiving the same by service on the secretary of state, is in lieu of service by publication prescribed by Code Civ. Proc. § 412. Olender v. Crystalline Min. Co. [Cal.] 86 P. 1082.

2. Service of process on the insurance commissioner confers jurisdiction of a foreign insurance company doing business within the state. Brenizer v. Supreme Council, Royal Arcanum [N. C.] 53 S. E. 835.

3. Under D. C. Code § 1537 (31 Stat. at L. 1419, c. 854), service of process on a foreign corporation doing business in the District of Columbia may be made upon the person conducting such business, whether or not he is technically an agent. Ricketts v. Sun Printing & Pub. Ass'n, 27 App. D. C. 222.

4. Hunter v. Mutual Reserve Life Ins. Co., 99 N. Y. S. 888.

5. Under Rev. St. 1895, art. 1223. Cameron & Co. v. Jones [Tex. Civ. App.] 14 Tex. Ct. Rep. 131, 90 S. W. 1129.

6. Johnson v. Computing Scale Co., 139 F. 339. Though the officer incidently takes up a matter of business. Buffalo Sandstone Brick Co. v. American Sandstone Brick Machinery Co., 141 F. 211.

7. Albright v. United Clay Production Co. [Del.] 62 A. 726.

8. Service on the managing agent under § 4504 of the Gen. St. of 1901, is sufficient, though service could have been made through the secretary of state under § 1262. Federal Betterment Co. v. Reeves [Kan.] 84 P. 560.

9. Manner of service designated in art. 23, c. 18, Wilson's Ann. St. 1903, on foreign corporations which have appointed a person for receiving service, is exclusive. Bes Line Const. Co. v. Schmidt, 16 Okl. 429, 85 P. 711. Act No. 41, 1894, and Act No. 105, p. 132, 1898, authorizing service on the secretary of state, are not exclusive (In re Curtis, 115 La. 918, 40 So. 334), and a service as authorized on corporations generally is sufficient (Id.). Service on agent at place of business as required by art. 198, Code of Prac. Id.

10. Under art. 23, c. 18, Wilson's Ann. St. 1903, where a foreign corporation has complied therewith, a service upon a person other than the one appointed is irregular, except in the case of railroad and stage line companies. Bes Line Const. Co. v. Schmidt, 16 Okl. 429, 85 P. 711.

11. Where an order for service by publication is only authorized upon a showing that the plaintiff is unable, with due diligence, to make service upon the defendant, an affidavit of a constable that after diligent search he is unable to find defendant within the state or any agent thereof is insufficient when service may be made on the secretary of state, under Rev. St. 1898, § 1770b. Rollins v. Maxwell Bros. Co., 127 Wis. 142, 106 N. W. 677.

12. If reasonable. Toledo Computing Scale Co. v. Computing Scale Co. [C. C. A.] 142 F. 919.

13. Bigalow Fruit Co. v. Armour Car Lines [Ohio] 78 N. E. 267. A foreign corporation whose business is to furnish refrigerator cars and to ice the same for transportation, partly within and partly without and across the state, is a "transportation or other corporation engaged in Ohio in interstate commerce business" within Rev. St. 1906, § 148c and hence cannot comply therewith. Id.

14. Putnam Lumber Co. v. Ellis-Young Co. [Fla.] 39 So. 193.

15. Registered as required by Act April 22, 1874 (P. L. 108). De La Vergne Refrigerating Mach. Co. v. Kolischer, 214 Pa. 400, 63 A. 971.

§ 4. *Remedies of stockholders and creditors as against foreign corporations and their officers.*[17]—A court will not take jurisdiction of a bill by a stockholder against a foreign corporation for an act of the latter in managing its internal affairs, which act affects complainant only as a stockholder,[18] but the right of a transferee of stock to have the same transferred on the books is a contractual one and will be enforced.[19] The courts of Canada have no jurisdiction to wind up a foreign corporation,[20] especially where such proceeding is not ancillary to others pending in the domiciliary state.[21] In Massachusetts, officers of a foreign corporation participating in the issuance of stock in exchange for property taken at an unfair valuation are personally liable for the debts of the corporation.[22] The liability of stockholders for unpaid stock issued by a foreign corporation is determined by the law of the domicile,[23] but matters of pleading are determined by the law of the forum.[24] Where it appears that a corporation has no assets in the state of its domicile and judgment has been obtained against it in another state, it is not necessary to obtain a judgment in the domiciliary state before bringing an action against a stockholder in the state where judgment has been obtained.[25] In an action to recover the prescribed penalty under the New York stock corporation law for refusing to permit a stockholder to inspect the stock book, the plaintiff need not prove that the person in apparent charge of the office and who refused actually represented defendant.[26] The right of contribution, under the law of the state of incorporation, of a stockholder who has been compelled to pay a corporate debt, where the statute of such state does not prescribe an exclusive mode of enforcing such liability, may be enforced in any state.[27]

FOREIGN JUDGMENTS.

§ 1. Recognition and Effect (1734).
§ 2. Matters Adjudicated and Concluded by Foreign Judgment (1736).
§ 3. Action on Foreign Judgment (1736). Defenses (1737). Proof of Foreign Judgments (1737).

§ 1. *Recognition and effect.*[28]—Under the Federal constitution, a judgment valid where rendered must be given full faith and credit in every other state,[29]

16. Jameson v. Simonds Saw. Co. [Cal. App.] 84 P. 289.
17. See 5 C. L. 1482.
18. McCloskey v. Snowden, 212 Pa. 249, 61 A. 796. A court has no power to control by mandamus or injunction the internal conduct of the affairs of a foreign corporation. Brenizer v. Supreme Council, Royal Arcanum [N. C.] 53 S. E. 835.
19. Enforcement not an interference in the internal affairs. Westminster Nat. Bank v. New England Electrical Works, 73 N. H. 465, 62 A. 971.
20. Rev. St. Canada c. 129, as amended by 52 Vict. c. 52, § 3, is not applicable to the winding up of a corporation created under the laws of West Virginia. In re Great Northern Const. Co., 50 Misc. 467, 100 N. Y. S. 564.
21. In re Great Northern Const. Co., 50 Misc. 467, 100 N. Y. S. 564.
22. Rev. Laws 1902, c. 126, § 18, is not limited by cl. 4, § 58, c. 110, making only such officers as sign the false statement of value liable, the latter being expressly made inapplicable by § 19, c. 126. Anthony & Scovill Co. v. Metropolitan Art Co., 190 Mass. 35, 76 N. E. 289.
23. Hobgood v. Ehlen [N. C.] 53 S. E. 857.
24. A creditor of a Kansas corporation, suing a stockholder in a Federal court in Pennsylvania, may join a count based on Gen. St. Kan. 1889, c. 23, § 32, giving a right of action in case of insolvency and one under § 44 giving a cause of action in case of dissolution, though they could not be joined in Kansas. Anglo-American Land Mortg. & Ag. Co. v. Wood, 143 F. 683.
25. McConey v. Belton Oil & Gas Co. [Minn.] 106 N. W. 900.
26. Action under Laws 1892, p. 1840, c. 688, § 53. Defendant has the burden of disproving such person's authority. Pelletreau v. Greene Consol. Gold Min. Co., 49 Misc. 233, 97 N. Y. S. 391.
27. Stockholder of a Maine corporation paying a corporate debt under Rev. St. Me. c. 46, §§ 37, 38, 44-47, making stockholders liable for corporate debts to the extent of unpaid subscription, contribution may be enforced in Massachusetts. Putnam v. Misochi, 189 Mass. 421, 75 N. E. 956.
28. See 5 C. L. 1483.
29. Splane v. Splane, 29 Pa. Super. Ct. 185. Decree of divorce. Field v. Field, 117 Ill. App. 307. Hence in an action on a judgment by a husband against his wife, he need not allege grounds upon which he could

though recovery could not have been had in the state where recognition is demanded.[30] Such judgments,[31] however, must be final,[32] and may be impeached for lack of jurisdiction,[33] either of the subject matter[34] or of the parties;[35] except in New York a foreign decree of divorce cannot be attacked by the party procuring it for want of jurisdiction of the defendant.[36] Where the judgment is rendered by a court of record, jurisdiction will be presumed in its favor,[37] unless the record negatives such fact,[38] and the party attacking it must show lack of jurisdiction.[39] As a general rule a foreign judgment cannot be impeached for fraud,[40] except as it affects the juris-

recover in the state where such action is brought. Splane v. Splane, 29 Pa. Super. Ct. 185.

NOTE. Right of a foreign corporation which has not complied with the laws of a state to sue on a foreign judgment: "The plaintiff, a foreign corporation,' recovered judgment in Missouri on a contract made in Texas and sought to enforce that judgment in the latter state. The defendant alleged that the plaintiff at the time of the contract had not applied for or else had forfeited his permit to do business in Texas and hence could not sue there upon the judgment, since it was a demand arising out of the contract within the provisions of Rev. Civ. St. 1895, arts. 745, 746. Held, that if such facts concerning the permit are proved, the plaintiff cannot recover on the judgment. St. Louis, etc., R. Co. v. Beilharz [Tex. Civ. App.] 13 Tex. Ct. Rep. 605, 88 S. W. 512.

It has been said in a case cited as a precedent for this decision that before enforcing a sister-state judgment under the 'full faith and credit' clause of the Federal Constitution (Art. 4, § 1), a court may ascertain whether the claim upon which it is based is such a one as the court has jurisdiction to enforce. Wisconsin v. Pelican Ins. Co., 127 U. S. 265, 32 Law. Ed. 239. This rule has already been practically confined to penal judgments, which are distinguishable upon the ground that the real plaintiff is not a citizen but the foreign state itself, and the judgments in favor of citizens alone are entitled to extra-territorial recognition. See Huntington v. Attrill, 146 U. S. 657, 36 Law. Ed. 1123. Since a corporation also, is not a citizen, within U. S. Const., art. 4, § 2, a state may as it sees fit refuse to entertain its suits. Anglo-American Prov. Co. v. Davis Prov. Co., No. 1, 191 U. S. 373, 48 Law. Ed. 225. See, also, 17 Harv. L. Rev. 417. Upon the basis of this right the principal case can be supported if the judgment can be said to be a demand arising out of the contract, upon which the Texas statute forbids a foreign corporation to sue."—From 19 Harv. L. R. 137.

30. Hence, where the Delaware **statute of limitations** had not run at the time of recovering a judgment therein, such judgment could be enforced in Iowa though the period in that state had expired. Cuykendall v. Doe, 129 Iowa, 453, 105 N. W. 698. Where a **judgment by confession** has been **regularly entered** under the laws of the state **where the warrant of attorney was made,** such judgment is entitled to recognition in other states not allowing such confession of judgment. Id.

31. Where the statutes of a state provide that the exemplification of a judgment of a justice of the peace, when filed in a court of record, shall become a judgment of such court, such exemplification will support an action in other states. Burnet v. Smith, 29 Pa. Super. Ct. 472.

32. A decree of maintenance subject to subsequent modification is not a final decree within the full faith and credit clause of the Federal constitution. Freund v. Freund [N. J. Eq.] 63 A. 756. Judgment held final though no costs were assessed by it. Childs v. Blethen, 40 Wash. 340, 82 P. 405.

33. Question of jurisdiction is always open notwithstanding the full faith and credit clause (Field v. Field, 117 Ill. App. 307; Cuykendall v. Doe, 129 Iowa, 453, 105 N. W. 698), though the judgment recites the service of notice (In re Culp [Cal. App.] 83 P. 89), and such judgment may be impeached, especially in view of Code Civ. Proc. §§ 1915, 1916, making a foreign judgment against a person presumptive evidence subject to impeachment (Id.). Modification of a decree of divorce changing the custody of a minor child. Id.

34. Field v. Field, 117 Ill. App. 307. Evidence held to show that no such residence had been established in Nebraska as to give its courts jurisdiction of a divorce proceedings. Id. In a suit on a foreign judgment the mere fact that nearly six years intervened between an interlocutory order determining liability and the rendition of the judgment sued on held no indication that the foreign court had lost jurisdiction. Childs v. Blethen, 40 Wash. 340, 82 P. 405.

35. Splane v. Splane, 29 Pa. Super. Ct. 185. A record of a court of Oklahoma setting aside a decree of divorce on application of the wife was not available to show such adjudication where the record does not show service of process on the husband. Buxbaum v. Mason, 48 Misc. 396, 95 N. Y. S. 539.

36. People v. Shrady, 47 Misc. 333, 95 N. Y. S. 991. A husband securing a decree of divorce in South Dakota and marrying again cannot impeach such divorce in an action for nonsupport by the second wife. Id.

37. Especially where such court has a clerk and seal. Woodworth v. McKee, 126 Iowa, 714, 102 N. W. 777.

38. Forrest v. Fey, 218 Ill. 165, 75 N. E. 789. Record shows that the affidavit of nonresidence required as basis for warning order was not signed nor sworn to. Id.

39. Must be overcome by affirmative evidence. Woodworth v. McKee, 126 Iowa, 714, 102 N. W. 777. Where a foreign default judgment was permitted to stand for more than a year, and the only evidence impeaching the service of summons is the conflicting testimony of defendant, which is denied by the deputy who served it, the evidence held insufficient to impeach the jurisdiction of the court. Splane v. Splane, 29 Pa. Super. Ct. 185.

diction of the court.[41] The conclusiveness of the sheriff's return as showing jurisdiction of the defendant is determined by the laws of the state rendering the judgment.[42] A judgment in personam where defendant was not served within the state and did not voluntarily appear is not enforceable in other states,[43] and a foreign divorce decree on constructive service is not binding except where the plaintiff was the injured spouse so that his or her domicile was rightfully severed from that of the defendant.[44] The courts of Illinois will give the same credit to judicial proceedings in other states as are given them in their own state.[45] The courts of one state have no power to enforce the decrees of other states.[46] A foreign record of conviction is admissible as affecting a witness' credibility.[47] A judgment of the supreme court is not denied full faith and credit by a decision of a state court not in conflict therewith.[48] In an action to recover maintenance under the New Jersey statute, a wife cannot recover an additional amount due on a foreign judgment.[49]

§ 2. *Matters adjudicated and concluded by foreign judgment.*[50]—A valid foreign judgment is conclusive of all matters litigated and decided by it.[51] While a decree cannot directly affect the legal title to real estate in another state, if the court has jurisdiction of the parties and their equitable rights in property owned by them,[52] the decree is conclusive of their equities[53] and must be given full faith and credit in other states.[54]

§ 3. *Action on foreign judgment.*[55]—A foreign judgment to be the basis of a suit must be rendered in favor of the party suing thereon,[56] and must be unsatisfied.[57] An action on a joint judgment may be maintained against one of the judgment debtors alone.[58] While the judgment must be final, the plaintiff need not allege that no appeal has been taken or that the time for appeal has expired.[59]

40. Field v. Field, 117 Ill. App. 307. Decree of divorce obtained by fraudulent averments and proof. Forrest v. Fey, 218 Ill. 165, 75 N. E. 789. Perjured testimony. Immaterial that it was not discovered until long after the judgment was rendered. El Capitan Land & Cattle Co. [N. M.] 86 P. 924. Code Civ. Proc. Kan. § 575, permitting a direct attack upon a judgment within two years from rendition, does not authorize its impeachment for fraud in an action on such judgment in another state. Id.

41. Forrest v. Fey, 218 Ill. 165, 75 N. E. 789.

42. Splane v. Splane, 29 Pa. Super. Ct. 185.

43. Decree of divorce awarding alimony. Downs v. Downs' Adm'r [Ky.] 96 S. W. 536.

44. Otherwise there could have been no jurisdiction save at the husband's domicile for the reason that the wife's follows his and would require personal service of defendant. Haddock v. Haddock, 201 U. S. 562, 50 Law. Ed. —.

45. Held that the law of California requiring a justice of the peace to enter judgment at the end of the trial is only directory and one subsequently entered is valid. Reilly v. Cooper, 119 Ill. App. 347.

46. Pennsylvania court has no power to enforce the decree of another state nor to declare it binding. Jarvis Adams Co. v. Knapp, 213 Pa. 567, 62 A. 1112.

47. Not objectionable as giving extraterritorial effect to such judgment. Ball v. U. S. [C. C. A.] 147 F. 32.

48. A judgment of the supreme court of the United States that an insurance policy could not be recovered upon as it stood is not denied full faith and credit by an adjudication by a state court that such judgment is not a bar to a suit in equity to reform the same. Northern Assur. Co. v. Grand View Bldg. Ass'n, 27 S. Ct. 27.

49. Remitted to a separate action. Freund v. Freund [N. J. Eq.] 63 A. 756.

50. See 5 C. L. 1486.

51. Decree of maintenance held conclusive of abandonment, both under the full faith and credit clause and under the doctrine of res judicata. Freund v. Freund [N. J. Eq.] 63 A. 756.

52. Under Hill's Ann. St. & Codes Wash. § 771 (Code 1881, § 2007), where the parties to divorce proceedings are personally before the court, it may determine their equitable rights in their property. Fall v. Fall [Neb.] 106 N. W. 412.

53. Decree of divorce in Washington settling the equities in land situated in Nebraska in favor of the wife held conclusive. Fall v. Fall [Neb.] 106 N. W. 412.

54. Fall v. Fall [Neb.] 106 N. W. 412.

55. See 5 C. L. 1488.

56. A judgment in receivership proceedings in which creditors intervened and impleaded the stockholders of the insolvent corporation, which determined the amount due each and adjudged that they recover the same, is a judgment in favor of the creditors on which they may sue, though it authorizes the receiver to collect the same. Childs v. Blethen, 40 Wash. 340, 82 P. 405.

57. Southern Pine Lumber Co. v. Ward, 16 Okl. 181, 85 P. 459.

58. Childs v. Blethen, 40 Wash. 340, 82 P. 405.

Defenses.—Fraud in the procurement of a foreign judgment is not a common-law defense[60] but is ground for an equitable decree enjoining enforcement,[61] and may be asserted in an action at law where equitable defenses are available[62] though the action be in a justice's court,[63] without violation of the full faith and credit clause.[64] Misnomer in a judgment is no defense where identity is alleged.[65] The law of the forum determines whether the action is timely brought,[66] unless it has become dormant under the laws of the state where obtained,[67] and whether another judgment may be set off.[68] Where it was the practice of the state where a judgment was obtained not to include accrued interest in the judgment but to note thereon the date from which interest is allowed, such interest may be assessed in an action on such judgment.[69]

Proof of foreign judgments.[70]—A copy of a foreign record must be certified by the clerk as a true and correct copy, which certificate must identify it,[71] and must also be accompanied by a certificate of the presiding judge that the attestation is in due form.[72]

FOREIGN LAWS, see latest topical index.

FORESTRY AND TIMBER.

§ 1. Protection and Regulation of Forests and Trees (1737).
§ 2. Logs and Lumbering; Booms and Floatage (1739). Liens (1744).

§ 1. *Protection and regulation of forests and trees.*[73]—Where lands paid for by the state are held in trust by a university for the purpose of instruction in scien-

59. Matters of defense. Coolot Co. v. Kahner & Co. [C. C. A.] 140 F. 836.
60. Levin v. Gladstein [N. C.] 55 S. E. 371.
61. Levin v. Gladstein [N. C.] 55 S. E. 371. Need not return to the state rendering the judgment to enjoin its enforcement. Id.
62. Levin v. Gladstein [N. C.] 55 S. E. 371.
63. Equitable defenses available in justice's court in North Carolina. Levin v. Gladstein [N. C.] 55 S. E. 371.
64. Especially where enforcement might be enjoined in the state rendering the judgment. Levin v. Gladstein [N. C.] 55 S. E. 371.
65. Could only be taken advantage of by a plea in abatement in the original action. El Capitan Land & Cattle Co. v. Lees [N. M.] 86 P. 924.
66. Not the statute of limitations of the state rendering the judgment. First Nat. Bank v. Hazie, 27 R. I. 190, 61 A. 171. Under D. C. Code § 1267, an action may be maintained in the District of Columbia, unless such action is barred by the laws of the state where rendered (McKay v. Bradley, 26 App. D. C. 449), the three year period prescribed by § 1265 being inapplicable (Id.). A statutory bar of limitation on a foreign judgment completed before the adoption of the code is one of the "rights" preserved by § 1638, providing that the repeal by § 1637 (31 Stat. at L. 1435, c. 854) of any statute shall not affect any "right" accrued. Id.
67. **NOTE: Enforcement of dormant judgment in sister state:** "A judgment was obtained against the testator in Kansas. In an action thereon brought in Rhode Island against his executor, the defendant pleaded that the testator had died more than one year previous, and that the action was therefore barred under Gen. St. Kan. 1901, § 4883. Held, that in an action on a judgment of a sister state the lex fori governs rather than the lex loci, and the plaintiff may accordingly recover. First Nat. Bank v. Hazie, 27 R. I. 190, 61 A. 171.

A state has power to prescribe the remedies which it will allow within its jurisdiction. The statute of limitations is held to affect the remedy and not the right, and the lex fori will in general prevail. McElmoyle v. Cohen, 13 Pet. [U. S.] 312, 10 Law. Ed. 177. But when a judgment is barred in the jurisdiction where obtained, the rule is somewhat doubtful, though unquestionably a state may allow an action in such a case. Miller v. Brenham, 68 N. Y. 83. Nevertheless, as the whole question is one founded on public policy, the better opinion, which is supported by the weight of authority, would appear to sustain the view that an action on a judgment barred by the laws of the state of its promulgation should not be allowed in another state, as it would seem a mere gratuity for a sister state to give it greater efficacy than its home tribunal. St. Louis, etc., Co. v. Jackson, 128 Mo. 119. A judgment barred by special statute applying to personal representatives of a decedent, as in the case at hand, is a dormant judgment equally with one barred by general statute. Mawhinney v. Doane, 40 Kan. 676. The result reached by the court may be supported, however, on the alternative holding that the plea did not bring the right

tific forestry,[74] the state has an interest in them sufficient to enable it to invoke the aid of the courts for the protection of the forests thereon,[75] and neither the university[76] nor one claiming under it will be permitted to destroy the forests without regard to the interests of the state or the duties undertaken by the university upon accepting the trust.[77] In Massachusetts, by statute, towns have an interest in shade trees in public places sufficient to warrant the expenditure of public money for their protection and preservation.[78] The Spanish grant of 1797 to the inhabitants of a certain district in Louisiana of the right to cut timber on certain swamp land near that district was intended for the benefit not only of the grantees then living but of their successors as well,[79] and the latter may prevent the unlawful cutting of timber on the grant by a stranger thereto.[80] An indictment will not lie for the violation of regulations made by the executive department of the United States government for the protection of forest reservations where such violation does not constitute an offense against the Federal statute.[81]

Statutes directed against larceny of logs have been enacted in many states,[82] and penalties have been provided for the unlawful cutting of the trees of another against

of action within the Kan. limitation."—From 19 Harv. L. R. 137.

68. Leathe v. Thomas, 218 Ill. 246, 75 N. E. 810. Such allowance does not violate the full faith and credit clause, though not allowed in the state rendering the judgment. Id.

69. Cuykendall v. Doe, 129 Iowa 453, 105 N. W. 698.

70. See 5 C. L. 1489.

71. Sufficient, though on a separate paper, if it is attached and specifically refers to the preceding copy. Woodworth v. McKee, 126 Iowa 714, 102 N. W. 777.

72. Chapman v. Chapman [Neb.] 104 N. W. 880.

73. See 5 C. L. 1489.

74. Under Laws 1898, p. 230, c. 122, authorizing Cornell University to acquire at the expense of the state forest lands for the purpose of conducting experiments in forestry, etc., the university is a trustee of the lands acquired by it and is not the absolute owner so as to permit it to dispose of it as it may choose. People v. Brooklyn Cooperage Co., 100 N. Y. S. 19. The statute is constitutional, the appropriation being assumed not to be in aid of the university within Const. art. 7, § 1, and art. 8, § 9, declaring that the state's credit shall not be loaned to any individual, association or corporation. Id.

75. People v. Brooklyn Cooperage Co., 100 N. Y. S. 19.

76. Though Cornell University, under Laws 1898, p. 230, c. 122, authorizing it to acquire at the expense of the state forest lands for experiments in forestry, is vested with discretion as to the manner of doing the work of instruction in forestry, it may not denude the forest lands acquired and cut or permit to be cut thereon timber in such quantities as to destroy the forests without regard to the interests of the state or the duties undertaken by the university when it accepted the provisions of the act. People v. Brooklyn Cooperage Co., 100 N. Y. S. 19.

77. Where land was held as above indicated, and was to become the absolute property of the state after 30 years, a third person who, with knowledge of the limitations under which it was held, contracted with the university for the right to cut timber thereon acquired no greater rights than the university had, and neither he nor the university could denude the lands without any attempt to carry on the work of scientific forestry. People v. Brooklyn Cooperage Co., 100 N. Y. S. 19.

78. Town could reimburse a tree warden who by mistake as to his duty but in good faith incurred expense in an unsuccessful attempt to protect certain trees from use for the support of guideboards. Hixon v. Inhabitants of Sharon, 190 Mass. 347, 76 N. E. 909.

79. Richard v. Perrodin, 116 La. 440, 40 So. 789.

80. The grant was intended only for the owners of prairie, or high, land in Bellevue. Richard v. Perrodin, 116 La. 440, 40 So. 789. The land surveyed may have been all swamp at the time of the grant though it is not all swamp at present. Id. The grant was sufficiently definite to enable the land to be located. Id. Defendant held not entitled to cut timber thereon. Id.

81. The provision of the act of June 4, 1897, c. 2, 30 Stat. 34 (U. S. Comp. St. 1901, p. 1540), making it a criminal offense to violate any rule or regulation made by the secretary of the interior under the power therein conferred, for the protection of forest reserves, is an attempted delegation of legislative power, and an indictment will not lie for pasturing sheep on a reservation without a permit in violation of a regulation made by the secretary, such pasturing not being prohibited by any statute of the United States. United States v. Matthews, 146 F. 306.

82. Under a statute providing that in a prosecution for the larceny of logs the finding of the logs in possession of the accused shall be presumptive evidence of guilt, the finding of marked logs in the possession of defendant does not of itself raise a presumption of guilt. Code 1897, § 4836. Ownership and wrongful taking as alleged must be established as in other prosecutions for larceny, and then possession by defendant raises a

his consent.[83] An owner of land whose growing trees have been destroyed by another may sue either for the injury to the land or for the value of the trees.[84] The measure of damages in such case is treated elsewhere.[85] Injunction will issue in proper cases to restrain the unlawful cutting or removal of timber,[86] but equity has no jurisdiction to grant relief for an unlawful cutting or conversion where the remedy is adequate at law.[87]

§ 2. *Logs and lumbering; booms and floatage.*[88]—Questions involving public and private rights on legally navigable waters,[89] contracts relating to sales of manufactured lumber,[90] and questions concerning the measure of damages for breach of timber contracts, are discussed in separate articles.[91]

Growing timber is a part of the realty[92] and contracts and conveyances relating thereto are governed by the laws applicable to contracts concerning that kind of property.[93] An attempted oral conveyance constitutes a mere revocable license to

presumption analogous to that arising from the possession of other stolen goods. State v. Loomis, 129 Iowa, 141, 105 N. W. 397.

83. Where defendant's employes were ignorant of plaintiff's land and cut trees thereon in defendant's absence, supposing that they belonged to defendant, the latter was not subject to the penalty imposed by Rev. Code 1892, § 4412, providing a penalty for cutting down trees without the consent of the owner. Smith v. Saucier [Miss.] 40 So. 328. Where defendant was not shown to have authorized or consented to the cutting of plaintiff's trees by defendant's agent, he was not liable for the penalty imposed by Code 1896, § 4137, for willfully and knowingly cutting the trees of another. Alabama Mineral Land Co. v. Lathrop-Hatton Lumber Co. [Ala.] 41 So. 952. Indictment charging accused with "maliciously" cutting timber from the lands of another in violation of Acts 1897, p. 257, c. 106, held good, after verdict, as against objection that it failed to charge that the removal was without the consent of the owner. Whim v. State [Tenn.] 94 S. W. 674. In an action to recover for a wrongful cutting of timber, the fact that plaintiffs at the opening of the trial waived their claim under the statute to treble damages did not necessitate an amendment to the complaint. Gumaer v. White Pine Lumber Co. [Idaho] 83 P. 771.

84. Galveston, etc., R. Co. v. Warnecke [Tex. Civ. App.] 15 Tex. Ct. Rep. 746, 95 S. W. 600. Where one sues for the value of fruit trees destroyed by a fire he cannot recover the value of the trees when attached to the soil, for he has not sued for injury to his land. Id.

85. See Damages, 7 C. L. 1029.

86. See, also, Injunction, 6 C. L. 6. Proper where defendant failed to remove timber within reasonable time as authorized by a decree, and acquiesced in plaintiff's purchase thereof and erection of sawmill, and market value of timber would not adequately compersate plaintiff. Hall v. Wellman Lumber Co. [Ark.] 94 S. W. 43. Held error to dissolve restraining order upon defendant's bond where it was shown plaintiff's damages would be irreparable. Wethington v. Baxter & Co., 124 Ga. 1024, 53 S. E. 505. Where defendants acted in good faith and had prima facie title to certain land, and plaintiff made no claim thereto, it was error for the court to include it in an injunction restraining defendants from cutting timber on a large body of land claimed by plaintiff. East Lake Lumber Co. v. East Coast Cedar Co. [N. C.] 55 S. E. 304. In a suit to enjoin the cutting of timber, evidence held to show that the land in controversy was contained in certain official surveys as contended by defendant. Taulbee v. Buckner's Adm'r [Ky.] 91 S. W. 734. In a suit to enjoin the cutting of timber by alleged trespassers in possession of real property, plaintiff must recover on the strength of his own title, as in ejectment. Id. Where defendants in possession derived title from the heirs of a former owner and plaintiffs had neither title nor possession, it was immaterial whether or not the will of such former owner was sufficiently certified to render a copy admissible in evidence. Id.

87. In suit by the United States for wrongful cutting and conversion of timber on the public domain, the fact that by reason of various devices resorted to by defendants it was difficult for the United States to prove its case did not give equity jurisdiction. United States v. Bitter Root Development Co., 200 U. S. 451, 50 Law. Ed. — . Nor could relief be had in equity on the theory that defendants were trustees ex maleficio (Id.), or because one of the defendants was the executrix of the principal tort feasor whose estate was solvent (Id.), or on the theory that since the wrongdoers had been granted permits to cut timber from other lands a case was made for an accounting (Id.). Nor could multiplicity of suits be relied upon to sustain the bill. Id. The rule that the proceeds of property obtained by theft or fraud may be followed in a suit in equity by the true owner into the hands of the voluntary assignee holding in bad faith could not be invoked where the allegations failed to identify any specific property as the proceeds of the timber taken. Id.

88. See 5 C. L. 1490.

89. See Navigable Waters, 6 C. L. 742.

90. See Sales, 6 C. L. 1320.

91. See Damages, 7 C. L. 1029.

92. See Emblements and Natural Products, 5 C. L. 1096. Corbin v. Durden [Ga.] 55 S. E. 30.

93. A contract for the sale of standing timber is within the meaning of the statute of frauds and must be in writing. Ives v.

enter upon the premises and cut and remove the growth,[94] but a vendee who has cut and appropriated timber cannot defend an action for the purchase price on the ground that the contract was oral.[95]

The essential elements of agreements for the sale or removal of timber depend upon the ordinary principles of contract law,[96] including those in regard to consideration[97] and certainty.[98] Fraud vitiates the contract as in other cases.[99]

The usual rules of interpretation apply, intention being the primary consideration.[1] Though the authorities are somewhat at variance on the question,[2] con-

Atlantic & N. C. R. Co. [N. C.] 55 S. E. 74; Corbin v. Durden [Ga.] 55 S. E. 30. A receipt, "Received of C $50 as part payment on D and B tracts of timber," signed by the vendor, does not comply with the statute of frauds because of the omission of the purchase price. The partial payment unaccompanied by possession did not save it from the statute. Id. A contract for the cutting of timber into cord wood is not within the statute. Ives v. Atlantic & N. C. R. Co. [N. C.] 55 S. E. 74. In a suit to compel performance of a contract to sell timber, it was immaterial that the memorandum was not signed by plaintiff. Dennis Simmons Lumber Co. v. Corey, 140 N. C. 462, 53 S. E. 300. See, also, Frauds, Statute of, 5 C. L. 1550.

94. Parol sale authorizing entry and cutting and providing that product should be divided between owner and buyer held revocable at pleasure of owner except as to timber cut. Colby-Hinkley Co. v. Jordan [Ala.] 41 So. 962. One is not liable as for breach of contract for failure to proceed with the performance of an oral agreement which legally gives him only a revocable license to enter upon and cut timber upon the lands of another. Id.

95. Alford Bros. v. Williams [Tex. Civ. App.] 14 Tex. Ct. Rep. 778, 91 S. W. 636.

96. See Contracts, 7 C. L. 761.

97. Plaintiffs' surrender of privilege of running their own logs in a river held consideration for defendant's agreement to boom and sort plaintiffs' logs. Nester v. Diamond Match Co. [C. C. A.] 143 F. 72.

98. A contract conveying standing timber containing no clause limiting the time within which it must be removed and authorizing the grantor upon clearing any of the land to deaden the trees on the cleared land after five years upon giving notice is not void for uncertainty, but is an absolute conveyance of the timber, and the grantor cannot restrain the grantee from removing the timber within the proper time. Woody v. Intermont Iron & Timber Co. [N. C.] 53 S. E. 953.

99. Where the sellers of timber assured the buyers that they had had the timber carefully estimated and such estimate showed a certain number of feet, such representations were not mere matters of opinion, and the buyers having manufactured and sold the timber, could counterclaim damages where the representations were fraudulent. May v. Loomis, 140 N. C. 350, 52 S. E. 728. See, also, Fraud and Undue Influence, 5 C. L. 1541. Where in an action to recover for cutting timber there was evidence from which fraud or mistake in defendant's scaling might have been inferred, it was not error to submit to the jury the question of fraud or mistake. Peterson v. Reichel [Mich.] 12 Det. Leg. N. 988, 106 N. W. 877.

1. The term **"timber"** has a variable meaning depending upon the connection in which it is used and sometimes upon the occupation of the person using it. Pennington v. Avera, 124 Ga. 147, 52 S. E. 324. Where the contract was for **timber for sawmill purposes** and the buyer was a sawmill man, held, taking the contract as a whole, only such portions of the trees as were capable of being sawed into lumber passed by the contract. Id. The term **"merchantable timber"** means "fit for market," "of such a quality as will bring the ordinary market price." Liston v. Chapman & Dewey Lumber Co. [Ark.] 91 S. W. 27. Under a contract for the sale of timber of a certain diameter, the diameter is determined by **measurement at the stump.** Strother v. American Cooperage Co., 116 Mo. App. 518, 92 S. W. 758. A clause providing that a certain price per thousand feet should be paid for all the "timber so cut on said land" did not show that the timber should be measured at the top but referred to measurement after the cutting. Id. A contract for timber "that will measure 12 inches at the stump" should be construed as a conveyance of all the timber that would measure 12 inches "or more" at the stump. Dennis Simmons Lumber Co. v. Corey, 140 N. C. 462, 53 S. E. 300. In an action to recover for sorting logs where the question was what was meant by **"sorting,"** a question asked by defendant as to whether plaintiff "expected to sort and separate all the different batches of logs" was not designed to aid in the interpretation of the contract. McGuire v. J. Neils Lumber Co. [Minn.] 107 N. W. 130. Plaintiff undertook by a first contract to drive and deliver certain logs clean and separate from logs of other parties, and by a second to **float, drive, and sort** in separate booms other logs. Held to "sort" meant to separate the logs, and the two causes of action arising on the contracts were practically identical as to what was to be done under each. Id. Evidence held insufficient to sustain defendants' contention as to the location of the boundary of a tract of land on which they had bought the standing timber from plaintiff. Preston v. McNeil Lumber Co., 145 F. 683. Where a vendor of timber to be cut into ties agreed to refund the difference between $800 paid him and the value of ties cut at five cents each, the vendee was entitled to recover the difference whether the shortage in the ties was due to a lack of timber or whether he was prevented by the vendor from cutting the timber during the time specified in the contract. Hilton v. Taylor [Ala.] 40 So. 273.

2. See 5 C. L. 1491.

tracts for the sale of timber to be removed within a specified time are generally construed as sales of only so many trees as the vendee removes within the time designated.[3] If no time is fixed for its removal, the vendee has a reasonable time for that purpose.[4] What is a reasonable time depends upon the circumstances of each particular case at the time of the execution of the contract.[5] A witness will not be allowed to give his opinion as to what is a reasonable time,[6] nor can the court ordinarily determine that fact as a matter of law.[7]

Questions of performance[8] and waiver[9] are governed by the ordinary rules. The parties generally agree upon some person to do the scaling.[10] Where a contract

3. See 28 A. & E. Enc. Law [2nd Ed.] 541. Where the contract provided that the grantee "shall cut and remove said timber" on or before a specified date, timber remaining uncut after that date reverted to the grantor though there were no words of reversion in the contract. Bennett v. Vinton Lumber Co., 28 Pa. Super. Ct. 495. A contract of sale of timber with the right of removal within a specified term passes a present estate in the timber defeasible as to timber not cut within the term. Dennis Simmons Lumber Co. v. Corey, 140 N. C. 462, 53 S. E. 300. Where defendants had agreed to execute "a lease for said timber" upon payment therefor within five years, plaintiff was entitled to a conveyance of the timber. Id.

4. Liston v. Chapman & D. Lumber Co. [Ark.] 91 S. W. 27; Carson v. Three States Lumber Co. [Tenn.] 91 S. W. 53. Where a consent decree in chancery authorized defendant to remove the timber from certain land, he was required to do so within a reasonable time. Hall v. Wellman Lumber Co. [Ark.] 94 S. W. 43.

5. Brinson & Co. v. Kirkland, 122 Ga. 486, 50 S. E. 369; Liston v. Chapman & D. Lumber Co. [Ark.] 91 S. W. 27. What is a reasonable time is a mixed question of law and fact, and in its determination, the condition of the land, whether overflowed or not, and, if overflowed, the effect of an overflow in aiding or hindering removal, the number of trees standing at the time of the contract, and the facilities under the contract of the grantees for cutting and removing the timber, should be taken into consideration. Carson v. Three States Lumber Co. [Tenn.] 91 S. W. 53. Under the evidence ten years held a reasonable time. Id. Where one, after giving a deed of standing timber fixing no time for removing it executed a deed of the land to another "subject to the timber deed," only the time subsequent to the execution of the second deed should be considered in determining what constituted a reasonable time for the removal of the timber as between the two grantees. Liston v. Chapman & D. Lumber Co. [Ark.] 91 S. W. 27. Where one produces the oldest recorded deed conveying timber privileges, the burden is on the opposite party to show that such interest has terminated by submitting proof from which the jury may determine what was a reasonable time for cutting and removing the timber. Brinson & Co. v. Kirkland, 122 Ga. 486, 50 S. E. 369. In the absence of such proof the court properly directed a verdict for the holder of the oldest deed. Id.

6. Brinson & Co. v. Kirkland, 122 Ga. 486, 50 S. E. 369.

7. Except where the period is very short or very long, the court cannot determine as a matter of law whether a reasonable time has expired. Brinson & Co. v. Kirkland, 122 Ga. 486, 50 S. E. 369.

8. See, also, Contracts, 7 C. L. 761. After the execution of a contract by which plaintiff was to sort certain logs, defendant bought all other logs with which the logs mentioned in the contract were commingled and after plaintiff had sorted some of the logs defendant notified him not to sort any more. Held this was a case of **gratuitously assisted and beneficial performance,** not of impossibility of performance or renunciation, and plaintiff was entitled to recover the contract price. McGuire v. Neils Lumber Co. [Minn.] 107 N. W. 130. Where the failure to boom logs lay not in defendant's failure to put the logs into the boom, but in its failure to run them down where they could be put into the boom because defendant used the river above the sorting gaps as a storage pond for its own logs, it was **no defense that the boom was of insufficient capacity** to contain the logs which plaintiffs placed in the river. Nester v. Diamond Match Co. [C. C. A.] 143 F. 72. In an action for cutting timber not authorized by a contract, for "down timber" not cut and decayed, and for accounting for logs cut under the contract, evidence held sufficient to sustain findings for plaintiff as to the first two claims but insufficient to show that defendant had failed to account for logs cut under the contract. Hammond Signor Tie Co. v. Zwolle Lumber Co., 115 La. 750, 40 So. 34. In action to recover for cutting saw logs, verdict for plaintiff held sustained by the evidence, and the calculation of its amount reasonable in view of the testimony as to the terms of the contract and its performance. Graves v. Bonness [Minn.] 107 N. W. 163. Where by a contract for the sale of timber plaintiff reserved to himself the timber on a certain tract of land and promised to compensate defendants therefor, evidence held to show that defendants had been compensated. Preston v. McNeil Lumber Co., 145 F. 683.

9. Plaintiffs held to have waived a provision in a logging contract requiring defendant to do the work during the first of two seasons unless notified by a certain date, where after that date they notified defendant not to commence until arrangements could be made for the transportation of the timber. Mueller v. Cook, 126 Wis. 504, 105 N. W. 1054.

10. In an action to recover for cutting timber at a certain price per thousand, the

for the sale of real estate provides that no timber shall be cut or removed from the ground until the contract has been complied with, the purchaser has no power to sell the timber and give permission to remove it until the contract is fully completed.[11] Under a conveyance of standing timber by which the landowner retains the remaining interest in the land, neither he nor his grantee has actual or constructive possession of the trees until the grantee actually engages in felling them.[12]

The practice of a log driving company of having two or more drives to insure greater expedition in driving logs to their destination is a reasonable one,[13] and where a company is authorized by its charter to make assessments according to the actual cost of driving, it may establish different rates for the different drives.[14] Where two separate drives are started from a given point at different times, the fact that owing to high water the second one overtakes the first does not make it part of the first drive.[15] A public driver of logs is bound to anticipate and guard against common and frequent freshets[16] or other climatic changes by performing the work without unnecessary delay.[17] Where a corporation contracts with a public log driving company to do its log driving and the contract is confirmed by legislative enactment, privity of contract between an owner of logs and such corporation is not essential to the maintenance of an action by the former against the latter for negligence in the driving of logs.[18] In such case the driving is done not only in performance of the contract but also in the exercise of the powers conferred by the state which carry with them the duty of using ordinary care and diligence.[19]

In many jurisdictions boom companies organized as provided by statute are quasi public corporations,[20] and, where required to file maps of location showing the territory proposed to be appropriated, their rights upon such filing are analogous to those acquired by railroads upon the filing of their locations,[21] and they may prevent by injunction other companies from afterwards adopting and using conflicting locations.[22] A company is required to construct only such works as are necessary

amount of logs to be determined by a scaler to be agreed upon, evidence held to warrant submission to the jury of the question whether plaintiff acquiesced in the selection of the person who made the scale. Peterson v. Reichel [Mich.] 12 Det. Leg. N. 988, 106 N. W. 877. Evidence held to sustain finding that the parties to a contract for the sale of logs did not agree that the scale by the surveyor general should conclusively bind the parties as to the quantity of logs delivered. Nelson v. Betcher Lumber Co., 96 Minn. 76, 104 N. W. 833.

11. Gumaer v. White Pine Lumber Co. [Idaho] 83 P. 771.

12. Law court in issuing writ of possession in ejectment could not guard interest of grantee. King v. Davis, 137 F. 222.

13, 14. Mattawamkeag Log Driving Co. v. Byron [Me.] 63 A. 913.

15. Where first could not be sent along on account of too high water below. Defendant required to pay the second drive rate. Mattawamkeag Log Driving Co. v. Byron [Me.] 63 A. 913.

16. Loss of logs could not be attributed to magnitude of freshets where the logs would have been lost during any ordinary freshet in the condition in which they were left. Marsh v. Great Northern Paper Co. [Me.] 64 A. 844.

17. Defendant's delay held the proximate cause of loss of logs, though after such delay a severe drought, early freezing, and freshets prevented further work and resulted in the logs being lost. Marsh v. Great Northern Paper Co. [Me.] 64 A. 844.

18. By accepting the legislative act by undertaking to drive the logs, defendant came under a duty to the public including plaintiff. Marsh v. Great Northern Paper Co. [Me.] 64 A. 844. The duty was coextensive with the contract but independent of it. Id.

19. Evidence held sufficient to support verdict for plaintiff for unreasonable delay resulting in loss of the logs by a winter freshet carrying them out to sea. Marsh v. Great Northern Paper Co. [Me.] 64 A. 844.

20. Under 1 Ballinger's Ann. Codes & St. §§ 4378-4394, requiring them to file maps of location and perform services for all persons requesting the same. Nicomen Boom Co. v. North Shore Boom & Driving Co., 40 Wash. 315, 82 P. 412.

21. Nicomen Boom Co. v. North Shore Boom & Driving Co., 40 Wash. 315, 82 P. 412.

22. While Ballinger's Ann. Codes & St. §§ 4378-4394, providing for the organization of boom companies, contemplate the existence of more than one boom on the same river, the fact that a single boom company acquires practical monopoly of the boom business on a river does not deprive it of protection against interference with its location by another company where the available extent of the river will not reasonably permit the operation of more than one

for the existing demands of its business and may use the balance of its territory when needed,[23] hence a mere temporary nonuser of a portion of its location is not an abandonment thereof. The question of diligence in construction must depend upon the particular circumstances of a given case.[24] A statute providing that after the failure of a boom company for one year to use property acquired by eminent domain such property shall revert to the original owner does not apply to property acquired by purchase,[25] nor to lands acquired for future needs but which has never been used for booming purposes.[26]

In an action to recover for timber removed from land under an alleged contract with plaintiff, any one claiming an interest in the timber is properly made a party defendant.[27] In actions for a wrongful cutting of timber or on contracts relating thereto, the ordinary rules of pleading[28] and evidence apply.[29] Where the contract is unambiguous, parol evidence is inadmissible to explain or qualify it.[30] The testimony of a lumber inspector who has made only a loose measurement of a small portion of a given number of logs is inadmissible to show the number of feet in all the logs.[31] Where a statute makes presumptive evidence the certificate of an inspector as to the quantity of lumber in timber measured by him, his certificate is properly admitted after a proper identification,[32] but when it appears that no real scalement or measurement was in fact made as required by the statute,[33] it becomes the duty of the court to strike the certificate[34] and exclude its contents from the

boom company thereon. Nicomen Boom Co. v. North Shore Boom & Driving Co., 40 Wash. 315, 82 P. 412.

23. Nicomen Boom Co. v. North Shore Boom & Driving Co., 40 Wash, 315, 82 P. 412.

24. Plaintiff not guilty of lack of diligence. Nicomen Boom Co. v. North Shore Boom & Driving Co., 40 Wash. 315, 82 P. 412.

25. See Eminent Domain, 7 C. L. 1276. Nicomen Boom Co. v. North Shore Boom & Driving Co., 40 Wash. 315, 82 P. 412.

26. Nicomen Boom Co. v. North Shore Boom & Driving Co., 40 Wash. 315, 82 P. 412.

27. Where party made defendant claimed an interest in the land. Alford Bros. v. Williams [Tex. Civ. App.] 14 Tex. Ct. Rep. 778, 91 S. W. 636.

28. See Pleading, 6 C. L. 1008. Complaint charging defendants with cutting other trees than those sold to them held sufficiently met by answer that defendants cut and removed only trees which they had purchased of plaintiff as against objection that complaint was based on a written contract and answer on an oral one without mention of the written one. Doell v. Schrier, 36 Ind. App. 253, 75 N. E. 600. Complaint held to show breach of defendant's contract to boom and sort plaintiff's logs where it stated that defendant did not boom and sort the logs with reasonable dispatch as agreed and that defendant monopolized the river with its own logs whereby plaintiff's logs became rotten and worm-eaten, as against objection that it stated mere conclusions. Nester v. Diamond Match Co. [C. C. A.] 143 F. 72.

29. See Evidence, 5 C. L. 1301. Where plaintiff in an action to recover for cutting timber claimed that defendant's scale was incorrect and sought to correct it by proof of a scale made by himself, his testimony as to his experience, etc., held to justify the admission in evidence of the scale made by him. Peterson v. Reichel [Mich.] 12 Det. Leg. N. 988, 106 N. W. 877. In an action to recover for breach of a contract whereby plaintiff was to cut and deliver timber to defendant, the testimony of a witness that he loaned the plaintiff money to enable him to fulfill the contract was admissible on the issue of plaintiff's ability and readiness to perform on his part. Ives v. Atlantic & N. C. R. Co. [N. C.] 55 S. E. 74. That the effect of admitting the evidence would make the witness the real plaintiff was no valid objection. Id. Verdict for plaintiff in an action on a contract whereby defendant was to saw and sell certain timber and pay plaintiff part of the proceeds, when paid by the purchasers, held without evidence to support it where there was nothing to show that defendant had been paid. Bruce v. Dickerson, 124 Ga. 928, 53 S. E. 454.

30. Parol evidence that all trees of the diameter called for were hollow at the butt was inadmissible. Strother v. American Cooperage Co., 116 Mo. App. 518, 92 S. W. 758. Where the contract properly construed was unambiguous, parol evidence was inadmissible to show that the parties intended that the limbs and tops of the trees were to pass under it as well as such portions as were capable of being sawed into lumber. Pennington v. Avera, 124 Ga. 147, 52 S. E. 324.

31. Especially where logs were in existence. Hurst v. Webster Mfg. Co. [Wis.] 107 N. W. 666.

32. Hurst v. Webster Mfg. Co. [Wis.] 107 N. W. 666.

33. Where the inspector measured only one-third of the logs and multiplied the average of that third by the whole number of logs, there was no "scalement or measurement" within Rev. St. 1898, § 1735, requiring the inspector to give a certificate show-

jury.[35] The facts being undisputed, the question of whether a scale was made by an inspector in accordance with the statute is for the court.[36]

Liens.[37]—A sawmill comes within the provisions of a statute giving a lien on any mill and its products for labor performed thereat,[38] but one who hauls logs to a sawmill with his own teams at a certain price per thousand feet is not a "laborer" within the meaning of the Texas statute.[39] In New York a logger has no lien on logs for cutting and hauling them to a sawmill.[40] The assertion of a lien for specific work bars a lien for other work not specified.[41]

Liens for boomage charges are provided by statute in many states.[42] Under a statute creating a lien in favor of a boom company on all logs with reference to which services are performed, the lien is not waived by the surrender of a portion of the logs handled during the season but may be enforced as an entirety against the remaining portion.[43]

FORFEITURES, see latest topical index.

FORGERY.

Elements of offense.[44]—To constitute forgery the instrument alleged to have been forged must be one of a class capable of being the basis of some right or liability,[45] and must be valid on its face,[46] but it is generally held sufficient if these

ing the number of feet of lumber in the logs scaled. Hurst v. Webster Mfg. Co. [Wis.] 107 N. W. 666.

34. Hurst v. Webster Mfg. Co. [Wis.] 107 N. W. 666.

35. Error to inform jury of number of feet shown by the certificate after it was stricken. Hurst v. Webster Mfg. Co. [Wis.] 107 N. W. 666.

36. Error to leave to jury whether inspector had made a "technical scale" as per the statute requiring him to give the owner a certificate of the amount of lumber contained in logs after scaling. Hurst v. Webster Mfg. Co. [Wis.] 107 N. W. 666.

37. See 5 C. L. 1497.

38. Sayles' Ann. Civ. St. 1897, art. 3339a. Sparks v. Crescent Lumber Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 672, 89 S. W. 423. Lien claims of certain laborers held filed within 30 days after the indebtedness "accrued" as required by the statute. Id.

39. Sayles' Ann. Civ. St. 1897, art. 3339a. Sparks v. Crescent Lumber Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 672, 89 S. W. 423.

40. Neither at common law nor by statute. Brackett v. Pierson, 99 N. Y. S. 770.

41. See Liens, 6 C. L. 451. One who in his notice of lien and in his pleading asserts a lien for cutting and hauling logs is not entitled to a lien for sawing them into lumber. Brackett v. Pierson, 99 N. Y. S. 770.

42. Defendant held to have been organized for the purpose of improving a river, facilitating the driving of logs thereon by locating thereon booms, etc., and carrying on the business of sorting, booming, etc., logs, so as to entitle it to the lien provided for by c. 221, p. 350, Gen. L. 1889. International Boom Co. v. Rainy Lake River Boom Corp. [Minn.] 107 N. W. 735, dist'g Northwestern Imp. & Boom Co. v. O'Brien, 75 Minn. 335, 77 N. W. 989. The erection of dams, booms, etc., incident to the driving of logs, must be treated as an improvement in the river within the meaning of the statute. Id. The river was in need of improvements of this character where without them the logs would not have been intercepted but would have floated away by the wind and been lost to the owners. Id. The validity of the statute as applied to the particular stream of water, which is an international boundary, was not involved where the services for which defendant claimed a lien were performed under a contract with plaintiff. Id. Evidence held to show a contract pursuant to which defendant sorted and handled plaintiff's logs, and that it was entitled to a reasonable compensation therefor so as to entitle it to a lien on the logs, and to keep possession thereof until the claim was paid. Id.

43. Under c. 221, p. 350, Gen. L. 1889. International Boom Co. v. Rainy Lake River Boom Corp. [Minn.] 107 N. W. 735.

44. See 5 C. L. 1498.

45. That after M had obtained judgment against defendant on a note he attempted to pass to the justice a **receipt** of M to defendant antedating the note and judgment, which receipt had been raised from $10 to $20, did not render defendant guilty of forgery as it could not change the financial status of either party or affect property. Knezek v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 767, 90 S. W. 1099. A properly dated instrument as follows: "L. Ratcliff pay to Edd Shaw or order $17. Seventeen dollars. J. H. Freeman"—is made the subject of forgery under Gen. St. 1901, § 2122, and an information charging the false making of such instrument with intent to defraud, without the allegation of any extraneous facts, charges the crime defined by said section. State v. Shaw, 72 Kan. 81, 82 P. 587. A **check payable to maker or order** cannot be made the

facts appear.[47] Forgery may be committed by typewriting an instrument,[48] but in Texas one may not be prosecuted for forgery for printing a name unless the signature resembles manuscript.[49] The name signed must be that of some person other than the one who executes the instrument, though it may be the same as that of the accused if by signing such name defendant intended to defraud.[50] There is a conflict as to whether a statute denouncing as forgery the false making of a certificate or other instrument applies to the making of a false certificate.[51]

The uttering of a forged instrument may constitute forgery,[52] but to constitute this offense the instrument must be uttered or published as true and genuine.[53] The person uttering the same must have known it to be false, forged, or counterfeited,[54] and the act must be done with intent to damage or defraud another.[55]

Defense.[56]—One who, without authority, signs the name of another to an order and procures money thereon is guilty of uttering and publishing a forged instrument, though he believes that the person whose name was signed would pay the order and not prosecute him.[57] A conviction or acquittal on a charge of larceny does not bar a prosecution for forging or uttering an instrument though the prosecution grew out of the same matter,[58] and a trial on a charge of forging an instrument is generally held not a bar to a subsequent prosecution for other forgeries committed at the same time.[59]

subject of forgery until the maker indorses it. People v. Thornburgh [Cal. App.] 87 P. 234. An instrument purporting to be a **bill of sale** from a third person to prosecutor and on which prosecutor loaned money to defendant held the subject of forgery as affecting the property rights of the third person. Gaut v. State [Tex. Cr. App.] 94 S. W. 1034.

46. The fact that the word "signed" is prefixed to the name of the signer of a check does not show that the paper is a mere copy which could not prejudice anyone. People v. Crane [Cal. App.] 87 P. 239. Certain **Chinese** duplicate **certificates of residence** were none the less the certificates contemplated by the statute, though the name of the collector on the duplicates was not the name of the collector whose name appeared upon the original certificates and whose term had expired. Dillard v. U. S. [C. C. A.] 141 F. 303.

Instrument invalid on its face cannot be the subject of forgery: Alteration of physician's prescription which did not state that liquor prescribed was necessary for medicinal use as required by statute. State v. McManus, 78 Vt. 433, 62 A. 1013.

47. False execution of **check** valid on its face held forgery, though it was payable to a third person. Norton v. State [Wis.] 109 N. W. 531. Contention that it was without value in forger's hands without merit since it was negotiable and could be transferred without indorsement. Id. Instrument purporting to be a **school warrant** issued by president and secretary of board of trustees held subject of forgery, though it was not alleged that the proper action had been taken by the board authorizing its issuance. Tracy v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 362, 90 S. W. 308.

48. Order for a suit of clothes. State v. Bradley [Tenn.] 94 S. W. 605.

49. Where signature by which a receipt was filled in was in bold type there was no forgery under White's Ann. Pen. Code, art. 533, providing that the signature when not written must be made to resemble manuscript. Heath v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 252, 89 S. W. 1063.

50. Evidence held to justify conviction. Murphy v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 940, 93 S. W. 543.

51. Notary **not guilty** of forgery for making certificate of acknowledgment of deed, contents of which were untrue. Comp. L. 1897, § 1168, is a forgery statute. Territory v. Gutierrez [N. M.] 84 P. 525. Bounty inspector, who issued a bounty certificate falsely reciting that skins had been exhibited and affidavits filed and that he had inspected the skins, held **guilty of forgery** under § 3078, Pol. Code, declaring one guilty of forgery who falsely makes, alters, etc., a bounty certificate. In re Terrett [Mont.] 86 P. 266. Making and swearing to an application to the United States civil service commission for examination for appointment in the civil service, containing wilfully false statements is an indictable offense under U. S. Rev. St. § 5479 against making, forging, etc., any bid, bond, affidavit, etc., for the purpose of defrauding the United States. United States v. Johnson, 26 App. D. C. 136.

52. People v. Crane [Cal. App.] 87 P. 239.

53, 54. State v. Murray, 72 S. C. 508, 52 S. E. 189.

55. State v. Murray, 72 S. C. 508, 52 S. E. 189. Evidence held to sustain conviction for forging and uttering a lease. Id. Cr. Code 1902, § 373, is not unconstitutional on the ground that the title and body of the statute do not correspond. The law was within the power of the legislature to enact. Id.

56. See 5 C. L. 1499.

57. Rose v. State [Ark.] 96 S. W. 996.

58. Conviction of grand larceny of a check under Kirby's Dig. §§ 1821-1824, not a bar to prosecution for forgery of check alleged to have been stolen. Crossland v. State [Ark.] 92 S. W. 776. Acquittal on a prosecu-

The indictment.[60]—The information or indictment should be direct[61] and certain in its averments,[62] and must contain a distinct allegation of each essential element of the offense as defined by the statute,[63] but being sufficient to charge the of-

tion for larceny and embezzlement no bar to prosecution for forging and passing a note. Spears v. People, 220 Ill. 72, 77 N. E. 112.

59. NOTE. Forging of different instruments at the same time as constituting one or more than one crime: A conviction for **uttering** a forged instrument is a bar to another prosecution for uttering other forged instruments at the same time and as a part of the same transaction. Uttering a forged mortgage and a forged note purporting to be secured thereby. State v. Moore, 86 Minn. 422, 61 L. R. A. 819. Uttering four forged checks. State v. Egglesht, 41 Iowa 574, 20 Am. Rep. 612. Indictment under Mass. Rev. St. c. 127, § 2, charging uttering and publishing of "sundry false, forged, and counterfeit promissory notes" and describing the notes as five bank notes, held not to charge various offenses in one count. Commonwealth v. Thomas, 10 Gray [Mass.] 483. But a conviction under a void indictment for uttering a forged mortgage is not a bar to a subsequent prosecution for uttering a note purporting to be secured by the mortgage. People v. Terrill, 133 Cal. 120, 65 P. 303. In State v. Calkins, 73 Iowa 128, 34 N. W. 777, though the conviction evidently was for uttering two instruments, there was no question made as to there being more than one crime. So, also, a conviction for **having in one's possession forged instruments,** knowing the same to be forged, bars further prosecution for having possession of other forged instruments at the same time and in the same manner. State v. Benham, 7 Conn. 414. In the case of **forging and uttering** several instruments at the same time, the uttering is one act but the forging of each instrument is a separate offense. See Barton v. State, 23 Wis. 587, where several forged drafts on one sheet of paper were uttered at the same time. In Nichols v. State, 39 Tex. Cr. Rep. 80, 44 S. W. 1091, it was held that an acquittal under one of several indictments for forging and uttering several instruments as part of one transaction did not prevent a subsequent trial on one of the other indictments. The forging and uttering of a note and a mortgage forming a single connected transaction is properly included in one indictment and the certificate of acknowledgment may be treated as a part of the mortgage. People v. Sharp, 53 Mich. 523, 19 N. W. 168; Van Sickle v. People, 29 Mich. 61; McKinney's Case, 10 Mich. 54, 95. In Rex v. Thomas, 2 East P. C. 934, where the indictment contained two counts for uttering numerous forged receipts, and a third count for forging and counterfeiting the receipt mentioned in the second count, a motion to require an election was denied and a conviction on the whole indictment was sustained. The **forgery of several instruments** at the same time is generally regarded as a separate offense for each instrument. Barton v. State, 23 Wis. 587; Nichols v. State, 39 Tex. Cr. Rep. 80, 44 S. W. 1091. But forgery of a claim against a county and an affidavit and jurat all constituting but a single instrument is but a single forgery (Rosekrans v. People, 5 Thomp. & C. 467), since the account would not be valid on its face and hence not the subject of forgery, unless it contained the affidavit and jurat. On the other hand, where the crimes of forgery of a mortgage and receipt were defined by different statutes prescribing different punishments, it was held that the indictment could not charge the forgery of both in one count. People v. Wright, 9 Wend. [N. Y.] 193. And an acquittal under an indictment for forging a certificate of deposit is not a bar to a prosecution for an attempt to obtain money from another bank by means of a forged letter inclosing the certificate.—From note to State v. Moore [Minn.] 61 L. R. A. 819.

60. See 5 C. L. 1499. See Indictment and Prosecution, 5 C. L. 1790.

61. Indictment for making false application for examination for appointment in civil service held bad for charging by mere implication (United States v. Johnson, 26 App. D. C. 136), though the charge may be said to be sufficiently clear to be unmistakable to the ordinary intelligence (Id.).

62. Information for forging and uttering notes held sufficiently certain as to identity of person where in the first and second counts the notes purported to have been signed "W—— B—— Sr." and it was charged that they were uttered with intent to defraud "the estate of W—— B—— Sr.," and in the third count they purported to have been signed "W—— B——" and it was charged that they were forged with intent to defraud "the estate of W—— B—— now deceased." State v. Simpson [Ind.] 76 N. E. 1005.

63. In charge under Cr. Code § 145, of having possession of a forged deed with intent to utter it as true, omission of words "knowing the same to be false," or their equivalent, held fatally defective. Not cured by the words, "unlawfully, feloniously and purposely." Newby v. State [Neb.] 105 N. W. 1099. In § 523, art. 41, c. 25, Wilson's Rev. & Ann. St. 1903, declaring guilty of forgery one who sells, exchanges, or delivers a forged or counterfeited instrument, knowing it to be forged with intent to have the same uttered or passed, or offers such instrument for sale, exchange, or delivery with like knowledge and intent, or with like knowledge and intent receives such instrument upon a sale, exchange, or delivery, the words "with intent to have the same uttered or passed" refer only to the second and third specifications of the definition, so that where the indictment charges that a certain school warrant was actually sold, exchanged, and delivered, with knowledge that it was forged or counterfeited, it was a sufficient allegation of an intent to utter and pass the same. Connella v. Territory, 16 Okl. 365, 86 P. 72. Count charging defendant with having in his possession certain counterfeited school warrants with intent to utter same as true and knowing same to be false held to charge an offense within § 524, art. 41, c. 25, Wilson's Rev. & Ann. St. 1903. Id. Where enough appeared in the

fense as so defined the use of unnecessary words does not render it bad.[64] The instrument alleged to have been forged should be set forth according to its tenor[65] and by facsimile copy if practicable,[66] unless the writing is lost or destroyed or otherwise inaccessible, in which case the disabling fact must be stated.[67] The purport and tenor clauses must correspond.[68] Where an instrument is complete on its face and purports to impose a liability, the indictment need not allege extrinsic facts showing its validity or that another might be injured by it,[69] but if uncertainties appear, the defects must be met by proper averments and proof.[70] It is proper to embody in the indictment statements explanatory of words contained in the instrument.[71] An indictment for the forgery of a note or check need not set out indorsements,[72] but an indictment for the forgery of an indorsement must set out the indorsement together with such facts as will make the offense affirmatively appear.[73] An indictment charging an intent to defraud need not allege of what the accused intended to defraud.[74] Other illustrations of the necessity for specific averments in particular cases are shown in the note.[75] Under the Federal statute several charges may be joined in one indictment where they are for acts or transactions connected together.[76]

warrant to apprise defendant that he was charged with feloniously transferring a check and defendant waived preliminary examination thereon, the county attorney was thereby authorized to more fully charge this crime in the information. State v. Shaw, 72 Kan. 81, 82 P. 587.

64. Where statute read "sell, exchange, or deliver," that indictment contained the additional word "publish" did not render it double. Connella v. Territory, 16 Okl. 365, 86 P. 72.

65. Mere substance is insufficient unless writing is inaccessible. Crossland v. State [Ark.] 92 S. W. 776.

66, 67. Crossland v. State [Ark.] 92 S. W. 776.

68. Indictment stating that an instrument purported to be the act of the president of a school board, but setting out the instrument showing itself to be the acts of the president and secretary, held fatally defective. Tracy v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 362, 90 S. W. 308.

69. Promissory note. White v. State [Ala.] 39 So. 570. If on the face of a writing there is all that belongs to an order to pay money or deliver goods, the law regards it as such though in fact the drawer had no funds and the drawer was under no obligation to respond. Looking simply at the writing there must appear to be a drawer having a disposing power over the fund or goods, a person under obligation to obey, and one to whom delivery or payment is to be made, sufficiently described to exclude uncertainties of meaning. Russell v. State [Fla.] 40 So. 625.

70. Where accused was charged with forging and uttering a writing as follows: "Mr. Crutch, pay Humpie three dollars for me," and presenting the same to one Crutchfield, the indictment should have stated who was meant by "Mr. Crutch" and "Humple." Russell v. State [Fla.] 40 So. 625.

71. Proper to aver that the instrument was intended to be the act of one "Dowlen" and that this name was misspelled "Doolen." Gaut v. State [Tex. Cr. App.] 94 S. W. 1034. Indictment for forgery of instrument as follows: "'J. H.' (meaning B. M. H.): 'Pleas' (meaning please) 'pay to [accused] $10.00 Dollales' (meaning ten dollars). * * * 'P. Monconies' (meaning P. Monciboyes)"—held sufficient without alleging the relation between the parties, and without stating that accused intended to use the names shown by the innuendo and by mistake used those which he did use; accused being thus apprised of the nature of the accusation and the names he intended to use. Rubio v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 576, 95 S. W. 120.

72. Crossland v. State [Ark.] 92 S. W. 776.

73. Crossland v. State Ark.] 92 S. W. 776. Where forgery of the indorsement is relied upon, it must be so charged in the indictment. Under § 470 Pen. Code. Indictment charging forgery of a check set out therein with name of maker indorsed thereon does not charge forgery of indorsement which is a separate contract. People v. Thornburgh [Cal. App.] 87 P. 234.

74. Charge of forgery with intent to defraud a bank. Not necessary to charge of what it was intended to defraud the bank. Taylor v. Com. [Ky.] 92 S. W. 292.

75. In a prosecution for keeping and selling counterfeited **school warrants** with intent to defraud, the fact that the copies of the warrants set forth in the indictment does not contain the seal of the school district does not render the indictment defective. Connella v. Territory, 16 Okl. 365, 86 P. 72. An indictment for forging a **theater pass** must allege that the person whose name was forged had authority to issue the pass. Indictment under Cr. Code § 105 (Hurd's Rev. St. 1903, p. 635, c. 38). Signature to pass preceded by the words "Adv. Agt." not sufficient. Klawanski v. People, 218 Ill. 481, 75 N. E. 1028. Must also show who the person claimed to be defrauded was. Not sufficient where name of person claimed to be defrauded simply appeared in copy of pass with the words "Sole Prop." Id. Must state that it was given for an entertainment "for which a consideration was required." Id. Indictment for forging and uttering **Chinese duplicate certificates** of residence need not necessarily state that the originals were issued or lost nor to whom duplicates were

Aider by verdict.—One count being sufficient and supported by the evidence, the verdict will be referred to it.[77]

Variance.—The proof must conform to the allegations.[78] A variance will, however, be held immaterial unless defendant may have been prejudiced or would be exposed to danger of a second prosecution.[79] A conviction for forgery is not sustained by proof of a swindle or a cheat.[80]

Presumptions.[81]—Where the uttering of an instrument with knowledge of its forgery is shown, the law will presume a fraudulent intent.[82]

Admissibility of evidence.[83]—Evidence is admissible which tends to show intent,[84] hence proof of the forging or uttering of other instruments is often allowed,[85] especially where they show a general scheme to defraud.[86] Secondary evidence of such instruments may be given after notice to produce and showing that they are in defendant's possession.[87] Other evidence within the issues,[88] which tend in a rea-

delivered. Where certificates were described and names of Chinese persons to whom they purported to have been issued were given, and it was alleged that persons to whom they were uttered were unknown to the grand jury. Dillard v. U. S. [C. C. A.] 141 F. 303.

76. Counts charging forgery of Chinese duplicate certificates of residence, the uttering of the forged certificates, and violation of the Federal statute as an officer in the revenue service covered "acts or transactions connected together," and so were properly joined under Rev. St. § 1024 (U. S. Comp. St. 1901, p. 720). Dillard v. U. S. [C. C. A.] 141 F. 303.

77. White v. State [Ala.] 39 So. 570.

78. Where indictment charged defendant with passing a forged instrument on W., a member of a firm, and it appeared that defendant made a purchase in the store of the firm and gave the clerk the instrument in question who took it to W., who gave the money to the clerk, who handed it to defendant, there should have been an acquittal. Lasister v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 67, 94 S. W. 233.

79. Where check introduced was identical with that set forth in information except that the word "signed" was written thereon. People v. Crane [Cal. App.] 87 P. 239.

80. Proof of inducing another to sign conveyance on representation that it was a pension paper was not forgery at common law or under Code 1892, § 1093. Johnson v. State [Miss.] 39 So. 692.

81. See 3 C. L. 1474.

82. State v. Murry, 72 S. C. 508, 52 S. E. 189. In prosecution for uttering and publishing a forged instrument with intent to obtain the property of the person whose name was forged, the law presumes an intent to defraud such person upon proof of actual intent to pass as good the instrument known to be forged. Rose v. State [Ark.] 96 S. W. 996.

83. See 5 C. L. 1500.

84. In prosecution for forging and uttering Chinese duplicate certificates of residence, evidence held competent to show defendant's guilty knowledge and purpose. Dillard v. U. S. [C. C. A.] 141 F. 303. Evidence that the agent of prosecuting witness had been in the habit of giving defendant checks for several months prior to the transaction in question, and had previously authorized defendant to write prosecutor's name on checks, should have been admitted on the question of intent as showing that defendant's possession and indorsement were rightful. Crossland v. State [Ark.] 92 S. W. 776.

85. In prosecution for indorsing forged note to a bank, such evidence was admissible to show guilty knowledge and intent. People v. Dolan [N. Y.] 78 N. E. 569. In prosecution for forgery of Chinese duplicate certificates of residence, other forged and fraudulent certificates in defendant's handwriting were admissible on the question of intent. Dillard v. U. S. [C. C. A.] 141 F. 303. Where the crime charged is the making of a false receipt for the payment of money with intent to defraud, evidence of similar offenses or similar transactions by the same defendant is competent as tending to show the motive or intent with which the receipt in question was made, altered, or forged, and its use in connection with other instruments forged by the defendant. Lingafelter v. State, 8 Ohio C. C. (N. S.) 537.

86. Where other forged notes were made and uttered at about same time and while accused was financially embarrassed and where he used names of persons with whose affairs he was familiar. People v. Dolan [N. Y.] 78 N. E. 569, rvg. 97 N. Y. S. 929. Held competent to show forging and uttering of other instruments at about same time in pursuance of general scheme to defraud, and the fact that defendant was under indictment for the forgery of some of the other instruments did not affect their admissibility. Pittman v. State [Fla.] 41 So. 385.

87. See Evidence, 7 C. L. 1511. Evidence held sufficient to show that certain forged notes had come into defendant's possession. People v. Dolan [N. Y.] 78 N. E. 569.

88. In a prosecution for the forgery and uttering of Chinese duplicate certificates of residence, evidence that the signatures thereon were forged was admissible though the indictment merely stated that they were false and fraudulent where it further charged defendant with knowledge that the certificates were not issued by the United States collector of revenue. Dillard v. U. S. [C. C. A.] 141 F. 303.

sonable degree to connect the accused with the offense charged,[89] including his own admissions,[90] is admissible if otherwise competent and material.[91] In a prosecution for forging a check it is competent to show as one of the circumstances of the transaction that the check was presented and not paid.[92] One who has seen defendant write his name may testify as to his signature,[93] but the signature alleged to have been forged cannot be compared with extraneous writings not in evidence for any other purpose,[94] nor with writings made by defendant at the time of trial.[95]

Sufficiency of evidence.[96]—The extrajudicial confession of the accused is not alone sufficient to convict.[97] In a prosecution for uttering a forged instrument, the state must prove that the instrument was forged and that the accused fraudulently uttered it.[98] Matters, not surplusage, must be proved, though unnecessarily alleged.[99] In a prosecution for forging a note there is no burden upon the state to show that the person whose name was forged as maker did not owe defendant anything.[1]

89. In a prosecution for forgery of Chinese duplicate certificates of residence, evidence held competent and material as tending to connect defendant with the offense charged. Dillard v. U. S. [C. C. A.] 141 F. 303. In prosecution for forgery of a check purporting to have been signed by H, evidence as to whether H had an account with the drawer during the month in which the check was drawn was not incompetent. People v. Crane [Cal. App.] 87 P. 239. On the issue of the fictitious character of the name signed, testimony of the tax collector that the name did not appear on the tax rolls was irrelevant. Lasister v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 67, 94 S. W. 233. Where the indictment charged the keeping and selling of counterfeited school warrants, evidence as to trouble existing between members of the school district board was irrelevant on the issue of guilt or innocence. Connella v. Territory, 16 Okl. 365, 86 P. 720. Where defendant had gone away about the time of the crime and two months later returned to the house of prosecuting witness, evidence as to whom he found there on his return was irrelevant. Bolton v. State [Ala.] 40 So. 409.

90. Letter admitting charge not inadmissible because it admitted another forgery where reference thereto was inseparably mingled with reference to crime charged. Taylor v. Com. [Ky.] 92 S. W. 292. Evidence that defendant admitted to witness that he had "put on a little" on a check held proper in prosecution for raising a check. State v. Spiker [Iowa] 108 N. W. 233.

91. In prosecution for forging a check purporting to be signed by H as trustee of an estate, evidence as to whether H as trustee had drawn checks payable to defendant was immaterial. People v. Crane [Cal. App.] 87 P. 239. In prosecution for forging a check, evidence as to whether the person whose name was signed to the check was in the bank afterwards and as to whether witness then showed her the check was material to show the time when she first saw the check and found out about the forgery. Bolton v. State [Ala.] 40 So. 409. Certain self-serving declarations held inadmissible. People v. Dolan [N. Y.] 78 N. E. 569, rvg. 97 N. Y. S. 929.

92. Proof of nonpayment and protest. People v. Tollefson [Mich.] 13 Det. Leg. N. 481, 108 N. W. 751.

93. See Evidence, 7 C. L. 1511. Not error to permit a witness to testify as to defendant's signature when witness testified that he had seen defendant sign his name on different occasions and thought he was familiar with his signature. Pittman v. State [Fla.] 41 So. 385. Signature of accused to motion for continuance proved by clerk of the court who saw accused sign was relevant as standard of comparison with forged writing. Gant v. State [Tex. Cr. App.] 94 S. W. 1034.

94. Signatures to which were not even shown to be genuine. Bolton v. State [Ala.] 40 So. 409.

95. Bolton v. State [Ala.] 40 So. 409.

96. See 5 C. L. 1501. Evidence sufficient to sustain conviction of forgery of an order to pay money. Rubio v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 576, 95 S. W. 120.

Evidence held sufficient to support conviction for forging a note. Pittman v. State [Fla.] 41 So. 385.

97. See Indictment and Prosecution, 5 C. L. 1790. Evidence insufficient, aside from confession, to convict of uttering a forged deed. Blacker v. State [Neb.] 105 N. W. 302. Cr. Code Prac. § 240. Where the only evidence that forged instrument was uttered was testimony that accused admitted to witness that he had delivered it to a third person. Commonwealth v. Burgess [Ky.] 91 S. W. 266.

98. Commonwealth v. Burgess [Ky.] 91 S. W. 266. Evidence on question of intent held sufficient to take to the jury where defendant could not account for another check in his possession and admitted to an officer that he had "been at it again." Norton v. State [Wis.] 109 N. W. 531. Intent to defraud shown where salesman, who took cash and forged and turned in to his employer a note of the purchaser, testified that he intended to defer payment for his own accommodation. Spears v. People, 220 Ill. 72, 77 N. E. 112.

99. Where indictment charged passing a check on a bank, "a corporation," it was necessary to prove the incorporation of the bank. Wisdom v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 74, 95 S. W. 505.

1. White v. State [Ala.] 39 So. 570.

Instructions.[2]—Instructions must conform to the charge and the evidence.[3] Where the evidence is circumstantial, the accused is entitled to an instruction on the law of such evidence,[4] but such instruction is not required if the evidence is positive in its character.[5]

FORMER ADJUDICATION.

§ 1. The Doctrine in General (1750). Persons Concluded (1754).
§ 2. Adjudication as a Bar of Causes of Action or Defense (1759). Identity of Parties (1760). Identity of Cause of Action (1760). Privies of a Party (1760). Scope of Adjudication (1760).
§ 3. Adjudication as Estoppel of Facts Litigated (1765).
§ 4. Pleading and Proof (1767).

To be distinguished from former adjudication are the doctrines that a decision of an appellate court is binding in all subsequent proceedings in the same case,[6] and that decisions on questions of law will be observed as precedents.[7] Also the doctrines of election of remedies,[8] and the conclusiveness of foreign judgments under constitutional provisions,[9] must be distinguished from that of former adjudication.

§ 1. *The doctrine in general.—The doctrine of former adjudication is that whatever matters have been finally*[10] *and without collusion*[11] *determined on the mer-*

2. See 5 C. L. 1502.

3. Where indictment merely charged forgery of a check and did not charge forgery of an indorsement thereon, and there was no proof that the check was forged, instruction authorizing conviction for uttering a forged instrument on the establishment of certain facts was erroneous. Crossland v. State [Ark.] 92 S. W. 776. Where the indictment set forth an instrument purporting on its face to be the act of "Doolen," but stated that it was intended to be the act of "Dowlen," a charge that if the jury believed the act to be that of "Dowlen" without regard to the variance between the two names they might convict under the circumstances stated, and one that if they believed that defendant intended the instrument to represent and operate as the act of Dowlen they could convict, were in accord with the indictment and sufficiently presented the matter to the jury. Gaut v. State [Tex. Cr. App.] 94 S. W. 1034. Where evidence showed that accused intended to defraud his father by passing a forged order, held not error to refuse to instruct that accused should be acquitted if he intended to defraud the bank and not his father. Rose v. State [Ark.] 96 S. W. 996.

4. Where state's evidence was circumstantial and of a negative character, held error to refuse instruction on circumstantial evidence. Lasister v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 67, 94 S. W. 233.

5. Where on trial for uttering forged bill of sale, uttering with intent and knowledge was clearly shown. Gaut v. State [Tex. Cr. App.] 94 S. W. 1034.

6. See Appeal and Review, 7 C. L. 128.

7. See Stare Decisis, 6 C. L. 1510.

8. See Election and Waiver, 7 C. L. 1222.

9. See Constitutional Law, 7 C. L. 691; Foreign Judgments, 7 C. L. 1734.

10. **Must be final judgment** [See 5 C. L. 1502]: Under Hurd's Rev. St. 1903, c. 110, § 88, a judgment of the appellate court purporting to finally dispose of the case is final, though it does not contain a recital that the party in whose favor the judgment was rendered go hence without day or words of like import. Larkins v. Terminal R. Ass'n [Ill.] 77 N. E. 678. Rulings and decisions in the course of an action which is subsequently dismissed without prejudice raise no estoppel. Harrison v. Remington Paper Co. [C. C. A.] 140 F. 385. Findings of fact and an order directing a conveyance "as decreed by this court," held not to constitute a judgment. Oklahoma City v. McMaster, 196 U. S. 529, 49 Law. Ed. 587. An order discharging a prisoner in habeas corpus proceedings is not conclusive as to the wrongfulness of the restraint in a subsequent action for false imprisonment. Losaw v. Smith, 109 App. Div. 754, 96 N. Y. S. 191. Items allowed in unappealed order settling account in probate court cannot be called in question on subsequent accounting. In re Dougherty's Estate [Mont.] 86 P. 38. Nunc pro tunc judgment correcting former judgment and reciting that no judgment on the merits was ever rendered or ordered held not res judicata. Howth v. Greer [Tex. Civ. App.] 14 Tex. Ct. Rep. 61, 90 S. W. 211. Separate judgments upon two of three consolidated appeals from awards in condemnation proceedings held not an adjudication of the third appeal. Mason v. Iowa Cent. R. Co. [Iowa] 109 N. W. 1. Where a wife, in a suit for maintenance, made a mortgagee of her husband a party, but the court in a decree awarding her the husband's interest in the mortgaged property expressly refused to determine the mortgagee's rights, held such decree did not affect the rights of either party in a subsequent suit for foreclosure. Lefmann v. Brill [C. C. A.] 142 F. 44. A decree in a divorce suit that "the complaint herein be dismissed and that the defendant have judgment against the plaintiff for the sum of $5,000 for alimony" cannot be construed to be a final determination of the controversy nor adjudge the future rights of the parties. Fred v. Fred, 67 N. J. Eq. 495, 58 A. 611.

Interlocutory and provisional rulings and

its,[12] in any action or proceeding[13] in a court having jurisdiction,[14] or before an officer

judgments [See 5 C. L. 1503]: Interlocutory orders are not binding. Harrah v. State [Ind. App.] 76 N. E. 443. Decree awarding temporary alimony. Bishop v. Bishop, 124 Ga. 293, 52 S. E. 743. A decree in equity proceedings awarding a preliminary injunction and an accounting for profits and referring the case to a master to ascertain the amount thereof, which is still pending and undetermined before the master, is an interlocutory decree and not binding. Hills & Co. v. Hoover, 142 F. 904. Under Rev. St. 1898, § 2883, providing that an interlocutory judgment may be made disposing of all the issues covered by the finding or decision and reserving further questions until the report, verdict, or subsequent finding, an interlocutory judgment is conclusive, except as to matters reserved. Gates v. Paul, 127 Wis. 628, 107 N. W. 492. A finding of nonresidence on a suggestion and motion to require security for costs in a pending action is not res judicata in another action between the same parties. Brown v. Beckwith, 58 W. Va. 140, 51 S. E. 977.

Verdict or findings without judgment not final. Hart v. Brierley, 189 Mass. 598, 76 N. E. 286; Walden v. Walden, 124 Ga. 145, 52 S. E. 323; Brown v. Bonds, 125 Ga. 833, 54 S. E. 933. Verdict in justice court. Id.

Judgments on demurrer; dismissal and nonsuit [See post this section, "On the merits"]: The sustaining of a demurrer to particular counts does not authorize a final judgment where other counts are at issue and undisposed of. Merker v. Belleville Distillery Co., 122 Ill. App. 326.

Effect of appeal [See 5 C. L. 1503]: Pending an appeal on which the action is triable de novo, the judgment appealed from is no bar. Lackmann v. Klauenberg [Cal. App.] 84 P. 776. An undisposed of appeal does not destroy the res judicata effect of the judgment appealed from. Black v. Thompson, 120 Ill. App. 424.

Appellate judgments [See 5 C. L. 1503]: Unappealed judgment of intermediate appellate court reversing lower court on a different finding of facts held res judicata. Larkins v. Terminal R. Ass'n [Ill.] 77 N. E. 678. Appellate judgment of affirmance by divided court is binding. Cain v. Union Cent. Life Ins. Co. [Ky.] 93 S. W. 622. A simple reversal on appeal without remanding the cause destroys the effect of the judgment as an estoppel. Stone v. Grand Lodge, A. O. U. W., 117 Mo. App. 295, 92 S. W. 1143. A reversal and a finding of facts by an appellate court is res judicata and bars a subsequent action in such cause. Larkins v. Terminal R. Ass'n, 122 Ill. App. 246.

Error does not prevent binding effect [See 5 C. L. 1503]. United States v. Yueng Chu Keng, 140 F. 748; Cain v. Union Cent. Life Ins. Co. [Ky.] 93 S. W. 622; Bank of Kentucky v. Com. [Ky.] 94 S. W. 620. A verdict to the effect that defendant had not cut timber on the land described in the complaint, followed by a judgment of the court thereon, is conclusive, though there was a report in the case made by the defendant that timber had been cut on the land in question. Roper Lumber Co. v. Elizabeth City Lumber Co., 140 N. C. 437, 53 S. E. 134. That decision of Federal land office is contrary to the preponderance of the evidence makes no difference. Love v. Flahive [Mont.] 83 P. 882. Conclusiveness of judgment is not affected because the court was mistaken in the facts or drew a wrong conclusion of law. Rooch v. Curtis, 50 Misc. 122, 100 N. Y. S. 411. Judgment in partition held binding though proceedings were irregular and the shares of the parties determined according to the provisions of an unconstitutional act of the legislature. Staats v. Wilson [Neb.] 107 N. W. 230.

Proceeding in equity instead of at law: A judgment is conclusive, though had the question been raised the bill would have been dismissed because there was an adequate remedy at law. Bill invoking a mandamus from the supreme court. Tolleson v. Wagner, 35 Tex. Civ. App. 577, 80 S. W. 846.

11. In order that a party to a judgment or decree may invoke it as an estoppel against another party thereto, it is essential that there should have been an honest determination of an existing controversy, directly involved between real parties who have an interest in the subject-matter, or a bona fide right asserted by one party and a genuine acknowledgment thereof, or a valid consent thereto, by the other party. Collusive suit. Multnomah County v. First Nat. Bank [Or.] 82 P. 23.

12. Judgment must be on the merits [See 5 C. L. 1503]: Res adjudicata cannot be based upon matter pertaining to remedy only, as the kind of proof required, but must rest upon a determination of the essential merits of the controversy. Barr v. Poor, 7 Ohio C. C. (N. S.) 333. Nunc pro tunc judgment correcting former judgment and reciting that no judgment on the merits was ever rendered or ordered held not res judicata. Howth v. Greer [Tex. Civ. App.] 14 Tex. Ct. Rep. 61, 90 S. W. 211. A decree in a suit to set aside a judgment of partition reciting that the cause was heard on the pleadings, affidavit of plaintiff, the record of decree and report of partition, and argument of counsel and that the court finds that there is no equity in plaintiff's complaint, is binding. Wheeler v. Bennett [Ark.] 95 S. W. 142. The decision of a motion before a justice of the peace to discharge from seizure certain property taken on attachment, on the ground that it is exempt, is not conclusive, and the question of exemption may be tried thereafter in an action of replevin brought by the judgment debtor. Brunson v. Merrill [Okl.] 86 P. 431. Summary order of bankruptcy court refusing to order third person to turn over property to the trustee held not to bar the trustee from suing to recover such property for fraud. Murray v. Joseph, 146 F. 260. An order discharging a prisoner in habeas corpus proceedings is not conclusive as to the wrongfulness of the restraint in a subsequent action for false imprisonment. Losaw v. Smith, 109 App. Div. 754, 96 N. Y. S. 191. Where at the close of plaintiff's case defendant moved for a dismissal, but no ruling was made on such motion, and afterwards a decision on the merits was made and expressed in findings and judgment entered thereon in favor of defendant, it was a trial

or board exercising judicial functions,[15] *are concluded by such adjudication and can-*

on the merits and not a dismissal. Keyes v. Smith, 183 N. Y. 376, 76 N. E. 473.

Dismissal [See 5 C. L. 1503].

No bar by a dismissal not upon the merits: In Municipal Public Improvement Assessment case. Dismissal because of lack of proof held no bar not res judicata to new assessment. Goodrich v. Chicago, 218 Ill. 18, 75 N. E. 805.

Dismissals on the merits: Dismissal after proof held on the merits. Smith v. Gowdy [Ky.] 96 S. W. 566. Final judgment that action was prematurely brought and dismissing bill on the merits is binding. McGown v. Barnum, 182 N. Y. 547, 75 N. E. 155. In an action by legatees against an executor to have certain annuities declared a lien on the real estate of the decedent, other legatees, who were made defendants and failed to answer, were barred by a judgment dismissing the complaint on the merits. Monroe v. Mather-Lovelace, 100 N. Y. S. 27. In a suit to annul a tax sale for irregularities, a judgment dismissing the suit after trial on issue joined by general denial concludes the plaintiff as effectually as if the defendant, in addition to the general denial, had, by way of reconventional demand, asked that his own title be recognized and enforced. Flukker v. De Grange [La.] 41 So. 591. Where in a suit for infringement of a patent the answer denied that complainant was the inventor, and the case was submitted on the bill and answer, and the answer was held good and the bill dismissed, held conclusive determination of the issue and a bar to a subsequent suit for infringement of the same patent between the same parties. Robinson v. American Car & Foundry Co., 142 F. 170.

Voluntary dismissal: Voluntary dismissal before final submission does not operate as a bar. Yates v. Jones Nat. Bank [Neb.] 105 N. W. 287. Dismissal by plaintiff held no bar. Burns' Ann. St. 1901, § 336, construed. Zuelly v. Casper [Ind. App.] 76 N. E. 646. Voluntary dismissal as to one count held no bar to action thereon, the determination thereof not being necessarily deposed of in the determination of the other. Lemon v. Sigourney Sav. Bank [Iowa] 108 N. W. 104.

Dismissal for failure to prosecute. United States Fastener Co. v. Bradley, 143 F. 523.

Dismissal without prejudice. Harrison v. Remington Paper Co. [C. C. A.] 140 F. 385; Robinson v. American Car & Foundry Co., 142 F. 170; National Salt Co. v. Ingraham [C. C. A.] 143 F. 805; Morris v. Linton [Neb.] 104 N. W. 927; Dittmer v. Mierandorf, 129 Iowa, 643, 106 N. W. 158; Brown v. Fisher, 35 Ind. App. 549, 74 N. E. 632. Order striking an action from the docket without trial is no bar. Potter v. Redmon's Guardian [Ky.] 96 S. W. 529. Dismissal without prejudice even after return of verdict in favor of plaintiff held not binding. Bilyeu v. Pilcher, 16 Okl. 228, 83 P. 546. Dismissal without prejudice of a cause of action pending on appeal is no bar. Thornhill v. Hargreaves [Neb.] 107 N. W. 847. A rule to show cause why liquor license should not be revoked is not res judicata where it is dismissed by consent. Arnold's License, 30 Pa. Super. Ct. 93.

Note: In this connection a distinction should be made between the dismissal of an appeal and of a cause of action on appeal. In the former case the judgment of the lower court would appear to operate as a bar. Ed.

General decree of dismissal is presumptively with prejudice and on the merits: Bill dismissed without reserving to the complainant the right to institute other proceedings. Stratton v. Essex County Park Commission, 145 F. 436. A decree "Bill dismissed" is a final decree on the merits. Corbett v. Craven [Mass.] 78 N. E. 748. "Libel dismissed" without the addition of the words "without prejudice" purports to be a final judgment upon the merits. Roach v. Roach, 190 Mass. 253, 76 N. E. 651. The issue being raised by proper pleadings, the presumption may be overcome by parol or other extrinsic evidence. Stratton v. Essex County Park Commission, 145 F. 436.

A nonsuit does not constitute a bar. Smith v. Superior Ct. of Napa County [Cal. App.] 84 P. 54.

Judgment on demurrer [See 5 C. L. 1504]: Judgment on demurrer going to the merits bars. Yates v. Jones Nat. Bank [Neb.] 105 N. W. 287. A judgment on a demurrer which is based on a technical defect of pleading, a lack of jurisdiction and the like, does not operate as a bar. Yates v. Jones Nat. Bank [Neb.] 105 N. W. 287. Judgment sustaining a general demurrer to a petition in an action at law held a bar. Smith v. Smith, 125 Ga. 83, 54 S. E. 73. Sustaining demurrer to bill held final adjudication of what was pleaded or what might properly have been pleaded so as to bar a second suit. Weathersby v. Pearl River Lumber Co. [Miss.] 41 So. 65. A judgment sustaining a demurrer to a reply to an answer setting up the **statute of limitations** in bar to the action, and dismissing the action on plaintiff declining to plead further is on the merits. Cain v. Union Cent. Life Ins. Co. [Ky.] 93 S. W. 622.

A default judgment is generally conclusive. Standard Supply & Equipment Co. v. Merritt, 48 Misc. 498, 96 N. Y. S. 181. A default judgment is conclusive only as to matters properly pleaded in the complaint. Pence v. Long [Ind. App.] 77 N. E. 961.

Consent judgments are generally conclusive (Jones v. Hubbard, 193 Mo. 147, 90 S. W. 1137) as to facts admitted therein (South Penn Oil Co. v. Calf Creek Oil & Gas Co., 140 F. 507). Parties to partition suit consenting to decree held estopped thereby. Suburban Co. v. Turner's Adm'r [Va.] 54 S. E. 29. See 5 C. L. 1504.

13. Condemnation proceedings [See 5 C. L. 1504]. Compton v. Seattle, 38 Wash. 514, 80 P. 757. See Lingle v. Chicago [Ill.] 77 N. E. 924.

Divorce cases and matters collateral thereto. Crockett v. Crockett [Iowa] 106 N. W. 944.

Habeas corpus [See 5 C. L. 1504]: The doctrine applies to habeas corpus proceedings to obtain the custody of a child. Willis v. Willis, 165 Ind. 332, 75 N. E. 655. An order discharging a prisoner in habeas corpus proceedings is not conclusive as to the wrongfulness of the restraint in a subsequent

not again be litigated[16] *between the same parties*[17] *or their privies,*[18] *either before the same or another tribunal,*[19] *until the adjudication has been duly reversed, modified, or otherwise adjudged erroneous.*[20] A judicial determination of the issues in one action is a bar to a subsequent one between the same parties having substantially the same object in view, although the form of the latter and the precise relief sought is different from the former.[21] Consequently, it makes no difference that one suit is

action for false imprisonment. Losaw v. Smith, 109 App. Div. 754, 96 N. Y. S. 191.

Irrigation proceedings: Decree rendered in statutory proceeding under irrigation act. Farmers' Union Ditch Co. v. Rio Grande Canal Co. [Colo.] 86 P. 1042.

Probate proceedings [See 5 C. L. 1504]: Order approving final account of executor and declaring estate settled. Stuckwisch v. Kamman [Ind.] 77 N. E. 349. An order of a probate court on a petition for separate maintenance is a bar to the same extent as a judgment in an action at law. Harrington v. Harrington, 189 Mass. 281, 75 N. E. 632. Unappealed order settling account in probate court held final. In re Dougherty's Estate [Mont.] 86 P. 38.

Search warrant proceeding: While ordinarily a finding in a search warrant proceeding is not conclusive as to the ownership of the property, but, where rival claimants appear, employ counsel and submit the issue of ownership upon testimony adduced pro and con, the finding is conclusive, although strictly speaking they are not parties to the action, and this applies to the person causing the warrant to be issued. Montgomery v. Alden [Iowa] 108 N. W. 234.

14. Harper v. Rankin [C. C. A.] 141 F. 626; Gaar, Scott & Co. v. Taylor, 128 Iowa, 636, 105 N. W. 125. See, also, Disconto Gesellschaft v. Umbreit, 127 Wis. 651, 106 N. W. 821. Partition proceedings. O'Donaghue v. Smith, 184 N. Y. 365, 77 N. E. 621. Judgment for alleged wrongdoer under Laws New Mexico 1903, p. 52, c. 33, § 2, held to bar action in another state by person claiming damages. Buttron v. El Paso N. E. R. Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 339, 93 S. W. 676. Allowance and determination of terms of redemption made by supreme court, pending appeal from a judicial sale, is res judicata in action to recover part of the redemption money. Thesing v. Westergren [Neb.] 106 N. W. 438. It is a general rule that a party to a judicial proceeding in which there has been a final judgment on the merits cannot be compelled by the parties to that action to again litigate any of the matters that were there in issue, if tribunal had jurisdiction of the parties to and the subject-matter of the suit. State v. Corron, 73 N. H. 434, 62 A. 1044.

15. Federal land department. Love v. Flahive [Mont.] 83 P. 882; Parryman v. Cunningham, 16 Okl. 94, 82 P. 822. Board of county commissioners. Brooks v. Morgan, 36 Ind. App. 672, 76 N. E. 331. Commissioners of claims against a decedent's estate. Flynn v. Lorimer's Estate, 141 Mich. 707, 12 Det. Leg. N. 629, 105 N. W. 37. Finding of board of commissioners created by Laws 1903, p. 88, c. 95, § 14, that liquor licensee had violated the provisions of the act, and that his license should be canceled, was conclusive both on him and his surcties on his liquor bond of such fact in an action by the state on the bond. State v. Corron, 73 N. H. 434, 62 A. 1044. A Chinese person charged with being unlawfully within the United States, being discharged by a United States commissioner after a hearing regular in form, cannot be again apprehended and proceeded against upon a complaint filed in the district court of the same district upon substantially the same facts. United States v. Yueng Chu Keng, 140 F. 748. The presence or absence of an appeal in matters constitutionally committed to the determination of a tribunal without a jury is not material upon the character of the tribunal's action as judicial or otherwise. State v. Corron, 73 N. H. 434, 62 A. 1044. The rule of res judicata is not restricted in its application to proceedings according to the course of the common law, but applies to all judicial determinations, whether made in actions or in summary or special proceedings, or by judicial officers in matters properly submitted for their determination. Id.

16. Love v. McGill [Tex. Civ. App.] 91 S. W. 246.

17. Whitesell v. Strickler [Ind.] 78 N. E. 845; Allen v. Ellis, 125 Wis. 565, 104 N. W. 739; Stockton Sav. & Loan Soc. v. Saddlemire [Cal. App.] 86 P. 723; Parkersville Drainage Dist. v. Wattier [Or.] 86 P. 775; State v. Ortiz [Tex.] 14 Tex. Ct. Rep. 883, 90 S. W. 1084. See post, Persons Concluded.

18. See post, Persons Concluded. Parkersville Drainage Dist. v. Wattier [Or.] 86 P. 775; State v. Ortiz [Tex.] 14 Tex. Ct. Rep. 883, 90 S. W. 1084.

19. Yates v. Jones Nat. Bank [Neb.] 105 N. W. 287. Judgment in Federal court conclusive in subsequent action in state court. Thornton v. Natchez [Miss.] 41 So. 498. A judgment in garnishment in one state is a bar to an action by the principal defendant against the garnishee to recover the same debt in the state of the residence of the former. Hadacheck v. Chicago, etc., R. Co. [Neb.] 104 N. W. 878. Matters res judicata will not be reconsidered by the court of claims in cases referred to it under the Tucker Act, unless the case demands the exercise of its equitable powers to correct the judgment. Claimant's citizenship determined by the supreme court. Le More & Co.'s Case, 39 Ct. Cl. 484.

20. Harper v. Rankin [C. C. A.] 141 F. 626; Yates v. Jones Nat. Bank [Neb.] 105 N. W. 287; Weaver v. San Francisco, 146 Cal. 728, 81 P. 119; Smith v. Gowdy [Ky.] 96 S. W. 566. See 5 C. L. 1502, 1504.

21. A judgment that an alleged trespass was committed on the land to which plaintiff claimed title held to bar subsequent suit for subsequent similar alleged trespasses, plaintiff asserting the same title or right. Roper Lumber Co. v. Elizabeth City Lumber Co., 140 N. C. 437, 53 S. E. 134. A former re-

at law and the other in equity.[22] The fact that the adjudication is in a proceeding ancillary and interlocutory to the main action does not affect its binding effect, it being original as between the parties.[23] The order of institution of two actions involving the same issue does not affect the res judicata effect of the one first reaching finality.[24] Where there is a joint and several liability and a compromise is reached and merged in a judgment, the latter is conclusive as to the liability of each.[25] As a general rule an action of ejectment does not bar another action in ejectment between the same parties in respect to the same title and same tract of land,[26] nor does a refusal of a patent bar a suit in equity to obtain the same.[27] In determining the effect of a decree of a Federal court involving constitutional rights, the principles of res judicata as settled by the supreme court of the United States must be applied, though they differ from those of the local state courts.[28]

Persons concluded.[29]—All adversary parties[30] to the action, or persons in privity with them,[31] are bound by a final judgment on the merits rendered therein, and the rule has been extended so as to reach persons who are responsible for the acts of others.[32] The term "privity" suggests mutual succession or relation to the same property or property right.[33] It creates no privity between the parties that, as liti-

covery in trover with satisfaction is a bar to an action of detinue between the same parties for the same property. Syson Timber Co. v. Dickens [Ala.] 40 So. 753.

22. Smith v. Smith, 125 Ga. 83, 54 S. E. 73. Where a bill was filed to enjoin the collection of a mortgage held by defendant, and it was alleged by a demurrer considered as an answer that defendant had obtained judgment in an action at law on the bond accompanying the mortgage, in which action the same facts were set up as in the bill, held proper to dismiss the bill. Megahey v. Farmers' & Mechanics' Sav. Fund & Loan Ass'n [Pa.] 64 A. 546.

23. Maritime lien claimants intervening in creditor's suit. The J. R. Langdon, 145 F. 64.

24. Black v. Thompson, 120 Ill. App. 424.

25. Huntington v. Newport News & M. V. Co. [Conn.] 61 A. 59.

26. Crowl v. Crowl, 195 Mo. 338, 92 S. W. 890; Weigel v. Green [Ill.] 77 N. E. 574.

27. The decision of the court of appeals of the District of Columbia on an appeal from the commissioner of patents taken under Act Feb. 9, 1893, c. 74, 27 Stat. 436, does not preclude the maintenance of a suit in equity by one of the parties against the other to obtain a patent, under Rev. St. § 4915. Dover v. Greenwood, 143 F. 136.

28. Gunter v. Atlantic Coast Line R. Co., 200 U. S. 273, 50 Law. Ed. —.

29. See 5 C. L. 1505.

30. Must be adversary parties. Comstock v. Keating, 115 Mo. App. 372, 91 S. W. 416; Gouwens v. Gouwens [Ill.] 78 N. E. 597. It is immaterial that the parties are formally arrayed on the same side in a suit if their interests are in fact adverse. Georgia R. & Banking Co. v. Wright, 124 Ga. 596, 53 S. E. 251. Suit against notary and sureties; held not adversary parties. Comstock v. Keating, 115 Mo. App. 372, 91 S. W. 416. Judgment against codefendants as partners held not res judicata on question of partnership as between the defendants. Gutfreund v. Standard Life & Acc. Ins. Co., 98 N. Y. S. 699. Judgment, in an action for negligence, against several codefendants as partners held not binding on question of ownership of horse and vehicle causing the injury as between one of the defendants and an indemnitor. Id. Where two or more defendants make issues with the plaintiff, a judgment determining those issues in favor of the defendants settles between them no fact that might have been but was not put in issue by a proper pleading. Whitesell v. Strickler [Ind.] 78 N. E. 845. Judgment in a bastardy proceeding instituted at the instance of the putative father, without the knowledge of the mother or the prosecuting attorney and the dismissal of which by the mother was fraudulently obtained, held not to bar another proceeding. Gooding v. State [Ind. App.] 78 N. E. 257. Where in a foreclosure suit lien claimants were made codefendants and answered claiming the right to any surplus arising on the foreclosure sale, held decree in foreclosure establishing such liens was not res judicata as between such codefendants. Gouwens v. Gouwens [Ill.] 78 N. E. 597. Failure of vendee of land to assert his right to rescind in an action brought by third persons against the vendee and his vendor, to establish the title of such third persons to such land, held not to bar subsequent action by vendee against his vendor for rescission. Olschewske v. King [Tex. Civ. App.] 96 S. W. 665. An answer directed against the complainant, but which seeks affirmative relief against a codefendant, raises no issue as to the latter where it is not served on him and he files no demurrer, answer, or reply thereto, and a part of a judgment granting such affirmative relief is not res judicata against such codefendant. Gulling v. Washoe County Bank [Nev.] 82 P. 800.

31. See ante this section. As to who are privies, see infra, this section.

32. Judgment in favor of lessee railroad held to bar action against lessor. Muntz v. Algiers & G. St. R. Co., 116 La. 236, 40 So. 688.

33. Williams v. Husky, 192 Mo. 533, 90 S. W. 425. A party is in privity with an-

gants in two different suits, they happen to be interested in proving or disproving

other when, in fact, he does claim under that other, although he may have some other undisclosed claim. Minnesota Debenture Co. v. Johnson, 96 Minn. 91, 104 N. W. 1149, 107 N. W. 740. One suing as assignee of different persons stands in their places, and a determination in one action is not res judicata in the other. Nathan v. Uhlmann, 101 App. Div. 388, 92 N. Y. S. 13. A judgment recovered by plaintiffs' intestate as an assignee of claims against an insolvent bank for accepting deposits after knowledge of its insolvency is inadmissible in a similar action by plaintiff's intestate on assignments from other depositors. Id. Those who claim property under one who was a party to a judgment affecting his right to, or in, such property are privies and bound by such judgment. City of Carthage v. Weesner, 116 Mo. App. 118, 92 S. W. 178. Holders of special tax bills, who assigned them as security to a bank and obtained them by reassignment after a judgment against the bank cancelling the bills, were bound by the judgment. Id.

Illustrations. Assignees: Where the estate of a deceased administrator is bound by a judgment in an action by the administrator de bonis non against the sureties on his bond, the assignee of the deceased administrator's share in the intestate's estate is also bound. In re McCauley's Estate, 49 Misc. 209, 99 N. Y. S. 238.

Corporation and stockholders: Stockholders held in privity with corporation in a suit brought against the latter alleging its insolvency and asking for a receiver. Francis v. Hazlett [Mass.] 78 N. E. 405. A judgment against a corporation binds the stockholders so far as the right of the creditor to enforce his claim against the corporate assets is concerned. Wheatley v. Glover, 125 Ga. 710, 54 S. E. 626. Such judgment is likewise conclusive upon a stockholder who in a subsequent suit is sought to be held liable for the amount of an unpaid stock subscription. Id.

Grantor and grantee held in privity with each other. Williams v. Husky, 192 Mo. 533, 90 S. W. 425. Where a grantee of the mortgagor is not made a party to the foreclosure suit, a judgment therein establishing the existence and validity of the lien is not binding upon the grantee in a second foreclosure action. Stough v. Badger Lumber Co., 70 Kan. 713, 79 P. 737.

Joint debtors [See 5 C. L. 1506]: Under Code Civ. Proc. § 1933, a judgment against joint debtors is, as against a defendant not summoned, conclusive evidence of the extent of plaintiff's demand. Hofferberth v. Nash, 98 N. Y. S. 684. A judgment against one of several joint makers of a note is not binding upon the other joint makers who are not parties to the action. Davis v. Schmidt, 126 Wis. 461, 106 N. W. 119.

Landlord and tenant held in privity with each other. Minnesota Debenture Co. v. Johnson, 96 Minn. 91, 104 N. W. 1149, 107 N. W. 740.

Legatee and personal representatives [See 5 C. L. 1506]: Where, in an action for the construction of a will, children of a certain legatee were made parties and the judgment determined that on the death of such person the fund in question would go to her issue living at her death, in a subsequent suit involving the same fund and between the same parties, it was not necessary that two of the children who had died without issue prior to the commencement of the action be made parties by their representative. Jewett v. Schmidt, 108 App. Div. 322, 95 N. Y. S. 631.

Life tenant and remaindermen: A decree reforming a deed so as to give the life tenant the estate in fee is not binding upon contingent remaindermen not parties thereto, including unborn issue. Downey v. Seib, 102 App. Div. 317, 92 N. Y. S. 431.

Principal and agent: Agent prosecuting or defending under the authority or in the right of his principal, the latter is bound. Jacob v. Oyster Bay, 109 App. Div. 630, 96 N. Y. S. 626.

Principal and sureties: Surety on recognizance. McChristal v. Clisbee, 190 Mass. 120, 76 N. E. 511. Sureties on a bond to comply with a statute or order of court are estopped in the same way and to the same extent as the principal obligor by any judgment or decree that estops him to deny that he failed to comply with the condition of the bond. State v. Corron, 73 N. H. 434, 62 A. 1044.

Promissory notes: Subsequent holder of a note and the original payee. Payor sought to question validity of claim for which note was given, a matter which had been previously decided in favor of the original payee in a suit by him against the payor. Camden Nat. Bank v. Fries-Breslin Co., 214 Pa. 395, 63 A. 1022. Where a vendee executed a note payable to a third person, an attachment proceeding in which it is attempted to show that the payee had no interest therein and to which he was not made a party does not bar the assignee of the payee from maintaining an action on such note. Young v. Steim, 29 Pa. Super. Ct. 205. A decree of a court vested with jurisdiction over the subject-matter and the parties in interest, fixing the status of a series of notes secured by a single mortgage, is binding on one who, in a subsequent action, attempts to avoid the effect of the decree, where it appears that the transfer of the note involved in the later proceeding was fraudulent as against the holder of the other notes. Preston v. Morsman [Neb.] 106 N. W. 320.

Purchasers at judicial sale: A judgment that a transaction was not a mortgage but a sale and an option to repurchase is conclusive against a purchaser of land under execution against the grantor. Jones v. Hubbard, 193 Mo. 147, 90 S. W. 1137.

Purchaser pendente lite. See Corbett v. Craven [Mass.] 78 N. E. 748. A purchaser pendente lite is not required to be made, by amendment, a party to the record in order to be bound by the findings of facts or the judgments or decrees in a cause. South Penn Oil Co. v. Calf Creek Oil & Gas Co., 140 F. 507.

Stockholders inter se: The decree of a foreign court as to the fact that an assessment of members of an insolvent mutual in-

the same facts.[34] While generally, but not always,[35] only parties or privies to parties to the action are bound by the judgments therein,[36] still it is not necessary that one

surance company is necessary, as to the amount required to be raised and as to the pro rata share of each policy, is conclusive on members of the company, but one may still show that he is not a policy holder or has a release or offset. Swing v. Consolidated Fruit Jar Co. [N. J. Law] 63 A. 899.

Trustee and beneficiary: Beneficiaries not parties to proceedings by trustee held not bound thereby. Sawyer v. First Nat. Bank [Tex. Civ. App.] 14 Tex. Ct. Rep. 701, 93 S. W. 151. Decree against trustee held to bind beneficiary as to his rights and interests in trust property. National Salt Co. v. Ingraham [C. C. A.] 143 F. 805.

Vendor and vendee in privity. Wm. Cameron & Co. v. Jones [Tex. Civ. App.] 90 S. W. 1129.

34. Duffee v. Boston El. R. Co., 191 Mass. 563, 77 N. E. 1036. A judgment in favor of defendant in an action by a married woman for injuries alleged to have been caused by defendant's negligence held not to bar suit by husband of plaintiff in former action for damages for care of wife and loss of consortium, though based on the same facts. Id.

35. Under the statutory provision for **reassessments,** any person holding warrants for **municipal improvements** may plead any former adjudication holding assessments made to pay for the work on account of which warrants were issued invalid, such right not being confined to the parties to the particular action, their privies, or successors in interest. Waldron v. Snohomish, 41 Wash. 566, 83 P. 1106. In Minnesota in the absence of mistake, fraud, or collusion, a judgment declaring assessment proceedings invalid is binding on a city though the city was not a party to the action. The rule is the same whether a case arises under a city charter or general statutes. Otis v. St. Paul, 94 Minn. 57, 101 N. W. 1066, 1134.

36. Duffee v. Boston El. R. Co., 191 Mass. 563, 77 N. E. 1036; Calkins v. First Nat. Bank [S. D.] 107 N. W. 675; Millhiser & Co. v. Leatherwood, 140 N. C. 231, 52 S. E. 782; Young v. Steim, 29 Pa. Super. Ct. 205. Hence there is no taking of property without due process of law so as to raise a Federal question. Iron Cliffs Co. v. Negaunee Iron Co., 197 U. S. 463, 49 Law. Ed. 836. Sale of remainder interest in partition. Suburban Co. v. Turner's Adm'r [Va.] 54 S. E. 29. Recital in a judgment as to plaintiff's homestead rights is not binding upon one not a party to the action. Parlin & Orendorff Co. v. Vawter [Tex. Civ. App.] 13 Tex. Ct. Rep. 47, 88 S. W. 407. Order in receivership proceedings determining stockholders' liability held not conclusive against a defendant who did not serve and did not appear. Converse v. Aetna Nat. Bank [Conn.] 64 A. 341. Order passing the accounts of receivers of a bankrupt estate in which they have credited themselves with property surrendered to third persons claiming it held not an adjudication of such persons' rights to the property. Whitney v. Wenman, 140 F. 959. Bona fide purchasers of land are not bound by a judgment setting aside a release of a deed of trust thereon rendered in an action to which they are not parties. Bristow v. Thackston, 187 Mo. 332, 86 S. W. 94. Where vendor of property took a trust deed running to a third party, held a judgment in a suit by a subsequent mortgagee of the vendee, in which suit the vendor intervened, was not binding on the first mortgagee. French v. Rogillio [Miss.] 40 So. 68. A dismissal of a rule to show cause why a liquor license should not be revoked is not res judicata in a rule obtained by different parties. Arnold's License, 30 Pa. Super. Ct. 93. Where an action purporting to be brought on behalf of a minor by her mother as next friend is not in fact brought by the mother, or is brought in her name but without her knowledge or consent, neither she nor the minor is bound by the judgment rendered therein. International & G. N. R. Co. v. Brisenio [Tex. Civ. App.] 14 Tex. Ct. Rep. 961, 92 S. W. 998. In an action to foreclose vendor's lien notes, wherein defendant pleaded failure of title, the fact that a judgment by default had been rendered against defendant for the possession of the land by a third person did not affect the rights of plaintiff who was not a party to that action. Bradbury v. Dumond [Ark.] 96 S. W. 390. Under Rev. St. 1898, § 3198, making judgments a lien upon the real estate of the judgment debtor, a purchaser at execution sale held not bound by a decree canceling the deed, under which the execution defendant held title, after the rendition of the judgment under which the sale was had. Larsen v. Gasberg [Utah] 86 P. 412. A county not a party to a suit, adjudging that a bank was liable for taxes only under the Hewitt act (Gen. St. 1888, c. 92), held entitled to recover from the bank taxes authorized by the subsequent revenue act of 1892 (Ky. St. 1903), § 4092. Bank of Kentucky v. Com. [Ky.] 94 S. W. 620. Where husband had deeded property to wife, held she was not bound by a judgment rendered in a suit to which he was a party. Milam v. Coley [Ala.] 39 So. 511. Owner of land not being a party to a suit to enforce taxes against the land, held not bound by judgment. Wood v. Smith, 193 Mo. 484, 91 S. W. 85. Former adjudication held not admissible against all the defendants, one of them not having been a party to the other action. Ryan v. Young [Ala.] 41 So. 954. Second mortgagee held not affected by judgment in detinue by first mortgagee, he not being a party to the action. Daniel Bros. v. Jordan [Ala.] 40 So. 940. In an action against city for failing to guard excavation in street, held city could not take advantage of judgment in favor of a contractor in suit brought against him. Fleming v. Anderson [Ind. App.] 76 N. E. 266. Decision of the commissioner of the general land office cancelling homestead entry held not conclusive against defeated occupant's right against subsequent homestead applicant who was not a party to the former proceedings. Martinson v. Marzolf [N. D.] 108 N. W. 801. Where, in an action to establish a lot corner, the then owner of adjoining land, sub-

be a party to the record in order to be bound; it is sufficient if he has an interest and participates in the action,[37] or has negligently failed to become a party,[38] or where he introduces the record and judgment in evidence in a subsequent case to which he is a party,[39] or where the judgment constitutes a link in a chain of title,[40] or where the proceeding is in rem,[41] though in the latter case the judgment does not extend to the personal liability.[42] These last two cases, however, may be related to the doctrine of privity. While a judgment is not generally binding on third persons, yet its use as evidence may shift the burden of proof.[43] It is not necessary that all the parties to the first action are parties to the second.[44] In the doctrine of res judicata, privity extends no further than the particular subject-matter or property, the sta-

sequently conveyed to plaintiff, was not served nor made a party to the proceedings, the judgment was not conclusive against plaintiff. Dittmer v. Mierandorf, 129 Iowa, 643, 106 N. W. 158. In an action involving the validity of Laws 1905, p. 2092, c. 737; Laws 1906, c. 125, and Laws 1905, p. 2091, c. 736, prescribing the rate to be charged consumers for gas, the fact that the City of New York was a party held not to render judgment binding on private consumers. Richmond v. Consolidated Gas Co., 114 App. Div. 216, 100 N. Y. S. 81. Also in such action members of state gas commission held not to represent private consumers. Id. A party to an action in a state court to restrain a gas company from cutting off gas connections and charging a higher rate than that prescribed by statute held not a party to a bill by the company in a Federal court seeking among other things to restrain the district attorney and attorney general from enforcing a statutory penalty against the company. Id. Subsequent purchaser in possession not being made a party to a suit to foreclose a vendor's lien is not bound by judgment therein. McKinley v. Wilson [Tex. Civ. App.] 96 S. W. 112.

37. So held as to one promoting action to recover statutory penalty for obstructing a highway, though state's attorney was called in but did not interfere in the prosecution of the suit. Kolpack v. Kolpack [Wis.] 107 N. W. 457. Where a number of insurance companies which had issued to plaintiffs concurrent policies covering the same property and identical in form, united in making a common defense to suits brought against them severally, held all were bound by the judgment. Greenwich Ins. Co. v. Friedman Co. [C. C. A.] 142 F. 944. Where a foreign executor of a deceased administrator had notice of an action by the administrator de bonis non against the surety on the deceased administrator's bond, and he selects the counsel to represent the surety, the estate is bound by the judgment against the surety for money converted. In re McCauley's Estate, 49 Misc. 209, 99 N. Y. S. 238.

38. Landlord concluded by judgment in suit against tenant, he being liable over to the latter and being notified of the suit. Kosower v. Sandler, 49 Misc. 443, 98 N. Y. S. 65, rvg. 96 N. Y. S. 734. Where grantee of land agreed to keep fence in repair and grantor was sued and damages recovered for injuries resulting in neglect to repair fence, held grantee was bound, he having been given notice of the suit and requested to defend. Hubbard v. Gould [N. H.] 64 A. 668. Suit to quiet title brought by grantee of tax deed. The defendant notified his grantor to defend but latter failed to do so. Judgment was rendered for plaintiff and defendant sued his grantor for breach of covenant in deed. Held former judgment was conclusive on the defendant in the second action that the purchase at tax sale was for the benefit of his grantee. Patterson v. Cappon [Wis.] 109 N. W. 103.

39. See 5 C. L. 1507, n. 58.

40. See 5 C. L. 1507, n. 59.

41. Decree of distribution in probate proceedings. Goodrich v. Ferris, 145 F. 844. Order in probate proceedings setting aside homestead to widow held binding on minor heirs, though not represented by guardian. In re Pearce [Tex. Civ. App.] 96 S. W. 1094. Judgment foreclosing state's lien for delinquent taxes is binding on all persons who were parties and served with citation, whether they were named in the judgment or not. Ball v. Carroll [Tex. Civ. App.] 15 Tex. Ct. Rep. 422, 92 S. W. 1023. Adjudication in involuntary bankruptcy proceedings is an adjudication in rem. Whitney v. Wenman, 140 F. 959. Ordinary proceedings in bankruptcy are not proceedings in rem. Proceeding to pass receivers' accounts. Id.

42. Judgment foreclosing second mortgage given to secure sureties on purchase-money note held not to bar an action on the note to establish the personal liability of the maker, there being no recital in the decree nor showing otherwise that in the foreclosure suit personal service was had on the maker. Hunter v. Porter [Iowa] 109 N. W. 283.

43. In an action to set aside a judgment based on the findings of a referee alleged to have been insane at the time of signing an adjudication of lunacy entered on the same day is not conclusive but changes the burden of proof. Schoenberg & Co. v. Ulman, 99 N. Y. S. 650.

44. A question of fact decided by a court of competent jurisdiction is res judicata in a subsequent action, as between parties who had the right to prosecute and defend, examine and cross-examine, even though other parties, or the same parties in other capacities, may be involved. Rohn v. Rohn, 117 Ill. App. 512. A judgment in an action by an administratrix against an executor de son tort for loss to the estate due to his negligence is res adjudicata in a subsequent action in equity by the executor de son tort to enjoin its enforcement, notwithstanding the former suit was by the executrix in her

tus of which was determined by the judgment as to that particular thing.[45] The mere personal effect of the judgment is absolutely confined to the parties to the litigation.[46] One who openly conducts the defense for a party will be bound by the decree.[47] So also, where an action is brought in the name of one person at the instance of another, the judgment will conclude the latter.[48] A judgment against one primarily liable is not conclusive against one secondarily liable, unless the latter had notice of the suit.[49] When such person had no notice of the suit the judgment, though not conclusive, is prima facie evidence of liability.[50] A judgment of a probate court against a personal representative is binding so far as the personal estate of the deceased is concerned and also lands not taken possession of by the devisees,[51] but it is not binding upon the devisees nor upon lands in their exclusive possession.[52] though even against the latter such judgment is prima facie evidence.[53] A municipality or other public body may be bound by suit in which it is represented by its proper officers.[54] Minors and persons non compos mentis will be bound if properly represented by guardian.[55] A corporation knowingly allowing an attorney to prosecute a suit in its name is bound by the final decree therein, although the attorney was not specifically employed by it.[56] A party to the former suit cannot defeat the binding effect of the judgment therein because of the clerk's failure to file his answer therein.[57] A judgment may be admissible in evidence even though suits are not between the same parties.[58]

official capacity, and the chancery suit is prosecuted against her individually and as executrix. Id.

45. Allen v. Ellis, 125 Wis. 565, 104 N. W. 739.

46. Allen v. Ellis, 125 Wis. 565, 104 N. W. 739. The assignee of a judgment, under an assignment made after the commencement and before the termination of a garnishment action by the judgment creditor, is a stranger to the garnishment action, and the judgment therein rendered is not conclusive in his favor. Id.

47. One who instigates another to do a wrongful act, and, when the wrongdoer is sued, takes upon himself and conducts the defense of the case, is concluded from again litigating with the plaintiff in that action, the issues there decided. Suit against corporation for infringement of trade mark held conclusive on executive officers when sued as individuals. Saxlehner v. Eisner, 140 F. 938. The holders of the legal title to land defending actions of ejectment brought against their tenants are bound by the judgment, and writ of ouster may issue against them. Crane v. Cameron, 71 Kan. 880, 81 P. 480.

48. City of Carthage v. Weesner, 116 Mo. App. 118, 92 S. W. 178. Where tax bills were assigned as collateral to a bank, which was to collect them and threatened suit for that purpose, a judgment against the bank cancelling the bills was binding on the assignors. Id.

49. Wheatley v. Glover, 125 Ga. 710, 54 S. E. 626. When the charter of a corporation provides that the stockholders shall be individually liable for the debts of the corporation, or a given class of debts, a judgment against the corporation in favor of a creditor is not conclusive against a stockholder in a proceeding to enforce the individual liability under the charter, when the stockholder had no notice of the suit nor opportunity to defend. Id.

50. Wheatley v. Glover, 125 Ga. 710, 54 S. E. 626.

51, 52. Brock v. Kirkpatrick, 72 S. C. 491, 52 S. E. 592.

53. Where a judgment was obtained on a note against an executor and was acknowledged by him in his accounting on his final discharge allowed as a claim against the estate and enrolled in the probate court as a judgment, on which judgment execution issued, it is binding on the estate and the creditor, and is prima facie evidence in a suit by a creditor to subject lands of devisees to the payment of the debt without the production of the note. Brock v. Kirkpatrick, 72 S. C. 491, 52 S. E. 592.

54. Judgment upon executive officers of city as such held binding on city. Lighton v. Syracuse, 98 N. Y. S. 792. Mayor, clerk, and corporation counsel appearing in suit, held city was bound by judgment. Id., 48 Misc. 134, 96 N. Y. S. 692. Suit in which county treasurer and district attorney participated as such held binding in subsequent suit against county superintendent as such. Davidson v. Baldwin [Cal. App.] 84 P. 238. Held, under the facts of the case and the statutes requiring the attorney general to defend actions to enjoin county treasurers from collecting state taxes, that the state had voluntarily become a party and was bound by the decree. Gunter v. Atlantic Coast Line R. Co., 200 U. S. 273, 50 Law. Ed. —. While a judgment in a suit by a city solicitor may not be a technical estoppel as against the city, it may be given practically that effect if the same matters are in litigation with the same adversary. McGonigale v. Defiance, 140 F. 621.

55. Infant parties represented by guardians ad litem are bound by the judgment. Partition proceedings. O'Donaghue v. Smith,

§ 2. *Adjudication as a bar of causes of action or defense.*[59]—*As a general proposition, it is stated that, to constitute a prior adjudication a complete bar to a cause of action or defense, there must occur identity of parties.*[60] *identity of subject-matter,*[61] *and identity of issues,*[62] *or the cause of action as it has been termed.*[63]

184 N. Y. 365, 77 N. E. 621. When minors are plaintiffs and suit is brought and prosecuted in good faith for their benefit, they are bound the same as adults would be. McCreary v. Creighton [Neb.] 107 N. W. 240.

56. Thompson v. Hemenway, 218 Ill. 46, 75 N. E. 791.

57. McLellan v. Rosser, 116 La. 801, 41 So. 97.

58. Action to recover amount due devisee. Judgment of probate court adjudging amount due held admissible. Carlisle v. Farrow [S. C.] 54 S. E. 766. Where in a suit for the recovery of realty the plaintiff relies on a receiver's deed in his chain of title, the fact that the defendant in the case on trial was a party to the action, which resulted in the decree under which the receiver sold the property, affords no ground for excluding the deed from evidence. Phillips v. Collinsville Granite Co., 123 Ga. 830, 51 S. E. 666. The record in the case may be introduced in cases wherein strangers to the first action are parties for the purpose of establishing that a certain state of facts exists as between the parties to the former action. Calkins v. First Nat. Bank [S. D.] 107 N. W. 675.

59. See 5 C. L. 1508.

60. Distributee of estate held a party to proceedings by other distributees to surcharge the executor, the ultimate liability to rest on the distributee first mentioned, and entitled to invoke the doctrine of res judicata against a proceeding brought against him by other distributees in the name of the executor and trustee. In re Alexander's Estate, 214 Pa. 369, 63 A. 799. See ante, § 1A, Persons Concluded.

61. Gering v. School Dist. No. 28, Cass County [Neb.] 107 N. W. 250. Suit to quiet title to part of land embraced in patent held not to bar suit to quiet title to other land embraced in same patent. Bird v. Winyer [Wash.] 87 P. 259. Recovery of damages for delay in shipping cattle held not to bar suit for damages caused by negligence in transportation. Texas & P. R. Co. v. Scoggin [Tex. Civ. App.] 15 Tex. Ct. Rep. 469, 95 S. W. 651. Recovery of damages for refusal of grantee of land to put in crossings held not to bar recovery by grantor on account of the grantee thereafter preventing the grantor putting in a crossing. Wilson v. Illinois Cent. R. Co. [Ky.] 92 S. W. 602. Suit to recover delinquent taxes collected by a city held not to bar subsequent suit to collect taxes for other years. Hubert v. New Orleans, 116 La. 507, 40 So. 853. A reduction in the amount of an assessment levied on stock by an irrigation company held in effect a new assessment, not affected by a judgment holding a previous assessment invalid. Grand Valley Irr. Co. v. Fruita Imp. Co. [Colo.] 86 P. 324. A suit in equity to reform a contract may be maintained after an unsuccessful attempt at law to recover on the unreformed contract. Grand View Bldg. Ass'n v. Northern Assur. Co. [Neb.] 102 N. W. 246. Suit by a widow to set aside election to repudiate husband's will for fraud held not barred by the fact that, on proceedings on a petition of the administrator to sell an undivided two-thirds of the realty of the estate, she admitted her election and raised no issue between herself and codefendants. Whitesell v. Strickler [Ind.] 78 N. E. 845. The denial by a board of county commissioners of an application to have a way established by user recorded as a public highway is no bar to an action to quiet title between the owner of the land on which such way was in part located and persons owning other lands contiguous thereto, to determine whether there had been an acceptance and dedication of the way. McClaskey v. McDaniel [Ind. App.] 74 N. E. 1023.

62. People v. Cohen, 219 Ill. 200, 76 N. E. 388; McCreary v. Creighton [Neb.] 107 N. W. 240; Lemon v. Sigourney Sav. Bank [Iowa] 108 N. W. 104. In an **action against a bank for a deposit,** a judgment rendered against the depositor on the ground that the certificate had been paid in notes of third persons payable to the depositor is not conclusive against the depositor in an action against the bank for the proceeds of the notes collected by it. Id. Judgment for plaintiff in an **action on a coal lease,** brought on the theory that all the culm belonged to plaintiff, held not to bar subsequent action by plaintiff to recover royalties on further coal taken from the culm. Genet v. Delaware & H. Canal Co., 109 App. Div. 733, 96 N. Y. S. 406, 410. Judgment that party did not have a **fee in the land** held not to bar suit in which he claimed an **easement.** In re Water Front of New York, 98 N. Y. S. 1063. Overruling of motion to set aside judgment for **want of authority** in attorneys to stipulate held not to bar motion to set aside judgment for **fraud.** Estudillo v. Security Loan & Trust Co. [Cal.] 87 P. 19. Findings in a decree **foreclosing a note and trust deed** are res judicata in an action at law upon the note raising the same issues and between the same parties. Black v. Thompson, 120 Ill. App. 424. In a proceeding to **condemn land** for an irrigating ditch, a judgment rendered in litigation involving plaintiff's **right to construct** a ditch without having first secured the right of way was not conclusive against plaintiff. Schneider v. Schneider [Colo.] 86 P. 347. Denial of **writ of mandamus** held not a bar to a proceeding for a writ founded upon a different transaction. Bushey v. Hardin [Kan.] 86 P. 146. Suit to impress a **resulting trust** on property held not to bar action to **recover money paid** defendant. Kraft v. Moore [Ark.] 89 S. W. 51. Action by vendee in **conditional sale** to recover money paid, under Laws 1897, p. 541, c. 418, § 116, as amended, held not barred because retaking was accomplished by an action by the vendor in which a default judgment was entered. Roach v. Curtis, 50 Misc. 122, 100

Identity of parties.[64]—Identity of names is presumptive, but not conclusive, evidence of identity of persons.[65]

Identity of cause of action.[66]—The test of the identity of causes of action is the identity of the facts essential to their maintenance.[67] That the relief sought in the second action is slightly different does not affect the binding effect of the first adjudication.[68]

Privies of a party.[69]

Scope of adjudication.[70]—If the parties and issues be identical, the adjudication is binding not only as to all matters actually litigated,[71] but as to everything which

N. Y. S. 411. A judgment that an alleged **trespass** was not committed on the land to which plaintiff claimed title held to bar subsequent suit for subsequent similar alleged trespasses, plaintiff asserting the same title and right. Roper Lumber Co. v. Elizabeth City Lumber Co., 140 N. C. 437, 53 S. E. 134. An adjudication of the **right to an accounting** made at a time when the right was identical with that existing at the time of filing a second petition is res judicata. First bill filed pending bankruptcy proceeding but argued and determined after the discharge of the trustee. Laing v. Fish, 119 Ill. App. 645. Judgment dismissing an action brought by heirs of a decedent to **partition land** which had been left by the decedent, but which had been sold in a settlement action, held not to bar suit to have judgment in settlement action set aside for **fraud.** May v. Vaughn [Ky.] 91 S. W. 273. Where grantee of part of a tract of land agreed to erect and keep partition fence sufficient to prevent the escape of domestic animals, and failed to do so and judgment was recovered against the grantor for damages resulting from such neglect, and the grantee was requested to defend such suit but failed to do so, held judgment against grantor did not authorize judgment against the grantee in a suit by the grantor, it being incumbent on the grantor to show that the injury was not due to any fault on his part. Hubbard v. Gould [N. H.] 64 A. 668.

63. Wilson Co. v. Farnham & Co. [Minn.] 106 N. W. 342. A provision in a **second contract** to the effect that the same should not be construed as a **settlement** for any **claim for damages** growing out of a prior contract held to constitute independent causes of action. Id. Suit to **enjoin carrying out of illegal contract** held not same cause of action as suit against defendant for wrongfully selling plaintiff's stock for nonpayment of an illegal assessment. Grand Valley Irr. Co. v. Fruita Imp. Co. [Colo.] 86 P. 324. An **action to recover** a sum of money alleged to be due **under a contract,** and an **action for the wrongful termination** of such contract are upon different demands. Delaware, etc., R. Co. v. Kutter [C. C. A.] 147 F. 51. Suit in ejectment resting on a **trust ex maleficio** not barred by former suit to have a **deed declared a mortgage.** Jackson v. Thompson [Pa.] 64 A. 421. Suit for **one year's interest** held not to bar suit on note. Davis v. Schmidt, 126 Wis. 461, 106 N. W. 149. A judgment in an **action under the Dram-Shop Act** by a widow for the death of her husband is not res judicata in a similar action by the minor children. Strong v. People, 119 Ill. App. 79. A judgment for defendant upon **particular counts** does not bar a recovery by plaintiff on the remaining ones. Muren Coal & Ice Co. v. Howell, 119 Ill. App. 209. A suit to **enjoin the collection of taxes for one year** is no bar to a suit to enjoin similar taxes for another year. Taxes for each year constitute a separate cause of action. Georgia R. & Banking Co. v. Wright, 124 Ga. 596, 53 S. E. 251. Judgment in suit to **quiet title** in which complainant claimed under his grantor by virtue of certain deeds held not to bar suit to quiet title, complainant claiming directly from such deeds. Scottish-American Mortg. Co. v. Bunckley [Miss.] 41 So. 502. A judgment establishing plaintiff's **status as a stockholder** held not res judicata of plaintiff's right to **recover** for the benefit of a corporation for **alleged losses** sustained by the mismanagement of the corporation's officers. Hingston v. Montgomery [Mo. App.] 97 S. W. 202. A cause of action to **enforce a stockholder's double liability** by motion in the event of an unsatisfied execution on a judgment against the corporation is not the same as one to enforce such liability because the corporation has suspended business for a year. Gen. St. Kan. 1889, §§ 1192, 1200, 1204, construed. Harrison v. Remington Paper Co. [C. C. A.] 140 F. 385. A final judgment in a former **action to recover the earnest money** paid, pursuant to a contract for the purchase of land, is not a bar to a subsequent action between the same parties to **recover damages in deceit for fraudulently** inducing the plaintiff to enter into that contract and for subsequent fraudulent representations in connection with its title. Woodman v. Blue Grass Land Co. [Minn.] 107 N. W. 1052.

64. See 5 C. L. 1510.

65. Hofferberth v. Nash, 98 N. Y. S. 684.

66. See 5 C. L. 1510.

67. Harrison v. Remington Paper Co. [C. C. A.] 140 F. 385.

68. McGowan v. Barnum, 182 N. Y. 547, 75 N. E. 155.

69. See ante § 1 A, Persons Concluded. See, also, 3 C. L. 1481.

70. See 5 C. L. 1510.

71. Hubbard v. Gould [N. H.] 64 A. 668; Roach v. Roach, 190 Mass. 253, 76 N. E. 651; Cotter v. Boston & N. St. R. Co., 190 Mass. 302, 76 N. E. 910; Lingle v. Chicago [Ill.] 77 N. E. 924; Roberts v. Leutzke [Ind. App.] 78 N. E. 635; Corbett v. Craven [Mass.] 78 N. E. 748; Lowe v. Prospect Hill Cemetery Ass'n [Neb.] 106 N. W. 429; Thornton v. Natchez [Miss.] 41 So. 498; Lighton v. Syra-

might have been litigated under the issues as made[72] by the pleadings,[73] even though

cuse, 48 Misc. 134, 96 N. Y. S. 692. A question tried and determined in the action in which a perpetual injunction is allowed cannot be relitigated on a motion to modify or vacate the order allowing such injunction. Lowe v. Prospect Hill Cemetery Ass'n [Neb.] 106 N. W. 429. Decree held to bar further litigation on the merits, a reservation applying only to an old judgment on part of the issues. Chapman v. Old African Baptist Church, 115 La. 677, 39 So. 806. Determination of title in equity suit held to warrant general charge in favor of prevailing party in a subsequent action for the same land. Everett v. Jordan [Ala.] 40 So. 386. Judgment in forcible entry and detainer for breach of lease held res judicata of breach in action for liquidated damages. Kidder v. Walker, 121 Ill. App. 546. Judgment held not to extend merely to invalidity of one year's taxes but to taxability of subject-matter. Georgia R. & Banking Co. v. Wright, 124 Ga. 596, 63 S. E. 251. Where in an action to enjoin the collection of taxes the question involved is not limited to the particular taxes but is general, the decree is res judicata as to future assessments. Decree enjoining the collection of taxes because of contract exemption is controlling on future taxes. Gunter v. Atlantic Coast Line R. Co., 200 U. S. 273, 50 Law. Ed. —. A decree settling an estate under Code Civ. Proc. § 2743, held a bar to a subsequent action by the legatee of the life tenant to recover certain stock dividends. Chester v. Buffalo Car Mfg. Co., 183 N. Y. 425, 76 N. E. 480. The denial of a motion to open up a judgment by confession and permit a trial of issues of breach of warranty and lack of consideration is res judicata as to those questions in a proceeding in aid of execution based on such judgment. Fosdick v. Forbes, 120 Ill. App. 226. Judgment for defendant in a suit on a claim previously interposed in another suit between the same parties as a set-off held conclusive on right to claim on appeal from a judgment disallowing the set-off. Jenkins v. Jenkins [Ark.] 94 S. W. 45. While the orphans' court alone can distribute the proceeds of an insurance policy in the hands of an administrator, the fund cannot be awarded by that court to a claimant whose claim has been adversely passed upon by a court of competent jurisdiction to which he, in a proper proceeding before it, had submitted the same. In re Shortlidge's Estate [Pa.] 64 A. 318.

Foreclosure proceedings: Determination of superiority of mortgage over other liens held not to determine relative priorities of such liens. Cronan v. Corbett, 78 Conn. 475, 62 A. 662. Priority of claim to compensation, for right of way of railroad, over mortgagees of railroad, held to have been previously litigated and not open to question in suits to foreclose the mortgages. Central Ind. R. Co. v. Grantham [C. C. A.] 143 F. 43. Judgment in foreclosure held conclusive as to the priority of other lien claimants. Fischel v. Thompson, 126 Wis. 73, 105 N. W. 229.

Order approving executor's final account is not conclusive of the validity of the will. Stuckwisch v. Kamman [Ind.] 77 N. E. 349. Order settling final account of executor held not to bar subsequent will contest. Id.

Judgment appointing guardian for infant held not to adjudicate that father of infant was a resident of the county of the forum at the time of his death. Herring v. Mosher [Mich.] 13 Det. Leg. N. 183, 107 N. W. 917. Decision in regard to **customs duties** in a suit in the Federal court held to bar subsequent proceedings before board of general appraisers. United States v. Johnson & Co., 145 F. 1018. Suit for **damages for cutting timber** held to include damages for all the timber on the land. Nelson v. Campbell & Cameron Co. [Wis.] 107 N. W. 297.

Judgment against corporation while in the hands of a receiver does not carry with it the **stockholders' liability.** Covell v. Fowler, 144 F. 535. Judgment in suit to quiet title that defendant had **no right, title, or interest** therein held to determine that he had no **easement** or license to use the land. Keeney v. Fargo [N. D.] 105 N. W. 93.

Decree dismissing petition by trustee in bankruptcy, alleging that bankrupt **owned certain machinery,** held conclusive as to the title to the machinery. Corbett v. Craven [Mass.] 78 N. E. 748. A final order approving **final report of surviving partner** bars action upon his **administration bond.** Harrah v. State [Ind. App.] 76 N. E. 443. County **contesting regularity and sufficiency** of proceedings taken to authorize **issuance of bonds** held estopped by decree from contesting their validity in a proceeding to compel the levy of a tax to pay them. Estill County v. Embry [C. C. A.] 144 F. 913. In the absence of a motion for a new trial on application for a writ of error, determination of circuit court on **motion to set aside judgment** held conclusive and res judicata against right to maintain **bill for equitable relief from judgment.** Valley City Desk Co. v. Travelers' Ins. Co. [Mich.] 12 Det. Leg. N. 39, 106 N. W. 1125. Where **allegations** showing due appointment of plaintiff as guardian ad litem were **admitted** because not properly put in issue, held plaintiff's due appointment was adjudicated by a judgment in his favor. Hughes v. Chicago, etc., R. Co., 126 Wis. 525, 106 N. W. 526.

72. Hubbard v. Gould [N. H.] 64 A. 668; Thompson v. Hemenway, 218 Ill. 46, 75 N. E. 791; Roach v. Roach, 190 Mass. 253, 76 N. E. 651; Cotter v. Boston & N. St. R. Co., 190 Mass. 302, 76 N. E. 910; Lingle v. Chicago [Ill.] 77 N. E. 924; Jackson v. Morgan [Ind.] 78 N. E. 633; Roberts v. Leutzke [Ind. App.] 78 N. E. 635; Corbett v. Craven [Mass.] 78 N. E. 748; Harrison v. Remington Paper Co. [C. C. A.] 140 F. 385; Lowe v. Prospect Hill Cemetery Ass'n [Neb.] 106 N. W. 429; Crockett v. Crockett [Iowa] 106 N. W. 944; Compton v. Seattle, 38 Wash. 514, 80 P. 757; Hollingsworth v. McAndrew [Ark.] 95 S. W. 485; Thornton v. Natchez [Miss.] 41 So. 498; Genet v. President, etc., of Delaware & H. Canal Co., 109 App. Div. 733, 96 N. Y. S. 406, 410; Lighton v. Syracuse, 48 Misc. 134, 96 N. Y. S. 692; Kidder v. Walker, 121 Ill. App. 546; Barber Asphalt Pav. Co. v. Field [Mo. App.] 97 S. W. 179, citing 3 C. L. 1479, et seq. Judgment for defendants in a **suit to cancel** as invalid **special tax bills** for street im-

the parties did not have knowledge thereof;[74] but this rule does not bar the use of an affirmative cause of action or set-off which might have been but never was actually put in litigation,[75] but where the same facts constitute a defense and also an affirmative cause of action, an option is presented, but both are not available.[76] The judgment does not extend to causes of action or defenses which could not have been set up,[77] though the fact that the filing of a supplemental bill would have been necessary

provements, holding them valid, held res judicata in another suit. Id. Where the **issue of title** is put in issue and adjudicated, it is conclusive of all claims possessed at the commencement of the action which might have been asserted. Remilliard v. Authier [S. D.] 105 N. W. 626. Immaterial that the failure to assert title as heir was due to inadvertence or otherwise. Id.

Lien holders failing to set up claims in foreclosure suit to which they were parties, judgment held res judicata on right. Wm. Cameron & Co. v. Jones [Tex. Civ. App.] 90 S. W. 1129. Judgment in **action** brought **on mercantile transactions** held not to bar action on personal loan. Eisenberg v. Thorne, 49 Misc. 617, 96 N. Y. S. 1020. County **contesting regularity and sufficiency of proceedings taken to authorize issuance of bonds** held estopped by decree from contesting their validity in a proceeding to compel the levy of a tax to pay them. Estill County v. Embry [C. C. A.] 144 F. 913. Valid **foreclosure decree** cuts off all defenses which might have been made. Livingston v. New England Mortg. Sec. Co. [Ark.] 91 S. W. 752. Where in **replevin** defendant filed **a general denial** and recovered judgment for the return of the property or its value held he could not subsequently maintain an action for damages for the taking and detention. Jackson v. Morgan [Ind.] 78 N. E. 633.

A decree in favor of a debtor and against a creditor settles all questions as to the validity of the debt and that such debt is not at the time of the decree barred by the statute of limitations. Turk v. Ritchie, 104 Va. 587, 52 S. E. 339. Where, in an action foreclosing a tax sale, an **issue as to description** is raised and determined, such issue is thereby concluded, and the sale of the lot described in the decree of foreclosure will not be set aside for irregularity of description. Medland v. Van Etten [Neb.] 106 N. W. 1022. In an **action to enjoin the collection of state taxes** on the ground of a contract exemption, all defenses asserted, whether brought to the court's attention or waived, are concluded by the decree establishing the exemption. Gunter v. Atlantic Coast Line R. Co., 200 U. S. 273, 50 Law. Ed. ——.

Order evicting tenant for nonpayment of rent held conclusive on fact that tenant owed rent and barred subsequent action by tenant against landlord for money paid the landlord under a contract binding the landlord to apply the same on the rent as it became due. Von der Born v. Schultz, 97 N. Y. S. 738. Where a town was authorized to appropriate and use not exceeding a stated sum of money in the construction and operation of a steamboat, a **judgment** against the town **for a portion of the cost** of such boat is conclusive on the **validity of the claim** in mandamus proceedings to compel the town officers to take proper steps to levy a tax to pay such judgment. McKie v. Rose, 140 F. 145. **A decree setting aside a deed from husband to wife** as in fraud of creditors, declaring title to be in the husband and ordering the land to be sold and the wife to be paid a certain amount for her homestead, held res judicata upon a subsequent petition by the wife for an assignment of dower in the property, the wife having been a party to the former proceedings. Barker v. Smiley, 218 Ill. 68, 75 N. E. 787. Where defendant in a **processioning proceeding** did not raise an **issue of title** in an action for the location of a boundary line, he was estopped by the judgment from denying the boundary thus determined to be the true boundary line and from thereafter asserting title to any land beyond it. Davis v. Wall [N. C.] 55 S. E. 350.

73. Bunker v. Bunker, 140 N. C. 18, 52 S. E. 237. Judgment in accounting held to bar claim for costs of former suit. Id.

74. Especially where lack of knowledge was not excusable. Barber Asphalt Pav. Co. v. Field [Mo. App.] 97 S. W. 179.

75. Seiber v. Johnson Mercantile Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 293, 90 S. W. 516. In an action on a foreign default judgment based on an account for medical services rendered defendant, he may set up a counterclaim for malpractice. Conly v. Scanlin [Iowa] 109 N. W. 300. Where, in an action on a policy, insurer did not seek to recover an unpaid premium, a judgment for plaintiff was not a bar to the insurer's right to subsequently recover such premium. Home Ins. Co. v. Ballew [Ky.] 96 S. W. 878. In an action on a note in a justice's court, where it appeared that by agreement the maker of the note was to be allowed on the note the value of services rendered and judgment is taken by default, defendant is not precluded by Code Civ. Proc. §§ 2947, 2948, from thereafter maintaining an action to recover for such services, the value thereof being undetermined. White v. Curtis, 49 Misc. 50, 98 N. Y. S. 319. Failure of defendants, in a suit to cancel invalid special tax bills for street improvements and remove the cloud cast thereby on the title to the lots, to file a cross bill to foreclose the lien does not estop them to thereafter maintain an action on the tax bills. Barber Asphalt Pav. Co. v. Field [Mo. App.] 97 S. W. 179.

76. Watkins v. American Nat. Bank [C. C. A.] 134 F. 36. Where a vendee sued upon a purchase price note sets up a failure of consideration in that the grantor could not convey, he cannot subsequently sue on the covenant to convey. Id.

77. Judgment that **infant** could not **disaffirm contract** while still under age held not to bar subsequent suit to recover on a disaffirmance made after reaching majority. Lansing v. Michigan Cent. R. Co. [Mich.] 12 Det. Leg. N. 912, 106 N. W. 692.

Order passing receivers' accounts in bank-

to fully present in the first action the claim asserted in the second does not affect the decree therein as a former adjudication.[78] In general, the conclusiveness of a former adjudication depends on the identity of rights involved, and not on the arguments and evidence presented.[79] One cannot split his cause of action and have several recoveries.[80] Allied to this principle is the one that the cause of action is merged in the judgment.[81] Mergers are not favored and courts will not permit a

ruptcy, in which the receivers had credited themselves with property surrendered to claimants, held not an adjudication of the claimant's rights to the same. Whitney v. Wenman, 140 F. 959.

78. Laing v. Fish, 119 Ill. App. 645.

79. Kay v. Gray, 30 Pa. Super. Ct. 450.

80. Wilson Co. v. Farnham & Co. [Minn.] 106 N. W. 342; Watkins v. American Nat. Bank [C. C. A.] 134 F. 36; Howard v. Hunter, 99 N. Y. S. 542. Cause of action upon **running account** held single or entire. Darrow v. Clipper Mfg. Co., 48 Misc. 635, 96 N. Y. S. 194. One cannot by one suit in **replevin** recover the property or its value and by another suit **recover damages** for the taking or detention. Jackson v. Morgan [Ind.] 78 N. E. 633. A **recovery by a bailee for injuries** to property in its possession because of defendant's negligence is a bar to a further recovery by the owner. American Storage & Moving Co. v. St. Louis Transit Co. [Mo. App.] 97 S. W. 184. Actions for **penalties for refusals to allow inspections of stock book** held allowable. Laws 1892, p. 1840, c. 688, § 53, construed. Gould v. Olympic Min. Co., 96 N. Y. S. 455. Where a salesman was to sell automobile tops for his principal for a year and to **receive all sums obtained above a specific price** fixed by the latter, the contract was entire and a judgment for compensation for the sale of particular tops bars further recovery. Howard v. Hunter, 99 N. Y. S. 542. Where a vendee when sued upon a note given in payment of a part of the purchase price sets up a **failure of consideration** in that the grantor could not convey, he cannot maintain an affirmative action to **recover the consideration paid.** Watkins v. American Nat. Bank [C. C. A.] 134 F. 36. Persons who are both **pecuniary and residuary legatees** are not entitled to maintain a bill against the executor to compel payment of their pecuniary legacies only. Wyckoff v. O'Neil [N. J. Eq.] 63 A. 982. Action for **injury to baggage** held to bar action for **mental suffering** arising from the same. Eller v. Carolina & N. W. R. Co., 140 N. C. 140, 52 S. E. 305. A creditor by **taking a note as a partial credit upon an open account** does not lose or abandon his claim by enforcing satisfaction of the note by suit. Ebersole v. Daniel [Ala.] 40 So. 614. Where defendant **pleads a set-off** and defeats plaintiff's recovery thereby, he cannot afterwards in another action recover of plaintiff the excess of the set-off over plaintiff's claim. Riddle v. McLester-Van Hoose Co. [Ala.] 40 So. 101. Judgment in **suit for one month's wages were due,** held to bar recovery for other month. Smith v. Cashie & C. R. & Lumber Co. [N. C.] 54 S. E. 788. Judgment in suit on some of a **series of notes** held not to operate as a bar to a suit on other of the notes nor to the maker's right to set up failure of consideration. Penney v. Corey [Ala.] 41 So. 978. Action for **instalments** under an **entire contract** held to bar subsequent action for instalments due at the time of the first suit but not included therein. Jones & Co. v. Gammel-Statesman Pub. Co. [Tex. Civ. App.] 94 S. W. 191. Each default in the payment of money falling due upon a contract payable in **instalments** may be the subject of an independent action, provided it is brought before the next instalment falls due, but each action should include every instalment due when it is commenced, unless a suit is at the time pending for the recovery thereof. Kieley v. Kahn, 98 N. Y. S. 774. The rule that, in an action for an **instalment of rent** due under a lease, the adjudication that the lease is valid or otherwise is conclusive in another action for a subsequent instalment has no application to suits to collect yearly rental under a contract running from year to year. Snowhill v. Diamond Plate Glass Co. [Ind. App.] 77 N. E. 412. Where **goods are sold to be delivered and paid for in instalments** and the vendor refuses to deliver an instalment, it is a breach of an entire contract so that a judgment for damages for nondelivery of a part of the goods is a bar to an action for failure to deliver the balance. Pakas v. Hollingshead, 184 N. Y. 211, 77 N. E. 40. The **contract of a stockholder to pay the debts of the corporation** is the basis of the double liability, and the action to enforce it is indivisible. The cause of action between the same parties is the same, whether it is upon one or several of the shares of stock owned by the latter and it may not be split. Harrison v. Remington Paper Co. [C. C. A.] 140 F. 385. Plaintiff ordered cars for **shipment of an entire herd of cattle.** The shipments were all made at the same time, though to different destinations, on contracts limiting the carrier's liability to its own line. Held that plaintiffs were not entitled to split up a cause of action for injury to the cattle by any delay in furnishing cars, which damages resulted prior to the shipment of any of the cattle, into several suits. Texas & P. R. Co. v. Scoggin [Tex. Civ. App.] 15 Tex. Ct. Rep. 469, 95 S. W. 651. Where an **action against a carrier for failure to deliver freight** consigned by plaintiff to himself, was dismissed because it appeared that he had sold the goods in transit, the judgment was a bar to a subsequent action in which plaintiff alleged an assignment to him from his vendee of all claims for the failure to deliver, where such assignment was made before the commencement of the first action. Sweeney v. Frank Waterhouse & Co. [Wash.] 86 P. 946.

81. The entry of judgment upon a judgment note merges the cause of action. Work v. Prall, 26 Pa. Super. Ct. 104. A judgment upon

merger when injustice will likely result, although all the essential elements of a technical merger combine in the particular case.[82] Where a note is merged in a judgment, the ownership of the note and the running of limitations against the same are immaterial issues in an action based on a claim of subrogation of the lien of the judgment.[83] Where damages are occasional and recurring, a party may sue as often as he suffers injury therefrom,[84] unless his prior claim was based on the theory that the damages are original[85] and permanent.[86] While a judgment in a criminal prosecution ordinarily constitutes no bar to a civil action based upon the same acts or transactions,[87] still this is not the rule in all courts,[88] and especially this rule does not apply where the subsequent action, though civil in form, is penal in its nature and the procedure is the same as in a criminal action.[89] A judgment in a criminal case is conclusive of the facts therein determined when pleaded in a civil action brought by the government against the same defendant.[90] An order of an appellate court reversing a judgment and remanding the cause generally has the effect only of a final judgment upon the facts then in the record, and the parties are not estopped

promissory notes merges them therein so that the owner of the judgment may not maintain an action against the judgment debtor upon them. Harrison v. Remington Paper Co. [C. C. A.] 140 F. 385. The recovery of a judgment on a sealed instrument merges the latter. Hence in a suit on the judgment it is improper to add a count on the original instrument. Davis v. Sanders, 25 App. D. C. 26. Where a beneficiary gave her note to the trustee for an amount less than her indebtedness to the trustee, it is presumed that it was given as a settlement of a part of the liability, and a recovery on the note in addition to the liability will not be authorized. Putnam v. Lincoln Safe Deposit Co., 49 Misc. 578, 100 N. Y. S. 101. A judgment for the value of chattels when satisfied passes the title to them. A judgment having been satisfied by offsetting another held by the debtor, who had a lien on the chattels extinguishes his lien by passing title to him. Hildebrand v. Head [Tex. Civ. App.] 13 Tex. Ct. Rep. 599, 88 S. W. 439.

82. Vendor's lien held not to merge in a judgment foreclosing a mortgage, the parties having agreed to the contrary. Carror v. Carrier, 34 Ind. App. 353, 73 N. E. 123. A judgment for defendant upon particular counts does not bar a recovery by plaintiff on the remaining ones. Muren Coal & Ice Co. v. Howell, 119 Ill. App. 209.

83. Brown v. Rash [Tex. Civ. App.] 13 Tex. Ct. Rep. 783, 89 S. W. 438.

84. Harvey v. Mason City & Ft. D. R. Co., 129 Iowa, 465, 105 N. W. 958. Where the injury to land caused by the damming of surface waters is one which will continue indefinitely without change from any cause but human labor, the damages are original, and but one recovery can be had for the decrease in the market value of the property on account of the injury; but where the injury is temporary, or of a continuing or intermittent character, the damages are ordinarily regarded as continuous, and one recovery against the wrongdoer is not a bar to separate actions for damages thereafter accruing from the same wrong. Id. Damages arising from the occasional flooding of land by reason of an insufficient culvert on the land of an adjacent proprietor are not original but continuous. Id. Judgment for injuries caused by filling of ditch under railroad embankment held not a bar to another action for a subsequent filling of the same ditch. Chicago, etc., R. Co. v. McCutchen [Ark.] 96 S. W. 1054.

85. Harvey v. Mason City & Ft. D. R. Co., 129 Iowa, 465, 105 N. W. 958.

86. Where an action to recover damages from a city for the construction of a sewer is based on the theory of permanent damages, the judgment is a bar to any further action against the city for such damages. Carpenter v. Lancaster, 212 Pa. 581, 61 A. 1113.

87. Violation of ordinance. Micks v. Mason [Mich.] 13 Det. Leg. N. 472, 108 N. W. 707. Conviction of using profane language in the presence of females held not to bar civil action for eviction from train. Seaboard Air-Line R. Co. O'Quinn, 124 Ga. 357, 52 S. E. 427. Assault and battery. Powell v. Wiley, 125 Ga. 823, 54 S. E. 732. Acquittal of alleged husband on a trial for bigamy in having married the plaintiff in a subsequent suit for dower held not to bar the latter suit. Frierson v. Jenkins, 72 S. C. 341, 51 S. E. 862.

88. Judgment of acquittal in a criminal prosecution for obstructing a navigable stream held to bar subsequent suit in equity to compel removal of obstruction. United States v. Donaldson-Shulz Co., 142 F. 300.

89. State v. Corron, 73 N. H. 434, 62 A. 1044. The procedure must follow the criminal procedure and it is essential the defendant cannot be compelled to be a witness against himself. Id. If the purpose of the civil suit is compensation and not punishment, the judgment in the criminal action is no bar. Id. Under Laws 1903, p. 81, c. 95, and Laws 1905, p. 532, c. 117, § 10, an action on a liquor dealer's bond is a civil remedy for the benefit of the state, and hence an acquittal of such liquor dealer in a criminal proceeding for the act alleged to constitute a breach of the bond was not res judicata of his liability thereon. Id.

90. Judgment of acquittal in criminal prosecution for obstructing a navigable stream held to bar subsequent suit in equity to compel removal of obstruction. United States v. Donaldson-Shulz Co., 142 F. 300.

thereby from introducing further evidence, tending to prove or disprove the issues as joined after the reinstatement of the cause,[91] and the judgment of a lower court being reversed and cause remanded on appeal, the judgment of the court below, so reversed, is of no binding effect in subsequent proceedings.[92] The judgment entered on the findings determines the rights of the parties to all of the disputed matters litigated and embraced in the issues and covered by the findings of the court.[93]

§ 3. *Adjudication as estoppel of facts litigated.*[94]*—Though there be no identity of issues*[95] *and subject-matter, an adjudication is conclusive in all courts in suits between the parties and their privies*[96] *as to all matters in issue,*[97] *and decided*[98]

91. People v. Cohen, 219 Ill. 200, 76 N. E. 388.

92. Illinois State Trust Co. v. St. Louis, etc., R. Co., 217 Ill. 504, 75 N. E. 562.

93. Krause v. Krause, 125 Wis. 337, 104 N. W. 76. Where plaintiffs sued to set aside a conveyance of real and personal property made to defendants and the court found that defendants had wrongfully transferred the personal property to third persons, and the decree restored the plaintiffs to their rights in the real estate, held the personal property was covered by the decree and left in the possession of the grantees of defendants. Id.

94. See 5 C. L. 1513.

95. Where the issue of title is fully litigated it will operate as an estoppel in a subsequent action involving that issue, though other issues were involved in the former action. Remilliard v. Authier [S. D.] 105 N. W. 626.

96. Bird v. Winyer [Wash.] 87 P. 259. See ante § 1 A, Persons Concluded.

97. Delaware, etc., R. Co. v. Kutter [C. C. A.] 147 F. 51; Harrington v. Harrington, 189 Mass. 281, 75 N. E. 632; Douglas v. Smith [Neb.] 106 N. W. 173; Gering v. School Dist. No. 28, Cass County [Neb.] 107 N. W. 250; Mercer Co. v. Omaha [Neb.] 107 N. W. 565. Admiralty case. Rhodes v. Interlake Transp. Co., 144 F. 205. Order of referee as to shortage in property sold held not an adjudication on terms of contract of sale. In re Drumgoole, 140 F. 208. Construction of will by surrogate held conclusive on rights of parties on intermediate accounting. In re Howard's Estate, 46 Misc. 204, 94 N. Y. S. 86. Judgment in action brought on mercantile transactions held not to bar action on personal loan. Eisenberg v. Thorne, 49 Misc. 617, 96 N. Y. S. 1020. It is to be presumed that in a partition suit the title was not in issue. Where judgment in partition suit was by default, held this presumption was not overcome by averments to the contrary in an answer in a subsequent suit. Pence v. Long [Ind. App.] 77 N. E. 961. Where in a mortgage foreclosure suit a prior judgment creditor is made a party, complainant is bound by a decree that the judgment lien is superior to that of the mortgage and ordering a sale of the property to satisfy both the judgment and mortgage. Thompson v. Hemenway, 218 Ill. 46, 75 N. E. 791. Judgment in forcible entry for breach of lease held res judicata of breach of lease in subsequent suit for liquidated damages. Kidder v. Waller, 121 Ill. App. 546. Finding of board of commissioners created by Laws 1903, p. 88, c. 95, § 14, that liquor licensee had violated provisions of the act and that his license should be canceled, held to render question of violation of act conclusive on both him and his sureties on his liquor bond in an action by the state on the bond. State v. Corron, 73 N. H. 434, 62 A. 1044. Judgment for plaintiff in ejectment held not to adjudicate ownership of improvements when raised in condemnation proceedings. Aldridge v. Board of Education of Stillwater, 15 Okl. 354, 82 P. 827. Judgment in favor of corporation in suit for damages for refusal to transfer stock on the books of the company, the defense being that plaintiff had fraudulently gained possession of such stock, held to preclude subsequent action by plaintiff for conversion of the stock. O'Dwyer v. Verdon, 100 N. Y. S. 588. Judgment for a policeman on certiorari proceedings to test the legality of his removal is not res judicata of the question of his appointment. Seifen v. Racine [Wis.] 109 N. W. 72. Decision that court had jurisdiction to appoint receiver, and his subsequent appointment, held to render propriety of appointment res judicata in proceedings for a settlement of his account and distribution of the assets. Campau v. Detroit Driving Club [Mich.] 13 Det. Leg. N. 200, 107 N. W. 1063. A petition by a wife for separate support charged the husband with lewd and lascivious conduct toward a domestic. The specifications did not allege adultery. The court found that the wife was living apart from her husband for a justifiable cause, not justifying permanent separation. Held not to bar subsequent suit by wife on the ground of husband's adultery with domestic. Harrington v. Harrington, 189 Mass. 281, 75 N. E. 632. Judgment that defendant while an officer of a bank embezzled its funds held conclusive of the character of the indebtedness upon an issue whether the debt is one from which such defendant was released by a discharge in bankruptcy. Harper v. Rankin [C. C. A.] 141 F. 626. Prior decisions sustaining a patent are to be given effect only as to matters that were before the court. Bragg Mfg. Co. v. New York, 141 F. 118. Infringement suit in which the bill alleges that defendant justifies under another patent and that the same was void, but such patent was not set up in defense, held not to bar subsequent action between the same parties for the infringement of the patent so set up. Leonard v. Simplex Elec. Heating Co., 145 F. 946.

98. Delaware, etc., R. Co. v. Kutter [C. C. A.] 147 F. 51; Harrington v. Harrington, 189 Mass. 281, 75 N. E. 632; Gering v. School Dist. No. 28, Cass County [Neb.] 107 N. W. 250. Judgment only binding as to matters decided. Davis v. Schmidt, 126 Wis. 461, 106 N. W. 119. Is an estoppel only as to matters

or necessarily involved in the decision made,[99] *but not as to matters not in contro-*

actually in issue and decided. Mercer Co. v. Omaha [Neb.] 107 N. W. 565. Matters determined in **suit for interest** on note held binding in subsequent suit on note. Davis v. Schmidt, 126 Wis. 461, 106 N. W. 119. A determination in an action by a contractor against drainage commissioners for contract price that the pleadings admitted having funds is res judicata in a mandamus suit to compel payment. Lewis v. Drainage Com'rs, 111 Ill. App. 222. Decree determining the amount due attorneys for services and making the payment of such amount conditional to the discharge of such attorneys and the appointment of others held res judicata on amount due attorneys. Seymour v. Du Bois, 145 F. 1003. Judgment for plaintiff in **forcible entry and detainer** proceedings held res judicata of both the entry and the detainer. Jacob v. Oyster Bay, 109 App. Div. 630, 96 N. Y. S. 626. Determination of **location of boundaries** of a lot in suit to recover damages for the erection of a viaduct on a vacated street held binding on the parties in a suit involving a different subject-matter. Pereles v. Gross, 126 Wis. 122, 105 N. W. 217. Verdict that **testator's last will** was **destroyed after his death,** and there were two wills in existence at the time of his death, held not res judicata of an issue to determine whether one of the wills, particularly described, had been destroyed by the testator himself with a view to revoking the same. In re Lappe's Estate [Pa.] 64 A. 607. Judgment in **suit to set aside sheriff's deeds under foreclosure,** reciting collusion between purchasers, mortgagee, and sheriff, held conclusive in subsequent action. Miller v. Kelsay, 114 Mo. App. 598, 90 S. W. 395.

Foreclosure decree held res judicata as to ownership and validity of mortgage and indebtedness of mortgagor. In re Angle's Estate, 148 Cal. 102, 82 P. 668. Judgment, determining the **validity of a marriage,** in guardianship proceedings held conclusive between same parties of the fact in distribution proceedings. Burgess v. Stribling [Mich.] 13 Det. Leg. N. 323, 108 N. W. 421. Adjudication that deceased wife of patentee had no **title to land.** Bird v. Winyer [Wash.] 87 P. 259.

Suit by lessee for specific performance held not to bar claim for damages arising from wrongful acts of the lessor. Newport News & O. P. R. & Elec. Co. v. Bickford [Va.] 52 S. E. 1011. Verdict and judgment in **ejectment** fixing a line held final and conclusive between the parties and their privies in estate as to the location of such line. Wade v. McDougle [W. Va.] 52 S. E. 1026. A judgment on a **claim of exemptions** in favor of the execution defendant is conclusive in an action for wrongful seizure under the execution. Stallings v. Gilbreath [Ala.] 41 So. 423. Determination of question **whether land** sought to be condemned **was** already a **public highway** held to bar parties from raising question in proceedings for the distribution of compensation awarded. Lingle v. Chicago [Ill.] 77 N. E. 924. Judgment that **corporate dividends** had been **regularly declared** held binding on the corporation as to the regularity of the dividend in a subsequent suit on a note given to the plaintiff in the former action to pay such dividend. Camden Nat. Bank v. Fries-Breslin Co., 214 Pa. 395, 63 A. 1022. Decision that **county board** had **power to elect a city superintendent of schools** held conclusive on power in subsequent suit by superintendent against county auditor for requisition for salary. Davidson v. Baldwin [Cal. App.] 84 P. 238.

Suit by lessee for an injunction against lessor placing guards at gate held not to prevent lessee from setting up a claim for damages arising from the lessor's wrongful interference with the leased premises. Newport News & O. P. R. & Elec. Co. v. Bickford [Va.] 52 S. E. 1011. The **appointment of a conservator** of a testator in 1903, on the ground that he was mentally incapable of bringing suit to set aside certain conveyances after a finding that he had been mentally unsound for years and insane prior to 1872, held not an adjudication as to testator's testamentary capacity in 1890. Nichols v. Wentz, 78 Conn. 429, 62 A. 610. Foreign judgment, in a **suit by an abandoned wife for separate maintenance,** granting the wife separation from her husband and a weekly allowance held conclusive evidence of husband's abandonment on dates fixed in a subsequent suit by the wife against the husband for maintenance and support. Freund v. Freund [N. J. Eq.] 63 A. 756. Where the resistance to a motion for a new trial after judgment claimed to have been entered on **service by publication** was based solely, in so far as it related to the question of service by publication, on the claim that service was made on an agent of defendants, an order overruling the motion generally did not constitute an adjudication of the sufficiency of the service by publication. Gaar, Scott & Co. v. Taylor, 128 Iowa, 636, 105 N. W. 125. A decision that a bank had an irrevocable contract under the Hewitt act and exempting it from **county and municipal taxes** did not make inoperative the provisions of the subsequent revenue act of 1892 (Ky. St. 1903, § 4092) with reference to the date of the assessment of bank property. Bank of Kentucky v. Com. [Ky.] 94 S. W. 620. Judgment of appellate court reversing a **judgment of ouster against village officers** is not an adjudication of the illegality of any organization of the village had after the entry of the judgment of ouster, where the judgment of the appellate court was based on the ground that a certain plea would, if established, constitute a valid defense, and the proceeding was dismissed after the cause was redocketed on remand. People v. Pederson, 220 Ill. 554, 77 N. E. 251. A husband conveyed property to his wife and the two then mortgaged the property. A judgment creditor of the husband levied on the latter's equity of redemption claiming the conveyance to the wife was a gift. A purchaser at the sale sued to **quiet title** and the bill was dismissed on the ground that the levy was bad. Thereafter the **judgment creditor sued on his judgment** and recovered a new judgment. Levy was again made and the same person purchased as before. Held, on a bill by the wife against the purchaser to remove a cloud, that she was not barred from litigating the question whether or not the deed to

versy and not heard and determined.[1] A judgment operates as an estoppel from further litigation only as to such matters as were necessarily considered and determined,[2] and never upon immaterial or collateral issues,[3] and the proper test to apply in determining the materiality of the issues is to inquire whether or not the judgment is dependent upon such issue.[4] If the findings upon any issue were erroneous, and yet the judgment has support, then such issue is collateral.[5] Nonessential recitals in judgment are prima facie, but not conclusive, evidence of facts on parties and their privies.[6]

§ 4. *Pleading and proof.*[7]—Ordinarily, and unless the former judgment is used merely as evidence,[8] the defense of res judicata must be presented by the pleadings.[9] A plea in equity setting up a former decree in bar must show that the former suit was substantially between the same parties for the same subject-matter.[10] It must set forth so much of the former bill and answer as will suffice to show that the same point was then in issue, and it should aver that the allegations as to the title to relief against the defendants were substantially the same in the second bill as

her was a gift. Gilcreast v. Bartlett [N. H.] 64 A. 767.

99. Harrington v. Harrington, 189 Mass. 281, 75 N. E. 632. Where in a suit for commissions the amount was admitted on the trial, held the rate of the commissions was necessarily involved in the adjudication. Potash v. Utopia Land Co., 48 Misc. 402, 95 N. Y. S. 571. Approval of local improvement assessment certificate, reciting substantial compliance with the terms of an ordinance, held conclusive on that question in a subsequent proceeding to collect the assessment. People v. Cohen, 219 Ill. 200, 76 N. E. 388.

1. Harrington v. Harrington, 189 Mass. 281, 75 N. E. 632. Does not extend to matters which might have been but were not litigated. Pereles v. Gross, 126 Wis. 122, 105 N. W. 217; Grand Valley Irr. Co. v. Fruita Imp. Co. [Colo.] 86 P. 324; Harrison v. Remington Paper Co. [C. C. A.] 140 F. 385. A judgment of denial of a motion to enforce a stockholder's liability under Gen. St. Kan. 1889, § 1192, in which the defense of a prior action under §§ 1200 and 1204 was pleaded and found, raises no estoppel against the plaintiff from litigating the issues presented in an action between the same parties under §§ 1200, 1204, in which that defense was not available, where the record does not disclose that the judgment upon the motion was based upon a decision of any of the issues in the latter case. Id.

2. Lowe v. Ozmun [Cal. App.] 86 P. 729. Facts found only for the purpose of enabling an appeal to be taken, but not made a part of the judgment or the record, are not adjudicated facts binding in a subsequent action between the same parties. Nichols v. Wentz, 78 Conn. 429, 62 A. 610.

3. Brown v. McKie [N. Y.] 78 N. E. 64; Jackson v. Thompson [Pa.] 64 A. 421; Lowe v. Ozmun [Cal. App.] 86 P. 729. An issue concerning the conversion of certain bonds held collateral in a suit to set aside a sale of stock of a corporation. Id. A judgment is not res judicata between the parties as to incidental and immaterial matters not necessary in determining which party is entitled to judgment on the claim in suit, or to sustain the judgment rendered. In re Locust Ave. in Port Chester [N. Y.] 77 N. E. 1012, modifying and afg. 110 App. Div. 774, 97 N. Y. S. 508. A judgment specifically enforcing a contract made by a village for the purchase of land for the extension of a street held not conclusive against the right of the city to raise by special assessment a part of the funds necessary to pay for the land, though the action was defended on the ground that it was necessary to raise the purchase price of the land by special assessment and that this had not been done. Id. Where, in an action to set aside certain tax assessments on the ground that they constituted a cloud on plaintiff's title, the court found the assessment invalid but dismissed the complaint because the defect, if any, was apparent on the face of the assessment, held the judgment was not res judicata as to the validity of the assessment. Brown v. McKie [N. Y.] 78 N. E. 64.

4, 5. Lowe v. Ozmun [Cal. App.] 86 P. 729.

6. State v. Ortiz [Tex.] 14 Tex. Ct. Rep. 883, 90 S. W. 1084.

7. See 5 C. L. 1515.

8. Former adjudication is admissible in evidence without being pleaded. Davis v. Schmidt, 126 Wis. 461, 106 N. W. 119; Standard Supply & Equipment Co. v. Merritt, 48 Misc. 498, 96 N. Y. S. 181.

9. Thomason v. Seaboard Air Line R. Co. [N. C.] 55 S. E. 198; Standard Supply & Equipment Co. v. Merritt, 48 Misc. 498, 96 N. Y. S. 181. Must show that matter was decided. Harrison v. Remington Paper Co. [C. C. A.] 140 F. 385. Recital in judgment of former judgment held insufficient, there being no plea of res judicata nor any former judgment introduced in evidence. Grenada Bank v. Adams [Miss.] 40 So. 4. Action before justice of the peace. Revisal 1905, § 1460, construed. Smith v. Cashie & C. R. & Lumber Co., 140 N. C. 375, 53 S. E. 233.

10. Lindsley v. McIver [Fla.] 40 So. 619. A complaint, in a suit by trustees in a deed for the benefit of creditors to settle their final accounts, which alleged that the conditions of the deed were duly modified by decree made in a certain court in a certain action, held to show that the creditors were parties to such action. McDougal v. Fuller, 148 Cal. 521, 83 P. 701.

in the first.[11] It is neither necessary nor proper practice to attach as an exhibit to such a plea all the testimony taken in the former suit.[12] In a suit against one secondarily liable, it is only necessary to allege that a judgment has been recovered against the one primarily liable;[13] and the petition need not show the character of the debt upon which the judgment was founded, or other particulars in reference thereto.[14] The one secondarily liable, having had no notice of the former suit, is entitled to assert all defenses appropriate to one in his position, that is, one ultimately liable, and also to all defenses the one primarily liable might have set up in the suit against it.[15] Judgment of court of general jurisdiction may be pleaded in general terms without alleging jurisdictional facts.[16] The sufficiency of particular allegations is shown in the notes.[17] In those states where defendant may rely upon as many defenses as he has, a defense of former adjudication, properly pleaded, is not waived by defendant entering into a trial on the merits.[18] In California a defense of former adjudication is deemed denied by operation of law and is available only on being proven.[19] The court will not take judicial notice of a former adjudication,[20] and the burden is on the party setting up the plea to prove it[21] by a fair preponderance of the evidence,[22] though it has been held that, defendant pleading a former adjudication, the burden is on the plaintiff to show that it was not on the merits.[23] In determining the scope of the former adjudication the record controls,[24] and the determination of such question will be deemed settled by the findings, order, or judgment in the former case rather than by the court's opinion;[25] though when the issues

11. Lindsley v. McIver [Fla.] 40 So. 619. Plea of former adjudication to a bill in equity for partition held insufficient, the title to the relief sought not being substantially the same in the two suits. Id.

12. Lindsley v. McIver [Fla.] 40 So. 619.

13. Suit against stockholder, judgment having been recovered against corporation. Wheatley v. Glover, 125 Ga. 710, 54 S. E. 626.

14. Suit against stockholder, judgment having been recovered against corporation. Wheatley v. Glover, 125 Ga. 710, 54 S. E. 626. In a suit against a stockholder to enforce ultimate liability for the debts of a corporation as described in the charter, a petition which sets forth that a judgment against the corporation has been rendered, and which fully describes the character of the suit in which the judgment was rendered and the amount of the judgment, is not subject to special demurrer. Id.

15. Suit against stockholder, judgment having been recovered against corporation. Wheatley v. Glover, 125 Ga. 710, 54 S. E. 626. Stockholder may set up any fact which will absolve him from liability under the charter and also any fact which would establish that the corporation was not liable upon the debt which was the basis of the judgment. Id.

16. Lear v. Brown County [Neb.] 109 N. W. 174.

17. An allegation that an ordinance was adjudged void in a previous action and that the proceedings thereunder had been held to be of no validity or effect is not defective for failure to show that the adjudication was "regularly or duly given or made" as provided by statute. Waldron v. Snohomish, 41 Wash. 566, 83 P. 1106. An allegation that the original ordinance was "adjudged void" is not objectionable in that it did not affirmatively allege that the ordinance was actually void. Id.

18. Harding v. Harding, 148 Cal. 397, 83 P. 434. Statement in Megerie v. Ashe, 33 Cal. 74, criticised.

19. Code Civ. Proc. § 607 construed. Harding v. Harding, 148 Cal. 397, 83 P. 434.

20. Estudillo v. Security Loan & Trust Co. [Cal.] 87 P. 19.

21. Gering v. School Dist. No. 28, Cass County [Neb.] 107 N. W. 250; Draper v. Medlock, 122 Ga. 234, 50 S. E. 113; Gulling v. Washoe County Bank [Nev.] 82 P. 800; Grand Valley Irr. Co. v. Fruita Imp. Co. [Colo.] 86 P. 324; Roach v. Curtis, 50 Misc. 122, 100 N. Y. S. 411. Must show that matter was decided. Harrison v. Remington Paper Co. [C. C. A.] 140 F. 385.

22. Grand Valley Irr. Co. v. Fruita Imp. Co. [Colo.] 86 P. 324. Finality of the judgment need only be established by a fair preponderance of the evidence. Instruction requiring it to be proved by "clear and conclusive" evidence held erroneous. White River, etc., R. Co. v. Star Ranch & Land Co. [Ark.] 91 S. W. 14.

23. Sweeney v. Frank Waterhouse & Co. [Wash.] 86 P. 946.

24. It is proper to look to the record to determine what issues were decided. Lansing v. Michigan Cent. R. Co. [Mich.] 12 Det. Leg. N. 912, 106 N. W. 692. Judgment roll and papers in former action being introduced determination of identity of subject-matter rests in showing made by the record and not on presumptions. Gulling v. Washoe County Bank [Nev.] 82 P. 800.

Judgment roll in former action is **admissible** to show facts determined. Tanenbaum v. Federal Match Co., 97 N. Y. S. 1101.

25. In re King, 183 N. Y. 440, 76 N. E. 584. Negligence of cashier of bank concluded by finding that he "assumed" that a husband had authority to draw on his wife's deposit.

in the former action are not disclosed by the decree, the opinion of the court properly authenticated may be looked to and the decree will be given effect as an adjudication in accordance with such opinion.[26] In the absence of proof it is assumed that the litigation involved all alleged in the petition and final order and covered the whole ground thereof.[27] When in existence the whole record must be produced,[28] but the papers in the cause being lost and not being found on diligent search, the final decree and entries on the rule docket are admissible to establish the former adjudication.[29] A court may consult its own records to see if parties and subject-matter are identical and to determine what issues were involved and adjudicated.[30] As we have seen, for the judgment to operate as an estoppel it must appear that the precise question was raised and necessarily determined in the former suit.[31] If there be any uncertainty or room for cavil as to this, the whole subject-matter of the action will be set at large and open for new contention.[32] As to matters apparently within the issues, parol evidence is inadmissible against the conclusiveness of the judgment to show that certain of those matters were withdrawn or not considered;[33] while, on the other hand, if the record is such that on its face the judgment may have proceeded upon one of several grounds, it is admissible to show aliunde upon which of such grounds the consideration and judgment or decree of the court did really proceed.[34] Where a judgment entered in an action involving several issues recites a finding on one which compels such judgment and is silent as to the others, it will be presumed that they were not passed upon and they may be litigated in a different cause of action.[35]

FORMER CONVICTION OR ACQUITTAL, see latest topical index.

FORMS OF ACTION.[36]

This topic includes holdings of general application as to the distinctions between particular forms or kinds of actions, grounds of actions being excluded.[37] The common law forms of personal actions now abolished in many states are treated

Daugherty v. Poundstone [Mo. App.] 96 S. W. 728.

26. Opinion of state supreme court looked to by Federal court. Carson v. Three States Lumber Co., 142 F. 893. The recitals in the decisions of the United States land department will be taken as conclusive as to what issues of fact were determined. Parryman v. Cunningham, 16 Okl. 94, 82 P. 822.

27. Jacob v. Oyster Bay, 109 App. Div. 630, 96 N. Y. S. 626.

28, 29. Russell v. Houston, 115 Tenn. 536, 91 S. W. 192.

30. Sawyer v. First Nat. Bank [Tex. Civ. App.] 14 Tex. Ct. Rep. 701, 93 S. W. 151.

31. See ante § 1.

32. Schwartz v. Kennedy, 142 F. 1027; Gering v. School Dist. No. 28, Cass County [Neb.] 107 N. W. 250. A judgment for defendants in replevin, one of the defenses being that plaintiff was only the owner of an undivided interest in the property, held not a bar to a subsequent action by plaintiff against one of the defendants for conversion of the property. Id.

33. Schwartz v. Kennedy, 142 F. 1027.

34. Schwartz v. Kennedy, 142 F. 1027. If the record does not disclose the matters actually litigated, the same may be shown by competent evidence. Hubbard v. Gould [N. H.] 64 A. 668. That dismissal without reservation of right to institute other proceedings was not on the merits may be shown by parol or other extrinsic evidence. Stratton v. Essex County Park Commission, 145 F. 436. Issues and matters determined not being disclosed by the pleadings, they may be shown by extrinsic evidence. Delaware, etc., R. Co. v. Kutter [C. C. A.] 147 F. 51. Parol evidence is admissible to prove that the pending suit and a former one arose from the same cause of action. Latta v. Wiley [Tex. Civ. App.] 14 Tex. Ct. Rep. 621, 92 S. W. 433. If the record does not show what was involved, it must be established by extrinsic evidence. Draper v. Medlock, 122 Ga. 234, 50 S. E. 113. A rejected offer to amend the pleadings in the former action so as to raise the issue is admissible to disprove res adjudicata. Id.

35. In absence of proof of actual litigation. Hudson v. Remington Paper Co., 71 Kan. 300, 80 P. 668. Validity of a corporate debt, fact of ceasing to do business, and whether defendant had fully discharged his corporate liability as a stockholder, held not adjudicated. Id.

36. See 5 C. L. 1517.

37. See Causes of Action and Defenses, 7 C. L. 603, and topics descriptive of particular causes of action.

under appropriate heads,[38] as are many matters of practice dependent on the form of the action.[39] In many states the common-law forms of action have been abolished, and a single form called a civil action substituted,[40] but these changes go only to the form and not to the substance of the actions,[41] and it is still necessary in matters of pleading to distinguish between the various forms.[42] The distinction between civil and criminal actions is important in matters of procedure.[43] Equitable matters cannot be asserted and litigated in an action at law,[44] but the interposition of an equitable defense, where allowable, with a prayer for affirmative equitable relief, converts the action to one in equity.[45] Where the technical distinction between trespass and trespass on the case[46] has been abolished, it is no ground for arrest of judgment that the action was erroneously entitled.[47] Whether an action is ex delicto[48] or ex contractu[49] is largely determined by the pleadings, and, in case of doubt, every intendment is in favor of the latter.[50] Inconsistent forms of action cannot be

38. See Assumpsit, 7 C. L. 296; Trespass, 6 C. L. 1721, etc.

39. See such topics as Costs, 7 C. L. 956; Dockets, Calendars and Trial Lists, 7 C. L. 1192; Jury, 6 C. L. 316, etc.

40. Section 1, art. 5, Const. of Idaho. Coleman v. Jaggers [Idaho] 85 P. 894.

41. Section 1, art. 5, of the Const., prohibiting distinctions between actions at law and suits in equity, and the forms of such actions and suits, does not abolish the rules of law and equity (Dewey v. Schreiber Implement Co. [Idaho] 85 P. 921), and § 21, art. 5, of the Const., conferring jurisdiction on the probate court to hear and determine all civil cases wherein the debt or damage claimed does not exceed $500, has reference to actions at law alone, and Act Feb. 27, 1903 (Sess. Laws 1903, p. 94), extending the jurisdiction of the probate court to the enforcement of mechanics' liens, is unconstitutional (Id.).

42. Complaint held to allege a cause of action for breach of contract of employment and not for salary due. Murray v. O'Donohue, 109 App. Div. 696, 96 N. Y. S. 335. Hence not error to refuse to dismiss because it shows that the work was not performed which would be essential to an action for salary. Id. A petition alleging that defendants conspired to have fake foot races on which strangers were enticed to bet, the race being thrown to fleece such strangers, and that plaintiff was caught in such scheme and praying for recovery states an action at common law for fraud and deceit, and not under Rev. St. 1899, § 424, to recover money lost in gambling. Hobbs v. Boatright, 195 Mo. 693, 93 S. W. 934.

43. An action for the violation of a town ordinance is a civil and not a criminal action in character, though a fine may be imposed and enforced by imprisonment. Fortune v. Incorporated Town of Wilburton [C. C. A.] 142 F. 114. Hence an affidavit that the appeal is not taken for the purpose of delay is required as in other appeals in civil actions. Id. See, also, Indictment and Prosecution, 5 C. L. 1790.

44. Bailey v. Fink [Wis.] 109 N. W. 86. Where a married woman is sued in law upon a note, estoppel cannot be asserted to charge her separate estate. Id. Equitable pleas in actions at law must be purely defensive, and are never admissible when they raise issues which cannot be dealt with by a law court. Attempt to show that the real consideration for contract sued on was another contract which had been broken by the plaintiff. Pensacola Lumber Co. v. Sutherland-Innes Co. [Fla.] 39 So. 789. See, also, Causes of Action and Defenses, 7 C. L. 603; Equity, 7 C. L. 1323.

45. An allegation in an action of ejectment of a prior conveyance to defendant's predecessors from a common source, which deed was lost or never in fact executed, and praying for a decree establishing title in defendant. Shaffer v. Detie, 191 Mo. 377, 90 S. W. 131.

46. A complaint alleging that plaintiff's intestate was injured by being struck by defendant's tram cars, negligently allowed to run against plaintiff's intestate, states an action in case, not in trespass. Lookout Mountain Iron Co. v. Lea [Ala.] 39 So. 1017.

47. Case under the Practice Act. Pratt v. Davis, 118 Ill. App. 161. Pleading over after the overruling of the demurrer waived the objection if valid. Id.

48. A complaint alleging that a note was obtained by fraud and was converted, by reason of which fraud and conversion plaintiff was damaged, etc., states a cause of action in tort and not in contract for money had and received. German Nat. Bank v. Princeton State Bank [Wis.] 107 N. W. 454. An action by a party to a contract pledging bonds with defendant for a specific purpose to recover for a wrongful repledge is ex delicto and not ex contractu. Interurban Const. Co. v. Hayes, 191 Mo. 248, 89 S. W. 927.

49. An action against a carrier on a contract of shipment for delay in delivery is one ex contractu and not ex delicto, though it contains allegations of negligence. Chicago, etc., R. Co. v. Chestnut Bros. [Ky.] 89 S. W. 298. An action by a partner against his copartner and his surety on a sequestration bond for damages resulting from the wrongful sequestration, in which it is sought to hold the surety to the extent of the bond, and the copartner to a greater liability, is not an action ex delicto. St. Geme v. Boimare [La.] 41 So. 557.

50. Lange v. Schile, 111 App. Div. 613, 98 N. Y. S. 81. A complaint alleging that plaintiff's intestate placed certain money in defendant's hands to pay certain claims if they became established before his return, such money to be returned to plaintiff's intestate

joined under a statute authorizing joinder of consistent causes.[51] The establishment of one form of civil action enables equitable and legal relief to be granted in the same suit.[52] An election of remedies is only presented when there are two appropriate forms of action for redressing the wrong.[53] A trustee in bankruptcy may recover the value of property taken by a creditor within four months of the filing of the petition in bankruptcy, in an action at law.[54]

FORNICATION.[55]

FORTHCOMING AND DELIVERY BONDS; FORWARDERS, see latest topical index.

FRANCHISES.

§ 1. Definition and Elements (1771).
§ 2. Grant of Franchise and Regulation of its Exercise (1771).
§ 3. Powers and Duties Under Franchises (1774).
§ 4. Duration and Extension of Term (1775).
§ 5. Transfer of Franchises and Effect Thereof (1775).
§ 6. Revocation and Forfeiture (1776).
§ 7. Taxation (1777).

Corporate franchises are elsewhere treated.[56]

§ 1. *Definition and elements.*[57]—A franchise is defined as a special privilege conferred by a government on individuals or corporations and which does not belong to the citizens of a country generally by common right.[58] Franchises are to be strictly construed in the public interest,[59] and nothing is to be taken by doubtful implication,[60] though granted by a delegate of the legislature.[61]

§ 2. *Grant of franchise and regulation of its exercise.*[62]—All franchises or

if not so used, a demand for such money by plaintiff, and that defendant wrongfully refused to return it, but converted it to his own use, etc., held to allege a cause of action for money received. Id.

51. An action on the theory that defendant has converted property of plaintiff cannot be joined with one on the theory that such property was sold to defendant, seeking to recover purchase price, under Code Civ. Proc. § 484, subd. 9, authorizing the joinder of consistent causes of action arising out of the same transaction, such actions being inconsistent. Drexel v. Hollander, 98 N. Y. S. 104.

52. Insurance policy reformed and recovery had on it as corrected. Aetna Ins. Co. v. Brannon [Tex.] 14 Tex. Ct. Rep. 208, 89 S. W. 1057. Under Rev. St. c. 84, §§ 17-21, the court can use its equity powers to assert equitable principles in an action at law. Hurd v. Chase, 100 Me. 561, 62 A. 660. Where property was conveyed in consideration of support until death, and a life estate was reserved to ensure performance, the court in an action at law to recover possession may go behind the absolute reservation and look at the intent. Id.

53. An owner of personalty converted by another cannot waive the tort and sue for money had and received unless the property has been sold. Southern R. Co. v. Attalla [Ala.] 41 So. 664. See, also, Election and Waiver, 7 C. L. 1222.

54. Not required to bring an action in equity. Pfeiffer v. Roe, 108 App. Div. 54, 95 N. Y. S. 1014.

55. No cases have been found for this subject since the last article. See 5 C. L. 1518.

56. See Corporations, 7 C. L. 862, and see, also, topics dealing with corporations exercising particular franchises: Street Railways, 6 C. L. 1556, and the like.

57. See 5 C. L. 1518.

58. Cyc. Law Dict. p. 390. A contract made by a municipal corporation with a third person for the supply of public utilities to the city and its inhabitants creates no special privilege or immunity within the constitution of Nebraska. Omaha Water Co. v. Omaha [C. C. A.] 147 F. 1. The operation of a dispensary for the sale of liquors is the exercise of a franchise in Alabama. City of Uniontown v. State [Ala.] 39 So. 814. The license or privilege granted to a telephone company to occupy the streets of a city is not a franchise. People v. Chicago Tel. Co., 220 Ill. 238, 77 N. E. 245.

59. City of Vicksburg v. Vicksburg Waterworks Co., 202 U. S. 453, 50 Law. Ed. —. The grant of a franchise by a city to a waterworks company does not prevent the city from building, owning, and operating a waterworks in the absence of express contractual provision. City of Meridian v. Farmers' Loan & Trust Co. [C. C. A.] 143 F. 67.

60. City held to have in plain language excluded itself from competition with the holder of a franchise for supplying water. City of Vicksburg v. Vicksburg Waterworks Co., 202 U. S. 453, 50 Law. Ed. —.

61. Municipality. Knoxville Water Co. v. Knoxville, 200 U. S. 22, 50 Law. Ed. —.

62. See 5 C. L. 1518.

privileges known by that term proceed from the state in the exercise of its sovereign power,[63] exercised either directly or by delegation,[64] and though the legislature may grant a corporate charter for the exercise of a franchise in a certain city, the city's consent must first be obtained in most jurisdictions,[65] and occasionally the property owner's consent is essential.[66] The power of a municipality is exercised by authorized officers or boards,[67] and the authority carries a discretion to be exercised in the public interest,[68] but prescribed procedure is often deemed essential to the validity of their acts;[69] but where no procedure is prescribed, any substantial expression of official assent will suffice,[70] and defects may be cured by retroactive legislation[71] or by es-

63. Wilcox v. McClellan [N. Y.] 77 N. E. 986.

64. The state legislature has power to transfer from the board of aldermen of the city of New York to the board of estimate and appraisement thereof the power to grant franchises. Wilcox v. McClellan [N. Y.] 77 N. E. 986.

65. Nanticoke Suburban St. R. Co. v. People's St. R. Co., 212 Pa. 395, 61 A. 997; Little Rock R. & Elec. Co. v. North Little Rock [Ark.] 88 S. W. 1026. Under the statutes of Illinois, the consent of the city of Chicago is a condition precedent to the right of street railroads chartered by the state to use its streets. Acts of Feb. 6, 1865, amending the act of Feb. 14, 1859, and Aug. 16, 1858. Blair v. Chicago, 201 U. S. 400, 50 Law. Ed. —.

66. Under the statute of Ohio, requiring street railroad franchises to be let to the person or corporation who will agree to carry passengers at the lowest rate of fare, the consent of a property owner to the construction of a street railroad in a street on which his property abuts, limited to a particular corporation is valid, though the limitation is void. Rev. Code 1903, § 1536-185 (section 30 of the Municipal Code). Forest City R. Co. v. Day [Ohio] 76 N. E. 396. The Tunnel Act of New York, in so far as it authorized certain railroads to build in a tunnel under the streets of a city with the consent of the local authorities, and the owners of one-half in value of the abutting property, was valid, though it contained certain unconstitutional provisions. Laws N. Y. 1880, p. 872, c. 582. New York, etc., R. Co. v. O'Brien, 50 Misc. 13, 100 N. Y. S. 316. And see Street Railroads, 6 C. L. 1557.

67. Authority conferred by the board of electrical control of New York City in 1896 for the use of subways by electric companies was not sufficient of itself to confer a franchise, the authority being in the board of aldermen. West Side Elec. Co. v. Consolidated Tel. & Electrical Subway Co., 110 App. Div. 171, 96 N. Y. S. 609. In Illinois the power of township trustees to control the streets and highways includes the right to authorize their use for street railway purposes. Blair v. Chicago, 201 U. S. 400, 50 Law. Ed. —. A board of county commissioners has no power under the statute of Washington, relating to its powers as to highways, to grant a franchise to lay pipes under or along a public highway. 1 Ballinger's Ann. Codes & St. § 342, construed. State v. Monroe, 40 Wash. 545, 82 P. 888. County commissioners have not the power to grant a franchise to a telegraph company giving it the right to maintain indefinitely in a particular part of a highway the poles and wires of the company. Ganz v. Ohio Postal Tel. & Cable Co. [C. C. A.] 140 F. 692.

68. Board presumed to have acted for best interests of municipality. Manhattan & Bronx Elec. Co. v. Fornes, 47 Misc. 209, 95 N. Y. S. 851.

69. Under the charter of Greater New York it is made the absolute duty of the board of aldermen to refer a proposed ordinance granting a franchise for the use of streets, etc., to the board of estimate. Laws 1897, p. 26, c. 378, as amended by Laws 1901, p. 38, c. 466. Manhattan & B. Elec. Co. v. Fornes, 47 Misc. 209, 95 N. Y. S. 851. What the rules of the board are as well as what may be the actual condition of the rules of parliamentary practice applicable under the rules of the board are questions of fact. Id. The publication of a proposed ordinance required by the Greater New York charter on application for a franchise for the use of streets, etc., is not a condition precedent to its introduction and first reading. Laws 1897, p. 26, c. 378, as amended by Laws 1901, p. 38, c. 466. Id. Until the views of the board of estimate are expressed, the matter is in no condition for an expression of opinion by the board of aldermen adversely to the granting of the franchise in any event. Id. The procedure which is to lead to the orderly bringing of a resolution or ordinance to a first reading is a necessary factor in determining whether the ordinance has come to a first reading within Greater New York charter, relating to the granting of franchises for the use of streets, etc. Id. Electric company held not entitled to peremptory writ of mandamus to compel the board of aldermen to refer proposed ordinance granting franchise to the board of estimate and appraisement. Id.

70. Where a city council has power to give consent requisite to confer a franchise, and no particular form is prescribed by law, the adoption of resolutions contemplating and providing for the execution of contracts on the theory of the existence of a franchise is sufficient to show the existence of a franchise. People v. Littleton, 110 App. Div. 728, 96 N. Y. S. 444. Gas lighting corporation held entitled to mandamus to compel issuance of permits to open streets for the purpose of connecting gas mains. Id. Under a statute requiring the consent of the township supervisor to the extension of street railways beyond the limits of a city where they are operating, the consent of the township board of trustees, after the supervisor became a member thereof, satisfies the requirement. Blair v. Chicago, 201 U. S. 400, 50 Law. Ed. —.

71. Consent to the use of streets obtained

toppel.[72] The granting of a franchise by a municipality is a proprietary and not a governmental function.[72a] It is no objection to the delegation to a board of power to grant franchises that such board is by other statutes authorized to vote cumulatively.[73] The grant may include after-acquired territory[74] and may extend beyond the terms of the granting officers.[75] A franchise is subject to the police power to regulate its use[76] and the charges made for public service in its exercise,[77] except so far as they have acquired the inviolability of a contract,[78] and subject to the prohibition against the disturbance of vested rights.[79] Impossibility of performance of orders

in violation of the Cantor Act (Laws N. Y. 1886, p. 919, c. 642), providing that authority to use streets should not be obtained without bidding or purchasing at public auction, was rendered effective as to certain corporations by Laws 1892, p. 1450, c. 702 (amending the Railroad Law), though obtained prior to the repeal of the Cantor Act. New York, etc., R. Co. v. O'Brien, 50 Misc. 13, 100 N. Y. S. 316.

72. Estoppel cannot be invoked to validate a franchise granted by a municipal board having no power to make the grant. State v. Monroe, 40 Wash. 545, 82 P. 888.

72a. City of Gadsden v. Mitchell [Ala.] 40 So. 557.

73. Wilcox v. McClellan [N. Y.] 77 N. E. 986.

74. A franchise providing that it shall be effective in the corporate limits of a city "as they now exist or as they may hereafter be enlarged" is valid as to new territory thereafter added to the city. Truesdale v. Newport [Ky.] 90 S. W. 589.

75. In the exercise of the business powers of a city, the municipality and its officers are not controlled by the rule which prevents the officers from making a grant or contract which will bind the municipality beyond the terms of their offices. Omaha Water Co. v. Omaha [C. C. A.] 147 F. 1.

76. City authorities held to have authority to compel removal of street car track to portion of street designated by them. People v. Geneva, etc., Traction Co., 98 N. Y. S. 719. The Federal post road statute, granting to telegraph companies the right to use military or post roads, expressly provides that such lines shall be so maintained as not to interfere with the ordinary travel thereon. Rev. St. U. S. § 5268. Ganz v. Ohio Postal Tel. & Cable Co. [C. C. A.] 140 F. 692. The use by a telegraph company of a highway to facilitate communication is subordinate to the right of the public to use it for travel and transportation. Where the use of a highway by a telegraph company incommodes the public, a county having the highway in charge may require removal of the poles to such part of the highway as will obviate the inconvenience. Id. County commissioners in office in whose charge a highway is must determine whether the use of the highway by a telegraph company has become inconvenient to the public travel by reason of changed conditions. No board has the power to determine for all time just how a highway shall be used. Id. The selection of the portion of a highway to be occupied by a telegraph company under its franchise is within the discretion of the county commissioners in charge of the highway (Id.), as is also the determination of the necessity for the removal of the company's poles and wires from a particular portion of the highway (Id.). The fact that a telegraph line was established on a highway prior to the grant of a franchise to an electric railway to operate thereon does not add anything to the right of the telegraph company to maintain its line in the portion of the highway originally selected. Id. Lapse of time does not bar a city's right to remove electric light poles erected in its streets under an electric lighting franchise to places other than those previously occupied. Merced Falls Gas & Elec. Co. v. Turner [Cal. App.] 84 P. 239. The holders of a franchise must conform to needful regulations controlling the exercise of personal and property rights. Id.

77. The power to so regulate rates for public utilities that they shall not be unreasonable is a legislative or governmental power which the state or city may exercise, but may not renounce. Omaha Water Co. v. Omaha [C. C. A.] 147 F. 1. The power to fix and regulate the rates which the inhabitants of a city shall pay to business corporations for public utilities partakes of the nature of a governmental power and also of that of a business power. Id. The legislature of a state, unless prohibited by its constitution, may, however, empower a city to suspend for a reasonable time its power to change or regulate the rates for public utilities under franchises granted by the city. City held to have no power to alter rates chargeable by a water company within maxima rates named in the company's franchise. Id.

78. Where the power of the legislature is unlimited as to the authorization of a city to agree on water rates and other terms of a contract with the grantee of a franchise, and it grants power to the city without restriction, the exercise of the power by the city by agreeing to the maintenance of maxima rates makes the contract irrevocable for the term of the franchise. Omaha Water Co. v. Omaha [C. C. A.] 147 F. 1.

79. The Constitution of California, in providing for the exercise and enjoyment of a franchise, does not grant an indefeasible right or easement in the particular spots of earth where the poles of an electric company are planted originally. City held entitled to remove electric light poles of electric company on company's failure to remove them to places other than those originally occupied. Merced Falls Gas & Elec. Co. v. Turner [Cal. App.] 84 P. 239. The constitutional provision forbidding the impairment of a contract is not violated by requiring a street railroad to remove its tracks to a portion of a street designated by municipal authorities. People v. Geneva, etc., Traction Co., 98 N. Y. S. 719. A city held to have contracted not to reduce water rates below

may, however, prevent the exercise of the power of regulation.[80] Where a franchise exists a municipality may be compelled to designate streets where it may be exercised.[80a] Mandamus is the proper remedy by which to enforce compliance with police regulations in the use of a franchise.[81] This subject is more fully treated in other topics.[82]

§ 3. *Powers and duties under franchises.*[83]—A franchise must be exercised in strict accordance with its terms,[84] which are binding alike on lessees and sublessees,[85] but which may be modified by agreement with the grantor;[86] but in the absence of prejudice to the grantor, it may be operated in conjunction with other franchises.[87] Unless the franchise is made exclusive[88] by clear and express terms,[89] pursuant to a clearly granted power,[90] competition by the grantor with its grantee of a franchise

those specified in an ordinance accepted by the grantee of the franchise. Omaha Water Co. v. Omaha [C. C. A.] 147 F. 1. Injunction is the proper remedy to prevent the impairment of the obligation of a contract by regulating measures affecting the exercise of franchises. Id. A water company held entitled to an injunction to prevent the enforcement of an ordinance lowering rates permitted by an ordinance accepted by the grantor of the franchise. Id.

80. The obligation of the holder of a franchise for the operation of a street passenger railway, under a contract with a township through which the line passes to remove the track from the side to the center of the highway, is part of a condition subsequent, impossibility of performance of which is excusable. Millcreek Tp. v. Erie Rapid Transit St. R. Co. [Pa.] 64 A. 901. Where a franchise to operate a passenger railway on one side of a highway is granted by a township, subject to the right of the township to require removal of the tracks to the center at any time, a removal cannot be required while abutting owners on the other side refuse their consent, and it is impossible to compel them to consent. Id.

80a. Mandatory injunction held proper. City of Gadsden v. Mitchell [Ala.] 40 So. 557.

81. Street railroad held compellable by mandamus to remove its tracks to a portion of a street designated by municipal authorities. People v. Geneva, etc., Traction Co., 98 N. Y. S. 719. Where a city has contracted, under proper legal authority, to permit the grantee of a franchise to establish and operate a water-works to charge certain maxima rates to private consumers, the attempt of the city to lower the rates during the term of the franchise, pursuant to state law, is an impairment of a contract within the inhibition of the Federal constitution. Omaha Water Co. v. Omaha [C. C. A.] 147 F. 1.

82. See Constitutional Law, 7 C. L. 691; Carriers, 7 C. L. 522; Commerce 7 C. L. 667 (powers and proceedings of Commerce Commission).

83. See 5 C. L. 1520.

84. Where a franchise provides that the grantee shall not increase the rates for the service over the rates charged at the beginning of operations, an increase under a special contract for improved service is a misuse of the powers of the holder. Telephone company held guilty of misuse of its powers under franchise forbidding increase of rates. People v. Chicago Tel. Co., 220 Ill. 238, 77 N. E. 245. Electric company held not entitled to urge its own guilt in entering into a combination in violation of its franchise to enable it to refuse to carry out its contract with a public service corporation depending on it for electricity. Seattle Elec. Co. v. Snoqualmie Falls Power Co., 40 Wash. 380, 82 P. 713.

85. The Rogers Law (Act Ohio, April 26, 1895), requiring transfer of interurban passengers in cities, held binding on sublessee of city street railway track. City of Cincinnati v. Cincinnati St. R. Co., 3 Ohio N. P. (N. S.) 489.

86. Statutes authorizing the grant by a city of franchises for horse railways therein, and providing for contractual amendment, modification, or annulment, authorize the city to grant and the railways to accept a changed method of operation. Acts Ill. Aug. 16, 1858, Feb. 14, 1859, and Feb. 6, 1865, held to authorize the use of electric or cable cars, though their titles referred only to horse cars. Blair v. Chicago, 201 U. S. 400, 50 Law. Ed. ——.

87. Under New Jersey statutes a consolidated gas company has the right to put in larger pipes in a municipality than necessary for serving the municipality with gas, for the purpose of supplying other municipalities by the same mains. Public Service Corp. v. De Grote [N. J. Eq.] 62 A. 65.

88. City held excluded by franchise provision from competition with waterworks. City of Vicksburg v. Vicksburg Waterworks Co., 202 U. S. 453, 50 Law. Ed. ——. In Alabama an exclusive franchise is in that respect unconstitutional. City of Gadsden v. Mitchell [Ala.] 40 So. 557.

89. Before the claim of an exclusive franchise by grant from a city can be upheld, it must appear that the legislature of the state, in express terms, or by necessary and inevitable implication, delegated to the city such sovereign and plenary power as once exercised by it exhausted the power to further contract in that regard during the life of the grant. Water, Light & Gas Co. v. Hutchinson, 144 F. 256. If by contract, or otherwise, a municipal corporation may, in particular circumstances, restrict the exercise of its public powers, the intention to do so must be manifested by words so clear as not to admit of two different or inconsistent meanings. Knoxville Water Co. v. Knoxville, 200 U. S. 22, 50 Law. Ed. ——.

90. A city has no inherent power to grant an exclusive privilege. The right to furnish

is not necessarily forbidden.[91] A corporation owning a valid franchise to operate in a city may, as a citizen and taxpayer, maintain an action to prevent another, without a franchise, from operating therein as a business rival.[92]

§ 4. *Duration and extension of term.*[93]—When the term of a franchise must be reasonable the courts have designated periods which are declared reasonable,[94] and in some states the term is limited by statute.[95] A franchise granted for an indefinite time by a municipality expires at the time the municipality ceases to exist by virtue of annexation to another,[96] but where a township is divided after a franchise has been granted by it, the validity of the franchise is not affected.[97] The rules of construction do not favor the extension of the term of a franchise,[98] but a plain intention to extend a franchise in consideration of expenditures and improvements by the holder cannot be ignored after it has been acted upon.[99] The mere silence of an ordinance granting a franchise as to the term of its exercise confers no right in perpetuity.[1] An extension may be made before the expiration of the original franchise.[2] The grantee of a franchise may be estopped to claim an unlimited term.[3]

§ 5. *Transfer of franchises and effect thereof.*[4]—The rule which forbids the sale of the entire property and franchise of a public service corporation during the life of the franchise has reference only to voluntary transfers[5] of the entire fran-

a city and its inhabitants with water and light held not exclusive. Water, Light & Gas Co. v. Hutchinson, 144 F. 256. The Constitution and statutes of Kansas confer no power on cities of the second class to grant exclusive franchises. Const. art. 12, § 5; Gen. St. 1901, pp. 225, 232, 237, §§ 35, 65, 83. Id.

91. Where a city has granted a franchise to a waterworks company without binding itself not to build and operate waterworks of its own, legislation authorizing it to do so, and ordinances in pursuance thereof, do not impair the obligation of the contract between the city and waterworks company. City of Meridian v. Farmers' Loan & Trust Co. [C. C. A.] 143 F. 67. Where a city has the right to build and operate its own waterworks, the fact that the city's competition will lessen the value of an existing water company's plant, operating under a franchise granted by the city, does not amount to a taking of property without due process of law, within inhibition of the Federal Constitution (Id.), nor to a taking of property without compensation within the Constitution of Mississippi (Id.). The establishment of a waterworks of its own by a city during the term of a franchise granted by it, in which the city agreed with a water company not to grant to any person or corporation the same privileges during the term of the franchise, was not the impairment of a contract within the constitutional inhibition. Knoxville Water Co. v. Knoxville, 200 U. S. 22, 50 Law. Ed. —.

92. Merchants' Police & District Tel. Co. v. Citizens Tel. Co. [Ky.] 93 S. W. 642.

93. See 5 C. L. 1521.

94. **Twenty-five years** is not an unreasonable term for a city to grant the use of its streets for water mains, to pay hydrant rentals, and to agree on water rates for its inhabitants. Omaha Water Co. v. Omaha [C. C. A.] 147 F. 1. Thirty years for a water supply franchise is not, as matter of law, an unreasonable time. City of Gadsden v. Mitchell [Ala.] 40 So. 557.

95. A franchise granted by a city council for an indefinite time, but revocable at the pleasure of the council, is void under the Constitution of Kentucky permitting a grant for "a term of years" [Const. § 164] (Merchants' Police & Dist. Tel. Co. v. Citizens' Tel. Co. [Ky.] 93 S. W. 642), nor is the validity of a franchise affected by the fact that the grantee is not required to begin operations thereunder till a future time, though it is granted for the full term permitted by law from the date of the grant (Truesdale v. Newport [Ky.] 90 S. W. 589).

96. Blair v. Chicago, 201 U. S. 400, 50 Law. Ed. —; People v. Chicago Tel. Co., 220 Ill. 238, 77 N. E. 245.

97. Public Service Corp. v. De Grote [N. J. Eq.] 62 A. 65.

98. A statute granting an extension of corporate existence to holders of a franchise granted by a municipality cannot by equivocal language extend the term of the franchise as granted by the municipality. Blair v. Chicago, 201 U. S. 400, 50 Law. Ed. —. The act of Ill. Feb. 6, 1865, amending the act of Feb. 14, 1859, held not to extend the franchise of certain Chicago street railroads. Id.

99. City held to have extended a street railway franchise. City of Cleveland v. Cleveland Elec. R. Co., 201 U. S. 529, 50 Law. Ed. —.

1. Blair v. Chicago, 201 U. S. 400, 50 Law. Ed. —.

2. Under the statutes of Ohio the City of Cleveland has power to contract for the extension of a street railway franchise before the expiration of the old grant. City of Cleveland v. Cleveland Elec. R. Co., 201 U. S. 529, 50 Law. Ed. —.

3. By accepting and acting under an ordinance limiting a franchise as to time, and which repealed a former, the grantee of a franchise unlimited as to time is estopped to claim rights under the repealed ordinance. Cumberland Tel. & T. Co. v. Evansville [C. C. A.] 143 F. 238.

4. See 5 C. L. 1522.

chise,[6] and does not prevent a sale to the grantor of the franchise.[7] A provision in the grant of a franchise by a city giving the city an option to purchase the property and plant of the grantee before the expiration of the franchise is presumed to have been adopted in the public interest,[8] and any doubt of its validity must be resolved in favor of the city's right to exercise the option,[9] nor does the grantee of the franchise have any concern with the use to be made of the plant when purchased by the city under the option.[10] A public service corporation does not exceed its powers by giving a city granting it a franchise an option to purchase its plant at a given time in the future,[11] and it may exercise the option, though express language empowering it to engage in the business be wanting.[12] The fixing of the price by appraisers is not unlawful,[13] nor is the right to exercise the option affected by a partial sale of the property of the grantee prior to the exercise of the option by the city.[14] One having an interest in a public service corporation is in equity entitled to have his interest defined and his rights enforced on a fraudulent sale of its property and franchise, though no stock has been issued to him.[15] In contracting for the construction or purchase of waterworks to supply itself and its inhabitants with water, a city is not exercising its governmental or legislative, but is using its business or proprietary, powers.[16]

§ 6. *Revocation and forfeiture.*[17]—The stipulation in a franchise for forfeiture for breach of its provisions is a condition subsequent,[18] and a declaration of forfeiture is necessary to its enforcement by a party,[19] but equity will not declare or enforce such a forfeiture if there is a legal remedy.[20] An ordinance granting a franchise when accepted by the grantee becomes a contract[21] substantial compliance

5. City of Indianapolis v. Consumers' Gas Trust Co. [C. C. A.] 144 F. 640. Injunction against the impairment of a contract will not be denied merely because the complainant claims title through a foreclosure sale of all the franchises, rights, and property of a public service corporation. Omaha Water Co. v. Omaha [C. C. A.] 147 F. 1. Where a company is authorized to mortgage its franchises and rights, these may be sold and the purchaser acquire title thereto at the foreclosure sale. City of Vicksburg v. Vicksburg Waterworks Co., 202 U. S. 453, 50 Law. Ed. —.

6. Where a concession is made to an individual "or to the company he may organize," but provides that the contract may not be transferred without the previous authority of the grantor, there is implied power to make transfers of interests therein to persons composing the company (McGue v. Rommel, 148 Cal. 539, 83 P. 1000), and the sale of such interest without the consent of the grantor constitutes a valid consideration for notes given in payment of the purchase price (Id.).

7, 8, 9. City of Indianapolis v. Consumers' Gas Trust Co. [C. C. A.] 144 F. 640.

10. The objection to the validity of the provision that the city intended to sell the plant to other parties, instead of operating it, was therefore untenable. City of Indianapolis v. Consumers' Gas Trust Co. [C. C. A.] 144 F. 640.

11. A natural gas company having power to operate its business only through grant of a franchise from a city does not exceed its powers by the acceptance of a provision giving the city the option to purchase the plant prior to the expiration of the franchise. City of Indianapolis v. Consumers' Gas Trust Co. [C. C. A.] 144 F. 640.

12. Charter power to construct and establish gas works authorizes a city to purchase the plant of a natural gas company, though natural gas was not recognized as an available product of the state at the adoption of the charter. City of Indianapolis v. Consumers' Gas Trust Co. [C. C. A.] 144 F. 640

13. The provision in a franchise for the supplying of natural gas that the city granting the franchise should have the option to purchase the plant of the grantee "at a price to be fixed by appraisers" is not invalid as a delegation of municipal power. City of Indianapolis v. Consumers' Gas Trust Co. [C. C. A.] 144 F. 640.

14. Under an option to purchase the entire plant or plants of the grantee of a franchise, a city is not disabled from exercising the option from the fact that the grantee has itself sold a portion of its property prior to the exercise of the option by the city. City of Indianapolis v. Consumers' Gas Trust Co. [C. C. A.] 144 F. 640.

15. Mulvihill v. Vicksburg R., Power & Mfg. Co. [Miss.] 40 So. 647.

16. Omaha Water Co. v. Omaha [C. C. A.] 147 F. 1.

17. See 5 C. L. 1522.

18, 19. Wheeling, etc., R. Co. v. Triadelphia, 58 W. Va. 487, 52 S. E. 499.

20. Street railroad held entitled to enjoin forfeiture of its franchise by city for breach of condition subsequent, but not to relief against performance. Wheeling, etc., R. Co. v. Triadelphia, 58 W. Va. 487, 52 S. E. 499.

21. Wheeling, etc., R. Co. v. Triadelphia, 58 W. Va. 487, 52 S. E. 499.

with which does not excuse the party in fault or support a prayer for equitable relief against the enforcement of its obligations,[22] but long continued acquiescence by a city in nonperformance of conditions warrants a court of equity in preventing a sudden ouster amounting to a surprise for the mere purpose of forcing the holder to the acceptance of a franchise more liberal towards the grantor.[23] The rule that equity will not relieve against a statutory forfeiture does not apply to the attempt of a city to forfeit a franchise for breach of conditions imposed by an ordinance granting the franchise.[24] Revocation of a franchise by a municipal corporation for alleged breach of stipulations is the exercise of police power.[25] Property rights under a franchise cannot be taken away by a municipal ordinance passed without notice to the holder of the franchise.[26] There may be loss of rights under a franchise by nonuser or failure to observe conditions.[27] A proceeding in the nature of quo warranto is the proper proceeding for forfeiture of a franchise,[28] or questioning the right to continue in the use and occupation of streets and to exercise a franchise therein.[29]

§ 7. *Taxation*[30] is elsewhere treated.[31]

FRATERNAL MUTUAL BENEFIT ASSOCIATIONS.

§ 1. Nature, Organization, and Powers (1778). Legislative Control as to Insurance (1778). Protection of Name, Ritual, and Individuality (1779). Status of Local Lodges and Relation to Supreme Body (1779).
§ 2. Foreign Associations (1780).
§ 3. Officers, Agents, Organizers, Physicians, etc. (1781).
§ 4. Members and Discipline (1782). Arbitration of Disputes (1783).
§ 5. The Contract of Insurance (1783).
A. General Nature, Requisites, and Formation (1783).
B. General Rules of Construction (1784).
C. Risk Assumed and Benefit Promised (1785).
D. Conditions, Warranties, and Representations (1787).
E. Dues and Assessments (1789).
F. Modification and Alteration of Contract or its Terms (1790).
G. Rescission, Forfeiture, Cancellation and Avoidance (1792).
H. Waiver, Estoppel, and Reinstatement (1794).
§ 6. The Beneficiary (1798).
§ 7. Maturity and Accrual of Benefits (1803).
§ 8. Notice and Proofs of Death or Disability (1803).
§ 9. Payment of Benefits and Discharge of Liability (1804).
§ 10. Procedure to Enforce Right to Benefits, etc. (1805). Rights of Action and Defenses in General (1805). Jurisdiction and Venue (1805). Pleading (1806). Evidence (1807). Relevancy and Admissibility (1809). Sufficiency and Degree of Proof (1810). Trial and Judgment (1811). Verdict and Judgment (1812).

Scope of title.—This title deals only with the law peculiarly applicable to fraternal mutual benefit societies and their contracts of insurance. Matters relating to insurance companies, or insurance contracts generally, or which are common to all corporations or associations, are treated elsewhere.[32]

22. Stipulation for forfeiture of street railroad franchise held enforceable by city council. Wheeling, etc., R. Co. v. Triadelphia, 58 W. Va. 487, 52 S. E. 499.

23, 24, 25. Wheeling, etc., R. Co. v. Triadelphia, 58 W. Va. 487, 52 S. E. 499.

26. Where a franchise to supply and distribute electricity throughout a city has been granted and partially acted on by the grantee, an ordinance forbidding a further extension of the system within the city is a deprivation of property rights. United Elec. Co. v. Bayonne [N. J. Law] 63 A. 996.

27. The grantee of a franchise for the raising of shellfish is required to perform in the ordinary way in which the cultivation is usually conducted the conditions of the statute in order to exclude the public from their common-law right of fishing and gathering oysters on the bays or arms of the seas which may be covered by his franchise. Vroom v. Tilly, 184 N. Y. 168, 77 N. E. 24.

28. People v. Chicago Tel. Co., 220 Ill. 238, 77 N. E. 245. A municipal corporation is a person within a statute authorizing a proceeding in the nature of quo warranto in the name of the state against any person who usurps or unlawfully exercises any franchise. City of Uniontown v. State [Ala.] 39 So. 814.

29. People v. Chicago Tel. Co., 220 Ill. 238, 77 N. E. 245.

30. See 5 C. L. 1523.

31. See Taxes. 6 C. L. 1602.

32. See titles Insurance, 6 C. L. 69; Corpo-

§ 1. *Nature, organization, and powers.*[33]—The statutes vary somewhat in their definitions of a fraternal mutual benefit association, the elements of social fraternity, mutual benefit, and representation in government being usual.[34] It is not essential that every member engage to purchase benefits,[35] and the fact that the members who do so engage are collectively designated by a special name does not make them a separate organization,[36] and therefore not a fraternal benefit association because lacking some essential feature.[37] The validity of a fraternal benefit organization cannot be attacked collaterally on the ground that it has ceased to be such,[38] but an attack on the legality of a by-law is not a collateral attack on the right of the society to do business.[39]

The character of a provision of a society's constitution is to be judged of, not by what has been done, but what may in future be done under it.[40] Practice and usage may explain but cannot abrogate the organic laws of the association.[41] A fraternal society cannot, by its by-laws, resolutions, or contracts, change the statutory mode of exercise of its corporate powers.[42] It has been held in Nebraska that a society organized in that state cannot issue negotiable paper.[43] Where the constitution requires a two-thirds vote of the membership to change it, a change adopted by a mere majority is void,[44] and the records of the association must show passage by the requisite vote.[45] Ratification within the state of its domicile of laws passed by sessions of a society held outside of the state does not validate laws which were not legally adopted at a session out of the state.[46] A transaction looking to the consolidation of fraternal societies is not unlawful or contrary to public policy.[47]

Legislative control as to insurance.[48]—The general laws of insurance and in-

rations, 7 C. L. 862; Foreign Corporations, 7 C. L. 1725; Associations and Societies, 7 C. L. 294.

A few cases arising on contracts of insurance of the kind excluded are retained because of applicability of the rules laid down.

33. See 5 C. L. 1524.

34. A society formed and carried on for the sole benefit of its members and their beneficiaries and not for profit, having a lodge system with a ritualistic form of work and a representative form of government, is a fraternal beneficiary society as defined in Missouri. Fact that some members of society do not hold certificates of insurance held not to interfere with its being characterized as a fraternal beneficiary society. Westerman v. Supreme Lodge K. P., 196 Mo. 670, 94 S. W. 470. Choosing of officers by membership held requisite to representative form of government within Cobbey's Ann. St. 1903, § 6483. Lange v. Royal Highlanders [Neb.] 106 N. W. 224.

35, 36, 37. The mere fact that such members of the Knights of Pythias as are entitled on application to receive certificates from it are designated as the "Endowment Rank" does not constitute them a separate and distinct organization formed for the purpose of issuing insurance. Westerman v. Supreme Lodge K. P., 196 Mo. 670, 94 S. W. 470. The ritual and the fraternal character of the main body brings the "Endowment Rank" within the fraternal insurance statutes. Id.

38. State Council v. National Council [N. J. Eq.] 64 A. 561. Where a society does not as required maintain a ritualistic form of work, it nevertheless has a valid status until regularly proceeded against. Monger v. New Era Ass'n [Mich.] 13 Det. Leg. N. 653, 108 N. W. 1111.

39. Lange v. Royal Highlanders [Neb.] 106 N. W. 224. Where the supreme body of a society assumes to pass an edict forfeiting benefits for suicide of a member, the edict is a mere by-law. Id.

40. State Council v. National Council [N. J. Eq.] 64 A. 561.

41. Practice of subordinate lodge of not requiring members to pay monthly assessments until required to do so by collecting officer, and of receiving them after the time fixed by laws of the order, held not to effect change in laws requiring payment within a specified time on penalty of suspension, since under charter such changes could only be made by national council. Coughlin v. Knights of Columbus [Conn.] 64 A. 223.

42. Lange v. Royal Highlanders [Neb.] 106 N. W. 224.

43. Negotiable paper, payable absolutely, is beyond the power of a society organized under Laws 1897, p. 266, c. 47, to issue (Scott v. Bankers' Union of the World [Kan.] 85 P. 604), and the holder takes it with notice of its infirmities (Id.).

44. National Council v. State Council, 27 App. D. C. 1.

45. State Council v. National Council [N. J. Eq.] 64 A. 561.

46. National Council v. State Council, 27 App. D. C. 1.

47. Notes given for services in attempting to bring about a consolidation held valid and enforceable as to an individual executing them along with a society which had no power to do so. Scott v. Bankers' Union of the World [Kan.] 85 P. 604.

48. See 5 C. L. 1524.

surance companies are in many particulars commonly made inapplicable to fraternal benefit insurance,[49] but there is no presumption that the laws of another state exempt them from insurance laws which would otherwise be binding on them.[50] In Kansas, however, it is declared to be unlawful for any company, corporation, or association to engage in the business of insurance therein without compliance with the insurance laws.[51] As a part of the law regulating the insurance business, special and expeditious procedure may be prescribed.[52] The right to issue endowment contracts is forbidden to fraternal societies in Alabama,[53] but this does not prohibit the issuance of certificates promising payment of a stipulated sum on the attainment of an age recognized as entailing disability.[54] The auditor of public accounts of Nebraska has not arbitrary power to refuse a license to a fraternal society,[55] but he may require the mortuary fund of a benefit society to be kept separate and apart from its other funds as a condition precedent to granting it a license to continue business.[56]

Protection of name, ritual, and individuality.[57]—A minority of members of a society who adhere to the original and ancient faith have a controlling position as against those who have repudiated its principles.[58] A local council from which in its jurisdiction the existence of a national council is derived may, after it has justifiably withdrawn, enjoin the use of its name by the national council or body.[59] The mere position of curator or supervisor of numerous constituent associations, possessing in the aggregate a large accumulation of property, gives a society standing in a court of equity to protect its rights.[60] Where the name adopted by a society asking for a certificate of organization so resembles a title in use by a society of a similar nature as to have a tendency to mislead the public, the auditor of public accounts of Nebraska is forbidden by statute to issue the certificate.[61]

Status of local lodges and relation to supreme body.[62]—The relations between

49. An unincorporated fraternal association is not an insurance company within the Pennsylvania statutes relating to insurance companies. Algeo v. Fries, 27 Pa. Super. Ct. 157. Statutory rules relating to particular rights or remedies on the contract of insurance, see post, §§ 5-9.

50. A fraternal insurance company, having the word "accident" in its name and confining its membership to members of a certain order, is within Burns' Ann. St. Ind. 1901, § 4914t, applying to "mutual life and accident companies." Bruning v. Brotherhood Acc. Co., 191 Mass. 115, 77 N. E. 710.

51. Burial association held engaged in the business of insurance within Gen. St. 1901, § 3386. State v. Wichita Mut. Burial Ass'n [Kan.] 84 P. 757.

52. Short time to take appeal or error. Gen. St. 1901, § 3580. Sons & Daughters of Justice v. Swift [Kan.] 84 P. 984.

53. Certificates held void under Code 1896, c. 28, art. 3, §§ 1116-1121. Boyd v. Southern Mut. Aid Ass'n [Ala.] 41 So. 164.

54. A statutory inhibition of the power of fraternal societies to promise payment of a stipulated amount during the life of a member as an endowment does not apply to prohibit the making of a stated old age conclusive evidence of disability whereupon a stipulated sum shall become payable. Guthrie v. Supreme Tent Knights of the Maccabees of the World [Cal. App.] 87 P. 405. Where general power is given to pay disability benefits, a fraternal society is not estopped to contract to pay on the attainment of a stated old age recognized as entailing disability. Id.

55. Cobbey's Ann. St. 1903, §§ 6490, 6492, 6498, construed. State v. Searle [Neb.] 105 N. W. 284.

56. Matters shown in petition for writ of mandamus to compel issue of license to society to transact business in state held sufficient to entitle the relator to an opportunity to change its practice in relation to loaning its mortuary fund. State v. Searle [Neb.] 105 N. W. 284. Where the irregularities charged against a benefit society by the auditor of public accounts of Nebraska, as shown by its report, are such that they may be corrected by his calling the attention of the society thereto, a license to continue business should not be refused until after opportunity has been afforded to make correction. Id. Refusal of license to fraternal society by auditor of public accounts of Nebraska held within the discretion lodged in that officer. Id.

57. See 3 C. L. 1501.

58. State Council v. National Council [N. J. Eq.] 64 A. 561.

59. State Council v. National Council [N. J. Eq.] 64 A. 561. State council which withdrew from national council held entitled to exclusive use of its original name in the state of its organization. Id.

60. State Council v. National Council [N. J. Eq.] 64 A. 561.

61. Cobbey's Ann. St. 1903, § 6502. "Western Maccabees" held an infringement on

a state council and a supreme or national organization created by an aggregation of state councils are purely contractual.[63] Whether the national or the state council is sovereign depends partly on which derives its existence from the other,[64] and the original sovereignty of a state council is not lost by the fact of its membership in a national council unless such was the intention.[65] Where the sovereignty of the local councils is preserved, the objects of the order are not alterable without their consent,[66] and they may withdraw if it be attempted,[67] but ordinarily the fact that local bodies have seceded from the state organization which had chartered them will deprive them of the right to enjoy property given for local use where their charters have been reissued to other bodies since the secession.[68] The revocation of the charter of a state lodge by a national judicature of the society, which was never legally created, is a nullity.[69] A member negligently injured in initiation has no cause of action therefor against the supreme body where he has agreed that the subordinate lodge officers shall be his agents and that the supreme lodge shall not be liable for their negligent acts.[70]

The question of agency of the local lodge as affecting waiver or estoppel of the society in relation to insurance and benefits is treated elsewhere in the topic.[71]

§ 2. *Foreign associations.*[72]—The laws and decisions of the state of the domicile of a foreign society are important in determining questions affecting its contracts.[73] Where the policy of the domicile is clearly at variance with that of the forum, the foreign association is not entitled to the privileges peculiar to fraternal orders.[74] Nevertheless a society deprived of those peculiar exemptions does not necessarily lose its classification as a fraternal society for all purposes.[75] A society doing business in a state other than that of its domicile under a license from such state is bound by all reasonable statutes relating to service for the purpose of giving jurisdiction to local courts,[76] and a requirement that all process against a foreign society doing business in a state under a license from it shall be served on the officer of the insurance department of the state so long as any liability remains outstanding against it is not unreasonable.[77] The mode of service is discussed elsewhere.[78]

plaintiff's name. Knights of Maccabees of the World v. Searle [Neb.] 106 N. W. 448.

62. See 5 C. L. 1524.

63, 64, 65. State Council v. National Council [N. J. Eq.] 64 A. 561.

66. Objects of order held not subject to change without a vote of the original constituent members. State Council v. National Council [N. J. Eq.] 64 A. 561.

67. State council held justified in withdrawal of affiliation from national council by its attempt to substitute the creation of "an insurance branch and a sick and funeral fund" for the establishment of "a sick and funeral fund" as one of the objects of the order. State Council v. National Council [N. J. Eq.] 64 A. 561. Where a state council was one of several such councils to establish a national council, the subsequent withdrawal of the state council from affiliation with the national council **did not work a dissolution of the state council.** Id.

68. New England Lodge No. 4 v. Weaver, 8 Ohio C. C. (N. S.) 529.

69. Hence injunction does not lie to compel observance by the state lodge of the decisions of the national tribunal. National Council v. State Council, 27 App. D. C. 1.

70. Kaminski v. Knights of Modern Maccabees [Mich.] 13 Det. Leg. N. 665, 109 N. W. 33.

71. See post, § 5 H.

72. See 5 C. L. 1524.

73. In determining the right to the proceeds of a certificate issued by a foreign society and involving the construction of the statutes of another state, a construction of the statute by the courts of the state in question is entitled to great consideration. Larkin v. Knights of Columbus, 188 Mass. 22, 73 N. E. 850.

74. Society of a state whose laws permit legatees and legal representatives to be made beneficiaries held not entitled to exemption from Rev. St. 1899, § 7896. Dennis v. Modern Brotherhood of America [Mo. App.] 95 S. W. 967. And this is true though in the particular case the beneficiaries are within the eligible class as defined by the Missouri statutes. Id.

75. As in determining the rights of beneficiaries. Dennis v. Modern Brotherhood of America [Mo. App.] 95 S. W. 967.

76. Bruning v. Brotherhood Acc. Co., 191 Mass. 115, 77 N. E. 710.

77. Service on auditor of state under Burns' Ann. St. Ind. 1901, § 4914t, on foreign society which had not renewed its license, held binding on the society. Bruning v. Brotherhood Acc. Co., 191 Mass. 115, 77 N. E. 710.

Funds collected by an officer of a local lodge of a foreign fraternal society are not subject to garnishment in the collector's hands for a debt of the society, since they are either the property of members or held in trust,[79] but when such funds are attached and the society is brought into court by summons, it may make motions and pursue such course as may be proper to protect the fund as a trust of which it is trustee.[80]

Where a foreign society permits the insurance of persons not members, it is a criminal offense in Kentucky for an unlicensed person to act as agent therefor.[81]

§ 3. *Officers, agents, organizers, physicians, etc.*[82]—In its relations with its officers and agents and in acting through them, the ordinary rules of agency[83] and corporations[84] apply. The question of agency of officers of a society as affecting their power to waive provisions or estop the society in relation to insurance and benefits is treated elsewhere in this topic.[85] In fixing compensation of officers a mere agreement with the members cannot overcome the charter provisions as to how it shall be done.[86] The employment of paid agents by societies is forbidden in Iowa,[87] but this prohibition does not extend to others than the society itself.[88] The directors may adopt such by-laws only as the organic law or charter permits,[89] and then only in the manner, if any, that is pointed out.[90] A committee on revision of the laws of a society has no authority to originate and propose the abolition of both the constitution and laws without the notice required for amendments generally.[91] One cannot attack the validity of a delegate meeting of a society when he participates in the meeting and becomes a candidate for one of the offices to be filled.[92] Profits procured by a society's officers selling their offices and control of the society accrue to them as trustees,[93] and creditors of the society may apply the fund to the payment of their claims.[94]

78. See post § 10, also see Process, 6 C. L. 1073; Foreign Corporations, 7 C. L. 1725.

79. Whether the funds so collected be treated as the property of the society immediately on receipt by the collector or as the property of the members of the local lodge until transmitted is immaterial on the question of the right to attach them for the debt of the society. Brenizer v. Supreme Council, Royal Arcanum [N. C.] 53 S. E. 835.

80. Society held entitled to move vacation of attachment. Brenizer v. Supreme Council of Royal Arcanum [N. C.] 53 S. E. 835.

81. Society represented by unlicensed agent held an assessment or co-operative company within Ky. St. 1903, § 664. Skelton v. Com., 28 Ky. L. R. 1351, 92 S. W. 298. On a prosecution of an unlicensed person for acting as agent for a foreign society, a variance between the averment of the indictment of the name of a person solicited as "Mrs. K. H." and proof that it was "Mrs. A. E. H." was immaterial. Id. On a prosecution for acting as agent of a foreign society without having procured a license, evidence tending to show that lodge membership was not essential to the right to insure in the society was admissible. Id.

82. See 3 C. L. 1502.

83. See Agency, 7 C. L. 61.

84. See Corporations, 7 C. L. 862; also Insurance, 6 C. L. 69.

85. See post, § 5 H.

86. A fraternal society whose governing power in relation to fees and salaries to be allowed the officers is vested in an executive committee is not bound by acts of members of the society in contracting as to fees and salaries. Burdick v. Sons & Daughters of Protection [Neb.] 106 N. W. 466. A proposition made to the delegates of a convention by one who is a candidate, relating to his fees, if elected, cannot be regarded as a contract in the event of his election, in the absence of any agreement with the executive committee in whom the constitution vested the power of fixing fees and salaries. Id.

87. Under Code, tit. 9, c. 9, society held not liable on contract to pay commissions for procuring insurance. First Nat. Bank v. Church Federation, 129 Iowa, 268, 105 N. W. 578. The plea of estoppel held unavailing to establish the liability of a society for commissions on a contract to procure applications in violation of a statute forbidding employment of paid agents. Id.

88. Promoter of society held liable on contract to pay commissions for procuring applications, notwithstanding Code, tit. 9, c. 9, forbidding the employment of paid agents by societies. First Nat. Bank v. Church Federation, 129 Iowa 268, 105 N. W. 578.

89, 90. Board of directors held to be acting without authority in adoption of by-law. Van Atten v. Modern Brotherhood of America [Iowa] 108 N. W. 313.

91. National Council v. State Council, 27 App. D. C. 1.

92. Medical examiner held estopped to attack validity of election of his successor. Burdick v. Sons & Daughters of Protection [Neb.] 106 N. W. 466.

93. Heineman v. Marshall, 117 Mo. App. 546, 92 S. W. 1131.

It is a criminal offense in Mississippi for an unlicensed person to act as agent for a fraternal society.[95]

§ 4. *Members and discipline.*[96]—Membership may exist by reason of a reincorporation of a society in which one was a member,[97] and every person interested in the assets of the corporation as a member on the date the old charter expired becomes a member of the corporation created by the renewal of the charter.[98] Membership as a qualification for eligibility for insurance is reserved for a later section.[99] Expulsion is possible only while the society's existence continues.[1] A member cannot lawfully be expelled for testifying truthfully as a witness[2] nor for giving his testimony as an expert,[3] nor has an expulsion based on finding member guilty of having truthfully stated his age at time of initiation to be in excess of society's age limit, any validity.[4] When a proceeding to expel a member is had pursuant to the rules and laws of the society, in good faith and according to the laws of the land, the expelled member has no redress in the courts,[5] but the legality of an expulsion is open to inquiry in the courts.[6] Where an expulsion is wrongful, its publication by those guilty of the wrong is equally so.[7] To make a wrongful expulsion actionable it is not necessary that malice in the sense of hatred or ill will on the part of defendants toward the member be shown.[8] In an action for damages for an unlawful expulsion, evidence of the value of the benefits of which he was deprived is admissible,[9] as is also evidence tending to show wrongful and im-

94. Where the officers of a society in breach of their trust sell out the business and convert the proceeds to their own use, a subsequent judgment creditor of the society cannot, on proof of the insolvency of the society, enforce the judgment against the officers without showing that the transfer was executed with a view to incurring subsequent debts and evading payment. Heineman v. Marshall, 117 Mo. App. 546, 92 S. W. 1131.

95. Laws 1902, c. 59, held to include fraternal societies. Fikes v. State [Miss.] 39 So. 783. Issuance of a permit by the insurance commissioner held a condition precedent to the exercise on the part of an agent of any of the powers of such agency. Id. The sole proof of authority to engage in the business of insurance in Mississippi is the permit and license issued by the insurance commissioner. Id. The uncontradicted testimony of the insurance commissioner and certified copy of the records of his office showing want of authority of defendant to act as agent and want of permission of the association represented held competent and conclusive as to the agent's guilt, under Laws 1902, c. 59, requiring license by any person assuming to act as insurance agent. Id. An affidavit charging one with unlawfully assuming to act as insurance agent under the Mississippi statute must show the character of insurance which the defendant is charged with writing or soliciting and set out in definite terms the nature and details of the act charged. Affidavit held insufficient under Laws 1902, c. 59. Id.

96. See 5 C. L. 1525.

97. Where a society reincorporates after the expiration of its charter, all members at the time of the expiration of the charter are entitled to the privileges and benefits which they would have had if the charter had not expired. United Brothers v. Williams [Ga.] 54 S. E. 907.

98. Member expelled during interim between expiration of old and procuring of new charter held to have lost no rights thereby. United Brothers v. Williams [Ga.] 54 S. E. 907.

99. See post, § 5 A.

1. Not after expiration. United Brothers v. Williams [Ga.] 54 S. E. 907.

2. Thompson v. Grand International Brotherhood of Locomotive Engineers [Tex. Civ. App.] 14 Tex. Ct. Rep. 467, 91 S. W. 834; United Brothers v. Williams [Ga.] 54 S. E. 907.

3. Thompson v. Grand International Brotherhood of Locomotive Engineers [Tex. Civ. App.] 14 Tex. Ct. Rep. 467, 91 S. W. 834.

4. Plattdeutsche Grot Gilde von de Vereenigten Staaten von Nord Amerika v. Ross, 117 Ill. App. 247.

5. Expulsion for making threats to use funds of lodge, regardless of right so to do, and slandering members and officers held conclusive on the courts in a mandamus proceeding to compel reinstatement. Kelly v. Grand Circle Women of Woodcraft, 40 Wash. 691, 82 P. 1007.

6. Substantial justice more than form is to be considered in testing the validity of proceedings by which a member is expelled under the rules of the society. Charges held sufficiently specific. Kelly v. Grand Circle Women of Woodcraft, 40 Wash. 691, 82 P. 1007.

7. Whatever motive actuated defendants in the expulsion must be held to have actuated them in making a publication thereof which was a part of the sentence of expulsion. Thompson v. Grand International Brotherhood of Locomotive Engineers [Tex. Civ. App.] 14 Tex. Ct. Rep. 467, 91 S. W. 834.

8. Malice held sufficiently shown by proof that defendants acted knowingly and willfully in violation of member's rights and to his injury. Thompson v. Grand International Brotherhood of Locomotive Engineers

proper motives in expelling plaintiff.[10] Expulsions and suspensions as affecting right to disability and death benefits are treated elsewhere.[11]

Arbitration of disputes.[12]—By uniting with a society the member impliedly binds himself to abide the decision of such tribunals as the constitution of the society provides for the determination of disputes arising within the organization, when the society conforms itself to the powers vested in it and in good faith pursues the matters prescribed by its laws;[13] but a member is not required to exhaust the remedies within the order to correct the wrongful action of a local lodge in expelling him before bringing suit against the supreme body for damages.[14]

§ 5. *The contract of insurance. A. General nature, requisites, and formation.*[15]—As in other cases, in order to constitute a binding contract of insurance, there must be an offer and an unconditional acceptance thereof.[16] By accepting an application, issuing a death benefit certificate to, and recognizing, one as a member by receiving dues and assessments, a fraternal order becomes bound on the face of the contract at death of the member, to pay the amount of the benefit to the beneficiary.[17] Conditions precedent to membership in the association must be complied with before the contract becomes effective.[18] So too, one does not be-

[Tex. Civ. App.] 14 Tex. Ct. Rep. 467, 91 S. W. 834.

9. Evidence of value of insurance policy admitted (Thompson v. Grand International Brotherhood of Locomotive Engineers [Tex. Civ. App.] 14 Tex. Ct. Rep. 467, 91 S. W. 834), also of a traveling card whereby he was enabled to travel on railroads free (Id.), also of sick benefits to which he might become entitled, was admissible (Id.), but not of the amount of his earnings per month while employed in the line of work requisite to obtain membership when he was not so engaged at the time of expulsion (Id.).

10. Evidence admissible that another involved in the same way that plaintiff was was not expelled and that threats of expulsion were made to coerce action. Thompson v. Grand International Brotherhood of Locomotive Engineers [Tex. Civ. App.] 14 Tex. Ct. Rep. 467, 91 S. W. 834.

11. See post §§ 5, E, G, H.

12. See 5 C. L. 1525. Submission to arbitration prior to action for benefits, see post § 10, Agreements to Arbitrate or Submit to Official Decision.

13. Good faith of society in expelling a member for signing his name to a letter held a question for the jury. Thompson v. Grand International Brotherhood of Locomotive Engineers [Tex. Civ. App.] 14 Tex. Ct. Rep. 467, 91 S. W. 834. See, also, Associations, etc., 7 C. L. 294.

14. Thompson v. Grand International Brotherhood of Locomotive Engineers [Tex. Civ. App.] 14 Tex. Ct. Rep. 467, 91 S. W. 834.

15. See 5 C. L. 1528, 1529, §§ 5 D, E. See generally on the contract of insurance, Kerr on Insurance. By-laws in general, see Boisot on By-laws.

16. Where an applicant agrees to comply with the requirements of the constitution and by-laws, and that they, with the application, shall be the basis of membership, exceptions contained in the constitution and by-laws not found in the application are not new conditions imposed requiring an acceptance by applicant before contract is completed. Tuttle v. Iowa State Traveling Men's Ass'n [Iowa] 104 N. W. 1131. Provision excepting suicide from the risk (Id.), and assessment plan disclosed in constitution and by-laws, but not in application, held not a new condition imposed (Id.). When an application is received by mail, a certificate of membership based thereon is issued to the applicant when duly executed by the insurer's officers, inclosed in an envelope duly addressed and stamped and deposited in the mail. Id. A request to communicate an acceptance of an application by mail may be inferred where the circumstances are such that it must have been contemplated that the post would be made use of in returning an answer. Id. Applicant held to have contemplated use of mail by corporation of another state in sending certificate of membership in response to his application handed to a solicitor at the domicile of the applicant. Id.

17. Kidder v. Supreme Commandery United Order of Golden Cross [Mass.] 78 N. E. 469.

18. Initiation held a condition precedent to membership. Loyal Mystic Legion v. Richardson [Neb.] 107 N. W. 795. The mere signing of an application containing the usual vow taken by members on initiation does not, in the face of by-laws requiring payment of an advance assessment and initiation as prerequisites to membership, constitute one a member. Id. Applies to charter members who fail to appear and be formally obligated. Id. Initiation being under the constitution a condition precedent to membership, and membership being condition precedent to right to recover on certificate, held that plaintiff was not entitled to recover for injury received prior to initiation in absence of waiver. Driscoll v. Modern Brotherhood [Neb.] 109 N. W. 158. A by-law providing that no person shall be considered a member until the board of directors have accepted his application and a certificate of membership has been issued, precludes the agency of another in the acceptance of an application. Rev. St. Mo. 1889, § 5915, held not to render one taking

come liable for assessments until after the performance of such conditions,[19] nor can payments be applied to assessments levied before that time.[20] The good health of the member is generally made a condition precedent to the right to transfer from one class of risks to another.[21] The institution of mandamus proceedings to compel recognition of the right to transfer is not necessary to its preservation,[22] but such right may be lost by acquiescence in a refusal to recognize it.[23]

As a general rule the constitution, by-laws, application, and certificate, all construed together, constitute the contract.[24] Members are bound to know the by-laws[25] and are deemed to assent thereto by joining the association.[26] As a general rule the laws, rules, and regulations may be made part of the certificate by reference.[27] By statute in some states they are not a part of the contract unless a copy thereof is attached to the policy.[28] A certificate reciting that the member is entitled to designate the beneficiary to whom a specified amount of the beneficiary fund of the order issuing it shall at his death be paid is a written promise to pay money.[29] A certificate issued in lieu of the original containing the name of a different beneficiary is not a "duplicate" within a provision authorizing the issuance of duplicates.[30]

(§ 5) *B. General rules of construction.*[31]—The contract is subject to the charter powers of the association.[32] The rights of members rest in contract and

an application in Missouri an agent in accepting the application. Tuttle v. Iowa State Traveling Men's Ass'n [Iowa] 104 N. W. 1131.

19. Where constitution and by-laws provided that certificate should not take effect until member was initiated into local lodge and certificate was delivered to her, held that membership and liability for assessments commenced on performance of such acts, though certificate bore previous date. Arrison v. Supreme Council Mystic Toilers, 129 Iowa, 303, 105 N. W. 580. Hence a health certificate is wrongfully demanded when assessments levied prior to membership and paid have not been applied in determining the member's good standing. Id.

20. When constitution requires acceptance of an applicant as a member, the passing of a satisfactory medical examination, the execution of a certificate by the grand and local officers, and its delivery to and acceptance by the applicant in writing thereon as a condition precedent to beneficial membership, an assessment paid at the time of making application is not available to the association until compliance with all the conditions. Hence a forfeiture for nonpayment of assessments could not be enforced where it could be saved by applying such assessment. Triple Tie Ben. Ass'n v. Wood [Kan.] 84 P. 565.

21. Right to transfer held to depend upon facts existing and not upon motive or opinion of medical examiner. Supreme Lodge K. P. v. Andrews [Ind. App.] 77 N. E. 361. Finding that rejection was unauthorized and arbitrary held conclusive. Id.

22. Supreme Lodge K. P. v. Andrews [Ind. App.] 77 N. E. 361.

23. Acquiescence held question of fact. Supreme Lodge K. P. v. Andrews [Ind. App.] 77 N. E. 361.

24. Mutual Protective League v. McKee, 122 Ill. App. 376. When not in conflict with statutes authorizing society's existence. Soehner v. Grand Lodge of Order of Sons of Herman [Neb.] 104 N. W. 871. Must be construed together. Entry on prohibited occupation held not to render contract absolutely void. Abell v. Modern Woodmen of America, 96 Minn. 494, 105 N. W. 65, 906. Constitution is part of contract. Flowers v. Sovereign Camp Woodmen of the World [Tex. Civ. App.] 14 Tex. Ct. Rep. 311, 90 S. W. 526; Triple Tie Benefit Ass'n v. Wood [Kan.] 84 P. 565.

25. Beeman v. Supreme Lodge, 29 Pa. Super. Ct. 387.

26. Members of a voluntary organization are bound by the constitution and laws thereof in the absence of fraud or deception. Myers v. Alta Friendly Soc., 29 Pa. Super. Ct. 492. By-laws printed on back of certificate. Id.

27. Thomas v. Covert, 126 Wis. 593, 105 N. W. 922. When the constitution and laws are printed on the back of the policy and referred to on the face of the policy as made a part thereof, they must be construed accordingly. Pearson v. Knight Templars' & Masons' Indemnity Co., 114 Mo. App. 283, 89 S. W. 588.

28. The manual of an accident society interpreting the policy and determining the amount due thereon is within Act May 11, 1881 (P. L. 20), rendering inadmissible rules bearing on the contract of which no copy is attached to the policy. Mowry v. National Protective Soc., 27 Pa. Super. Ct. 390.

29. There is no difference between an agreement to pay a specified sum to a person named in a certificate and one to pay a person designated by the member. Grand Lodge A. O. U. W. v. Barwe [Ind. App.] 75 N. E. 971.

30. Grand Lodge, A. O U. W. v. O'Malley, 114 Mo. App. 191, 89 S. W. 68.

31. See 5 C. L. 1528.

32. Power to pay birth, sick, and disability benefits excludes power to promise a refund of all dues above benefits paid. Boyd v. Southern Mut. Aid Ass'n [Ala.] 41 So. 164.

must be measured thereby.[33] The contract will be liberally construed in favor of the insured.[34] A construction which will uphold the contract will be preferred to one rendering it void.[35] The society's course of conduct may be considered on the construction of ambiguous provisions.[36] A by-law will not be given a strained construction to meet a situation covered directly by other provisions.[37] Forfeitures are not favored[38] and will not be declared except on clear and satisfactory evidence.[39] A construction preventing a forfeiture will be adopted if possible.[40]

The contract is ordinarily to be construed according to the laws of the state where it is completed.[41] Stipulations as to what laws shall govern are valid unless in conflict with the laws of the state where the contract is made.[42]

(§ 5) *C. Risk assumed and benefit promised* is determined by the terms of the contract.[42a] The association is frequently exempted from liability in case the member engages in a more hazardous occupation, thereby exposing himself to risks to which members are not usually liable,[43] or in case his death results from any

33. Assessment paid when application was made held available to the society only at the completion of the contract as determined by a construction of the constitution. Triple Tie Benefit Ass'n v. Wood [Kan.] 84 P. 565. Where a member agrees to be bound by after-adopted laws, the terms of his contract are to be determined by the constitution and laws of the order existing when he became a member and as amended from time to time. Coughlin v. Knights of Columbus [Conn.] 64 A. 223.

34. Provision as to appeals within order. Carey v. Switchmen's Union of North America [Minn.] 107 N. W. 129. By-laws and constitution. Soehner v. Grand Lodge of Order of Sons of Herman [Neb.] 104 N. W. 871. Certificate is a contract of insurance. Id. All ambiguity resolved in favor of indemnity. Mutual Protective League v. McKee, 122 Ill. App. 376. Contract is one of insurance to be given fair and liberal construction most favorable to insured. Beber v. Brotherhood of Railroad Trainmen [Neb.] 106 N. W. 168. Questions and answers in application will be construed strictly against the society and liberally with reference to the insured. Lyon v. United Moderns, 148 Cal. 470, 83 P. 804. Questions in application made a part of the contract. Modern Woodmen of America v. Wilson [Neb.] 107 N. W. 568. A subsequent by-law providing for a forfeiture will be construed most strongly against the association. Lange v. Royal Highlanders [Neb.] 106 N. W. 224.

35. In re Harton's Estate, 213 Pa. 499, 62 A. 1058. Civ. Code §§ 1643, 3541, applied in construing contract providing for permanent and old age benefits. Guthrie v. Supreme Tent, Knights of the Maccabees of the World [Cal. App.] 87 P. 405. By-laws will be construed so as to give them validity when that construction can be given them. Fraternal Aid Ass'n v. Hitchcock, 121 Ill. App. 402.

36. Rewitzer v. Switchmen's Union of North America, 98 N. Y. S. 974.

37. By-law making provision for distribution of proceeds of policy on death of beneficiary, in absence of another designation, held applicable only when member's wife was sole beneficiary. Polhill v. Battle, 124 Ga. 111, 52 S. E. 87.

38. Taylor v. Modern Woodmen of America, 72 Kan. 443, 83 P. 1099. The courts not favoring forfeitures are usually inclined to take hold of any circumstances that indicate an election to waive the forfeiture. Soehner v. Grand Lodge of Order of Sons of Herman [Neb.] 104 N. W. 871.

39. Sleight v. Supreme Council [Iowa] 107 N. W. 183.

40. Where any construction can reasonably be put on a question and answer that will avoid a forfeiture on the ground of falsity of the answer, it will be given and the validity of the contract sustained. Lyon v. United Moderns, 148 Cal. 470, 83 P. 804. In construing the conditions of membership when a forfeiture is claimed, the courts will preserve, if possible, the equitable rights of the holder of the certificate of membership. Taylor v. Modern Woodmen of America, 72 Kan. 443, 83 P. 1099.

41. Tuttle v. Iowa State Traveling Men's Ass'n [Iowa] 104 N. W. 1131. The fact that an insurer is doing business in a particular state is immaterial on the question whether a particular contract with it was made in such state. Id. Contract of accident insurance held not a Missouri contract so as to be subject to Rev. St. Mo. 1889, § 5855, pretermitting suicide as a defense unless contemplated at the time of the application. Id. Laws of state where certificate was issued by local lodge, and where member resided, held to govern in determining who were included in term "heirs" used to designate beneficiaries. Thomas v. Covert, 126 Wis. 593, 105 N. W. 922.

42. Rights of beneficiaries under policy issued to resident of New York held determinable under laws of Ohio. Burns v. Burns, 109 App. Div. 98, 95 N. Y. S. 797.

42a. Where the contract provides for death, disability, and accident insurance, but also provides that one having a defective eye shall not be entitled to accident insurance, the society's nonliability for accidental injury is sufficiently shown by running diagonal red ink lines through the accident feature in the policy of an applicant who had but one eye. Keckler v. Modern Brotherhood [Neb.] 109 N. W. 157.

43. Brotherhood of Painters, Decorators & Paperhangers v. Moore, 36 Ind. App. 580, 76 N. E. 262.

cause directly traceable to a prohibited employment.[44] Engaging in an employment or occupation prohibited by the contract has reference to a vocation or calling to which the insured devotes himself with some degree of permanency for hire or profit.[45] Stipulations that the amount to which the insured shall be entitled shall be reduced in case he is injured, while engaged in an occupation classed as more hazardous than that mentioned in the policy, refer only to the classification in force when the policy is issued.[46] An exemption from liability in case death results in consequence of a violation or attempted violation of law is reasonable and valid.[47] It is competent for the insured to waive all claim under the certificate in case his death results from a particular disease, and to make such waiver binding on the beneficiary by apt words in the application.[48]

The same rule of construction applies in determining whether death occurred from an excepted cause as would in case death from that cause had been the risk insured against, and not the strict doctrine in abhorrence of forfeitures.[49] Loss of a member by means of a physical severance will be construed to mean the destruction of its usefulness for the purpose to which, in its normal condition, it was susceptible of application.[50] One is "sick and unable to work" so long as he is not restored to his full health and is substantially unable to do such work or make such a living as he did before his injury.[51] Death from puerperal septicæmia is within an exception of death from existing pregnancy.[52]

Contracts of accident insurance issued by fraternal orders usually except injuries caused by voluntary exposure to unnecessary danger[53] or disease,[54] and frequently provide that the association shall only be liable in case of "total disability,"[55] which shall "immediately" prevent and disable him from carrying on his business.[56] Suicide from an insane impulse of a disordered and unsound mind is a death ef-

44. Where entry on an occupation prohibited by the by-laws is declared by the certificate to render the same null and void as to any claim directly traceable to such prohibited employment, engaging in a prohibited occupation does not render the certificate void except as to hazards of the occupation. Modern Woodmen of America v. Talbot [Neb.] 107 N. W. 790. Agreement entered into by member on entering prohibited employment whereby he waived all liability in event of death resulting therefrom held to preclude recovery where it did so result. Fraternal Aid Ass'n v. Hitchcock, 121 Ill. App. 402.

45. Occasional acting as bartender held not an employment in that as a prohibited occupation. Stevens v. Modern Woodmen of America, 127 Wis. 606, 107 N. W. 8.

46. Where a member was insured as a stage driver which was in the same class as passenger brakemen at the time of taking the insurance, a change in the classification after the member became a passenger brakeman reducing the insurance recoverable was not binding on him in the absence of reserved power to change the contract. Morse v. Fraternal Acc. Ass'n, 190 Mass. 417, 77 N. E. 491.

47. Request for instruction held properly refused because covered by instructions given. Sovereign Camp of Woodmen of the World v. Welch, 16 Okl. 188, 83 P. 547.

48. Waiver of liability for death from smallpox held binding. Bankers' Union v. Mixon [Neb.] 103 N. W. 1049.

49. Knights & Ladies of Columbia v. Shoaf [Ind.] 77 N. E. 738.

50. Beber v. Brotherhood of Railroad Trainmen [Neb.] 106 N. W. 168. Held question for jury whether total loss of three fingers and injury to remaining finger and thumb, and cutting away of part of the palm of the hand, constituted "by means of a physical separation" the loss of a hand at or above the wrist joint. Id.

51. Plattdeutsche Grot Gilde von de Vereenigten Staaten von Nord Amerika v. Ross, 117 Ill. App. 247.

52. Knights & Ladies of Columbia v. Shoaf [Ind.] 77 N. E. 738.

53. Question of such exposure held for jury. Noyes v. Commercial Travelers' Eastern Acc. Ass'n, 190 Mass. 171, 76 N. E. 655.

54. Whether injury was caused by disease held for the jury. Noyes v. Commercial Travelers' Eastern Acc. Ass'n, 190 Mass. 171, 76 N. E. 665. Such a disorder as the sudden giving away of plaintiff's foot without apparent cause held not a disease as a matter of law. Id.

55. Meaning of words considered. Order of United Com. Travelers v. Barnes, 72 Kan. 392, 80 P. 1020, 82 P. 1099.

56. Disability is immediate when it follows directly from an accidental hurt within such time as the processes of nature consume in bringing the person affected to a state of total incapacity to prosecute every kind of business pertaining to his occupation. Order of United Commercial Travelers v. Barnes, 72 Kan. 392, 80 P. 1020;

fected through and by external, violent, and accidental means,[57] but suicide while sane is not.[58]

Where a certificate is payable to a beneficiary other than the member's estate or legal representatives, and suicide is not an excepted risk, suicide of the member while sane does not defeat the right of the beneficiary to recover on the certificate.[59] It has, however, been held that a contract silent at its inception on the subject of suicide is not changed by a subsequent amendment specifically exempting the insurer from liability in case of suicide of the insured while sane.[60] Suicide while insane or mentally irresponsible does not forfeit insurance merely excepting suicide or self-destruction from the risk.[61] Provisions exempting the association from liability in case the member commits suicide while sane or insane are generally held to be valid.[62] By statute in Missouri suicide is no defense to an action on a life insurance policy unless contemplated when the insurance was applied for, and any stipulation to the contrary is void.[63] Fraternal benefit associations are exempted from the operation of the act, but in order to be entitled to the exemption they must come within the description given by the statutes providing for the organization of such associations.[64]

The amount to be paid depends upon the terms of the contract.[65]

(§ 5) *D. Conditions, warranties, and representations.*[66]—Where questions in the application are so framed or placed that the assured may have honestly mistaken their true import and given answers which were in fact untrue, but true as he may reasonably have understood the questions, it is for the jury to say whether he acted honestly and in good faith, and without intention to misrepresent or conceal any material fact.[67] The amount of space left in an application for answer to a question therein propounded is of weight in determining the character of answer required.[68] As a general rule a false warranty avoids the policy whether ma-

82 P. 1099. Where the injury was claimed to have resulted from swallowing a pin, held error to refuse to require jury to answer on what date the pin was swallowed (Id.) and, when plaintiff first learned that he had swallowed the pin, when the injury occurred being material (Id.), but questions calling for findings as to who were present when he swallowed it and the circumstances were improper (Id.).

57. Tuttle v. Iowa State Traveling Men's Ass'n [Iowa] 104 N. W. 1131. Is neither a voluntary nor an intentional act. Id.

58. Tuttle v. Iowa State Traveling Men's Ass'n [Iowa] 104 N. W. 1131.

59. Grand Legion of Illinois v. Beaty, 117 Ill. App. 657.

60. It is nothing more than the written expression of the provision which the law read into the contract at its inception. Plunkett v. Supreme Conclave, Improved Order of Heptasophs [Va.] 55 S. E. 9.

61. Bunker v. United Order of Foresters [Minn.] 107 N. W. 392.

62. Zerulla v. Supreme Lodge Order of Mutual Protection, 118 Ill. App. 191; Tuttle v. Iowa State Traveling Men's Ass'n [Iowa] 104 N. W. 1131. Where suicide, sane or insane, is excepted from the risk, proof of intent to take one's own life is essential to defeat liability, in the absence of evidence of insanity. Sebesta v. Supreme Court of Honor [Neb.] 109 N. W. 166.

63. Rev. St. 1899, § 7896. Dennis v. Modern Brotherhood of America [Mo. App.] 95 S. W. 967. Rev. St. Mo. 1889, § 5855, relates not merely to the remedy but enters into and forms a part of the contracts of insurance made within the state. Tuttle v. Iowa State Traveling Men's Ass'n [Iowa] 104 N. W. 1131.

64. Certificate of foreign association held a policy of insurance within the meaning of the statute so that suicide was no defense where association was organized under a statute authorizing other classes of beneficiaries than those prescribed by Rev. St. 1899, § 1408. Dennis v. Modern Brotherhood of America [Mo. App.] 95 S. W. 967. Section 7896 is not confined to old line insurance, but is broad enough to cover any life insurance not withdrawn from its application by some other statute. Id.

65. Contract held to show an agreement to pay member's beneficiary a stipulated sum as the face of the policy and all the moneys paid in by the member on assessments. Pearson v. Knight Templars' & Masons' Indemnity Co., 114 Mo. App. 283, 89 S. W. 588.

66. See 5 C. L. 1526, § 5B.

67. Modern Woodmen of America v. Wilson [Neb.] 107 N. W. 568. When the truthfulness of an answer is challenged, the first question is whether the applicant understood the question. Id. That applicant was a farmer and that many of the words and combinations in which they were used in framing questions in the application were new to him would render it highly probable that he failed to grasp their import. Id.

terial to the risk or not,[69] while misrepresentations have that effect only if intentionally false and material to the risk.[70] If it appears that the representation could not have been relied upon by the insurer, it will be disregarded.[71] By statutes in some states misrepresentations and breaches of warranty do not avoid the policy unless material to the risk.[72] A fact is material to the risk when if known to the insurer it would have caused it to refuse the risk or to demand a higher premium.[73] An understatement as to the age of the applicant is material as a matter of law.[74] There is a conflict of authority as to whether or not false statements as to pregnancy increase the risk.[75] In answer to a question calling for the names of ailments for which applicant has been treated and the names of physicians who treated him therefor, he is not required to give the name of every ailment, however trifling, or of every physician he has consulted, but may confine his answer to such ailments as are of a serious character.[76] Where an applicant has suffered from a disease of so grave a nature that it is generally recognized as having a tendency to shorten life, and fails to disclose that fact in answer to a question calling for such information, the risk is thus increased as a matter of law,[77] but whether the risk is increased by a failure under similar circumstances to inform the insurer of a disease which, though serious, has no such tendency, is a question for the jury.[78] A warranty as to the health of others imports merely the honest judgment of the applicant.[79]

68. Space left held to show requirement of categorical answer. Modern Woodmen of America v. Wilson [Neb.] 107 N. W. 568.

69. Breach of one of several warranties. Instruction held erroneous. Knapp v. Brotherhood of American Yeoman, 128 Iowa, 566, 105 N. W. 63. Where the application is made a part of the contract and the answers to questions therein are made warranties, a false answer avoids the policy. National Council of Knights & Ladies of Security v. O'Brien, 112 Ill. App. 40. A statement of a member in changing beneficiaries that the newly designated beneficiary is a dependent, where relationship or dependency is required, amounts to a warranty that the dependency existed. Caldwell v. Grand Lodge of United Workmen of California, 148 Cal. 195, 82 P. 781. Statement by applicant that she was not pregnant contained in instrument signed by her and referred to in policy as constituting a part of it, expressly declared to be warranties, being as to matter material to risk, held warranty. Rev. Codes 1899, §§ 4503-4512. Satterlee v. Modern Brotherhood of America [N. D.] 106 N. W. 561. Conclusive and unimpeached evidence held to show that insured's age was greater than that stated in his application, so that verdict should have been directed for defendant. Dinan v. Supreme Council Catholic Mut. Ben. Ass'n, 213 Pa. 489, 62 A. 1067.

70. As to whether applicant has consulted or been treated by a physician during the year preceding the application. Kidder v. Supreme Commandery United Order of Golden Cross [Mass.] 78 N. E. 469. Rev. Laws c. 119, § 22, exempting fraternal orders from operation of Rev. Laws c. 118, § 21, held not to change the doctrine of the common law as to misrepresentations. Id. Whether risk was increased by false answers to questions in application relating to the consulting of physicians or of treatment by them held for the jury. Id. Whether answers were intentionally false held question for jury. Id.

71. Bankers' Union of the World v. Mixon [Neb.] 103 N. W. 1049.

72. Act June 23, 1885 (P. L. 134, 1 Purd. Dig. 1046). McCaffrey v. Knights & Ladies of Columbia, 213 Pa. 609, 63 A. 189. Rev. Codes 1899, § 4485, providing that no oral or written misrepresentation made in the negotiation of the contract shall be deemed material or defeat or avoid the policy or prevent its attaching unless made with actual intent to deceive, or unless the matter misrepresented increased the risk of loss, does not change effect of false warranties as to matters material to risk, but they avoid policy whether made intentionally or innocently. Satterlee v. Modern Brotherhood of America [N. D.] 106 N. W. 561.

73. P. L. 134, 1 Purd. Dig. 1046, construed. McCaffrey v. Knights & Ladies of Columbia, 213 Pa. 609, 63 A. 189.

74. Statement that he was 44 when he was 47 held to increase risk as matter of law where by-laws limited membership to persons under 45. Taylor v. Grand Lodge A. O. U. W., 96 Minn. 441, 105 N. W. 408.

75. False statements as to pregnancy of married woman held not material. McCaffrey v. Knights & Ladies of Columbia, 213 Pa. 609, 63 A. 189. Pregnancy held material so that a false statement in regard to it avoided policy, however innocently made. Satterlee v. Modern Brotherhood of America [N. D.] 106 N. W. 561.

76. Modern Woodmen of America v. Wilson [Neb.] 107 N. W. 568. No suspicion of fraud or collusion can be drawn from a failure to disclose ailments of a comparatively trivial or temporary nature. Mystic Workers of the World v. Troutman, 113 Ill. App. 84.

77, 78. Kidder v. Supreme Commandery United Order of Golden Cross [Mass.] 78 N. E. 469.

79. Ranta v. Supreme Tent, Knights of the Maccabees of the World [Minn.] 107 N. W. 156. An ordinary applicant cannot by

False statements in a health certificate for reinstatement will not forfeit the rights of a member when the reinstatement is unnecessary because of the good standing of the member at the time it is made.[80] The question in an application as to whether any proposal or application to insure applicant's life has ever been made to any "company" on which a policy has not been issued does not include applications made to fraternal societies.[81]

(§ 5) *E. Dues and assessments.*[82]—Rates may be based on a classification of members according to age.[83] Though the contract promises to pay the stipulated sum named on the face of the policy and all moneys paid in on assessments, the insurer cannot make the face of the policy, plus the amounts paid in on assessments, the basis of assessing a member, in the absence of authority therefor reserved in the contract.[84] Assessments must be paid within the time fixed by the contract.[85] Insanity of the member is no excuse for nonpayment.[86] In the absence of an agreement, a new member is not liable for an assessment levied previous to his admission,[87] nor is a member in arrears until the expiration of the time allowed by the by-laws for payment.[88] Where the contract requires payment on or before a certain day, depositing the money in the post office on that day is not payment in the absence of proof of its receipt by the proper officer on the same day.[89] Where assessments are required to be paid monthly in the absence of notice to the contrary, a failure to pay in the absence of such notice is not excused on the ground that the assessment was unlawfully made.[90] Where a local lodge votes to loan a member a sum sufficient to pay his dues and assessments for a certain period, the effect is equivalent to payment by the member of the assessments in question when he is notified thereof and relies thereon;[91] and a reconsideration subsequently made without notice to the member rescinding the action and suspending him for nonpayment of the dues they had agreed to make the loan cover is a nullity.[92] Where a member believes and has a right to believe that an offer of payment will be refused, a tender is unnecessary.[93] Injunction will not issue in a foreign court to restrain

warranty in the application insure the exact reality of physical conditions and causes. Id.

80. Health certificate held wrongfully demanded. Arrison v. Supreme Council of Mystic Toilers, 129 Iowa, 303, 105 N. W. 580.

81. Civ. Code § 451 distingulshes between fraternal and other classes of insurance companies. Hence, evidence in an action on a certificate that such application was made to the "Woodmen of the World" and disapproved by its head physician was inadmissible. Lyon v. United Moderns, 148 Cal. 470, 83 P. 804.

82. See 5 C. L. 1531.

83. Reynolds v. Supreme Council Royal Arcanum [Mass.] 78 N. E. 129.

84. The courts cannot interpolate the agreement on equitable grounds nor for the insurer's self-preservation. Pearson v. Knight Templars' & Masons' Indemnity Co., 114 Mo. App. 283, 89 S. W. 588. But assuming the insurer's right to assess on that basis, a provision of the contract making $1,000 the unit for determining the rates of assessment would forbid it from making the assessment on assessments paid in until they aggregated $1,000 (Id.), nor could the basis for levying an assessment be again raised until a second $1,000 had been paid in assessments (Id.).

85. Sending assessments to residence of local lodge officer when he was not at home held insufficient to show payment. Schoeller v. Grand Lodge, A. O. U. W., 110 App. Div. 456, 96 N. Y. S. 1088.

86. Sheridan v. Modern Woodmen of America [Wash.] 87 P. 127.

87. Hetzel v. Knights & Ladies of Golden Precept, 129 Iowa, 655, 106 N. W. 157. A resolution merely requiring that all new members should pay one advance mortuary assessment at the time of joining cannot be construed as requiring one advance assessment to be always on hand. Id.

88. Grand Legion of Illinois v. Beaty, 117 Ill. App. 657.

89. Beeman v. Supreme Lodge, Shield of Honor, 29 Pa. Super. Ct. 387; afd. [Pa.] 64 A. 792.

90. Constitution and laws held to require each member to pay at least one assessment each month unless notified that payment was unnecessary. Sovereign Camp, Woodmen of the World v. Ogden [Neb.] 107 N. W. 860.

91. Johanson v. Grand Lodge, A. O. U. W. [Utah] 86 P. 494.

92. The subsequent action amounted merely to a misappropriation of money belonging to the supreme body. Johanson v. Grand Lodge, A. O. U. W. [Utah] 86 P. 494.

93. Plattdeutsche Grot Gilde v. Ross, 117 Ill. App. 247.

collection of increased assessments where it is not clear that by the law of the domicile they are invalid.[94]

(§ 5) *F. Modification and alteration of contract or its terms.*[95]—The contract may of course be modified at any time by mutual consent,[96] but, in the absence of reserved power, cannot be changed to the detriment of a member without his consent.[97] An agreement to abide by regulations or by-laws subsequently adopted authorizes only such changes as are lawful and reasonable[98] and as do not interfere with the vested rights of the member.[99] It is generally held that such a reservation does not authorize a reduction of the amount of the certificate.[1] There is a conflict of authority as to whether it authorizes an increase in the assessment rate[2] or the

94. Where a change is made in the contract as to assessments, a member alleged to have been injured by the change is not entitled to injunction against the enforcement of the new rates on the ground of impairment of the obligation of the contract in a court outside of the domicile of the society, when it is not clear that under the law of the state of its domicile the new plan of assessment and its effect on the members impairs the obligation of the contract. Gaines v. Supreme Council of Royal Arcanum, 140 F. 978.

95. See 5 C. L. 1530. See Special Article, 5 C. L. 496.

96. General provision declaring the contract null and void in case any female member should at confinement be attended by any one other than a regularly licensed practitioner held superseded by the execution of a release or waiver by a pregnant applicant of liability for death caused by pregnancy. Knights & Ladies of Columbia v. Shoaf [Ind.] 77 N. E. 738.

97. Morse v. Fraternal Ass'n of America, 190 Mass. 417, 77 N. E. 491. In the absence of a reserved right to change the contract, a stipulation for prorating in case of injury occurring while the member is engaged in an occupation classed as more hazardous by the insurer refers only to the classification in force at the time the contract was made. Id. Member held not to have assented to a reduction of benefits by a change in classification by mere failure to object after notification. Id.

98. Any change which is within the power of the society and which does not violate the law of the state or impair the obligation of the contract may be made. Fraternal Union of America v. Zeigler [Ala.] 39 So. 751. Amendment requiring beneficiaries to be related to or dependent on member held reasonable as against a member joining when no restrictions were placed on naming of beneficiaries. Caldwell v. Grand Lodge of United Workmen, 148 Cal. 195, 82 P. 781. Compliance with procedure prescribed for collection of sick benefits held a condition precedent to resort to courts, though the procedure was prescribed by amendment subsequent to date of certificate. Union Fraternal League v. Johnston, 124 Ga. 902, 53 S. E. 241. By-law limiting the time within which suit might be brought on the certificate held valid. McCloskey v. Supreme Council, A. L. H., 109 App. Div. 309, 96 N. Y. S. 347. By-law declaring the certificates of members engaging in the retail sale of intoxicating liquors null and void held reasonable. Strang v. Camden Lodge, A. O. U. W. [N. J. Law] 64 A. 93.

99. Liability for sick benefits held not divested by amendment subsequent to commencement of illness. Wiedynski v. Pulaski Polish Benev. Soc., 110 App. Div. 732, 97 N. Y. S. 413. Change requiring both bones of forearm to be broken held not binding on member insured generally against breaking of an arm or leg. Van Atten v. Modern Brotherhood [Iowa] 108 N. W. 313. Passage of by-law declaring void certificates of members engaging in the sale of intoxicants held not to violate vested rights. Strang v. Camden Lodge, A. O. U. W. [N. J. Law] 64 A. 93.

1. By-law reducing $2,000 certificates to $1,000 held to impair obligation of contract. Bornstein v. District Grand Lodge No. 4 [Cal. App.] 84 P. 271. Provision that the member agrees to "comply with the laws and regulations now governing" the society "or which may be hereafter adopted for its government" does not permit a subsequent reduction of the amount of the certificate, such reduction having no relation to the government of the society. Id.

2. **Held to authorize increase:** Increase in rates of assessment is not in violation of the contractual rights of members who, on entering, agreed to be bound by the laws of the order then in force or thereafter adopted. Reynolds v. Supreme Council Royal Arcanum [Mass.] 78 N. E. 129. There is a distinction between right to make such an increase and right to cut down the amount expressly promised to be paid in the certificate, the assessments to be paid being provided for and the duty to pay being prescribed by the by-laws. Id. Where plan of assessment of society organized under Rev. Laws c. 125, § 6, c 119, §§ 2, 6, 7, was such that it would ultimately result in inability to meet losses, held that it had power to amend by-laws so as to increase assessments to amount equal to cost of insurance. Id. The amount of benefit payable by express agreement cannot be reduced by the association without the member's consent previously or presently given (Shepperd v. Bankers' Union [Neb.] 108 N. W. 188), and stipulated deductions to meet assessments lost in case of death before expectancy cannot exceed the original assessments (Id.), even though increase of assessments be determined on by subsequent by-law binding on the member (Id.), but such increase as fell due during the member's life may be so deducted if the increase to which he was bound was so conditioned (Id.).

adoption of a by-law providing for forfeiture in case of suicide.[3] Such reservations have been held to prevail over incontestable clauses.[4] An illegal reduction of the amount payable puts a member to his election to sue for breach of contract or to

Held not to authorize increase: Where member agreed to be bound by subsequent by-laws, to pay assessments at a given rate per month, and such additional assessments as might be levied, held that amendment increasing the rate of monthly assessments was void as being unreasonable and in violation of vested rights, though increase was necessary to continued existence of the society. Wright v. Knights of Maccabees of the World, 48 Misc. 558, 95 N. Y. S. 996. Increase in amount of assessments held void since it increased cost of insurance and thereby materially modified contract which could only be done with his express consent. Pearson v. Knight Templars' & Masons' Indemnity Co., 114 Mo. App. 283, 89 S. W. 588.

3. Change held valid: By-law passed subsequent to admission of member limiting recovery to one-third of the amount of the policy in case of suicide held reasonable and not to impair obligation of contract. Fraternal Union v. Zeigler [Ala.] 39 So. 751. A by-law passed subsequent to the issuance of a certificate specifically making suicide a ground of forfeiture is valid as to self-destruction by a sane member, since there can be no such thing as a vested right for a sane man to commit suicide. Plunkett v. Supreme Conclave I. O. H. [Va.] 55 S. E. 9. Exception of suicide sane or insane as risk held reasonable. Lange v. Royal Highlanders [Neb.] 106 N. W. 224.

Change held invalid: Deprivation of benefits for suicide, sane or insane, held not warranted under reserved power to change contract. Sautter v. Supreme Conclave Improved Order of Heptasophs, 72 N. J. Law, 325, 62 A. 529; Lewine v. Supreme Lodge, Knights of Pythias [Mo. App.] 99 S. W. 821.

Note: In Lewine v. Supreme Lodge, K. of P. [Mo. App.] 99 S. W. 821, as sustaining the doctrine that it is both an unreasonable exercise of the power reserved and an unreasonable interpretation of the contract to place on the language therein employed a construction holding that the member had in contemplation and intended thereby to authorize the association to strike down and abrogate the substantial provisions of indemnity therein contained, the court cites the following authorities: Knights Templars, etc., Life Indemnity Co. v. Jarman [C. C. A.] 104 F. 638; Newhall v. Supreme Council, 181 Mass. 111, 63 N. E. 1; Wist v. Grand Lodge, 22 Or. 271, 29 Pac. 610, 29 Am. St. Rep. 603; Gaut v. Supreme Council [Tenn.] 64 S. W. 1070; Supreme Council v. Getz [C. C. A.] 122 F. 119; Hale v. Eq. Aid Union, 168 Pa. 377, 31 A. 1066; Parish v. N. Y. Produce Exchange, 169 N. Y. 34, 61 N. E. 977, 56 L. R. A. 149; Pokrefky v. Association, 121 Mich. 456, 80 N. W. 240; Langan v. Amer. Legion, 70 N. Y. S. 663; Weller v. Eq. Aid Union, 36 N. Y. S. 734; Bornstein v. Dist. Grand Lodge [Cal. App.] 84 P. 271; Starling v. Supreme Council [Mich.] 66 N. W. 340; Evans v. Southern Tier, 182 N. Y. 453, 75 N. E. 317; Beach v. Supreme Tent, 177 N. Y. 100, 69 N. E. 281; O'Neill v. Legion of Honor, 70 N. J. Law, 410, 57 A. 463; Wuerfler v. Trustees of Grand Grove of Order of Druids, 116 Wis. 19, 92 N. W. 433, 96 Am. St, Rep. 940; Strauss v. Mut. Reserve Ass'n, 128 N. C. 465, 35 S. E. 55, 83 Am. St. Rep. 699, 54 L. R. A. 605, Id., 126 N. C. 977, 36 S. E. 352, 83 Am. St. Rep. 699, 54 L. R. A. 605; Bragaw v. Supreme Lodge, 128 N. C. 354, 38 S. E. 905, 54 L. R. A. 602; Ins. Co. v. Connor, 17 Pa. 136; Becker v Farmers' Mut. Ass'n, 48 Mich. 610, 12 N. W. 874; Taylor v. Modern Woodmen, 72 Kan. 443, 83 P. 1099, 5 L. R. A. (N. S.) 283. As holding that the only limitation is that the subsequent law itself shall be reasonable the court cites and disputes the authority of the following: Gilmore v. K. of C., 77 Conn. 58, 58 A. 223; Strang v. Camden Lodge, A. O. U. W. [N. J. Law] 64 A. 93; Hughes v. Wisconsin Odd Fellows, 98 Wis. 292, 73 N. W. 1015; Eversberg v. Maccabees, 33 Tex. Civ. App. 549, 77 S. W. 246; Chambers v. Supreme Lodge, K. of M., 200 Pa. 244, 49 A. 784, 86 Am. St. Rep. 716; Supreme Tent v. Hammers, 81 Ill 560; Supreme Tent K. of P. v. La Malta, 95 Tenn. 157, 31 S. W. 493, 30 L. R. A. 838; Dornes v. Supreme Lodge, 75 Miss. 466, 23 So. 191; Daughtry v. K. of P., 48 La. 1203, 20 So. 712, 55 Am. St. Rep. 310; Supreme Tent v. Stensland, 105 Ill. App. 267; Schmidt v. Supreme Tent, 97 Wis. 528, 73 N. W. 22; Doldge v. Dominion Council, 4 Ont. L. R. 423; Hall v. Western Travelers' Ass'n, 69 Neb. 601, 96 N. W. 170; Miller v. Nat. Council, 69 Kan. 234, 76 P. 830; Ross v. Modern Brotherhood, 120 Iowa, 692, 95 N. W. 207; Pain v. Society of St. Jean, 172 Mass. 319, 52 N. E. 502, 70 Am. St. Rep. 287; Evans v. Southern Tier, 76 App. Div. 151, 78 N. Y. S. 611; Loefler v. Modern Woodmen, 100 Wis. 79, 75 N. W. 1012; Supreme Com. v. Ainsworth, 71 Ala. 436, 46 Am. Rep. 332; Fullenwider v. Royal League, 180 Ill. 621, 54 N. E. 485, 72 Am. St. Rep. 239; Lange v. Royal Highlanders [Neb.] 106 N. W. 224; Supreme Lodge v. Trebbe, 179 Ill. 348, 53 N. E. 730, 70 Am. St. Rep. 120; Supreme Lodge v. Kutscher, 179 Ill. 340, 53 N. E. 620, 70 Am. St. Rep, 115; Supreme Lodge v. Clark, 88 Ill. App. 600; Sheppard v. Bankers' Union [Neb.] 108 N. W. 188; Union Ben. Soc. v. Martin, 67 S. W. 38, 23 Ky. L. R. 2276; Messer v. Grand Lodge, 180 Mass. 321, 62 N. E. 262; Stohr v. San Francisco, etc., Soc., 82 Cal. 557, 22 P. 1125.

4. Certificate provided that it should be forfeited if insured came to his death by his own hands, that insured would be bound by subsequent by-laws, and that policy should be incontestable after two years. Held that by-law providing that only one-third of the amount should be paid in case of suicide was valid and precluded recovery of more than that sum though adopted more than two years after the certificate was issued. Fraternal Union v. Zeigler [Ala.] 39 So. 751. Did not violate vested rights or contract obligations. Id. Conceding that incontestable clause was applicable to cases of suicide, agreement to be bound by subsequent by-laws was more specific, so that it would prevail in case of conflict in order that effect could be given to both. Id.

continue the contract as reduced.[5] Unreasonable delay[6] or the payment of assessments on the basis of the reduced benefits[7] will be regarded as an assent to the reduction. Changes in the by-laws[8] and in statutes governing the rights of members[9] will not be deemed retroactive unless they so provide, either expressly or by necessary implication. To be effectual changes must be made in the manner prescribed by the laws of the order.[10] The right of a member to recover a benefit for permanent disability is not affected by an amendment of the constitution adopted subsequent to his injury.[11] The legality of changes is to be determined by the laws of the state where a society is organized.[12]

(§ 5) *G. Rescission, forfeiture, cancellation and avoidance.*[13]—The contract may ordinarily be forfeited for breach of warranty, for material misrepresentations,[14] and for a failure to pay assessments when due.[15] A provision in the constitution for forfeiture of benefits by a member exposing himself to risks to which members are not usually liable is valid.[16] Where the laws of a society provide for an assessment against each subordinate council payable immediately after the first of the month on the total membership reported, a seasonable payment thereof does not prevent the operation of laws providing for ipso facto suspension of individual members for nonpayment of their assessments before the end of the month.[17] A forfeiture cannot be declared for nonpayment of assessments[18] or

5. Supreme Council, A. L. H., v. Lippincott [C. C. A.] 134 F. 824. When election to continue is once made, it is irrevocable. Id.

6. Delay held unreasonable. Supreme Council, A. L. H. v. McAlarney [C. C. A.] 135 F. 72.

7. Payment of reduced assessments for 17 months without objection. McCloskey v. Supreme Council, A. L. H., 109 App. Div. 309, 96 N. Y. S. 347. Where defendant, though protesting, paid assessments for two years and five months based on the reduced amount, held that he was estopped from rescinding. Supreme Council v. Lippincott [C. C. A.] 134 F. 824.

8. Especially when the statute under which the society is organized and previous by-laws forbid changes which affect the rights of members (Guthrie v. Supreme Tent Knights of the Maccabees [Cal. App.] 87 P. 405), and when the member whose rights would be affected thereby has had no notice of an intention to make the change so apply (Id.). By-law changing eligible classes of beneficiaries held not to affect validity of prior contract naming creditor as beneficiary. Emmons v. Supreme Conclave, I. O. H. [Del.] 63 A. 871. Insurance of member engaged in liquor selling at time of admission held not avoided by by-laws subsequently passed purporting to prohibit the occupation. Grand Lodge, A. O. U. W. v. Haddock, 72 Kan. 35, 82 P. 583. The status of a member addicted to the intemperate use of drugs at the time of the adoption of a by-law declaring forfeited the certificates of members heretofore or hereafter adopted who "shall" become intemperate in the use of drugs, is not affected thereby, but it applies only to those who in future become addicted. Taylor v. Modern Woodmen of America, 72 Kan. 443, 83 P. 1099. By-law requiring application for sick benefits to be made within one week from commencement of sickness held inapplicable to sickness commencing prior to its adoption. Dary v. Providence Police Ass'n, 27 R. I. 377, 62 A. 513.

9. Laws 1894, p. 404, c. 295, restricting beneficiaries to certain classes of relatives, held not to affect validity of prior contract naming creditor as beneficiary. Emmons v. Supreme Conclave, I. O. H. [Del.] 63 A. 871.

10. Where the laws are subject to change only by the supreme body, a practice in disregard of them will not effect a change in consonance with the practice. Laws requiring reinstatement as condition precedent to restoration to beneficial membership after nonpayment of assessment in time held not changed by contrary practice. Coughlin v. Knights of Columbus [Conn.] 64 A. 223.

11. Brotherhood of Painters, Decorators & Paperhangers v. Moore, 36 Ind. App. 540, 76 N. E. 262.

12. Gaines v. Supreme Council of Royal Arcanum, 140 F. 978.

13. See 5 C. L. 1531, § 7.

14. See § 5 D, ante.

15. See, also, § 5 E, ante. Evidence held insufficient to show payment of particular assessment. Sovereign Camp Woodmen of the World v. Cox [Ind. App.] 75 N. E. 290. Evidence held to show that time for payment of assessment had not been extended and that member had not paid it when due and was therefore suspended and not in good standing when he died. Moore v. Supreme Assembly of Royal Soc. of Good Fellows [Tex. Civ. App.] 15 Tex. Ct. Rep. 654, 93 S. W. 1077. Certificate held forfeited. United Moderns v. Rathbun, 104 Va. 736, 52 S. E. 552; Sheridan v. Modern Woodmen of America [Wash.] 87 P. 127.

16. Brotherhood of Painters, Decorators & Paperhangers v. Moore, 36 Ind. App. 580, 76 N. E. 262.

17. Coughlin v. Knights of Columbus [Conn.] 64 A. 223.

18. Hetzel v. Knights & Ladies of Golden Prospect, 129 Iowa, 655, 106 N. W. 157; Rambousek v. Supreme Council of Mystic Toilers [Iowa] 106 N. W. 947; Sleight v. Supreme

per capita taxes[19] when the association has on hand advance assessments paid by the member sufficient to meet them.

Whether provisions for forfeitures and suspensions are self-executing or require some affirmative action to render them effective is a question of construction and depends entirely on the terms of the contract.[20] Under a by-law purporting ipso facto to work a dissolution of membership by the failure to pay or tender an assessment when due, the burden of proving a forfeiture for noncompliance therewith is on the society.[21] Acquiescence by a member in an irregular forfeiture may prevent recovery on the certificate.[22]

Certificates frequently provide that they shall be incontestable after a certain time.[23] Provisions agreeing to be bound by future by-laws have been held to prevail over incontestable clauses.[24] A rule that sick or disabled members while injured or sick shall not become delinquent for dues and assessments cannot be limited to special assessments made by the local or subordinate lodge in the absence of such restrictive provisions appearing in the contract.[25] The Missouri nonforfeiture statute providing for the application of the net value of life insurance policies to main-

Council of Mystic Toilers [Iowa] 107 N. W. 183.

19. Sleight v. Supreme Council of Mystic Toilers [Iowa] 107 N. W. 183.

20. **Held self-executing:** Evidence held to show that member attempted to commit suicide, and that rights under certificate were thereby forfeited under rule providing that member attempting to commit suicide should ipso facto void all rights under certificate and stand suspended from the order, and should not be eligible for reinstatement. Supreme Tribe of Ben Hur v. Miller, 122 Ill. App. 489. By-laws held not to require investigation before suspension in such case. Id. When the by-laws expressly declare that the fact of delinquency in the payment of an assessment shall work a forfeiture of membership, no action of the lodge or society is required to suspend a member. Sovereign Camp Woodmen of the World v. Ogden [Neb.] 107 N. W. 860. Where the members agree to be bound by after-adopted by-laws and a by-law is thereafter adopted declaring that the certificate of any member engaging in the retail sale of intoxicants shall thereupon become null and void, one admitted prior to the adoption of the by-law engaging in the prohibited occupation is not entitled to notice of suspension. Strang v. Camden Lodge, A. O. U. W. [N. J. Law] 64 A. 93. Where by-law provided that certificate should be void and that all benefits thereunder should be forfeited in case the member committed suicide, held that it was not necessary for the association to declare a forfeiture in such case or to offer to return the premiums. Tisch v. Protected Home Circle, 72 Ohio St. 233, 74 N. E. 188. By-law held to operate as suspension of member for nonpayment of assessment on or before a certain date without any action on the part of the lodge. Beeman v. Supreme Lodge, Shield of Honor, 29 Pa. Super. Ct. 387, afd. [Pa.] 64 A. 792. Where a certificate declared that the contract of insurance should be null and void for false statements in the application, the society to avail itself of the defense is not required to rescind the contract on discovery of false statements after the death of the member. Taylor v. Grand Lodge A. O. U. W., 96 Minn 441, 105 N. W. 408.

Held not self-executing: A by-law providing that members three months in arrears are suspended in the meeting next following and that if they are six months in arrears they are expelled without further action of the guild, as to those three months in arrears. Plattdeutsche Grot Gilde v. Ross, 117 Ill. App. 247. A by-law merely providing that no person shall be admitted or retained in membership who is engaged in a certain occupation. Insurance of member engaged in liquor selling at time of admission held not avoided by subsequent by-laws. Grand Lodge A. O. U. W. v. Haddock, 72 Kan. 35, 82 P. 583. Certificate and by-laws construed together held to contemplate an actual forfeiture for nonpayment of an assessment when due. United States Indemnity Soc. v. Griggs, 118 Ill. App. 577. A provision in the constitution and by-laws that a member not remitting his assessments within a specified time shall forfeit his claim to membership held not self-executing, but to require affirmative action of the society declaring a forfeiture. Soehner v. Grand Lodge of Order of Sons of Herman [Neb.] 104 N. W. 871.

21. Kidder v. Supreme Commandery United Order of Golden Cross [Mass.] 78 N. E. 469.

22. Inactivity for more than two years by an infant beneficiary and her mother after notice of forfeiture for nonpayment by member while insane held fatal to rights of beneficiary. Sheridan v. Modern Woodmen of America [Wash.] 87 P. 127.

23. Clause rendering certificate incontestable after two years held to bar defense of suicide. Mutual Protective League v. McKee, 122 Ill. App. 376. Suicide held not a violation of the constitution within meaning of saving clause. Id.

24. Incontestable clause held not to bar the right to limit the amount recoverable in case of suicide, where power was reserved to change the contract. Fraternal Union of America v. Zeigler [Ala.] 39 So. 751.

25. Rewitzer v. Switchmen's Union, 98 N. Y. S. 974.

tain their validity after forfeiture, as declared by the terms thereof for nonpayment of premiums, is inapplicable to fraternal societies.[26]

A rule of a railway relief association that the bringing of suit for damages arising from or growing out of injury or death of a member shall operate ipso facto to forfeit all benefits under the relief certificate is binding on the beneficiary.[27] By statute in some states the fact that the member has accepted benefits from the association does not preclude him from thereafter suing the railroad company.[28]

(§ 5) *H. Waiver, estoppel, and reinstatement.*—Any course of conduct on the part of the association leading the member to rest on the well founded belief that a strict performance of conditions will not be insisted on precludes it from thereafter insisting on a forfeiture for failure to strictly perform.[29] So too, if with knowledge of the facts by reason of which it is entitled to claim a forfeiture the association continues to treat the certificate as in force, or does any act inconsistent with an intent to insist upon a forfeiture, the forfeiture is waived.[30] Thus the acceptance of an assessment by the association is a waiver of all former grounds of forfeiture known to it,[31] but this rule does not of course apply where the member

26. Fraternal society held exempt from Rev. St. 1899, § 7897, under Laws 1897, p. 132. Wcsterman v. Supreme Lodge K. P., 196 Mo. 670. 94 S. W. 470.

27. Unsuccessful suit for damages for the death of a member of a railway relief association held a forfeiture of benefits under the certificate. Walters v. Chicago, etc., R. Co. [Neb.] 104 N. W. 1066. In such case, consequences of suing railroad company for damages before bringing suit on the certificate are to be determined by the terms of the contract, and not by rules of law relating to election of remedies. Id.

28. Code § 2071, as amended by Acts 27th Assem., p. 33, c. 49, providing that no contract of insurance, relief, or indemnity entered into between employe injured and railroad company or any other person or association acting for it, before such injury occurred, shall be a defense to an action against railroad company for death or injury of employe due to negligence of agents or fellow-servants, is constitutional. McGuire v. Chicago, etc., R. Co. [Iowa] 108 N. W. 902.

29. Delivery of certificate while insured was not in good health held waiver of provision that it should not take effect unless delivered while he was in good health. Sovereign Camp Woodmen of the World v. Carrington [Tex. Civ. App.] 14 Tex. Ct. Rep. 397, 90 S. W. 921. By-laws relating to payment of assessments held waived by conduct of local lodge in agreeing to loan member amount of four assessments. Johanson v. Grand Lodge A. O. U. W. [Utah] 86 P. 494. Society held not estopped to enforce a forfeiture for nonpayment of assessments when due. Moore v. Supreme Assembly of Royal Society of Good Fellows [Tex. Civ. App.] 15 Tex. Ct. Rep. 654, 93 S. W. 1077. Evidence held insufficient to show waiver by society of nonpayment of assessments due at the time of the death of the member. United Moderns v. Rathbun, 104 Va. 736, 52 S. E. 552. Where the contract provides for a forfeiture for nonpayment of assessments by a certain date in the month and reserves to the society the option of reinstating delinquent members, a custom of receiving assessments after due without requiring formal reinstatement is a waiver of the forfeiture. United States Indemnity Soc. v. Griggs, 118 Ill. App. 577. Society held liable for an injury received while member was in arrears for assessments, it having, by its conduct in receiving delinquent payments prior to such accident without objection, without requiring application for reinstatement or certificate of good health, and without any action by secretary or board of directors exercising option in regard to reinstatement, led him to believe that it would not insist upon express letter of contract and enforce forfeiture. Id. A single instance of violation of the by-laws of a society by a local lodge officer in the course of his dealing with members or beneficiaries is insufficient to establish a custom binding on the society. Agreement of local lodge officer to notify mother of infant beneficiary of assessments to be paid held not binding on society. Sheridan v. Modern Woodmen of America [Wash.] 87 P. 127.

30. Where a chief officer was present at the initiation of a member and was then apprised of the member's age being in excess of the society's age limit, but thereafter both the local and grand lodges treated the member as such and accepted and retained his dues, the forfeiture of his rights which might otherwise have been insisted on was waived. Plattdeutsche Grot Gilde v. Ross, 117 Ill. App. 247. Making an assessment against a member is a waiver of failure to pay past due assessments. Soehner v. Grand Lodge of Order of Sons of Herman [Neb.] 104 N. W. 871.

31. Provision for forfeiture for engaging in more hazardous occupation. Brotherhood of Painters, Decorators & Paperhangers v. Moore, 36 Ind. App. 580, 76 N. E. 262. Forfeiture for conviction of felony. Pringle v. Modern Woodmen of America [Neb.] 107 N. W. 756 For failure to perform conditions as to payment of dues and assessments. Rewitzer v. Switchmen's Union, 98 N. Y. S. 974. Receipt by local lodge officer of past due assessments and per capita tax held a waiver of a by-law providing for suspension

is expressly informed at the time that the payment will be unavailing.[32] A waiver of a condition or a defense will not be implied from an act not inconsistent with an intention to insist thereon.[33] The acts relied upon to constitute a waiver must be those of the persons whose rights are to be affected by it, or of some one duly authorized to act for them.[34] Local lodges[35] and their officers are regarded as the agents of the supreme body in the performance of all duties which the laws of the order require them to perform as between the members and the supreme body.[36] The constitution being a part of the contract, members are chargeable with notice of limitations therein on the authority of the association's officers and agents[37] and of sub-

of a member in arrears more than 30 days. Soehner v. Grand Lodge of Order of Sons of Herman [Neb.] 104 N. W. 871.

32. Acceptance by scribe of subordinate lodge of subsequent assessment held not a waiver of right to interpose violation of rule against attempted suicide as a defense to certificate where person making payment was at the time expressly informed that such payment would be unavailing because supreme lodge would not accept the money. Supreme Tribe of Ben Hur v. Miller, 122 Ill. App. 489.

33. Retention of membership fee held not a waiver of right to insist on initiation as condition precedent to liability on certificate, where constitution provided that fee should be forfeited if applicant did not report for initiation within a specified time. Driscoll v. Modern Brotherhood of America [Neb.] 109 N. W. 158. Defense of suicide held not waived by furnishing blank proofs of loss with knowledge of facts, though beneficiary thereafter went to expense in furnishing proofs, where beneficiary was expressly informed that association did not thereby waive any of its rights. Tuttle v. Iowa State Traveling Men's Ass'n [Iowa] 104 N. W. 1131. A mere suggestion by letter in a friendly spirit of the advisability of employment of counsel by the beneficiary when advising her of nonliability cannot be considered as a waiver of the right of the society to avail itself of a material misrepresentation as to the age of the applicant. Taylor v. Grand Lodge A. O. U. W., 96 Minn. 441, 105 N. W. 408. Where an entry on a prohibited occupation avoids the insurance only as to any claim growing out of or made on account of death directly traceable to such employment, acceptance of dues and assessments with knowledge of the member being so engaged does not waive the forfeiture. Modern Woodmen of America v. Talbot [Neb.] 107 N. W. 790; Abell v. Modern Woodmen of America, 96 Minn. 494, 105 N. W. 65. Same consideration remains for the member so engaged to pay dues and assessments as would have existed had the insured not engaged in the employment. Modern Woodmen of America v. Talbot [Neb.] 107 N. W. 790. Where the laws provide for reinstatement by merely paying assessments within 30 days after due, together with a fine for the delinquency, the receipt and acceptance of delinquent assessments within the 30 days has no tendency to establish a waiver of forfeiture (Order of Golden Cross v. Bernard, 26 App. D. C. 169), nor has the failure of the local officer to notify the supreme body of the failure to pay assessments when due such tendency where reinstatement has occurred by payment within the 30 days allowed (Id.).

34. Driscoll v. Modern Brotherhood of America [Neb.] 109 N. W. 158. Failure of camp physician to examine member before issuing health certificate held not a waiver of provision requiring such examination, he not being an agent of the association with authority to manage its business affairs but the agent of the member in making the certificate. Warner v. Modern Woodmen of America [Mo. App.] 96 S. W. 222.

35. Where the local lodge is required to make collections and has power to annul membership for nonpayment of dues and make reinstatements on application therefor, a waiver of nonpayment of assessments by the local lodge is binding on the supreme body. Johanson v. Grand Lodge A. O. U. W. [Utah] 86 P. 494.

36. Local officer's acceptance of amount of member's delinquency held a waiver of forfeiture. Court of Honor v. Dinger [Ill.] 77 N. E. 557. Where the constitution and policy issued make it the duty of a member to pay dues and assessments to a local secretary, who remits to an officer of the higher body and who returns a receipt to be read in lodge, the local secretary is agent of the higher body in receiving dues and assessments. Soehner v. Grand Lodge of Order of Sons of Herman [Neb.] 104 N. W. 871. The authority of a local lodge officer as to his power to bind the supreme body is to be determined by the actual power and authority conferred on him rather than by the name given him or the restrictions contained in the regulations of the order, if such regulations are contrary to the actual power which he possesses. Sovereign Camp Woodmen of the World v. Carrington [Tex. Civ. App.] 14 Tex. Ct. Rep. 397, 90 S. W. 921. A local camp clerk charged with the duty of delivering certificates, and invested with discretionary powers with respect thereto, held to have authority to waive provisions requiring delivery of certificate while insured was in good health. Id. Delivery to beneficiary, who knew nothing of by-laws and was not chargeable with notice thereof, but believed that he had the authority which he held himself out as having, and receipt of premium from her in behalf of member, held waiver. Id.

37. Driscoll v. Modern Brotherhood of America [Neb.] 109 N. W. 158. Where the constitution required initiation as a condition precedent to delivery of the certificate, unauthorized delivery by a subordinate lodge officer held not to operate as a waiver of the condition. Id. Constitutional authority

ordinate lodges,[38] and are bound thereby. In respect to matters in which the officers of the local lodge are the agents of the supreme body, their knowledge is deemed to be its knowledge,[39] and this being the case, the continued collection of dues and assessments from a member who has forfeited his certificate, after knowledge of such forfeiture by its officers or agents intrusted with the duty of making assessments, is a waiver of the forfeiture regardless of any restrictions or limitations in the contract on the authority of such persons to make such waivers, it being presumed that such knowledge was communicated to those having such authority.[40] The Iowa statute imputing to the agents of life insurance companies knowledge of facts in regard to the habits of the insured within the general knowledge of the community where they reside does not apply to the agents of fraternal benefit associations.[41] An agent cannot ratify his own unauthorized acts.[42] A provision forbidding waiver by subordinates does not militate against their conduct raising an estoppel.[43] Where the facts are equally known to both parties, there can be no estoppel.[44] Neither party can be estopped from showing that a provision of the contract is void under the statute.[45] The failure of the association to promptly return

of secretary of subordinate lodge to receive payment of assessments from members held not to give him authority to receive such payment from nonmembers so that his act in doing so did not amount to a waiver of constitutional provision that initiation should be a condition precedent to membership, where it did not appear that payments were brought to knowledge of supreme lodge, and it was shown that when two of them were brought to notice of supreme secretary he at once repudiated them. Id. A member is bound to know the limits of the powers of officers of a society set forth in the laws of the society, and hence their acts in allowing payment of assessments after the time fixed by the laws of the order could not operate, either by waiver or estoppel, to prevent society from setting up defense that payment was not made on time. Coughlin v. Knights of Columbus [Conn.] 64 A. 223. Belief on the part of a member that his violation of a law of the society is justified by conduct of the society's officers does not prevent the operation of the law. Id. Where constitution prohibited any officer from waiving any provision of the laws, held that fact that recorder of local lodge, after death of member whose failure to pay assessment had resulted in his suspension, mailed death notice to supreme body reciting that he died "while a member in good standing," was not a waiver of right of order to claim forfeiture. Schoeler v. Grand Lodge A. O. U. W., 110 App. Div. 456, 96 N. Y. S. 1088.

38. Local council held to have no authority to waive provisions as to payment of assessments. Coughlin v. Knights of Columbus [Conn.] 64 A. 223.

39. Knowledge of subordinate lodge as to member's age held knowledge of supreme body. Plattdeutsche Grot Gilde v. Ross, 117 Ill. App. 247. Financial officers of local union held agents of parent organization so that their knowledge that member was engaged in more hazardous occupation was its knowledge. Brotherhood of Painters, Decorators & Paperhangers v. Moore, 36 Ind. App. 580, 76 N. E. 262.

40. Presumed that agent has performed duty to make such communication except when, in extreme cases, it is shown that the agent, with the knowledge of the opposite party, has repudiated his agency or has acted fraudulently under such circumstances as to apprise the latter that the communication has not been and probably will not be made, or it is the intent of the adverse party that it shall not be made or he is in some way implicated with the default of the agent. Pringle v. Modern Woodmen of America [Neb.] 107 N. W. 756. In the absence of evidence bringing the case within the exception to the rule, held that it would be presumed that local camp clerk having knowledge of the conviction of a member of felony seasonably communicated the fact to the society, so that subsequent collection of assessments and their acceptance and retention by head camp without objection, was waiver of forfeiture. Id.

41. Such associations are expressly exempted from operation of Code, § 1811, by § 1825. Knapp v. Brotherhood of American Yeomen, 128 Iowa, 566, 105 N. W. 63. General knowledge as to intemperate habits held not imputed to local soliciting agent. Id.

42. Can be no question of ratification where acts relied on to constitute it are unauthorized acts of same agent whose acts are sought to be ratified. Driscoll v. Modern Brotherhood of America [Neb.] 109 N. W. 158.

43. Waiver and estoppel distinguished. Wandell v. Mystic Toilers [Iowa] 105 N. W. 448.

44. Requiring the furnishing of proofs of death, the appointment of a guardian of an infant beneficiary, and the incurring of expense incident to a meeting with an officer of a fraternal order, does not estop it to defend an action on the policy on the ground that the cause of death was such that liability therefor was specially excepted, where knowledge of the facts is not denied by those asserting the estoppel and no charge is made that they were misled by the conduct of the insurer. Knights & Ladies of Columbia v. Shoaf [Ind.] 77 N. E. 738.

45. Beneficiary under a certificate issued by a foreign society, not confined to the same classes of eligible beneficiaries as domestic societies and therefore deprived of the ex-

assessments upon learning, after the death of the insured, of the fact that they were paid too late, does not operate to reinstate the contract on which all liability had ceased at the time of the member's death by reason of the failure to make payments on time.[46] Where an applicant in good faith makes truthful answers to questions in the application, but owing to the fraud, mistake, or negligence of the agent or medical examiner of the insurer they are incorrectly transcribed, the insurer is estopped to assert their falsity.[47] Where a beneficiary certificate is obtained by actual fraud of the applicant, the society is not required to return what it has received for assessments as a condition of availing itself of the right to elect to treat the contract as void ab initio,[48] but where it, nevertheless, on discovering a ground for treating the contract as void ab initio voluntarily offers to return the amount of assessments paid, this in itself is sufficient to show that there was no intention to waive the forfeiture.[49] A member may waive his right to benefits by acts and conduct showing an intention to relinquish such right.[50]

Reinstatement.[51]—A member expelled from a society during the interim between the expiration of its old charter and the granting of a new one cannot be denied admission into the new society created by the renewal of the charter.[52] Payment of arrearages[53] and the procuring of a certificate of good health[54] are generally made conditions precedent to the reinstatement of a suspended member. When a suspended member has in good faith complied with every condition entitling him to reinstatement, subsequent sickness is not ground for refusing reinstatement.[55] The right to reinstatement is personal to the member.[56] Money paid after the death of a member on account of assessments can have no effect on his suspension or reinstatement or his standing in the order at the time of his death.[57] Proceedings to compel reinstatement are not essential to maintain membership after an illegal ex-

emption of domestic societies from the Missouri statute restricting suicide as a defense, held not estopped to set up that fact and to contend that under such statute suicide was not a defense because member obtained insurance at reduced rates, etc. Dennis v. Modern Brotherhood [Mo. App.] 95 S. W. 967.

46. Moore v. Supreme Assembly of Royal Soc. of Good Fellows [Tex. Civ. App.] 15 Tex. Ct. Rep. 654, 93 S. W. 1077.

47. This rule is applicable to fraternal societies where the applicant is not a member until after the making of his application. Lyon v. United Moderns, 148 Cal. 470, 83 P. 804. Insured is not responsible for omission or neglect of agent of company unless he has actual knowledge of fact that answer has been imperfectly or incorrectly written. Id.

48, 49. Taylor v. Grand Lodge A. O. U. W., 96 Minn. 441, 105 N. W. 408.

50. Waiver is not, in the proper sense, a species of estoppel unless the conduct of one party has induced the other to take such a position that he will be injured if the first be permitted to repudiate his acts. Dary v. Providence Police Ass'n, 27 R. I. 377, 62 A. 513. Right to sick benefits held not waived, under the circumstances, by failure to make claims therefor. Id.

51. See 5 C. L. 1533.

52. Member held entitled to mandamus to compel recognition of rights. United Brothers v. Williams [Ga.] 54 S. E. 907.

53. Warner v. Modern Woodmen of America [Mo. App.] 96 S. W. 222. Verdict held properly directed for defendant on issue of reinstatement. Id. Where one by-law provides for reinstatement of a member by mere payment of arrearages within 30 days and another for reinstatement after three months by a vote of the society, a liberal construction of the by-laws permits a reinstatement of a member in arrears at any time within three months by paying arrearages, when the money is accepted without a vote of the lodge. Soehner v. Grand Lodge of Order of Sons of Herman [Neb.] 104 N. W. 871.

54. The words "good health," when applied to a human being, mean that the person said to be in good health is in a reasonably good state of health, and that he is free from any disease or illness that tends seriously or permanently to weaken or impair the constitution. Court of Honor v. Dinger, 221 Ill. 176, 77 N. E. 557. One suffering with chronic laryngitis may nevertheless be in reasonably good health. Id. Where by-laws required certificate of good health from camp physician after medical examination by him, held that there was no reinstatement where physician furnished certificate without any examination. Warner v. Modern Woodmen of America [Mo. App.] 96 S. W. 222.

55. Warner v. Modern Woodmen of America [Mo.] 96 S. W. 222.

56. Executors of member held not entitled to exercise absolute right decedent had at time of his death to pay delinquent assessment and be reinstated. Order of Golden Cross v. Bernard, 26 App. D. C. 169.

57. Admission of receipt showing payment of assessment two days after death of member held not cause for reversal. Court of

pulsion.[58] Equity has jurisdiction of a bill to compel the reinstatement of a member wrongfully expelled from a voluntary association when such remedies as are available within the society have been exhausted.[59]

§ 6. *The beneficiary.*[60]—In case the statute or the laws of the order provide that only persons belonging to certain specified classes may be beneficiaries, a designation of a beneficiary not within such classes is void,[61] but one not eligible as a beneficiary may be named as trustee for a person who is, the latter being regarded as the real beneficiary in such case.[62] Among those commonly made eligible are "dependents,"[63] "heirs,"[64] "members of the family,"[65] and "relatives."[66] The bene-

Honor v. Dinger, 221 Ill. 176, 77 N. E. 557.

58. Plattdeutsche Grot Gilde v. Ross, 117 Ill. App. 247.

59. Mesisco v. Giuliano, 190 Mass. 352, 76 N. E. 907. Court of law affords no adequate remedy since it cannot restore him to membership. Id.

60. See 5 C. L. 1533, et seq.

61. Miller v. Prelle, 122 Ill. App. 380; Supreme Lodge, O. M. P. v. Dewey [Mich.] 12 Det. Leg. N. 886, 106 N. W. 140; Dennis v. Modern Brotherhood [Mo. App.] 95 S. W. 967. Designation of persons not within classes named by Rev. Civ. Code § 712. Foss v. Petterson [S. D.] 104 N. W. 915. Statute of foreign state presumed to be same in absence of provision to contrary. Id. Where power is reserved to bind the member by subsequent changes in the contract and restrictions are thereafter placed on the naming of beneficiaries, a member voluntarily designating a new beneficiary after the change cannot designate a beneficiary not contemplated by the contract as changed. Member held to have no power to designate woman unrelated to and nondependent on him, though she would have been eligible at the time of the admission of the member. Caldwell v. Grand Lodge of United Workmen, 148 Cal. 195, 82 P. 781.

62. Designation of ineligible person "as guardian" of grandchildren who were eligible held valid though such person was not then or thereafter their legal guardian, grandchildren alone being regarded as beneficiaries and the person named holding the fund in trust for their benefit. Mee v. Fay, 190 Mass. 40, 76 N. E. 229. Parol evidence held admissible to show why member caused insertion of such person's name. Id. Since property is held for grandchildren in fiduciary capacity, they are not entitled to its possession and their regularly appointed guardian cannot recover it in an action at law, but remedy is, under Rev. Laws c. 159, § 1, to have trust declared and defendant as trustee directed to execute it. Id.

63. Where the assistance is not trivial or casual or wholly charitable, but is substantial and material, and the obligation to furnish it, although perhaps not enforceable in law, nevertheless rests on moral and equitable grounds, and it is furnished, not gratuitously, but in recognition of such obligation, it is sufficient to render the beneficiary a dependent within Rev. Laws c. 119, § 6. Wilber v. Supreme Lodge of New England Order of Protection [Mass.] 78 N. E. 445. A dependence founded on the mere whim or caprice of the member and which may be cast aside by him with impunity is insufficient. Caldwell v. Grand Lodge of United Workmen, 148 Cal. 195, 82 P. 781.

Held dependent: Sister-in-law. Wilber v. Supreme Lodge of New England Order of Protection [Mass.] 78 N. E. 445; Erickson v. Modern Woodmen of America [Wash.] 86 P. 584.

Held not to be dependent: Stepson grown and married, earning a good salary and saving money. Morey v. Monk [Ala.] 40 So. 411. Married woman unrelated to member, and whom he promised to take care of until his death. Caldwell v. Grand Lodge U. W., 148 Cal. 195, 82 P. 781. One living with member as his concubine or mistress. Miller v. Prelle, 122 Ill. App. 380.

64. "Legal heirs" held to have been used, in its popular sense, and to mean all persons designated as distributees by the statutes for the distribution of the property of intestates. Thomas v. Covert, 126 Wis. 593, 105 N. W. 922. Held to include widow, under Rev. St. 1898, § 3935, subd. 6. Id. Widow held heir, where contract was governed by laws of Ohio. Burns v. Burns, 109 App. Div. 98, 95 N. Y. S. 797. "Legal representatives" held to mean heirs, where designation would have been invalid had words been given their primary meaning. In re Harton's Estate, 213 Pa. 499, 62 A. 1058. Such construction held not affected by fact that after designation had been made rules were changed so as to include executors and administrators in eligible classes. Id. "Legal representatives" held to mean "family and heirs," latter being only beneficiaries who could be lawfully designated when it was issued, and rule was not changed by fact that law was subsequently amended so as to permit designation of executors and administrators. Knights T. & M. Aid Ass'n v. Bleher, 3 Ohio N. P. (N. S.) 673. For purpose of ascertaining who are the heirs, resort must be had to the intestate laws of the state under which the descent is cast. Burke v. Modern Woodmen [Cal. App.] 84 P. 275. After they have been ascertained, however, they take under the contract and not by virtue of the statute, and hence the contract must be looked to to determine the share to which each is entitled. Id. Where certificate was payable to heirs generally without naming them, held that they shared equally. Id. Heirs as used in by-law held to mean persons to whom personalty of deceased would go in case of intestacy, among whom fund should be distributed in accordance with statute regulating distribution of personalty of intestates. Dielmann v. Berka, 49 Misc. 486, 97 N. Y. S. 1027. Where member left father and widow, latter held entitled to half the

ficiary is sometimes required to be eligible both when named and at the time of the member's death.[67] Where classes of beneficiaries are made eligible in a particular order, with a provision that in case of a designation out of the order named the aid shall be rendered to the family or relatives who are heirs at law, the status at the time of the member's death determines the right.[68] Changes in the provisions as to who may be designated will not be construed as retroactive unless they so provide either expressly or by necessary implication.[69] The by-laws sometimes provide for the disposition of the fund in case there is no valid designation, or in case of the death of one or more of the named beneficiaries.[70] A provision in the constitution or by-laws limiting the eligibility of beneficiaries may be waived by the society[71] and cannot be taken advantage of by third persons.[72] The intention of the member controls in determining the rights of beneficiaries under a certificate where the power of appointment within the eligible classes rests exclusively with the member.[73] Where everything is performed which is required by the society, there cannot be a lapse of the fund payable on the death of a member except the beneficiary dies or is otherwise incapacitated to take.[74] Provisions as to the manner in which the beneficiary shall be designated must be substantially complied with.[75] When a

benefit in view of Code Civ. Proc. § 2732. Id.

65. A relative by marriage, as a step-father, is not a member of the family when not a member of the household nor maintaining the usual family relations. Supreme Lodge, O. M. P. v. Dewey [Mich.] 12 Det. Leg. N. 886, 106 N. W. 140.

66. On the death of a spouse without issue of the marriage thereby dissolved, children of the decedent by a former marriage lose their affinity to the surviving step-parent. Morey v. Monk [Ala.] 40 So. 411. Step-son held not a relative of step-father in such case. Id.

67. Where by-laws required new beneficiary to be eligible "when named" and marriage of member with beneficiary designated as his wife was void because he already had a living wife, held that designation was void regardless of whether fact that they continued to live together after death of lawful wife constituted a valid common-law marriage. Miller v. Prelle, 122 Ill. App. 380. Under Illinois statute beneficiary must be within eligible classes at time of member's death. Id.

68. Widow of member held entitled to proceeds as against claim of father of member designated as beneficiary before the marriage. Larkin v. Knights of Columbus, 188 Mass. 22, 73 N. E. 850; Davin v. Davin, 99 N. Y. S. 1012.

69. See, also, § 5F, ante. Where at the time a creditor was named as beneficiary such designation was lawful, subsequent change making such designation unlawful held not to affect the right of the creditor to recover. Emmons v. Supreme Conclave, I. O. H. [Del.] 63 A. 871.

70. A by-law declaring that when a beneficiary died before the member the share of the deceased, in the absence of other designation, should go to the surviving beneficiaries equally held effective to defeat the claim of a widow who was not designated. Polhill v. Battle, 124 Ga. 111, 52 S. E. 87. A by-law declaring the designation of beneficiary void on the death of the beneficiary and providing that in case no new designation is made payment shall be made to persons designated in their order is controlling in such cases. Widow, who was a second wife, held entitled to fund as against claims of children of former wife where designation as beneficiary was not changed by the member after her death. In re Rock's Estate, 49 Misc. 286, 99 N. Y. S. 157. Where a by-law makes the benefit payable in a particular order in case of failure to designate a beneficiary or the designation of an unlawful one, the preferred beneficiary, under the by-law, has a direct interest in the contract which he is entitled to enforce when the beneficiary named is unlawful. Husband held entitled to enforce payment of proceeds of policy on wife's life, payable to her step-father. Supreme Lodge Order of Mutual Protection v. Dewey [Mich.] 12 Det. Leg. N. 886, 106 N. W. 140.

71. Mutual aid society. Alfsen v. Crouch, 115 Tenn. 352, 89 S. W. 329.

72. Alfsen v. Crouch, 115 Tenn. 352, 89 S. W. 329. The payment of an invalid certificate does not confer any basis in equity for third persons to lay claim to the money. Father of member who was original beneficiary held not entitled to recover from alleged illegally substituted beneficiary amount paid by society. Id.

73. Where a member designated his two children to take in equal parts and one died, and thereafter the member continued to pay assessments for the full amount without changing the certificate, he showed his intention to pass the whole fund to the survivor. Dennis v. Modern Brotherhood [Mo. App.] 95 S. W. 967. Mother of member held entitled to proceeds as against claim of widow. Coston v. Coston [Mich.] 13 Det. Leg. N. 540, 108 N. W. 736.

74. Death of joint beneficiary held not ground for lapse of share of deceased. Dennis v. Modern Brotherhood [Mo. App.] 95 S. W. 967.

75. Provision that "name" of beneficiary should be recorded and indorsed on certificate held substantially complied with where registration and indorsement stated that bene-

member has defectively but in good faith sought to comply with the law as to designation of beneficiaries and has made every effort on his part to do so, equity will interpose to effectuate his intention.[76] A designation by will is sufficient when the will follows the policy.[77] Whether the testator has exercised the power[78] and who are entitled to take under a testamentary designation are questions of intention to be determined from the language used in the will.[79] A prohibition in the contract of the right to designate by will is valid.[80] Directory provisions requiring designation at a certain time and place may be waived by the society.[81] The laws of the state where the society is organized generally govern in determining the eligibility of beneficiaries.[82] Where, however, the right of a society to do business depends on the statutes of two states, one where it is organized and the other where it is permitted to do business as a foreign corporation, the laws of the latter will control, in cases originating therein, in determining who may be made beneficiaries.[83]

In the absence of a provision to the contrary in the contract,[84] the beneficiary ordinarily has no vested interest in the certificate during the member's lifetime,[85] and hence his death before that of the member puts an end to his interest.[86] The member may ordinarily surrender the certificate[87] or change the beneficiaries at will[88]

ficiary was such person as member should name in his will. Brooklyn Trust Co. v. Seventh Regiment Veteran & Active League, 99 N. Y. S. 248.

76. Wife of member held entitled to benfits as designated beneficiary, though never in fact designated according to the rules of the society. St. Louis Police Relief Ass'n v. Tierney, 116 Mo. App. 447, 91 S. W. 968.

77. Jacob v. Jacob's Ex'r, 28 Ky. L. R. 327, 89 S. W. 246.

78. Will bequeathing specified sum to be derived from testator's life insurance held to exercise power of designation conferred by certificate where total amount of insurance, including certificate, did not equal such sum. Jacob v. Jacob's Ex'r, 28 Ky. L. R. 327, 89 S. W. 246.

79. Where beneficiary was to be "as provided in my will," held that general residuary legatee was entitled to the money though fund was not specifically mentioned. Brooklyn Trust Co. v. Seventh Regiment Veteran & Active League, 99 N. Y. S. 248.

80. Not contrary to public policy. Thomas v. Covert, 126 Wis. 593, 105 N. W. 922.

81. St. Louis Police Relief Ass'n v. Tierney, 116 Mo. App. 447, 91 S. W. 968. Provisions of constitution requiring member to appear at the office of the association between certain hours on the third day after admission and designate a beneficiary, and that on failing to make a designation the fund will be paid to his heirs at law, held directory and to have been waived. Id.

82. In absence of evidence to the contrary, it will be presumed that the law of a sister state is the same as the law of the forum in determining the legal status of a substituted beneficiary in a contract issued by a foreign fraternal society. Foss v. Petterson [S. D.] 104 N. W. 915.

83. Dennis v. Modern Brotherhood [Mo. App.] 95 S. W. 967.

84. Where the contract reserves no power to change the beneficiary except with his consent, while sui juris, the beneficiary takes a vested interest which is not divested by his death prior to that of the member. Simms v. Randall [Tenn.] 96 S. W. 971. Proceeds held to pass to distributees of beneficiary predeceasing member. Id. The mere payment of dues and assessments by a beneficiary does not, in the absence of anything further, give him a vested interest so as to prevent a change without his consent. Grand Lodge A. O. U. W. v. O'Malley, 114 Mo. App. 191, 89 S. W. 68. The Missouri statute (Rev. St. 1899, § 1417), providing that payment of dues and assessments by a beneficiary shall not give the beneficiary a vested interest in the certificate, has no retrospective operation. Id.

85. Wandell v. Mystic Toilers [Iowa] 105 N. W. 448; Knights of Maccabees v. Sackett [Mont.] 86 P. 423. A change in the law cannot be said to impair the contractual rights of the beneficiary (Westerman v. Supreme Lodge K. P. [Mo.] 94 S. W. 470), nor can a change in the constitution and by-laws have such effect (Id.). An agreement that engagement in a prohibited occupation shall work a forfeiture of benefits is binding on the beneficiary. Fraternal Aid Ass'n v. Hitchcock, 121 Ill. App. 402. One cannot assail change of beneficiaries on ground of fraud, or, where his rights have been cut off by a cancellation of the original certificate, because second beneficiary was ineligible. Alfsen v. Crouch, 115 Tenn. 352, 89 S. W. 329. In order to make a prima facie case in an action on the certificate, the beneficiary is required to plead performance by the member. Grand Lodge A. O. U. W. v. Hall [Ind. App.] 76 N. E. 1029.

86. Administrator of cobeneficiary who predeceased member held not entitled to maintain action against society to recover on certificate, though member took no action toward making a change incident to the death of the beneficiary. Dennis v. Modern Brotherhood [Mo. App.] 95 S. W. 967. This is true in Missouri as to beneficiaries under certificates of foreign societies not entitled to exemption as fraternal societies from the operation of insurance laws applicable to regular life companies. Id.

87. May do so on any ground and for any

during his lifetime,[89] provided he has sufficient mental capacity to contract.[90] Changes must, however, be made in the manner prescribed by the laws of the association,[91] unless compliance therewith is waived[92] during the member's lifetime.[93] Where the original beneficiary is himself to blame for the nonsurrender of the original certificate, he cannot contend that an attempted change is thereby rendered invalid.[94] If a member who has pursued the course pointed out by the laws of the order, and has done all in his power to effectuate a change, dies before a new certificate has actually been issued, equity will regard the change as having been effectuated.[95] A beneficiary who has paid assessments prior to a valid change of beneficiaries is entitled to reimbursement out of the fund.[96] A designation of beneficiaries valid when made ordinarily remains valid until changed in the method provided by the contract,[97] and hence an attempted change which is ineffectual for any reason does

reason he sees fit, and when surrendered and canceled, it is entirely immaterial to the original beneficiary whether the society ever issued another or to whom it made payment of the proceeds of a policy issued in lieu of the original. Alfsen v. Crouch, 115 Tenn. 352, 89 S. W. 329.

88. Wandell v. Mystic Toilers [Iowa] 105 N. W. 448; Knights of Maccabees of the World v. Sackett [Mont.] 86 P. 423. Beneficiary of certificate payable as directed by will held not shown to have been changed to designate the children of the member. Jacob v. Jacob's Ex'r, 28 Ky. L. R. 327, 89 S. W. 246.

89. Since interest of beneficiary attaches instantly upon the death of the insured, change must have been effectuated before that time. Knights of Maccabees v. Sackett [Mont.] 86 P. 423. Where insured sent application by mail but it was not received by association until six hours after his death, held that interest of original beneficiary was not affected. Id. Mail was his agent and he took the risk of a failure to deliver prior to his death. Id.

90. Insanity of a member at time of attempted change leaves original designation in full force. Sovereign Camp, Woodmen of the World v. Wood, 114 Mo. App. 471, 89 S. W. 891.

91. In re Harton's Estate, 213 Pa. 499, 62 A. 1058. Where no change was made in accordance with by-laws and rules, held that attempted change by naming different beneficiary in will was invalid and did not affect rights of those originally named. Burke v. Modern Woodmen [Cal. App.] 84 P. 275. A provision in a bond executed by a member and his beneficiary for payment of the money due from the proceeds of the insurance held inoperative as a change of the person designated to receive payment. Algeo v. Fries, 27 Pa. Super. Ct. 157. Change held ineffectual where declaration made to procure it was signed by only one witness instead of two as required. Abbott v. Supreme Colony United Order of Pilgrim Fathers, 190 Mass. 67, 76 N. E. 234. Fact that two witnesses could not be procured because rule of hospital where member died allowed but one visitor a day to a patient held not to change rule, it not appearing that the necessity for two was called to attention of hospital authorities. Id. Attempted change failing to stipulate for a waiver of rights of beneficiary held not a substantial compliance with constitutional provision requiring such waiver. Flowers v. Sovereign Camp. Woodmen of the World [Tex. Civ. App.] 14 Tex. Ct. Rep. 311, 90 S. W. 526. Where a change can be made under a lost certificate only by an actual furnishing of proof of loss thereof with request for change, the mere mailing of the request and proof is insufficient. Death of member prior to actual receipt of request and proof of loss of certificate held to render attempted change of beneficiary unavailing. Id. Substantial compliance is sufficient. Provisions held substantially complied with. Grand Lodge, A. O. U. W. v. O'Malley, 114 Mo. App. 191, 89 S. W. 68. Affidavit held sufficient application for new certificate. Polish National Alliance v. Nagrabski [N. J. Eq.] 64 A. 471.

92. Since laws as to manner of change are solely for society's benefit, strict compliance therewith may be waived by it. Change held effective without surrender of old certificate. Grand Lodge, A. O. U. W. v. O'Malley, 114 Mo. App. 191, 89 S. W. 68; Stronge v. Supreme Lodge, K. P., 97 N. Y. S. 661. Defective declaration held not waived by its receipt by subordinate lodge where neither it nor its officers had authority to waive laws, and evidence showed that supreme board of directors knew nothing of defect until after member's death. Abbott v. Supreme Colony, U. O. of P. F., 190 Mass. 67, 76 N. E. 234. Society held estopped by assurance of local secretary as to sufficiency of an indorsement for change of beneficiary. Wandell v. Mystic Toilers [Iowa] 105 N. W. 448. Husband of member held not entitled to contest a change of beneficiary by which member's father was substituted. Id.

93. Since beneficiary becomes vested on the death of the member, any waiver by the society must occur during his lifetime. Gordon v. Gordon, 117 Ill. App. 91. Payment of amount of certificate into court and requiring the claimants to interplead held not a waiver of any rights of the beneficiary. Knights of Maccabees v. Sackett [Mont.] 86 P. 423.

94. Though nonsurrender might be available to society as a defense. Polish Nat. Alliance v. Nagrabski [N. J. Eq.] 64 A. 471.

95. As where member has absolute right to make the change, and acts remaining to be done by the association are purely ministerial. Polish Nat. Alliance v. Nagrabski [N. J. Eq.] 64 A. 471.

96. Grand Lodge, A. O. U. W. v. O'Malley, 114 Mo. App. 191, 89 S. W. 68.

not affect the rights of the original beneficiary.[98] Where, however, the original certificate has been surrendered and canceled, the rights of the original beneficiary are thereby terminated, regardless of whether a new certificate subsequently issued is valid or not.[99] Statutes in some states authorize the substitution of persons not previously eligible on the death of the first named beneficiary.[1]

Assignment of benefits.[2]—An instrument purporting to be procured by one acting for himself and others, agreeing on a division of the proceeds of a certificate, is not enforceable as an assignment where his authority to represent others was lacking,[3] and a recital therein that it is made with the approval of the others does not obviate the lack of authority.[4] Where an attempted change of beneficiary is ineffectual, the proposed substitute cannot claim title by assignment in the absence of delivery or written transfer of the certificate,[5] nor can the certificate in such case be claimed as a gift;[6] but the courts will hold a change of beneficiary to be an assignment to effectuate the intention of the member as to the disposition of the proceeds.[7]

Exemption of benefits from liability for debts.[8]—Statutes[9] and the contract[10] frequently exempt the proceeds of the certificate from liability for the member's debts. A creditor cannot rely on representations as to the character of a fraternal insurance policy which he takes as security for a debt to assert its nonexemption from liability for debts.[11] Where the heirs of the member are named as beneficiaries,

97. Burke v. Modern Woodmen [Cal. App.] 84 P. 275.

98. Change ineffectual because new beneficiary was ineligible. Miller v. Prelle, 122 Ill. App. 380; Foss v. Petterson [S. D.] 104 N. W. 915. Where member was insane at time of attempted change. Sovereign Camp, Woodmen of the World v. Wood, 114 Mo. App. 471, 89 S. W. 891.

99. In such case held that original beneficiary could not recover from new beneficiary the amount of the certificate, which had been paid to her by the company, on ground that she had no insurable interest. Alfsen v. Crouch, 115 Tenn. 352, 89 S. W. 329.

1. Authorized by Act Dec. 31, 1901, "with the consent of the officers and under the rules they may prescribe." Morey v. Monk [Ala.] 40 So. 411. After death of original beneficiary member designated a new one who was ineligible under the by-laws as they then existed. Subsequently the above act was passed before the member's death, but association took no affirmative action to change by-laws. Held that designation having continued after the passage of the act and until member's death, the society could not contend that person so designated was ineligible, and persons who would have taken had there been no valid designation were in same position. Id.

2. See 5 C. L. 1535.

3. Banholzer v. Grand Lodge, A. O. U. W. [Mo. App.] 95 S. W. 953.

4. Contract with widow, who had action for divorce pending against member at time of his death, held ineffective to deprive her of her rights as beneficiary. Banholzer v. Grand Lodge, A. O. U. W. [Mo. App.] 95 S. W. 953. Instrument executed by beneficiary named in certificate held nothing more than a mere executory contract to assign (Id.), and not an assignment legal or equitable (Id.).

5, 6. Flowers v. Sovereign Camp, Woodmen of the World [Tex. Civ. App.] 14 Tex. Ct. Rep. 311, 90 S. W. 526.

7. Change of beneficiary from wife of member to sister held an assignment as security for indebtedness. Great Camp, Knights of Modern Maccabees v. Deem [Mich.] 13 Det. Leg. N. 79, 107 N. W. 447.

8. See 5 C. L. 1536.

9. The proceeds are exempt from liability for debts of the beneficiary accrued at the time of payment, under Insurance Law, art. 6, § 212. People's Bank v. Cushman, 109 App. Div. 349, 95 N. Y. S. 882. A New York association not incorporated or reincorporated under the New York insurance law is nevertheless within the provision exempting the proceeds from liability for debts. Insurance Law (Laws 1892, p. 2015, c. 690, as amended by Laws 1897, p. 261, c. 345) art. 6, §§ 201, 206, 212, construed. Id.

10. Where the purpose of the contract is to secure to relatives and dependents a fund free from the claim of creditors, it will be construed as creating a spendthrift trust as fully as if it in terms provided that the money payable should not be subject to the engagements or liabilities of the beneficiary. Algeo v. Fries, 27 Pa. Super. Ct. 157. The contract of an unincorporated fraternal association specifically excluding creditors from any right to the fund payable on the death of a member is valid. Proceeds held not subject to garnishment under judgment on bond executed by member and beneficiary. Id. Such a contract, described as a beneficiary certificate, is not an insurance policy within the statutes relating to insurance companies and policies. Assignee of benefit certificate held charged with knowledge of its character. Id.

11. Representation that certificate was a life insurance policy held not binding on beneficiary. Algeo v. Fries, 27 Pa. Super. Ct. 157.

they take by virtue of the contract and not by succession so that the proceeds of the certificate are not assets of the member's estate.[12] A law placing benefits "to be paid" beyond attachment or the like is not an exemption of such as have been paid to the credit of the beneficiary.[12a]

§ 7. *Maturity and accrual of benefits.*[13]—The right to the benefit does not mature until death of the insured from one of the insured causes or the happening of the event stipulated against.[14] Where benefits are not by the terms of the contract due until six months after proofs of death are filed, a prior denial of liability does not mature them.[15] A promise to pay after satisfactory proof of death and of the identity and right of claimant and the validity of the claim does not require such a showing as ought reasonably to satisfy the society's officers that the society has no good defense against the claim.[16]

§ 8. *Notice and proofs of death or disability.*[17]—*Notice* within a limited time after accident or disability is a valid requirement,[18] but application cannot be required for a benefit accrued before the by-law was passed.[19] Notice need not be given where the insurer has actual knowledge within the time stipulated for the giving of formal notice.[20] Where an association was put on inquiry by the filing with it of a claim which, followed by investigation, would have disclosed a progressive and fatal illness that would entitle him to sick benefits for the remainder of his life, it was unnecessary for the member to give notice from time to time of the continued existence of his disease[21] except for the purpose of laying a foundation for claims for interest.[22]

Proofs[23] are waived by a denial of liability,[24] and treating a proof sent as sufficient waives defects.[25] When proofs of loss are required to be satisfactory to insurer's board of directors, the law implies a further provision that the board shall act reasonably in its decision,[26] and the board is not justified in rejecting the proofs merely because they disclose a defense available under the contract.[27] The proofs need not negative the existence of facts which constitute a defense in an action on the contract.[28] A provision requiring certificates of disability or proofs of loss to be furnished within a limited time after accident or disability is valid,[29] and physical

12. Burke v. Modern Woodmen of America [Cal. App.] 84 P. 275.

12a. Recor v. Recor [Mich.] 12 Det. Leg. N. 784, 106 N. W. 82.

13. See 5 C. L. 1536.

14. Risks assumed, suicide clauses and exceptions, see ante § 5C; Incontestable clauses, see ante § 5G.

15. Action for monument benefits held premature. Arrison v. Supreme Council of Mystic Toilers, 129 Iowa, 303, 105 N. W. 580.

16. If the proof showed facts of which the society might avail itself as a defense, this would not bar the bringing of an action. Lyon v. United Moderns, 148 Cal. 470, 83 P. 804.

17. See 5 C. L. 1537.

18. Order of United Commercial Travelers v. Barnes, 72 Kan. 392, 80 P. 1020, 82 P. 1099. Date of accident (swallowing a pin) and of the time when insured first knew of it held for jury. Id.

19. Dary v. Providence Police Ass'n, 27 R. I. 377, 62 A. 513.

20. Western Travelers' Acc. Ass'n v. Tomson [Neb.] 103 N. W. 695.

21, 22. Dary v. Providence Police Ass'n, 27 R. I. 377, 62 A. 513.

23. See 5 C. L. 1537.

24. Denial of liability held waiver of proofs of loss. Arrison v. Supreme Council of Mystic Toilers, 129 Iowa, 303, 105 N. W. 580.

25. Arrison v. Supreme Counell of Mystic Toilers, 129 Iowa, 303, 105 N. W. 580.

26. Decision of board that proofs were unsatisfactory held not conclusive on member. Noyes v. Commercial Travelers' Eastern Acc. Ass'n, 190 Mass. 171, 76 N. E. 665.

27, 28. Noyes v. Commercial Travelers' Eastern Acc. Ass'n, 190 Mass. 171, 76 N. E. 665.

29. Where injury was claimed to have resulted from swallowing a pin, held error to refuse to require jury to answer on what date pin was swallowed (Order of United Commercial Travelers v. Barnes, 72 Kan. 392, 80 P. 1020, 82 P. 1099), and when plaintiff first learned that he had swallowed the pin (Id.), but questions calling for findings as to who were present when he swallowed it and the circumstances were improper (Id.). A by-law requiring the furnishing of a weekly certificate from the attending physician of a member as a prerequisite to payment of sick benefits is valid. Myers v. Alta Friendly Society, 29 Pa. Super. Ct. 492.

inability to comply is not always an excuse for failure so to do,[30] but when the requirement for notice is made a part of the contract subsequent to the illness or disability and is not given a retrospective operation it is not a condition precedent to liability.[31]

§ 9. *Payment of benefits and discharge of liability.*[32]—The requirement of receipts and signatures of beneficiaries on the certificate as a condition precedent to payment of the amount due thereunder is valid.[33] Payment to known beneficiaries does not release the liability of the society to others whose existence is unknown at the time of payment.[34] The consideration paid on a settlement procured by false representations need not be returned as a condition precedent to suit for the balance.[35] Where the sum paid is insufficient to satisfy an accord of a claim under a certificate, the plaintiff may retain the money as a partial payment and sue for the balance,[36] or disregard the accord, return the amount paid, and sue for the entire amount of the original claim.[37] A settlement for a less sum than is due when induced by fraud is not binding[38] and tender back is not prerequisite to recover on the policy.[39] A settlement for less than the face of the claim is not rendered fraudulent by mere nondisclosure to the claimant that a by-law reducing the benefit had been declared invalid.[40] Where the amount paid is insufficient to execute an accord, the question of fraud in negotiating it is immaterial.[41] Funeral benefits are generally made payable to the member's next of kin or to those having charge of his burial.[42]

Interest.[43]—A beneficial association will not be treated as a delinquent debtor, within the rule requiring the payment of interest, before demand made on it, followed by its refusal or neglect,[44] and though demand is unnecessary under the particular circumstances of the case to keep a claim alive, it is necessary for the pur-

30. Not where the writing and signing of the member's name is not forbidden to be done by others. Myers v. Alta Friendly Soc., 29 Pa. Super. Ct. 492.

31. A by-law requiring application for sick benefits to be made within one week from commencement of sickness held inapplicable to sickness commencing prior to its adoption. Dary v. Providence Police Ass'n, 27 R. I. 377, 62 A. 513.

32. See 5 C. L. 1537.

33. Hence, until it is done, a garnishment of the fund in the hands of the association for the liability of the member and beneficiary cannot be enforced. Algeo v. Fries, 27 Pa. Super. Ct. 157.

34. Widow of marriage unknown to society or member's relatives held entitled to share of death benefit notwithstanding payment of the benefit in full to father of member. Dielmann v. Berka, 49 Misc. 486, 97 N. Y. S. 1027.

35. Mowry v. National Protective Soc., 27 Pa. Super. Ct. 390.

36. Kinney v. Brotherhood of American Yeomen [N. D.] 106 N. W. 44. A finding that there had been no accord and satisfaction as to the claim on the policy in suit held conclusive on appeal. Id.

37. Kinney v. Brotherhood of American Yeomen [N. D.] 106 N. W. 44.

Voluntary payment of funeral benefits **need not be restored** on the rescission of such accord (Kinney v. Brotherhood of American Yeomen [N. D.] 106 N. W. 44), and such payment need not be credited as a partial payment (Id.).

38, 39. Where settlement is procured with a beneficiary by false representations as to the terms of the contract, her action to recover the balance due does not involve the question of the settlement of a disputed claim, or the compromise of a doubtful right. Mowry v. National Protective Soc., 27 Pa. Super. Ct. 390.

40. McCloskey v. Supreme Council, A. L. H., 109 App. Div. 309, 96 N. Y. S. 347.

41. Kinney v. Brotherhood of American Yeomen [N. D.] 106 N. W. 44.

42. Plaintiffs held entitled thereto where petition alleged that they were next of kin and evidence showed that they were member's children and had charge of her burial. Sleight v. Supreme Council Mystic Toilers [Iowa] 107 N. W. 183. Where, in the absence of the designation of a person to receive a funeral benefit, it became the duty of the association, under the by-laws, to pay it to his widow, unless certain officers of the association were satisfied that it would be diverted from its legitimate purpose, in which latter case they had full power to see that the funeral expenses were paid, an undertaker who conducted the burial without any contractual relation to the association could not require the payment of the benefit to him by the service of notice that the widow had declared her purpose of refusing to pay the undertaker for his services. Battersby v. Schuylkill Tribe No. 202, I. O. R., 29 Pa. Super. Ct. 288.

43. See 5 C. L. 1537.

44. Right to interest on sick benefits not

pose of creating the relation of debtor and creditor.[45] Hence, in the absence of proof of demand earlier than the date of the writ, interest will be computed from that date when the claim in suit is well-founded.[46]

§ 10. *Procedure to enforce right to benefits, etc.*[47]—*Agreements to arbitrate or submit to official decision*[48] which attempt to usurp the functions of justice are invalid,[49] but purely internal concerns may be so concluded,[50] and where a member voluntarily concurs in and submits to the decision of an officer purporting to have final authority, he is bound by the decision.[51] A requirement that before suit the remedies provided by the society shall first be exhausted is valid,[52] and a legal excuse must be given for failure to resort to them.[53] Where appeals within a society are heard only in convention whose meetings are two years apart, a postponement of an appeal is prima facie unreasonable[54] and is in legal effect a decision disallowing the claim.[55] The right, on rejection of a claim for injuries by the society, to proceed in the courts is not waived by the claimant's subsequent efforts to secure payment by submitting to an examination as to his injuries by the society's physician and making no objection to his report.[56] A decision expelling a member who was physically disabled to appear and defend and for whom no other could act is not binding.[57]

Rights of action and defenses in general.[58]—A cause of action arises out of a valid subsisting contract of insurance or for benefits[59] assuming the particular risk which has befallen,[60] and performance by insured and the beneficiary of the terms binding on them,[61] coupled with such other facts and notice and proofs of loss as are necessary to mature the right.[62] A beneficiary may maintain an action against a reinsurer of the risks of a society, though not a party to the contract of reinsurance.[63] Injunction will not issue to impound emergency funds before the right of recovery is established, no fraud being charged.[64] The defense of no loss and that of failure to give notice are not necessarily inconsistent.[65]

Jurisdiction and venue.[66]—Actual notice by a foreign association of the com-

paid as accrued determined. Dary v. Providence Police Ass'n, 27 R. I. 377, 62 A. 513.

45, 46. Dary v. Providence Police Ass'n, 27 R. I. 377, 62 A. 513.

47. See 5 C. L. 1538.

48. See 5 C. L. 1525.

49. A by-law obligating a member to abide the decision of an officer of the society as to the construction of the laws thereof is invalid as an attempt to usurp the judicial functions of government. Fraternal Aid Ass'n v. Hitchcock, 121 Ill. App. 402.

50. A by-law purporting to give an officer of the society authority finally to construe the laws of the society and decide all questions arising thereunder held to relate to questions concerning the government of the society and the general conduct of its affairs (Fraternal Aid Ass'n v. Hitchcock, 121 Ill. App. 402), and not as investing the officer with the power finally to determine the contract liability of the society to its members (Id.).

51. Express waiver of liability for injuries in particular occupation held binding, irrespective of validity or invalidity of opinion pursuant to which it was made. Fraternal Aid Ass'n v. Hitchcock, 121 Ill. App. 402.

52. Held binding on member and beneficiary. Beeman v. Supreme Lodge, Shield of Honor [Pa.] 64 A. 792, afg. 29 Pa. Super. Ct. 387.

53. Union Fraternal League v. Johnston, 124 Ga. 902, 53 S. E. 241.

54, 55, 56. Carey v. Switchmen's Union of North America [Minn.] 107 N. W. 129.

57. Where the laws of an order provide for notice of expulsion and give the right of appeal within the order from such action, but make no provision for appeal by another on behalf of a member, a member's rights are not affected by an expulsion for false statements in procuring admission of which action she had no notice by reason of her mortal sickness and unconsciousness lasting from the time of expulsion till death, though no appeal was taken. Kidder v. Supreme Commandery United Order of Golden Cross [Mass.] 78 N. E. 469.

58. See 5 C. L. 1538.

59, 60. See ante § 5.

61. See ante §§ 5, 6.

62. See ante §§ 7, 8.

63. Cosmopolitan Life Ins. Co. v. Koegel, 104 Va. 619, 52 S. E. 166.

64. Assessment levied on the membership of a society failed to produce sufficient to pay a certificate in full. Northwestern Traveling Men's Ass'n v. Raphael, 121 Ill. App. 540.

65. Western Travelers' Acc. Ass'n v. Tomson [Neb.] 105 N. W. 293, on rehearing correcting 103 N. W. 695.

66. See 5 C. L. 1538, n. 6.

mencement of an action against it does not give the courts "jurisdiction in personam" over it.[67] The Washington statute does not authorize service to be made on a deputy on behalf of a society which has appointed a state officer agent for service,[68] nor has such agent power to accept service by mail.[69] In Michigan fraternal societies are exempt from the general insurance laws relating to venue.[70]

Pleading.[71]—The complaint may omit facts presumed of a policy[72] and need not anticipate and negative defenses.[73] A general allegation of performance of conditions precedent is generally permissible by the codes,[74] and defective allegations should be promptly challenged;[75] but a complaint by a beneficiary averring performance of all conditions by her to be performed, without averring performance by the member, is demurrable.[76] Waiver cannot be shown under an allegation of performance[77] but must be specially pleaded.[78] Where a society issues a certificate providing for payment of a specified sum in consideration of fixed sums at fixed periods, a declaration on the certificate will be governed by rules applicable to regular life policies, and not those governing certificates of fraternal societies.[79] A bill seeking restoration of the complainant to membership in a voluntary association from which he charges an illegal expulsion, and also seeking to have ordered paid to him such benefits and expenses incurred for medical attendance, is multifarious.[80]

An answer or affidavit of defense must aver the facts from which the court can determine the law of the defense.[81] When a plaintiff has alleged generally the performance of conditions precedent, the defendant must specially plead any condition and breach on which he relies,[82] and the same as to breach of warranty.[83]

67. Bennett v. Supreme Tent Knights of Maccabees, 40 Wash. 431, 82 P. 744. Service of summons on the commissioner of insurance is sufficient in North Carolina to confer jurisdiction over a foreign fraternal society. Brenizer v. Supreme Council Royal Arcanum [N. C.] 53 S. E. 835.

68, 69. Laws 1901, p. 360, c. 174, construed. Bennett v. Supreme Tent Knights of Maccabees, 40 Wash. 431, 82 P. 744.

70. Societies held exempt from Comp. Laws §§ 10,444, 10,445, providing that actions may be commenced against any insurance company in any county in which plaintiff resides and that the declaration or writ may be served by the sheriff of the county where the principal office of the company is located. Monger v. New Era Ass'n [Mich.] 13 Det. Leg. N. 653, 108 N. W. 1111.

71. See 5 C. L. 1538.

72. Need not aver a **consideration.** Rev. St. 1899, § 894, declares that all instruments promising payment of money import a consideration. Johnson v Sovereign Camp, Woodmen of the World [Mo. App.] 95 S. W. 951. Averment in petition that same was issued on a "valuable consideration" held surplusage in view of Rev. St. 1899, § 894. Id. A stipulation that insured may designate the beneficiary to whom the agreed sum shall be paid is equivalent to promising to pay money within the law presuming a consideration of written instruments promising to pay money. Grand Lodge, A. O. U. W. v. Barwe [Ind. App.] 75 N. E. 971.

73. Supreme Lodge, K. P. v. Lipscomb [Fla.] 39 So. 637.

74. Ballinger's Ann. Codes & St. § 4934. Taylor v. Modern Woodmen, 42 Wash. 304, 84 P. 867.

75. Held sufficient on appeal: Allegations as to compliance with constitution relating to appeals. Carey v. Switchmen's Union of North America [Minn.] 107 N. W 129. Complaint for permanent disability benefits held sufficient to meet provisions of constitution on which the right to benefits was based. Brotherhood of Painters, Decorators & Paperhangers v. Moore, 36 Ind. App. 580, 76 N. E. 262.

76. Under the Indiana practice permitting a general averment of performance of conditions precedent. Grand Lodge, A. O. U. W. v. Hall [Ind. App.] 76 N. E. 1029.

77. Evidence of waiver of right to reinstatement held inadmissible. Victors v. National Prov. Union, 99 N. Y. S. 299.

78. Victors v. National Prov. Union, 99 N. Y. S. 299.

79. A certificate held a policy of insurance within Code 1887, § 3251, declaring what shall be a sufficient declaration in actions on policies and not merely a certificate of membership within Acts 1897-98, p. 734, c. 688, relating to benevolent societies and beneficial associations. Cosmopolitan Life Ins. Co. v. Koegel, 104 Va. 619, 52 S. E. 166.

80. Misisco v. Giuliano, 190 Mass. 352, 76 N. E. 907.

81. Affidavit of defense based on a misstatement in the application as to the pregnancy of applicant held insufficient. McCaffrey v. Knights and Ladies of Columbia, 213 Pa. 609, 63 A. 189. Answer averring forfeiture for nonpayment of assessment held sufficient. Sovereign Camp, Woodmen of the World v. Ogden [Neb.] 107 N. W. 860.

82. The general denial does not raise the issue as to breach of a condition precedent, the performance of which has been

In defensively pleading nonpayment of an assessment, facts should be averred showing that it was legally levied.[84]

A reply pleading estoppel to claim that a cause of risk was excepted must state facts showing equitable estoppel.[85] A special exception is necessary in Texas to reach want of particularity in a reply.[86] Failure to deny the execution of a certificate under oath is, in Missouri, an admission or confession of its execution,[87] but the defendant is not thereby prevented from showing under a proper answer that there was no consideration or that it failed.[88] If not controverted a general allegation of performance of conditions precedent[89] is taken as true, and there is no issue thereon if the complaint is silent and defendant makes no objection.[90] Where suspension of the member is justified by a ground pleaded, it cannot be shown that a different ground existed.[91] A stipulation "reserving" certain issues reserves only those joined.[92]

Evidence.[93] *Presumptions and burden of proof.*[94]—Members are presumed to know the constitution and by-laws.[95] The presumption is that assessments were paid when due.[96] When considering and answering questions involving an applicant's past and present condition of bodily health, the applicant is presumed to have been cognizant of her physical history within the period to which the inquiries are confined,[97] and also to have known whether she had consulted or been treated by a physician.[98] There is a presumption against suicide or death by any other unlawful act,[99] but it may be overcome by verbal testimony[1] and also by reasonable deductions from the facts established.[2] Sanity is presumed[3] and no presumption of insanity

alleged generally by the plaintiff. Taylor v. Modern Woodmen of America, 42 Wash. 304, 84 P. 867. Where a by-law purports ipso facto to work a forfeiture of membership by the failure to pay or tender an assessment when due, the defense of forfeiture thus incurred is not open to defendant under a general denial in an action on a certificate. Kidder v. Supreme Commandery United Order of Golden Cross [Mass.] 78 N. E. 469.

83. Breach of warranty in application as to condition of health at the time and prior held not available because not pleaded. Taylor v. Modern Woodmen, 42 Wash. 304, 84 P. 867.

84. Insufficient when it fails to allege authority existing under either the statutes of the state where the society was organized or its by-laws for the levy of the assessment. Mere reference to laws of defendant without setting same out held insufficient. Johnson v. Sovereign Camp, Woodmen of the World [Mo. App.] 95 S. W. 951. Must allege as a fact the levy of the assessment. Kinney v. Brotherhood of American Yeoman [N. D.] 106 N. W. 44.

85. Reply failing to deny knowledge of provision of contract excepting pregnancy as a risk or to charge that plaintiffs were misled or deceived by the conduct of defendant held insufficient to avoid answer setting up the exception. Knights & Ladies of Columbia v. Shoaf [Ind.] 77 N. E. 738.

86. Plea of waiver or estoppel to defend action on certificate on ground of suspension for nonpayment of premium held sufficient, in the absence of special exception to raise the issue. Moore v. Supreme Assembly of Royal Soc. [Tex. Civ. App.] 15 Tex. Ct. Rep. 654, 93 S. W. 1077.

87. Certificate sued on held not required to be introduced in evidence under Rev. St. 1899, § 746, to make a prima facie case. Johnson v. Sovereign Camp, Woodmen of the World [Mo. App.] 95 S. W. 951.

88. Answer averring nonpayment of assessment held insufficient. Johnson v. Sovereign Camp, Woodmen of the World [Mo. App.] 95 S. W. 951.

89. Ballinger's Ann. Codes & St. § 4943. Taylor v. Modern Woodmen, 42 Wash. 304, 84 P. 867.

90. Where the complaint in an action on a certificate contained no allegation as to performance or nonperformance of a condition as to submission of the claim to arbitration, and defendant did not interpose failure to submit as a defense, it was not an issue. Knapp v. Brotherhood of American Yeomen, 128 Iowa, 566, 105 N. W. 63.

91. Taylor v. Modern Woodmen, 72 Kan. 443, 83 P. 1099.

92. Where neither party had a right to show a waiver as their pleadings stood, a stipulation that each party expressly reserved any right it may have to show a waiver at the trial did not confer the right irrespective of the form of the pleadings. Victors v. National Provident Union, 99 N. Y. S. 299.

93, 94. See 5 C. L. 1539.

95. United Moderns v. Rathbun, 104 Va. 736, 52 S. E. 552.

96. Sovereign Camp, Woodmen of the World v. Cox [Ind. App.] 78 N. E. 683, rvg. on rehearing [Ind. App.] 76 N. E. 888.

97, 98. Kidder v. Supreme Commandery United Order of Golden Cross [Mass.] 78 N. E. 469.

99. Grand Lodge, A. O. U. W. v. Banister [Ark.] 96 S. W. 742; Taekman v. Brotherhood of American Yeomen [Iowa] 106 N. W. 350.

arises from the fact of one taking his own life.[4] A self-inflicted death is presumed to have been accidental,[5] but this is true only where one is found dead under circumstances leaving the cause of death in doubt.[6] Where suicide is a defense, the presumption against self-destruction is to be treated as evidence in the case.[7] The presumption of death from seven years' absence is rebuttable.[8] The presumption of receipt of a letter from its being mailed yields to positive evidence.[9]

It will be presumed that the law of a sister state is the same as the law of the forum in determining the legal status of a beneficiary in a contract issued by a foreign society.[10]

The burden is on plaintiffs, in an action on a certificate, to show that a copy of the constitution and by-laws put in evidence had been changed prejudicially to them after the contract in suit was issued,[11] and to entitle a claimant to benefits, he must show affirmatively a strict compliance with the by-laws.[12] The burden is on defendant to show nonpayment of assessments,[13] suicide,[14] falsity of answers in the application,[15] violation of law by member,[16] and waiver of the right to claim benefits as defenses;[17] and where the sole issue in an action to recover a death benefit is payment, the burden is on the defendant to show not only the fact of payment but the further fact that the payment was made to a proper beneficiary.[18] Where the complaint or declaration unnecessarily avers performance of all conditions, the burden of proof is not shifted,[19] and it is still incumbent on defendant to prove defensive matter,[20] but when the issue of nondependency of a beneficiary is raised by the member's executor making a claim to the fund and the society's denial thereof, the burden is on the executor to show nondependency of the beneficiary.[21] When matters stated in proofs of loss are relied on as a defense, the defendant nevertheless has the burden of establishing the facts necessary to make the defense available under the contract,[22] and where an accord and satisfaction is pleaded as a defense, the burden is on defendant to establish it, notwithstanding a reply admitting an accord but denying satisfaction.[23]

1, 2. Supreme Tent Knights of Maccabees v. King [C. C. A.] 142 F. 678.

3. Plunkett v. Supreme Conclave, I. O. H. [Va.] 55 S. E. 9; Tackman v. Brotherhood of American Yeomen [Iowa] 106 N. W. 350.

4. Plunkett v. Supreme Conclave, I. O. H. [Va.] 55 S. E. 9.

5. Grand Lodge, A. O. U. W. v. Banister [Ark.] 96 S. W. 742.

6. Supreme Tent Knights of Maccabees v. King [C. C. A.] 142 F. 678. Where a man is found dead under circumstances showing clearly that he killed himself, there is no presumption that his death was accidental at least none which requires additional evidence to overcome. *Id.*

7. Tackman v. Brotherhood of American Yeomen [Iowa] 106 N. W. 350.

8. Evidence held insufficient to sustain the presumption of death from seven years' absence. Modern Woodmen v. Gerdom, 72 Kan. 391, 82 P. 1100.

9. Evidence of nonreceipt of letter before expiration of time for payment of assessment held sufficient to rebut presumption of its receipt on day mailed. Beeman v. Supreme Lodge, Shield of Honor [Pa.] 64 A. 792.

10. Nondependent stranger held ineligible as substituted beneficiary under Rev. Civ. Code § 712. Foss v. Petterson [S. D.] 104 N. W. 915.

11. United Moderns v. Rathbun, 104 Va. 736, 52 S. E. 552.

12. Illness of member held no excuse for failing to furnish certificate of illness. Myers v. Alta Friendly Soc., 29 Pa. Super. Ct. 492.

13. Sleight v. Supreme Council of Mystic Toilers [Iowa] 107 N. W. 183; Rambousek v. Supreme Council of Mystic Toilers [Iowa] 106 N. W. 947; Kinney v. Brotherhood of American Yeomen [N. D.] 106 N. W. 44; Kidder v. Supreme Commandery United Order of Golden Cross [Mass.] 78 N. E. 469; Sovereign Camp, Woodmen of the World v. Cox [Ind. App.] 78 N. E. 683, rvg. on rehearing 76 N. E. 888.

14. Grand Lodge, A. O. U. W. v. Banister [Ark.] 96 S. W. 742.

15. Loyal Americans v. Fisher, 117 Ill. App. 150.

16. Supreme Lodge K. P. v. Lipscomb [Fla.] 39 So. 637.

17. Dary v. Providence Police Ass'n, 27 R. I. 377, 62 A. 513.

18. Kittredge v. Boston Firemen's Mut. Relief Ass'n, 191 Mass. 23, 77 N. E. 648.

19, 20. Supreme Lodge K. P. v. Lipscomb [Fla.] 39 So. 637.

21. Kittredge v. Boston Firemen's Mut. Relief Ass'n, 191 Mass. 23, 77 N. E. 648.

22. Noyes v. Commercial Travelers' Eastern Acc. Ass'n, 190 Mass. 171, 76 N. E. 665.

Relevancy and admissibility.[24]—The general rules of evidence[25] have been applied in passing on the admissibility of admissions,[26] declarations,[27] hearsay,[28] experiments,[29] similar acts and circumstances.[30] The verdict of a coroner is generally held inadmissble in an action on a policy to show the cause of death,[31] especially where it shows that no formal inquest was held and the coroner himself testified in the case as to the cause of death;[32] but a death certificate produced from records kept pursuant to statute, purporting to show of what disease a person died, has been held competent to prove death from such cause.[33] Proofs of loss are admissible only to prove compliance with the provisions of the policy,[34] and where proofs of loss or injury of a certain character are, by the contract, made a condition precedent to recovery, and the proofs furnished comply with the contract, the plaintiff, in an action on the contract, is not limited to the details of fact or evidence contained in the proofs.[35] The statute of Pennsylvania declaring inadmissible papers of which no copy is attached to the policy is applicable to fraternal societies.[36] Where the only

23. Kinney v. Brotherhood of American Yeomen [N. D.] 106 N. W. 44.

24. See 5 C. L. 1539.

25. See Evidence, 7 C. L. 1511.

26. The records of a **local lodge** are admissible in an action against the **supreme body** as admissions of the defendant against interest and, when lost, secondary evidence of their contents is competent. Plattdeutsche Grot Gilde v. Ross, 117 Ill. App. 247.

While doubtful of the correctness of the rule, it has been held by the Indiana appellate court that conditions may exist under which statements of a **member** of a fraternal order are admissible **against** his **beneficiary.** Grand Lodge A. O. U. W. v. Hall [Ind. App.] 76 N. E. 1029.

27. Generally, when the fact is material, the **declarations of** the **insured** as to the **condition of** his **health** are competent. Court of Honor v. Dinger [Ill.] 77 N. E. 557. Refusal to admit deceased's declarations to show ill health at time of his reinstatement held not reversible error. Id. Declarations of a deceased member prior to admission to an insurance fraternity as to suffering from disease is admissible in an action to recover the death benefit to show falsity of statements in his application that he never had been sick. Nophsker v. Supreme Council of Royal Arcanum [Pa.] 64 A. 788. Where a witness testifies to a statement by a deceased member that deceased thought he had a certain disease, testimony as to what deceased attributed it was inadmissible. Tyler v. Modern Woodmen of America, 42 Wash. 304, 84 P. 867. In a contest between claimants of the proceeds of a certificate, the beneficiary of which had been changed from wife to sister of member, the declarations of the **member** as to his **object in making** the **change** are admissible **to show** mental **competency** (Great Camp Knights of Modern Maccabees v. Deem [Mich.] 13 Det. Leg. N. 79, 107 N. W. 447), but inadmissible for the purpose of proving a gift (Id.).

28. Certain letters from absentee and others relating to him after disappearance held admissible only as proof of performance of preliminary steps in fixing liability in an action to recover on his certificate on theory of presumption of death arising from absence. Modern Woodmen v. Gerdom, 72 Kan. 391, 82 P. 1100. Testimony of wife as to **statement** of husband that he **had made a demand** for his certificate held hearsay. Coston v. Coston [Mich.] 13 Det. Leg. N. 540, 108 N. W. 736.

Knowledge possessed by officers of a society cannot be shown by witnesses other than those possessing the knowledge. Sovereign Camp Woodmen of the World v. Carrington [Tex. Civ. App.] 14 Tex. Ct. Rep. 397, 90 S. W. 921. Portion of question as to knowledge of officers of society with respect to the health of insured at time of delivery of certificate held properly excluded. Id. The **private record of a physician** other than the witness showing the fact of an examination and analysis of an applicant's urine held inadmissible. Loyal Americans v. Fisher, 117 Ill. App. 150.

Affidavit of assistant medical examiner not called as a witness as to examination and analysis of urine of an applicant on behalf of affiant's deceased employer held admissible. Loyal Americans v. Fisher, 117 Ill. App. 150.

29. Evidence of experiments under conditions surrounding deceased at time of his death held admissible on **issue of suicide.** Tackman v. Brotherhood of American Yeomen [Iowa] 106 N. W. 350.

30. On the issue of the **authority of a local lodge officer** to deliver certificate in a manner different from that prescribed by the by-laws, evidence of his having done so in another instance than that involved in the action is admissible. Sovereign Camp, Woodmen of the World v. Carrington [Tex. Civ. App.] 14 Tex. Ct. Rep. 397, 90 S. W. 921.

31. Where the defense to an action on a life policy is suicide, the finding of a coroner's jury to that effect is not admissible in evidence. Boehme v. Sovereign Camp Woodmen of the World, 98 Tex. 376, 84 S. W. 422.

32. Kinney v. Brotherhood of American Yeomen [N. D.] 106 N. W. 44.

33. National Council of the Knights and Ladies of Security v. O'Brien, 112 Ill. App 40.

34. Proofs and accompanying affidavits of physicians not admissible as proof of facts therein recited. Order of United Commercial Travelers v. Barnes, 72 Kan. 392, 80 P. 1020, 82 P. 1099.

35. Noyes v. Commercial Travelers' Eastern Acc. Ass'n, 190 Mass. 171, 76 N. E. 665.

issue in an action on a certificate is whether a true copy thereof was attached to the petition, the certificate is admissible without being accompanied by the application and by-laws.[37] The intent with which an assault was committed is relevant to the inquiry whether the injury was received while violating the law.[38] On the question of prompt notice the member's first knowledge of his disability[39] and the time of the accident[40] is relevant, but the facts as to who were present and the circumstances are not.[41] Relevant to the truth of answers in the application, it may be shown that true answers were given the agent or examiner,[42] and on the issue whether insured had a progressive disease when he answered that he had not been sick, it may be shown that shortly afterwards he had it and died from it.[43] Where the amount payable is limited to a sum derived from one assessment on the entire membership, evidence as to the financial condition of the society and number of members it has is admissible.[44] The recent loss of the husband of plaintiff, her ill health and unfamiliarity with business, bear on the question of her being influenced by false representations in the settlement of her claim as beneficiary.[45] In the absence of statutory inhibition a waiver in the application of the disqualification of attending physicians as witnesses is valid,[46] and the benefits of the waiver are equally as available to the beneficiary as to the insurer.[47] A "manual" of rules of the association is not admissible in connection with a policy of which it is no part when relevant wholly to the adverse party's case,[48] and not to that unless its connection with the issues is shown.[49]

Sufficiency and degree of proof.[50]—On the issue of suicide or accident the reasonable probability controls.[51] The fact of suicide need not be shown beyond a reasonable doubt[52] but may be established by a mere preponderance of the evidence.[53] Slight evidence is sufficient to show dependency when that is an element of eligibility of a beneficiary.[54] The evidence must suffice to show resort to the primary modes of adjusting claims[55] and the title of one claiming as assignee of the nominal

36. Manual of accident society held inadmissible under act May 11, 1881, P. L. 20, requiring copy to be attached to policy. Mowry v. National Protective Soc., 27 Pa. Super. Ct. 390.

37. Tackman v. Brotherhood of American Yeomen [Iowa] 106 N. W. 350.

38. Hence, evidence as to the member's character as a peaceable and law-abiding citizen could be shown. Sovereign Camp of Woodmen v. Welch, 16 Okl. 188, 83 P. 547.

39, 40. Where injury was claimed to have resulted from swallowing a pin, held error to refuse to require jury to answer on what date the pin was swallowed. Order of United Commercial Travelers v. Barnes, 72 Kan. 392, 80 P. 1020, 82 P. 1099.

41. But questions calling for findings as to who were present when he swallowed the pin and the circumstances were improper. Order of United Commercial Travelers v. Barnes, 72 Kan. 392, 80 P. 1020, 82 P. 1099.

42. Lyon v. United Moderns, 148 Cal. 470, 83 P. 804.

43. Nophsker v. Supreme Council of Royal Arcanum [Pa.] 64 A. 788.

44. Sovereign Camp Woodmen of the World v. Carrington [Tex. Civ. App.] 14 Tex. Ct. Rep. 397, 90 S. W. 921.

45. Mowry v. National Protective Soc., 27 Pa. Super. Ct. 390.

46. Trull v. Modern Woodmen of America [Idaho] 85 P. 1081.

47. Trull v. Modern Woodmen of America [Idaho] 85 P. 1081. A stipulation in the constitution that the proofs of death shall consist in part of the affidavit of the attending physician, which shall state such information as may be required by the insurer, is a waiver of the privileged character of communications and constitutes the physician a competent witness as to disclosures made to him concerning insured's last sickness. Western Travelers' Acc. Ass'n v. Munson [Neb.] 103 N. W. 688.

48. Manual of accident society held inadmissible because evidence for the defense and not competent at the time it was offered. Mowry v. National Protective Soc., 27 Pa. Super Ct. 390.

49. Inadmissible on issue of fraud in a settlement, because not shown to have been in possession of a representative of defendant at the time the alleged fraudulent settlement, which was sought to be rescinded, was procured. Mowry v. National Protective Soc., 27 Pa. Super. Ct. 390.

50. See 5 C. L. 1529.

51, 52, 53. Supreme Tent Knights of Maccabees v. King [C. C. A.] 142 F. 678.

54. Erickson v. Modern Woodmen of America [Wash.] 86 P. 584.

55. Evidence held sufficient to sustain a finding that plaintiff's claim was before a convention of the defendant on appeal. Carey v. Switchmen's Union [Minn.] 107 N. W. 129. Evidence held insufficient to show

beneficiary.[56] The admission in evidence of the verdict of the coroner's jury finding that insured came to his death by suicide does not necessarily make out a prima facie case of death from that cause,[57] and where the evidence of self-destruction is circumstantial, the defendant fails in its effort to prove suicide unless the circumstances exclude with reasonable certainty any hypothesis of death by accident or by the act of another.[58]

Trial and judgment.[59]—Instructions are tested by the general rules of trial practice.[60] It is for the court to say what was the legal effect on the policy of the fact that insured suffered from a disease which increased the risk,[61] but where there is a question whether the disease does increase the risk, it is for the jury.[62] It has been held a jury question whether answers were intentionally false[63] and material,[64] whether insured had a particular disease[65] or had impaired his health by drugs,[66] whether there was an unnecessary exposure to danger[67] or a violation of law,[68] whether disease or accident was the cause of disability[69] or accident or suicide the

a denial of liability by a society for sick benefits. Union Fraternal League v. Johnston, 124 Ga. 902, 53 S. E. 241.

56. Evidence held insufficient to establish claim of widow by assignment as against the member's mother named in the certificate as beneficiary before his marriage and retained as such till his death. Coston v. Coston [Mich.] 13 Det. Leg. N. 540, 108 N. W. 736.

57. Grand Lodge A. O. U. W. v. Banister [Ark.] 96 S. W. 742.

58. Cosmopolitan Life Ins. Co. v. Koegel, 104 Va. 619, 52 S. E. 166.

59. See 5 C. L. 1540.

60. See generally Instructions, 6 C. L. 43. **Must not assume facts not proved:** Instruction held properly refused as assuming that applicant had suffered from the disease of "pleurisy." Lyon v. United Moderns, 148 Cal. 470, 83 P. 804.

Construction of instructions: Instructions given held to properly present the issue whether a deceased's changed occupation was more hazardous than that of a farmer. Hardister v. Supreme Order of Married Men's League [Mo. App.] 96 S. W. 316. Instruction requested as to change of occupation to sawmill operative increasing the hazard to a member insured as a farmer held covered by instructions given. Id.

Effect of proofs of loss as evidence: It is error to refuse an instruction limiting the scope and effect of proofs of loss when admitted in evidence to the one purpose of showing compliance with the policy conditions No matter how offered, or whether they were objected to when offered or not. Order of United Commercial Travelers v. Barnes, 72 Kan. 392, 80 P. 1020, 82 P. 1099.

61. Where an applicant has suffered from a disease so grave in its nature that generally it is recognized as having a tendency to shorten life, it may be ruled as matter of law that as the risk is thus increased the policy is void. Kidder v. Supreme Commandery United Order of Golden Cross [Mass.] 78 N. E. 469.

62. But where the insurer in reply to a question calling for the fact has not been informed of a disease which, although serious, may not have this tendency, it is for the jury to say if the risk has been increased. Kidder v. Supreme Commandery, United Order of Golden Cross [Mass.] 78 N. E. 469.

63. Answers as to applicant having consulted or being treated by physician were intentionally false. Kidder v. Supreme Commandery, United Order of Golden Cross [Mass.] 78 N. E. 469. Answer to a question as to his having been an inmate of any infirmary, sanitarium, retreat, asylum, or hospital, was given in good faith and truthfully as he understood the question. Modern Woodmen of America v. Wilson [Neb.] 107 N. W. 568. Answer to a question as to his health, character, and habits was given in good faith and according to the applicant's condition as he understood it at the time. Id. Answer to a question regarding treatment by and consulting physicians was made honestly and in good faith and without intention to deceive the society. Id. Warranty in application as to condition of health of applicant's mother was true or false. Ranta v. Supreme Tent, Knights of the Maccabees of the World [Minn.] 107 N. W. 156. Warranty in application that applicant was in good health was true or false. Id. Answering double inquiry as to changing or having been advised to change residence on account of health did so in good faith. Id.

64. False answers as to whether the applicant has consulted or been treated by physician. Kidder v. Supreme Commandery United Order of Golden Cross [Mass.] 78 N. E. 469.

65. Disease of pleurisy. Lyon v. United Moderns, 148 Cal. 470, 83 P. 804. Whether the death of a member was the result of **disease from which he was suffering at the time of reinstatement** held a question of fact, concluded against the order by the judgment of the appellate court. Court of Honor v. Dinger [Ill.] 77 N. E. 557.

66. Taylor v. Modern Woodmen of America, 72 Kan. 44, 83 P. 1099.

67. Accident insurance. Noyes v. Commercial Travelers' Eastern Acc. Ass'n, 190 Mass. 171, 76 N. E. 665.

68. Whether member met his death while engaged in violation or attempted violation of law. Sovereign Camp of Woodmen v. Welch, 16 Okl. 188, 83 P. 547.

cause of death,[70] whether suicide was sane or insane,[71] what was the disability ensuing on a particular injury,[72] whether facts evince a waiver of the right to transfer to a new class of insurance,[73] whether a settlement was fraudulent.[74] Timeliness in tendering an assessment[75] and whether acceptance of a past due assessment was unconditional have also been left to the jury.[76]

Verdict and judgment.[77]—Special interrogatories as to when the accident happened and when insured became aware of it are allowable on the issue of timely notice.[78] A special finding that a fact was contrary to the answer in the application does not necessarily conflict with a general finding that answers were in good faith and without intention to deceive.[79]

Where the plaintiffs show themselves entitled to recover on a death benefit certificate, but do not show their right to a money judgment, a court of equity has power only to order an assessment to make the amount.[80] By statute in Florida a judgment for attorney's fees is required to be entered against any life or fire insurance company when plaintiff succeeds in an action on a policy.[81] This statute is constitutional[82] and has not been repealed in so far as applicable to fraternal societies.[83] The Texas statute permitting recovery of damages and attorney's fees by successful litigants in actions on insurance policies is inapplicable to fraternal societies.[84] In Kansas a judgment against a society is required to be appealed from within less time than is granted to litigants generally,[85] and this has been held to

69. Whether sudden giving way of one's foot without apparent cause is a disease within an accident insurance contract excluding liability for injuries resulting from disease. Noyes v. Commercial Travelers' Eastern Acc. Ass'n, 190 Mass. 171, 76 N. E. 665.

70. Tackman v. Brotherhood of American Yeomen [Iowa] 106 N. W. 350; Grand Lodge A. O. U. W. v. Banister [Ark.] 96 S. W. 742; Cosmopolitan Life Ins. Co. v. Koegel, 104 Va. 619, 52 S. E. 166.

71. Mental condition of a member at time of taking his life. Bunker v. United Order of Foresters [Minn.] 107 N. W. 392.

72. Whether there was a total loss of the use of a hand at or above the wrist joint. Beber v. Brotherhood of Railroad Trainmen [Neb.] 106 N. W. 168. Whether insured after swallowing a pin became wholly and continuously disabled from attending to every kind of business pertaining to his occupation on a certain date. Order of United Commercial Travelers v. Barnes, 72 Kan. 392, 80 P. 1020, 82 P. 1099.

73. Where a fraternal order created a new class of membership in its insurance department and authorized transfers from other classes thereto, the question whether a member who was denied the right of transfer acquiesced therein by failing for nine years to exercise his right of appeal within the order, or otherwise proceed to preserve his rights, is one of fact. Supreme Lodge K. P. v. Andrews [Ind. App.] 77 N. E. 361.

74. Mowry v. National Protective Soc., 27 Pa. Super. Ct. 390.

75. Whether an assessment was tendered within the time it was payable. Taylor v. Modern Woodmen of America, 72 Kan. 443, 83 P. 1099.

76. Where an unconditional receipt was given for past due assessments, the question whether an alleged conversation between the deceased member and the local officer to whom the payment was made, as testified to by the officer, was sufficient to inform the member that the officer would hold the money subject to the action of a superior officer was a question for the jury. Soehner v. Grand Lodge of Order of Sons of Herman [Neb.] 104 N. W. 871.

77. 5 C. L. 1540, n. 47 et seq.

78. Where the injury was claimed to have resulted from swallowing a pin, held error to refuse to require jury to answer on what date the pin was swallowed (Order of United Commercial Travelers v. Barnes, 72 Kan. 392, 80 P. 1020, 82 P. 1099) and when plaintiff first learned that he had swallowed the pin (Id.), but questions calling for findings as to who were present when he swallowed it and the circumstances were improper (Id.).

79. Where insured answered in the negative a question whether he had ever been an inmate of a sanitarium, and the jury found specially that a place where insured had received treatment was a sanitarium, the special verdict did not necessarily contradict a general finding that the insured's answers were given honestly, in good faith, and without any intention to deceive. Modern Woodmen of America v. Wilson [Neb.] 107 N. W. 568.

80. Sleight v. Supreme Council, Mystic Toilers [Iowa] 107 N. W. 183.

81, 82. Laws 1893, p. 101, c. 4173. Supreme Lodge K. P. v. Lipscomb [Fla.] 39 So. 637.

83. Laws 1893, p. 101, c. 4173, held not repealed by Laws 1895, p. 143, c. 4380. Supreme Lodge K. P. v. Lipscomb [Fla.] 39 So. 637.

84. Fraternal societies are by Rev. St. 1895, art. 3092, expressly exempted from the operation of article 3071. Sovereign Camp Woodmen of the World v. Carrington [Tex. Civ. App.] 14 Tex. Ct. Rep. 397, 90 S. W. 921.

apply to the perfection of proceedings in error,[86] the failure to comply being ground for dismissal of the proceeding.[87] Statutes of this character are not repugnant to the constitutional provision forbidding the denial of the equal protection of the laws.[88]

FRAUD AND UNDUE INFLUENCE.

§ 1. Actual Fraud (1813).
§ 2. Inferences from Circumstances and Condition of Parties or From the Intrinsic Nature of the Transaction (1818).
§ 3. Remedies (1820). Pleading (1822). Evidence (1823). An Instruction (1826).

The right of action for damages from misrepresentation is elsewhere treated.[1]

§ 1. *Actual fraud.*[2]—Fraud consists of any deception or artifice used to circumvent, cheat, or deceive another.[3] A false representation[4] or concealment[5] of a

85, 86. Gen. St. 1901, § 3580, limiting appeals to 60 days after rendition of judgment. Sons and Daughters of Justice v. Swift [Kan.] 84 P. 984.

87, 88. An action of ouster also lies. Sons and Daughters of Justice v. Swift [Kan.] 84 P. 984.

1. See Deceit, 7 C. L. 1093.

2. See 6 C. L. 1541.

3. **It is fraud** when one furnishes to a mercantile agency a false statement as to his rating where others acquire and give credit on faith of such representations. Katzenstein v. Reid, Murdock & Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 654, 91 S. W. 360. A false statement by an owner of land to brokers that he had withdrawn it from the market, whereby a settlement was made for a small sum, held sufficient to avoid the settlement where the owner shortly afterwards sold to a purchaser procured by the brokers. Bowe v. Gage, 127 Wis. 245, 106 N. W. 1074. False representations as to the ownership of bonds held as collateral, and that a sale of the bonds at par had been practically closed held to justify rescission of a contract to underwrite such bonds. Rose v. Merchants' Trust Co., 96 N. Y. S. 946. One who obtains a loan evidenced by a note and mortgage upon a promise to pay off a prior lien, without any intention of doing so, is guilty of fraud entitling the other party to rescind under Civ. Code § 1572. Matteson v. Wagoner, 147 Cal. 739, 82 P. 436. An answer in an action on a note alleging that the note was given for corporate stock which the seller had represented to be of a greater value than it was, and said he would take it himself when it was issued if the defendant did not want it, and before the stock was issued defendant demanded the return of his note, held to state a defense. Grinnell v. Hill, 1 Cal. App. 492, 82 P. 445. Where a wife while estranged from her husband and in love with another induced him to convey property to her by falsely representing that she would resume marital relations with him, but refused to keep her promise, her husband was entitled to have the deed canceled. Jennings v. Jennings [Or.] 85 P. 66. Where evidence discloses false representations as to material facts willfully made as an inducement to the transaction and causing injury, the cause set up by counterclaim should not be dismissed. May v. Loomis, 140 N. C. 350, 52 S. E. 728. Where one who owed a debt of gratitude to another induced him to purchase a note by falsely representing that it was secured, it was held that the transaction was induced by fraud. Thompson v. Randall [Ky.] 90 S. W. 251. Where a release of damages for personal injuries was procured by falsely representing it to be a receipt. Robertson v. Fuller Const. Co., 115 Mo. App. 456, 92 S. W. 130. Where a lessor, knowing that a lessee cannot read, professes to read from the lease an agreement which is not there for the purpose of inducing the lessee to accept. Knoepker v. Redel, 116 Mo. App. 62, 92 S. W. 171. Instruction held to embody all the essential elements of fraud. George v. Hesse [Tex. Civ. App.] 16 Tex. Ct. Rep. 359, 94 S. W. 1122.

Held not to constitute fraud: Where the lessee of a rooming house who had paid the last month's rent in advance sold her interest in the premises, she was held not entitled to assert that she did not intend to dispose of her interest in the deposit, there being no fraud practiced. Wackerow v. Engel, 96 N. Y. S. 1071. Representations by a landlord in making a lease that the house had been repaired and did not leak, and it appeared that the landlord did not have reason to believe that the repairs had not accomplished their purpose, held not fraudulent. Bayles v. Clark, 100 N. Y. S. 586. Failure of consideration in whole or in part is no ground for setting aside a deed in the absence of fraud or undue influence. Ripperdan v. Weldy [Cal.] 87 P. 276. A threat by one having good title to land and entitled to possession as purchaser under a decree of sale, as against a debtor occupying the land, to eject such occupant by process under the decree of confirmation of sale does not constitute fraud or duress to set aside a deed made by such occupant to such owner. Dunfee v. Childs [W. Va.] 53 S. E. 209. Allegations in a petition to set aside a sheriff's sale, that plaintiff was surety on notes executed by his wife, that the notes were procured by his wife's heirs and turned over to third persons without consideration to compel plaintiff to pay them and relieve the wife's estate from liability, that judgment was procured on the notes and the husband's interest in the estate sold, held not to state facts sufficient

material,[6] past, or existing fact[7] made by a party or his agent,[8] and relied and acted

to set aside the sale on the ground of fraudulent combination. Martin v. Castle, 193 Mo. 183, 91 S. W. 930.

4. There must be fraudulent representations. Hutchason v. Spinks [Cal. App.] 85 P. 132.

False representation to one partner that the other desired the contract executed held sufficient to avoid a contract executed by such partner in the firm name. Standard Mfg. Co. v. Stallman [Wis.] 107 N. W. 662. Where one purchases goods with the intention not to pay for them, there is such a fraudulent representation as will avoid the sale. The intention must exist at the time of the sale and may be inferred from circumstances. Upchurch v. Mizell [Fla.] 40 So. 29.

Evidence sufficient to show that representations in the sale of land were false and fraudulent. Jones v. Coan [Ala.] 41 So. 757. Evidence sufficient to show fraud where one procured from another land by false representations as to the extent of incumbrances thereon. Heath v. Schroer [Mo. App.] 96 S. W. 313. Where a purchaser with knowledge of the vendor's title essayed to represent the state of the title but failed to make full disclosure, and procured the property for a grossly inadequate consideration, he was held guilty of fraud. Smith v. Woodson [Ky.] 92 S. W. 980. One's false statement with respect to his financial responsibility, made with a view of inducing others to extend him credit, is a false representation, whether made carelessly or fraudulently. Katzenstein v. Reid, Murdock & Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 554, 91 S. W. 360.

Evidence insufficient to show that false representations were made, or, if made, that they induced the transaction complained of. Smith v. Krueger [N. J. Eq.] 63 A. 850. A statement made as a repetition of what another has said, and not as of one's own knowledge, is not. Jewett v. Buck, 78 Vt. 353, 63 A. 136. Evidence insufficient to show that false representations had been made in inducing a contract assigning rights in certain territory for the organization of burial associations. Burk v. Johnson [C. C. A.] 146 F. 209. Where one purchasing timber land through an agent wrote to the seller "I hand you copy of the contract; * * * will send check on receipt of your advice that it is all right." Held that the letter was not a request for information as to the value of the timber, nor an expression of reliance on the seller's judgment as to the value. Cook v. Bagnell Timber Co. [Ark.] 94 S. W. 695.

5. Where in making an ante-nuptial contract the prospective husband concealed the extent of his property. Murdock v. Murdock, 219 Ill. 123, 76 N. E. 57.

6. Misrepresentation as to a material fact entitles a purchaser to be relieved from his contract. Mather v. Barnes, 146 F. 1000.

Held material: Statements of officers of corporation that none of its stock had been sold below par held material misrepresentation authorizing rescission. Hubbard v. International Mercantile Ag., 68 N. J. Eq. 434, 59 A. 24. A false statement of the number of rooms in a building contained in a written contract for the sale of land is so material that it will justify the vendee in rescinding, though the vendor can make the building comply with the contract. Davis v. Scher [N. J. Law] 62 A. 193. Where a purchaser receives what he bargained for and bases his right to rescind on the ground of false representation concerning it, he must show that such representation was material and that he was misled to his injury. Jakway v. Proudfit [Neb.] 109 N. W. 388. False representations as to the value of a stock of goods, made to induce one to enter into a partnership, is of fact and not opinion. Coplen v. Cox [Tex. Civ. App.] 15 Tex. Ct. Rep. 266, 92 S. W. 1048.

Not material: Statement that a lot is 25 by 60 feet when it is 23 by 60, and that it is leased for 5 years when in fact four months of such period has expired, is not material or fraudulent. Kafka v. Grant [N. J. Law] 63 A. 900. A false representation as to the place where goods are manufactured is not material, there being no representation as to the manufacturer. Brennard Mfg. Co. v. Citronelle Mercantile Co. [Ala.] 41 So. 671.

7. Representations must be relative to an existing or past fact. Clark Co. v. Rice, 127 Wis. 451, 106 N. W. 231. The false statement of an intention may constitute fraud. Schrafft v. Fidelity Trust Co. [N. J. Law] 62 A. 933. A representation that an owner offering to sell his property offered it for $1,000, when in fact he demanded but $500, is one of an existing material fact. Hughes v. Lockington [Ill.] 77 N. E. 1105. False representation as to title held to constitute fraud. Howerton v. Augustine [Iowa] 106 N. W. 941. False representations that one was a member of a certain law firm, was a rich man, had sold one mine and was interested in a deal on another, that his mother had made out checks for the amount she was to contribute to an enterprise, held statements as to existing facts. Damers v. Sternberger, 95 N. Y. S. 532. False statements by a vendor, positively as of his own knowledge as to the number of acres in a tract, is a statement of fact. Judd v. Walker, 114 Mo. App. 128, 89 S. W. 558. Representations as to boundaries are of fact. Freeman v. Gloyd [Wash.] 86 P. 1051. Statement of physician as to length of time treatment would continue held mere opinion and not sufficient to set aside contract fixing amount of physician's fee based thereon. Denenholz v. Kelly, 97 N. Y. S. 389.

8. Where one's agent fraudulently misrepresented the boundaries of a tract of land to a prospective purchaser. Kell v. Trenchard [C. C. A.] 142 F. 16. A principal is liable for false representations made by his agent within the scope of his authority. Judd v. Walker, 114 Mo. App. 128, 89 S. W. 558. Where the mortgagee is not a party to the procuring of the insurance contract, and had no knowledge of fraud in the procuring of the insurance, an allegation of fraudulent representations and concealments on the part of the mortgagor in the procuring of the insurance does not constitute a defense to the claim of the mortgagee under the policy. Firemen's Ins. Co. v. Boland, 8 Ohio C. C. (N. S.) 325. One cannot have a contract set aside for the fraud of a third person not the agent

upon[9] by one who has a right to rely and act upon it[10] to his damage,[11] is fraud.

of the other party nor in collusion with him. Cason v. Cason [Tenn.] 93 S. W. 89. An agent employed to sell corporate stock, who receives a commission for his services, is personally liable for false representations made by himself to induce a sale. Getchell v. Dusenbury [Mich.] 13 Det. Leg. N. 511, 108 N. W. 723. Corporate transaction investigated and held not fraudulent as against the corporation. Figge v. Bergenthal [Wis.] 109 N. W. 581. Where one to whom a mining company issues stock in payment for services sells it, falsely representing that it is treasury stock and the money would be used in developing the mine, the corporation cannot question the sale nor recover the proceeds thereof. Chilkat Gold & Copper Min. Co. v. Fos, 42 Wash. 201, 84 P. 827. Where a director and president of a corporation offered to sell his stock to a director and manager, and at their joint request a statement was procured from the bookkeeper, the seller was not liable for false representations in such statement. Goodwin v. Daniel [Tex. Civ. App.] 13 Tex. Ct. Rep. 892, 93 S. W. 534. Principal liable for fraud of his agent. Heath v. Schroer [Mo. App.] 96 S. W. 313.

9. Representation must have been relied on. Clark Co. v. Rice, 127 Wis. 451, 106 N. W. 231. The sole question is whether the false representations deceived and influenced the conduct of the person injured. It is immaterial whether the representations were sufficient to influence the conduct of a person of ordinary intelligence. Bowe v. Gage, 127 Wis. 245, 106 N. W. 1074. Representations made to a mercantile agency and by it communicated to plaintiff. Beacon Falls Rubber Shoe Co. v. Pratte, 190 Mass. 72, 76 N. E. 285. They must have been relied upon. Hutchason v. Spinks [Cal. App.] 85 P. 132. Where a representation did not induce the opposite party to forego a more particular examination and was not relied upon, it is not fraud, though false. Milby v. Hester [Tex. Civ. App.] 15 Tex. Ct. Rep. 495, 754, 94 S. W. 178. Instruction as to the necessity of reliance on the false representations, where it was asserted that the injured party relied on his own judgment, held not misleading. George v. Hesse [Tex. Civ. App.] 16 Tex. Ct. Rep. 359, 94 S. W. 1122.

10. No right to rely: A purchaser will not be heard to complain that he was deceived by representations as to matters which he had means at hand to investigate. Mather v. Barnes, 146 F. 1000. Evidence insufficient to show fraud in the assignment of a patent where the assignor dictated the terms, had them read over to him, and the final draft was read to him before he signed it. Marsh v. Cortis, 144 F. 132. One signing a deed without reading it held negligent. Hyatt v. Zion, 102 Va. 909, 48 S. E. 1. Where defendant knew he was signing a contract of some kind and had an opportunity to read it, but chose to sign without reading, he was bound by its terms, though plaintiff stated its contents imperfectly, there being no concealment. Alexander v. Ferguson [N. J. Law] 63 A. 998. One who makes full investigation and is not prevented from making it as exhaustive as he desires cannot assert that the opposite party made false representations which he relied upon to his damage. Pittsburg Life & Trust Co. v. Northern Cent. Life Ins. Co., 140 F. 888. Where one was given full opportunity to ascertain the truth or falsity of representations concerning rights under a copyright plan for the establishment of mutual burial associations, he was held not entitled to rescind because of the falsity of such representations. Burk v. Johnson [C. C. A.] 146 F. 209. One who makes an independent investigation of his own cannot assert that he was misled. Mather v. Barnes, 146 F. 1000. Statement by a mercantile agency to the effect that a person's rating was in some two years and the figures could not be corroborated, and that the estimate of $1,000 as his total worth was conservative, was sufficient to put one selling him goods on guard, and he could not rely on the statement of the agency in giving credit. Beacon Falls Rubber Shoe Co. v. Pratte, 190 Mass. 72, 76 N. E. 285. Where one signed a note upon the representation that it was an application for a prospectus of an insurance policy, and he relied upon such representation, but did not read the paper and was not prevented from doing so by device or subterfuge, he was held negligent and not entitled to plead fraud. Holmes v. Baker, 129 Iowa, 49, 105 N. W. 349. The defrauded person must have been entitled to rely upon them. Clark Co. v. Rice, 127 Wis. 451, 106 N. W. 231. The misrepresentations must have been such as the defrauded party was entitled to rely upon. Marshall-McCartney Co. v. Halloran [N. D.] 106 N. W. 293. A vendee who is given an abstract showing on its face that it is not down to date may not rescind for false representations of the vendor that the premises were free from incumbrances and that the lots were deeper than in fact they were. Lake v. Churchill, 39 Wash. 318, 81 P. 849. Where one has made investigation for himself, or where means are at hand to ascertain the truth or falsity of the representations, his reliance on such representations, however false, affords no ground for relief. Grindrod v. Anglo-American Bond Co. [Mont.] 85 P. 891. One who signs a release of damages for personal injuries without reading it is negligent. Bennett v. Himmelberger-Harrison Lumber Co., 116 Mo. App. 699, 94 S. W. 808. Where it does not appear that one was induced by fraud or artifice to sign a contract, and had opportunity to examine it, he will not be heard to say that he did not know what it contained. Walter Pratt & Co. v. Metzger [Ark.] 95 S. W. 451.

Entitled to rely: The rule of caveat emptor does not apply to cases of actual fraud. Kell v. Trenchard [C. C. A.] 142 F. 16. If in the course of an investigation a prospective purchaser is diverted by the act of the seller, it is the same as if no investigation had been made. Mather v. Barnes, 146 F. 1000. Where one who cannot read writing has a relative who acts as agent for the opposite party to reduce the agreement to writing, he is not negligent in signing the instrument without having it read over to him. Nichols & Shepard Co. v. Berning [Ind. App.] 76 N. E. 776. A person induced to purchase land by false representations that there was a

It is held in some states, however, that pecuniary injury is not an essential element.[12] A purchaser is entitled to the bargain which he supposed he was getting and is not to be put off with any other, however good.[13] It is not essential that the maker have knowledge of the falsity.[14] Liability attaches if a false representation is made

large amount of standing timber on it is not precluded from rescinding because he did not ascertain the truthfulness of the statements. Bonness v. Felsing [Minn.] 106 N. W. 909. It is not the duty of one residing in Iowa, who purchases land in Dakota, to go to Dakota to ascertain whether the vendor's representations were true. Scott v. Burnight [Iowa] 107 N. W. 422. False statement in a horse trade that a horse was unincumbered held fraud where the trade was made in the evening some distance from where the records of personal property were kept, and there were no suspicious circumstances. Miller v. Hackbarth, 126 Wis. 50, 105 N. W. 311. A contracting party may rely on the express statement of an existing fact, the truth of which is known to the opposite party and not to himself. Farley v. Wiess [Neb.] 107 N. W. 561. Where one makes a false representation as to a material fact and means are not at hand to ascertain its truth or falsity, the other party may rescind whether or not the maker knew the falsity of the representation, if the parties can be placed in statu quo. Gardner v. Mann, 36 Ind. App. 694, 76 N. E. 417. The rule of caveat emptor does not apply where a purchaser is not familiar with the goods but relies expressly on the knowledge and representations of the seller. Lyon v. Lindblad [Mich.] 13 Det. Leg. N. 574, 108 N. W. 969. Where land was obtained by false representations that the purchaser desired it for a mill site, had mill machinery in transit, and timber enough to keep it running for 10 years, would give the vendor employment at good wages, the vendor was not negligent in not discovering the fraud before the sale was made. McMullen v. Rousseau, 40 Wash. 497, 82 P. 883. Where one was handed a written contract prepared by the other party with whom he was well acquainted, was told that it represented the agreement between them, was long and involved, and if he had read it would probably not have discovered that it differed from the oral understanding, he was held entitled to repudiate it. Lilienthal v. Herren, 42 Wash. 209, 84 P. 829. The rule of caveat emptor applies only to defects which are patent, not to a deficiency in a represented acreage which is not within the range of the senses while viewing the land. Judd v. Walker, 114 Mo. App. 128, 89 S. W. 558. Where a vendor makes positive statements as to the number of acres in a tract of land, the vendee is not, in the exercise of ordinary business prudence, required to survey the land. Id. A vendee may rely on the positive statement of his vendor, the falsity of which is not palpable; the vendor may not relieve himself on the ground of caveat emptor. Id. Where a sale is induced by fraud and the seller resorted to artifice to induce the buyer to forbear making investigation, claim for relief is not barred by alleged negligence in relying on such representations. May v. Loomis, 140 N. C. 350, 52 S. E. 728. Whether false representations were so palpably so that one had no right to rely upon them is ordinarily a question of fact. State Life Ins. Co. v. Johnson [Kan.] 85 P. 597.

11. Loss or damage must have been the proximate result of the fraud. Marshall-McCartney Co. v. Halloran [N. D.] 106 N. W. 293; Sonnesyn v. Akin [N. D.] 104 N. W. 1026. Evidence sufficient to show damage sufficient to sustain an action where one falsely represented what another would sell his land for. Hughes v. Lockington [Ill.] 77 N. E. 1105. Actual pecuniary damage must result. Jakway v. Proudfit [Neb.] 106 N. W. 1039. A party must be misled to his damage. Id. One induced to purchase corporate stock cannot rely on false representations as to the credit of the corporation, where it is not shown that transactions subsequent to the time he became a member of the corporation, and in which he participated, were not the cause of the corporation's disaster. Getchell v. Dusenbury [Mich.] 13 Det. Leg. N. 511, 108 N. W. 723. Actual damages must have resulted from the fraud alleged. Thompson v. Newell, 118 Mo. App. 405, 94 S. W. 557.

12. A purchaser who is fraudulently induced to accept a thing he has not contracted for may rescind without showing that he has sustained pecuniary injury. Jakway v. Proudfit [Neb.] 109 N. W. 388. It is not necessary in order to avoid a contract for fraud that damage result. Raymond v. Edelbrock [N. D.] 107 N. W. 194.

13. Mather v. Barnes, 146 F. 1000. One induced by fraud to purchase bonds may maintain an action for rescission without proof of any damage. Rose v. Merchants' Trust Co., 96 N. Y. S. 946.

14. Good or bad faith is not material where one purchases property in reliance upon false statements. Krause v. Cook [Mich.] 13 Det. Leg. N. 243, 108 N. W. 81. In an action to rescind a deed, it is immaterial whether the information on which the grantor acted was fraudulent; it is sufficient that without negligence on his part he was led to believe that material facts were different. Cramsey v. Sterling, 97 N. Y. S. 1082. Where one makes false representations designing them to be acted upon by another and they are acted upon by one who believes them to be true, the person who makes them is liable, regardless of his knowledge of their falsity or intent to deceive. Goodwin v. Daniel [Tex. Civ. App.] 15 Tex. Ct. Rep. 892, 93 S. W. 534. Under Rev. Civ. Code § 1201, subd. 2, a seller is liable for false representations made by him though he believes them to be true, he being bound to know as a matter of fact whether or not they are true. McCabe v. Desnoyers [S. D.] 108 N. W. 341. Directors of a national bank are not liable to one who purchases bank stock in reliance on the report of the comptroller of currency which is attested by the directors and published, unless at the time of attesting and publication, they knew or should have known it to be false. Mason v. Moore [Ohio] 76 N. E. 932.

recklessly without knowledge of its truth or falsity,[15] especially if it is his duty to know as to the truth of the statement.[16] It must be more than an expression of opinion,[17] and must relate to some matter of inducement to the transaction.[18] A

15. Where one consciously ignorant or recklessly indifferent makes statements. Mueller Furnace Co. v. Cascade Foundry Co. [C. C. A.] 145 F. 596. One who represents as true that which he does not know to be true to one who has no knowledge of the truth or falsity of such representations is guilty of fraud. Western Cattle Brokerage Co. v. Gates, 190 Mo. 391, 89 S. W. 382.

16. Where a president of a corporation is charged with making false representations as to the solvency of such corporation, it is unnecessary to prove his actual knowledge of the falsity of such representations as he is chargeable with such knowledge. Collins v. Chipman [Tex. Civ. App.] 15 Tex. Ct. Rep. 411, 95 S. W. 666.

17. **Held matter of opinion:** A statement in a sale of a business that book accounts not charged off were "better than the ordinary" is an expression of opinion. Pittsburg Life & Trust Co. v. Northern Cent. Life Ins. Co., 140 F. 888. Representations by a seller of mining stock as to its value, predictions as to future operations and dividends. Crosby v. Emerson [C. C. A.] 142 F. 713. A representation by the seller of a threshing machine engine that it was of sufficient power to run the purchaser's threshing machine, and though it had been rebuilt was practically as good as new and would steam well. Gaar, Scott & Co. v. Halverson, 128 Iowa, 603, 105 N. W. 108. Where a vendor's land had been prospected and coal discovered in some quantity of which she was aware, but there was doubt as to the extent of the workable veins, a statement by the vendee that coal did not exist in workable quantities. Garrett v. Slavens, 129 Iowa, 107, 105 N. W. 369. Opinion as to one's rights under a copyright. Burk v. Johnson [C. C. A.] 146 F. 209. The claim of one party to contract as to what such contract is does not constitute a representation on which the other party has a right to rely. Bilafsky v. Conveyancers' Title Ins. Co. [Mass.] 78 N. E. 534. A statement to a prospective purchaser of land that it was underlaid with a particular vein of coking coal, but also stated that they were not much acquainted with the land themselves, is to be taken as an expression of opinion or trade talk. Mather v. Barnes, 146 F. 1000. The mere expression of an opinion as to value if intended as such, is not. Clark Co. v. Rice, 127 Wis. 451, 106 N. W. 231. The expression of a favorable opinion as to a corporation and its business out-look to a subscriber for stock is not sufficient to vitiate the subscription as against creditors of the corporation. Dieterle v. Ann Arbor Paint & Enamel Co. [Mich.] 13 Det. Leg. N. 1, 107 N. W. 79. Statement that fences on land are in good condition is an opinion. Else v. Freeman, 72 Kan. 666, 83 P. 409. Where a vendor represented to a vendee who was on the land that there was 240 acres under cultivation and 25 or 30 acres more that could be put under cultivation, and not to exceed 50 or 60 acres of waste land, the statements constituted no more than expressions of opinion. Van Horn v. O'Connor, 42 Wash. 513, 85 P. 260. False representation as to value of land is an opinion. Else v. Freeman, 72 Kan. 666, 83 P. 409. A statement as to value is an expression of opinion unless fraudulent means are resorted to to prevent an investigation. Upchurch v. Mizell [Fla.] 40 So. 29. A statement that a body of ore through which a drill hole has been sunk is pay ore is a mere expression of opinion, even though such opinion is unwarranted. Brown v. South Joplin Lead & Zinc Min. Co., 194 Mo. 681, 92 S. W. 699.

Held statement of fact: Where one was induced to purchase corporate stock by false representations that the corporation was solvent, owned a large amount of property and paid big dividends, the further statement that the stock was a splendid investment, in connection with other statements, was not objectionable as mere opinion. Collins v. Chipman [Tex. Civ. App.] 15 Tex. Ct. Rep. 411, 95 S. W. 666. A false **statement of the law** by one who knows it to be false made to one ignorant of the law is sufficient upon which to base rescission of a transaction thereby induced. Busiere v. Reilly, 189 Mass. 518, 75 N. E. 958. False representations as to the character and effect of a deed of conveyance to one who is ignorant of the law. Id. False statements **as to value** intentionally made to one who is ignorant of the value, made with intent that they should be acted upon, may be treated as representations of fact if the party to whom they are made has no opportunity to investigate. Pinch v. Hotaling [Mich.] 12 Det. Leg. N. 841, 106 N. W. 69. Representations in the sale of mining stock that the mine was owned by the company, that it comprised certain acreage, had pipe lines run, had mines enough running to pay dividends, and dump ore enough to pay running expenses, held more than mere expression of opinion. Krause v. Cook [Mich.] 13 Det. Leg. N. 243, 108 N. W. 81. Representations in the sale of land that it was in a valley three miles from town and was good farming land, when in fact it was on a ridge fifty miles from town and poor grazing land, are statements of fact and not opinion. Reilly v. Gottlieb [Wash.] 85 P. 675. A seller of timber who states that he had it carefully estimated and that the estimates showed certain quantities does more than express an opinion. May v. Loomis, 140 N. C. 350, 52 S. E. 728. When there is any doubt as to whether a statement is an expression of opinion or a statement of fact, the question must be determined by the court or jury. Clark Co. v. Rice, 127 Wis. 451, 106 N. W. 231. A representation as an assertion of knowledge concerning affairs not susceptible of exact knowledge is to be taken as meaning no more than strong belief founded upon what appears to be reasonable grounds. In such case the question is wholly one of good faith. Krause v. Cook [Mich.] 13 Det. Leg. N. 243, 108 N. W. 81. The doctrine of trade talk has no application to false representations of material facts in their nature calculated to deceive. Harris v. Rosenberger

breach of promise to do some future act is not fraud.[19] One who acquires information from others and repeats it, explaining that he has no personal knowledge, is not guilty of fraud.[20] As between the immediate parties to a contract where one is induced by false statements of the other to execute it, he may defend on the ground of fraud, though negligent in signing without reading it.[21]

§ 2. *Inferences from circumstances and condition of parties or from the intrinsic nature of the transaction.*[22]—Fraud may be inferred from circumstances surrounding the transaction, as where the transaction is unjust and unconscionable,[23] or the person getting the better of the bargain stands in the more advantageous position,[24] or the parties stand in a fiduciary relation to each other.[25] When fiduciary relations exist the dominant party, if he gets the best of the bargain, must show the transaction to be fair and reasonable.[26] This rule applies as between parent and child,[27] brother and sister,[28] attorney and client,[29] physician and patient,[30]

[C. C. A.] 145 F. 449. On conflicting evidence as to the exact language used, the question whether the person accused of fraud intended to make a statement of fact or to express an opinion is for the jury Mueller Furnace Co. v. Cascade Foundry Co [C. C. A.] 145 F. 596.

18. Instruction held not objectionable as not requiring a finding that the false representations induced the transaction. George v. Hesse [Tex. Civ. App.] 16 Tex. Ct. Rep. 359, 94 S. W. 1122. They must have induced the transaction complained of. Hutchason v. Spinks [Cal. App.] 85 P. 132. Where one was induced by fraud to purchase mining stock, but after investigation purchased more and sold some on commission, exhibiting samples of the ore, he could not rely on the false representations and maintain action therefor. Irby v. Tilsley, 41 Wash 211, 83 P. 97.

19. Though such promise is relied on Weigand v. Cannon, 118 Ill. App. 635.

20. Krause v. Cook [Mich.] 13 Det. Leg. N. 243, 108 N. W. 81.

21. Eggleston v. Advance Thresher Co., 96 Minn. 241, 104 N. W. 891.

22. See 5 C. L. 1544.

23. Inadequacy of consideration may be considered with other circumstances, though it is not so gross as to shock the conscience or amount to proof of fraud. Deepwater Council No. 40 O. U. A. M. v. Renick [W. Va.] 53 S. E. 552. Provision in a contract for the sale of land stipulating a nominal cash payment, balance in instalments extending over several years, authorizing the purchaser to sell any part of the property and binding the vendor to accept contracts of sale as cash payments. Stone v. Moody, 41 Wash. 680, 84 P. 617, 85 P. 346. Where one party to a contract has clearly obtained an unjust advantage over another which it would be inequitable to permit him to enforce, equity will set aside the contract though the defrauded party was careless. Id. Inferred from receipt of deed with knowledge of grantor's mental incapacity. Sprinkle v. Wellborn, 140 N. C. 163, 52 S. E. 666.

24. Where an ignorant negress was induced to sign a deed of her property under belief that she was executing other papers. Johnson v. Hall [Miss.] 40 So. 1. Where an ignorant woman is induced to take out a policy of insurance by false representations that she can draw out her interest in 10 years, she may recover premiums paid. Caldwell v. Life Ins. Co., 140 N. C. 100, 52 S. E. 252. Evidence sufficient to show fraud in a transaction with an intoxicated person. Morrow v. Laverty [Neb.] 109 N. W. 150.

25. Where one who owes a debt of gratitude to another, to induce him to purchase a note, falsely represents that it is secured by a lien, the existence and validity of which he is in a position to know, the purchaser may rely on his representations. Thompson v. Randall [Ky.] 90 S. W. 251. There must be something besides mere blood relationship between the parties to create such fiduciary relations as will shift the burden of proof. Russell v. Phillips [Mich.] 13 Det. Leg. N. 462, 108 N. W. 718. Evidence held to show that money was procured by fraud where the wife of the only person who knew that another was seeking investment induced him to take a mortgage on property which she did not own. Mosley v. Donnell, 42 Wash. 518, 85 P. 259.

26. One occupying a confidential relation toward another is held to the exercise of scrupulous good faith and will not be permitted to make use of his knowledge or opportunities to his own advantage and the injury of the party with whom he is dealing, from which the latter in good faith is entitled to profit. Morrison v. Hunter [Neb.] 105 N. W. 88. One who is an active participant in a scheme by which another with whom he is in close and confidential business relations is defrauded cannot escape liability on the ground that he did not benefit by the fraud. Goldsmith v. Koopman, 140 F. 616.

Evidence insufficient to show a confidential relation between a depositor in a bank and a donee of the deposit, creating a presumption of undue influence, and casting on the donee the burden of showing a fair and voluntary transaction. Meriden Sav. Bank v. McCormack [Conn.] 64 A. 338.

27. Evidence held to show fraud in a deed from parent who was old and infirm to a child. May v. May [Ky.] 96 S. W. 840. Where an aged and infirm parent conveys all his property to his child without consideration or agreement for support, the child has the burden to show that the transaction was

principal and agent,[31] and confidential friends.[32] Undue influence sufficient upon which to avoid a contract must be a malign influence which deprives the defrauded party of his free agency.[33] The question is whether the mind has been overcome.[34]

free from fraud. Croissant v. Beers, 118 Ill. App. 502. Where a son knew that his father was very anxious to remove to another state and purchased all his property for a grossly inadequate consideration, it was held the father was entitled to have the deed set aside. Bradley v. Bradley [Ky.] 91 S. W. 1143. Conveyance by a parent of all her property to one child for a nominal consideration, held under such circumstances as to require the grantee to make full explanation of all circumstances connected with the transaction. Horner v. Bell, 102 Md. 435, 62 A. 736. Where at the time a parent conveyed all her property to her child, whom she had lived with for 30 years, she was ill and dependent on such child, and the consideration was very small, evidence held to show the existence of confidential relations, casting on the grantee the burden of proving that the deed was the voluntary act of the grantor. Id. Evidence sufficient to show undue influence in a transfer of property from parent to child. Fennimore v. Wagner [N. J. Eq.] 64 A. 698.

Evidence insufficient to show that deed from a parent to two of his children to the exclusion of others was procured by undue influence. Kamin v. Kamin [Mich.] 13 Det. Leg. N. 580, 108 N. W. 1077. Evidence that a grantor 80 years old was not enfeebled in mind or body and though unable to read was shrewd, that his daughter did not induce him to make the conveyance but that he induced her to enter into it. She was not a member of his household and seldom saw him. There was no fraud. Held not to take the case out of the rule that one alleging fraud must prove it. Russell v. Phillips [Mich.] 13 Det. Leg. N. 462, 108 N. W. 718. Evidence held insufficient to show undue influence in transfer by aged and infirm man to wife and daughter excluding other children. Teter v. Teter [W. Va.] 53 S. E. 779. Evidence insufficient to show that a deed from parent to child was induced by fraud. Russell v. Phillips [Mich.] 13 Det. Leg. N. 462, 108 N. W. 718.

28. A brother who deals with his ignorant sisters who rely upon him is held to the utmost good faith. Reeder v. Meredith [Ark.] 93 S. W. 558. Where confidential relations exist between brothers, the beneficiary of a transaction has the burden of proving that no undue advantage has been taken by him. Shevlin v. Shevlin, 96 Minn. 398, 105 N. W. 257.

29. Richardson v. Johnson [La.] 39 So. 449 [Advance sheets only].

30. A transfer from patient to physician for an inadequate consideration induced by false representations is voidable. Viallet v. Consolidated R. & Power Co. [Utah] 84 P. 496.

31. Where an agent for investing money sells property of his own to his principal without disclosing the facts, the principal may rescind. Especially where the principal is an aged woman without business experience. Landis v. Wintermute, 40 Wash. 673, 82 P. 1000. It is no defense to an agent who has defrauded his principal that the principal was negligent. Calkins v. Worth, 117 Ill. App. 478. A co-owner of real estate who acts for himself and as agent of the other owner in a sale thereof, and does not disclose the true purchase price, is guilty of fraud. Id.

32. Where a grantee in a deed is the confidential friend and advisor of the grantor, the law raises a presumption of fraud. Smith v. Moore [N. C.] 55 S. E. 275. Where a confidential relation exists between parties to a contract, the burden of showing good faith in the transaction is upon the person asserting it. Landis v. Wintermute, 40 Wash. 673, 82 P. 1000.

33. There must be a malign influence resulting from fear, coercion, or other cause, which deprives the grantor of his free agency. It is not sufficient that the grantor was influenced in the ordinary affairs of life or was on confidential terms with the grantee. Boggianna v. Anderson [Ark.] 94 S. W. 51. Where heirs sought to set aside deeds of their ancestor on the ground of undue influence exerted by his wife, and evidence failed to show that he was helpless or dependent on his wife during his last illness, no presumption arose that the deeds were of her procurement. Dean v. Dean [Iowa] 108 N. W. 1051. The fact that the disposition of property made prior to death was not equal between all his children raises no presumption of undue influence, though he was living with his most favored child. Meyer v. Arends, 126 Wis. 603, 106 N. W. 675. Evidence held to show undue influence where an elder brother secured from a younger a transfer of all his property consisting of shares of corporate stock. Shevlin v. Shevlin, 96 Minn. 398, 105 N. W. 257. Where lands are purchased with a husband's money and title taken in the wife's name, undue influence cannot be predicated of a transfer by her to him reserving to her the use for her life. Critchfield v. Easterday, 26 App. D. C. 89.

34. Schneider v. Vosburgh [Mich.] 13 Det. Leg. N. 24, 106 N. W. 1129.

Evidence insufficient to show undue influence or duress where shortly after a quarrel with her husband, in which she was cruelly treated, a wife deeded to the husband, but he was not present when the deed was executed. Hintz v. Hintz [Ill.] 78 N. E. 565. To show that a gift from parent to child was induced by undue influence. McLeod v. McLeod [Ala.] 40 So. 414. To show fraud or undue influence where an elderly woman conveyed all her property to her son in consideration of support for life. Kleckner v. Kleckner, 212 Pa. 515, 61 A. 1019. To show undue influence inducing a woman 80 years old to sign a contract. Simmons v. Kelsey [Neb.] 107 N. W. 122. Where a husband was actuated by a baseless fear of litigation and, without any undue influence by his wife, conveyed property to her without reserving the beneficial title in himself, he is not entitled to have the deed set aside.

No presumption of undue influence arises in the execution of a deed where no confidential relation exists.[35]

§ 3. *Remedies.*[36]—Fraud in the execution of an instrument renders it absolutely void as to the person guilty of the fraud,[37] and voidable as to the defrauded party.[38] Courts of law and equity have concurrent jurisdiction in cases of fraud.[39] A defrauded party may affirm the transaction and maintain an action at law for damages,[40] or he may rescind and recover property or money delivered.[41] Duress and deceit are simply different methods by which fraud is consummated. The same remedies are available to the injured party.[42] Fraud in procuring a release may be set up against a plea of accord and satisfaction in an action at law.[43] Fraud in procuring the execution of a deed is not so merged in the deed that it cannot be made the basis of a decree vacating the same.[44] The right to have a deed set aside for fraud does not abate on the grantor's death.[45] The venue of an action involving an issue of fraud is in some states regulated by statute.[46] An infant is not liable for falsely representing his age to induce payment on a contract to convey land, such liability being on contract and not tort.[47]

Newman v. Newman [Tex. Civ. App.] 86 S. W. 635.

Evidence sufficient to show fraud by which one was induced to transfer his interest in a joint enterprise. Goldsmith v. Koopman, 140 F. 616. To show that deeds were the result of undue influence. Horner v. Bell, 102 Md. 435, 62 A. 736. Evidence held to raise an inference that a deed was the result of undue influence. Owings v. Turner [Or.] 87 P. 160. Evidence insufficient to overcome such inference. Id.

35. Ripperdan v. Wildy [Cal.] 87 P. 276. A conveyance from child to parent is not constructively fraudulent if the transaction is fair, understandingly entered into, and long acquiesced in. Chapman v. Ferns, 118 Ill. App. 116. A daughter, though keeping house for her father, did not occupy such a confidential relation as to raise a presumption of undue influence in a deed from him to her. Bonsal v. Randall, 192 Mo. 525, 91 S. W. 475. Where one child seeks to set aside deeds from a parent to his wife and children living with him to the exclusion of others living away, on the ground of undue influence, he has the burden of proving undue influence. Teter v. Teter [W. Va.] 53 S. E. 779. Attacks made by heirs upon deeds from a parent to a favored child are not to be encouraged or sustained except upon clear and full proof. Kennedy v. Bates [C. C. A.] 142 F. 51. Where an aged and infirm parent granted all his estate to his wife and one child, who lived at home, to the exclusion of others living away, and such disposition was different from what he intended as shown by a prior will, is a circumstance from which undue influence may under certain circumstances be inferred, but such inference may be rebutted by other circumstances showing reason for such disposition. Teter v. Teter [W. Va.] 53 S. E. 779. Old age and infirmity, together with the fact that the grantor granted all his property to his wife and one child who resided with him to the exclusion of others who lived abroad, raise no legal presumption of undue influence. Id. The burden of proof to show undue influence is on a parent who seeks to set aside a deed to his child. McLeod v. McLeod [Ala.] 40 So. 414. A gift from parent to child, the parent being the dominant party, will not be set aside for undue influence. Id. A gift from parent to child raises no presumption of undue influence. Id.

36. See 5 C. L. 1546.

37. Sass v. Thomas [Ind. T.] 89 S. W. 656.

38. Fraud renders a contract voidable. Bennett v. Glaspell [N. D.] 107 N. W. 45.

39. To prevent the use of a fraudulent instrument as evidence. Sass v. Thomas [Ind. T.] 89 S. W. 656. Chancery has concurrent jurisdiction with courts of law to grant relief from consequences of fraud. Fred Macy Co. v. Macy [Mich.] 12 Det. Leg. N. 948, 106 N. W. 722.

40. See, also, Deceit, 7 C. L. 1093. Sonnesyn v. Akin [N. D.] 104 N. W. 1026; Crockett v. Burleson [W. Va.] 54 S. E. 341; Rose v. Merchants' Trust Co., 96 N. Y. S. 946; Neibuhr v. Gage [Minn.] 108 N. W. 884.

41. A defrauded person may rescind and recover what he has parted with. Rose v. Merchants' Trust Co., 96 N. Y. S. 946; Sonnesyn v. Akin [N. D.] 104 N. W. 1026. May rescind by his own act and sue at law (Neibuhr v. Gage [Minn.] 108 N. W. 884), or proceed in equity for rescission of the transaction by the court (Id.). Where one is induced by false representations to sell to an insolvent, he may, upon promptly rescinding, recover the goods or the proceeds thereof in the hands of the buyer's receiver. Seeley v. Seeley-Howe-Le Van Co. [Iowa] 105 N. W. 380.

42. Neibuhr v. Gage [Minn.] 108 N. W. 884.

43. Memphis St. R. Co. v. Giardino [Tenn.] 92 S. W. 855.

44. False representations procuring a deed as to the character of the instrument. Busiere v. Reilly, 189 Mass. 518, 75 N. E. 958.

45. Busiere v. Reilly, 189 Mass. 518, 75 N. E. 958.

46. An action for fraud must under the express provisions of Sayles' Ann. Civ. St. 1897, art. 1194, be brought in the county where the fraud was committed. Karner v.

One who seeks to rescind must restore what he has received by virtue of the transaction,[48] but such restoration is not always a condition precedent to rescission.[49] It may, however, be recovered by the guilty party.[50]

A defrauded party must act without unnecessary delay,[51] or within the period prescribed by law after discovery of the fraud,[52] and if he waives[53] or ratifies the

Ross [Tex. Civ. App.] 16 Tex. Ct. Rep. 737, 95 S. W. 46.

47. Brooks v. Sawyer, 191 Mass. 151, 76 N. E. 953.

48. A grantor who does not offer to return the consideration may not have his deed cancelled for fraud. Clint v. Eureka Crude Oil Co. [Cal. App.] 86 P. 817.

49. One who pleads that a release of damages for personal injuries was procured by fraud need not tender the amount received by him with his replication. Memphis St. R. Co. v. Giardino [Tenn.] 92 S. W. 855. Tender or return is not always essential to rescission. An offer in the complaint to return and a prayer for full declaration of the rights of the parties. Carroll v. Barry Brothers Transportation Co., 118 Ill. App. 230. In an action to rescind a contract for fraud, plaintiff was entitled to retain a payment made under the contract. Held he was not bound to tender a return of such payment as a condition of his right to rescind. Matteson v. Wagoner, 147 Cal. 739, 82 P. 436. In a suit to set aside a deed, if the case is such as to enable the court to adjust and protect the equities of the defendant without an indemnity bond or tender by the plaintiff, none is necessary. Romine v. Howard [Tex. Civ. App.] 15 Tex. Ct. Rep. 347, 93 S. W. 690.

50. Where a retailer rescinds a purchase of goods for fraud, his seller may recover the proceeds of sales made by him. Lyon v. Lindblad [Mich.] 13 Det. Leg. N. 574, 108 N. W. 969. A purchaser of timber who has made payments in recognition of the contract, and manufactured and sold the timber, cannot set up fraud as against the purchase money notes, but may set it up by counterclaim and recover for damage sustained. May v. Loomis, 140 N. C. 350, 52 S. E. 728.

51. Must rescind immediately upon discovery of the fraud. Rose v. Merchants' Trust Co., 96 N. Y. S. 946; Seeley v. Seeley-Howe-Le Van Co. [Iowa] 105 N. W. 380. Whether rescission was made with due promptness after discovery of fraud held a question of fact. Shreve v. Crosby, 72 N. J. Law, 491, 63 A. 333. Where action to rescind was commenced within five months after the contract was made, and it was alleged that a considerable time had elapsed before the fraud was discovered, the complaint was not demurrable for failure to allege rescission promptly on discovery of the fraud. Civ. Code § 1691. Matteson v. Wagoner, 147 Cal. 739, 82 P. 436. Delay in instituting proceedings to rescind on the ground of abuse of confidential relations is not a waiver of the right to rescind where the delay resulted from temporary alleviation of suspicions, ignorance, and inexperience. Landis v. Wintermute, 40 Wash. 673, 82 P. 1000. Where after discovery of the fraud the injured person continued to act under the contract for a year before asking relief. Burk v. Johnson [C. C. A.] 146 F. 209. Where an heir sought to set aside a deed to an administrator, and did not know of the conveyance until after his death, was not put on inquiry, and had only constructive notice of the account of the administrator showing the conveyance which was filed, held to show that she was not guilty of laches. Manning v. Mulrey [Mass.] 78 N. E. 551. To set aside a deed for fraud, suit must be brought in a reasonable time under the circumstances of the particular case. Dunfee v. Childs [W. Va.] 53 N. E. 209. A deed obtained by deception is properly set aside on prompt application. Bryson v. Bridges [Fla.] 41 So. 28. Three months' delay after discovery of false representations as to boundaries does not constitute a waiver to rescind, delay having been occasioned by the weather. Freeman v. Gloyd [Wash.] 86 P. 1051. Where one is induced by false representations, that a deed is drawn in accordance with a prior agreement, to sign it, a right of action for such fraud accrues on the discovery thereof. Griffin v. Roanoke R. & Lumber Co., 140 N. C. 514, 53 S. E. 307.

52. Under Rev. St. 1898, § 4222, subd. 7, an action based on fraud is barred in six years from the discovery thereof. Figge v. Bergenthal [Wis.] 109 N. W. 581. An action for damages occasioned by fraud must be brought within the period prescribed by law. Smith v. Krueger [N. J. Eq.] 63 A. 850. Code Civ. Proc. § 338, providing that an action for fraud must be brought within three years, does not apply to fraud pleaded as an equitable defense against a judgment which was without consideration. McColgan v. Muirhead [Cal. App.] 82 P. 1113. Limitations do not commence to run until the fraud is or should have been discovered. Harris v. Cain [Tex. Civ. App.] 14 Tex. Ct. Rep. 327, 91 S. W. 866. Action for relief on the ground of fraud held barred by Code Civ. Proc. § 338, or § 343. Matteson v. Wagoner, 147 Cal. 739, 82 P. 436. See Limitation of Actions, 6 C. L. 465.

53. Acceptance of a note held not a waiver of a tort in inducing one by false representations to invest in an enterprise. Damers v. Sternberger, 95 N. Y. S. 532. Evidence and facts alleged in a complaint for rescission held not to show waiver of the fraud complained of. Matteson v. Wagoner, 147 Cal. 739, 82 P. 436.

The right to rescind is waived where the purchaser of a majority of the stock of a corporation, after learning of the fraud, determined to go on with the business, believing he could make himself whole and did so as long as he could. Speicher v. Thompson, 141 Mich. 654, 12 Det. Leg. N. 579, 104 N. W. 1104. One who receives and retains money for a release of damages for personal injuries for two years is estopped to assert that it was procured by fraud. Memphis St. R. Co. v. Giardino [Tenn.] 92 S. W. 855. Vendor of an executory contract for sale of corporate stock who, after discovering fraud,

fraud[54] he is bound by the terms of the contract; but mere delay in seeking to have a deed set aside, if unaccompanied by any change in the situation of the parties, will not deprive the defrauded party of his right to relief, so long as he remains ignorant of the fraud or of facts which ought to put him on inquiry.[55] An executor and testamentary trustee may sue in his representative capacity to set aside a conveyance made by him and his cotrustees, as procured by fraud, though he was a party to the fraud.[56]

Pleading.[57]—Fraud is a defense and the facts constituting it must be pleaded.[58] A general averment is not sufficient.[59]

subsequently performs by delivering stock and accepting purchase price, waives fraud and cannot thereafter sue for damages. McDonough v. Williams [Ark.] 92 S. W. 783. A seller who was induced to sell by fraud may not on discovery of the fraud attempt to collect, and, after ascertaining that he cannot, sue to recover the goods. Seeley v. Seeley-Howe-Le Van Co. [Iowa] 105 N. W. 380.

54. Imperfect and incomplete information is insufficient upon which to base ratification. Shevlin v. Shevlin, 96 Minn. 398, 105 N. W. 257. Any unequivocal act after discovery of the fraud, whether made in or out of court, is sufficient to preclude a subsequent rescission. Seeley v. Seeley-Howe-Le Van Co. [Iowa] 105 N. W. 380. Whether a letter written by a defrauded party to the person guilty of the fraud, and who at the time was ill in a hospital, was an affirmance or polite rescission of the fraudulent transaction, held a question of fact. Shreve v. Crosby, 72 N. J. Law, 491, 63 A. 333. A buyer of goods who is defrauded, who offers to return them and follows such offer by a tender of the goods into court, thereby rescinds the sale. Lyon v. Lindblad [Mich.] 13 Det. Leg. N. 574, 108 N. W. 969.

Evidence insufficient to show ratification of a transfer of corporate stock by one brother to another, which transfer was procured by the exercise of undue influence. Shevlin v. Shevlin, 96 Minn. 398, 105 N. W. 257. The fact that one assigns a note secured in the transaction before discovering the fraud is not a ratification of the transaction. Romine v. Howard [Tex. Civ. App.] 15 Tex. Ct. Rep. 347, 93 S. W. 690. Evidence insufficient to show ratification of a contract precluding rescission. Rose v. Merchants' Trust Co., 96 N. Y. S. 946. Where a settlement was induced by fraud, the fact that the amount received was not tendered back did not preclude the injured party from seeking relief, where he offered in his complaint to apply such sum in his account against the defendant. Bowe v. Gage, 127 Wis. 245, 106 N. W. 1074. One from whom a release of damages for personal injuries is fraudulently procured, who spends a portion of the amount received for the release prior to learning of the fraud, does not thereby ratify the transaction. Louisville & N. R. Co. v. Helm [Ky.] 89 S. W. 709.

Evidence held to show a ratification of a sale of goods fraudulently procured, precluding the seller from recovering the goods. Seeley v. Seeley-Howe-Le Van Co. [Iowa] 105 N. W. 380. One who after discovering fraud inducing a contract and attempting repudiation thereof, who accepts the consideration for the completion of the contract, is bound by it. Urbansky v. Shirmer, 97 N. Y. S. 577. One who with full knowledge of fraud accepts the benefits of a contract cannot thereafter assail its validity. Bennett v. Glaspell [N. D.] 107 N. W. 45.

55. Manning v. Mulrey [Mass.] 78 N. E. 551.

56. Smith v. David Stevenson Brewing Co., 50 Misc. 395, 100 N. Y. S. 521. An executor and testamentary trustee who sues to set aside for fraud a conveyance made by him may join himself as plaintiff in his individual capacity. Id.

57. See 5 C. L. 1548.

58. Ingraham v. International Salt Co., 100 N. Y. S. 192. Where the question of fraud is not involved in an action under the pleadings, the plaintiff is in no position to take advantage of undiscovered fraud to prevent the running of the statute of limitations. Keese v. Dewey, 97 N. Y. S. 519. Facts constituting the fraud must be pleaded and proved. Dorris v. McManus [Cal. App.] 86 P. 909. Fraud must be distinctly alleged. Smith v. Collins [Ala.] 41 So. 825. A defendant who does not plead fraud cannot urge it as a defense. Finck v. Schmitt, 48 Misc. 503, 96 N. Y. S. 197. Facts constituting the fraud must be alleged. Trainor v. Schutz [Minn.] 107 N. W. 812. Facts from which the legal conclusion of fraud is to be drawn must be set up. Weigand v. Cannon, 118 Ill. App. 635. At common law it may be shown under the general issue that execution of a contract was procured by fraud. Otherwise under the Minnesota Code. Trainor v. Schutz [Minn.] 107 N. W. 812.

Misrepresentations relied upon must be specifically alleged. Marshall-McCartney Co. v. Halloran [N. D.] 106 N. W. 293. Only such representations can be considered as are alleged and relied on. White v. White [Tex. Civ. App.] 16 Tex. Ct. Rep. 134, 95 S. W. 733. Fraud must be set up by special plea, containing facts directly alleged constituting fraud. Facts held sufficiently stated in an action for a real estate broker's commissions. McAfee v. Bending, 36 Ind. App. 628, 76 N. E. 412. Facts and circumstances constituting the fraud must be clearly alleged. In a suit to enjoin the payment to contractors of a balance of the price of a public improvement. Board of Com'rs of La Porte County v. Wolff [Ind.] 76 N. E. 247. The representations made and the extent of the falsity thereof should be specifically stated. It is not sufficient to allege that

Evidence.[60]—Fraud is never presumed.[61] It must be established by one who asserts it.[62] All essential elements must be proven.[63] To entitle one to equitable relief, the proof must be clear and satisfactory,[64] but where relief is sought at law,

they consisted of statements that "the property rented for more than in fact it was rented," and that "the janitor received less for his services than in fact he did." Kranz v. Lewis, 100 N. Y. S. 674. That the defendant knew the representations to be false must be alleged. Id. Affidavit of defense alleging fraudulent alteration of deed in chain of title so that defendant took no title, held to show neither fraud nor reliance on any representations. Robbins v. Jay, 27 Pa. Super. Ct. 652.

Complaint held sufficient. Motley v. Mercantile Trust Co., 51 Misc. 460, 100 N. Y. S. 281. An answer in an action for breach of contract of sale that certain provisions not contained in the oral agreement were inserted in the written contract alleges facts in relation to the fraud with sufficient certainty. Lilienthal v. Herren, 42 Wash. 209, 84 P. 829. Fraud, either actual or constructive, is sufficiently pleaded by an averment of the facts constituting it without directly alleging it to be fraud. Holliday v. Perry [Ind. App.] 78 N. E. 877. Complaint alleging materiality of the representations and facts from which materiality might be inferred held good as against general demurrer. Karner v. Ross [Tex. Civ. App.] 16 Tex. Ct. Rep. 737, 95 S. W. 46. It is sufficient to plead the facts constituting constructive fraud without alleging it to be fraud; fraud being a conclusion of law. Parsons v. Balson [Wis.] 109 N. W. 136. Fraud held sufficiently pleaded where one made false statements as to his financial ability to a mercantile agency. Katzenstein v. Reid, Murdock & Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 554, 91 S. W. 360. Complaint alleging the acquisition of a majority of the stock of one corporation by a competitor, and placing it in the hands of a receiver, held to sufficiently allege fraud as against a motion for a bill of particulars. Ingraham v. International Salt Co., 100 N. Y. S. 192.

Insufficient: Allegation that bonds issued by a corporation were issued in fraud of plaintiff's rights held insufficient. Cowell v. City Water Supply Co. [Iowa] 105 N. W. 1016. An allegation that the representations were made by "defendant or his agent" is not the equivalent of the necessary allegation that they were made by the defendant. Kranz v. Lewis, 100 N. Y. S. 674. An allegation that one falsely and fraudulently made certain representations is not sufficient without an averment that the representations were untrue. Bonham v. Doyle [Ind. App.] 77 N. E. 859.

59. Baker v. Hutchinson [Ala.] 41 So. 809. In a suit to set aside a judgment. Machen v. Bernheim [Ky.] 93 S. W. 621. It must appear by specification wherein the fraud exists. Anderson v. Goodwin, 125 Ga. 663, 54 S. E. 679. Allegations of fraud in a cross bill to restrain foreclosure of a mortgage held too general. Ramoneda Bros. v. Loggins [Miss.] 39 So. 1007.

60. See 5 C. L. 1549.

61. Presumption of good faith in business transactions must be overcome. Hughes v. Lockington [Ill.] 77 N. E. 1105. Good faith is presumed in the absence of any evidence. Breaux v. Broussard, 116 La. 215, 40 So. 639. In a charge of false swearing in the proof of loss by fire, the burden of proving such false swearing is on the insurer. Virginia Fire & Marine Ins. Co. v. Hogue [Va.] 54 S. E. 8.

62. In an action against directors of a corporation for fraudulently purchasing property for more than its worth from another director, the plaintiff has the burden to prove fraud. Polhemus v. Polhemus, 100 N. Y. S. 263. A partner seeking recovery of money paid a copartner after settlement on the ground that such payment was induced by fraudulent representations has the burden of proving such representations and their falsity notwithstanding the firm settlement. Devereux v. Peterson, 126 Wis. 558, 106 N. W. 249. Compromise settlement of suits where there was nothing to indicate that plaintiff's attorney had not acted in entire good faith and in no way misled or deceived him will not be set aside on the ground of fraud. Judson v. Bowser [Ky.] 91 S. W. 727. Where the defense to an action for fraud in selling chattels as free from incumbrances was an agreement with the mortgagee that defendant had a right to sell and that plaintiff bought with knowledge of the mortgage, the burden was on the purchaser to prove the fraud. Colston v. Bean, 78 Vt. 283, 62 A. 1015. Where heirs seek to set aside deed executed by their ancestor on the ground of undue influence, they have the burden to prove that the transaction was the result of undue influence. Dean v. Dean [Iowa] 108 N. W. 1051.

63. A plea of fraud must be sustained by proof of representations, falsity, scienter, deception, and damage. Standard Mfg. Co. v. Brons, 118 Ill. App. 632.

64. Bowe v. Gage, 127 Wis. 245, 106 N. W. 1074. Clear and satisfactory proof in cases involving fraud may be defined as a preponderance of evidence sufficient to overcome the presumption of innocence of fraud. Virginia Fire & Marine Ins. Co. v. Hogue [Va.] 54 S. E. 8. The inference or conclusion of fraud will not be indulged merely from suspicious circumstances, unless the showing of guilt is so clear as to exclude all reasonable hypothesis of good faith. State Sav. Bank v. Emge [Iowa] 108 N. W. 530. Evidence must be clear, precise, and indubitable to overthrow a written instrument. Hicks v. Harbison-Walker Co., 212 Pa. 437, 61 A. 958. When actual fraud is relied on to set aside a deed, the fraud must be clearly proved. Deepwater Council No. 40, O. U. A. M. v. Renick [W. Va.] 53 S. E. 552; Smith v. Collins [Ala.] 41 So. 825. The evidence must amount to more than a mere probability of the truth of the charge of fraud or a mere preponderance of evidence that such charges are true. Id. An instruction that fraud must be proved by "clear" and satisfactory

only a preponderance of evidence is required.[65] All allegations of fraud need not be established,[66] and variance in the proof as to one allegation will not preclude relief.[67] Relief on the ground of fraud cannot be granted on proof of mutual mistake[68] or negligence.[69] Fraud may be proven by direct or circumstantial evidence,[70]

evidence requires **too high a degree of proof.** Walsh v. Taitt [Mich.] 12 Det. Leg. N. 651, 105 N. W. 544.

Evidence sufficient to show fraud where one was induced to sign checks under the belief that he was signing other instruments. Bilafsky v. Conveyancers Title Ins. Co. [Mass.] 78 N. E. 534. The testimony of the defendant alone in a suit to set aside a deed for fraud is not sufficient to overcome the testimony of the plaintiff and two disinterested witnesses to the fact that false representations were made. Reilly v. Gottleb [Wash.] 85 P. 675. False representations by which one is induced to enter into a partnership is ground upon which to set aside the partnership agreement. Caplen v. Cox [Tex. Civ. App.] 15 Tex. Ct. Rep. 266, 92 S. W. 1048. Evidence sufficient to show that one was induced by fraud to enter into a partnership contract. Id. Fraud in giving false statements to a mercantile agency held sufficiently proved. Katzenstein v. Reid, Murdock & Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 554, 91 S. W. 360. Evidence sufficient to show that a release of damages for personal injuries was procured by fraud. Louisville & N. R. Co. v. Helm [Ky.] 89 S. W. 709. Evidence sufficient to show that one was deceived by the misrepresentation of material facts. Cramsey v. Sterling, 97 N. Y. S. 1082. Evidence sufficient to show that notes were procured by false representations as to accounts due a business sold defendant for the purchase price of which the note was given. Wilson v. Cohen, 48 Misc. 654, 96 N. Y. S. 113. Evidence sufficient to show that a deed was not the free act of the grantor. Eggert v. Eggert [Mich.] 13 Det. Leg. N. 219, 107 N. W. 920. Evidence sufficient to show fraudulent representations in the sale of land. Farley v. Weiss [Neb.] 107 N. W. 561. Evidence sufficient to show that the purchase of certain bonds was induced by false statements in circulars. Grindrod v. Anglo-American Bond Co. [Mont.] 85 P. 891. Evidence sufficient to show that a deed was procured by fraud though it was necessary to discredit the testimony of two witnesses and believe one who was a party in interest. Kleimenhagen v. McConick, 126 Wis. 340, 105 N. W. 812. Evidence held to show fraud where an administrator purchased through a third person property of the estate for a grossly inadequate consideration. Manning v. Mulrey [Mass.] 78 N. E. 551. Evidence sufficient to show that a party was misled by false representations in an exchange of property. Troutman v. Eggleston [S. D.] 104 N. W. 257. Evidence sufficient to show fraud. Eggleston v. Advance Thresher Co., 96 Minn. 241, 104 N. W. 891. Evidence held sufficient to warrant a rescission of an exchange of property where some of the land represented as arable land located within four miles of a county seat was in fact arid and located 10 miles from such county seat. Gardner v. Mann, 36 Ind. App. 694, 76 N. E. 417. A finding of fraud by the jury is conclusive that all the essential elements existed. Busiere v. Reilly, 189 Mass. 518, 75 N. E. 958.

Evidence insufficient to show fraud in the execution of a deed. Patnode v. Deschenes [N. D.] 106 N. W. 573. To show fraud in an unambiguous contract which a party examined and inserted additional paragraphs. American Fine Art Co. v. Simon [C. C. A.] 140 F. 529. To show that corporate stock was purchased under a misapprehension or misrepresentation as to the assets of the corporation. Dowling v. Wheeler, 117 Mo. App. 169, 93 S. W. 924. To show fraud where one represented that he owned land the title to which had been by his agent fraudulently placed in his own name on the records. Buchall v. Higgins, 109 App. Div. 607, 96 N. Y. S. 241. To show that large sums of money paid a woman of ill repute to keep her from making public the illicit relations between the parties held insufficient to show that the money was procured by fraud. Platt v. Elias, 108 App. Div. 365, 95 N. Y. S. 710. To show that deeds were procured by the exercise of undue influence. Dean v. Dean [Iowa] 108 N. W. 1051. To show fraud in procuring a deed from aged people in consideration of future support. Lewis v. Wilcox [Iowa] 108 N. W. 536. To show fraud. Raymond v. Edelbrock [N. D.] 107 N. W. 194. To show fraud in the execution of a deed. Lentz v. Lentz [Mich.] 12 Det. Leg. N. 942, 106 N. W. 701. To show undue influence in the disposition of an intestate's property. Meyer v. Arends, 126 Wis. 603, 106 N. W. 675. Evidence that the fraud was or should have been discovered at a time sufficiently remote to bar the cause of action does not authorize an affirmative charge. Jones v. Coan [Ala.] 41 So. 757. Evidence that the maker of a note was an Indian, that he could not read or write the English language, and that he did not understand the language perfectly, is insufficient to overcome the presumption that he understood. Warnock v. Itawis, 38 Wash. 144, 80 P. 297. Where heirs sought to set aside deeds of their ancestor to his second wife on the ground of undue influence, evidence insufficient to show that deceased was helpless or dependent on her during his last illness. Dean v. Dean [Iowa] 108 N. W. 1051.

65. See Deceit, 7 C. L. 1093. The preponderance of evidence where fraud is alleged is such proof as is clear and strong enough to preponderate over the presumption that men are honest. Virginia Fire & Marine Ins. Co. v. Hogue [Va.] 54 S. E. 8.

66. A party who alleges false representations as to various independent facts need not establish all of them. Pinch v. Hotaling [Mich.] 12 Det. Leg. N. 841, 106 N. W. 69.

67. The fact that the proof as to one allegation varies from it is not ground for directing verdict for the guilty party. Collins v. Chipman [Tex. Civ. App.] 15 Tex. Ct. Rep. 411, 95 S. W. 666.

68. Burk v. Johnson [C. C. A.] 146 F. 209.

and a liberal range of investigation is permitted,[71] especially in the examination of persons charged with the fraud.[72] The parol evidence rule does not apply in an action to cancel an instrument for fraud.[73]

69. Polhemus v. Polhemus, 100 N. Y. S. 263.

70. May be proved by circumstantial evidence. Fabian v. Traeger, 117 Ill. App. 176. Where all circumstances present a showing that can be reconciled with no reasonable theory of good faith, the transaction will be deemed fraudulent. First Congregational Church of Cedar Rapids v. Terry [Iowa] 107 N. W. 305. May be proved by evidence of collateral circumstances and direct evidence is not necessary. Id. Collateral circumstances are sometimes admissible for the purpose of showing fraudulent intent. Standard Mfg. Co. v. Brons, 118 Ill. App. 632. Evidence must be clear and satisfactory but may be either direct or by facts and circumstances. Redwood v. Rogers [Va.] 53 S. E. 6. Evidence and circumstances must be such as to clearly establish fraud. Proof of circumstances raising only a suspicion is not sufficient. Deepwater Council No. 40, O. U. A. M. v. Renick [W. Va.] 53 S. E. 552.

71. Wide latitude should be allowed in admission of testimony. Fabian v. Traeger, 117 Ill. App. 176.

Held admissible: Representations made by a third person which are explanatory of the representations alleged to constitute the fraud. McMullen v. Rousseau, 40 Wash. 497, 82 P. 883. The fact that the false representations were made two days before the transaction was consummated does not preclude relief. Hauptman v. Pike [Neb.] 108 N. W. 163. The defrauded party may trace the negotiations to their inception. Id. On an issue of fraud in procuring a chattel mortgage from defendant's partner, evidence that the negotiations were secret and that the partner was paid to give the mortgage. Walsh v. Taitt [Mich.] 12 Det. Leg. N. 651, 105 N. W. 544. On an issue of fraud in procuring a chattel mortgage, evidence of a transaction between the mortgagee and a creditor of the mortgagor. Id. Where one was induced to purchase corporate stock by false representations as to the solvency of the corporation, and employes of the concern testified that it had earned net profits up to a certain date, it was competent to show by cross-examination of such employes that during the period referred to the earnings had been insufficient to pay off a debt for purchase price of the plant. Collins v. Chipman [Tex. Civ. App.] 15 Tex. Ct. Rep. 411, 95 S. W. 666. Where one was induced by false representations as to the solvency of a corporation to purchase corporate stock, it was competent to prove by defendant who was president of the corporation and the salary paid its officers. Id. Where one was induced by false representations as to the solvency of a corporation to purchase corporate stock, his testimony that at the time he purchased the stock he believed it would pay large dividends. Id. Where one was induced to purchase corporate stock by false representations as to the solvency of the corporation, evidence that just prior to the sale the company owed its officers and employes large sums of money. Id. Where one was induced to purchase corporate stock by false representations as to the solvency of the corporation, it is permissible to show that within two or three years after the purchase the assets of the corporation had disappeared, it had ceased business and was in liquidation. Id. A grantee's failure to record a deed until 10 months after its execution may be considered. Smith v. Moore [N. C.] 55 S. E. 275. In an action by an ignorant man to set aside a deed on the ground that its purport had been misrepresented to him, it was competent to ask him who told him that the deed conveyed all his interest, in order to corroborate his testimony that as soon as he learned the true purport of the deed he put up notices on the land repudiating it. Hodge v. Hudson, 139 N. C. 358, 51 S. E. 954.

Held inadmissible: One who seeks relief on the ground of fraud may not prove false representations made by the opposite party to third persons not in the presence of the plaintiff. Clark Co. v. Rice, 127 Wis. 451, 106 N. W. 231. In an action by an administrator to recover property on the ground of undue influence, it is not permissible to show the disposition of one of the defendants with regard to having "active, exerting influence." Meyer v. Arends, 126 Wis. 603, 106 N. W. 675. One who seeks relief on the ground of fraud may not prove newspaper advertisements and circulars, many of which he had never seen and some of which were not in print until after the transaction complained of. Clark Co. v. Rice, 127 Wis. 451, 106 N. W. 231. In a suit to set aside a deed for fraud, evidence of the defendant's purchase of a mortgage on the premises from one who was not the owner is irrelevant. Hodge v. Hudson, 139 N. C. 358, 51 S. E. 954.

72. Weigand v. Cannon, 118 Ill. App. 635.

73. Karner v. Ross [Tex. Civ. App.] 16 Tex. Ct. Rep. 737, 95 S. W. 46. Parol evidence of conversations leading up to a written contract is admissible where one party asserts that he was induced to sign it by false representations and had no opportunity to read it. State Life Ins. Co. v. Johnson [Kan.] 85 P. 597. It is admissible to show conversations of the parties leading up to the contract where it is claimed that one party was induced to execute the contract by false representations of the other and that it did not represent the agreement as shown by the oral conversations. Lilienthal v. Herren, 42 Wash. 209, 84 P. 829. Where it is set up that a contract executed was falsely represented and not the one agreed upon, parol evidence is admissible to show the one agreed upon. Nichols & Shepard Co. v. Berning [Ind. App.] 76 N. E. 776. In an action on a written contract it is permissible to prove that the execution of the contract was obtained solely by the false statement of a nonexistent fact. Sheldon Co. v. Harleigh Cemetery Ass'n [N. J. Law] 62 A. 189

An instruction submitting the issue of fraud should embody all the essential elements[74] and all material evidence.[75]

FRAUDS, STATUTE OF.

§ 1. Agreements not to be Performed Within One Year (1826).
§ 2. Promise to Answer for Debt or Default of Another or to Indemnify or Insure (1827). Insurance (1829).
§ 3. Agreements in Consideration of Marriage (1829).
§ 4. Representations as to Character or Credit of Another (1829).
§ 5. Agreements with Executors and Administrators (1829).
§ 6. Agreements with Real Estate Brokers (1829).
§ 7. Agreements Respecting Real Property or an Estate or Interest Therein (1830).
§ 8. Sale of Goods (1832).
§ 9. Trusts (1832).
§ 10. What will Satisfy the Statute 1833).
A. Writing (1833). Contracts not Performed Within a Year (1833). Sale of Goods (1833). Contracts for the Sale of Land (1833). To Answer for the Debt of Another or to Indemnify or Insure (1835).
B. Delivery and Acceptance (1835).
C. Part Payment and Earnest Money (1836.)
D. Part Performance (1836). Contracts for the Sale of Land (1836). Parol Gifts of Land (1838). Contracts Not Performable Within a Year (1838). Contracts for Sale of Goods (1839).
§ 11. Operation and Effect of Statute (1839).
§ 12. Pleading and Proof (1840).

§ 1. *Agreements not to be performed within one year.*[76]—To fall within the condemnation of the statute it must appear from the terms of the contract that it is not to be performed within a year.[77] If its termination is made to depend on a contingency which may eventuate within a year, it is not within the statute.[78] The mere fact that such contingency was not likely to or expected to occur within a year does not bring the contract within the statute.[79] An oral agreement to enter into a written contract which by its terms cannot be performed within one year is itself within the statute of frauds and void,[80] as is an oral contract for one year where by its terms performance is to commence at some future time.[81] A contract performable within a year from the time of acceptance of an offer is not within the statute, though not performable within a year of the time the offer was made.[82]

74. An instruction should submit all the essential elements of fraud. Paris Mfg. & Importing Co. v. Carle, 116 Mo. App. 581, 92 S. W. 748.

75. An instruction should submit all the facts tending to show fraud and imposition. Robertson v. Fuller Const. Co., 115 Mo. App. 456, 92 S. W. 130.

76. See 5 C. L. 1551.

77. Pinto v. Rintleman [Tex. Civ. App.] 15 Tex. Ct. Rep. 660, 92 S. W. 1003. A complaint alleging a contract of employment for one year held not to show a case within Burns' Ann. St. 1901, § 6629, subd. 5, as a contract not to be performed within one year. City of Decatur v. McKean [Ind.] 78 N. E. 982.

78. Where the termination of a contract depends on a contingency which may happen within a year, it is not within the statute of frauds; thus, a contract to receive, run, sort, and deliver defendant's logs so long as it operated on a certain river is not within the statute. Nester v. Diamond Match Co. [C. C. A.] 143 F. 72. A contract to render services so long as defendant remained in business at a certain place is not within statute. Lennard v. Texarkana Lumber Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. §2, 94 S. W. 383. A promise to pay a certain sum weekly, as long as the promisee resides in a certain place, does not require a memorandum under the statute of frauds. Burgesser v. Wendel [N. J. Law] 62 A. 994. In order that an oral contract may be held void under this branch of the statute, it must appear that it was the understanding of the parties that it was not to be performed within the year. That one of the parties had an option to extend it over more than one year does not bring it within the condemnation of the statute. American Fine Art Co. v. Simon [C. C. A.] 140 F. 529.

79. Lennard v. Texarkana Lumber Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 82, 94 S. W. 383.

80. McLachlin v. Whitehall, 99 N. Y. S. 721. An oral agreement to execute a written lease is within the statute of frauds when the terms of the written lease are such as to bring it within the statute. Harrell v. Sonnabend, 191 Mass. 310, 77 N. E. 764.

81. Chase v. Hinkley, 126 Wis. 75, 105 N. W. 230. Contract construed and held to be one performable within a year. Embry v. Hargadine-McKittrick Dry Goods Co., 115 Mo. App. 130, 91 S. W. 170.

82. An oral offer of employment for a year from a date in the future which is not accepted until the day on which performance

The statute has no application where the contract could be performed within a year, nor where it runs for an indefinite time and may be terminated by either party thereto at any time,[83] but the fact that a contract for services might be terminated by the death of the person who was to render the services within a year does not take it out of the statute.[84] Any excess, however short, over one year from the date of an oral contract for its full performance, renders it void.[85]

§ 2. *Promise to answer for debt or default of another or to indemnify or insure.*[86]—An oral promise to pay the debt of another is within the statute and void.[87] The validity of such a promise is to be determined by the law of the state where the promise is made.[88] Where an agent without authority enters into a contract in behalf of his principal which is subsequently ratified by the principal, the contract is that of the principal and not an agreement of the principal to answer for the "debt, default or doings of another."[89] The statute does not extend to a joint promise by two or more persons for the benefit of one of them.[90] A promise to pay the debt of another based on a consideration passing to the promisor is not within the statute,[91] as where the promise is a part of the consideration for a conveyance,[92] or

is to begin is performable within a year and hence not within the statute. Mobile, etc., R. Co. v. Hayden [Tenn.] 94 S. W. 940. Where defendant offered to repurchase stock from plaintiff at the end of a year, in case he was not satisfied with the purchase, and plaintiff a few weeks afterwards purchased the stock pursuant to the offer, the contract was one to be performed within a year. Gurwell v. Morris [Cal. App.] 83 P. 578.

83. Stitt v. Rat Portage Lumber Co. [Minn.] 107 N. W. 824.

84. Chase v. Hinkley, 126 Wis. 75, 105 N. W. 230. But see Shropshire v. Adams [Tex. Civ. App.] 13 Tex. Ct. Rep. 540, 89 S. W. 448, holding that an oral contract to form a partnership for a period of years is not within the statute for the reason it might be terminated by the death of any one of the copartners within a year.

85. Chase v. Hinkley, 126 Wis. 75, 105 N. W. 230.

86. See 5 C. L. 1551.

87. Murphy v. Hardiman, 112 App. Div. 670, 99 N. Y. S. 6. To pay for labor done for another. Engel v. Gordon, 49 Misc. 641, 97 N. Y. S. 981. The verbal acceptance by the drawee of a bill of exchange, who holds no funds of the drawer, is no more than an oral promise to answer for the debt of another. Chicago Heights Lumber Co. v. Miller, 219 Ill. 79, 76 N. E. 52. Where one on the written request of another pays part of an indebtedness which the person making the request owes and orally agrees to pay the balance, the promisor not being indebted to the person making the request, the promise to pay the balance is within the statute of frauds and void. Id. Where plaintiff purchased land at a foreclosure sale under an oral agreement to convey it to defendant upon being reimbursed, such contract is void, and hence when he deeded it to defendant's brother and took his note under an oral agreement that defendant would endorse the same, the latter agreement is not without Rev. St. 1898, § 2307, requiring agreements to answer for the debt of another to be in writing on the theory that it was defendant's debt. Kaufer v. Stump [Wis.] 109 N. W. 561. An oral promise to reimburse the surety on a bond for any damages which he might incur in the future by reason of his suretyship is within the statute and void. Craft v. Lott [Miss.] 40 So. 426.

88. Craft v. Lott [Miss.] 40 So. 426.

89. Lincoln Mountain Gold Min. Co. v. Williams [Colo.] 85 P. 844.

90. Where goods are sold and delivered to one person and another before the sale promises to pay for them jointly with the one to whom they are sold, and the delivery to the former is of benefit to the latter, the agreement is not within the statute of frauds. Oldenburg v. Dorsey, 102 Md. 172, 62 A. 576. Where the person to whom goods were sold and delivered and the one who orally undertook to be bound for their price are sued together as joint original promisors, the action will not be defeated as to the latter by showing that credit for the goods was given partly to one and partly to the other defendant. East Baltimore Lumber Co. v. Waldeman [Md.] 62 A. 575.

91. Blake v. Robinson, 129 Iowa, 196, 105 N. W. 401. Where a person agrees to pay the debt of another in consideration of the creditor doing something beneficial to the promisor, and which as to the promisor the creditor is not bound to do, the promise is an original promise and not within the statute. Breen v. Isaacs, 49 Misc. 127, 96 N. Y. S. 741. The promise of one person, though in form to answer for the debt of another, if founded upon a new and sufficient consideration, moving from the creditor and promisee to the promisor and beneficial to the latter, is not within the statute of frauds and need not be in writing subscribed by the promisor and expressing the consideration. Roy v. Flin [Ariz.] 85 P. 725.

92. One who as a part of the consideration of a conveyance to him orally agrees to pay certain debts cannot afterwards claim the defense of the statute, as his promise is an original promise. Greenley v. Greenley, 100 N. Y. S. 114. A promise to pay the debts of another in consideration of his transfer of his property to the promisor is a direct and

a surrender of property under levy,[93] or the release of a lien,[94] or attachment against the property of the promisor.[95] In some jurisdictions it is held that an oral promise to pay the debt of another on condition that the creditor would refrain from attaching[96] or foreclosing a mortgage on the property of the debtor is within the statute and void.[97] If the promisor does not receive the consideration agreed on,[98] or there is no consideration, the oral promise is void.[99] Where one whose name has been forged to a note as a comaker with the party owing the debt orally agrees to pay the same, such contract is within the statute.[1] Where goods are delivered to a third person,[2] or a liability incurred[3] in consideration of defendant's promise to pay therefor or indemnify the person incurring the liability, the promise is an original promise and not within the statute. In case of a sale, to charge the defendant on an oral promise to pay, it must appear that they were sold on his sole credit.[4]

not a collateral promise, and hence not within the statute of frauds. Williams Shoe Co. v. C. Gotzian & Co. [Iowa] 107 N. W. 807.

93. Where plaintiff in attachment directs that the officer deliver the property into the custody of plaintiff's servant and agrees to hold the officer harmless from all liability arising from such transaction, such indemnitor is "the principal debtor" within Civ. Code § 2794, subd. 2, and hence the contract is not to answer for the default of another. Burr v. Cross [Cal. App.] 86 P. 824.

94. A promise by the owner of personal property to pay the debt of one from whom he has purchased it and for which the creditor has a lien on the property, provided the creditor would surrender the lien, is an original promise within the exception specified in Code Cal. § 2794. Doe v. Allen, 1 Cal. App. 560, 82 P. 568.

95. Where one sued on an oral promise to pay the debt of another agreed to pay the debt if the plaintiff would release an attachment which he had levied on defendant's property, the latter promise is not within the statute of frauds. Kalispell Liquor & Tobacco Co. v. McGovern [Mont.] 84 P. 709.

96. An oral agreement by a person interested in a corporation to one of its creditors, who was about to attach its property, that if the creditor would refrain from attaching he would pay the debt, is within the statute and void; the fact that the refraining from attaching was beneficial to promisor does not change the rule. Carleton v. Floyd, Rounds & Co. [Mass.] 78 N. E. 126.

97. An oral guaranty by a third person of the payment of a mortgage debt made to the legal owner of a mortgage, the equitable title being in another, on condition that the legal owner would forbear present foreclosure, is within the statute of frauds and void. Commonwealth Bank v. Kirkland, 102 Md. 662, 62 A. 799.

98. An oral agreement to pay the debt of another, provided such other would give the promisor a chattel mortgage on certain property owned by him, no mortgage having been given, is within the statute of frauds and void. It was not an original promise. Schroeder v. Helms, 98 N. Y. S. 214.

99. An oral promise to pay a lessor rent for land leased to a third person to raise a crop, or pursuant to a contract with defendant, held not to be an original promise but one within the statute. Draggo v. West Bay City Sugar Co. [Mich.] 13 Det. Leg. N. 245, 107 N. W. 911.

1. Pye v. Commercial Nat. Bank [Tex. Civ. App.] 97 S. W. 127.

2. Bennett v. Thuet [Minn.] 108 N. W. 1; Gates v. Morton Hardware Co. [Ala.] 40 So. 509; Yawger v. Backs, 119 Ill. App. 61. Where the complaint alleges a sale to defendant and the evidence shows that the goods were ordered by and delivered to an agent of defendant on the express promise of defendant to pay therefor, the statute of frauds has no application. Southern Pine & Cypress Co. v. Bruce Lumber Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 981, 95 S. W. 28. Where the owner promises a subcontractor that he will pay him for the work he has agreed to do, after the subcontractor has stated to the owner that he does not feel safe about his pay and will not proceed unless the owner will agree to pay him, the promise of the owner is an original promise and not within the statute. Block v. Galitzka, 100 N. Y. S. 173.

3. An oral promise by a third person to hold sureties on a bond harmless if they would sign it as sureties, is an original promise and not within the statute of frauds. Hawes v. Murphy, 191 Mass. 469, 78 N. E. 109. Where the builder, upon being informed by a subcontractor that he did not care to go on with the building unless he would guaranty payment, says: "All right; if that is the case, I will see that you are paid," and thereafter reiterates: "Don't fear, I will take care of you," and "I will see that you get it," the undertaking is an original one. Block v. Galitzka, 100 N. Y. S. 173. Where a subcontractor goes to the builder before commencing and states that he has no money to lose and asks that his payments be secured, and the owner tells him to go ahead and that he would pay him upon an order from the contractor, the undertaking is original. Schild v. Monroe Eckstein Brewing Co., 108 App. Div. 50, 95 N. Y. S. 493. An agreement by one surety on a note given for the purchase price of a stallion that if the maker did not pay the note he would take the stallion and pay it is not within the statute of frauds. Hall v. Taylor [Tex. Civ. App.] 16 Tex. Ct. Rep. 374, 95 S. W. 755.

4. Atlas Lumber & Coal Co. v. Flint [S. D.] 104 N. W. 1046. If credit is given exclusively to the promisor, his promise is original, but it is collateral if any credit

Whether a promise sued on is an original promise or a collateral one is one for the jury.[5] On the other hand the question whether certain acts constitute an original or collateral promise is for the court to determine as a matter of law.[6] A completed contract of novation is not within the statute of frauds,[7] since novation is the substitution of a new obligation for an old one which is thereby extinguished.[8]

Insurance.—In Georgia a contract of insurance must be in writing[9] and signed.[10]

§ 3. *Agreements in consideration of marriage.*[11]—An oral agreement that after the marriage a debt shall be regarded as cancelled is executed by the marriage;[12] hence the statute does not apply.[13]

§ 4. *Representations as to character or credit of another.*[14]—Under the laws of Michigan, one who has made false and fraudulent representations to a bank to induce it to discount notes for another cannot be charged in a tort action unless his representations were in writing.[15]

§ 5. *Agreements with executors and administrators.*[16]—No note or memorandum in writing is necessary to charge either the administrator or purchaser at an administrator's sale.[17]

§ 6. *Agreements with real estate brokers.*[18]—Some statutes provide that a real estate broker shall not maintain an action to recover commissions unless his contract of employment is in writing. It may be shown by letters between the parties.[19] A written authority to one of the members of a real estate firm is sufficient.[20]

was given to the other party. Sheppard v. Newton, 139 N. C. 533, 52 S. E. 143.

5. Ridgeway v. Corporation Liquidating Co. [N. J. Err. & App.] 62 A. 116; Yawger v. Backs, 119 Ill. App. 61. Evidence held to support a finding that the promise sued on was an original promise and not one to answer for the debt of another. McNeill v. Stitt [Cal. App.] 82 P. 1121.

6. Gates v. Morton Hardware Co. [Ala.] 40 So. 509. On an issue as to whether the promise sued on was original or collateral, the fact that plaintiff had charged the goods to others is to be considered but is not conclusive as to whom the credit was given; such method of keeping account is not necessarily inconsistent with credit being given defendant. Ridgeway v. Corporation Liquidating Co. [N. J. Err. & App.] 62 A. 116.

7. Bicknall v. Bicknall, 27 R. I. 429, 62 A. 976; Sheppard v. Newton, 139 N. C. 533, 52 S. E. 143. An oral agreement to pay the debt of another on condition that the latter's creditor will release the debt against him, followed by such release, constitutes a novation and the promise of the person assuming the debt is not within the statute of frauds. Abercrombie v. Fourth Nat. Bank [Ala.] 39 So. 606. Where a debtor, at the request of his creditor, agrees to pay the debt to a third person to whom the creditor is indebted, the promise of the debtor is not within the statute of frauds, as such arrangement constitutes a novation. Sherer v. Rubedew [Idaho] 83 P. 512. The statute does not forbid an oral contract to assume the debt of another, who is thereupon discharged of all liability to the creditor. "A promise to assume the debt of another, who is thereupon released, need not be in writing." Jenkins v. Holley, 140 N. C. 379, 53 S. E. 237.

8. Bicknall v. Bicknall, 27 R. I. 429, 62 A. 976. See, also, Novation, 6 C. L. 826. Where one who has commenced an action for deceit against a mortgagor, who falsely represented that plaintiff's mortgage was a first mortgage, discontinues the same in consideration of another's promise to pay the amount of the mortgage, but does not satisfy the mortgage, there is no novation, but the third person's promise is within the statute of frauds. Bicknall v. Bicknall, 27 R. I. 429, 62 A. 976.

9, 10. Civ. Code 1895, § 2089. Delaware Ins. Co. v. Pennsylvania Fire Ins. Co. [Ga.] 55 S. E. 330.

11. See 5 C. L. 1552.

12, 13. Weld v. Weld, 71 Kan. 622, 81 P. 183.

14. See 3 C. L. 1528.

15. Hicks v. Steel [Mich.] 12 Det. Leg. N. 706, 105 N. W. 767.

16. See 5 C. L. 1552.

17. Civ. Code 1895, § 5466. Green v. Freeman [Ga.] 55 S. E. 45.

18. See 5 C. L. 1552.

19. Isphording v. Wolfe, 36 Ind. App. 250, 75 N. E. 598. Cobbey's Ann. St. 1903, § 10,258. Tracy v. Dean [Neb.] 109 N. W. 505. A contract sufficient to meet the requirements of Cobbey's Ann. St. 1903, § 10,258, requiring contracts with broker for sale of land to be in writing describing the land and subscribed by the owner and broker, may be created by letters between the parties containing a description, though the same papers are not subscribed by both parties to the correspondence. If the description is such that the land can be identified by parol without contradicting the writing, it is sufficient. Holiday v. McWilliams [Neb.] 107 N. W. 578. Correspondence set out held insufficient to show such a contract as the period therein allowed within which to make a sale had expired before the sale in

To be available as a defense, the fact that the contract was not in writing must be set up by answer.[21] The New York statute making it a misdemeanor for any person in cities of first and second classes to offer for sale any real property without written authority does not apply to leases.[22]

§ 7. *Agreements respecting real property or an estate or interest therein.*[23]—The validity of a contract for the sale of real estate is to be determined by the law of the state where the land is situated and not by the law of the jurisdiction where the contract is made.[24] A parol contract for the sale[25] or exchange[26] of lands is within the statute and void. The statute applies to contracts for the conveyance of an equitable estate,[27] an easement,[28] or a life estate in land.[29] The statute has no application to a suit to have a deed declared to be a mortgage if the averments of the bill are sufficient to show the relation of debtor and creditor and an intention to give the deed as security.[30] A modification of a contract binding defendant to execute a lease to plaintiff of certain property for saloon purposes, so as to require him to exclusively use defendant's liquors, is a covenant restricting the use of lands and within the statute and not a mere personal covenant.[31] An option contract is within the statute.[32] In Iowa it is held that an oral agreement to assign a contract for the purchase of land is within the statute and void,[33] while in New York a contrary ruling is found.[34]

controversy was concluded. Tracy v. Dean [Neb.] 109 N. W. 505. A letter advising a broker that if he could purchase certain property for a stated price the signer thought he would be ready to purchase on the following Monday is not a sufficient memorandum of a contract to employ a broker to satisfy Civ. Code § 1624, as it does not purport to employ the addressee. Logan v. McMullen [Cal. App.] 87 P. 285.

20. A written authority to one of the members of a firm of real estate brokers, especially when it appears the vendor knew of the partnership relation, is a sufficient compliance with Pen. Code § 640d, and will support an action for commission in the name of the firm. Cox v. Hawke, 49 Misc. 106, 96 N. Y. S. 433.

21. Cox v. Hawke, 49 Misc. 106, 96 N. Y. S. 433.

22. Laws 1901, p. 312, c. 128. Lovejoy v. Weil, 48 Misc. 611, 95 N. Y. S. 552.

23. See 5 C. L. 1552.

24. Dal v. Fischer [S. D.] 107 N. W. 534. The Texas statute providing that "no action shall be brought in any of the courts on a contract for the sale of real estate, unless the contract or some memorandum thereof shall be in writing and signed by the party to be charged, etc., has no application to a contract entered into in New York with reference to lands in Texas, when the contract is sought to be enforced in New York courts. Daniels v. Rogers, 108 App. Div. 338, 96 N. Y. S. 642.

25. Bewick v. Haulka [Mich.] 12 Det. Leg. N. 672, 106 N. W. 63; Rapley v. McKinney's Estate [Mich.] 13 Det. Leg. N. 41, 107 N. W. 101. Contracts to purchase real estate must be in writing, and only convey such rights as are provided for in the contract. Gumaer v. White Pine Lumber Co. [Idaho] 83 P. 771. An oral agreement to accept a farm in part payment of an antecedent debt is within the statute of frauds and not binding on the person agreeing to so accept it, in an action on the original debt. Bull v. Payne [Or.] 84 P. 697. An oral agreement between an attorney and a landowner that the former should bring an action to quiet title to the land, and in case he was successful that the owner should convey him one-half of the land, is within the statute of frauds and cannot be specifically enforced. Jackson v. Stearns [Or.] 84 P. 798. An agreement by a real estate agent that if the owner of property would place it in their hands for renting they would guarantee him a certain sum per month as rental, less their commission, is not within the statute relative to contracts concerning real estate. Hewes v. Loveman [Ala.] 40 So. 306. Releases of vendor's liens is not within the statute of frauds relating to "contracts for the sale of lands." McKinley v. Wilson [Tex. Civ. App.] 96 S. W. 112.

26. Begley v. Treadway [Ky.] 93 S. W. 1045.

27. An oral assignment of an equitable interest in land is as much within the statute as is a transfer of a legal title. Morgart v. Smouse [Md.] 63 A. 1070.

28. An agreement giving an easement of flowing water over the land of another is within the statute of frauds, and where the grantee does not pay any consideration for it and has not taken possession of any land under it, cannot be proven by parol. Jones v. Stover [Iowa] 108 N. W. 112.

29. A gift or relinquishment of a life estate is within the statute of frauds, as such an estate is a freehold. Wallis v. Turner [Tex. Civ. App.] 16 Tex. Ct. Rep. 92, 95 S. W. 61. A contract construed and held a contract to convey a life estate and not a renting for the life of the promisor, and hence within the statute of frauds. Miller v. Hart [Ky.] 91 S. W. 698.

30. Shreve v. McGowin [Ala.] 42 So. 94.

31. Mausert v. Christian Feigenspan [N. J. Eq.] 64 A. 801.

32. Esslinger v. Pascoe, 129 Iowa, 86, 105 N. W. 362.

33. An agreement to take a contract for

Gas or oil in its natural state is regarded as real estate, hence a parol sale or release thereof is of no legal effect, but to be valid must be in writing.[35] In some cases a parol sale of a building,[36] or standing timber,[37] divests the thing sold of its character as a part of the real estate so as to take the transaction out of the statute, but where it continues to be regarded as part of the land, writing is essential.[38] The sale of standing timber is distinguishable from an agreement to cut and deliver timber.[39]

A written contract for the sale of land may be waived or abandoned by parol.[40] A parol agreement by the purchaser at foreclosure sale to allow the holder of the equity of redemption to redeem at a time after the period allowed by law is within the statute of frauds, and the purchaser does not hold the title in trust for such promisee.[41] But an agent who in breach of an oral agreement to purchase for his principal with funds furnished by the latter wrongfully takes title in his own name will hold the title in trust for his principal.[42] In some jurisdictions a contract of partnership to engage in the business of buying and selling lands and dividing the profits and losses is not within the statute of frauds.[43] In Wisconsin such a contract is held to be within the statute.[44]

the purchase of land off of the hands of one who had entered into a written contract for the purchase of it, whereby the person so agreeing with the purchaser was to pay the balance of the unpaid purchase price to the vendor and pay to the purchaser what he had already paid. Is an agreement for the purchase of real estate or some interest therein, and must be in writing. Esslinger v. Pascoe, 129 Iowa, 86, 105 N. W. 362.

34. Hahn v. Brettler, 98 N. Y. S. 607.

35. Ramage v. Wilson [Ind. App.] 77 N. E. 368. Where an oil lease provides for the payment of a certain proportion of the oil produced as a consideration for the grant, a subsequent oral modification of the lease for a consideration, as to the proportion of oil to be paid the lessor, is not a contract for an interest in land, but relates to personalty and is valid. Nonamaker v. Amos [Ohio] 76 N. E. 949.

36. The sale by the owner of buildings situate on land belonging to him, by parol contract, constitutes a severance of the building from the land so as to divest it of its character as realty within the statute of frauds. Finney v. Lucy [Ala.] 39 So. 583.

In North Dakota an elevator erected on the right of way of a railroad with its consent acquires by virtue of the N. D. statute such a status as to constitute it an interest in land within the purview of the statute of frauds requiring a contract to convey it to be in writing. Todd v. Bettingen [Minn.] 107 N. W. 1049.

37. In re Benjamin, 140 F. 320. One who has cut timber from land under a parol contract for its sale to him cannot, in an action to recover its value, set up as a defense thereto that the contract is void as being within the statute of frauds. Alford Bros. v. Williams [Tex. Civ. App.] 14 Tex. Ct. Rep. 778, 91 S. W. 636.

38. Growing timber is a part of the realty and a sale thereof must be in writing under Civ. Code 1895, § 2693, par. 4. Corbin v. Durden [Ga.] 55 S. E. 30. A contract for the sale of standing timber is within the statute of frauds relating to a sale of realty. Ives v. Atlantic, etc., R. Co. [N. C.] 55 S. E. 74.

39. A contract whereby one agrees to cut and deliver trees at a certain price per cord is not within the statute relating to realty. Whether the trees are to be cut from land of the cutter or of the other contracting party. Ives v. Atlantic, etc., R. Co. [N. C.] 55 S. E. 74.

40. Wisner v. Field [N. D.] 106 N. W. 38. The surrender of a mere option to acquire an interest in land is not within the statute of frauds. Larsh v. Boyle [Colo.] 86 P. 1000.

41. Campbell v. Bright [Miss.] 40 So. 3. An agreement whereby plaintiff was to purchase land at a foreclosure sale and take title and then to transfer it to defendant upon being reimbursed is a contract within Rev. St. 1898, § 2302, requiring agreements relating to land to be in writing. Kaufer v. Stumpf [Wis.] 109 N. W. 561.

42. Plaintiff employed defendant to bid in and purchase in plaintiff's name certain land at a public sale with defendant's money, defendant to be recompensed therefor as well as be at once repaid whatever he expended; defendant bid in the land in his own name and refused to convey to plaintiff. Held that the contract was one of agency and not for the conveyance of an interest in land, and hence need not be in writing to be enforceable. Schmidt v. Beiseker [N. D.] 105 N. W. 1102.

43. Morgart v. Smouse [Md.] 63 A. 1070; Mallon v. Buster [Ky.] 89 S. W. 257; Stitt v. Rat Portage Lumber Co. [Minn.] 107 N. W. 824; Rice v. Parrott [Neb.] 107 N. W. 840. A verbal contract contemplating dealing in land and within the statute of frauds, while executory, will be enforced where it has been fully executed, except accounting for profits before the commencement of the action. Norton v. Brink [Neb.] 106 N. W. 668. It is not essential to the validity of an agreement to share in the profits of a contemplated speculation in real estate that it should be in writing. Such an agreement does not involve such an interest in real estate as the statute requires to be in writ-

Parol agreements between adjoining owners, between whom there is a dispute as to the true location of their boundary, fixing an agreed line as a boundary, which is thereafter acquiesced in, are not within the statute,[45] but an agreement, where there is no dispute, that a certain line shall be the boundary, where such line would give to one of the parties land concededly not his, not followed by possession, is within the statute.[46] By reasoning analogous to that respecting boundaries, where parties have entered into an oral agreement settling disputed water rights which has been carried into effect and acquiesced in for considerable time, such agreement is not within the statute of frauds, though water rights are classed as realty.[47] In some jurisdictions the statutes expressly provide that agreements in regard to party walls shall be void unless in writing.[48]

§ 8. *Sale of goods.*[49]—In most jurisdictions the statutes provide that contracts for the sale of goods, wares, and merchandise exceeding a specified amount shall be void unless the contract or some memorandum thereof is in writing and signed by the party to be charged.[50] Stocks of an incorporated company are "goods, wares, and merchandise" within the statute of frauds.[51] An oral contract for manufacturing and delivering to defendant a certain quantity of an article which requires work, labor, and services to evolve it is not within the statute of frauds relative to a sale of goods.[52] Mutual waiver of liens on personal property does not constitute a sale of the property within the purview of the statute.[53]

§ 9. *Trusts.*[54]—A valid trust in personal property may be created by parol,[55]

ing. Jones v. Patrick, 140 F. 403. Evidence held to show that an oral contract contemplated a conveyance to complainant of an interest in land and was not merely an agreement to share the profits of the purchase and sale of the land, and hence was within the statute and void. Tuttle v. Bristol [Mich.] 12 Det. Leg. N. 686, 105 N. W. 145.

44. Scheuer v. Cochem, 126 Wis. 209, 105 N. W. 573.

45. Roberts v. Fellman Dry Goods Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 733, 92 S. W. 1060; Kitchen v. Chantland [Iowa] 105 N. W. 367.

46. Amburgy v. Burt & B. Lumber Co. [Ky.] 89 S. W. 680.

47. Rule applicable to settlements of disputed boundaries applied. Bree v. Wheeler [Cal. App.] 87 P. 255. May also be upheld on the theory of part performance. Id.

48. **Party walls:** Code Iowa, § 3003, providing that special agreements about party walls shall not be valid unless in writing and signed by the parties, does not preclude the admission of parol evidence to determine whether a certain wall is a party wall or whether it has been repaired or increased in height so as to be within the purview of Code §§ 2997 and 2999. Howell v. Goss, 128 Iowa, 569, 105 N. W. 61.

49. See 5 C. L. 1553.

50. Where an agent sells to another certain goods and orally agrees to purchase them from the buyer in case he becomes dissatisfied, the obligation to repurchase being that of the person acting as agent, there are two separate contracts, one between the principal and the buyer and one between the person acting as agent and the buyer, and the latter is within the statute of frauds and void, the price exceeding $50. Morse v. Douglass, 99 N. Y. S. 392. When defendant offered to repurchase stock from plaintiff at the end of one year in case he was not satisfied with his purchase, and plaintiff a few weeks afterwards purchased the stock pursuant to the offer, the contract was one to be performed within a year and hence not required to be in writing; the contract did not commence until accepted by plaintiff. Such transaction was not a contract for the purchase by defendant of goods exceeding $200 in value, since the consideration of defendant's promise was the purchase by plaintiff of the stock. Gurwell v. Morris [Cal. App.] 83 P. 578.

51. Contract of sale for more than $50 held within Civ. Code 1895, § 2693, p. 7. Hightower v. Ansley [Ga.] 54 S. E. 939.

52. Gerli v. Metzger & Co., 99 N. Y. S. 858. A verbal contract for the manufacture of articles according to certain specifications furnished or a model selected, and which are not suitable for the general trade and which would not have been otherwise manufactured, is not within the statute of frauds. Schloss v. Josephs [Minn.] 108 N. W. 474. An agreement to construct an article according to plans of another and especially for him, and not of a kind which the maker usually has for sale in the course of his business, is a contract for work and labor and not for a sale within the statute. Moore v. Camden Marble & Granite Works [Ark.] 96 S. W. 1063. A contract for a completed tombstone cut according to a catalogue design selected by the party for whom made held not a sale. Id.

53. Plaintiff released mortgage on horse owned by defendant in consideration of a release by defendant of a first lien on oxen upon which plaintiff held a second. Holden v. Gilfeather, 78 Vt. 405, 63 A. 144.

54. See 5 C. L. 1553.

55. Rapley v. McKinney's Estate [Mich.]

but a parol agreement to hold land in trust is not enforceable,[56] unless the circumstances are such as to create a resulting[57] or a constructive trust.[58] A valid, express trust of lands, enforceable in equity, may be created by parol agreement contemporaneous with conveyance.[59] Thus an oral agreement to take a conveyance of land as security is not within the statute and will be enforced.[60] An alleged trust in land created by parol is not enforceable against the proceeds of the land when sold and converted into money.[61]

§ 10. *What will satisfy the statute. A. Writing.*[62] *Contracts not performable within a year.*—Where a contract of employment is evidenced by certain correspondence which is vague and incomplete without certain conversations, the correspondence does not constitute a sufficient memorandum to satisfy the statute.[63]

Sale of goods.—A memorandum for the purchase of goods is insufficient if it does not identify the subject-matter and the terms of sale with such certainty that resort to parol evidence is unnecessary.[64] A writing to satisfy the statute must cover the entire contract.[65] The contract or memorandum must be signed by the party sought to be charged.[66]

Contracts for the sale of land.—A contract or memorandum for the sale of land need be signed only by the party denying the contract and resisting its enforcement,[67]

13 Det. Leg. N. 41, 107 N. W. 101; Zeldeman v. Molasky, 118 Mo. App. 106, 94 S. W. 754.

56. Where a person orally agrees to buy land for another and afterwards buys it with his own money and takes title in his own name, he will not be held to hold title in trust for the person for whom he promised to purchase, since his agreement is within the statute of frauds and void unless in writing. Camden Land Co. v. Lewis [Me.] 63 A. 523. A mere naked verbal promise by a purchaser at a sheriff's sale, who purchases with his own money, to hold the property in trust for the debtor, neither vests in the debtor any equitable estate, under the statute prohibiting parol declarations of trust, nor does it give any cause of action on the contract, it being nudum pactum. Bryan v. Douds, 213 Pa. 221, 62 A. 828. A parol agreement to purchase land and hold it in trust for another, where the consideration is not paid by the latter, is within the statute of frauds and void. Wormald's Guardian v. Heinze [Ky.] 90 S. W. 1064.

57. A trust in land can be proved in no way except by a writing, unless the circumstances are such as to create a resulting trust, such as the law implies. Bryan v. Douds, 213 Pa. 221, 62 A. 828.

58. Peterson v. Hicks [Wash.] 86 P. 634. Where one orally agrees to advance the purchase money for another to take title in himself for security and to execute a bond for a deed, and title is so taken, but he repudiates the agreement, a constructive trust results. Id.

59. A contemporaneous parol agreement with the execution and delivery of a deed absolute on its face, to hold the property in trust for the grantor, is not within the statute of frauds. Insurance Co. v. Waller [Tenn.] 95 S. W. 811.

60. An oral agreement to take a conveyance of land and hold it as security for indebtedness is not contrary to the statute of frauds and may be specifically enforced, where the specific thing contracted for and not the pecuniary compensation is the redress practically required. It is of no importance that the loan is made wholly on the security and without any personal obligation on the part of the borrower, nor does it make any difference that the party taking the conveyance received it from a third person, if the equitable title was in the promisee. Grout v. Stewart, 96 Minn. 230, 104 N. W. 966.

61. Rapley v. McKinney's Estate [Mich.] 13 Det. Leg. N. 41, 107 N. W. 101.

62. See 5 C. L. 1553.

63. Ballantine v. Yung Wing, 146 F. 621.

64. Borum v. Swift & Co., 125 Ga. 198, 53 S. E. 608. A memorandum for the sale of coal held to be a compliance with the statute. Morrison v. Browne, 191 Mass. 65, 77 N. E. 527.

65. A written receipt omitting to state the purchase price is insufficient. Corbin v. Durden [Ga.] 55 S. E. 30. If it requires parol evidence to supply the omissions, is insufficient to take the case without the statute. An oral sale of stocks is not taken out of the statute by a subsequent letter which does not identify the stocks or state the prices or manner of payment. Hightower v. Ansley [Ga.] 54 S. E. 939.

66. A resolution passed by the legislative body of a municipal corporation authorizing its officers to enter into a contract with another city for a water supply, not signed by it or any officer and not communicated to the other city, cannot constitute a part of the memorandum required by the statute of frauds. Jersey City v. Harrison, 72 N. J. Law, 185, 62 A. 765.

67. Dennis Simmons Lumber Co. v. Corey, 140 N. C. 462, 53 S. E. 300. The fact that a written contract for the sale of land is not signed by the purchaser does not invalidate it as against the seller. Caren v. Liebovitz, 99 N. Y. S. 952. A copy of a resolution passed by the board of directors of a corporation, in favor of the sale of land owned by it, describing the land and the price and the purchaser and signed by the president of

and accepted by the other.[68] The party seeking to enforce it must show that he assented to its terms.[69] Signature by the suing party only will not suffice.[70] It must either name the parties or describe them in such a way that they can be identified,[71] and express the consideration.[72] A contract of sale of real estate in Indiana need not state the consideration to satisfy the statute of frauds,[73] hence an exchange which contains no provision as to payment of difference is good.[74] The writing need not contain all collateral agreements.[75] It may consist of several papers, provided the one signed by the party charged refers to the others so as to enable the court to gather the terms of the contract from all of them.[76] It is sufficient if it describes the land so that it can be identified by extrinsic evidence.[77] In some jurisdictions where the contract or memorandum is executed by an agent, his authority to act must be in writing,[78] while in others an oral authorization is sufficient.[79] In some jurisdic-

the corporation, is a sufficient written memorandum to comply with the requirements of the statute of frauds. Western Timber Co. v. Kalama River Lumber Co., 42 Wash. 620, 85 P. 338. The mere receipt of a counter proposition by one who in writing has made an offer to sell land does not create a contract in writing binding on the party receiving the counter proposition. Kaufmann v. Burton [Mich.] 13 Det. Leg. N. 371, 108 N. W. 349.

68. The execution of a deed and a letter informing the vendees that it had been deposited in a bank for delivery to them upon payment of the purchase price does not satisfy Okl. Laws 1897, chap. 8, § 4, providing that no contract relating to real estate "shall be valid until reduced to writing and subscribed by the parties thereto," especially where the vendees refused to accept it until a fuller and more undisputed possession could be given. Halsell v. Renfrow, 202 U. S. 287, 50 Law. Ed. —.

69. Borum v. Swift & Co., 125 Ga. 198, 53 S. E. 608.

70. A written instrument for the conveyance of lands signed by the vendor only is within the statute of frauds when sought to be enforced against the vendee. Rev. St. 1903, § 995, providing that "no action shall be brought to charge any person upon any contract for the sale of land * * * unless such contract * * * shall be in writing and signed by the party to be charged therewith, etc.," requires an instrument signed by the party sought to be held. Kingsbury v. Cornelison, 122 Ill. App. 495.

71. Frahm v. Metcalf [Neb.] 106 N. W. 227.

72. Hain v. Burton, 118 Mo. App. 577, 94 S. W. 589. Where the language of an instrument is such as to warrant the inference that the consideration rests on mutual promises, the writing satisfies all the requirements of the statute of frauds. Bowers v. Ocean Acc. & Guarantee Corp., 110 App. Div. 691, 97 N. Y. S. 485. A writing as follows: "Washington, D. C., Oct. 6, 1904. Rec'd of Chas. E. Tribby fifty dollars in part payment for lot No. 115, sq. 1242, to be conveyed to him by us in fee ($5,300) simple on Oct. 8, 1904," signed by the vendees, held sufficient to satisfy § 1117, D. C. Code [31 Stat. at L. 1367, chap. 854], although it does not state whether the consideration is to be paid in cash or by the assumption of certain trusts on the property. Johnson v. Tribby, 27 App. D. C. 281.

73. Howard v. Adkins [Ind.] 78 N. E. 665.

74. Contract was sufficient as the parties contemplated that the value of the merchandise to be exchanged would equal or exceed the value of the farm, and the excess if any was to be paid for in cash. Howard v. Adkins [Ind.] 78 N. E. 665.

75. A written contract between plaintiffs and defendant for the purchase of land, each to furnish certain portion of the money and to take title in the same proportion, satisfies the statute of frauds, though when it came to taking title defendant under a parol agreement advanced plaintiff's share of the money and took title to their share of the property as security. Holliday v. Perry [Ind. App.] 78 N. E. 877.

76. Hain v. Burton, 118 Mo. App. 577, 94 S. W. 589; Borum v. Swift & Co., 125 Ga. 198, 53 S. E. 608; Levin v. Dietz, 48 Misc. 593, 96 N. Y. S. 468. The contract for the sale of land may consist wholly of letters and telegrams, if they are connected by reference, express or implied, so as to show on their face that they all relate to the same subject-matter. Welsh v. Brainerd, 95 Minn. 234, 103 N. W. 1031. Correspondence between the parties held insufficient to satisfy the statute of frauds. Dillard v. Sanders [Tex. Civ. App.] 97 S. W. 108.

Trusts in real estate: Writings held not to be a sufficient memorandum within the statute of frauds requiring "trusts" in real estate to be in writing. Kennedy v. Bates [C. C. A.] 142 F. 51.

77. Daniels v. Rogers, 108 App. Div. 338, 96 N. Y. S. 642; Bowers v. Ocean Acc. & Guarantee Corp., 110 App. Div. 691, 97 N. Y. S. 485; Hain v. Burton, 118 Mo. App. 577, 94 S. W. 589. Must be completed by parol evidence without contradiction or the introduction of a new description. Howard v. Adkins [Ind.] 78 N. E. 665. It is not necessary that the description should contain the name of the county and state where it is situate. Crotty v. Effler [W. Va.] 54 S. E. 345. An incumbrance on a devisee's undivided interest describing it as all his interest in Godfrey Stiltz's estate is a sufficient description to satisfy the statute of frauds. Thompson's Ex'rs v. Stiltz [Ky.] 96 S. W. 884.

78. Frahm v. Metcalf [Neb.] 106 N. W. 227. Where an agent for the sale of real estate pursuant to written authority ex-

tions an auctioneer has authority to sign the name of both the vendor and purchaser.[80]

Letters if they constitute a contract may show an employment of a real estate broker.[81]

To answer for the debt of another or to indemnify or insure.[82]—A writing relied on to satisfy the statute must be definite and certain in its terms,[83] and must either itself or in connection with other writings identify the debt which is the subject of the promise without the aid of parol evidence.[84] A contract of insurance required in Georgia to be signed suffices if the insurer's name placed there with signatory intent appears in the body of the policy,[85] or on a permit attached to and part of the policy.[86]

(§ 10) *B. Delivery and acceptance.*[87]—An oral contract for the sale of goods, in an amount which is within the statute, may be taken out of its operation by a delivery by the seller and acceptance by the purchaser.[88] A delivery to a carrier for transportation to the purchaser is not such delivery and acceptance as takes the contract out of the statute.[89] If the buyer exercises absolute dominion over the property, there is such delivery and acceptance as will take the contract out of the stat-

ecutes a contract in behalf of his principal, which gives the name of the purchaser and identifies him, the contract is valid and enforceable, though the written authority to the agent did not refer to the purchaser by name but merely authorized a sale to any person of the land described at the price named. Stuart v. Mattern, 141 Mich. 686, 12 Det. Leg. N. 616, 105 N. W. 35.

79. Hopper v. McAllum [Miss.] 40 So. 2. Under a statute requiring a writing signed by the party to be charged or his authorized agent, it is not necessary that an agent's authority to make an executory contract of sale of land be in writing (Whitworth v. Pool [Ky.] 96 S. W. 880), nor is it necessary that the agent indicate in writing that the principal's name was signed by her as agent (Id.). Tender of a deed by the husband pursuant to a contract for sale of land signed by the wife as his agent, together with other evidence, held sufficient to show that the wife was an authorized agent within the statute. Id. In Georgia the authority to make a memorandum required to be in writing by the statute of frauds may be by parol. Civ. Code 1895, § 3002, held not to require the authority of an agent to sell land to be in writing. Brandon v. Pritchett [Ga.] 55 S. E. 241. And hence a parol ratification of a contract of sale by one without authority to sell is sufficient, provided such person signed a sufficient memorandum which showed on its face that it was executed in behalf of the owner. Id.

80. Where no memorandum is made by the mortgagor or the auctioneer at a mortgage foreclosure sale, the purchaser cannot enforce the sale to him. If the auctioneer places the purchaser's name and the amount bid on the printed advertisement, both parties are bound. Dickerson v. Simmons [N. C.] 53 S. E. 850. An auctioneer employed to sell land has no authority to sign a memorandum of sale containing terms other than those actually the basis of the sale. A memorandum not in accord with the actual sale is "not signed by the party charged or some one thereunto by him lawfully authorized." Kelly v. Holbrook, 191 Mass. 565, 77 N. E. 1037.

81. See ante, § 6.

82, 83. A written agreement to answer for the debt, default, or doings of another "must be stated with reasonable certainty so that it can be understood from the writing itself without having recourse to parol proof. It cannot be partly in writing and partly parol Commonwealth Bank v. Kirkland, 102 Md. 662, 62 A. 799. A letter held too uncertain and indefinite to constitute a valid promise to answer for the debt of another. Craft v. Lott [Miss.] 40 So. 426. A written guaranty of the debt of another held to constitute a compliance with Code 1896, § 2152, subd. 3. Marx v. Ely [Ala.] 41 So. 411.

84. Pearce & Co. v. Stone Tobacco Co., 125 Ga. 444, 54 S. E. 103.

85, 86. Delaware Ins. Co. v. Pennsylvania Fire Ins. Co. [Ga.] 55 S. E. 330.

87. See 5 C. L. 1554.

88. Orr v. Hall [Neb.] 106 N. W. 656; Federal Iron & Brass Bed Co. v. Hock, 42 Wash. 668, 85 P. 418; Brockman Commission & Cold Storage Co. v. Pound [Ark.] 91 S. W. 183. Evidence held to show a delivery and acceptance of cattle so as to take the oral contract for their purchase out of the statute of frauds. Bennett v. Thuet [Minn.] 108 N. W. 1.

89. Direction by a seller to a railroad company to deliver a car of coal owned by the seller to one who had purchased it by a parol contract is not a delivery to and acceptance by the purchaser so as to take it out of the statute of frauds, precluding countermanding of order by purchaser. A custom to do business in such way could not overrule the statute of frauds. Calvert v. Schultz [Mich.] 13 Det. Leg. N. 14, 106 N. W. 1123. When a seller loads articles exceeding $50 in value on cars for the purchaser, but forbids the carrier to deliver the goods to the buyer until they are paid for, there is not such completed delivery to the purchaser as will take the contract out of the statute of frauds. Scully v. Smith, 110 App. Div. 88, 96 N. Y. S. 998.

ute, though the seller retain possession as bailee of the purchaser. If, however, by the terms of the sale the buyer's right to possession is restricted, the contract is void.[90] A delivery and acceptance of a part of the goods takes the entire parol contract out of the statute.[91] While the delivery and acceptance of goods must be under the parol contract, it is not necessary that there be an express reference thereto in order to take it out of the statute.[92]

(§ 10) *C. Part payment and earnest money.*[93]—Part payment of the purchase price of goods purchased under a parol contract, otherwise within the statute, takes the contract out from its operation,[94] but mere payment of a part or all of the purchase price does not so operate as to an oral contract for the sale of land,[95] though equities may arise therefrom.[96]

(§ 10) *D. Part performance.*[97] *Contracts for the sale of land.*—In some jurisdictions a part performance of an oral contract for the sale of land will take it out of the operation of the statute,[98] or at least will raise up equities to specific performance liens or constructive trusts,[99] while in others it does not.[1] Nothing is to be considered a part performance which does not put the party performing in a situation which is a fraud on him, unless the agreement is fully performed.[2] One re-

90. Oral sale of steer, seller retaining possession for exhibition purpose, within statute, the owner advertised he had purchased steer. Sotham v. Weber, 116 Mo. App. 104, 92 S. W. 181. Where goods sold were consigned to a third person who inquired of the purchaser about delivery and was told that the purchaser would do his own hauling, and upon arrival gave notice to him, but the goods were destroyed before they were removed, held that there was no delivery and acceptance to take the sale from under the statute of frauds. Eichberg v. Benedict Paper Co. [Mo. App.] 95 S. W. 963.

91. Walnut Ridge Mercantile Co. v. Cohn [Ark.] 96 S. W. 413.

92. Delivery and acceptance under Kirby's Dig. § 3656. Walnut Ridge Mercantile Co. v. Cohn [Ark.] 96 S. W. 413.

93. See 5 C. L. 1555.

94. Orr v. Hall [Neb.] 106 N. W. 656. Under Code Civil Proc. § 3276, and Civ. Code §§ 2185, 2340, an oral contract for the sale of goods is valid where a part of the purchase price is paid, hence authority to an agent to sell, but requiring him to exact part payment in cash, is not within purview of statute requiring that authority to agent to enter into a contract required by law to be in writing must be in writing. Case v. Kramer [Mont.] 85 P. 878.

95. Scheuer v. Cochem, 126 Wis. 209, 105 N. W. 573.

96. See post, § 10D, also Trusts, 6 C. L. 1736; Specific Performance, 6 C. L. 1498.

97. See 5 C. L. 1555, n. 6 et seq. See, also, Specific Performance, 6 C. L. 1498.

98. Fleming v. Baker [Idaho] 85 P. 1092. A parol modification of a written contract for the cultivation of a farm, acted on by the parties, and a crop of grain raised thereunder, is not void under the statute of frauds. Part performance takes it out of the operation of the statute. Denison v. Sawyer, 95 Minn. 417, 104 N. W. 305. Where pursuant to an oral agreement to devise lands in consideration of the promisee caring for the promisor during his life the promisee performs his part of the agreement, there is such part performance as takes the contract out of the statute of frauds. Soper v. Galloway, 129 Iowa, 145, 105 N. W. 399. Where one deeds land to another in consideration of the latter's oral promise to maintain the grantor, the conveyance and furnishing of maintenance by the grantee to the grantor is such part performance of the contract as takes it out of the statute of frauds. Norris v. Lilly, 147 Cal. 754, 82 P. 425.

99. See, also, Specific Performance, 6 C. L. 1498; Trusts, 6 C. L. 1736; Liens, 6 C. L. 451. A verbal agreement to convey land if part performed may be enforced in equity. Price v. Lloyd [Utah] 86 P. 767.

1. Rhea v. Craig [N. C.] 54 S. E. 408. In North Carolina a parol partition of land followed by possession for a less period than that required for the acquiring of title by adverse possession is ineffectual, since such parol partition agreement is within the statute of frauds, but exclusive possession of the allotted shares pursuant to the oral partition for the period of limitation gives title by adverse possession. Id. In Tennessee part performance of an oral contract for the sale and conveyance of land will not take the contract out of the operation of the statute; thus one seeking specific performance of an oral contract to devise land who shows that he quit a lucrative employment and rendered services in reliance on the promise is not entitled to the relief. Goodloe v. Goodloe [Tenn.] 92 S. W. 767. Under Ky. St. 1903, § 470, an oral contract of sale of real estate cannot be specifically enforced, though fully performed by complainant. Lucas v. McGuire [Ky.] 96 S. W. 867.

2. Jones v. Patrick, 140 F. 403. Where a contract within the statute has been so far performed as to render it a fraud upon one for the other to repudiate it, the statute will not prevent its enforcement. McLeod v. Hendry [Ga.] 54 S. E. 949. There can be no part performance sufficient to justify a specific performance of an oral contract to convey land where all such acts were disputed by a tenant in possession. Halsell v. Renfrow, 202 U. S. 287, 50 Law. Ed. —.

lying on a part performance must prove the oral contract and its terms and his performance thereof by clear and convincing evidence.[3] A contract for the performance of services, a part of the agreed value thereof to be credited on the purchase price of real estate thereafter to be conveyed, although for the sale of real estate and not in writing, furnishes a basis for the value of the services rendered, provided the party agreeing to perform the work did not abandon it or fail to go forward with it through his own fault.[4] In most jurisdictions surrender of possession to the purchaser and payment by him of a part or all of the purchase price,[5] or possession and making of valuable improvements,[6] and in Arkansas possession alone if taken pursuant to the contract,[7] will take an oral contract in regard to land out of the operation of the statute. To constitute one of the elements of part performance which will take the oral contract out of the operation of the statute, the possession of the purchaser must be clearly shown to refer to and result from the contract of purchase.[8] Continuance in possession by one in possession at the time the contract is entered into,[9] either as tenant in common[10] or lessee,[11] is insufficient. Where a con-

Where one having a vendor's lien agrees with a prospective buyer to release the same if he will buy, which he does, paying the price to his insolvent vendor, equity will enforce the agreement to release though it be within the statute of frauds. McKinley v. Wilson [Tex. Civ. App.] 96 S. W. 112.

3. Evidence held not to comply with above rule. Russell v. Sharp, 192 Mo. 270, 91 S. W. 134.

4. Murphy v. Adams, 8 Ohio C. C. (N. S.) 583.

5. Scheuer v. Cochem, 126 Wis. 209, 105 N. W. 573. The vendee in possession can maintain an action to quiet title against a purchaser with notice. Morrisson v. Gosnell [Neb.] 107 N. W. 753. Where the owner orally agrees to convey an interest in land to another on condition that such other shall do certain things, and the latter performs his part of the agreement, such performance by him together with possession of the interest agreed to be conveyed constitutes such part performance as entitles the promisee to specific performance. Churchill v. Russell, 148 Cal. 1, 82 P. 440. Where a tenant in possession makes an oral agreement "for a written agreement" of sale and purchase, such agreement does not change his status into a possession under a parol agreement of sale so as to constitute part performance. Nesbitt v. Tarbrake, 30 Pa. Super. Ct. 460. Part payment of the purchase price is not a part performance sufficient to take a parol contract of sale out of the statute. Corbin v. Durden [Ga.] 55 S. E. 30.

6. Phillips v. Jones [Ark.] 95 S. W. 164. Where a person promises to convey land to another on condition that the latter will do certain things and he does them and takes possession of the land and expends money in the improvement thereof, managing and controlling it as his own, there is such part performance as takes it out of the statute of frauds. White v. Poole, 73 N. H. 403, 62 A. 494. Where one orally agrees to advance the purchase price of land for another, to take title in himself and to execute a bond for a deed on repayment, and the agreement is so far carried out that the money is paid, title taken, and the purchaser goes into possession and makes improvements, there is a sufficient part performance to take it out of the statute of frauds. Peterson v. Hicks [Wash.] 86 P. 634. A lessee in possession under a written lease made an oral lease within the statute for another term, and relying on the oral lease declined another building and made $400 worth of improvements. Landlord repudiated the oral lease before the expiration of the written one. Held that the case was not taken out of the statute as there was no possession referable to the oral lease and the improvements were too inconsequential. Lechenger v. Merchants' Nat. Bank [Tex. Civ. App.] 96 S. W. 638. Where it is orally agreed that one shall advance the purchase price yet due on a farm, take title as security, and deed it to the purchaser upon being reimbursed, and the purchaser takes possession and clears a portion and the land increases in value, there is such part performance as will take it out of the statute. McLeod v. Henry [Ga.] 54 S. E. 949.

7. Phillips v. Jones [Ark.] 95 S. W. 164. An oral agreement for the partition of land by cotenants followed by exclusive possession by each of their respective allotments, and the execution by one to the other of a deed to the latter's moiety, is binding on the parties and enforceable in equity. Seawell v. Young [Ark.] 91 S. W. 544.

8. Steger v. Kosch [Neb.] 108 N. W. 165. Acts not done pursuant to the contract but which might well have been done in any event will not take the contract out of the statute. Burckhardt v. Greene, 7 Ohio C. C. (N. S.) 515. Acts done prior to a verbal agreement to convey land are never a part performance upon which to decree specific performance. Price v. Lloyd [Utah] 86 P. 767.

9. Phillips v. Jones [Ark.] 95 S. W. 164. Continuance in possession by one in possession at the time of entering into an oral agreement for the sale of land, and payment of a part of the purchase price, is not such part performance as will take the contract without the statute of frauds. Pence v. Life, 104 Va. 518, 52 S. E. 257.

10. O'Brien v. Knotts, 165 Ind. 308, 75 N. E. 594. But where a tenant in common takes actual and absolute possession of every part of a tract of land under a parol agreement for its purchase, and pays all of the

tract for the sale of several tracts of land is an entire contract and indivisible, the taking of possession of one of the tracts by the purchaser, the other elements being present, is part performance as to all.[12]

Parol gifts of land.—Equity protects a parol gift of land equally with a parol agreement to sell it, if accompanied by possession and the donee, induced by the promises to give it, has made valuable improvements on the land.[13] The improvements must be of substantial value. Improvements of slight or insignificant value are insufficient.[14] The possession must be with the consent or acquiescence of the donor.[15] Mere remaining in possession and exercising ownership on the premises is insufficient.[16] The parol gift or agreement to convey land must be shown by definite, unequivocal evidence.[17]

Contracts not performable within a year.—Such performance that nonenforcement will aid fraud is necessary.[18] Where a lessee under an oral lease for a term exceeding one year goes into possession and makes valuable improvements, there is such part performance as will take the contract out of the operation of the statute.[19] One seeking to hold possession under such circumstances must show that the improvements enhance the rental value of the premises.[20] Mere taking of possession by the lessee under an oral lease for more than a year does not take it out of the statute, but it will be deemed a letting for a period equal to the intervals for the payment of rent fixed by the agreement.[21] In some jurisdictions, where by the terms of a verbal contract the acts to be done by one of the parties can by its terms be performed in a year, and he does perform within such time, it is enforceable against the other party, though by the terms of the contract the acts by him to be performed are not performable within a year.[22]

purchase price and makes valuable improvements, there is such performance as takes the contract out of the statute. Id.

11. Steger v. Kosch [Neb.] 108 N. W. 165.

12. Tillis v. Folmar [Ala.] 39 So. 913.

13. Merriman v. Merriman [Neb.] 106 N. W. 174; Karren v. Rainey [Utah] 83 P. 333. To take a parol gift of land out of the statute, the donee must not only enter into possession of the premises but also make improvements thereon, or perform such other acts with reference thereto as would make it inequitable not to enforce the gift. Snow v. Snow [Minn.] 108 N. W. 295.

14. Wallis v. Turner [Tex. Civ. App.] 16 Tex. Ct. Rep. 92, 95 S. W. 61. The making of valuable improvements or doing of analogous acts by a donee in possession rendering nonenforcement inequitable is essential to the enforcement of a parol gift of land. Price v. Lloyd [Utah] 86 P. 767.

15. Wallis v. Turner [Tex. Civ. App.] 16 Tex. Ct. Rep. 92, 95 S. W. 61.

16. Snow v. Snow [Minn.] 108 N. W. 295.

17. Price v. Lloyd [Utah] 86 P. 767.

18. Specific performance of a verbal agreement will be enforced on the ground of part performance only when the petitioner has so changed his position by the acts of performance that he cannot be restored to his former position, and the situation is such that to permit the defendant to invoke the statute would make it an instrument of fraud. Quinn v. Stark County Tel. Co., 122 Ill. App. 133. Specific performance of a parol contract to furnish telephone service for 20 years will not be enforced on the ground of part performance where the acts of performance consist of labor in constructing the line and a money contribution. Id.

19. Harrell v. Sonnabend, 191 Mass. 310, 77 N. E. 764. The owner of premises who has orally agreed to rent them to another for a period of 10 years may recede from it at any time before the lessee takes possession, and where he afterwards recedes and gives an oral lease for a less time, the fact that the lessee goes into possession and makes improvements does not give him a right to specific performance for the term first named. Czermak v. Wetzel, 100 N. Y. S. 167.

20. Watkins v. Balch, 41 Wash. 310, 83 P. 321.

21. Mollitor v. Thom Van Co., 118 Ill. App. 293. Under the Washington statute an oral lease for more than one year, where possession has been taken by the tenant, is not void in toto, but is valid for a term equal to the intervals during which rent is to be paid, if yearly for a year, if monthly for a month, terminable at the expiration of any of such periods by the giving of notice as required by statute. Watkins v. Balch, 41 Wash. 310, 83 P. 321.

22. City of Tyler v. St. Louis S. W. R. Co. [Tex.] 14 Tex. Ct. Rep. 839, 91 S. W. 1. An oral contract to cease doing business in a certain place and not to again engage therein at said place, where the promisor has received the consideration for such promise, is not within the statute as to contracts not to be performed in a year. Wolverton v. Bruce [Ind.] 89 S. W. 1018.

Contracts for sale of goods.—An oral sale of stocks in consideration that purchaser gives up a lucrative position and enters the employ of the corporation, which is done, is taken out of the statute by part performance.[23]

§ 11. *Operation and effect of statute.*[24]—The statute has no application to a contract which has been fully performed,[25] for an oral contract which is not void but merely nonenforceable is not affected by the statute after it has been executed.[26] Courts are not justified in straining the terms of a contract so as to bring it within the statute of frauds, nor should they be astute to discover reasons for evading it.[27] The statute is available only where it is sought to base rights on the parol contract.[28] The statute cannot be invoked as the basis of an action, but is available only as a defense[29] or a counter defense.[30] Such defense is a personal privilege,[31] which may be waived.[32] Heirs and privies of the parties to the contract may avail themselves of the defense,[33] but strangers to the contract cannot.[34] Under some circumstances a party may be estopped to urge the statute as a defense.[35] Collateral liabilities are not avoided by the nonenforceability of the contract,[36] thus the promise to pay for land which has been conveyed is enforceable, though not in writing.[37] One who has rendered services under a contract within the statute can recover therefor on a quantum meruit,[38] unless want of writing avoids the contract,[39] and one who under

23. Hightower v. Ansley [Ga.] 54 S. E. 939. Part performance is not defeated by quitting before the end of his term of employment where nonperformance is waived by a subsequent offer to carry out the sale. Id.

24. See 5 C. L. 1555.

25. Welch v. Mann, 193 Mo. 304, 92 S. W. 98; Jones v. Patrick, 140 F. 403. An oral contract, superseding or modifying a prior contract in writing, as required by the statute of frauds, will be upheld if executed. Lucas v. County Recorder of Cass County [Neb.] 106 N. W. 217. An oral agreement to form a partnership within a year, the copartnership to continue for several years, is not within the statute where the copartnership is formed within the year. Thereafter each partner becomes entitled to an accounting as to partnership property. Shropshire v. Adams [Tex. Civ. App.] 13 Tex. Ct. Rep. 540, 89 S. W. 448. See, also, ante § 2, as to novation of debtors.

26. An oral agreement made in consideration of marriage that after the marriage takes place a debt due from one to the other shall be regarded as paid is performed when marriage takes place, and no action on the debt can thereafter be maintained. Weld v. Weld, 71 Kan. 622, 81 P. 183.

27. Jones v. Patrick, 140 F. 403.

28. Not where suit is based on fraud. Lindley v. Kemp [Ind. App.] 76 N. E. 798.

29. McIlvane v. Big Stony Lumber Co. [Va.] 54 S. E. 473.

30. A statute providing that "no action shall be brought," etc., is equally applicable where the oral contract is attempted to be set up as an affirmative defense. Interposition of an oral lease as a defense in an action for possession. Lechenger v. Merchants' Nat. Bank [Tex. Civ. App.] 96 S. W. 638.

31. Brinkerhoff Zinc Co. v. Bond, 192 Mo. 597, 91 S. W. 523.

32. St. Anthony & D. Elevator Co. v. Cass County [N. D.] 106 N. W. 41. Where in an action to enforce a contract as modified by a parol agreement within the statute of frauds defendant's answer admits a part of the modification and does not plead the statute, the modification so far as admitted will be enforced. Modification of a contract binding defendant to execute a lease to plaintiff. Mansert v. Christian Feigenspan [N. J. Eq.] 64 A. 801.

33. Sonnemann v. Mertz [Ill.] 77 N. E. 550.

34. McIlvane v. Big Stony Lumber Co. [Va.] 54 S. E. 473; Brinkerhoff Zinc Co. v. Boyd, 192 Mo. 597, 91 S. W. 523.

35. Thus where a purchaser under a written contract for the sale of land is proceeding to raise the money with which to pay the purchase price and the vendor orally requests an extension of time within which to convey and the purchaser consents, the vendor will be estopped to set up the statute of frauds and claim purchaser had not performed in time fixed by written contract. Alston v. Connell, 140 N. C. 485, 53 S. E. 292.

36. Under the Pennsylvania statute of frauds and perjuries, an action may be brought to recover for the breach of a parol contract for the sale of land. Stephens v. Barnes, 30 Pa. Super. Ct. 127. In an action by a principal against his agent for misconduct, the relation may be shown by parol notwithstanding he was employed to purchase real estate. Bought and sold the property on his own account. Mucke v. Solomon [Conn.] 64 A. 738.

37. Where land has been conveyed to a purchaser, the vendor can recover an unpaid portion of the purchase price, though there was no written promise by the purchaser to pay, as in such case the statute of frauds is not applicable. Murray v. Schuldt [N. J. Law] 63 A. 904. In an action on notes given in consideration of the assignment of a leasehold interest in land, it is no defense thereto that the assignment was oral and hence within the statute of frauds. Wilkinson v. Sweet [Tex. Civ. App.] 14 Tex. Ct. Rep. 529, 93 S. W. 702.

an oral promise of a conveyance has paid the promisor money therefor can recover the money so paid,[40] or in Kentucky may have a lien.[41] Parol evidence may be given of the situation and relation of the parties to aid a written contract within the statute of frauds.[42] The consideration of a contract in other respects within the statute of frauds may be proved by parol.[43] One cannot avail himself of the statute of frauds to perpetrate fraud upon the other contracting party.[44] A statute providing that a written contract may be altered only by a contract in writing or by an executed oral agreement does not require that the oral agreement be executed at the time of its inception.[45]

§ 12. *Pleading and proof.*[46]—When the statute of frauds attacks the remedy, the lex fori governs, and is a rule of decision in the Federal courts.[47] In most jurisdictions the statute is regarded as establishing a rule of evidence and not one of pleading,[48] hence the complaint need not allege that the contract is in writing.[49] It is available as a defense under a general denial.[50] If it affirmatively appears from the complaint that the contract is not in writing, a demurrer will lie.[51] To be

38. One who pursuant to an oral agreement has performed work for another, in consideration of the other's agreement to let him occupy and use certain land for two years, can recover the reasonable value of his services where defendant refused to let him occupy the land, though the contract was within the statute of frauds. Gates v. Davis [Ky.] 89 S. W. 490.

39. In Nebraska, services as a real estate broker, rendered for the owner of the land without a written contract, cannot be recovered for as such on a quantum meruit. Rodenbrock v. Gress [Neb.] 104 N. W. 758.

40. Where one person furnishes money to another with which to pay a part of the purchase price of land under an oral agreement by the latter to convey a portion of the land to the former, and the contract cannot be specifically enforced because the purchaser sets up the statute of frauds, equity will require the latter to repay the money received. Cross v. Iler [Md.] 64 A. 33.

41. Where purchase price has been paid for land bought under an oral contract, the purchaser is entitled to a lien upon the land for the money paid upon the refusal of the vendor to convey. Lucas v. McGuire [Ky.] 96 S. W. 867.

42. Howard v. Adkins [Ind.] 78 N. E. 665.

43. Alsterberg v. Bennett [N. D.] 106 N. W. 49.

44. Where one joint purchaser takes entire title in his own name to secure payment for advancements made for the copurchasers, agreeing to deed over their share when the profits satisfy the debt, he cannot assert the statute to defeat an accounting. Holliday v. Perry [Ind. App.] 78 N. E. 877.

45. Civ. Code § 1698 is satisfied if the parol modification is subsequently duly carried out. Oatman v. Eddy [Cal. App.] 87 P. 210.

46. See 5 C. L. 1556.

47. Ballantine v. Yung Wing, 146 F. 621.

48. Where a complaint alleges a contract in writing, the defendant need not deny that it was in writing, to avail himself of the contention that it was not and hence within the statute. Levin v. Dietz, 48 Misc. 593, 96 N. Y. S. 468. Compare Daniels v. Rogers, 108 App. Div. 338, 96 N. Y. S. 642. The statute of frauds prescribes a rule of procedure and relates to the remedy (56 O. S. 101). Barr v. Poor, 7 Ohio C. C. (N. S.) 333.

49. Wall v. Continental Casualty Co., 111 Mo. App. 504, 86 S. W. 491. Where a written agreement is indispensable to a valid contract, a pleading of an agreement, though it does not affirmatively show that it is not in writing, is a pleading of a written contract and not demurrable. Barnsdall v. Waltemeyer [C. C. A.] 142 F. 415; Delaware Ins. Co. v. Pennsylvania Fire Ins. Co. [Ga.] 55 S. E. 330; International Harvester Co. v. Campbell [Tex. Civ. App.] 96 S. W. 93. A pleading which alleged a promise to answer for the debt, default, or miscarriage of another is not demurrable because it fails to allege that such promise was in writing. Tyson v. Jackson Bros. [Tex. Civ. App.] 14 Tex. Ct. Rep. 431, 90 S. W. 930. Where a complaint to cancel a vendor's lien alleges an agreement to release the same, the presumption is that it was in writing. McKinley v. Wilson [Tex. Civ. App.] 96 S. W. 112.

50. Morgart v. Smouse [Md.] 63 A. 1070. In an action on an oral contract alleged in the complaint to be one by its terms to be performed within a year, the defendant can avail himself of the defense of the statute of frauds when it appears from the evidence that the contract was for a year, performance to be commenced at a future date, though he had not pleaded the statute. Where the evidence as to when performance was to commence is conflicting, the question is for the jury. Closson v. Thompson Pulp & Paper Co., 97 N. Y. S. 1113. But see holding that where it does not appear from the complaint that a contract by its terms not to be performed within a year is not in writing, the defendant to make it available must set up such defense by answer. It is a defense which the party relying on it must assert affirmatively. Id.; Leggett v. Campbell, 96 N. Y. S. 639. Where a complaint alleges that one of the defendants agreed to indorse and pay the other's note in consideration of a transfer of land to the maker, the statute of frauds relating to agreements to answer for the debt of another may be relied on under a general denial. Kaufer v. Stumpf [Wis.] 109 N. W. 561.

available as a reply to special pleas it should be set up by replication.[52] While in an action on a contract a general denial is sufficient to let in the defense of the statute of frauds, defendant must make the defense good by objecting to parol evidence establishing the contract.[53] One relying on an oral contract has the burden of showing that its terms are such that it need not be in writing,[54] but where there is no dispute as to the terms of the contract, the question of whether or not it is within the statute is for the court.[55] In an action on a contract, though it appears from the complaint that it is one which must be in writing, a request for a peremptory instruction for defendant, not disclosing upon what ground it is asked, does not raise the defense of the statute of frauds.[56]

FRAUDULENT CONVEYANCES.

§ 1. The Fraud and Its Elements (1841). Bulk Sales (1844). Consideration (1846). Retention of Possession or Apparent Title (1847). Reservation of Benefits and Resulting Trusts (1848). Fraudulent Intent and Evidence of Fraud (1849). Fraud in the Grantee and Notice to Him of Fraud (1851). Relationship of the Parties (1852). Preference to Creditors (1853).
§ 2. Validity and Effect (1855).
§ 3. Who May Attack (1855).
§ 4. Rights and Liabilities of Persons Claiming under a Fraudulent Grantee (1856).
§ 5. Extent of Grantee's Liability (1856).
§ 6. Remedies of Creditors (1856).

§ 1. *The fraud and its elements.*[1]—A fraudulent conveyance is one made with intent to hinder, delay, or defraud creditors of the grantor,[2] or to avoid some duty

51. Leggett v. Campbell, 96 N. Y. S. 639; Wallis v. Turner [Tex. Civ. App.] 16 Tex. Ct. Rep. 92, 95 S. W. 61. Complaint did not show that the contract was oral. Alexander v. Cleland [N. M.] 86 P. 425. In an action on a contract which the statute of frauds requires to be in writing, it is not necessary to allege that it is in writing, and a demurrer to the complaint will be sustained only when it appears therefrom that the contract is **not** in writing. Allen v. Powell, 125 Ga. 438, 54 S. E. 137. The defense of the statute of frauds must be specifically interposed, which may be done by demurrer where it affirmatively appears from the complaint that the cause of action is within the statute. International Harvester Co. v. Campbell [Tex. Civ. App.] 96 S. W. 93.

52. Notice that plaintiff will rely on the statute of frauds is insufficient. Snow v. v. Greisheimer, 120 Ill. App. 516.

53. International Harvester Co. v. Campbell [Tex. Civ. App.] 96 S. W. 93. Failure to object to the introduction of parol evidence establishing an oral contract waives the defense of the statute of frauds unless specifically pleaded. Id.

54. In an action on an oral contract of employment for one year, the burden is on plaintiff to prove that the contract was made on the day the employment was to commence and not a few days before as claimed, since if to commence at a future date it was within the statute. Jacobson v. Schiffer, 99 N. Y. S. 864.

55. Where a party sues on a contract and sets it out in haec verba, the fact that he has treated it as one extending over a period of more than one year does not deprive him or the court from thereafter asserting that it is one which may be performed within a year, since the proper decision of the claim depends on the very terms of the contract and not inconsistent allegations in the pleadings by the party relying on it. Lennard v. Texarkana Lumber Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 82, 94 S. W. 383.

56. International Harvester Co. v. Campbell [Tex. Civ. App.] 96 S. W. 93.

1. See 5 C. L. 1557.

2. Held fraudulent conveyances: Where a president of a corporation who was also its largest creditor resigned so he could take a conveyance of all the property of the corporation, the conveyances should be treated as made to an officer of the corporation for the purpose of preferring him over other creditors and was therefore void. Nixon v. Goodwin [Cal. App.] 85 P. 169. Voluntary release by an insolvent of a right to recover a payment made under a gaming contract is fraudulent where such right of recovery is prescribed by statute. Anderson v. Metropolitan Stock Exch., 191 Mass. 117, 77 N. E. 706. Where a husband purchased and paid for land out of his own funds and thereafter borrowed money from his wife and agreed to convey the land to her, he was nevertheless held out as owner of the land and incurred debts on faith thereof. Later he conveyed to his wife. Held fraudulent as to creditors who extended credit on faith of his ownership. Long v. Deposit Bank [Ky.] 90 S. W. 961. Where a husband conveyed his interest in land owned jointly by himself and wife to his wife, and both gave a mortgage to a third person, creditors of the husband could levy on the husband's equity of redemption of an undivided half. Gilcreast v. Bartlett [N. H.] 64 A. 767. Where a debtor gives a mortgage to her sister for a large amount and there is no consideration passed, and such mortgage is transferred to a trusted em-

or obligation incumbent upon him.[3] There must be a conveyance or transfer[4] and

ployе of the mortgagor who knows that the transfer is not bona fide but for the purpose of defrauding creditors, it is fraudulent and void as to them, and being designed in fraud it is immaterial that the mortgagor was solvent at the date of its execution. Ullman v. Lockhart [Fla.] 41 So. 452.

A conveyance is not fraudulent as to the grantee because of the fact that his grantor acquired it through a fraudulent conveyance. Wilson v. Parke [Mo. App.] 96 S. W. 244. An agreement between an assignor for the benefit of creditors and the creditor's assignee that the sureties on an indemnity bond shall not be released is not fraudulent when not secretly made. Creditor being a trustee for third persons the sureties were not released. Weddington v. Jones [Tex. Civ. App.] 15 Tex. Ct. Rep. 107, 91 S. W. 818. Prior to June 1, 1903, when ch. 160, p. 124 of Public Laws took effect, a transfer by a married woman of her separate personal property, though made with intent to deprive her husband of his distributive share, was not fraudulent as to the husband. Wright v. Holmes, 100 Me. 508, 62 A. 507. Up to the moment of bankruptcy a party may make a valid disposition of his property if done for a fair consideration and with an honest motive, and if there be fraudulent intent, collusion must be shown in order to affect the purchaser. In re Benjamin, 140 F. 320.

Transfer by husband to wife of a **calf of trifling value** will not be disturbed at the instance of the husband's creditors. Foreman v. Citizens' State Bank, 128 Iowa, 661, 105 N. W. 163. Where the son of a decedent was insolvent and his interest in his father's estate had been exhausted by advancements, the act of his sisters in conveying their interests in their father's estate to a minor son of the insolvent was not fraudulent as to his creditors. Hickey v. Davidson, 129 Iowa, 384, 105 N. W. 678. A bill of sale, absolute in terms but given as security for present indebtedness and future advances, is not fraudulent as to creditors as a matter of law. McCormick Harvesting Mach. Co. v. Citizens' Bank [N. D.] 106 N. W. 122. A conveyance from husband to wife in consideration of an unenforceable promise made before marriage is not fraudulent as to a subsequent creditor of the husband. Welch v. Mann, 193 Mo. 304, 92 S. W. 98.

The emancipation of a child is not a fraudulent conveyance of his earnings by a parent. Livesley v. Heise [Or.] 85 P. 509. Future earnings of minor children are not assets of the father's estate to which creditors may look, and a parent, though insolvent, may relinquish his right to them by will. Merrill v. Hussey [Me.] 64 A. 819.

3. It is a fraudulent conveyance for a man with intent to defraud his future wife to make a voluntary conveyance of his property, though at the time of such conveyance he has not selected any particular woman to be his wife. Higgins v. Higgins, 219 Ill. 146, 76 N. E. 86. A conveyance **for the purpose of defeating a judgment for alimony,** which might be recovered in a suit which the grantor's divorced wife threatened to bring against him, is fraudulent. Foster v. Beidler [Ark.] 96 S. W. 175.

Wife's right to maintenance is protected by Civ. Code § 3439, making a transfer to defraud creditors void as against them. Kessler v. Kessler [Cal. App.] 83 P. 257. Under Civ. Code § 157, neither spouse has any interest in the property of the other, hence a conveyance by the husband does not affect his power to maintain his wife and is not fraudulent as to her right to maintenance. Id.

NOTE. Conveyance in fraud of alimony: Whether alimony has been decreed as incident to a divorce suit, or whether the wife is entitled to it and seeking to enforce it, a conveyance for the purpose of defeating her right is fraudulent. Bowman v. Worthington, 24 Ark. 522; Wood v. Wood, 54 Ark. 172, 15 S. W. 459; 2 Bigelow, Frauds 147; Bumpas, Fraudulent Conveyances, § 504. In Pickett v. Garrison, 76 Iowa, 347, 41 N. W. 38, 14 Am. St. Rep. 220, it is said, "While it is true that the claim for alimony is not a debt within the meaning of that term, and that it must be allowed according to equitable principles, yet it is also true that it is a right, contingent to some extent, which becomes vested with the right to divorce. It can no more be defeated by a fraudulent conveyance than if it were fixed and certain as to amount." See, also, Chase v. Chase, 105 Mass. 385; Livermore v. Boutelle, 11 Gray [Mass.] 217. In Foster v. Foster, 56 Vt. 560, it is held (quoting from the syllabus) that the lien will attach to the real estate which the libelee has fraudulently conveyed after the cause of divorce existed and just before the libel was brought and injunction served, such conveyance having been made in contemplation that alimony might be granted, without consideration, and with the fraudulent intent of preventing its payment, and it is immaterial whether the grantees were aware of such intent. See, also, Tyler v. Tyler, 126 Ill. 525, 21 N. E. 616, 9 Am. St. Rep. 642; Bonslough v. Bonslough, 68 Pa. 496; Kamp v. Kamp, 46 How. Prac. [N. Y.] 143. The law will not tolerate a conveyance made confessedly to circumvent an action for alimony which it expressly authorizes.—See Foster v. Beidler [Ark.] 96 S. W. 175.

4. A decree of distribution is not, in New Jersey, a conveyance. Bayley v. Bayley [N. J. Eq.] 63 A. 11. Rev. St. 1895, art. 2547, providing that where a **loan of goods** or chattels shall be made to one and shall have remained in his possession for two years without demand for their return, or when any reservation shall have been made of the use of such property the transfer shall be held fraudulent unless the loan is evidenced by a recorded instrument, does not apply to a bailment stored without charge for a reasonable time without any agreement that the bailee could use the same. Woodward v. San Antonio Traction Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 364, 95 S. W. 76. Where an intestate bailed goods with intent to defraud creditors, his fraudulent intent was no defense in an action by his administrator to recover the goods. Knapp v. Knapp, 118 Mo. App. 685, 96 S. W. 295.

an intent to defraud,[5] unless the transaction is one which is by law denominated as fraudulent,[6] and the grantee must have or be charged with notice of such intent.[7] There must be creditors whose rights will be prejudiced,[8] although where the conveyance is conceived in fraud and is made for the purpose of defeating the rights of future creditors, it is fraudulent as to them.[9] Exempt property not being liable for

5. Where assignment of credits by a corporation was made on the morning of the day it suspended and before a mortgagee took possession, but were not delivered until after suspension and assumption of possession by the mortgagee, the assignment is considered as having been made at the time of delivery and not at the time of execution of the papers. Russel & E. Mfg. Co. v. Faitoute Hardware Co. [N. J. Eq.] 62 A. 421. It must be shown that the conveyance was made with intent to hinder, delay, and defraud creditors, and that the grantee participated in such intent. Atkinson v. McNider [Iowa] 105 N. W. 504. Where a merchant was deeply in debt and sold his stock to a bona fide purchaser who paid the fair cash value of the stock, which was used in paying the seller's debts so far as it would go, the sale was held not to be fraudulent. Purcell Wholesale Grocery Co. v. Bryant [Ind. T.] 89 S. W. 662.

6. Under P. L. 1896, p. 298, § 164, prohibiting the assignment of property by a corporation when it is insolvent, contemplating insolvency or has suspended business for want of funds, and providing that such transfer shall be void as to creditors, but protecting a bona fide purchaser, a transfer of credits by an insolvent corporation after it has suspended business is not valid, though made to a bona fide purchaser. Russel & E. Mfg. Co. v. Faitoute Hardware Co. [N. J. Eq.] 62 A. 421. The fact that such assignment was in pursuance of legal proceedings and not voluntary does not affect the invalidity of such proceedings. Id.

7. Where there was no evidence that the grantee knew of or shared in the fraudulent intent, a judgment for plaintiff cannot be sustained. Buongierno v. Schiller, 98 N. Y. S. 464. In order to charge land conveyed to another for a valuable consideration with a grantor's debts, it must appear that the purchaser had notice of the grantor's fraudulent intent. Sutton & Co. v. Christie [W. Va.] 53 S. E. 602. A complaint alleging that a conveyance was executed for the benefit of the grantee and with intent to defraud creditors of the grantor sufficiently alleges fraud on the part of the grantee. Klauber v. Schloss [Mo.] 95 S. W. 930.

8. Where in an action to set aside an alleged fraudulent conveyance the debt asserted was incurred in partnership transactions and was a partnership matter, it cannot be determined in the absence of a partnership accounting what the amount of the debt is, hence the conveyance cannot be decreed fraudulent. Mertens v. Mertens, 48 Misc. 235, 96 N. Y. S. 785.

Who are creditors: One who has a right of action for tort is a creditor of the wrongdoer within B. & C. Comp. § 5508. Seed v. Jennings [Or.] 83 P. 872. Under the California Code a mortgagee is a creditor of the mortgagor before the docketing of a deficiency judgment, and a violation of the bulk sales law is fraudulent as to him. Calkins v. Howard [Cal. App.] 83 P. 280. A wife after a decree dissolving her marriage and awarding her alimony may sue to set aside a transfer of property by her husband pending the divorce action with intent to defeat her alimony. Cochran v. Cochran, 96 Minn. 523, 105 N. W. 183. While A was a debtor of B he made a fraudulent conveyance to C. Subsequently he conveyed land to B to secure the debt by deed, reciting as a consideration the amount of the debt. B quitclaimed to another reserving a vendor's lien. Held he was a creditor whose debt existed at the time of the fraudulent conveyance. James v. Mallory [Ark.] 89 S. W. 472. A judgment based upon a bona fide indebtedness cannot be impeached by another creditor because the debtor waived service and confessed the debt, or otherwise facilitated the obtaining of the judgment, nor because the creditor agreed to hold the property obtained under the judgment for the benefit of others who would contribute to the payment of the debt and expense of procuring the judgment. Hardin v. Kelley [C. C. A.] 144 F. 353. Under the rule that deeds must be signed and acknowledged by the grantor and that a voluntary conveyance shall be void as to creditors unless sufficient property subject to execution is retained to satisfy debts, where before deeds of gift were acknowledged one became a creditor of the grantor who did not retain sufficient property to pay his debts, the deed was fraudulent. Lewis v. Herrera [Ariz.] 85 P. 245.

9. Where a grantor before conveyance was subject to a contingent liability, which contingency occurred after the conveyance, the indebtedness should be considered as having accrued when the contingent liability was incurred. Welch v. Mann, 193 Mo. 304, 92 S. W. 98. In order to set aside a conveyance as fraudulent against future creditors, fraudulent intent must be alleged and proved by such creditors. Willett v. Froelich [Ky.] 90 S. W. 572. A creditor in order to maintain an action to set aside as fraudulent a conveyance of his debtor must show an unsatisfied judgment or execution upon a cause of action existing at the time of the conveyance, or a cause of action arising subsequent thereto, in which latter case he must show that the conveyance was made with intent to defraud subsequent creditors. Seed v. Jennings [Or.] 83 P. 872. A creditor who seeks to subject a life policy which has a cash surrender value, and which provides that if the insured lives a certain time the company will pay him a certain sum of money, must show that the insured was insolvent when the policy was issued, or that his debt existed at such time, or that the policy was taken out with a view to create future indebtedness. National Bank of Commerce v. Appel Clothing Co. [Colo.] 83 P. 965. Where in an action by a subsequent creditor to set aside a deed to the wife as in violation

debts, its conveyance cannot be fraudulent,[10] unless the right thereto is waived,[11] hence there can be no fraudulent conveyance of the homestead[12] or of the proceeds of a sale thereof,[13] unless as to a creditor whose debt was incurred prior to the acquisition of such homestead.[14]

Bulk sales.[15]—In many states bulk sales of his stock of merchandise by a retailer are declared fraudulent unless statutory conditions are complied with.[16] There is some conflict as to the validity of such statutes, but by the weight of authority they are constitutional[17] and a valid exercise of the police power.[18] In some states

of Code 1904, § 2458, it appears that the deed was procured with the husband's money, yet the husband was not indebted at the time, it must further appear that the transaction was in anticipation of future indebtedness and to defraud future creditors. Richardson v. Pierce [Va.] 54 S. E. 480. Where a mortgage was executed before debts were created, actual fraudulent intent participated in by both mortgagor and mortgagee must be shown. Rike v. Ryan [Ala.] 41 So. 959.

Evidence insufficient to show actual fraud where a subsequent creditor sought to set aside a voluntary conveyance from brother to sister. Hunt v. Nance [Ky.] 92 S. W. 6. A sale cannot be held to have been made with intent to defraud future creditors where it does not appear that the seller designed to contract debts which he did not intend to or might not be able to pay. Hart v. Brierley, 189 Mass. 598, 76 N. E. 286.

10. Hoskins v. Fayetteville Grocery Co. [Ark.] 96 S. W. 195; Rike v. Ryan [Ala.] 41 So. 959; Foreman v. Citizens' State Bank, 128 Iowa, 661, 105 N. W. 163. Where a wife uses exempt wages of the husband in property, such property is not subject to the husband's debts. Ehlers v. Blumer, 129 Iowa, 168, 105 N. W. 406.

11. In re Connor, 146 F. 998.

12. Homestead. Deweese v. Deweese [Ky.] 90 S. W. 256. Testimony by a witness that a debtor told him he intended to redeem land on which was his home is insufficient to show that it was his homestead when he conveyed it. James v. Mallory [Ark.] 89 S. W. 472. Where the transfer by husband to wife of the homestead was not with intent to defraud creditors in case of future abandonment, it was not rendered so by the fact that the husband subsequently filed on a government homestead and was joined there by his family. Commercial State Bank v. Kendall [S. D.] 106 N. W. 53. Where a conveyance is set aside, the property is to be administered as that of the debtor, who is not precluded from asserting his right of homestead exemption. In re Thompson, 140 F. 257.

13. Where a wife refused to sign a mortgage of the homestead unless part of the proceeds should be used to purchase corporate stock in her name and for her separate use, the fact that the stock was first taken in the name of the husband and assigned to her does not render such assignment fraudulent as to creditors of the husband. Yardley v. San Joaquin Valley Bank [Cal. App.] 86 P. 978.

14. Where an insolvent who assigned for the benefit of creditors was paid his homestead exemption out of the proceeds of the sale of his home, which he used to purchase an option on such home from the purchaser at the sale and subsequently paid the balance, it was held that the homestead exemption received was thereby placed beyond the reach of a creditor whose claim antedated the acquisition of the homestead and was fraudulent. Porter v. Hart County Deposit Bank & Trust Co. [Ky.] 96 S. W. 832.

15. See 5 C. L. 1559, n. 20, et seq.

16. For enumeration of such states see Thorpe v. Pennock Mercantile Co. [Minn.] 108 N. W. 940.

17. Sess. Laws 1903, p. 249, c. 30, § 1, does not impair the right to private property, nor is it class legislation. Williams v. Fourth Nat. Bank, 15 Okl. 477, 82 P. 496. Pub. Acts 1905, p. 322, No. 223, declaring void as against creditors a sale in bulk of merchandise except on compliance with certain conditions, applies to residents and nonresidents, and does not abridge privileges and immunities of citizens nor deny equal protection of the law. Spurr v. Travis [Mich.] 13 Det. Leg. N. 598, 108 N. W. 1099. Bulk Sales Law, Pub. Acts 1905, p. 322, No. 223, is not class legislation because not including merchants not having creditors. Its purpose being to protect creditors. Id. Nor is it class legislation because limited to merchants. Id. The fact that five days' notice to creditors is required does not render it violative of the due process clause. Proper exercise of the police power. Id. Minnesota law is constitutional. Thorpe v. Pennock Mercantile Co. [Minn.] 108 N. W. 940.

Held unconstitutional: Laws 1902, p. 1249, c. 528, providing that a bulk sale of merchandise outside the regular course of business shall be fraudulent as to creditors unless at least five days before the sale an inventory is made, and the purchaser makes explicit inquiry of the seller as to the names of his creditors and notifies them, violates the constitutional provision guarantying equal protection of the laws and the due process provision. Wright v. Hart, 182 N. Y. 330, 75 N. E. 404. See 6 Columbia L. R. 123. Ohio law is held unconstitutional. Miller v. Crawford, 70 Ohio St. 207, 71 N. E. 631.

NOTE. Validity of such statutes: Statutes which make the sale presumptively fraudulent and declare a rule of evidence are generally held valid. See Thorpe v. Pennock Mercantile Co. [Minn.] 108 N. W. 940. The New York statute which declares the sale to be void was held invalid in Wright v. Hart, 182 N. Y. 330, 75 N. E. 404, 2 L. R. A. (N. S.) 338. The court said that the act does not differentiate between sales which are honestly made and sales made with intent to defraud. The Utah statute which de-

noncompliance with statutory conditions raises a conclusive presumption of fraud,[19] and in others such presumption is rebuttable.[20] What transfers fall within the terms of such statutes is a question of construction.[21] They have been held not to apply to a deed of trust for the benefit of creditors,[22] nor to a mortgage foreclosure sale,[23] nor to a transfer to a preferred creditor.[24] The Washington statute does not apply to the sale of a livery stable.[25] The Massachusetts statute does not apply to

clared the sale void was held unconstitutional in Block v. Schwartz, 27 Utah, 387 76 P. 22, 101 Am. St. Rep. 971, 65 L. R. A. 308 because it deprived the owners of their property without due process. The court distinguishes the statute from those which make the sale only presumptively fraudulent. See the earlier case of Neldon-Judson Drug Co. v. Commercial Bank, 27 Utah, 59. 74 P. 195. The Ohio statute which declared the sale void was held unconstitutional in Miller v. Crawford, 70 Ohio St. 207, 71 N. E. 631, because it placed unwarranted restriction upon the right of an individual to acquire and possess property and discriminated in favor of certain classes of creditors. The court after stating that the statute in terms makes the sale void and that it would sometimes be impossible to comply with all its requirements said: "This act under the guise of preventing fraud in such sales prohibits them altogether and thus places upon the enjoyment of property an important restriction which no public interest requires and which the constitution forbids." The Indiana statute declaring such sales void was held unconstitutional in Sellers v. Hayes. 168 Ind. 422, 72 N. E. 119. In Young v. Com., 101 Va. 853, 45 S. E. 327, a statute which made the sale only prima facie evidence of fraud was held unconstitutional on the ground that the subject-matter of the legislation was not within the scope of the police power as it did not affect the health, morals, or safety of the community. On the other hand the statutes were held constitutional in Squire v. Tellier, 185 Mass. 18, 69 N. E. 312, 102 Am. St. Rep. 322; Neas v. Borches, 109 Tenn. 398, 71 S. W. 50, 97 Am. St. Rep. 851; McDaniels v. Connolly Shoe Co., 30 Wash. 549, 71 P. 37, 94 Am. St. Rep. 889, 60 L. R. A. 947; Walp v. Lamkin, 76 Conn. 515, 57 A. 277; Williams v. Fourth Nat. Bank, 15 Okl. 477, 82 P. 496, in which case the court said: "Statutes of similar import have had the consideration of other courts and have been uniformly upheld and indeed in certain cases even though the prohibition is absolute." The Maryland statute was approved without comment. Hart v. Roney, 93 Md. 432, 49 A. 661, and in Fisher v. Herrmann, 118 Wis. 424, 95 N. W. 392, the court declined to consider the question of the validity because not properly raised. See, also, State v. Artus, 110 La. 441, 34 So. 596.—See Thorpe v. Pennock Mercantile Co. [Minn.] 108 N. W. 940.

18. It is within the police power of the legislature to adopt reasonable measures for the regulation of bulk sales. In re Paulis. 144 F. 472. Conn. Pub. Acts 1905, p. 408 c. 211, requiring to be filed in the town clerk's office at least seven and not more than thirty days before the sale, notice of intention, description of the property and terms of the sale, is reasonable and valid. Id.

19. Civ. Code § 3440 makes violation of the bulk sales law conclusively presumptive of fraud, and a finding of no fraud in fact cannot control the statutory presumption. Calkins v. Howard [Cal. App.] 83 P. 280. Where property was transferred in violation of Civ. Code § 3440, Bulk Sales Law, it is not necessary in order to recover the property that the debtor was insolvent. Id.

20. A finding of the court that a bulk sale was made in good faith and without actual fraud overthrows the statutory presumption. Williams v. Fourth Nat. Bank, 15 Okl. 477, 82 P. 496. Where such sales are only made presumptively fraudulent, such presumption may be rebutted. Id. Ch. 291, p. 357, Gen. Laws 1899, to prevent certain sales of merchandise in fraud of creditors, merely creates a rule of evidence and makes such sales presumptively fraudulent. Thorpe v. Pennock Mercantile Co. [Minn.] 108 N. W. 940. Where an insolvent partnership obtained new capital and organized a corporation to which was transferred all the partnership property, and the bulk sales law was not complied with, it was held that the conveyance was not fraudulent and that creditors of the corporation had precedence. Id.

21. Where one sold his stock of goods and fixtures to another who was unable to pay and retransferred the goods in satisfaction of the debt, though such retransfer was an accord and satisfaction, it is also as to the person who retransferred a violation of the bulk sales law. Gallus v. Elmer [Mass.] 78 N. E. 772. A provision in a chattel mortgage that it is to cover after-acquired property operates as an agreement that such goods shall be holden by the mortgagee, who may take possession of them before the rights of third persons intervene without regard to claims of general creditors. Wasserman v. McDonnell, 190 Mass. 326, 76 N. E. 959.

22. Deed of trust for the benefit of creditors does not violate bulk sales law. McAvoy v. Jennings [Wash.] 87 P. 53. Where a deed of trust for the benefit of creditors failed to comply with bulk sales law, the purchaser became a trustee for all the creditors. Id.

23. St. 1903, p. 389, c. 415, prohibiting bulk sales, does not apply to a sale under a duly recorded mortgage for a valuable consideration and free from fraud. Wasserman v. McDonnell, 190 Mass. 326, 76 N. E. 959.

24. A debtor though insolvent may prefer a creditor, and a transfer of a stock of goods without complying with the bulk sales law, to a creditor whose claim is more than the stock is worth, does not give other creditors any rights to assail the transaction. Petersen v. Doak [Wash.] 86 P. 663.

25. A sale of a livery stable business is not within bulk sales law of Washington.

a sale of fixtures,[26] nor to the sale of the entire product of a bakery for a certain period.[27] Rights of creditors under the Washington statute may be waived,[28] but not by instituting involuntary proceedings in bankruptcy.[29] The noncompliance with such statutes can be complained of only by persons whose rights were prejudiced,[30] and where an alleged bulk sale is not in violation of the statute, the title of a bona fide purchaser cannot be impeached by the seller's creditors.[31]

Consideration.[32]—A valuable consideration is essential to support a conveyance as against creditors.[33] A good consideration is not sufficient.[34] A voluntary

Everett Produce Co. v. Smith Bros., 40 Wash. 566, 82 P. 905.

26. Bulk sales laws do not apply to fixtures of a merchant's place of business. Gallus v. Elmer [Mass.] 78 N. E. 772.

27. The sale of the entire product of a bakery for three months in advance does not violate Bulk Sales Law, St. 1903, p. 276 c. 415. Such sale is not outside the usual course of business. Hart v. Brierley, 189 Mass. 598, 76 N. E. 286.

28. Where a creditor of a partnership which made a sale without complying with the bulk sales law accepted the guaranty of the buyer with knowledge of the facts, he waived his rights under the act. Whitehouse v. Nelson [Wash.] 86 P. 174. Where one took notes as security for a loan to be used by the maker in his business, and the maker sold his business without complying with the bulk sales law and the payee allowed a year to elapse without making any demand on the purchaser, the maker in the meantime having become execution proof, the payee was estopped to proceed against the purchaser. First Nat. Bank v. Coles, 40 Wash. 528, 82 P. 892.

29. Under the Washington statute providing that in bulk sales of stocks of merchandise the purchaser must apply the proceeds on the seller's debts, the seller is deemed to have assented to such application, and on his adjudication as a bankrupt cannot claim his statutory exemptions. Creditors do not waive their rights in such fund by instituting involuntary proceedings in bankruptcy against him. In re Connor [C. C. A.] 146 F. 998.

30. A sale by a partnership without complying with bulk sales law is fraudulent as to partnership creditors but not as to creditors of one of the partners. Whitehouse v. Nelson [Wash.] 86 P. 174. One not a creditor at the time of a sale in violation of the bulk sales law or at any other time except by inference cannot assail the transaction. Petersen v. Doak [Wash.] 86 P. 663. A seller of goods does not become a creditor of a buyer within the bulk sales law until the goods sold or a portion of them have been delivered. Hardwick v. Gettier [Wash.] 86 P. 943.

31. Hart v. Brierley, 189 Mass. 598, 76 N. E. 286.

32. See 5 C. L. 1560.

33. Clarke v. Black, 78 Conn. 467, 62 A. 757. Where an executor sought to set aside a trust deed executed to a creditor while the decedent was in extremis, evidence held to show that the debt the deed was executed to secure had been paid, and that the deed was without consideration and fraudulent as to creditors. Chapoton v. Prentis [Mich.] 13 Det. L. N. 186, 107 N. W. 879.

Consideration held sufficient: Marriage is a sufficient consideration to support a conveyance. Welch v. Mann, 193 Mo. 304, 92 S. W. 98. An assignment of a life policy in consideration of marriage is supported by a sufficient consideration as against prior creditors or an assignee for value. Howe v. Hagan, 110 App. Div. 392, 97 N. Y. S. 86. Marriage is a valuable consideration. Savage v. Savage [C. C. A.] 141 F. 346. A deed from husband to wife is not voluntary where the consideration is the **relinquishment of her dower rights** in other lands. Pettit v. Coachman [Fla.] 41 So. 401. A creditor who **extends time** in consideration of a note and chattel mortgage, without notice of the lien of a third person on such chattels, is a bona fide purchaser and his title is good as against the lien claimant. Snellgrove v. Evans [Ala.] 40 So. 567. A bill of sale taken in good faith and without intent to defraud other creditors in **payment of a debt** protects the buyer to the same extent as had there been a new consideration. Starr v. Dow [Neb.] 108 N. W. 1065. A **release** by a lessee **of his rights under a lease** in consideration of the lessor's agreement to forego his right to collect rent is based on a sufficient consideration. Livesley v. Heise [Or.] 85 P. 509.

Consideration insufficient: An assignment by an insolvent corporation **for a pre-existing debt** is not for a valuable consideration sufficient to sustain the assignment under P. L. 1896, p. 298, § 64, providing that a bona fide purchase before suspension of business should not be invalidated. Russel & E. Mfg. Co. v. Faitoute Hardware Co. [N. J. Eq.] 62 A. 421. Under the laws in force in 1869, a husband was entitled to the rents of his wife's land, not settled to her sole use, and he did not by collecting them become her debtor in such sense as would sustain a conveyance to her as against other creditors. Vandeventer v. Goss, 116 Mo. App. 316, 91 S. W. 958. Loaning money to an individual to be used by him in the business of a corporation did not make it the corporation's debt so as to render a mortgage by the corporation valid as against creditors. Mowen v. Nitsch [Md.] 62 A. 582.

Evidence sufficient to show consideration: Where a bill of sale by a debtor did not include his book accounts, but there was evidence showing that the assignment of such accounts was part of the transaction involved in the bill of sale, evidence was sufficient to show that the assignment was based on sufficient consideration as against creditors. Krippendorf-Dittman Co. v. Trenoweth [Colo.] 84 P. 805.

conveyance[35] is presumed fraudulent as to existing creditors,[36] and such presumption is conclusive if the grantor is insolvent,[37] but in the absence of actual fraud it is not fraudulent as to subsequent creditors.[38] A voluntary conveyance is not necessarily fraudulent if the grantor retains sufficient property to satisfy his debts.[39] Hence one can make suitable and appropriate provision for his family,[40] though indebted to some extent at the time.[41]

Retention of possession or apparent title.[42]—It is generally provided by statute that chattel mortgages[43] or sales of personal property shall be accompanied by delivery and immediate and continued change of possession,[44] or the instrument evidencing the transfer be recorded,[45] in order to render the transaction valid as to sub-

Evidence insufficient: The admission of a mortgagor to a third person having in his hands for collection a claim against him that the claim is correct is insufficient to prove the consideration of a mortgage given to secure such debt. Snellgrove v. Evans [Ala.] 40 So. 567.

34. A good consideration is insufficient to support a conveyance as against creditors. Must be valuable. Clarke v. Black, 78 Conn. 467, 62 A. 757.

35. A conveyance from parent to child for the expressed consideration of one dollar is on its face voluntary and void as to creditors. Folmar v. Lehman-Durr Co. [Ala] 41 So. 750.

36. The fact that the grantor in a voluntary conveyance is indebted raises the presumption that the conveyance is fraudulent and casts on him the burden of proof. Vandeventer v. Goss, 116 Mo. App. 316, 91 S. W. 958. A voluntary conveyance which will defeat an existing indebtedness is presumed to have been executed for the purpose of defrauding such creditor. Crary v. Kurtz [Iowa] 105 N. W. 590.

37. A voluntary conveyance by an insolvent is fraudulent regardless of intent to defraud. James v. Mallory [Ark.] 89 S. W. 472. A voluntary conveyance by an insolvent, or one contemplating insolvency, is void as to existing creditors. Civ. Code § 3442. Nixon v. Goodwin [Cal. App.] 85 P. 169. The voluntary transfer of a stock of goods by an insolvent to his wife is fraudulent as to his existing creditors. Vandeventer v. Goss, 116 Mo. App. 316, 91 S. W. 958. Evidence held to show that the husband was insolvent. Id. Only clear solvency in the sense of adequacy of assets, if sold under execution to satisfy debts, will uphold a voluntary conveyance as against exisiting creditors. Id.

38. A voluntary conveyance is constructively fraudulent as to existing creditors but not as to subsequent ones, unless impeached for actual fraud. Seed v. Jennings [Or.] 83 P. 872. A voluntary conveyance from brother to sister is not fraudulent as to a subsequent creditor, in the absence of actual fraud. Hunt v. Nance [Ky.] 92 S. W. 6.

39. A conveyance without substantial consideration is not fraudulent if the grantor retains sufficient property to pay his debts Pearsall v. Stewart, 98 N. Y. S. 467. That a husband is in debt at the time he makes a conveyance to his wife is not sufficient to show the conveyance to be fraudulent Wadleigh v. Wadleigh, 111 App. Div. 367 97 N. Y. S. 1063. Recital in a deed from husband to wife of a consideration of one dollar and other valuable considerations cannot be relied upon to show want of consideration. Id. A voluntary conveyance by a debtor is not fraudulent if he retains sufficient property to pay his debts. Welch v. Mann, 193 Mo. 304, 92 S. W. 98. A deed of gift by husband to wife, when he is not indebted, and which is duly recorded, is not fraudulent. Savage v. Savage [C. C. A.] 141 F. 346. The existence of a cause of action at the time of a voluntary conveyance by a debtor must appear from the record in the action in which a creditor recovers judgment, in order to enable the former to assail the conveyance as fraudulent. Seed v. Jennings [Or.] 83 P. 872.

40. A gift by a solvent debtor to his wife not made in contemplation of insolvency, or of engaging in some hazardous enterprise, will be upheld if not excessive in view of the husband's circumstances at the time. Harvey v. Godding [Neb.] 109 N. W. 220.

41. A man with large assets may make reasonable provision for his family, though he owes debts, if he does so in good faith and without intent to defraud creditors. The criteria being the value of his assets as compared with his debts, and his intention Vandeventer v. Goss, 116 Mo. App. 316, 91 S. W. 958. A voluntary conveyance from husband to wife is not fraudulent unless the husband was indebted at the time or subsequently became indebted from causes then existing, or the conveyance was made to withdraw the property from the hazard of a contemplated business venture. Welch v. Mann, 193 Mo. 304, 92 S. W. 98.

42. See 5 C. L. 1561.

43. A chattel mortgage reserving right in the mortgagor to sell the property and use the income in the business, and not requiring application of the proceeds to any particular purpose, but for the use of the mortgagor, is fraudulent as to creditors. Zartman v. First Nat. Bank, 109 App. Div. 406, 96 N. Y. S. 633. A mortgage of a stock of merchandise authorizing the mortgagor to sell and requiring him to account for so much of the sale price as represents the purchase price, which does not appear in the mortgage but only in an inventory filed therewith, is fraudulent as to creditors because giving authority to sell without accounting for the proceeds. Pfeiffer v. Roe, 108 App. Div. 54, 95 N. Y. S. 1014.

44. License to sell intoxicating liquors is personal property. Degginger v. Seattle Brewing & Malting Co., 41 Wash. 385, 83 P. 998. Civ. Code § 4491, requiring sales of personal property to be accompanied by

sequent purchasers and creditors. Such rule does not apply to an absolute sale,[46] and the presumption of fraud is, under some statutes, rebuttable.[47] What constitutes a sufficient delivery or change of possession must be determined from the nature of the property[48] and situation of the parties,[49] but it must be sufficient to impart notice to strangers.[50]

Reservation of benefits and resulting trusts.[51]—The reservation by a seller of some right or benefit,[52] however small,[53] may render the transaction fraudulent. Transfers in trust for the benefit of the transferror are deemed fraudulent,[54] especially if they fall within the terms of a statute by which they are prohibited.[55]

actual and continued change of possession, applies to a sale of range cattle and brand. Ettien v. Drum, 32 Mont. 311, 80 P. 369.

45. Under Pierce's Code §§ 6549, 6550, and Bali. Ann. Codes & St. § 4578, a transfer of a liquor license is void as to creditors if not recorded, where the assignor retains possession of the license. Degginger v. Seattle Brewing & Malting Co., 41 Wash. 385, 83 P. 898.

46. Where after a sale of certain logs a third person with notice of the contract became a creditor of the seller and levied on the logs after notice that the buyer claimed to own them, it was held that, as the transferee was the owner, failure to record the contract as a mortgage or conditional bill of sale did not affect the buyer's rights. Montesano Nat. Bank v. Graham, 40 Wash. 490, 82 P. 881.

47. Under Rev. St. 1898, § 2310, making every sale of chattels presumably fraudulent as to creditors unless there is an actual and continued change of possession, the presumption of fraud is rebutted by proof of payment of full consideration. Griswold v. Nichols, 126 Wis. 401, 105 N. W. 815.

48. The delivery of large and heavy machines, if the parties act in good faith and the vendor surrenders to the vendee their actual possession and control, does not require that they be moved or changed in place, and this is especially true where the vendee intends to use them in the place where they are at the time of the sale. Presses and linotype machines. Ott v. Sutcliffe [N. J. Eq.] 60 A. 965.

49. A sale of cattle by husband to wife which also included his brand which was transferred in the records of marks and brands. Thereafter the husband used a different brand. The cattle were kept on land owned partly by the wife and partly by the husband. Webster v. Sherman [Mont.] 84 P. 878. Held there was sufficient delivery and change of possession to satisfy Civ. Code § 4491, in view of Civ. Code § 227, providing that the separate property of the wife is not liable for her husband's debts unless he has exclusive possession of it. Id.

50. The delivery must be such as to impart notice to third persons. Clark v. Williams, 190 Mass. 219, 76 N. E. 723.

There is a sufficient change of possession where there is a delivery at the time of sale and the purchasers employ an employe of the seller as their agent and give the property into his possession to hold for them. Russell v. Halton [Ark.] 89 S. W. 471.

Delivery held insufficient: Where after a sale of chattels the seller retained possession for about four months, when the buyer employed one who had been in the employ of the seller to take possession, and the goods of the buyer were mingled with those of the seller, there was no delivery or change of possession sufficient to comply with Rev. St. 1898, § 2473. Johnson v. Emery [Utah] 86 P. 869. Where a chattel mortgage was given on tan bark but it was not recorded, and an attempted delivery by scaling and placing a mark on each, but no visible change of possession, it is held that there was not sufficient delivery to take the case out of Rev. St. Me. c. 93, § 1. In re Shaw, 146 F. 273.

Evidence of delivery: Under Rev. St. 1898, § 2310, making every sale of chattels presumptively fraudulent as to creditors, unless followed by an actual and continued change of possession, on an issue of change of possession it is proper to show that the vendee in answer to a question as to what he wanted with the property stated that it was a "ground hog sale" and that the property was all he had to show. Griswold v. Nichols, 126 Wis. 401, 105 N. W. 815.

51. See 5 C. L. 1562.

52. The retention of possession by a chattel mortgagor or a provision in a mortgage authorizing the same is not such a reserved benefit as renders the mortgage fraudulent. Rike v. Ryan [Ala.] 41 So. 959.

53. It is fraudulent though the benefit reserved be great or small. Tissier v. Wailes [Ala.] 39 So. 924.

54. A transfer of property by a debtor in trust for his own use and benefit is fraudulent as to existing and subsequent creditors. Williams v. Kemper [Minn.] 109 N. W. 242.

Held not fraudulent: Where a lessee of hop yards surrendered his lease and it was thereafter secured by his wife and son, evidence held insufficient to show that they leased in good faith for their own use and not in trust for the original lessee. Livesley v. Heise [Or.] 85 P. 509.

Trust not created: In an action by a creditor of a husband to impress a trust on real estate acquired by a wife, evidence held to show that the wife was a good faith purchaser from parties who acquired through mortgage foreclosure. Bodkin v. Kerr [Minn] 107 N. W. 137. Where a deed was executed by husband and wife for the fraudulent purpose on the part of the husband of placing the title beyond the reach of the wife and there was no contract to reconvey to the husband or that the property should be held for his benefit, the conveyance did not create a trust for his benefit. Jolly v. Graham [Ill.] 78 N. E. 919.

Fraudulent intent and evidence of fraud.[56]—A conveyance must have been made with intent to defraud.[57] The question of fraudulent intent is one of fact[58] and is provable by circumstantial evidence,[59] and in ascertaining such intent a wide range of investigation is permitted.[60] Fraud is never presumed[61] but must be proven by

55. A sale of personalty at an agreed consideration which the buyer promised to pay to creditors is not a transaction within Comp. Laws 1897, § 9514, making transfers of goods in trust for the use of the transferor fraudulent as to creditors. Thompson v. Newland [Mich.] 13 Det. Leg. N. 320, 108 N. W. 93.

56. See 5 C. L. 1563, 1571.

57. See ante, § 1, The Fraud and Its Elements. Where there was no intent on the part of a grantor to defraud creditors and all his property was applied to the payment of his debts, the conveyance was held not fraudulent. Scott v. Thomas, 104 Va. 330, 51 S. E. 829. Where one before marriage conveyed his property retaining a life interest, but it did not appear that at the time he contemplated matrimony, and at the time of his marriage he was in possession of the property, the conveyance was held not fraudulent as to his wife's marital rights. Collings v. Collings [Ky.] 92 S. W. 577. Under the rule that a voluntary conveyance is not on that account void as to subsequent creditors, where a husband deeded to his wife and thereafter purchased an interest in a business, the seller could not assert that the conveyance was fraudulent without showing that such venture was anticipated at the time the deed was made. Peyton v. Webb [Ky.] 96 S. W. 839. A subsequent creditor cannot assail an issue of bank stock to his debtor's wife where such stock was paid for by the husband who was indebted to his wife for an amount exceeding the cost of the stock. Boldrick v. Mills [Ky.] 96 S. W. 524. Under Ohio St. § 6343, amended by 93 Ohio Laws p. 209, an intent to prefer a creditor is made constructively fraudulent, and actual intent or fraud need not be shown. Barber v. Coit [C. C. A.] 144 F. 381.

58. Where the facts concerning a conveyance claimed to be fraudulent are ascertained and determined by the court, the conclusion as to the existence of fraud and consideration is for the jury. Clarke v. Black, 78 Conn. 467, 62 A. 757.

59. May be shown by facts and circumstances connected with and surrounding the transaction. Klauber v. Schloss [Mo.] 95 S. W. 930. Fraud may be inferred from circumstances and need not be established by direct evidence. Lawrence Bros. v. Heylman, 111 App. Div. 848, 98 N. Y. S. 121.

60. Everything that was said by the parties at the time of the transaction is admissible. Fabian v. Traeger, 117 Ill. App. 176.

Evidence of fraud: Withholding from record is not of itself conclusive evidence of fraudulent intent, but is a circumstance to be considered with other circumstances of the case. Rogers v. Page [C. C. A.] 140 F. 596. Conveyance by mortgage between brothers held fraudulent when given only a few days before bankruptcy and was not recorded. Id. It is not necessary that the **Insolvency of the debtor** at the time of the conveyance be shown, though such fact is material as bearing on the purpose of the conveyance. Crary v. Kurtz [Iowa] 105 N. W. 590.

Not evidence of fraud: That a parent wanted to make a fraudulent conveyance to his child is not evidence that his conveyance to a stranger was fraudulent. Perry v. Pore [Ky.] 90 S. W. 952. It is not permissible in an action by a trustee in bankruptcy to set aside a conveyance made by the bankrupt to his wife six months prior to the petition in bankruptcy to show that his reason for going into bankruptcy was threatened attachment by creditors. Maffi v. Stephens [Tex. Civ. App.] 15 Tex Ct. Rep. 140, 93 S. W. 158. On an issue as to the bona fides of a sale of a stock of merchandise, it is not permissible to show previous offers to sell to others, in the absence of a showing of open offers for legitimate purposes. McCuin. v. Merchant Grocery Co. [Ark.] 93 S. W. 563.

Evidence held admissible: When the consideration for a conveyance was $4,000, it was admissible to show that shortly thereafter one-half of the property was taken for widening a street and $22,000 awarded. Lawrence Bros. v. Heylman, 111 App. Div. 848, 98 N. Y. S. 121. Where defendant claimed that the conveyance was made to him for the benefit of all the creditors, a deed by him to a bank which reconveyed and took a mortgage to secure its debt was admissible to contradict such defense. Nixon v. Goodwin [Cal. App.] 85 P. 169. When a grantee claimed that a deed was made to him for the benefit of all the creditors, a mortgage on such property executed to secure a note given by the grantee was admissible to contradict such defense. Id.

Evidence held inadmissible: Declarations of the seller in the buyer's absence, after an alleged fraudulent conveyance, are not admissible to impeach the title of the buyer. Hart v. Brierley, 189 Mass. 598, 76 N. E. 286. Where a grantor stated after the conveyance and in the absence of the grantee that the property still belonged to him, evidence of such statements is not admissible against the grantee in an action to recover the property. Perry v. Pore [Ky.] 90 S. W. 952. Declarations of the grantor long after the conveyance are not competent against the grantee to prove fraudulent intent, insolvency, or want of consideration. Wadleigh v. Wadleigh, 111 App. Div. 367, 97 N. Y. S. 1063. The fact that the ledger used by the bankrupt during the year the alleged fraudulent conveyances occurred was mutilated did not render such ledger admissible. Clark v. Mulcahy, 190 Mass. 64, 76 N. E. 236. In a suit to set aside as fraudulent a conveyance made more than two years before the grantor was adjudicated a bankrupt, evidence of his financial condition 10 months after he purchased the property, which was later conveyed, was too remote as to his condition at the time the deed was made and of his intent. Id. In an action to recover the value

a preponderance of evidence.[62] The fact that the grantor is indebted does not raise

of certain mining stock alleged to have been fraudulently conveyed, where the value of the stock and dividends had been shown evidence of the reputation and standing of other mines in the vicinity was immaterial. Arnold v. Harris [Mich.] 105 N. W. 744. In an action to recover money transferred by a debtor to his son, evidence that the son was a first class business man was irrelevant. Id. In an action to set aside an alleged fraudulent conveyance, it is incompetent for the sheriff who levied executions to testify that in his opinion the grantor had no property other than that on which he levied. Id. Where the acts of a debtor in contracting a debt and making a sale were independent and not parts of a scheme to defraud creditors, evidence that he perpetrated a fraud in contracting the debt was not admissible on the question as to whether the sale was fraudulent. Thompson v. Newland [Mich.] 13 Det. Leg. N. 320, 108 N. W. 93. A debtor who has made a conveyance and has testified that it was demanded and given as security may not testify what his intention was in executing it. Russell v. Halton [Ark.] 89 S. W. 471. Where in an action to set aside as fraudulent a conveyance from a corporation to its president, a witness testified that on the date of the conveyance the corporation owned stock of a mining company but he did not know what it was worth since about a year prior to that time, evidence as to its value a year prior to the conveyance was immaterial. Nixon v. Goodwin [Cal. App.] 85 P. 169. In an action to set aside as fraudulent a conveyance by a corporation to its president, it is not permissible to show that the corporation borrowed money from the president without showing that the directors had authorized such borrowing. Id. Where it was not offered to show what took place at a certain meeting of the directors, it is immaterial as to who were present at such meeting. Id. In an action to set aside as fraudulent a conveyance by a corporation to its president, notes by the corporation to the grantee were inadmissible to show indebtedness to him in the absence of a showing that such notes were authorized by the directors of the corporation. Id. In an action by a corporation in insolvency to set aside as fraudulent a conveyance of the corporate property to its president, a judgment recovered against the corporation after the conveyance was inadmissible. Id. Sentiment of people who knew of a conveyance and the parties thereto as to its being fraudulent is not admissible. Perry v. Pore [Ky.] 90 S. W. 952.

61. See Fraud and Undue Influence, 7 C. L. 1813. Solvency at the time of a transfer is presumed in the absence of an allegation to the contrary. Jensen v. Montgomery, 29 Utah, 89, 80 P. 504. Where a creditor assails a conveyance, an allegation that the grantor is insolvent raises no question as to his solvency at the time the conveyance was made. Id.

62. Evidence sufficient to show fraud: Evidence held to show that the sale of a stock of merchandise for an inadequate consideration was fraudulent where the buyer advised the seller to get out of the country and immediately commenced to dispose of the stock in job lots. Rusho v. Richardson [Neb.] 109 N. W. 394. Where an agreement between parent and child for an annuity to the parent provided for the turning over to the parent of certain rents and profits, it was held not necessary in an action to set aside a fraudulent conveyance to show that all such rents went to him. Mertens v. Mertens, 48 Misc. 235, 96 N. Y. S. 785. Evidence sufficient to show that a conveyance was fraudulent. Ainsworth v. Roubal [Neb.] 105 N. W. 248. Evidence sufficient to show that a transfer by a husband pending a divorce proceeding by his wife was fraudulent as to her right to alimony. Cochran v. Cochran, 96 Minn. 523, 105 N. W. 183. Evidence sufficient to show that a mortgage given by a corporation was not given to secure a debt of the corporation but was to secure a debt of an officer and was fraudulent. Mowen v. Nitsch [Md.] 62 A. 582. But a charge of concealment of property will be regarded as sufficiently proven where sustained by the testimony of a number of witnesses as to declarations made by the debtor at different times that he was execution proof and that his property had all been placed beyond the reach of creditors. Ravenna National Bank v. Latimer, 8 Ohio C. C. (N. S.) 563. Evidence sufficient to show a conveyance of standing timber to be fraudulent where the price was inadequate, took away much value from the land which was heavily incumbered, was a secret additional benefit for the grantor, and other fraudulent circumstances. In re Benjamin, 140 F. 320. Evidence held to show a conveyance fraudulent where a stockholder of a corporation advanced it a large sum of money, and knowing that it was insolvent resigned as president and took a deed of the company's property. The transaction was kept secret and only disclosed at a meeting of creditors, when he stated that the deed was made to protect other creditors before himself. Subsequently he conveyed the property to a bank and the bank reconveyed to him and took a mortgage back. The creditors did not ratify these transactions. Nixon v. Goodwin [Cal. App.] 85 P. 169. Where the president of a corporation secretly resigned so that he could take a conveyance of the corporate property in satisfaction of a pre-existing debt, and though he stated that the conveyance was for the benefit of all the creditors he later conveyed to a bank which reconveyed to him taking a mortgage, such facts were insufficient to show that the conveyance to him was for the benefit of all the creditors. Id.

Evidence insufficient to show fraud: That a mortgage is made on $18,000 worth of property to secure a debt of $4,403 is not of itself sufficient to prove fraudulent intent on the part of the mortgagor. Mercantile Exch. Bank v. Taylor [Fla.] 41 So. 22. Where it did not appear how much a married woman was in debt, how much property she had, nor its value at the time she executed a chattel mortgage, such mortgage was held not to be fraudulent. Id. Where a debtor sold goods to one who promised to pay the purchase price to creditors, and a creditor attached part of the property sold, where-

a presumption of fraud,[63] unless the conveyance is without consideration,[64] or he is indebted to the extent of insolvency.[65]

Fraud in the grantee and notice to him of fraud.[66]—As a general rule the grantee must have notice of the fraudulent intent of his grantor,[67] or be a party to the fraudulent design,[68] but this is not so as to a voluntary conveyance in fraud of mari-

upon the seller directed the buyer not to pay such debt but to pay others, the act of the debtor did not prove the original transaction to be fraudulent. Thompson v. Newland [Mich.] 13 Det. Leg. N. 320, 108 N. W. 93. Evidence insufficient to show that a conveyance was fraudulent. Atkinson v. McNider [Iowa] 105 N. W. 504. Where one creditor testified that at the time the debtor made a conveyance he believed she did not intend to defraud him but had the deeds made to a third person because of trouble with her husband, the evidence was insufficient to show that she intended to defraud creditors generally. Lyons v. Urgalones, 189 Mass. 424, 75 N. E. 950. Evidence sufficient to show that notes secured by a mortgage were not in fact paid though so indorsed, and that the mortgage was not kept alive for the purpose of defrauding creditors, and particularly a creditor whose lien was subsequent to the lien of the mortgage. McCaffrey v. Burkhardt [Minn.] 105 N. W. 971 Finding that a conveyance was not fraudulent held not against the clear preponderance of the evidence, which was in direct conflict on the material facts as to require it to be set aside. Rosenheimer v. Krenn, 126 Wis 617, 106 N. W. 20. Where the evidence of fraud on the part of the grantor was meager and there was none showing that the grantee participated in the fraud, and he paid a fair consideration, a finding that the conveyance was not fraudulent was justified. Whiting v. Hoglund, 127 Wis. 135, 106 N. W. 391. Evidence sufficient to show that full value was paid and that a sale was not fraudulent. Wheeler v. Lasch [Mich.] 12 Det. Leg. N. 987, 106 N. W. 689. Evidence of improper conduct by the grantor in a voluntary conveyance, committed subsequent to the conveyance with the wife of the defendant, does not show such conveyance to have been made to defraud defendant in the collection of a judgment he might recover in an action for alienation of affections, where it does not appear that the grantor anticipated such action or had reason for putting his property out of his hand on that account. Seed v. Jennings [Or.] 83 P. 872. In a suit to set aside a transfer of dower rights by a dowress, where it was set up that the transfer was without consideration, but no other facts were shown except the transfer and it was not shown that the transferee was not responsible, he will not be restrained from collecting the rents which constitute the dower right. Dolan v. Conlon, 99 N. Y. S. 1090. Where an insurance company in failing circumstances sells out for the best interest of all to another corporation, unintentional omission to provide for scattered creditors, who will be paid as fast as their claims are presented, is not sufficient to render the sale fraudulent as a matter of law. Raymond v. Security Trust & Life Ins. Co., 111 App. Div. 191, 97 N. Y. S. 557. An offer by a debtor to sell a piece of property at a low figure, and to accept notes and mortgage for all or a large part of the purchase price, it is not sufficient when standing alone to establish a purpose on the part of the debtor of placing his property beyond the reach of creditors. Ravenna National Bank v. Latimer, 8 Ohio C. C. (N. S.) 563. The fact that at the time of a voluntary conveyance a corporation organized by the grantor to carry on the business previously carried on by him was insolvent does not show that the grantor was unable to pay his personal debts. Welch v. Mann, 193 Mo. 304, 92 S. W. 98. The mere fact that a creditor withholds a deed of trust from record without any agreement between debtor and creditor or other fraudulent circumstance is insufficient to establish fraud on the part of the creditor. Jones v. Levering, 116 Mo. App. 377, 91 S. W. 980.

63. The mere fact that a grantor is in debt does not show his conveyance to be fraudulent if he retains sufficient property to satisfy his debts. Wadleigh v. Wadleigh, 111 App. Div. 367, 97 N. Y. S. 1063.

64. A voluntary conveyance by a debtor is presumptively fraudulent. Lawrence Bros. v. Heylman, 111 App. Div. 848, 98 N. Y. S. 121.

65. In an action to set aside a conveyance as fraudulent, it must be shown that the grantor was insolvent at the time it was made or that execution had been returned nulla bona which implies insolvency. McAvoy v. Jennings [Wash.] 87 P. 53. A complaint by a creditor to subject property conveyed by the debtor in trust for himself to the payment of his debt, which alleges that execution has been returned unsatisfied, need not allege that the debtor is insolvent and has no other property from which the debt can be satisfied. Williams v. Kemper [Minn.] 99 N. W. 242.

Insolvency not shown: Evidence did not show that a debtor was insolvent when a conveyance was made. First State Bank v. Sibley County Bank, 96 Minn. 456, 105 N. W. 485. The return of an execution partly unsatisfied one year after a conveyance was made does not alone show insolvency at the time of the conveyance. Wadleigh v. Wadleigh, 111 App. Div. 367, 97 N. Y. S. 1063. A return of execution nulla bona and that the sheriff was unable to find other property is **prima facie evidence** of the debtor's insolvency. Calkins v. Howard [Cal. App.] 83 P. 280.

66. See 5 C. L. 1563.

67. Evidence insufficient to show fraud in a purchaser where he gave full value, inquired as to debts, and property given by him in exchange was as much subject to execution as the property he received. Hoskins v. Fayetteville Grocery Co. [Ark.] 96 S. W. 195. In order to entitle a third person to set it aside, both vendor and vendee must have participated in the fraud. Adams v. Wallace, 122 Ill. App. 550.

tal rights.[69] A grantee is presumed to share his grantor's fraudulent intent,[70] and if the grantor is insolvent the grantee has the burden of proving the bona fides of his purchase.[71] A grantee with notice of facts sufficient to put an ordinarily prudent man on inquiry is charged with notice of his grantor's fraudulent intent.[72]

Relationship of the parties.[73]—The mere fact that a transaction is between relatives does not stamp it with fraud[74] unless it is voluntary,[75] and its effect is to defeat the rights of creditors,[76] in which case a presumption of fraud is raised[77] and the transferee has the burden of proving the bona fides of the transaction.[78]

68. A grantee who accepts the provisions of a deed given to secure a pretended indebtedness becomes a party to the fraudulent design of the grantor. Klauber v. Schloss [Mo.] 95 S. W. 930.

69. Where one makes a voluntary conveyance with intent to defraud his future wife of her marital rights, it is not essential, in order to have the deed set aside, that the grantee participate in the fraudulent intent. Higgins v. Higgins, 219 Ill. 146, 76 N. E. 86

70. Where the grantor conveys with intent to defraud creditors, it is presumed that the grantee shared such intent and he has the burden to show that his purchase was bona fide. Lawrence Bros. v. Heylman, 111 App. Div. 848, 98 N. Y. S. 121.

71. Where the grantor's insolvency is shown, the burden is on the grantee to show that the conveyance was upon a good consideration and he had no notice of the fraudulent intent. Wadleigh v. Wadleigh, 111 App. Div. 367, 97 N. Y. S. 1063. The proof of fraudulent intent of the grantor which will cast the burden of proof on the grantee must be supplied by evidence which is competent against the grantee. Id. One who claims to be a bona fide purchaser must allege that he is a purchaser for value and without notice of the fraudulent intent of his vendor. Dent v. Pickens [W. Va.] 53 S. E. 154.

72. An assignee of credits of a corporation, who has notice of foreclosure of a mortgage on all the company's property, and of the mortgagee's entry under the lease, and inquiry would have led to information of the actual condition of the company, he was charged with notice of the insolvency. Russel & E. Mfg. Co. v. Faitoute Hardware Co. [N. J. Eq.] 62 A. 421. A conveyance with intent to defraud creditors is void as to them if the grantee had notice of such intent or of such facts as would excite the suspicion of an ordinarily prudent man. Baze v. Island City Mfg. Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 483, 94 S. W. 460.

73. See 5 C. L. 1565.

74. Evidence sufficient to show that a conveyance from a solvent person to his wife was not fraudulent. Harvey v. Godding [Neb.] 109 N. W. 220. A husband may render services in the management of his wife's property without rendering such property subject to the claims of his creditors. Foreman v. Citizens' State Bank, 128 Iowa, 661, 105 N. W. 163.

75. A voluntary conveyance from parent to child is constructively fraudulent as to existing creditors, if the grantor has not enough property left to satisfy his debts. Campbell v. Campbell, 129 Iowa, 317, 105 N. W. 583. Where a parent makes a voluntary conveyance to a child, the grantee has the burden to show that remaining property of the grantor was sufficient to satisfy his debts. Id. Evidence sufficient to show that a parent after making a voluntary conveyance to a child had sufficient property to satisfy his debts. Id. It is presumed that a conveyance from husband to wife at the time of his financial embarrassment is voluntary, and hence fraudulent. Auburgh v. Lydston, 117 Ill. App. 574.

76. A conveyance by father to son or other near relative is presumptively fraudulent as to existing creditors. Seeley v. Ritchey [Neb.] 107 N. W. 769. Evidence insufficient to rebut the presumption that a deed from father to son was fraudulent as to existing creditors. Id. In an action to set aside a voluntary deed from parent to child where it appeared that execution had been issued on plaintiff's judgment and returned no property found, it is presumed that the grantor then had no property to pay his debts and had none after the conveyance. Campbell v. Campbell, 129 Iowa, 317, 105 N. W. 583. A conveyance by husband to wife of all his property for the release of the purported obligation to thereafter support her is fraudulent as to existing creditors. Auburgh v. Lydston, 117 Ill. App. 574.

77. Purchases of real or personal property made during coverture by the wife of an insolvent from him are regarded with suspicion, and, as against his creditors, the presumption that it was not paid for out of her separate estate must be overcome by clear, full, and strict proof. Southern Lumber & Supply Co. v. Verdier [Fla.] 40 So. 676. A transfer to a relative which leaves the transferor without sufficient means to pay his debts is prima facie fraudulent. Horner-Gaylord Co. v. Miller, 147 F. 295. Where a husband just prior to the maturity of an obligation conveyed all his real estate to his wife, evidence held to show that such conveyance was prima facie fraudulent. Knickerbocker Trust Co. v. Carhart [N. J. Eq.] 64 A. 756.

78. In a suit by creditors to set aside a conveyance by husband to wife while he was insolvent, the burden of proving adequate consideration and that the transaction was bona fide is on the wife and clearer proof is required than if the transaction was between strangers. Southern Lumber & Supply Co. v. Verdier [Fla.] 40 So. 676. A postnuptial settlement, where the husband is indebted at the time it is made, is void as to his creditors, and the settlement is voluntary unless those claiming under it can clearly show that it is supported by a valuable consideration. Vashon v. Barrett [Va.] 54 S.

Preference to creditors.[79]—In the absence of statutory inhibition[80] a debtor may prefer one creditor,[81] though others are thereby hindered and delayed.[82] Relation-

E. 705. A wife and son taking a conveyance from her husband has the burden of showing good faith. Livesley v. Heise [Or.] 85 P. 509. Where a husband made a voluntary conveyance to his wife, the effect of which is to defeat an existing debt against him, she has the burden to prove that he retained ample means to pay his debts and that the gift was not unreasonable in view of his financial condition. Crary v. Kurtz [Iowa] 105 N. W. 590.

Transactions held fraudulent: Where the wife of the only person who knew that another was seeking investment while unknown to the investor procured him to take a mortgage on land which she did not own, and thereafter made a voluntary conveyance to her husband, evidence held to show that such conveyance was fraudulent. Mosley v. Donnell, 42 Wash. 518, 85 P. 259. Where a son two days before trial of a suit against him executed a bill of sale of all his property to his mother for a previous debt, judgment was rendered against the son. He continued in possession of the property. His mother knew of the debt. Held the sale was fraudulent and the mother had sufficient knowledge to put her on inquiry as to her son's intent. Sjoberg v. Field, 50 Misc. 412, 100 N. Y. S. 531. Bill of sale from an insolvent to his wife, and notes and mortgage to his brother, of his personal property and crops, held fraudulent under the Iowa law. In re Hemstreet, 139 F. 958.

Evidence sufficient to show a conveyance to be fraudulent where a transfer was between relatives. Willett v. Froelich [Ky.] 90 S. W. 572. Evidence held to show that a conveyance from a son to his mother was fraudulent. Jones v. Lossiter [Ky.] 93 S. W. 657. Evidence sufficient to show to be fraudulent a transfer by an insolvent person to his brother who lived with him and was not shown to have means with which to make the purchase where neither buyer nor seller as a witness affirms or denies that the sale was made in good faith. Dallas Brewery v. Holzner, 116 La. 719, 41 So. 48. Evidence sufficient to show that a conveyance from husband to wife was fraudulent as to his creditors. Preslar v. Walker, 116 La. 661, 40 So. 1033. Money paid by a husband for taxes and interest on incumbrances on his wife's property held under the evidence to be his money so that his creditors have a lien on such property to the extent of the payments. Farr v. Hauenstein [N. J. Eq.] 62 A. 383.

Not fraudulent: A deed from husband to wife based on a valuable consideration is not void because not recorded as to a simple creditor of the husband whose claim does not exceed the value of property retained, unless actual fraud or other inequitable circumstances be shown. Pettit v. Coachman [Fla.] 41 So. 401. Land conveyed by husband to wife without fraud and for a valuable consideration is not subject to the husband's debts. Id. The mere fact that a wife knows of an obligation of her husband does not show to be fraudulent a transaction by which she becomes lessee for the residue of a term of premises of which her husband was originally the lessee. Livesley v. Heise [Or.] 85 P. 509. Where a wife and son of a lessee of a hop farm who owed an obligation became the owners of the residue of the lease upon the husband's release of it, evidence held to show that they took it in good faith for a sufficient consideration. Id. Whether a transfer from son to father who transferred to another was with intent to defraud creditors held a **question for the jury.** White v. Million, 114 Mo. App. 70, 89 S. W. 599.

79. See 5 C. L. 1566.

80. Where the owner of a retail stock sells it, reserving title until paid for but provides that the buyer may sell it out in the regular course of business, such sale is fraudulent, and where the seller retakes the goods for the buyer's failure to pay, he recovers an unlawful preference. West *v.* Fulling, 36 Ind. App. 617, 76 N. E. 325. An assignee suing under Pub. St. c. 157, § 96, to recover a preference, need only show that the debtor was insolvent, that the transfer was made within six months before filing the petition in insolvency with a view to give a preference, and that the creditor had cause to believe the debtor was insolvent and that the transfer was in fraud of the insolvency laws. Bolster v. Graves, 189 Mass. 301, 75 N. E. 714 Evidence sufficient to show a preference. Id. A complaint by a trustee in bankruptcy to set aside a preference must allege that there are not sufficient assets to pay all creditors who have filed claims and that the transfer was for an antecedent consideration. Lesser v. Bradford Realty Co., 47 Misc. 463, 95 N. Y. S. 933. Where a corporation gives a mortgage for the purpose of all creditors who could file mechanic's liens against the premises, a preference arising from the refusal of some of the creditors to accept the benefits of the mortgage does not invalidate it under Laws 1892, p. 1838, c. 688, forbidding the giving of preferences by an insolvent corporation. American Mortg. Co. v. Merrick Const. Co., 50 Misc. 464, 100 N. Y. S. 561. A trustee can recover an unlawful preference only to the extent necessary to satisfy debts. Rogers v. Page [C. C. A.] 140 F. 596.

81. A debtor may prefer his creditors if the debt be bona fide, the payment absolute, and the property conveyed not materially in excess of the debt. Rike v. Ryan [Ala.] 41 So. 959. One creditor may be preferred. Fabian v. Traeger, 117 Ill. App. 176.

Valid preferences: Where one sold a horse and rescinded the contract and took the horse back in settlement of the purchase-money note it is not fraud on another creditor of such debtor. Baker v. Drake [Ala.] 41 So. 845. Where a mortgage was taken for an existing debt when the creditor had no notice that the mortgagor was embarrassed and when his credit was still good, the mortgage was not fraudulent. Rike v. Ryan [Ala.] 41 So. 959. Where a creditor in good faith takes security at a time when the debtor is solvent and more than a year before the petition in bankrupt-

ship with the preferred creditor does not render the transaction fraudulent.[83] Where property conveyed by an insolvent in payment of a pre-existing debt does not materially exceed in value the amount of the indebtedness, and no benefit is reserved to the debtor, the conveyance is valid as against other creditors regardless of the motive or badges of fraud,[84] but if the debt is materially less than the value of the property it is fraudulent as to other creditors,[85] though the difference be paid in cash.[86]

cy is filed, he is entitled to realize on it, though before undertaking to do so he learns of the insolvency of his debtor. Hawes v. Bank of Elberton, 124 Ga. 567, 52 S. E. 922. A sale of chattels by a debtor at an agreed fair price, all of which the buyer promised to pay to bona fide creditors, is not fraudulent though the arrangement did not provide for the payment of all creditors. Thompson v. Newland [Mich.] 13 Det. Leg. N. 320, 108 N. W. 93. A conveyance in payment of notes which had been assigned to the vendee is not fraudulent, the notes being valid claims, and the vendee having purchased them with his own money, though he did so to protect the seller from suit thereon. Riske v. Rotan Grocery Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 392, 93 S. W. 708. A sale to a mortgagee of the homestead of nonexempt crops grown on the homestead in payment of his debt is not fraudulent as to other creditors. Nunn-Weldon Dry Goods Co. v. Haden [Tex. Civ. App.] 16 Tex. Ct. Rep. 318, 95 S. W. 73. Since an insolvent may prefer a creditor, a deed to a trustee for the benefit of a list of creditors is not void because providing that before any creditor should be entitled to his pro rata share he should release all claims against the debtor. McAvoy v. Jennings [Wash.] 87 P. 53. Under the National Bankruptcy Act a preference, though made within four months of filing the petition in bankruptcy, is not voidable at the election of the trustee unless the creditor had notice that a preference was intended. Hawes v. Bank of Elberton, 124 Ga. 567, 52 S. E. 922. Evidence insufficient to show such notice. Id. In an action to recover a preference, evidence of the state of the money market at the time of the payments is not admissible on an issue of the debtor's insolvency at the time. Bolster v. Graves, 189 Mass. 301, 75 N. E. 714.

82. An insolvent may turn over his property in good faith in payment of a debt, though other creditors are thereby hindered and delayed. Atkinson v. McNider [Iowa] 105 N. W. 504. Where one creditor purchases property from his debtor in payment of his debt knowing such debtor to be insolvent, but only purchases so much as would satisfy his debt, the transaction is not fraudulent as to other creditors, though the debtor intended to defraud them and the purchaser knew of such intent but did not participate therein. Sparks v. Ponder [Tex. Civ. App.] 15 Tex. Ct. Rep. 480, 94 S. W. 428.

83. Where a son conveyed to his father in payment of antecedent debts, the fact that the son was in failing circumstances at the time does not render the conveyance fraudulent if the father acted in good faith and his claim was bona fide, though he subsequently aided his son with payments in excess of the value of the property conveyed. White v. Million, 114 Mo. App. 70, 89 S. W. 599. If the wife of a debtor is a bona fide creditor she may be preferred. Maffi v. Stephens [Tex. Civ. App.] 15 Tex. Ct. Rep. 140, 93 S. W. 158. Instructions on the subject of preferences approved. Id. If there is no fraud a parent may receive pay or take security from his son who is indebted to him, though the result will be to defeat or delay other creditors. First Nat. Bank v. Brubaker, 128 Iowa, 587, 105 N. W. 116. Where a wife obtained money from her husband to be used in her business with the understanding that she should build a home out of the proceeds of the business and convey it to the husband, and some years later the understanding was carried out, it was held that the conveyance was based on a valuable consideration, and there being no actual fraud was valid, though both husband and wife knew of claims against the wife and had notice that the conveyance might operate as a preference. Clarke v. Black, 78 Conn. 467, 62 A. 757. Where a husband was indebted to his wife a conveyance by him to her of all his real estate, just prior to the maturity of an obligation, was held not fraudulent but only a preference, and enforceable as a mortgage. Knickerbocker Trust Co. v. Carhart [N. J. Eq.] 64 A. 756.

84. Ober & Sons Co. v. Phillips Buttorff Mfg. Co. [Ala.] 40 So. 278.

85. Ober & Sons Co. v. Phillips Buttorff Mfg. Co. [Ala.] 40 So. 278. A bona fide creditor may, with knowledge that the debtor intends to defraud other creditors, take property of the debtor in satisfaction of his claim, and if necessary make a cash payment of the difference, but the transaction must not be for the purpose of conferring a benefit on him, and the payment made must be necessary in order to effectuate the transfer or collection of his debt. Sly v. Bell [Iowa] 108 N. W. 227. Where a creditor transferred goods to one debtor in payment of his debt and received the difference between the amount of the debt and the value of the goods in cash, the sale was not fraudulent as a matter of law where the excess was for an interest in the property which belonged to the debtor's lessor. Sparks v. Ponder [Tex. Civ. App.] 15 Tex. Ct. Rep. 380, 94 S. W. 428. Where an insolvent sold goods to a creditor in satisfaction of his debt, and the value of the goods was almost equal to the debt, the fact that the creditor agreed to pay the debtor a small amount of cash was not sufficient to stamp the transaction as fraudulent against other creditors. Redd v. Wallace [Ala.] 40 So. 407. A dation en paiement from husband to wife is fraudulent as to his creditors where the debt did not equal in amount the value of the property transferred and was conceived in fraud. Pelletier v. State Nat. Bank [La.] 41 So. 640. The right of a husband to make a transfer of property

§ 2. *Validity and effect.*[87]—A conveyance fraudulent as to creditors is valid and binding as to the parties[88] and those in privity to the grantor.[89] As to creditors it is void regardless of the grantor's solvency[90] or the consideration paid.[91] If part of the consideration is fictitious or fraudulent, the entire transaction is fraudulent.[92]

§ 3. *Who may attack.*[93]—Only creditors who were prejudiced by the conveyance may attack it,[94] and they may not if they acquiesced in the transaction.[95] As a general rule a creditor must first reduce his claim to judgment,[96] but a trustee in

to his wife through a dation en paiement can be exercised only under the conditions prescribed by law. Where a creditor of the husband attaches property so held by the wife, it is sufficient for him to show that the husband and wife colluded together to withdraw all the property of the husband from the payment of his debts. Id. A purchase by one creditor of the entire stock of trade of a common debtor will be set aside as to others if upon the whole evidence it does not appear to have been made in good faith and for an adequate consideration. Fabian v. Traeger, 117 Ill. App. 176.

86. Where a debtor with intent to defraud other creditors transferred property to one creditor and accepted a cash payment for the difference, the transaction was held fraudulent as the cash payment was unnecessary and could have been avoided by omitting some of the property from the sale. Sly v. Bell [Iowa] 108 N. W. 227.

87. See 5 C. L. 1567.

88. A conveyance though fraudulent as to creditors and voidable as to them is valid as between the parties. Bouton v. Beers, 78 Conn. 414, 62 A. 619. A secret trust made for the purpose of defrauding the grantor's creditors will not be enforced in equity. Gillum v. Kirksey [Ky.] 93 S. W. 591. A judgment setting aside a conveyance should not set it aside absolutely, as the title of the grantee is good as against the grantor and the creditor except so far as it is necessary for them to resort to the lands. The grantee is entitled to redeem. Delia v. Caprio [Conn.] 64 A. 340. So far as the land is taken from the grantee to pay secured debts, he may be subrogated to rights of the creditors in the other security. Long v. Deposit Bank [Ky.] 90 S. W. 961. In a suit by an executor under Comp. Laws 1897, § 9363, to set aside an alleged fraudulent conveyance by his testator because of insufficiency of assets to pay debts, a decree should only require the grantee to pay the claims allowed with costs, and should not require a reconveyance to the executor. Chapoton v. Prentis [Mich.] 13 Det. Leg. N. 186, 107 N. W. 879.

89. It is good as between the parties, and if the grantee can make a case without the fraud appearing, it cannot be invoked by the grantor or one in privity with him. Lefmann v. Brill [C. C. A.] 142 F. 44.

90. Klauber v. Schloss [Mo.] 95 S. W. 930. Under Civ. Code § 3439, a fraudulent conveyance is void as to creditors or the debtor's assignee in insolvency without regard to whether it was made within 30 days of the debtor's petition in insolvency, provided there were creditors at the time of insolvency and not sufficient property to pay them. Nixon v. Goodwin [Cal. App.] 85 P. 169.

91. Where a deed is executed with intent to defraud creditors to secure a pretended indebtedness, to one who has notice of the fraudulent intent of the grantor, it is void as to creditors irrespective of the amount or nature of the consideration. Klauber v. Schloss [Mo.] 95 S. W. 930. Under a statute making conveyances with intent to defraud creditors void as against creditors, a fraudulent conveyance is void though full consideration was paid by the grantee. Russell & E. Mfg. Co. v. Faitoute Hardware Co. v. [N. J. Eq.] 62 A. 421.

92. Klauber v. Schloss [Mo.] 95 S. W. 930. A transaction with one creditor which is fraudulent in part as to others will be wholly set aside. Fabian v. Traeger, 117 Ill. App. 176.

93. See 5 C. L. 1567.

94. A subsequent creditor cannot assail a conveyance in the absence of proof that fraud on him was contemplated. Collings v. Collings [Ky.] 92 S. W. 577. A subsequent creditor may not assail a conveyance made to defraud existing creditors. Williams v. Kemper [Minn.] 109 N. W. 242. He must show that its purpose or effect was to defraud him. Id. Where an insolvent mortgagor with intent to defraud creditors furnished money to obtain an assignment to his daughter of a mortgage on his property, such assignment could be assailed only by his general creditors. Hatch v. Daugherty [Mich.] 13 Det. Leg. N. 657, 108 N. W. 986. A mortgagor while insolvent and with intent to defraud creditors furnished money to procure an assignment to his daughter of a mortgage on his property. Held that such fraud did not impair the security of a subsequent mortgage on the same property and did not give it priority over the mortgage assigned. Id. A pre-existing debtor who has not changed his position from the time such debt was incurred to the time he takes confession of judgment cannot assail an intervening conveyance to another creditor because it was not recorded until a few days prior to such confession of judgment, though failure to record was pursuant to agreement. Atkinson v. McNider [Iowa] 105 N. W. 504. In replevin by A against an officer who justifies under an attachment against B on the ground of fraudulent conveyance from B to A, it is immaterial that the relation of debtor and creditor exists between the attachment plaintiffs and B, and the question as to whether the conveyance was fraudulent is immaterial until it is shown that he represents the creditors. Dunn v. Overton, 15 Okl. 670, 83 P. 715.

95. Where an insolvent at the instance of all but one of his creditors conveyed his property in trust to be operated for their benefit, and such creditor made no objection and did not participate in the scheme it was

bankruptcy may attack it for the benefit of general creditors.[97] It cannot be assailed by the grantor[98] or his heirs[99] or those in privity with him.[1] Administrators of the grantor may attack it only where authorized by statute.[2]

§ 4. *Rights and liabilities of persons claiming under a fraudulent grantee.*[3]—A fraudulent grantee can convey a good title to an innocent purchaser,[4] but not to one with notice of the fraud.[5]

§ 5. *Extent of grantee's liability.*[6]—A fraudulent grantee may not recover payments made by him on account of the transaction,[7] but he is entitled to the surplus after the claims of creditors have been satisfied,[8] and he may be called upon to account for rents and profits which accrued while he was in possession.[9] Where a chattel mortgage of a stock of merchandise is void because authorizing the mortgagor to sell without accounting for the proceeds, the creditors may compel the mortgagee to account for goods taken by him under the mortgage, though taken before the creditors could enforce their claims.[10]

§ 6. *Remedies of creditors.*[11]—A proceeding to have a fraudulent conveyance set aside is equitable.[12] A creditor may enforce his rights by attachment[13] to the

held that such creditor could not impeach the conveyance. Imperial Woolen Co. v. Longbottom [C. C. A.] 143 F. 483.

96. Only judgment creditors may assail. Lefmann v. Brill [C. C. A.] 142 F. 44; Ainsworth v. Roubal [Neb.] 105 N. W. 248; Hatch v. Daugherty [Mich.] 13 Det. Leg. N. 657, 108 N. W. 986.

Contra. See 3 C. L. 1544, n. 15.

97. A claim need not be reduced to judgment in order that a trustee in bankruptcy may sue to set aside a fraudulent conveyance. Crary v. Kurtz [Iowa] 105 N. W. 590. A trustee in bankruptcy has the same right to assail a chattel mortgage which is void as to creditors as the judgment creditors of the mortgagor would have. Zartman v. First Nat. Bank, 109 App. Div. 406, 96 N. Y. S. 633. That a trustee took possession under a chattel mortgage void as to creditors before there were any other liens or judgments does not affect the rights of other creditors to assail the transaction after reducing their claims to judgment. Id.

98. A deed made by a husband in anticipation of divorce and for the purpose of placing the property beyond the reach of his wife will not be set aside in equity at the instance of the husband. Creighton v. Roe, 218 Ill. 619, 75 N. E. 1073. Neither the grantor nor his heirs can obtain relief in equity. Jones v. Jones [S. D.] 108 N. W. 23.

99. Not by heirs of the grantor. Foster v. Beidler [Ark.] 96 S. W. 175. Neither the grantor, his heirs nor assigns can question the validity of the conveyance. Jolly v. Graham [Ill.] 78 N. E. 919.

1. A wife who has recovered a decree for alimony against her husband and is awarded specific property upon which her husband prior to the suit had executed a mortgage cannot avoid such mortgage as fraudulent, as she was in privity with him. Lefmann v. Brill [C. C. A.] 142 F. 44.

2. Kirby's Dig. § 81, authorizing an administrator to attack a fraudulent conveyance of his intestate, applies only to a conveyance of real estate and not to the assignment of life insurance. Matlock v. Bledsoe [Ark.] 90 S. W. 848.

3. See 5 C. L. 1569.

4. A mortgage by the fraudulent grantee to an innocent person is valid. Gilcrest v. Bartlett [N. H.] 64 A. 767. Where a conveyance was alleged to be fraudulent as to creditors of a firm, evidence as to the consideration paid by a subsequent grantee is immaterial. Dorris v. McManus [Cal. App.] 86 P. 909.

5. Where a conveyance from a wife to a brother-in-law and one from such brother-in-law to the husband of the original grantor was for the purpose of defrauding a mortgagor and creditor of the wife, the creditor could have it set aside though the husband did not know of the mortgage. New v. Young [Ala.] 41 So. 523.

6. See 5 C. L. 1569.

7. Where there is actual fraud on the part of both grantee and grantor, the grantee is not entitled to be reimbursed for any payments made by him on account of the transaction. Tissier v. Wailes [Ala.] 39 So. 924. Where both grantee and grantor were guilty of fraud, the grantee was not, when the conveyance was set aside, entitled to a return of the purchase money paid by him. Willett v. Froelich [Ky.] 90 S. W. 572.

8. Where a conveyance is set aside the grantee is not entitled to recover the consideration paid, but he is entitled to the surplus after the creditor's claim is satisfied. Porter v. Hart County Deposit Bank & Trust Co. [Ky.] 96 S. W. 832.

9. Where a conveyance is set aside as fraudulent and the land is insufficient to satisfy the judgment, the grantee may be compelled to apply upon its payment the rents and profits of the land which accrued while he was in possession. First Nat. Bank v. Gibson [Neb.] 105 N. W. 1081.

10. Pfeiffer v. Roe, 108 App. Div. 54, 95 N. Y. S. 1014.

11. See 5 C. L. 1570.

12. Where one of two debtors executing a note was solvent at the time, but afterwards became insolvent, a conveyance by the other may be set aside in equity. The rule that equity will not set aside a conveyance by one joint debtor while there is a

extent provided by statute[14] and no further,[15] and if the remedy prescribed by law is inadequate, he may proceed by creditor's bill.[16] A proceeding by which a receiver is appointed to collect and pay rents to a dowress cannot be extended to a suit to set aside as fraudulent a transfer by the dowress of her dower right.[17] One creditor may maintain a bill to set aside a conveyance fraudulent as to him.[18] A creditor may enforce his judgment by levy and sale on the property held by the grantee and then sue to set aside the conveyance, but the better practice is to first sue to set aside the conveyance.[19] If a creditor has an adequate remedy at law, equity will not intercede in his behalf.[20] The proceeding must be instituted with due diligence[21] and within the limitation period.[22] The action is transitory.[23] An administrator[24] or executor of the grantor may set aside a fraudulent conveyance by him.[25] The personal representative of a grantor since deceased is not a necessary party if there is no estate and no administrator has been appoint-

remedy against the other does not apply. Stark v. Lamb [Ind.] 78 N. E. 668.

13. Under Rev. Laws c. 178, § 53, a creditor may on recovering judgment against the administrator of a deceased debtor cause execution to be levied on property fraudulently conveyed by the debtor. Dunbar v. Kelly, 189 Mass. 390, 75 N. E. 740.

14. Rev. Laws c. 167, § 112, providing that an attachment shall be dissolved if the debtor dies before the property is taken and administration granted, applies to attachments of property fraudulently conveyed. Dunbar v. Kelly, 189 Mass. 390, 75 N. E. 740. Rev. Laws c. 167, § 112, declaring an attachment to be dissolved if the debtor dies before the property is seized on execution, is not repeated. Id.

15. St. 1844, p. 211, c. 107, § 2, authorizing special attachment of lands fraudulently conveyed, and standing in the name of a third person, does not apply to land standing in the name of a third person in trust for the debtor. Lyons v. Urgalones, 189 Mass. 424, 75 N. E. 950.

16. Under the Pennsylvania statute authorizing suit to set aside a bulk sale within 90 days, if statutory conditions were not complied with, where it is impossible for creditors to pursue their claims to judgment and execution within the time specified, a creditor's bill may be filed. Guaranty Title & Trust Co. v. Pearlman, 144 F. 550.

17. Dolan v. Conlon, 99 N. Y. S. 1090.

18. Where it is not a general creditor's bill. Tissier v. Wailes [Ala.] 39 So. 924.

19. Welch v. Mann, 193 Mo. 304, 92 S. W. 98.

20. Where remedy by attachment is available and complete, the extraordinary remedy of injunction and receiver is properly denied. In an action by a vendee of a stock of goods where the bulk sales law is not complied with and the sale is therefore void. Carstarphen Warehouse Co. v. Fried, 124 Ga. 544, 52 S. E. 598. A suit in equity may not be maintained until the creditor has exhausted his remedies at law. State v. Goggin, 191 Mo. 482, 90 S. W. 379. A sale of a stock of merchandise in bulk without complying with Acts 1903, p. 92, is void as to creditors, who may proceed by attachment against the debtor. Such remedy being complete, remedy by injunction and receiver was properly denied. Carstarphen Warehouse Co. v. Fried, 124 Ga. 544, 52 S. E. 598.

21. Where one makes a voluntary conveyance with intent to defraud his future wife of her marital rights, the woman whom he marries must, as soon as she learns the facts, bring suit to set the deed aside. If she delays too long she will lose her right. Higgins v. Higgins, 219 Ill. 146, 76 N. E. 86.

22. Until a creditor has reduced his claim to judgment, limitations do not commence to run against his right to assail the conveyance. Ainsworth v. Roubal [Neb.] 105 N. W. 248. To bar an action to set aside a conveyance as fraudulent, there must have been adverse possession for the statutory period, the debt not being barred. James v. Mallory [Ark.] 89 S. W. 472. A bill to subject land of a wife to a debt of her husband on the claim that it was paid for with the husband's money and conveyed to the wife in fraud of his creditors must charge notice of the fraudulent intent on the part of the wife, otherwise it is to be regarded as a bill to set aside a voluntary conveyance, and the five year limitation statute applies. Laidley v. Reynolds, 58 W. Va. 418, 52 S. E. 405.

23. A suit to set aside a fraudulent conveyance and successive conveyances thereunder, and praying that some of the grantees residing in a county other than that in which the land is located be held as trustees, is properly brought in the county in which they reside. Chisolm v. Wallace [Ala.] 40 So. 219.

24. An administrator is the proper person to sue for goods fraudulently conveyed by his intestate. Wright v. Holmes, 100 Me. 508, 62 A. 507. Under Rev. Laws, c. 146, §§ 2, 17, and c. 178, § 1, as between debtor and creditor, property fraudulently conveyed may be recovered and sold by an administrator. Dunbar v. Kelly, 189 Mass. 390, 75 N. E. 740. Under the Vermont statute a compromise of a debt by an administrator is not a bar to a subsequent suit by heirs against the same parties involving transfers of other property. Marsh v. Marsh, 78 Vt. 399, 63 A. 159.

25. Under Comp. Laws 1897, § 9363, providing that where there is a deficiency of assets in the hands of an executor he shall prosecute an action to recover property fraudulently conveyed by the decedent, he may do so without an order of the probate court or application of creditors. Chapoton v. Prentis [Mich.] 13 Det. Leg. N. 186, 107 N. W. 879

ed.[26] The pleadings are governed by the general rules of pleading.[27] They must not be repugnant.[28] A trustee in bankruptcy suing to set aside a conveyance need not allege the special orders of the bankrupt court authorizing him to sue, though he must have such authority.[29] The answer of an assignee to a bill attacking an assignment must deny notice of the fraudulent intent of the assignor, as well as fraudulent intent of the assignee.[30] It may be shown under a general denial that the purchase was bona fide,[31] or that the property was exempt.[32] A creditor assailing the conveyance of a debtor since deceased must prove it to be fraudulent.[33] A judgment creditor suing to set aside a trust deed who fails to prove fraud may have the land sold and the surplus, after satisfying the trust deed, applied to the payment of his judgment.[34]

FREEMASONS; FRIENDLY SUITS; FRIEND OF THE COURT; FUNDS AND DEPOSITS IN COURT; FUTURE ESTATES, see latest topical index.

GAMBLING CONTRACTS.

§ 1. What Constitutes a Wagering Contract (1859).
§ 2. Rights and Remedies of Parties and Their Privies (1860).
§ 3. Effect of Illegality on Substituted or Collateral Contracts or Securities (1861).

The crime of gambling and the right to recover money lost at gaming are treated elsewhere.[35]

26. Under Laws 1897, p. 509, c. 417, providing that a creditor of a deceased insolvent may without reducing his claim to judgment sue to set aside a fraudulent conveyance made by the decedent, it is not necessary to make the decedent's personal representative a party where the decedent died without property, no administrator has been appointed, and his executor is dead. Johnston v. Gundberg, 98 N. Y. S. 1015.

27. A complaint by a judgment creditor to set aside a fraudulent conveyance, alleging that the grantee in such conveyance had agreed to pay the grantor's debt, and praying that the proceeds of property conveyed by the debtor and sold by the grantee be applied to the payment of the debt, and also praying for a receiver, only states a cause of action to set aside a fraudulent conveyance. Zeiser v. Cohn, 98 N. Y. S. 1078. An objection to a bill that a conveyance may have been based on a past consideration is obviated by an amendment of the bill in which it is alleged that there was a secret reservation of benefit to the grantor. Tissier v. Walles [Ala.] 39 So. 924.

28. A bill to set aside a fraudulent conveyance and successive conveyances thereunder is repugnant and inconsistent for claiming the proceeds of the sales of the property, and also praying that the conveyance be set aside and title vested in complainant, trustee in bankruptcy. Chisolm v. Wallace [Ala.] 40 So. 219.

29. Chisolm v. Wallace [Ala.] 40 So. 219.

30. Failure to deny is an admission of the truth of the allegation of notice. Dent v. Pickens [W. Va.] 53 S. E. 154. General denial held insufficient. Id.

31. In an action to subject property standing in the name of a third person to the claim of a creditor on the ground that title had been so placed to defraud creditors, it could be shown under a general denial that the purchase price and the cost of improvements on the premises had been furnished by the person in whose name the title stood. Veerkamp v. Goodrich [Colo.] 86 P. 1017.

32. In an action to set aside as fraudulent, a conveyance, it may be shown under a general denial that the property was exempt. Deweese v. Deweese [Ky.] 90 S. W. 256.

33. Under Laws 1896, p. 604, c. 547, § 232, authorizing a creditor of a deceased insolvent debtor to sue to set aside a fraudulent conveyance of the decedent, he must in such action prove his claim in the same manner as he would be required to prove it in an action at law. Mertens v. Mertens, 48 Misc. 235, 96 N. Y. S. 785. He must also prove the insufficiency of the assets of the estate to pay the debts. Id. Where an executor sought to set aside fraudulent conveyances by his decedent, the allowance of claims by commissioners of the estate, which did not show on their face that they accrued after testator's death, constituted prima facie evidence that they existed before that time. Chapoton v. Prentis [Mich.] 13 Det. Leg. N. 186, 107 N. W. 879. Where a bill by a judgment creditor to set aside as fraudulent a conveyance shows that the judgment was obtained in a court having jurisdiction, it is presumed that the judgment was properly obtained. McDevitt v. Connell [N. J. Eq.] 63 A. 504.

34. Scott v. Thomas, 104 Va. 330, 51 S. E. 829. It is immaterial that the debt secured was not due when he filed his bill if it became due before the sale. Id.

§ 1. *What constitutes a wagering contract.*[36]—A contract for the sale of a commodity for future delivery is valid even though the seller does not own it, if the parties thereto intend that there shall be an actual delivery and payment of the contract price,[37] but if they have no intention of receiving or delivering the commodity, but intend to settle by the payment of the difference between the selling price and the market price at the time of delivery, the contract is a wagering or gambling one and invalid.[38] Contracts of the latter class are expressly condemned by statute in many states.[39] If the contract is itself lawful, the putting up of margins to cover

35. See Betting and Gaming, 7 C. L. 434.

36. See 5 C. L. 1571.

37. John Miller Co. v. Klovstad [N. D.] 105 N. W. 164; Berry v. Chase [C. C. A.] 146 F. 625. If it is bona fide intention of seller to deliver or the buyer to pay, and option consists merely in time of delivery within a given time. Whitehead v. Ballinger [Colo.] 88 P. 169. One may sell for future delivery a thing he does not own provided both he and his vendee intend at the time that an actual delivery shall be made, and parties may thereafter release each other from performance either with or without the payment of a consideration by one of them. Hingston v. Montgomery [Mo. App.] 97 S. W. 202. Evidence in action by brokers on account held insufficient to show that stock transactions on which it was based were gambling contracts. Dryden v. Zell [Md.] 65 A. 33. Contract held valid even if conceded to be an option contract. Whitehead v. Ballinger [Colo.] 88 P. 169. Evidence in action by agent against principal to recover for losses sustained in transactions on board of trade in sale of grain for future delivery held not to require submission of issue raised by answer so that direction of verdict for plaintiff was proper. John Miller Co. v. Klovstad [N. D.] 105 N. W. 164. Contract by corporation to sell certain bonds, which it had acquired the right to buy, to subscribers at a specified price and reserving right to sell them for the account of the subscribers at a specified higher price before a certain date, held not a gambling contract, where corporation delivered bonds to all the other subscribers and tendered plaintiff's to him and demanded the price. Nes v. Union Trust Co. [Md.] 64 A. 310.

Note: In general, except as otherwise provided by express enactment, a dealing in futures is not illegal (Barnett v. Baxter, 64 Ill. App. 544; Mohr v. Meson, 47 Minn. 228, 49 N. W. 862; Morrissey v. Broomal, 37 Neb. 766, 56 N. W. 383), and the weight of authority seems to be that a purchase on margins is not necessarily unenforceable (Hatch v. Douglas, 48 Conn. 116, 40 Am. Rep. 154; Wall v. Schneider, 59 Wis. 352, 18 N. W. 443; In re Taylor, 192 Pa. 304, 43 A. 973, 73 Am. St. Rep. 812; Tantum v. Arnold, 42 N. J. Eq. 60, 6 A. 316). But such contracts must intend actual delivery and not simply a settlement of differences. Pearce v. Rice, 142 U. S. 28, 35 Law. Ed. 925; Billingslea v. Smith, 77 Md. 504, 26 A. 1077. Though if one party only intended actual delivery, the contract has been held valid. Bibb v. Allen, 149 U. S. 481, 37 Law. Ed. 819; Clews v. Jamieson, 182 U. S. 461, 45 Law. Ed. 1183. In any given instance the question as to what the intention really was is for the jury. Gregory v. Wendell, 39 Mich. 337; Kirkpatrick v. Adams, 20 F. 287; Watts v. Costello, 40 Ill. App. 307. —From 4 Mich. L. R. 168.

38. Western Union Tel. Co. v. State, 165 Ind. 492, 76 N. E. 100; Dryden v. Zell [Md.] 65 A. 33; State v. McGinnis, 138 N. C. 724, 51 S. E. 50; John Miller Co. v. Klovstad [N. D.] 105 N. W. 164.

Contracts held void: Sales of grain on margin. Hingston v. Montgomery [Mo. App.] 97 S. W. 202. Contracts for purchase and sale of stock with bucket shop proprietors. McCarthy v. Meaney, 183 N. Y. 190, 76 N. E. 36. In action by broker to recover balance alleged to be due on series of stock transactions, held that nonsuit was properly granted where it appeared that all the transactions were settled by adjustments in money of the profit and loss, and there was no testimony showing a bona fide intention by either party that there should be actual deliveries. Snider v. Harvey [Pa.] 64 A. 687. Petition in action by customer against broker to recover profits of sales of cotton and margins paid and not used held to show a deal in futures without any intention of making actual delivery. Norris v. Logan [Tex.] 97 S. W. 820, afg. [Tex. Civ. App.] 15 Tex. Ct. Rep. 41, 526, 94 S. W. 123. Same held true of answer in which defendants sought to recover losses alleged to have been suffered by them through failure of plaintiffs to put up margins. Id. In action by brokers to recover money alleged to have been paid by them for defendant's account in the purchase of certain cotton, evidence held to justify submission to jury of question whether a delivery was actually intended, and to support verdict for defendant. Appling v. Watts [Tex. Civ. App.] 98 S. W. 935.

39. A contract to furnish not less than 125 nor more than 200 tons of coal per day as might be ordered is not an option contract within Rev. St. c. 38, § 130. Consolidated Coal Co. v. Jones & Adams Co., 120 Ill. App. 139. The actual purchase or the entering into a contract to actually purchase grain at a future day is not within Ill. Cr. Code § 130, Hurd's Rev. St. 1905, p. 698, providing that whoever contracts to have or give to himself or another the option to sell or buy at a future time any grain or other commodity shall be subject to fine or imprisonment, and that all contracts made in violation of the statute shall be void. Zeller v. Leiter, 99 N. Y. S. 624. It is only where the parties have no intention of receiving or delivering the commodity, but intend to settle by the payment of differences between the selling price and the market price, that the contract is a gambling contract and incapable of enforcement. Id.

losses which may accrue from the fluctuations of prices, and the final settlement of the transaction according to the usages and rules of the board of trade, are entirely legitimate and proper.[40] In the absence of a statutory provision to the contrary,[41] the test is the intention, not alone of one of the parties but of both,[42] to be ascertained from all the surrounding facts and circumstances,[43] the question being ordinarily one of fact for the jury.[44]

§ 2. *Rights and remedies of parties and their privies.*[45]—Gambling contracts, being void, will not be enforced by the courts and no action thereon will lie.[46] The law presumes the validity of the contract and the burden is upon the party asserting the contrary to establish such fact.[47] Memoranda of contracts made at the time are admissible in evidence in actions thereon.[48]

Statutes in many states provide for the setting aside of gambling contracts,[49] or for the recovery back of money or property paid or transferred pursuant to them;[50] but a statute imposing a license on persons engaged in the business of dealing in futures precludes a recovery of money lost to them in transactions in futures, even though they are purely speculative.[51] In some states one contracting to buy or sell securities, intending at the time that there shall be no actual purchase or sale, may recover any payments made to the other party if the latter had reasonable

40. Whitehead v. Ballinger [Colo.] 88 P. 169.

41. Under Rev. St. 1899, §§ 2337-2342, obligations arising out of option transactions are void in the hands of a party to such transactions, though he acted in ignorance of the fact that an actual delivery was not intended, the intention of one of the parties not to deliver or receive the property invalidating the agreement. Stewart v. Hutchinson [Mo. App.] 96 S. W. 253. Under Shannon's Code Tenn. § 3166, any contract for sale of products or bonds or stock is a gambling contract and void when either party does not intend an actual delivery. Berry v. Chase [C. C. A.] 146 F. 625.

42. Hingston v. Montgomery [Mo. App.] 97 S. W. 202. Undisclosed intention of one party will not invalidate contract. Zeller v. Leiter, 99 N. Y. S. 624; John Miller Co. v. Klovstad [N. D.] 105 N. W. 164; Berry v. Chase [C. C. A.] 146 F. 625.

43. The mere making of a written contract under which a delivery or its legal equivalent may be compelled is not conclusive of a mutual intention to deliver, and it will be disregarded when it is shown to be a mere subterfuge intended to conceal the actual agreement. Hingston v. Montgomery [Mo. App.] 97 S. W. 202.

44. Question of intention held properly left to the jury, the contract not being a gambling one on its face. Rankin v. Mitchem [N. C.] 53 S. E. 854.

45. See 5 C. L. 1573.

46. Contracts for dealing in futures without any intention of making actual delivery held unenforceable because contrary to public policy and in violation of Pen. Code art. 377. Norris v. Logan [Tex.] 97 S. W. 820, afg. [Tex. Civ. App.] 15 Tex. Ct. Rep. 41, 526, 94 S. W. 123. Where it appears from the record that the contract is a wagering one, the appellate court will declare it invalid of its own motion though it was not objected to on that ground below. Id.

47. Dryden v. Zell [Md.] 65 A. 33; John Miller Co. v. Klovstad [N. D.] 105 N. W. 164. Evidence insufficient. Overbeck, Starr & Cooke Co. v. Roberts [Or.] 87 P. 158.

48. In action by broker to recover balance on sales and purchases of cotton for defendant, telegrams by plaintiff to his agents directing such sales and purchases held admissible as tending to show that actual bona fide sales and purchases were contemplated. Overbeck, Starr & Cooke Co. v. Roberts [Or.] 87 P. 158. Statements furnished customers by clerk, hired by manager of branch bucket shop, showing nature of transactions and amount of margin paid thereon, held admissible in action to recover money lost, both as declarations made by defendants' agents in course of their agency and also as being the very contracts under which the money was paid. McCarthy v. Meaney, 183 N. Y. 190, 76 N. E. 36. Such statements issued to manager in transactions on his own account held inadmissible in similar action by him. Id.

49. Rule as to parties in pari delicto does not apply in action to cancel indorsements on drafts made in consideration of money lost at gaming, where statute provides that contracts based on such a consideration are void and may be set aside. Morton v. Provident Nat. Bank [Tex. Civ. App.] 14 Tex. Ct. Rep. 988, 93 S. W. 189.

50. Stock transactions with bucket shop. McCarthy v. Meaney, 183 N. Y. 190, 76 N. E. 36. Bill seeking to compel defendants to transfer to complainant certain stock alleged to have been transferred and delivered to them by him in violation of Act March 27, 1874, 2 Gen. St. 1606, held demurrable if brought under § 5, since it appeared on its face that suit was commenced more than six months after the delivery of the stock. Myers v. Fridenberg [N. J. Eq.] 62 A. 532.

51. Irrespective of whether a purely speculative transaction in cotton futures is a "gaming" contract within Civ. Code 1895, § 3671, permitting the recovery back of money

cause to believe that such an intention existed.[52] In such case defendant's undisclosed intention,[53] and his dealings with others, the particulars of which are not shown to have been known to plaintiff, cannot be shown.[54] Equity will not take jurisdiction of a bill to recover property transferred pursuant to a gambling contract where complainant has an adequate remedy at law.[55]

§ 3. *Effect of illegality on substituted or collateral contracts or securities.*[56]—Statutes in some states make void any security the whole or any part of the consideration for which is money won or lost at gaming.[57] The invalidity of the original contract does not affect an independent contract supported by a detached and independent consideration.[58] A note for a balance due on transactions in grain is not invalidated by reason of the fact that the statement from which the balance was struck contained an illegal item, in the absence of a showing that the balance was thereby decreased.[59] The fact that commercial paper is based on a gambling transaction is no defense as against bona fide purchasers.[60]

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delivered upon a gaming consideration. Miller & Co. v. Shropshire, 124 Ga. 829, 53 S. E. 335.

52. Under Rev. Laws c. 99, § 4. Anderson v. Metropolitan Stock Exch., 191 Mass. 117, 77 N. E. 706. Statute is constitutional. Id. Right of action held to survive to administrator, statute being remedial and not penal. Id. Right to recover on account of transactions prior to date when act went into effect held not taken away by such act. Id. One employed by another to buy or sell for his account has no remedy under statute to recover payments made. Id. Evidence held not to establish as matter of law that defendant was merely employed as a broker and was not contracting as a principal. Id. Findings held to bring case within statute. Id. Voluntary release of right by insolvent held fraudulent as to creditors. Id.

53. Question being what was plaintiff's intention and what defendant had reasonable cause to believe it was. Anderson v. Metropolitan Stock Exch., 191 Mass. 117, 77 N. E. 706.

54. Anderson v. Metropolitan Stock Exch., 191 Mass. 117, 77 N. E. 706.

55. Bill seeking to compel defendants to transfer to complainant certain stock alleged to have been transferred and delivered by him to them in violation of Act March 27, 1874, 2 Gen. St. 1606, held demurrable if brought under § 2, since complainant had a complete remedy at law by way of an action of trover and conversion. Myers v. Fridenberg [N. J. Eq.] 62 A. 532.

56. See 3 C. L. 1550.

57. Check given for losses at poker. Remer v. Ettinger, 48 Misc. 641, 96 N. Y. S. 263. Note given by defendant to broker as additional security for advances made by him in the purchase of stock held not within Mills' Ann. St. § 1344, the stock bought being at all times defendant's property and subject to his order on payment of his indebtedness to the broker. Whitehead v. Ballinger [Colo.] 88 P. 169. A note to secure a balance found due on a settlement of joint speculations on the future market value of a commodity is void under Rev. St. 1899, §§ 2337-2342. Stewart v. Hutchinson [Mo. App.] 96 S. W. 253. Where drafts payable to one of the defendants were indorsed by him to plaintiff as security for money loaned him during a game of craps, which money was won by plaintiff, and after winning full amount of drafts, plaintiff retained same in settlement of such winnings, held that transaction was within Rev. St. Mo. 1899, § 3426, declaring that notes, etc., are void and may be set aside when consideration therefor is money lost at gaming. Morton v. Provident Nat. Bank [Tex. Civ. App.] 14 Tex. Ct. Rep. 988, 93 S. W. 189. Since money was lost in game in which plaintiff participated, fact that others took part in the game and won defendant's wagers or a part thereof would not prevent cancellation of indorsements. Id. Cross bill seeking cancellation of indorsements held not within Rev. St. Mo. 1899, § 3432, requiring actions for money or property lost at gaming to be brought within three months after right of action accrues. Id.

58. Ky. St. 1903, § 1955, held not to render invalid a note given in consideration of money advanced by payee to maker to enable latter to pay gambling debt, where payee in no way participated in the gambling transaction, and was not appraised of the purpose for which the money was to be used. Cooley v. Allen [Ky.] 90 S. W. 1048. Bank in good faith advanced money to plaintiff and defendant who used it in gambling in wheat. Plaintiff thereafter paid the bank in full and defendant gave him his note for his share of the indebtedness. Held that note was a new and independent contract supported by a detached and independent consideration and was valid. Stewart v. Hutchinson [Mo. App.] 96 S. W. 253.

59. Zeller v. Leiter, 99 N. Y. S. 824.

60. The fact that notes regular on their face were given on account of a stock gambling transaction. Myers v. Kessler [C. C. A.] 142 F. 730.

GARNISHMENT.[61]

§ 1. Definition and Nature of Remedy in General (1862).
§ 2. Grounds for Garnishment and Choses and Properties Subject (1862).
§ 3. Persons Liable to Garnishment (1864).
§ 4. Rights, Defenses, and Liabilities Between Plaintiff and Garnishee (1865).
§ 5. Rights, Defenses, and Liabilities Between Defendant and Garnishee (1866).
§ 6. Duties of a Garnished Agent to his Principal (1866).
§ 7. Conflicting and Hostile Claims and Liens (1866).
§ 8. Jurisdiction and Venue (1866).
§ 9. Procedure to Obtain Writ; Bond (1869).
§ 10. The Writ and Service Thereof; Return; Notice to Defendant (1870).
§ 11. Answer or Disclosure and Later Pleadings or Traverse (1870).
§ 12. Claims or Interventions (1872).
§ 13. Dissolution of Writ (1872).
§ 14. Effect of Pendency of Other Proceedings; Stay, etc. (1872).
§ 15. Trial, Verdict and Judgments, Costs and Execution (1873).
§ 16. Appellate Review (1874).

§ 1. *Definition and nature of remedy in general.*[62]—Garnishment is purely a statutory remedy,[63] and while statutes providing therefor will be liberally construed as remedial and beneficial,[64] the statutory procedure must be strictly followed.[65] It is always ancillary to some principal action and falls with such action.[66]

§ 2. *Grounds for garnishment and choses and properties subject.*[67]—Plaintiff must have a valid claim against the defendant,[68] and it must appear either that the garnishee has property in his possession belonging to the defendant[69] or that he is indebted to him[70] unconditionally,[71] and generally ex contractu,[72] in a liquidated

61. Includes in addition to garnishment, so called, equivalent proceedings, locally designated as "trustee process," "factorizing process," etc.

62. See 5 C. L. 1574.

63. Murdock Brokerage Co. v. Collins [Ala.] 40 So. 96; Gilbert Book Co. v. Pye [Tex. Civ. App.] 16 Tex. Ct. Rep. 290, 95 S. W. 8.

64. Murdock Brokerage Co. v. Collins [Ala.] 40 So. 96.

65. King v. Harrigan [Mich.] 13 Det. Leg. N. 492, 108 N. W. 748. Right cannot be extended beyond provisions of statute. Gilbert Book Co. v. Pye [Tex. Civ. App.] 16 Tex. Ct. Rep. 290, 95 S. W. 8. Parties must conform substantially to requirements of statute. Murdock Brokerage Co. v. Collins [Ala.] 40 So. 96.

66. Reversal of judgment against the defendant requires reversal of judgment against the garnishee who has appealed. Chicago Herald Co. v. Bryan, 195 Mo. 590, 92 S. W. 906. Where an attachment is levied by garnishment, the judgment against the garnishee is a judicial sequence of the antecedent attachment proceedings, and such proceedings being void, judgment against the garnishee is also void. Leffler v. Union Compress Co. [Ga.] 55 S. E. 927.

67. See 5 C. L. 1575.

68. Where purchasers of timber had no claim in equity against the heirs of a widow for breach of her covenant to defend title, equity could not by a species of garnishment or injunction against distribution seize and hold the money of such heirs coming to them as heirs of their father to satisfy a decree which complainant could not obtain. Zimmerman Mfg. Co. v. Wilson [Ala.] 40 So. 515.

69. Evidence examined and held to show that there was no money or property in the garnishee's possession belonging to defendant when the garnishee summons was served. McCormick Harvesting Mach. Co. v. Citizens' Bank [N. D.] 106 N. W. 122. Money placed in hands of deputy sheriff as security for defendant's appearance in court released by defendant's giving a bond and then assigned, not subject to garnishment in hands of deputy sheriff. Welch v. Renfro [Tex. Civ. App.] 94 S. W. 107. Where administrator of debtor's wife was made garnishee but the debtor had transferred all his interest in his wife's estate to his daughters, the garnishee was properly discharged. Durfree v. Meadowcroft [Mass.] 79 N. E. 268. Where a corporation held a sum of money for defendant under agreement to pay to the party determined to be entitled to it in an action by plaintiff against defendant and the corporation, judgment was properly rendered against the corporation as garnishee based on a judgment against defendant. Ligenfelter v. Iowa Tel. Co. [Iowa] 109 N. W. 722.

70. On the question of whether garnishee as contractor owed money to a partnership or to a corporation as subcontractor, instruction to find for plaintiff "unless the contract had been assigned in good faith" held correct on the evidence. Shannon Mfg. Co. v. McCaulley, 214 Pa. 377, 63 A. 794. Where a vendor of goods caused the order to be filled by a third person under a previous contract with him, a creditor of such third person could not garnish the purchaser, the money being due to the vendor. Heimbuecher v. Goff, Horner & Co., 119 Ill. App. 373. Employer held not liable as garnishee by reason of owing defendant for delivering laundry where defendant, being charged with the bills for the laundry, collected but failed to pay over to employer amounts in excess of his salary. Frank v. Dungan [Ark.] 90 S. W. 17. Instruction misleading as giving jury to believe that employer could not deduct from defendant's salary laundry accounts which defendant had failed to collect and for which he was liable. Id.

amount[73] presently due and owing.[74] Hence a verdict before entry of judgment,[75] or a transaction constituting a cash sale,[76] cannot be made the basis of garnishment proceedings. The question of what kinds of funds or other property may be reached will of course depend upon the statutes of the different states. Trust property,[77] funds in court,[78] and the interest of one in a life insurance policy,[79] have been held garnishable. In Massachusetts, property in the possession of a lessee may be reached by trustee process subject to the rights of the lessee.[80] Railroad cars of a foreign railroad company in the possession of another company having the right to use them cannot be subjected.[81] A debt payable outside the state is subject to garnishment within the state.[82] Debts evidenced by negotiable instruments are not subject to garnishment if the bill or check is actually discounted for value in due course by an innocent purchaser,[83] though it may not be discounted until after service of the writ;[84] but a check being drawn merely to transfer an account to another bank, the account is not appropriated as against a garnishing creditor until actual payment by the drawee bank, although the check is certified.[85] Garnishment proceedings cannot be maintained where a debt is owing to defendant and to others not parties to the action.[86] A creditor of a building contractor cannot garnish the owner while the work is still in progress on a claim that the contract has been substantially performed.[87] Ordinarily the writ covers only debts existing at the time of its service.[88] Wages, to a limited extent, are generally made exempt by statute,[89]

71. The debt must be an absolute existing one, though the time of payment may not yet have arrived. Where garnishees had agreed to pay the balance for certain land provided title should vest in defendant in a contest, the debt was not subject to garnishment before the expiration of the contest. Smith v. Marker [Ind. T.] 90 S. W. 611.

72. The Illinois statute authorizes the garnishment of only such indebtedness as can be recovered by an action of debt or indebitatus assumpsit in the name of the attachment or judgment debtor against the garnishee. Ryan v. Kimberly, 118 Ill. App. 361

73. An unliquidated sum in damages cannot be recovered by garnishment. Ryan v. Kimberly, 118 Ill. App. 361. Action for value of horses driven to death is for unliquidated damages for a tort, though alleged to be for a debt, and garnishment was therefore unauthorized. Welch v. Renfro [Tex. Civ. App.] 94 S. W. 107.

74. Where indorsement on building contract required liens to be released before payment, balance due could not be garnished until such release was made. Grimwood Co. v. Capitol Hill Bldg. & Const. Co. [R. I.] 65 A. 304.

75. Opportunity to plead garnishment has passed and defendant has not a present cause of action. Cappelli v. Wood, 27 R. I. 411, 62 A. 978.

76. Contract for sale of stock to be delivered upon payment of price held not executed so that anything was owing by garnishee for the stock. Ryan v. Kimberly, 118 Ill. App. 361.

77. Under Code 1896, § 764, authorizing courts of chancery to issue writs of attachment on demands owing by other persons to which defendant is in equity entitled, etc., a bill is maintainable to attach by garnishment the interest of a cestui qui trust in the hands of a trustee and to subject the same to the payment of plaintiff's demand. Riordan v. Schlicher [Ala.] 41 So. 842.

Property deposited in a safe deposit box of a trust company is the depositor's property in charge of the trust company, and the company may be garnished therefor in an action against the depositor. Washington L. & T. Co. v. Susquehanna Coal Co., 26 App. D. C. 149.

78. Under Kirby's Dig. § 358, providing for the attachment of funds in court, the **surplus on a mortgage sale** could be garnished before confirmation and, upon confirmation, the garnishment took precedence of an assignment of the surplus by the mortgagor made after service of the writ. Green v. Robertson [Ark.] 96 S. W. 138.

79. The interest of the holder of a policy of life insurance having a cash surrender value, though contingent upon his survival of the alternative beneficiary, is an interest which can be ascertained by sale or "any means within the ordinary procedure of the court," and may be subjected to equitable trustee process brought under R. L. c. 159, § 3, cl. 7. Biggert v. Straub [Mass.] 78 N. E. 770.

80. Rev. Laws c. 189, §§ 24, 57. Clark v. Williams, 190 Mass. 219, 76 N. E. 723.

81. Johnson v. Union Pac. R. Co., 145 F. 249.

82. Ryan v. Kimberly, 118 Ill. App. 361.

83, 84, 85. Boswell v. Citizens' Sav. Bank [Ky.] 96 S. W. 797.

86. Ryan v. Kimberly, 118 Ill. App. 361.

87. Grimwood Co. v. Capitol Hill Bldg. & Const. Co. [R. I.] 65 A. 304.

88. The words "at or after" in Civ. Code Prac. § 224, providing that in case a corporation is made garnishee any shares of stock held therein for the benefit of defendant "at or after" service of the order of attachment shall be subject to the writ, relate only to corporate stock, and the writ

and the general rule is that the exemption laws of the forum apply.[90] The debtor may waive his exemptions if he so desires,[91] and will be held to have done so if he fails to contest the garnishment;[92] but garnishment being purely a creature of statute, the right thereto cannot be enlarged by a waiver of exemptions.[93] Injunction will not lie at the instance of defendant to restrain plaintiff from exercising his legal right to institute garnishment proceedings on the ground that wages are exempt.[94] The right to seize the proceeds of a sale of exempt property is governed by statute.[95]

Garnishment is not allowed where it would interfere with interstate commerce,[96] but the mere fact that an indebtedness to a foreign railroad company arose out of the carrying on of interstate commerce does not exempt it from garnishment by foreign attachment.[97] A judgment creditor is justified in bringing a garnishment suit, though he has a judgment lien on an uncertain interest of his debtor in public land not occupied for the statutory time.[98] In Minnesota, the proceeding is authorized in actions in tort.[99]

§ 3. *Persons liable to garnishment.*[1]—The garnishee must be a person against whom defendant has a present right of action.[2] A carrier is liable to garnishment process as to goods received from a connecting carrier for shipment but not yet forwarded,[3] and the fact that the goods are received for shipment to a point outside the state is not a defense.[4] The relation of debtor and creditor does not exist be-

does not cover other indebtedness accruing after service. Boswell v. Citizens Sav. Bank [Ky.] 96 S. W. 797.

89. See Exemptions, 7 C. L. 1631. Evidence held to sustain finding awarding wages to a laborer who claimed them as exempt. Couch v. Hice [Ga.] 54 S. E. 813.

90. Debt due from foreign corporation to nonresident subject to garnishment, though exempt by law of state where it arose. Stone v. Drake [Ark.] 96 S. W. 197.

91, 92. Sturges v. Jackson [Miss.] 40 So. 547.

93. Wages to the amount of $25 are exempt under Code 1896, § 2038, as amended by Act Feb. 23, 1899 (Acts 1898-99, p. 37), notwithstanding a waiver by the debtor. Richardson v. Kaufman, 143 Ala. 243, 39 So. 368. Constitutional right to waive all exemptions not applicable. Id. Statute not unconstitutional as to contracts made after its enactment. Id.

Note: Garnishment in Alabama and in this country generally is a proceeding of purely statutory creation (Jones' Adm'r v. Crews, 64 Ala. 368; Rindge v. Green, 52 Vt. 204), derived historically from the custom of London and Exeter (White v. Simpson, 107 Ala. 386; Railroad v. Crane, 102 Ill. 249; 1 Comyn's Dig. 449; 1 Rolle's Abr. 552). For an early statute see 2 Mass. Pub. Laws 673 (Feb. 28, 1795). Therefore the right to garnish exists only where created by statute. Picquet v. Swan, 4 Mason, 443; Fisher v. Consequa, 2 Wash. (C. C.) 382. The Alabama code creates no such right against wages up to $25. Hence the exemption of the wages is due to a lack of right in the plaintiff, not in the debtor's inability to waive an exemption. It follows that the constitutional guaranty of the right of waiver does not apply.—See 6 Columbia L. R. 126.

94. There being adequate remedy at law and the question of exemption being properly determinable in the garnishment proceedings. Sturges v. Jackson [Miss.] 40 So. 547. That employer had a rule requiring the discharge of employees whose wages were garnished was immaterial. Id.

95. Prior to March 1, 1906, when the Revised Laws of 1905 went into effect, process of garnishment reached money owing by the garnishee derived from a sale of defendant's homestead and which defendant intended at the time of the service of the garnishee summons to use in the purchase of another homestead within one year from the sale of the premises. Fred v. Brameu [Minn.] 107 N. W. 159.

96. Sums due a foreign railroad company from other companies for freight collected by them as terminal or final carriers on continuous interstate shipments are not subject to attachment by garnishment of the debtors under the foreign attachment laws of a state in which defendant cannot be personally sued. Davis v. Cleveland, etc., R. Co., 146 F. 403.

97. Johnson v. Union P. R. Co., 145 F. 249.

98. Baze v. Island City Mfg. Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 483, 94 S. W. 460.

99. Under Gen. St. 1894, § 5306, providing that garnishee summons may issue "in any action in a court of record or justice court for the recovery of money." Cummings v. St. Paul Nat. Bank [Minn.] 106 N. W. 304.

1. See 5 C. L. 1576.

2. One against whom defendant had obtained a verdict could not be made garnishee where no judgment had been rendered on the verdict. Cappelli v. Wood, 27 R. I. 411, 62 A. 978.

3. Malott v. Johnson [Ind. App.] 77 N. E. 866.

4. Burns' Ann. St. 1901, § 951, providing that a garnishee shall not be required to perform otherwise than he would be bound to do for defendant, when construed in connection with §§ 944, 952, does not prevent

tween a treasurer of a municipal corporation and a city official to whom a salary is due so as to render the treasurer liable as garnishee for a claim against the official.[5] An administrator may be garnished as to funds in his hands,[6] but in the absence of express statute, an executor or administrator is not liable to garnishment for money due a creditor of the estate before an order of distribution has been made.[7] In Illinois he is liable to garnishment before such order is made as to money or other property belonging to any legatee or devisee or belonging to any heir or distributee of any estate,[8] and no transfer or disposition of such property will defeat the garnishment unless the evidence thereof is filed in the office of the clerk of the county court,[9] but an executor named in a will may not be summoned before probate of the will and issuance of letters.[10] A creditor of an estate is not a distributee within the meaning of statutes authorizing garnishment of executors and administrators with respect to money or other property belonging to an heir or distributee.[11] The garnishee occupying the position of an ordinary debtor of the defendant, plaintiff need not proceed against him as administrator.[12] An administrator entitled to compensation for his services as such may be made garnishee in that capacity in an action against him as an individual.[13]

§ 4. *Rights, defenses, and liabilities between plaintiff and garnishee.*[14]—Garnishment being a proceeding in the nature of an involuntary suit by defendant against the garnishee,[15] the general rule is that plaintiff acquires no greater rights against the garnishee than defendant himself possesses,[16] and hence the garnishee may plead as a defense or set-off whatever he might have relied upon were the action

such garnishment. Malott v. Johnson [Ind. App.] 77 N. E. 866.

5. Laws 1905, p. 285, subjecting to garnishment the salary of officers of counties, cities, etc., if construed as authorizing the rendition of a personal judgment against an officer of a city in favor of one to whom he is not indebted or to require a city treasurer to deposit in court the amount found due the officer as wages by a contempt proceeding, is invalid as depriving the city treasurer of his property without due process of law. Badenoch v. Chicago [Ill.] 78 N. E. 31. The act is incomplete and can be made effective only by resorting to the general garnishment statute, and is therefore in conflict with Const. art. 4, § 13, prohibiting the amendment of any law by reference to its title only. Id. Unconstitutional also as class legislation. Id.

6. Geiger v. Gaige [Iowa] 105 N. W. 1007.

7. Right to garnish limited to cases specifically mentioned in Rev. St. c. 62, § 35. Equitable Trust Co. v. Clark, 119 Ill. App. 341.

8. The Act of 1897 was intended to remedy the evil existing prior thereto by authorizing garnishment before an order of distribution is made. Staaland v. Thompson, 122 Ill. App. 109.

9. Conveyance by heir of interest in realty left him did not defeat garnishment later instituted where will conferred on executor a power of sale and conveyance was not filed. Staaland v. Thompson, 122 Ill. App. 109.

10. Could not be garnished under Act of 1897 as to money or other estate "belonging to devisee or legatee under the will." Chicago Title & Trust Co. v. Wheeler, 119 Ill. App. 508. The subsequent qualification as executor pending garnishment will not relate back and validate the premature proceedings. Id.

11. Rev. St. c. 62, § 35. Equitable Trust Co. v. Clark, 119 Ill. App. 341.

12. Where nothing remained but to comply with order of distribution. Kiernan v. Robertson, 116 Mo. App. 56, 92 S. W. 138.

13. Under Code Civ. Prac. §§ 224, 225, providing that garnishee shall not be a party to the suit if he answers, and answer is satisfactory, but that in such case the court may order the amount due from the garnishee to be paid into court, etc. Sanders v. Herndon [Ky.] 93 S. W. 14.

14. See 5 C. L. 1577.

15. Cappelli v. Wood, 27 R. I. 411, 62 A. 978.

16. Allen v. Aetna Life Ins. Co. [C. C. A.] 145 F. 881; Grimwood Co. v. Capitol Hill Bldg. & Const. Co. [R. I.] 65 A. 304. Service of a garnishment order does not operate as an assignment, legal or equitable, of a debt due from the garnishee to the defendant nor establish between plaintiff and the defendant the relation of debtor and creditor (Allen v. Aetna Life Ins. Co. [C. C. A.] 145 F. 881), but merely gives to the plaintiff the statutory right to collect from the garnishee a debt due to the defendant not exceeding the amount due from defendant to plaintiff, and in default of voluntary payment by the garnishee, the right to execution therefor (Id.). Where nothing was due from insurer to insured, garnishment of former for claim against latter was unfounded. Id. Where order of attachment was served on executor after compromise of will contest, interest of legatee was subject only to extent of amount due him under compromise. Murphy v. Whitesides [Ky.] 92 S. W. 5.

brought directly against him by the defendant.[17] He is entitled and it is his duty to assert known jurisdictional defects against the main action,[18] and this is not a mere collateral attack upon the judgment against the defendant.[19] He is not bound to notice a correction in the record with reference to the name of defendant where not made until after his answer and discharge, unless a new order of attachment is served on him.[20] On the other hand, after service of the garnishment writ, plaintiff's rights cannot be impaired by any settlement between defendant and the garnishee,[21] and, when carried into judgment, a garnishment transfers to plaintiff all the rights of defendant with reference to the debt including liens to secure it.[22] Upon a judgment being entered against an administrator as garnishee, he is bound to pay over the fund in accordance therewith,[23] and an order of the probate court does not justify him in paying the amount to the defendant.[24] Where the garnishee holds money for defendant under agreement to apply it to the payment of any judgment which might be recovered by plaintiff against defendant and himself, he cannot apply such money to his own claim against defendant.[25] The garnishee can be bound only for the amount which he is commanded to withhold by the paper served upon him.[26] Where he pays to the sheriff the amount due defendant, plaintiff has no further claim against him.[27]

§ 5. *Rights, defenses, and liabilities between defendant and garnishee.*[28]—One garnished for exempt wages should disclose the fact of exemption to the court.[29] If he fails to do so, permits judgment to be rendered against him, and pays the money into court, he will be held liable in an action by the laborer.[30] The courts of one state will presume that the proper steps were taken to charge a garnishee in proceedings in another state, providing the court had jurisdiction of the parties and the subject-matter,[31] and under the full faith and credit clause of the Federal constitution, a payment by a garnishee of a judgment rendered against him in another state, in an action in which the defendant was personally served with process and wherein the court had jurisdiction, must be recognized by the courts of any other state where properly pleaded in an action against the garnishee by the defendant to whom he originally owed the debt.[32]

§ 6. *Duties of a garnished agent to his principal.*[33]

§ 7. *Conflicting and hostile claims and liens.*[34]—Garnishing creditors are en-

17. Mills' Ann. Code § 130. Where he was entitled to compensation as receiver. Tabor v. Bank of Leadville [Colo.] 83 P. 1060.

18. Garnishee entitled to discharge where a mere stockholder had no power to employ counsel to defend action against a corporation. Tabor v. Leadville [Colo.] 83 P. 1060.

19. Tabor v. Leadville [Colo.] 83 P. 1060.

20. Boswell v. Citizens' Sav. Bank [Ky.] 96 S. W. 797.

21. Settlement of divorce judgment for less than amount awarded thereby. Nathan v. St. John [Ala.] 40 So. 970.

22. Liddell v. Jones [Ark.] 88 S. W. 961. A purchaser of goods who had given a mortgage thereon to secure the price was made garnishee in an action against the seller. Held, though plaintiff waived the mortgage by levying execution on the goods, it was error to allow the garnishee's claim that the goods were exempt, since in an action by defendant they would not have been exempt from execution for the purchase price. Id.

23, 24. Geiger v. Gaige [Iowa] 105 N. W. 1007.

25. Ligenfelter v. Iowa Tel. Co. [Iowa] 109 N. W. 722.

26. Was authorized to pay over what was not called for by writ. Murphy v. Whitesides [Ky.] 92 S. W. 5. That the garnishee knows that the judgment on which the order of garnishment is based is for a greater amount than that attached in his hands would not authorize him to withhold from defendant any greater amount. Id.

27. Kruse v. Wilson. [Cal. App.] 84 P. 442.

28. See 5 C. L. 1578.

29. Southern R. Co. v. Fulford, 125 Ga. 103, 54 S. E. 68.

30. Southern R. Co. v. Fulford, 125 Ga. 103, 54 S. E. 68. Where an employer in a garnishment suit failed to interpose the right of exemption existing in favor of his employee after service by the employee upon him of the affidavit that he is the head of a family as provided by § 14, c. 62, Rev. St., he could not, when sued for the wages by the employee, defend on the ground that the amount was paid to the plaintiff in gar-

titled to priority in the order in which valid service is made upon the garnishee.[35] Plaintiff's rights are superior to those of the holder of a mortgage unrecorded at the time the writ was served.[36]

§ 8. *Jurisdiction and venue.*[37]—In trustee process jurisdiction depends upon the place of residence of the trustee[38] at the time the action is brought.[39] The garnishment of a debt due a nonresident is a proceeding in rem,[40] and the court by virtue of its jurisdiction of the garnishee may compel him to satisfy the execution to the extent of his indebtedness without service of process on defendant;[41] but defendant being without the jurisdiction of the court, the res in the hands of the garnishee must be within its jurisdiction.[42] The levy of an attachment is not essential to jurisdiction of property.[43] A debt has its situs for the purposes of garnishment wherever the debtor may be found except where he is only temporarily within the state,[44] or unless the debt is expressly made payable elsewhere,[45] and, though expressly made so payable, it may be attached by garnishment at the place of the residence of the debtor.[46] A debt due from a foreign corporation to a nonresident is garnishable in a state where the corporation transacts business and is

nishment. Chicago & A. R. Co. v. Moore, 117 Ill. App. 147.

31, 32. Wright v. Southern R. Co. [N. C.] 53 S. E. 831.

33, 34. See 5 C. L. 1578.

35. Where building contract required liens to be released before payment of contract price the amount due thereon was not payable until such release, and hence the first valid service of writ of attachment was that made immediately after such release. Grimwood Co. v. Capitol Hill Bldg. & Const. Co. [R. I.] 65 A. 304.

36. Thatcher v. Jeffries [Tex. Civ. App.] 14 Tex. Ct. Rep. 33, 91 S. W. 1091.

37. See 5 C. L. 1579.

38. Rev. Laws c. 167, § 80, authorizing the issuance of trustee process during the pendency of an action upon the commencement of which an arrest or attachment is authorized by law, permits only such attachment during the pendency of an action as could have been made at its commencement, and hence the only attachment by trustee process which can be made during the pendency of a suit on a special precept from a superior court is one where the precept is returnable in the county where one or all of the trustees dwell or have their place of business. Daniels v. Clarke [Mass.] 78 N. E. 751.

39. Plea in abatement in present tense held bad. Hibbard v. Newman [Me.] 64 A. 720.

40. Veeder Mfg. Co. v. Marshall-Sanders Co. [Conn.] 63 A. 641. The liability of a domestic corporation upon a policy of life insurance held by a nonresident is property within the state so as to give jurisdiction to its courts to enter a decree in the nature of a judgment in rem against it in a suit in the nature of an equitable trustee process brought under R. L. c. 159, § 3, cl. 7. Biggert v. Straub [Mass.] 78 N. E. 770.

41. Object of Gen. St. 1902, §§ 603, 604, was simply to give defendant reasonable notice and afford him opportunity to protect his interests. Veeder Mfg. Co. v. Marshall-Sanders Co. [Conn.] 63 A. 641. Gen. St. 1902, § 828, providing that when defendant is a nonresident and has an estate within the state which is attached a copy of the process and complaint with a return describing the estate shall be left with the agent of defendant in the state, etc., does not apply to "foreign attachments," as the statute contemplates a direct levy upon property and not a notice to a garnishee, the word "estate" not meaning a mere chose in action. Leaving copy of writ with garnishee held sufficient. Id.

42. District court had no jurisdiction of garnishment proceeding in which only $7.75 was attached in suit against foreign corporation for such amount as a debt and $2,000 for unliquidated damages, and in which personal judgment could not be rendered against corporation. Meek v. Houston Ice & Brewing Co. [Tex. Civ. App.] 96 S. W. 937.

43. Under Burns' Ann. St. 1901, § 931, authorizing judgment for an attachment plaintiff when a garnishee shall have been summoned in the county where the action is brought who has property subject to attachment, and § 943 (Acts 1897, p. 233, c. 153), authorizing a proceeding against a garnishee whether a writ of attachment has been issued or not, the court had jurisdiction of property of a foreign corporation in the possession of a carrier, though there was no valid levy of a writ of attachment against the property. Malott v. Johnson [Ind. App.] 77 N. E. 866.

44. Krafve v. Roy [Minn.] 107 N. W. 966. A debt due from one foreign corporation to another foreign corporation arising out of a transaction occurring within the state at a permanent agency of the debtor corporation maintained therein is subject to garnishment, though the creditor corporation has no agency within the state, and in such case the garnishee is not merely temporarily within the state. Id. It was not necessary to affirmatively show that garnishee had complied with conditions precedent to doing business within the state, compliance with statutes being presumed. Id.

45. Debt subject wherever debtor found unless expressly made payable elsewhere. Baltimore & O. R. Co. v. Allen, 58 W. Va. 388, 52 S. E. 465.

46. Baltimore & O. R. Co. v. Allen, 58 W. Va. 388, 52 S. E. 465.

liable to suit,[47] though the authorities are somewhat in conflict where in such case the debt is made payable in a foreign jurisdiction or arose out of transactions occurring without the state.[48] Where a railroad company is incorporated in several

47. A state court has jurisdiction to render a valid judgment in garnishment of a debt due by a railway company doing business and permanently liable to service and suit within the state to a nonresident properly served by publication. Louisville & N. R. Co. v. Deer, 200 U. S. 176, 50 Law. Ed. —.

48. A debt due from a foreign corporation to a nonresident who is only constructively served with process is subject to garnishment in a state in which such corporation does business, though the debt is not payable there and did not arise out of business transacted therein. Stone v. Drake [Ark.] 96 S. W. 197. A debt due from a foreign railroad company having a line and an agent within the state for labor performed in another state by a nonresident may be subjected to garnishment here. Id. Railroad corporations chartered by other states, but owning and operating railroads within this state, have the status of residents of this state, though they are not citizens of it within U. S. Const. cl. 1, § 2, art. 3, and cl. 1, § 2, art. 4, nor domiciled in this state in the technical sense of that term, and may be proceeded against as garnishees without reference to the jurisdiction in which debts due from them were contracted or are payable. Baltimore & O. R. Co. v. Allen, 58 W. Va. 388, 52 S. E. 465. Authorities considered. Id. That employes in other states of foreign railroad companies doing business in this state may be thus deprived of exemptions allowed in other states cannot alter the case. Id.

NOTE. Where debt garnishable: It has been authoritatively decided by the United States supreme court in Chicago, etc., R. Co. v. Strum, 174 U. S. 710, 43 Law. Ed. 1144 and King v. Cross, 175 U. S. 396, 44 Law. Ed. 211, that a court in the state in which the debtor is domiciled may by mere constructive service upon the nonresident creditor acquire jurisdiction to render a judgment in garnishment condemning a debt, payable generally, to the satisfaction of a claim against the nonresident creditor, which judgment will be entitled to full faith and credit in other states under the Federal Constitution. Jurisdiction in such case does not rest upon the situs of the debt but upon the control obtained over the debtor. Chicago, etc., R. Co. v. Strum, 174 U. S. 710, 43 Law. Ed. 1144; Mooney v. Buford & G. Mfg. Co. [C. C. A.] 72 F. 32; Lancashire Ins. Co. v. Corbetts, 165 Ill. 592, 46 N. E. 631, 56 Am. St. Rep. 275, 36 L. R. A. 640. Many courts seem to deny the jurisdiction of the court of the debtor's domicile if the debt is payable in another state, Chicago, etc., R. Co. v. Strum, 174 U. S. 710, 43 Law. Ed. 1144; Barbour v. Boyce, 7 Ohio N. P. 504; Central R. Co. v. Brinson, 109 Ga. 354, 34 S. E. 597, 77 Am. St. Rep. 382; Johnson v. Southern R. Co., 110 Ga. 303, 34 S. E. 1002; Beasley v. Lenox-Haldeman Co., 116 Ga. 13, 42 S. E. 385; High v. Padrova, 119 Ga. 648, 46 S. E. 859; Glower v. Gilden Varnish Co., 120 Ga. 983, 48 S. E. 355; Bullard v. Chaffee, 61 Neb. 83, 84 N. W. 604, 51 L. R. A. 715. Others hold that a debt due a nonresident is garnishable by a court of the debtor's domicile, though it is expressly made payable in another state. Tootle v. Coleman [C. C. A.] 107 F. 41, 57 L. R. A. 120; Wyeth Hardware & Mfg. Co. v. Lang & Co., 127 Mo. 242, 29 S. W. 1010, 48 Am. St. Rep. 626, 27 L. R. A. 651; Dinkins v. Crunden-Martin Hardware Co., 99 Mo. App. 310, 73 S. W. 246; Pomroy v. Rand McN. & Co., 157 Ill. 176, 41 N. E. 636; Hawley v. Hurd, 72 Vt. 122, 82 Am. St. Rep. 922, 52 L. R. A. 195. See, also, Rothschild v. Knight, 176 Mass. 48, 57 N. E. 337; Brag v. Gaynor, 85 Wis. 468, 21 L. R. A. 164; Reimers v. Seatco Mfg. Co. [C. C. A.] 70 F. 573, 30 L. R. A. 365; Sexton v. Phoenix Ins. Co., 132 N. C. 1, 43 S. E. 479; Olcott v. Guerinck, 19 Ohio C. C. 32. The weight of authority holds that a judgment is not subject to garnishment outside the state wherein it was rendered. Wabash R. Co. v. Taurville, 179 U. S. 322, 45 Law. Ed. 210; Boyle v. Musser-Sauntry Land, Logging & Mfg. Co., 88 Minn. 456, 93 N. W. 520, 97 Am. St. Rep. 538. Ordinarily, garnishment will not reach a debt due to a nonresident creditor from a nonresident debtor who is only temporarily within the state where the proceedings are instituted, unless he has within the state property of defendant in his possession or is bound to pay defendant money or deliver him property within the state. Pennsylvania R. Co. v. Rogers, 52 W. Va. 450, 44 S. E. 300, 62 L. R. A. 178; National Broadway Bank v. Sampson, 179 N. Y. 213, 103 Am. St. Rep. 851, 71 N. E. 766, 66 L. R. A. 606; Central Trust Co. v. Chattanooga, etc., R. Co., 68 F. 685; Reimers v. Seatco Mfg. Co., 70 F. 573, 30 L. R. A. 365; McKinney v. Mills, 80 Minn. 478, 83 N. W. 452, 81 Am. St. Rep. 278. The broad statement in Harvey v. Great Northern R. Co., 50 Minn. 405, 17 L. R. A. 84, that for purposes of attachment the situs of the debt is wherever the debtor may be found was characterized as dictum, and the case was restricted in McKinney v. Mills, 80 Minn. 478, and Boyle v. Musser-Sauntry Land, etc., Co., 88 Minn. 456, 97 Am. St. Rep. 538. The court in Kansas City, P. & G. R. Co. v. Parker, 69 Ark. 401, 86 Am. St. Rep. 205, favored the broad position, that, regardless of the place of payment, the situs of a debt is in any state in which the garnishee may be found provided the proceeding is authorized by the local law and jurisdiction is obtained over the garnishee by personal service within the state or his voluntary appearance, but this was going further than the case required. There is a conflict on the question whether a debt due from a foreign corporation doing business within the state, to a nonresident not personally within the jurisdiction, may be garnished when it arises out of business transacted out of the state, though the tendency seems to be to make the question depend upon whether under the local statute defendant himself might have maintained an action for the debt. The right to garnish was upheld upon that criterion in Mooney v. Buford & G. Mfg. Co. [C. C. A.] 72 F. 32, and

states and operates a line through all of them under a single set of officers, the situs of a debt due another company and arising out of the operation of the road is in either one of the states.[49] There being no jurisdiction in the main action, jurisdiction is not conferred by service upon the garnishee.[50] The garnishee may have the venue changed where the convenience of witnesses and the ends of justice require it.[51] If the court of one county has no power or discretion to order a change of venue, mandamus is the proper remedy to compel it to proceed, notwithstanding its order for a change.[52]

§ 9. *Procedure to obtain writ; bond.*[53]—The requisites of the application for garnishment,[54] and of the notice to the garnishee,[55] depend upon statute. Where an application for garnishment is attached to the petition in the main action, the petition should be considered as a part of the application.[56] The notice must specify the debts or obligations garnished and to that end moneys standing on deposit to defendant as trustee must be so described,[57] even though in law he is the absolute owner.[58] An attorney may make the necessary statements to obtain a garnishment against an executor or administrator.[59] Where an affidavit for garnishment is made by an attorney, a statement that "affiant" has reason to apprehend loss if the writ is not issued is sufficient,[60] but a statement by an attorney that "plaintiff" is appre-

National F. Ins. Co. v. Ming [Ariz.] 60 P. 720, and probably in Lancashire Ins. Co. v. Corbetts, 165 Ill. 592, 56 Am. St. Rep. 275, 36 L. R. A. 640; Missouri P. R. Co. v. Flannigan, 47 Ill. App. 322; German Bank v. Am. F. Ins Co., 83 Iowa, 491, 32 Am. St. Rep. 316; Pittsburg, etc., R. Co. v. Bartels, 108 Ky. 216, 56 S. W. 152; National F. Ins. Co. v. Chambers, 53 N. J. Eq. 468, 32 A. 663; Newfelder v. German Am. Ins. Co., 6 Wash. 336, 36 Am. St. Rep. 166, 22 L. R. A. 287; Riter Conley Mfg. Co. v. Mzik, 23 Ohio C. C. 164. The following cases deny the right to such garnishment where the debt arises out of business transacted out of the state or is payable out of the state: Central Trust Co. v. Chattanooga, etc., R. Co., 68 F. 685; Reimo v. Seatco Mfg. Co., 70 F. 573, 30 L. R. A. 365; Atchison, etc., R. Co. v. Maggard, 6 Colo. App. 85, 39 P. 985; Northwestern Life & Sav. Co. v. Gippe [Minn.] 99 N. W. 364; Drake v. Lake Shore & M. S. R. Co., 69 Mich. 168, 13 Am. St. Rep. 382; Swedish Am. Nat. Bank v. Bleecker, 72 Minn. 383, 71 Am. St. Rep. 492, 42 L. R. A. 283; American Cent. Ins. Co. v. Hettler, 37 Neb. 849, 40 Am. St. Rep. 522; Wood v. Furtick, 40 N. Y. S. 687; Strause Bros. v. Etna F. Ins. Co., 126 N. C. 223, 48 L. R. A. 452; Morawetz v. Sun Ins. Office, 96 Wis. 175, 65 Am. St. Rep. 43. The decision in the last case cited was, however, placed upon the ground that the defendant could not have sued.—From Note to Goodwin v. Claytor [N. C.] 67 L. R. A. 209.

49. Unity such that situs was in either state for purposee of garnishment whether it be said that there were three or only one corporation. Johnson v. Union P. R. Co., 145 F. 249.

50. Service of garnishee in another county held ineffective where no service of any kind was made in county where action was brought. Fell v. Gorman [Mich.] 13 Det. Leg. N. 275, 108 N. W. 282.

51. Statutory provisions relating to change of venue in general where impartial trial cannot be had, or for convenience of witnesses, apply to garnishment proceedings. State v. Superior Ct. of Spokane County, 40 Wash. 443, 82 P. 875.

52. That proceedings may eventually reach supreme court from county to which transferred, not adequate. State v. Superior Ct. of Spokane County, 40 Wash. 443, 82 P. 875.

53. See 5 C. L. 1579.

54. Under Rev. St. 1895, art. 219, providing that an application for garnishment against a corporation must state that the "garnishee is an incorporated company," it is not necessary to allege that the garnishee is "duly" incorporated. First Nat. Bank v. Brown [Tex. Civ. App.] 15 Tex. Ct. Rep. 627, 92 S. W. 1052. Affidavit for garnishment made by treasurer of plaintiff corporation held not insufficient for stating that "plaintiff" had reason to believe that garnishee was indebted to defendant instead of stating that "affiant" had reason to believe, etc. Le Tulle Mercantile Co. v. Markham Rice Milling Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 872, 94 S. W. 416.

55. A notice to the garnishee under Code § 3935 must require him to answer on the first day of the next term of court, and must state that if he fails to answer he will be liable for the judgment plaintiff might obtain. Bower Bros. v. Hansen, 129 Iowa, 148, 105 N. W. 394.

56. So considered, application held sufficient. Trabue v. Whitney [Tex. Civ. App.] 15 Tex. Ct. Rep. 618, 94 S. W. 186. Where application stated a definite sum of money as due, the fact that from the allegations therein more might have been claimed did not render it uncertain as to the amount. Id.

57. Gittings v. Russel, 99 N. Y. S. 1064.

58. Where money really belonged to defendant as surviving husband. Gittings v. Russel, 99 N. Y. S. 1064.

59. Under Civ. Code 1895, § 4735. Morrison v. Hilburn [Ga.] 54 S. E. 938.

60. Not necessary to state that plaintiff

hensive of loss is insufficient.[61] In an application for a writ of garnishment by a judgment creditor, it is not necessary to show that the judgment was not dormant.[62] A recital in the affidavit which if true would render the judgment dormant may be disregarded as a clerical error where the docket of the justice referred to and made a part of the application shows it to be erroneous.[63]

Bond.[64]

§ 10. *The writ and service thereof; return; notice to defendant.*[65]—The statute providing that the writ shall command the garnishee to appear on the first day of the ensuing term, a writ commanding appearance at the next term gives no jurisdiction.[66] An order of attachment served only on execution defendants does not create any lien on any of their property in the hands of other persons on whom it is not served as a garnishee process.[67] To give jurisdiction of property garnished, a return showing a declaration of seizure should be made on the execution and not merely on the notice of garnishment.[68] The return on the notice to the garnishee need not recite facts shown by the notice itself.[69] A garnishee cannot waive irregularities in the writ or its service by appearance or otherwise so as to affect the rights of defendant.[70] In the absence of statute, where defendant is personally served in the main action, the fact that he is not notified of garnishment proceedings does not invalidate payments made by the garnishee under such proceedings.[71]

§ 11. *Answer or disclosure and later pleadings or traverse.*[72]—The garnishee is generally required to personally appear and answer.[73] An executor or administrator having the right to delay his answer pending further administration of the estate must assert such right by proper plea or motion.[74] While trustee process is regulated by statutory requirements, its procedure must conform to the rules of civil pleading.[75] Hence the trustee may not incorporate in his disclosure matters in the nature of a plea in abatement affecting the jurisdiction of the court.[76] The disclosure is sufficient if it plainly appears that the garnishee is not under obligation to defendant.[77] The garnishee being a corporation, it must be shown that defendant

has reason to apprehend loss. Morrison v. Hilburn [Ga.] 54 S. E. 938.

61. Affidavit made by attorney stating that "plaintiff," (not the affiant) is apprehensive of a loss of the debt unless a writ issues is insufficient to confer jurisdiction. Duryea v. Raymond [Mich.] 13 Det. Leg. N. 842, 109 N. W. 851. Such affidavit cannot be amended. Id.

62. Court will take judicial notice. Thatcher v. Jeffries [Tex. Civ. App.] 14 Tex. Ct. Rep. 33, 91 S. W. 1091. It is presumed that execution has issued on a judgment under which garnishment is applied for and that the judgment is not dormant. Baze v. Island City Mfg. Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 483, 94 S. W. 460.

63. Where docket showed that no period of ten years had elapsed without the issuance of execution. First Nat. Bank v. Brown [Tex. Civ. App.] 15 Tex. Ct. Rep. 627, 92 S. W. 1052.

64, 65. See 5 C. L. 1580.

66. Rev. St. 1895, art. 220. Gilbert Book Co. v. Pye [Tex. Civ. App.] 16 Tex. Ct. Rep. 290, 95 S. W. 8.

67. Murphy v. Whitesides [Ky.] 92 S. W. 5.

68. Commercial Real Estate & Brokerage Co. v. Riemann [Mo. App.] 93 S. W. 305.

69. Where notice contained declaration of seizure, return showing due service was sufficient without statement that officer made declaration of seizure. Commercial Real Estate & Brokerage Co. v. Riemann [Mo. App.] 93 S. W. 305.

70. Default judgment against nonresident void for want of jurisdiction where writ did not command garnishee to appear on first day of ensuing term as required by statute, though garnishee appeared and answered. Gilbert Book Co. v. Pye [Tex. Civ. App.] 16 Tex. Ct. Rep. 290, 95 S. W. 8.

71. Wright v. Southern R. Co. [N. C.] 53 S. E. 831.

72. See 5 C. L. 1581.

73. Under Code § 3935 requiring a garnishee to personally appear and answer unless his answers have been taken by the sheriff by direction of plaintiff, held not error to require the garnishee to appear and submit to an examination after it had filed its answer, especially where by amendment of its answer it disclosed the substance of the testimony brought out. Lingenfelter v. Iowa Tel. Co. [Iowa] 109 N. W. 722.

74. Right under Civ. Code 1895, § 4735, to delay answer "until the estate in his hands is sufficiently administered to enable him to answer the same." Not incumbent upon plaintiff to show condition of estate in his hands. Morrison v. Hilburn [Ga.] 54 S. E. 938.

75. Hibbard v. Newman [Me.] 64 A. 720.

owns or is interested in shares of stock before an answer can be required showing what shares or interest he has.[78] A trust company as garnishee is not exempt from liability to answer interrogatories as to its having in its possession or control a safe deposit box standing in defendant's name.[79] Under a statute requiring the garnishee to render a sworn statement of defendant's property in his possession, it is the duty of the garnishee to see that the account submitted is correct and a negligent disclosure of more than the amount due is not ground for a new trial.[80] The garnishee may call upon other witnesses and introduce other evidence than his own at the disclosure for the purpose of corroboration or explanation, or of establishing facts additional to those disclosed by him.[81] Statutes generally provide for plaintiff's right to take issue on the answer of the garnishee,[82] and that this must be done within a specified time.[83] A statutory provision making conclusive the answer of the garnishee unless notice to take issue thereon is served upon him within a specified time is not waived by the consent of the garnishee to the appointment of a referee to determine the issues involved in the case and report his findings thereon.[84] The answer of the garnishee must be considered true in determining his liability in the absence of contrary proof.[85] A reply to the merits to plaintiff's denial of the answer is a waiver of all defects except such as cannot be cured by verdict.[86] Failure to appear and answer the writ after due service generally renders the garnishee liable in default,[87] though in Rhode Island a garnishee who by accident or mis-

76. Unless defect is apparent in writ or return. Hibbard v. Newman [Me.] 64 A. 720. Disclosure merely presents question of fact upon which liability of trustee depends by reason of business relations with principal defendant. Id.

77. Disclosure held not evasive and unsatisfactory as contended by plaintiff. McCormick Harvesting Mach. Co. v. Citizens' Bank [N. D.] 106 N. W. 122.

78. Must appear from affidavit under Sayles' Rev. Civ. St. 1897, art. 221. Le Tulle Mercantile Co. v. Markham Rice Milling Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 872, 94 S. W. 416.

79. Washington L. & T. Co. v. Susquehanna Coal Co., 26 App. D. C. 149. Under Code § 470 (31 St. at L. 1264, c. 854), providing that when the ground of attachment is that defendant has disposed of his property with intent to defraud his creditors the attachment may be levied upon the property alleged to be so assigned in the hands of the alleged fraudulent assignee as a garnishee, where the affidavit in support of a writ of attachment and garnishment stated that defendant had fraudulently assigned his property and that his wife and son had aided him therein, and that his wife or son had deposited large sums of money in a safe deposit box of a trust company, the company could not lawfully refuse to answer interrogatories as to whether it had in its possession or control a safe deposit box standing in the name of defendant, his wife, or his son. Id.

80. Gen. L. 1896, c. 254, § 10. Where garnishee submitted account giving $50 more than was due and allowed cause to proceed to execution, he could not have relief on the ground of mistake. People's Loan & Trust Co. v. McMurray, 27 R. I. 516, 63 A. 803.

81. Executor may call others to show that effects under his control do not in fact belong to defendant. Pitzl v. Winter, 96 Minn. 499, 105 N. W. 673.

82. Under Revisal 1905, § 781, where plaintiff suggests a desire to traverse the return, he is entitled to have the issue tried by the jury as directed by the court without filing any formal or verified statement. Brenizer v. Supreme Council, Royal Arcanum [N. C.] 53 S. E. 835. Contest filed on ground that answer was untrue, that garnishee paid defendant money after service of garnishment, etc., held to present a sufficient issue and held not demurrable. Brookside Dry Goods Co. v. City Furniture Co. [Ala.] 41 So. 659. Allegation in plaintiff's denial of garnishee's answer that garnishee had in his possession a certain amount of money due defendant held not a conclusion of law but a proper statement of a conclusion of fact. Kiernan v. Robertson, 116 Mo. App. 56, 92 S. W. 138.

83. Answer of garnishee conclusive unless plaintiff within 20 days serves notice upon garnishee that he elects to take issue on his answer. Wilson's Rev. & Ann. St. 1903, § 4382. Davis v. Lilly [Okl.] 87 P. 302.

84. Garnishee could make objection before reference. Davis v. Lilly [Okl.] 87 P. 302. Held error to render judgment against garnishee where he answered that he was not indebted to defendant, and plaintiff failed to give the statutory notice of election to take issue on the answer. Id.

85. Gen. L. 1896, c. 254, § 25. Grimwood Co. v. Capitol Hill Bldg. & Const. Co. [R. I.] 65 A. 304. Serves the double purpose of a pleading and as against him, of proof in the case. If uncontradicted it is prima facie evidence of the truth of what it contains as between the parties to the suit. Smith v. Marker [Ind. T.] 90 S. W. 611.

86. No attack being made by demurrer or motion. Kiernan v. Robertson, 116 Mo. App. 56, 92 S. W. 138.

87. Leonard v. Weymouth [Mass.] 79 N. E. 787. If a garnishee duly summoned in a justice court fails to make timely answer, the justice may "enter a default" against

take fails to disclose that he has no property in his hands may discharge his liability by making affidavit showing such fact and refunding double the fee paid him.[88] A slighter showing of diligence or excuse is required to warrant the setting aside of a default against a garnishee than in cases of ordinary default.[89] A garnishee is entitled to have a default judgment against him set aside where at the time of its entry no judgment had been entered against the principal defendant.[90]

§ 12. *Claims or interventions.*[91]—Courts of law will protect the equitable owner of choses in action against garnishee process instituted to reach them as the property of the holder of the naked legal title.[92] A claimant is, however, bound to appear and interplead,[93] providing he has notice of the proceedings.[94] Irregularities as to the form in which the claim is propounded may be waived by proceeding to trial or amended on appeal.[95] The fact and bona fides of the transfer is the only issue between plaintiff and the claimant.[96]

§ 13. *Dissolution of writ.*[97]—Judgment against a garnishee is a condition precedent to a judgment on a bond given to dissolve the garnishment.[98] Under a statute providing that upon defendant's giving a bond for the release of the garnished funds he may make any defense which the garnishee could make, a defendant who thus secures the funds may assert the invalidity of the writ of garnishment regardless of the disposition he makes of the funds.[99]

§ 14. *Effect of pendency of other proceedings; stay, etc.*[1]—The pendency of a garnishee action is a defense to an action by the principal defendant to recover the debt sought to be reached,[2] and the proper proceeding in such cases is to order a stay

him and thereupon enter up judgment for plaintiff in such sum as may have been obtained by judgment against defendant, or for such amount as may thereafter be recovered in the pending suit. Civ. Code 1895, § 4153. Morrison v. Hilburn [Ga.] 54 S. E. 938. Where a garnishee is excused from answering on the first day of the term, he cannot be held to be in default thereafter without notice to him as to the time and place where he should answer. Bower Bros. v. Hansen, 129 Iowa, 148, 105 N. W. 394.

88. May discharge liability imposed by Gen. L. 1896, c. 254, § 20, by proceeding as provided by c. 256, § 21. Marshall v. McCormick, 27 R. I. 357, 62 A. 212. The word "mistake" in Gen. Laws 1896, c. 256, § 21, should receive a broad construction, and an affidavit that a garnishee through accident and mistake failed to file his personal affidavit of no funds is within the provision. Id.

89. Showing that he understood he would be notified and that he was not indebted to defendant held sufficient. Bower Bros. v. Hansen, 129 Iowa, 148, 105 N. W. 394.

90. Travelers' Ins. Co. v. Wolcott [Mich.] 13 Det. Leg. N. 279, 108 N. W. 363.

91. See 5 C. L. 1582.

92. Defective assignment of order for money. Gray v. Bever, 122 Ill. App. 1.

93. Where the balance due a contractor was garnished, labor and materialmen who took no steps to impound the fund were not entitled to any interest therein. Hardison & Co. v. Yeaman, 115 Tenn. 639, 91 S. W. 1111.

94. In garnishment proceedings in attachment, the fact that a claimant has no knowledge of the proceedings during the term in which judgment is rendered against the defendant will not excuse a failure to interplead provided he has such knowledge before the expiration of the term at which judgment is rendered against the garnishee. Under Garnishment Act (2 Starr & C. Ann. St. 1896, pp. 2056, 2060, 2062, c. 62), §§ 5, 8, 10, 11, 12, prohibiting judgment against garnishee before recovery of judgment against defendant and providing for notice to claimant. Suit to enjoin collection of judgment against garnishee. Fry v. Radzinski, 219 Ill. 526, 76 N. E. 694.

95. Under § 2144, Code 1892, requiring a claimant to propound his claim in writing under oath, the form in which the claim is propounded is not jurisdictional, but may be waived by the parties going to trial on an oral claim or may be amended upon appeal to the circuit court, and claimant's appeal to that court cannot be dismissed because his claim was not propounded in writing under oath. First Nat. Bank v. Fain Grocery Co. [Miss.] 40 So. 6.

96. Under Code 1896, §§ 2199, 2200. Ober & Sons Co. v. Phillips Buttorff Mfg. Co. [Ala.] 40 So. 278. Plaintiff cannot raise the question that an order for money given by the garnishee to the defendant drawn upon a third person and assigned by the defendant to interpleader is invalid because it was only for part of the amount due by the third person to the garnishee, and that the contract being entire could not be split up to suit the convenience of the payee. Gray v. Bever, 122 Ill. App. 1.

97. See 5 C. L. 1583.

98. Smith v. Kennedy, 125 Ga. 830, 54 S. E. 731.

99. Sayles' Rev. Civ. St. art. 225. Fleming & Fleming v. Pye [Tex. Civ. App.] 16 Tex. Ct. Rep. 292, 95 S. W. 594.

1. See 5 C. L. 1583.

pending determination of the liability of the garnishee in the garnishee action.[3] The proper tribunal to determine whether a garnishee may be charged as such on the facts of his disclosure is the court in which the garnishee action is pending.[4]

§ 15. *Trial, verdict and judgments, costs and execution.*[5]—Trial must be had at the term to which the process is returnable.[6] The right of the garnishee to a trial,[7] and the time within which it may be demanded,[8] are matters of statutory regulation. The garnishee being notified of the suit by service of the writ, he is not entitled to further notice of trial.[9] There being no claim that the garnishee will not safely keep the fund until the recovery of judgment against defendant, there is no occasion for ordering the fund to be turned over to the clerk.[10] The usual rule is that the burden of establishing the liability of the garnishee is upon the plaintiff.[11] Plaintiff's failure to make formal proof of a certain fact may be cured by admissions of the garnishee.[12] A trustee is entitled to raise the question of the exemption from garnishment or attachment of trust funds in the hands of his officers by motion to dismiss the attachment.[13] Matters of evidence[14] and questions for the jury[15] are governed by the ordinary rules. Questions of fact relating to the main action are not determinable on a motion to quash the writ.[16] For the purpose of entering up a judgment against the garnishee, the court will take judicial notice of the judgment in the main action entered in the same court.[17] If the garnishee admits possession of property belonging to defendant, no personal judgment can be rendered against him in the first instance except an order that he deliver up the property on demand.[18] Judgment cannot be entered against the gar-

2, 3. American Hardwood Lumber Co. v. Joannin-Hansen Co. [Minn.] 109 N. W. 403.

4. Could not be determined in action by garnishee's creditor against garnishee pending garnishee proceedings. American Hardwood Lumber Co. v. Joannin-Hansen Co. [Minn.] 109 N. W. 403.

5. See 5 C. L. 1583.

6. Court without authority to take up case over plaintiff's objection at term prior to the one at which it was set for trial, though all the parties were present in court. Sanger Bros. v. Wise County Coal Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 301, 90 S. W. 518.

7. Where both the disclosure and the oral examination denied liability, the fact that the record showed that the court heard the proofs and argument of counsel did not show a waiver by the garnishee of his statutory right to demand a trial on the issues raised. King v. Harrigan [Mich.] 13 Det. Leg. N. 492, 108 N. W. 748.

8. Under Comp. L. § 10,610, giving a garnishee 10 days after filing his answer in which to demand a trial, a garnishee is entitled to 10 days after filing his disclosures in which to demand a trial. Error to render judgment against him on same day that oral examination was filed. King v. Harrigan [Mich.] 13 Det. Leg. N. 492, 108 N. W. 748.

9. People's Loan & Trust Co. v. McMurray, 27 R. I. 516, 63 A. 803.

10. Hawarden State Bank v. Hessler [Iowa] 109 N. W. 210.

11. Tabor v. Leadville [Colo.] 83 P. 1060. Plaintiff's burden to prove that garnishee was indebted not met by proving contradictory statements of garnishee or his agents. Frank v. Dungan [Ark.] 90 S. W. 17.

12. Failure to prove by best evidence that order of distribution had been made in administration proceedings cured by admissions of that fact by garnishee while testifying as a witness. Kiernan v. Robertson, 116 Mo. App. 56, 92 S. W. 138.

13. Where assessments for benefit fund of benefit society were held exempt. Brenizer v. Supreme Council Royal Arcanum [N. C.] 53 S. E. 835.

14. Where the garnishees contended that they had not purchased goods from defendants but from another person, and plaintiff claimed that such person was a mere agent of defendants, a paper claimed by plaintiff to be a memorandum of the actual transaction between defendants and the garnishees was properly admitted. Seitz v. Starks [Mich.] 13 Det. Leg. N. 377, 108 N. W. 354.

15. Where the defense was that no sale was made to the garnishees by the defendant but to another party from whom the garnishees purchased the goods, the question whether such defense was a mere pretense was for the jury. Seitz v. Starks [Mich.] 13 Det. Leg. N. 377, 108 N. W. 354.

16. Question of whether defendant's indebtedness accrued prior or subsequent to the death of her husband, if material, was a question of fact to be disposed of in the principal suit. Recor v. Recor [Mich.] 12 Det. Leg. N. 784, 106 N. W. 82.

17. Need not be formally introduced in evidence. Morrison v. Hilburn [Ga.] 54 S. E. 938; Baze v. Island City Mfg. Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 483, 94 S. W. 460.

18. Judgment in first instance that he deliver up property and in default thereof pay its value held invalid under Code 1896, § 2193. Murdock Brokerage Co. v. Collins [Ala.] 40 So. 96. Code 1896, § 2192, providing that if a garnishee is liable for the delivery of personal property or for a debt discharge-

nishee before judgment against defendant has been obtained.[19] As a final judgment in garnishment is a confirmation of the judgment nisi, a valid judgment nisi is essential to the entry of a valid final judgment.[20] A recital in a judgment on a bond to dissolve the garnishment that judgment had been rendered against the garnishee is not conclusive,[21] and on the trial of an illegality attacking the judgment, evidence that no judgment against the garnishee had first been obtained will overcome the presumption that the judgment attacked was regularly rendered.[22] The judgment showing a finding against plaintiff on the issue between him and a claimant, plaintiff cannot complain that it does not discharge the garnishee or mention the amount.[23] Antecedent attachment proceedings being void on their face, the judgment against the garnishee is also void and should be arrested.[24] Though it appear that the garnishee must be discharged because he has no property belonging to defendant, plaintiff is nevertheless entitled to judgment against defendant.[25] Equity will exercise its power to set aside a judgment duly rendered against a garnishee and grant a new trial on the issue of his liability only on facts showing the clearest and strongest reasons for its interposition.[26] Where the garnishee is discharged on his answer, he is generally entitled to costs and attorney's fees.[27] In Massachusetts plaintiff upon default of the trustee is entitled to the costs of his travel and term fees provided he "does not otherwise recover his costs."[28] Where scire facias is issued against the trustee on default, he is personally liable for the costs thereon.[29] In the action on the scire facias, the trustee may prove any matter which may be necessary and proper for his defense.[30]

§ 16. *Appellate review.*[31]—An exception lies in favor of a garnishee to the ruling of the court charging him as such.[32] While no appeal lies from an order

able by the delivery of personal property, judgment shall be rendered against the garnishee, that if he does not deliver the property to the sheriff judgment will be rendered against him for a fixed sum, etc., applies only where the garnishee is liable for the delivery of personal property under a contract or the payment of a debt in property, and not where he merely holds property to which he never asserted title, for the benefit of defendant. Id.

19. Hawarden State Bank v. Hessler [Iowa] 109 N. W. 210; Kruse v. Wilson [Cal. App.] 84 P. 442.

20. Where not shown that corporation garnishee was properly served. Ex parte National Lumber Mfg. Co. [Ala.] 41 So. 10.

21, 22. Smith v. Kennedy, 125 Ga. 830, 54 S. E. 731.

23. Code 1896, § 2200. Ober & Sons v. Phillips Buttorff Mfg. Co. [Ala.] 40 So. 278.

24. Fatal variance between affidavit and writ of attachment. Leffler v. Union Compress Co. [Ga.] 55 S. E. 927.

25. Durfree v. Meadowcroft [Mass.] 79 N. E. 268.

26. Trammell v. Ullman, Lewis & Co. [Tex. Civ. App.] 96 S. W. 648. Bill demurrable where through inexcusable neglect garnishee permitted judgment to be erroneously rendered on his answer and his bill failed to show excuse for failure to pursue legal remedy of motion for new trial during term or writ of error. Id.

27. Under Rev. St. 1895, art. 253, providing that where a garnishee is discharged on his answer the costs of the proceeding including a reasonable compensation to the garnishee shall be taxed against plaintiff, a garnishee discharged on his answer is entitled to recover of plaintiff a reasonable attorney's fee. Eastham Bros. v. Blanchette [Tex. Civ. App.] 15 Tex. Ct. Rep. 119, 94 S. W. 441. Under Ballinger's Ann. Codes & St. § 5413, providing that where a garnishee is discharged on his answer costs and attorney's fees shall be taxed against plaintiff, a garnishee is entitled to costs and attorney's fees in all cases when discharged from liability, whether upon the answer or upon the hearing. Whitehouse v. Nelson [Wash.] 86 P. 174.

28. Under Rev. Laws c. 189, § 72, a trustee who without cause fails to appear and answer is not personally liable to plaintiff for the costs for plaintiff's travel and term fees where plaintiff recovers from the trustee in scire facias proceedings more than enough of the property of the debtor to pay these costs. Leonard v. Weymouth [Mass.] 79 N. E. 787.

29. Where a town duly summoned as trustee made default and scire facias was issued against it, it was individually liable for the cost on the scire facias as provided by R. L. c. 189, § 76. Leonard v. Weymouth [Mass.] 79 N. E. 787.

30. Under the express provisions of Rev. Laws c. 189, § 48, a trustee "may prove any matter which may be necessary or proper for his defense in the action on the scire facias." Leonard v. Weymouth [Mass.] 79 N. E. 787.

31. See 5 C. L. 1584.

32. Grimwood Co. v. Capitol Hill Bldg. & Const. Co. [R. I.] 65 A. 304.

refusing to discharge a garnishee in an action in which the court has jurisdiction of the parties,[33] where defendant by his motion to discharge the garnishee and to dismiss the action challenges the jurisdiction of the court to proceed further therein, an order denying such motion is appealable.[34] An order denying a motion that the garnishee pay into court a sum sufficient to satisfy any judgment that might be recovered against defendant is not appealable.[35] Certiorari is the proper remedy to review a final judgment against a garnishee confirming a void judgment nisi.[36] Where property of the garnishee is sold on execution pending his appeal from the justice's court, and it appears that the judgment below on which the execution was based was erroneous, the appellate court has no power to direct a verdict in favor of the garnishee for the value of the property sold,[37] the proper method of obtaining restitution in such case being by motion after verdict in favor of the garnishee and an opportunity given plaintiff to resist it.[38] The usual presumptions obtain on appeal.[39]

GAS.

§ 1. **Gas Franchises; Powers and Duties of Corporations Exercising Them (1875).** Obligation to Supply Consumers (1876).
§ 2. **Public Regulation (1876).**
§ 3. **Torts and Crimes (1877).**

Gas wells and leases for their operation are elsewhere treated,[40] as are general matters relating to franchises,[41] corporations,[42] and some questions relating to rights in streets,[43] and the police power of municipalities.[44]

§ 1. *Gas franchises; powers and duties of corporations exercising them.*[45]—A municipality which has power to purchase a gas plant[46] may reserve in a charter to a gas company an option to purchase,[47] and the power is not impaired by the fact that the gas company has sold an interest in its plant before the exercise of the option,[48] nor have the stockholders of the gas company any concern as to the use which the municipality intends to make of the plant.[49] The exclusive privilege conferred by the Pennsylvania statute upon the first gas company organizing thereunder in a particular locality until it has paid certain dividends is not affected as to subsequently organized companies by the fact that there is a previously organized company having the right to supply gas in such territory.[50] A charter giving a gas

33, 34. Krafve v. Roy [Minn.] 107 N. W. 966.

35. Does not involve merits or materially affect final decision under Code § 4101. Hawarden State Bank v. Hessler [Iowa] 109 N. W. 210.

36. Ex parte National Lumber Mfg. Co. [Ala.] 41 So. 10.

37. Case must be tried on issues below. Woolverton v. Freeman [Ark.] 91 S. W. 190.

38. Woolverton v. Freeman [Ark.] 91 S. W. 190.

39. That record was silent as to affidavits required by Acts 1894-95, p. 415, did not on appeal by garnishee create a presumption of want of jurisdiction. Brookside Dry Goods Co. v. City Furniture Co. [Ala.] 41 So. 659. Circuit court having retained jurisdiction of garnishment proceedings, it is presumed that the return on the execution was sufficient to give jurisdiction of property garnished. Commercial Real Estate & Brokerage Co. v. Riemann [Mo. App.] 93 S. W. 305. Where judgment entry on an issue taken by plaintiff on a claim by a third person did not show that issue was joined on certain pleas filed, it was presumed that the case was tried on the statutory issue, a denial of the claimant's claim. Ober & Sons Co. v. Phillips Buttorff Mfg. Co. [Ala.] 40 So. 278.

40. See Mines and Minerals, 6 C. L. 644.

41. See Franchises, 7 C. L. 1771.

42. See Corporations, 7 C. L. 862.

43. See Highways and Streets, 5 C. L. 1645.

44. See Municipal Corporations, 6 C. L. 714.

45. See 5 C. L. 1584.

46. Charter power to construct and establish gas works held to give power to purchase. City of Indianapolis v. Consumers' Gas Trust Co. [C. C. A.] 144 F. 640, rvg. Quinby v. Consumers' Gas Trust Co., 140 F. 362. And though natural gas was not known to be available in the vicinity at the time the power was given, it extends to the purchase of a natural gas plant. Id.

47, 48. City of Indianapolis v. Consumers' Gas Trust Co. [C. C. A.] 144 F. 640.

49. Alleged that resale was intended. City of Indianapolis v. Consumers' Gas Trust Co. [C. C. A.] 144 F. 640.

50. Exclusive privilege under Act April

company the right to operate in a particular county is not wholly void because of another company's exclusive right to furnish gas in a portion of such county.[51] The passing of resolutions by a common council having power to grant franchises, providing for the execution of contracts with a gas company for lighting a certain territory, gives the consent requisite to confer a franchise on such company.[52]

Obligation to supply consumers.[53]—Where a contract to furnish gas is silent as to the pressure, it need only be furnished at the usual and customary pressure.[54] In the absence of a statute fixing the rates to be charged by a company furnishing gas to the inhabitants of a city, the acceptance of a franchise implies the obligation to furnish it at a reasonable price,[55] and equity has jurisdiction, at the suit of the city on behalf of the individuals injured, to restrain an excessive charge.[56]

§ 2. *Public regulation.*[57]—The state may regulate and fix the charges of a public service gas company provided such rate is reasonable,[58] and mandamus will lie to enforce it.[59] The power to fix rates is legislative and not judicial.[60] Such companies are entitled to a reasonable profit on the actual value of their property,[61] including their franchises.[62] Where the legislature fixes a maximum charge, it is equivalent to granting an express authority to charge up to that amount,[63] and if too high it deprives a consumer of no constitutional right,[64] and the courts cannot declare a lower rate unreasonable.[65] The constitutionality of a statute fixing rates being presumed, consumers are entitled to the rates so prescribed notwithstanding the statute is attacked as unconstitutional,[66] but pending such litigation the parties should be protected from irreparable damages.[67] A statute providing penalties of

29, 1874, § 34, cl. 3 (P. L. 94). Commonwealth v. Consumers' Gas Co., 214 Pa. 72, 63 A. 463.

51. Quo warranto to oust from such portion allowed but not as to the entire county. Commonwealth v. Consumers' Gas Co., 214 Pa. 72, 63 A. 463. Application to the council for privilege of occupying streets held to amount to an attempt to exercise franchise in such city so as to authorize quo warranto to oust from such territory. Id.

52. Peremptory writ issued to compel the president of the borough and other officers to grant permits to open streets in such territory. People v. Littleton, 110 App. Div. 728, 96 N. Y. S. 444.

53. See 5 C. L. 1585.

54. Flaccus v. West Penn. Gas Co., 213 Pa. 561, 62 A. 1111.

55, 56. City of Madison v. Madison Gas & Elec. Co. [Wis.] 108 N. W. 65.

57. See 5 C. L. 1585.

58. City of Madison v. Madison Gas & Electric Co. [Wis.] 108 N. W. 65. Such rate is not unconstitutional as impairing the right to contract or as taking property without due process of law (Richman v. Consolidated Gas Co., 114 App. Div. 216, 100 N. Y. S. 81), unless it is unreasonably low, in which case it violates the latter constitutional provision (Brooklyn Union Gas Co. v. New York, 50 Misc. 450, 100 N. Y. S. 570). In determining the reasonableness of a rate, the court may consider matters dehors the record and declare the statute void if it allows an insufficient return. Richman v. Consolidated Gas Co., 114 App. Div. 216, 100 N. Y. S. 81.

59. In re Rebecchi, 51 Misc. 327, 100 N. Y. S. 335; Richman v. Consolidated Gas Co., 114 App. Div. 216, 100 N. Y. S. 81.

60. The courts may determine whether existing rates are reasonable, but have no power to fix future rates. City of Madison v. Madison Gas & Elec. Co. [Wis.] 108 N. W. 65.

61. Under a statute authorizing a company to organize by the consolidation of other companies and to issue stock to the aggregate value of the property, rights and franchises of such companies, it has no contract right to a return on such capitalization without regard to depreciation. In re Rebecchi, 51 Misc. 327, 100 N. Y. S. 335.

62. Notwithstanding it was originally granted as a gratuity. Consolidated Gas Co. v. Mayer, 146 F. 150.

63. Brooklyn Union Gas Co. v. New York, 50 Misc. 450, 100 N. Y. S. 570. The rule that a public service gas company may charge only a reasonable rate and that the courts may ascertain such rate in a given case is inapplicable where the legislature has fixed the maximum rate. Brooklyn Union Gas Co. v. New York, 100 N. Y. S. 625. Consequently an order granting an examination of the company's books to show the cost of production and that the price is unreasonable will not be granted. Id.

64. Since he is not obliged to buy. Brooklyn Union Gas Co. v. New York, 50 Misc. 450, 100 N. Y. S. 570.

65. Brooklyn Union Gas Co. v. New York, 100 N. Y. S. 625.

66. Richman v. Consolidated Gas Co., 114 App. Div. 216, 100 N. Y. S. 81. Motion to enlarge an injunction restraining state officers from enforcing the penalty for excessive charges so as to enjoin private consumers from maintaining actions denied as to

such a character as to inflict irreparable injury upon a company while testing the constitutionality of a rate fixed by the legislature denies equal protection of the laws.[68] Where a lower rate is prescribed for the city than for private consumers, an adjudication that the city rate is unreasonably low does not establish the unreasonableness of the latter rate.[69] An answer to a petition for mandamus to compel a company to furnish gas at the statutory rate, denying that defendant "refused to supply the petitioner," does not put in issue its "refusal to furnish gas at the statutory price,"[70] and an answer alleging the unconstitutionality of a rate must plead facts and not a mere conclusion.[71]

§ 3. *Torts and crimes.*[72]—Corporations engaged in manufacturing and distributing gas are held to a high degree of care and must exercise every reasonable precaution suggested by the known dangers,[73] but no liability exists for resulting injuries in the absence of negligence,[74] and the mere escape of gas does not make a prima facie case.[75] As in other cases the negligence must be the proximate cause,[76] and the plaintiff must be free from contributory negligence.[77] One unlawfully abstracting and using gas by disconnecting the meter and connecting direct pipes is guilty of larceny and not of the offense of tampering with meters.[78]

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those not parties to the suit. Consolidated Gas Co. v. Mayer, 146 F. 150.

67. In determining the propriety of granting an injunction restraining the company from refusing to supply gas at the statutory rate, the court should require the company to furnish gas at such rate upon the consumer giving an undertaking to pay the additional price if the statute is held unconstitutional, or permit it to charge the old rate upon insuring the return of the excess if held valid. Schneider v. New Amsterdam Gas Co., 101 N. Y. S. 535. Charges paid in excess of the statutory rate impounded to be refunded if the rate is finally held valid. Consolidated Gas Co. v. Mayer, 146 F. 150.

68. New York Gas Commission Act, Laws 1905, p. 2100, c. 737, § 21, making a demand for a higher rate than the statutory rate a complete defense to any recovery, and Laws 1906, c. 125, imposing a penalty of $1,000 for charging more than the statutory rate in the borough of Manhattan, held to practically deny the gas companies equal protection of the laws, and a temporory injunction will issue enjoining the enforcement of the $1,000 penalty. Consolidated Gas Co. v. Mayer, 146 F. 150.

69. Richman v. Consolidated Gas Co., 114 App. Div. 216, 100 N. Y. S. 81.

70. In re Rebecchi, 51 Misc. 327, 100 N. Y. S. 335.

71. An answer to a petition for mandamus to compel a company to furnish gas at the fixed price, alleging that the rate would yield very little above the actual cost and would not yield an adequate return so that the company would be deprived of property without due process of law, etc., held insufficient. In re Rebecchi, 51 Misc. 403, 100 N. Y. S. 513.

72. See 5 C. L. 1586.

73. Morgan v. United Gas Imp. Co., 214 Pa. 109, 63 A. 417; Shirey v. Consumers' Gas Co. [Pa.] 64 A. 541.

74. Failure to repair a leak of which defendant has no actual notice and which could not be discovered except by entering the house into which it was escaping, held not negligence. Hammerschmidt v. Municipal Gas Co., 99 N. Y. S. 890. An action for personal injuries from inhaling gas which escaped into plaintiff's cellar from defendant's pipes held properly dismissed for lack of evidence of negligence. Morgan v. United Gas Imp. Co., 214 Pa. 109, 63 A. 417. Presence of gas in a house connected by private pipes to defendant's main in the street held not sufficient indication of a leak in the main to require the company to dig up such pipe for examination. Id.

Negligence held for the jury: Gas permitted to escape while defendant's workmen were making repairs in plaintiff's house. Flaherty v. Scranton Gas & Water Co., 30 Pa. Super. Ct. 446. Evidence that gas had been escaping from the main for several days and that the pipe after the explosion showed an old break. Shirey v. Consumers' Gas Co. [Pa.] 64 A. 541.

75. Hammerschmidt v. Municipal Gas Co., 99 N. Y. S. 890.

76. One installing a gas service so negligently as to allow gas to escape is liable for resulting damages from explosion, though ignited by some one else, such being the natural and probable result of his act. Moore v. Lanier [Fla.] 42 So. 462. And hence the declaration need not allege who ignited the gas. Id.

77. In an action for the death of an infant child, the mother's contributory negligence in leaving the door of the child's room open after discovering the escaping gas held under the facts for the jury. Flaherty v. Scranton Gas & Water Co., 30 Pa. Super. Ct. 446.

78. Guilty of larceny within Cr. Code § 167 (Starr & C. Ann. St. [2nd Ed.] c. 38, par. 305, p. 1316), and not of the offense cre-

GIFTS.

§ 1. Definitions and Distinctions (1878).
§ 2. Validity and Requisites (1878).
§ 3. Fraud, Undue Influence, Mistake, and Incapacity (1882).

The doctrine of charitable gifts is elsewhere treated,[79] as is the validity as to third persons of voluntary conveyances.[80]

§ 1. *Definitions and distinctions.*[81]

§ 2. *Validity and requisites.*[82]—In order to constitute a valid gift there must be a delivery,[83] actual or symbolical,[84] of the subject-matter, unless it is already in the possession of the donee,[85] with an intent[86] on the part of the donor to presently[87] divest himself of all title and dominion over the same,[88] and an acceptance by the

ated by § 117 (1 Starr & C. Ann. St. [2nd Ed.] c. 38, par. 234, p. 1288), making it an offense to tamper with meters. Woods v. People, 222 Ill. 293, 78 N. E. 607.

79. See Charitable Gifts, 7 C. L. 624.

80. See Fraudulent Conveyances, 7 C. L. 1841.

81, 82. See 5 C. L. 1587.

83. Gift of personal property. Thomas v. Tilley [Ala.] 41 So. 854; Wilson v. Edwards [Ark.] 94 S. W. 927. A deposit in a bank with directions that it be paid to the depositor if she lived and to a named donee in case of death lacks delivery. Bailey v. New Bedford Inst. [Mass.] 78 N. E. 648. A deposit of funds payable to depositor or a named person, the former retaining the deposit book without which it could not be withdrawn, is no delivery. Bath Sav. Inst. v. Fogg [Me.] 63 A. 731. Under Civ. Code §§ 1146, 1147, requiring an actual or symbolical delivery where possible, a gift of money is not made by a declaration of an intention to pay a note on which the donee is primarily and the donor secondarily liable. Townsend v. Sullivan [Cal. App.] 84 P. 435.

Delivery must be as complete as circumstances will permit. Lavelle v. Melley, 27 Pa. Super. Ct. 69. Where decedent, calling a servant and handing him his vest, said, "Here Pat, take this and take the keys, and take the money in the trunk," and upon receiving the keys from another servant continued: "Here Pat, take the keys and take the money in the trunk," question of delivery held for the jury. Id. Evidence held sufficient to show that the bank books were in the bundle delivered as a gift causa mortis. Van Wagenen v. Bonnot [N. J. Eq.] 65 A. 239.

Delivery of certificates of stocks (Mothes' Estate, 29 Pa. Super. Ct. 462), a **savings bank book** (Van Wagenen v. Bonnot [N. J. Eq.] 65 A. 239), or a **bond and mortgage, is sufficient without an assignment or indorsement** (Andrews v. Nichols, 101 N. Y. S. 977).

84. Delivery may be symbolical. Hall v. Simmons, 125 Ga. 801, 54 S. E. 751.

Symbolical deliveries held sufficient: Delivery of **deed** to convey **land.** Jost v. Wolf [Wis.] 110 N. W. 232. Savings **bank book** to pass the **deposit.** Van Wagenen v. Bonnot [N. J. Eq.] 65 A. 239; Meriden Sav. Bank v. McCormack [Conn.] 64 A. 338.

Indorsement and delivery of **certificate of deposit** transfers the **fund.** Foster v. Murphy [Neb.] 107 N. W. 843.

85. Gift of land in possession of donee. Barnes v. Banks [Ill.] 79 N. E. 117.

86. A deed executed and delivered is conclusive of the intention of the grantor to convey. Mascarel v. Mascarel's Ex'rs [Cal. App.] 86 P. 617. The delivery of a savings bank deposit book not made with an intention to constitute a gift is ineffectual as a gift inter vivos of the deposit. Nogga v. Savings Bank of Ansonia [Conn.] 65 A. 129. Delivery of note to the maker with words indicative of an intention to extinguish the debt discharges it. Percival-Porter Co. v. Oaks [Iowa] 106 N. W. 626.

87. Held not to show an intent to presently surrender dominion: The fact that a mother changed her savings bank account to herself and son, "payable to either or survivor," she retaining exclusive control of the bank book. In re Seigler's Estate, 49 Misc. 189, 98 N. Y. S. 929. Statements and acts of a depositor of funds in a bank payable to herself or sister together with the retention of the deposit book without which no withdrawal could be made held to show an intention to retain control of the funds. Bath Sav. Inst. v. Fogg [Me.] 63 A. 731. Delivery of an insurance policy in an envelope with directions not to open until after his death, especially where a sealed envelope had previously been given and recalled several times. Northwestern Mut. Life Ins. Co. v. Collamore, 100 Me. 578, 62 A. 652.

Evidence held to show that it was the alleged donor's intention to make a gift to her sister at the time of death. Bath Sav. Inst. v. Fogg [Me.] 63 A. 731.

88. A mere intention to make a gift is not sufficient without an actual transfer of right and dominion over the thing given. Oliver v. Perry [Iowa] 109 N. W. 183.

Failure of gift because of retention of dominion: Instrument disposing of bank deposits and providing this "order shall be in full force immediately after my death." Schultz v. Becker [Wis.] 110 N. W. 214. Stocks delivered to secretary together with a list of persons to whom they were to be delivered on the death of owner, with express direction that they be retained subject to her control. Noble v. Learned [Cal. App.] 87 P. 402. Father divided his land among his children but expressly refused to presently convey to one because of outstanding judgments. Oliver v. Perry [Iowa] 109 N. W. 183. Owner deposited securities in his private box in safety deposit vault, at the same time telling the defendant that they were hers, and giving her a key and the password but subsequently exercised full control over the same and attempted to get control

donee.[89] Where, however, the donor parts absolutely with the title and relinquishes all dominion over the property as owner, mere retention of possession will not defeat the gift,[90] but it must be shown that the continued or resumed possession was not a part of the donative transaction.[91] A promise to make a gift creates no legal obligation until executed,[92] after which it is irrevocable by the donor,[93] and a gift to a prospective wife is not waived or relinquished by a subsequent general ante-nuptial agreement.[94] Unless the rights of creditors[95] or of the wife, who has no interest in personalty,[96] intervenes, one may dispose of his property[97] as he sees fit. In Louisiana a gift may be either free, remunerative, or onerous,[98] unless it impoverishes the donor,[99] in which case it may be recovered from a third person taking with notice[1] without a tender of the benefits received,[2] though no lien exists on land purchased therewith by such person.[3] In this state a donation of land under private signature is void,[4] and can be rendered valid by ratification only when ratified by authentic

of the key. Millard v. Millard [Ill.] 77 N. E. 595.

Held absolute gifts in presenti: The cancellation of a mortgage by the mortgagee in consideration of the execution of a new one to a son, who was to divide the proceeds with his brothers. Trabbic v. Trabbic [Mich.] 12 Det. Leg. N. 782, 105 N. W. 876. An instrument reciting "I present you, on your 33d birthday, with the house * * * now occupied by you," etc. Barnes v. Banks [Ill.] 79 N. E. 117. Where one having a bank account places it in the name of another with arrangements that either may draw thereon, but all withdrawals by him thereafter are made as agent of such person, there is such surrender of dominion as to complete the gift. Wilson v. Edwards [Ark.] 94 S. W. 927. A voluntary deed deposited in the hands of a third person to be delivered to the grantee upon the death of the grantor, without any reservation of the right to recall. Foreman v. Archer [Iowa] 106 N. W. 372.

Evidence examined and **held to show** an absolute delivery to the third party (Foreman v. Archer [Iowa] 106 N. W. 372), and even if it were subject to recall an offer by the grantor to sell to another is insufficient to show revocation of the gift (Id.).

89. Mahoney v. Martin, 72 Kan. 406, 83 P. 982. If **burdened** with **no conditions** the **law presumes** an **acceptance** (Id.), but if disputed it becomes a question of fact to be determined from the evidence (Id.). A gift may be made by transfer of property to a trustee for the benefit of the donee (Larimer v. Beardsley [Iowa] 107 N. W. 935), and if burdened with no conditions, it becomes effectual without notice to or acceptance by the donee (Id.).

90. Hall v. Simmons, 125 Ga. 801, 54 S. E. 751.

91. Parker v. Copland [N. J. Err. & App.] 64 A. 129. Evidence held insufficient to show that the return of bank books was not a part of the transaction, especially in view of the fact that they were treated as a part of the donor's estate thereafter with acquiescence of the donee. Id.

92. Though in the form of a promissory note. Tyler v. Stitt, 127 Wis. 379, 106 N. W. 114. Gift of the cultivated portions of a farm with a promise to give the rest the following year passes no title to the latter portion. Wallis v. Turner [Tex. Civ. App.] 16 Tex. Ct. Rep. 92, 95 S. W. 61. Unexecuted promise is revoked by death. Estate of Augustus Switzer v. Gertenbach, 122 Ill. App. 26. Unless the promisee in reliance thereon has so changed his position as to incur a loss as a legal necessity from failure to so execute the promise. Id.

93. A vendor constituting himself a trustee to hold a purchase price note for the use of a third party to the extent of the interest creates a valid gift which cannot be revoked. Malone's Committee v. Lebus [Ky.] 96 S. W. 519.

94. Larimer v. Beardsley [Iowa] 107 N. W. 935.

95. A deed of property as a gift to the wife, duly recorded, is good against subsequent creditors. Savage v. Savage [C. C. A.] 141 F. 346.

96. Robertson v. Robertson [Ala.] 40 So. 104. A gift without wife's assent is not void under Comp. Law §§ 9300, 9301, unless done with the fraudulent intent to prevent it from passing to the wife at death. Trabbic v. Trabbic [Mich.] 12 Det. Leg. N. 782, 105 N. W. 876. Disposition of certain bonds by way of a trust to be delivered at death, the donor reserving a life interest in the dividends, construed as a gift and not a testamentary disposition, and hence valid without wife's consent. Robertson v. Robertson [Ala.] 40 So. 104.

97. An insurance policy payable to the insured, his executors or assigns, is an asset of his estate. Nixon v. Malone [Tex. Civ. App.] 16 Tex. Ct. Rep. 715, 95 S. W. 577.

98. Ackerman v. Larner, 116 La. 101, 40 So. 581. When a donor makes a gift on condition that he receive support and maintenance during life, it is an onerous donation and not a commutative contract. Id.

99. Civ. Code art. 1497. Ackerman v. Larner, 116 La. 101, 40 So. 581. And such donation being void ab initio in the interest of public order and morals can acquire no validity by ratification or lapse of time, and recovery is not barred by prescription either of 5 or 10 years. Id.

1. At least to the extent of the property still in possession at the time of action. Ackerman v. Larner, 116 La. 101, 40 So. 581.

2. Onerous donation conditioned on future support and maintenance. Ackerman v. Larner, 116 La. 101, 40 So. 581.

3. Ackerman v. Larner [La.] 40 So. 581.

acts.[5] Actual possession of land so donated constitutes an acceptance of the gift,[6] but does not render it valid as against third persons.[7] Gifts, except donations of land,[8] may be by parol,[9] and in the case of land, if the donee takes possession[10] and makes valuable improvements,[11] under a parol gift he will be protected.[12] Where a husband buys lands and has the title placed in his wife's name,[13] or a wife makes voluntary improvements on her husband's homestead,[14] or a parent makes payments of money to a child,[15] a gift is presumed.

To constitute a gift causa mortis there must be a manifest intention to give,[16] a subject capable of passing by delivery,[17] and an actual delivery in contemplation of death.[18] Although such a gift is revocable,[19] it must be absolute when made.[20] Mere possession raises no presumption of delivery[21] or of a gift,[22] especially where such possession may be otherwise accounted for.[23] One claiming property as a gift

4. In re Lahaye, 115 La. 1089, 40 So. 468.

5. Art. 2273 of the Civ. Code. Attempted ratification by acts under private signature. In re Lahaye, 115 La. 1089, 40 So. 468.

6. Evidence held to show no such actual and continuous possession as is contemplated by art. 1541, Civ. Code, to amount to an acceptance. In re Lahaye, 115 La. 1089, 40 So. 468.

7. In re Lahaye, 115 La. 1089, 40 So. 468.

8. A life estate is a freehold estate within Rev. St. 1895, art. 624, requiring a conveyance thereof to be in writing. Wallis v. Turner [Tex. Civ. App.] 16 Tex. Ct. Rep. 92, 95 S. W. 61.

9. A parol gift of a life insurance policy accompanied by delivery is effective. Indorsement not necessary. Nixon v. Malone [Tex. Civ. App.] 16 Tex. Ct. Rep. 715, 95 S. W. 577.

10. Where the only possession claimed is attornment by a tenant in possession, and the evidence not only fails to show donor's knowledge or consent to such attornment but that he subsequently repudiated it by re-renting, no possession is shown. Wallis v. Turner [Tex. Civ. App.] 16 Tex. Ct. Rep. 92, 95 S. W. 61.

11. Evidence that the donee had done some work on a fence on the farm and had furnished a dozen posts, without proof of the value of the work or posts, held not to show such improvements as to take the case out of the statute of frauds. Wallis v. Turner [Tex. Civ. App.] 16 Tex. Ct. Rep. 92, 95 S. W. 61. Expenditures in papering and painting and the building of fences and chicken coops held not sufficient where much less than the rental value of the premises during the time occupied. Price v. Lloyd [Utah] 86 P. 767. A finding that plaintiff expended money on the premises, paid taxes and worked for deceased donor, without a finding as to the amount or that the improvements were valuable or permanent, is insufficient to support a judgment enforcing the parol gift. Id.

12. Parol gift will be enforced in equity (Karren v. Rainey [Utah] 83 P. 333; Price v. Lloyd [Utah] 86 P. 767), though it be but a life estate (Merriman v. Merriman [Neb.] 106 N. W. 174). Where in trespass to try title plaintiff relies on a parol gift followed by possession and improvements thereunder, a plea that the gift was oral and within the statute of frauds is insufficient (Wallis v. Turner [Tex. Civ. App.] 16 Tex. Ct. Rep. 92, 95 S. W. 61), and the parol gift may be shown notwithstanding the statute of frauds (Id.), but if a general denial is also interposed, plaintiff must prove the gift and possession and improvements thereunder (Id.). Evidence held sufficient to show that defendant and her husband took possession of the land in question under the parol gift and made improvements thereon. Karren v. Rainey [Utah] 83 P. 333.

13. Siling v. Hendrickson, 193 Mo. 365, 92 S. W. 105.

14. Creates no debt but is a gift in the expectation that she will be entitled to occupy the homestead during their joint lives. Knickerbocker Trust Co. v. Carhart [N. J. Eq.] 64 A. 756.

15. In the absence of fraud or undue influence. Jenning v. Rohde [Minn.] 109 N. W. 597.

16. Hecht v. Shaffer [Wyo.] 85 P. 1056. Delivery must be accompanied by an act or declaration indicating that a gift causa mortis is intended. Id. Circumstances of the original assignment of stocks together with the donor's subsequent recognition of the validity of the gift after recovery held to show a gift inter vivos and not causa mortis. Larimer v. Beardsley [Iowa] 107 N. W. 935.

17. Hecht v. Shaffer [Wyo.] 85 P. 1056. A gift causa mortis can only be made of personal property under Civ. Code §§ 1146, 1149, et seq. Mascarel v. Mascarel's Ex'rs [Cal. App.] 86 P. 617.

18. Hecht v. Shaffer [Wyo.] 85 P. 1056; Nogga v. Savings Bank of Ansonia [Conn.] 65 A. 129. The fact that there is an existing indebtedness cannot cure a defective gift causa mortis. Bennett v. First Nat. Bank, 117 Ill. App. 382.

19. The return of the subject-matter of a gift causa mortis at the direction of the donor ipso facto revokes the gift. Van Wagenen v. Bonnot [N. J. Eq.] 65 A. 239.

20. Delivery to a third person with instructions to deliver to the donee in case of the donor's death and to return them to him if he recovered is insufficient. Bennett v. First Nat. Bank, 117 Ill. App. 382.

21. Especially where party had opportunity before and after death to acquire possession. Hecht v. Shaffer [Wyo.] 85 P. 1056.

22. Wilson v. Edwards [Ark.] 94 S. W. 927.

23. Possession of bank books by an at-

has the burden[24] of establishing it by clear and convincing evidence.[25] Although insufficient in themselves,[26] declarations of an alleged donor are admissible to prove[27] but not to disprove a gift.[28] Proof of a gift is admissible under a general denial to an action to recover money loaned.[29] Failure to transfer national bank stocks on the books does not affect the gift.[30] In actions involving gifts the general rules relevant to pleading,[31] evidence,[32] instructions,[33] and findings,[34] are applicable.

torney in fact to make and withdraw deposits will be presumed under such authority. Hoffman v. Union Dime Sav. Inst., 109 App. Div. 24, 95 N. Y. S. 1045.

24. Merchants' Loan & Trust Co. v. Egan [Ill.] 78 N. E. 800; Nogga v. Savings Bank of Ansonia [Conn.] 65 A. 129; Merrit v. Bush, 122 Ill. App. 189. Gift causa mortis. In re Bailey, 111 App. Div. 909, 98 N. Y. S. 725.

25. In re Schroeder, 99 N. Y. S. 176; Price v. Lloyd [Utah] 86 P. 767. Especially where the alleged donor is deceased (Thomas v. Tilley [Ala.] 41 So. 854), in which case the same strict proof is required as in case of a gift causa mortis (Id.).

Evidence held sufficient: Evidence of the notary who took the acknowledgment of the deed and declarations of the grantor together with the surrounding facts, held to show a gift of land and also of the notes and mortgage obtained by the grantor from the sale of the land to a third person. Bently v. Jun [Neb.] 107 N. W. 865. To show a parol gift of 40 acres to defendant and her husband as tenants in common as a wedding present. Karren v. Rainey [Utah] 83 P. 333. To show gifts by decedent of various sums of money and simultaneous loans by plaintiff to decedent of similar amounts. Stewart v. Whittemore [Cal. App.] 84 P. 841. To establish an absolute gift of mortgages and not merely the use of the income during donee's natural life. Poppleton v. Poppleton [Mich.] 12 Det. Leg. N. 944, 106 N. W. 703. To show a gift of a deposit by delivery and endorsement of the certificate of deposit. Foster v. Murphy [Neb.] 107 N. W. 843. Held from the particular facts of the case that a voluntary absolute gift was established and not a conditional gift in consideration of future care. Hall v. Hall, 118 Ill. App. 544. A gift may be established on the **unsupported testimony of** the **donee's wife** where the surrounding circumstances cast no suspicion upon her credibility. Andrews v. Nichols, 101 N. Y. S. 977.

Evidence held insufficient: To show a gift of a note and mortgage, they being unindorsed, and among many other papers of the alleged deceased donor in the plaintiff's possession. Thomas v. Tilley [Ala.] 41 So. 854. Evidence of a widow, claiming title to furniture as a gift from the husband, being mostly confined to testimony of interested witnesses, held insufficient. In re Schroeder, 99 N. Y. S. 176. Testimony of a witness testifying to facts sufficient to establish a gift held so unreliable as not to justify a finding of a gift. In re Bailey, 111 App. Div. 909, 98 N. Y. S. 725.

Gifts partially established: A written instrument reciting "I present you * * * with the house and premises now occupied by you, which includes the garden and orchard back of the house and the pasture north of the house, more fully described in my last will, in the 40 acre tract with other lands," held to give only the portions described and not the 40 acre tract, especially in view of the subsequent conduct of the parties. Barnes v. Banks [Ill.] 79 N. E. 117. Direct evidence of the donor together with the surrounding circumstances held to show a gift of a life estate only. Merriman v. Merriman [Neb.] 106 N. W. 174.

26. Thomas v. Tilley [Ala.] 41 So. 854. Declarations of the decedent that the bonds belonged to the executor held insufficient to show a gift to him. Gerting v. Wells [Md.] 64 A. 298.

27. Thomas v. Tilley [Ala.] 41 So. 854. Admissible as declarations against interest, and are not objectionable as hearsay. Bently v. Jun [Neb.] 107 N. W. 865. In an action to recover as for money loaned, declarations of plaintiff that he had given and was going to give defendant more money, and that he (plaintiff) was worth $52,000, are admissible to show a gift and not a loan. Jenning v. Rohde [Minn.] 109 N. W. 597.

28. Where it is claimed that certain notes had been assigned to the wife of the debtor by the creditor as a gift, subsequent declarations of the creditor of the existence of the debt are inadmissible, though the donor is dead. Crawford v. Hord [Tex. Civ. App.] 14 Tex. Ct. Rep. 71, 89 S. W. 1097.

29. Jenning v. Rohde [Minn.] 109 N. W. 597.

30. Larimer v. Beardsley [Iowa] 107 N. W. 935.

31. In an action to recover a mortgage and note, an allegation that the mortgagee had given them to plaintiff is not inconsistent with an allegation that he had given plaintiff the farm from the sale of which the mortgage was obtained. Bently v. Jun [Neb.] 107 N. W. 865.

32. Evidence properly excluded: In an action involving the validity of certain gifts of a decedent, evidence as to who were his relatives and the amount of the estate he left. Stewart v. Whittemore [Cal. App.] 84 P. 841. Witness having stated that the donor said nothing to her in regard to the alleged gift, evidence of a conversation in relation to donor's intention to give other things, especially where donor made bequests to the donee. Hecht v. Shaffer [Wyo.] 85 P. 1056.

Erroneously excluded: On an issue of a parol gift of land, it appearing that the donee was put in possession, evidence that the donor, handing her the deeds, said, "The deeds and the land are yours. After I die the land will be yours," is admissible though it also tends to prove a parol will. Hammond v. Hammond [Tex. Civ. App.] 15 Tex. Ct. Rep. 835, 94 S. W. 1067.

33. An instruction relating to the gift of notes using the word "transfer" held not to exclude the idea of delivery (Crawford v.

§ 3. *Fraud, undue influence, mistake, and incapacity.*[35]—A gift made under undue influence is voidable,[36] and where the parties stand in a fiduciary relation[37] and the dominant party[38] is the donee,[39] the law will presume undue influence and cast upon the donee the burden of showing good faith.[40] The presumption that a gift from a man to his mistress is induced by undue influence is one of fact and not of law.[41] The fact that a decedent in disposing of his property by way of gifts did not divide it equally between his children raises no presumption of undue influence.[42] Equity will not aid a donor to recover a gift induced by illicit intimacy between the parties.[43] Where a bill to set aside a gift intermingles charges of actual and of constructive fraud, it will be dismissed upon failure of proof of actual fraud, though relief might have been granted for constructive fraud if charged separately.[44]

GOOD WILL.[45]

Good will is the favor which the management of a business has won from the public and the probability that old customers will continue their patronage.[46] It is a species of property which is often of great value and which may be sold and transferred.[47] The good will dependent upon the use of trade names is property which will be protected from infringement.[48] A firm name is not necessarily a part of its good will.[49] It cannot be in a business such as banking or professional partnerships in which the name has become a symbol denoting the personal integrity and business qualities of the partners,[50] and hence it cannot be made the subject of a compulsory sale as a part of the good will at the termination of the partnership in the absence of agreement as to the disposition to be made of it,[51] though in such

Hord [Tex. Civ. App.] 14 Tex. Ct. Rep. 71, 89 S. W. 1097), and if defendant wished a fuller instruction he should have requested it (Id.).

34. A finding of a gift of a deposit by delivery of the bank book is not inconsistent with a denial in the answer that defendant claimed by virtue of a written order, such order in the book being merely incidental. Meriden Sav. Bank v. McCormack [Conn.] 64 A. 338.

35. See 5 C. L. 1589. Being governed largely by general rules, validity of assent is more fully treated in the topics Duress, 7 C. L. 1201; Fraud and Undue Influence, 7 C. L. 1813; Incompetency, 5 C. L. 1775, and Mistake and Accident, 6 C. L. 678.

36. Evidence held insufficient to show that gifts to an old servant and personal attendant were made under undue influence. Cole v. Sweet, 112 App. Div. 777, 98 N. Y. S. 625. Evidence held to show that the gifts were pursuant to a general intention to distribute property before death, and were not affected with undue influence. Meyer v. Arends, 126 Wis. 603, 106 N. W. 675. In an action to set aside a gift on the ground of undue influence, the **donee's general disposition for exercising influence** is **immaterial,** the question being what influence was exercised, if any. Id.

37. A domestic making deposits and purchases, collecting interest, disbursing money, etc., for her mistress under explicit directions and immediate supervision, does not occupy a fiduciary relation. Cole v. Sweet, 112 App. Div. 777, 98 N. Y. S. 625. Proof that the donor had been the housekeeper of the donee's father for many years, and had the control and care of the donee, held under the facts not sufficient to show such a confidential relation as to raise a presumption of undue influence. Meriden Sav. Bank v. McCormack [Conn.] 64 A. 338.

38. As between parent and child the former is presumed to be the dominant party. Hence no presumption of undue influence in a gift from father to children. McLeod v. McLeod [Ala.] 40 So. 414.

39. Where the donor is the dominant party, no presumption of undue influence can arise. McLeod v. McLeod [Ala.] 40 So. 414.

40. Parent attempting to set aside a gift to child has the burden of proving undue influence. McLeod v. McLeod [Ala.] 40 So. 414.

41. Platt v. Elias [N. Y.] 79 N. E. 1. Hence such inference is to be considered with the other facts of the case. Id.

42. Though he was living with the most favored one. Meyer v. Arends, 126 Wis. 605, 106 N. W. 675.

43. Platt v. Elias [N. Y.] 79 N. E. 1.

44. Schuyler v. Stephens, 27 R. I. 479, 63 A. 561.

45. See 5 C. L. 1590.

46. White v. Trowbridge [Pa.] 64 A. 862.

47. Bradford v. Montgomery Furniture Co., 115 Tenn. 610, 92 S. W. 1104.

48. Infringement of plaintiff's right to make a particular kind of bread and use a certain name. Fox & Co. v. Glynn, 191 Mass. 344, 78 N. E. 89. See Trade Marks and Trade Names, 6 C. L. 1713.

49. Read v. Mackay, 47 Misc. 435, 95 N. Y. S. 935.

50. Would tend to fraud and deceit. Read v. Mackay, 47 Misc. 435, 95 N. Y. S. 935.

51. Partner could not obtain order of sale

case one partner may enjoin the continued use of the name by the others after the expiration of the partnership.[52] One who makes an unrestricted transfer of the good will of a business, together with the right to use the firm name, will be enjoined from enticing away the employees of the purchaser and customers who were such at the time of the trade and from thereafter using the firm name,[53] but an agreement on the part of a vendor of the good will not to resume the same business, while adding greatly to its value when sold, is no part of the good will, and is not implied from a sale of it;[54] and a mere transfer by one partner to his copartners of his interest in the good will of the business does not preclude him from entering into a similar business in the same town in competition with the old firm, there being no restriction in the dissolution agreement.[55] In a judicial sale of partnership property and good will, the good will sold is only the probability that the old customers will resort to the old place,[56] and either of the members of the old firm stands with reference to the purchaser as though the partnership had never existed.[57] A sale of a business and good will carries with it, as an incident of the good will, covenants on the part of a former owner with the seller and his assigns not to engage in a similar business within a specified time.[58] A sale of the contents of a store coupled with a covenant not to engage in the business so long as the buyer shall continue therein is a sale of the business and of the good will of the business.[59] An assignment for the benefit of creditors of all the property of a publishing company, except that exempt by law from attachment or execution, carries the good will of the business,[60] and the assignee can give to a purchaser of the property, and the good will connected with it, the right to use the company's name as a designation of publications that had previously borne its imprint, and to advertise as the company's successor in the business purchased.[61] A partner who unlawfully excludes his copartners from participation in the business is chargeable with the value of the good will in a suit to settle the partnership.[62] A contract by an insurance company to transfer its good will and a list of its policies, which recites that the seller is about to wind up its affairs, is not broken by the insolvency of the seller a few months after the making thereof.[63] In an action for breach of a contract whereby the good will of a business was sold to plaintiff and a partner, the partner is not a necessary party, he having sold his interest to plaintiff.[64] There is no specific rule for determining the value of a good will, but each case must be considered in the light of the surrounding facts, the question being left to the jury on proper evidence.[65]

GOVERNOR, see latest topical index.

of name of banking firm. Read v. Mackay, 47 Misc. 435, 95 N. Y. S. 935.

52. Regardless of pendency of action for determination that he has no interest in name. Read v. Mackay, 47 Misc. 435, 95 N. Y. S. 935.

53. Acker, Merrall & Condit Co. v. McGaw, 144 F. 864.

54. In absence of agreement vendor may resume his former business. Bradford v. Montgomery Furniture Co., 115 Tenn. 610, 92 S. W. 1104.

55. White v. Trowbridge [Pa.] 64 A. 862.

56. Griffith v. Kirley, 189 Mass. 522, 76 N. E. 201.

57. No implied covenant not to solicit trade from former customers. Griffith v. Kirley, 189 Mass. 522, 76 N. E. 201.

58. American Ice Co. v. Meckel, 109 App. Div. 93, 95 N. Y. S. 1060.

59. Sale of business is sale of good will. Shafer v. Sloan [Cal. App.] 85 P. 162.

60. Exception applies only to property expressly exempted by statute. Lothrop Pub. Co. v. Lothrop, Lee & Shepard Co., 191 Mass. 353, 77 N. E. 841.

61. Lothrop Pub. Co. v. Lothrop, Lee & Shepard Co., 191 Mass. 353, 77 N. E. 841.

62. Same as though he had purchased under order of court. Griffith v. Kirley, 189 Mass. 522, 76 N. E. 201. There being no evidence on which the court could pass on the value of the good will, the decree must be reversed, though the court found the value of the tangible property and the good will to be a certain amount. Id.

GRAND JURY.[66]

Constitution of Juries; Qualifications of Jurors (1884).
Jury Lists; Summoning and Impaneling of Jury (1884).
Powers and Procedure (1885).
Effect of Illegality in Constitution or Proceedings of Juries (1886).
Objections and Waiver Thereof; Estoppel to Urge (1888).
Secrecy of Deliberations (1889).

The qualification of jurors and the drawing of general jury lists are more fully treated elsewhere.[67]

Constitution of juries; qualifications of jurors.[68]—Where the constitution fixes the number of jurors, neither the jury itself nor the court can excuse a member after the jury has been legally organized, but the power of the court is limited to a discharge of the entire body.[69] Among the persons commonly disqualified are those charged with any crime or offense,[70] public officers,[71] and persons who have not paid their taxes for the preceding year.[72] In some states only freeholders and householders are eligible.[73] In others the accused may object to anyone summoned on the ground that he is a witness on the part of the prosecution and has been summoned or bound in a recognizance as such.[74] The fact that one was a member of the coroner's jury is not a ground for challenge in Arkansas.[75] Where the accused is a negro there must be no discrimination against members of his race in the selection of the jury.[76]

Jury lists; summoning and impaneling of jury.[77]—Statutes prescribing the time and manner of selecting jurors are usually regarded as directory,[78] and a substantial compliance therewith is sufficient.[79] In most states the jury is required to be selected by chance by drawing from slips containing the names of those sum-

63. Especially where prior to insolvency buyer had obtained all the benefits which could accrue under it. Bowers v. Ocean Acc. & Guarantee Corp., 110 App. Div. 691, 97 N. Y. S. 485.

64. Jenkins v. Eliot [Mass.] 78 N. E. 431.

65. Von Au v. Magenheimer, 100 N. Y. S. 659. See Damages, 7 C. L. 1029.

66. See 5 C. L. 1591.

67. See Jury, 6 C. L. 316.

68. See 5 C. L. 1591.

69. Action of court in excusing member held a nullity, and further action in appointing another person to take his place was invalid and latter person was not a member. Ex parte Love [Tex. Cr. App.] 16 Tex. Ct. Rep. 65, 93 S. W. 551.

70. Violation of municipal ordinance is not a "crime or offense" within meaning of Acts 1898, No. 135, § 1, p. 216, and does not render juror incompetent. State v. Calhoun [La.] 41 So. 360. Since it is not cognizable by the grand jury. State v. Bush [La.] 41 So. 793.

71. Pen. Code 1895, § 811, declaring that certain county officers shall be incompetent to serve during their respective terms of office, creates a disqualification propter defectum. Parris v. State, 125 Ga. 777, 54 S. E. 751.

72. Under Code N. C. § 1722, even before it was amended by Acts 1899, p. 901, c. 729, a failure to pay any part of the taxes assessed against a person for the preceding year disqualified him. Breese v. U. S. [C. C. A.] 143 F. 250.

73. Evidence held to sustain finding that juror was a householder. McCampbell v. State [Tenn.] 93 S. W. 100.

74. Kirby's Dig. § 2220. Sullins v. State [Ark.] 95 S. W. 159. Fact that his name was indorsed on indictment as witness for state held no ground for challenge where it did not appear that he had been summoned or bound in a recognizance as such witness at the time of the challenge. Id.

75. Sullins v. State [Ark.] 95 S. W. 159.

76. Motion to quash indictment on ground that accused was a negro and that man he was charged with murdering was a white man, and that he was discriminated against in that there were no names of negroes in the jury box from which grand jury that indicted him was drawn, held properly overruled where none of such facts were proved. State v. West, 116 La. 626, 40 So. 920. Mere fact that all of the names drawn out of the venire box were those of white men held not to show discrimination, in absence of showing that box contained no names of negroes. Id. Affidavit held insufficient to present question of discrimination. Smith v. Com. [Ky.] 91 S. W. 742. Evidence not to show discrimination. Thomas v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 535, 95 S. W. 1069.

77. See 5 C. L. 1591. See, also, Jury, 6 C. L. 316.

78. Fact that commissioners assigned to grand jury, as their names were drawn, those persons whom they deemed best qualified instead of returning the persons whose names were first drawn as required by Cr. Code 1902, § 39, held a mere irregularity. State v. Smalls, 73 S. C. 516, 53 S. E. 976.

79. Law relating to drawing and selection of jurors need not be followed with

moned.[80] The right to make up a deficiency in the number of jurors caused by excusing some of them,[81] to excuse the foreman and to appoint another in his place,[82] to empanel a second jury at the same term,[83] and the practice in such cases, is regulated wholly by statute and varies in the different states. In certain of the courts of Alabama a grand jury may be summoned for each term if, in the opinion of the court, it is necessary.[84] In that state it is sufficient if the organization of the jury is incorporated in the minutes at any time before the adjournment of the term.[85] The fact that a jury commissioner, who assisted in listing and drawing a jury which returned an indictment for homicide, was related to the person alleged to have been killed by the accused will not vitiate the indictment unless the relationship is such as to lead to the presumption that he was thereby affected in such a manner as to impair the proper discharge of his duties.[86] In the absence of proof to the contrary it will be presumed that the statute was followed.[87]

Powers and procedure.[88]—It is generally held that the grand jury may act upon information received by them from the examination of witnesses without a formal indictment or other charge previously laid before them.[89] In some states, however,

technical and literal strictness. State v. Disbrow [Iowa] 106 N. W. 263.

80. Jury illegally constituted where judge arranged slips containing names face up in hats, so that he could read names before picking them up, and himself drew out only names of such persons as he desired to serve, in contravention of Acts 1896, p. 95, c. 84, § 4, requiring names to be placed in boxes or hats and drawn in regular order by some person designated by the judge. Sheppard v. State [Miss.] 42 So. 544.

81. Court held to have complied with Code 1896, § 5023, in summoning two qualified persons to make up deficiency where number of jurors was reduced to 14. Jacobs v. State [Ala.] 42 So. 70. Where number of jurors was reduced below 15 and trial court complied with Code 1896, § 5023, in completing the grand jury, held immaterial that number was increased to over 15. Walker v. State [Ala.] 41 So. 878.

82. Action of court held in compliance with Code 1896, § 5022. Jacobs v. State [Ala.] 42 So. 70.

83. When, after a grand jury has been regularly and properly discharged, an exigency arises requiring a further service of that nature, the court may call in the entire body of members summoned and impanel a new jury, instead of recalling the discharged panel, notwithstanding provision of Code, § 5240, that grand jurors shall appear on second day of each term of court, and from their number the proper number shall be drawn, who shall constitute the grand jury for that term. State v. Disbrow [Iowa] 106 N. W. 263. Such practice after original indictment had been set aside held no ground for setting aside second one, it being a substantial compliance with the law. Id. Only authority for organizing a second grand jury at the same term of court is that conferred by Code 1896, § 5000, and an order making provision for a second grand jury at an adjourned term which shows that it was made under § 5001, which applies solely to special terms, is unauthorized and indictments returned by such jury are void. Fryer v. State [Ala.] 41 So. 172.

84. It is not necessary that the opinion of the judge of the criminal court of Jefferson county that it is necessary to summon and impanel a grand jury be in the form of a written order, but it may be expressed orally. Acts 1900-01, p. 217, § 10, construed. Dix v. State [Ala.] 41 So. 924. Record reciting that grand jurors were drawn according to law, and that court organized jury at beginning of the term from venire turned into court by sheriff, held to show that opinion had been duly expressed and communicated to the proper officials, and that jurors had been duly drawn and summoned. Id.

85. Act 1895, p. 1227, § 22, does not apply to general orders, but merely to judgments and decrees. Jacobs v. State [Ala.] 42 So. 70.

86. This fact must be determined by presiding judge in exercise of sound discretion. State v. Perry, 73 S. C. 199, 53 S. E. 169. Held error for circuit judge to quash indictment on ground that parties were related by affinity within the sixth degree and that he was therefore without power to exercise his discretion. Id.

87. State v. West, 116 La. 626, 40 So. 920.

88. See 5 C. L. 1592.

89. Examination need not be preceded by presentment or indictment formally drawn up, but jury may proceed, either upon their own knowledge or upon the examination of witnesses, to inquire for themselves whether a crime cognizable by the court has been committed, and may subsequently embody the result of their investigations in an indictment. Hale v. Henkel, 201 U. S. 43, 50 Law. Ed. ——.

NOTE. Inquisitorial power: In America the grand jury, in all cases, are practically in the position of the English grand jury when making presentments of matters that come to their own knowledge (U. S. v. Hill, 1 Brock [U. S.] 156), and may, as in England in cases of presentment, examine witnesses as to the crime under investigation. This inquisitorial power was recognized in this country before the adoption of the fifth amendment (Addison's Pa. Rep. App. 38), and was fully supported by Mr. Justice Catson in the investigation in 1851 in Tennessee of the Cuban expedition (Wharton Crim. P.

it has no inquisitorial powers except such as are expressly conferred upon it by statute.[90] In the absence of a statutory provision to the contrary, the jury may sit and deliberate until the end of the term for which it is organized unless sooner discharged by the court,[91] and the court may recess it and reconvene it at any time so long as it has not been discharged by an order of court or by operation of law.[92] In summoning witnesses it is generally sufficient to apprise them of the names of the parties with respect to whom they will be called to testify without indicating the nature of the charge against them.[93] In the absence of a statute to the contrary, the jury may visit the scene of the crime without the permission of the court provided it is within their territorial jurisdiction.[94] The number of jurors who must concur in finding an indictment is fixed by statute.[95]

Effect of illegality in constitution or proceedings of juries.[96]—Indictments found by a jury composed of any other number of members than that fixed by the constitution,[97] or by a jury constituted in any other manner than that prescribed by statute,[98] are void. Statutes in many states, however, provide that no objection can be taken to the indictment because of defects relating to the formation of the jury.[99] In some states it is expressly provided that an indictment may be set aside

& P. § 337 note). The Federal courts have generally adopted this view (Charge to Grand Jury, 2 Sawy. [U. S.] 667; U. S. v. Kimball, 117 F. 156; U. S. v. Terry, 39 F. 235, and dicta of Mr. Justice Brewer in Frisbie v. U. S., 157 U. S. 160, 39 Law. Ed. 657), and the contrary view in U. S. v. Kilpatrick, 16 F. 765, was avowedly based on the state practice in North Carolina. In the states too, the weight of authority supports the decision in Hale v. Henkel, 201 U. S. 43, 50 Law. Ed. —. Ward v. State, 2 Mo. 120; State v. Terry, 30 Mo. 368; Commonwealth v. Smyth, 11 Cush. [Mass.] 473; State v. Wolcott, 21 Conn. 272; State v. Magrath, 44 N. J. Law, 227; Blaney v. Maryland, 74 Md. 153. Some state courts, however, following the English practice, still require a specific charge. In re Lester, 77 Ga. 143; Lewis v. The Board, 74 N. C. 194.—From 6 Columbia L. R. 347.

90. If offense is one in respect to which no such power has been expressly granted, investigation must be confined to grand jurors themselves and they cannot base presentment or indictment on testimony of witnesses summoned at their own instance, but only on their own personal knowledge or information. State v. Wilson, 115 Tenn. 725, 91 S. W. 195. Inquisitorial power granted in cases of gaming and tippling does not extend to cases of perjury consisting in the violation of the preliminary oath required of liquor dealers not to allow gaming on the premises, though breach of such oath is made perjury by Shannon's Code § 6781. Id. Fact that § 6781 was taken from Acts 1846, c. 90, which gave inquisitorial powers in investigating its violation, does not change rule in view of fact that such grant of power was omitted from Code of 1858. Id. Offense of selling liquor without a license is within inquisitorial powers. McCampbell v. State [Tenn.] 93 S. W. 100.

91. Jacobs v. State [Ala.] 42 So. 70. Where grand jury of city court of Talladega adjourned in March until May unless sooner called, held that proceedings whereby it reconvened and found indictment in April were valid. Acts 1898, p. 737, § 1, Acts 1894-95, p. 1220, § 5. Id.

92. Jacobs v. State [Ala.] 42 So. 70. Judge may authorize jury to take a recess for a longer period than that prescribed by statute. Ex parte Love [Tex. Cr. App.] 16 Tex. Ct. Rep. 65, 93 S. W. 551.

93. Hale v. Henkel, 201 U. S. 43, 50 Law. Ed. —.

94. Scene of homicide, where it was within the corporate limits of the parish seat. State v. Johnson, 116 La. 855, 41 So. 117.

95. Under Wilson's Rev. & Ann. St. 1903, § 5349, an indictment cannot be found except by the concurrence of at least 12 jurors. Robinson v. Territory, 16 Okl. 241, 85 P. 451. Since under Shannon's Code § 7055, 12 jurors may find a valid indictment, objection that presentment was invalid because 13 did not sign it held without merit, there being no objection urged to any member returning the presentment or to the thirteenth member who did not participate. McCampbell v. State [Tenn.] 93 S. W. 100.

96. See 5 C. L. 1594. See, also, Indictment and Prosecution, 5 C. L. 1790.

97. Ex parte Love [Tex. Cr. App.] 16 Tex. Ct. Rep. 65, 93 S. W. 551. Fact that court erroneously excused a juror and appointed another in his place held not to vitiate indictment where latter person was afterwards discharged and took no part in the proceedings and was not present during them. Id.

98. Indictment found by second grand jury at an adjourned term held void, where order making provision for such jury showed that it was made under Code 1896, § 5001, which applies only to special terms, instead of under § 5000. Fryer v. State [Ala.] 41 So. 172. Where slips containing names of jurors were placed in hat face up and judge looked at them before drawing them out and selected only such as he desired to serve. Sheppard v. State [Miss.] 42 So. 544.

99. Under Code 1896, § 5269, only such objection that can be so taken advantage of is that jurors were not drawn in presence

if any person other than the jurors was present during their deliberations.[1] It has been held that the mere fact that an outside attorney assists the prosecuting attorney in the examination of witnesses will not have that effect.[2] Indictments have been held not to be invalidated because members who possess the requisite qualifications were irregularly drawn,[3] or because persons exempt from service served as members of the jury,[4] or because the case was presented to the jury by an assistant prosecuting attorney,[5] who should not have been appointed and who received a larger salary than that allowed by law,[6] or because the jury received hearsay evidence,[7] or permitted incompetent witnesses to testify before it.[8]

The court cannot go behind the return of the jury and inquire into the sufficiency of the evidence to support an indictment.[9] So too, if the jury had any legal evidence before it to authorize a bill, the nature, character, and sufficiency of any other evidence introduced before it cannot be inquired into for the purpose of attacking the validity and integrity of the indictment.[10] But the court has inherent

of officers designated by law. Shirley v. State [Ala.] 40 So. 269. Failure of minute entry to show that foreman was appointed as required by Code 1896, § 5022, and objection that number of jurors was reduced to 14, and § 5023 was not complied with in making up the deficiency, are objections going to the formation of the jury, and hence are not grounds for quashing the indictment. Id. Failure of jury commissioners to take oath required by Code 1896, § 4977, held no ground for quashing indictment. Sims v. State [Ala.] 41 So. 413. Indictment cannot be objected to on ground that jury was organized illegally and without authority of law, and that no order was issued by judge of circuit court requiring clerk to issue venire for grand jury as required by statute. Bentley v. State [Ala.] 39 So. 649. No ground for quashing indictment that 23 persons were drawn to serve as grand jurors instead of 21, as required by Cr. Code 1896, § 4989. Rogers v. State [Ala.] 40 So. 572. Not that more than 21 names were drawn. Sanders v. State [Ala.] 41 So. 466. Code § 5321, denying to a defendant, who has been held to answer before the impaneling of the grand jury which returns the indictment against him, the right to move to set aside the indictment on the ground that the jury was not selected, drawn, summoned, or sworn as prescribed by law, does not violate Const. art. 1, § 11, providing that no person shall be held to answer for a felony except on indictment by a grand jury, and amendment of 1884, providing that grand jury may consist of any number of members, not less than five nor more than 15, as the general assembly may provide, at least so as to render invalid an indictment found by a grand jury of seven members duly constituted, one of whom was challenged by defendant and disqualified for his case, where five members joined in finding such indictment as required by Code § 5274. Busse v. Barr [Iowa] 109 N. W. 920.

1. Cr. Code Prac. § 158, subsec. 2, does not authorize setting aside of indictment because of fact that sworn interpreter was present during examination of witnesses who could not speak English, where he was not present during deliberations of jury. Fletcher v. Com. [Ky.] 96 S. W. 855.

2. Attorney for local option party, where he did not comment on evidence and was not present during jury's deliberations. McElroy v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 424, 95 S. W. 539.

3. State v. Cambron [S. D.] 105 N. W. 241.

4. Defendant cannot object to indictment because names of persons exempt from service because of having previously served within a year were placed in the box from which the names of the grand jurors were drawn, or because such persons served as members of the jury, the exemption being personal to the jurors. State v. Hopkins, 115 La. 786, 40 So. 166.

5. Because case was presented by assistant U. S. attorney who took oath of office the day before case was taken up and resigned a few days thereafter. Browne v. U. S. [C. C. A.] 145 F. 1.

6. Whether assistant should have been appointed in view of fact that he had already familiarized himself with the case, whether his salary was in excess of appropriation or of the statutory designation, and whether at the time of his appointment he was counsel for persons having claims against the government, held immaterial on motion to quash and plea in abatement. Browne v. U. S. [C. C. A.] 145 F. 1.

7. Is not one of the grounds enumerated by the statute. Robinson v. Territory, 16 Okl. 241, 85 P. 451. Wilson's Rev. & Ann. St. 1903, § 5399, providing for setting aside indictment on motion "when it is not found" as prescribed by the statute, means when not concurred in by at least 12 grand jurors, and has no reference to the kind or character of the evidence received by the jury. Id.

8. Not because accused was called as a witness, notwithstanding provisions of Code § 5319, that indictment may be set aside when any person other than the jurors was present during the examination of the charge, except as required or permitted by law, and of § 5484 that defendants in criminal cases cannot be called as witnesses by the state. State v. Shepherd, 129 Iowa, 705, 106 N. W. 190.

9. In re Atwell, 140 F. 368; State v. Shepherd, 129 Iowa, 705, 106 N. W. 190.

10. Accused held not entitled to inspect the transactions, minutes, and records of jury on ground that it had admitted im-

power to set aside an indictment whenever it appears that it has been found without evidence or wholly upon illegal or incompetent testimony, or where it is based in part on the testimony of the defendant who has been compelled to be a witness in violation of his constitutional right.[11]

Objections and waiver thereof; estoppel to urge.[12]—Fundamental and jurisdictional objections may be availed of at any time, even after conviction.[13] The right to a jury of a specified number of members may be waived by the accused even though it is a constitutional one.[14] Errors in procedure in the selection of the jury are waived by failure to object to the submission of the case to it or to a trial on the indictment as returned.[15] A juror disqualified propter defectum must be challenged by the accused before the finding of the indictment,[16] unless it appears that he did not have full notice or opportunity to make the challenge at that time.[17] So too, it is generally held that, if the accused has knowledge of the fact that his case is to be investigated, a failure to challenge the array is a waiver of the objection that the race to which he belongs has been discriminated against in the selection of the jury,[18] though there is some conflict of authority in this regard.[19] The failure of one confined in jail at the time of the impaneling of the jury to request that he be brought into court so as to challenge the array precludes him from afterwards moving to quash the indictment on the ground that he was not afforded an opportunity to make such challenge.[20] In some states the impaneling of the jury is made conclusive evidence of its competency and qualifications.[21] In others it is expressly provided that irregularities in the selection of the jury will not vitiate the verdict unless prejudicial.[22]

material, irrelevant, and illegal evidence, there being no pretense that there was not sufficient legal evidence on which to find indictment. Gaines v. State [Ala.] 41 So. 865.

11. Notwithstanding mandatory provisions of Cr. Code § 313 that a motion to dismiss can be made only on grounds enumerated therein. People v. Steinhardt, 47 Misc. 252, 93 N. Y. S. 1026.

12. See 5 C. L. 1594. See, also, Indictment and Prosecution, 5 C. L. 1790.

13. That jury was composed of more or less than constitutional number of members. Ex parte Love [Tex. Cr. App.] 16 Tex. Ct. Rep. 65, 93 S. W. 551.

14. Even if defendant had constitutional right to have jury composed of seven members, held that he waived it by failure to insist upon it at any stage of the proceedings between the submission of his case to the grand jury and the final affirmance of his conviction on appeal. Busse v. Barr [Iowa] 109 N. W. 920.

15. Objection that, through omission to fill vacancy due to a challenge of a member by defendant as prescribed by Code § 5246 as amended by Acts 27th Gen. Assem., p. 61, c. 114, § 2, jury was composed of six instead of seven members, where indictment is concurred in by at least five. Busse v. Barr [Iowa] 109 N. W. 920.

16. On ground that juror, who is a county officer, is incompetent under Pen. Code 1895, § 811. Parris v. State, 125 Ga. 777, 54 S. E. 751.

17. Where he seeks to make objection subsequently, must show that he did not have such opportunity. Parris v. State, 125 Ga. 777, 54 S. E. 751. Where accused has been arrested upon a warrant charging him with an offense, and has been committed to await the action of the grand jury, or has given bond for his appearance, he is apprised of fact that his case will be investigated, and hence must make such objections before indictment is returned against him. Id.

18. Plea in abatement properly stricken where he failed to object to jury. Rivers v. State [Tenn.] 96 S. W. 956. Where he takes no steps to object to jury's formation, and between finding of indictment and day set for trial asks that a special panel be summoned for his trial, he cannot subsequently raise such objection by motion to quash. Ransom v. State [Tenn.] 96 S. W. 953.

19. Failure does not preclude motion to quash indictment. Thomas v. State [Tex. Cr App.] 16 Tex. Ct. Rep. 535, 95 S. W. 1069.

20. Thomas v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 535, 95 S. W. 1069.

21. Error in drawing jury is not cured by Ann. Code 1892, § 2375, providing that no objection shall be raised to jury after it is impaneled, where objection is made before the impaneling. Sheppard v. State [Miss.] 42 So. 544.

22. Civ Code 1902, § 2947, providing that no irregularity of any writ of venire facias, or in the drawing, summoning, returning, or empaneling of jurors shall be sufficient to set aside the verdict unless prejudicial, or unless objected to before verdict, applies to grand as well as petit jurors. State v. Smalls, 73 S. C. 516, 53 S. E. 976. Fact that instead of returning as grand jurors those members whose names were first drawn as required by Cr. Code 1902, § 39, the commissioners assigned to the grand jury as

Objections which do not appear of record can be availed of only by motion to quash,[23] or by pleas in abatement,[24] and are waived by going to trial on the merits,[25] in the absence of a stipulation to the contrary.[26] Objections which appear of record are ground of error.[27] A motion to quash must be made before arraignment and plea[28] and pleas in abatement are waived by going to trial on the merits before they are passed upon.[29] Pleas in abatement setting up mere irregularities in the selection of jurors should be drawn with the greatest accuracy and precision and must be certain to every intent.[30] A motion in arrest of judgment cannot be entertained after sentence.[31]

Secrecy of deliberations.[32]—The obligation of secrecy imposed on a grand juror is not a personal privilege which may be waived by him, but an obligation which prohibits a disclosure,[33] except when the ends of justice require it, in which case it can only be made by permission of and under the direction and supervision of the court.[34] The obligation is not removed by the juror's discharge,[35] and his disclosure to counsel for a person indicted, before his trial, of the evidence on which the indictment is based is a contempt, regardless of the purpose for which the disclosure is made.[36] The testimony of grand jurors cannot be introduced to impeach an indict-

their names were drawn those persons whom they regarded as best qualified for grand jury duties, held a mere irregularity and waived when first objected to on appeal. State v. Smalls, 73 S. C. 516, 53 S. E. 976.

23. McInerney v. U. S. [C. C. A.] 147 F. 183. Under the practice in the Federal courts of North Carolina objections dehors the record, such as that jurors were disqualified because of nonpayment of taxes, may be made by motion to quash. Breese v. U. S. [C. C. A.] 143 F. 250.

24. Must be presented by plea in abatement duly verified and sustained by competent evidence. That negroes were excluded from grand jury on account of their race. Ransom v. State [Tenn.] 96 S. W. 953.

25. Objection that grand jurors to take the place of those excused were brought in from the bystanders instead of being summoned from the body of the district. McInerney v. U. S. [C. C. A.] 147 F. 183. Fact that one of the grand jurors concurring in finding indictment was incompetent to serve is waived unless taken advantage of by plea in abatement, and cannot first be taken advantage of on motion for new trial. Colson v. State [Fla.] 40 So. 183.

26. Order entered by consent on the entry of a plea of not guilty reserving to defendant the right to take advantage on motion in arrest of judgment, or for a new trial of all matters which could be taken advantage of by motion to quash or demurrer, held to give him right to make objection that jurors were disqualified at subsequent term, even after his trial and conviction. Breese v. U. S. [C. C. A.] 143 F. 250.

27. Waived by failure to assign them as error on suing out writ of error. McInerney v. U. S. [C. C. A.] 147 F. 183.

28. On ground of discrimination against negro in selecting grand jury. Smith v. Com. [Ky.] 91 S. W. 742. On ground of incompetency of a juror. State v. Bush [La.] 41 So. 793.

29. Before the action of the court is invoked upon them. McCampbell v. State [Tenn.] 93 S. W. 100.

30. Colson v. State [Fla.] 40 So. 183. Plea in abatement on ground that a certain person was sworn and charged as a member of the jury, while record showed that another person not qualified as a member participated in the deliberations, held fatally defective in failing to aver that the presentments were found on the information of one of the grand jurors, where the offense was within the jury's inquisitorial powers, and it was impliedly conceded that there were 12 jurors, the necessary presumption being that presentments were found by them. McCampbell v. State [Tenn.] 93 S. W. 100.

31. McInerney v. U. S. [C. C. A.] 147 F. 183.

32. See 5 C. L. 1595.

33. In re Atwell, 140 F. 368.

34. In re Atwell, 140 F. 368. Fact that court quashed the indictment held not to justify disclosure, the court having no authority to go behind the indictment and pass upon the sufficiency of the evidence, and its action not having been based on that ground. Id. Secrecy imposed by the common law and statutes upon the proceedings will not prevent the public or an individual from proving by members of jury, in a court of justice, what passed before it, when, after the purpose of secrecy has been effected, such disclosure becomes necessary for the furtherance of justice or for the protection of public or individual rights. State v. Campbell [Kan.] 85 P. 784. Gen. St. 1901, § 5535, providing that no grand juror shall disclose any evidence given before the grand jury "except when lawfully required to testify as a witness in relation thereto," is not limited by § 5533, permitting such evidence in certain cases, and the enumeration of two cases in the latter section in which it is admissible does not operate to exclude it in all other cases. Id.

35. In re Atwell, 140 F. 368.

36. In re Atwell, 140 F. 368. Rev. St. § 725 does not preclude punishment. Id.

Note: Because of their oath of secrecy, grand jurors are incompetent to act as witnesses of testimony presented before them unless the court decides their evidence is

ment found by them,[37] and the rule as to the secrecy of the proceedings is generally applicable to the prosecuting attorney.[38] Where witnesses cannot speak English and the jury does not understand their tongue, it is proper to permit a sworn interpreter to remain in the jury room while they are testifying for the purpose of translating their testimony.[39]

In the absence of a statutory provision to the contrary, the court has no authority to appoint a stenographer to take the testimony heard before the jury.[40] In some states where a stenographer is provided for, the court has no authority to permit the accused to inspect the minutes of the testimony.[41] In others the accused is not entitled to inspect them as a matter of right but as a matter of judicial discretion,[42] and a motion to permit him to do so will only be entertained for the purpose of enabling him to move to set aside the indictment upon one or more of the grounds permissible by law.[43] The fact that the charge was initiated before the grand jury without a preliminary hearing before a magistrate has no bearing on the question whether an inspection should be granted.[44] The minutes of the evidence of a witness cannot be used either directly or indirectly to impeach him at the trial.[45]

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necessary on the ground of public policy. Burdick v. Hunt, 43 Ind. 381, 389; State v. Broughton, 29 N. C. 96, 45 Am. Dec. 507. Therefore, though seemingly the only case other than In re Atwell, 140 F. 368, where a grand juror was punished for contempt, involved a revelation made during the jury's session (In re Summerhayes, 70 F. 769), it is evident the court has the power to enforce the obligation of secrecy after the jury's discharge. And the reason for such enforcement, the weakening of the prosecution's case (Crocker v. State, 19 Tenn. 127; 1 Chitty Crim. Law 317), applies equally to revelations before and after discharge.—From 6 Columbia L. R. 366.

37. As to whether prosecuting attorney was present and advised as to the action to be taken, and as to who else was present. State v. Hopkins, 115 La. 786, 40 So. 166.

38. Refusal to allow him to testify as to whether he was present and advised as to action to be taken during investigation of charge against defendant, and as to who else was present, held proper. State v. Hopkins, 115 La. 786, 40 So. 166.

39. Where prosecuting witness cannot speak English, and interpreter does not remain during deliberations. Fletcher v. Com. [Ky.] 96 S. W. 855. Notwithstanding Cr. Code Pr. § 110, providing that no person but prosecuting attorney and witness under examination shall be present. Lyon v. Com. [Ky.] 96 S. W. 857.

40. Cr. Code Pr. § 110, providing that no person except the attorney for the commonwealth and the witness under examination shall be present while the jury are examining a charge, and no person whatever while they are deliberating or voting, is peremptory. Commonwealth v. Berry [Ky.] 92 S. W. 936. Mandamus will lie to compel court to set aside order appointing stenographer. Id.

41. The court of common pleas is without power to entertain a motion by the defendant in a criminal prosecution to inspect the minutes of the grand jury or a transcript made by the official stenographer of the testimony taken before the grand jury; nor is there any discretion in the court to permit a disclosure of the proceedings before the grand jury except in the actual trial of the case, where the testimony of a witness is a matter of issue in determining the facts which are to be weighed by the jury. State v. Haugh, 4 Ohio N. P. (N. S.) 79.

42. Laws 1885, p. 600, c. 348. People v. Steinhardt, 47 Misc. 252, 93 N. Y. S. 1026.

43. People v. Steinhardt, 47 Misc. 252, 93 N. Y. S. 1026. Motion to inspect minutes on ground that certain persons were present in violation of Cr. Code § 313, their names not appearing on the indictment as witnesses, held without merit, there being nothing further to show that they were not present as witnesses and the remedy for failure to indorse names on indictment being by application to have names furnished, under § 217. Id. Is not entitled to such an inspection in order to enable him to prepare for trial (Id.), or because he is ignorant of the testimony upon which the jury acted and believes that it is insufficient in law (Id.). Is entitled to an inspection of so much of the testimony as will enable him to move to set aside the indictment on the ground that he was compelled to be a witness against himself. Of his own testimony and that of the stenographer of a previous grand jury before which he testified. Id.

44. People v. Steinhardt, 47 Misc. 252, 93 N. Y. S. 1026.

45. On cross-examination of a witness for defendant, who had testified before grand jury but whose name was not indorsed on the indictment and whose testimony was not returned therewith, permitting county attorney to read from typewritten document and to ask witness if he did not testify in accordance with such statement when before the grand jury, and to ask witness to read document and to state whether he had so testified, and refusal to allow defendant's attorney to inspect such document held not prejudicial error, where there was

GUARANTY.

§ 1. What Constitutes (1891).
§ 2. Forms and Requisites of the Contract (1891).
§ 3. Operation and Effect of Guaranty (1892).
§ 4. Rights and Remedies Between Guarantor and Principal Debtor (1895).
§ 5. Actions on Guaranty (1895).

§ 1. *What constitutes.*[46]—A guaranty is a collateral promise to answer for the debt of another.[47] Whether certain facts make an obligation an original or a collateral undertaking is a question of law.[48] One who conveys land by warranty deed may subsequently guaranty the payment of taxes primarily the obligation of his grantor.[49]

§ 2. *Form and requisites of the contract.*[50]—A mere proposal to guaranty must be accepted,[51] and before acceptance may be recalled,[52] but a guaranty being absolute no notice is necessary of any acceptance or of advances under it.[53] There

no attempt to use document as evidence and its character did not appear. State v. Woodard [Iowa] 108 N. W. 753.

46. See 5 C. L. 1596.

47. See 5 C. L. 1596. Where a bank purchased stock for a trust company never debiting it on the bank books, but taking for the amounts expended the notes of employees of the company guaranteed by the company, the company was liable only as guarantor. Maryland Trust Co. v. National Mechanics' Bank, 102 Md. 608, 63 A. 70. An indorsement by one corporation of the notes of another corporation in which the first named corporation owns all the stock is a guaranty based on a valuable consideration and is not void as an accommodation indorsement. In re New York Car Wheel Works, 141 F. 430. In action on alleged contract under which plaintiff claimed to have delivered bonds to defendant for reinvestment under a guaranty to make good any resulting loss, evidence held insufficient to establish guaranty. Linden v. Thieriot, 101 N. Y. S. 568. A mere receipt for interest on a mortgage signed by defendant and reciting that the money was received from one K. with the understanding that he guaranteed the payment of the mortgage, unexplained, was unintelligible, and did not show a guaranty by defendant. Commonwealth Bank of Baltimore v. Kirkland, 102 Md. 662, 62 A. 799.

48. Where defendant agreed to see that the account of a third person was paid and plaintiff with his consent charged it to him and extended no credit to the third person, the undertaking was not collateral and defendant could not plead failure of consideration for a note subsequently executed. Gates v. Morton Hardware Co. [Ala.] 40 So. 509.

49. Where upon discovery of tax lien plaintiff took security from his grantor's grantor and about the same time defendant, the grantor, gave instrument reciting that "in any event we guarantee the payment of said taxes" and plaintiff "shall suffer no loss," and plaintiff did not realize on security given him by defendant's grantor. Biglow v. Stearns, 137 Mich. 26, 100 N. W. 125.

50. See 5 C. L. 1597.

51. American Exch. Nat. Bank v. Seaverns, 121 Ill. App. 480. Must be accepted and acted upon. Irving Nat. Bank v. Ellis [N. J. Law] 64 A. 1071. If the guaranty is signed by the guarantor without any previous request of the other party and in his absence, for no consideration moving between them except future advances to be made to the principal debtor, the guaranty is in legal effect an offer or proposal on the part of the guarantor needing an acceptance by the other party to complete the contract. William Deering & Co. v. Mortell [S. D.] 110 N. W. 86. Guaranty of machinery agency contract signed by guarantors without plaintiff's knowledge and without consideration from him held not absolute but a mere offer of guaranty not binding without acceptance. Id. Guarantors not estopped to deny obligation because after principal's liability had been ascertained he delivered certain notes to them as security in case plaintiff should seek to hold them liable, which notes were later returned. Id. Where an instrument of guaranty executed by defendant and others as officers of a corporation was rejected by plaintiff and an individual guaranty substituted to which defendant was not a party and on the faith of which alone goods were shipped, defendant was not liable though the instrument he signed was never returned to him. Bridgeport Malleable Iron Co. v. Iowa Cutlery Works [Iowa] 107 N. W. 937.

52. Kamber v. Rosen, 98 N. Y. S. 839.

53. The **true test** for determining whether an instrument is an absolute guaranty or a mere offer of guaranty is mutual assent. William Deering & Co. v. Mortell [S. D.] 110 N. W. 86. Held absolute. American Exch. Nat. Bank v. Seaverns, 121 Ill. App. 480. In answer to plaintiff's inquiry as to defendant's willingness to guaranty payment for goods sold to a third person, defendant replied that he would do so provided the purchaser was given a 30-day credit and the right to make every second payment by a 90 day note to be indorsed by defendant. The purchaser never asked to be allowed to give the note. Plaintiff sold goods in reliance on the reply. Held there was prima facie a meeting of the minds. Drucker v. Heyl-Dia, 101 N. Y. S. 796. Where a guaranty was demanded and received as a condition to withholding judicial proceedings and the proceedings were withheld, no fur-

must also be a legal[54] and sufficient consideration.[55] A guaranty being executed under misapprehension as to the amount secured, it is binding only up to the amount as to which there was no error,[56] and it is immaterial that the mistake was not induced by the creditor.[57] In such case, however, the person committing the error must stand good for all losses resulting therefrom.[58] The statute of frauds requires contracts of guaranty to be in writing.[59] The law of the place at which it is accepted and acted upon controls as to the validity of the instrument unless otherwise declared in the writing itself.[60]

§ 3. *Operation and effect of guaranty.*[61]

Interpretation in general.[62]—The liability of the guarantor is not to be extended beyond the terms of his contract,[63] but the instrument should be given effect according to the apparent intention of the parties as gathered from its context and the circumstances attending its execution.[64] This is especially so where the pro-

ther acceptance was necessary. Newman v. Scarborough, 115 La. 860, 40 So. 248. Instrument stating "Please let bearer have whatever he wants at any time and I will see that the same is paid for" held binding guaranty when accepted rendering guarantor liable without notice of acceptance. Stewart v. Knight & Jillson Co. [Ind.] 76 N. E. 743.

54. Guaranty of sons' debts in consideration of suppression of criminal prosecution of sons held void, and the fact that a legal consideration also entered into the guaranty did not validate it. Beal-Doyle Dry Goods Co. v. Barton [Ark.] 97 S. W. 53.

55. Words "for value received" are prima facie evidence of consideration to support guaranty of payment of note. White v. Western State Bank, 119 Ill. App. 354. Machinery agent's guaranty of a note under contract of agency whereby plaintiff could demand of defendant either cash or other notes held supported by a sufficient consideration. Warder, Bushnell & Glessner Co. v. Johnson, 114 Mo. App. 571, 90 S. W. 392. Where a note is given in renewal of another on which defendant is guarantor and the renewal note is not accepted until defendant guarantees the same, it is immaterial that the execution of the note precedes the execution of the guaranty. White v. Western State Bank, 119 Ill. App. 354. The guaranty of payment of a **past indebtedness** without a consideration passing to the guarantor is unenforceable. Whitehead v. American Lamp & Brass Co. [N. J. Eq.] 62 A. 554.

56. Where guarantor signed under belief that obligation of $11,000 was only $1,100, she was liable only to extent of $1,100, but was not relieved altogether. Newman v. Scarborough, 115 La. 860, 40 So. 248.

57, 58. Newman v. Scarborough, 115 La. 860, 40 So. 248.

59. See Frauds, Statute of, 7 C. L. 1813.

60. Irving Nat. Bank v. Ellis [N. J. Law] 64 A. 1071. Agreement ready for defendant's signature drawn in New York and signed and mailed by defendant in New Jersey not complete till accepted and acted upon in New York and hence valid under the New York law. Id.

61, 62. See 5 C. L. 1598.

63. Manatee County State Bank v. Weatherly [Ala.] 39 So. 988; Stewart v. Knight & Jillson Co. [Ind.] 76 N. E. 743. Where defendant's guaranty was to pay for certain carloads of oranges if the principals did not, providing each bill of lading was accompanied by a certificate that the oranges were sound and shipped according to signed contract between M. & S. and W. & M., guarantor held not liable where certificates failed to affirm that the oranges were shipped according to the signed contract between M. & S. and W. & M." Manatee County State Bank v. Weatherly [Ala.] 39 So. 988. A guaranty of payment of all moneys to become due from a merchant for merchandise does not cover the liability of a firm of which he subsequently becomes a member. Coan v. Partridge, 98 N. Y. S. 570. Letter of guaranty dated in August, 1903, and reciting that guarantor would guaranty "future purchases during this year" should be construed as limited to the remainder of the year 1903. Whitehead v. American Lamp & Brass Co. [N. J. Eq.] 62 A. 554. A guaranty of payment for material "not to exceed in the aggregate $13,000" held to guaranty that $13,000 worth of material should be paid for, and not to mean that the guarantor would stand good for any default of the principal up to $13,000. American Bridge Co. v. Colonial Trust Co. [Pa.] 64 A. 532. Contract reciting the sale by defendant and another to plaintiff of their two-thirds interest in the stock of a certain corporation, and whereby defendant guaranteed the collection of certain notes and accounts considered, and held, defendant was liable thereon only to the extent of the value of the assets up to the amount of the corporate indebtedness. Miller v. Sloan [Ark.] 95 S. W. 994. The fact that the third stockholder credited himself on the books of the concern with amounts realized from the collection of notes and accounts, as undivided profits, instead of applying them to the corporate debts, did not extend defendant's liability. Id. The fact that after the sale of the undivided profits to the third stockholder defendant told plaintiff that the matter of payment of profits was between plaintiff and the third stockholder did not extend defendant's guaranty. Id. Should be neither limited nor extended by implication beyond the terms of his contract. Bogardus v. Phoenix Mfg. Co., 120 Ill. App. 46; Delaware County Nat. Bank v. King, 47 Misc. 447, 95 N. Y. S. 954.

64. Rundle v. Scully [Mich.] 13 Det. Leg. N. 141, 107 N. W. 694; Bosworth v. Pearce, 28

curement of credit is the object of the guaranty, and the character of the obligation as limited or continuing is not declared by its terms.[65] In such case, if upon the whole evidence the instrument is still ambiguous, it should be interpreted most strongly against the guarantor, especially where drawn by him.[66]

Fixing default and liability of the guarantor.[67]—Where the guaranty is one of collection, it is the duty of the guarantee to use due diligence to recover from the principal before the guarantor can be held liable,[68] and the insolvency of the principal is not an excuse for failure to do so.[69] A guaranty against loss is equivalent to a mere guaranty of collection and not of payment, and imposes upon the guarantee the obligation to demonstrate the loss by legal proceedings,[70] and if collateral is held to seek his remedy against it before having recourse to the guarantor.[71] In the case of an absolute guaranty of payment, however,[72] there is a breach if pay-

Ky. L. R. 1160, 92 S. W. 277. According to intention as obtained from context. Delaware County Nat. Bank v. King, 47 Misc. 447, 95 N. Y. S. 954. Where a contract by which an investment company guaranteed the repayment by it of a sum of money was signed by parties not mentioned in the body of the instrument, but who subsequently made a contract stating that they had signed the first contract as guarantors of the investment company, they were bound as guarantors. Bosworth v. Pearce, 28 Ky. L. R. 1160, 92 S. W. 277. A contract guarantying payment for a heating plant provided that the company furnishing the plant should not be responsible except as to the rated capacity of the boiler. Held the words "rated capacity" referred not to the efficiency of the boiler to warm the house but merely to its theoretical capacity according to the customary way of rating such articles by dealers. United States Heater Co. v. Jenss [Wis.] 107 N. W. 293. Burden was on defendant guarantor to show that the boiler was not in fact rated. Id. Evidence sufficient to sustain direction of verdict for plaintiff. Id. A certain underwriting agreement between a construction company, a trust company, and underwriters, construed and held the underwriters were responsible under their guaranty for their pro rata share of loans to be made by the trust company to the construction company, though the latter had not carried out certain recitals in the agreement as to its purposes and intentions. Knickerbocker Trust Co. v. Garden, 99 N. Y. S. 620. A certain amount of bonds therein referred to held to relate to the balance of the amount authorized to be issued, and not to what was left after a specific appropriation of the other bonds to meet a certain mortgage. Id. Where defendant wrote "I, as an officer in said company, guaranty hereby to personally hold you harmless for any losses," etc., the guaranty was that defendant would personally hold plaintiffs harmless, not that he would hold them personally harmless. Nachod v. Hindley, 101 N. Y. S. 840. Defendant guaranteed that if certain bonds "were not paid at maturity" and the trust deed to secure them was foreclosed he would bid a certain amount at the sale. The trust deed provided that upon default in payment of interest both principal and interest could be declared due. Held the word "maturity" was the maturity as fixed by the trust deed, and not the date of maturity of the bonds. Binz v. Hyatt [Mo.] 98 S. W. 637. Where a guaranty makes special reference to a proposition between the parties to the original transaction, the two agreements will be construed together. Bogardus v. Phoenix Mfg. Co., 120 Ill. App. 46. Where on the sale of a business to plaintiff defendant guaranteed to protect plaintiff against all obligations not stated in the schedules attached to the inventory, defendant was liable for the services of a chemist performed for the corporation before the transfer and not shown in the schedules. American Fruit Product Co. v. Ward, 99 N. Y. S. 717.

65. Bridgeport Malleable Iron Co. v. Iowa Cutlery Works [Iowa] 107 N. W. 937. Guaranty by which defendants guaranteed to plaintiff "the sum of $100, the amount which they will sell," to a certain company, held not continuing but to cover only the first purchase of $100 worth of goods. Lamport v. Greenburg, 48 Misc. 513, 96 N. Y. S. 143. Where plaintiff gave a mortgage to secure the payment of $1,000 according to an agreement by which coal was to be furnished by defendant to plaintiff's husband, evidence held to show a continuing guaranty not merely limited to the first $1,000. Rundle v. Scully [Mich.] 13 Det. Leg. N. 141, 107 N. W. 694.

66. And credit has been extended on the faith of the construction most favorable to the party secured. Bridgeport Malleable Iron Co. v. Iowa Cutlery Works [Iowa] 107 N. W. 937. Evidence held to show that a guaranty of payment for castings was intended to be continuing. Id.

67. See 5 C. L. 1598.

68. Phillips v. Lindley, 98 N. Y. S. 423. Evidence held to show due diligence on plaintiff's part to collect a note, collection of which defendant had guaranteed. Id.

69. Phillips v. Lindley, 98 N. Y. S. 423.

70. Nachod v. Hindley, 101 N. Y. S. 840.

71. Where plaintiff held certain accounts as collateral he was not entitled to recover on the guaranty in absence of proof that the various debtors under the collateral were insolvent and that he had used reasonable diligence to collect the accounts. Nachod v. Hindley, 101 N. Y. S. 840.

72. A guaranty to plaintiffs that a third person "shall promptly pay them for all goods which they may hereafter sell" him on credit, etc., held an absolute guaranty of payment upon which suit could be insti-

ment is not made within the time prescribed,[73] and in order to charge the guarantor it is not necessary to proceed against the principal or to show his insolvency.[74] An absolute guaranty having been accepted, the guarantor is not entitled to notice of his principal's default in order to fix his liability.[75] The guaranty being conditional, fulfillment of the condition is a condition precedent to liability.[76] Formal demand upon the guarantor to make good his guaranty may be waived by his subsequent promise and recognition of continued liability.[77]

Defenses and discharge of guaranty.[78]—A surrender of the instrument of guaranty[79] or an extension of the original credit,[80] unless made with the consent of the guarantor,[81] will discharge him; but one who guaranties performance of the covenants of a lease by which the lessor may enter the premises on default is not discharged by a surrender of the lease to the lessor after default.[82] Nor is the guarantor released by the mere fact that with his consent the creditor receives from the principal a portion of the debt to apply thereon.[83] The question as to what credits he is entitled to is usually one of fact.[84] The fact that subsequent to the execution of a guaranty seals are affixed thereto by a stranger without authority will not discharge the guarantor in the absence of a ratification by the obligee.[85] In some

tuted against guarantor without a previous action against the principal. Loverin & Browne Co. v. Bumgarner [W. Va.] 52 S. E. 1000. Instrument guarantying that in the event certain notes were not paid when due defendants would "jointly and severally pay the said notes and any expense involved in the collection of this claim" held a guaranty of payment and not of collection. Kahn v. Eisenberg, 97 N. Y. S. 959.

73. If time of payment is stated in guaranty. Loverin & Browne Co. v. Bumgarner [W. Va.] 52 S. E. 1000. One who guarantees the payment of a note becomes liable on nonpayment of the note at maturity. Wood Reaping & Mowing Mach. Co. v. Ascher [Md.] 62 A. 1023.

74. Loverin & Browne Co. v. Bumgarner [W. Va.] 52 S. E. 1000. Guaranty of payment of note. Wood Reaping & Mowing Mach. Co. v. Ascher [Md.] 62 A. 1023. The liability of a guarantor of a note under an absolute guaranty of payment is not affected by mere neglect on the part of the payee to enforce a mortgage security (Warder, Bushnell & Glessner Co. v. Johnson, 114 Mo. App. 571, 90 S. W. 392), nor need the payee show any diligence in attempting to collect the note from the maker (Id.). In an action on a guaranty of the payment of a debt of a decedent, it is not necessary to show that the estate of the decedent had been adjudged insolvent. Marx v. Ely [Ala.] 41 So. 411.

75. Stewart v. Knight & Jillson Co. [Ind.] 76 N. E. 743.

76. Guaranty providing defendant received a mortgage on debtor's fixtures not binding, no mortgage being ever received and debtor being discharged in bankruptcy. Schroeder v. Helms, 98 N. Y. S. 214.

77. That plaintiff failed to formally demand action by defendant who had guaranteed collection of a note. Phillips v. Lindley, 98 N. Y. S. 423.

78. See 5 C. L. 1599.

79. A voluntary surrender of the instrument of guaranty by the creditor to the principal as "no good," accompanied by a request that it be taken to the guarantor and changed, discharges the latter from liability for debts thereafter incurred (Stewart v. Knight & Jillson Co. [Ind.] 76 N. E. 743), and a mere redelivery of the instrument by the principal to the creditor cannot revive the liability of the guarantor (Id.).

80. Where goods were sold on credit and later plaintiff without defendant's consent took from debtor a series of notes payable at weekly intervals. Schulman v. Buchler, 98 N. Y. S. 651. In an action against the principal debtor, an agreement for judgment and that execution should not issue before a specified date was not an extension of time of payment to the principal so as to release the guarantor where the right to execution was given within a time shorter than that required by the ordinary course of judicial procedure. Bothfeld v. Gordon, 190 Mass. 567, 77 N. E. 639.

81. Not where defendant consented and also recognized his liability after extension. Phillips v. Lindley, 98 N. Y. S. 423.

82. Not discharged by surrender after default in payment of rent since term was ended substantially in accordance with lease, the liability was already fixed, and lease was not assignable to guarantor without lessor's consent. Bothfeld v. Gordon, 190 Mass. 567, 77 N. E. 639.

83. Marx v. Ely [Ala.] 41 So. 411.

84. Contention on part of guarantor that he should be credited with $1,500 because plaintiff had recovered that sum in another action against the debtor held without merit where the sum was paid to his attorney as fees and costs and no part was received on the claim guaranteed by defendant. Phillips v. Lindley, 98 N. Y. S. 423.

85. Affixing of seals to guaranty of lease by plaintiff's agent not authorized to bind plaintiff by making lease or contracting for occupation of premises. Tulane University of La. v. O'Connor [Mass.] 78 N. E. 494. Plaintiff did not ratify the alteration. Id.

states where a guarantor has been indemnified by the principal, he is liable to the creditor to the extent of the indemnity, though the creditor without his consent may have modified the contract or released the principal.[86] Fraud in connection with the contract guarantied may be waived by subsequently giving security.[87] Laches defeats the right to repudiate the contract for fraud or misrepresentations.[88]

§ 4. *Rights and remedies between guarantor and principal debtor.*[89]

§ 5. *Actions on guaranty.*[90]—The liability being joint, all the guarantors are necessary parties,[91] but in an action on a promise to pay for goods sold to another, the third person is not a necessary party defendant.[92] In New York, one who guaranties performance of a building contract may be joined as defendant in an action to foreclose a mechanic's lien.[93] The complaint must of course show the execution and delivery of the instrument sued on.[94] The guaranty must be declared on specially and not by general counts in indebitatus assumpsit,[95] and the guarantor's breach must be pleaded and not merely that of the principal.[96] In enforcing the guaranty of a note, the note must be identified with reasonable certainty.[97] The instrument sued on not importing a consideration on its face, the complaint should aver facts showing a consideration.[98] In cases where notice of the principal's default is necessary to fix the liability of the guarantor, failure to give notice is a matter of defense, and the fact of notice need not be set forth in the complaint.[99] Conclusions of law should be avoided.[1] A material variance cannot be disregarded.[2] Questions of fraud or misrepresentations must be raised by proper plea.[3] The burden is upon plaintiff to establish a breach.[4] The usual rules of evidence apply.[5]

86. Evidence sufficient to show that guarantor had taken indemnity from principal. Civ. Code Cal. § 2824. Aetna Indemnity Co. v. Auto-Traction Co. [C. C. A.] 147 F. 95. Where guarantor had taken security from principal for performance of contract to manufacture automobiles, he was not discharged by buyer's rescission of contract after breach by manufacturer, and buyer's commencement of suit to recover the money paid. Id.

87. Giving note and mortgage to secure guaranty. Emerson-Newton Implement Co. v. Cupps [N. D.] 108 N. W. 796.

88. See Fraud and Undue Influence, 7 C. L. 1813. Where defendant purchased and used mortgaged cattle without paying the mortgagee but later guarantied payment of the mortgage upon being given the right to handle the remaining cattle, failure for 39 days to deny liability was fatal to its right to defend on the ground of misrepresentations as to the number of cattle on hand. Drovers' Live Stock Commission Co. v. Charles Wolff Packing Co. [Kan.] 86 P. 128. In such case defendant was required to either offer payment to the mortgagee for the cattle used prior to execution of the guaranty or show excuse for failure to do so. Id.

89, 90. See 5 C. L. 1600.

91. Contract made by four guarantors guarantying to plaintiff "each to the amount of $5,000 the payment" of a note, held joint. Delaware County Nat. Bank v. King, 109 App. Div. 553, 95 N. Y. S. 956.

92. Stewart v. Knight & Jillson Co. [Ind.] 76 N. E. 743.

93. Code Civ. Proc. §§ 484, 3399. Whisten v. Kellogg, 50 Misc. 409, 100 N. Y. S. 526.

94. Complaint stating that defendant wrote letter of credit to plaintiff and that notice of acceptance was sent defendant by plaintiff who, relying thereon, furnished credit, held to sufficiently allege that guaranty was delivered by defendant to plaintiff. Page Woven Wire Fence Co. v. Joslin [Colo.] 88 P. 142.

95. Guaranty not admissible to prove debt or that plaintiff was entitled to interest. American Exch. Nat. Bank v. Seaverns, 121 Ill. App. 480.

96. Delaware County Nat. Bank v. King, 109 App. Div. 553, 95 N. Y. S. 956.

97. Where note described was made payable 13 days later than that guaranteed. Bogardus v. Phoenix Mfg. Co., 120 Ill. App. 46.

98. Kingan & Co. v. Orem [Ind. App.] 78 N. E. 88.

99. Stewart v. Knight & Jillson Co. [Ind.] 76 N. E. 743.

1. That plaintiff performed "in conformity with the provisions of said proposition" held mere conclusion. Bogardus v. Phoenix Mfg. Co., 120 Ill. App. 46. That guaranty was "for a valuable consideration" held mere conclusion, the guaranty not importing a consideration on its face. Kingan & Co. v. Orem [Ind. App.] 78 N. E. 88. Allegation that "by reason of the facts aforesaid defendant was justly and truly indebted to plaintiff" in a certain amount held a mere conclusion. Delaware County Nat. Bank v. King, 109 App. Div. 553, 95 N. Y. S. 956.

2. Where contract sued on was one under which defendant purchased the goods described in the complaint, recovery could not be had on contract by which subsequently to the selling of the goods to another he promised to pay for them in consideration of a release of his property from attach-

GUARDIANS AD LITEM AND NEXT FRIENDS.

§ 1. Necessity or Occasion for a Guardian ad Litem or Next Friend (1896).
§ 2. Qualification and Appointment (1897).
§ 3. Powers, Duties, Rights, and Liabilities (1897).
§ 4. Procedure by or Against Guardian ad Litem or Next Friend (1899).

§ 1. *Necessity or occasion for a guardian ad litem or next friend.*[6]—A guardian ad litem or next friend must ordinarily be appointed for an infant litigant,[7] though in some states infant defendants may be represented by their regular guardians.[8] At common law and by statute in some states an infant may defend by a guardian ad litem, but can prosecute an action, either upon a complaint or a cross complaint, only by next friend.[9] In some states a guardian ad litem must be appointed even though the infant is a married woman.[9a] It has been held that the appointment and appearance of a guardian ad litem for minor beneficiaries is not a condition precedent to the admission of a will to probate.[10] In Louisiana the court has discretionary power to appoint a tutor ad hoc when necessary to protect the property interests of minors.[10a] A guardian ad litem may appeal in the name and

ment. Kallspell Liquor & Tobacco Co. v. McGovern [Mont.] 84 P. 709.

3. Marx v. Ely [Ala.] 41 So. 411.

4. Where defendant guarantied performance of a contract to transfer a business, the burden is on plaintiff to show that a horse which he claimed was not transferred belonged to the business. American Fruit Product Co. v. Ward, 99 N. Y. S. 717. Where defendant guarantied performance of a contract to transfer a business and furnish a complete schedule of assets and liabilities, held the liability of the corporation whose business was transferred to furnish certain vinegar to another company was sufficiently shown by the schedule. Id.

5. Certain evidence held admissible as showing defendant's liability by original contract for goods furnished another, and that he was not a mere surety or guarantor so as to render invalid for want of consideration a note subsequently given by him for the price. Gates v. Morton Hardware Co. [Ala.] 40 So. 509. In an action on a contract to pay for liquor sold to a third person, the promise having been made after the goods were sold, it was immaterial whether defendant was an Indian or a white man as the contract was not for liquors sold to defendant. Kalispell Liquor & Tobacco Co. v. McGovern [Mont.] 84 P. 709.

6. See 5 C. L. 1601. Courts have inherent power to appoint guardians ad litem to protect interests of minor defendants in actions pending before them, and such power is also conferred on them by Burns' Ann. St. 1901, § 2684. Gibbs v. Potter [Ind.] 77 N. E. 942.

7. Tutor of minors cannot legally represent them in partition suit in which they are defendants where he is a coplaintiff with his wife in such suit, and no judgment can be rendered against them unless they are otherwise properly represented. Succession of Becnel [La.] 42 So. 256. Where cause of action exists directly in favor of infant, action should be brought by guardian ad litem rather than general guardian, but this rule does not apply where guardian is entitled to sue as trustee of express trust. Schlieder v. Wells, 99 N. Y. S. 1000. Where complaint alleges due appointment of guardian ad litem, who appears on record as such, which allegation is admitted because not properly put in issue, the due appointment is adjudicated and settled in the action, and the judgment is binding both upon the infant plaintiff and the defendant. Hughes v. Chicago, etc., R. Co., 126 Wis. 525, 106 N. W. 526. Infants without general guardians may appear as plaintiffs by next friend appointed in the manner prescribed by statute, and judgments in proceedings in which they so appear are, if otherwise valid, as binding upon them and as conclusive of their rights as if they were sui juris. Infants joining in proceedings to sell realty to pay decedent's debts. State v. Settle [N. C.] 54 S. E. 445.

8. Where real defense was made in behalf of infant defendant by statutory guardian after ward had been properly served constructively, it was not necessary to appoint guardian ad litem. Kirby's Dig. § 6023. Nunn v. Robertson [Ark.] 97 S. W. 293.

9. Under Burns' Ann. St. 1901, §§ 259, 2684. Ziegler v. Ziegler [Ind. App.] 78 N. E. 1066. Guardian appointed for infant defendant in suit to reform deed held to have no power to file cross complaint to quiet infant's title to the land. Gibbs v. Potter [Ind.] 77 N. E. 942

9a. Code Civ. Proc. 1902, § 136, providing for appointment of guardians for infant litigants, makes no exception, and hence she cannot sue by joining husband as coplaintiff. Hiers v. Atlantic Coast Line R. Co. [S. C.] 55 S. E. 457. Section 135, providing that in no case need married woman sue or defend by guardian or next friend, refers to disability of coverture only and not that of infancy. Id.

10. Hence fact that guardian had filed general denial and demanded proof of due execution of will did not prevent court from admitting it to probate on evidence of but one subscribing witness, it not appearing that the failure to call the others was prejudicial to the children. In re Glandt's Estate [Neb.] 107 N. W. 248.

for the benefit of the infants, and the appointment of a guardian by the appellate court is unnecessary.[11] Failure to make the appointment does not as a rule render the judgment void,[11a] the remedy being by appeal[11b] or by motion to vacate.[11c]

§ 2. *Qualification and appointment.*[12]—In some states a guardian ad litem cannot be appointed for an infant defendant until he has been brought into court by being properly served with process.[13] In others no appointment can be made until after plaintiff or his attorney has filed an affidavit showing that such defendant has no guardian, curator, nor committee residing in the state known to the affiant.[14] Such provisions are directory only and intended for the protection of the infant so that a failure to file such affidavit will not be cause for a reversal unless it appears that his interests have been prejudiced thereby.[15] None of the interested parties have the right to name or dictate to the court the appointment.[16] In the absence of evidence of fraud or wrongdoing on the part of the guardian, the judgment of the court will not be set aside for a mere irregularity as to the time of his appointment.[17] A next friend is generally appointed by the court on petition of some party in interest.[18]

§ 3. *Powers, duties, rights, and liabilities.*[19]—A next friend by whom a suit is prosecuted in behalf of an infant is a mere manager and conductor of the suit and is not a party in interest or to the record.[20] The acts of a guardian ad litem

10a. Where it is represented to judge that executory proceedings have been taken out against minor's property and are being carried on contradictorily with their mother as tutrix, and that neither she nor the undertutor has qualified, and that proceedings are being carried on by collusion with her, which, if not stayed, would result in injury to minors, may appoint tutor ad hoc to investigate matters, and authorize him to take legal steps in their interest. Gates v. Bank of Patterson, 116 La. 539, 40 So. 891. Where proceedings have not yet become consummated and rights of third persons have not intervened, may set them aside up to point when appointment of representative for minors was necessary, and stay them until such appointment. Id.

11. Easy Property Payment Co. v. Vonderheide [Ky.] 93 S. W. 911.

11a. Omission is a mere irregularity and is no ground for dismissing complaint where evidence shows that plaintiff arrived at full age before trial. McGarity v. New York City R. Co., 51 Misc. 666, 101 N. Y. S. 191. Since rendition of judgment against infant without appointment of guardian ad litem is a mere irregularity, it cannot be vacated without a hearing on the merits, and hence new trial in such case is properly denied in absence of allegations or proof tending to sustain truth of answer or to indicate that justice requires re-opening of the case. Reints v. Engle [Iowa] 107 N. W. 947. Failure to appoint such a guardian for minor heirs does not invalidate proceedings to partition a decedent's realty. Rye v. Guffey Petroleum Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 739, 95 S. W. 622.

11b. For failure to appoint guardian for infant heir in proceedings to sell land to pay ancestor's debts, and not by action to set aside sale after he becomes of age. Davidson v. Marcum, 28 Ky. L. R. 562, 89 S. W. 703.

11c. Failure to appoint guardian ad litem for infant plaintiff in suit for separation held an error in fact not arising upon the trial, rather than a mere irregularity, so that motion to vacate judgment on that ground could be made at any time within two years under Code Civ. Proc. §§ 1290, 1291. Byrnes v. Byrnes, 109 App. Div. 535, 96 N. Y. S. 306. Judgment by default against minor in action for tort alleged to have been committed by him held properly set aside where he was personally served with process but no guardian ad litem was appointed for him. Civ. Code 1895, § 4987. Maryland Casualty Co. v. Lanham, 124 Ga. 859, 53 S. E. 395.

12. See 5 C. L. 1601.

13. Rev. St. 1899, § 558. McMurtry v. Fairley, 194 Mo. 502, 91 S. W. 902. Where there was no proper service on infants, either active or constructive. Wright v. Hink, 193 Mo. 130, 91 S. W. 933; Laflin v. Gato [Fla.] 42 So. 387.

14. Civ. Code Prac. § 38. Downing v. Thompson's Ex'r, 28 Ky. L. R. 1182, 92 S. W. 290.

15. Sale under decree of court in suit to foreclose mortgage will not be set aside because of such failure where no one complains except purchaser whose title could not be affected thereby. Downing v. Thompson's Ex'r, 28 Ky. L. R. 1182, 92 S. W. 290.

16. A mere suggestion is not improper. In re Glandt's Estate [Neb.] 107 N. W. 248.

17. Action to set aside probate of will. In re Glandt's Estate [Neb.] 107 N. W. 248.

18. Where record showed that petition for appointment of next friend of infant plaintiff was filed in open court, together with written consent of certain person to act, and that court subsequently appointed such person, and filing mark was on back of petition, held that proceedings were regular. Morgan v. Hager & Sons Hinge Mfg. Co. [Mo. App.] 97 S. W. 638.

19. See 5 C. L. 1602.

20. His wife is a competent witness in

appointed without authority of law are not binding on the infant.[21] A guardian ad litem is required to exercise the same energy, skill, and integrity in behalf of his wards as though acting under an express retainer from a client.[22] He cannot admit or waive anything to the prejudice of the infant whom he represents.[23] His formal answer should submit the infant's rights to the determination of the court and leave the complainant to make out the facts of his case by strict proof.[24] Even though his answer in a chancery case admits the allegations of the bill, the case should be referred to a master to take the proof and report thereon,[25] and the guardian should in all cases have notice of the proceedings in the master's office and should attend and protect the interests of his ward.[26] In some states a failure to file an answer is a mere irregularity which does not render the judgment void.[26a] It has also been held that, in the absence of fraud, a failure to file a general denial does not avoid the judgment where the guardian appears and plaintiff was entitled to a decree in the absence of an affirmative defense.[26b] By statute in some states no judgment may be rendered against an infant until after a defense by a guardian.[27] The guardian ad litem and testamentary guardian of an infant entitled to a share of trust property, which the trustees are authorized to sell, may, with the approval of the court, file an election on his behalf to join in an action of partition and thereby treat the trust property as realty.[27a] It is generally held that next friends[28] and guardians ad litem[29] and their attorneys have power to receive payment of and satisfy judgments recovered by them in favor of the minors whom they represent,[30] though there is a conflict of authority in this regard.[30a]

The compensation of a guardian ad litem must be paid by his wards and may be made a charge on any property or estate belonging to them involved in the litigation in which he represents them.[31] The allowance should ordinarily be made by the

such suit, even though he may be liable for costs. Illinois C. R. Co. v. Becker, 119 Ill. App. 221.

21. Guardian named for infant defendant in partition suit who had not been brought into court by service of process on him. McMurtry v. Fairley, 194 Mo. 502, 91 S. W. 902. Appearance in infant's behalf. Wright v. Hink, 193 Mo. 130, 91 S. W. 933. Answer of guardian ad litem will not amount to an appearance for infant when guardian was appointed before service by publication on infant had been perfected. Laflin v. Gato [Fla.] 42 So. 387.

22. Evidence in action to set aside probate of will held not to show that guardian had neglected any of his duties. In re Glandt's Estate [Neb.] 107 N. W. 248.

23. Failure of master to whom equity case was referred to give notice of the proceedings before him held not waived or cured, so far as infant defendants were concerned, by fact that their guardian had notice of application for final decree and did not appear to resist the same. Mote v. Morton [Fla.] 41 So. 607.

24, 25, 26. Mote v. Morton [Fla.] 41 So. 607.

26a. Failure of guardian ad litem to file answer in proceedings to revive judgment against infants. Galloway v. Craig [Ky.] 92 S. W. 320.

26b. Where guardian ad litem appeared by filing acceptance of appointment and court had jurisdiction, held that failure of guardian to file answer denying generally the allegations of the complaint in suit to foreclose a mortgage did not render foreclosure decree void, where there were sufficient facts admitted to show that plaintiff was entitled to a decree in the absence of an affirmative defense, and there was no fraud or collusion. Gravelle v. Canadian & American Mortg. & T. Co., 42 Wash. 457, 85 P. 36.

27. Under Kirby's Dig. § 6023, held that, where guardian ad litem of infant defendants in a suit for partition failed to answer a cross complaint in which a codefendant asked relief against infants and plaintiff, no judgment could be rendered against such infants in favor of cross complainant. Sexton v. Crebbins [Ark.] 98 S. W. 116.

27a. Train v. Davis, 49 Misc. 162, 98 N. Y. S. 816.

28. In view of Comp. Laws 1897, § 10,458, authorizing court appointing him to require him to give bond to account to infant for all moneys recovered. Baker v. Pere Marquette R. Co. [Mich.] 12 Det. Leg. N. 780, 105 N. W. 1116.

29. State v. Ballinger, 41 Wash. 23, 82 P. 1018.

30. Particularly in view of Ball. Ann. Codes & St. § 4766, subd. 2, relating to right of attorneys to receive payment of and satisfy judgments in favor of their clients. State v. Ballinger, 41 Wash. 23, 82 P. 1018. Id. § 5676, relating to payment of judgments against public corporation, does not change rule. Id.

30a. Only regularly qualified guardian, and neither next friend by whom he sues or his attorney, can do so. Collins v. Gillespy [Ala.] 41 So. 930.

court appointing him and should cover both his services in that and the appellate court.[32]

§ 4. *Procedure by or against guardian ad litem or next friend.*[33]—It will not be presumed, in the absence of a showing to the contrary, that a grandfather prosecuted a suit as next friend of his infant granddaughter where he was not her legal guardian and did not pretend to represent her therein.[34] The validity of the appointment of a guardian ad litem[35] or next friend,[36] and the right of a minor defendant to file a cross complaint by a guardian ad litem,[37] can only be raised by demurrer or answer. In Missouri an allegation that the next friend by whom the suit of an infant is prosecuted was appointed by order of the court can only be put in issue by a special denial.[37a]

GUARDIANSHIP.

§ 1. The Occasion for Guardianship (1899).
§ 2. The Person of the Guardian; His Appointment, Qualification, and Tenure (1900).
§ 3. General Powers, Duties, and Liabilities (1903).
§ 4. Custody, Support, and Education of the Ward (1903).
§ 5. The Ward's Property and Administration Thereof (1904).
§ 6. Presentment and Allowance of Claims (1908).
§ 7. Judicial Proceedings to Sell Property of Ward (1909).
§ 8. Actions and Legal Proceedings By and Against Guardians (1911).
§ 9. Accounting and Settlement (1912).
§ 10. Rights and Liabilities Between Guardian and Ward (1913).
§ 11. Compensation of Guardian (1914).
§ 12. Guardianship Bonds (1914).

The rights and liabilities of infants[38] and insane persons,[39] and of parents as natural guardians,[40] are treated elsewhere.

§ 1. *The occasion for guardianship.*[41]—*The jurisdiction*[42] to appoint guardians of the persons and estates of minors, insane persons, spendthrifts, and the like, is generally vested in the probate court[43] of the county in which the ward is domiciled,[44]

31. In re Korn's Will [Wis.] 107 N. W. 659. Where, on application by testamentary trustees for their discharge and the appointment of substituted trustees, it was very doubtful whether infant party had any interest in the corpus of the trust fund, held that the compensation of his guardian ad litem was necessarily limited to taxed costs. In re Pitney [N. Y.] 78 N. E. 1110. Allowance granted in action to construe will held payable out of interest of infant whom he represented. Illensworth v. Illensworth, 110 App. Div. 399, 97 N. Y. S. 44.

32. Gardner v. Moss [Ky.] 96 S. W. 461. Where partial allowance has been made to cover services in trial court, further allowance may be made to cover those thereafter rendered. Id. Compensation for his services on an appeal will not be fixed by the appellate court where they were not performed in its presence so as to give it any advantage over the lower court in knowledge of their character. In action to construe will, where he did not appear in appellate court further than to join by signature in the brief for the respondents, held that matter would be left to court appointing him. In re Korn's Will [Wis.] 107 N. W. 659.

33. See 5 C. L. 1603.

34. Lutcher v. Allen [Tex. Civ. App.] 16 Tex. Ct. Rep. 149, 95 S. W. 572.

35. Goes to plaintiff's legal capacity to sue, and, when not apparent on face of complaint, is waived unless taken advantage of by answer. Rev. St. 1898, §§ 2653, 2654. Hughes v. Chicago, etc., R. Co., 126 Wis. 525, 106 N. W. 526.

36. General denial is insufficient to raise issue. Morgan v. Hager & Sons Hinge Mfg. Co. [Mo. App.] 97 S. W. 638.

37. Under Burns' Ann. St. 1901, § 342, objection must be taken by demurrer, or by plea in abatement if not apparent on the face of the cross complaint, and right cannot be first questioned on appeal. Ziegler v. Ziegler [Ind. App.] 78 N. E. 1066.

37a. Wegenschiede v. St. Louis Transit Co., 118 Mo. App. 295, 94 S. W. 774.

38. See Infants, 6 C. L. 1.

39. See Insane Persons, 6 C. L. 34.

40. See Parent and Child, 6 C. L. 877.

41. See 5 C. L. 1603.

42. See 5 C. L. 1604.

43. Illinois: Under Const. art. 6, § 20, and Hurd's Rev. St. 1899, p. 547, probate court has original jurisdiction to appoint a conservator for a spendthrift, notwithstanding statutory provision that where there has been a trial in county court of issue as to whether person is a spendthrift or drunkard the record of the verdict and judgment shall be certified to the probate court and the issue need not be tried again. Ure v. Ure [Ill.] 79 N. E. 153.

New Mexico: Probate court held to have jurisdiction under Comp. Laws 1897, §§ 2052,

or where his property is situated.[45] In some states a guardian may be appointed for a minor orphan in the county where he is found.[46] The fact of lunacy gives jurisdiction to the court where the lunatic resides and has an estate to appoint a guardian to represent his interests.[47] Such court need not, however, itself adjudicate that fact, but may accept and act upon any valid adjudication thereof.[48] Jurisdiction, having once attached, continues until surrendered by the court or discharged by operation of law.[49] Jurisdiction will be presumed in collateral proceedings in the absence of a showing to the contrary.[50]

§ 2. *The person of the guardian; his appointment, qualification, and tenure.*[51] —In the appointment of a guardian for a minor the latter's welfare will always be kept in mind.[52] The court should not refuse to appoint an otherwise competent person on the sole ground that it will be to her interest to prevent her ward's marriage.[53] As a general rule the parent is entitled to the guardianship of his minor children,[54] if a fit and competent person for that purpose.[55] The court will attach

2053, to appoint special guardian to sell realty of minor heirs of deceased intestate and to direct such sale to be made. Hagerman v. Meeks [N. M.] 86 P. 801. Such sections were not repealed either directly or by necessary implication by §§ 2065, 2086, subsequently adopted providing for sale of lands of deceased persons to pay debts and requiring proceedings for that purpose to be brought in the district court. Id. Proceeding for appointment of special guardian for sale of lands held one for sale of land for benefit of minor heirs under Laws 1897, §§ 2052, 2053, and not one for sale of lands for payment of debts of deceased parent under §§ 2065, 2086, allegations of indebtedness of decedent's estate in the petition being merely incidental to the relief prayed for, which was preservation of minors' interests after such indebtedness was paid. Id.

Washington: The superior court has jurisdiction of an adversary proceeding for the appointment of a guardian for the persons and estates of minors after the death of their mother, though their father is still alive. Russner v. McMillan, 37 Wash. 416, 79 P. 988.

44. Except as limited by statute, probate courts have same power over persons and estates of lunatics as that formerly possessed by courts of chancery. Foran v. Healy [Kan.] 86 P. 470. Jurisdiction to appoint a guardian over the person and estate of a lunatic belongs exclusively to the probate court of the county where such lunatic has a permanent residence. Gen. St. 1901, §§ 3941, 3945, construed. Id. [Kan.] 85 P. 751. Jurisdiction conferred upon other probate courts by § 3941, to inquire into and adjudicate upon the sanity of persons in the county is intended as a police regulation and ends with the adjudication and commitment or discharge of such person. Id. Where the grandparents of a minor stand in the relation of parent to him, the residence of the grandparents is his residence, and jurisdiction to appoint a guardian is in the probate court of the county of their residence. In re Guardianship of Murray, 8 Ohio C. C. (N. S.) 498, afg. 4 Ohio N. P. (N. S.) 233.

45. Where nonresident minor has property in state, probate court of county where property is situated has power to appoint a curator or guardian of such estate who has power to represent minor in actions affecting same. Kirby's Dig. § 3771. Nunn v. Robertson [Ark.] 97 S. W. 293.

46. Under Rev. St. 1895, art. 2565, "residence," in its technical sense, of orphan in county is not essential to jurisdiction, so that, where uncle of orphan brought her into county from another state in which her last surviving parent resided, county court had jurisdiction to appoint him. Hagan v. Snider [Tex. Civ. App.] 98 S. W. 213.

47. Foran v. Healy [Kan.] 85 P. 751.

48. Adjudication of lunacy under Gen. St. 1901, § 3941, legally had, is conclusive upon lunatic and all other persons, and probate court of county where lunatic has permanent residence may accept and act thereon on petition for appointment of a guardian the same as if it had occurred in that court. Foran v. Healy [Kan.] 85 P. 751.

49. County court may require the guardian appointed by it to make his settlements and renew his bond from time to time, and on his failure to do either may remove him and appoint another in his place. Havens v. Ahlering [Ky.] 97 S. W. 344.

50. Will be presumed in an action for the discovery of assets to satisfy a judgment recovered on a guardian's bond that the court found the jurisdictional facts to exist when it appointed the guardian and took the bond. Havens v. Ahlering [Ky.] 97 S. W. 344.

51. See 5 C. L. 1605.

52. In re Tank's Guardianship [Wis.] 109 N. W. 565.

53. Because she would inherit a portion of ward's estate in event of her death without issue. In re Masterson's Estate [Wash.] 87 P. 1047.

54. Father has preferential right. Gill v. Riley, 28 Ky. L. R. 639, 90 S. W. 2. Mother held properly appointed in preference to uncle who was choice of deceased father. In re Tank's Guardianship [Wis.] 109 N. W. 565. Under Code Civ. Proc. § 1751, parent is entitled to guardianship of child under age of 14, if a fit, competent, and proper person, in preference to any other person. Father, where mother was dead. In re Galleher [Cal. App.] 84 P. 352. Under Rev. St. 1887, § 5774, as amended by Sess. Laws 1899, p. 302, the parent is entitled to the guardianship when he is competent to transact his own business, and not otherwise unsuitable as guardian. Andrino v. Yates [Idaho] 87 P. 787.

weight to the request of a deceased parent, but will not necessarily be controlled thereby in determining the question of suitableness between the person so designated and the surviving parent.[56] The parent's right is lost where the child is legally adopted by another.[57] In some states a minor over a certain age is given the right to select his own guardian or curator,[58] and may appeal from an order refusing to set aside the appointment of another in derogation of such right.[59] The right to the guardianship of an infant cannot be tried upon habeas corpus.[60]

In some states application for the appointment of a guardian for an insane person may be made by a verified petition[61] filed by any relative or friend[62] residing in the county.[63] Notice of the application is often required to be given to such person himself and to the person having his care, custody, and control,[64] and it is sometimes required that the alleged incompetent be present at the hearing if able to attend.[65] In the absence of a statutory provision to the contrary, no notice is necessary to confer authority to appoint a guardian for a lunatic who has been duly adjudged to be a person of unsound mind.[66] It is contrary to public policy to allow one instituting proceedings for the appointment of a guardian for an incompetent

55. In order to deprive surviving father of the right, must be such a showing as to make it appear that he will probably fail in a substantial degree to discharge his duty toward child. In re Galleher [Cal. App.] 84 P. 352. Evidence held insufficient to sustain finding that father failed or refused to properly care for child (Id.), or that he deserted or abandoned it (Id.), or that he was improvident, indolent, intemperate, or otherwise unfit to have guardianship (Id.). Parent held to have become "unsuitable" within meaning of Rev. St. 1887, § 5774, where child had resided with aunt from an early age, and conditions had become such, through the acts of the parent, that its care and custody could not be changed without endangering its welfare. Andrino v. Yates [Idaho] 87 P. 787. Mother of minors, who had procured a divorce, held a proper person to be appointed after father's death, notwithstanding fact that she had been guilty of immoral conduct some years previously. In re Tank's Guardianship [Wis.] 109 N. W. 565.

56. In re Tank's Guardianship [Wis.] 109 N. W. 565.

57. Under Ball. Ann. Codes & St. § 6483, providing that the adoption of a child shall divest its natural parents of all legal rights and obligations in respect to it. In re Masterson's Estate [Wash.] 87 P. 1047. Same held true of right of grandparent after death of parents. Id.

58. Under Rev. St. 1899, § 3486, minor over 14 years of age has right to select his own curator, and court is bound to appoint person so selected if he is satisfied that he is suitable and competent, and if he is a resident of the state. State v. Reynolds [Mo. App.] 97 S. W. 650. Right is absolute within bounds prescribed, and court has no discretion if it finds person so chosen to be qualified. Id. Minor living with mother in the state does not become a nonresident so as to lose right by temporarily leaving state to attend school. Id.

59. Appeal lies from order of probate court refusing to set aside order appointing public administrator as curator of estate of minors over 14 in derogation of their right of selection. Rev. St. 1899, §§ 3535, 278, construed. State v. Reynolds [Mo. App.] 97 S. W. 650. Statute makes minor sui juris for purpose of making selection and for purpose of appealing from order denying that right, and hence he may take such appeal regardless of his minority, or appoint an agent to do so for him. Id.

60. Andrino v. Yates [Idaho] 87 P. 787.

61. Verified petition required by Laws 1903, p. 242, c. 130, § 1, should set forth the residence of the insane person so that court may require proper notice to be given. Coleman v. Cravens, 41 Wash. 1, 82 P. 1005.

62. Allegation that petitioner was agent and friend of such person, and that he had been requested by such person's sons and the person who had him in custody to make application to be appointed, held to bring him within Laws 1903, p. 242, c. 130, § 1. Coleman v. Cravens, 41 Wash. 1, 82 P. 1005.

63. State v. Superior Court, 41 Wash. 450, 83 P. 726.

64. Under Laws 1903, p. 242, c. 130, §§ 1, 2. Coleman v. Cravens, 41 Wash. 1, 82 P. 1005. In case the incompetent is a nonresident service by publication, as provided in Id. § 5, is sufficient. Id. Where verified petition sets forth the residence of the insane person for whom guardian is sought to be appointed, from which it appears that she is a nonresident, no affidavit of nonresidence is necessary. Id. Requirement is jurisdictional, and record must show compliance therewith, or judgment appointing guardian is a nullity. State v. Superior Ct., 41 Wash. 450, 83 P. 726. Under Code Alaska § 896, notice must be personally served on supposed insane person of time and place of hearing in proceedings for appointment of guardian for him, or appointment is void. Martin v. White [C. C. A.] 146 F. 461. Id. §§ 911, 912, apply only to proceedings for the appointment of guardians for nonresidents having estates within the district where the proceedings are instituted. Id.

65. Requirement is jurisdictional. State v. Superior Ct., 41 Wash. 450, 83 P. 726.

66. Foran v. Healy [Kan.] 86 P. 470.

to use them as a source of profit to himself.[67] One may ordinarily appeal from an order appointing a guardian for him on the ground that he is an imbecile.[68]

Testamentary guardians.[69]—The exclusive power vested in the husband by the common law to appoint a testamentary guardian of his children has been abrogated by statute in many states, the right to the custody and management of their persons and property being conferred on the surviving wife.[70] As a general rule the wife has no such power.[71]

Discharge, removals, and resignations.[72]—A guardian of a minor is ordinarily deemed discharged when the ward becomes of age.[73]

A guardian who has been appointed and executed a bond cannot be removed except for cause,[74] but may generally be removed by the court at any time for cause shown upon notice duly given.[75] In some states proceedings for removal may be instituted by any person.[76] Among the common grounds for removal are waste or mismanagement of the estate,[77] and the fact that he has become unsuitable or incapable of executing his trust.[78] The fact that a guardian's bond is insufficient or unsatisfactory is no ground for his removal until he has been given an opportunity to execute a satisfactory one and has failed to do so.[79] On proceedings for removal the only question ordinarily open for consideration is whether there is substantial

67. Dismissal of proceedings is not a valid consideration for a promise made by person against whom they were instituted. Simmons v. Kelsey [Neb.] 107 N. W. 122.

68. Application was made to the probate court for the appointment of a guardian for Elias Breitenstein; the court, on hearing, entered on the record its finding and decision that due notice of said application had been given, that said Elias Breitenstein was a resident of the county and was an imbecile, and that it was necessary to appoint a guardian for him, but no guardian was appointed, and no further order was made by the court. Held, Elias Breitenstein is not entitled to appeal from such finding or decision of the probate court. Guardianship of Elias Breitenstein, 4 Ohio N. P. (N. S.) 358.

69. See 5 C. L. 1606, n. 89, 90.

70. In re Kellogg, 110 App. Div. 472, 96 N. Y. S. 965. Laws 1893, c. 175, p. 303, making every married woman the joint guardian of her children with her husband with equal powers, rights, and duties in regard to them, and giving surviving parent authority by deed or will to "dispose of the custody and tuition" of their minor children, vests authority over minor children and their property primarily in father and upon his death in mother, and any attempt by husband to dispose of guardianship over their persons or estates by will is void. Id. "Custody and tuition" includes management of property. Id. Provision of will appointing certain persons as joint guardians of the estates of children held not sustainable on ground that such persons were trustees, there being no attempt to create trusts. Id.

71. Mother has no such power, either under common law or by statute. Rev. St. 1892, § 2086, conferring such power on the father alone. Hernandez v. Thomas [Fla.] 39 So. 641.

72. See 5 C. L. 1606.

73. Within meaning of Rev. St. 1898, § 3968, limiting time within which action can be brought on bond, though same person is appointed guardian of other minors by same order and the performance of his duties with respect to them is secured by the same bond. Wescott v. Upham, 127 Wis. 590, 107 N. W. 2.

74. Gill v. Riley, 28 Ky. L. R. 639, 90 S. W. 2.

75. Code § 3198. Smith v. Haas [Iowa] 109 N. W. 1075. In proceeding which was in effect one in probate court by the guardian to obtain custody of ward, held that answer would have justified court in removing guardian on proof of allegations of unfitness, etc. Id. Question whether grandfather, who was next of kin and stood in loco parentis to ward and would have been ward's heir in case of his prior death, was a "party interested" within Rev. St. 1899, § 42, so as to be entitled to petition for removal of curator, held immaterial where it appeared on hearing to which curator was a party that he had been guilty of devastavit and had interests adverse to that of ward. In re Padgett's Estate, 114 Mo. App. 307, 89 S. W. 886.

76. Prior appointment as guardian in another state of one instituting proceedings to vacate the appointment of a guardian of a minor orphan must be proved, though not denied under oath, the material question not being the right to maintain the suit, since under Rev. St. 1895, art. 2559, any person may commence any proceeding which he deems beneficial to the ward, but whether, conceding such right, there was any ground for relief. Hagan v. Snider [Tex. Civ. App.] 98 S. W. 213.

77. Rev. St. 1899, §§ 42, 3498, 3534. In re Padgett's Estate, 114 Mo. App. 307, 89 S. W. 886. Curator, for devastavit in wrongfully misappropriating funds of ward in purchasing land without sanction of probate court. Id.

78. Rev. St. 1899, §§ 42, 3534. In re Padgett's Estate, 114 Mo. App. 307, 89 S. W. 886. Curator, where he asserts claim adverse to ward's interest in certain realty. Id. Where he has evidently become unsuited for the office. St. 1903, § 2024. Evidence held not to justify removal of father as

evidence authorizing such a course,[80] and the court cannot review the order making the appointment where there has been no appeal therefrom and the time for taking an appeal has not expired, and the jurisdiction is not questioned.[81] A guardian appealing from an order removing him because of lack of jurisdiction in the court appointing him is not a party in a fiduciary capacity appealing in the interest of the trust within the meaning of a statute exempting such persons from the necessity of giving appeal bonds.[82]

The resignation of the guardian, when accepted, puts an end to the guardianship until a successor is appointed.[83]

§ 3. *General powers, duties, and liabilities.*[84]—During the continuation of the relation the lawful possession by the guardian of the ward's realty cannot, by any act of the guardian, be converted into a possession adverse to the ward so as to found a title by adverse possession in the guardian.[85] The guardian may delegate the performance of ministerial acts to an attorney or agent.[86] The acts of a guardian of minors without authority and in excess of his powers with reference to the ward's estate do not operate as an estoppel against the infants.[87] The committee of an incompetent has only such authority as is conferred by statute or by order of the court.[88]

§ 4. *Custody, support, and education of the ward.*[89]—As a general rule the guardian of a minor is entitled to the custody of the person of the ward,[90] but the right is not an absolute one, and the court will take into consideration the welfare of the child.[91] The right to custody may be enforced by habeas corpus proceedings.[92]

guardian of minors. Gill v. Riley, 28 Ky. L. R. 639, 90 S. W. 2.

79. Gill v. Riley, 28 Ky. L. R. 639, 90 S. W. 2.

80. On proceedings for removal of curator, question of jurisdiction of circuit court to proceed in a previous case in which judgment was recovered by guardian appointed therein against curator is not open for review. In re Padgett's Estate, 114 Mo. App. 307, 89 S. W. 886.

81. Probate court held to have no jurisdiction to review order appointing guardian for incompetent on petition of latter for removal of guardian on ground that he was in fact competent. Jacqueth v. Benzie Circuit Judge [Mich.] 12 Det. Leg. N. 664, 105 N. W. 148.

82. Cannot appeal to common pleas from order of probate court by merely giving written notice of his intention, but must file bond required by Rev. St. § 6408. In re Guardianship of Wallace, 4 Ohio N. P. (N. S.) 449.

83. Guardian of infants resigned and another was appointed in her place but failed to qualify. Held that the failure of the new guardian to qualify did not operate to reinstate the old one without a re-appointment, and since, after such resignation, there was no legally appointed guardian, an instrument of adoption executed by parent was valid. Smiley v. McIntosh, 129 Iowa, 337, 105 N. W. 577.

84. See 5 C. L. 1607.

85. Though Gen. Laws 1896, c. 205, §§ 2, 3, relating to adverse possession, would apply to such relation if literally construed. Guardian of minors. Searle v. Laraway [R. I.] 65 A. 269.

86. May appoint attorney to receive principal of overdue mortgage and on receipt of amount due to give certificate of satisfaction, and such a certificate executed under power of attorney is valid. Forbes v. Reynard, 98 N. Y. S. 710. Vendee's objection to title on ground that mortgage thereon had been held by guardian and it did not appear that he had ever accounted in court after its payment held untenable. Id.

87. Act in signing division orders agreeing to accept, and in actually accepting, less oil than decree directing sale of infants' interest in oil authorized him to accept. Headley v. Hoopengarner [W. Va.] 55 S. E. 744.

88. Committee held not to have waived any objection to failure of plaintiff to obtain leave of court to continue action on claim commenced before committee was appointed by appearing and answering and permitting case to be placed on calendar, it not appearing whether he acted voluntarily or under order of court. Grant v. Humbert, 114 App. Div. 462, 100 N. Y. S. 44.

89. See 5 C. L. 1608.

90. Under express provisions of Code § 3193, has same power and control over ward as parents would have if living. Smith v. Haas [Iowa] 109 N. W. 1075. Under Burns' Ann. St. 1901, § 2682, the right to the custody of a minor ward is an incident of the office of guardian where both of the ward's parents are dead. Cottrell v. Booth [Ind.] 76 N. E. 546.

91. Right is no greater than that of a parent. Smith v. Haas [Iowa] 109 N. W. 1075. Though after the court has appointed a guardian it may not review such appointment in an independent proceeding, nor inquire whether he should be in any manner relieved of his duties and rights, nor whether the custody of the child should be given

In case a guardian otherwise entitled thereto is not a fit person to have such custody, the proper remedy is by application for his removal.[93]

The guardian of a minor will ordinarily be given a reasonable allowance for the support and maintenance of his ward.[94] No allowance for board and services will be made, however, to a guardian who voluntarily stands in loco parentis to the ward and has no intention of charging for them when furnished.[95] In Louisiana the widow and natural tutrix of minor children administering the estate of her deceased husband is entitled to an allowance by way of remuneration for sums expended by her for the support of the minors after she has lost the usufruct of the property by contracting a second marriage.[96] In some states no allowance will be made to the guardian for sums expended out of the corpus of the estate for the maintenance and education of the ward, though the income is insufficient for that purpose, unless he makes such expenditures under order of the court,[97] but this rule has no application to valid claims against the ward before the appointment of the guardian.[98] In others the realty of the ward cannot be made liable for his support and maintenance, but only the income thereof can be used for that purpose.[99]

§ 5. *The ward's property and administration thereof.*[1]—A guardian in handling the funds of his ward is held to the use of such care as an ordinarily prudent person would use in the handling of his own funds.[2] He is liable for losses result-

to another more capable or better fitted to receive it, yet, as between the guardian and another person who has had the custody of the child, the court may interfere in the child's interest, at least to the extent of making some temporary disposition of its custody other than that resulting from the appointment of the guardian. Id. In proceeding which was in effect one to compel persons having custody of minor wards to surrender them to guardian, where answer alleged that defendants were uncle and aunt of wards and had had their custody since death of their father, and that guardian was unfit to have their custody, held that court on proof of such allegations should have made some provision for their custody, at least temporarily, by defendants. Id.

92. Burns' Ann. St. 1901, § 1121. Cottrell v. Booth [Ind.] 76 N. E. 546. Action by guardian to obtain custody of minor wards held not a proceeding in habeas corpus, but an action at law in effect a proceeding in probate court for purpose of carrying out appointment and making letters of guardianship effectual, to be determined as such in absence of objection to form by defendant. Code § 3432. Smith v. Haas [Iowa] 109 N. W. 1075.

93. Ward or some person on his behalf should apply for his removal pursuant to Burns' Ann. St. 1901, § 2688. Cottrell v. Booth [Ind.] 76 N. E. 546.

94. Held that increase in allowance for expenses of support and maintenance would not be interfered with. In re Switzer [Mo.] 98 S. W. 461. Court may, upon the accounting, make such allowance for past support and maintenance as might have been made if application therefor had been made before the same was furnished. Amount claimed reduced. In re Ward, 49 Misc. 181, 98 N. Y. S. 923.

95. Neither guardian nor her sureties held entitled to allowance. Abrams v. U. S. Fidelity & Guaranty Co., 127 Wis. 579, 106 N. W. 1091.

96. Gaspard v. Coco, 116 La. 1096, 41 So. 326.

97. Rev. St. 1895, art. 2630. Logan v. Gay [Tex.] 14 Tex. Ct. Rep. 640, 90 S. W. 861. The guardian and his sureties are liable for sums expended without the permission of the court, though used for the maintenance and support of the ward. Murph v. McCullough [Tex. Civ. App.] 14 Tex. Ct. Rep. 176, 90 S. W. 69.

98. Refers only to expenditures made by guardian during existence of guardianship. Logan v. Gay [Tex.] 14 Tex. Ct. Rep. 640, 90 S. W. 861. Persons furnishing food, clothing, and other necessaries before appointment of guardian are entitled to reimbursement out of minor's property, claims therefor constituting debts against minor's estate which may be established and paid when guardian is appointed. Id.

99. Under St. 1903, § 2034, unless authorized by deed or will under which estate is derived, no allowance can be made guardian for maintenance and education of ward beyond the income of the estate, except where ward is of such tender years or infirm health that he cannot be bound out as an apprentice, or no suitable person will take him as such, or except when it is best for ward that principal of personalty shall be applied for his board and tuition, and court, upon settlement of accounts, shall deem application to have been judicious and properly made, but neither ward nor his realty can be held liable for any such disbursements. Fidelity Trust Co. v. Butler, 28 Ky. L. R. 1268, 91 S. W. 676. Realty cannot be made liable for such disbursements even though minor solicited them and received benefit of them. Id. Guardian cannot subject realty and proceeds thereof belonging to ward at termination of guardianship to payment of advances made during ward's minority. Wilson v. Fidelity Trust Co. [Ky.] 97 S. W. 753.

ing from his fault or mismanagement,[3] but, when he exercises the required degree of care, will not be held responsible for those for which he is not to blame.[4] He is not liable for losses due to the failure of a bank in which in the exercise of such care, he deposits the funds of the ward for safe keeping during such time as is reasonably necessary for their investment under order of court, provided such bank is regarded by the public as solvent and safe and he knows nothing to the contrary,[5] but the contrary is true where, without an order of court, he agrees that the deposit shall remain for a fixed period of time, and thereby loses the right to withdraw it during such time.[6] He may employ attorneys or agents according to the usual course of business to reduce the estate of his ward to possession and to protect the same.[7] When once reduced to possession, however, it becomes his personal duty to manage and care for it, and if he intrusts it to another for that purpose he is liable for any loss resulting therefrom.[8] He must exercise diligence and good faith to make the estate productive, but where he does so is only responsible for the highest rate of interest which could have been procured under the circumstances.[9] If he uses in his own business the estate of the ward, or so commingles his ward's money with his own that it becomes undistinguishable, he must account for at least legal interest.[10] He will be charged with interest on funds received by him and not invested.[11] In some states he is not liable for interest during the first year after his

1. See 5 C. L. 1608.

2. Murph v. McCullough [Tex. Civ. App.] 14 Tex. Ct. Rep. 176, 90 S. W. 69. Where money was left in bank for nine months, question whether action of guardian was prudent in management thereof held for jury. Id.

3. Cannot be charged with less than full amount of notes where it appears that failure to collect full amount was due to his own fault. Griffin v. Collins, 125 Ga. 159, 53 S. E. 1004.

4. Guardian who acted in good faith in purchase of note and exercised reasonable and proper care for investment of ward's money held not liable for loss due to failure to realize thereon the amount expected at time of its purchase. Henderson v. Lightner [Ky.] 92 S. W. 945. Where he received notes which thereafter became uncollectible without fault on his part, held that he was properly allowed by court to compromise same and should be charged only with amount received under such compromise. Griffin v. Collins, 125 Ga. 159, 53 S. E. 1004. Burden held on administrator of ward, under the circumstances, to show that loss resulted from guardian's mismanagement. Id.

5. Murph v. McCullough [Tex. Civ. App.] 14 Tex. Ct. Rep. 176, 90 S. W. 69.

6. Both he and his bondsmen liable in such case. Murph v. McCullough [Tex. Civ. App.] 14 Tex. Ct. Rep. 176, 90 S. W. 69. Evidence held to sustain finding that it was so deposited. Id. Instruction in effect a peremptory one to find for defendant if money was deposit and not a loan held properly refused. Id.

7. Abrams v. U. S. Fidelity & Guaranty Co., 127 Wis. 579, 106 N. W. 1091.

8. Where attorney collected claims which were satisfied by checks or drafts payable to guardian's order, and guardian indorsed same and gave them back to attorney to be invested by him for her as guardian. Abrams v. U. S. Fidelity & Guaranty Co., 127 Wis. 579, 106 N. W. 1091. Guardian held responsible for his agent's administration of property of ward coming into his hands and entitled to credit only for actual value of property accounted for by him. Griffin v. Collins, 125 Ga. 159, 53 S. E. 1004.

9. Is responsible for any loss or deficit in its income arising either from want of good faith or the exercise of due diligence. Goff's Guardian v. Goff [Ky.] 93 S. W. 625. St. 1903, § 2035, does not render him responsible at all hazards for interest at 6 per cent on balances remaining in his hands, particularly in view of § 4706 authorizing investments in such securities as are regarded as safe by prudent business men. Id. Evidence held to show that guardian acted with diligence and good faith but that it was impossible to keep funds invested at level rate of 6 per cent. Id. Fact that banks could loan money at 6 per cent held not to show that guardian could have done so. Id.

10. Goff's Guardian v. Goff [Ky.] 93 S. W. 625.

11. Charged with interest on sum received from former guardian from date of its receipt at rate it would have earned if deposited in bank with other funds, where he failed to charge himself such sum and offered no proof as to what he did with it. In re Ward, 49 Misc. 181, 98 N. Y. S. 923. Also charged with interest at same rate from date of his appointment on sum which he admitted had been loaned him out of ward's funds by former guardian before his appointment and for which he was held liable to account. Id. Where, instead of investing funds, guardian turned them over to attorney for that purpose and he defaulted, held that there was no abuse of discretion in charging her with interest on a part thereof from two months, and on balance from three months, after she received them. Abrams v.

appointment unless there is interest earned, in which event he is chargeable with the actual interest and no more.[12] The method of figuring interest is sometimes regulated by statute.[13] In the allowance to the guardian of interest on his disbursements, annual rests should be made, the amounts expended for the preceding year deducted, and interest computed on the balance up to the next annual rest.[14]

Unless the rights of innocent third parties have intervened,[15] an otherwise valid sale of the ward's realty is voidable and may be set aside by him or anyone claiming under him if the guardian either directly or indirectly becomes the purchaser at the sale.[16] Where the representative has been guilty of actual fraud, it is immaterial that the minors may have obtained some benefit from the transaction.[17]

The guardian cannot, by any contract except those specially allowed by law, bind his ward's property or create any lien thereon.[18] The fact that one dealing with him is ignorant of the law in this regard does not, in the absence of fraud or misplaced confidence, entitle him to equitable relief.[19] He may, as a general rule, contract for labor and services for the benefit of the ward's estate, and such contracts, when made in good faith and approved by the court, are a charge upon the estate.[20] In some states he may, with an order of court, compromise controversies involving the ward's lands when the ward's interests will thereby be subserved.[21] He has only such right to mortgage realty as is conferred on him by statute.[22] He has no authority to postpone the security of a mortgage given him as

U. S. Fidelity & Guaranty Co., 127 Wis. 579, 106 N. W. 1091. Interest held properly charged on fund from date subsequent to that on which it was stipulated it had been received. Id. Where guardian failed to properly handle funds of wards and used them without order of court, held properly charged with interest at 10 per cent from time when, by use of reasonable diligence, she could have loaned money under order of court. Murph v. McCullough [Tex. Civ. App.] 14 Tex. Ct. Rep. 176, 90 S. W. 69.

12. Griffin v. Collins, 125 Ga. 159, 53 S. E. 1004.

13. Provision of Civ. Code 1895, § 3498, relating to interest to be charged trustees, held applicable to settlement by one who was estopped to deny that he was guardian. Griffin v. Collins, 125 Ga. 159, 53 S. E. 1004.

14. Allowance from a period midway between time of her appointment and time of her resignation held not prejudicial error where that method was more favorable to her than the proper one would have been. Abrams v. U. S. Fidelity & Guaranty Co., 127 Wis. 579, 106 N. W. 1091.

15. See 5 C. L. 1612, § 10. Burns v. Cooper [C. C. A.] 140 F. 273. One to whom guardian afterwards conveyed property out of gratitude for past care and kindness and upon a promise to care for her in the future held not a bona fide purchaser for value where it appeared that he did not thereafter support her, though he expressed his willingness to do so if required, and wards had same right against him as they would have had against her. Sunter v. Sunter, 190 Mass. 449, 77 N. E. 497.

16. Both under the general principles of equity and Comp. St. Neb. c. 23, § 85. Burns v. Cooper [C. C. A.] 140 F. 273. Sale held fraudulent and voidable where guardian sold to third person for purpose of transferring title to himself, and such person shortly thereafter, and as a part of the same transaction, reconveyed to him individually. Id. Sale by guardian of minor indirectly to herself. Sunter v. Sunter, 190 Mass. 449, 77 N. E. 497.

17. Where guardian procured property to be sold for purpose of himself acquiring title, held that such benefit would not estop wards or those claiming under them from avoiding the sale or interposing fraud in defense of their rights. Burns v. Cooper [C. C. A.] 140 F. 273.

18. Civ. Code 1895, § 2552. Burke v. Mackenzie, 124 Ga. 248, 52 S. E. 653.

19. Burke v. Mackenzie, 124 Ga. 248, 52 S. E. 653.

20. Civ. Code 1895, § 2549. Burke v. Mackenzie, 124 Ga. 248, 52 S. E. 653. Contract for improvement of realty by erection of buildings thereon held not within such section, and person erecting them was not entitled to foreclose lien thereon nor to payment out of rents and profits. Id. Nor would equity compel guardian to proceed under order obtained by him authorizing him to mortgage the property to pay the debt. Id.

21. Under St. 1903, § 2030, statutory guardian of infant cestui que trust, who was also testamentary trustee, held properly authorized to borrow money on mortgage to settle contest instituted by heirs for purpose of having will declared invalid, where adjudication of invalidity would have resulted in beneficiaries of trust receiving nothing. Fidelity Trust Co. v. Hawkins, 28 Ky. L. R. 720, 90 S. W. 249.

22. Mortgage executed under order of probate court by guardian on estate in remainder belonging to minor heirs held a valid lien on heirs' interests and should be paid out of proceeds of a sale thereof. Ure v. Ure [Ill.] 79 N. E. 153. Rev. St. 1899, § 3504, prescribes only purposes for which curator may mortgage his ward's lands even

guardian to that of a second mortgage on the same property.[23] In many states he may sell personalty without an order of court.[24] In the absence of evidence to the contrary, it will be presumed that a regularly appointed guardian leasing property of his ward has taken all necessary legal steps to authorize him to do so,[25] and the burden is upon the party attacking the lease to establish the facts necessary to show its illegality.[26] The assignee of such a lease in possession cannot question its validity because of irregularities in the procedure.[27]

All payments of sums due the ward must be made to the guardian.[28] The guardian will be charged with all property of the ward actually received by him,[29] and must account for debts which he owes to the ward.[30] He will generally be allowed for sums expended for necessary improvements,[31] and for repairs and insurance,[32] and for taxes paid on the property of the ward.[33] A guardian suing to set aside a deed of his ward has the burden of showing the ward's legal incapacity to make the conveyance.[34]

One who, without legal appointment or qualification, assumes the functions of a guardian by exercising control over the person or estate, or both, of a minor, will be regarded as a guardian de son tort[35] and will be held subject to all the responsi-

with order of court, and since he is not thereby authorized to do so for purpose of borrowing money to discharge pre-existing incumbrances, no such authority will be implied and none exists, and mortgage for that purpose is void even though curator's act in making it was for ward's best interest. Capen v. Garrison, 193 Mo. 335, 92 S. W. 368.

23. Where duly recorded mortgage was assigned to guardian who thereafter, as agent of third party, negotiated loan to mortgagors, the money being applied on guardian's mortgage and expended for benefit of infant wards, loan being secured by another mortgage on same land, held that guardian had no authority to postpone his security as guardian to second mortgage. Covey v. Leslie [Mich.] 13 Det. Leg. N. 218, 107 N. W. 900.

24. Rev. Laws c. 145, § 35, providing that the probate court may authorize guardian to sell personalty, is for the protection of the guardian and does not render a sale without a license invalid. Gardner v. Blacon Trust Co., 190 Mass. 27, 76 N. E. 455. Guardian of minor legatees held to have power to sell stock the title to which had vested in them under the will. Cabble v. Cabble, 111 App. Div. 426, 97 N. Y. S. 773. Evidence held to sustain finding that stock was sold by guardian of minors for an adequate price. Id

25, 26. Norton v. Stroud State Bank [Okl.] 87 P. 848.

27. Where a guardian leased land without complying with statutory requirement that lease shall be made to highest bidder after public notice, and the lessee conveyed his interest, without warranty, to a third person, who entered upon and enjoyed the peaceable and uninterrupted possession of the premises and reaped the fruit of the lease, held that such third person could not question the validity of the lease or the assignment in defense of a note given in consideration of such assignment. Norton v. Stroud State Bank [Okl.] 87 P. 848.

28. Only the regularly qualified guardian of an infant has authority to receive payment and enter satisfaction of a judgment recovered in favor of such infant, and neither next friend by whom infant sues nor attorney representing him in action can do so. Collins v. Gillespy [Ala.] 41 So. 930. A mortgagor who pays the amount of a past due mortgage to one entitled to receive payment is not bound to see to the proper application of the money. Where pays amount of mortgage held by guardian to one to whom latter has given power of attorney to receive it and give satisfaction. Forbes v. Reynard, 98 N. Y. S. 710.

29. Is chargeable with the rents of property in which he invests the funds of the ward. Griffin v. Collins, 125 Ga. 159, 53 S. E. 1004. Guardian collecting rents through an agent after ward became of age held entitled to credit for commissions paid agent. Ohlmann v. Wirth [Ky.] 97 S. W. 760.

30. Guardian held liable to account for sum which he admitted had been loaned to him by former guardian out of ward's property before his appointment, such indebtedness having passed to him from former guardian as an indebtedness against himself individually. In re Ward, 49 Misc. 181, 98 N. Y. S. 923.

31. Held entitled to make up out of rents sums expended by him out of his own money in betterments upon the property so as to make it rent producing. Ohlmann v. Wirth [Ky.] 97 S. W. 760. Widow as natural tutrix of minor heirs administering succession of deceased husband held entitled to allowance for amount expended in building house on property of community, it being a necessary improvement which enhanced the value of the property and enabled her to collect rents for which she accounted to her wards. Gaspard v. Coco, 116 La. 1096, 41 So. 326.

32. On property in which he invests ward's funds. Griffin v. Collins, 125 Ga. 159, 53 S. E. 1004.

33. Natural tutrix administering succession of deceased husband. Gaspard v. Coco, 116 La. 1096, 41 So. 326.

34. Reese v. Shutte [Iowa] 108 N. W. 525.

35. One who takes charge of infant's per-

bilities that attach to a legally constituted guardian or trustee.[36] He becomes liable as a trustee in invitum, and the trust relation continues until his account is settled or discharged.[37] The ward may, in such case, upon attaining his majority, maintain an action for money had and received against him for the moneys of the ward received by him during the period of his assuming to act in that capacity.[38] Such guardianship, however, ceases upon the arrival of the infant at the age of maturity, and money of the ward thereafter received by the guardian cannot be regarded as in his possession as trustee by virtue of such guardianship.[39]

§ 6. *Presentment and allowance of claims.*[40]—Claims must generally be approved and allowed by the guardian and the court.[41] In New York the surrogate has no authority to pass on the personal claim of a general guardian.[42] The action of the court in establishing a claim as a judgment against the estate of the ward cannot be questioned except by the direct revisory proceeding provided by statute.[43]

In New York the court, which by its committee takes possession of the property of an incompetent, has full authority to pay all just claims against him to the extent of his estate and to determine the validity of disputed claims.[44] One seeking to enforce a claim against an incompetent for whom a committee has been appointed should petition the court that the claim be allowed and paid, or, in the alternative, for leave to sue thereon.[45] If the estate is insufficient to pay all claims in full, the property will be applied in payment thereof pro rata without preference, except where, prior to the adjudication of incompetency and the appointment of a committee, the creditor has in good faith obtained a lien or acquired a right of property by contract or otherwise.[46] The mere fact that a creditor has commenced an action at law on his claim prior to the appointment of a committee gives him no lien or right of priority in its payment.[47] Such action need not necessarily be stayed until the discharge of the committee or the further order of the court, but may properly be prosecuted to judgment to enable the plaintiff to have his claim liquidated before applying to the court to have it paid by the committee.[48] Any judgment recovered in such action can only be enforced by application to the court.[49]

son and earnings. Zeideman v. Molasky, 118 Mo. App. 106, 94 S. W. 754.

36. Zeideman v. Molasky, 118 Mo. App. 106, 94 S. W. 754.

37. Relation will continue after infant becomes of age where he continues in possession and fails to account at that time. Zeideman v. Molasky, 118 Mo. App. 106, 94 S. W. 754.

38. For value of her services appropriated by him and interest thereon. Petition held to state cause of action. Zeideman v. Molasky, 118 Mo. App. 106, 94 S. W. 754.

39. Earnings of ward after that time. Zeideman v. Molasky, 118 Mo. App. 106, 94 S. W. 754.

40. See 2 C. L. 1573.

41. Where claim was allowed by guardian and duly entered on claim docket and was thereafter approved by the court and approval was by the county judge duly entered on the claim docket and indorsed on the claim, the claim was thereby established as a judgment against the estate of the ward, no order on the minutes in addition to that on the claim docket being required. Rev. St. 1895, arts. 2714, 2717, 2719, 2723, 2730. Logan v. Gay [Tex.] 14 Tex. Ct. Rep. 640, 90 S. W. 861.

42. Guardian of minor. In re Tyndall, 48 Misc. 39, 96 N. Y. S. 222. Code Civ. Proc. § 2846, is not broad enough to confer such authority, and § 2719 applies only to executors and administrators. Id.

43. Logan v. Gay [Tex.] 14 Tex. Ct. Rep. 640, 90 S. W. 861.

44. Summary remedy is favored and will be adopted in absence of special circumstances rendering action necessary or appropriate. Grant v. Humbert, 114 App. Div. 462, 100 N. Y. S. 44.

45, 46, 47. Grant v. Humbert, 114 App. Div. 462, 100 N. Y. S. 44.

48. Grant v. Humbert, 114 App. Div. 462, 100 N. Y. S. 44. Held that motion by committee for stay should have been denied and leave should have been granted to plaintiff to prosecute action to judgment. Id. Where plaintiff commenced action on claim against lunatic before appointment of committee, held that fact that limitations expired pending stay secured by committee would not affect plaintiff's right, if his claim was not paid in full by the committee, to continue his action for any unpaid balance after committee's discharge. Id.

49. Is not enforceable by execution while estate is in custody of the court, but would at once become so if incompetent should recover and committee be discharged. Grant

§ 7. *Judicial proceedings to sell property of ward.*[50]—In some states realty belonging to infants may be sold where the income thereof and the personalty is insufficient for their support and education.[51] In others the property of nonresident insane persons may be sold for the payment of their debts, to provide for their support and maintenance, or for the better investment of the proceeds.[52] The fact that the estate of a decedent owes debts does not prevent a sale of realty descending to minor heirs for their benefit under the New Mexico statute.[53]

The procedure to sell realty is purely statutory and varies in the different states. The guardian is sometimes required to take an oath before fixing the time and place of sale.[54] The required notice must be given.[55] In some states the sale is made by commissioners appointed by the court for that purpose,[56] and the guardian as such has no right to the possession of the proceeds, but they can only be paid for the purpose of reinvestment into the hands of some person, who may or may not be the guardian, upon special bond being given for the care of the same.[57] In proceedings under the New York code to sell realty to pay debts, the report of the referee to whom the matter may be referred is not binding on the court.[58] The mere fact that the guardian makes no objection to the claim for the payment of which a sale is sought does not require the court to allow it,[59] and the court cannot adjudicate a claim involving an accounting by the claimant as administrator of a decedent.[60]

Where the petition and order correctly describe the premises, subsequent mis-

v. Humbert, 114 App. Div. 462, 100 N. Y. S. 44.

50. See 5 C. L. 1609.

51. Sale of infant's realty ordered on ground that personalty and income of realty was insufficient for their support and education. In re Wyckoff, 50 Misc. 190, 100 N. Y. S. 417.

52. Laws 1893, p. 286, c. 120, when construed in connection with the rest of the act. Coleman v. Cravens, 41 Wash. 1, 82 P. 1005. Act held to repeal by implication Hill's Ann. St. & Codes §§ 3071-3078, though provision expressly repealing such sections is void because subject is not expressed in title. Id.

53. Mere fact that petition for appointment of special guardian for minor heirs and for sale of land set up the fact that there were debts of decedent's estate which should be paid held not to prevent sale for benefit of such heirs under Comp. Laws 1897, §§ 2052, 2053. Hagerman v. Meeks [N. M.] 86 P. 801.

54. Fact that guardian did not take oath required by B. & C. Comp. § 5602, until after fixing the time and place of sale and until four days before the sale, held an irregularity and was cured and sale validated by Laws 1899, p. 64, § 3, a curative act subsequently passed validating guardians' sales in certain cases. Fuller v. Hager [Or.] 83 P. 782.

55. Notice of hearing required by statute to be given to ward is jurisdictional, and deed made without it is void and subject to collateral attack. Beachy v. Shomber [Kan.] 84 P. 547. Where record shows giving of notice which was insufficient, it cannot be presumed from fact that sale was confirmed that new notice was given. Id. In proceeding under Civ. Code 1895, § 4987, by guardian for sale of property of minors and reinvestment of proceeds, minors under age of 14 need not be served with notice. Furr v. Burns, 124 Ga. 742, 53 S. E. 201.

56. Where two persons were appointed commissioners with power in either to act, but only one gave bond and acted, and decree ratifying sale directed him to collect money and make deeds, which he did, held that on his subsequently, and without authority, turning over a part of the proceeds to the other, the latter could not be held liable therefor as commissioner. Pope v. Prince's Adm'r [Va.] 52 S. E. 1009.

57. Under Code 1904, § 2622. Pope v. Prince's Adm'r [Va.] 52 S. E. 1009. Guardian to whom fund was turned over, having no right to receive it as guardian de jure, could not be held liable for it as guardian de facto, and claim of infant therefor against his estate on his death was not a preferred debt of fourth class under § 2660. Id. He would, however, be regarded as a constructive or de facto trustee holding fund for ward's benefit. Id. Orders relating to interest on instalments of purchase price of land in which infants owned an undivided interest and which was sold under mortgage foreclosure held to authorize payment to commissioner of entire amount of interest due so that purchaser was entitled to credit for amount so paid and turned over by commissioner to guardian under order of court, though guardian failed to account for a part of it. Louisville Trust Co. v. Kidd [Ky.] 93 S. W. 38.

58. Report of referee appointed under Code Civ. Proc. § 2354. In re Wyckoff, 50 Misc. 190, 100 N. Y. S. 417.

59. In re Wyckoff, 50 Misc. 190, 100 N. Y. S. 417.

60. Court held to have no jurisdiction to adjudicate claim of infants' mother based in whole or in part on her dealings as administratrix with the estate of her deceased

descriptions will be regarded as clerical errors which may be corrected by the court and the parties at any time.[61] An ambiguous report of appraisers will, if possible, be so construed as to uphold the deed.[62] The burden of proving fraud is on an infant seeking to have the sale set aside on that ground.[63]

A guardian's sale under order of court is a judicial one to which the rule of caveat emptor strictly applies.[64] The court sells and the purchaser acquires only such title as the ward has.[65] The purchaser is bound to know the source and condition of the title, and, after confirmation of the sale, is not, in the absence of fraud or mutual mistake of fact, entitled to be relieved from the purchase or from paying the purchase price, thouugh he has acquired no valid title.[66] Persons dealing with titles derived through such sales are chargeable with what the public records disclose with reference thereto.[67] It is generally provided that actions by the ward, or those claiming under him, to recover land sold by his guardian must be brought within a specified time after the termination of the guardianship,[68] or the recording of the deed,[69] but such statutes do not preclude them from setting up the fraudulent character of a sale at which the guardian indirectly became the purchaser and the consequent invalidity of a mortgage subsequently executed by him in a suit to foreclose the same, though more than the statutory period has elapsed, where they have not been guilty of laches.[70]

In case the sale is set aside as invalid, the purchaser must account for rents and profits,[71] but, in many states, will be allowed the value of permanent improvements made by him.[72]

husband in a foreign state and involving an accounting by her in that capacity. In re Wyckoff, 50 Misc. 190, 100 N. Y. S. 417.

61. Misdescription in certificate of appraisement carried forward in order of court approving sale and in curator's deed. Metz v. Wright, 116 Mo. App. 631, 92 S. W. 1125.

62. As to value of property. Beachy v. Shomber [Kan.] 84 P. 547.

63. Evidence held insufficient to show fraud on part of guardian and purchaser. Sansom v. Wolford [W. Va.] 55 S. E. 1020.

64. A sale of an infant's lands under the summary proceedings provided for by Code 1899, c. 83, § 17. Headley v. Hoopengarner [W. Va.] 55 S. E. 744.

65. Headley v. Hoopengarner [W. Va.] 55 S. E. 744.

66. Is his duty to ascertain for himself whether title may not be impeached or superseded by some other paramount one. Headley v. Hoopengarner [W. Va.] 55 S. E. 744. One purchasing interest of infants in oil and gas in certain lands inherited by them from their father, and agreeing to pay certain royalty therefor, held not entitled, after sale was confirmed and deed made, to be relieved from payment of royalty on ground that father had disposed of a part of such oil and gas during his lifetime. Id. Nor could proceedings be re-opened and corrected, they being final and conclusive in absence of clear showing of fraud or mutual mistake. Id.

67. Where records showed that guardian's deed to third person and latter's deed reconveying property to guardian individually were executed on same day, filed for record at same time, and expressed same consideration, held that one subsequently taking a mortgage from the guardian was charged with notice of the invalidity of the guardian's title. Burns v. Cooper [C. C. A.] 140 F. 273.

68. Must be brought within five years under Comp. St. Neb. 1901, § 2578. Burns v. Cooper [C. C. A.] 140 F. 273. Suit by wards to set aside sale of land by guardian to herself individually held not barred by laches or by limitations, though not brought within 10 years after they became of age as required by Rev. Laws c. 202, § 24, where they sued soon after discovering the facts and exercised reasonable diligence. Sunter v. Sunter, 190 Mass. 449, 77 N. E. 497.

69. Held that after lapse of five years no defect in the qualification, after appointment, of the guardian who made the sale, and no defect in the jurisdiction of the probate court to order sale, could be urged to defeat title of purchaser, and hence land could not be recovered because guardian of insane person failed to publish notice of her appointment. Steward v. Rea [Kan.] 87 P. 1150.

70. Ward having had sale set aside, those claiming under him were not guilty of laches in waiting to interpose defense until suit to foreclose was instituted. Burns v. Cooper [C. C. A.] 140 F. 273.

71. In suit in equity to set aside guardian's sale on ground that she herself indirectly purchased the land where occupant is given an allowance for betterments, the plaintiffs held entitled to set off their share of the rents and profits during the period of the guardian's occupation after deducting their contributory part of the sum expended by her for taxes, repairs, and insurance, the amount set off not to exceed the sum with which they are charged for improvements. Rev. Laws c. 179, §§ 23, 24. Sunter v. Sunter, 190 Mass. 449, 77 N. E. 497. Admission in

Orders and judgments of probate courts in proceedings to procure a sale cannot be collaterally attacked where jurisdiction appears and fraud is not charged, particularly where they are courts of record.[73] The deed will not be held void on collateral attack merely because the petition fails to affirmatively show the existence of the conditions under which the statute authorizes the sale.[74]

§ 8. *Actions and legal proceedings by and against guardians.*[75]—Actions to recover property belonging to the ward must be brought in the ward's name and not that of the guardian.[76] Actions which an infant would be authorized to bring if sui juris may ordinarily be brought by his guardian.[77] In some states, where a cause of action exists directly in favor of an infant, the action should be brought by a guardian ad litem rather than the general guardian,[78] but this rule does not apply to cases where the general guardian is entitled to sue as trustee of an express trust.[79] The court may in some states authorize foreign guardians of nonresident minors to sue for debts due their wards,[80] and an order vacating an order granting leave to do so is appealable.[81] In an action by a guardian, his appointment according to law must be alleged.[82] A suit by a guardian of a minor to foreclose a mortgage given to secure a note payable to him as guardian does not abate by reason of the fact that the ward reaches his majority before its termination and that the guardian is thereupon discharged,[83] but the ward is, in such case, entitled to be substituted as plaintiff in the action in place of the guardian.[84]

evidence of rental value of premises during entire period elapsing between improvement of premises and commencement of suit, for purpose of ascertaining amount of rent with which defendant should be charged after he obtained title, held within master's discretion, it being for him to determine whether it was so remote as to be of no evidentiary value. Id.

72. Rev. Laws c. 179, § 17, c. 184, § 19, providing that where land has actually been held or possessed by a tenant or his predecessor for six years and he is thereafter found to have no title as against the true owner he is entitled to betterments annexed by himself or a former owner, or, if such period of time has not elapsed, and where improvements have been made in good faith, he may recover compensation, whether title is put in issue by writ of entry or by petition for partition, applies where relief against a guardian's sale is sought in equity. Sunter v. Sunter, 190 Mass. 449, 77 N. E. 497. Provision for allowance where land has been held for six years does, however, apply to such a case. Id. Provision that tenant is entitled to compensation where it appears that he held by title which he had reason to believe was good has no application where title was acquired through sale by guardian to herself of the property of the wards. Id.

73. Hagerman v. Meeks [N. M.] 86 P. 891. Proceedings for sale of realty of minor heirs by special guardian appointed for that purpose, no appeal having been taken. Id. Improper distribution of proceeds of guardian's sale is mere irregularity which cannot be reached on collateral attack. Id.

74. Beachy v. Shomber [Kan.] 84 P. 547. Petition alleging that it would be for the minor's interest to sell realty "to pay debts of the estate" held not so defective as to render sale void or deed open to collateral attack, though Gen. St. 1901, § 3299, authorizes sale only when necessary for minor's support or education, or where his interest will thereby be promoted because of unproductiveness of property, or its exposure to waste, or any other peculiar circumstances, it being conceivable that upon hearing facts may have been shown bringing case within statutory requirements. Id.

75. See 5 C. L. 1610.

76. Action to recover money belonging to minors, which defendant claims to hold in trust for their benefit. Mee v. Fay, 190 Mass. 40, 76 N. E. 229.

77. Under Civ. Code Prac. § 428, authorizing creditor of decedent to bring action for settlement of estate, guardian of infant creditor may do so. Beddow v. Wilson, 28 Ky. L. R. 661, 90 S. W. 228.

78. See, also, Guardians ad Litem and Next Friends, 7 C. L. 1896. Schlieder v. Wells, 99 N. Y. S. 1000.

79. As where guardian sues to have proceeds of collateral, given him by defendants to secure note and subsequently returned by him to them to sell for his account and converted by them pursuant to a conspiracy, declared a trust fund in their hands. Schlieder v. Wells, 99 N. Y. S. 1000.

80. Superior court has jurisdiction to grant leave to do so, both upon the principle of comity and under 2 Ball. Ann. Codes & St., § 6419, providing that upon complying with certain conditions court may grant such guardian permission to remove property to state in which wards reside, and that order granting it shall be authority for him to sue for and receive same. In re Crosby, 42 Wash. 366, 85 P. 1. Word "property" as used in such section includes choses in action. Id.

81. Since it in effect determines the action brought thereunder. In re Crosby, 42 Wash. 366, 85 P. 1.

82. Allegation that he was duly appointed by an order of the surrogate's court of a

In some states an infant may defend actions by his regular guardian.[85] A minor defendant must ordinarily be served with process before the filing of an answer by his guardian will amount to an appearance on his part.[86] Service of summons on the duly appointed guardian of a lunatic is binding on the lunatic and confers jurisdiction on the court to adjudicate his rights.[87]

§ 9. *Accounting and settlement.*[88]—A guardian is not absolutely bound to account in court for the property of his ward, but may account out of court when the ward comes of age, and if such accounting is fairly and honestly made and no advantage taken of the ward, a release given by him to the guardian is as effective as a decree entered in court.[89] The guardian cannot excuse himself from accounting for the property of his deceased ward by claiming that he has himself acquired title thereto.[90] An order directing him to account to the court therefor is not a final order or judgment for the delivery of the same to the ward's representative, but after the account has been settled the guardian's individual claim to the property as against the representative may then be tried under appropriate issues framed for that purpose.[91] In Texas a guardian of a minor who fails to account to him at the first term of the probate court after he becomes of age and to turn over to him the money in his hands is liable for interest thereon from that time at the legal rate.[92] In Louisiana on the settlement of the account of the natural tutrix of minor heirs administering the succession of her deceased husband, the court will not consider claims arising after the heirs have reached their majority.[93] In New York on accounting the surrogate has no power to pass upon the claim of a guardian for services rendered as counsel for the infant in the action in which the estate was created and before his appointment as general guardian.[94] In that state the settlement of a guardian's accounts before his successor has been chosen, though authorized, is not conclusive on the accounting after the appointment of such successor.[95] The costs of the accounting may be taxed against the guardian personally, where he has been guilty of misconduct.[96]

Suits for an accounting must, of course, be commenced within the time fixed by the statute of limitations,[97] and the right to maintain them may be lost by laches.[98]

specified county held sufficient. Schlieder v. Wells, 99 N. Y. S. 1000.

83. Revivor neither necessary nor proper. Shattuck v. Wolf, 72 Kan. 366, 83 P. 1093. Where note and mortgage ran to "S., guardian," and complaint was entitled "S. guardian, plaintiff," and was signed in same manner, he being in such case prima facie invested with full title to them and full authority to enforce them as his own. Id.

84. Shattuck v. Wolf, 72 Kan. 366, 83 P. 1093. Proceedings for substitution held properly instituted by motion, and court had jurisdiction to hear and determine ownership of note and mortgage without further pleadings and without a jury in absence of objection. Id.

85. Kirby's Dig. § 6023. Nunn v. Robertson [Ark.] 97 S. W. 293.

86. Court held to have acquired jurisdiction of minor's person where, after minor had been properly served, guardian appeared and filed answer in his behalf. Nunn v. Robertson [Ark.] 97 S. W. 293. Filing of answer by guardian before minor was properly served held not an appearance by the minor. Id.

87. In suit to foreclose mortgage on lunatic's property. Foran v. Healy [Kan.] 85 P. 751.

88. See 5 C. L. 1610.

89. Forbes v. Reynard, 98 N. Y. S. 710.

90. By claiming that by agreement made during ward's lifetime with latter's heirs and next of kin he was to have all of ward's property in consideration of his keeping and caring for him until his death. Mase v. Martin [Iowa] 106 N. W. 3.

91. Mase v. Martin [Iowa] 106 N. W. 3.

92. Logan v. Gay [Tex.] 14 Tex. Ct. Rep. 640, 90 S. W. 861. The statute making guardians liable for 10 per cent interest on money of ward which they fail to lend when they can do so with proper diligence has no application to such a case. Id.

93. Particularly where they were not considered by lower court. If anything is due tutrix she may deduct it in paying balances found due such heirs. Gaspard v. Coco, 116 La. 1096, 41 So. 326.

94. In re Tyndall, 48 Misc. 39, 96 N. Y. S. 222.

95. Under Code Civ. Proc. § 2837. In re Tyndall, 48 Misc. 39, 96 N. Y. S. 222.

Orders of the probate court confirming the settlement of the accounts of guardians of insane persons have the force and effect of judgments which, if erroneous, may be corrected on appeal.[99] Courts of chancery may set them aside for fraud, either actual or constructive,[1] but the acts constituting such fraud must be specifically alleged and proved.[2]

Any interested party aggrieved thereby may ordinarily appeal from orders settling guardian's accounts,[3] the procedure in such case being regulated by the statutes of the various states.[4] The acceptance by the special guardian of an incompetent, appointed to represent him upon an accounting by his committee, of a sum awarded him by the decree settling the account as compensation for his services and for costs, is not a waiver of his right to appeal.[5]

In some states a guardian failing to pay over money as directed by the decree on accounting may be punished as for a contempt.[6]

§ 10. *Rights and liabilities between guardian and ward.*[7]—Contracts made by a guardian with his ward shortly after the latter becomes of age and which inure to the benefit of the guardian will be closely scrutinized and will not be allowed to stand unless the guardian exercises the utmost good faith and the ward acts with full knowledge of all of the facts and of his legal rights.[8] The right of the guardian to purchase the property of the ward at his own sale is treated in a previous section.[9]

96. Where he failed to account for certain funds and demanded credit for excessive board bill. In re Ward, 49 Misc. 181, 98 N. Y. S. 923.

97. Suit held not barred where it was commenced within two years after appointment of administrator for guardian's estate. Comp. Laws § 9737. Murphy v. Cady [Mich.] 13 Det. Leg. N. 412, 108 N. W. 493.

98. Suit against guardian's administrator held not barred. Murphy v. Cady [Mich.] 13 Det. Leg. N. 412, 108 N. W. 493.

99. Since such courts are given exclusive original jurisdiction of estates of insane persons, and of the settlement of the accounts of their guardians by Const. art. 7, § 34, Kirby's Dig. § 4002. Nelson v. Cowling [Ark.] 91 S. W. 773.

1. Nelson v. Cowling [Ark.] 91 S. W. 773. Omission to account for rent money actually received by guardian is fraud within this rule. Id. Allegations seeking to charge guardian with rents which he could have collected by ordinary prudence and loyalty to his ward held to state no facts constituting fraud but merely to allege negligence, which is no ground for interference by court of equity after settlements had been confirmed, remedy if confirmation was erroneous being by appeal. Id. Allowances for interest, services, and improvements held also matters for probate court subject to correction, if erroneous, on appeal, and, there being nothing in any of them on which to base charge of fraud, chancery court erred in taking original jurisdiction over them. Id.

2. Nelson v. Cowling [Ark.] 91 S. W. 773. Complaint held sufficient in absence of motion to make more specific. Id. Evidence held insufficient to show fraud. Id.

3. Surety aggrieved by order restating account. Mertz v. Mehlhop, 117 Ill. App. 77. Sureties may appeal from order settling account. Rev. St. 1899, §§ 278, 3535. In re Switzer [Mo.] 98 S. W. 461.

4. Chap. 64, § 43, of statute relating to guardian and ward, providing that appeals shall be allowed to circuit court on appellant giving such bond and security as shall be directed by the court, requires court to approve appeal bond and does not authorize delegation of such authority to clerk. Mertz v. Mehlhop, 117 Ill. App. 77. Appellant having in good faith attempted to perfect his appeal in obedience to order of court, held that it should not have been dismissed because bond was approved by clerk where he filed cross motion for leave to file good and sufficient bond, but such motion should have been granted. Id.

5. Is entitled to allowance in any event. In re Edwards, 110 App. Div. 623, 97 N. Y. S. 185.

6. Order of orphans' court, made after hearing on order to show cause, directing that guardian be attacked for contempt for failure to pay over money as directed by decree on accounting, held not to be a definitive adjudication upon the question of contempt but merely an interlocutory order for the purpose of bringing her before the court so that question of her guilt could then be determined. In re Doland [N. J. Err. & App.] 64 A. 1091. Hence she was not a person aggrieved by such order within the meaning of P. L. 1898, p. 793, § 204, and was not entitled to appeal therefrom. Id.

7. See 5 C. L. 1612.

8. Fidelity Trust Co. v. Butler, 28 Ky. L. R. 1268, 91 S. W. 676. Execution of mortgage by ward shortly after he became of age to guardian to reimburse him for moneys expended by him for ward's benefit in excess of income of estate held not a ratification of such expenditures, it appearing that ward acted entirely on guardian's advice and without knowledge of the fact that realty was exempt from liability for such expenditures under express provisions of St. 1903, § 2034. Id. Ratification of accounts by ward while he was in jail and in ignorance of his legal rights held no bar to subsequent action for

The court cannot in the guardianship proceeding settle the estate of the deceased ward nor determine who is entitled to the proceeds thereof.[10]

§ 11. *Compensation of guardian.*[11]—The amount of compensation to be allowed a general[12] or special guardian[13] is generally discretionary with the court. In some states a fixed commission is allowed on all property coming into his hands with which he is chargeable as a part of the corpus of the estate.[14] Commissions should not be allowed on commissions,[15] but one acting as administrator of each of two estates and also as guardian is entitled to commissions in each of those capacities, though the property passing through his hands in each is the same.[16] Commissions may be denied where the guardian has been guilty of misconduct.[17] Trustees are aggrieved by an order allowing grossly excessive compensation to special guardians of minors payable out of their share of the trust estate, and hence may appeal therefrom.[18]

§ 12. *Guardianship bonds.*[19]—Statutes in some states require a special bond from a guardian to whom the proceeds of the ward's realty is turned over for the purpose of re-investment.[20] The fact that the estate of a minor is committed to a guardian without his having executed the bond required by statute does not make void his acts in collecting money or prosecuting suits for the recovery of money due the wards, especially when they are for the benefit of the wards and are ratified by them on becoming of age.[21] Leave of court is not ordinarily necessary to enable one to sue on a bond payable to the state.[22] The sureties can only be held liable for such part of the estate as actually comes into the hands of the guardian as such,[23] and

an accounting and to recover amount paid by ward to guardian out of proceeds of a mortgage on realty. Wilson v. Fidelity Trust Co. [Ky.] 97 S. W. 753.

9. See § 5, ante.

10. In re Lindsay's Guardianship [Iowa] 109 N. W. 473. Cannot litigate question whether there was an agreement between heirs of deceased ward and guardian whereby guardian and his wife were to have ward's estate on his death. Id. Heirs of ward are not parties to proceeding and court cannot make them parties for that purpose. Id. Hence contention that guardian should not be compelled to turn over property to administrator because it would have to be returned to him by virtue of such agreement is untenable. Id.

11. See 5 C. L. 1613.

12. Will not be interfered with on appeal. In re Switzer [Mo.] 98 S. W. 461.

13. Surrogate's court has discretionary power to make suitable allowances to special guardians of infants for services in prosecuting appeal from its order settling accounts of trustees. In re Stevens, 99 N. Y. S. 1070. Supreme court has power to review and reverse decree of surrogate where allowance is so grossly excessive as to indicate an abuse of discretion, though it cannot itself make the proper allowance. Id. Allowance held grossly excessive and an abuse of surrogate's discretion. Id.

14. Under Civ. Code 1895, §§ 2552, 3485, guardian is entitled to 10 per cent commissions on interest made by him provided he returns such interest to the ordinary so as to become chargeable therewith as a part of the corpus of the estate, but not otherwise. Griffin v. Collins, 125 Ga. 159, 53 S. E. 1004.

15, 16. Griffin v. Collins, 125 Ga. 159, 53 S. E. 1004.

17. As where he failed to account for certain funds and sought credit for an excessive amount for board of ward. In re Ward, 112 App. Div. 911, 98 N. Y. S. 923. Ordinary has a broad discretion in the matter of relieving guardian from forfeitures due to a failure to make returns. Griffin v. Collins, 125 Ga. 159, 53 S. E. 1004.

18. Under Code Civ. Proc. § 2568, giving right to appeal to parties aggrieved. In re Stevens, 99 N. Y. S. 1070.

19. See 5 C. L. 1613.

20. Though it was court's purpose to require proceeds of infants' interest in certain realty sold on mortgage foreclosure to be reinvested for their benefit, held that, where such reinvestment had not been made or ordered, it had right to direct that interest on infants' share of unpaid purchase price secured by sale bonds to be paid to their guardian without execution of bond required by Civ. Code Prac. § 497. Louisville Trust Co. v. Kidd [Ky.] 93 S. W. 38.

21. Guardian will not be heard to deny his liability to the wards, and third persons cannot deny them any benefit they may derive from such acts. Havens v. Ahlering [Ky.] 97 S. W. 344.

22. Fact that suit on bond for failure to turn over money as directed was instituted without obtaining leave of the court which made the order, held not to affect right of plaintiff to recover. Grafflin v. State [Md.] 63 A. 373.

23. Not for funds converted or lost by guardian in her capacity as administratrix. In re Switzer [Mo.] 98 S. W. 461. Where administratrix who was also guardian gave to herself as administratrix a receipt signed by herself as guardian, but did not in fact transfer the assets and take charge of the same as guardian, held that she did not

the ward may by his conduct estop himself to proceed against them at all.[24] Only matters rendering an order requiring the guardian to pay money into court erroneous when passed are a defense to an action on the bond for failure to obey it.[25] Statutes in many states limit the time within which actions on the bond may be instituted.[26] An appeal from an order of the probate court in accounting proceedings does not operate to stay the institution of an action in a court of general jurisdiction on the bond to recover the amount found due so as to prevent the running of limitations.[27]

In Kentucky the county judge is liable to the ward for any damage resulting from any failure on his part to use ordinary care to acquaint himself with the solvency of the sureties accepted by him on the guardian's bond.[28] The test of the sufficiency of a surety is whether he is solvent, being a resident of the state and having

thereby discharge herself and her sureties as administratrix and impose liability on herself and her sureties as guardian. Id. Guardian of two of six infant children who were joint tenants of homestead, rented whole homestead and collected all the rent. Other four asserted no claim to any part of rents, guardian never accounted to them, and their rights were barred by limitations. Held that, since joint tenant may rent common property and collect rent, guardian was not a wrongdoer or a trustee for other four children, but received money for his wards, and his sureties were responsible on his failure to account for it. Potter v. Redmon's Guardian [Ky.] 96 S. W. 529.

24. Ward held not entitled to recover against sureties upon ground that guardian had never turned over amount found due on final settlement, where it appeared that on arrival at age, with full knowledge of her rights, without fraud or misrepresentation, and contrary to the advice of the judge of probate, she gave guardian a receipt in full without having received the money, and that sureties were thereby induced to release mortgage held by them on guardian's land as security. Baum v. Hartman, 122 Ill. App. 444. Fact that probate court, upon petition of the ward, cited the administrator of the guardian, deceased after the ward came of age, to settle an account of the guardianship, and refused to allow the account presented to him and that no appeal was claimed by the administrator, do not constitute an irrefragable right of action by the ward against the sureties upon the guardian's bond, but court of equity can nevertheless enjoin prosecution of such action if failure to settle the account was caused by the inequitable conduct of the ward. Clark v. Chase [Me.] 64 A. 493. Where ward delayed asking for account until after guardian's death, eight years after ward came of age, and then caused guardian's administrator to be cited to settle account, which he was unable to do, held that he would be enjoined from prosecuting action at law against administrator of deceased surety on guardian's bond, his laches having given him an unconscionable advantage over the defendant. Id.

25. Where committee invested money in second mortgage instead of first mortgage as he was authorized to do, a release of the first mortgage after an order requiring him to pay such money into court held no defense to an action on the bond for failure to obey such order. Graffiin v. State [Md.] 63 A. 373.

26. Under Comp. Laws § 8727, providing that actions against sureties must be commenced within four years after guardian's discharge, action commenced more than four years after guardian's death held barred. Murphy v. Cady [Mich.] 13 Det. Leg. N. 412, 108 N. W. 493. Rev. St. 1898, § 3968, providing that no action can be maintained against sureties on any bond given by a guardian unless commenced within four years from time when guardian shall have been discharged, unless at the time of such discharge plaintiff is under any legal disability to sue, in which case the action may be commenced within four years after the removal of the disability, applies to a bond given in a special real estate sale proceeding under Id. c. 171. Wescott v. Upham, 127 Wis. 590, 107 N. W. 2. Guardian of minor is "discharged" within meaning of such section when ward obtains his majority, though same person is appointed guardian of other minors by same order and the performance of his duties with respect to them is secured by the same bond. Id. It is immaterial that cause of action on bond does not accrue until after there has been an accounting in the probate court and a breach has been established, the discharge of the guardian and not the accrual of the cause of action operating to start the running of the limitation. Id. Question whether, where statute allowed plaintiff only 34 days after termination of accounting proceedings in which to sue, it was so unreasonable as to be unconstitutional, held not involved where half of the four year period was allowed to elapse before institution of proceedings for accounting. Id. "Disability to sue" means a personal disability to maintain the suit as distinguished from a mere obstacle to the commencement of a particular action, and hence inability to sue during the period of the accounting and until a settlement of the guardian's account does not prevent the running of the statute. Id.

27. Not so as to require the deduction of such time in figuring limitations by virtue of Rev. St. 1898, § 4236. Wescott v. Upham, 127 Wis. 590, 107 N. W. 2. Under Rev. St. 1898, § 4036, appeal from county court operates to stay all further proceedings in pursuance of the act appealed from. Id.

28. St. 1903, § 2018. Commonwealth v. Lee, 28 Ky. L. R. 596, 89 S. W. 731, modifying 27 Ky. L. R. 806, 86 S. W. 990. Judge held

enough property liable for debts to pay the liability assumed to the ward in addition to his other liabilities.[29]

HABEAS CORPUS (AND REPLEGIANDO).

§ 1. Nature of the Remedy and Occasion and Propriety of It (1916).
§ 2. Jurisdiction (1917).
§ 3. Petition (1918).
§ 4. Hearing on Petition and Issuance of Writ (1918).
§ 5. The Writ; Service Thereof; Effect of Writ (1918).
§ 6. Certiorari in Aid of Habeas Corpus (1918).
§ 7. Return and Hearing and Determination Thereon; Judgment (1918).
§ 8. Review (1919).

§ 1. *Nature of the remedy and occasion and propriety of it.*[30]—While the writ is now commonly used to determine custody of infants,[31] to relieve from invalid enlistments in the army and navy,[32] in extradition proceedings,[33] to admit to bail,[34] and for other similar purposes to which the common-law rules have no application, when used to relieve from restraint under legal process it issues only when the judgment or process is void.[35] It cannot be used to review the merits[36] or mere irregularities of procedure,[37] but only in case of want of jurisdiction,[38] and ordinarily will

not to have used required degree of care in taking bond or in seeing to it that it continued safe. Id.

29. Commonwealth v. Lee, 28 Ky. L. R. 596, 89 S. W. 731, modifying 27 Ky. L. R. 806, 86 S. W. 990.

30. See 5 C. L. 1615.

31. Lies to determine custody of child where neither of the claimants has any natural right. Mahon v. People, 119 Ill. App. 497. Custody of child may be determined but not right to guardianship. Andrino v. Yates [Idaho] 87 P. 787. An Indian woman, a ward of the United States, is within the New York statute allowing a wife living separate from her husband to maintain habeas corpus to settle the custody of children. People v. Rubin, 98 N. Y. S. 787.

32. No answer to writ by parent that naval authorities were entitled to hold minor for trial for fraudulent enlistment. Ex parte Lisk, 145 F. 860. Contemplated or possible court-martial proceedings no defense to writ. Ex parte Bakley, 148 F. 56. Will not lie to relieve minor from military arrest for offense committed before his enlistment was rescinded by his parents. In re Scott [C. C. A.] 144 F. 79.

33. May go behind executive warrant and review grounds on which it was issued. Ex parte Cheatham [Tex. Cr. App.] 95 S. W. 1077. May show that process set out in the return is void, but not the merits of the case. Singleton v. State [Ala.] 42 So. 23. After return to demanding state, habeas corpus will not lie to determine whether petitioner was a fugitive from justice. Ex parte Moyer [Idaho] 85 P. 897. Federal court will not relieve by habeas corpus because petitioner was brought within the jurisdiction of the state court in a manner violating the Federal extradition statute. Pettibone v. Nichols, 27 S. Ct. 111.

34, 35. Must be void and not merely erroneous. Harris v. Nixon, 27 App. D. C. 94. To relieve from arrest under void capias. Schwarzschild v. Goldstein, 121 Ill. App. 1. Sentence of imprisonment when only fine was authorized. State v. Miesen [Minn.] 108 N. W. 513. Conviction under unconstitutional statute. Ex parte Knight [Fla.] 41 So. 786. To relieve from detention for violation of void ordinance. In re McMonies [Neb.] 106 N. W. 456. To prevent one being again put on trial after an acquittal. Ex parte Davis [Tex. Cr. App.] 14 Tex. Ct. Rep. 109, 89 S. W. 978. Where part of a fine was without authority remitted during good behavior, habeas corpus will issue to relieve from a rearrest on breach of the condition of the remission. Gordon v. Johnson [Ga.] 55 S. E. 489. Not to relieve from detention under sentence which is voidable only. Valid conviction but sentence under wrong statute. Martin v. District Ct. of Second Judicial Dist. [Colo.] 86 P. 82.

Judgment void in part: Cannot be discharged for excessive sentence until so much as was within the power of the court to impose has been performed. Harris v. Lang, 27 App. D. C. 84. Imprisonment was on several sentences and that admitted to be valid had not expired. Woodward v. Bridges, 144 F. 156.

36. Whether evidence warranted binding over. People v. Flynn, 49 Misc. 328, 99 N. Y. S. 198. Where the findings show a violation of the ordinance and the sentence is within the power of the municipal court. Logan v. Childs [Fla.] 41 So. 197.

37. Lillibridge v. State, 7 Ohio C. C. (N. S.) 452; In re Terrill [C. C. A.] 144 F. 616; Ex parte Stephens [Tex.] 16 Tex. Ct. Rep. 80, 94 S. W. 327. Not for mere irregularities in sentencing on plea of guilty. Ex parte White [Tex. Cr. App.] 98 S. W. 850. Commitment of married female infant to industrial school under statute applying only to unmarried females is not void. Ryan v. Rhodes [Ind.] 76 N. E. 249. And the fact that the petition is by one not a party to the proceeding in which the judgment was rendered does not entitle him to collaterally assail it. Ryan v. Rhodes [Ind.] 78 N. E. 330. Whether one under conviction is confined in the wrong prison or improperly required to

not issue when there is a remedy by appeal or error,[38] and a constitutional prohibition against suspension or denial of the writ does not invalidate a statute providing that it shall not be allowed for errors of law reviewable by appeal.[40] There is a conflict as to whether jurisdictional facts may be inquired into.[41] Petitioner must be in custody at the time of applying for the writ,[42] and the authorities are not agreed as to whether one at large on bail is entitled to it.[43]

§ 2. *Jurisdiction.*[44]—There is no jurisdiction to issue to review imprisonment under judgment of court of concurrent jurisdiction.[45] The probate court in Ohio is without power to issue habeas corpus in extradition cases, its jurisdiction in such cases being taken away by statute.[46] Original applications for habeas corpus are not within the California Practice Rule allowing transfer to the supreme court on disagreement of the judges of the court of appeals,[47] and unless the justices of the latter court concur in granting the writ, the petition must be dismissed.[48] In Louisiana the supreme court can issue the writ only in cases within its appellate jurisdiction.[49]

Federal courts.[50]—The circuit court of appeals has no authority to issue habeas corpus as an original proceeding.[51] Where the evidence is conflicting as to whether petitioner was in exercise of duty as Federal officer, the writ will not be issued by Federal court to relieve from state arrest.[52] Interference by Federal courts being limited to persons detained in violation of the Federal constitution or of a Federal law or statute,[53] imprisonment under state authority in violation of the constitutional amendments which do not apply to the state governments gives no Federal juris-

serve at hard labor cannot be inquired into. In re Terrill [C. C. A.] 144 F. 616.

38. State v. Pratt [S. D.] 107 N. W. 538; Bass v. Lawrence, 124 Ga. 75, 52 S. E. 296; Flagg v. Sisson, 125 Ga. 277, 54 S. E. 171; People v. Feenaughty, 51 Misc. 468, 101 N. Y. S. 700; Felts v. Murphy, 201 U. S. 123, 50 Law. Ed. 689; Valentina v. Mercer, 201 U. S. 131, 50 Law. Ed. 693; City of Selma v. Till [Ala.] 42 So. 405; Ledford v. Emerson [N. C.] 55 S. E. 969. Failure to take requisite steps in procedure must affirmatively appear of record to authorize relief on habeas corpus. Failure to interrogate accused before sentence. Manaca v. Ionia Circuit Judge [Mich.] 13 Det. Leg. N. 919, 110 N. W. 75. While the complaint and other record proceedings may be looked to, nothing of a defensive nature will be considered. In re Myrtle [Cal. App.] 84 P. 335. The circuit court has jurisdiction in habeas corpus in the case of one committed for contempt by a common pleas judge who was without jurisdiction in the premises. Ex parte Froome Morris, 8 Ohio C. C. (N. S.) 212. Not to review evidence to sustain a conviction of contempt. Ex parte Reid [Tex.] 14 Tex. Ct. Rep. 347, 89 S. W. 956. Imprisonment under judgment of criminal conviction will be reviewed only for want of jurisdiction. That grand jurors were improperly drawn, no ground of discharge. Ex parte Moran [C. C. A.] 144 F. 594; In re Terrill [C. C. A.] 144 F. 616. One imprisoned for contempt of a decree without jurisdiction may be released on habeas corpus. Ex parte Robinson [C. C. A.] 144 F. 835. Contempt in refusal to obey subpoena issued without jurisdiction and void on its face. People v. Wyatt [N. Y.] 79 N. E. 330.

39. Will not be granted where error would lie, except in unusual cases. In re Lincoln, 202 U. S. 178, 50 Law. Ed. 984. Only in exceptional cases will it be allowed where there is another remedy. Insufficient indictment. Riggins v. U. S., 199 U. S. 303, 50 Law. Ed. 547. Judgment in contempt reviewable by error. Ex parte Stidger [Colo.] 86 P. 219.

40. Busse v. Barr [Iowa] 109 N. W. 920.

41. All jurisdictional facts open to trial. In re Depue [N. Y.] 77 N. E. 798; People v. Flynn, 48 Misc. 159, 96 N. Y. S. 653. Imprisonment under judgment cannot be inquired into for an alleged want of jurisdiction depending on matters of fact, for these are conclusively presumed to have been determined against the petitioner. Ex parte Columbia George, 144 F. 985.

42. If petitioner was in custody when the application was made, it is sufficient, though he was not at the time a former application was denied. Ex parte Jackson [Tex. Cr. App.] 96 S. W. 924.

43. That he is. Mackenzie v. Barrett [C. C. A.] 141 F. 964. **Contra.** U. S. v. Peckham, 143 F. 625.

44. See 5 C. L. 1616.

45. Martin v. District Ct. of Second Judicial Dist. [Colo.] 86 P. 82.

46. Thomas v. Evans [Ohio] 76 N. E. 862.

47. Ex parte Oates [Cal. App.] 83 P. 261.

48. Ex parte Sauer [Cal. App.] 84 P. 995; Ex parte Williams [Cal.] 87 P. 568.

49. State v. Kiernan, 116 La. 739, 741, 41 So. 55.

50. See 5 C. L. 1616.

51. Whitney v. Dick, 202 U. S. 132, 50 Law. Ed. 963. This case apparently overrules Ex parte Moran [C. C. A.] 144 F. 594.

52. United States v. Lewis, 200 U. S. 1, 50 Law. Ed. 343.

53. Rev. St. § 753.

diction;[54] and habeas corpus will not issue to relieve from imprisonment under a conviction in a state court unless the court had no jurisdiction or proceeded in such manner as to lose it.[55] That a state legislative committee was acting beyond its powers does not authorize habeas corpus by a Federal court to relieve from commitment for contempt of the committee.[56]

§ 3. *Petition.*[57]—Petitions for habeas corpus are to be construed with much liberality and no particular adherence to form is required.[58] Where the authority to issue is conferred on the judge of a certain court, the petition must be addressed to the judge, not to the court.[59]

§ 4. *Hearing on petition and issuance of writ.*[60]—Where an order denying the writ is appealable, a second application to another judge need not be heard,[61] but the doctrine of res judicata has no application and successive applications may be considered.[62]

§ 5. *The writ; service thereof; effect of writ.*[63]

§ 6. *Certiorari in aid of habeas corpus.*[64]

§ 7. *Return and hearing and determination thereon; judgment.*[65]—It has been held that averments of petition as to absence of jurisdictional facts are taken as true unless traversed by the return,[66] but in another jurisdiction it was said that the return is an answer to the writ and not to the petition, and its sufficiency is to be determined without reference to the petition.[67] The burden is on the petitioner[68] except where an affirmative showing is made by the return.[69] On habeas corpus to admit to bail, however, the state has the opening and closing of the argument in Alabama.[70] Petitions in habeas corpus are usually tried summarily and reference is not of right;[71] though in California, where a question of fact is presented by the return to a writ issued from the supreme court, it may be ordered tried in the superior court.[72] Continuance is discretionary.[73] The matter will be determined according to the status at time of decision.[74] No question not essential to trial of the

54. Commitment by state court for contempt in refusing to answer alleged incriminating questions. Ex parte Munn, 140 F. 782. Detention of one under state process in violation of the state constitution does not authorize interference by a Federal court. Alleged denial of jury trial. Ex parte Brown, 140 F. 461. The question of the identity of petitioner with an escaped convict gives no ground of Federal interference. Ex parte Moebus, 148 F. 39.

55. Where a state court has general jurisdiction of the subject-matter, it is only in extreme cases that a Federal court will interfere by habeas corpus on the ground that there is no jurisdiction of the particular case. Mackenzie v. Barrett [C. C. A.] 144 F. 954. Not because accused was brought within the jurisdiction in a manner violating the Federal statutes regulating extradition. Pettibone v. Nichols, 27 S. Ct. 111. Failure of state court to make adequate provision for reading of testimony to deaf prisoner does not cause it to lose jurisdiction (Felts v. Murphy, 201 U. S. 123, 50 Law. Ed. 689), nor does error in taking from jury certain included offenses (Valentina v. Mercer, 201 U. S. 131, 50 Law. Ed. 693), neither does failure to specify a building in the order fixing the place of trial (In re Moran, 27 S. Ct. 25), irregularities in the selection of grand jurors (Id.), or compelling accused to walk in the presence of the jury (Id.).

56. Carfer v. Caldwell, 200 U. S. 293, 50 Law. Ed. 488.

57. See 5 C. L. 1617.

58. Crooms v. Schad [Fla.] 40 So. 497.

59. Carwile v. State [Ala.] 39 So. 1024.

60. See 5 C. L. 1617.

61. Ex parte Moebus, 148 F. 39.

62. In re Kopel, 148 F. 505.

63. See 3 C. L. 1578.

64, 65. See 5 C. L. 1617.

66. In re Depue [N. Y.] 77 N. E. 798.

67. In re Moyer [Colo.] 85 P. 190.

68. Every presumption favors the legality of imprisonment under judicial process. Presumed that present insanity of petitioner did not exist at time of order depriving him of good time for insubordination in prison. In re Terrill [C. C. A.] 144 F. 616. In habeas corpus to determine the custody of an infant, the burden is on petitioner to show that the best interests of the child require that it be committed to his custody. White v. Richeson [Tex. Civ. App.] 94 S. W. 202.

69. Where the warrant alleged in the return was not produced or otherwise proven on the hearing, petitioner must be discharged. Ex parte Baker [Cal. App.] 86 P. 915.

70. Wray v. State [Ala.] 41 So. 878.

71. Ex parte Cannon [S. C.] 55 S. E. 325.

72. Sanity of petitioner. Ex parte Clary [Cal.] 87 P. 580.

validity of the restraint complained of will be ordinarily gone into,[75] but where a decree respecting the custody of a child is held invalid on habeas corpus, the question of custody will be adjudged in the same proceeding.[76] Remand should be to the custody to which petitioner should at the time of the decision be committed,[77] and where an invalid judgment is entered on a valid conviction, the petitioner will be discharged from detention under the judgment and remanded for further proceedings on the conviction.[78]

§ 8. *Review.*[78]—Local statutes and practice determine whether an order in habeas corpus is reviewable by appeal,[80] error,[81] exceptions,[82] or certiorari.[83] Error and not appeal is the remedy in Illinois to review an order on habeas corpus to determine custody of a child,[84] but voluntary appearance to appeal entitles the court to hear it.[85] Review in Nebraska is governed by the statutes relating to civil proceedings.[86] Where on habeas corpus to admit to bail an order for bail is made and then set aside before bail is given, the petition is left pending and there is no appealable order.[87] Order for custody of child cannot be suspended pending appeal by supersedeas bond.[88] Invalidity of ordinance not in record cannot be reviewed.[89] The case will be determined with respect to condition at time order below was made,[90] but where the term of petitioner's imprisonment expires pending appeal, the appeal will be dismissed.[91]

HABITUAL DRUNKARDS.[92]

Before an inebriate can be committed to the asylum under the Dipsomaniac Law of Nebraska, there must be an application in the nature of an information,[93] a hearing thereon,[94] and a finding by the commissioners that the applicant is an inebriate.[95] This law must be construed in connection with the general laws relat-

73. Held properly denied. Ex parte Cannon [S. C.] 55 S. E. 325.

74. Ossie v. State [Ala.] 41 So. 945. Compare People v. Reardon [N. Y.] 78 N. E. 860.

75. On habeas corpus to admit to bail, the court will not inquire whether the admitted facts show there was no offense. Ex parte Adams [Tex. Cr. App.] 90 S. W. 24; Ex parte Kent [Tex. Cr. App.] 90 S. W. 168.

76. Sullivan v. People [Ill.] 79 N. E. 695. Will determine question of parent's forfeiture of rights by willful abandonment. Newsome v. Bunch [N. C.] 54 S. E. 785.

77. Convict labor contract expired pending hearing but sentence not completed. Ossie v. State [Ala.] 41 So. 945.

78. State v. Miesen [Minn.] 108 N. W. 513.

79. Sec 5 C. L. 1619.

80. Discharge on habeas corpus from arrest on capias ad sat. is in the nature of an order recalling the execution and is appealable. Ledford v. Emerson [N. C.] 55 S. E. 969. Appeal lies in habeas corpus to determine custody of child. Bleakley v. Smart [Kan.] 87 P. 76. Order discharging petitioner is not appealable. Ex parte White [Cal. App.] 84 P. 242.

81. Error lies to order in habeas corpus to determine custody of infant. Mahon v. People, 119 Ill. App. 497. Error does not lie in Michigan. In re Brock [Mich.] 107 N. W. 446.

82. Exceptions do not lie to an order for discharge. Stewart v. Smith [Me.] 64 A. 663.

83. Certiorari lies. Martin v. District Ct. of Second Judicial Dist. [Colo.] 86 P. 82; In re Brock [Mich.] 107 N. W. 446.

84, 85. Sullivan v. People [Ill.] 79 N. E. 695.

86. Ex parte Decker [Neb.] 108 N. W. 157.

87. Carwile v. State [Ala.] 39 So. 1024.

88. State v. Poindexter [Wash.] 87 P. 1069.

89. Ferlita v. Jones [Fla.] 39 So. 593.

90. Order discharging on bail one who had not obtained certificate of reasonable doubt reversed, though certificate was obtained after the discharge. People v. Reardon [N. Y.] 78 N. E. 860.

91. Ex parte Person [N. C.] 52 S. E. 1033.

92. See 2 C. L. 159.

93. Such application under Cobbey's Supp. 1905, § 9650c, must allege that the person is a dipsomaniac or inebriate and a fit subject for treatment in the hospital. Ex parte Simmons [Neb.] 107 N. W. 863.

94. There must be a trial and a record kept thereof sufficient to show the jurisdiction of the commissioners and the action taken by them. Ex parte Simmons [Neb.] 107 N. W. 863.

95. A finding that he is a "fit subject for treatment for the liquor habit at the state hospital for the insane" is insufficient (Ex parte Simmons [Neb.] 107 N. W. 863), and a statement in the commitment that the commissioners find him to be an inebriate cannot be treated as an additional finding in aid thereof (Id.).

ing to the detention, care, and discharge of persons committed to the hospital.[96] Inmates cured are entitled to liberty[97] without conditions.[98] A decree finding one to be an habitual drunkard is conclusive as to his condition on the date of rendition, but not prior thereto.[99]

HABITUAL OFFENDERS.[1]

HANDWRITING, PROOF OF; HARBOR MASTERS, see latest topical index.

96. Laws relating to privileges while confined, and the right to test the legality of the confinement by the inmates generally, apply to inebriates. Ex parte Schwarting [Neb.] 108 N. W. 125.

97. Detention thereafter is unlawful and the ordinary remedies applicable to such cases may be invoked to secure a release. Ex parte Schwarting [Neb.] 108 N. W. 125.

98. Section 7, c. 82, p. 388, Laws 1905 (§§ 9650a to 9650h, Cobbey's Supp. 1905), providing for the paroling of cured inmates upon their taking a pledge to abstain from the use of liquors and to avoid places and persons tending to lead them back into their old habits, etc., held unconstitutional as violating the right to personal liberty. Ex parte Schwarting [Neb.] 108 N. W. 125.

99. A decree under D. C. Code § 115f [32 Stat. at L. 524, chap. 1329], rendered on Sept. 15, 1904, is not conclusive of one's contractual incapacity on Aug. 11th, although raising an inference as to his helpless condition. Knott v. Giles, 27 App. D. C. 581.

1. No cases have been found during the period covered by this volume. See Criminal Law, 7 C. L. 1015, for increased punishment for second offenses.